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"The law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society. But this progress must be by analogy to what is already settled."

Chief Justice Greene, in 1 R.I. 356.

CITE BY TITLE AND SECTION

Thus

13 C.J.S. Carriers § 10

CORPUS JURIS SECUNDUM

A COMPLETE RESTATEMENT OF THE ENTIRE AMERICAN LAW

AS DEVELOPED BY

ALL REPORTED CASES

By

WILLIAM MACK, LL. D.
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EXPLANATION

THE object in view in preparing *Corpus Juris Secundum* has been twofold: First, to provide a complete encyclopedic treatment of the whole body of the law, which means that it must be based upon all the reported cases; Second, to present each title of the law in form and content most suitable as a means of practical reference for the Bench and Bar.

Corpus Juris Secundum is therefore a complete restatement of the entire body of American Law. The clear-cut and exhaustive propositions comprising the text are supported by all the authorities from the earliest times to date. The supporting case citations, conspicuously set out in the notes, point to all decisions handed down since the publication of Corpus Juris. When the searcher may wish to consult earlier authorities, a specific reference to Corpus Juris will make available all cases back to 1658.

Each title will be preceded by a complete section analysis, greatly simplified to facilitate research. Where the scope of any section is such as to require it, a more minute analysis will be found thereunder in its appropriate place within the title (see Abatement and Revival, Section 112). The convenience of this method—an innovation in encyclopedic writing—must immediately commend itself.

A concise summary, a black-letter epitome, indicative of its scope, will precede the full treatment or statement of the law under each section. These introductory summaries, concise and free from interlineation of authorities, will prove of great convenience and value in legal research.

An index will be found in the back of each volume covering the titles contained therein, thus providing another convenient means of ready access to the text and notes.

Corpus Juris Secundum will be kept to date by means of annual cumulative pocket parts for each volume. This feature of supplementation which has proved so successful in modern digests and statutes will conveniently, and with certainty, keep each title constantly to date through current cases and new precedents.

Corpus Juris Secundum represents the combined product of the highest editorial talent and manufacturing skill. Its many excellent editorial features are fittingly accompanied by corresponding innovations and improvements in mechanical arrangement, typography, and design, which the publisher believes will commend themselves to the profession as representing a new standard in legal publications.

THE PUBLISHERS

TABLE OF ABBREVIATIONS

REPORTS AND TEXTBOOKS

A

A.	Atlantic Reporter
Abb.	Abbott (U.S.)
Abb.Adm.	Abbott's Admiralty (U.S.)
Abb.App.Dec.	Abbott's Appeals Decisions (N.Y.)
Abb.Dec.	Abbott's Decisions (N.Y.)
Abb.N.Cas.	Abbott's New Cases (N.Y.)
Abb.Pr.	Abbott's Practice (N.Y.)
Abb Pr.N.S.	Abbott's Practice New Series (N.Y.)
A'Beck.Res. Judgm.	A'Beckett's Reserved Judgments (Vict.)
[1917]A.C.	[1917] Appeal Cases (Can.)
[1918]A.C.	Law Reports [1918] Appeal Cases (Eng.)
Acton	Acton (Eng.)
Adams	Adams Reports (N.H.)
Add.	Addison (Pa.)
Add.Eccl.	Addams' Ecclesiastical (Eng.)
A.&E.	Adolphus & Ellis (Eng.)
A.&E.Enc.L.	American & English Encyclopædia of Law
A.&E.Enc.L.&Pr.	American & English Encyclopædia of Law & Practice
Aik.	Aikens (Vt.)
A.K.Marsh.	A. K. Marshall (Ky.)
Ala.	Alabama
Ala.App.	Alabama Appellate Court
Alaska	Alaska
Alb.L.J.	Albany Law Journal
A.L.C.	American Leading Cases
Alc.&N.	Alcott & Napier (Eng.)
Alc.Reg.Cas.	Alcock's Registry Cases (Eng.)
Aleyn	Aleyn (Eng.)
Alison Pr.	Alison's Practice (Sc.)
Allen	Allen (Mass.)
Allen (N.B.)	Allen, New Brunswick
Alta.L.	Alberta Law
A.L.R.	American Law Reports
Am.Bankr.	American Bankruptcy (U.S.)
Ambl.	Ambler (Eng.)
A.M.C.	American Maritime Cases
Am.Corp.Cas.	American Corporation Cases
Am.Cr.	American Criminal
Am.D.	American Decisions
Am.&E.Corp.Cas.	American & English Corporation Cases
Am.&E.Corp.Cas. N.S.	American & English Corporation Cases New Series
Am.&Eng.Ency. Law	American and English Encyclopedia of Law
Am.&E.Eq.D.	American & English Decisions in Equity
Am.&Eng.Pat. Cas.	American and English Patent Cases
Am.&Eng.R.R. Cas.	American and English Railroad Cases
Am.Electr.Cas.	American Electrical Cases
Am.&E.R.Cas.	American & English Railroad Cases
Am.&E.R.Cas.N. S.	American & English Railroad Cases New Series
Am.J.Int.L.	American Journal of International Law
Am.L.J.	American Law Journal (Pa.)
Am.L.J.N.S.	American Law Journal New Series (Pa.)
Am.L.Rec.	American Law Record (Ohio)
Am.L.Reg.	American Law Register
Am.L.Reg.N.S.	American Law Register New Series
Am.Law Reg.(O. S.)	American Law Register Old Series
Am.L.Rev.	American Law Review
Am.L.T.Bankr.	American Law Times Bankruptcy Reports
Am.Law Inst.	American Law Institute, Restatement of the Law
Am.Negl.Cas.	American Negligence Cases
Am.Negl.R.	American Negligence Reports
A.M.&O.	Armstrong, Macartney & Ogle (Ir.)
Am Prob.	American Probate
Am.Prob.N.S.	American Probate New Series
Am.Pr.	American Practice
Am.R.	American Reports
Am.R.&Corp.	American Railroad & Corporation
Am.R.Rep.	American Railway Reports
Am.S.R.	American State Reports
Am.St.R.D.	American Street Railway Decisions
And.	Anderson (Eng.)
Andr.	Andrews (Eng.)
Ann.Cas.	American & English Annotated Cases
Ann.Cas.1912A	American Annotated Cases 1912A, et seq.
Anstr.	Anstruther (Eng.)
Anth.N.P.	Anthon's Nisi Prius (N.Y.)
App.D.C.	Appeal Cases (D.C.)
App.Cas.	Law Reports Appeal Cases (Eng.)
App.Div.	Appellate Division (N.Y.)
Ariz.	Arizona
Ark.	Arkansas
Ark.Just.	Arkley's Justiciary (Sc.)
Arn.	Arnold (Eng.)
Arn.&H.	Arnold & Hodges (Eng.)
Ashm.	Ashmead (Pa.)
Aspin.	Aspinwall's Maritime Cases (Eng.)
Atk.	Atkyn (Eng.)
Austr.C.L.R.	Commonwealth Law Reports, Australia
Austr.Jur.	Australian Jurist
Austr.L.T.	Australian Law Times

B

Bacon Abr.	Bacon's Abridgment (Eng.)
Bail.Eq.	Bailey's Equity (S.C.)
Bailey.	Bailey's Law (S.C.)
B.&Ad.	Barnewall & Adolphus (Eng.)
B.&Ald.	Barnewall & Alderson (Eng.)
Baldw.	Baldwin (U.S.)
Balf.Pr.	Balfour's Practice (Sc.)
Ball&B.	Ball & Beatty (Ir.)
Bank.&Ins.R.	Bankruptcy and Insolvency Reports (Eng.)
Bann.	Bannister (Eng.)
Bann.&A.	Banning & Arden (U.S.)
Barb.	Barbour (N.Y.)
Barb.Ch.	Barbour's Chancery (N.Y.)
B.&Arn.	Barron & Arnold (Eng.)
Barn.	Barnardiston King's Bench (Eng.)
Barn.Ch.	Barnardiston Chancery (Eng.)
Barnes	Barnes' Practice Cases (Eng.)
Barnes Notes	Barnes' Notes (Eng.)
Batty	Batty (Ir.)
B.&Aust.	Barron & Austin (Eng.)
Baxt.	Baxter (Tenn.)
Bay	Bay (S.C.)
B.&B.	Broderip & Bingham (Eng.)
B.C.	British Columbia

B.&C.	Barnewall & Cresswell (Eng.)
B.&Macn.	Browne & Macnamara (Eng.)
B.D.&O.	Blackham, Dundas & Osborne (Ir.)
Beatty	Beatty (Ir.)
Beav.	Beavan (Eng.)
Beav.&Wal.Ry. Cas.	Beavan & Walford's Railway and Canal Cases (Eng.)
Beav.R.&C.Cas.	English Railway and Canal Cases
Beaw.Lex Mer.	Beawes Lex Mercatoria (Eng.)
Bee	Bee (U.S.)
Bell.	Bellewe (Eng.)
Bell App.Cas.	Bell's Appeal Cases (Sc.)
Bell Cas.	Bell's Cases (Sc.)
Bell C.C.	Bell's Crown Cases (Eng.)
Bell Comm.	Bell's Commentaries (Eng.)
Bell Sc.Cas.	Bell's Scotch Court of Session Cases
Ben.	Benedict (U.S.)
Benl.	Benloe (Eng.)
Benl.&D.	Benloe & Dallison (Eng.)
B.&H.Cr.Cas.	Bennett & Heard Leading Criminal Cases (Eng.)
Bibb	Bibb (Ky.)
Bing.	Bingham (Eng.)
Bing.N.Cas.	Bingham's New Cases (Eng.)
Binn.	Binney (Pa.)
Biss.	Bissell (U.S.)
Bitt.W.&P.	Bittleson, Wise & Parnell (Eng.)
Black	Black (U.S.)
Blackf.	Blackford (Ind.)
Blackstone Comm.	Blackstone Commentaries
Bla.H.	Henry Blackstone's English Common Pleas (Eng.)
Blair Co.	Blair County (Pa.)
Bland	Bland (Md.)
Bland's Ch.	Bland Chancery (Md.)
Blatchf.	Blatchford (U.S.)
Blatchf.&H.	Blatchford & Howland (U.S.)
Blatchf.PrizeCas.	Blatchford's Prize Cases (U.S.)
Bligh	Bligh (Eng.)
Bligh N.S.	Bligh New Series (Eng.)
B.Mon.	B. Monroe (Ky.)
Bond	Bond (U.S.)
Bouvier.	Bouvier's Law Dictionary
Boyce	Boyce (Del.)
B.&P.	Bosanquet & Puller (Eng.)
B.&P.N.R.	Bosanquet & Puller's New Reports (Eng.)
Bract.	Bracton de Legibus et Consuetudinibus Angliæ
Bradf.Surr.	Bradford's Surrogate (N.Y.)
Brayt.	Brayton (Vt.)
B.R.C.	British Ruling Cases
Brev.	Brevard (S.C.)
Brewst.	Brewster (Pa.)
Brightly	Brightly (Pa.)
Brightly El.Cas.	Brightly's Election Cases (Pa.)
Bro.Ch.	Brown's Chancery (Eng.)
Brock.	Brockenbrough (U.S.)
Brock.Cas.	Brockenbrough's Virginia Cases
Brod.&B.	Broderip & Bingham (Eng.)
Brod.&Fr.	Broderick & Fremantle's Ecclesiastical Cases
Brodix Am.&E. Pat.Cas.	Brodix's American & English Patent Cases
Bro.Just.	Broun's Justiciary (Sc.)
Brook Abr.	Brook's Abridgments (Eng.)
Brook N.Cas.	Brook's New Cases (Eng.)
Brooke N.C.	Brooke's New Cases
Bro.P.C.	Brown's Parliament Cases (Eng.)
Brown Adm.	Brown's Admiralty (U.S.)
Brown, Ch.	Brown's Chancery Cases (Eng.)
Brown Ecc.	Brown Ecclesiastical (Eng.)
Brown N.P.	Brown's Michigan Nisi Prius
Brown.Parl.Cas.	Brown Parliamentary Cases (Eng.)
Browne	Browne (Pa.)
Brown.&L.	Browning & Lushington (Eng.)
Brownl.&G.	Brownlow & Goldesborough (Eng.)
Bruce	Bruce (Sc.)
Brunn.Coll.Cas.	Brunner's Collective Cases (U.S.)
B.&S.	Best & Smith (Eng.)
B.T.A.	Board of Tax Appeals (U.S.)
Buck	Buck (Eng.)
Buller N.P.	Buller's Nisi Prius (Eng.)
Bulstr.	Bulstrode (Eng.)
Bunb.	Bunbury (Eng.)
Burn.	Burnett (Wis.)
Burr.	Burrows (Eng.)
Burr.S.Cas.	Burrows' Settlement Cas. (Eng.)
Busb.	Busbee (N.C.)
Busb.Eq.	Busbee Equty (N.C.)
Bush	Bush (Ky.)
B.W.C.C.	Butterworth's Workmen's Compensation Cases (Eng.)

C

Cab.&E.	Cababe & Ellis (Eng.)
Cai.	Caines (N.Y.)
Cai.Cas.	Caines' Cases (N.Y.)
Cal.	California
Cal.(2d)	California Reports, Second Series
Cal.App.	California Appellate Court
Cal.App.(2d)	California Appellate Reports, Second Series
Cald.	Caldecott (Eng.)
Call	Call (Va.)
Calthr.	Calthrop (Eng.)
Cal.Unrep.Cas.	California Unreported Cases
Cam.Cas.	Cameron's Cases (Can.)
Campb.	Campbell (Eng.)
Canal Zone	Canal Zone Supreme Court
Can.App.Cas.	Canadian Appeal Cases
Can.Cr.Cas.	Canadian Criminal Cases
Can.Exch.	Canadian Exchequer
Can.L.J.	Canada Law Journal
Can.L.J.N.S.	Canada Law Journal New Series
Can.L.T.Occ. Notes	Canadian Law Times Occasional Notes
Can.R.Cas.	Canadian Railway Cases
Can.S.C.	Canada Supreme Court
Cane&L.	Cane & Leigh Crown Cases Reserved (Eng.)
Car.&K.	Carrington & Kirwan (Eng.)
Car.&M.	Carrington & Marshman (Eng.)
Car.&P.	Carrington & Payne (Eng.)
Car.H.&A.	Carrow, Hamerton & Allen (Eng.)
Carp.P.C.	Carpmael Patent Cases (Eng.)
Carter	Carter (Eng.)
Carth.	Carthew (Eng.)
Cartwr.Cas.	Cartwright's Cases (Can.)
Cary	Cary (Eng.)
Cas.	Casey (Pa.)
Cas.t.Hardw.	Cases temp. Hardwicke (Eng.)
Cas.t.Holt	Cases temp. Holt (Eng.)
Cas.t.King	Cases temp. King (Eng.)
Cas.t.Talb.	Cases temp. Talbot (Eng.)
C.B.	Common Bench (Manning, Granger & Scott) (Eng.)
C.B.N.S.	Common Bench New Series (Manning, Granger & Scott New Series) (Eng.)
C.C.A.	Circuit Court of Appeals (U.S.)
C.C.P.A.	Court of Customs and Patent Appeals
Centr.L.J.	Central Law Journal
[1891] Ch.	Law Reports [1891] Chancery (Eng.)
Chamb.Rep.	Chamber (Ont.)
Chandl.	Chandler (Wis.)
Charlt.R.M.	R. M. Charlton (Ga.)
Charlt.T.U.P.	T. U. P. Charlton (Ga.)
Chase	Chase (U.S.)
Ch.Cas.	Cases in Chancery (Eng.)
Ch.Chamb.	Chancery Chambers (U.C.)
Ch.Col.Op.	Chalmers' Colonial Opinions
Ch.D.	Law Reports Chancery Division (Eng.)
Chest.Co.	Chester County (Pa.)
Chev.	Cheves (S.C.)
Chit.	Chitty (Eng.)
Choyce Cas.Ch.	Choyce Cases in Chancery (Eng.)
Ch.Rep.	Chancery Reports (Eng.)
Ch.Sent.	Chancery Sentinel (N.Y.)
Cinc.L.Bul.	Weekly Law Bulletin (Oh.)
Cinc.Super.	Cincinnati Superior Court Reporter (Oh.)
City Ct.R.	City Court Reports (N.Y.)
City Hall Rec.	City Hall Recorder (N.Y.)

Civ.Proc.Rep.	Civil Procedure Reports (N.Y.)
C.J.	Corpus Juris
C.J.Ann.	Corpus Juris Annotations
C.J.S.	Corpus Juris Secundum
C.&K.	Carrington & Kirwin (Eng.)
C.&L.	Connor & Lawson (Ir.)
Cl.App.	Clark's Appeal Cases (Eng.)
Cl.Ch.	Clarke's Chancery (N.Y.)
Clark &F.	Clark & Finnelly (Eng.)
Clark &Fin.N.S.	Clark's House of Lords Cases (Eng.)
Clarke	Clarke's Chancery (N.Y.)
Clarke &S.Dr.Cas.	Clarke & Scully's Drainage Cases (Ont.)
Clarke Ch.	Clarke's Chancery (N.Y.)
Clayt.	Clayton's Reports, York Assizes (Eng.)
C.L.Chamb.	Chamber's Common Law (U.C.)
Clev.L.Rec.	Cleveland Law Record (Oh.)
Clev.L.Rep.	Cleveland Law Reporter (Oh.)
Cl.&F.	Clark & Finnelly (Eng.)
Clif.El.Cas.	Clifford's Southwick Election Cases
Cliff.	Clifford (U.S.)
C.L.R.	Common Law Reports (Eng.)
C.&M.	Carrington & Marshman (Eng.)
C.M.&R.	Crompton, Meeson & Roscoe (Eng.)
Cock.&Rowe.	Cockburn & Rowe's Election Cases
Code Rep.	Code Reporter (N.Y.)
Code Rep.N.S.	Code Reports New Series (N.Y.)
Coff.Prob.	Coffey's Probate (Cal.)
Co.Inst.	Coke's Institutes
Coke	Coke (Eng.)
Col.Cas.	Coleman's Cases (N.Y.)
Col.&C.Cas.	Coleman & Caines' Cases (N.Y.)
Col.C.C.	Collyer's Chancery Cases (Eng.)
Coldw.	Coldwell (Tenn.)
Coll.	Collyer (Eng.)
Col.L.Rep.	Colorado Law Reporter
Col.Law Review	Columbia Law Review
Coll.&E.Bank.	Collier and Eaton's American Bankruptcy Reports
Colles	Colles' Cases in Parliament (Eng.)
Colo.	Colorado
Colo.App.	Colorado Appeals
Colq.	Colquit
Coltm.	Coltman (Eng.)
Comb.	Comberbach (Eng.)
Com.Cas.	Commercial Cases (Eng.)
Com.L.	Commercial Law (Can.)
Comptr.Treas. Dec.	Comptroller Treasury Decisions
Comst.	Comstock (N.Y.)
Comyns	Comyns (Eng.)
Comyns Dig.	Comyns Digest (Eng.)
Con.&Law.	Connor & Lawson (Ir.)
Conf.	Conference Reports (N.C.)
Conn.	Connecticut
Conn.Surr.	Connolly's Surrogate (N.Y.)
Const.	Constitutional Reports (N.C.)
Cooke	Cooke (Eng.)
Cooke	Cooke (Tenn.)
Cooke & A.	Cooke & Alcock (Ir.)
Cook Vice-Adm.	Cook's Vice-Admiralty (L.C.)
Coop.	Cooper's Chancery (Eng.)
Coop.Pr.Cas.	Cooper's Practice Cases (Eng.)
Coop.t.Brough.	Cooper's Cases temp. Brougham (Eng.)
Coop.t.Cott.	Cooper's Cases temp. Cottenham (Eng.)
Coop.t Eld.	Cooper's Cases *tempore* Eldon (Eng.)
Co.P.C.	Coke's Reports (Eng.)
Corb.&D.	Corbett & Daniell's Election Cases (Eng.)
Court.&Macl.	Courtnay & Maclean (Sc.)
Cow.	Cowen (N.Y.)
Cow.Cr.Rep.	Cowen's Criminal (N.Y.)
Cowp.	Cowper (Eng.)
Cox.Am.T.M.Cas.	Cox's American Trade-Mark Cases
Cox C.C.	Cox's Criminal Cases (Eng.)
Cox Ch.	Cox's Chancery (Eng.)
Cox &Atk.	Cox & Atkinson (Eng.)
C.&P.	Carrington & Payne (Eng.)
C.P.C.	C. P. Cooper's Chancery Practice Cases (Eng.)
C.P.D.	Law Reports Common Pleas Division (Eng.)
Crabbe	Crabbe (U.S.)
Cranch	Cranch (U.S.)
Cranch C.C.	Cranch's Circuit Court (U.S.)
Cranch Pat.Dec.	Cranch's Patent Decisions (U.S.)
Cr.App.	Criminal Appeals (Eng.)
Crawf.&D.	Crawford & Dix (Ir.)
Crawf.&D.Abr. Cas.	Crawford & Dix's Abridged Cases (Ir.)
Cripp's Ch.Cas.	Cripp's Church and Clergy Cases
Cr.J.Mag.	Criminal Law Magazine
Cr.&Ph.	Craig & Phillips (Eng.)
C.Rob.	Christopher Robinson's Admiralty (Eng.)
Cro.Car.	Croke Charles (Eng.)
Cro.Eliz.	Croke Elizabeth (Eng.)
Cro.Jac.	Croke's Reports tempore James (Jacobus) (Eng.)
Cromp.&J.	Crompton & Jervis (Eng.)
Cromp.&M.	Crompton & Meeson (Eng.)
Crosw.Pat.Cas.	Croswell's Collection of Patent Cases (U.S.)
Cr.&Ph.	Craig & Phillips (Eng.)
Ct.Cl.	Court of Claims (U.S.)
Ct.Cust.&Pat. App.	Court of Customs and Patent Appeals
Cunn.	Cunningham (Eng.)
Curt.	Curtis (U.S.)
Curt.Eccl.	Curtis Ecclesiastical (Eng.)
Cush.	Cushing (Mass.)
Cust.A.	United States Customs Appeals
Cyc.	Cyclopedia of Law & Procedure
Cyc Ann.	Cyclopedia of Law & Procedure Annotations

D

Dak.	Dakota
Dal.C.P.	Dalison's Common Pleas (Eng.)
Dall.	Dallaman's Decisions (Tex.)
Dall.	Dallas (Pa.)
Dall.	Dallas (U.S.)
Dalr.Dec.	Dalrymple's Decisions (Sc.)
Daly	Daly (N.Y.)
Dan.	Daniell (Eng.)
Dana	Dana (Ky.)
Dane Abr.	Dane's Abridgment
Dans.&L.	Danson & Lloyd (Eng.)
D'Anv.Abr.	D'Anver's Abridgment (Eng.)
Dauph.Co.	Dauphin County (Pa.)
Dav.&M.	Davison & Merivale (Eng.)
Davys	Davys (Ir.)
Day	Day (Conn.)
D.B.&M.	Dunlop, Bell & Murray (Sc.)
D.C.	District of Columbia
D.Chipm.	D. Chipman (Vt.)
Deac.	Deacon (Eng.)
Deac.&C.	Deacon & Chitty (Eng.)
Deady	Deady (U.S.)
Dears.&B.	Dearsley & Bell (Eng.)
Dears.C.C.	Dearsley's Crown Cases (Eng.)
Deas & A.	Deas & Anderson (Eng.)
De Gex	De Gex (Eng.)
De G.F.&J.	De Gex, Fisher & Jones (Eng.)
De G.J.&S.	De Gex, Jones & Smith (Eng.)
De G.&J.	De Gex & Jones (Eng.)
De G.M.&G.	De Gex, MacNaghten & Gordon (Eng.)
De G.&Sm.	De Gex & Smale (Eng.)
Del.	Delaware
Del.Ch.	Delaware Chancery
Del.Co.	Delaware County (Pa.)
Dem.Surr.	Demarest's Surrogate (N.Y.)
Den.	Denio (N.Y.)
Den.C.C.	Denison's Crown Cases (Eng.)
Desaus.Eq.	Desaussure (S.C.)
Dev.Ct.Cl.	Devereux's Court of Claims (U.S.)
Dev.L.	Devereux (N.C.)
Dev.&Bat.	Devereux & Battle (N.C.)
Dick.	Dickens (Sc.)
Dill.	Dillon (U.S.)
Dirl.Dec.	Dirleton's Decisions (Sc.)
Disn.	Disney (Oh.)

D.&L.	Dowling & Lowndes (Eng.)
Dods.	Dodson's Admiralty (Eng.)
Dom.L.R.	Dominion Law Reports (Can.)
Donnelly	Donnelly (Eng.)
Dorion	Dorion (L.C.)
Dougl.	Douglas (Eng.)
Dougl.	Douglass (Mich.)
Dougl.El.Cas.	Douglas' Election Cases (Eng.)
Dow	Dow (Eng.)
Dow & Cl.	Dow & Clark (Eng.)
Dow.&L.	Dowling & Lowndes (Eng.)
Dow.N.S.	Dowling, New Series (Eng.)
Dowl.	Dowling's English Bail Court (Practice) Cases
Dowl.P.C.	Dowling's Practice Cases (Eng.)
Dowl.P.C.N.S.	Dowling's Practice Cases New Series (Eng.)
D &R.	Dowling & Ryland (Eng.)
Draper	Draper (U.C.)
Drew.	Drewry (Eng.)
Drinkw.	Drinkwater (Eng.)
D.&R Mag.Cas.	Dowling & Ryland's Magistrate Cases (Eng.)
D.&R.N.P.	Dowling & Ryland's Nisi Prius (Eng.)
Dr.&Sm.	Drewry & Smale (Eng.)
Drury	Drury (Ir.)
Dr.&Wal.	Drury & Walsh (Ir.)
Dr.&War.	Drury & Warren (Ir.)
D.&Sw.	Deane & Swabey (Eng.)
Dud.Eq.	Dudley (S.C.)
Dudl.	Dudley (Ga.)
Duer	Duer's Superior Court (N.Y.)
Dunl.B.&M.	Dunlop, Bell & Murray (Sc.)
Dunlop	Dunlop (Sc.)
Dunn.	Dunning (Eng.)
Durie	Durie (Sc.)
Durn.&E.	Durnford & East (Eng.)
Duv.	Duvall (Ky.)
Dyer	Dyer (Eng.)

E

East	East (Eng.)
East.L.R.	Eastern Law Reporter (Can.)
East P.C.	East's Pleas of the Crown (Eng.)
East.T.	Eastern Term (Eng.)
E.&B.	Ellis & Blackburn (Eng.)
E.B.&E.	Ellis, Blackburn & Ellis (Eng.)
E.B.&S.	Ellis, Best & Smith (Eng.)
E.C.L.	English Common Law
Eden	Eden (Eng.)
Edgar	Edgar (Sc.)
Edm.Sel.Cas.	Edmond's Select Cases (N.Y.)
E. D. Smith	E. D. Smith (N.Y.)
Edw.	Edwards (Eng.)
Edw.	Edwards' Chancery (N.Y.)
Edw.Abr.	Edwards' Abridgment of Prerogative Court Cases
Edw.Adm.	Edwards' Admiralty (Eng.)
E.&E.	Ellis & Ellis (Eng.)
Enc.Pl.&Pr.	Encyclopædia of Pleading & Practice
Ency.Law.	American and English Encyclopædia of Law
Eng.Ad.	English Admiralty
Eng.C.C.	English Crown Cases
Eng.Ch.	English Chancery
Eng.Eccl.	English Ecclesiastical Reports
Eng.Ecc.R.	English Ecclesiastical Reports
Eng.Exch.	English Exchequer Reports
Eng.L.&Eq.	English Law & Equity
Eng.Rep.R.	English Reports, Full Reprint
Eng.Ry.&C.Cas.	English Railway and Canal Cases
Eng.&Ir.App.	Law Reports, English and Irish Appeal Cases
Eq.Cas.Abr.	Equity Cases Abridged (Eng.)
Eq.Rep.	Equity Reports (Eng.)
E.R.C.	English Ruling Cases
Esp.	Espinasse's Nisi Prius (Eng.)
Euer	Euer (Eng.)
Exch.	Exchequer (Eng.)
Exch.Cas.	Exchequer Cases (Sc.)
Ex.D.	Law Reports Exchequer Division (Eng.)
Eyre	Eyre's Reports (Eng.)

F

Falc.	Falconer's Court of Sessions (Sc.)
Falc.&F.	Falconer & Fitzherbert (Eng.)
Far.	Farresley (Eng.)
F.Cas.No.	Federal Cases (U.S.)
F. (Ct.Sess.)	Fraser's Court of Sessions Cases (Sc.)
F.	Federal Reporter (U.S.)
F. (2d)	Federal Reporter Second Series
F.Supp.	Federal Supplement
Ferg.Cons.	Ferguson's Consistory (Eng.)
F.&F.	Foster & Finlason (Eng.)
Fish.Pat.Cas.	Fisher's Patent Cases (U.S.)
Fish.Pat.R.	Fisher's Patent Reports (U.S.)
Fish.PrizeCas.	Fisher's Prize Cases (U.S.)
Fitzg.	Fitzgibbon (Eng.)
Fitzh.	Fitzherbert's Abridgment (Eng.)
Fitzh.N.Br.	Fitzherbert's Natura Brevium (Eng.)
Fla.	Florida
Flipp.	Flippin (U.S.)
Fl.&K.	Flanagan & Kelly (Ir.)
Fonb.Eq.	Fonblanque's Equity (Eng.)
Fonbl.	Fonblanque (Eng.)
Fonbl.R.	Fonblanque's English Cases
Forbes	Forbes (Eng.)
Forr.	Forrest (Eng.)
Forrester	Forrester's Cases (Eng.)
Fortesc.	Fortescue (Eng.)
Fost.	Foster (Eng.)
Fost.	Foster (N.H.)
Fost.&Fin.	Foster & Finlason (Eng.)
Fount.Dec.	Fountainhall's Decisions (Sc.)
Fox	Fox Reports (Eng.)
Fox & S.	Fox & Smith (Ir.)
Freem.	Freeman's Chancery (Eng.)
Freem.	Freeman's Chancery (Miss.)
Freem.K.B.	Freeman's King's Bench (Eng.)

G

Ga.	Georgia
Ga.App.	Georgia Appeals
Ga.Dec.	Georgia Decisions
Gale	Gale (Eng.)
Gal.	Gallison (U.S.)
G.Coop.	G. Cooper (Eng.)
G.&D.	Gale & Davidson (Eng.)
Geld.&M.	Geldart & Maddock (Eng.)
Gibb.Surr.	Gibbon's Surrogate (N.Y.)
Giffard	Giffard (Eng.)
Giff.&H.	Giffard and Hemming (Eng.)
Gil.	Gilfillan's Edition (Minn.)
Gilb.	Gilbert's (Eng.)
Gilb.Cas.	Gilbert's Cases (Eng.)
Gilb.C.P.	Gilbert's Common Pleas (Eng.)
Gilb.Exch.	Gilbert's Exchequer (Eng.)
Gill	Gill (Md.)
Gill&J.	Gill & Johnson (Md.)
Gilm.	Gilmer (Va.)
Gilm.&Fale.	Gilmour & Falconer (Sc.)
Gilp.	Gilpin (U.S.)
Glasc.	Glascock (Ir.)
Glyn&J.	Glyn & Jameson (Eng.)
Godb.	Godbolt (Eng.)
Godo.	Godolphin's Abridgment of Ecclesiastical Law
Goeb.	Goebel's Probate Court Cases
Gosf.	Gosford (Eng.)
Gouldsb.	Gouldsborough (Eng.)
Gow	Gow (Eng.)
Gow N.P.	Gow's English Nisi Prius Cases
Grant	Grant's Cases (Pa.)
Grant Ch.	Grant's Chancery (U.C.)
Grant Err.&App.	Grant's Error & Appeal (U.C.)
Gratt.	Grattan (Va.)
Gray	Gray (Mass.)

Green Cr.	Green's Criminal Law (Eng.)
Greene	Greene (Iowa)
Gwill.T.Cas.	Gwillim's Tithe Cases (Eng.)

H

Hadd.	Haddington (Eng.)
Hagg.Adm.	Haggard's Admiralty (Eng.)
Hagg.Cons.	Haggard's Consistory (Eng.)
Hagg.Eccl.	Haggard's Ecclesiastical (Eng.)
Hailes Dec.	Hailes' Decisions (Sc.)
Hale	Hale's Common Law (Eng.)
Hale Ecc.	Hale's Ecclesiastical (Eng.)
Hale P.C.	Hale's Pleas of the Crown (Eng.)
Hall	Hall's Superior Court (N.Y.)
Hall&T.	Hall & Twells (Eng.)
Halsbury L.Eng.	Halsbury's Law of England
Handy	Handy (Oh.)
Han.(N.B.)	Hannay's Reports, New Brunswick
Hard.	Hardin (Ky.)
Hardres	Hardres (Eng.)
Hare	Hare (Eng.)
Harp.Eq.	Harper (S.C.)
Harr.	Harrison's Chancery (Mich.)
Harr.(Del.)	Harrington (Del.)
Harr.(Mich.)	Harrington's Michigan Chancery Reports
Harr.&G.	Harris & Gill (Md.)
Harr.Ch.	Harrison's Chancery (Eng.)
Harr.&H.	Harrison & Hodgins (U.C.)
Harr.&J.	Harris & Johnson (Md.)
Harr.&M.	Harris & McHenry (Md.)
Harr.&R.	Harrison & Rutherford (Eng.)
Harr.&W.	Harrison & Wollaston (Eng.)
Hask.	Haskell (U.S.)
Havil.	Haviland (Pr.Edw.Isl.)
Hawaii	Hawaiian
Hawaii.Fed.	Hawaiian Federal
Hawaiian Rep.	Hawaii Reports
Hawk.P.C.	Hawkins' Pleas of the Crown (Eng.)
Hay.Exch.	Hayes Exchequer (Ir.)
Hayes	Hayes (Ir.)
Hayes&J.	Hayes & Jones (Ir.)
Hay&M.	Hay & Marriott (Eng.)
Hayw.	Haywood (N.C.)
Hayw.	Haywood (Tenn.)
Hayw.&H.	Haywood & Hazelton (U.S.)
Haz.Reg.	Hazard's Register (Pa.)
H Bl.	Henry Blackstone (Eng.)
H.&C.	Hurlstone & Coltman (Eng.)
Head	Head (Tenn.)
Heisk.	Heiskell (Tenn.)
Hem.&M.	Hemming & Miller (Eng.)
Hempst.	Hempstead (U.S.)
Hen.&M.	Henning & Munford (Va.)
Het.	Hetley (Eng.)
Het.C.P.	Hetley's Common Pleas (Eng.)
H.&H.	Horn & Hurlstone (Eng.)
Hill	Hill (N.Y.)
Hill S.C.	Hill (S.C.)
Hill &Den.	Hill & Denio (N.Y.)
Hill &Den. Supp.	Lalor's Supplement to Hill & Denio's (N.Y.)
Hilt.	Hilton (N.Y.)
Hil.T.	Hilary Term (Eng.)
H.L.Cas.	House of Lords Cases (Eng.)
H.&N.	Hurlstone & Norman (Eng.)
Hob.	Hobart (Eng.)
Hodg.El.	Hodgins' Election (U.C.)
Hodges	Hodges (Eng.)
Hoffm.	Hoffman's Chancery (N.Y.)
Hoffm.Land Cas.	Hoffman's Land Cases (U.S.)
Hog.	Hogan (Ir.)
Holmes	Holmes (U.S.)
Holt Adm.Cas.	Holt's English Admiralty Cases
Holt Eq.	Holt's Equity (Eng.)
Holt K.B.	Holt's King's Bench (Eng.)
Holt N.P.	Holt's Nisi Prius (Eng.)
Home	Home (Sc.)
Hope Dec.	Hope's Decisions (Sc.)
Hopk.	Hopkins' Chancery (N.Y.)
Hopk.Dec.	Hopkins' Decisions (Pa.)
Hopw.&C.	Hopwood & Coltman (Eng.)
Hopw.&P.	Hopwood & Philbrick (Eng.)
Hosea	Hosea (Ohio)
Houst.	Houston (Del.)
Houst.Cr.	Houston's Criminal Cases (Del.)
How.	Howard (U.S.)
How.(Miss.)	Howard (Miss.)
How.A.Cas.	Howard's Appeal Cases (N.Y.)
How.N.P.	Howell's Nisi Prius (Mich.)
How.Pr.	Howard's Practice (N.Y.)
How.Pr.N.S.	Howard's Practice New Series (N.Y.)
How.St.Tr.	Howell's State Trials (Eng.)
Hud.&B.	Hudson & Brooke (Ir.)
Hughes	Hughes (Ky.)
Hughes	Hughes (U.S.)
Hume	Hume's Decisions (Sc.)
Humphr.	Humphreys (Tenn.)
Hun	Hun (N.Y.)
Hurl.&Gord.	Hurlstone & Gordon (Eng.)
Hurl.&W.	Hurlstone & Walmsley (Eng.)
Hutt.	Hutton (Eng.)

I

Idaho	Idaho
Iddings D.R.D.	Iddings Dayton Term Reports
Ill.	Illinois
Ill.App.	Illinois Appellate Court
Ill.Cir.	Illinois Circuit Court
Ind.	Indiana
Ind.App.	Indiana Appellate Court
Ind.T.	Indian Territory
Ins.L.J.	Insurance Law Journal
Int.Com.Comm.	Interstate Commerce Commission
Int.Com.Rep.	Interstate Commerce Reports
Int.Rev.Rec.	Internal Revenue Record
Iowa	Iowa
[1891]Ir.	Law Reports [1891] Irish
Ir.Ch.	Irish Chancery
Ir.C.L.	Irish Common Law
Ir.Eccl.	Irish Ecclesiastical Reports
Ired.	Iredell (N.C.)
Ir.Eq.	Irish Equity
Ir.Law Rep.	Irish Law Reports
Ir.Law &Eq.	Irish Law and Equity Reports
Ir.R.1894.	Irish Law Reports for year 1894
Ir.R.C.L.	Irish Reports Common Law
Ir.R.Eq.	Irish Reports Equity
Irv.Just.	Irvine's Justiciary Cases (Eng.)

J

Jac.	Jacob (Eng.)
Jac.&W.	Jacob & Walker (Eng.)
J.Bridgm.	John Bridgman (Eng.)
J.&C.	Jones & Carey (Ir.)
Jebb &B.	Jebb & Bourke (Ir.)
Jebb C.C.	Jebb's Crown Cases (Ir.)
Jebb&S.	Jebb & Symes (Ir.)
Jeff.	Jefferson (Va.)
Jenk.	Jenkins (Eng.)
J.J.Marsh.	J. J. Marshall (Ky.)
J.&L.	Jones & La Touche (Eng.)
Johns.	Johnson (Eng.)
Johns.	Johnson (N.Y.)
Johns.Cas.	Johnson's Cases (N.Y.)
Johns.Ch.	Johnson's Chancery (N.Y.)
Johns.V.C.	Johnson's English Vice-Chancellors (Eng.)
Johns.&H.	Johnson & Hemming (Eng.)
Jones Exch.	Jones Exchequer (Ir.)
Jones T.	Sir Thomas Jones' English King's Bench Reports
Jones W.	Sir William Jones' English King's Bench Reports
Jones&Spen.	Jones & Spender (N.Y.)
Journ.Jur.	Journal of Jurisprudence (Pa.)
J.P.	Justice of Peace (Eng.)
Jur.	Jurist (Eng.)
Jur.N.S.	Jurist New Series (Eng.)
Just.L.R.	Justices' Law Reporter (Pa.)

K

Kames Dec.	Kames' Decisions (Sc.)
Kames Elucid.	Kames' Elucidation (Sc.)
Kames Rem.Dec.	Kames' Remarkable Decisions (Sc.)
Kames Sel.Dec.	Kames' Select Decisions (Sc.)
Kan.	Kansas
Kan.App.	Kansas Appeals
Kay	Kay (Eng.)
Kay&J.	Kay & Johnson (Eng.)
[1917]K.B.	Law Reports [1917] King's Bench (Eng.)
Keane &Gr.	Keane & Grant (Eng.)
Keb.	Keble (Eng.)
Keen	Keen (Eng.)
Keilw.	Keilway (Eng.)
Kel.C.C.	Kelyng's Crown Cases (Eng.)
Kelly	Kelly (Ga.)
Kelyng, J.	Kelyng's English Crown Cases
Kelynge, W.	Kelynge's Chancery (Eng.)
Keyes	Keyes (N.Y.)
Keyl.	Keilwey (Eng.)
K.&G.	Keane & Grant (Eng.)
Kilk.	Kilkerran's Decisions (Sc.)
Kirby	Kirby (Conn.)
Knapp	Knapp (Eng.)
Knapp&O.	Knapp & Ombler (Eng.)
Kn.&Moo.	Knapp & Moore (Eng.)
Knox	Knox (N.S.Wales)
Knox&F.	Knox & Fitzhardinge (N.S.Wales)
Kulp	Kulp (Pa.)
Ky.	Kentucky
Ky.Dec.	Kentucky Decisions
Ky.L.	Kentucky Law Reporter
Ky.Op.	Kentucky Opinions

L

La.	Louisiana
La.App.	Louisiana Court of Appeals
La.A.(Orleans)	Court of Appeal, Parish of Orleans
La.Ann.	Louisiana Annual
Lab.	Labatt's District Court (Cal.)
Lack.Jur.	Lackawanna Jurist (Pa.)
Lack.Leg.N.	Lackawanna Legal News (Pa.)
Lack.Leg.Rec.	Lackawanna Legal Record (Pa.)
Lalor	Lalor's Supplement to Hill & Denio (N.Y.)
Lanc.Bar	Lancaster Bar (Pa.)
Lanc.L.Rev.	Lancaster Law Review (Pa.)
Land Dec.	Land Decisions (U.S.)
Lane	Lane (Eng.)
Lans.	Lansing (N.Y.)
Lans.Ch.	Lansing's Chancery Decisions (N.Y.)
Latch	Latch (Eng.)
Law Rep.N.S.	Law Reports New Series (N.Y.)
L.C.	Lower Canada
L.&C.	Leigh & Cave (Eng.)
L.C.Jur.	Lower Canada Jurist
L.C.L.J.	Lower Canada Law Journal
L.C.Rep.S.Qu.	Lower Canada Reports Seignorial Questions
L.D.	Law Dictionary
Ld.Ken.	Lord Kenyon (Eng.)
Ld.Raym.	Lord Raymond (Eng.)
Lea	Lea (Tenn.)
Leach C.C.	Leach's Crown Cases (Eng.)
L.Ed.	Lawyers' Edition United States Supreme Court
Lee Eccl.	Lee's Ecclesiastical (Eng.)
Lee t Hardw.	Lee temp. Hardwicke (Eng.)
Lef.Dec.	Lefevre's Parliamentary Decisions (Eng.)
Leg.Chron.	Legal Chronicle (Pa.)
Leg.Gaz.	Legal Gazette (Pa.)
Leg.&Ins.R.	Legal & Insurance Reporter (Pa.)
Leg.Int.	Legal Intelligencer (Pa.)
Leg.Op.	Legal Opinions (Pa.)
Leg.Rec.	Legal Record (Pa.)
Lehigh Co.L.J.	Lehigh County Law Journal (Pa.)
Lehigh Val.L.R.	Lehigh Valley Law Reporter (Pa.)
Leigh	Leigh (Va.)
Leigh &C.	Leigh & Cave's English Crown Cases
Leon.	Leonard (Eng.)
Lev.	Levinz (Eng.)
Lew.C.C.	Lewin's Crown Cases (Eng.)
Ley	Ley (Eng.)
L.G.	Law Glossary
Liberian L.	Liberian Law
Litt.	Littell (Ky.)
Litt.	Littleton (Eng.)
Litt.Sel.Cas.	Littell's Select Cases (Ky.)
L.J.Adm.	Law Journal Admiralty New Series (Eng.)
L.J.Bankr.	Law Journal Bankruptcy New Series (Eng.)
L.J.Ch.	Law Journal Chancery New Series (Eng.)
L.J.Ch.O.S.	Law Journal Chancery Old Series (Eng.)
L.J.C.P.	Law Journal Common Pleas New Series (Eng.)
L.J.C.P.O.S.	Law Journal Common Pleas Old Series (Eng.)
L.J.Eccl.	Law Journal Ecclesiastical New Series (Eng.)
L.J.Exch.	Law Journal Exchequer New Series (Eng.)
L.J.Exch.O.S.	Law Journal Exchequer Old Series (Eng.)
L.J.K.B.	Law Journal King's Bench New Series (Eng.)
L.J.K.B.O.S.	Law Journal King's Bench Old Series (Eng.)
L.J.M.C.	Law Journal Magistrate Cases New Series (Eng.)
L.J.M.C.O.S.	Law Journal Magistrate Cases Old Series (Eng.)
L.J.P.C.	Law Journal Privy Council New Series (Eng.)
L.J.P.D.&Adm.	Law Journal Probate Divorce & Admiralty New Series (Eng.)
L.J.P.&M.	Law Journal Probate & Matrimonial New Series (Eng.)
L.J.Q.B.	Law Journal Queen's Bench New Series (Eng.)
L.J.Rep.	Law Journal Reports (Eng.)
Ll.&G.t.Pl.	Lloyd & Goold temp. Plunket (Ir.)
Ll.&G.t.S.	Lloyd & Goold temp. Sugden (Ir.)
Ll.&W.	Lloyd & Welsby (Eng.)
L.&M.	Lowndes & Maxwell (Eng.)
L.M.&P.	Lowndes, Maxwell & Pollack (Eng.)
Loc.Gov.	Local Government (Eng.)
Lofft	Lofft (Eng.)
Longf.&T.	Longfield & Townsend (Ir.)
Low.Can.Seign.	Lower Canada Seignorial Reports
Lowell	Lowell (U.S.)
L.R.	Law Reports (U.S.)
L.R.A.	Lawyers' Reports Annotated
L.R.A.1915A.	Lawyers' Reports Annotated 1915A
L.R.App.Cas.	English Law Reports, Appeal Cases (Eng.)
L.R.A.&E.	Law Reports Admiralty & Ecclesiastical (Eng.)
L.R.A.N.S.	Lawyers' Reports Annotated New Series
L.R.C.C.	Law Reports Crown Cases (Eng.)
L.R.Ch.	Law Reports Chancery Appeal Cases (Eng.)
L.R.C.P.	Law Reports Common Pleas Cases (Eng.)
L.R.Eq.	Law Reports Equity Cases (Eng.)
L.R.Exch.	Law Reports Exchequer Cases (Eng.)
L.R.H.L.	Law Reports House of Lords (English & Irish Appeal Cases)
L.R.H.L.Sc.	Law Reports House of Lords (Scotch Appeal Cases)
L.R.Indian App.	Law Reports Indian Appeals (Eng.)
L.R.Ir.	Law Reports Irish
L.R.P.C.	Law Reports Privy Council (Eng.)
L.R.P.&D.	Law Reports Probate & Divorce (Eng.)
L.R.Q.B.	Law Reports Queen's Bench Cases (Eng.)
L.T.	Law Times (Pa.)
L.T.N.S.	Law Times New Series (Pa.)
L.T.O.S.	Law Times, Old Series (Eng.)

L.T.Rep.N.S.	Law Times Reports New Series (Eng.)
Lush.	Lushington's Admiralty (Eng.)
Lutw.	Lutwyche (Eng.)
Lutw.Reg.Cas.	Lutwyche's Registration Cases (Eng.)
Luz.Leg.Obs.	Luzerne Legal Observer (Pa.)
Luz.Leg.Reg.	Luzerne Legal Register (Pa.)
Lynd.Prov.	Lyndwood's Provinciales

M

MacA.Pat.Cas.	MacArthur's Patent Cases (D.C.)
MacArth.	MacArthur's District of Columbia Reports
MacAr.&M.	MacArthur & Mackey's District of Columbia Reports
Maccl.	Macclesfield (Eng.)
MacFarl.	MacFarlane (Sc.)
Mackey	Mackey's Reports, District of Columbia
Macl.&R.	Maclean & Robinson (Eng.)
Macn.&G.	Macnaghten & Gordon (Eng.)
Macph.	Macpherson (Sc.)
Macph.S.&L.	Macpherson, Shirreff & Lee (Sc.)
Macq.	Macqueen's Scotch Appeal Cases
Madd.	Maddock (Eng.)
Madd.Ch.Pr.	Maddock's Chancery Practice (Eng.)
Malloy	Malloy (Ir.)
Man.	Manitoba Law
Man.El.Cas.	Manning's Election Cases (Eng.)
Man.Exch.Pr.	Manning's Exchequer Practice (Eng.)
Man.Gr.&S.	Manning, Granger, & Scott (Eng.)
Man.L.J.	Manitoba Law Journal
Man.&Ry.	Manning & Ryland (Eng.)
Man &Ry.Mag. Cas.	Manning & Ryland's Magistrates' Cases (Eng.)
Man.&S.	Manning & Scott (Eng.)
Mann.Unrep.Cas.	Manning's Unreported Cases (La.)
Manson	Manson (Eng.)
Man.t.Wood	Manitoba temp. Wood
March	March (Eng.)
Mar.Prov.	Maritime Province Reports (Can.)
Mars.Adm.	Marsden's Admiralty (Eng.)
Marsh.	Marshall (Eng.)
Marsh.J.J.	J. J. Marshall (Ky.)
Mart.	Martin Old Series (La.)
Mart.(N.S.)	Martin, New Series (La.)
Mart.	Martin (N.C.)
Marv.	Marvel (Del.)
Mart.N.S.	Martin New Series (La.)
Mart.&Y.	Martin & Yerger (Tenn.)
Mason	Mason (U.S.)
Mass.	Massachusetts
Maule &S.	Maule & Selwyn (Eng.)
Mayn.	Maynard (Eng.)
McAll.	McAllister (U.S.)
McC.	McCahon (Kan.)
McClell.	McClelland (Eng.)
McClell.&Y.	McClelland & Younge (Eng.)
McCord.	McCord (S.C.)
McCrary	McCrary (U.S.)
McG.	McGloin (La.)
McLean	McLean (U.S.)
McMul.	McMullan (S.C.)
Md.	Maryland
Md.Ch.	Maryland Chancery
Me.	Maine
Mees.&Ros.	Meeson & Roscoe (Eng.)
Mees.&W.	Meeson & Welsby (Eng.)
Meg.	Megone (Eng.)
Meigs	Meigs (Tenn.)
Menzies Cape of Good Hope	Menzies Cape of Good Hope
Meriv.	Merivale (Eng.)
Metc.	Metcalf (Mass.)
Metc.	Metcalfe (Ky.)
M.&G.	Manning & Granger (Eng.)
M.&H.	Murphy & Hurlstone (Eng.)
Mich.	Michigan
Mich.N.P.	Michigan Nisi Prius
Mich.T.	Michaelmas Term (Eng.)
Miles	Miles (Pa.)
Mill.Const.	Mill's Constitutional (S.C.)
Mill.Dec.	Miller's Decisions (U.S.)
Mills	Mills (N.Y.)
Milw.	Milward (Ir.)
Minn.	Minnesota
Minor	Minor (Ala.)
Misc.	Miscellaneous (N.Y.)
Miss.	Mississippi
Miss.Dec.	Mississippi Decisions
Miss.St.Cas.	Mississippi State Cases
M.&M.	Moody & Malkin (Eng.)
Mo.	Missouri
Mo.App.	Missouri Appeals
Moak	Moak (Eng.)
Mo.A.R.	Missouri Appeals Reporter
Mod.	Modern (Eng.)
Mod.Cas.L.&Eq.	Modern Cases at Law and Equity (Eng.)
Molloy	Molloy (Ir.)
Mon.	Monaghan (Pa.)
Mont.	Montana
Mont.	Montagu (Eng.)
Mont.Bank.Rep.	Montagu's English Bankruptcy Reports
Mont.L.R.	Montreal Law Reports (Can.)
Mont.&A.	Montagu & Ayrton (Eng.)
Mont.&B.	Montagu & Bligh (Eng.)
Mont.&C.	Montagu & Chitty (Eng.)
Mont.D.&DeG.	Montagu, Deacon & De Gex (Eng.)
Montg.Co.	Montgomery County Law Reporter (Pa.)
Mont.&M.	Montagu & McArthur (Eng.)
Montr.Cond.Rep.	Montreal Condensed Reports
Montr.Leg.N.	Montreal Legal News
Montr.Q.B.	Montreal Law Reports Queen's Bench
Montr.Super.	Montreal Law Reports Superior Court
Moody C.C.	Moody's Crown Cases (Eng.)
Moore C.P.	Moore's Common Pleas (Eng.)
Moore Indian App.	Moore's Indian Appeals (Eng.)
Moore K.B.	Moore's King's Bench (Eng.)
Moore P.C.	Moore's Privy Council Old Series (Eng.)
Moore P.C.N.S.	Moore's Privy Council New Series (Eng.)
Moore&S.	Moore & Scott (Eng.)
Moore&W.	Moore & Walker (Tex.)
Mor.Min.Rep.	Morrison's Mining Reports
Morr.	Morris (Iowa)
Morr.Bankr.Cas.	Morrell's Bankruptcy Cases (Eng.)
Morr.St.Cas.	Morris' State Cases (Miss.)
Mosely	Mosely (Eng.)
M.&P.	Moore & Payne (Eng.)
M.&R.	Manning & Ryland (Eng.)
M.&Rob.	Moody & Robinson (Eng.)
M.&S.	Maule & Selwyn (Eng.)
Mun.Corp.Cas.	Municipal Corporation Cases
Munf.	Munford (Va.)
Murph.	Murphey (N.C.)
Murr.	Murray (Sc.)
M.&W.	Meeson & Welsby (Eng.)
Myl.&C.	Mylne & Craig (Eng.)
Myl.&K.	Mylne & Keen (Eng.)
Myr.Prob.	Myrick's Probate (Cal.)

N

Nat.Bankr.Reg.	National Bankruptcy Register (U.S.)
Nat.Corp.Rep.	National Corporation Reporter
Nat.L.Rep.	National Law Reporter
N.B.	New Brunswick
N.Benl.	New Benloe (Eng.)
N.B.Eq.	New Brunswick Equity
N.C.	North Carolina
N.Chipm.	N. Chipman (Vt.)
N.C.Conf.	North Carolina Conference
N.C.T.Rep.	North Carolina Term Reports
N.D.	North Dakota
N.E.	North Eastern Reporter
N.E.(2d)	North Eastern Reporter Second Series
Neb.	Nebraska
Neb.(Unoff.)	Nebraska Unofficial
Nels.	Nelson (Eng.)
Nels.Abr.	Nelson's Abridgment of the Common Law

Nev.	Nevada
Newb.Adm.	Newberry's Admiralty (U.S.)
Newfoundl.	Newfoundland
Newf Sel.Cas.	Newfoundland Select Cases
New Rep.	New Reports in all Courts (Eng.)
New Sess.Cas.	New Session Cases (Eng.)
New Zeal.	New Zealand Law
N.H.	New Hampshire
N.J.Eq.	New Jersey Equity
N.J.Law	New Jersey Law
N.J.L.J.	New Jersey Law Journal
N.J Misc.	New Jersey Miscellaneous
N.M.	New Mexico
N.&M.	Nevile & Manning (Eng.)
N.&Macn.	Neville & Macnamara (Eng.)
Nolan	Nolan (Eng.)
North.	Northington (Eng.)
North.Co.	Northampton County Reporter (Pa.)
Northum.	Northumberland County Legal News (Pa.)
Northumb.Co.Leg. N.	Northumberland County Legal News (Pa.)
Notes of Cas.	Notes of Cases (Eng.)
Nott & McC.	Nott & McCord (S.C.)
Noy	Noy (Eng.)
N.&P.	Nevile & Perry (Eng.)
N.S.	Nova Scotia
N.S.Dec.	Nova Scotia Decisions
N.S.Wales	New South Wales
N.S.Wales L.	New South Wales Law
N.S.Wales L.R.Eq.	New South Wales Law Reports Equity
N.W.	North Western Reporter
N.Y.	New York
N.Y.Ann.Cas.	New York Annotated Cases
N.Y.City Ct.	New York City Court
N.Y.City Ct.Suppl.	New York City Court Supplement
N.Y.Civ.Proc.	New York Civil Procedure
N.Y.Civ.Pr.Rep.	New York Civil Procedure Reports
N.Y.Code Reports, N.S.	New York Code Reports, New Series
N.Y.Cr.	New York Criminal
N.Y.Leg.Obs.	New York Legal Observer
N.Y.L.Rec.	New York Law Record
N.Y.Month.L.Bul.	New York Monthly Law Bulletin
N.Y.S.	New York Supplement
N.Y.St.	New York State Reporter
N.Y.Super.	New York Superior Court
N.Y.Wkly.Dig.	New York Weekly Digest

O

O.Ben.	Old Benloe (Eng.)
O.Bridgm.	Orlando Bridgman (Eng.)
Off.Gaz.	Official Gazette
Ohio	Ohio
Ohio App.	Ohio Court of Appeals
Ohio Cir.Ct.	Ohio Circuit Court
Ohio Cir.Ct.N.S.	Ohio Circuit Court New Series
Ohio Cir.Dec.	Ohio Circuit Decisions
Ohio Dec. (Reprint)	Ohio Decisions (Reprint)
Ohio F.Dec.	Ohio Federal Decisions
Ohio L.J.	Ohio Law Journal
Ohio N.P.	Ohio Nisi Prius
Ohio N.P.N.S.	Ohio Nisi Prius New Series
Ohio O.	Ohio Opinions
Ohio Prob.	Ohio Probate
Ohio S.&C.P.	Ohio Superior & Common Pleas Decisions
Ohio St.	Ohio State
Okl.	Oklahoma
Okl.Cr.	Oklahoma Criminal
Olcott	Olcott (U.S.)
Oliv.B.&L.	Oliver, Beavan & Lefroy (Eng.)
O'M.&H.	O'Malley & Hardcastle (Ir.)
Ont.	Ontario
Ont.A.	Ontario Appeals
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Ont.W.N.	Ontario Weekly Notes
Ont.W.R.	Ontario Weekly Reporter
Op.Atty.-Gen.	Opinions of Attorneys-General (U.S.)
Op.Sol.Dept. Labor	Opinions of the Solicitor for the Department of Labor dealing with Workmen's Compensation
Or.	Oregon
Orleans App.	Orleans Appeals (La.)
Overt.	Overton (Tenn.)
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P

P.	Pacific Reporter
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[1891]P.	Law Reports [1891] Probate (Eng.)
Pa.	Pennsylvania State
Pa.Cas.	Pennsylvania Supreme Court Cases (Sadler)
Pa.Co.	Pennsylvania County Court
Pa.C.Pl.	Common Pleas (Pa.)
Pa.Dist.	Pennsylvania District
Pa.Dist.&Co.	Pennsylvania District and County
Paige	Paige's Chancery (N.Y.)
Paine	Paine (U.S.)
Pa.L.J.	Pennsylvania Law Journal
Pa.L.Rec.	Pennsylvania Law Record
Pa.L.J.R.	Clark's Pennsylvania Law Journal Reports
Palm.	Palmer (Eng.)
Park.	Parker (Eng.)
Park.Cr.	Parker's Criminal (N.Y.)
Park Exch.	Parker's Exchequer (Eng.)
Park.Ins.	Parker's Insurance (Eng.)
Pars.Eq.Cas.	Parsons' Equity Cases (Pa.)
Pa.Super.	Pennsylvania Superior Court
Paton App.Cas.	Paton's Appeal Cases (Sc.)
Patrick El.Cas.	Patrick's Election Cases (Can.)
Patt.&H.	Patton & Heath (Va.)
P.D.	Law Reports Probate Division (Eng.)
P.&D.	Perry & Davison (Eng.)
Peake N.P.	Peake's Nisi Prius (Eng.)
Pearce C.C.	Pearce's Reports in Dearsly's (Eng.)
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Peck.El.Cas.	Peckwell's Election Cases (Eng.)
Pennew.	Pennewill (Del.)
Pennyp.	Pennypacker (Pa.)
Penr.&W.	Penrose & Watts (Pa.)
Perry & Kn.	Perry & Knapp Election Cases (Eng.)
Pet.	Peters (U.S.)
Pet.Adm.	Peters' Admiralty (U.S.)
Pet.C.C.	Peters' Circuit Court (U.S.)
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Phil.	Phillip (N.C.)
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Pick.	Pickering (Mass.)
Pig.&R.	Pigott & Rodwell (Eng.)
Pig.Rec.	Pigott's Recoveries (Eng.)
Pinn.	Pinney (Wis.)
Pittsb.	Pittsburgh (Pa.)
Pittsb.Leg.J.	Pittsburgh Legal Journal (Pa.)
Pittsb.Leg.J.N.S.	Pittsburgh Legal Journal New Series (Pa.)
P.&K.	Perry & Knapp (Eng.)
Plowd.	Plowden (Eng.)
Pollexf.	Pollexfen (Eng.)
Poph.	Popham (Eng.)
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Posey	Posey's Unreported Cases (Tex.)
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P.R.&D.El.Cas.	Power, Rodwell & Dew's Election Cases (Eng.)
Prec.Ch.	Precedents in Chancery (Eng.)
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Prid.&C.	Prideaux & Cole (Eng.)
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Prob Rep.	Probate Reports (Eng.)
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P.Wms.	Peere-Williams (Eng.)
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Q.B.	Queen's Bench (Adolphus & Ellis New Series) (Eng.)
[1891]Q.B.	Law Reports [1891] Queen's Bench (Eng.)
Q.B.D.	Law Reports Queen's Bench Division (Eng.)
Queensl.J.P.	Queensland Justice of the Peace
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Que.L.	Quebec Law
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Que.Q.B.	Quebec Official Reports Queen's Bench
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Rap.Jud.Q.C.S.	Rapport's Judiciaries de Quebec Cour Superieure
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Reeve Eng.L.	Reeve's English Law
Reports	Reports (Eng.)
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Riley	Riley (S.C.)
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Am Law S.Rev.	American Law School Review
B.U.L.Rev.	Boston University Law Review
Brooklyn L.Rev.	Brooklyn Law Review
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Camb.L J.	Cambridge Law Journal
Chi-Kent Rev.	Chicago-Kent Review
Colum.L.Rev.	Columbia Law Review
Com.L J.	Commercial Law Journal
Cornell L.Q.	Cornell Law Quarterly
Detroit L.Rev.	Detroit Law Review
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Fed.B A.J.	Federal Bar Association Journal
Fla L.J.	Florida Law Journal
Fordham L.Rev.	Fordham Law Review
Geo.Wash.L.Rev.	George Washington Law Review
Geo.L.J.	Georgetown Law Journal
Harv.L.Rev.	Harvard Law Review
Ia.L Rev.	Iowa Law Review
Idaho L.J.	Idaho Law Journal
Ill L.Rev.	Illinois Law Review
Ind.L.J.	Indiana Law Journal
J.Am Jud.Soc.	Journal of the American Judicature Society
J.Comp.Leg.	Journal of the Society of Comparative Legislation
J.N A.Referees Bank.	Journal of the National Association of Referees in Bankruptcy
J.Soc Pub.Teach. Law	Journal of the Society of Pub. Teachers of Law
John Marshall L. Q.	The John Marshall Law Quarterly
Kan.City L.Rev.	Kansas City Law Review
Kan St L.J.	Kansas State Law Journal
Ky.L.J.	Kentucky Law Journal
L J.	Law Journal
L Lib.J.	Law Library Journal
Law Ser.Mo.Bull.	University of Missouri Bulletin, Law Series
Law Soc.J.	Law Society Journal
Lincoln L.Rev.	Lincoln Law Review
Marq.L.Rev.	Marquette Law Review
Mass.L.Q.	Massachusetts Law Quarterly
Mercer, Beasley L Rev.	Mercer, Beasley Law Review
Mich L Rev.	Michigan Law Review
Minn L Rev.	Minnesota Law Review
Miss.L.J.	Mississippi Law Journal
Neb.L.B.	Nebraska Law Bulletin
N J.L.J.	New Jersey Law Journal
N J.L Rev.	New Jersey Law Review
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Notre Dame Law.	Notre Dame Lawyer
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Okla.S.B.J.	Oklahoma State Bar Journal
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St. John's L.Rev.	St. John's Law Review
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So.Calif.L.Rev.	Southern California Law Review
Temp.L.Q.	Temple Law Quarterly
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CORPUS JURIS SECUNDUM

VOLUME THIRTEEN

CARRIER. See C.J.S. title Carriers §§ 2, 529.

Phrases: "Against such carrier,"[46] "any carrier by railroad, subject to the Interstate Commerce Act,"[47] "carrier by railroad,"[48] "carrier for hire," see Carriers C.J.S. § 3, also 10 C.J. p 45 notes 74–81, C.J.S. § 529, also 10 C.J. p 607 note 62, "carrier of passengers," see Carriers C.J.S. § 529, also 10 C.J. p 607 notes 62, 63, "carrier operating such railroad,"[49] "common carrier," see C.J.S. title Carriers §§ 3, 530, "common motor carrier,"[50] "contract carrier,"[51] "contract motor carrier,"[52] "contracts between the carrier and its employee,"[53] "from a common or other carrier,"[54] "private carrier," see Carriers §§ 4, 531, "private motor carrier,"[55] "public conveyance provided by a common carrier for passenger service,"[56] and "substituting the Director General of Railroads for the carrier;"[57] also "carriers during federal control,"[58] "carriers engaged in interstate commerce,"[59] "carrier of goods," see C.J.S. title Carriers § 3, "carriers while under federal control,"[60] "employee of the carriers,"[61] and "operator of carriers;"[62] and also, adjectively, "carrier-made rates."[63]

46. U.S.—Stark v. Payne, D.C.Mont., 271 F. 477.

47. U.S.—Birmingham Trust & Savings Co. v. Atlanta, B. & A. Ry Co., D.C.Ga., 271 F. 731, 739.

48. U.S.—U. S. v. American Ry. Express Co., Ga., 44 S.Ct. 560, 561, 265 U.S. 425, 68 L.Ed. 1087—U. S ex rel. Chicago, New York & Boston Refrigerator Co. v. Interstate Commerce Commission, D.C., 44 S.Ct 558, 559, 265 U.S. 292, 68 L Ed. 1024—American Ry. Express Co. v. U. S., D C.Ga., 293 F 31, 34.
App D C.—U. S. ex rel. Chicago, New York & Boston Refrigerator Co. v. Interstate Commerce Commission, 288 F. 649, 652, 53 App.D.C. 111.

49. Tex.—Payne v. Harris, Com. App., 241 S.W. 1008, 1011.

50. Wis.—Standard Oil Co. v. Public Service Commission of Wisconsin, 259 N W. 598, 599, 217 Wis. 563.

51. "Private carrier" equivalent
Conn.—Ace-High Dresses, Inc., v. J. C. Trucking Co., Inc., 191 A. 536, 538, 122 Conn. 578.

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52. Wis.—Standard Oil Co. v. Public Service Commission of Wisconsin, 259 N.W. 598, 599, 219 Wis. 563.

53. N.J.—Delaware, L. & W. R. Co. v. Smyth, 115 A. 65, 66, 193 N.J.Eq. 80.

54. Ind.—Smith v. State, 156 N.E. 513, 514, 199 Ind. 217.

55. Wis.—Standard Oil Co. v. Public Service Commission of Wisconsin, 259 N W. 598, 599, 219 Wis. 563.

56. Colo.—United States Casualty Co. v. Ellison, 176 P. 279, 65 Colo. 252.

57. U.S.—Rutherford v. Union, Pac. R. Co., D.C.Neb., 254 F. 880.

58. U S.—Westbrook v. Director General of Railroads, D.C Ga., 263 F 211, 214.

59. Ohio.—Iron City Produce Co. v American Ry. Express Co., 153 N E. 316, 318, 22 Ohio App. 165.

60. U.S.—Virginian Ry. Co. v. Mullens, W.Va., 46 S.Ct. 526, 529, 271 U.S. 220, 70 L.Ed. 915—Missouri Pac. R. Co. v. Ault, Ark., 41 S.Ct. 593, 595, 256 U.S. 554, 65 L.Ed. 1087—Hines v. Dahn, C.C.A.Iowa, 267 F. 105, 108.
Ark.—Missouri Pac. R. Co. v. Ault, 216 S W. 3, 5, 140 Ark. 572.
Cal.—American Fruit Distributors of California v. Hines, 203 P. 821, 824, 55 Cal.App. 377.
Ky.—Rogers Bros Coal Co. v. Hines, 237 S.W. 1058, 193 Ky. 795.
Miss.—Davis v. Dantzler Lumber Co., 89 So. 148, 151, 126 Miss. 812.
N.D.—McGregor v. Great Northern Ry. Co., 172 N.W. 841, 842, 42 N.D. 269, 4 A.L.R. 1635.

61. Tex.—Hanson v. Ponder, Civ. App., 300 S.W. 35, 40.

62. "Carrier" distinguished
"The Director General [of railroads under federal control] was not a carrier, but an operator of carriers."—E. I. Du Pont De Nemours & Co. v. Davis, Ark., 44 S.Ct. 364, 366, 264 U.S. 456, 68 L.Ed. 788.

63. U.S.—Texas & P. Ry. Co. v. Louisiana Oil Refining Corporation, C.C.A.La., 76 F.2d 465, 468.

CARRIERS

This Title includes the regulation and conduct of the business of transportation of goods and passengers, by common or private carriers, and matters incidental thereto, such as the operation of palace cars, sleeping cars, etc., freight lines, collection and transportation of money by express companies, etc.; and rights, duties, and liabilities of those engaged in any such business, as to the public and as to individuals, in respect of the persons and property carried.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. INTRODUCTORY STATEMENT

§ 1. Kinds of Carriers

Within the definition of the term carriers are either private or common carriers.

A carrier is one who undertakes the transfer of persons or property from one place to another for hire,[1] or gratuitously.[2] The authorities recognize two classes of carriers, namely, private carriers and common carriers;[3] all persons who undertake for hire, to carry the goods of another, belong to one or the other of these classes,[4] the class to which a particular carrier is to be assigned depending on the nature of the business, the character in which it holds itself out to the public, the terms of the contract, and its relations generally with the parties with whom it deals and the public.[5] While a common carrier has been defined as one that holds itself out to the public to carry persons or freight for hire, see infra §§ 3, 530, the term did not, at the common law, embrace a carrier of passengers, see infra § 530.

II. CARRIERS OF GOODS AND LIVE STOCK

A. DEFINITIONS AND GENERAL NATURE

§ 2. In General

A carrier of goods is one who undertakes to carry, or is engaged in the business of carrying, goods for hire.

A carrier of goods is one who undertakes for hire to transport the goods of another, or who is engaged in the business of carrying goods for others for hire.[6] A "mandatory" is a person who undertakes gratuitously to carry goods for another, and was known to the civil law as a carrier, and was so recognized by the common law.[7]

§ 3. Common Carrier in General

a. Common carrier defined
b. Essential characteristics

a. Common Carrier Defined

A common carrier is one who as a regular business transports personal property from place to place for persons who may employ him and pay his charges. What constitutes a common carrier is a question of law; but whether one charged as such is within the definition is a question of fact.

A common carrier of goods has been defined as one who, by virtue of his calling, and as a regular business, undertakes to transport goods from place to place, offering his services to such as may choose to employ him and pay his charges,[8] and

1. N.M.—Roeske v. Lamb, 41 P.2d 522, 39 N.M. 111.
Wash.—Cushing v. White, 172 P. 229, 101 Wash. 172, L.R.A.1918F 463.
Wis.—Standard Oil Co. v. Public Service Commission of Wisconsin, 259 N.W. 598, 217 Wis. 563.
This definition, stated in Corpus Juris, has been quoted in Roeske v. Lamb, 41 P.2d 522, 523, 39 N.M. 111.

2. Wash.—Cushing v. White, 172 P. 229, 101 Wash. 172, L.R.A. 1918F 463.

3. Ga.—Central of Georgia R. Co. v. Lippman, 36 S.E. 202, 110 Ga. 665, 50 L.R.A. 5.
10 C.J. p 37 note 2.
This statement in Corpus Juris has been quoted in Smallwood v. Jeter, 244 P. 149, 154, 42 Idaho 169.

4. Ark.—Jones v. Ferguson, 27 S.W. 2d 96, 181 Ark. 522.
Cal.—People v. Duntley, 17 P.2d 715, 217 Cal. 150.
Idaho.—Smallwood v. Jeter, 244 P. 149, 42 Idaho 169.
Ill.—Hinchliffe v. Wenig Teaming Co., 113 N.E. 707, 274 Ill. 417, affirming 194 Ill.App. 627.
Mich.—Automobile Ins. Co. of Hartford, Conn. v. Cochran, 247 N.W. 755, 262 Mich. 605.
N.H.—Bernardi Greater Shows v. Boston & M. R. R., 165 A. 124, 86 N.H. 146.
Wash.—Cushing v. White, 172 P. 229, 101 Wash. 172, L.R.A.1918F 463.
Wis.—Standard Oil Co. v. Public Service Commission of Wisconsin, 259 N.W. 598, 217 Wis. 563.

5. Wash.—Cushing v. White, 172 P. 229, 230, 101 Wash. 172, L.R.A. 1918F 463.

6. Ind.—Smith v. State, 156 N.E. 513, 199 Ind. 217.
N.H.—Bernardi Greater Shows v. Boston & M. R. R., 165 A. 124, 86 N.H. 146.
N.M.—Roeske v. Lamb, 41 P.2d 522, 39 N.M. 111.
Carrier of passenger distinguished see infra § 529.

7. Ind.—Smith v. State, 156 N.E. 513, 199 Ind. 217.

8. U.S.—McCoy v. Pacific Spruce Corporation, C.C.A.Or., 1 F.2d 853, affirming, D.C., Pacific Spruce Corporation v. McCoy, 294 F. 711.
N.Y.—Jackson Architectural Iron Works v. Hurlbut, 52 N.E. 665, 158 N.Y. 34, 70 Am.S.R. 432—Slutzkin v. Gerhard & Hey, 191 N.Y.S. 104, 199 App.Div. 5.
10 C.J. p 39 note 35.
The definition as stated in Corpus Juris has been quoted or referred to with approval in Sanger v. Lukens, D.C.Idaho, 24 F.2d 226, 228; The Point Brava, D.C.Cal., 1 F. Supp. 366, 367, Brookhart v. Greenlesse-Lied Motor Co., 244 N.W. 721, 724, 215 Iowa 8; Zajic v. Johnson, 253 N.W. 77, 78, 126 Neb. 191; Roeske v. Lamb, 41 P.2d 522, 523, 39 N.M. 111, and Aronimink Transp. Co. v. Public Service Commission, 170 A. 375, 377, 111 Pa.Super. 414.
Similar definitions
U.S.—Campbell River Mills Co. v. Chicago, M., St. P. & P. R. Co., D.C.Wash., 42 F.2d 775, affirmed, C.C.A., Chicago, M., St. P. & P. R. Co. v. Campbell River Mills Co., 53 F.2d 69, certiorari denied 52 S.Ct. 310, 285 U.S. 536, 76 L.Ed. 930—Smitherman & McDonald v. Mansfield Hardwood Lumber Co., D.C.Ark., 6 F.2d 29—Koppers Connecticut Coke Co. v. James McWilliams Blue Line, D.C.N.Y., 18 F.Supp. 992, affirmed, C.C.A., 89

without regard to distance or motive power.[9]

It is a question of law for the court to determine what constitutes a common carrier;[10] but whether one charged as a common carrier is within that definition and is carrying on its business in that capacity, is a question of fact to be determined from the evidence in each case by the triers of fact.[11]

b. Essential Characteristics

(1) In general

(2) Carriage of particular kinds of property

(3) Transportation for hire or reward

(4) Ownership of means of carriage

(1) In General

To constitute a carrier a common carrier, he must hold himself out as engaged in public service for all persons indifferently, so that he would be liable for refusal, without excuse, to carry for all who might apply.

The test by which it is determined whether a par-

F.2d 865, certiorari denied James McWilliams Blue Line v. Koppers Connecticut Coke Co., 58 S.Ct 25.

Ala.—North American Acc Ins. Co v Pitts, 104 So 21, 213 Ala 102, 40 A.L.R. 1171.

Ark.—Jones v. Ferguson, 27 S.W.2d 96, 181 Ark 522—City Fuel Co v. Torreyson, 224 S.W. 727, 145 Ark. 399

Cal.—Associated Pipe Line Co. v. Railroad Commission of California, 169 P. 62, 176 Cal. 518, L.R.A. 1918C 849.

Conn.—Ace-High Dresses v. J. C. Trucking Co., 191 A. 536, 122 Conn. 578—Lang v. Brady, 49 A. 199, 73 Conn 707.

Del.—Pennewill v. Cullen, 5 Del 238—McHenry v Philadelphia, etc., R. Co., 4 Del. 448

D C—Southern Ry. Co. v. Taylor, 16 F 2d 517, 57 App D.C 21, certiorari denied Taylor v. Southern Ry. Co., 47 S.Ct. 571, 273 U.S. 767, 71 L. Ed. 882

Ga—McIntyre v. Harrison, 157 S.E. 499, 172 Ga. 65.

Ill.—Chicago & E. I. Ry. Co. v. Chicago Heights Terminal Transf. R. Co, 147 N.E. 666, 317 Ill. 65, error dismissed 46 S.Ct. 207, 270 U. S. 626, 70 L.Ed. 767—Rathbun v. Ocean Accident & Guarantee Corporation, 132 N.E. 754, 299 Ill. 562, 19 A.L.R. 140, reversing 219 Ill.App 514—Beatrice Creamery Co. v. Fisher, 10 N.E.2d 220, 291 Ill.App. 495—Transformer Corporation of America v. Hinchcliff, 279 Ill.App. 152—McCusker v. Curtiss Wright Flying Service, 269 Ill.App. 502—Morrison v. Parmelee Co., 222 Ill.App. 90.

Iowa.—State ex rel. Board of Railroad Com'rs v. Rosenstein, 252 N.W. 251, 217 Iowa 985.

Mass.—Paine Furniture Co. v. Acme Transfer & Storage Co., 195 N E. 302, 290 Mass. 195.

Mo—State ex rel Anderson v. Witthaus, 102 S.W.2d 99, 340 Mo. 1004.

Mont.—Stoner v. Underseth, 277 P. 437, 85 Mont. 11.

N.Y.—Gerhard & Hey v. Cattaraugus Tanning Co., 150 N.E. 500, 241 N. Y. 413, modifying 207 N.Y.S. 842, 212 App.Div. 812, motion denied 152 N.E 444, 242 N.Y. 600—W. N. Stevenson & Co. v. Hartman, 132 N E 121, 231 N Y 378, 18 A. L R. 1314, reversing 181 N.Y.S. 465, 191 App.Div. 406—New York Lumber Trade Ass'n v. Lacey, 277 N Y S. 519, 154 Misc. 747, reversed on other grounds 281 N Y. S. 647, 245 App Div. 262, affirmed 199 N.E. 688, 269 N.Y. 595, amended 200 N.E. 54, 269 N.Y. 277, certiorari denied 56 S.Ct. 954, 298 U. S. 684, 80 L Ed. 1404.

N.C—Williams v. Kinston Mfg. Co., 95 S E. 366, 175 N.C. 226

Ohio—Hissem v. Guran, 18 Ohio App. 247, affirmed 146 N.E. 808, 112 Ohio St. 59.

Pa.—Phillips v. Public Service Commission, Super., 191 A. 641—Klawansky v. Public Service Commission of Pennsylvania, 187 A. 248, 123 Pa.Super. 375—Nicolette Lumber Co. v. Peoples Coal Co., 26 Pa.Super. 575, reversed on other grounds 62 A 1060, 213 Pa. 379, 110 Am.S.R 550, 3 L.R A.,N.S., 327.

Tenn—Howell v. Sloan Messenger Co., 5 Tenn.App. 312.

Tex.—Burnett v. Riter, Civ.App., 276 S.W. 347

Wash—Independent Truck Co. v. Wright, 275 P 726, 151 Wash. 372—Cushing v. White, 172 P. 229, 101 Wash. 172.

Wis—Waldum v. Lake Superior Terminal & Transfer Ry. Co., 170 N.W. 729, 169 Wis. 137.

Statutory definitions

Under the statutes of California, North Dakota, and Oklahoma "every one who offers to the public to carry . . . property . . . is a common carrier of whatever he thus offers to carry."

Cal—People v. Duntley, 17 P 2d 715, 217 Cal. 150—Klein v. Baker, 296 P. 631, 112 Cal App. 157.

N.D—Peterson v. Fargo-Moorhead St Ry. Co, 164 N W. 42, 37 N.D. 440.

Okl.—Turner Okl. Co. v. Yellow Cab & Baggage Co, 269 P. 1082, 132 Okl 134.

9. Pa—Nicolette Lumber Co. v. Peoples Coal Co., 26 Pa.Super 575, reversed on other grounds 62 A. 1060, 213 Pa. 379, 110 Am.S R. 550, 3 L.R.A.,N.S, 327.

10. Idaho.—Smallwood v. Jeter, 244 P. 149, 42 Idaho 169.

Iowa.—State ex rel. Board of Railroad Com'rs v. Rosenstein, 252 N.W. 251, 217 Iowa 985.

Pa.—Dairymen's Co-op. Sales Ass'n v. Public Service Commission of Pennsylvania, 177 A. 770, 318 Pa. 381, 98 A.L.R. 218—Erb v. Public Service Commission, 93 Pa.Super. 421.

Wash—Big Bend Auto Freight v. Ogers, 269 P. 802, 148 Wash. 521.

10 C.J. p 40 note 37.

11. Cal—People v. Duntley, 17 P. 2d 715, 217 Cal. 150—Associated Pipe Line Co. v. Railroad Commission of California, 169 P. 62, 170 Cal. 518, L.R.A.1918C 849.

Idaho.—Smallwood v. Jeter, 244 P. 149, 42 Idaho 169.

Ill.—Beatrice Creamery Co. v. Fisher, 10 N.E.2d 220, 291 Ill.App. 495.

Iowa.—State ex rel. Board of Railroad Com'rs v. Rosenstein, 252 N. W. 251, 217 Iowa 985.

La.—Crowell & Spencer Lumber Co v. Louisiana Public Service Commission, 102 So. 866, 157 La. 676.

Pa.—Dairymen's Co-op. Sales Ass'n v. Public Service of Pennsylvania, 177 A 770, 318 Pa. 381, 98 A.L. R. 218—Erb v Public Service Commission, 93 Pa.Super 421.

Wash.—Big Bend Auto Freight v. Ogers, 269 P. 802, 148 Wash 521—State v. Public Service Commission of Washington, 201 P 765, 117 Wash. 453, rehearing denied 203 P. 3, 117 Wash. 453.

10 C.J. p 40 note 37.

Statement in Corpus Juris of the rule laid down has been quoted in Smallwood v. Jeter, 244 P. 149, 154, 42 Idaho 169, and referred to in State v. Rosenstein, 252 N.W. 251, 253, 217 Iowa 985.

Failure to file tariffs

While the failure of a refrigerator car company to file tariffs with the interstate commerce commission is not proof that it is not a common carrier, it is evidence tending to show that it did not regard itself as such.—U. S. ex rel Chicago, New York & Boston Refrigerator Co. v. Interstate Commerce Commission, 288 F. 649, 53 App.D.C. 111, affirmed 44 S.Ct. 558, 265 U.S. 292, 68 L.Ed. 1024.

ty is a common carrier of goods is: (1) He must be engaged in the business of carrying goods for others as a public employment, and must hold himself out as ready to engage in the transportation of goods for persons generally as a business, and not as a casual occupation. (2) He must undertake to carry goods of the kind to which his business is confined. (3) He must undertake to carry by the methods by which his business is conducted, and over his established roads. (4) The transportation must be for hire.[12] The distinctive characteristics of a common carrier are those stated in the first test set out above, viz: That he holds himself out as ready to engage in the transportation of goods for hire as a public employment, and not as a casual occupation,[13] and that he undertakes to carry for all persons indifferently,[14] within the limits of his

12. Ariz.—Claypool v. Lightning Delivery Co., 299 P. 126, 38 Ariz. 262.

13. Ariz.—Claypool v. Lightning Delivery Co., supra.
Ark.—Jones v. Ferguson, 27 S.W.2d 96, 181 Ark. 522—City Fuel Co v. Torreyson, 224 S.W 727, 145 Ark. 399.
Conn.—Ace-High Dresses v. J. C Trucking Co., 191 A. 536, 122 Conn 578.
Ga.—Georgia Public Service Commission v. Washburn Bonded Warehouse, 157 S.E. 518, 172 Ga 106—Georgia Public Service Commission v. Taylor, 157 S.E 515, 172 Ga 100—McIntyre v. Harrison, 157 S.E 499, 172 Ga 65.
Iowa—State ex rel. Board of Railroad Com'rs v. Rosenstein, 252 N W. 251, 217 Iowa 985
Mo.—State ex rel Anderson v. Witthaus, 102 S.W 2d 99, 340 Mo. 1004—Osage Tie & Timber Co. v. Gorg-Murphy Timber & Grain Co., App., 191 S.W. 1026.
N.Y.—Gerhard & Hey v. Cattaraugus Tanning Co., 150 N.E. 500, 241 N Y 413, modifying 207 N.Y.S. 842, 212 App.Div. 812, motion denied 152 N.E. 444, 242 N.Y. 600—Place v. Union Express Co., 2 Hilt. 19.
N.C.—Williams v. Kinston Mfg. Co., 95 S.E. 366, 175 N.C. 226.
Pa.—Klawansky v. Public Service Commission, 187 A. 248, 123 Pa. Super. 375—Erb v. Public Service Commission, 93 Pa.Super. 421.
Tenn.—Howell v. Sloan Messenger Co., 5 Tenn.App. 312
Wash.—Independent Truck Co. v. Wright, 275 P. 726, 151 Wash. 372.
Wyo.—Weaver v. Public Service Commission of Wyoming, 278 P. 542, 40 Wyo. 462.
10 C.J. p 41 note 38.

Other statements of rule

(1) In order to constitute one a common carrier, the business of a common carrier must be regular and customary in its character, and not casual only, but must be conducted as a business, and must be of such a general and public nature that a person carrying it on is bound to convey goods of all persons indifferently who offer to pay for the transportation, an occasional undertaking to carry goods not being sufficient.—Presson v Vail Cooperage Co., 245 S.W 14, 155 Ark 424—Arkadelphia Milling Co. v. Smoker Merchandise Co., 139 S.W. 680, 100 Ark. 37.

(2) To constitute a person a common carrier of goods in a particular instance the carrier in question must be over a route or within a territory over or within which there has been a general undertaking by the person, a holding of himself out as undertaking to carry goods for the public generally, as a business, over that route or within that territory, which undertaking may be either express or may be implied from conduct by a series of acts by known habitual continuance in such line of business.—Ney v. Haun, 109 S.E. 438, 131 Va 557, 18 A.L.R 1310.

True test is whether the given undertaking is a part of the business engaged in by the carrier, which he has held out to the general public as his occupation, rather than the quantity or extent of the business actually transacted, or the number and character of the conveyances used in the employment.—Cushing v. White, 172 P. 229, 101 Wash. 172.

14. U.S.—Campbell River Mills Co. v. Chicago, M., St. P. & P. R Co., D.C.Mo., 42 F.2d 775.
Ala.—North American Acc Ins. Co. v. Pitts, 104 So. 21, 213 Ala 102, 40 A.L.R. 1171.
Ark.—City Fuel Co. v. Torreyson, 224 S.W. 727, 145 Ark. 399.
Cal.—People v. Duntley, 17 P.2d 715, 217 Cal. 150—Klein v. Baker, 296 P. 631, 112 Cal.App. 157.
Conn.—Ace-High Dresses v. J. C. Trucking Co., 191 A. 536, 122 Conn 578.
Ga.—Georgia Public Service Commission v. Washburn Bonded Warehouse, 157 S.E. 518, 172 Ga. 106—Georgia Public Service Commission v. Taylor, 157 S.E. 515, 172 Ga. 100—McIntyre v. Harrison, 157 S.E. 499, 172 Ga. 65.
Md.—Rutledge Co-op. Ass'n v Baughman, 138 A. 29, 153 Md. 297, 56 A.L.R. 1042.
N.Y.—Jackson Architectural Iron Works v. Hurlbut, 52 N.E. 665, 158 N.Y. 34, 70 Am.S.R. 432—Slutzkin v. Gerhard & Hey, 191 N.Y.S. 104, 199 App.Div. 5—W. N. Stevenson & Co. v. Hartman, 181 N.Y.S. 465, 191 App.Div. 406, reargument denied 181 N.Y.S. 959, 192 App.Div. 900, and reversed on other grounds 132 N.E. 121, 231 N.Y. 378, 18 A.L.R. 1314
Ohio—Hissem v. Guran, 146 N.E. 808, 112 Ohio St 59, affirming 18 Ohio App. 247.
Pa.—James v. Public Service Commission, 177 A. 343, 116 Pa.Super. 577—Erb v. Public Service Commission, 93 Pa.Super. 421.
S.C.—Reaves v. Western Union Telegraph Co., 96 S.E. 295, 110 S.C. 233
Tenn.—Howell v. Sloan Messenger Co., 5 Tenn.App. 312.
Tex.—Burnett v Riter, Civ.App., 276 S.W 347
Wash.—Cushing v. White, 172 P. 229, 101 Wash 172, L.R.A.1918F 463.
Wyo.—Weaver v Public Service Commission, 278 P. 542, 40 Wyo. 462.
10 C.J. p 39 note 35.

Other statements of rule

(1) Test of "public carrier is" whether he holds himself out as being ready and willing for hire to carry particular classes of goods for all who may desire transportation between places between which he professes to carry.—State v. Washington Tug & Barge Co., 250 P. 49, 140 Wash 613.

(2) Test of "common carrier" of property is not whether he is carrying on public employment, nor whether he carries to fixed place, but whether he holds out, either expressly or by course of conduct, that he will carry for hire, so long as he has room, goods of all persons without preference.—State ex rel. Board of Railroad Com'rs v. Rosenstein, 252 N.W. 251, 217 Iowa 985.

(3) To constitute a common carrier there must be a dedication of property to public use of such character that the product and service are available to the public generally and indiscriminately, and that the carrier must hold himself ready to serve the public indifferently to the limit of his capacity.—Motor Freight v. Public Utilities Commission of Ohio, 165 N.E. 355, 120 Ohio St. 1.

Essential feature of "public use," distinguishing a common carrier

capacity[15] and the sphere of the business required of him,[16] so that he is bound to serve all who apply, and is liable for refusal, without sufficient reason, to do so.[17]

In general, the liability of carrier does not attach to one that does not hold itself out as pursuing that business, but in the particular case, and in each particular case, acts only in consequence of a special employment.[18] The law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons who have neither expressly assumed that character nor by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it.[19] Whether one is a common carrier is determined by the business actually carried on[20]

from a private carrier, is that it is not confined to privileged individuals, but is open to the indefinite public. —State ex rel. Anderson v. Witthaus, 102 S.W.2d 99, 340 Mo. 1004.

"Public" which a carrier must serve to constitute it a common carrier does not mean everybody all the time.—State ex rel. Anderson v. Witthaus, 102 S.W.2d 99, 340 Mo. 1004.

Real test of whether person is common carrier is whether he serves alike all of public who apply to him for carriage.—Beatrice Creamery Co. v. Fisher, 10 N.E.2d 220, 291 Ill.App. 495.

Whether a carrier is a common carrier or a private carrier depends, not on number of persons whom carrier serves, but on whether carrier's services are available to all members of public who may require them, to extent of carrier's capacity, and fact that only limited number may have occasion to use carrier's services does not make carrier a "private carrier" if public generally has right to avail itself of carrier's services, the essential feature being that carrier's services are not confined to privileged individuals but are available to indefinite public.—Phillips v. Public Service Commission, Pa.Super., 191 A. 641.

Acts evidencing nature of carrier

(1) Mere rendering of service by carrier to limited number of persons is not proof that carrier has devoted his facilities to public use, but very fact that he has limited his actual service, as well as his offering to serve, to a privileged few is some evidence that he is not a common carrier.—Phillips v. Public Service Commission, Pa.Super., 191 A. 641.

(2) Proof that carrier has transported property for more than two persons, without other circumstances, is not ordinarily sufficient to show that carrier is common carrier. —Klawansky v. Public Service Commission of Pennsylvania, 187 A. 248, 123 Pa.Super. 375.

(3) Undertaking of common carrier to carry goods for all people indifferently may be evidenced by carrier's own notice or practically by series of acts in business.—McIntyre v. Harrison, 157 S.E. 499, 172 Ga. 65.

Common carriers are public servants

Mo.—Foster Lumber Co. v. Atchison, T. & S. F. Ry. Co., 194 S.W. 281, 270 Mo. 629, L.R.A.1918A 768.

15. Ala.—North American Acc. Ins. Co. v. Pitts, 101 So. 21, 213 Ala. 102, 40 A.L.R. 1171.
Iowa.—State ex rel. Board of Railroad Com'rs v. Rosenstein, 252 N.W. 251, 217 Iowa 985.
Md.—Rutledge Co-op. Ass'n v. Baughman, 138 A. 29, 153 Md. 297, 56 A.L.R. 1042.
Mo.—State ex rel. Anderson v. Witthaus, 102 S.W.2d 99, 340 Mo. 1001.
N.Y.—Gerhard & Hey v. Cattaraugus Tanning Co., 150 N.E. 500, 241 N.Y. 413, modifying 207 N.Y.S. 842, 212 App.Div. 812, motion denied 152 N.E. 444, 242 N.Y. 600.
Ohio.—Hissem v. Guran, 146 N.E. 809, 112 Ohio St. 59.
Tex.—Burnett v. Rider, Civ.App., 276 S.W. 317.
Wyo.—Weaver v. Public Service Commission, 278 P. 512, 40 Wyo. 462.

Even though a carrier's facilities are limited, and he cannot accommodate all who call on him, he may be a common carrier if he offers to serve the public indifferently.—Phillips v. Public Service Commission, Pa.Super., 191 A. 641.

16. Wyo. Weaver v. Public Service Commission of Wyoming, 278 P. 512, 40 Wyo. 462.

17. Cal.—Associated Pipe Line Co. v. Railroad Commission of California, 169 P. 62, 67, 176 Cal. 518, L.R.A.1918C 819. Klein v. Baker, 296 P. 631, 112 Cal.App. 157.
Ga. Georgia Public Service Commission v. Washburn Bonded Warehouse, 157 S.E. 518, 172 Ga. 106. Georgia Public Service Commission v. Taylor, 157 S.E. 515, 172 Ga. 100. McIntyre v. Harrison, 157 S.E. 499, 172 Ga. 65.
Md.—Rutledge Co-op. Ass'n v. Baughman, 138 A. 29, 153 Md. 297, 56 A.L.R. 1042.
Mass.—Haddad v. Griffin, 142 N.E. 74, 247 Mass. 369.
Mich.—Automobile Ins. Co. of Hartford, Conn. v. Cochran, 247 N.W. 755, 262 Mich. 605.
Mo.—Osage Tie & Timber Co. v. Gorg-Murphy Timber & Grain Co., App., 191 S.W. 1026.
10 C.J. p 37 note 8.

Corpus Juris has been cited in State v. Carlson, 251 N.W. 160, 161, 217 Iowa 854 as authority for the rule stated in this text.—State v. Carlson, 251 N.W. 160, 217 Iowa 854.

Reason for refusal held sufficient

"Common carrier" does not cease to be such by refusing to carry for shippers where ability to pay is doubtful.—State ex rel. Board of Railroad Com'rs v. Lueher Bros., Iowa, 272 N.W. 604.

18. Pa. Erb v. Public Service Commission, 93 Pa.Super. 121.
10 C.J. p 41 note 11.

19. Cal.—People v. Duntley, 17 P.2d 715, 217 Cal. 150.
10 C.J. p 41 note 12.

20. U.S.—U. S. v. State of California, Cal., 56 S.Ct. 421, 297 U.S. 175, 80 L.Ed. 567, reversing, C.C.A., State of California v. U. S., 75 F.2d 41, certiorari granted U. S. v. State of California, 56 S.Ct. 87, 296 U.S. 544, 80 L.Ed. 391.
Ariz.—Claypool v. Lightning Delivery Co., 299 P. 126, 38 Ariz. 262.
Colo.—Davis v. People, 217 P. 801, 79 Colo. 642.
Conn. Ace-High Dressed v. J. C. Trucking Co., 191 A. 536, 122 Conn. 578.
Pa. Phillips v. Public Service Commission, Super., 191 A. 641.
Wash.—State v. Washington Tug & Barge Co., 250 P. 49, 140 Wash. 613. State v. Public Service Commission, 201 P. 765, 117 Wash. 453, rehearing denied 203 P. 3, 117 Wash. 453. Curling v. White, 172 P. 229, 101 Wash. 172.

Corpus Juris is cited in North Shore Fish & Freight Co. v. North Shore Business Men's Trucking Ass'n, 263 N.W. 98, 195 Minn. 326 in connection with a ruling that one who carries for hire in competition with common carriers is himself a common carrier subject to regulation as such, and a statement that the courts "have thrown into the discard various and varied schemes to avoid statutory requirements relating to control and regulation of public carriers."

Mere schemes or devices to avoid the duties and responsibilities of a common carrier are unavailing when true character of such acts is established.—Dairymen's Co-op. Sales Ass'n v. Public Service Commission of Pennsylvania, 177 A. 770, 318 Pa. 381, 98 A.L.R. 213.

or the obligation assumed,[21] and not by what the carrier is authorized to do,[22] or says he is doing,[23] or by any secret intention or mental reservation entertained or asserted when charged with duties and obligations which the law imposes.[24] So, one holding himself out as a common carrier does not divest himself of that status by a secret intention to reserve the right to refuse to serve certain persons,[25] or because he may on occasion refuse to perform the services for which he is equipped,[26] or by the fact that he does not advertise.[27]

One may be a common carrier although such business is not his exclusive business, and he is not continually or regularly engaged in it;[28] and it is sometimes said that one that undertakes for only a single occasion to carry goods for any person who desires to employ it for that occasion is a common carrier for that transportation.[29] On the other hand, the fact that a carrier invites all persons to employ him does not make him a common carrier, if he reserves the right to accept or reject offers within his discretion,[30] or because, by contract, he exempts himself from the usual common-law duties of a public carrier, as stated in § 113 infra.

It is not an essential characteristic of a common carrier that he operate between fixed termini, or on regular schedules[31] or at uniform or fixed charges.[32]

An individual, as well as a corporation, may be liable as a common carrier.[33]

Existence of contract for carriage. It is not necessary to the status of one as a common carrier that a contractual relation should exist between the carrier and shipper with respect to the transportation.[34] On the other hand, the fact that a carrier makes written contracts with his patrons is not controlling;[35] and one who fulfills the conditions essential to render him a common carrier does not, as will hereinafter appear, see infra § 5, become a private carrier by making individual contracts with shippers.

The distinction between a common carrier and a private carrier is a matter necessarily involved in the decisions heretofore cited in which the characteristics of common carriers are stated. If the carrier so holds himself out as engaged in public

21. U.S.—Smitherman & McDonald v. Mansfield Hardwood Lumber Co., D.C.Ark., 6 F.2d 29.
Mass.—Paine Furniture Co. v. Acme Transfer & Storage Co., 195 N.E. 302, 290 Mass. 195.

22. U.S.—Smitherman & McDonald v. Mansfield Hardwood Lumber Co., D.C.Ark., 6 F.2d 29.
Colo.—Davis v. People, 247 P. 801, 79 Colo. 642
Conn.—Ace-High Dresses v. J. C. Trucking Co., 191 A. 536, 122 Conn. 578
Wash.—State v. Public Service Commission, 201 P. 765, 117 Wash. 453, rehearing denied 203 P. 3, 117 Wash. 453.

Charter giving power to act as common carrier is not conclusive.—State v. Public Service Commission of Washington, 201 P. 765, 117 Wash. 453, rehearing denied 203 P. 3, 117 Wash. 453.

23. Ariz.—Claypool v. Lightning Delivery Co., 299 P. 126, 38 Ariz. 262.
Pa.—Phillips v. Public Service Commission, Super., 191 A. 641.

Descriptive name employed is not a test.—Paine Furniture Co. v. Acme Transfer & Storage Co., 195 N.E. 302, 290 Mass. 195.

Allegations in pleadings
That a corporation in a petition to condemn land, which it got by purchase, without prosecuting the action to judgment, alleged facts showing it to be a common carrier, is not conclusive of it being such.—State v. Public Service Commission of Washington, 201 P. 765, 117 Wash. 453, rehearing denied 203 P. 3, 117 Wash. 453.

24. Wash.—State v. Washington Tug & Barge Co., 250 P. 49, 140 Wash. 613—Cushing v. White, 172 P. 229, 101 Wash. 172

25. Ariz.—Claypool v. Lightning Delivery Co., 299 P. 126, 38 Ariz. 262.

26. Ariz.—Claypool v. Lightning Delivery Co., supra.
Pa.—Dairymen's Co-op. Sales Ass'n v. Public Service Commission, 177 A. 770, 318 Pa. 381, 98 A.L.R. 218—Klawansky v. Public Service Commission, 187 A. 248, 123 Pa. Super. 375—James v. Public Service Commission, 177 A. 343, 116 Pa.Super. 577.

27. Ind.—Smith v. State, 156 N.E. 513, 199 Ind. 217.
Pa.—Dairymen's Co-op. Sales Ass'n v. Public Service Commission, 177 A. 770, 318 Pa. 381, 98 A.L.R. 218—Klawansky v. Public Service Commission of Pennsylvania, 187 A. 248, 123 Pa.Super. 375—James v. Public Service Commission, 177 A. 343, 116 Pa.Super. 577.

28. S.C.—Reaves v. Western Union Telegraph Co., 96 S.E. 295, 110 S.C. 233.

29. Iowa—State ex rel. Board of Railroad Com'rs v. Rosenstein, 252 N.W. 251, 217 Iowa 985.
10 C.J. p 41 note 39.

30. Ga.—Georgia Public Service Commission v. Washburn Bonded Warehouse, 157 S.E. 518, 172 Ga. 106—Georgia Public Service Commission v. Taylor, 157 S.E. 515, 172 Ga. 100—McIntyre v. Harrison, 157 S.E. 499, 172 Ga. 65.
Iowa—State ex rel Board of Railroad Com'rs v. Rosenstein, 252 N.W. 251, 217 Iowa 985.

31. Ariz.—Claypool v. Lightning Delivery Co., 299 P. 126, 38 Ariz. 262.
N.Y.—Anderson v. Fidelity & Casualty Co. of New York, 170 N.Y.S. 431, 183 App.Div. 170, modifying 166 N.Y.S. 640, 100 Misc. 411, and affirmed 127 N.E. 584, 228 N.Y. 475.

32. Ariz.—Claypool v. Lightning Delivery Co., 299 P. 126, 38 Ariz. 262.
N.Y.—Jackson Architectural Iron Works v. Hurlbut, 52 N.E. 665, 158 N.Y. 34

33. Pa.—Consolidated Cigar Corporation v. Corbin, 132 A. 364, 285 Pa. 273.

34. Pa.—Turner Oklahoma Co. v. Yellow Cab & Baggage Co., 269 P. 1082, 132 Okl. 134.

35. Pa.—Dairymen's Co-op. Sales Ass'n v. Public Service Commission of Pennsylvania, 177 A. 770, 318 Pa. 381, 98 A.L.R. 218—Klawansky v. Public Service Commission of Pennsylvania, 187 A. 248, 123 Pa.Super. 375—James v. Public Service Commission of Commonwealth of Pennsylvania, 177 A. 343, 116 Pa.Super. 577.

service for all persons indifferently, as to make him liable for refusal to accept employment offered, he is a common carrier, see cases supra this section, otherwise he is a private carrier, as defined and discussed in § 4 infra. A common carrier also differs from a private carrier in respect to the risk, the former being regarded by the law as an insurer, as stated in § 71 infra, the latter being liable like ordinary bailees as will appear in § 13 infra.

(2) Carriage of Particular Kinds of Property

A carrier who holds itself out as engaged in the business of carrying particular kinds of property, such as money and other valuables, or livestock, is a common carrier as to such property.

To constitute a carrier a common carrier of goods, it is not essential that it carry all kinds of property; if it holds itself out to the public as engaged in the business of carrying only a particular kind of property, it is a common carrier of such property only, and is under no duty to carry other kinds.[36]

Money or other valuables. The liability of a carrier as a common carrier for the loss of money or currency delivered to it for transportation depends on whether or not it has held itself out generally to carry such articles.[37] There is no presumption that an ordinary carrier assumes to act as a common carrier of money or currency and the assumption of that status must be proved by the party alleging it.[38] No contract of a carrier to transport money as a common carrier can be implied from the fact that the carrier has held itself out as a common carrier of goods, wares, and merchandise generally,[39] nor does the transportation by the carrier of money for an express company, under a special contract, have that effect.[40] Nevertheless, a carrier may be a common carrier of money as well as of goods, or, expressing this proposition in other terms, a carrier may render itself liable as a common carrier of money by holding itself out to the public as such.[41]

Live stock. It has been held that, at common law, the obligation of a common carrier does not necessarily extend to the carriage of live stock, where that is not a part of the business which the carrier holds itself out to transact;[42] but by the weight of authority a carrier is a common carrier of live stock accepted by it for transportation,[43] subject to the rule applicable in case of other goods, that it is not accountable for loss resulting from the inherent nature of the property, and not due to any negligence or fault on its part, as stated infra § 79; and it is immaterial whether the carriage of live stock is the carrier's principal business, or whether it is incidental or subordinate.[44]

(3) Transportation for Hire or Reward

An essential characteristic of a common carrier is that the services performed must be for hire.

The definitions of a common carrier, supra § 3 a, include the element of hire or reward; and while private carriers also usually carry for hire, they may carry gratuitously, infra § 4. No person is a common carrier in the sense of the law who performs the service without hire;[45] and where there is no right to remuneration, the party who carries incurs no liability other than that of a gratuitous bailee.[46] It is not necessary, however, that there be an express contract for compensation;[47] hence the fact that the carrier intended to carry goods

36. U.S.—Pacific Spruce Corporation v. McCoy, D.C.Or., 294 F. 711, affirmed, C.C.A., McCoy v. Pacific Spruce Corporation, 1 F.2d 853.
Conn.—Ace-High Dresses v. J. C. Trucking Co., 191 A. 536, 122 Conn. 578.
10 C.J. p 41 note 43, p 42 note 44

Reference has been made to Corpus Juris as authority for this rule, in Alabama Great Southern R. Co. v. Herring, Ala., 174 So. 502, 503, and State v. Rosenstein, 252 N.W. 251, 254, 217 Iowa 985.

37. Tenn.—Howell v. Sloan Messenger Co., 5 Tenn.App. 312.

38. Tenn.—Howell v. Sloan Messenger Co., supra.
10 C.J. p 42 note 47.

39. Tenn.—Howell v. Sloan Messenger Co., supra.
10 C.J. p 42 notes 47, 48.

40. U.S.—Kuter v. Michigan Cent R. Co., C.C.Ill., 14 F.Cas.No.7,955, 1 Biss. 35.

41. Tenn.—Howell v. Sloan Messenger Co., 5 Tenn.App. 312.
10 C.J. p 42 note 50.

42. Mich.—Lake Shore, etc., R. Co. v. Perkins, 25 Mich. 329, 12 Am.R. 275—Michigan Southern, etc., R. Co. v. McDonough, 21 Mich. 165, 4 Am.R. 466.
10 C.J. p 43 note 63.

43. Ala.—Southern Express Co. v. Ashford, 28 So. 732, 126 Ala. 591.
Fla.—Atlantic Coast Line R. Co. v. Hinely-Stephens Co., 60 So. 749, 64 Fla. 175, Ann.Cas.1914B 999—Summerlin v. Seaboard Air Line Ry., 47 So. 557, 56 Fla. 687, 19 L.R.A.,N.S., 191, 131 Am.S.R. 164.
Ga.—Central of Georgia Ry. Co. v. Hall, 52 S.E. 679, 124 Ga. 322, 4 L.R.A.,N.S., 808, 110 Am.S.R. 170.
N.C.—Holton v. Norfolk Southern R. Co., 81 S.E. 131, 165 N.C. 155.
10 C.J. p 43 note 64.

One who receives a dog for transportation, for hire, is a common carrier with reference to the animal.—Southern Express Co. v. Ashford, 28 So. 732, 126 Ala. 591.

44. Vt.—Kimball v. Rutland, etc., R. Co., 26 Vt. 247, 62 Am.D. 567.

45. U.S.—Citizens' Bank v. Nantucket Steamboat Co., C.C.Mass., 5 F.Cas.No.2,730, 2 Story 16.
S.C.—Lesesne v. Atlantic Coast Line R. Co., 103 S.E. 147, 114 S.C. 95.
10 C.J. p 45 note 74.

46. U.S.—Citizens' Bank v. Nantucket Steamboat Co., C.C.Mass., 5 F.Cas.No.2,730, 2 Story 16.
10 C.J. p 45 note 75.

47. Ark.—City Fuel Co. v. Torreyson, 224 S.W. 727, 145 Ark. 399.
10 C.J. p 45 note 76.

gratuitously, without having indicated that intention to the shipper, will not relieve such carrier from his usual liability.[48] If by reason of usage, or the general nature of the business, the right to compensation arises by implication, the carrier is liable as a carrier for hire;[49] nor is it necessary that compensation be provided for under an express or implied agreement to pay for the particular service.[50] If the transportation is a part of an undertaking on the part of the carrier, for which there is a valid consideration, it will be a carriage for hire, although it is agreed that, in connection with the general advantage resulting to the carrier from the entire transaction, this particular part of the service is to be rendered without charge.[51]

(4) Ownership of Means of Transportation

To constitute one a common carrier he need not own the means of transportation.

To constitute one a common carrier, it is not essential that he should own the means of transportation.[52] If the contract is that the goods will be carried and delivered, it makes the one so contracting a common carrier, regardless of the name or the ownership of the line or lines over which the service extends,[53] as in the case of express and transportation companies, which, as shown in § 7 infra, are universally held to be common carriers, and in the case of companies owning no cars of their own and transporting the cars of other companies.[54] So, a common carrier cannot change its public character by private contract with shippers to haul freight over its tracks from one industrial track to another industrial track, whether owned by the shipper or the carrier.[55]

§ 4. Private Carrier

A private carrier is one who undertakes by special agreement in a particular instance to transport property without being bound to serve every person who may apply.

A private carrier of goods has been defined as one who, without being engaged in the business of carrying as a public employment, undertakes to deliver goods in a particular case for hire or reward;[56] but this definition is not strictly correct in so far as it implies that one who does not carry for hire or reward is not a private carrier; and more accurately stated, a private carrier is one who, without making it a vocation, or holding himself out to the public as ready to act for all who desire his services, undertakes, by special agreement in a particular instance only, to transport property from one place to another either gratuitously or for hire.[57] He carries only for persons with whom he has an initial contract, and assumes no obligation to carry for others,[58] and in this lies the chief distinc-

48. Mo.—Gray v. Missouri River Packet Co., 64 Mo. 47.

49. Me.—Emery v. Hersey, 4 Me. 407, 16 Am.D. 268.
10 C.J. p. 45 note 78.

50. Mass.—Gott v. Dinsmore, 111 Mass. 45.
Tex.—Gulf, etc., R. Co. v. Gillespie, 118 S.W. 628, 54 Tex.Civ.App. 593.
10 C.J. p. 45 note 80.

51. N.Y.—Spears v. Lake Shore, etc., R. Co., 67 Barb. 513.

52. Pa.—Highway Freight Forwarding Co. v. Public Service Commission, 164 A. 835, 108 Pa.Super. 178
10 C.J. p. 45 note 82.

53. Iowa.—J. H. Cownie Glove Co. v. Merchants' Dispatch Transp. Co., 106 N.W. 749, 130 Iowa 327, 4 L.R.A.,N.S., 1060.

54. U.S.—U. S. v. Sioux City Stock Yards Co., C.C.Iowa, 162 F. 556, affirmed 167 F. 126, 92 C.C.A. 578.

55. Ark.—Straub v. Missouri Pac. R. Co., 283 S.W. 36, 170 Ark. 1174.

56. U.S.—Smitherman & McDonald v. Mansfield Hardwood Lumber Co., D.C.Ark., 6 F.2d 29—Koppers Connecticut Coke Co. v. James McWilliams Blue Line, D.C.N.Y., 18 F. Supp. 992, affirmed, C.C.A., 89 F.2d 865, certiorari denied James McWilliams Blue Line v. Koppers Connecticut Coke Co., 58 S.Ct. 25.
Ala.—Alabama Great Southern R. Co. v. Herring, 174 So. 502, 234 Ala. 238.
Ill.—Austin Bros. Transfer Co. v. Bloom, 147 N.E. 387, 316 Ill. 435
Pa.—Brink's Express Co. v. Public Service Commission, 178 A. 346, 117 Pa.Super. 268—Erb v. Public Service Commission, 93 Pa.Super. 421.
10 C.J. p. 38 note 17.

This definition in Corpus Juris has been quoted or cited in:
U.S.—Sanger v. Lukens, D.C.Idaho, 24 F.2d 226, 228.
Ga.—McIntyre v. Harrison, 157 S.E. 499, 508, 172 Ga. 65.
Ill.—Rathburn v. Ocean Accident & Guarantee Corporation, 132 N.E. 754, 755.
Iowa.—Bookhart v. Greenlease-Lied Motor Co., 244 N.W. 721, 723, 215 Iowa 8
N.M.—Roeske v. Lamb, 41 P.2d 522, 523, 39 N.M. 111.
Pa.—Aronimink Transp. Co. v. Public Service Commn., 170 A. 375, 377, 111 Pa.Super. 414.

"Private" and "special" carrier of goods are synonymous.—Allen v. Sackrider, 37 N.Y. 341.

Not affected by published tariffs
Where common carrier receives goods for carriage by special or implied contract, it is then not controlled by its published tariffs, and to that extent it is a private carrier or bailee for hire.—Alabama Great Southern R. Co. v. Herring, 174 So. 502, 234 Ala. 238.

57. Mont.—Stoner v. Underseth, 277 P. 437, 85 Mont. 11
"Although it is generally understood that a private carrier is one who carries for hire, the exact definition is not so limited."—Smith v. State, 156 N.E. 513, 514, 199 Ind. 217.

58. U.S.—Film Transport Co. v. Michigan Public Utilities Commission, D.C.Mich., 17 F.2d 857.
Cal.—People v. Duntley, 17 P.2d 715, 217 Cal. 150—Klein v. Baker, 296 P. 631, 112 Cal.App. 157.
Conn.—Ace-High Dresses v. J. C. Trucking Co., 191 A. 536, 122 Conn. 578
La.—National Sand & Gravel Co., Inc. v. Jones Contracting Co., 126 So. 560, 13 La.App. 240.
Md.—Rutledge Co-op. Ass'n v. Baughman, 138 A. 29, 153 Md. 297, 56 A.L.R. 1042.
Mass.—Haddad v. Griffin, 142 N.E. 74, 247 Mass. 369.
Mich.—Automobile Ins. Co. of Hartford, Conn. v. Cochran, 247 N.W. 755, 262 Mich. 605.

tion between a private carrier and a common carrier,[59] the latter as before stated, supra § 3 b (1), being bound to carry for all who may apply.

§ 5. Common Carrier Acting as Private Carrier

A common carrier may, by special contract, act as a private carrier, but cannot by such contract avoid the duties required of common carriers.

A common carrier may, under some circumstances, act as a private carrier, and when, as a matter of accommodation or special engagement, a common carrier undertakes to carry something which it is not his business to carry, he becomes a private carrier, pro hac vice.[60] A common carrier cannot, however, avoid the duties required of him as such carrier, by insisting on a special or private contract with the shipper.[61] It has also been held that, while the same person may be engaged in one line of business as a common carrier and in another line of business as a private carrier,[62] the same facilities cannot be used at the same time in both common carrier and private carrier transportation.[63]

The question whether a contract of carriage changes the relation of the carrier from that of a common carrier to that of a private carrier is one of law.[64]

§ 6. Railroad Companies

a. In general
b. Extent of use of facilities in general
c. Particular operations and kinds of service

a. In General

Railroad companies are ordinarily common carriers of goods received for transportation.

Railroad companies, whose property and fran-

N.Y.—W N. Stevenson & Co. v. Hartman, 132 N.E. 121, 231 N.Y. 378, 18 A.L.R. 1314, reversing 181 N.Y.S. 465, 191 App.Div. 406.
Ohio.—Hissem v. Guran, 146 N.E. 808, 112 Ohio St. 59.
Pa.—Brink's Express Co. v. Public Service Commission, 178 A. 346, 117 Pa.Super. 268
Wis.—Great Atlantic & Pacific Tea Co. v. Hattle, 236 N.W. 575, 205 Wis. 7.
10 C.J. p 38 note 18.

Rule stated in Corpus Juris has been approved in McIntyre v. Harrison, 157 S.E. 499, 508, 172 Ga. 65

Carrier employed by one or a definite number of persons by a special contract or for a special undertaking, is a private carrier.—Hissem v. Guran, 146 N.E. 808, 112 Ohio St. 59.

If the undertaking be a single transaction, not a part of the general business or occupation engaged in, as advertised and held out to the general public, then the individual or company furnishing such service is a "private" carrier.—Cushing v. White, 172 P. 229, 101 Wash. 172.

59. **Distinction** between "common" and "private" carrier is that former holds himself out in common to all persons who choose to employ him while latter agrees in special cases to carry for hire.—Koppers Connecticut Coke Co. v James McWilliams Blue Line, D.C.N.Y., 18 F.Supp. 992, affirmed, C.C.A., 89 F.2d 865, certiorari denied James McWilliams Blue Line v. Koppers Connecticut Coke Co., 58 S.Ct. 25.

Test in determining whether a carrier is a "common carrier" or a "private carrier" is whether or not the enterprise is open to the use and service of all members of the public who may require the service to the extent of its capacity.—Marshall v Public Service Commission, 195 A. 475, 129 Pa.Super. 272.

60. U.S.—New York Central R. Co. v. Lockwood, N. Y., 17 Wall 357, 21 L.Ed. 627—Wilson v. Atlantic Coast Line R. Co., C.C.Ga., 129 F 774, affirmed 133 F. 1022, 66 C.C.A. 486.
Ariz.—Claypool v. Lightning Delivery Co., 299 P. 126, 38 Ariz 262.
Ga.—Western & A. R Co. v. Waldrip, 89 S.E. 346, 18 Ga.App. 263.
N.H.—Bernardi Greater Shows v Boston & M. R R., 165 A. 124, 86 N.H. 146.
10 C.J. p 39 note 30.
"In such case, it is dealing with matters involving ordinary considerations of contractual relation; those who choose to enter into engagements with it are not at a disadvantage and its stipulations even against liability for its own neglect are not repugnant to the requirements of its public service. . . . There may be special engagements which are not embraced within its duty as a common carrier although their performance may incidentally involve the actual transportation of persons and things, whose carriage in other circumstances might be within its public obligation."—Santa Fé, etc., R. Co. v. Grant Bros. Constr. Co., Ariz., 33 S.Ct. 474, 228 U.S. 177, 185, 57 L.Ed. 787.

This rule, stated in Corpus Juris, has been quoted in Zajic v. Johnson, Neb., 253 N.W. 77, 78.

61. U.S.—Denver & R. G. W. Ry. Co v. Linck, C.C.A.Utah, 56 F.2d 957—Sanger v. Lukens, D.C.Idaho, 24 F. 2d 226, reversed on other grounds, C.C.A., 26 F.2d 855—Smitherman & McDonald v. Mansfield Hardwood Lumber Co., D.C.Ark., 6 F.2d 29.
Ariz.—Claypool v. Lightning Delivery Co., 299 P. 126, 38 Ariz. 262.
Ill.—Chicago & E. I. R. Co. v. Chicago Heights Terminal T. R. Co., 147 N.E. 667, 317 Ill. 65.
Ind.—Vandalia R. Co. v Stevens, 114 N.E. 1001, 67 Ind.App. 238.
Iowa.—State ex rel. Board of Railroad Com'rs v. Carlson, 251 N.W. 160, 217 Iowa 854.
N.H.—Bernardi Greater Shows v. Boston & M. R. R., 165 A. 124, 86 N.H. 146
Wash.—State v. Washington Tug & Barge Co., 250 P. 49, 140 Wash. 613.
10 C.J. p 39 note 33.

Carrier rendering services under contract may still be a common carrier.—State ex rel. Board of Railroad Com'rs v. Carlson, 251 N.W. 160, 217 Iowa 854.

Making of contract considered, but not conclusive

Although the fact that a carrier makes a contract in every case in which he transports property is to be considered in determining whether or not he is a common carrier, it is not conclusive, since he might make such contracts merely to escape the duties of a common carrier by subterfuge or evasion.—Weaver v. Public Service Commission of Wyoming, 278 P. 542, 40 Wyo. 462.

62. U.S.—Chenery v. Employers' Liability Assur. Corporation, C.C.A. Cal., 4 F.2d 826.

63. Pa.—Hubert v. Public Service Commission, 180 A. 23, 118 Pa.Super. 128.

64. U.S.—Kentucky Bank v. Adams Express Co., Ky., 93 U.S. 174, 23 L.Ed. 872.
Vt.—Kimball v. Rutland, etc., R. Co., 26 Vt. 247, 62 Am.D. 567.

chises are affected with a public interest, are ordinarily held to be common carriers of goods delivered to them for transportation, although their charters do not specifically so provide.[65] In some jurisdictions, railroads are by express constitutional or statutory provision declared to be common carriers;[66] and it is immaterial, under such provisions, whether the incorporators did or did not intend the railroad to be a common carrier.[67] These provisions, however, are merely declaratory of the common law as it already existed.[68] Even before the road is completed, goods received for transportation on construction trains may be deemed to have been received for transportation by the company as a common carrier.[69] An agreement between a railroad and an express company for the transportation of light freight on passenger trains does not relieve the railroad company from liability as a common carrier to one who had no notice that the business was not being done by the railroad company.[70] A railroad is none the less a common carrier because it maintains no freight station and issues no bills of lading.[71]

Railroad receivers and trustees. A receiver appointed by the court to operate a railroad is a common carrier, the same as the corporation which he represents, so far as he transacts the business of carrying goods,[72] and is subject to the same rights and duties.[73] Trustees who purchase at a foreclosure sale and operate the road under a decree authorizing them to do so are liable as common carriers for goods received by them while thus operating the road,[74] and they are not in possession of the property as receivers, and are not relieved from liability on the ground that they stood in that relation to the court, since they are accountable, not to the court, but to the bondholders; nor are they released from their liability as common carriers by a conveyance of the property to a new company organized in obedience to a decree of court, where

65. Ill.—Chicago & E. I. Ry. Co. v. Chicago Heights Terminal Transfer R. Co., 147 N.E. 666, 317 Ill. 65, error dismissed 46 S.Ct. 207, 270 U.S. 628, 70 L.Ed. 767
N.J.—Falzarano v. Delaware, L. & W. R. Co., 194 A. 75, 119 N.J.Law 76.
N.C.—Williams v. Kinston Mfg. Co., 95 S.E. 366, 175 N.C. 226.
Ohio—Barlotti v. Public Utilities Commission, 134 N.E. 468, 103 Ohio St. 647.
10 C.J. p. 46 notes 89–91.

Railroad company exercising all its franchises is a "common carrier."—Chicago & E. I. Ry. Co. v. Chicago Heights Terminal Transfer R. Co., 147 N.E. 666, 317 Ill. 65, error dismissed 46 S.Ct. 207, 270 U.S. 626, 70 L.Ed. 767—Kenna v. Calumet, H. & S. E. R. Co., 120 N.E. 259, 284 Ill. 301, affirming 206 Ill.App. 17.

By organizing under the general Railroad Act, a railroad company assumes a duty to serve the public as a common carrier—Kenna v. Calumet, H. & S. E. R. Co., 206 Ill.App. 17, affirmed 120 N.E. 259, 284 Ill. 301.

Railroad constructed by United States as war measure

That a right of way for a railroad, acquired by the United States during war to aid in spruce production, was taken by it under the war power or right of eminent domain, does not charge it and the road built thereon by such government with a public use, giving the public a right to demand a common carrier service as to freight. Conveyance by the United States of the right of way, and a road built thereon by it, to a corporation organized, owned, and used by it for the same war purpose, did not charge the property with a public use so as to make the company a common carrier of freight. The railroad was not charged with a public use by temporary gratuitous permit to operate it while a corporation organized by the government was winding up its affairs after close of war. That purchaser of such railroad, on close of war, consented to continuance for two months, until it was ready to begin logging operations, of operation of road by an individual, begun under temporary permit from government instrumentality, did not charge the road with a public use.—McCoy v. Pacific Spruce Corporation, C.C.A.Or., 1 F.2d 853, affirming, D.C., Pacific Spruce Corporation v. McCoy, 294 F. 711.

66. Miss.—Illinois Cent. R. Co. v. King, 88 So. 322, 125 Miss. 734.
Mo.—Idalia Realty & Development Co. v. Norman's Southeastern Ry. Co., 219 S.W. 923
10 C.J. p. 46 note 92.

Application of statute

Where a buyer of timber who was given a right of way over the lands, constructed a standard gauge railroad and equipped the same with two locomotives, which were used to haul timber products, etc., it was held that although the buyer was an individual, yet he was included within the term "railroad corporation" as defined by Rev.St.1909 § 3214, and hence such railroad became a common carrier under §§ 3174, 3179, even though its original business was practically confined to the transportation of timber products, such road continuing to serve the surrounding territory after exhaustion of the timber.—Idalia Realty & Development Co. v. Norman's Southeastern Ry. Co., Mo., 219 S.W. 923

67. Idaho.—Connolly v. Woods, 92 P. 573, 13 Idaho 591.

68. Fla.—Seaboard Air Line R. Co. v. Simon, 47 So. 1001, 56 Fla. 545, 20 L.R.A.,N.S., 126, 16 Ann.Cas. 1234
Or.—Thompson-Houston Electric Co. v. Simon, 25 P. 147, 20 Or. 60, 23 Am.S.R. 86, 10 L.R.A. 251

69. Ark.—Little Rock, etc., R. Co. v. Glidewell, 39 Ark. 487.

70. N.Y.—Langworthy v. New York, etc., R. Co., 2 E.D.Smith 195.

71. U.S.—U. S. v. State of California, Cal., 56 S.Ct. 421, 297 U.S. 175, 80 L.Ed. 567, reversing, C.C.A., State of California v. U. S., 75 F. 2d 41, certiorari granted U. S. v. State of California, 56 S.Ct. 87, 296 U.S. 554, 80 L.Ed. 391.

72. U.S.—U. S. v. Nixon, Mo., 35 S. Ct. 49, 235 U.S. 231, 59 L.Ed. 207.
Colo.—People v. Colorado Title, etc., Co., 178 P. 6, 65 Colo. 472.
Tex.—International, etc., R. Co. v. Dawson, 232 S.W. 279, 111 Tex. 247, 15 A.L.R. 1367.
10 C.J. p. 52 note 74—51 C.J. p. 958 note 92.

73. U.S.—U. S. v. Nixon, Mo., 35 S. Ct. 49, 235 U.S. 231, 59 L.Ed. 207—Rutherford v. Union Pac. R. Co., D.C.Neb., 254 F. 880—Beers v. Wabash, etc., R. Co., C.C.Ill., 34 F. 244.
Mo.—Moore v. Metropolitan St. R. Co., 176 S.W. 1120, 189 Mo.App. 555.

74. N.H.—Barter v. Wheeler, 49 N. H. 9, 6 Am.R. 434.
N.Y.—Faulkner v. Hart, 44 N.Y.Super. 471, reversed on other grounds 82 N.Y. 413, 37 Am.R. 574.

the act or contract as common carrier was done or entered into before the transfer took place.[75]

Lessee of railroad franchise. The lessee of the franchise of a railroad company which is a common carrier is also a common carrier.[76]

Declaration of public service commission. Where a railroad company is not in fact a common carrier, an order of the public service commission declaring it to be such is void.[77]

b. Extent of Use of Facilities in General

The test as to whether a railroad is a common carrier is the right of the public to use it, and not the extent of its use.

Whether or not a railroad is a common carrier does not depend on the extent of its business or use, the real criterion being the right of the public to use its facilities and to demand its services.[78] The character of a regularly organized railroad as a common carrier is not changed by the fact that its facilities are so limited as to enable it to serve only a few customers, or even a single customer,[79] or that it carries only a particular kind of property for a single customer,[80] or because most of its traffic is in its own products, and only a small part of the traffic carried is the property of others.[81]

c. Particular Operations and Kinds of Service

(1) Railroads operated by industrial plants
(2) Railroads operated by stockyard companies
(3) Companies operating branch lines and spurs
(4) Companies operating terminals, belt lines, or switches
(5) Companies transporting cars of other carriers
(6) Companies transporting special trains
(7) Street railway companies
(8) Miscellaneous

(1) Railroads Operated by Industrial Plants

An industrial company authorized to operate a railroad may become a common carrier if it holds itself out as such, but it is only a private carrier if it carries only its own products.

A lumber company which is authorized by its charter or articles of incorporation to operate railroads, either generally, or for the purpose of transporting its own products, may become a common carrier although it is not incorporated as such,[82] and the fact that the company has never exercised the right of eminent domain and does not possess such right, that the railroad lines maintained by the company are only temporary structures, and that the company maintains no stations or depots, does not prevent it from being a common carrier if it is such[83] within the rules laid down in § 3 b. However, a system of internal trackage constructed and operated by an industrial corporation to meet the requirements of its own business in the process of manufacture is a mere plant facility and not a common carrier.[84] A lumber company does not become a common carrier where it transports goods for such persons only as it chooses to make contracts with, and as a necessary part of its lumber business, and carries passengers for hire, only as an accommodation for a railroad company to which it pays over the fares collected by it.[85] So, a company organized as a railroad company for the purpose of conveying its own product, and which does no other business except occasionally to carry goods for others without charge, or at a charge less than

75. N.Y.—Rogers v. Wheeler, 43 N. Y. 598, affirming 2 Lans. 486.

76. Ga.—Georgia R., etc., Co. v. Maddox, 42 S.E. 315, 116 Ga. 64.

77. U.S.—McCoy v. Pacific Spruce Corporation, C.C.A.Or., 1 F.2d 853, affirming, D.C., Pacific Spruce Corporation v. McCoy, 294 F. 711.

78. U.S.—Pacific Spruce Corporation v. McCoy, D.C.Or., 294 F. 711, affirmed, C.C.A., McCoy v. Pacific Spruce Corporation, 1 F.2d 853.
Ark.—Helena Southwestern R. Co. v. Coolidge, 275 S.W. 896, 169 Ark. 552.
Ill.—See Kenna v. Calumet, H. & S. E. R. Co., 206 Ill.App. 17, affirmed 120 N.E. 259, 284 Ill. 301, quoting "Tap Line Cases," 34 S.Ct. 741, 234 U.S. 1, 58 L.Ed. 1185.
Wis.—Waldum v. Lake Superior Terminal & Transfer Ry. Co., 170 N.W. 729, 169 Wis. 137.
10 C.J. p 46 notes 86, 87.

79. Ill.—Chicago & E. I. Ry. Co. v. Chicago Heights Terminal Transfer R. Co., 147 N.E. 666, 317 Ill. 65, error dismissed 46 S.Ct. 207, 270 U.S. 626, 70 L.Ed. 767.

80. Ark.—Helena Southwestern R. Co. v. Coolidge, 275 S.W. 896, 169 Ark. 552.

81. U.S.—Tap Line Cases, Com.Ct., 34 S.Ct. 741, 234 U.S. 1, 58 L.Ed. 1185.
Pa.—Crane R. Co. v. New Jersey Cent. R. Co., 93 A. 1076, 248 Pa. 333.

82. Ky.—Dawkins Lumber Co. v. L. Carpenter & Co., 281 S.W. 1013, 213 Ky. 795.

Acts constituting company common carrier

A lumber company which owned and operated a railroad for transportation of its own products, but subsequently extended its road into an oil field, and held itself out as willing to carry any freight offered under private contract, was a common carrier, although not authorized by its charter to operate as such.—Smitherman & McDonald v. Mansfield Hardwood Lumber Co., D.C.Ark., 6 F.2d 29.

83. Ky.—Dawkins Lumber Co. v. L. Carpenter & Co., 281 S.W. 1013, 213 Ky. 795.

84. Ill.—Kenna v. Calumet, H. & S. E. R. Co., 120 N.E. 259, 284 Ill. 301, affirming 206 Ill.App. 17.

85. Ky.—Dawkins Lumber Co. v. L. Carpenter & Co., 281 S.W. 1013, 213 Ky. 795.

the cost of the service, is not a common carrier, although its charter gives it the broad powers of such services.[86]

A logging railroad, holding itself out to the public as a common carrier, and having the power of eminent domain, cannot deny that it is a common carrier merely because it has never operated as such.[87] On the other hand, a logging railroad which carries only its own products and does not hold itself out as a common carrier, is not such a carrier;[88] and the fact that it exercises the power of eminent domain is immaterial.[89] The rules are also applicable to industrial companies operating branch lines and spurs, see infra subdivision (3).

(2) Railroads Operated by Stockyard Companies

Stockyard companies owning and operating tracks to and from their yards for the transportation of live stock for others are common carriers.

Stockyard companies are common carriers where they are made such by the terms of their charters, hold themselves out as such, and constantly act in that capacity, and are so treated by the railroad systems which use them;[90] and the fact that a stockyard company by means of a lease to another terminal company divests itself of the operation of the railroad system which it was authorized by its charter to construct and operate, and which for many years it did in fact operate, does not affect its character as a common carrier where it still continues to perform the customary stockyard operations, and by the terms of the lease gets a share of the profits received by the terminal company for performing the service in connection with the railroad transportation.[91] It is immaterial that the company has no cars of its own but transports cars of other companies only, or that it operates its road only for a short distance.[92] Where the company carries on no other business than that of transportation for others, it is a common carrier, although it does not deal with the general public but only with the railroad companies whose lines connect with its transfer line and with the industries located on the margin of its premises, and with the consignees and consignors of live stock who receive shipments or load shipments in its yards.[93]

(3) Companies Operating Branch Lines and Spurs

Companies maintaining branches and spurs are common carriers if such facilities are used for general transportation purposes, otherwise not.

Where a railroad company is vested by charter with power to construct branch lines, and they are constructed and operated for the purpose of general transportation, the company becomes a common carrier as to such branches and is subject to the rules governing such carriers.[94] If the purpose of the company is to maintain and operate branch or spur tracks as a part of its system so as to serve all who may desire service, the company becomes a common carrier as to such branch or spur lines, without regard to the amount or proportion of freight carried thereon for the general public,[95] and although the track at the outset may lead only to a single industry[96] or was constructed merely as a plant facility,[97] and its character as a common

86. Wash.—State v. Public Service Commission of Washington, 201 P. 765, 117 Wash. 453, rehearing denied 203 P. 3, 117 Wash. 453.

Charges collected from others

In a proceeding involving question of whether a lumber company operating a railroad was as to such railroad a common carrier, insufficiency of evidence as to the exact sums collected from outside persons is immaterial, where sum so collected was inconsequential as compared with the freight carried by the railroad for the company itself.—State v. Public Service Commission of State of Washington, 203 P. 3, 117 Wash. 453, denying rehearing 201 P. 765, 117 Wash 453.

87. Idaho.—Codd v. McGoldrick Lumber Co., 267 P. 439, 46 Idaho 256.

88. U.S.—Campbell River Mills Co. v. Chicago, M., St. P. & P. R. Co., D.C.Wash., 42 F.2d 775, affirmed, C.C.A., Chicago, M., St. P. & P. R. Co. v. Campbell River Mills Co., 53 F.2d 69, certiorari denied 52 S. Ct. 310, 285 U.S. 536, 76 L.Ed. 930.
N.C.—Williams v. Kinston Mfg. Co., 95 S.E. 366, 175 N.C. 226.

89. Idaho.—Codd v. McGoldrick Lumber Co., 279 P. 298, 48 Idaho 1, 67 A.L.R. 580.

90. U.S.—Adams v. Mills, Ill., 52 S. Ct. 589, 286 U.S. 397, 76 L.Ed. 1184, reversing, C.C.A., Adams v. Mellan, 51 F.2d 620, affirming, D.C., 39 F.2d 80, and certiorari granted 52 S. Ct. 208, 284 U.S. 614, 76 L.Ed. 525
Neb.—Schneider v. Davis, 192 N.W. 230, 109 Neb. 638.
10 C.J. p. 51 note 67.

91. U.S.—U. S. v. Union Stockyards, etc., Co., Com.Ct., 33 S.Ct. 83, 226 U.S. 286, 57 L.Ed. 226.

92. U.S.—U. S. v. Sioux City Stock Yards Co., C.C.Iowa, 162 F. 556, affirmed 167 F. 126, 92 C.C.A. 578.

93. U.S.—Union Stock Yards Co. v. U. S., Neb., 169 F. 404, 406, 94 C.C.A. 626.
Neb.—State v. Union Stock Yards Co., 115 N.W. 627, 81 Neb. 67.
10 C.J. p. 51 note 71.

94. U.S.—Union Lime Co. v. Chicago, etc., R. Co., Wis., 34 S.Ct. 522, 233 U.S. 211, 58 L.Ed. 924
S.C.—Avinger v. South Carolina R. Co., 7 S.E. 493, 29 S.C. 265, 13 Am. S.R. 716.
10 C.J. p. 46 notes 97, 98

95. U.S.—Tap Line Cases, Com.Ct., 34 S.Ct. 741, 234 U.S. 1, 58 L.Ed. 1185.

96. U.S.—Hairston v. Danville, etc., R. Co., Va., 28 S.Ct. 331, 208 U.S. 598, 52 L.Ed. 637, 13 Ann.Cas. 1008.
Wis.—Chicago, etc., R. Co. v. Morehouse, 87 N.W. 849, 112 Wis. 1, 88 Am.S.R. 918, 56 L.R.A. 240.
10 C.J. p. 47 note 1.

97. Pa.—Crane R. Co. v. New Jersey Cent. R. Co., 93 A. 1076, 248 Pa. 333
10 C.J. p. 47 note 2.

carrier is not affected by the fact that the traffic is furnished mostly by one or a few industries situated on the branch or spur tracks,[98] or that the proprietors of such industries contributed to the cost.[99] A railroad company which is in the exclusive control of stub or tap lines joining its main line, and which owns the rails and fasteners and maintains the tracks and roadbeds in condition, and which maintains a distance mileage tariff for freight originating on the stub lines the same as from points on its main line, is a common carrier, although the roadbed and the ties of the stub line roads are owned by lumber companies.[1] So, a railroad company which serves business houses along a spur track which is not one of its regular sidetracks nor owned by it, by delivering to them cars of freight and cars to be freighted and shipped is a common carrier with respect to the use it makes of this track.[2]

However, there is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings.[3] Thus, a spur railway line built by a lumber company on its own land, forming a connecting line between a railroad and its mill, some miles distant, for the purpose of transporting its own products to the railroad for shipment, which had no rolling stock except an engine and logging cars and which neither did, nor held itself out to do, carrying for the public, is not a common carrier.[4] Railroad tracks connecting ironworks with the track of an interstate railroad on the grounds of the iron company and engines used thereon are mere plant facilities, although transferred to a separate company organized as a railroad, and the latter is not a common carrier entitled to share in the interstate rates so far as related to the business of the iron company.[5] It has also been held that the fact that a motor car for mail and passengers was run over a spur track belonging to a private carrier does not establish the fact that the spur was operated as a public carrier of freight.[6]

The question as to whether branch lines were constructed and were actually used for purposes of general transportation, so as to make the operator a common carrier as to them, is a question of fact to be determined by the jury.[7]

(4) Companies Operating Terminals, Belt Lines, or Switches

Terminal companies, belt lines, and companies switching cars of others, may be common carriers.

Terminal companies are common carriers, when so made by the terms of their charters, or where they hold themselves out as such and constantly act in that capacity and are so treated by the great railroad systems which use them,[8] even though they own no cars of their own and transport only the railroad cars of other companies.[9] A railroad company incorporated under a statute authorizing the formation of corporations for the purpose of constructing, maintaining, and operating railroads for public use, and engaged chiefly in switching cars of other railroad companies, is a common carrier,[10] and the same is true of a railroad company doing a general business in switching cars over its switch tracks to and from warehouses situated on its spurs and switches and delivering them on the transfer tracks of other railroad companies in the same

98. Minn.—Chicago, etc., R. Co. v. Porter, 46 N.W. 75, 43 Minn. 527.

99. U.S.—Hairston v. Danville, etc., R. Co., Va., 28 S.Ct. 331, 208 U.S. 598, 52 L.Ed. 637, 13 Ann.Cas. 1008.

1. Minn.—McCallum v. Minneapolis, etc., R. Co., 151 N.W. 974, 129 Minn. 121.

2. Ala.—Agee v. Louisville, etc., R. Co., 37 So. 680, 142 Ala. 344.

3. U.S.—Union Lime Co. v. Chicago, etc., R. Co., Wis., 34 S.Ct. 522, 233 U.S. 211, 58 L.Ed. 924.
Ky.—Straight Creek Coal, etc., Co. v. Straight Creek Coal Min. Co., 132 S.W. 842, 135 Ky. 536.

4. U.S.—Campbell River Mills Co. v. Chicago, M., St. P. & P. R. Co., D.C.Wash., 42 F.2d 775.
10 C.J. p. 47 note 8.

5. U.S.—Crane Iron Works v. U. S., Com.Ct., 209 F. 238.

6. Ark.—Edgar Lumber Co. v. Cornie Stave Co., 130 S.W. 452, 95 Ark. 449.

7. S.C.—Avinger v. South Carolina R. Co., 7 S.E. 493, 29 S.C. 265, 277, 13 Am.St.R. 716.
10 C.J. p. 47 note 11.

8. U.S.—U. S. v. Chicago, B. & Q. R. Co., C.C.A.Colo., 293 F. 185.
Fla.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.
Ill.—Chicago & E. I. Ry. Co. v. Chicago Heights Terminal Transfer R. Co., 147 N.E. 666, 317 Ill. 65, error dismissed 46 S.Ct. 207, 270 U.S. 626, 70 L.Ed. 767.
10 C.J. p. 47 note 13.

9. U.S.—U. S. v. Sioux City Stock Yards Co., C.C.Iowa, 162 F. 556, affirmed 167 F. 126, 92 C.C.A. 578.

10. Ill.—Kenna v. Calumet, H. & S. E. R. Co., 120 N.E. 259, 284 Ill. 301, affirming 206 Ill.App. 17.
Wis.—Waldum v. Lake Superior Terminal & Transfer Ry. Co., 170 N.W. 729, 169 Wis. 137.

Exclusive service to manufacturing company

A railroad, organized under the general railroad act, which operated about five miles of switch tracks of standard gauge within the plant of a coke corporation partly included within a fence inclosing the corporation's plant and connected with delivery tracks, and whose only business was in switching cars for the coke corporation between its plant and the delivery roads, and which through its connections was bound to receive from, and deliver to, the coke corporation cars consigned to, or shipped by, it over four different railroads to and from points within and without the state and which received pay for such services as a part of the general freight rate paid by the shipper for the whole carriage, was not a mere facility of the coke corporation, but was a common carrier. —Kenna v. Calumet, H. & S. E. R. Co., 120 N.E. 259, 284 Ill. 301.

town,[11] or operating between freight terminals and delivery cars at various private sidings.[12] So, a railroad company taking loaded cars from its connection with another railroad and transferring them by means of a switch engine over a portion of its own track to a spur of its own and receiving its compensation from the connecting road acts as a common carrier and is liable as such for the safety of the goods transported, no matter how short the distance from the place of receipt to that of delivery.[13] A belt line switching whole trains on its own line from a given station to stockyards,[14] or which receives and transports cars and freight offered it by rail carriers, steamboat companies, or industrial plants along the waterfront of a harbor, with wharf and track connections and direct service to industrial plants,[15] is a common carrier. On the other hand, it has been held that where a corporation, which is under no legal obligation so to do, voluntarily contracts to switch cars over its tracks between two or more railways, for which service it collects a certain switching charge for switching the cars loaded or empty, but charges no traffic rates on the freight transported or transferred in the cars, such corporation in the performance of such service assumes none of the responsibilities of a common carrier, but only those of a switchman;[16] and one who constructs a railroad switch, under a statute authorizing the owner of a coal mine within three miles of a railroad to condemn a right of way for a railroad switch to get his product to market, and providing that the owner of such road shall be, so far as they are applicable, governed by the laws relating to other railroads is not a common carrier, in contravention of a constitutional provision that no corporation engaged in the business of common carrier shall own a mine, so that it can either ship or permit to be shipped by the lessees of its mine all products thereof free of charge.[17]

A wharf company chartered as a transportation company, owning railroad trackage connecting with railroads and operating switches, and having on file with the proper authorities tariffs covering its charges for various services, is a common carrier.[18]

(5) Companies Transporting Cars of Other Carriers

A railroad may be a common carrier as to loaded freight cars of another road received for transportation; but the railroad is not a common carrier of common carriers of passengers.

A railroad company which receives loaded freight cars of another road for transportation thereby assumes the obligations of a common carrier in respect to such cars,[19] its liability being the same as when it undertakes to transport ordinary freight.[20] However, a railroad company is not a common carrier of common carriers of passengers;[21] it owes no duty to sleeping car companies to haul their cars, and may impose the terms on which it will haul such cars.[22] Furthermore, as regards ordinary freight cars, it has been held that, if they are destroyed after the carriage has terminated, and after delivery, or tender to deliver, to the consignee, there is as to the cars no liability as a common carrier. In other words, although the cars remain on the tracks of the transporting carrier, its liability is that of a warehouseman only.[23]

(6) Companies Transporting Special Trains

A railroad transporting special trains belonging to the person for whom the service is rendered is, ordinarily,

11. Tex.—Texarkana, etc., R. Co. v. Rosebrook-Josey Grain Co., 114 S. W. 436, 52 Tex.Civ App. 156.

12. Mass.—Batchelder & Snyder Co. v. Union Freight R. Co, 156 N.E 698, 259 Mass. 368, 54 A.L.R. 616, certiorari denied Union Freight R. Co. v. Batchelder & Snyder Co., 48 S Ct. 117, 275 U.S. 556, 72 L.Ed. 424.

13. Kan.—Missouri Pac. R. Co. v. Wichita Wholesale Grocery Co., 40 P 899, 55 Kan. 525, 529.
10 C.J p 47 note 17.

14. Mo.—Fleming v. St. Louis, etc., R. Co, 89 Mo.App 129.
Tex.—Texas, etc, R. Co. v. Henson, 132 S W. 118, 103 Tex. 598, reversing, Civ App, 121 S W. 1127.
10 C.J. p 47 note 15.

15. U.S.—U. S. v. State of California, Cal, 56 S Ct. 421, 297 U.S. 175, 80 L.Ed. 567, reversing, C.C.A., State of California v. U. S., 75 F. 2d 41, certiorari granted U. S. v State of California, 56 S.Ct 87, 296 U.S. 554, 80 L Ed 391.

16. U S.—Kentucky, etc, Bridge Co v. Louisville, etc, R. Co., C C.Ky., 37 F. 567, 2 L R.A 289.

17. Ky.—Straight Creek Coal, etc., Co v. Straight Creek Coal Min. Co, 122 S.W. 842, 135 Ky. 536

18. Tex.—Galveston, H. & S. A Ry Co v. American Grocery Co, 36 S W 2d 985, affirming, Com App, 25 S W.2d 588, which reversed, Galveston Wharf Co. v. American Grocery Co., Civ.App., 13 S.W 2d 983, certiorari granted Galveston Wharf Co. v. Galveston, H. & S. A. Ry. Co, 52 S Ct. 41, 284 U.S 608, 76 L.Ed. 521, affirmed 52 S.Ct 342, 285 U.S. 127, 76 L.Ed. 659.

19. Wis.—Waldum v. Lake Superior Terminal & Transfer Ry. Co., 170 N W. 729, 169 Wis. 137.
10 C.J. p 44 note 69.

20. Okl.—Atchison, etc, R. Co. v. Homewood, 134 P. 856, 39 Okl. 179, 48 L.R.A.,N.S., 990.

21. U.S.—Donovan v. Pennsylvania R. Co., Ill., 120 F 215, 57 C C.A. 362, 61 L R A. 140 affirmed 26 S Ct. 91, 199 U.S. 279, 50 L Ed. 192.

22. U S.—Pullman Palace Car Co v. Missouri Pac. R. Co., Mo, 6 S Ct. 194, 115 U S. 587, 24 L Ed. 499—Donovan v Pennsylvania R. Co, Ill, 120 F. 215, 57 C C.A. 362, 61 L R.A. 140, affirmed 26 S.Ct 91, 199 U S. 279, 50 L Ed 192.
Colo.—Denver, etc, R Co. v. Whan, 89 P. 39, 39 Colo. 230, 11 L.R.A., N.S., 432, 12 Ann.Cas 732.

23. U.S.—Missouri Pac. R. Co. v. Chicago, etc, R. Co., C.C., 25 F. 317, affirmed 10 S.Ct. 65, 132 U.S. 191, 33 L.Ed. 309.
10 C.J. p 45 note 73.

not a common carrier as to the property transported on such trains; but it may become such.

A railroad company which furnishes men and motive power for the transportation of special trains, such as a circus train, belonging to the person for whom the service is rendered, is not a common carrier with reference to the property transported on such train,[24] but it has been held otherwise in a case where cars of the person for whom the service was being rendered were injured while the train in which they were being hauled was under the control of the conductor as agent of the railroad company, and were injured in the operation of the road.[25] The mere fact that the car in which the property is being transported belongs to the owner of the property may not relieve the railroad company from the "ordinary" liability of a carrier.[26] So it has been held that a railroad company, by publishing and filing its tariffs, classifications, and rules for the transportation of show companies, in accordance with the law, held itself out as a common carrier of such companies, and by giving a show company an option of transportation at a higher rate, according to the tariffs, etc., or at a reduced rate, admitted willingness to transport the show company as a common carrier.[27]

(7) Street Railway Companies

A street railway company may become a common carrier of goods.

A street railway company may become a common carrier of goods by the practice of permitting passengers or others to put freight in its cars to be carried for extra hire.[28]

(8) Miscellaneous

A company furnishing refrigerator or other specially constructed cars to railroads is not a common carrier. A connecting carrier transporting goods for hire is a common carrier, but not where it transports gratuitously.

A company which owns and maintains refrigerator, tank, or box cars which it lets to railroads or shippers, but owns no railroad lines and has no control over the motive power or the movements of the cars so furnished, is not a common carrier.[29]

A railroad connecting carrier which accepts from an initial carrier freight to be delivered at a point on the connecting carrier's route, and transports it over its own tracks from the terminus of the initial carrier to the point of destination, is a common carrier, notwithstanding its remuneration is received from the initial carrier alone; but if the services of the connecting carrier are gratuitous, it is not a common carrier.[30]

§ 7. Express and Transportation Companies

An express company receiving goods for transportation in the usual course of business is a common carrier. It is otherwise where a company is not engaged in, and does not hold itself out as, carrying for the public generally.

Express business is a "branch of the carrying trade, that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized so as to require the court to take notice of the same, as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads,"[31] the term involving the idea of regularity as to route or time, or both.[32] An express company is "a company engaged in the business of carrying for hire money, goods, and parcels from one locality to another."[33] Express companies are essentially different from railway companies, not only in the fact that the latter carry more bulky freight, but they collect money, and do other things that would be held ultra vires, if attempted by a railroad company.[34] An express company receiving property for transportation in the ordinary course of business, from anyone who chooses to hire its services, is a common carrier of such property.[35]

Another definition

An express company is a firm or corporation (usually a corporation) engaged in the business of transporting parcels, or other movable property, in the capacity of a common carrier, and especially undertaking the safe carriage and speedy delivery of small but valuable packages of goods and money.—America Ry. Express Co. v. Wright, 91 So. 342, 128 Miss. 593, 23 A.L.R. 127.

24. U.S.—Wilson v. Atlantic Coast Line R. Co., C.C.Ga., 129 F. 774.
Ind.—Cleveland, etc., R. Co. v. Henry, 83 N.E. 710, 170 Ind. 94.
10 C.J. p. 50 note 54.

25. N.Y.—Mallory v. Tioga R. Co., 39 Barb. 488, affirmed 3 Abb.Dec. 139, 3 Keyes 354, 1 Transcr.A. 203, 36 How.Pr. 202.

26. Ark.—Fordyce v. McFlynn, 19 S.W. 961, 56 Ark. 424.

27. N.H.—Bernardi Greater Shows v. Boston & M. R. R., 165 A. 124, 86 N.H. 146

28. Mass.—Levi v. Lynn, etc., R. Co., 11 Allen 300, 87 Am.D. 713.

29. U.S.—U. S. ex rel. Chicago, New York & Boston Refrigerator Co., 44 S.Ct. 558, 265 U.S. 292, 68 L.Ed. 1024, affirming 288 F. 649, 53 App. D.C. 111—Ellis v. Interstate Commerce Commn., Ill., 35 S.Ct. 645, 237 U.S. 434, 59 L.Ed. 1036.
Iowa.—E. N. Emery & Co. v. American Refrigerator Transit Co., 189 N.W. 824, 194 Iowa 926

30. S.C.—Lesesne v. Atlantic Coast Line R. Co., 103 S.E. 147, 114 S.C. 95.

31. Cal.—Pfister v. Central Pac. R. Co., 11 P. 686, 70 Cal. 169, 182, 59 Am.R. 404

32. U.S.—Retzer v. Wood, N.Y., 3 S.Ct. 164, 109 U.S. 185, 187, 27 L.Ed. 900—Pacific Express Co. v. Seibert, C.C.Mo., 44 F. 310, 319.

33. Md.—Dulaney v. United R., etc., Co., 65 A. 45, 104 Md. 423, 438.

34. N.C.—Alsop v. Southern Express Co., 10 S.E. 297, 104 N.C. 278, 6 L.R.A. 271.

35. U.S.—Taylor v. Wells Fargo & Co., Miss., 249 F. 109, 161 C.C.A. 161, certiorari granted Wells Fargo & Co. v. Taylor, 38 S.Ct. 581, 247

This is so for the reason that the business of an express company as usually conducted involves continuous custody of goods received as bailee from the time of their receipt until their final delivery, although the transportation thereof is to be effected by means of vehicles belonging to and controlled by others, the person furnishing the transportation being an employee in that respect of the express company.[36] In some jurisdictions by constitutional or statutory provision express companies are declared to be common carriers;[37] and the failure of such companies to comply with the provision of the act will not relieve them from responsibility.[38] The name or style under which they assume to carry on their business is immaterial when their real business is that of a common carrier.[39] They cannot evade their common-law liabilities by calling themselves "express forwarders" or by attempting to appear as agents only.[40] Likewise, so-called transportation or dispatch companies or fast freight lines not owning or controlling any means of conveyance which contract for through transportation of goods in cars which are taken on various lines of road to the destination of the goods are common carriers;[41] and the carriers employed by such a company are its agents.[42]

The rule that a carrier may be a common carrier of money as well as of goods, supra § 3 b (2), perhaps is more frequently applied in the case of express companies,[43] it being said that it is peculiarly the business of express companies to carry money.[44] A corporation authorized by its articles of incorporation to forward merchandise and freight of every description between and within certain towns by means of buses, wagons, automobiles, or other methods of transportation, "and to carry on generally the business of . . . carriers of personal property of every description," is a common carrier.[45] A transportation company engaged in transporting moving picture films for theaters and exchanges under special contracts, exclusively operating over fixed routes, but not advertising or soliciting business, nor holding itself out as ready to transport for the public indiscriminately, is not a common carrier;[46] nor is an express company a common carrier if it merely acts as agent for the shipper in arranging for the transportation and storage of goods, without having possession, or transporting them as a common carrier.[47]

§ 8. Draymen, Carters, Truckmen, Etc.

Persons engaged in the business of draymen, truckmen, etc., for the transportation of goods for hire to anyone desiring their services, are common carriers; but they are not common carriers if they do not hold themselves out as such, and carry only under private contract with one or more persons.

Persons who engage in the business of draymen, carters, truckmen, wagoners, or public moving van companies for the transportation of goods and merchandise, and who hold themselves out as willing to serve all who apply and pay their charges, are common carriers in respect to the carriage of such goods and merchandise as they make a business of carrying,[48] and it is immaterial what mode of

U.S. 515, 62 L.Ed. 1244, and reversed on other grounds 41 S.Ct. 93, 254 U.S. 175, 65 L.Ed 205

Mo.—Whitmore v. American Ry. Express Co., App., 269 S.W. 654—Tilles v. American Express Co., App., 186 S.W. 1102.

N.Y.—Wolf Thread Co. v. Rosenbusch, 180 N.Y.S. 94.

10 C.J. p 48 note 26.

36. Ill.—See Ford v. American Express Co., 203 Ill.App. 275.

Mo.—Whitmore v. American Ry. Express Co., App., 269 S.W. 654.

This statement in Corpus Juris is cited in Whitmore v. American Ry. Express Co., Mo.App., 269 S.W. 654, 656, in determining whether a certain person was an independent contractor or an agent of the express company.

37. Miss.—American Ry. Express Co. v. Wright, 91 So. 342, 128 Miss. 593, 23 A.L.R. 127.

Mo.—Whitmore v. American Ry. Express Co., App., 269 S.W. 654.

10 C.J. p 48 note 28.

38. Ind.—U. S. Express Co. v. Rush, 24 Ind. 403.

39. U.S.—Kentucky Bank v. Adams Express Co., Ky., 93 U.S. 174, 23 L.Ed 872.

40. Mo.—John Deere Plow Co. v. American Express Co., App., 203 S.W. 488.

10 C.J. p 49 note 31.

41. Tenn.—Block v. Merchants' Despatch Transportation Co., 6 S.W. 881, 86 Tenn. 392, 6 Am.S.R. 847.

10 C.J. p 49 note 32.

42. Tenn.—Block v. Merchants' Despatch Transp. Co., supra.

43. U.S.—Platt v. Le Cocq, C.C.S.D., 150 F. 391, 395, reversed on other grounds 158 F. 723, 85 C.C.A. 621, 15 L.R.A.,N.S., 558.

44. N.C.—Alsop v. Southern Express Co., 10 S.E. 297, 104 N.C. 278, 6 L.R.A. 271.

10 C.J. p 42 note 52.

45. Ohio.—Interstate Motor Freight Corporation v. Beecher, 174 N.E. 27, 28, 37 Ohio App. 23.

"The word 'generally' . . . imports something more than engaging in the private carriage of goods."—Interstate Motor Freight Corporation v. Beecher, supra.

46. U.S.—Film Transport Co. v. Michigan Public Utilities Commission, D.C.Mich., 17 F.2d 857.

47. Mo.—Tilles v. American Express Co., App., 186 S.W. 1102.

48. Ark.—City Fuel Co. v. Torreyson, 224 S.W. 727, 145 Ark. 399

Ill.—City of Chicago v. Mayer, 124 N.E. 842, 290 Ill. 142—Hinchliffe v. Wenig Teaming Co., 113 N.E. 707, 274 Ill. 417, affirming 194 Ill.App. 627

Ky.—Farley v. Lavary, 54 S.W. 840, 21 Ky.L. 1252, 47 L.R.A. 383.

N.Y.—W. N. Stevenson & Co. v. Hartman, 132 N.E. 121, 231 N.Y. 378, 18 A.L.R. 1314, reversing on another ground 181 N.Y.S. 465, 191 App.Div. 406—Heuman v. M. H. Powers Co., 162 N.Y.S. 590, 175 App.Div. 627.

10 C.J. p 49 note 34.

Rule stated in Corpus Juris, as embodied in this and the two following text statements, has been approved in Zajic v. Johnson, Neb., 253 N.W. 77, 78; and Corpus Juris has been cited in support of this rule in

transportation is employed,[49] or that there is no regular tariff of charges.[50] A person who uses his trucks partly in the prosecution of his own business, and partly in hauling goods for the public for hire, is a common carrier to the extent that the trucks are used for the latter purpose.[51] So, a person hauling freight by truck, at regular rates, for over ninety per cent of the shippers in his territory, is a common carrier, although all of such shippers were members of an association organized by him.[52] If a truckman transporting goods from a wharf of the initial carrier to a freight station of the delivering carrier is the agent of either the initial or the delivering carrier, the truckman may be considered a participant in the transportation of goods for his principal as the common carrier.[53]

On the other hand, draymen, truckmen, and other persons of the character under discussion, who transport goods under private or special contract with one or more persons, and do not hold themselves out as willing to serve the public indiscriminately, are not common carriers;[54] and the fact that a person or company transporting goods under such circumstances was authorized to do a general trucking business for the public, is immaterial,[55] the test being, as stated in § 3 b (1) supra, not what the carrier was empowered to do, but what it was actually engaged in doing. So, it has been held that a local stage line hauling express matter to railroad stations, is not a common carrier.[56]

§ 9. Transfer Companies

Companies engaged in the business of transferring freight to or from railroad or steamship depots are common carriers if they hold themselves out as ready to carry for hire the goods of all who may apply.

Transfer companies engaged in the business of transferring freight to or from railroad or steamship depots, or between different parts of towns or cities, are not inherently common carriers;[57] whether they are or are not depends on the manner in which they conduct their business, that is, whether they hold themselves out as common carriers, and the character of their operations.[58] If such com-

Duplex Printing Press Co v. Deering, N.Y., 252 F. 722, 745, 164 C.C.A. 562, and W. N. Stevenson & Co. v. Hartman, 181 N.Y.S. 465, 191 App.Div. 406, although the judgment in the latter case was reversed in 132 N.E. 121, 231 N.Y. 378, so far as concerned the application of the rule to the particular facts.

Truckman carrying under contract with government

Truckman, transporting special general order merchandise from docks to bonded warehouse designated by importer, under contract with United States government for exclusive carrying of such merchandise at fixed charges for which importer ultimately reimbursed government was "common carrier," liable as insurer. —Textile Alliance v. P. H. Keahon, Inc., 211 N.Y.S. 205, 125 Misc. 400, affirmed 215 N.Y.S. 931, 216 App.Div. 797.

49. Ark.—Arkadelphia Milling Co. v. Smoker Merchandise Co., 139 S.W. 680, 100 Ark. 37.
10 C.J. p. 49 note 35.

50. N.Y.—Jackson Architectural Iron Works v. Hurlbut, 52 N.E. 665, 158 N.Y. 34, 70 Am.S.R. 432

51. Ark.—City Fuel Co. v. Torreyson, 224 S.W. 727, 145 Ark. 399.
Ohio.—Craig v. Public Utilities Commission of Ohio, 154 N.E. 795, 115 Ohio St. 512.

Fuel company which let its trucks with drivers to carry goods, which was part of its regular business, was a common carrier.—City Fuel Co. v. Torreyson, 224 S.W. 727, 145 Ark. 399.

52. Colo.—Davis v. People, 247 P. 801, 79 Colo. 642.

This is so for two reasons: First, that the proportion of the public served is so large as to be the public; second, that the limitation is a mere device to hoodwink the law. —Davis v. People, 247 P. 801, 79 Colo. 642.

53. Mass.—Goodman v. New York, N. H. & H. R. Co., 3 N.E.2d 777.

54. Conn.—Ace-High Dresses v. J. C. Trucking Co., 191 A. 536, 122 Conn. 578.
Mich.—Automobile Ins. Co. of Hartford, Conn., v. Cochran, 247 N.W. 755, 262 Mich. 605.
10 C.J. p. 49 notes 39, 40, p. 50 note 41.

Persons held not common carriers

(1) Truck owners not holding themselves out as willing to serve the public generally, but hauling produce of their own and other farms under private contracts, including one with a producers' association which was not shown to be a common carrier, and expressly stipulated in the contract that no goods should be hauled except as directed by it, are not common carriers.—Public Utilities Commission of Ohio v. Holdren, 171 N.E. 255, 34 Ohio App. 416.

(2) Truck owner, transporting butter and eggs for creamery company under special contract, providing for carrying of insurance by such company at such owners' cost, was held not "common carrier," but "private carrier" or "bailee" when cargo was taken by robbers, although loss under insurance policy was fully paid to consignor.—Beatrice Creamery Co. v. Fisher, 10 N.E.2d 220, 291 Ill.App. 495.

(3) An owner of motor trucks engaged in hauling household goods and personal effects for hire, under private contracts, such trucks not traveling on regular routes nor between established termini, is not a common carrier.—Klein v. Baker, 296 P. 631, 112 Cal.App. 157.

(4) Truck driver engaged in the transfer business in a certain place under license, but not licensed to engage in such business in another city and not pursuing the business of carrying goods over a route from such other city to a third city, and never having held himself out as undertaking to carry goods for the public generally between them, did not, in undertaking to transport goods between such places in a particular instance, assume the liability of a common carrier.—Ney v. Haun, 109 S.E. 438, 131 Va. 557, 18 A.L.R. 1310.

55. Conn.—Ace-High Dresses v. J. C. Trucking Co., 191 A. 536, 122 Conn. 578.

56. N.Y.—Walker v. Taylor, 174 N.Y.S. 520, 186 App.Div. 544.

57. Pa.—City Transfer Co. v. Public Service Commission, 93 Pa.Super. 210.

Reference is made to Corpus Juris on this point in M. Lewis & Sons v. Illinois Cent. R. Co., Tenn., 259 S.W. 903, 904.

58. Pa.—City Transfer Co. v. Public Service Commission, 93 Pa.Super. 210.

panies hold themselves out as willing to transport goods for all who apply and are ready to pay the charges demanded, they are common carriers with reference to such business.[59]

§ 10. Forwarding Agents

A mere forwarding agent is not a common carrier unless he so conducts his business as to lead the public to believe he is such.

A forwarder or forwarding agent who, as agent for the shipper, merely contracts for the transportation of goods by carriers, and who has no interest in the freight but receives compensation from the shipper as his agent, is not a common carrier,[60] and is liable only for want of ordinary care.[61] He is not an insurer of the safety of the goods during transportation, or before, as is a common carrier, discussed hereafter in § 71, but is liable only for his own negligence or that of his agents.[62] However, where persons calling themselves forwarders are so conducting their business as to lead the public to believe that they are carriers, and are employed as carriers to ship goods without any knowledge of their true character, they are liable as common carriers.[63] Thus, an alleged forwarding agent who receives goods for transit, issues bills of lading, makes contracts in his own name with a railroad company for carriage, is, as to a person with whom he contracts for the delivery of goods, a common carrier and liable as such.[64] He is also a common carrier where he hauls the goods in his own vehicles to a railroad, and the goods are to be delivered to his agents at the place of destination, to be delivered by them finally to the consignee,[65] or where he undertakes to transport merchandise and delivers it to a carrier, paying the freight and providing for reimbursement by draft attached to the bill of lading.[66] So, where a forwarder undertakes to transport property from one city to another, for through rates less than the published rates for broken lots, which he is enabled to do by accumulating property for the given destination until a car can be filled, and a carload is billed to his distributing agent at the point of destination, the forwarding agent, while holding the property for accumulation, assumes the liability of a common carrier.[67]

Where a carrier undertakes to transport goods to their destination, deliver them to a purchaser, and return the purchase money received to the consignor, it is a carrier as to the transportation of the goods and an agent as to the sale, and a carrier again as to the money while transporting it to such consignor; and for loss of the money it is, therefore, liable, not only in case of negligence, but also under the same conditions that would charge liability on a carrier,[68] but with reference to custody of goods at destination, it may be bailee only.[69]

The status of an initial carrier as a forwarder is treated infra § 414.

§ 11. Companies Operating Pipe Lines

Pipe line companies, operating such lines as a public business for hire, are common carriers; but where they transport oil under private contract for particular persons, they are not common carriers.

An oil company which owns and operates a pipe line as a public business, holding itself out as ready to transport oil for all persons who may offer it for transportation for hire, is a common carrier,[70] and

59. Ill.—Neuman v Chicago & N. W. Ry. Co., 216 Ill App 387.
Va.—Carlton v. Boudar, 88 S.E. 174, 118 Va. 521, 4 A.L.R. 1480.
10 C.J. p 40 note 43.

60. U.S.—In re Emerson, Marlow & Co., Ill., 199 F. 99, 117 C.C.A. 639—In re Emerson, 199 F. 95, 117 C.C.A. 635
Cal.—Heath v. Judson Freight Forwarding Co., 190 P. 839, 47 Cal.App 426.
Minn.—Northwest Tablet Co. v. Universal Carloading & Distributing Co., 250 N.W. 456, 189 Minn. 582.
10 C.J. p 50 note 45.

Statement of this rule in Corpus Juris is quoted with approval in Highway Freight Forwarding Co. v. Public Service Commission, Pa., 164 A. 835, 836.

"Carrier" distinguished

"His [a forwarder's] compensation is limited to his care and trouble, and the charges paid by him, in receiving, keeping and duly forwarding; and, when he has placed the goods in the course of transit by the proper conveyance, his duty is at an end. His occupation is further distinguished from that of the carrier by the circumstance that he has no interest in, and receives no part of, the compensation that is paid for the carriage and due delivery of the goods."
N.Y.—Place v. Union Express Co., 2 Hilt. 19, 25.
Pa.—Detweiler v. Adams Express Co., 25 Pa.Dist. 503, 505.

61. Ill.—Ingram v American Forwarding Co., 162 Ill.App 476
Mo.—Holtzclaw v. Duff, 27 Mo. 392.
N.Y.—Stannard v. Prince, 64 N.Y. 300.
10 C.J. p 50 note 45.

62. Pa.—Detweiler v Adams Express Co., 25 Pa.Dist. 503.
10 C.J. p 50 note 46.

63. N.Y.—Slutzkin v. Gerhard & Hey, 191 N.Y.S. 104, 199 App.Div. 5.

64. Pa.—Highway Freight Forwarding Co. v. Public Service Commission, 164 A. 835.
10 C.J. p 50 note 47.

Statement of this rule in Corpus Juris is quoted with approval in Highway Freight Forwarding Co. v. Public Service Commission, Pa., 164 A. 835, 836.

65. Pa.—Blakiston v Davies, 42 Pa. Super. 390.

66. Ill.—Judson Freight Forwarding Co. v. Delaware, etc., R. Co., 163 Ill App 22

67. Cal.—Heath v. Judson Freight Forwarding Co., 190 P. 839, 47 Cal App 426.

68. N.Y.—Kemp v. Coughtry, 11 Johns 107
Pa.—Harrington v. McShane, 2 Watts 443, 27 Am.D 321.

69. Tex.—Williams v. O'Daniels, 35 Tex. 542
10 C.J. p 50 note 51.

70. U.S.—Producers' Transp. Co. v. Railroad Commission of State of

is sometimes declared to be such by express statutory provisions;[71] but a company constructed solely to transport oil for particular persons under strictly private contracts is not a common carrier, and the state cannot by mere legislative fiat or any regulating order of a commission, convert such private line into a public utility or make its owner a common carrier.[72]

An oil company operating a pipe line for the sole purpose of drawing oil from its own wells to its own refinery is not a common carrier within the statute extending the operation of the Interstate Commerce Act to any persons or corporations engaged in the transportation of oil or gas by pipe lines and declaring that they shall be considered common carriers within the meaning of the act; but, on the other hand, oil companies controlling interstate pipe lines are common carriers within the act where the oil offered for shipment in interstate transportation is accepted only on the condition that the party offering the oil shall sell it to them, or through them, on terms more or less dictated by themselves.[73] Whether the business conducted by a pipe line company is that of a common carrier is a question of fact.[74]

§ 12. Other Common Carriers

Whether or not certain other persons or corporations are common carriers has been considered.

The essentials of common carriers, as laid down in § 3 b supra, determine whether or not persons or corporations engaging in particular kinds of business are common carriers, as, for example, a contractor engaged to cut and transport timber,[75] a distributor,[76] an ice dealer,[77] and a person letting automobiles for hire.[78] Whether or not certain other persons or corporations engaged in particular kinds of business, not discussed in this section or in §§ 6–11 supra, are common carriers, is treated in the various titles relating to such callings. The question in reference to bridge companies is discussed in C.J.S. title Bridges § 69, also 9 C.J. p 475 note 63; the question as to boom companies is treated in C.J.S. title Logs and Logging § 49, also 38 C.J. p 207 note 45; as to ferrymen, in C.J.S. title Ferries § 26, also 25 C.J. p 1075 notes 2, 5; as to irrigation companies, in C.J.S. title Waters § 347, also 10 C.J. p 51 note 61, 67 C.J. p 1375 note 39 [a]; as to owners of vessels generally, in C.J.S. title Shipping § 101, also 58 C.J. p 340 notes 90–7; as to owners of vessels let on charter, in C.J.S. title Shipping § 34, also 58 C.J. p 154 notes 8, 9, 11; as to telegraph and telephone companies generally, in C.J.S. title Telegraphs and Telephones § 7, 62 C.J. p 17 note 87, p 18 note 1; as to telegraph companies transmitting money, in C.J.S. title Telegraphs and Telephones § 248, also 62 C.J. p 272 note 87; as to telegraph companies operating district telegraph and messenger service, in C.J.S. title Telegraphs and Telephones § 277, also 62 C.J. p 298 notes 68–71; as to tugboats, in C.J.S. title Towage § 13, also 63 C.J. p 19 note 19, p 20 note 22; as to warehousemen, in C.J.S. title Warehousemen and

California, 40 S.Ct. 131, 251 U.S. 228, 64 L.Ed. 239, affirming 169 P. 59, 176 Cal. 499—Producers Pipe Line Co. v. Martin, D.C.Ky., 22 F. Supp. 44

Ky.—Hall v. Cumberland Pipe Line Co., 237 S.W. 405, 193 Ky. 728.

Okl.—In re Champlin Refining Co., 264 P. 160, 129 Okl. 166

71. Colo.—Colorado, etc., R. Co. v. State R. Commn., 129 P. 506, 54 Colo. 64.

Pa.—Commonwealth v. Southern Pipe Line Co., 1 Pa.Dist. & Co.R. 616

Tex.—Gulf Sulphur Co. v. Ryman, Civ.App., 221 S.W. 310.

72. U.S.—Producers' Transp. Co. v. Railroad Commission of State of California, 40 S.Ct. 131, 251 U.S. 228, 64 L.Ed. 239, affirming 169 P. 59, 176 Cal. 499.

Cal.—Associated Pipe Line Co. v. Railroad Commission of California, 169 P. 62, 176 Cal. 518, L.R.A.1918C 849.

73. U.S.—U.S. v. Ohio Oil Co., Com. Ct., 34 S.Ct. 956, 234 U.S. 548, 58 L.Ed. 1459, reversing 204 F. 798.

Evident purpose of the statute "was to bring within its scope pipe lines that although not technically common carriers yet were carrying all oil offered, if only the offerers would sell at their price."—U.S. v. Ohio Oil Co., Com.Ct., 34 S.Ct. 956, 234 U.S. 548, 560, 58 L.Ed. 1459.

74. Cal.—Associated Pipe Line Co. v. Railroad Commission of California, 169 P. 62, 176 Cal. 518, L.R.A. 1918C 849—Producers' Transp. Co. v. Railroad Commission of California, 169 P. 59, 176 Cal. 499, affirmed 40 S.Ct. 131, 251 U.S. 228, 64 L.Ed. 239.

75. **Contractor to cut and transport timber**

A person contracting under a special contract to cut timber and transport it to a designated place is not a common carrier.—Pike v. Nash, 3 Abb.Dec., N.Y., 610, 1 Keyes 335.

76. **Distributor** who received furniture purchased in Michigan by furniture dealer and collected there by forwarding company and shipped by rail to distributor as consignee was not "common carrier," as regards liability of distributor for loss of furniture by fire in distributor's warehouse, where his contract with dealer required him only to receive and store furniture and notify dealer of its arrival.—Paine Furniture Co. v. Acme Transfer & Storage Co., 195 N.E. 302, 290 Mass. 195.

77. **Ice dealers**

A person engaged in the business of buying and selling ice using his truck exclusively in such business, does not become a common carrier because he takes a special job of moving another's household goods.—Hardin v. Grant, Tex.Civ.App., 54 S.W.2d 189.

78. **Letting automobiles for hire**

One who is in the business of letting automobiles for hire, is not necessarily a common carrier; the determination of the question depending on whether or not he is bound to carry for all who derive such service on tender of proper compensation.—Haddad v. Griffin, 142 N.E. 74, 247 Mass. 369.

Safe Depositaries § 2, also 67 C.J. p 445 notes 60–64; as to wharfingers, in C.J.S. title Wharves § 1, also 10 C J. p 51 note 59.

Carriers of mail see C.J.S. title Post Office § 31, also 49 C.J. p 1182 note 43–p 1186 note 19.

Operator of "inclines". One who operates an incline for hire and undertakes to carry the cargoes of all vessels plying a river up the incline to the cars of a railroad company is a common carrier.[79]

Stagecoach lines. A stagecoach line is not ordinarily a common carrier of goods, but an established practice of carrying for passengers packages which are not baggage will subject it to liability as a common carrier with respect to such packages.[80] The practice of conveying for hire in a stagecoach parcels not belonging to passengers constitutes the proprietors of the coach common carriers.[81] They may make themselves such either by special contract in a particular case or by their general course of business.[82]

§ 13. Applicability of Law of Bailments

A private carrier, as a bailee for hire, is within the law of bailments as to its liabilities.

A private carrier with or without reward is merely a bailee and his liability is determined by the rules governing the responsibilities of bailees,[83] and the law as to common carriers of goods is said to be a branch of the law relating to the subject of bailments,[84] that is, the carrier of goods is a bailee, and, aside from any considerations of public policy which affect the liability of a carrier conducting a public employment, its duties and liabilities are in general those of an ordinary bailee;[85] but these considerations of public policy[86] have led to the recognition by the courts, from an early period in the history of the common law, of rules, stated infra § 27 et seq, 40 et seq, 71 et seq, 147 et seq, respecting the duty of the common carrier as to serving the public, and as to liability for goods intrusted to its care which do not apply to private carriers of goods or to other bailees.[87] It has been said that, while a common carrier may become a bailee for hire when, as a matter of accommodation or special engagement, it undertakes to carry something which it is not its business to carry, yet when a carrier has a regularly established business for carrying all or certain articles, and especially if the carrier be a corporation created for the purpose of the carrying trade, its character as a common carrier cannot be divested by entering into a special contract.[88] So, it has been held that an express company, made by the constitution a common carrier in its line of business, is in no sense a bailee for hire in respect to such business.[89]

§ 14. Incorporation, Franchises, and Powers

State legislature ordinarily has power to provide for incorporation of carriers; and such carriers may make special contracts not prohibited by law.

State legislatures, except in so far as they may be restrained by constitutional provisions, have power to provide for the organization of corporations to furnish local transportation,[90] and the construction of statutes passed pursuant to such power is governed by the general rules.[91] A common carrier may make special contracts outside its duties to the public, and may make some special contracts relative to such duties, if they are not prohibited by statute or public policy, and under such contracts the carrier is not held to the strict liability of a common carrier.[92] As stated by other authorities, where a service or act is not clearly within the legal

79. Ark.—Joest v. Clarendon & Rosedale Packet Co., 183 S.W. 759, 122 Ark. 353.

80. Ohio—Jones v. Vorhees, 10 Ohio 145.
Pa.—Beckman v. Shouse, 5 Rawle 179, 28 Am.D. 653
10 C.J. p 48 note 23

81. Mass.—Dwight v. Brewster, 18 Mass. 50, 11 Am.D. 133.

82. Miss.—Powell v. Mills, 30 Miss. 231, 64 Am.D. 158.

83. Tex.—Hardin v. Grant, Civ.App., 54 S.W.2d 189
10 C.J. p 37 note 9, p 38 note 19.

84. Cal.—Klein v. Baker, 296 P. 631, 112 Cal.App. 157.

85. Tex.—Hardin v. Grant, Civ.App., 54 S.W.2d 189.
Wis.—Treleven v. Northern Pac. R. Co., 62 N.W. 536, 89 Wis. 598.

86. U.S.—Munn v. Illinois, 94 U.S. 113, 24 L.Ed. 77.

87. **This statement in Corpus Juris** has been quoted in Smallwood v. Jeter, Idaho, 244 P. 149, 154.

88. U.S.—New York Central R. Co. v. Lockwood, N.Y., 17 Wall. 357, 376, 21 L.Ed. 627.

89. Miss.—American Ry. Express Co. v. Wright, 91 So. 342, 128 Miss. 593, 23 A.L.R. 127.

90. Ill.—People v. City of Chicago, 182 N.E. 419, 349 Ill. 304.

Statute held not unconstitutional
Statute empowering municipalities to grant terminable permits to operate local transportation systems is not unconstitutional.—People v. City of Chicago, 182 N.E. 419, 349 Ill. 304.

91. Ill.—People v. City of Chicago, supra.

Statute construed
(1) There being nothing to indicate legislative intention to contrary, "city," within statute authorizing organization of corporations to furnish local transportation, should be construed as including villages and incorporated towns.—People v. City of Chicago, 182 N.E. 419, 349 Ill. 304

(2) Words "terminable permits" in such statute have no fixed meaning, and do not necessarily refer to permits terminable only for misuser.—People v. City of Chicago, supra.

(3) The legislature properly defined the meaning which it gave to the words of the statute.—People v. City of Chicago, supra.

92. S.C.—Reaves v. Western Union Telegraph Co., 96 S.E. 295, 110 S.C. 233.

duties of a common carrier, so that such carrier has the right to refuse to perform the same, it may contract for the performance thereof, if not ultra vires, in a different capacity from that which rests on it as a common carrier;[93] but it is not the proper business of a common carrier to foster particular enterprises or to build up new industries,[94] and hence, a common carrier exceeds its legitimate powers when it engages in the promotion of town building, although it would result in increased transportation and consequent prosperity for the carrier.[95]

Storage incidental to transportation. Where a carrier does not hold itself out to the public generally as a warehouseman, the storage of freight at terminal points, as incidental to the carrier's business of transporting freight, and free of charge for a specified time, subject to stipulated charges thereafter until the freight is removed, is not ultra vires.[96]

B. REGULATION AND CONTROL OF CARRIERS

§ 15. In General

The business of a common carrier is subject to governmental regulation and control.

The business of a common carrier with reference to the performance of its public duties is subject to governmental regulation and control,[97] within the limits of the constitution.[98] For the purposes of public regulation, there is a fundamental distinction between the acts of a common carrier in the performance of its public duties as such, and those done in the exercise of its purely private right to manage and control its own property in matters not embraced within its public duties.[99] So long as the service furnished by a common carrier in the discharge of its public duties is adequate, the public is not concerned with the selection of the particular agency through which such service is supplied.[1]

Judicial control. A common carrier of goods is also subject to judicial control to prevent the abuse of its powers and privileges.[2]

§ 16. By State

State has power to make reasonable regulations of the business of carriers, subject to constitutional restrictions.

A state has power to regulate and control common carriers in the operation and management of their business as carriers within the state,[3] except in so far as it is restricted by contract obligation imposed

93. Ala.—Ex parte Alabama Great Southern R Co, 90 So. 502, 206 Ala 400, 19 A.L.R. 978, reversing Alabama Great Southern R. Co v. Wood, 90 So. 503, 18 Ala.App 147.

94. U S—Union Pac Ry. Co. v. Goodridge, Colo, 13 S Ct 970, 149 U S 680, 37 L Ed 986

95. Mo—Foster Lumber Co v. Atchison, T. & S F Ry. Co, 194 S. W. 281, 270 Mo. 629, L R A.1918A 768.

96. Minn.—State v. Minneapolis, etc., R. Co, 131 N W. 1075, 115 Minn 116.

97. Ark.—Jones v. Ferguson, 27 S. W 2d 96, 181 Ark. 522.
Colo—Greeley Transp. Co. v. People, 245 P 720, 79 Colo 307.
Fla—State ex rel Postal Telegraph Cable Co v. Wells, 118 So 731, 96 Fla. 591, 60 A.L.R. 1072—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.
Mich—Grand Rapids & I. Ry. Co. v. Cobbs & Mitchell, 168 N.W. 961, 203 Mich. 133.
N.C.—Williams v. Kingston Mfg Co, 95 S.E. 366, 175 N.C 226
Va.—Atlantic Coast Line R Co. v. Commonwealth, 118 S.E. 257, 136 Va. 134.

"A common carrier by railroad, operating under charter, is affected with a public use, and is to a certain extent under the control of governmental authorities"—Williams v Kingston Mfg. Co., 95 S.E. 366, 175 N.C. 226.

98. Mich.—Grand Rapids & I. Ry. Co. v. Cobbs & Mitchell, 168 N W. 961, 203 Mich 133
Va.—Atlantic Coast Line R. Co. v. Commonwealth, 118 S.E 257, 136 Va. 134.

Every rule or regulation must be read in connection with the constitution, which declares that "the provisions of this article shall always be so restricted in their application as not to conflict with any of the provisions of the constitution of the United States, and as if the necessary limitations on their interpretation has been herein expressed in each case"—Atlantic Coast Line R. Co. v. Commonwealth, 118 S.E. 257, 136 Va. 134.

99. Fla—State ex rel. Postal Telegraph Cable Co. v Wells, 118 So. 731, 96 Fla. 591, 60 A.L.R. 1072—State v Jacksonville Terminal Co, 106 So. 576, 90 Fla. 721.

Common carrier has no public duty to use its property so that others having no business with it as carrier may profit.—State ex rel. Postal Telegraph Cable Co. v. Wells, 118 So. 731, 96 Fla. 591, 60 A.L.R. 1072.

1. Fla.—State ex rel. Postal Telegraph Cable Co. v. Wells, 118 So. 731, 96 Fla. 591, 60 A.L.R. 1072.

2. Ohio.—Scofield v. Lake Shore, etc, R. Co., 3 N.E 907, 43 Ohio St 571, 54 Am R. 846—Johnson Coal Min. Co. v. Hocking Valley R. Co., 14 Ohio S & C.P. 209, 213.

3. U.S—Atlas Pipe Line Co. v Sterling, D.C.Tex., 4 F.Supp 441.
Ariz.—Corporation Commission of Arizona v People's Freight Line, 16 P.2d 420, 41 Ariz 158.
Fla—State v Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.
Ky—Reo Bus Lines Co. v. Southern Bus Line Co., 272 S.W. 18, 209 Ky. 40.
Mont—Stoner v. Undersoth, 277 P. 437, 85 Mont 11.
R.I—Public Utilities Commission v. Rhode Island Co., 110 A. 654, 43 R. I. 135.
Tex.—Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co., Com. App., 221 S.W. 590, reversing, Civ. App, 173 S W. 222.
Wash—State v Public Service Commission of Washington, 162 P. 523, 94 Wash. 274.
10 C.J. p 52 note 80, p 53 note 81.

"It is agreed by all authorities in modern times that common carriers are subject to reasonable regulation by the state, and that such regulation should be exercised so as to pro-

by the charter or the statute under which the carrier is incorporated.[4] Any contract, usage, or practice observed by a common carrier, that has immediate relation to the duties of the carrier to its patrons, although it may be binding as between the parties, is subject to lawful governmental rules and regulations,[5] and a carrier cannot, by making contracts for future transportation, present or postpone assertion by state of the power to regulate it.[6] This power as respects intra-state traffic is in no way affected by the provisions of the Interstate Commerce Act.[7] The extent of the control and regulation is for the legislature to determine, subject to constitutional restrictions[8] and the requirement that regulations imposed shall be reasonable,[9] since the legislature cannot under the guise of regulation interfere with the proper conduct of the business of the carrier in matters which do not fairly belong to the domain of reasonable regulation.[10] The constitutional provision conferring the power of regulation, and the statutes enacted thereunder, contemplate that the regulations shall be efficient and adequate to conserve the public welfare.[11] So long as the use continues the power of regulation remains,[12] and extends to every phase of service as common carrier and to every act that affects such service,[13] as appears in subsequent sections dealing with specific regulations, particularly § 19 relating to the carriers, instrumentalities, and facilities subject to regulation, § 278 dealing with the power to fix and regulate rates, and § 350, as to the power to prohibit discrimination. When the legislature in unmistakable terms, and within constitutional limits, has exercised its power to regulate corporations, it should be given full effect, but no inferences unfavorable to the reasonable operation of the franchise of a corporation should be allowed from words susceptible of use in more than one sense.[14] The power of regulation "is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent."[15] Furthermore, in determining the extent of the state's power to control and regulate carriers it must be borne in mind that charters under which carriers operate are taken subject to any constitutional provisions existing at the time, which authorize the alteration or repeal of the charters[16] or authorize the legislature to pass laws prescribing certain regulations.[17] Even where the charter exempts a carrier from state regulation in certain respects, the state, nevertheless, has the power to see to it that the carrier keeps within the charter limits.[18]

§ 17. By Federal Government

Common carriers engaged in interstate transportation are subject to regulation by the federal government.

A common carrier engaged in interstate trans-

mote public necessity and convenience; the rights of the public being paramount to those of the carrier" —Corporation Commission of Arizona v. People's Freight Line, Inc., 16 P.2d 420, 422, 41 Ariz. 158

4. U.S.—Stone v. Farmers' Loan & Trust Co., Miss., 6 S.Ct. 334, 388, 1191, 116 U.S. 307, 29 L.Ed. 636.
Ind.—Indianapolis v. Navin, 47 N.E. 525, 51 N.E. 80, 151 Ind. 139, 41 L.R.A. 337.

5. Fla.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.

6. U.S.—Producers' Transp. Co. v. Railroad Commission of State of California, 40 S.Ct. 131, 251 U.S. 228, 64 L.Ed. 239, affirming 169 P. 59, 176 Cal. 499.
Mont.—Stoner v. Underseth, 277 P. 437, 85 Mont. 11.

7. Mo.—Hull v. Chicago Great Western R. Co., 185 S.W. 1155, 193 Mo.App. 425
Neb.—State v. Missouri Pac. R. Co., 115 N.W. 614, 81 Neb. 15.

8. U.S.—Atlas Pipe Line Co. v. Sterling, D.C.Tex., 4 F.Supp. 441.
Mo.—State ex rel. and to Use of Missouri Pac. R. Co. v. Public Service Commission, 259 S.W. 445, 303 Mo. 212
Tex.—Missouri, K. & T. Ry. Co. of Texas v. Bonfire Express Co., Com.App., 221 S.W. 590, reversing, Civ.App., 173 S.W. 222.
10 C.J. p. 53 notes 83–86.

9. U.S.—Atlas Pipe Line Co. v. Sterling, D.C.Tex., 4 F.Supp. 441.
Ariz.—Corporation Commission of Arizona v. People's Freight Line, 16 P.2d 420, 41 Ariz. 158.
Fla.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721—State v. Atlantic Coast Line R. Co., 47 So. 969, 56 Fla. 617, 32 L.R.A.,N.S. 639.
10 C.J. p. 52 note 80.

10. U.S.—Wisconsin, etc., R. Co. v. Jacobson, Minn., 21 S.Ct. 115, 179 U.S. 287, 45 L.Ed. 194—Lake Shore, etc., R. Co. v. Smith, Mich., 19 S.Ct. 565, 173 U.S. 684, 43 L.Ed. 858.

11. Fla.—Atlantic Coast Line R. Co. v. State, 143 So. 255, 106 Fla. 278

12. U.S.—Georgia R., etc., Co. v. Smith, Ga., 9 S.Ct. 47, 128 U.S. 174, 32 L.Ed. 377.

13. Fla.—State ex rel. Postal Telegraph Cable Co. v. Wells, 118 So. 731, 96 Fla. 591, 60 A.L.R. 1072.
Ga.—Atlanta Terminal Co. v. Georgia Public Service Commission, 137 S.E. 556, 163 Ga. 897

Liquidated damages

A legislature may provide by a general law that a shipper of live stock may recover liquidated damages from the carrier for failure to transport such stock committed to it for transportation between stations within the state.—Cram v. Chicago, etc., R. Co., 122 N.W. 31, 84 Neb. 607, 26 L.R.A.,N.S., 1022, rehearing allowed 123 N.W. 1045, 85 Neb. 586, 26 L.R.A.,N.S., 1028, 19 Ann.Cas. 170.

14. N.Y.—Kelly v. New York City R. Co., 84 N.E. 569, 192 N.Y. 97, affirming 104 N.Y.S. 561, 119 App.Div. 223, reversing 102 N.Y.S. 742, 52 Misc. 585.

15. U.S.—Railroad Commn. Cases, Miss., 6 S.Ct. 334, 388, 1191, 116 U.S. 307, 325, 29 L.Ed. 636.

16. U.S.—Piek v. Chicago, etc., R. Co., Wis., 94 U.S. 164, 24 L.Ed. 97, affirming 19 F.Cas.No.11,138, 6 Biss. 177.

17. Mich.—Wellman v. Chicago, etc., R. Co., 47 N.W. 489, 83 Mich. 592.

18. Miss.—Mississippi R. Commn. v. Gulf, etc., R. Co., 29 So. 789, 78 Miss. 750.

portation is subject to the regulations prescribed by the Interstate Commerce Act.[19]

Questions as to carriers, instrumentalities, and facilities subject to federal regulation are treated infra § 19; and questions relating to the power of congress to fix rates generally, and the construction and effect of provisions of the Interstate Commerce Act prohibiting unfair discrimination, are discussed infra §§ 279, 350 et seq.

The exclusive power of congress to regulate the interstate transportation of goods, and the means and methods of regulation are considered in the C.J.S. title Commerce §§ 92–94, also 10 C.J. p 56 note 30–p 58 note 61; 12 C.J. p 83 note 2–page 92 note 21.

§ 18. Supervision by Public Officers

a. In general
b. Reports to commission
c. Proceedings in exercise of powers

a. In General

Power of state to regulate common carriers may be exercised through public commissions whose regulations must be authorized by statute or constitution, and be reasonable. Such regulations prevail over conflicting rules of carrier.

The power of a state to regulate common carriers may be, and frequently is, exercised through public service commissions or other like boards and administrative officers,[20] and statutes conferring this power upon such commissions or officers have been held not an unconstitutional delegation of legislative power, as shown in the C.J.S. title Constitutional Law § 138, also 10 C.J. p 54 notes 9–14, 12 C.J. p 850 notes 52–93, the convenience and need of the public, not the benefit of the carriers, being the primary considerations,[21] whose authority is exclusive until revoked by the legislature.[22] The powers of such officers or bodies are limited to those conferred by the statute,[23] liberally construed to promote its objects,[24] or by provisions of the constitution;[25] and the exercise of the powers con-

19. Wis.—Holt Lumber Co. v. Duluth, S. S. & H. Ry. Co., 238 N. W. 839, 206 Wis. 77—Northern Wisconsin Produce Co. v. Chicago & N. W. Ry. Co., 234 N.W. 726, 203 Wis. 549.

Relations between common carriers and shippers under the Interstate Commerce Act are not merely contractual, but are fixed by the rules regulating interstate commerce.—Northern Wisconsin Produce Co. v. Chicago & N. W. Ry. Co., 234 N.W. 726, 203 Wis. 549.

20. Fla.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.
Ga.—Georgia Public Service Commission v. Saye & Davis Transfer Co., 154 S.E. 439, 170 Ga. 873.
Ill.—People v. City of Chicago, 182 N.E. 419, 349 Ill. 304.
Pa.—Brink's Express Co. v. Public Service Commission, 178 A. 346, 117 Pa. Super. 268.
R.I.—Public Utilities Commission v. Rhode Island Co., 110 A. 654, 43 R.I. 135.
Wash.—State v. Public Service Commission of Washington, 162 P. 523, 94 Wash. 274.

21. Ill.—Illinois Commerce Commission v. Chicago Rys. Co., 1 N.E. 2d 65, 362 Ill. 559.
Md.—West v. Williams, 173 A. 259, 167 Md. 316.

Protection of carrier against competition in order to conserve existing investments or to render less liable discontinuance of operation of its existing railway system must be regarded as secondary to fundamental obligation of commission to secure adequate and permanent service for public generally at least cost.—West v. Williams, 173 A. 259, 167 Md. 316.

22. Mo.—City of Cape Girardeau v. St. Louis-San Francisco Ry. Co., 267 S.W. 601, 305 Mo. 590, 36 A.L.R. 1488.

23. U.S.—Atlas Pipe Line Co. v. Sterling, D.C.Tex., 4 F.Supp. 411.
Fla.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.
Ga.—Estes v. Perry, 147 S.E. 370, 167 Ga. 902.
Ill.—Marion & E. R. Co. v. Illinois Cent. R. Co., 245 Ill.App. 83, certiorari denied 48 S.Ct. 320, 276 U.S. 626, 72 L.Ed. 738.
Ky.—Southern Ry. Co. v. Louisville Cooperage Co., 266 S.W. 382, 205 Ky. 721.
Ohio.—State v. New York Cent. R. Co., 154 N.E. 790, 115 Ohio St. 477.
Pa.—Cage v. Public Service Commission, 189 A. 896, 125 Pa.Super. 330.
Porto Rico.—Vidal & Co., Ltd. v. American R. Co., 28 Porto Rico 190.

Corpus Juris is cited as authority for this statement in Louisville & N. R. Co. v. Commonwealth, Ky., 226 S.W. 113, 118.

In absence of special legislation limiting or affecting power given to state railway commission by constitutional provision creating it, adopted on submission under L.1905 c. 233, it would seem that the people have given the commission all the control over common carriers that they themselves would exercise.—In re Lincoln Traction Co., 171 N.W. 192, 103 Neb. 229.

Acts held not authorized

The railroad commissioners of the state of Florida, acting under the authority of Const. art. 16, § 30, by the amendment of art. 5 § 35, adopted in 1898, and by L.1899 p. 76 c. 4700, have no power to require a railroad company to transport freight from any point on its own line within the state to a destination on a connecting line, when it does not appear that it holds itself out to the public to perform such services, nor have the railroad commissioners power to impose penalties on a railroad which refuses compliance with such an order.—State v. Louisville, etc., R. Co., 40 So. 885, 51 Fla. 311.

24. Ky.—Southern Ry. Co. v. Louisville Cooperage Co., 266 S.W. 382, 205 Ky. 721.

25. Okl.—Western Union Telegraph Co. v. Carter, 220 P. 635, 93 Okl. 269—Missouri, O. & G. Ry. Co. v. State, 156 P. 1155, 53 Okl. 311.
Va.—City of Portsmouth v. Virginia Ry. & Power Co., 126 S.E. 362, 141 Va. 54, 39 A.L.R. 1510.

Powers conferred by constitution

Under Const. art. 9 § 18, relating to power of corporation commission, the commission has power to adopt and promulgate orders regulating intrastate shipment of cattle.—Shaff v. Kramer, 235 P. 517, 109 Okl. 109.

Only public duties of carrier are subject to the supervision of the railroad commission, under Const. Va.1902 § 156 (b).—City of Portsmouth v. Virginia Ry. & Power Co., 126 S.E. 362, 141 Va. 54, 39 A.L.R. 1510.

ferred is subject, of course, to constitutional restrictions.[26]

Under the constitution of some states the railway commission has independent legislation, judicial, executive, or administratrive powers in so far as necessarily involved in the general regulation and control of common carriers, and such exercise of the commission's powers may be controlled or limited by the legislature.[27] The rules and regulations which the commission is authorized to make must be reasonable,[28] and under constitutional and statutory provisions, in some jurisdictions, such rules and regulations are prima facie just and reasonable, and correct as to the facts found.[29]

The difficulty of making specific enumeration of all such powers as the legislature may intend to confer upon railroad commissioners for the regulation of common carriers in the interest of the public welfare renders it necessary to confer some powers in general terms, and general powers given are intended to confer other powers than those specifically enumerated.[30] The power of a state commission to regulate and control common carriers includes the power to determine whether a company may incorporate for transportation as a common carrier, that being an administrative question,[31] and the same is true as to the determination of the extent of competition in the intrastate transportation of freight.[32] It is within the power of the commission to anticipate and provide for the reasonable requirements necessitated by the prospective growth of the carrier's business.[33] The commission is not deprived of jurisdiction to require service to be furnished by a common carrier to a shipper by the fact that a controversy, arising out of contract, exists between the carrier and shipper and that ultimately the question of the validity of the contract must be determined in a suit at law.[34] A state commission has no power to authorize a carrier to disregard the plain provisions of a statute,[35] or to make local transfer agents the agents of the terminal company or of railroads entering the terminal station.[36] Rules and regulations prescribed by a state railroad commission supersede any rules or regulations prescribed by the carrier which are in conflict therewith.[37] What carriers, instrumentalities, and facilities are subject to regulation by a state through its public service commission, is considered infra § 19.

b. Reports to Commission

Carrier may be required to make reports to railroad commission.

A railroad commission may require a carrier to give notice to such commission of any accident to a train operated by it, where empowered so to do by statute.[38] It is otherwise, however, in the absence of express statutory authority.[39] A public service commission act, which provides that the

26. Fla.—Riley v. Lawson, 143 So. 619, 106 Fla. 521—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.
Neb.—In re Lincoln Traction Co., 171 N.W. 192, 103 Neb. 229.
10 C.J. p 54 note 17.

Regulation of common carriers on highways

Power of legislature to impose on railroad commission regulatory powers over common carriers on highways is not restricted by constitutional provision relative to railroads.—Ex parte Sparks, 2 S.W.2d 449, 108 Tex.Cr. 619.

27. Neb.—In re Lincoln Traction Co., 171 N.W. 192, 103 Neb. 229.

28. U.S.—Atlas Pipe Line Co. v. Sterling, D.C.Tex., 4 F.Supp. 441.
Fla.—State v. Atlantic Coast Line Co., 81 So. 498, 77 Fla. 366.
Pa.—Cage v. Public Service Commission, 189 A. 896, 125 Pa.Super. 330—Vance Transp. Co. v. Public Service Commission of Pennsylvania, 161 A. 428, 105 Pa.Super. 228—Collins v. Public Service Commission, 84 Pa.Super. 58.
S.D.—John Morrell & Co. v. American Ry. Express Co., 187 N.W. 724, 45 S.D. 399.
Va.—City of Portsmouth v. Virginia Ry. & Power Co., 126 S.E. 362, 141 Va. 54, 39 A.L.R. 1510.

29. Fla.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721—State v. Atlantic Coast Line R. Co., 81 So. 498, 77 Fla. 366.
Ill.—State Public Utilities Commission of Ill. v. Atchison, T. & S. F. Ry. Co., 115 N.E. 904, 278 Ill. 58—State Public Utilities Commission v. Chicago & W. T. Ry. Co., 114 N.E. 325, 275 Ill. 555.
Okl.—Bromide Crushed Rock Co. v. Dolese Bros. Co., 247 P. 74, 121 Okl. 40.
10 C.J. p 55 note 26-27.

30. Fla.—State v. Atlantic Coast Line R. Co., 54 So. 900, 61 Fla. 799—State v. Atlantic Coast Line R. Co., 47 So. 969, 56 Fla. 617, 32 L.R.A.,N.S., 639.

31. Pa.—Vance Transp. Co. v. Public Service Commission of Pennsylvania, 161 A. 428, 105 Pa.Super. 228.

Extent of jurisdiction

Under the Public Service Company Law, Pa.St.1920 § 18057 et seq., the public service commission has jurisdiction to determine what transportation service is necessary or desirable for the convenience, comfort, and safety of the public. Such jurisdiction extends to municipalities as well as to the state at large. It is an administrative question rather than one of law, and one which must be left in a large degree to the sound judgment of the public service commission.—Collins v. Public Service Commission, 84 Pa.Super. 58.

32. Pa.—Cage v. Public Service Commission, 189 A. 896, 125 Pa.Super. 330.

33. Fla.—State v. Atlantic Coast Line R. Co., 81 So. 498, 77 Fla. 366.

34. Ohio.—New York Cent. R. Co. v. Public Utilities Commission of Ohio, 164 N.E. 427, 119 Ohio St. 331.

35. Tex.—State R. Commn. v. Galveston Chamber of Commerce, 115 S.W. 94, 51 Tex.Civ.App. 476.

36. Fla.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.

37. Okl.—U. S. Express Co. v. State, 150 P. 178—St. Louis, etc., R. Co. v. Travelers' Corp., 148 P. 166.

38. Miss.—Stone v. Yazoo, etc., R. Co., 62 Miss. 607, 52 Am.R. 193.

39. Fla.—State v. Louisiana, etc., R. Co., 49 So. 39, 57 Fla. 526.

commission shall prescribe the form of the annual reports required under the act to be made by common carriers, that the contents of such report and the form thereof shall conform as near as may be to that required of common carriers under act of congress to regulate commerce, and that the commission may require such report to contain information relative to rates or regulations concerning fares or freights, contemplates a report independently of that required by the general railroad law, or else such report as may be indicated by the commission in the form which it prescribes.[40] Although a statute requires every one operating a railroad under a contract or lease to file the same in the office of the state corporation commission, the object is merely to furnish the commission with information of the lease or its contents; and if the commission treats the filing of a verified copy as a sufficient compliance with the statute a freight rate established in favor of the lessee cannot be declared invalid because there was not a strict compliance with the statute.[41]

c. Proceedings in Exercise of Powers

Whether a carrier is a common carrier subject to regulation is a question for determination of commission, subject to review by courts. A commission may, in determining carrier's status, order the production of books and papers.

A public service commission has jurisdiction to determine preliminarily the question whether or not a particular carrier is engaged in the business of a common carrier so as to be subject to regulation,[42] subject to review by the courts when the commission has acted, as stated infra § 24. The commission is authorized to procure the information necessary to evoke it to determine the question of the carrier's status, and for this purpose may order the production of books and papers bearing on the question; and if it finds that the carrier is a common carrier, the commission may render such orders as it thinks proper, using to that end the processes afforded it by the constitution and laws of the state.[43] In conducting hearings the commission does not sit as a legislative committee for the purpose of formulating a public policy and putting it into effect by the issuance of general rules, legislative in nature, but is limited to an investigation of specific acts of omission or commission on the part of common carriers.[44]

§ 19. Carriers, Instrumentalities, and Facilities Subject to Regulation

a. Particular kinds of carriers subject to regulation

b. Particular matters subject to regulation

a. Particular Kinds of Carriers Subject to Regulation

(1) In general

(2) Private carriers and common carriers acting as such

(1) In General

Carriers subject to governmental regulation include not only railroads, but any carrier whose mode of operation is such as to constitute it a common carrier.

Although the greater part of the regulations of common carriers is directed against railroads, it is not essential to the power to regulate that a carrier be an incorporated railroad, engaged as such,[45] but any carrier whose property is employed in public transportation service, and which so conducts its business as to constitute it a common carrier under the rules stated in §§ 3, 7–12 supra, is subject to governmental regulation directly by the legislature or through the agency of public service commissions.[46] Persons and companies which may be sub-

40. N.Y.—Peo. v. Johne, 121 N.Y.S. 857, 65 Misc. 394.

41. Va.—Carolina, etc., R. Co. v. Clinch Valley Lumber Co., 72 S.E. 116, 112 Va. 540, 543.

42. La.—Crowell & Spencer Lumber Co. v. Louisiana Public Service Commission, 102 So. 866, 157 La. 676—Standard Oil Co. of Louisiana v. Louisiana Public Service Commission, 97 So. 859, 154 La. 557.
Ohio.—Craig v. Public Utilities Commission of Ohio, 154 N.E. 795, 115 Ohio St. 512.

43. La.—Standard Oil Co. of Louisiana v. Louisiana Public Service Commission, 97 So. 859, 154 La. 557.

Scope of investigation
The public service commission, having instituted investigation as to operation of common carrier pipe line by an oil company and a pipe line company to which it had transferred the pipe line, had right to procure information as to value of the pipe line company's property, and amount of oil transported by it, and its earnings and expenses, and as to cost and value of the pipe line system transferred, and amount of oil transported through it by the oil company, and charges and expenses thereof.—Standard Oil Co. of Louisiana v. Louisiana Public Service Commission, 97 So. 859, 154 La. 557.

44. Mo.—Public Service Commission of Missouri v. St. Louis-San Francisco Ry. Co., 256 S.W. 226, 301 Mo. 157.

45. U.S.—Smitherman & McDonald v. Mansfield Hardwood Lumber Co., D.C.Ark., 6 F.2d 29.

46. U.S.—Sanger v. Lukens, D.C. Idaho, 24 F.2d 226, reversed on other grounds, C.C.A., 26 F.2d 855.
N.Y.—Huff v. Manhattan Transit Co., 198 N.Y.S. 280, 119 Misc. 814, affirmed 205 N.Y.S. 929, 209 App. Div. 904.

Public interest in use
When one in effect sets apart his property to a use in which the public has an interest, he in effect grants such use to the public and as a consequence must submit to be controlled by the public for the com-

jected to governmental control in addition to railroads,[47] whether such railroads are owned and operated by industrial companies, such as lumber or logging companies,[48] or by terminal companies,[49] include express companies[50] although not organized as corporations,[51] pipe lines,[52] and other carriers mentioned supra §§ 6–12, whose status has been determined to be that of common carriers. So, if the owner of private property voluntarily associates the property with that of another for a certain period of time in the creation of a common carrier system, thereby leading the public to believe that the system is tendered to the public for such services as are usually rendered by common carriers, such property is subject to regulation as such during the prescribed period, unless the owner may go into a court of competent jurisdiction and show a right to withdraw the property from public service before the expiration of such period.[53] A statute giving the public service commission jurisdiction over common carriers, and defining the same as including railroad corporations, express companies, etc., and all persons and associations of persons "operating such agencies for public use in the conveyance of persons or property," applies only to the agencies enumerated, and to no others.[54]

(2) Private Carriers and Common Carriers Acting as Such

Under its power to regulate common carriers, a state cannot regulate purely private carriers; nor are private activities of common carriers subject to governmental regulation.

A state under its power to regulate common carriers, has no power, either directly or through its administrative boards or officers, to regulate purely private carriers,[55] and it cannot, by legislative fiat,

mon good to the extent of the interest he has created.—Pacific Spruce Corporation v. McCoy, D.C.Or., 294 F. 711, affirmed McCoy v. Pacific Spruce Corporation, C.C.A., 1 F.2d 853.

Corporation organized under private act

Where a corporation organized in 1899 under a private act to operate vehicles as a common carrier in New York City never exercised its alleged powers, it may not now begin to exercise them, unless it complies with Greater New York Charter §§ 74, 1458, Transportation Corporation Law §§ 20, 25, 26, and Public Service Commission Law § 53, relating to permission, supervision, and regulation of such carrier, and its attempt to do so will be enjoined at the suit of a competitor.—Huff v. Manhattan Transit Co., 198 N.Y.S. 280, 119 Misc. 814, affirmed 205 N.Y.S. 929, 209 App.Div. 904.

47. Ill.—Kenna v. Calumet, H. & S. E. R. Co., 206 Ill.App. 17, affirmed 120 N.E. 250, 284 Ill. 301.
Md.—Whitman v. Northern Cent. Ry. Co., 127 A. 112, 146 Md. 580.
Okl.—Bromide Crushed Rock Co. v. Dolese Bros. Co., 247 P. 74, 121 Okl. 40.

By organizing under the general Railroad Act a company assumes the duty of a common carrier, subject to the regulatory power of the legislature.—Kenna v. Calument, H. & S. E. R. Co., 206 Ill.App. 17, affirmed 120 N.E. 250, 284 Ill. 301.

Railroads subject to Interstate Commerce Act

(1) The word "organized," in Interstate Commerce Act § 20a subsec. 1, as added by Transportation Act Feb. 28, 1920 § 439, U.S.Comp.St.Annot.Suppl.1923 § 8592a, defining "carrier" as "any corporation organized for purpose of engaging in transportation by railroad subject to this act," is used to describe present and existing status of corporation, and not its status or condition at some past time.—Whitman v. Northern Cent. Ry. Co., 127 A. 112, 146 Md. 580.

(2) Where railroad which was organized and did business for many years as a common carrier leased its system to another, whereby lessee performed actual work of transportation of leased system, but lessor was required to discharge many duties as a carrier, is still organized to act as carrier, and in event of default by lessee must again operate railroad system as a carrier, it still remained a "common carrier," within meaning of Interstate Commerce Act § 20a, as added by Transportation Act Feb. 28, 1920 § 439, U.S.Comp.St.Annot.Suppl.1923 § 8592a.—Whitman v. Northern Cent. Ry. Co., supra.

48. U.S.—Smitherman & McDonald v. Mansfield Hardwood Lumber Co., D.C.Ark., 6 F.2d 29.
N.M.—Threlkeld v. Third Judicial Dist. Court, 15 P.2d 671, 36 N.M. 350, 86 A.L.R. 547.
N.C.—Raleigh Granite Co. v. Atlantic Coast Line R. Co., 121 S.E. 767, 187 N.C. 424.

Condemnation of land by logging company for right of way for logging railroad subjects company to laws governing common carriers.—Threlkeld v. Third Judicial Dist. Court in and for Otero County, 15 P.2d 671, 36 N.M. 350, 86 A.L.R. 547.

State may on application of lumber company railroad declare it to be a common carrier, and the corporation commission, in imposing on it, with its consent, the duties, privileges, and liabilities of such relation to the public, was acting for the state through its prescribed machinery.—Raleigh Granite Co. v. Atlantic Coast Line R. Co., 121 S.E. 767, 187 N.C. 424.

49. U.S.—U.S. v. Chicago, B. & Q. R. Co., C.C.A.Colo., 293 F. 185.
Fla.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.

50. Neb.—State v. Pacific Express Co., 115 N.W. 619, 80 Neb. 823, 18 L.R.A.,N.S., 664.

51. Ind.—U.S. Express Co. v. State, 73 N.E. 101, 164 Ind. 196.

52. U.S.—Producers' Transp. Co. v. Railroad Commission of California, 40 S.Ct. 131, 251 U.S. 228, 64 L.Ed. 239, affirming 169 P. 59, 176 Cal. 499.—Atlas Pipe Line Co. v. Sterling, D.C.Tex., 4 F.Supp. 441.

53. Okl.—Western Union Telegraph Co. v. Carter, 220 P. 635, 93 Okl. 269.

54. N.Y.—People ex rel. Kelly v. Public Service Commission, 157 N.Y.S. 703, 171 App.Div. 810.

Elevator between street levels

Under Public Service Commissions Law § 2 subd. 9, defining common carrier, an elevator between street levels is not a common carrier within § 5, enumerating services over which the commission has jurisdiction.—People ex rel. Kelly v. Public Service Commission, 157 N.Y.S. 703, 171 App.Div. 810.

55. U.S.—Frost v. Railroad Commission of California, 46 S.Ct. 605, 271 U.S. 583, reversing 240 P. 26, 197 Cal. 230.—Denver & R. G. W. Ry. Co. v. Linck, C.C.A.Utah, 56 F.2d 957.—Film Transport Co. v. Michigan Public Utilities Commission, D.C.Mich., 17 F.2d 857.
Ark.—Jones v. Ferguson, 27 S.W.2d 96, 181 Ark. 522.
Cal.—Associated Pipe Line Co. v.

convert a private carrier into, or compel it to become, a common carrier, so as to be subject to regulations applicable only to common carriers,[56] although it has been held that the legislation, without violating this rule, may place private carriers operating on public highways under the control of the corporation commission and empower the commission to prescribe for them regulations necessary for public safety and order,[57] and that a statute requiring such carriers to obtain permits to operate on the highway is valid.[58] A statute regulating transportation will, to uphold its validity, be construed as intended to be limited to common carriers.[59] Common carriers may have activities which lie outside the performance of their duties as such, and not subject to state regulation[60] or the provisions of the Interstate Commerce Act;[61] but a common carrier dealing with transportation that is subject to the Act cannot escape its statutory obligations by calling itself a private carrier as to such transactions.[62]

b. Particular Matters Subject to Regulation

(1) Facilities for accommodation of public generally
(2) Connections with, and facilities to, other carriers
(3) Carriage of particular articles
(4) Systems of bookkeeping

(1) Facilities for Accommodation of Public Generally

Common carrier may be required to furnish reasonable and adequate facilities for convenience of public.

The legislature has power, either directly or through a commission or board, to require common carriers to furnish facilities adequate for the safe

Railroad Commission of California, 169 P. 62, 176 Cal. 518, L.R.A.1918C 849

Ga.—Georgia Public Service Commission v. Washburn Bonded Warehouse, 157 S.E. 518, 172 Ga. 106—Georgia Public Service Commission v. Taylor, 157 S.E. 515, 172 Ga. 100—McIntyre v. Harrison, 157 S.E. 499, 172 Ga. 65.

Idaho—In re Public Utilities Commission's Investigation, 1 P.2d 627, 51 Idaho 56.

La.—National Sand & Gravel Co. v. Jones Contracting Co., 126 So. 560, 13 La.App. 240.

Ohio—Motor Freight v. Public Utilities Commission of Ohio, 165 N.E. 355, 120 Ohio St. 1.

Pa.—Phillips v. Public Service Commission, Super., 191 A. 641—Brink's Express Co. v. Public Service Commission, 178 A. 346, 117 Pa.Super. 268—Harder v. Public Service Commission, 90 Pa.Super. 373.

Wis.—Great Atlantic & Pacific Tea Co. v. Hattle, 236 N.W. 575, 205 Wis. 7.

"The court below seemed to think that, if the state may not subject the plaintiffs in error to the provisions of the act in respect of common carriers, it will be within the power of any carrier, by the simple device of making private contracts to an unlimited number to secure all the privileges afforded common carriers without assuming any of their duties or obligations. It is enough to say that no such case is presented here, and we are not to be understood as challenging the power of the state, or of the Railroad Commission under the present statute, whenever it shall appear that a carrier, posing as a private carrier, is in substance and reality a common carrier, to so declare and regulate his or its operations accordingly."—Frost v. Railroad Commission of State of California, Cal., 46 S.Ct. 605, 609, 271 U.S. 583, 70 L.Ed. 1101.

Private pipe line

St.1913 p. 657, regulating pipe line companies, or other instrumentalities, or persons transporting oil, petroleum, or its products, enacted in pursuance of Const. art. 12 § 23, authorizing the legislature to regulate such business, applies only to persons or other agencies transporting oil or its products to or for the public—Associated Pipe Line Co. v. Railroad Commission of California, 169 P. 62, 176 Cal. 518, L.R.A.1918C 849.

56. U.S.—Frost v. Railroad Commission of State of California, 46 S.Ct. 605, 271 U.S. 583, 70 L.Ed. 1101, 47 A.L.R. 457, reversing Frost v. Railroad Commission of California, 240 P. 26, 197 Cal. 230—Michigan Public Utilities Commission v. Duke, Mich., 45 S.Ct. 191, 266 U.S. 570, 69 L.Ed. 445, 36 A.L.R. 1105

Ariz.—Claypool v. Lightning Delivery Co., 299 P. 126, 38 Ariz. 262—State v. Smith, 252 P. 1011, 31 Ariz. 297.

Cal.—Frost v. Railroad Commission of California, 240 P. 26, 197 Cal. 230, reversed on other grounds Frost v. Railroad Commission of State of California, 46 S.Ct. 605, 271 U.S. 583, 70 L.Ed. 1101.

Ga.—Georgia Public Service Commission v. Washburn Bonded Warehouse, 157 S.E. 518, 172 Ga. 106—Georgia Public Service Commission v. Taylor, 157 S.E. 515, 172 Ga. 100—McIntyre v. Harrison, 157 S.E. 499, 172 Ga. 65.

Idaho.—Smallwood v. Jeter, 244 P. 149, 42 Idaho 169.

Mass.—Commonwealth v. New England Transp. Co., 185 N.E. 23, 282 Mass. 429.

Pa.—Dairymen's Co-op. Sales Ass'n v. Public Service Commission of Pennsylvania, 177 A. 770, 318 Pa. 381, 98 A.L.R. 218—Phillips v. Public Service Commission, Super., 191 A. 641.

R.I.—Mooney v. Tuckerman, 144 A. 891, 50 R.I. 37.

Wash.—Big Bend Auto Freight v. Ogers, 269 P. 802, 148 Wash. 521.

57. Ariz.—State v. Smith, 252 P. 1011, 31 Ariz. 297.

Ga.—Georgia Public Service Commission v. Saye & Davis Transfer Co., 154 S.E. 439, 170 Ga. 873.

58. U.S.—Stephenson v. Binford, D.C.Tex., 53 F.2d 509, affirmed 53 S.Ct. 181, 287 U.S. 251, 77 L.Ed. 288, 87 A.L.R. 721.

59. Ariz.—State v. Smith, 252 P. 1011, 31 Ariz. 297.

Idaho.—Smallwood v. Jeter, 244 P. 149, 42 Idaho 169.

60. Fla.—State ex rel. Postal Telegraph Cable Co. v. Wells, 118 So. 731, 96 Fla. 591, 60 A.L.R. 1072.

Terminal companies

Powers and duties of railroad commissioners as applied to terminal companies have reference to public duties of such companies only as common carriers.—State ex rel. Postal Telegraph Cable Co. v. Wells, 118 So. 731, 96 Fla. 591, 60 A.L.R. 1072.

61. U.S.—Kansas City Southern Ry. Co. v. U. S., Mo., 51 S.Ct. 304, 282 U.S. 760, 75 L.Ed. 684.

62. U.S.—Kansas City Southern Ry. Co. v. U. S., supra.

transportation of freight and the performance of their duties generally to their patrons,[63] and the fact that such service would be unremunerative and burdensome does not operate to prevent the state from imposing the duty to perform it if the burden to the carrier has some fair relation to the benefits accruing to the public, and the burden of the particular service considered with reference to the entire business of the carrier does not in fact amount to a denial to the carrier of a reasonable compensation for the service rendered by it as an entirety.[64] The power to require reasonable facilities and conveniences for the transaction of its business with the public, it has been said, is as broad and ample as the police power,[65] but it is subject to the limitations that the duty imposed on the carrier must relate to matter which is within the domain and a proper subject of police regulation,[66] that it must be reasonable,[67] and that it should not be extended to bring within its scope private persons or corporations. It can only be invoked in order to promote the public convenience.[68]

In accordance with these rules, carriers may be required to increase the number of trains, where it does not operate a sufficient number reasonably to serve the needs of shippers;[69] to furnish adequate telephone service for the convenience of its patrons;[70] to furnish cars to shippers,[71] to furnish car door boards for box cars carrying coal,[72] to have cotton compressed in transit where the shipper so instructs by a notation on the bill of lading,[73] to maintain icing stations,[74] to provide suitable facilities for the removal of freight from its premises;[75] or to weigh grain shipped in bulk and issue a receipt stating the true weight.[76] Milling in transit,[77] and cleaning, mixing, and storing in transit,[78] are lawful services which may be required of common carriers; and the board of commissioners may determine when and where such services shall be furnished, and what is adequate compensation there-

63. Ill.—Shellabarger Elevator Co v. Illinois Cent R. Co., 116 N.E. 170, 278 Ill. 333, L.R.A.1917E 1011
Iowa—State v Chicago, M. & St. P Ry. Co., 130 N.W. 802, 152 Iowa 317, affirmed Chicago, M & St. P R. Co. v. State of Iowa, 34 S.Ct. 592, 233 U.S. 334, 58 L.Ed. 988.
Neb—Rivett Lumber & Coal Co. of Benson v. Chicago & N. W Ry. Co., 167 N.W. 570, 102 Neb. 492
S.D.—John Morrell & Co. v. American Ry. Express Co, 187 N.W. 724, 45 S.D. 399
Tex—Missouri, K & T. Ry. Co of Texas v Empire Express Co, Com App., 221 S.W. 590, reversing, Civ. App., 173 S.W 222
Wash—State v Public Service Commission of Washington, 162 P. 523, 94 Wash 274.
10 C.J. p 53 note 93, p 59 notes 74–76.

Corpus Juris is quoted with approval in Cahill & Redman v. Great Northern Ry. Co., 166 N.W. 306, 308, 40 S.D. 55, in support of the proposition stated in this and the following text.

Compelling payment for switching services

Railroad Commission has jurisdiction to compel railroad to pay gravel company for switching cars by latter's locomotive on latter's spur tracks between gravel plants and railroad, but the commission cannot force railroad to use shipper's private tracks, nor shipper to allow railroad's use thereof—Missouri Pac. R. Co. v. Whelen Springs Gravel Co., 49 S.W.2d 374, 185 Ark. 669, certiorari denied 53 S.Ct. 87, 287 U.S. 638, 77 L.Ed. 553.

64. Fla.—State v. Louisville, etc., R. Co., 57 So. 175, 62 Fla. 315.
S.D—Cahill & Redman v Great Northern Ry. Co, 166 N.W. 306, 40 S.D. 55.

However, the loss resulting from performance of a particular duty may be considered in determining the reasonableness of the order requiring that particular service to be rendered.—State v. Louisville, etc., R. Co., 57 So. 175, 62 Fla. 315.

65. U.S.—Wisconsin, etc., R. Co. v. Jacobson, Minn., 21 S.Ct. 115, 179 U.S. 287, 45 L.Ed. 194

66. Okl.—Atchison, etc., R. Co. v. State, 100 P. 11, 23 Okl. 210, 21 L.R.A.,N.S., 908.

67. U.S.—Norfolk & W. Ry. Co. v. Public Service Commission of West Virginia, 44 S.Ct. 439, 265 U.S. 70, 68 L.Ed. 904, affirming 113 S.W. 247, 91 W.Va. 414—Atlas Pipe Line Co. v. Sterling, D.C.Tex., 4 F.Supp 441.
Ill.—Shellabarger Elevator Co. v. Illinois Cent R. Co., 116 N.E. 170, 278 Ill. 333, L.R.A.1917E 1011.
La—Empire Rice Milling Co. v. Railroad Commission, 79 So 833. 143 La. 1036.
Neb.—State v. Missouri Pac. Ry. Co, 161 N.W 270, 100 Neb. 700, P.U.R. 1917C 597, L.R.A.1918E 346.
S.D—John Morrell & Co. v. American Ry. Express Co., 187 N.W. 724, 45 S.D 399.
Tex—Missouri, K & T. Ry. Co. of Texas v Empire Express Co, Com. App., 221 S.W. 590, reversing, Civ. App., 173 S.W. 222.
10 C.J. p 59 notes 74–76, p 60 note 81.

68. Okl.—Chicago, etc., R. Co. v. State, 99 P. 901, 23 Okl. 94.

69. Colo.—Colorado, etc., R. Co. v State R. Commn, 129 P 506, 54 Colo 64

70. Neb—State v. Missouri Pac. Ry. Co, 161 N.W 270, 100 Neb. 700, P.U.R.1917C 597, L.R.A.1918E 346
Okl—Atchison, etc., R Co v. State, 100 P. 11, 23 Okl. 210, 21 L.R.A., N.S., 908.

71. Wash—State v. Public Service Commission of Washington, 162 P. 523, 94 Wash. 274.

72. Colo.—Boetticher v. Public Utilities Commission of Colorado, 213 P. 114, 73 Colo. 46, error dismissed 44 S.Ct 458, 265 U.S 572, 68 L.Ed. 1185.

73. Tex.—West Texas Compress & Warehouse Co v. Panhandle & S.F. Ry. Co, Com.App, 15 S.W.2d 558, affirming, Civ.App., 7 S.W.2d 597
10 C.J. p 59 note 75 [f].

Carrier may select agent to compress the cotton—West Texas Compress & Warehouse Co. v. Panhandle & S. F. R. Co, Tex.Com.App., 15 S.W.2d 558.

74. Pa.—Farris Bros. & Co v. Pennsylvania R. Co, 98 Pa.Super 123

75. U.S—Norfolk & W. Ry. Co. v Public Service Commission of West Virginia, 44 S.Ct. 439, 265 U.S 70, affirming 113 S.E 247, 91 W.Va 414.

76. Ill—Shellabarger Elevator Co. v. Illinois Cent R. Co, 116 N.E. 170, 278 Ill. 333, L.R.A.1917E 1011.

77. La—Empire Rice Milling Co. v Railroad Commission of Louisiana, 79 So. 833, 143 La. 1036.
N.D.—State v. Great Northern Ry. Co., 219 N.W. 295, 56 N.D 822

78. N.D.—State v. Great Northern Ry. Co., supra.

for.[79] Even if the service of milling in transit may not be enforced by a state railroad commission, yet when voluntarily entered on it may be regulated.[80] So, an order of the railroad commission requiring pipe line carriers to install motors, make reports, and submit records to inspection has been held to be within the statutory grant of power to regulate the production and transportation of oil.[81]

(2) Connections with, and Facilities to, Other Carriers

Carrier may be required to provide reasonable facilities to other carriers for interchange of traffic, etc.

A railroad carrier may lawfully be required to afford reasonable facilities to other carriers, including facilities for the interchange of traffic and the transportation over its line of freight from, or of cars of, a connecting line.[82] So, a railroad com-

79. N.D.—State v. Great Northern Ry. Co., supra.

80. Fla.—State v. Atlantic Coast Line R. Co., 52 So. 4, 59 Fla. 612

81. U.S.—Atlas Pipe Line Co. v. Sterling, D.C.Tex., 4 F.Supp. 441

82. U.S.—Grand Trunk R. Co. of Canada v. Michigan Railroad Commission, Mich., 34 S.Ct. 152, 231 U.S. 457, 58 L.Ed. 310
Fla.—State v. Florida East Coast Ry. Co., 50 So. 425, 58 Fla. 254
Ind.—Chicago, I. & L. R. Co. v. Railroad Commission, 95 N.E. 364, 175 Ind. 630.
Mass.—Vermont & M. R. Co. v. Fitchburg R. Co., 63 Mass. 369, 9 Cush. 369
Neb.—Missouri Pac. R. Corporation v. Nebraska State Ry. Commission, 215 N.W. 138, 115 Neb. 856, error dismissed 49 S.Ct. 81, 278 U.S. 569, 73 L.Ed. 511.
N.Y.—Hudson Valley Ry. Co. v. Boston & M. R. R., 94 N.Y.S. 545, 106 App.Div. 375
10 C.J. p. 59 note 75 [a].

Particular regulations held valid

(1) State Railway Commission had jurisdiction to regulate intrastate business use and charges therefor of team tracks on railroad's belt line in city.—Missouri Pac. R. R. Corporation in Nebraska v. Nebraska State Ry. Commission, C.C.A.Neb., 65 F.2d 557, certiorari denied 54 S.Ct. 72, 290 U.S. 656, 78 L.Ed. 568.

(2) Where the state established a Barge Canal terminal, constructed docks and loading ships and laid railroad tracks of standard gauge through the docks to connect with adjacent tracks of a railroad company, the public service commission properly ordered the latter to provide transportation between such terminal and shippers on its own and on connecting lines, and to furnish necessary rolling stock therefor and to operate the same by its own power and servants, Public Service Commissions Law § 49 subd. 3 par. (a), as amended by L.1920 c. 541, under which such an order was made, being constitutional, since the state had reserved control of corporations to require assumption of such burden.—People ex rel. New York Cent. R. Co. v. Public Service Commission, Second Dist., 191 N.Y.S. 636, 198 App.Div. 436, affirmed 134 N.E. 590, 232 N.Y. 606, and certiorari denied Public Service Commission of State of New York v. New York Cent. R. Co., 42 S.Ct. 314, 258 U.S. 621, 66 L.Ed. 795.

Interchange of traffic between railroads and motor transport companies

Railroads may properly be required to interchange traffic with motor transport companies owned, controlled, and operated by other railroads to carry on freight pick-up and delivery service, since such subsidiary corporations must be considered merely as department of parent railroads. Order requiring railroads to interchange traffic with subsidiary corporations organized by other railroads to carry on freight pick-up and delivery service was not unreasonable as requiring additional expense in investigation of claims because subsidiaries were not members of freight claim division of American Railway Association, and not financially responsible, since their acts were acts of parent railroads; nor was such order unreasonable as requiring additional accounting expense because freight in less than carload lots handled through pick-up and delivery service would be handled as express and not as freight, since freight shipments so interchanged would not be changed in character to express. The order was not unreasonable as requiring additional expense in publishing tariffs, since rates applicable were identical with rates applicable between railroads affected and parent railroads, Rev.St.1925, arts. 6445, 6448, 6471.—Atchison, T. & S. F. Ry. Co. v. Railroad Commission of Texas, Tex.Civ.App., 77 S.W.2d 773.

Particular regulations construed

The word "terminal," as used in Public Service Commission Law § 35, providing that every common carrier is required to afford reasonable facilities for interchange of traffic between its lines and those of other common carriers, but that such section shall not be construed to require a carrier to permit any other to use its tracks or terminal facilities, and every common carrier is required to receive from every other common carrier, at a connection point, freight cars of a proper standard, and haul the same through to destination, is applicable, not only to the portion of the main track, sidings, and team tracks used in loading and unloading freight, but also to industrial switches, at which freight shipments terminate, a terminal point being a place of consignment. The word "use," as used in the provision prohibiting use of terminal facilities of one carrier by another, is not confined to actual presence of locomotives, but the passage of any cars thereover. The provision that the law shall not be construed to require a common carrier to permit or allow any other carrier to use its track or terminal facilities, is definite and unambiguous, and prohibits commission from ordering interchangeable use of carrier's terminal tracks.—People ex rel. New York Cent. R. Co. v. Public Service Commission of New York, Second District, 163 N.Y.S. 777, 177 App.Div. 208.

Shipping service to mining company

Order requiring railroad to furnish shipping service to mining company with respect to coal to be shipped over competitive lines, is not violative of Public Utilities Act art. 4 § 44, as requiring furnishing of terminal facilities to another carrier.—Public Utilities Commission v. Cleveland, C., C. & St. L. Ry. Co., 133 N.E. 722, 301 Ill. 219.

Switching freight

Under Rev.St. art. 4535, requiring every railway company doing business in the state to receive all freight and passengers coming to it from a connecting line, and going to points on its line or beyond, and to transport the same to destination or the next connecting line, a railroad company is not compelled to switch freight which was not consigned over its lines from the line of one railroad to that of another in the same city.—Gulf & I. Ry. Co. of Texas v. Texas & N. O. Ry. Co., 56 S.W. 328, 93 Tex. 482, affirming 51 S.W. 1031.

Trackage agreement between two railroad companies

Where one railroad company is granted the right by another railroad company to operate its trains over the tracks of the grantor, so

pany may lawfully be required to provide reasonable facilities to express companies,[83] provided the express company makes a demand for such service, with payment or tender of the proper rate.[84] A railroad company cannot be required to transfer cars delivered to it by another company from its station to another point as a switching service and at switching rates, where such point is beyond the yard limits and on the main line, and the service is performed by trains under regular despatch orders and not under the direction of the yardmaster.[85]

Services voluntarily undertaken. A statute authorizing the public service commission to require railroad corporations and street railway corporations to maintain such switch or other connections with other like companies as it shall deem necessary for the convenience of the public, but declaring that nothing in the act shall give the commission power over street railway companies not engaged in the general business of transporting freight, relates only to compulsory connections and interchange of service, and where a street railway company voluntarily undertakes the joint interchange of light freight with another company, it submits itself to the jurisdiction of the commission, and may be compelled to perform the duty so assumed, adequately, fairly, and reasonably.[86]

(3) Carriage of Particular Articles

With respect to particular articles, the commodities clause of the Interstate Commerce Act and the rule of the interstate commerce commission have been construed and applied.

The commodities clause of the Interstate Commerce Act, 49 U.S.C.A. § 1 (8), making it unlawful for any railroad company to transport in interstate commerce any article or commodity—other than timber and as manufactured products thereof—manufactured, mined, or produced by it, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles as may be necessary and intended for its

as to form a continuous line to and from points on the grantee's road, but under the trackage agreement the grantee has no right to the use of a switch track constructed by the grantor, and connecting the grantor's main track with the mine tracks of a coal company for the convenience of the latter, the duties of the grantee to the public are not the general duties of a common carrier operating on its own road, and it cannot be required to furnish cars to the coal mining company for the transportation of such company's output.—Kanawha & M. Ry Co. v. Public Utilities Commission of Ohio, 117 N.E. 353, 96 Ohio St. 414.

Interstate commerce regulations

(1) The provision of Interstate Commerce Act § 3, Act Feb. 4, 1887, c 104, 24 St. at L. p 380, U.S.Comp. St 1901 p 3155, that the requirement that all railroads shall provide reasonable facilities for the interchange of traffic shall not require one carrier to give the use of its track or terminal facilities to another engaged in like commerce, is not a substantive enactment, but a mere interpretation clause designed to restrain, if necessary, the generality of the language preceding it.—Pittsburgh, C., C. & St. L. Ry Co. v. Hunt, 86 N.E. 328, 171 Ind. 189.

(2) With respect to services governed by the Interstate Commerce Act, as amended by the Elkins Act, the rule that both carrier and shipper are bound by and cannot alter the terms of service as fixed by the filed regulations, applies to stipulations relating to service facilities within the purview of the act.—Cicardi Bros. Fruit & Produce Co. v. Pennsylvania Co., 213 S.W. 531, 201 Mo.App. 609.

83. Mass.—Director General of Railroads v. People's Express, 126 N.E. 417, 235 Mass. 199.
Tex.—Missouri, K. & T. Co. of Texas v. Empire Express Co., Com.App., 221 S.W. 590, reversing, Civ.App., 173 S.W. 222.

Extent of duty and rights of parties

(1) Railroad was under no obligation to furnish express company facilities under Rev.St.1911 arts. 6616, 6617, although contract tendered by express company called for same per cent of gross rates as was provided for by the railroad's contract with another express company, where latter company did a big interstate business and its contract guaranteed a minimum payment, and where contract tendered contained no such guaranty and contemplated only intrastate business. That railroad accepted from express company, which had applied for facilities, certain trucks necessary in the conduct of plaintiff's business for free distribution, issuing its bill of lading therefor with notation, "Deadhead account of contract pending," did not entitle express company, on railroad's refusal to permit the company to do an express business over its line, to recover as damages expenses incurred in the belief that such permission would be granted, where express company made the notation and knew that at such time there was no contract pending. Railroad would not be estopped to decline to enter into a contract with express company because of its acceptance for free distribution of certain trucks necessary in the conduct of the express company's business and issuance of bills of lading therefor with notation, "Deadhead account pending."—Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co., Tex.Com.App., 221 S.W. 590, reversing, Civ.App., 173 S.W. 222.

(2) Railroad may properly require shipments by express on passenger trains to be in charge of messenger, but express shipper cannot compel carrier's baggagemen to act as messengers in compliance with such order, nor does alleged discrimination against particular express company in favor of others furnishing more and different business warrant its refusal, under St.1906 c. 463 p. 2 §§ 196, 197, 201, to comply with such rule, and on such refusal railroad through director general was justified in terminating contract, and in action to enjoin such express shipper from placing shipments on trains after termination of contract, evidence as to rules and regulations in force in another railroad system was properly excluded.—Director General of Railroads v. People's Express, 126 N.E. 417, 235 Mass. 199.

84. Tex.—Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co., Com.App., 221 S.W. 590, reversing, Civ.App., 173 S.W. 222.

85. Iowa.—State v. Chicago, M. & St. P. R. Co., 55 N.W. 331, 88 Iowa 445.

86. Pa.—Lehigh Valley Transit Co. v. Public Service Commission, 78 Pa.Super. 105.

use in the conduct of its business as a common carrier, has been construed as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (1) When the article or commodity has been manufactured, mined, or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity. (2) When the carrier owns the article or commodity to be transported in whole or in part (3) When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity.[87]

A company chartered to secure coal mines and mine coal, and to construct a canal and railroad for the purpose of transporting the products of its mines, being also engaged as a carrier by rail in the transportation of coal in the channels of interstate commerce, is a "railroad company" within the meaning of the commodities clause.[88] A railroad company cannot do by indirection that which the commodities clause prohibits, and, irrespective of form, if the facts show that such company occupies the inconsistent position of carrier and shipper, it comes within the prohibition of the act,[89] and hence, if the railroad company owns all of the stock of a producing or manufacturing company and then so controls such company as to deprive the latter of all independent existence and make it a mere agent or department of the railroad, the railroad company has an "interest" within the meaning of the statute.[90] So, where a manufacturing or producing company, such as a coal company, is created with the express purpose that, with stockholders in common, it shall be a party to a contract intended to enable the railroad company to meet the requirements of the commodity clause and at the same time continue the business of buying, mining, selling, and transporting the product, the transportation of such product violates the statute[91] Further, it has been held that the statute applies to an interstate railroad company transporting coal on its road from mines, the capital stock of which is owned by the railroad company, although all the coal mined by the railroad company is sold at the mine and title is passed before the coal is transported to another state.[92] However, a contract between a railroad company owning coal mines and a coal company, by which the latter agreed to buy the coal produced by the former f. o. b. at the mines, and to pay for certain grades a per cent of the general average prices at tidewater points, does not leave in the railroad company after such sales any interest in the coal which rendered its transportation by such company unlawful under the commodities clause.[93]

Articles or commodities manufactured, mined, produced, or owned, etc., by a bona fide corporation in which the railroad company is a stockholder are not included;[94] but combining in a single holding corporation the ownership of all of the stock of a carrier and all of the stock of a producing company may result in such community of interest as to make the transportation of the latter company's products by the carrier a violation of the commodities clause;[95] whether it does so result being a ques-

87. U S—U. S. v. Elgin, J. & E Ry Co., Ill, 56 S Ct. 811, 298 U. S. 492, 80 L Ed 1300, affirming, D. C, 11 F.Supp. 435—U. S. v Delaware, L. & W. R Co, N J., 35 S.Ct. 873, 238 U S. 516, 59 L.Ed. 1438—U. S. v. Lehigh Valley R. Co., Pa., 31 S.Ct. 387, 220 U S. 257, 266, 55 L Ed 458.

88. U S.—U. S v. Delaware, etc., Co., Pa., 29 S.Ct. 527, 213 U S 366, 53 L Ed 836.
10 C.J. p 60 note 90.

89. U S.—U S. v. Delaware, L. & W. R. Co, N.J., 35 S Ct. 873, 238 U.S. 516, 59 L Ed 1438—U. S v. Elgin, J. & E Ry. Co, D.C.Ill., 11 F.Supp. 435, affirmed 56 S Ct. 841, 298 U.S. 492, 80 L Ed. 1300.

90. U.S—U S. v. Elgin, J. & E Ry. Co., supra.

91. U.S.—U. S. v. Lehigh Valley R. Co., N Y., 41 S Ct. 104, 254 U. S. 255, 65 L.Ed 253—U. S. v. Delaware, L. & W. R. Co., N.J., 35 S.Ct 873, 238 U.S. 516, 59 L.Ed. 1438.

92. N Y—Central Trust Co. v. Pittsburg, etc., R Co, 101 N.Y.S. 837, 52 Misc. 195.
10 C J p 61 note 93.

93. U.S.—U. S. v. Delaware, etc., R Co., D.C N J, 213 F. 240.

Common controlling stock ownership

It is insufficient to render such transportation unlawful that a comparatively small number of persons own a controlling interest in both the railroad company and the coal company, and that some of the officers and directors of the two are the same, where the business of each is separately conducted, and no discrimination is shown to have been made by the railroad company in favor of the coal company as a shipper.—U. S. v. Delaware, etc., R. Co., D.C.N.J., 213 F. 240.

94. U.S.—U. S. v. Elgin, J. & E. Ry. Co., Ill., 56 S.Ct. 841, 298 U. S. 492, 80 L.Ed. 1300, affirming, D.C., 11 F Supp. 435—U. S. v Delaware, etc., Co., Pa., 29 S.Ct. 527, 213 U.S. 366, 415, 53 L.Ed. 836, reversing 164 F. 215.

"Mere stock ownership by a railroad, or by its stockholders, in a producing company cannot be used as a test by which to determine the legality of the transportation of such company's coal by the interstate carrier."—U. S. v. Delaware, L. & W. R. Co., N J., 35 S.Ct. 873, 877, 238 U.S. 516, 59 L.Ed. 1438.

95. U.S.—U. S. v. Reading Co., Pa., 40 S.Ct. 425, 253 U.S. 26, 64 L.Ed. 760.

"While the right of a railroad company as a stockholder to use its stock ownership for the purpose of a bona fide separate administration of the affairs of a corporation in which it has a stock interest may not be denied, the use of such stock ownership in substance for the pur-

tion of fact to be determined by the evidence.[96] The mere power of the holding company to control a subsidiary railroad company and producing subsidiary companies whose products are transported by the railroad company, with the attendant possibility of initiating unlawful conditions does not show a violation of the commodities clause;[97] nor does the filing by the holding company of a consolidated income tax return, destroy the separate corporate entities, so as to make the transportation of such products by the railroad company a violation of the clause.[98]

The statute expressly excludes lumber from its operation, and it is not unlawful for a common carrier to carry lumber owned by it; it may treat lumber owned by it in the same manner as other freight.[99] The exception in favor of timber and manufactured products thereof contained in the statute does not render it invalid for discrimination between carriers, and the question of the expediency of such exception cannot affect the question of the power of congress to enact the statute.[1]

Hay purchased by a railroad company for the use of animals employed in operating its coal mines cannot be said to have been necessary for the use of the company in the conduct of its business as a common carrier, within the meaning of the commodity clause of the Act.[2] The statute applies only to commodities transported in interstate commerce, and coal sold to persons outside the state, and delivered to a common carrier consigned to such purchasers, or sold and delivered to another corporation within the state, and by it sold and shipped to purchasers outside the state is not within the prohibition of the Act.[3]

Carriage of explosives see the C.J.S. title Explosives § 9, also 25 C.J. p 198 note 85–p 199 note 97.

Burned cotton. A rule of the Interstate Commerce Commission providing that cotton which has been on fire, and not subsequently repicked and rebaled, must not be offered for shipment until it has been reconditioned or until more than five days have elapsed since the last evidence of fire therein, does not forbid the shipment of cotton which had been part of a larger mass that had been on fire after the expiration of five days, merely because there was fire in other cotton about two hundred yards distant at the time of the shipment.[4]

(4) Systems of Bookkeeping

A state railroad commission may prescribe reasonable methods of keeping accounts by intrastate carriers

Reasonable methods of bookkeeping may be prescribed by a state railroad commission for intrastate carriers; the section of the Interstate Commerce Act authorizing the interstate commerce commission to prescribe a uniform bookkeeping system and prohibiting the keeping of any accounts, etc., other than those ordered by the commission, was directed only against other accounts of matters relating to interstate commerce, and does not preclude a state commission from requiring the keeping of other accounts of matters relating to purely intrastate business. Since the word "system" in the statute giving the commission power to prescribe a system of bookkeeping, means "method," and "bookkeeping" is the art of recording in a systematic manner the transactions of merchants, traders, and other persons engaged in pursuits connected with money, the commission cannot, under such statute, order the apportionment of items of expense to be made on a

pose of destroying the entity of a producing, etc, corporation and of commingling its affairs in administration with the affairs of the railroad company, so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing, etc., corporation within the prohibitions of the commodities clause." —U. S. v. Lehigh Valley R Co., Pa., 31 S Ct. 387, 391, 220 U.S. 357, 274, 55 L Ed. 455.

96. U.S.—U. S. v. Elgin, J. & E. Ry. Co., Ill., 56 S.Ct 841, 298 U.S. 492, 80 L.Ed. 1300, affirming, D.C., 11 F.Supp. 435.

97. U.S—U. S. v Elgin, J. & E. Ry Co., Ill., 56 S.Ct. 841, 298 U.S. 492, 80 L.Ed. 1300, affirming, D.C., 11 F Supp. 435.

Railroad company which functioned as separate corporate carrier under immediate control of its own directors, no one of whom was on board of holding company owning all railroad company's stock, and which owned all its necessary equipment, made its own contracts, managed its own finances, and served its patrons without discrimination, was not "agent," "instrumentality," or "department" of such holding company, and hence railroad company's transportation of products of producing companies whose stock belonged to same holding company was not in violation of commodities clause of Interstate Commerce Act forbidding railroads from transporting in interstate commerce commodities in which railroads are interested.—U. S. v. Elgin, J. & E. Ry. Co., Ill., 56 S.Ct. 841, 298 U.S. 492, 80 L.Ed. 1300, affirming, D.C., 11 F. Supp. 435.

98. U S.—U. S. v. Elgin, J. & E. Ry Co., D.C Ill, 11 F Supp. 435, affirmed 56 S.Ct. 841, 298 U.S 492, 80 L.Ed 1300.

99. U.S.—U. S. v. Butler County R. Co., Com Ct, 34 S.Ct. 748, 234 U. S. 29, 58 L.Ed. 1196—Tap Line Cases, Com Ct., 34 S Ct. 741, 234 U.S. 1, 58 L.Ed. 1185.

1. U.S.—U S. v. Delaware, etc., Co, Pa., 29 S.Ct. 527, 213 U S. 366, 53 L.Ed. 836.

2. U.S.—Delaware, etc., R. Co. v. U. S., N Y, 34 S Ct. 65, 231 U.S. 363, 58 L Ed. 269.

3. Ind.—Sisters of Providence of St Mary's of the Woods v. Lower Vein Coal Co., 154 N.E. 659, 198 Ind 645.

4. U.S.—Southern Ry. Co. v. Pettit, Tenn., 257 F. 663, 168 C.C.A. 613, certiorari denied 39 S.Ct. 290, 249 U.S. 607, 63 L.Ed. 799.

purely arbitrary basis of "car miles" in a certain ratio between passenger and freight traffic, and orders prescribing that certain conclusions and deductions be entered on the books of the railroad are not authorized [5]

§ 20. License Fees and Taxes

Carriers may be subjected to license taxes, or required to procure a certificate of convenience and necessity from the proper public authorities.

The business of common carriers is one which may properly be subjected to the payment of an occupation, privilege, or license tax.[6]

Power to license or tax generally see the C.J.S. title Licenses §§ 4–11, also 37 C.J. p 173 note 72–p 184 note 50.

Express business; municipal license tax. A license tax may be imposed by a city on persons or companies engaged in the express business in the city,[7] and provisions for the apportionment of such taxes between the companies engaged in doing business in the city must be followed [8] A statute authorizing a tax in occupations conducted within a city authorizes a tax on an express business of carrying packages into the city from other cities, or of collecting packages in the city and carrying them to places outside the city;[9] but a statute imposing an occupation tax on one doing an express business by "railroad" has been held not to apply to such business done by electric interurban carriers, where there is nothing in the statute indicating that the word railroad is used in any other than its ordinary meaning.[10]

Certificate of convenience and necessity. In some jurisdictions a company desiring to operate a pipe line for the transportation of natural gas is required, as a condition precedent to procure from the state corporation commission a certificate of public necessity and convenience;[11] and the fact that the granting of such certificate would destroy the value of an existing competitor's property is not ground for refusal to grant the certificate, if public convenience and necessity would be served by granting it.[12] The determination of the question is a matter within the sound discretion of the commission.[13]

§ 21. Exclusive Privileges

A carrier may grant exclusive privileges as to matters unconnected with its duties as a common carrier, but in the performance of its duties as a common carrier, it cannot grant to one person privileges which it denies to others.

In the performance of its duties as a common carrier, a carrier cannot grant to any person privileges or facilities which it refuses to grant to others, but in matters unconnected with, and beyond the scope of, its duties as a common carrier, it may grant to some persons privileges which it denies to others.[14] A terminal company may grant to a telegraph company an exclusive privilege to conduct on the former's premises a commercial telegraph business which is unconnected with the terminal company's business as a common carrier, and such grant is not against public policy.[15] In Kentucky, it has been held that a railroad company cannot grant to one person the exclusive right to go on the company's depot grounds with vehicles for the purpose of receiving freight.[16]

5. Tex.—Texas, etc., R. Co. v. State R. Commn., 150 S.W. 878, 105 Tex 386, reversing, Civ.App., 140 S.W 829.

6. U.S.—Robertson v. Southeastern Express Co., 94 So. 210, 130 Miss 305, affirmed Southeastern Express Co. v. Miller, 44 S.Ct. 421, 264 U. S. 535, 68 L.Ed 836.

10 C.J. p 61 note 1—37 C.J. p 219 notes 76, 80–82, 90

7. Kan.—City of Leavenworth v. Ewing, 101 P. 664, 80 Kan. 58, affirmed Ewing v Leavenworth, 33 S.Ct. 157, 226 U.S. 464, 57 L.Ed. 303—Topeka v. Jones, 86 P. 167, 74 Kan 164, affirmed 87 P 1133, 74 Kan. 164

8. Ala.—City of Montgomery v American Ry Express Co., 122 So. 639, 219 Ala 476.

Where more than one express company is doing business in a city, the license tax must be equally divided between them so that the aggregate collected shall not exceed the maximum license tax in any one year —City of Montgomery v. American Ry. Express Co., 122 So. 639, 219 Ala. 476.

9. Kan.—City of Leavenworth v. Ewing, 101 P. 664 80 Kan. 58, affirmed Ewing v. Leavenworth, 33 S.Ct. 157, 226 U.S 464, 57 L.Ed. 303—Topeka v. Jones, 86 P. 162, 74 Kan 164, affirmed 87 P. 1133, 74 Kan 164

10. Tex.—North Texas Transfer & Warehouse Co. v. State, 191 S.W. 550, 108 Tex. 235, reversing, Civ. App., 169 S.W. 1045.

11. Kan.—In re Inland Pipe Line Co., 57 P.2d 65, 143 Kan. 820.

Refusal to remand proceeding to review order of state corporation commission granting certificate of convenience and necessity for natural gas pipe line, so that matters respecting financial plans and sources of funds which commission allegedly considered could be included in record, was held not error, since matters were not controlling in determining whether certificate should be granted —In re Inland Pipe Line Co., 57 P.2d 65, 143 Kan 820.

12. Kan.—In re Inland Pipe Line Co., supra.

13. Kan.—In re Inland Pipe Line Co., supra.

14. Fla.—State ex rel. Postal Telegraph Cable Co. v. Wells, 118 So. 731, 96 Fla. 591, 60 A.L.R. 1072.

15. Fla.—State ex rel. Postal Telegraph Co v. Wells, supra.

16. U.S.—Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., C.C. A.Ky., 15 F.2d 509, certiorari granted 47 S.Ct. 472, 273 U.S. 690, 71 L.Ed. 842, affirmed 48 S.Ct. 404, 276 U.S 518, 72 L.Ed. 681, 57 A. L.R. 426.

§ 22. Use of Carrier's Premises

A carrier may regulate the use of its premises as it sees fit, if not inconsistent with its duties as common carrier. It is under no duty to allow others to use its premises for purposes not connected with such duties.

A railroad carrier's station grounds must be devoted primarily to public use to the extent necessary for the public objects intended to be accomplished by the construction and maintenance of the railroad as a highway, but this does not prevent the carrier from establishing such reasonable rules in respect to the use of its property as the public convenience and the interests of the carrier may suggest, if such rules are consistent with the purposes for which the corporation was created, and are not inconsistent with public regulations legally established for the conduct of its business.[17] A carrier by railroad is under no common-law duty to permit a coal dealer to construct a coal bin on the railroad right of way for assembling and shipping coal, nor is such duty imposed on the carrier by a statute requiring common carriers to furnish freight transportation at places which it equips and maintains for that purpose.[18] Permission granted by a railroad to the owners of cotton to use a private platform for the storage of cotton is a mere license, which does not authorize a cotton owner to send an agent to remove the cotton for shipment to other points, where the agent was a competitor of the railroad.[19]

Facilities to patrons of telegraph company. A terminal company is not bound to afford patrons of a commercial telegraph company facilities for carrying on business unconnected with the terminal company's duties as common carrier.[20]

§ 23. Contracts in Violation of Regulations

A valid private contract may be entered into by a common carrier with respect to matters not within duties as such a carrier.

A common carrier may make valid private contracts as to matters not within its duties as a common carrier,[21] as for example "intra-plant" switching[22]

Questions relating to the validity and status of contracts in violation of regulations are discussed infra § 130, in connection with special contracts for the transportation of property, and infra §§ 392–397, where the question of contracts in violation of statutes prohibiting discrimination is treated.

§ 24. Judicial Proceedings to Enforce or Restrain Enforcement of Regulations by Statutes or Orders of Railroad Commissions

a In general
b. Injunction

a. In General

The orders of a state railroad commission or other similar body are subject to judicial review; but the courts will not interfere in the absence of clear evidence to overcome the presumption that the acts of the commission are just, reasonable, and within its powers.

Orders of a state railroad commission or other like administrative body, complained of as being unreasonable or beyond the powers of the commission,[23] and the determination by the commission as to who is a common carrier,[24] are subject to appropriate judicial review; and the methods whereby such review can be obtained may be by an action to set aside or rescind the order,[25] by an appeal from such order,[26] or by a suit to enjoin its enforce-

17. Mo.—Canary Taxicab Co v. Terminal Ry. Ass'n of St. Louis, 294 S.W. 88, 316 Mo 709.

18. Ky.—Browning v. Louisville & N. R Co, 281 S.W. 490, 213 Ky 376, 44 A.L.R 1522.

19. N C.—Norfolk Southern R. Co. v. Rapid Transit Co., 149 S.E 733, 734, 197 N C 505.
"Obviously, this would amount to permitting the competitor to use plaintiff's property in order to carry on his business—Norfolk Southern R Co. v Rapid Transit Co., supra

20. Fla.—State ex rel. Postal Telegraph Cable Co v. Wells, 118 So 731, 96 Fla 591, 60 A.L.R 1072.

21. U S.—American Smelting & Refining Co. v. Union Pac. R Co, C.C.A.Neb., 256 F 737.

22. Mich.—Grand Trunk Western R. Co. v Mount Clemens Sugar Co., 269 N W. 208, 277 Mich 366.

23. Fla.—State v. Jacksonville Terminal Co., 106 So 576, 90 Fla. 721
La.—Empire Rice Milling Co. v Railroad Commission of Louisiana, 79 So. 833, 143 La. 1036.
Pa.—Beaver Valley Service Co. v Public Service Commission, 186 A 304, 122 Pa Super. 221.
Tex.—Missouri, K. & T. Ry Co of Texas v Empire Express Co., Com App., 221 S W 590, reversing, Civ App., 173 S.W. 222—Railroad Commission of Texas v. San Antonio Compress Co, Civ.App, 264 S W. 214, error denied 278 S.W. 1115, 114 Tex. 582
W.Va.—Baltimore & O. R. Co. v. Public Service Commission, 94 S.E. 545, 81 W.Va. 457, L.R.A.1918D 268.

24. La.—Crowell & Spencer Lumber Co. v. Louisiana Public Service Commission, 102 So. 866, 157 La. 676.

25. La.—Empire Rice Milling Co. v. Railroad Commission of Louisiana, 79 So. 833, 143 La 1036
W Va.—Baltimore & O. R. Co. v. Public Service Commission, 94 S E. 545, 81 W Va. 57, L.R A 1918D 268.

Time of filing suit
In Louisiana, by Act No 171 of 1908 no suit to set aside, change, or alter orders of the railroad commission should be entertained unless filed within three months after the order is made—Shreveport Window Glass Co. v. Railroad Commission of Louisiana, 79 So. 407, 143 La. 794.

26. Ill.—State Public Utilities Commission of Ill. v. Atchison, T & S. F. Ry. Co, 115 N.E 904, 278 Ill. 58—State Public Utilities Commis-

ment, as stated infra subdivision b of this section. Milling in transit being a burden placed on the carrier, the validity of a rule of the railroad commission requiring such service may be contested by the carrier, but by no one else.[27]

In determining the reasonableness of regulations as to facilities to be furnished by the carrier, the courts cannot go further and determine the facilities which they deem reasonable, that being a legislative function.[28] Since the acts of the commission are presumed to be just and reasonable,[29] or, as expressly declared by constitutional or statutory provisions in some jurisdictions are prima facie just and reasonable, the courts will interfere only when it clearly appears that the commission has exceeded its powers;[30] and the findings of the commission will not be disturbed, if there is sufficient evidence to support them.[31] In other words, in determining the reasonableness of the regulations the courts in deference to the governmental functions conferred by law upon the commissioners will not only require the prima facie presumption of reasonableness impressed by the statute on the regulation to be overcome by the admissions or the proofs, but will also require the admissions or the proofs of unreasonableness to be clear and convincing, every reasonable doubt being yielded in favor of the regulation.[32] However, unreasonable regulations are not within the authority conferred by law upon the railroad commissioners, as stated supra § 18 a, and, when regulations appear from the pleadings or the evidence in a case to be unreasonable and violative of constitutional provisions for the protection of private property rights, such unreasonable regulations will not be enforced by the courts.[33] It has been held that, where the court cannot say that orders of a state railroad commission prescribing a system of bookkeeping are unreasonable as a matter of law, it cannot determine that question as one of fact.[34] Where it clearly appears from the pleadings that a regulation of the railroad commissioners is just, it is not necessary for the court to take testimony on the subject.[35] The remedies for enforcing rights under a railroad commission law have been held to be governed exclusively thereby, notwithstanding a provision therein that the act "shall not have the effect to release or waive any right of action . . . for any right, penalty, or forfeiture which may have arisen, or may hereafter arise, under any law of this state."[36] The use of remedies for enforcing obedience to duties imposed by laws passed to accomplish the purposes specified is not taken away by implication by a constitutional provision which after specifying that the legislature may pass certain laws regulating common car-

sion v Chicago & W. T. Ry. Co., 114 N.E. 325, 275 Ill. 555.

Okl.—Pierce Oil Corporation v. Phœnix Refining Co., 190 P. 857, 79 Okl. 36.

27. La.—Empire Rice Milling Co. v. Railroad Commission of Louisiana, 79 So. 833, 143 La. 1036.

28. Tex.—Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co., Com.App., 221 S.W. 590, reversing, Civ.App., 173 S.W. 222.

29. La.—Empire Rice Milling Co. v. Railroad Commission of Louisiana, 79 So. 833, 143 La. 1036.

30. Ark.—St. Louis, I. M. & S. Ry. Co. v. Clark Pressed Brick Co., 192 S.W. 382, 127 Ark. 474.

Ill.—Chicago & E. I. Ry. Co. v. Commerce Commission, 175 N.E. 8, 343 Ill. 117—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 166 N.E. 466, 335 Ill. 70.

La.—Empire Rice Milling Co. v. Railroad Commission of Louisiana, 79 So. 833, 143 La. 1036

Determination as to duties of express company in transportation of money

What is the reasonable amount of money which an express company may be required to take the risk of keeping overnight in any given point of shipment is an administrative question rather than one of law. It is a question of fact, or at least a mixed question of law and fact, and one which should be left, in a large degree, to the sound discretion of the public service commission, which has jurisdiction over such matters, and the conclusions of that tribunal are not to be disturbed by judicial interference unless it is made clearly to appear that they are unreasonable and not in conformity with law.—Henderson Coal Co. v. Public Service Commission, 73 Pa. Super. 45.

Extent of competition in intrastate transportation of freight by common carrier is largely matter of policy and administrative question, which must be left to sound judgment and discretion of public service commission, decision of which, based on competent and relevant evidence, will not be disturbed by superior court, unless convinced that it is unreasonable or not in conformity with law.—Beaver Valley Service Co. v. Public Service Commission, 186 A. 304, 122 Pa.Super. 221.

31. Ill.—Chicago & E. I. Ry. Co. v. Commerce Commission, 175 N.E. 8, 343 Ill. 117—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 166 N.E. 466, 335 Ill. 70.

Evidence is held sufficient to support state railway commission's order requiring railroad to open team tracks on its belt line in Omaha to use of other companies.—Missouri Pac. R. Corporation in Nebraska v. Nebraska State Ry. Commission, 215 N.W. 138, 115 Neb. 856, error dismissed 49 S.Ct. 81, 278 U.S. 569, 73 L.Ed. 511.

Finding that pipe line is common carrier

A finding by the corporation commission that a pipe line extending between two points within the state has been transporting oil for hire and is a common carrier, within the meaning of Rev.L.1910 § 4309, will not be disturbed on appeal to supreme court, when there is evidence reasonably tending to support such finding.—Pierce Oil Corporation v. Phœnix Refining Co., 190 P. 857, 79 Okl. 36.

32. Fla.—State v. Atlantic Coast Line R. Co., 60 So. 186, 64 Fla. 469.

33. Fla.—State v. Atlantic Coast Line R. Co., 81 So. 498, 77 Fla. 366.

10 C.J. p 63 note 25.

34. Tex.—Texas, etc., R. Co. v. State R. Commn., 150 S.W. 878, 105 Tex. 386.

35. Fla.—State v. Atlantic Coast Line R. Co., 54 So. 900, 61 Fla. 799.

36. Mont.—Doney v. Northern Pac. Ry. Co., 199 P. 432, 60 Mont. 209.

riers further provides for enforcing such laws by adequate penalties and forfeitures.[37] The power of the courts to review the determination of the commission as to the reasonableness of rates, and the proceedings for relief from such rates, whether brought by the carrier, see infra §§ 305–308, or by the shipper or consignee, see infra § 309, or by bondholders, see infra § 310; and the remedies for unjust discrimination, see infra §§ 38 b and 391, are discussed in the sections indicated.

Mandamus to compel obedience to orders of railroad commission or other like bodies is considered in the C.J.S. title Mandamus § 231, also 10 C.J. p 63 note 21; 38 C.J. p 813 note 50–p 814 note 53.

b. Injunction

The enforcement of an unlawful or unreasonable order of a state railroad commission may be enjoined; and injunction will lie in a proper case to restrain a carrier from violating state or federal regulations.

A reasonable exercise by the commission of powers conferred upon it may not lawfully be enjoined,[38] but a court of equity may enjoin the enforcement of arbitrary and unreasonable orders,[39] where the statutes do not provide for a judicial review.[40] So, a shipper who is liable to suffer irreparable injury by reason of an unlawful order by a state railroad commission assuming to regulate interstate commerce is entitled to an injunction restraining the commission from enforcing such order.[41] Under a statute making regulations by the railroad commission conclusive until found otherwise in a direct action brought for that purpose, a suit to enjoin the enforcement of a regulation is a collateral attack thereon and cannot be maintained,[42] although it has been held in the same jurisdiction that, in a suit to set aside an order of the commission as unjust and unreasonable, the court may grant a temporary injunction against the enforcement of such order.[43] Under a statute providing that the railroad commission may prescribe a system of bookkeeping to be observed by railroads, and that the commission shall cause to be prepared suitable blanks with questions calculated to elicit all information concerning railroads and shall furnish such blanks to railroads as often as may be necessary, it was held that, notwithstanding a circular issued by the railroad commission prescribing a system of bookkeeping was objectionable and subject to injunction, it was improper for the court to enjoin the commission from including in subsequent circulars matters which were properly included in the original circulars and which could properly be prescribed as "bookkeeping."[44]

Injunction against carrier. Injunction will lie to restrain one from carrying on the business of a common carrier without obtaining a certificate of convenience and necessity.[45] In a suit by a public utilities commission to enjoin persons from using their trucks as common carriers in hauling produce, where defendants deny that they are common carriers, the burden is on the commission to prove by clear and convincing evidence that they are such carriers.[46]

Violation of Interstate Commerce Act. A single stockholder in a railroad corporation cannot maintain a bill to enjoin the railroad from violating the commodities clause of the Interstate Commerce Act forbidding railroads from transporting in interstate commerce commodities in which they are interested, in the absence of a showing that plaintiff suffered any substantial injury from the violation or that there were any other equities entitling him to in-

37. Fla.—State v. Jacksonville Terminal Co., 27 So. 225, 41 Fla. 377.

38. U.S.—Atlas Pipe Line Co. v. Sterling, D.C.Tex., 4 F.Supp. 441.

39. Tex.—Texas & P. Ry. Co. v. R. Commn., 150 S.W. 878, 105 Tex. 386, reversing on other grounds, Civ.App., 140 S.W. 829—Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co., Com.App., 221 S.W. 590, reversing Civ.App., 173 S.W. 222.

40. U.S.—Illinois Cent. R. Co. v. Railroad Commission of Kentucky, D.C.Ky., 1 F.2d 805.

Effect of temporary injunction

Where an order of a state railroad commission was temporarily enjoined to enable the commission to reconsider it, the commission had jurisdiction to hold a further hearing.—Illinois Cent. R. Co. v. Railroad Commission of Kentucky, D.C.Ky., 1 F.2d 805.

41. U.S.—J. Rosenbaum Grain Co. v. Chicago, etc., R. Co., C.C.Tex., 130 F. 46, affirmed 130 F. 110, 64 C.C.A. 444.

42. Tex.—West Texas Compress & Warehouse Co. v. Panhandle & S.F. Ry. Co., Com.App., 15 S.W.2d 558, affirming, Civ.App., 7 S.W.2d 597.

43. Tex.—Railroad Commission of Texas v. San Antonio Compress Co., Civ.App., 264 S.W. 214, error denied 278 S.W. 1115, 114 Tex. 582.

Ex parte hearing

Under Rev.St. art 6657, requiring that action to set aside order of railroad commission be "tried and determined as all other civil cases," such orders are subject to action of court, in same manner, and to same orders and method of procedure, as other civil suits, and may be set aside by injunction on sworn petition or ex parte hearing before final judgment after hearing on merits.—Railroad Commission of Texas v. San Antonio Compress Co., Tex.Civ.App., 264 S.W. 214, error denied 278 S.W. 1115, 114 Tex. 582.

44. Tex.—Texas R. Commn. v. Texas, etc., R. Co., 150 S.W. 878, 105 Tex. 386, reversing, Civ.App., 140 S.W. 829

45. Ohio.—Bruner v. Public Utilities Commission of Ohio, 170 N.E. 184, 34 Ohio App. 198.

46. Ohio.—Public Utilities Commission of Ohio v. Holdren, 171 N.E. 255, 34 Ohio App. 416.

junctive relief.[47] In a proceeding to enjoin a railroad company whose stock was owned by a holding company from transporting in interstate commerce the products of producing companies whose stock belonged to the same holding company, the supreme court, in determining whether or not the railroad company violated the act, should consider not what the corporation had power to do, or did, but what it now has power to do or is doing.[48]

C. RIGHT OF CARRIER TO MAKE REGULATIONS FOR CONDUCT OF BUSINESS

§ 25. In General

A common carrier may make reasonable rules for the conduct of its business, and may alter them on reasonable notice.

A common carrier has a right to conduct its business according to the rules of the common and statutory law;[49] it may make, and enforce by its agents, reasonable and necessary rules for the transaction of its business,[50] with a view to the safety, protection, and preservation of freight,[51] as well as the protection of itself against fraud and imposition,[52] provided such rules are not in contravention of law[53] or of some regulation of the railroad commission,[54] and do not unnecessarily infringe on the rights of the public and others having or carrying on business in connection with railroad traffic and travel.[55] The power of the carrier to make reasonable rules implies power to alter or modify such rules from time to time, as it may deem proper and expedient, on reasonable notice to the public, in order that the interested parties may be apprised of what is required in seeking service at the hands of the carrier.[56] The rules which the carrier adopts for the management of its business are presumptively right and reasonable,[57] and the burden is on him who assails them to prove that they are unfair and unjust, and it is only when it clearly appears by competent evidence that they are unreasonable that commissions or courts may lawfully interfere to annul or to change them.[58]

§ 26. Time, Place, and Method of Receiving Freight

A common carrier may make reasonable rules, not in contravention of law or the regulations of the railroad commission, prescribing the times, places, methods and forms in which goods shall be delivered to the carrier, and the mode of packing, loading, and transporting the same.

A carrier may make and enforce reasonable regulations, fixing the times, the places, the methods, and the forms in which it will receive the various commodities which it undertakes to carry,[59] and

47. U.S.—Ketchum v. Denver & R. G. R. Co., C.C.A. Utah, 248 F. 106, 160 C.C.A. 246.

48. U.S.—U. S. v. Elgin, J. & E. Ry. Co., Ill., 56 S.Ct. 811, 298 U.S. 492, 80 L.Ed. 1300, affirming, D.C., 11 F.Supp. 435.

49. Okl.—U. S. Express Co. v. State, 150 P. 178.

50. Ga.—Central of Georgia Ry. Co. v. Smith, 120 S.E. 30, 31 Ga.App. 135.
N.Y.—Feynman v. American Ry. Express Co., 234 N.Y.S. 727, 131 Misc. 223.
Pa.—Henderson Coal Co. v. Public Service Commission, 73 Pa.Super. 45.
Tenn.—Louisville & Nashville R. Co. v. Knoxville Transfer Co., 8 Tenn. Civ.App. 223.
10 C.J. p. 64 notes 39, 41.

Corpus Juris is cited in Cantor v. Pennsylvania R. Co., 270 N.Y.S. 346, 351, 150 Misc. 814, to the proposition that unreasonable regulations by carriers are not favored by the courts.

51. Pa.—Henderson Coal Co. v. Public Service Commission, 73 Pa.Super. 45.

52. Pa.—Henderson Coal Co. v. Public Service Commission, 73 Pa.Super. 45.

Carrier's right to protect himself from fraud by reasonable rules is correlative of right to receive compensation commensurate to risk assumed.—Feynman v. American Ry. Express Co., 234 N.Y.S. 727, 134 Misc. 223.

53. Okl.—U. S. Express Co. v. State, 150 P. 178.
Pa.—Henderson Coal Co. v. Public Service Commission, 73 Pa.Super. 45.
Tenn.—Louisville & Nashville R. Co. v. Knoxville Transfer Co., 8 Tenn. Civ.App., 223.

54. Okl.—U. S. Express Co. v. State, 150 P. 178.

55. Tenn.—Summitt v. State, 8 Lea 413, 41 Am.R. 637.

56. U.S.—U. S. v. Oregon R., etc., Co., C.C.Or., 159 F. 975.—Harp v. Choctaw, etc., R. Co., Ark., 125 F. 445, 61 C.C.A. 405, affirming 118 F. 169.

57. U.S.—Platt v. Lecocq, S.D., 158 F. 723, 85 C.C.A. 621, 15 L.R.A., N.S., 558, reversing 150 F. 391.

58. U.S.—Platt v. Lecocq, S.D., 158 F. 723, 85 C.C.A. 621, 15 L.R.A., N.S., 558.—Harp v. Choctaw, etc., R. Co., Ark., 125 F. 445, 61 C.C.A. 405, affirming 118 F. 169.

59. Ga.—Central of Georgia Ry. Co. v. Smith, 120 S.E. 30, 31 Ga.App. 135.
Pa.—Henderson Coal Co. v. Public Service Commission, 73 Pa.Super. 45.
10 C.J. p. 65 note 44.

Time of delivery to carrier
A common carrier may make a rule requiring articles to be delivered within the time necessary to ship them in its next ensuing trip. Where an express company made a rule that it would refuse for transportation packages of money to be shipped on the following day, such a provision is not unreasonable or contrary to the regulations of the Public Service Company Law.—Henderson Coal Co. v. Public Service Commission, 73 Pa.Super. 45.

Shipping instructions and receipt for freight
A common carrier, which, under Civ.Code 1910 § 2729, is bound to receive all goods and passengers offered, on compliance with reasonable regulations adopted for its own safety and the benefit of the public, may properly establish a rule that it assumes no responsibility for freight until it has been received with proper shipping instructions and receipted for by its agent.—Central of Georgia Ry. Co. v. Smith, 120 S.E. 30, 31 Ga.App. 135.

may make regulations providing how commodities shall be packed or loaded for shipment, so that they may be handled and transported conveniently, safely, and expeditiously,[60] but such rules must not contravene any rule of law or lawful regulation prescribed by the railroad commission.[61] However, the carrier cannot impose unusual conditions on a shipper nor require him to go to unusual expense in delivering his goods for transportation.[62] Regardless of statute, carriers cannot maintain unreasonable regulations for the receipt and transportation of freight.[63]

D. DUTY TO RECEIVE AND TRANSPORT PROPERTY

§ 27. General Rule

Every common carrier is under a duty to receive and transport any property tendered to it for transportation, provided the property is such as it holds itself out as willing to carry, or as it usually carries. A private carrier has no duty to transport goods in the absence of a special contract.

Both under and apart from statutory provisions to that effect, every common carrier is under a duty to receive for transportation and to transport the property of any person tendered to it for transportation, provided the property is such as it holds itself out as willing to carry, or as it usually carries.[64] Such duty arises out of the relationship which a common carrier sustains to the public, and is imposed by law,[65] it exists independently, there-

Shipment of live stock

Railroad's operating rule restricting west-bound live stock shipments to one train weekly, except special movement on showing of necessity, was not void, although not included in filed and published tariff—Bodine & Clark Livestock Commission Co. v Great Northern Ry Co, C C A.Or., 63 F 2d 472, certiorari denied 54 S Ct. 48, 290 U S. 629, 78 L.Ed. 548.

60. U.S—Harp v. Choctaw, etc, R Co, Ark., 125 F. 445, 61 C.C A. 405.

Miss—Vicksburg, etc., Tobacco Co. v. U. S. Express Co, 8 So 332, 68 Miss 149.

S.C.—Harveley v. Southern R. Co, 78 S.E 887, 95 S.C. 201

61. Okl.—U. S Express Co. v. State, 150 P. 178.

Pa—Henderson Coal Co. v Public Service Commission, 73 Pa.Super 45

62. Ark.—St. Louis, etc., R Co v. State, 104 S W. 1106, 84 Ark. 150.

63. Mo.—Warner v. St. Louis, etc., R. Co, 137 S W. 275, 156 Mo.App. 523.

N.C.—Alsop v. Southern Express Co., 10 S.E. 297, 104 N.C. 278, 6 L.R. A. 271.

64. U.S.—Swayne & Hoyt v. Everett, China, 255 F. 71, 166 C.C.A. 399—Chicago, R. I. & P. Ry. Co. v. Lawton Refining Co., Okl., 253 F. 705, 165 C C A. 299.

Ala.—St. Louis & S. F. Ry. Co. v. Georgia, F. & A. Ry. Co, 104 So. 33, 213 Ala. 108

Ark.—Jones v. Ferguson, 27 S W.2d 96, 181 Ark. 522.

Conn—Ace-High Dresses v. J. C. Trucking Co., 191 A. 536, 122 Conn. 578.

Ga.—Knight v Georgia Southwestern & G. Ry Co., 90 S.E. 81, 18 Ga App. 539.

Ill.—Kenna v Calumet, H. & S. E. R. Co., 120 N E 259, 284 Ill. 301, affirming 206 Ill.App. 17.

Ky—Cumberland Pipe Line Co v Commonwealth ex rel. Sheriff of Estill County, 79 S W 2d 366, 253 Ky. 90—Dawkins Lumber Co. v L. Carpenter & Co, 281 S.W. 1013, 213 Ky. 795—Hall v. Cumberland Pipe Line Co, 237 S.W. 405, 193 Ky 728

La—Miller Engineering Co v. Louisiana Ry & Nav. Co, 81 So 314, 144 La. 786

Md.—American Ry Express Co. v. Peninsula Produce Exch., 130 A. 346, 148 Md. 465.

Mass.—Haddad v. Griffin, 142 N.E 74, 247 Mass. 369—Houle v. Lewonis, 140 N.E 427, 245 Mass. 254.

Mo.—Fewel v. St. Louis & S F. Ry. Co., App., 267 S W. 960.

N H—Bernardi Greater Shows v. Boston & M. R. R, 165 A 124, 86 N H. 146.

N M—San Juan Coal & Coke Co. v. Santa Fé, S. J & N. R. R., 298 P. 663, 35 N.M. 336.

N Y—Crittenden v. American Ry. Express Co., 199 N.Y S 521, 205 App Div 228, affirmed 144 N.E. 899, 238 N.Y. 578.

Okl—St. Louis & S. F. Ry. Co. v. State, 184 P. 442, 76 Okl. 60, P.U. R.1920A 605, 7 A.L R. 140.

Pa—New York, Susquehanna & Western R. Co v. Ruthven, 88 Pa. Super. 501.

Tex—Gulf, C & S. F. Ry. Co v. Hamilton, Civ App., 57 S W 2d 309, appeal dismissed 89 S.W.2d 208, 126 Tex. 542—Texas Pipe Line Co. v. Burton Drilling Co., Civ App, 54 S W.2d 190—Ft. Worth & D. C. Ry. Co. v. Strickland, Civ.App., 208 S W. 410.

Wash—Spokane Valley Growers' Union v. Spokane & I. E. R. Co, 175 P. 184, 103 Wash. 587.

10 C J p 66 notes 52, 55.

Apparently recognizing rule

Ala.—Mobile & O. R. Co. v. Zimmern, 89 So. 475, 206 Ala. 37, 16 A L.R. 1352.

Ky.—Louisville & N. R. Co. v. Falls City Ice & Beverage Co., 61 S W. 2d 639, 249 Ky. 807, 91 A.L R. 509.

Duty of intermediate and terminal carriers to receive and transport property see infra § 419.

Liability of lessor railroad for refusal of its lessee to transport property see C.J.S. title Railroads § 355, also 51 C.J. p 1093 note 70.

The statement of this rule in Corpus Juris

(1) Has been adopted by the court in its syllabus.—St. Louis & S. F. Ry. Co. v. State, 184 P. 442, 76 Okl. 60, 7 A.L.R 140.

(2) Has been cited in support of a holding that the language of the Hepburn Act § 1 subd 4 "is merely declaratory of the common-law rule."—Lucking v. Detroit & C Navigation Co., D.C Mich, 273 F. 577, 583.

Shipper entitled to reasonable service

Ind.—Vandalia R. Co. v Schnull, 122 N E. 225, 188 Ind. 87, reversed on other grounds 41 S Ct. 324, 255 U. S. 113, 65 L Ed. 539, opinion conformed to 130 N.E. 865, 190 Ind. 638.

Refusal by carrier's agent because of personal animosity between himself and the shipper has been held to render the carrier liable—Lanning v. Sussex R. Co, 1 N.J L.J 21.

A statute imposing a penalty on a railroad company for failure to furnish cars on reasonable demand does not relieve it of its duty to transport.—Bell v. Norfolk Southern R. Co., 79 S.E. 421, 163 N.C. 180.

65. U.S—The Henry W Breyer, D. C.Md., 17 F.2d 423.

Pa.—New York, Susquehanna & Western R. Co. v. Ruthven, 88 Pa. Super. 501

Tex—Gulf, C. & S. F. Ry. Co. v. Hamilton, Civ.App, 57 S W.2d 309, appeal dismissed 89 S.W.2d 208, 126 Tex. 542

10 C.J. p 66 notes 52, 53.

fore, of any special contract,[66] and is unaffected by any length of time, manner of treatment, or habit of dealing with shippers,[67] or by any contract between common carriers themselves by which either carrier will be disabled from performing service to which the public is entitled.[68]

Private carrier. A private carrier is under no duty to receive and transport goods unless it has entered into a special contract to do so.[69]

§ 28. Excuses for Refusal to Receive and Transport

a. In general
b. Character or condition of property tendered
c. Circumstances beyond carrier's control
d. Other excuses

a. In General

A common carrier's duty to receive and transport property is subject to reasonable limitations and conditions, and, where necessary to the proper conduct of its business, the carrier may declare an embargo on the carriage of property.

The duty of a common carrier to accept for carriage and to carry property tendered, discussed in § 27 supra, is not an absolute one, but is subject to reasonable limitations and conditions.[70] Accordingly, whenever necessary to the proper conduct of its business, a common carrier may lay an embargo on the carriage of property[71] for a limited and definite period, or for an unlimited or indefinite period.[72]

b. Character or Condition of Property Tendered

A common carrier is not required to receive and transport property of such character or in such condition that it cannot be deemed to have held itself out as willing to carry it; nor, except in some circumstances, is it required to haul privately owned cars.

In the absence of statute to other effect, a common carrier is under no duty to receive and transport property of an extraordinary character,[73] or other than it holds itself out as willing to carry.[74] Thus, it has been held that it may refuse to receive and transport property of a dangerous character,[75] although there is authority to the contrary;[76] it may refuse to receive and transport property injurious to the public health, peace or morals,[77] or property the transportation of which is prohibited by law,[78] or the handling of which is

66. U.S.—The Henry W. Breyer, D C.Md., 17 F.2d 423.
Conn.—Ace-High Dresses v. J. C. Trucking Co., 191 A. 536, 122 Conn. 578.
Pa.—New York, Susquehanna & Western R. Co v. Ruthven, 88 Pa. Super. 501.
Tex.—Gulf, C. & S. F. Ry. Co. v Hamilton, Civ.App., 57 S.W.2d 309, appeal dismissed 89 S.W.2d 208, 126 Tex. 542
10 C.J. p 66 notes 52, 53.

67. Ky.—Louisville, etc., R. Co. v. Higdon, 148 S.W. 26, 149 Ky. 321.

68. Ky.—Chesapeake, etc., R. Co. v Peed, 150 S.W. 472, 155 Ky. 696, Ann.Cas.1915C 460—Seasongood v. Tennessee, etc., Transp. Co., 54 S. W 193, 21 Ky.L. 1142, 49 L.R.A. 270.
Limitation generally on right of common carrier to make special contracts see infra § 130.

69. Ark.—Jones v. Ferguson, 27 S W.2d 96, 181 Ark. 522
Conn.—Ace-High Dresses v. J. C. Trucking Co., 191 A. 536, 122 Conn. 578.
Ky.—Dawkins Lumber Co. v. L. Carpenter & Co., 281 S.W. 1013, 213 Ky. 795
Mass.—Haddad v. Griffin, 142 N.E. 74, 247 Mass. 369.
Lumber company railway held not required to receive and haul freight for public.—Dawkins Lumber Co. v. L. Carpenter & Co., 281 S.W. 1013, 213 Ky. 795.

70. La.—Miller Engineering Co v. Louisiana Ry. & Nav. Co., 81 So. 314, 144 La. 786
10 C.J. p 67 note 62.

71. U.S.—U. S. v. Metropolitan Lumber Co., D.C.N.J., 254 F. 335.
"Embargo" defined
"An embargo is a notice issued by a common carrier refusing to receive or carry certain kinds of freight on its line, or between certain points."—Chesapeake, etc., R. Co. v. O'Gara, 139 S.W. 803, 804, 144 Ky. 561.
Embargo held violative of federal statute
However, a declaration of embargo by an interstate carrier, at the request of a consignee under contract to receive interstate shipments, was held violative of a provision of the Hepburn Act as to an interstate carrier's duty to transport property.—Menasha Paper Co. v. Chicago, etc., R. Co., Wis., 36 S.Ct. 501, 241 U.S. 55.

72. Ky.—Chesapeake, etc., R. Co. v. O'Gara, 139 S.W. 803, 144 Ky. 561.

73. U.S.—Chicago, R. I. & P. Ry. Co. v. Lawton Refining Co., Okl., 253 F. 705, 165 C.C.A. 299.
Okl.—St. Louis & S. F. Ry. Co. v. State, 184 P. 442, 76 Okl. 60, 7 A. L.R. 140.
10 C.J. p 43 note 63 [b].

74. Ala.—Alabama Great Southern R. Co. v. Herring, 174 So. 502, 234 Ala. 238.
Iowa.—State ex rel Board of Railroad Com'rs v. Rosenstein, 252 N. W. 251, 217 Iowa 985.
10 C.J. p 41 note 43, p 42 note 44.

75. Cal.—California Powder Works v. Atlantic, etc., R. Co., 45 P. 691, 113 Cal. 329, 36 L.R.A. 648 and note.
10 C.J. p 67 note 64.
Explosives
Cal.—California Powder Works v. Atlantic, etc., R. Co., 45 P. 691, 113 Cal. 329, 36 L.R.A. 648.
Right of inspection
It has been said that a carrier may demand an examination of property which it has reasonable ground to suspect of being of a dangerous character, but that, in the absence of reasonable ground for such suspicion, it possesses no such right.—Gulf, C., & S. F. Ry. Co. v. Fowler, 122 S.W. 593, 57 Tex.Civ.App. 556—10 C.J. p 67 note 65.

76. U.S.—Actiesselskabet Ingrid v. Central R. Co. of New Jersey, N. Y., 216 F. 72, 132 C.C.A. 316, L.R.A.1916B 716, affirming, D.C., The Ingrid, 195 F. 596, rehearing denied 216 F. 991, 132 C.C.A. 665, L.R.A.1916B 716, certiorari denied 35 S.Ct. 284, 238 U.S. 615, 59 L.Ed. 1190.

77. Ga.—Coweta County v. Central of Georgia R. Co., 60 S.E. 1018, 4 Ga.App. 94.

78. Ill.—City of Chicago v. Chicago

specially taxed.[79]

Likewise, a common carrier is under no duty to receive and transport property not prepared for shipment in the manner ordinarily required by it,[80] or property which has been packed or loaded in such a manner,[81] or which is in such a condition,[82] that its transportation would entail extra care and risk.

Particular train. A carrier is not bound to transport on a particular train goods not ordinarily carried on that train, especially where its practice in this respect is known to the shipper.[83]

Privately owned cars. A carrier, being required to furnish cars on demand, as shown infra § 35, is entitled to use its own cars, and is ordinarily under no duty as a common carrier to accept and haul privately owned cars;[84] however, it may accept and transport such cars upon such terms as it sees fit,[85] although it need not transport them otherwise than according to its own schedule and in its ordinary course of business.[86] On the other hand, it must receive and transport such cars where it holds itself out as willing to do so,[87] or where a rule of a state regulatory commission having jurisdiction in the matter so provides;[88] and

& N W. Ry. Co., 113 N.E 849, 275 Ill 30, L.R.A.1917C 238
Ky—Meeks Motor Freight v Falls City Brewing Co, 104 S W.2d 421, 268 Ky. 213
Mo—Gum v. St. Louis & S F Ry. Co, App, 198 S W. 494.
10 C.J. p 67 note 66.

Intoxicating liquor

(1) A common carrier is under no duty to carry intoxicating liquor the transportation of which is prohibited by statute.
Ky.—Meeks Motor Freight v. Falls City Brewing Co, 104 S W.2d 421, 268 Ky. 213.
Mo—Gum v. St. Louis & S. F. Ry. Co., App, 198 S W 494.
10 C.J. p 67 note 66 [a] (1).

(2) On the other hand, it is under a duty to carry liquor the transportation of which is not prohibited by statute.
Ga—Southern Express Co. v. State, 33 S.E. 637, 107 Ga. 670, 73 Am. S R. 146, 46 L R A. 417—Knight v. Georgia Southwestern & G. Ry. Co., 90 S E. 81, 18 Ga App. 539.
Ky.—Louisville & N. R. Co. v Falls City Ice & Beverage Co, 61 S W. 2d 639, 249 Ky 807, 91 A L.R. 509.
10 C J. p 67 note 66 [a] (2).

(3) Accordingly an invalid prohibitory ordinance of the city of destination is not an excuse for refusal to carry intoxicating liquor.—Southern Express Co. v. R. M. Rose Co, 53 S E. 185, 124 Ga. 581, 5 L.R.A.,N.S., 619.

(4) So also a common carrier has been held not entitled to refuse to carry an intra-state shipment of "3.2" beer, the court finding that such beer is nonintoxicating and therefore not within the provisions of the local prohibition law.—Louisville & N. R. Co. v. Falls City Ice & Beverage Co., supra.

Milk

A common carrier is not bound to carry milk which is not of the temperature prescribed by an ordinance of the city of destination.—City of Chicago v. Chicago & N. W. Ry. Co., 113 N E. 849, 275 Ill. 30, L R A. 1917C, 238.

79. Tex—Craddock v. Wells-Fargo Co. Express, 125 S.W. 59, 58 Tex. Civ.App 551.

C. O. D. shipments of intoxicating liquor may be refused by a common carrier where it is required to pay a tax on such shipments—Craddock v. Wells-Fargo Co. Express, 125 S.W. 59, 58 Tex Civ.App. 551.

80. Ill—Wiggins Ferry Co. v. East St. Louis Union R. Co, 107 Ill 450.
Or—Thompson-Houston Electric Co. v. Simon, 25 P. 147, 20 Or. 60, 23 Am S R 86, 10 L.R.A 251.

81. Ala—Louisville & N. R. Co. v Hendricks, 171 So. 273, 233 Ala 259
Cal.—California Powder Works v Atlantic, etc, R. Co, 45 P. 691, 113 Cal. 329, 36 L.R A. 648—Mitchell v. North Pac S. S. Co., 213 P. 293, 60 Cal.App 554.
Ill.—S Valentine & Co. v. Atchison, T. & S. F. Ry Co., 220 Ill App 188.
N D—Gehrke v. American Ry. Express Co., 240 N.W. 321, 61 N D 668, 81 A.L R. 808.
Tex—Abbott v. Tompkins, Civ.App., 283 S.W 647.
10 C J. p 68 note 77.

Notice to reload

The carrier should notify the shipper, so that property improperly loaded may be reloaded in a proper manner.—Louisville & N. R. Co. v. Hendricks, 171 So. 273, 233 Ala. 259.

82. Ala.—Atlantic Coast Line R Co v. Dothan Ins. Agency, 80 So. 647, 16 Ala.App 623.

Effect of shipper's offer of indemnity

(1) However, the condition of the property offered for shipment has been held not to excuse a carrier's refusal where the shipper has offered to indemnify the carrier against any loss resulting from such condition.—Spokane Valley Growers' Union v. Spokane & I. E. R. Co., 175 P. 184, 103 Wash. 587.

(2) Moreover the carrier's assumption of liability, in such circumstances, for any loss not the direct result of the shipper's negligence constitutes no excuse for refusal.—Spokane Valley Growers' Union v. Spokane & I E R. Co, supra.

83. N C.—Shaw v. Southern Express Co, 88 S.E 222, 171 N.C. 216

84. U S—Sasinowski v. Boston & M. R. R., C C A.Mass, 74 F 2d 628.
Ariz—Southern Pac Co v State, 165 P. 303, 19 Ariz. 20, affirmed 39 S Ct. 313, 249 U.S. 472, 63 L. Ed. 713.
10 C J. p 73 note 60.

85. Ariz.—Southern Pac. Co v. State, supra

86. U S.—Sasinowski v. Boston & M. R. R., C.C A.Mass, 74 F 2d 628.

87. N H—Bernardi Greater Shows v. Boston & M. R. R, 165 A. 124, 86 N H 146.

88. Ariz—Southern Pac. Co. v. State, 165 P. 303, 19 Ariz. 20, affirmed 39 S.Ct. 313, 249 U S. 472, 63 L.Ed. 713.
10 C J. p 564 note 28.

Cars of another carrier

A carrier is bound to accept and transport the cars of another carrier not a connecting carrier where ordered to do so by the state railroad commission having general supervision of all steam railroads in the state, irrespective of whether it is bound to do so under a statute compelling it to accept and transport the cars of a connecting carrier.—State v Chicago, etc, R Co, 130 N.W. 802, 152 Iowa 317.
Under Emergency Railroad Transportation Act see infra § 922.

Failure to file tariff

A carrier is bound to receive and transport circus cars where ordered to do so by the state corporation commission possessing jurisdiction in the matter, even though the carrier did not file a tariff providing for such transportation.—Southern Pac. Co. v. State, 165 P. 303, 19 Ariz. 20, affirmed 39 S.Ct. 313, 249 U.S. 472, 63 L.Ed. 713.

it has been held that a statute fixing maximum rates where cars are owned or furnished by others recognizes a shipper's right to use its own cars and requires a carrier to haul such cars.[89]

c. Circumstances beyond Carrier's Control

Circumstances beyond a common carrier's control rendering transportation over its line, or that of a connecting carrier, impossible or impracticable excuse its refusal to receive property for shipment; but it must promptly notify the shipper of its inability to render the service demanded.

A common carrier may refuse to receive property for shipment if transportation on its line, or the line of a connecting carrier, has become impossible or impracticable because of circumstances beyond its control,[90] such as a contagious disease of animals,[91] a strike,[92] military control of the carrier's line,[93] or an unprecedented and unexpected rush of business.[94] However, a common carrier must promptly notify the shipper of its inability to render the service demanded,[95] and if it receives property without giving such notice it will be estopped from setting up what otherwise would be a sufficient excuse for refusal to accept such property.[96]

d. Other Excuses

Various circumstances in addition to those considered above have been adjudged available or unavailable as an excuse for a common carrier's refusal to receive and transport property.

In addition to the excuses considered in preceding subdivisions of this section, a common carrier has been held to be under no duty to receive and transport property tendered by a wrongdoer,[97] likewise it may refuse to accept for transportation fuel tendered by a shipper delinquent under a contract to furnish fuel to the carrier for the latter's own use, and necessary to the operation of its trains.[98] A railroad company is not bound to receive goods at places in its line where it has no facilities for doing so.[99]

On the other hand, a carrier has been held not justified in refusing to receive and transport property because of a mere controversy between it and the shipper,[1] or because the point to which the property is to be consigned is not a regular station at which an agent of the carrier is maintained,[2] or because the shipment and marketing of the property offered would injuriously affect the sale and consequently the shipment of other property produced

89. Pa.—Logan Coal Co. v. Pennsylvania R. Co., 16 Pa.Dist. 635.

90. U.S.—Swayne & Hoyt v. Everett, China, 255 F. 71, 166 C.C.A. 399.
Ark.—Gage v. Arkansas Cent. R. Co., 254 S.W. 665, 169 Ark. 402
Tex.—Hill County v. St. Louis Southwestern Ry. Co., Civ.App., 31 S.W. 2d 868.

91. Ala.—Nashville, C. & St. L. Ry. v. Farrell, 70 So. 986, 14 Ala.App. 380.
Disease in stockyard in which a railroad, in accordance with a federal statute, rested live stock in transit was held to excuse its refusal to accept a shipment of live stock where it did not have knowledge of such disease in time to remedy the situation.—Nashville, C. & St. L. Ry. v. Farrell & Braley, 70 So. 986, 14 Ala. App. 380.

92. Ark.—Gage v. Arkansas Cent. R. Co., 254 S.W. 665, 160 Ark. 402.
10 C.J. p. 67 note 74.
Strikes as excuse for delay in transportation see infra § 202.
The statement of the rule in Corpus Juris is cited and followed in Gage v. Arkansas Cent. R. Co., 254 S.W. 665, 666, 169 Ark. 402.
Switchmen's strike on the line of a connecting carrier—Gage v. Arkansas Cent. R. Co., 254 S.W. 665, 160 Ark. 402

93. Ill.—Phelps v. Illinois Cent. R. Co., 94 Ill. 548.
10 C.J. p. 67 note 63.
Apparently recognizing rule, Illinois Cent. R. Co. v. Schwartz, 13 Ill. App. 490.
Contract immaterial
The fact that a carrier is under contract to transport the goods is immaterial if the suit is not on the contract but in tort for failure to perform its common-law duty.—Phelps v. Illinois Cent. R. Co., 94 Ill. 548.

94. Ark.—Gage v. Arkansas Cent. R. Co., 254 S.W. 665, 160 Ark. 402
Tenn.—Southeastern Express Co. v. Bowers, Inc., App., 109 S.W.2d 851.
10 C.J. p. 67 note 75—20 C.J. p. 404 note 23
Press of business or lack of facilities as excuse for delay in transportation see infra § 200.
Effect of providing cars
However, where cars have been provided in response to a notice from the shipper, the carrier cannot refuse to accept property offered for transportation in such cars on the ground that there is an unusual and unprecedented demand by others at that time and place.—Cross v. McFadden, 20 S.W. 846, 1 Tex.Civ.App. 461

95. U.S.—Eastern R. Co. v. Littlefield, Tex., 35 S.Ct. 489, 237 U.S. 140, 59 L.Ed. 878.
Duty to advise shipper of probable delay see infra § 199.

96. U.S.—Eastern R. Co. v. Littlefield, supra.
Corpus Juris statement quoted
N.D.—Gehrke v. American Ry. Express Co., 240 N.W. 321, 322, 61 N.D. 668, 81 A.L.R. 808.

97. Mo.—Metzger v. Columbia Terminals Co., 50 S.W.2d 680, 227 Mo. App. 135.

98. U.S.—Springfield Light, Heat & Power Co. v. Norfolk & W. Ry. Co., D.C.Ohio, 260 F. 254.
Apparently so holding Phoenix Coal Co. v. Pennsylvania R. Co., 180 N.Y.S. 283, 190 App.Div. 665.

99. Ill.—Kenna v. Calumet, H. & S.E.R. Co., 120 N.E. 259, 284 Ill. 301, affirming 206 Ill.App. 17.

1. Ohio—New York Cent. R. Co. v. Public Utilities Commission of Ohio, 164 N.E. 427, 119 Ohio St. 381.
Apparently so holding Corbett v. Atlantic Coast Line R. Co., 170 S.E. 129, 205 N.C. 85.
As to rights under a contract
Ohio—New York Cent. R. Co. v. Public Utilities Commission of Ohio, 164 N.E. 427, 119 Ohio St. 381.
As to transportation rates
N.C.—Corbett v. Atlantic Coast Line R. Co., 170 S.E. 129, 205 N.C. 85.

2. N.C.—Reid v. Southern R. Co., 63 S.E. 112, 149 N.C. 423—Alexander v. Atlantic Coast Line R. Co., 56 S.E. 697, 144 N.C. 93.
Wash.—Normile v. Northern Pac. R. Co., 77 P. 1087, 36 Wash. 21, 67 L.R.A. 271.

on the carrier's line.[3] So, also, it cannot refuse to receive and transport property pending an inquiry as to whether the consignee will accept the property.[4]

§ 29. Conditions Precedent to Right of Transportation

The conditions precedent to the right of transportation are ordinarily such as relate to a tender of the goods and a prepayment of charges, as considered in §§ 30 and 31 infra.

§ 30. Tender of Goods

A shipper, to be entitled to damages for a common carrier's refusal to receive and transport property, must have properly tendered it, unless informed in advance that it would not be accepted.

To be entitled to claim damages from a common carrier for refusal to receive and transport his property, a shipper must have tendered such property,[5] unless informed in advance that it would not be accepted,[6] to some person authorized to act for the carrier in such matters,[7] or to an agent permitted by the carrier to hold himself out as authorized.[8]

Time for tender. Any regulation as to the time when property should be tendered must be reasonable.[9]

What constitutes a proper tender must depend on all the circumstances of the particular case.[10]

§ 31. Prepayment of Charges

A common carrier may make prepayment of charges a condition precedent to furnishing transportation; but, if it does not, failure to tender payment in advance does not excuse refusal to transport.

A common carrier may make prepayment of freight charges a condition precedent to furnishing transportation.[11] Unless it requires prepayment, however, failure to tender such payment in advance will not be an excuse for refusing to transport.[12] A fortiori, if the bill of lading provides for payment of charges at the end of transportation, failure to tender such charges in advance will not be a defense for refusal to receive and to transport goods tendered for shipment.[13]

§ 32. Transportation to Points beyond Carrier's Line

A common carrier must carry on its own line freight destined to a point beyond; but it has no common-law duty, in the absence of a contract or a holding out of itself as assuming such duty, to carry freight beyond its own line.

A common carrier has no right to refuse to receive freight destined to a point beyond its own line, but must carry such freight to the end of its line,[14] and, as will be seen in § 410 infra, deliver it to a connecting carrier to be forwarded. Accordingly, a contract by one carrier with another that it will not receive goods destined to a point beyond its own line is illegal and cannot excuse its refusal to receive goods so destined.[15]

On the other hand, a common carrier has no duty at common law, in the absence of a contract to do so, to transport goods to a point beyond its own line,[16] or beyond the limits of the territory to which

3. U.S.—Olanta Coal Min. Co. v. Beech Creek R. Co., C.C.Pa., 144 F. 150, affirmed 158 F. 36, 85 C.C.A. 148.

4. Pa.—Director General of Railroads v. Birdsboro Stone Co., 86 Pa.Super. 587—Pennsylvania R. Co. v. Whitney & Kemmerer, 73 Pa.Super. 588.

5. Minn.—Richey, etc., Co. v. Northern Pac. R. Co., 125 N.W. 897, 110 Minn. 347.
10 C.J. p 68 note 85.
Tender of goods as condition precedent to shipper's right to cars see infra § 37.

6. Tex.—Houston, etc., R. Co. v. Campbell, 45 S.W. 2, 91 Tex. 551, 43 L.R.A. 225.
10 C.J. p 68 note 89.

7. Mo.—Hoffman Heading, etc., Co. v. St. Louis, etc., R. Co., 94 S.W. 597, 119 Mo.App. 495.

8. Ky.—Seasongood v. Tennessee, etc., Transp. Co., 54 S.W. 193, 21 Ky.L. 1142, 49 L.R.A. 270.

9. N.C.—Alsop v. Southern Express Co., 10 S.E. 297, 104 N.C. 278, 6 L.R.A. 271

10. Minn.—Richey, etc., Co. v. Northern Pac. R. Co., 125 N.W. 897, 110 Minn. 347.
10 C.J. p 68 notes 77 [a], 88

11. Ind.—Evansville, etc., R. Co. v. Keith, 35 N.E. 296, 8 Ind.App. 57
10 C.J. p 68 note 91, p 441 note 52.
Apparently recognizing rule
Mass.—Houle v. Lewonis, 140 N.E. 427, 245 Mass. 254.
N.C.—Corbett v. Atlantic Coast Line R. Co., 170 S.E. 129, 205 N.C. 85.

12. Ill.—Galena, etc., R. Co. v. Rae, 18 Ill. 488, 68 Am.D. 574
Me.—Lord v. Maine Cent. R. Co., 74 A. 117, 105 Me. 255—Wilson v. Grand Trunk R. Co., 57 Me. 138, 2 Am.R. 26.

13. Ind.—Chicago, etc., R. Co. v. Wolcott, 39 N.E. 451, 141 Ind. 267, 50 Am.S.R. 320.

14. Ill.—State Public Utilities Commission v. Pittsburgh, C., C. & St. L. R. Co., 125 N.E. 495, 290 Ill. 580
N.C.—M. V. Moore & Co. v. Southern Ry. Co., 111 S.E. 166, 183 N.C. 213.
10 C.J. p 69 note 95
The statement of this rule in Corpus Juris is cited with approval—State Public Utilities Commission v. Pittsburgh, C., C. & St. L. R. Co., 125 N.E. 495, 497, 290 Ill. 580

15. Ky.—Seasongood v. Tennessee, etc., Transp. Co., 54 S.W. 193, 21 Ky.L. 1142, 49 L.R.A. 270
10 C.J. p 69 note 96

16. Ill.—State Public Utilities Commission v. Pittsburgh, C., C. & St. L. R. Co., 125 N.E. 495, 290 Ill. 580.
N.Y.—Anthony & Jones Co. v. New York Cent. & H. R. R. Co., 119 N.E. 90, 223 N.Y. 21, L.R.A.1918F 1085, reversing 152 N.Y.S. 1097, 167 App.Div. 955
N.C.—M. V. Moore & Co. v. Southern Ry. Co., 111 S.E. 166, 183 N.C. 213.
Tex.—Ft. Worth & R.G. Ry. Co. v. Jones, Civ.App., 212 S.W. 552.
10 C.J. p 69 note 97.
Bill of lading
(1) A provision of a statute authorizing a public utilities commission to order carriers to establish

it devotes its common service.[17] It may assume such obligation, however, by contract, as will be seen in § 405 infra, or by holding itself out as doing so.[18]

§ 33. Actions for Refusal to Receive and Transport

a. Nature and form
b. Venue
c. Parties
d. Pleading
e. Evidence
f. Questions for jury
g. Damages
h. New trial

a. Nature and Form

A common carrier's failure to receive and transport freight is a private wrong for which the shipper may recover damages at law.

The neglect or refusal of a common carrier to receive and transport freight tendered for shipment is a private wrong for which the shipper is entitled to recover, in an action at law, such damages as he has sustained;[19] and trespass has been held the proper form.[20]

b. Venue

If the complaint does not show the place of the carrier's refusal, the action is presumably in the proper county. For a change to the county of its principal place of business, the carrier must show that the breach occurred outside the county where action was brought.

If the place at which the common carrier's refusal to carry plaintiff's goods occurred does not appear in the complaint, the action is presumably brought in the proper county. To obtain a change of venue to the county where it has its principal place of business, the carrier must affirmatively show that the breach did not occur in the county in which the action was brought.[21]

c. Parties

The shipper is the proper party plaintiff. The lessor of a railroad line is not a necessary party defendant in an action against the lessee railroad.

The shipper, not the consignee, is the proper party to bring an action against a common carrier for wrongfully refusing to transport property.[22] The lessor of a railroad line is not a necessary party defendant in an action against the lessee railroad for refusal to receive and transport property over such line.[23]

d. Pleading

In an action for a carrier's failure or refusal to receive or transport property, various allegations have been held or held not required of plaintiff; and the carrier must affirmatively plead facts exonerating it from liability. The evidence must conform to the theory of the complaint.

In an action for a common carrier's failure or refusal to receive and transport property, the complaint or petition should allege plaintiff's capacity to sue, as that he is the consignor or owner of the property which the carrier neglected or refused to carry,[24] that defendant is a common carrier for

through routes and rates has been held not to authorize such commission to order a carrier to issue a through bill of lading over a line with which the carrier had no direct physical connection—State Public Utilities Commission v. Pittsburgh, C., C. & St. L. R. Co., 125 N.E 495, 290 Ill. 580.

(3) A bill of lading showing the destination and the name of the consignee does not of itself bind a carrier to transport property beyond its own line.

Tex—Ft. Worth & R. G. Ry. Co. v. Jones, Civ.App., 212 S.W. 552.

Duty on branch line

A railroad is not necessarily under a duty to transport goods over a branch line operated by it under lease—Avinger v. South Carolina R. Co., 7 S.E. 493, 29 S.C. 265, 13 Am.S. R. 716.

17. Mass.—Houle v. Lewonis, 140 N. E. 427, 245 Mass. 254.
10 C.J. p 69 note 1 [a].

18. Ind.—Chicago, etc., R. Co. v. Wolcott, 89 N.E. 451, 141 Ind. 267, 50 Am.S.R. 320.
10 C.J. p 69 note 1.

Duty held not assumed

However, the fact that a carrier has on certain occasions transported cars from the point of shipment to a point beyond its line has been held insufficient to impose on it the duty of so doing.—Coles v. Central R., etc., Co., 12 S.E. 749, 86 Ga. 251.

19. U.S—Moor v. Texas & N. O. R., C.C.A.Tex., 75 F.2d 386, certiorari granted 55 S.Ct. 836, 295 U.S. 728, 79 L.Ed. 1678, appeal dismissed 56 S.Ct. 372, 297 U.S 101, 80 L.Ed. 509—Swayne & Hoyt v. Everett, China, 255 F. 71, 166 C.C.A. 399.
Iowa.—Baird Bros. v. Minneapolis & St. L. R Co., 165 N.W. 412, 181 Iowa 1104.
N.C—Corbett v. Atlantic Coast Line R. Co., 170 S.E 129, 205 N.C. 85.
Pa.—New York, Susquehanna & Western R. Co. v. Ruthven, 88 Pa. Super. 501.
10 C.J. p 70 note 14.
Action against common carrier of property for breach of duty as contractual or in tort see Actions § 49 c (4).
Mandamus to compel common carrier to receive and transport property see C.J.S. title Mandamus § 231, also 10 C.J. p 69, notes 5 9, and 38 C.J. p 812 note 27 p 813 note 49, p 816 notes 82 84.
Penalty for refusal to receive freight for transportation see infra § 502.

Corpus Juris statement quoted

Iowa.—Baird Bros v Minneapolis & St. L. R. Co., 165 N W 412, 418, 181 Iowa 1104.

20. Pa.—New York, Susquehanna & Western R. Co. v. Ruthven, 88 Pa. Super. 501.

21. Cal.—Chase v. South Pac Coast R. Co., 23 P. 532, 83 Cal. 468.

22. La.—Lafaye v. Harris, 13 La. Ann. 553.
10 C.J. p 70 note 17.

23. Ga.—Central R., etc., Co. v. Logan, 2 S.E 465, 77 Ga. 804.

24. Ind.—Pittsburgh, etc., R. Co. v. Morton, 61 Ind. 539, 28 Am.R. 682—Pittsburgh, etc., R. Co. v. Racer, 31 N.E. 853, 5 Ind.App. 209.

hire,[25] that plaintiff requested defendant to carry his goods and was ready and willing to pay the customary freight charges,[26] that defendant neglected and refused to carry his goods,[27] and, apparently, the specific damages incurred by plaintiff as the result of defendant's refusal.[28]

On the other hand, it has been held unnecessary to allege a tender of the transportation charges,[29] at least if the carrier's refusal was for reasons other than nonpayment of such charges,[30] the point to which the property was destined, where such point was necessarily unascertained,[31] that the rate agreed on was that established by the railroad commission,[32] or that it was within the carrier's power to receive and transport the property with reasonable dispatch.[33]

Plea or answer. A common carrier must affirmatively plead any fact which will exonerate it from liability for refusing to receive and carry goods tendered to it for shipment.[34]

Variance. The evidence must correspond to the theory of the complaint; a party cannot declare on one theory and recover on another.[35]

e. Evidence

The carrier has the burden of proving facts exonerating it from liability. Evidence that the carrier quoted an incorrect rate has been held admissible, and, in a particular case, evidence has been held insufficient to show a tender to the carrier.

A common carrier has the burden of proving such facts as would exonerate it from liability for refusing to receive and transport property tendered to it for shipment.[36] Evidence that an interstate carrier quoted an incorrect rate has been held admissible in an action against it for refusal to transport property at the rate prescribed by the interstate commerce commission.[37] In particular cases, evidence has been held insufficient to show a tender of the property,[38] or any purpose to make such a tender to defendant as a carrier.[39]

f. Questions for Jury

Particular evidence has been held sufficient to go to the jury as to the wrapping, marking, or acceptance of goods, or the carrier's refusal to transport except at an excessive rate.

In particular cases, evidence has been held sufficient to go to the jury on the question whether the goods were tendered properly wrapped and

Iowa.—Cobb v. Illinois Cent. R. Co., 38 Iowa 601.

Form of complaint

Ind.—Pittsburgh, etc., R. Co. v. Morton, 61 Ind. 539, 541, 542, 28 Am. R. 682.

25. Iowa—Cobb v. Illinois Cent. R. Co., 38 Iowa 601.
10 C.J. p 70 note 22.

26. Ind.—Pittsburgh, etc., R. Co. v. Racer, 31 N.E. 853, 5 Ind.App. 209.
10 C.J. p 70 note 23.

27. Ind.—Pittsburgh, etc., R. Co. v. Morton, 61 Ind. 539, 28 Am.R. 682.

28. Tex.—Central, etc., R. Co. v. Morris, 3 S.W. 457, 68 Tex. 49.

Allegation held sufficient where the petition stated specifically what could have been realized from sales of the property had transportation been furnished, the loss from subsequent inability to sell the property, and all incidental expenses.—Central, etc., R. Co. v. Morris, 3 S.W. 457, 68 Tex. 49.

29. Tex.—Texas, etc., R. Co. v. Hays, 2 Tex.A.Civ.Cas. § 390.
10 C.J. p 70 note 25.

Averment of readiness to pay held sufficient

Tex.—Texas, etc., R. Co. v. Hays, 2 Tex.A.Civ.Cas. § 390.

30. Tex.—Central, etc., R. Co. v. Morris, 3 S.W. 457, 68 Tex. 49.

31. Tex.—Central, etc., R. Co. v. Morris, supra.

Failure of shipper to obtain contracts

It has been held that, although an averment as to the point of destination might be necessary in an ordinary case, it is unnecessary where the carrier's continuous refusal to transport the shipper's goods prevented the shipper from obtaining any contracts to deliver.—Central, etc., R. Co. v. Morris, 3 S.W. 457, 68 Tex. 49.

32. Tex.—Thompson v. San Antonio, etc., R. Co., 32 S.W. 427, 11 Tex. Civ.App. 145.

33. S.D.—Dunlap v. Chicago, etc., R. Co., 144 N.W. 226, 32 S.D. 581
10 C.J. p 71 note 26.

Reason for rule has been said to be that, since a common carrier is liable for refusal to carry without a reasonable excuse, it is for the carrier to show an excuse, and "what the shipper cannot be required to prove he ought not to be obliged to allege."—Pittsburgh, etc., R. Co. v. Racer, 31 N.E. 853, 854, 5 Ind.App. 209.

Rule of pleading as to penalties inapplicable

In an action to recover damages under a statute providing that common carriers must receive and transport freight with reasonable dispatch, the rule requiring a pleading in an action for a statutory penalty to set forth clearly and specifically the grounds on which it is sought was held inapplicable.—Dunlap v. Chicago, etc., R. Co., 144 N.W. 226, 32 S.D. 581.

34. U.S.—Swayne & Hoyt v. Everett, China, 255 F. 71, 166 C.C.A. 399.

Tex.—Ft. Worth & D. C Ry. Co. v. Strickland, Civ.App., 208 S.W. 410.

Under Interstate Commerce Act

Tex.—Ft. Worth & D. C. Ry. Co. v. Strickland, Civ.App., 208 S.W. 410.

Strike

An answer setting up a strike on the carrier's line as an excuse for its refusal to transport need not further allege that such strike could not have been prevented by either the carrier or civil authorities, since the prevention of strikes is an exercise of greater diligence than the law requires.—Galveston, etc., R. Co. v. Karrer, Tex.Civ.App., 109 S.W. 440.

35. Ind.—Louisville, etc., R. Co. v. Godman, 4 N.E. 163, 104 Ind. 490.
10 C.J. p 71 note 32.

36. U.S.—Swayne & Hoyt v. Everett, China, 255 F. 71, 166 C.C.A. 399.

Tex.—Ft. Worth & D. C. Ry. Co. v. Strickland, Civ.App., 208 S.W. 410.

Dictum Pittsburgh, etc., R. Co. v. Racer, 31 N.E. 853, 5 Ind.App. 209.

Under Interstate Commerce Act

Tex.—Ft. Worth & D. C. Ry. Co. v. Strickland, Civ.App., 208 S.W. 410.

37. S.C.—Aldrich v. Southern R. Co., 79 S.E. 316, 95 S.C. 427

38. Fla.—Charlotte Harbor & N. Ry. Co. v. Buchan, 71 So. 842, 71 Fla. 575

39. N.C.—Nelson v. Atlantic Coast Line R. Co., 82 S.E. 868, 166 N.C. 547.

marked, or were accepted by the carrier's agent,[40] or whether the carrier refused to transport them except at an excessive rate.[41]

g. Damages

A shipper may recover such damages as naturally and proximately result from a carrier's failure to receive and transport property; and losses and expenses resulting from delay in acceptance or incomplete performance may likewise be recovered. Exemplary damages may be allowed where willful disregard of the shipper's rights or gross negligence is shown.

The damages recoverable for a common carrier's wrongful failure or refusal to receive and to transport property are those which naturally and proximately flow from such failure or refusal.[42] Thus, the shipper may ordinarily recover the difference between the market value of the property at the point to which it was destined at the time it would have arrived had the carrier discharged its duty, and its market value at the same time at the point of shipment, less the cost of transportation.[43] Moreover, it has been held that a shipper may recover for an injury to his business at the point of destination resulting from the need for the property in such business,[44] or, under a statute allowing recovery of actual damages, for profits he would have realized under a contract with a third person but for the carrier's wrongful refusal to transport.[45]

Delay in acceptance. Where the carrier accepts the property for shipment after an improper delay, the measure of damages is the difference between the market value of the property at the point of destination at the time the property should have arrived and its market value at that point at the time it did arrive;[46] further, the carrier will be liable for any injury to, or deterioration in, the property resulting from the delay,[47] even though the deterioration results from something inherent in the nature of the goods,[48] and for expenses incurred by the shipper in caring for the property during the delay,[49] and in delivering it a second time for transportation.[50] Liability and actions for delay in transportation are considered generally in §§ 190–230 infra.

Incomplete performance. Where a carrier fails to complete performance of its duty to transport property, it is liable for the cost of transportation, above the proper charges, incurred by the shipper in completing performance.[51]

Exemplary damages may be given if the carrier's refusal is the result of ill-will or willful disregard of the rights of the person tendering the goods for transportation,[52] or if its breach of the statutory duty to transport is attended by circumstances warranting a finding of gross negligence.[53]

40. N.C.—Nelson v. Atlantic Coast Line R. Co., 82 S.E. 868, 166 N.C. 547.

41. S.C.—Aldrich v. Southern R Co., 79 S.E. 316, 95 S.C. 427.

42. Pa.—Pennsylvania R. Co. v. Titusville & P. Plank Road Co., 71 Pa. 350, 355.
10 C.J. p 71 note 37.
"The rule is compensation; such damage as might reasonably have been anticipated, and within the view of the parties."—Pennsylvania R. Co. v Titusville & P. Plank Road Co., supra.
Damages for breach of special contract to transport see infra § 134.

Difference between correct and quoted rate

Where an interstate carrier quotes a higher rate than the regular interstate rate, forcing the shipper to forego shipment and sell his goods at a loss, the shipper's recovery is not confined to the mere difference between the correct and the quoted rate.—Aldrich v. Southern R. Co., 79 S.E 316, 95 S.C. 427.

43. Pa.—Pennsylvania R. Co. v. Titusville & P. Plank Road Co., 71 Pa.St. 350.
10 C.J. p 71 note 39.

Availability of similar goods as qualification

However, where goods of the type tendered by the shipper are necessary to his business at the point of destination, the rule of damages stated in the text is subject to the qualification that similar goods be obtainable at such point.—Pennsylvania R Co. v. Titusville & P. Plank Road Co., 71 Pa. 350.

44. Pa.—Pennsylvania R. Co. v. Titusville & P. Plank Road Co., supra.

Particular items of damage recoverable

(1) In such circumstances, the carrier has been held liable for "the natural consequences of delay and stoppage of work and payment of wages, and expenses arising therefrom, and the loss from not having the work finished at the time it otherwise would have been"—Pennsylvania R. Co. v. Titusville & P Plank Road Co, 71 Pa 350, 356.

(2) On the other hand, the shipper has been held not entitled to recover for loss to his business resulting from a rise of wages, stormy weather, or bad roads, since such loss was not a proximate effect of the carrier's failure to transport—Pennsylvania R. Co. v. Titusville & P. Plank Road Co., supra.

(3) Furthermore, it was held that the shipper must adopt every proper and feasible means of supplying himself with necessary goods, and that his neglect to do so was "an element for the consideration of the jury in estimating damages"—Pennsylvania R. Co. v. Titusville & P. Plank Road Co., supra.

45. N.C.—Corbett v. Atlantic Coast Line R. Co., 170 S.E. 129, 205 N.C. 85.

46. Tex.—Galveston, etc., R Co. v. Karrer, Civ.App., 109 S.W. 440.

47. Ill.—Chicago, etc., R. Co. v. Erickson, 91 Ill. 613, 33 Am.R. 70.
Ind.—Pittsburgh, etc., R. Co. v. Morton, 61 Ind. 539, 28 Am.R 682.
10 C.J. p 72 note 41.

48. Ind.—Pittsburgh, etc., R. Co. v. Morton, supra.

49. Neb.—Chicago etc., R. Co. v. Todd, 105 N.W 83, 74 Neb. 712
10 C.J. p 72 note 43.

50. Tex.—Inman v. St. Louis Southwestern R Co., 37 S.W. 37, 14 Tex. Civ.App 39.

51. N.Y.—American Cotton Products Co. v. New York Cent R. Co., 255 N.Y.S. 672, 142 Misc. 821.

52. S.C.—Avinger v. South Carolina R Co., 7 S.E. 493, 29 S.C 265, 13 Am S R. 716.

53. Tex.—Gulf, C. & S. F Ry. Co. v. Hamilton, Civ App., 57 S.W.2d 309, appeal dismissed 89 S.W.2d 208, 126 Tex. 542.

h. New Trial

Grant of a new trial on the ground that the verdict was contrary to law and unsupported by evidence is within the trial court's discretion.

The grant of a new trial on the ground that the verdict was contrary to law and without evidence to support it is within the discretion of the trial court.[54]

§ 34. Injunction to Enjoin Refusal to Receive and Transport

A shipper may obtain a mandatory injunction enjoining a common carrier from wrongfully refusing to receive and transport his property, if an adequate legal remedy is lacking, but not if such injunction would inequitably expose the carrier to serious risk.

If the legal remedy is inadequate, a shipper may ordinarily obtain a mandatory injunction enjoining a common carrier from wrongfully refusing to receive and transport his property;[55] but such an injunction will not be granted in the absence of a showing that the legal remedy, as by an action at law for damages, is inadequate,[56] or where such injunction would inequitably expose the carrier to the risk of serious legal consequences.[57]

E. DUTY TO FURNISH CARS

§ 35. Statement of Rule

A common carrier must promptly furnish cars for the transportation of property of a shipper who has complied with conditions precedent, whenever it can do so with reasonable diligence and without jeopardizing its other business or discriminating against other shippers; but the duty is not absolute, the law requiring only what is reasonable. A carrier unable to furnish cars must give notice of such inability within a reasonable time after a request therefor.

As a corollary to the general rule stated in § 27 supra, that a common carrier has the duty to receive and transport property, it is well settled, both under and apart from statutes in effect so providing, that a common carrier is bound promptly to furnish cars for the transportation of property,[58] whenever it can do so by the exercise of

54. Ga.—Atlanta, etc., R Co. v. Holcombe, 76 Ga. 590.

Discretion held properly exercised

A trial court's refusal to grant a carrier a new trial has been held to be a proper exercise of its discretion where plaintiff showed that the carrier transported goods of other parties engaged in the same business, who had applied for such transportation after plaintiff, and that plaintiff's goods depreciated in value owing to the failure to transport, although the carrier denied such facts and its evidence tended to show that it did not have the means to transport plaintiff's goods because of a pressure of general business on its road —Atlanta, etc., R Co. v. Holcombe, 76 Ga. 590.

55. Tex.—Texas Pipe Line Co. v. Burton Drilling Co., Civ.App., 54 S.W.2d 190

10 C.J. p 70 note 10.

Apparently so holding Mobile & O. R. Co. v. Zimmern, 89 So. 475, 206 Ala. 37, 16 A.L.R. 1352.

Apparently recognizing rule Louisville & N. R. Co. v. Falls City Ice & Beverage Co., 61 S.W.2d 639, 249 Ky. 807, 91 A.L.R. 509.

Injunction to compel connecting carrier to receive freight see infra § 450.

The Corpus Juris statement is cited with approval—Texas Pipe Line Co. v. Burton Drilling Co., Tex.Civ.App., 54 S.W.2d 190, 194.

Resort to interstate commerce commission in the first instance is unnecessary, since a suit of this character is one to compel the performance of a duty imposed by law and is within the jurisdiction of the courts.—Danciger v. Wells, Fargo & Co., C.C.Mo., 154 F. 379.

Preliminary mandatory injunction

(1) A shipper is entitled to a preliminary mandatory injunction if threatened with serious and irreparable injury—Texas Pipe Line Co. v. Burton Drilling Co., Tex.Civ.App., 54 S.W.2d 190—10 C.J. p. 70 note 12 Apparently so holding, Crescent Liquor Co. v. Platt, C.C.W.Va., 148 F. 894.

(2) Such an injunction was held to have been properly granted where, although the shipper had earlier tendered the property without furnishing the affidavit required by the railroad commission, the commission had subsequently authorized its transportation without such affidavit—Texas Pipe Line Co. v. Burton Drilling Co., supra.

56. U.S.—Moor v. Texas & N.O.R. Co., C.C.A.Tex., 75 F.2d 386, certiorari granted 55 S.Ct. 836, 295 U.S. 728, 79 L.Ed. 1678, appeal dismissed 56 S.Ct. 372, 297 U.S. 101, 80 L.Ed. 509

Carrier's ability to pay damages is presumed in the absence of any allegation as to its solvency or insolvency.—Moor v. Texas & N.O. R. Co., C.C.A.Tex., 75 F.2d 386, certiorari granted 55 S.Ct. 836, 295 U.S. 728, 79 L.Ed. 1678, appeal dismissed 56 S.Ct. 372, 297 U.S. 101, 80 L.Ed. 509

Multiplicity of suits is not a ground for equitable intervention in the absence of a showing that the enforcement of the shipper's rights would necessitate numerous suits.—Moor v. Texas & N. O. R. Co., C.C.A. Tex., 75 F.2d 386, certiorari granted 55 S.Ct. 836, 295 U.S. 728, 79 L.Ed. 1678, appeal dismissed 56 S.Ct. 372, 297 U.S. 101, 80 L.Ed. 509.

57. U.S.—Moor v. Texas & N. O. R. Co., supra

Disobedience of statute

The exercise of judicial discretion in refusing to grant a mandatory injunction directing a railroad company to accept and transport cotton without attached bale tags required by statute has been held to have been properly influenced by the fact that the issuance of such writ would probably encourage persons situated similarly to plaintiff, but who would not be bound by the decree, to make demands similar to those made by plaintiff, compliance with which by defendant would, in the absence of a court order, inequitably expose defendant to the risk of serious punishment for disobeying a statute the validity of which it was not beneficially interested in championing—Moor v. Texas & N. O. R. Co., C.C.A. Tex., 75 F.2d 386, certiorari granted 55 S.Ct. 836, 295 U.S. 728, 79 L.Ed. 1678, appeal dismissed 56 S.Ct. 372, 297 U.S. 101, 80 L.Ed. 509.

58. Fla.—Atlantic Coast Line R. Co. v. Florida Fine Fruit Co., 112 So. 66, 93 Fla. 161, affirmed 113 So. 384, 93 Fla. 161.

Ga.—Wadley Southern Ry. Co. v. Kent & Downs, 89 S.E. 765, 145 Ga. 689—Central of Georgia Ry. Co. v. George P. Greene & Co., 154 S.E. 809, 41 Ga.App. 794.

reasonable diligence,[59] and without jeopardizing, or unduly interfering with, its other business[60] or unfairly discriminating against, or interfering with the rights of, other shippers,[61] and, as appears in § 37 infra, when the shipper has made proper demand or given reasonable notice, and complied with other conditions. The carrier must furnish, without unreasonable delay, sufficient cars to transport property of such quantity as is ordinarily, or may reasonably be expected to be, offered for shipment,[62] and of such character as it holds itself out as willing to carry.[63]

The carrier's duty in this respect is created by law, not by an agreement on its part to provide transportation, and arises on a shipper's request that

Mo.—Warner v. St Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo. App 314.

10 C.J. p 66 note 55 [a], p 72 note 51, p 73 notes 54, 55.

Duty to furnish:

Cars under special contract see infra § 133.

Suitable cars see infra §§ 49–58

Penalties for failure to furnish cars see infra §§ 466–473.

Shipper's agreement to assume risk and care of property until it has been loaded was held not to abrogate the carrier's duty to furnish cars within a reasonable time after demand therefor.—St Louis, etc., R. Co. v. Jones, 125 S.W. 1025, 93 Ark. 537, 137 Am.S.R. 99.

Commission's order held applicable and binding

An order of the state public utilities commission as to the distribution of freight cars in times of shortage was held applicable to the furnishing of cars for the transportation of wheat, and to have the force and effect of a statute.—Stratton v. Atchison, T. & S. F. Ry. Co., 236 P. 831, 118 Kan. 673.

Statute held inapplicable to livestock

The provisions of a state statute requiring railroads to furnish growers of peaches, apples, cantaloupes, watermelons, or other perishable products with cars for the shipment of their products on request therefor made in a specified manner, have been held to have no application to the matter of receiving live stock for transportation. — Youmans v. Georgia, etc., R. Co., 83 S.E. 784, 142 Ga. 781.

59. Ark.—American Ry. Express Co. v. Bald Knob Fruit Exch., 258 S.W. 985, 162 Ark. 588

Iowa.—Baird Bros v. Minneapolis & St. L. R. Co., 165 N.W. 412, 181 Iowa 1104

Md.—American Ry. Express Co. v. Peninsula Produce Exch., 130 A. 346, 148 Md. 465.

Mo.—Howell v. Hines, App., 236 S.W. 886.

N.Y.—Walrath v. American Ry Express Co., 216 N.Y.S. 545, 217 App. Div. 83.

Wis.—Richland Equity Shipping Ass'n v. Chicago, M. & St. P. Ry. Co., 188 N.W. 625, 177 Wis. 530.

The Corpus Juris statement in accordance with the text is cited with approval in American Ry Express Co. v. Bald Knob Fruit Exch., 258 S.W. 985, 987, 162 Ark. 588, and Baird Bros. v Minneapolis & St. L R Co., 165 N.W. 412, 415, 181 Iowa 1101.

Duty to furnish by special train

A railroad's duty to furnish cars does not include the duty to bring them to the point of shipment by a special train.—Seaboard Air Line Ry. Co. v Gay, 126 So. 772, 99 Fla. 394—Seaboard Air Line Ry. Co. v. Gay, 126 So. 771, 99 Fla. 391.

Duty to make reasonable regulations, under Interstate Commerce Act, as to car service.—Midland Valley R. Co. v. Barkley, 291 S.W. 431, 172 Ark. 898, certiorari granted 48 S.Ct. 37, 275 U.S. 514, 72 L.Ed. 401, reversed on other grounds 48 S.Ct. 342, 276 U.S. 482, 72 L.Ed. 664.

60. Ark.—Missouri Pac. R. Co. v. Henderson, 247 S.W. 1070, 157 Ark. 43, reversed on other grounds Davis v. Henderson, 45 S.Ct. 24, 266 U.S. 92, 69 L.Ed. 182—Hines v. Mason, 231 S.W. 861, 144 Ark 11.

Fla.—Atlantic Coast Line R. Co. v. Florida Fine Fruit Co., 112 So 66, 93 Fla. 161, affirmed 113 So. 384, 93 Fla. 161.

Mo.—Howell v. Hines, App., 236 S.W. 886.

Wis.—Richland Equity Shipping Ass'n v. Chicago, M. & St. P. Ry. Co., 188 N.W. 625, 177 Wis. 530.

10 C.J. p 72 note 51, p 73 note 52.

61. Fla.—Atlantic Coast Line R. Co. v. Florida Fine Fruit Co., 112 So. 66, 93 Fla. 161, affirmed 113 So. 384, 93 Fla. 161.

N.Y.—Walrath v. American Ry. Express Co., 216 N.Y.S. 545, 217 App. Div. 83.

62. Ga.—Wadley Southern Ry. Co. v. Kent & Downs, 89 S.E. 765, 145 Ga. 689—Central of Georgia Ry. Co. v. George P. Greene & Co., 154 S.E. 809, 41 Ga.App. 794.

Ky.—McCord v. Louisville & N. R. Co., 267 S.W. 766, 206 Ky. 501—Louisville & N. R. Co. v. Crain, 224 S.W. 1063, 189 Ky. 431.

Mich.—Anderson v. Chicago, M. & St. P. Ry. Co., 175 N.W. 246, 208 Mich. 424

Mo.—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo.App 314—Fewel v. St Louis & S. F. Ry. Co., App., 267 S.W. 960.

"The proper measure of the carrier's obligation . . . is generally determined by the amount of freight ordinarily carried in normal times. The carrier must, however, anticipate that more freight will be offered for transportation at some seasons than others, and it is required to have ample rolling stock and cars on hand to meet such emergencies."—Atlantic Coast Line R. Co v. Florida Fine Fruit Co., 112 So 66, 69, 93 Fla. 161, affirmed 113 So 384, 93 Fla. 161. To same effect Central of Georgia Ry. Co v. George P Greene & Co., 154 S.E. 809, 41 Ga App 794—Anderson v. Chicago, M & St. P. Ry. Co., 175 N.W. 246, 208 Mich. 424.

Car lot shippers

Fla.—Atlantic Coast Line R. Co. v Florida Fine Fruit Co., 112 So. 66, 93 Fla. 161, affirmed 113 So. 384, 93 Fla. 161.

Well considered case

Ga.—Wadley Southern Ry. Co. v. Kent & Downs, 89 S.E. 765, 145 Ga. 689.

Other statements of duty

(1) Reasonable car service must be furnished by a common carrier.

Ark.—Midland Valley R. Co. v. Barkley, 291 S.W. 431, 172 Ark 898, certiorari granted 48 S.Ct. 37, 275 U.S. 514, 72 L.Ed. 401, reversed on other grounds 48 S.Ct. 342, 276 U.S. 482, 72 L.Ed. 664.

Okl.—Schaff v. Rose, 239 P. 455, 111 Okl. 237.

(2) A shipper is ordinarily entitled to as many cars as he needs.—Brownsville Nav. Dist. of Cameron County v. St. Louis, B. & M Ry. Co., C.C.A.Tex., 91 F.2d 502, certiorari granted 58 S.Ct. 42—Manbar Coal Co. v. Davis, C.C.A.W.Va., 297 F. 24.

(3) A shipper is ordinarily entitled to all the cars he can promptly load.

U.S.—Pennsylvania R. Co. v. Puritan Coal Co., 35 S.Ct. 484, 237 U.S. 121, 59 L.Ed. 867, affirming 85 A. 426, 237 Pa. 420, Ann.Cas.1914B 37.

Fla.—Seaboard Air Line Ry. Co. v. Gay, 126 So. 772, 99 Fla. 394—Seaboard Air Line Ry. Co. v. Gay, 126 So. 771, 99 Fla 391.

63. Ga.—Wadley Southern Ry. Co. v. Kent & Downs, 89 S.E. 765, 145 Ga. 689.

Ky.—Louisville & N. R. Co. v. Crain, 224 S.W. 1063, 189 Ky. 431.

10 C.J. p 72 note 51.

cars be furnished at a reasonable time[64] For failure to perform this duty, without lawful excuse, the carrier is liable to a shipper in damages for such injuries as he has sustained in consequence thereof.[65]

Duty not absolute. The carrier's duty to furnish cars for the transportation of property is not an absolute one, either at common law or under statutes prescribing its duty in that regard,[66] the law exacts from a common carrier only what is reasonable as regards furnishing cars.[67] It is not required to furnish means of transportation other than it owns and uses or holds out to the public on its own route for that purpose,[68] or to furnish cars at stations or points on its road other than those provided for the service of the public, or at which it is in the habit of accepting freight from any person offering it for transportation.[69]

In connection with the limitation on the carrier's duty should be considered excuses for failure to furnish cars and conditions precedent to a shipper's right to cars, considered in § 36 and § 37 respectively.

Notice as to ability to furnish cars. A common carrier must notify a shipper within a reasonable time if it is unable to furnish cars at the time and place requested.[70] If it fails to give such notice, and to obtain the shipper's consent, express or implied, to a delay,[71] or induces the shipper to believe, so that he presents his property for shipment at the time and place requested, that cars will be furnished as requested,[72] the carrier will be liable for any damages resulting from its failure to give such notice, unless there is no causal relation between the failure to give notice and the damages sustained.[73] However, a carrier is not liable for failure to notify a shipper that cars are available for an interstate shipment, since the giving of such notice would be a special service and unlawful.[74]

§ 36. Excuses for Failure to Furnish Cars

a. Circumstances beyond carrier's control

b. Other excuses

a. Circumstances beyond Carrier's Control

A common carrier is not liable for a failure to fur-

64. Mo.—Baker v. St. Louis, etc., R. Co., 129 S.W. 436, 145 Mo.App. 189.
Apparently so holding, Williams v. St. Louis-San Francisco Ry. Co, 274 S.W. 935, 217 Mo.App. 662.

65. Ark.—De Queen & E. R. Co. v Park, 225 S.W. 614, 146 Ark. 350—Hines v. Mason, 221 S.W. 861, 144 Ark. 11.
Ky.—Davis v. McKinley, 225 S.W. 523, 200 Ky. 699.
Okl.—Schaff v. Rose, 239 P. 458, 111 Okl. 237—St. Louis-San Francisco Ry. Co. v. Hobart Mill & Elevator Co, 239 P. 165, 111 Okl. 295.
10 C.J. p 72 note 51 [a], p 73 note 58.

66. U.S.—Midland Valley R. Co. v. Barkley, 48 S.Ct. 342, 276 U.S. 482, 72 L.Ed. 664, reversing on other grounds 291 S.W. 431, 172 Ark. 898, certiorari granted 48 S.Ct. 37, 275 U.S. 514, 72 L.Ed. 401—Brownsville Nav. Dist. of Cameron County v. St. Louis, B. & M. Ry. Co., C.C.A.Tex., 91 F.2d 502, certiorari granted 58 S.Ct. 42.
Fla.—Seaboard Air Line Ry. Co. v. Gay, 126 So. 772, 99 Fla. 394—Seaboard Air Line Ry. Co. v. Gay, 126 So. 771, 99 Fla. 391.
Ky.—McCord v. Louisville & N. R. Co., 267 S.W. 766, 206 Ky. 501.
Mich.—Anderson v. Chicago, M. & St. P. Ry. Co., 175 N.W. 246, 208 Mich. 424.
Mo.—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo.App. 314.
10 C.J. p 73 note 63, p 74 note 69.
Excuses for failure to furnish cars under special contract see infra § 133.

67. U.S.—Midland Valley R. Co. v. Barkley, 48 S.Ct. 342, 276 U.S. 482, 72 L.Ed. 664, reversing on other grounds 291 S.W. 431, 172 Ark. 898, certiorari granted 48 S. Ct. 37, 275 U.S. 514, 72 L.Ed. 401—Brownsville Nav. Dist. of Cameron County v. St. Louis, B. & M. Ry. Co., C.C.A.Tex., 91 F.2d 502, 505, certiorari granted 58 S.Ct. 42.
Ky.—Louisville & N. R. Co v. Crain, 224 S.W. 1063, 189 Ky. 431.
Okl.—Chicago, R. I. & P. Ry. Co. v. Long, 227 P. 389, 99 Okl. 276.
10 C.J. p 73 note 52, p 74 note 70.
Reasonable time in which to furnish cars see infra § 37 d.
"As at common law the carrier was not liable for failure to transport, if his coach were full, the law today exacts only what is reasonable from carriers who transport freight in railroad cars."—Brownsville Nav Dist. of Cameron County v. St. Louis, B & M. Ry. Co., supra. To same effect Pennsylvania R. Co v. Puritan Coal Co, 35 S.Ct. 484, 488, 237 U.S. 121, 133, 59 L.Ed. 867, affirming 85 A. 426, 237 Pa. 420, Ann.Cas.1914B 37.
Corpus Juris cited
Ky.—Louisville & N. R. Co. v. Crain, 224 S.W. 1063, 1064, 189 Ky. 431.

68. Fla.—Atlantic Coast Line R. Co. v. Florida Fine Fruit Co., 112 So 66, 93 Fla. 161, affirmed 113 So. 384, 93 Fla. 161.

69. S.C.—Dowling v. Charleston & W. C R. Co., 81 S.E 313, 105 S C. 475.
Tex.—Beaumont, etc., R. Co. v. Moore, Civ.App., 174 S.W. 844.
10 C.J. p 73 note 64.
Reason for refusal is immaterial where a carrier has no duty to furnish cars on a particular track.—Dowling v. Charleston, etc., R. Co., 81 S.E. 313, 105 S.C. 475.

70. Ark.—Hines v. Mason, 221 S.W 861, 144 Ark. 11
Mo.—Warner v. St. Louis-San Francisco Ry. Co, 274 S.W. 90, 218 Mo App. 314—Fewel v. St Louis & S. F. Ry. Co, App., 267 S.W 960.
Wis.—Richland Equity Shipping Ass'n v. Chicago, M & St. P Ry. Co., 188 N.W. 625, 177 Wis 530.
10 C.J. p 74 note 79.
The rule as stated in Corpus Juris is cited with approval in Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 93, 218 Mo.App 314.

71. Mo.—Warner v. St Louis-San Francisco Ry. Co, supra—Fewel v. St. Louis & S. F. Ry. Co., App., 267 S.W. 960.

72. Ark.—Hines v. Mason, 221 S.W. 861, 144 Ark. 11.

73. Wis.—Richland Equity Shipping Ass'n v. Chicago, M. & St. P. Ry. Co., 188 N.W. 625, 177 Wis 530

74. Mo.—Tuttle v. Quincy, O. & K. C. R. Co., 13 S.W.2d 1111, 222 Mo. App. 1135

nish cars resulting from circumstances not reasonably within its power to control, such as a shortage of cars caused by a sudden and unforeseeable demand, but in particular circumstances a shortage due to the carrier's own fault or which it could have prevented has been held not an excuse.

Under, or apart from, statutes in effect so providing, a common carrier's failure to furnish cars, or to furnish them promptly, is excused by all causes not reasonably within its power to prevent [75]

Shortage or want of cars. A carrier is not liable for failure to furnish cars where the failure results from a sudden and great demand for cars,[76] or from an abnormal, prolonged detention thereof on connecting lines,[77] which could not have been foreseen and against which the carrier could not reasonably have been expected to provide.

On the other hand, the fact that a carrier did not have sufficient cars to supply a demand does not excuse a failure to furnish cars resulting from negligence in not providing for the ordinary conduct of its business;[78] and it has been held that, where the carrier does not possess a reasonable equipment for all ordinary purposes, the fact that at the time of demand for cars the volume of business was such as could not have been foreseen will not constitute a defense for failure to furnish cars.[79] Further, it is not an excuse that the carrier does not own cars of the type requested, but is wholly dependent on another company for them, and that such company has failed to supply them,[80] especially where a car of the type requested has been commonly used by the carrier in transporting property of the kind tendered,[81] or the carrier, although it does not own cars by which the property can be shipped, accepts the property with notice of its character.[82] Likewise a car shortage resulting from the fact that a large number of the carrier's cars were in the hands of connecting carriers does not constitute a sufficient excuse in the absence of a showing that such circumstances were not the fault of the carrier.[83] So also a car shortage is not an excuse where the extraordinary demand occurred only on a division of the carrier's road and with ordinary care the carrier could have obtained cars from other parts of its system,[84] or where the shortage results from the carrier's own act of inducing large shipments,[85] or from an extension of the carrier's mileage and a natural increase in business,[86] or where the car-

75. U.S.—Manbar Coal Co. v. Davis, C.C.A.W.Va., 297 F. 24.
Wash.—Pacific Fruit & Produce Co. v. Northern Pac. Ry. Co., 186 P. 852, 109 Wash. 481, 10 A.L.R. 337.
10 C.J. p. 74 notes 69, 83.
Impossibility of performance as excuse for failure to furnish cars under special contract see infra § 133.

Corpus Juris cited
Wash.—Pacific Fruit & Produce Co. v. Northern Pac. Ry. Co., 186 P. 852, 855, 109 Wash. 481, 10 A.L.R. 337.

76. U.S.—Midland Valley R. Co. v. Barkley, 48 S.Ct. 342, 276 U.S. 482, 72 L.Ed. 664, reversing on other grounds 291 S.W. 431, 172 Ark. 898, certiorari granted 48 S.Ct. 37, 275 U.S. 514, 72 L.Ed. 401—Manbar Coal Co. v. Davis, C.C.A.W.Va., 297 F. 24.
Fla.—Seaboard Air Line Ry. Co. v. Gay, 126 So. 772, 99 Fla. 394—Seaboard Air Line Ry. Co. v. Gay, 126 So. 771, 99 Fla. 391—Atlantic Coast Line R. Co. v. Florida Fine Fruit Co., 112 So. 66, 93 Fla. 161, affirmed 113 So. 384, 93 Fla. 161.
La.—George H. Koepp, Inc., v. New Orleans Great Northern R. Co., 110 So. 729, 162 La. 487.
Mich.—Anderson v. Chicago, M. & St. P. Ry. Co., 175 N.W. 246, 208 Mich. 424.
Wash.—Pacific Fruit & Produce Co. v. Northern Pac. Ry. Co., 186 P. 852, 109 Wash. 481, 10 A.L.R. 337.
W.Va.—Lowe v. Davis, 119 S.E. 477, 94 W.Va. 521.
10 C.J. p. 74 note 68.
Dictum Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo.App. 314.

Corpus Juris cited
Wash.—Pacific Fruit & Produce Co. v. Northern Pac. Ry. Co., 186 P. 852, 855, 109 Wash. 481, 10 A.L.R. 337.

Apportionment as discharge of duty
(1) A fair and equitable distribution of available cars by a carrier has been held to constitute a discharge of its duty to furnish cars where a car shortage was unforeseeable, or, if foreseeable, could not have been guarded against.—Manbar Coal Co. v. Davis, C.C.A.W.Va., 297 F. 24.

(2) However, a carrier is not bound to furnish cars during a car shortage, in accordance with its rules as to car distribution, if to do so would work a preference.—Leinbach v. Union Pac. R. Co., 227 P. 258, 116 Kan. 495

(3) Apportionment of available cars as discrimination see infra § 366.

77. Wash.—Pacific Fruit & Produce Co. v. Northern Pac. Ry. Co., 186 P. 852, 109 Wash. 481, 10 A.L.R. 337.

78. Tenn.—Southeastern Express Co. v. Bowers, Inc., App., 109 S.W.2d 851.

79. Miss.—Yazoo, etc., R. Co. v. Blum Co., 40 So. 718, 88 Miss. 180, 10 L.R.A.,N.S., 432

80. Ark.—De Queen & E. R. Co. v. Park, 225 S.W. 614, 146 Ark. 350.
Ga.—Wadley Southern Ry. Co. v. Kent & Downs, 89 S.E. 765, 145 Ga. 689.
Tex.—Ft. Worth & D. C. Ry. Co. v. Strickland, Civ.App., 208 S.W. 410.
10 C.J. p. 74 note 72.

81. Tex.—Ft. Worth & D. C. Ry. Co. v. Strickland, supra.

82. Tex.—Ft. Worth & D. C. Ry. Co. v. Strickland, supra.

Perishable goods
Tex.—Ft. Worth & D. C. Ry. Co. v. Strickland, Civ.App., 208 S.W. 410.

83. Fla.—Atlantic Coast Line R. Co. v. Florida Fine Fruit Co., 112 So. 66, 93 Fla. 161, affirmed 113 So. 384, 93 Fla. 161.
Ky.—McCord v. Louisville & N. R. Co., 267 S.W. 766, 206 Ky. 501.
10 C.J. p. 74 notes 74, 75.

84. Ark.—St. Louis, etc., R. Co. v. Keefe, 168 S.W. 131, 113 Ark. 215.

85. N.C.—Branch v. Wilmington, etc., R. Co., 77 N.C. 317.

86. Mo.—Baker v. St. Louis, etc., R. Co., 129 S.W. 136, 145 Mo.App. 189.
10 C.J. p. 74 note 73.

Reason for rule
A common carrier cannot excuse its failure to meet natural and normal traffic conditions by saying that it failed to anticipate them or to provide against them. That would

rier promised the shipper that cars would be furnished, and failed to notify him at any time that it would be unable to furnish them.[87] Unreasonable delay is not excused by a car shortage where the carrier has served other shippers at nearby points more promptly.[88]

Governmental agency. The fact that the transportation of particular property was prohibited except on permission of a government inspector, which permission the shipper failed to obtain has been held to excuse a carrier's refusal to furnish cars for such property.[89] On the other hand, the fact that a carrier's tracks had been dangerously weakened by an excavation made by a municipality has been held not to constitute a sufficient excuse for failure to furnish cars, where it did not appear that the carrier could not have easily braced its tracks.[90]

Inclement weather. The fact that a carrier's servants abandoned the train because of cold weather was held not to constitute an excuse, in a particular climate, for failure to furnish cars.[91]

Strike. A strike has been held not to be an excuse where the shipper was not given timely notice that the carrier would be prevented from furnishing cars,[92] even if the shipper had knowledge of the existence of such strike.[93]

b. Other Excuses

Various circumstances in addition to those considered in the preceding subdivision have been adjudged available or unavailable as excuses for a common carrier's failure or refusal to furnish cars.

A carrier whose filed tariff contains no provision under which the property offered can be lawfully accepted is not bound to furnish cars.[94] Of course, a carrier is not liable for failure to furnish a car where the shipper's request therefor is canceled before the time for furnishing,[95] or where the car was requested from another company and the carrier had nothing to do with the transaction except to set out the car for the shipper.[96]

On the other hand, it has been held that a carrier cannot excuse its refusal to furnish car service on the ground that such action was necessary to prevent the shipper from violating the rates imposed by the carrier, which rates were themselves illegal,[97] or that the shipper refused to pay demurrage charges for the detention of cars, where such detention was occasioned as much by the carrier's fault as by the shipper's.[98] So also, where the carrier furnishes a car before the day requested, it is not entitled to remove the car on the day the car was to have been furnished, on the ground that the car was not loaded within the time allowed by its rules.[99]

§ 37. Conditions Precedent to Shipper's Right to Cars

a. Notice
b. Tender of property for shipment
c. Tender of freight charges
d. Reasonable time to furnish cars

a. Notice

A common carrier must be given reasonable notice of the number and kind of cars desired and the time and place at which they are to be furnished. Written notice is necessary where required by statute or by the carrier's rule. In some circumstances, but not in others, formal requirements as to notice may be waived.

be merely offering its own nonfeasance as an excuse for the injurious consequences thereof.—Baker v. St Louis etc. R. Co, 129 S.W. 426, 438, 145 Mo App. 189.

87. Mo.—Cronan v. St. Louis, etc., R. Co., 130 S.W. 437, 149 Mo.App 384.

88. Kan.—Stratton v. Atchison, T & S. F. Ry. Co., 236 P. 831, 118 Kan. 673.

89. Ark.—Ft. Smith, S. & R. I. R. Co. v. Roady, 258 S.W. 374, 162 Ark. 580.

Cattle tendered in quarantine district

Ark.—Ft. Smith, S. & R. I. R. Co v Roady, 258 S.W. 374, 162 Ark. 580.

90. Miss.—Parish, etc., Co. v. Yazoo, etc., R Co., 60 So. 322, 103 Miss. 288.

91. Mo.—Rittman v. Missouri Pac. R. Co, 171 S.W. 8, 184 Mo.App. 424.

Reason for rule

"If a carrier may, through its agents and servants, abandon its duty 'because of the cold' in this climate [central Missouri], the service of a common carrier would become too uncertain for all practical purposes."—Rittman v. Missouri Pac R. Co., 171 S.W. 8, 184 Mo App. 424

92. Mo.—Warner v. St. Louis-San Francisco Ry. Co, 274 S.W. 90, 218 Mo.App 314.—Fewel v. St. Louis & S. F. Ry. Co, App, 267 S.W. 960.

93. Mo.—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo.App. 314.

94. U.S.—Texas, etc, R. Co. v. American Tie, etc., Co., Tex., 34 S.Ct. 885, 234 U.S. 138, 58 L.Ed. 1255, reversing 190 F. 1022, 111 C.C.A. 673.

95. Tex.—Hallam v. Duckworth, Civ.App., 209 S.W. 222.

96. Ark.—St. Louis-San Francisco Ry. Co. v Fruitman's Union, 258 S.W. 626, 162 Ark. 618.

Common agent and tracks

The mere facts that a railroad company and an express company had the same station agent and that the latter company operated its cars over the former's tracks do not render the former liable for the latter's failure to furnish its own cars. —St. Louis-San Francisco Ry. Co. v. Fruitman's Union, 258 S.W. 626, 162 Ark. 618.

97. Ky.—Louisville, etc., R. Co. v. Ohio Valley Tie Co, 170 S.W. 633, 161 Ky. 212.

98. Kan.—Larabee Flour Mills Co. v. Missouri Pac. R. Co., 88 P. 72, 74 Kan 808.

99. Mo.—Bartlett v. Missouri Pac. R. Co., App., 230 S.W. 660.

A shipper requiring cars for the shipment of property must in all cases give the common carrier reasonable notice of such requirement, or make proper demand therefor.[1] Such notice must be given to an agent of the carrier having authority to furnish cars.[2] It must be sufficiently specific reasonably to inform the carrier of what it is expected to do;[3] thus, it must show definitely the number[4] and character[5] of cars desired, and the time[6] and place[7] at which they are to be furnished.

Written notice is not required at common law,[8] but is necessary where a statute[9] or a rule of the carrier[10] so provides. . Moreover, while it has

1. U.S.—Brownsville Nav. Dist of Cameron County v. St. Louis, B. & M. Ry. Co., C.C.A.Tex., 91 F.2d 502, certiorari granted 58 S.Ct. 42.
Ark.—Midland Valley R. Co. v. Barkley, 291 S.W. 431, 172 Ark. 898, certiorari granted 48 S.Ct. 37, 275 U.S. 514, 72 L.Ed. 401, reversed on other grounds 48 S.Ct. 342, 276 U.S. 482, 72 L.Ed. 664—Hines v. Mason, 221 S.W. 861, 144 Ark. 11.
Ky.—Davis v. McKinley, 255 S.W. 523, 200 Ky. 699—Louisville & N. R. Co. v. Grain, 224 S.W. 1063, 189 Ky. 431.
Mo.—Williams v. St. Louis-San Francisco Ry. Co., 274 S.W. 935, 217 Mo.App. 662—Howell v. Hines, App., 236 S.W. 886.
N.Y.—Walrath v. American Ry. Express Co., 216 N.Y.S. 545, 217 App. Div. 83
N.C.—Futch v. Atlantic Coast Line R. Co., 100 S.E. 436, 178 N.C. 282
Okl.—Schaff v. Rose, 239 P. 458, 111 Okl. 237—Chicago, R. I. & P. Ry. Co. v. Long, 227 P. 389, 99 Okl. 276.
Tex.—Ft. Worth & D. C. Ry. Co. v. Strickland, Civ.App., 208 S.W. 410.
Wis.—Richland Equity Shipping Ass'n v. Chicago, M. & St. P. Ry. Co., 188 N.W. 625, 177 Wis. 530.
10 C.J. p 72 note 51, p 75 note 85.

2. Ark.—St. Louis, etc., R. Co. v. Moss, 86 S.W. 828, 75 Ark. 64.

3. La.—George H. Koepp, Inc. v. New Orleans Great Northern R. Co., 110 So. 729, 162 La. 487.
10 C.J. p 75 note 87.

Under a rule of a public utilities commission requiring written order for cars to state date, number, and kind of cars wanted, destination, date wanted to load, quantity of each kind of grain on hand and conveniently located for prompt loading, and name of shipper, particular orders have been held or held not a substantial compliance, according as the quantity and location of grain to be shipped was or was not stated.—Stratton v. Atchison, T. & S. F. Ry. Co., 236 P. 831, 118 Kan. 673.

4. Ga.—Simmons v. Seaboard Air-Line R. Co., 66 S.E. 783, 133 Ga. 635.
Md.—Di Giorgio Importing, etc., Co. v. Pennsylvania R. Co., 65 A. 425, 104 Md. 693, 8 L.R.A.,N.S., 108.
Minn.—Weida v. Chicago, etc., R. Co., 75 N.W. 121, 72 Minn. 102.
10 C.J. p 75 note 88.

Apparently so holding, Stratton v. Atchison, T. & S. F. Ry. Co., 236 P. 831, 118 Kan. 673.

Notice construed

A shipper's order for two cars was held to require a carrier on a narrow gauge line to furnish four narrow gauge cars, since a car of the latter type had only half the capacity of a standard gauge car and the carrier's uniform custom had been to furnish double the number of cars requested by the shipper.—Weida v. Chicago, etc., R. Co., 75 N.W. 121, 72 Minn. 102.

5. La.—George H. Koepp, Inc. v. New Orleans Great Northern R. Co., 110 So. 729, 162 La. 487.
10 C.J. p 75 note 87.

Cars for lumber or piling

A sawmill company was required to stipulate in its notice to the carrier whether lumber or piling was to be shipped, since each product required a different type of car.—George H. Koepp, Inc. v. New Orleans Great Northern R. Co., 110 So. 729, 162 La. 487.

Interstate commerce commission's rule that a shipper's order for cars "desired for loading" must specify the type of car desired was held inapplicable, however, where the shipper was not present to load a car, and the duty of selecting suitable cars devolved upon the carrier itself.—Keystone Packing Co. v. Norfolk & W. R. Co., 30 Ohio N.P., N.S., 477, modified on other grounds 195 N.E. 403, 49 Ohio App. 136, 2 Ohio Opinions 272.

6. Ga.—Simmons v. Seaboard Air-Line R. Co., 66 S.E. 783, 133 Ga. 635.
Md.—Di Giorgio Importing, etc., Co. v. Pennsylvania R. Co., 65 A. 425, 104 Md. 693, 8 L.R.A.,N.S., 108.
10 C.J. p 75 note 88.

7. Ga.—Central of Georgia Ry. Co. v. Rabun, 94 S.E. 598, 21 Ga.App. 402.

Presumption as to place

An application for cars addressed to an agent of the carrier at a point on its line was presumed, where nothing to the contrary appeared, to mean that cars were desired at that point, although the carrier would have been authorized to furnish them, not upon its tracks at that station, but at a private siding there located, since its custom had been to furnish them at such siding.—Central of Georgia Ry. Co. v. Rabun, 94 S.E. 598, 21 Ga.App. 402.

8. Minn. — Zetterberg v. Great Northern R. Co., 136 N.W. 295, 117 Minn. 495.

9. Ga.—Thompson v. Atlantic Coast Line R. Co., 106 S.E. 322, 26 Ga. App. 487.

Notice as to market

Under a Georgia statute so providing, a shipper must notify the carrier in writing of the market to which the property is to be shipped.—Thompson v. Atlantic Coast Line R. Co., 106 S.E. 322, 26 Ga.App. 487.

10. U.S.—Davis v. Henderson, 45 S. Ct. 24, 266 U.S. 92, 69 L.Ed. 182, reversing Missouri Pac. R. Co. v. Henderson, 247 S.W. 1070, 157 Ark. 43.
Iowa.—Jackson & Crawford v. Chicago, B. & Q. R. Co., 238 N.W. 912, 213 Iowa 365.
Md.—American Ry. Express Co. v. Peninsula Produce Exch., 130 A. 346, 148 Md. 465.
Mich.—Falmouth Co-op. Marketing Ass'n v. Pennsylvania R. Co., 212 N.W. 84, 237 Mich. 406.
N.C.—McLemore v. Atlantic Coast Line R. Co., 154 S.E. 390, 199 N.C. 264.

Request for exclusive or special car must be in writing where a tariff rule of the carrier so provides.—American Ry. Express Co. v. Peninsula Produce Exch., 130 A. 346, 148 Md. 465.

Memorandum of carrier's agent regarding oral orders made by shippers does not comply with a carrier's rule that orders for cars must be given or confirmed in writing.
Iowa.—Jackson & Crawford v. Chicago, B. & Q. R. Co., 238 N.W. 912, 213 Iowa 365.
Mich.—Falmouth Co-op. Marketing Ass'n v. Pennsylvania R. Co., 212 N.W. 84, 237 Mich. 406.

Inaccessibility of cars furnished does not entitle a shipper to recover damages where he failed to make a written request for cars as required by the carrier's rule.—McLemore v. Atlantic Coast Line R. Co., 154 S.E. 390, 199 N.C. 264.

Rule as to interstate shipments held applicable

In particular circumstances, a shipper who had failed to make a written order for cars was held not entitled to urge, for the purpose of avoiding the carrier's rule requiring

been held that the requirement of written notice under such a rule may be waived,[11] it is more commonly held that a carrier's rule requiring written notice cannot be waived where such rule constitutes a part of the tariffs filed with the state railroad commission[12] or the interstate commerce commission;[13] but it has been held that a carrier may waive a statutory requirement as to written notice,[14] or a rule of the interstate commerce commission prescribing the form of a written notice.[15]

b. Tender of Property for Shipment

A shipper must have properly tendered property to be entitled to recover for failure to furnish cars, unless it appeared in advance that cars would not be furnished. A tender is sufficient if made in the manner usual for such property or held out by the carrier as sufficient.

A shipper must have made a proper tender of the property to be shipped in order to be entitled to recover from the common carrier for failure to furnish cars,[16] unless the shipper was informed, or it appeared, in advance that cars would not be furnished.[17] A tender is sufficient if made in the manner usual for such property,[18] or in a manner which the carrier holds out as being sufficient.[19]

c. Tender of Freight Charges

A shipper need not have tendered freight charges to be entitled to recover for failure to furnish cars, where the carrier did not demand payment.

A shipper need not have tendered the freight charges in order to be entitled to recover from the common carrier for failure to furnish cars within a reasonable time, where the carrier had made no demand for payment.[20]

d. Reasonable Time to Furnish Cars

In the absence of controlling statutory or contractual provision, a common carrier is entitled to a reasonable time to furnish cars after notice. What constitutes a reasonable time depends, in the absence of statute or a rule of the carrier, upon the particular circumstances.

In the absence of a statutory provision as to the time within which cars must be furnished,[21]

orders for cars for interstate shipments to be in writing, that the shipper might have employed the cars in intra-state commerce if they had been furnished.—Falmouth Co-op. Marketing Ass'n v. Pennsylvania R. Co., 212 N.W. 84, 237 Mich. 406.

Carrier's want of control of line at the time the rule was established does not preclude it from invoking the rule as a defense where the rule was a part of the published tariffs and binding on the carrier.—Falmouth Co-op. Marketing Ass'n v. Pennsylvania R. Co., 212 N.W. 84, 237 Mich. 406.

Potatoes are perishable goods within a rule requiring written orders for cars for perishable goods.—Falmouth Co-op. Marketing Ass'n v. Pennsylvania R. Co., 212 N.W. 84, 237 Mich. 406.

11. Ark.—St Louis, etc., R. Co. v. Wynne Hoop, etc., Co., 99 S.W. 375, 81 Ark. 373.

12. Iowa.—Jackson & Crawford v. Chicago, B & Q. R. Co., 238 N W. 912, 213 Iowa 365.

13. U S—Davis v. Henderson, 45 S.Ct. 24, 266 U.S. 92, 69 L.Ed. 182, reversing Missouri Pac. R. Co. v. Henderson, 247 S.W. 1070, 157 Ark. 43.

Mich.—Falmouth Co-op. Marketing Ass'n v. Pennsylvania R. Co., 212 N.W. 84, 237 Mich. 406.

N.C.—McLemore v. Atlantic Coast Line R. Co., 154 S.E. 390, 199 N. C. 264.

However, a carrier was held to have waived written notice, a requirement apparently created by a rule of the carrier filed with the interstate commerce commission, where the carrier notified the shipper that no additional cars would be furnished.—American Ry. Express Co v. Bald Knob Fruit Exch, 258 S.W. 985, 162 Ark. 588

14. Ark.—De Queen & E R Co. v. Park, 225 S.W. 614, 146 Ark. 350

Furnishing cars on verbal request of the shipper was held to constitute a waiver of such statutory requirement.—De Queen & E. R. Co v. Park, 225 S.W. 614, 146 Ark. 350.

15. Ark.—American Ry. Express Co v. Bald Knob Fruit Exch., 258 S W 985, 162 Ark. 588.

Carrier's furnishing of forms upon which demands for cars were to be made, and its acceptance of demands so made, were held to waive the necessity of a shipper's giving notice in the form prescribed by the rules of the interstate commerce commission.—American Ry. Express Co. v. Bald Knob Fruit Exch., 258 S W. 985, 162 Ark. 588.

16. Ind.—Louisville, etc., R. Co. v. Flanagan, 14 N.E. 370, 113 Ind. 488, 3 Am S.R. 674.
10 C.J p 74 note 65.

17. N C.—Bell v. Norfolk Southern R. Co, 79 S.E. 421, 163 N C. 180
Tex.—Houston, etc., R. Co. v. Campbell, 45 S.W. 2, 91 Tex. 551, 43 L R A. 225.
Apparently so holding, Louisville, etc., R. Co. v. Flanagan, 14 N.E. 370, 113 Ind. 488, 3 Am.S.R. 674.

Reason for rule
"It is elementary that the law does not require a man to do a vain thing"—Bell v. Norfolk Southern R Co., 79 S.E. 421, 422, 163 N.C. 180.

Refusal to furnish for property previously delivered
Thus, where a railroad company refused to transport property already loaded or to furnish cars for that already delivered to it, the shipper was not required to deliver similar property for which he had also demanded cars, in order to recover damages for the railroad's refusal to furnish cars for the latter.—Bell v Norfolk Southern R Co, 79 S E 421, 163 N C. 180.

Further tender after refusal
Where property has been properly tendered, and the carrier has refused on demand to furnish cars, no further tender is necessary—Louisville, etc, R Co. v Flanagan, 14 N. E. 370, 113 Ind. 488, 3 Am S R. 674

18. Ark—St. Louis, etc., Co v. Leder, 112 S.W. 744, 87 Ark. 298—St. Louis, etc, R. Co. v Ozier, 110 S.W. 593, 86 Ark. 179, 17 L.R.A.,N S 327—St. Louis, etc., R. Co. v. Wynne Hoop, etc, Co., 99 S W. 375, 81 Ark. 373

Shipper's failure to place property on platform does not relieve a carrier of its duty to furnish cars, where the property was under the shipper's control and ready for shipment in the usual way—St. Louis, etc, R. Co v. Leder, 112 S.W 744, 87 Ark. 298—St Louis, etc., R. Co. v Ozier, 110 S W 593, 86 Ark. 179, 17 L R A,N S, 327—St Louis, etc, R. Co. v. Wynne Hoop, etc, Co., 99 S.W. 375, 81 Ark. 373.

19. Ky.—Louisville & N. R. Co. v. Brashear, 289 S.W. 1094, 217 Ky. 439.

20. Ill.—Cleveland, etc., R. Co v. Perishow, 61 Ill.App. 179.

21. Ky.—Louisville & N. R. Co. v. Crain, 224 S.W. 1063, 189 Ky. 431.

Under an Arkansas statute provid-

or of a contract for a particular time,[22] a common carrier is entitled to a reasonable time in which to furnish cars after receiving notice from the shipper.[23] Whether the carrier was allowed a reasonable time in which to furnish cars depends, in the absence of statutory provision as to the length of notice, or of any rule on the subject established by the carrier, upon the circumstances of the particular case.[24]

§ 38. Actions for Failure or Refusal to Furnish Cars

a. Nature and form
b. Limitations
c. Jurisdiction
d. Defenses
e. Parties
f. Pleading
g. Evidence
h. Trial
i. Damages
j. Attorney's fees

a. Nature and Form

A common carrier's failure to furnish cars within a reasonable time constitutes a breach of a duty created by law, not by contract; but it has been held immaterial, even in the case of interstate shipments, that the shipper predicated liability for damages on a breach of contract. Statutory remedies do not abrogate the common-law right of action.

A common carrier's failure to furnish cars within a reasonable time after demand constitutes a breach of a duty created by law, not by contract;[25] but it has been held that the form of an action for damages for failure to furnish cars on the day requested is unimportant, and that it is immaterial that the shipper may have predicated the carrier's liability on a breach of contract to furnish cars,[26] even where the cars were requested for an interstate shipment.[27] A shipper's common-law right of action for damages is not abrogated by the existence of various statutory remedies.[28]

ing that a carrier must furnish cars at the place of shipment within twenty four hours from 7 P.M. on the day following an application therefor, it was held that a carrier performed its duty by furnishing a car on the morning following the afternoon it was ordered.—St. Louis-San Francisco Ry. Co. v. Fruitman's Union, 258 S.W. 626, 162 Ark. 618.

22. Ky.—Louisville & N. R. Co v. Crain, 224 S.W. 1063, 189 Ky. 431.

23. Ark.—Hines v. Mason, 221 S.W. 861, 144 Ark. 11.
Ky.—Louisville & N. R. Co. v. Crain, 224 S.W. 1063, 189 Ky. 431.
Okl.—Schaff v. Rose, 239 P. 458, 111 Okl. 237.
Tex.—Ft. Worth & D. C. Ry. Co. v. Strickland, Civ.App., 208 S.W. 410.
10 C.J. p 72 note 51 [b], p 75 note 92.
Reasonableness generally as measure of carrier's duty to furnish cars see supra § 35.

Corpus Juris cited
Ky.—Louisville & N. R. Co. v. Crain, 224 S.W. 1063, 1064, 189 Ky. 431.

Negligence or want of reasonable diligence is the basis of a carrier's liability for delay in furnishing cars —McCord v. Louisville & N. R. Co, 267 S.W. 766, 206 Ky. 501.

Effect of carrier's acquiescence and assurance
However, a carrier cannot complain of the reasonableness of the time given for furnishing cars where it failed to complain of such time, and accepted the order with an assurance that it would be filled.—Baker v. St. Louis, etc., R. Co., 129 S.W. 436, 145 Mo.App. 189.

24. Mo.—Howell v. Hines, App., 236 S.W. 836.
10 C.J. p 75 notes 92, 93.
"To be reasonable, notice for such purpose must allow sufficient time to enable the railway company, by the exercise of reasonable diligence, under the existing circumstances, to furnish the cars, without interference with orders previously given by other shippers at the same station, or jeopardy to its other business on other portions of its road."—McNeer v. Chesapeake, etc., R. Co., 86 S.E. 887, 888, 76 W.Va. 803. To same effect Hines v. Mason, 221 S.W. 861, 863, 144 Ark. 11.

Six days' advance notice held reasonable where three or four days was the usual time allowed for furnishing cars for the transportation of property of the kind offered.—Howell v. Hines, 249 S.W. 924, 298 Mo. 282.

Carrier's delay held unreasonable where it failed to furnish cars for live stock until three days after it had accepted the live stock for shipment.—Payne v. Mallory, 230 S.W. 270, 148 Ark. 431.

25. Mo.—Williams v. St. Louis-San Francisco Ry. Co., 274 S.W. 935, 217 Mo.App. 662.
Action for breach of contract to furnish cars at specified time and place see infra § 134.

26. Kan.—Pletcher v. Chicago, R. I. & P. Ry. Co., 177 P. 1, 103 Kan. 834.
Okl.—Chicago, R. I. & P. Ry. Co. v. Vail, 201 P. 804, 83 Okl. 266.
Remedy for failure to furnish cars as in tort see Actions § 49 e (4).

27. Kan.—Pletcher v. Chicago, R. I. & P. Ry. Co, 177 P. 1, 103 Kan. 834.

28. Mo.—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 213 Mo.App. 314.
10 C.J. p 73 note 59.

Statutes prescribing penalty
(1) Statutes prescribing a penalty for failure to furnish cars on reasonable notice do not abrogate the common-law right of action for damages.
Ga.—Southern R. Co. v. Moore, 67 S.E. 85, 133 Ga. 806, 26 L.R.A.,N.S., 851, disapproving Pennington v. Douglas, etc., R. Co., 60 S.E. 485, 3 Ga.App. 665.
Miss.—Yazoo, etc., R. Co. v. Fisher, 59 So. 877, 102 Miss. 702.
Mo.—Raper v. Lusk, 181 S.W. 1032, 192 Mo.App 378.

(2) The reason for this rule has been said to be that: "It would require a very strong implication to show that the Legislature, in endeavoring to confer upon shippers an additional means of enforcing prompt furnishing of cars, absolutely excluded them from a resort to the courts for a recovery of damages . . . the act was intended to give an additional safeguard and remedy, which a shipper might adopt if he so desired, and not to destroy his right of action for damages."—Southern R. Co. v. Moore, 67 S.E. 85, 89, 133 Ga. 806, 815, 26 L.R.A., N.S., 851.

(3) However, it was held, in an action under a statute providing that the shipper could recover both a penalty and the actual damages suffered, that the shipper was not entitled to recover damages if the facts

b. Limitations

Under a statute so providing, an action for damages for refusal to furnish cars is barred if not brought within one year after the cause accrues.

Under a statute so providing, an action for damages for a common carrier's refusal to furnish a car on demand is barred if not brought within one year after the cause of action accrues.[29]

c. Jurisdiction

State and federal courts have concurrent jurisdiction of an action for failure to furnish cars for interstate shipment. That a carrier has a legal excuse for failure to furnish cars does not deprive courts of jurisdiction to hear and decide the issues.

Where the action is for failure to furnish cars for property destined for shipment in interstate commerce, the state and federal courts have concurrent jurisdiction,[30] and this is so irrespective of whether the action is treated as a suit for a breach of the carrier's common-law duty to furnish cars or an action for damages for the carrier's unjust discrimination in the allotment of cars.[31] The fact that a carrier has a legal excuse for failure to furnish cars does not deprive the courts of jurisdiction to hear and decide the issues upon the law and the facts.[32]

d. Defenses

Legal defenses may be interposed to an action for failure to furnish cars.

Legal defenses may be interposed to an action against a carrier for damages for failure to furnish cars.[33] It is not a defense that the shipper failed to give the carrier notice before removing injured property from a car;[34] nor is the fact that the shipper held the property for speculative purposes a bar to recovery.[35] The fact that after discovering that cars will not be furnished the shipper continues to haul property to the station does not constitute a defense, but cause only for denying redress to the extent that he increased the damage by accumulating property after such discovery.[36]

A shipper is not guilty of contributory negligence in simply having his property at the point of shipment at what is in fact a reasonable time after demanding cars.[37]

Where the carrier has failed to furnish cars and damages have accrued, the fact that the shipper and the carrier subsequently enter into a contract for the shipment of the freight does not in any way affect the shipper's right to recover the damages sustained.[38]

e. Parties

A factor who controlled the property, prepared it for shipment, and requested cars may maintain an action in his own name for failure to furnish cars. A shipper's employees cannot recover for loss of employment caused by a carrier's failure to furnish cars.

A factor who had the custody and control of property, prepared it for shipment, and requested cars for its transportation has such an interest in the property as entitles him to maintain an action in his own name against the carrier for failure to furnish cars.[39] On the other hand, a shipper's employees have been held not to have such an interest as will entitle them to maintain an action against a carrier for loss of employment resulting from the carrier's failure to furnish cars to the shipper.[40]

f. Pleading

(1) Declaration, petition, or complaint
(2) Plea or answer

(1) Declaration, Petition, or Complaint

A shipper's pleading in an action for damages caused by a carrier's failure to furnish cars must allege the facts

did not entitle him to recover the penalty.—Texas, etc., R. Co. v. Blocker, 106 S.W. 718, 48 Tex.Civ.App. 100.

(4) Penalties generally for failure to furnish cars see infra §§ 466–473.

Well considered case
Ga.—Southern R. Co. v. Moore, 67 S.E. 85, 133 Ga. 806, 26 L.R.A.,N.S., 851, disapproving Pennington v. Douglas, etc., R. Co., 60 S.E. 485, 3 Ga.App. 665.

29. Ark.—St. Louis, etc., R. Co. v. Paul, 176 S.W. 327, 118 Ark. 375.

30. Iowa.—Baird Bros. v. Minneapolis & St. L. R. Co., 165 N.W. 412, 181 Iowa 1104
10 C.J. p 76 note 9.
Corpus Juris quoted
Iowa.—Baird Bros. v. Minneapolis & St. L. R. Co., 165 N.W. 412, 418, 181 Iowa 1104.

31. Iowa.—Baird Bros. v. Minneapolis & St. L. R. Co., supra.
10 C.J. p 76 note 9.

32. U.S.—Brownsville Nav. Dist. of Cameron County v. St. Louis, B. & M. Ry. Co., C.C.A.Tex., 91 F.2d 502, certiorari granted 58 S.Ct. 42.

33. U.S.—Brownsville Nav. Dist. of Cameron County v. St. Louis, B. & M. Ry. Co., C.C.A.Tex., 91 F.2d 502, certiorari granted 58 S.Ct. 42.

34. Mo.—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo.App. 314.

35. N.Y.—Dobbins v. Syracuse, etc., R. Co., 141 N.Y.S. 637, 157 App. Div. 80, affirmed 109 N.E. 79, 215 N.Y. 674.

36. Mo.—Shoptaugh v. St. Louis, etc., R. Co., 126 S.W. 752, 147 Mo. App. 8.

37. Tex.—Galveston, etc., R. Co. v. Word, Civ.App., 124 S.W. 478.

38. Ark.—St. Louis, etc., R. Co. v. Taylor, 112 S.W. 745, 87 Ark. 331.

39. Ga.—Central of Georgia Ry. Co. v. George P. Greene & Co., 154 S.E. 809, 41 Ga.App. 794.

40. Ky.—Illinois Cent. R. Co. v. Baker, 159 S.W. 1169, 155 Ky. 512, 49 L.R.A.,N.S., 496.
Reason for rule
"[The duty to furnish cars], to be the basis of an action . . . must rest on a contract, express or implied, made between the complaining party and the carrier."—Illinois Cent. R. Co. v. Baker, 159 S.W. 1169, 1174, 155 Ky. 512, 49 L.R.A.,N.S., 496.

essential to such cause of action, including proper demand for the cars and tender of the goods.

The declaration, petition, or complaint in an action for damages for failure to furnish cars must allege a timely demand by the shipper[41] for a certain number of cars to be furnished on a definite date,[42] that the demand was made on an agent authorized to furnish cars,[43] the time when the demand was made,[44] and, under a statute so requiring that the carrier was notified in writing of the market to which the property was to be shipped.[45]

Further the complaint must allege a tender of the goods[46] to a duly authorized agent of the carrier,[47] and, under a statute in effect requiring such a showing, that it was within the power of the carrier to furnish cars on the requested day.[48]

So also, it should be made to appear that the damages alleged were the proximate result of the carrier's failure to furnish cars,[49] and the facts from which the amount of damages may be estimated should likewise appear.[50]

Where the complaint alleges the character of the goods offered for shipment, it need not further allege the character of cars required, since the carrier will be presumed to know, in such circumstances, what kind is needed.[51]

In particular cases, complaints or petitions have been held to be sufficient,[52] at least after verdict,[53] to state a cause of action for failure to furnish cars, or to state a cause of action for a breach of the carrier's common-law or statutory duty rather than of a special agreement;[54] also, the pleadings have been held to raise the issue as to whether the carrier furnished cars within a reasonable time after demand,[55] and an allegation that it became necessary for the shipper to incur certain expenses in caring for his stock has been held to mean, in the absence of a special exception, that such expenses were reasonable.[56]

Amendment. Where the original petition alleges specific damage resulting from the carrier's failure to furnish cars on a written demand, an amendment alleging that the carrier was bound by an express contract to furnish cars does not add a new and distinct cause of action, and the amended petition is not demurrable.[57]

(2) Plea or Answer

General rules apply in determining the sufficiency of a plea or answer.

An allegation in the answer that the property was shipped under a written contract exempting

41. Fla.—Seaboard Air Line Ry. Co. v. Gay, 126 So. 772, 99 Fla. 394—Seaboard Air Line Ry. Co. v. Gay, 126 So. 771, 99 Fla. 391.
10 C.J. p 76 note 2.

Allegation held sufficient
Ark.—St. Louis, etc., R. Co. v. Wynne Hoop, etc., Co., 99 S.W. 375, 81 Ark. 373.

42. Fla.—Seaboard Air Line Ry. Co. v. Gay, 126 So. 772, 99 Fla. 394—Seaboard Air Line Ry. Co. v. Gay, 126 So. 771, 99 Fla. 391.

43. Ark.—St. Louis, etc., R. Co. v. Lee, 65 S.W. 99, 69 Ark. 584.
10 C.J. p 75 note 1.

44. Ark.—Choctaw, etc., R. Co. v. Rolfe, 88 S.W. 870, 76 Ark. 220.

Averment held sufficient
Where the carrier's stations were small, an averment that cars were demanded in a certain month was held to be sufficiently definite as to time to enable the carrier to ascertain whether such was the fact.—Choctaw, etc., R. Co. v. Rolfe, 88 S. W. 870, 76 Ark. 220.

45. Ga.—Thompson v. Atlantic Coast Line R. Co., 106 S. E. 322, 26 Ga.App. 487.

46. Ga.—Thompson v. Atlantic Coast Line R Co., supra.

Allegation held sufficient
(1) Allegation that the shipper had placed saw logs along the carrier's tracks for shipment.—St. Louis, etc., R. Co. v Wynne Hoop, etc., Co., 99 S.W. 375, 81 Ark. 373.

(2) Allegation that the carrier was told that peaches were in the packing house ready for loading to move on a certain date.—Central of Georgia Ry. Co. v. George P. Greene & Co., 154 S.E. 809, 41 Ga.App. 794.

47. Ark.—Choctaw, etc., R. Co. v. Rolfe, 88 S.W. 870, 76 Ark. 220.
10 C.J. p 75 note 99.

48. Wis.—Richardson v. Chicago, etc., R. Co., 21 N.W. 49, 61 Wis. 596, 602.

49. Ark.—St. Louis, etc., R. Co. v. Wynne Hoop, etc., Co., 99 S.W. 375, 81 Ark. 373.
10 C.J. p 76 note 4.

50. Mo.—Shoptaugh v. St. Louis, etc., R. Co., 126 S.W. 752, 147 Mo. App. 8

Petition held to state sufficient facts to show that the shipper had sustained some damage from the carrier's breach of duty, and hence not demurrable on the claimed ground that it failed to allege a legal measure of damages.—Central of Georgia Ry. Co. v. George P. Greene & Co., 154 S.E. 809, 41 Ga.App. 794.

51. Ind.—Pittsburgh, etc., R. Co. v. Wood, 84 N.E. 1009, 88 N.E. 709, 45 Ind App 1.
Mo.—Shoptaugh v. St. Louis, etc., R. Co., 126 S.W. 752, 147 Mo.App. 8.
10 C.J. p 76 note 3.

52. Ky.—Broughton v. Louisville & N. R. Co., 289 S.W. 237, 217 Ky. 297.
Mo.—German v. Chicago, M. & St. P. Ry. Co., App., 276 S.W. 1041.
10 C.J. p 75 note 98 [a].

Averment as to inapplicable statute held surplusage and not to render a petition subject to general demurrer where the petition states a cause of action for a breach of the carrier's common-law duty to furnish cars.—Youmans v. Georgia R. Co., 83 S.E. 784, 142 Ga. 781.

53. Mo.—Walters v. Kansas City Southern Ry. Co., App., 266 S.W. 491.

54. Ga.—Central of Georgia Ry. Co. v. George P. Greene & Co., 154 S. E. 809, 41 Ga.App. 794.
10 C.J. p 76 note 8 [a].

55. Tex.—Ft. Worth & D. C. Ry. Co. v. Strickland, Civ.App., 205 S.W. 410.

56. Tex.—Schaff v. Johnson, Civ. App., 267 S.W. 737.

57. Ga.—Georgia Northern Ry. Co. v. Snellgrove & Bozeman, 85 S.E. 790, 16 Ga.App. 344.

the carrier from liability for delay on account of strikes is properly stricken where such contract was not entered into until after the delay had occurred;[58] and an allegation that the shipper had knowledge that injunction proceedings had been instituted against a strike alleged to have caused the carrier's delay has been held immaterial.[59] On the other hand, a carrier's failure to comply with state rules of practice in pleading a defense that the shipper's order for cars for an interstate shipment was not in writing does not preclude the carrier from establishing such defense,[60] since the written order cannot be waived.[61]

g. Evidence

In actions for failure to furnish cars the general rules of evidence apply.

In an action for damages for failure to furnish cars, the burden is on the shipper to establish that the carrier owned and operated a railroad at the point at which cars were to be furnished,[62] and, under the federal rule, actual negligence on the carrier's part in delaying to furnish cars after demand.[63] On the other hand, the burden is on the carrier to establish the facts constituting an excuse for failure to furnish cars;[64] thus, a carrier claiming justification for a delay because of abnormal operative conditions, such as abnormally great demand for, or shortage of, cars has the burden of proving the existence of such conditions,[65] that such conditions could not reasonably have been anticipated and avoided,[66] and that they were the sole cause of the delay.[67]

Admissibility. In particular cases, evidence has been held admissible, for the purpose of rebutting a carrier's defense that its failure to furnish cars was caused by an unprecedented demand, to show that the carrier had assured the shipper, prior to the latter's demand for cars, that it would furnish sufficient cars for shippers in the particular area,[68] that in preceding seasons there had been a car shortage on the carrier's line in that area,[69] and that shippers who ordered cars after plaintiff received cars before plaintiff did.[70] Evidence of the number of cars which the carrier had on the lines of connecting carriers is inadmissible where the carrier makes no claim of a car shortage.[71] Under an answer alleging that the carrier was prevented from furnishing cars by causes which it could not have avoided by the exercise of reasonable diligence, evidence is admissible that there was a car shortage and that cars were distributed under rules adopted while railroads were under governmental control.[72]

A witness' lump estimate of the total damage, without indication of the items entering into such estimate, has been held not competent evidence.[73]

58. Mo.—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo App. 314.

59. Mo.—Warner v. St. Louis-San Francisco Ry. Co., supra.

Reason for decision

"Knowledge of the fact that injunction proceedings had been instituted would more likely cause plaintiffs to believe the effect of the strike had been averted than otherwise."—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 92, 218 Mo.App. 314.

60. Mich.—Falmouth Co-op. Marketing Ass'n v. Pennsylvania R. Co., 212 N.W. 84, 85, 237 Mich. 406.

61. Mich.—Falmouth Co-op. Marketing Ass'n v. Pennsylvania R. Co., supra.

"The carrier cannot waive written orders . . . and the public policy so carried into the law of interstate commerce could not be rendered nugatory by failure of defendant to seasonably . . . [plead its tariff rule requiring written orders] under state rules of pleading. If failure to plead the rule permits recovery, then waiver is accomplished. The rule may not be so waived."—Falmouth Co-op Marketing Ass'n v. Pennsylvania R. Co., supra.

62. Mo.—Brandom v. Atchison, etc., R. Co., 114 S.W. 540, 134 Mo.App. 89.

63. Mo.—Walters v. Kansas City Southern Ry. Co., App., 266 S.W. 491.

64. Ky.—McCord v. Louisville & N. R. Co., 267 S.W. 766, 206 Ky. 501.
Tex.—Ft. Worth & D. C. Ry. Co. v. Strickland, Civ.App., 208 S.W. 410.
10 C.J. p 76 note 12 [b].

65. Ark.—Hines v. Mason, 221 S.W. 861, 144 Ark. 11.
Iowa.—Vander Zyl v. Chicago, R. I. & P. Ry. Co., 189 N.W. 953, 195 Iowa 901, error dismissed Chicago, R. I. & P. Ry. Co. v. Vander Zyl, 45 S.Ct. 10, 266 U.S. 636, 69 L. Ed. 481.
Ky.—McCord v. Louisville & N. R. Co., 267 S.W. 766, 206 Ky. 501.

Excuse held not established

Evidence as to the number of the carrier's cars in its shops for repairs is insufficient to prove that the carrier's delay in furnishing cars was caused solely by abnormal operative conditions which could not reasonably have been anticipated and avoided by the carrier.—McCord v. Louisville & N. R. Co., 267 S.W. 766, 206 Ky. 501.

66. Ark.—Hines v. Mason, 221 S.W. 861, 144 Ark. 11.
Ky.—McCord v. Louisville & N. R. Co., 267 S.W. 766, 206 Ky. 501

67. Ky.—McCord v. Louisville & N. R. Co., supra.

68. Ark.—De Queen & E. R. Co. v. Park, 225 S.W. 614, 146 Ark 350.

69. Mo.—Cronan v. St Louis, etc., R. Co., 130 S.W. 437, 149 Mo.App. 384.

70. Ark.—St. Louis, etc., R. Co. v. Keefe, 168 S.W. 131, 113 Ark. 215.

71. U.S.—Pennsylvania R. Co. v. Sonman Shaft Coal Co., 37 S.Ct. 46, 242 U.S. 120, 61 L.Ed 188, affirming Sonman Shaft Coal Co. v. Pennsylvania R. Co., 88 A. 746, 241 Pa. 487.

72. Kan.—Leinbach v. Union Pac R. Co., 227 P. 258, 116 Kan. 495.

73. S.C.—Mauldin v. Seaboard Air Line R. Co., 73 S.C. 9, 52 S.E. 677.

Reason for decision

Such an estimate was incompetent "for the reason that it was impossible for the jury to separate the items of damage which, under the instructions of the court, could be considered the proximate result of defendant's alleged breach of duty, and for which it might be liable, from those items of alleged damage which, under the instruction of the court, would be too remote to enter into the verdict."—Mauldin v. Sea-

Evidence as to the effect of the carrier's failure to furnish cars upon the expense of maintaining and conducting the shipper's business has been held admissible for the purpose of arriving at the shipper's net profit, as affecting damages;[74] but evidence as to the state of the market at the point of destination on the day cars were to have been furnished is irrelevant where the property could not have arrived at such point on the same day it was to have been shipped.[75] A carrier's rule, filed with the state railroad commission, requiring orders for cars to be given or confirmed in writing is admissible in evidence.[76]

Weight and sufficiency. In particular cases, evidence has been held sufficient to support findings that a carrier's failure or delay in furnishing cars was without sufficient excuse,[77] or was negligent,[78] or not negligent,[79] that the carrier did not furnish cars within a reasonable time;[80] that its delay in furnishing cars was not the result of demands which it could not reasonably have anticipated and met;[81] that it had not prepared itself to meet an increased demand[82] of which it had notice,[83] that the shipper's demand for cars was made on an agent of the carrier having apparent authority to receive such demand;[84] that the shipper had on hand at the time cars were to be furnished a sufficient quantity of property to fill the cars;[85] that the shipper had no knowledge of a shortage of cars at the time he tendered the property;[86] that the value of the property decreased a particular amount because the shipper was obliged, on the carrier's failure to furnish cars, to ship the property by a less desirable method;[87] and that the shipper suffered damage in a particular amount because of the carrier's delay.[88]

On the other hand, evidence has been held insufficient, in particular cases, to show that the carrier owned or operated a railroad at the point at which cars were to be furnished,[89] to support a finding that the carrier could have furnished cars by the exercise of reasonable diligence,[90] and to permit of a determination of the correct measure of damages to be applied in the circumstances.[91]

h. Trial

In actions for failure or refusal to furnish cars, various questions, including that of whether delay in furnishing cars was reasonable, have been held to be for the jury; and in particular cases the sufficiency of evidence to go to the jury, and the propriety of instructions, have been determined.

It is a question of fact or for the jury whether a carrier was properly equipped to supply normal demands for cars,[92] whether there was an abnormally great and unforeseen demand for or shortage of, cars,[93] or the demand for cars was

board Air Line R. Co., 52 S.E. 677, 678, 73 S.C. 9.

74. Ark.—Midland Valley R. Co. v. Hoffman Coal Co., 120 S.W. 380, 91 Ark. 180.

75. Tex.—Galveston, etc., R. Co. v. Word, Civ.App., 124 S.W. 478.

76. Iowa.—Jackson & Crawford v. Chicago, B. & Q. R. Co., 238 N.W. 912, 213 Iowa 365.

77. Mo.—Cronan v. St. Louis, etc., R. Co., 180 S.W. 437, 149 Mo.App. 384.

78. Ark.—Arkansas Central R. Co. v. Walker, 234 S.W. 619, 150 Ark. 514.

Kan.—Pletcher v. Chicago, R. I. & P. Ry. Co., 177 P. 1, 103 Kan. 834. 10 C.J. p 76 note 14 [b] (2).

79. Mo.—German v. Chicago, M. & St. P. Ry. Co., App., 276 S.W. 1041.

Evidence held not to prove ability to furnish

Evidence that an employee of the carrier procured a car for another shipper for a bribe and without knowledge of the carrier is not sufficient proof that the carrier was able to furnish cars to the plaintiff shipper on the date requested.—St. Louis-San Francisco Ry. Co. v. Watts, 271 S.W. 464, 168 Ark. 804

80. Tex.—Ft. Worth & D. C. Ry. Co. v. Strickland, Civ.App., 208 S.W. 410.

81. Ark.—Chicago, R. I. & P. Ry. Co. v. Sims, 256 S.W. 33, 161 Ark. 289

Kan.—Pletcher v. Chicago, R. I. & P. Ry. Co., 177 P. 1, 103 Kan. 834.

82. Kan.—Stratton v. Atchison, T. & S. F. Ry. Co., 236 P. 831, 118 Kan. 673.

83. Ark.—American Ry. Express Co. v. Bald Knob Fruit Exch., 258 S.W. 985, 162 Ark. 588.

Kan.—Pletcher v. Chicago, R. I. & P. Ry. Co., 177 P. 1, 103 Kan. 834

84. Mo.—Hoffman Heading, etc., Co. v. St. Louis, etc., R. Co., 94 S.W. 597, 119 Mo.App. 495.

85. Kan.—Stratton v. Atchison, T. & S. F. Ry. Co., 236 P. 831, 118 Kan. 673.

86. Tex.—Texas Midland R. R. v. O'Kelley, Civ.App., 203 S.W. 152, dismissed for want of jurisdiction.

87. Ark.—American Ry. Express Co. v. Bald Knob Fruit Exch., 258 S.W. 985, 162 Ark. 588.

88. Ark.—Arkansas Central R. Co. v. Walker, 234 S.W. 619, 150 Ark. 514.

Verdict for reduced amount held justified by the evidence.—Richey, etc., Co. v. Northern Pac. R. Co., 125 N.W. 897, 110 Minn. 347

89. Mo.—Brandom v. Atchison, etc., R. Co., 114 S.W. 540, 134 Mo.App. 89.

90. Wis.—Richland Equity Shipping Ass'n v. Chicago, M. & St. P. Ry. Co., 188 N.W. 625, 177 Wis. 530.

Undisputed evidence of unusual demand

Where evidence was undisputed that the carrier's failure to furnish cars was caused by an unusual demand for cars after a strike, the jury was not warranted in finding that the carrier could have furnished cars by the exercise of reasonable diligence.—Richland Equity Shipping Ass'n v. Chicago M. & St. P. Ry. Co., 188 N.W. 625, 177 Wis. 530.

91. Ala.—Central of Georgia Ry. Co. v. Nolan Land & Live Stock Co., 92 So. 609, 207 Ala. 391.

92. Fla.—Atlantic Coast Line R. Co. v. Florida Fine Fruit Co., 112 So. 66, 93 Fla. 161, affirmed 113 So. 384, 93 Fla. 161, 171.

Ga.—Wadley Southern Ry. Co. v. Kent & Downs, 89 S.E. 765, 145 Ga. 689.

93. Iowa.—Vander Zyl v. Chicago, R. I. & P. Ry. Co., 189 N.W. 953, 195 Iowa 901, error dismissed Chicago, R. I. & P. Ry. Co. v. Van-

such as could not reasonably have been anticipated and supplied by the exercise of ordinary care,[94] or whether the carrier's delay in furnishing cars was reasonable in the circumstances.[95] However, there is authority holding that the question of a reasonable time for furnishing cars is a mixed one of law and fact,[96] and, of course, uncontroverted evidence as to a carrier's inability to furnish cars by the exercise of reasonable diligence presents no question for the jury, but is for the court.[97]

In particular cases, evidence has been held sufficient to go to the jury on the questions whether the shipper ordered a particular number of cars of a particular type for loading at a particular time,[98] whether the carrier failed to meet normal demands for cars,[99] and whether the demand for cars was such as could not reasonably have been anticipated and supplied by the exercise of ordinary care;[1] and in particular circumstances the trial court has been held not justified in ruling, as a matter of law, that the carrier was without fault in delaying to furnish cars.[2] On the other hand, evidence in a particular case has been held insufficient to go to the jury on the question whether a shortage of cars was caused by a demand which could not have been anticipated and supplied,[3] and, in an action based upon a negligent and unreasonable failure to furnish a car after notice, evidence that a car was not furnished until a certain number of days after it was ordered is insufficient to take the case to the jury in the absence of evidence tending to show that such a delay was negligence.[4]

Instructions. A requested instruction as to the invalidity of a special contract is properly refused where the action is for a breach of the carrier's common-law duty to furnish cars;[5] and where the jury is charged as to a carrier's duty generally, it is not error for the trial court not to repeat in other portions of its charge as to the carrier's duty a statement as to its duty to transport all property it is able and accustomed to carry.[6] An instruction that the carrier is liable if it unreasonably delayed in furnishing cars is sufficient to include a defense, and evidence in support thereof, that the delay was caused by a strike.[7] An instruction stating the measure of damages in terms of the price for which the shipper could reasonably have sold the property, rather than its market value, is inaccurate, but not prejudicial,[8] but an instruction authorizing a recovery not exceeding a particular amount is prejudicially erroneous where there was no evidence supporting a finding for that amount.[9] An instruction that the jury should determine whether the carrier failed, without lawful excuse, to furnish a car in a reasonable time is prejudicially inadequate if it does not instruct the jury as to how it should determine whether the delay was unreasonable,[10] and an instruction that the carrier would not be relieved of liability if it failed to notify the shipper, at the time a car was ordered, of its inability to furnish cars because of a strike was held to be prejudicially erroneous in view of the undisputed evidence.[11]

Direction of verdict. A common carrier is not entitled to a directed verdict on the claimed ground that its delay in furnishing cars was excused, where it fails to show that its distribution of cars was not discriminatory, or did not cause the delay.[12]

i. Damages

In a shipper's action against a carrier for breach of

der Zyl, 45 S.Ct. 10, 266 U.S. 636, 69 L.Ed. 481.

94. Fla.—Atlantic Coast Line R. Co. v. Florida Fine Fruit Co., 112 So. 66, 93 Fla. 161, affirmed 113 So. 384, 93 Fla. 161, 171.
Ga.—Wadley Southern Ry. Co. v. Kent & Downs, 89 S.E. 765, 145 Ga. 689—Central of Georgia Ry. Co. v. George P. Greene & Co., 154 S.E. 809, 41 Ga.App. 794.

95. Mo.—Fewel v. St. Louis & S. F. Ry. Co., App., 267 S.W. 960—Morrison v. St. Louis-San Francisco Ry. Co., App., 264 S.W. 449
N.Y.—Walrath v. American Ry. Express Co., 216 N.Y.S. 545, 217 App.Div. 83.
Tex.—Ft. Worth & D. C. Ry. Co. v. Strickland, Civ.App., 208 S.W. 410.
10 C.J. p. 75 note 94.

96. Okl.—Chicago, R. I. & P. Ry. Co. v. Long, 227 P. 389, 99 Okl. 276.

97. Wis.—Richland Equity Shipping Ass'n v. Chicago, M. & St. P. Ry. Co., 188 N.W. 625, 177 Wis. 530

98. Mo.—Howell v. Hines, 249 S.W. 924, 298 Mo. 282.

99. Mich.—Anderson v. Chicago, M. & St. P. Ry. Co., 175 N.W. 246, 208 Mich. 424.

1. Ark.—Chicago, R. I. & P. Ry. Co. v. Sims, 256 S.W. 33, 161 Ark. 289—Hines v. Mason, 221 S.W. 861, 144 Ark. 11.
10 C.J. p. 76 note 14 [b] (1)

2. Ky.—McCord v. Louisville & N. R. Co., 267 S.W. 766, 206 Ky. 501

3. Ark.—St. Louis, etc. R. Co. v. Keefe, 168 S.W. 131, 113 Ark. 215.

4. Mo.—Howell v. Hines, App., 236 S.W. 886.

5. Ga.—Central of Georgia Ry. Co. v. George P. Greene & Co., 154 S.E. 809, 41 Ga.App. 794.

6. Ga.—Wadley Southern Ry. Co. v. Kent & Downs, 89 S.E. 765, 145 Ga. 689.

7. Mo.—Fewel v. St. Louis & S. F. Ry. Co., App., 267 S.W. 960.

8. Ky.—Louisville & N. R. Co. v. Estes, 261 S.W. 882, 203 Ky. 93.

9. Mo.—Morrison v. St. Louis-San Francisco Ry. Co., App., 264 S.W. 449.

10. N.Y.—Walrath v. American Ry. Express Co., 216 N.Y.S. 545, 217 App.Div. 83.

11. Ark.—St. Louis-San Francisco Ry. Co. v. Watts, 271 S.W. 464, 168 Ark. 804

12. Ky.—McCord v. Louisville & N. R. Co., 267 S.W. 766, 206 Ky. 501.

its common-law or statutory duty to furnish cars within a reasonable time after demand, the carrier is liable for such damages as were the proximate result of its breach of duty and were within the contemplation of the parties.

In actions based on a breach of a carrier's common-law or statutory duty to furnish cars, the carrier is liable to the shipper for such damages as were sustained because of the carrier's failure or default in delivering cars as requested.[13] Thus, where, on failure of the carrier to furnish cars within a reasonable time after demand, the shipper elects to treat the carrier's obligation to furnish cars as at an end, the shipper is entitled to recover the difference between the market value of the goods at the destination to which they were to be carried, at the time they would have arrived had the carrier furnished cars within a reasonable time, and their market value at the same time at the place from which they were to be shipped, less the freight,[14] also, the shipper may recover the additional expense of transporting the property by a different means.[15]

On the other hand, where the carrier transported the property after an unreasonable delay in furnishing cars, the weight of authority is that the shipper is entitled to recover the difference between the market value of the property at the point of destination at the time the property should have arrived and its market value at that point at the time it did arrive.[16] Under other authority, however, the measure of damages for a carrier's failure to furnish cars within a reasonable time is the difference between the market value of the property at the point of shipment at the time the cars should have been furnished and the market value at that point at the time cars were furnished.[17] The shipper is also entitled to recover expenses incurred by him because of the delay,[18] provided such expenses were reasonable.[19]

13. Ark.—Hines v. Mason, 221 S.W. 861, 144 Ark. 11.
10 C.J. p 77 note 20.

The measure of damages stated in a statute is the exclusive one in a suit instituted thereunder.—Thompson v. Atlantic Coast Line R. Co., 106 S.E. 322, 26 Ga.App. 487.

14. Ala.—Central of Georgia Ry. Co. v. Nolan Land & Live Stock Co., 92 So. 609, 207 Ala. 391.
10 C.J. p 77 note 21.

The text as it was stated in Corpus Juris is quoted and followed in Central of Georgia Ry. Co. v. Nolan Land & Live Stock Co., Ala., 97 So. 828, and Central of Georgia R. Co. v. Nolan Land & Livestock Co., 92 So. 609, 207 Ala. 391.

Effect of favorable later market

The fact that a shipper could have secured cars in subsequent months, and that the market was as good at that time as when cars were demanded and refused does not limit his recovery to nominal damages, since a shipper is not required "to await the turn of the market to find out whether the railroad company had injured him by failing to furnish cars."—St. Louis Southwestern R. Co. v. Leder, 112 S.W. 744, 745, 87 Ark. 298, 302.

In absence of market price at point of shipment, the price at the nearest market, or the actual value of the property, may be considered by the jury in computing damages.—Falmouth Co-op. Marketing Ass'n v. Pennsylvania R. Co., 205 N.W. 477, 232 Mich. 538

15. Ky.—Davis v. McKinley, 255 S.W. 523, 200 Ky. 699.

16. Ark.—Hines v. Mason, 221 S.W. 861, 144 Ark. 11.
Ky.—Davis v. McKinley, 255 S.W. 523, 200 Ky. 699.
Mo.—Williams v. St. Louis-San Francisco Ry. Co., 274 S.W. 935, 217 Mo.App. 662—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo.App. 314—Morrison v. St. Louis-San Francisco Ry. Co., App., 264 S.W. 449.
Okl.—St. Louis-San Francisco Ry. Co. v. Hobart Mill & Elevator Co., 239 P. 165, 111 Okl. 295.
10 C.J. p 311 note 23.

Measure same as in action ex contractu for a carrier's failure to ship promptly.—Hines v. Mason, 221 S.W. 861, 144 Ark. 11.

Immediate sale on arrival immaterial

The rule of the text obtains although the property was not to be sold immediately on its arrival at the point of destination.—Pecos, etc., R. Co. v. Bivins, 130 S.W. 210, 61 Tex.Civ.App. 170.

Market value elsewhere not controlling

The measure of damages for a carrier's delay in furnishing cars depends upon the market value of the property at the destination contemplated by the parties at the time of shipment, rather than at the place to which the property was actually shipped.—Texas, etc., R. Co. v. Shipman, Tex.Civ.App., 98 S.W. 449.

Increase in freight rates and new tax

A shipper may recover for a decline in the market price of wheat resulting from an increase in freight rates and the levy of a war tax subsequent to the time the wheat would have been shipped had cars been furnished within a reasonable time.—St. Louis-San Francisco Ry. Co. v. Hobart Mill & Elevator Co., 239 P. 165, 111 Okl. 295.

Deterioration in property because of the carrier's delay in furnishing cars is a proper element of damage.—St. Louis, etc., R. Co. v. Wynne Hoop, etc., Co., 99 S.W. 375, 81 Ark. 373—10 C.J. p 77 note 26

Effect of stoppage in transit by shipper's order

Where cattle were stopped in transit, unloaded, and detained several days by the shipper's order, the measure of damages for the carrier's delay in furnishing cars at the beginning of the journey is not that stated in the text, but the difference between the market value of the cattle at the point of destination at the time they would have arrived but for the carrier's delay and their market value at that point at the time they would have arrived had the trip not been interrupted by the shipper's order.—Peterson & Howe v. Davis, 196 N.W. 113, 111 Neb. 265.

17. Ga.—Central of Georgia Ry. Co. v. George P. Greene & Co., 154 S.E. 809, 41 Ga.App. 794.
Minn.—Richey, etc., Co. v. Northern Pac. R. Co., 125 N.W. 897, 110 Minn. 347.

18. Mo.—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo.App. 314—Morrison v. St. Louis-San Francisco Ry. Co., App., 264 S.W. 449.

19. Mo.—Williams v. St. Louis-San Francisco Ry. Co., 274 S.W. 935, 217 Mo.App. 662.
10 C.J. p 77 note 23.

Reasonable expense of holding property

(1) The shipper is entitled to recover the reasonable expense of holding the property during the carrier's

However, a shipper is not entitled to recover for claimed items of damage which were not within the contemplation of the parties,[20] or the proximate result of the carrier's failure or delay in furnishing cars.[21]

j. Attorney's Fees

A statute allowing an attorney's fee to a shipper who successfully sues a railroad for not furnishing cars, but not to a railroad which successfully sues a shipper for not using cars, is unconstitutional.

A statute allowing an attorney's fee to a shipper who successfully sues a railroad company for failure to furnish cars, but making no such allowance to a railroad company in a successful action under such statute by the company against the shipper for failure to use cars, has been held unconstitutional.[22]

§ 39. Injunction to Compel Carrier to Furnish Cars

A mandatory injunction may be granted a shipper to compel a carrier to furnish him cars.

A mandatory injunction may be granted a shipper to compel a carrier to furnish him cars,[23] the fact that he has an action for damages for the carrier's refusal to furnish cars constitutes no ground for denial of an injunction.[24]

F. DUTIES INCIDENT TO TRANSPORTATION GENERALLY

§ 40. In General

A common carrier of goods has the duty to furnish reasonable and necessary facilities for the transportation of the volume of freight reasonably to be anticipated, and to use the care requisite for safe carriage; but it is not required to provide facilities at places other than at which they are customarily to be found. Corresponding to its duty, the carrier has the right exclusively to furnish the services and facilities required of it.

The duties and obligations imposed by law on a common carrier follow as a matter of course from the acceptance of goods for transport.[25] It is the duty of the carrier to provide and furnish all reasonable and necessary facilities for the prompt, safe, and efficient transportation of such goods as it holds itself out to the public as engaged in carrying,[26] and for, as hereinafter discussed in this section,

delay.—Texas, etc., R. Co. v. Smith, 79 S.W. 614, 34 Tex.Civ.App. 571—10 C J p 77 notes 23, 25.

(2) Thus, the shipper may recover the reasonable cost of feed and pasturage of live stock during the delay—Hines v. Mason, 221 S.W. 861, 144 Ark. 11—10 C J. p 77 note 23.

(3) Also, the shipper may recover the reasonable cost of hiring assistants to care for the property during the delay.—Texas, etc., R. Co. v. Powell, 79 S.W. 86, 34 Tex.Civ.App. 575.

20. Tex.—Schaff v. Johnson, Civ. App., 267 S.W. 737.

Reason for rule

"[A carrier is] not liable as an insurer, but only for negligence"—Wallace v. Pecos, etc., R. Co., 110 S. W. 162, 50 Tex Civ.App. 296.

Feed necessitated by unprecedented weather

Tex.—Wallace v. Pecos, etc., R. Co., 110 S.W. 162, 50 Tex Civ.App. 296.

Windmill repair and telegraph bill

Tex.—Schaff v. Johnson, Civ.App., 267 S.W. 737.

Loss under contract with third person

(1) It has been held that a contract between the shipper and a third person cannot be the basis of a recovery from the carrier for failure or delay in furnishing cars where the carrier had no notice of such contract—Davis v. McKinley, 255 S.W. 523, 200 Ky. 699.

(2) Likewise, the shipper cannot recover the expense of transporting the property by another means for the purpose of minimizing the loss under such contract, but only the difference between such expense and what it would have cost to have had the property transported by the carrier.—Davis v. McKinley, supra.

(3) However, there is authority holding that a shipper may recover for the loss of profits under such a contract even though the carrier had no knowledge of the contract.—Houston, etc., R. Co. v. Campbell, 45 S.W. 2, 91 Tex. 551, 43 L.R.A. 225. Contra Beaumont, etc., R Co v. Moore, Tex.Civ App., 174 S.W. 844.

21. Fla.—Seaboard Air Line Ry. v. Roberts, 70 So. 773, 71 Fla. 28.
Tex.—Schaff v. Johnson, Civ.App., 267 S W. 737.

22. U.S.—Atchison, etc., R. Co. v. Vosburg, 35 S Ct. 675, 238 U S. 56, 59 L Ed. 1199, L.R.A.1915E 953, reversing 130 P. 667, 89 Kan. 114.

23. Ky.—Louisville, etc., R. Co. v. Pittsburg, etc., Coal Co., 64 S W. 969, 111 Ky. 960, 23 Ky L. 1318, 98 Am.S.R. 447, 55 L.R.A. 601

Courts held to have jurisdiction to compel a carrier to furnish cars to a shipper.—Chicago, R I & P. Ry. Co. v. Lawton Refining Co., Okl., 253 F. 705, 165 C.C.A. 299.

Equity jurisdiction affirmed

"By accepting the charter the carrier assumes obligations to the public, and the duty of enforcing these obligations, in the absence of some statute providing a different remedy, necessarily devolves upon courts of equity. Their jurisdiction to grant relief of this sort has been well established and defined."—Louisville, etc., R. Co v. Pittsburg, etc., Coal Co., 64 S W. 969, 970, 111 Ky 960, 23 Ky L. 1318, 98 Am.S R. 447, 55 L.R A. 601.

24. Ky.—Louisville, etc., R Co. v. Pittsburg, etc., Coal Co., supra.

25. Vt.—Oakdale Farms v. Rutland R Co., 158 A. 678, 104 Vt. 279

Prima facie, common carrier, by accepting merchandise for transportation, incurred responsibility put on it by common law, or that law as modified by statute—Saliba v New York Cent. R. Co., 140 A. 491, 101 Vt. 56

26. U.S.—Chicago, R I. & P Ry. Co. v. U. S, Ill, 52 S.Ct. 87, 284 U.S 80, 76 L Ed 177.
Ark.—St Louis-San Francisco Ry. Co v. Greig & Smith, 31 S W.2d 290, 182 Ark. 261—American Ry Express Co. v. Bald Knob Fruit Exch., 258 S.W 985, 162 Ark. 588—Gage v. Arkansas Cent. R. Co., 254 S W. 665, 160 Ark. 402
Fla.—Atlantic Coast Line R. Co. v. Chase & Co., 146 So. 658, 109 Fla. 50.
Ill.—Jennings v. Baltimore & O. R. Co., 194 Ill.App 358.
Iowa.—Vander Zyl v. Chicago, R I. & P. Ry. Co., 189 N.W. 953, 195 Iowa 901, error dismissed Chicago, R. I. & P. Ry. Co. v. Vander Zyl, 45 S.Ct. 10, 266 U.S. 636, 69 L.Ed. 481.
Ky.—Davis v. McKinley, 255 S.W. 523, 200 Ky. 699.

such quantities as might reasonably and ordinarily be expected to be offered for carriage. It also has the duty safely to carry such goods,[27] and to this end, to exercise such care as is required to protect them from loss or injury during transportation.[28] The duty to furnish proper facilities for transportation similarly applies to carriers of live stock,[29] although ordinarily, a carrier of such freight does not have the same responsibilities which attend it as a carrier of goods.[30]

The carrier's duty in respect to necessary facilities is imposed by the common law and is in no sense dependent on statute,[31] although, as is already shown in § 19, the matter of furnishing reasonable facilities is very largely regulated by legislation on the subject or by rules formulated and promulgated by railroad commissions to whom the power of regulation has been delegated. If a carrier can otherwise lawfully be required to provide a service prescribed by a railroad commission, such obligation cannot be avoided merely because it is attended with considerable expense.[32]

In determining whether the carrier has fulfilled its obligation to provide adequate facilities, the test is one of reasonable diligence;[33] and its business as a whole, the character of the service required, the need of its performance, and the various rights of the public and of the carrier should in this respect be considered.[34] It is expected to be prepared with the equipment necessary to handle the average traffic offered it, and also such an increase as would be expected by a manager of experience, inasmuch as the volume of traffic will vary with the seasons and general business conditions, and the law requires that there be provision for these contingencies.[35] The rule, as otherwise ex-

Mo—Fewel v. St. Louis & S. F. Ry. Co., App., 267 S.W. 960—Schreiber Milling & Grain Co. v. Chicago Great Western R. Co., App., 246 S.W. 647.

N.Y.—Crittenden v. American Ry. Express Co., 199 N.Y.S. 521, 205 App.Div. 228, affirmed 144 N.E. 899, 238 N.Y. 578.

N.C.—McLemore v. Atlantic Coast Line R. Co., 154 S.E. 390, 199 N.C. 294.

Wash.—Pacific Fruit & Produce Co. v. Northern Pac. Ry. Co., 186 P. 852, 109 Wash. 481, 10 A.L.R. 337

10 C.J. p. 77 note 33.

Corpus Juris cited

Colo.—Boettcher v. Public Utilities Commission of Colo., 213 P. 114.

Commensurate with powers

The duty of a carrier to furnish reasonably adequate service is commensurate with the powers and privileges conferred upon the carrier, and the just requirements of the public.—State v. Florida East Coast R. Co., 50 So. 425, 58 Fla. 524.

"Promptness in transportation is of great and increasing importance, and hence common carriers should be required to use every reasonable means and to take every reasonable precaution to insure it."—Mauldin v. Seaboard Air Line R. Co., 52 S.E. 677, 73 S.C. 9, 14.

Transportation of coal

(1) General rule respecting obligation of railroad, whether short line or trunk line, to furnish equipment for transporting freight tendered to it, applies to coal loaded at coal mines as well as to other traffic—Chicago, R. I. & P. Ry. Co. v. U. S., Ill., 52 S.Ct. 87, 284 U.S. 80, 76 L.Ed. 177.

(2) Under a statute which requires a carrier to make reasonable provision for the transportation of coal, the obligation of the carrier in this respect depends on the facts of each case.—State v. White Oak R. Co., 61 S.E. 630, 65 W.Va. 15, 28 L.R.A.,N.S., 1013.

War as excuse from duty

Carrier will not be excused from duty to furnish shipping facilities because its energies are required to meet government needs arising from state of war, where granting of such facilities would not divert its energies or interfere with its public duties—Norfolk & W. Ry. Co. v. Public Service Commission, 96 S.E. 62, 82 W.Va. 408.

27. Ga.—Davis v. A. F. Gossett & Sons, 118 S.E. 773, 30 Ga.App. 576, affirmed by divided court A. F. Gossett & Sons v. Davis, 124 S.E. 529, 158 Ga. 886—Sipple v. Seaboard Air Line Ry. Co., 114 S.E. 435, 154 Ga. 376, reversing 110 S.E. 39, 28 Ga.App. 16, conformed to 115 S.E. 47, 29 Ga.App. 328.

Mo.—Security Stove & Mfg. Co. v. American Ry. Express Co., 51 S.W. 2d 572, 227 Mo.App. 175—Green v. American Ry. Express Co., App., 34 S.W.2d 1039

N.Y.—Heuman v. M. H. Powers Co., 123 N.E. 373, 226 N.Y. 205, reversing 162 N.Y.S. 590, 175 App.Div. 627, reargument denied 124 N.E. 899, 226 N.Y. 711.

N.Y.—Feynman v. American Ry. Express Co., 234 N.Y.S. 727, 134 Misc. 223.

Vt.—Saliba v. New York Cent. R. Co., 140 A. 491, 101 Vt. 56.

28. Del.—Hardesty v. American Ry. Express Co., 119 A. 681, 2 W.W. Harr. 66

Ill.—Jennings v. Baltimore & O. R. Co., 194 Ill.App. 358.

10 C.J. p. 77 note 33.

29. Fla.—Walton Land & Timber Co. v. Louisville & N. R. Co., 72 So. 485, 72 Fla. 66.

30. Iowa—Buck v. American Railway Express Co., 192 N.W. 277, 195 Iowa 1024.

Ky.—Louisville & N. R. Co. v. Taylor, 205 N.W. 934, 181 Ky. 794.

10 C.J. p. 123 note 38.

31. Ark.—American Ry. Express Co. v. Bald Knob Fruit Exch., 258 S.W. 985, 162 Ark. 588.

10 C.J. p. 78 note 34.

32. U.S.—Grand Trunk R. Co. v. Michigan R. Commn., D.C.Mich., 198 F. 1009, 1020.

33. Ark.—St. Louis-San Francisco Ry. Co. v. Greig & Smith, 31 S.W. 2d 290, 182 Ark. 261.

Ordinary care

Carrier transporting strawberries had duty merely to exercise ordinary care in furnishing shipping facilities.—Railway Exp. Agency v. H. Rouw Co., 42 S.W.2d 761, 184 Ark. 482.

Yard engines

Railroads need not keep engines at all times to move freight to other yards, but must use reasonable diligence in furnishing such facilities—St. Louis-San Francisco Ry. Co. v. Greig & Smith, 31 S.W.2d 290, 182 Ark. 261.

34. Fla.—State v. Florida East Coast R. Co., 50 So. 425, 58 Fla. 524.

35. Ark.—American Ry. Express Co. v. Bald Knob Fruit Exch., 258 S.W. 985, 162 Ark. 588.

10 C.J. p. 78 note 40.

Carriers of coal

(1) It has been held that a carrier of coal must have facilities sufficient to meet the normal demands of the trade during the periods of the year when the normal demand is heaviest.—Illinois Cent. R. Co. v. River, etc., Coal, etc., Co., 150 S.W.

pressed is that a carrier is not required to provide facilities to meet an unexpected and unprecedented rush of business, or unusual and extraordinary contingencies, which ordinary prudence or foresight could not anticipate,[36] but is bound only to provide facilities for such transportation as might reasonably be anticipated.[37]

The carrier is not required to furnish facilities to shippers other than at the places where they are customarily to be found.[38] Also, the carrier owes no duty to spot cars solely at the shipper's convenience, nor does a published switching tariff obligate it to conduct interplant movements of cars to the sole end of efficient operation of the plant.[39]

Where articles of an extraordinary character are offered, the carrier is not bound to provide facilities of a different kind from those usually furnished for transportation.[40]

Correlative right of carrier to furnish facilities. Where the law imposes on carriers the duty of furnishing specified services or facilities, it is vested with the corresponding right to furnish such services and facilities and to charge therefor.[41] This, it has been said, is an economic necessity due to the fact that the carrier cannot be expected to prepare to meet the demand and then let the use of its plants depend on haphazard calls under which the services for which the plants were built can be demanded by all shippers at one time and by only a few at another.[42]

Loading to capacity. The shipper has the right to insist that a truck hired to haul his goods be loaded to its fullest capacity, whether the hauling is to be paid for by the hour or by the load; but he cannot compel the carrier to overload the truck.[43]

Particular freight to be moved first. The shipper has a right to dictate the particular freight first to be moved.[44]

Reimbursement of shipper for providing equipment. A shipper who has furnished necessary equipment which it is the duty of the carrier to furnish, is entitled to be reimbursed therefor, irrespective of the fact that the carrier is insolvent or has been rendering the service at a loss.[45]

Special tracks not dedicated to public use. A carrier is not obliged to transport goods for the general public over a special track which by its rule and usage is reserved for its own use and the services of the industries located thereon; and its use of the track for other purposes in exceptional cases does not constitute a dedication for public use.[46]

§ 41. Duty to Furnish Suitable Facilities for Receiving and Delivering Goods

The duty of a carrier to furnish suitable facilities for handling inanimate freight will be discussed in § 42, for handling live stock in § 43. The duty of connecting carriers to furnish such facilities is treated in § 420 infra.

Examine Pocket Parts for later cases.

§ 42. Inanimate Freight

A carrier must furnish adequate freight houses for receiving and delivering freight.

Adequate freight houses or depots for receiving freight for shipment or for holding it for delivery must be provided by the carrier.[47]

641, 150 Ky. 489, 44 L.R.A.,N.S., 643, Ann Cas.1914C 1255.

(2) According to other authority the carrier is not required to provide facilities sufficiently extensive for maximum freight output at any time of the year, but is only required to meet a demand so adjusted as to utilize the equipment with regularity throughout the year—Montana, etc., R. Co. v. Morley, D.C.Mont., 198 F. 991—Logan Coal Co. v. Pennsylvania R. Co., C.C.Pa., 154 F. 497
10 C.J. p 78 note 41.

36. Ark.—Gage v. Arkansas Cent. R Co., 254 S.W. 665, 160 Ark. 402.
10 C.J. p 78 note 44, p 79 note 46.

37. Ark.—Gage v. Arkansas Cent. R Co., supra.
Iowa—Vander Zyl v. Chicago, R. I & P. Ry. Co., 189 N.W. 953, 195 Iowa 901, error dismissed Chicago, R. I. & P. Ry. Co. v. Vander Zyl, 45 S.Ct. 10, 266 U.S. 636, 69 L.Ed. 481.

Carrier has fulfilled its duty where it has furnished itself with the appliances necessary for the transportation of freight offered it in the usual course of events, taking into consideration the fact that at certain seasons more cars are needed than at others—State v. Chicago, etc., R Co., 99 N.W. 309, 71 Neb. 593.

38. Miss.—Yazoo, etc., R Co. v. Crawford, 65 So. 462, 107 Miss. 355, L.R.A.1915C 250.
10 C.J. p 79 note 47.

39. Mich.—Grand Trunk Western R Co v. Mount Clemens Sugar Co., 269 N.W. 208, 277 Mich. 366.

40. U.S.—Chicago, R. I. & P. Ry. Co. v. Lawton Refining Co., Okl., 253 F. 705, 165 C.C.A. 299.
Okl.—St. Louis & S. F. Ry Co. v. State, 184 P. 442, 76 Okl. 60, P.U.R.1920A 605, 7 A.L.R. 140

41. U.S.—Atchison, etc., R. Co. v. U. S., Com.Ct., 34 S.Ct. 291, 232 U.S. 199, 58 L.Ed. 568.

42. U.S.—Atchison, etc., R. Co. v. U. S., supra
10 C.J. p 106 note 65.

43. Or.—Brothers v. State Industrial Accident Commission, 12 P.2d 302, 139 Or. 658.

44. Or.—Brothers v. State Industrial Accident Commission, supra

45. Colo.—Boetticher v. Public Utilities Commission of Colorado, 213 P. 114, 73 Colo. 46, error dismissed 44 S.Ct. 458, 265 U.S. 572, 68 L.Ed. 1185

46. La.—Miller Engineering Co. v. Louisiana Ry. & Nav. Co., 81 So. 314, 144 La. 786.

47. Tex.—Sugarland Industries v. Universal Mills, Civ.App., 275 S.W. 406
10 C.J. p 79 note 49.

Duty under statute may be absolute Under a statute declaring it to be the duty of railroad companies operating line in state to provide suf-

§ 43. Live Stock Pens and Yards

a. In general
b. Nature and character of facilities required
c. Carrier's or shipper's knowledge of defects

a. In General

A carrier is under the duty to provide reasonably sufficient facilities for receiving and delivering live stock accepted for transportation, and it will be liable for loss resulting from failure to maintain such facilities in a safe condition, notwithstanding that the shipper remains in control of the stock, or that a contract exonerates it from the duty of inspection of the facilities provided.

It is the duty of a carrier of live stock, as an incident to the business of transporting such stock, to furnish suitable pens, yards and other facilities for receiving and delivering the stock,[48] sufficient in number and size to take care of the shipments which are usually made or which may be reasonably anticipated;[49] and it will be liable for loss or injury resulting from nonperformance of its duty to keep such facilities in a reasonably safe condition for the purposes intended,[50] notwithstanding that the shipficient tracks, switches, sidings, yards, depots, and other facilities for receiving and delivering freight, the duty to provide such facilities is absolute.—Sugarland Industries v. Universal Mills, Tex.Civ.App., 275 S.W. 406.

Facilities on international bridge

A domestic railroad company cannot, however, be required to build an inclosure for the transfer of freight at the center of an international bridge owned half by it and half by a foreign company.—Texas-Mexican Ry. Co. v. State, Tex.Civ.App., 174 S.W. 298.

48. Ark.—Chicago, R. I. & P. Ry. Co. v. Butler, 200 S.W. 144, 132 Ark. 37, L.R.A.1918C 537.
Idaho.—Houchtelin v. Oregon Short Line R. Co., 202 P. 571, 34 Idaho 482.
N.D.—Booke & Olson v. Payne, 184 N.W. 803, 48 N.D. 435.
Okl.—St. Louis & S. F. Ry. Co. v. Slade, 291 P. 107, 144 Okl. 216.
Or.—Brown v. Oregon-Washington R. & Navigation Co., 128 P. 38, 63 Or. 396.
Tex.—Panhandle & S. F. Ry. Co. v. Andrews, Civ.App., 278 S.W. 478—Gulf, C. & S. F. Ry. Co. v. Culwell, Civ.App., 216 S.W. 457.
10 C.J. p 13 note 64, p 79 note 51.
Duty of carrier to furnish loading and unloading pens see infra § 69.

This rule as set forth in Corpus Juris, has been cited with approval.—Booke & Olson v. Payne, 184 N.W. 803, 805, 48 N.D. 435.

Analogous to inanimate freight

(1) Such duty is strictly analogous to the duty of the carrier to construct and to maintain proper facilities for the receipt of inanimate freight.
U.S.—Covington Stock-Yards Co. v. Keith, Ky., 11 S.Ct. 461, 139 U.S. 128, 35 L.Ed. 73
Mo.—Bozworth v. Wabash Ry. Co., 58 S.W.2d 448, 332 Mo. 277, affirming Bosworth v. Wabash Ry. Co., App., 21 S.W.2d 1110—Burton v. Wabash Ry. Co., 58 S.W.2d 443, 332 Mo. 268, affirming, App., 22 S.W.2d 201.
10 C.J. p 79 note 55.

(2) The Corpus Juris text has been cited with approval.—Bozworth v. Wabash Ry. Co., supra—Burton v. Wabash Ry. Co., 58 S.W.2d 443, 446, 332 Mo. 268, affirming, App., 22 S.W.2d 201.

(3) Duty to provide safe facilities for inanimate freight see § 42 supra.

Before loading

The duty of a carrier of live stock, it is said, cannot be efficiently discharged without the aid of pens or yards in which the live stock offered for shipment can be received and handled, with safety and without inconvenience to the public, before being loaded in the cars in which they are to be transported.—Booke & Olson v. Payne, 184 N.W. 803, 48 N.D. 435—10 C.J. p 79 note 54.

"In the case of live stock destined to a town or city the carrier must furnish yards in which to receive the stock with safety, and so situated as to be convenient to the public and as to enable the carrier to promptly deliver the stock to the consignee. It is not required to own and operate such yards itself but may delegate that duty to another."—Bosworth v. Wabash Ry. Co., 58 S.W.2d 448, 332 Mo. 277, affirming Bosworth v. Wabash Ry. Co., App., 21 S.W.2d 1110—Burton v. Wabash Ry. Co., Mo.App., 22 S.W.2d 201, 204, affirmed 58 S.W.2d 443, 332 Mo. 268.

Pens used jointly with connecting carrier

The rule requiring the carrier to maintain suitable pens applies with full force and effect to pens which are maintained and used jointly with another connecting carrier.—Texas, etc., R. Co. v. Felker, 90 S.W. 530, 40 Tex.Civ.App. 604—10 C.J. p 81 note 76.

Rule similar as to cars

The same rule applies to pens as to cars.—Pruitt v. Hannibal, etc., R. Co., 62 Mo. 527 Jackland v. Chicago, etc., R. Co., 74 S.W. 505, 101 Mo. App. 420.
Duty to furnish cars suitable for live stock see § 54 infra.

49. Okl.—Midland Valley R. Co. v. Price, 260 P. 26, 127 Okl. 106.

50. Mo.—McSpadden v. Lusk, App., 186 S.W. 731.
N.D.—Booke & Olson v. Payne, 184 N.W. 803, 48 N.D. 435.
Okl.—St. Louis & S. F. Ry. Co. v. Slade, 291 P. 107, 144 Okl. 216.
10 C.J. p 79 note 51.

Unqualified duty

The duty of a carrier to furnish stockyards reasonably secure is unqualified.—Houchtelin v. Oregon Short Line R. Co., 202 P. 571, 34 Idaho 482.

No duty rests on the shipper to repair the gates and pens and put them into condition for holding cattle, and he has the right to presume that the carrier will discharge this duty.—Panhandle & S. F. Ry. Co. v. Andrews, Tex.Civ.App., 278 S.W. 478.

Loss occurring on line of another carrier

Where the carrier fails to provide safe and suitable pens, it is liable for loss or injury caused thereby, although the loss or injury occurs on the line of another carrier.—Norfolk, etc., R. Co. v. Harman, 22 S.E. 490, 91 Va. 601, 50 Am.S.R. 855, 44 L.R.A. 289.

In transit or awaiting shipment

(1) A carrier which has provided at a station the yard facilities for the loading and unloading of shipments must use reasonable care to keep its facilities in such condition and so equipped that animals awaiting shipment may receive proper care and attention during a reasonable time prior to loading.—Zakrzewski v. Great Northern R. Co., 154 N.W. 966, 131 Minn. 175—Zakrzewski v. Great Northern R. Co., 145 N.W. 801, 125 Minn. 125.

(2) The duty to maintain suitable facilities in a proper state of repair applies whether such facilities are to be used for the purpose of feeding, watering, and resting live stock while being transported over its road or are furnished for the reception of live stock intended for shipment.—Houchtelin v. Oregon Short Line R. Co., 202 P. 571, 34 Idaho 482.

per in fact retains the control and management of the stock until loading is commenced.[51] This duty extends to the provision of safe yards and pens both at the point of shipment and at the point of destination.[52] It does not exist prior to the tender of the stock to the carrier for shipment,[53] but commences when the stock is delivered into its pens.[54] The duty is one imposed by law and it is in no way dependent on any condition of the shipping contract;[55] moreover, it has been held that the duty resting on the carrier of inspection of inclosures cannot be imposed on the shipper by contract, and any provision to that effect in a contract of shipment is void.[56]

However, a carrier, in providing pens, is only required to have such a number of pens as, according to the business of the carrier, is sufficient for the ordinary and usual volume of business,[57] and the business of other carriers there is immaterial.[58] Further, the carrier is not made an absolute insurer of live stock in transit, but its duty is fully performed by providing pens properly equipped.[59] The true test, it is said, is whether, under all the circumstances, the pens were such as a person of ordinary prudence would have provided.[60]

b. Nature and Character of Facilities Required

Pens must be provided with proper appliances for feeding, watering, and resting live stock and they must be so constructed as to prevent escape and to keep the stock secure from attack by outside animals; further, the pens must be kept reasonably clean, dry and free from noxious substances, and the carrier will be liable for loss resulting from placing animals in pens known to be infected.

In accordance with the rule stated in this section, subdivision a supra, requiring the carrier to furnish safe facilities for the care of live stock, the carrier is liable for injuries to animals resulting from defective chutes leading from the pens.[61] The pens must be provided with necessary equipment for feeding, watering, and sheltering the stock, such as proper racks, mangers, and troughs,[62] although, in the absence of statutory provision, a railroad company is not required to furnish feed or water to live stock in its pens awaiting shipment, unless the company has accepted the care and control thereof.[63] Further, pens must be constructed and maintained in such a state of efficiency as is reasonably calculated to prevent animals escaping therefrom, and a failure to fulfill its duty in this regard will render the carrier liable for loss or injury sustained thereby.[64] If surrounding conditions are such that injury to the stock confined in pens, from dogs or wild animals, might be expected, reasonable provisions for their safety must be made.[65] The pens should be kept reasonably clean and dry,[66] so that the animals should not be compelled to stand

51. N.D.—Booke & Olson v. Payne, 181 N.W. 803, 48 N.D. 435.

52. N.D.—Booke & Olson v. Payne, supra.

10 C.J. p 79 note 56.

Corpus Juris text has been cited with approval and the rule as there announced termed to be "undoubtedly" the general rule.—Booke & Olson v. Payne, 181 N.W. 803, 805, 48 N.D. 435.

53. S.D.—Cahill & Redman v. Great Northern Ry. Co., 166 N.W. 306, 40 S.D. 55, reversed on other grounds 40 S.Ct. 457, 253 U.S. 71, 64 L.Ed. 787, 10 A.L.R. 1335.

54. U.S.—Covington Stock-Yards Co. v. Keith, Ky., 11 S.Ct. 461, 139 U.S. 128, 35 L.Ed. 914.

Mo.—Hardesty v. Atchison, etc., R. Co., App., 179 S.W. 725.

55. Idaho.—Houchtelin v. Oregon Short Line R. Co., 202 P. 571, 34 Idaho 482.

10 C.J. p 79 note 53.

56. Kan.—Ward v. Chicago, etc., R. Co., 126 P. 1083, 87 Kan. 824.

Tex.—El Paso, etc., R. Co. v. Lumbley, 120 S.W. 1050, 56 Tex.Civ.App. 418.

10 C.J. p 81 note 75.

Contract imposing on shipper duty of inspecting and selecting cars see infra § 57.

57. Okl.—Midland Valley R. Co. v. Price, 260 P. 26, 127 Okl. 106.

10 C.J. p 81 note 78

Corpus Juris text has been cited with approval.—Midland Valley R. Co. v. Price, 260 P. 26, 29, 127 Okl. 106.

58. Tex.—Casey v. St. Louis Southwestern R. Co., 83 S.W. 20, 37 Tex. Civ.App. 49.

59. Utah.—Beckman v. Southern Pac. Co., 118 P. 118, 39 Utah 472.

60. Tex.—Chicago, etc., R. Co. v. Crenshaw, 126 S.W. 602, 59 Tex Civ.App. 238.

61. Ky.—Louisville, etc., R. Co. v. Hedger, 72 Ky. 645, 15 Am.R. 740.

62. Minn.—Zakrzewski v. Great Northern R. Co., 145 N.W. 801, 125 Minn. 125.

Mo.—Bell v. Chicago, etc., R. Co., App., 171 S.W. 41.

10 C.J. p 80 note 59.

63. Minn.—Zakrzewski v. Great Northern R. Co., 145 N.W. 801, 125 Minn. 125.

Duty to provide feed and water to animals in transit see infra § 64.

64. Tex.—Texas, etc., R. Co. v. Bigham, 38 S.W. 162, 90 Tex. 223.

10 C.J. p 80 note 68.

Patented locks

No inference of negligence can be drawn from the failure of a carrier to provide its stockyards with patented locks, unless the circumstances are shown to be such that a prudent person would have provided locks.—Lane v. Oregon Short Line R. Co., 198 P. 671, 34 Idaho 37, 15 A.L.R. 197.

65. Idaho.—Houchtelin v. Oregon Short Line R. Co., 202 P. 571, 34 Idaho 482.

10 C.J. p 81 note 69.

Notice of existence of vicious animals

(1) Whether the stockyards furnished are reasonably secure for sheep should be determined in view of the well-known fact that every city or village contains dogs, some of which are likely to attack sheep in pens, if opportunity is afforded.—Houchtelin v. Oregon Short Line R. Co., 202 P. 571, 34 Idaho 482.

(2) On the other hand, it has been held that the carrier is not bound to guard against the possibility of danger from dogs in the absence of the known existence of vicious animals in the vicinity.—Beckman v. Southern Pac. Co., 118 P. 118, 39 Utah 472.

66. Minn.—Zakrzewski v. Great Northern R. Co., 145 N.W. 801, 125 Minn. 125.

or lie in mud.[67] If the carrier permits salt water to stand in pens accessible to lambs offered for shipment, it is guilty of negligence and liable for loss occasioned thereby.[68] The carrier will be liable for loss or injury caused by unloading live stock into infected pens from which the stock contract disease,[69] if the infected condition existed and the carrier knew or had notice of it before the stock were received,[70] and it makes no difference as respects the carrier's liability that putting the stock in the infected pen was the only means which the carrier had of avoiding a violation of the Twenty-Eight-Hour Law.[71] The fact that they were unloaded in violation of the regulations of the United States department of agriculture will not defeat a recovery.[72] It is also immaterial that the loss did not occur until after delivery.[73] On the other hand, it has been held that where rules of the state department of agriculture declared public pens or yards to be infected, the removal of live stock from the yards by the shipper without disinfecting them constitutes contributory negligence precluding recovery against the carrier.[74]

c. Carrier's or Shipper's Knowledge of Defects

Notice of the defective condition of its facilities is not essential to the liability of the carrier; and, knowledge of such condition and use of the pens by the shipper does not constitute contributory negligence barring liability, although such may be the result if the pens are so obviously unsafe as to make injury certain or if the shipper should have undertaken to remedy the defect or if he himself negligently penned the animals.

As affects the liability of a carrier for injuries to live stock due to defective pens, it is of no importance that the carrier had received no notice that the pens were insufficient.[75] The shipper has the right to presume that the carrier will discharge its duty to keep pens in a suitable condition,[76] and mere knowledge on his part that the pens are defective will not relieve the carrier of liability;[77] nor will the use of defective pens by the shipper constitute contributory negligence absolving the carrier from liability, unless the pens are so obviously unsafe as to make it reasonably certain that injury to the animals must inevitably result.[78] It has been held, however, that if the shipper himself undertakes to pen his animals and fastens the gate so insecurely that the cattle escape, the carrier is not liable for loss or injury sustained thereby.[79] It has also been held that where the shipper could have prevented the escape of the animals by guarding or closing up a hole in the pen of which he had knowledge, his negligence is the proximate cause of the loss and he cannot recover against the carrier;[80] but the obligation of the shipper to discover defects in the yards furnished requires at most the exercise of ordinary care on his part.[81]

§ 44. Duty to Follow Shipping Directions

A carrier is under the obligation to follow specific shipping instructions to which it assents, whether there is an express contract to that effect or otherwise, and if such instructions are not clear, it must hold the goods until further directions are received. A carrier having an option as to the mode of shipment must exercise it for the best interests of the shipper.

Where goods are tendered to a carrier for transportation with specific shipping directions from the consignor, to which it assents, it assumes the obligation to follow such directions and is liable for loss or injury resulting from its failure to do so, and this is true whether there is or is not an express contract to follow such directions evidenced by bill of lading or otherwise.[82] Accordingly, in

67. Minn.—Zakrzewski v. Great Northern R. Co., supra.

68. Va.—Norfolk, etc., R. Co. v. Harman, 22 S.E. 490, 91 Va. 601, 50 Am.S.R. 855, 44 L.R.A. 289 and note

69. Mo.—Council v. St. Louis, etc., R. Co., 100 S.W. 57, 123 Mo.App. 432.
10 C.J. p. 80 note 62.

70. Ala.—Nashville, C. & St. L. Ry. Co. v. Farrell & Braley, 70 So. 986, 14 Ala.App. 380.
Mo.—Larimore v. Chicago, etc., R. Co., 65 Mo.App. 167.

71. Ala.—Nashville, C. & St. L. Ry. Co. v. Farrell & Braley, 70 So. 986, 14 Ala.App. 380.
Carrier's duty as to live stock under Twenty-Eight-Hour Law see infra § 64c (1).

72. Tex.—International, etc., R. Co. v. McCullough, Civ.App., 118 S.W. 558.

73. Md.—Baltimore, etc., R. Co. v. Dever, 75 A. 352, 112 Md. 290, 26 L.R.A.,N.S., 712, 21 Ann.Cas. 169.

74. Okl.—Schaif v. Richardson, 250 P. 133, 119 Okl. 160.

75. Tex.—Texas, etc., R. Co. v. Slator, Civ.App., 102 S.W. 156.

76. Tex.—Panhandle & S. F. Ry. Co. v. Andrews, Civ.App., 278 S.W. 478.

77. Mo.—Paddock v. Missouri Pac. R. Co., 60 Mo.App. 328.
10 C.J. p. 81 note 71.

78. Mo.—Lackland v. Chicago, etc., R. Co., 74 S.W. 505, 101 Mo.App. 420
10 C.J. p. 81 note 72.

79. Ark.—St. Louis, etc., R. Co. v. Law, 57 S.W. 258, 68 Ark. 218.
10 C.J. p. 81 note 73.

Shipper as mere invitee

Where plaintiff, without informing defendant's agent, and without feeding the cattle, put them in a yard properly fenced, but failed to put up all the gate bars, and left no one to guard the cattle, and the cattle broke through the gate, and some were killed by defendant's train, it was held that plaintiff, being a mere invitee, defendant was under no obligation to guard the cattle and was guilty of no negligence. Smith v. Maine Cent. R. Co., 96 A. 778, 114 Me. 474.

80. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Brown & Co., Civ.App., 248 S.W. 97.

81. Idaho.—Houchtelin v. Oregon Short Line R. Co., 202 P. 571, 34 Idaho 482.

82. Colo.—Southern Express Co. v. McClellan, 185 P. 347, 66 Colo. 591.

addition to its duty to follow routing directions, treated in § 45 infra, the carrier, under the circumstances mentioned, is bound to transport goods in the particular manner and position directed,[83] and to use reasonable care to follow the shipping directions as to the place of destination.[84] It is also liable for loss or injury resulting from failure to follow shipping instructions and erroneously marking a shipment as deliverable only on the payment of the price.[85] On the other hand, if loss or injury occurs as a result of following the shipping directions, the carrier of course is not liable.[86]

Where shipping instructions are not clear, or where there is an obvious error in the directions given by the shipper as to the destination of the freight, it is the duty of the carrier to hold the goods, except in cases of emergency, and ask further instructions from the shipper.[87]

Optional mode of shipment. If the contract gives the carrier an option as to the mode of shipment, it is its duty to exercise it for the best interests of the shipper, and it is a breach of the contract to exercise it to his disadvantage unless in good faith and under circumstances which seem to require it.[88]

§ 45. Routing

a. In general
b. In absence of directions by shipper

a. In General

In the absence of circumstances justifying a deviation, it is the carrier's duty to obey the shipper's routing directions, although it cannot be compelled to use one of two equally desirable routes if the shipper has no reason for such demand; where the designated route is impracticable the carrier is not obliged to use another route but it should give the shipper notice of possible delays. A carrier's contractual option as to routing must be exercised reasonably.

The shipper on delivering property to a carrier for shipment has the right to designate the route by which it shall be transported, at least under a statute to that effect.[89] If specific directions as to the routing of the goods to be shipped are given,

Tex.—Levin v. International-Great Northern R. Co., 45 S.W.2d 435.
10 C.J. p. 81 notes 81, 82.

Approval of Corpus Juris rule

(1) This rule, as stated in Corpus Juris, 10 C.J. p. 81 note 81, has been quoted with approval with the statement that the authorities uniformly support the rule as there stated.—Levin v. International-Great Northern R. Co., Tex.Civ.App., 45 S.W.2d 435, 437.

(2) The Corpus Juris rule has also been cited with approval, and the rule as there stated followed without other citation of authority.—Southern Express Co. v. McClellan, 185 P. 347, 66 Colo. 591.

Measure of damages for failure of carrier to stop shipment of lumber at intermediate point for kiln-drying as required by the bill of lading and way-bill, is limited to the excess in cost thereof at destination, which was the damage which might reasonably have been anticipated by the parties.—Van Keulen & Winchester Lumber Co. v. Manistee & N. E. R. Co., 193 N.W. 289, 222 Mich. 682.

83. Me.—Colbath v. Bangor, etc., R. Co., 74 A. 918, 105 Me. 379, 134 Am.S.R. 569.
10 C.J. p. 82 note 84.

Adjustment of ventilators in certain manner

Ill.—Sparr v. Southern Pac. Co., 220 Ill.App. 180.

Tex.—Texas, etc., R. Co., v. Davis-Fowler Co., Civ.App., 133 S.W. 309.

Instruction to lay crates flat

Me.—Colbath v. Bangor, etc., R. Co., 74 A. 918, 105 Me. 379, 134 Am.S.R. 569.

Keeping glass bottle right side up

Mass.—Hastings v. Pepper, 11 Pick. 41.

Shipment in single car

N.Y.—Uptegrove v. New Jersey Cent. R. Co., 37 N.Y.S. 659, 16 Misc. 14.

Shipment of live stock by passenger service

Pa.—Pavitt v. Lehigh Valley R. Co., 25 A. 1107, 153 Pa. 302.

Transportation of goods in bond

Mo.—Mellier v. St. Louis, etc. Transp. Co., 14 Mo.App. 281.

Use of particular conveyance

N.Y.—Goodrich v. Thompson, 27 N.Y.Super. 75, affirmed 44 N.Y. 324.

84. Ga.—Western, etc., R. Co. v. Exposition Cotton Mills, 7 S.E. 916, 81 Ga. 522, 2 L.R.A. 102.
10 C.J. p. 82 note 87.
Duty of carrier to deliver property at the destination specified see infra § 164.

85. Tex.—American Ry. Express Co. v. Bean, Civ.App., 233 S.W. 561.

Measure of damages recoverable

(1) Where the carrier knew that plaintiff was a wholesale dealer in coffee, and by reason of the indorsed value knew the selling price, it was charged with knowledge that plaintiff usually made a profit in business, and the item of profit was properly recoverable against it.—American Ry. Express Co. v. Bean, Tex.Civ.App., 233 S.W. 561.

(2) But in the absence of a showing of notice to defendant at the time of the making of the contract, or of the negligent act or omission, that the loss of business, patronage, and good will was to be expected from the negligent act, damages on this count will not be sustained.—American Ry. Express Co. v. Bean, supra.

(3) Where the manager of plaintiff's customer, the consignee, testified that he quit trading with plaintiff because of plaintiff's competition with him in sale of goods to cafés, the evidence does not support a finding of loss of business, patronage, and good will on account of the negligence of defendant.—American Ry. Express Co. v. Bean, supra.

86. Wis.—Treleven v. Northern Pac. R. Co., 62 N.W. 536, 89 Wis. 598.
10 C.J. p. 82 note 90.

87. La.—Lindsey Wagon Co. v. Louisiana & A. Ry. Co., 129 So. 395, 14 La.App. 236.
10 C.J. p. 120 note 5.

88. Ga.—Stewart v. Comer, 28 S.E. 461, 100 Ga. 754, 62 Am.S.R. 353.
10 C.J. p. 212 note 47.

Higher freight rate

If the carrier adopts a mode of transportation which involves the payment of a higher rate of freight rather than a lower, it may show that it asked for and obtain direction from the shipper or consignee to employ the more expensive mode, or that, because of its inability to procure the means of shipment by the cheaper method, it was reasonably necessary in view of the exigencies of the particular case.—Stewart v. Comer, 28 S.E. 461, 100 Ga. 754, 62 Am.S.R. 353.

89. Pa.—Davis v. Kehota Mining Co., 86 Pa.Super. 443.

it is the duty of the carrier to obey these directions, and ordinarily, it will be liable for any injuries directly resulting from a nonobservance thereof,[90] especially where a greater freight charge than the lawful charge agreed on will be incurred if a different route is employed,[91] unless, as indicated herein, a deviation is justified by intervening circumstances. Where the carrier refuses to route as demanded by the shipper, there is a failure to perform a duty to the shipper imposed by law and a completed legal wrong is then done.[92] This duty to observe routing directions, it is said, arises at the time when the goods are offered and is imposed on the railroad company independently of any contract,[93] but until a proper tender of the goods has been made the duty does not arise.[94]

90. Ala.—Ex parte Louisville & N R. Co., 79 So. 139, 201 Ala. 667, reversing Oden-Elliott Lumber Co. v. Louisville & N. R. Co., 77 So 240, 16 Ala App. 251.
Ill.—Crane v. Taft, 203 Ill App. 253.
La.—Texas & P Ry. Co. v. Consolidated Companies, Inc, 156 So. 215, 180 La. 180, affirming, App., 151 So. 433.
N.C.—Harrill v. Seaboard Air Line Ry Co., 103 S.E. 21, 179 N.C. 540.
Pa.—Davis v. Kehota Mining Co., 86 Pa Super. 443.
Tex.—Levin v. International-Great Northern R. Co., Civ.App., 45 S. W.2d 435, error dismissed—Lancaster v. Mebane, Civ.App., 260 S. W. 252.
10 C.J. p 82 note 91, p 84 note 4 [a] (1).
Duty of connecting carrier to follow routing directions see infra § 422.

Change of route

Consignor's change of routing was held effective although bill of lading was not surrendered for indorsement in accordance with reconsignment tariff providing that original bill of lading "should" be surrendered, word "should" being merely directory.—Texas & P. Ry. Co. v. Consolidated Companies, 156 So. 215, 180 La. 180, affirming, App., 151 So. 433.

Damages

(1) Where the contract of transportation provided for delivery of cattle to Chicago by way of Kansas City, the shipper having the privilege to sell the cattle at Kansas City, the shipper can recover in an action against the carrier for failing to permit a stop-off at Kansas City, the loss resulting from a forced sale on the Chicago market.—Bailey v. St. Louis & S. F. Ry. Co., Mo. App., 290 S.W. 630.

(2) Where shipper ordered routing over certain lines with a certain railroad as the last carrier, and the goods were routed so that they arrived over a different railroad, and shipper filed claim two months after shipment, and two months after filing claim goods were found, and shipper ordered them sent to another destination over a route specified by him, and they were so sent and lost, the initial carrier is not liable for a conversion of the goods because of the misrouting and delay, being only liable for damages caused by the misrouting and damages sustained by reason of reshipment—Harrill v. Seaboard Air Line Ry. Co., 103 S.E. 21, 179 N.C. 540.

(3) Other examples see 10 C.J. p 82 note 91 [c].

Delay after arrival

Initial carrier which failed to observe routing was liable for damages resulting from delayed delivery, irrespective of whether arrival notice was sent consignee within reasonable time or whether consignee used reasonable diligence—Levin v. International-Great Northern R. Co., Tex Civ.App., 45 S.W.2d 435, error dismissed.

No deviation

(1) Provision of receipt requiring carrier to transport freight only over its own lines was not violated by carrier in hiring a truck and chauffeur, according to its usual custom for transporting merchandise received from its customers—John H. Goetze & Co. v. Beam's Own, Inc, 199 N.Y.S. 790.

(2) In the absence of specific instructions to the contrary, a route named in a shipping receipt or bill of lading requires not only a terminal delivery by the carrier named but includes also a line haul in intermediate routing by such carrier—Davis v. Kehota Mining Co, 86 Pa Super. 443.

Shipment of corpse

Where a railroad at the time of selling a corpse ticket and tickets to relatives of deceased understood that the corpse was to be transported on the same train and over the same route as called for by the tickets sold to the relatives of deceased, its removal of the corpse from the train and transportation over different route was a violation of its contract for which each of the relatives could sue individually.—Lancaster v. Mebane, Tex.Civ App., 260 S. W. 252.

Sufficiency of direction

(1) Where bill of lading specified legal rate of a certain amount, and there was only one route over which shipment could be made at such rate, carrier was sufficiently apprised of the route desired by the shipper—Ex parte Louisville & N. R. Co, 79 So. 139, 201 Ala. 667, reversing Oden-Elliott Lumber Co. v. Louisville & N. R. Co., 77 So. 240, 16 Ala.App. 251.

(2) A shipper's written instruction to a station agent as to the selection of a connecting carrier is superseded by subsequent bills of lading containing no provision on the subject—Bessling v. Houston, etc., R. Co, 80 S.W. 639, 35 Tex Civ.App. 470.

(3) Other examples.—10 C.J. p 82 note 91 [d] [e].

Waiver of objection

Where plaintiff has accepted and paid the freight at destination on several cars of watermelons consigned to him, he cannot afterward maintain an action of conversion against the initial carrier for misrouting them.—Shafton Co. v. St. Louis, etc., R. Co., 174 Ill.App. 121.

91. Ala.—Ex parte Louisville & N. R. Co., 79 So. 139, 201 Ala. 667, reversing Oden-Elliott Lumber Co. v. Louisville & N. R. Co., 77 So. 240, 16 Ala App. 251.

92. Tex.—St. Louis, etc., R. Co. v. True, Civ.App., 140 S.W. 837.

Effect of subsequent contract

(1) It has been held in view of the rule stated in the text, that where the carrier refuses to route a consignment as requested by the shipper, the shipper is entitled to recover any damages proximately resulting from such refusal, notwithstanding any shipping contracts subsequently entered into whereby the shipper agrees to employ another route.—St Louis, etc., R. Co. v. True, Tex Civ.App., 140 S.W. 837.

(2) It has been held, however, that where the shipper makes a binding contract for a through shipment over a designated route, he is not entitled to recover damages by reason of that route being longer than another route which he had demanded, in the absence of fraud or misrepresentation, by the carrier or its agent, as to its inability to employ the route originally requested—Houston, etc, R Co. v. Buchanan, 94 S.W. 199, 42 Tex Civ.App. 620—10 C.J. p 83 note 99.

93. Tex.—St. Louis, etc., R. Co. v. True, Civ.App., 140 S.W. 837—Inman v St. Louis, etc., R. Co., 37 S.W. 37, 14 Tex.Civ.App. 39.

94. Tex.—St. Louis, etc., R. Co. v. True, Civ.App., 140 S.W. 837.
10 C.J. p 83 note 94.

Notwithstanding the rule just stated, it has been held that when goods are tendered for shipment to a point beyond the carrier's line, and there are two or more routes equally safe, prompt, and reliable, the carrier cannot be compelled to accept the goods to be carried over one route in preference to another, at the option of the shipper, unless some reason appears therefor; especially when the carrier shows that, in the conduct of its business, the use of one route may be advantageous to it without injury or sacrifice to the interests of the shipper.[95] It has also been held that, where a shipper of live stock was informed before the stock was loaded that there could be no through billing to the point of destination other than by a particular route, he could not select a different route and exact a through billing, when the carrier was not prepared to give it, and the shipper had been informed of that fact.[96] It seems also that the carrier may be justified in deviating from the shipper's instructions as to routing where the designated route becomes impracticable or incapable of use because of various intervening circumstances, such as floods,[97] an embargo,[98] the necessity for preservation of perishable goods,[99] the irresponsibility of the designated delivery company,[1] or the impossibility of transportation to destination by the designated connecting carrier.[2] However, where a definite route is specified, the carrier is not bound to forward by a different route, in the case that transportation by the designated route becomes impracticable,[3] although it is its duty in such a case to notify the shipper of the attendant circumstances and to await his further instructions.[4]

It has been held that, if the exercise of the shipper's right to route his goods over particular connecting lines would probably cause delays detrimental to the shipper and carrier, it is the carrier's duty to notify the shipper of this fact, and to allow him to choose whether he will take the attendant risk.[5]

Optional route. If the contract gives the carrier an option as to the route to be chosen, the exercise thereof must be reasonable in view of the circumstances and the interest of the shipper.[6]

The carrier is not responsible for failure to employ the route directed by the shipper where the contract of shipment gives it the right to deviate from the route in the case of physical necessity, and such necessity is shown where the designated connecting carrier was not receiving goods for transportation to the point of destination.[7] So, also, where the contract gives the carrier the right to change the route on the happening of certain contingencies, such as flood, and the existence of a flood is proved, no liability attaches.[8]

b. In Absence of Directions by Shipper

In the absence of specific routing directions by the shipper, the carrier may select a route convenient to it; but its option in this respect must be exercised with due regard to the rights and interests of the shipper.

The general rule is that, when no special instructions are given and assented to as to routes, the initial carrier may ordinarily select the route or use that commonly employed by it to the point of destination named, and the absence of special instructions given and acceded to amounts to an assent that the carrier's usual course of business may be followed, and that it may designate the

95. Tenn.—Post v. Southern R. Co., 52 S.W. 301, 103 Tenn. 184, 55 L.R.A. 481.
10 C.J. p 83 note 97.

96. Tex.—Houston, etc., R. Co. v. Buchanan, 94 S.W. 199, 42 Tex. Civ.App. 620.

97. Ill.—Aurora Automatic Machinery Co. v. Chicago, B. & Q. R. Co., 217 Ill.App. 60.

98. U.S.—Krauss Bros. Lumber Co. v. Mellon, C.C.A.Ala., 30 F.2d 901, conforming to mandate 48 S.Ct. 358, 276 U.S. 386, 72 L.Ed. 620, which reversed, C.C.A., 18 F.2d 369, certiorari granted 48 S.Ct. 35, 275 U.S. 513, 72 L.Ed. 400, amended 48 S.Ct. 527, 72 L.Ed. 1018, certiorari denied 49 S.Ct. 513, 279 U.S. 872, 73 L.Ed. 1008.

99. Mo.—Lord & Bushnell Co. v. Texas & N. O. R. Co., 134 S.W. 111, 155 Mo.App. 175.

1. Wash.—State v. Great Northern Ry. Co., 167 P. 103, 98 Wash. 197.
Preventing violation of law
Where interstate shipment of liquor was not routed by customary route, carrier was not bound to deliver to irresponsible delivery company within state, but had right to cause deviation from designated route in order to guard against possible unlawful delivery of the liquor. —State v. Great Northern Ry. Co., 167 P. 103, 98 Wash. 197.

2. Ohio.—Frank v. Louisville & N. R. Co., 19 Ohio N.P.,N.S., 574.
Different connecting carrier
Where on the arrival of the shipment at the point at which the shipper's directions called for it to be turned over to a certain connecting carrier, such carrier was not receiving freight for transportation to the point of destination, the initial carrier could, without liability, change the routing and turn the goods over to another connecting carrier.—Frank v. Louisville & N. R. Co., 19 Ohio N.P.,N.S., 574.

3. Me.—Fisher v. Boston, etc., R. Co., 59 A. 532, 99 Me. 338, 105 Am.S.R. 283, 68 L.R.A. 390.
10 C.J. p 83 note 95.

4. Tex.—Inman v. St. Louis Southwestern R. Co., 37 S.W. 37, 14 Tex.Civ.App. 39.

5. Tex.—Inman v. St. Louis Southwestern R. Co., supra.
10 C.J. p 83 note 96.

6. Ala.—Ex parte Louisville & N. R. Co., 79 So. 139, 201 Ala. 667, reversing Oden-Elliott Lumber Co. v. Louisville & N. R. Co., 77 So. 240, 16 Ala.App. 251.
10 C.J. p 212 note 47.

7. Ohio.—Frank v. Louisville & N. R. Co., 19 Ohio N.P.,N.S., 574.

8. Ill.—Aurora Automatic Machinery Co. v. Chicago, B. & Q. R. Co., 217 Ill.App. 60.

route as its convenience may suggest;[9] the carrier's right in this regard is, however, not an absolute or inalienable one, and it may be waived or surrendered by a subsequent agreement.[10] Notwithstanding this rule, the carrier in selecting the route must have due regard to the rights and the interests of the shipper and exercise its option of selecting a route so that it will not work to the disadvantage of the shipper, unless under circumstances which require it.[11] Thus, the carrier must ordinarily select the shortest,[12] cheapest,[13] safest,[14] and most available[15] route; and, if the carrier is not informed of any reason for delivery of the goods to destination within a specified time, nor requested to use the shortest route, its shipment over a longer and cheaper route does not constitute a conversion.[16] The carrier, however, is not bound to employ the cheapest route, where, considering the interests of the shipper, the carrier, and the general public, another route would be more reasonable under the circumstances.[17]

9. Tenn.—Frazier & Crews v. L. & N. R. R Co, 13 Tenn.App. 387.
10 C J. p 83 note 1.

Any reasonable routing to point as to which tariff contains no restriction is permissible.—W. L Shepherd Lumber Co. v. Atlantic Coast Line R. Co, 112 So. 323, 216 Ala. 89.

10. Minn.—Steidl v. Minneapolis, etc, R Co, 102 N.W. 701, 94 Minn 233.
10 C J. p 84 note 3.

11. Iowa.—Miller v. Davis, 240 N.W. 743, 213 Iowa 1091, 78 A.L R. 1541.
10 C J. p 84 note 4.

Corpus Juris text has been cited with approval and the rule as there stated followed—Miller v. Davis, 240 N W. 743, 744, 213 Iowa 1091, 78 A. L R. 1541.

12. Iowa.—Miller v. Davis, supra.

Prima facie, direct transit by carrier to destination indicated by bill of lading is intended by shipper and carrier.—Oden-Elliott Lumber Co. v. Louisville & N. R. Co, 79 So. 400, 16 Ala App 495, certiorari denied 78 So. 989, 201 Ala. 700.

Longer and less expeditious route

Where railroad fails in its duty to transport goods to destination by the most direct route, shipper could recover damages accruing as proximate consequence of such breach of duty.—Oden-Elliott Lumber Co. v. Louisville & N. R. Co., 79 So. 400, 16 Ala App. 495, certiorari denied 78 So 989, 201 Ala. 700.

13. U S—Northern Pac. Ry. Co. v Solum, 38 S Ct 550, 247 U S 477, 62 L Ed. 1221, reversing Solum v Northern Pac. Ry. Co, 157 N W. 996, 133 Minn. 93, and Monarch Elevator Co v. Northern Pac. Ry Co, 157 N W. 998, 133 Minn 461, and dismissing error, Duluth Elevator Co v. Northern Pac. Ry Co, 162 N W. 1087, 136 Minn. 468—Borst v. Chicago & N. W. Ry. Co, D.C Minn., 3 F.Supp 139.

Ala.—W L. Shepherd Lumber Co v. Atlantic Coast Line R Co, 112 So. 323, 216 Ala 89—Oden-Elliott Lumber Co. v Louisville & N R. Co., 79 So. 400, 16 Ala App. 495, certiorari denied 78 So. 989, 201 Ala 700.

Mo—Stroud v. Missouri Pac R. Co., 236 S.W. 891, 210 Mo.App. 311

Tenn.—Frazier & Crews v. Louisville & N. R. R Co., 13 Tenn.App 387.

If there are two routes equally practicable, the carrier must route the shipment by the route having the cheaper rate—Frazier & Crews v L. & N. R. R. Co., 13 Tenn App. 387

14. U S.—U. S. Express Co. v. Kountze, Neb, 8 Wall. 342, 19 L. Ed. 457

Cal.—Pierce v. Southern Pac. Co, 47 P. 874, 52 P. 302, 120 Cal. 156, 40 L R A 350.

S.C—Chartrand v Southern R. Co., 67 S E 741, 85 S C. 479.
10 C J. p 84 note 4 [a].

15. Ala—W. L Shepherd Lumber Co. v. Atlantic Coast Line R. Co, 112 So. 323, 216 Ala. 89.

Obstructed route

Although by the bill of lading the carrier was entitled to choose the route, it could not select a route so obstructed that delivery could not be made over it, where another practicable route was open—Houston, etc. R. Co. v. Houx, 40 S.W. 327, 15 Tex Civ.App. 502

Usual and customary route

In absence of special contract, obligation of carrier of goods is to transport them by usual and customary route proposed by him to public, without any unnecessary deviation.

Ala—Oden-Elliott Lumber Co. v. Louisville & N. R. Co, 79 So 400, 16 Ala App 495, certiorari denied 78 So 989, 201 Ala. 700.

Wash.—State v. Great Northern Ry. Co, 167 P. 103, 98 Wash. 197.

16. Tex—Coulter v. Gulf, C. & S. F. Ry. Co, Civ App, 286 S W. 559.

17. U S—Northern Pac Ry. Co. v. Solum, 38 S.Ct. 550, 247 U S 477, 62 L Ed. 1221, reversing Solum v. Northern Pac. Ry. Co., 157 N.W. 996, 133 Minn. 93, and Monarch Elevator Co v. Northern Pac. Ry. Co, 157 N.W. 998, 133 Minn 461, and dismissing error Duluth Elevator Co. v. Northern Pac. Ry. Co, 162 N.W. 1087, 136 Minn. 468—Borst v. Chicago & N. W. Ry. Co., D.C.Minn., 3 F.Supp. 139.

Minn.—Comstock Farmers' Elevator Co. v Great Northern Ry. Co, 163 N W. 280, 137 Minn. 470.

Mo—Stroud v. Missouri Pac. R. Co, 236 S.W. 891, 210 Mo App 311.

"In the absence of shipping instructions it is ordinarily the duty of the carrier to ship by the cheaper route But the duty is not an absolute one. The obligation of the carrier is to deal justly with the shipper, not to consider only his interests and to disregard wholly its own and those of the general public. If, all things considered, it would be unreasonable to ship by the cheaper route, the carrier is not compelled to do so. The duty is upon the carrier to select the cheaper route only 'if other conditions are reasonably equal.' Resort to the more expensive route may be justified. And the justification may rest either upon the peculiar circumstances of a particular case or upon a general practice"—Northern Pac. Ry. Co. v. Solum, 38 S Ct. 550, 552, 247 U S. 477, 62 L Ed. 1221, reversing Solum v. Northern Pac. Ry. Co., 157 N W 996, 133 Minn 93, and Monarch Elevator Co. v. Northern Pac. Ry Co, 157 N W. 998, 133 Minn 461, and dismissing error Duluth Elevator Co. v. Northern Pac. Ry Co., 162 N W. 1087, 136 Minn. 468—Borst v. Chicago & N. W. Ry. Co., D.C Minn., 3 F.Supp. 139, 143.

Efficient operation of carrier

(1) Carrier justifiably selected customary but more expensive route for unrouted furniture shipments, where cheaper route would involve additional switching, handling, clerical work, and mileage and would otherwise not be consonant with efficient and economical operation of the carrier—Borst v. Chicago & N W Ry. Co, D C Minn., 3 F.Supp. 139.

(2) Carrier is not bound to route shipment on intrastate line to secure lower rate, when easier grade and shorter distance call for interstate route.—Comstock Farmers' Elevator Co. v. Great Northern Ry. Co., 163 N. W. 280, 137 Minn. 470.

§ 46. Duty to Divert Shipment at Request of Owner of Goods

The nature, extent, and consequences of a carrier's duty to observe the shipper's order to divert the shipment of goods in transit at any intermediate point through which it passes is treated in § 147 infra; and, the availability of such diversion as a defense to the carrier in an action against it for injury to the goods shipped is treated in § 245 infra.

§ 47. Correlative Right of Carrier to Furnish Facilities and to Charge for Them

The right of a carrier exclusively to furnish the services and facilities which the law requires it to provide is treated in § 40 supra, and the right to charge for services is treated in § 314 infra.

§ 48. Miscellaneous Rights and Duties Imposed by Exceptional Circumstances

a. Sale of goods

b. Other rights and duties

a. Sale of Goods

Notwithstanding that a carrier ordinarily does not have the right to sell goods in transportation, it has the right and duty to sell perishable goods where necessary to prevent loss to the shipper.

A bailment of goods to a carrier confers no power of sale.[18] The contract relates to their transportation; and the carrier has no implied right to sell them under ordinary circumstances.[19] Statutes which authorize a carrier to store unclaimed freight do not authorize the sale of unclaimed freight.[20] Nevertheless, it is held, in some cases under statutes so authorizing, and in other cases apparently independent of statute, that a carrier has the right[21] and duty[22] to sell perishable goods where such sale becomes necessary to prevent loss to the shipper or to the owner. This principle is applicable where goods cannot be delivered as required by the bill of lading,[23] as where the consignee refuses to accept them.[24] The carrier has discharged its full duty to the shipper by giving notice of arrival to the party designated in the bill of lading, and after a reasonable time, notice of sale to the consignor, before actually selling the goods.[25] It has been held, however, that, in the absence of a statute otherwise providing,[26] it is the duty of the carrier to notify the shipper, when this is practicable, before selling the goods, and a failure to do so renders it liable for the value of the goods.[27] Further, the sale

If there is but one usual and practical route, the railroad company should use that route, even though there is another route carrying a cheaper rate—Frazier & Crews v. L. & N. R. R. Co., 13 Tenn.App. 387.

18. Ga.—Alabama Great Southern R Co v. McKenzie, 77 S E 647, 139 Ga. 410, 45 L R A ,N.S , 18.
Sale of goods by carrier as conversion see infra § 181.
Sale of goods for payment of freight charges see infra § 331.

19. Ohio—Pennsylvania R Co. v. Gentile Bros Co., 191 N.E 369, 47 Ohio App 162, error dismissed 190 N.E 578, 128 Ohio St. 50.
10 C.J. p 107 note 70.

Even where carriage charges remain unpaid or consignee is absent or rejects goods tendered, carrier cannot of own mere motion, without aid of enabling statute, summarily dispose of goods, and a carrier, except under judicial order or legal process, cannot sell goods.—Pennsylvania R. Co. v. Gentile Bros. Co., 191 N E 369, 47 Ohio App 162, error dismissed 190 N.E. 578, 128 Ohio St 50.

Good faith immaterial

Carrier's good faith in selling damaged shipment, and honest exercise of discretion, will not protect it, if there existed no necessity for sale.—Pennsylvania R. Co. v. Gentile Bros Co., 191 N.E. 369, 47 Ohio App 162, error dismissed 190 N.E. 578, 128 Ohio St 50.

20. Tex.—Gulf, etc., R. Co. v. Patten Mfg. Co., Civ App., 151 S.W. 1158.

21. U S. — Merchants' & Miners' Transp Co. v. Branch, C C.A.Va , 282 F. 494
Ill —See Gilbert v. Chicago & A. R Co., 194 Ill.App. 481.
Md —Payne v. Roe, 122 A. 322, 143 Md 282.
10 C J. p 107 note 72.

Trust imposed on carrier

If it becomes necessary to sell goods shipped because of their perishable nature, carrier must first consider what is best to be done for owner, for trust is imposed on him respecting goods which he cannot ignore to make his own lien effectual—Pennsylvania R. Co. v. Gentile Bros. Co , 191 N E 369, 47 Ohio App. 162, error dismissed 190 N E. 578, 128 Ohio St. 50.

22. U.S — Merchants' & Miners' Transp Co. v. Branch, C C.A.Va., 282 F. 494.

Reason for rule

The right and duty of the carrier to sell perishable goods under certain circumstances is based on the principle that when goods cannot be delivered as directed, the carrier becomes a trustee for the owner charged with the duty to use all reasonable efforts to protect him from loss.—Merchants' & Miners' Transp. Co. v. Branch, C C A Va , 282 F 494.

23. U.S — Merchants' & Miners' Transp. Co. v. Branch, C.C A.Va., 282 F. 494

Right and duty

"The carrier's obligation to deliver goods according to the bill of lading is qualified by his right and duty to sell perishable goods which cannot be delivered as required by the bill of lading."—Merchants' & Miners' Transp Co. v Branch, C.C A. Va , 282 F. 494, 496.

24. Mo—Vernon v. American Ry. Express Co , App , 222 S W 913.
10 C J. p 107 note 73.
Failure or refusal of consignee to accept goods see infra § 178.

Carrier which is not negligent has the right to sell and dispose of a shipment of damaged perishable goods to the best advantage, where the consignee refuses to receive it, in which case consignor can only recover the amount for which the shipment sold—Vernon v. American Ry Express Co., Mo.App , 222 S W. 913.

25. Pa.—McCarthy v. Pennsylvania R. Co., 97 Pa.Super. 570.

26. N.Y.—Leach v. New York, etc., R. Co., 83 N.Y.S. 166, 40 Misc. 654.

27. U.S. — Merchants' & Miners'

should be made only after such notice of the sale as will reasonably assure that the goods to be sold will bring their reasonable market value.[28] It is not essential that the sale shall be made at the place of destination.[29] It may be made at the place where the property will bring the best price,[30] and it has been held that the owner, to avoid a sale at a place other than the point of destination, must show that the place selected was unreasonable and that he was probably injured.[31]

b. Other Rights and Duties

Besides other rights and duties, a carrier has the duty not to unreasonably detain the shipper's cars for its own purposes in violation of his instructions; it has the right to receive and transport dangerous articles; it may be authorized to make a necessary customs entry; and it may have the duty of seeing that a bill of lading is accompanied by an inspection certificate.

In the absence of contrary statute, it is the duty of a carrier not unreasonably to detain and use the shipper's cars for the carrier's own purposes in violation of the shipper's instructions, and it will be liable to the shipper for any such detention and use. Such liability is unaffected by the carrier's freight tariff filed with the interstate commerce commission, which specifies the rate to be paid the shipper for the use of the cars.[32]

A carrier has the right to receive and transport dangerous articles; but it must exercise ordinary care to the end that the same may be safely transported without injury to others, and such care must be proportionate to the danger incident to the handling of the goods.[33]

Where a carrier requires a coal company to specify separately the cars required for shipments of coal to be used by the railroad and to private consignees, it has the right to use the coal put in cars requisitioned for delivery of fuel to it, notwithstanding that the shipper intended such coal to be sent to private consignees, where, due to a shortage of cars, the coal company would not have received such cars for shipments to private consignees.[34]

The carrier may be authorized to make the customs entry where goods are transferred from one country into another.[35]

Where cattle are inspected before shipment and a certificate of good health is issued by a United States inspector, which certificate would have entitled the cattle to be further transported and sold at a higher price, as intended, it is the carrier's duty to have the inspection certificate required by the regulations of the agricultural department accompany the shipment to destination with the proper bill of lading.[36] A carrier, however, is under no duty to furnish gratuitously information as to quarantine regulations affecting the shipment of live stock,[37] and in so doing no peculiar relation of trust or confidence exists so as to render the carrier liable for giving inaccurate information as to such regulations.[38]

Transp. Co. v. Branch, C.C.A.Va., 282 F. 494.
Md.—Payne v. Roe, 122 A. 322, 143 Md. 282.
Mo.—F. W. Brockman Commission Co. v Missouri Pac. R. Co., 188 S. W. 920, 195 Mo.App. 607.
Ohio.—Pennsylvania R. Co. v. Gentile Bros Co., 191 N.E. 369, 47 Ohio App. 162, error dismissed 190 N.E. 578, 128 Ohio St. 50.
10 C.J. p 107 note 75.

Notice by intended purchaser of necessity of sale

The carrier is not ordinarily excused from selling the goods without notice to the owner by the fact, known to the carrier, that the intended purchaser has himself given the owner notice of the necessity of disposition.—Merchants' & Miners' Transp. Co. v. Branch, C.C.A.Va., 282 F. 494.

28. Tex.—Missouri, etc, R. Co. v. Groce, Civ.App., 106 S.W. 720—Carter v. International, etc., R. Co., Civ.App., 93 S.W. 681.

Sale without notice as constituting conversion by carrier see infra § 181.

29. Tex.—Gulf, etc., R. Co. v. Patten Mfg. Co., Civ.App., 151 S.W. 1158

30. Ky.—Chesapeake, etc., R. Co. v. Saulsbury, 103 S.W. 254, 31 Ky. L. 624, 12 L.R.A.,N.S., 431.
Tex.—Gulf, etc., R. Co. v. Patten Mfg. Co., Civ.App., 151 S.W. 1158.
10 C.J. p 107 note 79.

31. Tex.—Gulf, etc., R. Co. v. Patten Mfg. Co., supra.

32. U.S.—J. C. Francesconi & Co. v. Baltimore & O. R. Co., D.C.N.Y., 274 F. 687.
Ill.—Gustafson v. Michigan Cent. R. Co., 129 N.E. 516, 296 Ill. 41, certiorari denied Michigan Cent. R. Co. v. Gustafson, 41 S.Ct. 538, 256 U.S. 698, 65 L.Ed. 1177.

Carrier's limitation of liability

The regulation of a carrier, in its tariffs on file with the interstate commerce commission, that it shall not be liable to a shipper owning its own cars for delay or diversion, except as authorized in filed tariffs, does not give the carrier the right purposely to detain the cars contrary to their owner's orders for the carrier's own purposes.—J. C. Francesconi & Co v. Baltimore & O. R. Co., D.C.N.Y., 274 F. 687.

33. Ill.—Hertz v. Chicago, I. & S. R. Co., 154 Ill.App. 80
Tex.—Gulf, C. & S. F. Ry. Co v. Fowler, 122 S.W. 593, 57 Tex.Civ. App. 556.

34. N.Y.—Phœnix Coal Co. v. Pennsylvania R. Co., 180 N.Y.S. 283, 190 App.Div. 665.

35. Minn.—Mitchelson v. Minneapolis, etc., R. Co., 69 N.W. 1106, 67 Minn. 406.

36. Tex.—Pecos, etc., R. Co. v. Jarman, Civ.App., 138 S.W. 1131.

37. Va.—Manieri v. Seaboard Air Line Ry. Co., 137 S.E. 496, 147 Va. 415.

38. Va.—Manieri v. Seaboard Air Line Ry. Co., supra.

G. DUTY TO FURNISH SUITABLE CARS

§ 49. For Inanimate Freight

a. In general
b. Particular types of cars
c. Repairs or alterations

a. In General

A common carrier must furnish cars suitable for the safe transportation of inanimate property which it undertakes to carry, and is liable for injuries resulting from a failure so to do, unless excused by circumstances beyond its control.

It is the primary duty of the common carrier to select and furnish cars suitable in every respect for the safe transportation of inanimate property which it undertakes to carry, and any failure to observe its duty in this regard will render it liable for loss or injury caused thereby.[39] Under some

39. U.S.—J. C. Famechon Co. v. Northern Pac. R. Co., C.C.A.Minn., 23 F.2d 307, affirming, D.C., 11 F. 2d 312—Chicago, R. I. & P. Ry. Co. v. Lawton Refining Co., Okl., 253 F. 705, 165 C.C.A. 299.
Colo.—Boettcher v. Public Utilities Commission of Colorado, 213 P. 114, 73 Colo. 46, error dismissed 44 S.Ct. 458, 265 U.S. 572, 68 L. Ed. 1185.
Del.—Hardesty v. American Ry. Express Co., 119 A. 681, 2 W.W.Harr. 66.
Fla.—Louisville & N. R. Co. v. Carr, 81 So. 779, 77 Fla. 469, 5 A.L.R. 102.
Ga.—Wadley Southern Ry. Co. v. Kent & Downs, 89 S.E. 765, 145 Ga. 689—Sperry Flour Co. v. Atlantic Coast Line R. Co., 189 S.E. 278, 54 Ga.App. 725—Southwestern R. Co. v. Davies, 186 S.E. 899, 53 Ga. App. 712—Central of Georgia Ry. Co. v. Evans, 134 S.E. 122, 35 Ga. App. 438.
Ill.—Grandt v. Chicago, B. & Q. R. Co., 195 Ill.App. 187
Ky.—Davis v. McKinley, 255 S.W. 523, 200 Ky. 699.
La.—American Trading Co. of New Orleans v. New Orleans & N. E. R. Co., 105 So. 82, 159 La. 9—Ellerbe v. Lancaster, 7 La.App. 105.
Mass.—Bonfiglio v. New York, N. H. & H. R. Co., 198 N.E. 236.
Minn.—De Vita v. Payne, 184 N.W. 184, 149 Minn. 405—Gibbon Farmers' Elevator Co. v. Minneapolis & St. L. R. Co., 170 N.W. 706, 142 Minn. 57.
Mo.—Todd v. St. Louis-San Francisco Ry. Co., App., 21 S.W.2d 1—Howell v. Hines, App., 236 S.W. 886—McDaniel Milling Co. v. Missouri Pac. R. Co., App., 191 S.W. 1021.
N.C.—Aydlett v. Norfolk-Southern R. Co., 89 S.E. 1000, 172 N.C. 47.
N.D.—Williston Coal & Ice Co. v. Davis, 190 N.W. 776, 49 N.D. 191.
Ohio.—Fean v. Alabama Great Southern R. Co., 159 N.E. 487, 26 Ohio App. 96—Keystone Packing Co. v. Norfolk & W. R. Co., 30 Ohio N. P.,N.S., 477, modified on other grounds 49 Ohio App. 136, 2 Ohio Op. 272—Price & Co. v. Erie R. Co., 13 Ohio N.P.,N.S., 65.
Okl.—Oklahoma, N. M. & P. Ry. Co v. H. M. S. Drilling Co., 229 P. 420, 100 Okl. 260—St. Louis & S. F. Ry. Co. v. State, 184 P. 442, 76 Okl. 60, P.U.R.1920A 605, 7 A.L.R. 140.
Tex.—Hanson v. Ponder, Com.App., 300 S.W. 35, affirming in part and reversing in part, Civ.App., 293 S. W. 219, rehearing denied, Com. App., 3 S.W.2d 426, motion granted 5 S.W.2d 767—Hines v. First Guaranty State Bank of Aubrey, Com. App., 243 S.W. 972, affirming, Civ. App., 228 S.W. 668—Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas, Com. App., 221 S.W. 270, reversing, Civ.App., 184 S.W. 1070—Davis v. Standard Rice Co., Civ.App., 293 S. W. 593—Fort Worth & D. C. Ry. Co. v. Hunt, Civ.App., 258 S.W. 593.
Wash.—Wilson & Co. v. Hines, 293 P. 5, 123 Wash. 643—Pacific Fruit & Produce Co. v. Northern Pac. Ry. Co., 186 P. 852, 109 Wash. 481, 10 A.L.R. 337.
Wis.—Richland Equity Shipping Ass'n v. Chicago, M. & St. P. Ry. Co., 188 N.W. 625, 177 Wis. 530.
10 C.J. p. 85 note 14, p. 86 note 25.

The Corpus Juris text is cited with approval in St. Louis & S. F. Ry. Co. v. State, 184 P. 442, 443, 76 Okl. 60, P.U.R.1920A 605, 7 A.L.R. 140.

Interstate Commerce Act

(1) Safe and adequate car service must be furnished by a carrier under the Interstate Commerce Act—Midland Valley R. Co. v. Barkley, 291 S.W. 431, 172 Ark. 898, certiorari granted 48 S.Ct. 37, 275 U.S. 514, 72 L.Ed. 401, reversed on other grounds 48 S.Ct. 342, 276 U.S. 482, 72 L.Ed. 664.

(2) Common law obligation not abrogated by rules of the interstate commerce commission under which a carrier is liable for failure to furnish a car of the type specified in the shipper's order—Central of Georgia Ry. Co. v. Evans, 134 S.E. 122, 35 Ga.App. 438.

Condition of goods when loaded does not affect the shipper's right to recover for damages resulting from the carrier's negligence in failing to provide suitable cars.—Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas, Tex. Com.App., 221 S.W. 270, reversing, Civ.App., 184 S.W. 1070.

Delay in furnishing suitable cars
Ky.—Davis v. McKinley, 255 S.W. 523, 200 Ky. 699.

Liability as carrier or warehouseman

Whether injury to a shipment in defective cars occurred before or after the carrier's liability changed to that of a warehouseman is immaterial.
La.—American Trading Co. of New Orleans v. New Orleans & N. E. R. Co., 105 So. 82, 159 La. 9.
Tex.—Davis v. Standard Rice Co., Civ.App., 293 S.W. 593.

Liability for lessee's breach of duty

A railroad corporation chartered by the state is liable for a tortious breach by a lessee of its tracks of the common-law duty to furnish suitable cars on the request of a shipper, in the absence of a statute exempting the corporation from such liability.—Southwestern R. Co. v. Davies, 186 S.E. 899, 53 Ga.App. 712.

Liability to purchaser from consignee

A purchaser of feed from the consignee may recover from the carrier from damages sustained by the purchaser as a result of the fact that the feed had become poisoned by white lead found on the bottom and sides of the car in which the feed had been transported.—Grandt v. Chicago, B. & Q. R. Co., 195 Ill. App. 187.

Newness of car not a defense where the shipment reached its destination in a damaged condition, although it is a circumstance to be considered by the jury—Galveston, H. & S. A. Ry. Co. v. Tullis, Tex. Civ.App., 8 S.W.2d 247, error dismissed.

Evidence held to support verdict for the shipper in an action by the carrier against the shipper wherein the shipper pleaded a set-off based on the carrier's failure to furnish suitable cars.—Louisville & N. R. Co. v. Tate, 91 S.E. 883, 19 Ga.App. 507.

Findings held not to sustain judgment

In an action against a carrier for failure to furnish suitable cars, spe-

authority, a carrier is required to furnish cars perfect in all their parts,[40] and no defect in a car will excuse the carrier from liability on proof of injury to the goods,[41] but under other authority the carrier is not bound to furnish perfect cars,[42] or, as will be shown infra § 54, with regard to live stock, even the safest and best cars, but only cars which are suitable and safe for the purposes for which they are to be used. Cars furnished must be such as will protect the goods from the elements,[43] although if they are suitable the carrier will not be liable for loss or injury resulting from unprecedented weather.[44] Moreover, it is not liable for failure to furnish suitable cars where it was prevented from doing so by extraordinary circumstances which it could not have foreseen and against which it could not have provided,[45] such as an unprecedented demand for the only cars suitable in the circumstances, or an abnormal prolonged detention of such cars on connecting lines,[46] or where the cars were needed by the carrier in the operation of its trains;[47] nor can it be required, in such circumstances, to carry the goods in an unsuitable car at its own risk.[48]

b. Particular Types of Cars

A carrier must furnish refrigerator or ventilated cars where necessary for the safe transportation of goods it undertakes to carry; tank cars need not be furnished. The furnishing of open cars is a breach of duty where such cars do not afford proper protection, unless the goods are such that they can be carried only on such a car.

Refrigerator cars. A carrier undertaking the shipment of perishable goods requiring protection from heat must furnish cars specially adapted to the preservation of such goods, such as refrigerator cars, during the time required for their transition from the place of shipment to the place of destination,[49] and will not be excused from liability for

cial findings of the jury that the carrier was not negligent in furnishing the kind of cars it did, that one car was suitable but the other was not, and that the carrier's failure to furnish suitable cars was negligence, were conflicting and could not sustain a judgment for the shipper, but the jury should have been required to reconcile their findings if they could do so—Wichita Valley Ry. Co. v. Lechner, Tex.Com.App., 276 S.W. 216.

40. Wash.—Wilson & Co. v. Hines, 213 P. 5, 123 Wash. 643.

41. Tex.—Hines v. First Guaranty State Bank of Aubrey, Com.App., 243 S.W. 972, affirming, Civ.App., 228 S.W. 668.
10 C.J. p. 86 note 16.
Corpus Juris quoted
Tex.—Hines v. First Guaranty State Bank of Aubrey, Com.App., 243 S.W. 972, affirming, Civ.App., 228 S.W. 668.
Duty to know condition of cars furnished
La.—Ellerbe v. Lancaster, 7 La.App. 105.

42. Ohio.—Fean v. Alabama Great Southern R. Co., 159 N.E. 487, 26 Ohio App. 96.

43. La.—American Trading Co. of New Orleans v. New Orleans & N.E.R. Co., 105 So. 82, 159 La. 9—Ellerbe v. Lancaster, 7 La.App. 105
Minn.—De Vita v. Payne, 184 N.W. 134, 149 Minn. 405.
Ohio.—Keystone Packing Co. v. Norfolk & W.R. Co., 30 Ohio N.P., N.S., 477, modified on other grounds 49 Ohio App. 136, 2 Ohio Op. 272—Price & Co. v. Erie R. Co., 13 Ohio N.P., N.S., 65
Tex.—Hines v. First Guaranty State Bank of Aubrey, Com.App., 243 S.W. 972, affirming, Civ.App., 228 S.W. 668—Davis v. Standard Rice Co., Civ.App., 293 S.W. 593
Wash.—Pacific Fruit & Produce Co. v. Northern Pac. Ry. Co., 186 P. 852, 109 Wash. 481, 10 A.L.R. 337.
10 C.J. p. 85 note 15.
Corpus Juris quoted
Tex.—Hines v. First Guaranty State Bank of Aubrey, Com.App., 243 S.W. 972, affirming, Civ.App., 228 S.W. 668.
Suitableness for season
It is the duty of carriers to transport goods offered for shipment in a proper car considering the season—Bivens Bros. v. Atlantic Coast Line R. Co., 97 S.E. 215, 176 N.C. 414.

Evidence held sufficient to go to jury as to whether damage to a shipment from rain occurred because of the carrier's failure to furnish suitable cars—Searles v. Alabama, etc., R. Co., 13 So. 815, 69 Miss. 186.

Instruction for carrier held improper where the evidence clearly showed that the goods were damaged because of the leaky roof of the car furnished by the carrier.—Gardner v. New Orleans, etc., R. Co., 29 So. 469, 78 Miss. 640

44. Ohio.—Keystone Packing Co. v. Norfolk & W.R. Co., 30 Ohio N.P., N.S., 477, modified on other grounds 49 Ohio App. 136, 2 Ohio Op. 272.
10 C.J. p. 86 note 17.
Reason for rule
"A reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as a standard of duty, will neither neglect what he can foresee as probable, nor waste his time and anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things."—Gulf, etc., R. Co. v. Texas Star Flour Mills, Tex.Civ.App., 143 S.W. 1179, 1182—Galveston, etc., R. Co. v. Crier, 100 S.W. 1177, 45 Tex.Civ.App. 434.

45. Wash.—Pacific Fruit & Produce Co. v. Northern Pac. Ry. Co., 186 P. 852, 109 Wash. 481, 10 A.L.R. 337.

46. Wash.—Pacific Fruit & Produce Co. v. Northern Pac. Ry. Co., supra.

47. U.S.—Chicago, R.I. & P. Ry. Co. v. Lawton Refining Co., Okl., 253 F. 705, 165 C.C.A. 299.

48. Wash.—Pacific Fruit & Produce Co. v. Northern Pac. Ry. Co., 186 P. 852, 109 Wash. 481, 10 A.L.R. 337.
Tariff provision held not compelling
A tariff provision referring to the type of cars required for the transportation of goods such as those offered by the shipper has been held not to require the carrier to carry the goods in an unsuitable car at the carrier's risk when it is unable, because of circumstances beyond its control, to carry them in a suitable car.—Pacific Fruit & Produce Co. v. Northern Pac. Ry. Co., 186 P. 852, 109 Wash. 481, 10 A.L.R. 337.

49. U.S.—J. C. Famechon Co. v. Northern Pac. R. Co., C.C.A.Minn., 23 F.2d 307, affirming, D.C., 11 F.2d 312.
Del.—Hardesty v. American Ry. Ex-

loss or injury by a shortage of refrigerator cars where it can adapt other cars to the carriage of such goods.[50]

Ventilated cars. If a ventilated car is the only reasonably safe means of carrying goods offered for transportation, a ventilated car must be furnished, and if loss or injury results from a failure to provide a car of this character, the carrier must respond in damages.[51]

Tank cars. A railroad is not bound to furnish tank cars for the transportation of oil,[52] even where it holds itself out as willing to carry oil in tank cars.[53]

Open cars. If open cars will not afford proper protection to the commodity offered for transportation, the furnishing of such cars in consequence of which loss is sustained is ordinarily a breach of the carrier's common-law duty for which the carrier is liable.[54] However, it has been held that a carrier is not negligent in transporting on an open flat car freight likely to be injured by the weather, where the size of the box in which the freight is packed renders it impossible to put the freight in a box car, and proper precautions are taken to protect it from the weather.[55]

c. Repairs or Alterations

Cars properly coopered or equipped with car door boards, bulkheads, or special floors must be furnished where necessary for the safe transportation of property. However, trivial repairs or alterations may be made by the shipper where greater damage will thereby be averted, although, under some authority, only after notice to, or under a contract with, the carrier.

If cooperage, car door boards, bulkheads,[56] or special floors[57] are necessary to render the cars safe and suitable for the character of commodity shipped, cars thus repaired or equipped must be furnished. However, the shipper himself may make trivial repairs or alterations where such repairs or alterations will render a defective car suitable and avert a greater damage which would result from a rejection of the car,[58] and may recover, under some authorities, the reasonable

press Co., 119 A. 681, 2 W.W.Harr. 66

Md.—American Ry. Express Co. v. Peninsula Produce Exch., 130 A. 346, 148 Md. 465.

Wash.—Pacific Fruit & Produce Co. v. Northern Pac. Ry. Co., 186 P. 852, 109 Wash. 481, 10 A.L.R. 337.

10 C.J. p. 86 note 19

Corpus Juris cited with approval

Del.—Hardesty v. American Ry. Express Co., 119 A. 681, 683, 2 W.W. Harr. 66.

Ky.—Davis v. McKinley, 255 S.W. 523, 525, 200 Ky. 699.

Burden of proof on shipper to establish a breach of duty by the carrier in failing to furnish a refrigerator car, and that the breach was the proximate cause of the injury to the shipper's goods, where the property was never in the custody of, or tendered to, the carrier.—American Ry. Express Co. v. Peninsula Produce Exch., 130 A. 346, 148 Md. 465.

Evidence held insufficient to show negligence by the carrier in failing to provide a refrigerator car requested by a shipper.—American Ry. Express Co. v. Peninsula Produce Exch., 130 A. 346, 148 Md. 465.

50. Iowa.—Beard v. Illinois Cent. R. Co., 44 N.W. 800, 79 Iowa 518, 18 Am.S.R. 381, 7 L.R.A. 280.

51. N.C.—Forrester v. Southern R. Co., 61 S.E. 524, 147 N.C. 553, 18 L.R.A.,N.S., 508, 15 Ann.Cas. 143.

52. Ill.—Gustafson v. Michigan Cent. R. Co., 129 N.E. 516, 296 Ill. 41, certiorari denied Michigan Cent. R. Co. v. Gustafson, 41 S.Ct. 538, 256 U.S. 698, 65 L.Ed. 1177.

Okl.—St. Louis & S. F. Ry. Co. v. State, 184 P. 442, 76 Okl. 60, P.U.R.1920A 605, 7 A.L.R. 140.

53. U.S.—Chicago, R. I. & P. Ry. Co. v. Lawton Refining Co., Okl., 253 F. 705, 165 C.C.A. 299.

54. Ohio.—Price & Co. v. Erie R. Co., 13 Ohio N.P.,N.S., 65.

10 C.J. p. 86 note 21.

55. N.C.—Burwell v. Raleigh, etc., R. Co., 94 N.C. 451.

56. Colo.—Boettcher v. Public Utilities Commission of Colorado, 213 P. 114, 73 Colo. 46, error dismissed 44 S.Ct. 458, 265 U.S. 572, 68 L.Ed. 1185.

Minn.—Gibbon Farmers' Elevator Co. v. Minneapolis & St. L. R. Co., 170 N.W. 706, 142 Minn. 57.

Mo.—Todd v. St. Louis-San Francisco Ry. Co., App., 21 S.W.2d 1.

N.D.—Williston Coal & Ice Co. v. Davis, 190 N.W. 776, 49 N.D. 191.

10 C.J. p. 86 note 24.

Corpus Juris cited with approval

Colo.—Boettcher v. Public Utilities Commission of Colorado, 213 P. 114, 73 Colo. 46, error dismissed 44 S.Ct. 458, 256 U.S. 572, 68 L.Ed. 1185.

57. Fla.—Atlantic Coast Line R. Co. v. Chase & Co., 146 So. 658, 109 Fla. 50.

58. Iowa.—Hawarden Sand & Gravel Co. v. Chicago & N. W. Ry. Co., 171 N.W. 735, 185 Iowa 1168.

Minn.—Gibbon Farmers' Elevator Co. v. Minneapolis & St. L. R. Co., 170 N.W. 706, 142 Minn. 57.

Mo.—Todd v. St. Louis-San Francisco Ry. Co., App., 21 S.W.2d 1.

N.D.—Williston Coal & Ice Co. v. Davis, 190 N.W. 776, 49 N.D. 191.

10 C.J. p. 86 note 26.

Reason for rule

"[If a shipper discovers] the defect and cannot reject the car and wait for another to be furnished without material loss to him, and he can, at slight expense, repair the car and save loss that would likely occur, it would be better for both him and the carrier that he make the repairs and prevent the loss or damage, and in that case the carrier could better pay the cost of slight repairs than to pay the damage that would result if the repairs were not made."—Todd v. St. Louis-San Francisco Ry. Co., Mo. App., 21 S.W.2d 1.

To same effect Gibbon Farmers' Elevator Co. v. Minneapolis & St. L. R. Co., 170 N.W. 706, 142 Minn. 57.

10 C.J. p. 86 note 26.

Complaint held to state cause of action for a carrier's failure to furnish cooperage and the furnishing of such cooperage by the shipper himself.—Williston Coal & Ice Co. v. Davis, 190 N.W. 776, 49 N.D. 191.

Demurrer to evidence properly overruled where the evidence as to the condition of the cars furnished and the necessity for immediate use of the cars established the existence of an emergency justifying the shipper in making slight repairs in order to prevent loss and damage which probably would have resulted from use of the cars in the condition in which they were furnished.—Todd v. St. Louis-San Francisco Ry. Co., Mo.App., 21 S.W.2d 1.

expense thereof,[59] or, under other authority, at least the necessary expense of lumber.[60] On the other hand, the shipper is not entitled to make such repairs or alterations in the absence of a probability that greater damage to him or to the carrier will thereby be averted,[61] and it has been held that he cannot recover for trivial alterations which he made voluntarily without calling the carrier's attention to their necessity or requesting other cars or entering into a special contract.[62]

§ 50. Liability for Loss or Injury Caused by Defective Cars Not Owned by Carrier

A carrier's duty to furnish suitable cars for the transportation of inanimate property is ordinarily the same whether the cars belong to the carrier or to another. However, a carrier is not liable, under most authority, for loss resulting from defects in cars furnished by the shipper, at least where the defects are not discoverable by the exercise of due care.

Generally speaking, a carrier's duty to furnish safe and suitable cars for the transportation of inanimate property is the same whether the cars belong to the carrier or to another.[63] However, where the shipper undertakes to furnish the cars used in transportation, it is generally held that the carrier is not liable for a loss resulting from their defective condition,[64] especially if such condition could not have been discovered by the carrier by the exercise of due care.[65] On the other hand, the carrier has been held liable where it could have discovered the defective condition and prevented the loss by the exercise of reasonable diligence, unless it was released from liability by the shipper,[66] or where it leased the cars from the shipper under an agreement whereby the carrier was to keep the cars in repair at the shipper's cost,[67] and there is even authority holding without qualification that the fact that the car was furnished by the shipper is immaterial.[68]

§ 51. Liability for Injury on Connecting Line Due to Defective Cars

An initial carrier which has negligently furnished a defective car is liable for resulting injuries occurring while the car is on the line of a connecting carrier.

It is the duty of the receiving carrier to select a car which is safe and suitable for the particular shipment.[69] Where an initial carrier negligently furnishes a defective car, it will be liable for resulting injuries occurring while the car is on the line of a connecting carrier.[70]

59. Mo.—Todd v. St. Louis-San Francisco Ry. Co., supra.
10 C.J. p 86 note 27.

Amount expended by shipper in making trivial repairs is recoverable by the shipper only to the extent to which such amount was reasonable. —Todd v. St. Louis-San Francisco Ry. Co., Mo.App., 21 S.W.2d 1.

60. Minn.—Gibbon Farmers' Elevator Co. v. Minneapolis & St. L. R. Co., 170 N.W. 706, 142 Minn. 57.

Recovery for labor and nails denied where a tariff rule provided that suitable boards would be furnished by the carrier for coopering.—Hawarden Sand & Gravel Co. v. Chicago & N. W. Ry. Co., 171 N.W. 735, 185 Iowa 1168.

No statutory requirement in Minnesota that the shipper seek redress in the first instance from the state railway and warehouse commission. —Gibbon Farmers' Elevator Co. v. Minneapolis & St. L. R. Co., 170 N.W. 706, 142 Minn. 57.

61. Mo.—Todd v. St. Louis-San Francisco Ry. Co., App., 21 S.W. 2d 1.

62. Mo.—Sloan v. St. Louis, etc., R. Co., 58 Mo. 220.

63. Del.—Hercules Powder Co. v. Pennsylvania R. Co., 122 A. 546, 2 W.W.Harr. 309.
Fla.—Louisville & N. R. Co. v. Carr, 81 So. 779, 77 Fla. 469, 5 A.L.R. 102.
Tenn.—Nashville, C. & St. L. Ry. v. Hopper, 217 S.W. 661, 142 Tenn. 200.
10 C.J. p 86 note 29.
Duty of intermediate or terminal carrier to furnish suitable cars see infra § 420

Reason for rule

"A failure on the part of the defendant carrier to provide a suitable and safe car . . . [is] an act of negligence on its part. . . . It is universally conceded that the carrier cannot by contract protect itself from the consequences of its own negligence. . . . What the carrier cannot directly accomplish by contract it cannot by indirection accomplish."—Louisville & N. R. Co. v. Carr, 81 So. 779, 781, 77 Fla. 469, 5 A.L.R. 102.

64. Ala.—Central of Georgia R. Co. v. Chicago Varnish Co., 53 So. 832, 169 Ala. 287.

65. U.S.—Southern Cotton Oil Co. v. Atlantic Coast Line R. Co., D.C.Va., 17 F.2d 411—Alabama & V. Ry. Co. v. American Cotton Oil Co., C.C.A.Miss., 249 F. 308, 161 C.C.A. 316.
Va.—Chesapeake & O. Ry. Co. v. National Fruit Products Co., 155 S.E. 630, 155 Va. 438, 72 A.L.R. 878.

Reason for rule

"The shipper, in himself furnishing the car, impliedly warrants its fitness and use for the purposes intended . . . If it were otherwise, the railroad company, in the exercise of the very highest degree of care on its part, would still be responsible although the shipper might, himself, have been guilty of gross negligence in the delivery of the defective car."—Southern Cotton Oil Co. v. Atlantic Coast Line R. Co., D.C.Va., 17 F.2d 411, 413.

66. Del.—Hercules Powder Co. v. Pennsylvania R. Co., 122 A. 546, 2 W.W.Harr. 309.

67. Ala.—Central of Georgia R. Co. v. Chicago Varnish Co., 53 So. 832, 169 Ala. 287.

Transaction held not a lease

The fact that a carrier makes an allowance in its freight charges when a car is furnished by the shipper does not constitute the transaction a lease of the car rendering the carrier liable for loss caused by defects as if the car had been furnished by the carrier itself.—Alabama & V. Ry. Co. v. American Cotton Oil Co., Miss., 249 F. 308, 161 C.C.A. 316.

68. Fla.—Louisville & N. R. Co. v. Carr, 81 So. 779, 77 Fla. 469, 5 A.L.R. 102.

69. N.C.—Tucker v. Norfolk & W. Ry. Co., 140 S.E. 77, 194 N.C. 496.
Okl.—Oklahoma, N. M. & P. Ry. Co. v. H. M. S. Drilling Co., 229 P. 420, 100 Okl. 260.

70. La.—American Trading Co. of

§ 52. Contract or Custom as Affecting Liability

A carrier's liability for injuries to inanimate freight caused by negligence in failing to furnish suitable cars cannot be limited by contract or custom. However, an agreement releasing the carrier from liability for failure to inspect cars selected by the shipper or for loss from freezing has been held enforceable.

In accordance with the general principle that a common carrier cannot limit its liability for injuries to goods caused by its own negligence, see infra § 99, a carrier's liability for injuries to inanimate property caused by its negligence in failing to furnish suitable cars cannot be limited by contract[71] or by custom;[72] nor can an initial carrier limit its liability for injuries occurring on the line of a connecting carrier as the result of the initial carrier's negligence in failing to furnish a suitable car by a contract with the shipper that the initial carrier shall be liable only for loss or injury occurring on its own line.[73] However, an agreement releasing a carrier from liability for failure to inspect cars selected by the shipper has been held not to be void or unenforceable by reason of any federal statute,[74] and an agreement releasing a carrier from liability for loss by freezing has been held to preclude a recovery for such loss.[75]

§ 53. Assumption of Risk by Shipper

Ordinarily it is not the shipper's duty to select suitable cars, but the carrier is relieved from liability for failure to furnish such cars if the shipper himself voluntarily selects cars under an express contract or in circumstances charging him with full knowledge of all defects and in reliance on his own, rather than on the carrier's, judgment.

Ordinarily it is not the shipper's duty to specify the type of cars to be furnished,[76] or to inspect cars furnished,[77] and the mere fact that the shipper has inspected a car,[78] or knows of the defects,[79] will not exempt the carrier from liability for loss or injury resulting from such defects, at least where, as a practical matter, the shipper has no course but to accept the cars in their unsuitable condition.[80]

On the other hand, where the shipper himself voluntarily selects cars under an express contract

New Orleans v. New Orleans & N. E. R. Co., 105 So. 82, 159 La. 9.
10 C.J. p 87 note 34.
Liability of:
Initial carrier generally for loss or injury on connecting lines see infra § 403 et seq
Intermediate or terminal carrier for loss from defects in cars received from initial carrier see infra § 420.

Liable as carrier or warehouseman
La.—American Trading Co. of New Orleans v. New Orleans & N. E. R. Co, 105 So. 82, 159 La. 9.

71. Mo.—McDaniel Milling Co. v. Missouri Pac. R. Co., App., 191 S. W 1021.
10 C.J. p 87 note 37.

Contract held not intended to limit liability of a carrier for negligently furnishing unsuitable cars or failing to keep cars in safe repair—Bernardi Greater Shows v. Boston & M R. R., 165 A 124, 86 N.H. 146—10 C.J. p 86 note 19 [c].

72. Iowa.—Beard v. Illinois Cent. R. Co., 44 N.W. 800, 79 Iowa 518, 18 Am.S.R. 381, 7 L.R.A. 280.
10 C.J. p 87 note 38.

73. Mich.—Kibby v. Michigan Cent R. Co., 105 N.W. 769, 142 Mich. 313.
10 C.J. p 87 note 34 [a] (2).

74. Tex.—McFaddin Rice Milling Co. v. Texas & N. O. Ry. Co., Civ. App., 277 S.W. 191.

75. Mich.—Randall v. Detroit & M Ry. Co., 180 N.W. 361, 212 Mich. 259—George W. Lardie & Son v. Manistee & N E. R. Co., 158 N.W. 31, 192 Mich. 77.

Reason for rule
"[Such a stipulation] does not attempt to relieve from liability for negligence. It relieves from liability for a loss which the parties contemplated might be caused by an element beyond the control of both parties, wholly unrelated to any act or omission of the carrier."—Randall v. Detroit & M. Ry. Co., 180 N.W. 361, 362, 212 Mich. 259—George W. Lardie & Son v. Manistee & N. E. R. Co., 158 N.W. 31, 32, 192 Mich. 77.

76. Ohio.—Norfolk & Western Ry. Co. v. Keystone Packing Co., 49 Ohio App. 136, 2 Ohio Op. 272, modifying 30 Ohio N.P.,N.S., 477.
Okl.—Oklahoma, N. M. & P. Ry. Co v. H. M. S. Drilling Co., 229 P. 420, 100 Okl. 260.

Failure to specify insulated cars did not relieve a carrier from liability for failure to furnish insulated cars where such cars were the only kind suitable, in the absence of evidence that insulated cars constituted "protective service" within the meaning of a rule of the carrier requiring the shipper to designate the "protective service" needed.—Norfolk & Western Ry. Co. v. Keystone Packing Co., 49 Ohio App, 136, 2 Ohio Op. 272, modifying 30 Ohio N.P.,N. S., 477.

77. La.—Ellerbe v. Lancaster, 7 La. App. 105.
Okl.—Oklahoma, N. M. & P. Ry. Co. v. H. M. S. Drilling Co., 229 P. 420, 100 Okl. 260.
10 C.J. p 88 note 47.

78. La.—Ellerbe v. Lancaster, 7 La. App. 105.
Minn.—De Vita v. Payne, 184 N.W. 184, 149 Minn. 405.
10 C.J. p 88 note 45.

79. Mo.—Seneker v. Lusk, App., 190 S.W. 96.
10 C.J. p 88 note 46.

Refrigerator car
The mere knowledge of a shipper of strawberries of defects in refrigerator car, and the probable effect of shipping in such car, would not necessitate a verdict for carrier in an action for damages.—Seneker v. Lusk, Mo.App., 190 S.W. 96.

80. La.—Ellerbe v. Lancaster, 7 La. App. 105.
Mo.—McDaniel Milling Co. v. Missouri Pac. R. Co, App., 191 S.W. 1021.
Tex.—Fort Worth & D. C. Ry. Co. v. Hunt, Civ.App., 258 S.W. 593.
10 C.J. p 88 note 46.

Duty to protest
A shipper is bound to protest against shipping in a defective car—Seneker v. Lusk, Mo.App, 190 S.W. 96.

Shipper's agreement to repair cars selected by him in circumstances depriving him of any free choice in the matter, and his failure properly to make such repairs, do not relieve the carrier from liability for failure to furnish suitable cars.—Fort Worth & D. C. Ry. Co. v. Hunt, Tex. Civ.App., 258 S.W 593.

Authorities reviewed
Tex.—Fort Worth & D. C. Ry. Co. v. Hunt, Civ.App., 258 S.W. 593.

or in circumstances charging him with full knowledge of their capabilities and defects, relying on his own judgment rather than on the duty of the carrier, the carrier is not liable for loss or injury caused by such defects.[81] However, the carrier is not relieved of liability if the defects were latent and not readily discoverable,[82] or the shipper was without knowledge that the cars were unsuitable for his purposes.[83] Moreover, it must appear either that there was a distinct agreement by the shipper to assume the risk of the sufficiency of the car furnished,[84] or that the shipper did not leave the selection of the car to the carrier, but assumed that duty himself.[85]

§ 54. For Live Stock

A common carrier must furnish cars suitable for the safe transportation of live stock it undertakes to carry, and is liable for injuries resulting from a failure so to do. Included in such duty is the furnishing of sufficient ventilating facilities, bedding, or partitions where necessary for the safe transportation of particular stock.

A railroad company undertaking to ship live stock must furnish a car that is reasonably safe and suitable for the transportation of the particular kind of stock to be shipped, and is liable for injuries resulting from its failure so to do.[86]

81. Mass.—Bonfiglio v. New York, N. H. & H. R. Co., 198 N.E. 236.
Mo.—Schreiber Milling & Grain Co. v. Chicago Great Western R. Co., App., 246 S.W. 647—McDaniel Milling Co. v. Missouri Pac. R. Co., App., 191 S.W. 1021.
Tex.—McFaddin Rice Milling Co. v. Texas & N. O. Ry. Co., Civ.App., 277 S.W. 191.
10 C.J. p. 87 note 40.

The rule as stated in Corpus Juris
(1) Quoted with approval—McFaddin Rice Milling Co. v. Texas & N. O. Ry. Co., Tex.Civ.App., 277 S.W. 191, 193.

(2) Cited in a review of authorities—Fort Worth & D. C. Ry. Co. v. Hunt, Tex.Civ.App., 258 S.W. 593, 595.

Reason for rule
"Where the shipper exercises his own judgment, is not deceived or misled by the carrier, and chooses a car for the transportation of his property, the carrier is not answerable for the sufficiency of the car, at least where the shipper selects the car in consideration of a reduced rate, or the like, for in such a case he does not trust to the carrier nor rely upon the duty of the carrier, but, on the contrary, freely exercises his right of choice, and relies entirely upon his own judgment, so that there is no reason for affirming that the carrier was guilty of any wrong."—Edward Frolich Glass Co. v. Pennsylvania Co., 101 N.W. 223, 225, 138 Mich. 116, 110 Am.S.R. 310, 4 Ann.Cas. 1140, quoting 4 Elliott Railroads § 1480.

82. La.—Ellerbe v. Lancaster, 7 La.App. 105.
Mass.—Bonfiglio v. New York, N. H. & H. R. Co., 198 N.E. 236.
Mo.—McDaniel Milling Co. v. Missouri Pac. R. Co., App., 191 S.W. 1021.

83. Mass.—Bonfiglio v. New York, N. H. & H. R. Co., 198 N.E. 236.
Mo.—McDaniel Milling Co. v. Missouri Pac. R. Co., App., 191 S.W. 1021.

Request for ventilated cars does not constitute an "act or default" of the shipper relieving the carrier from liability for loss caused by the fact that ventilated cars were unsuitable for the particular kind of property, in the absence of knowledge on the part of the shipper that such cars were unsuited for the purpose for which he selected them—Bonfiglio v. New York, N. H. & H. R. Co., Mass., 198 N.E. 236.

84. La.—Ellerbe v. Lancaster, 7 La.App. 105.
10 C.J. p. 87 note 42.

85. Ky.—Cleveland, etc., R. Co. v. Louisville Tin, etc., Co., 111 S.W. 358, 33 Ky.L. 924, 17 L.R.A.,N.S., 1034.

Corpus Juris quoted
Tex.—McFaddin Rice Milling Co. v. Texas & N. O. Ry. Co., Civ.App., 277 S.W. 191, 193.

86. Mo.—Green v. American Ry. Express Co., App., 34 S.W.2d 1039.
Neb.—Johnson v. Payne, 191 N.W. 696, 109 Neb. 531—Wegner v. Chicago, St. P. M. & O. R. Co., 186 N.W. 971, 107 Neb. 628—Fuller v. Chicago & N. W. Ry. Co., 157 N.W. 332, 99 Neb. 611, reversing 154 N.W. 251, 98 Neb. 727.
N.C.—Bryan v. Louisville & N. R. Co., 93 S.E. 750, 174 N.C. 177.
Tex.—Mexico North Western Ry. Co. v. Williams, Com.App., 229 S.W. 476, affirming, Civ.App., 208 S.W. 712, certiorari denied 42 S.Ct. 54, 257 U.S. 644, 66 L.Ed. 413—Ft. Worth & D. C. Ry. Co. v. Strickland, Civ.App., 208 S.W. 410.
Utah.—Smith v. Payne, 206 P. 715, 60 Utah 89.
Va.—Manieri v. Seaboard Air Line Ry. Co., 137 S.E. 496, 147 Va. 415.
10 C.J. p. 43 note 64, p. 88 note 49.

Duty to provide transportation, under the Interstate Commerce Act, requires a carrier to furnish suitable cars for the transportation of live stock—Ft. Worth & D. C. Ry. Co. v. Strickland, Tex.Civ.App., 208 S.W. 410.

Special agreement unnecessary and adds nothing to a carrier's duty to furnish suitable cars for the transportation of live stock—Bryan v. Louisville & N. R. Co., 93 S.E. 750, 174 N.C. 177.

Uniform live stock contract for transportation has been held to require the carrier to furnish a car reasonably safe for the use intended—Green v. American Ry. Express Co., Mo.App., 34 S.W.2d 1039.

Defective door held gross negligence
The furnishing of a car with a door which could not be closed was gross negligence, bringing the carrier's liability within the terms of a contract exempting it from liability except for gross negligence—Root v. New York, etc., R. Co., 83 Hun., N.Y., 111.

Liability for negligence of agents or employees
(1) A carrier is liable for the negligence of subordinate agents in failing to furnish suitable cars for live stock, irrespective of whether its chief officers had no knowledge of such negligence and had selected proper subordinate agents.—Great Western R. Co. v. Hawkins, 18 Mich. 427.

(2) Also, a carrier is liable for the loss of live stock poisoned by a disinfectant negligently prepared by the carrier's employees, even though the carrier was required by law to employ a state veterinarian to supervise the process—Smith v. Payne, 206 P. 715, 60 Utah 89.

Proof held sufficient under petition
Under a petition alleging that no car was furnished, proof that only a double-decked car was furnished has been held sufficient where such a car was not suitable for the transportation of the stock tendered, since the furnishing of such a car is the same as furnishing no car—Vitt v. Wabash Ry. Co., Mo.App., 251 S.W. 734.

Evidence held insufficient to enable the jury to estimate damages in an action by a shipper against a

Moreover, cars must be safe not only when originally furnished, but also throughout the trip.[87] If large, heavy, strong animals are shipped, the car must be proportionately safe and strong,[88] and if, because of defects in cars, the animals being transported escape, the carrier will be liable for the loss.[89] Also, it is the duty of the carrier to furnish cars free from contagious animal diseases, and its failure so to do will render it liable for the resulting damages.[90]

However, it has been held that a carrier is not bound to furnish a particular type of car for the shipment of live stock,[91] at least if it does not own, and its tariff stipulates that it will not furnish, such cars.[92] Also, it is generally held that the carrier is not bound to furnish the safest and best cars,[93] and that its duty is complied with where the cars are reasonably safe and suitable for the purposes for which they are to be used.[94] Thus, if suitable cars are furnished and due care is exercised, it is generally held that the carrier is not liable for injuries resulting by reason of the viciousness and unruly disposition of the animals or from any inherent vice.[95] On the other hand, the fact that the cars furnished were those which the carrier always used,[96] or which were "in general and approved use,"[97] is not a defense if such cars were not suitable in the particular circumstances.

Particular equipment or preparation. The duty to furnish suitable cars includes the furnishing of sufficient facilities for the proper ventilation thereof.[98] Also, a carrier is ordinarily bound to furnish suitable bedding where bedding is necessary to render the cars safe and suitable for the kind of animals shipped,[99] and, whether or not

carrier for failure to furnish cars suitable for the shipment of live hogs—Crum v. Cleveland, C., C. & St L Ry. Co, 200 Ill App 641.

87. Me—Hopkins Bros Co. v. American Ry Express Co, 131 A 145 125 Me 118
10 C J. p 88 note 50, p 90 note 72.

88. Tex—Ft Worth & R G. Ry. Co. v Albin, Civ App, 185 S W. 647.
10 C J. p 88 notes 49 [b], 52.

Ordinary propensity of mule or horse to kick when confined in a crowded place must be reasonably provided against by the carrier—Ft Worth & R G Ry. Co v. Albin, Tex Civ.App, 185 S W. 647—10 C J. p 88 notes 49 [b], 52 [b]

89. Mass—Smith v New Haven, etc., R. Co, 12 Allen 531, 90 Am. D 166.
10 C J. p 88 note 53.

90. Okl—St. Louis & S F. Ry. Co. v. Slade, 291 P. 107, 144 Okl. 216.
10 C J. p 89 note 63.

"Clean" car, within the meaning of a rule of the state live stock sanitary commission requiring a carrier to furnish cars thoroughly cleaned and disinfected, is a car free from infection, although not necessarily from dirt.—Clampitt v St. Louis Southwestern Ry. Co of Texas, Tex Civ App., 185 S W. 342, error refused.

91. Ohio—Cleveland Provision Co. v Public Utilities Commission, 135 N.E. 612, 104 Ohio St. 253, 23 A. L R. 404.

Double-deck cars

Ohio.—Cleveland Provision Co. v Public Utilities Commission, 135 N.E. 612, 104 Ohio St 253, 23 A. L.R. 404.

92. U S.—James v. Davis, C.C.A. Neb., 280 F. 780.

93. Miss—Illinois Central R. Co v Haynes, 63 Miss. 495

N C—Selby v. Wilmington, etc, R Co., 18 S E. 88, 113 N C 588, 37 Am S R 635

94. Mo—Moran v Chicago, B & Q R Co, App., 255 S.W. 331.
10 C J. p 89 note 68.

Corpus Juris cited

Mo—Moran v. Chicago, B & Q R Co, App. 255 S W 331, 335.

Under Texas statute, however, providing that a railroad must furnish all necessary and suitable cars for all freight offered or tendered, or to be offered or tendered, it has been held that a carrier's duty in that regard extends beyond the mere exercise of ordinary care and is the absolute duty of an insurer.—St. Louis Southwestern Ry. Co. of Texas v. Morehead, Tex Civ App., 207 S W. 336, error refused.

95. Mo—Moran v. Chicago, B. & Q. R Co, App, 255 S W. 331.
10 C J. p 89 note 66.

"The vehicle must be suitable for the safe conveyance of ordinary animals of the class. It is not required that it shall be strong enough to withstand the struggles of some of that class that may be not only unruly, but vicious"—Selby v. Wilmington, etc, R Co, 18 S E. 88, 89, 113 N.C. 588.

Carrier's liability generally for loss from inherent nature of the property see infra § 79.

96. Mass.—Leonard v Fitchburg R. Co, 9 N.E 667, 143 Mass. 307.

S.D—Berry v Chicago, etc, R. Co, 24 S W 859, 24 S D. 611.
10 C J. p 89 note 64.

97. N C—Hornthal v Norfolk Southern R Co., 82 S.E. 830, 167 N.C. 627.
10 C.J. p 89 note 65.

Reason for rule

"To acquit . . . a carrier of liability simply because the . . car employed was 'approved and in general use' might shut out the consideration of negligence in other respects"—Hornthal v Norfolk Southern R. Co., 82 S E 830, 831, 167 N C 627.

98. Ga—East Tennessee, etc, R Co v Whittle, 27 Ga 535, 73 Am D. 741
10 C J p 89 note 54.

99. Neb—Wegner v Chicago, St P, M & O R Co, 186 N W 971, 107 Neb 628

Tex.—Mexico Northwestern Ry Co v Williams, Com App, 239 S.W. 476 affirming Civ App, 208 S.W. 712, certiorari denied 42 S Ct. 54, 257 U S 644, 66 L Ed 413
10 C J p 89 notes 56, 57, 59.

Failure to bed car not negligence per se, as a matter of law, but will render a carrier liable if bedding is usual and customary, and a precaution such as a prudent, competent, and faithful man, experienced in business would take, in the circumstances—East Tennessee, etc, R. Co. v. Johnston, 75 Ala 596, 51 Am. R. 489.

Duty where shipper unable to bed car

Despite a contract limiting the carrier's liability to injuries resulting from a collision or derailment, and a custom of shippers to provide bedding, a carrier is liable for failure to bed cars into which it reloaded the live stock following an accident to the original cars, where the shipper had no opportunity to bed the cars—McDaniel v. Chicago, etc., R Co, 24 Iowa 412.

Injury caused by vicious propensities of animals incited and caused to be exercised by the carrier's negli-

bound to, if it undertakes to bed the cars, it must exercise at least ordinary care to see that the bedding is properly done,[1] and if injury results from failure to provide bedding or from improper bedding, the carrier will be liable. However, it is sufficient if the car is bedded so as to be reasonably safe.[2] Partitions put in a car by the carrier for the proper transportation of particular live stock must be reasonably safe.[3]

§ 55. Liability for Injury Caused by Defective Cars Not Owned by Carrier

A carrier is liable for loss or injury to live stock resulting from defects in cars used by it in transporting the stock, irrespective of whether it owned the cars.

The fact that cars used by the carrier for the transportation of stock, do not belong to it will not relieve it from liability for loss or injury caused by the defective condition of such cars.[4]

§ 56. Liability for Injuries on Connecting Line Due to Defective Cars

A common carrier assuming the transportation of live stock to a point beyond its own line must deliver the stock at its own terminus in cars suitable for transportation of the stock to its destination, and is liable for loss caused by defects in the cars whether the loss occurs on its own line or on that of a connecting carrier.

If a carrier assumes the transportation of stock to a point beyond its own line, it must deliver the stock at the terminus of its own road in cars suitable for the transportation of the stock to the point of destination,[5] and is liable for injury to the stock caused by the defective condition of a car whether the injury occurred on its own line or on that of a connecting carrier.[6]

§ 57. Contractual Provisions Limiting Liability

Under most, but not all, authority, a carrier's liability for injuries to live stock caused by negligence in furnishing defective cars cannot be limited by a contract requiring the shipper to select the cars, or to send attendants, or stipulating that the shipper has examined and accepts the car as suitable, or restricting liability to injuries occurring on the carrier's own line.

In accordance with the well settled principle that a common carrier cannot limit its liability for injuries to goods caused by its own negligence, see infra § 99, a carrier cannot by contract or otherwise relieve itself from the consequences of its own negligence in failing to furnish suitable cars for the transportation of live stock.[7] Accordingly, it is generally held that it cannot evade its duty to furnish suitable cars, or its liability for failure to perform such duty, by a mere stipulation in the shipping contract or bill of lading devolving on the shipper the duty of selecting suitable cars,[8] or of sending an attendant with the stock,[9] or by a gen-

gent failure to furnish bedding—Blair Horse, etc, Co. v. St Joseph, etc., R. Co, Mo.App., 180 S.W. 412.

Liability for loss by fire originating in combustible bedding which the carrier permitted to be used.—Powell v. Pennsylvania R. Co, 32 Pa. 414, 75 Am.D. 564—Trace v. Pennsylvania R. Co., 26 Pa.Super. 466.

1. Tex—Texas & P. Ry. Co. v. Thorp, Civ App, 198 S.W. 335.
10 C.J. p 89 note 58.

2. Neb.—Allen v. Chicago, etc., R Co., 113 N.W. 655, 82 Neb. 726, 23 L.R.A.,N.S., 278.

3. Mo.—Crow v. Bush, App, 200 S. W. 762.

"Reasonably safe" defined
A car is reasonably safe when it is such as a person of ordinary prudence would provide.—Southern Express Co v. Fox, 115 S.W. 184, 117 S W. 270, 131 Ky. 257, 133 Am.S.R 241

4. Tex—Lancaster v. Hollebeke, Civ App, 235 S.W. 1113.
10 C.J. p 90 note 70.
Duty of intermediate or terminal carrier to furnish suitable cars see infra § 420.

5. Pa.—Eckert v. Pennsylvania R. Co., 60 A. 781, 211 Pa. 267, 107 Am. S.R. 571.

6. Tex.—St. Louis Southwestern Ry. Co of Texas v Morehead, Civ App, 207 S.W. 336, error refused.
10 C.J p 90 note 73.
Liability of:
Initial carrier generally for loss or injury on connecting lines see infra § 403 et seq.
Intermediate or terminal carrier for loss from defects in cars received from initial carrier see infra § 420

Connecting carrier's acceptance of defective car does not relieve the initial carrier of liability for loss caused by the initial carrier's negligence in failing to furnish suitable cars—Texas Cent R. Co. v. O'Loughlin, 84 S.W. 1104, 37 Tex Civ App. 640

7. Ky.—Davis v. McKinley, 255 S.W. 523, 200 Ky. 699.
10 C J. p 90 note 79, p 91 note 92 [b], p 159 notes 11, 12.

Particular contracts held within rule
Colo.—Adams v. Colorado, etc., R. Co, 113 P. 1010, 49 Colo. 475, 36 L.R A,N.S, 412.
10 C.J. p 90 note 79 [a] (1).

Tariff provision stipulating that the carrier did not own, and would only endeavor to procure from the owner, a particular type of car has been held not to relieve the carrier from liability for failure to furnish such a car where such a car was the only suitable type, despite the fact that the tariff provision was approved by the interstate commerce and the state railroad commissions.—Davis v. McKinley, 255 S.W. 523, 200 Ky 699.

Contract held not to contain limitation on the carrier's liability for negligent failure to furnish suitable cars—Green v. American Ry. Express Co., Mo.App., 34 S W.2d 1039—10 C.J. p 90 note 79.

Contract held not to require notice to the carrier of defects in the car where the carrier was aware thereof. —Green v. American Ry. Express Co., Mo.App., 34 S.W.2d 1039.

8. D C—Blatcher v. Philadelphia, etc., R. Co, 31 App.,D.C., 385, 16 L R A,N.S, 991.
10 C J p 90 notes 81, 82.

Contract held not controlling in circumstances
A shipper is not contributorily negligent in failing to report defects to the carrier in accordance with a contract requiring the shipper to make an inspection and report defects, where the defects became operative and dangerous only by a subsequent negligent act of the carrier. —Shay v Union Pac. Co., 153 P. 31, 47 Utah 252—10 C.J. p 90 note 81.

9. Ind.—Lake Erie, etc, R Co. v. Holland, 69 N.E. 138, 162 Ind. 406, 63 L.R.A. 948.

eral stipulation that the shipper has examined the car in which the stock is shipped and accepts it as suitable and sufficient.[10] However, there is other authority holding that a carrier is relieved of liability by a stipulation of the last type, where based on a sufficient consideration,[11] unless the defect was latent,[12] or by a stipulation that the carrier will not be liable for loss caused by improper bedding,[13] or where by contract the shipper assumed the duty of proper storage of the live stock, and accepted and loaded the car without objection, knowing that it was unsuitable;[14] but such contracts will not be extended beyond the strict letter of the agreement.[15] An initial carrier cannot, by a contract with the shipper limiting the carrier's liability to loss or injury occurring on its own line, relieve itself of liability for injuries occurring on the line of a connecting carrier because of the initial carrier's negligence in furnishing defective cars.[16]

§ 58. Assumption of Risk by Shipper

A shipper's inspection, knowledge of defects, presence during loading, or attempt to prepare the car does not ordinarily relieve the carrier of liability for furnishing defective cars, but it is generally held that the shipper assumes the risk where he makes his own selection knowing of the defects, and, under some, but not all, authority, under a distinct agreement to assume the risk.

A shipper is not bound to inspect cars to determine whether they are suitable for the transportation of his live stock,[17] and it is generally held that the carrier is not relieved from liability for negligence in failing to furnish suitable cars by the mere fact that the shipper examined the car and made no objections to its fitness,[18] or knew of the defects,[19] at least where, as a practical matter, he had no course but to accept the cars in their unsuitable condition,[20] or was present while the stock was being loaded, although having no control over the cars,[21] or attempted to put the car in proper condition.[22]

On the other hand, it is generally held that where the shipper of live stock makes his own selection of the vehicles under circumstances which charge him with full knowledge of all their capabilities and defects, the carrier is not responsible for injury which may result exclusively from such defects.[23] Under some authority, nothing less than a distinct agreement to assume the risk is sufficient,[24] but under other authority it is sufficient to

Contract held not to contain limitation on the carrier's liability for negligence in furnishing a suitable car—St. Louis, etc, R. Co v. Brosius, 105 S.W. 1131, 47 Tex.Civ.App. 647, 659.

10. Ala.—Western R Co. v. Harwell, 8 So 649, 91 Ala. 340.
10 C J p 90 note 79 [a] (2), p 91 notes 82, 84.

Corpus Juris statement said to be comprehensive, and quoted—H. Ginsberg & Sons v. Wabash R. Co., 189 N W 1018, 1020, 219 Mich. 665, 28 A.L R. 518, affirmed Ginsberg v. Wabash R. Co, 193 N.W. 286, 222 Mich. 560.

11. Ga.—Seaboard Air Line R. Co. v McRae, 80 S E. 211, 14 Ga.App. 94.

Stipulation held not conclusive as to whether the shipper inspected the car and knew of its condition.—Davis v. Dawkins, 95 So. 188, 209 Ala. 45.

12. Ga.—Central of Georgia R. Co v. James, 45 S E. 223, 117 Ga. 832.

13. Ala.—Louisville, etc., R Co. v Shepherd, 61 So. 14, 7 Ala App. 496.

14. Ala.—East Tennessee, etc., R. Co. v. Johnston, 75 Ala. 596, 51 Am. R. 489
10 C.J. p 89 note 61.

15. Neb.—Allen v. Chicago, etc, R. Co, 118 N.W. 655, 82 Neb. 726, 23 L R A.,N.S, 278
10 C.J p 89 note 62.

Shipper not bound to bed car or otherwise prepare it under a contract providing that the shipper shall load and unload, and care for, water, feed, and rest the animals during transportation.—Allen v. Chicago, etc, R Co, 118 N.W. 655, 82 Neb. 726, 23 L R A.,N S, 278.

16. Tex.—St Louis Southwestern Ry Co. of Texas v. Morehead, Civ. App, 207 S W. 336, error refused
10 C J p 90 note 74.

17. Mo.—Mason v. Missouri Pac. R Co, 25 Mo App. 473
Tex.—Gulf, etc., R Co. v. Trawick, 15 S W. 568, 18 S W. 948, 80 Tex 270.
Wyo.—Chicago, etc, R. Co. v. Morris, 93 P. 664, 16 Wyo. 308.

18. Tex.—Gulf, etc, R Co. v. Cunningham, 113 S.W. 767, 51 Tex.Civ. App 368.

19. Ohio—Welsh v. Pittsburg, etc., R Co, 10 Ohio St. 65, 75 Am.D. 490.
10 C J. p 91 note 92.

Dirty cars
A shipper of live stock does not assume the risk thereto from dirty cars, although knowing of their condition before loading, unless he knew of the danger, and there were other suitable cars reasonably available—Rhodes v. Missouri Pac. R. Co., Mo App., 234 S W 1026.

20. Mo.—Green v. American Ry. Express Co., App, 34 S.W.2d 1039.
Neb.—Johnson v. Payne, 191 N.W. 696, 109 Neb. 531.
10 C.J. p 91 note 92.

Reason for rule
"The individual, in a sense, is compelled to accept of whatever is offered him by the carrier and cannot refuse it without, perhaps, destroying his interests"—Paddock v. Missouri Pac. R. Co., 60 Mo App 328, 340.

21. La.—Peters v. New Orleans, etc, R Co., 16 La.Ann. 222, 79 Am. D. 578

22. Tex.—Trout v. Gulf, etc., R. Co, Civ.App., 111 S W 220.
10 C J p 91 note 92 [a] (4).

Shipper held carrier's agent for the purpose of putting the cars in suitable condition, the court saying that the carrier was "as clearly liable as it would have been had the service been performed by other persons chosen by it to do it."—Trout v. Gulf, etc, R Co, Tex.Civ.App, 111 S W 220, 222—10 C.J p 91 note 92 [a] (3).

23. Ill.—Illinois Cent. R. Co. v. Hall, 58 Ill 409.
10 C J p 91 note 86.

Question held for jury as to whether the shipper assumed the risks incident to the defects—Coupland v. Housatonic R. Co., 23 A. 870, 61 Conn. 531, 15 L.R.A. 534—10 C J. p 91 note 86.

24. Mass.—Pratt v. Ogdensburg, etc., R Co., 102 Mass. 557.
10 C.J. p 91 note 92 [b].

relieve the carrier of liability that the shipper accepts the cars fully aware that they are manifestly unfit for the purpose intended and are likely to produce loss or injury,[25] especially where the defect is not known to the carrier.[26] Also, it must appear that the shipper assented to the use of the cars with notice of their actual condition,[27] and the carrier is not relieved of liability where the defects were latent and not readily discoverable,[28] at least if the carrier had knowledge of such defects.[29] Furthermore, it has been said that if the car is reasonably suitable, and the shipper merely indulges his whim to change conditions, he takes his own risk with respect to any alteration he makes.[30]

H. CARE OF PROPERTY WHILE IN TRANSIT

§ 59. Introductory Statement

As stated in § 40 supra, the carrier is bound to exercise such care as is required to protect the goods from loss or injury during transportation. The similar duty of connecting carriers is treated in § 421 infra.

§ 60. Inanimate Freight

A carrier is bound to protect goods in transit by exercising the care and diligence required by the nature of the goods and the circumstances.

Ordinarily, the carrier and not the shipper is responsible for the proper care of goods in transit.[31] If the carrier knows that the doing of a particular act is necessary for the safety of the goods, and that such act may be performed without imposing upon it any burden for which it is not fully compensated, a failure to protect the shipment by the doing of such act constitutes negligence as a matter of law.[32] In other words, the carrier is bound to exercise the care and diligence that the character of the goods and the circumstances require,[33] and the necessary standard of care may increase or diminish according to the nature of the shipment.[34]

Care of perishable goods. The shipment of goods of a perishable nature requires a higher degree of care than shipments of other articles not inherently perishable.[35] If the carrier holds itself out as pro-

25. Iowa—Blair v. Wells, 135 N.W 615, 155 Iowa 190.
Tex—Ft Worth, etc., R. Co. v. Word, Civ App, 32 S W. 14.
10 C J p 92 note 93.
Apparently recognizing rule Chicago, etc, R. Co. v Van Dresar, 22 Wis 511.

26. Wis.—Betts v Farmers' L. & T. Co, 21 Wis. 80, 91 Am.D. 460.
10 C J. p 92 note 94.
Carrier entitled to notice of the defect in such circumstances.—Betts v. Farmers' L & T. Co., 21 Wis. 80, 91 Am D. 460

27. La—Peters v. New Orleans, etc, R Co, 16 La Ann. 222, 79 Am.D 578
Mich.—Great Western R. Co. v. Hawkins, 18 Mich. 427.
N Y—Harris v Northern Indiana R. Co, 20 N.Y 232.
10 C J p 91 note 87.

28. Ga—Seaboard Air Line R Co v. McRae, 80 S E 211, 14 Ga App 94
10 C J p 91 notes 82, 87.
"[Where the] defects are not obvious, or such as it may be presumed that an inspection by an ordinary person will bring to his knowledge, and yet are such that a reasonably careful inspection by a person experienced in such business will lead to their discovery, an inspection and acceptance of the car by the shipper will not save the carrier harmless from damages caused by such defects, unless it be shown that they were actually pointed out to the shipper, and that he accepted the car with full knowledge of their existence."—Leonard v. Whitcomb, 70 N. W 817, 819, 95 Wis 646. To same effect Harris v. Northern Indiana R. Co., 20 N Y. 232, 236
Shipper held not bound to know hazard before discovered
Mo.—Green v. American Ry. Express Co, App, 34 S W.2d 1039.

29. Ind—Lake Erie, etc, R Co v. Holland, 69 N E. 138, 162 Ind. 406, 63 L R A. 948.

30. Neb—Allen v. Chicago, etc, R Co, 118 N W 655, 82 Neb 726, 23 L R.A.,N S, 278.

31. Md—Atlantic Fruit Co. v. Pennsylvania R. Co., 130 A. 63, 149 Md. 1.

32. Ariz—Southern Pac. R Co. of Mexico v. Gonzalez, 61 P 2d 377.

33. Del.—Hardesty v. American Ry. Express Co., 119 A 681, 2 W W Harr. 66.
Ill—Jennings v. Baltimore & Ohio R Co, 194 Ill App. 358
N.Y—Bobzein v New York Cent. R Co, 176 N Y S 407, 187 App Div 767.
Tex—Galveston, H. & S A Ry Co v. Tullis, Civ App., 8 S.W.2d 247, error dismissed.
10 C J. p 93 note 3.
The Corpus Juris text has been cited with full approval
Mo—Aurora Fruit Growers' Ass'n v. St Louis-San Francisco Ry Co, 297 S W 440, 442, 220 Mo App 1316—Tri-State Fruit Growers' Ass'n v. St Louis-San Francisco Ry. Co, App, 264 S W. 445, 146.
N Y—Bobzein v New York Cent R Co, 176 N.Y.S. 407, 410, 187 App. Div. 767.
Cotton linters
It was the duty of the carrier to transport a shipment of cotton linters with care and to cause an inspection of the car and its contents at reasonable times and at reasonable periods during its entire transportation and up to the time of its delivery. A failure to make proper inspection shows a lack of ordinary care.—Galveston, H. & S A Ry Co v. Tullis, Tex Civ App, 8 S W.2d 247, error dismissed.
Open flat cars
Where a carrier undertakes to transport cotton for hire on open flat cars, it is bound to take all needful precautions for the safety and protection of the cotton—Insurance Co. of North America v St Louis, I. M. & S. R. Co, C C.Mo, 9 F 811, 3 McCrary 233—10 C.J. p 86 note 21 [a].
There is no obligation, however, to employ the most approved safety devices—Davis v A F. Gossett & Sons, 118 S E 773, 30 Ga App. 576, affirmed by divided court A F. Gossett & Sons v. Davis, 124 S E. 529, 158 Ga 886.

34. Del.—Hardesty v American Ry Express Co., 119 A. 681, 2 W.W. Harr. 66.

35. Del.—Hardesty v. American Ry. Express Co., supra.

posing to provide means of preserving such goods during transit, it is responsible for the exercise of ordinary care in the furnishing of the necessary facilities,[36] but it has been held that the refusal of the carrier to perform special services en route, not offered to shippers generally by its tariffs, will not support a charge of negligence, as to perishable fruit, unless, perhaps, in the case of a great emergency.[37] The carrier, in the absence of an agreement to do so, is not bound to heat cars to protect perishable goods from freezing,[38] as where it undertakes no such obligation but merely permits the shipper to furnish the heat at his own expense,[39] nor does such a duty exist in the case of an interstate shipment for which the filed tariff provides for heating by the shipper only.[40] The fact that the bill of lading contains a contractual obligation to perform some specific act as to ventilation does not relieve the carrier from its common-law duty otherwise to use due care to prevent the decay of perishable goods.[41]

A tariff provision that all protective service to certain fruits in transit will be governed by the shipper's written instruction is intended to regulate the handling of shipments and not to limit the amount of recovery, and, hence, is not void as limiting the carrier's liability.[42]

Protection against fire loss. While the carrier is required to furnish reasonably adequate protection against fire loss to goods in transit,[43] it is not required to provide fire equipment adequate to protect against loss to the shipment from a fire caused by heating apparatus voluntarily furnished and used by the shipper with the carrier's consent.[44]

§ 61. Refrigeration

A carrier must exercise proper care and diligence in providing refrigeration necessary for the preservation of perishable goods. Correlative to its duty, the carrier has the exclusive right to furnish ice where needed.

As previously shown in § 49 supra, when a carrier undertakes the transportation of perishable goods, it is its duty to furnish cars especially adopted for the preservation of that class of goods. In addition, the rule stated in § 60 supra, that the carrier must exercise the degree of diligence required by the character of the goods, applies to goods shipped in refrigerator cars,[45] and consequently the carrier is under the duty to exercise care and diligence in providing the necessary refrigeration,[46] and is prima facie liable for injury to perishable

N.Y.—Perkel v. Pennsylvania R. Co., 265 N.Y.S. 597, 148 Misc. 284.

Negligence essential to liability

Suit against carrier for damages to perishable goods will be dismissed, if carrier had no knowledge of perishable quality of goods and was not negligent.—Swift & Co. v. Texas & P. Ry. Co., 6 La.App. 7.

36. Ark.—American Ry. Express Co. v. H. Rouw Co., 48 S.W.2d 220, 185 Ark. 526.

The law is well settled that "when a carrier holds itself out as proposing to provide means of preserving perishable goods, it must exercise ordinary care in the adoption of such means of transportation and in furnishing such equipment as will accomplish the purpose."—Missouri Pac. R. Co. v. American Fruit Growers, 260 S.W. 39, 40, 163 Ark. 318.

37. Neb.—Dolan Fruit Co. v. Davis, 196 N.W. 168, 111 Neb. 322, 32 A.L.R. 107.

Special services during storm

The failure of a carrier to place a car of fruit in a roundhouse to permit ventilation during a storm or to move the car by passenger train does not constitute negligence since such services are not available to shippers generally.—Dolan Fruit Co. v. Davis, 196 N.W. 168, 111 Neb. 322, 32 A.L.R. 107.

38. Mass.—W. H. Blodget Co. v. New York Cent. R. Co., 159 N.E. 45, 261 Mass. 365, 55 A.L.R. 900.

39. Colo.—Fort v. Denver & R. G. R. Co., 195 P. 109, 69 Colo. 441.

40. Mass.—W. H. Blodget Co. v. New York Cent. R. Co., 159 N.E. 45, 261 Mass. 365, 55 A.L.R. 900.
Wis.—McGovern v. Ann Arbor R. Co., 162 N.W. 668, 165 Wis. 525.

Assumption of risk by shipper

Where tariffs, made part of bill of lading, stipulated that, if stove was to be used in car, the fuel and attendant should be furnished by shipper, shipper of potatoes, who made no provision for heating car, assumed the risk of injury to shipment from extremely cold weather.—Clemons Produce Co. v. Denver & R. G. R. R., 219 S.W. 660, 203 Mo.App. 100.

The furnishing of a caretaker by the shipper to look after heat protection relieves the carrier from liability for damages arising from want of heat, or directly and solely from the use of heaters.—S. G. Palmer Co. v. Illinois Cent. R. Co., 204 N.W. 566, 164 Minn. 68.

41. Conn.—New England Fruit & Produce Co. v. Hines, 116 A. 243, 97 Conn. 225.

42. Ky.—Gus Datillo Fruit Co. v. Louisville & N. R. Co., 11 S.W.2d 953, 226 Ky. 813.

43. Me.—John Groves Co. v. Bangor & A. R. Co., 129 A. 823, 124 Me. 373.

Miss.—Chicago, etc., R. Co. v. Moss, 60 Miss. 1003.

44. Me.—John Groves Co. v. Bangor & A. R. Co., 129 A. 823, 124 Me. 373.

45. Mo.—Tri-State Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co., App., 264 S.W. 445.

46. Ala.—Louisville & N. R. Co. v. Hendricks, 171 So. 273, 233 Ala. 259.

Cooling after delivery of goods to carrier

Where precooling of refrigerator cars took place after delivery of fresh vegetables to carrier, negligence in precooling and icing cars is attributable, not to shipper, but to carrier.—Wells Fargo & Co. v. Sprague, Tex.Civ.App., 199 S.W. 657.

Refrigeration basis of separate charge

Loss to fruit from imperfect refrigeration was damage for which a carrier was liable under a provision in bill of lading that the amount of "any" loss or damage for which it was liable should be computed on basis of value of property at place and time of shipment notwithstanding there was a separate and distinct charge for refrigeration inasmuch as the refrigeration was inseparably connected with the transportation.—Crenshaw Bros. & Saffold v. Southern Pac. Co., 181 P. 252, 40 Cal.App.

goods resulting from defective refrigeration.[47] Although the duty has been said to be a contractual one,[48] it is in no way dependent on an express contract imposing it, and the carrier's liability is not affected by the fact that the bill of lading is silent on the subject.[49]

In accordance with these rules, unless such duty is voluntarily assumed by the shipper,[50] if the class of goods shipped requires refrigeration for their preservation, it is the duty of the carrier to provide a supply of ice sufficient for the purpose, and it will be liable for damages resulting from nonperformance.[51] Further, the carrier must use due care in seeing that the ice effectively refrigerates the goods.[52] Such ice must be furnished not only at the point of shipment, but at such places along its line as will reasonably insure a safe transit to the point of destination,[53] especially where re-icing is rendered necessary by delay attributable to the carrier's negligence.[54] Moreover, the carrier may be liable for damages caused by its failure to exercise the care required to re-ice in transit notwithstand-

603, amendment of remittitur and correction of judgment denied 183 P. 208, 42 Cal.App. 44, certiorari denied 40 S.Ct. 14, 250 U.S. 669, 63 L.Ed. 1198.

47. Ala.—Louisville & N. R. Co. v. Hendricks, 171 So. 273, 233 Ala. 259.

48. Ala.—Louisville & N. R. Co. v. Hendricks, supra.

Loading by shipper

Although shipment of perishable goods was loaded by shipper in absence of special averment and proof of facts which impose on shipper sole duty to load with reference to effective refrigeration, or of such wrongful act on his part as to mislead carrier, duty of vigilance and care in providing actual refrigeration is part of carrier's contractual obligation.—Louisville & N. R. Co. v. Hendricks, 171 So. 273, 233 Ala. 259.

49. Del.—Hardesty v. American Ry. Express Co., 119 A. 681, 2 W.W. Harr. 66.

10 C.J. p. 93 note 2.

The Corpus Juris text is quoted with approval in Hardesty v. American Ry. Express Co., supra.

Custom as affecting duty see C.J.S. title Customs and Usages § 19, also 10 C.J. p. 93 note 2 [a].

50. Del.—Hardesty v. American Ry. Express Co., 119 A. 681, 2 W.W. Harr. 66.

51. U.S.—U. S. v. Fruit Growers' Express Co., Pa., 49 S.Ct. 374, 279 U.S. 363, 73 L.Ed. 739.

Ark.—Railway Exp. Agency v. H. Rouw Co., 42 S.W.2d 761, 184 Ark. 482.

Del.—Hardesty v. American Ry. Express Co., 119 A. 681, 2 W.W. Harr. 66.

Md.—Pennsylvania R. Co. v. Walker, 128 A. 45, 147 Md. 323

Mo.—Aurora Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co., 297 S.W. 440, 220 Mo.App. 1316—Tri-State Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co., App., 264 S.W. 445.

N.Y.—Bobzein v. New York Cent. R. Co., 176 N.Y.S. 407, 187 App.Div. 767.

10 C.J. p. 92 note 98.

The Corpus Juris text has been cited with approval and the rule as there announced followed.

Ala.—Louisville & N. R. Co. v. Hendricks, 171 So. 273, 276, 233 Ala. 259.

Mo.—Tri-State Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co., App., 264 S.W. 445, 446.

N.Y.—Bobzein v. New York Cent. R. Co., 176 N.Y.S. 407, 410, 187 App. Div. 767.

A shipper may assume that a fruit car placed by the carrier for loading has been properly iced.—Seaboard Air Line Ry. Co. v. J. E. Bowden & Co., 131 S.E. 245, 144 Va. 154.

Employment of independent contractor

Carrier may contract to have its duty of icing refrigerator cars performed by independent contractor. —U. S. v. Fruit Growers' Express Co., Pa., 49 S.Ct. 374, 279 U.S. 363, 73 L.Ed. 739.

Failure to ice

As otherwise expressed, a failure to ice the cars is a want of proper care for the protection and the preservation of the goods and would be an act of negligence.

Del.—Hardesty v. American Railway Express Co., 119 A. 681, 2 W.W. Harr. 66.

Mo.—Tri-State Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co., App., 264 S.W. 445.

10 C.J. p. 92 note 98 [a].

Switching or belt line carrier

(1) "The plaintiff says it was the duty of the Public Belt Railroad to have iced the car. We do not think so. . . . Whether the Public Belt Railroad can be considered as a carrier or a warehouseman there is a material difference between railroad carriers which carry goods for several days and are provided with depots and warehouses and facilities for holding goods and preserving them with ice and other carriers, such as belt roads, which do only a belting or switching business for a short time and possess none of the above facilities and do not extend them to the knowledge of their customers."—Swift & Co. v. Texas & P. Ry. Co., 6 La.App. 7, 10.

(2) However, it has been held that a switching carrier, operating between freight terminals, and unable to set carload of meat at the consignee's siding for several days, was liable for loss from failure to ice. —Batchelder & Snyder Co. v. Union Freight R. Co., 156 N.E. 698, 259 Mass. 368, 54 A.L.R. 616, certiorari denied Union Freight R. Co. v. Batchelder & Snyder Co., 48 S.Ct. 117, 275 U.S. 556, 72 L.Ed. 424.

52. Ala.—Louisville & N. R. Co. v. Hendricks, 171 So. 273, 275, 233 Ala. 259.

"Whether lack of effective refrigeration is due to insufficient icing, or to a failure of the ice-cooled air to properly circulate, is immaterial Due care in seeing that the refrigeration is effective is just as essential as furnishing the car and the ice."—Louisville & N. R. Co. v. Hendricks, supra.

53. Ark.—Railway Exp. Agency v. H. Rouw Co., 42 S.W.2d 761, 184 Ark. 482.

Del.—Hardesty v. American Ry. Express Co., 119 A. 681, 2 W.W.Harr. 66.

Md.—Pennsylvania R. Co. v. Walker, 128 A. 45, 147 Md. 323.

Mo.—Aurora Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co., 297 S.W. 440, 220 Mo.App. 1316.

N.Y.—Bobzein v. New York Cent. R. Co., 176 N.Y.S. 407, 187 App.Div. 767.

10 C.J. p. 92 note 99.

The Corpus Juris text has been cited with approval—Hardesty v. American Ry. Express Co., Del., 119 A. 681, 2 W.W.Harr. 66.

Re-icing at specified point

Carrier, accepting shipment for transportation under contract to re-ice car to full capacity at certain point, assumed duty of providing a sufficient supply of ice, at such point and was liable for damages for failure to re-ice car.

La.—Swift & Co. v. Texas & P. Ry. Co., 6 La.App. 7.

N.Y.—Bobzein v. New York Cent. R. Co., 176 N.Y.S. 407, 187 App.Div. 767.

54. Mo.—St. Louis, etc., R. Co. v. White, App., 103 S.W. 673.

ing it has complied with the terms of a bill of lading which calls for re-icing en route only at regular icing stations.[55]

Where injury results to a shipment of perishable property because of the carrier's failure properly to ice the cars, the carrier cannot evade responsibility for the resulting injury by showing that the cars belonged to another company.[56]

The carrier's liability for injuries caused by insufficient icing is not affected by the fact that the shipper discovered that the cars were insufficiently iced before their departure, if they had no opportunity to remedy the situation and believed that the goods would reach their destination without injury,[57] or if the shipper called the attention of the carrier's agent to the fact that the cars were insufficiently iced and was assured that sufficient ice would be furnished.[58] That the shipper was lacking in knowledge or skill in loading or was negligent in any way has also been held not to be a defense as to the carrier's negligence in not providing proper refrigeration.[59]

On the other hand, a carrier is not required to give a shipment extraordinary treatment by providing ice at places where ice is not ordinarily needed.[60] So, where cars are properly iced at the nearest station to that at which the goods are shipped, the carrier is not required to re-ice the cars at the point of shipment where it has no icing plant, and where the necessity of re-icing is caused by the delay of plaintiff in loading the cars.[61] Where a statute so provides, the carrier is not bound to re-ice in the absence of specific instructions from the shipper, notwithstanding a delay in transit;[62] nor is the carrier obliged to re-ice cars containing perishable goods in the absence of directions by the shipper, where the bill of lading exempts it from liability for injury caused by heat.[63] Where the shippers of perishable goods undertake to supply a refrigerator car with ice, the carrier has a right to assume, except as facts may exist that put it on notice to the contrary, that the shippers have furnished enough ice to keep the car cool until a delivery to the consignee can be had in the ordinary course of business.[64]

Shipper's instructions as to icing. In any event, the carrier must follow the shipper's instructions as to icing and it will be liable for damages resulting from an action contrary to instructions regardless of its propriety.[65] So the carrier is responsible for damage caused by its icing of cars when ordered to transport without icing,[66] or by its failure to remove ice after it had been requested to do so.[67] The carrier is relieved of its duty to re-ice in transit where the consignee expressly so directs, as under the circumstances the latter assumes all risk of damage.[68]

Correlative right to furnish ice. Where the carrier is under obligation to furnish ice for refrigeration, it has the corresponding right to furnish ice where it is needed.[69] However, it is not to be understood from what is here said that because carriers have ice on hand they can compel the shipper to have his goods iced where on account of the state of the weather or for other cause he prefers to

55. Mo.—Aurora Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co., 297 S.W. 440, 220 Mo.App. 1316.

56. Ark.—St. Louis, etc., R. Co. v. Renfroe, 100 S.W. 889, 82 Ark. 143, 118 Am.S.R. 58, 10 L.R.A.,N.S., 317.
Va.—New York, etc., R. Co. v. Cromwell, 35 S.E. 444, 98 Va. 227, 81 Am.S.R. 722, 49 L.R.A. 462.
10 C.J. p. 93 note 6.

57. Mich.—Johnson v. Toledo, etc., R. Co., 95 N.W. 724, 133 Mich. 596, 103 Am.S.R. 464.

58. Ga.—Southern R. Co. v. Williams, 77 S.E. 153, 139 Ga. 357.

59. Ala.—Louisville & N. R. Co. v. Hendricks, 171 So. 273, 233 Ala. 259.

60. Md.—Pennsylvania R. Co. v. Walker, 128 A. 45, 147 Md. 323.

61. Ark.—Wright v. Midland Valley R. Co., 163 S.W. 1151, 111 Ark. 196.

62. Tex.—Texas & N. O. R. Co. v. Wolfson, Civ.App., 23 S.W.2d 455, error dismissed.

Negligence of shipper

In an action against a carrier for failure to re-ice a car containing bananas, which service was necessitated by a delay in transit, the owner could not recover against the carrier in view of his negligence in failing to give instructions to re-ice after learning of the delay and in view of the tariff rule whereby the carrier was not obligated to re-ice bananas without specific instructions.—Texas & N. O. R. Co. v. Wolfson, Tex.Civ.App., 23 S.W.2d 455, error dismissed.

63. Ill.—Mittenthal v. Michigan Cent. R. Co., 176 Ill.App. 77.

64. Chicago, etc., R. Co. v. Reyman, 72 N.E. 587, 163 Ind. 596.

65. Ky.—Gus Datillo Fruit Co. v. Illinois Cent. R. Co., 299 S.W. 1089, 222 Ky. 41.

66. Ky.—Gus Datillo Fruit Co. v. Illinois Cent. R. Co., supra.

67. Ariz.—Southern Pac. R. Co. of Mexico v. Gonzalez, 61 P.2d 377

Regulations of interstate commerce commission

As respects railroad's liability to shipper for damage to car of tomatoes because of presence of ice after shipper had ordered railroad to remove ice and guaranteed cost of removal, regulations of interstate commerce commission concerning the furnishing of heating service did not affect the railroad's right and obligation on request of the shipper to withdraw ice from car at any time or place upon its line.—Southern Pac. R. Co. of Mexico v. Gonzalez, Ariz., 61 P.2d 377.

68. Ga.—Southern Express Co. v. Fant Fish Co., 78 S.E. 197, 12 Ga.App. 447
10 C.J. p. 93 note 10.

69. U.S.—Atchison, T. & S.F. Ry. Co. v. U.S., Com.Ct., 34 S.Ct. 291, 232 U.S. 199, 58 L.Ed. 568.
10 C.J. p. 93 note 11.
Correlative right to furnish facilities generally see supra § 40.

have them forwarded under ventilation only[70] Further, a carrier may not arbitrarily characterize a certain product as perishable, and require that the shipper use the refrigeration equipment provided, if it is practicable to use some other character of equipment at a much less freight rate.[71]

§ 62. Ventilation

Unless the shipper assumes such responsibility, it is the carrier's duty, independent of any express contract, to see that goods requiring such care are properly ventilated, and it must follow any directions as to ventilation provided for in the contract of shipment.

If the preservation of perishable goods requires that the cars in which they are shipped shall be ventilated, it is the carrier's duty, independent of any express contract, to see that they are kept properly ventilated, and a failure to comply with it resulting in loss or injury will render the carrier liable for damages[72] So a carrier is liable for deterioration resulting from placing perishable goods in a hot, unventilated freight house.[73] Where the contract of shipment makes provision for ventilation, the carrier will be liable for failure to observe instructions contained therein regardless of whether or not it was in the exercise of due care in handling the ventilation appliances,[74] although if it follows the shipper's written instructions it will not be liable for any damage resulting therefrom.[75] When the shipper undertakes to ventilate the car, the carrier is relieved of all responsibility as to ventilation, unless it commits some overt act causing damage.[76]

§ 63. Live Stock

- a. In general
- b Care as to particular matters
- c. Effect of caretaker accompanying shipment
- d. Validity and effect of contract shifting duty of care to shipper

a. In General

Generally the liability of a carrier of live stock is similar to that of carriers of goods.

It is generally held that a carrier receiving live stock for transportation does so under the usual liabilities which attach to the carriers of goods,[77] subject, however, to the rule stated in § 79 infra, applicable in case of other goods, that it is not accountable for loss resulting from the inherent nature of the property, and not due to any negligence or fault on its part. According to some authority, however, in view of the fact that animals have some volition and propensities of their own which may lead to loss or damage regardless of the control exercised by those who undertake their transportation, carriers of live stock are not liable, in the care of live stock being transported, as common carriers, but are only bound to transport with ordinary care and skill.[78]

Accordingly, as a general rule, the carrier is bound to use reasonable care to transport without injury live stock placed in its hands for shipment and it will be liable for damage or for loss proximately resulting from its failure so to do[79] It is,

70. U. S.—Atchison, T & S F. Ry Co v. U. S, Com Ct, 34 S Ct. 291, 232 U S 199, 58 L.Ed 568.

71. Ark.—Missouri Pac. R Co. v. Fields Bros, 203 S W. 1036, 131 Ark. 273.

72. Cal.—Jacobs, Malcolm & Burtt v. Northern Pac. Ry. Co, 234 P 328, 71 Cal App. 42.
10 C J p 93 note 13.

The Corpus Juris text has been cited with approval and followed in Jacobs, Malcolm & Burtt v Northern Pac. Ry. Co., 234 P. 328, 71 Cal.App 42.

73. Ala.—Louisville & N. R Co. v Farmers' Produce Co., 85 So 578, 17 Ala App 388.

74. Ill—Sparr v. Southern Pac. Co, 220 Ill App 180.

75. Ky—Gus Datillo Fruit Co v Louisville & N R. Co., 11 S W.2d 953, 226 Ky. 813

76. Ohio—Louisville & N R. Co. v Riley, 160 N.E. 730, 27 Ohio App. 188
Tex.—N. Nigro & Co. v. Houston & T C. R Co, Civ App, 250 S.W. 739.

77. U.S.—Covington Stock-Yards Co v. Keith, Ky, 11 S Ct. 461, 139 U. S 128, 35 L Ed. 73.
10 C J p 43 note 64.

78. Mich—Heller v. Chicago, etc, R Co., 66 N W. 667, 109 Mich. 53, 63 Am S R. 541
10 C J p 43 note 63.

Analogy to carriage of slaves
(1) This theory was perhaps adopted in analogy to that under which a carrier of slaves was held not to be a common carrier of goods, inasmuch as slaves had volition and were not under the complete control of the carrier—Boyce v Anderson, Ky., 2 Pet, U S, 150, 7 L.Ed. 379.

(2) Liability of carrier of slaves as not of the nature assumed in carrying goods or property see C J S. title Slaves § 4, also 58 C.J. p 751 note 73.

79. Ark—St Louis-San Francisco Ry Co v. Chastain, 25 S W 2d 28, 181 Ark 192.
Fla.—Walton Land & Timber Co. v. Louisville & N R. Co, 72 So. 485, 72 Fla 66
Mo—Cole v. American Ry. Express Co, 68 S.W 2d 736, 228 Mo App. 78
Neb—Wegner v. Chicago St P, M & O R. Co, 186 N W. 971, 107 Neb 628.
Tex—Panhandle & S. F Ry Co v Reynolds, Civ App, 33 S W 2d 219—Panhandle & S. F. Ry. Co v Andrews, Civ App, 278 S W. 478—Panhandle & S F. Ry Co. v Sanderson, Civ App, 218 S W 540, dismissed for want of jurisdiction.
10 C J. p 93 note 16.

Otherwise stated
A carrier is charged with the duty of delivering a car of animals in good condition or to explain the failure to do so.—Morrow v Wabash Ry. Co, Mo App, 6 S.W 2d 628.

Mistreatment before shipment
It is the duty of a carrier to use reasonable care to protect a hog, while under its care in its possession for transportation, from meddlesome interference with, or mistreatment by, strangers, likely to render it unfit for shipment.—Cole v. American

however, required to use only such care to avoid injury as a person of ordinary prudence would use under the same or similar circumstances,[80] and it is not absolutely bound to deliver the stock in good condition.[81]

Transportation of live stock in a reasonably safe manner is in some jurisdictions a nondelegable statutory duty,[82] and the person designated by the carrier to perform this duty is in law the carrier itself.[83] This duty of safe transport exists independently of any contract,[84] so that, in a case where it is applicable, the office of a contract is not to create the duty, but only to make it obligatory.[85] It has also been held that, in the absence of a statute or a provision in the bill of lading, the common-law rule as to the duty to care for live stock in transportation is imported into, and becomes a part of, the contract.[86] The fact that the carrier cannot make a charge for a service, unless such charge is provided for in the published tariffs and classifications, see infra § 302, does not affect the existence of the duty to render such service as is necessary to the proper care of live stock in transit.[87]

The release of the carrier for a certain time from the duty of feeding and watering the animals does not relieve it from its duty otherwise during this period to exercise proper care in transporting the shipment.[88]

A carrier transporting live stock under a uniform live stock contract limiting its liability is nevertheless subject to a statute requiring the exercise of "extraordinary care."[89]

b. Care as to Particular Matters

The rule requiring a carrier to exercise reasonable care for the safety and protection of live stock carried by it is one of general application.

The rule set forth in the preceding subsection is one of wide application, and has been applied in a number of situations in addition to the duties set forth in detail in the sections immediately following this section.

Bedding. The carrier must use proper care in providing bedding for the animals, and it will be liable for injuries resulting from improper bedding,[90] unless the shipper knew of the bedding supplied and acquiesced[91] It is negligence on the part of the carrier to place a stock car in which straw bedding is used near to the engine, so as to expose the animals to danger of loss by reason of fire being communicated by sparks to the straw.[92]

Escape of animals. Care must also be exercised during the transportation to prevent the animals shipped from escaping through the windows or the doors of the car,[93] and also to prevent their escape when they are unloaded for some reason incident to the transportation.[94] It has also been held that a carrier's exemption in the bill of lading from risks in caring for cattle is not applicable to prevent its liability for the escape of cattle from pens in which they had been placed prior to shipment, before the issuance of such bill of lading.[95]

Exercising animals. A carrier is under the duty to obey the instruction of the shipper to exercise a dog shipped in a crate and it will be liable for in-

Ry Express Co, 68 S.W 2d 736, 228 Mo App. 78.

80. Iowa—Wilke v Illinois Cent. R. Co, 133 N W. 746, 153 Iowa 695, Ann Cas 1913E 308.
10 C J. p 94 note 18

81. Ark—St. Louis-San Francisco Ry. Co v. Chastain, 25 S.W.2d 28, 181 Ark. 192.
10 C J p 94 note 17.

82. Tex.—Gulf, C. & S. F. Ry. Co. v Hamilton, Civ App, 57 S W.2d 309, appeal dismissed 89 S W.2d 208, 126 Tex 542.

Duty under federal statute

It is common carrier's duty to use ordinary care in doing what he undertakes to do and what federal statutes make it his duty to do—Terrill v. Payne, 124 A. 462, 81 N. H. 164

83. Tex—Gulf, C. & S F Ry Co. v Hamilton, Civ App., 57 S W 2d 309, appeal dismissed 89 S W.2d 208, 126 Tex 542.

A person in control of a train on which live stock was being transported was the vice principal of the railroad, and notice to him by the shipper of the danger of switching the car with the stock onto a track running into a district infected with cholera was notice to the corporation.—Council v. St. Louis & S. F. R. Co., 100 S.W. 57, 123 Mo App 432.

84. N C.—Osborne v. Southern R. Co, 96 S.E. 31, 175 N C 594.
Tex—Gulf, C & S. F Ry. Co v. Hamilton, Civ App, 57 S W 2d 309, appeal dismissed 89 S W 2d 208, 126 Tex 542.

85. Tex.—Gulf, C. & S. F. Ry Co v Hamilton, supra.

86. Ind.—Chicago, etc, R. Co v Hostetter, 84 N.E. 534, 171 Ind 465.

87. Colo—Southern Express Co v McClellan, 185 P. 347, 66 Colo 591

88. Ga—Ragsdale-Lawhon Mule & Horse Co. v Davis, 119 S E. 428, 30 Ga App 752

89. Ga.—Atlantic Coast Line R. Co v. McLemore, 164 S.E. 464, 45 Ga. App. 154.

90. Neb—Wegner v. Chicago, St. P, M. & O R. Co., 186 N W 971, 107 Neb. 628.
Tex—Kansas City, M. & O. Ry Co. of Texas v. Moore, Civ.App., 11 S. W.2d 335.
Duty to furnish cars suitably provided with bedding see supra § 54.

91. Tex.—Kansas City, M & O Ry. Co. of Texas v. Moore, supra.

92. Mo—McFadden v Missouri Pac. R Co, 4 S W. 689, 92 Mo. 343, 1 Am S R. 721.
Pa.—Powell v. Pennsylvania R. Co., 32 Pa 414, 75 Am D 564.

93. Ind—Indianapolis, etc., R Co. v. Allen, 31 Ind 394.
10 C J. p 94 note 21.

94. Mich—Snyder v. King, 165 N W. 840, 199 Mich 345, 1 A.L.R. 893.
10 C.J p 94 note 22.

95. Ark—Missouri Pac. R. Co. v. King, 268 S.W. 595, 167 Ark. 335.

jury resulting from disobedience of this instruction.[96]

Furnishing attendants. The carrier is not bound to furnish attendants for animals which it assumes to transport, where such attendants are not reasonably necessary.[97] So, the carrier is not required to keep some person present to watch a car of live stock sidetracked in a railroad yard to see that the animals are not moved and injured.[98]

Handling of train. The carrier must use due and proper care in the handling of the train in which live stock is shipped.[99] Thus, the trains must be so managed as not to injure the animals by unnecessary concussion.[1] It has also been held that a railroad company is guilty of gross carelessness in making a "flying switch," whereby one freight car is kicked violently against another containing animals, thereby injuring them.[2] The fact that the shipper undertakes to accompany his stock in a car, and to look after it to a limited extent, does not relieve the carrier of the duty to prevent injuries in switching the car.[3] The carrier is bound to exercise care commensurate with the increased hazard where it places live stock cars at the end of a "dead freight" train, even though at the caretaker's request.[4]

"Natural vices" and propensities. Care and vigilance must be used to guard against and restrain the natural vices and propensities of the animals themselves, in order to prevent them from injuring themselves and each other.[5] Accordingly, a carrier is responsible for the negligence of its agent in not separating larger cattle from small cattle to prevent their being trampled after discovering some of the cattle down in the car.[6]

Protection of stock from inclement weather. A carrier assumes no duty to resort to unusual care to protect stock from inclement weather.[7] Thus it is not liable for loss or injury caused by unprecedented climatic conditions, where the provisions for the protection of the stock are sufficient for ordinary conditions.[8] However, where cars containing live stock are set on a side track in inclement weather, it is the duty of the carrier to use reasonable care to protect the stock from cold and not to leave them unreasonably exposed;[9] and, if the exercise of such care requires, it must remove, or enable the caretaker to remove, the cattle from the cars.[10] Also, in case animals are unloaded for some reason incident to the transportation, reasonable care must be used in giving them shelter, so far as practicable, from inclement weather.[11]

Removal of dead animals. The failure of the carrier to remove dead cattle on the request of caretakers accompanying the shipment, who explained that the presence of dead cattle was a menace to the others, has been held not to constitute negligence unless the request for their removal was made to some responsible authority.[12]

Showering overheated animals. The duty of showering or throwing water over hogs or other animals that become, or are likely to become, overheated during transportation rests on the carrier who has control of the facilities for so doing,[13]

96. Colo.—Southern Express Co. v. McClellan, 185 P. 347, 66 Colo. 591.

97. N.Y.—Ames v. Fargo, 99 N.Y.S. 994, 114 App.Div. 666.

98. Miss.—Illinois Cent. R. Co. v. Wm. Atkinson & McDonald Co., 74 So. 616, 113 Miss. 678.

99. Tex.—Davis v. McMillan, Civ. App., 241 S.W. 723.

1. Idaho.—Cooper v. Oregon Short Line R. Co., 262 P. 873, 45 Idaho 313
10 C.J. p. 94 note 26.

To constitute "negligence" on carrier's part, jerking or jamming of freight car must have been accomplished with unusual severity or violence and not have been the ordinary tram movements.—Cooper v. Oregon Short Line R. Co., 262 P. 873, 45 Idaho 313.

2. Ill.—Chicago, etc., R. Co. v. Calumet Stock Farm, 96 Ill.App. 337, affirmed 61 N.E. 1095, 194 Ill. 9, 88 Am.S.R. 68.

3. Iowa.—Thompson v. Chicago, etc., R. Co., 139 N.W. 557, 158 Iowa 235

4. Or.—Carstens Packing Co. v. Southern Pac. Co., 292 P. 89, 134 Or. 53

5. Ill.—See Blickstein v. Chicago & A. R. Co., 211 Ill.App. 255
Mo.—Pacific Express Co. v. Emerson, 74 S.W. 132, 101 Mo.App. 62.
10 C.J. p. 94 note 20

6. La.—Ker Texada v. Texas & P. Ry. Co., 133 So. 415, 16 La.App. 66.

Proximate cause of injury
Negligence of conductor in not separating small from large cattle held proximate cause of death and injury to cattle.—Ker Texada v. Texas & P. Ry. Co., 133 So. 415, 16 La.App. 66.

7. Pa.—Maiorano v. American Ry. Express Co., 86 Pa.Super. 88.

8. Ky.—Louisville, etc. R. Co. v. Warfield, 98 S.W. 313, 30 Ky.L. 352.

9. Iowa.—Colsch v. Chicago, etc., R. Co., 153 N.W. 327, 171 Iowa 78.

Obligation not modified by special contract
If a carrier, while transporting a carload of live stock, for its own convenience sets the car out on a side track and leaves it for several hours exposed to extreme cold, its obligation to take the necessary steps for protecting the stock is of the highest order known to due care, and such obligation is not modified by the shipper accompanying the stock under a special contract which requires him to provide feed and water.—Colsch v. Chicago, etc., R. Co., Iowa, 117 N.W. 281.

10. Iowa.—Colsch v. Chicago, etc., R. Co., 153 N.W. 327, 171 Iowa 78.

11. N.J.—Feinberg v. Delaware, etc., R. Co., 20 A. 33, 52 N.J.Law 451

12. Tex.—Houston E. & W. T. Ry. Co. v. Southern Pine Lumber Co., Civ.App., 6 S.W.2d 418.

13. Iowa.—McCoy v. Wabash Ry. Co., 231 N.W. 353, 210 Iowa 1075
10 C.J. p. 102 note 12.

The Corpus Juris text is quoted at length and the rule as there stat-

even though the animals were overcrowded in loading, where it undertakes their transportation with knowledge of that fact.[14] The susceptibility of hogs to overheating, and the danger of death resulting therefrom is not within the common-law exception to liability treated in § 79 infra, for injuries due to the "proper vice" of the animal or inherent weakness over which the carrier would have no control.[15] If water is scarce on the line of a railroad so that it cannot be provided for the purpose of applying to animals shipped in its cars when necessary, it is the duty of the company to inform shippers of the fact before they ship; and if such information is withheld and animals are shipped and die on the route for want of water, the company will be liable.[16] This duty it has been held is one which cannot be evaded by a custom of the carrier[17] or by a special contract.[18] In any event, a contract requiring the shipper to water and feed his animals means no more than that the shipper shall see that the stock is furnished with such food and water as is required for consumption; it does not impose on him the duty of showering the animals to keep down their temperature.[19] All that can be exacted of the shipper accompanying the animals is that he shall keep the employees of the carrier advised as to the condition of the stock, so that they may apply water as necessary;[20] and, where the carrier's employees know the state of the weather and that animals in transit are suffering from heat, the shipper is not required to call attention to conditions with which they are acquainted, but may rely on them to discharge their plain duty of showering as the condition of the animals requires.[21]

c. Effect of Caretaker Accompanying Shipment

Generally, in the absence of an agreement to the contrary, the carrier's duty of caring for live stock is not affected by the shipper accompanying the shipment.

A carrier is not relieved of the duty to care for live stock properly in transportation by the fact that the shipper or his agent accompanies the shipment,[22] in the absence of a specific agreement that he will care for the stock.[23] It has been held, on the other hand, that the presence of a caretaker relieves the carrier from the duty of giving particular attention to the stock,[24] although it does not relieve it from the duty to afford the caretaker a reasonable opportunity to care for the stock, and consequently from liability for negligence, if injury results therefrom.[25] It has also been held that if the shipper accompanies the stock and assumes to perform certain duties of the carrier with regard to caring for the animals, such fact becomes a material consideration in determining the liability of the carrier.[26] Of course, the carrier is not liable for damage to the animals caused by the negligence of the shipper's caretaker.[27]

d. Validity and Effect of Contract Shifting Duty of Care to Shipper

Except where such contract is regarded as absolving the carrier from liability for negligence, a contract providing that the shipper will care for the stock at his own risk and expense is valid and ordinarily releases the carrier from liability; but, where it knows that the shipper is not accompanying the stock, it must nevertheless give it the necessary attention.

Except where such a contract is regarded as absolving the carrier from its negligence in failing to care for live stock,[28] a contract between a shipper and a carrier which provides that the shipper will at his own risk and expense attend and care for the animals during transportation[29] is, at least where

ed followed in Atchison, T. & S. F. Ry. Co. v. Krow, 270 P. 15, 16, 132 Okl. 281.

How frequently animals should be showered necessarily depends on the condition of the weather and on their condition.—Peck v. Chicago Great Western R. Co., 115 N.W. 1113, 138 Iowa 187, 128 Am.S.R. 185, 16 L.R.A., N.S., 883.

14. Ohio.—Lake Shore, etc., R. Co. v. Gibson, 28 Ohio Cir.Ct. 538.

15. Tex.—Pecos R. Co. v. Morrison, Civ.App., 169 S.W. 1098.

16. Ill.—Toledo, etc., R. Co. v. Thompson, 71 Ill. 434

17. Ohio.—Lake Shore, etc., R. Co. v. Gibson, 28 Ohio Cir.Ct. 538.
10 C.J. p 102 note 17.

18. Okl.—Atchison, T. & S. F. Ry. Co. v. Krow, 270 P. 15, 132 Okl. 281.
10 C.J. p 102 note 18.

19. Okl.—Atchison, T. & S. F. Ry. Co. v. Krow, supra.
10 C.J. p 102 note 19.

20. Iowa.—Peck v. Chicago Great Western R. Co., 115 N.W. 1113, 138 Iowa 187, 128 Am.S.R. 185, 16 L.R.A., N.S., 883.
10 C.J. p 102 note 20.

21. Iowa.—Peck v. Chicago Great Western R. Co., supra.

22. Wyo.—Davis v. Graham, 225 P. 789, 31 Wyo. 239.
10 C.J. p 95 note 38.

Contract not altered
Furnishing of caretaker for cattle shipment does not alter contract of shipment.—Panhandle & S. F. R. Co. v. Ross, Tex.Civ.App., 80 S.W.2d 427.

23. Wyo.—Davis v. Graham, 225 P. 789, 31 Wyo. 239.
10 C.J. p 95 note 39.

24. S.D.—Sheehan v. Minneapolis & St. L. R. Co., 193 N.W. 597, 46 S.D. 429.

25. S.D.—Sheehan v. Minneapolis & St. L. R. Co., supra.

26. Iowa.—Gibson v. Adams Express Co., 175 N.W. 331, 187 Iowa 1259.

27. La.—Griggs v. Tremont & Gulf Ry. Co., 8 La.App. 601

28. Ky.—Cincinnati, etc. R. Co. v. Sanders, 80 S.W. 488, 118 Ky. 115, 25 Ky.L. 2333.
Tex.—Pecos, etc., R. Co. v. Brooks, Civ.App., 145 S.W. 649
Limitation of common-law liability generally see infra §§ 88–117

29. Idaho.—Crabill v. Oregon Short Line R. Co., 200 P. 121, 34 Idaho 251.—Lane v. Oregon Short Line R. Co., 198 P. 671, 34 Idaho 37, 15 A.L.R. 197.
Mass.—New York Cent. R. Co. v. Sturtevant & Haley Beef & Supply Co., 127 N.E. 509, 236 Mass. 16.
10 C.J. p 98 notes 68, 69.

the owner or his agent accompanies the shipment,[30] valid and effective, both as to intra-state and interstate shipments,[31] and, in the absence of gross negligence on its part, the carrier will be relieved from liability therefor.[32] Under such a contract, where the stock is unloaded during transportation, the duty of the carrier is performed when it furnishes suitable yards in proper condition and reasonably secure.[33] It is also competent for the parties to stipulate that the shipper will see that the doors are so fastened as to prevent escape of, or injury to, the animals in transit,[34] although such a contract does not relieve the carrier from the obligation to use reasonable care.[35]

However, although there is some authority to the contrary,[36] it is held that, notwithstanding such contract, where the carrier knows that no one is accompanying the shipment, it is its duty to give the stock the necessary attention, and it cannot under such circumstances be absolved from liability for failure to do so.[37] Also, although the contract requires the shipper to care for cattle awaiting shipment, the carrier must use ordinary care to prevent injury to animals accepted for transportation, while in pens awaiting shipment, if such care is necessitated by its delay.[38]

§ 64. Duty to Provide Feed, Water, and Rest

a. In absence of statute or special contract
b. Contract imposing duty on shipper
c. Statutory duties
d. Time and manner of complying with duty

a. In Absence of Statute or Special Contract

In addition to its duty to provide proper facilities for such purpose, it is the carrier's duty to see that live stock is properly fed, watered, and rested; and it is generally held that this duty, in the absence of contrary specific agreement, is not affected by the fact that the shipper accompanies the shipment.

In addition to the duty to furnish proper and reasonable facilities for such purpose,[39] it is the duty of the carrier to see that live stock in transportation is properly fed, watered, and rested at suitable intervals, so far as is reasonably necessary for keeping such stock in good condition;[40] and the

Purchaser of live stock reconsigned en route subject to bill of lading was bound by the original shipper's contract in the bill of lading to accompany and care for the shipment.—Clay v. New York Cent. R. Co., 231 N.Y.S. 424, 224 App.Div. 508.

Failure to ventilate car

Where the shipper by express contract agrees to care for the animals and accompanies the shipment for that purpose, but fails to assure proper ventilation of the car, the carrier is not liable for damages caused by lack of ventilation.—Haner v. Fargo, 151 N.Y.S. 913, 166 App.Div. 466—10 C.J. p. 95 note 44 [c].

30. Mich.—Shier v. American Ry. Express Co., 208 N.W. 746, 234 Mich. 505.

In Iowa

(1) A contract whereby the shipper agrees to accompany the shipment and care for the animals is valid and releases the carrier from liability for injuries resulting to the stock from lack of care which could have been supplied by the caretaker who in fact accompanied the shipment.—Burgher v. Chicago, etc. R. Co., 75 N.W. 192, 105 Iowa 335—Grieve v. Illinois Cent. R. Co., 74 N.W. 192, 104 Iowa 659.

(2) On the other hand, such a contract was held invalid and not to absolve a carrier from its negligence in failing to care for live stock where the shipper or his agent did not accompany the stock.—Wisecarver v. Chicago, etc., R. Co., 119 N.W. 532, 141 Iowa 121—Powers v. Chicago, etc. R. Co., 105 N.W. 345, 130 Iowa 615.

31. Mich.—Shier v. American Ry. Express Co., 208 N.W. 746, 234 Mich. 505.

32. Mass.—New York Cent. R. Co. v. Sturtevant & Haley Beef & Supply Co., 127 N.E. 509, 236 Mass. 16.

33. Idaho.—Lane v. Oregon Short Line R. Co., 198 P. 671, 34 Idaho 37, 15 A.L.R. 197.

34. Wis.—Chamson v. American Ry. Express Co., 189 N.W. 529, 178 Wis. 286.

35. Wis.—Chamson v. American Ry. Express Co., supra.

36. Ind.—Herran v. Chicago & E. R. Co., 135 N.E. 253, 78 Ind.App. 253.

37. Iowa.—Gibson v. Adams Express Co., 175 N.W. 331, 187 Iowa 1259.
N.J.—Purity Farms v. Adams Exp. Co., 112 A. 334, 95 N.J.Law 134.
N.D.—Morrell v. Northern Pac. Ry. Co., 179 N.W. 922, 46 N.D. 535.

Failure to send attendant due to fault of carrier

Where under a contract a carrier is liable for injuries to animals shipped from neglect unless the animals are accompanied by the owner or an attendant, and the carrier transports the animals without an attendant to its knowledge, the carrier is not relieved from proper care, notwithstanding it was expected that the attendant would accompany the animals, but failed because of misleading information by the carrier's agent as to when the animals would be moved.—Purity Farms v. Adams Exp. Co., 112 A. 334, 95 N.J.Law 134.

Noncompliance with contract

In an action for damages to a jack shipped, that a clause requiring the shipper to accompany and take care of the stock while in transit was not complied with, did not absolve the carrier from liability.—Schade v. Missouri Pac. R. Co., 221 S.W. 146, 204 Mo.App. 88.

38. Tex.—Panhandle & S. F. Ry. Co. v. Vaughn, Civ.App., 191 S.W. 142, affirmed Com.App., 222 S.W. 206.

39. Idaho.—Ritchie v. Oregon Short Line R. Co., 244 P. 580, 42 Idaho 193, 45 A.L.R. 909.—Lane v. Oregon Short Line R. Co., 198 P. 671, 34 Idaho 37, 15 A.L.R. 197.

Duty to
Furnish live stock pens and yards see supra § 43
Provide facilities generally see supra § 40

40. Iowa.—Brower v. Chicago, R. I. & P. Ry. Co., 252 N.W. 755, 218 Iowa 317.
La.—Harmon v. Louisiana Western R. Co., 6 La.App. 369.
Mo.—Vaughn v. St. Louis-San Francisco Ry. Co., 15 S.W.2d 901, 223 Mo.App. 732.—Bradford v. Hines, 227 S.W. 889, 206 Mo.App. 582.
Tex.—Texas & P. Ry. Co. v. McMillen, Civ.App., 183 S.W. 773.
10 C.J. p. 94 note 29.
Duty to provide feed and water to

shipper is under no obligation to incur expense in that behalf, especially where the stock is being unlawfully held at destination by the carrier.[41] This obligation to feed, water, and rest live stock exists even in the absence of an express request by the consignor,[42] as such a request will be implied.[43] It also exists in the absence of any statutory provision,[44] although, as will be shown in subsection c infra, the duty is imposed by express statutory provision in some jurisdictions. Even in case of unavoidable delay, it is the duty of the carrier to make reasonable efforts to carry the stock to some point where reasonable facilities for feeding exist, and where food and water are obtainable,[45] and to permit the stock to be unloaded for that purpose.[46] It has been held that the fact that an owner of animals was guilty of contributory negligence in overcrowding a car for their transportation did not relieve the carrier from liability for its negligence in keeping the car, without unloading, an unreasonable length of time at a feeding station.[47] A shipper's failure to pay freight before unloading stock will not defeat the carrier's liability for failure to delay in watering and feeding the animals where it was customary to unload before payment, and the shipper had done so on previous occasions.[48]

Effect of shipper accompanying the stock. The fact that the owner of the stock, or his agent, by arrangement with the carrier, accompanies the animals on the same train does not relieve the carrier from the duty to feed and water them,[49] in the absence of a specific agreement that he would care for the stock,[50] or of a custom known to the shipper and assented to by him.[51] It has been held, on the other hand, that where live stock is accompanied by the shipper, it is his duty to feed and water the animals, if the carrier affords him an opportunity of so doing at suitable places where adequate facilities for such purpose exist,[52] and that even if no such facilities exist at the point at which the live stock is unloaded for that purpose, it is the duty of the shipper to render such assistance as is possible in caring for the animals and mitigating the damage which may be sustained.[53]

b. Contract Imposing Duty on Shipper

(1) In general

(2) Duty to furnish reasonable opportunity and facilities

(1) In General

An agreement by the shipper to assume the duty of

animals in pens awaiting shipment see supra § 43 b

Extraordinary diligence

Carrier was chargeable with extraordinary diligence, where sued for damage by failure to feed and water stock for prolonged period—Bugg v Perry & Faircloth, 156 S.E. 708, 42 Ga.App. 523

Intra-state shipment

The law does not require absolutely that the carrier unload, rest, feed, and water live stock en route on an intra-state shipment not subject to the federal statutes relating to such matter, and it will be liable only if it was negligent in not taking this precaution and leaving it to the shipper to do so—Payne v. Parsons, 223 P 618, 97 Okl 168.

Pigeons

It was held, in the absence of an agreement to do so, that an express company transporting live pigeons was not required to feed and water the birds—American Merchants' Union Express Co. v. Phillips, 29 Mich 515

Provision for watering

(1) A carrier is required to make adequate provision for watering cattle shipped—Kirby v Oregon Short Line R Co, 197 P 254, 59 Mont 425

(2) A carrier is under a duty to give a shipment of hogs, during hot weather, sufficient water to drink—McCoy v Wabash Ry Co, 231 N W. 353, 210 Iowa 1075.

Railroad must break continuous confinement of live stock when necessary—Jennings v. Missouri Pac R Co., 134 So 694, 172 La 522.

The failure of the carrier to place a car of mules at an unloading track to permit the shipper to unload and care for the animals or, if it did not want to do this, to feed and water the animals itself, was negligence for which it was liable—St Louis-San Francisco Ry Co v. Chastain, 25 S W 2d 28, 181 Ark. 192.

41. Tex.—Southern Kansas R. Co v J. W. Burgess Co., Civ App., 90 S W. 189

42. Mo—Vaughn v. St. Louis-San Francisco Ry. Co, 15 S W.2d 901, 223 Mo App 732
Wyo—Davis v. Graham, 225 P. 789, 31 Wyo 239.
10 C J p 95 note 31.

43. Mo.—Vaughn v. St Louis-San Francisco Ry. Co, 15 S.W 2d 901, 223 Mo App. 732
10 C J p 95 note 32

44. Mo.—Vaughn v. St Louis-San Francisco Ry Co, supra—Bradford v Hines, 227 S.W. 889, 206 Mo App 582.
10 C J. p 95 note 33.

45. Mass—Brockway v. American Express Co., 47 N E. 87, 168 Mass 257
10 C.J. p 95 note 35.

46. Tex—Kansas City, M & O Ry Co. of Texas v Cliett, Civ App., 216 S.W. 682

47. Iowa—Moore v. Chicago, etc, R. Co, 131 N.W. 30, 151 Iowa 353

48. Ark—St Louis-San Francisco Ry. Co v Chastain, 25 S W 2d 28, 181 Ark. 192.

49. Wyo—Davis v. Graham, 225 P. 789, 31 Wyo 239
10 C J p 95 note 38.

The Corpus Juris text is quoted with approval in Davis v. Graham, 225 P. 789, 791, 31 Wyo. 239

50. Wyo—Davis v. Graham, supra. 10 C J. p 95 note 39.

51. Tex—Missouri Pac. R Co v. Fagan, 9 S W. 749, 72 Tex 127, 13 Am S R. 776, 2 L R.A. 75
10 C.J. p 95 note 40.

52. N M.—Diamond X Land & Cattle Co. v Director General of Railroads, 205 P. 267, 27 N M. 675.
S D—Sheehan v Minneapolis & St L R Co, 193 N W. 597, 46 S D 429

Otherwise stated

It is the duty of the shipper of live stock or his agent, if either accompanies the shipment, to see that the stock is properly fed, but it is the carrier's duty to see that feed is available at feeding stations when needed—Sheehan v Minneapolis & St L. R Co., 193 N W 597, 46 S D 429

53. N.M—Diamond X Land & Cattle Co. v. Director General of Railroads, 205 P. 267, 27 N M. 675.

feeding, watering, and resting live stock is ordinarily valid and effective, but under such a contract the carrier will not be absolved from liability for matters under its control or for its own negligence, or if it assumes to perform the duty, fails to assume it although it knows that the stock is unattended, or prevents the shipper from complying with the contract.

As a general rule, subject to some exceptions, a special agreement by the shipper, as a part of the contract of transportation, that he or his agents will attend to feeding, watering, and resting the animals, releases the carrier to that extent from the liability imposed by common law or by statute, and if damage ensues to the animals from lack of such care the carrier cannot be held responsible,[54] provided, as will be discussed in the following subsection, the necessary facilities and opportunity for such care are made available by the carrier. The carrier, however, cannot, without the shipper's consent, impose on him any duty to accompany and to care for the shipment.[55]

Contracts of such a character are ordinarily regarded as valid[56] and not in violation of public policy.[57] Thus, although there is some authority apparently to the contrary,[58] it has been held that constitutional and statutory provisions prohibiting a common carrier from limiting its common-law liability do not prevent it from making such special contracts with shippers,[59] for the reason, it has been said, that such provisions are not intended to prevent freedom of contract as to matters merely incidental to the contract of transportation, and not peculiar or necessary to it.[60] Also, notwithstanding some contrary authority,[61] it has been held that the Carmack amendment, preventing a carrier from stipulating against liability therein provided for, has not the effect of invalidating such contracts.[62]

The assumption of responsibility on the part of the shipper for the care of animals during transportation cannot, however, be extended beyond the terms of the contract expressed or reasonably implied, or held to include matters under the carrier's control or to exempt the carrier from liability for its own negligence.[63] The shipper's default in

54. Idaho.—Crabill v. Oregon Short Line R. Co., 200 P. 121, 34 Idaho 251—Lane v. Oregon Short Line R. Co, 198 P. 671, 34 Idaho 37, 15 A.L.R. 197.
Ind.—Herran v. Chicago & E. R. Co, 135 N.E. 253, 78 Ind.App. 253.
Mass.—New York Cent. R. Co. v. Sturtevant & Haley Beef & Supply Co, 127 N.E. 509, 236 Mass. 16.
Mo.—Argenbright v. St. Louis & S. F. Ry. Co., 267 S.W. 74, 218 Mo.App. 633.
N.Y.—Clay v. New York Cent. R. Co, 231 N.Y.S. 424, 224 App.Div. 508.
Tex.—Nelson v. Gulf, C. & S. F. Ry. Co., Civ.App, 252 S.W. 195—Panhandle & S. F. Ry. Co. v. Thompson, Civ.App, 250 S.W. 751—Ft. Worth & D. C. Ry. Co. v. Allen, Civ.App, 189 S.W. 765.
10 C.J. p. 95 note 44
Duty under federal and state statutes as affected by such contract see infra subsection c.

The rule as stated in Corpus Juris has been cited with approval and followed.
Mass.—New York Cent. R. Co. v. Sturtevant & Haley Beef & Supply Co, 127 N.E. 509, 510, 236 Mass. 16.
Mo.—Argenbright v. St. Louis & S. F. Ry. Co., 267 S.W. 74, 76, 218 Mo.App. 633

Act of conversion by carrier

Where a shipper continued to rely on his contract when the carrier stopped the shipment and wrongfully or erroneously demanded additional freight, instead of electing to treat such act as a conversion, his caretaker was bound to continue to feed and water the live stock pursuant to contract.—Panhandle & S. F. Ry. Co. v. Guthrie, Tex.Civ.App., 248 S.W. 106.

Default by shipper

It has been held that, where the contract provides that the animals be fed and watered by the shipper or, on his failure to comply with the contract, by the carrier, the failure of the shipper to perform these services is a default on his part, and he cannot recover damages arising therefrom.—Phelps v. Great Northern Ry. Co, 213 P. 610, 66 Mont. 198, certiorari dismissed Great Northern Ry. Co. v. Galbreath Cattle Co, 44 S.Ct. 334, 264 U.S. 571, 68 L.Ed. 855, reversed on other grounds 46 S.Ct. 439, 271 U.S. 99, 70 L.Ed. 854.

55. Iowa.—Hanley v. Chicago, etc, R. Co, 134 N.W. 417, 154 Iowa 60

56. Idaho.—Lane v. Oregon Short Line R. Co, 198 P. 671, 34 Idaho 37, 15 A.L.R. 197.
Mass.—New York Cent. R. Co. v. Sturtevant & Haley Beef & Supply Co, 127 N.E. 509, 236 Mass. 16
Tex.—Nelson v. Gulf, C. & S. F. Ry. Co, Civ.App, 252 S.W. 195
10 C.J. p. 164 note 71.

57. Ga.—Cranor v. Southern R. Co, 78 S.E. 1014, 13 Ga.App. 86

58. Ky.—Cincinnati, etc, R. Co. v. Sanders, 80 S.W. 488, 118 Ky. 115, 25 Ky.L. 2333
10 C.J. p. 98 note 70.

59. Neb.—Chicago, etc, R. Co. v. Schuldt, 92 N.W. 162, 66 Neb. 43.
10 C.J. p. 98 note 68
Permissible limitations of liability generally see infra § 98.

In Iowa

(1) A contract whereby the shipper agrees to accompany the shipment of live stock and feed and water it is not invalidated by a statutory prohibition against the limitation of the common-law liability of a carrier and, where the shipper undertakes to accompany the shipment and provide such services, the carrier cannot be charged with liability therefor.—Burgher v. Chicago, etc, R. Co, 75 N.W. 192, 105 Iowa 335—Grieve v. Illinois Cent. R. Co, 74 N.W. 192, 104 Iowa 659.

(2) On the other hand, it has apparently been held that such a contract is invalid and of no effect on the liability of the carrier where the shipper does not accompany the stock, and hence has not assumed performance of the duty.—Wisecarver v. Chicago, etc, R. Co., 119 N.W. 532, 141 Iowa 121—Powers v. Chicago, etc, R. Co, 105 N.W. 345, 130 Iowa 615—10 C.J. p. 98 note 70 [a].

60. Neb.—Chicago, etc., R. Co. v. Schuldt, 92 N.W. 162, 66 Neb. 43.

61. Tex.—Chicago, etc, R. Co. v. Linger, Civ.App., 156 S.W. 298—Chicago, etc., R. Co v. Scott, Civ.App, 156 S.W. 294.

62. Neb.—Starr v. Chicago, B. & Q. R. Co, 173 N.W. 682, 103 Neb. 645.
N.Y.—Clay v. New York Cent. R. Co, 231 N.Y.S. 424, 224 App.Div. 508
10 C.J. p. 95 note 44 [d] (3).

63. Mass.—New York Cent. R. Co. v. Sturtevant & Haley Beef & Supply Co., 127 N.E. 509, 236 Mass. 16.

failing to perform the duties required of him by the contract will constitute no defense to the carrier's liability for its default, unless the default of the shipper was one of the causes of the damage.[64] Where the carrier undertakes to feed and water stock notwithstanding a contract imposing this duty on the shipper, it is bound to exercise due care to see that the stock is given suitable food and water.[65] So, where the carrier undertakes and assumes the duty of bedding cars before live stock are loaded and before the contract is signed, it will not be permitted to rely on an exemption stipulated for in the contract imposing the duty of bedding on the shipper.[66] Where a contract for the shipment of live stock required that the shipper accompany the stock, for which purpose he was entitled to free passage, and he failed to accompany the stock to feed and water them, and they were injured, he cannot contend that the carrier failed to issue transportation to him, where he did not request the same.[67]

Where carrier knows that stock is not attended. Although there is some authority to the contrary,[68] a recognized limitation of the general rule is that if the carrier is aware that, notwithstanding the special contract, no one is accompanying the shipment as required thereby, it is bound properly to feed, water, and rest the animals just as though no such contract had been made with the shipper, and it will be liable for loss or injury sustained by its failure to do so.[69] This it is said necessarily results from the rule which denies to the carrier the right to relieve itself by contract of liability for its own negligence.[70] The carrier must in such a case care for the cattle, and look to the shipper for reimbursement.[71]

Where carrier prevents compliance with contract. The rule shifting liability to the shipper, of course, has no application where he is prevented from complying with the contract by the carrier's own act, as by refusing to allow him to accompany the shipment[72] or by performing the duty itself[73] against the shipper's protest.[74]

(2) Duty to Furnish Reasonable Opportunity and Facilities

Although the shipper assumes by contract the duty to feed, water, and rest live stock, the carrier has the duty to afford him reasonable opportunity and facilities for doing so, the shipper not being obliged to procure facilities elsewhere.

Although a special contract requires the shipper to give care and furnish food and water to stock in transit, the carrier is still bound to afford him or his agent reasonable opportunity[75] and facilities[76] for doing so, and it will be liable for loss or injury from its neglect to perform this duty.

N.Y.—Clay v. New York Cent. Co., 231 N.Y.S. 424, 224 App. Div. 508.
10 C.J. p. 96 note 47.

Negligent delay

(1) Notwithstanding a contract requiring the shipper to feed cattle awaiting shipment, the carrier must feed cattle accepted for transportation and in pens awaiting shipment, if such feeding is necessitated by its delay in transporting them.—Panhandle & S. F. Ry. Co. v. Vaughn, Civ. App., 191 S.W. 142, affirmed, Com. App., 222 S.W. 206.

(2) Other applications of rule see 10 C.J. p. 96 note 47 [c].

64. S.D.—Drake v. Great Northern R., 123 N.W. 82, 24 S.D. 19.

65. Neb.—Thompson v. Davis, 194 N.W. 434, 110 Neb. 491.
N.D.—Sailer v. United Railway Administration, 181 N.W. 57, 47 N.D. 126.
Wash.—Leddy v. Great Northern Ry. Co., 210 P. 354, 122 Wash. 136.
10 C.J. p. 96 note 49.

The Corpus Juris text has been quoted with approval and the rule as there stated followed
Utah.—Byram v. Payne, 201 P. 401, 58 Utah 536.
Wash.—Leddy v. Great Northern Ry. Co., 210 P. 354, 355, 122 Wash. 136.

Liable only for negligence

Where a carrier fed and watered the stock, the owner being present, and it appears that some of the stock was injured by reason of poison contained in hay, furnished by the carrier, it was not an insurer against loss by reason of the poisoned hay, but would be liable only for negligence.—Thompson v. Davis, 194 N.W. 434, 110 Neb. 491.—Starr v. Chicago, B. & Q. R. Co., 173 N.W. 682, 103 Neb. 645.

66. Tex.—Gulf, etc., R. Co. v. Boger, Civ. App., 169 S.W. 1093.

67. Ga.—Cranor v. Southern R. Co., 78 S.E. 1014, 13 Ga. App. 86.

68. Ind.—Herran v. Chicago & E. R. Co., 135 N.E. 253, 78 Ind. App. 253.
10 C.J. p. 96 note 52, p. 97 note 54 [b].

69. N.D.—Werner v. United States Railway Administration, 181 N.W. 80, 47 N.D. 49.—Sailer v. United States Railway Administration, 181 N.W. 57, 47 N.D. 126.
Okl.—Davis v. Miller, 232 P. 75, 105 Okl. 158.—Chicago, R. I. & P. Ry. Co. v. W. T. Hales & Co., 214 P. 170, 89 Okl. 130.
10 C.J. p. 97 note 54.

The Corpus Juris text has been cited with approval in Sailer v. United States Railway Administration, 181 N.W. 57, 58, 47 N.D. 126.

70. Tex.—Trout v. Gulf, etc., R. Co., Civ. App., 111 S.W. 220.

71. Tex.—Trout v. Gulf, etc., R. Co., supra.
10 C.J. p. 97 note 56.

72. Ala.—Lynn v. Mellon, 131 So. 458, 24 Ala. App. 144.
10 C.J. p. 97 note 57.

The Corpus Juris text has been cited with approval in Lynn v. Mellon, 131 So. 458, 460, 24 Ala. App. 144.

73. Tex.—Atchison, etc., R. Co. v. Bivins, Civ. App., 136 S.W. 1180.
10 C.J. p. 97 note 58.

74. Mo.—101 Live Stock Co. v. Kansas City, etc., R. Co., 75 S.W. 782, 100 Mo. App. 674.

75. Mo.—Argenbright v. St. Louis & S. F. Ry. Co., 267 S.W. 74, 218 Mo. App. 633.
Tex.—Austin v. Chicago, R. I. & G. Ry. Co., Civ. App., 18 S.W. 2d 733.—Panhandle & S. F. Ry. Co. v. Thompson, Civ. App., 250 S.W. 751.—Ft. Worth & D. C. Ry. Co. v. Allen, Civ. App., 189 S.W. 765.
10 C.J. p. 95 notes 44, 45.

76. Tex.—Austin v. Chicago, R. I. & G. Ry. Co., Civ. App., 18 S.W. 2d 733.—Panhandle & S. F. Ry. Co. v. Thompson, Civ. App., 250 S.W. 751.

This duty includes that of giving notice to the shipper in a reasonable way where such facilities are to be had, although the contract contains a stipulation that the carrier agrees to stop its cars at any of its stations for watering and feeding, when it has facilities for so doing, and whenever requested by the owner, in writing, so to do.[77] If the carrier fails to discharge this duty, any stipulation in the contract requiring a shipper to feed and water stock shipped is unreasonable and void,[78] and the shipper who has undertaken to procure feed and water for the stock is not required to procure it elsewhere.[79] In order to fasten liability on the carrier it is not necessary that there should be a wanton refusal on its part to furnish the necessary facilities.[80]

Where the shipper accompanies the stock, the carrier may rely on him to notify his agents, whenever he thinks it necessary, to unload for feed and water and rest.[81] It has been held, however, that a stipulation in a contract of shipment requiring such notice to be in writing is unreasonable and should not be enforced, and that a failure to grant a verbal request is sufficient on which to predicate a cause of action, where damage results therefrom,[82] and in any event such a stipulation may be waived by the carrier.[83]

c. Statutory Duties

(1) Federal twenty-eight-hour law
(2) State statutes

(1) Federal Twenty-Eight-Hour Law

(a) In general
(b) Effect of contract that shipper care for stock
(c) Effect of shipper accompanying stock
(d) Computation of time of confinement; extension

(a) In General

Under the federal statute providing that live stock be unloaded if confined for greater than a specified period of time, and furnished with feed, water, and rest by the shipper, or, on his default, by the carrier, it is the carrier's duty to furnish the necessary facilities and to see that the stock is cared for as required, and a failure to do so is negligence per se rendering it liable to the shipper except where its noncompliance with the statute is caused by an unavoidable accidental cause.

The common-law duty of a carrier stated in subsection a, supra, is not changed, but merely made certain as to the time and manner of its performance by a federal statute, Comp.St. §§ 8651–8654, 45 U.S.C.A. §§ 71–73, generally known as the Twenty-Eight-Hour Law, which provides in substance that an interstate carrier of animals cannot confine the stock in its cars for a longer period of time than twenty-eight consecutive hours without unloading the same for rest, water, and feeding for a period of at least five consecutive hours, unless prevented from doing so by accidental or unavoidable causes, that the twenty-eight hour period of time may be extended to a period of thirty-six hours if written request of the shipper or his agent be made separate and apart from the printed bill of lading or other railroad form, and, further, that animals so unloaded shall be properly fed and watered during such rest by the owner or person in charge or in case of his default by the carrier transporting the stock at the expense of the owner or the custodian, and that the carrier have a lien on the animals for food, care, and water furnished.[84] Notwithstanding a penalty is provid-

—Ft Worth & D C Ry. Co. v. Allen, Civ.App., 189 S.W. 765.
10 C.J. p 95 notes 44, 45, p 97 note 60.

The Corpus Juris text has been cited with approval in Terrill v. Payne, 124 A. 462, 81 N.H. 164.

77. Tex.—Pecos, etc., R. Co. v. Evans-Snider-Buel Co., 93 S.W. 1024, 42 Tex.Civ.App. 60, 65, affirmed 97 S.W. 466, 100 Tex. 190
10 C.J. p 97 note 61.

78. Tex.—Ft. Worth, etc., R. Co. v. Daggett, 28 S.W. 525, 87 Tex. 322—Gulf, etc., R. Co. v. Cunningham, 113 S.W. 767, 51 Tex.Civ.App. 368

79. Tex.—Gulf, etc., R. Co. v. Cunningham, supra.

80. S.C.—Comer v. Columbia, etc., R. Co., 29 S.E. 637, 52 S.C. 36.

81. Iowa.—Westphalen v. Atlantic Northern, etc., R. Co., 132 N.W. 57, 152 Iowa 232
Neb.—Jeffries v. Chicago, etc., R. Co., 129 N.W. 273, 88 Neb. 268.
10 C.J. p 98 note 65.

To whom notice given

In the absence of a showing to the contrary, the shipper may assume that an agent transacting business in the office of the carrier where freight and passenger business is transacted is the proper agent to whom his request may be directed, and where it is shown to be the custom for the passenger ticket agent to receive such requests, a notice to such agent charges the carrier with responsibility notwithstanding a freight agent is employed at the station.—Westphalen v. Atlantic Northern, etc., R. Co., 132 N.W. 57, 152 Iowa 232.

82. Tex.—Gulf, etc., R. Co. v. Kimble, 109 S.W. 234, 49 Tex.Civ.App. 622.

83. Okl.—St. Louis, etc., R. Co. v. Copeland, 102 P. 104, 23 Okl. 837
10 C.J. p 98 note 67.

84. Ala.—Lynn v. Mellon, 131 So. 458, 460, 24 Ala.App. 144
N.H.—Terrill v. Payne, 124 A. 462, 81 N.H. 164.
Tex.—Texas & P. Ry. Co. v. McMillen, Civ.App., 183 S.W. 773
Wyo.—Davis v. Graham, 225 P. 789, 31 Wyo. 239.
10 C.J. p 99 notes 75, 76.

The Corpus Juris text has been cited with approval in Lynn v. Mellon, supra.

Object of statute

(1) The Twenty-Eight-Hour Law has for its main purpose the prevention of cruelty to animals.
Mo.—Bradford v. Hines, 227 S.W. 889, 892, 206 Mo.App. 582—Bradford v. McAdoo, 219 S.W. 92, 202 Mo.App. 412.

ed for a violation of this regulation, see § 484 infra, a failure to comply therewith is negligence per se, rendering the railroad company also liable to the shipper for the resulting injuries to the animals.[85]

The duty to unload, feed, water, and rest animals as required by the statute is a part of the duty of transportation incumbent upon the carrier.[86] It must see to compliance with the statute,[87] and hence it has the right to unload stock for that purpose, whether or not authorized by the shipper, or even against his protest.[88] The statute, although it gives the owner or shipper an option of performing the statutory duty, does not contemplate a divided, dual duty but rather a single, unitary one, which the owner primarily has the right to perform;[89] but if he does not assume it, the carrier must do so.[90] From this it follows that if the shipper does not assume the duty in its entirety, and if it is cast on the railroad, the shipper cannot hamper the railroad with conditions, or by any voluntary part performance on his part add to, or detract from, the railroad's obligation to perform the statutory duty in its entirety.[91]

Under this statute it is the duty of the carrier not only to unload the animals within the stated period, but also to provide reasonably suitable conveniences for feeding, watering, and caring for the animals, and a place reasonably suitable and sufficient to allow the animals to obtain rest;[92] but such facilities need not be owned by the carrier or located on its right of way.[93]

Neb—McGinley v. Union Pac R Co., 263 N.W. 393, 129 Neb 855
10 C.J. p 98 note 72 [a].

(2) "While prevention of cruelty to animals is the 'primary' object of the statute, yet the secondary objects are to prevent results flowing from confinement beyond the time limit"—Bradford v. Hines, supra.

(3) The statute is not primarily for the benefit of the owners of the stock, but is restrictive of their rights—McGinley v. Union Pac R Co., supra—10 C.J. p 98 note 72 [a] (2)

(4) Nor was it ever intended to create an obligation on the carrier not to unload live stock within a lawful time.—Bradford v. Hines, supra.

Particular live stock

(1) The statute does not apply to poultry, or other birds, but is confined in its application to the transportation of "cattle, sheep, swine, or other animals."—Clay v New York Cent R Co., 231 N.Y.S. 424, 224 App. Div. 508.

(2) The statute is not restricted in its application to animals intended to be used for food—Chesapeake, etc, R. Co. v American Exch. Bank, 23 S.E. 935, 92 Va. 495, 44 L.R.A. 449

(3) The statute applies to shipments of horses—U S v. Powell C.C.A.Va., 65 F.2d 793—10 C.J. p 99 note 78 [a].

(4) The statute applies to shipments of mules.—Chesapeake, etc, R Co v. American Exch Bank, supra.

Terminal railroad subject to statute

A terminal railroad company, which receives cars of live stock from other railroad companies for transportation and delivery to another company or to stockyards is a carrier "whose road forms any part of a line of road" over which a shipment of animals is made, within the terms of the Twenty-Eight-Hour Law

U.S.—U S v Chicago, B & Q R Co., C.C.A.Colo 293 F 185

Tex—Gulf, C & S. F. Ry Co. v. Hines, Civ App., 4 S.W.2d 641

85. Ala—Lynn v. Mellon, 131 So 458, 460, 24 Ala App 144.

La—Collins v Texas & P. Ry. Co., 123 So 504, 11 La App. 445

Mo—Johnson v. Wabash Ry. Co., App., 251 S.W. 719

Wyo—Davis v. Graham, 225 P 789, 31 Wyo 239.

10 C.J. p 99 note 78.

The Corpus Juris text has been cited with approval.

Ala—Lynn v. Mellon, supra

Wyo—Davis v. Graham, 225 P. 789, 792, 31 Wyo 239.

Carrier held negligent

(1) Railroad, not providing proper food or bedding for hogs, confined in cars over twenty-eight hours and delivered in injured condition, was negligent—Vaughn v. St Louis-San Francisco Ry. Co., 15 S.W.2d 901, 223 Mo 732.

(2) Where the carrier failed to feed and water stock, and gave the shipper no opportunity to do so until after the animals had been confined for more than forty hours in violation of the federal law, there was negligence on which a recovery for injuries to the animals, which ate off one another's tails and manes because of hunger, might be based—Hines v. Morgan, 218 S.W. 672, 142 Ark 272.

86. Mich—Snyder v. King, 165 N.W. 840, 199 Mich 345, 1 A.L.R. 893

87. Neb—McGinley v. Union Pac. R Co., 263 N.W 393, 129 Neb 855

88. Ala—Nashville, etc, R. Co v. Parker, 27 So. 323, 123 Ala 683.

89. U S—Pennsylvania R. Co v Swift, Pa., 258 F. 289, 169 C.C.A. 305.

90. U S—Pennsylvania R. Co. v. Swift, supra

Mich—H Ginsberg & Sons v. Wabash R. Co., 189 N.W. 1018, 219 Mich 665, 28 A.L.R 518, affirmed Ginsberg v Wabash R. Co., 193 N. W. 286, 222 Mich. 560

Neb—Starr v. Chicago, B. & Q R Co., 173 N.W. 682, 103 Neb. 645.

N.Y—Walrath v. American Ry. Express Co., 216 N.Y.S. 545, 217 App. Div 83

Recovery by carrier of expense incurred by it in feeding and watering animals see infra § 314

Statutory lien on animals for expense of feeding and watering see infra § 325

91. U S—Pennsylvania R. Co. v. Swift & Co., Pa., 258 F. 289, 169 C.C.A 305.

Reason for rule

"To hold the duty was a divisible one would result, not only in neglect of the cattle, but in the absence of that governmental inspection of the cattle in transit, which safeguards them from unnecessary suffering"—Pennsylvania R Co. v. Swift & Co., Pa, 258 F. 289, 291, 169 C.C.A. 305.

92. U.S.—Southern Pac. Co. v Stewart, C.C.A.Ariz, 233 F 956, 147 C.C.A. 630, error dismissed 38 S.Ct 130, 245 U.S 359, 62 L.Ed. 345, rehearing granted 38 S.Ct 203, 245 U.S. 562, 62 L.Ed 472, reversed on other grounds 39 S.Ct 139, 248 U.S 446, 63 L.Ed 350.

Mo.—Johnson v Wabash Ry. Co., App., 251 S.W. 719

N.H—Terrill v Payne, 124 A. 462, 463, 81 N.H 164

10 C.J. p 99 note 77.

93. N.H—Terrill v Payne, supra

"Although . . . [the statute] makes it the . . [carrier's] duty to provide properly equipped pens for holding the horses while they are being fed, watered, and rested, there is nothing in the statute itself, or in the purpose it is

Although the carrier will, within the terms of the statute, be excused from performing its duty by "storm or other accidental causes," such exception clause must be taken to mean unavoidable accidental causes and an effect attributable to the negligence of the carrier is not an unavoidable cause excusing it from liability.[94] Moreover, even though the transportation is delayed by an unavoidable cause,[95] such as by an act of God,[96] the statute does not relieve the carrier from liability where there is an entire absence of evidence that the cause of delay in any way interfered with the handling of the stock or providing it with food and water and giving it such care as would insure its delivery at destination in good condition.

The statute does not excuse a carrier for keeping animals confined for the length of time specified without feed or water even if it would otherwise be negligent so to do.[97] It has been held, however, that, where the carrier has given a shipment of stock the rest required by the statute, its failure to give further time does not render it liable in the absence of a contract stipulation providing for additional time.[98]

Restriction or waiver. The provisions of the statute cannot be waived except in the manner and on the contingencies specified therein.[99] In other words, the statute operates as a restriction on the right of contract between the shipper and the carrier and this restriction cannot be disregarded and contractual rights built on it; consequently a contract conflicting therewith is void.[1] So, although there are some decisions which apparently have reached the opposite conclusion,[2] it has been held that, inasmuch as the statute makes it obligatory on the carrier properly to care for and to feed and water stock in transit if the shipper or custodian fails so to do, the carrier cannot by any contract relieve itself of liability for a noncompliance with the statutory requirements.[3]

(b) Effect of Contract That Shipper Care for Stock

A carrier contracting that the shipper attend and provide for the animals in transit remains under the duty to furnish the shipper the necessary information, opportunity, and facilities to do so, aside from any request therefor by him, and, if it knows that the animals are unattended, it must furnish the care required by the statute.

It has been held that a carrier contracting that the shipper shall attend and care for animals dur-

intended to serve, which even suggests that these pens must be on the . . . [carrier's] right of way, or that . . . [it] must own them The . . . [carrier], therefore, could have performed . . . [its] duty of providing pens, by maintaining them either on . . . [its] own land or on the land of others, or by hiring them whenever . . . [it] had occasion to use them In other words, the thing a carrier must do to avoid liability is to provide suitable pens It is immaterial who owns them, [or] the land on which they stand."—Terrill v. Payne, supra.

94. Wyo.—Davis v. Graham, 225 P. 789, 31 Wyo. 239.

Shipment over connecting lines

The fact that the stock was shipped over connecting lines, and that the connecting carrier refused to receive the stock from the initial carrier, will not exonerate it from the liability imposed by the statute, and it makes no difference that the shipper may have a remedy against the connecting carrier also for refusing to accept and to unload the stock.—Texas, etc., Co v Berchfield, 46 S W. 900, 19 Tex Civ App. 228.

95. Wyo.—Davis v. Graham, 225 P. 789, 31 Wyo 239.

96. La.—Collins v. Texas & P. Ry. Co., 123 So. 504, 11 La.App. 445. 10 C J. p 99 note 80.

The Corpus Juris text has been quoted with full approval and the rule as there stated followed without other citation of authority.—Collins v. Texas & P Ry. Co., 123 So 504, 506, 11 La App. 445.

97. Ga.—Hogg v Louisville & N R Co, 127 S E. 830, 33 Ga App. 773. 10 C J. p 99 note 81.

"At common law, it was the duty of carriers transporting live stock for long distances to feed, water, and rest them as reasonable necessity required. The statute only makes certain when and where such common-law duty shall be exercised The object of the statute being to prohibit the confinement of animals longer than the time specified, it is not to be construed as a grant of privilege to the carrier, authorizing it to confine stock for the length of time therein specified, irrespective of the question of negligence in so doing."—Texas & P. Ry Co v McMillen, Civ.App, 183 S W. 773, 776.

98. Mo.—Kent v Chicago, etc, R. Co, App., 176 S W 1105.

99. U S.—Baltimore & Ohio Southwestern R Co v. U. S, Ohio, 31 S Ct. 368, 220 U S. 94, 55 L Ed. 384 Ind.—Cleveland, etc, R. Co v Hayes, 102 N.E. 34, 103 N E. 839, 181 Ind. 87.

1. Ark.—Missouri Pac. R Co. v Burnett, 247 S.W. 1047, 157 Ark 58, error and petition for certiorari dismissed 44 S Ct. 458, 266 U.S. 572, 583, 68 L.Ed. 1185.

Mo.—Johnson v. Wabash Ry Co., App, 251 S W. 719

Agreement not to unload at public pens

A mere agreement that there should be no unloading of hogs in the public pens at destination does not, however, violate the statute, it being within the legal right of a carrier to perform an agreement not to unload at destination or any particular place or in any particular manner.—Missouri Pac. R. Co. v. Burnett, 247 S W 1047, 157 Ark. 58, error and petition for certiorari dismissed 44 S Ct 458, 266 U.S 572, 583, 68 L Ed. 1185

2. U S.—Missouri Pac. R Co. v. Texas & P. Ry. Co., C C.La., 41 F. 913

N.Y.—Haner v. Fargo, 151 N.Y S. 913, 166 App Div. 466.

10 C J. p 99 note 84.

3. Ala.—Lynn v Mellon, 131 So. 458, 24 Ala App 144

Ark.—Hines v. Morgan, 218 S W. 672, 142 Ark. 272.

Mich.—Snyder v King, 165 N.W. 840, 199 Mich 345, 1 A L.R 893.

Mo.—Johnson v. Wabash Ry Co., App, 251 S.W. 719.

10 C J. p 99 note 85.

The statute imposes the absolute duty to feed and water the stock at the expiration of the thirty-six hour release period upon the carrier, irrespective of any contract with the shipper shifting the duty.—Hines v. Morgan, 218 S.W. 672, 142 Ark. 272.

ing transportation remains under the duty to furnish adequate facilities for feeding and watering stock,[4] and to provide the shipper with reasonable information[5] and opportunity[6] for performing the services he has undertaken; and it will be liable for the damage resulting from its failure or refusal to do so. The failure of the owner or caretaker to request or demand such opportunity does not, as a matter of law, excuse the carrier from liability[7] inasmuch as the statute provides for the performance of the duty by the carrier on the default of the shipper.[8] Notwithstanding a contract obligating the shipper to comply with the duty, if he fails to accompany the shipment to perform it, the carrier must unload, feed, and rest the animals within the requisite time the same as though no contract had existed.[9]

(c) Effect of Shipper Accompanying Stock

Although the shipper accompanying the animals in transit has the primary duty to feed, water, and rest them in compliance with statute, the carrier is obligated to provide facilities and undertake this duty if the shipper fails or refuses to do so; and, it must unload the stock for that purpose even in the absence of the shipper's request.

Although it has been held to be the rule that where the shipper or his agent in fact accompanies the shipment, it is primarily his duty to comply with the statute,[10] and a refusal to perform or assist in the performance of the duty constitutes a defense in an action against the carrier for unskillful handling of the live stock, especially where a contract provision exempts the carrier from liability for loss due to the act or default of the shipper,[11] the carrier must ordinarily feed, water, and rest the animals if the shipper or his agent accompanying the shipment fails to do so,[12] it being held that the general rule stated in subsection a, supra, that the presence of a caretaker does not relieve the carrier of its duty, in the absence of a specific agreement that the shipper would care for the stock, is applicable under the federal statute.[13] This duty of a carrier is not dependent on any demand of the caretaker that the statute be complied with, and his failure to request that the stock be unloaded for that purpose is no defense to the shipper's action for damages,[14] at least in the absence of an agreement placing the duty of feeding and watering the stock on the shipper.[15] In any case, the carrier is obligated to make available proper and adequate facilities for the performance of the statutory requirements.[16]

(d) Computation of Time of Confinement; Extension

Under provision of statute to that effect, the time of confinement on connecting roads is included in estimating the time of prohibited confinement. The shipper's privilege, under provision of the statute, to extend the time of confinement from twenty-eight to thirty-six hours, by written request therefor, does not obligate the carrier to confine the stock as long as twenty-eight hours.

Under a provision of the statute that, in estimating the prohibited confinement, the time during which the animals have been confined on connecting roads from which they are received should be included, a carrier is guilty of a violation of the

4. Utah.—Dee v. San Pedro, L. A. & S. L. R. Co., 167 P. 246, 50 Utah 167.

Stock in cars or in yard awaiting delivery

Railroad, not having provided facilities for feeding horses shipped while they were in its charge, and before delivery to consignee, became liable for damage sustained by shipper by animals having been deprived of food for more than thirty-six hours, whether horses were in cars or in stockyard awaiting delivery.—Dee v. San Pedro, L. A. & S. L. R. Co., 167 P. 246, 50 Utah 167.

5. Neb.—McGinley v. Union Pac. R. Co., 263 N.W. 393, 129 Neb. 855.

6. Neb.—McGinley v. Union Pac. R. Co., supra.
N.Y.—Walrath v. American Ry. Express Co., 216 N.Y.S. 545, 217 App. Div. 83.

7. N.Y.—Walrath v. American Ry. Express Co., supra.
10 C.J. p. 99 note 79.
"The failure of a shipper to notify or to demand of a railroad company that it shall stop a train of stock so that he can water, feed, and rest the cattle before they have been confined more than twenty-eight hours is not necessarily fatal in all cases to his right to recover for damages caused by the confinement, if he has in no way requested or consented to the continued confinement and transportation of the stock."—Southern Pac. Co. v. Arnett, Utah, 126 F. 75, 79, 61 C.C.A. 131.

8. N.Y.—Walrath v. American Ry. Express Co., 216 N.Y.S. 545, 217 App.Div. 83.

9. Iowa.—Gibson v. Adams Express Co., 175 N.W. 331, 187 Iowa 1259.

10. U.S.—Atchison, T. & S. F. Ry. Co. v. Merchants' Live Stock Co., C.C.A.N.M., 273 F. 130.
Neb.—Starr v. Chicago, B. & Q. R. Co., 173 N.W. 682, 103 Neb. 645.

11. U.S.—Atchison, T. & S. F. Ry. Co. v. Merchants' Live Stock Co., C.C.A.N.M., 273 F. 130.

No right of action

It has been held that where a shipper of live stock consents to, and participates with the carrier in, the violation of the twenty-eight hour law, he cannot thereafter maintain a civil action for damages alleged to have been caused by such violation.—Fluckiger v. Chicago, etc., R. Co., 154 N.W. 865, 99 Neb. 6.

12. Neb.—Starr v. Chicago, B. & Q. R. Co., 173 N.W. 682, 103 Neb. 645.

13. Wyo.—Davis v. Graham, 225 P. 789, 31 Wyo. 239.

14. Iowa.—Heisel v. Minneapolis & St. L. R. Co., 171 N.W. 177, 180, 185 Iowa 885.
The shipper "had the right, in delivering the shipment to the carrier, to assume that the carrier would obey the law. . . . The carrier cannot be allowed to escape liability for its disobedience of a mandatory law because of a failure to protest by the servant of one who suffers injury therefrom."—Heisel v. Minneapolis & St. L. R. Co., supra.

15. Wyo.—Davis v. Graham, 225 P. 789, 31 Wyo. 239.

16. Neb.—Starr v. Chicago, B. & Q. R. Co., 173 N.W. 682, 103 Neb. 645.

statute if it fails to give animals rest, feed, and water when the period of twenty-eight hours from the time they were last fed expires, although they were in the possession of a connecting carrier during part of that period.[17]

The right vested in a shipper by the statute to extend the period of confinement of animals from twenty-eight to thirty-six hours is a valuable one, and the duty is imposed on the carrier to afford a reasonable opportunity for its exercise.[18] The power of the shipper to extend the time limit of confinement is not, however, a privilege ipso facto to impose an obligation of the carrier to keep the stock confined as long as twenty-eight hours but only a privilege to extend the time from twenty-eight to thirty-six hours.[19]

The requirement of the statute that the shipper's request for an extension be written and "separate and apart from any printed bill of lading, or other railroad form," is sufficiently complied with by a request on a separate railroad form which contains the request alone,[20] or, it has been held, by a written indorsement in the blank margin of the bill of lading.[21] A request signed by the shipper without consideration to himself or detriment to the carrier for an extension of time may be revoked by him.[22] Where a railroad company failed to maintain pens for unloading stock so as to comply with the act, and a conductor of a stock train stated to the shipper that, unless he would sign a written release extending the time to thirty-six hours, he would unload the cattle without pens, and the shipper signed the release to prevent such unloading, the release was not invalid as having been obtained by duress of property.[23]

(2) State Statutes

Under various state statutes regulating the feeding, watering, and resting of live stock, the carrier may be required to furnish adequate facilities therefor, but the duty of actually feeding and watering the stock may be shifted by contract to the shipper, and the carrier will be relieved of responsibility therefor even though the shipper fails to accompany the stock to render this service.

State statutes, similar to the federal statute considered in subdivision c (1) of this section, which provide for the feeding and watering of stock in transit, have for their purpose the prevention of cruelty to animals and the protection of the public health from diseased animals;[24] they do not

17. Ky.—Cincinnati, etc, R. Co v Gregg, 80 S.W. 512, 25 Ky.L. 2329

18. Neb.—McGinley v Union Pac R Co., 263 N.W. 393, 129 Neb. 855.

Purpose of provision

"While . . . one of the purposes of the permission to extend the time of confinement upon a request was that the person in custody during the transportation might provide for an unanticipated emergency . . . another of the purposes of the permission was to enable those owners, whose cattle were shipped from points more than 28 and less than 36 hours' run from their destination, or from pens suitably equipped for unloading, watering, feeding, and resting them, to avoid unloading them on the way. It is much more cruel and injurious to cattle and sheep to unload and reload them than it is to continue their confinement 8 hours when the 28-hour limit is reached"—McGinley v. Union Pac R Co, 263 N.W. 393, 399, 129 Neb 855.

Liability for resulting delay

Where terminal carrier was advised when shipment was turned over to it that shipment was for certain market, and conductor, when inquired of as to when train would arrive at destination, made answer disclosing that ample time remained to complete movement of cattle before expiration of twenty-eight-hour limit, but carrier's yardmaster at intermediate point had cattle unloaded for feed, water, and rest, because of carrier's rule requiring ten hours from leaving time at that point to make destination, without informing caretaker in charge or giving caretaker opportunity to execute request for extension of time to thirty-six hours, the carrier was negligent in so unloading the stock, and liable for loss resulting from the delay—McGinley v. Union Pac. R. Co., 263 N.W. 393, 129 Neb. 855.

19. **In Missouri**

(1) The rule stated in the text has been enunciated—Bradford v. Hines, 227 S.W. 889, 206 Mo App 582.

(2) It was held, apparently contrary to this rule, that where a shipper, to escape contagion at a point en route, desired more time for transit without unloading than twenty-eight hours, by giving his written request for extension of time to thirty-six hours, he became entitled to such an extension as would cause unloading not earlier than some time between twenty-eight and thirty-six hours, and that a lawful contract to that effect resulted, which gave rise to a cause of action in the shipper if violated by the carrier—Bradford v McAdoo, 219 S.W. 92, 202 Mo App. 412

(3) It has been said that the case of Bradford v. McAdoo, supra, is distinguishable on the ground that the court was not dealing with the question whether the contract alone created a binding obligation on the carrier not to unload within any specified lawful time but whether such obligation was created by a custom whereby the attachment of an agreement extending the twenty-eight hour period constituted an agreement by the carrier not to unload before that time—Bradford v. Hines, supra.

20. Neb.—McGinley v. Union Pac. R Co., 263 N.W. 393, 398, 129 Neb. 855.

"The plain object of this clause of the act [requiring the request for extension to be separate and apart from any printed bill of lading or other railroad form] was to make it certain that the owner or person in custody of the shipment should know, when he made the request, that he was making it, and should exercise his judgment and choice in the matter . . . The end sought is as perfectly attained by a separate request upon a railroad form as by one upon any other piece of paper"—McGinley v. Union Pac R Co., supra

21. Va.—Norfolk, etc, R. Co. v. Steele, 86 S.E. 124, 117 Va 788

22. N.M.—Durrett v. Chicago, etc, R Co., 146 P. 962, 20 N.M 114

23. Tex.—Kansas City, etc, R. Co. v. Graham, Civ.App, 145 S.W. 632.

24. Mass.—Hendrick v. Boston, etc., R Co, 48 N.E 835, 170 Mass. 44.
Penalties for violation of statute see infra § 491.

apply to interstate shipments.[25] Under a statute which imposes on the carrier the duty to feed and water the stock, the carrier may be required to furnish places where the stock may be unloaded, watered, and fed without injury in any kind of weather if the cars in which they are transported are not properly constructed for that purpose.[26] A statute of such a character authorizes the carrier to contract with the shipper of animals that he shall attend to the feeding and watering of the stock himself.[27] Under a statute which imposes penalties on the carrier for failure to unload, feed, and water stock as provided therein,[28] or which imposes such a duty on the carrier unless it provides otherwise by special contract,[29] the failure of the shipper to accompany and take care of the animals as required by his special contract relieves the carrier from the duty to feed and water, as concerns its liability to the shipper. On the other hand, the shipper's failure to accompany and care for the animals as called for by the contract of shipment does not absolve the carrier from liability under a statute providing that the stock be fed and watered by the shipper or in his default by the carrier.[30]

d. Time and Manner of Complying with Duty

In compliance with its duty, the carrier may be required to stop the train, or set out the cars at an intermediate stopping place, or place the cars at a convenient place for unloading. The carrier, however, is not obligated to accede to the shipper's request for the performance of the duty, where the demand is unreasonable, and ordinarily the times when, and the places for, rest and refreshment are to be left to its judgment.

If reasonable opportunity for feeding and watering is not otherwise afforded, the carrier should stop the train for that purpose.[31] If unloading is necessary, it is the duty of the carrier to place the cars where the stock can be unloaded by the persons in charge.[32] At the request of the shipper it is the duty of the carrier to set out the car containing the animals at an intermediate stopping place, if essential to avoid injury from continuance of the transportation.[33]

Where, however, cattle are brought to the carrier for shipment in apparently good condition, the carrier is not liable for failing to furnish opportunities to water them before commencing transportation, unless notified of the necessity thereof.[34] It has also been held that the times when, and places where, rest and refreshment may be necessary must be left to the judgment of the carrier, and not the shipper, who cannot demand of the carrier that it feed the live stock at any particular time or place;[35] this is so notwithstanding the contract of shipment requires the shipper to feed, water, and care for the stock at his own risk and expense.[36] While the carrier is bound to afford proper facilities and reasonable opportunities for rest, feed, and water, it is not required to supply these on a mere demand of the shipper without regard to the reasonableness or necessity of such demand.[37] So the duty of a carrier whether by contract or rule of law to exercise proper care for the preservation of live stock in transportation does not require it to permit the shipper to unload the stock for rest and feeding for a considerable period of time in order to improve them for market instead of merely to preserve

Effect of quarantine regulations

A statute which provides that railroad companies shall not confine animals in cars for more than twenty-eight consecutive hours, is not superseded by an order of the board of cattle commissioners forbidding a railroad from unloading any neat cattle for any purpose whatever except upon written permit from the board, at any place except certain designated quarantine stations—Hendrick v. Boston, etc., R Co., 48 N E 835, 170 Mass 44.

25. Tex.—International, etc., R. Co. v Startz, 82 S W. 1071, 37 Tex Civ. App. 51.

26. Tex—International, etc., R Co. v McRae, 18 S W 672, 82 Tex 614, 27 Am S R 926.

27. Tex—Ft Worth, etc., R Co v Daggett, 28 S W. 525, 87 Tex 322—Gulf, etc., R Co. v. Winn, Civ App., 178 S.W 697—Dickerson v San Antonio, etc., R. Co., Civ.App., 170 S.W 1045.

28. Iowa—Burgher v. Chicago, etc., R Co., 75 N W 192, 105 Iowa 335—Grieve v. Illinois Cent. R Co., 74 N W 192, 104 Iowa 659, 663
"If the owner undertakes to oversee the transportation of his stock and attend to loading and unloading it, feeding and watering it, whether by contract or voluntarily, and it suffers injury through his fault, he cannot recover, though the contract in no way relieves the company from liability"—Grieve v. Illinois Cent R. Co., supra.

29. U S—Missouri Pac. R. Co v. Texas & P. R Co, C C La, 41 F 913.

30. S C—Millan v. Southern R. Co., 36 S E. 571, 58 S.C 247—Crawford v Southern R Co., 34 S.E. 80, 56 S C. 136—Comer v. Columbia, etc., R Co., 29 S E 637, 52 S C 36
10 C J. p 100 note 95

31. Tex.—Gulf, etc., R. Co. v Gann, 28 S W. 349, 8 Tex Civ App. 620.

32. Mass.—Brockway v. American Express Co., 47 N E. 87, 168 Mass. 257.
Wis.—Burns v. Chicago, etc., R. Co., 80 N W. 927, 104 Wis. 646.
10 C J. p 100 note 1

33. Conn—Coupland v. Housatonic R. Co., 23 A. 870, 61 Conn. 531, 15 L.R A. 534

34. Tex.—San Antonio, etc., R Co v. Chittim, Civ App., 135 S.W. 747
10 C J p 101 note 3

35. Tex.—Austin v Chicago, R. I. & G Ry Co., Civ.App., 18 S.W.2d 733
10 C J p 101 note 4

36. Miss—Illinois Cent R Co. v. Peterson, 10 So. 43, 68 Miss. 454, 14 L.R.A 550.
10 C J. p 101 note 6.

37. La—Regan v. Adams Express Co., 22 So. 835, 49 La Ann. 1579.
Neb—Keat v Chicago, etc., R. Co., 154 N W. 220, 98 Neb 641
Tex.—Missouri, etc., R Co. v. Clark, 79 S W 827, 35 Tex.Civ.App. 189.

their physical condition, and the right of the shipper to such a privilege must be expressed in his contract of shipment.[38] On the other hand, where the carrier has established a usage of unloading at a particular place for the proper care and necessary preservation of certain live stock, the shipper, in the absence of notice of a change of usage, has the right to expect that such usage on the part of the carrier will be observed, and if it is not observed, resulting in loss to him, he may hold the carrier responsible therefor.[39]

While the carrier's duty does not require it to keep water on hand in its pens at all times and under all circumstances,[40] such duty is not discharged by stopping at places where there are no such facilities, or where neither food nor water is obtainable.[41] Where the carrier undertakes to rest and water sheep as required by statute, it must furnish wholesome water, and it will be liable for injuries to the animals caused by the drinking of unwholesome water,[42] notwithstanding it had no knowledge of the fact that the water was of such a character.[43] The carrier's duty is not discharged by showing that unwholesome water furnished was the water offered by that section of the country where it appears that it was not impossible, by reasonable efforts, to furnish wholesome water for the stock.[44]

§ 65. Duty of Complying with Quarantine Regulations

A carrier in transporting live stock has the duty to comply with quarantine regulations; and, as part of the service required by the shipping contract, it must dip animals where this is required by law, although some authority holds this to be a duty of the shipper in the absence of special contract to the contrary.

A carrier is under the duty to comply with quarantine regulations concerning the transportation of live stock.[45] Although it has been held that, in the absence of special contract,[46] the duty of dipping cattle in compliance with quarantine regulations before transportation to points outside a quarantine area is no part of the contract of shipment and rests primarily with the shipper,[47] it has also been held that it is part of the service required by the shipping contract,[48] and that in performing such service the carrier must exercise ordinary care.[49] A carrier which, intending to comply with quarantine regulations, refuses to receive cattle for transportation unless tuberculin tested or castrated is not liable for damage to the animals caused by the shipper's compliance with the carrier's demand.[50] Likewise, notwithstanding a federal statute permitting the interstate transportation of animals from a quarantined area for the purpose of immediate slaughter, without dipping, a carrier which refuses to accept

38. Mo.—Banks v. Chicago, etc., R. Co., 134 S.W. 1071, 153 Mo.App. 469.

The term "fill," used with relation to shipments of live stock, means feeding and watering stock just prior to sale so as to increase their weight and thus enhance their value.—Texas & P. Ry. Co. v. West Bros., Tex.Com.App., 207 S.W. 918, affirming in part and reversing in part St. Louis, I. M. & S. R. Co. v. West Bros. Co., Civ.App., 159 S.W. 142, rehearing denied Texas & P. R. Co. v. West Bros., 214 S.W. 808.

39. Ark.—St. Louis Southwestern R. Co. v. Mitchell, 142 S.W. 168, 101 Ark. 289, 37 L.R.A.,N.S., 546.

40. Tex.—San Antonio, etc., R. Co. v. Chittim, Civ.App., 135 S.W. 747.

41. Utah.—Groot v. Oregon Short Line R. Co., 96 P. 1019, 34 Utah 152.

42. Utah.—Byram v. Payne, 201 P. 401, 58 Utah 536, 18 A.L.R. 1110.

43. Utah.—Byram v. Payne, supra.

44. Tex.—Chicago, etc., R. Co. v. Mitchell, Civ.App., 85 S.W. 286. 10 C.J. p. 101 note 10.

45. Ark.—St. Louis, I. M. & S. Ry. Co. v. Campbell, 172 S.W. 823, 116 Ark. 119.

Liability of carrier for:

Causing quarantine of animals of another see C.J.S. title Animals § 52

Communication of disease by animals transported see C.J.S. title Animals § 56.

Inspection at yard nearest quarantine line

The quarantine regulations requiring carriers to unload horses brought into the state from points west of the Missouri river for inspection, unless copy of a certificate of health is attached to the waybill, do not require a railroad company to unload a shipment of horses at the yards nearest the Missouri river, but only at the yards nearest the river upon its line.—Marks & Shields v. Chicago, R. I. & P. Ry. Co., 169 N.W. 764, 184 Iowa 1352.

46. Tex.—Texas, etc., R. Co. v. Crowder, Civ.App., 165 S.W. 116.

47. Tex.—Clegg v. Gulf, etc., R. Co., 137 S.W. 109, 104 Tex. 280.—Texas, etc., R. Co. v. Crowder, Civ.App., 165 S.W. 116.

48. Okl.—Schaff v. Hudgins, 221 P. 90, 96 Okl. 173, certiorari denied 44 S.Ct. 454, 264 U.S. 595, 68 L.Ed. 867.—Ezell v. Midland Valley R. Co., 174 P. 781, 73 Okl. 40.—Missouri, K. & T. Ry. Co. v. Skinner, 160 P. 875, 61 Okl. 189.

Separate contract

Under an interstate shipment of cattle, dipping of the cattle is covered in the contract of carriage, and is not a proper subject of a separate contract.—Ezell v. Midland Valley R. Co., 174 P. 781, 73 Okl. 40.

49. Okl.—Schaff v. Hudgins, 221 P. 90, 96 Okl. 173, certiorari denied 44 S.Ct. 454, 264 U.S. 595, 68 L.Ed. 867.—Missouri, K. & T. Ry. Co. v. Williamson, 180 P. 961, 75 Okl. 36.

Negligence measured by terms of contract

The question of negligence in the performance of the carrier's duty to dip cattle in compliance with quarantine regulations must be measured by the terms of the shipping contract.—Schaff v. Hudgins, 221 P. 90, 96 Okl. 173, certiorari denied 44 S.Ct. 454, 264 U.S. 595, 68 L.Ed. 867.—Missouri, K. & T. Ry. Co. v. Skinner, 160 P. 875, 61 Okl. 189.

Unnecessary dipping

Where cattle shipped into another state had been inspected and a proper certificate of inspection issued, and the carrier on its own initiative caused them to be dipped again at their destination, the carrier is liable to the shipper for the expense.—Robinson & Reynolds v. Atlantic Coast Line R. Co., 112 S.E. 389, 28 Ga.App. 484.

50. Tex.—Texas & P. Ry. Co. v. McDowell, Civ.App., 222 S.W. 1109.

such shipment without dipping is not liable in damages for injuries occasioned by the shipper's dipping of the cattle where a state quarantine regulation so required before the cattle could be tendered for transportation.[51]

Contributory negligence of shipper. The refusal of the shipper to consent to the confinement of his cattle longer than twenty-eight hours, necessitating their being unloaded in infected pens and nonquarantined territory, is contributory negligence precluding a recovery for injuries caused by improper dipping, where noninfected territory could have been reached in two hours over the twenty-eight-hour period, which would have obviated the necessity of dipping.[52]

§ 66. Care Required in Respect of Sick or Pregnant Animals

The carrier, in the absence of negligence on its part, is not liable for damage resulting from the sickness or pregnancy of animals in transit.

A carrier of live stock is not liable, except in case of negligence proximately contributing thereto, for damages occasioned by sickness of the animals.[53] So, in the absence of notice or of facts sufficient to charge a carrier with knowledge that animals shipped are pregnant, such condition is a hidden or concealed defect, and the carrier in handling the shipment will not be charged with greater care than that ordinarily exercised in handling such animals that are not pregnant;[54] and where the carrier carries such animals without negligence on his part there can be no liability for injuries due to such causes.[55] On the other hand, where, although not expressly informed of the fact by the shipper, the pregnant condition of an animal is plainly apparent to the carrier, or plainly inferable from facts known to it, the carrier will be liable for injuries caused by its negligence in not handling the animal with due care under the circumstances.[56]

Mistakes of veterinarian. A carrier transporting a horse is not liable for mistakes made by a veterinarian it secured to treat the horse, unless it failed to exercise reasonable care in selecting him.[57]

I. DUTY AS TO LOADING AND UNLOADING

§ 67. Inanimate Freight

a. In general
b. Where shipper assumes duty

a. In General

The carrier ordinarily has the duty to load and unload freight, except that it is not required to unload bulky freight shipped in carload lots or cars delivered off its premises.

The carrier is bound to furnish proper facilities for the loading and unloading of freight.[58] It is not, however, required to establish facilities to accommodate each patron, and it has the right to load or unload cars where its facilities or appliances for such work are located.[59]

Subject to qualifications hereinafter stated, it is also the primary duty of the carrier properly to load and unload freight delivered to it for transportation, and it will generally be liable for loss

51. Tex.—Pecos & N. T Ry. Co. v. Hall, Com.App., 222 S.W. 170, reversing, Civ.App., 189 S.W. 535.

52. Tex.—Kansas City, etc., R. Co. v. McCunningham, Civ.App., 149 S.W. 420.

53. Ky.—Louisville & N. R Co. v. Taylor, 205 S.W. 934, 181 Ky. 794.
10 C.J. p 102 note 24.

54. Neb.—Daily v. Chicago, St. P., M. & O Ry. Co., 194 N.W. 676, 110 Neb. 481.
10 C.J. p 102 note 25.

55. Tex.—Gulf, etc., R. Co. v. Staton, Civ.App., 49 S.W. 277.

56. Neb.—Daily v. Chicago, St. P. M. & O Ry. Co., 194 N.W. 676, 110 Neb. 481.

Animal accustomed to shipment

Although a common carrier is not an insurer of animals against injury or death caused by their nature which could not be guarded against by foresight and vigilance, where a mare was heavy with foal and accustomed to being shipped by car, the evidence may be such as to warrant a jury in finding that the facts did not bring the case within the rule.—Kingsbury v. Chicago & A. R Co., 213 Ill.App. 439.

Notice at time of shipment not essential

In order to render the carrier liable for depreciation in market value, due to abortions caused by the carrier's negligence, it is not essential that the carrier should have had notice at the time of the shipment that the animals were pregnant.
U.S.—New York, L. E. & W. R Co. v. Estill, Mo., 13 S.Ct. 444, 147 U.S. 591, 37 L.Ed. 292, affirming, C.C., Estill v. New York, L. E. & W R Co., 41 F. 849.
Iowa.—McCune v. Burlington, etc., R Co., 3 N.W. 615, 52 Iowa 600, 603.
Tex.—Gulf, etc., R Co. v. Staton, Civ. App., 49 S.W. 277.
10 C.J. p 102 note 27.

57. N.Y.—Rosenberg v. New York Cent R. Co., 167 N.Y.S. 518, 180 App.Div. 79.

58. N.C.—McLemore v. Atlantic Coast Line R. Co., 154 S.E. 390, 199 N.C. 264.
10 C.J. p 102 note 29
Duty to provide facilities for receiving and delivering goods see supra § 42.

Accessibility to cars

In addition to the duty to furnish reasonable facilities for loading cars for shipment, the carrier must provide reasonable accessibility to the cars furnished.—McLemore v. Atlantic Coast Line R. Co., 154 S.E. 390, 199 N.C. 264.

59. U.S.—Missouri Pac R. Co. v. State of Nebraska, 30 S.Ct. 461, 217 U.S. 196, 54 L.Ed. 727, 18 Ann.Cas. 989.
Fla.—State v. Florida East Coast R. Co., 68 So. 761, 69 Fla. 491, L.R.A. 1918A 158.

or injury to goods sustained in the performance of this duty.[60] The company ordinarily cannot by any regulation impose its duty on the shipper, nor require, as a condition of transportation, that the shipper shall enter into a contract to perform this duty himself,[61] although, as appears in subsection b infra, the shipper may voluntarily bind himself, either by an express or implied agreement, to do the loading or unloading himself. It has been held that, even though the carrier in loading uses appliances furnished by the shipper himself it will be liable for injuries resulting from defects in the appliances, if the appliances were under the exclusive control of the carrier and there was no assumption of responsibility on the part of the shipper.[62] Although the shipping contract contains a provision that the carrier shall not be liable for loss or injury occurring on a connecting line, such provisions will not exempt it from liability for loss or injury caused by its improperly loading on its cars goods offered for transportation.[63]

Bulky freight shipped in carload lots. By custom or usage, an exception to the general rule stated above usually obtains in the case of bulky freight in carload lots. In the case of shipments of this character, the carrier is not required to remove such freight from the car, but may deliver the car in a safe and convenient position for unloading at the place designated by the contract, or, in the absence of such designation, on its sidetrack in the usual and customary place for unloading by consignees.[64]

Cars delivered off carrier's premises. The general rule requiring the carrier to load and unload shipments is also not applicable to a case where the cars are not to be loaded or unloaded at the station or on the lands and tracks of the carrier. Where cars are delivered on a private siding off the land of the carrier, it is under no obligation to unload them.[65]

Reloading in transit. Where a car was loaded by the shipper with a definite design to separate goods of different character, the carrier is liable for loss resulting from a negligent failure to maintain the separation in unloading and transferring the contents of the car to another car during transportation.[66] A carrier, receiving a shipment without notifying the shipper of quarantine regulations preventing movement of the shipment in open cars through certain areas of the route designated, must reload the shipment so as to conform to quarantine regulations.[67]

Weighing. Under a statute requiring a carrier to weigh grain accepted for shipment in bulk, on loading the same the duty is not limited to those cases where the weighing is requested by the shipper, or where less than carload lots are shipped.[68]

b. Where Shipper Assumes Duty

Generally, if the shipper assumes the duty of loading and unloading, the carrier will not be liable for loss resulting from defective performance. The carrier must afford the shipper a reasonable opportunity to load and unload.

60. Ill.—See Keystone Oil & Mfg Co v Illinois Cent R. Co, 207 Ill App. 243
La.—Flann v. House, 123 So 406, 11 La App 469
Va.—Hines v Buchanan, 109 S E 219, 131 Va 88.
10 C J p 103 note 30, p 121 note 14.

Damage in unloading
The carrier is liable for damage to goods injured while being unloaded by it.—Greenwald v New York Cent & H R R. Co, 159 N Y S. 15, 95 Misc. 122.

Less than carload lots
The carrier is responsible for the proper loading of goods shipped in less than carload lots.—Robinson v. New York Cent R Co, 282 N.Y.S 877, 245 App Div 378, affirmed 1 N E 2d 985, 270 N Y 659

Overloading or improperly loading
A carrier contracting to transport household goods by automobile truck is responsible for damage to property caused by overloading or improperly loading truck.—Flann v. House, 123 So 406, 11 La App. 469

61. N.Y.—London, etc., F. Ins Co. v. Rome, etc, R Co, 39 N E 79, 144 N Y. 200, 43 Am S R. 752.

62. Del.—Union Stone Co. v. Wilmington Transfer Co, 90 A. 407, 5 Boyce 59
10 C J p 103 note 33

63. Minn.—Davis v. New York, etc, R Co, 72 N.W. 823, 70 Minn 37

The Corpus Juris text has been cited with approval in Fort Worth & Denver City Ry. Co. v. Motley, Tex. Civ App., 87 S W.2d 551, 556.

64. Ill.—Gregg v. Illinois Cent R Co, 35 N E 343, 147 Ill. 550, 37 Am S R 238.
10 C J p 103 note 35
Effect of such delivery as relieving carrier from further obligation other than to use reasonable care for safekeeping, see infra § 152.

Interstate shipment of carload lots
Only duty of common carrier of carload shipments in interstate commerce is that of transportation and the shipper is obliged to see that the shipment is properly loaded and braced so that it may be transported in a satisfactory manner.—Annunziato v. New York, N H & H R. Co, 253 N.Y S 636, 142 Misc. 327

65. N Y.—New York Cent, etc., R Co v. General Electric Co, 146 N Y S. 322, 83 Misc 529, reversed on other grounds 153 N.Y S. 478, 167 App Div. 726.

66. Mass.—L L. Cohen & Co. v. Davis, 142 N E 75, 247 Mass 259, reversed on other grounds Davis v. L L Cohen & Co, 45 S Ct. 633, 268 U S 638, 69 L Ed. 1129.

67. Ga.—Atlantic Coast Line R Co v. South Georgia Milling Co, 161 S E. 282, 44 Ga App. 316.

68. Ill.—Shellabarger Elevator Co v. Illinois Cent. R Co, 116 N E 170, 278 Ill. 333, L R.A.1917E 1011

Shipper's "sworn statement" as to weight
Under a further provision of the statute that, if the carrier fail to weigh the shipment as required, a sworn statement of the shipper shall be conclusive as to the weight, such statement may consist of an affidavit as well as oral testimony at trial.—Shellabarger Elevator Co. v Illinois Cent R Co, 116 N E. 170, 278 Ill. 333, L R A 1917E 1011.

Although there is authority to the contrary,[69] it is the general rule that if the shipper voluntarily assumes the duty of loading or unloading,[70] as under a special contract to that effect,[71] the carrier is ordinarily absolved from responsibility therefor, and will not be liable for loss or injury resulting from an improper performance of the duty, especially where the injuries result from the shipper's misrepresentation of the manner in which he loaded the goods on the carrier's cars;[72] but such improper loading will be available as a defense only where it is the direct cause of the damage to the goods.[73] As otherwise expressed, the rule is that if, after undertaking the duty of loading, the shipper fails to see that the car is properly prepared for the transportation of the particular article which he is loading, he assumes responsibility for all defects in loading which are necessarily invisible to the agent of the carrier who accepts the freight, or which he cannot discern by ordinary observation or such inspection as he can readily make.[74]

69. U S—Hannibal, etc., R Co. v Swift, 79 U S. 262, 273, 20 L Ed 423, approving Elgin, etc., R. Co v. Bates Mach. Co., 98 Ill.App 311, affirmed in 66 N.E. 326, 200 Ill. 636, 93 Am S R. 218.

"The liability of the common carrier attaches when the property passes, with his assent, into his possession, and is not affected by the car in which it is transported, or the manner in which the car is loaded The common carrier is regarded as an insurer of the property carried, and upon him the duty rests to see that the packing and conveyance are such as to secure its safety. The consequences of his neglect in these particulars cannot be transferred to the owner of the propery."—Hannibal, etc., R. Co. v. Swift, supra.

70. Iowa—Pedelty Thresher Co. v. Chicago, M. & St. P. Ry. Co., 176 N W 615 189 Iowa 397.

Pa.—David E Kennedy Inc. v. O'Brien, 175 A 882, 115 Pa Super. 469

Tex—Houston & T. C R. Co v. Oriental Oil Co, Civ App, 198 S W. 601.

Va—Hines v Buchanan, 109 S E. 219, 131 Va 88.

10 C J p 103 notes 34, 37, 38, p 121 note 17.

Draining gasoline from car

A railway company having nothing to do with loading an automobile on a freight car and preparing it for shipment, except to inspect and approve the manner of its being fastened, was not liable for the loss thereof by fire by reason of the negligence of the shipper's agent in draining gasoline therefrom in proximity to a lighted lantern, although it did not require such drainage, a bill of lading had been signed, and one of its employees got a can for and expected to receive some of the gasoline—Train v. Atchison, T & S F Ry. Co, 253 S W. 497, 214 Mo App 354

Failure to use blocks

Where the shipper's employees, who had run a traction engine onto the carrier's loading platform, for the purpose of loading it on a flat car, although they saw that the car was lower than the loading platform and discussed what to do, attempted to run the engine from the platform onto the car, without the use of blocks, which were at hand, he could not recover for damages due to engine falling from car.—Pedelty Thresher Co. v Chicago, M. & St P Ry. Co, 176 N.W. 615, 189 Iowa 397

Improper fastening of machine to truck

Where shipper's employees loaded machine on truck for transportation to buyer, shipper, and not common carrier by truck, was liable to the consignee for damage to machine in transit due to improper loading—David E. Kennedy, Inc., v. O'Brien, 175 A. 882, 115 Pa Super 469.

Open valve on tank car

Where a tank car was unloaded by removing a tap on a pipe in the bottom and opening a valve from the top of the tank, the railroad was not liable for loss of oil by reason of the valve being open when the tap was removed at destination, the tank having been filled by the shipper—Houston & T. C. R. Co. v. Oriental Oil Co, Tex Civ App, 198 S W. 601.

71. U S—South Carolina Asparagus Growers' Ass'n v. Southern Ry. Co., C C A S C, 46 F 2d 452—Leonard v. Pennsylvania R Co, D C N.Y., 15 F.Supp. 55.

N.Y—Robinson v. New York Cent. R Co, 282 N Y S 877, 245 App Div. 378, affirmed 1 N.E 2d 985, 270 N. Y. 659.

10 C J p 103 note 38.

Carrier's obligation under contract obligating shipper to load cars with watermelons, which he elected to load in bulk, was merely to transport melons in normal and orderly process without negligence—Leonard v. Pennsylvania R. Co., D C N.Y, 15 F. Supp. 55.

Contract for "shipper's load and count"

"Placing on the bill of lading the words, "Shipper's Load and Count" gives the shipper the privilege of loading as he pleases Requiring the carrier to see that the shipper does his own business prudently, and making it responsible for his failure to do so, would not be just."—Robinson v. New York Cent. R. Co., 282 N.Y S 877, 879, 245 App Div. 378, affirmed 1 N E 2d 985, 270 N.Y. 659.

Circulation of air

Where the shipper so loaded crates of asparagus shipped in refrigerator cars as to prevent a proper circulation of cool air, he must bear the loss resulting from deterioration.—South Carolina Asparagus Growers' Ass'n v. Southern Ry. Co., C.C.A. S.C, 46 F 2d 452.

Rate for particular mode of shipment

A carrier is not liable for damages to oranges, shipped under "Shipper's Load and Count" bill of lading, caused by improper loading of oranges in mesh bags, on theory that carrier, by promulgating tariff rate for shipment of oranges in mesh bags, tacitly represented that such manner of shipping oranges was safe and impliedly assumed common-law liability of carriers as to oranges—Robinson v New York Cent. R Co, 282 N. Y.S 877, 245 App Div. 378, affirmed 1 N E.2d 985, 270 N.Y. 659.

Shifting of goods loaded in bulk

Shipper loading in bulk watermelons transported under bill of lading indorsed "S L and C," with knowledge that practically all such shipments shift, could not recover from railroad company for loss caused by bruising of some melons as result of shift during normal movement of cars, in absence of evidence of such company's negligence or breach of contract—Leonard v. Pennsylvania R. Co, D.C N Y, 15 F.Supp. 55.

72. Ill—Pennsylvania Co. v. Kenwood Bridge Co, 49 N.E 215, 170 Ill. 645.

73. Ohio.—St Louis-San Francisco Ry Co. v. Glow Electric Co, 172 N E. 425, 35 Ohio App. 291.

74. U S—Alabama & V. Ry. Co. v. American Cotton Oil Co., Miss., 249 F. 308, 161 C C A. 316.

Ill—See Keystone Oil & Mfg Co v. Illinois Cent. R. Co., 207 Ill.App. 243.

Wash—American Cotton Oil Co. v. Davis, 224 P. 23, 28, 129 Wash. 24—Wilson & Co. v. Hines, 213 P. 5, 123 Wash 643.

Although the carrier is not called on to see that the shipper has properly performed his duty in this regard,[75] it has been held that, if the improper loading is apparent to the ordinary observation of the carrier's servants, the carrier cannot escape liability on the ground of the shipper's defective loading,[76] and that it is its duty in such case to refrain from transporting the goods until the defects and deficiencies in loading have been remedied.[77] On the other hand, it has been held that improper loading by the shipper constitutes a complete defense, regardless of whether or not the shipment was inspected by the carrier's employees,[78] and that the fact that the carrier's employees knew before starting that the goods were improperly loaded is immaterial,[79] the carrier being under no duty, in such case, to reload the cars.[80]

The defense that the car was improperly loaded by the shipper is available whether the shipper or the consignee brings the action;[81] and the negligence of the shipper is imputable to the consignee and will bar a recovery by either.[82]

Appliance under control of carrier. Where the carrier provides a crane, to be operated by its own employees, for the convenience of shippers in loading heavy and bulky freight, it is liable for damages to the freight caused by negligent operation of the crane by its employee, notwithstanding it makes no charge for the use of the crane.[83]

Duty of shipper to remove within reasonable time. While a carrier owes to a shipper the duty to furnish him with reasonable facilities and opportunity for unloading goods shipped in carload lots, the shipper must exercise reasonable diligence in unloading, and is not entitled to use the car as a store in which to carry on his business of selling the goods shipped on payment of demurrage charges.[84] The carrier is not liable for damages to the goods shipped, resulting from its refusal to permit its car to be used for such purpose.[85]

Reasonable opportunity for loading. Under a statute which authorizes a carrier to regulate the time and manner for movements of freight, the duty rests on the carrier to establish such rules

Wis.—Thomson v. Chicago, M. & St. P. Ry. Co., 217 N.W. 927, 195 Wis. 78.

10 C.J. p 121 note 15.

"Improper loading constitutes ordinarily such a fault on the part of the shipper as will relieve a common carrier from its common-law liability for the safe delivery of goods it undertakes to carry, especially where the faulty loading, in carload lots, consists of internal defects of which the carrier does not know and from which the loss or damage ensues to the goods in the ordinary course of handling and transportation."—American Cotton Oil Co. v. Davis, 224 P. 23, 25, 129 Wash. 24. To same effect Wilson & Co. v. Hines, 213 P. 5, 6, 123 Wash. 643.

Negligence of shipper in packing see infra § 78.

The Corpus Juris text has been quoted with full approval in American Cotton Oil Co. v. Davis, supra.

Defective valve in tank car

(1) Where consignee of cotton oil furnished its own tank cars for shipment, and it was not apparent that inner valve in car had not been closed, railroad company, although bound to exercise high degree of care, cannot be held liable for loss of oil resulting from failure to close valve securely, notwithstanding outer cap might have prevented escape, had it not been defective.—Alabama & V. Ry. Co. v. American Cotton Oil Co., Miss., 249 F. 308, 161 C.C.A. 316.

(2) The carrier is not liable in such case even though it made the seller, who was required by contract to deliver oil, an allowance for the use of the car.—Alabama Great Southern R. Co. v. Morris & Co., Miss., 249 F. 312, 161 C.C.A. 320.

75. Ill.—Pennsylvania Co. v. Kenwood Bridge Co., 49 N.E. 215, 170 Ill. 645.
N.Y.—Lewis v. New York, O. & W. Ry. Co., 104 N.E. 944, 210 N.Y. 429
Va.—Hines v. Buchanan, 109 S.E. 219, 131 Va. 88.
10 C.J. p 121 note 18.

76. Wis.—Thomson v. Chicago, M. & St. P. Ry. Co., 217 N.W. 927, 195 Wis. 78.
10 C.J. p 121 note 21.

Presumed knowledge of patent faults

"Even where the shipper is to do his own loading, the carrier who accepts the freight for shipment assumes the obligation and liabilities of a common carrier . . . and, in the absence of a false representation or deceitful conduct on the part of the shipper with reference to the manner of loading, the carrier, on issuing its bill of lading for the goods as in apparent good order, is presumed to acquire knowledge of any patent fault or delinquency in the manner of loading which a casual inspection of the freight thus tendered would render apparent."—Central of Georgia Ry. Co. v. Griner & Rustin, 127 S.E. 878, 881, 33 Ga. App. 705.

Shipper may assume loading satisfactory

If carrier, with full knowledge of manner in which loading was done, accepts shipment without objection, shipper may assume that manner is satisfactory.—Abbott v. Tompkins, Tex.Civ.App., 283 S.W. 647.

77. Ga.—Central of Georgia Ry. Co. v. Griner & Rustin, 127 S.E. 878, 33 Ga.App. 705.
Carrier's right to refuse to ship goods defectively loaded by shipper see supra § 28.

78. Ohio.—St. Louis-San Francisco Ry. Co. v. Glow Electric Co., 172 N.E. 425, 35 Ohio App. 291.

79. Vt.—Ross v. Troy, etc., R. Co., 49 Vt. 364, 24 Am.R. 144.
10 C.J. p 121 note 19.

80. N.H.—Rixford v. Smith, 52 N. H. 355, 13 Am.R. 42.

81. Ala.—McCarthy v. Louisville, etc., R. Co., 14 So. 370, 102 Ala. 193, 48 Am.S.R. 29.

82. Ala.—McCarthy v. Louisville, etc., R. Co., supra.

83. Pa.—Morris v. Payne, 78 Pa.Super. 171.

84. Tex.—Waltam v. International, etc., R. Co., Civ.App., 168 S.W. 973
—Wichita Falls, etc., R. Co. v. Wattam, Civ.App., 168 S.W. 398.
10 C.J. p 104 note 40.
Custody and control of goods awaiting delivery to consignee see infra §§ 152–158.

85. Tex.—Wichita Falls, etc., R. Co. v. Wattam, Civ.App., 168 S.W. 398.

as will afford the shipper a reasonable opportunity for loading and transporting.[86] It is also the carrier's duty, apparently independent of any statute, to afford the consignee a reasonable opportunity to unload.[87]

Violations of tariff regulation. A carrier which accepts for shipment goods not loaded in compliance with its regulations does so under its full common-law liability,[88] and it is only where the shipper's violation of the regulation is the proximate cause of the damage to the shipment that it can be availed of as a defense by the carrier.[89]

Under a tariff regulation requiring the owner to unload a carload shipment, neither the consignee nor the carrier's agent can lawfully agree that the carrier shall unload the car.[90] Such a tariff rule, however, is not violated by the imposition of liability on the carrier for the negligence of its crane operator in unloading freight, where the interstate transportation had been completed, and further transportation to the point of unloading was not under the tariff but under a new and separate service.[91]

§ 68. Live Stock

The duty of a carrier to provide proper facilities for loading and unloading is treated in § 69 infra, and the duty to load and unload live stock is treated in § 70 infra.

§ 69. Furnishing Facilities for Loading and Unloading

The carrier is bound to furnish safe and adequate facilities for the loading and unloading of live stock in transportation and will be liable for loss resulting from defective equipment, even where the shipper has by contract assumed the duty of loading and unloading the stock, unless the shipper knew of the unsafe condition of the facilities and nevertheless undertook the unloading

As an essential part of the duty of transportation, it is the duty of a carrier of live stock to provide safe and proper facilities and safe and proper places for loading and unloading stock delivered to it,[92] and it will be liable for loss or injury to animals sustained while being loaded or unloaded because of the insufficiency of the facilities or want of safety of places furnished.[93] This duty, as included within the duty of transporta-

86. Okl.—Chicago, R. I. & P. Ry Co. v. Long, 227 P. 389, 99 Okl. 276.

87. N.Y.—Crittenden v. American Ry. Express Co., 199 N.Y.S. 521, 205 App.Div. 228, affirmed 144 N.E. 899, 238 N.Y. 578.

88. Ohio.—St. Louis-San Francisco Ry. Co. v. Glow Electric Co., 172 N.E. 425, 35 Ohio App. 291.

89. Ohio.—St. Louis-San Francisco Ry. Co. v. Glow Electric Co., supra.

90. Pa.—Rau v. Wilkes-Barre & E. R. Co., 167 A. 230, 311 Pa. 510.

91. U.S.—Indemnity Ins. Co. of North America v. Atchison, T. & S. F. Ry. Co., C.C.A.Ariz., 85 F.2d 1006, denying rehearing 85 F.2d 438.

92. U.S.—Atchison, T. & S. F. Ry. Co. v. U. S., N.Y., 55 S.Ct. 748, 751, 295 U.S. 193, 79 L.Ed. 1382, reversing, D.C., 8 F.Supp. 825.

Fla.—Walton Land & Timber Co. v. Louisville & N. R. Co., 72 So. 485, 72 Fla. 66.

Okl.—St. Louis & S. F. Ry. Co. v. Slade, 291 P. 107, 144 Okl. 216.

Tex.—Gulf, C. & S. F. Ry. Co. v. Culwell, Civ.App., 216 S.W. 457.

10 C.J. p. 104 note 42.

"Transportation of ordinary live stock in carload lots from and to points other than public stockyards has always been deemed to include furnishing of facilities at the place of shipment for loading and at destination for unloading and suitable ways for convenient ingress and egress."—Atchison, T. & S. F. Ry. Co. v. U. S., supra.

Duty of carrier to furnish suitable pens and yards for receiving and delivering live stock see supra § 43.

The Corpus Juris text is cited with approval in Midland Valley R. Co. v. Price, 260 P. 26, 29, 127 Okl. 106.

Reason for maintaining facilities

"The live stock loading and unloading pens of a railway company are maintained for the joint use of the transportation company and the public to facilitate the shipment of live stock."—St. Louis-San Francisco Ry. Co. v. Slade, 293 P. 547, 146 Okl. 173.

Sufficiency for ordinary business

"It is statutory, as well as the general rule as to common carriers, that suitable pens and facilities must be provided to unload live stock preparatory to and as part of the delivery by the carrier to the consignee. But the rule does not require more than that the pens should be sufficient in capacity to accommodate the ordinary and usual volume of business, or such business as is to be reasonably anticipated at the point in question."—Davis v. Simmons, Tex.Civ.App., 240 S.W. 970, 975, dismissed for want of jurisdiction.

93. Okl.—St. Louis, & S. F. Ry. Co. v. Slade, 291 P. 107, 144 Okl. 216.

S.D.—Sheehan v. Minneapolis & St. L. R. Co., 193 N.W. 597, 46 S.D. 429.

Tenn.—Southern Ry. Co. v. Cowan, 9 Tenn.App. 158.

Tex.—Gulf, C. & S. F. Ry. Co. v. Culwell, Civ.App., 216 S.W. 457.—Panhandle & S. F. Ry. Co. v. Crawford, Civ.App., 198 S.W. 1079.

10 C.J. p. 104 note 42.

Contributory negligence

Where the evidence showed that the stock pens and chutes of defendant railroad were in bad condition but had been used continually by stock men, it has been held that plaintiff was not guilty of contributory negligence in attempting to load stock through them.—Southern Ry. Co. v. Cowan, 9 Tenn.App. 158.

Insufficient facilities

Where a shipper, pursuant to invitation, tendered his cattle for shipment at the time specified, and because of insufficient facilities, such as cattle pens, he was compelled to load the same prematurely under the direction of the carrier's agent, and the cattle had to stand in the cars an unnecessarily long time before the cars were moved, he could recover for the loss sustained thereby.—Missouri & N.A. Ry. Co. v. Potts, 10 S.W.2d 515, 178 Ark. 334.—Chicago, R. I. & P. Ry. Co. v. Butler, 200 S.W. 144, 132 Ark. 37, L.R.A. 1918C 537.

Stock pens and chutes

(1) Stock pens and chutes provided by a railroad for the loading of stock must be kept in a reasonably safe condition, and a failure to do so constitutes negligence on the part of the railroad rendering it lia-

tion provided for by statute, is nondelegable, and if agents are employed to perform it the liability remains with the carrier just the same.[94] On the other hand, a carrier owes no duty to furnish loading facilities to the shipper for purposes other than that of immediate transportation, such as for assembling and feeding stock preparatory to shipment, and, where its facilities are used for that purpose by the shipper without its consent, it is obliged only to refrain from wantonly or maliciously injuring the stock.[95]

Effect of contract shifting duty of loading and unloading. Notwithstanding the existence of a contract which imposes on the shipper the duty of loading and unloading, the carrier is bound to furnish suitable and safe facilities for loading and unloading, and it will be liable for loss or injuries sustained through a neglect of this duty,[96] unless the shipper knew of the unsafe condition of the appliance and nevertheless undertook to unload his stock,[97] assuming the risk of the injury.[98]

§ 70. Loading and Unloading

a. In general
b. Under contract shifting duty to shipper

a. In General

It is the primary duty of the carrier to load and unload live stock and it will be liable for loss or injury resulting therefrom, whether due to its negligence or not, notwithstanding the shipper's participation therein. It will not, however, be liable for injuries resulting from negligent loading or unloading by the shipper.

In the absence of a contrary agreement or understanding, see infra subsection b, it is the primary duty of a carrier, as an incident to the service of transportation,[99] to load and unload live stock delivered to it for shipment,[1] and ordinarily it will be liable for loss or injury sustained in the performance of this duty.[2] This liability, it appears, is not limited to injuries caused by the carrier's negligence inasmuch as its liability with respect

ble for injuries to the stock resulting therefrom
Okl.—St. Louis & S. F. Ry. Co. v. Slade, 291 P. 107, 144 Okl. 216
Tenn.—Southern Ry. Co. v. Cowan, 9 Tenn.App. 158

(2) So, where horses to be shipped were overheated in a "cutting out" process made necessary by the railroad's negligence in permitting water troughs in a loading pen to overflow, rendering such pen muddy, the road was liable for consequent injuries to the horses in transit.—Gulf, C. & S. F. Ry. Co. v. Culwell, Tex.Civ.App., 216 S.W. 457.

Unloading within reasonable time

It was the duty of the carrier to furnish facilities for unloading horses accepted by it for shipment within a reasonable time after they reached their destination.—Sheehan v. Minneapolis & St. L. R. Co., 193 N.W. 597, 46 S.D. 429.

94. Tex.—Panhandle & S. F. Ry. Co. v. Crawford, Civ.App., 198 S.W. 1079.

95. Okl.—St. Louis-San Francisco Ry. Co. v. Slade, 293 P. 547, 146 Okl. 173

Railway's removal of hogs from loading pen to owner's pen was held not to be gross negligence or wanton act.—St. Louis-San Francisco Ry. Co. v. Slade, 293 P. 547, 146 Okl. 173.

96. Ga.—Payne v. Duncan & Nelms, 111 S.E. 209, 28 Ga.App. 399.
Tex.—Davis v. Simmons, Civ.App., 240 S.W. 970, dismissed for want of jurisdiction
10 C.J. p 106 note 60.

An engine to move and spot the cars is a necessary facility.—Davis v. Simmons, Tex.Civ.App., 240 S.W. 970, dismissed for want of jurisdiction.

97. Ga.—Payne v. Duncan & Nelms, 111 S.E. 209, 28 Ga.App. 399.
10 C.J. p 105 note 52 [b], p 106 note 61.

98. Ga.—Payne v. Duncan & Nelms, 111 S.E. 209, 28 Ga.App. 399.
10 C.J. p 106 note 62.

99. U.S.—Atchison, T. & S. F. Ry. Co. v. U. S., N.Y., 55 S.Ct. 748, 295 U.S. 193, 79 L.Ed. 1382, reversing, D.C., 8 F.Supp. 825.

1. U.S.—Atchison, T. & S. F. Ry. Co. v. U. S., supra.
10 C.J. p 104 note 46.

Loading

It is the duty of the carrier to load cattle, accepted for shipment, on the cars.—Massey v. Texas & P. Ry. Co., Tex.Civ.App., 200 S.W. 409.

Unloading

(1) The duty is primarily on the carrier.—Davis v. Simmons, Tex.Civ.App., 240 S.W. 970, dismissed for want of jurisdiction.

(2) The carrier is obligated to perform this duty within a reasonable time.—Davis v. Simmons, supra

Unloading at yard away from tracks

Where a carrier, required to unload stock in transit, desires to furnish a yard away from its tracks, it assumes the duty of making the transfer from the cars to the yard.—Sheehan v. Minneapolis & St. Louis R. Co., 193 N.W. 597, 46 S.D. 429.—10 C.J. p 104 note 46 [b].

2. La.—Ker Texada v. Texas & P. Ry. Co., 133 So. 415, 16 La.App. 66.
Tex.—Massey v. Texas & P. Ry. Co., Civ.App., 200 S.W. 409.
10 C.J. p 104 note 46.

Care required

(1) The servant of the carrier must use the care required in dealing with each particular animal, reference being had to its instincts and habits.—Jones v. Memphis, etc., Packet Co., Miss., 31 So. 201.

(2) The carrier must exercise a high degree of care to prevent animals from injuring themselves while being loaded, considering their propensity to become frightened.—Alexander v. Texas & P. Ry. Co., 129 So. 419, 14 La.App. 245.

Loading at rear end of train

Where cattle were injured as a result of jolting caused by a head-on collision, the fact that they were loaded at the rear end of the train could not be made the basis of a recovery on the ground of negligence in so loading them, although cattle of another at the front end of the train were not injured.—Wichita Valley Ry. Co. v. Baldwin, Tex.Civ.App., 263 S.W. 1090.

Particular acts held negligent

(1) Carrier's removing loading bridge while mules in car were restless, with result that one slipped over edge and injured leg.—Alexander v. Texas & P. Ry. Co., 129 So. 419, 14 La.App. 245.

(2) Failure of carrier's inspector, being veterinary, present when mule cut leg while being loaded, to disinfect injury.—Alexander v. Texas & P. Ry. Co., supra

(3) Where the carrier loaded stock, a failure to separate large from small cattle constituted im-

to the shipment is that of an insurer,[3] except, as indicated in § 79 infra, as to loss or injuries due to the peculiar nature and propensity of the animals. Liability for the negligent overloading of live stock remains with the carrier notwithstanding participation in the loading by the shipper where he or his agent merely assisted therein under control of the carrier,[4] and the duty of the carrier to unload stock safely is not avoided by the fact that the consignee's servant participated in the unloading.[5] That the carrier is required by the Twenty-Eight-Hour Law to break the continued transportation of live stock does not justify unloading the stock in unsuitable pens.[6]

Negligence of the shipper. As an apparent exception to the general rule of liability stated above, it has been held that, irrespective of any contract by which the shipper assumes the risk of loading and unloading his stock,[7] the carrier is not liable for injuries incurred by the stock as a consequence of improper loading or unloading, where such injuries resulted from the negligent performance of that service by the shipper.[8] Moreover, for the carrier to escape responsibility, it is not necessary that the shipper's negligence have been the sole proximate cause of the injury to the animals.[9] It has been held, however, that although the shipper was negligent in overloading the stock and thus caused injury to them, the carrier could not escape liability on this ground where it had knowledge or might have known of the condition of the car as to the loading when it received it for transportation.[10]

Reasonable regulations for loading. Under a statute which authorizes a carrier to regulate the time and manner for the movement of live stock, the duty rests upon it to establish such rules as will afford the shipper a reasonable opportunity for loading and transporting.[11]

b. Under Contract Shifting Duty to Shipper

The carrier may by contract shift the duty of loading and unloading live stock to the shipper and such a contract is generally held to release it from liability for loss resulting from defective loading unknown to it; but, notwithstanding such contract, the carrier will be liable if it fails to afford the shipper a reasonable time and opportunity for loading or unloading or, ordinarily, if it in fact assumes that duty itself.

It is generally held that by special contract the duty of loading and unloading may be shifted from the carrier to the shipper, in which event the carrier, subject to exceptions herein stated, is not liable for loss or injury to the shipment sustained in the performance of this duty, or resulting from and after the improper performance thereof by the shipper.[12] Such a contract is not inval-

proper loading, rendering it liable for resulting injuries, especially in view of the fact that it required that this be done where the shipper himself loaded the stock—Ker Texada v Texas & P. Ry. Co., 133 So. 415, 16 La.App 66.

3. Ky.—Louisville, etc, R Co. v. Stiles, 119 S.W. 786, 133 Ky. 786, 134 Am S R. 491.
Mo—Creel v Missouri Pac R. Co, 119 S W 30, 137 Mo.App. 27.
10 C J. p 104 note 49

4. Tex—Massey v. Texas & P. Ry Co, Civ App., 200 S W. 409.

5. Mo.—Creel v. Missouri Pac. R Co, 119 S.W. 30, 137 Mo.App. 27.

6. U S—Southern Pac. Co. v Stewart, Ariz., 233 F. 956, 147 C C A 630, error dismissed 38 S.Ct. 130, 245 U.S. 359, 62 L Ed. 345, rehearing granted 38 S Ct. 203, 245 U S 562, 62 L Ed. 472, and reversed on other grounds 39 S Ct 139, 248 U.S 446, 63 L Ed. 350
Duty of carrier under Twenty-Eight-Hour Law see supra § 64 c (1).

7. Conn.—Candee v New York, etc., R. Co., 49 A. 17, 73 Conn 667.

8. Ill—See Libro v. Cleveland, C., C & St L Ry. Co., 202 Ill App. 418
Mont.—Phelps v. Great Northern Ry. Co, 213 P. 610, 66 Mont. 198, certiorari dismissed Great Northern Ry Co. v. Galbreath Cattle Co., 44 S Ct 334, 264 U.S 571, 68 L Ed 855, reversed on other grounds 46 S Ct. 439, 271 U S. 99, 70 L Ed 854.
Tex—St. Louis, B. & M Ry Co. v Moss, Civ App, 203 S W. 777—Massey v. Texas & P. Ry. Co., Civ. App, 200 S.W. 409.
10 C J. p 105 note 51.

Particular acts held negligent

(1) Overloading stock in cars—Massey v. Texas & P. Ry. Co, Tex Civ App, 200 S.W. 409. See Libro v. Cleveland, C., C & St. L. Ry Co, 202 Ill.App. 418.

(2) Rough handling of stock by shipper's agent.—Massey v. Texas & P. Ry. Co, supra.

(3) Placing vicious bulls unconfined in a car together.—St. Louis, B & M. Ry. Co. v Moss, Tex Civ App., 203 S W. 777.

(4) Where the shipper loads stock into the wrong car without inquiry from the carrier's agent, he assumes the risk of loss resulting from the subsequent unloading—Weisinger v Southern R. Co., 112 S W. 660, 33 Ky L. 1038.

(5) Other acts of negligence precluding recovery by shipper see 10 C.J. p 105 note 51 [a].

9. Tex—St. Louis, B. & M. Ry. Co v. Moss, Civ.App., 203 S.W. 777.

10. Iowa—Kinnick v. Chicago, etc., R Co., 29 N.W. 772, 69 Iowa 665

11. Okl—Chicago, R. I. & P. Ry. Co v. Long, 227 P. 389, 99 Okl. 276.

12. Ga—Central of Georgia Ry. Co. v. Griner & Rustin, 127 S E 878, 33 Ga App 705.
Idaho—Crabill v. Oregon Short Line R. Co, 200 P 121, 34 Idaho 251.
Mass.—New York Cent. R. Co v. Sturtevant & Haley Beef & Supply Co, 127 N E 509, 236 Mass 16.
Mo—Grisham v St. Louis-San Francisco R. Co., App, 12 S W.2d 101.
N M.—Spence v. El Paso & S. W. Co, 207 P. 579, 28 N M. 132
Tex—Texas & N. O R. Co v. Robinson, Civ.App, 57 S W 2d 938—St Louis Southwestern Ry. Co of Texas v Anderson & Hileman, Civ. App, 17 S W 2d 473.
10 C J p 104 note 44, p 105 note 52, p 106 note 56.

The Corpus Juris text has been cited with approval in Central of Georgia Ry. Co. v Griner & Rustin, 127 S.E 878, 881, 33 Ga App. 705.

Default by shipper

Failure of the shipper to comply with a contract requiring that the loading and unloading of the stock be attended to by him, or, on his

id[13] as exonerating the carrier from exercising ordinary care.[14] Accordingly, where, by the contract of shipment, the duty of loading the animals on the cars is imposed on the shipper, and loss or injury results from his overloading the cars, the carrier is not liable,[15] at least where it has no notice of such overloading.[16]

On the other hand, it has been held that, where the stock as loaded by the shipper is accepted by the carrier, the latter assumes all the liabilities of a common carrier, in the absence of any misrepresentation or deceit on the part of the shipper as to the loading,[17] although it will not be liable if it foregoes inspection of the loading in reliance on the shipper's professed competency in the performance of this function.[18] A contract shifting the duty does not preclude the shipper from recovering damages based on the carrier's refusal to allow the stock to be unloaded in transit, although such contract provided that the stock should not be unloaded unless absolutely necessary.[19] Where the contract places on the shipper the duty of unloading live stock, the carrier must at least afford him a reasonable time and opportunity for doing so, and a failure in this respect will render the carrier liable for resulting damages.[20] As otherwise expressed, the management and control of trains is in the carrier's own hands, and the facilities for loading and unloading along the route are its property, and it cannot by contract release itself from liability for a failure to exercise control of its property so as to allow the shipper to discharge the duties which he has assumed.[21] Also, as appears from § 69 supra, such a contract

failure to do so, by the carrier, constitutes a default on his part ordinarily preventing him from recovering damages arising therefrom.—Phelps v. Great Northern Ry. Co., 213 P. 610, 66 Mont. 198, certiorari dismissed Great Northern Ry Co v. Galbreath Cattle Co., 44 S.Ct. 334, 264 U.S. 571, 68 L.Ed. 855, reversed on other grounds 46 S.Ct. 439, 271 U.S. 99, 70 L.Ed. 854

Separation of hogs from cattle

Where shipper assumes duty of loading live stock at own risk and subject to certain regulations in bill of lading requiring separation of hogs from cattle, carrier would not ordinarily be liable for damages incurred by noncompliance with such regulations.—Central of Georgia Ry. Co. v Griner & Rustin, 127 S.E. 878, 33 Ga.App 705.

The duty of unloading may be imposed on the shipper by special contract.—Davis v. Simmons, Tex.Civ. App., 240 S.W. 970, dismissed for want of jurisdiction.

Where a shipper was negligent in failing to unload live stock on arrival as required by the contract, so that the stock was injured, he could not recover for such injury.—Chicago, R. I. & G Ry. Co. v. Pavillard, Tex.Civ App., 187 S.W. 998.

13. Idaho—Lane v Oregon Short Line R Co., 198 P. 671, 34 Idaho 37, 15 A.L.R. 197.
Mass—New York Cent. R Co. v. Sturtevant & Haley Beef & Supply Co, 127 N.E 509, 236 Mass. 16.
10 C.J p 105 note 52 [a].

14. Conn.—Candee v. New York, etc., R. Co., 49 A. 17, 73 Conn. 667.

15. Mo—Grisham v. St Louis-San Francisco R. Co., App., 12 S.W.2d 101.
N.M.—Spence v. El Paso & S. W. Co., 207 P. 579, 28 N.M 132.
Tex.—Texas & N O. R Co. v. Robinson, Civ.App, 57 S.W 2d 938—St. Louis Southwestern Ry. Co. of Texas v Anderson & Hileman, Civ. App, 17 S.W 2d 473, 474.
10 C.J p 105 note 55.

The Corpus Juris text has been cited with approval in St. Louis Southwestern Ry. Co. of Texas v. Anderson & Hileman, supra

Overloading due to small car

Notwithstanding the carrier furnished a thirty-six foot car instead of a forty foot car as requested, the shipper could not recover for damages due to overloading of live stock in such car where the contract relieved the carrier of liability therefor in the absence of negligence on its part, and the shipper's agent loaded the stock into the car furnished.

Mo.—Grisham v. St. Louis-San Francisco R. Co., App, 12 S.W 2d 101
N.M.—Spence v El Paso & S. W. Co., 207 P 579, 28 N.M. 132.

16. Ala.—Southern Ry. Co. v. Frank De Latour, Inc., 135 So. 137, 223 Ala 245.
Iowa.—Wiersma v. Chicago & N. W. Ry. Co, 238 N.W. 579, 213 Iowa 223.

17. Ga.—Central of Georgia Ry. Co. v. Griner & Rustin, 127 S.E. 878, 881, 33 Ga App. 705.
10 C.J p 106 note 57.

The Corpus Juris text has been cited with approval in Central of Georgia Ry Co v. Griner & Rustin, supra

18. Ark.—Fordyce v. McFlynn, 19 S. W. 961, 56 Ark 424, 429.
"By the terms of the contract, the plaintiffs [shippers] undertook to furnish and load the cars for the carriage of their animals; they thereby represented themselves as competent to do the entire work of loading, and if they did it carelessly and thereby caused the injury complained of, the defendants would not be liable, although it appeared that there was a general duty resting upon the conductor to examine trains under his control and see that they were properly loaded. If such duty existed generally, its performance in this case was excused by the plaintiffs And if the conductor, relying upon their professed competency and the careful performance of their undertaking, refrained from making the examination necessary to detect their incompetency or neglect, the carrier is not liable for injuries occasioned by either"—Fordyce v. McFlynn, 19 S.W. 961, 56 Ark 424, 429.

19. N.Y—Dickerson v. Erie R. Co, 169 N.Y.S 5, 181 App Div. 815.

20. Tex—Davis v. Simmons, Civ. App., 240 S.W. 970, dismissed for want of jurisdiction.

Placement of car at unloading chutes

Where shipment contract required shipper to unload the cattle, it will be assumed that it was carrier's duty to place the car at the unloading chutes, and that it was then the duty of the stockyards company to unload them, acting as agent for shipper—McMickle v. Wabash R. Co, Mo App., 209 S.W. 611.

Failure to hold engine as agreed

Where the conductor in charge of a train agreed to give the shipper reasonable time to procure horses to remove from pens stock already unloaded, in order to make room for the other stock still on the cars, the carrier was liable for failing to hold available an engine which was necessary to the unloading of the stock during the reasonable time so granted.—Davis v. Simmons, Tex.Civ.App., 240 S.W. 970, dismissed for want of jurisdiction

21. N.Y—Harris v. Northern Indiana R. Co., 20 N.Y. 232.

does not absolve the carrier from a loss or injury which results from its failure to provide a proper place and suitable facilities for loading and unloading.

Carrier's assumption of duty notwithstanding contract. A stipulation in a contract of shipment which requires the shipper to load and unload his stock is inoperative and has no application where the carrier in fact assumes the duty notwithstanding the contract, and it will be liable for loss or injury sustained in the performance of such duty.[22] Under these circumstances there is a waiver of the provisions of the contract imposing the duty of loading and unloading on the shipper.[23] It seems, however, that under a freight classification of the interstate commerce commission providing that any assistance rendered by an employee of the carrier in loading and unloading be construed as purely voluntary and as the agent of the shipper, the carrier cannot be held responsible for its employees' acts in unloading and caring for stock on the failure of the shipper to meet the shipment.[24]

J. LIABILITY OF CARRIER FOR LOSS OR INJURY

1. At Common Law

§ 71. Statement of, and Reasons for, Rule

Subject to certain exceptions, a common carrier is absolutely liable under the common law for loss or injury to goods received for carriage.

The implied agreement of common carriers is to carry safely,[25] and at common law they are held to a very strict accountability for the loss of, and failure to deliver, goods received by them for carriage,[26] being liable for all losses and injuries,[27] except as stated infra §§ 76–79, such as arise from

22. Mont.—Phelps v. Great Northern Ry. Co., 213 P. 610, 66 Mont. 198, certiorari dismissed Great Northern Ry. Co. v. Galbreath Cattle Co., 44 S.Ct. 334, 264 U.S. 571, 68 L.Ed. 855, reversed on other grounds 46 S.Ct. 439, 271 U.S. 99, 70 L.Ed. 854
10 C.J. p. 106 note 58.

23. Tex.—Chicago, etc., R. Co. v. Linger, Civ.App., 156 S.W. 298.

24. Miss.—Columbus & G. Ry. Co. v. Owens, 121 So. 265, 153 Miss. 628, 62 A.L.R. 521.

Agents of shipper

Delivering carrier's employees were shipper's agents while unloading and caring for stock until shipper's agent arrived.—Columbus & G. Ry. Co. v. Owens, 121 So. 265, 153 Miss. 628, 62 A.L.R. 521.

25. Va.—Eastern Shore of Virginia Produce Exch. v. New York, P. & N. R. Co., 126 S.E. 674, 141 Va. 611.
"In the absence of a statute fixing the responsibility of the expressman, a common-law carrier, he is obligated to carry safely"—David v. Abramowitz, 256 N.Y.S. 15, 16, 143 Misc. 162.

26. Fla.—Atlantic Coast Line R. Co. v. Sandlin, 78 So. 667, 75 Fla. 539.
Tex.—Galveston, H. & S. A. Ry. Co., Civ.App., 214 S.W. 721.
Va.—Chesapeake & O. Ry. Co. v. Osborne, 153 S.E. 865, 154 Va. 477.

27. U.S.—The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., N.Y., 55 S.Ct. 483, 294 U.S. 494, 79 L.Ed. 1016, affirming, C.C.A., The Ansaldo San Giorgio I, 73 F.2d 40, reversing, D.C., 3 F.Supp. 579, certiorari granted The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., 55 S.Ct. 217, 293 U.S. 551, 79 L.Ed. 654.
Ala.—Atlantic Coast Line Ry. v. Enterprise Cotton Oil Co., 74 So. 232, 199 Ala. 57
Ark.—American Ry. Express Co. v. H. Rouw Co., 48 S.W.2d 220, 185 Ark. 526.
Cal.—American Fruit Distributors of California v. Hines, 203 P. 821, 55 Cal.App. 377.
Conn.—Ace-High Dresses v. J. C. Trucking Co., 191 A. 536, 122 Conn. 578.
D.C.—Shapiro v. Pennsylvania R. Co., 83 F.2d 581, 65 App.D.C. 324.
Fla.—Hammers v. Southern Express Co., 85 So. 246, 80 Fla. 51.
Ga.—Central of Georgia Ry. Co. v. Council Bros., 137 S.E. 569, 36 Ga.App. 573—Southern Ry. Co. v. Standard Growers' Exch., 130 S.E. 373, 34 Ga.App. 534—Hines v. Vann, 106 S.E. 921, 26 Ga.App. 704—Heath v. Sandersville R. Co., 98 S.E. 92, 23 Ga.App. 255.
Idaho.—Ritchie v. Oregon Short Line R. Co., 244 P. 580, 42 Idaho 193, 45 A.L.R. 909.
Ill.—Hinchliffe v. Wenig Teaming Co., 113 N.E. 707, 274 Ill. 417, affirming 194 Ill.App. 627—Beatrice Creamery Co. v. Fisher, 10 N.E.2d 220, 291 Ill.App. 495—Hudson v. Grand Rapids & I. Ry. Co., 203 Ill. App. 377.
Ind.—American Ry. Express Co. v. Rhody, 143 N.E. 640, 84 Ind.App. 283
Iowa.—Dye Produce Co. v. Davis, 209 N.W. 744, 202 Iowa 1008—Coad v. Pennsylvania Ry. Co., 175 N.W. 344, 187 Iowa 1025
Ky.—Hall v. Cumberland Pipe Line Co., 237 S.W. 405, 193 Ky. 728—Louisville & N. R. Co. v. Hunter, 214 S.W. 914, 185 Ky. 165
Me.—Warren v. Portland Terminal Co., 116 A. 411, 121 Me. 157, 26 A.L.R. 304
Mass.—Bonfiglio v. New York, N. H. & H. R. Co., 198 N.E. 236
Minn.—De Vita v. Payne, 184 N.W. 184, 149 Minn. 405
Miss.—Yazoo & M. V. R. R. Co. v. Craig, 79 So. 102, 118 Miss. 299, certiorari denied 39 S.Ct. 11, 248 U.S. 573, 63 L.Ed. 427.
Mo.—Morrow v. Wabash Ry. Co., 265 S.W. 851, 219 Mo.App. 62—Sullivan v. American Ry. Express Co., 245 S.W. 375, 211 Mo.App. 123—Singer v. American Express Co., 219 S.W. 662, 203 Mo.App. 158, certiorari denied 41 S.Ct. 8, 254 U.S. 632, 65 L.Ed. 448—Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co., 187 S.W. 149, 193 Mo.App. 572.
Neb.—Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry. Co., 182 N.W. 967, 106 Neb. 149
N.J.—Kassel Poultry Co. v. Pennsylvania R. Co., 145 A. 316, 7 N.J. Misc. 301.
N.Y.—Ely v. Barrett, 168 N.Y.S. 419, 181 App.Div. 176, appeal dismissed 120 N.E. 60, 224 N.Y. 550.
N.C.—Winstead v. East Carolina Ry., 118 S.E. 887, 186 N.C. 58—M. V. Moore & Co. v. Southern Ry. Co., 111 S.E. 166, 183 N.C. 213.
Ohio.—Fean v. Alabama Great Southern R. Co., 159 N.E. 487, 26 Ohio App. 96.
Okl.—Atchison, T. & S. F. Ry. Co. v. Weaver, 47 P.2d 104, 173 Okl. 156.
Pa.—Dreibelbis & Co. v. Philadelphia & Reading R. Co., 28 Pa.Dist. 488—Edmunds v. Philadelphia & Reading Railroad Co., 75 Pa.Super. 176.

an act of God or of the public enemy, the negligence of the shipper, or the inherent nature or vice of the property, or, as shown infra § 75, perhaps from some other causes which have found recognition in different jurisdictions. The rule might now be more fully stated as being that the common carrier is liable for all loss or injury not due to the act of God or the public enemy, the inherent nature or qualities of the goods, or the act or fault of the owner or shipper, it being understood that as to all of these excepted cases the carrier may be liable by reason of his own negligence or that of his agents, servants, or employees.[28] Where the loss is not due to the excepted causes, it is immaterial whether the carrier was negligent or not,[29] and the carrier cannot escape liability by proving reasonable care and diligence,[30] or by showing that there was no negligence;[31] and as to all of the excepted causes the carrier may, as shown infra § 80, be liable by reason of his own negligence or that of his agents, servants, or employees. In many cases the liability of the carrier has been said to be that of an insurer,[32] but in view of the exceptions to the rule of liability, the

Tex.—Panhandle & S. F. Ry. Co. v. Andrews, Civ.App., 278 S.W. 478—Baker v. H. Dittlinger Roller Mills Co., Civ.App., 203 S.W. 798.
Vt.—Haglin-Stahr Co. v. Montpelier & W. R. Co., 102 A. 940, 92 Vt. 258.
Va.—Chesapeake & O. Ry. Co. v. Osborne, 153 S.E. 865, 154 Va. 477.
10 C.J. p. 43 note 64, p. 108 note 82, p. 110 note 98.

Corpus Juris is cited with approval in:
U.S.—Inland Waterways Corporation v. Hallet & Carey Co., C.C.A.Minn., 52 F.2d 13—Merchants' & Miners' Transp. Co. v. Branch, C.C.A.Va., 282 F. 494, 496.
Mo.—State v. Taylor, 251 S.W. 383, 386.
N.D.—Morrell v. Northern Pac. Ry. Co., 179 N.W. 922, 924.

Live stock

The settled rule as to the common-law liability of a common carrier in connection with the carriage of live stock, where the same is in sole charge of the carrier and not accompanied by the shipper, or his agent, is that such carrier is charged with any loss occurring thereto which cannot be attributed to an act of God, the public enemy, or the inherent vices or propensities of the animals themselves.
Ill.—Hartford Live Stock Ins. Co. v. Railway Express Agency, 274 Ill.App. 585.
Ky.—Louisville & N. R. Co. v. Crain, 224 S.W. 1063, 189 Ky. 431.

Effect of federal legislation

While federal legislation on liability of carriers in interstate commerce supersedes state regulations and policies, it did not destroy but was intended to continue in force any right which shipper had under common law, not inconsistent with federal, and the common-law rule, making carrier liable for any loss or damage not the act of God or the public enemy, was not affected.—Bowles v. Quincy, O. & K. C. R. Co., Mo.App., 187 S.W. 131.

Avoidance of blame

(1) Where trees, which were damaged at defendant's depot by frost, were held by it as a common carrier, through failure to give consignee notice, defendant was required to acquit itself of blame as such common carrier.—American Ry. Express Co. v. Judd, 104 So. 418, 213 Ala. 242.

(2) Where goods were in good condition when received by carrier but in bad condition when delivered by it, the only defenses available to carrier at common law were that injury was caused by act of God, of public enemy, of shipper, or by inherent nature of the goods themselves.—Southern Pac. Co. v. Itule, Ariz., 74 P.2d 38.

28. Corpus Juris summary of the rule has been quoted with approval in:
Mo.—Robinson v. Bush, 200 S.W. 757, 760, 199 Mo.App. 184.
Ohio.—Fean v. Alabama Great Southern R. Co., 159 N.E. 487, 489, 26 Ohio App. 96.

29. U.S.—Inland Waterways Corporation v. Hallet & Carey Co., C.C.A.Minn., 52 F.2d 13.
Ariz.—Southern Pac. Co. v. Itule, 74 P.2d 38.
Ill.—Sparr v. Southern Pac. Co., 220 Ill.App. 172.
Iowa.—Coad v. Pennsylvania Ry. Co., 175 N.W. 344, 187 Iowa 1025.
Mo.—Morrow v. Wabash Ry. Co., 265 S.W. 851, 219 Mo.App. 62—Johnson v. American Ry. Express Co., App., 245 S.W. 1071—Sullivan v. American Ry. Express Co., 245 S.W. 375, 211 Mo.App. 123—Erisman v. Wabash Ry. Co., App., 243 S.W. 237—Boyd v. St. Louis Express Co., App., 211 S.W. 702—Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co., 187 S.W. 149, 193 Mo.App. 572—Bowles v. Quincy, O. & K. C. R. Co., App., 187 S.W. 131.
N.Y.—Perkel v. Pennsylvania R. Co., 265 N.Y.S. 597, 148 Misc. 284—Feynman v. American Ry. Express Co., 234 N.Y.S. 727, 134 Misc. 223.
Tex.—Rio Grande & E. P. Ry. Co. v. T. A. Austin & Co., Civ.App., 12 S.W.2d 1070, reversed on other grounds, Com.App., 25 S.W.2d 306—Panhandle & S. F. Ry. Co. v. Andrews, Civ.App., 278 S.W. 478.
Vt.—Haglin-Stahr Co. v. Montpelier & W. R. Co., 102 A. 940, 92 Vt. 258. 10 C.J. p. 109 note 86.

Corpus Juris statement has met with approval in Inland Waterways Corporation v. Hallet & Carey Co., C.C.A.Minn., 52 F.2d 13.

Gravamen of action

"The gravamen of an ordinary action against a carrier for loss or injury to goods intrusted to the carrier for shipment consists in the absolute liability for the damage growing out of the relationship of shipper and carrier, and is not grounded in negligence."—Southern Ry. Co. v. Standard Growers' Exch., 130 S.E. 373, 34 Ga.App. 534.

30. Ga.—Western & A. R. Co. v. Waldrip, 89 S.E. 346, 18 Ga.App. 263.
Tex.—Panhandle & S. F. Ry. Co. v. Andrews, Civ.App., 278 S.W. 478. 10 C.J. p. 109 note 87.

High degree of care of carrier of turkeys accompanied by shipper who placed locks on car did not relieve carrier of liability for theft not due to act of shipper or agent.—Kassel Poultry Co. v. Pennsylvania R. Co., 145 A. 316, 7 N.J.Misc. 301.

Live stock

In action against carrier for injuries to cattle shipment based on contract duty, the carrier is liable independently of question of negligence.—Wichita Valley Ry. Co. v. Anderson, Tex.Civ.App., 48 S.W.2d 361.

31. N.J.—Kassel Poultry Co. v. Pennsylvania R. Co., 145 A. 316, 7 N.J.Misc. 301.

32. U.S.—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500—American Ry. Express Co. v. Ewing Thomas Converting Co., C.C.A.Pa., 292 F. 335.
Ala.—Atlantic Coast Line Ry. v. Enterprise Cotton Oil Co., 74 So. 232, 199 Ala. 57.
Ariz.—McClure v. Johnson, 69 P.2d 573.
Ark.—Missouri Pac. R. Co. v. American Fruit Growers, 260 S.W. 39,

carrier is not technically an insurer,[33] at least it is not an insurer as to the excepted causes of injury,[34] nothing more being meant by the expression than that the carrier is absolutely liable,

163 Ark 429—Missouri Pac R. Co. v Martindale, 213 S W 777, 139 Ark 143.

Cal.—American Fruit Distributors of California v. Hines, 203 P. 821, 55 Cal App. 377.

Del—Hardesty v. American Ry. Express Co, 119 A 681, 2 W W Harr., Super, 66.

Ga—American Ry. Exp. Co. v Fegenbush, 144 So. 320, 107 Fla. 145—Atlantic Coast Line R Co v. Wilson & Toomer Fertilizer Co, 104 So. 593, 89 Fla 224—Hammers v. Southern Express Co., 85 So. 246, 80 Fla. 51—Atlantic Coast Line R Co v. Sandlin, 78 So. 667, 75 Fla 539—Walton Land & Timber Co v. Louisville & N. R Co., 72 So. 485, 72 Fla 66.

Ga—Southern Ry. Co v Standard Growers' Exch, 130 S E 373, 34 Ga App. 534—Western & A R Co v. Waldrip, 89 S E 346, 18 Ga App 263.

Ill—Hinchliffe v Wenig Teaming Co, 113 N.E 707, 274 Ill 417, affirming 194 Ill App 627—Beatrice Creamery Co v. Fisher, 10 N E 2d 220, 291 Ill App 495—Armour Grain Co v. Davis, 233 Ill App 1—Sparr v. Southern Pac. Co, 220 Ill App. 172—Arakelian v. Southern Pac Co, 220 Ill App 160—S. Valentine & Co v. Atchison, T & S. F Ry Co, 220 Ill.App. 160.

Ind—American Ry. Express Co v. Rhody, 143 N E 640, 84 Ind App 283.

Iowa—Dye Produce Co. v Davis, 209 N W 744, 202 Iowa 1008—Buck v American Railway Express Co, 192 N W 277, 195 Iowa 1024

Ky—Peter Fox & Sons Co. v. Louisville & N R Co, 259 S W. 37, 202 Ky. 139—Southern Ry. Co in Kentucky v. John T Barbee & Co, 226 S W 376, 190 Ky 63, 20 A L R. 257—Louisville & N R Co v Crain, 224 S W 1063, 189 Ky 431—Louisville & N R Co. v Edwards' Adm'x, 209 S W 519, 183 Ky 555—Louisville & N R. Co v. Taylor, 205 S.W 934, 181 Ky. 794—Merchants' Transfer Co v Kiser, 200 S W 454, 179 Ky 324, L.R A 1918C 658—Southern Ry Co v. Avey, 191 S W 460, 173 Ky 598

La—Anderson, Clayton & Co v Yazoo & M. V R Co, 141 So. 453, 174 La. 762

Me—Warren v Portland Terminal Co, 116 A. 411, 121 Me 157, 26 A L.R. 304.

Mass—Houle v Lewonis, 140 N.E 427, 245 Mass 254.

Minn—McNeil & Scott Co. v. Great Northern R Co, 194 N.W. 614, 156 Minn. 120—De Vita v. Payne, 184 N.W. 184, 149 Minn 405.

Mo—Frawley v. Atchison, T. & S. F R Co., 299 S.W 93, 220 Mo App. 1189—Hurley v Illinois Cent. R. Co, 282 S W 97, 221 Mo App 478—Ford v. Wabash Ry. Co, App, 266 S W. 1032, affirmed 300 S W. 769, 318 Mo 723—Tri-State Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co, App, 264 S W 445—Viviano v Davis, App., 258 S W 69—Johnson v. American Ry Express Co, App, 245 S.W. 1071—Vernon v. American Ry Express Co, App, 222 S W 913—Burgher v Wabash Ry. Co, App, 217 S W 854—Boyd v. St. Louis Express Co, App, 211 S W 702—Baker v. Bush, App, 194 S W 1061

Neb—Nye-Schneider-Fowler Co v Chicago & N. W Ry Co, 179 N W 503, 105 Neb. 151—N H Nelson & Co v. Chicago & N. W. Ry Co, 167 N W 574, 102 Neb 439.

N Y.—D'Utassy v Barrett, 114 N E 786, 219 N Y. 420, 5 A L R 979, affirming 157 N Y S. 916, 171 App Div 772—Mairs v. Baltimore & O R Co, 76 N Y S 838, 73 App Div 265—Feynman v American Ry Express Co, 234 N Y S 727, 134 Misc 223—Sullivan v Williams, 176 N Y S 710, 107 Misc 511

N C.—Perry v. Seaboard Air Line R Co, 88 S E 156, 171 N C 158, L R. A 1916E 478.

Tex—Rio Grande & E P. Ry Co. v T A Austin & Co, Civ App, 12 S W 2d 1070, reversed on other grounds, Com App, 25 S W.2d 306—Abbott v Tompkins, Civ.App, 283 S W 647—Myers v Texas Land & Development Co, Civ App, 282 S W 919—Burnett v. Riter, Civ App, 276 S W. 347—Fort Worth & D. C Ry Co v Lemons, Civ App, 258 S W 1095—Mistrot-Calahan Co. v. Missouri, K & T Ry Co. of Texas, Civ App, 209 S W 775

Va—Chesapeake & O Ry Co. v. W. C Crenshaw & Co, 138 S E 467, 140 Va 48, 53 A L R 990—Chesapeake & O Ry Co. v. W C Crenshaw & Co, 137 S E. 515, 147 Va. 290—Chesapeake & O Ry Co. v. Timber-Lake, Currie & Co, 137 S. E 507, 147 Va 304.

10 C.J p 109 note 89

"The liability of the carrier is practically that of an insurer of the property"—Chesapeake & O Ry Co. v Osborne, 153 S E 865, 869, 154 Va 477.

Corpus Juris statement has been cited with approval in:

U S.—Inland Waterways Corporation v Hallet & Carey Co., C C A Minn., 52 F 2d 13

Idaho.—Ritchie v. Oregon Short Line R Co, 244 P. 580, 582, 42 Idaho 193, 45 A.L.R 909.

N C.—Morris v American Ry. Express Co, 110 S E 855, 857, 183 N. C. 144—Greene v. Ben Vonde Co., 107 S E 139, 140.

Effect of Interstate Commerce Act

(1) At common law, express company, as common carrier of interstate shipment, is liable as insurer, and such liability is not changed by Interstate Commerce Act and amendments—American Trust Co v. American Railway Exp. Co, D C Ind., 42 F. 2d 272, reversed, C.C A., American Ry. Express Co. v. American Trust Co, 47 F 2d 16, certiorari denied American Trust Co. v American Ry. Express Co, 52 S Ct 13, 284 U.S. 629, 76 L Ed 536.

(2) The provision of § 20 of the Interstate Commerce Act, U.S Comp. St § 8604a, that nothing in the act shall deprive the shipper "of any remedy or right of action, which he has under existing law," means the common law as declared by the federal courts.—Sparr v Southern Pac. Co., 220 Ill App. 172

Qualified insurer

"A common carrier is a qualified insurer of goods intrusted to it for transportation"—St Louis-San Francisco Ry. Co v Bengal Lumber Co, 292 P 52, 145 Okl 124.

Effect of carrier's rule

Railroad company's rule, requiring owners to load and unload freight carried at carload ratings, did not relieve company from liability as insurer for damage to watermelons in transit, rule merely requiring shipper to assume burden or expense of loading and person ultimately receiving property that of unloading—Perkel v Pennsylvania R Co, 265 N Y S 597, 148 Misc. 284.

Accident or mistake

Carrier is liable as insurer for losses by accident or mistake—Franklin v Southern Pac Co, 265 P 936, 203 Cal. 680, 59 A.L R. 118, certiorari denied Southern Pac Co. v Franklin, 49 S Ct. 24, 278 U S. 621, 73 L.Ed 542

33. U S—Philpott v. Davis, C C A. Neb., 291 F 370.

D C—Shapiro v Pennsylvania R. Co., 83 F 2d 581, 65 App D.C. 324.

Ill—Shellabarger Elevator Co. v. Illinois Cent R. Co, 116 N E 170, 278 Ill. 333, L R A 1917E 1011

34. Ariz—Southern Pac. Co. v. Itule, 74 P 2d 38.

Iowa—Buck v. American Railway Express Co, 192 N.W 277, 195 Iowa 1024

Miss.—Baltimore & O. R Co. v. Johl & Bergman, 177 So. 778.

Va.—Chesapeake & O. Ry. Co v. W. C. Crenshaw & Co., 137 S.E. 515, 147 Va 290.

with only the exceptions recognized in the rule as above stated.[35]

It is undoubtedly well settled that at common law a common carrier is bound to deliver the goods that have been entrusted to him, or their value; and he can only justify or excuse a default where a loss occurred by an act of God, by public enemies, the conduct of the shipper, by the inherent nature of the goods, or unless special exemption has been agreed on by contract, the terms of which are not against public policy. This is not strictly speaking a common-law doctrine, for the law that makes a common carrier an insurer, and his engagement to the public a contract of indemnity, is founded on the Praetorian edict of the civil law found in the ninth title of the fourth book of the Pandects.[36] Under the Carmack Amendment, the common-law rule of liability attaches to a carrier, and it is not liable as an insurer.[37]

The general rule as to the carrier's liability is illustrated by cases holding the carrier liable for loss of goods by fire,[38] water,[39] theft or robbery,[40] or other accidental cause,[41] or by negligence or other torts,[42] such as negligence or wrong of the carrier or its agents;[43] and additional care taken by the shipper to guard its property does not in any

35. Ill.—Shellabarger Elevator Co. v. Illinois Cent. R. Co., 116 N.E. 170, 278 Ill. 333, L.R.A.1917E, 1011.
10 C.J. p. 109 note 90.

Constitutional provision as to grain

Under a constitutional provision requiring common carriers on railroads to weigh or measure grain at points where it is shipped and imposing on them responsibility for the delivery of such amount to the owner or consignee thereof at the place of destination, the carrier is not an insurer, but must deliver the full weight of grain unless prevented by act of God, public enemy, or shipper's negligence.—Shellabarger Elevator Co. v. Illinois Cent. R. Co., 116 N.E. 170, 278 Ill. 333, L.R.A.1917E 1011.

36. Ohio.—Thomas v. Baltimore & O. R. Co., 16 Ohio N.P.,N.S., 194.

37. Tex.—Nabors v. Colorado & S. Ry. Co., Civ.App., 210 S.W. 276.

38. Ky.—A. Arnold & Son Transfer & Storage Co. v. Weisiger, 6 S.W. 2d 1084, 224 Ky. 659.
10 C.J. p. 109 note 91, p. 111 note 13 [b] (3).

39. S.C.—Campbell v. Morse, 1 Harp. 468.
Tex.—Philleo v. Sanford, 17 Tex. 227, 67 Am.D. 654.
10 C.J. p. 109 note 92.

40. Mass.—R. J. Reynolds Tobacco Co. v. Boston & M. R. R., 10 N.E. 2d 59.
Miss.—Illinois Cent. R. Co. v. King, 88 So. 322, 125 Miss. 734.
Pa.—Edmunds v. Philadelphia & Reading Railroad Co., 75 Pa. Super. 176
10 C.J. p. 109 note 93.

Liability as bailee

That breaking of car seals was criminal offense did not relieve carrier of degree of care it should have exercised as bailee to prevent theft.—Wood Livestock Co. v. Oregon Short Line R. Co., 298 P. 371, 50 Idaho 524.

41. La.—Brousseau v. Ship Hudson, 11 La.Ann. 427.
Wyo.—Oregon Short Line R. Co. v. Blyth, 118 P. 649, 119 P. 875, 19 Wyo. 410, Ann.Cas.1913E 288.

42. Va.—Manieri v. Seaboard Air Line Ry. Co., 137 S.E. 496, 147 Va. 415.
10 C.J. p. 110 note 95

43. Miss.—Illinois Cent. R. Co. v. King, 88 So. 322, 125 Miss. 734.
Ohio.—Harris v. Stoley, 166 N.E. 428, 31 Ohio App. 533.
Pa.—Caplan v. Ebel, 73 Pa. Super. 601.
Va.—Chesapeake & O. Ry. Co. v. W. C. Crenshaw & Co., 138 S.E. 467, 140 Va. 48, 53 A.L.R. 990.—Chesapeake & O. Ry. Co. v. W. C. Crenshaw & Co., 137 S.E. 515, 147 Va. 290.
10 C.J. p. 110 note 95.

Improper address

Notwithstanding it may be duty of shipper to address package, express agent in addressing it is not shipper's agent, but agent of company, and it would seem that company should be liable for loss resulting from any negligence of such agent in addressing the package.—Wall v. American Ry. Express Co., 272 S.W. 76, 220 Mo.App. 989.

Loss by fire

(1) Carrier, issuing bills of lading on goods received by compress company with which it had contract for preparing cotton for shipment providing that compress company should reimburse carrier for storing and handling, is liable for loss by fire caused by negligence of compress company, which under the contract became the agent of the carrier.—Chas. W. Sheppard Cotton Co. v. New Orleans, M. & C. R. Co., 78 So. 193, 118 Miss. 464.

(2) So, if the servants of both a railway company and a warehouse company, acting within the scope of their authority, entered a freight car for the purpose of preparing automobiles for shipment by draining gasoline therefrom, and undertook to do so with a lighted lantern, negligently brought by them into the car, in close proximity, both companies would be liable for the resulting loss of the automobiles by fire, whether or not the warehouse company had partially or entirely relinquished them to the custody of the railway company, each being liable for the negligence of its own servants.—Train v. Atchison, T. & S. F. Ry. Co., 253 S.W. 497, 214 Mo.App. 354

Negligently inviting shipment

The carrier is liable for loss resulting from negligence in inviting a shipment when it had no facilities to move it promptly.—Missouri & N. A. Ry. Co. v. Potts, 10 S.W.2d 515, 178 Ark. 334.

Unauthorized reconditioning

Carrier unauthorizedly permitting shipment of cotton to be sent to pickery and reconditioned before delivery is liable for injury shipper sustained by reason of loss in weight of cotton in reconditioning process.—Atchison, T. & S. F. Ry. Co. v. Weaver, 47 P.2d 104, 173 Okl. 156.

Free carriage

Where a carrier engaged to carry goods free for its contractor to do repair work to the place where the work was to be done, it was liable for ordinary negligence resulting in injury to the goods, the carriage being for the benefit both of the carrier and the contractor.—Bush v. Beason, 198 S.W. 130, 130 Ark. 569

Railroad as express company's agent

A railroad is the agent of an express company when carrying goods for it, and the express company must respond for the negligence of the railroad in transporting a shipment.—Vernon v. American Ry. Express Co., Mo.App., 222 S.W. 913.

Contract with government

Where defendant, pursuant to a contract with the government, transported merchandise, invoiced to plaintiff and requiring government appraisal, from the pier to the appraisal stores, defendant was liable for the truck driver's negligence under the doctrine of respondeat superior, as defendant was not a pub-

way lessen the burden of care incumbent on the carrier.[44] A carrier should not be required, however, to take precautions to protect goods, which the owner himself deemed unnecessary or undesirable to take.[45] Moreover, an express company is not liable for the conversion by its driver of goods received by him for transportation without directions from it, unless he had real or apparent authority to receive them and contract for their delivery.[46] Where the entire shipment reaches its destination in good condition, the carrier is not negligent, even though the shipper who loaded it misrepresented its contents to the carrier and consignee.[47] Where a carrier of live stock unloaded the stock en route for rest and feed, as required by law, and for that purpose placed them in stockyard pens, the fact that the injured condition of the stock was not discovered until after they were placed in the pens did not render inapplicable the rule that a carrier is an insurer of live stock, except against injury or loss from the act of God, or the public enemy, or from the inherent nature, propensities, or viciousness of the animals themselves.[48]

The carrier cannot escape liability for its own negligence even though the contract of shipment is illegal,[49] but where the action is based wholly on an illegal contract there can be no recovery thereon for the loss or conversion of goods actually received under the contract and actually shipped but lost in shipment or converted, although it has been intimated that, if the contract, while illegal, was not immoral, liability may be established independent of the contract, as by action maintained, not on the illegal contract, but on an implied contract to return the goods or make compensation for property which it has no right to retain.[50] The consignee is not liable for possible negligence or illegal operation of a company transporting the consignee's goods to defendant carrier's terminal as an independent contractor.[51]

Effect of invalid discriminatory contract on shipper's right to recover for loss or injury see infra § 394. Liability of initial carrier for loss on connecting lines see infra § 403. Liability of intermediate and terminal carriers see infra §§ 418–427. Limitation of common-law liability generally see infra §§ 88–117.

Reasons for rule. The strict accountability to which carriers are held at common law for loss or injury to goods received by them for carriage is not founded on contract, but is imposed by law for the protection of the shipper, and exists independently of any special contract, having its foundation in the policy of the law arising out of the hardship which would result to shippers from the adoption of any other rule.[52] The common-law rule is based on a number of considerations which have been enumerated as follows: The public character of the carrier's duties; the inequality in the footing of the carrier and the shipper; the absolute possession and control of the property by the carrier while in course of shipment, and the entire separation of the shipper from his property while in course of transportation and his lack of opportunity to protect it by any efforts of his own; the opportunity of the carrier for embezzlement and for fraudulent collusion with others; and the ordinarily exclusive possession by the carrier of the means of evidence, and the difficulty, if not impossibility, of proving the fraud or negligence by which the goods were lost.[53] In any case, the

lic agent.—Thompson v. P H Keahon, Inc., 197 N.Y.S. 686, 120 Misc. 70.

44. U.S.—Lehigh Valley R. Co. v. State of Russia, C C.A.N Y., 21 F 2d 406, certiorari denied 48 S Ct. 159, 275 U S 571, 72 L.Ed. 432

45. Mich.—Standard Pickle Co v. Pere Marquette Ry. Co, 193 N.W. 300, 222 Mich 639

46. N.Y.—Wolf Thread Co. v. Rosenbusch, 180 N Y.S. 94.

47. Tex.—Lipshitz v Lindsay Nat. Bank, Civ App, 33 S.W.2d 874, error refused.

48. Ky.—Cincinnati, etc., R Co. v. Smith, 159 S.W 987, 155 Ky 481.

49. U.S.—Adams Express Co. v. Darden, C C.A Tenn., 286 F. 61, affirmed 44 S Ct 502, 265 U S. 265, 68 L Ed 1010—Judge v Northern Pac. Ry. Co., C.C.Or., 189 F. 1014.

Tex.—Gulf, C. & S. F. Ry. Co v. Lipshitz, Civ App., 29 S W.2d 905, error refused.

Effect of invalid discriminatory contract on shipper's right to recover for loss or injury see infra § 394

50. Tex.—Payne v. Bassett, Civ. App, 235 S.W. 917.

51. U S.—Lehigh Valley R Co. v. State of Russia, C C A N.Y., 21 F. 2d 396, certiorari denied 48 S.Ct. 159, 275 U S. 571, 72 L Ed. 432.

52. Fla.—Atlantic Coast Line R. Co v. Sandlin, 78 So. 667, 75 Fla 539.
N.C.—Winstead v. East Carolina Ry., 118 S.E 887, 186 N.C. 58.
Va.—Chesapeake & O. Ry Co. v. Osborne, 153 S.E. 865, 154 Va. 477.
10 C J. p 110 note 6.

Public policy

The exceptional liability of a common carrier, in addition to that of an ordinary bailee for hire is imposed by public policy.—Gardiner v. New York Cent, etc, R. Co, 123 N. Y S 865, 139 App Div 17, affirmed 94 N E 876, 201 N Y. 387, 34 L.R A, N S, 826, Ann Cas.1912B 281—Greenwald v. Weir, 115 N.Y S. 311, 130 App.Div. 696, affirmed 99 N E 218, 199 N.Y. 170, 35 L R A.,N S., 971.

53. Del.—Mercer v. Christiana Ferry Co., 155 A. 596, 4 W.W Harr, Super, 490
Ky.—Louisville & N. R. Co. v. Taylor, 205 S.W. 934, 181 Ky. 794.
10 C.J. p 110 notes 7–11.

"The common-law rule, making the carrier an insurer of goods in its hands for transportation, arose from the practical impossibility of shippers proving how the goods were lost. Frauds and collusions were easily practiced but hard to prove. The shipper parted entirely with his possession and control, and the carrier could pretend a robbery or accident, which had not happened"—

whole responsibility and liability of a carrier as an insurer of goods is built on the foundation of a delivery of the goods to the carrier and an express or implied acceptance of them on his part; and the whole theory of liability is based on the custody or right of custody of the goods by the carrier.[54] It has been said that the rule works no real hardship on the carrier, that the price of transportation will include a reasonable premium for this kind of insurance, that the rule being uniform and well understood, the rate of compensation regulates itself, and that the loss, if no fault can be charged anywhere, will be cast, on principles of true public policy, on the party whose diligence and care will be encouraged and stimulated by the risk.[55]

Louisiana doctrine. Under the express provision of the Louisiana civil code, carriers are liable for loss or damage of the things intrusted to their care, unless they can prove that such loss or damage has been occasioned by "accidental and uncontrollable events,"[56] by which, as shown infra § 76, is meant fortuitous events such as those which happen by an irresistible cause or which are caused by superior force which human prudence can neither foresee nor prevent Accordingly, the carrier is liable for a loss to which its negligence or that of its servants or agents contributed,[57] and, since carriers are bound to some vigilance, if a little vigilance and forethought might have prevented the loss the carrier is liable for the amount of the loss.[58] In a few cases, it is said that, under the law of this state, the liability of the carrier is the same as at common law,[59] but decision under an earlier code, which differed in some respects from the present provision, held that a common carrier is not to be held to the same strict liability as under the common law;[60] and under the present code provision, it is held that, while at common law the carrier is considered as in the nature of an insurer for loss by fire, unless it is caused by lightning, the civil law does not go to this extent; but,

Starr v Chicago, B. & Q R. Co., 173 N.W. 682, 683, 103 Neb. 645.

"It would be interesting to trace the development of the common-law liability of a common carrier as insurer, but time and space do not permit this indulgence. It seems certain that the strict liability did not exist in the very early days of the common law, but the ordinary liability of a bailee then prevailed, but when England had become a great commercial nation then the law quickly adapted itself to the changing circumstances. The first liability growing out of a maritime venture seems to have been fixed about 1670 in Mors v Slew, Sr Thos Raymond 220 The reasons for the strict liability of a common carrier were set forth by Chief Justice Holt in Coggs v Bernard, 2 Ld. Raymond 909, as founded on the possibility that 'carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, &c. and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point.' The reasons for the rule suggested by Chief Justice Holt no longer exist in their primitive force and seem to have no application in cases of injury or damage to goods as contrasted with actual loss On the other hand, the tremendous increase in trade and the immense value of goods entrusted to common carriers make more necessary now the preservation of the rule itself. The comments and reasons for the rule suggested by Chief Justice Best in Riley v. Horne, 5 Bing 217 are those now generally adopted as more consonant with modern conditions 'If [goods] should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss His witnesses must be the carrier's servants, and they knowing that they could not be contradicted would excuse their masters and themselves. To give due security to property the law has added to that responsibility of a carrier, which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer' "—Mercer v. Christiana Ferry Co, 155 A 596, 597, 4 W W.Harr, Del Super, 490.

Reason is "well stated" in Corpus Juris, which states, the reason for the rule substantially as it appears in the text herein, according to the court quoting Corpus Juris in Louisville & N. R Co v. Taylor, 205 S W. 934, 181 Ky. 794.

54. Del.—Mercer v. Christiana Ferry Co, 155 A. 596, 4 W.W.Harr, Super., 490.

Dependent on contract

"In every case of an action for damages for breach of contract or breach of duty by a common carrier of freight to carry it safely, whether in assumpsit on the contract, or in tort for breach of duty, the right of action is dependent upon the existence of a contract of carriage between the plaintiff and defendant at the time the alleged cause of action arose (10 C J. § 130, p. 110); which contract, however, need not have been an express contract, but may have arisen from the duty imposed at common law or by statute, state or federal, in which case the contract will be implied in law from the duty imposed by the common law or by statute "—Chesapeake & O. Ry Co. of Indiana v. National Bank of Commerce of Norfolk, 95 S E. 454, 459, 122 Va 471, certiorari denied 38 S Ct. 582, 247 U. S. 519 62 L Ed 1246.

55. N H.—Rixford v Smith, 52 N H 355, 13 Am R 42—Moses v Boston, etc., R. Co, 24 N H. 71, 55 Am.D 222.
10 C J. p 110 note 12.

56. La.—Jennings v. Missouri, Pac. R Co, 134 So 694, 172 La 522—Southern Cotton Oil Co. v New Orleans & N. E. R Co, 83 So 821, 146 La. 541—National Rice Milling Co. v New Orleans & N E. R. Co, 61 So 708, 132 La 615, Ann.Cas 1914D 1099—Noel Bros v Texas & P Ry Co, 133 So 830, 16 La.App. 622—Eatman v. Texas & P Ry Co, 6 La App. 638

57. La.—Southern Cotton Oil Co v New Orleans & N E R. Co, 83 So 821, 146 La 541—National Rice Milling Co v. New Orleans & N. E R Co, 61 So 708, 132 La 615, Ann.Cas 1914D 1099

58. La.—National Rice Milling Co v New Orleans & N E R Co., supra.

59. La.—Pitre v. Offutt, 21 La.Ann 679, 99 Am D. 749
10 C J. p 108 note 82 [a].

60. La.—Hunt v. Norris, 6 Mart. 676, 12 Am D. 489.

on the other hand, it does require the carrier to prove the precise cause of the fire, that it was impossible for human prudence to foresee or to prevent the loss, and that no act of imprudence or negligence is chargeable to the carrier.[61]

Negligence outside contract of carriage. An interstate carrier's tariff provision that corn might be shelled in transit merely permitted the shipper to have the corn shelled en route, but did not obligate the carrier to do the shelling, and a notation that it was to be shelled in transit was no more than a direction how the shipment was to be handled, and not a contract that the carrier would shell it, so that it was not liable for alleged negligence in shelling the corn, the charge for which was added to the scheduled freight charge and deducted from proceeds to the shipper.[62]

§ 72. What Law Governs

Actions for damages to an intrastate shipment are governed by the law of the state in which the shipment was made; but in the case of an interstate shipment the law of the place where the injury occurred governs in the absence of a contrary agreement.

An action against a common carrier for damage of goods shipped, where the shipping contract was executed and fully performed wholly in a particular state, is governed and controlled by the laws and decisions of that state,[63] but in an action for the conversion of goods shipped from one state to another, the law of the place where the tort was committed must control unless the contract otherwise provides.[64] The degree of a carrier's liability for loss or damage to an intrastate shipment is determined by what it would be at common law, in the absence of a contract with reference thereto.[65]

§ 73. To What Classes of Carriers Rule Applicable

The general rule of liability applies to common carriers of all kinds.

The general rule of liability heretofore stated is applicable to common carriers of all kinds and is not confined to any particular class of common carriers,[66] and, accordingly, it has been applied, among others, to a public truckman,[67] expressman,[68] furniture mover,[69] transfer company,[70] and a carrier of cars.[71] If a railroad company hires or charters cars to anyone absolutely, it has been held that the hirer cannot look to the company for damages in case of injury to his property; his remedy for injuries must be on the contract of hire, and on the implied undertaking of the company that the hired cars are substantial and will be duly carried to their point of destination.[72] Where one railroad company actually controls another and operates both as a single system, the dominant company will be liable for injuries due to the negligence of the subsidiary company.[73] Liability of lessor railroad for the negligence of its lessee causing loss in transit of goods and live stock see C.J.S. title Railroads § 355, also 51 C.J. p 1093 notes 68, 69.

The general rule of common-law liability as a common carrier cannot, however, be applied to one who is not in fact a common carrier.[74]

61. La.—Noel Bros. v. Texas & P. Ry. Co., 133 So. 830, 16 La.App. 622.
10 C.J. p 133 note 18.

Fire of unknown cause
A carrier is liable for damage to intrastate shipment of cotton by reason of fire originating from unknown cause—Noel Bros. v Texas & P Ry. Co., 133 So 830, 16 La App. 622.

62. Iowa—Fay v. Chicago, R I & P Ry. Co., 173 N.W. 69, 186 Iowa 573
Care of property while in transit generally see supra §§ 59–66.

63. La.—Noel Bros. v. Texas & P. Ry. Co., 133 So 830, 16 La.App 622
Mo.—Strother v. Atchison, T & S. F Ry. Co., App., 212 S.W 404.
Va.—Chesapeake & O. Ry Co. v. Osborne, 153 S.E. 865, 154 Va. 477

64. Ala.—Ocean S. S. Co. of Savannah v People's Shoe Co., 81 So. 241, 202 Ala 594, conformed to 81 So. 245, 17 Ala.App. 34.

65. Va.—Chesapeake & O Ry. Co v Osborne, 153 S.E. 865, 154 Va 477.

66. Mo.—Daggett v. Shaw, 3 Mo 264, 25 Am.D. 439
10 C.J. p 111 note 13.

67. N.Y.—Sullivan v. Williams, 176 N.Y.S 710, 107 Misc 511.

68. N.Y.—David v. Abramowitz, 256 N.Y.S 15, 143 Misc. 162

69. La.—Flann v House, 123 So 406, 11 La App. 469.
Mass.—Houle v Lewonis, 140 N.E 427, 245 Mass 254

70. Ky.—Merchants' Transfer Co v Kiser, 200 S.W 454, 179 Ky. 324, L.R.A 1918C 658
Mo.—Ford v. Wabash Ry Co., App., 266 S.W. 1032, affirmed 300 S.W. 769, 318 Mo. 723.

71. Mass.—Vermont, etc., R. Co v Fitchburg R Co., 14 Allen 462, 92 Am.D 785.
10 C.J. p 111 note 13 [b].

72. Ga.—East Tennessee, etc., R. Co v. Whittle, 27 Ga. 535, 73 Am.D 741.

73. Okl.—Davis v Alexander, 46 S. Ct. 34, 269 U.S. 114, 70 L.Ed. 186, affirming 220 P 358, 93 Okl. 159.

Shipment over dominant and subsidiary lines
Where cattle in shipment from New Mexico to Oklahoma City, via Texas, were injured partly in New Mexico, partly in Texas, and partly in Oklahoma, it was held that dominant carrier, over whose lines shipment was started in New Mexico, was liable for negligence causing injury to shipment in Texas, where it was shown that carrier over whose lines cattle were transported in Texas was subsidiary of dominant carrier, and controlled and operated by it as part of single system.—Davis v Alexander, 46 S.Ct. 34, 269 U.S. 114, 70 L.Ed 186, affirming 220 P. 358, 93 Okl 159.

74. Mass.—Paine Furniture Co. v. Acme Transfer & Storage Co., 195 N.E 302, 290 Mass 195.
Who are common carriers in general see supra § 3 et seq.

§ 74. Private Carriers

A private carrier is not an insurer but is liable only for negligence.

A private carrier is not an insurer of the safety of the goods intrusted to him for transportation.[75] Where such a carrier makes a special contract for the carriage of goods or one is implied, its liability is governed by the terms of the contract if specially made or, if implied, by the nature of its implication.[76] As a general rule, a private carrier is under the duty of exercising at least ordinary care and diligence to prevent damage to the goods intrusted to him for transportation,[77] and is liable where injury results from his negligence or failure to use that care;[78] but his liability is limited to damage or injury resulting from such causes.[79]

The measure of a private carrier's duty may be affected by the matter of a reward for the service; if it is done without compensation and for the sole benefit of the shipper, the liability is only for gross negligence or bad faith or willful loss; but if it is done for a reward or compensation, the duty is that of ordinary care and diligence; the care required is such as would be suggested by the apparent nature of the shipment, if its true value is not known by the carrier;[80] and if the goods come into the carrier's possession in a way that does not show an attempt to evade the tariff requirements, and the carrier receives them for transportation for a reward, although ignorant of their nature, the carrier must exercise the care of a bailee to prevent their loss or destruction.[81]

§ 75. Excepted Causes Exempting Carrier from Liability

The rule of absolute liability of a common carrier at common law for loss or injury to goods carried is subject to certain exceptions.

The absolute liability of a common carrier for loss or injury to goods received for carriage is subject to certain exceptions. Thus, as shown infra §§ 76–79, in the absence of negligence on the part of the carrier, it is not liable where the damage was caused by the act of God or the public enemy, acts or negligence of the shipper, or where it resulted from the inherent nature or qualities of the goods. As shown infra § 113 a, the carrier is not liable if the injury results from some cause against which it has lawfully contracted. In addition to these common ones, further exceptions to the common-law rule have found recognition in some jurisdictions which exempt the carrier from liability where the loss or injury was occasioned

75. Cal.—Klein v. Baker, 296 P. 631, 112 Cal.App. 157.
Ill.—Beatrice Creamery Co. v. Fisher, 10 N.E.2d 220, 291 Ill.App. 495—Langendorf Clothing Co. v. Fara, 272 Ill.App. 160.
10 C.J. p 38 note 21.
Private carrier defined see supra § 4.

76. Ala.—Alabama Great Southern R. Co. v. Herring, 174 So. 502, 234 Ala. 238.

77. Cal.—W. C. Cook & Co. v. White Truck & Transfer Co., 13 P.2d 549, 124 Cal.App. 721—Klein v. Baker, 296 P. 631, 112 Cal.App. 157.
Ill.—Beatrice Creamery Co. v. Fisher, 10 N.E.2d 220, 291 Ill.App. 495.
10 C.J. p 38 note 21.

Ordinary bailee
Where defendant, pursuant to a contract with the government transported from the pier to the government appraisal stores merchandise invoiced to plaintiff and requiring government appraisal, defendant was an ordinary and not a gratuitous bailee, and as such must exercise ordinary care to deliver the goods in the condition in which they were received.—Thompson v. P. H. Keahon, Inc., 197 N.Y.S. 686, 120 Misc. 70.

78. Cal.—W. C. Cook & Co. v. White Truck & Transfer Co., 13 P.2d 549, 124 Cal.App. 721.

79. Cal.—Klein v. Baker, 296 P. 631, 112 Cal.App. 157.
Ga.—Bloomberg-Michael Furniture Co. v. Urquhart, 143 S.E. 789, 38 Ga.App. 304—Western & A. R. Co. v. Waldrip, 89 S.E. 346, 18 Ga.App. 263.
Ill.—Hinchliffe v. Wenig Teaming Co., 113 N.E. 707, 274 Ill. 417, affirming 194 Ill.App. 627—Beatrice Creamery Co. v. Fisher, 10 N.E.2d 220, 291 Ill.App. 495—Langendorf Clothing Co. v. Fara, 272 Ill.App. 160.
Mass.—Houle v. Lewonis, 140 N.E. 427, 245 Mass. 254.
N.Y.—Pike v. Nash, 3 Abb.Ct.App. Dec. 610, 1 Keyes 335.
10 C.J. p 38 note 20.

Furniture mover, if private carrier, is liable for damage only if due to driver's negligence.—Houle v. Lewonis, 140 N.E. 427, 245 Mass. 254.

Highway robbery
"The evidence clearly shows that the defendants were in the process of transporting the plaintiff's goods in the defendants' truck, when a car containing four armed men forced the defendant De Long and his relief driver to get out of the truck and turn it over to them and took from the person of defendant De Long $50 in money. Two armed men had gotten upon the running boards and forced the occupants to leave the truck and kneel with their faces down upon the rear seat cushion of a sedan, later forced one to go into an adjoining cornfield under armed guard while the other was forced to change a punctured tire, and subsequently, at the northwestern outskirts of Chicago, they were forced to leave the car. They thereupon walked to a farmhouse where they telephoned to the sheriff and the owner about the robbery, and the empty abandoned truck was found and recovered three days later. Can it be said under this uncontradicted state of facts that the defendant and his driver failed to exercise due care for the safety of the cargo in question? The trial court held to the contrary, in which holding on the facts this court concurs"—Beatrice Creamery Co. v. Fisher, 10 N.E.2d 220, 224, 291 Ill.App. 495.

80. Ala.—Alabama Great Southern R. Co. v. Herring, 174 So. 502, 234 Ala. 238.

81. Ala.—Alabama Great Southern R. Co. v. Herring, supra.

Gross negligence
Where a railroad is acting as a gratuitous bailee, as where it is transporting household goods of an employee free of charge, it is liable for damage thereto only in case of gross negligence.—Tennessee A. & G. Ry. Co. v. Hunt, 13 Tenn.App. 590.

by extraordinary occurrences not within its control,[82] acts of the consignee[83] or owner,[84] authority of law,[85] or by acts of the public authority[86] or military forces of the government.[87] The mere declaration of martial law in a district will not, however, relieve a common carrier operating therein of all liability to the shipper, and where a shipment of live stock was appropriated by the military authorities at the request of the carrier, the latter cannot escape liability on the ground that there was a confiscation.[88] That seizure of goods under legal process generally excuses nondelivery is shown infra § 187.

The federal statute, U.S.Comp.St. § 8604a, making interstate carriers liable for loss, damage, or injury to property, it has been held applied only to property lawfully received for transportation, and not to property received for transportation in violation of § 8569 par 7, forbidding the transportation of property unless the rates, fares, and charges have been filed and published.[89]

§ 76. Act of God

A carrier is not liable for loss or injury to goods caused by an act of God.

An act of God is a justification for failure to perform a contract of carriage and relieves a common carrier of the liability for the loss of, or injury to, the goods concerned,[90] and acceptance and retention of freight charges by the carrier does

82. Cal.—American Fruit Distributors of California v. Hines, 203 P. 821, 55 Cal.App. 377.

83. Fla.—Hammers v. Southern Express Co., 85 So. 246, 80 Fla. 51.
Tex.—Mistrot-Calahan Co. v. Missouri K. & T. Ry. Co. of Texas, Civ.App., 209 S.W. 775.

84. D.C.—Shapiro v. Pennsylvania R. Co., 83 F.2d 581, 65 App.D.C 324.
Ky.—Louisville & N. R. Co. v. Crain, 224 S.W. 1063, 189 Ky. 431—Louisville & N. R. Co. v. Hunter, 214 S.W. 914, 185 Ky. 165.
Mo.—Robinson v. Bush, 200 S.W. 757, 199 Mo.App. 184.
Neb.—Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry. Co., 179 N.W. 503, 105 Neb. 151.
Ohio.—St. Louis-San Francisco Ry. Co. v. Glow Electric Co., 172 N.E. 425, 35 Ohio App. 291.
Va.—Chesapeake & O. Ry. Co. v. National Fruit Products Co., 155 S.E. 630, 155 Va. 438, 72 A.L.R. 878—Chesapeake & O. Ry. Co. v. Timber-Lake, Currie & Co., 137 S.E. 507, 147 Va. 304.
10 C.J. p 114 notes 42, 44.

Part owner's breach of faith

Where bill of lading designating plaintiff as consignor and consignee contained notation to stop at point en route to complete loading by plaintiff's associate, and car was delivered to person intended by plaintiff for loading, railroad company was not liable for loss of plaintiff's property taken by the associate. "The damages suffered by the plaintiff in this case are the result of a breach of good faith on the part of its associate in the transaction. The carrier is not liable for damages or loss from a car while the car is stopped in transit, and in the possession of a part owner, and being loaded by the part owner of the property, pursuant to an understanding with the other associate"—Chicago, R. I. & P. Ry. Co. v. Basey, 246 P. 626, 628, 118 Okl. 87.

85. Fla.—Hammers v. Southern Express Co., 85 So. 246, 80 Fla. 51.
Ill.—Sparr v. Southern Pac. Co., 220 Ill.App. 172—Arakelian v. Southern Pac. Co., 220 Ill.App. 160.

Statute may excuse liability—Hines v. Vann, 106 S.E. 921, 26 Ga.App. 704—Heath v. Sandersville R. Co., 98 S.E. 92, 23 Ga.App. 255

86. Ark.—Missouri Pac. R. Co. v. Martindale, 213 S.W. 777, 139 Ark. 143.
Fla.—American Ry. Exp. Co. v. Fegenbush, 144 So. 320, 107 Fla. 145.
Ill.—S. Valentine & Co. v. Atchison, T. & S. F. Ry. Co., 220 Ill.App. 160.
Ky.—Merchants' Transfer Co. v. Kiser, 200 S.W. 454, 179 Ky. 324, L.R.A.1918C 658.
La.—Anderson, Clayton & Co. v. Yazoo & M. V. R. Co., 141 So. 453, 174 La. 762.
N.Y.—Sullivan v. Williams, 176 N.Y.S. 710, 107 Misc. 511.
Vt.—Haglin-Stahr Co. v. Montpelier & W. R. Co., 102 A. 940, 92 Vt. 258.
Va.—Chesapeake & O. Ry. Co. v. Osborne, 153 S.E. 865, 154 Va. 477—Chesapeake & O. Ry. Co. v. W. C. Crenshaw & Co., 138 S.E. 467, 140 Va. 48, 53 A.L.R. 990—Chesapeake & O. Ry. Co. v. W. C. Crenshaw & Co., 137 S.E. 515, 147 Va. 290—Chesapeake & O. Ry. Co. v. Timber-Lake, Currie & Co., 137 S.E. 507, 147 Va. 304.

Collector at port of destination

Where carrier engaged to make shipment in bond under Act June 10, 1880 § 3, U.S.Comp.St. § 5697, whereunder carrier was responsible to United States for safe delivery to collector at port of destination, carrier was not liable to shipper for loss resulting from collector's disregard of instructions given by carrier as received from shipper—Hudson Forwarding & Shipping Co. v. New York Cent. R. Co., 207 N.Y.S. 184, 124 Misc. 156.

87. Tenn.—Nashville, etc., R. Co. v. Estes, 10 Lea 749
10 C.J. p 113 note 38.

88. U.S.—Chicago & E. I. R. Co. v. Collins Produce Co., Ill., 235 F. 857, 149 C.C.A. 169, affirmed 39 S.Ct. 189, 249 U.S. 186, 63 L.Ed. 552

89. Tex.—Payne v. Bassett, Civ.App., 235 S.W. 917.

90. U.S.—The Ansaldo San Giorgio I. v. Rheinstrom Bros. Co., N.Y., 55 S.Ct. 483, 294 U.S. 494, 79 L.Ed. 1016, affirming, C.C.A., The Ansald San Giorgio I, 73 F.2d 40, reversing, D.C., 3 F.Supp. 579, certiorari granted The Ansaldo San Giorgio I. v. Rheinstrom Bros. Co., 55 S.Ct. 217, 293 U.S. 551, 79 L.Ed. 654
Ala.—Atlantic Coast Line Ry. v. Enterprise Cotton Oil Co., 74 So. 232, 199 Ala. 57.
Ariz.—McClure v. Johnson, 69 P.2d 573.
Ark.—American Ry. Express Co. v. H. Rouw Co., 48 S.W.2d 220, 185 Ark. 526—St. Louis-San Francisco Ry. Co. v. Ozark White Lime Co., 9 S.W.2d 17, 177 Ark. 1018—Missouri Pac. R. Co. v. American Fruit Growers, 260 S.W. 39, 163 Ark. 429—Missouri Pac. R. Co. v. Martindale, 213 S.W. 777, 139 Ark. 143
Conn.—Ace-High Dresses v. J. C. Trucking Co., 191 A. 536, 122 Conn. 578.
Del.—Hardesty v. American Ry. Express Co., 119 A. 681, 2 W.W.Harr., Super., 66
D.C.—Shapiro v. Pennsylvania R. Co., 83 F.2d 581, 65 App.D.C 324.
Fla.—American Ry. Exp. Co. v. Fegenbush, 144 So. 320, 107 Fla. 145—Atlantic Coast Line R. Co. v. Wilson & Toomer Fertilizer Co., 104 So. 593, 89 Fla. 224—Hammers v. Southern Express Co., 85 So. 246, 80 Fla. 51—Walton Land & Timber Co. v. Louisville & N. R. Co., 72 So. 485, 72 Fla. 66.
Ga.—Whittier Mills Co. v. Southern Ry. Co., App., 190 S.E. 433—Southern Ry. Co. v. International Vege-

not preclude it from setting up the release of liability for damage to the shipment through an act of God.[91] As shown infra §§ 80–83, however, the rule does not apply if the carrier has been guilty of negligence which brought the property in contact with the destructive force of the actus Dei or unnecessarily exposed it thereto.

There is some difficulty in framing a concise, comprehensive, and accurate definition of the term "act of God" as that term is used and understood when applied to occurrences causing damage for which the carrier is not liable.[92] As thus used, the term means the manifestation of a superhuman power which breaks the chain of causation in the

table Oil Co., 159 S E 773, 43 Ga. App. 489—Central of Georgia Ry. Co. v. Council Bros, 137 S E. 569, 36 Ga App 573—Southern Ry. Co. v. Standard Growers' Exch., 130 S E 373, 34 Ga App 534—Hines v. Vann, 106 S.E. 921, 26 Ga.App. 704—Heath v. Sandersville R. Co, 98 S E 92, 23 Ga.App. 255—Western & A. R. Co. v Waldrip, 89 S E. 346, 18 Ga App 263.

Ill—Hinchliffe v. Wenig Teaming Co., 113 N E 707, 274 Ill 417, affirming 194 Ill App. 627—Beatrice Creamery Co. v. Fisher, 10 N.E 2d 220, 291 Ill App 495—Hartford Live Stock Ins Co v. Railway Express Agency, 274 Ill App 585—Armour Grain Co. v. Davis, 233 Ill. App. 1—Sparr v. Southern Pac. Co., 220 Ill App. 172—Arakelian v. Southern Pac Co., 220 Ill.App. 160—S Valentine & Co v Atchison, T & S. F. Ry. Co., 220 Ill App. 160—Hudson v. Grand Rapids & I. Ry. Co, 203 Ill.App 377.

Ind—Chicago & E Ry. Co. v. Schaff Bros Co, 117 N.E. 869, 74 Ind. App. 227.

Iowa—Dye Produce Co. v Davis, 209 N W. 744, 202 Iowa 1008

Ky.—Hall v. Cumberland Pipe Line Co, 237 S.W. 405, 193 Ky. 728—Louisville & N R. Co v Crain, 224 S.W 1063, 189 Ky. 431—Louisville & N R. Co. v. Hunter, 214 S.W. 914, 185 Ky. 165—Louisville & N. R. Co. v. Taylor, 205 S.W. 934, 181 Ky. 794—Merchants' Transfer Co. v. Kiser, 200 S W. 454, 179 Ky 324, L R A 1918C 658.

La—Anderson, Clayton & Co. v. Yazoo & M. V. R Co, 141 So. 453, 174 La. 762

Me.—Warren v Portland Terminal Co, 116 A 411, 121 Me. 157, 26 A. L R 304—Continental Paper Bag Co. v. Maine Cent R. Co., 99 A. 259, 115 Me. 449

Md.—Atlantic Fruit Co. v. Pennsylvania R. Co, 130 A. 63, 149 Md. 1.

Mich.—Ithaca Roller Mills v Ann Arbor R. Co., 186 N W. 516, 217 Mich. 348.

Minn.—Northwestern Consol Milling Co. v. Chicago, B & Q R Co, 160 N.W 1028, 135 Minn 363, certiorari denied 38 S.Ct. 8, 245 U S. 644, 62 L.Ed 528

Miss—Yazoo & M V. R. R. Co v Craig, 79 So. 102, 118 Miss 299, certiorari denied 39 S.Ct. 11, 248 U. S. 573, 63 L.Ed. 427.

Mo.—Morrow v. Wabash Ry. Co, App, 6 S.W.2d 628—Frawley v Atchison, T & S F. R Co, 299 S W. 93, 220 Mo App 1189—Hurley v. Illinois Cent R Co., 282 S W. 97, 221 Mo App 478—Ford v. Wabash Ry. Co, App., 266 S.W 1032, affirmed 300 S.W. 769, 318 Mo 723—Morrow v. Wabash Ry. Co, 265 S W. 851, 219 Mo App 62—Tri-State Fruit Growers' Ass'n v St. Louis-San Francisco Ry Co., App, 264 S W 445—Sullivan v American Ry Express Co, 245 S.W. 375, 211 Mo App 123—Erisman v Wabash Ry. Co, App., 243 S W. 237—Harrison v Chicago & A. R. Co, 239 S W. 871, 209 Mo App 526—Vernon v. American Ry. Express Co, App., 222 S W 913—Singer v. American Express Co, 219 S W. 662, 203 Mo App. 158, certiorari denied 41 S Ct. 8, 254 U S 632, 65 L Ed 448—Boyd v. St Louis Express Co, App, 211 S.W. 702—Robinson v. Bush, 200 S W. 757, 199 Mo App. 184—Baker v Bush, App, 194 S W 1061—Cudahy Packing Co. v. Atchison, T & S F. Ry. Co, 187 S W 149, 193 Mo.App. 572—Bowles v Quincy, O & K C. R Co, App, 187 S.W. 131.

Neb.—Nye-Schneider-Fowler Co. v. Chicago & N W. Ry Co, 179 N.W. 503, 105 Neb. 151—N. H Nelson & Co v. Chicago & N W. Ry. Co, 167 N.W 574, 102 Neb. 574

N.J—Kassel Poultry Co. v. Pennsylvania R Co, 145 A. 316, 7 N.J. Misc 301.

N Y.—Hadba v. Baltimore & O R. Co, 170 N Y.S. 769, 183 App.Div. 555—Mairs v. Baltimore & O R. Co, 76 N Y S. 838, 73 App Div. 265—Perkel v. Pennsylvania R Co, 265 N Y S 597, 148 Misc 284—Feynman v American Ry. Express Co, 234 N Y.S 727, 134 Misc. 223—O K. Display Fixture Co v. American Ry Exp. Co, 201 N.Y.S. 266, 121 Misc 816—Rezsek v. Southern Pac Co, 181 N.Y S 117, 111 Misc. 180—Sullivan v. Williams, 176 N Y S 710, 107 Misc 511—International Paper Co. v. New York Cent. R. Co., 166 N.Y S. 751, 100 Misc. 683

N.C.—M. V. Moore & Co. v. Southern Ry. Co., 111 S E. 166, 183 N.C 213—Morris v. American Ry. Express Co, 110 S E. 855, 183 N.C. 144—Harris v. Norfolk Southern R. Co, 91 S E. 710, 173 N C. 110—Perry v. Seaboard Air Line R Co., 88 S E. 156, 171 N C 158, L R A.1916E 478.

Ohio—St Louis-San Francisco Ry. Co v. Glow Electric Co., 172 N E. 425, 35 Ohio App 291—Urbana Egg Case Co v Nypano R. Co, 16 Ohio N.P.,N S, 321.

Pa—Dreibelbis & Co. v. Philadelphia & Reading R. Co, 28 Pa Dist. 488.

Tex—Abbott v Tompkins, Civ.App, 283 S W. 647—Panhandle & S. F. Ry Co v. Andrews, Civ App, 278 S W. 478—American Ry Express Co v Home Star Produce Co, Civ. App., 276 S W. 790—Burnett v. Riter, Civ App, 276 S W 347—Bergman Produce Co v American Ry. Express Co., Civ App, 262 S W 891—Mistrot-Calahan Co v. Missouri, K & T Ry Co of Texas, Civ App, 209 S W 775

Vt—Haglin-Stahr Co. v Montpelier & W R Co, 102 A. 940, 92 Vt. 258.

Va.—Chesapeake & O Ry Co v. Osborne, 153 S E 865, 154 Va. 477—Chesapeake & O Ry Co v W C Crenshaw & Co, 138 S.E 467, 148 Va 48, 53 A L R. 990—Chesapeake & O. Ry Co. v W C Crenshaw & Co, 137 S E 515, 147 Va. 290—Chesapeake & O. Ry. Co. v. Timber-Lake, Currie & Co, 137 S E. 507, 147 Va 304—Merchants' & Miners' Transp. Co. v. L J Upton & Co., 103 S E 616, 127 Va. 406.

10 C.J. p 110 note 98, p 111 note 14.

"The authorities are abundant that when loss is proximately caused by an act of God, such as an unprecedented flood, which was not foreseeable, the defendant is not liable, and does not need a stipulation in its contract to that effect to be relieved of such liability, if defendant is not wanting in due care in that connection."—Louisville & N. R. Co. v Finlay, 170 So 207, 208, 233 Ala. 128

"Such defense not only applies where expressly provided in the contract, but may be presented where the contract is silent—as a matter of law."—Fort Worth & D. C Ry Co. v. Lemons, Tex Civ App, 258 S.W. 1095, 1098

Corpus Juris is cited with approval in Lloyds America v. Brooks, Tex. Civ App, 79 S.W.2d 881, 882.

91. Ala—Louisville, etc, R. Co. v. McKenzie, 59 So. 345, 5 Ala. 605.

92. Tex—Gulf, etc., R. Co. v. Texas Star Flour Mills, Civ.App., 143 S. W. 1179.

realm of human activity.[93] It refers to a natural cause,[94] a direct and violent act of nature,[95] and excludes the idea of human agency.[96] Moreover, the act must be of such a character that its effect could not be prevented by the exercise of due diligence on the part of the carrier.[97] It need not, however, be unprecedented.[98]

The terms "inevitable accident" and "unavoidable accident" are sometimes used as synonymous with "act of God,"[99] but they lack the suggestion that the loss is due to other than human agency, and therefore their use is not satisfactory. Indeed, it has been said that "act of God" is distinguishable from "inevitable accident."[1]

Particular occurrences considered. A loss by fire, unless caused by lightning, does not come within the exception of the act of God and is chargeable against a common carrier,[2] even though the fire originated outside of the premises controlled by the carrier, and was not due to any act or fault of the carrier or his servants, but was of such nature that by no human skill or foresight on the part of the carrier or his servants could the loss have been avoided,[3] nor does the fact that an ordinary wind blew the fire on the goods make it such an act of God as will exempt the carrier,[4] although it has been suggested, by way of dictum, that if a storm should arise and drive the fire with resistless fury on the goods placed at a suitable distance from the origin of the fire, the carrier's liability might perhaps be avoided.[5] Where the fire was caused by lightning, however, and the carrier was not guilty of negligence after it was promptly discovered, the carrier is not liable; and this rule applies where the fire originated on adjoining premises of a third person in which were stored, to the carrier's knowledge, goods of a highly inflammable nature.[6]

93. Ind.—Chicago & E. Ry. Co. v. Schaff Bros. Co., 117 N.E. 869, 74 Ind. App. 227

94. Fla.—Atlantic Coast Line R. Co. v. Wilson & Toomer Fertilizer Co., 104 So. 593, 89 Fla. 224
Ga.—Southern Ry. Co. v. Standard Growers' Exch., 130 S.E. 373, 34 Ga.App. 534
N.Y.—Feynman v. American Ry. Express Co., 234 N.Y.S. 727, 134 Misc. 223
Vt.—Porter Screen Mfg. Co. v. Central Vermont Ry. Co., 102 A. 44, 92 Vt. 1
10 C.J. p. 112 notes 17, 20.

95. Va.—Friend v. Woods, 6 Gratt. 189, 47 Va. 189, 52 Am.D. 119

96. Fla.—Atlantic Coast Line R. Co. v. Wilson & Toomer Fertilizer Co., 104 So. 593, 89 Fla. 224.
Ga.—Southern Ry. Co. v. Standard Growers' Exch., 130 S.E. 373, 34 Ga.App. 534
N.Y.—Feynman v. American Ry. Express Co., 234 N.Y.S. 727, 134 Misc. 223
Vt.—Porter Screen Mfg. Co. v. Central Vermont Ry. Co., 102 A. 44, 92 Vt. 1.
10 C.J. p. 112 notes 17, 20

97. Ga.—Southern Ry. Co. v. Standard Growers' Exch., 130 S.E. 373, 34 Ga.App. 534.
Vt.—Porter Screen Mfg. Co. v. Central Vermont Ry. Co., 102 A. 44, 92 Vt. 1.

Other definitions

(1) An act of God, which releases a carrier of goods from its liability for loss, is one resulting from "such forces in nature as could not reasonably have been foreseen and provided against."—Mistrot-Callahan Co. v. Missouri, K. & T. Ry. Co. of Texas, Tex.Civ.App., 209 S.W. 775, 776.

(2) "'An act of God,' as the term is known to the law, is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been anticipated or expected"—Ellerson Floral Co. v. Chesapeake & O. Ry. Co., 141 S.E. 834, 835, 149 Va. 810, quoted in Southern Ry. Co. v. Cohen Weenen & Co., 157 S.E. 563, 564, 156 Va. 313.

(3) "An 'act of God' is defined as 'Inevitable accident without the intervention of man or the public enemy'"—Tobin v. Lake Shore & M. S. Ry. Co., 159 N.W. 389, 192 Mich. 549

(4) "By the act of God, is meant such inevitable accident as cannot be prevented by human care, skill or foresight, but results from natural causes; such as lightning and tempest, floods and inundation, etc."—Klair v. Philadelphia, B. & W. R. Co., Del., 78 A. 1085, 1096, 2 Boyce 274, 302—Hardesty v. American Ry. Express Co., 119 A. 681, 683, 2 W.W. Harr. (Del.) Super., 66
See also Act of God 1 C.J.S. p. 1423 notes 29 et seq.

98. Va.—Southern Ry. Co. v. Cohen Weenen & Co., 157 S.E. 563, 156 Va. 313.
10 C.J. p. 112 note 17 [a].

99. Ga.—Central of Georgia Ry. Co. v. Council Bros., 137 S.E. 569, 570, 36 Ga.App. 573.
10 C.J. p. 112 note 18.
"The act of God means any act produced by physical causes which are inevitable, in other words, unavoidable accidents are the same as the acts of God."—Central of Georgia Ry. Co. v. Council Bros., supra.

1. N.Y.—Merritt v. Earle, 29 N.Y. 115, 86 Am.D. 292.

2. Tex.—American Express Co. v. Duncan, Civ.App., 193 S.W. 411.
10 C.J. p. 112 note 22

Spontaneous combustion

(1) "I have not found any authority which shows that fire, arising from any other cause than lightning, is such an act of God as would excuse a carrier from liability. There is no doubt, however, that spontaneous combustion would be so considered"—Chevallier v. Straham, 2 Tex. 115, 125, 47 Am.D. 639

(2) That the carrier is not liable for loss or injury due solely to spontaneous combustion on the theory that that is a loss resulting from the inherent nature of the property and natural causes is shown infra § 79 a.

3. N.Y.—Miller v. Steam Nav. Co., 10 N.Y. 431, Seld. 64.
Tex.—Chevallier v. Straham, 2 Tex. 115, 47 Am.D. 639.
10 C.J. p. 112 note 22.

4. N.Y.—Parsons v. Monteath, 13 Barb. 353
Tex.—Chevallier v. Straham, 2 Tex. 115, 47 Am.D. 639.
10 C.J. p. 113 note 26 [a] (2)

5. Tex.—Chevallier v. Straham, 2 Tex. 115, 47 Am.D. 639.

6. Ala.—Britton Lumber Co. v. Central of Georgia Ry. Co., 127 So. 824, 221 Ala. 134.

Cotton

That carrier knew cotton was stored in compress adjoining tracks on which carload of plaintiff's lumber was placed, and was aware of other dangerous conditions, was held not to render it liable for damage to lumber by fire communicated from compress when struck by lightning.—Britton Lumber Co. v. Central of Georgia Ry. Co., 127 So. 824, 221 Ala. 134.

A flood of such extraordinary character that it could not have been foreseen or provided against is an act of God, and the carrier is not responsible for loss of goods in his possession resulting therefrom.[7]

Although protection from ordinary weather conditions is a common-law duty of a carrier,[8] a wind and rainstorm of such unusual extent and violence as to be out of the ordinary range of human experience is an "act of God" within the meaning of the principle which ordinarily relieves a common carrier of liability for loss or destruction of goods in such cases.[9] So, where the storm was of unprecedented and unforeseen violence, the carrier is not liable for damages due solely to a hurricane[10] or tornado.[11] Likewise, an electrical storm is an act of God,[12] and so is a snowstorm which blocks up a railway and prevents the moving of trains.[13]

Extraordinary hot weather at a particular time is an act of God exempting the carrier from liability for injury to freight caused thereby,[14] and an unprecedented fall in the temperature which the carrier could not reasonably be expected to foresee, whereby the goods were injured, is an act of God absolving the carrier, in the absence of negligence proximately causing the damage;[15] but freezing weather coming at a season or a time when such weather may be expected is not an act of God,[16] and it has been said that the freezing of fruit is usually, if not always, caused by man's negligence rather than by any act of God.[17] So, the natural tendency of fruit to deteriorate under unfavorable climatic conditions is not an act of God.[18] Where the loss is caused by the breaking of a rail, due to sudden intense cold, the carrier is not responsible, the loss being properly chargeable to an act of God.[19]

Other occurrences which have been held acts of God exempting the carrier from liability are earthquakes[20] and the presence of ice in the harbor where the goods were transshipped.[21] Loss or damage to property in course of transportation through explosion of war munitions, also in transit, is not, however, considered in a legal sense an "act of God,"[22] and neither is insanity of the engineer in charge of, and recklessly running, a train.[23] At common law destruction of goods in transit, by a mob or in consequence of a riot, was not considered a vis major, and, as a general rule, no exemption for recovery could be had therefor.[24]

Under the Louisiana doctrine, stated supra § 71, that the carrier is liable unless it can prove that the loss was occasioned by "accidental and uncontrolla-

7. Ala.—Louisville & N. R. Co. v. Finlay, 170 So. 207.
Ark.—St. Louis-San Francisco Ry. Co. v. Ozark White Lime Co., 9 S.W.2d 17, 177 Ark. 1018.
Ga.—Whittier Mills Co. v. Southern Ry. Co., App., 190 S.E. 433—Southern Ry. Co. v. International Vegetable Oil Co., 159 S.E. 773, 43 Ga. App. 489.
Ill.—Dean v. Belt Ry. Co. of Chicago, 210 Ill.App. 220—See Ohio Salt Co. v. Baltimore & O. R. Co., 204 Ill. App. 376.
Ind.—Chicago & E. Ry. Co. v. Schaff Bros. Co., 117 N.E. 869, 74 Ind. App. 227.
Mich.—Ithaca Roller Mills v. Ann Arbor R. Co., 186 N.W. 516, 217 Mich. 348.
Mo.—Ford v. Wabash Ry. Co., App., 266 S.W. 1032, affirmed 300 S.W. 769, 318 Mo. 723.
N.Y.—Hadba v. Baltimore & O. R. Co., 170 N.Y.S. 769, 183 App.Div. 555—O. K. Display Fixture Co. v. American Ry. Exp. Co., 201 N.Y.S. 266, 121 Misc. 816—International Paper Co. v. New York Cent. R. Co., 166 N.Y.S. 751, 100 Misc. 683.
Ohio.—Urbana Egg Case Co. v. Nypano R. Co., 16 Ohio N.P.,N.S., 321.
Tex.—Bergman Produce Co. v. American Ry. Express Co., Civ.App., 262 S.W. 891.
Vt.—Porter Screen Mfg. Co. v. Central Vermont Ry. Co., 102 A. 44, 92 Vt. 1.
10 C.J. p. 112 note 23.

Want of negligence.
A carrier is not liable for damage to shipment of sugar which was proximate result of unprecedented flood whose danger carrier was not negligent in not foreseeing and in not avoiding after it became apparent.—Louisville & N. R. Co. v. Finlay, La., 170 So. 207.

8. Tex.—Abbott v. Tompkins, Tex.Civ.App., 283 S.W. 647.
9. N.C.—Harris v. Norfolk Southern R. Co., 91 S.E. 710, 173 N.C. 110.
10. Tex.—Wells Fargo & Co. v. Porter, Civ.App., 202 S.W. 987.
11. Tex.—Gulf, etc., R. Co. v. Compton, Civ.App., 38 S.W. 220.
10 C.J. p. 113 note 26 [a] (1).
12. Ky.—Southern R. Co. v. Smith, 102 S.W. 232, 125 Ky. 656, 31 Ky. L. 243.
13. Neb.—Ward v. Chicago, etc., R. Co., 137 N.W. 995, 92 Neb. 183—Black v. Chicago, etc., R. Co., 46 N.W. 428, 30 Neb. 197.
10 C.J. p. 112 note 24.
14. Mo.—Vernon v. American Ry. Express Co., App., 222 S.W. 913.
15. N.Y.—Rezsek v. Southern Pac. Co., 181 N.Y.S. 117, 111 Misc. 180.
10 C.J. p. 113 note 29.
16. Mich.—Bernstein v. Illinois Cent. R. Co., 208 N.W. 679, 234 Mich. 614.
10 C.J. p. 113 note 28, p. 122 note 36 [a] (1), (3).

This statement in Corpus Juris is quoted with approval in Bernstein v. Illinois Cent. R. Co., 208 N.W. 679, 681, 234 Mich. 614.

17. Ohio.—Louisville & Cincinnati Packet Co. v. Long, 14 Ohio Cir.Ct., N.S., 225.
18. Minn.—Fockens v. U. S. Express Co., 109 N.W. 834, 99 Minn. 404.
19. N.Y.—McPadden v. New York Cent. R. Co., 44 N.Y. 478, 4 Am.R. 705.
10 C.J. p. 113 note 30.
20. S.C.—Slater v. South Carolina R. Co., 6 S.E. 936, 29 S.C. 96.
21. Md.—Atlantic Fruit Co. v. Pennsylvania R. Co., 130 A. 63, 149 Md. 1.
22. U.S.—John Lysaght, Limited, v. Lehigh Valley R. Co., C.C.A.N.Y., 254 F. 351, affirmed Lehigh Valley R. Co. v. John Lysaght, Limited, 271 F. 906, certiorari denied 41 S.Ct. 625, 256 U.S. 704, 65 L.Ed. 1180, and error dismissed 42 S.Ct. 53, 257 U.S. 613, 66 L.Ed. 397.
23. Ga.—Central of Georgia R. Co. v. Hall, 52 S.E. 679, 124 Ga. 322, 110 Am.S.R. 170, 4 L.R.A.,N.S., 898, 4 Ann.Cas. 128.
24. Ky.—Julius Kessler & Co. v. Southern Ry. Co. in Kentucky, 255 S.W. 535, 200 Ky. 713.
10 C.J. p. 113 note 39.

ble events," the quoted term means fortuitous events such as those which happen by an irresistible cause or which are caused by superior force which human prudence can neither foresee nor prevent,[25] and does not cover a fire of unknown cause.[26]

§ 77. Act of the Public Enemy

A common carrier is not liable for loss caused by act of the public enemy.

Inasmuch as such act puts it out of its power to do that which it had agreed to do,[27] destruction or conversion by the public enemy is universally mentioned as within the exceptions to the carrier's liability.[28] The term "public enemy" includes the military forces of a nation at war with the domestic

25. La.—Dejean v. Louisiana Western R. Co., 118 So. 822, 167 La. 111—Noel Bros. v. Texas & P. Ry. Co., 133 So. 830, 16 La.App. 622.

26. La.—Noel Bros. v. Texas & P. Ry. Co., 130 So. 830, 16 La.App. 622

Fire caused by match or spark

Destruction of cotton by fire, started either by a match or a small piece of metal which caused a spark to develop in ginning the cotton, was held not result of "fortuitous event or irresistible force," for which carrier could avoid liability.—Dejean v. Louisiana Western R. Co., 118 So. 822, 167 La. 111.

27. N.Y.—Spaids v. New York Mail SS. Co., 3 Daly 139.

28. U.S.—The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., N.Y., 55 S.Ct. 483, 294 U.S. 494, 79 L.Ed. 1016, affirming, C.C.A., The Ansaldo San Giorgio I, 73 F.2d 40, reversing, D.C., 3 F.Supp. 579, certiorari granted The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., 55 S.Ct. 217, 293 U.S. 551, 79 L.Ed. 654

Ala.—Atlantic Coast Line Ry. v. Enterprise Cotton Oil Co., 74 So. 232, 199 Ala. 57.

Ariz.—McClure v. Johnson, 69 P.2d 573.

Ark.—American Ry. Express Co. v. H. Rouw Co., 48 S.W.2d 220, 185 Ark. 526—Missouri Pac. R. Co. v. American Fruit Growers, 260 S.W. 39, 163 Ark. 429—Missouri Pac. R. Co. v. Martindale, 213 S.W. 777, 139 Ark. 143.

Conn.—Ace-High Dresses v. J. C. Trucking Co., 191 A. 536, 122 Conn. 578.

Del.—Hardesty v. American Ry. Express Co., 119 A. 681, 2 W.W.Harr., Super., 66.

D.C.—Shapiro v. Pennsylvania R. Co., 83 F.2d 581, 65 App.D.C. 324.

Fla.—American Ry. Exp. Co. v. Fegenbush, 144 So. 320, 107 Fla. 145—Atlantic Coast Line R. Co. v. Wilson & Toomer Fertilizer Co., 104 So. 593, 89 Fla. 224—Hammers v. Southern Express Co., 85 So. 246, 80 Fla. 51—Walton Land & Timber Co. v. Louisville & N. R. Co., 72 So. 485, 72 Fla. 66.

Ga.—Southern Ry. Co. v. Standard Growers' Exch., 130 S.E. 373, 34 Ga.App. 534—Hines v. Vann, 106 S.E. 921, 26 Ga.App. 704—Heath v. Sandersville R. Co., 98 S.E. 92, 23 Ga.App. 255—Western & A. R. Co. v. Waldrip, 89 S.E. 346, 18 Ga.App. 263.

Ill.—Hinchliffe v. Wenig Teaming Co., 113 N.E. 707, 274 Ill. 417, affirming 194 Ill.App. 627—Beatrice Creamery Co. v. Fisher, 10 N.E.2d 220, 291 Ill.App. 495—Hartford Live Stock Ins. Co. v. Railway Express Agency, 274 Ill.App. 585—Armour Grain Co. v. Davis, 233 Ill. App. 1—Sparr v. Southern Pac. Co., 220 Ill.App. 172—Arakelian v. Southern Pac. Co., 220 Ill.App. 160—S. Valentine & Co. v. Atchison, T. & S. F. Ry. Co., 220 Ill.App. 160—Hudson v. Grand Rapids & I. Ry. Co., 203 Ill.App. 377.

Iowa.—Dye Produce Co. v. Davis, 209 N.W. 744, 202 Iowa 1008.

Ky.—Hall v. Cumberland Pipe Line Co., 237 S.W. 405, 193 Ky. 728—Louisville & N. R. Co. v. Crain, 224 S.W. 1063, 189 Ky. 431—Louisville & N. R. Co. v. Hunter, 214 S.W. 914, 185 Ky. 165—Louisville & N.R. Co. v. Taylor, 205 S.W. 934, 181 Ky. 794—Merchants' Transfer Co. v. Kiser, 200 S.W. 454, 179 Ky. 324, L.R.A.1918C 658.

La.—Anderson, Clayton & Co. v. Yazoo & M. V. R. Co., 141 So. 453, 174 La. 762

Me.—Warren v. Portland Terminal Co., 116 A. 411, 121 Me. 157, 26 A.L.R. 304

Mich.—Ithaca Roller Mills v. Ann Arbor R. Co., 186 N.W. 516, 217 Mich. 348.

Miss.—Yazoo & M. V. R. R. Co. v. Craig, 79 So. 102, 118 Miss. 299, certiorari denied 39 S.Ct. 11, 248 U.S. 573, 63 L.Ed. 427

Mo.—Morrow v. Wabash Ry. Co., App., 6 S.W.2d 628—Frawley v. Atchison, T. & S. F. R. Co., 299 S.W. 93, 220 Mo.App. 1189—Hurley v. Illinois Cent. R. Co., 282 S.W. 97, 221 Mo.App. 478—Morrow v. Wabash Ry. Co., 265 S.W. 851, 219 Mo.App. 62—Tri-State Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co., App., 264 S.W. 445—Sullivan v. American Ry. Express Co., 245 S.W. 375, 211 Mo.App. 123—Erisman v. Wabash Ry. Co., App., 243 S.W. 237—Vernon v. American Ry. Express Co., App., 222 S.W. 913—Singer v. American Express Co., 219 S.W. 662, 203 Mo. App. 158, certiorari denied 41 S.Ct. 8, 254 U.S. 632, 65 L.Ed. 448—Boyd v. St. Louis Express Co., App., 211 S.W. 702—Robinson v. Bush, 200 S.W. 757, 199 Mo.App. 184—Baker v. Bush, App., 194 S.W. 1061—Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co., 187 S.W. 149, 193 Mo. App. 572—Bowles v. Quincy O. & K. C. R. Co., App., 187 S.W. 131

Neb.—Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry. Co., 179 N.W. 503, 105 Neb. 151—N. H. Nelson & Co. v. Chicago & N. W. Ry. Co., 167 N.W. 574, 102 Neb. 439.

N.J.—Kassel Poultry Co. v. Pennsylvania R. Co., 145 A. 316, 7 N.J.Misc. 301.

N.Y.—Mairs v. Baltimore & O. R. Co., 76 N.Y.S. 838, 73 App.Div. 265—Perkel v. Pennsylvania R. Co., 255 N.Y.S. 597, 143 Misc. 284—Feynman v. American Ry. Express Co., 234 N.Y.S. 727, 134 Misc. 223—Sullivan v. Williams, 176 N.Y.S. 710, 107 Misc. 511.

N.C.—Morris v. American Ry. Express Co., 110 S.E. 855, 183 N.C. 144—Perry v. Seaboard Air Line R. Co., 88 S.E. 156, 171 N.C. 158, L.R.A.1916E 478

Ohio.—St. Louis-San Francisco Ry. Co. v. Glow Electric Co., 172 N.E. 425, 35 Ohio App. 291.

Pa.—Dreibelbis & Co. v. Philadelphia & Reading R. Co., 28 Pa.Dist. 488

Tex.—Abbott v. Tompkins, Civ.App., 283 S.W. 647—Panhandle & S. F. Ry. Co. v. Andrews, Civ.App., 278 S.W. 478—Burnett v. Riter, Civ.App., 276 S.W. 347—Fort Worth & D. C. Ry. Co. v. Lemons, Civ.App., 258 S.W. 1095—Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 209 S.W. 775.

Vt.—Harlin-Stahr Co. v. Montpelier & W. R. R. Co., 102 A. 940, 92 Vt. 258

Va.—Chesapeake & O. Ry. Co. v. Osborne, 153 S.E. 865, 154 Va. 477—Chesapeake & O. Ry. Co. v. W. C. Crenshaw & Co., 138 S.E. 467, 148 Va. 48, 53 A.L.R. 990—Chesapeake & O. Ry. Co. v. W. C. Crenshaw & Co., 137 S.E. 515, 147 Va. 290—Chesapeake & O. Ry. Co. v. Timber-Lake, Currie & Co., 137 S.E. 507, 147 Va. 304

10 C.J. p. 110 note 98, p. 113 note 34.

Duty of government

"The government itself, is called upon to protect its subjects from loss from such a hazard; as private citizens have not the power to furnish the security and protection required."—Thomas v. Boston, etc.,

government,[29] but, as shown supra § 75, the question of the liability of a railroad company for loss of goods, due to seizure by the military power of the domestic government, depends on other principles. Bodies of men not organized and operating as a military force against the government do not come within the description of "public enemy";[30] and, in the absence of a valid contract exempting it from liability in such case, the common carrier is liable for a loss due to depredations or acts of violence of such bodies of men as mobs or rioters,[31] or strikers,[32] even though the carrier was not negligent.[33]

§ 78. Acts or Negligence of Shipper

a. In general
b. Concealment of nature or value
c. Improper packing
d. Misdirection

a. In General

A carrier is not liable for injuries resulting from the negligence or wrongful act of the shipper.

The carrier is not liable for loss of the goods due to the negligent or wrongful act of the shipper,[34] to the disregard of a known rule of the carrier

R. Corp, 10 Metc.,Mass., 472, 476, 43 Am.D. 444.

29. Ohio.—St. Louis-San Francisco Ry. Co. v Glow Electric Co, 172 N.E. 425, 35 Ohio App. 291.
10 C.J. p 113 note 34.
Pirates as enemies of the human race see C.J.S. title Piracy § 2, also 48 C.J. p 1308 note 45.
Public enemy defined generally see C.J.S. title Enemy, also 50 C.J. p 853 notes 43–45.

30. W.Va.—Hutchinson v. United States Exp. Co, 59 S.E. 949, 63 W.Va. 128, 14 L.R.A.,N.S., 393.
10 C.J. p 114 note 40.

31. Ill.—Shapleigh Hardware Co. v Southern Ry. Co, 222 Ill.App 360.
La.—Japhet & Co v. Southern Ry. Co., 8 La.App 706.
10 C.J. p 113 note 39.
Mob defined see C.J.S. title Mob, also 40 C.J. p 1231 note 80–p 1232 note 2.
Rioter defined see C.J.S. title Riot § 15, also 54 C.J. p 834 note 82.

32. Ark.—Missouri Pac. R. Co. v. Nevill, 30 S.W. 425, 60 Ark. 375, 46 Am.S.R. 208, 28 L.R.A. 80.
10 C.J. p 113 note 39
Inability to move goods
Where barge in which potatoes had been shipped to railroad's wharf sank after railroad had accepted potatoes for shipment, but before the potatoes had been removed from the barge, the fact that the railroad did not have facilities wherewith to unload the potatoes because of labor troubles or strikes on the wharf was no defense in shipper's action against railroad for loss of the potatoes.—American Fruit Growers v. King, 114 S.E. 861, 122 S.C. 69

33. Ill.—Shapleigh Hardware Co v Southern Ry. Co., 222 Ill.App 360

34. U.S.—Lehigh Valley R. Co v. State of Russia, C.C.A.N.Y., 21 F.2d 406, certiorari denied 48 S.Ct 159, 275 U.S. 571, 72 L.Ed 432—S. B. Locke & Co. v St Louis-San Francisco Ry. Co., C.C.A.Mo, 284 F. 46—Alabama Great Southern R. Co. v. Morris & Co., 249 F. 312, 161 C.C.A. 320—Alabama & V. Ry. Co v. American Cotton Oil Co, 249 F. 308, 161 C.C.A. 316.
Ala.—Atlantic Coast Line Ry v. Enterprise Cotton Oil Co, 74 So. 232, 199 Ala. 57.
Ark.—Missouri Pac R. Co v. Martindale, 213 S.W. 777, 139 Ark. 143.
Conn.—Cassone v. New York, N.H. & H. R. Co., 123 A. 280, 100 Conn 262.
D.C.—Shapiro v. Pennsylvania R. Co, 83 F.2d 581, 65 App.D.C 324.
Fla.—American Ry. Exp. Co. v. Fegenbush, 144 So. 320, 107 Fla 145.
Ga.—Hines v. Vann, 106 S.E. 921, 26 Ga.App. 704—Heath v. Sandersville R. Co, 98 S.E. 92, 23 Ga.App 255
Ill.—S. Valentine & Co v. Atchison, T. & S.F. Ry. Co, 220 Ill.App 188—Sparr v. Southern Pac. Co, 220 Ill.App. 172—Arakelian v. Southern Pac Co, 220 Ill.App 160—See Eustrom v. Northern Pac Ry Co, 208 Ill.App. 267.
Iowa.—Wiersma v. Chicago & N.W. Ry Co, 238 N.W. 579, 213 Iowa 223.
Ky.—Louisville & N.R. Co v. Taylor, 205 S.W. 934, 181 Ky 794—Merchants' Transfer Co v Kiser, 200 S.W. 454, 179 Ky 324, L.R.A. 1918C 658
La.—Anderson, Clayton & Co v. Yazoo & M.V.R. Co, 141 So 453, 174 La. 762
Me.—Warren v. Portland Terminal Co, 116 A. 411, 121 Me. 157, 26 A.L.R. 304.
Md.—Atlantic Fruit Co v. Pennsylvania R. Co, 130 A. 63, 149 Md. 1.
Mass.—Emery & Co. v Boston & M.R.R., 120 N.E. 106, 230 Mass 463
Mo.—Morrow v Wabash Ry Co., App, 6 S.W.2d 628—Hurley v. Illinois Cent R. Co, 282 S.W. 97, 221 Mo.App 478—Tri-State Fruit Growers' Ass'n v. St Louis-San Francisco Ry Co, App, 264 S.W. 445—Schreiber Milling & Grain Co. v. Chicago Great Western R. Co., App, 246 S.W. 647—Sullivan v American Ry. Express Co, 245 S.W. 375, 211 Mo.App. 123—Erisman v. Wabash Ry. Co., App, 243 S.W. 237—Clemons Produce Co v Denver & R.G.R.R, 219 S.W. 660, 203 Mo.App 100—Robinson v. Bush, 200 S.W. 757, 199 Mo.App. 184—Baker v. Bush, App., 194 S.W. 1061.
Mont.—Kirby v. Oregon Short Line R. Co, 197 P. 254, 59 Mont. 425
Neb.—Dolan Fruit Co v. Davis, 196 N.W. 168, 111 Neb. 322, 32 A.L.R. 107.
N.J.—Kassel Poultry Co v. Pennsylvania R. Co, 145 A. 316, 7 N.J.Misc. 301.
N.Y.—Sullivan v. Williams, 176 N.Y.S. 710, 107 Misc. 511
N.C.—M. V. Moore & Co. v Southern Ry. Co, 111 S.E. 166, 183 N.C. 213—Morris v American Ry Express Co, 110 S.E. 855, 183 N.C. 144—Perry v. Seaboard Air Line R. Co, 88 S.E. 156, 171 N.C. 158, L.R.A. 1916E 478
Ohio.—Fean v. Alabama Great Southern R. Co, 159 N.E. 487, 26 Ohio App 96.
Okl.—Schaff v Richardson, 250 P. 133, 119 Okl. 160
Pa.—Bell Telephone Co. v American Ry. Express Co., 92 Pa.Super. 180—Dreibelbis & Co. v. Philadelphia & Reading R. Co., 28 Pa.Dist 488.
Tenn.—Model Mill Co v. Carolina, C. & O. Ry. Co., 188 S.W. 936, 136 Tenn 211.
Tex.—Texas & N.O.R. Co. v. Wolfson, Civ.App, 23 S.W.2d 455, error dismissed—Rio Grande & E.P. Ry Co. v. T. A. Austin & Co, Civ.App, 12 S.W.2d 1070, reversed on other grounds, Com.App., 25 S.W.2d 306—Abbott v. Tompkins, Civ.App, 283 S.W. 647—Burnett v. Riter, Civ.App, 276 S.W. 347—Wichita Valley Ry Co. v. Turbeville, Civ.App, 269 S.W. 498—St Louis Southwestern Ry. Co. of Texas v. Brown & Co, Civ.App, 248 S.W. 97—Galveston, H. & S.A. Ry. Co v. Crowley, Civ.App, 214 S.W. 721—Kansas City, M. & O. Ry Co. of Texas v Weatherby, Civ.App., 203 S.W. 793—Gulf, C. & S.F. Ry. Co. v. Persky, Civ.App., 200 S.W. 606.
Vt.—Saliba v. New York Cent. R. Co., 144 A. 194, 101 Vt. 427—Harlin-Stahr Co. v. Montpelier & W.R.R. Co., 102 A. 940, 92 Vt. 258.

which is reasonable and adopted for the mutual interests of the carrier and shipper,[35] or to a violation of the rules made by the interstate commerce commission.[36] The shipper's failure to mark a portion of the freight shipped as required by regulations does not, however, relieve the carrier from liability for loss of the portion properly marked.[37] As shown infra § 198, in an action for delay, the carrier cannot be held accountable for injury resulting from a delay due to the act or fault of the shipper.

In general, aside from considerations affecting connecting carriers which are discussed infra §§ 400–450, a carrier is responsible for the safe carriage of goods only when it has exclusive possession and control thereof.[38] Accordingly, if a shipper accompanies the consignment and undertakes to perform certain duties of the carrier, that fact becomes a material consideration in determining the liability of the carrier;[39] and the carrier is not liable for any injury or loss that may occur through the act of such shipper or through any agency that is under his exclusive control,[40] this rule having been frequently applied, as shown supra § 64, in case of shipment of animals where the shipper accompanies them, by arrangement with the carrier, for the purpose of giving them necessary care If the shipper accompanies his stock and assumes to give them personal care during transportation, he must perform his duty with reasonable diligence;[41] nor is the carrier liable for injuries to a shipment occasioned by improper interference of the owner with the carrier's management of the transportation.[42]

If the carrier follows the directions of the shipper or his agent as to method of transportation, and loss or injury results therefrom, the carrier will not be liable,[43] unless because of an unreasonable delay

Va.—Chesapeake & O. Ry. Co. v. National Fruit Products Co, 155 S.E. 630, 155 Va 438, 72 A.L.R. 878—Chesapeake & O. Ry. Co. v. Osborne, 153 S.E. 865, 154 Va. 477—Chesapeake & O. Ry Co. v. W C. Crenshaw & Co, 138 S E 467, 148 Va. 48, 53 A L R 990—Chesapeake & O. Ry Co v. W. C Crenshaw & Co, 137 S E. 515, 147 Va. 290.

10 C J. p 110 note 98, p 114 note 45.

"The common carrier is not liable where the loss is caused by the shipper's act, whether that act be one of negligence, or misadventure, or misfortune."—American Lead Pencil Co. v. Nashville, C. & St. L Ry., 134 S W. 613, 617, 124 Tenn 57, 32 L.R.A.,N.S., 323, quoted in Model Mill Co v Carolina, C. & O Ry Co, 188 S W. 936, 939, 136 Tenn. 211.

Negligence not imputable to defendant

Consequences to car of fish from consignee's failure to provide sufficient ice are not imputable to carrier, nor can he recover where his own negligence is as much cause of loss as that of carrier.—Emery & Co v Boston & M. R. R, 120 N E. 106, 230 Mass. 463.

Acts not constituting negligence

(1) The act of a shipper in shipping fruit during freezing weather, even though he did not ask the carrier to heat the cars while in transit—Jennings v Baltimore & O R Co, 194 Ill App. 358

(2) The act of shipping cattle which were in a weak and impoverished condition before shipment due to the lack of food and water which could only be obtained by shipping them elsewhere—Hartford Fire Ins Co. v Galveston, H. & S. A. Ry Co., Tex Com App., 239 S W. 919, reversing Galveston, H & S A. Ry. Co. v. Hartford Fire Ins. Co., Civ.App., 220 S.W. 781.

(3) In an action by a shipper of mules which ate off one another's tails and manes, the animals being confined for more than forty hours without food, etc, the failure of the shipper to place chemicals on the animals' manes and tails, there being no such universal practice as to make it a custom and the carrier not requiring such treatment.—Hines v. Morgan, 218 S.W. 672, 142 Ark. 272.

(4) Failure of shipper to minimize damages to cattle—Texas & P Ry Co. v Bryan, Tex.Civ.App., 15 S W.2d 1098.

(5) Other acts not constituting negligence—See Albright v. Illinois Cent. R. Co., 211 Ill App. 134.

10 C J. p 114 note 45 [b].

35. Pa.—Bell Telephone Co. v. American Ry. Express Co, 92 Pa. Super. 180.

10 C.J. p 114 note 45.

36. **Rule not violated**

Since rule of the interstate commerce commission providing that burnt cotton, which is cotton that has been on fire, and which has not been subsequently repicked and rebaled, must not be offered for shipment until it has been reconditioned, or until not less than five days have elapsed since the last evidence of fire therein, does not forbid shipment of cotton which had been part of a larger mass that had been on fire after five days elapsed, merely because there was fire in other cotton about two hundred yards distant at the time of the shipment, as discussed in § 19, the carrier cannot escape liability for the loss of the cotton by fire during transit, on the ground that the shipper was negligent in loading the cotton while still containing fire—Southern Ry. Co v. Pettit, Tenn, 257 F. 663, 168 C.C.A. 613, certiorari denied 39 S.Ct. 290, 249 U S 607, 63 L Ed 799.

37. Pa.—Grammes v Central R Co. of New Jersey, 112 A 532, 269 Pa. 466.

38. Ohio.—Louisville & N. R. Co. v. Riley, 160 N E 730, 27 Ohio App. 188

39. Iowa.—Gibson v. Adams Express Co, 175 N.W. 331, 187 Iowa 1259.

40. Md.—Atlantic Fruit Co. v. Pennsylvania R. Co, 130 A 63, 149 Md. 1.

Neb.—Dolan Fruit Co v. Davis, 196 N.W. 168, 111 Neb. 322, 32 A.L.R. 107.

10 C J. p 115 note 49.

This statement in Corpus Juris was quoted with approval in Atlantic Fruit Co. v. Pennsylvania R. Co., 130 A 63, 65, 149 Md. 1.

41. Iowa.—Blair v. Wells, 135 N.W. 615, 155 Iowa 190

Wis.—Chamson v. American Ry. Express Co, 189 N W. 529, 178 Wis. 286

10 C J. p 101 note 11.

42. Minn.—Hutchinson v. Chicago, etc., R. Co, 35 N W. 433, 37 Minn. 524

10 C J p 115 note 52.

43. Conn.—Cassone v New York, N H. & H R Co., 123 A. 280, 100 Conn. 262.

Tex.—Gulf, C & S. F. Ry Co v. Persky, Civ.App, 200 S W 606.

10 C J. p 115 note 54, p 122 note 36 [a] (4).

Unrefrigerated car

Where the shipper of grapes contracted for transportation in a dry car without ice, relying on ventilation to protect the fruit, he cannot make that choice and then insist

in transportation it becomes the carrier's duty to disregard the instruction and to take such precautions for the preservation of the goods as are rendered necessary by such delay.[44] Negligence in loading or unloading see supra §§ 67–70.

One delivering an automobile to a warehouse company for shipment may sue the railway company, to which it delivers the car, for loss thereof by fire after being loaded on a freight car, although the warehouse company was his agent, instead of bailee, as between him and the railway company, and the bill of lading was in the warehouse company's name, the contract being for his benefit; but he cannot recover if the loss was caused by the negligence of such agent, unless the railway company also was negligent.[45]

b. Concealment of Nature or Value

Subject to some limitations and exceptions, the general rule is that concealment by the shipper of the nature or value of the goods shipped relieves the carrier from liability. Whether a fraud has been committed depends on the circumstances of the case. Silence as well as untruthful statements may constitute fraud.

Where the shipper either by his acts or his omissions fraudulently conceals the nature or the value of the goods shipped, the effect of such conduct is to relieve the carrier from its liability as insurer;[46] but the decisions are not in entire harmony in respect of the extent of the carrier's liability under the circumstances. Thus, it has either been held or said in a number of decisions in which the goods shipped were money, jewelry, or other valuables so concealed as to hide their value and mislead the carrier, that the latter is discharged absolutely from any liability for loss or injury to such property;[47] and this rule is particularly applicable if the loss is due to the carrier's omission of such precautions as were necessary to the safe transportation and delivery of the goods, superinduced by the shipper's fraudulent conduct.[48] It is immaterial, as respects the carrier's liability, whether the deception resulted from premeditation or from inadvertence on the part of the shipper;[49] the intention to impose on the carrier is not important—it is enough if such is the practical effect of the conduct of the shipper.[50] However, the shipper's conduct will not operate to bar a recovery for loss of the less valuable goods in which the jewelry or money or other valuables were concealed,[51] and the weight of authority holds in respect of fraudulent concealment as to goods other than money, jewels, and other valuables, that even though the shipper is guilty of misrepresentation, intentional or otherwise, he would, nevertheless, be entitled to recover the apparent value of the goods according to the representations made,[52] but nothing beyond this,[53] and this rule is not affected by a statute regulating interstate commerce, which statute prohibits a shipper from obtaining the transportation of property at less than the regular rates established and in force by fraudulent representations as to value, and making such fraud a misdemeanor and imposing a penalty therefor.[54] Failure to give notice that the contents of a package are perishable or easily broken relieves the carrier from liability for the consequences of such failure.[55]

On the other hand, it has been held that, notwithstanding the fraud of the shipper, the carrier,

that carrier must assume the peril of loss to the fruit in transit in the way contracted for, if it develops on delivery that ventilation failed to keep them from decay, when refrigeration might have done so.—Cassone v. New York, N. H & H R. Co., 123 A. 280, 100 Conn. 262.

44. Tex.—Texas, etc., R. Co. v. Dorsey, 70 S.W. 575, 30 Tex.Civ.App 377.

45. Mo.—Train v. Atchison, T. & S. F. Ry. Co., 253 S.W. 497, 214 Mo.App. 354.

46. Ill.—See Mitchell v. Frank Parmelee Co., 209 Ill.App. 428.
Pa.—Bell Telephone Co. v. American Ry. Express Co., 92 Pa.Super. 180.
10 C.J. p 115 note 57.

Corpus Juris has been cited with approval in Shikany v. Salt Creek Transp. Co., Wyo., 45 P.2d 645, 648.

47. Tex.—Lancaster v. Houghton, Civ.App., 249 S.W. 1103, error dismissed 45 S.Ct. 194, 266 U.S. 590, 69 L.Ed. 456.
10 C.J. p 116 note 60.

48. Miss.—Mobile, etc., R. Co. v. Phillips, 60 So. 572, 103 Miss. 536.
10 C.J. p 115 note 58.

49. Minn.—Porteous v. Adams Express Co., 127 N.W. 429, 112 Minn. 31—Harrington v. Wabash Ry Co., 122 N.W. 14, 108 Minn. 257, 23 L.R.A.,N.S., 745.
10 C.J. p 118 note 80.

50. N.Y.—Magnin v. Dinsmore, 62 N.Y. 35, 40, 20 Am.R. 442—Pardee v. Drew, 25 Wend. 459.

51. N.Y.—Gassman v. New York Cent. R. Co., 201 N.Y.S. 740, 207 App.Div. 15.
Tex.—Lancaster v. Houghton, Civ. App., 249 S.W. 1103, error dismissed 45 S.Ct. 194, 266 U.S. 590, 69 L.Ed. 456.
10 C.J. p 116 note 61.

52. S.C.—Jenkins v. Atlantic Coast Line R. Co., 66 S.E. 407, 84 S.C. 520.
10 C.J. p 116 note 62.

53. Ark.—Kansas City, etc., R. Co. v. New York Cent., etc., R. Co., 163 S.W. 171, 173, 110 Ark. 612.
10 C.J. p 116 note 63.

When corresponding rate obtained
"In an interstate shipment like this where the shipper describes a shipment as belonging to a certain classification and obtains a rate corresponding to the same, he is not entitled to recover damages according to a higher value or better classification in case there is a loss in transit."—Bachos v. Chicago, R. I. & P. Ry. Co., Mo.App., 61 S.W.2d 416, 418.

54. Va.—Adams Express Co. v. Green, 72 S.E. 102, 112 Va. 527.
10 C.J. p 116 note 64.

55. Pa.—Bell Telephone Co. v. American Ry. Express Co., 92 Pa.Super. 180.

although discharged of liability as insurer, is liable as an ordinary bailee of the property for hire and as such charged with the duty to exercise ordinary care safely to keep and to deliver the property,[56] and that a misrepresentation by the shipper as to the contents of the shipment, in order to obtain lower rates, will not prevent a recovery from the carrier for loss thereof where such misrepresentation did not contribute to the loss by misleading the carrier as to the precautions required for safe transportation.[57] Moreover, a shipper's misrepresentation as to value will not work an estoppel to recover the full value of the property lost or destroyed where, at the time of the delivery of the property, it was known or must have been apparent to the carrier or its agent that the kind, grade, or value of the property was not as represented, for in such case the carrier is not deceived.[58] The carrier will be liable for the amount of injury sustained by animals in transportation, notwithstanding the fact that the owner misrepresented their value in order to obtain a cheaper freight rate, where it knew that the value of the animals was greater than that stated; and it is not material that the carrier did not know the exact value of the animals.[59] It has also been held that, where there is no indication to the shipper or to the local expressman that the character of the conveyance affected the rate, or that the shipper had any knowledge of the fact, the fact that less freight was charged because of the misdescription of the goods does not relieve the carrier from liability.[60] So, an innocent misdescription of the goods shipped resulting in a lower rate being charged does not relieve the carrier from liability for their loss, where the bill of lading provides that in case of misdescription the freight charges must be paid on the articles actually shipped.[61] Where the consignor misdescribed the character of the goods in order to get them carried at a lower rate, this does not defeat the consignee's right of action for loss of the goods, although the carrier is entitled to an allowance of the amount of freight evaded.[62]

In some cases the view is taken that failure to inform the carrier of the nature of the goods shipped is ground for avoiding liability for loss thereof only if such failure amounted to actual or constructive fraud.[63]

Where by express statutory provision fraudulent misrepresentation by the shipper or fraudulent concealment of the value of the goods releases the carrier absolutely from liability, the shipper in such case cannot recover even the small apparent value of the package,[64] but this rule does not apply where, in the absence of fraud on the shipper's part, a carrier, although ignorant of the contents of a package, accepted it for carriage, and unless there is a contract limiting liability, the carrier cannot escape liability for the full amount of the loss even though it could have refused to accept the goods for shipment.[65]

Larceny by agent of carrier. The theft, by the agent of the carrier, of valuable articles or money contained in a consignment which a carrier had accepted for transportation, renders the carrier liable for the loss, although the shipper failed to disclose the presence of such valuables[66] or was himself

56. Tex—Head v. Pacific Express Co., 126 S.W. 682, 60 Tex Civ App. 169.
10 C.J. p 115 note 59.

57. Ky.—Chesapeake, etc., R. Co. v Magowan, 144 S.W. 80, 147 Ky. 422.
10 C J. p 119 note 84.

58. Ky.—A. Arnold & Son Transfer & Storage Co. v. Weisiger, 6 S.W. 2d 1084, 224 Ky. 659
Va—Chesapeake & O Ry. Co. v Osborne, 153 S E. 865, 154 Va. 477.
10 C J. p 119 note 86.

Exhibiting goods to carrier
Shippers exhibiting furniture, household goods, and wearing apparel, not in a sealed package or closed box, to a transfer company are not estopped by fraud to claim more than the represented value of such articles on their destruction by fire in transit, the carrier not being deceived.—A. Arnold & Son Transfer & Storage Co. v. Weisiger, 6 S.W.2d 1084, 244 Ky. 659.

59. Ky.—Southern Express Co. v. Fox, 115 S.W. 184, 117 S W. 270, 131 Ky 257, 133 Am S R 241
10 C J p 119 note 85.

60. N J—Blumenthal v. New Jersey Cent. R. Co., 95 A. 973, 88 N. J Law 254.

61. U S.—New York Cent. R Co. v. Goldberg, N.Y., 39 S Ct. 402, 250 U S. 85, 63 L Ed 857, affirming Goldberg v. New York Cent. & H R. R Co., 116 N.E 1047, which affirmed 149 N.Y.S. 629.
Va—Old Dominion S. S. Co v. Blakeman, 105 S E. 752, 129 Va 206.

62. Mo—Rice v. Indianapolis, etc., R. Co, 3 Mo.App. 27.

63. N C.—Morris v. American Ry. Express Co., 110 S.E. 855, 183 N C 144.

Money
An express company can avoid liability for failure to deliver a package containing money received by it for shipment on the ground that the shipper did not inform the carrier there was money in the package only if the failure to give such information amounted to actual or constructive fraud—Morris v American Ry. Express Co., 110 S.E 855, 183 N.C. 144.

64. Ga.—Southern Express Co. v. Pope, 63 S.E 809, 5 Ga App. 689.
10 C.J p 116 note 60 [a]

65. Ga—American Ry. Express Co. v. Jones, 110 S E. 513, 28 Ga App. 175.

Actual value less than declared
Where there was no intent to mislead the carrier as to the contents of the shipment, and no inquiry or representation as to the contents was made but its declared value was greater than its actual value, the shipper is entitled to recover—American Ry. Express Co. v. Jones, 110 S E 513, 28 Ga App. 175.

66. N.Y.—Heuman v M. H. Powers Co, 123 N E. 373, 226 N.Y. 205, reversing 162 N.Y.S 590, 175 App. Div. 627, and reargument denied 124 N.E. 899, 226 N.Y. 711.

guilty of fraud in not notifying the carrier thereof.[67] Similarly, it has been held that, where money intrusted to a carrier for transportation, and stolen by its agent, is recovered by the carrier, it will be liable therefor, notwithstanding fraudulent acts on the part of the shipper by reason of which only ordinary care was used by the carrier in its transportation.[68]

Dangerous character of goods. The failure of a shipper of inflammable and explosive goods to notify the carrier of their nature relieves the carrier of liability for loss of the goods due to explosion and fire.[69] It has been held, however, that a shipper of a carload of emigrant movables, whose agent, riding in the car to look after the contents carried a revolver and a shotgun and placed some cartridges in the oven of one of the stoves, together with some loaded shells for the shotgun, did not thereby violate the law prohibiting the shipment of explosives and other dangerous articles, so as to defeat the shipper's recovery for a destruction of the goods by fire started by sparks from defendant's locomotive.[70] Where the bill of lading described a shipment as high explosives, and placards showing contents of cars to be explosives were affixed to cars, the railroad had notice, as a matter of law, of the explosive nature of the shipment, within a provision of the bill of lading requiring full disclosure of explosive qualities of goods shipped.[71]

Reasons for rule of nonliability. Reasons on which the rule of nonliability is based are that the carrier is, by the fraudulent act of the shipper, deprived of the compensation to which it is entitled, in proportion to the value of the article intrusted to its care and the consequent risk, while such act tends to lessen the vigilance which the carrier would otherwise exercise,[72] and that, by reason of the fraud of the shipper in misleading the carrier, the latter has not in fact accepted or undertaken to carry the goods delivered to it.[73]

Right and duty of carrier to ascertain facts. It is the right of the carrier to require good faith on the part of those persons who deliver goods to be carried, or enter into contracts with it;[74] and inasmuch as the freight may depend on the value of the article to be carried, the carrier ordinarily has a right to inquire as to its value.[75] Ordinarily, it is the duty of the carrier to make inquiry as to the general nature of the articles shipped and of their value before it consents to receive them;[76] and its failure so to do cannot defeat the shipper's right to recover the full value of the package if lost, in the absence of any showing of fraud or deceit on the part of the shipper.[77] The rule is subject to the reasonable qualification that, if the owner is guilty of any fraud or imposition, as by concealing the value or nature of the article, or if he deludes the carrier by his own carelessness in treating the parcel as a thing of no value, he cannot hold the carrier liable for the loss of the goods.[78] In the absence of more definite information, the carrier has the right to accept the shipper's marks as to the contents of a package offered for transportation and is not bound to inquire particularly about them in order to take advantage of a false classification,[79] and where a shipper expressly represents the contents of a package to be of a designated character, it is not the duty of the carrier to ask for a repetition of the statement, nor to disbelieve it and open the box and see for itself.[80] Under the first Cummins Amendment to the Interstate Commerce Act, providing that if the goods shipped are hidden from view and the carrier is not notified as to their character it could require the shipper specifically to state their value in writing, the rules stated were subject to the further qualification that a carrier informed of the character of such goods had no right

67. Ky.—Chesapeake, etc., R. Co. v. Hall, 124 S.W. 372, 136 Ky. 379, Ann.Cas 1912A 364.
10 C.J. p 119 note 88.

68. U.S.—St. John v. Southern Express Co., C.C.Ala., 21 F.Cas.No. 12,228, 1 Woods 612.

69. N.Y.—Bradley v. Lake Shore, etc., R. Co., 129 N.Y.S. 1045, 145 App.Div. 312.
Transportation of explosives generally see C.J.S. title Explosives § 9, also 25 C.J. p. 198 note 85–p. 199 note 97.

70. Utah.—Shay v. Union Pac. R. Co., 153 P. 31.

71. U.S.—Lehigh Valley R. Co. v. State of Russia, C.C.A.N.Y., 21 F. 2d 396, certiorari denied 48 S.Ct. 159, 275 U.S. 571, 72 L.Ed. 432.

72. Ga.—Everett v. Southern Express Co., 46 Ga. 303
Ill.—Chicago, etc., R. Co. v. Shea, 66 Ill. 471.
10 C.J. p. 116 note 66.

73. Ga.—Charleston, etc., R. Co. v. Moore, 5 S.E. 769, 80 Ga. 522.
10 C.J. p. 116 note 67.

74. Mass.—Graves v. Lake Shore, etc., R. Co., 137 Mass. 33, 34, 50 Am.R. 282.

75. Me.—Little v. Boston, etc., R. Co., 66 Me. 239.

76. Mich.—Farnsworth v. National Express Co., 132 N.W. 441, 166 Mich. 676
10 C.J. p. 117 note 69.

77. S.C.—Jenkins v. Atlantic Coast Line R. Co., 66 S.E. 407, 84 S.C. 520.
10 C.J. p. 117 note 70.

78. Ga.—Southern Express Co. v. Everett, 37 Ga. 688.
Pa.—Relf v. Rapp, 3 Watts & S. 21, 37 Am.D. 528.
10 C.J. p. 117 note 73.

79. Minn.—Harrington v. Wabash R. Co., 122 N.W. 14, 108 Minn. 257, 23 L.R.A.,N.S., 745.
10 C.J. p. 117 note 71.

80. S.C.—Bottum v. Charleston, etc., R. Co., 51 S.E. 935, 72 S.C. 375, 110 Am.St.R. 610, 2 L.R.A.,N.S., 773, 5 Ann.Cas. 118.

to require a statement as to their value or to rely on a value stated as determining the amount of its liability.[81]

Duty of shipper. Good faith requires the shipper to make the facts known to the carrier if the contents of a package tendered for carriage are perishable or easily broken,[82] or inflammable and explosive,[83] and, under a statute requiring the shipper to give notice to the carrier of the nature of the shipment if it includes silk or other specified articles, in order to claim the value thereof in excess of the statutory amount, the word "silk" imports manufactured silk as well as raw silk.[84] On the other hand, the shipper is under no duty to inform the carrier of the value of his goods when no inquiry is made; he is bound only to refrain from using any artifice, designed or not, by which the carrier would be led to believe that such goods were worth less than their apparent value.[85] However, as shown infra § 102, when the shipper has voluntarily made a declaration of the value of his property, and the carrier acts on such declaration in fixing the rate of freight and the manner of transportation, he is bound by his statements and cannot then repudiate them, although he may not have known that his statement was calculated to affect the carrier's liability.

Acts of shipper's agent. If the agent of a shipper makes misrepresentations as to the contents of a package delivered to a carrier for shipment, the shipper is bound thereby to the same extent as if he himself had made the misrepresentations.[86] The ignorance of an agent as to the contents of a package delivered for shipment, and innocence of any intention to deceive the carrier, or to conceal the value of the goods, do not affect the liability of the carrier where the principal intended to deceive the carrier or to conceal the value of the goods.[87]

What constitutes fraud. Whether a fraud has been committed on the carrier depends on the circumstances of each case;[88] and in a number of decisions, in which the courts have not always been uniform in the conclusions reached, particular acts of the shipper have, under the circumstances presented, been held to constitute or not to constitute fraud.[89] In general, the shipper may become chargeable with fraud, through imposition and deception, as well when he is silent as when he speaks that which is untrue.[90] So, it is immaterial whether the fraud is practiced on the carrier by means of actual false representations, or by so packing the goods as to induce the carrier to think that the cases contain only what the packing would seem to indicate, when in reality they contain something more valuable, the effect on the carrier's liability in each case being the same.[91]

81. Idaho.—Thompson v. Great Northern Ry. Co, 174 P. 607, 31 Idaho 492.

82. Pa.—Bell Telephone Co. v. American Ry. Express Co., 92 Pa. Super 180.

83. N.Y.—Bradley v. Lake Shore, etc., R Co., 129 N Y S 1045, 145 App Div. 312.

84. Cal.—Lowder v Union Transfer Co. of San Francisco, 250 P. 703, 79 Cal.App 598

85. Va.—Southern Express Co. v. Keeler, 64 S E 38, 109 Va 459.
10 C.J. p 117 note 75.

86. U S.—S. B. Locke & Co v. St. Louis-San Francisco Ry. Co., C.C. A.Mo, 284 F. 46
10 C J p 119 note 91.

Condition of goods

A compress company issued to a shipper receipts showing that it held for shipment on shipper's order a stated number of bales of cotton in good condition or to be put in good condition at shipper's expense. On delivery of such clearance receipts to railroad receivers, they issued bills of lading for cotton received in good condition at a tariff rate which required them to pay for the compression. The cotton was afterward compressed and shipped, but, owing to failure of the compress company to properly condition it by drying before compression, it was damaged before terminal delivery. It was held that for conditioning the cotton the compress company was the shipper's agent, and that the railroad receivers had a right to rely on the statement in the clearance receipt that the cotton would be properly conditioned before shipment and were not liable for the damage resulting from its not being done.—S. B Locke & Co. v. St. Louis-San Francisco Ry. Co., C.C.A.Mo, 284 F 46.

87. Ky.—Chesapeake, etc, R. Co v. Hall, 124 S.W 372, 136 Ky. 379, Ann.Cas.1912A 364.

88. Minn.—Porteous v. Adams Express Co., 127 N W. 429, 112 Minn. 31.
10 C.J. p 117 note 77.

89. **Circumstances showing fraud**

(1) The presence of a watch and cuff buttons, valued at twenty dollars, in a shipment of household goods, without revealing their special value—Lancaster v. Houghton, Tex.Civ.App., 249 S W. 1103, error dismissed 45 S.Ct. 194, 266 U.S 590, 69 L.Ed. 456.

(2) Other circumstances showing fraud—10 C.J p 118 note 82.

Acts not constituting fraud

(1) Delivery of a package containing one hundred and fifty dollars in money to a railroad agent with a statement that it contained "change" valued at that amount and a request that it be delivered to defendant express company's agent, although in delivering it the railroad agent notified defendant's agent that it contained "automobile chains" valued at one hundred and fifty dollars, the package being manifestly too small to contain automobile chains of the stated value—Morris v. American Ry. Express, 110 S E 855, 183 N C. 144.

(2) Other acts not constituting fraud—10 C J. p 118 note 83.

The many illustrations given in Corpus Juris are referred to in Shikany v Salt Creek Transp. Co., Wyo., 45 P 2d 645, 648.

90. Pa.—Bell Telephone Co. v. American Ry. Express Co, 92 Pa. Super. 180
10 C.J. p 117 note 77.

91. Pa.—Bell Telephone Co. v. American Ry. Express Co, 92 Pa. Super. 180.
10 C.J p 117 note 79.

c. Improper Packing

For injuries due to improper packing of the goods by the shipper, particularly where the defect is not apparent, the carrier is not ordinarily liable.

One of the exceptions to the carrier's common-law liability arises in cases where the injuries are due to the improper packing of the goods by the shipper.[92] Accordingly, if goods are improperly packed, and this fact is not apparent or known to the carrier, it is not liable for loss or injury resulting in the ordinary course of handling and transportation from such improper packing, if it is itself free from negligence,[93] although, if the carrier is guilty of negligence but for which the damage would not have occurred, it is liable even though the improper packing is not apparent.[94] Some decisions hold without qualification that the full duty of the carrier is simply to carry goods in the condition in which they are offered, and that, where goods tendered are insufficiently packed, the carrier is not liable for loss or injury due to such defect, even though the defect in the packing is apparent;[95] but in view of the fact that the carrier is entitled, as stated supra § 28, to reject defectively packed goods tendered for shipment, the rule supported by the weight of authority is that if it accepts for transportation goods which it knows are defectively packed, or which by the exercise of reasonable care it could have observed were defectively packed, it assumes to carry the goods as they are, and its common-law liability as carrier attaches, and it is subject to all the liabilities usually attaching to an ordinary shipment of the same character,[96] even though the goods were not packaged in accordance with the requirements of classifications filed with the interstate commerce commission.[97] It cannot be said, however, under this rule that the carrier must, at his peril, know that the goods are not in fact safely packed.[98] The shipper usually knows better than the carrier the manner in which the goods have been packed and the manner in which they should be packed, and even though the carrier may have knowledge of some defect in the packing, still if it is not apparent to the

92. Del.—Carpenter v. Baltimore, etc., R. Co., 64 A. 252, 22 Del. 15—Culbreth v. Philadelphia, etc., R. Co., 8 Del. 392—Truax v. Philadelphia, etc., R. Co., 8 Del. 233.
Ga.—Atlantic, etc., R. Co. v. Jacob's Pharmacy Co., 68 S.E. 1039, 135 Ga. 113.
La.—Snowden v. Tremont & G. Ry. Co., App., 140 So. 122
Minn.—Shriver v. Sioux City, etc., R. Co., 24 Minn. 506.
N.Y.—Greenwald v. New York Cent. & H. R. R. Co., 159 N.Y.S. 15, 95 Misc. 122.
Or.—Goodman v. Oregon R., etc., Co., 28 P. 894, 22 Or. 14.
Tex.—Gulf, etc., R. Co. v. Wiltneberi, 108 S.W. 150, 101 Tex. 368, 130 Am.S.R. 858, 14 L.R.A.,N.S., 1227, 16 Ann.Cas. 1153, reversing, Civ.App., 104 S.W. 424.
Wash.—Wilson & Co. v. Hines, 213 P. 5, 123 Wash. 643—Revilla Fish Products Co. v. American-Hawaiian SS. Co., 137 P. 337, 77 Wash. 49.
Wis.—Thomson v. Chicago, M. & St. P. Ry. Co., 217 N.W. 927, 195 Wis. 78.
10 C.J. p. 119 note 94.
"The owner of liquids, or any articles, shipped in casks, of any description, is, in the first instance, chargeable with the duty of supplying proper ones, and would, presumptively, be responsible for a loss, arising from their insufficiency or defects."—Nelson v. Stephenson, 12 N.Y. Super. 538, 551.
Corpus Juris is quoted and commended as a "clear statement of the law" in Snowden v. Tremont & G. Ry. Co., La.App., 140 So. 122, and its statement of the rule of the text is referred to in Devinne Hallenbeck Co. v. Autotyre Co., Conn., 154 A. 170, 172.

93. U.S.—Zerega v. Poppe, D.C.N.Y., 30 F.Cas.No.18,213, Abb.Adm. 397.
Cal.—Mitchell v. North Pac. S. S. Co., 213 P. 293, 60 Cal.App. 554.
Conn.—Devinne Hallenbeck Co. v. Autotyre Co., 154 A. 170.
Ill.—S. Valentine & Co. v. Atchison T. & S. F. Ry. Co., 220 Ill.App. 188
Or.—Michellod v. Oregon-Washington R. & Nav. Co., 168 P. 620, 86 Or. 329.
Wash.—Wilson & Co. v. Hines, 213 P. 5, 123 Wash. 643
Wis.—Thomson v. Chicago, M. & St. P. Ry. Co., 217 N.W. 927, 195 Wis. 78—Klauber v. American Express Co., 21 Wis. 21.

94. Cal.—Mitchell v. North Pac. S.S. Co., 213 P. 293, 60 Cal.App. 554.
N.Y.—Greenwald v. New York Cent. & H. R. R. Co., 159 N.Y.S. 15, 95 Misc. 122.

95. N.H.—Rixford v. Smith, 52 N.H. 355, 13 Am.R. 42
Vt.—Ross v. Troy & B. R. Co., 49 Vt. 364, 24 Am.R. 144.
10 C.J. p. 119 note 95.

96. Cal.—Mitchell v. North Pac. S.S. Co., 213 P. 293, 60 Cal.App. 554
Ill.—S. Valentine & Co. v. Atchison, T. & S. F. Ry. Co., 220 Ill.App. 188
N.Y.—Robinson v. New York Cent. R. Co., 282 N.Y.S. 877, 245 App.Div. 378, affirmed 1 N.E.2d 985, 270 N.Y. 659
N.C.—Newman v. Seaboard Air Line Ry. Co., 124 S.E. 627, 188 N.C. 341.
N.D.—Gehrke v. American Ry. Express Co., 240 N.W. 321, 61 N.D. 668, 81 A.L.R. 808.
10 C.J. p. 120 note 97.
"Where a shipper tenders to a carrier goods for transportation, which are insufficiently crated, boxed, packed, or loaded, and such insufficiency is discoverable by the carrier upon ordinary observation and inspection, it is the duty of the carrier to refuse to receive the goods, and . . . if the carrier does accept the goods, it may not thereafter allege that any injury which they sustained in the course of transportation was due to such insufficient crating, boxing, packing, or loading."—Thomson v. Chicago, M. & St. P. Ry. Co., 217 N.W. 927, 929, 195 Wis. 78.

97. N.C.—Newman v. Seaboard Air Line Ry. Co., 124 S.E. 627, 188 N.C. 341.
Reason for rule
Such provisions are for the protection of the carrier and may be waived by it.—Newman v. Seaboard Air Line Ry. Co., 124 S.E. 627, 188 N.C. 341.
Tobacco
Railroad could be held liable for damage to tobacco during transportation, although not shipped in accordance with classifications filed with interstate commerce commission, requiring shipment of tobacco in bags, bales, bundles, etc.—Newman v. Seaboard Air Line Ry. Co., 124 S.E. 627, 188 N.C. 341

98. Ala.—Southern Ry. Co. v. Frank De Latour, Inc., 135 So. 187, 223 Ala. 243.
10 C.J. p. 120 note 98.

ordinary observation of the carrier or his servants that the goods cannot be safely carried in the condition in which they are presented, the carrier should not be held to take the chances of injury from improper packing.[99] The shipper is not required to cover the goods so as to make them safe against external injuries, such as rain, wind, or fire,[1] but where failure of the shipper to comply with a rule of the interstate commerce commission prescribing the method for packing goods of the character which were destroyed was the proximate cause of the loss, the carrier is not liable.[2]

d. Misdirection

The carrier is not liable for loss or injury resulting from misdirection by the shipper, although it is liable if, notwithstanding such misdirection, the loss was its own fault.

Where the carrier receives from the shipper goods which are lost because of an improper address as to their destination, clearly there can be no liability of the carrier to the shipper, for the shipper's negligence in misdirecting the goods, or giving to the carrier the wrong address, has brought about the loss by his own negligence.[3] Furthermore, the consequence of defective marking will be charged to the shipper, although the direction of the package may have been written out by the carrier's agent, where, in so doing, he acted under the direction of the shipper.[4] Nevertheless, as shown supra § 44, where shipping instructions are not clear, it is the carrier's duty, unless an emergency arises, to hold the goods and ask for instructions from the shipper; and, in order to exempt the carrier from liability, the loss must have resulted from the negligent misdirection of the shipper alone, unaided by a breach of duty on the part of the carrier or its agent; and if the carrier itself has been guilty of some negligent act or omission without which, notwithstanding the fault of the shipper, the loss would not have occurred, it will be liable.[5] So, a carrier is liable for loss of goods notwithstanding misdirection, where it was not misled by such misdirection,[6] where it undertook the duty of transportation, knowing that the goods were consigned to a point that had no existence in fact,[7] where, by the exercise of ordinary diligence, it could have ascertained the proper direction,[8] or where it actually knew the proper direction.[9] Although the point to which the goods were consigned had no actual existence, however, the carrier is not liable if the misdirection was not so obvious as to require the carrier to ask for further instructions, as where there was a station on defendant's line with a very similar name.[10] The fact that the shipper may have been negligent in marking the goods shipped is no defense to a suit against the carrier for its conversion of the goods.[11]

§ 79. Loss from Inherent Nature of the Property and Natural Causes

a. In general
b. Live stock

99. Ala.—Southern Ry. Co. v. Frank De Latour, Inc., 135 So. 187, 223 Ala. 245.
N.Y.—Robinson v. New York Cent. R. Co., 282 N.Y.S. 877, 245 App. Div. 378, affirmed 1 N.E.2d 985, 270 N.Y. 659.
10 C.J. p 119 note 95 [a], p 120 note 99.

1. Wis.—Klauber v. American Express Co., 21 Wis. 21, 91 Am.D. 452.

2. N.Y.—Bradley v. Lake Shore, etc., R. Co., 129 N.Y.S. 1045, 145 App. Div. 312.
10 C.J. p 120 note 96.

3. Ky.—J. B. Hirschfield Co. v. Vanhoose Grocery Co., 289 S.W. 226, 217 Ky. 399.
La.—Lindsey Wagon Co. v. Louisiana & A. Ry. Co., 129 So. 395, 14 La. App. 236.
10 C.J. p 120 note 2.

Injury resulting from delay
The carrier is not liable where delay or injury due to the inherent nature of the goods resulting from the delay is due to the shipper's improper marking or direction as to their destination.

U.S.—The Huntress, D.C.Me., 12 F. Cas.No 6,914, 2 Ware 89.
Pa.—Forsythe v. Walker, 9 Pa. 148.

4. Colo.—Adams Express Co. v. Ten Winkel, 96 P. 818, 44 Colo. 59.
Ill.—Erie R. Co. v. Wilcox, 84 Ill. 239, 25 Am.R. 451.
10 C.J. p 120 note 4.

5. Tex.—Carson, Pirie, Scott & Co. v. Hauk, Civ.App., 261 S.W. 533.
10 C.J. p 121 note 7.

Corpus Juris has been cited with approval in Carson, Pirie, Scott & Co. v. Hauk, Tex.Civ.App., 261 S.W. 533, 534.

6. Ill.—Rabinowitz v. Hall, 123 Ill. App. 65.

Immaterial error in the name of the addressee will not exempt the carrier from liability for loss.—Carson, Pirie, Scott & Co. v. Hauk, Tex. Civ.App., 261 S.W. 533.

7. Iowa.—O'Rourke v. Chicago, etc., R. Co., 44 Iowa 526.

8. N.Y.—Guillaume v. General Transp. Co., 3 N.E. 489, 100 N.Y. 491.

9. N.Y.—Krender v. Woolcott, 1 Hilt. 223.
10 C.J. p 121 note 11.

10. La.—Lindsey Wagon Co. v. Louisiana & A. Ry. Co., 129 So. 395, 14 La. App. 236.

"Coldwater" and "Coldwater Spur"
Where the shipper in a bill of lading directed the carrier to deliver the goods to the consignee at "Coldwater Spur, La.," and the carrier had no station on its line by that name, but did have one named "Coldwater," which was a blind, prepay station, where all freight consigned to that place was unloaded on a spur track, the misdirection of the shipment was held not so obvious as to require the carrier to ask for further instructions, although some months later a station on another line in Texas was designated as "Coldwater Spur." In reaching this conclusion the court quoted at great length from Corpus Juris on the subject of misdirection. —Lindsey Wagon Co. v. Louisiana & A. Ry. Co., 129 So. 395, 396, 14 La. App. 236.

11. U.S.—Downing v. Outerbridge, N.Y., 79 F. 931, 25 C.C.A. 244.

a. In General

A common carrier is not liable for injury to goods solely due to their inherent nature and qualities or to defects therein.

Where the destruction of, or the injury to, the goods is due to their inherent nature and qualities, or to defects therein, the carrier is not liable, if its own negligence did not occasion or contribute to the injury.[12] With respect to perishable goods which themselves contain the elements of destruction governing their loss or deterioration, the carrier is not an insurer, and is no more liable for destruction or injury resulting solely from the inherent infirmity in the goods than for loss entailed solely by an act of God or of the public enemy, or by the carelessness of the shipper.[13]

12. U.S.—C. M. McMahen & Sons v. Louisville & N. R. Co., C C A.Ala., 16 F.2d 698.
Ark.—American Ry. Express Co. v H. Rouw Co., 48 S W.2d 220, 185 Ark 526—Missouri Pac. R. Co. v. American Fruit Growers, 260 S W. 39, 163 Ark. 429.
Colo.—Fort v. Denver & R. G. R. Co., 195 P. 109, 69 Colo 441.
Conn.—Cassone v. New York, N. H. & H. R. Co., 123 A. 280, 100 Conn 262.
D.C.—Shapiro v. Pennsylvania R Co., 83 F.2d 531, 65 App D C. 324.
Fla.—American Ry. Exp. Co v. Fegenbush, 144 So 320, 107 Fla. 145—Hammers v. Southern Express Co., 85 So. 246, 80 Fla 51.
Ga.—Southern Ry. Co. v Bateman Fruit Exchange, 162 S E. 112, 173 Ga. 826, conformed to, App., 163 S.E 219, 44 Ga.App. 802—Bugg v. Perry & Faircloth, 156 S E. 708, 42 Ga App. 523—Hines v. Vann, 106 S E 921, 26 Ga.App. 704.
Ill.—S Valentine & Co v. Atchison, T. & S F. Ry Co., 220 Ill.App. 188—Sparr v. Southern Pac. Co., 220 Ill App. 172—Arakelian v. Southern Pac Co., 220 Ill App 160.
Ky.—Hall v. Cumberland Pipe Line Co., 237 S W. 405, 193 Ky. 723—Louisville & N R. Co. v. Taylor, 205 S W 934, 181 Ky. 794—Merchants' Transfer Co v. Kiser, 200 S W. 454, 179 Ky. 324, L.R A.1918C 658.
La.—Anderson, Clayton & Co. v. Yazoo & M. V. R. Co., 141 So 453, 174 La 762.
Me.—Warren v. Portland Terminal Co, 116 A. 411, 121 Me. 157, 36 A L.R. 304.
Md.—Pennsylvania R. Co. v. Walker, 128 A 45, 147 Md 323
Mo.—Ozark Fruit Growers' Ass'n v. St. Louis-San Francisco R Co, 46 S W 2d 895, 226 Mo App 222—Frawley v. Atchison, T & S F. R. Co, 299 S.W 93, 220 Mo App. 1189—Hurley v Illinois Cent. R Co, 282 S W. 97, 221 Mo App 478—Morrow v Wabash Ry Co, 265 S W 851, 219 Mo App 62—Vernon v. American Ry Express Co, App, 222 S W 913—Singer v American Express Co, 219 S W 662, 203 Mo. App 158, certiorari denied 41 S Ct. 8, 254 U S 632, 65 L Ed. 448—Robinson v. Bush, 200 S W 757, 199 Mo App 184—Cudahy Packing Co. v. Atchison, T & S F. Ry. Co, 187 S.W. 149, 193 Mo App. 572.
Neb.—Leypoldt & Pennington Co v Davis, 199 N W. 463, 112 Neb. 350—Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry. Co., 182 N W 967, 106 Neb 149—N. H. Nelson & Co v. Chicago & N. W. Ry. Co, 167 N W. 574, 102 Neb 439
N.Y.—Sullivan v. Williams, 176 N.Y. S 710, 107 Misc 511.
N C.—M. V. Moore & Co v. Southern Ry. Co, 111 S E. 166, 183 N C. 213—Morris v. American Ry. Express Co., 110 S.E. 855, 183 N.C. 144—Perry v. Seaboard Air Line R. Co, 88 S E. 156, 171 N.C. 158, L R. A.1916E 478
Ohio.—St. Louis-San Francisco Ry. Co v. Glow Electric Co, 172 N E 425, 35 Ohio App. 291—Fean v. Alabama Great Southern R. Co, 159 N E. 487, 26 Ohio App. 96.
Pa.—Dreibelbis & Co v. Philadelphia & Reading R Co, 28 Pa Dist 488
Tex.—Cleburne Peanut & Products Co. v Missouri, K & T Ry. Co. of Texas, Com.App., 221 S W. 270, reversing, Civ App, 184 S W. 1070—Rio Grande & E P. Ry. Co. v. T. A. Austin & Co, Civ App, 12 S W 2d 1070, reversed on other grounds, Com.App., 25 S W 2d 306—Abbott v. Tompkins, Civ App, 283 S W. 647—American Ry. Express Co v. Home Star Produce Co, Civ App, 276 S W. 790—Fort Worth & D C Ry. Co v. Lemons, Civ App, 258 S W. 1095—Hines v. First Guaranty State Bank of Aubrey, Civ App, 230 S W. 764—Mistrot-Calahan Co v. Missouri, K. & T. Ry Co of Texas, Civ.App, 209 S W. 775—Gulf, C & S. F. Ry Co v. Persky, Civ App., 200 S.W. 606
Vt.—Saliba v. New York Cent. R Co, 144 A 194, 101 Vt 427—Harlin-Stahr Co v. Montpelier & W R R. Co, 102 A. 940, 92 Vt. 258
Va.—Chesapeake & O. Ry. Co. v Osborne, 153 S E. 865, 154 Va. 477—Chesapeake & O Ry Co v W. C Crenshaw & Co, 137 S.E. 515, 147 Va 290—Chesapeake & O. Ry. Co v Timber-Lake, Currie & Co, 137 S E 507, 147 Va. 304.
Wash.—W. E Roche Fruit Co. v. Northern Pac Ry Co., 52 P 2d 325, 184 Wash. 695
W Va.—A. F. Thompson Mfg Co v. Chesapeake & O Ry. Co., 115 S E 877, 93 W Va 3
10 C J p 110 note 98, p 121 note 24.
"It is the rule of the common law that a carrier is not liable for losses or injuries resulting from the inherent nature of the goods, which would not have been prevented by the exercise of ordinary care upon its part, or for loss or injury to goods caused by an inherent defect in the goods themselves, the existence of which was unknown both to the shipper and the carrier"—Fort v. Denver & R. G. R. Co., 195 P. 109, 111, 69 Colo. 441.

Corpus Juris has been cited with the approval in:
Ark.—Railway Express Agency, Inc. v. H. Rouw Co, 45 S W 2d 515, 516.
Del.—Hardesty v. American Ry. Express Co, 119 A. 681, 683, 2 W.W. Harr, Super., 66.
Kan.—Parker Corn Co v. Chicago, B & Q. R. Co., 244 P. 240, 243, 120 Kan 484
Or.—Michellod v. Oregon-Washington R. & Nav. Co., 168 P. 620, 622, 86 Or. 329.
Tex.—Gulf, C & S. F. Ry. Co. v. Downs, Civ.App., 70 S.W.2d 318, 321, error refused.
Wash.—Spokane Valley Growers' Union v. Spokane & I. E. R Co, 175 P. 184, 186.

Assimilated to act of God

"Where the shipment consists of perishable goods, and their loss is occasioned by an inherent vice, or by natural deterioration of the shipment, unmixed with negligence on the part of the carrier, the damage can be attributed to a cause which is in the nature of an act of God, and the carrier, upon such proof being made, is relieved from liability, provided it shows that its negligence did not contribute to the loss thus occasioned"—Southern Ry. Co. v Standard Growers' Exch., 130 S.E 373, 374, 34 Ga App. 534.

Under Carmack Amendment

"The only loss or damage the appellant [carrier] is liable for under the Carmack Amendment is the loss or damage caused by it, and shrinkage [of grain] would not come within that rule unless the proof should show the shrinkage was caused by it"—Shellabarger Elevator Co v. Illinois Cent R. Co, 212 Ill App. 1, 6.

13. Ala.—Louisville & N R Co v. Hendricks, 171 So. 273, 233 Ala. 259
Md.—Atlantic Fruit Co. v. Pennsylvania R Co, 130 A. 63, 149 Md 1—Pennsylvania R Co. v. Walker, 128 A. 45, 147 Md. 323.

It is not correct, however, to say, broadly, that a carrier is not an insurer of perishable goods; he is not an insurer if the damage is caused by the goods perishing, but he is an insurer in all other respects just as if it were not perishable, as, for instance, if it be injured in a wreck, or fire, or any other cause not the act of God or the public enemy.[14] As to goods delivered to the carrier in defective condition, it has been held that the condition of the goods which will excuse the carrier, is some internal and latent defect at the time of making contract of shipment, of which the carrier did not know, and from which loss or damage ensues in the ordinary course of handling and transportation,[15] where defects in the goods are perfectly apparent, if the carrier elects to carry them it cannot urge these defects as a defense, but the full common-law liability will attach,[16] and if the carrier receives goods which are in such condition as to be liable to become damaged while in transit, it is bound to handle them with reference to that condition, and is liable for failure to do so, nor is it relieved of the duty under the contract to deliver them at the point of destination named in the shipper's contract by the fact that they were further damaged.[17]

The measure of the carrier's duty is to exercise reasonable care and diligence to protect the goods from loss or injury while in its custody,[18] taking into consideration the character of the commodity, the condition of the weather, and the time necessary to complete the transportation,[19]

Minn.—Geo B. Higgins & Co. v Chicago, B & Q R. Co, 161 N.W 145, 135 Minn 402, L R A 1917C 507.

Mo—Ozark Fruit Growers' Ass'n v. St Louis-San Francisco R Co, 46 S W 2d 895, 226 Mo.App. 222—Aurora Fruit Growers' Ass'n v. St Louis-San Francisco Ry. Co, 297 S W. 440, 220 Mo App 1316—Vernon v. American Ry 'Express Co, App, 222 S W. 913.

N Y—Fish v. Seaboard Air Line Ry, 163 N Y S 439, 98 Misc 662

Ohio—Fean v Alabama Great Southern R Co, 159 N E. 487, 26 Ohio App 96

Or—Daniels v. Northern Pac. Ry. Co, 171 P 1178, 88 Or 421.

Pa—Farris Bros & Co v. Pennsylvania R. Co, 98 Pa Super 123

Va.—Chesapeake & O Ry Co v. Timber-Lake, Currie & Co., 137 S E 507, 147 Va. 304

Wash—W. E Roche Fruit Co v Northern Pac. Ry. Co, 52 P 2d 325, 184 Wash 695

W Va—A F Thompson Mfg. Co. v. Chesapeake & O. Ry Co, 115 S E 877, 93 W Va 3

10 C J p 122 notes 25, 26.

"A common carrier . . . is not an insurer that perishable freight, which term includes such commodities as fruits and vegetables, will be delivered at destination undamaged" —McNeil & Scott Co v Great Northern R Co, 194 N W. 614, 616, 156 Minn. 120.

This Corpus Juris statement has been cited with approval in:

Del—Hardesty v. American Ry. Express Co, 119 A. 681, 683, 2 W.W Harr, Super., 66

Iowa—Dye Produce Co. v. Davis, 209 N W. 744, 747, 202 Iowa 1008.

Kan—Parker Corn Co. v. Chicago, B. & Q. R Co, 244 P. 240, 243, 120 Kan 484

Or—Michellod v. Oregon-Washington R & Nav Co., 168 P. 620, 622, 86 Or. 329.

Va—Chesapeake & O Ry Co. v W C Crenshaw & Co, 138 S E. 467, 468, 148 Va 48, 53 A L R 990.

Damaged goods

While a carrier is under the duty to deliver a shipment of damaged corn received for carriage, it is not an insurer that the corn would reach its destination in the same condition as when shipped—Atlantic Coast Line R Co v. Dothan Ins Agency, 80 So 627, 16 Ala App. 623.

Following shipper's direction

Transporting perishable goods in the way contracted for cannot constitute negligence and impose on the carriers liability arising from the inherent tendency of the goods to perish or decay.—Cassone v. New York, N. H & H. R. Co, 123 A 280, 100 Conn. 262—10 C J. p 122 note 36 [a] (4).

14. Mo—Singer v American Express Co, 219 S W. 662, 203 Mo. App 158, certiorari denied 41 S Ct. 8, 254 U S 632, 65 L Ed. 448.

Fading and deterioration of furs

In an action for damage for delay in delivery of a shipment of fur coats, damage for the fading of the color and deterioration from lying unused were recoverable, notwithstanding the carrier's receipt exempted it from liability for damage caused by the "nature of the property or inherent vice therein"; such a clause referring only to a special or peculiar quality in the article, which would render it intrinsically perishable.—Bawer v. Barrett, 171 N.Y S. 322.

15. Ala—Atlantic Coast Line R Co v. Dothan Ins Agency, 80 So 627, 16 Ala.App. 623.

16. N.Y.—Perkel v. Pennsylvania R. Co., 265 N Y S. 597, 148 Misc. 284.

17. Ala.—Atlantic Coast Line R Co. v. Dothan Ins. Agency, 80 So. 627, 16 Ala.App. 623.

Delay in transit

A carrier receiving damaged corn for transportation, must deliver it at destination without unreasonable delay in transit, so that the natural deterioration will be minimized; and hence it was competent to prove how long the corn was delayed at the point where it should have been turned over to the connecting carrier. —Atlantic Coast Line R Co. v Dothan Ins. Agency, 80 So. 627, 16 Ala. App. 623.

18. Ala—Louisville & N R Co. v. Hendricks, 171 So. 273, 233 Ala 259.

Md.—Atlantic Fruit Co. v. Pennsylvania R Co, 130 A. 63, 149 Md. 1.

Minn.—McNeil & Scott Co v. Great Northern R. Co, 194 N.W 614, 156 Minn 120.

Neb—N H Nelson & Co. v Chicago & N. W Ry Co, 197 N.W. 574, 102 Neb 439.

N Y—Fish v Seaboard Air Line Ry., 163 N.Y.S. 439, 98 Misc. 662.

Ohio—Hines v. Dinovo, 14 Ohio App. 119

Va.—Chesapeake & O. Ry. Co. v. Timber-Lake, Currie & Co, 137 S. E 507, 147 Va. 304.

10 C J. p 122 note 33.

Quoting Corpus Juris, the rule of the text has been approved in:

Iowa—Dye Produce Co. v. Davis, 209 N.W. 744, 747, 202 Iowa 1008.

Kan—Parker Corn Co. v. Chicago, B & Q. R Co, 244 P. 240, 243, 120 Kan 484.

19. Fla—American Ry. Exp. Co v. Fegenbush, 144 So. 320, 107 Fla. 145.

"Its care is determined by the character of the shipment and the conditions obtaining"—Aurora Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co., 297 S.W 440, 442, 220 Mo App. 1316.

Perishable goods

(1) The duty of a carrier is to carry a shipment safely with due

and it is generally said that the carrier is liable for only such deterioration as is attributable to its negligence.[20] Nevertheless, if it appears that the carrier's negligent conduct conduced to set the inherent infirmity of the goods in motion to the damage of the owner, it will suffice to fix the carrier with liability therefor; in other words, the exemption on account of the infirmity of the goods obtains only where the loss is solely attributable to such infirmity, for if the carrier's negligence commingles with the infirmity and contributes in part to the damage, liability is entailed therefor against the carrier for his negligent conduct.[21]

The civil liability of a carrier for loss or injury to property carried is not affected by provisions of the penal law or compliance of the carrier therewith;[22] and the rules and regulations of the interstate commerce commission as to explosives did not supersede the common-law liability of the carrier, and they are not the sole measure of the railroad company's responsibility,[23] although the existence of rules and regulations of such commission and of the American Railway Association may have some bearing on the question of negligence of the carrier with respect to a particular shipment.[24]

regard to its perishable character—E H Emery & Co. v. American Refrigerator Transit Co., 184 N.W. 750, 193 Iowa 93, 20 A.L.R. 86.

(2) The measure of the duty of a carrier of perishable goods is to use reasonable care and diligence, considering the nature of the goods.—Daniels v. Northern Pac. Ry. Co., 171 P. 1178, 88 Or. 421.

20. Md.—Pennsylvania R. Co. v. Walker, 128 A. 45, 147 Md. 323.
Minn.—Howe v. Great Northern Ry. Co., 222 N.W. 290, 176 Minn. 46—McNeill & Scott Co. v. Great Northern R. Co., 194 N.W. 614, 156 Minn. 120—George B. Higgins & Co. v. Chicago, B & Q. R. Co., 161 N.W. 145, 135 Minn. 402, L.R.A. 1917C 507.
Mo.—Tri-State Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co., App., 264 S.W. 445.
Pa.—Farris Bros. & Co. v. Pennsylvania R. Co., 98 Pa.Super 123.
Va.—Chesapeake & O. Ry. Co. v. Timber-Lake, Currie & Co., 137 S.E. 507, 147 Va. 304.
10 C.J. p 122 note 34.

Corpus Juris has been quoted and cited with approval in:
Iowa.—Dye Produce Co. v. Davis, 209 N.W. 744, 747, 202 Iowa 1008.
Kan.—Parker Corn Co. v. Chicago, B & Q. R. Co., 244 P. 240, 243, 120 Kan. 484.
Wash.—Spokane Valley Growers' Union v. Spokane & I. E. R. Co., 175 P. 184, 186.

Proof of cause not essential

"Defendant need not prove that the damage was caused by the natural tendency to decay. It is sufficient to prove that it was not caused by its negligence."—Howe v. Great Northern Ry. Co., 222 N.W. 290, 291, 176 Minn. 46—George B. Higgins & Co. v. Chicago, B. & Q. R. Co., 161 N.W. 145, 146, 135 Minn. 402, L.R.A. 1917C 507.

21. Kan.—Parker Corn Co. v. Chicago, B. & Q. R. Co., 244 P. 240, 120 Kan. 484.
Mo.—Ozark Fruit Growers' Ass'n v. St. Louis-San Francisco R. Co., 46 S.W.2d 895, 226 Mo.App. 222—Hurley v. Illinois Cent. R. Co., 282 S.W. 97, 221 Mo.App. 478—Vernon v. American Ry. Express Co., App., 222 S.W. 913.
Ohio.—Louisville & Cincinnati Packet Co. v. Long, 14 Ohio Cir.Ct.,N.S., 225.
10 C.J. p 122 note 35.

Crude oil

Custom in shipping and transporting crude oil providing for strapping tanks in field three per cent short to allow for shrinkage, made part of contract of carriage, does not permit deduction of three per cent from amount of oil received by carrier, irrespective of whether actual loss from such causes amounted to that much, but carrier will be required to account to shipper for all oil received, less only loss due to excepted causes without negligence, such deduction not exceeding three per cent of total.—Enid Oil & Pipe Line Co. v. Champlin, 240 P. 649, 113 Okl. 170.

Presence of prohibited article

Recovery can be had by a shipper for negligent damage to, or destruction of, a shipment of lawful merchandise, which without the knowledge of either the shipper or the carrier contains a prohibited article or articles, where it is found affirmatively that the presence of such articles did not cause such damage or loss. Thus, a carrier was held liable where it accepted a carload of rags for shipment, which was damaged or destroyed by fire while in its custody, the jury having found that such fire did not result from the presence of a rag or rags containing prohibited quantities of vegetable oil.—Gulf, C. & S. F. Ry. Co. v. Lipshitz, Civ.App., 29 S.W.2d 905, error refused.

This text in Corpus Juris was quoted and approved as the basis of an instruction in Parker Corn Co. v. Chicago, B. & Q. R. Co., 244 P. 240, 243, 120 Kan. 484.

22. Minn.—National Elevator Co. v. Great Northern Ry. Co., 164 N.W. 79, 138 Minn. 100.

Explosives

Compliance by a carrier with the requirements of a criminal law providing against the carriage of explosives on passenger vehicles does not affect its civil liability for loss or injury to other property through an explosion.—John Lysaght, Limited, v. Lehigh Valley R. Co., C.C.A.N.Y., 254 F. 351, affirmed Lehigh Valley R. Co. v. John Lysaght, Limited, 271 F. 906, certiorari denied 41 S.Ct. 625, 256 U.S. 704, 65 L.Ed. 1180, and error dismissed 42 S.Ct. 53, 257 U.S. 613, 66 L.Ed. 397.

Grain

"Section 4491, G.S.1913, providing that 'every common carrier transporting grain shall give the shipper, on request, a receipt for the number of pounds of grain received from him, and shall deliver such quantity to the consignee . . . less loss from transportation, not to exceed sixty pounds to each car,' construed as it must be with section 4492, which provides for a penalty for failure to deliver the proper quantity of grain, is held to be a penal provision only, and it does not in any manner affect the civil liability of the carrier. This civil liability remains as at common law, save as this may be modified by other provision of statute."—National Elevator Co. v. Great Northern Ry. Co., 164 N.W. 79, 138 Minn. 100.

23. U.S.—Lehigh Valley R. Co. v. State of Russia, C.C.A.N.Y., 21 F.2d 406, certiorari denied 48 S.Ct. 159, 275 U.S. 571, 72 L.Ed. 432.

24. **Lime**

As bearing on negligence rule of American Railway Association and regulation of interstate commerce commission as to transportation of unslaked lime was held notice to carrier's agent that car of unslaked lime might be fired if entered by water, although accompanying slip stated contents merely as "lime."—Porter Screen Mfg. Co. v. Central Vermont Ry. Co., 102 A. 44, 92 Vt. 1.

Applying the general principles here stated it has been held that the carrier is not liable for loss or injury due solely to such causes as fermentation,[25] depreciation,[26] drying,[27] decay,[28] heating merely as a result of transportation,[29] spontaneous combustion,[30] effervescence,[31] putrefaction,[32] or corrosion or rusting resulting from the chemical union of parts of the goods shipped.[33] Irrespective of the exemption from liability for injuries attributable to acts of God, which is considered supra § 76, it may perhaps also be stated as a general proposition that the carrier is not liable for loss happening from the operation of natural causes without negligence or fault of the carrier.[34] This rule has been frequently applied where the shipment was susceptible to injury by freezing and was so injured or destroyed,[35] and it has been applied where the injury was due to warm weather,[36] although, as shown infra § 61, the carrier is liable for injuries resulting from its failure to keep the goods under refrigeration when it is its duty to do so. It has been doubted, however, that it is an inherent quality of fruit to freeze; freezing is usually, if not always, caused by man's negligence rather than by any inherent nature.[37] Loss or damage to property in the course of transportation through explosion of war munitions also in transit cannot be attributed to any vice in the former property which was injured by the vice of the explosives and not by its own.[38]

b. Live Stock

In the case of a shipment of live stock a carrier not guilty of negligence is not liable for loss or injury due to the peculiar nature and propensities of the animals.

A carrier is not an insurer of live stock delivered to it for transportation, for it does not absolutely warrant such freight against the consequences of its own vitality, and if there is loss or injury due to the peculiar nature and propensities of the ani-

25. N H—Faucher v. Wilson, 38 A 1002, 68 N.H 338, 39 L.R.A. 431—Rixford v. Smith, 52 N.H. 355, 13 Am R 42.
10 C J. p 122 note 27.

26. Del—Hardesty v. American Ry. Express Co., 119 A. 681, 2 W.W. Harr, Super., 66.

27. Neb—Nye-Schneider-Fowler Co v. Chicago & N W. Ry. Co, 182 N W. 967, 106 Neb. 149.

Shrinkage of grain

A railroad company is not liable for the natural shrinkage in weight of grain during shipment, due to its drying and losing a percentage of its moisture content.—Nye-Schneider-Fowler Co. v. Chicago & N. W Ry. Co., 182 N.W. 967, 106 Neb. 149.

28. Ala—Louisville & N. R. Co. v. Farmers' Produce Co., 85 So. 578, 17 Ala App. 388.
Del—Hardesty v. American Ry. Express Co, 119 A. 681, 2 W.W Harr., Super., 66
10 C J. p 122 note 28.

29. Tex—Hines v. First Guaranty State Bank of Aubrey, Civ.App., 230 S.W. 764.

Meal

A carrier is not liable for injury to a shipment of meal because of the inherent vice of the article, which became heated merely as a result of transportation—Hines v. First Guaranty State Bank of Aubrey, Tex.Civ. App, 230 S.W. 764.

30. Tex.—Gulf, C. & S F Ry. Co. v Downs, Civ.App., 70 S.W.2d 318, error refused
10 C.J. p 122 note 29.

Corpus Juris is cited with approval in Gulf, C. & S F Ry. Co. v. Downs, Tex.Civ.App., 70 S.W.2d 318, 321, error refused.

Baled cotton

(1) Nature of cotton in bales is not such as to make it subject to spontaneous combustion and thus relieve carrier from insurer's liability because of inherent nature of goods —Anderson, Clayton & Co v. Yazoo & M. V. R. Co., 141 So. 453, 174 La. 762.

(2) But fire packed in bale of cotton is "defect" or "latent infirmity," and shipper cannot recover against carrier for such loss or damage.—Gulf, C. & S F. Ry. Co. v. Downs, Tex Civ.App, 70 S.W 2d 318, error refused.

31. Ind—Pittsburg, etc, R. Co v. Morton, 61 Ind. 539, 28 Am R. 682.

32. N H.—Rixford v. Smith, 52 N H 355, 13 Am.R. 42.

33. W Va—A. F Thompson Mfg Co. v. Chesapeake & O. Ry. Co, 115 S E. 877, 93 W.Va. 3.

Iron stoves

A railway company, transporting a shipment of iron stoves, is entitled to defend an action for damage caused by the corrosion or rusting of the stoves in transit, on the ground that the corrosion is the result of a chemical union of acetic acid in the asbestos fire fronts and the metal surrounding it, and that there was no negligence on the part of the carrier causing such corrosion—A. F Thompson Mfg. Co. v. Chesapeake & O. Ry. Co, 115 S.E. 877, 93 W.Va. 3.

34. Kan.—Parker Corn Co. v. Chicago, B. & Q. R. Co, 244 P 240, 120 Kan. 484.
Md—Baltimore & O. R. Co. v Dever, 75 A. 352, 112 Md. 296, 26 L R A.,N. S, 712, 21 Ann Cas. 169
Or.—Michellod v Oregon-Washington R & Nav. Co, 168 P. 620, 86 Or. 329
10 C J. p 122 note 36.

This statement in Corpus Juris has been quoted with approval in
Kan—Parker Corn Co v Chicago, B. & Q R. Co., 244 P. 240, 243, 120 Kan. 484.
Or—Michellod v. Oregon-Washington R. & Nav. Co, 168 P 620, 622, 86 Or. 329.

35. Ill—Northwestern Fruit Exchange v. Erie R. Co., 248 Ill App. 193
Iowa—Dye Produce Co v. Davis, 209 N.W. 744, 202 Iowa 1008.
Mich—Standard Pickle Co v Pere Marquette Ry. Co., 193 N.W 300, 222 Mich. 639—Barber v. Detroit, G H. & M Ry. Co, 164 N W. 377, 197 Mich 643, Ann Cas 1918E 1109
Mo—Clemons Produce Co. v. Denver & R. G R. R., 219 S.W. 660, 203 Mo App 100.
Or.—Michellod v. Oregon-Washington R & Nav. Co, 168 P. 620, 86 Or. 329
10 C J p 122 note 36 [a] (1).

Corpus Juris was cited with approval in Clemons Produce Co. v. Denver & R. G. R R, 219 S W 660, 662, 203 Mo App. 100.

36. U S.—Nelson v. Woodruff, N Y, 1 Black. 156, 17 L Ed. 97.

37. Ohio—Louisville & Cincinnati Packet Co. v. Long, 14 Ohio Cir.Ct, N S, 225.
10 C J. p 122 note 36 [a] (3).

38. U S.—John Lysaght, Limited v. Lehigh Valley R. Co., D C N.Y., 254 F. 351, affirmed, C C A., Lehigh Valley R Co v John Lysaght, Limited, 271 F. 906, certiorari denied 41 S Ct. 625, 256 U S. 704, 65 L Ed. 1180, and error dismissed 42 S Ct. 53, 257 U.S. 613, 66 L Ed. 397.

mals, the carrier is not liable, unless the loss or injury could have been prevented by the exercise of reasonable foresight, vigilance, and care on its part.[39] The carrier is relieved from liability

39. U S—Philpott v. Davis, C C.A. Neb., 291 F. 370
Ala.—Lynn v. Mellon, 131 So. 458, 24 Ala App. 144
Ark.—St. Louis-San Francisco Ry Co. v. Chastain, 25 S W.2d 28, 181 Ark 192—Missouri Pac R Co v. Martindale, 213 S W 777, 139 Ark. 143
Conn.—Cassone v. New York, N. H & H. R. Co, 123 A. 280, 100 Conn. 262.
Fla.—American Ry. Exp. Co. v. Fegenbush, 144 So 320, 107 Fla 145—Walton Land & Timber Co. v Louisville & N. R Co, 72 So. 485, 72 Fla 66.
Ga.—Hines v Vann, 106 S E 921, 26 Ga App. 704.
Idaho.—Cooper v. Oregon Short Line R. Co., 262 P. 873, 45 Idaho 313.
Ill.—Hartford Live Stock Ins. Co. v Railway Express Agency, 274 Ill App 585—Libro v. Cleveland, C, C & St. L. Ry. Co, 202 Ill App 418
Ky.—Louisville & N R Co. v. Crain, 224 S W. 1063, 139 Ky 431—Louisville & N. R Co. v Hunter, 214 S W. 914, 185 Ky. 165—Louisville & N R. Co v Taylor, 205 S.W. 934, 181 Ky. 794.
La.—Alexander v. Texas & P. Ry. Co, 129 So 419, 14 La App 245.
Mo.—Jones v St Louis-San Francisco Ry. Co, 50 S W 2d 217, 226 Mo App 1152—Morrow v. Wabash Ry. Co, App, 6 S W.2d 628—Moran v. Chicago, B & Q. R Co., App., 255 S W. 331—Sullivan v American Ry. Express Co, 245 S W. 375, 211 Mo App 123—Erisman v Wabash Ry. Co, App, 243 S W. 237—Bragg v. Payne, App, 235 S.W. 148—Jordan v. Chicago, B & Q. R Co, 226 S.W 1023, 206 Mo.App 56—Burgher v Wabash Ry Co, App, 217 S W 854—Boyd v. St Louis Express Co, App, 211 S W 702—Baker v Bush, App, 194 S W. 1061.
Neb.—Nye-Schneider-Fowler Co. v Chicago & N. W Ry. Co, 179 N.W 503, 105 Neb 151—N H Nelson & Co v. Chicago & N. W. Ry. Co., 167 N W 574, 102 Neb 439.
N.Y.—Clay v. New York Cent. R Co, 231 N Y S. 424, 224 App Div 508—Walrath v. American Ry. Express Co, 216 N Y S. 545, 217 App Div 83—Ely v. Barrett, 168 N Y.S 419, 181 App Div. 176, appeal dismissed 120 N.E. 60, 224 N.Y 550
Ohio.—Thomas v Baltimore & O R Co, 16 Ohio N.P.,N S, 194
S.C.—Ward v Atlantic Coast Line R. Co, 151 S E 904, 155 S C 54.
Tex.—Davis v. Sullivan & Opry, Com App., 258 S W 157, affirming, Civ App, 242 S W. 764—Hartford Fire Ins. Co. v Galveston, H & S. A Ry. Co., Com App, 239 S W. 919, reversing Galveston, H. & S. A. Ry Co. v. Hartford Fire Ins Co, Civ App, 220 S W 781—St. Louis, B & M. Ry. Co v. Murray, Civ App, 40 S W 2d 949—Panhandle & S. F. Ry Co v. Key, Civ App, 20 S W 2d 260—Wichita Valley Ry. Co v Turbeville, Civ App, 269 S W. 498—Galveston, H & S. A Ry. Co v Crowley, Civ App, 214 S.W. 721—Gulf, C. & S F Ry Co. v. Helms Bros, Civ App, 210 S W. 853—Mistrot-Calahan Co v. Missouri, K & T. Ry Co. of Texas, Civ App, 209 S.W. 775—Kansas City, M & O Ry. Co. of Texas v. Weatherby, Civ.App., 203 S W 793.
W.Va.—Geyer v. Chesapeake & O. Ry Co., 168 S E 380, 113 W.Va 401.
Wis.—Chaimson v. American Ry. Express Co., 189 N.W. 529, 178 Wis. 286
10 C J p 44 notes 65, 66, p 110 note 98, p 123 notes 38–41.

As declared in Corpus Juris, the rule of the text has been approved in:
Ala.—Atlantic Coast Line R Co v. J. S Carroll Mercantile Co, 97 So 904, 905 210 Ala. 284.
Iowa.—Ruebel Bros. v. American Express Co, 180 N W. 658, 661.
Mo.—Jordan v Chicago, B. & Q R Co, 226 S W. 1023, 1027, 206 Mo. App 56.
Tex.—Hartford Fire Ins. Co v. Galveston, H & S A Ry. Co, Com. App, 239 S W. 919, 925—Wichita Valley Ry. Co v Turbeville, Civ. App, 269 S W. 498, 501.
W.Va.—Talbott v. Payne, 111 S.E 328, 330, 90 W.Va. 280.

Reason for rule

A carrier of animals by a mode of conveyance opposed to their habits and instincts, has no means of securing absolute safety. They may die of fright, or by refusing to eat, or they may, notwithstanding every precaution, destroy themselves in attempting to break away from the fastenings by which they are secured in the vehicle used to transport them, or they may kill each other. In such cases, supposing all proper care and foresight to have been exercised by the carrier, it would be unreasonable in a high degree to charge him with the loss —Robinson v Bush, 200 S W. 757, 199 Mo App 184—10 C.J. p 123 note 45

Concurrent negligence

(1) While it is true that defendant is not liable for injuries caused by the inherent vicious propensities of the animals, yet if the negligence of defendant and the inherent infirmity or natural evil propensities of the animals concurred in causing the injury, defendant is liable.

Ala.—Atlantic Coast Line R. Co v. J. S Carroll Mercantile Co, 97 So. 904, 210 Ala 284
Mo.—Morrow v. Wabash Ry. Co, 265 S W 851, 219 Mo App 62—Moran v. Chicago, B & Q R. Co, App, 255 S W. 331, 333.
Tex.—St Louis, B. & M. Ry Co. v. Murray, Civ App., 40 S W 2d 949.

(2) That hogs might have become diseased by exposure during transit would not necessarily exonerate railroad, if negligence combined with exposure caused injury—Vaughn v St Louis-San Francisco Ry. Co, 15 S.W.2d 901, 223 Mo App 732.

(3) A carrier is not relieved from liability for loss to cattle shipped caused by negligence or unreasonable delay by the fact that their impoverished or bad condition may have contributed to their death or injury, but, if guilty of negligence or unreasonable delay which proximately resulted in injury, the carrier is liable, although the results may have been more disastrous than would have been the case had the cattle been in good condition—Galveston, H. & S A Ry. Co. v. Buck, Tex.Civ App, 230 S W. 891.

Liability only for negligence

A carrier of live stock is liable only for injuries caused by its negligence, not being legally responsible for injuries resulting from the natural vice or the nature and propensities of the animals carried—Gulf, C & S. F. Ry. Co. v. Helms Bros, Tex Civ.App, 210 S.W. 853

Natural consequence of shipment

(1) In absence of negligence, carrier is not liable for condition of live stock, which naturally results from shipment—St Louis, B & M Ry. Co v. Murray, Tex Civ App, 40 S W.2d 949—Mais v. Panhandle & S F. Ry. Co., Tex Civ App, 25 S W 2d 1001, error dismissed.

(2) So, a carrier is not liable for damages to cattle during shipment which necessarily resulted in course of transportation between point of shipment and point of destination from ordinary handling, such as ordinary switching and confinement in cars—Lancaster v. Daggett, Tex Civ App., 272 S W 310—Hines v Thornton, Tex Civ App, 251 S W. 523.

(3) If there was no unreasonable delay, no rough handling out of the ordinary, or if cattle were damaged owing to their nature or condition or other causes over which the carrier had no control, carrier, if it used ordinary care, would not be liable—Panhandle & S. F Ry. v. Morrison, Tex.Civ.App., 191 S.W. 138

from such causes, if he has provided suitable means of transportation and exercised that degree of care which the nature of the property requires, or has not otherwise contributed to the injury.[40] This rule prevails at common law and no special contract limiting the carrier's liability in respect to injuries resulting to animals from such causes is necessary.[41] Where, however, the cause of loss is unconnected with the characteristics under consideration, the ordinary relation between the shipper and the carrier is not affected by the fact that the property transported is live stock.[42]

Notwithstanding the general rule of nonliability, the carrier is bound to exercise that degree of care which the nature of the property requires.[43] It is the carrier's duty to take notice of the weaknesses, character, and propensities of domestic animals, and to make such provisions against loss or injury therefrom as may reasonably be done in furnishing the means of transportation and providing for the protection of the property during transit.[44] The fact that the shipper was present in the car and saw that the carrier failed to exercise the required degree of vigilance and care does not detract from the carrier's liability as long as the shipper's conduct did not amount to an estoppel[45]

Applications of rule. In applying the general rule above stated, it is held that the carrier is not liable for loss or injury to animals superinduced by fright or nervousness, where no negligence is attributable to the carrier.[46]

Likewise, the carrier, when not itself at fault, is not responsible for damages caused by an animal's own viciousness or bad temper, or by the viciousness or bad temper of other animals shipped with it;[47] and as long as the conduct of the animals

(4) Thus, the carrier is not liable for injury incidental to a long trip in cold weather—Jordan v Chicago, B & Q R Co, 226 S W. 1023, 206 Mo App. 56.

Dog gnawing out of crate

Express company accepting dog for interstate shipment was held not liable for loss resulting when dog escaped by gnawing out of crate—Grant v American Ry. Express Co, 139 A. 784, 126 Me 489.

Poor condition of cattle

The weak and impoverished condition of cattle tendered to a carrier for shipment constitutes an inherent vice or defect, so that, in the absence of negligence on its part, a carrier is not liable for any injury or damages resulting from such defect during the shipment—Hartford Fire Ins Co v Galveston, H & S. A. Ry Co, Tex Com App., 239 S W. 919, reversing Galveston, H & S A Ry. Co. v Hartford Fire Ins Co, Civ App, 220 S W 781—Leon v Hines, Tex Civ App, 223 S W. 239.

40. Ariz—Southern Pac. Co. v. Itule, 74 P 2d 38.
Tex—Davis v Sullivan & Opry, Com App, 258 S W. 157, affirming, Civ App, 242 S W. 764—Kansas City, M & O Ry Co. v. Cauble, Civ App, 286 S W. 478.
10 C.J. p 123 note 42.

At common law, shipment of live stock constituted an exception to rule that carrier was liable for damages to goods in transit unless damage was caused by act of God, of public enemy, of shipper, or by inherent nature of goods themselves, and in such case carrier needed only to show that it furnished proper means of transportation and exercised reasonable care which the nature of the shipment required.—Southern Pac. Co. v. Itule, Ariz, 74 P 2d 38

41. Va—Adams Express Co. v. Scott, 73 S.E. 450, 113 Va. 1, Ann. Cas 1913D 972

42. Ill—Hartford Live Stock Ins. Co v Railway Express Agency, 274 Ill App. 585
Mo—Sullivan v American Ry. Express Co, 245 S W. 375, 211 Mo. App. 123—Burgher v Wabash Ry. Co, App, 217 S W 854
10 C.J p 43 note 61, p 44 note 66, p 123 note 44.

43. Ark—St Louis-San Francisco Ry. Co. v Chastain, 25 S.W 2d 28, 181 Ark 192
10 C J p 124 note 55
"Defendant is required to use ordinary care, taking into account the characteristics of the animal and the weather"—Burgher v Wabash Ry Co, App, 217 S W. 854, 855.

Death of stallion

For such swaying, jarring, and sudden stopping as are ordinary incidents of transportation of live stock, even if they might be sufficient to cause a guttie, carrier would not be liable for death of stallion, since it is only when violence which produces a guttie, whether it be swaying, jarring, sudden stopping, or other movement, constitutes negligence or failure to perform its duty, that carrier can be held liable for injury or loss caused thereby—Vander Beek v. Chicago & N. W. Ry. Co, Iowa, 278 N W 201

44. Iowa—Buck v. American Railway Express Co, 192 N W. 277, 195 Iowa 1024.
Mo.—Boyd v St Louis Express Co, App, 211 S W. 702
Tex—Hartford Fire Ins Co. v. Galveston, H. & S. A. Ry. Co., Com App, 239 S W 919, reversing Galveston, H & S. A Ry. Co. v. Hartford Fire Ins Co, Civ App, 220 S W 781—Kansas City, M & O Ry. Co of Texas v. Weatherby, Civ App, 203 S.W 793.
10 C J. p 124 note 57.

Defective door

Live stock carrier could have anticipated that propensity of animals to become restless, kick, and trample on an animal that was prostrate might contribute to injure a horse if it became fastened in a defective door—Moran v Chicago, B. & Q R. Co, Mo App, 255 S.W. 331.

45. Ky—Kelly v. Adams Express Co, 119 S W. 747, 134 Ky. 208

46. Conn—Coupland v. Housatonic R. Co, 23 A. 870, 61 Conn. 531, 15 L R A. 534.
Va.—Adams Express Co. v Scott, 73 S E 450, 113 Va. 1, Ann Cas 1913D 972
10 C J p 123 note 46.
"Frightened animals may die of terror or starve themselves by refusing food, notwithstanding every precaution it is possible to use. For such occurrences the carrier is not answerable"—Smith v. New Haven, etc, R Co, 12 Allen, Mass, 531, 533, 90 Am D. 166

47. Ga—Hines v Vann, 106 S E 921, 26 Ga App. 701—Heath v Sandersville R. Co, 98 S E 92, 23 Ga.App. 255.
Idaho.—Cooper v. Oregon Short Line R. Co, 262 P 873, 45 Idaho 313
Ill—See Blickstein v. Chicago & A. R. Co., 211 Ill.App 255
Mo—Jordan v. Chicago, B & Q. R Co, 226 S.W. 1023, 206 Mo App 56—Robinson v. Bush, 200 S.W. 757, 199 Mo.App 184
N C—Teeter v Southern Express Co, 90 S E. 761, 172 N.C. 616, reargument denied 90 S E 927, 172 N C. 620—Schloss-Bear-Davis Co.

is not caused by any neglect of the carrier, it is not material whether it was such as would ordinarily occur or not.[48] A shipper in transporting several animals takes the risk of injuries inflicted on one animal by the vicious or restless propensities of the others.[49]

The carrier is not an insurer against disease in live stock,[50] and loss or injury due to want of vitality or sickness of the animals is not chargeable to the carrier, unless he has in some way been at fault.[51]

A carrier of live stock is not liable for injuries caused by changing weather conditions.[52] In the absence of some negligence or misfeasance on the part of the carrier or its servants, the carrier is not liable for loss or injury to animals occasioned by excessive heat[53] or cold.[54] This is a risk assumed by the shipper.[55]

§ 80. Necessity That Excepted Cause Be Proximate Cause

The carrier is not exempt from liability unless the exceptional cause on which he relies as an excuse was the immediate, and proximate, or, as sometimes stated, sole cause of the loss.

Where the carrier relies on one of the exceptions to his common-law liability, it must appear, in order to excuse him, that the exceptional cause, such as an act of God, or the like, was the immediate or proximate, and not the remote, cause of the loss;[56] and it is further said in some cases that

v. Louisville & N. R. Co., 88 S.E. 476, 171 N.C. 350.
10 C.J. p 124 note 48.
"We are not able to perceive any reason upon which the shrinkage of the plaintiff's cattle, their disposition to become restive, and their trampling upon each other when some of them lie down from fatigue, is not to be deemed an injury arising from the nature and inherent character of the property carried, as truly as if the property had been of any other description or perishable goods."—Conger v. Hudson River R. Co., 13 N.Y Super. 375, 381.
This statement in Corpus Juris has been cited and approved in Jordan v. Chicago, B & Q. R. Co., 226 S.W. 1023, 1027, 206 Mo.App. 56.

48. Iowa—Hanley v. Chicago, etc., R. Co., 134 N.W. 417, 154 Iowa 60

49. Mo.—Jordan v. Chicago, B & Q R. Co, 226 S W. 1023, 206 Mo App. 56.
10 C.J p 124 note 50.

50. Iowa—Siegel v Chicago, R. I. & P. Ry. Co, 208 N.W. 78, 201 Iowa 712.

51. Ill.—Libro v. Cleveland, C., C. & St L Ry Co, 202 Ill App. 413—See Blickstein v. Chicago & A. R Co., 211 Ill App. 255.
Iowa.—Siegel v. Chicago, R. I. & P Ry. Co., 208 N W. 78, 201 Iowa 712
Ky.—Louisville & N. R. Co v. Taylor, 205 N W. 934, 181 Ky. 794.
Tex—Wichita Valley Ry. Co v. Turbeville, Civ App., 269 S W. 498—Kansas City, M. & O Ry. Co. of Texas v Weatherby, Civ.App., 203 S.W. 793.
10 C.J. p 124 note 51.
This Corpus Juris statement has been cited with approval in:
Mo.—Jordan v. Chicago, B. & Q. R Co, 226 S.W. 1023, 1027, 206 Mo App. 56.
Tex.—Hartford Fire Ins. Co v. Galveston, H. & S. A. Ry Co., Com. App., 239 S W. 919, 925—Wichita Valley Ry. Co. v. Turbeville, Civ. App., 269 S W. 498, 501—Ft. Worth & D. C Ry. Co. v. Gatewood, Civ. App, 185 S W 932, affirmed Gatewood v. Ft Worth & D C. Ry. Co, 232 S.W. 493, 111 Tex. 291.
Contraction in transit
Where the evidence showed that hogs, dying in transit, died from pneumonia, and there was nothing to show or raise an implication that the pneumonia was due to any culpability or default on the part of the carrier, rather than to the inherent weakness or physical infirmity of the animals, the carrier was not liable, whether the hogs had pneumonia when shipped or contracted it while in transit—Bragg v. Payne, Mo.App., 235 S.W. 148.

52. N.C.—Washington Horse Exch. v. Louisville, etc., R. Co., 87 S.E. 941, 171 N.C. 65.

53. Neb—Cleve v. Chicago, etc. R. Co., 120 N.W. 959, 84 Neb. 158.
W.Va—Maslin v. Baltimore, etc., R. Co., 14 W.Va. 180.

54. Mo.—Jordan v. Chicago, B. & Q. R. Co, 226 S.W. 1023, 206 Mo. App. 56.

55. Iowa.—Winn v. American Express Co, 140 N W. 427, 159 Iowa 369, 44 L R A,N S, 662.

56. Ala.—Louisville & N. R. Co. v. Finlay, 170 So 207, 233 Ala. 128.
Ark.—St Louis-San Francisco Ry. Co. v. Ozark White Lime Co., 9 S W.2d 17, 177 Ark. 1018.
La—Southern Cotton Oil Co. v. New Orleans & N. E. R. Co., 83 So. 821, 146 La 541.
Mich—Standard Oil Co. v. Payne, 110 N.W. 769, 220 Mich. 663.
Minn—De Vita v. Payne, 184 N.W. 184, 149 Minn. 405.
Mo—Moran v. Chicago, B. & Q. R Co, App., 255 S W. 331—Vernon v. American Ry. Express Co., App, 222 S W. 913.
Ohio.—St. Louis-San Francisco Ry Co. v. Glow Electric Co., 172 N E. 425, 35 Ohio App. 291—Cincinnati, H. & D. Ry. Co. v. Myers & Patty Co., 4 Ohio App. 493—Erie R. Co v. Kohler, 26 Ohio Cir.Ct,N S, 337
Pa—Dreibelbis & Co. v. Philadelphia & Reading R. Co, 28 Pa Dist 188
Tex.—Hartford Fire Ins Co. v. Galveston, H & S. A. Ry. Co, Com App., 239 S.W. 919, reversing Galveston H. & S. A. Ry. Co. v. Hartford Fire Ins. Co., Civ App., 220 S. W. 781—Fort Worth & D. C. Ry. Co. v. Lemons, Civ.App., 258 S W 1095.
Vt.—Porter Screen Mfg. Co. v. Central Vermont Ry. Co., 102 A. 44, 92 Vt. 1.
Va.—Chesapeake & O. Ry. Co v. Timber-Lake, Currie & Co, 137 S E. 507, 147 Va. 304—Merchants' & Miners' Transp. Co. v. L. J. Upton & Co., 103 S E. 616, 127 Va. 406.
10 C.J. p 125 notes 60, 62 [c].
This statement in Corpus Juris has been cited with approval in:
Ala.—Atlantic Coast Line R. Co. v J. S. Carroll Mercantile Co., 97 So. 904, 905, 210 Ala. 284.
Ky.—Louisville & N. R. Co. v. Taylor, 205 S W. 934, 936, 181 Ky. 794.
N C.—Morris v. American Ry. Express, 110 S.E. 855, 857, 183 N.C 144.
Tex.—Gulf, C. & S. F. Ry. Co. v Culwell, Civ App, 216 S W. 457, 459.
Storm
Where freight placed on pier for delivery to connecting water carrier was engulfed by sudden rise of tide without warning, after once receding, as result of continuation of a storm, and no tide had ever before covered the pier and weather bureau had given no warning that storm would be more severe than other storms, inference was authorized that damage resulted from sudden and unprecedented storm and rising of tide constituting an act of God and that no negligence of railroad proximately contributed to the damage.—Whit-

to excuse the carrier the act of God, or the like, must be the sole cause of the loss.[57] Thus, if plaintiff's loss proximately results from defendant's breach of contract, defendant is liable even though one of the excepted causes contributes to the loss,[58] and it is very generally declared that, if the negligence of the carrier concurs with the excepted cause in producing a loss or injury, the carrier is not exempted from liability by showing that the immediate cause was the act of God, or some other excepted cause. As otherwise expressed, the carrier is responsible where the loss is caused by an act of God or other excepted cause, if the carrier's negligence mingles with it as an active and coöperative cause.[59] The fact that the shipper or a caretaker representing him accompanied a

tier Mills Co. v. Southern Ry. Co., 190 S.E. 433, 55 Ga.App. 519.

57. Ark.—St. Louis-San Francisco Ry. Co. v. Ozark White Lime Co., 9 S.W.2d 17, 177 Ark. 1018—Missouri & N. A. R. Co. v. United Farmers of America, 292 S.W. 990, 173 Ark. 577.

Ky.—Louisville & N. R. Co. v. Taylor, 205 S.W. 934, 181 Ky. 794.

Mich.—Tobin v. Lake Shore & M. S. Ry. Co., 159 N.W. 389, 192 Mich. 549.

Mo.—Ford v. Wabash Ry. Co., App., 266 S.W. 1032, affirmed 300 S.W. 769, 318 Mo. 723—Erisman v. Wabash Ry. Co., App., 243 S.W. 237.

N.C.—Morris v. American Ry. Express, 110 S.E. 855, 183 N.C. 144.

Okl.—Atchison, T. & S. F. Ry. Co. v. Eddie, 61 P.2d 681, 177 Okl. 634.

10 C.J. p. 125 note 62.

58. Kan.—Bruce Bros. Grain Co. v. Hines, 193 P. 339, 107 Kan. 658.

Failure of inspection

Where plaintiff bought car of corn to be shipped by seller over defendant railroad on a stipulated condition that carrier would stop car at stated point for inspection and sold the corn to a dealer on basis of such inspection and he sold it at destination on same basis, and because of failure of inspection plaintiff repaid the price received and corn reached destination deteriorated, although in good condition at place of inspection and where last buyer refused to receive it, and plaintiff sold the corn at a loss, the loss was the proximate result of carrier's breach of contract to stop the car for inspection, and the carrier is liable for the resulting loss.—Bruce Bros. Grain Co. v. Hines, 193 P. 339, 107 Kan. 658.

59. U.S.—Chesapeake & O. Ry. Co. v. J. Wix & Sons, C.C.A.Va., 87 F.2d 257—Lehigh Valley R. Co. v. State of Russia, C.C.A.N.Y., 21 F.2d 396, certiorari denied 48 S.Ct. 159, 275 U.S. 571, 72 L.Ed. 432—Chicago & E. I. R. Co. v. Collins Produce Co., Ill., 235 F. 857, 149 C.C.A. 169, affirmed 39 S.Ct. 189, 249 U.S. 186, 63 L.Ed. 552.

Ala.—Louisville & N. R. Co. v. Finlay, 170 So. 207, 233 Ala. 128.

Ariz.—Southern Pac. R. Co. of Mexico v. Gonzalez, 61 P.2d 377, 48 Ariz. 260.

Ark.—St. Louis-San Francisco Ry. Co. v. Ozark White Lime Co., 9 S.W.2d 17, 177 Ark. 1018—Missouri & N. A. R. Co. v. United Farmers of America, 292 S.W. 990, 173 Ark. 573.

Mo.—Vaughn v. St. Louis-San Francisco Ry. Co., 15 S.W.2d 901, 223 Mo.App. 732—Hurley v. Illinois Cent. R. Co., 282 S.W. 97, 221 Mo. App. 478—Ford v. Wabash Ry. Co., App., 266 S.W. 1032, affirmed 300 S.W. 767, 318 Mo. 723—Morrow v. Wabash Ry. Co., 265 S.W. 851, 219 Mo.App. 62—Harrison v. Chicago & A. R. Co., 239 S.W. 871, 209 Mo. App. 526—Vernon v. American Ry. Express Co., App., 222 S.W. 913

N.C.—Tuthill v. Norfolk & S. R. Co., 93 S.E. 446, 174 N.C. 77—Harris v. Norfolk Southern R. Co., 91 S.E. 710, 173 N.C. 110

Ohio.—Cincinnati, H. & D. Ry. Co. v. Myers & Patty Co., 4 Ohio App. 493—Erie R. Co. v. Kohler, 26 Ohio Cir.Ct.,N.S., 337.

Okl.—Atchison, T. & S. F. Ry. Co. v. Eddie, 61 P.2d 681, 177 Okl. 634

Pa.—Dreibelbis & Co. v. Philadelphia & Reading R. Co., 28 Pa.Dist. 488.

Tex.—Hartford Fire Ins. Co. v. Galveston, H. & S. A. Ry. Co., Com.App., 239 S.W. 919, reversing Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co., Civ.App., 220 S.W. 781—Gulf, C. & S. F. Ry. Co. v. Morrow, Civ.App., 66 S.W.2d 481, error dismissed—American Ry. Express Co. v. Home Star Produce Co., Civ.App., 276 S.W. 790—Fort Worth & D. C. Ry. Co. v. Lemons, Civ.App., 258 S.W. 1095—Galveston, H. & S. A. Ry. Co. v. Buck, Civ.App., 230 S.W. 891—Kansas City, M. & O. Ry. Co. of Texas v. Blackstone & Slaughter, Civ.App., 218 S.W. 552, denying rehearing 217 S.W. 208.

Vt.—Porter Screen Mfg. Co. v. Central Vermont Ry. Co., 102 A. 44, 92 Vt. 1.

Va.—Chesapeake & O. Ry. Co. v. W. C. Crenshaw & Co., 137 S.E. 515, 147 Va. 290—Chesapeake & O. Ry. Co. v. Timber-Lake, Currie & Co., 137 S.E. 507, 147 Va. 304

W.Va.—Annese v. Baltimore & O. R. Co., 105 S.E. 807, 87 W.Va. 588, 22 A.L.R. 869

10 C.J. p. 110 note 99, p. 125 note 62

"If the intervention of negligence breaks the line of defense so that the loss is not directly caused by the Act of God, such act is not a proximate cause, but the negligence is its sole proximate cause. The act of God is then only the condition on which defendant's negligence operates, and resembles the status of subsequent negligence in respect to the plaintiff's primary contributory negligence."—Louisville & N. R. Co. v. Finlay, 170 So. 207, 209, 233 Ala. 128.

"The carrier . . . would be liable to the shipper if the goods were injured by its negligence, whether it was an insurer or not."—Missouri Pac. R. Co. v. Myers, 293 S.W. 15, 19, 173 Ark. 747.

"Where injury is produced by negligence of the carrier concurring with another cause from which it is exempt from liability, by law, as the act of God, or by contract, and there is no negligence on the part of the shipper contributing to such injury, the carrier is liable in damages for the full amount of such injury."—Gulf, C. & S. F. Ry. Co. v. Culwell, Tex.Civ.App., 216 S.W. 457, 459.

This rule as stated in Corpus Juris has been quoted or cited with approval in:

Ala.—Atlantic Coast Line R. Co. v. J. S. Carroll Mercantile Co., 97 So. 904, 905, 210 Ala. 284.

Ky.—Louisville & N. R. Co. v. Taylor, 205 S.W. 934, 936, 181 Ky. 794.

La.—Southern Cotton Oil Co. v. New Orleans & N. E. R. Co., 83 So. 821, 823, 146 La. 541

Mich.—Standard Oil Co. v. Payne, 190 N.W. 769, 770, 220 Mich. 663.

Mo.—Robinson v. Bush, 200 S.W. 757, 760, 199 Mo.App. 184

Ohio.—Fean v. Alabama Great Southern R. Co., 159 N.E. 487, 489, 26 Ohio App. 96

Tex.—Bergman Produce Co. v. American Ry. Express Co., Civ.App., 262 S.W. 891, 894—St. Louis Southwestern Ry. Co. of Texas v. Culberson, Civ.App., 248 S.W. 111, 114.

Va.—Merchants' & Miners' Transp. Co. v. L. J. Upton & Co., 103 S.E. 616, 618, 137 Va. 406.

Act of God

In absence of contributory negligence, a carrier is liable for the full amount of injury caused by failure to properly shelter and care for dipped cattle delayed in transit, although the concurring cause was an act of God.—St. Louis Southwestern Ry. Co. of Texas v. Culberson, Tex.Civ.App., 248 S.W. 111.

shipment does not relieve the carrier from liability for damage caused by its negligence,[60] and the furnishing of a caretaker to look after heat protection of the goods shipped does not relieve the carrier from liability for acts of negligence in the management of its train;[61] nor is the liability of the carrier defeated by the fact that the extent of the damage was not ascertained immediately on delivery of the goods to the consignee.[62]

The maxim, that "In law the immediate and not the remote cause of any event is regarded," applies in cases of negligence affecting a carrier's liability, however,[63] and it must be true, as a general proposition, that, although the carrier is in

Act of shipper or consignee

(1) Although shipper of cattle cannot recover from carrier for injuries which were the proximate result of weakness at time cattle were tendered for carriage, carrier, having received cattle, is bound to transport them with reasonable dispatch, and on breach of such duty is liable for injuries proximately resulting therefrom, although results were more disastrous than if cattle had been in good condition—Panhandle & S. F. Ry. Co. v. Sanderson, Tex Civ App., 218 S W. 540, dismissed for want of jurisdiction.

(2) Where shipper and carrier are negligent, carrier's concurring negligence makes it liable.

U.S—Lehigh Valley R Co v. State of Russia, C.C A N Y, 21 F.2d 406, certiorari denied 48 S Ct 159, 275 U S 571, 72 L Ed 432

Cal—Mitchell v North Pac. S. S. Co, 213 P. 293, 60 Cal App. 554.

Minn—De Vita v Payne, 184 N W 184, 149 Minn. 405

N.Y—Greenwald v. New York Cent & H R R. Co, 159 N.Y.S 15, 95 Misc. 122

Vt—Saliba v. New York Cent. R Co, 144 A 194, 101 Vt. 427.

10 C J p 125 note 62 [b]

(3) Possible negligence of consignee of explosives will not relieve carrier of liability, if loss would not have occurred, except for carrier's concurring fault—Lehigh Valley R Co v State of Russia, C C A N Y, 21 F 2d 396, certiorari denied 48 S Ct. 159, 275 U S 571, 72 L Ed 432.

(4) Where fruit was damaged in shipment, although shipper was negligent in installation of heater or in caring for it, if negligence of railroad company in moving train proximately concurred with that of shipper as cause of overturning of heater and consequent damage to fruit railroad company was liable, notwithstanding fault of shipper—S. G Palmer Co. v. Illinois Cent. R Co, 204 N W. 566, 164 Minn 68.

(5) Where railroad by haste in moving freight prevented shipper from properly marking the freight, and where the railroad received such freight not properly marked, and issued a through bill of lading therefor, which did not show the markings on the freight as required by the regulations of the company, it could not avoid liability for loss, on the ground that the shipper did not mark the freight as required—Grammes v. Central R. Co. of New Jersey, 112 A. 532, 269 Pa. 466.

(6) Although there is a negligent misdirection by the shipper, the carrier is liable, as shown supra § 78 d, if the carrier itself has been guilty of some negligent act or omission without which the loss would not have occurred.

Inherent vice or defect

It has already been shown supra § 79 a, b that, if the carrier's negligence conduced to set the inherent infirmity of goods or live stock carried in motion to the owner's damage, the carrier is liable.

Negligent construction of bridge

Where shipment of sheep was delayed by wreck and washout of three bridges, the fact that the wreck and washout of one bridge were inevitable accidents does not relieve the carrier of liability where the wreck was cleared in time for the train to have crossed the bridge before washout had it not been for negligent construction of the other two bridges—Kansas City, M & O Ry. Co v. Blackstone & Slaughter, Tex Civ.App., 217 S.W. 208, rehearing overruled 218 S W. 552, error granted

Noncompliance with statute

Where the shipper failed to comply with a statutory requirement to give notice of the nature of the goods, if consisting of pictures contained in any package or trunk, he could recover nevertheless if the loss was due to the carrier's negligence—Wheeler v. Oceanic Steam Nav. Co, 26 N E 248, 125 N.Y. 155, 21 Am S R. 729.

Successive negligence

If carrier fails to protect perishable goods on consignee's failure to do so, negligence of consignee and carrier are not concurrent but successive—Porter v Pennsylvania R Co, 215 N Y.S. 727, 217 App Div. 49.

Failure to notify shipper

(1) While a carrier is exempt from liability if the act of God is the proximate and sole cause of loss, the carrier is liable if its negligence concurs in, and contributes to, the loss, as where the carrier negligently fails to notify the shipper that it could not perform its promise to make prompt delivery of potatoes shipped, so that the shipper could cooperate in the usual way by removing them to a safer place, and the potatoes were injured by freezing.—Merchants' & Miners' Transp Co. v. L J. Upton & Co, 103 S E 616, 127 Va 406.

(2) So, where a railroad negligently failed to give notice of arrival of cotton required by bill of lading, the fact that lightning caused its destruction was held not to relieve railroad from liability—Missouri & N. A. R. Co. v. United Farmers of America, 292 S.W. 990, 173 Ark. 577

Separable damages

(1) Shipper's contributory negligence is not complete defense in action for damages to live stock if damages caused by carrier's negligence and shipper's contributory negligence can be separated.—Fort Worth & Denver City Ry. Co. v Motley, Tex Civ.App., 87 S W 2d 551, error dismissed.

(2) Thus, alleged contributory negligence of shipper in shipping cattle immediately after dipping, and while they were in poor condition, is no bar to recovery of damages resulting from carrier's negligent handling of cattle, if the respective damages can be separated, but if not, it will bar recovery—Wichita Valley Ry. Co. v. Turbeville, Tex Civ.App., 269 S.W. 498.

(3) So, if part of the injury to a shipment of horses arose solely from the shipment being in a box car, and part solely from the condition of the shipping pens, the risk from the use of a box car being assumed by the shipper, while the improper condition of the pens was negligence of the railroad for which it was liable, the damage from each cause should be apportioned, and the shipper given recovery only for the part caused by the condition of the pens.—Gulf, C & S. F. Ry. Co. v. Culwell, Tex.Civ.App, 216 S W. 457.

60. Iowa—Vincent, Albin & Strahl v. Hines, 200 N.W. 1, 198 Iowa 1224.

61. Minn—S. G. Palmer Co. v Illinois Cent R. Co, 204 N W. 566, 164 Minn 68.

62. Ark—Missouri Pac. R Co. v. W M. Smith & Co, 265 S.W. 64, 165 Ark. 546.

63. Tex—Fort Worth & D. C. Ry Co v. Lemons, Civ App., 258 S.W. 1095.

some way negligent, if such negligence does not contribute to the loss which is due to an excepted cause, the carrier is not liable.[64] Accordingly, it has been held that the carrier is not liable if its negligence was the remote, and not the proximate, cause of the loss suffered, where the injury was the proximate result of one of the causes exempting the carrier from liability.[65]

Where the action is for breach of contract, the term "proximate cause," as used in the law of negligence has no application.[66]

§ 81. Negligent Delay in Transportation

The authorities are in conflict as to the liability of a carrier for goods lost as a result of an act of God or the like, where the carrier negligently delayed their transportation and thus exposed them to the hazard.

Apart from considerations involved in actions for negligent delay in transportation, which are discussed infra § 190 et seq, there is a diversity of opinion as to the liability of a common carrier for goods lost as a result of an act of God or other exceptional cause, where the carrier was guilty of a negligent delay in transportation.[67] Where property is destroyed by an act of God or other excepted cause, but would not have been within the range of the destructive force except for the negligent delay of the carrier, it is established as the rule accepted and enforced in the federal courts that the act of God or other cause, not the negligent delay of the carrier, is the proximate cause of the loss, and that the negligent delay of the carrier is too remote as a contributing cause to entail liability on him,[68] at least unless the carrier has such notice of the situation as to cause it to

64. La.—Southern Cotton Oil Co. v. New Orleans & N. E. R. Co., 83 So. 821, 146 La. 541.
Mich.—Standard Pickle Co. v. Pere Marquette Ry. Co, 193 N.W. 300, 222 Mich. 639—Standard Oil Co v Payne, 190 N.W. 769, 220 Mich. 663.
Ohio—Urbana Egg Case Co. v. Nypano R. Co., 16 Ohio N.P.,N.S, 321.
Va—Merchants' & Miners' Transp. Co. v. L. J. Upton & Co, 103 S E 616, 127 Va. 406.
10 C J. p 125 note 61.

65. Ill—See Ohio Salt Co. v. Baltimore & O. R. Co., 204 Ill.App. 376
Mont—Kirby v. Oregon Short Line R Co., 197 P. 254, 59 Mont. 425
N.Y—Rotundo v. Erie R. Co, 198 N Y S 688, 120 Misc. 461.
"If negligence of the carrier was the proximate cause of the loss of the pickles it is liable although frost may have contributed to cause the loss. See Ignaszak v. McCray, etc, Co, 190 N W. 756, 221 Mich 10, and cases cited. But, unless the carrier has been guilty of such causal negligence, it is not liable"—Standard Pickle Co. v. Pere Marquette Ry Co., 193 N.W. 300, 302, 222 Mich. 639.

Negligence of shipper

In an action by a shipper of stock for damages and shrinkage, due to defendant's failure to furnish adequate watering facilities, in that out of five pens wherein the cattle were unloaded only four were provided with such facilities, but wherein it appeared plaintiff, who was in charge of his stock, had ample opportunity to transfer them to vacant pens before reloading and to provide them with water, it was held that his failure to do so could be attributed only to his own neglect or misconduct, and that the negligence of the company was at most the remote, and not the proximate, cause of the loss, so that he could not recover, the proximate cause being that which, in a natural and continuous sequence, unbroken by any new independent cause, produces the injury, and without which it would not have occurred.—Kirby v. Oregon Short Line R. Co., 197 P. 254, 59 Mont. 425.

Flood

(1) Carrier of goods is liable for their loss or damage only where its own negligence contributes as a proximate cause to their destruction by an act of God, such as an unprecedented flood.—International Paper Co. v. New York Cent. R. Co., 166 N.Y.S. 751, 100 Misc. 683.

(2) The proximate cause of loss of an interstate shipment through an unprecedented flood after arrival at destination was an act of God, within the contract relieving the carrier from liability therefor, although, had it not been negligent with respect to notice of arrival of the goods, they would have been removed—Hadba v. Baltimore & O. R Co., 170 N Y.S. 769, 183 App.Div. 555.

Causal connection

In action for damage to perishable goods in transit, there must be causal connection between carrier's negligence proved and damage claimed.—Lyon v. Norfolk & W. Ry. Co., 136 S.E. 694, 103 W.Va. 73.

Shipper's disregard of agriculture regulations

In action against terminal carrier for damages for loss of sale of part of a carload of Christmas trees from moth-infested area, which defendant had prevented plaintiff from unloading pursuant to instruction of inspector of department of agriculture, it was held that plaintiff lost his trees through his disregard of regulations with reference to trees shipped from area quarantined.—Chapman v. New York Cent. R. Co., 105 A. 404, 118 Me. 481.

66. Tex—Wichita Valley Ry. Co v. Anderson, Civ App, 48 S W.2d 361

67. **Citing Corpus Juris,** it has been said in a case involving an interstate shipment: "Two conflicting rules have been established in different jurisdictions. (1) In several of the states it is held that the act of God completely exonerates the carrier even though there has been negligent delay in transportation, and these cases rest on the proposition that the delay is not the proximate cause of the loss; (2) In some other states it is held that the act of God does not exonerate the carrier where there has been negligent delay in transportation, and these cases rest on the proposition that the delay is a contributing cause, or a concurring cause, or a proximate cause, or a concurring proximate cause. . . . So far as we are advised, it has not been decided in Indiana . . . The rule first above stated has been followed consistently by the federal courts . . . We are of the opinion that the first rule is sound"—Chicago & E Ry. Co v Schaff Bros Co, 117 N.E. 869, 870, 74 Ind App 227.

68. Ind.—Chicago & E. Ry. Co. v Schaff Bros. Co., supra.
Ky.—Julius Kessler & Co. v. Southern Ry. Co. in Kentucky, 255 S.W 535, 200 Ky. 713.
Me.—Continental Paper Bag Co. v. Maine Cent. R. Co, 99 A 259, 115 Me. 449.
Minn.—Northwestern Consol. Milling Co v. Chicago, B & Q. R Co, 160 N.W 1028, 135 Minn 363, certiorari denied 38 S.Ct. 8, 245 U.S. 644, 62 L.Ed. 528
Neb.—Dolan Fruit Co. v. Davis, 196 N.W 168, 111 Neb. 322, 32 A.L.R. 107.

apprehend the danger.[69] In other words, under the federal rule, unless the carrier is chargeable with some negligence other than delay in making the shipment, the destruction of the property by an act of God, not foreseen in time to guard against it, absolves the carrier from liability.[70] The federal rule is applied in some states in the case of intrastate shipments.[71] This doctrine is predicated on the view that, if the carrier could not reasonably have foreseen or anticipated that the goods would be overtaken by such a casualty as a natural and probable result of the delay, then the negligent delay was not the proximate cause of the loss and should be disregarded in determining the liability for such loss;[72] and it has been held not to apply where the carrier could reasonably have anticipated the loss as the probable result of its negligent delay.[73] Moreover, the principle is not to be so extended as to exempt the carrier from liability for destruction of goods by an act of God, where the carrier is guilty of a positive act of misfeasance in refusing to deliver the goods

N.Y.—Rezsek v. Southern Pac. Co., 181 N.Y.S. 117, 111 Misc 180.

Ohio—Toledo & O. C. Ry. Co. v. S J. Kibler & Bros. Co, 119 N.E 733, 97 Ohio St. 262, certiorari denied 39 S.Ct. 10, 248 U.S. 569, 63 L.Ed. 425.

10 C.J. p 126 note 64.

"Under the federal rule, delay, whether reasonable or unreasonable, is as a matter of law not a concurrent proximate cause with an act of God."—Spitzer v. Porto Rican Express Co, 183 N.Y.S. 19, 21, 112 Misc. 453.

Absence of negligence

In suit by shipper to recover damages for injury to interstate shipment of goods by an unexpected and unprecedented flood, where, due to large number of freight cars in train arriving at railroad's terminal, freight was not placed on pier for delivery to connecting water carrier until last boat calling on that date had left, railroad was held not negligent respecting delay in delivery of the shipment at the pier.—Whittier Mills Co. v. Southern Ry. Co., 190 S.E. 433, 55 Ga.App. 519.

Loss direct result of delay

Shipper, sustaining loss as direct result of railway company's negligent delay in handling interstate shipment of onions, delivered to it in good condition, but received in damaged condition at destination, was entitled to judgment against company—Gulf, C. & S. F. Ry. Co. v. Morrow, Tex.Civ.App., 66 S.W.2d 481, error dismissed.

69. Ky.—Julius Kessler & Co. v. Southern Ry. Co. in Kentucky, 255 S.W. 535, 200 Ky. 713.

10 C.J. p 126 note 64.

70. Minn—Northwestern Consol Milling Co v. Chicago, B. & Q R Co, 160 N.W. 1028, 135 Minn. 363, certiorari denied 38 S.Ct. 8, 245 U S. 644, 62 L.Ed 528.

N.Y—Rezsek v Southern Pac. Co, 181 N.Y.S 117, 111 Misc. 180.

10 C.J p 126 note 64

Provision in uniform bill of lading

Where the uniform bill of lading for an interstate shipment of tobacco provides that "no carrier or party in possession of any of the property herein described shall be liable for any loss thereof, or damage hereto or delay caused by the act of God," and the proximate cause of damage to the tobacco in the hands of the terminal carrier is an act of God, an unprecedented flood in the company's yards, the carrier is excused from liability even though its own negligence or delay may have contributed to the loss or damage as a remote cause thereof.—Dean v. Belt Ry. Co. of Chicago, 210 Ill.App. 220

71. Tex—Bergman Produce Co. v. American Ry. Express Co., Civ. App., 262 S.W. 891—Fort Worth & D C. Ry. Co v. Lemons, Civ.App., 258 S.W. 1095.

10 C.J. p 126 note 64.

In Ohio

(1) There is a conflict of authority on the question The supreme court without deciding that defendant was a common carrier has ruled, where defendant contracted to tow plaintiff's barge from a point in Michigan to a point in New York but voluntarily delayed the voyage after it had been commenced, and on subsequent resumption the barge was lost in a storm, that defendant by the mere fact of the unnecessary and unreasonable delay did not become responsible for the loss, even though, but for the delay the barge would probably have been safely towed to its place of destination—Daniels v. Ballantine, 23 Ohio St. 532, 13 Am R. 264.

(2) On the theory that the cases were distinguishable in that defendant in the case at bar was a common carrier whereas in the Daniels case he was not, a contrary result was reached in a court of appeals case holding that if the carrier's negligence in furnishing a defective car, necessitating delay in reloading brings the goods in contact with the forces of nature (flood), the carrier is liable—Cincinnati, H & D. Ry. Co v Myers & Patty Co, 4 Ohio App 493.

(3) This distinction was denied by another court of appeals which expressly refused to follow the Myers case and, on the authority of the Daniels case, held a common carrier not liable for goods damaged in transit in a flood—Erie R Co. v. Kohler, 26 Ohio Cir.Ct.,N.S, 337.

(4) In a subsequent case applying the federal, and not the state, rule, the supreme court took cognizance of the attempt to distinguish the Daniels case and deny its application to common carriers and said, "It is difficult to perceive wherein the difference in principle obtains, since recovery must be based, not upon the degree of contractual duty cast upon the bailee, but upon the tortious act of the defendant"—Toledo & O. C. Ry. Co v. S J. Kibler & Bros Co, 119 N.E. 733, 734, 97 Ohio St 262, certiorari denied 39 S.Ct 10, 248 U. S 569, 63 L.Ed. 425.

(5) Where a flood which caused the loss could not reasonably have been anticipated, the carrier's delay, although concurrent in point of time, was held not the proximate cause of the loss, and hence the carrier was held not liable—Urbana Egg Case Co v. Nypano R Co, 16 Ohio N.P.,N.S, 321.

(6) Where there was such delay in transporting and unloading cars of wheat that the grade of the wheat was materially changed, it was held that the carrier was not excused from liability for the loss by the fact that the delay was caused by fear of the act of a public enemy, the shipment being a domestic one—Davis v. Early & Daniel Co, 16 Ohio App. 60.

Diseased cattle

Where a shipment of cattle, suffering from Texas fever, is negligently delayed by the carrier, and the cattle are damaged solely on account of their infection with disease, the shipper cannot recover—Ft Worth & D. C. Ry Co v. Gatewood, Civ. App, 185 S.W 932, affirmed Gatewood v. Ft Worth & D. C Ry. Co, 232 S.W. 493, 111 Tex. 291.

72. Ind.—Chicago & E Ry. Co v Schaff Bros Co., 117 N.E 869, 74 Ind App 227.

10 C.J p 127 note 66.

This reason advanced in Corpus Juris has been cited with approval in Richards v. Northern Pac. Ry. Co, 173 N.W. 778, 780, 42 N.D 472.

73. N.D—Richards v. Northern Pac. Ry. Co., supra.

to the owner on payment of the proper freight charges, immediately after which wrongful refusal the goods are destroyed by act of God,[74] and, as shown infra § 83, the carrier may be liable if damage ensues from its failure to exercise due care after discovery of the danger.

On the other hand, in some state courts the principle has been adopted that where the carrier has been guilty of negligent delay in transporting or delivering goods, and thereafter the goods are lost or injured by an act of God or other excepted cause, and but for such delay the goods would not have been exposed to the casualty, the carrier will be liable;[75] and this rule has been

74. Kan—Henry v Atchison, etc, R. Co, 109 P. 1005, 83 Kan. 104, 113, 28 L R A,N S, 1088.
10 C J. p 127 note 65.

75. N Y—Spitzer v. Porto Rican Express Co, 183 N Y.S. 19, 112 Misc 453
10 C J. p 111 note 15 [a], p 127 note 67.

Reference to Corpus Juris for a statement of this view has been made in Julius Kessler & Co. v Southern Ry. Co. in Kentucky, 255 S.W. 535, 538, 200 Ky. 713.

In Missouri

(1) The rule applies, as stated supra § 80, that to relieve the carrier from liability the loss must be the proximate, immediate, or sole result of the exceptional cause, and if it results from, or is proximately caused by, concurring negligence on the part of the carrier, the latter is liable.

(2) Accordingly in an action against a common carrier, for breach of contract of affreightment, in not fulfilling its undertaking with plaintiff that it would securely keep and safely carry over its road, from Ottumwa, Iowa, to St. Louis, Missouri, and in reasonable time securely deliver to plaintiff's agent, in St. Louis, one hundred boxes of eggs, whereby such eggs were totally lost to plaintiff, it was held that the railroad was liable where the goods were injured by an exposure which would not have occurred had they been forwarded without delay, the delay which occasioned the damage being wholly unauthorized by the consignee or his agent, and occurring at the direction or suggestion of a third party who had no legal right whatever to control the goods. —Armentrout v. St. Louis, K. C. & N. Ry. Co., 1 Mo App. 158.

(3) The fact that damage results from the perishable nature of the goods does not prevent recovery if there be a negligent delay in transportation and this delay keeps the goods off the market until by its nature it decays—Ozark Fruit Growers' Ass'n v. St Louis-San Francisco R. Co, 46 S W.2d 895, 226 Mo.App. 222—Vernon v. American Ry. Express Co, Mo App, 222 S.W. 913.

(4) On the other hand, it has been said: "The elementary books as well as the opinions of the courts attempt to lay down a general rule upon this subject, which is substantially, that carriers are responsible for the natural or ordinary and proximate consequences of their acts, but not for such as are remote and extraordinary. . . . The general statement of the rule is easy enough, but the point of difficulty frequently is to ascertain whether a given case is within it or not. Here the act complained of is the failure to receive in its proper order of priority stock offered for shipment. If the bad faith of the defendant is made to appear, he is liable for whatever damages can be shown to have resulted to the plaintiff as the natural and proximate consequences of its act. The delay occasioned to the plaintiff, and the necessary expenses in feeding and taking care of the hogs, are therefore to be taken in such case as the natural and immediate consequences of the act. But this cannot be said in reference to the loss occasioned either by the death or shrinkage in weight of the hogs, unless it could be made to appear that these effects were in some manner caused directly by the act of the defendant. The witness, John Ballentine, stated repeatedly in the course of his examination that 'the freezing and piling caused the death of the hogs.' His testimony in this respect is corroborated by all the witnesses. But very few of the hogs died previous to the occurrence of the storm, and the loss of the plaintiff in this respect, as well as the large amount of shrinkage in the weight of the hogs taken to market, was certainly the natural and proximate consequence of the storm, and not the failure of the defendant."—Ballentine v. North Missouri R. Co., 40 Mo. 491, 505, 93 Am.D. 315.

(5) In an action to recover the value of goods received by defendant carrier at Sedalia to be transported and delivered to plaintiff at St. Louis, it appeared that the cars in which the goods were carried were detached from the train at Jefferson City and other cars were taken up in their place and carried safely through to St Louis. Plaintiff's goods were left in Jefferson City for one day and picked up by a train leaving that point on the following day. This whole train was burned en route at Miller's Landing by the public enemy, and plaintiff's goods were lost. There was nothing in the case to indicate that the goods carried safely in place of plaintiff's were entitled to any priority. The court held: "The evidence fails to show any unreasonable and unnecessary delay for which the defendant might have been held liable if any damage had been thus occasioned. But even if the delay were inexcusable, it was not the cause of the loss. There was no relation of cause and effect between that delay and the destruction of the goods by the public enemy. The loss was consequential on the delay in no other sense than that of being merely subsequent in time. The goods arrived safely on the next day at Miller's Landing No damage had been done by that delay. Then the act of the public enemy destroyed the property It was this act that occasioned the loss. As to the delay it was at most an injury without a damage, and as to the loss it was a damage without an injury on the part of the defendant. It is a well settled rule that the wrongdoer shall be held responsible only for the proximate and not for the remote consequences of his actions, and this maxim has been applied to cases of this kind—Denny v New York Central R. Co, 13 Gray, Mass., 481; Morrison v Davis, 20 Pa. 171."—Clark v. Pacific R Co., 39 Mo. 184, 190, 90 Am.D. 458.

(6) So, it has been held that delay of a carrier in transporting goods whereby they come in the path of a flood, and are destroyed by the act of God, is not a proximate cause of the injury.—Lightfoot v. St. Louis, etc, R. Co, 104 S W. 482, 126 Mo App. 532—Lamar Mfg. Co v. St. Louis, etc, R. Co, 93 S W. 851, 117 Mo. App. 453—Moffat Commn Co. v Union Pac R Co, 88 S W. 117, 113 Mo. App. 544—10 C.J. p 126 note 64 [a] (1), (3).

(7) Nor is the carrier liable in such case on the theory of breach of contract, as the consequence was not in the contemplation of the parties as a probable result of the breach.—Moffat Commn Co. v. Union Pac. R Co, supra.

(8) But the rule stated infra § 83 applies in this jurisdiction, and, as there stated, the carrier cannot relieve itself of liability for loss caused by flood if, by the reasonable exercise of diligence, it could have

held to apply whether the goods are perishable or not.[76] The reason usually assigned for this view is that, where the goods are injured or destroyed by an act of God or other excepted cause while in the possession of a carrier, such default is an active and operative cause concurrent with the act of God or other excepted cause;[77] and it has further been said that the carrier should foresee, as any reasonable person could foresee, that negligent delay would extend the time during which the goods would be liable, in the hands of the carrier, to be overtaken by some such casualty and would, therefore, increase the peril if the goods should be lost to the shipper.[78]

Applying the principles above stated, it has been said that a delay in transportation will not be considered the proximate cause of the loss where the loss sustained was as likely to occur where the goods would have been if seasonably transported as where they were awaiting shipment,[79] or where the loss was the result of a contingency that could not reasonably be anticipated,[80] or of an act of God, so-called, relieving defendant from liability,[81] or where the loss occurring in transit was as likely to happen at one time as at another,[82] or where it cannot be said with certainty that the loss would not have occurred had the goods reached their destination on schedule.[83] As to goods destroyed by fire, however, the delay is the proximate cause of the loss where the freight was lying in a place known to be subject to a greater fire risk than in transit or at destination;[84] and where injury to live stock occurred by reason of its becoming restive as a result of the prolonged confinement and lack of exercise, the carrier is liable for any damages proximately caused by negligent delay in forwarding it.[85]

Where plaintiff brings his action under a statute requiring carriers to pay for goods lost or damaged or for any overcharge, he cannot recover for mere delay in transit and delivery unless such delay resulted in damage.[86]

§ 82. Loss Occurring during Deviation

As a general rule, an unnecessary and unexcused deviation renders the carrier liable for loss occurring during such deviation.

If a carrier in transporting goods unnecessarily deviates from the usual and ordinary route contemplated in the undertaking, he will be liable for any loss occurring during such deviation, although such loss is within the recognized exceptions to the carrier's liability.[87] Similarly, the carrier is liable where, having expressly contracted for a particular

anticipated that such loss would occur or if it fails to exercise reasonable care to preserve the goods after the occurrence of the flood.

In West Virginia

(1) It has been held that where goods are injured by freezing weather, which injury would not have occurred except for negligent delay in transportation, the carrier is liable.—McGraw v. Baltimore, etc, R. Co., 18 W.Va. 361, 41 Am.R. 696.

(2) The rule that, if the proximate cause of the loss is an act of God, the carrier is relieved although preceding the loss he had been negligent and but for that negligence the goods would not have been exposed to the peril resulting in their destruction, has been recognized in this state, however.—Hutchinson v. U S. Express Co., 59 S.E 949, 63 W.Va. 128, 14 L.R.A.,N.S, 393.

76. Minn.—Bibb Broom Corn Co v. Atchison, etc., R Co., 102 N.W. 709, 94 Minn. 269, 110 Am S R 361, 69 L.R A 509, 3 Ann.Cas 450
Neb.—Sunderland Bros Co v. Chicago, etc., R. Co, 131 N.W. 1047, 89 Neb 660

77. Ind.—Chicago & E. Ry. Co. v Schaff Bros Co, 117 N E 869, 74 Ind App. 227.
10 C.J p 127 note 69

78. Iowa.—Green-Wheeler Shoe Co v. Chicago, etc., R. Co, 106 N.W. 498, 130 Iowa 123, 5 L.R.A.,N.S., 882, 8 Ann Cas 45.
10 C.J. p 128 note 70.

79. Wis.—Bell Lumber Co. v. Bayfield Transfer Ry. Co., 172 N.W. 955, 169 Wis. 357.

80. Ohio.—Urbana Egg Case Co. v. Nypano R. Co, 16 Ohio N P.,N.S, 321.
Wis.—Bell Lumber Co. v. Bayfield Transfer Ry Co., 172 N.W. 955, 169 Wis. 357.

81. Wis.—Bell Lumber Co. v. Bayfield Transfer Ry. Co, supra.

82. Mich.—Barber v. Detroit, G. H & M. Ry. Co., 164 N W. 377, 197 Mich. 643, Ann Cas 1918E 1109.
Wis.—Bell Lumber Co. v. Bayfield Transfer Ry. Co., 172 N W. 955, 169 Wis. 357.

83. **Damages from freezing**

(1) Where potatoes shipped by rail reached destination three days late, but it could not be said with any certainty that if they had reached destination on schedule none of them would have been frozen, railroad was not liable to shippers for damages from freezing.—Barber v. Detroit, G H. & M Ry. Co, 164 N W. 377, 197 Mich. 643, Ann Cas.1918E 1109.

(2) So, where a delay in transit occurred after a shipment of pickles was subjected to destructive temperatures, which, had there been no delay, could not have been avoided, neither the delay, nor failure to notify shipper of connecting carrier's temporary embargo, nor routing shipment over such connecting carrier's line, was the proximate cause of the freezing.—Standard Pickle Co v. Pere Marquette Ry. Co., 193 N W. 300, 222 Mich. 639.

84. **Forest fire**

Where a shipper in Spring placed forest products ready for shipment at a spur in the northern woods on a carrier's line, and more than a month later such products were destroyed by a forest fire, the proximate cause of the loss was the unreasonable delay of the carrier in repairing its road, it knowing that such freight was subject to great fire risk.—Bell Lumber Co v. Bayfield Transfer Ry. Co, 172 N.W. 955, 169 Wis. 357.

85. Wis.—Wooster v Chicago & N W. Ry. Co., 166 N W. 431, 167 Wis. 6.

86. Fla.—Seaboard Air Line Ry. Co v. France, 111 So 248, 92 Fla. 1102

87. Iowa.—Green-Wheeler Shoe Co v. Chicago, etc, R Co, 106 N W. 498, 130 Iowa 123, 5 L R A,N S, 882, 8 Ann.Cas. 45.
W.Va.—Belknap v Baltimore & O R. Co, 91 S E. 656, 79 W.Va. 691, L R A.1917D 916
10 C.J. p 128 note 72.

route, mode, or manner of transportation, or having received from the shipper express directions in regard to such matters, it transports goods otherwise than as stipulated or directed, and they are lost or damaged;[88] and, as shown infra § 116, such a deviation will deprive the carrier of the benefit of any contractual exemption from liability. Moreover, it has been said that, in departing from the established route, or from that fixed by contract, the carrier is guilty of misfeasance[89] and is liable for the value of the goods on the theory of conversion,[90] although there is authority denying liability on this theory.[91] The reason assigned for the foregoing rules is that the carrier, being in the wrong and it being impossible to determine certainly that the loss would have occurred had the usual course been followed, must answer for the consequences.[92]

The liability of the carrier applies whether such loss or injury was caused by an act of God or by any other agency;[93] and, furthermore, the liability of the carrier is not limited to loss and injury occurring on its own line, but applies equally to loss and injury on the line of a connecting carrier.[94] That connecting carriers are also liable for loss of, or injury to, property which they have diverted is shown infra § 422. It has been said, however, when a deviation from the usual or stipulated route or method of transportation is shown, the carrier may excuse itself by proof that subsequent loss or damage for which it would not, but for the deviation, have been liable, would have occurred had there been no deviation.[95] Furthermore, a deviation by the carrier from the designated route without the shipper's consent does not make the carrier liable for losses resulting from the shipper's inability to accomplish some special purpose of which the carrier had no knowledge.[96]

A carrier which never undertook to transport a shipment farther than a certain point, by changing the routing without notation on the bill of lading, does not become an insurer of its arrival in good condition at another, more distant place to which it was subsequently forwarded.[97]

Where the action is based on loss of weight of cattle due to alleged delay and other negligence of the carrier, no injury is shown by the failure of the carrier to send the cattle over the stipulated route when, as a result of the deviation they were delivered sooner than they otherwise would have been, although the distance traveled was greater.[98]

Wrongful detention

The detention of goods on return to destination, after having been wrongfully reshipped away, for nonpayment of charges, is wrongful, and subjects carrier to absolute liability for loss within detention period, the situation of the carrier being substantially the same, in such case, as if it had deviated from the route of shipment.—Belknap v. Baltimore & O. R Co., 91 S.E. 656, 79 W.Va. 691, L R A.1917D 916.

88. Kan.—Bennett v. Missouri Pac. Ry. Co, 164 P. 1084, 100 Kan. 537, L R A 1918A 1061.
N.Y.—Ely v. Barrett, 168 N Y S. 419, 181 App Div 176, appeal dismissed 120 N E 60, 224 N.Y. 550.
10 C J. p 128 note 73.
"A deviation from the designated route makes the carrier liable as an insurer for all damages to the property and for losses resulting from delay, if of a nature which ought to have been anticipated as likely to result therefrom."—Minneapolis, St. P & S. S. M Ry Co. v. Reeves Coal Co., 181 N.W. 335, 336, 148 Minn. 196, 14 A L.R. 405.

Animals

Where carrier of animals departs from stipulated route, it is liable for exposing their vitality to the conditions of the route, and is required to show that departure did not contribute to their death, Carmack Amendment not disturbing such common-law liability.—Ely v. Barrett, 168 N.Y.S. 419, 181 App.Div. 176, appeal dismissed 120 N.E. 60, 224 N.Y. 550

Corpse

Unnecessary deviation or departure by a carrier from a route contracted for in transportation of corpse makes the carrier absolutely liable for legal damages; and where a railroad company, at the time of sale of a corpse ticket and tickets to relatives of deceased, which called for transportation over a particular route, knew that the corpse was to be transported over the same route on the same train, failure of the tag on the casket to contain a direction for transportation over that route was held not to relieve the carrier from liability, where the erroneous tagging was done by fault of a baggage agent authorized to represent the carrier.—Lancaster v. Mebane, Tex. Civ.App., 260 S.W. 252.

Delivery to carrier other than designated constitutes a deviation.
N.Y.—Napoli v. Erie R. Co, 165 N. Y.S. 206.
Tex.—St. Louis, B & M. Ry Co v. Murray, Civ App, 40 S W 2d 949.
10 C J p 128 note 73 [b].

89. Tex.—St Louis, B. & M Ry. Co. v Murray, supra.
10 C J. p 128 note 74.

90. Mass.—McKahan v. American Express Co., 95 N E. 785, 209 Mass. 270, 35 L.R.A.,N S, 1046, Ann.Cas. 1912B 612.
10 C.J p 128 note 74.

91. Tex.—Southern Pac. Co. v. Booth, Civ.App, 39 S.W. 585

92. Ark.—St Louis, etc, R Co. v. Caldwell, 116 S W. 210, 89 Ark. 218

93. Kan.—Rodgers v Missouri, etc., R. Co, 88 P 885, 75 Kan 222, 121 Am S R. 416, 10 L R A.,N S., 658, 12 Ann Cas. 441.
10 C J. p 129 note 77.

94. Ark.—St Louis, etc, R. Co. v. Caldwell, 116 S W. 210, 89 Ark. 218.
10 C.J p 129 note 78.

95. N Y.—Maghee v. Camden, etc, R. Transp. Co, 45 N Y. 514, 6 Am. R. 124—Ely v. Barrett, 168 N Y S 419, 181 App Div. 176, appeal dismissed 120 N E. 60, 224 N Y 550
Tex.—Galveston, etc., R. Co v. Breaux, Civ.App, 150 S.W. 287.

96. Minn.—Minneapolis, St. P. & S. S M. Ry. Co v. Reeves Coal Co, 181 N.W. 335, 148 Minn 196, 14 A.L.R. 405.

97. Tex.—Chicago & G. W Ry Co. v Plano Milling Co, Civ.App., 214 S.W. 833, affirmed Missouri K & T. R. Co. of Texas v. Plano Milling Co, Com App, 231 S W. 100, certiorari denied 42 S Ct. 317, 258 U S 624, 66 L.Ed 797.

98. Tex.—Mars v Panhandle & S. F. Ry Co, Civ App., 25 S W.2d 1004, error dismissed.

While a carrier consenting to a diversion of a shipment is liable for a loss resulting from the negligence of its agent in giving erroneous directions concerning the consignee, if the shipper in such case knew, or should have known, that the shipment had been billed to the original consignee instead of the new one and was being held, after negligent diversion by the initial carrier, for tariff charges, and made no effort to redeem or forward it, the failure of the carrier correctly to designate the new consignee in the order of diversion was not the proximate cause of the loss of the shipment through sale to pay customs charges.[99]

The fact that a carrier which has wrongfully diverted a shipment failed to comply with the requirements of the Carmack Amendment in issuing a bill of lading does not affect its liability for loss occurring due to the deviation.[1]

Excuses for deviation. Consent of the owner will excuse a deviation,[2] and it may become necessary for the carrier, by reason of some emergency not contemplated at the time of shipment, to change the route or the method of transportation, and if so it will not be liable for subsequent loss or injury for which it is, in general, not responsible by law or by contract.[3] If it is practicable in such case, however, without risk to the goods, to notify the shipper, the carrier should do so and await further directions, rather than depart from the terms of the contract;[4] and this is so even though there is a stipulation in the contract of shipment that every carrier, in case of necessity, may forward the goods by any railroad between the place of shipment and the place of destination.[5] When the shipper is so notified, and he refuses to give further shipping instructions, the carrier may then return the shipment to him at his expense, and, thus being wholly without fault, it avoids all liability to him.[6] The burden of proving an excuse for a deviation is discussed infra § 254; and whether this is a question of law or fact is discussed infra § 258.

Waiver of strict performance. Notwithstanding a shipment of live stock has been misrouted, the owner may accept an imperfect performance of the contract and close contract relations, and the carrier cannot be held responsible for what subsequently happens to the shipment.[7]

§ 83. Negligence in Not Avoiding or Lessening Loss or Injury

Although loss or injury to goods results from act of God or other excepted cause, if the carrier is negligent in not avoiding or lessening the damages it is liable.

From principles stated in the foregoing sections of this Title, it is apparent that, if the carrier might, by reasonable care or foresight, have avoided loss by act of God or by other excepted cause, it will be liable. The duty also rests on it, as far as possible, to avoid or to lessen the damage resulting from such cause, and negligence in not so doing will render it liable.[8] However, under such circum-

99. Tex.—Texas Midland R. Co. v. Cummer Mfg. Co., Civ.App., 207 S.W. 617.

1. Mass.—Saxon Mills v. New York, etc., R. Co., 101 N.E. 1075, 214 Mass. 383.
10 C.J. p 129 note 80.

2. Ark.—St. Louis, etc., R. Co. v. Wood, 138 S.W. 461, 99 Ark. 363.
10 C.J. p 130 note 87.

3. U.S.—Empire State Cattle Co. v. Atchison, etc., R. Co., Kan., 28 S.Ct. 607, 210 U.S. 1, 52 L.Ed. 931, 15 Ann.Cas. 70.
10 C.J. p 130 note 88.

4. Miss.—Alabama, etc., R. Co. v. Brichetto, 18 So. 421, 72 Miss. 891.
10 C.J. p 130 note 89.

5. Me.—Fisher v. Boston, etc., R. Co., 59 A. 532, 99 Me. 338, 105 Am.St.R. 283, 68 L.R.A. 390.

6. Tenn.—Drake v. Nashville, etc., R. Co., 148 S.W. 214, 125 Tenn. 627.

7. Wis.—Rosenthal v. Chicago, etc., R. Co., 154 N.W. 367, 161 Wis. 302.
10 C.J. p 129 note 81.

8. U.S.—Chicago & E.I.R. Co. v. Collins Produce Co., Ill., 235 F. 857, 149 C.C.A. 169, affirmed 39 S.Ct. 189, 249 U.S. 186, 63 L.Ed. 552.
Idaho.—Rice v. Oregon Short Line R. Co., 198 P. 161, 38 Idaho 565.
Kan.—Parker Corn. Co. v. Chicago, B. & Q. R. Co., 244 P. 240, 120 Kan. 484.
La.—Southern Cotton Oil Co. v. New Orleans & N.E.R. Co., 83 So. 821, 146 La. 541.—Japhet & Co. v. Southern Ry. Co., 8 La.App. 706.
Mich.—Ithaca Roller Mills v. Ann Arbor R. Co., 186 N.W. 516, 217 Mich. 348.
Mo.—Boyd v. St. Louis Express Co., App., 211 S.W. 702.
N.Y.—Ely v. Barrett, 168 N.Y.S. 419, 181 App.Div. 176, appeal dismissed 120 N.E. 60, 224 N.Y. 550.
Tex.—Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 209 S.W. 775.
Va.—Southern Ry. Co. v. Cohen Weenen & Co., 157 S.E. 563, 156 Va. 313.—Merchants' & Miners' Transp. Co. v. L. J. Upton & Co., 103 S.E. 616, 127 Va. 406.
10 C.J. p 130 note 93.
"A carrier is liable for damages proximately caused by an act of God, in case its failure to use reasonable diligence to prevent or mitigate the damage contributes to the loss."—Rice v. Oregon Short Line R. Co., 198 P. 161, 164, 38 Idaho 565.
Live stock
Under Rev.St. art. 707, providing that "the duties and liabilities of carriers . . . shall be the same as are prescribed by the common law," while there is excluded from the liability of the carrier all damages arising from the excepted causes—owners' negligence, act of God or the public enemy, and inherent vices and defects in the animals—the carrier is liable to the extent that damages from inherent vices and defects in the animals are aggravated by its failure to perform its duties, or to the extent such damages could have been avoided by the exercise of ordinary care, as live stock, by reason of their peculiar nature, if roughly handled or delayed in transportation, will suffer greater loss and injury as a result of their inherent vices than if handled properly and with dispatch.—Davis v. Sullivan & Opry, Tex.Com.App., 258 S.W. 157, affirming, Civ.App., 242 S.W. 764.—Panhandle & S.

stances the liability of the carrier is not that of an insurer, and it is ordinarily held bound to use only reasonable care to avoid loss or injury,[9] although it has been said that, when encountering vis major, a carrier must do all in his power to protect goods committed to his care.[10]

Application of rule. If the carrier, after becoming aware of a storm and impending danger to goods, could, by the exercise of such care as a man of ordinary prudence would have exercised under like circumstances, have protected the goods from the consequences of the disaster and failed to do so, the carrier is liable,[11] notwithstanding the storm itself was of unprecedented violence and could not have been foreseen at the time of the negligent delay, and when a delivery, by the exercise of due care, was possible.[12] Thus, although a storm may be such as to justify a delay in transportation of a shipment of live stock, if the carrier gives the animals no attention or care during the delay, and loss ensues, the carrier is liable for its negligence.[13] In order to charge a common carrier with goods lost in an unprecedented storm, however, plaintiff must show that by ordinary prudence it could have protected the goods after becoming aware of the impending danger;[14] and the refusal to perform special services not offered to shippers generally will ordinarily not support a charge of negligence.[15]

A carrier is ordinarily under no duty to guard against a flood far in excess of all previous floods until it becomes apparent that the flood probably would become dangerously excessive,[16] and is not negligent because it fails to guard against a rise of water not reasonably to be expected.[17] On the other hand, an unprecedented flood is not the proximate cause of loss, so as to relieve a carrier of liability therefor, if the carrier has notice of the danger in time to avert the loss by an exercise of the care and diligence which the circumstances and its relation to the owner demand, and negligently fails to do so.[18] It follows that the carrier cannot relieve itself from liability for loss or injury caused by an extraordinary or unprecedented flood, if, by the reasonable exercise of diligence, it could have anticipated that such loss or injury would occur, or if it fails to exercise reasonable care to preserve the goods from loss or injury after the occurrence of the flood.[19] Accordingly, the carrier is responsible for injuries to freight by a flood, where at the date the goods were delivered the officer in charge of the United States weather bureau notified all railroad companies of the coming flood and warned them to guard their property in the

F Ry. Co. v. Key, Tex.Civ.App., 20 S.W.2d 260.

9. Ky.—Julius Kessler & Co. v. Southern Ry. Co. in Kentucky, 255 S.W. 535, 200 Ky. 713.
10 C.J. p 131 note 94

Diligence of prudent, skillful men

In the case of accident or emergency, the carrier "is bound to such means as would suggest themselves to, and be within the knowledge and capacity of well-informed and competent business men in such positions, and such diligence as prudent, skillful men, engaged in that kind of business, might fairly be expected to use under like circumstances, and that this diligence and those means should be actively used to protect and secure the property confided to their care. That they should use actively and energetically all the known means which may fairly be expected to be found within the knowledge of men of average qualifications engaged in business of this kind."—Nashville, etc., R. Co. v. David, 6 Heisk., Tenn., 261, 19 Am. R. 594.

10. W.Va.—Annese v. Baltimore & O. R. Co., 105 S.E. 807, 87 W.Va. 588, 22 A.L.R. 869.

11. Tex.—Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 209 S.W. 775.

Va.—Southern Ry. Co. v. Cohen Weenen & Co., 157 S.E. 563, 156 Va. 313.

12. Tex.—International, etc., R. Co. v. Bergman, Civ.App., 64 S.W. 999.

13. S.D.—Gormley v. Chicago & N.W. Ry. Co., 165 N.W. 249, 39 S.D. 547.

14. Tex.—International, etc., N. R. Co. v. Bergman, Civ.App., 64 S.W. 999.

15. Neb.—Dolan Fruit Co. v. Davis, 196 N.W. 168, 111 Neb. 322, 32 A.L.R. 107.

Refusal not constituting negligence

The refusal of a carrier to put a carload of bananas, which had been provided with a heater by the railroad and a caretaker by the shipper, in a roundhouse during a severe snowstorm, or to attach the car to a passenger train to expedite the shipment, was held not a refusal to act in an emergency such as would justify recovery against the railroad for damage to the shipment.—Dolan Fruit Co. v. Davis, 196 N.W. 168, 111 Neb. 322, 32 A.L.R. 107.

16. Ala.—Louisville & N.R. Co. v. Finlay, 170 So. 207, 233 Ala. 128

17. U.S.—Empire State Cattle Co. v. Atchison, etc., R. Co., C.C.Kan., 135 F. 135, affirmed 147 F. 457, 77 C.C.A. 601, and 28 S.Ct. 607, 210 U.S. 1, 52 L.Ed. 931, 15 Ann.Cas. 70.

Pa.—Smith v. Baltimore, etc., R. Co., 72 A. 264, 223 Pa. 118.

18. Ala.—Louisville & N.R. Co. v. Finlay, 170 So. 207, 233 Ala. 128

Neglect as proximate cause

"If defendant [carrier] had notice of the impending danger from the act of God, or if it was foreseeable, in time to have avoided the loss by such means as were then available, and neglected to use them, such neglect was the sole proximate cause of the loss, and the act of God was a remote cause."—Louisville & N.R. Co. v. Finlay, 170 So. 207, 209, 233 Ala. 128.

19. U.S.—Chicago & E.I.R. Co. v. Collins Produce Co., Ill., 235 F. 857, 149 C.C.A. 169, affirmed 39 S.Ct. 189, 249 U.S. 186, 63 L.Ed. 552

Ala.—Louisville & N.R. Co. v. Finlay, 170 So. 207, 233 Ala. 128

Mich.—Ithaca Roller Mills v. Ann Arbor R. Co., 186 N.W. 516, 217 Mich. 348

Ohio.—Toledo & O.C. Ry. Co. v. S.J. Kibler & Bros. Co., 119 N.E. 733, 97 Ohio St. 262, certiorari denied 39 S.Ct. 10, 248 U.S. 569, 63 L.Ed. 425.

Tex.—Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 209 S.W. 775.

10 C.J. p 131 notes 95, 98 [b].

lowlands, and the carrier exposed the goods negligently to injury;[20] nor is inaccuracy in the weather bureau's forecast a defense, where the carrier showed no reasonable activity to protect the shipment after being warned of the impending flood.[21] The duty to exercise reasonable care to preserve the goods after the occurrence of the flood is a continuing one as long as the loss is avoidable.[22] If the carrier failed to act promptly on an alarm of impending apparent danger by a rising flood and failed to have the goods moved to a place of safety before the flood reached them, and the goods were consequently ruined, the carrier is liable for the loss,[23] and the fact that the storm which occasioned the flood was unprecedented will not relieve the carrier from liability in such case.[24] So, the carrier is liable where the transportation of certain goods was delayed by the unusually high waters, and it did not appear that the carrier, knowing that a delay would result in their loss, made any effort to send them by another route.[25] In view of the rule of nonliability for acts of God, stated supra § 76, however, the carrier is not liable if it did everything within reason to protect the goods after discovery of the danger, and was not negligent.[26]

A carrier is liable for loss or injury to goods caused by freezing where it should have foreseen that they might be exposed to cold sufficient to freeze them and failed to guard against the contingency.[27] So, after termination of the transportation, failure of the carrier properly to store the goods and to protect them against freezing weather renders it liable.[28]

While it is the duty of the carrier, as shown infra § 199, to advise the shipper of probable delay in transportation which is within the knowledge of the carrier and not within the knowledge of the shipper, and while, as there stated, if it fails in its duty in this respect, a delay in transportation will not be excused, where goods in transit were subject to freezing temperatures before a delay of uncertain duration, failure to notify the consignor and consignee of the delay and of low temperature at the place of delay is not negligence, since such notice, if given, would have availed nothing.[29]

Although goods shipped catch fire without the carrier's negligence, yet if the carrier's agents do not make all proper necessary efforts to save the goods, it is still responsible for all that might have been saved, and for any portion saved the carrier is liable, no matter what afterward becomes of it.[30]

Where the consignee agreed to take care of the goods while in transit, the carrier is not liable for their loss on the theory that the refusal of the carrier's gateman to permit the consignee to enter its yard for that purpose after the closing hour was negligence.[31]

If a carrier to which goods had been shipped accepted them before removal from a barge with knowledge of its leaky condition, it was liable for the loss of the goods when the barge sank at its wharf, notwithstanding the condition of the barge.[32]

§ 84. Commencement and Termination of Liability

As shown infra § 145, ordinarily the carrier becomes responsible as such immediately on delivery of the goods to it, unless the shipper has something further to do with them; and this liability continues, under the rule stated infra § 185, until it delivers the goods at the point of destination, when its liability as carrier ceases.

§ 85. Effect of Right of Carrier to Refuse to Receive Goods

A carrier is not liable as common carrier for goods destroyed on its premises after rightfully refusing to receive them, but although it could have refused to receive them, if it did receive them it is liable as common carrier.

Where the carrier has rightfully refused to re-

20. Neb.—Wabash R. Co v. Sharpe, 107 N.W 758, 76 Neb. 424, 124 Am.S.R. 823.

21. La.—National Rice Milling Co. v New Orleans, etc., R. Co, 61 So. 708, 132 La. 615, Ann.Cas.1914D 1099.

22. Pa.—Cunningham v. Pennsylvania R. Co., 50 Pa.Super. 609.

23. Tex.—Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas, Civ App., 209 S W. 775.
10 C J. p 132 note 1.

24. Tex.—Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas, supra.

25. Neb.—Chicago, etc., R. Co. v. Manning, 37 N.W. 462, 23 Neb 552.

26. Okl.—Armstrong v. Illinois Cent. R. Co, 109 P. 216, 26 Okl. 352, 29 L R A.,N S., 671.
10 C J. p 131 note 98 [a].

27. N.Y.—Rezsek v. Southern Pac. Co., 181 N Y S 117, 111 Misc 180

28. Mo.—Wolf v. American Express Co., 43 Mo 421, 97 Am D. 406 and note.

29. Mich.—Standard Pickle Co v Pere Marquette Ry. Co, 193 N W 300, 222 Mich. 639.

30. U S.—Woodward v. Illinois Cent R. Co, C.C Ill., 30 F Cas.No 18,007, 1 Biss. 447.
La.—Japhet & Co. v. Southern Ry Co, 8 La App 706.

31. Mass.—Emery & Co. v. Boston & M R. R, 120 N E 106, 230 Mass. 463.

32. S C.—American Fruit Growers v King, 114 S E 861, 122 S.C. 69.

ceive goods offered for transportation, it is not liable as common carrier for their destruction by fire while on its loading platform.[33] On the other hand, although the carrier, under the rules stated supra § 28, had a reasonable ground for refusing to receive such goods, yet if it did receive them, it has been held that its common-law liability attached, and that it could exonerate itself from liability only by showing loss by the act of God or of the public enemy, or by the shipper's negligence.[34] This rule has been particularly applied where the road was in control of the military,[35] and, as shown supra §§ 67 b and 78 c respectively, where, without being required to do so, it accepts goods which are defectively loaded or packed, in which case it assumes to carry them as they are, although, as indicated in the sections last referred to, the view has been taken that the carrier is not liable for injuries resulting from the defect.

§ 86. Duties after Disaster

Although the carrier is not liable for injury to goods from excepted causes, it is its duty to use reasonable care to salvage the goods or permit the owner to do so.

It has already been shown, supra § 83, that although loss or injury to goods in transportation results from an act of God or other cause for which no liability attaches, the duty rests on the carrier to exercise reasonable care to avoid or lessen the damage resulting from such cause. Applying this general principle, it is held that, where goods are wet by an extraordinary flood, the carrier may still be held liable for damages resulting from not drying them or for refusal to deliver them to the consignee for drying when it had no facilities for doing so.[36] However, where the heating of a shipment of perishable goods was caused by their inherent character and not by any fault of the carrier or any extraneous agency operating on them while in shipment, the carrier was under no duty to cause them to be reconditioned.[37] In emergencies of this character the carrier, as a trustee for the shipper or owner, may act in a prudent way to salvage the goods, but it is the carrier's duty, before appropriating the goods for the purpose, first to notify the owner if at all practicable, and its failure to do so makes it liable.[38] Moreover, to relieve the carrier from responsibility, on notifying the shipper or owner it must fully disclose the facts.[39]

§ 87. Insurance by Carrier against Usual Risks as Affecting Liability

Insurance taken by the carrier does not lessen its responsibility.

The fact that the carrier gets the goods insured against the usual risk does not in any way lessen its responsibility to the shipper, but rather increases its means of meeting that responsibility.[40]

That the carrier is not entitled to the benefit of insurance taken by the shipper is shown infra § 398.

2. Limiting or Extending Common-Law Liability

§ 88. What Law Governs

Questions relating to contractual limitations of liability are governed by state law in the case of intrastate shipments, by federal law when an interstate shipment is involved, and by common law in the case of an international shipment.

Questions relating to contractual limitation of liability in an intrastate shipment of goods are governed by the law of the state in which the shipment is made.[41] Where such questions arise with respect to interstate shipments, the federal law controls.[42] A contract for the transportation of goods to a foreign country not adjacent is not controlled either by the federal or state statutes forbidding the limitation of liability by the carrier, but rather is controlled by the principles of the common law;[43] the provision of the Cummins amendment, imposing on a carrier liability for the

33. La.—Hardee-Glaspie Co. v. Wallace & Lancaster, 5 La.App. 206.

34. S.C.—Porcher v. Northeastern R. Co., 14 Rich. 181.

35. S.C.—Porcher v. Northeastern R. Co., supra.

36. Pa.—Chouteaux v. Leech, 18 Pa. 224, 57 Am.D. 602.
10 C.J. p 132 note 99.

37. Kan.—Parker Corn Co. v. Chicago, B. & Q. R. Co., 244 P. 240, 120 Kan. 484.

38. Tenn.—Henderson Co. v. Southern Ry. Co., 3 Tenn.App. 396.

39. Va.—Southern Ry. Co. v. Cohen Weenen & Co., 157 S.E. 563, 156 Va. 313.

Shipper's failure to request action

That agent of shipper made no request for uncoopering of tobacco damaged by rain when roof blew off warehouse did not relieve railroad from responsibility, where it did not fully disclose facts.—Southern Ry. Co. v. Cohen Weenen & Co., 157 S.E. 563, 156 Va. 313

40. Va.—Spriggs v. Rutland R. Co., 60 A. 143, 77 Vt. 347.
10 C.J. p 132 note 11.

41. **In Illinois** an intrastate shipment of freight is governed by the Uniform Bills of Lading Act of Illinois.—House v. Wheelock, 254 Ill.App. 149.

42. Ala.—Nashville, C. & St. L. Ry. Co. v. Camper, 78 So. 925, 201 Ala. 581.

N.C.—Winstead v. East Carolina Ry., 118 S.E. 887, 186 N.C. 58

43. Tex.—A. L. Wolff & Co. v. Missouri, K. & T. Ry. Co., Com.App., 289 S.W. 1000, affirming, Civ.App., 283 S.W. 250.

full loss or damage to interstate shipments, or shipments "to an adjacent foreign country," notwithstanding any limitation in the bill of lading does not apply in such case.[44] As shown in the title Commerce § 92, also 12 C.J. p 86 note 44, the Carmack Amendment supersedes all policies and constitutional or statutory regulations of a particular state on the subject of limited liability contracts in so far as interstate shipments are concerned. It follows, therefore, that no question can now arise as to the conflict of state laws in respect of the validity of contracts for interstate shipments limiting the carrier's common-law liability, and all previous contrary decisions on the subject, whether state or federal, have been nullified. Where an interstate motor carrier's limitation of liability for shipment preceded the date to which the interstate commerce commission postponed the efficacy of the provisions of the Motor Carrier Act permitting limitation of liability only on the proper filing of alternative rates, the validity of the limitation of liability clause was determinable under the law of the state where the shipment originated and the action for the loss thereof was brought.[45]

§ 89. How Limitation of Liability Effected

Limitations of the carrier's liability must be effected by unambiguous and clearly understood contract with the shipper knowingly made at the time of the receipt of the goods for carriage, otherwise full common-law liability attaches.

A common carrier has no power to limit its common-law liability except with the assent of the shipper, and, accordingly, such a carrier cannot relieve itself from any part of its common-law liability for the loss or injury of property carried by it, except by express or implied contract with the shipper;[46] and there is authority holding that such a contract must be express,[47] but, unless a governing statute provides otherwise,[48] it may be either verbal or written.[49] In the absence of a valid contract limiting liability, the full liability as at common law attaches,[50] and it is immaterial in such case that the carrier quoted and collected a rate

44. U S—Dexter & Carpenter v. Davis, C.C.A Md., 281 F 385

45. N Y.—Faultless Clothing Co. v. Branch Storage Co., 300 N.Y.S. 642, 165 Misc. 658.

46. Fla.—Payne v. Bryan, 105 So. 832, 90 Fla. 174.
La.—W. H. & C. B. Hodges v. Louisiana Ry. & Nav. Co., 156 So 26, 180 La. 3.
Me.—Mason v. Maine Cent. R. Co., 110 A. 425, 119 Me. 195.
Mo.—Hunter v. American Ry. Express Co., App., 4 S W 2d 847.
S.C—Southern Ry. Co. v. Kimball, 88 S E. 14, 103 S C. 365.
Utah.—Bingham v. San Pedro, etc., R. Co, 117 P. 606, 39 Utah 400.
10 C.J. p 138 note 50, p 149 note 50.
This statement in Corpus Juris has been approved in Shikany v. Salt Creek Transp. Co., 45 P.2d 645, 48 Wyo. 190.

Limit of recovery

(1) Shipper of goods by common carrier, shipment, being intrastate, will not be bound in the limit of his recovery by the payment of the released rate, unless it is shown that he knew the rate was a released rate, and there was a fair meeting of the minds of the shipper and the carrier that by payment of the released rate the recovery of the shipper would be limited to a certain maximum sum clearly agreed on—Payne v. Bryan, 105 So. 832, 90 Fla. 174

(2) Recovery against common carrier under statute was held limited to freight, baggage, or express lost, damaged, or overcharged—Seaboard Air Line Ry. Co. v. France, 111 So 248, 92 Fla. 1102.

47. Ga.—American Ry. Express Co. v. Estroff, 121 S E 711, 31 Ga.App. 577, affirmed 125 S.E. 40, 159 Ga. 58
10 C J. p 138 note 50.

48. Wash.—Wall-A-Hee v. Northern Pac. Ry. Co., 41 P.2d 786, 180 Wash. 656.

49. Ohio.—Pittsburgh, etc., R. Co. v. Barrett, 36 Ohio St. 448.
Wis.—Boorman v. American Express Co, 21 Wis. 152.
10 C J. p 143 note 97.

Signature

One making interstate shipment by common carrier may be bound by provisions of special rate without signing contract for shipment—Hamway v. Seaboard Air Line Ry. Co., 136 So. 628, 101 Fla. 1483.

50. Ark.—American Ry. Express Co v. H. Rouw Co, 48 S.W.2d 220, 185 Ark. 526—Missouri Pac. R. Co v. American Fruit Growers, 260 S W. 39, 163 Ark. 429.
Fla.—American Ry. Exp. Co. v. Fegenbush, 144 So. 320, 107 Fla. 145—Payne v Bryan, 105 So. 832, 90 Fla 174—Atlantic Coast Line R. Co. v. Sandlin, 78 So. 667, 75 Fla. 539—Walton Land & Timber Co v. Louisville & N. R Co, 72 So. 485, 72 Fla. 66.
Ga.—Hines v. Vann, 106 S.E. 921, 26 Ga App 704.
La.—W. H. & C B Hodges v Louisiana Ry. & Nav Co., 156 So. 26, 180 La. 3
Me.—Mason v. Maine Cent. R. Co, 110 A. 425, 119 Me. 195
Mass.—Bonfiglio v. New York, N. H. & H. R. Co, 198 N.E. 236.
Mich.—Mosier v. American Ry. Express Co, 178 N.W. 81, 211 Mich. 19.
Minn.—Western Assur. Co. v. Wells Fargo & Co., 173 N.W. 402, 143 Minn. 60.
Miss.—Yazoo & M. V. R. R. Co. v. Craig, 79 So. 102, 118 Miss. 299, certiorari denied 39 S.Ct. 11, 248 U. S 573, 63 L.Ed. 427.
Mo.—Hunter v. American Ry. Express Co., App., 4 S W.2d 847.
N.J.—Kassel Poultry Co. v. Pennsylvania R. Co., 145 A. 316, 7 N.J. Misc. 301.
N.Y.—Ely v. Barrett, 168 N.Y S 419, 181 App Div. 176, appeal dismissed 120 N.E. 60, 224 N.Y. 550—Perkel v. Pennsylvania R. Co, 265 N.Y.S. 597, 148 Misc. 284.
Pa.—Worthington v. Adams Express Co., 72 Pa Super. 292—Dreibelbis & Co v. Philadelphia & Reading R. Co., 28 Pa.Dist. 488.
S.C—Kristianson v. American Ry. Express Co., 115 S E. 899, 122 S.C. 528.
Tenn.—Tennessee Central Ry. Co v. Russell, 15 Tenn App. 312.
Tex.—Abbott v. Tompkins, Civ.App., 283 S W. 647.
Vt.—Haglin-Stahr Co. v. Montpelier & W. R R. Co., 102 A. 940, 92 Vt. 258.
10 C J p 138 note 51.
"Where goods are received for shipment by a carrier and no receipt or bill of lading is at the time delivered to the shipper, but the goods are received for shipment without any express agreement between the carrier and the shipper, and the carrier voluntarily accepts the goods for shipment, it undertakes to trans-

applicable to shipment under a limited liability contract.[51] The fact that the interstate commerce commission has given the carrier the right to make a given contract does not authorize its enforcement until the contract is in fact made.[52]

The contract must be knowingly and understandingly made between the parties,[53] and must be unequivocal and unambiguous,[54] and not open to any reasonable doubt as to the intention of the parties.[55] Its language must be so clear that it cannot be misunderstood,[56] and nothing should be left to implication or inference,[57] particularly where the controlling statute provides that a party who accepts a contract of carriage with a knowledge of its terms assents to the limitation to the carrier's liability stated therein.[58] So, if the alleged special contract is in writing, it must be expressed in such manner and form as to be understood by a person of average intelligence, or if not so expressed it must be explained to the person to be bound, unless he himself has such knowledge of the subject as will enable him to understand the meaning of the writing.[59]

Furthermore, the limitation of liability must be made at the time of the receipt of the goods for shipment,[60] and, as shown infra § 91 c, a delivery afterward by a carrier to a shipper of a written receipt or bill of lading purporting to have been issued as of date of shipment and limiting the carrier's common-law liability, and retention of such receipt of bill by the shipper, will not, in absence of express agreement or an agreement implied from previous conduct, render the stipulations binding as a part of the contract, even though the receipt or bill of lading was delivered at the shipper's request.

Nor can interstate carriers relieve themselves from liability as carriers by a stipulation in an independent contract, such as the lease of an elevator, warehouse, or part of the right of way, having no connection with the contract of shipment of the goods.[61]

Limitations on a carrier's liability contained in its official classification approved by the Interstate Commerce Commission before the shipment was made, apply, however, to an interstate shipment, although the bill of lading was on a form formerly in use and did not contain the limitations of the current classification.[62]

A contract between a railway company and a warehouse, whereby the latter assumed liability for loss or damage to cotton delivered to it for con-

port them under its common-law liability."—American Ry. Express Co v. Estroff, 121 S.E. 711, 31 Ga.App 577, affirmed 125 S.E. 40, 159 Ga. 58

51. S.C.—Anderson v. Atlantic Coast Line R. Co., 161 S.E. 523, 163 S.C. 350.

Constructive knowledge

Mere quotation and collection of lower rate on household goods was held not to charge shipper with constructive knowledge that carrier had limited its liability to valuation different than that requested by shipper—Anderson v. Atlantic Coast Line R. Co., 161 S.E. 523, 163 S.C. 350.

52. Me.—Mason v. Maine Cent. R. Co., 110 A. 425, 119 Me. 195.

Diamonds

Where a shipper of diamonds by express without the state informed the carrier's agent that the package was valuable, but declared no value in writing, and the receipt therefor did not do so, or limit liability pursuant to the Carmack Amendment, U.S.Comp.St. §§ 8604a, 8604aa, and the rules of the interstate commerce commission, the shipper was properly allowed to recover full value for his loss.—Kristianson v. American Ry. Express Co., 115 S.E. 899, 122 S.C. 528.

53. Fla.—Payne v. Bryan, 105 So. 832, 90 Fla. 174.
Ga.—American Ry. Express Co. v. Estroff, 121 S.E. 711, 31 Ga.App. 577, affirmed 125 S.E. 40, 159 Ga. 58—American Ry. Express Co. v. Daniel, 116 S.E. 660, 29 Ga.App. 780, affirmed 121 S.E. 686, 157 Ga. 731, certiorari granted 44 S.Ct. 461, 265 U.S. 576, 68 L.Ed. 1187, vacated 132 S.E. 144, 35 Ga.App. 81, and reversed on other grounds 46 S.Ct. 15, 269 U.S. 40, 70 L.Ed. 154
Mo.—Hunter v. American Ry. Express Co., App., 4 S.W.2d 847.

54. Cal.—Murray v. Southern Pac. R. Co., 296 P. 667, 112 Cal.App. 150
Mich.—Mosier v. American Ry. Express Co., 178 N.W. 81, 211 Mich. 19.
Pa.—Atlantic Refining Co. v. Pennsylvania R. Co., 113 A. 570, 270 Pa. 415.
Va.—Adams Express Co. v. Allen, 100 S.E. 473, 125 Va. 530.
10 C.J. p. 181 note 13, p. 184 note 40

55. Quoting 10 C.J. p. 181 it has been said, "a contract relied on as limiting the carrier's common-law liability must be unequivocal and unambiguous, leaving nothing to implication or inference, and not open to any reasonable doubt as to the intention of the parties"—Atlantic Refining Co. v. Pennsylvania R. Co., 113 A. 570, 571, 270 Pa. 415.

56. Kan.—Mangelsdorf Seed Co. v. Missouri Pac. R. Co., 280 P. 896, 128 Kan. 729.
N.Y.—Heuman v. M. H. Powers Co., 123 N.E. 373, 226 N.Y. 205, reversing 162 N.Y.S. 590, 175 App.Div. 627, reargument denied 124 N.E. 899, 226 N.Y. 711.
Tex.—Missouri-Kansas-Texas R. Co. v. King, Civ.App., 265 S.W. 761.

57. N.Y.—Levinson v. Morris Transfer Co., 186 N.Y.S. 563
Pa.—Atlantic Refining Co. v. Pennsylvania R. Co., 113 A. 570, 270 Pa. 415.
10 C.J. p. 181 note 14.

58. Cal.—Murray v. Southern Pac. R. Co., 296 P. 667, 112 Cal.App. 150

59. Del.—Carpenter v. Baltimore, etc., R. Co., 64 A. 252, 22 Del. 15.

60. Ga.—American Ry. Express Co. v. S. & W. Estroff, 125 S.E. 40, 159 Ga. 58, affirming 121 S.E. 711, 31 Ga.App. 577.
10 C.J. p. 177 note 65.

61. Kan.—Mangelsdorf Seed Co. v. Missouri Pac. R. Co., 280 P. 896, 128 Kan. 729.
Mo.—Morrison Grain Co. v. Missouri Pac. Ry. Co., 170 S.W. 404, 182 Mo.App. 339.

62. Vt.—N. Pelaggi & Co. v. Central Vermont Ry. Co., 121 A. 441, 97 Vt. 1.

signees, could not affect the rights of a consignee having no knowledge of the agreement.[63]

Right to limit liability as affected by statutory provisions see infra § 91, and generally the C.J.S. title Commerce § 91, also 12 C.J. p 86 note 41–p 89 note 84.

§ 90. Notice

In the absence of express assent by the shipper, mere notice of a limitation of the common-law liability will not relieve the carrier, although such assent may be conclusively presumed under the interstate commerce act where a regulation limiting liability is filed with the interstate commerce commission.

Contrary to the English doctrine, it has always been the rule in the United States that a common carrier cannot limit its common-law liability merely by giving a particular notice to the shipper, or by a general notice to the public, although such latter notice is brought to the knowledge of the shipper. In either case, according to the great weight of authority, there must be express assent on the part of the shipper to render the limitation binding.[64] Notwithstanding the notice, the owner, it is said, has a right to insist that the carrier shall receive and carry goods subject to all the incidents of his employment; and there can be no presumption, when they are delivered to, and received by, the carrier, that the owner intended to abandon any of his legal rights or to yield to the wishes of the carrier.[65] Within the rule under consideration, it is very generally held that limitations marked or indorsed on the back of a shipping receipt or a bill of lading, or even on its face, are nothing more than a mere notice and do not bind the shipper unless he knows of, and assents to, them,[66] but where the limitation is stamped on the face of the contract by the carrier's agent in the presence of the shipper, and before it is signed and delivered to him, he will be bound thereby.[67] On the other hand, it has been said that a distinction exists between the effect of those notices by a carrier which seeks to discharge itself from duties which the law has annexed to its employment and those designed simply to insure good faith and fair dealing on the part of its employer; in the latter case notice alone, if brought home to the knowledge of the owner of the property delivered for carriage, will be sufficient.[68] Furthermore, it has been held that where a shipper undertakes to prove a contract of shipment by the company's tariff rates as posted in the stations, which vary what would otherwise be the legal obligations of the company, he is bound by any provisions therein favorable to the carrier;[69] and, of course, a common carrier may limit its responsibility for freight by notice containing reasonable restrictions, if brought home to the owner of the goods and assented to, and if the terms for transportation were adopted as the contract between the parties.[70]

Filing of regulations with interstate commerce commission. Although there is authority to the contrary,[71] it is generally held that under the interstate commerce act and its amendments a regulation filed with the interstate commerce commission limiting the liability of the carrier to a specified amount, in the absence of the declaration of a greater value, is conclusively presumed to be a part of the contract of carriage and governs the liability of the carrier.[72] The shipper is bound to take notice of the rates filed, and actual want of knowledge is no excuse; and to the extent that such limitations of liability are not forbidden

63. Ark.—Southern Grocery Co. v. Bush, 198 S.W. 136, 131 Ark. 153.

64. Fla.—Payne v. Bryan, 105 So. 832, 90 Fla. 174.
Mich.—Mosier v. American Ry. Express Co., 178 N.W. 81, 211 Mich. 19.
Wash.—United Artists Corporation v. Puget Sound Electric Ry., 211 P. 873, 122 Wash. 537.
10 C.J. p 138 note 54.

In Maine

(1) It has been said that notices limiting the carrier's liability have no effect unless brought to the knowledge of the owner of the goods before he entrusted them to the carrier.—Sager v. Portsmouth, etc., R. Co., 31 Me. 228, 50 Am.D. 659.

(2) But carriers may restrict their general liability by notices brought home to the owner of the goods, before or at the time of delivery to the carrier, if assented to expressly or impliedly by the owner.—Fillebrown v. Grand Trunk R. Co., 55 Me. 462, 92 Am.D. 606.

In North Carolina see 10 C.J. p 138 note 54 [d].

In Pennsylvania see 10 C.J. p 138 note 54 [d].

65. Ill.—Western Transp. Co. v. Newhall, 24 Ill. 466, 76 Am.D. 760.
Okl.—St. Louis, etc., R. Co. v. Copeland, 102 P. 104, 23 Okl. 837.

66. U.S.—Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., Conn., 16 Wall. 318, 21 L.Ed. 297.
10 C.J. p 139 note 58.

67. N.Y.—Royal Costume Co. v. Weir, 95 N.Y.S. 575, 48 Misc. 376.

68. Ill.—Boscowitz v. Adams Express Co., 93 Ill. 523, 34 Am.R. 191.—Oppenheimer v. U.S. Express Co., 69 Ill. 596, 18 Am.R. 596.
N.Y.—Hollister v. Nowlen, 19 Wend. 234, 32 Am.D. 455.
10 C.J. p 139 note 60.

69. Mass.—Burroughs v. Norwich, etc., R. Co., 100 Mass. 26, 1 Am.R. 78.

70. Fla.—Atlantic Coast Line R. Co. v. Coachman, 52 So. 377, 59 Fla. 130, 20 Ann.Cas. 1047.
10 C.J. p 139 note 62.

71. Mo.—Drey, etc., Glass Co. v. Missouri Pac. R. Co., 136 S.W. 757, 156 Mo.App. 178.

72. U.S.—Boston, etc., R. Co. v. Hooker, Mass., 34 S.Ct. 526, 233 U.S. 97, 58 L.Ed. 868, L.R.A.1915B 450, Ann.Cas.1915D 593.
10 C.J. p 139 note 63.

Corpus Juris is cited in support of this rule in Gus Mayer Co. v. Louisville & N.R. Co., 153 So. 249, 252, 228 Ala. 290.

by law they become, when filed, a part of the rate.[73] Where a carrier had no joint rates over its line and that of a connecting carrier, but the rates of each were duly published, the fact that no through rates were published did not relieve the shipper of notice of the connecting local rates based on valuation.[74] In so far as any of the provisions of a uniform live-stock contract contravenes the settled principles of common law preventing a carrier from contracting against liability for loss caused by its own negligence, however, it gains nothing from being filed with the interstate commerce commission.[75]

§ 91. Stipulations in Shipping Receipts or Bills of Lading

a. Shipping receipts in general
b. Bills of lading in general
c. Stipulations in bill of lading or receipt after delivery for shipment

a. Shipping Receipts in General

(1) Receipt made out by shipper
(2) Receipt not made out by shipper

(1) Receipt Made Out by Shipper

Where the shipping receipt is made out by the shipper he cannot claim ignorance of provisions therein limiting liability.

Where a shipper of goods who has been provided with blank receipts fills out one ready for the signature of the carrier's agent and presents it to him, and the receipt is signed by the agent and returned, this constitutes a special contract between the parties, including all the provisions therein contained limiting the carrier's liability, and the shipper cannot plead ignorance of its terms.[76] Under these circumstances, it is said, there is a proposal on the part of the shipper for a special contract wholly of his own creation,[77] and, as stated infra § 254, the shipper is presumed to know the contents of the instrument.

(2) Receipt Not Made Out by Shipper

Although there is authority to the contrary, the general rule, subject to statutory modification, is that the shipper is bound by a valid limitation of the carrier's liability embodied in a receipt delivered by the carrier to the shipper and accepted by the latter.

Where a stipulation for a valid limitation of the carrier's liability is embodied in a receipt, delivered by the carrier to the shipper and accepted by the latter, by the weight of authority the assent of the shipper to such stipulation is presumed as will be shown in § 254, and the limitation thus embodied will be binding upon him as a special contract in the absence of evidence of fraud, imposition, or deceit practiced by the carrier, and it is immaterial that such shipper did not sign the receipt;[78] the agreement may be direct

73. U.S.—Kansas City Southern R. Co. v. Carl, Ark., 33 S.Ct. 391, 227 U.S. 639, 652, 57 L.Ed. 683.
10 C.J. p. 140 note 64.

74. Ky.—Robinson v. Louisville, etc., R. Co., 169 S.W. 831, 160 Ky. 235.

75. Mich.—H. Ginsberg & Sons v. Wabash R. Co., 189 N.W. 1018, 219 Mich. 665, 28 A.L.R. 518, affirmed Ginsberg v. Wabash R. Co., 193 N.W. 286, 222 Mich. 560.

76. N.Y.—Greenberg v. Rapid Delivery Express Co., 163 N.Y.S. 102.
10 C.J. p. 140 note 66.

Acceptance of receipt

Where jeweler, returning diamonds to company which had submitted them for inspection filled in receipt of express company, excepting rate and agent's signature, agent inserting rate, signing receipt, delivering it, and receiving package, acceptance of receipt by jeweler made its provisions binding upon him.—Tribble v. Southern Express Co., 96 S.E. 712, 111 S.C. 31, certiorari denied 39 S.Ct. 287, 248 U.S. 582, 63 L.Ed. 432.

Inducing carrier to sign receipt

In an action for value of a trunk lost in transit, where plaintiff with full knowledge of his loss induced carrier's agent to sign his receipt, he could not, to avoid being bound by a provision limiting liability for loss, complain that the signature was missing when he accepted the receipt.—Wolfe v. American Ry. Express Co., 197 N.W. 24, 197 Iowa 216.

77. N.Y.—Bernstein v. Weir, 83 N.Y.S. 48, 40 Misc. 635.

78. U.S.—American Exp. Co. v. U. S. Horseshoe Co., Pa., 37 S.Ct. 595, 244 U.S. 58, 61 L.Ed. 990.
Del.—Windsor v. American Ry. Exp. Co., 143 A. 37, 4 W.W.Harr. 16
N.Y.—Feynman v. American Ry. Express Co., 234 N.Y.S. 727, 134 Misc. 223—Kolb v. Taylor, 168 N.Y.S. 685, 102 Misc. 220—Lichterman v. Barrett, 159 N.Y.S. 929, 95 Misc. 594
Pa.—Kirwan v. Railway Express Agency, 179 A. 924, 118 Pa. Super. 431—Yaeck v. Adams Express Co., 69 Pa. Super. 143.
S.D.—Strong v. Wells Fargo & Co. Express, 164 N.W. 967, 39 S.D. 389
Wash.—United Artists Corporation v. Puget Sound Electric Ry., 211 P. 873, 122 Wash. 537.
10 C.J. p. 140 note 70

In Georgia, although in cases arising under the state statute a different rule ordinarily applies as shown infra this section, the rule of the text has been followed as the federal rule in an action based on an interstate shipment.—American Ry. Express Co. v. S. & W. Estroff, 125 S.E. 40, 159 Ga. 58, affirming 121 S.E. 711, 31 Ga.App. 577—Lynch v. Southern Express Co., 90 S.E. 655, 18 Ga.App. 761, conforming to answers to certified questions 90 S.E. 527, 146 Ga. 68

In South Carolina the rule of the text, being the federal rule, is applied where interstate shipments are involved.—Huddy v. Railway Express Agency, 188 S.E. 247, 181 S.C. 508

Under federal legislation

(1) Under the Cummins amendment, permitting the carrier to limit its liability to a stated value, unless a greater value is declared in writing by the shipper or agreed on in writing as the released value of the property, it is not essential that an express receipt limiting the liability to the basic valuation in consideration of the reduced rate be signed by the shipper to be binding on him, although such signature would be additional evidence of his agreement, but his acceptance of the receipt, the contents of which he is presumed to know, is an assent to its terms,

and express or it may arise indirectly out of the acceptance by the shipper of a receipt from the carrier in which the limitation is embodied.[79] The fact that the provision was printed on the back of the receipt does not prevent it from limiting the carrier's liability where it was made a part of the contract by reference and there was no intent or tendency to deceive.[80] In order to effect a limitation of liability, however, the provisions relied on must be clear and free from ambiguity.[81] Where several receipts containing limitations of the carrier's liability are given for property consigned, each receipt constitutes a special contract for the transportation of the property named therein, so that a limitation of liability on a receipt applies only to the property described therein.[82]

While it is held or said in a number of decisions, considered infra § 254, that the possession of the receipt is merely prima facie evidence of the shipper's assent to the stipulations contained therein, the general rule seems to be that his acceptance of the receipt is conclusive on the shipper and will estop him from denying the acceptance of the contract with its limitation, and, accordingly, the shipper cannot be heard to say that he did not know of the limitations in the contract of shipment,[83] and where no fraud or deception is practiced by the carrier the limitations contained in the receipt, if reasonable and not contrary to public policy, will be binding on the shipper, although he failed to read them.[84] The shipper will not be permitted to say that by reason of his own inattention he did not read the terms and conditions and thereby impose upon the carrier a greater liability than that expressed in the contract,[85] and it has been held that the fact that the shipper was unable to read does not in any way affect the operation of the rule,[86] although it has been said that without any explanatory evidence it is difficult to understand how the carrier can claim a contract in its favor with such a person.[87]

A distinction has been drawn, however, in the matter of the effect of acceptance of receipts, between freight and baggage cases.[88] The effect of

so as to make it the written agreement of the parties.

U.S.—American Ry. Express Co. v. Lindenburg, 43 S.Ct. 206, 260 U.S. 584, 67 L.Ed. 414, reversing Lindenburg v. American Ry Express Co., 106 S.E. 884, 88 W.Va 439.

Iowa.—Wolfe v American Ry. Express Co., 197 N.W. 24, 197 Iowa 216

Minn.—Sands v. American Ry Express Co., 193 N.W. 721, 154 Minn. 308

(2) This rule applies notwithstanding recital in the receipt that, if the shipper desires to release the value to not exceeding the stated value, he may do so by inserting therein a statement to that effect, such recital being merely explanatory, and not exclusive, nor constituting part of the contract—Windsor v American Ry. Express Co., 143 A. 37, 4 W.W.Harr.,Del., 16.

Liability resting on contract

The owner of goods shipped in interstate commerce under a limited liability contract, and embezzled by the carrier's employee, cannot avoid the limitation of liability by proving that the shipment and assent to the limitation were without her consent, as the carrier's liability arises only from the contract—Henderson v. Wells Fargo & Co. Express, Tex.Civ. App., 217 S.W. 962.

79. N.Y.—Greenwald v. Barrett, 92 N.E. 218, 199 N.Y. 170, 177, 35 L.R.A.,N.S., 971.

80. S.D.—Strong v Wells Fargo & Co. Express, 164 N.W. 967, 39 S.D. 389.
10 C.J. p 140 note 70 [c].

81. Mich.—Mosier v. American Ry. Express Co., 178 N.W. 81, 211 Mich 19.

Va.—Adams Express Co. v. Allen, 100 S.E. 473, 125 Va. 530.

Indistinct printing

A receipt in the form of a bill of lading delivered to the shipper of some horses over a railroad contained a clause limiting the liability of the carrier to one hundred dollars on each horse, but the shipper denied having read it. This clause was described in the report as printed over the clauses of the receipt which were in black ink, and at right angles to them. It was itself in red ink, and looked as if it might have been impressed upon the receipt after the latter was printed by some hand or power stamp. The coloring was far from bright, and parts of it, by reason of the size of type, and by reason of its being printed across the black lines of the receipt, could not be read without the most careful inspection. It was held that the shipper was not bound by the conditions in this clause—New York, N. H. & H. R. Co. v Sayles, N.Y., 87 F. 444, 32 C.C.A. 485.

82. N.Y.—Rappaport v. White's Express Co., 131 N.Y.S. 131, 146 App. Div. 576.

83. U.S.—American Exp. Co. v. U. S. Horseshoe Co., Pa., 37 S.Ct. 595, 244 U.S. 58, 61 L.Ed. 990

Ohio.—Adams Express Co. v Starkey, 21 Ohio Cir.Ct.,N.S., 326, 4 Ohio App. 121 Contra, Mack v. Great Western Transp Co., 3 Ohio Cir.Ct. 36, 2 Ohio Cir.Dec. 22.

Shipper's actual ignorance of limitation of liability clause in shipping receipt issued by motor carrier did not deprive the carrier of right to insist on limitation of liability, in view of ample opportunity afforded shipper to familiarize himself with limitation of liability clause—Faultless Clothing Co. v Branch Storage Co., 300 N.Y.S. 642, 165 Misc. 658.

84. U.S.—American Exp. Co. v. U. S. Horseshoe Co., Pa., 37 S.Ct. 595, 244 U.S. 58, 61 L.Ed. 990.

Mass.—Boynton v. American Express Co., 108 N.E. 942, 221 Mass 237.

N.Y.—Barter v. Barrett, 174 N.Y.S. 779, 186 App.Div. 715—Lichterman v. Barrett, 159 N.Y.S. 929, 95 Misc. 594.
10 C.J. p 141 note 75.

85. U.S.—American Exp. Co. v. U. S. Horseshoe Co., Pa., 37 S.Ct. 595. 244 U.S. 58, 61 L.Ed. 990.
10 C.J. p 141 note 76.

86. Ala.—Jones v. Cincinnati, etc., R. Co., 8 So. 61, 89 Ala. 376, 379.
10 C.J. p 141 note 77.

Illiteracy of agent

Although shipper's servant, who delivered trunk and took receipt, was illiterate, liability of defendant express company was held limited by amount stated in its receipt, where amount paid for transportation entitled shipper only to such amount under filed tariffs—Kolb v. Taylor, 168 N.Y.S. 685, 102 Misc. 220.

87. N.Y.—Berlinsky v. Barrett, 173 N.Y.S. 449.

88. N.Y.—Baum v. Long Island R. Co., 108 N.Y.S. 1113, 58 Misc. 34—

the acceptance of receipts in baggage cases see infra § 877.

Minority rule. Notwithstanding the general rules heretofore stated, it is held in a number of decisions, independently of statute, that a limitation in a shipping receipt, which is not shown to have been brought to the attention of the shipper at the time of shipment and assented to by him, is not binding, and that assent to a limitation of liability does not arise from acceptance of the receipt by the shipper, in silence.[89] If, however, a shipper has actual knowledge of a clause in a shipping receipt which limits the liability of the carrier to an amount therein stated, and he accepts the receipt in silence, such acceptance estops him from afterward asserting the value to be greater.[90]

Effect of statutory provisions. Under a statute providing that a party who accepts a contract for carriage with a knowledge of its terms assents to the limitation stated therein on the amount of the carrier's liability in case the property is lost or injured, the knowledge prescribed by the statute may be constructive as well as actual;[91] but the mere acceptance of a receipt containing a limitation of the amount of the carrier's liability will not, as a matter of law, charge the consignor with a knowledge of such limitation.[92]

Under a statutory provision that a common carrier cannot limit its legal liability by any notice given by publication or by entry on receipts given, but may make an express contract and will then be governed thereby, an express contract is necessary, and the shipper, by the mere acceptance of a receipt, is not bound by the limitations therein contained.[93] It is said that an express contract made with the shipper of the goods limiting the liability of the carrier must be made independently of the receipt given for the goods and must be proved independently thereof, as any other contract is proved when entered into by two or more parties;[94] but this principle does not prevent the parties from using the terms set out in the receipt as a basis on which an express contract may be made.[95]

Under a statute which provides that, when any property is delivered to a common carrier to be transported, it shall not be lawful for the carrier to limit its common-law liability by any stipulation expressed in the receipt given for the property, the mere acceptance by the shipper of a receipt containing limitations of liability does not constitute an assent to such limitations nor prevent him from recovering full compensation for loss or injury.[96] In order to bind the shipper, it must appear that he was aware of the restriction in the receipt.[97] A clause in a receipt limiting and restricting the carrier's liability, if understandingly assented to by the shipper, is, however, binding.[98]

The effect of the Cummins amendment to the Interstate Commerce Act was to nullify provisions limiting liability contained in public tariffs and in bills of lading, and the second Cummins amendment

Addoms v. Weir, 108 N.Y.S. 146, 56 Misc. 487.

"Cases where parties, proposing to have articles of property transported by a common carrier, deliberately enter into some necessary contract relating to the transportation, differ materially from those cases of travelers who commit their trunks, or articles of baggage, to an agent of some express or transfer company, and receive at the moment some paper, which, as it has been said, amounts simply to a voucher enabling them to follow and identify their property. (Madan v. Sherard, 73 N.Y. 329, 29 Am.R. 153.) The difference is very obvious in the circumstances, which, in the one case, usually admit of no negotiation, or discussion; while, in the other, the shipment of the property is a matter of arrangement, with full opportunity for deliberate action."—Zimmer v. New York, etc., R. Co., 33 N.E. 642, 137 N.Y. 460, 463.

What is a freight shipment

Where one shipped his trunk by express and agreed to pay a specified sum for the expressage when delivered at his residence, and there was nothing to show that he was about to become a passenger of the carrier, the shipment was one of express freight, and not a baggage matter, binding him, in the absence of fraud or imposition, to the printed receipt given him limiting the carrier's liability to a specified sum.—Baum v. Long Island R. Co., 108 N.Y.S. 1113, 58 Misc. 34.

89. N.J.—Higgins v. U. S. Express Co., 85 A. 450, 83 N.J.Law 398.
10 C.J. p 142 note 85.

90. N.J.—Atkinson v. New York Transfer Co., 71 A. 278, 76 N.J. Law 608.

91. Cal.—Curtis v. United Transfer Co., 138 P. 726, 167 Cal. 112.

92. Cal.—Curtis v. United Transfer Co., supra.
10 C.J. p 143 note 88

93. Ga.—American Ry. Express Co. v. Jones, 110 S.E. 513, 28 Ga.App. 175.
10 C.J. p 143 note 90.

Reference to uniform receipt

Where an express receipt for a shipment referred to the uniform express receipt, provisions in such uniform receipt limiting the carrier's liability were not a part of the contract, and did not limit the carrier's liability in the absence of a special agreement by the shipper.—American Ry. Express Co. v. Jones, 110 S.E. 513, 28 Ga.App. 175.

94. Ga.—Southern Express Co. v. Purcell, 37 Ga. 103, 92 Am.D. 53.

95. Ga.—Southern Express Co. v. Hanaw, 67 S.E. 944, 134 Ga. 445, 137 Am.S.R. 227.

96. Ill.—Nonotuck Silk Co. v. Adams Express Co., 99 N.E. 893, 256 Ill. 66, affirming 166 Ill.App. 519.
10 C.J. p 143 note 93.

97. Ill.—Plaff v. Pacific Express Co., 95 N.E. 1089, 251 Ill. 243.

98. Ill.—Boscowitz v. Adams Express Co., 93 Ill. 523, 34 Am. R. 191—Dwyer v. American Railway Express Co., 280 Ill.App. 11—Produce Reporter Co. v. Adams Express Co., 176 Ill.App. 74.

did not change the first amendment in that regard.[99]

b. Bills of Lading in General

Generally, although the contrary has been asserted, valid stipulations limiting the carrier's liability which are embodied in a bill of lading accepted by the shipper are binding upon him although he has not formally assented thereto. Limitations of liability by stipulations in bills of lading are governed by applicable statutory provisions.

A common carrier may limit its common-law liability by receiving the shipment for transportation, subject to all the terms and conditions of the uniform bill of lading.[1] The nature of the bill of lading as constituting a contract between the carrier and the shipper will be discussed infra § 123; and the discussion here is confined to the effect of provisions in such a contract stating the limitations, if any, under which the goods are received by the carrier for transportation.

Although the contrary view has been taken,[2] as a general rule, in the absence of controlling statutes providing otherwise, if a formal bill of lading is executed by the carrier, delivered to the shipper and accepted by him as evidence of the terms of shipment, valid stipulations embodied therein limiting the carrier's liability will be binding on the parties, and no formal assent to the limitation of liability by signature to the bill of lading, or otherwise, is essential on the part of the shipper;[3] nor is it necessary in view of the rule stated infra § 254, that the stipulation limiting the carrier's liability be expressly called to the shipper's attention, since, as there shown, it will be presumed that the shipper was apprised of the contents of the instrument, and that he assented to its terms; and he will not be heard to say that stipulations therein limiting the carrier's liability were not known and assented to by him. Thus he cannot show, to defeat the exemption, that he did not read the instrument;[4] and this principle is especially applicable where he signed the bill of lading or special contract limiting the carrier's common-law liability,[5] notwithstanding he executed it hurriedly and without due consideration,[6] or where for several years previous he had been receiving bills of lading in the same form and terms as the one in question.[7] So, where the shipper obtains a blank bill of lading from the carrier's agent and fills it out and presents it to such agent for his signature, and the agent signs it, the shipper is conclusively bound by its terms and cannot be heard to say that he had not acquainted himself therewith.[8] Moreover, knowledge of the fact that such stipulations are usually contained in the bill of lading issued by the carrier will affect the shipper with notice thereof in a particular case.[9] Failure to deliver bills of lading to shipper, who left the country without direction as to their delivery, does not prevent the carrier from claiming the benefit of exemptions therein.[10]

99. Ill.—Gardner v. Railway Express Agency, 274 Ill.App. 626.

1. N.Y.—Strahs v. New York Cent. R. Co., 184 N.Y.S. 362, 113 Misc. 273.

2. S.C.—Southern Ry. Co. v. Kimball, 88 S.E. 14, 103 S.C. 365.
10 C.J. p 145 note 11.

Directing attention to provision
While the parties may limit the carrier's liability, the shipper's attention must be called to the limitation, and the mere insertion in the bill of lading of a stipulation to that effect is not binding on the parties —Southern Ry. Co. v. Kimball, 88 S.E. 14, 103 S.C. 365.

3. Ga.—American Ry. Express Co. v. S. & W. Estroff, 125 S.E. 40, 159 Ga. 58, affirming 121 S.E. 711, 31 Ga.App. 577.
Mass.—Aradalou v. New York, N. H. & H. R. Co., 144 N.E. 297, 225 Mass. 235.
N.C.—Rogers & Co. v. East Carolina Ry., 118 S.E. 835, 186 N.C. 86.
Ohio—Adams Exp. Co. v. Starkey, 4 Ohio App. 121, 21 Ohio Cir.Ct.,N.S., 326—Cincinnati, etc., R. Co. v. Berdan, 22 Ohio Cir.Ct. 326, 12 Ohio Cir.Dec. 481.
Okl.—Chicago, R. I. & P. Ry. Co. v. Geissler, 61 P.2d 14.
Tenn.—Tennessee Central Ry. Co. v. Russell, 15 Tenn.App. 312.
Wis.—McGovern v. Ann Arbor R. Co., 162 N.W. 668, 165 Wis. 525.
10 C.J. p 143 note 98, p 145 note 11 [b] (3).

In absence of conversation between shipper and carrier of interstate shipment as to limitation of liability, both were bound by bill of lading.—Aradalou v. New York, N. H. & H. R. Co., 114 N.E. 297, 225 Mass. 235.

"Owner's risk"
By acceptance of bill of lading covering car of apples, which bill included words "owner's risk," or letters understood by parties to be equivalent, consignor relieved carrier from liability as insurer and limited it to liability for negligence.—McGovern v. Ann Arbor R. Co., 162 N.W. 668, 165 Wis. 525.

4. U.S.—American Exp. Co. v. U. S. Horseshoe Co., Pa., 37 S.Ct. 595, 244 U.S. 58, 61 L.Ed. 990.
Ill.—Sweetser v. Chicago & Alton R. Co., 196 Ill.App. 623.
Ohio.—Adams Express Co. v. Starkey, 4 Ohio App. 121, 21 Ohio Cir.Ct., N.S., 326.
Okl.—Chicago, R. I. & P. Ry. Co. v. Geissler, 61 P.2d 14—Chicago, R. I. & P. Ry. Co. v. Craig, 157 P. 87, 59 Okl. 18.
10 C.J. p 144 note 4.

5. U.S.—American Exp. Co. v. U. S. Horseshoe Co., Pa., 37 S.Ct. 595, 244 U.S. 58, 61 L.Ed. 990.
Ill.—Sweetser v. Chicago & Alton R. Co., 196 Ill.App. 623.
10 C.J. p 144 note 5.

Knowledge of contents
A shipper of live stock who duly executes a special contract of shipment, in law, has knowledge of its contents—Bilby v. Atchison, T. & S. F. Ry. Co., Mo., 199 S.W. 1004.

6. Okl.—Chicago, R. I. & P. Ry. Co. v. Craig, 157 P. 87, 59 Okl. 18.

7. Me.—Hix v. Eastern SS. Co., 78 A. 379, 107 Me. 357.

8. U.S.—Cau v. Texas, etc., R. Co., La., 113 F. 91, 51 C.C.A. 76, affirmed 24 S.Ct. 663, 194 U.S. 427, 48 L.Ed. 1053.

9. N.Y.—Ghormley v. Dinsmore, 53 N.Y.Super. 36.
10 C.J. p 144 note 2 [a].

10. U.S.—Callister v. U. S. Shipping Board Merchant Fleet Corporation, D.C.N.Y., 21 F.2d 447, affirmed, C.

Nevertheless, the provisions assuming to limit the liability of the carrier should be so stated that they may be easily comprehended; and if not they are inoperative.[11] Furthermore, the shipper is not bound where he is prevented by the carrier's fraud from reading or otherwise obtaining a knowledge of the terms of the bill of lading,[12] or where he did not assent but specifically objected to the limited liability clause and signed only after he was told that no other contract could be given to him.[13] That a shipper filed a claim for damages with the carrier's agent does not show an acceptance of the bill of lading limiting the carrier's liability, where the shipper informed the agent he had not signed the bill, and the agent refused to take up the claim until the bill of lading was filed therewith.[14]

Provisions of a bill of lading issued for a contemplated shipment will be binding if the shipment is made thereunder.[15]

Limitations in a bill of lading issued to and accepted by a third person not the agent of the shipper are not binding on the latter, if he did not know of them until after the loss or injury.[16]

Effect of statutory provisions. Under a statute providing that where a consignor receives a bill and makes no objection neither he nor any person who accepts delivery of the goods or seeks to enforce any provision of the bill shall be allowed to deny that he is bound by any lawful condition thereof, a shipper accepting a bill without objection is deemed to have assented to the lawful limitations of liability contained therein and is bound by them;[17] and this rule applies whether or not the shipper or his agent actually knew what was in the bill.[18]

Where a statute provides that when any property is delivered to a common carrier to be transported, it shall not be lawful for the carrier to limit its common-law liability by any stipulation expressed in the receipt given for the property, it is held that where a limitation of the carrier's common-law liability is contained in a bill of lading which in its entirety constitutes both a receipt and a contract, the mere acceptance by the shipper of the bill of lading does not amount to an assent thereto so as to make the restriction binding.[19] In order that restrictions contained in a bill of lading shall be binding, it is essential that either the shipper or his agent at the time of making the contract of shipment knew the terms and conditions of the bill of lading and assented thereto.[20] Such assent must be shown by evidence dehors the instrument.[21] The fact that the shipper filled up the bill of lading on a blank furnished by the initial carrier is only evidence tending to show assent.[22] However, if the shipper accepts a receipt or bill of lading containing limitations of the carrier's common-law liability, with a full knowledge of its terms, and with intent to assent thereto, he is bound by such limitations whether or not he signed the receipt;[23] and if the parties specially contract with reference to limitation of liability, the shipper is bound by the instrument, and cannot relieve himself from its terms by reason of ignorance thereof.[24] By the

C.A., Callister v. U. S. Shipping Emergency Fleet Corporation, 30 F.2d 1008.

11. N.Y.—Fenderson v. Lehigh Valley R. Co., 148 N.Y.S. 494, 163 App. Div. 107.
S.C.—Southern R. Co. v. Kimball, 88 S.E. 14, 103 S.C. 365.
10 C.J. p. 144 note 8.

12. Tex.—Southern Pac. R. Co. v. Meadors, 140 S.W. 427, 104 Tex. 469
10 C.J. p. 145 note 9.

No time to read

Where a shipper is furnished cars for shipment of live stock, without requiring him to sign any written contract, and a contract is presented to him for signature after the stock is in the car and about to start, and where he or the person signing it does not know its contents, and has no time to read it, and signs to secure passes to attend the stock, such contract would not be a contract of the shipper, and the limitation restricting liability of the initial carrier to damages on its own line is not binding.—Atchison, T. & S. F. Ry. Co. v. White, Tex.Civ.App., 188 S.W. 714, error refused.

13. Utah.—Bingham v. San Pedro, etc., R. Co., 117 P. 606, 39 Utah 400
10 C.J. p. 144 note 5 [b].

14. S.C.—Southern Ry. Co. v. Kimball, 88 S.E. 14, 103 S.C. 365.

15. U.S.—Robinson v. Memphis, etc., R. Co., C.C.Tenn., 16 F. 57.

16. Me.—Hunter v. American Ry. Express Co., App., 4 S.W.2d 847

Bill issued to independent shipper

Where horses belonging to several individual shippers were put by the carrier into one car, and only one bill of lading was issued for the entire carload, it being issued to and accepted by one of the shippers, limitations as to value contained therein are not binding on a shipper who did not know of what had been done.—Hunter v. American Ry. Express Co., Mo.App., 4 S.W.2d 847.

17. Ill.—House v. Wheelock, 254 Ill. App. 149.

18. Ill.—Bean v. Jackson, 207 Ill. App. 577.

19. Ill.—Wabash, etc., R. Co. v. Thomas, 78 N.E. 777, 222 Ill. 337, 7 L.R.A.,N.S., 1041.
Wis.—Berger-Crittenden Co. v. Chicago, etc., R. Co., 150 N.W. 496, 159 Wis. 256
10 C.J. p. 145 note 13

20. Wis.—Berger-Crittenden Co. v. Chicago, etc., R. Co., supra.
10 C.J. p. 145 note 14

21. Ill.—Illinois Match Co. v. Chicago, etc., R. Co., 95 N.E. 492, 250 Ill. 396.

22. Ill.—Peoria Packing Co. v. Nashville, etc., R. Co., 164 Ill.App. 646.
10 C.J. p. 146 note 19.

23. Ill.—Illinois Match Co. v. Chicago, etc., R. Co., 95 N.E. 492, 250 Ill. 396
10 C.J. p. 146 note 20.

24. Ill.—Coles v. Louisville, etc., R. Co., 41 Ill.App. 607.—Chicago, etc., R. Co. v. Hale, 2 Ill.App. 150.

enactment of the Carmack amendment, as to all cases within its operation, such statute and the decisions construing it are superseded, and the shipper is conclusively presumed to know the terms of the bill of lading and the published rate filed with the interstate commerce commission.[25]

Construing a statute providing that a common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold, but may make an express contract and will then be governed thereby, it is held, with reference to bills of lading, that a mere acceptance by the shipper of a bill of lading containing limitations of the carrier's common-law liability will not bind the shipper, but that such limitations must be expressly assented to by the shipper.[26] Where, however, the shipper himself filled out the blanks in the bill and then tendered it to the carrier for signature, it was held that, when signed and delivered to the shipper, it created a special contract as to the limitation of liability which was binding on the shipper;[27] and where a special contract is incorporated in the bill of lading which is signed by both parties on a consideration, the requirements of the statute are satisfied.[28] At least there must be an express contract.[29]

c. Stipulations in Bill of Lading or Receipt after Delivery for Shipment

If the bill of lading or receipt is delivered after receipt of the goods for shipment, stipulations therein limiting liability are ineffective in the absence of circumstances making it apparent that such limitations were contemplated by both parties at the time of making the contract

To be binding as a part of the contract of shipment the stipulation limiting liability must be embodied in the contract made at the time the goods are shipped. If without any receipt or bill of lading being issued the goods are accepted by the carrier for transportation, its common-law liability attaches, and the subsequent delivery to, and acceptance by, the shipper or his agent of a receipt or bill of lading containing such stipulation will not constitute a part of a binding contract, for in such case there is no consideration for the subsequent agreement,[30] and this rule applies even though the receipt or bill of lading was delivered at the shipper's request.[31] The doctrine that acceptance of a receipt or bill of lading containing stipulations limiting liability implies assent thereto,[32] or that prior negotiations are merged in a subsequent written contract,[33] has no application in such a case. It has been said that this principle is especially applicable to an action brought by the consignee, where, at the time the contract was made, it was agreed that the rights of the consignee should not be affected.[34] Furthermore, a recovery may be had for a breach of the parol contract without suing in equity to have the written contract reformed.[35]

Limitation of rule. If there is an understanding arising out of the course of business by which bills of lading are to be delivered for goods shipped which contain stipulations limiting liability, then it may be presumed that the shipment in such course of business is made on the terms of such a bill of lading, and the stipulations therein will be binding.[36] So a receipt in the form of a contract of shipment containing a limitation of liability constitutes a binding contract, where it was delivered and accepted at the time the charges were prepaid, pursuant to the understanding of the parties, even

25. Ill.—Sweetser v. Chicago & Alton R Co, 196 Ill.App. 623
10 C.J. p 146 note 22

26. Ga.—Georgia Cent. R. Co. v. Lippman, 36 S.E. 202, 110 Ga. 665, 50 L.R.A. 673—Central R. Co. v. Hasselkus, 17 S.E. 838, 91 Ga. 382, 44 Am.S.R. 37.
10 C.J. p 146 note 24.

27. Ga.—Wallace v. Matthews, 39 Ga. 617, 99 Am.D. 473.
10 C.J. p 146 note 25.

28. Ga.—Georgia R. Co. v. Spears, 66 Ga. 485, 42 Am.R. 81.

29. Ga.—Southern Express Co. v. Hanaw, 67 S.E. 944, 134 Ga. 445, 137 Am.S.R. 227.
10 C.J. p 146 note 27.

30. Ill.—Behrends v. Chicago, R. I. & P. Ry. Co., 198 Ill.App. 236
Wash.—United Artists Corporation v. Puget Sound Electric Ry., 211 P. 873, 122 Wash. 537.
10 C.J. p 177 note 65, p 178 note 70 [a].

This statement in Corpus Juris is referred to by the court in support of the conclusion reached in Goldstein v. Robert Dollar Co., 270 P. 903, 127 Or. 29.

Delivery after loss of goods

Fact that carrier's agent prepared and signed receipt for goods, which contained agreement as to released value, shippers knowing nothing of its preparation, and it not having been delivered to them until four or five months after shipment and loss of goods, was held not a declaration or agreement as to value such as would sustain carrier's defense of limited liability.—American Ry. Express Co. v. S. & W. Estroff, 125 S.E. 40, 159 Ga. 58, affirming 121 S.E. 711, 31 Ga.App. 577—10 C.J. p 177 note 65 [g], [h].

31. Ga.—American Ry. Express Co. v. S. & W. Estroff, supra

32. Or.—Goldstein v. Robert Dollar Co., 270 P. 903, 127 Or. 29.

33. N.Y.—Bostwick v. Baltimore, etc., R. Co., 45 N.Y. 712, reversing 55 Barb. 137.
N.C.—Hamilton v. Western North Carolina R. Co., 3 S.E. 164, 96 N.C. 398
10 C.J. p 178 note 70 [a]

34. S.C.—Frasier v. Charleston, etc., R. Co., 52 S.E. 964, 73 S.C. 140.

35. Ky.—Louisville, etc., R. Co. v. Cooper, 56 S.W. 144, 21 Ky.L. 1644.

36. N.Y.—Shelton v. Merchants' Dispatch Transp. Co., 59 N.Y. 258.
Tex.—Ft. Worth, etc., R. Co. v. Wright, 58 S.W. 846, 24 Tex.Civ. App. 291.
10 C.J. p 178 note 70 [c].

though the goods had been actually shipped prior to such prepayment, since in such case the transaction is not complete until the charges are prepaid and the receipt delivered.[37]

§ 92. Agency in Making Contracts

An agent authorized to ship goods has implied authority to make a shipping contract involving a limitation on the carrier's liability; and this rule applies to a consignor contracting for the consignee, but not ordinarily to teamsters employed merely to deliver goods for shipment or to contracts made by the consignee, although unauthorized contracts may be ratified.

One who has authority to ship goods for another has thereby implied authority to make a contract for their shipment involving a limitation of the carrier's liability;[38] and a carrier is not bound by any private instructions given by the shipper to his agent limiting the agent's authority to bind the shipper;[39] nor is it material that the carrier knew of the agent's ignorance of the value of the goods if it acted in good faith.[40] It has been held, however, that an agent's authority to ship goods does not include the power to limit their value where such limitation does not affect the carriage charges.[41] Moreover, where the consignor makes a contract with the carrier for shipment before the goods are delivered, the agent who delivers the goods thereafter has no authority to accept a bill of lading which contains limitations of liability varying the contract already agreed on.[42] As to the general authority of an agent of the shipper to make contracts with the carrier see the title Agency § 104.

While the general rule has been applied as to a drayman or like person hired by the shipper to deliver the goods to the carrier for transportation,[43]

37. Iowa—Wolfe v. American Ry. Express Co., 197 N.W. 24, 197 Iowa 216

38. U.S.—American Ry. Express Co. v. Daniel, 46 S.Ct. 15, 269 U.S. 40, 70 L.Ed. 154, reversing 121 S.E. 686, 157 Ga. 731, which affirmed 116 S.E. 660, 29 Ga.App. 780, certiorari granted 44 S.Ct. 461, 265 U.S. 576, 68 L.Ed. 1187, vacated 132 S.E. 144, 35 Ga.App. 81—Great Northern R. Co. v. O'Connor, 34 S.Ct. 380, 232 U.S. 508, 58 L.Ed. 703, reversing O'Connor v. Great Northern Ry. Co., 136 N.W. 743, 118 Minn. 223, and 139 N.W. 618, 120 Minn. 350.
Colo.—Denver & R. G. R. Co. v. Teufel, 172 P. 1060, 64 Colo. 515.
Ill.—Michelson v. Judson Freight Forwarding Co., 189 Ill.App. 568, affirmed 109 N.E. 281, 268 Ill. 546.
Mass.—Boynton v. American Express Co., 108 N.E. 942, 221 Mass. 237—Johnson v. New York, N. H. & H. R. Co., 104 N.E. 445, 217 Mass. 203.
N.Y.—Foster v. Taylor, 157 N.Y.S. 571, 171 App.Div. 511—Miller v. Taylor, 164 N.Y.S. 823, 100 Misc. 18.
Or.—George v. Spokane, P. & S. Ry. Co., 265 P. 408, 124 Or. 598
Wash.—Wall-A-Hee v. Northern Pac. Ry. Co., 41 P.2d 786.
2 C.J. p. 663 note 25—10 C.J. p. 146 note 31.

Agent of owner's agent

(1) Where the agent of the owner of goods employs an agent to take the property to a railroad company and ship it, the owner is estopped from disputing that part of the contract which provided for a reduced rate of transportation and limitation of the carrier's liability—Button v. Chicago, I. & L. R. Co., 210 Ill.App. 176.

(2) So, where plaintiff's agent left a suit case with the hotel clerk, requesting him to deliver it to the express driver, after having ordered defendant express company to carry the case to a certain destination, and the hotel clerk complied, and received a receipt limiting the carrier's liability to fifty dollars, it was held that the hotel clerk was plaintiff's agent, with authority to contract for limited liability—Miller v. Taylor, 164 N.Y.S. 823, 100 Misc. 18.

Hotel employee

Where an express company was directed to call at a hotel for a trunk, and when the call was made the trunk was delivered to it by a maid, and she accepted a receipt tendered, containing the terms of shipment, it was held that the maid must be deemed the agent of the owner, and the owner became bound by limitations expressed in the receipt.—Barter v. Barrett, 174 N.Y.S. 779, 186 App.Div. 715—2 C.J. p. 663 note 25 [b]—10 C.J. p. 146 note 31 [d] (2).

39. U.S.—Great Northern R. Co. v. O'Connor, 34 S.Ct. 380, 232 U.S. 508, 58 L.Ed. 703, reversing O'Connor v. Great Northern Ry. Co., 136 N.W. 743, 118 Minn. 223, and 139 N.W. 618, 120 Minn. 359.
10 C.J. p. 147 note 32.

40. U.S.—American Ry. Express Co. v. Daniel, Ga., 46 S.Ct. 15, 269 U.S. 40, 70 L.Ed. 154.

41. Cal.—Scranton v. Southern Pac. Co., 245 P. 1102, 77 Cal.App. 132

42. N.Y.—Northern Assur. Co., Limited, of London, v. B. A. W. Trucking Co., 299 N.Y.S. 308, 252 App.Div. 323.
10 C.J. p. 147 note 33.

Where a hotel proprietor was authorized by a guest to deliver her trunk to an express company's agent and get a receipt, he had no authority to assent for her, to a limited liability clause contained in the receipt which he accepted—Stickel v. United States Express Co., 89 A. 23, 85 N.J.Law 285.

43. Or.—George v. Spokane, P. & S. Ry. Co., 265 P. 408, 124 Or. 598

Expressman hired by owner's agent
Ill.—Button v. Chicago, I. & L. R. Co., 210 Ill.App. 176.

Local stage line

Where plaintiff sent her trunks by a local stage line to the railroad depot, with instruction to send them by express, and the stage line took a receipt limiting liability, but the trunks were subsequently damaged, the stage line was plaintiff's agent—Walker v. Taylor, 174 N.Y.S. 520, 186 App.Div. 544.

Transfer company acting as forwarder
U.S.—Great Northern R. Co. v. O'Connor, Minn., 34 S.Ct. 380, 232 U.S. 508, 58 L.Ed. 703

Cases distinguished

(1) "It is claimed by appellee that the limitation in the bill of lading to $10 per 100 pounds was not binding upon him, because the bill of lading was executed by Whitney and not pursuant to any authority given by appellee. The latter cites the case of New v. Chicago, R. I. & P. Ry. Co., 171 Ill.App. 488. In that case, however, the teamster who signed the bill of lading was only employed to 'move the household goods from South Ottawa to the Rock Island depot', and the court said that it was clear the railroad knew that the plaintiff (the owner) was the consignor. In the instant case, Holmes, who employed Whitney to take the property to the railroad company and ship it to Chicago, and who gave him the money to pay the freight, was acting as an agent for appellee. It cannot be said, reasonably, that there was any obligation

it has been held that the mere employment of one as drayman, cartman, or teamster to deliver goods to a common carrier for shipment does not of itself give him authority to make any contract in behalf of the shipper, or to assent to any proposition on the part of the carrier to qualify his liability,[44] since under these circumstances the duty and authority of the drayman, the cartman, or the teamster, as the case may be, ends with the delivery of the goods to the carrier.[45] A wide difference, it is said, exists between the instructions given to a personal agent to cause goods to be shipped and the mere employment of a carrier to carry goods to a shipping office.[46] A fortiori a cartman cannot be presumed to have authority to enter into a contract limiting the carrier's liability where his employer sends a complete shipping order with the goods to be shipped.[47] However, where a course of business extending over several years had grown up between the shipper and the carrier whereby the drayman in every instance executed the ordinary release of valuation and exemption from damages beyond a certain sum, he must be considered the shipper's agent for making the contract of shipment, and as such has authority to bind him.[48]

Contract by consignor for consignee. Although there is some authority to the contrary,[49] according to the weight of authority it is generally assumed, in the absence of proof to the contrary, that a consignor has authority to make special contracts with the carrier as to the terms of shipment, and the consignee will be bound by any reasonable stipulation limiting the carrier's liability on the contract made by the consignor.[50] The carrier is not bound to inquire as to the consignor's authority, but is entitled to assume that it exists.[51] This is especially so if the consignee accepts the benefits of the special contract.[52] If the consignor acting for the consignee exceeds his authority in consenting to limitations on the carrier's liability, the carrier cannot be made to suffer thereby, unless actual notice of such fact is brought home to it.[53]

Contract made by consignee. The converse of the rule just stated is not necessarily true. The consignor is not bound by a contract made by the carrier with the consignee unless he has assented thereto.[54]

Ratification of unauthorized contract. The shipper may ratify an unauthorized contract entered into by a cartman or a teamster[55] or other person,[56] but to constitute a ratification there must be full knowledge by the shipper of all the material circumstances.[57]

§ 93. Livestock Shipments

Generally, although the rule is not without exceptions, one arranging to ship live stock for another is considered to have authority to make contracts limiting the carrier's liability.

on the appellant to make an investigation and undertake to discover whether Whitney or Holmes were authorized to ship goods Whitney simply carried out the instructions of Holmes and Holmes undertook to do what appellee had requested, and it would seem that the latter is now estopped from disputing that part of the contract which provided for a reduced rate of transportation and the limitation of liability on the part of the carrier."—Button v. Chicago, I. & L. R. Co., 210 Ill.App. 176, 178.

(2) "The plaintiff asserts that the opinion in Grice v. Oregon-Washington R & Navigation Co, 150 P. 862, 152 P. 509, 78 Or 17, 37, Ann.Cas. 1917E 645, sustains his theory of the law and supports plaintiff's judgment. If this case is in conflict with the rule announced by the Supreme Court of the United States, then the federal rule is paramount It seems the facts differ somewhat in the two cases."—George v Spokane, P. & S Ry. Co., 265 P. 408, 411, 124 Or. 598

44. Ill—New v. Rock Island R Co., 171 Ill.App. 488.
Or.—Grice v. Oregon-Washington R. & Navigation Co, 150 P. 862, 78 Or. 17, Ann.Cas.1917E 645, affirmed 152 P. 509, 78 Or 17, Ann Cas 1917E 645
10 C J. p 147 note 34.

45. Or—Grice v. Oregon-Washington R & Navigation Co, supra.

46. N J.—Hill v. Adams Express Co, 71 A. 683, 77 N.J Law 19.

47. N.J.—Russell v. Erie R. Co., 59 A. 151.
10 C J. p 147 note 37.

48. Cal.—California Powder Works v. Atlantic, etc, R Co, 45 P. 691, 113 Cal 329, 36 L.R.A. 648
10 C.J p 148 note 38

49. Ill.—Nonotuck Silk Co. v Adams Express Co, 99 N E 893, 256 Ill. 66—Plaff v. Pacific Express Co, 95 N.E 1089, 251 Ill. 243—Merchants' Despatch Transp. Co v Joesting, 89 Ill. 152—Nonotuck Silk Co. v. Adams Express Co, 166 Ill.App 519. See Pacific Exp Co. v. Spauld- & Co, 199 Ill App 474.
10 C.J p 148 note 43.

50. La—Hall v. Houston, E. & W T Ry. Co, 121 So. 769, 9 La App 577.
10 C.J. p 149 note 44.

51. Del.—Klair v. Philadelphia, etc., R. Co., 78 A. 1085, 25 Del. 274.

52. S C.—Harby v. Southern R. Co, 55 S E 760, 75 S C. 321.
10 C.J. p 149 note 46.

53. Mass.—Briggs v. Boston, etc, R. Co., 6 Allen 246, 83 Am.D. 626.
10 C J. p 149 note 47.

54. Wis—White v. Goodrich Transp. Co, 1 N W. 75, 46 Wis. 493.

55. Or—Grice v. Oregon-Washington R., etc., Co., 150 P. 862, 152 P. 509, 78 Or. 17, Ann.Cas 1917E 645.
10 C J. p 148 note 39.

56. N Y—Barter v. Barrett, 174 N. Y S 779, 186 App.Div. 715.
Facts showing ratification
Where an express company was directed to call at a hotel for a trunk, and it was delivered by a maid, who accepted an express receipt containing the terms of shipment, and such receipt was promptly given to the owner, who retained it without objection to the terms therein limiting the time for suit in case of loss, it was held that the maid's authority to deliver the trunk and accept the receipt was ratified—Barter v. Barrett, 174 N Y.S. 779, 186 App Div. 715.

57. Mo—Hunter v. American Ry. Express Co., App., 4 S.W.2d 847.
10 C.J. p 148 note 40.

While it has been held that an agent to ship live stock is authorized only to ship at the regular rate unless the entire matter be left to him, or the circumstances be such that power to ship at a less rate whereby the carrier's liability was limited could be inferred, and that a mere showing that an agent of the shipper signed a bill of lading limiting the carrier's liability is insufficient to establish his authority,[58] as a general rule, one who arranges for the transportation of live stock belonging to another, at his request, must, in the absence of evidence to the contrary, be considered his agent for that purpose with authority to make a contract for transportation with the carrier limiting the carrier's common-law liability.[59] The owner will be presumed to have known and assented to the provisions of the contract.[60]

It has been held that as a matter of law persons accompanying a shipment of stock during transportation are not authorized to execute a contract limiting the carrier's liability,[61] and that the carrier is not justified in assuming that such a person had such authority, particularly where an oral contract to receive, transport, and deliver the property involved had already been made with the owner.[62] On the other hand, such contracts have been held to bind the owner under certain circumstances.[63]

§ 94. Necessity of Giving Shipper Option between Modes of Shipment

Generally a limitation of liability in a contract is not valid unless the shipper was offered the choice between such contract and one imposing on the carrier the full common-law liability.

In order to give validity to a limited liability contract the carrier should, at the time of entering into the contract, hold itself out as being in readiness to transport the freight tendered with or without such limitation, and allow the shipper the choice between the limited liability contract and one imposing on the carrier the full common-law liability; and if this is not done, the contract is void and the limitation is inoperative,[64] as under these circumstances it cannot be said that the contract is freely and fairly entered into, and the carrier has by its own wrongful act prevented the making of a lawful contract binding upon the parties.[65] So, where the tariff of a carrier provided for two kinds of service in the shipment of perishables, under which the shipper could assume responsibility for certain damages, or, by paying an increased rate, could require the carrier to

58. S.C.—Southern Ry. Co. v. Kimball, 88 S.E. 14, 103 S.C. 365.
59. Ind.—Cleveland, C., C. & St. L. Ry. Co. v. Blind, 105 N.E. 483, 182 Ind. 398
Mo.—Stubblefield v. St. Louis & S. F. R. Co., 184 S.W. 149, 194 Mo. App. 396.
10 C.J. p. 148 note 41.
60. N.Y.—Zimmer v. New York Cent. R. Co., 33 N.E. 642, 137 N.Y. 460
61. Tex.—Southern Pac. Co. v. Meadors, Civ.App., 176 S.W. 882.
10 C.J. p. 148 note 41 [a].
62. Kan.—Atchison, etc., R. Co. v. Watson, 81 P. 499, 71 Kan. 696.
10 C.J. p. 148 note 41 [a].
63. Mass.—Squire v. New York Central R. Co., 98 Mass. 239, 93 Am.D. 157.
Minn.—Armstrong v. Chicago, M. & St. P. Ry. Co., 54 N.W. 1059, 53 Minn. 183
10 C.J. p. 148 note 41.
64. U.S.—Union Pac. R. Co. v. Burke, 41 S.Ct. 283, 255 U.S. 317, 65 L.Ed. 656, affirming Burke v. Union Pac. R. Co., 124 N.E. 119, 226 N.Y. 534, which reversed 166 N.Y.S. 100, 178 App.Div. 783—The Ansaldo San Giorgio I, C.C.A.N.Y., 73 F.2d 40, reversing, D.C., 3 F.Supp. 579, and certiorari granted The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., 55 S.Ct. 217, 293 U.S. 551, 79 L.Ed. 654, affirmed 55 S.Ct. 483, 294 U.S. 494, 79 L.Ed. 1016—A. C. Lawrence Leather Co. v. Compagnie Générale Transatlantique, C.C.A., N.Y., 18 F.2d 930, affirming, D.C., 12 F.2d 83, and certiorari denied Compagnie Générale Transatlantique, 47 S.Ct. 770, 274 U.S. 761, 71 L.Ed. 1338.
Miss.—Hill Mfg. Co. v. New Orleans, M. & C. R. R. Co., 78 So. 187, 117 Miss. 548, certiorari denied New Orleans, M. & C. R. Co. v. Hill Mfg. Co., 39 S.Ct. 11, 248 U.S. 571, 63 L.Ed. 426.
Mo.—Der Bogosian v. Atchison, T. & S. F. Ry. Co., 202 S.W. 1078.
N.Y.—F. A. Straus & Co. v. Canadian Pac. Ry. Co., 173 N.E. 564, 254 N.Y. 407, modifying 238 N.Y.S. 50, 227 App.Div. 316, which modified 234 N.Y.S. 622, 134 Misc. 439—Burke v. Union Pac. R. Co., 124 N.E. 119, 226 N.Y. 534, reversing 166 N.Y.S. 100, 178 App.Div. 783, certiorari granted Union Pac. R. Co. v. Burke, 40 S.Ct. 56, 251 U.S. 548, 64 L.Ed. 409, and affirmed 41 S.Ct. 283, 255 U.S. 317, 65 L.Ed. 656—Magid v. Compagnie Generale Transatlantique, 254 N.Y.S. 1, 233 App.Div. 515, affirmed 182 N.E. 167, 259 N.Y. 529—Kilthau v. International Mercantile Marine Co., 157 N.E. 267, 245 N.Y. 361, affirming 215 N.Y.S. 718, 217 App.Div. 22—Faultless Clothing Co. v. Branch Storage Co., 300 N.Y.S. 642, 165 Misc. 658—Aronstein v. New York Cent. R. Co., 230 N.Y.S. 298, 132 Misc. 563, modified on other grounds 243 N.Y.S. 221, 136 Misc. 352, certiorari denied 51 S.Ct. 28, 282 U.S. 850, 75 L.Ed. 754
Tenn.—Tennessee Central Ry. Co. v. Russell, 15 Tenn.App. 312.
10 C.J. p. 149 note 51.

Ocean and land shipment

A carrier is not permitted to limit its liability for loss occasioned by its negligence where only one rate is offered to the shipper, so that he has no choice which can be made the basis of an estoppel, and therefore the provision of a bill of lading for ocean and land shipment limiting the value of the goods, even if it be construed to have been carried into the uniform bill of lading for the land shipment, does not limit the land carrier's liability for loss resulting from its negligence, where its rate schedules stated only one rate for those goods.—Union Pac. R. Co. v. Burke, 41 S.Ct. 283, 255 U.S. 317, 65 L.Ed. 656, affirming Burke v. Union Pac. R. Co., 124 N.E. 119, 226 N.Y. 534, which reversed 166 N.Y.S. 100, 178 App.Div. 783

65. Ind.—Toledo, St. L. & W. R. Co. v. Milner, 110 N.E. 757, 62 Ind.App. 208.
10 C.J. p. 150 note 52.

assume the responsibility, it was primarily the duty of the carrier to accept the shipment under its ordinary common-law liability expressed in the second option, when such service was requested by the shipper; but the carrier is not liable for such damage to goods shipped under the first option notwithstanding its refusal to accept the shipment under the second option, where such refusal was excused by an unusual, unforeseen, and unavoidable shortage of cars suitable for the requested service.[66] It is only when the common carrier acting as such seeks to secure relief from liabilities imposed on it by law in that capacity that it is necessary that the shipper be given an option as to the terms of the contract, however;[67] as will be shown infra § 117, the general rules respecting limitation of the liability of a common carrier do not apply to a carrier not acting within the scope of its duty as common carrier.

In considering whether a shipper had an opportunity to choose between the common-law rate and the limited liability rate, it is held, the question is not what the contract recites in respect to the matter, but whether he had in fact a chance to choose between his common-law rate and a lower rate with limited liability.[68] It is not essential that the alternative should be actually presented to the shipper, however;[69] nor is it material that he did not know of the choice if such choice existed;[70] it is sufficient if it would have been given had he demanded it.[71] Where the shipper exercises his option of choosing which of two rates he will ship by, his right to damages will be determined in accordance with any reasonable stipulations accompanying the rate under which the shipment is made.[72]

§ 95. Consideration

a. Necessity
b. Sufficiency

a. Necessity

A contractual stipulation relieving the carrier from its common-law liability must be supported by some sufficient consideration.

Inasmuch as the carrier is by law bound to carry at a reasonable rate for all who may apply without any limitation of common-law liability, a stipulation relieving him to any extent from the liability imposed by law must be supported by some sufficient consideration, and in the absence of such consideration the stipulation will not be valid,[73]

66. Wash.—Pacific Fruit & Produce Co v Northern Pac Ry. Co, 186 P 852, 109 Wash 481, 10 A.L.R. 337.

67. N.H.—Bernardi Greater Shows v Boston & M. R R, 165 A. 124, 86 N.H. 146.

68. N.H.—Kimball v. American Express Co, 79 A. 492, 76 N.H. 81
10 C.J. p 150 notes 53, 56 [b].

69. U.S.—Arthur v Texas, etc., R Co, 27 S.Ct 333, 204 U.S. 505, 51 L.Ed 590—Cau v. Texas, etc, R Co., La., 24 S.Ct 663, 194 U.S 427, 430, 48 L.Ed. 1053, affirming 113 F. 91, 51 C.C.A 76
10 C.J. p 150 note 55.

70. Ark.—Scullin v. Eoff, 191 S.W. 31, 126 Ark. 523.

71. Ark.—St. Louis Southwestern R Co v Haynie, 179 S.W 170, 120 Ark 26
10 C.J. p 150 note 56.

72. Ill.—Fox v. Chicago & N. W Ry. Co, 199 Ill App 453
10 C.J. p 151 note 57

73. U.S.—The Ansaldo San Giorgio I v Rheinstrom Bros Co., N.Y., 55 S.Ct 483, 294 U.S. 494, 79 L.Ed 1016—Union Pac. R Co. v Burke, 41 S.Ct. 283, 255 U.S. 317, 65 L.Ed 656, affirming Burke v. Union Pac R. Co., 124 N.E 119, 226 N.Y 534, which reversed 166 N.Y.S 100, 178 App Div 783—Lehigh Valley R Co. v. State of Russia, C.C.A.N.Y., 21 F.2d 396, certiorari denied 48 S. Ct. 159, 275 U.S. 571, 72 L.Ed 432
Cal.—Murray v Southern Pac R. Co., 296 P 667, 112 Cal App 150.
Ind.—Illinois Cent R Co v. Mattingly, 119 N.E 498, 69 Ind App 166.
Mo.—Grass v. St. Louis-San Francisco Ry. Co, App, 238 S.W 551
N.Y.—F. A Straus & Co v. Canadian Pac Ry. Co, 173 N.E 564, 254 N.Y. 407, modifying 238 N.Y.S 50, 227 App Div. 316, which modified 234 N.Y.S 622, 134 Misc. 439—Kilthau v. International Mercantile Marine Co, 157 N.E 267, 245 N.Y. 361, affirming 215 N.Y.S 718, 217 App Div. 22—Faultless Clothing Co v. Branch Storage Co., 300 N.Y.S. 642, 165 Misc. 658
Okl.—Enid Oil & Pipe Line Co v Champlin, 240 P. 649, 113 Okl 170—St. Louis & S F. R Co v Ladd, 178 P. 125, 72 Okl 55—Haskell v. St. Louis & S. F R Co, 162 P 459, 62 Okl 116—St. Louis & S F. R Co v. Wynn, 156 P. 346, 56 Okl 509.
Tex.—Chicago, R I & G. Ry. Co v Jenkins, Civ.App, 196 S.W. 679, error refused
10 C.J. p 151 note 60, p 164 notes 55, 57, 63, p 166 note 77, p 177 note 63, p 179 note 79.

Limitation as to value

(1) It is frequently stated that a consideration is necessary to sustain a contract limiting the liability of the carrier as to value.—Der Bogosian v. Atchison, T. & S F. Ry. Co, Mo, 202 S.W 1078—Hull v Chicago, B. & Q R Co, 208 S.W 494, 200 Mo App 392—Wilson v. Chicago Great Western R. Co, Mo App, 190 S.W 22—10 C.J. p 166 note 77.

(2) This rule applies to a contract providing that in case of loss the damage for which the carrier shall be liable shall be computed on the basis of the value of the goods at the time and place of shipment.—New York, C. & St L Ry Co. v The Euclid Builders Supply Co, 11 Ohio App 196—10 C.J. p 177 note 63.

(3) A bill of lading which limited carrier's liability to a stipulated amount per package unless higher value was declared, in which case either declared value or market value at place of shipment, whichever was less, was taken, was void as without consideration in not giving the shipper a choice of rates, since, even though the shipper placed a higher valuation thereon and paid a correspondingly higher rate, he could not recover more than the value of the goods at the time and place of shipment.—F. A. Straus & Co. v. Canadian Pac. Ry. Co, 173 N.E 564, 254 N.Y. 407, modifying 238 N.Y.S. 50, 227 App Div. 316, which modified 234 N.Y.S. 622, 134 Misc 439—Magid v. Compagnie General Transatlantique, 254 N.Y.S. 1, 233 App Div 515, affirmed 182 N.E. 167, 259 N.Y. 529.

notwithstanding the contract recites that it is based on a consideration;[74] and, even where the carrier contracts to transport property under a limited liability for a good consideration, such as a reduced rate, such contract is of no effect where the carrier did not in fact transport the property at a reduced rate.[75]

b. Sufficiency

To constitute a sufficient consideration for a special limited liability contract, the services rendered by the carrier or the charge for carriage must be different from what they would be if there were no special contract.

There is not a sufficient consideration for a stipulation limiting the carrier's common-law liability where the services rendered by the carrier and the charges for carriage are in no respect different from what they would be if there were no special contract.[76] So mere acceptance of goods and an agreement to ship them do not constitute a sufficient consideration,[77] the reason for this being that the carrier is bound, on the shipper's demand, to perform the transportation without exacting from the shipper an agreement to relieve the carrier from any part of its common-law liability.[78] Furthermore, a special contract limiting the liability of the carrier issued and accepted after the shipment is unsupported by consideration unless the subsequent execution and issuance was authorized by prior agreement.[79]

A pass entitling the shipper to free transportation is a sufficient consideration, however,[80] unless the shipper was entitled under the law to accompany the goods if accepted for shipment;[81] and in the absence of statute an agreement by the carrier to transport the goods shipped not only over its own line but over that of a connecting carrier is a sufficient consideration, as the carrier is not bound at common law to transport goods over any line but its own,[82] although, as shown infra § 405, by the construction placed on the Carmack amendment, the common law is changed so far as interstate shipments are concerned, and the carrier is bound to make a contract for through shipment over connecting lines, so that it would seem that so far as interstate shipments are concerned an agreement of an initial carrier to ship goods over the line of a connecting carrier will constitute no consideration for a limitation of liability.

Reduced freight rates. A lower freight rate is generally held to be a sufficient consideration for a limited liability contract,[83] and no consideration need be shown for such a contract other than the

74. Ill.—Illinois Cent. R. Co. v. Mattingly, 119 N.E. 498, 69 Ind App. 166.
Mo.—Grass v. St. Louis-San Francisco Ry Co., App., 238 S.W. 551.

75. Colo.—Colorado, etc., R Co. v Manatt, 121 P. 1012, 21 Colo.App. 593.
Tex.—Missouri, etc., R Co. v. Darlington, Civ App., 40 S.W. 550.

76. N.Y.—Burke v. Union Pac. R Co., 124 N.E. 119, 226 N.Y. 534, reversing 166 N.Y.S. 100, 178 App. Div 783, certiorari granted Union Pac. R. Co. v. Burke, 40 S.Ct. 56, 251 U.S. 548, 64 L.Ed. 409, and affirmed 41 S.Ct. 283, 255 U.S. 317, 65 L.Ed 656.
Tex.—Chicago, R I & G Ry. Co. v. Jenkins, Civ.App., 196 S.W. 679, error refused.
10 C.J. p 152 note 63.

Consideration based on legal rate

A release of liability for delay in furnishing cars for an interstate shipment of live stock in consideration of the legal rate, for transporting the shipment is without consideration, and void.—Grass v. St Louis-San Francisco Ry. Co., Mo. App., 238 S.W. 551.

77. Ind.—Illinois Cent. R. Co. v. Mattingly, 119 N.E. 498, 69 Ind. App. 166.
10 C.J. p 152 note 64.
"A mere agreement to transport goods furnishes no consideration for a stipulation for less than common-law liability. There must be some specific consideration, as reduced rates, the performance of a duty other than that of a common carrier."—Lehigh Valley R Co. v State of Russia, C.C.A.N.Y., 21 F.2d 396, 403, certiorari denied 48 S.Ct. 159, 275 U.S. 571, 72 L.Ed 432.

78. Mo.—Meyers v. Missouri, etc., R. Co., 96 S.W. 737, 120 Mo App. 288.
10 C.J. p 152 note 65.

79. Ind.—Chesapeake & O. Ry Co. of Indiana v. Jordan, 114 N.E. 461, 63 Ind App. 365.

80. Ga.—Carter v. Southern R Co., 59 S.E. 209, 3 Ga.App. 34
La.—Simms v. New Orleans, etc., R. Co., 47 So. 602, 122 La 268

81. Mo.—Bowles v. Quincy, O & K C R. Co., App., 187 S.W. 131.

82. Tenn.—Mobile, etc., R. Co. v. Brownsville Livery, etc., Co., 130 S.W. 788, 123 Tenn 298.

83. U.S.—Union Pac. R. Co v. Burke, 41 S.Ct. 283, 255 U.S. 317, 65 L.Ed. 656, affirming Burke v. Union Pac. R Co., 124 N.E. 119, 226 N.Y. 534, which reversed 166 N.Y.S. 100, 178 App.Div. 783
Ark.—Lusk v. Long, 192 S.W. 213, 127 Ark. 261.
Ga.—Western & A. R. Co. v. Waldrip, 89 S.E. 346, 18 Ga.App. 263.
Ind.—Illinois Cent R. Co v. Mattingly, 119 N.E. 498, 69 Ind.App. 166.
Iowa.—Keeney v. Chicago, B. & Q R. Co., 167 N.W. 475, 183 Iowa 522
La.—E. Borneman & Co v. New Orleans, M & C R Co., 81 So. 882, 145 La 150
Mo.—Stubblefield v. St. Louis & S. F. R Co., 184 S.W. 149, 194 Mo App. 396
N.Y.—American Locomotive Co. v. New York Cent. R Co., 179 N.Y.S. 851, 190 App.Div 372
Okl.—Haskell v. St Louis & S F. R. Co., 162 P. 459, 62 Okl 116.
Vt.—Piper v. Boston & M. R R., 97 A 503, 90 Vt. 176, affirmed Boston & M. R R v. Piper, 38 S.Ct. 354, 246 U.S 439, 62 L.Ed 820
10 C.J. p 152 note 69, p 164 notes 55, 63, p 166 notes 78, 79.

Choice of rates

Where the carrier offers the shipper the choice of two rates, the higher one for carriage subject to common-law liability, and the lower one for carriage subject to certain exemptions from that liability, the lower rate was sufficient consideration for the exemption of the carrier's liability, especially when the exemption did not include the carrier's negligence.—Simmons Hardware Co. v. Southern Ry. Co., C.C.A.Mo., 279 F. 929, certiorari denied 43 S.Ct. 96, 260 U.S. 739, 67 L.Ed. 490.

lower rates in force for shipments made thereunder.[84] However, such concession in charges must be actual and not fictitious;[85] and notwithstanding the recital in a contract of shipment that the limitations are made in consideration of a reduced rate or other valuable consideration, if it is shown that there is no such reduced rate or other valuable consideration, the carrier is liable just as if the contract had contained no such stipulation.[86]

A stipulated difference in the shipping rate affords a sufficient consideration to support a contract limiting liability only where the shipper has a bona fide opportunity of making a choice of rates.[87] Where the carrier has but one regular rate applicable for a given class of property, it is not a reduced or special rate, such as will serve as a consideration for the limitation of its common-law liability.[88] There is no reduced rate authorizing a limitation of liability shown by a contract, where the reduced rate named in the contract is a reduction from a rate based on the weight of the article shipped, while the limitation applies to the article regardless of weight[89] So it has been held that a contract reciting that the price charged for transportation is "at the rate of tariff per cwt." must be construed to mean that the price charged is the full tariff rate and shows a want of consideration for a limitation of liability, notwithstanding a recital that the rate charged was less than the rate charged for shipments transported at the carrier's risk.[90] Where the carrier estimates the weight of the goods shipped at less than the estimate furnished it by the shipper, and incorporates its estimate in the contract, and bases the freight rate on such estimate, it is estopped to claim that by reason of the fact that the goods ran over the estimated weight the shipment was made at a reduced freight rate which entitled it to limit its common-law liability.[91]

§ 96. Reasonableness of Limitation

Contractual limitations of a carrier's liability must be just and reasonable, and not contrary to public policy.

A carrier cannot lawfully stipulate for exemption from liability, unless such exemption is just and reasonable,[92] and unless the contract is freely and fairly made[93] and is not inconsistent with pub-

Schedule containing two rates

Where the published and approved schedule of a railroad's rates for carrying live stock contains two rates, one, lower, where contracts limiting liability must be entered into, another, higher, where no contract limiting liability is required, the difference between the two rates is a sufficient consideration for the contract limiting liability; and where the first schedule of rates of a railroad, applying to it and other roads, indicated two kinds of contracts, at owner's risk, one where the agreed value was within a certain amount, the other, where the value exceeded the amount and did not exceed eight hundred dollars, and then provided for a contract at the carrier's risk, and the fixed rates first given in the schedule were made to apply only on shipments of ordinary live stock where contracts were executed by shippers on blanks furnished by the companies, the latter provision of the schedule authorized a contract covering an interstate shipment of live stock in the form of the several blanks of the several railroads—Bilby v. Atchison, T & S. F. Ry. Co., Mo., 199 S.W. 1004.

84. Minn.—Carpenter v. U. S. Express Co., 139 N.W. 154, 120 Minn. 59.

85. Ind.—Lake Erie, etc., R. Co. v. Holland, 69 N.E. 138, 162 Ind. 406.
10 C.J. p 152 note 71.

86. Ind.—Illinois Cent. R. Co. v. Mattingly, 119 N.E. 498, 69 Ind App. 166.
10 C.J. p 152 note 72.

87. Ind.—Illinois Cent. R. Co. v. Mattingly, supra.

Ad valorem rate or rate by weight

Before a carrier can successfully claim the benefit of a limitation from full liability in a bill of lading, wherein the rate for transportation is determined by weight, the essential choice between an ad valorem rate and a rate by weight must be made to appear—Mariani Bros. v. Thomas Wilson, Sons & Co., 177 N.Y.S. 335, 188 App.Div. 617.

88. N.Y.—Aronstein v. New York Cent. R. Co., 230 N.Y.S. 298, 132 Misc. 563, modified 243 N.Y.S. 221, 136 Misc. 352, certiorari denied 51 S.Ct. 28, 282 U.S. 850, 75 L.Ed. 754.
10 C.J. p 152 note 73.

89. Mo.—Burns v. Chicago, etc., R. Co., 132 S.W. 1, 151 Mo.App. 573—Hancock v. Chicago, etc., R. Co., 111 S.W. 519, 131 Mo.App. 401.

90. Mo.—George v. Chicago, etc., R. Co., 113 S.W. 1099, 214 Mo. 551, 127 Am.S.R. 690
10 C.J. p 153 note 75.

91. Mo.—Rice v. Wabash R. Co., 80 S.W. 974, 106 Mo.App. 371.
10 C.J. p 153 note 78.

92. U.S.—The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., N.Y., 55 S.Ct. 483, 294 U.S. 494, 79 L.Ed. 1016.
Ark.—Lusk v. Long, 192 S.W. 213, 127 Ark. 261.
Ill.—Doster & McKibben v. Michigan Cent. R. Co., 196 Ill.App. 49
La.—Coustaline v. Louisiana Ry. & Nav. Co., 98 So. 81, 154 La. 667.
Md.—Peninsula Produce Exch. v. American Ry. Express Co., 128 A. 403, 147 Md. 424.
Mich.—Shier v. American Ry. Express Co., 208 N.W. 746, 234 Mich. 505—George W. Lardie & Son v. Manistee & N. E. R. Co., 158 N.W. 31, 192 Mich. 77.
Miss.—Hill Mfg. Co. v. New Orleans, M. & C. R. R. Co., 78 So. 187, 117 Miss. 548, certiorari denied New Orleans, M. & C. R. Co. v. Hill Mfg. Co., 39 S.Ct. 11, 248 U.S. 571, 63 L.Ed. 426.
Mo.—Sullivan v. American Ry. Express Co., 245 S.W. 375, 211 Mo. App. 123.
N.Y.—Feynman v. American Ry. Express Co., 234 N.Y.S. 727, 134 Misc. 223
Okl.—St. Louis & S. F. R. Co. v. Ladd, 178 P. 125, 72 Okl. 55—Haskell v. St. Louis & S. F. R. Co., 162 P. 459, 62 Okl. 116.
Tex.—Austin v. Chicago, R. I. & G. Ry. Co., Civ.App., 18 S.W.2d 733.
W.Va.—Carman v. Virginia Ry. Co., 126 S.E. 567.
10 C.J. p 154 note 86.

93. Okl.—St. Louis & S. F. R. Co. v. Ladd, 178 P. 125, 72 Okl. 55—Haskell v. St. Louis & S. F. R. Co., 162 P. 459, 62 Okl. 116.
Utah.—Bingham v. San Pedro, etc., R. Co., 117 P. 606, 39 Utah 400.
10 C.J. p 154 note 87.

lic policy.[94] No contractual limitation is reasonable which is subversive of public policy.[95] Whether a limited liability contract is reasonable is in all cases to be determined by the facts and circumstances of the particular case.[96] A provision exempting the carrier from liability for loss from any cause whatever would be against public policy and void as an attempt on the part of a common carrier to relieve itself from its public duties,[97] and, as shown infra § 113 b, as an attempt to relieve itself from the consequences of negligence.

§ 97. Right to Limit Liability

a. In general
b. Effect of special constitutional and statutory provisions

a. In General

In the absence of prohibitory constitutional or statutory provisions, reasonable limitations of the carrier's common-law liability are permissible.

While considerations of public policy as shown supra § 71, have been potent in influencing the courts to recognize a rule of liability, in the case of common carriers, much stricter than that recognized as applying in the case of ordinary bailees, the courts have not thought it necessary to deny the parties to a contract of carriage the right to exonerate the carrier from its extraordinary liability, where there is no constitutional or statutory provision forbidding it; and, subject to the rule stated supra § 96 that such limitation must be reasonable, the general proposition has been recognized that by special agreement, or by notice to the shipper acquiesced in by him, the common carrier may limit its common-law liability.[98] Accordingly, it is stated as a general proposition in many decisions that a common carrier may by contract limit its liability, except for damages or loss resulting from the negligence of the carrier or its agents or servants.[99] However, a common carrier cannot, by declar-

94. U.S.—The Ansaldo San Giorgio I v. Rheinstrom Bros Co, N.Y., 55 S.Ct. 483, 294 U.S. 494, 79 L.Ed. 1016

N.Y.—Feynman v American Ry. Express Co, 234 N.Y.S. 727, 134 Misc. 223.

95. Mont.—Nelson v. Great Northern R. Co, 72 P. 642, 28 Mont. 297.

Discrepancies in weights of grain

Provision of bill of lading exempting carrier from liability for differences in weights of grain caused by natural shrinkage or discrepancies in elevator weights is contrary to public policy, and hence not permitted by Uniform Bills of Lading Act, in view of constitutional provision requiring carriers to measure grain shipped and deliver the full amount at the destination.—Shellabarger Elevator Co v Illinois Cent. R. Co., 116 N.E. 170, 278 Ill. 333, L.R.A.1917E 1011

96. U.S.—Inman v. Seaboard Air Line R. Co., C.C.Ga., 159 F. 960.

Ala.—South, etc., R. Co v. Henlein, 52 Ala. 606, 23 Am.R. 578.

Mont.—Wall v Northern Pac. R. Co., 145 P. 291, 50 Mont. 122

97. Iowa.—Ruebel Bros. v. American Express Co., 180 N.W. 658, 190 Iowa 600

98. U.S.—The Ansaldo San Giorgio I v. Rheinstrom Bros Co, N.Y., 55 S.Ct. 483, 294 U.S. 494, 79 L.Ed. 1016, affirming, C.C.A., The Ansaldo San Giorgio I, 73 F.2d 40, reversing, D.C., 3 F.Supp. 579, certiorari granted The Ansaldo San Giorgio I v. Rheinstrom Bros Co., 55 S.Ct. 217, 293 U.S. 551, 79 L.Ed. 654—Moore v Duncan, Ohio, 237 F. 780, 150 C.C.A. 534—Simmons Hardware Co. v. Southern Ry. Co., C.C.A.Mo., 279 F. 929, certiorari denied 43 S.Ct. 96, 260 U.S. 739, 67 L.Ed. 490

Fla.—American Ry. Express Co v Johnson, 100 So. 743, 87 Fla. 451—Noone v. Southern Express Co, 83 So. 607, 79 Fla. 25

Iowa.—Keeney v. Chicago, B. & Q. R. Co, 167 N.W. 475, 183 Iowa 522

Mo.—Morrow v Wabash Ry. Co, App., 6 S.W.2d 628—Morrow v Wabash Ry. Co, 276 S.W. 1030, 220 Mo.App. 518.

N.Y.—Mairs v. Baltimore & O. R. Co, 76 N.Y.S. 838, 73 App.Div. 265—Faultless Clothing Co. v. Branch Storage Co, 300 N.Y.S. 642, 165 Misc. 658.

Ohio.—Thomas v Baltimore & O. R. Co, 16 Ohio N.P.,N.S., 194.

Okl.—Haskell v St. Louis & S. F. R. Co, 162 P. 459, 62 Okl. 116.

Or.—Carroll v. Royal Mail Steam Packet Co., 279 P. 861, 130 Or. 294

S.C.—Southern Ry. Co. v. Kimball, 88 S.E. 14, 103 S.C. 365

Utah.—Paradise Land & Live Stock Co. v. Davis, 207 P. 145, 60 Utah 189.

Vt.—Oakdale Farms v. Rutland R. Co, 158 A. 678, 104 Vt. 279—Piper v Boston & M. R. R., 97 A. 508, 90 Vt. 176, affirmed Boston & M. R. R. v Piper, 38 S.Ct. 354, 246 U.S. 439, 62 L.Ed. 820.

Va.—Chesapeake & O. Ry. Co v Osborne, 153 S.E. 865, 154 Va. 477.

10 C.J. p 133 note 22.

"The carrier may exempt himself by contract from liability for the consequences of events beyond his control."—The Ansaldo San Giorgio I v. Rheinstrom Bros Co, N.Y., 55 S.Ct. 483, 484, 294 U.S. 494, 79 L.Ed. 1016, affirming, C.C.A., The Ansaldo San Giorgio I, 73 F.2d 40, reversing, D.C., 3 F.Supp. 579, certiorari granted The Ansaldo San Giorgio I v. Rheinstrom Bros. Co, 55 S.Ct. 217, 293 U.S. 551, 79 L.Ed. 654

Contrary view

(1) There have been a few expressions apparently to the contrary—Hartford Fire Ins. Co. v Payne, 203 N.W. 4, 5, 199 Iowa 1008, 39 A.L.R. 1109—10 C.J. p 133 note 22 [a].

(2) Thus it has been said in Iowa, without reference to the statute in that jurisdiction prohibiting contractual limitations on liability, "The carrier may not, generally speaking, by contract relieve itself from liability to the shipper"—Hartford Fire Ins. Co. v. Payne, supra.

(3) That the rule of the text is not applicable where such a contract is specifically prohibited by constitutional or statutory provision is shown in a subsequent subdivision of this section

99. Ark.—St. Louis-San Francisco Ry. Co v. Watts, 271 S.W. 464, 168 Ark. 804—Lusk v. Long, 192 S.W. 213, 127 Ark. 261

Cal.—American Fruit Distributors of California v. Hines, 203 P. 821, 55 Cal.App. 373.

Ill.—Donchian v Brink's Chicago City Express Co., 217 Ill.App. 124.

Ind.—Western Union Telegraph Co. v. Lapenna, 133 N.E. 144, 78 Ind.App. 598

Ky.—Julius Kessler & Co v Southern Ry. Co in Kentucky, 255 S.W. 535, 200 Ky. 713.

La.—Bowie Lumber Co v. Yazoo & M. B. R. Co., 131 So. 689, 14 La.App. 454.

Mass.—Florida Cotton Oil Co. v. Clyde S. S. Co., 125 S.E. 855, 235 Mass. 10.

Miss.—Yazoo & M. V. R. R. Co. v.

ing or stipulating that it shall not be so considered, divest itself of the liability attached to the fixed legal character of its occupation.[1]

Briefly summarized, the reasons assigned for permitting common carriers to limit their common-law liability by contract are: (1) Changed methods and conditions of transportation.[2] (2) The right of every citizen to control his own affairs and to make such contracts with relation to his property as may seem beneficial to him.[3] (3) The absence of any interest the public can have in requiring the responsibility of insurance to accompany the service of transportation, in the face of a special agreement for its relinquishment.[4] (4) The great hardship on the carrier in certain special cases, where goods of great value were delivered to it without notice of their character, and where loss happened by sheer accident, without any possibility of fraud or collusion on its part, such as by collisions at sea, accidental fire, etc.[5] (5) The fact that the relaxation of the rule enables the carrier to reduce its rates of compensation, thus proportionately relieving the transportation of produce and merchandise from some of the burden with which it is loaded.[6]

In this Title the right of an initial carrier to limit its liability to its own line is considered infra § 407; and the right of a connecting carrier to the benefit of a limited liability clause in the contract of carriage, infra §§ 432, 433. What limitations of liability are permissible are discussed at length infra §§ 98–111.

b. Effect of Special Constitutional and Statutory Provisions

(1) State provisions
(2) Federal provisions

(1) State Provisions

As regards intra-state shipments, a contract for limitation of liability made in violation of a state constitutional or statutory prohibition thereof is void.

State statutes authorizing carriers to limit their liability by express contract do not affect the operation of the general rule as laid down in the preceding subdivision of this section.[7]

In some states, however, carriers are expressly prohibited from limiting their liability by contract, and any attempted limitation thus prohibited is void,[8] and, as against such a constitutional or statutory prohibition, it is immaterial that there is a consideration for the limitation of liability in a reduced rate of transportation.[9] It has been held,

Craig, 79 So. 102, 118 Miss. 299, certiorari denied 39 S.Ct. 11, 248 U.S. 573, 63 L.Ed. 427.

Mo.—Bilby v. Atchison, T. & S. F. Ry. Co., 199 S.W. 1004—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo.App. 314.

N.H.—J. F. Bell & Sons Co. v. American Ry. Exp. Co., 149 A. 497.

Ohio.—Thomas v. Baltimore & O. R. Co., 16 Ohio N.P.,N.S., 194.

Okl.—Haskell v. St. Louis & S. F. R. Co., 162 P. 459, 62 Okl. 116—St. Louis & S. F. R. Co. v. Wynn, 156 P. 346, 56 Okl. 509.

Or.—Carroll v. Royal Mail Steam Packet Co., 279 P. 861, 130 Or. 294.

Wis.—Ashton v. Chicago & N.W. Ry. Co., 225 N.W. 328, 198 Wis. 618.

10 C.J. p. 134 note 23.

1. Tex.—Austin v. Chicago, R. I. & G. Ry. Co., Civ.App., 18 S.W.2d 733.

2. Minn.—Murphy v. Wells, 108 N.W. 1070, 99 Minn. 230.

10 C.J. p. 134 note 24.

3. Mich.—Michigan Cent. R. Co. v. Hale, 6 Mich. 242.

10 C.J. p. 135 note 25.

4. U.S.—York Mfg. Co. v. Illinois Cent. R. Co., 3 Wall. 107, 18 L.Ed. 170.

5. U.S.—New York Cent. R. Co. v. Lockwood, N.Y., 17 Wall. 357, 21 L.Ed. 627.

6. U.S.—New York Cent. R. Co. v. Lockwood, supra.

7. Ga.—Southern Express Co. v. Hanaw, 67 S.E. 944, 134 Ga. 445, 137 Am.S.R. 227—Central of Georgia R. Co. v. Hall, 52 S.E. 679, 124 Ga. 322, 110 Am.S.R. 170, 4 L.R.A., N.S., 898, 4 Ann.Cas. 128.

8. Ala.—Southern Ry. Co. v. Harris, 80 So. 101, 202 Ala. 263.

Ky.—Julius Kessler & Co. v. Southern Ry. Co. in Kentucky, 255 S.W. 535, 200 Ky. 713.

Tex.—American Ry. Express Co. v. Santa Anna Gas Co., Civ.App., 250 S.W. 271, petition dismissed 44 S.Ct. 3, 263 U.S. 725, 68 L.Ed. 526.

Va.—Chesapeake & O. Ry. Co. v. Osborne, 153 S.E. 865, 154 Va. 477.

10 C.J. p. 135 note 31.

"If 'the state has the right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding' (Pennsylvania R.R. v. Hughes, Pa., 24 S.Ct. 132, 191 U.S. 477, 48 L.Ed. 268, Liverpool, etc., Nav. Co. v. Brooklyn Terminal, N.Y., 40 S.Ct. 66, 251 U.S. 48, 64 L.Ed. 130), it has the right to enact statutes safeguarding the rights of the shipper as to provisions for notice, inspection, etc., when there was no notice or knowledge of the condition within the time stipulated or of the facts recited and sought to be pleaded in bar."—Davis v. Dawkins, 95 So. 188, 190, 209 Ala. 45.

Exemption from liability

Limitation on carrier's liability for loss or damage to intra-state shipment constitutes exemption from liability, and is therefore ineffective under statute prohibiting carrier from exempting itself from common-law liability.—Chesapeake & O. Ry. Co. v. Osborne, 153 S.E. 865, 154 Va. 477.

"Ordinary live stock"

Under a statute prohibiting a carrier from limiting liability on ordinary live stock received for intra-state transportation and defining the term "ordinary live stock" to include all cattle, swine, sheep, goats, horses, and mules except such as are chiefly valuable for breeding, racing, show purposes, or other special uses, horses owned by Indians and shipped for use in Indian village presentation at fair, which were not chiefly valuable for breeding, racing, show purposes, or other special uses, were held "ordinary live stock" and a contract attempting to limit liability thereon was invalid.—Wall-A-Hee v. Northern Pac. Ry. Co., 41 P.2d 786, 180 Wash. 656.

9. U.S.—Chicago, etc., R. Co. v. Solan, 18 S.Ct. 289, 169 U.S. 133, 42 L.Ed. 688.

however, that constitutional and statutory provisions of this character are not intended to prevent freedom of contract as to matters merely incidental to the contract of transportation and not peculiar or necessary to it,[10] this rule being particularly applicable, as shown supra § 64, to contracts requiring the shipper to accompany and care for live stock. So also it has been held that such provisions have no application where loss or injury occurs after the carrier's liability as such has terminated and where its only responsibility is that of a warehouseman.[11]

Interstate shipments. Before the enactment of the Carmack amendment it was held that these statutes were applicable to interstate as well as to intra-state shipments,[12] except where, as is the case in some statutes, an intent is indicated that they are to be restricted in their application to intra-state shipments.[13] However, as shown in the following subdivision of this section, the so-called Carmack amendment has entirely nullified the effect of these statutes so far as interstate and certain foreign shipments are concerned, although it is inoperative as regards intra-state shipments.

(2) Federal Provisions

The Carmack amendment and second Cummins amendment permit, with certain exceptions, modification of the common-law liability of a carrier in so far as interstate shipments are concerned, but do not affect state laws relating to intra-state shipments.

As shown in the C.J.S. title Commerce § 92, also 10 C.J. p 136 note 39–p 137 note 42, and 12 C.J. p 86 notes 41, 44, 49, the right of the carrier to limit its liability by special contract in respect of interstate shipments depends entirely on the provisions of the so-called Carmack amendment and the various amendments thereto, 49 U.S.C.A. § 20 (11). The liability imposed by the original Carmack amendment was the liability imposed by the common law upon a common carrier, and could be limited or qualified by special contract with the shipper, provided the limitation or qualification was just and reasonable, and did not exempt from loss or responsibility due to negligence.[14] Under the Act of March 4, 1915, c 176, 38 U S St. at L. p 1196, c 176, known as the first Cummins amendment, which expressly forbade any limitation of liability by the carrier for loss or injury to an interstate shipment of goods or to goods shipped from the United States to an adjacent foreign country, except as to concealed goods the value of which the carrier required the shipper specifically to state in writing,[15] but which did not affect rights of ac-

Ky.—Illinois Cent. R. Co. v. Radford, 64 S.W. 511, 23 Ky.L. 886.

10 C.J. p 135 note 31 [f]

10. Neb.—Chicago, etc., R. Co. v. Schuldt, 92 N.W. 162, 66 Neb. 43.

11. U.S.—In re The City of Clarksville, D.C.Ind., 94 F. 201.

Liability as custodian generally see infra §§ 106, 156, 157.

12. Iowa.—Solan v. Chicago, etc., R. Co., 63 N.W. 692, 95 Iowa 260, 58 Am.S.R. 430, 28 L.R.A. 718, affirmed 18 S.Ct. 289, 169 U.S. 133, 42 L.Ed. 688.

10 C.J. p 136 note 36.

13. Tex.—Texas, etc., R. Co. v. Richmond, 63 S.W. 619, 94 Tex. 571.

10 C.J. p 136 note 37.

Nonadjacent foreign country

Rev.St.1925 art. 883, prohibiting carriers within the state from limiting their common-law liability, held not applicable to shipments to nonadjacent foreign countries.—A. L. Wolff & Co. v. Missouri, K. & T. Ry. Co. of Texas, Tex.Com.App., 289 S.W. 1000, affirming, Civ.App., 283 S.W. 250.

14. U.S.—Adams Express Co. v. Croninger, Ky., 33 S.Ct. 148, 226 U.S. 491, 37 L.Ed. 314, 44 L.R.A.,N.S., 257.

Ark.—Jonesboro, L. C. & E. R. Co. v. Maddy, 248 S.W. 911, 157 Ark. 484, 28 A.L.R. 498.

Ill.—Doster & McKibben v. Michigan Cent. R. Co., 196 Ill.App. 49—Sweetser v. Chicago & Alton R. Co., 196 Ill.App. 623.

Ind.—Chesapeake & O. Ry. Co. of Indiana v. Jordan, 114 N.E. 461, 63 Ind.App. 365.

La.—E. Borneman & Co. v. New Orleans, M. & C. R. Co., 81 So. 882, 145 La. 150.

Md.—Peninsula Produce Exch. v. America Ry. Express Co., 128 A. 403, 147 Md. 424.

Mich.—Shier v. American Ry. Express Co., 208 N.W. 746, 234 Mich. 505.

Mo.—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo.App. 314—Morrow v. Wabash Ry. Co., 265 S.W. 851, 219 Mo.App. 62.

Okl.—St. Louis & S. F. R. Co. v. Ladd, 178 P. 125, 72 Okl. 55—St. Louis & S. F. R. Co. v. Akard, 159 P. 344, 60 Okl. 4.

10 C.J. p 137 notes 45, 46

The pertinent provision of the Carmack amendment is quoted in 10 C.J. p 136 note 39

Corpus Juris is cited with approval.

Kan.—Kennedy v. Atchison, T. & S. F. Ry. Co., 179 P. 314, 315, 104 Kan. 129.

La.—American Cotton Co-operative Ass'n v. New Orleans & Vicksburg Packet Co., 157 So. 733, 734, 180 La. 836.

Negligence of shipper

Under the Carmack amendment a contract of shipment in interstate commerce, which places responsibility upon shipper for loss due to shipper's negligence, is valid.—Hamway v. Seaboard Air Line Ry. Co., 136 So. 628, 101 Fla. 1483.

Furnishing cars

Where cars were furnished on request for an interstate shipment of live stock, as required by Interstate Commerce Act, conditions in the contract as to the carrier's liability were controlling.—Atchison, T. & S. F. Ry. Co. v. White, Tex.Civ.App., 188 S.W. 714, error refused.

Limitation held unwarranted

Ill.—Lino v. Northwestern Pac. R. Co., 246 Ill.App. 451, reversed on other grounds 163 N.E. 316, 332 Ill. 93.

Early diverse views

Before this question was authoritatively settled by the United States supreme court there was great diversity of view in the state courts. See 10 C.J. p 137 notes 45, 46.

15. **Value not stated**

Under the first Cummins amendment a carrier could limit its liability only by requiring the shipper to state specifically in writing the value of the goods shipped, and a mere recital in the receipt or bill of lading that liability was limited, unless

tion accruing under former statutes,[16] provisions in public tariffs and bills of lading limiting liability were nullified,[17] and the express provision of the statute could not be defeated by any construction based on the convenience of the clause nor any argument based upon the history of the statute or the Carmack amendment or upon the policy of the later Cummins amendment, Act Congr. Aug. 9, 1916, 39 U.S.St. at L. p 441, c 301, 49 U.S.C.A. § 20 (11).[18] Under the amendment last referred to, which apparently restored to a large extent the operation of the Carmack amendment as it had been judicially construed, it is held that the liability of a carrier as an insurer may be modified by an agreement fairly entered into with the shipper,[19] but such agreement must not include exemption of the carrier from liability due to its own negligence or that of any of its employees acting within the scope of their employment;[20] and the same rule applies under subsequent amendments such as the Transportation Act of 1920.[21]

Intra-state shipments. The Carmack amendment and the decisions of the supreme court of the United States construing and applying that legislation do not change or affect the laws of a state with relation to contracts, obligations, and liabilities of carriers with regard to shipments which are exclusively intra-state.[22]

§ 98. What Limitations of Liability Permissible

Limitations which do not restrict a carrier's common-law liability are permissible and not against public policy; and among such limitations, restrictions exempting from loss resulting from leakage, strike, mob, or riot are permissible.

Generally speaking, limitations which do not restrict the carrier's common-law liability are not against public policy or unlawful.[23] Thus, the contract of carriage may provide that, unless caused in whole or in part by its own negligence or that of its agents, the carrier shall not be liable for loss, damage, or delay caused by the nature of the

the value was declared, in the manner set forth in the statute, was insufficient.

Kan.—Payne v. Adams Express Co., 195 P. 860, 108 Kan. 327.

N.Y.—Bragg v. Taylor, 199 N.Y.S. 156, 205 App.Div. 59, affirmed 142 N.E. 327, 236 N.Y. 666

W.Va.—McCormick v. Southern Express Co., 93 S.E. 1048, 81 W.Va. 87.

16. Ala.—Southern R. Co. v. Bynum, 69 So. 820, 194 Ala. 190.

Applies to liability and not to damages

Interstate Commerce Act of 1887, amended in 1906 by the Carmack amendment, and in 1915 by the Cummins amendment, 49 U.S.C.A. § 20 (11), providing that that section shall not deprive holder of bill of lading of any remedy or right of action which he has under existing law, applies to rule of liability, and not to elements of damage, and provides that common-law liability could not be changed or limited by contract.—Clay v. New York Cent. R. Co., 231 N.Y.S. 424, 224 App.Div. 508.

17. U.S.—Adams Express Co. v. Darden, Tenn., 44 S.Ct. 502, 265 U.S. 265, 68 L.Ed. 1010, affirming C.C.A., 286 F. 61—Chicago, M. & St. P. Ry. Co. v. McCaull-Dinsmore Co., Minn., 40 S.Ct. 504, 253 U.S. 97, 64 L.Ed. 801, affirming 260 F. 835, 171 C.C.A. 561, affirming D.C., 252 F. 664, certiorari granted 40 S.Ct. 219, 251 U.S. 549, 64 L.Ed. 409—Lehigh Valley R. Co. v. State of Russia, C.C.A.N.Y., 21 F.2d 396, certiorari denied 48 S.Ct. 159, 275 U.S. 571, 72 L.Ed. 432

Ark.—Missouri Pac. R. Co. v. Alma Cash Store, 271 S.W. 453, 168 Ark. 823.

First Cummins amendment is quoted in 10 C.J. p 137 note 48 [a].

18. U.S.—Chicago, M. & St. P. Ry. Co. v. McCaull-Dinsmore Co., Minn., 40 S.Ct. 504, 253 U.S. 97, 64 L.Ed. 801, affirming 260 F. 835, 171 C.C.A. 561, affirming, D.C., 252 F. 664, certiorari granted 40 S.Ct. 219, 251 U.S. 549, 64 L.Ed. 409—Adams Express Co. v. Darden, C.C.A.Tenn., 286 F. 61, affirmed 44 S.Ct. 502, 265 U.S. 265, 68 L.Ed. 1010.

19. U.S.—Lancaster v. McCarty, 45 S.Ct. 342, 267 U.S. 427, 69 L.Ed. 696, reversing, Tex.Civ.App., 248 S.W. 816.

Mo.—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo.App. 314.

N.Y.—Hance Bros. Co. v. American Ry. Express Co., 190 N.Y.S. 530, 116 Misc. 653.

Vt.—Piper v. Boston & M.R.R., 97 A. 508, 90 Vt. 176, affirmed Boston & M.R.R. v. Piper, 38 S.Ct. 354, 246 U.S. 439, 62 L.Ed. 820.

Wis.—Chaimson v. American Ry. Express Co., 189 N.W. 529, 178 Wis. 286.

Articles not specifically rated

A provision in a carrier's tariff of rates as filed, published, and approved by the interstate commerce commission that certain articles, including precious metals or articles manufactured therefrom, will not be accepted for shipment and a provision of such carrier's bill of lading, providing that articles not specifically rated would not be carried, and that the carrier would not be liable therefor, unless a special agreement and stipulated value was indorsed thereon, although amounting to rules and regulations, are not forbidden by the Carmack amendment to the Interstate Commerce Act as amended by the first and second Cummins amendments, making interstate carriers liable for loss, damage, or injury, and prohibiting contracts, receipts, rules, or regulations, etc., exempting carriers from such liability, especially in view of the further provision of that amendment that it should not apply to property concerning which the carrier should be expressly authorized or required by the interstate commerce commission to maintain rates dependent on declared value—Payne v. Bassett, Tex.Civ.App., 235 S.W. 917.

Second Cummins amendment is quoted in 10 C.J. p 138 note 49½ [a].

20. Mo.—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo.App. 314

N.Y.—Hance Bros. Co. v. American Ry. Express Co., 190 N.Y.S. 530, 116 Misc. 653.

21. N.Y.—Clay v. New York Cent. R. Co., 231 N.Y.S. 424, 224 App.Div. 508—Feynman v. American Ry. Express Co., 234 N.Y.S. 727, 134 Misc. 223—Hance Bros. Co. v. American Ry. Express Co., 190 N.Y.S. 530, 116 Misc. 653

22. Mo.—Keithley v. Lusk, 177 S.W. 756, 190 Mo.App. 458

Pa.—Bast v. Platt, 55 Pa.Super. 618.

10 C.J. p 137 note 47.

23. Ill.—House v. Wheelock, 254 Ill.App. 149.

property or defect or inherent vice therein, and this is a reasonable and legal limitation upon the liability of the carrier permissible under both the common law and the Carmack amendment.[24] Furthermore a stipulation exempting the carrier from loss by leakage is reasonable.[25] Subject to the general rule, stated infra § 99, that a carrier cannot limit its liability for loss or injury caused by its own negligence, a carrier may by fair and reasonable agreement restrict its liability for losses which are the proximate result of strikes,[26] mobs,[27] or riots,[28] even though a strike is in existence at the time the contract is made;[29] and this rule is not affected by the Interstate Commerce Act as amended by the Carmack and second Cummins amendments,[30] although in a case controlled by the first Cummins amendment such a limitation was not permissible.[31] Whether other limitations of liability are permissible is discussed under specific heads infra §§ 99–111.

Questions relating to limitation of liability, as to notice of claim are considered infra §§ 233–241, and as to time to sue infra §§ 242–243.

§ 99. Negligence

a. Common-law rule
b. Effect of special constitutional and statutory regulations

a. Common-Law Rule

Under the common law based on considerations of public policy, a carrier cannot limit its liability for loss or injury caused by its own negligence. This rule prohibits contracts relieving the carrier from liability for the negligence of its servants or contracts providing for partial exemption from liability; and it applies to carriers of live stock as well as of inanimate property.

In the absence of statute, it is well settled that whatever limitations against its common-law liability are permissible to a carrier, it cannot limit its liability for injury to or loss of goods shipped, where such injury or loss is caused by its own negligence.[32] This is the common-law doctrine and

24. Md.—Peninsula Produce Exch. v. American Ry. Express Co., 128 A. 403, 147 Md. 424

25. Mass.—Florida Cotton Oil Co. v. Clyde S. S. Co., 125 N.E. 855, 235 Mass. 10.

26. Ark.—St. Louis-San Francisco Ry. Co. v. Watts, 271 S.W. 464, 168 Ark. 804—Jonesboro, L. C. & E. R. Co. v. Maddy, 248 S.W. 911, 157 Ark. 484, 28 A.L.R. 498.
Cal.—American Fruit Distributors of California v. Hines, 203 P. 821, 55 Cal.App. 377
Fla.—American Ry. Express Co. v. Johnson, 100 So. 743, 87 Fla. 451.
Ill.—Sexton v. Grand Trunk Western R. Co., 260 Ill.App. 448
Mich.—Feniger v. American Ry. Express Co., 197 N.W. 550, 226 Mich. 106
Mo.—Mourer v. Wabash Ry. Co., 280 S.W. 1050, 222 Mo.App. 495—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo.App. 314.

Delay

A provision in a contract between carrier and shipper affecting interstate shipments, limiting carrier's liability for loss resulting from delays in transportation of goods, due to strikes, is a valid clause binding on the shipper.—American Ry. Express Co. v. Johnson, 100 So. 743, 87 Fla. 451—10 C.J. p. 179 note 71 [a] (2).

27. Ky.—Southern Ry. Co. in Kentucky v. John T. Barbee & Co., 226 S.W. 376, 190 Ky. 63, 20 A.L.R. 257.

28. Cal.—American Fruit Distributors of California v. Hines, 203 P. 821, 55 Cal.App. 377.
Ky.—Julius Kessler & Co. v. Southern Pac. Ry. Co. in Kentucky, 255 S.W. 535, 200 Ky. 713—Southern Ry. Co. in Kentucky v. John T. Barbee & Co., 226 S.W. 376, 190 Ky. 63, 20 A.L.R. 257.
Mich.—Feniger v. American Ry. Express Co., 197 N.W. 550, 226 Mich. 106.

29. Mo.—Mourer v. Wabash Ry. Co., 280 S.W. 1050, 222 Mo.App. 495.

30. Ky.—Julius Kessler & Co. v. Southern Ry. Co. in Kentucky, 255 S.W. 535, 200 Ky. 713.
Mich.—Feniger v. American Ry. Express Co., 197 N.W. 550, 226 Mich. 106
Mo.—Mourer v. Wabash Ry. Co., 280 S.W. 1050, 222 Mo.App. 495—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo.App. 314.

31. Mo.—Frawley v. Atchison, T. & S. F. R. Co., 299 S.W. 93, 220 Mo. App. 1189.

32. U.S.—The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., 55 S.Ct. 483, 294 U.S. 494, 79 L.Ed. 1016, affirming, C.C.A., The Ansaldo San Giorgio I, 73 F.2d 40, reversing, D.C., 3 F.Supp. 579, certiorari granted The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., 55 S.Ct. 217, 293 U.S. 551, 79 L.Ed. 654—Union Pac. R. Co. v. Burke, 41 S.Ct. 283, 255 U.S. 317, 65 L.Ed. 656, affirming Burke v. Union Pac. R. Co., 124 N.E. 119, 226 N.Y. 534, which reversed 166 N.Y.S. 100, 178 App.Div. 783—The Cherca, D.C.N.Y., 52 F.2d 644, reversed on other grounds, C.C.A., 55 F.2d 926.
Ark.—St. Louis-San Francisco Ry. Co. v. Watts, 271 S.W. 464, 168 Ark. 804—Jonesboro, L. C. & E. R. Co. v. Maddy, 248 S.W. 911, 157 Ark. 484, 28 A.L.R. 498—Lusk v. Long, 192 S.W. 213, 127 Ark. 261.
Cal.—American Fruit Distributors of California v. Hines, 203 P. 821, 55 Cal.App. 377.
Colo.—Denver & R. G. R. Co. v. Teufel, 172 P. 1060, 64 Colo. 515
Conn.—New England Fruit & Produce Co. v. Hines, 116 A. 243, 97 Conn. 225.
Fla.—Noone v. Southern Express Co., 83 So. 607, 79 Fla. 25.
Ga.—American Ry. Express Co. v. Daniel, 116 S.E. 660, 29 Ga.App. 780, affirmed 121 S.E. 686, 157 Ga. 731, certiorari granted 44 S.Ct. 461, 265 U.S. 576, 68 L.Ed. 1187, and reversed on other grounds 46 S.Ct. 15, 269 U.S. 40, 70 L.Ed. 154, vacated 132 S.E. 144, 35 Ga.App. 81.
Ill.—Transformer Corporation of America v. Hinchcliff, 279 Ill.App. 152—Gardner v. Railway Express Agency, 274 Ill.App. 626—Brennan Packing Co. v. Mellon, 252 Ill.App. 522—Macomber & Whyte Rope Co. v. United Fruit Co., 225 Ill.App. 286—Donchian v. Brink's Chicago City Express Co., 217 Ill.App. 124.
Ind.—Western Union Telegraph Co. v. Lapenna, 133 N.E. 144, 78 Ind.App. 598.
Ky.—Southern Ry. Co. in Kentucky v. John T. Barbee & Co., 226 S.W. 376, 190 Ky. 63, 20 A.L.R. 257.
La.—Coustaline v. Louisiana Ry. & Nav. Co., 98 So. 81, 154 La. 667.
Mass.—Florida Cotton Oil Co. v. Clyde S. S. Co., 125 N.E. 855, 235 Mass. 10.
Mich.—Shier v. American R.y. Express Co., 208 N.W. 746, 234 Mich. 505—H. Ginsberg & Sons v. Wabash R. Co., 189 N.W. 1018, 219

Mich. 665, 28 A.L.R. 518, affirmed Ginsberg v. Wabash R Co., 193 N. W. 286, 222 Mich. 560—George W Lardie & Son v Manistee & N E R Co, 158 N.W. 31, 192 Mich 77.

Minn —Millers' Nat Ins Co v Minneapolis, St P. & S S. M Ry. Co, 156 N W 117, 132 Minn 151

Miss.—Hill Mfg Co. v New Orleans, M. & C. R R Co, 78 So 187, 117 Miss. 548, certiorari denied New Orleans, M. & C. R Co v Hill Mfg. Co., 39 S Ct 11, 248 U S 571, 63 L.Ed 426—Covington v. Yazoo & M. V. Ry. Co., 71 So 821, 111 Miss 559.

Mo —State ex rel. Western Union Telegraph Co v Public Service Commission, 264 S W. 669, 304 Mo. 505, 35 A L R. 328—Howell v. Hines, 249 S.W 924, 298 Mo. 282—Bilby v. Atchison, T. & S F. Ry. Co, 199 S.W. 1004—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W 90, 218 Mo App. 314—Johnson v Wabash Ry. Co., App, 251 S W. 719

Nev.—Southern Pac. Co. v. Haug, 182 P. 92, 43 Nev 102.

N.H —J F. Bell & Sons Co. v. American Ry. Exp Co, 149 A. 497, 84 N.H 273.

N.C —Pendergraph v. American Ry. Express Co, 100 S.E. 525, 178 N C. 344—Bivens Bros v. Atlantic Coast Line R. Co, 97 S E. 215, 176 N.C. 414.

Ohio —St Louis-San Francisco Ry. Co v Glow Electric Co., 172 N E. 425, 35 Ohio App. 291.

Okl.—Haskell v. St. Louis & S. F. R. Co., 162 P. 459, 62 Okl. 116—St. Louis & S. F R. Co v. Akard, 159 P. 344, 60 Okl. 4.

Or —Carroll v Royal Mail Steam Packet Co, 279 P 861, 130 Or. 294.

Pa.—Ensign v. Union Transfer Co., 88 Pa.Super 26.

Tex.—Austin v. Chicago, R I. & G Ry. Co, Civ App., 18 S.W 2d 733 —Wells Fargo & Co. v. Sprague, Civ App., 199 S W. 657—Western Union Telegraph Co v. Piper, Civ. App., 191 S.W. 817—St. Louis Southwestern Ry. Co. of Texas v. Miller & White, Civ App., 190 S W 819.

Utah.—Paradise Land & Live Stock Co. v. Davis, 207 P. 145, 60 Utah 189.

Wash.—Broderick & Bascom Rope Co v. Luckenbach S S Co, 247 P. 937, 139 Wash. 444, certiorari denied 47 S Ct. 335, 273 U S. 741, 71 L Ed 868.

W Va —Annese v. Baltimore & O. R. Co, 105 S E. 807, 87 W Va. 588, 22 A L R. 869.

10 C J p 134 note 23, p 155 note 90.

"It is well settled here and elsewhere that a common carrier, while performing its duties to the public, cannot contract against its negligence."—Singleton v. Atlantic Coast Line R. Co., 166 S.E. 305, 307, 203 N.C. 462.

Corpus Juris has been cited with approval.

Fla —Louisville & N R. Co. v. Carr, 81 So 779, 781, 77 Fla. 469, 5 A. L R. 102

N.Y.—Conklin v. Canadian-Colonial Airways, 194 N E 692, 266 N Y. 244—F. A Straus & Co. v Canadian Pac Ry Co., 173 N E 564, 566, 254 N.Y. 407.

Degree of diligence required by law of a carrier is a matter over which it has no control and in which the public is interested —Central of Georgia Ry. Co. v. Patterson, 84 So. 471, 17 Ala.App. 305.

Gross negligence or ordinary negligence

(1) Although in some early cases some courts drew a distinction between ordinary negligence and gross negligence, and sustained exemptions so far as they did not exonerate the carrier from gross or willful neglect, or from fraud on its own part or on the part of its servants, this assumed distinction has been repudiated and the general rule prevails that the carrier cannot exempt itself from liability on account of negligence, whether gross or ordinary —Summerlin v Seaboard Air Line R Co, 47 So. 557, 56 Fla 687, 131 Am.S R. 164, 19 L R A.,N.S., 191 —10 C J. p 157 note 2, p 158 note 3.

(2) When confronted with circumstances due to the elements rendering a carrier unable to make safe delivery of goods consigned to a particular destination, it cannot by contract excuse itself for its gross negligence in wantonly discharging said goods at such point in mud and rain, in a place where they will certainly be destroyed and rendered useless.—Annese v. Baltimore & O R. Co., 105 S E. 807, 87 W.Va. 588, 22 A L R. 869.

In New York

(1) By virtue of the statute considered infra subdivision b of this section, contracts purporting totally to exempt the carrier from liability for negligence are now against the public policy of the state. These statutes supersede the court decisions of this state which expressed a different view and represented the public policy of the state when made —F. A. Straus & Co. v. Canadian Pac. Ry. Co, 173 N E. 564, 254 N Y. 407, modifying 238 N Y.S 50, 227 App Div. 316, modifying 234 N.Y S 622, 134 Misc 439.

(2) Early in the jurisprudence of the state it was announced that a common carrier had no right, by special contract or otherwise, to limit its common-law liability or to evade the consequences of a breach of its duty under the common law, and that a clause in the receipt or bill of lading accepted by the shipper providing that the carrier should not be liable for loss by fire was invalid and of no effect, whether or not the fire was the result of the carrier's negligence —Gould v. Hill, 2 Hill 623, affirming Cole v. Goodwin, 19 Wend 251, 32 Am D. 470.

(3) Later the courts changed their position and held that a carrier might by a special contract fairly entered into limit its liability to specified risks.—Stoddard v Long Island R. Co., 7 N Y Super 180, following New Jersey Steam Nav. Co v. Merchants Bank, R I., 6 How, U. S, 344, 12 L Ed. 465—10 C J p 160 note 16.

(4) Thereafter the doctrine was still further extended and the rule adopted that the carrier could by a special contract stipulate for exemption from liability even for losses resulting from its own negligence. —American Locomotive Co v New York Cent. R. Co., 179 N Y S. 851, 190 App.Div. 372—10 C.J. p 157 note 2 [a], p 160 note 17.

(5) It was as to exemptions from liability for servants' negligence that the New York courts most clearly departed from the weight of authority, by holding such a contract valid. —Magnin v Dinsmore, 62 N Y. 35, 20 Am R. 442.

(6) The theory of the New York cases was that the contract between the carrier and the shipper was purely a private one with which the public had properly no concern, and that if the parties freely and voluntarily made a contract exempting the carrier from all liability, it would be presumed that the carrier parted with a sufficient consideration for the exemption —Smith v. New York Cent. R. Co, 24 N.Y. 222—10 C.J p 160 note 19.

(7) The rule was subject to certain limitations, however. Thus, while the carrier could by contract exempt itself even from liability for negligence, it could not do so by general words, to uphold a limitation of this character the stipulation for exemption was required to be express and explicit.—Boyle v. Bush Terminal R. Co, 104 N.E 983, 210 N.Y. 389, reversing 136 N Y S. 255, 151 App Div 551—Gardiner v New York Cent, etc, R. Co., 94 N E 876, 201 N Y. 387, 34 L R A.,N.S, 826, Ann Cas. 1912B 281—10 C.J. p 160 note 20

(8) Moreover, no stipulation was allowed to protect the carrier from liability for losses resulting from the willful wrongdoing or gross neglect of the carrier or its servants — Keeney v. Grand Trunk R Co, 47 N.Y. 525, affirming 59 Barb. 104—10 C J p 157 note 2 [a], p 161 note 21.

(9) "While the early decisions in this state expressed the public policy of the state at the time, changed conditions have resulted in a change of the public policy of the

it makes no difference that there is no statutory prohibition against contracts of this character,[33] nor does the fact that the carrier gives a special consideration for the stipulation in any way affect the operation of the rule.[34] Such a stipulation, as shown infra § 113 b, being considered as void and of no effect, and in accordance with the principles announced infra § 112 b, a contract containing valid limitations of the carrier's common-law liability will not be construed so as to protect the carrier from the consequences of its own negligence.

The common-law rule rests on considerations of public policy.[35] The undertaking is to carry the goods, and to relieve the shipper from all liability for loss or damage arising from negligence in performing its contract is to ignore the contract itself.[36] The natural tendency of a limitation of liability against negligence is to induce want of care on the part of the carrier in the performance of its duty[37] and to encourage guilty negligence.[38] The shipper and the carrier are not on equal terms; the shipper must send his freight by the common carrier, or not at all; he is therefore entirely at the mercy of the carrier, unless protected by the higher power of the law against being forced into contracts limiting the carrier's liability.[39] Such contracts are wanting in the element of voluntary assent.[40]

Application and extent of rule generally. While a common carrier cannot by contract exempt himself from liability for his own negligence, he is not liable for a failure to perform his duty where no damage results although an attempt was made to exempt himself from liability.[41] As shown infra § 117, the general rule prohibiting limitation of liability for negligence has no application where the railroad company is acting outside the performance of its duty as a common carrier; but the rule has been applied as shown infra § 103, to prevent limitations of liability for negligent delay.

Negligence of servants. The rule is often stated as a prohibition of any contract relieving the carrier from loss or damage caused by its own negligence or misfeasance, or that of its servants;[42] and, as shown infra § 113 b, it has been specifically decided in many cases that no contract limitation will relieve the carrier from responsibility for the negligence, unskillfulness, or carelessness of its employees. Moreover, the rule cannot be evaded by providing in the bill of lading that, when the carrier furnishes the labor to aid the shipper in loading and unloading the goods shipped, such laborers shall be considered the servants of the shipper and that he alone shall be responsible for their negligence.[43]

Transportation of live stock. The rule of law that a common carrier cannot, by contract, relieve itself from liability for its own negligence is applicable to the carrier of live stock as well as of inanimate property.[44] In applying the foregoing

state. The rule of freedom of contract, which reflected the public policy of the state in the days of the canal boat and stage coach, has ceased to be applicable under modern conditions"—F. A. Straus & Co. v. Canadian Pac. Ry. Co., 173 N.E. 564, 566, 254 N.Y. 407.

33. Ark.—St. Louis Southwestern R. Co. v. Wallace, 118 S.W. 412, 90 Ark. 138, 22 L.R.A.,N.S., 379.

34. U.S.—The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., N.Y., 55 S.Ct. 483, 294 U.S. 494, 79 L.Ed. 1016, *affirming*, C.C.A., The Ansaldo San Giorgio I, 73 F.2d 40, reversing, D.C., 3 F.Supp. 579, certiorari granted The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., 55 S.Ct. 217, 293 U.S. 551, 79 L.Ed. 654.

Mo.—State ex rel. Western Union Telegraph Co. v. Public Service Commission, 264 S.W. 669, 304 Mo. 505, 35 A.L.R. 328.

10 C.J. p. 156 note 92.

35. Mo.—State ex rel. Western Union Telegraph Co. v. Public Service Commission, supra.

Pa.—Ensign v. Union Transfer Co., 88 Pa.Super. 26.

Utah.—Paradise Land & Live Stock Co. v. Davis, 207 P. 145, 60 Utah 189.

10 C.J. p. 156 note 93.

36. Minn.—Christenson v. American Express Co., 15 Minn. 208.

10 C.J. p. 156 notes 94, 95 [a].

37. N.J.—Atkinson v. New York Transfer Co., 71 A. 278, 76 N.J.Law 608.

38. Pa.—Ensign v. Union Transfer Co., 88 Pa.Super. 26.

39. U.S.—The Kensington, N.Y., 22 S.Ct. 102, 183 U.S. 263, 46 L.Ed. 190, reversing 94 F. 885, 36 C.C.A. 533.

N.C.—Harden v. Chesapeake, etc., R. Co., 72 S.E. 1042, 157 N.C. 238.

10 C.J. p. 156 note 96.

40. U.S.—The Kensington, N.Y., 22 S.Ct. 102, 183 U.S. 263, 268, 46 L.Ed. 190, reversing 94 F. 885, 36 C.C.A. 533.

41. Va.—Smokeless Fuel Co. v. Chesapeake & O. Ry. Co., 140 S.E. 823, 149 Va. 13.

42. U.S.—Union Pac. R. Co. v. Burke, 41 S.Ct. 283, 255 U.S. 317, 65 L.Ed. 656, affirming Burke v. Union Pac. R. Co., 124 N.E. 119, 226 N.Y. 534, which reversed 166 N.Y.S. 100, 178 App.Div. 783.

Ark.—Jonesboro, L. C. & E. R. Co. v. Maddy, 248 S.W. 911, 157 Ark. 484, 28 A.L.R. 498.

Colo.—Denver & R. G. R. Co. v. Teufel, 172 P. 1060, 64 Colo. 515.

Ill.—Macomber & Whyte Rope Co. v. United Fruit Co., 225 Ill.App. 286.

Mass.—Florida Cotton Oil Co. v. Clyde S. S. Co., 125 S.E. 855, 235 Mass. 10.

Nev.—Southern Pac. Co. v. Haug, 182 P. 92, 43 Nev. 102.

Pa.—Ensign v. Union Transfer Co., 88 Pa.Super. 26.

Tex.—Western Union Telegraph Co. v. Piper, Civ.App., 191 S.W. 817.

10 C.J. p. 157 note 98.

43. Tex.—Missouri Pac. R. Co. v. Smith, 16 S.W. 803.

10 C.J. p. 158 note 8.

44. Ark.—St. Louis-San Francisco Ry. Co. v. Watts, 271 S.W. 464, 168 Ark. 804.—Jonesboro, L.C. & E. R. Co. v. Maddy, 248 S.W. 911, 157 Ark. 484, 28 A.L.R. 498.

Ill.—Hudson v. Grand Rapids & I. Ry. Co., 203 Ill.App. 377.—Moyers v. Illinois Cent. R. Co., 197 Ill. App. 179.

principle it is held that the carrier cannot by stipulation relieve itself from liability for loss of, or damage to, stock due to defective appliances for loading and unloading,[45] or defective facilities for feeding and watering stock being carried over its line.[46]

Partial exemption. The general rule applies as well where the contract provides for partial or limited exemption as where it contemplates total exemption from liability.[47] It would be an idle thing for the courts to declare the principle that contracts for total exemption from such loss are subversive of public policy and void, and at the same time permit and uphold a partial limitation which could avail to prevent anything like adequate and substantial recovery by the shipper.[48] As shown infra § 102 a, however, a fair and just agreement that the carrier's liability for loss or injury to goods intrusted to it for shipment shall not exceed a certain amount agreed to be the value of the goods is valid and will be sustained whether or not the loss or injury is due to the carrier's negligence.

b. Effect of Special Constitutional and Statutory Regulations

Various special constitutional and statutory provisions have been construed to prohibit or not to permit limitations of liability for loss caused by the carrier's negligence.

It is settled that a common carrier has no right to exempt itself from liability for loss or injury which is caused by its own negligence where a statute expressly so provides,[49] where constitutional and statutory provisions forbid any limitation of common-law liability,[50] or where the statute prohibits exemptions from liability although allowing the parties to fix the value of the goods and confining the shipper's recovery to the value so fixed.[51] A similar rule applies where the statute prohibits the insertion of terms and conditions in a bill which impair the carrier's obligation to exercise reasonable care in the transportation and safe-keeping of the goods, provides that no stipulation shall exempt the carrier from liability for damage caused by it, and makes the carrier liable for all loss caused by negligent delay.[52] Where the statute in express terms prohibits common carriers from limiting their liability for loss or injury caused by gross negligence, any limitation of liability against injuries caused by gross negligence is of course inoperative.[53] There is, however, a conflict of opinion as to whether such a statute abrogates the common-law rule as to ordinary negli-

Ind.—Anderson v. Lake Shore, etc., R. Co., 59 N.E. 396, 26 Ind.App. 196.

Miss.—Covington v. Yazoo & M. V. Ry. Co., 71 So. 821, 111 Miss. 559.

Mo.—Howell v. Hines, 249 S.W. 924, 298 Mo. 282—Bilby v. Atchison, T. & S. F. Ry. Co., 199 S.W. 1004.

N.Y.—Hance Bros. Co. v. American Ry. Express Co., 190 N.Y.S. 530, 116 Misc. 653.

Pa.—William Zoller Co. v. Hartford Fire Ins. Co., 116 A. 359, 272 Pa. 386.

Vt.—Piper v. Boston & M. R. R., 97 A. 508, 90 Vt. 176, affirmed Boston & M. R. R. v. Piper, 38 S.Ct. 354, 246 U.S. 439, 62 L.Ed. 820.

10 C.J. p. 159 notes 10, 14.

Nonliability except for gross negligence

Provisions of bill of lading covering shipment of mules touching nonliability except for gross negligence held void as indirect effort of road to contract against liability for negligence.—Covington v. Yazoo & M. V. Ry. Co., 71 So. 821, 111 Miss. 559.

Nonliability for delay due to extreme weather

A condition in a bill of lading for a shipment of hogs that the shipment was accepted subject to delay, owing to extreme weather conditions, was void if it was intended to waive the shipper's right to recover for the carrier's negligence.—William Zoller Co. v. Hartford Fire Ins. Co., 116 A. 359, 272 Pa. 386.

45. Tenn.—Nashville, etc., R. Co. v. Stone, 79 S.W. 1031, 112 Tenn. 348, 105 Am.S.R. 955

Wis.—Nevius v. Chicago, etc., R. Co., 102 N.W. 489, 124 Wis. 313, 109 Am.S.R. 935.

10 C.J. p. 159 note 11.

46. Va.—Chesapeake, etc., R. Co. v. American Exch. Bank, 23 S.E. 935, 92 Va. 495, 44 L.R.A. 449.

Provision in uniform live stock contract, issued on interstate shipment of cattle, that upon delay from negligence of an initial or connecting carrier the shipper would accept the amount actually spent for food and water for the stock while detained held a stipulation against carrier's negligence and void.—Piper v. Boston & M. R. R., 97 A. 508, 90 Vt. 176, affirmed Boston & M. R. R. v. Piper, 38 S.Ct. 354, 246 U.S. 439, 62 L.Ed. 820

47. U.S.—Union Pac. R. Co. v. Burke, 41 S.Ct. 283, 255 U.S. 317, 65 L.Ed. 656, affirming Burke v. Union Pac. R. Co., 124 N.E. 119, 226 N.Y. 534, which reversed 166 N.Y.S. 100, 178 App.Div. 783.

Mo.—State ex rel. Western Union Telegraph Co. v. Public Service Commission, 264 S.W. 669, 304 Mo. 505, 35 A.L.R. 328

10 C.J. p. 158 note 6.

The rule of public policy which prevents a carrier from securing a release from liability for its own negligence equally prevents it from obtaining a stipulation for its release from liability as to any part of the damage, and a stipulation, in a bill of lading for an interstate shipment of live stock, that in event of unusual delay or detention due to the negligence of the carrier or its employees, or otherwise, the shipper will accept as full compensation for all loss or damages sustained thereby the amount actually expended by the shipper in the purchase of food and water for the stock while so detained, is invalid.—Hudson v. Grand Rapids & I. Ry. Co., 203 Ill.App. 377.

48. N.C.—Everett v. Norfolk, etc., R. Co., 50 S.E. 557, 138 N.C. 68, 1 L.R.A.,N.S., 985.

49. Va.—Adams Express Company v. Allen, 100 S.E. 473, 125 Va. 530

50. Tex.—St. Louis Southwestern Ry. Co. v. Cox, Civ.App., 221 S.W. 1043

10 C.J. p. 161 note 23.

51. Colo.—Denver & R. G. R. Co. v. Teufel, 172 P. 1060, 64 Colo. 515.

52. N.Y.—F. A. Straus & Co. v. Canadian Pac. Ry. Co., 173 N.E. 564, 254 N.Y. 407, modifying 238 N.Y.S. 50, 227 App.Div. 316, modifying 234 N.Y.S. 622, 134 Misc. 439.

53. Cal.—Mitchell v. North Pac. S. S. Co., 213 P. 293, 60 Cal.App. 554.

10 C.J. p. 161 note 24.

gence; there is some authority to the effect that it does,[54] but also some authority to the effect that the statute is merely declaratory of the common-law rule as to gross negligence and that it does not in any way change the rule as to ordinary negligence.[55]

Federal legislation. Under the federal law a carrier cannot exempt itself from liability for its own negligence or that of its servants in the transportation of property by interstate shipments,[56] and a contract by which it purports to do so can gain no validity from being filed with the interstate commerce commission;[57] nor do the tariff regulations of the carrier avail.[58] Specifically, it has been held that the common-law rule heretofore stated is not in any manner affected by anything in the Interstate Commerce Act of 1887 or in the acts amending it, known as the Elkins Act and the Hepburn Act,[59] the Carmack amendment,[60] the Cummins amendments,[61] or in the Transportation Act of 1920[62] as subsequently amended, 49 U.S.C.A. § 20 (11).[63] Indeed it is declared by the supreme court of the United States that the provision of the Carmack amendment making the initial carrier liable to the holder of a shipping receipt for any loss or damage caused by it or by any connecting carrier, and that no contract, receipt, rule, or regulation shall exempt such a common carrier from the liability hereby imposed is a statutory declaration that a contract of exemption from liability for negligence is against public policy and void.[64] Under the Carmack amendment an agreement to release a carrier for part of a loss due to negligence is no more valid than one by which there is a complete exemption.[65]

§ 100. In Case of Loss by Fire

Unless prohibited by statute the carrier may stipulate against liability for loss or damage by fire not due to its negligence.

Provided the contract meets the general require-

54. Cal.—Donlon v. Southern Pac. Co., 91 P. 603, 151 Cal. 763, 11 L.R.A.,N.S., 811, 12 Ann.Cas. 1118.

55. Okl.—Blackwell Milling, etc., Co. v. Western Union Tel. Co., 89 P. 235, 17 Okl. 376, 10 Ann.Cas. 855.

56. Ala.—Louisville & N. R. Co. v. Jones, 99 So. 919, 211 Ala. 158.

Ark.—Jonesboro, L. C. & E. R. Co. v. Maddy, 248 S.W. 911, 157 Ark. 484, 28 A.L.R. 498—Lusk v. Long, 192 S.W. 213, 127 Ark. 261.

Conn.—New England Fruit & Produce Co. v. Hines, 116 A. 243, 97 Conn. 225.

Ill.—Doster & McKibben v. Michigan Cent. R. Co., 196 Ill.App. 49.

N.H.—Bernardi Greater Shows v. Boston & M. R. R., 165 A. 124, 86 N.H. 146.

N.Y.—Clay v. New York Cent. R. Co., 231 N.Y.S. 424, 224 App.Div. 508—Walrath v. American Ry. Express Co., 216 N.Y.S. 545, 217 App.Div. 83—Feynman v. American Ry. Express Co., 234 N.Y.S. 727, 134 Misc. 223.

Okl.—St. Louis & S. F. R. Co. v. Wynn, 156 P. 346, 56 Okl. 509.

Tex.—Wells Fargo & Co. v. Sprague, Civ.App., 199 S.W. 657—Western Union Telegraph Co. v. Piper, Civ.App., 191 S.W. 817.

This statement in Corpus Juris is quoted with approval in St. Louis-San Francisco Ry. Co. v. Glow Electric Co., 172 N.E. 425, 428, 35 Ohio App. 291.

57. U.S.—Boston & M. R. R. v. Piper, 38 S.Ct. 354, 246 U.S. 439, 62 L.Ed. 820, affirming Piper v. Boston & M. R. R., 97 A. 508, 90 Vt. 176.

Ill.—Gardner v. Railway Express Agency, 274 Ill.App. 626.

58. Ohio.—St. Louis-San Francisco Ry. Co. v. Glow Electric Co., 172 N.E. 425, 35 Ohio App. 291.

59. Ohio.—St. Louis-San Francisco Ry. Co. v. Glow Electric Co., supra.

10 C.J. p. 161 note 27.

60. U.S.—Boston & M. R. R. v. Piper, Vt., 38 S.Ct. 354, 246 U.S. 439, 62 L.Ed. 820.

Ark.—Missouri Pac. R. Co. v. Porter, 269 S.W. 47, 168 Ark. 22, reversed on other grounds 47 S.Ct. 383, 273 U.S. 341, 71 L.Ed. 672—Jonesboro, L. C. & E. R. Co. v. Maddy, 248 S.W. 911, 157 Ark. 484, 28 A.L.R. 498.

Colo.—Denver & R. G. R. Co. v. Teufel, 172 P. 1060, 64 Colo. 515.

Conn.—New England Fruit & Produce Co. v. Hines, 116 A. 243, 97 Conn. 225.

Ill.—Doster & McKibben v. Michigan Cent. R. Co., 196 Ill.App. 49. See Crossley v. St. Louis, I. M. & S. Ry. Co., 199 Ill.App. 195.

Ind.—Chesapeake & O. Ry. Co. of Indiana v. Jordan, 114 N.E. 461, 63 Ind.App. 365.

Md.—Peninsula Produce Exch. v. American Ry. Express Co., 128 A. 403, 147 Md. 424.

Mo.—Howell v. Hines, 219 S.W. 924, 298 Mo. 282—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo.App. 314.

Okl.—St. Louis & S. F. R. Co. v. Ladd, 178 P. 125, 72 Okl. 55.

Vt.—Piper v. Boston & M. R. R., 97 A. 508, 90 Vt. 176, affirmed Boston & M. R. R. v. Piper, 38 S.Ct. 354, 246 U.S. 439, 62 L.Ed. 820.

10 C.J. p. 162 note 28.

61. Ark.—Missouri Pac. R. Co. v. Porter, 269 S.W. 47, 168 Ark. 22, reversed on other grounds 47 S.Ct. 383, 273 U.S. 341, 71 L.Ed. 672.

Ga.—American Ry. Express Co. v. Daniel, 116 S.E. 660, 29 Ga.App. 780, affirmed 121 S.E. 686, 157 Ga. 731, certiorari granted 44 S.Ct. 461, 265 U.S. 576, 68 L.Ed. 1187, and reversed on other grounds 46 S.Ct. 15, 269 U.S. 40, 70 L.Ed. 154, vacated 132 S.E. 144, 35 Ga.App. 81.

Mo.—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo.App. 314.

N.Y.—Hance Bros. Co. v. American Ry. Express Co., 190 N.Y.S. 530, 116 Misc. 653.

N.C.—Bivens Bros. v. Atlantic Coast Line R. Co., 97 S.E. 215, 176 N.C. 414.

62. N.Y.—Clay v. New York Cent. R. Co., 231 N.Y.S. 424, 224 App.Div. 508—Hance Bros. Co. v. American Ry. Express Co., 190 N.Y.S. 530, 116 Misc. 653.

63. Ohio.—St. Louis-San Francisco Ry. Co. v. Glow Electric Co., 172 N.E. 425, 35 Ohio App. 291.

64. U.S.—Kansas City Southern R. Co. v. Carl, Ark., 33 S.Ct. 391, 227 U.S. 639, 57 L.Ed. 683—Adams Express Co. v. Croninger, Ky., 33 S.Ct. 148, 226 U.S. 491, 57 L.Ed. 314, 44 L.R.A.,N.S., 257.

10 C.J. p. 162 note 29.

65. Ohio.—St. Louis-San Francisco Ry. Co. v. Glow Electric Co., 172 N.E. 425, 35 Ohio App. 291.

Vt.—Piper v. Boston & M. R. R., 97 A. 508, 90 Vt. 176, affirmed Boston & M. R. R. v. Piper, 38 S.Ct. 354, 246 U.S. 439, 62 L.Ed. 820.

10 C.J. p. 162 note 30.

ments set out supra §§ 88–96 relating to manner of effecting limitation, consideration, reasonableness, and the like, in the absence of a controlling prohibitory statute it is well settled that a contract exempting the carrier from liability for loss or damage by fire, not due to the carrier's negligence, is valid,[66] nor, in view of the rules stated supra § 97 b, is such contract forbidden by the Carmack amendment[67] or second Cummins amendment,[68] although with respect to an intra-state shipment such a contract is prohibited by a state statute making it unlawful for a carrier, by agreement, to abridge its common-law liabilities.[69] In view of the rule stated infra § 115, a provision in a contract of shipment exempting the carrier from liability for loss by fire not caused by its own negligence or that of its servants may be waived.

§ 101. Injuries to Live Stock

A common carrier of live stock may limit its liability except for loss or damage resulting from negligence.

The exceptional nature of the property and of the loss or damage which may result during its transportation is held to justify a contract by a carrier of live stock limiting its liability, except for such loss or damage as may result from its own negligence or from that of its agents or servants,[70] and this rule applies alike under the Carmack amendment which is fully considered supra § 97 b and under the common law,[71] although such limitations of liability are forbidden under controlling provisions of state constitutions or statutes which prohibit common carriers from contracting away their common-law liability.[72]

Applying the general rule, it has been held that the carrier may by contract stipulate against liability for loss or injury to animals caused by inherent viciousness or fright, as a result of which they may injure themselves or each other,[73] for injuries due to suffocation and heating,[74] cold, heat, or change in weather,[75] fire,[76] dipping or disinfection,[77] want of bedding,[78] or for the risk of loss or damage

66. Ark.—Missouri Pac. R. Co. v. Porter, 269 S.W. 47, 168 Ark. 22, reversed on other grounds 47 S.Ct. 383, 273 U.S. 341, 71 L.Ed. 672.
Ky.—Julius Kessler & Co. v. Southern Pac. Ry. Co. in Kentucky, 255 S.W. 535, 200 Ky. 713.
La.—E. Borneman & Co. v. New Orleans, M. & C. R. Co., 81 So. 882, 145 La. 150.
Tex.—Texarkana & F. S. Ry. Co. v. Brass, Civ. App., 245 S.W. 457, affirmed, Com. App., 260 S.W. 828.
Wis.—Ashton v. Chicago & N. W. Ry. Co., 225 N.W. 328, 198 Wis. 618.
10 C.J. p. 145 note 11 [b] (4), p. 163 note 54.

Foreign shipment

A carrier of a foreign shipment had a right under the common law to limit liability and exempt itself from responsibility for loss by fire unless caused by negligence of itself or agents.—Texarkana & F. S. Ry. Co. v. Brass, Tex. Civ. App., 245 S.W. 457, affirmed, Com. App., 260 S.W. 828.

67. Ark.—Missouri Pac. R. Co. v. Porter, 269 S.W. 47, 168 Ark. 22, reversed on other grounds 47 S.Ct. 383, 273 U.S. 341, 71 L.Ed. 672.
Ky.—Julius Kessler & Co. v. Southern Pac. Ry. Co. in Kentucky, 255 S.W. 535, 200 Ky. 713.
La.—E. Borneman & Co. v. New Orleans, M. & C. R. Co., 81 So. 882, 145 La. 150.
10 C.J. p. 163 note 54 [b].

68. Ark.—Missouri Pac. R. Co. v. Porter, 269 S.W. 47, 168 Ark. 22, reversed on other grounds 47 S.Ct. 383, 273 U.S. 341, 71 L.Ed. 672.
Ky.—Julius Kessler & Co. v. Southern Pac. Ry. Co. in Kentucky, 255 S.W. 535, 200 Ky. 713.

69. Ark.—Straub v. Missouri Pac. R. Co., 283 S.W. 36, 170 Ark. 1174.

70. Ga.—Western & A. R. Co. v. Waldrip, 89 S.E. 346, 18 Ga. App. 263.
La.—Hall v. Houston E. & W. T. Ry. Co., 121 So. 769, 9 La. App. 577, 582.
Ohio.—Thomas v. Baltimore & O. R. Co., 16 Ohio N.P.,N.S., 194.
Okl.—Chicago, R. I. & P. Ry. Co. v. Craig, 157 P. 87, 59 Okl. 18.
10 C.J. p. 164 note 62.

71. Ill.—Sweetser v. Chicago & Alton R. Co., 196 Ill. App. 623.

Transportation Act of 1920

Under Act to Regulate Commerce § 20, as amended by Acts June 29, 1906, Febr. 25, 1909, June 18, 1910, March 4, 1915, and Aug. 9, 1916, U.S. Comp. St. §§ 8592, 8604a, 8604aa, and incorporated into the Transportation Act of 1920, 49 U.S.C.A. § 20 (11), declaring a common carrier liable to the holder of a receipt or bill of lading for any loss, damage, or injury "caused by it" to property covered thereby, notwithstanding any limitation of liability or agreement as to value therein, the carrier's liability as an insurer may be modified by an agreement fairly entered into with a shipper of live stock, but such agreement must not include exemption from liability due to its own negligence or that of any of its employees acting within the scope of their employment.—Hance Bros. Co. v. American Ry. Express Co., 190 N.Y.S. 530, 116 Misc. 653.

Absence of consideration

Whether under the Carmack and Cummins amendments to the Interstate Commerce Act, a shipper of live stock might, in consideration of lower rates, contract for lower liability, and require owner to prove that the loss was caused by the carrier's negligence, was immaterial where there was no such consideration.—Alexander v. American Ry. Express Co., 193 N.W. 560, 195 Iowa 1155.

72. Ky.—Adams Express Co. v. Walker, 83 S.W. 106, 119 Ky. 121, 26 Ky.L. 1025, 67 L.R.A. 412.
10 C.J. p. 164 note 62 [b].

73. La.—Hall v. Houston E. & W. T. Ry. Co., 121 So. 769, 9 La. App. 577, 582.
Mich.—Shier v. American Ry. Express Co., 208 N.W. 746, 234 Mich. 505.
Ohio.—Thomas v. Baltimore & O. R. Co., 16 Ohio N.P.,N.S., 194.
10 C.J. p. 164 note 64.

Propensities of live stock

A carrier of live stock may contract that it will not be liable for injuries caused only by the propensities of the animals themselves.—Chapman v. American Ry. Express Co., 189 N.W. 529, 178 Wis. 286.

74. Ohio.—Thomas v. Baltimore & O. R. Co., 16 Ohio N.P.,N.S., 194.
10 C.J. p. 164 note 67.

75. Ohio.—Thomas v. Baltimore & O. R. Co., supra.

76. Ga.—Mitchell v. Georgia R. Co., 68 Ga. 644.
Tex.—Texas, etc., R. Co. v. Davis, 2 Tex.A.Civ.Cas. § 191.

77. La.—Glaser v. New Orleans, T. & M. Ry. Co., 120 So. 798, 10 La. App. 755.

78. Ark.—St. Louis Southwestern R.

caused by delay,[79] or from any cause beyond the control of the carrier,[80] and, where the duty of loading and unloading is placed upon the carrier, it may stipulate against liability for loss or injury not caused by its negligence but which is occasioned by injuries sustained by animals in loading and unloading,[81] or from overloading,[82] crowding one upon another,[83] or escaping from cars, pens, or vessels.[84] Furthermore, under the Carmack amendment the parties may agree that the carrier shall not be liable for any mistake or inaccuracy in information furnished concerning quarantine regulations, such agreement not being a contract against negligence.[85] It may be observed, however, that no special contract is necessary to protect the carrier from liability for loss or injury due to inherent viciousness or fright, since under the common-law rule stated supra § 79 b the carrier is not liable for such loss. In determining whether a particular attempted limitation of liability is permissible, the general rules discussed supra §§ 88–95 relating to the manner of effecting the limitation, consideration, reasonableness, etc., must be kept in mind and applied.

The right of a carrier of live stock to limit its liability as to value is treated infra § 102, and as against its own negligence or that of its employees, supra § 99 a. Questions relating to limitation of liability by a contract imposing on the shipper the duty to feed and water during transportation are considered supra § 64.

§ 102. Limitation of Liability as to Value

a. Agreed valuation
b. Value not disclosed or stated
c. Invoice price, or value at place of shipment

a. Agreed Valuation

(1) In absence of prohibitory statute
(2) Effect of constitutional or statutory provisions

(1) In Absence of Prohibitory Statute

As a general rule in the absence of controlling statutes to the contrary, reasonable contracts providing that the carrier's liability for loss or injury to goods shall not exceed an agreed valuation are upheld whether or not the carrier's negligence contributed to the damage sustained. A carrier cannot by arbitrary agreement as to valuation limit its liability for a loss or injury due to its negligence.

While the rule as shown by the general rule stated below, is by no means of universal application, the view sustained by the great weight of authority, with respect to both interstate and intra-state shipments, in the absence of controlling statutes to the contrary is that contracts of carriage providing that the carrier's liability for loss or injury to goods intrusted to it for shipment shall not exceed an agreed valuation, when they are fair, open, and reasonable, and made for the purpose of furnishing the basis of the liability assumed, and the rates to be charged for the transportation are valid and will be sustained, whether or not the loss or injury is due to the carrier's negligence.[86]

The real question upon which the division of judicial opinion arises with respect to agreements of the general character under consideration is whether a contract which protects a carrier against the

Co. v. Butler, 102 S.W. 378, 82 Ark. 469.
Okl.—St. Louis, etc., R. Co v. Copeland, 102 P. 104, 23 Okl. 837.

79. Mass.—Squire v. New York Cent. R. Co, 98 Mass. 239, 93 Am. D. 162.

80. Ohio.—Thomas v. Baltimore & O. R. Co., 16 Ohio N.P.,N S., 194.

81. La.—Hall v. Houston E. & W. T. Ry. Co, 121 So. 769, 9 La App. 577, 582.
10 C.J. p 164 note 65.

82. La.—Hall v. Houston E. & W. T. Ry. Co, supra
Ohio.—Thomas v. Baltimore & O. R. Co., 16 Ohio N.P.,N.S, 194.
10 C.J. p 164 note 66.

83. La.—Hall v. Houston E. & W. T. Ry. Co, 121 So. 769, 9 La.App. 577, 582.
Ohio.—Thomas v. Baltimore & O R. Co., 16 Ohio N P.,N.S, 194.

84. La.—Hall v. Houston E. & W. T. Ry. Co, 121 So. 769, 9 La App. 577, 582.

85. Va.—Manieri v. Seaboard Air Line Ry. Co., 137 S.E 496, 147 Va. 415.

86. U.S.—Southeastern Express Co. v. Pastime Amusement Co., S.C, 57 S Ct 73, 299 U.S. 28, 81 L Ed. 20—American Ry. Express Co v. Daniel, 46 S.Ct. 15, 269 U S. 40, 70 L.Ed. 154, reversing 121 S E 686, 157 Ga. 731, which affirmed 116 S.E. 660, 29 Ga.App. 780 Certiorari granted 44 S.Ct. 461, 265 U.S. 576, 68 L.Ed. 1187. Judgment vacated 132 S.E. 144, 35 Ga. App. 81—American Ry. Express Co. v. Level, La, 44 S.Ct. 11, 263 U.S. 19, 68 L.Ed. 140—American Ry. Express Co. v. Lindenburg, 43 S Ct. 206, 260 U.S 584, 67 L Ed. 414, reversing Lindenburg v American Ry. Express Co., 106 S E. 884, 88 W.Va. 439—Union Pac. R. Co. v. Burke, 41 S.Ct. 283, 255 U.S. 317, 65 L.Ed 656, affirming Burke v. Union Pac. R. Co., 124 N E. 119, 226 N.Y. 534, which reversed 166 N Y S 100, 178 App Div. 783—Western Transit Co. v. A. C. Leslie & Co, 37 S Ct. 133, 242 U.S. 448, 61 L Ed. 423, reversing A C. Leslie & Co. v. Western Transit Co, 150 N.Y S 1073, 165 App Div. 947—Great Northern R. Co v. O'Connor, 34 S Ct. 380, 232 U S. 508, 58 L.Ed 703, reversing O'Connor v. Great Northern R. Co., 136 N.W. 743, 118 Minn 223 and 139 N W. 618, 120 Minn. 359—A. C. Lawrence Leather Co. v. Compagnie Générale Transatlantique, C C A N Y., 18 F.2d 930, affirming, D.C., 12 F 2d 83, and certiorari denied Compagnie Générale Transatlantique v. A. C. Lawrence Leather Co, 47 S Ct 770, 274 U S. 761, 71 L.Ed. 1338—Lawrence Leather Co. v. Norton, Lilly & Co., D.C.N.Y., 15 F.2d 101—Moore v.

recovery of a larger amount than the agreed value of the property is one relieving it from the consequences of its own negligence.[87] Where the majority rule above stated prevails, it is very generally considered that limitations of this character do not in any respect exempt the carrier from liability for negligence and are not calculated to induce negligence,[88] their only effect being to liquidate the amount for which the carrier in case of loss shall be answerable, whether through its negligence or otherwise.[89]

Contracts of this character furnish a just and reasonable mode of securing a due proportion between the amount for which the carrier becomes responsible and the freight which it receives, and of protecting itself against extortionate valuations in case of loss.[90] Such a contract is not in viola-

Duncan, Ohio, 237 F 780, 150 C C. A 534—Taylor v. U. S, 60 Ct Cl. 429, appeal dismissed U. S. v. Taylor, 47 S.Ct. 235, 273 U.S 773, 71 L Ed 885.

Cal—Murray v. Southern Pac. R. Co., 296 P. 667, 112 Cal App. 150—Crenshaw Bros & Saffold v. Southern Pac. Co, 181 P. 252, 40 Cal. App. 603, amendment of remittitur and correction of judgment denied 183 P. 208, 42 Cal App. 44, certiorari denied 40 S.Ct. 14, 250 U.S. 669, 63 L Ed. 1198.

Fla—Noone v. Southern Express Co., 83 So. 607, 79 Fla. 25.

Ga—De Bow v. Vicksburg, S. & P Ry. Co., 95 S.E. 261, 21 Ga App 732, reversed on other grounds Vicksburg, S. & P. Ry. v. De Bow, 98 S E 381, 148 Ga. 738.

Iowa.—Taylor v. Chicago, R. I. & P. Ry. Co., 227 N.W. 407, 208 Iowa 1396—Wolfe v. American Ry. Express Co., 197 N.W. 24, 197 Iowa 216.

Kan.—Kennedy v. Atchison, T. & S F. Ry. Co., 179 P. 314, 104 Kan 129, 368, motion granted 181 P. 117, 104 Kan. 708.

Mo—Bilby v. Atchison, T. & S. F. Ry. Co, 199 S.W. 1004—Donoho v. v. Missouri Pac. Ry. Co, 187 S W. 141, 193 Mo.App. 610, transferred, Sup, 184 S W. 1149.

N.M—Enderstein v. Atchison, T & S. F. Ry. Co., 157 P. 670, 21 N.M. 548

N.Y.—Kulthau v. International Mercantile Marine Co, 157 N.E 267, 245 N.Y. 361, affirming 215 N.Y S. 718, 217 App Div. 22—Burke v. Union Pac R. Co., 124 N.E. 119, 226 N Y. 534, reversing 166 N.Y S. 100, 178 App Div. 783, certiorari granted Union Pac. R. Co. v. Burke, 40 S.Ct. 56, 251 U S. 548, 64 L.Ed. 409 and affirmed 41 S Ct 283, 255 U S 317, 65 L Ed 656—D'Utassy v. Barrett, 114 N E. 786, 219 N.Y. 420, 5 A L R 979, affirming 157 N Y S 916, 171 App Div. 772—Chenango Textile Corporation v. Willock, 288 N.Y.S. 270, 247 App Div. 638—Glanzer v. Cunard S. S. Co, 212 N.Y.S. 500, 214 App Div 473—Heuman v. M. H Powers Co, 162 N.Y.S. 590, 175 App Div. 627—Mavis Hosiery Co v Pennsylvania Transp. Co., 239 N Y S 713, 135 Misc. 636

Okl.—Lusk v. Durant Nursery Co., 232 P. 11, 73 Okl 269—Haskell v. St. Louis & S F. R. Co, 162 P. 459, 62 Okl. 116.

Tenn.—Louisville & N. R. Co. v. Hobbs, 190 S W 461, 136 Tenn. 512

Utah.—Paradise Land & Live Stock Co v. Davis, 207 P. 145, 60 Utah 189

Vt—Piper v. Boston & M R R, 97 A 508, 90 Vt. 176, affirmed Boston & M R R. v. Piper, 38 S Ct 354, 246 U S 439, 62 L Ed 820.

Wash—United Artists Corporation v. Puget Sound Electric Ry., 211 P. 873, 122 Wash 537.

10 C.J. p 165 note 76.

Corpus Juris is cited with approval in Kennedy v. Atchison, T. & S F. Ry. Co., 179 P. 314, 315, 104 Kan. 129

In Illinois

(1) The rule of the text has been applied with respect to interstate shipments—Christensen v. Chicago, M. & St P. Ry. Co, 194 Ill App. 562 See Bass v. Erie R Co., 195 Ill App. 508.

(2) And it has been applied as to a shipment from a state to the Panama Canal Zone held not to be under the Interstate Commerce Act.—Macomber & Whyte Rope Co v. United Fruit Co, 225 Ill App 286.

(3) A contrary rule applies, however, as shown infra this section where the shipment is intra-state.

In Texas

(1) The rule of the text has been recognized and applied as the federal rule governing interstate shipments.—Henderson v. Wells Fargo & Co Express, Tex Civ.App, 217 S W. 962

(2) Where the jury found specially that the shipper of a grip through a hotel company as its agent represented that the grip was of the value of only ten dollars and that, if its true value of nearly five hundred dollars had been stated, the carrier would have exercised more care and the loss would probably have been prevented, it was not error to limit recovery against the carrier to fifty dollars, which was the extent of liability assumed by it, unless a greater value was declared and an additional rate paid—Galveston Hotel Co. v. Goggan, 253 S W. 694.

(3) Under the Texas statutes, however, as shown infra this section different rule applies as to intrastate shipments.

Live stock

(1) The carrier and the shipper may make an agreement as to the value of live stock shipped which will bind the shipper and control the amount of his recovery in case of loss—Bowring v. Wabash R Co, 77 Mo App. 250

(2) Interstate carrier of live animal may have alternate rates, one of which permits greater recovery for loss due to carrier's negligence—Grant v. American Ry. Express Co, 139 A. 784, 126 Me. 489.

87. Kan.—Kennedy v. Atchison, T & S. F. Ry. Co, 179 P. 314, 104 Kan 129, 368, motion to amend mandate granted on other grounds 181 P. 117, 104 Kan 708.

88. Ill—Macomber & Whyte Rope Co v. United Fruit Co., 225 Ill. App 286—Christensen v. Chicago, M & St. P. Ry. Co, 194 Ill.App. 562.

N.M—Enderstein v. Atchison, T & S. F. Ry. Co., 157 P. 670, 21 N M. 548.

N Y—Burke v. Union Pac. R Co, 124 N E 119, 226 N.Y. 534, reversing 166 N Y S. 100, 178 App Div 783, certiorari granted Union Pac R Co. v. Burke, 40 S Ct. 56, 251 U.S. 548, 64 L Ed 409, and affirmed 41 S.Ct. 283, 255 U.S. 317, 65 L Ed. 656.

Okl—Lusk v. Durant Nursery Co, 232 P. 11, 73 Okl. 269—Haskell v. St. Louis & S F. R. Co., 162 P. 459, 62 Okl 116.

10 C J. p 166 note 80.

Corpus Juris statement of the majority view is referred to in Kennedy v. Atchison T & S F. Ry Co, 179 P. 314, 315, 104 Kan 129, 368, motion to amend mandate granted on other grounds 181 P. 117, 104 Kan. 708.

89. N D—Hanson v Great Northern R. Co, 121 N W 78, 18 N D. 324, 138 Am S R 768.

10 C J. p 166 note 81.

90. Ill—Macomber & Whyte Rope Co. v. United Fruit Co, 225 Ill App 286

Okl—Lusk v. Durant Nursery Co., 232 P. 11, 73 Okl. 269—Haskell v. St Louis & S. F. R. Co., 162 P. 459, 62 Okl. 116.

10 C.J. p 166 note 82.

tion of public policy;[91] on the contrary it is said that it would be unjust and unreasonable and repugnant to the soundest principle of fair dealing and of freedom in contracting, and thus in conflict with public policy, if the shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.[92] The shipper should not be permitted to impose on the carrier the obligations of a contract different from that into which it has entered,[93] and one reason for the rule sustaining the declared and agreed valuation is to prevent fraudulent practices by shippers in obtaining a lower rate by undervaluation.[94] Having accepted the lower rate dependent upon the specified valuation, the shipper is estopped to claim a greater value than that fixed.[95]

Extent and limits of rule in general. The fact that no express limitation against liability for negligence is contained in the contract does not in any way affect the operation of the general rule stated above; the limitation nevertheless applies to losses by reason of the carrier's negligence.[96] It has further been held that on principle it can make no difference whether the negligence is ordinary or gross,[97] although this proposition has been denied.[98] It has also been held that the shipper will not be relieved from the limitation by the fact that injury to the consignment was caused by the carrier's violation of a federal statute prohibiting the confinement of cattle in a car for more than twenty-eight hours.[99] So, as will be shown infra § 113 c, it has been held that the limitation applies, although the goods were stolen by the carrier's employees. On the other hand, the view has been taken, as stated infra § 115, that stipulations limiting the carrier's liability for loss or injury to an agreed valuation have no application in case of a conversion of the goods by the carrier. Whether the provision applies in case of loss or injury caused by delay, or by the carrier's delivery of the goods after notice of the shipper to stop them in transitu, which

91. U.S.—Moore v. Duncan, Ohio, 237 F. 780, 150 C.C.A. 534.
Ill.—Macomber & Whyte Rope Co. v. United Fruit Co., 225 Ill.App. 286—Christensen v. Chicago, M. & St. P. Ry. Co., 194 Ill.App. 562.
Utah.—Paradise Land & Live Stock Co. v. Davis, 207 P. 145, 60 Utah 189.
10 C.J. p. 167 note 83.

92. U.S.—Union Pac. R. Co. v. Burke, 41 S.Ct. 283, 255 U.S. 317, 65 L.Ed. 656, affirming Burke v. Union Pac. R. Co., 124 N.E. 119, 226 N.Y. 534, which reversed 166 N.Y.S. 100, 178 App.Div. 783—Taylor v. U.S., 60 Ct.Cl. 429, appeal dismissed U.S. v. Taylor, 47 S.Ct. 235, 273 U.S. 773, 71 L.Ed. 885.
Ill.—Christensen v. Chicago, M. & St. P. Ry. Co., 194 Ill.App. 562.
10 C.J. p. 167 note 84.

The reason thus assigned in Corpus Juris has been approved by the Utah court in these terms. "It seems only fair that when the shipper declares that the goods he ships have a certain value he should not reap the benefit of the lower freight charge if there is no loss, and in case of loss recover a greater amount than the declared and agreed value. 10 C.J. p. 166, § 212. For a carrier to contract against loss through its negligence is against public policy, but it is not against good business morals nor against public policy to agree upon a valuation which shall limit the liability of the carrier, whether for loss arising from negligence or otherwise, when the contract is fair, open and reasonable, and no fraud or imposition of any kind has been practiced by the carrier."—Paradise Land & Live Stock Co. v. Davis, 207 P. 145, 147, 60 Utah 189.

93. Mass.—Graves v. Lake Shore, etc., R. Co., 137 Mass. 33, 50 Am.R. 282.
Wash.—Wibdmiller v. Northern Pac. R. Co., 101 P. 225, 52 Wash. 613.

94. N.Y.—D'Utassy v. Barrett, 114 N.E. 786, 219 N.Y. 420, 5 A.L.R. 979, affirming 157 N.Y.S. 916, 171 App.Div. 772.

95. U.S.—American Ry. Express Co. v. Lindenburg, 43 S.Ct. 206, 260 U.S. 584, 67 L.Ed. 414, reversing Lindenburg v. American Ry. Express Co., 106 S.E. 884, 88 W.Va. 439—Union Pac. R. Co. v. Burke, 41 S.Ct. 283, 255 U.S. 317, 65 L.Ed. 656, affirming Burke v. Union Pac. R. Co., 124 N.E. 119, 226 N.Y. 534, which reversed 166 N.Y.S. 100, 178 App.Div. 783—A. C. Lawrence Leather Co. v. Compagnie Générale Transatlantique, C.C.A.N.Y., 18 F.2d 930, affirming, D.C., 12 F.2d 83, and certiorari denied Compagnie Générale Transatlantique v. A. C. Lawrence Leather Co., 47 S.Ct. 770, 274 U.S. 761, 71 L.Ed. 1338—Moore v. Duncan, Ohio, 237 F. 780, 150 C.C.A. 531—Taylor v. U.S., 60 Ct.Cl. 429, appeal dismissed U.S. v. Taylor, 47 S.Ct. 235, 273 U.S. 773, 71 L.Ed. 885.
Cal.—Crenshaw Bros. & Saffold v. Southern Pac. Co., 181 P. 252, 40 Cal.App. 603, amendment of remittitur and correction of judgment denied 183 P. 208, 42 Cal.App. 44, certiorari denied 40 S.Ct. 14, 250 U.S. 669, 63 L.Ed. 1198.
N.Y.—Burke v. Union Pac. R. Co., 124 N.E. 119, 226 N.Y. 534, reversing 166 N.Y.S. 100, 178 App.Div. 783, certiorari granted Union Pac. R. Co. v. Burke, 40 S.Ct. 56, 251 U.S. 548, 64 L.Ed. 409 and affirmed 41 S.Ct. 283, 255 U.S. 317, 65 L.Ed. 656—Chenango Textile Corporation v. Willock, 288 N.Y.S. 270, 247 App.Div. 638.
Pa.—Sloan v. Pennsylvania R. Co., 29 Pa.Dist. 146.
Utah.—Paradise Land & Live Stock Co. v. Davis, 207 P. 145, 60 Utah 189.
Vt.—Piper v. Boston & M. R. R., 97 A. 508, 90 Vt. 176, affirmed Boston & M. R. R. v. Piper, 38 S.Ct. 354, 246 U.S. 439, 62 L.Ed. 820.
10 C.J. p. 167 note 86.

96. N.Y.—Gardiner v. New York Cent., etc., R. Co., 94 N.E. 876, 201 N.Y. 387, 34 L.R.A.,N.S., 826, Ann.Cas.1912B 281, limiting Beirmel v. New York, etc., R. Co., 65 N.E. 1113, 172 N.Y. 639, mem., which affirmed 70 N.Y.S. 804, 62 App.Div. 389.
10 C.J. p. 167 note 88.

97. Cal.—Donlon v. Southern Pac. Co., 91 P. 603, 151 Cal. 763, 11 L.R.A.,N.S., 811, 12 Ann.Cas. 1118.
10 C.J. p. 167 note 89.

Gross, wanton, or wilful negligence. A limitation of liability to the declared value in an interstate contract of shipment applies to gross, wanton, and wilful negligence, making the theft or embezzlement of the shipment by an employee of the carrier easy of accomplishment and difficult of detection.—Henderson v. Wells Fargo & Co. Express, Tex.Civ.App., 217 S.W. 962.

98. Ala.—Georgia Pac. R. Co. v. Hughart, 8 So. 62, 90 Ala. 36.
10 C.J. p. 167 note 90.

99. Wash.—Pierson v. Northern Pac. R. Co., 112 P. 509, 61 Wash. 450.

it agreed to do, or in case of negligence in the delivery of goods, is considered infra § 113 c, where the operation and effect of such provision generally is treated.

Arbitrary valuation. A very generally recognized limitation of the general rule above stated is that, if the purpose of the contract is merely to place an arbitrary valuation on the amount for which the carrier will be liable for loss or damage, and not to fix a reasonable valuation with reference to which the charges and the responsibilities of the carrier are to be proportioned, the contract is not just or reasonable and is not binding on the shipper. Such a contract, it is said, is nothing more than a cloak for a limitation of the carrier's liability against its own negligence, and is contrary to public policy.[1] It will not bind the shipper, although it is reduced to writing and signed by the shipper or assented to in writing,[2] and although a consideration consisting of a reduced freight rate is given.[3] Whether or not a contract belongs in this category depends on the facts of each case.[4]

Some courts draw a distinction between stipulations which merely fix the maximum value of property, limiting recovery in case of loss or injury, to a sum not exceeding such amount, and a stipulation by which the parties expressly agree to a certain fixed valuation. The latter stipulation, according to their view, is valid, while the former is void as a mere arbitrary attempt to limit the carrier's liability for loss or injury due to its negligence.[5] Other decisions repudiate this doctrine and hold that, on principle, there can be no difference between a case where the stipulation is that the value of the property does not exceed a specified sum and one by which the value is agreed to be a specified sum.[6] In either case, it is said, it becomes a part of the contract on which the minds of the parties meet and on which they act.[7]

In a number of decisions a distinction is made between contracts in which the valuation inserted in the contract is one designated by the shipper on request of the carrier, and contracts in which the valuation is inserted in the contract without being named by the shipper, or in other words a general limitation of actual value. According to some decisions the latter class of contracts is invalid.[8] This, however, is not the view of the United States supreme court or of some other courts in which the question has been raised; no difference in principle, it is held, exists between the two classes of contracts; when the latter class is acquiesced in by the shipper there is an "agreed" valuation as much as in the first class,[9] and the correctness of this view

1. Ga.—American Ry. Express Co v. Bailey, 113 S E 551, 154 Ga. 96, affirming Bailey v. American Ry. Express Co, 108 S E. 303, 27 Ga App 364—American Ry. Express Co. v. Daniel, 116 S E 660, 29 Ga.App 780, affirmed 121 S E. 686, 157 Ga. 731, certiorari granted 44 S.Ct. 461, 265 U.S 576, 68 L. Ed. 1187, reversed on other grounds 46 S Ct. 15, 269 U S. 40, 70 L.Ed. 154, vacated 132 S E 144, 35 Ga App. 81.
Mo—Schade v Missouri Pac. R. Co., 221 S W. 146, 204 Mo.App. 88.
W.Va.—Carman v. Virginian Ry. Co., 126 S E 567.
10 C J. p 168 note 1.

Free transportation
"Where an interstate carrier issued a circular and published a general order providing that all shipments of hogs intended for exhibition at fairs and expositions should be carried thereto at the full tariff rates, but that, if returned in 30 days, they should be returned free from further freight charges, on presentation of the paid freight bill showing that the shipment moved over the carrier's lines on the first movement, and of a certificate from the proper officers of the fair, showing that the hogs had been regularly exhibited and had not changed ownership, and thereafter a hog was shipped to a fair on the carrier's line, for the purpose of exhibition, and the shipper complied in all respects with this order, and the carrier accepted the hog for return shipment in accordance with the agreement to return it free from further freight charges, and, while in course of transportation, the hog received injuries which caused its death, the shipper, if the injuries resulted from negligence of the carrier, was not bound by an arbitrary prearranged valuation upon such property, printed in a bill of lading issued to him, acknowledging receipt of the hog for return shipment free of additional freight charges, and he was entitled to recover full damages for the loss sustained by him by reason of such negligence."—De Bow v. Vicksburg, S. & P. Ry. Co., 95 S. E 261, 21 Ga App. 732, reversed on other grounds Vicksburg, S. & P. Ry. Co. v. De Bow, 98 S E. 381, 148 Ga. 738.

2. Ga.—Southern Express Co. v. Hanaw, 67 S E. 944, 134 Ga. 445, 137 Am.S.R. 227.
10 C J. p 169 note 2.

3. Colo.—Union Pac. R. Co. v. Stupeck, 114 P. 646, 50 Colo 151

4. N D.—Hanson v Great Northern R. Co, 121 N W. 78, 18 N.D. 324, 138 Am.S R. 768.
10 C.J. p 169 note 4.

5. U S.—Fells v. St. Louis, etc, R. Co, C C Iowa, 52 F. 903.
Mo.—Kellerman v. Kansas City, etc., R. Co, 68 Mo App. 255.
Tenn.—Nashville, etc., R Co. v. Stone, 79 S W 1031, 112 Tenn. 348, 105 Am S R 955.
10 C.J. p 169 note 5.

6. N.Y.—Heuman v. M. H. Powers Co., 162 N.Y S. 590, 592, 175 App. Div. 627.
10 C J. p 140 note 70 [a], p 169 note 6.
"A clause in a contract of carriage, limiting the liability of a carrier to a given sum, is held to be equivalent to a valuation of the goods."—Heuman v. M H. Powers Co., supra.

7. Minn.—Alair v. Northern Pac. R. Co., 54 N W. 1072, 53 Minn. 160, 39 Am S R. 588, 19 L R A. 764.

8. Ga.—Central of Georgia R. Co v. Murphey, 38 S.E. 970, 113 Ga. 514, 53 L.R.A. 720.
Mo.—Doan v. St. Louis, etc., R. Co., 38 Mo.App. 408.
10 C J. p 169 note 9.

9. U.S.—Great Northern R. Co. v. O'Connor, 34 S.Ct. 380, 232 U.S. 508, 58 L Ed. 703, reversing O'Connor v. Great Northern R Co., 136 N. W 743, 118 Minn. 223 and 139 N. W. 618, 120 Minn 359.
10 C.J. p 169 note 10.

is borne out by the weight of authority as to what constitutes a contract limiting liability, for, as shown supra § 91, where a limitation of liability is embodied in a receipt or bill of lading which is accepted by the shipper, he will in most jurisdictions be presumed to have acquiesced in such limitation, even without any formal assent thereto, in the absence of fraud or imposition.

Disproportion between actual and fixed value. In some jurisdictions the view has been taken that, where a contract limits the liability of the carrier to an agreed valuation, on a consideration of reduced charges for carriage of goods, and such agreed valuation is largely disproportionate to the value of the goods, it is violative of public policy, as far as it limits the carrier's liability for loss or injury caused by the negligence of itself or its servants, and that too, although the value of the goods shipped is not disclosed to the carrier.[10] On the other hand, it has been held that a mere difference between the value as agreed on and the actual value of the property, however wide such difference may be, is not a controlling test as to the validity of the stipulation, and that the true test is whether the stipulation was fairly entered into, by the parties, and is just and reasonable in the eye of the law; and contracts have frequently been sustained where the difference between the agreed and the fixed value was very great.[11] However, there are decisions, some of which were decided in jurisdictions where the foregoing view prevails, where contracts in which there was great discrepancy between the actual and the agreed value, taken in connection with other circumstances, have been held void as arbitrary and unreasonable. In some of these decisions the fact on which the reasonableness of the contract turns is the knowledge, or want of knowledge, on the part of the carrier of the value of the goods. If made knowing such value, and that the valuation fixed was unreasonably low, the contract is considered void as being an arbitrary limitation of liability;[12] but this view has been repudiated in other decisions where this precise question was carefully considered.[13] In other cases the decisions turned on the fact that the valuation was fixed without any reference to the charges and responsibilities to be borne by the carrier.[14] Other decisions seem to turn on the fact that the valuation was that expressed in the company's tariffs applicable to all shipments of a like character under a reduced rate, and that the valuation was not the result of any actual estimation or consideration of the actual value of the goods;[15] but these cases are not in harmony with decisions of the United States supreme court.[16] In a decision of the United States supreme court, in which the United States supreme court decisions were reviewed and relied on as the basis of its holding, it was declared "that the legality of the contract does not depend upon a valuation which shall have a relation to the actual worth of the property," but on the acceptance by the parties of the contract as the basis of shipment and on the force of the statute as to the filed tariff, making it optional with the shipper to ship at the lower rate and not avail himself of a greater recovery on paying the higher rate named in the tariff, and on the requirement of the shipper to take notice of its terms and to be bound thereby.[17]

Use of printed form

A case of an agreed valuation is presented where the shipper's agent filled out a printed bill of lading describing the shipment as "emigrant movables released to $10 per cwt," which was signed by the carrier's agent, and the goods were shipped under the lower rate applicable to goods of that character and value.—Great Northern R. Co. v. O'Connor, 34 S.Ct. 380, 232 U.S. 508, 58 L.Ed. 703, reversing O'Connor v. Great Northern R. Co., 136 N.W. 743, 118 Minn. 223, and 139 N.W. 618, 120 Minn. 359.

10. Ala.—Southern Express Co. v. Gibbs, 46 So. 465, 155 Ala. 303, 130 Am.S.R. 24, 18 L.R.A.,N.S., 874—Broadwood v. Southern Express Co., 41 So. 769, 148 Ala. 17—Southern Express Co. v. Owens, 41 So. 752, 146 Ala. 412, 119 Am.S.R. 41, 8 L.R.A.,N.S., 369, 9 Ann.Cas. 1143.
10 C.J. p 169 note 12, p 170 note 13.

11. Cal.—Donlon v. Southern Pac. Co., 91 P. 603, 151 Cal. 763, 11 L.R.A.,N.S., 811, 12 Ann.Cas. 1113
N.Y.—Zimmer v. New York Cent., etc., R. Co., 33 N.E. 642, 137 N.Y. 460—Steers v. Liverpool, etc., S.S. Co., 57 N.Y. 1, 15 Am.R. 453.
N.D.—Hanson v. Great Northern R. Co., 121 N.W. 78, 18 N.D. 324, 138 Am.S.R. 768
Va.—Richmond, etc., R. Co. v. Payne, 10 S.E. 749, 86 Va. 481, 6 L.R.A. 849
10 C.J. p 170 note 14.

12. Colo.—Colorado, etc., R. Co. v. Manett, 121 P. 1012, 21 Colo.App. 593
Okl.—St. Louis, etc., R. Co. v. Mounts, 144 P. 1036, 44 Okl. 359
Utah—Bingham v. San Pedro, etc., R. Co., 117 P. 606, 39 Utah 400.
10 C.J. p 170 note 15

13. U.S.—George N. Pierce Co. v. Wells Fargo & Co., N.Y., 35 S.Ct. 351, 236 U.S. 278, 59 L.Ed. 576, affirming 189 F. 561, 110 C.C.A. 645.
Mo.—Donovan v. Wells, 177 S.W. 839, 265 Mo. 291.
10 C.J. p 171 note 16

14. Iowa.—Blair v. Wells, 135 N.W. 615, 155 Iowa 190.
Minn.—Murphy v. Wells, 108 N.W. 1070, 99 Minn. 230.
10 C.J. p 171 note 17.

15. Minn.—Ostrott v. Northern Pac. R. Co., 127 N.W. 177, 111 Minn. 504
N.D.—Hanson v. Great Northern R. Co., 121 N.W. 78, 18 N.D. 324, 138 Am.S.R. 768.
10 C.J. p 171 note 18.

16. U.S.—Missouri, Kansas & Texas Ry. Co. v. Harriman, Tex., 33 S.Ct. 397, 227 U.S. 657, 57 L.Ed. 690—Kansas City Southern R. Co. v. Carl, 33 S.Ct. 391, 227 U.S. 639, 57 L.Ed. 683, reversing 121 S.W. 932, 91 Ark. 97, 134 Am.S.R. 56.
10 C.J. p 171 note 19.

17. U.S.—George N. Pierce Co. v. Wells Fargo & Co., N.Y., 35 S.Ct. 351, 236 U.S. 278, 285, 59 L.Ed.

Minority rule. In a few states the common-law rule is that, when loss or damage results from a violation of a contract of intra-state shipment, growing out of the negligence of the carrier or its servants, any limitation as to the amount recoverable for loss or injury contained in the contract of shipment is inoperative, although a reduced rate of freight is charged.[18] The decisions formulating this rule generally hold that contracts of this nature are in direct contravention of the common-law doctrine which forbids a common carrier to contract for exemption against the consequences of its own negligence or that of its servants,[19] and that there can be no difference in principle between contracts for total and contracts for partial exemption from liability.[20] It is recognized, however, that for losses caused otherwise than by the carrier's negligence, contracts fairly made on a reasonable consideration limiting the carrier's liability to an agreed valuation should be upheld.[21]

(2) Effect of Constitutional or Statutory Provisions

Statutes not prohibiting limitations of liability do not affect the general rule upholding limitations of liability as to value. Constitutional or statutory provisions, expressly forbidding any contractual limitation of the carrier's liability are applied usually to forbid contracts limiting liability to a specified valuation. Contracts limiting a carrier's liability for loss or injury to an agreed valuation are generally permitted by federal law if in compliance with the statutory requirements.

The general rule above stated in this section upholding limitations of liability as to value, is not affected by a statute which declares the measure of damages to be the market value at destination,[22] nor by a statute providing that no contract in any receipt shall "exempt" any common carrier from liability for loss;[23] and, under state statutes substantially identical with the Carmack Amendment to the Interstate Commerce Law, the effect of which is considered below, contracts limiting the liability of the carrier for loss or injury to goods shipped in intra-state commerce to an amount not greater than an agreed valuation are upheld and given effect according to their terms, even though the loss was due to the carrier's negligence.[24] A limitation of the shipper's recovery to the amount on which the freight charges are based is not regarded as an exemption of the carrier from liability for loss or injury which it has caused, within the statutory prohibition.[25] Where such a statute brings about a change in the law of the state, as where prior to its enactment the state adhered to the minority rule above announced in this section, the fact that the statute provides that nothing therein shall deprive the parties of any right or remedy under existing law does not preserve the common-law right of recovery of the actual value of the goods lost, where the bill of lading contained a clause limiting liability.[26]

Prohibiting limitation of common-law liability. While it has been held that state constitutional and statutory provisions which expressly forbid any limitation of the carrier's liability by special contract do not invalidate a clause in a shipping contract limiting the value of the goods covered in consideration of the rate given if a higher rate would be charged at a higher valuation,[27] in so far as intra-state shipments are concerned, under such provisions by the weight of authority contracts limiting liability in case of loss or injury to a specified valuation are held to constitute a limitation of the carrier's common-law liability and to be inoperative and void, and it makes no difference whether the loss or injury was caused by negligence or not.[28]

576, affirming 189 F. 561, 110 C.C.A. 645.

18. Colo.—Denver & R. G. R. Co. v. Teufel, 172 P. 1060, 64 Colo. 515.
N.C.—Pendergraph v. American Ry. Express Co., 100 S.E. 525, 178 N.C. 344.
10 C.J. p. 171 note 22.

The minority rule as stated in Corpus Juris is quoted with approval
Ill.—Kingsbury v. Chicago & A. R. Co., 213 Ill.App. 439, 445
Nev.—Southern Pac. Co. v. Haug, 182 P. 92, 94, 43 Nev. 102

19. Ill.—Kingsbury v. Chicago & A. R. Co., 213 Ill.App. 439.
Nev.—Southern Pac. Co. v. Haug, 182 P. 92, 43 Nev. 102
N.C.—Pendergraph v. American Ry. Express Co., 100 S.E. 525, 178 N.C. 344
10 C.J. p. 172 note 23.

The statement in Corpus Juris of the minority rule and the considerations upon which it is referred to in Kennedy v. Atchison, T. & S. F. Ry. Co., 179 P. 314, 315, 104 Kan. 129.

20. D.C.—Galt v. Adams Express Co., 11 D.C. 124, 48 Am.R. 742.
Miss.—Chicago, etc., R. Co. v. Abels, 60 Miss. 1017.
N.C.—Everett v. Norfolk, etc., R. Co., 50 S.E. 537, 138 N.C. 68, 1 L.R.A., N.S., 985
10 C.J. p. 172 note 24.

21. Pa.—Grogan v. Adams Express Co., 7 A. 134, 114 Pa. 523, 60 Am.R. 360—American Express Co. v. Sands, 55 Pa. 140

22. Ala.—Illinois Cent. R. Co. v. Kilgore, 67 So. 707, 12 Ala.App. 358

23. N.Y.—Jones v. Wells, 145 N.Y.S. 601, 83 Misc. 508.

24. Colo.—Denver & R. G. R. Co. v. Teufel, 172 P. 1060, 64 Colo. 515.
Kan.—Kennedy v. Atchison, T. & S. F. Ry. Co., 179 P. 314, 104 Kan. 129, 368, motion to amend mandate granted on other grounds 181 P. 117, 104 Kan. 708
Mo.—Strother v. Atchison, T. & S. F. R. Co., App., 212 S.W. 404

25. Kan.—Kennedy v. Atchison, T. & S. F. Ry. Co., 179 P. 314, 104 Kan. 129, 368, motion to amend mandate granted on other grounds 181 P. 117, 104 Kan. 708

26. Colo.—Denver & R. G. R. Co. v. Teufel, 172 P. 1060, 64 Colo. 515

27. Wash.—Carstens Packing Co. v. Northern Pac. R. Co., 116 P. 625, 64 Wash. 256
10 C.J. p. 173 note 28.

28. Tex.—Gulf, C. & S. F. Ry. Co. v. Buckholts State Bank, Civ.App.,

However, although prior to the Carmack amendment it was held that the fact that the contract was for the carriage of goods from a point in a state where statutes of this character obtain to a point in another state did not affect the operation of the rule,[29] as will be shown in the C.J.S. title Commerce § 92, also 10 C.J. p 174 note 35, by the construction placed by the supreme court of the United States on the Carmack amendment, contracts of interstate shipment of the character under consideration are now valid, notwithstanding statutory or constitutional provisions to the contrary. The power of the interstate commerce commission to fix nondiscriminatory rates in intra-state shipments does not include authority to bind a shipper to accept less than the actual value of goods lost in an intra-state shipment even if he signed a contract containing such limitation where the limitation is prohibited by statute, particularly where the agreed valuation is unreasonable.[30] It has been held, however, although there is authority to the contrary,[31] that notwithstanding such statute, if the shipper is guilty of any fraud or imposition on the carrier in reference to the nature or value of the articles shipped, whereby the carrier received a smaller compensation for the transportation and was induced not to take the care it would have taken if the value had been correctly stated, the carrier's liability is limited to the declared value.[32] Where the statute expressly makes invalid any contract for exemption from liability for loss occasioned by the carrier's neglect or misconduct, an attempted limitation to a stipulated sum is void where the loss is occasioned by the carrier's negligence or misconduct.[33]

Effect of federal legislation. In view of the rule, stated in the C.J.S. title Commerce § 92, also 12 C J. p 86 note 43, that the federal legislation supersedes absolutely all state laws and policies on the subject of interstate shipments,[34] since the adoption of the Carmack amendment, except during the period between the passage of the first and second Cummins amendments, where rates for interstate shipments have been graded according to the valuation of the property, contracts limiting the carrier's liability to the released value as set out in the contract have been upheld in all jurisdictions.[35] The Carmack Amendment does not prohibit, but authorizes, contracts limiting the liability of the carrier for loss or

258 S.W 491, reversed on other grounds, Com.App., 270 S.W. 1008—Galveston Hotel Co. v. Goggan, Civ.App., 253 S W. 694.

Va.—Chesapeake & O Ry. Co. v. Osborne, 153 S E. 865, 154 Va. 477.

10 C J. p 172 note 27.

29. Neb.—St. Joseph, etc, R. Co v. Palmer, 56 N.W. 957, 38 Neb 463, 22 L R A 335.

30. Tex.—Lancaster v. Houghton, Civ App., 249 S W. 1103, error dismissed 45 S Ct. 194, 266 U S 590, 69 L Ed. 456.

Valuation held unreasonable

A valuation of each article of household goods shipped by carrier at ten cents per pound beyond which it attempts to limit its liability for loss of such goods is unreasonable and should not be enforced, since it is a matter of common knowledge that some articles of small weight are of great value, whereas others of greater weight are of small value—Lancaster v. Houghton, Tex Civ App, 249 S W. 1103, error dismissed 45 S Ct 194, 266 U S 590, 69 L Ed. 456.

31. Iowa.—Lucas v. Burlington, etc, R Co, 84 N W. 673, 112 Iowa 594 10 C J p 172 note 27 [b].

Estoppel at common law against shipper to assert facts contrary to representation regarding value of intra-state shipment is ineffective, if resulting in enforcement contrary to statute of contract limiting carrier's liability, nor will the shipper's misrepresentation estop him from recovering actual value for loss or damage, where carrier in fact applies but one rate for particular property, for to apply an estoppel in such cases is to permit the carrier to limit its liability by contract.—Chesapeake & O Ry. Co. v. Osborne, 153 S E. 865, 154 Va 477.

32. Tex.—Galveston Hotel Co. v. Goggan, Civ.App, 253 S.W. 694.

33. Va.—Adams Express Co. v. Allen, 100 S E. 473, 125 Va. 530.

34. **Valuation appropriate to interstate rate**

In a damage action, a live stock consignee paying interstate rate is bound, under Interstate Commerce Act, by valuation appropriate to such rate, irrespective of whether he authorized consignor to execute oral contract, since such a special contract can have no binding force.—Dickerson v Erie R. Co, 169 N.Y S. 5, 181 App Div. 815

35. Kan.—Kennedy v. Atchison, T. & S F. Ry. Co, 179 P. 314, 104 Kan 129, 368, motion to amend mandate granted on other grounds 181 P 117, 104 Kan 708

N.Y.—Burke v. Union Pac R Co, 124 N E 119, 226 N Y. 534, reversing 166 N.Y S 100, 178 App Div. 783, certiorari granted Union Pac. R Co v Burke, 40 S Ct 56, 251 U.S 548, 64 L Ed 409, and affirmed 41 S.Ct 283, 255 U S. 317, 65 L Ed 656—Haddad v. Southern Pac. R Co, 173 N.Y.S 256, 185 App Div 500.

First Cummins amendment

(1) Under the first Cummins amendment a contract attempting to limit the carrier's liability to a released value set out therein was void and of no effect.—Western Assur. Co. v. Wells Fargo & Co., 173 N W. 402, 143 Minn. 60.

(2) So, under the provision of that amendment making the carrier liable for loss of goods received for interstate shipment, unless they were hidden from view and the carrier was not notified as to their character, in which case it could limit its liability to a valuation amount which it could require shipper to state in writing, if the carrier was informed of the character of the concealed goods, it could not rely on a written statement of their value as a limitation of liability to that amount in case of loss or damage.—Thompson v Great Northern Ry. Co, 174 P. 607, 31 Idaho 492.

Notwithstanding second Cummins Act, an interstate carrier may, by agreement fairly and understandingly made, when shipper is given choice of lower rate based on declared or agreed value, limit liability to such value.—American Ry. Express Co v. Daniel, 116 S E 660, 29 Ga App 780, affirmed 121 S.E. 686, 157 Ga. 731, certiorari granted 44 S Ct. 461, 265 U S 576, 68 L Ed. 1187, and reversed on other grounds 46 S Ct 15, 269 U.S. 40, 70 L.Ed 154, vacated 132 S.E. 144, 35 Ga.App. 81.

injury to an amount not greater than a valuation fixed by an agreement of the parties, where fair, open, and reasonable, and made for the purpose of furnishing the basis of the liability assumed, and that too whether the loss or injury was due to the carrier's negligence or not,[36] although the act makes the carrier liable for some value.[37] The underlying principle of the amendment is that the carrier is entitled to base rates on value, and that its compensation should bear a reasonable relation to the risk and responsibility assumed, and its broad purpose is to compel establishment of reasonable rates, and to provide for their uniform application; special contracts are not permitted to give any advantage to a particular shipper.[38] Under the provision of the second Cummins Amendment permitting the carrier, by agreement in writing, to limit its liability to an agreed amount if authorized to base rates on value, to avoid liability for the full value the carrier must bring itself within the statute by obtaining, by order of the interstate commerce commission, the right to adopt alternative rates based on the declared valuation of the shipment,[39] and a written agreement from the shipper to a released value.[40] Under the provisions of this amendment, however, which prohibit limitations of liability for loss or damage to ordinary live stock, a limitation of recovery to a certain agreed amount per head for loss of any one such animal is void.[41] Animals chiefly valuable for breeding, racing, show purposes, or other special uses, being excluded by this act from the definition of "ordinary live stock," however, a limitation of liability with respect to a race horse is valid.[42]

36. U.S.—Southeastern Express Co. v. Pastime Amusement Co, 57 S Ct 73, 299 U S 28, 81 L Ed. 20, reversing Pastime Amusement Co. v. Southeastern Express Co, 186 S E 283, 181 S C. 203, certiorari granted Southeastern Express Co. v. Pastime Amusement Co, 56 S.Ct 954, 298 U.S. 653, 80 L Ed. 1380—Boston & M. R. R v. Piper, 38 S Ct. 354, 246 U.S. 439, 62 L Ed 820, affirming Piper v. Boston & M R. R, 97 A 508, 90 Vt. 176—Erie R. Co. v. Stone, Ohio, 37 S Ct. 633, 244 U S 332, 61 L Ed 1173—American Exp. Co. v U. S Horseshoe Co., Pa., 37 S Ct. 595, 244 U S. 58, 61 L Ed 990.

Cal—Crenshaw Bros. & Saffold v. Southern Pac. Co, 181 P 252, 40 Cal.App 603, amendment of remittitur and correction of judgment denied 183 P. 208, 42 Cal.App 44, certiorari denied 40 S.Ct 14, 250 U S. 669, 63 L.Ed. 1198.

Ill—See Crossley v. St. Louis, I. M & S Ry Co., 199 Ill App. 195.

N Y—Burke v. Union Pac R. Co., 124 N E 119, 226 N Y 534, reversing 166 N.Y S. 100, 178 App Div. 783, certiorari granted Union Pac R Co v Burke, 40 S.Ct. 56, 251 U S 548, 64 L Ed 409, and affirmed 41 S.Ct 283, 255 U.S 317, 65 L Ed 656—D'Utassy v Barrett, 114 N.E 786, 219 N Y. 420, 5 A L R. 979, affirming 157 N Y S 916, 171 App. Div. 772

Tex—Kansas City, M. & O Ry. Co of Texas v. Corn, Civ App., 186 S. W 807.

Vt—Piper v. Boston & M R R., 97 A. 508, 90 Vt. 176, affirmed Boston & M. R R v. Piper, 38 S Ct. 354, 246 U.S 439, 62 L Ed 820.

Wis—Bassett v. Chicago & N. W Ry Co, 171 N.W. 749, 168 Wis 617, rehearing denied 171 N.W. 752, 168 Wis. 617.

10 C J. p 173 note 32.

Corpus Juris is cited with approval in Kennedy v. Atchison, T. & S F. Ry. Co., 179 P. 314, 315, 104 Kan 129.

Omission to post rate sheets of an express company on file with interstate commerce commission does not invalidate limitation of express company's liability to an agreed value made to adjust the rate—American Exp. Co v. U. S Horseshoe Co, Pa., 37 S Ct. 595, 244 U S. 58, 61 L Ed. 990.

Ordinary or gross negligence

Under Carmack Amendment, in interstate shipment of racing mare, shipper paying alternative rate based on one hundred fifty dollars valuation of mare, the valuation limited the amount the shipper could recover for damage to her for any defaults of carriers in transport, whether result of ordinary or gross negligence, as defined in law of state of suit and destination.—Bassett v Chicago & N. W Ry Co, 171 N.W. 749, 168 Wis. 617, rehearing denied 171 N.W. 752, 168 Wis 617.

Rugs destroyed by fire

Where shipper notified carrier that rugs were being shipped, but declared a value less than the invoice value in order to secure a reduced rate under published schedules filed with interstate commerce commission, carrier was not liable, on burning of rugs from fire of unknown origin, for more than declared value of rugs, having had no knowledge of the "character" of the goods shipped, within Carmack Amendment to the Interstate Commerce Act, U S.Comp St.1916 §§ 8604a, 8604aa, as amended by the Cummins Amendment, U S Comp.St.1916, §§ 8592, 8604a.—Haddad v. Southern Pac Co, 173 N.Y.S. 256, 185 App Div 500.

37. Miss—Hill Mfg. Co. v. New Orleans, M & C. R R Co., 78 So. 187, 117 Miss 548, certiorari denied New Orleans, M & C. R. Co. v. Hill Mfg. Co, 39 S Ct. 11, 248 U S. 571, 63 L.Ed 426.

38. U.S.—Southeastern Express Co v Pastime Amusement Co, S C, 57 S Ct 73, 299 U.S. 28, 81 L Ed. 20, reversing Pastime Amusement Co. v. Southeastern Express Co, 186 S.E 283, 181 S C. 203, certiorari granted Southeastern Express Co. v. Pastime Amusement Co, 56 S Ct. 954, 298 U S. 653, 80 L Ed. 1380.

39. Minn—Western Assur. Co. v. Wells Fargo & Co., 173 N.W. 402 143 Minn. 60.

S C.—Kristianson v. American Ry Express Co, 115 S.E. 899, 122 S C. 528.

Prospective operation of statute

"In denying defendant's application for a rehearing in this cause we take occasion to say, that there may be no misunderstanding as to the position of the court in the matter, that in our view of the question a prospective operation and effect must be given to the clause found in the [second] Cummins Amendment of August 9, 1916 to the effect that the declared liability of the carriers for the actual loss shall not apply to contracts of limitation authorized by order of the Interstate Commerce Commission. That proviso or exception should not be construed to apply to orders made by the Commission prior to the [first Cummins] amendment of March 4, 1915."—Western Assur Co. v. Wells Fargo & Co, 173 N.W. 402, 404, 143 Minn 60.

40. Mo—Hunter v. American Ry. Express Co, App, 4 S W.2d 847

S C.—Kristianson v. American Ry. Express Co, 115 S.E. 899, 122 S C 528.

41. U S.—Galveston, H. & S. A Ry Co v. Hall, C.C.A.Tex., 70 F 2d 608.

42. Pa—Wilson v Adams Express Co., 72 Pa.Super. 384.

b. Value Not Disclosed or Stated

Ordinarily it is competent for the carrier to stipulate that it shall not be liable for goods beyond a certain named sum unless a value in excess thereof is disclosed.

It has already been suggested, supra § 78 b, that, where by fraudulent concealment of the shipper for the purpose of avoiding payment of increased charges for transportation the carrier is induced to accept goods under the belief that they are of ordinary character and value, while in fact they are of such exceptional character or value as that a higher rate would have been charged if the facts had been known, the transaction constitutes such a fraud as to relieve the carrier from liability for the exceptional value; and in accordance with this principle, while the rule is otherwise in some jurisdictions,[43] the weight of authority is that it is competent for the carrier by contract or notice brought to the attention of the shipper to stipulate that it shall not be liable for the goods beyond a certain named sum, unless the value in excess of that sum is disclosed to the carrier and an increased compensation paid in accordance with the increased value, and such a stipulation will be valid, even in case of loss by negligence,[44] it being reasonable and consistent with public policy.[45] Under such circumstances it is not the duty of the carrier to make inquiry as to the value, but it is the duty of the shipper to disclose the value if he seeks to hold the carrier liable beyond the stipulated sum.[46] The shipper by accepting a shipping receipt containing a recital that the carrier is not to be held liable beyond a designated sum, at not exceeding which sum the property is valued, unless a different valuation is stated, represents that the value does not exceed that sum.[47] However, it has been held that if it appears that the real value was known to the carrier to be in excess of the stipulated amount, then in case of negligence it will be liable for the real value, notwithstanding the stipulation.[48]

Effect of federal legislation. An agreement of the character under consideration is not in viola-

43. Mo—Schade v. Missouri Pac. R Co, 221 S.W. 146, 204 Mo App. 88
10 C.J. p 174 note 39.

44. U.S.—The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., N Y, 55 S Ct. 483, 294 U S. 494, 79 L Ed. 1016—American Ry. Express Co. v. Levee, La., 44 S.Ct. 11, 263 U S 19, 68 L.Ed. 140—American Ry Express Co. v. Lindenburg, 43 S Ct 206, 260 U.S. 584, 67 L Ed. 414, reversing Lindenburg v. American Ry. Express Co., 106 S E. 884, 88 W.Va. 439, certiorari granted American Ry. Express Co. v. Lindenburg, 42 S.Ct. 52, 257 U.S 627, 66 L Ed 404—American Exp. Co. v. U. S. Horseshoe Co., Pa., 37 S Ct 595, 244 U.S. 58, 61 L Ed. 990—Taylor v. U. S., 60 Ct.Cl. 429, appeal dismissed U. S. v. Taylor, 47 S Ct. 235, 273 U.S. 773, 71 L Ed 885
Del.—Windsor v. American Ry. Exp. Co, 143 A. 37, 4 W.W Harr. 16
Ill—Dwyer v. American Railway Express Co., 280 Ill.App. 11—Macomber & Whyte Rope Co v. United Fruit Co, 225 Ill App 286.
N Y—Faultless Clothing Co. v. Branch Storage Co, 300 N Y S. 642, 165 Misc. 658—Kolb v. Taylor, 168 N.Y.S. 685, 102 Misc. 220—Granbery v. Taylor, 159 N Y S. 932, 95 Misc. 585.
Ohio—Bevis v. American Ry. Exp. Co, 17 Ohio App. 73—Cohn-Goodman Co. v. Wells Fargo Exp. Co., 13 Ohio Cir Ct ,N.S., 467, affirmed 87 Ohio St. 458.
Okl—Chicago, R. I. & P R Co v. Geissler, 61 P 2d 14—Lusk v. Durant Nursery Co, 232 P. 11, 73 Okl. 269—Haskell v. St. Louis & S. F. R. Co., 162 P. 459, 62 Okl. 116.
S D—Strong v. Wells Fargo & Co. Express, 164 N.W. 967, 39 S D. 389.
10 C J. p 141 note 75 [b] (2), p 174 note 40.

Corpus Juris was cited in Shikany v Salt Creek Transp. Co., Wyo, 45 P.2d 645, 648.

Basis for validity of contract

The validity of a carrier's limitation of liability for loss during transit is based on inclusion in contract of right of shipper to declare goods to be of higher agreed value, to which carrier will be bound on payment of higher rate of carriage in consideration of greater assumption of liability.—Faultless Clothing Co. v. Branch Storage Co., 300 N.Y. S. 642, 165 Misc. 658

Consistency with rate sheets

A limitation of the carrier's liability for an interstate shipment of live stock, where the shipper has made no declaration of value, to a primary valuation upon which the rate was based, is not repugnant to the declaration in the carrier's rate sheets on file with the interstate commerce commission that the rate schedules dealing with merchandise, which expressly provide that the primary limitations of value fixed shall be the measure of the charge and liability unless another and higher valuation be declared, must not be applied to live stock To hold otherwise would cause this clause to accomplish the result which it was obviously intended to prevent, that is, the control or modification of the charges contained in live-stock clauses by the provisions as to merchandise charges—American Exp Co v. U. S. Horseshoe Co, Pa., 37 S Ct. 595, 244 U.S. 58, 61 L.Ed. 990.

Value automatically fixed

"Where different rates for the shipment of property by the carriage company are prescribed by the carriers, under the authority of the Interstate Commerce Commission and depending upon the declaration of the shipper of the value of the property to be shipped, and where a shipper offers property for shipment, and is quoted the lowest rate and ships thereunder without any formal declaration of value, held, that the agreement as to rate automatically fixed the value"—Chicago, R. I. & P. Ry. Co. v. Geissler, Okl, 61 P.2d 14.

In Texas the rule of the text has been recognized and applied as the federal rule governing interstate shipments with respect to loss occasioned by negligence whether ordinary or gross, wilful, and wanton negligence—Henderson v. Wells Fargo & Co. Express, Tex Civ.App, 217 S W 962.

45. Ill—Dwyer v. American Railway Express Co, 280 Ill.App 11.
10 C J. p 174 note 40 [c].

46. U S—Great Northern R Co. v. O'Connor, 34 S Ct 380, 232 U S 508, 58 L Ed 703, reversing O'Connor v. Great Northern Ry Co, 136 N.W. 743, 118 Minn 223, and 139 N. W. 618, 120 Minn 359.
10 C J. p 175 note 41

47. U.S—Wells v. Neiman-Marcus Co., 33 S Ct. 267, 227 U S 469, 477, 57 L Ed. 600, reversing, Tex Civ. App, 125 S.W 614.
10 C.J. p 176 note 42.

48. N.Y—Van Winkle v. Adams Express Co., 26 N Y.Super. 59.
10 C.J. p 176 note 43.

tion of the Interstate Commerce Act making it an offense to obtain transportation of property at less than the established rate from a carrier subject to the act.[49] Furthermore, the general rule is not abrogated by, but is applicable under, the Carmack amendment[50] and the second Cummins amendment;[51] but under the first Cummins amendment a limitation of the amount of liability in a carrier's receipt for goods hidden from view was void where the carrier did not ask or require the shipper to state the character or value thereof, and the shipper gave no such information and did not dictate or suggest what the receipt should contain.[52] The view has been taken, however, that the shipper's acceptance of a receipt limiting the value constituted a sufficient statement in writing by him under that statute so as to make the limitation binding.[53]

c. Invoice Price, or Value at Place of Shipment

Contractual provisions limiting the carrier's liability for loss to the invoice price or value at the time and place of shipment are upheld in the absence of statutes changing the rule.

A regulation that the liability of the carrier in case of loss shall be limited to the invoice value of the goods is a reasonable regulation as to the damage to be recovered and is valid.[54] So a provision that the liability for loss shall be measured by the value at the time and the place of shipment is generally upheld,[55] except where a controlling statute prevents the application of this rule[56] or where it

49. S.C.—Visanska v Southern Express Co, 75 S E 962, 92 S C. 573
10 C J p 176 note 44.

50. U S —American Exp Co v. U S Horseshoe Co, Pa, 37 S.Ct. 595, 244 U S 58, 61 L Ed. 990
Ohio —Cohn-Goodman Co. v. Wells Fargo Exp. Co, 13 Ohio Cir.N S., 467, affirmed 87 Ohio St. 458
S.C.—Huddy v. Railway Express Agency, 188 S E 247, 181 S C. 508 —Poliakoff v. American Ry. Express Co., 105 S.E 744, 115 S C 355
10 C.J. p 176 note 46.

Early contrary decisions

Prior to the decisions of the United States supreme court definitely settling the question, it was held in some decisions that the general rule stated was considered as abrogated by the Carmack amendment —Vigouroux v. Platt, 115 N Y S 880, 62 Misc 364—Schutte v. Weir, 111 N.Y. S 240, 59 Misc. 438—Silverman v. Weir, 114 N Y.S. 6.

51. U S.—American Ry Express Co. v Lindenburg, 43 S Ct. 206, 260 U S 584, 67 L.Ed. 414, reversing Lindenburg v. American Ry Express Co, 106 S E 884, 88 W Va. 439, certiorari granted American Ry. Express Co. v. Lindenburg, 42 S Ct. 52, 257 U.S. 627, 66 L Ed 404.
Del —Windsor v. American Ry. Exp. Co, 143 A. 37, 4 W W.Harr. 16.
S.C.—Tribble v. Southern Express Co, 96 S E. 712, 111 S C. 31, certiorari denied 39 S Ct. 287, 248 U.S. 582, 63 L Ed. 432.
Tenn —Tennessee Central Ry. Co. v. Russell, 15 Tenn.App. 312.

Interstate commerce commission rules

In view of Interstate Commerce Commission Rules, rule 13 §§ (a), (b), and (c), unless a shipper declares a value greater than fifty cents per hundredweight, and pays the excess rate for the higher valuation, the liability of the express company is limited to such lower rate, and that, even though the contract is oral and nothing is said about rates or value, all express charges to be paid at destination —Wells Fargo & Co. Express v Bollin, Tex Civ.App., 212 S W. 283.

Contrary conclusion

Relying on Lindenburg v. American Railway Express Co., 106 S E 884, 88 W.Va 439, prior to the reversal of that case by the United States supreme court (43 S Ct 206, 260 U S 584, 67 L Ed 414), a contrary conclusion was reached in American Ry Express Co. v. Galt, 90 So. 597, 128 Miss. 81, 25 A L R 728

52. Kan —Payne v. Adams Express Co, 195 P. 860, 108 Kan. 327.

Estoppel

"The defendant says the plaintiff estopped himself by accepting the receipt. Statutes expressing a definite public policy, in clear and positive terms, are not to be nullified so easily."—Payne v. Adams Express Co., 195 P. 860, 861, 108 Kan. 327.

53. S C.—Tribble v. Southern Express Co, 96 S E 712, 111 S C. 31, certiorari denied 39 S Ct. 287, 248 U.S. 582, 63 L Ed. 432.

54. Ala.—Davis v. Zimmern, 99 So. 307, 211 Ala. 63.
10 C J. p 176 note 49.

55. U S —The Asuarca, D C N Y., 13 F 2d 222.
Ill —Shellabarger Elevator Co. v. Illinois Cent. R Co, 212 Ill App. 1.
Mo —Kemper Mill & Elevator Co v. Hines, 239 S W 803, 293 Mo 88— Wilson v. Chicago Great Western R Co, App, 190 S W. 22.
Pa —Sloan v. Pennsylvania R. Co, 29 Pa Dist 146
10 C J p 176 note 50.

This statement in Corpus Juris is quoted in Davis v. Zimmern, 99 So 307, 308, 211 Ala 63.

Invoice price to consignee

A provision in a bill of lading that amount of any loss or damage for which carrier shall be liable shall be computed on basis of value of property, being bona fide invoice price to consignee, including freight charges if prepaid, at place and time of shipment under the bill of lading, whether or not such loss or damage occurs from negligence, is valid.
Cal —Crenshaw Bros. & Saffold v Southern Pac. Co, 181 P 252, 40 Cal App 603, amendment of remittitur and correction of judgment denied 183 P. 208, 42 Cal App 44, certiorari denied 40 S Ct. 14, 250 U S 669, 63 L.Ed 1198.
Ill.—Fox v. Chicago & N. W. Ry Co, 199 Ill App 453.
Kan.—Wallingford v. Atchison, T & S. F Ry Co, 167 P 1136, 101 Kan. 544, L R A 1918B 716.
Mo —Cudahy Packing Co. v. Bixby, 205 S W. 865, 199 Mo.App 589, certiorari denied 39 S Ct. 19, 248 U.S 577, 63 L Ed. 429.
Neb.—Bowman-Kranz Lumber Co. v. Bush, 176 N W. 91, 104 Neb 165.

Tariff provision

Where, under the filed and published tariffs of an interstate railroad company, the rate on coal was based on its value at the mines where shipment was made, a provision of such tariffs, which became a part of its contracts of carriage, that the amount of any loss or damage for which the company was liable should be computed on the value of the property at the time and place of shipment, as applied to a coal shipment is valid and enforceable.— Springfield Light, Heat & Power Co. v Norfolk & W. Ry. Co, D.C Ohio, 260 F. 254.

56. Mo —Marshall Land & Mercantile Co v Missouri Pac. R. Co, App, 270 S W. 422.
10 C.J p 176 note 51.

Exemption from common-law liability

A provision in a bill of lading limiting liability to the value at the point of shipment is unenforceable

is impossible to separate such provision from one which is invalid.[57] It is not important that the agreement does not specify the value but leaves it to be ascertained, limiting it to a particular time and place, since the same principle would manifestly apply as though the parties had stated the exact value.[58] There is nothing contrary to public policy in contracts of this character;[59] they are intended merely to establish a rule for determining the value of the property in case of loss, and not to limit or diminish the carrier's liability,[60] and although where the actual loss was more than the amount recoverable thereunder such a limitation was contrary to the first Cummins amendment which, as stated supra § 97 b, prohibited limitations of liability in interstate shipments,[61] nothing in the Carmack amendment or other statutes such as the second Cummins amendment relating to interstate commerce forbids limitations of this character.[62] On the contrary, a contract for an interstate shipment

under a statute which provides that no contract, receipt, rule, notice, or regulation shall exempt any railway company from the liability of a common carrier which would exist had no contract, receipt, rule, notice, or regulation been made or entered into—Marshall Land & Mercantile Co v Missouri Pac. R. Co, Mo App., 270 S W. 422.

Cases distinguished

"This court in Gratiot St. Warehouse Co. v. Missouri, K. & T Ry Co, 102 S.W. 11, 124 Mo App. 545, held that it was competent for a carrier to contract that the loss shall be measured by the standard of cost and value at the time and place of shipment, although the general rule is that the shipper can recover the market value of the goods at the point of destination. The Kansas City Court of Appeals, in Wilson v Chicago Great Western R Co., 190 S W. 22, held likewise, and based such opinion upon the authority of Gratiot St Warehouse Co. v. Missouri, K. & T. Ry. Co, supra, by this court. The opinion in Gratiot St. Warehouse Co v. Missouri, K. & T. Ry Co, supra, by this court, was handed down in 1907; and in 1911 the Legislature enacted what is now section 10018, R S 1919, which provides that no contract, receipt, rule, notice, or regulation shall exempt any railway company or common carrier from the liability of a common carrier which would exist had no contract, receipt, rule, notice, or regulation been made or entered into. This section of the statute was not in force at the time this court rendered its opinion in Gratiot St Warehouse Co. v. Missouri, K. & T. Ry. Co., supra"—Marshall Land & Mercantile Co. v. Missouri Pac R. Co, Mo.App, 270 S.W. 422, 423

57. Utah—Bingham v. San Pedro, etc., R. Co., 117 P. 606, 39 Utah 400.

58. Cal—Crenshaw Bros. & Saffold v. Southern Pac. Co, 181 P. 252, 40 Cal App. 603, amendment of remittitur and correction of judgment denied 183 P. 208, 42 Cal App 44, certiorari denied 40 S Ct. 14, 250 U.S 669, 63 L.Ed. 1198

N Y.—Strahs v. New York Cent R Co., 184 N.Y.S 362, 113 Misc. 273. 10 C J. p 177 note 53.

59. Cal.—Crenshaw Bros. & Saffold v. Southern Pac. Co, 181 P. 252, 40 Cal App. 603, amendment of remittitur and correction of judgment denied 183 P. 208, 42 Cal.App. 44, certiorari denied 40 S Ct. 14, 250 U S. 669, 63 L Ed 1198.

10 C J. p 177 note 53.

60. Kan.—Wallingford v. Atchison, T. & S F. Ry. Co, 167 P. 1136, 101 Kan. 544, L.R.A.1918B 716

"The stipulation under consideration recognizes the right of the shipper to measure his damages in such case by the actual value of the property, and therefore cannot be regarded as a stipulation for a limited valuation."—Wilson v. Chicago Great Western R. Co., Mo App., 190 S.W. 22, 24.

61. U S.—Chicago, M. & St P. R. Co. v McCaull-Dinsmore Co., Minn, 40 S Ct. 504, 253 U.S. 97, 64 L Ed. 801, affirming 260 F 835, 171 C.C.A. 561, in which certiorari is granted 40 S Ct. 219, 251 U.S 549, 64 L.Ed. 409, and which affirms, D. C., McCaull-Dinsmore Co. v. Chicago, M. & St. P. Ry. Co., 252 F. 664.

Ala—Louisville & N. R. Co. v. Jones, 99 So 919, 211 Ala. 158

Ark—Missouri Pac. R. Co. v. Alma Cash Store, 271 S.W. 453, 168 Ark. 823.

Ind—Davis v. Hunter, 138 N E. 785, 79 Ind.App. 462

N Y.—Porter v. Pennsylvania R. Co., 215 N.Y S. 727, 217 App Div. 49—Smith v. New York, O. & W. R Co, 196 N.Y.S. 521, 119 Misc. 506

On the authority of Chicago, M & St. P. Ry. Co. v. McCaull-Dinsmore Co, supra, a provision in a bill of lading issued in 1918 limiting recovery to the value of the goods carried at the place of shipment was held void, where it would prevent recovery of the full actual loss if enforced. In this case no mention is made of the second Cummins amendment of 1916—Buschow Lumber Co. v. Hines, 229 S.W. 451, 206 Mo App. 681

62. Cal—Crenshaw Bros. & Saffold v. Southern Pac Co., 181 P. 252, 40 Cal.App 603, amendment of remittitur and correction of judgment denied 183 P. 208, 42 Cal.App 44, certiorari denied 40 S.Ct. 14, 250 U S 669, 63 L Ed. 1198.

Ill—Cohen v Atchison, T. & S. F. Ry. Co., 198 Ill.App. 174.

Neb—Bowman-Kranz Lumber Co. v. Bush, 176 N.W. 91, 104 Neb. 165.

N.Y.—Strahs v. New York Central R. Co, 184 N Y.S- 362, 113 Misc. 273. 10 C J. p 177 note 54.

Contrary dictum Taylor v. St. Louis & H. R. Co, Mo App., 256 S.W. 499.

First Cummins amendment

(1) "There is the following stipulation in the bill of lading in the instant case, namely: 'The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including the freight charges, if paid.' This value has been construed by the courts to mean the invoice price at which the goods are sold at the time and place of shipment, with freight added to the place of destination, if paid. Kelly v. Southern Railway, 66 S E 198, 84 S C. 249, 137 Am St. Rep. 842. While such stipulation might not be valid under the Cummins Amendment of 1915 (Fed.Stat Ann.1916, Supp. pp 124, 125 [U.S Comp St. §§ 8592, 8604a]) as against the shipper where there has been no such sale, or where such sale is defeated by the action of the carrier, and it appears in evidence that the stipulated value is less than the market value at destination at the time the goods should have there arrived, and the shipper seeks to recover such market value, no such case is presented by the record before us And such stipulation, with the construction placed upon it aforesaid, is certainly valid under the circumstances of the instant case, for in such case, in the absence of any stipulation on the subject, the law would fix the same measure of damages"—New York, P & N R Co v. Chandler, 106 S.E. 684, 692, 129 Va 695

(2) A provision, in a bill of lading on a shipment originating prior to the first Cummins amendment, that damages for loss would be computed on the bona fide invoice price to consignee at the time and place of shipment, was valid and binding on the carrier—St. Louis Southwestern Ry. Co. v Texas Packing Co., Tex. Civ.App., 253 S.W. 864.

made in a state where such a limitation of liability is forbidden by statute is valid notwithstanding it contains such a limitation, inasmuch as the Carmack amendment supersedes all state legislation on the subject.[63] The Cummins amendments were not intended to apply to shipments to nonadjacent foreign countries, and hence nothing in such acts prohibits provisions of the character here under consideration in contracts for such shipments.[64] Moreover, a state statute providing that common carriers in case of loss or injury shall be liable for the value of the goods at the place of destination does not prohibit contracts in derogation of the statutory rule.[65]

According to some decisions a stipulation of the character under consideration is thought not to be good if so worded as to deny to the shipper any recovery in case of loss for freight paid in addition to the value of the goods,[66] but, as shown infra § 112 b, a limitation of liability as to value at the place of shipment should be construed to mean the value when delivered to the carrier, under contract of transportation, which would reasonably include freight paid either by the shipper or the consignee, since property under such circumstances at the place of shipment would reasonably be worth the invoice price with freight added. It has been held that such a limitation is void as against public policy in case of loss caused by negligence, on the principle that the effect of the stipulation is not alone to avoid inconvenience and uncertainty in the demand for damages, but to work a reduction in the real loss,[67] although there is authority supported by the majority rule above stated applicable to limitations of liability generally in respect of value, which sustains the opposite view, on the principle that the stipulation is not a limitation of the carrier's liability for negligence.[68] Whether limitations of this kind apply to damages occurring from failure to deliver within a reasonable time is considered infra § 113 c; and their application where the carrier wrongfully sells or converts the goods infra § 115.

§ 103. Limitations of Liability in Respect of Time and Place of Delivery

A carrier may contract against liability for loss resulting from delay not due to its negligence or from leaving goods at a station at which there is no agent.

Although it has been said that a carrier's statutory duty to transport within a reasonable time cannot be varied by contract,[69] it is generally held permissible for the carrier to contract against liability for loss or injury resulting from delay in transportation, where the delay is not due to the negligence of the carrier or its servants,[70] as by contracting for

63. Tex.—Galveston, etc., R. Co. v. Carmack, Civ.App., 176 S.W. 158

"In 10 Corpus Juris, 57, it is said: 'Before the enactment of the Carmack Amendment the greatest confusion existed as to whether a limitation of the carrier's liability for loss or injury to a specified value was valid in case the shipment was lost or injured by reason of the negligence of the carrier. . . . The effect of the Carmack Amendment is, of course, to make the rule uniform in all jurisdictions of the United States, so far as interstate shipments are concerned, and to render valid a limitation of the character under consideration, whether the loss or injury was due to the carrier's negligence or not.' Furthermore, it is said that even in states where such a contract is held void under statutes prohibiting carriers from limiting their common-law liability, 'a contract for an interstate shipment, made in a state where such a statute is in force, is valid under the Carmack Amendment, inasmuch as the decisions of the federal courts prior to the amendment held such contracts valid.' Our own Supreme Court has also directly upheld the validity of such agreement"—Crenshaw Bros. & Saffold v. Southern Pac. Co., 181 P. 252, 254, 40 Cal.App. 603, amendment of remittitur and correction of judgment denied 183 P. 208, 42 Cal.App. 44, certiorari denied 40 S.Ct. 14, 250 U.S. 669, 63 L.Ed. 1198.

64. Md.—Fahey v. Baltimore & O. R. Co., 114 A. 905, 139 Md. 161.

Foreign shipment

The intention as to destination with which goods are delivered and accepted for conveyance by a carrier being the determining factor in deciding whether a consignment should be classified as foreign or interstate commerce, where a bill of lading described a consignment of grain as being for export, and, from an agreed statement of facts, it appeared that each carload, at the time it was shipped and at the time it was destroyed in transit, was intended for transportation by railroad to Baltimore, where it was to be unloaded into the carrier's elevators and thereafter loaded into a vessel for transportation to a point in Europe, the shipments were in the course of transportation to a nonadjacent foreign country at the time of their destruction, so that a stipulation in the bills of lading, limiting the carrier's liability to the value of the grain at the time and place of shipment, was not contrary to the provision of the Federal Act to Regulate Commerce and its amendments, Comp.St. § 8604a, prohibiting stipulations against recovery of less than the full amount of the actual loss or damage to property in transit from one state to another, or for export to an adjacent foreign country, nor did the purchase of such bills of lading by plaintiffs while the grain was in transit, although it affected the title thereto, make any change in its movement or destination or in any of its commercial characteristics.—Fahey v. Baltimore & O. R. Co., 114 A. 905, 139 Md. 161.

65. Ala.—Davis v. Zimmern, 99 So. 307, 211 Ala. 63.

66. Minn.—Shea v. Minneapolis, etc., R. Co., 65 N.W. 458, 63 Minn. 228.
Mo.—Horner v. Missouri Pac. R. Co., 70 Mo.App. 285.

67. Pa.—Jakeway & Tyrrell v. Lehigh Valley R. Co., 120 A. 820, 277 Pa. 236.
10 C.J. p. 177 note 60.

68. Neb.—Bowman-Kranz Lumber Co. v. Bush, 176 N.W. 91, 104 Neb. 165.
10 C.J. p. 177 note 61.

69. Tex.—Texas & P. Ry. Co. v. Bufkin, Civ.App., 46 S.W.2d 714, error dismissed.

70. Fla.—American Ry. Express Co. v. Johnson, 100 So. 743, 744, 87 Fla. 451.
10 C.J. p. 179 note 71.

exemption from liability for loss from a specified cause,[71] and although the contrary rule prevailed under the first Cummins Amendment,[72] the right of the carrier to limit its liability in this regard is not affected by the Carmack or the second Cummins Amendment.[73] However, in accordance with the general principles already stated supra § 99, a carrier cannot in any event limit its liability for delay resulting from its own negligence or the negligence of its agents or servants,[74] and this rule also applies under the Carmack and Cummins Amendments as well as at common law.[75] It is especially applicable where there is a legislative declaration as to when a common carrier shall be liable for delay; this liability cannot be abridged by special contract.[76] So, a contract limiting liability for delay is inoperative where the shipper is induced to enter into such contract by the false representations of the carrier's agent.[77]

A carrier may stipulate in its bill of lading that property destined to, or taken from, a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at the owner's risk after it is unloaded from, or until it is loaded in, cars or vessels, and that when received from, or delivered on, private or other sidings or wharves it shall be at the owner's risk until the cars are attached to, and after they are detached from, trains.[78] Such a stipulation, as shown infra § 112 b, does not undertake to limit the carrier's liability resulting from its own negligence or the negligence of its agents and servants, and it is a reasonable restriction of the carrier's liability.[79] Moreover, the view has been taken that the stipulation does not limit the carrier's liability as a common carrier, but so far as it relates to the carrier's receipt of the goods merely defines the circumstances under which delivery for shipment and acceptance by the carrier shall be understood as having taken place between the parties, and hence is not a violation of the first Cummins Amendment.[80]

§ 104. Limitation or Release of Damages Occurring Prior to Execution of Contract

A contract releasing or limiting liability for damages already accrued without any new consideration is invalid.

Although such an agreement has been held valid if supported by a valuable consideration,[81] a contract releasing or limiting the liability of a carrier for damages already accrued, without any new consideration therefor, is void;[82] and, as stated infra

"The common carrier, of course, is liable in any case for damages resulting from its own negligence, but he may by contract protect himself from the hardship and injustice of a rule of law which requires him to make delivery safely and expeditiously of goods accepted for transportation, whether or not it is possible to do so by the use of all diligence and every agency available to him."—American Ry. Express Co. v. Johnson, supra.

71. U.S.—American Ry. Express Co. v. Ewing Thomas Converting Co., C.C.A.Pa., 292 F. 335.

Shopmen's strike

If, due to shopmen's strike and without carrier's negligence, it had reason to believe there would be delay in transporting live stock, carrier had right to protect against such contingency by contract, since it could have refused to accept shipment for failure to comply with a reasonable requirement in relation thereto, provided strike could be considered as cause for unavoidable delay.—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo.App. 314.

72. Mo.—Frawley v. Atchison, T. & S.F.R. Co., 299 S.W. 93, 220 Mo.App. 1189.

73. Mo.—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo.App. 314.
10 C.J. p 179 note 72.

74. U.S.—Boston & M. R. R. v. Piper, 38 S.Ct. 354, 246 U.S. 439, 62 L.Ed. 820, affirming Piper v. Boston & M. R. R., 97 A. 508, 90 Vt. 176
Ga.—Seaboard Air Line Ry. Co. v. Pruitt, 102 S.E. 182, 24 Ga.App. 748
10 C.J. p 159 note 14 [b], p 179 note 74, p 296 note 50.

75. Mo.—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo.App. 314.
10 C.J. p 179 note 75.

76. Mont.—Nelson v. Great Northern R. Co., 72 P. 642, 28 Mont. 297.

77. Mo.—Hamilton v. Wabash R. Co., 80 Mo.App. 597.
10 C.J. p 179 note 77.

78. Ark.—Chickasaw Cooperage Co. v. Yazoo & M. V. R. Co., 215 S.W. 897, 141 Ark. 71.
N.Y.—Siebert v. Erie R. R., 163 N.Y.S. 111.
Pa.—Atlantic Refining Co. v. Pennsylvania R. Co., 113 A. 570, 270 Pa. 415.
Vt.—Charles Bianchi & Sons v. Montpelier & W. R. R. Co., 104 A. 144, 92 Vt. 319.
W.Va.—McClure v. Norfolk & W. Ry. Co., 98 S.E. 514, 83 W.Va. 473.
Wis.—Ashton v. Chicago & N. W. Ry. Co., 225 N.W. 328, 198 Wis. 618.

No building or agent

A carrier may contract that goods destined for a station at which there is no building or agent, shall be unloaded there at owner's risk.—Allam v. Pennsylvania R. Co., 38 A. 709, 183 Pa. 174, 39 L.R.A. 535—10 C.J. p 179 note 80.

79. W.Va.—McClure v. Norfolk & W. Ry. Co., 98 S.E. 514, 83 W.Va. 473.

80. Ark.—Chickasaw Cooperage Co. v. Yazoo & M. V. R. Co., 215 S.W. 897, 141 Ark. 71.

81. Mo.—Coleman v. Hines, App., 217 S.W. 602.

Breach of common-law duty

That the shipper of live stock bottoms his cause for damages on breach of the carrier's common-law duty to furnish cars on reasonable notice does not prevent the consequences of an agreement, supported by valuable consideration, whereby such damages are waived.—Coleman v. Hines, Mo.App., 217 S.W. 602.

82. Mo.—Thee v. Wabash Ry. Co., 233 S.W. 959, 208 Mo.App. 200.
10 C.J. p 179 note 82.

Prior independent contract

Where a station agent's oral contract with a stock shipper to furnish cars was breached by the carrier, and the shipper subsequently entered into a written contract for shipment whereby he released all claims by

§ 112 b, stipulations in a contract releasing or limiting liability will not ordinarily be construed to exempt the carrier from damages which have accrued to the shipment before the contract was entered into. It is unreasonable to require a shipper to release the carrier from a liability already accrued on account of negligence or failure to perform a duty owing to shippers,[83] and while it has been said that a separate consideration is necessary to render a contract of this character valid,[84] the view has been taken that it would be violative of the policy declared by the federal statute regulating interstate commerce to permit a carrier to violate its duty and to contract against liability therefor no matter for what consideration.[85] Furthermore, it has been held that a contract of this character, in so far as interstate shipments are concerned, involved a discrimination in contravention of the Elkins Act and was void.[86]

§ 105. Limiting Liability to That of Warehouseman or Forwarder

A carrier may by contract limit its liability to that of warehouseman after the arrival of the goods at destination if they are not removed within a reasonable time, but cannot change its liability to that of forwarder only.

It has been held that it is competent for the carrier to stipulate in the shipping contract that it will be liable for goods only as warehouseman after their arrival at destination if not removed within a specified time after notice,[87] and in case of failure to remove within the specified time the carrier, in conformity with the rules, stated infra § 157, relating to the nature and extent of the carrier's liability as a warehouseman, is liable only for negligence.[88] On the other hand, it has been held that such a provision does not change the established rule that, where the goods are not accepted, the liability of the carrier as carrier under the Carmack and first Cummins amendments does not cease until the expiration of a reasonable time for the removal of the goods after the giving of the notice to the party entitled to receive them.[89] A provision for terminating the carrier's liability as such immediately on the arrival of the shipment at its destination is subject to the requirement which the law, from public

reason of any prior verbal contract, such release did not affect the cause of action on the oral contract, that being a different contract on which a right of action had already accrued—Thee v. Wabash Ry. Co., 233 S.W. 959, 208 Mo.App. 200—10 C.J. p 179 note 82 [a].

83. Ark.—St. Louis, etc., R. Co. v. Pearce, 101 S.W. 763, 82 Ark. 339.

84. Ark.—St. Louis, etc., R. Co. v. Pearce, supra
10 C.J. p 179 note 84.

85. Tex.—Fort Worth & R. G. Ry. Co. v. Burns, Civ.App., 242 S.W. 295.

Delay in furnishing cars

An interstate shipper did not waive right to damages for delay in furnishing stock cars by a provision in the subsequent bill of lading that all prior contracts relating to the manner of receipt or transportation of the live stock described herein, or furnishing cars therefor, are hereby waived and merged in this agreement, it not being within the power of the carrier under the Carmack Amendment to make a contract exempting it from liability for damages resulting from its own negligence or unlawful act in the handling of interstate business—Howell v. Hines, 249 S.W. 924, 298 Mo. 282.

86. Iowa.—Stewart v. Chicago, etc., R. Co., 151 N.W. 485, 172 Iowa 313.

87. D.C.—Peavey v. Philadelphia, B. & W. R. Co., 277 F. 333, 51 App.D.C. 127
10 C.J. p 180 note 87, p 188 note 85 [a].

88. Ga.—Central of Georgia Ry. Co. v. Owens, 110 S.E. 339, 28 Ga.App. 140.
10 C.J. p 180 note 88.

89. Va.—New York, P. & N. R. Co. v. Chandler, 106 S.E. 684, 129 Va. 695.

Cases distinguished

"It is argued that this identical provision in a bill of lading was held valid and binding in the case of Southern Ry. Co. v. Prescott, S.C., 36 S.Ct. 469, 240 U.S. 632, 60 L.Ed. 836, and that therefore it should be held by us as fixing the character of the liability of the terminal carrier in this case as that of a warehouseman after the expiration of 48 hours after both Chandler and De Wald were notified of the arrival of the goods at destination. And the discussion by the Interstate Commerce Commission, in the Matter of Bills of Lading, decided April 14, 1919, 52 Interst. Com. Com'n R. 671, at pages 696, 700, 701, and 712, is also relied upon. But neither the Supreme Court decision nor the discussion of the Interstate Commerce Commission referred to sustains the position that the clause in the bill of lading in question is applicable or binding in cases of interstate shipments, when the relationship of shipper and carrier has not been terminated by the expiration of a reasonable time for the removal of the goods after the giving of the notice to the party entitled to receive them. In the Prescott Case it developed in evidence on the trial that the consignee accepted the goods, took away a portion of them, and left the residue merely for his convenience until he could call for them, and, as stated in the opinion of the court: 'At the close of the testimony the plaintiff withdrew his causes of action against the defendant as a common carrier . . . and the case went to the jury solely with respect to the liability of the defendant as warehouseman.' The loss in the case was occasioned by fire while the goods remained in the custody of the railroad company in the admitted capacity of warehouseman. And, as clearly appears from the opinion of the court in the Prescott Case, and from what is said with respect to that case and other cases by the Interstate Commerce Commission in its report in the Matter of Bills of Lading, 52 Interst. Com. Com'n. R. at pages 696 to 700, inclusive (referred to at page 712), the Prescott Case has not changed the established rule that when the goods are not accepted, the liability of the carrier, as carrier, under the Carmack Amendment, does not cease until the expiration of a reasonable time for the removal of the goods after the giving of the notice to the party entitled to receive them. And the Interstate Commerce Commission in its said report unquestionably recognizes that such rule was in force as late as April 14, 1919, unaffected by the clause in bills of lading which is drawn in question in the case before us, notwithstanding the Prescott Case, which is expressly referred to and discussed in such report."—New York, P. & N. R. Co. v. Chandler, 106 S.E. 684, 693, 129 Va. 695.

policy, injects into the agreement, that the responsibility of the common carrier, as such, shall continue until a reasonable time and opportunity has been allowed the consignee for receiving the goods.[90] There are decisions, however, even in jurisdictions where liability of the carrier as such continues until there has been a reasonable time for removal of the property, which hold that the carrier may stipulate that its liability as such shall terminate and its liability as warehouseman begin on the arrival of the property at its destination, provided there is a consideration for the contract.[91] So, it has been held that a common carrier may contract that it will not be liable, except as warehouseman, while the property awaits further conveyance by a connecting carrier,[92] and that an express company may limit its liability for packages received to be shipped C. O. D to that of warehouseman while holding the packages for collection.[93]

A common carrier cannot divest itself of its obligation as such and by stipulation in a contract of shipment change its liability to that of a forwarder only.[94] Where the law has affixed to a company the status of common carrier, this status is not affected by an agreement of the parties that they are not carriers but only forwarders.[95] A clause in a receipt given by a forwarding company, "Claim for any loss or damage must be presented within thirty (30) days from date of arrival of shipment at destination," etc, referred to claims for loss or damage while the goods were in transit due to some fault of the railroad company, and was not intended to cover a claim for damages due to the forwarder's failing to withhold the goods from shipment on the shipper's order.[96]

§ 106. Exempting Carrier from Liability as Warehouseman

Examine Pocket Parts for later cases. See also supra § 105, and infra §§ 156, 157.

§ 107. Limitation of Liability for Injuries to Perishable Goods by Heat

A carrier may limit its liability for damages caused by heat.

A contract exempting the carrier from liability for damages to perishable goods caused by heat is not unreasonable nor against public policy and will protect the carrier from liability for loss so caused, provided the carrier is itself free from negligence.[97] That such a contract will not be construed so as to protect the carrier from the consequences of its own negligence is shown infra § 112 b.

§ 108. Limiting Liability for Goods Not Sealed and Marked, or Not Packed According to Requirements

Unless prohibited by statute a carrier can relieve itself from liability for loss of goods not sealed and marked or not packed according to regulations.

While such a provision is permissible in the absence of a prohibitory statute,[98] a stipulation in a receipt relieving a carrier from liability for loss of money, jewelry, etc, unless separately packed, sealed, and marked as such, and so described, is an attempt to limit the common-law liability of the carrier and in contravention of a statute forbidding common carriers to limit their common-law liability by inserting exceptions in the bill of lading or memorandum given on receipt of the goods for transportation, or in any manner whatever, and declaring void any stipulation made in contravention of such statute.[99]

§ 109. Requiring Shipper to Insure

The carrier cannot require the shipper to insure the goods carried.

A method sometimes resorted to for the purpose of avoiding liability for negligence is that of requiring the shipper to take insurance on the property as against loss. It is true, as shown infra § 399,

90. Ala.—Tallassee Falls Mfg. Co v. Western R Co, 29 So. 203, 128 Ala 167

91. Mo.—Scott County Milling Co v. St Louis, etc, R Co., 104 S W 924, 127 Mo App 80.

92. Mass.—Washburn-Crosby Co v Boston, etc, R Co, 62 N.E. 590, 180 Mass. 252.

93. Ark.—Pacific Express Co v. Wallace, 29 S W 32, 60 Ark. 100.

94. Cal.—Hooper v. Wells, 27 Cal. 11, 85 Am D. 211.
10 C J p 180 note 97.

95. D.C.—Galt v. Adams Express Co, 11 D C 124, 48 Am.R. 742

96. Cal.—Heath v Judson Freight Forwarding Co, 190 P. 839, 47 Cal. App 426

97. Ill.—Mittenthal v. Michigan Cent R Co, 176 Ill App. 77.
10 C J. p 180 note 99

98. Pa.—Kirwan v Railway Express Agency, 179 A. 924, 118 Pa.Super. 431

Enumeration in receipt

Clause in uniform express receipt, that "unless caused by its own negligence or that of its agents, the company shall not be liable for . . loss of . . . jewelry, precious stones . . . unless such articles are enumerated in receipt," is not invalid as inconsistent with the rule that carrier could not exempt itself from liability for negligence of itself or employees, since the carrier is entitled to compensation proportionate to the risk and to protection from fraud by reasonable regulations.—Kirwan v. Railway Express Agency, 179 A. 924, 118 Pa Super. 431.

99. Tex.—Head v Pacific Express Co., Civ App., 126 S.W. 682.

that a contract of insurance taken by the carrier on goods in its custody and a stipulation in the bill of lading by which the carrier shall have the benefit of any insurance held by the shipper are valid. To require as a condition of acceptance of the goods that the shipper shall insure them against all loss, however, is to throw the burden of liability for the carrier's negligence on the shipper, and such a contract is invalid;[1] but it has been held, in a case governed by the law of England, that a clause exempting the carrier from liability for any damage capable of being covered by insurance is valid.[2]

§ 110. Limitations Placing Burden of Proving Negligence on Shipper

Authorities differ as to whether the parties may by contract stipulate that the burden of proving negligence shall rest on the shipper.

According to some decisions, while a carrier cannot contract against its own negligence, it may by special contract place the burden of proving negligence on its part on the shipper,[3] but there is authority to the contrary,[4] it being held that such a provision is, in practical effect, an effort by the carrier to exempt itself from liability for its negligence, thus working an injustice to the shipper that the Interstate Commerce Act and its amendments never contemplated.[5] So, it has been held that a stipulation against the presumption of negligence which would arise from proof of certain facts and prescribing the character of proof necessary to fix liability for loss of the goods on the carrier is unreasonable as an abrogation of the rules of evidence, and will not be enforced;[6] and that a stipulation in regard to the amount of proof required in order to fix the carrier's liability is invalid.[7] As to the burden of proving negligence generally see infra § 254.

§ 111. Limiting Liability for Mental Anguish

Under the Carmack amendment a carrier cannot limit its liability for special damages for mental anguish caused by delay in delivery.

While it is settled, as stated supra § 97 b, that the Carmack amendment does not prohibit the carrier from limiting its liability for loss or damage to the property shipped, a carrier cannot thereunder limit its liability for special damages by reason of mental anguish sustained by plaintiff as a result of the carrier's delay in delivery.[8]

§ 112. Construction of Contracts Limiting Liability

a. General rules of construction
b. Special applications of rules

a. General Rules of Construction

Contracts limiting liability are construed most strongly against the carrier; and other general rules of construction are applicable.

While stipulations for limited liability ought not to be wholly frittered away by an adherence to the letter of the contract in obvious disregard of its intent and spirit,[9] in construing an agreement relied on as limiting the carrier's liability, words and phrases which are susceptible of different meanings will be construed most strongly against the carrier and in favor of the shipper, the reason being that restrictions of the carrier's liability in contracts such as receipts or bills of lading, drawn up and executed by it, are for its benefit and are interposed for the purpose of escaping a liability which would otherwise be imposed by law.[10] Accordingly, where there are two inconsistent provisions in a contract,

1. Iowa.—Hartford Fire Ins. Co v. Payne, 203 N.W. 4, 199 Iowa 1008, 39 A.L.R. 1109
10 C.J. p 181 note 5.
"Any stipulation which requires the shipper to procure insurance for the benefit of the carrier in case of loss is void"—Nebraska Co-op. Creameries v Des Moines Transp. Co, D.C Iowa, 16 F.Supp. 853, 856.

Interstate shipment from Nebraska
Shipper suing truck carrier for loss of cargo en route to New York from Nebraska could not claim that oral agreement requiring shipper to procure insurance and limiting carrier's liability was void under Nebraska statutes, since alleged attempt of statutes to limit liability in shipment would be direct burden on interstate commerce and would be invalid in so far as shipment involved was affected.—Nebraska Co-op. Creameries v Des Moines Transp. Co, D.C Iowa, 16 F.Supp. 853

2. U.S.—The Titania, D.C N.Y., 19 F. 101.

3. N.J.—Fry v American Ry. Express Co, 142 A. 568, 6 N.J.Misc. 720
10 C.J. p 181 note 8.

Carmack amendment
Requirement in contract for interstate shipment of horses that shipper prove carrier's negligence as condition to recovery for loss, injury, damage, or delay was held binding under the Carmack amendment as amended.—Fry v. American Ry Express Co, 142 A. 568, 6 N.J.Misc 720.

4. La.—Coustaline v. Louisiana Ry. & Nav. Co, 98 So. 81, 154 La. 667.

Risk of defect in equipment
A clause in a bill of lading requiring the shipper to inspect the carrier's equipment and assume the risk of defects therein, is invalid as shifting the burden of proof from the carrier to the shipper.—Coustaline v Louisiana Ry. & Nav. Co, 98 So. 81, 154 La. 667

5. Ill.—Gardner v Railway Express Agency, 274 Ill.App. 636.

6. Tex.—Southern Pac. Co. v. Phillipson, Civ.App., 39 S.W. 958

7. Mass.—Cox v. Central Vermont R. Co, 49 N.E. 97, 170 Mass. 129.
10 C.J. p 181 note 10.

8. N.C.—Byers v Southern Express Co., 81 S.E. 741, 165 N.C. 542.
10 C.J. p 181 note 12.

9. U.S.—The Queen of Pacific, Cal., 21 S.Ct. 278, 180 U.S. 49, 45 L.Ed. 419.

10. U.S.—Inland Waterways Corpo-

the law will favor that which tends the least to diminish the carrier's common-law liability,[11] and a specific clause imposing common-law liability on the carrier for loss of certain goods from particular causes takes effect to the exclusion of general clauses containing matters of general exemption.[12]

The rule of ejusdem generis applies, so that where the contract stipulates against liability for losses resulting from certain specified causes and this specification is followed by more general words of exemption, the latter are to be construed as embracing only such causes as are ejusdem generis with those specifically named, where the contrary is not made clearly to appear.[13]

A provision in one of two contracts of shipment signed by the shipper to the effect that any question arising under it shall be determined by the law of a certain state does not govern in the construction of the other contract.[14]

Operation and effect of contracts see infra § 113.

b. Special Applications of Rules

General rules of construction have been applied to particular limitations, as well as to many words and phrases contained therein. Such limitations will not be construed to protect the carrier from its own negligence; nor, in general, will they be construed to release liability for damages that accrued before the contract of carriage was entered into.

The general rules of construction here under consideration have been applied in a great variety of cases involving a construction and application of particular specifications of losses for which the carrier was not to be held liable, such as cases where the stipulation was for exemption from liability for losses due to accidents to machinery,[15] climatic conditions,[16] delay in transportation,[17] leakage and

ration v. Hallet & Carey Co., C C A Minn., 52 F.2d 13

Mich.—Mosier v. American Ry Express Co., 178 N.W. 81, 211 Mich. 19.

Miss.—Illinois Cent. R. Co. v. Shaw, 90 So. 629, 128 Miss. 9.

N.J.—Reich v. McGill, 196 A. 651, 119 N.J. Law 358.

N.Y.—Chenango Textile Corporation v. Willock, 288 N.Y.S. 270, 247 App. Div. 638.

Pa.—Atlantic Refining Co. v. Pennsylvania R. Co., 113 A. 570, 270 Pa. 415.

Tex.—Gulf, C. & S. F. Ry. Co. v. Harrell, Civ. App., 270 S.W. 187.

10 C.J. p. 181 note 16

"All live stock contracts must be construed liberally in favor of the shipper against the carrier"—Thee v. Wabash Ry. Co., 233 S.W. 959, 961, 208 Mo. App. 200.

Corpus Juris is cited with approval in McElwain v. Union Pac. R. Co., 163 N.W. 845, 101 Neb. 484.

11. N.H.—Bernardi Greater Shows v. Boston & M. R. R., 165 A. 124, 86 N.H. 146.

10 C.J. p. 181 note 16 [b].

Conflicting theories

A clause in a contract that railroad would transport a show, perform switching services, and place cars for loading and unloading, nullified a subsequent clause, framed on a distinct and conflicting theory, attempting to make the show the hirer of motive power and master of railroad employees and to relieve railroad of liability for their negligence—Bernardi Greater Shows v. Boston & M. R. R., 165 A. 124, 86 N.H. 146

12. U.S.—Texas, etc., R. Co. v. Callendar, N.Y., 98 F. 538, 39 C.C.A. 154, affirmed 22 S.Ct. 257, 183 U.S. 632, 46 L.Ed. 362

10 C.J. p. 183 note 54 [c].

13. Mich.—Hawkins v. Great Western R. Co., 17 Mich. 57, 97 Am.D. 179.

N.Y.—Zimmer v. New York Cent., etc., R. Co., 16 N.Y.S. 631, affirmed 33 N.E. 642, 137 N.Y. 460

Live stock

(1) A carrier is liable for loss or injury not occasioned by or due to some act or fault of the owner, or to a cause inherent in the animal shipped, regardless of provision of contract that it should not be liable for the conduct or acts of the animals to themselves, or each other, such as kicking, or smothering, or damage from condition of the animals themselves—Alexander v. American Ry. Express Co., 193 N.W. 560, 195 Iowa 1155.

(2) A provision in a contract for the shipment of stock exempting the carrier from liability for loss resulting from the acts or nature of the animals or from any cause whatever except the negligence of the carrier and its employees was not intended as a blanket release from loss from any cause whatever—Ruebel Bros. v. American Express Co., 180 N.W. 658, 190 Iowa 600

14. Mass.—Brockway v. American Express Co., 50 N.E. 626, 171 Mass. 158.

10 C.J. p. 182 note 21.

15. U.S.—Fairbank v. Cincinnati, etc., R. Co., Ohio, 81 F. 289, 26 C.C.A. 402, reversing, C.C., 66 F. 471.

10 C.J. p. 186 note 58.

16. Ill.—Chicago, etc., R. Co. v. Davis, 42 N.E. 382, 159 Ill. 53, 50 Am.S.R. 143.

10 C.J. p. 186 note 59.

17. **Causes beyond carrier's control**

A contract providing for carriers' nonliability for injury to stock "for delay caused by stress of weather, by obstruction of tracks, by riots, strikes, or stoppage of labor or from causes beyond their control," did not include an injury resulting from the derailing of cars, the latter phrase referring only to the word "delay."—Slider v. Pere Marquette R. Co., 161 N.W. 961, 194 Mich. 581.

Delay not due to negligence

Under stipulation in bill of lading providing that, except in cases of negligence approximately contributing thereto, no carrier in possession of any live stock should be liable for any delay caused by strikes, etc., carrier had right to show that delay to intrastate shipment of live stock was not caused by its negligence.—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo. App. 314.

Delay of live stock

Although a provision in a contract for the shipment of live stock, to the effect that, in the event of any unusual delay owing to the carrier's negligence, the shipper shall accept as full compensation the amount expended in the purchase of food and water, has, as shown infra § 113 b, been held invalid as a contract exempting the carrier from liability for negligence, it has also been held that such a provision does not prevent recovery in a case where the shipper during the period of delay was unable to obtain food and water, and in consequence of the delay some of the cattle died, but only contemplates a case where the shipper can feed and water the cattle during the delay, and thereby save them, and does so—Galloway v. Erie R. Co., 102 N.Y.S. 25, 116 App. Div. 777, affirmed 84 N.E. 1113, 192 N.Y. 545.

breakage,[18] fire,[19] floods or fire,[20] unavoidable dangers and accidents,[21] robbery,[22] strikes,[23] "or in any way."[24] So, limitations of liability as dependent on the time or place of loss have been construed and applied.[25] Where a shipper of freight under a limited liability contract makes a new contract divert-

Duty to re-ice shipment

A stipulation exempting a carrier from liability for delay in transportation does not relieve it in case of delay from an obligation assumed by the carrier to re-ice the shipment adequately from the point of shipment to destination—Geraty v. Atlantic Coast Line R. Co., 62 S.E. 444, 81 S. C. 367.

18. U.S.—The Bellona, D.C.N.Y., 3 F.Cas.No.1,277, 14 Ben. 503
Conn.—Coupland v. Housatonic R. Co., 23 A. 870, 61 Conn. 531, 15 L.R.A. 534.
10 C.J. p. 186 note 61.

19. Ky.—Merchants' Dispatch Transp. Co. v. Hoskins, 41 S.W. 31, 44 S.W. 362, 19 Ky.L. 799.
10 C.J. p. 186 note 62.

20. N.Y.—Burke v. Erie R. Co., 119 N.Y.S. 309, 134 App.Div. 413.
10 C.J. p. 186 note 63.

21. Ind.—Walpole v. Bridges, 5 Blackf. 222.
N.M.—Seligman v. Armijo, 1 N.M. 459.
Ohio—Union Mut. Ins. Co. v. Indianapolis, etc., R. Co., 1 Disn. 480, 12 Ohio Dec., Reprint, 745.
10 C.J. p. 186 note 64.

22. Ala.—Louisville, etc., R. Co. v. Dunlap, 41 So. 826, 148 Ala. 23.
10 C.J. p. 186 note 65.

23. Fla.—American Ry. Express Co. v. Johnson, 100 So. 743, 87 Fla. 451

Existing strike

A clause in a shipping contract, exempting carrier from liability on account of strikes, carries on its face notice to shipper that carrier would not be liable for delays in furnishing cars caused by a strike which had been in effect three months preceding the time of making the contract, and exempting clause did not limit liability for delays in furnishing cars which might have occurred in the future.—St. Louis-San Francisco Ry. Co. v. Watts, 271 S.W. 464, 168 Ark. 804.

"Outlaw" strikes

Contract limiting interstate carrier's liability for delays in transportation due to "strikes," includes all strikes whether called "outlaw" or strikes not called officially by the organization or labor union of which the strikers are members, or regularly called and organized strikes if it is so general, and affects the facilities of the carrier so as to render impossible prompt and safe delivery.—American Ry. Express Co. v. Johnson, 100 So. 743, 87 Fla. 451.

24. N.Y.—Zimmer v. New York Cent., etc., R. Co., 16 N.Y.S. 631, reversed on other grounds 33 N.E. 642, 137 N.Y. 460
10 C.J. p. 186 note 66

25. La.—W. H. & C. B. Hodges v. Louisiana Ry. & Nav. Co., 156 So. 26, 180 La. 3
10 C.J. p. 186 note 67.

Stations without regular agent

(1) Under a provision in a bill of lading, that property destined to, or taken from, a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from, or delivered on, private or other sidings, wharves, or landings, shall be at owner's risk until the cars are attached to, and after they are detached from, trains, neither clause has application, except in cases where it appears the loss of goods shipped occurred at stations, wharves, or landings at which the carrier did not maintain a regularly appointed agent—McClure v. Norfolk & W. Ry. Co., 98 S.E. 514, 83 W.Va. 473—10 C.J. p. 186 note 67 [f].

(2) Thus, a bill of lading containing the provision under consideration did not exempt carrier from liability for loss of freight by fire while the loaded cars were on a private siding on carrier's belt line about three-quarters of a mile from a station at which an agent was maintained—McClure v. Norfolk & W. Ry. Co., supra.

(3) So, where the shipper without compensation discharged the agent's duties at the station, the clause was held inapplicable—W. H. & C. B. Hodges v. Louisiana Ry. & Nav. Co., 156 So. 26, 180 La. 3.

(4) A clause in a through bill of lading, providing that goods "destined to or taken from a station wharf or landing, at which there is no regularly appointed agent," should be held at owner's risk while in the yard after arrival, did not apply to city yards at which the company had a station—St. Louis-San Francisco Ry. Co. v. Solomon & Wineberg, 256 S.W. 862, 161 Ark. 552.

(5) Where goods had been loaded in a railroad car on the shipper's private siding, issuance of the bill of lading by the carrier for immediate shipment constituted a delivery of the goods to the carrier, but was not sufficient to make the car part of a train within the provision of the bill of lading imposing liability only after the car had been attached to a train—Atlantic Refining Co. v. Pennsylvania R. Co., 113 A. 570, 270 Pa. 415

"Private or other sidings"

Under a bill of lading providing that property, when received from, or delivered on, "private or other sidings," should be at owner's risk until the cars were attached to, and after they were detached from, trains, an additional track on the carrier's right of way, parallel with and connected with its main track by two switches, and closed at each end by a bumper, used for the storage of cars and for making up trains, and for the convenience of warehouses fronting thereon, was a "siding," and, although not a private siding, was within the term "other sidings," as that term was used to make conditions comprehensive, so as to apply to all sidings whether public or private—Bers v. Erie R. Co., 163 N.Y.S. 114, 176 App.Div. 241.

"On or about" leased premises

Cars delivered on tracks alongside dock space leased by shipper were not "on or about" leased premises, within clause in lease, so as to exempt carrier from liability for loss by fire.—Pillsbury Flour Mills Co. v. Erie R. Co., 216 N.Y.S. 486, 127 Misc. 466, affirmed 222 N.Y.S. 882, 230 App.Div. 826, affirmed 162 N.E. 560, 248 N.Y. 649, certiorari denied Erie R. Co. v. Pillsbury Flour Mills Co., 49 S.Ct. 80, 278 U.S. 645, 73 L.Ed. 559.

Notice of arrival

(1) Where a bill of lading provides "for loss, damage, or delay, caused by fire occurring after 48 hours (exclusive of legal holidays) after notice of arrival of the property at destination has been duly sent or given, the carrier's liability shall be that of warehouseman only," the 48 hours does not begin until the consignee receives the notice, and a request of the carrier by a consignee to mail to him the notice of the arrival of goods provided for does not make the postal department the consignee's agent for the receipt of the notice—Illinois Cent. R. Co. v. Shaw, 90 So. 629, 125 Miss. 9

(2) It has been held, however, that within the provision of a bill of lading limiting liability to that of a warehouseman after a notice of arrival had been duly sent or given, the expression "duly sent" means sent in a regular and approved manner, so that it is sufficient if notice by a letter stamped and addressed is deposited in the post office, although it was not received. A bill of lading requiring notice of arrival of the goods to be duly sent or given

ing the shipment while the goods are in transit awaiting the shipment, the second contract is ancillary to the first and does not affect the limited liability therein provided.[26]

Particular words and phrases in bills of lading or shipping contracts have received judicial construction, such as "all baggage,"[27] "at the convenience of the company,"[28] "carriages,"[29] "contents and value unknown,"[30] "each horse, mule, etc.,"[31] "go through uncompressed . . . unless compressed . . . in transit at carrier's discretion,"[32] "other animals,"[33] "owner's risk,"[34] "package,"[35] "perishable property,"[36] "weight, contents, packing, marks, and damage,"[37] and "willful misconduct or actual negligence."[38]

Operation and effect of contracts generally see infra § 113.

Limitations as to value of shipment. The rule of strict construction of contracts limiting liability, stated supra this section subdivision a, is applied to contracts containing limitations as to the value of the shipment,[39] but the circumstances and condi-

does not make actual notice necessary, since the words "or given" are qualified by the words "duly sent," and proof of either the due sending of the notice or actual notice is sufficient.—Peavey v. Philadelphia, B & W. R. Co, 277 F. 333, 51 App D C. 127.

(3) Under a bill of lading limiting liability of carrier to that of warehouseman for loss occurring forty-eight hours after notice of arrival and also providing, in another clause, for storage of goods, which, within forty-eight hours after notice of arrival, are not removed by the party "entitled to receive" them, the notice of arrival is to be given to the party "entitled to receive" the goods, which means a party who has an interest in the goods distinct from that of another or forwarding carrier, a steamship company, accepting them for conveyance to their destination, not being such a party in the absence of a showing of its authority to act for the owner in the transaction — Baltimore & O. R. Co. v. Jones & Laughlin Steel Co., 114 A. 730, 138 Md. 604.

26. Wash —Davis v. Northern Pac R. Co., 137 P. 464, 77 Wash. 261.

27. Mass —Dwight v. Brewster, 1 Pick. 50, 11 Am D 133.
10 C J. p 187 note 72.

28. N C —Branch v. Wilmington, etc, R. Co, 88 N.C. 573.
10 C.J. p 179 note 74 [a].

29. Wis —Cream City R Co v. Chicago, etc., R. Co, 23 N.W. 425, 63 Wis. 93, 53 Am.R. 267.
10 C.J. p 187 note 75.

30. Ala —Southern Express Co. v. Crook, 44 Ala. 468, 4 Am.R 140.
10 C J. p 187 note 68.

31. Mo.—Richardson v Chicago, etc., R. Co, 50 S.W. 782, 149 Mo 311.
10 C J. p 187 note 73.

32. N.Y.—D'Utassy v Southern Pac. Co., 161 N.Y S 222, 174 App.Div. 547

Words on face of bill of lading

Where, according to the tariff schedules, a shipper or owner of cotton is not entitled to select the place at which his cotton is to be compressed, the fact that he wrote on the bill of lading that it was to be compressed at a certain place will not relieve the carrier from liability for its loss, under a clause of the bill of lading relieving the carrier from liability for loss of the property while it is stopped and held in transit on the request of the shipper or owner —D'Utassy v. Southern Pac. Co, 161 N Y S. 222, 174 App.Div. 547.

33. Tenn —Nashville, etc, R Co. v Stone, 79 S W 1031, 112 Tenn 348, 105 Am.S R 955
10 C J p 187 note 74.

34. **"Shipper's load and count"**

The phrase, "owner's risk," as used in the phrase, "Shipper's load and count . . . owner's risk," stamped on a bill of lading for a sealed carload shipment, applies to the shipper's load and count and is intended merely to relieve the carrier of liability for the contents of the car as disclosed on the bill and not to make a special contract whereby the carrier is exempted from all liability except for its negligence, which would contravene the first Cummins amendment applicable to the shipment.— Lehigh Valley R Co. v. State of Russia, C C A N.Y, 21 F 2d 396, certiorari denied 48 S Ct. 159, 275 U S. 571, 72 L Ed. 432.

35. Mo —Rosenstein v Missouri Pac. R. Co, 16 Mo App. 225.
10 C J. p 187 note 70.

36. Ill.—Illinois Cent R. Co. v. McClellan, 54 Ill 58, 5 Am.R. 83
10 C J p 187 note 69

37. U S —The Tommy, D C.N Y., 16 F 601
10 C J p 187 note 71

38. Colo —Adams v Colorado, etc, R Co, 113 P 1010, 49 Colo. 475, 36 L R A,N S, 412
10 C J p 159 note 14 [e].

39. Mich —Mosier v American Ry. Express Co, 178 N W 81, 211 Mich 19.
N Y.—Chenango Textile Corporation v Willock, 288 N.Y S. 270, 247 App Div 638.
Tex —Gulf, C & S. F. Ry Co v. Harrell, Civ.App, 270 S.W. 187.

Ambiguous provisions

(1) A receipt for a C O. D shipment stated: "Please Rush. Uniform Express Receipt. The company will not pay over $50 in case of loss or 50 cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared and charges for such greater value paid. Adam Express Co Nonnegotiable Receipt 10-6-1917 Received from Dept of Agriculture, subject to the Classifications and Tariffs in effect on the date hereof, 1 box hog cholera serum. Value herein declared by shipper to be C O. D. fifty-six and 75/100 dollars Consigned to W P. Allen, at Wheeler, Va. Which the company agrees to carry upon the terms and conditions printed on the back hereof, to which the shipper agrees and as evidence thereof accepts and signs this receipt. . . . Note— . . . If the shipper desires to release the value to $50 00 for any shipment of 100 pounds or less, or not exceeding fifty cents per pound actual weight for any shipment in excess of 100 pounds, the value may be released by inserting 'not exceeding $50' or 'not exceeding fifty cents per pound,' in which case the company's liability is limited to an amount not exceeding the value so declared or released." On the back of the receipt was the following material provision: "2. In consideration of the rate charged for carrying said property, which is dependent upon the value thereof and is based upon an agreed valuation of not exceeding fifty dollars for any shipment of 100 pounds or less, and not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared at the time of shipment, the shipper agrees that the company shall not be liable in any event for more than fifty dollars for any shipment of 100 pounds or less, or for more than fifty cents per pound, actual weight, for any shipment weighing more than 100 pounds, unless a greater value is stated herein Unless a greater value is declared and stated herein the shipper agrees that the value of

tions of each particular case must be regarded in the interpretation of such a contract.[40] A notation on a C. O. D. shipment of the amount to be collected by the carrier, not entered in a space left blank for a declaration of value, is not a declaration of value limiting the carrier's liability;[41] and a clause limiting the liability of the carrier to a stipulated agreed value, "on which basis the rate of freight is adjusted," clearly means that a choice of rates was given to the shipper, and that the rate was tied to the release, a lesser rate being charged by virtue of the limiting clause.[42] A limitation of liability as to value at the place of shipment should be construed to mean the value when delivered to the carrier, under contract of transportation, which would reasonably include freight paid either by the shipper or the consignee, since property under such circumstances at the place of shipment would reasonably be worth the invoice price with the freight added.[43] A charge for carting paid by the shipper from the place where he purchased the goods to defendant's freight station is not part of the value within such provision;[44] the words, "place of shipment," mean the city, town, or locality where the shipment originates as contradistinguished from the place of destination, and cannot be construed to mean the actual street or station from which the goods are shipped.[45] Matters relating to the operation and effect of contractual limitations as to the value of the shipment are considered infra § 113 c. Whether or not a contract containing a limitation of liability as to value is one relieving the carrier from the consequences of its own negligence is a question on which the courts are divided, the conflicting views are discussed supra § 102.

Construction limiting liability for negligence not favored In harmony with the rules stated supra § 99 and infra § 113 b, a contract containing valid limitations of the carrier's common-law liability will not be construed so as to protect the carrier from the consequences of its own negligence, or that of its agents or servants,[46] and no arrangement, understanding, agreement, or scheme between the shipper and carrier will be given the effect of relieving the carrier from the consequences of its negligence, since the carrier cannot accomplish by indirection what it cannot directly accomplish by contract.[47]

Applying this rule it has been held that the carrier cannot require the shipper to inspect its own equipment and assume the risks of defect therein.[48] So, a stipulation that the goods are accepted by the carrier at the owner's risk is not to be construed as relieving the carrier from any liability for loss due to negligence;[49] and this rule has been applied to a

the shipment is as last above set out and that the liability of the company shall in no event exceed that value." It was held that the quoted provisions, being ambiguous, did not limit the carrier's liability to the sum of fifty dollars.—Adams Express Co. v. Allen, 100 S.E. 473, 125 Va. 530

(2) A similar uniform express receipt issued by a different express company and accepted by the shipper without reading it, although it did not contain the C. O. D. provision inserted in the receipt in the case last cited, was, under the rule of strict construction as to liability, similarly construed in Mosier v. American Ry. Express Co., 178 N.W. 81, 211 Mich. 19.

(3) Where there was nothing said between shipper and truckman as to the valuation of the goods, or as to terms or conditions of shipment, except as to the consideration, which was based on the size of the package and not on its value, the expression "val $200," in receipt given shipper by truckman, but prepared by shipper, did not limit truckman's liability to two hundred dollars.—Bolton Worsted Mills Co. v. United British Ins. Co., 193 N.Y.S. 688, 118 Misc. 530.

(4) The unintelligible words, "Rel. Val 10.00 per cwt," in a contract of shipment, would not meet statutory demands as to a declaration of value.—Missouri-Kansas-Texas R. Co. v. King, Tex. Civ. App., 265 S.W. 761.

(5) A shipper did not accept a live stock contract of carriage with knowledge of terms creating assent to limitation on value, in view of uncertainty of contract in which the figures "50/100" appeared under the heading "Shipper's declared value."—Murray v. Southern Pac. Co., 296 P. 667, 112 Cal.App. 150.

(6) Other illustrations see 10 C.J. p. 184 note 40 [a].

40. Cal.—Crenshaw Bros. & Saffold v. Southern Pac. Co., 181 P. 252, 40 Cal.App. 603, amendment of remittitur and correction of judgment denied 183 P. 208, 42 Cal.App. 44, certiorari denied 40 S.Ct. 14, 250 U.S. 669, 63 L.Ed. 1198

41. Miss.—American Ry. Express Co. v. Galt, 90 So. 597, 128 Miss. 81, 25 A.L.R. 728.

42. N.Y.—Glanzer v. Cunard S. S. Co., 212 N.Y.S. 500, 214 App.Div. 473.

43. U.S.—The Asuarca, D.C.N.Y., 13 F.2d 222
Cal.—Olcovich v. Grand Trunk Ry. Co. of Canada, 176 P. 459, 179 Cal. 332
Va.—New York P. & N. R. Co. v. Chandler, 106 S.E. 684, 129 Va. 495
10 C.J. p. 185 note 52.

44. N.J.—Blessing v. Central R. Co. of New Jersey, 103 A. 1045, 91 N.J. Law 398.

45. N.J.—Blessing v. Central R. Co. of New Jersey, supra.

46. Pa.—Kirwan v. Railway Express Agency, 179 A. 924, 118 Pa.Super. 431.
Tex.—Chicago, R. I. & G. Ry. Co. v. Pavillard, Civ.App., 187 S.W. 998
10 C.J. p. 159 note 14 [c], p. 182 note 22, p. 183 note 35 [d].

47. Fla.—Louisville & N. R. Co. v. Carr, 81 So. 779, 77 Fla. 469, 5 A.L.R. 102.

Provision in lease of land for elevator

A provision of a lease of land by a carrier to an elevator company that the carrier should not be liable for loss from fire communicated from the elevator to grain on trains, did not relieve the carrier from liability for loss from its own negligence in performing its duties as common carrier.—Millers' Nat. Ins. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 156 N.W. 117, 132 Minn. 151.

48. La.—Coustaline v. Louisiana Ry. & Nav. Co., 98 So. 81, 154 La. 667.

49. N.C.—Parker v. Atlantic, etc., R. Co., 43 S.E. 1005, 131 N.C. 327, 45 S.E. 658, 133 N.C. 335, 63 L.R.A. 827
10 C.J. p. 183 note 24.

stipulation that goods destined to, or taken from, a station or siding where there is no agent of the carrier shall be at the owner's risk after unloading or until loaded or while the cars are not attached to trains,[50] particularly where the provision specifically excepts from the owner's risk the risk of the carrier's negligence[51]

A contract exempting the carrier from liability for loss by fire, although in general valid, will not exempt it from loss by fire due to the failure to use ordinary diligence and care in protecting the goods intrusted to it.[52] A provision which exempts the carrier from liability for loss by fire has no application where goods are lost by fire due to the carrier's own negligence.[53] Furthermore, a provision exempting the carrier from liability for damage from heat applies only in the absence of negligence.[54] A stipulation that the carrier will not be responsible for any loss or deficiency in weight,[55] or a stipulation against liability for leakage or breakage,[56] will not relieve the carrier from liability for losses of this character due to the carrier's negligence; and a rule requiring the shipper to give notice when the contents of the package shipped are fragile is not a limitation against the carrier's negligence,[57] and neither is a provision in a receipt exempting the carrier from liability for the loss of certain articles, unless mentioned in the receipt.[58] The same general rule has been applied to exemption from liability for loss due to other causes, such as vermin,[59] thieves or robbers,[60] accidental decay,[61] natural vice or propensity of animals shipped,[62] or loss of market;[63] or damage by reason of sweating or otherwise,[64] or loss or damage by enemies of the government or from any of the dangers incident to a time of war.[65] Similarly, a stipulation that the carrier shall not be liable for any damage by wet must be construed to mean damage by wet not due to the negligence of the carrier or its servants.[66]

A carrier cannot by a stipulation that it is "not to be responsible except as forwarder" relieve itself from liability for negligence of employees of another carrier by whom the contract for transportation by the first carrier is performed.[67]

A contract limiting the carrier's liability for loss or injury caused by delay in transportation does not exempt the carrier from liability for damage caused by delay, where the damage is the result of the carrier's negligence.[68]

A stipulation exempting the carrier from loss while the property is at the place of transshipment will not relieve the carrier if the loss is occasioned by negligent exposure during delay in transportation.[69]

Whether a contract containing a limitation of liability as to value is one relieving the carrier from the consequences of its own negligence is a question on which the courts are divided. The conflict-

Where negligence limitations allowed

(1) Even in New York where, as shown supra § 99, the doctrine was formerly well settled that a carrier could limit its liability for damages arising from the negligence of itself or its servant provided an express contract was made to that effect, the cases broadly held that the general language in a stipulation such as that referred to in the text was insufficient to limit liability for negligence, under the rule that liability for negligence could be limited only by express provision to that effect.—Canfield v. Baltimore, etc., R. Co., 93 N.Y. 532, 45 Am.R. 268—10 C.J. p 183 note 25.

(2) Notwithstanding the insertion of such clause in the contract of shipment, the carrier was bound to exercise reasonable care and prudence in the transportation.—Canfield v. Baltimore, etc., R. Co., 93 N.Y. 532, 45 Am.R. 268.

50. W.Va.—McClure v. Norfolk & W. Ry. Co., 98 S.E. 514, 83 W.Va. 473

51. Wis.—Ashton v. Chicago & N. W. Ry. Co., 225 N.W. 328, 198 Wis. 618.

52. Ala.—Central of Georgia R. Co. v. Burton, 51 So. 643, 165 Ala. 425
10 C.J. p 157 note 99 [b] (3), p 182 note 23.

53. U.S.—Erie R. Co. v. Star, etc., Milling Co., Ill., 162 F. 879, 89 C.C.A. 569

54. Ill.—Brennan Packing Co. v. Mellon, 252 Ill.App. 522.

55. Man.—Henry v. Canadian Pac. R. Co., 1 Man. 210

56. Ky.—Reno v. Hogan, 12 B.Mon. 63, 54 Am.D. 513.
10 C.J. p 183 note 33

57. Pa.—Bell Telephone Co. v. American Ry. Express Co., 92 Pa.Super. 180.

58. Pa.—Kirwan v. Railway Express Agency, 179 A. 924, 118 Pa.Super. 431—Yaeck v. Adams Express Co., 69 Pa.Super. 143.

59. U.S.—Stevens v. Navigazione Generale Italiana, D.C.N.Y., 39 F. 562.
10 C.J. p 183 note 35 [a].

60. U.S.—The Saratoga, D.C.N.Y., 20 F. 869
10 C.J. p 183 note 35 [c].

61. Colo.—Merchants' Dispatch, etc., Co. v. Cornforth, 3 Colo. 280, 25 Am.R. 757.

N.Y.—Giles v. Fargo, 17 N.Y.S. 476, 60 N.Y.Super. 117.
10 C.J. p 183 note 35 [e].

62. Wis.—Loeser v. Chicago, etc., R. Co., 69 N.W. 372, 94 Wis. 571.
10 C.J. p 159 note 14 [a].

63. N.Y.—Jennings v. Grand Trunk R. Co., 5 N.Y.S. 140, 52 Hun 227, affirmed 28 N.E. 394, 127 N.Y. 438.
10 C.J. p 183 note 35 [f]

64. U.S.—Paturzo v. Compagnie Francaise, D.C.N.Y., 31 F. 611.
10 C.J. p 183 note 35 [b].

65. U.S.—U. S. Express Co. v. Kountze, Neb., 8 Wall. 342, 19 L.Ed. 457
10 C.J. p 183 note 35 [g]

66. Conn.—Mears v. New York, etc., R. Co., 52 A. 610, 75 Conn. 171, 96 Am.S.R. 192, 56 L.R.A. 884.
10 C.J. p 183 note 35 [e].

67. Cal.—Hooper v. Wells, 27 Cal. 11, 85 Am.D. 211.

68. Mo.—Meriwether v. Quincy, etc., R. Co., 107 S.W. 434, 128 Mo.App. 647
Tex.—Texas, etc., R. Co. v. Farrington, Civ.App., 88 S.W. 889.
10 C.J. p 183 note 29.

69. U.S.—Thomas v. Lancaster Mills, Ill., 71 F. 481, 19 C.C.A. 88.

ing views are discussed supra in § 102.

Release of liability for accrued damages. Although the language of a particular contract, viewed in the light of surrounding circumstances, may require a different construction,[70] it is very generally held that stipulations in a contract releasing or limiting liability cannot be construed to exempt the carrier from damages which have accrued to the shipment before the contract was entered into,[71] unless there is a separate consideration for the release.[72] The validity of limitations or releases of damages occurring prior to execution of the contract is treated supra § 104.

§ 113. Operation and Effect of Contracts Limiting Liability

a. In general
b. Limitations as to negligence
c. Limitations as to value

a. In General

A valid contract limiting liability governs the rights of the parties thereto.

Freeing itself by contract from its usual common-law duties does not change the true character of a carrier's employment and it is a public carrier still, with its common-law liability restricted in so far as it may lawfully be restricted by the contract.[73] Where the parties enter into an express contract limiting the liability of the carrier, the contract becomes the rule by which the parties are governed, instead of the general law governing common carriers, if the limitations therein contained are such as the law recognizes as valid,[74] and, if the carrier has not waived or lost the benefit of the limitation under principles discussed infra §§ 115–116, where the damage results from some cause against which the carrier has lawfully contracted, it is not liable.[75] A shipper given an opportunity to ship without lim-

70. Delay in furnishing cars

There being no delay in furnishing cars under the contract under which the shipment was made, the language thereof that the shipper waives and releases all claims arising from, or connected with, the shipment or the arrangements therefor, existing at or before the execution of the contract, including "any delay in the furnishing of cars," relates to prior delay in furnishing them on notice.—Coleman v. Hines, Mo App, 217 S W. 602.

71. Kan—Pletcher v. Chicago, R. I. & P Ry. Co, 177 P. 1, 103 Kan. 834.
10 C J p 185 note 54

Liability limited to time of loading

Where a shipper relying on compliance with his request for cars, placed hogs in carrier's stockyard for interstate transportation, and some died because of failure to furnish cars, and, after remainder were loaded shipper signed bill of lading for transportation of the remaining hogs limiting liability to time when live stock was loaded, he did not waive or release loss of hogs which died prior to the issuance of the bill of lading—Pletcher v. Chicago, R I & P. Ry Co, 177 P. 1, 103 Kan. 834

72. Ark.—St Louis, etc, R. Co v. Jones, 125 S.W 1025, 93 Ark. 537, 137 Am S.R. 99.
10 C.J. p 185 note 55.

73. Ind.—Lake Erie, etc, R Co. v Holland, 69 N E 138, 162 Ind. 406, 63 L R A. 948.
Mo—Kirby v. Adams Express Co, 2 Mo App 369.
10 C J p 187 note 77.

74. D C—Peavey v. Philadelphia, B & W R. Co., 277 F. 333, 51 App D C. 127.
Ill—See Gilbert v. Chicago & A. R Co, 194 Ill App. 481.
Mo—Cudahy Packing Co v Bixby, 205 S W. 865, 199 Mo App. 589, certiorari denied 39 S Ct. 19, 248 U S 577, 63 L Ed. 429
N Y.—Chenango Textile Corporation v. Willock, 288 N Y.S. 270, 247 App Div. 638
10 C J p 187 note 79.

Modification of liability

Provisions of special contract, exempting carrier from liability for injuries to animals due to certain specified causes, did not supersede common-law liability, but merely modified it—Morrow v. Wabash Ry. Co, 276 S.W. 1030, 220 Mo App. 518.

75. U S.—Simmons Hardware Co. v. Southern Ry Co, C C A.Mo, 279 F 929, certiorari denied 43 S Ct 96, 260 U S 739, 67 L Ed. 490—El Paso & Southwestern R. Co. v. U. S, 55 Ct Cl 472.
Ga—Heath v. Sandersville R Co, 98 S E. 92, 23 Ga App 255
La—E. Borneman & Co. v New Orleans, M. & C R Co., 81 So 882, 145 La. 150—Hall v. Houston E & W. T. Ry. Co, 121 So. 769, 9 La App. 577, 582
Mass—Bonfiglio v. New York, N H & H R Co, 198 N.E 236
Miss—Yazoo & M V. R R. Co. v Craig, 79 So 102, 118 Miss. 299, certiorari denied 39 S.Ct 11, 248 U S 573, 63 L Ed 427
Pa—Kirwan v Railway Express Agency, 179 A. 924, 118 Pa Super 431.
Wis—Ashton v Chicago & N. W Ry Co, 225 N W. 328, 198 Wis 618
10 C J p 145 note 11 [b] (4), p 163 note 54 [a]

Loss at siding

(1) Where shipment of ore subject to Interstate Commerce Act was unloaded at sampling works siding, sampled, reloaded, and sealed, there was an initial shipment from siding, so that under uniform bill of lading providing that property received from sidings shall be at owner's risk until the cars are attached to trains, carrier was not liable where metallics were stolen from car before attached to train—Siebert v. Erie R R, 163 N.Y S 111

(2) A railroad company is not liable for loss of plaintiffs' lumber destroyed by fire while on side track of the company at nonagency station unless it was guilty of negligence, regardless of question whether relationship of shipper and carrier was created before fire occurred under bill of lading governing relationship between parties and providing that property taken from station to which there was no regularly appointed freight agent shall be entirely at risk of owner, except in case of carrier's negligence.—Ashton v. Chicago & N W Ry. Co, 225 N.W. 328, 198 Wis. 618.

Condition of animal shipped

An express company is not liable for death of dog from disease common in locality of destination under provisions of bill of lading exempting the carrier from liability for damage resulting from the condition of the animal shipped—Astugue v. American Ry Express Co., 131 So 62, 15 La.App. 347.

Inaccurate information

Under contract limiting carrier's liability for inaccurate information concerning quarantine regulations, no recovery could be had by shipper for damages resulting from misinformation, in absence of fraud.—

itations cannot take advantage of a valid special contract and then repudiate its conditions or limitations.[76] So, in an action for damages to a shipment of live stock carried under a written contract at a reduced rate in consideration of a reduced valuation, the shipper, having classified them in the contract as calves, could not claim that they should have been classified as older animals,[77] and the same rule applies where a shipper classified his race horse as "ordinary live stock."[78] The fact that the bill of lading exempts the carrier from liability for loss of some articles shipped does not prevent recovery for loss of other articles in the same shipment as to which the exemption did not apply.[79]

Indorsements "S. L. & C," meaning shippers' load and count, on bills of lading do not relieve the carrier from liability for damage to goods properly loaded by the shipper.[80]

Notwithstanding completed delivery to the consignee, contractual limitations of liability are binding on the parties with respect to a loss occurring thereafter from a cause which began to operate while the property was still in the carrier's possession, but such limitations do not apply where the cause of destruction did not begin to operate while the property was in the carrier's possession.[81]

The fact that a special contract is entered into

Manieri v. Seaboard Air Line Ry. Co., 137 S.E. 496, 147 Va. 415.

Articles not rated or enumerated

(1) Where shipper, seeking to recover for loss of diamond pin, failed to indicate on uniform express receipt that trunk contained article of jewelry, and receipt contained clause that carrier would not be liable for loss of jewelry or precious stones, etc., unless articles were enumerated on receipt, shipper failing to meet requirement was not entitled to recover—Kirwan v. Railway Express Agency, 179 A. 924, 118 Pa.Super. 431.

(2) Where an express company's receipt for a package states that the property is accepted as merchandise only, and states that the company will not be liable for the loss of jewelry unless such articles are enumerated in the receipt, and the package in fact contains jewelry, although this is not mentioned in the receipt, the company cannot be held liable for loss of the package either as "jewelry" or as "merchandise."—Yaeck v. Adams Express Co., 69 Pa.Super. 143.

(3) Where a bill of lading provided that carrier should not be liable for articles of extraordinary value not specifically rated in published tariffs without a special agreement, the carrier was not liable for jewelry shipped, unless jewelry was specifically rated in the tariffs, or there was a special agreement to carry it indorsed on the bill of lading.—Gassman v. New York Cent. R. Co., 201 N.Y.S. 740, 207 App.Div. 15.

Damage due to strike

(1) A carrier has been held not liable for damages by delay due to a strike under a bill of lading providing against liability for damage from strike.—Sexton v. Grand Trunk Western R. Co., 260 Ill.App. 448

(2) Thus, if a carrier, after a strike not brought about through its fault, uses every reasonable effort to fill the places of the strikers, and every reasonable effort to obtain men and means to care for property intrusted to it for shipment, which property is lost or destroyed while in its charge, the exceptional conditions operate as a release of the carrier from liability under a bill of lading exempting it from liability for loss caused by strikes—American Fruit Distributors of California v. Hines, 203 P. 821, 55 Cal.App. 377.

Overloading

Stipulation of bill of lading relieving carrier from liability in case of overloading or other injury to live stock unless caused by negligence was binding on consignee—Hall v. Houston E. & W. T. Ry. Co., 121 So. 769, 9 La.App. 577, 582.

Effect of Cummins Act

The Cummins Act, as amended by Act Aug. 9, 1916, making the carrier liable for full value of goods lost in shipment, does not apply to a loss exempted by the bill of lading, but only to valuation in case of loss or damage for which the carrier is lawfully liable, especially where the bill of lading had been approved by the interstate commerce commission, so as to be within the express exception in that statute—Simmons Hardware Co. v. Southern Ry. Co., C.C.A.Mo., 279 F. 929, certiorari denied 43 S.Ct. 96, 260 U.S. 739, 67 L.Ed. 490.

76. U.S.—Boston, etc., R. Co. v. Hooker, Mass., 34 S.Ct. 526, 233 U.S. 97, 58 L.Ed. 868, L.R.A.1915B 450, Ann.Cas.1915D 593.
10 C.J. p. 188 note 80.

77. Tex.—Kansas City, M. & O. Ry. Co. of Texas v. Corn, Civ.App., 186 S.W. 807.

78. Va.—Peery v. Norfolk & W. Ry. Co., 124 S.E. 250, 140 Va. 113.

79. N.Y.—Gassman v. New York Cent. R. Co., 201 N.Y.S. 740, 207 App.Div. 15.

80. N.Y.—Perkel v. Pennsylvania R. Co., 265 N.Y.S. 597, 603, 148 Misc. 284.
'The bills of lading covering these twenty cars were indorsed 'S. L. & C.' an abbreviation for shippers' load and count in accordance with the Federal Bill of Lading Act (section 21 [49 U.S.C.A. 101]), which provides: 'The carrier may also by inserting in the bill of lading the words "Shipper's weight, load, and count," or other words of like purport indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the non-receipt or by the misdescription of the goods described in the bill of lading.' This statute was designed to protect the carriers against innocent purchasers of bills of lading where the carrier neither loaded, counted, nor observed the condition or loading of the property and to permit the carrier to issue bills of lading indorsed so that the documents themselves will not constitute a representation to purchasers as to the property shipped, its quantity, its condition, or loading. The act and indorsements on the bills of lading in these cases cannot relieve the defendant from responsibility here since the court has determined from the evidence that the melons were properly loaded."—Perkel v. Pennsylvania R. Co., supra.

81. Or.—Cripe v. Davis, 214 P. 343, 107 Or. 142.

Sheep killed after delivery

Where five carloads of sheep were shipped under a "low value live stock contract," prescribed by the public service commission by virtue of Or.L. § 5878, and after completed delivery by unloading on private spur track some of the sheep strayed on the main line of railroad and were killed by a train, the contract provisions as to the measure of damages and notice of injury were inapplicable, since the cause of destruction of the sheep did not begin to operate while they were in the carrier's possession—Cripe v. Davis, 214 P. 343, 107 Or. 142.

covering a shipment does not altogether eliminate the duty which the carrier owes as custodian, for the violation of which it may be answerable in an action ex delicto.[82] So, where a valid contract fixes the liability of the carrier as that of a private carrier only, the carrier is bound to exercise ordinary care;[83] but where the contract requires the shipper to indemnify the carrier against all claims against it arising out of loss or damage in transportation, except such liability as results from gross negligence of carrier and its servants, the carrier is required to exercise only slight diligence.[84]

Invalidity of a severable provision of a special contract limiting liability will not vitiate the entire contract.[85]

Construction of contracts generally see supra § 112.

b. Limitations as to Negligence

Contracts intended to relieve a carrier from liability for its own negligence or that of its agents are invalid and of no effect.

In accordance with principles stated supra §§ 99, 112 b, where the express language or evident purpose of the stipulation relieving the carrier from common-law liability is to exempt it from liability for its own negligence or that of its servants or agents, the stipulation is against public policy, and is, therefore, void and of no effect; and it has been specifically decided in many cases that no contract limitation will relieve the carrier from responsibility for the negligence, unskillfulness, or carelessness of its employees.[86] Furthermore, if the stipulation is against all liability, it is invalid, for the manifest purpose of such a general stipulation must be to relieve from negligence as well as from other grounds of loss.[87] It follows that a stipulation against liability for injury by fire from any cause whatever is invalid, as fire might be due to the carrier's negligence.[88] The general principle that a contract relieving the carrier from liability for negligence will not be valid is applicable also where it sought to escape responsibility for goods held for delivery, or the like;[89] and a contract limiting liability against delay due to the carrier's own negligence is likewise invalid.[90]

The attempt on the part of carriers to limit their liability as against their own negligence or that of their servants has been particularly persistent where the contract of transportation is with reference to live stock, but such limitations have been uniformly held ineffectual.[91] So, a provision in a live stock agreement, which on express consideration of a reduced rate, limits the shipper's damages for unusual delay resulting from negligence to the amount actually expended in purchase of food or water for the stock while detained is invalid as a contract exempting the carrier from liability for its own negligence.[92] Such a stipulation is not within the principle of limiting liability to an agreed valuation which has been made the basis of a reduced freight rate; nor is it a legal limitation on the amount of recovery, but it is in effect an attempt to limit the carrier's liability for negligence by a contract which leaves practically no recovery for damages resulting from such negligence.[93] The stipulation has been upheld, however, in an action against the carrier, where it appeared that the delay was not occasioned by the negligence of the carrier.[94]

A statutory provision that no parties shall be allowed to deny that they are bound by the terms and conditions of a bill of lading received by the con-

82. N.D.—Werner v. United States Railway Administration, 181 N.W. 80, 47 N.D. 49.

83. Ga.—Western & A. R. Co. v. Waldrip, 89 S.E. 346, 18 Ga.App. 263.

84. Ga.—Hines v. Jackson & Co., 103 S.E. 36, 25 Ga.App. 207.

85. Minn.—Millers' Nat. Ins. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 156 N.W. 117, 132 Minn. 151.

Lease

The invalidity of a severable provision of a lease of lands by a carrier of freight to an elevator company, relieving the lessor from liability for loss from its negligence in the performance of its duties as common carrier, was held not to vitiate the entire contract.—Millers' Nat. Ins. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 156 N.W. 117, 132 Minn. 151.

86. Mo.—Akeman v. Wabash Ry. Co., App., 201 S.W. 590.
10 C.J. p 157 note 99, p 188 note 83.

87. Miss.—Hill Mfg. Co. v. New Orleans, M. & C. R. Co., 78 So. 187, 117 Miss. 548, certiorari denied New Orleans, M. & C. R. Co. v. Hill Mfg. Co., 39 S.Ct. 11, 248 U.S. 571, 63 L.Ed. 426.
Ohio.—Thomas v. Baltimore & O. R. Co., 16 Ohio N.P.,N.S., 194.
10 C.J. p 188 note 84.

88. Ohio.—Thomas v. Baltimore & O. R. Co., supra
10 C.J. p 164 note 60.

89. Ark.—Pacific Express Co. v. Wallace, 29 S.W. 32, 60 Ark. 100
10 C.J. p 188 note 85.

90. N.Y.—Jennings v. Grand Trunk R. Co., 28 N.E. 394, 127 N.Y. 438
10 C.J. p 296 note 50.

91. Ill.—Gardner v. Railway Express Agency, 274 Ill.App. 626.
Mo.—Akeman v. Wabash Ry. Co., App., 201 S.W. 590.
10 C.J. p 158 note 9.

Stock in pens awaiting shipment

A provision in a contract of shipment of cattle, that the carrier does not assume any liability for live stock while remaining in pens awaiting shipment, is void as far as intended to relieve the carrier of negligence.—Akeman v. Wabash Ry. Co., Mo.App., 201 S.W. 590.

92. U.S.—Boston & M. R. R. v. Piper, 38 S.Ct. 354, 246 U.S. 439, 62 L.Ed. 820, affirming Piper v. Boston & M. R. R., 97 A. 508, 90 Vt. 176.
10 C.J. p 158 note 9 [a], p 159 note 14 [b].

93. U.S.—Boston & M. R. R. v. Piper, supra

94. Mo.—Vaughn v. Wabash R. Co., 78 Mo.App. 639.

signor so far as they are not contrary to law or public policy does not change the rules stated as to the effect of contractual limitations on liability, but merely shifts the burden of proof as to the making of the contract.[95]

c. Limitations as to Value

Limitations as to value are given effect according to the tenor of the agreement if valid.

In so far as any attempted limitation as to value is in violation of public policy or positive law, it will, of course, be ineffectual to prevent recovery of the full amount of the loss;[96] but where the parties have, within the rules stated supra § 102, lawfully agreed on a valuation, or where the shipper, in compliance with a regulation requiring the value to be stated as the basis for estimating the compensation to be paid, has placed a valuation on the goods, such valuation will control in an action against the carrier for loss,[97] and the shipper will not be heard to claim or to recover for damage or loss, however great, in excess of the amount named in the shipping contract,[98] the rule being based on

95. Ill.—Kingsbury v. Chicago & A. R. Co., 213 Ill.App. 439.

96. Ill.—Kingsbury v. Chicago & A. R. Co., 213 Ill.App. 439.
Minn.—Western Assur. Co. v. Wells Fargo & Co., 173 N.W. 402, 143 Minn. 60.

Duress

Where the only railroad at place of shipment refused to ship cattle unless it was written across bill of lading that some were in bad condition, and although statement was untrue, and shipper, under such pressure, signed such bill of lading, the carrier's act constituted legal duress, and shipper was not barred from recovering damages for their negligent transportation.—Missouri, K. & T. Ry. Co. v. Pacheco, Tex.Civ.App., 185 S.W. 1051.

97. N.Y.—Berlinsky v. Barrett, 173 N.Y.S. 449.
10 C.J. p 399 note 19.

Amount of recovery

Where an express parcel weighed two hundred seventy pounds, the receipt, providing that the carrier should not be liable for more than fifty dollars for any shipment of one hundred pounds or less, or for more than fifty cents per pound for shipments weighing more, did not limit recovery to fifty dollars.—Berlinsky v. Barrett, 173 N.Y.S. 449.

98. U.S.—The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., N.Y., 55 S.Ct. 483, 294 U.S. 494, 79 L.Ed. 1016—American Ry. Express Co. v. Daniel, 46 S.Ct. 15, 269 U.S. 40, 70 L.Ed. 154, reversing 121 S.E. 686, 157 Ga. 731, which affirmed 116 S.E. 660, 29 Ga.App. 780, certiorari granted 44 S.Ct. 461, 265 U.S. 576, 68 L.Ed. 1187, vacated 132 S.E. 144, 35 Ga.App. 81—American Ry. Express Co. v. Lindenburg, 43 S.Ct. 206, 260 U.S. 584, 67 L.Ed. 414, reversing Lindenburg v. American Ry. Express Co., 106 S.E. 884, 88 W.Va. 439, certiorari granted American Ry. Express Co. v. Lindenburg, 42 S.Ct. 52, 257 U.S. 627, 66 L.Ed. 404—Erie R. Co. v. Stone, Ohio, 37 S.Ct. 633, 244 U.S. 332, 61 L.Ed. 1173.
Ark.—Scullin v. Eoff, 191 S.W. 31, 126 Ark. 523.
Colo.—Denver & R. G. R. Co. v. Teufel, 172 P. 1060, 64 Colo. 515.
Fla.—Seaboard Air Line Ry. Co. v. Schenck, 119 So. 517, 97 Fla. 16—Payne v. Bryan, 105 So. 832, 90 Fla. 174—Noone v. Southern Express Co., 83 So. 607, 79 Fla. 25.
Ga.—American Ry. Express Co. v. S. & W. Estroff, 125 S.E. 40, 159 Ga. 58, affirming 121 S.E. 711, 31 Ga.App. 577.
Ill.—Dwyer v. American Railway Express Co., 280 Ill.App. 11—Macomber & Whyte Rope Co. v. United Fruit Co., 225 Ill.App. 286—Donchian v. Brink's Chicago City Express Co., 217 Ill.App. 124.
Iowa.—Ruebel Bros. v. American Express Co., 180 N.W. 658, 190 Iowa 600—T. Richter & Sons v. American Express Co., 164 N.W. 228, 180 Iowa 1037, L.R.A.1918A 749.
La.—Luckett & Hunter v. Texas & P. Ry. Co., 1 La.App. 434, reinstated 108 So. 405, 161 La. 175, annulling 2 La.App. 752.
Mo.—Strother v. Atchison, T. & S. F. R. Co., App., 212 S.W. 404.
N.Y.—D'Utassy v. Barrett, 114 N.E. 786, 219 N.Y. 420, 5 A.L.R. 979, affirming 157 N.Y.S. 916, 171 App.Div. 772—Lewis v. American Railway Express Co., 180 N.Y.S. 751, 111 Misc. 146—Kolb v. Taylor, 168 N.Y.S. 685, 102 Misc. 220—Granbery v. Taylor, 159 N.Y.S. 932, 95 Misc. 585—John H. Goetze & Co. v. Beam's Own, Inc., 199 N.Y.S. 790.
Ohio.—Bevis v. American Ry. Exp. Co., 17 Ohio App. 73—Cohn-Goodman Co. v. Wells Fargo Exp. Co., 13 Ohio Cir.N.S., 467, affirmed 102 N.E. 1122, 87 Ohio St. 458.
Okl.—Shaff v. Kramer, 235 P. 517, 109 Okl. 109.
Or.—George v. Spokane, P. & S. Ry. Co., 265 P. 408, 124 Or. 598.
Pa.—Wilson v. Adams Express Co., 72 Pa.Super. 384—Sloan v. Pennsylvania R. Co., 29 Pa.Dist. 146.
S.C.—Tribble v. Southern Express Co., 96 S.E. 712, 111 S.C. 31, certiorari denied 39 S.Ct. 287, 248 U.S. 582, 63 L.Ed. 432.
S.D.—Christensen v. Minneapolis, St. P. & S. S.M. Ry. Co., 252 N.W. 738, 62 S.D. 264.
Tex.—Gulf, C. & S. F. Ry. Co. v. Harrell, Civ.App., 270 S.W. 187.
Utah.—Paradise Land & Live Stock Co. v. Davis, 207 P. 145, 60 Utah 189.
Wis.—Bassett v. Chicago & N.W. Ry. Co., 171 N.W. 749, 168 Wis. 617, rehearing denied 171 N.W. 752, 168 Wis. 617.
10 C.J. p 187 note 79 [a], p 399 note 20.

Corpus Juris is quoted with approval in Kennedy v. Atchison, T. & S. F. Ry. Co., 179 P. 314, 316, 104 Kan. 129, 368, motion granted 181 P. 117, 104 Kan. 708, 5 A.L.R. 149.

Loss in warehouse

A released valuation clause in an interstate bill of lading, based on difference in tariffs on file, governs, and the shipper cannot recover more, although loss occurs while freight is in carrier's warehouse at an intermediate point, under provisions of one of such tariffs.—Western Transit Co. v. A. C. Leslie & Co., 37 S.Ct. 133, 242 U.S. 448, 61 L.Ed. 423, reversing A. C. Leslie & Co. v. Western Transit Co., 150 N.Y.S. 1073, 165 App.Div. 947.

Nature of cause of action

Whether an action is in tort or on a contract, carrier is liable only for the stipulated value of sheep in consideration of a lower rate.—Paradise Land & Live Stock Co. v. Davis, 207 P. 145, 60 Utah 189.

Computation of damages

Where bill of lading recites that sum named therein is agreed value of goods, in absence of shipper's declaration of higher value, and that rate is fixed with reference to specified value, and that, in consideration of rate, carrier's liability for loss or damage shall be limited to stipulated value, damages are computed in usual way without reference to stipulation, but if, when so computed, they exceed agreed limit of value, no recovery of excess may be had.—The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., N.Y., 55 S.Ct. 483, 294 U.S. 494, 79 L.Ed. 1016, affirming, C.C.A., The Ansaldo San

estoppel.[99] Such a contract is a true limitation agreement, enuring in case of loss or damage to the carrier's, but not to the shipper's, benefit.[1] It is immaterial that the contract does not in terms limit the carrier's liability to the amount stated therein as their value, if it contains clauses which should be given that effect.[2]

In harmony with the general rule, if the contract of shipment stipulates that the value of the goods is to be determined at the place of shipment, the value must be determined in accordance with such stipulation,[3] unless contracts of this character are

Giorgio I, 73 F.2d 40, reversing, D.C., 3 F.Supp. 579, certiorari granted The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., 55 S.Ct. 217, 293 U.S. 551, 79 L.Ed. 654.

99. U.S.—A. C. Lawrence Leather Co. v. Compagnie Generale Transatlantique, C.C.A.N.Y., 18 F.2d 930, affirming, D.C., 12 F.2d 83, and certiorari denied Compagnie Generale Transatlantique v. A. C. Lawrence Leather Co., 47 S.Ct. 770, 274 U.S. 761, 71 L.Ed. 1338.

Ga.—Atlanta & West Point R. Co. v. Fairburn Marble Co., 89 S.E. 817, 145 Ga. 708.

Okl.—Shaff v. Kramer, 235 P. 517, 109 Okl. 109.

S.D.—Christensen v. Minneapolis, St. P. & S. S. M. Ry. Co., 252 N.W. 738, 62 S.D. 464.

Tex.—Galveston Hotel Co. v. Goggan, Civ.App., 253 S.W. 694.

Ignorance of law

Where railroad carries goods and charges are paid under interstate rate demanding a certain valuation, the shipper cannot, by pleading ignorance of law, schedules, contract, and bill of lading, recover damages on valuation calling for higher rate. —Dickerson v. Erie R. Co., 169 N.Y.S. 5, 181 App.Div. 815.

1. U.S.—The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., N.Y., 55 S.Ct. 483, 294 U.S. 494, 79 L.Ed. 1016.

2. Kan.—Kennedy v. Atchison, T. & S. F. Ry. Co., 179 P. 314, 104 Kan. 129, 368, motion granted 181 P. 117, 104 Kan. 708, 5 A.L.R. 149.

10 C.J. p. 399 note 19.

Rate based on valuation

Where a shipping contract contains no express provision that carrier's liability is limited to value of stock as set out in contract, the same result as to carrier's limited liability follows from recitals that the rate is based on such valuation.—Kennedy v. Atchison, T. & S. F. Ry. Co., 179 P. 314, 104 Kan. 129, 368, motion granted 181 P. 117, 104 Kan. 708, 5 A.L.R. 149.

Value not disclosed

Where different rates for shipment of property were prescribed by carrier under authority of interstate commerce commission, depending on declaration of shipper of value of property, shipper, who shipped under lowest rate without formal declaration of value could not recover greater value for damage to, or loss of, property, since agreement as to rate automatically fixed value.—Chicago, R. I. & P. Ry. Co. v. Geissler, 61 P.2d 14, 177 Okl. 560.

3. Cal.—Olcovich v. Grand Trunk Ry. Co. of Canada, 176 P. 459, 179 Cal. 332.

Ill.—Shellabarger Elevator Co. v. Illinois Cent. R. Co., 212 Ill.App. 1.—Fox v. Chicago & N. W. Ry. Co., 199 Ill.App. 453.—Cohen v. Atchison, T. & S. F. Ry. Co., 198 Ill.App. 174.

Md.—Fahey v. Baltimore & O. R. Co., 114 A. 905, 139 Md. 161.

Mo.—Cudahy Packing Co. v. Bixby, 205 S.W. 865, 199 Mo.App. 589, certiorari denied 39 S.Ct. 19, 248 U.S. 577, 63 L.Ed. 429.

N.C.—Washington Horse Exch. v. Louisville, etc., R. Co., 87 S.E. 941, 171 N.C. 65.

S.C.—Lesesne v. Atlantic Coast Line R. Co., 103 S.E. 147, 114 S.C. 95.

Tex.—St. Louis Southwestern Ry. Co. v. Texas Packing Co., Civ.App., 253 S.W. 864.

Wis.—Wegener v. Chicago, etc., R. Co., 156 N.W. 201, 162 Wis. 322.

10 C.J. p. 397 note 84, p. 398 note 98, p. 400 note 25.

Invoice price

(1) In an action against a railroad for damages to dressed poultry shipped under a bill of lading providing for computation of damages on the invoice price to consignee at the time and place of shipment, the measure of damages was not the difference in the market value of the property in the condition in which it should have arrived and that in which it did arrive at the place of destination, but the amount computed on the basis of such stipulation.—St. Louis Southwestern Ry. Co. v. Texas Packing Co., Tex.Civ.App., 253 S.W. 864.

(2) So, where a shipper delivered cotton to a common carrier for transportation, under a bill of lading providing that the amount of the carrier's liability for loss or damage was to be computed on the basis of the value of the cotton at the bona fide invoice price to the consignee, including freight charges if prepaid at the place and time of shipment, the shipper could not recover the increased value of the cotton since its loss, notwithstanding that he told the carrier that he intended to hold the cotton.—Lesesne v. Atlantic Coast Line R. Co., 103 S.E. 147, 114 S.C. 95.

(3) Under bill of lading providing that liability for damages should be computed on value of goods at bona fide invoice price, measure of damages would be difference between price at which goods sold at delivery and invoice or fair market value at place and time of shipment.—Wallingford v. Atchison, T. & S. F. Ry. Co., 167 P. 1136, 101 Kan. 544, L.R.A. 1918B 716.

(4) Difference between invoice price of interstate shipment at place of shipment and value when delivered in its damaged condition was the proper measure of damages for loss by carrier's failure to re-ice, under a stipulation in the bill of lading for computation of value at place of shipment.—Gulf, C. & S. F. Ry. Co. v. Texas Packing Co., Tex., 37 S.Ct. 487, 244 U.S. 31, 61 L.Ed. 970.

(5) So, under a bill of lading providing that amount of any loss or damage for which carrier was liable should be computed on basis of value of property being bona fide invoice price to consignee, including freight charges if prepaid at place and time of shipment, the extent of damages is measured by the actual loss, which is determined by the difference between the invoice price, with the freight and refrigeration charges added, and the selling price, and it is immaterial what the fruit might have sold for at point of destination. —Crenshaw Bros. & Saffold v. Southern Pac. Co., 181 P. 252, 40 Cal.App. 603, amendment of remittitur and correction of judgment denied 183 P. 208, 42 Cal.App. 44, certiorari denied 40 S.Ct. 14, 250 U.S. 669, 63 L.Ed. 1198.

(6) Under a contract of shipment, stipulating that carrier should be liable for damage computed on the bona fide invoice price, if any, to the consignee, at the place and time of shipment, the shipper of a soda fountain, purchased for one hundred dollars, although actually worth two hundred fifty dollars, could recover only the cost price, where it was destroyed in transit.—Wilson v. Chicago Great Western R. Co., Mo.App., 190 S.W. 22.

(7) Where the catalogue of mail order company, giving premium merchandise as a bonus with purchases, disclosed that such premium merchandise had a fixed cash price, and that customers understood and paid it, such premium merchandise had an invoice price within the bill of

forbidden by statute, in which case the value of the goods will be determined in accordance with the general rule, stated infra § 264, which controls in the absence of valid contractual limitation.[4] It has been held, however, that the second Cummins amendment merely limits the maximum of recovery to the value stated in the bill and does not affect cases where the loss is less than that value, so that notwithstanding a provision of the kind under consideration, if the value of the goods at the time of the loss was, through no fault of the carrier, less than at the time and place of shipment, the former value controls.[5]

The mere payment by the shipper of a rate based on a limited value different from that requested by him does not limit his recovery to the valuation corresponding to the rate.[6]

Partial loss. An agreement as to the amount to be paid in case of total loss will not furnish the basis of recovery of damages for partial loss.[7] Where a shipping contract provides that the carrier shall be liable for the value of goods up to a declared value which is less than the actual value, the parties may stipulate that in case of partial loss the recovery should be such proportion of the agreed valuation as the actual loss bears to the actual value of the goods shipped,[8] and where they do so the shipper can recover only according to the agreement.[9] So, although the contrary view has been

lading—Larkin Co v. New York, C & St. L. R. Co, 162 N.Y.S. 870, 98 Misc 446.

Sale price

(1) Where shipper lost sale of goods under contract through carrier's negligent delay as to a shipment wrongfully sold by the carrier, the jury properly estimated the damages on the basis of the price the shipper was to receive under the contract of sale, instead of following the general rule that the measure of damages for loss of entire value of goods occasioned by delay in transportation is the market value of the goods at destination when delivery should have been made, plus other proximate damage, where the contract price was less than the market price, and the bill of lading provided that loss should be computed on basis of value of property at place and time of shipment—New York, P. & N. R Co. v. Chandler, 106 S E 684, 129 Va. 695.

(2) So, where shipper had sold a carload of potatoes at ten dollars per barrel, f o. b shipping point, and the carrier, with full knowledge of the character of shipment and the importance of prompt delivery, stipulated that the measure of damages in case of nondelivery should be "the value of the property to the consignee at the place and time of shipment," carrier was liable to shipper for such value, since there is nothing in either the Carmack or Cummins amendments to the interstate commerce act which forbids a carrier to stipulate for payment of the full actual loss sustained—New York, P. & N R. Co. v Bundick, Taylor, Corbin-Handy Co, 122 S E. 261, 138 Va. 535.

(3) The right of a shipper to recover his actual loss against a carrier for goods lost in interstate transit, as measured by the sale thereof, is not altered because such loss is consequential only, and not damages or injury "to such property"—New York, P & N R. Co. v. Bundick, Taylor, Corbin-Handy Co., supra.

Value at place of delivery immaterial

A stipulation that the liability for loss shall be measured by the value at the time and place of shipment will preclude a recovery by the consignee for the difference between the market value at the place of delivery and what he paid—Matheson v Southern R Co., 60 S E 437, 79 S.C 155.

In absence of direct evidence of value at place of shipment, the damages for loss of a shipment may be determined with reasonable certainty by deducting the freight and cost of converting the commodity into cash from its value at destination.

Ga—Lamb v. Mitchell, 84 S E. 213, 15 Ga App. 759.

Minn—St Anthony, etc, El Co v. Great Northern R Co., 149 N.W 471, 127 Minn. 299.

4. U S—McCaull-Dinsmore Co v Chicago, M & St P Ry Co, D C Minn, 252 F 664, affirmed Chicago, M. & St P Ry. Co. v. McCaull-Dinsmore Co, 260 F. 835, 171 C C A. 561, certiorari granted 40 S.Ct. 219, 251 U S 549, 64 L Ed. 409, and affirmed 40 S Ct. 504, 253 U S. 97, 64 L Ed 801

N.Y—Porter v. Pennsylvania R. Co, 215 N Y.S. 727, 217 App Div. 49.

10 C J. p 397 note 85, p 398 note 99

5. Mass—Crutchfield & Woolfolk v Hines, 131 N.E. 340, 239 Mass 84

6. S C—Anderson v. Atlantic Coast Line R Co, 161 S E 523, 163 S C 350

Reason for rule

"If the carrier by mistake charged too low a rate there is nothing to prevent it from recovering of the shipper the published rate. . . . The contention of the defendant is in substance that, even though a shipper has declared a high value for the purpose of enabling the carrier to fix a rate, he is nevertheless bound to a much lower limitation of value simply because of the rate actually prepaid; that it is the rate charged and not the value declared which fixes the carrier's liability. That argument is an inversion of sound reason. The declaration of value fixes both the legal rate and the amount recoverable; the rate actually charged does not control a written declaration of value. . . . It seems inequitable to permit the carrier by charging the lower rate to prevent the shipper from relying upon his express declaration of value simply by referring to a published schedule where two alternative rates are stated, the higher one of which ought to have been charged if reliance had been placed on the declared statement of value made by the shipper. Such an interpretation of the law in effect would permit the railroad to elect after the event the course most to its interests, by collecting the balance of the higher rate in case of a safe delivery, and by limiting its liability to the lower value fixed by the rate actually exacted in case of loss."—Aradalou v New York, N H. & H R. Co., 114 N E 297, 300, 225 Mass. 235.

Mistake of carrier

When the shipper makes an express representation of value for the purpose of enabling the carrier to fix the rate, and a rate is fixed by the carrier, which by mistake is based on the theory that a much lower valuation was fixed than that in fact contained in the written statement of value signed by the shipper, the rights of the shipper cannot be affected within the limits established by his declaration of value by the rate which the carrier exacts.—Aradalou v New York, N H & H. R. Co, 114 N.E 297, 225 Mass. 235.

7. U S.—Woodburn v. Cincinnati, etc. R. Co, C C Tenn, 40 F. 731.

8. N Y—Chenango Textile Corporation v. Willock, 288 N.Y S. 270, 247 App Div 638

10 C J p 399 note 22.

9. Tex.—Kansas City, M & O Ry Co of Texas v Corn, Civ.App., 186 S W 807.

10 C J. p 185 note 51.

taken,[10] the law is firmly grounded that in cases where a contract of carriage fixes the value of a shipment at so much per pound, per hundredweight, per ton, or at some other unit of weight or measure and the rate is calculated on such agreed value, the recovery, in case of partial loss, is limited to the agreed value, per unit, of that part of the shipment which was lost, for the consignor is estopped from asserting any unit to have a greater value than the per unit value declared.[11] Where the articles shipped are heterogeneous in nature, it has been declared that the correct rule is to adopt as the agreed valuation of each article that proportion of its actual value which the agreed valuation of the whole shipment bears to the actual value of such shipment.[12]

Computation of amount recoverable

Under a bill of lading stipulating that in case of total loss of any live stock covered by the contract for which the carrier should be liable the value was the actual cash value at the time and place of shipment, in no case to exceed ten dollars for each calf, and that in case of injury or partial loss the amount claimed should not exceed the same proportion, a recovery on findings of the jury that there was a depreciation of five per cent on a valuation of thirty dollars, or one dollar and fifty cents per head, limited the shipper's recovery to five per cent of the agreed valuation, or fifty cents per head—Kansas City, M & O. Ry Co. of Texas v. Corn, Tex.Civ.App., 186 S.W. 807.

10. Ohio—Blum v. Cleveland, C., C. & St. L Ry. Co, 25 Ohio N.P.,N.S, 112, 117.

10 C.J. p 185 note 49 [a] (2).

"In the case at bar, the fact that the released value was stated at ten cents per pound and the weight of the shipment 7,000 pounds, the court is of the opinion what was meant was that the released value should be restricted to $700 and that no one pound or part of a shipment should be restricted to ten cents per pound. In other words, the shipper should be permitted to show the actual value of the goods damaged, and should be permitted to recover, if the proper showing is made, the full actual value of the goods damaged so long as this damage in amount does not exceed the maximum released value of the shipment."—Blum v. Cleveland, C., C. & St. L. Ry. Co., supra.

11. U S.—Western Transit Co. v. A C. Leslie & Co., 37 S.Ct 133, 242 U.S. 448, 61 L.Ed. 423, reversing A. C Leslie & Co. v. Western Transit Co., 150 N.Y S 1073, 165 App Div. 947.

Iowa.—Taylor v. Chicago, R I. & P. Ry Co., 227 N.W. 407, 208 Iowa 1396.

N.Y.—Chenango Textile Corporation v Willock, 288 N.Y.S 270, 247 App. Div. 638—Glanzer v. Cunard S. S Co., 212 N Y S. 500, 214 App Div. 473—Aronstein v. New York Cent. R Co., 243 N Y S. 221, 136 Misc. 352, modifying 230 N Y S. 298, 132 Misc. 563, and certiorari denied 51 S.Ct. 28, 282 U.S. 850, 75 L.Ed. 754 —H. R. Mallison & Co. v. Barrett, 207 N Y.S 793, 124 Misc. 358

"The 'released' or agreed valuation is '$100 per net ton' There were 25 tons in this shipment It is insisted that, as the 25 tons constituted a single lot, $2,500 is recoverable for loss of, or damage to, the whole or to any part of the lot. This construction does violence to the language used and is unreasonable. The valuation clause fixes not an arbitrary limit of recovery, but a ratio. In Kansas City Southern R Co v. Carl, 227 U S. 639, 656, 57 L.Ed. 683, 689, 33 S.Ct. 391, where the released valuation clause was applied to a shipment consisting of two boxes and a barrel, and one box was lost, this court said the consignor and carrier must have understood the agreed valuation to mean that the package contained 'household goods of the average per hundredweight of $5' The ratio is more naturally applied where the whole shipment is homogeneous. Under this bill of lading the shipper is entitled to recover not more than $100 a ton for each or any ton damaged or lost."—Western Transit Co. v. A. C. Leslie & Co, 37 S Ct 133, 135, 242 U S. 448, 61 L.Ed 423, reversing A C Leslie & Co. v. Western Transit Co., 150 N.Y S. 1073, 165 App Div. 947.

Apportionment of declared value

Although the terms of the contract are not clearly set out therein, the rule of the text was apparently applied in a case holding that under an interstate contract limiting carrier's liability to fifty dollars, recovery could be had for only twenty five dollars, when only half of merchandise was undelivered.—Mavis Hosiery Co. v. Pennsylvania Transp Co., 239 N.Y S. 713, 135 Misc. 636.

Live stock

In action for damages against live stock carrier, valuations contained in schedules govern damages for killed stock, and recovery for injuries to other stock must be in the ratio of the stipulated to the real value.—Dickerson v Erie R Co., 169 N.Y S. 5, 181 App.Div. 815.

12. S D—Stratton v. Chicago, M. & St. P. Ry. Co., 168 N.W 757, 758, 41 S D 79

"Defendants sought an instruction to the effect that each article must be considered by itself and the damage fixed upon each separate article upon the basis that the value of such article did not exceed $10 per hundredweight. Consistent with such requested instruction, it is contended by defendant that, before plaintiff could recover upon any article in said carload shipment, it was incumbent upon her to establish the weight of such article. It needs no reflection to see that such a rule would be absolutely impracticable and unreasonable. In order to meet such a requirement, it would be necessary for a party intending to ship household goods to weigh every knife, chair, sofa, piano, feather bed, stove, etc, and to make and keep an itemized list of all said articles in order to be prepared to make proof in case he suffered loss through the negligence of the shipper, as otherwise the necessary proof could not possibly be forthcoming as to at least the great majority of articles that would go to make up such a shipment Both parties have cited decisions in cases where the articles shipped were of homogeneous nature, in two cases the shipments being of metal ingots, all ingots in each shipment being of the same metal and, so far as appears, alike in their percentage of purity. It is readily to be seen that, where the goods shipped are thus homogeneous, the damage can be based upon the weight of the particular part lost or injured as the valuation of each pound of the shipment is the same, and can in no case exceed the true value or the agreed limited value. But an entirely different situation is presented where the goods are heterogeneous in their kind. . . . The correct rule and one applicable to all cases where there is a limited valuation agreement and where the actual value of the goods exceeds such limited value is to base the loss upon the limited or agreed valuation of the thing injured, lost, or destroyed, adopting as the agreed valuation of each article that proportion of its actual value which the agreed valuation of the whole shipment bears to the actual value of such shipment . . Thus, with the evidence showing this carload of goods to weigh 16,000 pounds, its agreed limited value was $1,600. If the evidence showed the actual value to be $3,200, then the value to be placed on each article as a basis for determining damages

Except where the contract of carriage expressly provides for prorating in the event of a partial loss, however, the emphatic trend is against the adoption of the prorating principle.[13] The rule entertained by the weight of authority is that where the contract of carriage provides that the amount recoverable in case of loss or damage shall be limited to the declared value of the shipment, such agreement in case of partial loss, is to be construed as permitting recovery for the loss or damage actually sustained, the amount recoverable, however, not to be greater than that agreed on as compensation for a total loss; and it necessarily follows that where this rule obtains the shipper is not limited to a recovery of such proportion of the amount named in the contract as the value of the property destroyed bore to the value of all the property shipped.[14] There are, however, decisions which are in conflict with this view.[15]

Under the general rule, the carrier is not free from liability because the goods in their injured condition are worth more than the agreed valuation;[16] nor is the carrier's liability limited to the

would be one-half of its actual value. . . . If the actual value of a shipment is twice the agreed limited value, and a silver spoon worth $1 is lost, the recovery therefor should be 50 cents; if a feather bed worth $10 is lost, the recovery therefor should be $5; if a chair worth $8 is injured, reducing its value $4, the recovery should be $2"—Stratton v. Chicago, M & St P. Ry. Co., supra.

13. N.Y.—Chenango Textile Corporation v. Willock, 288 N.Y.S. 270, 247 App Div. 638.

14. Ill—Fox v. Chicago & N. W. Ry. Co., 199 Ill App. 453—Christensen v Chicago, M. & St. P. Ry. Co., 194 Ill App. 562.

Ind—Chicago, I & L. Ry. Co. v. Priddy, 115 N.E. 266, 65 Ind.App 552—United States Express Co. v. Joyce, 69 N.E. 1015, 36 Ind.App. 1, affirmed, Sup., 76 N.E. 1117, withdrawing opinion 72 N.E. 865.

Iowa—E. H. Emery & Co. v. Wabash R. Co., 166 N.W. 600, 183 Iowa 687.

Mo—Green v. American Ry. Express Co, App., 34 S.W.2d 1039.

N.J—Candee v. Delaware, L. & W. R. Co., 109 A. 202, 94 N.J Law 144, certiorari denied Delaware, L. & W. R. Co. v. Candee, 40 S.Ct. 584, 253 U.S. 490, 64 L.Ed. 1027.

N.Y—Chenango Textile Corporation v. Willock, 288 N.Y.S. 270, 247 App Div. 638—R. H. Macy & Co. v. Pennsylvania Transp. Co, 266 N.Y.S. 194, 148 Misc. 129, affirmed 266 N.Y.S. 198, 149 Misc. 460.

Contra, Lewis v. American Railway Express Co., 180 N.Y.S. 751, 111 Misc. 146.

Ohio—Blum v. Cleveland, C., C. & St. L. Ry. Co, 25 Ohio N.P.,N.S., 112

Pa—Wilson v. Adams Express Co., 72 Pa.Super. 384.

Tex—Gulf, C. & S. F. Ry. Co. v. Harrell, Civ.App., 273 S.W. 661—Gulf, C. & S. F. Ry. Co. v. Harrell, Civ.App., 270 S.W. 187—Atchison, T. & S. F. Ry. Co. v. Smyth, Civ App., 189 S.W. 70.

Va.—Chesapeake & O. Ry. Co. v. Rebman & Clark, 90 S.E. 629, 120 Va. 71

10 C.J. p 185 note 49, p 399 note 23.

"We are of the opinion that in the case before us the plain language of the agreement to the effect that the declared value of the shipment shall establish the limit of the carrier's liability should not be interpreted to mean that in the event of partial damage recovery is to be that proportion of the actual loss which the declared value bears to the actual value. If the carrier had intended to bind the shipper to such provision, it was incumbent upon the carrier so to state in plain and unambiguous language"—Chenango Textile Corporation v Willock, 288 N.Y.S. 270, 276, 247 App Div. 638.

This statement in Corpus Juris has been quoted with approval in Olcovich v. Grand Trunk Ry. Co. of Canada, 176 P. 459, 460, 179 Cal. 332

Place and time of shipment

(1) Where bill of lading provides that carrier's liability should be computed at the value of the property at the place and time of shipment, the carrier's liability for partial loss of shipment of paper, where damage exceeded cost at point of shipment, was limited to value of paper at the time and place of shipment plus the freight, if paid—Olcovich v. Grand Trunk Ry. Co. of Canada, 176 P. 459, 179 Cal. 332.

(2) A shipping contract, providing that payment for loss should be made only on basis of actual cash value at time and place of shipment, but not to exceed value specified, did not, however, require damages to be measured by value at shipping point rather than value at destination in condition in which animals should have arrived, and, in absence of pleading or proof of actual value at shipping point, it was not necessary to take it into consideration.—Gulf, C. & S. F. Ry. Co. v. Harrell, Tex. Civ.App., 273 S.W. 661.

Recovery governed by total charge

Shipper of horses, even if governed by written contract with another covering entire car, was held entitled to have valuation for loss of horse fixed by total charges paid by him and the other shipper in the car.—Hunter v. American Ry. Express Co., Mo App, 4 S.W.2d 847.

Cases distinguished or disapproved

"It is true that in the case of Mallison & Co. v. Barrett, 213 N.Y.S. 652, 215 App Div. 524, this court, upon the principle of estoppel, held that for a partial loss, a shipper could only recover that proportion of the loss which the declared value of the entire shipment bears to the actual value. The language of the shipping contract in that case differed somewhat from that employed in this contract, and it contained no agreement to the effect that the carrier 'shall be liable for the value of the goods shipped within' the limitation of the value declared. The Fourth Department, in the case of Frank v. Michigan Central R. Co., 154 N.Y.S. 701, 169 App.Div. 69, originally adopted, in this state, this prorating theory for a partial loss based apparently upon an excerpt from Hutchinson's 'The Law of Carriers' (Vol. 1, § 429, [3d Ed 1906]). That textbook cites but one authority to support its conclusion, namely, U. S. Express Co. v. Joyce, Ind., 72 N.E. 865, but that opinion in that case, it is to be noted, was subsequently ordered withdrawn, Ind, 76 N.E. 1117."—Chenango Textile Corporation v. Willock, 288 N.Y.S. 270, 274, 247 App Div. 638

Estoppel

Shipper, declaring valuation on five bales as a whole, was estopped from claiming that single bale was of greater proportionate value than others, although no valuation was placed on any particular bale and there was no stated release value per unit, of weight or otherwise—H. R. Mallison & Co. v. Barrett, 213 N.Y.S. 652, 215 App Div 524, modifying 207 N.Y.S. 794, 124 Misc. 359.

15. U.S.—Shelton v Canadian Northern R. Co, C.C.Minn, 189 F. 153.
W.Va.—Fielder v. Adams Express Co, 71 S.E. 99, 69 W.Va 138
Tex.—American Ry Express Co. v. Thompson, Civ.App., 2 S.W.2d 493.

16. U.S.—Southern Pac. Co v. Stewart, Ariz., 233 F. 956, 147 C.C.A. 630, error dismissed 38 S.Ct 130, 245 U.S. 359, 62 L.Ed. 345, rehearing

difference between the actual value of the goods as received by the consignee and the declared value when that difference is less than the declared value.[17]

Damages for delay or misdelivery. Whether or not a provision in a contract limiting the liability of the carrier to an agreed valuation applies in an action for damages for delay as distinguished from one for loss or injury depends on the terms of the contract, and even in cases involving similar stipulations the holdings of the courts are not uniform. Thus, while it has been unreservedly held that contracts of this nature relate to loss of the goods, and do not preclude recovery for delay or fix the amount of damages for delay,[18] and particularly so, where the contract expressly states that no carrier shall be liable "for the loss or injury to" the property in any amount in excess of the valuation thereof,[19] the view has been taken, although there is authority to the contrary,[20] that a provision, that "the company shall not be liable in any event for more than" the agreed value, is broad enough to include damages sustained by either delayed shipment or wrongful delivery,[21] and that the shipper is not entitled to recover, in excess of the amount permitted by its terms, damages for the interruption of his business caused by delay alleged to be due to the carrier's negligence.[22] As shown supra in subdivision b of this section, however, this rule does not authorize or validate a provision limiting the damages of a shipper of live stock for unusual delay resulting from negligence to the amount actually expended in the purchase of food or water for the stock while detained. A provision that, in all cases of loss of any portion or the whole of the goods, the amount of the claim shall be restricted to the cash value at the time and place of shipment does not limit the carrier's liability for loss resulting from delay,[23] but, although the contrary view has

granted 38 S.Ct. 303, 245 U.S. 562, 62 L.Ed. 472, and reversed on other grounds 39 S.Ct. 139, 248 U.S. 446, 63 L.Ed. 350

Ill.—Lewis v. Chicago & N. W. Ry. Co., 199 Ill.App. 438

Ind.—United States Express Co. v. Joyce, 69 N.E. 1015, 36 Ind.App. 1, affirmed, Sup., 76 N.E. 1117, withdrawing opinion 72 N.E. 865

Mo.—Greening v. Chicago & N. W. Ry. Co., App., 183 S.W. 1121.

Pa.—Wilson v. Adams Express Co., 72 Pa.Super. 384.

Tex.—Atchison, T. & S. F. Ry. Co. v. Smyth, Civ.App., 189 S.W. 70.

Utah.—Baird v. Denver & R. G. R. Co., 162 P. 79, 49 Utah 58

Va.—Chesapeake & O. Ry. Co. v. Rebman & Clark, 90 S.E. 629, 120 Va. 71.

10 C.J. p. 400 note 24.

17. Utah.—Dee v. San Pedro, L. A. & S. L. R. Co., 167 P. 246, 50 Utah 167.

Live stock

Where contract for transportation of horses by rail limited claim for damages on account of any one animal to one hundred dollars, fixed as declared value, and shipper sold injured mare for seventy-five dollars, shipper was held entitled to recover eighty dollars damages on account of injuries to mare, and was not limited to recovery of twenty-five dollars.—Dee v. San Pedro, L. A. & S. L. R. Co., 167 P. 246, 50 Utah 167.

18. Wash.—Kirby v. American Ry. Express Co., 242 P. 24, 137 Wash. 241.

"Any loss, injury or damage"

A provision fixing an agreed value and stipulating that "the liability of the company for any loss, injury or damage for which it may be responsible," shall be to the extent only of such agreed valuation does not limit liability for damages from delay in transit resulting in loss of advantageous market.—Elliott v. Chicago, M. & St. P. Ry. Co., 161 N.W. 347, 38 S.D. 371.

19. Mo.—Ficklin v. Wabash R. Co., 93 S.W. 861, 117 Mo.App. 211.

10 C.J. p. 184 note 42 [a].

20. W.Va.—Delaney v. U. S. Express Co., 74 S.E. 512, 70 W.Va. 502, 514.

"The bill of lading says that the shipper agreed that the value of the drill was $50, and that the liability of company should not, 'in any event,' exceed that sum. On this account, the claim is that the verdict could not be more. We do not think this is involved in this case. It relates to loss of the article shipped, not delay. The drill was not lost. We do not think this stipulation would bear on damage for delay of transportation."—Delaney v. U. S. Express Co., supra.

21. Or.—Coos Bay Amusement Co. v. American Ry. Express Co., 277 P. 107, 129 Or. 216.

22. U.S.—Southeastern Express Co. v. Pastime Amusement Co., 57 S.Ct. 73, 299 U.S. 28, 81 L.Ed. 20, reversing Pastime Amusement Co. v. Southeastern Express Co., 186 S.E. 283, 181 S.C. 203, certiorari granted Southeastern Express Co. v. Pastime Amusement Co., 56 S.Ct. 954, 298 U.S. 653, 80 L.Ed. 1380

23. N.Y.—Meyer v. Central R. Co. of New Jersey, 174 N.Y.S. 93, 185 App.Div. 812.

10 C.J. p. 184 note 43.

Reason for rule

"A reading of this clause in the bill of lading clearly indicates that the loss there referred to is, as is stated in the clause itself, 'the loss of any portion or the whole of said goods or merchandise.' In this case there has been no loss of the goods, either of a portion or of the whole thereof, nor has there been any damage to the goods. The right of action is loss to the shipper by failure of the carrier to make prompt delivery of the goods after arrival. The provision in the bill of lading, that the amount of the claim should be restricted to the cash value of such goods or merchandise at the original port of shipment, clearly indicates that the loss referred to in the bill of lading refers to a loss of the goods themselves, or a portion thereof."—Meyer v. Central R. Co. of New Jersey, 174 N.Y.S. 93, 95, 185 App.Div. 812.

Similar clauses

(1) The rule of the text has been applied to a clause providing that "in the event of the loss of property under the provisions of this agreement, the value or cost of the same at the point of shipment shall govern the settlement."

Mo.—Morrow v. Missouri Pac. Ry. Co., 123 S.W. 1034, 140 Mo.App. 200.

Okl.—Ft. Smith & W. R. Co. v. Awbrey & Semple, 134 P. 1117, 39 Okl. 270.

(2) So, a clause in a bill of lading, providing "that the amount of loss or damage accruing to the owner of said goods, in so far as the same shall fall upon this or any connecting carrier shall be computed at the value or cost of said goods at the place and time of shipment, and that the railroad company or carrier paying such loss shall have the full

been taken,[24] it has been held that a stipulation that the amount of any loss or damage for which the carrier is liable shall be computed on the basis of the value of the property at the time and place of shipment is broad enough to include damages caused by delayed delivery.[25]

Limitations of value to an amount specified have no application in case of loss or injury caused by wrongful or negligent delivery of the goods.[26]

Conversion by employee of carrier. In the case of a conversion or embezzlement by an employee of the carrier, as distinguished from a conversion by the carrier itself, which is considered infra § 115, stipulations limiting the liability of the carrier to an agreed valuation are effective and the shipper's recovery is controlled by the terms of the contract;[27] but a clause which contains no stipulation as to the value of the property intrusted to the carrier and which simply limits the carrier's responsibility to a stated sum, refers to the company's responsibility as a carrier and does not relieve it from liability for the full face value of articles stolen by its employees.[28]

§ 114. Exempt Cause Must Be Proximate

To relieve the carrier from liability under a contractual exemption, the exempt cause must be the proximate cause of the injury.

benefit of any insurance that may have been effected upon or on account of said goods," was meant to cover the loss or damage done to the goods themselves, and does not cover the owner's damage sustained by reason of a mere failure to carry and deliver the goods in a reasonable time. The last sentence, providing that the carrier shall be entitled to the benefit of insurance taken, adds force to this construction.—Klass Commission v. Walsh R. R. Co., 80 Mo.App. 164.

24. Ark.—Chicago, R. I. & P. Ry. Co. v. Cunningham Commission Co., 192 S.W. 211, 127 Ark. 246.

25. Md.—Fahey v. Baltimore & O. R. Co., 114 A. 905, 139 Md. 161.
N.Y.—American Locomotive Co. v. New York Cent. R. Co., 179 N.Y.S. 851, 190 App.Div. 372.

Consequential damages

(1) Under provision in bill of lading that amount of any loss or damage for which the carrier is liable shall be computed on value of goods at time and place of shipment, shipper was held not entitled to consequential damages for delayed delivery, or from inability to use property for any period of time because of damaged condition.—Emil Grossman Mfg. Co. v. New York Cent. R. Co., 169 N.Y.S. 213, 181 App.Div. 764.

(2) It has been held, however, that shippers of cases of aluminum which were unreasonably delayed by the railroad's negligence, were properly awarded as damages, in view of such contract of shipment, the difference between the invoice value of the goods at the place and time of shipment and their market value at destination.—Strahs v. New York Cent. R. Co., 184 N.Y.S. 362, 113 Misc. 273.

26. Ala.—Southern R. Co. v. Webb, 39 So. 262, 143 Ala. 304, 111 Am.S.R. 45, 5 Ann.Cas. 97.
N.Y.—Vroman v. American Merchants' Union Express Co., 2 Hun 512.
Va.—Clarke-Lawrence Co. v. Chesapeake, etc., R. Co., 61 S.E. 364, 63 W.Va. 423.

This statement in Corpus Juris is quoted in Boone v. Missouri Pac. R. Co., App., 263 S.W. 495, 497, certiorari granted Missouri Pac. R. Co. v. Boone, 45 S.Ct. 196, 266 U.S. 600, 69 L.Ed. 461, affirmed 46 S.Ct. 341, 270 U.S. 466, 70 L.Ed. 688.

Stoppage in transitu

Limitations of value to an amount specified have no application in case of loss or injury caused by the carrier's delivery of the goods after notice from the shipper to stop them in transitu which it agreed to do.—Rosenthal v. Weir, 63 N.E. 65, 170 N.Y. 148, 57 L.R.A. 527, affirming 66 N.Y.S. 841, 54 App.Div. 275.

Delivery to wrong person

A provision in a contract of shipment limiting the carrier's liability to a stipulated amount for all loss or damage that might occur to the property from any cause has no application where the goods are delivered to the wrong person, since, as said by the court, "A wrongful delivery was not anticipated by the parties, and cannot, therefore, be within the stipulation."—Clarke-Lawrence Co. v. Chesapeake, etc., R. Co., 61 S.E. 364, 63 W.Va. 423, 428.

Damages recoverable

A provision that should damage occur for which the carrier may be liable the value at the place of shipment shall govern, has no application to a claim for damages for misdelivery, and does not prevent a recovery of damages consisting of a fall in the market price at the place of destination.—Southern R. Co. v. Webb, 39 So. 262, 143 Ala. 304, 111 Am.S.R. 45, 5 Ann.Cas. 97.

27. U.S.—Moore v. Duncan, Ohio, 237 F. 780, 150 C.C.A. 534.
Tex.—Henderson v. Wells Fargo & Co. Express, Civ.App., 217 S.W. 962.
10 C.J. p. 184 note 48.

"It would be unjust and contrary to the policy of the law to permit the agreed valuation to be overthrown for the purpose of enabling the shipper to obtain a recovery in excess thereof in a suit for loss or damage on any theory of trover or conversion for loss of goods by wrongful deliveries or acts of employés for their own benefit, based, not on the wrongful misconduct of the carrier as such, but on the act of the employé.—Rosenthal v. Weir, 63 N.E. 65, 170 N.Y. 148, 154, 57 L.R.A. 527. The liability of carriers of goods at common law was that of insurers, and proper care and diligence were insufficient to avoid such liability. The duty was to carry the goods and deliver them to the consignee. A breach of that duty imposed liability. The innocent mistakes of the servant in delivering the goods, no less than his willful misconduct in breach of the trust reposed in him, constituted a conversion by the carrier. Price v. Oswego & Syracuse R. Co., 50 N.Y. 213, 10 Am.R. 475. But the contract in suit does not evade the liability, it merely fixes the valuation of the goods when liability is established. . . . The contention of appellant that the agreed value does not conclude the shipper as against the acts of employés outside the scope of their employment cannot be sustained without ignoring the terms of the contract, disregarding the intent of the parties and of the acts of Congress regulating interstate transportation and holding the carrier to a different responsibility than that which it assumed."—D'Utassy v. Barrett, 114 N.E. 786, 787, 219 N.Y. 420, 5 A.L.R. 979, affirming 157 N.Y.S. 916, 171 App.Div. 772.

28. N.Y.—Heuman v. M. H. Powers Co., 123 N.E. 373, 226 N.Y. 205, reversing 162 N.Y.S. 590, 175 App.Div. 627, reargument denied 124 N.E. 899, 226 N.Y. 711.

The loss must be the proximate result of a cause as to which the carrier has exempted itself from liability in order to be relieved from liability under such exemption,[29] and the excepted cause of liability must be the sole cause of the loss, for if the negligence of the carrier mingles with it as an active and coöperative cause the carrier will be responsible.[30] Thus, the carrier is not relieved from liability merely because the excepted cause set in motion the circumstances resulting in the loss if the carrier could, by the exercise of reasonable diligence, have prevented the loss after discovery of the danger.[31]

§ 115. Waiver or Loss of Benefit of Limitations

The benefit of limitations of liability may be waived or lost by the carrier.

The benefit of the limitation contained in a contract limiting the carrier's common-law liability may be forfeited or lost by the carrier[32] or waived.[33] Thus, the benefit of the limitation is lost by

29. Vt—Porter Screen Mfg. Co. v Central Vermont Ry. Co, 102 A. 44, 92 Vt. 1
10 C J p 188 note 86.

30. Tex—St. Louis Southwestern Ry. Co of Texas v. Culberson, Civ. App, 248 S.W 111—Gulf, C & S F. Ry. Co. v. Culwell, Civ.App., 216 S W. 457.
Vt—Porter Screen Mfg. Co v. Central Vermont Ry Co, 102 A. 44, 92 Vt. 1
10 C J. p 188 note 87.

Corpus Juris is quoted or cited in St. Louis, B. & M Ry. Co. v Murray, Tex.Civ.App., 40 S.W 2d 949, 951—St. Louis Southwestern Ry Co of Texas v. Culberson, Tex Civ.App, 248 S W. 111, 112—Gulf, C. & S F Ry Co v Culwell, Tex.Civ.App, 216 S. W. 457, 459

Defective roadbed

Special contract between railroad and show company, providing that show company should be the hirer of motive power and employees furnished, and that the railroad should not be liable for their negligence, would not bar actions for damages resulting from wreck caused in part by defective condition of roadbed—Bernardi Greater Shows v Boston & M. R. R, 165 A. 124, 86 N.H. 146.

Negligence of wrecking crew

Special contract between railroad and show company fixing railroad's obligations in respect of other matters could not affect railroad's liability for negligent handling by railroad's wrecking crew of show company's property after wreck—Bernardi Greater Shows v. Boston & M. R. R, 165 A. 124, 86 N.H. 146.

Gross negligence

Notwithstanding bill of lading stipulates that property destined to be taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at owner's risk after unloading, the carrier will not be relieved from gross negligence in unloading in the mud and rain, at an unreasonable hour of the night, goods consigned to such point, when the consignee is not present, or could not reasonably be expected to be present, and it is manifest that the goods are of such character that they will be rendered useless by the elements—Annese v. Baltimore & O R Co, 105 S E 807, 87 W Va 588, 22 A.L R 869.

Negligence not proximate cause

Where the bill of lading provides that the carrier would be liable only as a warehouseman for goods not removed within forty-eight hours after notice of arrival had been sent, and the goods arrived on Thursday at 12 55 p. m, carrier's failure to mail a notice of arrival until Friday at 5 p. m. was not the proximate cause of a loss of the goods while in carrier's possession by theft the following week.—Rotundo v. Erie R Co, 198 N.Y S. 688, 120 Misc. 461

31. Ark—Jonesboro, L. C. & E. R Co. v. Maddy, 248 S W. 911, 157 Ark 484, 28 A L R 498.
Ky—Southern Ry Co. in Kentucky v. John T Barbee & Co, 226 S.W. 376, 190 Ky. 63, 20 A.L.R. 257.

Act of God

Under bill of lading excepting liability for damages from act of God, the damage must have been proximately and exclusively due to natural causes which could not have been prevented by the foresight and care reasonably to be expected from the carrier.—Porter Screen Mfg Co v. Central Vermont Ry. Co, 102 A. 44, 92 Vt. 1.

Mobs, strikes, or violence

(1) Although the contract specifically exempts the carrier from all liability for losses caused by mobs, strikes, or violence, it is the duty of the carrier to exercise reasonable diligence to prevent injury by finding another route over which safe and undelayed transportation might be had.—Chicago, R I & P R Co v. Dawson, 248 S W. 558, 157 Ark 460

(2) Irrespective of such a provision the carrier is liable for delay on account of a strike unless it uses all reasonable efforts to procure men to run the trains and avoid delay and consequent damage
Cal—American Fruit Distributors of California v. Hines, 203 P 821, 55 Cal App. 377.
Mo—Warner v St. Louis-San Francisco Ry. Co, 274 S W. 90, 218 Mo App. 314.

(3) So, although a strike may be in progress, a carrier is not relieved of liability by merely showing a strike, and the consequent delay due in part to it, if, by exercising ordinary care, it might have moved the car from the place of shipment to the place of destination under the schedule in force during the strike.—St. Louis-San Francisco Ry. Co. v. Watts, 271 S W. 464, 168 Ark 804.

(4) Where in the course of a race riot in East St. Louis in 1917, fires were started near railroad yards, the mobs burning down negro shacks in the vicinity, notwithstanding the contract of carriage provides against liability for loss resulting from riots or the consequences thereof, the railroad company is liable for the loss of a shipment, where there was no hostility displayed by the mobs to the railroad company's property, and there was a great delay in sending for an engine to draw the car containing the shipment into a point of safety, it appearing that no sufficient guard was placed around the yards, and no arrangements made by the railroad officials to keep in touch with events—Southern Ry. Co. in Kentucky v. John T. Barbee & Co, 226 S W. 376, 90 Ky. 63, 20 A.L R. 257.

Only ordinary care required

Where agents of carrier apprehend danger of destruction of property in consequence of riot and fires, the carrier being by valid contract exempted from liability for loss from such cause, they are required to exercise only ordinary care to preserve and protect the property.—Julius Kessler & Co. v Southern Ry. Co in Kentucky, 255 S.W. 535, 200 Ky. 713

32. N C.—Reynolds v. Adams Express Co., 90 S E 510, 172 N C 487, Ann.Cas 1918C 1071 error dismissed Adams Express Co. v Reynolds, 39 S Ct. 183, 248 U.S. 548, 63 L Ed. 416.
10 C.J. p 189 note 96.

33. Ark—Wells Fargo & Co. Express v. Townsend & Freeman Co., 204 S.W 417, 134 Ark 560
Miss—Illinois Cent R. Co v. King, 88 So. 322, 125 Miss. 734.
10 C.J. p 189 note 95.

making a charge in excess of a reduced rate which constituted the consideration therefor,[34] by failure of the carrier to return the goods carried when ordered so to do by the shipper during their transportation,[35] or by an abandonment,[36] or an affirmative repudiation, by the carrier of the contract to carry and deliver,[37] such as a deliberate and intentional refusal to perform,[38] but it is only where the contract is repudiated by the carrier that the limitation is abrogated.[39] The fact that the consignees were not given notice of a loss in transit until long after the shipment was due to arrive does not estop the carrier from relying on a provision fixing its liability on the basis of value at the place and time of shipment, even though the replacement value of the goods was higher when such notice was finally received.[40] The statutory right of a carrier to limit its liability to a certain valuation according to the published tariff, unless a greater one is declared, is not waived by failure to inquire as to value where the carrier's agents were not instructed not to inquire.[41]

Conversion by carrier. As distinguished from the rule which governs in the case of an embezzlement or conversion by an employee of the carrier, which is discussed supra § 113 c, it is frequently held that a carrier, which itself wrongfully converts the goods intrusted to it for transportation, loses the benefit of limitations on its liability; such limitations, it is said, have no application in the case of a conversion.[42] This rule has been specifically applied where the shipping contract provided that the carrier shall not be liable for loss or injury beyond a fixed amount or an agreed valuation,[43] or that the liability of the carrier for loss or injury shall be measured by the value of the goods at the time and the place of shipment;[44] and it follows that where this rule obtains a carrier converting goods shipped under a contract limiting liability to a specified sum is, notwithstanding the contract, liable for the full value of the goods.[45] With respect to interstate shipments governed by the Carmack amendment as amended, however, the view has been taken that the effect of a stipulation limiting liability to a certain amount cannot be escaped by suing in trover and laying the failure to deliver as a conversion,[46]

Facts showing waiver

(1) Limitation is waived by carrier where its claim agent directs shipper to replace article lost at carrier's expense—Wells Fargo & Co. Express v. Townsend & Freeman Co., 204 S.W. 417, 134 Ark. 560.

(2) Where a shipper carries freight to a freight agent of a railroad and discloses the nature and value of the articles, and the agent writes only one article in the bill of lading when the shipment contains many articles, the company cannot escape liability for the negligence or dishonesty of its employees because the bill of lading contains a clause that no carrier shall be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated, in the absence of a special agreement, such clause being considered as waived by the failure of the carrier's agent to write the data on the bill of lading.—Illinois Cent R. Co v. King, 88 So. 322, 125 Miss 734.

34. Mo.—Hendrix v. Wabash R Co., 80 S.W. 970, 107 Mo.App. 137.

35. N.Y.—Rosenthal v. Weir, 66 N Y S. 841, 54 App Div. 275, affirmed 63 N.E 65, 170 N.Y. 148, 57 L.R.A 527.

36. N.C—Reynolds v. Adams Express Co, 90 S.E. 510, 172 N.C. 487, Ann Cas.1918C 1071, error dismissed Adams Express Co. v Reynolds, 39 S Ct. 183, 248 U.S. 548, 63 L Ed 416.
10 C.J. p 184 note 37 [a].

37. Ala.—Davis v. Zimmern, 99 So. 307, 211 Ala. 63

38. N.Y.—Keeney v. Grand Trunk R. Co, 59 Barb. 104, affirmed 47 N.Y. 525.
10 C.J. p 186 note 56.

39. Mass.—Coleman v. New York, etc, R Co., 102 N.E. 92, 215 Mass. 45

40. Md.—Fahey v. Baltimore & O. R. Co, 114 A. 905, 139 Md. 161

41. N.Y.—Levett v. Draper, 174 N.Y. S 721, 106 Misc 497.

Provision of tariff that rates were based on a value not exceeding fifty dollars on each shipment and liability limited to value stated, unless a greater was declared, did not award company option to inquire as to value of package and to fix its rate and liability accordingly, and did not import a waiver if no such inquiry was made—Granbery v. Taylor, 159 N.Y. S 932, 95 Misc. 585.

42. U.S.—Menuez v. Julius Kindermann & Sons, D.C.N.Y., 19 F Supp. 7.
Tex.—American Ry. Express Co v. Santa Anna Gas Co, Civ App, 250 S.W. 271, 273, petition dismissed 44 S Ct. 3, 263 U.S. 725, 68 L Ed 526
10 C.J. p 184 note 37, p 189 note 98
Corpus Juris is cited with approval in American Ry. Express Co. v. Santa Anna Gas Co, supra.

43. Tex.—American Ry Express Co. v. Santa Anna Gas Co., supra—Kansas City, M. & O. Ry Co. of Texas v. Corn, Civ.App., 186 S.W. 807.
10 C.J. p 184 note 46.

44. U.S.—Norfolk & W. Ry. Co. v. Ft. Dearborn Coal & Export Co, C.C.A.W.Va, 292 F. 78—Dexter & Carpenter v. Davis, C.C.A.Md., 281 F. 385.
Tex.—International & Great Northern Ry. Co. v. Kansas City Produce Co, Civ.App., 200 S.W. 254, dismissed for want of jurisdiction.
10 C.J. p 184 note 47.

Corpus Juris is cited with approval in Davis v. Zimmern, 99 So. 307, 310, 211 Ala. 63.

Cummins amendment inapplicable

The rule of the text has been applied where the shipment in question was to a foreign country not adjacent, the Cummins amendment to the Carmack amendment not being applicable in such case—Norfolk & W. Ry. Co. v. Ft. Dearborn Coal & Export Co, C.C.A.W.Va, 292 F. 78—Dexter & Carpenter v. Davis, C.C.A. Md, 281 F. 385

45. Tex.—St Louis, etc, R Co v. Wallace, Civ.App, 176 S.W. 764
10 C.J. p 189 note 99.

46. U.S.—American Ry. Express Co. v. Levee, La., 44 S.Ct 11, 263 U. S. 19, 68 L Ed. 140.
Ga.—American Ry. Express Co. v. S. & W. Estroff, 125 S.E. 40, 159 Ga. 58, affirming 121 S.E 711, 31 Ga.App 577.
Iowa.—T. Richter & Sons v. American Express Co., 164 N.W. 228, 180 Iowa 1037, L.R.A 1918A 749.

and it has accordingly been held that it is not the rule under the Carmack amendment that where a conversion has occurred the carrier is deemed to have abandoned the contract of shipment, so that the amount to be recovered is in accord with the measure of damages which obtains in conversion;[47] but notwithstanding the Carmack amendment, that rule has been applied in the case of interstate shipments where there was an actual conversion.[48]

§ 116. By Deviation

A carrier by deviating from the stipulated or customary course of shipment ordinarily deprives itself of the benefit of contractual limitations of liability.

Although deviation from oral directions merged in a written shipping contract will not deprive the carrier of the benefit of contractual limitations where there was no deviation from the written contract,[49] if the carrier deviates from the course or method of shipment stipulated for in the contract, or the one customarily used and which the shipper has the right to assume will be used, it will deprive itself of the benefit of any exemption from liability found in such contract.[50] This rule in no way conflicts with the general rule for the measuring of damages for breach of contract of carriage which limits recovery for breach of such contract to such damages as might reasonably be supposed to have been within the contemplation of the parties at the time when the contract was made as a probable result of the breach.[51]

The doctrine of unlimited liability in case of deviation applies to live stock shipments as well as to shipments of merchandise,[52] and to shipments in interstate as well as intrastate commerce.[53] The simplest class of cases in which this principle has been applied is where the deviation or departure is the proximate cause of the loss.[54] However, it has been pointed out that in some English cases the principle has been applied where it was not possible to say that the deviation or departure was the proximate cause of the loss, but where the loss occurred during the continuance of the deviation or departure; and, also, where the deviation was not the proximate cause of the damage done to the goods shipped, and where it did not occur while the deviation was in effect.[55] The rule has been applied in respect of limitations of liability against loss by fire,[56] and limitations as to the amount of recovery in case of loss or injury.[57]

Ohio—Rogers v. Standard Steel Castings Co., 16 Ohio App. 474.

47. Mo—F. W. Brockman Commission Co. v Missouri Pac. Ry. Co., 188 S.W. 920, 195 Mo.App. 607

48. Minn—Sands v. American Ry Express Co, 193 N.W. 721, 154 Minn 308

Without referring to the Carmack Amendment, it has been held by some courts in cases involving interstate shipments that limitations of liability do not apply where the carrier is guilty of a conversion—International & Great Northern Ry. Co. v. Kansas City Produce Co, Tex.Civ.App., 200 S.W. 254, dismissed for want of jurisdiction—Kansas City, M. & O. Ry. Co. v. Corn, Tex.Civ.App, 186 S.W. 807

49. Iowa—Marks & Shields v. Chicago, R. I & P. Ry Co., 169 N.W. 764, 184 Iowa 1352

Unloading for inspection

Where the written contract for the shipment of horses contained no provision for unloading for inspection at particular yards, and the unloading for inspection at the company's own yards was warranted under the quarantine regulation, it was held that, as oral shipping directions to unload at another yard were not binding, such unloading was not a deviation from the route specified, as would deprive the railroad company of benefit, the provisions of the contract limiting recovery.—Marks & Shields v. Chicago, R. I & P. Ry. Co, 169 N.W. 764, 184 Iowa 1352.

50. N.C—Reynolds v. Adams Express Co, 90 S.E. 510, 172 N.C. 487, Ann.Cas.1918C 1071 error dismissed Adams Express Co v. Reynolds, 39 S.Ct. 183, 248 U.S. 548, 63 L.Ed. 416.

Okl—O. K. Transfer & Storage Co. v Neill, 159 P. 272, 59 Okl. 291, L.R.A.1917A 58.

10 C.J. p 189 note 2.

Reason for rule

"Where the company voluntarily and without just cause or excuse had abandoned the mode and manner of transportation contemplated and provided for by the contract, the shipper, as we have seen, is justified in treating the contract as abrogated for the time being, and for injuries received during such period and incident to such breach he may, as stated, recover for the entire damages suffered, notwithstanding the restrictions as to value, these, being but a part of the contract, are also ineffective while the carrier is acting outside of the contract and its obligations."—Reynolds v. Adams Express Co., 90 S.E. 510, 512, 172 N.C. 487, Ann.Cas.1918C 1071, error dismissed Adams Express Co v. Reynolds, 39 S.Ct. 183, 248 U.S. 548, 63 L.Ed. 416—10 C.J. p 189 note 2 [a].

Sending express by freight train

Contract of carriage by express is abandoned, where the car is put in a freight train, so that limitation of recovery to the one hundred dollar valuation put by the contract on each horse does not control, although it is an interstate shipment.—Reynolds v. Adams Express Co, 90 S.E. 510, 172 N.C. 487, Ann.Cas.1918C 1071, error dismissed Adams Express Co v. Reynolds, 39 S.Ct. 183, 248 U.S. 548, 63 L.Ed. 416—10 C.J. p 189 note 2 [b].

51. Tex—St. Louis Southwestern R. Co. v Louisiana, etc, Lumber Co, 109 S.W. 1143, 50 Tex.Civ.App. 179.

52. N.C—Reynolds v. Adams Express Co, 90 S.E. 510, 182 N.C. 487, Ann.Cas.1918C 1071, error dismissed Adams Express Co. v. Reynolds, 39 S.Ct. 183, 248 U.S. 548, 63 L.Ed. 416.

10 C.J. p 190 note 4.

53. N.C—Reynolds v. Adams Express Co, supra.

54. U.S.—Hunnewell v. Taber, D.C. Mass., 12 F.Cas.No.6,880, 2 Sprague 1.

Pa.—Hand v. Baynes, 4 Whart 204, 33 Am.D. 54.

55. Mass.—McKahan v. American Express Co, 95 N.E. 785, 209 Mass. 270, 35 L.R.A.,N.S., 1046, Ann.Cas. 1912B 612

56. Okl.—O. K. Transfer & Storage Co v. Neill, 159 P. 272, 59 Okl. 291, L.R.A.1917A 58.

10 C.J. p 190 note 8.

57. N.C.—Reynolds v. Adams Express Co, 90 S.E. 510, 182 N.C. 487, Ann.Cas.1918C 1071, error dismissed Adams Express Co. v. Reynolds, 39 S.Ct. 183, 248 U.S. 548, 63 L.Ed. 416

10 C.J. p 190 note 12.

§ 117. As to Carriage of Goods Not within Scope of Duty to Carry

Where the carrier is not acting within the scope of its duty as common carrier, it may impose any limitations on its liability as it sees fit, and, accordingly, may contract against liability for damage resulting from its own negligence.

Where the goods offered for shipment are such as the carrier is not bound to accept for transportation, it may, if it chooses to carry them, impose such limitations on its liability as it sees fit; in other words, it enjoys the same freedom of the right of contract as other corporations or persons and may name the conditions under which it will undertake the transportation.[58] This is not violative of public policy.[59]

The general rule, stated supra § 99, that common carriers cannot secure immunity from liability for their negligence by contract has no application when a railroad company is acting outside the performance of its duty as a common carrier; in such case it is dealing with matters involving ordinary considerations of contractual relation; those who choose to enter into an engagement with it are not at a disadvantage, and its stipulations even against liability for its own neglect are not repugnant to the requirements of its public service, but the rule extends no further than the reason for it.[60] There may be special engagements which are not embraced within its duty as a common carrier, although their performance may incidentally involve the actual transportation of persons and things whose carriage in other circumstances might be within its public obligation,[61] as, for instance, the transportation of men and supplies required by a construction company in grading an extension;[62] and a contract for such transportation at reduced rates may validly stipulate against liability for negligence.[63] This principle has also been applied to the carriage of express matter, the view being taken that railway companies although common carriers may contract as private carriers to transport express matter for express companies as such matter is usually carried, and in that capacity may properly require exemption from liability for negligence as a condition to the obligation to carry.[64] Likewise, the principle has been applied to carriers of express messengers, it being held, as shown infra § 636, that the carrier may make a contract by which an express messenger as a condition of the carrier's employment assumes all risk of injury while so riding, whether from negligence of the carrier's servants or otherwise. In further application of the principle, it has been held that a railroad company selling its own property can, as a private carrier, contract with the purchaser to transport it and exempt itself from liability for its negligence in the transportation.[65] Similarly, a railroad company can limit its liability for negligence to operators of a motor car owned by an independent company and run on the railroad with the company's permission.[66] The general rule has frequently been applied in the hauling of circus trains owned by circus proprietors, it being held that the carrier may validly contract against loss or injury to person or property of the circus train from any cause whatsoever, where the carrier furnishes men and motive power to transport the train which is to be operated under the management and the control of the circus proprietor,[67] or where the proprietors of the circus train agree to load and to unload the cars, the carrier's servants having no right to direct the same.[68] A different rule prevails, however, where the railroad acting as a common carrier transports a show company; in such case the principles, stated supra § 99, which prohibit contracts relieving it of liability for

58. Mich.—Mehegan v. Boyne City, etc., R. Co., 141 N.W. 905, 148 N. W. 173, 178 Mich. 694, L.R.A.1915E 1170.
10 C.J. p. 67 note 64 [a], p. 190 note 13.

59. N.Y.—Ferrari v. New York Cent., etc., R. Co., 147 N.Y.S. 376, 162 App. Div. 6.

60. N.H.—Bernardi Greater Shows v. Boston & M. R. R., 165 A. 124, 86 N.H. 146.
Ohio.—C. L. Hils Co. v. Cincinnati, N. O. & T. P. Ry. Co., 181 N.E. 819, 42 Ohio App. 103.
10 C.J. p. 191 note 16.

61. U.S.—Northern Pac. R. Co. v. Adams, Wash., 24 S.Ct. 408, 192 U.S. 440, 48 L.Ed. 513.

62. U.S.—Santa Fé, etc., R. Co. v. Grant Bros. Constr. Co., Ariz., 33 S.Ct. 474, 228 U.S. 177, 57 L.Ed. 787.

63. U.S.—Santa Fé, etc., R. Co. v. Grant Bros. Constr. Co., supra.

64. Ind.—Pittsburgh, etc., R. Co. v. Mahoney, 46 N.E. 917, 47 N.E. 464, 148 Ind. 196, 62 Am.S.R. 503, 40 L.R.A. 101.

65. Ohio.—C. L. Hils Co. v. Cincinnati, N. O. & T. P. Ry. Co., 181 N.E. 819, 42 Ohio App. 103.

Operation and effect of contract.
Railroad carrying its own scrap iron as vendor under contract exempting it from liability for "loss, damage or injury" to scrap is not liable for loss due to delay.—C. L. Hils Co. v. Cincinnati, N. O. & T. P. Ry. Co., 181 N.E. 819, 42 Ohio App. 103.

66. Mich.—Mehegan v. Boyne City, etc., R. Co., 141 N.W. 905, 148 N.W. 173, 178 Mich. 694, L.R.A.1915E 1170.

67. U.S.—Sasinowski v. Boston & M. R. R., C.C.A.Mass., 74 F.2d 628.—Clough v. Grand Trunk Western R. Co., Mich., 155 F. 81, 85 C.C.A. 1, 11 L.R.A.,N.S., 446, certiorari denied 29 S.Ct. 688, 212 U.S. 579, 53 L.Ed. 659.
10 C.J. p. 191 note 22.

68. U.S.—Wilson v. Atlantic Coast Line R. Co., C.C.Ga., 129 F. 774, affirmed 133 F. 1022, 66 C.C.A. 486, certiorari denied 25 S.Ct. 802, 198 U.S. 585, 49 L.Ed. 1173.
Mass.—Robertson v. Old Colony R. Co., 31 N.E. 650, 156 Mass. 525, 32 Am.S.R. 482.

its own negligence or that of its servants are applicable.[69]

§ 118. Extending Common Law Liability

The common-law liability of a carrier may ordinarily be extended by contract or statute.

By a special contract the carrier may extend its common-law liability so as to be answerable for loss or damages for which it would not be accountable under the common-law rule, or by statute,[70] provided the contract is not in conflict with the law.[71] Thus, while a private carrier is ordinarily liable only for loss shown to have resulted from his own lack of care, there is no rule to prevent his undertaking to insure the safe delivery of goods intrusted to him for carriage, and if he does so undertake, he will be liable accordingly,[72] but the express exclusion of a particular risk will not by implication extend the undertaking to all other risks,[73] and it has been held that the mere undertaking of a private carrier to carry the goods safely imposes no higher duty than already existed on the carrier's part and renders him liable for losses caused by his negligence, but for nothing more.[74] A constitutional provision that the liability of railroad corporations as common carriers shall never be limited does not prohibit the legislature from increasing the common-law liability of such carriers.[75]

K. SHIPPING RECEIPTS, BILLS OF LADING, AND SPECIAL CONTRACTS

§ 119. In General

The relations between a shipper and a carrier are contractual in their nature.

The relations between shipper and carrier are contractual, even though the terms of the contract are fixed by law and not by agreement of the parties.[76] In the case of an interstate shipment it is said that the contract between the shipper and the carrier is made up of the bill of lading, and the tariffs, schedules, and other governing rules and regulations of the interstate commerce commission,[77] which are to be read into,[78] and are regarded as becoming a part of,[79] any contract of shipment authorized by and within the scope of the federal Transportation Act.

§ 120. What Law Governs

Subject to limitations which may be imposed by its interstate character, a contract of shipment is governed as to its validity, interpretation, and effect by the law of the place where it is entered into.

In general, the validity, construction, and effect of a contract of shipment are governed by the law of the place where it is entered into;[80] contracts for through interstate shipments are, however, controlled by the pertinent federal laws,[81] the agree-

69. N.H.—Bernardi Greater Shows v. Boston & M. R. R., 165 A. 124, 86 N.H. 146.

70. Cal.—Klein v. Baker, 296 P. 631, 112 Cal.App. 157.
W.Va.—Max Biederman, Inc. v. Henderson, 176 S.E. 433, 115 W.Va. 374.
10 C.J. p. 133 note 19.

71. Tex.—St. Louis, etc., R. Co. v. Hicks, Civ.App., 158 S.W. 192.

72. Cal.—Klein v. Baker, 296 P. 631, 112 Cal.App. 157.
W.Va.—Max Biederman, Inc., v. Henderson, 176 S.E. 433, 115 W.Va. 374.
"A private carrier, or bailee, may enlarge his legal liability by a special contract by which he agrees, without qualification or condition, to deliver safely, thus making himself an insurer of the goods to be transported."—Max Biederman, Inc. v. Henderson, supra.

73. Mont.—U. S. v. Power, 12 P. 639, 6 Mont. 271.

74. N.Y.—Ames v. Belden, 17 Barb. 513.
10 C.J. p. 39 note 25.

75. Neb.—Smith v. Chicago, St. P., M. & O. Ry. Co., 157 N.W. 622, 99 Neb. 719.—Cram v. Chicago, B. & Q. R. Co., 122 N.W. 31, 84 Neb. 607, 26 L.R.A.,N.S., 1022.

76. Mich.—Thomas Canning Co. v. Southern Pac. Co., 189 N.W. 210, 219 Mich. 388.

77. Miss.—Pitman v. Yazoo & M. V. R. Co., 158 So. 547, 171 Miss. 799.—Mobile & O. R. Co. v. Jensen, 139 So. 840, 162 Miss. 741.

Conditions governing change in destination contained in carrier's tariff circulars filed with interstate commerce commission are as much a part of carriage contract as the bill of lading, binding consignee and carrier.—American Cotton Products Co. v. New York Cent. R. Co., 255 N.Y.S. 672, 142 Misc. 821.

78. N.Y.—Bobzein v. New York Cent. R. Co., 176 N.Y.S. 407, 187 App.Div. 767.

79. Mich.—Rockwell v. Grand Trunk Western Ry. Co., 250 N.W. 515, 264 Mich. 626.—Shier v. American Ry. Express Co., 208 N.W. 746, 234 Mich. 505.

80. U.S.—Sasinowski v. Boston & M. R. R., C.C.A.Mass., 74 F.2d 628.
Ill.—Macomber & Whyte Rope Co. v. United Fruit Co., 225 Ill.App. 286.
N.Y.—Johnston v. Compagnie Générale Transatlantique, 206 N.Y.S. 413, 123 Misc. 806.
Tenn.—Model Mill Co. v. Carolina, C. & O. Ry. Co., 188 S.W. 936, 136 Tenn. 211.

Foreign law not pleaded
Missouri law controls construction of Arkansas contracts between consignor and consignee in Missouri action, where no Arkansas law is pleaded.—Turner Lumber & Investment Co. v. Chicago, R. I. & P. Ry. Co., 16 S.W.2d 705, 223 Mo.App. 564.

Transfers of bill of lading
Subsequent transfers of a bill of lading constitute new and independent contracts, which are governed by the law of the state where made.—Standard Grain Co. v. State Bank of Omaha, 182 N.W. 507, 106 Neb. 73.

81. Ala.—Nashville, C. & St. L. Ry. Co. v. Camper, 78 So. 925, 201 Ala. 581.
Mo.—Clemons Produce Co. v. Denver & P. G. R. R., 219 S.W. 660, 203 Mo.App. 100.

Carmack amendment
If otherwise entitled to recover, the provisions of the Carmack amendment should be accorded appropriate effect in determining the liability of the carrier to the shipper

ment of the parties, and the common-law principles accepted and enforced in the federal courts.[82]

§ 121. Receipts

While a shipping receipt may be no more than a mere receipt for goods, it may constitute the contract of carriage and is evidence, although not conclusive, of delivery to the carrier of goods of the quantity and condition receipted for.

In general a receipt given by the carrier to the shipper, in so far as it contains stipulations as to the transportation, constitutes the contract under which the goods are to be transported, and its terms are binding on both parties,[83] unless illegal,[84] and will control in determining the rights and liabilities of a carrier and shipper not subject to the Interstate Commerce Act.[85] However, a carrier's receipt is not conclusive evidence of the contract;[86] and, in fact, where such an instrument is and purports to be only an acknowledgment of the receipt of the goods it is not a contract at all, even though it contains a memorandum as to the rate of freight.[87]

Where a receipt is delivered after shipment, under a prior contract, whether oral or written, it will not supersede the agreement under which the shipment was made.[88] On the other hand, if the receipt indicates that a subsequent bill of lading

in case of interstate shipments—Nashville, C. & St. L. Ry. Co. v. Camper, 78 So. 925, 201 Ala. 581.

Straight nonnegotiable bills of lading, so marked on their face and used in interstate shipment, are governed by the Federal Bills of Lading Act.—Stefani v. Southern Pac. Co., 5 P.2d 946, 119 Cal.App. 69.

The interpretation of contracts must be by state law as the federal acts do not undertake to do this—Turner Lumber & Investment Co. v. Chicago, R. I. & P. Ry. Co., 16 S.W.2d 705, 223 Mo.App. 564.

82. Mo.—Clemons Produce Co. v. Denver & P. G. R. R., 219 S.W. 660, 203 Mo.App. 100.
Tex.—Chicago, R. I. & G. Ry. Co. v. Shroyer, Civ.App., 197 S.W. 773, reversed on other grounds Shroyer v. Chicago, R. I. & G. Ry. Co., Com.App., 222 S.W. 1095, 111 Tex. 24, which is modified 226 S.W. 140, 111 Tex. 24.

Parties to contract

Whether consignee of interstate freight is or has become party to contract of transportation must be determined by general principles of common law.—New York Cent. & H. R. R. Co. v. York & Whitney Co., 119 N.E. 855, 230 Mass. 206, affirmed in part and reversed in part on other grounds 41 S.Ct. 509, 256 U.S. 406, 65 L.Ed. 1016.

The uniform bill of lading approved by the interstate commerce commission having been prepared for use throughout the United States, its provisions are not to be construed in the light of the statutory law of any particular state.—Cereal Products Co. v. Delaware, L. & W. R. Co., 190 N.Y.S. 698, 198 App.Div. 580.

83. Ala.—Ex parte American Ry. Express Co., 106 So. 197, 213 Ala. 151, granting certiorari Farmers' & Merchants' Bank of Samson v. American Ry. Express Co., 106 So. 195, 21 Ala.App. 133
Ga.—American Ry. Express Co. v. Daniel, 116 S.E. 660, 29 Ga.App. 780, affirmed 121 S.E. 686, 157 Ga. 731, certiorari granted 44 S.Ct. 461, 265 U.S. 576, 68 L.Ed. 1187, reversed on other grounds 46 S.Ct. 15, 269 U.S. 40, 70 L.Ed. 154, vacated 132 S.E. 144, 35 Ga.App. 81.
Iowa.—Wolfe v. American Ry. Express Co., 197 N.W. 24, 197 Iowa 216.
N.Y.—Knapp v. Wells, Fargo & Co., 119 N.Y.S. 117, 134 App.Div. 712
10 C.J. p. 191 note 27.

Express receipt and bill of lading distinguished

A bill of lading is both the receipt and a contract by the carrier to deliver to the consignee or the holder of a duly indorsed document, and an express receipt serves one purpose, namely, a receipt limiting the carrier's liability in case of loss and damage upon contingencies named in it.—U. S. v. Wells, Fargo & Co., C.C.A.N.Y., 271 F. 180

Uniform express receipts

(1) Uniform express receipts prescribed by interstate commerce commission, pursuant to which shipment moved, together with classification schedules of carrier on file with commission, constitute contract of carriage.—Feynman v. American Ry. Exp. Co., 234 N.Y.S. 727, 134 Misc. 223.

(2) Shippers are presumed to have known and to have assented to the conditions contained in a uniform express receipt constituting the contract under which their shipment in interstate commerce was accepted and transported, which conditions are not inconsistent with public policy nor inimical to the federal transportation law.—Feniger v. American Ry. Express Co., 197 N.W. 550, 226 Mich. 106.

(3) Provision of uniform express receipt constituting the contract under which interstate commerce shipment was accepted and transported, in the form approved by the interstate commerce commission and the Michigan public utilities commission, exempting express company from liability for loss, damage, or delay caused by the act of God, public enemies, riots, strikes, etc., unless caused by its own negligence, is not inconsistent with public policy nor inimical to the federal transportation law.—Feniger v. American Ry. Express Co., supra.

Indorsement on bill not receipt

Act of terminal company's agent in accepting report of captain of ship and indorsing his bill of lading, which indorsement signified that "defendant [terminal company] accepted its obligation as a public service corporation as aforesaid to notify the captain to dock his vessel (in its turn) and to discharge said vessel," was not equivalent to a receipt of the coal for transportation, but was merely the acknowledgment of a tender, and not tantamount to a receipt of the cargo.—Warren v. Portland Terminal Co., 116 A. 411, 121 Me. 157, 26 A.L.R. 304

84. Ala.—Ex parte American Ry. Express Co., 106 So. 197, 213 Ala. 151, granting certiorari Farmers & Merchants Bank of Samson v. American Ry. Express Co., 106 So. 195, 21 Ala.App. 133

85. N.H.—R. H. Macy & Co. v. Pennsylvania Transp. Co., 266 N.Y.S. 194, 148 Misc. 129, affirmed 266 N.Y.S. 198, 149 Misc. 460.

86. Cal.—Pereira v. Central Pac. R. Co., 4 P. 988, 66 Cal. 92

87. Mo.—Wood v. Steamboat Fleetwood, 22 Mo. 560
10 C.J. p. 191 note 31.

Instrument held receipt only

Memorandum acknowledging issue of bill of lading, stating that it was solely for filing, and having prefaced to signature statement that signature acknowledged only amount prepaid, can be regarded only as a receipt for money prepaid on shipment.—McRary v. Southern Ry. Co., 94 S.E. 107, 174 N.C. 563.

88. Tex.—Missouri, etc., R. Co. v. Linton, Civ.App., 141 S.W. 129.
10 C.J. p. 191 note 32.

containing the contract is to be issued, the receipt does not constitute the contract, but will be superseded by the bill of lading when issued, so far as its terms are different from those in the bill of lading.[89]

If the receipt does not purport to contain any contract, but is simply an acknowledgment of the receipt of the goods for transportation, the law supplies the contract and fixes the rights and liabilities of the parties.[90]

The duty of the carrier to transport the goods safely with reasonable dispatch and to deliver them to the consignee at the point of destination exists even though there is no shipping contract,[91] as the mere receipt of the goods, marked with their destination, is sufficient to give rise to contractual obligations, without regard to the issuance of a shipping receipt.[92]

The rules applicable to bills of lading may be applied to receipts in so far as bills of lading are regarded as receipts,[93] and these receipts have been held to be straight or nonnegotiable bills of lading within the acts of congress affecting such bills.[94] A statement on a receipt that a shipment was received subject to the conditions of the uniform bill of lading is of the same legal effect as if the provisions of the bill had been set out in full in the receipt.[95]

Duty to issue. The Interstate Commerce Act imposes on the carrier of goods in interstate commerce the duty to issue a bill of lading, infra § 123, or a receipt, and failure to deliver a receipt as required imposes on the carrier the highest responsibility.[96] In such a case the law implies the obligation of the carrier to deliver the goods to the consignee at the address shown on the shipment within a reasonable time.[97]

As evidence of delivery to carrier. Ordinarily a receipt is not essential to a complete delivery of goods to the carrier for transportation, but when issued is competent[98] and prima facie, but not conclusive,[99] evidence of delivery to the carrier.

Recitals as to quantity or condition. A receipt is not conclusive as to the amount of goods receipted for, it being competent to show, as between the parties, that a different quantity was actually delivered.[1] A receipt showing delivery of the goods to the carrier and reciting that they were received in good order is evidence that the goods were received in good order;[2] but, it is not conclusive of the question, constituting merely an admission, subject to explanation;[3] and the acknowledgment in a receipt that cases of goods were received by the carrier in apparently good condition does not shift to the carrier the responsibility for damage resulting from improper packing, of which the carrier had no knowledge.[4] A recital of what a sealed package is "said to contain" is not even prima facie evidence of the contents.[5]

Indorsement of a shipping receipt has been held to transfer title to the goods.[6]

§ 122. Bills of Lading

A bill of lading is a document issued by a carrier evidencing a receipt of and contract to carry and deliver goods.

An instrument issued by the carrier to the consignor, consisting of a receipt for the goods and an agreement to carry them from the place of ship-

89. Ill.—Merchants' Despatch Transp Co. v. Furthmann, 36 N.E. 624, 149 Ill. 66, 41 Am.S.R. 265.
10 C.J. p 192 note 33.

90. Tenn.—Southern Express Co. v Womack, 1 Heisk. 256.

91. Tex.—Galveston, etc., R. Co. v. Clemons, 47 S.W. 731, 19 Tex.Civ. App. 452.

92. N.C.—Smith v. Atlantic Coast Line R. Co., 79 S.E. 433, 163 N.C. 143
10 C.J. p 209 note 15.

93. La.—Raphiel v American Ry. Express Co., 120 So. 786, 10 La. App. 463.

94. Pa.—Teller & Co. v. American Railway Express Co., 78 Pa.Super 300.

95. U.S.—Lowden v. Iroquois Coal Co., D.C.Ill., 18 F.Supp. 923.

96. Ala.—Southern Express Co. v Malone, 78 So. 408, 16 Ala.App. 414, certiorari denied 78 So. 990, 201 Ala. 700.

97. Ala.—Southern Express Co. v Malone, supra.

98. N.D.—Knapp v. Minneapolis, St P. & S. S. M. Ry. Co., 159 N.W. 81, 34 N.D. 466

99. Tex.—Gulf, C. & S. F. Ry. Co. v. Rosenthal Dry Goods Co., Civ.App., 207 S.W. 167.

1. Iowa.—Higley v. Burlington, etc., R. Co., 68 N.W. 829, 99 Iowa 503, 61 Am.S.R. 250.
10 C.J. p 192 note 37.

2. N.C.—Gibbs v. High Point, Thomasville & Denton R. Co., 154 S.W. 916, 199 N.C. 806—Brown v Southeastern Express Co., 133 S.E. 414, 192 N.C. 25
10 C.J. p 192 note 34.

3. Me.—Goldberg v. New York, N. H. & H. R. Co., 153 A. 812, 130 Me. 96.
10 C.J. p 192 note 35

4. Conn.—Devinne Hallenbeck Co. v. Autotyre Co., 154 A. 170, 113 Conn. 97.
Liability of carrier in case of improper packing see supra § 78
Packing and shipment by bailee
Carrier's acknowledgment of receipt of display screens in apparently good condition did not shift to carrier, as against bailee, responsibility for damage resulting from improper packing by bailee without carrier's knowledge so as to relieve the bailee from liability.—Devinne Hallenbeck Co. v. Autotyre Co., 154 A. 170, 113 Conn. 97.

5. Ind.—Fitzgerald v. Adams Express Co., 24 Ind. 447, 87 Am.D. 341.
10 C.J. p 192 note 39.

6. U.S.—North Pennsylvania R. Co. v. Commercial Nat. Bank, Pa., 8 S.Ct. 266, 123 U.S. 738, 31 L.Ed 287.
Ala.—Ocean S. S. Co. of Savannah v People's Shoe Co., 81 So. 241, 202 Ala. 594, conformed to 81 So. 245, 17 Ala.App. 34.

ment to the place of destination, is a bill of lading.[7]

A straight bill of lading is one in which it is stated that the goods are consigned to a specified person.[8]

An order bill is one in which it is stated that the goods are consigned to the order of any person named in the bill.[9]

The term "spent" has been applied to bills of lading which have not been produced, surrendered, or canceled although the carrier has delivered the goods represented by them to the person entitled thereto.[10]

"Blind billed." Shipments billed by a carrier without designating a rate of charges are "blind billed."[11]

§ 123. Nature and Duty to Issue

a. Nature
b. Duty to issue

a. Nature

(1) As receipt and contract
(2) As evidence of delivery
(3) As evidence of quantity and quality of goods
(4) As evidence of title

(1) As Receipt and Contract

A bill of lading is both a receipt and a contract; a receipt as to quantity and description of goods, and a contract to transport and deliver such goods to the designated person on the terms specified.

A bill of lading is twofold in its character; it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated, on the terms specified in such instrument.[12] It is a mere receipt in so far as it admits the quantity, quality, or condition of the goods at the time they were delivered to the initial

7. Pa.—Teller & Co. v. American Railway Express Co., 78 Pa.Super. 300
10 C.J. p. 192 note 42.

Statutory definitions

(1) California Civ. Code § 2126, defines a "bill of lading" as an instrument in writing signed by the carrier or its agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage, and agreeing to deliver the freight to a specified person at a specified place. —Pioneer Fruit Co. v. Southern Pac. Co., 190 P. 50, 51, 47 Cal.App. 44

(2) Under Oklahoma Rev.L.1910 § 828, a bill of lading is an instrument in writing, signed by a carrier or its agent, describing the freight so as to identify it.—Shaff v. Kramer, 235 P. 517, 109 Okl. 109—Chicago, R. I. & P. Ry. Co. v. Cleveland, 160 P. 328, 61 Okl. 64

Other definitions

(1) "A contract to transport and deliver the goods to the consignee upon the terms therein specified."—John Vittuci Co. v. Canadian Pac. Ry. Co., D.C.Wash., 238 F. 1005, 1006

(2) A document issued by a carrier on land, showing a contract for carriage and delivery of goods.—National Wholesale Grocery Co. v. Mann, 146 N.E. 791, 793, 251 Mass. 238.

(3) An agreement between a shipper and a carrier for a consideration to deliver goods at a certain place to a specified consignee.—Swift v. Davis, 193 N.Y.S. 848, 849, 118 Misc. 205

(4) An instrument issued by carrier to consignor, consisting of a receipt for the goods and an agreement to carry them from the place of shipment to destination.—Aman v. Dover & Southbound R. Co., 102 S.E. 392, 393, 179 N.C. 310.

(5) A memorandum or acknowledgment in writing, signed by the carrier, binding the carrier to transport goods as therein directed.—Davis v. Stamford Mill & Elevator Co., Tex.Civ.App., 260 S.W. 1081, 1083

8. Fla.—Atlantic Coast Line R. Co. v. Roe, 109 So. 205, 207, 91 Fla. 762

9. Fla.—Atlantic Coast Line R. Co. v. Roe, supra.

10. N.Y.—National Commercial Bank of Albany v. Lackawanna Transp. Co., 69 N.Y.S. 396, 56 App.Div. 270
58 C.J. p. 1299 note 5

11. U.S.—Standard Oil Co. v. U.S., N.Y., 179 F. 614, 622, 103 C.C.A. 172

12. U.S.—Louisville & N. R. Co. v. Central Iron & Coal Co., Ala., 44 S.Ct. 441, 265 U.S. 59, 68 L.Ed. 900, affirming, C.C.A., 284 F. 250—Second Nat. Bank v. Columbia Trust Co., C.C.A.N.J., 288 F. 17, 30 A.L.R. 1299—Aktieselskabet Bruusgaard v. Standard Oil Co. of New Jersey, C.C.A.N.J., 283 F. 106, 107—U.S. v. Wells Fargo & Co., C.C.A.N.Y., 271 F. 180, 182—New York Cent. R. Co. v. Mutual Orange Distributors, Cal., 251 F. 230, 163 C.C.A. 386—King v. Barbarin, Mich., 249 F. 303, 161 C.C.A. 311—Vanderbilt v. Ocean S. S. Co., N.Y., 215 F. 886, 132 C.C.A. 226.

Ala.—Louisville & N. R. Co. v. Cullman Warehouse, 147 So. 421, 226 Ala. 493.

Cal.—Pioneer Fruit Co. v. Southern Pac. Co., 190 P. 50, 51, 47 Cal.App. 44.

Ill.—Rudin v. King-Richardson Co., 143 N.E. 198, 311 Ill. 513—Chicago, R. I. & P. R. Co. v. North American Cold Storage Co., 244 Ill.App. 522

Mass.—Paine Furniture Co. v. Acme Transfer & Storage Co., 195 N.E. 302, 290 Mass. 195—L. E. Fosgate Co. v. Atlantic Coast Line R. R., 160 N.E. 783, 263 Mass. 192—L. L. Cohen & Co. v. Davis, 142 N.E. 75, 247 Mass. 259, reversed on other grounds Davis v. L. L. Cohen & Co., 45 S.Ct. 633, 268 U.S. 638, 69 L.Ed. 1129.

Minn.—Great Western Grain Co. v. Chicago, M. & St. P. Ry. Co., 204 N.W. 47, 49, 163 Minn. 371.

Neb.—Omaha Elevator Co. v. Chicago, B. & Q. R. Co., 178 N.W. 211, 104 Neb. 566

N.Y.—William C. Will Co. v. Canadian Nat. Ry. Co., 214 N.Y.S. 513, 216 App.Div. 239—Dorff v. Taya, 185 N.Y.S. 174, 176, 194 App.Div. 278—Schwalb v. Erie R. Co., 293 N.Y.S. 842, 161 Misc. 743—American Cotton Products Co. v. New York Cent. R. Co., 255 N.Y.S. 672, 142 Misc. 821—Central Railroad of New Jersey v. Berry, 165 N.Y.S. 1041, 99 Misc. 560

N.D.—Knapp v. Minneapolis, St. P. & S. S. M. Ry. Co., 159 N.W. 81, 34 N.D. 466.

Tex.—Texarkana & Ft. S. Ry. Co. v. Brass, Com.App., 260 S.W. 828, affirming, Civ.App., 245 S.W. 457, rehearing overruled, Com.App., 262 S.W. 737—Morris v. Davis, Civ.App., 3 S.W.2d 109, 111—Insurance Co. of

carrier[13] constituting as between the parties an admission not necessarily conclusive, but subject to explanation,[14] except so far as the carrier may be estopped by the admissions, infra § 127, or be bound by the recitals of the bill because of the authority of the agent executing it, infra § 141. So far as a bill of lading states the terms on which the transportation, detention, and delivery of the goods is to be made, it stands as a contract.[15]

Ordinarily the terms and obligations of the contract between a shipper and a common carrier of goods are to be found in and determined by the bill of lading,[16] or the bill of lading together with the carrier's filed tariffs.[17] Each party is governed

North America v. Irby, Alexander & Irby, Tex.Civ.App., 263 S.W. 1071.

Vt.—Quigley v. Wiley, 179 A. 206, 107 Vt. 253

Wash.—John Vittucci Co. v. Canadian Pac. Ry. Co., 174 P. 981, 102 Wash. 686

10 C.J. p. 193 note 43—22 C.J. p. 1109 note 29.

"As a receipt, it recites the place and date of shipment, describes the goods as to quantity, weight, dimensions, identification marks, and conditions, quality, and value. As a contract, it names the contracting parties which includes the consignee, fixes the route, destination, and freight rate or charges, and stipulates the rights of and obligations assumed by the parties"—Schwalb v. Erie R. Co., 293 N.Y.S. 842, 846, 161 Misc. 743—American Cotton Products Co. v. New York Cent. R. Co., 255 N.Y.S. 672, 681, 142 Misc. 821.

Primarily a "bill of lading" is in the nature of a receipt for goods by carrier but it may become a contract between carrier and shipper for delivery of goods to owner or consignee.—Bedig v. Southern Pac. Co., 258 P. 148, 84 Cal.App. 325.

13. Me.—Lewis Poultry Co. v. New York Cent. R. Co., 105 A. 109, 117 Me. 482.

Tex.—Morris v. Davis, 3 S.W.2d 109, affirmed Davis v. Morris, Com.App., 13 S.W.2d 63.

14. Me.—Lewis Poultry Co. v. New York Cent. R. Co., 105 A. 109, 117 Me. 482.

Mass.—L. L. Cohen & Co. v. Davis, 142 N.E. 75, 247 Mass. 259, reversed on other grounds Davis v. L. L. Cohen & Co., 45 S.Ct. 633, 268 U.S. 638, 69 L.Ed. 1129.

"As between the parties it is impeachable for mistake, error, or false statements contained therein"—Bedig v. Southern Pac. Co., 258 P. 148, 153, 84 Cal.App. 325

15. Vt.—Booth v. New York Cent. R. Co., 112 A. 894, 95 Vt. 9.

"A bill of lading is a contract, in every sense of the term."—Weed v. Boston & M. R. R., 128 A. 696, 699, 124 Me. 336, 42 A.L.R. 487.

When expressing consideration

Wash.—Oregon-Washington R. & Nav. Co. v. Seattle Grain Co., 178 P. 648, 106 Wash. 1, affirmed 185 P. 583, 106 Wash. 1.

Defenses

A bill of lading issued to a consignor, and held by him, is subject to any meritorious defense against him, like any other contract.—Port Huron Machinery Co. v. Chicago, M. & St. P. Ry. Co., 201 N.W. 779, 199 Iowa 295.

Parties

(1) Consignee who is to receive goods only for sale on commission, and notifies carrier to such effect, is not necessarily party to contract of carriage.—New York Cent. & H. R. R. Co. v. York & Whitney Co., 119 N.E. 855, 230 Mass. 206, affirmed in part and reversed in part on other grounds 41 S.Ct. 509, 256 U.S. 406, 65 L.Ed. 1016.

(2) A bill of lading is a contract between the transportation company and him who is interested in the shipment.—Michigan Cent. R. Co. v. Mark Owen & Co., 41 S.Ct. 554, 555, 256 U.S. 427, 65 L.Ed. 1032, affirming judgment, 1919, Mark Owen & Co. v. Michigan Cent. R. Co., 125 N.E. 767, 291 Ill. 149.

(3) A "bill of lading" does not stand for, or represent, the contract between the buyer and the seller.—Hines v. Scott, 248 S.W. 663, 112 Tex. 506.

Written contract

A bill of lading issued by a railroad company is treated as a written contract between the parties thereto.—Houston & T. C. Ry. Co. v. Southern Architectural Cement Stone Co., 245 S.W. 644, 112 Tex. 139.

16. N.Y.—Davis v. Cayuga Operating Co., 216 N.Y.S. 186, 217 App.Div. 675

Pa.—Keystone Pub. Co. v. Pennsylvania R. Co., 78 Pa.Super. 486.

10 C.J. p. 194 note 51.

Evidence of entire contract

(1) A bill of lading issued in accordance with the Carmack amendment requiring it of carriers of interstate commerce constitutes the entire contract.

Ga.—Fleshnar & Adar v. Southern Ry. Co., 127 S.E. 768, 160 Ga. 205, answers to certified questions conformed to 128 S.E. 78, 33 Ga.App. 823

Mass.—Aradalou v. New York, N. H. & H. R. Co., 114 N.E. 297, 225 Mass. 235.

Mo.—Cudahy Packing Co. v. Bixby, 205 S.W. 865, 199 Mo.App. 589, certiorari denied 39 S.Ct. 19, 248 U.S. 577, 63 L.Ed. 429

(2) The terms govern the entire transportation.—Lewis Poultry Co. v. New York Cent. R. Co., 105 A. 109, 117 Me. 482.

To ascertain what contract was entered into, bill of lading must be examined, bearing in mind that it serves both as a receipt and as a contract.—Louisville & N. R. Co. v. Central Iron & Coal Co., Ala., 44 S.Ct. 441, 265 U.S. 59, 68 L.Ed. 900, affirming C.C.A., 284 F. 250

Bill of lading and shipping order

Bill of lading plainly limiting value of goods to one thousand dollars, if construed with shipping order, blanks in release clause of which were filled by indecipherable scrawl, controls and is not modified by the shipping order.—Aradalou v. New York, N. H. & H. R. Co., 114 N.E. 297, 225 Mass. 235.

17. N.Y.—Grand Trunk Western R. Co. v. Makris, 255 N.Y.S. 443, 142 Misc. 807.

Tariffs, schedules, and rules of interstate commerce commission as part of contract see supra § 119.

Reference to tariffs

A shipper is bound by tariffs, referred to in bill of lading, providing that perishable freight will receive ordinary box car service on parts of road without protective service.—Northern Wisconsin Produce Co. v. Chicago & N. W. Ry. Co., 234 N.W. 726, 203 Wis. 549.

Uniform bill

Under Interstate Commerce Act § 1, and filed and posted classification requiring the consignor to give notice if he wishes to ship other than under the uniform bill prescribed by the act, where the shipper, without notice of intention not to ship subject to uniform bill of lading, availed itself of the reduced rate of such bill, its conditions were binding upon the parties.—Siebert v. Erie R. R., 163 N.Y.S. 111.

In case of discrepancy

While the bill of lading should conform to the tariffs, rules, and regulations approved by the interstate commerce commission, nevertheless, in case of a discrepancy, the published approved rules govern.—Breazeale v. American Ry. Exp. Co., 137 So. 585, 18 La.App. 59.

by the terms of the bill, and their respective rights and liabilities are regulated thereby.[18]

As contracts, bills of lading are prima facie contracts of both carriage and delivery[19] binding on carrier, shipper, and consignee as well.[20]

(2) As Evidence of Delivery

A bill of lading is prima facie evidence that the goods represented thereby were delivered to the carrier.

The issuance of a bill of lading carries the presumption that the goods were delivered to the carrier issuing the bill,[21] for immediate shipment,[22] and it is nowhere questioned that a bill of lading is prima facie evidence of the receipt of the goods by the carrier.[23] This is true although a statute forbids the issuance of bills of lading, except for goods actually in the carrier's possession.[24] In the absence of convincing testimony establishing mistake, recitals in the bill of lading showing that the carrier received the goods for shipment on a specified day must control.[25] A state statute which is merely declaratory of this rule applies to interstate as well as to intra-state shipments.[26]

(3) As Evidence of Quantity and Quality of Goods

A bill of lading is prima facie evidence of the quantity and quality of the goods delivered, at least so far as external conditions are concerned.

A bill of lading, as between the parties thereto and their privies, is prima facie evidence of the kind and quantity of the goods delivered to the carrier.[27] It is usual to insert in a bill of lading recitals to the effect that the goods were received in good condition or in apparently good condition and such recitals pertain to the instrument as a receipt.[28] A statement in a bill of lading that the goods were received by the carrier in apparent good order is an admission that, so far as external appearance was concerned, the shipment was in good condition when received,[29] and is sufficient to make out a prima

18. Minn.—Allegrezza v. Great Northern Ry Co., 221 N W 428, 175 Minn 374.
N.Y.—Bers v. Erie R Co., 163 N Y S 114, 176 App Div. 241.
Va—Old Dominion S. S Co. v. Blakeman, 105 S E. 752, 129 Va 206.
10 C J. p 194 note 52.

Bill acknowledging receipt of goods from "owners"

Although consignees were also named in bill of lading, as consignors, yet, where carrier acknowledged receipt of shipment not from consignors but from owners, consignees were only prima facie owners of goods shipped.—King v. Barbarin, Mich., 249 F. 303, 161 C C.A. 311.

19. Ala—Ocean S S Co. of Savannah v. People's Shoe Co, 81 So 241, 202 Ala. 594, conformed to 81 So 245, 17 Ala.App 34

20. N Y—Glanzer v. Cunard S S Co, 212 N Y.S. 500, 214 App Div. 473.

21. Conn.—Shore v. New York, N. H & H R Co, 121 A. 344, 99 Conn. 129.
Miss—Hill Mfg. Co. v. New Orleans, M & C R R. Co, 78 So. 187, 117 Miss 548, certiorari denied New Orleans, M & C. R. Co. v Hill Mfg Co, 39 S Ct 11, 248 U.S. 571, 63 L Ed 426.
N D—Knapp v. Minneapolis, St P. & S S. M Ry. Co, 159 N.W. 81, 34 N D. 466

22. Tex—U. S Fire Ins. Co of New York v. St. Louis, B. & M. Ry Co, Civ.App, 41 S W.2d 118, reversed on other grounds St. Louis, B & M Ry Co v. U. S Fire Ins. Co of New York, Com.App., 60 S.W.2d 196.

23. U S—Inland Waterways Corporation v. Standard Commercial Tobacco Co, C C La, 65 F 2d 715.
Mo—John Deere Plow Co. v American Express Co, App, 203 S W 488.
Tex—Gulf, C & S. F. Ry. Co. v Galbraith, Civ App, 39 S W.2d 91
10 C.J. p 199 note 96.

The rule as stated in Corpus Juris is quoted in Jenckes Spinning Co v. New York, N H & H. R. Co., 126 A. 753, 46 R I. 264.

Contradiction

A bill of lading, acknowledging carrier's receipt of goods, is only admission, which may be contradicted by showing true facts—R. J. Reynolds Tobacco Co v. Boston & M. R. R, Mass, 10 N E 2d 59.

24. Ark—Martin v. St. Louis, etc, R. Co, 19 S W 314, 55 Ark. 510.

25. Ky.—Illinois Cent R Co. v. Nelson, 97 S.W. 757, 30 Ky L. 114.

26. Minn.—Great Western Grain Co. v. Chicago, M & St P. Ry. Co, 204 N.W. 47, 163 Minn. 371.

27. Tex—Gulf, C. & S. F. Ry. Co v Kempner, Com App, 282 S W 735, reversing, Civ App, 275 S W 459—Gulf, C & S. F Ry. Co v Galbraith, Civ App, 39 S W.2d 91—Insurance Co of North America v. Irby, Alexander & Irby, Civ App, 263 S W. 1071.

Recital as to weight

(1) Weights stated in a bill of lading are prima facie evidence of the amount received and the fact that the weighing was done by another will not relieve the carrier where it accepted such weight and entered it in the bill of lading.—Baker v H Dittlinger Roller Mills Co, Tex Civ App., 203 S W 798.

(2) However, the carrier will not be liable if he proves delivery of all goods received although the weight at destination is less than that stated in the bill of lading—Baker v. H. Dittlinger Roller Mills Co, supra.

Rebuttal

The part of bill of lading which is a receipt is only prima facie evidence of what goods were delivered by shipper, and may be rebutted by proof of tender of goods in like order and condition as when received. —Gulf, C. & S. F. Ry. Co v. Kempner, Tex Com.App, 282 S W. 795, reversing Civ.App, 275 S.W. 459.

28. U S—Cheek Neal Coffee Co. v. Osaka Shosen Kaisha, D C.La., 36 F 2d 256, affirmed, C C.A., 39 F.2d 1021.
10 C.J. p 200 note 7.

The rule as stated in Corpus Juris has been relied on in support of a holding that a recital in bill of lading that coffee was in apparent good order when received was not contractual and did not amount to warranty as between parties—Cheek Neal Coffee Co v Osaka Shosen Kaisha, D C.La, 36 F 2d 256, affirmed, C. C A, 39 F 2d 1021.

29. Me—Goldberg v New York, N. H. & H R Co, 153 A. 812, 130 Me. 96
Pa—Beresin v Pennsylvania R. Co., 176 A. 774, 116 Pa.Super. 291.

As notice of inherent quality

Bill of lading, stating that shipment was carbonated nonalcoholic beverage, received in apparent good order, does not give carrier conclusive notice of inherent quality of goods, where it further recited that

facie case against the carrier that the goods were in apparently good condition so far as ordinary inspection without opening the packages would disclose,[30] and to place on the carrier the burden of proving that the goods were not in such apparently good condition when received, as discussed infra § 254. However, such a statement relates only to external conditions, and it is, of course, open to the carrier to show that the damaged condition existed at the time of the receipt of the goods, but was not apparent on inspection.[31] The statement creates no presumption against the carrier[32] and does not make out even a prima facie case with reference to damage not apparent.[33] The rule as generally stated is that the recital as to the condition of the goods is prima facie evidence only as to that fact, and the carrier may show the contrary;[34] but a recital of good condition may be binding on the carrier when the bill was intended to be negotiated and is held by a bona fide transferee for value.[35] A bill of lading is evidence that merchandise was delivered to the carrier in good condition in the absence of any notation or entry thereon to the contrary.[36]

Where quantity of goods guaranteed. The carrier may by stipulation guarantee the quantity of goods received so that the recital of the bill of lading will be conclusive, even as against mistake, and render the carrier liable for any shortage.[37]

(4) As Evidence of Title

A bill of lading furnishes presumptive documentary evidence of title to the goods represented thereby.

A bill of lading serves as documentary evidence of title,[38] providing proof of ownership if a straight bill, and title to the goods themselves if an order bill,[39] as by mercantile law and usage the bill of lading stands as a substitute and symbolic representative of the goods therein described,[40] and carries the legal title to the consignment,[41] so that, as shown in § 128, a transfer of the bill of lading is a transfer of the goods evidenced by it, and possession symbolized by a bill of lading is the same as actual possession.[42] The form in which a bill of lading is taken is indicative of the title to the goods shipped,[43] but is not always conclusive,[44] as the bill is only presumptive evidence of ownership of the goods.[45] By taking the bill of lading in the name of the consignee the shipper vests apparent

contents and condition of contents were unknown.—Michellod v. Oregon-Washington R & Nav. Co, 168 P. 620, 86 Or. 329.

30. N.J.—Sprotte v. Delaware, L & W. R. Co., 101 A. 518, 90 N.J Law 720
10 C.J. p 201 note 11.

31. U.S.—Monnier v. U. S, D.C.N.Y, 16 F.2d 812, affirmed, C.C.A., 16 F.2d 815.
10 C.J. p 200 note 9.

32. N.Y.—Harry Meyers Co. v. Cunard S. S Co., 244 N.Y.S. 114, 137 Misc. 875.

33. N.J.—Sprotte v. Delaware, L & W. R. Co., 101 A. 518, 90 N.J Law 720.
N.Y.—Harry Meyers Co. v. Cunard S S Co., 244 N.Y.S. 114, 137 Misc 875.
10 C.J p 201 note 10.

34. Ala.—Smith v McDonald, 130 So. 516, 24 Ala.App. 88.
10 C.J p 201 note 13.
The text of Corpus Juris has been cited in Smith v McDonald, 130 So 516, 24 Ala.App. 88.

35. Ga.—Louisville, etc, R. Co. v Pferdmenges, 68 S.E. 617, 8 Ga App. 81.

36. N.C.—Gibbs v. High Point, Thomasville & Denton R. Co., 154 S.W. 916, 199 N.C 806—Brown v Southeastern Express Co, 133 S.E. 414, 192 N.C. 25.
10 C.J. p 200 note 8.

37. U.S.—Sawyer v. Cleveland Iron Min. Co, N.Y., 69 F. 211, 16 C.C.A. 191.
10 C.J p 200 note 5.

38. Neb.—Omaha Elevator Co. v Chicago, B & Q R Co., 178 N.W. 211, 104 Neb 566.
N.Y.—Schwalb v Erie R. Co, 293 N.Y.S 842, 161 Misc 743—American Cotton Products Co. v. New York Cent. R Co, 255 N.Y.S. 672, 142 Misc. 821.

39. N.Y.—Schwalb v. Erie R Co, 293 N.Y.S. 842, 161 Misc 743.

40. Colo.—People v Home Oil & Supply Co., 34 P.2d 67, 95 Colo. 143.
Ga.—Baker v. Central Grocery Co, 83 S.E. 504, 15 Ga.App 377—Orr v. Planters' Phosphate & Fertilizer Co, 68 S.E 779, 8 Ga.App 59.
Mass.—National Wholesale Grocery Co. v. Mann, 146 N.E. 791, 251 Mass. 238.
N.Y.—Swift v Davis, 193 N.Y.S. 848, 118 Misc. 205
N.C.—Lawshe v. Norfolk-Southern R Co, 132 S.E 160, 161, 191 N.C. 473
Vt.—Quigley v. Wiley, 179 A. 206, 107 Vt. 253.
10 C.J. p 193 note 44
The rule as stated in Corpus Juris has been referred to in Quigley v Wiley, 179 A. 206, 107 Vt. 253.

Purpose of federal statutes
Federal Bills of Lading Act was enacted to make bill of lading take place of goods shipped so that goods would be emancipated from rules of procedure interfering with its transportation.—Frederick Leyland & Co v Webster Bros & Co., Tex.Civ.App, 283 S.W 332, error dism Webster Bros. & Co. v. Frederick Leyland & Co, 283 S.W 1071, 115 Tex. 511.

Shipper retaining bill
(1) Seller was not divested of title to lumber sold buyer by unauthorized delivery thereof to it, where bill of lading was attached to draft for purchase price, and was not surrendered to buyer.—Franklin Bank of St. Louis, Mo., v. Boeckeler Lumber Co, 147 N.E. 722, 83 Ind.App 94.

(2) A shipper who retains the bill of lading is authorized to take possession as against the buyer, and on default in payment at the time of the diversion, the buyer cannot complain.—Krug Coal Co. v. C. G. Blake Co, 218 Ill.App 85.

41. Iowa.—Port Huron Machinery Co. v Chicago, M & St P. Ry. Co, 201 N.W 779, 199 Iowa 295.
S.C.—Edwards v. Cottingham, 171 S.E 621, 171 S.C 131

42. Iowa.—Morse v. Chicago, etc., R. Co., 34 N.W 825, 73 Iowa 226

43. Ill.—Rudin v. King-Richardson Co., 143 N.E. 198, 311 Ill. 513.

44. Ill.—Rudin v. King-Richardson Co, supra.
Minn.—Banik v. Chicago, M & St. P. Ry. Co, 179 N.W. 899, 147 Minn. 175.

45. Cal.—Bedig v. Southern Pac. Co., 258 P. 148, 84 Cal.App. 325.

title in him;[46] but the presumption to this effect is not conclusive and may be rebutted by special clauses in the bill of lading or by evidence aliunde.[47] The shipper may make a bill of lading in such a manner as to show no intention of passing the title in the goods, but rather to reserve in himself a jus disponendi; whether or not there is such an intention must depend on all the circumstances of the case,[48] but where, except for the form of the bill, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods will be presumed, in the absence of evidence to the contrary, to be only for the purpose of securing payment.[49] If the consignee refuses to receive the goods it will be presumed that the title has revested in the consignor.[50] When, by the contract between the seller and purchaser, legal title has passed to the purchaser, such title is evidenced not by the bill of lading but by the contract of sale.[51]

b. Duty to Issue

It is the duty of the carrier to issue a proper bill of lading, although failure to issue will not prevent the relationship of shipper and carrier from arising.

It is the duty of a carrier to issue a proper bill of lading[52] to the owner of the goods shipped.[53] No particular form or solemnity is required,[54] but the bill must contain a description of the goods,[55] using ordinary care with reference thereto,[56] and refusal to issue a bill except with a notation that goods were in damaged condition, which was not true, is refusal to issue a bill.[57] A uniform bill of lading having been prescribed by the interstate commerce commission, all interstate shipments are deemed to be under the rights and liabilities defined thereby.[58]

46. Minn.—Litchfield Bank v. Elliott, 86 N.W. 454, 83 Minn. 469
10 C.J. p. 205 note 54

Prima facie evidence of title

(1) The naming of one as consignee in a bill of lading is prima facie evidence that the one named has title to the goods consigned—Pacific Lumber Agency v. National Aircraft Materials Corporation, Vt., 182 A. 192

(2) In action for purchase price of lumber, effect of bills of lading as prima facie evidence of title was only to relieve seller in its opening from doing more to establish fact of ownership than to show contents of documents by admissible evidence—Pacific Lumber Agency v. National Aircraft Materials Corporation, supra.

(3) Presumption as to ownership arising from bills of lading became functus officio when evidence tending to show contrary was introduced and burden remained on seller suing to recover purchase price to show that title was as it claimed it to be—Pacific Lumber Agency v. National Aircraft Materials Corporation, supra.

(4) In action to recover purchase price of lumber on theory that president of defendant's grantor in making purchase acted as undisclosed principal of grantor, uncontradicted testimony of president showing that he purchased lumber personally, that it was sold to him on his personal credit, that it was shipped according to his instructions, and that he and not grantor received benefits of transaction so completely rebuts the presumption of title arising from fact that grantor was consignee named in bills of lading as to authorize directed verdict—Pacific Lumber Agency v. National Aircraft Materials Corporation, supra.

Rights of consignee

(1) Carrier's contract to ship goods under straight bill of lading is a contract for benefit of consignee which was party to bill.—State Bank of De Pere v. Chicago & N. W. Ry. Co., 248 N.W. 423, 211 Wis. 465.

(2) Consignee's rights under straight bill of lading were not ambulatory and could not be devolved upon shipper's assignee of account against consignee—State Bank of De Pere v. Chicago & N. W. Ry. Co., supra.

47. U.S.—Merchants' Exch. Bank v. McGraw, Wash., 76 F. 930, 22 C.C.A. 622
10 C.J. p. 205 note 55.

48. Vt.—Quigley v. Wiley, 179 A. 206, 107 Vt. 253.
10 C.J. p. 205 note 56.

The Corpus Juris text and cases cited are relied on to support the statement that the shipper may reserve to himself the jus disponendi and a bill of lading made for the benefit of the consignor or his order is strong proof of his intention so to do.—Quigley v. Wiley, 179 A. 206, 107 Vt. 253.

49. Ohio.—Van Leunen Co. v. Meddock, 16 Ohio App. 309

F. o. b. contracts

In f. o. b. contracts title passes to the buyer at the time of delivery to the carrier and, although this rule is subordinate to the intention of the parties, the fact that the bill of lading is made out to seller or order does not indicate an inconsistent intention.—Miller v. New York Cent. R. R., 200 N.Y.S. 287, 205 App. Div. 663.

50. Ala.—Ezell v. English, 6 Port. 311

51. Ill.—Chicago, R. I. & P. R. Co. v. North American Cold Storage Co., 244 Ill. App. 522.

Transfer of seller's interest

Where ownership is not evidenced by bill of lading, a carrier cannot obtain title to goods shipped by paying seller, who was consignee, amount of draft which buyer had not paid, and receiving assignment of seller's interest.—Chicago, R. I. & P. R. Co. v. North American Cold Storage Co., 244 Ill. App. 522

52. Ala.—Louisville & N. R. Co. v. Williams, 97 So. 817, 210 Ala. 268.
N.Y.—Dobbins v. Delaware, L. & W. R. Co., 163 N.Y.S. 849, 177 App. Div. 132

53. Ala.—Louisville & N. R. Co. v. Williams, 97 So. 817, 210 Ala. 268
La.—Landis v. Darling, 2 Rob. 70

54. U.S.—Mobile & M. R. Co. v. Jurey, Ala., 4 S.Ct. 566, 111 U.S. 584, 28 L.Ed. 527.
10 C.J. p. 193 note 47.

55. Tex.—Insurance Co. of North America v. Irby, Alexander & Irby, Civ.App., 263 S.W. 1071.

56. Okl.—Chicago, R. I. & P. Ry. Co. v. Cleveland, 160 P. 328, 61 Okl. 64.

57. N.Y.—Dobbins v. Delaware, L. & W. R. Co., 163 N.Y.S. 849, 177 App. Div. 132.

Proof of refusal to issue

In an action for conversion following sale of goods by the carrier on refusal of the shipper to accept a bill of lading with a notation that goods were damaged, proof that carrier refused to deliver a bill of lading without notation that goods were in damaged condition, where such was not the fact, is sufficient proof of allegation that carrier wholly refused to issue a bill of lading.—Dobbins v. Delaware, L. & W. R. Co., 163 N.Y.S. 849, 177 App. Div. 132

58. Conn.—New England Fruit & Produce Co. v. Hines, 116 A. 243, 97 Conn. 225.

It is not essential that a bill of lading be issued, for in the absence of any such instrument the rights of the shipper and the duty of the carrier are fixed by the applicatory rules of law.[59] Failure to issue a bill of lading as required by the Carmack amendment does not relieve the carrier of liability on a contract of interstate shipment entered into without a bill of lading,[60] and the requisite stipulations of bill or contract as prescribed by the federal statutes or valid regulations of the interstate commerce commission will attach and govern the rights of the parties.[61] A carrier may properly refuse to issue a bill of lading for property delivered to it when the ownership of the property is in dispute.[62] A separate bill of lading is required for each shipment of goods.[63]

Where the relation of carrier and shipper existed but the bill of lading was not yet signed, the rights and liabilities of the parties must be determined under the terms of the standard bill of lading made out for the goods and mailed to the carrier.[64]

An oral contract of shipment is valid,[65] at least so far as intra-state shipments are concerned.

§ 124. Validity

Bills of lading must be just and reasonable in their terms, conforming to the laws regulating them, and issued only for property in the carrier's possession.

A bill of lading is legal when within the policy and edicts of the law regulating the relation between the carrier and him who is interested in the shipment,[66] and the terms of bills of lading of common carriers who are subject to federal laws may be fixed by congress.[67] Bills of lading must be just and reasonable,[68] and, although legal conditions and limitations in a carrier's bill of lading duly filed with the interstate commerce commission are binding until changed by that body, illegal conditions are void even though they are so filed.[69]

No valid bill of lading can be issued unless the carrier has received, or is in possession of, property to transport, or divert beyond its original destination.[70] Where the signature of the agent of the carrier is required, use of a stamped signature of the carrier is not sufficient to sustain the validity of the bill where the stamp on its face indicated it was intended to record only part of the transaction, the remainder of which was to be inserted in a blank left for that purpose.[71] The date has been said to be a material part of a bill of lading.[72] Where no damage results to the owner of goods shipped because of a mistake in naming the consignor, the carrier is not liable for such mistake.[73]

59. N C—Newman v. Seaboard Air Line Ry Co, 124 S.E 627, 188 N. C 341—Aman v. Dover & Southbound R Co, 102 S E 392, 179 N.C 310—McRary v. Southern Ry. Co, 94 S E 107, 174 N C. 563.
10 C J p 193 note 46.

The Corpus Juris text has been cited as authority in Aman v. Dover & Southbound R. Co., 102 S.E. 392, 179 N.C. 310

60. N C.—Bryan v Louisville & N R Co, 93 S.E. 750, 174 N C. 177—Davis v. Norfolk & S R. R, 90 S E. 123, 172 N C. 209.

61. U S—Charles J. Webb Sons Co v. Central R. Co. of New Jersey, D.C N.Y, 28 F 2d 392, affirmed, C. C A, 36 F 2d 702.
N C.—Aman v. Dover & Southbound R Co., 102 S E. 392, 179 N C. 310—Bryan v. Louisville & N R. Co., 93 S E 750, 174 N.C 177
W Va—Western Maryland Ry Co. v Cross, 123 S.E. 572, 96 W.Va 666.
10 C.J p 194 note 49.

Uniform bill of lading

Where a railroad carrier receives an interstate shipment without issuing any bill of lading or making a contract with the shipper its liability is governed by the terms of a uniform bill of lading published and filed with the interstate commerce commission.—Lazarus v. New York Cent. R R, D C N Y, 271 F. 93, reversed on other grounds, C C A., New York Cent R. Co. v. Lazarus, 278 F. 900

62. U S—Hynds v. Schaff, C.C.A. Okl, 46 F.2d 275.

63. N Y.—Morris & Co. v. Southern Express Co, 189 N Y S. 26, 197 App. Div. 930.

64. Wis—Ashton v. Chicago & N. W. Ry. Co., 225 N W. 328, 198 Wis 618.

65. N C—Newman v. Seaboard Air Line Ry. Co., 124 S.E. 627, 188 N C 341
10 C J. p 193 note 48.

66. U S—Michigan Cent R. Co. v. Mark Owen & Co, 41 S Ct. 554, 226 U.S 427, 65 L Ed 1032, affirming Mark Owen & Co v. Michigan Cent R Co., 125 N E 767, 291 Ill 149.

67. U.S—Alaska S S Co. v U S, D.C N.Y, 259 F 713, reversed on other grounds U S. v. Alaska S. S Co, 40 S Ct. 448, 253 U S 113, 64 L Ed. 808

68. N Y.—South & Central American Commercial Co v. Panama R Co, 142 N E 666, 237 N Y. 287, affirming 199 N.Y S. 92, 205 App Div 123

69. U.S—Boston & M R. R v Piper, 38 S Ct. 354, 246 U S. 439, 62 L.Ed. 820, Ann Cas 1918E 469, affirming Piper v. Boston & M R R., 97 A. 508, 90 Vt. 176.

70. Neb—Omaha Elevator Co v. Chicago, B & Q R. Co., 178 N W 211, 104 Neb 566.

After possession lost

After a carrier has transported property, and permanently lost possession and control of it by delivery under the original bill of lading, its subsequent bill of lading to divert the original consignment to a different destination is void—Omaha Elevator Co. v Chicago, B & Q R Co, 178 N W. 211, 104 Neb 566.

71. Pa—Harris Bros Corporation v Philadelphia & Reading Ry. Co, 84 Pa.Super. 116.

72. Md—Merchants Nat. Bank v Baltimore, etc, Steamboat Co, 63 A. 108, 102 Md 573.

73. Minn—Cohen v Minneapolis, St. P. & S S M. Ry. Co, 158 N W. 334, 133 Minn 298.

Wrong person named consignor

A carrier is not liable for damages for its carelessness in inserting the name of the wrong person as consignor, in consequence of which such person was paid for the shipment, where prior to the commencement of suit he had returned the money thus wrongfully paid, although the money was garnished in the hands of the

Exchange or reconsignment bills can validly be issued only where the lading received at the point of origin has remained intact.[74]

The terms of an original through bill of lading for an interstate shipment cannot be altered by a second bill issued by a connecting carrier.[75]

§ 125. Delivery and Acceptance

A bill of lading delivered and accepted constitutes the contract of carriage even though not signed, but bills should be signed by the shipper where the statute so requires.

The law presumes that the shipper has assented to, and agreed to be bound by, reasonable and valid provisions in the bill of lading,[76] and when it is delivered by the carrier to the shipper and accepted by him it is presumed to constitute the contract for carriage, whether or not he has signed it,[77] and although he did not read it,[78] although until signed and delivered it does not become a bill of lading stricti juris;[79] but a bill of lading given to the shipper after his goods have been shipped and it is too late for him to recede will not be binding on him.[80]

The shipper receiving the bill of lading is conclusively presumed to have read it and to have acquiesced in its terms, in the absence of fraud, imposition, or mistake,[81] in so far as the provisions therein contained are lawful and not opposed to public policy.[82] Where shippers have been given an opportunity to read bills of lading before signing them, they are bound by them so far as they express the terms of the contract of shipment,[83] but if the shipper is prevented by fraud of the carrier's agent from reading the contract he is not bound thereby.[84] Words written on a bill of lading without the shipper's consent or direction form no part of the contract.[85]

Bills of lading must be signed by the shipper where it is so required by statute,[86] but in the absence of statute need not be signed in order to bind the shipper.[87]

Acceptance by a shipper of a second bill of lading, issued by a connecting carrier, is not a waiver by the shipper of any rights accruing under the original bill issued by the initial carrier.[88]

In determining whether the relationship of shipper and carrier exists, that bills of lading were delivered contrary to the statute may be considered.[89]

§ 126. Construction

Bills of lading are to be construed according to the rules applicable to the construction of contracts generally.

As far as the bill of lading is a contract, the language used therein is subject to the rules of construction which govern other contracts.[90] Being a

consignee—Cohen v. Minneapolis, St P & S. S. M. Ry. Co., 158 N.W. 334, 133 Minn 298.

74. U.S.—Boatmen's Nat. Bank of St Louis v St Louis Southwestern Ry. Co, C C.A.Ark., 75 F 2d 494, certiorari denied St. Louis Southwestern Ry. Co. v. Boatmen's Nat Bank of St. Louis, 55 S Ct. 830, 295 U S. 751, 79 L Ed 1695.

75. U S—Missouri, K. & T Ry Co of Texas v. Ward, Tex., 37 S Ct 617, 244 U.S 383, 61 L.Ed 1213

76. Vt—Charles Bianchi & Sons v Montpelier & W. R. R. Co., 104 A. 144, 92 Vt 319.

77. U.S.—Charles J. Webb & Sons v. Central R Co. of New Jersey, C C A N Y, 36 F.2d 702, affirming D C, Charles J. Webb Sons Co. v Central R Co. of New Jersey, 28 F 2d 392.
10 C J. p 194 note 53.

Proof of custom is not admissible to vary terms of a bill of lading where the custom has been expressly stipulated against—Tallassee Falls Mfg. Co v. Western Ry of Alabama, 29 So. 203, 128 Ala 167.

78. S.C.—Johnstone v Richmond, etc., R. Co, 17 S E. 512, 39 S C 55.

79. U.S.—Charles J. Webb & Sons v. Central R. Co. of New Jersey, C C A N.Y, 36 F 2d 702, affirming, D C, Charles J. Webb Sons Co v. Central R Co. of New Jersey, 28 F. 2d 392

80. Wash—John Vittucci Co v. Canadian Pac Ry. Co., 174 P 981, 102 Wash 686

81. Cal.—Yorke v. Pickwick Stages System, 298 P. 831, 113 Cal App. 566
10 C J. p 194 note 55

The text of Corpus Juris has been referred to in Yorke v. Pickwick Stages System, 298 P. 831, 113 Cal App 566.

82. Mass—Cox v. Central Vermont R Co, 49 N E. 97, 170 Mass. 129

83. Ark—Arkansas Western Ry Co v. Robson, 285 S.W. 372, 171 Ark 698

84. Tex—Southern Pac. R. Co v. Meadors, 140 S W. 427, 104 Tex. 469.
10 C.J p 194 note 57.

85. Ky.—Cincinnati, N O. & T. P. Ry Co. v. Luke, 186 S W. 875, 171 Ky. 50, denying rehearing 184 S.W. 1132, 169 Ky. 560.

86. U.S.—Old Colony Trust Co. v. Atlanta, B. & A. R. Co, D.C.Ga., 264 F. 355.
10 C J. p 194 note 53 [c] (2).

87. Okl—Chicago, R I. & P. Ry. Co. v. Geissler, 61 P.2d 14

88. U.S—Missouri, K. & T Ry. Co. of Texas v. Ward, Tex., 37 S Ct. 617, 244 U.S. 383, 61 L Ed 1213

89. Ark.—Graysonia, N. & A R. Co. v Newberger Cotton Co., 282 S.W. 975, 170 Ark 1039

90. Ala—Logan v. Mobile Trade Co., 46 Ala 514.
10 C J. p 195 note 58.

Provisions of other instruments referred to

A provision of a through bill of lading, issued by a railroad company for a shipment to a European port, that the property should be subject to all conditions expressed in the regular forms of bills of lading in use by the steamship company at the time of shipment, is valid, and makes the conditions of the ocean bills a part of the contract.—The Susquehanna, C.C.A.Md., 296 F. 461, affirming, D C., 291 F. 698.

Particular bills of lading construed

(1) A description in bill of lading, "one carload of scrap iron," did not import that the contents of the car

contract in writing, its construction is a question of law,[91] it is to be construed as a whole,[92] effect given, if possible, to all its parts,[93] and invalid conditions will not necessarily render the whole contract invalid, as it may be enforced as far as it is valid.[94] A consistent, rather than an inconsistent, construction of the various clauses of a bill is to be adopted if possible.[95] It is to be construed according to its terms,[96] and, where the terms employed have by usage acquired a particular signification, the parties will be presumed to have used them in that sense.[97] A bill having been prepared by the carrier, it is to be construed most strongly against the carrier.[98] In construing a bill to determine who is the consignee, admittedly fictitious symbols designating the consignee will be disregarded.[99]

The court will look to the mode of transportation by means of which the contract is to be performed in construing the bill of lading.[1]

Where a bill of lading is silent as to route, its effect is the same as if there was a provision therein giving the carrier a right to select any usual route, and such provision thus inserted by law is as unassailable by parol evidence as any express term of the contract.[2]

§ 127. Effect as Estoppel

A bill of lading, unless properly qualified, may operate as an estoppel, preventing the carrier from denying receipt of goods of the quantity and quality described in the bill. The shipper may also be estopped by the bill.

A bill of lading may contain constituent elements of estoppel and thus become something more than a

could be mixed or mingled without damage, so as to relieve the carrier for improper reloading in transit, it appearing that the shipper had put iron of a different nature in different parts of the car.—L. L. Cohen & Co v Davis, 142 N.E. 75, 247 Mass. 259, reversed on other grounds Davis v. L. L. Cohen & Co., 45 S.Ct. 633, 268 U.S. 638, 69 L.Ed. 1129.

(2) Words, "at which there is no regularly appointed agent," apply to both clauses of following provision of uniform bill of lading, approved by Interstate Commerce Commission: "Property destined to or taken from station, wharf, or landing, at which there is no regularly appointed agent, shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings, shall be at owner's risk until cars are attached to, and after they are detached from trains, or until loaded and after unloaded from vessels."—Atlantic Coast Line R. Co. v Wilson & Toomer Fertilizer Co., 104 So. 593, 89 Fla. 224.

Separate bills

Where the carrier issues separate bills of lading covering shipments of goods, the undertaking is to carry the shipments separately, and not to permit commingling while in transit.—Inland Waterways Corporation v. Sloss Sheffield Steel & Iron Co., 136 So. 849, 223 Ala. 397.

The uniform bill of lading includes lighterage as well as rail carriage.—Charles J. Webb & Sons v. Central R. Co. of New Jersey, C.C.A.N.Y., 36 F.2d 702, affirming, D.C., Charles J. Webb Sons Co v. Central R. Co. of New Jersey, 28 F.2d 392

91. Vt.—Booth v. New York Cent. R. Co., 112 A. 894, 95 Vt. 9.
10 C.J. p 195 note 63.

92. Iowa—Sheldon v. Chicago, B. & Q. R. Co., 169 N.W. 189, 184 Iowa 865.

93. U.S.—Isler v. Luckenbach S. S. Co., C.C.A.N.Y., 18 F.2d 946.

94. Neb.—Whitnack v. Chicago, etc., R. Co., 118 N.W. 67, 82 Neb. 464, 469, 130 Am.S.R. 692, 19 L.R.A., N.S., 1011.
10 C.J. p 195 note 62.

95. Tex.—Texarkana & Ft. S. Ry. Co. v. Brass, Com.App., 260 S.W. 828, affirming, Civ.App., 245 S.W. 457, rehearing overruled, Com.App., 262 S.W. 737.

96. Ark.—Prescott & N.W. R. Co. v. Davis, 191 S.W. 210, 126 Ark. 366.
Me.—Lewis Poultry Co. v New York Cent. R. Co., 105 A. 109, 117 Me. 482

Change in uniform bill

The rights of the parties must be determined by the uniform bill of lading as it stood when the contract was made notwithstanding a subsequent change in the uniform bill by the interstate commerce commission.—Humphrey-Cornell Co. v. Hines, 115 A. 561, 97 Conn. 21.

Consignee

Under P.L.1913 p. 261, the term "consignee," used in a bill of lading, means the person named in the bill as the person to whom delivery of the goods is to be made.—Pennsylvania R. Co. v. Townsend, 100 A. 855, 90 N.J.Law 75.

Meaning of "reasonable despatch" provision of bill of lading cannot be shown by construction placed thereon by parties.—Parsons v. Chicago, B. & Q. R. Co., Mo.App., 300 S.W. 324.

Practical construction

A stipulation for making written claim for loss, damage, or delay should be given a practical construction.—Babbitt v. Grand Trunk Western Ry. Co., 120 N.E. 803, 285 Ill. 267, affirming 209 Ill.App. 183.

97. Conn.—Soper v. Tyler, 58 A. 699, 77 Conn. 104.
10 C.J. p 195 note 59.

98. U.S.—E. Gerli & Co. v. Cunard S.S. Co., C.C.A.N.Y., 48 F.2d 115
Ill.—Mark Owen & Co. v. Michigan Cent. R. Co., 125 N.E. 767, 291 Ill. 149, affirming 214 Ill.App. 94, and certiorari granted Michigan Cent. R. Co. v. Mark Owen & Co., 40 S.Ct. 483, 253 U.S. 481, 64 L.Ed. 1023, and affirmed 41 S.Ct. 554, 256 U.S. 427, 65 L.Ed. 1032—Cohen v. Southern Ry. Co., 273 Ill.App. 116, affirmed 193 N.E. 480, 358 Ill. 532—Lino v. Northwestern Pac. R. Co., 246 Ill.App. 451, reversed on other grounds 163 N.E. 316, 332 Ill. 93.
Me.—Lewis Poultry Co. v New York Cent. R. Co., 105 A. 109, 117 Me. 482.
Miss.—Yazoo & M.V. R. Co. v. Nichols & Co., 83 So. 5, 120 Miss. 690, certiorari granted 40 S.Ct. 219, 251 U.S. 550, 64 L.Ed. 409
Tex.—Gulf, C. & S.F. Ry. Co. v. Hines, Com.App., 250 S.W. 1013, affirming, Civ.App., 239 S.W. 244.
10 C.J. p 195 note 58 [a].

Ambiguity in a bill of lading for the shipment of live stock in designating the consignee, or in not clearly showing who they are, or the place of destination, should be construed most favorably to the shipper.—Cincinnati, N. O. & T.P. Ry. Co. v. Luke, 184 S.W. 1132, 169 Ky. 560, rehearing denied 186 S.W. 875, 171 Ky. 50.

99. N.Y.—Mayer v. Southern Pac. Co., 159 N.Y.S. 93, 95 Misc. 498

1. Ill.—Dixon v. Dunham, 14 Ill. 324.
10 C.J. p 195 note 60.

2. Ind.—Snow v. Indiana, etc., R. Co., 9 N.E. 702, 109 Ind. 422.
10 C.J. p 195 note 61.

contract between the carrier and the shipper.[3] Estoppels against a carrier in favor of a purchaser of a bill of lading rest on falsity of representations intending others to rely thereon,[4] and therefore when the carrier issues a bill of lading containing a statement as to the quantity of goods received, with the understanding that the goods may be transferred by means of a transfer of the bill of lading, the transferee is justified in relying on the representations of the carrier made in the bill with reference to the quantity of goods received under it, and as to one who receives the bill in good faith, relying on the statement of quantity, and pays a consideration, the carrier is estopped from showing that it has not received the quantity of goods recited in the bill.[5] To guard against such estoppel the carrier may insert in the bill of lading, "quantity, weight, and contents unknown," or some like clause qualifying its representation, and in that event it will not be liable to an assignee for value if it delivers all the goods received,[6] nor does the estoppel apply to a case where the owner of the property did not purchase it while it was in the hands of the carrier, and therefore did not take title to it through the bill of lading, but the shipment was made by its agent,[7] or where the bill of lading which was for a car shipment of cotton seed showed on its face that the bags were loaded and counted only by the consignor.[8] The principle of estoppel has no application where the bills of lading as delivered did not in fact include goods not received, but were fraudulently altered by the shipper.[9]

Truth of qualification. A carrier will not be relieved of liability by inserting a qualifying clause in the bill of lading unless such clause is true,[10] and hence the carrier is liable where no goods were ever shipped, notwithstanding the insertion of such words;[11] but where true the carrier is not liable for nonreceipt of any part of the goods described.[12]

Packaged goods. When a bill of lading acknowledging receipt of packaged goods recites that the contents and condition are unknown, the bill is prima facie evidence of receipt of the packages, but not of the quantity of goods therein,[13] and is not of itself sufficient to prove a shortage of the contents.[14] Such a recital relieves the carrier of liability for shortage of contents of the package.[15] A recital that goods were received in apparent good

3. Ala.—Louisville & N. R. Co. v Cullman Warehouse, 147 So. 421, 226 Ala. 493

The text of Corpus Juris was quoted at length, as illustrative of the rule stated in the text, in Louisville & N. R. Co. v. Cullman Warehouse, 147 So. 421, 226 Ala. 493.

4. U.S.—Olivier Straw Goods Corporation v. Osaka Shosen Kaisha, D.C.N.Y., 21 F.2d 618, reversed on other grounds, C.C.A., 27 F.2d 129, certiorari denied Osaka Shosen Kaisha v. Olivier Straw Goods Corporation, 49 S.Ct. 22, 278 U.S. 618, 73 L.Ed. 540.

Non-reliance on representation

Where buyer had knowledge of railroad's custom to sign bill of lading prepared in advance by shipper, without verification of the correctness of the weight of goods stated therein, and was entitled by contract of sale to examine the goods and verify the goods before payment of the price, and where the bill of lading stated that weights shown therein were "subject to correction," the buyer, having paid draft with bill of lading attached before arrival of goods at destination, could not recover from railroad the loss sustained on delivery of amount less than that stated in the bill of lading —Houston & T. C. R. Co. v. Paris Milling Co., Tex.Civ.App., 240 S.W. 638

Terminal carrier

In consignee's action against terminal carrier for alleged negligence causing damage to carload shipment, admission in bill of lading issued by initial carrier in Canada that goods were received in apparent good order was not binding on terminal carrier.—Kaufherr & Co. v. Pennsylvania R. Co., 174 A. 27, 12 N.J.Misc. 542

5. Mass.—Northern Industrial Chemical Co. v. Davis, 144 N.E. 64, 249 Mass. 246

Mich.—Dwinnell v. Duluth, S. S. & A. Ry. Co., 218 N.W. 649, 242 Mich. 357

N.C.—Riff v. Yadkin R. Co., 127 S.E. 588, 189 N.C. 585

10 C.J. p. 195 note 65.

6. U.S.—The Buenos Aires, D.C.N.Y., 46 F.2d 693.

Ala.—Davis v. Zimmern, 99 So. 307, 211 Ala. 63.

10 C.J. p. 196 note 70.

Weight subject to correction

(1) "Weight subject to correction" has been held to allow the carrier to show that the weight was in fact less than that specified, on the authority of the text and cases of 10 Corpus Juris p. 196.—Davis v. Zimmern, 99 So. 307, 211 Ala. 63.

(2) On the other hand, a bill of lading reciting "weight subject to correction" has been held not to indicate that shipper weighed grain nor to relieve carrier from liability for shortage.—Beacon Milling Co. v. New York Cent. R. Co., 244 N.Y.S. 573, 137 Misc. 865.

(3) The insertion of the words "weight subject to correction" does not destroy the prima facie effect of the recital as to quantity; it merely leaves the matter open to further inquiry instead of being absolutely concluded.—Brown v. Missouri, etc., R. Co., 112 P. 147, 83 Kan. 574.

7. N.Y.—Meyer v. Peck, 28 N.Y. 590

8. S.C.—Palmetto Fertilizer Co. v. Columbia, etc., R. Co., 83 S.E. 36, 99 S.C. 187.

9. Pa.—Franklin Trust Co. v. Philadelphia, etc., R. Co., 85 A. 855, 237 Pa. 519

10. N.Y.—Beacon Milling Co. v. New York Cent. R. Co., 244 N.Y.S. 573, 137 Misc. 865

11. U.S.—Chicago & N. W. Ry. Co. v. Stephens Nat. Bank of Fremont, C.C.A.Neb., 75 F.2d 398, certiorari denied 55 S.Ct. 650, 295 U.S. 738, 79 L.Ed. 1685.

12. Mich.—People's Sav. Bank of Saginaw v. Pere Marquette Ry. Co., 209 N.W. 182, 235 Mich. 399.

Tex.—Gulf, C. & S. F. Ry. Co. v. Galbraith, Civ.App., 39 S.W.2d 91

13. N.C.—Riff v. Yadkin R. Co., 127 S.E. 588, 189 N.C. 585.

14. N.C.—Riff v. Yadkin R. Co., supra

15. N.Y.—Dworkwitz v. New York Cent. R. Co., 129 N.E. 650, 230 N.Y. 188, reversing 173 N.Y.S. 654, 187 App.Div. 906.

order and condition is not, in the case of packaged goods, an admission by the carrier of receipt of the alleged contents of the packages.[16] A recital of receipt of a package "in apparent good order except as noted (contents and condition of contents of packages unknown)" renders the bill of lading insufficient prima facie to show delivery of the purported contents of the package[17] and is not an admission that the contents were received in good condition.[18] Such a recital will destroy the prima facie effect of a recital that property has been received in apparent good order and condition only when the contents and condition are actually concealed and not observable or the carrier has no opportunity to inspect.[19] The Bills of Lading Act requires, in the case of package goods, only that the carrier count the packages, and, where the bill contains a further statement of the weight of the packaged goods, qualified by the words "subject to correction," the carrier is not liable for a shortage of weight.[20]

Where the goods have been misdescribed but the carrier has disclaimed knowledge of the contents of the packages and the words of description have been added by the consignor, the carrier is not liable for failure of the packages to contain the contents described.[21]

Shipments in bulk. It has been held that the usual statement in the bill of lading that contents and value are unknown will have no application to material shipped in bulk as to which the carrier has full opportunity to advise itself, and the quantity stated will be binding on it.[22]

Liability for goods actually received. Although the bill of lading is marked "shipper's load and count," the carrier is liable for whatever he actually receives from the shipper.[23] The insertion of the words "shipper's load and count" will not, of course, relieve the carrier of liability for goods actually delivered to and accepted by it,[24] but such a statement does not affect the liability of the carrier for the actual contents,[25] nor do the words "received in apparent good order except as noted (contents and condition of contents of packages unknown)."[26]

Where no goods received. As between the shipper and the carrier, when no goods have been delivered for shipment no recitals in the bill can estop the carrier from showing the true facts,[27] but as against a third person a carrier may, as shown in § 141, be bound by a bill of lading issued by an authorized agent even though no goods have been received.

Between the consignor of goods and a receiving carrier, recitals in a bill of lading as to the goods shipped raise only a rebuttable presumption that such goods were delivered for shipment.[28] As be-

16. N.Y.—Dworkwitz v. New York Cent. R. Co., supra.
Tex.—Hines v. Warden, Civ.App., 229 S.W. 957.

17. Conn.—Shore v. New York, N. H. & H. R. Co., 121 A. 344, 99 Conn. 129.

18. Ala.—Louisville & N. R. Co. v. Hendricks, 171 So. 273, 233 Ala. 259

19. N.Y.—Schwalb v. Erie R. Co., 293 N.Y.S. 842, 161 Misc. 743.

Condition apparent on casual inspection

Provision in bill of lading that shipment of lidded lugs of grapes, consisting of boxes with solid ends and sides and raised or bulged tops, was received in apparent good order, was prima facie evidence of good condition of property when shipped, where contents of lugs were visible by even a casual inspection, as respects liability of carrier for injury to grapes in transit.—Schwalb v. Erie R. Co., 293 N.Y.S. 842, 161 Misc. 743.

20. U.S.—Leigh Ellis & Co. v. Payne, D.C.Ga., 274 F. 443, affirmed, C.C.A., Lehigh Ellis & Co. v. Davis, 276 F. 400, certiorari denied 42 S.Ct. 187, 257 U.S. 659, 66 L.Ed. 422, and affirmed 43 S.Ct. 243, 260 U.S. 682, 67 L.Ed. 460

21. N.Y.—Josephy v. Panhandle & S. F. Ry., 139 N.E. 277, 235 N.Y. 306, reversing 194 N.Y.S. 947, 118 Misc. 266.

22. Ill.—Alton Iron & Metal Co. v. Wabash Ry. Co., 235 Ill.App. 151, reversed on other grounds 159 N.E. 802, 328 Ill. 353.
10 C.J. p. 196 note 72.

23. U.S.—Boatmen's Nat. Bank of St. Louis v. St. Louis Southwestern Ry. Co., C.C.A.Ark., 75 F.2d 494, certiorari denied St. Louis Southwestern Ry. Co. v. Boatmen's Nat. Bank of St. Louis, 55 S.Ct. 830, 295 U.S. 751, 79 L.Ed. 1695

On exchange or reconsignment bills

(1) Notations of "shipper's load and count" and "contents and condition of contents of packages unknown," on reconsignment bills of lading, refer to contents of cars at point of origin, since reconsignment bills could not be issued where lading received at point of origin had not remained intact.—Boatmen's Nat. Bank of St. Louis v. St. Louis Southwestern Ry. Co., C.C.A.Ark., 75 F.2d 494, certiorari denied St. Louis Southwestern Ry. Co. v. Boatmen's Nat. Bank of St. Louis, 55 S.Ct. 830, 295 U.S. 751, 79 L.Ed. 1695.

(2) Carrier is liable to purchaser of reconsignment bills of lading for value of high quality rice shipped under original bills, where reconsignment bills were issued by carrier after original consignee had substituted inferior rice for that originally shipped, which reconsignment bills recited that they were issued in exchange for those originally issued, and that cars contained same quality of rice, notwithstanding substitution was made without carrier's knowledge and that bills recited "shipper's load and count" and "contents and condition of contents of packages unknown."—Boatmen's Nat. Bank of St. Louis v. St. Louis Southwestern Ry. Co., supra.

24. Mich.—Dwinnell v. Duluth, S. S. & A. Ry. Co., 218 N.W. 649, 242 Mich. 357.

25. N.C.—Riff v. Yadkin R. Co., 127 S.E. 588, 189 N.C. 585

26. N.Y.—Wallens v. New York Cent. & H. R. R. Co., 166 N.Y.S. 1083.

27. Va.—Director General of Railroads v. Chandler, 106 S.E. 226, 129 Va. 418

28. S.C.—Palmetto Fertilizer Co. v.

tween the consignor and a receiving carrier the fact must outweigh the recital.[29]

Estoppel of shipper. A shipper by signing a bill of lading is estopped from contending that his shipment was not made thereunder;[30] and cannot deny the correctness, as against a connecting carrier who it is claimed unreasonably delayed the shipment, of demurrage charges shown by the face of the bill to be due.[31]

§ 128. Negotiability and Transfer

a. In general
b. Who may transfer
c. Mode of transfer
d. Effect of transfer
e. Limitations on negotiability
f. Bona fide purchasers
g. Warranties arising out of transfer
h. Delivery for collection

a. In General

The negotiability of bills of lading depends primarily on their terms and the provisions of the statutes, if any, under which they are issued.

Under the provisions of the federal Bills of Lading Act and the Uniform Bills of Lading Act which has been adopted in many states, the negotiability of a bill of lading depends primarily on whether it is a straight bill or an order bill.[32] Under these acts straight bills of lading are deemed nonnegotiable, even though indorsed,[33] while order bills are negotiable.[34] The negotiability of an order bill is not affected by a provision that someone other than the consignee is to be notified of the arrival of the goods at their destination;[35] however, the statutory provision that the insertion in an order bill of the name of the person to be notified of the arrival of goods shall not limit the negotiability of the bill nor constitute notice to a purchaser thereof of any rights or equities of such person in the goods applies only to contests with a purchaser of the bill and has no application to contests between the carrier and a shipper who is the holder and in possession of the bill.[36] Where a bill is nonnegotiable, failure so to mark it does not make it negotiable.[37]

Bills made out to a consignee or "assigns" have been variously held to be order bills and negotiable,[38] and straight bills and nonnegotiable.[39]

b. Who May Transfer

Under statutory provisions as to negotiability, bills of lading may be negotiated or transferred by such persons as the statutes contemplate. Transfer so as to pass title to the goods may be made by a consignee having title, or by a consignor reserving the jus disponendi.

Under the express provision of the statutes mentioned in the preceding section, an order bill may be negotiated by any person in possession of the same, however such possession is acquired, if by the terms of the bill the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery. Other provisions of the statutes in so far as they provide for the manner of negotiation by particular persons, are considered in § 128 c.

Where the title of the goods is in the consignee, a transfer of the bill of lading, so as to pass title to the goods, may be made by him.[40] If, however, the consignor has retained the jus disponendi he may transfer the bill of lading,[41] but not otherwise.[42] Nothing in the federal law prohibits the consignee from orally authorizing the seller to bill

Columbia, etc., R. Co., 83 S.E. 36, 99 S.C. 187.
10 C.J. p. 196 note 73.

29. S.C.—Palmetto Fertilizer Co. v. Columbia, etc., R. Co., supra

30. Mo.—Johnson v. Missouri Pac. Ry. Co., App., 187 S.W. 282

31. Ga.—Powell v. Seaboard Air Line Ry., 90 S.E. 980, 19 Ga.App. 91.

32. N.Y.—Calumet & Hecla Min. Co. v. Equitable Trust Co., 174 N.Y.S. 319, 186 App.Div. 330

33. Conn.—Kasden v. New York, N. H. & H. R. Co., 133 A. 573, 104 Conn. 479

34. Tex.—F. L. Shaw Co. v. Coleman, Civ.App., 236 S.W. 178 error refused

An order bill of lading containing nothing on its face indicating that it is not negotiable is negotiable.—Slutzkin v. Gerhard & Hey, 191 N.Y.S. 104, 199 App.Div. 5.

A bill to the shipper's order as consignee is a negotiable bill.—R. B. George Machinery Co. v. New Orleans, T. & M. R. Co., 119 So. 432, 167 La. 474, reversing 119 So. 473, 9 La.App. 302.

Bills of lading for oil with draft attached for purchase price, which bank would pay and become owner thereof, were "negotiable instruments."—Kansas State Bank v. Atchison, T. & S. F. Ry. Co., 251 P. 188, 122 Kan. 77.

35. N.C.—Temple v. Southern R. Co., 129 S.E. 815, 190 N.C. 438.

36. Mo.—Kemper Mill & Elevator Co. v. Hines, 239 S.W. 803, 293 Mo. 88.

37. N.Y.—Gubelman v. Panama R. Co., 182 N.Y.S. 403, 192 App.Div. 165, affirmed 134 N.E. 574, 232 N.Y. 566

38. U.S.—New York & P. R.S.S. Co. v. McGowin Lumber & Export Co., C.C.A.Porto Rico, 284 F. 513

39. N.Y.—Goldstein v. Societa Veneziana Per L'Industria Delle Conterie, 183 N.Y.S. 460, 193 App.Div. 168.—Gubelman v. Panama R. Co., 182 N.Y.S. 403, 192 App.Div. 165, affirmed 134 N.E. 574, 232 N.Y. 566

40. U.S.—Conard v. Atlantic Ins. Co., Pa., 1 Pet. 386, 7 L.Ed. 189.
10 C.J. p. 205 note 58.

41. U.S.—Lovell v. Isidore Newman & Son, La., 192 F. 753, 113 C.C.A. 39, affirming, C.C., 188 F. 534.
10 C.J. p. 205 note 59.

42. Ohio.—Peoples Savings Bank & Trust Co. v. Jos. Joseph Brothers Co., 16 Ohio App. 45.
10 C.J. p. 205 note 60.

the shipment in the consignee's name and transfer the bills to others.[43]

c. Mode of Transfer

Bills of lading may be transferred by assignment, or indorsement and delivery, and, in a proper case, by delivery alone

The transfer of a bill of lading so as to pass to the transferee, for value, whatever title the transferor had at the time, may be by indorsement and delivery of the instrument.[44] The indorsement may be in blank,[45] but a mere indorsement, without delivery, does not satisfy the requirements of the rule,[46] nor will mere delivery, without indorsement, where indorsement is required.[47] However, where bills of lading are transferable by indorsement and delivery, a formal assignment is not, in the absence of a statute requiring it, necessary to a valid transfer and the mere delivery of the bill of lading without a written indorsement, if made with the intention of passing title to the goods, is sufficient to effect that purpose.[48] Even the fact that the bill of lading is drawn to order does not prevent its trans-

43. Cal.—Bedig v. Southern Pac Co., 258 P 148, 84 Cal App. 325.

44. Kan.—Ranney-Davis Mercantile Co. v. Bumgarner, 185 P. 287, 105 Kan. 474.
La.—Aleman Planting & Mfg. Co. v. Hines, 102 So. 815, 157 La. 625.
Wash.—Wiekens v. Scheuer, 204 P 780, 118 Wash. 614.
10 C.J. p 204 note 45

The text statement in Corpus Juris has been relied on in support of the proposition that the effect to be given an indorsement of a bill of lading depends on the intention of the parties, and, where they intend title to the goods to be passed thereby, that will be the effect of the transaction. —Wiekens v. Scheuer, 204 P. 780, 118 Wash 614.

Effect of delivery of goods to another

A transfer of title by indorsement of bills of lading covering sea and land transportation is not defeated as between the parties by delivery of the goods to an agent designated by the buyer at the termination of the sea voyage.—Wiekens v. Scheuer, 204 P 780, 118 Wash 614.

Evidence of ownership

The text of Corpus Juris has been referred to in an action to recover from railroad company value at destination of hay shipped under order bill of lading, in support of the proposition that possession by plaintiff of order bill of lading indorsed by shipper was evidence of plaintiff's ownership of hay and his right to proceeds of sale of same, and no further evidence of sale, transfer, or assignment by predecessors in title was required.—Temple v. Southern R. Co., 129 S.E. 815, 190 N.C. 438.

45. Ala.—Industrial Finance Corporation v. Turner, 110 So. 904, 215 Ala. 460.
Ill.—Charles D. Stone & Co. v. New York Cent. R. Co., 214 Ill App 483.
Iowa.—Chicago, R. I. & P. Ry. Co. v. McElhany, 165 N.W. 67, 182 Iowa 1035
Tex.—Texarkana & Ft. S. Ry. Co. v. Brass, Com.App., 260 S.W. 828, affirming, Civ App., 245 S.W. 457, rehearing overruled, Com.App., 262 S.W. 737.
Vt.—Quigley v. Wiley, 179 A. 206, 107 Vt. 253.

46. Mass.—Buffington v. Curtis, 15 Mass. 528, 8 Am.D. 115.
10 C.J. p 204 note 46.

47. Ala.—Davis v. Hines, 85 So. 882, 17 Ala.App. 443.

48. U.S.—King v. Barbarin, Mich., 249 F. 303, 161 C.C.A. 311.—New York Cent. & H.R.R. Co. v. Bank of Holly Springs, C.C.Miss., 236 F. 562, modified on other grounds 195 F. 456, 115 C.C.A. 358.
Ga.—Central of Georgia Ry. Co. v. Evans, 134 S.E. 122, 35 Ga.App. 438. —Baker v. Central Grocery Co., 83 S.E. 504, 15 Ga.App. 377
Mo.—Kinsolving v. State Savings & Trust Co., 190 S.W. 379, 195 Mo. App. 326.
10 C.J. p 204 note 48

Transfer for value

It is questionable whether federal Uniform Bills of Lading Act § 29, 49 U.S.C.A. § 109, providing a bill may be transferred by holder by delivery, extends to an order bill of lading, since the only specific bill designated therein is a straight bill, but if an order bill is within the purview of this section, as well as within section 113, providing that, when the bill is transferred for value, the transferee acquires the right to compel indorsement to him, the transfer must be for value, and the parties must intend either expressly or impliedly to transfer the title.—Davis v. Fruita Mercantile Co., 220 P. 983, 74 Colo. 247.

This, it is said, is an apt and usual way of passing title in the usual course of trade.—Ladd, etc., Bank v. Commercial State Bank, 130 P. 975, 64 Or. 486, 49 L.R.A.,N.S., 657.

The rule applies even though the instrument contains no words of negotiability, if the delivery of the instrument is intended to have that effect.—Davenport Nat. Bank v. Homeyer, 45 Mo. 145, 100 Am.D. 363.—10 C.J. p 204 note 50.

Intent essential

(1) Delivery of an unindorsed bill of lading constitutes a good symbolical delivery of the goods represented by the bill of lading only when such was the intent and purpose of the parties.—Florence, etc., R. Co. v. Jensen, 108 P. 974, 48 Colo. 28.

(2) Delivery of a bill to enable the buyer to inspect the goods does not constitute a transfer of title to the goods to the buyer.—St. Joseph Hay & Feed Co. v. Missouri Pac. Ry. Co., Mo.App., 185 S.W. 1162

Shipper's order

(1) It has been held that a shipper's order bill must be indorsed by the shipper.—Lamborn v. Lake Shore Banking & Trust Co., 188 N.Y.S. 162, 196 App.Div. 504, affirmed 132 N.E. 911, 231 N.Y. 616.

(2) Where a shipper's order bill of lading in favor of the consignee was attached to a draft drawn by a consignee in favor of a bank, fact that bill of lading was not indorsed by consignee would not affect right of bank to proceeds when collected, as assignment could be proven in some other way.—West Texas Nat. Bank v. Wichita Mill & Elevator Co., Tex.Civ.App., 194 S.W. 835

(3) That a shipper's order bill of lading in favor of consignee was attached to a draft drawn by consignee in favor of bank with notation on face of draft to the bill of lading attached was itself sufficient assignment of bill of lading upon its delivery with attached draft to bank. —West Texas Nat. Bank v. Wichita Mill & Elevator Co., supra.

Effect of delivery

It has been said that, even if delivery to plaintiff, without indorsement, of a bill of lading by the one entitled by its terms to the goods did not give a right of action thereon against the carrier, it would be some evidence of waiver of the requirement that without the indorsement the carrier's agent recognized plaintiff's right to the goods, and that the carrier issued to him a voucher for the value of the lost part of the goods shipped.—McMeekin v. Southern R. Co., 64 S.E. 413, 82 S.C. 468.

fer by delivery to a third person without any indorsement,[49] but under the express provision of the Bills of Lading Act order bills may be negotiated by delivery only when indorsed by the person to whose order the goods are deliverable, and a transferee of an unindorsed order bill will take only such title as his transferor had.[50] When an order bill of lading has been indorsed in blank by the person to whose order the goods are deliverable it may be negotiated by delivery.[51] The presumption of ownership of the property arising from the possession of a bill of lading indorsed to the order of the holder may be explained or rebutted by other evidence showing where the real ownership lies.[52]

As a straight bill of lading cannot be negotiated free from existing equities, indorsement of such a bill can give the transferee no more rights than he would have if the bill was not indorsed.[53]

To constitute an assignment of a bill of lading so as to transfer title to the goods there must be a delivery, actual or constructive, of the bill.[54] A straight bill of lading is assigned or transferred by delivery.[55]

d. Effect of Transfer

(1) Transfer of title and right to goods
(2) Transfer of contract

(1) Transfer of Title and Right to Goods

(a) In general
(b) Transfer as security; bill with draft attached
(c) Transferee's rights as to creditors

(a) In General

Transfer of a bill of lading passes title to the goods represented thereby, while in the possession of the carrier, as effectually as if the goods themselves were delivered, where such is the intention.

As symbols of property therein receipted for, as said in § 123, bills of lading are transferable so as to pass title to the goods represented thereby while in the possession of the carrier as bailee, when such is the intention, as effectually as if the goods themselves were delivered,[56] and such transfer confers

49. N.Y.—Merchants' Bank v. Union R, etc, Co, 69 N.Y. 373.
10 C.J. p 204 note 51.

50. Tenn.—John S. Hale & Co. v. Beley Cotton Co, 290 S.W. 994, 154 Tenn. 689.

Indorsement necessary where bill negotiable
N.Y.—Lamborn v. Lake Shore Banking & Trust Co, 188 N.Y.S. 162, 196 App. Div. 504, affirmed 132 N.E. 911, 231 N.Y. 616—Gubelman v. Panama R. Co., 182 N.Y.S. 403, 192 App. Div. 165, affirmed 134 N.E. 574, 232 N.Y. 566.
N.C.—Temple v. Southern R. Co., 129 S.E. 815, 190 N.C. 438.

51. N.Y.—Lamborn v. Lake Shore Banking & Trust Co, 188 N.Y.S. 162, 196 App. Div. 504, affirmed 132 N.E. 911, 231 N.Y. 616.

Delivery as passing title
Under Personal Prop. L. §§ 214, 217, a bill of lading made out to the shipper's order could only be negotiated by the shipper's indorsement, and when indorsed in blank could be negotiated by delivery, and title to the goods passed by such negotiation —Lamborn v. Lake Shore Banking & Trust Co, 188 N.Y.S. 162, 196 App. Div. 504, affirmed 132 N.E. 911, 231 N.Y. 616.

52. Hawaii.—Riverside Portland Cement Co. v. Von Hamm-Young Co, 21 Hawaii 727.

The Corpus Juris text is cited with approval in Turner Lumber & Inv. Co. v. Chicago, R. I. & P. Ry. Co., Mo., 34 S.W.2d 1009.

53. Cal.—Ward-Lewis Lumber Co. v. Mahony, 234 P. 417, 70 Cal. App. 708.

54. Ala.—Cox v. Griel Bros. Co, 94 So. 292, 208 Ala. 250.

55. N.Y.—Gubelman v. Panama R. Co, 182 N.Y.S. 403, 192 App. Div. 165, affirmed 134 N.E. 574, 232 N.Y. 566.

Rights of assignee
Nonnegotiable bills of lading may be assigned or transferred by delivery, and the transferee acquires against the transferor the title to the goods, subject to the terms of any agreement between them; but as against the carrier the transferee acquires the right to notify the carrier of the transfer of the bill, and thereby secure to himself the rights that the transferor had immediately before such notification, and until such notification the carrier may deliver the goods to the consignee named, under Personal Prop. L. § 198 subs. (b), and §§ 199, 210.—Gubelman v. Panama R. Co, 182 N.Y.S. 403, 192 App. Div. 165, affirmed 134 N.E. 574, 232 N.Y. 566.

Intent to pass title
Mere delivery of bill of lading, which is nonnegotiable, to buyer, does not transfer title, unless such is parties' intention at time.—Garner Mfg. Co. v. Cornelius Lumber Co, 262 S.W. 1011, 165 Ark. 119.

56. U.S.—Olivier Straw Goods Corporation v. Osaka Shosen Kaisha, C.C.A.N.Y., 27 F.2d 129, reversing, D.C., 21 F.2d 613, certiorari denied Osaka Shosen Kaisha v. Olivier Straw Goods Corporation, 49 S.Ct. 22, 278 U.S. 618, 73 L.Ed. 540—Olivier v. Mt. Union Tanning & Extract Co., D.C.Pa., 253 F. 593, reversed on other grounds, C.C.A., 264 F. 601.
Ala.—Cox v. Greil Bros. Co, 94 So. 292, 208 Ala. 250.
Ark.—Prescott & N. W. R. Co. v. Davis, 191 S.W. 210, 126 Ark. 366.
Colo.—People v. Home Oil & Supply Co., 34 P.2d 67, 95 Colo. 143.
Ga.—Baker v. Central Grocery Co, 83 S.E. 504, 15 Ga. App. 377—Orr v. Planters' Phosphate & Fertilizer Co., 68 S.E. 779, 8 Ga. App. 59.
Ind.—Frontier Nat. Bank of Eastport, Me. v. Salinger, 126 N.E. 40, 72 Ind. App. 479.
Iowa.—Midland Linseed Co. v. American Liquid Fireproofing Co., 166 N.W. 573, 183 Iowa 1046, error dismissed 41 S.Ct. 60, 254 U.S. 610, 65 L.Ed. 436.
La.—Alex Woldert Co. v. Jos. Samuel Co, 1 La. App. 251.
Mass.—Meteor Products Co. v. Société d'Electro Chimie et d'Electro Metallurgie, 161 N.E. 875, 263 Mass. 543—National Wholesale Grocery Co. v. Mann, 146 N.E. 791, 251 Mass. 238.
Mich.—F. W. Stock & Sons v. Capitol Cooperage Co, 197 N.W. 529, 226 Mich. 405.
Miss.—Itzig Co. v. First Nat. Bank, 91 So. 15, 128 Miss. 345—Merchants' & Manufacturers' Bank of Ellisville v. Philip J. Toomer Lumber Co, 76 So. 565, 115 Miss. 647.
Mo.—Feeders Supply Co. v. Union Pac. R. Co, App., 96 S.W.2d 1056.
N.Y.—Terranova v. Southern Pac. Co, 200 N.Y.S. 309, 206 App.Div. 64—Derma-Viva Co. v.. Kells Co.,

the right to the property without the taking of actual possession of it or the doing of any further act to perfect title.[57] Nevertheless the question of intention in making the transfer is of controlling importance,[58] and what actually was the intention of the parties in making the transfer may be shown just as it may be shown that the delivery of goods is for some other purpose than for transferring title,[59] and where the intention not to transfer title fully appears, transfer of the bill of lading does not give title to the goods to the possessor.[60]

The transferee has the right to rely on the terms of the bill of lading when purchasing it.[61]

A straight bill of lading cannot be negotiated free from existing equities,[62] and the transferee can take no better title to the goods than his transferor had.[63] In view of the nonnegotiability of a straight bill of lading, the naming of one as consignee gives him no better title than would an assignment of the bill to him had the consignor been named consignee.[64]

Delivery to carrier. Delivery to the initial carrier of indorsed bills of lading entitling the holder to receive the goods, after refusal of the consignee to accept the goods, is tantamount to a constructive delivery to the carrier for reshipment.[65]

(b) Transfer as Security; Bill with Draft Attached

aa. In general

bb. Pledge or assignment

aa. In General

Transfer of a bill of lading with draft attached gives to the transferee a property in the goods, subject to be divested by acceptance and payment of the draft by the one on whom it is drawn

Except as it may otherwise be agreed between the parties,[66] where the consignor draws on the con-

176 N.Y.S. 776, 188 App.Div. 177—Marine Bank of Buffalo v. Fiske, 9 Hun 363, affirmed 71 N.Y. 353—Cohen v. John Curtin, Inc., 177 N.Y.S. 246, 107 Misc. 622, affirmed 181 N.Y.S. 931, 191 App.Div. 952.

S.C.—Liberty Nat. Bank v. Hines, 104 S.E. 313, 115 S.C. 82.

Tenn.—Tennessee Egg Co. v. Monroe, 268 S.W. 372, 151 Tenn. 121, certiorari denied L. J. Schwaub & Sons v. Tennessee Egg Co., 46 S.Ct. 105, 269 U.S. 580, 70 L.Ed. 422

Tex.—Early-Foster Co. v. Latham & Co., Civ.App., 253 S.W. 663—F. L. Shaw Co. v. Coleman, Civ.App., 236 S.W. 178, error refused.

Vt.—Quigley v. Wiley, 179 A. 206, 107 Vt. 253

10 C.J. p. 201 note 17.

The rule as stated in Corpus Juris has been cited and approved

Colo.—People v. Home Oil & Supply Co., 34 P.2d 67, 95 Colo. 143.

S.C.—Liberty Nat. Bank v. Hines, 104 S.E. 313, 115 S.C. 82.

Vt.—Quigley v. Wiley, 179 A. 206, 107 Vt. 253

Constructive transmutation

By indorsement and delivery of the bill of lading to another a constructive transmutation of the property is worked, and the carrier, who was the agent for the consignee, becomes the agent of the indorsee, if it has actual possession of the property.—Storey v. Hershey, 19 Pa.Super. 485

Possession as evidence of ownership

The possession of a bill of lading, whether indorsed or not, is presumptive evidence of ownership of goods therein described as against any person not showing a better title.—National Bank of Ashtabula v. Bradley, D.C.N.Y., 264 F. 700.

Estoppel of carrier

Where persons, after shipping goods by a vessel consigned to themselves, sell the goods while in transit, surrender the bill of lading, take delivery orders, and assign them to the purchasers, and the purchasers demand the goods and receive part of them, the carrier is not estopped, in an action by the shippers for conversion, because of failure to deliver the balance of the goods, to deny the shippers' title.—Sweeney v. Frank Waterhouse & Co., 81 P. 1005, 39 Wash. 507.

57. N.D.—Yegan v. Northern Pac. R. Co., 121 N.W. 205, 19 N.D. 70.
10 C.J. p. 202 note 19.

58. Wash.—Wickens v. Scheuer, 204 P. 780, 118 Wash. 614.

59. Mo.—F. H. Smith Co. v. Louisville & N. R. Co., 122 S.W. 342, 145 Mo.App. 394
10 C.J. p. 202 note 21.

60. Ga.—Mutual Fertilizer Co. v. Moultrie Banking Co., 136 S.E. 803, 36 Ga.App. 322.

Goods delivered to await further orders

Title to fertilizer transferred by landlord to tenant, to hold subject to further orders, did not pass to tenant, although he possessed bill of lading.—Mutual Fertilizer Co. v. Moultrie Banking Co., 136 S.E. 803, 36 Ga.App. 322.

61. Ark.—Prescott & N.W.R. Co. v. Davis, 191 S.W. 210, 126 Ark. 366.

62. Wash.—Quality Shingle Co. v. Old Oregon Lumber & Shingle Co., 187 P. 705, 110 Wash. 60.

Assignment by transferee

Under Bills of Lading Act, relating to bills of lading in interstate commerce, an assignee of an assignee of a straight bill of lading, in which the shipper was named as consignor and consignee, acquired no more rights in the shipment than his assignor had.—Quality Shingle Co. v. Old Oregon Lumber & Shingle Co., 187 P. 705, 110 Wash. 60.

63. U.S.—C. E. White & Co. v. Century Savings Bank of Des Moines, Iowa, Ill., 229 F. 975, 144 C.C.A. 257.

Ark.—Dewberry-Hargett Co. v. Arkansas State Bank, 261 S.W. 301, 164 Ark. 223.

Conn.—Kasden v. New York, N. H. & H. R. Co., 133 A. 573, 104 Conn. 479.

Ohio.—National Commission Co. v. Citizens Savings Bank of Upper Sandusky, 17 Ohio Cir.Ct.,N.S., 463, affirmed 88 Ohio St. 606, 11 Ohio L.R. 95, 58 Wkly.L.Bul. 255.

Right to purchase price

(1) Where the seller of goods has, before shipment, arranged to assign the nonnegotiable bills of lading, manifesting an intent to make only conditional delivery to the buyer, and the buyer, before accepting the goods, has notice of the claims of the assignee, he becomes a purchaser directly from the assignee.—Dewberry-Hargett Co. v. Arkansas State Bank, 261 S.W. 301, 164 Ark. 223.

(2) In an action by the assignee of nonnegotiable bills of lading covering shipments of lumber accepted by the consignee to recover the price of same, the consignor, is not a necessary party.—Dewberry-Hargett Co. v. Arkansas State Bank, supra.

64. Wash.—Getchell v. Northern Pac. R. Co., 187 P. 707, 110 Wash. 66

65. N.Y.—Schlitten v. Hines, 186 N.Y.S. 831, 196 App.Div. 254

66. Ga.—Davis v. Carroll, 119 S.E. 422, 30 Ga.App. 719.

signee for the purchase money of goods and the draft with the bill of lading attached is indorsed or transferred to some one who discounts the draft, a special property in the goods passes to the transferee subject, however, to be divested by acceptance and payment of the draft,[67] and this is likewise true where the goods are consigned to the shipper and the draft is drawn on a prospective purchaser[68] or other third person,[69] or where a purchaser of goods transfers to a bank or other third person the bill of lading with draft on the purchaser attached, and the transferee pays the draft.[70] However, the

Reservation of title in shipper

The title to property shipped under an "order notify" bill of lading with draft attached does not pass to the transferee when the transferee and the shipper have agreed that the title shall remain in the shipper.—Davis v. Carroll, 119 S.E. 422, 30 Ga.App. 719

Reservation of title until payment of draft

Where goods are shipped to a consignee and bills of lading with drafts attached are transferred to some one for discount, the shipper, however, reserving title until the drafts are paid by the discounting party, on payment of the drafts by such party title is transferred to him.—Pacific Finance Corporation v. Hendley, 284 P. 736, 103 Cal.App. 335, hearing denied and opinion modified, Sup., on other grounds 285 P. 1048.

67. U.S.—Albers Bros. Milling Co. v. Drumheller, D.C.Wash., 280 F. 217.
Ill.—Merchants' State Bank of Centralia v. Chicago, B. & Q. R. Co., 245 Ill.App. 211.
Okl.—First Nat. Bank v. Stallings, 177 P. 373, 74 Okl. 180.
Tex.—First Nat. Bank v. McClain, Adams & Co., Civ.App., 279 S.W. 614—Davis v. First Nat. Bank of Longview, Civ.App., 245 S.W. 1009.
Va.—Fourth Nat. Bank of Montgomery, Ala., v. Bragg, 102 S.E. 649, 127 Va. 47, 11 A.L.R. 1034.
W.Va.—Old Nat. Bank of Waupaca v. People's Bank of Harrisville, 108 S.E. 716, 89 W.Va. 132, 18 A.L.R. 728.
10 C.J. p. 202 note 27.

The text of Corpus Juris

(1) Has been quoted at length and approved in Frontier Nat. Bank of Eastport, Me., v. Salinger, 126 N.E. 40, 72 Ind.App. 479.

(2) Has been cited as authority.
Md.—Johnston v. Western Maryland Ry. Co., 135 A. 185, 151 Md. 422.
Tex.—Davis v. First Nat. Bank of Longview, Civ.App., 245 S.W. 1009.

Time drafts

(1) In absence of special agreement, purchaser of time draft with bill of lading attached acquires title to property described conditional upon acceptance of draft by drawee, and not upon the ultimate payment of the draft.—Helburn Thompson Co. v. All Americas Mercantile Corp., 167 N.Y.S. 711, 180 App.Div. 167, affirmed 119 N.E. 1048, 223 N.Y. 675.

(2) Where purchaser of ninety-day drafts with bills of lading attached turned over the property on acceptance of drafts, it released right of lien on goods, and in absence of specific agreement therefor, could not claim an implied trust in the goods or the proceeds thereof.—Helburn Thompson Co. v. All Americas Mercantile Corp., supra.

Tender of payment

A consignee, who paid freight under agreement with consignor, could not recover amount paid from holder of draft because of failure to surrender warehouse receipt issued in lieu of the bill of lading on tender of payment of draft.—First Nat. Bank v. Gidden, 162 N.Y.S. 317, 175 App.Div. 563, affirmed 122 N.E. 880, 225 N.Y. 698.

Evidence held not to disprove implied intent to transfer title

Kan.—Ranney-Davis Mercantile Co. v. Baumgarner, 185 P. 287, 105 Kan. 474

68. Ala.—Cox v. Greil Bros. Co., 94 So. 292, 208 Ala. 250.
Ga.—Southern Flour & Grain Co. v. Central Texas Exch. Nat. Bank, 109 S.E. 685, 27 Ga.App. 524.
Iowa.—Peninsular Bank of Detroit v. Citizens' Nat. Bank of Knoxville, 172 N.W. 293, 186 Iowa 418, 19 A.L.R. 547.
La.—New Iberia Nat. Bank v. Teche Canning & Syrup Co., 106 So. 451, 159 La. 946.
Me.—Weed v. Boston & M.R.R., 128 A. 696, 124 Me. 336, 42 A.L.R. 487
Okl.—First & Old Detroit Nat. Bank v. Holloman, 208 P. 791, 86 Okl. 246—Marsh Milling & Grain Co. v. Guaranty State Bank of Ardmore, 171 P. 1122, 69 Okl. 222.
Tex.—Hubbell, Slack & Co. v. Farmers' Union Cotton Co., Civ.App., 196 S.W. 681, error refused.

As otherwise expressed, the transfer by indorsement of a bill of lading to a shipper's order with draft attached vests title to the goods in the transferee as purchaser or pledgee, as the case may be.—Schéuermann v. Monarch Fruit Co., 48 So. 647, 123 La. 55.

Legal title in purchaser

Where bill of lading in favor of drawer is by him indorsed to bank with draft attached and draft is paid to drawer by bank, the transaction transfers the legal title of the property called for in bill of lading to bank.—Marsh Milling & Grain Co. v. Guaranty State Bank of Ardmore, 171 P. 1122, 69 Okl. 222, L.R.A. 1918D 704

Nature of draft as between consignor and purchasing bank

Where plaintiff bank purchased from consignor draft attached to bill of lading, naming the owner as consignee and directing that drawee be notified, the draft as between plaintiff and the owner was a bill of exchange, and upon its nonacceptance plaintiff had the immediate right of recourse thereon against the consignor.—Peninsular Bank of Detroit v. Citizens' Nat. Bank of Knoxville, 172 N.W. 293, 186 Iowa 418, 19 A.L.R. 547.

Ownership of draft attached

Where bill of lading with draft attached was indorsed and delivered by a customer to a bank, and bank credited amount thereof to customer with right to check, relation is that of debtor and creditor, and bank became owner of draft with right to dispose of it at its pleasure, fact that bank had right to charge back such draft if it were dishonored does not go to title of draft, as bank had such right as matter of law.—Weed v. Boston & M.R.R., 128 A. 696, 124 Me. 336, 42 A.L.R. 487.

Transfer of invoice not transfer of title

Where a firm sold goods to plaintiff and shipped to its own order, "notify" its broker, and forwarded the bill of lading to the broker who paid the freight and surrendered the bill to the carrier, and thereafter the firm drew on a bank and assigned the draft and invoice to the bank, the transfer of the invoice for the purchase price did not pass title to the goods to the bank, it being merely a transfer of the debt.—Cox v. Greil Bros. Co., 94 So. 292, 208 Ala. 250

69. N.Y.—Cooper v. Hong Kong & Shanghai Banking Corp., 14 N.E. 277, 107 N.Y. 282, 28 Wkly.Dig. 45, reversing 13 Daly 183—Commercial Sav. Bank of Grand Rapids, Mich., v. Mann, 200 N.Y.S. 587, 206 App.Div. 297, affirmed 144 N.E. 890, 238 N.Y. 559

70. Mo.—Frank Adam Co. v. Orpheum Theater Co., 193 S.W. 908, 195 Mo.App. 413
Okl.—City Nat. Bank of Hobart v. State, 176 P. 232, 73 Okl. 316.

party who pays the draft cannot use the title thus obtained to enable the consignor to defeat the collection by the purchaser of a debt due him by the consignor.[71]

The nature of the special property in the transferee, that is, whether it is as absolute owner or as security for the payment of the draft, depends, in its final analysis, on the intention and contract of the parties,[72] and while a bill of lading may be transferred under such circumstances as to show conclusively the intention to rest in the transferee the shipper's title to the property covered by the bill,[73] and it has been said that the discounting party takes title to the property described in the bill as completely as if it had been passed by deed and delivery of the goods,[74] ordinarily the discounting party does not become a common purchaser of the property but does acquire some kind or character of special property, claim, or lien on that property to protect it in the payment of the draft which it has purchased.[75] The goods are pledged for the payment of the draft,[76] and the party paying the draft is entitled to possession of the goods until the draft is paid in full.[77] The position of the transferee, it is said, is similar to that of a mortgagee in possession,[78] and he is under no necessity to file papers to preserve his lien.[79] This right of the transferee before payment of the draft is superior to that of the shipper,[80] who, after delivery of the bill and discount of the draft, cannot by any subsequent acts affect the transferee's rights.[81]

On refusal of the consignee to pay the draft, the title of the party discounting it becomes absolute,[82] and when the drawee refuses to accept the goods the fact that the bank sells them will not prevent its collecting on the draft.[83]

The right to the goods or their proceeds is not lost as against the shipper or his assignee for the benefit of creditors by a surrender of the bill of lading to the shipper under an agreement that, until advances have been paid, he will hold the goods or their proceeds if sold under lien as agent of the party paying the draft,[84] and the title of the payee of the draft attached to the bill of lading is not affected by a sale of the goods to a bona fide purchaser by the drawee of the draft who has obtained them without authority or knowledge of the payee and without having paid the draft.[85] Where the party who has advanced money on the draft after a levy on the goods as the property of the consignor filed a claim thereto, his right to maintain this claim was not lost merely because, while the claim case

71. Tex—W. T. Wilson Grain Co. v Central Nat. Bank, Civ.App., 139 S W 996.

72. Wash—Chase Nat. Bank of City of New York v. Spokane County, 215 P. 374, 125 Wash. 1.

Whether sale or transfer as security

(1) Although delivery of bills of lading to the shipper's order to a bank places the legal title to the shipment in the bank, whether there is a sale of the shipment, or merely a transfer of title for security, depends upon the intention of the parties.—Cochrane v. First State Bank of Pickton, Tex., 201 S W. 572, 198 Mo App 619

(2) Whether drawing draft on commission agent for approximate value of wheat to be sold on commission, attaching it to bill of lading, and depositing it in bank and receiving credit, evidenced sale of wheat to bank, or advancement of amount of draft to shipper, depended on intention of parties—Harrington v. Missouri Pac. R Co., 247 P 441, 121 Kan. 488.

(3) Where a seller of automobile trucks sold a draft on the buyer with bill of lading attached to a bank, it was not the intention of the parties to vest the absolute title to the trucks in the bank, but it was intended that the bank's title, or interest therein, was for security only.—Chase Nat. Bank of City of New York v. Spokane County, 215 P. 374, 125 Wash 1.

73. Wash—Chase Nat Bank of City of New York v. Spokane County, supra.

74. Me—Weed v. Boston & M R R, 128 A. 696, 124 Me. 336, 42 A L R 487.

75. Wash—Chase Nat Bank of City of New York v. Spokane County, 215 P 374, 125 Wash 1.

Not owner or purchaser of property by discounting draft.—Falls Mfg. Co. v. Barbour, 11 Tenn.App. 509.

76. Iowa.—Kansas City First Nat Bank v. Mt. Pleasant Milling Co., 72 N.W. 689, 103 Iowa 518.

77. Neb—Huftman v Henry Motor Co, 153 N.W. 566, 98 Neb 517.

78. Tex—Commercial Bank v. First State Bank, etc, Co, Tex.Civ App., 153 S W 1175.
10 C J p 203 note 30.

79. Va—Seward v. Miller, 55 S E 681, 106 Va. 309
10 C J p 203 note 31.

80. Mass—Chicago Fifth Nat. Bank v. Bayley, 115 Mass 228.

81. U S—National Bank of Ashtabula v. Bradley, D.C.N.Y., 264 F. 700

Right of bank unaffected by acts of depositor

(1) Where a bank discounted drafts attached to a bill of lading, and gave credit to the depositor, who was already indebted, allowing the depositor to withdraw the excess, the bank became the owner of the property specified in the bill of lading, notwithstanding the depositor's attempts to induce the consignee, on whom the drafts were drawn, to dispose of the property; this being particularly true where the deposit slip giving credit contained no reservation—National Bank of Ashtabula v. Bradley, D C N.Y., 264 F. 700.

(2) Where a bank discounted drafts with bills of lading attached, and gave the depositor credit, which he withdrew, the rights of the bank were not affected, because a relative of the depositor subsequently gave a note to secure other indebtedness due the bank, on which the depositor made payments, etc—National Bank of Ashtabula v. Bradley, supra.

82. Tenn—St. Louis Third Nat. Bank v Hays, 108 S.W. 1060, 119 Tenn. 729, 14 Ann.Cas. 1049.

83. Wash—Yakima Trust Co. v. Zintheo, 237 P. 729, 135 Wash. 389

84. N Y—Carter v. Arguimbau, 31 Abb.N.Cas. 3.

85. U S.—Albers Bros. Milling Co. v. Drumheller, D.C.Wash., 280 F. 217.

was pending, the drawee refused to accept the goods and pay the draft, and in consequence the bill of lading was "indorsed over" to the consignee for the sole purpose of having him dispose of the goods for the exclusive benefit of the party filing the claim.[86] On receipt by the consignee of the property, and its conversion, he is liable to the party discounting the draft for the money advanced on it;[87] this is true where the party obtaining the goods is a buyer from the consignee,[88] and the discounting party may maintain an action in trover.[89]

A consignee who advances money on transfer to him of apparent title by the bill of lading acquires a title to or a lien on the goods regardless of the claims of those who, without having received actual or constructive possession, seek to assert their rights to such goods through the shipper.[90]

Where a seller places a true bill of lading in a bank and gives the buyer a forged bill with which he obtains the property, the buyer should be regarded as an equitable assignee of the seller, entitled, on recovery by the bank of a judgment against the carrier for conversion, to any balance remaining after payment of the debt secured by the true bill.[91]

Liability on discount or agreement to accept. An agreement by a bank to honor drafts upon a purchaser with bill of lading attached is not an assumption of direct liability for payment or performance of the purchaser's contract,[92] and before the bank can be held liable on its agreement to accept the drafts there must be a compliance by the shipper with its terms on its part.[93] Where a bank purchases drafts with bills of lading attached from the consignor for value and without notice of fraud, and the consignees fully pay the drafts, the bank is not liable to any one injured by the transaction for the fraud of the consignor in making out the bills of lading.[94]

Where the buyer of goods has given checks to the seller and deposited the bills of lading with drafts attached in a bank to obtain money to cover the checks, the bank cannot disclaim liability for payment of the checks and at the same time claim absolute title to the goods.[95]

Consideration for transfer. Where the owner of goods, being indebted to a bank, gives it a bill of sale, and the bank permits the issuing of a bill of lading, the transaction evidences valuable consideration for the subsequent transfer of the bill of lading and drafts to the bank.[96]

bb. Pledge or Assignment

Pledge or assignment of the bill of lading to secure

86. Ga.—Coker v. Memphis First Nat. Bank, 37 S.E. 122, 112 Ga. 71.

87. N.Y.—Chicago Mar. Bank v. Wright, 48 N.Y. 1.

88. La.—First Nat. Bank v. Henderson Cotton Oil Co., 102 So. 501, 157 La. 394.

89. Ga.—Southern Flour & Grain Co. v. Central Texas Exch. Nat. Bank, 109 S.E. 685, 27 Ga.App. 524.

Right to recover property

(1) Where the bank purchasing a draft on the buyer of grain and the attached order bill of lading, permitted the grain to be delivered to the buyer for storage, and the buyer afterward refused on demand to pay the draft or deliver the grain, the bank was entitled to sue in trover.—Southern Flour & Grain Co. v. Central Texas Exch. Nat. Bank, 109 S.E. 685, 27 Ga.App. 524.

(2) Where the bank permitted it to be delivered to the buyer for storage to prevent damage to the grain, it did not surrender its title thereto.—Southern Flour & Grain Co. v. Central Texas Exch. Nat. Bank, supra.

(3) Where the bank permitted delivery to the buyer for storage, and the sellers thereafter agreed that the buyer might hold it as margin to protect against loss on other shipments, the doctrine that the one of two innocent persons who put it in the power of a third person to inflict injury must bear the loss could not be invoked against the bank's legal rights.—Southern Flour & Grain Co. v. Central Texas Exch. Nat. Bank, supra.

(4) Where the sellers of grain deposited bill of lading and draft for the price with the bank, the sellers' representative in agreeing that the buyer might hold such grain as a margin against loss on other shipments has been held not acting for or on behalf of the bank.—Southern Flour & Grain Co. v. Central Texas Exch. Nat. Bank, supra.

(5) Direction of a verdict for the bank in trover for the amount of the draft with interest is proper under Civ. Code 1910 § 5930, where the buyer had sold the grain for more than the amount of the draft.—Southern Flour & Grain Co. v. Central Texas Exch. Nat. Bank, supra.

(6) The bank was entitled in trover to recover the amount of the draft with seven per cent. interest, when such amount was not more than the highest proved value of the grain between the date of the conversion and the trial.—Southern Flour & Grain Co. v. Central Texas Exch. Nat. Bank, supra.

90. U.S.—Burritt v. Rench, C.C.Ohio, 4 F.Cas.No.2,201, 4 McLean 325.

Ga.—Orr v. Planters' Phosphate, etc., Co., 68 S.E. 779, 8 Ga.App. 59.

10 C.J. p. 204 note 44.

91. U.S.—Hubbard Bros. & Co. v. Southern Pac. Co., La., 256 F. 761, 168 C.C.A. 107.

92. Wis.—Monark Metal & Supply Co. v. General Metal & Refining Co., 218 N.W. 179, 195 Wis. 294.

93. Wis.—Monark Metal & Supply Co. v. General Metal & Refining Co., supra.

94. Tex.—Parma v. First Nat. Bank, Com.App., 63 S.W.2d 692, reversing, Civ.App., 37 S.W.2d 274.

95. Mo.—New First Nat. Bank v. C. L. Rhodes Produce Co., 58 S.W.2d 742, 332 Mo. 163, transferred 37 S.W.2d 986, 225 Mo.App. 438.

In bank's action against shipper for conversion of eggs covered by bills of lading with drafts attached, deposited with bank by the buyer to meet checks given the seller, evidence showed that drawer of drafts in depositing sum in bank applied it to payment of dishonored drafts.—New First Nat. Bank v. C. L. Rhodes Produce Co., 58 S.W.2d 742, 332 Mo. 163, transferred 37 S.W.2d 986, 225 Mo.App. 438.

96. Ill.—Merchants' State Bank of Centralia v. Chicago, B. & Q. R. Co., 245 Ill.App. 211.

loans or advances carries with it the right to control the property described in the bill.

A bill of lading may be pledged to secure a loan,[97] such as a loan to finance the purchase of the goods,[98] and if made in good faith such pledge is valid against the pledgor or any third person.[99] Where a negotiable bill of lading is pledged as collateral security for a loan, the pledgee does not lose his lien on the goods by returning the bill to the pledgor temporarily on a trust receipt.[1] Where bills of lading have been hypothecated against payment of the drafts, the right to sell the collateral persists even after delivery of the bills to the acceptor, and such delivery does not release the drawer to the payee of the drafts to whom the bills were pledged.[2]

Assignment of a bill of lading by a shipper to a bank to secure advances to the shipper carries with it the control of the goods.[3]

Where a consignee in a straight bill of lading knows the bill with draft attached has been transferred to a bank to secure a loan he has no right to sell the goods and apply the proceeds on an indebtedness due him by the consignor without paying the draft.[4]

(c) Transferee's Rights as to Creditors

The rights of a transferee of a bill of lading are superior to subsequent attaching creditors of the transferor. On transfer of a straight bill the transferee, to preserve his rights over creditors, must give notice of the transfer as required by statute.

In the absence of any showing of fraud,[5] the right of a transferee of a bill of lading is superior to that of the shipper's subsequent attaching creditors,[6] for the reason that no attachable interest re-

97. La.—Canal-Commercial Trust & Savings Bank v. New Orleans, T. & M. Ry. Co., 109 So. 834, 161 La. 1051, 49 A.L.R. 274.

Mass.—Orvis v. Jackson, 194 N.E. 89, 289 Mass. 348.

Notice of pledge

Notice to a buyer to remit directly to a bank, to which the bill of lading and invoice had been transferred, is notice that the account had been pledged.—Brown Bros. Co. v. Smith Bros. Co., D.C.La., 231 F. 475.

98. Mass.—Orvis v. Jackson, 194 N.E. 89, 289 Mass. 348.

99. Mass.—Orvis v. Jackson, supra.

Title to goods

Bank accepting draft, indorsed in blank by payee, with bill of lading attached, pledged as security for loan, became holder of draft in due course and took title to goods described in bill.—Anderson v. Keystone Chemical Supply Co., 127 N.E. 668, 293 Ill. 468.

1. La.—Canal-Commercial Trust & Savings Bank v. New Orleans, T. & M. Ry. Co., 109 So. 834, 161 La. 1051, 49 A.L.R. 274.

2. N.Y.—Hongkong & Shanghai Banking Corporation v. Lazard-Godchaux Co. of America, 201 N.Y.S. 771, 207 App.Div. 174, motion denied 143 N.E. 761, 237 N.Y. 604, and affirmed 147 N.E. 216, 239 N.Y. 610.

3. Pa.—State Bank of Avon v. Luff, 112 A. 452, 269 Pa. 199.

Effect of assignment

(1) The assignment of a bill of lading to a bank advancing money to the shipper with which to fill the consignee's order, carried with it the control of the goods, with the right to stipulate for a note before delivery of the bill to the consignee.—State Bank of Avon v. Luff, 112 A. 452, 269 Pa. 199.

(2) Where defendant had advanced money to a manufacturer under an agreement that it might deduct twenty-five per cent on subsequent purchases, and subsequently gave the manufacturer an order for goods, agreeing to give a note for a specified amount, and a bank which had advanced to the manufacturer amounts in excess of the amount of the note made a further advance to enable the manufacturer to fill the order on the manufacturer's agreement to assign the bill of lading, and surrendered the bill of lading to defendant on the express condition that the note would be given, defendant had no right to set off its claim for the amount due from the manufacturer against the bank.—State Bank of Avon v. Luff, supra.

(3) Where defendant, when sued for the breach of the promise to give a note did not set up a bailment, but claimed an unqualified right to deduct the entire balance due it, plaintiff was entitled to a verdict if the note was to be given after inspection of the goods, but was entitled only to the amount in excess of defendant's claim if there was no agreement to give the note for a particular amount.—State Bank of Avon v. Luff, supra.

4. U.S.—George F. Hinrichs, Inc., v. Standard Trust & Savings Bank, C.C.A.N.Y., 279 F. 382, certiorari denied 42 S.Ct. 462, 258 U.S. 629, 66 L.Ed. 800.

Sufficiency of notice of right of transferee

Where straight bill of lading of interstate shipment and draft were discounted with a bank, presentation to factor consignee of the draft with bill of lading attached was sufficient notice to the consignee of the rights of the bank to be paid out of a sale of the shipment, under Act Congr. August 29, 1916, c. 415 §§ 2, 3, 29, 32.—George F. Hinrichs, Inc. v. Standard Trust & Savings Bank, C.C.A.N.Y., 279 F. 382, certiorari denied 42 S.Ct. 462, 258 U.S. 629, 66 L.Ed. 800.

5. Iowa.—Shaffer v. Rhynders, 89 N.W. 1099, 116 Iowa 472.

6. U.S.—National Bank of Ashtabula v. Bradley, D.C.N.Y., 264 F. 700.

Ariz.—P. Pastene & Co. v. First Nat. Bank, 172 P. 656, 19 Ariz. 493.

Colo.—First Nat. Bank v. Hammer, 246 P. 272, 79 Colo. 395.—Painesville Nat. Bank of Painesville, Ohio, v. Hannan, 171 P. 364, 64 Colo. 301.

Ga.—Strickland v. American Nat. Bank of Nashville, Tenn., 130 S.E. 598, 34 Ga.App. 549.

Kan.—Burdg v. Scott, 208 P. 668, 111 Kan. 610.—Lampl v. Hawkins, 188 P. 233, 106 Kan. 423.—Farmers' & Merchants' Nat. Bank v. Sprout, 179 P. 301, 104 Kan. 348.—Oklahoma State Bank v. Hicklin, 164 P. 257, 100 Kan. 301.

La.—Holmes & Barnes v. Shawnee Milling Co., 5 La.App. 391.

Md.—Johnston v. Western Maryland Ry. Co., 135 A. 185, 151 Md. 422.

Mass.—Boston Sheridan Co. v. Sheridan Motor Car Co., 138 N.E. 806, 244 Mass. 425.

Miss.—Merchants' & Manufacturers' Bank of Ellisville v. Philip J. Toomer Lumber Co., 76 So. 565, 115 Miss. 647.

N.Y.—American Nat. Bank v. Warren, 160 N.Y.S. 413, 96 Misc. 265.—American Trust, etc., Bank v. Austin, 55 N.Y.S. 561, 25 Misc. 454, affirmed 62 N.Y.S. 1131, 47 App.Div. 635.

mains in the shipper.[7] The same is true where the bill of lading is given as collateral security for advances to a consignee.[8] The rule applies although no money has actually been advanced to the consignor before the attachment. It is sufficient that the consignor has been given credit therefor,[9] and it is immaterial that the shipper has not checked against the credit.[10] In the application of the rule it is likewise immaterial that the party paying the draft had obtained a guaranty from the consignee

N C.—Sterling Mills v. Saginaw Milling Co., 114 S.E. 756, 184 N.C. 461.
Okl.—First & Old Detroit Nat. Bank v. Holloman, 208 P. 791, 86 Okl. 246.
Pa.—Sturgeon Bay Bank v. McLaughlin, 63 Pa.Super. 588.
Tenn.—Lookout Knitting Mills v. Reid, 248 S.W. 306, 147 Tenn. 399.
Tex.—First Nat. Bank v. McClain, Adams & Co., Civ.App., 279 S.W. 614—Early-Foster Co. v. Latham & Co., Civ.App., 253 S.W. 663—Officer v. F. & M. Nat. Bank of Hobart, Civ.App., 230 S.W. 226.
Wash.—Hull v. Myers, 235 P. 786, 134 Wash. 286—Wickens v. Scheuer, 204 P. 780, 118 Wash. 614—Commercial Bank of Port Huron v. Elliott, 159 P. 377, 92 Wash. 357.
10 C.J. p. 203 note 34.

As respects attachment, a transfer of title of goods by an importer by indorsing bill of lading to a bank advancing the purchase price is not invalid as against the creditors of the importer because of the importer's right to obtain the goods by paying the purchase price, where the importer had never been in possession of the goods.—Wickens v. Scheuer, 204 P. 780, 118 Wash. 614.

As affected by rules of bank

Rule of bank that, in receiving drafts, it shall act only as agent for the depositor, applies only between the bank and its customer, and does not constitute the bank, which discounted drafts attached to a bill of lading, a mere agent of the owner as against an attaching creditor.—National Bank of Ashtabula v. Bradley, D.C.N.Y., 264 F. 700.

Seizure as conversion

Where, after a bank had discounted drafts with bills of lading attached, the sheriff seized the grain shipped under a judgment against the consignor an action for damages for conversion may be maintained against the sheriff.—National Bank of Ashtabula v. Bradley, D.C.N.Y., 264 F. 700.

Drafts on several purchasers with refusal by one to pay

Where a carload of seed corn was sold to three purchasers at the same point, and bill of lading, with three drafts attached, one on each of the purchasers, was indorsed to a bank which discounted the drafts, the bank's special property was not divested, where on refusal of one of the purchasers to accept the corn the seller made settlement with the purchaser refusing to accept, drew a draft for a less amount, and paid the bank the difference, it being understood, in event the drafts were not paid, the seller should reimburse the bank, hence a creditor of the seller could not attach the fund in the hands of the bank.—Farmers' Exchange Bank v. Greil Bros. Co., 84 So. 427, 17 Ala.App. 287, certiorari denied Ex parte Greil Bros. Co., 84 So. 924, 203 Ala. 698.

Sale by shippers after attachment

That a transaction between shippers of hay, dealers therein, and a bank, by their transfer of bill of lading with attached draft to it, and giving of credit by it and drawing thereon by them, did not pass title to it, is not conclusively shown by the fact that after it had claimed the hay, and given bond therefor, against attachment by the shippers' creditor, it sold it through them.—Officer v. F. & M. Nat. Bank of Hobart, Tex.Civ.App., 230 S.W. 226.

Purchase with notice

A purchaser of the goods, with notice of the rights of the bank to which the bill of lading is transferred, who pays the draft cannot attach the fund in the hands of the bank as property of the seller.—Sturgeon Bay Bank v. McLaughlin, 63 Pa.Super. 588.

Evidence of rights of transferee

(1) The fact that a draft was drawn by the shipper in favor of the bank and attached to a shipper's order bill of lading is enough to show the bank to be the owner of the funds.—West Texas Nat. Bank v. Wichita Mill & Elevator Co., Tex.Civ.App., 194 S.W. 835.

(2) Where a shipper's order bill of lading was indorsed by a holder and attached to a draft drawn by the shipper in favor of a bank and proceeds collected, evidence held not to sustain findings that funds belonged to the shipper, that the holder had possession of draft and bill of lading without knowledge of the shipper, indorsed his name without his knowledge, and that credit of account of holder with amount of draft was without the knowledge of the shipper, and that bank knew all these things.—West Texas Nat. Bank v. Wichita Mill & Elevator Co., supra.

(3) On trial of bank's claim to automobile attached by plaintiff in his action against motor car company evidence as to whether car in question was covered by bank's bill of lading held insufficient to support verdict for plaintiff.—Commercial Bank of Port Huron v. Elliott, 159 P. 377, 92 Wash. 357.

Question for jury

On trial to determine whether plaintiff in an action or a bank which claimed to own the automobile attached by him was the owner of the car, question whether the car attached was covered by the bill of lading held by the bank, being a question of fact, was for the jury.—Commercial Bank of Port Huron v. Elliott, 159 P. 377, 92 Wash. 357.

7. Kan.—Lampl v. Hawkins, 188 P. 233, 106 Kan. 423—Farmers' & Merchants' Nat. Bank v. Sprout, 179 P. 301, 104 Kan. 348.
Okl.—First & Old Detroit Nat. Bank v. Holloman, 208 P. 791, 86 Okl. 246.
Va.—Fourth Nat. Bank of Montgomery, Ala., v. Bragg, 102 S.E. 649, 127 Va. 47, 11 A.L.R. 1034.
10 C.J. p. 203 note 35.

8. Iowa.—Exchange Nat. Bank v. McCaffery, 157 N.W. 209, 175 Iowa 451.

Evidence held insufficient as to fraud in procuring the assignment as against creditors.—Exchange Nat. Bank v. McCaffery, 157 N.W. 209, 175 Iowa 451.

Ownership of bill

(1) Creditors of a consignee could not attach goods as property of the consignee where a bank had agreed in advance to furnish the price of the goods and take the bills of lading as security, as the bank became the owner of the bills as soon as issued on delivery to the carrier.—Kinsolving v. State Savings & Trust Co., 190 S.W. 379, 195 Mo.App. 326.

(2) Where seller of lumber retained bills of lading to keep title until paid by bank, and bills were sent to second bank, pursuant to agreement to pay for lumber and take bills, when title passed from buyer to seller, it passed to second bank by virtue of bill, and lumber could not be attached as property of buyer.—Kinsolving v. State Savings & Trust Co., supra.

9. Ala.—Owensboro Banking Co. v. Buck, 77 So. 940, 16 Ala.App. 346, certiorari denied Ex parte Buck, 79 So. 394, 202 Ala. 56.
10 C.J. p. 203 note 36.

10. Kan.—Lampl v. Hawkins, 188 P. 233, 106 Kan. 423.

that the draft would be paid.[11] The rule also applies whether the party purchased or was merely a pledgee of the draft,[12] but does not apply if the transferee is merely an agent for collection.[13]

The provision of the Bills of Lading Act requiring the transferee of a straight bill of lading to notify the carrier of the transfer to preserve his rights against attachment or garnishment applies to goods in the custody of the carrier but not to purchase money owing by the consignee after delivery.[14] A transferee of a straight bill of lading, who fails to notify the carrier of the transfer, as required by statute, until after the goods have been attached acquires no right to the shipment or its proceeds as against the attaching creditor, even though he has paid the draft accompanying the bill of lading.[15]

As against consignee. The rule that the right of one discounting a draft with a bill of lading attached is superior to attaching creditors applies where a consignee, having paid the draft, seeks to attach the proceeds as a creditor of the consignor[16] or because of defective quality or quantity of the goods not discovered until after the draft was paid.[17] However, the proceeds of the draft may be attached by the consignee where the bank discounting the draft was not a bona fide purchaser[18] or where the bank is regarded as liable for breach of warranty of the seller.[19]

Title revesting in seller. As against levying creditors, the property is that of the seller when, on refusal of the buyer to accept the goods, the seller

11. Iowa—Shaffer v. Rhynders, 89 N.W. 1099, 116 Iowa 472.

12. Colo.—Painesville Nat. Bank of Painesville, Ohio v. Hannan, 171 P 364, 64 Colo 301.
10 C J p 203 note 38.

13. N.C.—Sterling Mills v. Saginaw Milling Co., 114 S.E. 756, 184 N C 461.

Bank as agent, not purchaser
Where a bank discounts a draft with bill of lading attached, and places the amount less the discount to the credit of the drawer, with the right to check on it, and reserves the right to charge back the amount if the draft is not paid, by express agreement or one implied in the course of dealing, and not by reason of liability on indorsement of the draft, the bank is an agent for collection, and not a purchaser so that funds in its hands may be attached by the buyer on breach of contract by the seller—Temple v. La Berge, 114 S E 166, 184 N.C. 252.

Question for jury
(1) Whether a bank claiming ownership of the proceeds of a draft attached to a bill of lading was a purchaser for value of the draft, or a mere collecting agent for the consignor, depended on the intention of the parties, and was a question of fact for the jury, where the evidence was conflicting.—Sterling Mills v. Saginaw Milling Co., 114 S E 756, 184 N.C 461.

(2) In an action against the consignor of goods under a bill of lading with draft attached, where the testimony of the cashier of an intervening bank claiming ownership of the draft is equivocal, if not contradictory, it is error for the court to charge the jury that, if they believed the testimony, they should answer the issue of ownership in the negative—Sterling Mills v. Saginaw Milling Co., supra.

14. W Va—City Nat Bank of Clinton, Iowa, v. West Virginia Farm Bureau Service Co., 153 S E 300, 109 W.Va. 153.

15. Tenn—Tennessee Egg Co. v Monroe, 268 S W 372, 151 Tenn 121, certiorari denied L J. Schwaub & Sons v. Tennessee Egg Co., 46 S Ct 105, 269 U.S. 580, 70 L.Ed. 422.

16. Kan.—Ranney-Davis Mercantile Co. v. Bumgarner, 185 P. 287, 105 Kan 474.

17. Ga—Terre Haute Nat. Bank v. Horne-Andrews Commission Co., 101 S.E. 6, 24 Ga App. 320.
Kan.—Lampl v. Hawkins, 188 P 233, 106 Kan 423.
Miss—First Nat. Bank v. Tchula Commercial Co., 95 So. 742, 132 Miss 58
N.C.—Farmers' & Merchants' Deposit Co v. Boulevard Bank & Trust Co., 122 S E 392, 187 N C 611.
Tex.—F. A Kadane & Co. v. Security Nat Bank, Civ App., 219 S.W. 506

18. Miss—Liberty Central Trust Co of St. Louis, Mo., v. Senton, 104 So 157, 138 Miss. 683.

Agent for collection
One of the banks through which there was forwarded for collection a draft, drawn by seller of cotton on buyer for price, attached to order bill of lading, although giving its forwarding correspondent a credit for the amount of the draft, to be charged back, however, to such correspondent if draft was not paid, was not a bona fide purchaser for value of the bill, within federal Uniform Bills of Lading Act, U S.Comp St. §§ 8604aaa–8604w, so as to prevent proceeds of draft, after its payment by buyer of cotton, being attached by him on rescinding for defect in quality of cotton.—Liberty Central Trust Co of St Louis, Mo., v. Senton, 104 So 157, 138 Miss 683.

Effect of indorsement
The status and rights of the parties in interest could not be changed by a bank through which there was forwarded for collection a draft for price of goods, attached to order bill of lading, indorsing on draft that such bank does not guarantee quality of goods covered by bill of lading—Liberty Central Trust Co. of St Louis, Mo., v. Senton, 104 So 157, 138 Miss 683.

19. Miss.—L. Marks' Sons v. West Tennessee Grain Co., 81 So. 162, 119 Miss. 465.

Attachment of proceeds of different drafts
(1) Where a bank at two different times took assignments of drafts with bills of lading attached for two different shipments of corn sold to the same buyer by the same seller, the bank was a cowarrantor in both transactions, and the amount received upon the second draft could be attached by the buyer in an action for breach of warranty as to the soundness and merchantability of the corn first shipped—L. Marks' Sons v. West Tennessee Grain Co., 81 So. 162, 119 Miss. 465.

(2) A bank which purchases a draft for the price of a shipment of goods, drawn by seller and consignor on buyer and consignee of goods, occupies, as to the consignee, the situation of the consignor only as to that shipment, so that although bank be not a bona fide holder for value of the draft, the consignee after paying it could recover no part of its proceeds, as against the bank, for losses from defects in goods in shipments prior to that covered by the draft.—Colonial Lumber Co. v. Andelusia Nat. Bank, 103 So. 343, 138 Miss. 566.

gives his check for the amount of the draft to the purchaser of the bill of lading with draft attached.[20]

(2) Transfer of Contract

Transfer of a bill of lading is not a transfer of the contract of carriage or of sale but only of the goods described therein; but the transferee may take all the rights of the transferor under the bill.

The transfer of the bill of lading is not a transfer of the contract of carriage, but only a transfer of the goods represented by it,[21] nor is it an assignment of the contract of sale.[22] It involves no promise on the part of the indorser to do anything toward forwarding the property to its destination and devolves no duty whatever on such indorser. If the instrument is fictitious, or if there is any fraud practiced in transferring it, any remedy that the transferee would be entitled to would be for that special wrong, and not by importing into the indorsement a promise to perform what the carrier had agreed, or purported to have agreed, to do.[23] As a contract with the carrier a bill of lading is a chose in action and as such is not assignable at common law,[24] but, as shown in the title Assignments § 5, now substantially all choses in action are assignable, and transfer of a bill of lading has been held to give to the transferee all the rights under the bill which the transferor had.[25] Transfer of the bill of lading and invoice by the seller to the holder of his note, to enable the holder to receive the purchase price, is an absolute transfer of the account and the seller has no contingent interest in it.[26]

Warranty of goods. A purchaser of a draft with bill of lading attached being to all intents and purposes the owner of the merchandise represented by the bill, he may sue the shipper on his warranty that the goods are merchantable and fit for the purpose for which they are intended.[27]

e. Limitations on Negotiability

Bills of lading are negotiable only in the sense that transfer of the bill of lading passes to the transferee such right or title as the transferor has to the goods therein described.

Under the rule as stated in Corpus Juris, volume 10 p 205 § 271, which has been judicially approved,[28] the view generally held is that "negotiability," as that term is applied to bills of lading, means nothing more than that the transfer of the bill of lading passes to the transferee only such right or title as the transferor had to the goods therein described,[29] and that the rights arising out of the

20. Tex—Collin County Nat. Bank v. Satterwhite, Civ.App., 184 S.W. 338.

21. Mass—Cox v. Central Vermont R. Co., 49 N.E. 97, 170 Mass. 129. 10 C.J. p 202 note 22.

22. Miss—Itzig Co v. First Nat. Bank, 91 So. 15, 128 Miss. 345.

23. Mich—Maybee v. Tregent, 11 N.W. 287, 47 Mich. 495.

24. Ill.—Ensign v. Illinois Cent. R. Co., 180 Ill.App. 382.

25. Mo—Feeders Supply Co. v. Union Pac. R. Co., App., 96 S.W.2d 1056.

Contract between carrier and indorsee

Indorsements of bills of lading created a contract between carrier and indorsee which could be surrendered for substituted contract without creating any liability by carrier to indorser or changing any existing contract between indorser and indorsee—Feeders Supply Co. v. Union Pac. R. Co., Mo.App., 96 S.W. 2d 1056.

The rights of the transferee and the carrier cannot be affected by any outside understanding between the transferee and the transferor—Feeders Supply Co. v. Union Pac. R. Co., Mo.App., 96 S.W.2d 1056.

Reshipment privilege

(1) Shipper's indorsement of bills of lading did not confer shipper's reshipment privilege on indorsee where shipper had already exercised such privilege—Feeders Supply Co. v. Union Pac. R. Co., Mo.App., 96 S.W.2d 1056.

(2) Notation on face of bill of lading is conclusive in determining extent of reshipment privilege and whether such privilege had been exercised—Feeders Supply Co. v. Union Pac. R. Co., supra.

Right of action for conversion

Me—Weed v. Boston & M. R. R., 128 A. 696, 124 Me. 336, 42 A.L.R. 487.

26. U.S.—Brown Bros. Co. v. Smith Bros. Co., D.C.La., 231 F. 475.

27. La.—New Iberia Nat. Bank v. Teche Canning & Syrup Co., 106 So. 451, 159 La. 946.

Warranty of mortgagee or pledgee receiving payment see infra subsection g (2).

Rights against shipper, consignee, and others

(1) Where purchaser of cane syrup transferred title by negotiable bill of lading to plaintiff by indorsement and delivery, he warranted that syrup was merchantable, and conveyed to plaintiff purchaser's right of warranty against seller—New Iberia Nat. Bank v. Teche Canning & Syrup Co., 106 So. 451, 159 La. 946.

(2) In action by holder of negotiable bill of lading for damages for breach of warranty in merchandise covered thereby, plaintiff was entitled to recover against shipper value of goods at time and place warranty arose in transferor's favor when he made purchase from shipper—New Iberia Nat. Bank v. Teche Canning & Syrup Co., supra.

(3) Holder of negotiable bill of lading was not required, in suit against shipper for damages for breach of warranty in merchandise covered thereby, also to sue party to whom holder's transferor sold the merchandise and bank that guaranteed payment of the draft attached to bill, where he could not have recovered against either—New Iberia Nat. Bank v. Teche Canning & Syrup Co., supra.

28. Or.—Weyerhaeuser Timber Co. v. First Nat. Bank, 38 P.2d 48, 150 Or. 172, affirmed 43 P.2d 1078, 150 Or. 172.

Tex.—Tradesmen's State Bank v. Ft. Worth Elevators Co., Civ.App., 214 S.W. 656.

29. U.S.—Olivier Straw Goods Corporation v. Osaka Shosen Kaisha, D.C.N.Y., 21 F.2d 618, reversed on other grounds, C.C.A., 27 F.2d 129, certiorari denied Osaka Shosen Kaisha v. Olivier Straw Goods Corporation, 49 S.Ct. 22, 278 U.S. 618, 73 L.Ed. 540.

Or.—Weyerhaeuser Timber Co. v. First Nat. Bank, 38 P.2d 48, 150 Or.

transfer of a bill of lading correspond, not to those arising out of the indorsement of a negotiable promise for the payment of money, but to those arising out of a delivery of the property itself under similar circumstances,[30] and are not to be determined by the application of rules which control the transfer of commercial paper.[31] Likewise it has been denied that bills of lading are negotiable at least in the sense in which the term is applied to commercial paper[32] even when the bill of lading in terms runs to order or assigns.[33] However, bills of lading have been characterized as quasi-negotiable,[34] or as negotiable in a qualified and restricted sense[35] although this limited negotiability may be destroyed by printing across the face of the instrument the words "not negotiable,"[36] or other notation,[37] but, under the express provisions of the federal Uniform Bills of Lading Act any nonnegotiable provision in an order bill is void unless upon its face and in writing agreed to by the shipper.[38]

Where bills of lading are declared negotiable by statute, the words "not negotiable" stamped on a bill of lading do not destroy its assignability[39] nor prevent transfer by indorsement and delivery where any contract is so transferable by statute.[40]

172, affirmed 43 P.2d 1078, 150 Or 172.
Tex.—Tradesmen's State Bank v. Ft Worth Elevators Co, Civ.App, 214 S.W. 656.
10 C.J. p 205 note 68

However, it has been said that the Bill of Lading Act manifests a clear intention of congress to make ordinary bills of lading fully negotiable and they are to be considered so as to holders in good faith, unless they carry some of the notices or declarations specified in the act, or others of like import, or some notice or recitation inconsistent with negotiability.—Chicago & N. W. Ry. Co v. Bewsher, C C A Neb., 6 F 2d 947, certiorari denied 46 S Ct. 205, 270 U S. 641, 70 L Ed. 775.

Statutory provisions

(1) It has been held that statutes which make bills of lading negotiable by indorsement and delivery, in the same manner as bills of exchange and promissory notes, are not intended to change totally their character or to put them on a footing with the character of instruments which are the representatives of money; and that such statutes have no effect other than that of recognizing the power of the owner of a bill of lading to transfer title to the property by means of a transfer of a bill of lading.—Shaw v. North Pennsylvania R. Co., Pa, 101 U.S. 557, 25 L Ed 892—10 C J. p 208 note 1.

(2) On the other hand, the courts of several states have construed statutes containing the same or very similar provisions as making bills of lading negotiable instruments in full without limitations—Thompson v Hibernia Bank & Trust Co., 86 So 652, 148 La. 57—10 C.J. p 208 note 2

(3) It has been held, however, that a state statute making bills of lading conclusive in the hands of bona fide holders for value against the person or corporation issuing them that the property described therein was received by the carrier is abrogated as far as interstate shipments are concerned by the Carmack amendment which covers the subject of bills of lading as to interstate shipments—Southern R Co. v North State Cotton Co., 64 So 965, 107 Miss. 71—10 C J. p 209 note 3.

30. Tex.—Tradesmen's State Bank v Ft. Worth Elevators Co., Civ App, 214 S W. 656
10 C J p 205 note 66

Blank or special indorsement

Indorsement in blank of a bill of lading merely transfers the right held by the transferor in the property mentioned in the bill, and an indorsement restricted to a particular person or bank transfers such rights as the indorser held in such property to his transferee, but does not constitute a guaranty of the quantity or quality of the goods, the fact that they exist, or the genuineness of the bill of lading.—Tradesmen's State Bank v. Ft. Worth Elevators Co., Tex Civ.App., 214 S.W. 656.

Property, not money, represented by bills of lading—J F. French & Co. v. Pere Marquette Ry. Co., 171 N W. 491, 204 Mich 573, certiorari granted Pere Marquette R. Co. v. J. F. French & Co, 39 S Ct 494, 250 U S. 637, 63 L Ed. 1183, reversed on other grounds 41 S Ct 195, 254 U.S 538, 65 L Ed. 391—10 C.J. p 205 note 64.

31. Tenn.—Nashville Fourth Nat Bank v. Nashville, etc., R Co, 161 S W. 1144, 128 Tenn. 530.

32. Tex.—Gulf, C. & S F Ry Co. v. Kempner, Com.App., 282 S W. 795, reversing, Civ.App, 275 S.W. 459.
10 C.J. p 205 note 62.

Negotiability not absolute

(1) A bill of lading is evidence of ownership in the hands of the holder, but it is not a negotiable instrument, and does not preclude inquiry into the circumstances under which it is transferred or surrendered—Omaha Elevator Co v Chicago, B & Q. R. Co, 178 N.W. 211, 104 Neb 566.

(2) A straight bill of lading not marked nonnegotiable or not negotiable stands for the goods, but is not, like a bill of exchange or a promissory note, absolute in its negotiability, but remains always subject to have the equities of its transfer revealed by evidence and its potentiality as between them depends on the parties' intention—Swift v. Davis, 193 N.Y S 848, 118 Misc. 205.

33. Tex—Grayson County Nat Bank v. Nashville, etc., R Co., Civ. App, 79 S W. 1094.
10 C J p 205 note 63.

34. Ind—Frontier Nat. Bank of Eastport, Me., v. Salinger, 126 N. E. 40, 72 Ind App. 479.

35. Mo—Davenport Nat. Bank v. Homeyer, 45 Mo. 145, 100 Am D. 363.

36. Md—Bristol Nat. Bank v. Baltimore, etc, R. Co, 59 A. 134, 99 Md 661, 105 Am.S R. 331.
10 C.J. p 206 note 69.

Effect of statute

The rule of the text has been held applicable under statutes which declare bills of lading to be negotiable, unless provided in express terms to the contrary on the face thereof.—Barnum Grain Co. v. Great Northern R Co, 112 N W 1030, 1049, 102 Minn. 147—10 C.J. p 206 note 70.

37. U S—Rainbolt v Lamson Bros., Neb., 259 F. 546, 170 C.C.A 508.

38. Colo.—Davis v. Fruita Mercantile Co, 220 P. 983, 74 Colo 247.

A stamped indorsement on an order bill of lading attempting to render it nonnegotiable, not signed by the shipper, is ineffective to change it into a straight bill—Louisville & N. R. Co. v. Mengel Co, 295 S W 183, 220 Ky. 289.

39. Mo.—Midland Nat. Bank v. Missouri, etc, R. Co., 62 Mo.App 531.
10 C.J. p 206 note 71.

40. N.Y.—Gass v. Astoria Veneer Mills, 118 N.Y.S. 982, 134 App.Div. 184.
10 C.J. p 206 note 72.

Reference to a party other than the consignee as the party to be notified does not limit the negotiability of a bill nor constitute notice to a purchaser thereof of rights or equities of such person.[41]

f. Bona Fide Purchasers

(1) Who are bona fide purchasers
(2) Rights of purchasers
(3) Rights as against carrier

(1) Who Are Bona Fide Purchasers

A transferee of a bill of lading who, without knowledge sufficient to put him on inquiry, and without bad faith, takes the bill in the usual course of business is a bona fide purchaser.

The transferee of a bill of lading who takes it in the usual course of business becomes, in the absence of bad faith, a bona fide purchaser.[42] One taking a bill of lading with knowledge of facts or with knowledge sufficient to put him on inquiry cannot claim to be a bona fide holder.[43] One who seeks

41. N.Y.—Slutzkin v. Gerhard & Hey, 191 N.Y.S. 104, 199 App.Div. 5

42. Kan.—Burdg v. Scott, 208 P. 668, 111 Kan. 610.
La.—First Nat. Bank v. Henderson Cotton Oil Co., 102 So. 501, 157 La. 394.
Tex.—Missouri, K. & T. Ry. Co. of Texas v. Clement Grain Co., Civ. App., 206 S.W. 126, rehearing denied 211 S.W. 347.

Bill as security for loans or advances

One who takes a bill of lading as security for advances to the consignor with the understanding that the proceeds are to be applied to the consignor's debt, and who has no knowledge that the carrier has delivered the goods without production or surrender of the bill of lading, is a bona fide purchaser.—Alderman Bros. Co. v. New York, N. H. & H. R. Co., 129 A. 47, 102 Conn. 461.

Bill with draft attached

(1) Upon acceptance of a draft with a shipper's order bill of lading attached indorsed in blank, the acceptor becomes a holder in due course.—Merchants' State Bank of Centralia v. Chicago, B. & Q. R. Co., 245 Ill.App. 211.

(2) A bank discounting a draft with bill of lading attached may become a bona fide holder.—Fourth Nat. Bank of Montgomery, Ala., v. Bragg, 102 S.E. 649, 127 Va. 47, 11 A.L.R. 1034

(3) A bank which merely gives credit for the draft and bill of lading, subject to cancellation if the draft is not paid, is not a bona fide purchaser.—First Nat. Bank v. Stengel, 169 N.Y.S. 217.

(4) Where bank, payee of drafts with bill of lading attached, upon receiving drafts gave the drawer unconditional credit on its books for the amount of the drafts, the bank was owner and holder of the drafts, and not merely the drawer's collecting agent, although it might have applied amount upon drawer's preexisting debt, or upon nonpayment might have claimed right to charge amount back against drawer.—Howe Grain & Mercantile Co. v. A. B. Crouch Grain Co., 211 S.W. 946, error refused.

(5) Where a purchaser of cars of wheat on track procured shipper's orders bills of lading to himself as consignor and consignee, and deposited drafts for the price of the wheat with bills of lading attached in bank and received credit therefor subject to check, the bank was a bona fide holder of such bills of lading and drafts unless in receiving such paper it acted in bad faith.—Burdg v. Scott, 208 P. 668, 111 Kan. 610.

(6) Where a bank, which claimed title to proceeds of draft attached by plaintiff, showed that the draft with bill of lading attached was duly executed and in its possession payable to its order, there was a presumption that it was a holder in due course under Comp.St. § 3040.—Mangum v. Mutual Grain Co., 114 S.E. 2, 184 N.C. 181.

Consideration

The application by a bank of the proceeds of the sale of property covered by a bill of lading to a previous indebtedness of an indorser of the bill of lading is sufficient consideration for the indorsement to the bank to make it a holder for value.—Thompson v. Hibernia Bank & Trust Co., 86 So. 652, 148 La. 57.

Violation by shipper of agreement with buyer

Where a bank is the holder of an order bill of lading transferred to it by the shipper without knowledge of his agreement with the buyer, who paid cash for the goods, to ship them by straight bills of lading the bank is entitled to the property as against the buyer.—National Bank of the Republic v. Hines, 192 P. 899, 112 Wash. 352.

43. Colo.—First State Bank of Brandon v. Kohl, 247 P. 571, 79 Colo. 620.
N.Y.—Knight v. Delaware & Hudson Co., 165 N.Y.S. 583, 178 App.Div. 518.
W.Va.—Richlands Brick Corp. v. Hurst Hardware Co., 92 S.E. 685, 80 W.Va. 476

Alteration of bill

Where, after delivery was made by a carrier without surrender of the bills of lading, which prohibited alterations except by indorsement signed by carrier's agent, the dates thereof were changed by the holder from 1909 to April, 1910, by covering the date spaces with cancellation marks, and new-dating them, but not in the natural place therefor, a bank loaning money thereon was put on inquiry, or guilty of negligence, and called on to challenge the same.—Saugerties Bank v. Delaware & Hudson Co., 198 N.Y.S. 722, 204 App.Div. 211, affirmed 141 N.E. 904, 236 N.Y. 425, and reargument denied 142 N.E. 331, 236 N.Y. 675

Bill with draft attached

(1) The fact that indorser of bills of lading with drafts attached was a regular customer of bank and had been frequently overdrawn for some time, and that the bank knew or had reason to believe that he was insolvent, would not make the bank guilty of bad faith in accepting such paper.—Burdg v. Scott, 208 P. 668, 111 Kan. 610

(2) Fact that a bank acts as agent for the collection of a draft with bill of lading for grain attached, and not as purchaser thereof, will not relieve it from liability to the owner of the grain by reason of a restrictive notation appearing on the face of the bill of lading, where the bank is chargeable with knowledge that its principal is without authority to negotiate it.—Standard Grain Co. v. State Bank of Omaha, 182 N.W. 507, 106 Neb. 73.

(3) Where bank surrendered bill of lading on acceptance of draft before arrival of car and then took assignment of bill of lading, "good faith" of bank could be impugned only upon showing that it acted with notice of facts making transaction wrongful.—New York, N. H. & H. R. Co. v. First Nat. Bank, 134 A. 223, 105 Conn. 33.

(4) Knowledge that property had been secured from the carrier without surrender of the bill, by means of an indemnity bond, does not show bad faith by bank in paying draft attached to bills of lading.—Kansas State Bank v. Atchison, T. & S. F. Ry. Co., 251 P. 188, 122 Kan. 77.

to claim as a bona fide purchaser must show that the indorsement of the bill was valid.[44]

(2) Rights of Purchasers
- (a) In general
- (b) Transfer by apparent owner

(a) In General

Ordinarily a transfer of a bill of lading by one having neither title to the goods or authority to transfer them gives to a bona fide purchaser no greater title to the goods than his transferor had.

Since the transfer of a bill of lading by the person in possession of the instrument can give no higher title to the property than would the transfer of the property itself by the same person, the general rule is that the holder of a bill of lading, in the absence of either title to the goods or authority to transfer them, cannot by a transfer of the instruments pass the right of property in the goods even to a bona fide purchaser for value.[45] The transferee's rights are not greater than the rights which he would have acquired by delivery to him of the property itself instead of the delivery of the bill of lading representing the property.[46]

Fraudulent or forged bills. It follows that if the bill of lading is fictitious, that is, if it does not represent any goods, then the transferee thereof acquires no rights under the transfer.[47] In the ab-

(5) Where bank, under agreement to back customer in purchase of oil, took his note and placed amount to his credit, under agreement that it was not to be checked against, but did pay checks therefrom, and subsequently accepted drafts and bills of lading for oil which it credited to customer, and, after refusing payment of customer's check in payment of the oil, credited proceeds of drafts to customer's indebtedness, it was not innocent purchaser of bills of lading for value, without notice of seller's title, and having both actual and constructive notice that the check was given for such oil, was bound to know that, if it refused payment, seller could reclaim bills of lading —Lewis v. James McMahon & Co, 271 S.W. 779, 307 Mo. 552

(6) A shipper who, having sold a bill of lading with draft attached to a bank, takes them back knowing the bank has delivered the bill without payment of the draft, that the carrier delivered the goods without requiring surrender of the bill, and that the buyers refused the goods and returned the bill, is not a bona fide purchaser —Pere Marquette Ry. Co. v. J. F. French & Co., 41 S.Ct 195, 254 U.S. 538, 65 L.Ed. 391, reversing J. F. French & Co. v. Pere Marquette Ry. Co, 171 N.W. 491, 204 Mich. 578.

Knowledge of other transactions

In action for carrier's diversion of grain shipment upon which plaintiffs held bills of lading, defense that from knowledge of other transactions plaintiffs should not have relied on bills was without merit.—Knight v. Delaware & Hudson Co, 165 N.Y.S. 583, 178 App.Div. 518.

Notice of reservation of title

A bill of lading for a car of grain, stamped on its face, "Receipt issued for this bill of lading under rules of Omaha Grain Exchange," charged a transferee, who was a member of the exchange, with notice that, as provided in such rules, title to the grain remained in the holder of the receipt until he was paid therefor.

U.S.—Rainbolt v Lamson Bros., Neb., 259 F. 546, 170 C.C.A. 508.

Neb.—J. F. Twamley, Son & Co. v Chicago Great Western R Co, 196 N.W. 319, 111 Neb. 311—Standard Grain Co v. State Bank of Omaha, 182 N.W. 507, 106 Neb. 73.

Shipper

Neither a shipper who takes out a bill of lading in his own name nor his assignee is a bona fide purchaser for value, within the meaning of the statute providing that the carrier is liable to a bona fide purchaser of the bill for value who acquires title to the bill, either after or before the carrier delivers the goods without requiring surrender of the bill —Miller v New York Cent R R, 200 N.Y.S. 287, 205 App.Div. 663.

44. U.S.—Moors v. Weil, C.C.A.N.Y., 20 F.2d 462.

45. U.S.—New York Cent. & H. R. R. Co. v. Bank of Holly Springs, C.C. Miss, 236 F. 562, modified on other grounds, 195 F. 456, 115 C.C.A. 358. Ala.—Daves v Lufkin, 131 So. 438, 222 Ala. 171. Colo.—First State Bank of Brandon v. Kohl, 247 P. 571, 79 Colo. 620. Mo.—Pioneer Trust Co. v. Missouri Pac R Co, 224 S.W. 106, 204 Mo. App. 289 N.Y.—Potash v. Cleveland-Akron Bag Co, 189 N.Y.S. 375, 197 App. Div. 763. Tex.—B. W. McMahan & Co. v. State Nat. Bank of Shawnee, Civ.App., 160 S.W. 403

10 C.J. p 206 note 73.

"Bills of exchange and promissory notes are representatives of money, circulating in the commercial world as such, and it is essential to enable them to perform the particular functions that he who purchases them should not be bound to look beyond the instrument, and that his right to enforce them should not be defeated by anything short of bad faith on his part. But bills of lading answer a different purpose and perform different functions. They are regarded as so much cotton, grain, iron, or other articles of merchandise, in that they are symbols of ownership of the goods they cover."—New York Cent & H. R. R Co. v. Bank of Holly Springs, supra.

The rule stated in Corpus Juris has been applied in determining the rights of an assignee of bills of lading retaining proceeds of sale of potatoes as against assignor's tenant in common entitled to proceeds—Daves v. Lufkin, 131 So. 438, 222 Ala. 171

Transfer by bailee

Warehouse to which beans were delivered for processing and storing could not, by shipping some of the goods to a subsidiary of it and drawing a draft on another and attaching to the draft the negotiable bill of lading covering the shipment, convey title through bill of lading to one discounting the draft.—Kendall Produce Co. v. Terminal Warehouse & Transfer Co., 145 A. 511, 295 Pa. 450.

Transferee not bona fide purchaser

Where cotton was not sold absolutely to debtor, who transferred bill of lading to bank, such property was not subject to bank's lien where bank was not a bona fide purchaser —People's Bank & Trust Co. v. Walthall, 75 So. 570, 200 Ala. 122.

Void additional bill

Where agents of a shipper induced agents of the carrier without authority to issue additional bills of lading for an interstate shipment, promising to surrender the original, such bills of lading were void and of no effect, even in the hands of an innocent holder, to whom they were indorsed, for such holder acquired only the title of the transferor—Pioneer Trust Co v Missouri Pac R. Co, 224 S.W. 106, 204 Mo.App 289

46. Iowa—Anchor Mill Co. v Burlington, etc, R. Co., 71 N.W. 255, 102 Iowa 262.

10 C.J. p 206 note 74.

47. U.S.—New York Cent. & H. R. R. Co v. Bank of Holly Springs, C.C.Miss., 236 F. 562, modified on

sence of contrary statutory provisions, where the carrier receives no goods, and the bill of lading is fraudulently issued by the agent, then the bill of lading represents nothing, and its transfer confers no rights on the transferee as to the goods which it appears to represent.[48]

A drawee of drafts with forged bills of lading attached cannot, on discovering the fictitious character of the bills, recover back what he has paid to the payee, where the payee was an innocent purchaser for value of the drafts.[49]

Other applications of rule. The rule that the transfer of a bill of lading gives to the transferee only such title to the property as the transfer of the property itself by the transferor would have given has been applied to innocent purchasers of lost or stolen bills,[50] bills of lading issued by the carrier to a person without title to the goods,[51] bills of lading obtained from their owner by fraud and then sold,[52] bills sold by an agent of the owner acting in excess of his authority,[53] and to the case of a "spent bill."[54]

Title to bill of lading. A bona fide holder of a negotiable bill of lading takes title to it free from any defect or flaw in the title of prior parties, or defenses available as between them.[55]

(b) Transfer by Apparent Owner

aa. In general

bb. Transfer by fraudulent vendee

aa. In General

A bona fide purchaser from one who has been given the apparent right of property as owner, or of disposal as agent, by the owner of the goods, obtains title to the goods. Lenders of money on security of the bill may be protected.

The general rule, like the rule ordinarily governing the sale of personal property, is subject to certain exceptions and limitations. Thus an exception to the rule obtains where the owner of the goods, by his own misconduct or voluntary act, confers on the person from whom the bona fide purchaser obtained his title the apparent right of property as owner, or of disposal as agent.[56] The true owner of property may, by placing it in the power of another to defraud innocent parties, cut himself off from claiming it and thereby divest the title from himself.[57]

By consignee invested with apparent ownership. A further exception to the rule arises in the case of the transfer of a bill of lading to a bona fide purchaser, for value, by a consignee to whom the goods are, by the terms of the instrument, made deliverable, or to whom the consignor and the original owner of the goods have indorsed and delivered the bill. Under these circumstances the transfer defeats the vendor's right of stoppage in transitu[58] and passes the title to the bona fide transferee.[59] However, the transferor must have been in the lawful possession of the bill of lading, so as to be in a situation to transfer the instrument itself—the

other grounds 195 F. 456, 115 C.C.A. 358.
Mass.—Stevens v. Boston & W. R. Corp., 8 Gray 262.
10 C.J. p 206 note 76.

48. Me.—Lewis Poultry Co. v. New York Cent. R. Co., 105 A. 109, 117 Me. 482.
10 C.J. p 206 note 77.

49. Tex.—Howe Grain & Mercantile Co. v. A. B. Crouch Grain Co., Civ. App., 211 S.W. 946, error refused.

Payee not guarantor

(1) Where drawer in transferring drafts to payee bank assigned bills of lading purporting to be issued to drawer, bank, in forwarding drafts, with attached bills of lading, to drawee, was not a guarantor of signatures attached to bills of lading.—Howe Grain & Mercantile Co. v. A. B. Crouch Grain Co., Tex.Civ.App., 211 S.W. 946, error refused.

(2) Drawee, seeking to recover from payee amount paid on drafts before discovery that attached bills of lading were fictitious, has burden of proving that payee, in forwarding drafts with forged bills of lading attached, was so negligent in not detecting forgery as to make it responsible for drawee's loss.—Howe Grain & Mercantile Co. v. A. B. Crouch Grain Co., supra.

(3) In drawee's action to recover from payee amount paid on drafts before discovery that attached bills of lading were fictitious, evidence held insufficient to present issue of whether payee was negligent in failing to detect forgery.—Howe Grain & Mercantile Co. v. A. B. Crouch Grain Co., supra.

50. U.S.—Shaw v. North Pennsylvania R. Co., Pa., 101 U.S. 557, 25 L.Ed. 892
N.Y.—Brower v. Peabody, 13 N.Y. 121.
10 C.J. p 207 note 83.

51. N.Y.—Toledo First Nat. Bank v. Shaw, 61 N.Y. 283.
10 C.J. p 207 note 84.

52. Pa.—Decan v. Shipper, 35 Pa. 239, 78 Am.D. 334.
10 C.J. p 207 note 85.

53. U.S.—Dows v. National Exch. Bank of Milwaukee, N.Y., 91 U.S. 618, 23 L.Ed. 214
10 C.J. p 207 note 86.

54. N.Y.—National Commercial Bank v. Lackawanna Transp. Co., 69 N.Y.S. 396, 59 App.Div. 270, affirmed 64 N.E. 1123, 172 N.Y. 596.
10 C.J. p 207 note 87.

55. La.—Thompson v. Hibernia Bank & Trust Co., 86 So. 652, 148 La. 57

56. Neb.—Omaha Grain Exch. v. National Surety Co., 174 N.W. 426, 103 Neb. 820.
10 C.J. p 207 note 88.

The Corpus Juris text has been cited as authority in Omaha Grain Exchange v. National Surety Co., 174 N.W. 426, 103 Neb. 820.

57. Neb.—Omaha Grain Exchange v. National Surety Co., 174 N.W. 426, 103 Neb. 820.
10 C.J. p 208 note 89.

58. Tex.—Missouri Pac. R. Co. v. Heidenheimer, 17 S.W. 608, 82 Tex. 195, 27 Am.S.R. 861.
10 C.J. p 208 note 91.

59. Ga.—Commercial Bank v. J. K. Armsby Co., 47 S.E. 589, 120 Ga. 74, 65 L.R.A. 443.
10 C.J. p 208 note 92.

symbol of the property transferred [60]

By agent of owner. Under a statute providing that persons intrusted with bills of lading and other documents of title to goods shall have power to make contracts for the sale, disposition, or pledge of the goods, a transfer of the bill by such a person will be binding against the true owner.[61]

Where through the negligence of a shipper a buyer has obtained possession of a bill of lading and secured a loan on it, the shipper is liable to the lender for any loss sustained.[62]

bb. Transfer by Fraudulent Vendee

A bona fide purchaser of a bill of lading from one who has obtained the goods by fraudulent purchase obtains title to the goods as against the original vendee.

A bona fide indorsee of a bill of lading, for value, received from a fraudulent purchaser of the goods, acquires a good title to the goods against the original vendor,[63] provided such indorsee parted with value on faith in the apparent title of the fraudulent purchaser and his right to dispose of the property,[64] and provided the relation of vendor and purchaser existed between the owner of the goods and the transferor.[65]

(3) Rights as against Carrier

A bona fide purchaser may, in a proper case, hold the carrier liable for issuing a fictitious bill, or a bill misdescribing the goods as to quantity or quality.

A carrier who is negligent in issuing a bill of lading may be liable to one injured by such negligence.[66] To protect bona fide purchasers it is provided in some states by statute that no bill of lading shall be issued unless the goods named therein have been actually delivered to the carrier, making the carrier liable to anyone injured by the issuance of a fraudulent or fictitious bill of lading;[67] and it has been held that the carrier's liability under statutes of this character to one to whom bills of lading have been negotiated for issuing the same before it has received the freight is not changed by a subsequent receipt thereof, the goods having been spoiled before their receipt.[68] Nevertheless statutes of the character under consideration do not operate to make the carrier liable for bills of lading issued by an agent who had no authority to issue bills of lading.[69] As shown in § 141, a carrier is liable to a purchaser of a bill of lading issued by an authorized agent.

As the federal Bills of Lading Act imposes liability on the carrier to a bona fide holder for value when the goods are not as described in the bill[70] an innocent purchaser, suffering damage because of such misdescription, may, as to a shipment within its terms, hold the carrier liable for his loss.[71] He cannot, however, hold the carrier liable for goods other than those actually received by it where the bill on its face shows the carrier is not representing the quality or quantity of the goods.[72] An inno-

60. N.Y.—Barnard v. Campbell, 55 N.Y. 456, 14 Am.R. 289.
10 C.J. p 208 note 93.

61. N.Y.—Toledo First Nat. Bank v. Shaw, 61 N.Y. 283.
10 C.J. p 208 note 94.

62. Wash.—National City Bank v. Parker-Bell Lumber Co., 210 P. 10, 122 Wash. 29.

63. Mass.—Rowley v. Bigelow, 12 Pick. 307, 23 Am.D. 607.
10 C.J. p 208 note 95.

64. N.Y.—Barnard v. Campbell, 58 N.Y. 73, 17 Am.R. 208.
10 C.J. p 208 note 96.

65. Pa.—Decan v. Shipper, 35 Pa. 239, 78 Am.D. 334.
10 C.J. p 208 note 97.

66. Ill.—Stone v. Wabash, etc., R. Co., 9 Ill.App. 48
10 C.J. p 207 note 78.

67. Ala.—Thompson v. Alabama Midland R. Co., 24 So. 931, 122 Ala. 378
10 C.J. p 207 note 79.

68. Mo.—Watkins Nat. Bank v. Cleveland, etc., R. Co., 93 S.W. 846, 117 Mo.App. 248.
10 C.J. p 207 note 80.

69. Ala.—Louisville, etc., R. Co. v. National Park Bank, 65 So. 1003, 188 Ala. 109.
10 C.J. p 207 note 81.

Requisites and sufficiency of complaint

In an action the purpose of which is to fasten liability on a carrier for the issuance of a false bill of lading, it must be alleged that the agents of defendant were acting in the line or scope of their authority in assenting to the issuance of the bill of lading, or that the issuance thereof or the authorization of issuance was within the scope of the employment of such agents.—Louisville, etc., R. Co. v. National Park Bank, 65 So. 1003, 188 Ala. 109

70. **Construction**

Laws enlarging negotiability of bills of lading should be construed to protect purchasers of bills relying on statements therein.—Beacon Milling Co. v. New York Cent. R. Co., 244 N.Y.S. 573, 137 Misc. 865

71. U.S.—Chicago & N. W. Ry. Co. v. Bewsher, C.C.A.Neb., 6 F.2d 947, certiorari denied 46 S.Ct. 205, 270 U.S. 641, 70 L.Ed. 775

Ga.—Atlantic Coast Line R. Co. v. Luke & Fleming, 93 S.E. 286, 20 Ga.App. 761.

Okl.—Chicago, R. I. & P. Ry. Co. v. Cleveland, 160 P. 328, 61 Okl. 64.

Effect of shipper's loading

A carrier may be liable to holder in good faith of order bill of lading covering car of wheat for damages caused by carrier's nonreceipt of part of the goods, in view of Bill of Lading Act Aug. 29, 1916, §§ 20, 22, notwithstanding wheat was loaded by shipper, and that bill of lading recited that weight was "subject to correction," such words not being of "like purport" to the words "shipper's weight, load, and count," or "shipper's weight," or that weight of wheat was "said to be" weight recited in bill of lading, within § 21, prescribing what descriptions in bill of lading shall not render carrier liable.—Chicago & N. W. Ry. Co. v. Bewsher, C.C.A.Neb., 6 F.2d 947, certiorari denied 46 S.Ct. 205, 270 U.S. 641, 70 L.Ed. 775.

72. U.S.—Chicago & N. W. Ry. Co. v. Stephens Nat. Bank of Fremont, C.C.A.Neb., 75 F.2d 398, certiorari denied 55 S.Ct. 650, 295 U.S. 738, 79 L.Ed. 1685.

Mich.—People's Sav. Bank of Saginaw v. Pere Marquette Ry. Co., 209 N.W. 182, 235 Mich. 399.

cent purchaser has no right of action against a carrier for misdating an order bill, as the date is no part of the description of the goods.[73]

Where plaintiff in fact purchased the property, and not the bill of lading which was a proper bill which did not describe the condition of the property, he cannot recover of the carrier on the ground the bill misrepresented the property and that he was an innocent purchaser.[74]

The assignee of an intra-state bill of lading has been held presumed to have acquired it with knowledge that the goods may not be as described.[75]

Rights against carrier for delay. Where a connecting carrier issues a bill of lading in exchange for the initial bill of lading, but at the time the goods are not in its possession, it is liable to a bona fide purchaser of the bill where by reason of delay in delivery of the goods to the connecting carrier the goods are spoiled,[76] and in such case the connecting carrier cannot assert the interstate character of the shipment when the bill erroneously indicated it to be intra-state.[77]

g. Warranties Arising Out of Transfer

(1) In general
(2) Warranties by mortgagee or pledgee receiving payment

(1) In General

Under the federal Bills of Lading Act the transferor, by indorsement or delivery, warrants the genuineness of the bill.

As the federal Bills of Lading Act provides that the transferor of a bill of lading by indorsement or delivery warrants, among other things, the genuineness of the bill, the indorser of a bill which is not genuine is liable to the person paying for it for the amount paid by him.[78] The transferor for value warrants the genuineness of the bill of lading whether the transfer is by indorsement or delivery.[79]

(2) Warranties by Mortgagee or Pledgee Receiving Payment

As provided by the federal Bills of Lading Act, a mortgagee or pledgee or other person holding a bill of lading as security who in good faith demands or receives payment of the debt does not warrant the genuineness of the bill nor the quantity or quality of the goods.

Under the provision of the federal Bills of Lading Act that a mortgagee or pledgee or other holder of a bill for security who in good faith demands or receives payment of the debt shall not be deemed to represent or warrant the genuineness of the bill nor the quality or quantity of the goods therein described, a pledgee of a bill for security,[80] a bank receiving drafts with bills of lading attached, merely for collection, delivering the bills on payment of the drafts,[81] or a bank, merely discounting or cashing a draft with a bill of lading attached,[82] does not

73. Kan.—Browne v. Union Pac. R. Co., 216 P. 299, 113 Kan. 726, certiorari granted 44 S.Ct. 135, 263 U.S. 697, 68 L.Ed. 512, and affirmed 45 S.Ct. 315, 267 U.S. 255, 69 L.Ed. 601.

74. U.S.—Mannell v. Luckenbach S. S. Co., D.C.Wash., 26 F.2d 908.

75. Tex.—Gulf, C. & S. F. Ry. Co. v. Kempner, Com.App., 282 S.W. 795, reversing, Civ.App., 275 S.W. 459.

76. Tex.—Missouri, K. & T. Ry. Co. of Texas v. Clement Grain Co., Civ.App., 206 S.W. 126, rehearing denied 211 S.W. 347.

77. Tex.—Missouri, K. & T. Ry. Co. of Texas v. Clement Grain Co., Civ.App., 211 S.W. 347, denying rehearing 206 S.W. 126.

78. Okl.—American Nat. Bank of Lawton v. J. Rosenbaum Grain Co., 299 P. 447, 148 Okl. 232—First Nat. Bank v. Kempner, 229 P. 840, 103 Okl. 237—Ft. Worth Elevator Co. v. State Guaranty Bank of Blackwell, 220 P. 340, 93 Okl. 191.

Reliance on indorsement

(1) One paying drafts is entitled to rely on indorsements on bills of lading attached thereto, indorser's obligations being question of law.—American State Bank of Omaha, Neb., v. Mueller Grain Co., C.C.A.Ill., 15 F.2d 899, certiorari granted Mueller Grain Co. v. American State Bank of Omaha, 46 S.Ct. 633, 271 U.S. 658, 70 L.Ed. 1136, and reversed on other grounds 48 S.Ct. 34, 275 U.S. 493, 72 L.Ed. 390.

(2) Indorsements calling for payment, being on bills of lading which call for no payment, are sufficient to put drawee of drafts on inquiry as to their genuineness.—American State Bank of Omaha, Neb. v. Mueller Grain Co., supra.

Recovery of payment

Money paid by drawee on draft against fictitious indorsed bills of lading, and accepted against such bills, in ignorance of fraud, may be recovered from payee.—First Nat. Bank v. Kempner, 229 P. 840, 103 Okl. 237.

Prior indorsements only guaranteed

(1) A bank's indorsement, "all prior indorsements guaranteed, pay to any bank or banker or order," upon a draft to which forged bills of lading were attached but which contained no reference thereto, implied no guaranty of the genuineness of such bills.—Downing Co. v. Pearson Banking Co., 92 S.E. 968, 20 Ga.App. 242.

(2) The indorsement on the back of a draft by a bank to which it was forwarded for collection, "Pay any bank or banker, all previous indorsements guaranteed," merely guaranteed the genuineness of the prior indorsements, and did not guarantee payment of the draft, nor the existence, quality, or quantity of the wheat mentioned in the accompanying bill of lading.—Tradesmen's State Bank v. Ft. Worth Elevators Co., Tex.Civ.App., 214 S.W. 656

79. N.Y.—Archibald & Lewis Co. v. Banque Internationale de Commerce, 214 N.Y.S. 366, 216 App.Div. 322.

80. Tenn.—Falls Mfg. Co. v. Barbour, 11 Tenn.App. 509.

81. N.Y.—Archibald & Lewis Co. v. Banque Internationale de Commerce, 214 N.Y.S. 366, 216 App. Div. 322.

82. U.S.—Bishop & Co. v. Midland Bank, C.C.A.Cal., 34 F.2d 585, certiorari denied Midland Bank v. Bishop & Co., 57 S.Ct. 111, 299 U.S. 587, 81 L.Ed. 432.

ordinarily warrant the genuineness of the bill nor the quality or quantity of the goods therein described,[83] and incurs no liability for the seller's breach of warranty.[84] The rule is otherwise, however, where the transaction amounts to a purchase of the bill.[85]

h. Delivery for Collection

A transferee for collection of a draft attached to a bill of lading has a lien on the property for advances made, and is liable for failure to follow instructions of the transferor.

Transfer of a bill of lading with draft attached to a bank for collection gives to the bank a lien on the property described in the bill for the money it advances to the shipper.[86] Where drafts with bills of lading attached are delivered to a bank for collection, instructions that the bills are to be surren-

Ga.—Downing Co. v. Pearson Banking Co., 92 S.E. 968, 20 Ga.App. 242

Bank named as consignee

A bank discounting a draft attached to a bill of lading in which it was named as consignee may, by proper indorsement on bill of lading, repudiate any implied warranties otherwise following such indorsement.—Johnston v. Western Maryland Ry. Co., 135 A. 185, 151 Md. 422.

Forged bills

(1) A drawee, who has paid a draft to which forged bills of lading were attached, has no recourse against a bank which has discounted the draft in the ordinary course of business and without knowledge of the fraud.—Downing Co. v. Pearson Banking Co., 92 S.E. 968, 20 Ga.App. 242.

(2) Bank discounting forged bill of lading, in which it was directed to notify J, is bound only to act in good faith toward J, who could not complain that bank did not take all possible precautions for its own protection.—Johnston v. Western Maryland Ry. Co., 135 A. 185, 151 Md. 422.

(3) Bank, discounting and collecting draft secured by forged bills of lading, is not liable to drawee for amount of draft.—Archibald & Lewis Co. v. Banque Internationale de Commerce, 214 N.Y.S. 366, 216 App.Div. 322

83. U.S.—Bishop & Co. v. Midland Bank, C.C.A.Cal., 84 F.2d 585, certiorari denied Midland Bank v. Bishop & Co., 57 S.Ct. 111, 299 U.S. 587, 81 L.Ed. 432.
W.Va.—Old Nat. Bank of Waupaca v. People's Bank of Harrisville, 108 S.E. 716, 89 W.Va. 132, 18 A.L.R. 728.
Warranty of goods on transfer of contract generally see supra subsection d (2).

Consignee waiving right of inspection

A consignee required to pay for goods before delivery is entitled to inspect before receiving and paying therefor, but may waive such rights by paying for and receiving them before inspection, and if he does so he cannot, upon later deciding to reject, require repayment from a bank who is assignee in good faith of a draft for the purchase price with bill of lading attached, the buyer's remedy being action against seller for damages.—Old Nat. Bank of Waupaca v. People's Bank of Harrisville, 108 S.E. 716, 89 W.Va. 132, 18 A.L.R. 728.

84. U.S.—Bishop & Co. v. Midland Bank, C.C.A.Cal., 84 F.2d 585, certiorari denied Midland Bank v. Bishop & Co., 57 S.Ct. 111, 299 U.S. 587, 81 L.Ed. 432.
Ark.—Merchants' Bank of Kansas City, Mo., v. Pine Bluff Produce & Provision Co., 227 S.W. 603, 147 Ark. 319
Conn.—Williams v. National Fruit Exch., 111 A. 197, 95 Conn. 300
Ga.—Terre Haute Nat. Bank v. Horne-Andrews Commission Co., 101 S.E. 6, 24 Ga.App. 320.
Iowa.—Market State Bank v. Farmers' Sav. Bank of Meservey, 181 N.W. 486, 190 Iowa 1112
Wyo.—Stacey-Vorwerk Co. v. Buck, 291 P. 809, 42 Wyo. 136, certiorari denied 51 S.Ct. 559, 283 U.S. 849, 75 L.Ed. 1458
55 C.J. p. 664 note 40.

Not party to sale

A discounting party does not become a party to the contract of sale.—Williams v. National Fruit Exch., 111 A. 197, 95 Conn. 300.

Refund

(1) A discounting bank is not required because of the seller's breach of warranty to refund the money paid; and it is immaterial that the bank required a guaranty of payment by the drawee before it would discount.—Williams v. National Fruit Exch., 111 A. 197, 95 Conn. 300

(2) A bank which in bad faith discounted a draft with bill of lading attached drawn on a buyer by the seller of grapes, bad but warranted good, is liable for return of the money paid by the buyer on the draft, as holding money which ex æquo et bono ought to be paid over to the buyer and drawee.—Williams v. National Fruit Exch., supra.

85. U.S.—Bishop & Co. v. Midland Bank, C.C.A.Cal., 84 F.2d 585, certiorari denied Midland Bank v. Bishop & Co., 57 S.Ct. 111, 299 U.S. 587, 81 L.Ed. 432
Miss.—Citizens' Bank & Trust Co. of Belzoni v. Harpeth Nat. Bank of Franklin, 82 So. 329, 120 Miss. 505.—L. Marks' Sons v. West Tennessee Grain Co., 81 So. 162, 119 Miss. 465.
55 C.J. p. 664 note 41.

Complaint good as against demurrer

Buyer's complaint against bank to which draft with bill of lading attached was allegedly "sold" by transaction which "was not an ordinary discount transaction," alleging that bank had furnished evidence in another connection to establish its absolute ownership of bill of lading and of cocoa beans represented thereby, and that seller had no interest therein, that beans were unfit for human consumption, and that department of agriculture ordered beans destroyed or deported stated cause of action with such reasonable precision as to preclude sustaining of demurrer to complaint without leave to amend.—Bishop & Co. v. Midland Bank, C.C.A.Cal., 84 F.2d 585, certiorari denied Midland Bank v. Bishop & Co., 57 S.Ct. 111, 299 U.S. 587, 81 L.Ed. 432.

86. Old.—First & Old Detroit Nat. Bank v. Holloman, 208 P. 791, 86 Okl. 246.

Right of bank as against creditors

(1) Where a bank advanced to a lumber company eighty per cent of shipping value of lumber shipped by it, taking its notes therefor, and, to secure them, bills of lading and other shipping papers were delivered to bank, which acted as collecting agent upon sale of lumber, it was held that, where company became insolvent and made an assignment for benefit of creditors, bank was entitled to retain such collateral security for unpaid notes.—Page v. U. S. Nat. Bank, 229 P. 375, 112 Or. 391.

(2) Where shipper indorsed draft and transferred the accompanying bill of lading to a bank, and received credit on his account with the bank for the amount of the draft with the understanding that the bank was acting only as the shipper's collecting agent, the property described in bill of lading was not subject to attachment by shipper's creditor prior to payment of draft.—First & Old Detroit Nat. Bank v. Holloman, 208 P. 791, 86 Okl. 246.

dered only on payment of the drafts must be complied with by the collecting bank.[87] If a collecting bank surrenders the bill of lading without collecting the draft it is liable to the drawer for the amount of the draft.[88] A bank receiving a bill of lading with draft for collection is liable to the drawer for damages when it accepts payment of the draft from, and delivers the bill of lading to, someone other than the purchaser of the goods on whom the draft was drawn.[89]

Where it is understood that the bank receiving a bill of lading with draft attached is acting only as a collecting agent, it may charge back to the shipper's account the amount of the draft if not paid.[90] Where the bank charges the seller's account, title to the goods revests in the seller.[91]

§ 129. - Duplicate and Substituted Bills of Lading

Except as it may otherwise be provided by statute, duplicate or triplicate bills of lading are each original bills. A substitute bill of lading may be issued but not to the prejudice of the rights of a transferee or holder of the original.

Apart from the provisions of the Uniform Bills of Lading Act forbidding the issuance of duplicate bills of lading unless so marked, it is not unusual for the carrier to issue duplicate or triplicate bills of lading, each being an original bill for all purposes.[92] When several bills of lading have been

87. U S —Hibernia Bank & Trust Co v. Bank of Topeka, C.C A La., 288 F. 41.
Conn —Shippee v. Pallotti, Andretta & Co, 168 A. 880, 117 Conn 472.
Iowa —Market State Bank v. Farmers' Savings Bank of Meservey, 181 N W. 486, 190 Iowa 1112
Okl —St. Louis Carbonating & Mfg. Co. v. Lookeba State Bank, 157 P. 1046, 59 Okl. 71.
Duties of bank as to collection of drafts with bills of lading attached see Banks and Banking § 241.

Bank alone liable

Where seller sends bill of lading to bank for delivery on payment by buyer and bank delivers without payment, although buyer is solvent, seller may look to bank alone for his damage —St Louis Carbonating & Mfg Co. v Lookeba State Bank, 157 P. 1046, 59 Okl. 71.

Defenses

Where plaintiff bank forwarded drafts and attached bills of lading to defendant bank for collection, the latter is in no position to deny its liability for the unauthorized surrender by it of a bill of lading without payment of the draft to which it is attached, and in suit for the amount of drafts it cannot object that the drawer, and not plaintiff bank, was the owner and real party in interest —Hibernia Bank & Trust Co v Bank of Topeka, C C.A La., 288 F. 41.

Effect of prior transactions

Where draft with bills of lading attached to "shipper's order notify" bore on its face the printed words, "Attached documents to be surrendered only on payment of draft," defendant bank was required to take notice that authority to surrender the bills of lading before payment of the draft was expressly withheld, notwithstanding prior transactions, in which plaintiff bank had permitted the bills of lading to be delivered prior to the payment of the drafts —Hibernia Bank & Trust Co v Bank of Topeka, C C A La, 288 F 41.

Liability of collecting bank to discounting bank

(1) Bank, which delivered bill of lading without requiring payment of draft, to which it was attached in violation of instructions of the discounting bank, who was the owner of bill of lading, was guilty of conversion of the bill of lading and the goods of which the bill of lading was the symbol —Market State Bank v Farmers' Sav Bank of Meservey, 181 N W. 486, 190 Iowa 1112.

(2) Where seller negotiated sight draft and bill of lading to a bank, and the bank forwarded the sight draft and a delivery order to other bank, and the other bank, on buyer's payment of the freight, turned the delivery order over to the buyer to enable buyer to inspect the goods, without payment by buyer of the sight draft, and the buyer on inspection refused to accept the goods, the second bank was not liable to the first bank on the theory that it was negligent in surrendering delivery order to buyer without payment of sight draft, since the first bank suffered no damages, the buyer not obtaining title to, nor converting, the goods.—First Nat. Bank v Farmers' Sav Bank of Traer, Iowa, 193 N.W 573, 195 Iowa 1260

Damages for wrongful delivery

Where a bank had delivered bill of lading without requiring payment of draft to which the bill of lading was attached contrary to instructions of owner of the bill, the owner's measure of damages in an action for conversion was the market value of the goods at the place to which they had been shipped in excess of the freight charges which would have to be paid before they could be disposed of — Market State Bank v Farmers' Sav. Bank of Meservey, 181 N W. 486, 190 Iowa 1112

Evidence

In an action against defendant bank for the amount of drafts, where defendant delivered bills of lading without payment of drafts, evidence that the agent of the drawer and consignor was not authorized by either the drawer or the payee of the drafts to consent to surrender of the bills of lading without payment of the drafts, is consistent with a finding that defendant bank's act in surrendering the bills of lading was unauthorized and wrongful —Hibernia Bank & Trust Co v. Bank of Topeka, C C.A La., 288 F 41.

88. U S.—Tampico Banking Co, S. A., v. Barber, C C.A.Tex., 3 F.2d 136, certiorari denied 45 S Ct 636, 268 U.S 699, 69 L Ed. 1164.

Amount

(1) Where seller consigning goods sent bill of lading to bank with directions to deliver goods on cash payment and execution of notes, and bank delivered goods without collecting the cash or requiring notes, its liability is not lessened by sum offered by buyer less than amount due. —St Louis Carbonating & Mfg Co. v Lookeba State Bank, 157 P. 1046, 59 Okl. 71.

(2) Where seller sent bill of lading to bank for delivery on payment by buyer, bank's liability on delivery without payment is lessened by amount of valid claim of buyer against seller for damage —St. Louis Carbonating & Mfg. Co v. Lookeba State Bank, supra.

89. La —Northwestern Bottle Co. v. Rosen, 8 La App 284.

90. Okl.—First & Old Detroit Nat. Bank v. Holloman, 208 P. 791, 86 Okl 246.

91. S C.—Davis v W H. Crozier & Co, 117 S E 309, 123 S C 525.

92. Mo —Midland Nat. Bank v. Missouri Pac R Co, 33 S W. 521, 132 Mo 492, 53 Am.S.R. 505.
10 C.J. p 209 note 4.

signed, the person who first gets one of them by a legal title from the owner or the shipper has a right to the consignment.[93] If one of the duplicate bills of lading as representing the goods is transferred to a holder, he can recover them, although the consignor retaining the other bill has ordered the carrier to return the goods;[94] but, of course, if the duplicate is issued without the carrier's authority he will not be bound thereby.[95] If issued with authority, the carrier will be liable to the holder of either, although the shipper who has received them fraudulently transfers both as originals.[96] In case of a variance between the duplicates, that one will be binding which is acted on as representing the contract or the goods.[97]

When a carrier by mistake issues two bills of lading and the consignee has made advances on the duplicate bill, he may recover them from the carrier.[98] Where, however, the shipper induced the carrier's agent to issue a second bill of lading for an interstate shipment, promising to surrender the first, which had already been negotiated to plaintiff, and the shipment was diverted to the point of destination specified in the second bill of lading, which with draft attached was also negotiated to plaintiff, it was held, where plaintiff collected the draft attached to the second bill, that he could recover from the carrier only the damages sustained by reason of the failure to deliver the shipment at the destination mentioned in the first bill of lading; therefore, the amount received from the collection of the draft attached to the second must be deducted.[99]

Substituted bills of lading. So long as the bill of lading representing the goods is in the hands of the person to whom it was originally issued, there can of course be no objection to the substitution of another bill by agreement of the parties; but after it has passed from the person to whom issued into the hands of another, it will work a fraud for the carrier to issue a substituted bill of lading which may be used by the person to whom it is issued in making a pretended sale or pledge of the property for which it stands, and in such a case, although the carrier has honored the second bill of lading, it will be responsible to a bona fide holder of the first bill for the goods.[1] Where the seller for cash delivers bills of lading, receiving the buyer's check, if the check is not paid the seller has title and the right to possession of substituted bills of lading issued to the buyer after he obtained the original bills.[2] The issuance of a second bill of lading without surrender of the original bill has been held void as permitting a discrimination.[3]

A memorandum copy of a bill of lading is not a duplicate bill of lading within a stamp tax statute requiring a stamp to be affixed to duplicate bills of lading.[4]

§ 130. Special Contracts for Transportation

While special contracts between a shipper and a carrier, when valid, will control and determine the rights and liabilities of the parties, they must not be illegal, discriminatory, or violative of the carrier's public duties.

Where there is a special contract between the shipper and the carrier, the terms of such contract, so far as it is valid, will determine the rights and liabilities of the parties,[5] unless fraudulently pro-

93. Mo.—Skilling v. Bollman, 73 Mo. 665, 39 Am.R. 537, affirming 6 Mo. App. 76.
10 C.J. p 209 note 5.

94. Tex.—Missouri Pac. R. Co. v. Heidenheimer, 17 S.W. 608, 82 Tex. 195, 27 Am.S.R. 861.
10 C.J. p 209 note 6.

95. Ohio.—Pomeroy v. Will, 5 Ohio Dec. (Reprint) 34, 2 Am.L.Rec. 1.

96. Kan.—Wichita Sav. Bank v. Atchison, etc., R. Co., 20 Kan. 519.

97. U.S.—Costello v. Seven Hundred and Thirty-Four Thousand and Seven Hundred Laths, D.C.N.Y., 44 F. 105.
10 C.J. p 209 note 9.

98. S.C.—Gleason v. Bamberg, E. & W. Ry. Co., 117 S.E. 188, 124 S.C. 88.

99. Mo.—Pioneer Trust Co. v. Missouri Pac. R. Co., 224 S.W. 106, 204 Mo.App. 289.

1. U.S.—The Protection, Wash., 102 F. 516, 42 C.C.A. 489.
10 C.J. p 209 note 10.

2. Mo.—Lewis v. James McMahon & Co., 271 S.W. 779, 307 Mo. 552.

3. Mo.—Pioneer Trust Co. v. Nashville, C. & St. L. R. Co., 224 S.W. 109, 204 Mo.App. 328.

Issuance prohibited by rule of carrier

(1) Where the rules of a carrier providing for diversion of shipment required the original bill of lading to be surrendered before a new one could be issued, a bill of lading, issued without surrender of the original, is void, even though issued with the authority of the carrier, for a contrary holding would permit a discrimination in violation of the Interstate Commerce Act, U.S.Comp.St. § 8597, and hence such a bill of lading is of no force even in the hands of a bona fide holder, where issued prior to the Pomerene Bill of Lading Act, U.S.Comp.St. §§ 8604a–8604w, making such bills negotiable.—Pioneer Trust Co. v. Nashville, C. & St. L. R. Co., 224 S.W. 109, 204 Mo.App. 328.

(2) Where a second bill of lading issued for an interstate shipment without surrender of the original was void because issued contrary to the rules of the carrier, the carrier cannot be held liable thereon, even by an innocent purchaser, on theory of estoppel, for that would tend to permit discrimination.—Pioneer Trust Co. v. Nashville, supra.

4. U.S.—Wright v. Michigan Cent. R. Co., Mich., 130 F. 843, 65 C.C.A. 327.

5. Ill.—See McCarthy v. Chicago & N.W. Ry. Co., 198 Ill.App. 405.
N.Y.—Baum v. Long Island R. Co., 108 N.Y.S. 1113, 58 Misc. 34.
10 C.J. p 209 note 16.

As against principles applicable, in absence of agreement

Where there is an express contract between the shipper and the carrier, the terms thereof control since an express agreement will prevail

cured by the carrier.[6]

Limitations on right to make special contracts. A carrier cannot enter into a contract which will disable it from performing its duties to the public[7] or in any way interfere with its statutory and common-law duties toward shippers.[8]

However, subject to this rule, special contracts which are not unjust, unreasonable, or discriminatory are not per se void.[9] On the other hand, any special contract resulting in discrimination or a violation of statute is, as shown in §§ 392–397, void. Under the Carmack amendment to the Interstate Commerce Act, requiring the carrier in interstate commerce to issue a bill of lading the terms of which are fixed by the interstate commerce commission, a carrier has no authority to enter into any other than the uniform contract,[10] although the Cummins amendment of the Carmack amendment, not being retroactive, does not affect stipulations in a contract where the shipment and the cause of action occurred before its enactment.[11]

Contracts must not be in derogation of the regulatory laws applicable to carriers,[12] and must be made according to the law and the rate schedules filed with the interstate commerce commission whenever these apply.[13] Contracts of carriers of freight for services not provided for in their tariffs cannot be enforced.[14]

Consideration and assent. Special contracts must be supported by a consideration.[15]

The fact that the shipper executed the contract hurriedly or without due care,[16] or that he did not read the contract if it is in writing, or that he did not fully comprehend its terms, is immaterial; he is none the less bound by its terms.[17]

Form and contents. Except as otherwise required by statute the contract may be in parol; a bill of lading is not the only evidence of the terms of a special contract.[18] However, as shown in § 131, the

against a general principle applicable in the absence of such an agreement.—Gruenwald v. American Ry. Express Co., 217 N.Y.S. 767, 128 Misc. 206.

Goods carrier not bound to accept

A carrier may by special contract accept for carriage certain goods which it is not bound to accept pursuant to its duty as a common carrier.—Alabama Great Southern R. Co. v. Herring, 174 So. 502, 234 Ala. 238.

Stopping and holding liquor shipment

Owner of beer being transported through Georgia, where it was then contraband, by common carrier in interstate commerce, could not have shipment stopped and held in Georgia until further instructions, or recover for carrier's failure to keep its agreement so to stop and hold shipment, since stoppage and holding of shipment in Georgia would take away interstate character of shipment and agreement was illegal—Davis v. Southern Ry. Co., 185 S.E. 606, 53 Ga.App. 286.

6. Tex.—Galveston, etc., R. Co. v. Sparks, Civ.App., 162 S.W. 943.
10 C.J. p 209 note 17.

7. U.S.—Burlington, etc., R. Co. v. Northwestern Fuel Co., C.C.Minn., 31 F. 652
10 C.J. p 211 note 30.

8. Wis.—Wirch v. Chicago, M. & St. P. Ry. Co., 222 N.W. 232, 197 Wis. 316.

9. Ohio.—Baltimore & O. R. Co. v. Armstrong, Lee & Co., 124 N.E. 186, 99 Ohio St. 163, 5 A.L.R. 1117
S.D.—Tribby v. Chicago & N. W. Ry. Co., 252 N.W. 20, 62 S.D. 154.

10. N.C.—Bryan v. Louisville & N. R. Co., 93 S.E. 750, 174 N.C. 177.

In the shipment of live stock the uniform live stock contract set forth in the tariffs and classifications filed with the interstate commerce commission and posted and published as required by law takes the place of the customary uniform bill of lading.—H. Ginsberg & Sons v. Wabash R. Co., 189 N.W. 1018, 219 Mich. 665, 28 A.L.R. 518, affirmed Ginsberg v. Wabash R. Co., 193 N.W. 286, 222 Mich. 560.

11. N.C.—Bryan v. Louisville & N. R. Co., 93 S.E. 750, 174 N.C. 177.

12. Tenn.—Louisville & Nashville R. R. Co. v. Hardiman, 5 Tenn.App. 289.

13. Mo.—Hunter v. American Ry. Express Co., App., 4 S.W.2d 847.

14. Md.—Pennsylvania R. Co. v. S. M. Hamilton Coal Co., 125 A. 405, 144 Md. 556, 35 A.L.R. 478.

15. Va.—Chesapeake & O. Ry. Co. v. Westinghouse, Church, Kerr & Co., 123 S.E. 352, 138 Va. 647, certiorari granted 45 S.Ct. 98, 266 U.S. 598, 69 L.Ed. 460, and affirmed 46 S.Ct. 220, 270 U.S. 260, 70 L.Ed. 576.

Agreements held supported by consideration

(1) Railway's general reduction of rates is a legal detriment, constituting "valuable consideration" for shipper's promise to locate its terminal on railway, and make all shipments of sand and stone over railway.—East Carolina Ry. v. Ziegler Bros., 157 S.E. 57, 200 N.C. 396.

(2) The transportation of the shipper and his live stock constitutes a valuable consideration for a written contract signed by the shipper, rendering it binding on him.—Turner v. Henderson, Tex.Civ.App., 183 S.W. 51.

Agreements held without consideration

(1) Agreement of contractor constructing embarkation facilities for government to pay rental to a railroad for use of engine to move and spot cars is without consideration, and ineffective, where services rendered were those already fully paid for in line haul rate.—Chesapeake & O. Ry. Co. v. Westinghouse, Church, Kerr & Co., 123 S.E. 352, 138 Va. 647, certiorari granted 45 S.Ct. 98, 266 U.S. 598, 69 L.Ed. 460, and affirmed 46 S.Ct. 220, 270 U.S. 260, 70 L.Ed. 576

(2) Where shipment was subject to delay on account of bridge of connecting carrier being out, contract that shipment was subject to delay on account of bridge, not agreed to before shipment was accepted for transportation, was without consideration, and plaintiff's subsequent ratification could not give it vitality.—Bowles v. Quincy, O. & K. C. R. Co., Mo.App., 187 S.W. 131.

16. Okl.—Chicago, etc., R. Co. v. Craig, 157 P. 87, 59 Okl. 18

17. Mo.—Spelman v. Delano, 172 S.W. 1163, 187 Mo.App. 119.
10 C.J. p 209 note 20.

18. U.S.—John Vittuci Co. v. Canadian Pac. Ry. Co., D.C.Wash., 238 F. 1005.
10 C.J. p 209 note 21.

Shipment of live stock

(1) Under the federal law a contract covering an interstate shipment of live stock must be in writing—Bradford v. Hines, 227 S.W. 839, 206 Mo.App. 582—Underwood v. Hines, Mo.App., 222 S.W. 1037—Thee v.

execution of a written contract may supersede a prior oral agreement. A contract for shipment is not necessarily defective because unfilled and incomplete in certain places,[19] and, when signed by the shipper while containing certain blanks, is binding on him, although the blanks are thereafter filled by the carrier's agent.[20] Where, as required by a carrier's published tariffs, notations were made on the contracts of shipment and the waybills as to the places at which live stock was to be fed and watered, such notations became binding on both parties as though incorporated in the contracts as formal stipulations.[21]

Construction. A special contract being phrased in its own language is to be construed strictly against the carrier.[22] Any ambiguity in the terms of a contract prepared by the carrier must be resolved against it,[23] particularly where to do otherwise would be to deprive the shipper of its common-law measure of damages.[24] Two contracts issued on the same day on the one shipment are to be construed together.[25]

Contract personal to shipper. Special agreements by the shipper are personal to him, and third persons have no right to avail themselves of the terms thereof.[26]

§ 131. Modification, Merger, and Rescission of Contract

Written contracts supersede prior oral agreements unless executed. Contracts may be modified by the proper parties, if done in the proper manner.

If a written contract has been entered into, the general rule is well settled that it is conclusive as to the matters covered thereby, and it is not open to either of the parties to say that there was a prior oral agreement inconsistent with the provisions of the writing.[27] However, it is equally well settled that the bill of lading or other written contract will not supersede a prior oral agreement, if the written contract is not entered into until the goods have already been accepted for transportation under the parol agreement,[28] and a bill of lading excluding on its face the idea that it began to operate before a car was furnished as agreed does not affect the rights of the parties accruing prior to the bill,[29] even though providing that it contains the entire bargain between the shipper and the carrier.[30] Thus a prior executory and yet unbroken parol agreement is merged in a subsequent bill of lading containing the contract agreed on;[31] but a parol contract which has already been broken by the carrier will not be merged in a subsequent written contract with reference to the shipment of the same property, so as to defeat a recovery for breach of the parol contract,[32] unless the shipper agrees for a sufficient consideration to waive it,[33] such an agreement if based on a sufficient consideration will be valid, and the written contract will supersede the prior oral contract;[34] but if the bill of lading is one forbidden by law it is void and the status of the par-

Wabash Ry. Co., Mo.App., 217 S.W. 566

(2) However, it has been held that an interstate shipment of live stock may be made on an oral contract—Kansas City, M. & O. Ry. Co. v. Hansard, Tex.Civ.App., 184 S.W. 329

19. Mass.—Fletcher v. New York Cent. & H. R. R. Co., 118 N.E. 294, 229 Mass. 258.

20. Tex.—Hines v. Thornton, Civ. App., 251 S.W. 523.

21. Mont.—Cook v. Northern Pac. Ry. Co., 203 P. 512, 61 Mont. 573.

22. Me.—Ross v. Maine Cent. R. Co., 96 A. 223, 114 Me. 287.

23. N.Y.—Chenango Textile Corporation v. Willock, 288 N.Y.S. 270, 247 App. Div. 638.

Live stock contracts

(1) All live stock contracts must be construed liberally in favor of the shipper against the carrier—Thee v. Wabash Ry. Co., 233 S.W. 959, 208 Mo.App. 200.

(2) A stock shipping contract prepared by a carrier will not be enlarged beyond its strict terms—Howell v. Hines, Mo.App., 236 S.W. 886.

"Tariffs, classifications, and rules" as used in special contract between railroad and show company mean those published and filed according to law with state public service commission and interstate commerce commission—Bernardi Greater Shows v. Boston & M. R. R., 165 A. 124, 86 N.H. 146.

24. N.Y.—Chenango Textile Corporation v. Willock, 288 N.Y.S. 270, 247 App. Div. 638.

25. Tex.—Panhandle & S. F. Ry. Co. v. Guthrie, Civ.App., 248 S.W. 106

26. Ga.—East Tennessee, etc., R. Co. v. Montgomery, 44 Ga. 278
10 C.J. p. 211 note 29.

27. Ark.—Prescott & N. W. R. Co. v. Davis, 191 S.W. 210, 126 Ark. 366
Tex.—Fort Worth & R. G. Ry. Co. v. Burns, Civ.App., 242 S.W. 295—Atchison, T. & S. F. Ry. Co. v. Smyth, Civ.App., 189 S.W. 70.
Va.—Old Dominion S. S. Co. v. Blakeman, 105 S.E. 752, 129 Va. 206
10 C.J. p. 210 note 22.

Prior negotiations superseded

All prior negotiations and agreements are superseded by the formal written agreement, and by it and it alone, in the absence of mistake or fraud, the duties and liabilities of the parties must be regulated—Long v. New York Cent. R. Co., 50 N.Y. 76.

28. Ind.—Chesapeake & O. Ry. Co. of Indiana v. Jordan, 114 N.E. 461, 63 Ind.App. 365.
Wash.—John Vittucci Co. v. Canadian Pac. Ry. Co., 171 P. 981, 102 Wash. 686.
10 C.J. p. 191 note 32, p. 199 note 90, p. 210 note 24.

29. Tenn.—Southern Ry. Co. v. Shipley, 245 S.W. 524, 147 Tenn. 40

30. Tenn.—Southern Ry. Co. v. Shipley, supra.

31. Mo.—Meriwether v. Quincy, etc., R. Co., 107 S.W. 434, 128 Mo.App. 647
10 C.J. p. 210 note 25.

32. Tex.—Gulf, etc., R. Co. v. Batte, Civ.App., 107 S.W. 632.
10 C.J. p. 210 note 26.

33. Ark.—St. Louis, etc., R. Co. v. Pearce, 101 S.W. 760, 82 Ark. 353, 118 Am.S.R. 75, 12 Ann.Cas. 125
10 C.J. p. 210 note 27.

34. Mo.—Helm v. Missouri Pac. R. Co., 72 S.W. 148, 98 Mo.App. 419.

ties is the same as if the agreement had never been entered into.[35]

Where a definite contract of shipment has been made between the consignee or the owner and the carrier, this binds both parties as between themselves, and it cannot be varied by any subsequent arrangement or agreement made with the carrier by the consignor or any other person acting in the shipment, unless, of course, such person has authority from the consignee to alter the original contract.[36] To hold otherwise would be to say that one party to a contract might relieve himself from its obligations without the consent or the knowledge of the other merely by making an inconsistent agreement with a third party.[37] A verbal contract to transport in time for market, allegedly supplementing the bill of lading, is not binding where the bill of lading requires merely reasonable dispatch in transportation.[38] Parties to a contract of transportation may in a proper case modify the original agreement by providing for diversion of the goods to a new destination while in transit.[39] Where the shipping contract is completed, a subsequent attempted modification by reconsignment must be made pursuant to the tariff regulations.[40]

Alteration after issue. A bill of lading having been made a part of the shipping agreement, it cannot be modified by the shipper except by written agreement.[41] A statutory provision that any alteration of a bill of lading, after its issue by the carrier, without authority from the carrier either in writing or noted on the bill, shall be void does not apply to a parol agreement between the consignor and the parties to be notified whereby they are made agents of the consignor to receive the goods without producing the bill of lading.[42] A promise by the carrier, after goods have arrived at their destination, to spot the car on a certain track for delivery does not add to or modify the bill of lading.[43] A provision in the bill against alteration does not apply to indorsement for transfer.[44]

§ 132. Excuses for Nonperformance

A carrier may by his contract lose the right to excuses for nonperformance of his duties which might otherwise be available to him.

The common law allows the carrier certain excuses for delay in transportation, infra §§ 197–207, or for failure to deliver, supra § 75 et seq, and the like, but by special agreement the carrier may obligate itself specifically with reference to the time of delivery, the furnishing of cars, and like matters, and if it does so it waives its common-law defenses and is bound as any other contracting party. In such case impossibility of performance will not be an excuse for a failure to carry out the terms of its agreement.[45] As otherwise expressed, "when a party agrees to perform a certain stipulation by a given date, without exception or qualification, he must answer in damages for failure to perform, notwithstanding performance was out of his power;"[46] and the liability being a contractual one, the question of negligence on the part of the carrier is immaterial.[47] Where a private carrier agreed to transport goods safely, the fact that the goods were damaged through the fault of a third person is no excuse.[48]

§ 133. Particular Contracts Considered

a To transport to point beyond line
b. Special contracts as to rates

35. Va.—Old Dominion S. S. Co. v. Blakeman, 105 S.E. 752, 129 Va. 206.

36. Mass.—Perkins v. American Express Co., 85 N.E. 895, 199 Mass. 561.
10 C.J. p 211 note 43.

37. Mass.—Perkins v. American Express Co., 85 N.E. 895, 199 Mass. 561.

38. Wis.—Stephens v. Chicago & N. W. Ry. Co., 227 N.W. 875, 200 Wis. 181.

39. N.Y.—Terranova v. Southern Pac. Co., 200 N.Y.S. 309, 206 App. Div. 64.

40. N.Y.—Porter v. Lehigh Valley R. Co., 184 N.Y.S. 870, 194 App.Div. 139.

Waiver of schedules

Railroad schedules, providing that a reconsignment or diversion en route could only be made if requested in writing, cannot be waived.—Porter v. Lehigh Valley R. Co., 184 N.Y.S. 870, 194 App.Div. 139.

41. U.S.—Callister v. U. S. Shipping Board Merchant Fleet Corporation, D.C.N.Y., 21 F.2d 447, affirmed, C.C.A., Callister v. U. S. Shipping Emergency Fleet Corporation, 30 F.2d 1008.

Delivery to shipper

Consignor's order instructing terminal carrier to deliver shipment to purchaser was merely authority to deliver goods to purchaser, when he should become lawful holder of bill of lading, and did not constitute an "alteration" of, or "addition" to, bill of lading required by bill of lading to be indorsed thereon, and signed by initial carrier.—Georgia Southern & F. Ry. Co. v. Tifton Produce Co., 127 S.E. 771, 160 Ga. 213, answers to certified questions conformed to, 128 S.E. 592, 34 Ga.App. 13.

42. Mo.—Kemper Mill & Elevator Co. v. Hines, 239 S.W. 803, 293 Mo. 88.

43. Minn.—Allegrezza v. Great Northern Ry. Co., 221 N.W. 428, 175 Minn. 374.

44. Neb.—J. F. Twamley, Son & Co. v. Chicago Great Western R. Co., 196 N.W. 319, 111 Neb. 311.

45. U.S.—Chicago, etc., R. Co. v. Frye-Bruhn Co., Mo., 184 F. 15, 106 C.C.A. 217.
10 C.J. p 211 note 39.

46. Mo.—Meriwether v. Quincy, etc., R. Co., 107 S.W. 434, 128 Mo.App. 647, 664.

47. Tex.—Texas R. Co. v. Moore, Civ.App., 119 S.W. 697.
10 C.J. p 211 note 41.

48. W.Va.—Max Biederman, Inc. v. Henderson, 176 S.E. 433, 115 W.Va. 374.

c. Contracts to furnish cars
d. Other contracts

a. To Transport to Point beyond Line

As shown in § 404 infra, the weight of authority is to the effect that the liability of the first carrier, in the absence of any contract, usage, or statute to the contrary, terminates if it transports the goods to the end of its line for carriage and delivers them to a connecting carrier, to be taken to their destination. Nevertheless, as shown § 405 infra, the carrier may contract for delivery of goods accepted for shipment to a point beyond its own line, and will be liable for loss or injury to the goods occurring after the goods passed into the hands of a connecting carrier. Under the Interstate Commerce Act an initial carrier is liable for any loss, damage, or injury to property, transported in interstate commerce, caused by a connecting carrier, as is discussed in § 406 infra.

b. Special Contracts as to Rates

Except as prohibited by statute, special contracts as to rates will bind the parties.

Questions of discrimination between shippers through special contracts as to rates and statutory prohibitions thereof are considered in §§ 375–385 infra. When contracts for shipment at a specified rate are permitted, and are not otherwise invalid, a contract by which the shipper is given the option to ship at a specified rate, either without limit, or up to a certain quantity, or not less than a certain quantity, binds the carrier if the shipper avails himself of this option.[49] The shipper may bind himself in consideration of a fixed rate to ship via a particular carrier all or a specified proportion of the goods which the shipper shall ship during a given period from a particular place.[50]

Consideration being necessary to support a contract, if the offer is at a certain rate, with the understanding that the shipper shall stipulate in acceptance of the offer the amount of goods to be transported, the mere shipment in response to the offer does not give rise to a contract, as there is no consideration for giving the shipper an option to ship any quantity he pleases.[51] An agreement by a railroad to guarantee a certain rate for an ocean shipment is without consideration where at the time no contract to ship the goods over the railroad had been entered into.[52] Where a written contract to transport an unspecified amount of ore at a specified rate contained no time limit, and hence could be abrogated on reasonable notice, a new agreement to transport at the same rate was sufficient consideration for a new oral contract guaranteeing a minimum tonnage for shipment.[53]

c. Contracts to Furnish Cars

(1) In general
(2) Requisites and sufficiency of contract and sufficiency of performance
(3) Excuses for nonperformance

(1) In General

Although such agreements are unenforceable where discriminatory or violative of statutory provisions, in other cases a carrier may specially agree to furnish cars at a certain time and place, and be liable for breach of such an agreement.

Contracts to furnish cars for interstate shipments, if violative of the published tariff regulations of the carrier, are, under the Interstate Commerce Act, not enforceable.[54] As to intra-state shipments, special contracts for furnishing cars have been held valid and enforceable[55] in the ab-

49. Ill.—Toledo, etc., R. Co. v. Roberts, 71 Ill. 540
Ind.—Cleveland, etc., R. Co. v. Closser, 26 N.E. 159, 126 Ind. 348, 22 Am S R. 593, 9 L.R.A. 754
10 C J. p 212 note 48.

Waiver of contract
Where a rate was quoted, but before shipment was made, the shipper was notified that an error had been made and that the rate was repudiated, and he then accepted a bill of lading specifying the higher rate, he thereby waived any right under the original offer.—Wabash R. Co. v. Wright, 75 Ill App. 243.

50. Cal.—Perkins v. Ophir Silver Min. Co., 35 Cal. 11.

51. N.Y.—Chicago, etc., R. Co. v. Dane, 43 N.Y. 240.

52. U.S.—Gosho Co. v. Southern Pac. Co., C C.A Tex., 285 F. 227, certiorari denied 43 S.Ct. 520, 262 U.S. 742, 67 L.Ed 1210

Whether such contract would work discrimination was held not necessary to be determined.—Gosho Co v. Southern Pac. Co, C.C A Tex, 285 F. 227, certiorari denied 43 S.Ct. 520, 262 U.S. 742, 67 L Ed. 1210

53. Ariz.—Dover Copper Mining Co. v. Doenges, 12 P.2d 288, 40 Ariz 349

54. U S.—Consumers' Mut. Oil Co. v. Schaff, C C A.Ill., 59 F.2d 730
Mich.—Falmouth Co-op. Marketing Ass'n v Pennsylvania R Co, 205 N W 477, 232 Mich 538
Minn.—Richey & Gilbert Co. v. Northern Pac. Ry. Co., 204 N W. 27, 163 Minn 349.
Mo.—Williams v. St. Louis-San Francisco Ry Co., 274 S.W. 935, 217 Mo 662.—Williams v. St Louis-San Francisco Ry. Co., 274 S W. 935, 217 Mo App 662.
N Y.—Saitta & Jones v Pennsylvania R. Co, 179 N Y.S. 471, 109 Misc. 604
S.C.—Strock v. Southern Ry.-Carolina Division, 140 S E. 470, 142 S. C 207
Tenn.—Tennessee Egg Co v. Nashville, C. & St L. Ry., 266 S.W. 106, 150 Tenn. 540.
Discrimination as to furnishing cars see infra § 366.
Duty to furnish cars generally see supra §§ 35–39

55. Mo.—German v. Chicago, M & St. P. Ry. Co., App., 276 S W. 1041.
S.C.—Strock v. Southern Ry.-Caro-

sence of any prohibitory statute,[56] and it is assumed that the carrier can furnish the cars without discrimination.[57]

When special contracts for furnishing cars are not invalid or prohibited, the carrier may make a binding contract to furnish cars at specified times and places, and will be liable for all damages to the shipper caused by failure or delay in carrying out such contract,[58] and the contract may be by parol as well as in writing,[59] and for interstate as well as intra-state shipments.[60] The contract must be express, for otherwise the proposing shipper has no action, save on a breach of the carrier's general common-law duty to furnish cars within a reasonable time.[61]

One railroad may agree with another railroad for the latter to furnish cars for the use of the former, and that it has done so does not show negligence in failing to furnish cars to a shipper.[62]

(2) Requisites and Sufficiency of Contract and Sufficiency of Performance

The rules of contracts generally determine the requisites and sufficiency of contracts to furnish cars. Sufficiency of compliance depends on the facts of the particular case.

The rules applicable to contracts generally, discussed in the C.J.S. title Contracts §§ 74–131, also 13 C.J. pp 311–369, making consideration and mutuality essential to their validity, apply to contracts of the character under consideration.[63] Whether or not a contract to furnish cars at a particular time and place exists,[64] and whether or not there has

lina Division, 140 S.E. 470, 142 S C 207.

Corpus Juris text has been quoted at length in support of the ruling that contracts to furnish cars at a specified date for intra-state shipments are valid—Strock v. Southern Ry.-Carolina Division, 140 S E 470, 142 S C 207

56. S C—Strock v. Southern Ry.-Carolina Division, supra

57. Tex—Weatherford, M W. & N. W. Ry. Co. v. King, Civ.App, 280 S W 235
Discriminatory contracts see infra § 366.

58. Mo—Kissell v. Pittsburgh, Ft W. & C. Ry Co, 188 S W. 1118, 194 Mo App. 346
Tenn—Southern Ry. Co. v. Shipley, 245 S.W. 524, 147 Tenn. 40.
10 C.J. p 212 note 51.

General reference to Corpus Juris, 10 C.J. §§ 290–294, has been made in American Ry. Express Co. v. Peninsula Produce Exch, Md., 130 A. 346

On line of connecting carrier

A railroad may bind itself by contract to furnish cars at a place not on its own line, but that of a connecting carrier—Kissell v. Pittsburgh, Ft. W & C. Ry. Co, 188 S W 1118, 194 Mo App 346—10 C J p 212 note 51 [a].

Furnishing cars on private sidetrack

A provision in a contract under which a railroad company built a sidetrack for the use of a large shipper at expense of the shipper, authorizing the company to discontinue its use and remove the track if in its opinion it "is not justified in continuing said side track because it will interfere with the proper operation of said railroad," did not authorize the company to arbitrarily refuse to furnish cars for use of the shipper on said sidetrack, without submitting to a judicial determination of the reasonableness of such proposed action.—Hines v. Atlantic Refining Co, C C A W Va, 265 F 839—Hines v. Henaghan, C C A W Va, 265 F 831.

59. Mont—Cornwell v. Davis, 213 P 218, 66 Mont 100
Okl.—St Louis-San Francisco Rv Co v. Hensley, 241 P. 135, 113 Okl 232
Tex—Davis v. Gee, Civ App, 238 S W. 735.
10 C J. p 212 note 52

Corpus Juris text has been cited in Cornwell v. Davis, 213 P 218, 66 Mont. 100.

Where written contract required

Where shippers of live stock orally contracted for cars for shipment, knowing that a written contract would be required, and with the purpose of executing such contract, and did so, they are bound by its terms—Atchison, T. & S. F. Ry Co v. Smyth, Tex Civ App, 189 S W 70

60. Tex—Missouri, etc, R Co v. Golson, Civ.App, 133 S W. 456
10 C J. p 212 note 53.

61. Ala.—Central of Georgia R. Co. v. Sagima Lumber Co., 54 So 205, 170 Ala 627, Ann Cas 1912D 965
10 C J. p 213 note 56

62. Tex—Hair v Wichita Valley Ry Co, Civ App, 274 S.W. 247

63. **Mutuality and consideration**

(1) The carrier's promise to furnish cars and the shipper's agreement to route shipments by the carrier's lines are sufficient mutual consideration to support the contract, even if the cars were to be furnished at a point fifty miles from the carrier's lines—Kissell v. Pittsburgh, Ft. W & C Ry Co., 188 S.W. 1118, 194 Mo.App 346.

(2) Where the carrier agreed to furnish cars to the shipper, at his place of business, fifty miles from the carrier's nearest line point, no guaranty of delivery at such place was necessary on which to base liability for failure to deliver at that place—Kissell v Pittsburgh, Ft. W. & C Ry Co, supra

(3) It was held that a request by a shipper that a carrier furnish cars at a specified time for the shipment of sheep carries with it an understanding on their part to use the cars, and furnishes a sufficient consideration for the carrier's promise to furnish them at such time—Pope v. Wisconsin Cent R. Co., 127 N.W. 436, 112 Minn 112.
10 C J. p 213 note 58 [a].

64. **Facts held to show contract**
Okl—St Louis, etc, R. Co v Walker, 133 P. 185, 37 Okl. 784, affirmed 138 P. 144, 41 Okl 382.
10 C J p 213 note 59 [a].

Facts insufficient to show contract

(1) Shipper's letter written before watermelon crop was planted, and railroad's reply promising "necessary arrangements," was held insufficient to constitute valid contract for increasing shipping facilities—McLemore v. Atlantic Coast Line R. Co, 154 S E. 390, 199 N C. 264.

(2) It was no acceptance of a railroad's offer to ship live stock from a designated town, so that it would not be under duty by federal statute to unload and water them in transit, to ship the stock from another town on a through bill of lading, containing no stipulation against unloading, issued by another carrier as initial carrier—Nashville, C. & St. L. Ry. v. Farrell & Braley, 70 So. 986, 14 Ala App. 380

(3) That defendant express company agreed with plaintiff shipper to have cars ready in time for shipment to go out, so as to connect with a fast passenger train, would not show a special contract for through and direct transportation of the cattle, where such train was not sche-

been a sufficient compliance therewith,[65] must be determined by the facts of each particular case and by the application of the ordinary rules governing the interpretation of contracts.

(3) Excuses for Nonperformance

In general the carrier may not be excused from the performance of a special contract to furnish cars except by the waiver, default, or misconduct of the shipper.

Where a carrier enters into a special contract to furnish cars at specified times and places, its liability is absolute and impossibility of performance furnishes no excuse;[66] and this is so whether the other party knew of it or not.[67] Matters not excusing the performance of a special contract to furnish cars, but tending only to excuse performance of the general duties imposed by law, constitute no defense to a breach of the special contract.[68] Irregularity in an application for a car, when waived,[69] accident,[70] or delay resulting from inevitable necessity, does not excuse nonperformance,[71] nor does inability to furnish cars because of unusually heavy traffic,[72] where the shipper is not notified.[73] In an action for breach of a carrier's contract to furnish cars for the shipment of stock, the fact that the shipper did not own or have the stock when the contract was made could not affect the question of the carrier's liability for failure to provide cars.[74] So, it is no defense to an action for breach of a contract by a carrier to furnish cars that plaintiff intended to dispose of the goods at their destination on Sunday.[75] It is also no excuse for nonperformance that the cars which the carrier agreed to furnish belonged to another company which failed to furnish them to the carrier,[76] or that it used reasonable efforts to procure foreign cars;[77] and the fact that the shipment is to be carried over connecting lines will not exonerate the carrier from the consequences of its breach of contract at the point of shipment;[78] nor can the carrier excuse nonperformance by showing that its line of road is under the military control of the federal government.[79] An act of God occurring after breach of the contract does not affect the carrier's liability.[80] As against the obligation to furnish cars at a particular time fixed by contract, it is immaterial that the time allowed for furnishing the cars is not reasonable for that purpose;[81] but the damages for failure to furnish sufficient cars to move a shipper's goods are not recoverable where the goods were never offered or delivered at the place designated by the shipping contract.[82]

duled to stop at a way station, destination of shipment.—Adams Express Co v Burr Oak Jersey Farm, 206 S W 173, 182 Ky. 116.

(4) That a railroad had for a long time always delivered shipments of cattle before a certain hour at a certain market destination, and that it knew that such shipments delivered later could not be sold on the day of receipt, does not prove an agreement to deliver such shipments at such time.—Wood v. Boston & M R. R., 98 A. 480, 78 N H 207.
10 C.J p 213 note 59 [b].

Car furnished by other road

There was no actual or implied contractual relationship between a railroad and one to whom another railroad furnished a car, from which a promise to pay could be implied, where there was nothing to indicate that the car was asked for or accepted from plaintiff, or that defendant was in fact dealing with plaintiff through its agent.—Seaboard Air Line Ry Co. v. Henderson Lumber Co., 111 S.E. 220, 28 Ga App. 391.

65. Mo.—McGrew v. Missouri Pac R Co., 19 S W 53, 109 Mo. 582.
10 C J p 213 note 60

66. Ark.—St. Louis, etc, R Co. v. Tilby, 174 S.W 1167, 117 Ark. 163
10 C J. p 214 note 61

67. Del.—Williams v. Armour Car Lines, 79 A. 919, 23 Del. 275

68. Ga.—Chattanooga Southern R Co. v Thompson, 65 S E. 285, 133 Ga 127
10 C J p 214 note 63.

69. Tex.—Ft Worth & D C Ry. Co v. Strickland, Civ App., 208 S W 410.

70. Tex.—Texas, etc., R Co v. Davis, 54 S W 381, 93 Tex. 378, reversed on other grounds 55 S.W 562, 93 Tex. 378
10 C J p 214 note 64.

71. Mo.—German v. Chicago, M. & St. P. Ry Co, 276 S.W. 1041.
10 C J. p 214 note 65.

72. Iowa.—Vander Zyl v. Chicago, R. I. & P. Ry. Co., 189 N W. 953, 195 Iowa 901, error dismissed Chicago, R. I. & P. Ry. Co. v Vander Zyl, 45 S Ct. 10, 266 U S. 636, 69 L Ed 481
Tex.—Weatherford, M. W. & N. W. Ry. Co v. King, Civ App., 280 S W. 235—Texas Midland R R v. O'Kelley, Civ App, 203 S W 152, dismissed for want of jurisdiction—Texas & N O. R Co. v. Weems, Civ.App., 184 S W. 1103, affirmed Com App, 222 S W 972.
10 C J. p 214 note 66.

Time for furnishing

Notwithstanding a shortage of cars, where a carrier expressly agreed to supply cars on designated dates in the future, it must be assumed that the time was reasonably sufficient, or at least was satisfactory to the parties, and the fact, if true, that the time was not a reasonable time to obtain cars is no defense to action for breach of the contract.—Vander Zyl v. Chicago, R I. & P. Ry. Co., 189 N W. 953, 195 Iowa 901, error dismissed Chicago, R I & P. Ry Co. v Vander Zyl, 45 S Ct 10, 266 U S. 636, 69 L Ed 481.

73. Tex.—Weatherford, M W. & N W Ry. Co. v. King, Civ.App, 280 S W 235.

74. Ind.—Pittsburgh, etc, R. Co v Racer, 31 N E. 853, 5 Ind.App. 209

75. N.C.—Waters v. Richmond, etc, R Co., 14 S E. 802, 110 N.C 338, 16 L.R A 834.
10 C.J. p 214 note 68.

76. S C.—Mathis v. Southern R. Co, 43 S.E. 684, 65 S.C. 271, 61 L R.A. 824.
10 C.J p 214 note 69.

77. N.C.—Outland v. Seaboard Air Line R. Co, 46 S E. 735, 134 N C. 350.

78. Tex.—Texas, etc., R. Co. v Scott, Civ App, 86 S W. 1065.

79. Ill.—Illinois Cent. R. Co v Cobb, 64 Ill 128—Illinois Cent. R. Co. v McClellan, 54 Ill. 58, 5 Am. R. 83

80. Tex.—Gulf, etc., R. Co v. McCorquodale, 9 S.W. 80, 71 Tex. 41.

81. Tex.—Galveston, etc, R Co. v. Thompson, Civ App, 44 S W. 8

82. La.—Landry v. J M Burguieres Co., 70 So. 875, 138 La. 902.

The carrier may be excused where failure to furnish cars as agreed was due to the shipper's fault.[83]

d. Other Contracts

Except as prohibited by statute a shipper and carrier may specially contract as to the time and manner of delivery and other particular matters arising out of their relationship.

Except as prohibited by statute special agreements may be made as to time, place, and manner of delivery,[84] for delivery beyond the point of termination of the carrier's lines,[85] for unloading goods,[86] for shipment by a particular train,[87] for refrigeration of cars,[88] for collection of freight charges from the consignee,[89] for storage,[90] for transportation of corpse and relatives,[91] and for compensation to the shipper in the event of loss or damage to the goods by the carrier.[92] A railroad may validly agree to hire an engine and crew to a manufacturer.[93]

A railroad, to which a car owned by a shipper was delivered under a bill of lading entitling the owner of the car to be paid for the use of it by the railroad on a mileage basis, is a bailee for hire, entitled to use the car under the contract of bailment only in accordance with the bill of lading, and is liable to the owner for breach of contract if the car is otherwise used.[94]

Contract of a carrier with a warehouse, giving it the right to load cars at its plant and procure bills of lading on the faith of its representations as to the quantity of goods loaded, makes the warehouse an agent of the shipper and not the carrier.[95]

A pipe line company, agreeing with a buyer to receive, transport, and load in the buyer's tank cars a certain quantity of oil for a pipeage charge to be paid by the buyer, is a carrier for, and agent of, the buyer, and not of the seller; and if the buyer breaches his contract with the seller by refusing to pay, the seller is released from his obligation to deliver any more oil to the pipe line and is not liable to the pipe line company for so refusing.[96]

When a logging company abandons its attempt to force a grade crossing, and agrees to do so as long as the railroad carries its logs at a certain rate, there is no want of mutuality in the contract.[97]

§ 134. Actions for Breach of Contract

The general rules of civil actions govern actions on contracts between shippers and carriers.

An action may be maintained against the carrier for breach of a special contract,[98] but for a shipper to maintain such an action there must have been privity of contract between the carrier and the shipper.[99] Where orders for cars for the shipment of goods were given by plaintiff and were accepted by the railroad company, there was a contractual relation between the parties, entitling plaintiff to maintain an action for damages for failure to furnish cars according to the orders, even though another was jointly interested with plaintiff in the shipments to be made.[1] A member of a pool has

83. La.—Ducote v. Texas & P. Ry. Co., 1 La.App. 443.

84. Ind.—Pittsburgh, etc., R. Co. v. Hall, 90 N.E. 498, 91 N.E. 743, 46 Ind.App. 219.

Construction of contracts as to time of delivery

A carrier contracting to deliver within specified time does not impliedly agree to deliver within reasonable time, and may not set up delivery within reasonable time as defense in action for violation of contract.—Louisville & N. R. Co. v. Warren County Strawberry Growers' Ass'n, 267 S.W. 551, 206 Ky. 432—10 C.J. p. 215 note 97 [a].

Statements as to time will not constitute an express contract unless made and acted on as such.—International, etc., R. Co. v. Wentworth, 28 S.W. 277, 87 Tex. 311.

85. N.Y.—Burtis v. Buffalo, etc., R. Co., 24 N.Y. 269.

86. N.Y.—New York Cent., etc., R. Co. v. Standard Oil Co., 20 Hun 39, affirmed 87 N.Y. 486.

87. N.Y.—Harrison v. Weir, 69 N.Y.S. 957, 34 Misc. 519, motion denied 73 N.Y.S. 1119, 68 App.Div. 25.

88. Mass.—Emery & Co. v. Boston & M. R. R., 120 N.E. 106, 230 Mass. 463

Excuses for noncompliance

Where a contract of carriage contained an absolute and unconditional stipulation requiring the carrier to re-ice the cars at every icing station, the carrier could not excuse noncompliance therewith because its employees in charge did not consider re-icing necessary.—Missouri, etc., R. Co. v. Texas Packing Co., Tex.Civ.App., 167 S.W. 337.

89. Mich.—King v. Van Slack, 159 N.W. 157, 193 Mich. 105.

90. N.J.—Atlantic Pebble Co. v. Lehigh Valley R. Co., 98 A. 410, 89 N.J.Law 336.

91. Tex.—Lancaster v. Mebane, Civ.App., 260 S.W. 252.

92. S.C.—Trakas v. Southern R. Co., 86 S.E. 492

93. Mich.—Grand Trunk Western R. Co. v. Mount Clemens Sugar Co., 269 N.W. 208, 277 Mich. 366

94. U.S.—Empire Refineries v. Guaranty Trust Co. of New York, C.C.A.Mo., 271 F. 668.

95. Ala.—Louisville & N. R. Co. v. Cullman Warehouse, 147 So. 421, 226 Ala. 493.

96. Okl.—Lawton Refining Co. v. Amerada Petroleum Corporation, 231 P. 252, 104 Okl. 231.

97. Wash.—Sultan Ry. & Timber Co. v. Great Northern Ry. Co., 109 P. 320, 58 Wash. 604, hearing en banc denied 109 P. 1020, 58 Wash. 604

98. Tex.—Panhandle & S. F. Ry. Co. v. Lockhart, Civ.App., 277 S.W. 230.

99. Ga.—American Ry. Express Co. v. Archer, 104 S.E. 92, 25 Ga.App. 647.

Successor to carrier's business

A consignor of a shipment delivered to a carrier which afterward goes out of business and is succeeded by another carrier with whom he has no privity of contract, may not recover against such carrier on the contract of shipment.—American Ry. Express Co. v. Archer, 104 S.E. 92, 25 Ga.App. 647.

1. Mich.—Fremont Canning Co. v. Pere Marquette R. Co., 146 N.W. 678, 180 Mich. 283.

no cause of action for failure to furnish cars under a contract to furnish cars to the manager of the pool itself, under a statute providing that all those parties who are united in interest must be joined as plaintiffs or defendants;[2] nor is he entitled to recover on the theory of breach of duty as a carrier.[3]

Limitations. A claim against a carrier for breach of contract to collect freight charges from the consignee and refund them to the shipper, even if such contract is an illegal discrimination, does not arise out of a "civil wrong," within the meaning of the Interstate Commerce Act requiring suit to be brought before the expiration of two years.[4]

Pleading. As in actions on contracts generally, the petition must allege a breach of the particular special agreement.[5] A complaint based on an oral agreement is demurrable where it alleges the issuance of a bill of lading and fails to show the oral contract was not merged in the bill.[6] A count alleging a special contract with an agent of the carrier must allege that the agent had authority to make it,[7] and when based on a contract forbidden by statute is demurrable.[8] In an action for breach of a special contract to furnish cars, the contract must be pleaded either in hæc verba or according to its legal effect.[9] A petition alleging an enforceable contract and containing sufficient averments of breach by the carrier with resultant damage, is good as against a general demurrer.[10] It is incumbent on the carrier to plead any defense he may have to the cause of action stated in plaintiff's pleadings.[11] The carrier must plead his defense that the services to be rendered under the special contract did not come within the tariffs on file and, therefore, the contract was void, unless plaintiff's pleadings show the invalidity of the contract for this reason.[12] A carrier seeking relief against a contract to transport, on the ground of mistake, must allege such mistake in its pleadings.[13] Inasmuch as an unprecedented rush of business constitutes no defense to an action for breach of contract to furnish cars,

2. Mont.—American Livestock, etc., Co v. Great Northern R. Co., 133 P. 1102, 48 Mont. 495.

3. Mont.—American Livestock, etc., Co. v. Great Northern R. Co., supra.

4. U.S.—Pennsylvania R. Co. v. Chesapeake & Ohio Coal & Coke Co., D.C.N.Y., 297 F. 249.

5. Ala.—Mott v. Jackson, 55 So. 528, 172 Ala. 448.
10 C.J. p. 71 note 28 [a].

Aider by verdict

Plaintiff brought suit on a contract to carry cattle, for refusal to carry; and the declaration alleged that for certain hire or reward, to be thereupon paid by plaintiff to defendant, the latter agreed to carry said stock. It was held that a reasonable construction of the contract was that the freight was to be paid at the end of the carriage, and that a verdict for plaintiff should not be arrested because the declaration did not aver a readiness to pay the charges at the time the contract of carriage was made.—Waterman v. Vermont Cent. R. Co., 25 Vt. 707.

Want of consideration for written contract

Under Rev.St.1911, art. 7093, providing that a contract in writing shall import consideration, in an action against a carrier for delay in furnishing cars pursuant to alleged oral agreement, where defendant pleaded a subsequent written contract for transportation, it was incumbent on plaintiff to allege and prove want of consideration for written contract.—Atchison, T. & S. F. Ry. Co. v. Smyth, Tex.Civ.App., 189 S.W. 70.

Petition or complaint held sufficient

In an action by a shipper of potatoes against the carrier for failure to carry out an agreement to reconsign the shipment, the petition was held to allege a definite breach of an oral special agreement on the carrier's part to immediately divert or reconsign by wire, on a given date, such shipment.—Cicardi Bros. Fruit & Produce Co. v. Pennsylvania Co., 213 S.W. 531, 201 Mo.App. 609.

6. U.S.—John Vittuci Co. v. Canadian Pac. Ry. Co., D.C.Wash., 238 F. 1005.

7. Ala.—Tennessee River Nav. Co. v. Walls, 85 So. 711, 204 Ala. 285.

8. N.C.—Pinehurst Peach Co. v. Norfolk Southern R. Co., 159 S.E. 359, 201 N.C. 176.

Agreement to furnish cars

Complaint alleging shipper's damage from carrier's negligent failure to furnish cars for interstate commerce within reasonable time and in accordance with shipper's order, calling for specified number of cars at specified place, on specified date, is demurrable.—Pinehurst Peach Co. v. Norfolk Southern R. Co., 159 S.E. 359, 201 N.C. 176.

9. Mo.—Currell v. Hannibal, etc., R. Co., 71 S.W. 113, 97 Mo.App. 93.
10 C.J. p. 214 note 80.

10. Okl.—St. Louis & S. F. R. Co. v. Wm. Bondies & Co., 166 P. 179, 64 Okl. 88.

11. **Good defense**

In an action against a carrier of live stock for breach of an oral agreement to furnish cars, a plea alleging a written contract merging all previous negotiations, and providing stipulation for notice, and that suit should be brought within six months or action should be barred, set up a good defense in the absence of a showing of want of consideration, duress, fraud, or mistake.—Atchison, T. & S. F. Ry. Co. v. Smyth, Tex.Civ.App., 189 S.W. 70.

War necessities

In a shipper's action for breach of contract by the carrier to furnish stock cars at a certain time and place for shipment of plaintiff's cattle, the carrier being under federal control, if defendant desired to present the defense that delay in furnishing the cars was occasioned by war necessities of the government, it was incumbent on him to plead and prove such defense.—Cornwell v. Davis, 213 P. 218, 66 Mont. 100, certiorari granted Davis v. Cornwell, 43 S.Ct. 700, 262 U.S. 740, 67 L.Ed. 1209, reversed on other grounds 44 S.Ct. 410, 264 U.S. 560, 68 L.Ed. 848, mandate conformed to Cornwell v. Davis, 226 P. 1117, 70 Mont. 608.

12. Mo.—Brunswig v. Bush, App., 221 S.W. 759, certiorari dismissed Bush v. Brunswig, 41 S.Ct. 9, 254 U.S. 660, 65 L.Ed. 462.
Tenn.—Roberts v. Nashville, C. & St. L. Ry. Co., 185 S.W. 69, 135 Tenn. 48.

13. Tex.—Chicago & G. W. Ry. Co. v. Plano Milling Co., Civ.App., 214 S.W. 333, affirmed Missouri, K. & T. R. Co. of Texas v. Plano Milling Co., Com.App., 231 S.W. 100, certiorari denied 42 S.Ct. 317, 258 U.S. 624, 66 L.Ed. 797.

as shown supra § 133, an allegation in the answer setting up such facts is irrelevant and should be stricken out.[14]

A carrier's plea to the jurisdiction in an attachment suit, based on the fact that it is a nonresident railroad having no place of business nor owning or operating a railroad in the state, and that the trial thereof would interfere with interstate commerce, is properly dismissed when the attachment is based on an accord and satisfaction of a claim for breach of a contract of carriage.[15]

Issues, proof, and variance. The rules applicable generally to questions of evidence admissible under the issues, and to variance between pleadings and proof, as stated in the C.J.S. title Pleading §§ 512–546, also 49 C.J. p 780 et seq, apply to this class of actions.[16] Where it is alleged that the contract contained a certain stipulation as to unloading, which defendant violated, plaintiff must prove that the contract contained such stipulation.[17] Evidence of failure to furnish cars as promised is admissible under an allegation of a verbal promise to accept goods for transportation on or about a certain date,[18] but evidence of treatment during shipment is inadmissible where damages before loading only are claimed.[19] There is no variance between allegations that the contract was made with two named agents of the carrier and proof of negotiations with one by telegram and letter and a verbal contract with the other.[20]

Evidence. The burden of proof is on plaintiff to show by sufficient competent evidence the making of a special contract,[21] negligence in refusing to accept goods for interstate shipment as agreed,[22] and also to show the amount of damages sustained from a breach.[23] The carrier, however, has the burden

14. Mo.—Meriwether v. Quincy, etc., R. Co., 107 S.W. 434, 128 Mo.App 647.

15. Ga.—Pere Marquette Ry. Co. v Tifton Produce Co., 172 S.E. 727, 48 Ga.App. 286.

16. No variance

(1) Plaintiff, alleging that "on or about" June 14 he demanded and defendant refused to furnish cars, proof that it was on that day of July is not a variance.—Texas & N O R. Co. v. Weems, Tex.Civ.App., 184 S.W. 1103, affirmed, Com.App., 222 S.W. 972.

(2) Where plaintiff pleaded that he ordered cars on or about Nov. 9, for the shipment of cattle on the 11th, and that he delivered the cattle to defendant railroad company on or about Nov. 11, evidence showing that the cars were requested on Nov. 6, and to be furnished on the 9th, was not a fatal variance.—Davis v. Kelley, Okl., 219 P. 923.

17. Ala.—Nashville, C. & St. L. Ry. v. Farrell & Braley, 70 So. 986, 14 Ala.App. 380.

18. Tex.—San Antonio, etc., R. Co. v. Timon, 99 S.W. 418, 45 Tex.Civ. App. 47.

19. Tex.—San Antonio, etc., R. Co. v. Timon, supra.

20. Tex.—Pecos River R. Co. v. Latham, 88 S.W. 392, 40 Tex.Civ. App. 78.

21. Tex.—Texas, etc., R. Co. v. Ray, 84 S.W. 691, 37 Tex.Civ.App. 622.

Evidence held inadmissible

Where the answer denies the allegations of the complaint and alleges that defendant entered into a contract for shipment which required notice of any claim for damages, which notice was not given, testimony of a witness that he on behalf of plaintiff requested cars and informed the agent of the number required is competent under the issues.—St. Louis, etc., R. Co. v. Taylor, 112 S.W. 745, 87 Ark. 331.

Evidence held sufficient

(1) To justify a finding of the existence of a special contract to furnish cars.

Ind.—Pittsburg, C. C. & St. L. R. Co. v. Racer, 37 N.E. 280, 38 N.E. 186, 10 Ind.App. 503.

Mont.—Cornwell v. Davis, 213 P. 218, 66 Mont 100, certiorari granted Davis v. Cornwell, 43 S.Ct. 700, 262 U.S. 740, 67 L.Ed. 1209, reversed on other grounds 44 S.Ct. 410, 264 U.S. 560, 68 L.Ed. 848, mandate conformed to Cornwell v. Davis, 226 P. 1117, 70 Mont. 608.

Tex.—Texas & N. O. Ry. Co. v. Woems, Com.App., 222 S.W. 972, affirming, Civ.App., 184 S.W. 1103.

(2) To warrant finding that there was an agreement between the shipper and the carrier's local agent to furnish the cars for a particular day, which agreement the carrier negligently treated, that the carrier was not excused from compliance therewith, and that the shipper was damaged by its failure to comply therewith.—Chicago, R. I. & P. Ry. Co. v. Vail, 201 P. 804, 83 Okl. 266.

22. Mo.—Crowdis v Quincy, O & K. C. R. Co., App., 255 S.W. 347.

23. Tex.—Gulf, C. & S. F. Ry. Co. v. Davis, Civ.App., 225 S.W. 773.
10 C.J. p 215 note 85.

Burden of proof

In a shipper's action against a carrier for failure to ship certain mules according to contract wherein special damages were claimed on the ground that the mules had been purchased for sale to the government for war purposes, it was necessary for plaintiff to prove that the live stock was up to the government standard, and would have passed inspection.—Gulf, C. & S. F. Ry. Co. v. Davis, Tex.Civ.App., 225 S.W. 773.

Evidence held admissible

(1) In an action against an interstate carrier on an alleged oral agreement to furnish cars, evidence that defendants' dispatcher immediately advised the agent with whom plaintiff talked that the cars could not be furnished on the day required by plaintiff, was admissible.—Atchison, T. & S. F. Ry. Co. v. Smyth, Tex.Civ.App., 189 S.W. 70.

(2) In an action for a carrier's failure to transport a corpse as agreed, whereby the funeral was delayed and had to be shortened, questions as to the whereabouts of plaintiff's children at the time and as to who accompanied plaintiff to the station were not erroneous as immaterial and irrelevant to any issue.—Texas Electric Ry. v. Blank, Tex. Civ.App., 247 S.W. 314.

(3) In an action against a carrier for breach of its contract to transport the remains of plaintiff's wife to the place of burial, evidence that plaintiff had intended to open the casket at the place of burial to permit friends to view the remains, but was unable to do so because of the delay resulting from defendant's breach, was admissible as establishing one of the elements of damage for which recovery was sought.—Texas Electric Ry. v. Blank, supra.
10 C.J. p 215 note 85 [a].

Evidence held sufficient

(1) Evidence that shipper frequently requested cars at point not on carrier's lines, and obtained them through traveling fast-freight agent, warrants finding that carrier, by a course of dealing, had led shipper to

of proving affirmative matters raised by it as a defense.[24]

Trial. In actions of this character, as in other civil actions, questions of fact, such as the existence of the special contract and damages arising from a breach thereof, on which the evidence is conflicting are for the determination of the jury[25]

believe that furnishing cars at such point was not unusual, and that the contract so to furnish them was not beyond the scope of the agent's authority.—Kissell v. Pittsburgh, Ft W & C. Ry. Co., 188 S.W. 1118, 194 Mo.App. 346.

(2) In an action against an express company for the value of two packages, delivered to it for shipment to a named consignee, where plaintiff testified that on two different dates in the same month he delivered to the company two packages containing a quantity of watches, addressed to the consignee at hotels in Lexington, Ky., and Birmingham, Ala., which packages were not received by the consignee, dismissal of the complaint as for failure of proof was improper, and judgment for defendant company thereon cannot stand.—Schiff v. American Ry. Express Co., 180 N.Y.S. 480.

(3) Evidence in an action against an interurban electric railway company was held to sustain the jury's finding that defendant agreed to transport the corpse on a designated car, so that it breached its contract by refusing to do so, although its offer to transport the corpse on a later car was refused by the undertaker, who transported it by automobile.—Texas Electric Ry. v. Blank, Tex.Civ.App., 247 S.W. 314.

(4) Although testimony by plaintiff that the delay in transporting the corpse of his wife to the place of burial disturbed his mind and was very unpleasant was insufficient alone to justify the jury in finding humiliation or mental anguish, such finding could be based thereon in connection with a consideration of the facts and circumstances attending the delay which resulted from the failure to transport and its consequences.—Texas Electric Ry. v. Blank, supra.

Evidence held insufficient

(1) In an action for breach of contract to transport corn into Mexico without reloading into other cars, to establish that the tariffs on file made no provision for such service, and thus to show illegality of the contract as a matter of law.—Brunswig v Bush, Mo.App., 221 S.W. 759, certiorari dismissed Bush v. Brunswig, 41 S.Ct. 9, 254 U.S. 660, 65 L.Ed. 462.

(2) In consignee's action against a railroad for damage to goods based on alleged agreement of railroad to pay for damage if consignee would receive and remove the goods, to prove that railroad employee who made such contract had authority so to do.—Gennet v. Lehigh Valley R. Co., 117 A. 706, 97 N.J.Law 486.

(3) In action for breach of carrier's contract to deliver cars to orchard for shipment of peaches, to show that plaintiffs' damages certainly would have been diminished had they delivered fruit at station of defendant carrier or at that of another carrier.—Texas & N. O. Ry. Co. v. Weems, Tex.Com.App., 222 S.W. 972, affirming, Civ.App., 184 S.W. 1103.

(4) To sustain a verdict finding an agreement by defendant to ship plaintiff's goods to destination within a certain time.—Emil Grossman Mfg. Co. v. New York Cent. R. Co., 169 N.Y.S. 213, 181 App.Div. 764.

(5) To show that an express driver receiving goods for delivery without a direction from his employer had any apparent authority to contract in its behalf for their delivery.—Wolf Thread Co. v. Rosenbusch, 180 N.Y.S. 94.

(6) To show that responsible officials of railway and express agency ratified their joint local agent's agreement to pay shipper for trucking belated express shipments to main line station, precluding shipper's recovery therefor.—Campbell v. St. Louis, B. & M. Ry. Co., Tex.Civ.App., 59 S.W.2d 467, error dismissed.

(7) In shipper's action against railroad for refusal to accept cattle on certain date pursuant to agreement, requiring shipper to drive cattle back to the farm in a snowstorm, to show the railroad was negligent in not notifying shipper, before he left home with the cattle, that they would not be received because of snowstorm making transportation impossible.—Crowdis v. Quincy, O. & K. C. R. Co., Mo.App., 255 S.W. 347.

(8) In shipper's action against railroad for delay in shipment for cattle following refusal to accept cattle on a certain date pursuant to agreement to accept them on such date for shipment into other state, because of snowstorm making it appear that cattle could not be transported on such date, to show the railroad was guilty of negligence in refusing to accept cattle on such date.—Crowdis v. Quincy, O. & K. C. R. Co., supra.

24. Abnormal demand for cars

Where a carrier seeks to excuse its failure to perform its obligations as to supplying itself with adequate transportation facilities because of an abnormally great and unforeseen demand for, or shortage of, cars, it assumes the burden of proving such alleged fact.—Vander Zyl v. Chicago, R. I. & P. Ry. Co., 189 N.W. 953, 195 Iowa 901, error dismissed Chicago, R. I. & P. Ry. Co. v. Vander Zyl, 45 S.Ct. 10, 266 U.S. 636, 69 L.Ed. 481.

25. Mont.—Cornwell v. Davis, 213 P. 218, 66 Mont. 100.
Tex.—Warren v. North American Car Co., Civ.App., 294 S.W. 301.
10 C.J. p. 215 note 86

Corpus Juris text has been referred to as authority in Cornwell v. Davis, 213 P. 218, 66 Mont. 100.

Authority of agent

Evidence that chief clerk in manifest bureau of defendant railroad acted as the traffic manager's assistant in agreeing to furnish plaintiffs live stock cars for shipment originating on a connecting road, etc., makes his authority to bind defendant a jury question.—Southern Pac. Co. v. Stevens, Ariz., 258 F. 165, 169 C.C.A. 233.

New promise

In an action against a railroad for failure to place a refrigerator car to receive lettuce, whether or not a new promise was made, on the day after the first attempt to order the car, to place it by 2:30 P.M. may be a question for the jury.—Futch v. Atlantic Coast Line R. Co., 100 S.E. 436, 178 N.C. 282.

Place for furnishing

(1) Whether the contract was to furnish cars at L., on defendant carrier's line, or at N., fifty miles away, at point of plaintiff shipper's business and point of loading, may, under the evidence, be a jury question.—Kissell v. Pittsburgh, Ft. W. & C. Ry. Co., 188 S.W. 1118, 194 Mo.App. 346.

(2) Where cars were frequently furnished to plaintiff at his place of business at N., fifty miles from the carrier's line, and the carrier agreed to furnish him cars, the court cannot say, as a matter of law, that the carrier was bound only to furnish the cars at the nearest point on its lines to N., or that there was no meeting of the minds.—Kissell v. Pittsburgh, Ft. W. & C. Ry. Co., supra.

Special damages

In a shipper's action against a carrier for damages arising from the carrier's failure to ship certain mules according to contract wherein special damages were claimed, based on a purchase for the purpose of sale to

under proper instructions.[26]

A nonsuit must be entered in an action on a special contract where it is clear plaintiff is not entitled to recover.[27]

Damages. The damages which the shipper is entitled to recover are those proximately and naturally resulting from the failure of the carrier to comply with the terms of the contract,[28] but nothing beyond this.[29] If increased freight charges result from the failure to furnish cars, the shipper is entitled to recover the excess freight.[30] So, the shipper is entitled to recover the difference in the market value of the goods, if the market declined during the delay,[31] depreciation in the goods themselves rendering them less valuable,[32] and also to recover any expenses incurred in paying for pasturage, and for the employment of labor to look after the cattle for which the cars were to be furnished, and in supplying food for horses used for that purpose.[33]

the government for war purposes, the question as to whether the mules would have passed inspection if they had reached destination, was under the evidence, one for the jury.—Gulf, C & S F Ry. Co. v. Davis, Tex.Civ. App., 225 S.W. 773.

26. Iowa—Vander Zyl v. Chicago, R I & P. Ry. Co., 189 N.W. 953, 195 Iowa 901, error dismissed Chicago, R. I. & P. Ry. Co v. Vander Zyl, 45 S.Ct 10, 266 U.S. 636, 69 L.Ed 481.
Mo—Bailey v. St. Louis & S F. Ry Co., App., 290 S.W 630—Williams v St Louis-San Francisco Ry Co., 274 S.W. 935, 217 Mo App. 662.

Instructions

(1) In a suit by a live stock shipper against a carrier for breach of an oral agreement to furnish cars, failure to instruct as to the meaning of the term "oral contract" is not error—Thee v. Wabash Ry. Co., 233 S.W. 959, 208 Mo App. 200.

(2) Where, in an action for failure to furnish a refrigerator car to receive lettuce, the one ordering the car testified that he also ordered two cars for another, designating the number of cars by raising two fingers and then one, an instruction to find for plaintiff if order was given and "understood" by defendant's agent was not erroneous, in that use of quoted word referred to understanding of terms of order—Futch v Atlantic Coast Line R. Co., 100 S.E. 436, 178 N.C. 282.

27. Pa.—Harris Bros. Corporation v. Philadelphia & Reading Ry. Co., 84 Pa Super. 116.

Nonperformance of condition

(1) In assumpsit for breach of contract for failure of express company to transport goods, nonsuit is properly entered where plaintiff gave company a conditional order to procure from a steamship company certain goods, and plaintiff failed to prove condition imposed was performed—Chambers v. American Ry. Express Co., 83 Pa Super. 71.

(2) In such case, having taken a receipt for the delivery order, containing a clause requiring written demand for any losses within four months, failure to prove filing of such a claim within stipulated period was a further reason for entering a nonsuit—Chambers v. American Ry. Express Co., supra.

Forged bill

In assumpsit for breach of contract by a common carrier, a nonsuit is properly entered where defense was that bill of lading was a forgery, and plaintiff failed to produce sufficient evidence to establish the contrary.—Harris Bros. Corporation v. Philadelphia & Reading Ry. Co., 84 Pa Super 116.

28. Or—Levy v Nevada-California-Oregon Ry., 160 P 808, 81 Or. 673, L.R.A 1917B 564.
Tenn—M C, etc, R. Co. v. Pounders, 4 Tenn.Civ.App 372.
10 C.J. p 71 note 39.

Cost of hauling to depot

Damages for carrier's breach of contract to furnish cars on private tracks were not limited to cost of hauling property to depot, where cars could not have been obtained there—Texas & N. O. R. Co. v. Weems, Tex.Civ.App., 184 S.W. 1103, affirmed, Com.App., 222 S.W. 972.

Expenditures for insurance paid on the goods during the period of delay in securing transportation are also allowable.—Shores Lumber Co. v. Stark, 76 N.W. 366, 100 Wis. 498.

Interest is an element of damages recoverable from a common carrier for breach of a contract to receive and transport freight—Cobb, Blasdel & Co. v. Illinois Cent. R. Co., 38 Iowa 601.

Loss of profits

Where a carrier, with full notice of the situation, violated its contract to furnish cars to a purchaser of cattle, it is liable for all resulting damages, including damages for loss of profits minus freight charges, even though the purchaser forfeited his contract and never obtained title to the cattle—Weatherford, M. W. & N. W. Ry. Co. v King, Tex.Civ.App., 280 S.W. 235.

Amount

In an action for a carrier's refusal to transport the corpse of plaintiff's wife on the car agreed, where the refusal delayed the funeral one hour and twenty minutes and caused the ceremony to be somewhat shortened, preventing an opportunity to permit friends to view the remains, a judgment awarding one thousand dollars damages was excessive, and must be reversed, unless plaintiff agrees to remit therefrom five hundred dollars—Texas Electric Ry. v. Blank, Tex.Civ.App., 247 S.W. 314.

29. Tex.—San Antonio, etc., R. Co. v. Broad-Davis Cattle Co., Civ. App., 140 S.W. 514.
10 C.J. p 215 note 88.

30. Tex.—Pecos River R. Co v. Latham, 88 S.W 392, 40 Tex.Civ. App. 78.

31. Ga.—Chattanooga Southern R. Co. v. Thompson, 65 S.E. 285, 133 Ga. 127.
Okl—Davis v. Kelley, 219 P. 923, 96 Okl 17.
10 C.J. p 71 note 39, p 215 note 90.

Depreciation at destination, not point of shipment

Under contract to supply cars for shipment of live stock, which the carrier broke by delay in supplying cars, knowing that stock was intended for sale on market in distant city, the measure of damages is not amount of depreciation at point of shipment, but depreciation in market value at destination—Levy v. Nevada-California-Oregon Ry., 160 P 808, 81 Or. 673, L.R.A.1917B 564

32. Tenn—Southern Ry Co v. Shipley, 245 S.W. 524, 147 Tenn. 40.
10 C.J. p 215 note 91.

Value at market not recoverable

Where a shipper who failed to give notice of claim was entitled to recover for breach of contract to furnish the car, which was not affected by the bill of lading, but not to recover for damages during transportation under the bill of lading, he cannot recover damages resulting from depreciation in value at the market, although the delay in reaching the market was due to the delay in furnishing the car, since an allowance for such depreciation assumes a contract to transport to the market—Southern Ry Co. v Shipley, 245 S.W 524, 147 Tenn. 40.

33. Tex—Southern Kansas R Co. v. Samples, Civ.App., 109 S.W. 417.
10 C.J p 215 note 92.

Loss sustained on account of contracts entered into on the faith of a stipulated rate may be recovered on failure of the carrier to transport at the rate agreed on.[34]

While it is the duty of the shipper, on failure of the carrier to comply with its contract to furnish cars, to exercise reasonable diligence to avoid or to lessen his damages, the principle does not require him in the exercise of ordinary care to make a new contract with the carrier which had just broken an identical one, and again agree to pay it for services which it is already under legal obligation to perform.[35]

Where a pipe line company is agent and carrier of the buyer of oil, it cannot recover of the seller for damages for the seller's refusal to deliver oil to it after the buyer had breached the contract, without showing that its damages were caused by the breach by the seller of some duty owing by him.[36]

Special damages may be recovered of a carrier for breach of contract where the carrier had knowledge at the time of the contract that a negligent breach thereof would result in special damages.[37] Hence, the fact that the shipper, at the time he made the contract with the carrier, informed its agent that he wished to make contracts with third persons for the sale of the goods to them, and the further fact that he did make such contract afterward, do not entitle a recovery from the carrier of profits which would have been made but for the breach of the contract of carriage.[38]

Damages resulting from act of shipper. Where, on refusal of a carrier to comply with the contract for transportation, the shipper abandons the shipment which is destroyed, the carrier is not liable for the loss resulting from such abandonment. Where a wrong has been committed, the damaged party must not increase it, and he has no right to complain of loss sustained by his willful acts of omission or commission.[39]

L. AUTHORITY OF AGENTS TO MAKE CONTRACTS FOR CARRIER

§ 135. In General

The question of whether contracts made by the agent of a carrier bind the carrier depends on the general principles of agency, such contracts being binding when within the scope of the agent's authority.

In determining whether a contract made for the carrier by an agent is binding, the principles of agency are applicable, and the general rule is well settled that, if the contract is within the general scope of authority of the agent, the carrier will be bound thereby, although the agent has acted beyond his instructions in the particular case.[40] This is in accordance with the well settled principle that the powers of the agent are prima facie coextensive with the business intrusted to his care and will not be narrowed by limitations not communicated to the persons with whom he deals.[41] Applying this principle it is very generally held that, where a railroad company places an agent in charge of its business at a station, and empowers him to contract for the shipment of freight, it holds him out to the public as having authority to contract with reference to all the necessary and ordinary details of the business, and, within the range of such business, he becomes a general agent, and may bind the company by a contract within the scope of his apparent authority, although in making the contract he may have exceeded his authority.[42] Strangers or other persons

34. Ky.—Louisville, etc., R. Co. v. Higdon, 148 S.W. 26, 149 Ky. 321.

35. Tex.—Pecos River R. Co. v. Latham, 88 S.W. 392, 40 Tex.Civ. App. 78.

36. Okl.—Lawton Refining Co. v. Amerada Petroleum Corporation, 231 P. 252, 104 Okl. 231.

37. Tex.—Atchison, T. & S. F. Ry. Co. v. Butler, 93 S.W.2d 143, dismissing certiorari, Civ.App., 89 S.W.2d 791.
10 C.J. p 215 note 93.

Allegation necessary
A common carrier is not liable for special damages for breach of shipping contract, in absence of allegation that it had knowledge or notice of circumstances rendering such damages natural and probable result of breach when contract was made.—Herrin Transp. Co. v. Marmion, Tex.Civ.App., 113 S.W.2d 291

Posting of forfeit by shipper
Carrier, notified of shipper's placing of forfeit to insure compliance with his contract to purchase the goods he intended to ship, is liable in special damages for failure to furnish cars at a specified time as agreed.—Weatherford, M. W. & N. W. Ry. Co. v. King, Tex.Civ.App., 280 S.W. 235.

38. Ark.—Missouri Pac. R. Co. v. S. L. Robinson & Co., 65 S.W.2d 902.
10 C.J. p 72 note 46.

Corpus Juris text has been quoted in Missouri Pac. R. Co. v. S. L. Robinson & Co., Ark., 65 S.W.2d 902.

39. La.—Armistead v. Shreveport, etc., R. Co., 32 So. 456, 108 La. 171.

40. N.Y.—Cohen v. American Ry. Express Co., 184 N.Y.S. 601, reversed 185 N.Y.S. 367.
10 C.J. p 216 note 99.

41. Mo.—Baker v. Kansas City, etc., R. Co., 3 S.W. 486, 91 Mo. 152.
10 C.J. p 216 note 1.

42. U.S.—Southern Pac. Co. v. Stevens, Ariz., 258 F. 165, 169 C.C.A. 233.
Mich.—Rudell v. Ogdensburg Transit Co., 76 N.W. 380, 117 Mich. 568, 44 L.R.A. 415.
Tex.—Davis v. Simmons, Civ.App., 240 S.W. 970, dismissed for want of jurisdiction.
10 C.J. p 216 note 2.

The text of Corpus Juris has been cited as authority in Southern Pac. Co. v. Stevens, Ariz., 258 F. 165, 169 C.C.A. 233.

delivering goods for transportation are not bound to inquire whether the person found at the depot ready to receive goods is authorized to transact such business, and the carriers cannot evade their responsibility for failure to carry and deliver goods so received.[43] These contracts will be binding on the carrier, although oral,[44] or although they were made before the goods were actually delivered.[45] Such is ordinarily the rule in respect of contracts made by freight agents of the carrier,[46] or by subagents appointed or designated by a general agent having power to contract for the carrier,[47] or by a clerk apparently in charge of a freight office.[48] In all cases where the contract is within the apparent scope of the agent's authority, the carrier cannot escape liability thereon, unless the shipper had actual knowledge that in making the contract the agent exceeded his authority.[49] So long as the agent has apparent authority to contract, the shipper is under no obligation to make inquiries as to his authority and is not chargeable with notice of a limitation of the agent's right to contract,[50] and the burden is on the carrier to show that the parties, when the contract was made, had knowledge of the fact that the agent was acting beyond his authority, if it seeks to escape liability on the ground that the contract is unauthorized.[51]

Contracts not within scope of apparent authority. On the other hand, an agent cannot bind the carrier beyond what may fairly be presumed, from the character of his employment, to be his authority;[52] and, if the shipper seeks to enforce such contract, the burden is on him to show actual authority on the part of the agent to make it.[53] Thus the local station agent's authority presumptively extends only to the control of the carrier's business at his own station, and he cannot act for the carrier in the matter of shipping from stations other than that at which he is employed, unless expressly or impliedly authorized so to do.[54] It is generally regarded that a local agent cannot bind the carrier by contract to transport goods from points distant from the carrier's railroad,[55] nor assume liability for the acts of preceding carriers.[56] Where nothing more appears than that the person making the agreement was "clerk" or "chief clerk" having charge of the clerical work of the carrier at a certain place, he will not be regarded as having implied authority to bind the carrier by contracts for shipment of goods.[57]

A contract made by an unauthorized agent may be ratified by an authorized agent, notwithstanding the want of authority of the former,[58] and the carrier may ratify a contract made by its agent in violation of its rules.[59] Ratification is necessary to charge a carrier on a contract outside the scope of an agent's authority.[60] When a new contract for transportation of goods which could not be shipped under the original contract because of damage, which would be increased, was void because made by one having no authority to bind the carrier, acceptance of the shipment and the loading of a part of it could not bind the carrier where done by the same person who made the new contract.[61]

If to the knowledge of the shipper the particular

43. Ky.—Potts v. Bowler, 1 Ky.Op. 133.

44. Tex.—Gulf, etc., R. Co. v. Jackson, 89 S.W. 968, 99 Tex. 343.
10 C.J. p 216 note 4.

45. N.H.—Deming v. Grand Trunk R. Co., 48 N.H. 455, 2 Am.R. 267.
10 C.J. p 216 note 5.

46. U.S.—Northern Pac. R. Co. v. American Trading Co., N.Y., 25 S. Ct 84, 195 U.S. 439, 49 L.Ed. 269.
10 C.J. p 216 note 6.

47. Ala.—Tennessee River Transp. Co. v. Kavanaugh, 13 So. 283, 101 Ala 1.
10 C.J. p 217 note 7.

48. Ill.—Bauer v. Illinois Cent. R. Co., 175 Ill.App. 346.

49. N.Y.—Lowenstein v. Lombard, 58 N.E. 44, 164 N.Y. 324.
10 C.J. p 217 note 9

50. N.Y.—Lowenstein v. Lombard, supra.
10 C.J. p 217 note 10.

It is only when a proposed contract with the shipping agent of a carrier is of an unusual and extraordinary character that the shipper is put on inquiry as to the agent's authority.—Rudell v. Ogdensburg Transit Co., 76 N.W. 380, 117 Mich. 568, 44 L.R.A. 415.

51. Tex.—Pecos, etc., R. Co. v. Cox, Civ.App., 150 S.W. 265.
10 C.J. p 217 note 11.

52. Tex.—Gathright v. Pacific Express Co., 145 S.W. 1185, 105 Tex. 157, affirming 130 S.W. 1035, 61 Tex.Civ.App. 587.
10 C.J. p 217 note 12.

53. Minn.—Weikle v. Minneapolis, etc., R. Co., 66 N.W. 963, 64 Minn 296
10 C.J. p 217 note 13.

54. S.D.—Strommer v. Chicago, M. & St. P. Ry. Co., 161 N.W. 346, 38 S.D. 368
10 C.J. p 217 note 14.

55. N.D.—Knapp v. Minneapolis, St. P. & S. S. M. Ry. Co., 159 N.W. 81, 34 N.D. 466.

56. N.D.—Knapp v. Minneapolis, St. P. & S. S. M. Ry. Co., supra.

57. U.S.—Davis v. American Silk Spinning Co., C.C.A.Wash., 282 F. 954.

Authority disclosed by title

Chief clerk in charge of clerical work of railroad at its office at a dock was not authorized to bind railroad by making new contract for transportation of silk cargo, which because of its wet and fermented condition could not be forwarded under the original shipping contract, the words "clerk" or "chief clerk" being suggestive only of clerical functions, and not of discretionary power to make important contracts.—Davis v. American Silk Spinning Co., C.C.A.Wash., 282 F. 954.

58. Tex.—Gulf, etc., R. Co. v. Jackson, 89 S.W. 968, 99 Tex. 343
10 C.J. p 217 note 15.

59. Ala.—Nashville, etc., R. Co. v. Smith, 31 So. 481, 132 Ala. 434.
10 C.J. p 217 note 16.

60. Tex.—Campbell v. St. Louis, B. & M. Ry. Co., Civ.App., 59 S.W.2d 467, error dismissed.

61. U.S.—Davis v. American Silk Spinning Co., C.C.A.Wash., 282 F. 954.

contract is not within the scope of the agent's authority, it is of course not binding on the carrier.[62] A bill of lading being in a form and on a rate approved by the interstate commerce commission, no agent could be authorized to vary its terms for the advantage of a shipper, by undertaking additional responsibility on behalf of the carrier.[63]

A carrier is not estopped to deny liability for goods accepted and receipted for by an impostor posing as an agent of the carrier, the carrier not having held out such impostor as an ostensible agent.[64]

One common carrier may in a proper case act as agent for another carrier.[65]

Knowledge of agent as affecting principal. Where a shipper has undertaken the packing of his goods, mere knowledge of the carrier's agent that the packing was negligently done cannot impose liability on the carrier for injuries resulting from such negligent packing.[66]

§ 136. Contracts for Furnishing Cars

An agent properly authorized may make a binding contract to furnish cars. Unauthorized contracts may be ratified.

Contracts to furnish cars, when made by an agent apparently authorized to represent the carrier in such matters, are binding on the carrier.[67] Such contracts may be oral.[68]

The general manager of a railroad has authority to make contracts to furnish cars to shippers.[69]

General freight agent. The general freight agent of a division of a railroad has authority to make contracts to furnish trains for moving freight,[70] and he has authority to bind the carrier by a contract to furnish a certain number of cars on a specified day for the transportation of freight,[71] as has the commercial freight agent.[72]

Conductor of train. The carrier is bound by the promise of a freight train conductor to furnish cars for a shipper, where he has been intrusted generally with such power and authorized to exercise it.[73]

Station agent. The station agent, having charge of a railroad company's business at a particular station, has implied authority to contract to furnish cars at particular times for the shipment of goods, and the company will be bound by such contracts, even though in violation of the company's directions to the agent, if the limitation of his authority is not known to the shipper.[74] A fortiori is this so where in the previous course of dealing between the same parties they recognize such contracts as valid,[75] and the rule has been held to apply, even though a reasonable time was not given to have the cars on hand.[76] The station agent likewise has authority to bind the carrier to furnish a particular kind of cars,[77] and it has further been held that a contract made by a station agent to furnish a shipper a certain variety of cars belonging

62. Ga.—Central of Georgia R. Co. v. Felton, 36 S.E. 93, 110 Ga. 597. 10 C.J. p 217 note 17.

63. U.S.—South Carolina Asparagus Growers' Ass'n v. Southern Ry. Co., C.C.A.S.C., 46 F.2d 452.

64. Mass.—Rudy v. American Ry. Exp. Co., 145 N.E. 454, 250 Mass. 351.

65. U.S.—Adams v. Mills, Ill., 52 S. Ct. 589, 286 U.S. 397, 76 L.Ed. 1184, reversing, C.C.A., Adams v. Mellan, 51 F.2d 620, affirming, D.C., 39 F.2d 80, and certiorari granted 52 S.Ct. 208, 284 U.S. 614, 76 L.Ed. 525.

For express company

Where railroad issued a special delivery check for bag received by its agent under direction of a passenger that it be transported at end of journey to his house, the road receiving four cents of total charge of forty cents for the service, the railroad acted as agent of the express company, which carried from station to house.—Noel v. Westcott Express Co., 158 N.Y.S. 702, 95 Misc. 154.

66. U.S.—South Carolina Asparagus Growers' Ass'n v. Southern Ry. Co., C.C.A.S.C., 46 F.2d 452.

67. U.S.—Southern Pac. Co. v. Stevens, Ariz., 258 F. 165, 169 C.C.A. 233.

Agent apparently authorized

Chief clerk in manifest bureau.—Southern Pac. Co. v. Stevens, Ariz., 258 F. 165, 169 C.C.A. 233.

68. Ga.—Chattanooga Southern R. Co. v. Thompson, 65 S.E. 285, 133 Ga. 127.
10 C.J. p 218 note 19.

69. Ga.—Chattanooga Southern R. Co. v. Thompson, supra.

70. N.C.—Outland v. Seaboard Air Line R. Co., 46 S.E. 735, 134 N.C. 350.
10 C.J. p 218 note 21.

A traveling fast freight soliciting agent, soliciting freight at points not on the carrier's lines, is a general agent, with power to bind the carrier to furnish cars at such points.—Kissell v. Pittsburgh, Ft. W. & C. Ry. Co., 188 S.W. 1118, 194 Mo.App. 346

71. Mo.—Baker v. Kansas City, etc., R. Co., 3 S.W. 486, 91 Mo. 152.

72. Mo.—Hoffman Heading, etc., Co. v. St. Louis, etc., R. Co., 94 S.W. 597, 119 Mo.App. 495.

73. Ga.—Georgia Coast, etc., R. Co. v. Durrence, 65 S.E. 583, 6 Ga.App. 615.

74. Mo.—Thee v. Wabash Ry. Co., 233 S.W. 959, 208 Mo.App. 200.
Mont.—Cornwell v. Davis, 213 P. 218, 66 Mont. 100.
N.Y.—Day v. Ulster & D. R. Co., 174 N.Y.S. 622, 186 App.Div. 601.
Tex.—Panhandle & S. F. Ry. Co. v. Lockhart, Civ.App., 277 S.W. 230—Fort Worth & R. G. Ry. Co. v. Burns, Civ.App., 242 S.W. 295—Texas Midland R. R. v. O'Kelley, Civ.App., 203 S.W. 152, dismissed for want of jurisdiction.
10 C.J. p 218 note 24.

The rule stated in Corpus Juris has been cited in Cornwell v. Davis, 213 P. 218, 66 Mont. 100.

75. Mo.—Meriwether v. Quincy, etc., R. Co., 107 S.W. 434, 128 Mo.App. 647.

76. Tex.—Galveston, etc., R. Co. v. Thompson, Civ.App., 44 S.W. 8.

77. Tex.—Wells v. Hennessy, Civ. App., 156 S.W. 1158.
10 C.J. p 218 note 27.

to another company is within the apparent scope of his authority and binds his principal.[78] Although it is not required that a station agent be authorized to contract to furnish a certain kind of car at a certain hour of a certain day, in violation of the rules of the carrier, the law requires that he be authorized to furnish reasonable facilities within a reasonable time for carrying on business either on his own authority or on his demand or notice to the company.[79] It has been held that such agent has implied authority to furnish cars for shipment to a destination beyond the carrier's line, and that, where the shipper has no notice to the contrary and relies on the appearance of authority, the contract made with the agent is binding on the company.[80] A local station agent also has authority to arrange for loading and receiving cars for transportation.[81] On the other hand, a station agent is not to be presumed, in the absence of evidence, to have authority to contract to furnish cars to shippers at other stations than his own;[82] but it has been otherwise held when the car was to be partially loaded at the one station and finished at the other;[83] and a local freight agent has no authority to bind the railroad by an agreement that cattle shall be shipped in a solid train, without mixing any other train with them, or that the train shall be drawn by a single engine.[84]

Ratification. An unauthorized contract to furnish cars at a certain place is ratified by the carrier by furnishing such cars at the place designated.[85]

§ 137. Contracts for Transportation on Connecting Line

In the absence of express or implied authority which, however, may be conferred by statute, an agent cannot bind the carrier by a contract for transportation over a connecting line.

In the absence of statutes providing otherwise, the weight of authority in this country is that the carrier receiving goods for transportation to a destination beyond its own line impliedly contracts as carrier only for its own line, and in jurisdictions where this is the rule it is evident that an agent attempting to contract for transportation over a connecting line is exceeding his ordinary authority as agent of the receiving carrier, and his principal is not bound by such contract, in the absence of express authority, or course of business from which such authority may be inferred;[86] and the statements of an agent of one carrier cannot impose a liability on a connecting carrier.[87] The authority of a station agent to bind a carrier by a contract of carriage to a point on a line of another carrier must be proved in order to hold the initial carrier for loss or damage occurring on the line of another company,[88] and is not to be inferred from the mere fact that the agent is authorized to receive goods for carriage,[89] or from the mere fact that the freight for the entire distance was collected by such agent;[90] but it is well settled that the authority of a station agent to bind a railroad company by a contract of carriage to a point beyond its terminus may be inferred from a previous course of dealing between the shipper and the carrier, as, for instance, where such contracts have been customarily made

78. Utah.—Nichols v. Oregon Short Line R. Co, 66 P. 768, 24 Utah 83, 91 Am.S R. 778.
10 C.J. p 218 note 28.

79. Okl.—Schaff v. Rose, 239 P. 458, 111 Okl. 237—St. Louis-San Francisco Ry. Co. v. Hobart Mill & Elevator Co., 239 P. 165, 111 Okl. 295.

80. Tex.—San Antonio, etc., R Co. v. Timon, Civ.App, 110 S.W. 82, 83, affirmed 114 S.W. 792, 102 Tex 222.
10 C J. p 219 note 29.

81. Iowa.—Stewart v. Chicago, etc., R Co., 151 N.W. 485, 172 Iowa 313.

82. Iowa.—Voorhees v. Chicago, etc, R Co., 30 N.W. 29, 71 Iowa 735, 60 Am R 823.
10 C.J. p 219 note 31.

83. Tex.—Ft. Worth & D. C Ry. Co v. Strickland, Civ.App., 208 S W. 410

84. Tex.—Gulf, etc., R. Co. v. Jackson, 89 S.W. 968, 99 Tex. 343, reversing, Civ App, 86 S.W. 47.
10 C.J. p 219 note 32.

85. Mo.—Kissell v. Pittsburgh, Ft. W. & C. Ry. Co., 188 S W. 1118, 194 Mo.App. 346.

86. Minn.—McNeill & Scott Co. v Great Northern R. Co, 194 N.W. 614, 156 Minn 120.
Tex.—Houston & T C R. Co. v. Smith, Civ.App., 258 S W. 542.
10 C J p 219 note 33.

Contract for ocean shipment
A railroad company is not bound by the representation of its agent made to a prospective shipper, with whom no contract of carriage had yet been entered into, relative to the procurement of cargo space for an ocean shipment at specified rates.—Gosho Co. v. Southern Pac Co, C C A Tex., 285 F. 227, certiorari denied 43 S Ct. 520, 262 U S. 742, 67 L Ed. 1210
Rights, duties, and liabilities of initial carrier generally see infra §§ 401–417.

87. Ark.—Missouri Pac. R. Co. v. Stein, 256 S.W. 373, 161 Ark. 405.

Conversations
Where, during federal control, a shipment was turned over to the director general operating defendant's railroad, but it was misdirected, and was found by a connecting carrier after return of railroads to their owners, fact that defendant's claim agent asked plaintiff what he wished done about forwarding the goods did not make defendant liable.—Missouri Pac R Co. v. Stein, 256 S W. 373, 161 Ark 405.
Rights, duties, and liabilities of intermediate and terminal carriers see infra §§ 413–427.

88. Iowa.—McLagan v. Chicago, etc., R Co, 89 N.W. 233, 116 Iowa 183.
10 C J p 219 note 34.

89. Ind.—Pittsburgh, etc, R Co. v. Bryant, 75 N E 829, 36 Ind.App. 340
10 C.J. p 219 note 35

90. S D.—Coates v Chicago, etc., R. Co., 65 N.W 1067, 8 S D. 173.
10 C.J. p 219 note 36.

by the agent and assented to by the carrier,[91] and where two or more railroad companies with connecting lines have formed an association for the transportation of goods, the agent of one has apparent authority to contract for the shipment of goods over the connecting lines.[92] Agents or officers of an initial carrier, who give through rates after conferring with officers of the final carrier, act on behalf of the final carrier, and bind it by their acts and declarations.[93] Although an agent was without authority to make a contract for transportation of goods beyond its own line, such a contract may be ratified by acts of the carrier.[94]

§ 138. Stipulations as to Time and Place of Delivery

A contract for delivery at a stipulated time or place may, where such a contract is not illegal, be made by an authorized agent, as may a contract for delivery to the carrier.

Except as such contracts may be forbidden by statute,[95] an agent having authority to contract for the shipment of goods has apparent authority to stipulate for the delivery of such goods at a specified place within a specified time;[96] and such contracts may be by parol as well as in writing.[97] The fact that it is not within the actual scope of the agent's authority is of no consequence, unless the shipper has notice of the scope of his authority,[98] or the contract is so unusual and extraordinary that it could not reasonably be included within the general authority of the agent.[99] A mere expression of opinion as to time of arrival or delivery will not bind the carrier.[1]

Delivery to carrier. A station agent has authority generally to consent to, and bind the carrier by, any special arrangement in regard to delivery of the goods to the carrier for shipment.[2]

§ 139. Settlement of Claims for Damages

Agents authorized to do so may settle claims for damages.

A general freight agent having authority to adjust claims for damages may bind the carrier in the settlement of such a claim.[3] Likewise an agreement by an agent who customarily settled claims for the road will bind it,[4] and any limitation on his authority must be established by the carrier;[5] but a local station agent has no authority to bind the carrier by a contract to settle a claim for damages; such claims are passed on and determined by officers of

91. Mo.—Faulkner v. Chicago, etc., R. Co., 73 S.W. 927, 99 Mo.App 421.
10 C.J. p 219 note 37.

92. Ill.—Erie, etc., Despatch v. Cecil, 112 Ill. 180.
10 C.J. p 220 note 38.

93. Tex.—Southern Kansas R. Co v. J. W. Burgess Co., Civ.App., 90 S.W. 189.

94. Tex.—Chicago & G. W. Ry. Co v. Plano Milling Co., Civ App., 214 S.W. 833, affirmed, Com.App., Missouri, K. & T. R. Co. of Texas v. Plano Milling Co, 231 S W. 100, certiorari denied 42 S Ct. 317, 258 U.S. 624, 66 L.Ed. 797.
10 C.J p 220 note 40.

Attempted performance

Where a railroad's agent exceeded authority in issuing bill of lading purporting to bind the road to transport over connecting lines property it had not and never afterward acquired possession of, but the road, by attempting to perform, adopted its agent's act, it was liable for damage resulting from negligent failure to transport and deliver within reasonable time.—Chicago & G. W. Ry Co. v. Plano Milling Co, Tex.Civ. App, 214 S.W. 833, affirmed Missouri K. & T. R. Co. of Texas v. Plano Milling Co., Com App., 231 S.W. 100, certiorari denied 42 S Ct 317, 258 U. S. 624, 66 L Ed 797.

95. **Federal Transportation Act**

Verbal agreement by railroad agent to get shipment to destination in time is void as applied to interstate shipments, under the federal Transportation Act.—Shier v. American Ry. Express Co., 208 N.W. 746, 234 Mich. 505.

96. Iowa.—Stoner v. Chicago, etc., R. Co, 80 N.W. 569, 109 Iowa 551.
10 C.J. p 220 note 41.

Driver of team

Where a general deliveryman as a common carrier sent boy with load of ice to another's place of business, and such other, without deliveryman's knowledge, instructed driver to deliver ice cream, the law would not imply driver's authority to contract for deliveryman that ice cream would be delivered within specified time.—Reynolds v. Hathaway, 167 N. W. 63, 102 Neb. 299.

97. Tex.—Gulf, etc, R. Co. v. Looney, 115 S.W. 268, 51 Tex.Civ. App. 381.

98. Mo.—Gann v. Chicago, etc., R Co., 72 Mo.App 34.

99. Mich.—Rudell v. Ogdensburg Transit Co., 76 N.W. 380, 117 Mich. 568, 44 L R.A. 415.

1. Wis.—Johnston v. Chicago & N. W. Ry. Co., 246 N.W. 336, 210 Wis 227.

2. S C.—American Fruit Growers v. King, 114 S.E 861, 122 S C. 69.

3. Ind.—Chicago, etc., R. Co. v. Katzenbach, 20 N E. 709, 118 Ind. 174.

4. Miss.—New Orleans & N. E. R. Co. v. Interstate Wholesale Grocers, 95 So. 316, 131 Miss. 157.

Freight agent

Where the freight agent of a railroad company is in the habit of settling claims for lost and damaged freight, but where there is a secret limitation that his authority only extends to settling claims for an amount not exceeding one hundred dollars, which fact is unknown to one with whom the agreement is made, then the agent had the apparent authority to make an agreement to settle the claim for lost and damaged freight, which agreement is binding on the railroad company.—New Orleans & N. E. R Co. v. Interstate Wholesale Grocers, 95 So. 316, 131 Miss. 157.

Release of shipper's liability on bond

In an action on bonds given to a carrier for the production of bills of lading covering shipments delivered without their production, evidence showing agent's authority to represent the carrier in securing return of merchandise shows conclusively that the carrier's agent, who negotiated for a return of the goods, had authority to release the shipper's liability on the bonds.—Russo v. Davis, C.C A Ill., 285 F. 231.

5. U.S.—Russo v. Davis, supra.

the company specially designated for that purpose and not by station agents.[6]

A claim agent's agreement that the carrier would return damaged goods to the point of shipment for repairs, without compensation, is binding on the carrier when ratified by it by so transporting the goods.[7] Where it appears that a freight station agent of a railroad company has extensive powers to dispose of perishable goods which a consignee has refused to accept in such manner as he considers to the best advantage of the company, he may bind the company by an agreement with a consignee that, if the latter will pay the freight due on carloads of such goods in a damaged condition and take the goods and sell them at the best price he can get, the railroad company will pay any loss sustained by reason of the condition of the goods.[8]

A carrier is not bound by an alleged agreement of his agent when the situation is an unusual and extraordinary one in which the agent has no implied authority to admit liability,[9] nor where the making of an agreement to adjust and pay damages is clearly beyond the authority of the particular agent.[10]

§ 140. Stipulations as to Rates, Rebates, and Discrimination

When not in violation of statutes, contracts stipulating as to rates and rebates may be made by authorized agents.

Except as such contracts may be in violation of statute, as shown infra §§ 392–397, an agent having authority to contract for shipment has also apparent authority to contract as to the rates of charge, on the line of his principal,[11] and as to rebates to be allowed the shipper, if a contract for rebates would be valid.[12] However, where such contracts are prohibited by law, an agent has no authority to contract with a shipper for transportation at a lower rate than that allowed to others,[13] or at a rate not authorized by a statutory classification.[14] It is not within the apparent scope of a local station agent's duties to fix rates on connecting lines in remote portions of the country over which the carrier did not undertake to carry property, and such carrier is not bound by the statement of its agent as to the rate that would be charged by the connecting company.[15]

§ 141. Authority in Respect to Other Contracts

a. In general
b. Bills of lading

a. In General

Such other contracts as a carrier may validly enter into may be made by authorized agents, and when so made will bind the carrier.

An agent who receives goods for shipment can bind the carrier by an agreement not to deliver without surrender of a bill of lading attached to a draft on the consignee,[16] or to give notice of the arrival of the goods at their destination,[17] or to ship goods by a certain train,[18] to furnish a special train,[19] or to reship goods,[20] or as to the unloading of live stock,[21] or to advance custom duties, unless the shipper had notice that the

6. Neb.—Leypoldt & Pennington Co. v. Davis, 199 N.W. 463, 112 Neb. 350.
10 C.J. p 220 note 46.

7. Ga.—Sipple v. Seaboard Air Line Ry. Co, 114 S.E. 435, 154 Ga. 376 reversing 110 S.E. 39, 28 Ga.App. 16, opinion conformed to 115 S.E. 47, 29 Ga.App. 328.

8. Pa.—Short v. Delaware, etc., Co., 41 Pa.Super. 141.
10 C.J. p 221 note 59.

9. N.H.—New Hampshire Wholesale Fruit Co. v. Payne, 120 A. 78, 80 N.H. 540.

Extraordinary situation

Where it appeared that a consignee of a carload of melons, on discovering that they were damaged, refused to accept them until the freight cashier and one called an adjuster told him to go ahead and save as many as possible and that the company would stand the loss, the consignee's demands were extraordinary and unusual in view of his duty to accept and seek damages thereafter, and they created a situation to meet which there was no implied authority on the part of the agent so to admit liability, and no recovery could be had based on such agreement.—New Hampshire Wholesale Fruit Co. v. Payne, 120 A. 78, 80 N.H. 540.

10. Iowa.—Moon v. Chicago, B. & Q. R. R., 195 N.W. 196, 196 Iowa 652.

11. N.C.—Borden v. Richmond, etc, R. Co., 18 S.E. 392, 113 N.C. 570, 37 Am.S.R. 632.
10 C.J. p 220 note 47.

12. Iowa.—Marsh v. Chicago, etc., R. Co., 44 N.W. 562, 79 Iowa 332
10 C.J. p 220 note 48.

13. U.S.—Loma Fruit Co. v. International Nav. Co, C.C.A.N.Y., 11 F.2d 124, certiorari denied Atchison, T. & S. F. R. Co. v. Loma Fruit Co, 46 S.Ct. 471, 270 U.S. 662, 663, 70 L.Ed. 787.
10 C.J. p 220 note 50.

14. Ark.—St. Louis, etc, R. Co. v. Ostrander, 52 S.W. 435, 66 Ark. 567

15. Iowa.—McLagan v. Chicago, etc, R. Co, 89 N.W. 233, 116 Iowa 183.

16. Mich.—Sturges v. Detroit, etc, R. Co, 131 N.W. 706, 166 Mich. 231.

17. Pa.—Tanner v. Oil Creek R. Co., 53 Pa. 411.

18. Tex.—Pacific Express Co. v. Needham, 83 S.W. 22, 37 Tex.Civ.App. 129.

19. Wash.—Auditorium Theatre Co. v. Oregon-Washington R., etc., Co., 137 P. 489, 77 Wash. 277.

20. Tex.—American Ry. Express Co. v. Barnhart Drug Co., Civ.App, 22 S.W.2d 759.

21. Tex.—Davis v. Four Lakes Cattle Co, Civ.App., 245 S.W. 711—Davis v. Simmons, Civ.App, 240 S.W. 970, dismissed for want of jurisdiction.
10 C.J. p 220 note 56.

Agreement to unload at certain place

Where a shipper of cattle billed to L, a point twenty-five miles further on than E, asked the agent at E if there was plenty of water at E, so

agent had no such authority,[22] or to hold cattle at a depository during a brief delay prior to shipment, where the carrier's general rules give the agents charge of their contracts subject to general rules and special orders, and where there is no evidence of a general rule or special order limiting such authority.[23] So an arrangement between the consignee of a trunk and the agent of an express company, by which the consignee is allowed to remove a part of the contents of the trunk and leave the trunk in the express company's custody, is within the apparent scope of the agent's authority and is binding on his principal, in the absence of any notice to the consignee of any restriction of the agent's authority.[24] The agent of a railroad company, while bound to receive goods for transportation, has the right to limit his company's liability for negligence to its own line, where such limitation is not forbidden by statute.[25]

On the other hand, it is not within the apparent authority of a station agent to make a contract of shipment by rail to a station on a line not yet open for operation,[26] or to receive,[27] or to deliver,[28] goods at a place on the company's road other than a regular station, and the burden of proving the agent's authority to make such a contract is on the shipper.[29] So an agent of a receiving carrier has no authority to bind a connecting carrier by a statement to a shipper that his check will be accepted at the other end of the line,[30] and a guaranty that the price of the goods shipped shall be paid by the consignee is not presumed to be within the power of a general shipping agent.[31] In the absence of proof of authority to do so an agent of a carrier cannot bind it by a contract to purchase goods.[32] An agent of an express company has no authority to agree on the part of the company to pay the undertaker's charges on a corpse and to ship it.[33] An express driver having authority to call for and receive goods for delivery under a contract with the express company, has not, therefore, authority to receive goods from a third person without the knowledge of the company, this being the making of a contract for the company.[34]

It cannot be assumed from the nature of the employment that a station agent has authority to make a verbal contract to feed and water stock in the company's stockyard.[35] Where a consignor of cattle agreed to accompany them, that the conductor told him, after part of the trip had been made, that it would be all right if he did not accompany the cattle the rest of the distance will not release the consignor without proof that the conductor was authorized to annul the contract.[36] Evidence that the agent of a carrier who furnished to a shipper of horses a special car owned by a different company was authorized by the owner of the car to make contracts for its use does not show that he had authority to make a contract for its use for an interrupted trip at the rate specified in the car company's schedules for a continuous trip.[37]

A station agent cannot, by his admissions, bind the carrier to a new agreement and deprive it of the requirements of a written contract entered into by the shipper with it.[38]

b. Bills of Lading

In general a carrier is bound by bills of lading issued

that shipper could exercise his right to terminate the transportation at E and unload the cattle there, the agent's affirmative reply to such inquiry on which the shipper relied and acted by unloading the cattle at E was held within the scope of the agent's authority, being in relation to the proper conduct of the carrier's business at E, and the shipper could rely on such representation without making an independent investigation to ascertain if the water supply there was ample.—Davis v. Four Lakes Cattle Co., Tex.Civ.App., 245 S.W. 711.

22. Wash.—Waldron v. Canadian Pac R. Co., 60 P. 653, 22 Wash. 253
10 C.J. p 220 note 57.

23. N.H.—Flint v. Boston, etc., R. Co., 59 A. 938, 73 N.H. 141.

24. N.Y.—Oderkirk v. Fargo, 11 N.Y.S. 871, 58 Hun 347, 16 N.Y.S. 220, 61 Hun 418.

25. Mo.—Miller v. Missouri, etc., R. Co., 138 S.W. 902, 157 Mo.App. 638.
Liability of initial carrier for loss or injury on connecting lines see infra § 403 et seq.

26. Tex.—Quanah, etc., R. Co. v. Drummond, Civ.App., 147 S.W. 728.

27. Ky.—Newport News, etc., R. Co. v. Reed, 10 Ky.L. 1020.

28. Miss.—Illinois Cent. R. Co. v. Swanson, 46 So. 83, 92 Miss. 485.

29. Miss.—Illinois Cent. R. Co. v. Swanson, supra.

30. Ky.—Louisville, etc., R. Co. v. Bennett, 76 S.W. 408, 25 Ky.L. 834.

31. Minn.—Weikle v. Minneapolis, etc., R. Co., 66 N.W. 963, 64 Minn. 296.

32. U.S.—Lake & Export Coal Corporation v. Chesapeake & O. Ry. Co., C.C.A.W.Va., 1 F.2d 968.
Purchase of coal for railroad
In action by carrier against shipper of coal for freight charges and demurrage, a defense that plaintiff bought the coal, and that the freight and demurrage due were to be a part of the price, is not sustained, where it was not shown that employee of plaintiff alleged to have made the contract had authority to make it, or was held out as having such authority.—Lake & Export Coal Corporation v. Chesapeake & O. Ry. Co., C.C.A.W.Va., 1 F.2d 968.

33. Tex.—Gathright v. Pacific Express Co., 145 S.W. 1185, 105 Tex. 157, affirming, Civ.App., 130 S.W. 1035.

34. N.Y.—Wolf Thread Co. v. Rosenbusch, 180 N.Y.S. 94.

35. Kan.—Missouri Pac. R. Co. v. Carpenter, 24 P. 462, 44 Kan. 257

36. S.D.—Mix v. Chicago, etc., R. Co., 149 N.W. 727, 34 S.D. 613.

37. Ark.—Chicago, etc., R. Co. v. Ingraham, 170 S.W. 232, 114 Ark. 506.

38. Mass.—Fletcher v. New York Cent. & H.R.R. Co., 118 N.E. 294, 229 Mass. 258.

by authorized agents and may not deny receipt of any or all of the goods described therein; but in some jurisdictions the rule, when not otherwise changed by statute, is that an agent has no authority to issue a bill of lading without actual receipt of goods and hence cannot bind the carrier.

The terms of a bill of lading issued by an agent authorized to do so are binding on the carrier.[39]

Liability for goods not received. By the express provision of the Federal Uniform Bills of Lading Act, the issuing of a bill of lading by an agent or employee acting within the scope of his actual or apparent authority renders the carrier liable to the owner of goods covered by a straight bill and subject to stoppage in transit, or to the holder in good faith for value, of an order bill, for damages caused by the nonreceipt of the carrier of all or part of the goods, or their failure to correspond to the description in the bill at the time of its issue. This provision imposes a new liability on the carrier for the acts of the agent in issuing a bill of lading when no goods have been received for shipment,[40] and under its terms a carrier has been held liable on a bill forged by its employee,[41] and to a bona fide holder for the quantity of goods specified in the bill.[42] However, this provision will not allow a shipper to recover for loss of property where the property was never delivered to the carrier, although the bill of lading recites its receipt.[43]

In those jurisdictions which have adopted the Uniform Bills of Lading Act a provision similar to that of the federal act is in force, limited in its application, of course, to bills of lading issued in intra-state shipments or to shipments in foreign commerce not governed by the federal act. This provision does not create a new cause of action, but merely deprives the carrier of a defense which it was allowed to make before its enactment.[44]

No liability can be imposed on the carrier under the provisions of either the federal act or the Uniform Bills of Lading Act where the bill of lading was for a purely intra-state shipment, and the holder of the bill was not "one who has given value in good faith relying upon the description therein of the goods," as required by both the acts.[45]

Independently of the statutory provisions under consideration, a number of jurisdictions have regarded the carrier as liable on a bill of lading issued by an agent having authority to issue bills of lading, even though no goods were in fact received;[46] but

39. Ark.—Prescott & N. W. R Co v. Davis, 191 S W. 210, 126 Ark. 366.

Change of destination

A carrier will be bound by the terms of a bill of lading changing the original destination of the goods shipped, when such bill was issued by an agent authorized to do so.—Prescott & N. W R Co. v. Davis, 191 S W. 210, 126 Ark. 366.

Misdescription of goods by an agent in the bill of lading will not prevent the shipper from recovering for damage to the goods not properly described—Newman v. Seaboard Air Line Ry. Co, 124 S.E. 627, 188 N.C 341.

40. U.S—Gleason v. Seaboard Air Line Ry. Co, Ga, 49 S Ct. 161, 278 U S. 349, 73 L Ed 415, reversing, C. C.A, Seaboard Air Line Ry Co. v Gleason, 21 F 2d 883, certiorari granted Gleason v. Seaboard Air Line R Co, 48 S Ct. 321, 276 U S. 612, 72 L.Ed. 731

Ala—Louisville & N R Co. v. Cullman Warehouse, 147 So. 421, 226 Ala 493

41. U.S—Gleason v. Seaboard Air Line Ry. Co, Ga., 49 S.Ct. 161, 278 U S. 349, 73 L Ed. 415, reversing, C C A, Seaboard Air Line Ry. Co. v Gleason, 21 F.2d 883, certiorari granted Gleason v. Seaboard Air Line R. Co, 48 S.Ct. 321, 276 U S 612, 72 L.Ed. 731.

Wash—Chas W. Johnson Lumber Co. v. Great Northern Ry Co, 176 P 343, 104 Wash 354, affirmed 181 P. 932, 104 Wash. 354.

However, although a carrier's agent, in collusion with a shipper and with intent to aid in fraud, but without the carrier's knowledge, allowed the shipper to retain forged order bills of lading when the shipper received the goods consigned to itself, the carrier cannot be held liable for any loss suffered by a bank through the shipper's forgery of the bills and the bank's loaning of money thereon, because the agent acted outside of his authority, and not as agent of the company in such transaction—Saugerties Bank v. Delaware & Hudson Co, 198 N.Y S 722, 204 App Div. 211, affirmed 141 N.E 904, 236 N.Y. 425, and reargument denied 142 N E. 331, 236 N.Y. 675.

42. Ill—Alton Iron & Metal Co v Wabash Ry. Co, 235 Ill App. 151, reversed on other grounds 159 N E 802, 328 Ill 353.

Carrier liable for large discrepancy in weight.—Alton Iron & Metal Co v. Wabash Ry. Co., 235 Ill.App. 151, reversed on other grounds 159 N.E. 802, 328 Ill. 353.

43. Ala.—Louisville & N. R. Co. v. Cullman Warehouse, 147 So 421, 226 Ala. 493.

44. Ill—American Hide & Leather Co. v. Southern Ry. Co, 142 N E 200, 310 Ill. 524, affirming 228 Ill App 305.

Not subject to constitutional objection

Uniform Bills of Lading Act § 23, as enacted in Illinois, is not subject to any constitutional objection.—American Hide & Leather Co. v. Southern Ry. Co., 142 N E. 200, 310 Ill 524, affirming 228 Ill App. 305

45. Mass—R. J. Reynolds Tobacco Co. v. Boston & M. R. R, 10 N E.2d 59.

46. Kan—Harold v. Atchison, etc, R. Co., 144 P 823, 93 Kan 456 10 C.J p 196 note 76.

Statutory provisions

(1) A statutory provision in Alabama imposing liability for spurious bills of lading issued by one having authority to issue bills or direct or authorize their issuance, does not make a carrier liable for spurious bills of lading issued by an agent who had only authority to supervise subordinates authorized to issue bills of lading or by an unauthorized person acting under such agent—National Park Bank of New York v Louisville & N R. Co, 74 So. 69, 199 Ala. 192

(2) Such a provision does not authorize an agent having power to issue bills of lading for property received to empower third persons not in the carrier's employ or in the prosecution of its business to issue at will bills of lading without receipt of the property to be shipped—National Park Bank of New York v. Louisville & N. R. Co., supra.

the rule stated in a majority of the jurisdictions is that the agent of the carrier, having no authority to issue a bill of lading without actual receipt of the goods, cannot bind the carrier even as to an innocent transferee for value of the bill of lading.[47] Even where the carrier was regarded as bound by his agent's act, it was held that the doctrine of equitable estoppel does not protect one who purchases a bill of lading or makes advances thereon either with actual knowledge or with reliable information that the recitals therein with respect to the receipt of the freight by the carriers are not true.[48]

Where a carrier gives its agent express authority to issue bills of lading for goods before actual receipt of the goods, the carrier will be bound by his act in issuing a bill of lading where the bill of lading has passed into the hands of a bona fide purchaser for value, although no goods are actually received.[49]

Even though a carrier might not be bound by a bill of lading issued by its agent for goods which are never received, it does not follow that the carrier is not bound thereby, if the goods are in fact subsequently delivered, to be transported according to the terms of the contract; and, where the agent of a railroad company issues a bill of lading without the goods in hand and they are susbequently delivered, the contract takes effect, and the carrier is bound as if the goods had originally been delivered.[50]

A carrier may ratify the unauthorized act of its agent in issuing a bill of lading without actual receipt of the goods, but there is no ratification if the act relied on to establish it was in itself induced by deceit or mistake.[51]

M. DELIVERY AND ACCEPTANCE, AND CUSTODY AND CONTROL OF GOODS

§ 142. Delivery to and Acceptance by Carrier

Delivery to, and acceptance of, goods by it are essential to impose on a carrier the duties and obligations of a common carrier.

In order that the carrier may be charged with reference to the custody, care, and transportation of goods, it is essential that as bailee it shall have come into possession of the goods, which, of course, involves a delivery by the shipper and an acceptance by the carrier, and until there has been such delivery and acceptance, by which the possession of the goods has been transferred from the shipper to the carrier, no liability of the carrier with reference to such goods arises.[52] To constitute actual delivery

(3) The fact that cotton had been previously delivered by connecting carriers on spurious bills of lading of defendant, does not show that the issuance of subsequent bills of lading was within the scope of the authority of defendant's agent.—National Park Bank of New York v. Louisville & N. R. Co., supra.

Rule unaffected by criminal statute

Where a carrier is liable on a bill issued by an authorized agent although no goods have been received, the operation of the rule is not affected by the fact that it is made a crime by statute for the agent to issue a bill of lading without having received the freight.—Hutchings v. Missouri, etc., R. Co., 114 P. 1077, 84 Kan. 479, 41 L.R.A.,N.S., 500—10 C.J. p 197 note 77.

47. U.S.—Friedlander v. Texas, etc., R. Co., Tex., 9 S.Ct. 570, 130 U.S. 416, 32 L.Ed 991.
Ark.—Prescott & N. W. R. Co. v. Davis, 191 S.W. 210, 126 Ark. 366.
N.C.—Commercial Nat. Bank v. Seaboard Air Line Ry., 95 S.E. 777, 175 N.C. 415
10 C.J. p 197 note 80.

Rule unaffected by criminal statute

Where the carrier is regarded as not liable on a bill of lading where no goods are received, the rule is in no way affected by a statute making it a felony to sign or to issue false receipts or bills of lading for property not actually received or delivered.—Henderson v. Louisville, etc., R. Co., 41 So. 252, 116 La. 1047, 1052, 114 Am.S.R. 582—10 C.J. p 198 note 83.

Statute making bills of lading negotiable for certain purposes does not affect the rule.—Roy v. Northern Pac. R. Co., 85 P. 53, 42 Wash. 572, 6 L.R.A.,N.S., 302, 7 Ann.Cas. 728.

Fraudulent conduct or mere mistake

(1) In the application of this rule it was of no consequence whether the act of the agent was fraudulent and collusive or merely the result of a mistake.—National Bank of Commerce v. Chicago, etc., R. Co., 46 N.W. 342, 560, 44 Minn. 224, 20 Am.S.R. 566, 9 L.R.A. 263.

(2) Nor would the fraudulent course of conduct of the agent for some time in so issuing bills of lading raise a presumption of the carrier's ratification.—Fitch v. Atchison, etc., R. Co., 155 N.Y.S. 1079, 170 App. Div. 222.

Rule not applicable where goods received by connecting carrier

It was within the scope of the authority of a railroad's agent to issue a bill of lading binding it to take up a carload of corn from its connecting carrier and to continue the carriage from its destination under bill of lading issued by the original carrier to a new destination.—Chicago & G.W. Ry. Co. v. Plano Milling Co., Tex.Civ.App., 214 S.W. 333, affirmed Missouri K. & T. R. Co. of Texas v. Plano Milling Co., Com.App., 231 S.W. 100, certiorari denied 42 S.Ct. 317, 258 U.S. 624, 66 L.Ed. 797.

48. Ill.—Lake Shore, etc., R. Co. v. National Live Stock Bank, 53 N.E. 326, 178 Ill. 506.
10 C.J. p 197 note 78.

49. Pa.—Dulaney v. Philadelphia, etc., R. Co., 77 A. 507, 228 Pa. 180
10 C.J. p 198 note 85.

50. U.S.—Robinson v. Memphis, etc., R. Co., C.C.Tenn., 16 F. 57.

51. U.S.—Cunard S.S. Co. v. Kelley, Mass., 115 F. 673, 53 C.C.A. 310
10 C.J. p 198 note 86.

52. Ark.—Straub v. Missouri Pac. R. Co., 283 S.W. 36, 170 Ark. 1174
Colo.—Atchison, T. & S. F. Ry. Co. v. Colorado Alfalfa Mill & Power Co., 184 P. 373, 67 Colo. 307.
Ky.—Louisville & N. R. Co. v. Edwards' Adm'x, 209 S.W. 519, 183 Ky. 555.
La.—Harris Hyman Co. v. Louisiana R. & Nav. Co., 4 La.App. 381.
Mass.—R. J. Reynolds Tobacco Co. v. Boston & M. R. R., 10 N.E.2d 59
Miss.—Adair v. Yazoo & M. V. R. Co., 107 So. 371, 142 Miss. 345.

and acceptance, there must be a real and present transfer of the physical possession and control of the goods.[53] On the other hand, a carrier, prima facie, by accepting goods for transportation, incurs the responsibilities of a common carrier,[54] and no formal acceptance is necessary where the agent has knowledge of the delivery of the goods with the intention that they be shipped, and makes no objection thereto.[55]

It is not incumbent on a carrier to inspect the contents of a shipment on receipt thereof and the issuance of a bill of lading,[56] and, indeed, it has been held that the carrier is not permitted to do so.[57]

§ 143. Time and Place

The time and place for delivery to a carrier are generally controlled by the regulations made by such carriers, unless altered by custom or other agreement.

As discussed in § 25 supra, carriers may make reasonable regulations as to the time when goods shall be tendered for shipment, and a tender at some other time will not, it seems, amount to a delivery; but a custom imposing conditions as to the hours within which shipments will be received or forwarded by a carrier becomes immaterial if the conditions are waived and the shipment is in fact accepted by the carrier for the purpose of transportation and delivery to the consignee.[58]

Under its right to make and enforce reasonable regulations, a carrier may fix the places at which it will receive and deliver freight, and it cannot be compelled to receive or handle it at other places.[59] Hence, as a general rule, the mere placing or depositing of goods at some place other than that at which the carrier is accustomed to receive goods does not amount to a delivery nor charge the carrier as such for loss or injury to the goods,[60] and this is especially true where the goods are so deposited for the shipper's own convenience.[61] This principle has received frequent application in the case of goods placed along the right of way of the carrier,[62] or near switches or sidings.[63] Where, however, the carrier directs the goods to be left

N.C.—Chas. A. Brown & Bro. v. Payne, 107 S.E. 310, 181 N.C. 381.
N.D.—Knapp v. Minneapolis, St. P. & S. S. M. Ry. Co., 159 N.W. 81, 34 N.D. 466.
Pa.—Irwin v. Davis, 82 Pa.Super. 288.
10 C.J. p 221 note 72.

The text as it appears in Corpus Juris has been cited with approval in Chas. A. Brown & Bro. v. Payne, 107 S.E. 310, 181 N.C. 381.

Coal taken by carrier for its own use

Loading coal on cars of defendant railroad company by a coal company at its mine and giving the conductor shipping orders directing that the cars be taken to the scale station, to which point only cars were moved on the shipping orders, and where they were consigned and waybills issued, and that they be there consigned to plaintiff, a contract customer was not a delivery of the coal to defendant as carrier for plaintiff, which was not present and had no part in the transaction, where defendant had a contract with the coal company for fuel coal, giving it the right of priority over all other orders, and under which, pursuant to its terms, defendant took the coal for its own use and notified the coal company of its action.—Phoenix Portland Cement Co. v. Baltimore & O. R. Co., C.C.A.Pa., 269 F. 136, affirming, D.C., 263 F. 230, certiorari denied 41 S.Ct. 376, 255 U.S. 574, 65 L.Ed. 792.

Receipt of goods essential

"The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver."
U.S.—Pollard v. Vinton, Ky., 105 U.S. 7, 8, 26 L.Ed. 998.
Ill.—Marcus v. Chicago, etc., R. Co., 167 Ill.App. 638, 642.

53. Del.—Mercer v. Christiana Ferry Co., 155 A. 596, 4 W.W.Harr. 490.

54. Vt.—Haglin-Stahr Co. v. Montpelier & W. R. R. Co., 102 A. 940, 92 Vt. 258.

55. N.C.—Howell v. Seaboard Air Line R. Co., 119 S.E. 198, 186 N.C. 239.

56. Ill.—Harshaw, Fuller & Goodwin Co. v. Illinois Cent. R. Co., 252 Ill.App. 253.
Va.—Hines v. Buchanan, 109 S.E. 219, 131 Va. 88.

57. Me.—Goldberg v. New York, N. H. & H. R. Co., 153 A. 812, 130 Me. 96.

58. Ga.—Central of Georgia R. Co. v. Butler Marble, etc., Co., 68 S.E. 775, 8 Ga.App. 1.

59. Ill.—Cleveland, C., C. & St. L. Ry. Co. v. Commerce Commission, 146 N.E. 606, 315 Ill. 461.

Receipt at point off carrier's line

As a general rule, in the absence of constitutional or statutory provisions, a carrier cannot be compelled to receive freight from a point off its lines.—Cleveland, C., C. & St. L. Ry. Co. v. Commerce Commission, 146 N.E. 606, 315 Ill. 461.

Receipt on private track

Where a railroad company furnishes sufficient facilities of its own for the receipt of freight, there is at common law no duty resting on it to receive freight on a private siding or spur.—Fairview Coal Co. v. Arkansas Cent. R. Co., 252 S.W. 920, 159 Ark. 649, 32 A.L.R. 191.—10 C.J. p 65 note 44 [e].

60. La.—Sentell v. Texas & P. Ry. Co., App., 146 So. 352.
Tex.—Gulf, C. & S. F. Ry. Co. v. Terrell Bros., Civ.App., 14 S.W.2d 903, error dismissed.
10 C.J. p 222 note 78.

Placing on platform at depot

A carrier, having posted notice that it would not be liable for goods left on platform until issuance of bill of lading, was not liable for loss of bale of cotton placed on platform by shipper, but stolen prior to issuance of bill of lading, notwithstanding shipper's custom of placing cotton on platform when purchased without obtaining bill of lading until the close of the business day, when bill of lading for the full day's purchases would be issued.—Behrmann v. Atlantic Coast Line R. Co., 109 S.E. 397, 118 S.C. 48, 22 A.L.R. 957.

61. Del.—Truax v. Philadelphia, etc., R. Co., 8 Del. 233.
Ga.—Wilson v. Atlanta, etc., R. Co., 9 S.E. 1076, 82 Ga. 386.
N.C.—Wells v. Wilmington, etc., R. Co., 51 N.C. 47, 72 Am.D. 556.

62. Ga.—Wilson v. Atlanta, etc., R. Co., 9 S.E. 1076, 82 Ga. 386.
10 C.J. p 222 note 80.

63. Colo.—Atchison, T. & S. F. Ry. Co. v. Colorado Alfalfa Mill & Power Co., 184 P. 373, 67 Colo. 307.
10 C.J. p 222 note 81.

at a particular place, agreeing to receive them there, a deposit of the goods at that place constitutes sufficient delivery to charge the carrier.[64] The carrier may also by special arrangement with the shipper or by implication from habitual custom and usage agree to accept and receive goods for transportation placed along its line for shipment at places other than the regularly designated places for the reception and delivery of freight; and by reason of such usage, custom, or agreement, a deposit of goods by the shipper at a place where it would not ordinarily be bound to accept goods for transportation may constitute a delivery sufficient to charge the carrier as an insurer for loss or injury to the goods.[65]

To complete delivery it is essential that the property should be placed in such a position that it may be taken care of by the agent or person having charge of the business and under his immediate control.[66] Even the placing of the goods on the vehicle of the carrier, whether it is a wagon or a car, ready for transportation, will not constitute sufficient delivery, where this is not done in pursuance of any previous understanding and the agent has no notice from which an acceptance can be inferred;[67] and, of course, there is no delivery where a car is loaded under these circumstances, and the carrier's agent on being notified thereof declines to ship the goods.[68]

The provisions of the uniform bill of lading that property destined to, or taken from, a station at which there is no regularly appointed agent and when received or delivered on private or other sidings, shall be at owner's risk until the cars are attached to trains, do not apply to loaded cars on a public or semipublic siding or one which is in fact part of the carrier's terminal system at a station at which there are regularly appointed agents, and, at least, where a bill of lading has been issued, such goods are not at the owner's risk.[69] The rule is otherwise, however, as to cars on strictly private industry tracks effectively separated from the terminal and exclusively under private control.[70]

§ 144. Notice of Delivery

In the absence of special contract, custom, or usage, notice of delivery must be given to the carrier or an agent thereof.

In the absence of special contract, custom, or usage, it is not sufficient that the property is delivered on the carrier's premises or placed in a position from which it might readily be taken by the carrier or its agent, but there must be notice to it or its agent of the delivery, and intention to place the goods in the care and custody of the carrier for transportation.[71]

Special contract, custom, or usage. The general rule just stated is subject to any conventional arrangement between the carrier and its patrons, or to a custom or usage in their dealings which dispenses with the giving of actual notice to the carrier of the delivery of the goods. In other words, constructive delivery may be made sufficient by a special contract, custom, or usage, and the placing of the goods by the shipper in the place at which they are accustomed to be deposited, or at a place specially designated by contract, will be a sufficient delivery and acceptance to charge the carrier as an

64. Ga.—Fleming v. Hammond, 19 Ga 145.

65. N.Y.—Crane, Hayes & Co. v New York, N. H. & H. R. Co., 230 N.Y.S. 427, 132 Misc. 682.
Tex.—Texarkana & F. S. Ry Co. v. Brass, Civ.App., 245 S.W. 457, affirmed, Com.App., 260 S.W. 828, rehearing overruled 262 S.W. 737.
10 C.J. p 222 notes 83, 84.

The Corpus Juris text has been cited with approval and the rule applied, where a freight car was the customary place of delivery, to a delivery to a freight car on a private siding.—Crane, Hayes & Co. v. New York, N. H. & H. R. Co., 230 N.Y.S. 427, 132 Misc. 682.

66. N.Y.—Grosvenor v. New York Cent. R. Co., 39 N.Y. 34.

67. N.C.—Basnight v. Atlantic, etc., R. Co., 16 S.E. 323, 111 N.C. 592.
10 C.J. p 224 note 92.

68. Tex.—Yoakum v. Dryden, Civ. App., 26 S.W. 312
10 C.J. p 224 note 93.

69. U.S.—Yazoo & M. V. R. Co. v. Nichols & Co., 41 S.Ct. 549, 256 U.S. 540, 65 L.Ed. 1081, affirming 83 So. 5, 120 Miss. 690

70. N.Y.—Bers v. Erie R. Co., 122 N.E. 456, 225 N.Y. 543, affirming 163 N.Y.S. 114, 176 App.Div. 241

71. Ark.—Matthews v. St. Louis, I. M. & S. Ry. Co., 185 S.W. 461, 123 Ark. 365, L.R.A.1916E 1194
La.—Sentell v. Texas & P. Ry. Co., App., 146 So. 352.
Okl.—St. Louis & S. F. R. Co. v. Blocker, 184 P. 584, 76 Okl. 279.
10 C.J. p 223 note 85

The Corpus Juris text has been cited with approval in St. Louis & S. F. R. Co. v. Blocker, 184 P. 584, 585, 76 Okl. 279.

Cars on private sidings

(1) Where a bill of lading provided that, when goods were received on private or other sidings, they should be at owner's risk until car was attached to a train and the car had been loaded and sealed up and the carrier notified thereof, the carrier had a reasonable time thereafter to take charge of property before becoming liable for damages thereto by fire breaking out prior to its removal.—Chickasaw Cooperage Co. v. Yazoo & M. V. R. Co., 215 S.W. 897, 141 Ark. 71.

(2) Where carrier had no notice that cars spotted on ginner's spur had been loaded, had received no shipping instructions, and had issued no bills of lading, it was not liable for destruction by fire of cotton in such cars, although it had occasionally hauled without prior request loaded cars from spur to side track some miles away to await shipping instructions or issuance of bills of lading.—Sentell v. Texas & P. Ry. Co., La.App., 160 So. 847.

insurer, although no actual notice is given to the carrier or assent shown.[72] This general principle has been held applicable even though the custom or usage relied on was contrary to the express directions and special regulations of the company, which fact was known to the shipper.[73] However, if custom or usage is relied on, there can be no constructive delivery of goods so as to bind the carrier for their carriage except at such place, as where by constant practice and usage they have received property left for transportation.[74] Constructive delivery may also be made by delivering to the carrier the receipt of a warehouseman or cotton compress company, from whose custody the goods are to be taken by the carrier, and the issuance of a bill of lading by the carrier's agent in consequence thereof,[75] especially where the compress company is the carrier's agent for compressing the cotton as preliminary to a more convenient transportation.[76]

§ 145. When Carrier's Liability as Such Attaches

a. In general
b. Delivery with directions to hold until further orders
c. Failure to give shipping directions
d. Failure to prepay freight
e. Issuance of receipt or bill of lading

a. In General

A carrier's liability attaches as soon as delivery to it is complete.

The risk of the carrier, as such, begins on delivery of the goods to it for immediate transportation,[77] that is, as soon as the delivery is complete

72. Ark.—Straub v. Missouri Pac. R Co., 283 S.W. 36, 170 Ark. 1174.
Mo.—First Nat. Bank v. Missouri Pac Ry Co., 278 S.W. 1075, 220 Mo.App. 941.
Okl.—St. Louis & S. F. R. Co. v. Blocker, 184 P. 584, 76 Okl. 279.
Or.—Blackwell v. Oregon Short Line Ry Co., 161 P. 565, 82 Or. 303.
Wash.—Kirby v. American Ry. Express Co., 242 P. 24, 137 Wash. 241
10 C.J. p 223 note 86

Approval of Corpus Juris text

(1) The rule as stated in Corpus Juris, 10 C.J. p 223 note 86, has been quoted with approval and followed in First Nat. Bank v. Missouri Pac Ry., 278 S.W. 1075, 1078, 220 Mo.App. 941.

(2) The rule has also been cited with approval in:
Okl.—St. Louis & S. F. R. Co. v. Blocker, 184 P. 584, 585, 76 Okl. 279.
Wash.—Kirby v. American Ry. Express Co., 242 P. 24, 25, 137 Wash. 241.

Agreement between parties controls

A shipper and a carrier may make such stipulations on the matter of delivery as they see fit, and, when made, such agreements will govern.—Blackwell v. Oregon Short Line Ry. Co., 161 P. 565, 82 Or. 303

Constructive delivery

Plaintiff's act in purchasing cattle, ordering cars, and telling carrier's agent that he was ready to ship, and asking that he be notified on arrival of cars, stating that he would load and be ready to ship in two or three hours thereafter, constituted a constructive delivery of cattle for shipment, notwithstanding placing of cattle on pasture, since it was a temporary arrangement to end on arrival of cars for shipment.—Fewel v. St. Louis & S. F. Ry Co., Mo.App., 267 S.W. 960.

Engine foreman

Where custom is to notify the engine foreman orally, such notice is sufficient.—Straub v. Missouri Pac. R Co., 283 S.W. 36, 170 Ark. 1174.

Necessity of formal notice

Where the station agent and conductor of a common carrier were informed the day before an intended shipment that the cattle were to be put into the pens for shipment according to custom, no further formal notice was necessary.—Blackwell v. Oregon Short Line Ry. Co., 161 P. 565, 82 Or. 303.

Occasional action as "custom" or "usage"

The fact that a carrier occasionally hauled, without prior request, loaded cars from ginner's spur to sidetrack to await shipping instructions or issuance of bills of lading did not establish "custom" or "usage" of carrier to accept delivery of cotton on spur so as to be liable for destruction of cotton by fire while on spur, and before receipt of shipping instructions or issuance of bills of lading.—Sentell v. Texas & P. Ry. Co., La.App., 160 So. 847.

73. Ala.—Montgomery, etc., R. Co. v. Kolb, 73 Ala. 396, 404, 49 Am.R. 54.
10 C.J. p 223 note 87.

74. Me.—Witzler v. Collins, 70 Me. 290, 35 Am.R. 327.

75. Ark.—Graysonia, N. & A. R. Co. v. Newberger Cotton Co., 282 S.W. 975, 170 Ark. 1039.
Tex.—U. S. Fire Ins. Co. of New York v. St. Louis, B. & M. Ry. Co., Civ.App., 41 S.W.2d 118, reversed on other grounds St. Louis, B. & M. Ry. Co. v. U. S. Fire Ins. Co. of New York, Com.App., 60 S.W.2d 196.
10 C.J. p 224 note 89.

76. Tex.—Texarkana & F. S. Ry. Co. v. Brass, Civ.App., 245 S.W. 457, affirmed, Com.App., 260 S.W. 828.
10 C.J. p 224 note 90

77. U.S.—Charles J. Webb & Sons v. Central R. Co. of New Jersey, C.C.A.N.J., 36 F.2d 702, affirming, D.C., Charles J. Webb Sons Co. v. Central R. Co. of New Jersey, 28 F.2d 392.
Ala.—Louisville & N. R. Co. v. Long, 105 So. 890, 213 Ala. 679
Ark.—Straub v. Missouri Pac. R. Co., 283 S.W. 36, 170 Ark. 1174.
Fla.—Wilson & Toomer Fertilizer Co. v. Atlantic Coast Line Ry. Co., 136 So. 339, 102 Fla. 324.
Kan.—Farmers' Union Co-op Creamery v. Atchison, T. & S. F. Ry. Co., 288 P. 569, 130 Kan. 831
Ky.—Peter Fox & Sons Co. v. Louisville & N. R. Co., 259 S.W. 37, 202 Ky. 189.—Louisville & N. R. Co. v. Edwards' Adm'x, 209 S.W. 519, 183 Ky. 555.
La.—W. H. & C. B. Hodges v. Louisiana Ry. & Nav. Co., 156 So. 26, 180 La. 3.—Harris Hyman & Co. v. Louisiana R. & Nav. Co., 4 La.App. 381.
Miss.—Adair v. Yazoo & M. V. R. Co., 107 So. 371, 142 Miss. 345
Neb.—Schneider v. Davis, 192 N.W. 230, 109 Neb. 638
N.Y.—Crane, Hayes & Co. v. New York, N. H. & H. R. Co., 230 N.Y.S. 427, 132 Misc. 682.
N.D.—Knapp v. Minneapolis, St. P. & S. S. M. Ry. Co., 159 N.W. 81, 34 N.D. 466
S.D.—Gormley v. Chicago & N. W. Ry. Co., 165 N.W. 249, 39 S.D. 547.
10 C.J. p 225 note 99
"It is the usual rule that the carrier becomes responsible as such at once upon delivery, unless the ship-

so as to place on the carrier the exclusive duty of seeing after their safety.[78] Delivery cannot be complete if anything remains to be done by the shipper before the goods can be sent on their way,[79] but if the thing to be done is something which it is the duty of the carrier to do, without

per has something further to do with the goods"—Charles J. Webb & Sons v. Central R. Co. of New Jersey, C.C.A.N.Y., 36 F.2d 702, 703, affirming, D.C., Charles J. Webb Sons Co. v. Central R. Co. of New Jersey, 28 F.2d 392.

Goods placed in station

A carrier having accepted goods for shipment as soon as practicable in the usual course of business, and not to await further orders, and having placed them in the station for its own convenience, its liability as carrier for their loss commenced at once.—Dionne v. American Express Co., 101 A. 209, 91 Vt. 521.

Point of time

It is the general rule that the point of time marking the commencement of the carrier's liability is that moment when the shipper surrenders the entire custody of his goods and the carrier receives complete control of them for the purpose of shipment at the earliest practicable opportunity in the usual course of business.—Fewel v. St. Louis & S. F. Ry. Co., Mo.App., 267 S.W. 960.

Under uniform bill of lading defendant is not relieved from liability as rail carrier, while goods are on board lighter for lighterage across harbor, so that carrier is liable for destruction of goods by fire while on board lighter, although it is conceded that it was guilty of no negligence; and bill of lading subsequently issued could not change obligations assumed by carrier on acceptance of goods—Charles J. Webb Sons Co. v. Central R. Co. of New Jersey, D.C.N.Y., 28 F.2d 392, affirmed, C.C.A., Charles J. Webb & Sons v. Central R. Co. of New Jersey, 36 F.2d 702.

78. Miss.—Adair v. Yazoo & M. V. R. Co., 107 So. 371, 142 Miss. 345.
N.Y.—Crane, Hayes & Co. v. New York, N. H. & H. R. Co., 230 N.Y.S. 427, 132 Misc. 682.
N.D.—Knapp v. Minneapolis, St. P. & S. S. M. Ry. Co., 159 N.W. 81, 34 N.D. 466.
Okl.—St. Louis & S. F. R. Co. v. Blocker, 184 P. 584, 76 Okl. 279.
Tex.—Gulf, C. & S. F. Ry. Co. v. Terrell Bros., Civ.App., 14 S.W.2d 903, error dismissed—Fort Worth & D. C. Ry. Co. v. Tomson, Civ. App., 250 S.W. 747.
10 C.J. p 225 note 1.

Shipment of money

Where tariff classifications filed by an express company with the interstate commerce commission recited, in substance, that packages containing money would be received for transportation only when delivered at its office by the shipper and that a shipment of coin or bullion too heavy to be carried might be called for by wagon, but that a representative of the shipper must accompany the same and retain custody of the shipment until delivered at the express company's office, an express company's placing of currency and silver bullion in a strong box on the bank's premises and taking the box into a truck, accompanied by a representative of the bank, was not a waiver of the tariff provisions governing delivery—American Ry. Express Co. v. American Trust Co., C.C.A.Ind., 47 F.2d 16, reversing, D.C., American Trust Co. v. American Ry. Express Co., 42 F.2d 272, and certiorari denied 52 S.Ct. 13, 284 U.S. 629, 76 L.Ed. 536.

79. U.S.—Charles J. Webb & Sons v. Central R. Co. of New Jersey, C.C.A.N.Y., 36 F.2d 702, affirming, D.C., Charles J. Webb Sons Co. v. Central R. Co. of New Jersey, 28 F.2d 392—Harris, Cortner & Co. v. Louisville & N. R. Co., C.C.A.Ala., 276 F. 277.
Ark.—W. F. Bogart & Co. v. Wade, 200 S.W. 148, 132 Ark. 49.
Ky.—Peter Fox & Sons Co. v. Louisville & N. R. Co., 259 S.W. 37, 202 Ky. 189—Louisville & N. R. Co. v. Edwards' Adm'x, 209 S.W. 519, 183 Ky. 555.
La.—Harris Hyman Co. v. Louisiana R. & Nav. Co., 4 La.App. 381.
Mass.—R. J. Reynolds Tobacco Co. v. Boston & M. R. R., 10 N.E.2d 59.
Miss.—Hill Mfg. Co. v. New Orleans, M. & C. R. R. Co., 78 So. 187, 117 Miss. 548, certiorari denied New Orleans, M. & C. R. Co. v. Hill Mfg. Co., 39 S.Ct. 11, 248 U.S. 571, 63 L.Ed. 426.
Okl.—Chicago, R. I. & P. Ry. Co. v. Garrison, 38 P.2d 502, 169 Okl. 634.
Tex.—Hines v. Steele, Civ.App., 224 S.W. 606, dismissed for want of jurisdiction.
10 C.J. p 224 note 95, p 225 note 97.

Corpus Juris text approved

(1) The rule as set forth in Corpus Juris, 10 C.J. p 225 note 97, has been quoted with approval and followed in:
Okl.—Chicago, R. I. & P. Ry. Co. v. Garrison, 38 P.2d 502, 506, 169 Okl. 634.
S.C.—Behrmann v. Atlantic Coast Line R. Co., 109 S.E. 397, 402, 118 S.C. 48.
(2) The same text has also been cited with approval in:
U.S.—S. B. Locke & Co. v. St. Louis-San Francisco Ry. Co., C.C.A.Mo., 284 F. 46, 49
La.—Harris, Hyman & Co. v. Louisiana R. & Nav. Co., 4 La.App. 381, 382
Miss.—Adair v. Yazoo & M. V. R. Co., 107 So. 371, 372, 142 Miss. 345.
Mo.—Mourer et al. v. Wabash Ry. Co., App., 280 S.W. 1050, 1052

As otherwise expressed the party bringing the goods must first do whatever is essential to enable the carrier to commence, or to make needful preparations for the service required from it, before it can be made liable or subject to responsibility in that capacity.—London, etc., F. Ins. Co. v. Rome, etc., R. Co., 39 N.E. 79, 144 N.Y. 200, 43 Am.S.R. 753.

Accumulation on platform

Carrier is not responsible for destruction by fire of cotton being accumulated by shipper, according to custom and consent of local agent, on station platform, until carload is made up.—Adair v. Yazoo & M. V. R. Co., 107 So. 371, 142 Miss. 345.

Act precedent to shipment

If shipper must do some act as necessary precedent to shipment, delivery to railroad would not be delivery to it as common carrier, but, if shipper is to do nothing further, delivery is to railroad as common carrier.—Hill Mfg. Co. v. New Orleans, M. & C. R. Co., 78 So. 187, 117 Miss. 548, certiorari denied New Orleans, M. & C. R. Co. v. Hill Mfg. Co., 39 S.Ct. 11, 248 U.S. 571, 63 L.Ed. 426.

Entire quantity

A carrier is not liable as an insurer of goods to be shipped until the entire quantity ordered to be shipped is delivered to, and accepted by, the carrier for immediate shipment by it.—Gulf, C. & S. F. Ry. Co. v. Anderson, Clayton & Co., Tex.Com.App., 246 S.W. 1031, reversing, Civ.App., 212 S.W. 814.

Separation of calves from cows

Where shipper had calves which he intended to ship and their mothers which he did not intend to ship inside railroad stock pens at 1 o'clock P. M., but did not separate cows from calves until later, railroad's liability as common carrier did not arise at 1 o'clock but only after cows had been separated from calves—Chicago, R. I. & P. Ry. Co. v. Garrison, 38 P.2d 502, 169 Okl. 634.

The test

(1) The test as to whether property has been delivered to a carrier for immediate transportation is: Is there anything to be done by the shipper to effect the passage of complete possession or control to the carrier? If the shipper must perform some service or do some act

further act on the part of the shipper, then the liability of the carrier attaches at once.[80] After the carrier has received the goods for transportation it is liable as common carrier, not merely as warehouseman, although they have not yet been loaded for immediate carriage.[81]

The question of the delivery and acceptance of freight for immediate delivery is not controlled or affected by any delay on the carrier's part in placing the goods in transit;[82] and the circumstance that both parties knew and understood that the carrier had no cars ready for immediate shipment of the goods does not change the result, inasmuch as the goods are to be held merely for carriage, and are to be forwarded without further orders at the earliest practicable moment.[83]

b. Delivery with Directions to Hold until Further Orders

A delivery by a shipper with directions to hold until further orders is not such a delivery and acceptance as will render the carrier liable as such.

It is well settled that, where the carrier is directed by the shipper to do that which is incompatible with its common-law duty as carrier, as, for instance, not to forward the goods until further orders, there is no such delivery and acceptance as will render the carrier liable as such.[84] Under these circumstances it is liable only as an ordinary bailee, so long as such special instructions are operative.[85] Where the shipper revokes the order and gives orders to forward the goods, the liability as carrier immediately attaches.[86]

c. Failure to Give Shipping Directions

A carrier, although holding actual custody of the goods, does not become liable therefor as a common carrier until the reception of shipping directions or orders.

A well settled general rule, which is hardly more than a repetition of the preceding proposition, is that notwithstanding the goods are in the actual custody of the carrier, its liability as such does not attach before shipping directions have been given, and that its liability is that of a warehouseman only,[87] and while it would seem that this principle might be rendered inoperative by custom or special

necessary to give this control over the entire shipment to the carrier, there is no such delivery.—Gulf, C & S. F. Ry. Co. v. Anderson, Clayton & Co., Tex.Com.App., 246 S.W. 1031, reversing, Civ.App., 212 S.W. 814.

(2) The rule has also been stated as follows: "The test as to whether the relation of shipper and carrier had been established is: Had the control and possession of the cotton been completely surrendered by the shipper to the railroad company? Whenever the control and possession of goods passes to the carrier and nothing remains to be done by the shipper, then it can be said with certainty that the relation of shipper and carrier has been established."—W. F. Bogart & Co. v. Wade, 200 S W. 148, 132 Ark. 49.

80. Ark.—Straub v. Missouri Pac. R Co., 233 S.W. 36, 170 Ark. 1174.
Miss.—Hill Mfg. Co. v. New Orleans, M. & C. R. Co., 78 So. 187, 117 Miss. 548, certiorari denied New Orleans, M. & C. R. Co. v. Hill Mfg. Co., 39 S.Ct. 11, 248 U.S. 571, 63 L.Ed. 426.
N.Y.—Crane, Hayes & Co. v. New York, N. H. & H. R. Co., 230 N.Y. S. 427, 132 Misc. 682.
Tex.—Gulf, C & S. F. Ry. Co. v. Anderson, Clayton & Co., Civ.App., 212 S.W. 814, error granted.
10 C J. p 225 note 98.

The Corpus Juris text, 10 C.J. p 225 notes 98–1, have been quoted with approval in Crane, Hayes & Co. v New York, N H & H R Co., 230 N.Y.S. 427, 429, 132 Misc. 682.

Addition to accepted shipment

Where goods are accepted, the subsequent placement of additional goods in the car does not relieve the carrier from liability.—Hines v. Steele, Tex.Civ.App., 224 S W. 606, dismissed for want of jurisdiction.

On reshipment

Where a consignee refused to accept goods shipped and the shipper at the request of the carrier notified a local agent to have the goods returned, liability as a carrier attached at once, and the carrier is liable as such, and not as a warehouseman, for goods destroyed before reshipment actually began.—American Ry. Express Co. v. Barnhart Drug Co., Tex.Civ.App., 22 S W.2d 759.

81. Miss.—Hill Mfg Co. v. New Orleans, M. & C. R. Co, 78 So. 187, 117 Miss. 548, certiorari denied New Orleans, M. & C. R. Co. v. Hill Mfg. Co., 39 S.Ct. 11, 248 U. S. 571, 63 L.Ed. 426.
10 C.J. p 225 note 2.

82. Miss.—Hill Mfg. Co. v. New Orleans, M & C. R. Co., supra.
Mo.—Fewel v. St. Louis & S. F. Ry. Co., App., 267 S W. 960
S.D.—Gormley v. Chicago & N. W. Ry. Co., 165 N.W. 249, 39 S D. 547.
10 C J. p 226 note 3.

The Corpus Juris text, 10 C J. p 226 note 3, has been cited with approval in Horner v Daily, 133 N.E. 585, 587, 77 Ind App. 378.

83. N.Y.—Wade v. Wheeler, 3 Lans. 201, affirmed 47 N.Y. 658.

84. Ky.—Louisville & N. R. Co. v. Edwards' Adm'x, 209 S.W. 519, 183 Ky. 555.
Miss.—Adair v. Yazoo & M. V. R. Co., 107 So 371, 142 Miss. 345.
10 C J. p 226 note 5.

The Corpus Juris text has been quoted with approval in Behrmann v. Atlantic Coast Line R. Co., 109 S.E. 397, 402, 118 S.C. 48.

85. Miss.—Adair v. Yazoo & M V. R. Co., 107 So. 371, 142 Miss. 345.
N.Y.—Wilson v. International Ry. Co., 160 N.Y.S. 367, affirmed 164 N. Y.S. 1118.
Utah.—Campbell v. Los Angeles & S. L. R. Co, 263 P. 495, 71 Utah 473.
10 C.J p 226 note 6.

Warehouseman or bailee

Evidence that a farmer, in accordance with an established custom, left a bale of cotton on a depot platform after having it weighed, with the consent of the railroad company, with the expectation of its being shipped at a later date, created a question for the jury whether or not the railroad company assumed the relation of warehouseman or bailee.—Parler v. Davis, 115 S.E. 818, 123 S. C. 39.

86. Utah.—Campbell v. Los Angeles & S. L. R. Co., 263 P. 495, 71 Utah 173.
Va.—Southern Express Co. v. McVeigh, 20 Gratt. 264, 61 Va. 264.

87. U S.—Harris, Cortner & Co. v. Louisville & N. R. Co., C.C.A.Ala., 276 F. 277.
Ky.—Peter Fox & Sons Co v. Louisville & N. R. Co., 259 S W. 37, 202 Ky. 189.

contract, the implication that the carrier assumes the duty of immediate transportation and its responsibility of an insurer, without knowing to what place and to whom goods are to be shipped, must be clear.[88]

d. Failure to Prepay Freight

If prepayment of the freight is a provision of the contract of shipment, a carrier is not liable as an insurer until such payment is made.

If, by the provisions of the contract of shipment, prepayment of freight is required, the carrier cannot be held liable as insurer until payment of freight is made, notwithstanding its possession of the goods.[89] On the other hand, where the carrier is in possession of the goods as a carrier, it is liable as such, notwithstanding the freight has not been prepaid as agreed or the regulation of the interstate commerce commission requiring collection of freight rates on a prepaid consignment before it is forwarded.[90]

e. Issuance of Receipt or Bill of Lading

The issuance of a receipt or bill of lading is not necessary to complete delivery and acceptance between a shipper and carrier.

The liability of the carrier as common carrier begins with the actual delivery of the goods for transportation, and not merely with the formal execution of a receipt or bill of lading; the issuance of a bill of lading is not necessary to complete delivery and acceptance.[91] Even where it is provided by statute that liability commences with the issuance of the bill of lading, actual delivery and acceptance are sufficient to bind the carrier.[92] The Carmack amendment requiring the carrier to issue a bill of

Tex.—Gulf, C. & S. F. Ry. Co. v. Terrell Bros., Civ.App., 14 S.W.2d 903, error dismissed.
10 C.J. p 226 note 8.

Corpus Juris text approved

(1) The Corpus Juris text, 10 C.J. p 226 notes 8, 9, has been quoted with approval and the rule as there announced followed in Gulf, C. & S. F. Ry. Co. v. Terrell Bros., Tex.Civ.App., 14 S.W.2d 903, 905, error dismissed.

(2) Corpus Juris text, 10 C.J. p 226 note 8, has also been cited with approval in:
U.S.—Hynds v. Schaff, C.C.A.Okl., 46 F.2d 275, 277.
Miss.—Adair v. Yazoo & M. V. R. Co., 107 So. 371, 372, 142 Miss. 345.
Tex.—Gulf, C. & S. F. Ry. Co. v. Terrell Bros., Civ.App., 14 S.W.2d 903, 905, error dismissed.

Goods held not delivered

Cotton owned by plaintiffs, which was destroyed by fire after it had been loaded by a compress company, at plaintiffs' request in cars of defendant railroad company, where the loading certificate issued by the compress company was held by plaintiffs, who had given no shipping directions to defendant and had made no application for a bill of lading, was held not in possession of defendant as carrier, and defendant was not liable as a carrier for the loss.—Harris, Cortner & Co. v. Louisville & N. R. Co., C.C.A.Ala., 276 F. 277.

88. Tex.—Gulf, C. & S. F. Ry. Co. v. Terrell Bros., Civ.App., 14 S.W.2d 903, error dismissed.
10 C.J. p 226 note 9.

89. Miss.—Hill Mfg. Co. v. New Orleans, M. & C. R. Co., 78 So. 187, 117 Miss. 548, certiorari denied New Orleans, M. & C. R. Co. v. Hill Mfg. Co., 39 S.Ct. 11, 248 U.S. 571, 63 L.Ed. 426.
10 C.J. p 226 note 10.

90. N.C.—Howell v. Seaboard Air Line R. Co., 119 S.E. 198, 186 N.C. 239.

91. Idaho.—Barrett v. Northern Pac. R. Co., 157 P. 1016, 29 Idaho 139.
Ind.—Chesapeake & O. Ry. Co. of Indiana v. Jordan, 114 N.E. 461, 63 Ind.App. 365.
Ky.—Louisville & N. R. Co. v. Edwards' Adm'x, 209 S.W. 519, 183 Ky. 555.
La.—W. H. & C. B. Hodges v. Louisiana Ry. & Nav. Co., 156 So. 26, 180 La. 3.
N.C.—Howell v. Seaboard Air Line R. Co., 119 S.E. 198, 186 N.C. 239.
N.D.—Knapp v. Minneapolis, St. P. & S. S. M. Ry. Co., 159 N.W. 81, 34 N.D. 466.
Or.—Blackwell v. Oregon Short Line Ry. Co., 161 P. 565, 82 Or. 303.
Pa.—Irwin v. Davis, 82 Pa.Super. 288.
S.C.—American Fruit Growers v. King, 114 S.E. 861, 122 S.C. 69.
Tenn.—Nashville, C. & St. L. Ry. v. Mayo, 14 Tenn.App. 28.
Tex.—Hines v. Steele, Civ.App., 224 S.W. 606, dismissed for want of jurisdiction—Gulf, C. & S. F. Ry. Co. v. Anderson, Clayton & Co., Civ.App., 212 S.W. 814, error granted—Galveston, H. & S. A. Ry. Co. v. Compania Hulera de Monclova, Civ.App., 204 S.W. 236.
Vt.—Dionne v. American Express Co., 101 A. 209, 91 Vt. 521.
10 C.J. p 226 note 12.

Corpus Juris text approved

(1) The Corpus Juris text, 10 C.J. p 226 notes 12, 13, has been quoted with approval and the rule of law there set forth declared to be correctly stated in Irwin v. Davis, 82 Pa.Super. 288, 291.

(2) The Corpus Juris text, 10 C.J. p 226 note 12, has also been quoted with approval and the rule as there stated followed in:
Ky.—Louisville & N. R. Co. v. Edwards' Adm'x, 209 S.W. 519, 521, 183 Ky. 555.
S.C.—American Fruit Growers v. King, 114 S.E. 861, 866, 122 S.C. 69.

Agent's instructions

There can be an acceptance binding on a carrier notwithstanding a book of instructions to employees required the issuance of a receipt.—Dionne v. American Express Co., 101 A. 209, 91 Vt. 521.

Failure to lift bill

Where cotton was loaded on freight cars at place where carrier maintained no regularly appointed freight agent, and shipper made out bills of lading and deposited same in lock box at station, according to custom, and carrier had agreed to accept and transport cars when loaded, failure of freight conductor to lift bills of lading was immaterial to liability of carrier, where shipper had surrendered complete control of goods to carrier.—W. H. & C. B. Hodges v. Louisiana Ry. & Nav. Co., 156 So. 26, 180 La. 3.

Bill subsequently issued

Under the uniform bill of lading, defendant is not relieved from liability as a rail carrier, while goods are on board a lighter for lighterage across a harbor, so that the carrier is liable for destruction of the goods by fire while on board the lighter, and a bill of lading subsequently issued could not change the obligations assumed by the carrier on acceptance of the goods.—Charles J. Webb Sons Co. v. Central R. Co. of New Jersey, D.C.N.Y., 28 F.2d 392, affirmed, C.C.A., 36 F.2d 702.

92. Pa.—Irwin v. Davis, 82 Pa.Super. 288.
10 C.J. p 227 note 13.

lading for goods shipped but not providing that the carrier's liability will not attach until the bill of lading has been issued does not affect the operation of the rule.[93] The issuance of a bill of lading is, however, prima facie an acceptance of the goods by the carrier.[94]

§ 146. Authority of Carrier's Agent to Receive

Delivery of goods to an agent of the carrier, in order to charge the carrier with liability as a common carrier, must be to an agent with authority to act in such capacity.

A delivery of goods, for shipment, to an agent of the carrier who is duly authorized or clothed with apparent authority to receive them, and who has been accustomed to receive goods tendered for carriage, is a sufficient delivery to bind the carrier,[95] notwithstanding any general or special instructions given the agent of which the shipper is ignorant,[96] and, where by custom or usage the person to whom the goods are intrusted is one recognized by the carrier as the proper person to receive such goods for transportation, the carrier will be liable, no matter what particular relation the person may otherwise bear to the carrier.[97] On the other hand, delivery of goods for transportation, to one who is not the person ordinarily intrusted with the duty of receiving goods for transportation, is not such a delivery as will bind the carrier.[98] If there is a question as to whether the delivery in a particular instance was to the agent in his individual capacity, or as agent for his employer, then to charge the carrier it must appear that the goods were received by him with authority to act as agent of the employer, and with the understanding that he was acting in that capacity.[99]

The same person may act as agent for the carrier to receive, as well as agent for the shipper to deliver, and in such case the question of delivery will depend on whether or not such person has acted in the capacity of agent for the carrier in receiving.[1] The agent may have authority to receive at another place than that ordinarily designated for the receipt of goods, and if he does receive within the scope of his authority the carrier will be bound, although the place of receipt is not the place where goods are usually delivered for transportation.[2]

Particular agents. Ordinarily it is necessary in delivering goods to a railroad company as carrier that the goods be delivered at a station to an authorized agent;[3] but acceptance by a railroad station agent of freight tendered for transportation at the station will bind the carrier, since his authority will be presumed.[4] Such presumption, however, applies only when the goods are tendered at the station, the regular place for the reception of the goods, and does not exist where the tender is made at some other point, in which instance his authority must be clearly proved.[5] Where the station agent, without authority to receive certain goods, permitted the shipper to load them into a car and immediately telegraphed to headquarters for instructions, and was directed to refuse to receive the goods and at once informed the shipper, there is no acceptance for shipment.[6]

An express driver is the general agent of the carrier to collect goods for carriage;[7] but, if a parcel

93. Mo.—Morrison Grain Co. v. Missouri Pac. R. Co., 170 S.W. 404, 182 Mo.App. 339.
10 C.J. p. 227 note 14

94. Miss.—Yazoo & M. V. R. Co. v. Nichols & Co., 83 So. 5, 120 Miss. 690, certiorari granted 40 S.Ct. 219, 251 U.S. 550, 64 L.Ed. 409.
N.Y.—Crane, Hayes & Co. v. New York, N. H. & H. R. Co., 230 N.Y.S. 427, 132 Misc. 682.

Private siding
Issuance of bill of lading for sealed car on private siding raised inference that possession was appropriated for carriage.—Crane, Hayes & Co. v. New York, N. H. & H. R. Co., 230 N.Y.S. 427, 132 Misc. 682

95. S.C.—American Fruit Growers v. King, 114 S.E. 861, 122 S.C. 69
10 C.J. p. 227 note 18.

96. S.C.—American Fruit Growers v. King, supra.

97. Ky.—Potts v. Bowler, 1 Ky.Op. 133
10 C.J. p. 227 note 19.

98. U.S.—Phœnix Portland Cement Co. v. Baltimore & O. R. Co., C.C.A. Pa., 269 F. 136, affirming, D.C., 263 F. 230, certiorari denied 41 S.Ct. 376, 255 U.S. 574, 65 L.Ed. 792
10 C.J. p. 227 note 16.

99. N.H.—Elkins v. Boston, etc., R. Co., 23 N.H. 275
10 C.J. p. 227 note 17.

1. U.S.—The Guiding Star, D.C.Ohio, 53 F. 936, affirmed 62 F. 407, 10 C.C.A. 454.
N.H.—Barter v. Wheeler, 49 N.H. 9, 6 Am.R. 434.
N.C.—Sumner v. Charlotte, etc., R. Co., 78 N.C. 289

2. Ga.—Georgia Southern, etc., R. Co. v. Marchman, 48 S.E. 961, 121 Ga. 235.
10 C.J. p. 227 note 22.

3. Del.—Truax v. Philadelphia, etc., R. Co., 8 Del. 233.
N.Y.—Rosenfeld v. Central Vermont R. Co., 97 N.Y.S. 905, 111 App.Div. 371.

4. Ala.—St. Louis, etc., R. Co. v. Cavender, 54 So. 54, 170 Ala. 601.
10 C.J. p. 227 note 25

Delivery of an express package to one in charge of a depot is a delivery to the express company, it being shown that the employees of the railroad company were in the custom of so receiving packages for the express company.—Pacific Express Co. v. Black, 27 S.W. 830, 8 Tex.Civ.App. 363.

5. Mo.—Missouri Coal, etc., Co. v. Hannibal, etc., R. Co., 35 Mo. 84.
10 C.J. p. 227 note 26

6. N.C.—Tilley v. Norfolk, etc., R. Co., 77 S.E. 994, 162 N.C. 37.

7. N.Y.—Lewis v. Van Horn, 53 N.Y.S. 546, 24 Misc. 765.—Magnus v. Platt, 115 N.Y.S. 824, 16 Misc. 499.

is placed in the custody of a driver to carry for his own gain, and not for the profit of his master, the master is not liable in case the parcel is not delivered.[8] A carrier by wagon who sends his team on his own business under the care of a driver who has never contracted for him and is without authority so to do is not liable for goods intrusted to the care of such driver.[9] A hotel porter who is accustomed to receive packages of a certain character for a railroad company is its agent for the acceptance of such packages, and a delivery thereof to him for transportation renders the carrier liable as such for their loss.[10]

§ 147. Custody and Control in Transit

Generally, the party with legal title to the goods is entitled to divert such goods at any time during transit, but this right ends when the carrier has fulfilled his obligation.

The true owner of goods transported by a common carrier or forwarding agent has the right to have his consignment while in transit withheld or diverted at any intermediate point through which it passes.[11] Instructions for a change in the destination of goods in transit must emanate from the party who is the real owner or one who has the authority to divert; otherwise the carrier alters the destination at its peril.[12] Such right of diversion, however, cannot add to the burden of the carrier or require it to do more than comply with a proper and legal demand therefor;[13] and, accordingly, a diversion of a shipment may be had during transit, but not after the destination has been reached, and the terms of the carrier's obligation have been fulfilled.[14] It is the duty of the carrier, on receipt

Pa.—Reel v. Adams Express Co., 27 Pa. Super. 77.
10 C.J. p. 228 note 29.

8. N.Y.—Blanchard v. Isaacs, 3 Barb. 388
10 C.J. p. 228 note 31.

9. Tenn.—Jenkins v. Pickett, 9 Yerg. 480.

10. W.Va.—Quarrier v. Baltimore, etc., R. Co., 20 W.Va. 424.

11. U.S.—Chicago, M., St. P. & P. R. Co. v. Flanders, C.C.A.Iowa, 56 F.2d 114
Cal.—Heath v. Judson Freight Forwarding Co., 190 P. 839, 47 Cal.App. 426
Ill.—Sparr v. Southern Pac. Co., 220 Ill. App. 180
Mo.—Wichita Poultry Co. v. Southern Pacific Ry. Co., 198 S.W. 82, 197 Mo.App. 578.
N.Y.—American Cotton Products Co. v. New York Cent. R. Co., 255 N.Y.S. 672, 142 Misc. 821.
S.C.—Liberty Nat. Bank v. Hines, 104 S.E. 313, 115 S.C. 82
Tex.—Panhandle & S. F. Ry. Co. v. Reynolds, Civ.App., 33 S.W.2d 249—Houston & T. C. R. Co. v. Smith, Civ.App., 258 S.W. 542—Davis v. Four Lakes Cattle Co., Civ.App., 245 S.W. 711
10 C.J. p. 84 note 5

The Corpus Juris text, 10 C.J. p. 84 note 5, has been cited with approval in:
U.S.—Chicago, M., St. P. & P. R. Co. v. Flanders, C.C.A.Iowa, 56 F.2d 114, 117
S.C.—Liberty Nat. Bank v. Hines, 104 S.E. 313, 315, 115 S.C. 82.
Tenn.—Virginia & S.W.R. Co. v. Sutherland, 197 S.W. 863, 864, 138 Tenn. 266

Duty to unload on order to withhold

A forwarding company, given an order to withhold shipment of goods which had been loaded with other goods in a car of which it still had control, was liable to the owner of the goods, where it failed to unload and withhold the same, where, although expense of unloading would be twenty dollars, an expense not out of proportion to the value of the goods.—Heath v. Judson Freight Forwarding Co., 190 P. 839, 47 Cal.App. 426

Issuance of exchange bill of lading

Where a carrier on diverting a shipment failed to rely on a rule giving it the right to refuse to divert and merely to act as plaintiff's agent in securing a bill of lading, but instead issued its own exchange bill of lading, it was bound by the new contract, and other contrary or equivocal terms of the original contract, if more favorable, were waived thereby.—W. L. Shepherd Lumber Co. v. Atlantic Coast Line R. Co., 112 So. 323, 216 Ala. 89.

New consideration unnecessary

A change in destination, being agreed on by a shipper and a carrier, does not require a new consideration to support it.—Panhandle & S. F. Ry. Co. v. Reynolds, Tex.Civ.App., 33 S.W.2d 249—Davis v. Four Lakes Cattle Co., Tex.Civ.App., 245 S.W. 711.

Shipper may freely interrupt transportation and have shipment diverted or reconsigned, even after delivery to connecting carrier, or when it reaches destination originally named, notwithstanding Carmack-Cummins Amendment to Interstate Commerce Act, 49 U.S.C.A. § 20.—Southern Produce Co. v. Norfolk Southern R. Co., 132 S.E. 360, 144 Va. 422

Sufficient notice

A telegram to a forwarding company, "Hold shipment further instructions if not shipped wire my expense whether shipped or not," was sufficient notice to charge the forwarding company with the duty of withholding the goods from shipment.—Heath v. Judson Freight Forwarding Co., 190 P. 839, 47 Cal.App. 426.

12. Tex.—Texas Midland R. Co. v. Cummer Mfg. Co., Civ.App., 207 S.W. 617.

Strangers to shipment

An unpaid seller to the shipper has been held to have no control over the goods, and the shipper alone has the lawful right to have the goods shipped and to require the carrier, under its duty toward shippers, to make out the bill of lading and forward the car according to instructions. Contracts of this character are not matters of private contract between carrier and shipper.—Wirch v. Chicago, M. & St. P. Ry. Co., 222 N.W. 232, 197 Wis. 316

13. Tex.—Houston & T. C. R. Co. v. Smith, Civ.App., 258 S.W. 542.
10 C.J. p. 85 note 7.

14. Ala.—Clark v. Louisville & N. R. Co., 114 So. 295, 216 Ala. 637
N.Y.—American Cotton Products Co. v. New York Cent. R. Co., 255 N.Y.S. 672, 142 Misc. 821
Tex.—Keeling v. Collins Grain Co., Civ.App., 59 S.W.2d 226.

Express company rule

The rule of an express company providing for the diversion of a car while in transit does not apply, where the car has reached its destination before the shipper requests the local agent to divert it.—Willson v. American Ry. Express Co., 197 N.Y.S. 600, 204 App.Div. 59, affirmed 147 N.E. 196, 239 N.Y. 562

Notice held to disclose intention

to change destination in transit, rather than reconsignment.—American Cotton Products Co. v. New York

from the owner of an order to divert, to deliver them to such owner or divert them according to his orders, on his presenting evidence of ownership and paying the proper charges;[15] and, if the carrier complies with the owner's request to divert the shipment, it is of course not open to him thereafter to object to the failure to deliver according to the original contract.[16]

In the absence of anything to show the contrary the consignee is presumed to be the owner of the goods shipped,[17] and the carrier before complying with a demand for a diversion of the shipment by one not the consignee is entitled to be furnished with evidence of the ownership of the person making the request and, in case he fails or refuses to furnish it, he cannot complain thereafter of a refusal to divert the shipment.[18] As the consignee is presumptively the owner of the goods in transit, unless the carrier is advised that the shipper has retained title, the carrier is justified in complying with the consignee's request to deliver the goods at some other destination than that designated by the consignor and incurs no liability to the latter by so doing.[19] The fact that at the time he gives directions for a change in the route the goods have passed into the possession of a connecting carrier does not affect the owner's right to have his consignment, while in transit, held or diverted.[20] In the absence of a special contract, however, an initial carrier is not required to notify its connecting carriers that the owner or consignee of goods desires them diverted.[21]

A mere notification by the buyer to the carrier to divert the goods in course of transit and change the destination of the shipment does not constitute a taking of possession of the goods by the buyer, either actual or constructive.[22]

Form of request. Under the rule of the interstate-commerce commission that a request for diversion or reconsignment must be made or confirmed in writing, a shipper cannot recover for a carrier's failure to divert an interstate shipment pursuant to an oral request regardless of whether the shipment is of perishable products.[23]

§ 148. Title to Goods

Where a consignor has not reserved title in himself, on delivery of goods to a carrier it is generally held that title passes to the consignee, although the consignor may pass no greater right than he himself possesses. A carrier may not dispute the title of a consignor, but is not liable for surrender to a holder of a paramount title. A carrier, by reason of the special ownership accorded to bailees, may maintain actions against persons damaging or wrongfully taking the property, and may defend against parties claiming the goods without right.

In accordance with the general rules of sales that a delivery of goods by the seller to a carrier for shipment to the buyer is a delivery to the buyer, as discussed in C.J.S. title Sales §§ 164, 165, also p. 378 note 90, 55 C.J. p 367 note 40—and that it will be presumed that delivery by the seller to a carrier for transportation to the buyer passes title to the buyer, as discussed in C.J.S. title Sales § 259, also 55 C.J. p 560 note 90, the consignee designated in the bill of lading is presumptively the owner of the goods shipped;[24] and, in the absence of a bill

Cent. R. Co., 255 N.Y.S. 672, 142 Misc. 821.

15. S.C.—Liberty Nat. Bank v. Hines, 104 S.E. 313, 115 S.C. 82.

16. N.Y.—Howatt v. Barrett, 142 N.Y.S. 135, 156 App.Div. 849, affirmed 110 N.E. 1042, 216 N.Y. 660

17. N.Y.—Bailey v. Hudson River R. Co., 49 N.Y. 70.
N.C.—Pinnix v. Charlotte, etc., R. Co., 66 N.C. 34.
10 C.J. p 85 note 8

18. Minn.—Ryan v. Great Northern R. Co., 95 N.W. 758, 90 Minn. 12.
Mo.—Carder v. Atchison, etc., R. Co., 153 S.W. 517, 170 Mo.App. 698.
10 C.J. p 85 note 9.

19. Ala.—Ocean S.S. Co. of Savannah v. People's Shoe Co., 81 So. 241, 202 Ala. 594, conformed to 81 So. 245, 17 Ala.App. 34.
10 C.J. p 85 note 11.

20. Ill.—Lewellyn v. Pere Marquette R. Co., 185 Ill.App. 171.

21. Tex.—Houston & T. C. R. Co. v. Smith, Civ.App., 258 S.W. 542

22. Ohio—M. Degaro Co. v. Cleveland, C., C. & St. L. Ry. Co., 174 N.E. 587, 123 Ohio St. 179.

23. Ark.—St. Louis-San Francisco Ry. Co. v. Robinson, 298 S.W. 881, 175 Ark. 126.

24. Ga.—Silver v. Earnest, 154 S.E. 456, 41 Ga.App. 741—Moss v. Earnest, 154 S.E. 455, 41 Ga.App. 740—Allen v. Southern Ry. Co., 126 S.E. 722, 33 Ga.App. 209
Ill.—Rudin v. King-Richardson Co., 143 N.E. 198, 311 Ill. 513.
N.Y.—New York Cent. R. Co. v. Warren Ross Lumber Co., 137 N.E. 324, 234 N.Y. 261, 24 A.L.R. 1160, reversing 191 N.Y.S. 940, 200 App.Div. 851.
Wash.—Puget Sound Bulb Exchange v. St. Paul Fire & Marine Ins. Co., 26 P.2d 84, 174 Wash. 691.
Bill of lading as legal symbol of the property see supra § 123
Negotiability and transfer of bill of lading see supra § 128.
Title to goods in transit when shipped C. O. D. see infra § 186 b.

Consignee treated as owner
Consignee may for certain purposes be treated as owner.—Otis Staples Lumber Co. v. Federal Nat. Bank of Boston, 154 N.E. 545, 258 Mass. 182—Coleman v. New York, N. H. & H. Ry., 102 N.E. 92, 215 Mass. 45, 7 A.L.R. 1366

Inconsistent claim
Shippers could not treat a shipment of lumber over defendant carrier's line as having been sold by them to a certain person, and, as against the carrier, claim ownership of that shipment.—Louisville & N. R. Co. v. Williams, 97 So. 817, 210 Ala. 268.

Prima facie owner
Upon a shipment of goods through a carrier to a third person, and on delivery to the shipper of the bill of lading, the consignee is prima facie the owner of the property
Mass.—New York, N. H. & H. R. Co. v. York & Whitney Co., 102 N.E. 366, 215 Mass. 36.

of lading,[25] or under an open bill of lading,[26] it is presumed that the title vests in the consignee absolutely on delivery of the goods to the carrier, subject only to the carrier's lien for freight, and the consignor's right of stoppage in transit. Therefore, in the absence of notice to the carrier of the existence of a different relation, it must treat the consignee as the owner of the goods, with authority to control them in transit.[27] By following the directions of the consignee, the carrier, in the absence of knowledge of consignee's lack of title, will not subject itself to any liability for losses which may result from so doing,[28] unless the directions involve the omission or nonperformance of some service or duty the performance of which is by law made essential in its transportation.[29] In the absence of a reservation of title by the consignor, the presumption of the passing of title to the consignee on delivery to the carrier will protect the carrier in delivering the goods to the consignee at the end of the transportation, as discussed in § 172 infra. If, however, before delivery to the consignee, the seller notifies the carrier not to deliver the goods, the carrier's duty then depends on the actual facts as to whether the relation between the consignor and the consignee is such that delivery to the carrier constitutes a transfer of title.[30] A purchaser from the consignee has been held to obtain no actual or constructive possession of goods in the hands of a carrier for transit.[31]

On the other hand, the consignor will be presumed to have retained the title if he has taken the bill of lading to himself or order,[32] or if the consignor

Mich.—King v. Van Slack, 159 N.W. 157, 193 Mich. 105—Turnbull v Michigan Cent. R. Co., 150 N.W. 132, 183 Mich. 213—Sturges v. Detroit, G. H. & M. Ry. Co., 131 N.W. 706, 166 Mich. 231.

Right of possession

Where goods are delivered to a carrier to be transported to a consignee, he has the right of possession of the goods.—Buschow Lumber Co. v. Hines, 229 S.W. 451, 206 Mo.App. 681.

Reliance on description of goods

Where it is the evident intention of a consignee not to pay for goods prior to loading, the title to the goods does not pass to such purchasing consignee until possession is had by the carrier and such consignee is entitled to rely on the description of the goods contained in the bill of lading.—American Hide & Leather Co. v. Southern Ry. Co., 142 N.E. 200, 310 Ill. 524, affirming 228 Ill.App. 305.

25. Minn.—Benjamin v. Levy, 38 N.W. 702, 39 Minn. 11.
10 C.J. p. 228 note 36.

Shipment to consignee in care of another

Where goods are consigned to one person in care of another, the title to the goods, as a general rule, is in the consignee.—Emmons Coal Mining Co. v. Norfolk & W. Ry. Co., C.C.A.Pa., 3 F.2d 525, affirming, D.C., Norfolk & W. Ry. Co. v. Emmons Coal Mining Co., 287 F. 168, and affirmed 47 S.Ct. 254, 272 U.S. 709, 71 L.Ed. 485.

26. N.C.—Aydlett v. Norfolk-Southern R. Co., 89 S.E. 1000, 172 N.C. 47.

Assignment of goods

Since a consignee possesses title to goods upon their delivery to the carrier, the shipper of goods under a straight bill of lading cannot assign the right to such goods to another, but may assign only the right which it owns, a claim for payment for goods shipped.—State Bank of De Pere v. Chicago & N.W. Ry. Co., 248 N.W. 423, 211 Wis. 465.

27. Ga.—Saunders Bros. v. Payne, 116 S.E. 349, 29 Ga.App. 615
Ky.—Hall v. Cumberland Pipe Line Co., 237 S.W. 405, 193 Ky. 728.
10 C.J. p. 228 note 37.

Evidence of ownership

The fact that a person is consignee of shipments by carrier is some evidence that he is the owner of the goods.—New York Cent. & H.R.R. Co. v. York & Whitney Co., 119 N.E. 855, 230 Mass. 206, affirmed in part and reversed in part on other grounds 41 S.Ct. 509, 256 U.S. 406, 65 L.Ed. 1016.

Shipping instructions not limited to shipper

Provision in shipping contract for ventilation of carload of bananas "on special instructions" did not imply that instructions should be received only from shipper, or warrant carrier in ignoring later reasonable instructions by consignee as apparent owner necessitated by change of temperature or weather conditions.—Saunders Bros. v. Payne, 116 S.E. 349, 29 Ga.App. 615.

28. Ga.—Saunders Bros. v. Payne, supra.
10 C.J. p. 228 note 38.

29. Ga.—Saunders Bros. v. Payne, supra
10 C.J. p. 228 note 39.

30. N.C.—Collins v. Seaboard Air Line Ry. Co., 120 S.E. 824, 187 N.C. 141
10 C.J. p. 229 note 43.

The Corpus Juris text has been cited with approval and the rule as there stated followed.
N.C.—Collins v. Seaboard Air Line Ry. Co., 120 S.E. 824, 825, 87 N.C. 141.
S.C.—Patterson v. American Ry. Express Co., 123 S.E. 844, 845, 129 S.C. 237

Rights of subvendor, not named as consignor

Where, in the sale of a carload of lumber, the subvendor delivered the same to carrier on an open bill of lading, in which the vendor was named as consignor and the vendee as consignee, upon refusal of vendee to pay for the lumber and accept the bill of lading, title not having passed, the carrier was justified in returning the shipment to the subvendor upon its demand.—Collins v. Seaboard Air Line Ry. Co., 120 S.E. 824, 187 N.C. 141.

31. Wis.—Bell v. Chicago & N.W. Ry. Co., 159 N.W. 914, 164 Wis. 277.

32. U.S.—Estherville Produce Co. v. Chicago, R.I. & P.R. Co., C.C.A.Iowa, 57 F.2d 50.
Ga.—Southern Ry. Co. v. Hodgson Bros. Co., 95 S.E. 263, 21 Ga.App. 753, reversed on other grounds 98 S.E. 541, 148 Ga. 851, conformed to 99 S.E. 41, 25 Ga.App. 536.
Tex.—Keeling v. Collins Grain Co., Civ.App., 59 S.W.2d 226.
10 C.J. p. 228 note 40.

Carrier liable to shipper where title reserved

Where plaintiff, under an executory contract of sale, loaded apples in a freight car with the consent of the railroad company, and notified the latter that title remained in plaintiff until payment by the buyer, the railroad company was liable to plaintiff for damages for refusing to deliver apples to plaintiff upon demand, such a refusal amounting to conversion.—Wilson v. International Ry. Co., 160 N.Y.S. 367, affirmed 164 N.Y.S. 1118.

Order notify bill

A shipment of goods to a buyer

or his agent takes control of the goods at the point of destination;[33] and, if the shipper retains the right to dispose of and control the goods, the title remains in him even though they have been delivered to the carrier for the consignee.[34] Of course, where there has been no sale, the title to goods shipped remains in the consignor notwithstanding delivery to the carrier,[35] and the mere fact that goods have been shipped to a person is of itself insufficient to vest title thereto in him.[36] The shipper may also show that the goods were shipped on consignment or that by agreement the title had revested in him so that he may be entitled to recover for damage to the goods,[37] and if, under the controlling statute, title has not passed, the shipper may have a right of action against the carrier for a loss of the goods during transit.[38] If the consignor ships goods to a factor or other agent in pursuance of a previous agreement so to do, but the factor or agent has made no advances on the strength of the delivery of the goods to the carrier for him, then his right to the goods has not yet attached, and the consignor may change their direction or countermand the order for delivery,[39] but if the right of the consignee to the goods has become complete on their delivery to the carrier, the consignor cannot by notice or direction to the carrier prevent such delivery.[40]

Where a carrier receives money for transmission but is unable to make delivery, the sale of a credit is not a complete transaction at the date of receipt, and the company does not become the owner of the money paid for such credit.[41]

Carrier cannot question consignor's title. The general rule is that a carrier, like any other bailee, is not at liberty to dispute the title of the consignor from whom it receives articles of shipment in an action brought by him,[42] the reason usually assigned being that, if the contrary doctrine prevailed, the carrier might by setting up title in some third person keep the property for itself.[43] However, the rule is subject to exceptions and the carrier will not render itself liable to the consignor where it actually surrenders the goods to the owner of the paramount title, as shown in § 172; and if the

under an order notify bill of lading reserves title in the seller and such title can pass to the buyer only on delivery of the bill of lading.

N.Y.—Dodge & Dent Mfg. Co. v. Pennsylvania R. Co., 162 N.Y.S. 549, 175 App. Div. 823.

N.C.—McCotter v. Norfolk Southern R. Co., 100 S.E. 326, 178 N.C. 159—W. L. Hall & Co. v. Norfolk Southern R. Co., 91 S.E. 607, 173 N.C. 108

Vt.—Booth v. New York Cent. R. Co., 112 A. 894, 95 Vt. 9.

When a draft for the price of a shipment is drawn on the purchaser with the bill of lading attached, the title does not ordinarily pass to such purchaser until the draft is paid, but remains in the shipper

Kan.—Farmers' Union & Co-op. Ass'n v. Payne, 205 P. 1035, 111 Kan. 96

N.C.—Collins v. Seaboard Air Line Ry. Co., 120 S.E. 824, 187 N.C. 141

Tex.—Texas Cotton Co-op. Ass'n v. Felton, Civ.App., 52 S.W.2d 1105, error dismissed.

33. Ky.—Celli v. Commonwealth, 199 S.W. 1, 178 Ky. 567.

34. N.Y.—Swift v. Davis, 193 N.Y.S. 848, 118 Misc. 205.

N.C.—W. L. Hall & Co. v. Norfolk Southern R. Co., 91 S.E. 607, 173 N.C. 108

10 C.J. p. 228 note 41.

Right of recovery

The owner of beans from whom the carrier received them can recover of it therefor, they not being delivered, he having always retained control of bill of lading, reciting receipt of beans from owner, although it recites consignment to order of another, by whom it is also signed as shipper.—Ortner v. Michigan Cent. R. Co., 167 N.W. 851, 202 Mich. 52.

35. Ark.—Southern Express Co. v. Freeze, 216 S.W. 303, 141 Ark. 161.

36. N.C.—Collins v. Seaboard Air Line Ry. Co., 120 S.E. 824, 187 N.C. 141.

37. N.C.—Aydlett v. Norfolk-Southern R. Co., 89 S.E. 1000, 172 N.C. 47.

38. **Seller required to deliver**

Under a statute providing that if a contract of sale requires a seller to deliver the goods to the buyer or to pay the transportation the property shall not pass until such goods are delivered, the seller retains title until delivery is made.—Conroy v. Barrett, 158 N.Y.S. 549, 95 Misc. 247

39. Ill.—Strahorn v. Union Stock Yard, etc., Co., 43 Ill. 424, 92 Am.D. 142—Lewis v. Galena, etc., R. Co., 40 Ill. 281.

Miss.—Chaffe v. Mississippi, etc., R. Co., 59 Miss. 182.

S.C.—Pool v. Columbia, etc., R. Co., 23 S.C. 286.

40. Ill.—Lake Shore, etc., R. Co. v. National Live Stock Bank, 53 N.E. 326, 178 Ill. 506

10 C.J. p. 229 note 45.

41. N.J.—Katcher v. American Express Co., 105 A. 497, 92 N.J. Law 309, reversed on other grounds 109 A. 741, 94 N.J. Law 165.

42. Ala.—Louisville & N. R. Co. v. James, 93 So. 701, 208 Ala. 6.

10 C.J. p. 229 note 47.

Assumption of ownership

A carrier which has no knowledge to the contrary can assume that the party in possession of the goods delivered to it for transportation is the owner or is authorized to consign the goods for shipment, and if it receives and delivers the goods in accordance with the directions of such person without knowledge of any other claim, it is not liable as for conversion to the true owner, so that an owner of an interest in oil land, who was out of possession, cannot charge a pipe line company with conversion of oil received from the persons in possession of the land, and delivered by it to the consignee before the company had any knowledge of plaintiff's claim to the land.—Hall v. Cumberland Pipe Line Co., 237 S.W. 405, 193 Ky. 728.

Bailor need not prove title

Where a shipper suing a carrier in detinue for miscarried goods was in possession of the goods and alone lays claim to them, and shipped them consigned to himself, the relation of bailor and bailee exists between them, and the rule that the depositary is bound to redeliver or restore chattels bailed to bailor, and that bailor may recover them of his bailee without proving his right of property in them, applies.—Louisville & N.R. Co. v. James, 93 So. 701, 208 Ala. 6.

43. N.Y.—Valentine v. Long Island R. Co., 79 N.E. 849, 187 N.Y. 121—Western Transp. Co. v. Barber, 56 N.Y. 544—Perkins v. Chautauqua Tract. Co., 137 N.Y.S. 80, 76 Misc. 307.

transaction is such as to import a transfer of title to the consignee, a delivery may be made to the consignee without imposing any liability on behalf of the consignor on the carrier.[44] Likewise, the carrier derives from the shipper no higher right with reference to possession of the goods than that which the shipper has, and in case of wrongful delivery to the carrier without authority the real owner may assert his rights as against the carrier[45] A carrier of goods is also without right to require an indemnity bond as a condition precedent to the delivery of property to its true owner;[46] but a consignee may be required by the carrier to give satisfactory indemnity on delivery to him, when the consignor's possession was wrongful and the carrier received notice thereof through a claim of ownership by a third person.[47] Also, if the carrier received the property for transportation in good faith without knowledge that the property was its own and thereafter discovered that the property belonged to it, it may avail itself of the defense that the property belonged to it in an action of conversion with the same force and effect that it could have availed itself of the right of a true owner in case of a third person.[48]

Rights and duties of carrier. A carrier, like any other bailee, has by reason of its rightful possession a special ownership of or title to the property as against third persons which will sustain an action for damage to the property or to recover possession thereof if wrongfully taken from it.[49] It may likewise maintain an action to recover possession of the goods where the goods have been delivered to the wrong person, or where they have been delivered to the right person without performance of proper conditions precedent to delivery, but in the latter instance it can do so only on paying back to the person to whom delivery is made all charges paid by him.[50] Also the carrier has such interest in the goods as to authorize it to defend against a person claiming it without right, and it is its duty to insist on its right where such person seeks to seize the goods.[51] The right of the carrier to possession does not, however, give it authority to dispose of the goods as against the rightful owner or to pledge them,[52] except as under emergency it may have implied authority as representative of the owner to sell, as discussed heretofore in § 48.

Since there can be no lawful delivery by and redelivery to a carrier en route, a carrier is in either actual or constructive possession of goods shipped until they reach their destination, even though temporarily sidetracked to permit a shipper's inspection.[53] And the same rule applies where goods are

44. Wis.—McCollom v. Minneapolis, etc., R. Co., 139 N.W. 1129, 152 Wis. 435.
10 C.J. p 229 note 50.

45. Ga.—Ocean S. S. Co. v. Southern States Naval Stores Co., 89 S.E. 838, 145 Ga. 798—Georgia R. & Banking Co. v. Haas, 56 S.E. 313, 127 Ga. 187.
10 C.J. p 229 note 46.

46. N.Y.—Wilson v. International Ry. Co., 160 N.Y.S. 367, affirmed 164 N.Y.S. 1113.

47. Ala.—Louisville & N. R. Co. v. Camody, 82 So. 648, 17 Ala.App. 158, reversed on other grounds 84 So. 824, 203 Ala. 522, conformed to 85 So. 846, 17 Ala.App. 370.

No liability in absence of notice

Railroad receiving goods for carriage from one whose possession is apparently rightful will not be liable as for conversion in action by true owner, unless latter, before goods are delivered demands them or gives notice of its rights thereto, and his intention to enforce it.—Atlantic Coast Line R. Co. v. Nellwood Lumber Co., 94 S.E. 86, 21 Ga.App. 209.

48. N.Y.—Valentine v. Long Island R. Co., 79 N.E. 849, 187 N.Y. 121, reversing 92 N.Y.S. 645, 102 App. Div. 419.

49. U.S.—Hubbard Bros. & Co. v. Southern Pac. Co., La., 256 F. 761, 168 C.C.A. 107
N.Y.—New York Cent. R. Co. v. Muszalski, 299 N.Y.S. 45, 252 App.Div. 251.
10 C.J. p 229 note 52.

Applicable in courts of admiralty

The rule that the carrier may sue in its own name as representative of the owner for a trespass on or injury to the property carried is applicable in courts of admiralty as well as at common law.—The Beaconsfield, N.Y., 15 S.Ct. 860, 158 U.S. 303, 39 L.Ed. 993—Vermilye v. Adams Express Co., N.Y., 21 Wall., U.S., 138, 22 L.Ed. 609—The Torgorm, D.C.S.C., 48 F. 584—Hovey v. The Sarah E. Brown, D.C.N.Y., 12 F.Cas. No.6,744.

Delivery on forged bill of lading

The mere fact that a railroad had previously delivered cotton to a buyer on forged bills of lading does not prevent the railroad from recovering from such buyer the value of the cotton delivered on a forged bill of lading purporting to have been issued by a connecting carrier, on the ground that the buyer was misled by the negligence of the railroad.—Hubbard Bros. & Co. v. Southern Pac. Co., C.C.A.La., 256 F. 761, 168 C.C.A. 107.

Evidence sufficient

In action by railroad for conversion of goods delivered for carriage, evidence established that defendant did not pay draft attached to bill of lading, did not acquire title to goods, and wrongfully converted goods to his own use.—New York Cent. R. Co. v. Muszalski, 299 N.Y.S. 45, 252 App. Div. 251.

50. Ill.—Chicago, R. I. & P. R. Co. v. North American Cold Storage Co., 244 Ill.App. 522.
10 C.J. p 230 note 53.

51. Me.—State v. Intoxicating Liquors, 21 A. 840, 83 Me. 158.

Carriers are bound to protect against third persons the respective interest of the consignor and the consignee, and are bound to both of these for the safe delivery of the property according to the bill of lading.—Holmes v. Balcom, 24 A. 831, 84 Me. 226.

52. Ark.—Crumbacker v. Tucker, 9 Ark. 365.
Ind.—Kitchell v. Vanadar, 1 Blackf. 356, 12 Am.D. 249.
N.H.—Bailey v. Shaw, 24 N.H. 297, 55 Am.D. 241.

53. N.Y.—Siebert v. Erie R. Co., 179 N.Y.S. 136, 189 App.Div. 536.

Carrier not relieved under unlawful agreement

A carrier is not relieved from liability for ore stolen from car placed on siding en route for sampling of

temporarily sidetracked to permit them to be reconditioned.[54]

§ 149. Stoppage in Transitu

Stoppage in transit may be had by one who is legally entitled to the goods or property, after reasonable notice, but only while such goods or property are in the possession of the carrier.

The right of the seller of goods sold on credit and which have been delivered to the carrier for the purchaser, in case the purchaser becomes insolvent before the carrier has delivered the goods to him, to prevent such delivery by notice to the carrier and to retake possession pertains to the law of sales, and is discussed in the C.J.S. title Sales § 403 et seq, also 55 C.J. p 907 note 2 et seq, and consequently need not be considered here. Only the duties of the carrier which arise from the giving of such notice will be considered at this point.

A carrier is entitled to insist on a full investigation as to a shipper's right to stoppage in transit and to retain possession until satisfied,[55] as only the legal owner of the goods[56] or his agent[57] has the right of stoppage in transit.

In some jurisdictions the right to stoppage in transit is controlled entirely by statute,[58] and under some statutes it is not a privilege to be granted or withheld at the will of the carrier.[59] A state transit commission's action in requiring the right of stoppage in transit to be granted to an intra-state shipment is not unconstitutional, nor does it interfere with the management of the carrier.[60]

Notice to carrier. Notice of stoppage in transit need not be in any specific form; it is enough if the carrier or its agent is advised of the wish of the vendor that his goods should not be delivered to the vendee on account of his insolvency.[61] The notice, however, must be reasonable and such as to enable the carrier to advise its agent in charge of the goods, or who is to deliver them to the vendee, that such delivery shall not be made.[62] According-

ore, since the carrier's agreement to leave car on siding temporarily en route for shipper's accommodation, not being authorized by uniform bill of lading, was unlawful under Elkins Act § 1, Interstate Commerce Act §§ 3, 6, and Hepburn Act § 2.—Siebert v. Erie R. Co., 179 N.Y.S. 136, 189 App.Div. 586.

Estoppel of carrier's claim

Carrier, having in violation of law granted shipper of silver ore special privilege of having car placed on siding en route for sampling of ore, could not complain, in shipper's action to recover for theft, after separation from rest of ore, that the stolen ore constituted articles of extraordinary value, within § 6 of the uniform bill of lading, providing for a higher rate therefor, and had not been so classified, since the increased value was due to separation in process of sampling, made possible by carrier's unlawful agreement.—Siebert v. Erie R. Co., 179 N.Y.S 136, 189 App.Div. 586.

54. **Where goods are damaged** while in the hands of a carrier and are returned to the shipper for reconditioning without a surrender of the bill of lading and are destroyed by fire while in the shipper's actual possession, the constructive possession is in the carrier and the liability for their loss falls on such carrier.—Curtis Tire & Rubber Co. v. Goodrich Transit Co., 203 N.W. 522, 230 Mich 598.

55. Conn.—Interstate Window Glass Co. v New York, N. H. & H R Co., 133 A. 102, 104 Conn. 342.
Tex.—Hines v. Chaddick, Civ.App., 63 S.W.2d 263, error dismissed.
Wis.—Morgan v. Chicago & N W. Ry. Co., 166 N.W. 777, 167 Wis. 48.

Unwarranted refusal a conversion

Where plaintiff loaded apples in freight cars after notifying defendant railroad company that title remained in him until payment by buyer, and thereafter demanded a return of the apples on the buyer's failure to pay, the carrier, as bailee, had a right to defer delivery for a reasonable time to investigate title to such property, but its refusal thereafter was a conversion.—Wilson v. International Ry. Co., 160 N.Y.S. 367, affirmed 164 N.Y.S. 1118

56. Ariz.—Wells Fargo & Co., Express, S A., v. Tribolet, 50 P 2d 878, 46 Ariz. 311.
Miss.—Merchants' & Manufacturers' Bank of Ellisville v. Philip J Toomer Lumber Co., 76 So. 565, 115 Miss. 647.

An unpaid consignor may exercise the right of stoppage in transit against an assignee of a bill of lading who has not paid for and acquired the bill prior to the diversion of the goods.—Dock & Mill Co v. Southern Ry. Co., Mo.App., 23 S W.2d 202.

Goods shipped to order of consignee may not be stopped in transit by one not the consignee or his agent for that purpose.—Smith v. Bank of Glade Spring, C C.A.Va., 12 F.2d 535.

57. Wash.—Cashmere Fruit Growers' Union v. Great Northern Ry Co., 270 P. 1038, 149 Wash. 319, certiorari denied Great Northern Ry. Co v. Cashmere Fruit Growers' Union, 49 S Ct. 347, 279 U S 851, 73 L.Ed 994.

58. Ohio.—Pennsylvania Co. v. Bonchek & Gordon, 15 Ohio App. 1.

59. S.D.—Chicago, M. & St. P. Ry. Co v. Board of Railroad Com'rs, 199 N.W. 453, 47 S D. 395, error dismissed 46 S Ct. 485, 271 U S. 645, 70 L Ed. 1129.

60. S.D.—Chicago, M. & St. P. Ry. Co. v. Board of Railroad Com'rs, supra.

61. Cal.—Jones v. Earl, 37 Cal. 630, 99 Am D. 338
N.Y.—Oppenheimer v. Wells, 106 N. Y.S. 547, 55 Misc. 385.
10 C J. p 230 note 60.

Statement that buyer is insolvent

Where the statement of claim avers delivery to a carrier and order to stop the goods in transit accepted by the carrier and the carrier's negligent failure to comply therewith, a judgment on the affidavit of defense raising a question of law was improperly entered, on the ground that the stoppage order failed to state, as required by statute, that the buyer was insolvent and had not paid the seller for the goods.—Teller & Co v. American Railway Express Co., 78 Pa Super. 300.

62. Conn.—Interstate Window Glass Co v. New York, N. H. & H R Co., 133 A. 102, 104 Conn. 342.
10 C.J. p 230 note 61.

Reasonable information in notice

The right of stoppage in transit can be exercised only by one who has sold goods on credit to a buyer who is or becomes insolvent, and it is not unreasonable that a carrier before it undertakes to obey such an order should have notice that the sale was on credit, that is, that the goods had not been paid for, and that the buyer was insolvent. Both conditions are

ly, where the carrier or its agent understands the object of the notice which is to exercise the right of the vendor to stop goods while in transit and before delivery and is satisfied with it when given, the carrier cannot thereafter object that the notice was insufficient, whether or not in fact it was sufficient.[63]

On receipt of a notice which complies with the requirements relating thereto, it is the duty of the carrier to return the goods to the owner, or to divert the goods according to his instructions, and in so doing it incurs no liability to the consignee.[64] The carrier, however, must deliver the goods to the person entitled to them, and on the exercise of the right the carrier acts at its peril in its disposition of the goods stopped.[65] If the carrier allows the consignee by direct or indirect means to get possession of the goods after the consignor has exercised the right of stoppage in transit, liability to the consignor will result.[66] The consignor's right of action for damages is in no way affected by the fact that he failed to tender the bill of lading, where there was no demand for the bill of lading, or denial of the consignor's ownership, the refusal being based on the ground of inability to comply with the consignor's demand.[67]

The mere fact that the carrier transported the goods to the city of their destination after receiving notice to stop does not constitute a conversion where the goods were not delivered to the consignee.[68]

Termination of the right. Ordinarily the right of a consignor to stoppage in transit remains so long as the goods are in the possession of the carrier[69] and not afterward.[70] In other words, as be-

necessary to justify a stoppage of goods in transit, and it is not unreasonable that the notice of the seller's claim to exercise his right should set them forth—Teller & Co. v. American Railway Express Co., 78 Pa Super. 300.

Sufficiency of notice

(1) Consignor's letter to carrier stating, "we will thank you to hold up delivery until you receive our telegraphic instructions," has been held to be a sufficient notice to stop delivery.—Phillips-Patterson Co. v. Northwestern R. Co. of South Carolina, 93 S E 868, 108 S.C. 166.

(2) Telegram and letter conveying notice of stoppage in transit was sufficient to apprise carrier of authenticity, although bearing only typewritten signature—Interstate Window Glass Co. v. New York, N. H. & H R Co., 133 A. 102, 104 Conn. 342.

(3) Other examples see 10 C.J. p 230 note 61 [a].

Jury question

In shipper's suit for failure to stop cotton in transit, whether shipper notified carrier's agent to stop and whether agent consented were questions for the jury under the evidence—Hines v. Chaddick, Tex Civ App, 63 S W.2d 263, error dismissed.

63. Pa.—Teller & Co. v. American Railway Express Co., 78 Pa.Super. 300, 305.
10 C J p 230 note 62

The Corpus Juris text has been cited with approval in Teller & Co v. American Railway Express Co, supra.

64. Ga.—Southern Ry Co. v Miller, 150 S E. 100, 40 Ga App. 448.
Mo.—Dock & Mill Co. v Southern Ry Co., App, 23 S W.2d 202.
10 C J. p 230 note 63.

Carrier's refusal amounts to conversion

A refusal by the carrier to comply with the demand of the true owner for goods amounted to a conversion.—Southern Ry. Co. v. Miller, 150 S. E. 100, 40 Ga.App 448.

Owner's demand paramount

Carrier cannot refuse owner's demand for property and deliver same to another merely because received from such person as consignor—Southern Ry. Co. v. Miller, 150 S E 100, 40 Ga App. 448.

Sufficient statement of claim

Where a statement of claim alleges that a carrier in an interstate shipment made delivery to the consignee notwithstanding notice of a stoppage in transit, the statement sets forth a case sufficient to go to a jury, and it is error under such circumstances to enter judgment for the defendant on the question of law—Teller & Co v. American Railway Express Co., 78 Pa Super. 300.

65. Ohio.—Howe v. Cincinnati, etc, R. Co, 18 Ohio Cir.Ct. 333, 10 Ohio Cir.Dec. 182.
Wis.—Morgan v. Chicago & N. W Ry. Co., 166 N.W. 777, 167 Wis 48.

Laches

In shipper's suit against government for failure to stop cotton in transit, government could not claim laches where delay was acquiesced in by both parties—Hines v. Chaddick, Tex Civ App, 63 S.W.2d 263, error dismissed.

66. S C.—Phillips-Patterson Co v Northwestern R. Co. of South Carolina, 93 S.E. 868, 108 S C. 166
10 C J p 231 note 64.
Action for carrier's wrongful delivery after notice of stoppage in transit as in tort and not in contract see C.J S. title Actions § 49.

Liability for failure of agent to stop delivery

(1) The moment notice is received, title to the goods becomes revested in the consignor, and the carrier is liable for the failure of its agent to stop delivery of them to anyone but the consignor, or a person named by him.—Phillips-Patterson Co v Northwestern R. Co of South Carolina, 93 S E. 868, 108 S.C. 166

(2) The failure of a carrier's agent to stop goods in transit on knowledge of a desire for such action is imputable to the carrier under circumstances imposing liability to the shipper for damages—Hines v Chaddick, Tex Civ App, 63 S W 2d 263, error dismissed.

67. Tex.—Hines v. Chaddick, supra
10 C J. p 231 note 65.

68. Wis.—Morgan v. Chicago & N W. Ry. Co, 166 N.W. 777, 167 Wis. 48.

69. Conn.—Interstate Window Glass Co. v. New York, N. H & H. R Co, 133 A. 102, 104 Conn. 342
Ohio—M Degaro Co v. Cleveland, C, C & St L Ry Co., 174 N.E. 587, 123 Ohio St 179
Wis.—Bell v. Chicago & N. W Ry Co, 159 N W. 914, 164 Wis. 277
10 C.J. p 231 note 66.

Procurement of exchange bills by consignee does not bar seller's right to stoppage in transit on the consignee's insolvency before delivery—Cashmere Fruit Growers' Union v Great Northern Ry Co, 270 P. 1038, 149 Wash. 319, certiorari denied Great Northern Ry. Co v. Cashmere Fruit Growers' Union, 49 S Ct. 347, 279 U.S. 851, 73 L Ed 994.

70. Ga.—Massee & Felton Lumber Co. v. Southern Ry. Co., 149 S.E. 427, 40 Ga App. 326.
10 C.J. p 231 note 67.

tween the carrier and a vendor seeking to exercise the right of stoppage in transitu, there must have been an actual or a constructive delivery by the carrier to the consignee in order to cut off the vendor's right of stoppage in transitu;[71] but it is also well settled that a sale of the goods by the consignee, by means of transfer of a negotiable bill of lading to a bona fide purchaser for value while the goods are in transit, will terminate the right of stoppage in transit,[72] and this may cause difficulty with the carrier which has no notice of such transfer. If the carrier refuses, although under the seller's order, to deliver to such third person, it may be liable for subsequent loss by reason of a falling market.[73] However, if no negotiable document of title is transferred by the buyer, the right of stoppage in transit for insolvency of the buyer is not lost by a resale of the goods while in transit.[74] The right of stoppage in transit is not impaired or extinguished by service of process of garnishment on the carrier.[75] Where goods are delivered pending a right of inspection, they are subject to stoppage in transit since legally they are still in transit.[76]

Effect on carrier's lien. The lien of the carrier for charges on the goods is prior to the vendor's right to repossession under stoppage in transit, and the carrier may retain its possession until such charges are paid,[77] but the carrier as against the right of the consignor to retake possession in the event of stoppage in transit cannot enforce the payment of charges for other shipments.[78]

§ 150. Custody and Control of Goods Awaiting Transportation

If a carrier receives goods for transportation, it is liable therefor as a common carrier while the goods are awaiting transportation.

As stated in § 145, where goods are delivered to a carrier for immediate transportation and nothing remains to be done by the shipper, the liability of the carrier as such attaches at once, and even while detained in the carrier's warehouse, or pens, or on its platforms in the usual course of business, or for the carrier's convenience, the liability of the carrier is not that of warehouseman, but that of carrier proper.[79] However, if the goods are detained by the carrier before commencement of actual transportation at the request of the consignor and for his accommodation, or in order that something further

Attempted preservation of right after delivery denied

Directions to bank, accompanying draft with bill of lading attached, requiring surrender of documents upon drawee's acceptance of draft payable thirty days after arrival of car, was not sufficient to show intent of drawer to preserve right of stoppage in transit—New York, N H & H R Co v. First Nat. Bank, 134 A 223, 105 Conn. 33

Mere arrival of goods at a fixed terminus does not necessarily end transit and thus bar the right to stoppage in transit, for the goods may be in the possession of the carrier or an intermediate bailee—Angelina County Lumber Co. v. Michigan Cent R Co, 252 Ill.App. 82

71. Wis—Bell v. Chicago & N W. Ry Co, 159 N.W. 914, 164 Wis 277.
10 C J p 231 note 68.

Normal termination

The normal termination of the transit is, under usual circumstances, the arrival of the goods at their destination and delivery to the buyer or his representative—Angelina County Lumber Co. v. Michigan Cent. R. Co, 252 Ill.App. 82.

72. Ill—Angelina County Lumber Co. v Michigan Cent. R. Co., supra
10 C J p 231 note 69.

73. U.S.—Schmidt v. The Steam-Ship Pennsylvania, C.C.Pa., 4 F. 548.

74. Conn—Kasden v. New York, N H & H. R Co, 133 A. 573, 104 Conn. 479.

75. Ga—Southern Ry. Co v Miller, 150 S.E. 100, 40 Ga App. 448
10 C J p 231 note 71.

76. Ill.—Angelina County Lumber Co. v. Michigan Cent. R. Co., 252 Ill.App. 82.

77. Ga—Pennsylvania Steel Co v. Georgia R., etc, Co, 21 S E 577, 94 Ga. 636
10 C J. p 231 note 72.

78. N C—Farrell v. Richmond, etc, R. Co, 9 S E 302, 102 N C 390, 11 Am S R. 760, 3 L R.A. 647.
10 C J p 231 note 73.

79. Ky.—Cumberland Pipe Line Co. v Commonwealth ex rel. Sheriff of Estill County, 79 S W 2d 366, 258 Ky. 90
Tex—Sugarland Ry. Co v Dew Bros, Civ App., 212 S W. 190, dismissed for want of jurisdiction.
10 C J. p 231 note 76

The Corpus Juris text has been cited with approval and the rule as there stated followed in Cumberland Pipe Line Co. v. Commonwealth ex rel. Sheriff of Estill County, 79 S.W. 2d 366, 371, 258 Ky 90

Forwarding order

Under the tariff regulations of a railroad company, providing that carload shipments arriving at its general New York terminal and there held for further directions, after a stated term, should be subject to demurrage charges, and the liability of the company therefor should be that of warehouseman only, where a car was so held, the liability of the company as carrier reattached on its receipt of an order for forwarding the shipment—Lehigh Valley R. Co. v. John Lysaght, Limited, C C A.N Y, 271 F. 906, affirming, D.C., John Lysaght v. Lehigh Valley R. Co, 254 F. 351, certiorari denied Lehigh Valley R. Co v John Lysaght, Limited, 41 S Ct 625, 256 U.S 704, 65 L Ed. 1180, and error dismissed 42 S Ct. 53, 257 U.S 613, 66 L.Ed. 397.

Inspection by carrier's agent

Where carrier requested that cotton be inspected and inspection certificate issued before it was shipped, and where inspector, pursuant to a custom, sealed cars inspected by him and delivered to carrier a certificate of inspection, after which shipper had nothing to do with transit, the inspector was carrier's employee so as to render the carrier liable for loss of the goods after delivery to it—St. Louis & S. F. R. Co. v. Blocker, 184 P. 584, 76 Okl 279

Storage for carrier's convenience

Where carrier agreed to pack and ship goods within a specified time, which for its convenience were stored in warehouse, where they were destroyed by fire, it was immaterial whether liability was that of carrier or warehouseman—Beall v. Bekins Van & Storage Co, 166 P. 370, 33 Cal. App. 652.

may be done to prepare the goods for transportation,[80] or where the goods are delivered to the carrier without shipping directions,[81] or to be held until freight charges are paid,[82] the carrier's liability during such detention is that of warehouseman only, and ordinary care for the safekeeping of the goods is the measure of the carrier's responsibility.

§ 151. Custody and Control of Goods Stopped in Transitu

A carrier, holding goods under an order of stoppage in transit, is liable as a warehouseman only.

If, by the orders of one entitled to such action, the goods are stopped in transit, and are held for such person, the carrier while so holding is liable as warehouseman only.[83]

§ 152. Custody and Control of Goods Awaiting Delivery to Consignee

Except while goods are in the control of an owner or his agent, a carrier's liability as such continues until the completion of transportation.

A carrier is liable as such until transportation is completed, and, accordingly, so long as anything remains to be done by the carrier as carrier, before the goods are ready for acceptance by the consignee, the carrier's liability as such continues.[84] This principle is subject to an important qualifi-

80. Idaho.—Wood Livestock Co. v. Oregon Short Line R. Co., 298 P. 371, 50 Idaho 524.
Ky.—Louisville & N. R Co. v. Edwards' Adm'x, 209 S.W. 519, 183 Ky. 555.
Miss.—Chas. W. Sheppard Cotton Co v. New Orleans, M. & C. R. Co., 78 So. 193, 118 Miss. 464
S.C.—Parler v. Davis, 115 S.E. 818, 123 S.C. 39.
Tex.—Rio Grande City Ry. Co v. Guerra, Civ.App., 26 S.W.2d 360.
10 C.J. p 232 note 77.

Carrier not liable for unguarded car
A carrier, as warehouseman, need not guard all loaded cars on sidings prior to transportation.—Marsh v. Pennsylvania R. Co., 167 S.E. 274, 159 Va. 694.

Implied agreement to hold as warehouseman
Where cotton was delivered to carrier to be held until number delivered had reached one hundred bales before shipment was to be made, there was an implied agreement that such cotton should be held by carrier as warehouseman until remaining cotton was delivered.—Rio Grande City Ry. Co. v. Guerra, Tex.Civ.App., 26 S.W.2d 360.

No duty prior to delivery to carrier
A carrier cannot be held for loss of hogs from eating poison found on premises adjoining its shipping pens, but not under its control, where a dipping vat for stock was in operation, and on which premises the hogs strayed while in the shipper's possession and before delivery, or tender to the carrier, the carrier under such circumstances owing the shipper no duty either to keep such premises free from poison or to prevent the hogs from reaching the same, and the care taken by the shipper and his agents to prevent the hogs from eating the poison not being material.—Lancaster v. Pitzer, Tex.Com.App., 228 S.W. 923, reversing, Civ.App., 211 S.W. 313.

81. S.C.—Parler v. Davis, 115 S.E. 818, 123 S.C. 39.
10 C.J. p 232 note 78.

Recall of directions
If the shipper, even after complete delivery to the carrier for immediate transportation, recalls his directions as to immediate shipment and requests the carrier to postpone the transportation for a designated time, the liability of the carrier changes from that of a common carrier to that of a warehouseman only on the request by the shipper and a compliance therewith. Under these circumstances, if the goods are destroyed after such a request has been granted, the carrier is not liable except on proof of negligence.—St. Louis, etc., R. Co. v. Montgomery, 39 Ill. 335.

Shipment prevented by injunction
Where railroad had no shipping directions for cotton and shipment was prevented by injunction, it held the cotton as warehouseman, and was liable only for negligence.—Hynds v. Schaff, C.C.A.Okl., 46 F.2d 275.

82. N.C.—Howell v. Seaboard Air Line R. Co., 119 S.E. 198, 186 N.C. 239.
10 C.J. p 232 note 79.

83. N.M.—MacVeagh v. Atchison, etc., R. Co., 5 P. 457, 3 N.M. 205.

84. Tex.—Texas & N. O R. Co. v Wrenn, Civ.App., 69 S.W.2d 156, error refused
10 C.J. p 233 note 86.

Delivery incomplete
Where delivery of cotton by a carrier to a compress company as agent of the consignee's assignee was not complete when the cotton was destroyed by fire, the carrier is liable as such rather than as a warehouseman.—Texas & N. O R. Co. v. Wrenn, Tex.Civ.App., 69 S.W.2d 156, error refused.

Final transfer by carrier
Where goods were consigned to place in Texas, care of third person, "not for purpose of delivery," ultimate delivery being to consignee in Mexico, and it was the custom of the carrier after goods had been changed to Mexican car to transfer them across border to carrier in Mexico, payment of freight and notice to carrier by consignee that he had transferred goods to Mexican car was sufficient to render carrier liable, as a carrier, and not as warehouseman for negligent delay in transporting the car whereby goods were destroyed by fire, no formal acceptance being necessary.—Galveston, H. & S. A. Ry. Co v. La Tolteca Cia de Cemento Portland, S A., Tex.Civ.App., 204 S.W. 1016.

Loss before lapse of time for removal
(1) Under bill of lading providing that "property not removed" within forty-eight hours after notice of arrival may be kept in car subject to reasonable charge for storage and carrier's liability as warehouseman only, carrier was liable as carrier for loss of goods within forty-eight hours after notice, although consignee broke seals, accepted shipment, and began unloading.—Mark Owen & Co. v. Michigan Cent. R Co., 125 N.E. 767, 291 Ill. 149, certiorari granted Michigan Cent. R Co v. Mark Owen & Co., 40 S.Ct. 483, 253 U.S. 481, 64 L.Ed. 1023, and affirmed 41 S.Ct. 554, 256 U.S. 427, 65 L.Ed. 1032.

(2) In suit by consignee's assignee against railroad whose bill of lading provided that its liability should be that of warehouseman only for cotton destroyed by fire occurring after expiration of free time allowed by its tariffs for unloading, evidence showed that such free time had not expired when cotton was destroyed by fire and, hence, carrier was liable as such.—Texas & N. O R. Co. v. Wrenn, Tex.Civ.App., 69 S.W.2d 156, error refused.

cation. It contemplates that, after the goods are once committed to the carrier, its possession and control over them continues over every mile of the route, and during every hour of the time until the arrival of the goods at the point of destination. Therefore, where at some point on the journey the goods are by agreement of the owner temporarily out of the possession and control of the carrier, and where the same are actually in the possession of the owner or some one as his agent, the relation of the carrier to the goods is not that of an insurer, and if the goods are, without its fault, destroyed while so out of its possession, the carrier cannot be held responsible.[85]

Storing; placing on sidetrack. Railroads usually have freight houses in which the goods are placed on reaching their destination, and in the absence of some contract or usage by which the consignee is bound to unload from the cars, their liability as carrier is not reduced to that of warehouseman until the goods are placed in the freight house, ready to be taken by the consignee;[86] but where the carrier is not required or expected in the usual course of business to remove the freight from the cars, as in the case of grain in bulk, coal, lumber, and the like, delivery of the car in a safe and convenient position for unloading at the elevator, warehouse, or other place designated by the contract or required in the usual course of business, or where no place of delivery is thus designated or required, on its sidetrack in the usual and customary place for unloading by consignees, together with notice to the consignee and a reasonable time allowed for the removal in those jurisdictions where this is necessary, terminates the liability of the carrier as such,[87] although it still continues liable as warehouseman, as is discussed in § 156 infra. Nevertheless, even under these circumstances, it is the duty of the carrier to place the car in a reasonably safe and accessible place for unloading, and, until it does so, the carrier's liability as such continues.[88] Storage of goods by a carrier, in case of an extraordinary interruption of service, before reaching its destination reduces the carrier's liability to that of a warehouseman, following notice of such action given to the consignee.[89] Delivery to the consignee's private tracks is a sufficient delivery to release the carrier from liability as such, as to the cars delivered.[90] This is so although the delivery was subject to the right of inspection. Such a delivery nevertheless places the cars under the dominion of the consignee, and the carrier thereafter has no right to interfere with that dominion unless on inspection the consignee rejected the cars and notified the carrier of that fact.[91] However, in the case of goods shipped under an order notify bill of lading, the unauthorized placement of the goods on a siding is a mere tender of delivery, not justifying an unlawful seizure by the consignee.[92]

Rules specially applicable to express companies. The general rule is that the liability of an express company as a common carrier does not end until it has made or tendered a personal delivery of the goods to the consignee or owner, or to some person authorized by him to receive them,[93] but if by reason of inability to find the consignee, or the consignee's refusal to receive the goods, delivery is not completed, the carrier is liable only for safekeeping as bailee for hire.[94]

85. Ala.—Barron v. Mobile, etc., R. Co., 56 So. 862, 2 Ala.App. 555.
10 C.J. p 233 note 87.

86. Tenn.—Pennsylvania R. Co. v. Naive, 79 S.W. 124, 112 Tenn. 239, 64 L.R.A. 443.
10 C.J. p 233 note 89.

87. Vt.—Charles Bianchi & Sons v. Montpelier & W. R. R. Co., 104 A. 144, 145, 92 Vt. 319.
10 C.J. p 233 note 90.

The Corpus Juris text has been cited with approval in Charles Bianchi & Sons v. Montpelier & W. R. R. Co., supra.

88. N.C.—Brooks Mfg. Co. v. Southern R. Co., 68 S.E. 243, 152 N.C. 665
10 C.J. p 233 note 92.

89. Wis.—Conkey v. Milwaukee, etc., R. Co., 31 Wis. 619, 11 Am.R. 630

90. Ga.—Georgia Cotton Co. v. Central of Georgia Ry. Co., 91 S.E. 933, 19 Ga.App. 576.

Vt.—Charles Bianchi & Sons v. Montpelier & W. R. R. Co., 104 A. 144, 92 Vt. 319.
10 C.J. p 233 note 93.

At owner's risk

Where cotton was shipped by plaintiff for delivery to its agent, a compress company, on its track, such track was a private or other siding within provision of bill of lading that property delivered on private or other siding should be at owner's risk after cars are detached from trains.—Georgia Cotton Co. v. Central of Georgia Ry. Co., 91 S.E. 933, 19 Ga.App. 576.

Nonnegotiable bill of lading

Where under a nonnegotiable bill of lading property was delivered on private siding in accordance with the bill of lading, the terminal carrier had a right to act upon the basis that the shipper, who was also consignee, still held the bill of lading, and the property could be placed upon the siding without receipt of the bill of lading and without notifying the consignee.—Charles Bianchi & Sons v. Montpelier & W. R. R. Co., 104 A. 144, 92 Vt. 319

91. Mo.—Kingman St. Louis Impl. Co. v. Southern R. Co., 112 S.W. 721, 133 Mo.App. 317.

92. Ga.—George C. Speir & Co. v. Atlantic Coast Line R. Co., 140 S.E. 43, 37 Ga.App. 283

93. Ala.—American Ry. Express Co. v. Stanley, 92 So. 642, 207 Ala. 380
Ind.—American Ry. Express Co. v. Rhody, 143 N.E. 640, 84 Ind.App. 283

The Corpus Juris text

(1) Is quoted with approval in American Ry. Express Co. v. Santa Anna Gas Co., Tex.Civ.App., 250 S.W. 271, 273.

(2) Is cited with approval in American Ry. Express Co. v. Stanley, 92 So. 642, 643, 207 Ala. 380.

94. W.Va.—Hutchinson v. U. S. Ex-

§ 153. Notice of Arrival of Goods and Reasonable Time to Remove Goods

a. Express companies
b. Other common carriers

a. Express Companies

Where the general rule requiring express companies to deliver goods transported to the consignee's residence or place of business has been dispensed with, the consignee is entitled to notice of arrival and a reasonable time to remove before the carrier's liability ceases and it becomes liable as a warehouseman only.

Where by usage, custom, or special contract, the general rule discussed in § 152 requiring the delivery at the place of business or at the residence of the consignee is dispensed with, the consignee is in all cases entitled to notice of the arrival of the goods and a reasonable time thereafter in which to remove them before the carrier's liability as insurer ceases and that of warehouseman attaches [95] However, when the goods have been transported safely to their destination, and the consignee has been notified of their arrival and a reasonable opportunity has been allowed him to remove them, the liability of the express company thereafter is that of a warehouseman [96] Special instructions on the shipping tag of express packages for notification of the consignee are not binding on an express company, operating under the rules and regulations of the interstate commerce commission, since such regulations are controlling on both parties to the shipping contract.[97]

b. Other Common Carriers

(1) Notice of arrival
(2) Time of removal

(1) Notice of Arrival

(a) Necessity
(b) Requisites and sufficiency of notice
(c) Circumstances excusing notice

(a) Necessity

Although not required in some jurisdictions or under contracts dispensing therewith, notice of arrival of goods must usually be given the consignee and a reasonable time allowed for removal before the carrier's liability as such will be terminated.

It is the general rule that the carrier's liability as such does not terminate nor its less stringent liability as warehouseman commence until notice has been given to the consignee of the arrival of the goods,[98] and, as discussed in subsection b (2) of this section, a reasonable time after such notice for removal of the goods has elapsed. The rule has been held to apply, although the consignee knew the probable date of shipment and the probable date of arrival,[99] and it has been further held that consignees of freight, even though it is of perishable nature, are not bound to make inquiry at the office of the carrier therefor in the absence of notice of arrival, and that too, although they have reason to

press Co., 59 S.E. 949, 63 W.Va. 128, 131, 14 L.R.A.,N.S., 393.
10 C.J. p 234 note 96.

95. Ind.—American Ry Express Co v. Rhody, 143 N.E. 640, 84 Ind. App. 283.
10 C.J. p 234 note 98.

The Corpus Juris text has been cited with approval in American Ry Express Co. v. Stanley, 92 So. 642, 643, 207 Ala. 380.

Intention of parties
In action involving question of express company's liability for meat stolen from its storehouse, in which the express company claimed that its liability was that of a warehouseman, it was shown that it was the intention of the parties that delivery was to be made at the railroad depot, and not to consignee at his residence or place of business.—American Ry. Express Co. v. Rhody, 143 N.E. 640, 84 Ind.App. 283

96. Ala.—Southern Express Co v Holland, 19 So. 66, 109 Ala. 362.

97. Mo.—Wall v. American Ry. Express Co., 272 S.W. 76, 220 Mo. App. 989.

98. Ala.—Louisville & N. R. Co. v. Hestle, 75 So. 885, 200 Ala. 137.
Fla.—Atlantic Coast Line R. Co v. Sandlin, 78 So. 667, 75 Fla 539.
La.—Marion T. Fannaly, Inc., v. Illinois Cent R. Co., App., 160 So 131—Swift & Co. v. Texas & P. Ry. Co., 6 La.App. 7.
Md.—Payne v. Roe, 122 A. 322, 143 Md. 282
N.J.—Kock v. Delaware, L. & W. R. Co., 110 A. 128, 94 N.J.Law 30.
N.Y.—Bragg v. Taylor, 199 N.Y.S. 156, 205 App.Div. 59, affirmed 142 N.E. 327, 236 N.Y. 666—Bobzein v New York Cent R Co., 176 N.Y.S. 407, 187 App.Div. 767.
10 C.J. p 236 note 9.

The Corpus Juris text has been cited with approval.
Md.—Paine v. Roe, 122 A. 322, 324, 143 Md. 282.
N.Y.—Bobzein v. New York Cent. R Co., 176 N.Y.S. 407, 411, 187 App Div 767.

Actions
(1) Under a statute providing that a carrier shall give notice of arrival of goods to the consignee and, on failure to do so, it shall be held to pay to the person injured thereby the actual amount of damages so sustained, a consignee must sue within the time allotted by statute.—Missouri Pac R Co v. Armstrong, 44 S.W.2d 1093, 184 Ark 1076.

(2) Such cause of action accrues as of the time when it came to the consignee's notice that he had not been notified of such arrival.—Missouri Pac. R. Co. v. Armstrong, supra.

Notice under freight bill provision
Where a freight bill provided for notice of arrival to be given a designated party, notice to such party was sufficient, and thereafter the carrier held the goods as a warehouseman.—Texas & N.O. Ry. Co. v. Patterson & Roberts, Tex.Civ.App., 192 S.W. 585.

The basis for this rule is that it is unreasonable to insist that the consignee shall be in constant attendance on the carrier's office to ascertain whether the goods have arrived.—Moses v. Boston, etc., R. Co., 32 N.H. 523, 64 Am.D. 381.

99. Mich.—Walters v. Detroit United R. Co., 102 N.W. 745, 139 Mich. 303.

believe that the shipment is overdue.[1]

In other jurisdictions following the so called "Massachusetts rule," it is held that when the goods have reached their destination and are placed in a position of reasonable safety, ready for delivery to the consignee, the carrier's duty as a carrier terminates without regard to notice to the consignee.[2] In still other jurisdictions, although the consignee is allowed a reasonable time in which to remove goods before the carrier's liability as such ceases, the view is taken that the consignee is not entitled to notice of the arrival of the goods, but is bound to take notice of such arrival, and has only a reasonable time thereafter in which to remove them regardless of notice.[3] In such jurisdictions a carrier's unauthorized and wrongful removal of goods from their place of destination, after delivery there, imposes on it the duty to notify the owner of the probable date of return thereto, and an omission of such duty subjects the carrier to absolute liability for loss occurring between the dates of their return and the owner's knowledge thereof,[4] and to make the general rule again applicable such notice must be given.[5] A limitation of the principle allowing reasonable time but making no provision for notice is also recognized in cases where the goods do not arrive on time. In these circumstances it is held that the carrier's liability as such does not terminate until notice is given to the consignee of the arrival of the goods;[6] and, of course, the rule has no application where the contract for transportation specially requires notice, as discussed later in this section.

A statute requiring the mailing of notice to the consignee has been held to have no application where the carrier's liability, either as such or as a warehouseman, had terminated by delivery to the consignee.[7]

Under contract requiring notice. The duty of the carrier as to giving notice may be controlled by contract between the shipper and the carrier.[8] Where notice is provided for by contract the requirements of the contract in this regard must be complied with, and it makes no difference whether or not notice is required by common law or by statute in the jurisdiction where the contract is made,[9] and, on the other hand, there is a corresponding duty on the part of the consignee to put himself in a position to receive the notice.[10]

Under contract dispensing with notice. Where a bill of lading provides that, in case packages are consigned to a station which has no agent, the shipper authorizes the carrier on arrival of the train by day or by night to deposit the goods on the platform, whether there is anyone there to receive them or not, and that the shipper agrees that the carrier's liability shall end on such deposit which shall be considered a delivery to the consignee, no notice of arrival of the goods is required.[11] A delay of fifty minutes in the arrival of such train will not operate to take the case out of the provisions of the contract and render a notice necessary.[12]

(b) Requisites and Sufficiency of Notice

Notice, if necessary, must be given to the consignee or his agent in a manner which definitely and sufficiently informs him of the arrival of his goods. Such notice should be promptly given, unless the time of giving notice is prescribed by statute, in which case compliance must be had therewith.

The notice must be given to the consignee or to his duly authorized agent,[13] unless the shipper is also consignee and designates a person whom the carrier is to notify at the place of delivery, in which case, if notice is given to such person, notice to the

1. Tenn.—Pennsylvania R. Co. v. Naive, 79 S.W. 124, 112 Tenn. 239, 64 L.R.A. 443.

2. Ill.—Phillipson & Co. v. Grand Trunk Western Ry. Co., 238 Ill. App. 251.
10 C.J. p. 234 note 1.

3. Vt.—L. Kommel & Son v. Champlain Transp. Co., 105 A. 253, 93 Vt. 1, 2 A.L.R. 275.
10 C.J. p. 236 note 6.

Usage must be of established and general nature in order to impose duty on railroad to notify consignees of arrival of freight at destination.—Saunders Bros. v. Payne, 116 S.E. 349, 29 Ga.App. 615.

4. W.Va.—Belknap v. Baltimore & O.R. Co., 91 S.E. 656, 79 W.Va. 691, L.R.A.1917D 916.

5. W.Va.—Belknap v. Baltimore & O.R. Co., supra.

6. Mo.—Dancinger v. Chicago, etc., R. Co., App., 182 S.W. 120.
10 C.J. p. 236 note 7

7. Ga.—Georgia Cotton Co. v. Central of Georgia Ry. Co., 91 S.E. 933, 19 Ga.App. 576

8. Ala.—Southern R. Co. v. W. T. Adams Mach. Co., 51 So. 779, 165 Ala. 436.
Ill.—See H. S. Gile Grocery Co. v. Chicago & N. W. R. Co., 205 Ill. App. 272
10 C.J. p. 237 note 14.

9. Mich.—Ithaca Roller Mills v. Ann Arbor R. Co., 186 N.W. 516, 217 Mich. 348.
10 C.J. p. 237 note 15.

10. Ark.—St. Louis, etc., R. Co. v. Townes, 124 S.W. 1036, 93 Ark. 430, 26 L.R.A.,N.S., 572

11. Mo.—Morrison Tent, etc., Co. v. Illinois Cent. R. Co., 175 S.W. 220, 190 Mo.App. 67.

12. Mo.—Morrison Tent, etc., Co. v. Illinois Cent. R. Co., supra.

13. Ill.—Aurora Automatic Machinery Co. v. Chicago, B. & Q. R. Co., 217 Ill. App. 60. See Pittsburgh, C., C. & St. L. R. Co. v. Templeton, 210 Ill. App. 377.
N.C.—Acme Mfg. Co. v. Tucker & Nobles, 111 S.E. 525, 183 N.C. 303.
10 C.J. p. 238 note 19.

Notice to shipper insufficient under a bill of lading consigning goods to shipper's order and requiring notice to be given to shipper's agent at destination.—Missouri & N. A. R. Co. v. United Farmers of America, 292 S.W. 990, 173 Ark. 577.

shipper consignee is not necessary.[14] An original consignee, however, who has surrendered his right, title, and interest to the goods, is not entitled to notification of arrival from the carrier.[15]

The notice must be in writing if a statute so provides;[16] but in the absence of such requirement a verbal notice will suffice.[17] A mere newspaper publication is not sufficient.[18] In the absence of statute, personal service on the consignee is not necessary; the sending of notice to the consignee through the mail will ordinarily satisfy the requirements of the rule,[19] although the mailing of notice to the place of delivery where the consignee was known not to be doing business and where the notice would not be received will not suffice.[20]

Where the consignee's address appears on the billing, or is known, notification of arrival of shipment must be given at that address.[21] If, however, the consignee's address is not known, the carrier is not bound to look for him at any place other than that of destination.[22]

It is not incumbent on the carrier to give notice that goods must be removed in a particular time, or to give notice that a charge will be made for storage, unless the goods are promptly removed before its liability as an insurer can cease.[23] Notice of the receipt of a class of goods altogether different from those which the consignee expected and which it had ordered is insufficient, and the consignee is excused from paying any attention to such notice.[24] Notice of a right of inspection under an "order notify" bill of lading need not be given.[25]

A consignee, having failed within the allotted time to object to the sufficiency of notice of arrival of goods, is not allowed afterward to claim that it was insufficient.[26] Ordinarily the burden of proof is on the carrier to show notice in order to relieve itself of liability as insurer, but notice may be presumed without proof where the course of dealing between the parties is one under which the carrier always gave notice.[27]

Time of giving notice. Notice of arrival of the goods must be given within the time, if any, prescribed by statute[28] or by the rules of the interstate commerce commission, if the shipment is subject thereto.[29] In any event prompt notice should be given, especially where the goods are of perishable nature.[30] A notice written before but not

14. Ala.—H. & L. M. Warten Cotton Co. v. Southern Ry. Co., 94 So. 726, 208 Ala. 417.
N.Y.—Porter v. Pennsylvania R. Co., 215 N.Y.S. 727, 217 App. Div. 49.
Va.—Jennings Automatic Dump Body v. Virginian Ry. Co., 119 S.E. 147, 137 Va. 207.

15. Md.—Monongahela Ry. Co. v. Read, 127 A. 739, 147 Md. 144.

16. N.C.—Citizens, etc., Bank v. Southern R. Co., 69 S.E. 261, 153 N.C. 346—Poythress v. Durham, etc., R. Co., 62 S.E. 515, 148 N.C. 391, 18 L.R.A.,N.S., 427.

17. Ala.—H. & L. M. Warten Cotton Co. v. Southern Ry. Co., 94 So. 726, 208 Ala. 417.
10 C.J. p. 238 note 22.

Telephone

Under a statute requiring notice of freight arrivals to be by mail or otherwise, notice by telephone is sufficient.—H. & L. M. Warten Cotton Co. v. Southern Ry. Co., 94 So. 726, 208 Ala. 417.

18. Ga.—Rome R. Co. v. Sullivan, 14 Ga. 277.
10 C.J. p. 238 note 20.

19. Ark.—Spears v. Missouri Pac. R. Co., 39 S.W.2d 727, 183 Ark. 945.
10 C.J. p. 238 note 23.

Registered letter

Law requiring railroad to give constructive notice by registered letter of arrival of shipment to consignee was abrogated by subsequent legislation and regulations approved pursuant thereto which permitted a carrier to adopt notice by regular mail.—Spears v. Missouri Pac. R. Co., 39 S.W.2d 727, 183 Ark. 945.

20. Mo.—National Bank of Commerce v. Southern R. Co., 115 S.W. 517, 135 Mo. App. 74.

21. Mo.—Milne Lumber Co. v. Michigan Cent. R. Co., App., 57 S.W.2d 732.

Consignee's address on billing

Freight classification rule that shipper could not require carrier to notify consignee at address other than destination of shipment unless otherwise provided was inapplicable, where consignee's address appeared on billing.—Milne Lumber Co. v. Michigan Cent. R. Co., Mo. App., 57 S.W.2d 732.

22. Tex.—Texas & N. O. Ry. Co. v. Patterson & Roberts, Civ. App., 192 S.W. 585.

23. S.C.—Knight v. Southern R. Co., 67 S.E. 16, 85 S.C. 78

24. Mich.—Wood v. Michigan Cent. R. Co., 151 N.W. 601, 184 Mich. 672.

25. U.S.—Director General of Railroads v. Lewis E. Sands Co., C.C.A.N.Y., 271 F. 85.

26. Ind.—Ross v. Indiana Natural Gas & Oil Co., 130 N.E. 440, 78 Ind. App. 219, rehearing denied 131 N.E. 794, 78 Ind.App. 219.

Notice to servant

Consignee not objecting, within time allowed by carrier's demurrage rules to sufficiency of notice of arrival given "in substantial compliance" therewith, whether in writing or otherwise, cannot afterward question sufficiency of notice, and having acted on information received through telephone and telegraph operator in its office, cannot question his authority, relation with him being that of master and servant rather than principal and agent.—Ross v. Indiana Natural Gas & Oil Co., 130 N.E. 440, 78 Ind. App. 219, rehearing denied 131 N.E. 794, 78 Ind. App. 219.

27. Wis.—Wood v. Milwaukee, etc., R. Co., 27 Wis. 541, 9 Am. R. 465

28. Ala.—Southern R. Co. v. W. T. Adams Mach. Co., 51 So. 779, 165 Ala. 436
10 C.J. p. 238 note 28.

29. Miss.—Mobile & O. R. Co. v. Jensen, 139 So. 840, 162 Miss. 741.

Shorter notice

Under a rule of the interstate commerce commission providing that notice of arrival shall be given within twenty-four hours unless agreed to in writing, the only way the shipper and carrier can provide for the giving of a shorter notice is by written contract expressly providing therefor, and such a stipulation should be noted on the bill of lading, because the bill of lading is the contract of shipment between the parties.—Mobile & O. R. Co. v. Jensen, 139 So. 840, 162 Miss. 741.

30. Wis.—Uber v. Chicago, etc., R. Co., 138 N.W. 57, 151 Wis. 431.
10 C.J. p. 238 note 29.

mailed until after the goods were destroyed is, of course, insufficient;[31] and so is a notice given on the morning of the arrival of the goods at their destination stating that the car would be delivered in the usual course of business.[32] Under a statute providing that a carrier shall be liable only as warehouseman after it has used due diligence to notify the consignee of the arrival of the goods, what is due diligence depends on the circumstances of the case.[33]

(c) Circumstances Excusing Notice

A carrier may be excused from giving notice of arrival under circumstances which show actual knowledge of arrival on the part of the consignee or indicate an impossibility of giving such notice for which the carrier is not responsible.

Circumstances may exist which will excuse the carrier from giving notice. The carrier is excused from giving notice to the consignee, even when required so to do by statute, when the consignee is already aware of the arrival of the goods.[34] Since no rule requires a carrier to do what by the exercise of due effort it cannot do,[35] provided due diligence is used under the circumstances,[36] the absence of notice is also excused where the consignee has no residence or place of business at the point to which the goods are sent, and his address is unknown to the carrier and cannot be ascertained by the exercise of due diligence,[37] or where a shipment is not properly addressed to the consignee's usual place of business.[38] Under these circumstances the carrier can place the goods in its warehouse, and after keeping them a reasonable time, if the consignee does not call for them, its liability as carrier ceases and it remains liable simply as a warehouseman[39] Notice is also excused where the consignee's place of business was closed on account of the day on which the goods arrived being a holiday,[40] or where the consignee had not called for his mail and would not have received the notice if it had been given.[41]

(2) Time of Removal

The consignee must use diligence in removing goods after their arrival, or, where he is entitled to notice of their arrival, after such notice has been given.

Because of the exceptional and arbitrary character of the insurance feature of the contract of carriage, it necessarily follows that the consignee is bound to observe diligence in removing the goods.[42] The duty of the consignee to receive the goods, it is said, is as imperative as is the duty of the carrier to deliver. The stringent liability of the carrier cannot be continued at the option or to suit the convenience of the consignee.[43] Where the parties by the contract between them have set a limit on the time within which the consignee is to remove the goods, such as a provision in the bill of lading that the goods are to be removed within forty-eight hours after notice of arrival, the extraordinary liability of the carrier terminates with the expiration of that time,[44] notwithstanding it was raining dur-

31. Cal.—Reeder v. Wells, 113 P. 342, 14 Cal App. 790.

32. Cal.—Jolly v. Atchison, etc., R Co, 131 P. 1057, 21 Cal.App. 368.
10 C J p 238 note 31.

33. Tex.—St. Louis, etc, R. Co. v. Hicks, Civ.App, 158 S.W. 192.

34. Ala.—H. & L. M. Warlen Cotton Co v. Southern Ry. Co, 94 So. 726, 208 Ala. 417.
10 C J. p 239 note 33.

Knowledge of agent

Failure to notify consignor of arrival of shipment consigned to himself, would impose no liability, where person with whom consignor had made arrangements to accept delivery knew of their arrival in good condition.—Rosenbaum v. Northern Pac. Ry. Co., 172 P. 238, 101 Wash. 225

Notice through another source

Where a carrier misaddressed a notice of arrival of goods, but the consignee later received notice through the warehouse in which such goods had been stored, the carrier is excused from giving notice and the consignee may not recover for loss to the goods caused by his negligence in not obtaining them from the warehouse within a reasonable time.—Hunt v. New York Cent. R. Co., 173 N Y S. 465.

Written notice to the consignee of goods from the carrier of their arrival is not necessary, where the consignee has actual notice of the fact. —Wichita Valley Ry. Co. v. Golden, Tex Civ.App., 211 S.W. 465.

35. Me.—Brown v. Railway Express Agency, 188 A. 716, 134 Me. 477.

36. N.Y.—Sherman v. Hudson River R. Co., 64 N.Y. 254.
Tenn.—Butler v. East Tennessee, etc., R. Co, 8 Lea 32.
10 C J. p 239 note 34.

37. Md.—Paine v. Roe, 122 A. 322, 143 Md 282
10 C J. p 239 note 34.

Shipper also consignee

(1) Shipper, consigning freight to himself, where he is not known without furnishing city address or making demand on terminal carrier, cannot complain of carrier's failure to give notice of arrival.—Seaboard Air Line Ry. Co. v. France, 111 So. 248, 92 Fla. 1102.

(2) One who delivers property to a carrier consigned to himself at a place where he does not reside, and has no representatives or place of business, is bound to put himself in a position to receive notice, and, failing to do so, cannot be heard to complain that notice was not given.—Rosenbaum v. Northern Pac. Ry Co, 172 P. 238, 101 Wash 225.

38. Ark.—American Standard Jewelry Co. v. Witherington, 93 S W. 695, 81 Ark 134.

39. Minn.—Derosia v. Winona, etc., R Co, 18 Minn. 133.

40. N.Y.—Ely v. New Haven Steamboat Co, 53 Barb. 207.

41. W.Va.—Hutchinson v U. S Express Co, 59 S E. 949, 63 W Va. 128, 14 L.R.A.,N S., 393

42. Mo.—Ginnochio-Jones Fruit Co v. Missouri, etc, R. Co, 134 S.W. 1028, 153 Mo App. 598.
10 C J p 243 note 69.

43. N Y.—Tarbell v. Royal Exch. Shipping Co., 17 N.E. 721, 110 N.Y. 170, 6 Am.S R 350—Redmond v. Liverpool, etc., Steamboat Co., 46 N.Y. 578, 7 Am.R 390.

44. Ill.—Mark Owen & Co v. Michigan Cent R Co, 125 N E. 767, 291 Ill. 149, certiorari granted Michigan Cent R. Co. v. Mark Owen & Co., 40 S Ct. 483, 253 U.S. 481, 64

ing part of that time, at least where a reasonable time to remove the goods remained after the rain stopped and before the expiration of the time fixed;[45] but the consignee is entitled to such time in which to remove the goods, and during that time the carrier is at least bound to use reasonable diligence to protect it from injury.[46]

In the absence of an express stipulation in the agreement of carriage referring thereto, a conflict prevails as to the right of a consignee to have a reasonable time in which to remove goods after their arrival.

Under the so-called Massachusetts doctrine which now prevails in that state and several others, when the goods have reached their destination and are placed in a position of reasonable safety, ready for delivery to the consignee, the carrier's duty as carrier terminates and that of warehouseman begins without regard to a reasonable time for the removal of the goods.[47] In other jurisdictions, however, irrespective of whether or not the consignee is entitled to notice of the arrival of his goods, when the goods have arrived at their destination, the liability of the carrier as such continues until the consignee or his agent has had a reasonable time in which to remove them.[48]

From what period time computed. Where notice of the arrival of the goods must be given the consignee, or where notice is specially provided for in the shipping contract, the reasonable time in which such goods must be removed commences to run only after such notice is given the consignee of the arrival of the goods, or after actual knowledge by him of such arrival.[49] Under a uniform bill of lading, allowing forty-eight hours for removal after notice of arrival of goods, such period begins to run from the time notice is properly mailed to the owner,[50] and a notice given before a shipment reaches the point of delivery is insufficient to start the running of such period.[51]

What constitutes a reasonable time for the removal of goods will in general depend on the circumstances of each particular case,[52] unless the

L.Ed. 1032, and affirmed 41 S Ct 554, 256 U.S 427, 65 L.Ed. 1032

45. La.—Wood v Louisiana & A. Ry Co., 104 So 306, 158 La. 504.

46. Kan.—Mangelsdorf Seed Co v Missouri Pac. R. Co., 280 P. 896, 128 Kan. 729.
La.—Wood v. Louisiana & A. Ry Co., 104 So. 306, 158 La. 504—Swift & Co v. Texas & P. Ry. Co., 6 La. App 7.
N Y.—Bobzein v. New York Cent R Co, 176 N Y S. 407, 187 App Div. 767.
Ohio—Louisville & N. R. Co. v. Riley, 160 N E. 730, 27 Ohio App. 188.

Construction of contract

The meaning of a uniform bill of lading is that the common-law liability of the carrier continues for forty-eight hours after placement and notice with respect to such part of the shipment as has not been removed—Mark Owen & Co. v. Michigan Cent R Co, 214 Ill App. 94, affirmed 125 N E. 767, 291 Ill. 149.

No absolute liability

A carrier is under no absolute liability for damage to grapes during forty-eight hours after notifying consignee, where such damage resulted from their inherent nature and condition—Porter v. Pennsylvania R Co, 231 N.Y S. 432, 224 App Div. 440

47. Ga.—Central of Georgia Ry. Co v. Leverette, 129 S E. 292, 34 Ga App. 304
Ill—Phillipson & Co. v Grand Trunk Western Ry. Co, 238 Ill App. 251
10 C.J. p 234 note 1.

48. Fla—Atlantic Coast Line R. Co v. Sandlin, 78 So. 667, 75 Fla. 539
La—Swift & Co. v. Texas & P. Ry. Co., 6 La.App 7.
N J—Koch v. Delaware, L. & W. R Co, 110 A. 128, 94 N J Law 30
N Y—Crittenden v. American Ry Express Co, 199 N Y S. 521, 205 App Div. 228, affirmed 144 N E 899, 238 N Y. 573—Bragg v Taylor, 199 N Y S 156, 205 App Div 59, affirmed 142 N E 327, 236 N Y 666—Bobzein v. New York Cent R Co, 176 N Y.S 407, 187 App.Div. 767.
Tex—Houston & T. C Ry. Co v. J W Geer & Sons, Civ App, 236 S W 199
Vt—L. Kommel & Son v. Champlain Transp Co, 105 A. 253, 93 Vt. 1, 2 A.L R 275
Va—New York, P. & N. R Co v Chandler, 106 S E 684, 129 Va. 695
10 C J p 235 note 2.

The Corpus Juris text has been cited with approval.
Colo.—Denver & R G R. Co v. Johnson, 193 P. 729, 69 Colo 252
N Y—Bobzein v New York Cent R Co., 176 N Y S. 407, 187 App.Div 767.

In the leading case supporting this view it was said that by the Massachusetts doctrine "the salutary and approved principles of the common law are sacrificed to considerations of convenience and expediency, in the simplicity and precise and practical character of the rule which it establishes."—Moses v Boston, etc, R Co, 32 N.H 523, 543, 64 Am.D 381.

49. Kan—Leavenworth, etc, R. Co. v. Maris, 16 Kan 333.
10 C J p 239 note 38.

50. N.Y—Rotundo v. Erie R. Co, 198 N.Y S. 688, 120 Misc 461.

51. Mo—Hoyland Flour Mills Co. v Missouri Pac. R Co, 5 S W.2d 125, 222 Mo App. 599, certiorari denied Erie R Co. v. Hoyland Flour Mills Co, 48 S Ct. 433, 277 U S. 586, 72 L Ed. 1001.
N Y—Pillsbury Flour Mills Co. v Erie R Co, 216 N Y S 486, 127 Misc. 466, affirmed 222 N.Y S 882, 220 App.Div 826, affirmed 162 N.E 560, 248 N Y. 649, certiorari denied Erie R Co. v. Pillsbury Flour Mills Co, 49 S Ct 80, 278 U S 645, 73 L. Ed. 559.

52. Ill—See Gilbert v Chicago & A. R Co., 194 Ill App 481.
Tex—Hines v. First Guaranty State Bank of Aubrey, Civ.App, 228 S W. 668, affirmed, Com.App, 243 S W. 972
10 C J p 239 note 39.

Consignee must be diligent in removal of goods

If a consignee who has received notice of arrival of goods wishes to hold the carrier liable as such for loss by fire, it is incumbent upon him at least to use diligence in removing the goods—American Express Co. v. Duncan, Tex.Civ App., 193 S W. 411.

Reasonable time not given

(1) Where pecan trees arrived at station Friday morning, and were damaged by cold during Sunday, and consignee's agent was not notified of arrival until Monday morning, consignee did not have reasonable time

time for the removal is definitely fixed by statute,[53] or by the contract between the parties as expressed in the bill of lading.[54] A rule has been laid down that the reasonable time to which the consignee is entitled, for the purpose of taking away the goods after their arrival at their destination, has no reference to the peculiar situation or circumstances of the consignee;[55] that a reasonable time is such time as will enable one residing in the vicinity of the place of delivery, and informed of the usual course of business on the part of the carrier, to come to the place of delivery, inspect the goods, and take them away.[56] This rule, however, has not received universal approval.[57] In determining what is a reasonable time, no consideration is to be given to the distance from the place of delivery at which the consignee lives.[58] The convenience or the accommodation of the consignee, or his means or facilities for removing the goods,[59] or the fact that his inability to remove the goods results from causes that he did not produce and could not avoid,[60] is not to be considered. He cannot defer taking the goods away in order to attend to other matters of his own, no matter how important they may be. The liability of a common carrier for goods in transit is an extraordinary liability and, although founded on sound principles of public policy, is not to be extended beyond the point where necessity for its existence continues.[61]

Whether a question of law or of fact. Where the facts are not in dispute, the question as to whether the time in a particular case was reasonable is ordinarily one of law for the court,[62] and, on the other hand, the question is for the jury when the facts are in dispute, or the inference to be drawn from them is in doubt.[63]

§ 154. Where Goods Are Held at Consignee's Request

Where, following transportation, goods are held by the carrier at the request or with the acquiescence of the consignee, the carrier's liability as such terminates and it becomes liable as a warehouseman only.

Where at the end of the transportation the goods are held by the carrier at the request or with the acquiescence of the consignee, and for his convenience, the liability of the carrier as such is at an end and the extent of its liability is that of warehouseman only.[64] This is so whether the goods are deposited in a warehouse belonging to the carrier

in which to remove trees before they were damaged—American Ry. Express Co v. Judd, 104 So. 418, 213 Ala. 242.

(2) Where consignee received notice of arrival of goods shipped, with instructions to hold until advised where to make delivery, after 5 o'clock in the afternoon, and they were damaged by fire the same evening at 9 o'clock, the carrier was still occupying the position of carrier, and not of warehouseman—Bragg v. Taylor, 199 N Y S 156, 205 App Div. 59, affirmed 142 N.E. 327, 236 N Y. 666

(3) Other examples see 10 C J. p 241 note 52

Time held reasonable

La—Wood v Louisiana & A. Ry Co, 104 So 306, 158 La. 504.

Tex—Southwest National Bank of Dallas v Missouri, K. & T. Ry Co of Texas, Civ App, 18 S W.2d 807, error refused—Hines v First Guaranty State Bank of Aubrey, Civ App, 228 S.W. 668, affirmed Com App, 243 S.W 972.

10 C J p 240 note 51.

53. Ala.—Hearn v. Louisville, etc, R. Co, 60 So. 600, 6 Ala.App. 483
10 C J p 239 note 40.

Powers of commission limited

Under a statute which gives a railroad commission power to prescribe rates for the storage of freight and to fix the time after its arrival when storage charges shall begin does not confer power on the commission to fix the time when the liability of the carrier ends and that of the warehouseman begins—Jones v. Southern R. Co., 56 S.E 666, 76 S C. 67.

54. La—Bonura & Co. v. New Orleans & N. E. R. Co, 123 So 149, 11 La App. 55.
W.Va.—Del Signore v. Payne, 109 S. E 232, 89 W Va 275

55. Ark—Missouri Pac R Co. v Nevill, 30 S W 425, 60 Ark. 375, 330, 28 L R A 80, 46 Am S R. 208
10 C J. p 239 note 41.

56. Md—United Fruit Co v. New York, etc, Transp Co, 65 A. 415, 104 Md. 567, 8 L R A,N S, 240, 10 Ann Cas 437.
10 C J p 239 note 42.

57. Ky—Lewis v. Louisville, etc, R Co, 122 S.W 184, 135 Ky. 361, 371, 25 L R A,N S, 938, 21 Ann.Cas 527
10 C J p 240 note 43.

58. Miss—Gulf, etc, R Co v Ferguson-McKinney Dry Goods Co, 52 So 797, 97 Miss 266
10 C J. p 240 note 44.

59. W Va—Berry v. West Virginia, etc, R Co, 30 S.E 143, 44 W Va 538, 67 Am.S R 781.
10 C J. p 240 note 45.

60. Ky—Harris v. Louisville, etc, R Co, 9 Ky L. 392

61. Wash.—North Yakima Brewing, etc, Co v. Northern Pac R Co, 95 P 486, 49 Wash 375, 16 L.R.A., N S, 935.
10 C.J p 240 note 48.

62. Ind—American Ry Express Co. v. Rhody, 143 N E. 640, 84 Ind. App. 283.
Tex.—Hines v First Guaranty State Bank of Aubrey, Civ App, 228 S. W 668, affirmed, Com App., 243 S. W. 972
10 C J p 240 note 49.

63. Ind—American Ry. Express Co. v Rhody, 143 N E 640, 84 Ind. App 283.
10 C J p 240 note 50.

64. Ill—Aurora Automatic Mach Co v Chicago, B & Q. R Co, 217 Ill.App 60
10 C J p 242 note 62.

Terminal service

The retention of an interstate shipment by a carrier as warehouseman under the bill of lading which, in accordance with the published regulations, provides that every service to be performed under it shall be subject to the conditions specified, among which is an express condition governing the carrier's responsibility as warehouseman for property not removed within forty-eight hours after notice of arrival, is a terminal service forming a part of the transportation in the sense of the federal statute, Comp St 1913 § 8563, 49 U.S. C.A. § 1 (4).—Southern Ry Co. v. Prescott, 36 S Ct 469, 240 U.S. 632, 60 L Ed 836, reversing Prescott v. Southern Ry. Co., 83 S E. 781, 99 S. C 422.

or in that of some responsible third person, the carrier having no warehouse at the place of destination.[65]

§ 155. Failure or Refusal of Carrier to Deliver Goods When Called for

A carrier's wrongful refusal or failure to deliver the goods when called for by the consignee extends its extraordinary liability beyond what would be a reasonable time for removal of the goods.

The carrier's liability as insurer is extended beyond what would be a reasonable time, under ordinary circumstances, for the consignee to remove the goods by its wrongful refusal or failure to deliver the goods when called for,[66] unless the loss is shown to have occurred while it was acting as warehouseman.[67] Accordingly, where delivery is prevented by the carrier's failure to have the goods in a position from which the consignee may conveniently remove them,[68] or where, by any similar conduct on the part of the carrier, the consignee is prevented without fault of his own from removing and caring for the goods, the carrier is liable.[69] If the consignee calls for his goods which have arrived and are stored in the depot, but is informed by the carrier's agent, through mistake, that they have not arrived, and the goods are destroyed, the carrier will be liable therefor.[70] Some of these decisions proceed on the theory that the carrier's liability at the time of the destruction of the goods is that of an insurer, while others hold that the negligence of the carrier in wrongfully detaining the goods is the proximate cause of the loss. However, this diversity of views is of no practical importance since the same net result is obtained under either view.[71]

On the other hand, it has been held that where a carrier's failure to deliver freight was not an absolute refusal to deliver, and did not constitute a conversion, the carrier's liability as an insurer was not extended indefinitely.[72] A carrier, required to notify a consignee and deliver on shipper's order, is justified in refusing to deliver until the presentation of such order,[73] but until delivery the carrier is obliged to exercise ordinary care in the preservation of the goods.[74]

§ 156. Liability of Carrier after Expiration of Reasonable Time That of Warehouseman

The liability of a carrier as an insurer is altered, on a lack of diligence by a consignee in removing goods, to that of a warehouseman only.

Notwithstanding the diversity of authority as to what constitutes diligence on the part of a consignee in removing goods, as discussed in § 153 b (2) supra, it is well settled that, where the consignee has not exercised diligence in the removal of the goods, the extraordinary liability of the carrier as an insurer ceases, and he is liable from that time on only as a warehouseman.[75] The Carmack

65. Ala.—Alabama, etc., R. Co. v. Kidd, 35 Ala. 209.
10 C.J. p. 243 note 63.

66. Okl.—Oklahoma, N. M. & P. Ry. Co. v. H. M. S. Drilling Co., 229 P. 420, 100 Okl. 260.
10 C.J. p. 243 note 64.

67. Okl.—Oklahoma, N. M. & P. Ry. Co. v. H. M. S. Drilling Co., supra.

68. Iowa.—Independence Mills Co. v. Burlington, etc., R. Co., 34 N.W. 320, 72 Iowa 535, 2 Am.S.R. 258.
10 C.J. p. 243 note 65.

Goods inaccessible

Where a carrier unloaded a cargo forty-eight hours before fire burned the dock, destroying shipper's goods, which it had so covered with others that shipper could not remove them, the relation of shipper and carrier still obtained, and carrier was liable. —Lagomarsino v. Pacific Alaska Nav. Co., 170 P. 368, 100 Wash. 105.

69. Okl.—Schaff v. Roach, 243 P. 976, 116 Okl. 205, 46 A.L.R. 296.
Tex.—Texas & N. O. R. Co. v. Wrenn, Civ.App., 69 S.W.2d 156, error refused.
10 C.J. p. 243 note 66.

Delivery not completed

Where, under evidence sustaining an implied finding that a compress company was the agent of the carrier for the purpose of unloading cotton and issuing tickets therefor by means of which the carrier could make a symbolic delivery of the cotton to the consignee's assignee, the transfer to the compress company's warehouse was not complete and the assignee was unable to get the goods when it sought to do so, the carrier remained liable as such, rather than as a warehouseman, to the assignee upon the destruction of the goods by fire before the completion of the delivery.—Texas & N. O. R. Co. v. Wrenn, Tex.Civ.App., 69 S.W.2d 156, error refused.

70. Kan.—Union Pac. R. Co. v. Moyer, 19 P. 639, 40 Kan. 184, 10 Am.S.R. 183
10 C.J. p. 243 note 67.

71. Okl.—Schaff v. Roach, 243 P. 976, 116 Okl. 205, 46 A.L.R. 296.

The Corpus Juris text is quoted and rule as there announced followed in Schaff v. Roach, 243 P. 976, 116 Okl. 205, 46 A.L.R. 296.

Proximate cause

Carrier's neglect and wrongful detention of goods after withholding delivery, without sufficient excuse, is proximate cause of their subsequent loss by fire, making carrier liable as warehouseman, although fire was not caused by its negligence.—Schaff v. Roach, 243 P. 976, 116 Okl. 205, 46 A.L.R. 296.

72. Ga.—Central of Georgia Ry. Co. v. Leverette, 129 S.E. 292, 34 Ga.App. 304.

73. U.S.—C. M. McMahen & Sons v. Louisville & N. R. Co., C.C.A.Ala., 16 F.2d 698.

74. Ark.—St. Louis-San Francisco Ry. Co. v. Cole, 294 S.W. 357, 174 Ark. 10.

75. U.S.—Michigan Cent. R. Co. v. Mark Owen & Co., Ill., 41 S.Ct. 554, 256 U.S. 427, 65 L.Ed. 1032, affirming Mark Owen & Co. v. Michigan Cent. R. Co., 125 N.E. 767, 291 Ill. 149.—Salomon Stern, Ltd. v. Davis, D.C.N.Y., 292 F. 221.—United Metals Selling Co. v. Pryor, Mo., 243 F. 91, 155 C.C.A. 621, certiorari denied 38 S.Ct. 61, 245 U.S. 662, 62 L.Ed. 536.
Ala.—Louisville & N. R. Co. v. Hestle, 75 So. 885, 200 Ala. 137.
Fla.—Atlantic Coast Line R. Co. v. Sandlin, 78 So. 667, 75 Fla. 539.
Ga.—Central of Georgia Ry. Co. v.

amendment, which provides that until transportation is terminated the liability of the initial carrier continues, does not extend its liability as warehousemen.[76]

Unloading the goods and storage in a warehouse is not requisite to limit a carrier's liability to that of a warehouseman after sufficient notice to consignee,[77] and a movement of the goods to an unloading track after a reasonable time following notice of arrival is not a recognition of a liability other than as warehouseman.[78] However, where a loss has occurred during transportation and the remainder of the goods are not removed within the time allotted, the carrier's liability as to all the goods is not changed to that of a warehouseman.[79]

§ 157. Nature and Extent of Carrier's Liability as Custodian or Warehouseman

A carrier which has become liable for goods as a warehouseman is bound to use ordinary care for their protection, but where by the actions of the consignee it has become a gratuitous bailee, it need exercise only slight care for the protection of the property.

The transportation of goods and the storage of goods are contracts of a different character; and although one person or company may render both services, yet the two contracts are not to be confounded or blended, because the legal liabilities attending the two are different.[80] A person may, in the character of carrier, be liable for a loss from which in the character of warehouseman he would be exempted,[81] since the common law imposes no duty on a common carrier to render services as warehouseman, other than such as are necessarily incidental to the transportation of the property.[82] The liability of a warehouseman is ordinarily different from that of a carrier,[83] as shown in §§ 71–118 supra, the liability of a carrier as such, with some few exceptions, is practically that of an insurer, while the duty of the carrier as warehouseman

Leverette, 129 S.E. 292, 34 Ga.App 304—Allen v. Southern Ry. Co., 126 S.E. 722, 33 Ga.App 209—Knight v. Georgia Southwestern & G. Ry. Co., 90 S.E. 81, 18 Ga.App 539.

Ill.—Aurora Automatic Machinery Co. v. Chicago, B. & Q. R. Co., 217 Ill.App 60.

Ind.—American Ry. Express Co. v. Rhody, 143 N.E. 640, 84 Ind.App. 283

Ky.—Gus Datillo Fruit Co. v. Louisville & N. R. Co., 65 S.W.2d 683, 251 Ky. 566.

La.—Marion T. Fannaly, Inc., v. Illinois Cent. R. Co., App., 160 So. 131—Bonura & Co. v. New Orleans & N. E. R. Co., 123 So. 149, 11 La.App. 55

Me.—Brown v. Railway Express Agency, 188 A. 716, 134 Me. 477.

N.Y.—Chalmers v. New York Cent. R. Co., 161 N.Y.S. 577, 175 App.Div. 239—Liberty Sales Co. v. Davis, 198 N.Y.S. 253.

N.C.—Groves Mills v. Carolina & N.W. Ry. Co., 148 S.E. 441, 197 N.C. 388—Lawshe v. Norfolk-Southern R. Co., 132 S.E. 160, 191 N.C. 473

Okl.—Ft. Smith & W. R. Co. v. Syracuse Portrait Co., 245 P. 600, 117 Okl. 113

Pa.—Sheehan v. American Ry. Express Co., 91 Pa.Super. 71—Keystone Pub. Co. v. Pennsylvania R. Co., 78 Pa.Super. 486

Tex.—Southwest Nat. Bank of Dallas v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 18 S.W.2d 807, error refused—Hines v. First Guaranty State Bank of Aubrey, Civ.App., 228 S.W. 668, affirmed, Com.App., 243 S.W. 972—Wichita Valley Ry. Co. v. Golden, Civ.App., 211 S.W. 465.

Wash.—Rosenbaum v. Northern Pac. Ry. Co., 172 P. 238, 101 Wash. 235

10 C.J. p 233 note 91, p 234 note 1, p 236 note 9, p 237 note 13, p 243 note 71.

Corpus Juris text was cited with approval in Cumberland Pipe Line Co. v. Commonwealth, 79 S.W.2d 366, 258 Ky. 90.

At owner's risk

After notice of arrival had been sent and reasonable time for removal had elapsed, carrier could remove and store the goods in a public warehouse at owner's cost and risk.—Liberty Sales Co. v. Davis, 198 N.Y.S. 253.

Delivery before time prescribed

A carrier cannot be held liable as a warehouseman if, before the time for liability as a warehouseman to begin, the shipment is delivered to the consignee.—Coyne v. Oregon Short Line R. Co., 244 Ill.App 359.

Terminal carrier in interstate shipment after forty-eight hours, under contract of shipment, was liable only as a warehouseman, and not under the Interstate Commerce Act.—Hamilton Mill & Elevator Co. v. Stephenville, N. & S. T. Ry. Co., Tex.Civ.App., 189 S.W. 774

Under uniform bill of lading

Where shipment is interstate, provision of uniform bill of lading covering it that after forty-eight hours from giving of notice of its arrival at destination carrier's responsibility shall be that of warehouseman only is reasonable and enforceable as valid contract.—Ft. Smith & W. R. Co. v. Syracuse Portrait Co., 245 P. 600, 117 Okl. 113.

76. Pa.—Keystone Pub. Co. v. Pennsylvania R. Co., 78 Pa.Super. 486.

77. Tex.—Southwest Nat. Bank of Dallas v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 18 S.W.2d 807, error refused.

78. Tex.—Southwest Nat. Bank of Dallas v. Missouri, K. & T. Ry. Co. of Texas, supra.

79. Ill.—Alton Iron & Metal Co. v. Wabash Ry. Co., 235 Ill.App 151, reversed on other grounds 159 N.E. 802, 328 Ill. 353

80. La.—New Orleans Export Co. v. Texas, etc., R. Co., 3 La.App., Orleans, 481.

Mass.—Thomas v. Boston, etc., R. Corp., 10 Metc. 472, 43 Am.D. 444

81. La.—New Orleans Export Co. v. Texas, etc., R. Co., 3 La.App., Orleans, 481.

82. Okl.—St. Louis, etc., R. Co. v. State, 107 P. 929, 26 Okl. 62, 30 L.R.A.,N.S., 137.

Compress company as carrier's agent

Where a railroad, in the absence of a warehouse building to protect cotton at its station, as required by statute, unloaded cotton shipped over its road on the platform of a compress company, the compress company was the agent of the railroad, and not an independent warehouseman.—Wichita Valley Ry. Co. v. Golden, Tex.Civ.App., 211 S.W. 465

83. Ala.—Bethea-Starr Packing & Shipping Co. v. Mayben, 68 So. 814, 192 Ala. 542.

Fla.—Seaboard Air Line Ry. Co. v. A. R. Harper Piano Co., 58 So. 491, 63 Fla. 264.

Ky.—Fowler, Lee & Co. v. Gano, 6 Ky.Op. 319.

is not that of an insurer,[84] but merely to exercise ordinary care, as discussed later in this section.

Gratuitous bailee. The goods may no doubt be so left in the hands of the carrier after reaching their destination and the consignee or owner has had opportunity to take them, as that the further duty of the carrier with reference thereto is only that of an accommodation or gratuitous bailee or custodian, with no right on the part of the carrier to collect charges for keeping, and no duty to exercise more than slight care, and in such case the carrier will be liable, it is said, only for gross negligence.[85] There are decisions, however, which hold that the carrier cannot claim that it was merely a gratuitous bailee before giving notice that it will not insist on the payment of storage charges and will not longer retain possession of the property as a warehouseman.[86]

Bailee for hire. Ordinarily, even after the strict responsibility of carrier ceases, it continues to be a warehouseman of the goods until they are taken by the consignee or owner, and for compensation, either included in the original charge for carriage or collectable as an additional charge against the consignee or owner;[87] and this is so although the goods may not have been unloaded and deposited in a building used for storing freight technically termed a warehouse.[88] Therefore, in accordance with the general principles relating to warehousemen, as discussed in the C.J.S. title Warehousemen and Safe Depositaries § 30, also 67 C.J. p 495 notes 86–91, the carrier as warehouseman is bound to use ordinary care in the keeping of the goods, and will be liable for negligence causing injury or loss thereto,[89] or permitting such goods to injure others.[90] This, however, is the extent of its liability,[91]

84. Ind.—American Ry Express Co v. Rhody, 143 N.E 640, 84 Ind App 283—Chicago, R. I & P. Ry Co. v Stouffer, 111 N.E. 809, 61 Ind App 190
10 C J p 244 note 77.

85. Ga.—Allen v. Southern Ry. Co., 126 S E. 722, 33 Ga App. 209.
10 C J p 244 note 79.

Voluntary assistance

Where freight has been paid and receipt for shipment given by consignee, and delivery is completed without relationship existing between consignee and carrier, either as common carrier or as warehouseman for compensation, carrier, by mere voluntary assistance of agent in closing or sealing car, where no storage or demurrage is charged or chargeable, becomes, at most, a gratuitous bailee.—Allen v. Southern Ry. Co., 126 S E 722, 33 Ga.App. 209

86. S C.—Saunders v. Southern R. Co, 72 S E. 637, 90 S C. 79—Brunson v. Atlantic Coast Line R Co., 56 S E. 538, 76 S.C. 9, 9 L.R.A.,N. S., 577

87. Ga.—Central of Georgia Ry. Co. v Leverette, 129 S.E. 292, 34 Ga App 304.
10 C.J p 244 note 81.

Law of warehousemen

In determining railroad's alleged liability as warehouseman for theft of potatoes from box car on siding, court must resort to general legal principles governing warehousemen's liability.—Marsh v Pennsylvania R. Co, 167 S.E 274, 159 Va 694

Rule of public service commission of Georgia, providing that on personal notice to consignee of arrival of freight there shall be period of "free time" within which consignee may receive it, which period may be extended, has reference solely to liability of consignee for storage, and cannot affect liability of carrier as warehouseman only.—Central of Georgia Ry Co. v. Leverette, 129 S E 292, 34 Ga.App. 304.

88. S C.—Brunson v Atlantic Coast Line R. Co., 56 S E 538, 76 S.C. 9, 9 L.R.A.,N.S., 577.

89. U S.—Southern Ry. Co v. Prescott, S.C., 36 S Ct. 473, 240 U.S 632, 60 L Ed 840—Lehigh Valley R. Co v State of Russia, C C A. N.Y., 21 F.2d 406, certiorari denied 48 S Ct. 159, 275 U S 571, 72 L Ed 432.
Colo.—Lynch v. Union Pac. R. Co., 172 P 1061, 65 Colo 152
Ga.—Allen v. Southern Ry Co., 126 S E 722, 33 Ga App 209.
La.—Wood v. Louisiana & A Ry. Co., 104 So. 306, 158 La. 504—Coate Bros. v. New Orleans Terminal Co., 72 So. 678, 139 La 958.
N.J.—Armstrong Rubber Co. v. Erie R. Co., 137 A. 596, 103 N J Law 579—Champlin v Erie R Co., 103 A. 807, 91 N.J.Law 319.
N.C.—Lawshe v Norfolk-Southern R. Co, 132 S E 160, 191 N.C. 473
Or.—Stoddard Lumber Co v. Oregon-Washington R & Nav Co, 165 P 363, 84 Or. 399, 4 A.L.R 1275.
Pa.—Sheehan v American Ry. Express Co, 91 Pa.Super. 71.
Tex.—Texas & N. O R. Co. v. Gann, Civ App., 68 S.W 2d 1096—Rio Grande City Ry Co v Guerra, Civ. App., 26 S W 2d 360—Hines v First Guaranty State Bank of Aubrey, Civ App., 228 S.W. 668, affirmed Com App., 243 S W. 972—Wichita Valley Ry Co. v. Golden, Civ.App., 211 S W 465—American Express Co. v. Duncan, Civ.App., 193 S W. 411.
Vt.—Charles Bianchi & Sons v. Montpelier & W. R. R. Co., 104 A. 144, 92 Vt 319
10 C.J p 245 note 84.

Exposure to rain

Where delivering carrier which held goods as warehouseman stored them in a warehouse where they were exposed to rain, and they were injured, it could not defeat liability on ground of circumstances such as fogs and high waters.—Coate Bros. v New Orleans Terminal Co., 72 So. 678, 139 La 958.

Lack of facilities

The fact that a carrier had no depot or warehouse at the place of destination within which to store the goods does not relieve its liability for permitting them to remain in a leaky car, although it had the right to warehouse the goods in a car, which in the exercise of ordinary care was a safe and suitable place.—Hines v. First Guaranty State Bank of Aubrey, Tex.Civ.App., 228 S W. 668, affirmed, Com.App., 243 S. W 972.

90. Tex.—Gulf, C & S F R. Co. v. Fowler, 122 S.W. 593, 57 Tex.Civ. App. 556

91. U S.—Salomon Stern, Limited, of America v. Davis, D C N Y., 292 F. 221.
Cal.—Franklin v Southern Pac. Co., 265 P 936, 203 Cal. 680, 59 A L R 118, certiorari denied Southern Pac. Co v. Franklin, 49 S.Ct. 24, 278 U. S 621, 73 L.Ed. 542.
Colo.—Denver & R G. R. Co. v. Johnson, 193 P. 729, 69 Colo 252.
N J.—Armstrong Rubber Co. v. Erie R Co., 137 A. 596, 103 N J Law 579
N Y.—Chalmers v. New York Cent. R. Co., 161 N Y.S. 577, 175 App.Div. 239.
Okl.—Ft. Smith & W. R. Co. v. Syra-

and, of course, no liability results from losses due to an act of God.[92] A much lighter degree of responsibility rests on the carrier, after the function of carriage is deemed by the law to have been completed, and its relation to the property and the owner thereof has assumed the character of that of mere custodian.[93] The carrier is then liable only for such losses or injuries as are shown to have resulted from the want of ordinary care on its part—such care as men of reasonable prudence ordinarily exercise for the safety of their own goods under such circumstances.[94] It is impracticable to differentiate all the various cases as to what acts or omissions on the part of the carrier or its servant or agent will constitute negligence in the preservation or care of the goods in its hands as warehouseman, for this must as a rule depend on the circumstances of each case.[95]

Care required of express companies to constitute ordinary care is greater than that required of ordinary railroad carriers on account of the greater value of the goods usually sent by express, and acts or omissions which may not be negligent in the latter case may be negligent in the former.[96]

§ 158. Actions against Carrier as Warehouseman

In an action against a carrier as warehouseman, the plaintiff has the burden of proving negligence, although the unexplained failure to produce and deliver the goods is generally sufficient to make out a prima facie case for the plaintiff.

The storage of the goods does not create a new contract, and the action against the carrier for negligence in keeping the goods at their destination may be based on the contract of shipment,[97] unless

cuse Portrait Co., 245 P. 600, 117 Okl. 113

Vt.—Charles Bianchi & Sons v. Montpelier & W. R. R. Co., 104 A. 144, 92 Vt. 319.

Va.—Marsh v. Pennsylvania R. Co., 167 S.E. 274, 159 Va. 694

10 C.J. p. 245 note 85.

Negligence of consignee

Carrier as warehouseman is not responsible for goods damaged through fault of consignee.—Swift & Co. v. Texas & P. Ry. Co., 6 La. App. 7.

92. Ark.—Mays v. Missouri & N. A. Ry. Co., 271 S.W. 977, 168 Ark. 908

93. W.Va.—Hutchinson v. U. S. Express Co., 59 S.E. 949, 63 W.Va. 128, 14 L.R.A.,N.S., 393 and note

94. Ind.—American Ry. Express Co. v. Rhody, 143 N.E. 640, 84 Ind. App. 283

N.Y.—Chalmers v. New York Cent. R. Co., 161 N.Y.S. 577, 175 App. Div. 239.

10 C.J. p. 245 note 87.

Duty of owner to warn of danger

Respecting a carrier's liability as warehouseman for theft of potatoes from box car, owner, if aware of danger of theft, should have warned such carrier.—Marsh v. Pennsylvania R. Co., 167 S.E. 274, 159 Va. 694

Protection required by statute

Where a carrier had established a platform as a place for the reception and delivery of cotton, it was required, under statute, to do whatever was reasonably necessary to protect cotton placed on the platform from fire caused by sparks from passing engines, or from a cotton gin located seventy-five or eighty yards therefrom.—Hartford Fire Ins. Co. v. Triplett, Tex. Civ. App., 223 S.W. 305.

95. N.J.—Champlin v. Erie R. Co., 103 A. 807, 91 N.J. Law 319.

10 C.J. p. 245 note 88.

Failure to lock car

Carrier accepting possession of potatoes in partially loaded box car, but refusing to lock car and depending only on seals to protect car, was negligent, and liable as warehouseman for stolen potatoes.—Texas & N. O. R. Co. v. Gann, Tex. Civ. App., 68 S.W. 2d 1096.

Fires

(1) The carrier as warehouseman is not liable for loss or injury caused by fires not due to its negligence.—Central of Georgia Ry. Co. v. Leverette, 129 S.E. 292, 34 Ga. App. 304—10 C.J. p. 245 note 88 [d].

(2) On the other hand, where cotton received by carrier under bill of lading, and placed with compress company for preparation for shipment, was burned by fire caused by sparks originating from defective chimney of carrier, in close proximity to compress, the carrier was negligent as warehouseman.—Chas. W. Sheppard Cotton Co. v. New Orleans, M. & C. R. Co., 78 So. 193, 118 Miss. 464

Flood

Where it was highly improbable that water would enter car containing intra-state freight in defendant carrier's yard and in his charge as warehouseman, no negligence can be charged against defendant for failure to remove the goods prior to the day of the loss, when it became apparent that there would be a flood.—Chalmers v. New York Cent. R. Co., 161 N.Y.S. 577, 175 App. Div. 239.

Improper care in warehousing

A carrier of seed potatoes from Wisconsin to New Orleans, where it piled them in a solid mass in an open shed without ventilation between the sacks, in consequence of which they became wet, mouldy, and unfit for seed by the time the consignee was required to accept and remove them, was negligent, a carrier being held to knowledge of the proper method of handling and storing a commodity which it accepts for shipment.—Kuney v. Chicago & N. W. Ry. Co., 197 N.W. 708, 183 Wis. 569

Storage in defective car

Even though a bill of lading gives carrier an option of keeping goods in car as warehouseman, if not removed in certain time after notice of arrival at destination, it will be liable for negligently keeping them in a leaky car.—Hines v. First Guaranty State Bank of Aubrey, Tex. Com. App., 243 S.W. 972, affirming, Civ. App., 228 S.W. 668.

Unauthorized reshipment

A carrier's unauthorized reshipment of goods from destination, after consignee's failure to call for them and after its liability to hold them as warehouseman has arisen, is wrongful, and imposes absolute liability for their loss in the unauthorized transit.—Belknap v. Baltimore & O. R. Co., 91 S.E. 656, 79 W.Va. 691, L.R.A. 1917D 916

96. Kan.—Filson v. Pacific Express Co., 114 P. 863, 84 Kan. 614

10 C.J. p. 246 note 89

97. Mich.—Thomas Canning Co. v. Pere Marquette Ry. Co., 178 N.W. 851, 211 Mich. 326.

10 C.J. p. 246 note 91.

No new contract of warehousing independent of contract of carriage was created by a letter from the carrier to interstate shipper, where goods have been stored for nearly two months at an intermediate point.—Western Transit Co. v. A. C. Leslie & Co., 37 S.Ct. 133, 242 U.S. 448, 61 L.Ed. 423, reversing A. C. Leslie & Co. v. Western Transit Co., 150 N.Y.S. 1073, 165 App. Div. 947.

a new contract was intended by the parties.[98] As the action against the carrier as warehouseman is founded on negligence, the burden of proving negligence is on plaintiff,[99] and also of showing that such negligence was the proximate cause of the loss or injury.[1] As in the case of other bailments, as discussed in § 50 c of the C.J.S. title Bailments, the unexplained failure to produce and to deliver the goods is generally sufficient to make out a prima facie case for plaintiff.[2] The custody of the goods being shown to have been in the carrier, and their loss or the failure to produce them being established, the burden of showing that there was no negligence, or at least of explaining the loss in a manner not prima facie negligent, is usually held to rest on the carrier.[3] This burden, it has been said,

Special charge unnecessary

Where it is sought to charge defendant with breach of duty as warehouseman, it is not necessary to show a special charge for such duty.
Iowa—Porter v Chicago, etc, R Co, 20 Iowa 73.
Pa—Aronson v. Cleveland, etc, R Co., 70 Pa 68.

98. U S—Barrett v. Fournial, C C A N.Y., 21 F 2d 298

Instruction as to new contract

Evidence may justify the action of a court in instructing jury that storage contract was substituted for written transportation contract—Barrett v. Fournial, C C A.N.Y., 21 F. 2d 298

99. U S.—Salomon Stern, Ltd. v. Davis, D C N Y, 292 F. 221.
La—Bonura & Co v. New Orleans & N E R. Co, 123 So. 149, 11 La App. 55
Mich—Thomas Canning Co v. Pere Marquette Ry. Co, 178 N.W. 851, 211 Mich. 326.
N.Y—Chalmers v. New York Cent. R Co, 161 N.Y S. 577, 175 App. Div. 239
Okl.—Ft Smith & W R Co v. Syracuse Portrait Co., 245 P. 600, 117 Okl 113.
Vt—Charles Bianchi & Sons v. Montpelier & W. R. R. Co, 104 A. 144, 92 Vt 319.
Va.—Marsh v. Pennsylvania R. Co., 167 S E. 274, 159 Va. 694.
10 C J. p 246 note 92.

Burden of going forward

Where carrier, who arrived at pier too late to deliver plaintiffs' goods to steamship company, proved that he stored goods overnight in warehouse, in which they were destroyed by fire, burden was on plaintiffs to show loss was caused by truckman's negligence, and, in absence of such proof, complaint against truckman, who had no control over warehouse, and who was blameless as to fire, should have been dismissed—Feld v Slaven, 210 N.Y S. 525, 125 Misc 253

Express company

Negligence of express company as warehouseman must be proved—Sheehan v. American Ry. Express Co, 91 Pa.Super 71

Goods stolen

The fact that goods were stolen does not create a prima facie presumption of negligence, and, in the absence of proof, a court will not assume that such theft was due to the carrier's negligence, acting as a warehouseman—Marsh v. Pennsylvania R Co, 167 S E. 274, 159 Va 694.

Interstate shipments

In the case of interstate shipments, the burden of proof of negligence is on plaintiff, and an instruction to the contrary is erroneous—Ft. Smith & W R Co v. Syracuse Portrait Co, 245 P. 600, 117 Okl 113.

What law governs

The measure of an interstate carrier's liability as warehouseman under a bill of lading issued pursuant to federal act as amended, was governed by the provisions of the bill of lading and not by a local law fixing the burden of proof in case of loss by fire—Southern Ry. Co. v. Prescott, 36 S Ct 469, 240 U S. 632, 60 L. Ed. 836, reversing Prescott v Southern Ry. Co, 83 S E. 781, 99 S C 422

1. Mich—Thomas Canning Co v Pere Marquette Ry. Co., 178 N W 851, 211 Mich. 326
Va—Marsh v Pennsylvania R. Co, 167 S E. 274, 159 Va. 694.
10 C J. p 247 note 93.

2. Ark.—Louisiana & N. R. Co. v. Wm R Moore Dry Goods Co., 2 S W 2d 1113, 176 Ark 341
Mo—Viviano v. Davis, App, 258 S W. 69
N.J.—Armstrong Rubber Co. v. Erie R Co, 137 A. 596, 103 N.J Law 579.

Burden of proof sustained

In an action against carrier as such or as warehouseman for loss of portion of shipment returned to plaintiff on consignee's refusal to accept, where plaintiff testified he delivered the goods to defendant in good condition and it was conceded the goods were in defendant's possession from that time until again delivered to plaintiff, but defendant did not attempt to show why all the goods were not returned or what became of the goods missing, plaintiff was held to have sustained the burden of proof of negligence of defendant—Viviano v. Davis, Mo App, 258 S W 69.

3. U S.—Southern Ry. Co. v. Prescott, 36 S Ct. 469, 240 U S. 632, 60 L.Ed. 836, reversing Prescott v Southern Ry. Co, 83 S E. 781, 99 S.C. 422.
Ga.—Allen v. Southern Ry. Co., 126 S E 722, 33 Ga.App 209
Ind—Chicago, R I. & P. Ry. Co. v Stouffer, 111 N E 809, 61 Ind App. 190
Mo—Viviano v Davis, App, 258 S W 69.
Okl—Ft Smith & W R Co v Syracuse Portrait Co, 245 P 600, 117 Okl 113
10 C J p 247 note 95.

The Corpus Juris text

(1) 10 C J p 246 note 91—p 247 note 96 has been quoted and approved in Thomas Canning Co. v Pere Marquette Ry. Co., 178 N W. 851, 211 Mich. 326.

(2) 10 C J p 247 note 95 to end of paragraph has been quoted and approved in Morrell v Northern Pac. Ry. Co, N D., 179 N W. 922.

Allegation of particulars

The fact that the complaint in an action against a warehouseman for loss of goods stated the particulars of the negligence relied on did not prevent the presumption of negligence, and the warehouseman had the burden of showing due care.—Prescott v Southern Ry. Co., 83 S E. 781, 99 S.C. 422, reversed on other grounds Southern Ry. Co. v. Prescott, 36 S Ct. 469, 240 U.S. 632, 60 L Ed 836

Injury is not conclusive evidence of negligence

Where a railway is in possession of a carload of vegetables as bailee, the freezing of such vegetables is prima facie, but not conclusive, evidence of its negligence, and can be rebutted by evidence that consignee had access to car and was removing vegetables at time of freezing.—Lynch v. Union Pac R. Co, 172 P. 1061, 65 Colo. 152

Onus of exoneration

In action against a carrier as a warehouseman for damage to goods, instruction that plaintiff had burden of proving defendant negligent, but that when it had shown that goods were in good condition when they were delivered for shipment and when they arrived at destination "then the burden of proof is placed upon the defendant to show that the beans were not damaged because of any want of care on its part," was not erroneous, notwithstanding use of words "burden of proof" instead of more technically correct words

is not merely the burden of going forward with the evidence, nor a shifting burden, but a burden of establishing before the jury the absence of negligence.[4] The presumption of negligence raised by a proof of failure to deliver goods on demand is not rebutted by mere proof that the goods cannot be found without any affirmative explanation of their disappearance.[5]

In an action of this character, the usual rules as to admissibility,[6] and weight and sufficiency,[7] of evidence apply. Ordinarily the question of negligence is for the jury,[8] under proper instructions,[9] but where there is no dispute as to the facts, the question of whether the goods have been properly cared for may become one of law.[10]

Where a carrier is held liable as a warehouseman or bailee at the point of shipment, the value of the goods at such place furnishes the proper basis for estimating damages for injury to the goods.[11] In the absence of evidence that such fee is reasonable, it is improper to allow an attorney's fee to the party seeking recovery from a carrier acting as warehouseman.[12]

N. FINAL DELIVERY

§ 159. In General

A delivery of freight may be made in accordance with local or special customs where they are not in contravention of law, and are known to the party whose rights are affected thereby.

In the absence of any provision to the contrary, a local or special custom regulating the delivery of freight by a carrier forms a part of the contract of shipment, if not in contravention of established rules of law;[13] but a usage between the carrier and shipper as to the mode of delivery, contrary to the terms of the contract, will not affect the rights of

"onus of exoneration," the jury not being misled—Thomas Canning Co v. Pere Marquette Ry. Co., 178 N.W 851, 211 Mich. 326.

4. Mich.—Thomas Canning Co. v. Pere Marquette Ry. Co., supra. 10 C J. p 247 note 96.

5. N.Y—Aaronson v. Pennsylvania R. Co., 52 N.Y.S. 95, 23 Misc. 666

6. **Absence of previous robberies**
In an action for loss of goods stolen from a carrier acting as warehouseman, the absence of previous robberies cannot be shown.—Armstrong Rubber Co. v. Erie R. Co, 137 A. 596, 103 N.J Law 579.

Contradictory statements
Evidence offered by plaintiff, that goods delivered by a carrier to a warehouse was for the purpose of preserving the carrier's lien for freight, is properly excluded when such evidence contradicts plaintiff's previous testimony that storage was in compliance with provisions of the bill of lading.—Mays v. Missouri & N. A. Ry. Co, 271 S.W. 977, 168 Ark. 908.

Presence of watchman
In action against railroad for destruction of car of hay by fire in open yard, testimony of witness, who stated he was in yard nearly every day, as to whether he ever saw or knew of watchman being in yard, was admissible in rebuttal of railroad's proof it maintained watchman.—Champlin v. Erie R. Co., 103 A. 807, 91 N J Law 319.

Surrounding conditions
On the question of negligence in storing goods in an unsafe place, evidence is admissible which shows the condition of surrounding buildings and that smoking in the locality had been prohibited by ordinance.—Judd v. New York, etc., SS. Co., C.C.Pa., 130 F. 991.

Usual care
On the question of care, evidence that the care used about the keeping of the freight was such as carriers exercised with similar freight is competent, but not controlling, evidence on the question of due care—Lane v. Boston, etc., R. Co, 112 Mass. 455—Cass v. Boston, etc, R Co., 14 Allen, Mass., 448

7. **Evidence held sufficient to support recovery**
Ala.—American Ry. Express Co. v. Stanley, 92 So. 642, 207 Ala. 380
Tex.—Wichita Valley Ry. Co v. Golden, Civ.App, 211 S.W. 465.
10 C J. p 247 note 98 [a].

Evidence held insufficient to support recovery
Ill—Lettunich v. Southern Pac. Co, 218 Ill.App. 479.
N.Y.—Chalmers v. New York Cent. R. Co, 161 N.Y.S. 577, 175 App Div. 239.
Pa.—Sheehan v. American Ry. Express Co, 91 Pa Super. 71.
Tex—Hartford Fire Ins Co. v. Triplett, Civ.App., 223 S W. 305
Va—Marsh v. Pennsylvania R. Co., 167 S.E. 274, 159 Va. 694.
10 C J. p 247 note 98 [b].

Value of goods
(1) Evidence of the contract price of goods, the retail value of similar goods, and the market price of the particular goods after damaged by the carrier, is sufficient to take the question of the shipper's damages to the jury.—Kuney v. Chicago & N W Ry. Co., 197 N.W. 708, 183 Wis 569
(2) Accordingly, evidence of the contract price of seed potatoes, rejected by the consignee as unfit, is some evidence of the value thereof, in an action against the carrier for negligence in storing them after their arrival in good condition—Kuney v. Chicago & N. W. Ry. Co., supra.

8. Tex—Rio Grande City Ry. Co. v Guerra, Civ.App, 26 S W 2d 360.
Vt—Charles Bianchi & Sons v Montpelier & W. R. R Co, 104 A. 144, 92 Vt. 319
10 C.J. p 247 note 1.

9. **Instruction erroneous**
Where the allegations of the petition charge defendant as warehouseman, it is error to instruct with reference to his liability as common carrier.—Porter v. Chicago, etc., R. Co, 20 Iowa 73.

Instruction requiring finding of negligence
An instruction requiring a finding that goods were lost from a want of common and reasonable diligence on the part of the carrier as warehouseman requires a finding of negligence.—Louisiana & N R. Co v. Wm. R. Moore Dry Goods Co, 2 S.W 2d 1113, 176 Ark 341.

10. N.J—Armstrong Rubber Co. v. Erie R. Co., 137 A. 596, 103 N J. Law 579.
10 C.J p 247 note 2.

11. Tex.—Fort Worth & D. C. Ry. Co v. Tomson, Civ.App., 250 S W. 747

12. Tex.—Texas & N. O R Co. v. Gann, Civ.App., 68 S.W 2d 1096.

13. Mass.—South Deerfield Onion Storage Co v. New York, N. H. & H R. Co., 111 N.E. 367, 222 Mass. 535.

an assignee of the bill of lading who had no knowledge of such usage;[14] and the same principle has been applied to delivery made to a person without the production of the bill of lading, as shown infra § 172. The application, operation, and effect of general customs or usages in relation to the delivery of freight by a carrier are treated in the C.J.S. title Customs and Usages §§ 9, 10, 13, 19, 30, also 17 C.J. p 464 note 39; p 469 note 66; p 475 note 83; p 481 notes 42, 48; p 513 notes 62, 64.

§ 160. Duty of Carrier to Make

a. In general
b. Sufficiency of delivery
c. Actions for failure to perform contract to deliver

a. In General

After property transported has reached its destination, the carrier has the duty to deliver it to the consignee according to instructions, and the consignee has the reciprocal duty to accept delivery.

It is the duty of a common carrier to make safe delivery of the property intrusted to it for transportation.[15] The consignee has the reciprocal duty to accept the goods;[16] but he is not bound to receive them before they arrive at their destination.[17] In the absence of a special contract or custom,[18] the duty of the carrier is not completed on the mere arrival of the property at its destination, but there must be a final delivery,[19] or offer to deliver,[20] in accordance with the bill of lading or shipping directions,[21] unless there is a sufficient excuse for failure to deliver,[22] as where delivery of live stock is prevented by the quarantine laws;[23] but it has been held that where delivery of goods was prevented by quarantine, the shipper's receipt of the purchase money from the consignee and the delivery of the bills of lading to such consignee, and the subsequent repayment of the money and repossession of the bills of lading by the shipper, did not relieve the carrier of its liability to him for failure to deliver.[24] If an adverse claimant of the goods

14. U.S.—Myrick v. Michigan Cent R. Co., C.C.Ill., 17 F.Cas.No 10,001, 9 Bliss. 44, reversed on other grounds 107 U.S. 102, 27 L.Ed 325.

15. Ga.—Sipple v. Seaboard Air Line Ry. Co., 114 S.E. 435, 154 Ga. 376, reversing 110 S.E. 39, 28 Ga. App. 16, conformed to 115 S.E. 47, 29 Ga.App 328—Davis v. A. F. Gossett & Sons, 118 S.E. 773, 30 Ga. App 576, affirmed by divided court A. F. Gossett & Sons v. Davis, 124 S.E. 529, 158 Ga. 886
N.Y.—Heuman v. M. H. Powers Co., 123 N.E. 373, 226 N.Y. 205, reversing 162 N.Y.S. 590, 175 App.Div. 627, reargument denied 124 N.E. 899, 226 N.Y. 711—Feynman v. American Ry. Express Co., 234 N.Y.S. 727, 134 Misc. 223.
N.C.—Osborne v. Southern R. Co., 96 S.E. 34, 175 N.C. 594
Vt.—Saliba v. New York Cent. R. Co., 140 A. 491, 101 Vt. 56.

16. Cal.—Crinella v. Northwestern Pac. R. Co., 259 P. 774, 85 Cal.App 440.
10 C.J. p 253 note 66.

17. Tex.—Houston, etc., R. Co. v. Burns, 90 S.W. 688, 41 Tex.Civ.App. 83

18. N.J.—Burr v. Adams Express Co., 58 A. 609, 71 N.J.Law 263
Under the Alabama law, a carrier may, by custom or contract, make a valid delivery of freight by merely placing car on sidetrack at place where it has no agent, even though neither consignee nor his representatives is there to accept it.—Georgia Cotton Co. v. Central of Georgia Ry. Co., 91 S.E. 933, 19 Ga.App. 576.

19. D.C.—U. S. ex rel. Kroger Grocery & Baking Co. v. Interstate Commerce Commission, 73 F.2d 948, 64 App.D.C. 43, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed 1246.
Cal.—Crinella v. Northwestern Pac. R. Co., 259 P. 774, 85 Cal.App. 440
Ga.—Central of Georgia Ry. Co. v. Owens, 110 S.E. 339, 28 Ga.App 140.
10 C.J. p 248 note 8.

20. D.C.—U. S. ex rel. Kroger Grocery & Baking Co. v. Interstate Commerce Commission, 73 F.2d 948, 64 App.D.C. 43, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed. 1246.

21. U.S.—Wilkinson & Carroll Cotton Co. v. Chicago, M. & G. R. Co., C.C.A.Tenn., 32 F.2d 553.
Ala.—Ocean S. S. Co. of Savannah v. People's Shoe Co., 81 So. 241, 202 Ala. 594, conformed to 81 So. 245, 17 Ala.App. 34.
Mass.—Myers v. American Ry. Express Co., 137 N.E. 654, 243 Mass 390.
Pa.—Feingold v. American Ry. Express Co., 92 Pa.Super. 76—Wiesen & Co. v. American Ry. Express Co., 90 Pa.Super. 78.
10 C.J. p 248 note 8.
Carrier failing to deliver according to directions acts at his peril.—Feingold v. American Ry. Express Co., 92 Pa.Super. 76.

22. Ala.—Alabama Great Southern R. Co. v. Independent Oil Co., 160 So. 720, 230 Ala. 222.
Miss.—Alabama, etc., R. Co. v. Tirelli, 48 So. 962, 93 Miss. 797, 136 Am.S.R. 559, 21 L.R.A.,N.S., 731, 17 Ann.Cas. 879 and note.
Tex.—St. Louis, etc., R. Co. v. Smith, 49 S.W. 627, 20 Tex.Civ.App. 45
Rescission of contract of purchase
Purchaser of car of gasoline shipped on straight bill of lading consigned to vendor could not recover damages from carrier who refused to deliver gasoline to purchaser, where contract between vendor and purchaser was rescinded when purchaser returned bill of lading to vendor's agent, after carrier's refusal to deliver, and received back the money which purchaser had paid for bill.—Alabama Great Southern R. Co. v. Independent Oil Co., 160 So. 720, 230 Ala. 222.
Unlawful conditions
Where carrier, sued for delay in delivery of a return shipment, had the bill of lading issued on the return shipment to itself, and would not surrender it to plaintiff shipper so that he could demand and receive his goods on return unless he submitted to conditions it had no right to impose, it cannot complain that he did not get the goods when they arrived at destination, nor object that he was allowed damages because of its own conduct in withholding the bill of lading and depriving him of the possession and use of the goods.—Harrill v. Seaboard Air Line Ry. Co., 107 S.E. 136, 181 N.C. 315

23. Ala.—Alabama, etc., R. Co. v. Tirelli, 48 So. 962, 93 Miss. 797, 136 Am.S.R. 559, 21 L.R.A.,N.S., 731, 17 Ann.Cas. 879 and note
Ill.—See Dunsworth v. Chicago & A. R. Co., 205 Ill.App. 51.
Tex.—St. Louis, etc., R. Co. v. Smith, 49 S.W. 627, 20 Tex.Civ.App. 451.

24. Tex.—Texas & N. O. R. Co. v. H. & C. Newman, Civ.App., 273 S.W. 335.

claims no rights under the contract of shipment, and makes no claim until after the goods have arrived at their destination, the carrier owes to him only the duty of a bailee or warehouseman, and may relieve itself from liability by showing that, without fault or negligence on its part, it is unable to deliver the goods.[25] Where goods cannot be delivered as directed, the carrier is charged with the duty to use reasonable efforts to protect the owner from loss,[26] and as soon as the owner has credible evidence that the contract of shipment cannot be carried out, it is his duty to relieve the carrier from further responsibility by giving new directions as to the disposition of the goods.[27] Where a contract for the shipment of live stock provided that the shipper should care for the stock and unload it, and should save the carrier harmless except as to damages resulting from the carrier's negligence, it was the duty of the carrier, if the shipper was not at the destination to unload the stock, to use, at least, ordinary care to preserve the stock from injury until the shipper could be notified; and if ordinary care required the stock to be unloaded, the carrier's failure to do so constituted negligence.[28] A carrier is not estopped to deny delivery because its agent mailed to the shipper a post card on a printed form stating that the goods were delivered, where subsequent communications between the shipper and the consignee negatived a delivery.[29] The act of the carrier in refusing to deliver without lawful excuse not only constitutes a breach of contract,[30] but it also constitutes a conversion, as appears infra § 181.

b. Sufficiency of Delivery

To constitute a delivery to the consignee, he must be placed in actual or constructive possession of the property.

Delivery by the carrier may be shown in a variety of ways, and may be either actual or symbolical, depending on the character of the property and the facts of the particular case,[31] although originally,

25. Minn.—Taylor v. Duluth, S. S & A. Ry. Co., 166 N.W. 128, 139 Minn. 216

26. U.S.—Merchants' & Miners' Transp. Co. v. Branch, C C A.Va., 282 F. 494.

27. U S.—Merchants' & Miners' Transp. Co v. Branch, supra.

28. Tex.—Chicago, R. I. & G Ry. Co v Pavillard, Civ.App., 187 S W. 993

29. N M.—Levers v. Atchison, T. & S F. Ry. Co, 166 P. 1178, 22 N. M. 599, L R A 1918A 294.

30. Cal.—Wilson v. California Cent. R. Co, 29 P. 861, 94 Cal. 166, 17 L R A. 685.
N.D.—Taugher v. Northern Pac. R. Co, 129 N.W. 747, 21 N.D. 111

31. U.S.—Michigan Cent. R. Co. v. Mark Owen & Co, 41 S Ct. 554, 256 U.S. 427, 65 L Ed. 1032, affirming Mark Owen & Co. v. Michigan Cent R. Co, 125 N E. 767, 291 Ill. 149.
Ark.—Arkansas Railroad v. Winters, 265 S W. 967, 166 Ark. 213—Arkadelphia Milling Co. v Smoker Merchandise Co, 139 S W. 680, 100 Ark 37
La.—Morley Cypress Co. v. Hines, 107 So 487, 160 La. 676.
Mo.—Carr v. St. Louis-San Francisco Ry. Co, App, 284 S.W. 184
N M.—Levers v. Atchison, T & S F. Ry. Co, 167 P. 1178, 22 N.M 599, L R A 1918A 294.
Ohio.—M. Degaro Co v. Cleveland, C, C & St L Ry. Co., 174 N E 587, 123 Ohio St. 179
Okl.—Wichita Falls & N. W Ry. Co v J. J. Brown Co., 183 P. 889, 76 Okl 84
Tenn.—Hart & Thornton Sausage Co v. City Transfer Co., 3 Tenn.App. 175.
Tex.—American Express Co v. Duncan, Tex.Civ.App., 193 S W. 411.
Wis.—Northern Milling Co v. Davis, 190 N.W. 351, 178 Wis. 493.
10 C.J. p 248 note 9.

Consignee must be placed in actual or constructive possession of the property in order to constitute an effectual delivery.—Levers v. Atchison, T. & S. F. Ry. Co., 166 P. 1178, 22 N M. 599, L.R A.1918A 294.

Delivery of live stock

Where live stock is shipped to a commission company, there must be an actual delivery by the carrier to complete the contract of carriage, which means that the carrier must put the shipment in the actual physical possession and control of the consignee, or in a place where he has access to it, with no one to interfere with or prevent such control. —Carr v. St. Louis-San Francisco Ry. Co., Mo App, 284 S.W. 184.

Acts constituting delivery

(1) Where an interstate shipment of flour was made under order notify bill of lading, and the notify party presented the bill of lading, indorsed in blank by plaintiff to whom it was issued, the notify party made disposition of the flour, and the carrier complied with such disposition, under federal Uniform Bills of Lading Act §§ 8, 9, U S.Comp St. §§ 8604dd, 8604e, which binds the carrier to deliver to the notify party on presentation of bills of lading properly indorsed, it constituted a delivery, and the carrier's duty ceased.—Northern Milling Co v. Davis, 190 N.W. 351, 178 Wis 493.

(2) In such case the fact that the shipment was turned over to a public warehouse at the buyer's orders, and carrier retained warehouse receipts to secure freight charges, and the fact that the notify party afterward refused to receive the shipment did not affect the question of delivery, which was then complete.—Northern Milling Co. v. Davis, supra.

Constructive delivery of two shipments of cotton, under billing "for compression in transit," is made possible and of practical effect by making the compress receipt the indicia of ownership, and causing it to be delivered to the owner or consignee of the shipment by and through the carrier on surrender of the original bill of lading.—St. Louis & S. F. Ry. Co v. Royal Ins. Co, 227 P. 410, 100 Okl. 11.

Acts not constituting delivery

(1) Where a car, on arrival at destination, was placed on a public delivery track and notice given a consignee, who accepted the car, broke the seals, and started to unload, there was no delivery of property still in the car, but only a right of access given to it, in order that it might be removed.—Michigan Cent. R Co v. Mark Owen & Co, 41 S Ct 554, 256 U S 427, 65 L Ed 1032, affirming Mark Owen & Co. v Michigan Cent R. Co., 125 N.E. 767, 291 Ill 149

(2) Spotting car at point for delivery does not amount to delivery.—Estherville Produce Co. v. Chicago, R I & P. R Co., C C A Iowa, 57 F. 2d 50.

(3) Rails shipped, which remained in car on spur track belonging to railroad company and afterward were

at common law, actual delivery was required.[32] If something remains to be done to complete delivery and acceptance, the carrier is still liable, at least as warehouseman[33] Thus, until the goods are so separated that the consignee can obtain possession thereof, the carrier's liability continues.[34] So, while delivery of cars of goods may be made by placing the cars on a siding or convenient place for unloading at destination, and by the carrier's surrender of dominion over the goods to the consignee,[35] yet, where the consignee, before he is entitled to possession, is required to pay a draft attached to a bill of lading, the placing of the cars on the consignee's private switch, without intent to surrender control of the goods, and without payment of the draft, does not constitute a delivery.[36] Ordinarily, there is a sufficient delivery where possession of the property is turned over to the consignee, or a tender made and a reasonable opportunity afforded him to remove it,[37] but the tender must be made under conditions enabling the consignee to take possession.[38] The mere arrival of the goods at destination without notice of their arrival to the person entitled thereto is not a delivery;[39] but where the consignee has assumed full dominion and control over the goods, the delivery is complete.[40] There is a sufficient performance of the carrier's duty to deliver, where, after search, it fails to find some person authorized to receive the goods after their arrival.[41] So, where the goods have reached their destination and the consignee or his agent gives a receipt for the same, there is a final delivery,[42] and it makes no difference that a part of the goods are temporarily left on the carrier's premises.[43] The

unloaded on right of way, were not delivered to consignee contrary to bill of lading—Morley Cypress Co v. Hines, 107 So. 487, 160 La. 676

(4) Mere arrival of goods at destination without consignee surrendering bill of lading and without carrier recognizing consignee's title or agreeing to hold goods as agent for new purchaser does not constitute possession by buyer.—M. Degaro Co v. Cleveland, C., C & St L Ry. Co., 174 N.E 587, 123 Ohio St. 179.

(5) Delivery of goods by a transfer company at the consignee's back porch, without giving him actual notice, is not a sufficient delivery to relieve the company from liability for loss of the goods.—Hart & Thornton Sausage Co. v. City Transfer Co., 3 Tenn App 175.

32. La—Wood v. Louisiana & A. Ry. Co., 104 So 306, 158 La 504

33. U S.—Michigan Cent. R Co v. Mark Owen & Co, 41 S Ct 554, 256 U S. 427, 65 L.Ed. 1032, affirming Mark Owen & Co v. Michigan Cent. R. Co, 125 N E 767, 291 Ill. 149
N M.—Levers v. Atchison, T. & S F. Ry. Co, 166 P 1178, 22 N M. 599, L R A 1918A 294.
Okl—Wichita Falls & N W Ry. Co. v. J. J Brown Co., 183 P. 889, 76 Okl. 84.
Tex—U S Fire Ins. Co of New York v. St Louis, B & M Ry Co, Tex. Civ App, 41 S W 2d 118, reversed on other grounds, Com.App, St Louis, B. & M Ry. Co v. U S Fire Ins. Co of New York, 60 S.W. 2d 196.
10 C.J p 248 note 10.

Inability of consignee to obtain goods

Where carrier delivered cotton to compress company, as arranged by consignee holding shipper's bill of lading with draft attached, and retained that company's tickets instead of delivering them to consignee, as was usual at that place, so that consignee could not secure the cotton, there was no delivery thereof within Rev.L.1910 § 821, providing that a carrier must deliver the property at the place to which it is addressed in the manner usual at that place.—Wichita Falls & N. W. Ry Co v. J. J. Brown Co., 183 P. 889, 76 Okl. 84

34. Tex.—Galveston, etc, R Co. v. Crow, Civ.App., 117 S W. 170
Wis—Hungerford v. Winnebago Tug Boat, 33 Wis. 303.

35. N M—Levers v Atchison, T. & S. F. Ry. Co., 166 P. 1178, 22 N.M. 599, L R.A 1918A 294.

36. N.M.—Levers v. Atchison, T. & S. F. Ry. Co, supra.

37. Ala.—James v. Alabama Great Southern R. Co, 81 So. 582, 202 Ala. 640.
Ark—Arkansas Railroad v. Winters, 265 S W. 967, 166 Ark. 213—Yazoo & M. V. R. Co. v. Altman, 187 S.W. 656, 124 Ark. 490—Arkadelphia Milling Co. v. Smoker Merchandise Co, 139 S.W. 680, 100 Ark. 37.
La—Wood v. Louisiana & A. Ry. Co, 104 So 306, 158 La 504
Me—Brown v. Railway Express Agency, 188 A. 716, 134 Me 477.
Minn.—Arthur v. St. Paul, etc., R Co., 35 N.W 718, 38 Minn 95.
N J—Cork v. Lehigh Valley R. Co, 119 A 88, 198 N J Law 143
Tex—Queen Ins Co v Galveston, H & S. A Ry. Co, Civ.App, 290 S W. 286, affirmed, Com App, 296 S W 484, affirmed 3 S W 2d 419—Texas & N O R. Co v H & C Newman, Civ App, 273 S W 335.
10 C J p 248 note 9.

Under U.S.Comp.St. § 8563, subd 2, 49 U S.C A § 1, declaring, "The term 'transportation' shall include . . all services in connection with the receipt delivery," etc, "of property transported," "delivery" connotes either tender to the consignee or a reasonable opportunity afforded him for the removal of the property transported—Cork v. Lehigh Valley R. Co, 119 A. 88, 198 N. J.Law 143.

Tender constitutes delivery as a matter of law where consignee did not refuse to accept goods or deny that he was consignee, but merely directed that delivery be made to another—Finck Cigar Factory v. American Ry. Express Co, Tex.Civ. App., 283 S.W. 219.

Reasonable opportunity must be afforded consignee to call, examine, and take his things from carrier's premises, notwithstanding carrier's inability to give notice of arrival of shipment—Brown v. Railway Express Agency, 188 A. 716, 134 Me. 477.

38. Tex.—Texas & N. O. R Co v H & C. Newman, Civ App., 273 S W. 335.

39. Miss.—Columbus & G. Ry. Co. v Owens, 121 So. 265, 153 Miss. 628, 62 A.L R. 521.
Okl—St Louis & S F. Ry Co v. Royal Ins Co, 227 P. 410, 100 Okl. 11.

40. Ky—Gus Datillo Fruit Co. v. Louisville & Nashville R. Co, 65 S W 2d 683, 251 Ky. 566.
N.M—Levers v Atchison, T. & S F. Ry. Co, 166 P. 1178, 22 N.M 599, L R A 1918A 294
10 C J p 248 note 12

Corpus Juris is quoted as authority for this statement in Gus Datillo Fruit Co. v. Louisville & Nashville R. Co, 65 S W 2d 683, 685, 251 Ky. 566

41. Tex—House v. Soder, 36 Tex. 629.

42. Ga—Allen v. Southern Ry. Co, 126 S E 722, 33 Ga App. 209.
10 C.J. p 249 note 13.

43. Ill—See Ford v American Express Co., 203 Ill App. 275
Me—State v. Intoxicating Liquors,

fact that a stockyards company, to which the carrier delivered live stock at the destination, kept the stock in unloading chutes, which were kept locked, rendering it necessary for the consignee to obtain possession of the keys before securing possession of the stock, did not show an incomplete delivery:[44] but, under a contract of shipment forbidding delivery to a prospective purchaser without surrender of the bill of lading, the act of the carrier, after the car had reached its destination, in switching it to an unloading sidetrack, without requiring surrender of the bill of lading, did not constitute a delivery to the purchaser.[45] Since the consignee has a right to inspect the property before accepting delivery, as appears infra § 170, permission given to him or his representative to make such inspection does not constitute a delivery.[46] Where a bill of lading to the order of the consignor was delivered to the buyer in order that he might exercise his right of inspection, a mistake of the carrier's agent in marking the bill of lading as canceled by delivery, did not entitle the consignor to treat the goods as delivered[47]

Agreement as to method of delivery. Where a cotton company shipped cotton to itself as consignee, a compress company, acting as its general agent to receive all cotton so shipped, had authority to agree with the carrier as to the method of receiving cotton when delivered after business hours.[48]

c. Actions for Failure to Perform Contract to Deliver

(1) In general
(2) Damages

(1) In General

In actions against carriers for breach of contract to deliver, the usual rules as to venue, parties, pleading, evidence, and instructions are applicable.

An action for breach of a contract to deliver goods at a specified destination may be brought in the county where the contract was made,[49] or where the failure to deliver occurred.[50] The general rules are applicable in an action against a carrier for failure to perform its contract to deliver, with respect to parties,[51] pleadings,[52] presumptions

76 A. 265, 106 Me. 138, 29 L.R.A., N.S., 745, 20 Ann.Cas. 668.

S.C.—Whitney Mfg. Co. v. Richmond, etc., R. Co., 17 S.E. 147, 38 S.C. 365, 37 Am.S.R. 767.

44. Mo.—Bozworth v. Wabash Ry. Co., 58 S.W.2d 448, 332 Mo. 277, affirming Bosworth v. Wabash R. Co., App., 21 S.W.2d 1110—Burton v. Wabash Ry. Co., App., 22 S.W.2d 201, affirmed 58 S.W.2d 443, 332 Mo. 268.

45. Minn.—Quinn-Sheperdson Co. v. Great Northern Ry. Co., 169 N.W. 422, 141 Minn. 100.

46. N.Y.—Bobzein v. New York Cent. R. Co., 176 N.Y.S. 407, 187 App.Div. 767.

Tex.—Hines v. Scott, 248 S.W. 663, 112 Tex. 506.

Order bill of lading with draft attached

Where apples sold by sample were shipped under an order bill of lading with draft attached, together with directions to notify the purchaser, that the carrier permitted the purchaser to enter the car and inspect the contents without taking up the draft and presenting the bill of lading, was not a delivery of the shipment, inspection without presenting bill having been made by the purchaser according to custom and the bill of lading impliedly authorizing inspection.—Hines v. Scott, 248 S.W. 663, 112 Tex. 506

47. Mo.—St. Joseph Hay & Feed Co. v. Missouri Pac. Ry. Co., App., 185 S.W. 1162

48. Ga.—Georgia Cotton Co. v. Central of Georgia Ry. Co., 91 S.E. 933, 19 Ga.App. 576

49. Ga.—Albany & N. Ry. Co. v. Merchants' & Farmers' Bank, 73 S.E. 637, 137 Ga. 391—Southern Ry. Co. v. Massee & Felton Lumber Co., 98 S.E. 106, 23 Ga.App. 309.

50. Ga.—Davis v. Seigel, 111 S.E. 439, 28 Ga.App. 418.

51. **Indorsee of bill of lading**

In an action for breach of contract to deliver goods shipped, a broker, to whom the bill of lading indorsed in blank has been delivered with instructions to attend to the shipping, is a bailee of the property, and as such is entitled to sue for the default of the carrier.—Charles D. Stone & Co. v. New York Cent. R. Co., 214 Ill.App. 483.

52. Ala.—Alabama Great Southern R. Co. v. Herring, 174 So. 502, 234 Ala. 238.

Mo.—Carr v. St. Louis-San Francisco Ry. Co., App., 284 S.W. 184

Mont.—Grover v. Hines, 213 P. 250, 66 Mont. 230.

Ohio.—Pennsylvania Co. v. Bonchek & Gordon, 15 Ohio App. 1.

Pa.—Tentzer v. Reading Co., 101 Pa. Super. 238.

Complaint or affidavit held sufficient

(1) A complaint, alleging that plaintiff and defendant entered into a contract by the terms of which defendant agreed for a valuable consideration to transport a trunk to Aberdeen and there deliver it to plaintiff or consignee, that defendant failed and refused to make delivery, and that in consequence plaintiff suffered damages, was sufficient to sustain an action for damages for breach of contract.—Grover v. Hines, 213 P. 250, 66 Mont. 230.

(2) Affidavit of cause of action in assumpsit against railroad was held not insufficient for insufficient allegation of defendant's possession of property.—Bank of Philadelphia & Trust Co. v. Wabash Ry. Co., 156 A. 604, 102 Pa.Super. 208.

Specifying property involved

In action against carrier for failure to deliver goods to consignee, plea that "certain articles" shipped were not included in published tariffs and stipulation in bill of lading and that special agreement for their carriage was not made was held insufficient where it did not specify property involved in issue tendered.—Alabama Great Southern R. Co. v. Herring, 174 So. 502, 234 Ala. 238.

Insufficient affidavit of defense

Plaintiffs declared for value of goods intrusted to carrier for interstate transportation pursuant to its uniform express receipt governing interstate shipments. On tender of delivery the consignee rejected the shipment. Defendant then notified plaintiffs of the rejection, specified charges due, and demanded disposition. Plaintiffs immediately paid the amount, and gave shipping instructions with which defendant avers it was unable to comply because it had then delivered the shipment, on the consignee's order, to the consignee's trustee in bankruptcy. It was held the affidavit of defense was insufficient: first, In the attempted denial that the goods were received

and burden of proof,[53] the admissibility[54] and | weight and sufficiency[55] of the evidence, questions

for transportation pursuant to the contract alleged, second, in not averring performance of the contract averred; or third, in not justifying the delivery alleged to have been made—J. Caps & Sons v. American Ry. Express Co., 80 Pa Super 244.

Interstate transportation; reference to acts of congress not required

Where plaintiff's statement shows contract sued on is transaction in interstate commerce, special reference to acts of congress governing such shipments is unnecessary.—Tentzer v. Reading Co., 101 Pa.Super. 238.

Pleading stoppage in transitu as defense

In an action by a consignee against a carrier for nondelivery of goods, a defense of stoppage in transitu is sufficiently pleaded where the fact of the stoppage and the obtaining of the goods by the consignor in a method provided by statute is set out.—Pennsylvania Co. v. Bonchek & Gordon, 15 Ohio App. 1.

Issues, proof, and variance

(1) Petition charging that carrier failed to deliver part of shipment of hogs is not sustained by proof that plaintiff's shipment had become interchanged with smaller shipment, which was sold as his.—Carr v. St. Louis-San Francisco Ry. Co., Mo. App., 284 S.W. 184.

(2) In an action for nondelivery a plea that defendant never received the goods is an admission of nondelivery, and this fact need not be proved to entitle plaintiff to judgment.—Hot Springs R. Co. v. Hudgins, 42 Ark. 485.

(3) A carrier, when sued for failure to deliver goods, may, to relieve itself of the breach set up in the complaint and denied by the general issue, prove, without a special plea, an attempted delivery.—Central of Georgia R. Co. v. Montmollen, 39 So. 820, 145 Ala. 468, 117 Am.S.R. 58.

53. Ark.—St. Louis-San Francisco Ry. Co. v. Allison, 250 S.W. 24, 158 Ark. 209
Fla.—Atlantic Coast Line R. Co. v. Seward, 142 So. 881, 106 Fla. 75, reversing 136 So. 620.
Ill.—See Dunsworth v. Chicago & A. R. Co., 205 Ill.App. 51.
Iowa.—Smith v. Louisville & N. R. Co., 209 N.W. 465, 202 Iowa 292.
Mass.—Nollman v. New York, N. H. & H. R. Co., 131 N.E. 195, 238 Mass. 465.
N.Y.—Rosenberg v. New York Cent. R. Co., 167 N.Y.S. 518, 180 App.Div. 79
Pa.—Wiesen & Co. v. American Ry. Express Co., 90 Pa.Super. 78.

Presumption as to contents of package delivered to carrier for shipment cannot be indulged in action for nondelivery, in absence of any proof.—Atlantic Coast Line R. Co. v. Seward, 142 So. 881, 106 Fla. 75, reversing 136 So. 620.

Burden of proof

(1) Plaintiff suing express company for failure to deliver merchandise must prove carrier's receipt of merchandise and nondelivery.—Wiesen & Co. v. American Ry. Express Co., 90 Pa.Super. 78.

(2) Plaintiff shipper has burden of proving that defendant carrier's failure to deliver a horse was not excused by liability exceptions in contract of carriage.—Rosenberg v. New York Cent. R. Co., 167 N.Y.S. 518, 180 App.Div. 79.

Shifting burden of proof

The burden is on plaintiff to prove nondelivery of the goods, and where defendant set up no affirmative defense, but merely offered evidence of delivery to plaintiff's authorized agent, introduction of some evidence of nondelivery did not shift burden of proof to defendant.—Nollman v. New York, N. H. & H. R. Co., 131 N.E. 195, 238 Mass. 465.

54. Ala.—Louisville & N. R. Co. v. B. F. Roden Grocery Co., 96 So. 912, 209 Ala. 694.
Cal.—Stefani v. Southern Pac. Co., 5 P.2d 946, 119 Cal.App. 69.
Ill.—Charles D. Stone & Co. v. New York Cent. R. Co., 214 Ill.App. 483.—Hinchliffe v. Wenig Teaming Co., 194 Ill.App. 627, affirmed 113 N.E. 707, 274 Ill. 417.
Ky.—Louisville & N. R. Co. v. Warren County Strawberry Growers' Ass'n, 267 S.W. 551, 206 Ky. 482
N.Y.—Jennings v. Barrett, 194 N.Y.S. 679.
N.D.—Morrell v. Northern Pac. Ry. Co., 179 N.W. 922, 46 N.D. 535

Evidence admissible

(1) In action against carrier for nondelivery of lime, brought by one claiming assignment to it by consignor while lime was in transit, assignment of invoice, although conveying no title to plaintiff, was admissible as circumstance for consideration in determining whether title was transferred.—Louisville & N. R. Co. v. B. F. Roden Grocery Co., 96 So. 912, 209 Ala. 694.

(2) Carrier sued for not delivering freight shipped under straight bill of lading could show that diversion to different destination as directed by consignor was justified, where consignor was owner and not plaintiff suing for nondelivery.—Stefani v. Southern Pac. Co., 5 P.2d 946, 119 Cal.App. 69.

(3) Defendant denying allegations that he was common carrier could show by truck driver's testimony that loss of goods was not due to his negligence.—American Tobacco Co. v. Schulenburg, Mo.App., 17 S.W.2d 557.

(4) In a shipper's action for non delivery of live stock shipped from Killdeer, N.D., to Chicago, where the testimony concerning the cattle at Killdeer was shown to have been based on a knowledge of the Chicago market, it was not error to admit testimony of the value at Killdeer, although the measure of damages are properly measured by the value at Chicago.—Morrell v. Northern Pac. Ry. Co., 179 N.W. 922, 46 N.D. 535.

Evidence inadmissible

(1) Admission of evidence of carrier's contract to deliver berries at destination within specified time, which was void for failure to publish and file schedule with interstate commerce commission, was error as furnishing standard by which to measure reasonable time for delivery, on which right to recover was based by court's instructions.—Louisville & N. R. Co. v. Warren County Strawberry Growers' Ass'n, 267 S.W. 551, 206 Ky. 482.

(2) In suit by a shipper against a carrier for failure to deliver a shipment, where a contract of shipment between the shipper and the carrier provided that suit for failure to deliver must be brought within two years after a reasonable time for delivery, admitting in evidence a letter from the carrier to the shipper written after the shipper's time to sue had expired, stating that the carrier had retired from business, and that it could not consider claims for loss in shipment, except in case of certain C. O. D. shipments, was error, since the letter was not material to the issues and did not establish a waiver by defendant of the provision that plaintiff must sue in two years, as alleged by plaintiff.—Jennings v. Barrett, 194 N.Y.S. 679.

55. Ala.—American Ry. Express Co. v. Powell, 89 So. 546, 206 Ala. 266.
Ark.—Yazoo & M. V. R. Co. v. Altman, 196 S.W. 122, 129 Ark. 358.
Cal.—Stefani v. Southern Pac. Co., 5 P.2d 946, 119 Cal.App. 69.
Ill.—Hinchliffe v. Wenig Teaming Co., 113 N.E. 707, 274 Ill. 417, affirming 194 Ill.App. 627. See Dunsworth v. Chicago & A. R. Co., 205 Ill.App. 51.
Kan.—Hollicke v. Missouri Pac. Ry. Co., 161 P. 594, 99 Kan. 261.
Mo.—Montgomery v. Davis, 240 S.W. 282, 209 Mo.App. 698.
Mont.—Grover v. Hines, 213 P. 250, 66 Mont. 230.
N.J.—Koch v. Delaware, L. & W. R. Co., 110 A. 128, 94 N.J.Law 30.
N.Y.—Epstein v. American Ry. Express Co., 185 N.Y.S. 94.
Pa.—Wiesen & Co. v. American Ry. Express Co., 90 Pa.Super. 78.

of law or fact,[56] and instructions.[57]

S.D.—Nield v. Illinois Cent. R. Co., 225 N.W. 654, 55 S.D. 229.
Tex.—American Ry. Express Co. v. Times Pub. Co., Tex.Civ.App., 295 S.W. 639.
Tenn.—Hart & Thornton Sausage Co. v. City Transfer Co., 3 Tenn.App. 175.

Evidence sufficient

(1) To support judgment for plaintiff.

Cal.—Stefani v. Southern Pac. Co., 5 P.2d 946, 119 Cal.App. 69.
Ill.—Hinchliffe v. Wenig Teaming Co., 113 N.E. 707, 274 Ill. 417, affirming 194 Ill.App. 627.
Kan.—Pettit v. Director General of Railroads, 203 P. 927, 110 Kan. 288.
Pa.—Dental Mfg. Supply Co. v. Southern Ry. Co., 82 Pa.Super. 553.
Tenn.—Hart & Thornton Sausage Co. v. City Transfer Co., 3 Tenn.App. 175.

(2) To sustain judgment for defendant.—Master Shirt and Blouse Co. v. American Ry. Express Co., 75 Pa.Super. 363.

(3) To warrant finding regarding amount of coal delivered to carrier.—Nield v. Illinois Cent. R. Co., 225 N.W. 654, 55 S.D. 229.

(4) To justify a finding that defendant's agent was correctly instructed as to the name of the consignee, and that all elements necessary for a binding verbal contract existed.—Montgomery v. Davis, 240 S.W. 282, 209 Mo.App. 698.

(5) To present a prima facie case of nondelivery.—Grover v. Hines, 213 P. 250, 66 Mont. 230.

(6) To support finding that delivery was not made as directed in reconsignment order.—Tenizer v. Reading Co., 101 Pa.Super. 238.

(7) In assumpsit for failure to deliver goods consigned to a common carrier, although the action was based on a bill of lading showing the number of the car in which the shipment was alleged to have been made, it is not essential that plaintiff prove conclusively that the goods were loaded in that particular car. The car number in the bill of lading is not such a material term of the contract that failure to prove shipment in the car will prevent a recovery.—Irwin v. Davis, 82 Pa.Super. 288

Evidence insufficient

(1) To sustain a judgment for defendant.—Epstein v. American Ry. Express Co., 185 N.Y.S. 94.

(2) To prove nondelivery to consignee.—Wiesen & Co. v. American Ry. Express Co., 90 Pa.Super. 78.

(3) To support carrier's defense that shortage of coal shipments was due to evaporation.—Smith v. Louisville & N. R. Co., 209 N.W. 465, 202 Iowa 292.

Negligence of carrier

Evidence held sufficient to show nondelivery of goods was due to carrier's negligence.—St. Louis-San Francisco Ry. Co. v. Allison, 250 S.W. 24, 158 Ark. 209.—Yazoo & M.V.R. Co. v. Altman, 196 S.W. 122, 129 Ark. 358

Value of goods

Evidence held sufficient to support trial court's finding of value.—Stefani v. Southern Pac. Co., 5 P.2d 946, 119 Cal.App. 69.

Custom as to delivery

Proof that consignee received notice from carrier of arrival of freight at destination was held insufficient to establish custom as to delivery.—Central of Georgia R. Co. v. Leverette, 129 S.E. 292, 34 Ga.App. 304.

56. Ala.—James v. Alabama Great Southern R. Co., 81 So. 582, 202 Ala. 640.
Ark.—St. Louis-San Francisco Ry. Co. v. Allison, 250 S.W. 24, 158 Ark. 209.—Yazoo & M.V.R. Co. v. Altman, 187 S.W. 656, 124 Ark. 490.
Ga.—Hines v. Mizell, 105 S.E. 736, 26 Ga.App. 151.
Kan.—Hollicke v. Missouri Pac. Ry. Co., 161 P. 594, 99 Kan. 261.
Ky.—Louisville & N. R. Co. v. E. H. Taylor & Sons, 6 S.W.2d 237, 224 Ky. 303.
Md.—Feldman v. Merchants' & Miners' Transp. Co., 124 A. 874, 144 Md. 209
Mo.—Sonken-Galamba Iron & Metal Co. v. Hines, Mo.App., 238 S.W. 135
N.J.—Katcher v. American Express Co., 105 A. 497, 92 N.J.Law 309, reversed on other grounds 109 A. 741, 94 N.J.Law 165
N.Y.—Todd Protectograph Co. v. Wells Fargo & Co. Express, 181 N.Y.S. 128, 111 Misc. 282.
Okl.—Harrell v. Dutton, 232 P. 33, 105 Okl. 169.
Pa.—Pittsburgh, C., C. & St. L. R. Co. v. Baker, Smith & Co., 81 Pa.Super. 388.
S.C.—C. M. Davis Son & Co. v. Northwestern R. Co. of South Carolina, 105 S.E. 350, 115 S.C. 221.

Delivery to, and acceptance of, goods by carrier

(1) In assumpsit for failure to deliver goods consigned to a common carrier, the case is for the jury, and a verdict for plaintiff will be sustained, where evidence was produced, although contradicted, that the property was delivered to defendant and accepted by it.—Irwin v. Davis, 82 Pa.Super. 288.

(2) Whether the amount of aluminum scrap stated in a bill of lading to have been delivered to a carrier was in fact delivered to it was held for the jury.—Sonken-Galamba Iron & Metal Co. v. Hines, Mo.App., 238 S.W. 135.

Delivery to consignee

Ky.—Louisville & N. R. Co. v. E. H. Taylor & Sons, 6 S.W.2d 237, 224 Ky. 303
N.Y.—Todd Protectograph Co. v. Wells Fargo & Co. Express, 181 N.Y.S. 128, 111 Misc. 282.
Pa.—Berman v. Adams Express Co., 73 Pa.Super. 314.—Wood v. Merchants' & Miners' Transportation Co., 73 Pa.Super. 132.
S.C.—C. M. Davis Son & Co. v. Northwestern R. Co. of South Carolina, 105 S.E. 350, 115 S.C. 221.

Reasonable time for delivery

Ordinarily, the question of a reasonable time for delivery is one of fact for the determination of the jury, in which there enters the consideration of distance, route, mode of conveyance, character of freight, facilities available, usual time required, abnormal conditions of weather, and extraordinary conditions of any character affecting movements of freight.—Spartan Mills v. Davis, 119 S.E. 905, 126 S.C. 312.

Intention as to passing of title to goods

In an action by the seller for failure of carrier to deliver shipment of lumber to purchaser, where the undisputed evidence showed that title was not to pass until delivery to purchaser, the court properly refused to submit to the jury an issue as to the intention of the parties as to the passing of title.—St. Louis-San Francisco Ry. Co. v. Allison, 250 S.W. 24, 158 Ark. 209.

Negligence of carrier

(1) Where one of two cars of lumber shipped by plaintiff to the same consignee was not delivered by the carrier and never reached the address specified in the bills of lading while the other was delivered within three weeks, the evidence made the carrier's negligence for nondelivery of the one car a question for the jury.—St. Louis-San Francisco Ry. Co. v. Allison, 250 S.W. 24, 158 Ark. 209.

(2) In action against carrier for nondelivery of goods, evidence having tendency to show that incorrect destination was defendant's fault, or that agent knew of destination intended, was held sufficient to take case to jury.—James v. Alabama Great Southern R. Co., 81 So. 582, 202 Ala. 640.

Value of goods

In action for failure to deliver consignment of deer tongue, the value of the consignment is peculiarly a question for the jury.—Hines v. Mizell, 105 S.E. 736, 26 Ga.App. 151.

57. Ark.—St. Louis-San Francisco Ry. Co. v. Allison, 250 S.W. 24, 158 Ark. 209.
N.D.—Morrell v. Northern Pac. Ry. Co., 179 N.W. 922, 46 N.D. 535.

Where the action is for nondelivery, there should

be an allegation of demand;[58] but if breach of contract is alleged demand is immaterial.[59] An allegation that plaintiff had not paid or tendered the freight charges is not necessary.[60] On the other hand, it has been held that if the foundation of the action is refusal of the carrier to deliver at the end of the transportation, there should be an averment of payment or tender of freight charges in order to discharge the carrier's lien.[61] There can be no recovery against a carrier for failure to deliver goods, in the absence of evidence that they were in fact delivered to the carrier,[62] and it is not sufficient to show delivery of a box purporting to contain the goods.[63] In Illinois, prior to the enactment of the Uniform Bill of Lading Act, a carrier which had issued a bill of lading acknowledging the receipt of certain goods for transportation could defend in an action for failure to deliver, by showing that, as a matter of fact, no goods had been received by it, but under § 23 of that act, the carrier is deprived of that defense;[64] and in an action by the consignee, who had failed to receive all of the goods purporting to have been shipped under a bill of lading, it is not necessary for plaintiff to allege that the bill purchased by him was issued by the carrier without actually receiving the goods.[65]

One who has paid drafts accompanying a bill of lading for the value of the goods not delivered to the carrier, on the theory that the carrier is estopped to deny having received the goods, must prove in an action for damages for nondelivery that the bill of lading was actually delivered by the carrier or by its authority.[66] Evidence by plaintiff that a shipment had not been delivered to the address specified in the bill of lading raised the presumption that the loss of the shipment was due to the negligence of the carrier or its agents,[67] and the burden was then on the carrier to show the contrary.[68] So, where plaintiff shipper proved delivery of live stock to defendant carrier and nondelivery to the consignee, and also delivery of inferior stock, a presumption of negligence arose, which, being unrebutted, entitled plaintiff to recover.[69] Since, to prove nondelivery is to prove a negative, slight evidence thereof is sufficient to cast on the carrier the burden of accounting for the goods.[70] Evidence of a custom of defendant carrier is inadmissible to contradict the express or implied terms of the contract of shipment.[71] Where the shipper refused to accept cattle at the destination because the carrier rightly refused to deliver the cattle at a dipping vat, and the carrier sold the cattle at public auction, and its tender of a check for the proceeds was refused by the shipper, it was held that, in an action by the shipper to recover the value of the cattle, in which such relief was denied, plaintiff was entitled to have the check delivered to him for collection.[72]

Questions of practice arising in actions of trover against carriers for failure to deliver are treated infra § 183.

Tex.—Gulf, C. & S. F. Ry. Co. v. McKie, Civ.App., 191 S.W. 576.

Instructions held properly to submit issue of carrier's negligence

Ark.—St. Louis-San Francisco Ry. Co. v. Allison, 250 S.W. 24, 158 Ark. 209.

Instruction not misleading

Instruction referring to "goods in controversy" was not misleading in action for nondelivery, where goods were designated by case bearing specific number.—Louisiana & N. W. R. Co. v. J. P. Machen & Co., 294 S.W. 714, 174 Ark. 122.

Effect of receipted freight bill

Instruction that receipted freight bill was only prima facie evidence of delivery and that it was the province of the jury, notwithstanding such receipted bill, to determine whether the goods were actually delivered, was not error in action against carrier for nondelivery.—Louisiana & N. W. R. Co. v. J. P. Machen & Co., 294 S.W. 714, 174 Ark. 122.

Goods taken from carrier by attachment

In an action against a carrier for failure to deliver goods, refusal of an instruction that the carrier was not liable for failure to deliver if the goods were taken under attachment was error.—Gulf, C. & S. F. Ry. Co. v. McKie, Tex.Civ.App., 191 S.W. 576.

58. Minn.—Jarrett v. Great Northern R. Co., 77 N.W. 304, 74 Minn. 477.

59. Mo.—Erskine v. Steamboat Thames, 6 Mo. 371.
Pa.—Ludwig v. Meyre, 5 Watts & S. 435.

60. Minn.—Jarrett v. Great Northern R. Co., 77 N.W. 304, 74 Minn. 477.

61. Ind.—Jeffersonville, etc., R. Co. v. Gent, 35 Ind. 39.

62. Conn.—Shore v. New York, N. H. & H. R. Co., 121 A. 344, 99 Conn. 129.
Tex.—Chicago, R. I. & G. Ry. Co. v. R. S. Le Sage Motor Co., Civ.App., 261 S.W. 209.

Evidence sufficient to show delivery to carrier.—American Ry. Express Co. v. Times Pub. Co., Tex.Civ.App., 295 S.W. 639.

Evidence insufficient to show delivery to carrier.—Chicago, R. I. & G. Ry. Co. v. R. S. Le Sage Motor Co., Tex.Civ.App., 261 S.W. 209.

63. Conn.—Shore v. New York, N. H. & H. R. Co., 121 A. 344, 99 Conn. 129.

64. Ill.—American Hide & Leather Co. v. Southern Ry. Co., 142 N.E. 200, 310 Ill. 524, affirming 228 Ill. App. 305.

65. Ill.—American Hide & Leather Co. v. Southern Ry. Co., 142 N.E. 200, 310 Ill. 524, affirming 228 Ill. App. 305.

66. N.Y.—Droste v. Wabash R. Co., 138 N.Y.S. 203, 153 App.Div. 160

67. Ark.—St. Louis-San Francisco Ry. Co. v. Allison, 250 S.W. 24, 158 Ark. 209.

68. Ark.—St. Louis-San Francisco Ry. Co. v. Allison, supra.

69. N.D.—Morrell v. Northern Pac. Ry. Co., 179 N.W. 922, 46 N.D. 535.

70. Mont.—Grover v. Hines, 213 P. 250, 66 Mont. 230.

71. N.Y.—Cappel v. Weir, 90 N.Y.S. 394, 45 Misc. 419.

72. La.—Sheridan v. New Orleans Great Northern R. Co., 119 So. 530, 167 La. 505, reversing 119 So. 465, 9 La.App. 308.

(2) Damages

A carrier's liability for nondelivery of a shipment is ordinarily the market value of the goods at the time and place delivery should have been made. Consequential and special damages are recoverable under some circumstances.

Ordinarily, the measure of damages for breach of contract to deliver is the value of the shipment[73] at the point of destination at the time delivery should have been made,[74] less transportation charges.[75] The value recoverable by plaintiff is the market value of the goods at the place of destination, rather than the price at the point of shipment;[76] but it has been held that, where the shipper is a coal dealer at the place of destination, and purchased his coal at the point of shipment for resale at destination, he may waive the difference and reduce his damages to the value at the point of shipment.[77] Where a carrier notified the consignee that the goods had arrived and would shortly be delivered, but the goods were never delivered, the carrier was liable for the loss occurring between the time of notice of arrival and the time the consignee was notified that the goods were lost, or at least for a reasonable time after the notification of arrival.[78] Consequential or special damages not within the contemplation of the parties, and not the proximate and material consequences of the carrier's breach of contract, are not recoverable;[79] but plaintiff may recover any damages which the carrier might reasonably have contemplated would result from its failure to deliver.[80] Special damages for nondelivery are not recoverable unless the shipper gives notice thereof at the time of delivery to the carrier,[81] and the general knowledge of the carrier that the consignee was in the retail coal business would not justify an award of special damages in such an amount as the coal could have been sold for at retail.[82] Where plaintiff shipped the head of a dog which had bitten him, to ascertain whether or not the dog had hydrophobia, the box being marked "Dog's Head, Rush," and defendant was informed of the accident and purpose for which the head was being shipped, defendant was liable, in case of nondelivery for the expense of shipment, mental pain to plaintiff, the expense incurred for medical treatment to prevent hydrophobia, the pain caused by that treatment, and the damage sustained by loss of time while taking it, although the treatment proved to be unnecessary.[83] If the goods had a market price at destination at the time they should have been delivered, the shipper cannot recover special damages for breach of contract to deliver;[84] but it has been held that an action to recover the

73. N.C.—Coppersmith v. Norfolk Southern R. Co., 113 S.E. 504, 184 N.C. 26.

74. Del.—Hardesty v. American Ry Express Co., 119 A. 681, 2 W.W. Harr. 66.
Ga.—Central of Georgia Ry. Co. v. American Coal Co., 110 S.E. 320, 28 Ga. App. 95.
Miss.—Yazoo & M. V. R. Co. v. Clarksdale Coal & Grain Co., 125 So. 725, 156 Miss. 152.
N.Y.—Seaver v. Lindsay Light Co., 182 N.Y.S. 30, 111 Misc. 553, reversed on other grounds 187 N.Y.S. 622, 196 App. Div. 397, motion denied 134 N.E. 545, 232 N.Y. 498, and reversed on other grounds 135 N.E. 329, 233 N.Y. 273, reargument denied 135 N.E. 953, 233 N.Y. 646.
Pa.—Allen v. Adams Express Co., 77 Pa. Super. 174.

75. Ga.—Central of Georgia Ry. Co. v. American Coal Co., 110 S.E. 320, 28 Ga. App. 95.
Ill.—See Gilbert v. Chicago & A. R. Co., 194 Ill. App. 481.

76. Ala.—Nashville, C. & St. L. Ry. v. W. L. Halsey Grocery Co., 121 So. 16, 219 Ala. 16.
Del.—Hardesty v. American Ry. Express Co., 119 A. 681, 2 W.W.Harr. 66.
Iowa.—Smith v. Louisville & N. R. Co., 209 N.W. 465, 202 Iowa 292.
Miss.—Yazoo & M. V. R. Co. v. Clarksdale Coal & Grain Co., 125 So. 725, 156 Miss. 152.

Fair average market value at time and place of delivery is proper measure of damages for breach of contract to deliver personal property.—Yazoo & M. V. R. Co. v. Clarksdale Coal & Grain Co., 125 So. 725, 156 Miss. 152.

77. Iowa.—Smith v. Louisville & N. R. Co., 209 N.W. 465, 202 Iowa 292.

78. N.C.—Rawls v. Atlantic Coast Line R. Co., 91 S.E. 367, 173 N.C. 6.

79. Ala.—Southern R. Co. v. Webb, 39 So. 262, 143 Ala. 304, 111 Am. S.R. 45, 5 Ann. Cas. 97.
N.C.—Coppersmith v. Norfolk Southern R. Co., 113 S.E. 504, 184 N.C. 26.

Payments made by plaintiff because of failure to deliver

Where carrier's failure to transport and deliver some chains caused consignee to pay additional amounts on a logging contract, but it did not appear that carrier knew or should have known of the purpose for which the chains were shipped, carrier was not liable for this loss.—Coppersmith v. Norfolk Southern R. Co., 113 S.E. 504, 184 N.C. 26.

Refusal to accept delivery

Where cotton transported to the point of destination was properly tendered ten days later to the holder of the shipper's order bill of lading, a subsequent loss in the market value was attributable to his unwarranted refusal to accept it, not to the carrier's failure promptly to deliver it, and hence was not recoverable from the carrier.—Gulf, C. & S.F. Ry. Co. v. Kempner, Tex. Com. App., 282 S.W. 795, reversing, Civ. App., 275 S.W. 459.

80. Tex.—Texas & N.O.R. Co. v. H. & C. Newman, Tex. Civ. App., 273 S.W. 335

Recovery of freight charges

Where carrier, having knowledge of quarantine on cotton from certain state, contracted to deliver shipment of such cotton without informing shipper of quarantine, and it failed to effect delivery, shipper was entitled to recover freight charges to destination and from there to nearest accessible point at which he could regain possession.—Texas & N.O.R. Co. v. H. & C. Newman, Tex. Civ. App., 273 S.W. 335

81. Miss.—Yazoo & M. V. R. Co. v. Clarksdale Coal & Grain Co., 125 So. 725, 156 Miss. 152.

82. Miss.—Yazoo & M. V. R. Co. v. Clarksdale Coal & Grain Co., supra.

83. Kan.—Austin v. American Ry. Express Co., 200 P. 293, 109 Kan. 512.

84. U.S.—Mitsubishi Shoji Kaisha v. Davis, C.C.A.N.Y., 291 F. 882.

loss resulting from the diminished output of plaintiff's mill, and the expense of hiring an extra man, because of the carrier's failure to deliver machinery after giving notice of its arrival, is an action for direct tangible damages, not for loss of profits.[85] So, it has been held that a shipper of grain, required to submit to a reduction in the selling price because the milling in transit privilege was lost because of the carrier's misrouting of the shipment, may recover for such loss;[86] but such damages cannot be recovered where the milling in transit privilege was available only when reference thereto was noted on the shipping order and bill of lading, and no such notation was made.[87] Where the goods are offered back to the shipper, the measure of damages for nondelivery of the goods is the difference between the market value at the time and place of delivery, and when they were offered back, irrespective of the cause of the reduction in such value.[88] The expense incurred by the owner of the goods in making a trip to the place of destination to recover them is not recoverable in an action for breach of the carrier's contract to deliver.[89] It has been held, however, that, where live stock was wrongfully delivered to a third party, the owner was entitled to recover a sum which he was required to pay such third party for feeding the stock before he could recover possession thereof.[90] It is the duty of a consignee seeking to recover damages for nondelivery to make reasonable efforts to minimize the loss.[91] Damages recoverable for delay in delivery are discussed infra § 162; damages for misdelivery in actions based on breach of contract are discussed infra § 174 d; and damages in actions for conversion, based on misdelivery, are discussed infra § 184.

§ 161. What Must Be Delivered

a. In general
b. Part delivery

a. In General

The carrier must, as a general rule, deliver to the consignee the identical goods shipped to him. Where the goods of two shippers become so commingled as to render separation impossible, each shipper may recover the value of his shipment in case of a loss for which the carrier is liable.

Ordinarily the carrier is bound to deliver to the consignee the identical goods shipped to him, and it is liable for any damage sustained by him in consequence of a delivery of other goods, whether caused by admixture or otherwise.[92] Where the goods of one shipper become mixed indiscriminately with those of another in such a way that separation is impossible, as where shipments of grain are mixed in one mass, the respective owners of the shipments become tenants in common of the entire mass, and each may recover the value of his shipment in the case of a loss for which the carrier is responsible.[93]

b. Part Delivery

There may be a delivery and acceptance as to a part of the goods, except where the part not delivered is necessary to make the whole consignment effective, or where it does not appear that the goods tendered were in fact a part of the original consignment.

There may, of course, be delivery and acceptance as to a part of the goods, leaving the carrier liable as to the balance,[94] and, as a general rule, failure of the carrier to tender all the goods shipped will not justify the consignee in refusing to receive the part of the goods tendered.[95] Where a carrier issues a bill of lading covering a shipment, and fails to establish the nonreceipt of any part thereof, it is liable for failure to deliver the whole shipment.[96] So, where the carrier fails to deliver a part of a consignment and the part not delivered is necessary to make the whole consignment effective, this amounts to a failure to deliver the whole, and the consignee is not bound to accept it,[97] nor is the consignee bound to accept partial delivery, where it does not appear that the goods so tendered were in fact a part of the original consignment.[98] Where

85. N.C.—Rawls v. Atlantic Coast Line R. Co., 91 S.E. 367, 173 N.C. 6.

86. Kan.—McCullough v. Missouri Pac. Ry. Co., 160 P. 214, 98 Kan. 710.

87. Kan.—McCullough v. Missouri Pac. Ry. Co., supra.

88. N.Y.—Freegood v. Barrett, 172 N.Y.S. 353.

89. Ala.—Southern R. Co. v. Webb, 39 So. 262, 143 Ala. 304, 111 Am. S.R. 45, 5 Ann. Cas. 97.

90. Ala.—Southern R. Co. v. Webb, supra.

91. La.—Clark v. Louisiana Ry. & Nav. Co., App., 134 So. 116.

92. U.S.—Eaton v. Neumark, D.C.N.Y., 33 F. 891, affirmed, C.C., 37 F. 375—The Augusto, D.C.N.Y., 29 F. 334.
Mass.—Rice v. Boston, etc., R. Corp., 98 Mass. 212.

93. Iowa.—Arthur v. Chicago, etc., R. Co., 17 N.W. 24, 61 Iowa 648.
Mass.—Forbes v. Boston, etc., R. Co., 133 Mass. 154.

94. Va.—Norfolk & W. Ry. Co. v. Aylor, 150 S.E. 252, 153 Va. 575, certiorari denied 51 S.Ct. 26, 282 U.S. 847, 75 L.Ed. 751.
10 C.J. p. 249 note 22.

95. Ky.—Louisville, etc., R. Co. v. Gay, 135 S.W. 400, 143 Ky. 56, 33 L.R.A.,N.S., 303.
10 C.J. p. 249 note 23.

96. R.I.—Jenckes Spinning Co. v. New York, N. H. & H. R. Co., 126 A. 753, 46 R.I. 264.

97. S.C.—McKerall v. Atlantic Coast Line R. Co., 56 S.E. 965, 76 S.C. 338.
10 C.J. p. 249 note 25.

98. Ill.—Chicago, etc., R. Co. v. Warren, 16 Ill. 502, 63 Am.D. 317.

Refusal to accept part delivery held justified

Where a party delivered to a railroad company, at Joliet, one thou-

freight consists of separate articles, there may be a partial delivery,[99] but when carload freight is placed on a delivery track, and a drayman is permitted to open it and begin unloading, there is a delivery of the whole carload.[1]

§ 162. Time of Delivery

Delivery to the consignee must be made within a reasonable time after completion of transportation and during business hours.

Delivery must be made within a reasonable time after the actual transportation to the point of destination is completed; otherwise the carrier is guilty of a breach of contract for which damages are recoverable,[2] if the delay was the proximate cause of the damage,[3] unless there was a sufficient excuse for the delay;[4] and a like rule has been applied where the carrier transports perishable goods ahead of schedule, but unreasonably refuses to deliver until the scheduled time.[5] So, delivery or tender to the consignee must be made at a reasonable hour,[6] and during business hours.[7] What is a reasonable time for making delivery is ordinarily a question of fact.[8]

In construing a statute providing that cars for unloading shall be considered placed "when" they are held awaiting orders from the consignors or consignees, it was held that the word "when" meant "while", and that the duty of prompt delivery is not ended when cars are placed on a "hold track" to await orders, but that the time allowed for delivery is merely suspended while the cars are so held.[9]

sand seven hundred and sixteen pounds of rags which were in sacks, to be transported to Chicago, and the company offered to deliver at Chicago five hundred pounds of rags which were loose and outside their depot, it was held that this was no delivery of a part, and that the company was liable for the price of the whole, unless it was shown that the rags tendered were a part of those delivered, and that they were in a proper condition.—Chicago, etc., R. Co. v. Warren, 16 Ill. 502, 63 Am. D 317.

99. Va.—Norfolk & W. Ry. Co. v. Aylor, 150 S.E. 252, 153 Va. 575, certiorari denied 51 S Ct. 26, 282 U S 847, 75 L.Ed. 751.

1. Va.—Norfolk & W. Ry. Co. v. Aylor, supra.

2. U S.—American Ry. Express Co. v. Ewing Thomas Converting Co., C.C.A Pa., 292 F. 335.
Conn.—Belkin v. New York, N. H. & H. R. Co., 146 A. 846, 109 Conn. 466.
Fla.—Florida East Coast Ry. Co. v. Peters, 73 So. 151, 72 Fla. 311, Ann.Cas.1918D 121.
Ohio—Toledo & O. C. Ry Co. v. Giha, 142 N.E. 375, 109 Ohio St. 189
Tenn.—Nashville, C. & St. L. Ry. v Davis, App., 114 S W.2d 830.
Utah—Smart v. Oregon Short Line R Co., 183 P. 320, 54 Utah 606.

What constitutes reasonable time
Express company's delivery of package on next business day after it was received was within reasonable time—Long v. American Ry Express Co., C C A Tex., 30 F.2d 571, certiorari denied 50 S.Ct. 24, 280 U S 563, 74 L Ed 617.

Reasonable diligence held established
A carrier was not liable where it refused to deliver a car after arrival at destination, because the number of the car did not correspond with the number of the order bill of lading, where it telegraphed the consignor for instructions, and before receiving an answer released the car, such act being an exercise of reasonable diligence in establishing the identity of the car before delivering it to plaintiff—Toledo & O C. Ry. Co v Giha, 142 N E 375, 109 Ohio St. 189.

3. La.—Miller Engineering Co v. Louisiana Ry & Nav. Co., 82 So 413, 145 La. 460.

Delay not proximate cause of damage
Although, after arrival of shipments of rock to be used in sinking mat against bank of river, defendant refused, after prompt notice of the circumstances under which damage was really to occur, to deliver at the usual and proper place for plaintiff to unload until after loss had occurred, defendant's refusal was not the proximate cause of the damage due to mat being carried away by a sudden rise in the river, and defendant is not liable for such damage—Miller Engineering Co v. Louisiana Ry. & Nav. Co., 82 So. 413, 145 La. 460.

4. Ohio.—Toledo & O. C. Ry. Co v Giha, 142 N E 375, 109 Ohio St 189.

5. N Y.—Cochran v. Norfolk Southern R. Co., 244 N.Y.S. 326, 138 Misc. 74.

6. Okl.—Midland Valley R. Co v. Price, 260 P. 26, 127 Okl 106.
Utah.—Smart v. Oregon Short Line R Co., 183 P. 320, 54 Utah 606.
10 C J p 250 note 29

Delivery too late in day
If at the time of unloading sheep there was an unreasonable delay by the acts of defendant carrier, it was liable if damage resulted from such negligence, when the sheep were unloaded too late in the day and so were chilled, it having been its duty to place the cars in proper position for unloading with reasonable promptness—Smart v Oregon Short Line R. Co., 183 P. 320, 54 Utah 606.

7. Colo.—Union Pac R Co v. Spano, 59 P 2d 75, 99 Colo. 47
Pa.—Hill v. Humphreys, 5 Watts & S 123, 39 Am D 117.
Tex.—Gulf, C. & S. F. Ry Co. v. Dean, Civ.App., 261 S.W. 520.
10 C.J p 250 note 29

Agreement between railroads serving city that shipments such as grapefruit arriving after 7 a. m. would not be delivered before 5 30 p. m of same day did not preclude liability by railroad to consignee for loss through market declining during delay, where shipment could have been delivered within from fifteen minutes to two hours as consignee demanded.—Union Pac. R. Co v. Spano, 59 P 2d 75, 99 Colo. 47

No fault or laches can be imputed to consignee in refusing the goods when tendered after business hours and at a time when the consignee had dismissed his servants and was incapable of receiving and putting away the goods.—Hill v. Humphreys, 5 Watts & S., Pa., 123, 39 Am D 117.

Delivery after business hours on Saturday
As respects liability for delay delivery of car of produce at consignee's warehouse after business hours on Saturday was, in legal effect, a delivery on the following Monday morning—Gulf, C. & S F. Ry. Co v Dean, Tex.Civ.App., 261 S W 520.

8. Conn.—Belkin v. New York, N. H. & H R. Co., 146 A. 846, 109 Conn. 466.
Pa.—Hill v. Humphreys, 5 Watts & S. 123, 39 Am D. 117.

9. Neb.—Sunderland Bros Co. v. Missouri Pac. Ry. Co., 162 N.W. 494, 101 Neb. 119, Ann.Cas.1918D 1120.

Where the contract provided for delivery of a car on the consignee's private siding, but, such siding being occupied, it was agreed that delivery should be made on a public siding, the carrier was not bound to place the car on the public siding immediately on learning, after its arrival, that the private siding was occupied.[10]

Weather conditions. The consignee is not obliged to accept, during sub-zero weather, delivery of vegetables susceptable of freezing, and on his refusal to accept them, it is the duty of the carrier to protect them until delivery can be made without injury from freezing.[11]

Mistake in address. Where goods shipped by express were wrongly addressed, it was the duty of the express company to discover the mistake, make inquiry, ascertain the consignee's correct address, and make delivery within a reasonable time thereafter.[12]

Money consigned to bank. It has been held that the proper time for a carrier to deliver money consigned to a bank is not limited to banking hours, in the absence of a special contract and usage of the place to that effect, but that an offer to deliver at any time during the usual hours of business, with due regard to the safety and convenience of the consignee, is sufficient.[13]

Damages. Where property is not delivered at the proper time, plaintiff may recover for the loss due to the decline in the market during the wrongful detention.[14]

Questions involving delay in the transportation of goods to their destination, not involving delivery to the consignee after the goods have arrived at such place, are discussed infra §§ 190–194.

§ 163. Place of Delivery

Ordinarily, a railroad carrier cannot be compelled to deliver freight to a point off its lines.

It is a general rule that, in the absence of constitutional or statutory provisions, a carrier by railroad cannot be compelled to deliver freight to a point off its lines.[15] The duty of a carrier to deliver the property transported by it at the specified destination, or at the usual place for delivery, or at a suitable place to receive the property, including the right to deliver on private tracks, and the effect of acceptance of delivery at a place other than that specified in the contract of shipment, is treated infra §§ 164–168. The liability of the carrier for making delivery at the wrong place is treated infra § 176.

§ 164. Duty to Deliver at Destination Specified in General

It is the duty of the carrier to deliver the property at the place designated in the contract of shipment, or according to authorized directions changing the place of delivery.

It is the duty of the carrier to deliver the freight at the destination designated in the contract of shipment, and delivery at any other place, whether in close proximity to the place designated or not, will not relieve the carrier from its responsibility as such,[16] although it has been held otherwise where

10. Conn.—Belkin v. New York, N. H. & H. R. Co., 146 A. 846, 109 Conn. 466.

11. La.—Pohlman v. Yazoo & M. V. R. Co., 130 So. 263, 14 La.App. 498.

12. U.S.—American Ry. Express Co. v. Ewing Thomas Converting Co., C.C.A.Pa., 292 F. 335.

13. Wis.—Marshall v. American Express Co., 7 Wis. 1, 73 Am.D. 381. 10 C.J. p 250 note 32.

14. Colo.—Union Pac. R. Co. v. Spano, 59 P.2d 75, 99 Colo. 47.
N.Y.—Cochran v. Norfolk Southern R. Co., 244 N.Y.S. 326, 138 Misc. 74.

15. Ill.—Cleveland, C., C. & St. L. Ry. Co. v. Commerce Commission, 146 N.E. 606, 315 Ill. 461.
Duty to accept freight for such delivery see supra §§ 32, 143.

16. Ill.—Unger v. Parmelee Co., 225 Ill.App. 556.
Iowa.—Crozier v. U. S. Railroad Administration, 181 N.W. 695.
Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Luke, 186 S.W. 875, 171 Ky. 50, denying rehearing 184 S.W. 1132, 169 Ky. 560.
Mo.—Frawley v. Atchison, T. & S. F. R. Co., 299 S.W. 93, 220 Mo.App. 1189—McNeill v. Wabash R. Co., 231 S.W. 649, 207 Mo.App. 161.
N.Y.—Porter v. Long Island R. Co., 225 N.Y.S. 365, 221 App.Div. 713, affirmed 164 N.E. 595, 249 N.Y. 591—Pillsbury Flour Mills Co. v. Erie R. Co., 216 N.Y.S. 486, 127 Misc. 466, affirmed 222 N.Y.S. 882, 220 App.Div. 826, affirmed 162 N.E. 560, 248 N.Y. 649, certiorari denied Erie R. Co. v. Pillsbury Flour Mills Co., 49 S.Ct. 80, 278 U.S. 645, 73 L.Ed. 559.
Okl.—Wichita Falls & N. W. Ry. Co. v. J. J. Brown Co., 183 P. 889, 76 Okl. 84.
Tex.—Gulf, C. & S. F. Ry. Co. v. Gross, Civ.App., 204 S.W. 693.
W.Va.—Belknap v. Baltimore & O. R. Co., 91 S.E. 656, 79 W.Va. 691, L.R.A.1917D 916.
10 C.J. p 250 notes 34, 35.

Carrier failing to change destination in transitu according to telegraphic notice, shipper given notice of arrival at original destination was entitled to delivery there under original contract.—American Cotton Products Co. v. New York Cent. R. Co., 255 N.Y.S. 672, 142 Misc. 821.

Where a transfer company undertakes to deliver a trunk at a certain apartment in a building, it does not make a proper delivery by leaving the trunk in a general room in the basement of such building.—Unger v. Parmelee Co., 225 Ill.App. 556

Where destination of live stock is stockyards, the arrival of train carrying shipment in the switching yards of the carrier three or four miles from the stockyards is not a delivery completing the shipment.—Gulf, C. & S. F. Ry. Co. v. Gross, Tex.Civ.App., 204 S.W. 693.

Delivery of live stock to wrong stockyards

Where a carrier had knowledge that the shipper was the owner of

the deviation from the designated place is too slight to prejudice the consignor.[17] If the carrier's line does not reach the destination named, its duty is to take the goods as near to the place of destination as practicable, in accordance with its general custom and usage, and to notify the consignee at the place of destination.[18] The shipper's instructions to the carrier to advise the consignee of a shipment to a particular destination, does not require delivery at a particular station at such destination.[19] A temporary congestion in the classification yards of a railroad terminal, or the temporary necessity of shifting cars there, does not excuse an absolute refusal to deliver at the particular place in the terminal designated in the bill of lading.[20]

Delivery at nonagency station. Where a bill of lading provided that property destined to a station at which no regular appointed agent was located should be at risk of owner after unloading from the cars, a carrier unloading a shipment at a nonagency station, which the shipper knew was such, without anyone present to receive the goods, did not become liable for their loss.[21]

Superseding instructions; diversion of shipment. The shipper may dictate where freight shall be delivered;[22] and a direction to deliver at a certain place may be superseded by a subsequent direction, so as to require delivery according to the later direction,[23] unless the subsequent direction is given by one not authorized to give it.[24] Where the consignor of goods shipped under a straight bill of lading is named therein as consignee, a diversion of the shipment in transit, at the request of a prospective buyer in whose care the goods are consigned, is not a delivery to such buyer.[25]

§ 165. Delivery on Private Tracks

By contract or custom a carrier may be required to deliver property on a private siding or spur track, but otherwise it is under no such duty.

In the absence of contract or custom, the carrier is under no common-law duty to deliver freight on private sidings or spur tracks of the consignee,[26] and the fact that it does so voluntarily does not ren-

breeding ewes consigned to an agent at the independent stockyards at St. Louis, the fact that the carrier wrongfully delivered them to the same agent at other yards, where they were sold for immediate slaughter, will not exonerate the carrier, which was advised if sent to the yards where delivered they would be sold for slaughter, for the consignee is to be regarded as an agent of the owner to receive only at the proper destination.—McNeill v. Wabash Ry. Co., 231 S.W. 649, 207 Mo. App. 161.

Construction of shipping contract

Where cattle shipped from Kentucky were consigned to "C., R. & Co., Chicago, Illinois, care of G. & E., Cincinnati, Ohio," independent firms of cattle brokers in the separate cities, Cincinnati being on the route of the shipment, it was the duty of the railroad to deliver the shipment to the Cincinnati firm at such city.—Cincinnati, N. O. & T. Ry. Co. v. Luke, 184 S.W. 1132, 169 Ky. 560.

17. N.Y.—Porter v. Pennsylvania R. Co., 215 N.Y.S. 727, 217 App. Div. 49.

Delivery to adjacent yard

Delivery of cars of grapes to yard adjacent to one to which they were to be delivered for unloading, with readiness to move them promptly to proper yard on orders, was substantial performance of agreement to deliver.—Porter v. Pennsylvania R. Co., 215 N.Y.S. 727, 217 App. Div. 49.

18. Ala.—Louisville, etc., R. Co. v. Bernheim, 21 So. 405, 113 Ala. 489. 10 C.J. p. 250 note 36.

19. Ill.—Coyne v. Oregon Short Line R. Co., 244 Ill. App. 359.

Irrespective of custom

The mere fact that the shipper's instructions were to advise certain parties cannot be construed to mean that the cars were to be delivered to any particular team track, even though it had been customary theretofore for the railroad to deliver cars of potatoes to plaintiffs at a certain team track.—Coyne v. Oregon Short Line R. Co., 244 Ill. App. 359.

20. N.Y.—Porter v. Long Island R. Co., 225 N.Y.S. 365, 221 App. Div. 713, affirmed 164 N.E. 595, 249 N.Y. 591.

21. La.—Lindsey Wagon Co. v. Louisiana & A. Ry. Co., 129 So. 395, 14 La. App. 236.

22. Or.—Brothers v. State Industrial Accident Commission, 12 P.2d 302, 139 Or. 658.

23. U.S.—Wilkinson & Carroll Cotton Co. v. Chicago, M. & G. R. Co., C.C.A.Tenn., 32 F.2d 553.
Ohio.—Maynard Coal Co. v. Chicago, K. & S. Ry. Co., 4 Ohio App. 459.
Tenn.—Virginia & S. W. R. Co. v. Sutherland, 197 S.W. 863, 138 Tenn. 266, L.R.A.1918B 77.

Subsequent notice to stop at intermediate point

Where a shipper notifies a carrier to stop certain carload shipments at a designated point en route and to hold for further shipping orders, such carrier is bound to do so, if not an unreasonable interference with the carrier's business.—Maynard Coal Co. v. Chicago, K. & S. Ry. Co., 4 Ohio App. 459.

Failure to obey directions

Where cattle are billed to one point, but directions are given to deliver at intermediate point, and they are carried on to point billed to, shipper is entitled to damages occasioned thereby.—Virginia & S. W. R. Co. v. Sutherland, 197 S.W. 863, 138 Tenn. 266, L.R.A.1918B 77.

24. Minn.—Thompson, Felde & Co. v. Great Northern Ry. Co., 170 N.W. 708, 142 Minn. 60.

Request of party to be notified

Where plaintiff shipped potatoes to point outside state to its own order by bill of lading with order to notify, and, on request of party to be notified and without plaintiff's consent or production of bill of lading, carrier stopped shipment at intermediate station and permitted such party to inspect, and he then refused to accept, and they were never carried to destination or delivered to owner, carrier was liable for their value.—Thompson, Felde & Co. v. Great Northern Ry. Co., 170 N.W. 708, 142 Minn. 60.

25. U.S.—Estherville Produce Co. v. Chicago, R. I. & P. R. Co., C.C.A. Iowa, 57 F.2d 50.

26. Ark.—Fairview Coal Co. v. Arkansas Cent. R. Co., 252 S.W. 920, 159 Ark. 649, 32 A.L.R. 191.
N.H.—Milford Quarry & Construction Co. v. Boston & M. R. R., 151 A. 336, 84 N.H. 407.
N.Y.—New York Cent. & H. R. R. Co. v. General Electric Co., 114 N.E. 115, 219 N.Y. 227, 1 A.L.R. 1417, reversing 153 N.Y.S. 478, 167 App. Div. 726, reversing 146 N.Y.S. 322, 83 Misc. 529, and certiorari

der such service enforceable as a right;[27] in fact it may be in direct conflict with statutes prohibiting rebates, as discussed infra § 379. Receiving and delivering freight on spur tracks of private individuals is purely a matter of contract to which either party may attach any condition desired.[28] It has been held that the fact that it has been the custom and practice of the carrier to place consignments billed for private spur tracks on such tracks will not prevent the carrier from changing its manner of delivering consignments by making delivery on a switch instead of on the private spur, provided notice of such action is given to the consignee; such notice, however, is necessary.[29] Where a carrier, pursuant to custom, places a car on a private siding, it relinquishes all dominion over the shipment, and the delivery is complete.[30] Where, by contract or custom, delivery is to be made at an industrial plant having an elaborate intra-mural system of trackage, delivery is complete when the cars containing the consignment are hauled from the carrier's main line to the general storage track of the consignee within the limits of the latter's yard, and the carrier is not bound to distribute the cars along such intra-mural trackage system to the various mills and warehouses of the consignee.[31] Under an ordinary contract of open shipment providing for unconditional delivery at a private sidetrack of the consignee, delivery is complete when the goods are placed on such sidetrack;[32] but where the goods, although routed to a private siding, are shipped under an order notify bill of lading, and neither the contract nor the prevailing custom authorizes delivery on a private siding, the placing of the goods thereon is not a delivery, but is merely a tender of delivery on compliance by the order notify consignee with the terms of the shipping contract, and the consignee need not accept the tender.[33]

§ 166. Acceptance at Place Other than Destination Specified

Acceptance by the person entitled to the goods at a place other than their specified destination will relieve the carrier from further liability.

While the owner of the goods is under no circumstances required to receive them before arrival at destination, as stated supra § 160 a, he may accept them at any place before or after arrival at destination, and this acceptance will work a discharge of the carrier from further liability;[34] but the acceptance of delivery at an intermediate point will not relieve the carrier from liability for damages already incurred,[35] and an offer to receive at an intermediate point on conditions which are refused will not terminate the carrier's liability nor its duty to deliver at the original destination.[36] The

denied General Electric Co v New York Cent. & H. R. R. Co., 37 S Ct. 400, 243 U.S. 636, 61 L.Ed. 941.

10 C.J. p 250 note 38.

Implied contract

It has been held that it is an implied contract duty of the carrier to place a car on the consignee's private track.—Lee v. Erie R. Co., 158 N.Y.S. 730, 173 App.Div. 75.

27. N.Y.—New York Cent. & H. R. R. Co. v. General Electric Co, 114 N.E. 115, 219 N.Y. 227, 1 A.L.R. 1417, reversing 153 N.Y.S. 478, 167 App.Div. 726, reversing 146 N.Y.S. 322, 83 Misc. 529, and certiorari denied General Electric Co. v. New York Cent. & H. R. R. Co, 37 S.Ct. 400, 243 U.S. 636, 61 L.Ed. 941.

28. Miss.—Gulf Compress Co. v. Alabama Great Southern R. Co., 56 So. 666, 100 Miss. 582.

Tex.—Missouri, K. & T. Ry. Co. of Texas v. Seeger, Civ.App., 175 S.W. 713.

29. La.—Webre v. Texas, etc., R. Co., 5 La.App., Orleans, 127.

30. Mich.—Ward v. Pere Marquette Ry. Co., 204 N.W. 120, 231 Mich. 323.

31. N.Y.—New York Cent. & H. R. R. Co. v. General Electric Co, 114 N.E. 115, 219 N.Y. 227, 1 A.L.R. 1417, reversing 153 N.Y.S. 478, 167 App.Div. 726, reversing 146 N.Y.S. 322, 83 Misc. 529, and certiorari denied General Electric Co. v. New York Cent. & H. R. R. Co., 37 S.Ct. 400, 243 U.S. 636, 61 L.Ed. 941.

Spotting cars

(1) It is no part of the duty of a carrier to spot cars at warehouses or factories, or to do more than to set them on the spur track and off their own right of way.—Norfolk Tidewater Terminals v. Norfolk & P. Belt Line R. Co, Va., 195 S.E. 684.

(2) The obligation of a common carrier with respect to the delivery and receipt of carload freight at private sidings and industrial tracks is restricted to acceptance and delivery at a point on the siding a sufficient distance from the point of connection with the tracks of the carrier to clear such tracks, and does not extend to placing or spotting cars at such points on an industrial railroad as the shipper designates.—Norfolk Tidewater Terminals v Norfolk & P. Belt Line R Co, supra

(3) Accordingly, a carrier operating a switching line had the duty to place cars intended for delivery at marine terminal at a point where they could be conveniently taken over by the terminal company, but services rendered beyond such placement were gratuitous.—Norfolk Tidewater Terminals v. Norfolk & P. Belt Line R. Co., supra.

32. Ga.—Massee & Felton Lumber Co. v Southern Ry Co, 149 S.E. 427, 40 Ga.App. 326.—George C. Speir & Co. v Atlantic Coast Line R. Co., 140 S.E. 43, 37 Ga.App. 283.

33. Ga.—George C. Speir & Co. v. Atlantic Coast Line R. Co, supra.

34. Mo.—Atkinson v. Steamboat Castle Garden, 28 Mo. 134

N.Y.—Anthony & Jones Co. v. New York Cent & H. R. R. Co, 119 N.E. 90, 223 N.Y. 21, L.R.A.1918F 1085, reversing 152 N.Y.S. 1097, 167 App.Div. 955.

Ohio.—Cleveland, etc., R. Co. v. Sargent, 19 Ohio St 438.

10 C.J. p 251 note 43.

Placing car on public team track for plaintiff to unload, concurred in and acted on by plaintiff, was complete delivery, and terminated defendant's obligation as common carrier.—Anthony & Jones Co. v. New York Cent & H. R. R. Co., 119 N.E. 90, 223 N.Y. 21, L.R.A.1918F 1085, reversing 152 N.Y.S. 1097, 167 App.Div. 955.

35. Mo.—Atkinson v Steamboat Castle Garden, 28 Mo. 124.

36. Pa.—Arbuckle v. Thompson, 37 Pa. 170.

place of delivery may always be varied with the assent of the owner of the property,[37] and if he interferes to control or direct in the matter, he assumes the responsibility.[38] So, it has been held that, where a consignee, on being notified of the arrival of goods at a place other than the destination contracted for, directs the goods to be forwarded to another place and receives them, this acceptance amounts to a waiver of the carrier's liability for an erroneous delivery.[39]

§ 167. Duty to Deliver at Usual Place at Destination for Making Delivery

a. In general
b. Effect of special contract
c. Delivery of grain in bulk; statutory provisions

a. In General

It is the duty of the carrier, in the absence of express stipulations to the contrary, to deliver the property at the usual place for making delivery at the point of destination, which, ordinarily, is a station, freight depot, or warehouse.

The place where property is to be delivered by a carrier is at the usual place for making such delivery at the point of destination,[40] unless, as may be done, a specified place is expressly stipulated for in the contract of shipment, as brought out infra § 167 b, or unless delivery at the usual place, such as the carrier's freight depot, is waived.[41] So, under a contract calling for delivery of cattle at the usual place, with a pencil notation by the carrier's agent regarding dipping and reshipping, the carrier is not required to deliver the cattle to a dipping vat or to any other place than that specified in the contract; and aside from this, the carrier could not be required to deliver the cattle to a dipping vat which had been closed to the public under proceedings to abate a nuisance.[42] Where the carrier has completed the contract of shipment, it is not bound to deliver the loaded cars containing the goods shipped to another carrier in the city of destination to be transported by its line across the city in the absence of any custom requiring it.[43] Ordinarily, the usual place is the station, freight depot, or warehouse where goods are customarily unloaded and delivered,[44] or, in case of heavy freight, such as lumber, stone, etc., team tracks or some convenient place on the carrier's grounds,[45] team track delivery being defined as "a service rendered by carriers in receiving and delivering carload freight in connection with their own line business, and is over the tracks owned by the carriers";[46] but a carrier may lawfully stipulate, either expressly or by implication, that its responsibility shall end when it has placed the goods on a sidetrack at the point of destination, where the carrier maintains neither agent, depot, nor warehouse at that point.[47] The foregoing rule is based on the theory that a delivery of this character is the only delivery which it is within the power of the carrier to make.[48] A fortiori is the carrier relieved of further responsibility by a delivery of this character where the consignee was present when the car was placed on the sidetrack and assumed control of the goods, and removed part of them, failing then to remove the balance, subsequently burned in the car, merely from

37. Conn.—Belkin v. New York, N. H. & H. R. Co., 146 A. 846, 109 Conn. 466.
Mass.—Lewis v. Western R. Corp., 11 Metc. 509.
N.H.—Jewell v. Grand Trunk R. Co., 55 N.H. 84.

38. N.H.—Jewell v. Grand Trunk R. Co., supra.

39. N.Y.—Haymoan v. Canadian Pac. R., 86 N.Y.S. 728, 43 Misc. 74.

40. Ga.—Massee & Felton Lumber Co. v. Southern Ry. Co., 149 S.E. 427, 40 Ga.App. 326.
Wis.—McDonald v. Chicago & N. W. Ry. Co., 266 N.W. 246, 221 Wis. 95.
10 C.J. p 251 notes 48, 49.

41. Ala.—Central of Georgia R. Co. v. Montmollen, 39 So. 820, 145 Ala. 468, 117 Am.S.R. 58.
10 C.J. p 251 note 50.

42. La.—Sheridan v. New Orleans Great Northern R. Co., 119 So. 530, 167 La. 505, reversing 119 So. 465, 9 La.App. 308.

43. Ga.—Seaboard Air-Line R. Co. v. Dixon, 79 S.E. 118, 140 Ga. 804.
Ill.—Wenatchee Valley Fruit Growers Ass'n v. Michigan Central R. Co., 215 Ill.App. 129.

44. Ga.—Massee & Felton Lumber Co. v. Southern Ry. Co., 149 S.E. 427, 40 Ga.App. 326.
Wis.—McDonald v. Chicago & N. W. Ry. Co., 266 N.W. 246, 221 Wis. 95.
10 C.J. p 251 note 52.

Compress company's warehouse

Consignees of cotton by rail were bound by the custom and usage of the railroad in making delivery of cotton at a compress company's warehouse.—Wichita Valley Ry. Co. v. Golden, Tex.Civ.App., 211 S.W. 465.

45. Wis.—McDonald v. Chicago & N. W. Ry. Co., 266 N.W. 246, 221 Wis. 95.

46. La.—Miller Engineering Co. v. Louisiana Ry. & Nav. Co., 81 So. 314, 317, 144 La. 786.

47. Ga.—Massee & Felton Lumber Co. v. Southern Ry. Co., 149 S.E. 427, 40 Ga.App. 326.

Knowledge of character of destination

Under bill of lading in interstate shipment, providing that property destined to a nonagency station, when delivered on siding, shall be at owner's risk after detached from train, such risk is not dependent on his having knowledge or notice of the character of the destination as a nonagency station.—Tamsett v. Hines, 91 So. 788, 207 Ala. 97, 22 A.L.R. 875.

There is an implied contract for such delivery where the fact that there is no agent, station, or warehouse at the point of destination is known to the consignee.—Massee & Felton Lumber Co. v. Southern Ry. Co., 149 S.E. 427, 40 Ga.App. 326.

48. Ala.—Louisville, etc., R. Co. v. Gilmer, 7 So. 654, 89 Ala. 534.

lack of conveyances.[49] The carrier may change the place of delivery from a platform which had been the usual place of delivery for twenty years, to another accessible platform.[50]

b. Effect of Special Contract

By special agreement the carrier may be bound to deliver at a particular place although it is not the usual place for delivery.

If goods are accepted for delivery at a specified warehouse, or other particular place, the carrier is bound to deliver at such place, although it is not the ordinary place for delivery at that destination.[51]

c. Delivery of Grain in Bulk; Statutory Provisions

Under some statutes a railroad carrier is prohibited from delivering grain in bulk to any warehouse other than that to which it has been consigned, without the consent of the owner or consignee.

Under a statute expressly prohibiting railroad companies from making delivery of grain in bulk which they may have received for transportation into any warehouse other than that to which it is consigned except when the owner's or the consignee's assent has been obtained, it is the duty of a railroad carrier, when so directed, to deliver grain to a private warehouse of the consignee located on a sidetrack constructed by the consignee, and leading to the main track of the railroad.[52] Such a statute applies only to shipments of grain,[53] and is limited to cases where grain is shipped in bulk,[54] and to cases where the warehouse or the elevator to which the grain is consigned is not located near the carrier's tracks nor near tracks over which it has a right of way.[55] The statute has no application to cases in which the grain was not originally consigned to a particular elevator at the time of shipping. A mere demand by the consignee at the place of destination that the grain be delivered at a particular warehouse is not enough to render the company subject to the penalties of the statute.[56]

§ 168. Duty to Deliver at Suitable Place for Receipt of Goods by Consignee

It is the duty of the carrier, when the property has reached the proper destination, to deliver it at a safe and accessible place for the consignee to receive it.

In addition to the duty already mentioned to deliver at the destination specified in the contract of shipment and at no other place, it is the further duty of the carrier, when the goods have reached their proper destination, to deliver them at a place safe and reasonable for the consignee to receive them.[57] Ordinarily it is a question for the jury under the circumstances of each particular case to determine, under proper instructions from the court, what would be a reasonable place for delivery.[58] However, if the consignee accepts a delivery of the shipment at a place or in a manner different from what the law would require of the carrier, he thereby waives his right to demand delivery at a different place or in a different manner, and cannot hold the carrier liable for losses occurring in the course of a removal from such place of delivery, although they might not have occurred had a proper delivery been made.[59]

Delivery of live stock. Where live stock is to be delivered from a car, the carrier must place the car where it may conveniently be unloaded by the consignee.[60] Such obligation is nondelegable, and,

49. Ala.—Brennfleck v. Mobile, etc., R. Co, 63 So. 954, 184 Ala. 545.

50. Ala.—Boshell v. Receivers of St. Louis & S. F. R. Co., 76 So. 282, 200 Ala. 366.

51. N.Y.—Porter v. Long Island R. Co., 225 N.Y.S. 365, 368, 221 App. Div. 713.

10 C.J. p 251 note 49, p 252 note 56.

Corpus Juris and the case of Loomis v New York Cent. & H. R. R. Co., 108 N.E. 837, 214 N.Y. 447, cited therein, are referred to as authority for this rule in Porter v. Long Island R Co., supra.

52. Ill.—Vincent v Chicago, etc., R. Co, 49 Ill 33—Galesburg, etc., R. Co. v. West, 108 Ill.App. 504.

53. Wis.—Stetler v. Chicago, etc., R. Co., 6 N.W. 303, 49 Wis. 609.

54. Ill.—Chicago R. Co. v. Stanbro, 87 Ill. 195.

55. Ill.—Hoyt v. Chicago, etc., R. Co., 93 Ill. 601.

Wis.—Stetler v. Chicago, etc, R. Co, 6 N.W. 303, 49 Wis. 609.

56. Ill.—Chicago, etc., R. Co. v. Stanbro, 87 Ill. 195.

57. Ala.—Boshell v. Receivers of St. Louis & S. F. R. Co., 76 So. 282, 200 Ala. 366.

Mo.—Bozworth v. Wabash Ry. Co, 58 S.W.2d 448, 332 Mo. 277, affirming Bosworth v. Wabash Ry. Co., App., 21 S W.2d 1110—Burton v. Wabash Ry. Co, 58 S W.2d 443, 332 Mo 268, affirming, App., 22 S W.2d 201.

N M.—Levers v Atchison, T. & S. F. Ry. Co., 166 P. 1178, 22 N M. 599, L R A 1918A 294

N.Y.—Lee v. Erie R. Co, 158 N Y.S. 730, 173 App Div. 75.

Corpus Juris is cited to the statement of this rule in Smith v Hines, 196 P. 1032, 1034, 33 Idaho 582

Property transferred in carload lots may be delivered by placing the cars upon a siding or other convenient place for unloading at the destination, and the surrender by the carrier to the consignee of its dominion over the property.—Levers v Atchison, T. & S. F Ry. Co., 166 P 1178, 22 N M. 599, L R A 1918A 294.

Delivery at stockyard company's unloading pens is a suitable place.—Bozworth v. Wabash Ry. Co, 58 S. W 2d 448, 332 Mo. 277, affirming Bosworth v Wabash Ry. Co, App, 21 S W.2d 1110—Burton v. Wabash Ry Co., 58 S W 2d 443, 332 Mo. 268, affirming, App, 22 S.W.2d 201.

58. N.H.—Jewell v. Grand Trunk R. Co, 55 N.H. 84.

59. N.H.—Jewell v. Grand Trunk R. Co, supra

60. Ala.—Louisville & N. R. Co. v. Kinney, 127 So. 802, 221 Ala. 48. Idaho—Smith v. Hines, 196 P. 1032, 33 Idaho 582.

Mo.—Bozworth v. Wabash Ry. Co., 58 S W 2d 448, 332 Mo. 277, affirming Bosworth v. Wabash Ry. Co.,

where delivery cannot be made in the pens of the consignee, the duty of the carrier is not performed by delivery at the chutes of a stockyards company, which placed them in inaccessible pens.[61] A disregard by the carrier of the shipper's directions not to unload live stock in public pens at the point of destination constitutes negligence.[62]

§ 169. Storage

The carrier cannot abandon the goods for failure of the consignee to appear and claim them; it must store or warehouse them, as will appear infra § 179.

§ 170. Opportunity to Inspect

The consignee, whether of an intra-state or interstate shipment, has a right to inspect the property before acceptance in the absence of any provision in the shipping contract to the contrary.

The consignee ordinarily has the right to examine the goods before accepting delivery,[63] and this doctrine applies to interstate as well as intra-state shipments, there being nothing in the Carmack amendment which restricts this right.[64] If unloading is essential for that purpose, the duty rests on the carrier to unload,[65] but it has been held that a notation on a bill of lading, "allow inspection," meant a side door inspection, that is, that the consignee had a right to examine the contents of a car by opening the side door, and that it gave him no authority to unload the car.[66] A stipulation in a bill of lading that inspection will not be permitted "unless provided by law, or unless permission is indorsed on this original bill of lading, or given in writing by the shipper," being inserted to comply with the Carmack amendment, which, however, contains no prohibition of inspection at destination, does not limit the right of inspection by a prospective buyer of goods shipped under a uniform order

App., 21 S.W.2d 1110—Burton v. Wabash Ry. Co., App., 22 S.W.2d 201, affirmed 58 S.W.2d 443, 332 Mo. 268—Erisman v. Wabash Ry. Co., App., 243 S.W. 237.

N.Y.—New York Cent. & H. R. R. Co. v. General Electric Co., 114 N.E. 115, 219 N.Y. 227, 1 A.L.R. 1417, reversing 153 N.Y.S. 478, 167 App. Div. 726, reversing 146 N.Y.S. 322, 83 Misc. 529, and certiorari denied General Electric Co. v. New York Cent. & H. R. R. Co., 37 S.Ct. 400, 243 U.S. 636, 61 L.Ed. 941.

"Delivery" of livestock does not mean delivery at town or place of destination, but at point where stock may be unloaded.—Louisville & N. R. Co. v. Kinney, 127 So. 802, 221 Ala. 48.

Placing cars on sidetrack

The common-law liability of a carrier for the delivery of a shipment of animals does not terminate when the cars containing the animals are placed on a sidetrack at the point of destination, but continues until the cars are placed in a position where the animals can be unloaded.—Erisman v. Wabash Ry. Co., Mo. App., 243 S.W. 237.

Delivery to unloading pens of stockyard company where live stock can conveniently be procured by consignee is sufficient, the consignee having been duly notified of the arrival of the shipment.—Bozworth v. Wabash Ry. Co., 58 S.W.2d 448, 332 Mo. 217, affirming Bosworth v. Wabash Ry. Co., App., 21 S.W.2d 1110—Burton v. Wabash Ry. Co., 58 S.W.2d 443, 332 Mo. 268, affirming, App., 22 S.W.2d 201.

61. Tex.—Panhandle & S. F. Ry. Co. v. Phillips, Civ.App., 197 S.W. 1031.

62. Ark.—Missouri Pac. R. Co. v. Burnett, 247 S.W. 1047, 157 Ark. 58, error and petition dismissed 44 S.Ct. 458, 266 U.S. 583, 68 L.Ed. 1185.

63. Cal.—Crinella v. Northwestern Pac. R. Co., 259 P. 774, 85 Cal. App. 440—Southern California Commercial Co. v. Alberti, 207 P. 779, 58 Cal.App. 84.

Neb.—Mitchell v. Missouri Pac. R. Corporation in Nebraska, 206 N.W. 12, 114 Neb. 72.

Tex.—Hines v. Scott, 248 S.W. 663, 112 Tex. 506.

W.Va.—Old Nat. Bank v. Peoples' Bank, 108 S.E. 716, 89 W.Va. 132.

10 C.J. p. 253 note 69.

Corpus Juris is quoted on this point in Southern California Commercial Co. v. Alberti, 207 P. 1023, 1025, 58 Cal.App. 84, and cited in Crinella v. Northwestern Pac. R. Co., 259 P. 774, 778, 85 Cal.App. 440, and Old Nat. Bank v. Peoples' Bank, 108 S.E. 716, 717, 89 W.Va. 132.

That shipper and consignee were interested as joint adventurers in a consignment of fruit did not make the consignee's rights different from the rights of other consignees in regard to right of inspection.—Crinella v. Northwestern Pac. R. Co., 259 P. 774, 85 Cal.App. 440.

Place of inspection

Where seller authorized railroad to allow buyer to inspect goods without advance payment of draft and delivery of bill of lading, without stipulating in what particular place and manner the inspection should be made, the railroad did not violate instructions by placing the car containing the goods on the privately owned track of buyer adjacent to buyer's warehouse for the purpose of enabling buyer properly to inspect goods.—Pittman-Harrison Co. v. Fox Bros., Tex.Civ.App., 228 S.W. 579

Delay caused by holiday

When a railroad common carrier establishes rules allowing twenty four hours, for final inspection and acceptance by consignee, on shipment of eggs, the carrier cannot take advantage of a delay beyond such period, caused by the fact that the carrier was observing holidays, and the consignee had no access to the goods, it having appeared that the consignee exercised due diligence and completed his inspection within twenty four hours, exclusive of the holidays and Sunday which intervened.—Marcus Bros. v. Director General of Railroads, 79 Pa.Super. 197.

Delivery without permitting inspection will not discharge carrier's liability as such.—Crinella v. Northwestern Pac. R. Co., 259 P. 774, 85 Cal.App. 440.

64. Cal.—Southern California Commercial Co. v. Alberti, 207 P. 1023, 58 Cal.App. 84.

Neb.—Mitchell v. Missouri Pac. R. Corporation in Nebraska, 206 N.W. 12, 114 Neb. 72.

N.Y.—Earnest v. Delaware, etc., R. Co., 134 N.Y.S. 323, 149 App.Div. 330.

S.C.—Woodruff Oil & Fertilizer Co. v. Charleston & W. C. Ry. Co., 180 S.E. 793, 177 S.C. 98.

The statement of this rule in Corpus Juris is quoted with approval in Southern California Commercial Co. v. Alberti, 207 P. 1023, 1025, 58 Cal.App. 84.

65. U.S.—Hudson River Lighterage Co. v. Wheeler Condenser, etc., Co., D.C.N.Y., 93 F. 374.

66. Tex.—Houston, E. & W. T. Ry. v. Ratcliff, Civ.App., 202 S.W. 525.

bill of lading;[67] and, moreover, such a stipulation in the bill, being inserted for the carrier's benefit, may be waived by it.[68] Where the bill of lading prohibits inspection of the shipment without the written permission of the shipper, the carrier may properly allow inspection if the shipper sends out circular letters stating that inspection will be allowed,[69] and, where a consignee examines goods while they are in the car, without permission, the carrier is not liable if it was not negligent.[70] So, where the shipping contract forbids inspection before delivery of the bill of lading, the carrier is not liable for an inspection by the prospective buyer, made secretly, without its knowledge or consent.[71] The lawful holder of the bill of lading has a right to inspect the consignment at a sidetrack designated in the bill of lading and cannot be required to make the inspection on another sidetrack which, by the rules of the railroad known to such holder, has been set aside for inspection.[72] However, the delivery of cars of goods at the proper place for inspection by the consignee releases the carrier from liability as a common carrier, unless the consignee, on inspection, rejects the freight and notifies the carrier to that effect.[73] The fact that the carrier permits or fails to prevent an unauthorized inspection of goods which does not injure them does not amount to a conversion, although the consignor refuses to accept them.[74]

The right of a consignee of goods carried C. O. D. to examine them is treated infra § 186.

§ 171. Personal Delivery

a. In general

b. Railroad and special transportation companies

c. Express companies

a. In General

At common law, before the introduction of railroads, a common carrier by land was compelled to make delivery to the consignee in person, either at his residence or place of business, but the rule was later relaxed.

At common law and before the introduction of railroad carriers a common carrier by land was compelled to make delivery to the consignee in person, either at his residence or place of business, and the delivery elsewhere would not operate to discharge the carrier from liability, unless a special contract or usage to the contrary could be shown;[75] but the common law later relaxed the earlier rule requiring personal delivery by the carrier, as the character and the quantity of freight changed.[76]

b. Railroad and Special Transportation Companies

A railroad carrier ordinarily is not bound to make personal delivery unless required by special contract, and the same principle applies to special transportation companies.

In the absence of special contract requiring it,[77] a railroad carrier is under no duty to make personal delivery,[78] but is bound only to carry the goods to the depot or station to which they are destined, and there to put them in a warehouse or other place of safety and to hold them ready for delivery when called for.[79] The same principle is applicable to

67. Tex.—Hines v. Scott, 248 S.W. 663, 112 Tex. 506.

68. Tex.—Hines v. Scott, supra.

69. N.C.—Elm City Lumber Co. v. Atlantic Coast Line R. Co., 88 S.E. 139, 171 N.C. 182.

70. N.C.—Elm City Lumber Co. v. Atlantic Coast Line R. Co., supra.

71. Minn.—Quinn-Sheperdson Co. v. Great Northern Ry. Co., 169 N.W. 422, 141 Minn. 100.

72. Ill.—Scovern v. Chicago, etc., R. Co., 189 Ill.App. 126.

73. Mo.—Kingman St. Louis Impl. Co. v. Southern R. Co., 112 S.W. 721, 133 Mo.App. 317.

74. Ga.—George C. Speir & Co. v. Atlantic Coast Line R. Co., 140 S.E. 43, 37 Ga.App. 283.
Kan.—Hoffman v. Atchison, T. & S. F. Ry. Co., 281 P. 935, 129 Kan. 59.
Mo.—Bernie Mill & Gin Co. v. St. Louis Southwestern Ry. Co., App., 228 S.W. 847.

N.Y.—Earnest v. Delaware, etc., R. Co., 134 N.Y.S. 323, 149 App.Div. 330.

S.C.—Woodruff Oil & Fertilizer Co. v. Charleston & W. C. Ry. Co., 180 S.E. 793, 177 S.C. 98.

Tenn.—Model Mill Co. v. Carolina, C. & O. Ry. Co., 188 S.W. 936, 136 Tenn. 211.

Tex.—Hines v. Scott, 248 S.W. 663, 112 Tex. 506.

75. Mo.—Bozworth v. Wabash Ry. Co., 58 S.W.2d 448, 332 Mo. 277, affirming, Bosworth v. Wabash Ry. Co., App., 21 S.W.2d 1110—Burton v. Wabash Ry. Co., App., 22 S.W.2d 201, affirmed 58 S.W.2d 443, 332 Mo. 268.

N.Y.—New York Cent. & H. R. R. Co. v. General Electric Co., 114 N.E. 115, 219 N.Y. 227, 1 A.L.R. 1417, reversing 153 N.Y.S. 478, 167 App. Div. 726, reversing 146 N.Y.S. 322, 83 Misc. 529, and certiorari denied General Electric Co. v. New York Cent. & H. R. R. Co., 37 S.Ct. 400, 243 U.S. 636, 61 L.Ed. 941.
10 C.J. p. 254 note 83.

76. Ohio.—Johnson, etc., Min. Co. v. Hocking Valley R. Co., 14 Ohio N.P. 209.

77. Mo.—Bozworth v. Wabash Ry. Co., 58 S.W.2d 448, 332 Mo. 277, affirming Bosworth v. Wabash R. Co., App., 21 S.W.2d 1110—Burton v. Wabash Ry. Co., App., 22 S.W.2d 201, affirmed 58 S.W.2d 443, 332 Mo. 268
10 C.J. p. 254 note 86.

78. Mo.—Bozworth v. Wabash Ry. Co., 58 S.W.2d 448, 332 Mo. 277, affirming Bosworth v. Wabash Ry. Co., App., 21 S.W.2d 1110—Burton v. Wabash Ry. Co., App., 22 S.W.2d 201, affirmed 58 S.W.2d 443, 332 Mo. 268.
7 C.J. p. 254 note 87.

79. U.S.—Atchison, etc., R. Co. v. Interstate Commerce Commn. Co., Com.C., 188 F. 229, reversed on

special transportation companies;[80] but, although the common-law rule requiring an actual delivery to the consignee was relaxed in the case of railroad companies, owing to their inability arising out of their methods of transportation to make such delivery, the reason for the relaxation ceases when the consignee's place of business to which the goods are directed adjoins the company's tracks, and the courts have returned to the original rule and exacted an actual delivery in such cases.[81]

c. Express Companies

An express company must deliver the property to the consignee at his residence or place of business, unless such delivery is waived by the consignee, or circumstances exist which show a contrary intention of the parties.

Ordinarily an express company is not only required, as a common carrier, to transport the goods to the place of destination, but the further duty is also enjoined on it to deliver the goods to the consignee at his residence or place of business.[82] Until reasonable effort to deliver in person has been made, the express company remains liable as carrier;[83] but a delivery in accordance with the rule stated may be waived by the consignee, as where there is an offer to make delivery which is declined by the consignee in order to serve his own convenience.[84] The contract of carriage may be modified essentially by express agreement or by circumstances from which an intention of the parties can be clearly gathered to change the usual incidents of the contract so as to put an end to the responsibility of the express company as soon as the goods are transported by it to a particular terminus,[85] and it has been held that, even in cities, delivery districts may be established, beyond the limits of which deliveries need not be made.[86] Delivery of an express shipment at the consignee's correct address to the person in charge does not amount to a misdelivery, although a different address was marked on the package.[87] As stated in § 162 supra, delivery should be made during business hours, but, in the case of money consigned to a bank, not necessarily during banking hours.

Custom and usage will sometimes relieve an express company from the duty of actual delivery at the residence or place of business of the consignee, as discussed in the C.J.S. title Customs and Usages § 19, also 17 C.J. p 481 note 42.

§ 172. To Whom Delivery Made

a. In general
b. Consignee
c. Holder of bill of lading
d. Agent
e. Real owner
f. Indemnity to carrier

a. In General

A carrier has the absolute duty to deliver freight to the proper person.

It is the duty of a carrier to deliver the property transported to the party entitled to receive it in accordance with the contract of carriage and the directions of the shipper.[88] This duty to deliver

other grounds 34 S.Ct. 814, 234 U.S. 294, 58 L.Ed. 1319.

Mo.—Bozworth v. Wabash Ry. Co., 58 S.W.2d 448, 332 Mo. 277, affirming Bosworth v. Wabash Ry. Co., App., 21 S.W.2d 1110—Burton v. Wabash Ry. Co., App., 22 S.W.2d 201, affirmed 58 S.W.2d 443, 332 Mo. 268.

80. Ill.—Merchants' Dispatch Transp. Co. v. Hallock, 64 Ill. 284
10 C.J. p 254 note 89

81. Ill.—Vincent v. Chicago, etc., R. Co., 49 Ill. 33
10 C.J. p 254 note 90

82. Ala.—American Ry. Express Co. v. Stanley, 92 So. 642, 207 Ala. 380.

Ind.—American Ry. Express Co. v. Rhody, 143 N.E. 640, 84 Ind.App. 283.

N.Y.—Feynman v. American Ry. Express Co., 234 N.Y.S. 727, 134 Misc. 223.

10 C.J. p 255 note 92.

"Freight" and "express" shipments distinguished

There is a well recognized distinction between the liability of a carrier in handling so-called express and freight shipments, having as its most important feature the manner in which the carrier is bound to make delivery. "Freight shipments," as the term is commonly used, means those distinct from baggage, to go by railroad carriers, and not by express carriers whose duty it is to deliver the goods to the consignee personally.—Baum v. Long Island R. Co., 108 N.Y.S. 1113, 58 Misc. 34

83. N.C.—Branch Saw Co. v. Bryant, 93 S.E. 839, 174 N.C. 355
10 C.J. p 255 note 94.

84. Tenn.—Southern Express Co. v. Potter, 183 S.W. 157, 134 Tenn. 1
10 C.J. p 255 note 95.

Liability of carrier

An express company which, on consignee's refusal to take a personal delivery and his direction to leave the goods on the station platform, put them inside the station to protect them from trespassers is liable only as warehouseman, so that on the burning of the station without its fault it was not liable for their value.—Southern Express Co. v. Potter, 183 S.W. 157, 134 Tenn. 1

85. Mass.—Conway Bank v. American Express Co., 8 Allen 512

W.Va.—Hutchinson v. U.S. Express Co., 59 S.E. 949, 63 W.Va. 128, 14 L.R.A.,N.S., 393 and note.

86. Mich.—Bullard v. American Express Co., 65 N.W. 551, 107 Mich. 695, 61 Am.S.R. 358, 33 L.R.A. 66 and note.

87. N.Y.—Davis v. Wells, 149 N.Y.S. 984.

88. U.S.—Estherville Produce Co. v. Chicago, R.I. & P. R. Co., C.C.A.Iowa, 57 F.2d 50.

Ala.—Southern Ry. Co. v. Harris, 80 So. 101, 202 Ala. 263—Davis v. Hines, 85 So. 882, 17 Ala.App. 443.

Ky.—Cumberland Pipe Line Co. v. Commonwealth ex rel. Sheriff of Estill County, 79 S.W.2d 366, 258 Ky. 90.

La.—Williams-Richardson Co. v. New Orleans & N.E. R. Co., 115 So. 358, 165 La. 33, affirming 7 La.App. 380.

to the proper person is absolute,[89] no obligation of the carrier being more rigorously enforced.[90]

b. Consignee

(1) General rule
(2) Exceptions to, and qualifications of, rule

(1) General Rule

A carrier must deliver the freight to the designated consignee; and delivery to the consignee under a straight bill of lading, without any power of disposal reserved to the consignor, completes the contract of shipment even though the bill of lading is not produced.

A consignee is that person or corporation to whom a carrier may lawfully make delivery of consigned goods in accordance with its contract of carriage.[91] The goods must be delivered to the designated consignee, and to him only, where there is nothing to indicate that he is not entitled to receive them;[92] and if there is a mistake in the consignee's

Mo.—Woolston v. Southern R. Co., 160 S.W. 1023, 177 Mo.App. 611.
N.Y.—Fox River Butter Co. v. Lightning Motor Line, 210 N.Y.S. 172, 125 Misc. 116—Swift v. Davis, 193 N.Y.S. 848, 118 Misc. 205.
N.C.—Myers v. Norfolk Southern R. Co., 88 S.E. 149, 171 N.C. 190.
Pa.—Freedman v. George W. Bush & Sons Co., 130 A. 263, 284 Pa. 16—Feingold v. American Ry. Express Co., 92 Pa.Super. 76—Stone & Co. v. Delaware, L. & W. R. Co., 72 Pa.Super. 416.
Tex.—Jester v. Lancaster, Civ.App., 266 S.W. 1103—Davis v. Simmons, Civ.App., 240 S.W. 970, dismissed for want of jurisdiction.
10 C.J. p. 262 note 62

Corpus Juris has been quoted in Estherville Produce Co. v. Chicago, R. I. & P. R. Co., 57 F.2d 50, 52, as authority for the rule stated in this and the following text.

Pipe line company operating as a common carrier is bound to deliver oil on consignor's order unless prevented by court order.—Cumberland Pipe Line Co. v. Commonwealth ex rel. Sheriff of Estill County, 79 S.W.2d 366, 258 Ky. 90.

89. U.S.—Estherville Produce Co. v. Chicago, R. I. & P. R. Co., 57 F.2d 50
Ala.—Southern Ry. Co. v. Harris, 80 So. 101, 202 Ala. 263.—Davis v. Hines, 85 So. 882, 17 Ala.App. 443.
Ark.—Chicago, R. I. & P. Ry. Co. v. Albert Pfeifer & Bro., 119 S.W. 642, 90 Ark. 524, 22 L.R.A.,N.S., 1107.
Ill.—Garden City Fan Co. v. Pittsburgh, C., C. & St. L. Ry. Co., 220 Ill.App. 126.
La.—Williams-Richardson Co. v. New Orleans & N. E. R. Co., 115 So. 358, 165 La. 33, affirming 7 La. App. 380.
Miss.—Western Union Telegraph Co. v. Goodman, 146 So. 128, 166 Miss. 782
Mo.—Woolston v. Southern R. Co., 160 S.W. 1023, 177 Mo.App. 611.
N.Y.—Swift v. Davis, 193 N.Y.S. 848, 118 Misc. 205.
10 C.J. p. 262 note 63.

90. U.S.—North Pennsylvania R. Co. v. Commercial Nat. Bank of Chicago, Pa., 8 S.Ct. 266, 123 U.S. 727.
Ala.—Louisville & N. R. Co. v. B. F. Roden Grocery Co., 96 So. 912, 209 Ala. 694
La.—Williams-Richardson Co. v. New Orleans & N. E. R. Co., 115 So. 358, 165 La. 33, affirming 7 La.App. 380
N.Y.—Furman v. Union Pac. R. Co., 13 N.E. 587, 106 N.Y. 579

91. U.S.—U. S. v. Eighty-Seven Barrels, etc., of Wine, D.C.Vt., 180 F. 215.

As owner or bailee

It has been held that such deliveree, or consignee, "may or may not be the owner, he may be a mere bailee, gratuitous or otherwise, a vendee, a commission merchant, or a mere agent of the shipper; and he may even be a swindler, who had deceived the shipper or consignor into sending him goods to which he can assert no legal or equitable title or interest whatever. In determining who is a consignee the question is not in the first instance to ascertain the contractual relations or lack of them between the person shipping the goods and the person entitled to receive them, but to correctly interpret the contract of carriage made by the shipper with the carrier."—U. S. v. Eighty-Seven Barrels, Etc., of Wine, D.C.Vt., 180 F. 215, 220.

Carrier has no right to designate the consignee.—Pennsylvania R. Co. v. Whitney & Kemmerer, 73 Pa.Super. 588.

92. U.S.—American Ry. Express Co. v. U. S., 62 Ct.Cl. 615, certiorari denied 47 S.Ct. 455, 273 U.S. 750, 71 L.Ed. 873
Ala.—Devon Mfg. Co. v. Southern Express Co., 76 So. 39, 200 Ala. 273
Ariz.—Wells Fargo & Co., Express, S. A., v. Tribolet, 50 P.2d 878, 46 Ariz. 311
Ark.—Missouri Pac. R. Co. v. Sellers, 65 S.W.2d 14, 188 Ark. 218—Southern Express Co. v. Freeze, 216 S.W. 303, 141 Ark. 161
La.—Williams-Richardson Co. v. New Orleans & N. E. R. Co., 115 So. 358, 165 La. 33, affirming 7 La. App. 380.
Mo.—Montgomery v. Davis, 240 S.W. 232, 209 Mo.App. 698.
N.Y.—Bragg v. Taylor, 199 N.Y.S. 156, 205 App.Div. 59, affirmed 142 N.E. 327, 236 N.Y. 666—Koscherak Siphon Bottle Works v. North & East River S. S. Co., 239 N.Y.S. 351, 135 Misc. 635.
N.C.—Acme Mfg. Co. v. Tucker & Nobles, 111 S.E. 525, 183 N.C. 303—A. E. Myers & Co. v. Norfolk Southern R. Co., 88 S.E. 149, 171 N.C. 190.
Okl.—Turner Oklahoma Co. v. Yellow Cab & Baggage Co., 269 P. 1082, 132 Okl. 134
Pa.—Stone & Co. v. Delaware, L. & W. R. Co., 72 Pa.Super. 416.

Delivery to person other than consignee is a breach of contract of carriage.—Koscherak Siphon Bottle Works v. North & East River S. S. Co., 239 N.Y.S. 351, 135 Misc. 635.

Excuse for nondelivery to consignee

(1) Instructions given express company at time of shipment to hold delivery of the shipment until advised where to make delivery related merely to the time and place of delivery and did not relieve it of the ultimate duty of delivering the goods to the consignee.—Bragg v. Taylor, 199 N.Y.S. 156, 205 App.Div. 59, affirmed 142 N.E. 327, 236 N.Y. 666.

(2) Where, under Uniform Bill of Lading Act, U.S.Comp.St. §§ 8604aaaa and 8604cc, 49 U.S.C.A. §§ 82, 86, nonnegotiable express receipt constituted straight bill of lading, owner of receipt was entitled to delivery of goods under U.S.Comp.St. §§ 8604e and 8604ee, 49 U.S.C.A. §§ 89, 90.—Wall v. American Ry. Express Co., 272 S.W. 76, 220 Mo.App. 989

(3) Where consignor sold a machine under title retention contract, but after delivery to carrier, to be shipped to purchaser under straight bill of lading, demanded that carrier divert shipment to another, carrier had a "lawful excuse," within Bill of Lading Act § 8, U.S.Comp.St. § 8604dd, 49 U.S.C.A. § 88, for refusal to deliver machine to original consignee.—Patterson v. American Ry. Express Co., 123 S.E. 844, 129 S.C. 237.

Shipper's request for change in destination does not include a change of the consignee.—Davis v. Fruita

name, it is the duty of the carrier to make reasonable inquiry from the consignor in an effort to correct it.[93] A carrier may, however, rightfully deliver the goods to a person to whom the consignee has directed delivery to be made.[94] Where a carrier receives goods for delivery under a "straight" or nonnegotiable bill of lading for delivery to a person named, without any reservation of power of disposal by the consignor, a delivery to such person,[95] or to his authorized agent, see infra § 172 d, completes the contract and relieves the carrier from any further liability. This rests on the assumption which the carrier is authorized to entertain that the title to the goods passes to the consignee on delivery to the carrier,[96] an assumption which is strengthened by a recital in the bill of lading that ownership of the goods is in the consignee;[97] and in the absence of some special statute otherwise providing,[98] if there is nothing in the bill of lading or shipping receipt indicating a reservation of title or power of disposal in the consignor, it is not necessary that the consignee, in a straight bill of lading, produce the bill in order to be entitled to receive the goods, or that the carrier should require its production and surrender in order to be protected fully in making the delivery to such consignee,[99] since the consignor could have protected himself against an improper delivery by using an or-

Mercantile Co., 220 P. 983, 74 Colo. 247.

Reconsignment; delivery to second consignee

Where a carrier, on being notified of the original consignee's refusal to pay for the goods shipped, indorsed on the original bill of lading a statement that they were reconsigned to another, a new contract of shipment came into existence, under which the carrier must make delivery to the second consignee, although the original consignee did not consent to the reconsignment.—A E Myers & Co. v Norfolk Southern R Co., 88 S.E. 149, 171 N.C. 190.

Effect of issuance of two bills of lading

If the carrier issues a bill of lading to the consignor for the delivery of the goods to such consignor, and then without authority issues another bill to the consignee, it will be liable to the consignee who has advanced money on such bill of lading for failure to deliver in accordance with such second bill.—Chicago, etc, R. Co. v. Fifth Nat. Bank, 59 N.E. 43, 26 Ind.App. 600.

93. La.—Williams-Richardson Co. v. New Orleans & N. E. R. R. Co, 7 La.App. 380, affirmed 115 So. 358, 165 La. 33.

94. Ark.—Carter v. St. Louis-San Francisco Ry. Co., 18 S.W.2d 376, 179 Ark. 865.
Pa.—Baltimore & O. R. Co. v. L B. Foster Co., 81 Pa.Super. 304.

95. Ala.—Ocean S. S. Co. of Savannah v. People's Shoe Co., 81 So. 241, 202 Ala. 594, conformed to 81 So. 245, 17 Ala.App. 34.
Ariz.—Wells-Fargo & Co. Express S A. v. Tribolet, 50 P.2d 878, 46 Ariz. 311.
Fla.—Atlantic Coast Line R. Co. v. Roe, 109 So 205, 91 Fla. 762.
Ill.—See Chicago, R. I. & P. R Co. v. North American Cold Storage Co., 244 Ill.App 522, dictum.
La.—Erskine Williams Lumber Co. v. John L. Hay & Co., App., 160 So. 650.
N Y.—Chandler Motor Car Co. v United Fruit Co, 216 N.Y S 413, 127 Misc. 432.—Mayer v. Southern Pac. Co, 159 N.Y.S. 93, 95 Misc 498
Pa.—Pennsylvania R Co. v. Edson Bros, 8 Pa Dist. & Co. 623.
10 C J. p 256 notes 4, 6.

This rule, as stated in Corpus Juris is cited in:
Ariz.—Wells-Fargo & Co. Express, S A. v. Tribolet, 50 P 2d 878, 46 Ariz. 311.
Fla.—Atlantic Coast Line R. Co. v. Roe, 109 So. 205, 206, 91 Fla. 762

Consignee doing business under trade name

Actual delivery of goods, at address to which consigned to person doing business under trade name of consignee, is a good delivery, although receipt is signed by another trade name than that used by shipper in addressing goods, and the carrier is not liable to shipper for misdelivery, where person ordering goods receives them.—Southeastern Express Co v. Kimball, 101 So. 563, 136 Miss. 420.

Under the Uniform Bill of Lading Act, 49 U S.C.A. §§ 82, 83, defining a "straight" bill of lading as one in which it is stated that the goods are consigned or destined to a specified person, and an "order" bill of lading as one in which it is stated that the goods are consigned or destined to the order of any person named in such bill, and under § 86, providing that a straight bill of lading shall state on its face that it is not negotiable, an interstate carrier is justified in delivering the freight to the consignee named in a straight bill of lading.—Atlantic Coast Line R. Co. v. Roe, 109 So 205, 91 Fla 762

96. U S.—New York & P. R S S. Co. v. McGowin Lumber & Export Co., Porto Rico, 284 F 513.
Ala.—Ocean S. S Co. of Savannah v. People's Shoe Co., 81 So. 241, 202 Ala 594, conformed to 81 So. 245, 17 Ala.App. 34
Fla.—Atlantic Coast Line R Co v. Roe, 109 So. 205, 91 Fla. 762.
Ill.—Commercial Bank v Chicago, etc, R. Co, 43 N E. 756, 160 Ill. 401
Iowa.—Malvern Cold Storage Co v. American Ry. Express Co, 220 N. W. 322, 206 Iowa 292
Ky.—Hall v. Cumberland Pipe Line Co, 237 S.W 405, 193 Ky 728
N Y.—Mayer v. Southern Pac. Co., 159 N Y.S. 93, 95 Misc 498.
10 C J. p 256 note 7, p 350 note 3

Corpus Juris is cited as authority for this statement in:
Fla.—Atlantic Coast Line R. Co. v. Roe, 109 So 205, 206, 91 Fla 762
Iowa.—Malvern Cold Storage Co. v. American Ry. Express Co, 220 N. W. 322, 324, 206 Iowa 292.

97. S.C.—Sanford v. Seaboard Air Line R Co, 61 S.E. 74, 79 S C. 519.

98. Mass.—Voghel v. New York, etc, R Co., 103 N.E. 286, 216 Mass. 165.
N.Y.—Colgate v. Pennsylvania Co., 6 N E. 114, 102 N Y. 120.
10 C J. p 258 note 25.

99. U.S.—Chicago, M & St P. & P R. Co. v. Flanders, C.C.A Iowa, 56 F 2d 114
Ill.—Commercial Bank v. Chicago, etc., R. Co., 43 N E 756, 160 Ill. 401.
La.—Erskine Williams Lumber Co. v John L Hay & Co, App, 160 So. 650.—Terracina v Yazoo & M V. R Co, App, 152 So. 771.
Mass.—St. John Bros. Co. v. Falkson, 130 N E. 51, 237 Mass. 399.—Edelstone v. Schimmel, 123 N.E. 333, 233 Mass 45.
N.Y.—McCoy v. American Express Co, 171 N E. 749 253 N.Y 477, reversing 237 N.Y S 829, 227 App. Div. 782, and reargument denied 173 N E 861, 254 N Y. 550.—Dusal Chemical Co. v. Southern Pac. Co, 168 N.Y.S. 617, 102 Misc. 222.—Mayer v. Southern Pac. Co., 159 N.Y.S 93, 95 Misc 498.
Pa.—Utley v. Lehigh Valley R. Co., 141 A. 53, 292 Pa. 251, reversing 89 Pa.Super. 599.—Pennsylvania

der bill of lading,[1] or by giving the carrier notice that the consignee was not entitled to receive delivery;[2] nor will reservation of power of disposal to the consignor in the bill of lading render delivery to the consignee unlawful if the carrier has no notice of the existence of such bill of lading.[3] Where goods are shipped under a straight bill of lading to the consignor, who wrote a letter to one who had purchased the goods, directing him to "take care of this car on arrival," such letter was a sufficient delivery order to justify the carrier in delivering the goods to the buyer, although the bill of lading was not presented, nor draft attached thereto paid.[4]

(2) Exceptions to, and Qualifications of, Rule

Where the carrier has notice that the consignee is not entitled to receive delivery, a delivery to him is unauthorized. If the title to the goods or the power of disposal is reserved by the issuance of a bill of lading negotiable in form, or by an express provision that surrender of the bill, properly indorsed, shall be required before delivery, or otherwise, delivery to the consignee without production and surrender of the bill, properly indorsed, is unauthorized.

The presumption that the consignee is the owner is not absolute, but may be rebutted.[5] Where the carrier has notice from the true owner or one entitled to possession of the property, that the consignee is not the owner or entitled to receive the property transported, delivery to him is unauthorized,[6] and constitutes conversion, as appears infra § 174. No particular form of notice is necessary. If the carrier has notice that title or power of disposal is reserved, either by issuance of a bill of lading negotiable in form,[7] or by an express provision in the

Railroad Company v. Edson Brothers, 8 Pa Dist & Co. 623.
Wyo.—Stacey-Vorwerk Co. v. Buck, 291 P. 809, 42 Wyo 136, certiorari denied 51 S Ct. 559, 283 U.S. 849, 75 L.Ed. 1458
10 C.J. p 256 note 10.

"It is the general rule that a nonnegotiable contract of shipment by a common carrier is discharged by delivery to the consignee without the surrender or production of the bill of lading. The fact that one is consignee is evidence of ownership"—Edelstone v. Schimmel, 123 N.E. 333, 334, 233 Mass. 45.

1. N.Y.—Dusal Chemical Co. v. Southern Pac. Co, 168 N Y S. 617, 102 Misc. 222—Mayer v. Southern Pac Co, 159 N.Y.S 93, 95 Misc. 498
Pa—Utley v. Lehigh Valley R. Co, 141 A. 53, 292 Pa. 251.

2. N Y.—Dusal Chemical Co. v. Southern Pac. Co., 168 N.Y.S 617, 102 Misc. 222—Mayer v. Southern Pac Co., 159 N.Y.S. 93, 95 Misc. 498

Delivery before payment

Where goods were consigned by a straight bill of lading in care of the bank for the alleged consignee, plaintiff having failed to guard himself against delivery before payment by using an order bill of lading, or notifying the carrier that the goods should not be delivered except on payment, defendant is not bound to know the arrangements between consignor and consignee.—Mayer v. Southern Pac. Co., 159 N Y S. 93, 95 Misc. 498.

Bill of lading transferred to third person

Consignor of interstate shipment could protect himself against delivery to consignee, without surrender of the bill of lading, by taking order bill of lading, as provided by interstate commerce commission, or, if taking a straight bill of lading thereunder, by notification to carrier, under Personal Property Law § 219, as added by L 1911 c 248, that a third person was transferee of the bill—Dusal Chemical Co. v Southern Pac Co., 168 N Y.S 617, 102 Misc. 222.

Facts putting on inquiry

That goods were consigned by straight bill of lading to a symbol in care of the bank for the alleged consignee, the symbol did not put the carrier on inquiry as to an arrangement between consignor and consignee, where payment of the purchase price was to be made before delivery.—Mayer v Southern Pac. Co, 159 N.Y.S 93, 95 Misc. 498.

3. Mo.—Nanson v. Jacob, 6 S W. 246, 93 Mo 331, 3 Am S R 531.
Pa—Phœnixville Nat Bank v Philadelphia, etc., R. Co, 30 A. 228, 163 Pa. 467.

4. Pa.—Utley v Lehigh Valley R. Co, 141 A 53, 292 Pa. 251, reversing 89 Pa Super 599

5. U S—New York & P. R. S. S Co. v. McGowin Lumber & Export Co., C.C A Porto Rico, 284 F 513—King v. Barbarin, Mich., 249 F. 303, 161 C C.A 311.
Fla—Atlantic Coast Line R. Co. v. Roe, 109 So. 205, 91 Fla 762
Ga—Allen v. Southern Ry. Co., 126 S E 722, 33 Ga App. 209
Ky—Hall v. Cumberland Pipe Line Co., 237 S W 405, 193 Ky. 728.
10 C J. p 257 note 13, p 351 note 9

6. U.S—In re Taub, C.C.A.N.Y, 7 F 2d 447
Fla.—Atlantic Coast Line R. Co. v. Roe, 109 So 225, 91 Fla 762.
Mo—Turner Lumber & Investment Co. v. Chicago, R. I & P. Ry. Co., 16 S W.2d 705, 223 Mo.App. 564
N.Y.—Mayer v. Southern Pac. Co., 159 N.Y.S 93, 95 Misc. 498.
Tex—Wells Fargo & Co Express v. Pugh, Civ App., 185 S W. 61.
Wash—Getchell v. Northern Pac. R. Co., 187 P. 707, 110 Wash. 66.
10 C J. p 257 note 14.

Statutory provisions

(1) Under the Pomerene Act, U.S. Comp St. § 8604ee, the carrier has no right to deliver to the consignee named in a straight bill of lading, where it has been requested by, or on behalf of, a person having a right of property or possession in the goods, not to make delivery.
U S—In re Taub, C C A N.Y., 7 F 2d 447
Mont.—Grover v. Hines, 213 P. 250, 66 Mont. 230.

(2) Under § 32 of such act, Comp. St § 8604pp, transferor of straight bill of lading or transferee thereof has the right to notify carrier not to make delivery to consignee named in straight bill.—In re Taub, supra.

Duty of carrier as to goods in storage

A carrier, which deposited a shipment of fruit with a storage company as against consignee named in straight bill, pursuant to instructions received from one claiming the right to the shipment, was required, after the fruit had been inspected and checked, and shipping documents examined and freight paid, to advise the storage company to deliver the fruit to the lawful consignee.—In re Taub, C C A N.Y., 7 F 2d 447.

Time to investigate

Where property at destination is demanded by consignee and also by an adverse claimant, the carrier on its request is entitled to a reasonable time for investigation before an action will lie against it—Taylor v. Duluth, S S. & A. Ry. Co., 166 N.W. 128, 139 Minn. 216.

7. Mass.—Alderman v. Eastern R. Co, 115 Mass. 233.
10 C.J. p 257 note 15.

bill of lading that the surrender of the bill, properly indorsed, shall be required before delivery,[8] or otherwise,[9] the carrier is not justified in making delivery except on production and surrender of the bill of lading properly indorsed; and an actual indorsement by the consignee of a forged bill of lading affords the carrier no more protection than would be given by delivery directly to the consignee without the production of any bill of lading.[10] The carrier is bound to observe the directions of the bill of lading which is not controlled by the marks on the goods designating the person to whom they are sent.[11]

c. Holder of Bill of Lading

(1) In general
(2) "Order" bill of lading

(1) In General

Delivery may be made to the indorsee of a bill of lading which is made to stand for the goods; but if the person claiming the goods does not produce and surrender the bill of lading, the carrier makes delivery to him at its peril, unless the requirement for surrender is waived, or the bill of lading gives the carrier the right to make delivery without surrender.

The indorsement of a bill of lading which by reserving in some manner to the person in whose favor it is drawn, whether he is the owner of the goods or the consignee, the right of subsequent disposition is made to stand as representative of the goods, transfers the right to receive the goods named therein, and authorizes and requires delivery to such indorsee,[12] even though he may have secured possession of it wrongfully and may have no right to it;[13] and the duty to deliver to the indorsee is not qualified by directions in a waybill which, by mistake of the carrier's agent, directed delivery to a third person.[14] However, if the bill of lading is made to stand for the goods, the person claiming the goods should produce and surrender the bill of lading. Otherwise, the carrier will make delivery to claimant of the goods at its peril,[15]

8. U.S.—King v. Barbarin, Mich., 249 F. 303, 161 C.C.A. 311.
Ind.—Jeffersonville, etc., R. Co. v. Irwin, 46 Ind. 180.
Mass.—Keystone Grape Co. v. Hustis, 122 N.E. 269, 232 Mass. 162.
Tex.—Wells Fargo & Co. Express v. Pugh, Civ.App., 185 S.W. 61.

Consignee designated as consignor

(1) A carrier is not warranted treating as owners consignees who were named in bill of lading as consignors, and in delivering property without production of bill of lading.—King v. Barbarin, Mich., 249 F. 303, 161 C.C.A. 311.

(2) Where sellers of goods took back their dishonored draft, drawn on consignees who were named in bill of lading as consignors also, they could recover from the carrier which had delivered the shipment without production of original bill of lading.—King v. Barbarin, supra.

Liability to bona fide holder of bill

Carrier, by delivering goods to consignee without production of bill of lading, becomes liable to bona fide holder of bill for value, whether by way of purchase or as security for advances before delivery of goods at destination.—King v. Barbarin, Mich., 249 F. 303, 161 C.C.A. 311.

Provision for delivery "upon presentation of the duplicate hereof" established the fact that the consignors were the owners of the property, so as to render a delivery to the consignee without presentation of any bill of lading unauthorized.—Jeffersonville, etc., R. Co. v. Irvin, 46 Ind. 180.—McEwen v. Jeffersonville, etc., R. Co., 33 Ind. 368, 5 Am. R. 216.

9. U.S.—New York & P. R. S. S. Co. v. McGowin Lumber & Export Co., C.C.A. Porto Rico, 284 F. 513
Minn.—Jellett v. St. Paul, etc., R. Co., 15 N.W. 237, 30 Minn. 265
N.Y.—Atlantic Nav. Co. v. Johnson, 27 N.Y.Super. 474.

Under the Federal Bills of Lading Act, U.S.Comp.St. §§ 8604aaa–8604w, 49 U.S.C.A. §§ 81–124, a carrier is not bound to require the presentation and surrender of a nonnegotiable bill of lading before delivery of the goods, but may take the risk of delivery without such presentation, and where the consignor, in the exercise of its right to stop delivery in case the consignee is insolvent, notifies the carrier not to deliver without the production and surrender of the bill of lading, the carrier will not be protected in making delivery in violation of such notice.—Interstate Window Glass Corp. v. New York, N.H. & H.R. Co., 133 A. 102, 104 Conn. 342

10. U.S.—King v. Barbarin, Mich., 249 F. 303, 161 C.C.A. 311.

11. Mo.—Wall v. American Ry. Express Co., 272 S.W. 76, 220 Mo.App. 989
10 C.J. p. 257 note 18.

12. Ala.—Southern Ry. Co. v. Harris, 80 So. 101, 202 Ala. 263.
Iowa.—Famous Mfg. Co. v. Chicago, etc., R. Co., 147 N.W. 754, 166 Iowa 361
10 C.J. p. 257 note 20.

Under federal statute regulating interstate carriers, as amended by the Carmack and Cummins amendments, U.S.Comp.St. §§ 8592, 8604a, 8604aa, 49 U.S.C.A. § 20, lawful holder of bill of lading would be entitled to demand goods from last carrier on payment of all proper charges on presentation of bill of lading without any express direction from the consignor.—Georgia Southern & F. Ry. Co. v. Tifton Produce Co., 127 S.E. 771, 160 Ga. 213, answers to certified questions conformed to 128 S.E. 592, 34 Ga.App. 13.

13. Ky.—Douglas v. People's Bank, 5 S.W. 420, 86 Ky. 176, 10 Ky.Law Rep. 243
10 C.J. p. 257 note 22

14. Ala.—Southern Ry. Co. v. Harris, 80 So. 101, 202 Ala. 263.

15. Ark.—Carter v. St. Louis-San Francisco Ry. Co., 18 S.W.2d 376, 179 Ark. 865
Ill.—Merchants' State Bank of Centralia v. Chicago, B. & Q. R. Co., 245 Ill.App. 211.
Iowa.—Port Huron Machinery Co. v. Chicago, M. & St. P. Ry. Co., 201 N.W. 779, 199 Iowa 295
Ky.—Louisville & N. R. Co. v. Johnson, 10 S.W.2d 1104, 226 Ky. 322.
La.—First Nat. Bank v. Henderson Cotton Oil Co., 102 So. 501, 157 La. 394
Mich.—Ward v. Pere Marquette Ry. Co., 204 N.W. 120, 231 Mich. 323
N.Y.—McCoy v. American Express Co., 171 N.E. 749, 253 N.Y. 477, reversing 237 N.Y.S. 829, 227 App. Div. 782, and reargument denied 173 N.E. 861, 254 N.Y. 550
Pa.—Pennsylvania R. Co. v. Edson Bros., 8 Pa.Dist. & Co. 623.
10 C.J. p. 257 note 23, p. 258 note 24.

Delivery held unauthorized

Station agent, wiring consignor of shipment consigned to one not at place of destination for advice as to disposition, was not authorized to deliver to person for whom intended

rendering it liable for conversion, as appears infra § 174 a; and this is especially true in view of statutes enacted in some jurisdictions prohibiting or regulating delivery without production of the bill of lading.[16] Notwithstanding the rule stated, the requirement that the bill of lading be surrendered before delivery of the goods may be waived by the consignor, and in a contest between the carrier and the consignor the former is fully protected, if it can show the latter's assent to the delivery without surrender of the bill of lading.[17] So, the carrier will be protected by making delivery without requiring the production and surrender of the bill of lading, where the bill provides that it may do so unless the word "order" is written thereon before or after the name of the party to whose order the freight is consigned, and such word does not appear on the bill.[18] If the goods are in fact delivered to the right person, it is immaterial, so far as the consignor is concerned, that a surrender of the bill of lading, in accordance with its terms, was not required; no breach of duty to the consignor is thereby involved;[19] and it has also been held that delivery to the right person, without surrender of the bill of lading in accordance with its terms, imposes no liability on the carrier in favor of one to whom the bill of lading was assigned after delivery of the goods.[20] It has been held, however, that the rule allowing a carrier sued by the holder of a bill of lading for the value of the goods shipped to show, as an excuse for delivery to another without the production of the bill, that the person receiving them was the true owner, is founded on principles of bailment,[21] and that such rule has no application where such person was not the holder or owner of the bill of lading, and had no right to receive the goods without it.[22] Delivery to any person other than the consignee, without an order from him or the indorsement of the bill of lading, is unauthorized.[23] The mere possession of the bill of lading by a person other than the consignee, without indorsement, will not authorize the carrier to deliver the goods to such person.[24]

(2) "Order" Bill of Lading

(a) In general

(b) Effect of "order notify" clause

(a) In General

Freight shipped under an "order" bill of lading may ordinarily be delivered only on production of the bill of lading, properly indorsed.

The term "shipper's order," as used in the bill of lading, is well understood and means that the title remains in the shipper until he orders a delivery of the goods,[25] and that the carrier must not deliver

but who was not named as consignee, on receipt of telegram advising that car was for him, without his having surrendered or ever having had possession of bill of lading—Missouri Pac. R Co. v. Toll, 261 S.W. 652, 164 Ark. 327.

Delivery of goods to drawee of sight draft without surrender of the attached bill of lading in which the shipper was named as consignee, is unauthorized—Louisville & N. R. Co. v. Johnson, 10 S.W.2d 1104, 226 Ky. 322.

Persons entitled to maintain action

Where the original consignee of goods shipped under an order bill of lading had drawn a draft on a subsequent consignee which he cashed with the bank to which he indorsed the bill of lading, his liability to the bank on the draft after it was dishonored by the drawee does not entitle him to recover from the carrier for delivering the goods to the second consignee without requiring surrender of the bill of lading, and the carrier incurred no liability to him in making the delivery, under U. S Comp St. § 8604r, 49 U.S.C.A. § 115—Davis v First Nat. Bank of Longview, Tex Civ.App., 245 S.W. 1009.

16. Ark.—St. Louis, etc, R Co. v Scarborough Co., 170 S.W. 572, 115 Ark. 14.

17. Pa.—Ridgway Grain Co v Pennsylvania R. Co, 77 A. 1007, 228 Pa 641, 31 L.R.A.,N.S., 1178.
10 C.J. p 258 note 26.

Waiver will be inferred where the shipper has acquiesced in a similar course of business in a large number of instances, for more than a year without protest.—Ridgway Grain Co. v. Pennsylvania R. Co, 77 A. 1007, 228 Pa. 641, 31 L.R.A.,N.S., 1178.

18. Kan.—St Louis, etc, R. Co. v. Mayer Bros. Co, 100 P. 623, 79 Kan. 697.

19. Ark.—Ben D. Schaad Machinery Co. v. St. Louis, I. M. & S. Ry. Co, 193 S.W. 270, 128 Ark 100, L.R.A. 1917D 481.
N.Y.—Miller v New York Cent. R R., 200 N.Y.S. 287, 205 App.Div. 663.
Tex.—Fleming v. St Louis Southwestern Ry Co. of Texas, Civ.App., 13 S.W.2d 440
10 C.J. p 259 note 27.

Injury to consignor

A railway delivering goods to the owner entitled to the possession without receiving the bill of lading is not liable although the consignor is thereby prevented from collecting a note attached to bill of lading.—Ben D. Schaad Machinery Co. v. St. Louis, I. M & S. Ry Co, 193 S.W. 270, 128 Ark 100, L.R.A. 1917D 481.

20. Iowa.—Anchor Mill Co v. Burlington, etc., R. Co, 71 N.W. 255, 102 Iowa 262
10 C.J. p 259 note 28

21. La.—Harwood-Barley Mfg. Co v Illinois Cent. R Co, 74 So 569, 141 La 1.

22. La.—Harwood-Barley Mfg Co. v. Illinois Cent. R. Co, 74 So 569, 141 La 1.

23. Ill.—Chicago, R I & P R. Co v. North American Cold Storage Co, 244 Ill.App. 522.
Pa.—Pennsylvania R Co v. Edson Bros, 8 Pa.Dist. & Co. 623.

24. Ala.—Davis v. Hines, 85 So. 882, 17 Ala.App. 443
10 C.J. p 257 note 21.

Where consignor ships goods to himself as consignee, the carrier has no authority to deliver the goods to a third person in possession of the bill of lading, without indorsement thereon—Davis v. Hines, 85 So 882, 17 Ala.App. 443.

25. Kan.—Bennett v. Dickinson, 186 P. 1005, 106 Kan. 95, affirmed 190 P 757, 107 Kan 17.
N.C.—Norfolk Southern R. Co. v. Armfield Co., 127 S.E. 557, 189 N.C. 581
Tex.—Gulf, C. & S. F. Ry. Co. v.

except on production of the bill of lading properly indorsed by the shipper.[26] Hence, where the bill of lading provides for delivery to the shipper's order or to his assigns, delivery of the goods to the consignee or anyone else without the bill of lading properly indorsed, is wrongful.[27] Especially are the foregoing rules applicable where the "shipper's order" bill of lading has attached to it a draft on the buyer,[28] or where the bill of lading expressly provides that the goods shall not be delivered without its surrender, properly indorsed;[29] and where delivery is made without complying with such provision, no title to the goods passes to the consignee.[30]

Federal Bills of Lading Act. Interstate shipments are governed by the Federal Bills of Lading Act, 49 U.S.C.A. c 4, under which freight shipped under an order bill of lading should ordinarily not be delivered except on presentation and surrender of the bill,[31] and if the bill has been lost, stolen, or destroyed, the carrier can only deliver on order of court and execution of bond, as shown infra § 172 f. Such Act does not render a delivery without the production and surrender of the bill of lading an illegal delivery; but the carrier takes the risk of such a delivery and will be liable for any loss which the shipper sustains thereby.[32] Delivery to the holder of an order bill of lading, properly indorsed, is justified,[33] regardless of the capacity in which he holds possession of the

Buckholts State Bank, Civ.App., 258 S.W. 491—McMahan v. State Nat. Bank, Civ.App., 160 S.W. 403.

Corpus Juris has been quoted in Bennett v Dickinson, 186 P. 1005, 1006, 106 Kan. 95, and cited in Gulf, C. & S. F. Ry. Co. v. Buckholts State Bank, Tex Civ.App., 258 S.W. 491, 494, as authority for the rules laid down in this section.

26. Kan.—Bennett v. Dickinson, 186 P. 1005, 106 Kan. 95.
10 C.J. p 259 note 30.

27. Colo.—Davis v. Fruita Mercantile Co, 220 P. 983, 74 Colo. 247.
Kan—Bennett v. Dickinson, 186 P. 1005, 106 Kan. 95.
La.—R. B. George Machinery Co. v. New Orleans, T. & M. R. Co., 119 So. 432, 167 La. 474, reversing on other grounds 119 So. 473, 9 La. App. 302.
Mass.—Keystone Grape Co. v. Hustis, 122 N.E. 269, 232 Mass. 162.
Mich.—First Nat. Bank v. Grand Rapids & I. Ry. Co., 161 N.W. 859, 195 Mich. 1.
N.C—Norfolk Southern R. Co. v. Armfield Co, 127 S.E. 557, 189 N.C. 581.
Pa.—Utley v. Lehigh Valley R. Co., 141 A. 53, 292 Pa. 251.
Tex—Davis v. First Nat. Bank of Longview, Civ.App., 245 S.W. 1009.
Va—Norfolk & W. Ry. Co. v. Aylor, 150 S.E. 252, 153 Va. 575, certiorari denied 51 S.Ct. 26, 282 U.S. 847, 75 L.Ed. 751.
Wash.—National Bank of the Republic v. Hines, 192 P. 899, 112 Wash. 352.
10 C.J. p 259 note 31.

Corpus Juris has been cited in Missouri Pac. R Co. v. Bland, 268 S.W. 22, 24, 167 Ark. 390, as stating correct rules of law on the matter set out in this and the next note.

Delivery is prima facie wrongful under order bill of lading unless original order bill properly indorsed is first surrendered to delivering carrier.—Norfolk & W. Ry. Co. v. Aylor, 150 S.E. 252, 153 Va. 575, certiorari denied 51 S.Ct. 26, 282 U.S. 847, 75 L.Ed. 751.

28. Ill.—Babbitt v. Grand Trunk Western Ry. Co., 120 N.E. 803, 285 Ill. 267.
Kan—Bennett v. Dickinson, 186 P. 1005, 106 Kan. 95.
10 C.J. p 259 note 32.

29. Ga.—Southern Ry. Co. v. Massee & Felton Lumber Co., 98 S.E. 106, 23 Ga.App. 309.
Ill.—Babbitt v. Grand Trunk Western Ry. Co., 120 N.E. 803, 285 Ill. 267.
Kan—Bennett v. Dickinson, 186 P. 1005, 106 Kan. 95.
Mass.—Keystone Grape Co. v. Hustis, 122 N.E. 269, 232 Mass. 162.
N.C—Norfolk Southern R. Co. v. Armfield Co., 127 S.E. 557, 189 N.C. 581.
10 C.J. p 259 note 33.

30. N.C.—Norfolk Southern R. Co. v. Armfield Co, supra.

31. Conn.—Alderman Bros. Co. v. New York, N. H. & H. R. Co, 129 A. 47, 102 Conn. 461.
Ky.—Louisville & N. R. Co. v. Mengel Co, 295 S.W. 183, 220 Ky. 289.
La—Orange Nat. Bank v. Southern Pac. Co, 110 So. 329, 162 La. 223, 56 A.L.R. 1167.
Pa.—Utley v. Lehigh Valley R. Co., 141 A. 53, 292 Pa. 251, reversing 89 Pa.Super. 599.
Tex—Davis v. First Nat. Bank of Longview, Civ.App., 245 S.W. 1009

32. U.S.—Pere Marquette Ry. Co. v. J. F. French & Co, 41 S.Ct. 195, 254 U.S. 538, 65 L.Ed. 391, reversing J. F. French & Co. v. Pere Marquette Ry. Co., 171 N.W. 491, 204 Mich 578.
Colo.—Davis v. Fruita Mercantile Co., 220 P. 983, 74 Colo. 247.
Conn—Interstate Window Glass Co. v. New York, N. H. & H. R. Co., 133 A. 102, 104 Conn 342—Alderman Bros. Co. v. New York, N. H. & H. R Co, 129 A. 47, 102 Conn 461.
Mo—Kemper Mill & Elevator Co v. Hines, 239 S.W. 803, 293 Mo 88.

Where carrier delivers on the statement of deliveree that he has the bill of lading, it will be liable for loss to the shipper, if such statement is untrue.—Pere Marquette Ry. Co. v. J. F. French & Co, 41 S.Ct. 195, 245 U.S. 538, 65 L.Ed. 391, reversing J. F. French & Co. v Pere Marquette Ry. Co, 171 N.W. 491, 204 Mich. 578.

If carrier waived production of order bill and delivered the shipment to proposed buyer on the belief that there was a transfer of the bill to such buyer, or that the bill was in the latter's possession or that he was lawfully entitled to possession, the delivery was made at the carrier's risk—Davis v. Fruita Mercantile Co., 220 P. 983, 74 Colo. 247.

Attempted change of order bill into straight bill

Even if a carrier knew of an attempted change of a consignee in an order bill of lading, it could protect itself by requiring the production of the bill before delivering—Davis v. Fruita Mercantile Co., 220 P. 983, 74 Colo. 247.

33. N.C—Temple v. Southern R Co., 129 S.E. 815, 190 N.C. 438

"Delivery"

Under Bills of Lading Act § 9, Comp St. § 8604e, providing that delivery is justified to a person in possession of an order bill by the terms of which the goods are deliverable to his order, or which has been indorsed to him, the act of the terminal carrier, after a shipment reached its destination, in striking out the original destination and substituting another, and delivering the shipment to another railroad for transportation to such new destination, on request of the party holding the bill of lading, constituted in legal contemplation a "delivery"—Pere Marquette Ry Co. v. J. F. French & Co., 41 S.Ct. 195, 254 U.S. 538, 65 L.Ed. 391, reversing J. F. French & Co. v.

bill, or whether he holds it lawfully or unlawfully, so long as the carrier has no notice of any infirmity of title.[34] So, delivery may be made to a person to whose order the bill is made, on his production of the bill, or on the production thereof by one to whom the bill has been duly indorsed, or on production of the bill indorsed in blank.[35] A carrier, however, is not justified in delivering a shipment if the order bill is not properly indorsed or if the carrier has information that the person demanding delivery is not lawfully entitled to possession;[36] and where the face of an unindorsed consignor's order bill of lading showed that the shipment was made to the order of the consignor, and was to be delivered to the proposed buyer of the goods only on payment of the attached draft, a delivery to such buyer without payment of the draft was not authorized.[37] Where freight was delivered without the production and surrender of the order bill of lading, which was still held by the shipper, who thereafter transferred it to another, the bill was not spent at the time of the transfer, as its obligation had not been met, and the carrier was liable to the transferee for the wrongful delivery.[38] Notwithstanding the general rule under the statute, that the bill of lading should be surrendered before delivery of the goods, a delivery to the real owner without production and surrender of the bill will protect the carrier, except as against a bona fide purchaser of the bill for value.[39]

(b) Effect of "Order Notify" Clause

Delivery of goods shipped under an "order notify" bill of lading or receipt, to the person to be notified, without production and surrender of the bill or receipt, is unauthorized.

Where a bill of lading or a shipping receipt contains a clause providing that a third person shall be notified of the arrival of the goods, or where it contains this clause and an additional clause reciting that the goods are shipped to the consignor's order, the carrier is not authorized to treat the person to be notified as a consignee, and if it delivers the goods to him without production and surrender of the receipt or the bill of lading, it will be liable to the true owner of the goods for any loss resulting from such delivery,[40] especially where the

Pere Marquette Ry. Co., 171 N.W 491, 204 Mich. 578

34. U S—Pere Marquette Ry. Co. v. J. F. French & Co, supra.

35. Conn—Alderman Bros. Co. v New York, N. H. & H. R. Co., 129 A. 47, 102 Conn. 461.

36. Colo—Davis v Fruita Mercantile Co., 220 P. 983, 74 Colo. 247.

Physical possession of bill of lading

The rule that under § 9, of the Federal Bills of Lading Act, Pomerene Act, Comp St. § 8604e, 49 U.S.C A. § 89, physical possession by one of a bill of lading justifies delivery to him by the carrier, applies only where the order bill of lading is properly indorsed, and not to an unindorsed bill of lading to which a draft is attached by a consignor, indicating to the carrier that delivery should be made only on payment of the draft by the prospective buyer who holds physical possession of the bill—Davis v. Fruita Mercantile Co., 220 P 983, 74 Colo. 247.

37. Colo.—Davis v. Fruita Mercantile Co, supra.

38. Conn.—Alderman Bros. Co. v. New York, N H & H. R. Co., 129 A 47, 102 Conn. 461.

39. Minn.—Weinstein v. Davis, 196 N.W. 933, 158 Minn 44—Banik v Chicago, M. & St. P. Ry. Co, 179 N W. 899, 147 Minn 175.
N Y.—Miller v New York Cent R R, 200 N.Y S. 287, 205 App Div. 663

40. U.S—First National Bank of Chicago v. Rogers, Brown & Co., D C Wash., 273 F. 529—King v Barbarin, Mich, 249 F 303, 161 C. C A 311
Ala—Louisville & N R Co v Sarris & Collas, 95 So. 903, 209 Ala 217.
Ark—Missouri Pac R. Co. v. Myers, 293 S.W. 15, 173 Ark 747—Missouri Pac. R Co. v. Bland, 268 S.W. 22
Ga—Southern Ry. Co. v. Hodgson Bros Co, 98 S E 541, 148 Ga 851, reversing 95 S E 263, 21 Ga App. 753, conformed to 99 S E. 41, 25 Ga App. 536—George C Speir & Co v Atlantic Coast Line R Co., 140 S E. 43, 37 Ga App. 283
Kan—Bennett v. Dickinson, 186 P. 1005, 106 Kan 95
La—Harwood-Barley Mfg Co v. Illinois Cent R. Co., 74 So. 569, 141 La. 1.
Mich—J. F. French & Co. v. Pere Marquette Ry. Co., 171 N W. 491, 204 Mich. 578
Mo.—Barton v. Louisville & N. R Co., App., 196 S W 379
Tex—Gulf, C & S. F Ry Co. v. Buckholts State Bank, Civ App, 258 S W. 491, reversed on other grounds, Com App, 270 S.W. 1008
10 C J. p 259 note 35.

Rules stated in Corpus Juris as to the effect of an "order notify" bill of lading are quoted in full, and with approval, in Missouri Pac R Co. v Myers, 293 S W 15, 18, 173 Ark 747, and in Bennett v Dickinson, 186 P. 1005, 1007, 106 Kan 95, and J F. French & Co v Pere Marquette Ry. Co, 171 N.W 491, 493, 204 Mich. 578, in support of the statements in this section.

Corpus Juris has been cited in Missouri Pac. R. Co. v. Bland, Ark, 268 S W 22, 24, as correctly stating the law set out in this note.

Carrier violated its duty under a bill of lading shipping "to F. Company, Paris, Texas, notify J.," when it delivered the shipment to J. without an order from F Company, the bill being an "order bill," and negotiable under U S Comp St §§ 8604a to 8604n, 49 U S C.A §§ 20–107—F L Shaw Co. v Coleman, Tex Civ App, 236 S W 178, error refused.

Removal of part of goods

Carrier was negligent in permitting consignee to remove part of shipment from car without production of order bill of lading—Missouri Pac R Co. v. Myers, 293 S W. 15, 173 Ark 747.

Owner of goods as shipper and consignee

(1) Where seller of goods shipped goods consigned to himself and attached bill of lading to draft, notation in bill of lading that buyer should be notified did not authorize the carrier to deliver the shipment to the buyer without the production of the bill of lading.—Louisville & N R Co. v Sarris & Collas, 95 So. 903, 209 Ala. 217.

(2) Carrier issuing bill of lading, naming owner as both shipper and consignee, with direction to notify third person, unless otherwise directed by some holder of bill of lading properly indorsed, must deliver to holder of bill of lading, or one duly authorized by him to receive goods, and cannot deliver to the per-

bill of lading expressly requires surrender thereof,[41] properly indorsed,[42] before delivery is made. Delivery of the goods under these circumstances without surrender of the receipt or the bill of lading constitutes a conversion, as appears infra § 174 a. A direction of this character in a shipping receipt or a bill of lading raises no presumption that the person to be notified is the consignee,[43] but on the contrary indicates that the carrier is not entitled to deliver the goods except on production of the bill of lading.[44] The fact that a carrier was instructed to notify a third party of the arrival of goods gives him no right to require a delivery without permission of the shipper,[45] or the production and surrender of the bill of lading, properly indorsed.[46] A carrier of perishable articles, shipped to the shipper's order with instructions to notify the prospective purchaser, had no authority, after giving such notice, and before receiving the bill of lading, to unload them at a point designated by the purchaser, where they were liable to freeze;[47] but a carrier is not entitled to require the production of an order bill of lading until it has complied with the transportation contract;[48] and even then, if it makes delivery without requesting the production of the bill or questioning the right of the notified party to the possession of the property, it is estopped to take advantage of such party's failure to produce the bill.[49] The shipper has no cause of action against the carrier for delivering the goods to the party to be notified, without receiving the bill of lading, where no damage to the shipper results therefrom.[50] Where an order notify bill of lading requires notification to the consignee and production of the bill before delivery, the consignee is entitled to a reasonable time after the arrival of the goods within which to obtain and produce the bill of lading.[51]

son designated to be notified to whom bill of lading has never been assigned or to another acting on his orders.—Southern Ry. Co v Hodgson Bros. Co, 98 S E 541, 148 Ga 851, reversing 95 S.E. 263, 21 Ga.App 753, conformed to 99 S E. 41, 25 Ga App. 536.

Excuse for wrongful delivery held insufficient

Where the receiver of a corporation, which purchased oil of the shipper, who had consigned the same to his own order, with directions to notify a soap company on delivery of the oil, wired the soap company that he was doing all possible to locate documents in order to stop demurrage, and suggested that the soap company establish bond to produce documents and unload the car, such telegram was not authority to the carrier to deliver the oil to the soap company without surrender of the bill of lading, or, in lieu thereof, a bond indemnifying the carrier, and, having done so, the receiver may recover from the carrier.—First Nat. Bank of Chicago v. Rogers, Brown & Co, D C.Wash, 273 F. 529.

41. Mo.—Kemper Mill & Elevator Co. v Hines, 239 S W. 803, 293 Mo. 88.

Ohio.—Pennsylvania R Co. v Greenwald Packing Co., 157 N E 809, 24 Ohio App 497.

Va.—Kewanee Private Utilities Co. v Norfolk Southern R. Co, 88 S E. 95, 118 Va 628.

42. Ga.—Southern Ry. Co. v. Massee & Felton Lumber Co, 98 S.E. 106, 23 Ga App. 309

Effect of failure to indorse

(1) Where "order notify" bill of lading required surrender of original order bill of lading, properly indorsed, shipper's mistake in sending original bill, instead of memorandum bill, direct to order notify party, unindorsed, did not relieve carrier from requiring it to be properly indorsed before delivery to order notify party.—Southern Ry. Co v Massee & Felton Lumber Co, 98 S E. 106, 23 Ga App 309

(2) Carrier, receiving consignment to shipper's order, with direction to notify a party executing an order notify bill in triplicate, requiring surrender of original bill, properly indorsed, before delivery, where original bill, unindorsed, was mailed to order notify party, and memorandum bill was attached to shipper's draft on him without carrier's knowledge, and where, on his surrender of original bill unindorsed, he received goods and became insolvent, without paying draft, was liable to shipper for value of goods.—Southern Ry Co. v. Massee & Felton Lumber Co, supra.

43. Ark.—Missouri Pac. R Co. v. Myers, 293 S.W 15, 173 Ark 747

Kan.—Bennett v Dickinson, 186 P. 1005, 106 Kan 95

Minn.—Ammon v Illinois Cent R Co, 139 N W 819, 120 Minn 438

44. Ark.—Missouri Pac R. Co v. Myers, 293 S.W. 15, 173 Ark. 747

Kan.—Bennett v. Dickinson, 186 P 1005, 106 Kan 95.

N.Y.—Furman v Union Pac. R Co, 13 N E 587, 106 N Y 579, reversing 35 Hun 669

Tenn.—Louisville, etc., R Co. v. U S. Fidelity, etc., Co., 148 S.W. 671, 125 Tenn 658, 675.

45. Ga.—Reed Oil Co v Smith, 109 S E 171, 27 Ga App 476, reversed on other grounds 114 S E. 56, 154 Ga. 183, conformed to 114 S E. 721, 29 Ga.App. 236.

46. Ark.—Missouri Pac. R. Co v. Myers, 293 S W. 15, 173 Ark. 747

N.C.—Killingsworth v. Norfolk, Southern R. Co., 87 S E. 947, 171 N. C 47.

Under the Federal Bill of Lading Act, where plaintiff's agent erroneously shipped interstate goods to plaintiff by an order notify bill of lading, and plaintiff did not give bond to carrier or institute an action under Bill of Lading Act § 14, U S Comp St § 8604gg, 49 U S C A. § 94, plaintiff cannot recover from carrier for refusal to deliver goods without bill of lading, in view of § 42, U S. Comp St. § 8604uu.—Moise v. Southern Ry. Co, 123 S E 790, 129 S C. 162

47. N Y.—Beggs v. New York Cent. R. Co, 162 N.Y.S 387, 97 Misc. 652.

48. N Y.—Schules Pure Grape Juice Co v. Mills, 263 N Y.S 754, 146 Misc 823.

49. N Y.—Schules Pure Grape Juice Co v. Mills, supra.

50. S C.—Baughman v. Southern Ry. Co, 121 S E 356, 127 S C 493

Circumstances showing shipper not injured

Where carrier delivered an order notifying shipment to the party to whom notice was to be given without receiving the bill of lading, but for its own protection required him to give his check for more than the invoice price, and later that party took up the draft, delivered the bill of lading to carrier, and attached the money in the hands of the bank as shipper's money, the shipper has no cause of action against carrier for delivering the goods without the bill of lading, or for surrendering the checks, as no damage was shown.—Baughman v Southern Ry. Co, 121 S.E. 356, 127 S C 493

51. S.C.—Layton v. Charleston & W C Ry. Co., 72 S.E. 988, 90 S.C. 323.

d. Agent

(1) In general
(2) Goods addressed to consignee in care of third person

(1) In General

Delivery of the goods to an agent of the consignee authorized to receive them, or whose acceptance thereof is ratified by the consignee, is a good delivery.

A delivery of the goods by the carrier to an agent of the consignee or other person entitled thereto, who has been duly authorized to receive the goods,[52] or whose acceptance of the goods is ratified by the consignee, with knowledge of the facts,[53] is a good delivery, completing the duty of the carrier in reference to the shipment. So, although a seller's delivery of a live stock shipment to the buyer was conditioned on the latter's payment of the price, whereby title remained in the seller, nevertheless, if the buyer was authorized to receive the shipment, delivery to him relieved the carrier from liability, although he failed to pay the price.[54] If the person to whom delivery is made is really the agent authorized to receive the goods, the delivery will be sufficient, although the authority was not known to the carrier,[55] or although the delivery was made on insufficient or even on false evidence.[56] A carrier is justified in delivering goods to the consignor's agent, although he obtained possession of the bills of lading by fraud, intending to appropriate them to his own use, and therefore, in perpetrating a crime, obtained no title to the bills by delivery.[57] An agent engaged in the general employment of the consignee in connection with his business may not have such authority as to excuse the carrier in making delivery to him if he has not actual authority to receive the goods,[58] and delivery to one who had been the consignee's agent, but whose authority had been terminated, with notice to the carrier, is not sufficient.[59] When the carrier is sued for misdelivery, it must show that the agent was authorized to receive the goods, or at least that he had been clothed with such apparent authority as to justify it in presuming his authority;[60] but no greater degree of proof of authority in the person to whom they were delivered is required than for

52. U.S.—Pere Marquette Ry. Co. v. J. F. French & Co., 41 S.Ct. 195, 254 U.S. 538, 65 L.Ed. 391, reversing J. F. French & Co. v. Pere Marquette Ry. Co., 171 N.W. 491, 204 Mich. 578.
Ala.—Devon Mfg. Co. v. Southern Express Co., 76 So. 39, 200 Ala. 273.
Ark.—Carter v. St. Louis-San Francisco Ry. Co., 18 S.W.2d 376, 179 Ark. 865.
Fla.—Atlantic Coast Line R. Co. v. Seward, 142 So. 881, 106 Fla. 75, reversing 136 So. 620.
Ga.—Payne v. Johnson, Fluker & Co., 108 S.E. 803, 27 Ga.App. 452.
N.Y.—Swift v. Davis, 193 N.Y.S. 848, 118 Misc. 205.
Pa.—Caplan v. Ebel, 73 Pa.Super. 601.
S.D.—Ryan v. Chicago, M. & St. P. Ry. Co., 220 N.W. 905, 53 S.D. 363.
Tex.—Fort Worth Elevators Co. v. Keel & Son, Civ.App., 231 S.W. 481, error refused.
10 C.J. p. 260 note 41.

Corpus Juris is quoted in Carter v. St. Louis-San Francisco Ry. Co., 18 S.W.2d 376, 380, 179 Ark. 865, as authority for the statements made in this note and the next following note.

Delivery to drayman

Where a drayman is authorized by the consignee to receive a shipment, or the carrier by a course of dealing with the consignee has a right to depend on delivery to such drayman, such delivery constitutes a delivery to the consignee.—Payne v. Johnson, Fluker & Co., 108 S.E. 803, 27 Ga.App. 452.

Delegation of agent's authority

Where a truckman was the consignee's agent to receive delivery of express packages, and one of the truckman's drivers receipted for a package, and afterward appropriated it, the agent's employee, in receiving the package, acted within the apparent scope of authority which defendant had delegated to drivers of his trucks, and delivery of the package by the railroad company was good as against both the consignee and the truckman.—Caplan v. Ebel, 73 Pa.Super. 601.

Interstate shipment; effect of federal statutes

Where, on an interstate shipment, straight bills of lading were not marked "nonnegotiable," or "not negotiable," to eradicate negotiability pursuant to U.S.Comp.St. § 8604aaa et seq., and the carrier on their surrender delivered the goods to consignor's agent, who receipted therefor in his own name, Carmack Amendment to Interstate Commerce Act, § 20, U.S.Comp.St. § 8604a, and Act Congr. Aug. 29, 1916, § 29, U.S.Comp.St. § 8604o, 29 U.S.C.A. § 109, must be applied, and hence bills were transferred by delivery to the agent as the statute provides, so that the carrier was justified in the delivery of the goods to the agent.—Swift v. Davis, 193 N.Y.S. 848, 118 Misc. 205.

Receipt, signed by the consignee's agent by his mark, admitting receipt of the goods, is valid, although not attested and acknowledged, and its effect cannot be limited in an action against the carrier for failure to deliver the same goods receipted for.—Louisville & N. R. Co. v. Price, 48 So. 814, 159 Ala. 213.

53. U.S.—Pere Marquette Ry. Co. v. J. F. French & Co., 41 S.Ct. 195, 254 U.S. 538, 65 L.Ed. 391, reversing J. F. French & Co. v. Pere Marquette Ry. Co., 171 N.W. 491, 204 Mich. 578.
Ala.—Devon Mfg. Co. v. Southern Express Co., 76 So. 39, 200 Ala. 273.

54. S.D.—Ryan v. Chicago, M. & St. P. Ry. Co., 220 N.W. 905, 53 S.D. 363.

55. Iowa.—Angle v. Mississippi, etc., R. Co., 9 Iowa 487.

56. Mo.—Parker Gordon Cigar Co. v. Chicago, etc., R. Co., 179 S.W. 785, 192 Mo.App. 86.

57. N.Y.—Swift v. Davis, 193 N.Y.S. 848, 118 Misc. 205.

Consignor is estopped by the use made of the bills, because possession thereof was not against his will, and as one of two innocent parties suffering a loss he enabled the fraud to be committed.—Swift v. Davis, 193 N.Y.S. 848, 118 Misc. 205.

58. Mo.—Wilson Sewing Mach. Co. v. Louisville, etc., R. Co., 71 Mo. 203.
10 C.J. p. 261 note 44.

59. N.Y.—Lester v. Delaware, etc., R. Co., 36 N.Y.S. 907, 92 Hun 342.

60. Ark.—Carter v. St. Louis-San Francisco Ry. Co., 18 S.W.2d 376, 179 Ark. 865.
10 C.J. p. 261 note 45.

any other issue in a civil case.[61] While the mere fact that persons are required, by an order bill of lading, to be notified gives them no rights in, or authority to, receive the goods, as stated supra § 172 c (2) (b), and does not make them agents for that purpose, such agency may be created by a subsequent parol agreement.[62] Where the shipper's contract with the carrier is not a bill of lading, delivery to the consignee's agent is a good delivery without production of the contract.[63] The agent's authority to accept delivery of the goods need not be in writing, unless expressly so required by statute.[64]

(2) Goods Addressed to Consignee in Care of Third Person

Goods addressed to the consignee in care of a third person may properly be delivered to such person in the absence of notice that he is not entitled to receive them. There are conflicting decisions as to whether this rule applies to goods directed to the consignee in care of the carrier's agent.

Where goods are addressed to the consignee in care of a third person, delivery to the latter ordinarily discharges the carrier's obligation, in the absence of any notice to it that such delivery is unauthorized;[65] but if the carrier knows that the authority of the person to whom the goods are so addressed is limited to a specified purpose, it will not be protected in making delivery to him or on his order,[66] and a delivery under such circumstances renders the carrier liable for conversion, as appears infra § 174 a. Although goods consigned to one person in care of another may properly be delivered to the latter, it does not follow that such delivery is the only delivery that will relieve the carrier from liability;[67] and if the person in whose care the goods are consigned declines to accept them, the consignee is the proper person to whom delivery should be made.[68]

Goods sent in care of carrier's local agent. Some authorities have held that where goods are directed to the consignee in care of an agent of the carrier at the point of destination, a delivery to such agent will constitute a complete delivery and exonerate the carrier;[69] but there is authority to the contrary.[70]

e. Real Owner

A carrier must deliver the goods to the real owner on his demand, and will be protected in making such delivery; but the carrier assumes the burden of proving the ownership of the person to whom delivery is made.

A carrier may, and it is its duty to, deliver the goods in its possession to the real owner on his demand therefor,[71] regardless of whether he is con-

61. Ark.—Carter v. St. Louis-San Francisco Ry. Co., supra.
Minn.—Wilcox v. Chicago, etc., R. Co., 24 Minn 269.

62. Mo.—Kemper Mill & Elevator Co. v. Hines, 239 S.W. 803, 293 Mo. 88.

63. S.D.—Ryan v. Chicago, M. & St. P. Ry. Co., 220 N.W. 905, 53 S.D. 363.

64. Ark.—Carter v. St. Louis-San Francisco Ry. Co., 18 S.W.2d 376, 179 Ark. 865.
Mo.—Kemper Mill & Elevator Co. v. Hines, 239 S.W. 803, 293 Mo. 88.

Consignee could orally require carrier to deliver shipment to another person.—Carter v. St. Louis-San Francisco Ry. Co., 18 S.W.2d 376, 179 Ark. 865.

65. U.S.—City Nat. Bank of El Paso, Tex., v. El Paso & N. E. R. Co., 43 S.Ct. 640, 262 U.S. 695, 67 L.Ed. 1184, affirming, Tex.Civ.App., 225 S.W. 391, certiorari granted 42 S.Ct. 461, 258 U.S. 616, 66 L.Ed. 792.
Ill.—Pontiac Refining Co. v. Railway Express Agency, 282 Ill.App. 242.
La.—Erskine Williams Lumber Co. v. John I. Hay & Co., App., 160 So. 650.
Mass.—Philadelphia Tapestry Mills v. New England S. S. Co., 146 N.E. 777, 251 Mass. 270.
10 C.J. p. 261 note 47.

66. U.S.—Estherville Produce Co. v. Chicago, R. I. & P. R. Co., C.C.A. Iowa, 57 F.2d 50.
La.—Erskine Williams Lumber Co. v. John I. Hay & Co., App., 160 So. 650.
Mass.—Claflin v. Boston, etc., R. Co., 7 Allen 341.

Corpus Juris is cited in Estherville Produce Co. v. Chicago, R. I. & P. R. Co., C.C.A.Iowa, 57 F.2d 50, 52, as an authority for the rule stated in the text.

Facts not showing notice to carrier
Where lumber was consigned by consignor to itself in care of third person whose name appeared on bill of lading under words "Mail or street address of the consignee—for purpose of notification only," and lumber was delivered by carrier to third person in accordance with custom, position of third person's name on bill of lading did not give carrier notice that delivery was to be made to consignee only, and carrier was not liable to consignor for delivery to third person.—Erskine Williams Lumber Co. v. John I. Hay & Co., La.App., 160 So. 650.

67. Ind.—United States Express Co. v. Hammer, 51 N.E. 953, 21 Ind.App. 186.
N.Y.—Mayer v. Southern Pac. Co., 159 N.Y.S. 93, 95 Misc. 498.

68. N.Y.—Mayer v. Southern Pac. Co., supra.

69. Ga.—Fitzsimmons v. Southern Express Co., 40 Ga. 330, 2 Am.R. 577.
10 C.J. p. 261 note 49.

"But such determination must proceed upon the ground of a tacit understanding between the parties that the carrier's agent was to become the agent of the owner for the receipt of the goods."—Bennett v. Northern Pac. Express Co., 6 P. 160, 169, 12 Or. 49.

70. N.Y.—Russell v. Livingston, 16 N.Y. 515, reversing 19 Barb. 646.

71. Ala.—Young v. The East Alabama Ry. Co., 80 Ala. 100.
Ariz.—Wells Fargo & Co., Express, S.A. v. Tribolet, 50 P.2d 878
Minn.—Weinstein v. Davis, 196 N.W. 933, 158 Minn. 44—Banik v. Chicago, M. & St. P. Ry. Co., 179 N.W. 899, 147 Minn. 175.
Miss.—Abasi Bros. v. Louisville & N. R. Co., 76 So. 665, 115 Miss. 803, L.R.A.1918B 652, sustaining suggestion of error 75 So. 756, 115 Miss. 149.
Mo.—Turner Lumber & Investment Co. v. Chicago, R. I. & P. Ry. Co., 16 S.W.2d 705, 223 Mo.App. 564
Nev.—Dixon v. Southern Pac. Co.,

signor, consignee, or holder of the bill of lading,[72] if the carrier has no notice of any fraud on the part of such owner in obtaining title to the goods,[73] and in doing so the carrier does not render itself liable to one who, having fraudulently or otherwise unlawfully obtained possession of them, has delivered them to the carrier for transportation.[74] This is in accordance with the general principle of the law of bailments, as stated in the C.J.S. title Bailments § 38 a, also 6 C.J. p 1110 note 18, by which the bailee is not answerable to the bailor where the bailee has performed his legal duty by delivering the goods to the true owner—a principle which is especially applicable to common carriers who must carry for all who offer.[75] In order to justify delivery to the true owner contrary to, or without, the shipper's orders, the carrier assumes the burden of proving the ownership of the person to whom delivery was made,[76] although there are decisions to the contrary.[77] There is, however, no rule requiring the carrier to give notice to the bailor of such delivery.[78] It is generally held that the real owner may maintain an action against the carrier for refusal to deliver goods to which he is entitled,[79] and it constitutes no defense that the carrier refused to recognize his title and right and delivered the property in accordance with the shipment.[80] However, to authorize the maintenance of such an action by a third person, he must have intervened before delivery of the goods and demanded them, and have given notice of his right to the property and of his intention to enforce it.[81] As the carrier cannot set up the right of a third person who has made no demand for the goods as an excuse for not delivering them to the person entitled thereto under the contract of shipment,[82] so the carrier may, without liability to the true owner, deliver, pursuant to the contract of shipment, goods received from one not rightfully entitled to possession, if such delivery is made without notice of the rights of the true owner.[83]

f. Indemnity to Carrier

Under some statutes a bond may be given by one to whom the goods are wrongfully delivered, to indemnify the carrier against liability for misdelivery, and the car-

177 P 14, 42 Nev. 73, L.R.A.1918D 960, affirming 172 P. 368, 42 Nev. 73, L.R.A.1918D 960.
N.Y.—Miller v. New York Cent. R. R., 200 N.Y.S. 287, 205 App.Div. 663
10 C.J. p 261 note 51.

Corpus Juris has been cited in support of this statement in:
Ariz.—Wells Fargo & Co., Express, S. A. v. Tribolet, 50 P.2d 878, 882.
Ky.—Louisville & N. R. Co. v. Hensley, 35 S.W.2d 279, 237 Ky. 224.
Minn.—Banik v. Chicago, M. & St. P. Ry. Co., 179 N.W. 899, 901, 147 Minn. 175.
Mo.—Turner Lumber & Inv. Co. v. Chicago, R. I. & P. Ry. Co., 34 S.W.2d 1009.

At carrier's peril
Carrier generally acts at peril when dealing with shipment as directed by stranger to bill of lading. —Louisville & N. R. Co. v. Hensley, 35 S.W.2d 279, 237 Ky. 224.

Conflicting claims to property
Where freight in railroad's possession for shipment is claimed by different parties, it must be delivered to true owner entitled thereto, and delivery to him is a complete defense to an action of conversion—Jones v. Chicago, B. & Q. R. Co., 170 N.W. 170, 102 Neb. 853.

72. Mo.—Turner Lumber & Inv. Co. v. Chicago, R. I. & P. Ry. Co., 16 S.W.2d 705, 223 Mo.App. 564.
10 C.J. p 261 note 52.

73. U.S.—Chicago, M., St. P. & P. R. Co. v. Flanders, C.C.A.Iowa, 56 F.2d 114

74. Minn.—Banik v. Chicago, M. & St. P. Ry. Co., 179 N.W. 899, 147 Minn. 175.
Miss.—Abasi Bros. v. Louisville & N. R. Co., 76 So. 665, 115 Miss. 803, L.R.A.1918B 652, sustaining suggestion of error 75 So. 756, 115 Miss. 149.
10 C.J. p 261 note 53.

Corpus Juris has been cited in support of this rule in Banik v. Chicago, M. & St. P. Ry. Co., 179 N.W. 899, 901, 147 Minn. 175.

75. La.—Harwood-Barley Mfg. Co. v. Illinois Cent. R. Co., 74 So. 569, 141 La. 1.
N.J.—Paul v. Pennsylvania R. Co., 57 A. 139, 70 N.J.Law 442.
"Presumptively the bailor or shipper is entitled to the property as against the carrier, and the authorities hold also that the bailee cannot himself hold the property by setting up title in a third person. But this rule has no application when the carrier yields to the paramount claim or title of the true owner."—Abasi Bros. v. Louisville & N.R. Co., 76 So. 665, 115 Miss. 803, 810, L.R.A. 1918B 652, sustaining suggestion of error 75 So. 756, 115 Miss. 149.

76. Ala.—Young v. The East Alabama Ry. Co., 80 Ala. 100.
Miss.—Abasi Bros. v. Louisville & N.R. Co., 76 So. 665, 115 Miss. 803, L.R.A.1918B 652, sustaining suggestion of error 75 So. 756, 115 Miss. 149.
10 C.J. p 262 note 55.

77. S.C.—Kohn v. Richmond & D. R. Co., 16 S.E. 376, 37 S.C. 1, 34 Am. S.R. 726, 24 L.R.A. 100.
Wash.—Switzler v. Northern Pac. R. Co., 88 P. 137, 45 Wash. 221, 122 Am.S.R. 892, 12 L.R.A.,N.S., 254, 13 Ann.Cas. 357.

78. Minn.—Thomas v. Northern Pac. Express Co., 75 N.W. 1120, 73 Minn. 185.

State is owner of game unlawfully killed, and when such game is delivered to a carrier for shipment by one not entitled to the possession of the game, the carrier, on delivering the game to the state, is not bound to give notice to the consignor—Thomas v. Northern Pac. Express Co., 75 N.W. 1120, 73 Minn. 185.

79. Neb.—Shellenberg v. Fremont, E. & M. V. R. Co., 63 N.W. 859, 45 Neb. 487, 50 Am.S.R. 561.
W.Va.—Smith v. Linden Oil Co., 71 S.E. 167, 69 W.Va. 57.
10 C.J. p 262 note 57.

80. Ga.—Georgia R., etc., Co. v. Haas, 56 S.E. 313, 127 Ga. 187, 119 Am.S.R. 327, 9 Ann.Cas. 677.

81. Ga.—Shellnut v. Central of Georgia R. Co., 62 S.E. 294, 131 Ga. 404, 407, 18 L.R.A.,N.S., 494.

82. U.S.—Rosenfield v. Express Co., C.C.La., 20 F.Cas.No.12,060, 1 Woods 131.
10 C.J. p 262 note 60.

83. Mo.—Robert C. White Live Stock Commission Co. v. Chicago, M. & St. P. Ry. Co., 87 Mo.App. 330.
10 C.J. p 262 note 60.

rier may sue on such bond where he has suffered loss; but in the absence of statute, a carrier cannot, by taking security from a purchaser to whom the goods were wrongfully delivered, compel the shipper to whose order the goods were consigned to look to such purchaser for payment of the price.

Under some statutes, where delivery of the goods in the carrier's possession may not rightfully be made without the production and surrender of the bill of lading, the carrier is, nevertheless, authorized to make delivery without the production of the bill, on receiving security against loss from the person to whom delivery is made.[84] When a bond given by the person to whom delivery is wrongfully made without production of the bill of lading is conditioned on the subsequent production of the bill, it is not enforceable after the carrier retakes possession of the goods.[85] The fact that the carrier would not deliver an interstate shipment to one to whom it was invoiced unless he executed an indemnity bond is a sufficient consideration for the bond;[86] and, where the carrier has responded in damages to the real owner of the property, it may maintain an action on the bond,[87] without tendering back the freight charges paid.[88] Neither the bringing nor the dismissal of an attachment by the person to whom the goods were delivered constituted a tender back of the goods, so as to affect the carrier's right to recover on the bond.[89] In the absence of statute, a carrier cannot, it has been held, relieve itself of liability for delivering goods shipped under an order bill of lading without the production and surrender of the bill, by taking an indemnity bond in lieu of the bill.[90]

84. Federal Bills of Lading Act

(1) Under Federal Bills of Lading Act, 49 USCA § 94, providing in effect that the court may order delivery of goods shipped under an order bill of lading without production and surrender of the bill of lading, on proof of the loss, theft, or destruction of the bill, and on giving the carrier a bond to protect it against loss incurred by reason of the original bill remaining outstanding, such bonds are valid.—Northwestern Casualty & Surety Co. v Illinois Cent. R. Co, CCA Ill., 19 F 2d 868.

(2) The words "lost, stolen, or destroyed" should be broadly construed to include any circumstance whereunder, for the time being, the bill of lading is in effect lost to the owner.—Northwestern Casualty & Surety Co. v. Illinois Cent. R. Co., supra.

(3) Under such Act, in event of loss of order bill of lading, carrier could only deliver interstate shipment on order of court and execution of bond—Orange Nat. Bank v. Southern Pac Co., 110 So. 329, 162 La. 223, 56 A.L.R. 1167.

In Arkansas

(1) Where the parties intended a bond securing carrier in delivering freight without bill of lading to be drawn under Crawford & Moses' Dig. § 973, providing for such bond, the court presumes the amount is double the value of the goods as required.—Kansas City Southern Ry. Co v. U S Fidelity & Guaranty Co, 295 S W. 705, 174 Ark. 318.

(2) Provisions of the bond will be construed most strongly against surety which was author thereof.—Kansas City Southern Ry. Co. v. U. S Fidelity & Guaranty Co, supra.

(3) Provision in bond that no delivery of freight would be "made" where draft with bill of lading was in bank did not require railroad to use diligence to ascertain whether they were in bank.—Kansas City Southern Ry. Co. v. U. S. Fidelity & Guaranty Co., supra.

(4) Bond indemnifying carrier against losses from deliveries without surrender of order bill of lading, on written order stating bill of lading had been lost or delayed, did not cover a case where goods were delivered without written order—St. Louis Southwestern Ry Co. v Cook-Bahlau Feed Mfg Co, 58 S.W 2d 428, 187 Ark. 106.

85. US—Russo v. Davis, C.C.A Ill, 285 F. 231.

86. Mo—Chicago, B & Q. R Co. v Vanden-Boom, App, 30 S.W 2d 186

87. Ga—Draper v Georgia, F. & A. Ry Co., 95 S E. 16, 21 Ga App 707, error dismissed 39 S.Ct. 132, 248 U S. 539, 63 L Ed 410.
Mo—Chicago, B & Q R Co v. Vanden-Boom, App., 30 S W 2d 186.
Tex—Latimer v. Texas & N. O R Co, Civ App., 56 S.W.2d 933, error refused.
Wis.—Chicago, St P., M. & O Ry Co. v. McDougald, 199 N W. 68, 184 Wis. 227.

Sufficiency of petition

(1) Allegations of petition in interstate carrier's action against surety on consignee's bond to recover amount of judgment paid to consignor "order notify" consignee was not demurrable on ground that they showed a rescission of the delivery made under contract between carrier and consignee.—Draper v. Georgia, F. & A. Ry. Co, 95 S E. 16, 21 Ga App 707, error dismissed 39 S. Ct. 132, 248 U S. 539, 63 L Ed. 410

(2) Petition on bond given to protect railroad delivering goods without bill of lading was sufficient without alleging bill of lading was produced, and that railroad thereby suffered damages.—Latimer v. Texas & N O. R Co, Tex Civ.App., 56 S.W 2d 933, error refused.

Directed verdict for carrier

In interstate carrier's action against surety on consignee's bond to recover amount of judgment paid to consignor "order notify" consignee, where there was no evidence that an unlawful preference had been extended to consignee or surety by contract as to delivery, a directed verdict for carrier was not error.—Draper v. Georgia F. & A Ry Co, 95 S.E. 16, 21 Ga App. 707, error dismissed 39 S.Ct. 132, 248 U S. 539, 63 L Ed. 410

Damages

One receiving a shipment of automobiles, without delivering bill of lading covering same, who gave bond to indemnify carrier against possible damage, was liable to carrier for depreciation in value of one car which he allowed to be used pursuant to supposed sale, when carrier demanded redelivery of same—Chicago, St P, M & O. Ry. Co v McDougald, 199 N.W. 68, 184 Wis. 227.

88. Mo—Chicago, B & Q R Co. v. Vanden-Boom, App, 30 S.W 2d 186.

89. Mo.—Chicago, B & Q R. Co. v. Vanden-Boom, supra.

90. La—Harwood-Barley Mfg. Co. v. Illinois Cent. R. Co., 74 So 569, 141 La. 1.

"There is no authority in law or reason for the doctrine . . . that a common carrier who receives goods consigned to the order of the shipper, with instructions to notify a certain party at the destination, may deliver the goods to the party so notified, on an indemnity bond from the latter to protect the carrier, and compel the shipper to look to the party to whom the goods were delivered, as the purchaser, for the payment of the price or value of the goods."—Harwood-Barley Mfg. Co. v.

§ 173. Delivery to Wrong Person

The carrier ordinarily has a right of action for recovery of goods or their value, where they have been delivered to the wrong person through mistake, fraud, or otherwise, on refunding the freight charges paid by the receiver. A demand is not necessary before maintaining the action unless the misdelivery was due solely to the carrier's mistake, without fraud on the part of the receiver.

Where through mistake, fraud, or otherwise the carrier has been induced to deliver goods to a person not entitled thereto, and he refuses to return them, the carrier may maintain an action against him for the recovery of the goods[91] or for their value;[92] and it is no defense to an action of trover that a consignee receiving goods shipped under an order bill of lading, without surrender of the bill, believed that his receipt of the goods was justified because of the carrier's surrender of its actual possession.[93] Suit may be brought for the value of the goods without averment and proof of an assignment of his interest to the carrier by the person entitled to the goods,[94] and, a fortiori, may the carrier maintain such action where it has taken an assignment from such person of his interest.[95] Where the carrier brings an action for conversion, and also on an assignment of the shipper's right of action, plaintiff's right of recovery in the action for conversion is not affected by the fact that he did not have the assignment at the time of bringing the action, nor have title to the goods at the time of

Illinois Cent. R. Co., 74 So. 569, 574, 141 La. 1.

Defenses

In shipper's action on the bill of lading for value of goods delivered by carrier to one not entitled to receive them without surrendering bill of lading, carrier and warrantors on indemnity bond, who did not object to being called on to defend the action, could not inject into suit as defense to the main action the complaints of purchaser of goods against shipper.—Harwood-Barley Mfg. Co. v. Illinois Cent. R. Co., 74 So. 569, 141 La. 1.

91. Ala.—Farmers' Cotton Oil Co. v. Atlanta & St. A. B. Ry. Co., 79 So. 387, 202 Ala. 40.

Ark.—Missouri Pac. R. Co. v. Bland, 268 S.W. 22.

Tenn.—A. Greener & Sons v. Southern Ry. Co., 290 S.W. 988, 155 Tenn. 486.

10 C.J. p 268 note 3.

Corpus Juris is cited in Missouri Pac. R. Co. v. Bland, 268 S.W. 22, 24, as stating correct principles of law in regard to the carrier's right of recovery

Delivering carrier

Carrier delivering shipment to within mile of destination rather than railway which switched the goods the final mile was the delivering carrier entitled to maintain replevin against party wrongfully receiving the goods.—Chicago, R. I. & P. R. Co. v. North American Cold Storage Co., 244 Ill.App. 522.

92. Ala.—Farmers' Cotton Oil Co. v. Atlanta & St. A. B. Ry. Co., 79 So. 387, 202 Ala. 46.

Ark.—Missouri Pac. R. Co. v. Bland, 268 S.W. 22.

Ga.—American Ry. Express Co. v. Willis, 111 S.E. 580, 28 Ga.App. 430.

Ind.—Michigan Cent. R. Co. v. State, 155 N.E. 50, 85 Ind.App. 557.

La.—Louisiana Ry. & Nav. Co. v. Copellar, 2 La.App. 34.

Mass.—New York Cent. R. Co. v. Freedman, 133 N.E. 101, 240 Mass. 200.

Mich.—In re Hayes Mfg. Co., 214 N.W. 102, 239 Mich. 247.

N.Y.—Pennsylvania R. R. v. Tozzi, 207 N.Y.S. 16, 124 Misc. 310.

Pa.—Pennsylvania Railroad Co. v. Edson Bros., 92 Pa.Super. 496.

Tenn.—A. Greener & Sons v. Southern Ry. Co., 290 S.W. 988, 155 Tenn. 486.

10 C.J. p 268 note 4.

Corpus Juris is cited in In re Hayes Mfg. Co., 214 N.W. 102, 239 Mich. 247, and Pennsylvania R. R. v. Tozzi, 207 N.Y.S. 16, 18, 124 Misc. 310, as sustaining the rule stated in this note.

Delivery without surrender of bill of lading

(1) Where a bill of lading required its surrender before delivery of the property, the delivering carrier, although the freight and demurrage charges had been paid, had such right of possession as bailee or agent as would support an action of trover against one obtaining possession without surrendering the bill.—New York Cent. R. Co. v. Freedman, 133 N.E. 101, 240 Mass. 200.

(2) If a consignee of goods knew that he was not entitled to possession without surrendering the bill of lading and that the carrier could not deliver the goods without a breach of its obligation to the shipper, and took possession knowing that the delivery was unauthorized and would not have been made except for an innocent mistake of fact, a verdict against him for conversion was justified.—New York Cent. R. Co. v. Freedman, supra.

Estoppel

(1) In determining whether carrier, in delivering an interstate shipment without requiring surrender of order bill of lading, was estopped to maintain an action against consignee for value of goods, court was required, not only to consider bill of lading as evidence of contract, but carrier's tariffs and orders of interstate commerce commission.—Norfolk Southern R. Co. v. Armfield, 127 S.E. 557, 189 N.C. 581.

(2) If carrier's agent released shipment under order bill of lading without demand thereof, neither title nor right of possession to shipment vested in consignee, and unlawful delivery thereof did not estop carrier to maintain an action against consignee for value of shipment, whether asserting its possessory right as bailee, or its title to property under an assignment of bill of lading.—Norfolk Southern R. Co. v. Armfield, supra.

Recoupment; instructions

In a carrier's action on an assignment of the shipper's claim for the purchase price against the consignee who had obtained possession without surrendering the bill of lading, evidence that lamps were broken when received did not require an abstract instruction as to defendant's right to recoupment, where the nature of the breakage or whether it diminished the value of the lamps was not shown.—New York Cent. R. Co. v. Freedman, 133 N.E. 101, 240 Mass. 200.

93. Mass.—New York Cent. R. Co. v. Freedman, supra.

94. Miss.—Johnson v. Gulf, etc., R. Co., 34 So. 357, 82 Miss. 452.

95. Miss.—Johnson v. Gulf, etc., R. Co., supra.

Transfer of bill of lading

If carrier's agent delivered shipment, made under order bill of lading, without demanding bill of lading, carrier, after taking transfer thereof from shipper, had cause of action in contract against consignee, and without bill of lading had cause of action against consignee for conversion.—Norfolk Southern R. Co. v. Armfield, 127 S.E. 557, 189 N.C. 581.

its conversion.[96] If the carrier after delivery to the wrong person on demand pays the consignee their full value, it may recover from such person the money so paid as paid to his use,[97] provided the delivery was by mistake,[98] and provided there are no other circumstances estopping the carrier.[99] So, where a carrier has delivered goods shipped under an "order notify" bill of lading to the person to be notified, without surrender of the bill or payment of the draft attached thereto, the carrier is entitled, after making good to the shipper, to recover from the person to be notified,[1] or from one who purchased the goods from him with notice of the outstanding bill,[2] the amount so paid; and the notify consignee, if he desires to escape payment on the ground that the shipment was too late, must prove that the delay was caused by the shipper or carrier.[3] The carrier may even recover against the innocent holder of a false bill of lading to whom it has delivered the property. This is on the principle that, where one of two innocent parties must suffer, that one by whose act the loss was occasioned must bear it.[4] So a carrier who delivers goods on a forged order can recover their value after fully accounting to the consignee from warehousemen to whom they were delivered by the fraudulent recipient for a valuable consideration, and by whom they were sold without knowledge of the fraud to other parties, the maxim of caveat emptor being applicable to such sale.[5] On the other hand, it has been held that a carrier who has negligently delivered goods to a vendee of the shipper without collecting the purchase money as should have been done, or without requiring the production of the bill of lading, cannot recover them from a bona fide purchaser of the vendee.[6] Where a statute requires actions to be prosecuted by the real party in interest, a private carrier who fails to retain possession of the goods until payment of the price, but delivers them unconditionally, cannot, as agent to collect, maintain an action in his own name to recover possession of the goods and so remedy his own default.[7] A carrier negligently delivering the goods to the wrong person, who accepts and uses them, and subsequently pays the consignor the full purchase price, cannot maintain trover against the person so receiving the goods.[8] It has been held that, notwithstanding the courts of one state have compelled the carrier to pay the consignor the value of goods on the ground that they had been misdeliv-

96. Mass.—New York Cent. R. Co. v. Freedman, 133 N.E. 101, 240 Mass. 200.

97. Ark.—Missouri Pac. R. Co. v. Bland, 268 S.W. 22.

98. Ark.—Missouri Pac. R. Co. v. Bland, supra.

N.Y.—Long Island R. Co. v. Structural Concrete Co., 110 N.Y.S. 379, 59 Misc. 167.

Allegation necessary

Allegation and proof of carrier, in action against one to whom it had misdelivered goods, did not warrant recovery, in absence of showing of mistake or fraud, or authority by shipper to bring suit.—Lancaster v. Boston Store, Tex.Civ.App., 282 S.W. 605.

What is not a delivery by mistake

Defendant purchased a car of cement, and the car was billed to the consignor with directions to notify defendant of its arrival. On its arrival plaintiff notified defendant, the notice stating that a bill of lading or a written order must accompany the notice to obtain the goods. The car was placed on a siding where defendant had received previous cars, and it appeared that plaintiff's agent had received bills of lading on some of the previous shipments before delivering the cars to the siding, and in other cases had not. Defendant paid the freight on the car and unloaded it, and subsequently the consignor to whom the car was billed demanded it from plaintiff who being unable to deliver the contents paid the value thereof and brought action against defendant for conversion of the cement. It was held that, plaintiff having intentionally delivered the car to defendant who received it in good faith and paid the freight thereon and paid for the cement to the person from whom he purchased, there was not a delivery by mistake in the usual acceptance of that term, and plaintiff could not recover.—Long Island R. Co. v. Structural Concrete Co., 110 N.Y.S. 379, 59 Misc. 167.

99. **Innocent brokers**

Where defendant grain brokers and plaintiff carrier unintentionally and innocently converted grain shipped, and where the carrier paid the owners of the grain therefor and took from them an assignment of the grain and cause of action and instituted this suit, defendants could set up the defense that, as between them and the carrier, it could not purchase and assert the claim of the shippers, since it committed the first act in the conversion of the grain, out of which grew the connection of defendants with the transaction.—Greer v. Equity Co-operative Exchange, 163 N.W. 527, 137 Minn. 300, L.R.A.1917F, 440.

Evidence admissible

In suit for conversion of car of wheat, brought by assignee of shipper, evidence that plaintiff had no interest in assignment of cause of action, but that railroad had paid shipper, and taken assignment for its own benefit, and brought action thereon, was admissible.—Greer v. Equity Co-operative Exchange, 163 N.W. 527, 137 Minn. 300, L.R.A.1917F 440.

1. La.—Louisiana Ry. & Nav. Co. v. Copellar, 2 La.App. 34.

2. Mich.—In re Hayes Mfg. Co., 214 N.W. 102, 239 Mich. 247.

3. La.—Louisiana Ry. & Nav. Co. v. Copellar, 2 La.App. 34.

4. Tenn.—Louisville, etc., R. Co. v. McKay, 182 S.W. 585, 133 Tenn. 503.

5. Tex.—Gulf, etc., R. Co. v. Taylor, 45 S.W. 749, 18 Tex.Civ.App. 571

6. Kan.—Chicago Great Western R. Co. v. Lowry, 239 P. 758, 119 Kan. 336.

N.C.—Norfolk Southern R. Co. v. Barnes, 10 S.E. 83, 104 N.C. 25, 5 L.R.A. 611.

Corpus Juris is quoted in Chicago Great Western R. Co. v. Lowry, 239 P. 758, 759, 119 Kan. 336, as sustaining this rule stated in the text

7. Wis.—Madden Bros. v. Jacobs, 235 N.W. 780, 204 Wis. 376

Unconditional delivery is presumed where there is nothing to show that goods were delivered otherwise than unconditionally.—Madden Bros. v. Jacobs, 235 N.W. 780, 204 Wis. 376.

8. Ala.—Farmers' Cotton Oil Co. v. Atlanta & St. A. B. Ry. Co., 79 So. 387, 202 Ala. 40.

ered, the carrier will not be permitted to recover from the person to whom the goods were delivered the value of the goods in the courts of another state which take the view that there was no misdelivery.[9] The receivers of goods delivered to them by mistake are entitled to prompt notice from the carrier whether it will elect to take the value of the goods or take back such goods, and on failure of the carrier to make its election within a reasonable time, the right of election passes to the receivers of the goods; and if, before discovering the mistake, they had used them in their business, they could discharge their obligations to the carrier by tendering an equal quantity of goods of the same grade.[10]

Demand and offer to refund charges paid. A demand is not a necessary condition precedent to an action against the receiver of the goods who knew that delivery to him was unauthorized;[11] but, where the misdelivery was due solely to the carrier's mistake, without fraud on the part of the receiver, it must demand possession of the goods before maintaining an action in detinue or trover.[12] To entitle the carrier to maintain an action to recover the property or its value it must refund or offer to refund the amount paid to it as freight charges,[13] and such charges may be allowed as a set-off against the carrier's claim;[14] but the refunding of the charges as a condition of maintaining the action may be waived.[15]

§ 174. Liability of Carrier as Such

a. In general
b. Mistake or fraud
c. Matters excusing misdelivery or affecting liability
d. Actions other than for conversion

a. In General

A delivery of goods to a person not entitled thereto constitutes a conversion and renders the carrier liable to the consignor or person entitled to possession of the goods for their value.

A carrier wrongfully delivering goods to a person not entitled to receive them is ordinarily liable to the shipper or person entitled to their possession, for the value of the goods[16] unless the misconduct

9. Pa.—Philadelphia, etc., R. Co. v. Wireman, 88 Pa. 264.

10. U S—Atlantic Coast Line R. Co v. Hollowell, C C.A S C., 2 F 2d 674

No attention will be paid to identity in passing on legal rights and obligations arising out of mistakes in delivery of a standardized commodity and their rectification—Atlantic Coast Line R Co. v. Hollowell, C.C A S C., 2 F 2d 674.

11. Ala—Farmers' Cotton Oil Co v. Atlanta & St. A. B Ry Co., 79 So. 387, 202 Ala. 40
Mass—New York Cent. R. Co. v. Freedman, 133 N E 101, 240 Mass 200.
Mich—In re Hayes Mfg. Co., 214 N W 102, 239 Mich 247.

12. Ala.—Farmers' Cotton Oil Co. v. Atlanta & St A B. Ry. Co, 79 So 387, 202 Ala 40.

13. Ala—Farmers' Cotton Oil Co. v. Atlanta & St. A B Ry Co, 79 So. 387, 202 Ala. 40—Walker v. Louisville, etc, R Co, 20 So. 358, 111 Ala 233.
N Y—Pennsylvania R R v. Tozzi, 207 N Y S 16, 124 Misc 310—Long Island R. Co v Structural Concrete Co., 110 N.Y S. 379, 59 Misc. 167.

Where carrier's misdelivery was due solely to its own mistake, it must offer to return freight or other charges before suing in detinue or trover.—Farmers' Cotton Oil Co. v. Atlanta & St. A. B. Ry. Co., 79 So. 387, 202 Ala. 40.

14. Mich—In re Hayes Mfg. Co, 214 N.W. 102, 239 Mich. 247.

15. Tenn—A. Greener & Sons- v Southern Ry. Co., 290 S W. 988, 155 Tenn. 486.

What constitutes waiver
Defendants waived condition that carrier must refund freight charges before suing for goods delivered to wrong person, when defense was that goods were not received.—A. Greener & Sons v. Southern Ry. Co., 290 S W. 988, 155 Tenn. 486.

16. U.S—American Ry Express Co v. U. S, 62 Ct Cl 615, certiorari denied 47 S Ct. 455, 273 U S. 750, 71 L Ed. 873.
Fla.—Atlantic Coast Line R Co. v. Roe, 109 So. 205, 91 Fla. 762.
Ill.—Babbitt v. Grand Trunk Western Ry. Co, 120 N E 803, 285 Ill. 267, affirming 209 Ill App 183
La—R B. George Machinery Co. v. New Orleans, T & M R. Co, 119 So. 432, 167 La 474, reversing on other ground 119 So 473, 9 La App 302—C H Rice & Son v. Payne, 92 So. 395, 151 La 949.
Mass—Myers v American Ry Express Co, 137 N E. 654, 243 Mass. 390
Mich—First Nat. Bank v. Grand Rapids & I. Ry. Co, 161 N W. 859, 195 Mich 1.
Mo—Vogel v. St Louis Merchants' Bridge Terminal Ry. Co., App, 16 S W.2d 624.
N.Y.—Barr & Shoulberg v. Yellow Taxi Corporation, 273 N Y.S. 754, 152 Misc 293, affirming 265 N.Y.S. 754, 148 Misc. 855.
Okl.—Turner Oklahoma Co v. Yellow Cab & Baggage Co, 269 P. 1082, 132 Okl 134.
Pa—Freedman v. George W Bush & Sons Co, 130 A 263, 284 Pa 16—Utley v. Lehigh Valley R Co, 89 Pa Super. 599, reversed on another ground 141 A 53, 292 Pa. 251—Eberbach v. Clyde S. S. Co., 74 Pa Super. 79
Vt.—L Kommel & Son v Champlain Transp. Co., 105 A. 253, 93 Vt. 1, 2 A L R 275.
Wash—Getchell v Northern Pac. R. Co, 187 P. 707, 110 Wash. 66.

Delivery to another carrier
A railroad, which undertook to carry cotton and to deliver it to the shipper at destination, but did not perform the contract, claiming that it delivered the shipper's cotton to another railroad at destination, is liable to the shipper for the whole loss, for failure to deliver to him.—Barwick v. Northwestern R Co. for South Carolina, 104 S.E. 545, 115 S.C 123.

Shipper may abandon the shipment and hold carrier for the price where carrier delivers goods without payment of draft attached to bill of lading—Dyer v. Atlantic Coast Line R. Co., Mo App, 186 S.W. 529.

Under federal Bills of Lading Act
(1) A carrier is liable, where it delivers goods to one who is not lawfully entitled to the possession of them, to any one having a right of property or possession in the goods if it delivers the property otherwise than as authorized under

or negligence of the shipper or person entitled to the goods induced the misdelivery, as stated in subdivision c (3) infra of this section. Such wrongful delivery constitutes a conversion,[17] rendering it

the provisions of the law or where it delivers to one authorized under the law after it has been requested by some person having a right of property not to make such delivery or had information at the time of the delivery that it was to a person not entitled to the possession —Teller & Co. v. American Railway Express Co., 78 Pa Super. 300.

(2) A carrier delivering to consignee in straight bill, after receipt of instructions from one having right of property or possession not to deliver to such consignee, is liable to person so instructing.

U S —In re Taub, C C A.N.Y., 7 F. 2d 447.

Fla.—Atlantic Coast Line R. Co. v. Roe, 109 So. 205, 91 Fla. 762.

Mont —Grover v. Hines, 213 P. 250, 66 Mont. 230.

(3) To render interstate carrier liable for wrongful delivery to consignee named in straight bill of lading, timely request not to make delivery must be made to carrier's officer or agent actual or apparent scope of whose duties includes action thereon.

Fla.—Atlantic Coast Line R. Co. v. Roe, supra.

Mo —Dock & Mill Co. v Southern Ry. Co, App., 23 S W.2d 202.

Test of liability for negligent misdelivery

When freight has been received by a carrier for shipment, it becomes the property of the consignee or holder of the bill of lading, and its value to him is the test of the liability of the railroad company for negligence in case of misdelivery, and, although the bill of lading be not regarded technically as a stipulation pour autrui, the carrier is bound not to cause loss to the consignee by its negligence —C. H. Rice & Sons v. Payne, 92 So. 395, 151 La. 949.

Unpaid seller

Carrier was not liable to seller loading car, for breach of contract to withhold delivery, where buyer, who had not made payment, ordered car and gave shipping instructions. Under such circumstances, the carrier incurred no liability in tort to seller, although station agent attempted to detain car pending payment.—Wirch v. Chicago, M. & St. P. Ry. Co., 222 N.W. 232, 197 Wis 316.

17. U S —Esthervllle Produce Co. v Chicago, R. I. & P. R Co., C.C.A. Iowa, 57 F 2d 50—New York & P R. S S. Co. v. McGowin Lumber & Export Co., C C A Porto Rico, 284 F 513—Payne v Card, C C.A Wyo., 275 F. 26—New York Cent. & H. R R Co. v. Bank of Holly Springs, C.C Miss., 236 F. 562, modified on other grounds 195 F. 456, 115 C C. A. 358.

Ala.—Southern Ry. Co. v. Harris, 80 So 101, 202 Ala 263—Louisville, etc, R. Co. v. Barkhouse, 13 So 534, 100 Ala 543—Davis v. Hines, 85 So. 882, 17 Ala App. 443

Colo —Davis v. Fruita Mercantile Co, 220 P 983, 74 Colo 247

Conn —Interstate Window Glass Co. v. New York, N H & H R Co, 133 A 102, 104 Conn 342

Fla —Atlantic Coast Line R. Co. v. Roe, 109 So 205, 91 Fla 762.

Ga.—Speir & Co v. Atlantic Coast Line R. Co., 140 S.E. 43, 37 Ga App. 283.

Ill.—Pacific Express Co. v. Shearer, 43 N E 816, 160 Ill 215, 52 Am S R. 324, 37 L R A. 177—Merchants' State Bank of Centralia v. Chicago, B & Q R Co, 245 Ill App. 211.

Ind —Vandalia R. Co v Upson Nut Co, 101 N.E. 114 55 Ind App 252

Iowa —Keota Produce Co. v Chicago, R I. & P R Co, 179 N W. 834, 189 Iowa 1284.

Mass —Keystone Grape Co v. Hustis, 122 N.E 269, 232 Mass. 162—Bowlin v. Nye, 10 Cush. 416

Mo —Turner Lumber & Investment Co v Chicago, R. I & P. Ry. Co, 16 S W 2d 705, 223 Mo.App 564—Wall v. American Ry. Express Co, 272 S.W. 76, 220 Mo App 989—J. L Price Brokerage Co. v. Chicago, R. I. & P. Ry. Co, 230 S W 374, 207 Mo.App 8.

N Y —Price v. Oswego & S R. Co, 50 N.Y. 213, 10 Am R. 475—Koscherak Siphon Bottle Works v. North & East River S. S Co, 239 N Y.S. 351, 135 Misc. 635—Hawkins v. Hoffman, 6 Hill 586, 41 Am. D 767.

N D.—Blaisdell v American Ry Express Co., 220 N W. 634, 56 N D 870

Okl —Shefts Supply v. Fischer, 41 P 2d 902, 171 Okl. 72.

Pa.—Pennsylvania R. Co. v. Edson Bros., 8 Pa.Dist. & Co. 623.

Tex —Jester v. Lancaster, Civ App., 266 S W 1103—Wells Fargo & Co Express v. Pugh, Civ.App, 185 S W. 61.

Va —Norfolk & W Ry. Co v. Aylor, 150 S E. 252, 153 Va 575, certiorari denied 51 S.Ct. 26, 282 U.S 847, 75 L Ed. 751.

10 C.J p 82 note 89, p 262 note 64

Corpus Juris has been quoted in support of this text and the two succeeding text statements.

U. S.—Esthervllle Produce Co v Chicago, R I. & P. R. Co, C.C A. Iowa, 57 F.2d 50, 52.

Mo.—Boone v Missouri Pac. R. Co., App., 263 S.W. 495.

Corpus Juris has been cited in support of this rule.

Ala —Southern Ry Co v Harris, 80 So. 101, 103, 202 Ala 263.

Iowa.—Keota Produce Co. v. Chicago, R I & P. Ry. Co., 179 N W. 834, 835, 189 Iowa 1284.

Mo —J L Price Brokerage Co v. Chicago, R I & P Ry. Co., 230 S W. 374, 377, 207 Mo App 8.

N D —Blaisdell v. American Ry Express Co., 220 N.W. 634, 635, 56 N.D. 870.

Delivery to one owning only half interest

Railroad which delivered entire carload of pipe to one of joint adventurers having half interest therein, contrary to shipper's instructions to deliver only half of shipment to such joint adventurer, held liable, together with joint adventurer, to his coadventurer for conversion —Shefts Supply v. Fischer, 41 P.2d 902, 171 Okl. 72.

Delivery to compress company instead of to consignee

Where a carrier failed to deliver cotton to the consignee, but turned it over to a compress company, retaining such company's ticket, it was liable for loss of the cotton by fire while it was held by the compress company.

Okl.—Wichita Falls & N W Ry Co. v. J J Brown Co., 183 P. 889, 76 Okl 84

Tex —Hines v Jordan, Civ.App, 228 S W. 633, error refused.

Crossing shipments of cattle by mistake

Where railroad company crossed deceased shipper's shipment of cattle with that of another shipper through mistake, the railroad company was liable to the damaged shipper for conversion of the cattle.—Metcalf v Payne, 106 So. 496, 214 Ala. 81.

Acts not constituting conversion

(1) Words "compress at Cameron," typewritten below signature of railroad's agent to bill of lading, were a part of contract for shipment of cotton to Cameron, so that railroad's placing thereof at such compress on arrival, pursuant to general custom, was not conversion, rendering it liable for destruction of cotton by fire before presentation of bill of lading by plaintiff —Gulf, C. & S F. Ry Co. v. Buckholts State Bank, Tex. Com App, 270 S W. 1008, reversing, Civ.App., 258 S W. 491

(2) Where goods sold were consigned to the buyer under bill of lading running to the order of the seller, notify the buyer, and the railroad notified the buyer of arrival, and the buyer telegraphed the seller to wire the railroad to allow exami-

immediately liable, regardless of a subsequent destruction of the goods by act of God,[18] and irrespective of its good faith in making the delivery. No question of care arises, for in such case the carrier acts at its peril and is liable regardless of negligence.[19] Thus a carrier is liable for conversion where it delivers the goods to the consignee with notice that he is not entitled thereto,[20] or, delivers to one not the consignee, on the order of the person in whose care the goods were addressed, but who had no authority to give such order,[21] or changes a consignment billed to the order of the shipper to a straight consignment to the person to be notified,[22] or makes delivery to one not entitled thereto without surrender of the bill of lading.[23] So, where the shipment is made under an "order" or "order notify" bill of lading, a delivery without requiring the surrender of the bill renders the carrier liable to the person entitled to the goods for the value thereof,[24] if due to the failure to take up the

nation of the car, the seller wiring the railroad "Allow examination only," but the customer for whose benefit examination was asked did not take the goods, so that the buyer arranged with a warehouse company for unloading, and requested the railroad to deliver the goods to the warehouse company, which was done by the railroad with specific direction not to deliver without surrender of the original bill of lading, properly indorsed, the goods being received by the warehouse company to the account of the order of the seller, and remaining in storage until destroyed by fire, the railroad, in such delivery to the warehouse company, did not so transfer control of the goods to the buyer as to amount to a conversion giving the seller a right of action.—Booth v. New York Cent. R. Co., 112 A. 894, 95 Vt. 9.

18. U.S.—Esthervllle Produce Co. v. Chicago, R. I. & P. R. Co., C.C.A. Iowa, 57 F.2d 50.
Tex.—Missouri, etc., R. Co. v. Seley, 72 S.W. 89, 31 Tex.Civ.App. 158.

19. U.S.—Esthervllle Produce Co. v. Chicago, R. I. & P. R. Co., C.C.A. Iowa, 57 F.2d 50.
Ill.—Garden City Fan Co. v. Pittsburgh, C., C. & St. L. Ry. Co., 220 Ill.App. 126.
Ind.—Cleveland, etc., R. Co. v. Wright, 58 N.E. 559, 25 Ind.App. 525.
Iowa.—Schlichting v. Chicago, etc., R. Co., 96 N.W. 959, 121 Iowa 502.
Okl.—Turner Okl. Co. v. Yellow Cab & Baggage Co., 269 P. 1082, 1083, 132 Okl. 134.
Tex.—Missouri Iron & Metal Co. v. Texas & P. Ry. Co., Civ.App., 198 S.W. 1067.
Va.—Norfolk & W. Ry. Co. v. Aylor, 150 S.E. 252, 153 Va. 575, certiorari denied 51 S.Ct. 26, 282 U.S. 847, 75 L.Ed. 751.
10 C.J. p 264 note 74.

Corpus Juris is cited to this effect in Turner Okl. Co. v. Yellow Cab & Baggage Co., supra.

Responsibility as carrier

Where, at time of misdelivery of shipment, carrier had not assumed the position of warehouseman, its responsibility was that of carrier.—Fisk Rubber Co. of New York v. New York, N. H. & H. R. R., 132 N.E. 714, 240 Mass. 40.

20. Fla.—Atlantic Coast Line R. Co. v. Roe, 109 So. 205, 91 Fla. 762.
Mo.—Wichita Poultry Co. v. Southern Pac. Ry. Co., 198 S.W. 82, 197 Mo.App. 578
Wis.—Bell v. Chicago & N. W. Ry. Co., 159 N.W. 914, 164 Wis. 277.
10 C.J. p 257 note 14.

21. U.S.—Esthervllle Produce Co. v. Chicago, R. I. & P. R. Co., C.C.A. Iowa, 57 F.2d 50.
Mass.—Claflin v. Boston, etc., R. Co., 7 Allen 341.

22. Mo.—People's State Sav. Bank v. Missouri, etc., R. Co., 178 S.W. 292, 192 Mo.App. 614.

23. Iowa.—Midland Linseed Co. v. American Liquid Fireproofing Co., 166 N.W. 573, 183 Iowa 1046.
Ky.—Louisville & N. R. Co. v. Johnson, 10 S.W.2d 1104, 226 Ky. 322.
Mass.—New York Cent. R. Co. v. Freedman, 133 N.E. 101, 240 Mass. 200.
Pa.—Pennsylvania R. Co. v. Edson Bros., 8 Pa.Dist. & Co. 623.
Tex.—Gulf, C. & S. F. Ry. Co. v. Buckholts State Bank, Civ.App., 258 S.W. 491, 494, reversed on other grounds, Com.App., 270 S.W. 1008.
Utah.—Clarkston First Nat. Bank v. Oregon-Washington R., etc., Co., 136 P. 798, 25 Utah 58.
10 C.J. p 257 note 23.

Corpus Juris is cited in Gulf, C. & S. F. Ry. Co. v. Buckholts State Bank, supra, as authority for this rule.

24. Ill.—Morse-Hubbard Co. v. Michigan Cent. R. Co., 3 N.E.2d 93, 286 Ill.App. 163.
La.—R. B. George Machinery Co. v. New Orleans, T. & M. R. Co., 119 So. 432, 167 La. 474, reversing 119 So. 473, 9 La.App. 302.
Mass.—Keystone Grape Co. v. Hustis, 122 N.E. 269, 232 Mass. 162.
Mich.—First Nat. Bank v. Grand Rapids & I. Ry. Co., 161 N.W. 859, 195 Mich. 1.
Tex.—Davis v. First Nat. Bank of Longview, Civ.App., 245 S.W. 1009.
Va.—Kewanee Private Utilities Co. v. Norfolk Southern R. Co., 88 S.E. 95, 118 Va. 628.
Wash.—National Bank of the Republic v. Hines, 192 P. 899, 112 Wash. 352.
10 C.J. p 259 note 31.

Under federal Bills of Lading Act

(1) A carrier which has issued an order bill of lading is liable to holder thereof for loss which may be sustained as result of delivery of goods represented by bill of lading to any person without production of order bill of lading.—Morse-Hubbard Co. v. Michigan Cent. R. Co., 3 N.E. 2d 93, 286 Ill.App. 163.

(2) Carrier over which two carloads of potatoes were shipped under order bills of lading with drafts attached and its lessee which surrendered one carload of potatoes without presentation of order bill of lading on presentation of paid draft and second carload of potatoes on surrender of order bill of lading without payment of draft was liable to shipper for loss sustained in transaction as against contention that railroads were not liable, since car which had not been paid for was not that which was delivered without surrender of bill of lading.—Morse-Hubbard Co. v. Michigan Cent. R. Co., supra.

Liability to bona fide purchaser of bill of lading

The delivery of goods shipped on order bills of lading within the meaning of U.S.Comp.St. §§ 8604aaa, 8604b, 49 U.S.C.A. §§ 81, 83, to a person who was not a holder of the bills of lading was wrongful without reference to an order for such delivery by the consignee, and entitled a purchaser of the bills of lading for value and in good faith to judgment against the carrier, under U.S.Comp.St. §§ 8604ee, 8604f, 8604p, 49 U.S.C.A. §§ 90, 91, 111, if the claim was presented in time.—Davis v. First Nat. Bank of Longview, Tex.Civ.App., 245 S.W. 1009.

Holder of bill of lading with draft attached

A carrier wrongfully delivered goods shipped under an order bill of lading without requiring its surrender as against a bank which held the bill of lading attached to a draft purchased by it, although merely as collateral for payment of the draft.—National Bank of the Republic v. Hines, 192 P. 899, 112 Wash. 352.

bill.[25] A delivery under such circumstances amounts to a conversion.[26] It has been held, however, that delivery to a compress company, as authorized by bill of lading, was not a conversion rendering the carrier liable for the loss of the goods by fire before presentation of the bill.[27] The carrier is not liable for misdelivery merely because it fails to require the surrender of an order bill of lading,[28] or of a straight bill of lading not marked "nonnegotiable,"[29] unless the carrier's failure to take up the bill was the proximate cause of the loss suffered by the shipper or the innocent holder of the bill. In general, a recovery cannot be had for wrongful delivery without the surrender of the bill of lading,

Remedies of shipper

Where railroad wrongfully delivered goods to purchasers from quasi consignee under shipper's order notify shipment, he having failed to pay drafts and secure bill of lading, shipper had right of action against: First, Purchasers; second, quasi consignee; or third, railroad.—Kewanee Private Utilities Co. v. Norfolk Southern R. Co., 88 S.E. 95, 118 Va. 628.

25. U.S.—Pere Marquette Ry. Co. v. J. F. French & Co., 41 S.Ct. 195, 254 U.S. 538, 65 L.Ed. 391, reversing J. F. French & Co. v. Pere Marquette Ry. Co., 171 N.W. 491, 204 Mich. 578.

Conn.—Interstate Window Glass Co. v. New York, N. H. & H. R. Co., 133 A. 102, 104 Conn. 342.

26. U.S.—Pere Marquette Ry. Co. v. J. F. French & Co., 41 S.Ct. 195, 254 U.S. 538, 65 L.Ed. 391, reversing J. F. French & Co. v. Pere Marquette Ry. Co., 171 N.W. 491, 204 Mich. 578.

Ark.—Missouri Pac. R. Co. v. Myers, 293 S.W. 15, 173 Ark. 747.

Colo.—Davis v. Fruita Mercantile Co., 220 P. 933, 74 Colo. 247

Conn.—Interstate Window Glass Co. v. New York, N. H. & H. R. Co., 133 A. 102, 104 Conn. 342—Alderman Bros. Co. v. New York, N. H. & H. R. Co., 129 A. 47, 102 Conn. 461.

Ga.—George C. Speir & Co. v. Atlantic Coast Line R. Co., 140 S.E. 43, 37 Ga.App. 283—Georgia, etc., R. Co. v. Blish Milling Co., 82 S.E. 784, 15 Ga.App. 142.

Kan.—Farmers' Grain & Supply Co. v. Atchison, T. & S. F. Ry. Co., 245 P. 734, 120 Kan. 21, 121 Kan 10—Bennett v. Dickinson, 186 P. 1005, 106 Kan. 95.

Mass.—Keystone Grape Co. v. Hustis, 122 N.E. 269, 232 Mass. 162

Mich.—Ward v. Pere Marquette Ry. Co., 204 N.W. 120, 231 Mich. 323

Mo.—Barton v. Louisville & N. R. Co., App., 196 S.W. 379—Woolston v. Southern Ry. Co., 160 S.W. 1023, 177 Mo.App. 611.

Ohio.—Pennsylvania R. Co. v. Greenwald Packing Corporation, 157 N.E. 809, 24 Ohio App. 497.

Tex.—Gulf, C. & S. F. Ry. Co. v. Buckholts State Bank, Civ.App., 258 S.W. 491, reversed on other grounds, Com.App., 270 S.W. 1008—Davis v. First Nat. Bank of Longview, Civ.App., 245 S.W. 1009.

Va.—Norfolk & W. Ry. Co. v. Aylor, 150 S.E. 252, 153 Va. 575, certiorari denied 51 S.Ct. 26, 282 U.S. 847, 75 L.Ed. 751

10 C.J. p. 260 note 36, p. 262 note 64.

The Corpus Juris text

(1) Is quoted as supporting this rule.

Ark.—Missouri Pac. R. Co. v. Myers, 293 S.W. 15, 18, 173 Ark. 747.

Kan.—Bennett v. Dickinson, 186 P. 1005, 1007, 106 Kan. 95.

(2) Is cited in support of this rule

Ark.—Missouri Pac. R. Co. v. Bland, 268 S.W. 22, 24, 167 Ark. 390.

Tex.—Gulf, C. & S. F. Ry. Co. v. Buckholts State Bank, Civ.App., 258 S.W. 491, 494.

Rights of bona fide indorsee of bill of lading

Failure of carrier, in delivering interstate shipment under order bill of lading, without production or surrender of the bill, coupled with loss of the goods, constituted a conversion as against a bona fide indorsee of the bill.—Alderman Bros. Co. v. New York, N. H. & H. R. Co., 129 A. 47, 102 Conn. 461.

Joint liability

Carrier and grain dealers, contributing to disposal of grain without surrender of an "order notify" bill of lading or consent of shipper, were jointly and severally liable for conversion.—Farmers' Grain & Supply Co. v. Atchison, T. & S. F. Ry. Co., 245 P. 734, 120 Kan. 21, 121 Kan 10.

27. Tex.—Gulf, C. & S. F. Ry. Co. v. Buckholts State Bank, Com.App., 270 S.W. 1008; reversing, Civ.App., 258 S.W. 491.

28. U.S.—Pere Marquette Ry. Co. v. J. F. French & Co., 41 S.Ct. 195, 254 U.S. 538, 65 L.Ed. 391, reversing J. F. French & Co. v. Pere Marquette Ry. Co., 171 N.W. 491, 204 Mich. 578.

N.Y.—Saugerties Bank v. Delaware & Hudson Co., 141 N.E. 904, 236 N.Y. 425, affirming 198 N.Y.S. 722, 204 App.Div. 211, and reargument denied 142 N.E. 331, 236 N.Y. 675.

Tex.—Hines v. Scott, 248 S.W. 663, 112 Tex. 506

Cause of loss

(1) Where delivery is made to a person who has the bill, or who has authority from the holder of the bill, and the cause of the shipper's loss is not the failure to require surrender of the bill, but the improper acquisition of it by the deliveree, or his improper subsequent conduct, the mere failure to require presentation and surrender of the bill will not make the delivery a conversion.—Pere Marquette R. Co. v. J. F. French & Co., 41 S.Ct. 195, 254 U.S. 538, 65 L.Ed. 391, reversing J. F. French & Co. v. Pere Marquette Ry. Co., 171 N.W. 491, 204 Mich. 578.

(2) Where sellers of potatoes attached the bill of lading to a draft and sold it to a bank, which sent it to another bank for collection of the draft, and such bank delivered the bill of lading without payment of the draft, and the buyers obtained possession without surrendering the bill, and afterwards rejected the potatoes and caused the bill of lading to be returned, the delivery by the carrier without requiring surrender of the bill of lading was not the cause of the shipper's loss, and did not constitute a conversion.—Pere Marquette R. Co. v. J. F. French & Co. supra.

(3) In such case the sellers were under no duty to take back the draft and bill of lading from the bank to which they sold them, as it was the tortious act of such bank's agent that occasioned the damage, and, having assumed the loss in so doing, the sellers could not hold the carrier for technical failure to take up the bill of lading.—Pere Marquette R. Co. v. J. F. French & Co., supra.

(4) Railroad's delivery of wheat to one named as consignor, consignee, and party to be notified, without taking up bills of lading as required by Penal L. § 365, was not the proximate cause of loss to bank which accepted bills of lading as security for a loan to consignor after consignor had wrongfully changed dates thereon, where the original dates antedated the date when they were delivered to the bank as security by so long a period that the bank would have been put on inquiry concerning the situation if dates had not been changed, since the intervening act of the consignor could not have been reasonably anticipated.—Saugerties Bank v. Delaware & Hudson Co., 141 N.E. 904, 236 N.Y. 425, affirming 198 N.Y.S. 722, 204 App.Div. 211, and reargument denied 142 N.E. 331, 236 N.Y. 675.

29. N.Y.—Chandler Motor Car Co. v. United Fruit Co., 216 N.Y.S. 413, 127 Misc. 432.

where no damages resulted from the misdelivery,[30] as where the consignors have received payment for the goods shipped.[31] Where an interstate shipment was made under an order bill of lading which impliedly authorized inspection, and the buyer inspected the goods without presenting the bill, but refused to accept the goods, whereupon they were sold by the shipper, there was no conversion by the carrier, and it was not liable under the federal statute where the inspection did not result in loss, damage, or injury to the goods.[32] Where consignees paid a draft attached to the bill of lading and received the bill, but the carrier, at the shipper's request, and without notice to the consignee, or surrender of the bill of lading, substituted the name of the shipper as consignee and diverted the shipment to another place, the carrier was liable to the original consignee for the loss resulting to him from the change in shipment.[33] Matters relieving the carrier from liability for misdelivery, including the negligence of the shipper, and ratification or waiver of the misdelivery, are discussed in subdivision c infra of this section.

b. Mistake or Fraud

(1) General rule
(2) Extent and limits of rule

(1) General Rule

Delivery to the wrong person is not excused even though due to mistake or fraud.

It is the general rule that a carrier cannot relieve itself from liability for delivery to a person not entitled to the goods, because such delivery was due to mistake or to the fraud of the person receiving the goods,[34] as where delivery is made on a forged order.[35] The question is not one of due care, for the carrier, like any other bailee, acts at its peril in making delivery, as stated supra § 174 a. The law exacts of the carrier absolute certainty that the person to whom delivery is made is rightfully entitled to the goods and places on it the entire risk of mistake.[36] The fact that goods are consigned to a named person at a named street and number, for the purpose of aiding the carrier in identifying the consignee, does not justify the carrier in delivering the goods to a third person at that address.[37]

(2) Extent and Limits of Rule

A carrier is liable for loss caused by delivery to one not the actual consignee, although the delivery was due to the fraud of the person receiving the goods, and even though the consignee refused to receive them; but the carrier is not liable where, in good faith, it delivers to the person to whom the goods were actually sent, although such person fraudulently induced the consignor to believe he was sending the goods to another person, but even then the carrier is liable if the successful perpetration of the fraud was due to its negligence.

Where one not the actual consignee, by means of any fraudulent device, procures a delivery of the goods to himself, the carrier is liable to the consignor for the loss,[38] and in the application of this

30. N.Y.—Pisapia v. Hartford, etc., Transp. Co, 116 N.Y.S 26, 62 Misc. 607.

31. Tenn.—Nashville Fourth Nat Bank v. Nashville, etc, R. Co, 161 S.W. 1144, 128 Tenn. 530.

32. La.—Morley Cypress Co. v. Hines, 107 So. 487, 160 La. 676.

33. N Y—Fleck & Hillman v. Wabash Ry. Co., 193 N.Y S. 131, 200 App.Div 482.

34. U S—Chicago, M. & St. P & P. R. Co. v. Flanders, C.C.A Iowa, 56 F 2d 114
Ala.—Southern Ry Co. v. Harris, 80 So 101, 202 Ala. 263
Ill—Garden City Fan Co. v. Pittsburgh, C, C. & St. L. Ry. Co., 220 Ill App. 126.
La—Williams-Richardson Co v. New Orleans & N. E. R. Co, 115 So. 358, 165 La 33, affirming 7 La.App 380
Mo—Vogel v. St. Louis Merchants' Bridge Terminal Ry. Co, App, 16 S W 2d 624
Pa.—Feingold v. American Ry. Express Co, 92 Pa.Super. 76—Stone & Co. v. Delaware, L. & W. R Co, 72 Pa.Super. 416.
Tex—Jester v. Lancaster, Civ.App, 266 S.W. 1103—Missouri Iron & Metal Co. v. Texas & P. Ry. Co., Civ App., 198 S.W 1067
Va—Norfolk & W Ry Co. v. Aylor, 150 S.E. 252, 153 Va 575, certiorari denied 51 S Ct. 26, 282 U.S. 847, 75 L.Ed. 751.
10 C J. p 264 note 23.

Delivery to wrong person is inexcusable for any cause of fraud, imposition, or mistake, however occasioned, that would not also release the carrier from the duty of safe carriage—Southern Ry. Co. v. Harris, 80 So. 101, 202 Ala. 263.

Nature of mistake

(1) Where plaintiff, having two cars of peaches, sold one car to H, after having shown peaches in such car to H, and carrier issued two night orders so that holders could unload them for sale when the market opened, but delivered the wrong night order to plaintiff's driver and the error was not discovered until the car was unloaded, and H refused to take the other car, and as a result the peaches were not sold until they were overripe and loss resulted, the carrier was liable, since H was entitled to receive the car he had inspected and purchased, and the carrier could not claim that no damage resulted because the other peaches were available to H—Vogel v. St. Louis Merchants' Bridge Terminal Ry. Co, Mo.App, 16 S W 2d 624

(2) Where plaintiff did not discover mistake until it was too late to unload the peaches for Saturday, and, because a Sunday and Labor Day followed, plaintiffs were unable to dispose of the peaches until Tuesday, it could not be said that plaintiff abandoned the car.—Vogel v. St. Louis Merchants' Bridge Terminal Ry. Co., supra.

35. Pa—Freedman v. George W. Bush & Sons Co, 130 A. 263, 284 Pa 16.
10 C J. p 267 note 83.

36. Ala—Southern Ry. Co. v. Harris, 80 So. 101, 202 Ala. 263.
Ill—Garden City Fan Co. v. Pittsburgh, C, C & St. L. Ry. Co, 220 Ill App. 126.
Mo—Woolston v. Southern R Co, 160 S W. 1023, 177 Mo App. 611

37. Vt.—L. Kommel & Son v Champlain Transp. Co, 105 A. 253, 93 Vt 1, 2 A.L R 275.

38. Conn—Hartford Distillery Co. v. New York, N. H & H. R. Co., 115 A. 488, 97 Conn. 1.

rule it is immaterial that the actual consignee refuses to accept the goods,[39] since in these circumstances it is the duty of the carrier to warehouse the goods and hold them subject to the consignor's order, as stated infra § 179. The rule applies with full force and effect, although the consignee to whom the goods are billed is a fictitious person or firm in whose name the goods have been fraudulently ordered. Here also it is the duty of the carrier to warehouse the goods for the consignor.[40] Nevertheless it is very generally held that, where the carrier, acting in good faith and with due diligence, delivers goods to the person to whom they were actually sent, it is not liable for a misdelivery, although by false and fraudulent devices that person induced the consignor to believe that he was sending the goods to another person,[41] since the carrier, although strictly responsible for delivery to the proper person, is not an insurer against frauds on the shipper by the consignee,[42] but even on this state of facts, if the carrier in making delivery is guilty of negligence, except for which the fraud could not successfully have been perpetrated, it will be liable.[43] The fact that the delivery is the result of an innocent mistake on the part of another carrier from whom it receives the goods will not relieve the carrier from liability.[44] Where a bill of lading authorizes the delivery of goods to the consignee without its production, misdelivery by a connecting carrier, to the party named as consignee by the initial carrier without the production of the bill of lading does not avoid the liability of the initial carrier to the consignor.[45] Misdelivery on an unindorsed bill of lading which has been improperly obtained by the person presenting it renders the carrier liable.[46] Where the bill of lading fails to show who the consignee is, delivery without ascertaining from the shipper to whom delivery is to be made makes the carrier liable as for a conversion.[47]

c. Matters Excusing Misdelivery or Affecting Liability

(1) In general
(2) Negligence of shipper
(3) Ratification or waiver

(1) In General

A carrier will not be relieved from liability for misdelivery by a return or offer to return the goods, or by the fact that the freight charges were not paid, or that delivery was made in the customary manner, or that the goods were uncalled for. Delivery to the person entitled thereto relieves the carrier from liability for misdelivery.

The fact that the carrier was entitled to retain the goods until the freight was paid,[48] or that the

La.—Williams-Richardson Co. v. New Orleans & N. E. R. Co, 115 So. 358, 165 La. 33, affirming 7 La App. 380.
Okl.—Turner Okl. Co. v. Yellow Cab & Baggage Co., 269 P. 1082, 1083, 132 Okl. 134.
Vt.—L. Kommel & Son v. Champlain Transp Co, 105 A. 253, 93 Vt. 1, 2 A.L.R. 275.
10 C.J. p 264 note 76.

Corpus Juris is quoted as authority for this rule in Turner Okl. Co. v. Yellow Cab & Baggage Co, supra.

39. Iowa—Brunswick v. U. S. Express Co., 46 Iowa 677.
Ky.—Louisville, etc., R. Co v. Ft. Wayne Electric Co., 55 S.W. 918, 21 Ky.L. 1544

40. Conn—Hartford Distillery Co. v. New York, N H & H. R. Co, 115 A. 488, 97 Conn. 1.
10 C.J. p 265 note 78.

41. U.S.—Chicago, M., St. P. & P R. Co. v. Flanders, C.C.A.Iowa, 56 F 2d 114.
N.Y.—Fox River Butter Co. v. Lightning Motor Line, 210 N.Y.S 172, 125 Misc. 116.
10 C.J. p 266 note 79.

The Corpus Juris text has been cited with approval in Kimbrough v. American Ry Express Co., 270 S.W. 518, 519, 168 Ark. 444.

Nature of fraud

Where plaintiff, on telephone orders from swindler styling himself as "William Evans, 4922 Fairmount avenue, Philadelphia," which name plaintiff found listed with satisfactory rating in credit agency reports, but without any address, made two shipments of butter to swindler at address given, which was store rented by swindler, the carrier was not liable to plaintiff for delivering butter to swindler at its Philadelphia terminal on delivery order on letter head of "William Evans, 4922 Fairmount avenue," nor in delivering second shipment to same person on following day without another delivery order.—Fox River Butter Co. v. Lightning Motor Line, 210 N.Y.S. 172, 125 Misc. 116.

Order under fictitious name

Where carrier delivered strawberries received for shipment to person who ordered them from shipper, it could not be held liable to shipper for their value, although they may have been ordered and received under fictitious name—Kimbrough v American Ry. Express Co, 270 S.W. 518, 168 Ark. 444

42. N.Y.—Fox River Butter Co v Lightning Motor Line, 210 N.Y.S. 172, 125 Misc. 116.

43. N.Y.—Price v. Oswego & Syracuse R. Co, 50 N.Y. 213, 10 Am R 475—Bond Trouser Co v. American Ry. Express Co., 208 N.Y.S. 643, 124 Misc. 619.
10 C.J. p 267 note 80.

What constitutes negligence

Where seller, on discovering that person who wrote letter ordering goods falsely represented his identity, notified carrier, two days after delivery to carrier, to stop shipment from New York to California, carrier was negligent in delivering goods to consignee, entitling seller to recover—Bond Trouser Co v American Ry. Express Co, 208 N.Y.S. 643, 124 Misc 619.

44. Ga.—Merchants', etc., Transp Co. v. Moore, 52 S.E. 802, 124 Ga. 482.

45. Mo—Central American SS. Co. v Mobile, etc, R Co., 128 S.W. 1822, 144 Mo App. 43.

46. Colo—Florence, etc, R Co. v. Jensen, 108 P. 974, 48 Colo. 28
Ga.—Raleigh, etc, R. Co. v. Lowe, 28 S.E. 867, 101 Ga. 320.
Tex—Cane Belt R Co v. Peden Iron, etc, Co., 101 S.W. 528, 45 Tex.Civ. App. 630.

47. N.Y.—Furman v. Union Pac. R. Co., 13 N.E. 587, 106 N.Y 579—Bank of Commerce v. Bissél, 72 N. Y. 615—Gass v. Astoria Veneer Mills, 118 N.Y.S. 982, 134 App Div. 184.

48. Ala—Southern R. Co. v. Webb, 39 So. 262, 143 Ala 304, 111 Am.S. R. 45, 5 Ann.Cas. 97.

shipper breached his contract to accompany the shipment or furnish attendants,[49] will not relieve the carrier from liability for delivery to the wrong person; nor will a carrier's liability for conversion by misdelivery be affected by a return or offer to return the goods,[50] or by tendering to the owner, several months after a misdelivery, a part of the goods;[51] and, where the goods were lost by misdelivery, the offer of the recipient to return equivalent goods to the consignor will not bar the consignor's right to recover from the carrier money compensation for the loss.[52] Where a carrier wrongfully diverted a shipment at the direction of the prospective buyer in whose care the shipment was made, the subsequent financial irresponsibility of the buyer will not relieve the carrier from liability, since the conversion took effect immediately upon the unwarranted diversion.[53] A rejected compromise proposition made to the consignee of goods by a person to whom they have wrongfully been delivered by the carrier for the purchase thereof and payment of a profit on the same does not relieve the carrier from liability for its breach of contract.[54] On the other hand, a carrier cannot be held liable for misdelivery where the goods are delivered to the true owner, or to one entitled to the possession thereof,[55] or are delivered in accordance with the shipper's directions;[56] and where the carrier makes delivery before obtaining the bill of lading, but subsequently rightfully obtains possession of the bill, it is not liable for conversion.[57] A shipper who, without right, used the proceeds of a draft drawn on his purchaser, for the purpose of satisfying a prior claim against the purchaser, could hold the carrier liable for conversion because it delivered to such purchaser the goods, of less value than the draft, without taking up the bill of lading.[58] Where the carrier delivers the goods to the true owner without a surrender of the order bill of lading, and the shipper, who retained the bill, was paid for the goods, the carrier is not liable to the shipper merely because it failed to get the bill before making delivery.[59]

Delivery according to custom. In accordance with the general rule, which will be discussed in the C.J.S. title Negligence § 16, also 45 C.J. p 708 note 39, that custom or usage will not justify an act which is negligent per se, the custom of a carrier to deliver goods to persons other than the consignee or to whom the consignee has authorized delivery to be made, will not relieve the carrier from liability for misdelivery;[60] so where the consignor ships goods to himself as consignee, a delivery of the goods to a third person in possession of the bill, without indorsement thereon, being unauthorized, as stated supra § 172 c (1), will render the carrier liable for misdelivery notwithstanding the custom of the particular carrier at that particular place to deliver the goods without such indorsement,[61] and, where production of the bill of lading is required before delivery, the custom or practice of the carrier to deliver without the production of the bill will not relieve it from liability for the wrongful delivery,[62] especially where such custom was not known to the shipper.[63]

49. Ala.—Southern R. Co v. Webb, supra
N.D.—Morrell v. Northern Pac. Ry. Co., 179 N.W. 922, 46 N.D. 535.

Attendants for live stock

Where a carrier's agent knows that neither the plaintiff nor any agent of his is accompanying live stock being transported by it, its liability for delivery of the stock to the wrong person or for converting the stock to its own use is not qualified by contract provisions reciting that the shipper will care for the stock and furnish attendants and that if he does not, the carrier's acts with respect to the care of the stock will be considered done as the shipper's representative —Morrell v. Northern Pac. Ry. Co., 179 N.W. 922, 46 N.D. 535.

50. N.D.—Blaisdell v. American Ry. Exp. Co., 220 N.W. 634, 56 N.D. 870

51. U.S.—Payne v. Card, C.C.A.Wyo., 275 F. 26.

52. Md.—White Transp. Co. v. Michelin Tire Co., 161 A. 163, 163 Md. 142.

53. U.S.—Estherville Produce Co. v. Chicago, R. I. & P. R. Co., C.C.A. Iowa, 57 F.2d 50

54. W.Va.—Clarke-Lawrence Co. v. Chesapeake, etc., R. Co., 61 S.E. 364, 63 W.Va. 423.

55. U.S.—Atchison, T. & S. F. Ry. Co. v. International Land & Investment Co., Neb., 247 F. 265, 159 C.C.A. 359
N.Y.—Koscherak Siphon Bottle Works v. North & East River S. S. Co., 239 N.Y.S. 351, 135 Misc. 635

Acts not constituting conversion

Where defendant railroad company had no control over hotel cars claimed by plaintiff at time demand for surrender was made, it having leased for storage purpose spur track to one claiming right to possession of cars, defendant was not liable for conversion of cars because it subsequently transported them for, and redelivered them to, party claiming them.—Atchison, T. & S. F. Ry. Co. v. International Land & Investment Co., Neb., 247 F. 265, 159 C.C.A. 359.

56. Miss.—Myers v. American Ry. Express Co., 137 N.E. 654, 243 Mass. 390

57. Iowa.—Midland Linseed Co. v. American Liquid Fireproofing Co., 166 N.W. 573, 183 Iowa 1046, error dismissed 41 S.Ct. 60, 254 U.S. 610, 65 L.Ed. 436.

58. Minn.—Weinstein v. Davis, 196 N.W. 933, 158 Minn. 44.

59. Minn.—Weinstein v. Davis, supra.

60. Ala.—Mobile, etc., R. Co. v. Bay Shore Lumber Co., 51 So. 956, 165 Ala. 610, 138 Am.S.R. 84.
10 C.J. p 264 note 70

61. Ala.—Davis v. Hines, 85 So. 832, 17 Ala.App. 443

62. U.S.—North Pennsylvania R. Co. v. Commercial Nat. Bank of Chicago, Pa., 8 S.Ct. 266, 123 U.S. 727, 31 L.Ed. 287
S.D.—Ryan v. Chicago, M. & St. P. Ry. Co., 220 N.W. 905, 53 S.D. 363.

63. U.S.—North Pennsylvania R. Co. v. Commercial Nat. Bank of Chicago, Pa., 8 S.Ct. 266, 123 U.S. 727, 31 L.Ed. 287.

Goods not called for. The carrier's duty to deliver to the right person is not affected by the fact that the goods are left uncalled for or are refused by the person entitled to them;[64] but delivery to the person whom the consignee designates as the one to whom delivery is to be made constitutes a complete bar to an action by the consignee for misdelivery, although the person to whom the goods are delivered refused to pay for them.[65] Where the loss of goods by fire after delivery at a compress was due to the failure to present the bill of lading for nearly a month after the arrival of the goods, the carrier was not liable for conversion.[66]

(2) Negligence of Shipper

Negligence of the shipper or person entitled to the goods relieves the carrier from liability if the misdelivery was caused thereby.

A carrier will be excused from liability for misdelivery where it was misled by the shipper[67] or consignee[68] as to the person to whom delivery should be made. Thus a carrier ordinarily is not liable for a misdelivery caused by the negligence of the shipper in improperly addressing the goods.[69] So, where the carrier accepted a box for delivery in accordance with shipping directions in a straight bill of lading, to which no objection was made by the shipper, giving an address different from that on the box, the carrier was not liable for misdelivery in the absence of fraud or any previous agreement.[70] The mere fact that an erroneous address is given will not exonerate the carrier, however, if it is not thereby misled into making delivery of the goods to a person wrongfully securing them.[71] The negligence of the shipper is no defense if, notwithstanding such negligence, the loss would not have occurred except for the carrier's negligence.[72] Where the person in charge of a shipment of live stock was the agent of the shipper only for the purpose of taking care of the stock in transit, his negligence did not excuse a misdelivery by the carrier which was bound to ascertain the extent of his authority.[73]

(3) Ratification or Waiver

A delivery to the wrong person may be waived or the right of action against the carrier therefor waived.

The owner or person entitled to the goods in the possession of a carrier may ratify a wrongful delivery thereof,[74] or waive its rights against the carrier therefor;[75] and, where such delivery is ratified with a full knowledge of the facts, the carrier is thereby exempted from further liability.[76] So a carrier who permits trial by a prospective purchaser of machinery shipped under an order bill of lading, without presentation of

Pa.—Pennsylvania R. Co. v. Stern, 12 A. 756, 119 Pa. 24, 4 Am.S.R. 626.

64. Ala.—Louisville & N. R. Co. v. B. F. Roden Grocery Co., 96 So. 912, 209 Ala. 694.
Ga.—American Sugar Refining Co. v. McGhee, 21 S.E. 383, 96 Ga. 27.
Ill.—Indianapolis & St. Louis R. Co. v. Herndon, 81 Ill. 143.
10 C.J. p. 263 note 68.

65. S.C.—Mutual Lumber Co. v. Southern R. Co., 84 S.E. 994, 100 S.C. 415.

66. Tex.—Gulf, C. & S. F. Ry. Co. v. Buckholts State Bank, Com. App., 270 S.W. 1008, reversing, Civ. App., 258 S.W. 491.

67. Tex.—Missouri Iron & Metal Co. v. Texas & P. Ry. Co., Civ.App., 198 S.W. 1067.
Vt.—L. Kommel & Son v. Champlain Transp. Co., 105 A. 253, 93 Vt. 1, 2 A.L.R. 275—Joslyn v. Grand Trunk Ry. Co., 51 Vt. 92.
10 C.J. p. 267 note 86.

68. Ill.—Phillipson & Co. v. Grand Trunk Western Ry. Co., 238 Ill. App. 251, 253.
Corpus Juris is cited in Phillipson & Co. v. Grand Trunk Western Ry. Co., supra, as supporting the rule laid down in this text.

69. N.Y.—Feynman v. American Ry. Express Co., 234 N.Y.S. 727, 134 Misc. 223.

70. Mass.—Porter v. Oceanic S. S. Co. of Savannah, 111 N.E. 864, 223 Mass. 224.

71. Ind.—McCulloch v. McDonald, 91 Ind. 240.

72. La.—Williams-Richardson Co. v. New Orleans & N. E. R. Co., 115 So. 358, 165 La. 33, affirming 7 La.App. 380.
Directing shipment to wrong town
Where shipper negligently directed shipment to wrong town, carrier delivering shipment to firm at that town with name similar to consignee was liable for loss which would not have resulted except for the carrier's inattention and carelessness.—Williams-Richardson Co. v. New Orleans & N. E. R. Co., 115 So. 358, 165 La. 33, affirming 7 La.App. 380.

73. Mo.—Montgomery v. Davis, 240 S.W. 282, 209 Mo.App. 698.

74. Ill.—Brown v. Vandalia R. Co., 163 Ill.App. 473.
Iowa.—Midland Linseed Co. v. American Liquid Fireproofing Co., 166 N.W. 573, 183 Iowa 1046, error dismissed 41 S.Ct. 60, 254 U.S. 610, 65 L.Ed. 436.
Ohio.—Lipman Refrigerator Co. v. Baltimore & Ohio Warehouse Co., 152 N.E. 686, 687, 21 Ohio App. 523.
Tex.—American Ry. Express Co. v. Patterson Produce Co., Com.App., 12 S.W.2d 158, reversing Patterson Produce Co. v. American Ry. Express Co., Civ.App., 1 S.W.2d 456.
10 C.J. p. 267 note 89.
Corpus Juris is quoted in full in Lipman Refrigerator Co. v. Baltimore & Ohio Warehouse Co., supra, as authority for the statements made in the text of this section.

75. Mo.—Montgomery v. Davis, 240 S.W. 282, 209 Mo.App. 698
Ohio.—Pennsylvania R. Co. v. Greenwald Packing Corporation, 157 N.E. 809, 24 Ohio App. 497.

76. Iowa.—Midland Linseed Co. v. American Liquid Fireproofing Co., 166 N.W. 573, 183 Iowa 1046, error dismissed 41 S.Ct. 60, 254 U.S. 610, 65 L.Ed. 436.
Ohio.—Lipman Refrigerator Co. v. Baltimore & Ohio Warehouse Co., 152 N.E. 686, 21 Ohio App. 523.
Tex.—American Ry. Express Co. v. Patterson Produce Co., Com.App., 12 S.W.2d 158, reversing Patterson Produce Co. v. American Ry. Express Co., Civ.App., 1 S.W.2d 456.
10 C.J. p. 267 note 90.

the bill of lading, is not liable to the shipper for conversion, where the taking of temporary possession for the purpose of trial was directed by the shipper's agent, and such trial was acquiesced in, and ratified by, the shipper;[77] but, in order to release a carrier from liability for wrongful delivery on the ground of ratification,[78] or waiver,[79] it must plainly appear that the ratification or waiver was intended, with full knowledge of all the material facts. What constitutes a ratification or waiver depends on the facts of each particular case[80] and may be shown by express words or implied from words, acts, or silence.[81] It has been held that a shipper ratifies a wrongful delivery by accepting from the person to whom delivery is made payment of the price of the goods, or part payment with a promise to pay the balance,[82] and that a ratification results even from a demand for payment of the price.[83] It has also been held that a shipper ratifies the wrongful act of the carrier in delivering bills of lading to the purchaser of goods shipped, by suing for the price, as represented by a draft given by the purchaser and prosecuting the suit to judgment with knowledge of the wrongful delivery of the bills;[84] and that a shipper's acceptance of the consignee's check, part of which it was directed to credit on the shipment, with full knowledge that delivery was made before draft for price was paid, ratifies the wrongful delivery.[85] On the other hand, it has been held that, where goods are delivered to the wrong person and sold, the acceptance of the proceeds thereof by the shipper does not ratify or waive the misdelivery,[86] but goes only in mitigation of damages, as appears infra § 184 c. So it has been held that acceptance of payment for a part of the goods delivered to the wrong person does not waive the wrongful delivery of the remainder;[87] that, where the shipper's recovery of a part of the goods or their value did not destroy the carrier's rights against the person to whom they were

77. Iowa—Port Huron Machinery Co. v. Chicago, M & St. P. Ry. Co., 201 N.W. 779, 199 Iowa 295.

78. Ohio—Lipman Refrigerator Co. v. Baltimore & Ohio Warehouse Co., 152 N.E. 686, 20 Ohio App. 523
Tex.—American Ry. Express Co. v. Patterson Produce Co., Com.App., 12 S.W.2d 158, reversing Patterson Produce Co. v. American Ry. Express Co., Civ.App., 1 S.W.2d 456.
Va.—Kewanee Private Utilities Co. v. Norfolk Southern R. Co., 88 S.E. 95, 118 Va. 628.

Corpus Juris is cited in Patterson Produce Co. v. American Ry. Express Co., Tex.Civ.App., 1 S.W.2d 456, 457, reversed on other grounds, Com. App., 12 S.W.2d 158, as sustaining the rule announced in the text.

Intention to ratify is the essence of ratification of an unauthorized delivery by an express company.—American Ry. Express Co. v. Patterson Produce Co., Tex.Com.App., 12 S.W.2d 158, reversing Patterson Produce Co. v. American Ry. Express Co., Civ.App., 1 S.W.2d 456.

79. Mo.—Montgomery v. Davis, 240 S.W. 282, 209 Mo.App. 698.

80. U.S.—Blowers v. Canadian Pac. R. Co., C.C.Wash., 155 F. 935.
Ala.—Central of Georgia Ry. Co. v. Dothan Nat. Bank, 91 So. 351, 206 Ala. 602.
La.—Vaccaro Bros. & Co. v. Louisville & N. R. Co., 123 So. 355, 11 La.App. 348.
Mo.—Barton v. Louisville & N. R. Co., App., 196 S.W. 379.
Ohio.—Pennsylvania R. Co. v. Greenwald Packing Corporation, 157 N.E. 809, 24 Ohio App. 497—Lipman Refrigerator Co. v. Baltimore & Ohio Warehouse Co., 152 N.E. 686, 21 Ohio App. 523.

Claim of ownership as waiver
Owner making claim of ownership of goods shipped with knowledge of railroad's conversion waives tort, and cannot recall waiver—Pennsylvania R. Co. v. Greenwald Packing Corporation, 157 N.E. 809, 24 Ohio App. 497.

Conversion is not ratified without ratification of unauthorized delivery—Pennsylvania R. Co. v. Greenwald Packing Corporation, 157 N.E. 809, 24 Ohio App. 497.

Acts not constituting ratification or waiver
(1) Bringing action on a sight draft with bill of lading attached is not ratification of wrongful delivery by the carrier—The Cabo Villano, D.C.N.Y., 14 F.2d 978, modified on other grounds, C.C.A., 18 F.2d 220.

(2) The fact that a bank had a draft indorsed and delivered to it, with bill of lading attached, presented for payment before or after the carrier's unauthorized delivery of the shipment, or whether with or without notice of said delivery, did not operate as a ratification thereof so as preclude the bank from maintaining action against the carrier for failure to deliver or in delivering without surrender of the bill of lading.—Central of Georgia Ry. Co. v. Dothan Nat. Bank, 91 So. 351, 206 Ala. 602.

(3) That shipper's agent took possession at original destination did not establish ratification of carrier's failure to divert shipments.—Vaccaro Bros. & Co. v. Louisville & N. R. Co., 123 So. 355, 11 La.App. 348.

(4) Where shipper was ignorant that delivery had been made without payment of draft attached to bill of lading and proper production of bill, her directions to broker at destination by letter to make best possible disposition of hay after party to whom it was sent rejected it did not ratify or waive act of wrongful delivery—Barton v. Louisville & N. R. Co., Mo.App., 196 S.W. 379.

(5) Bank holding title to shipment covered by bill of lading, moving to dissolve attachment against shipment without knowledge of railroad's conversion, did not waive the conversion.—Pennsylvania R. Co. v. Greenwald Packing Corporation, 157 N.E. 809, 24 Ohio App. 497.

81. Ohio—Lipman Refrigerator Co. v. Baltimore & Ohio Warehouse Co., 152 N.E. 686, 20 Ohio App. 523
10 C.J. p. 267 note 93.

82. U.S.—Blowers v. Canadian Pac. R. Co., C.C.Wash., 155 F. 935
Ill.—Brown v. Vandalia R. Co., 163 Ill.App. 473.
Tex.—American Ry. Express Co. v. Patterson Produce Co., Com.App., 12 S.W.2d 158, reversing Patterson Produce Co. v. American Ry. Express Co., Civ.App., 1 S.W.2d 456.

83. Iowa—Midland Linseed Co. v. American Liquid Fireproofing Co., 166 N.W. 573, 183 Iowa 1046, error dismissed 41 S.Ct. 60, 254 U.S. 610, 65 L.Ed. 436.

84. Ala.—Louisville & N. R. Co. v. Williams, 97 So. 817, 210 Ala. 268.

85. Ohio—Annin v. Cincinnati Northern R. Co., 153 N.E. 522, 22 Ohio App. 37.

86. Mo.—Montgomery v. Davis, 240 S.W. 282, 209 Mo.App. 698.

87. N.Y.—Lester v. Delaware, etc., R. Co., 36 N.Y.S. 907, 92 Hun 342.

wrongfully delivered, such recovery does not bar the shipper's action against the carrier for misdelivery;[88] that a consignor who gave credit to the consignee did not ratify the carrier's misdelivery of the goods to a third person by receiving part payment of the price from such person;[89] and that the owner or person entitled to possession of the goods does not waive or ratify a wrongful delivery, by attempting to secure payment for, or the value of, the goods from the person to whom they were wrongfully delivered,[90] or by taking a check, subsequently dishonored.[91] The burden of showing ratification rests on the carrier.[92] If the facts relating to ratification are in dispute, or if reasonable minds might draw different conclusions from the facts, the question of ratification or waiver is for the jury.[93] If the facts are undisputed, however, and no other conclusion can reasonably be drawn than that an unqualified ratification was intended, the law imputes this intention to the ratifying party, who will not be heard to say that his intenion was otherwise,[94] and whether or not different conclusions can reasonably be drawn from the facts in evidence is a question of law.[95]

d. Actions Other than for Conversion

Assumpsit will lie against a carrier for misdelivery, and in actions based on breach of contract the usual rules of practice are applicable.

Assumpsit will lie against a carrier for delivery of goods to one not entitled thereto without the surrender of the bill of lading.[96] In an action for breach of contract because of delivery of the goods to one not entitled thereto, the general rules are applicable with respect to parties.[97] The action can be brought only by the shipper, since the contract of carriage was made with him,[98] although the consignee, when he is the owner of the goods, may sue for conversion, as appears infra § 183 d. The person wrongfully receiving the goods is not a proper party to the action for breach of contract.[99] The general rules are also applicable as to presumptions and burden of proof,[1] and the admissibility[2] and weight and sufficiency[3] of the evi-

88. N.Y.—Lefcort v. Railway Express Agency, 278 N.Y.S. 238, 158 Misc. 630.

89. Vt.—L. Kommel & Son v. Champlain Transp. Co., 105 A. 253, 93 Vt. 1, 2 A.L.R. 275.

90. Conn.—Alderman Bros. Co. v. New York, N. H. & H. R. Co., 129 A. 47, 102 Conn. 461.
N.Y.—McSwegan v. Pennsylvania R. Co., 40 N.Y.S. 51, 7 App. Div. 301.

91. Va.—Kewanee Private Utilities Co. v. Norfolk Southern R. Co., 88 S.E. 95, 118 Va. 628

92. Ohio—Lipman Refrigerator Co. v. Baltimore & Ohio Warehouse Co., 152 N.E. 686, 20 Ohio App. 523.
Or.—W. H. Stanchfield Warehouse Co. v. Central R. Co., 136 P. 34, 67 Or. 396.

93. Ind.—Lake Shore, etc., R. Co. v. McIntyre, 108 N.E. 978, 60 Ind. App. 191.
Mo.—McNeill v. Wabash Ry. Co., 231 S.W. 649, 207 Mo. App. 161.
Ohio—Lipman Refrigerator Co. v. Baltimore & Ohio Warehouse Co., 152 N.E. 686, 20 Ohio App. 523

Acceptance of proceeds of sale

Where an owner of breeding ewes, which had been delivered by carrier to the wrong yards, where they were slaughtered, accepted the proceeds of their sale, he did not waive as a matter of law his right of action against the carrier which made the misdelivery, but the question should be submitted to the jury.—McNeill v. Wabash Ry. Co., 231 S.W. 649, 207 Mo. App. 161.

94. Tex.—American Ry. Express Co. v. Patterson Produce Co., Com. App., 12 S.W.2d 158, reversing Patterson Produce Co. v. American Ry. Express Co., Civ. App., 1 S.W.2d 456.

95. Tex.—American Ry. Express Co. v. Patterson Produce Co., supra.

96. Mich.—First Nat. Bank v. Grand Rapids & I. Ry. Co., 161 N.W. 859, 195 Mich. 1.

97. Ohio.—Pittsburg, C., C. & St. L. Ry. Co. v. Guarantee Finance & Securities Co., 153 N.E. 166, 21 Ohio App. 227.

98. Ill.—See Helburn Leather Co. v. Stone, 205 Ill.App. 347.
N.Y.—Koscherak Siphon Bottle Works v. North & East River S.S. Co., 239 N.Y.S. 351, 135 Misc. 635.

Reconsignment order

Consignee who held bill of lading was proper person to bring action against carrier for failure to deliver goods under reconsignment order, as he became in effect the consignor thereon.—Tentzer v. Reading Co., 101 Pa. Super. 238.

99. Ohio.—Pittsburg, C., C. & St. L. Ry. Co. v. Guarantee Finance & Securities Co., 153 N.E. 166, 21 Ohio App. 227.

1. U.S.—Chicago, M., St. P. & P. R. Co. v. Flanders, C.C.A.Iowa, 56 F.2d 114.
Conn.—Hartford Distilling Co. v. New York, N. H. & H. R. Co., 115 A. 488, 97 Conn. 1.
Pa.—Catz-American Co. v. Pennsylvania R. Co., 7 Pa.Dist. & Co. 430

Presumption as to particular facts

(1) The burden of proof being on plaintiff, copy of straight bill of lading executed in triplicate was presumed delivered to purchaser.—Chicago, M., St. P. & P. R. Co. v. Flanders, C.C.A.Iowa, 56 F.2d 114.

(2) It will be presumed, in the absence of evidence that person to whom railroad delivered goods purported to be acting for shipper, or that railroad's agent supposed him to be so acting, that such person was acting for the consignee.—Hartford Distillery Co. v. New York, N. H. & H. R. Co., 115 A. 488, 97 Conn. 1.

2. Mo.—Montgomery v. Davis, 240 S.W. 282, 209 Mo. App. 698.

3. U.S.—Nashville, C. & St. L. Ry. v. Tennessee-Oklahoma Grain Co., C.C.A.Tenn., 4 F.2d 756.
Conn.—Interstate Window Glass Co. v. New York, N. H. & H. R. Co., 133 A. 102, 104 Conn. 342
Mass.—Myers v. American Ry. Express Co., 137 N.E. 654, 243 Mass. 390.
Mich.—First Nat. Bank v. Grand Rapids & I. Ry. Co., 161 N.W. 859, 195 Mich. 1.
Mo.—Dyer v. Atlantic Coast Line R. Co., App., 186 S.W. 529.
Pa.—Feingold v. American Ry. Express Co., 92 Pa.Super. 76.

Evidence sufficient

(1) To show delivery without indorsement of bill of lading and payment of draft attached.—Dyer v. Atlantic Coast Line R. Co., Mo.App., 186 S.W. 529.

(2) To warrant finding that loss from delivery without surrender of bills of lading sent, with drafts attached, to bank, was not due to

dence. The value of the goods misdelivered is ordinarily the measure of damages;[4] and such value is the fair cash market value at the time and place the goods should have been delivered.[5] Under the Cummins amendment to the Interstate Commerce Act, providing for recovery of the "full actual loss," however, such loss may, but need not necessarily, be the market value of the property at destination;[6] and where the carrier delivers the property to a purchaser without requiring the surrender of the bill of lading, in consequence of which the shipper did not receive the price the purchaser was to pay him, the measure of damages is the amount he would have received had the carrier performed its contract, and not the market value of the property at destination.[7] In the absence of actual or constructive notice to a carrier that plaintiff relies on special circumstances additional to such as are the natural and probable result of wrongful delivery, the consequential damages are not recoverable.[8] A carrier negligently delivering a shipment of cattle consigned to a commission merchant for sale, to one of his competitors, was held liable to the consignee for the loss of his commission which he had virtually earned and would have received but for the carrier's negligence.[9] Procedure in actions for conversion for misdelivery is treated infra § 183, and the measure of damages for conversion is discussed infra § 184.

§ 175. Liability of Carrier as Warehouseman

Where a carrier's liability as such terminates and its liability as warehouseman begins, it is liable for negligently delivering the goods to the wrong person; but ordinarily it ceases to be liable as an insurer of proper delivery.

If after the carrier's liability as such has ceased and that of warehouseman has begun it negligently delivers the goods to the wrong person it is liable of course in damages for such loss,[10] in accordance with well settled rules relating to the duties and liabilities of warehouseman, considered in the C.J.S. title Warehousemen and Safe Depositaries § 49, also 67 C.J. p 524 et seq. Expressions are sometimes found which seem to imply that, although transportation is terminated and the goods are held by the carrier as warehouseman, its duty to deliver to the right person is the same as if its relation to the goods was still that of carrier, that its duty to deliver to the right person is absolute, and that delivery to one not entitled to the goods renders it liable as for a conversion;[11] and it has been held that

bank's negligence in not applying in payment of such draft proceeds of other drafts deposited in bank by consignee on customers with attached invoices for same grain.—Nashville, C & St. L. Ry. Co. v. Tennessee-Oklahoma Grain Co., C C A.Tenn, 4 F.2d 756.

(3) To sustain finding that delivery to teamster was authorized by consignee.—Myers v. American Ry. Express Co., 137 N.E. 654, 243 Mass 390.

(4) To sustain finding that plaintiff bank to whom bill of lading was transferred did not authorize the shipper's agent to release the goods without the bill of lading, so that the carrier was liable to it for the ensuing loss.—First Nat. Bank v Grand Rapids & I. Ry. Co., 161 N.W 859, 195 Mich. 1.

Value of goods

Carrier's draft finding as to value of shipment misdelivered was held sufficient to support trial court's conclusion as to value.—Interstate Window Glass Co. v. New York, N. H & H R. Co., 133 A. 102, 104 Conn 342

4. Ohio.—Pittsburg, C, C. & St. L Ry. Co. v Guarantee Finance & Securities Co, 153 N.E 166, 21 Ohio App. 227.

Delivery without requiring payment of draft

The measure of damages for wrongful delivery of goods by the carrier to the consignee without requiring payment of the draft cannot exceed the value of the goods.—Louisville & N. R. Co. v. Hartwell, 36 S.W. 183, 99 Ky. 436.

Jury question

In an action to determine the liability of a carrier for the wrongful delivery of two carloads of logs, and the liability of the recipient to the carrier for such logs, conflicting evidence as to the quality of the logs raises a question for the jury as to whether they were suitable for mine props, or were merely mill logs, or were suitable for either. The measure of such liability, whether the logs be considered mill logs, mine props, or as suitable for either, was their market value, and that lack of notice to the carrier of probable loss arising from special circumstances would not preclude the jury from considering their higher value as mill props.—Norfolk Southern R. Co. v. Houtz, 118 S.E. 850, 186 N.C. 46.

5. Ill.—Hutchison Grocery Co. v. Louisville & N. R Co, 230 Ill App 291.

6. Fla.—Atlantic Coast Line Ry. Co. v. Roe, 118 So. 155, 96 Fla 429.

7. Fla.—Atlantic Coast Line Ry. Co v. Roe, supra.

8. N.C.—Norfolk Southern R. Co. v. Houtz, 118 S.E. 850, 186 N.C. 46.

9. La.—C. H. Rice & Son v. Payne, 92 So. 395, 151 La. 949.

10. U.S.—Salomon Stern, Limited, of America v. Davis, D.C.N.Y., 292 F. 221

Ill.—Phillipson & Co v. Grand Trunk Western Ry. Co., 238 Ill App. 251.

Carrier held not negligent

(1) Where carrier's practice, upon surrender of arrival notice and letter from consignee authorizing delivery, was to issue paid freight bill, enabling holder to obtain delivery, it was not negligent in not having person receiving the freight bill sign his name thereon at the time in order that delivery clerk might identify him by comparison of signatures.—Salomon Stern, Limited, of America v. Davis, D.C.N.Y., 292 F. 221.

(2) Where consignee's agent loses paid freight bill, production of which entitles holder to delivery of goods, carrier should not be charged with negligence in making wrong delivery, at least where it was not at once advised.—Salomon Stern, Limited, of America v. Davis, supra.

11. Ind.—American Express Co v. Stack, 29 Ind. 27.

N.Y.—Rochester Security Trust Co. v. Wells, 80 N.Y.S. 830, 81 App. Div. 426, affirmed 70 N.E. 1109, 178 N.Y. 620.

the carrier will be liable even though the misdelivery is the result of an honest mistake on its part.[12] On the other hand, it has been held that, where the carrier's relation to the goods as carrier has terminated and that of voluntary bailee attached, its absolute duty to deliver to the right person has also terminated, and that it will be liable for a misdelivery only in case it has failed to exercise reasonable and proper care and caution.[13] The nature and extent of a carrier's duties and liabilities as warehouseman with reference to goods awaiting delivery are discussed supra §§ 152–158.

§ 176. Delivery at Wrong Place

A carrier is liable for damages caused by delivery of the goods at the wrong place. If the owner accepts the goods he releases the carrier from future liability, but not from liability for damages already sustained.

A common carrier having received goods for transportation to a designated point is liable as for a conversion if it carries the goods to a different point, thereby depriving the owner of his goods.[14] A carrier is not, however, liable for damages resulting from diversion of a shipment under the order of the shipper's agent acting within the scope of his authority,[15] nor is the carrier liable when delivery at the wrong destination was due to the mistake of the shipper in marking the goods.[16] If the owner accepts the goods notwithstanding they are delivered at the wrong place, he thereby releases the carrier from any future liability with reference to the goods, but he does not release the carrier from liability for damages already sustained[17] A carrier who negligently fails to divert a shipment as instructed by the shipper is liable for the loss.[18] So, where a shipper attempted to divert a shipment to a different destination and received a new bill of lading, but the carrier through a mistake for which it was responsible carried the goods to the original destination and delivered them to the consignee named in the first bill of lading, the carrier was guilty of a conversion.[19] A state court has jurisdiction of an action against a carrier to recover damages for breach of contract in failing to deliver an interstate shipment at the place of destination specified in the contract.[20]

The general rules of pleading,[21] evidence,[22] and

12. N.Y.—Oswego Bank v. Doyle, 91 N. Y. 32, 43 Am R. 634.

13. Ill.—Phillipson & Co. v. Grand Trunk Western Ry. Co, 238 Ill. App. 251.

14. Ind.—Cleveland, etc., R. Co. v. Potts, 71 N.E. 685, 33 Ind App. 564.
Mich.—Stowe v. U. S. Express Co., 146 N W. 158, 179 Mich. 349.
Neb.—Lincoln Grain Co. v. Chicago, B. & Q. R. Co., 135 N.W. 443, 91 Neb. 203.
Ohio—Baltimore & O. R. Co. v. O'Donnell, 32 N.E. 476, 49 Ohio St. 489.

Loss of property by attachment
Where a carrier accepts property for a certain point and diverts it to a different point in another state, where it is attached, and the shipper loses his property, the carrier is liable as for conversion.—Lincoln Grain Co. v. Chicago, etc., R. Co, 135 N.W. 443, 91 Neb. 203.

15. Pa.—Kaull Milling Co. v. Pennsylvania R. Co, 90 Pa.Super. 43.

16. Ala.—James v. Alabama Great Southern R. Co., 81 So. 582, 202 Ala. 640.

17. Ill.—McFadden v. Union Stock Yards, etc., Co., 185 Ill.App. 94.
10 C.J. p 269 note 16.

18. La.—Vaccaro Bros & Co v. Louisville & N. R. Co., 123 So. 355, 11 La.App. 348.

19. Iowa.—Keota Produce Co. v. Chicago, R. I. & P. R. Co., 179 N W. 834, 189 Iowa 1284.

20. Wis.—Wooster v. Chicago & N. W. Ry. Co., 166 N.W. 431, 167 Wis. 6.

21. Tex.—Davis v. Stamford Mill & Elevator Co., Civ.App., 260 S.W 1081.

Sufficiency of complaint
(1) Where goods for shipment of which to a certain point a bill of lading had been issued were sold under a contract requiring the car to be diverted to other point, buyer's petition, in his action against the railroad to recover demurrage, reconsignment charges, and war tax paid on the railroad's failure to divert the car to other point, alleging the number of the car containing the goods, the issuance of the original bill of lading, and the substitution of another bill of lading binding the railroad to transport the car to other point, was not subject to general demurrer for failure to allege whether the contract for the purchase of the goods was oral or written—Davis v. Stamford Mill & Elevator Co., Tex Civ App., 260 S. W. 1081.

(2) The petition was not subject to general demurrer for failure to allege to whom and at what point the demurrage, reconsignment charges, and war tax were paid—Davis v. Stamford Mill & Elevator Co, supra.

(3) The petition alleging that railroad did not transport the car as obligated to do under the substituted bill of lading, but transported it to the point to which the wheat was originally shipped, and that buyer was required to pay such expenses through the fault and negligence of the railroad in transporting the wheat to such point instead of the point to which it should have been diverted and in delaying the car at such point, was sufficient as against general demurrer, notwithstanding failure to allege railroad's negligence, in view of Rev.St. art 6554, placing burden on railroad to show that delay was not negligent—Davis v. Stamford Mill & Elevator Co, supra.

Immaterial variance
In action by buyer of carload of wheat under a contract requiring seller to divert the car to a point other than that to which it had been shipped, against railroad for demurrage, reconsignment charges, and war tax, which buyer was required to pay because of delay of car at point to which it was originally shipped, to which railroad had moved the car in violation of bill of lading issued in substitution for that originally issued, variance between allegation as to date on which buyer's contract with seller was entered into and proof as to such date was not vital, in the absence of a showing that the railroad was injured by reason thereof—Davis v. Stamford Mill & Elevator Co., Tex. Civ.App., 260 S.W. 1081.

22. La.—Vaccaro Bros. & Co. v. Louisville & N. R. Co., 123 So. 355, 11 La.App. 348.

the amount of damages[23] are applicable in actions for delivery at the wrong place, or for failure to divert a shipment in accordance with the contract of carriage.

The measure of damages in actions for conversion for delivery of the goods at the wrong place is stated infra § 184.

§ 177. Delivery without Collection of Charges

Delivery without payment of draft attached to bill of lading is a conversion.

Drafts attached to a bill of lading constitute positive instructions to the carrier to collect before delivering the goods,[24] and a delivery without requiring such payment renders the carrier liable for conversion.[25] In an action by a consignor to recover from a carrier the amount of a sight draft attached to a bill of lading, drawn on the consignee of certain lumber to be delivered on payment of the draft and which plaintiff alleged that defendant had delivered without such payment, defendant could show that the lumber was so inferior to the lumber contracted for that the payments already made covered the value of the entire amount shipped, and that there was therefore no balance due plaintiff[26] Carriage of goods generally with instructions to collect upon delivery is discussed infra § 186.

§ 178. Failure or Refusal of Consignee to Accept Goods

a. In general
b. Duty to notify consignor
c. Duty to return goods

a. In General

The duty of the consignee to accept delivery is not ordinarily excused by the fact that the goods are damaged, unless they are rendered valueless, nor by delay.

The duty of the consignee of goods transported by a carrier to accept delivery thereof, in accordance with the rule stated supra § 160 a, is not ordinarily excused by the fact that the goods are damaged,[27] unless such damage renders the property

Tex—Davis v. Stamford Mill & Elevator Co., Civ.App., 260 S.W. 1081.

Presumptions

(1) Without charge of fraud or bad faith and contrary proof, court must assume price received for fruit which carrier negligently failed to divert was all it was reasonably worth.—Vaccaro Bros. & Co. v. Louisville & N. R. Co., 123 So 355, 11 La.App 348.

(2) Contract price of goods not procurable on open market may be assumed to be actual value, as respects seller's loss from carrier's failure to divert the shipment as directed.—Vaccaro Bros. & Co. v. Louisville & N. R. Co., supra.

Burden of proof

Carrier, seeking to avoid liability for negligent failure to divert banana shipments, had burden of establishing loss would have occurred anyway.—Vaccaro Bros. & Co. v. Louisville & N. R. Co., 123 So. 355, 11 La.App. 348.

Sufficiency of evidence

La.—Vaccaro Bros. & Co. v. Louisville & N. R. Co., 123 So. 355, 11 La.App. 348.

23. Ga—Central of Georgia R. Co. v. Chicago Portrait Co, 49 S.E 727, 122 Ga 11, 106 Am St.R. 87.
La—Vaccaro Bros. & Co. v. Louisville & N R. Co, 123 So 355, 11 La.App. 348
Okl.—Chicago, R. I. & P. Ry Co. v. Murphy, 229 P. 210, 104 Okl. 34, certiorari denied 45 S.Ct. 512, 268 U.S. 693, 69 L.Ed. 1161, error dismissed 46 S.Ct. 472, 271 U.S. 642, 70 L.Ed. 1128.

Tex—Davis v. Stamford Mill & Elevator Co, Civ.App, 260 S.W. 1081
Wis—Wooster v Chicago & N. W Ry. Co, 166 N.W. 431, 167 Wis. 6

Carrier liable for actual damages sustained by reason of nondelivery at designated place—Chicago, R. I. & P. Ry. Co. v. Murphy, 229 P. 210, 104 Okl. 34, certiorari denied 45 S.Ct. 512, 268 U.S. 693, 69 L.Ed 1161, error dismissed 46 S.Ct. 472, 271 U.S. 642, 70 L.Ed 1128.

Market value, not contract price at which goods, procurable on open market, are sold, determines seller's damages for carrier's failure to divert a shipment to a place designated by the shipper—Vaccaro Bros. & Co. v. Louisville & N. R. Co., 123 So 355, 11 La.App 348.

Interest on claim

Under Federal Control Act March 21, 1918 § 10, Transportation Act Febr. 28, 1920, and Vernon's Sayles Civ St.Annot 1914 art 4981, it was proper in rendering a judgment against the director general of railroads or the agent designated by the president, for demurrage, reconsignment charges, and war tax, which the plaintiff was required to pay because of delay of car at point to which it was transported other than that specified in bill of lading, to allow interest on the claim.—Davis v. Stamford Mill & Elevator Co., Tex Civ.App., 260 S.W 1081.

Expenses incurred

(1) Where goods are carried beyond the place to which they are consigned and are delivered to the consignee at another place, he may recover any sum which, in order to get possession of the goods, he was required to pay as freight for carriage beyond their proper destination.—Flakne v. Great Northern R. Co, 118 N.W. 58, 106 Minn. 64

(2) Where a carrier delivered stock at the wrong point, and the shipper had to hire a car to ship them to the agreed destination, the carrier was liable for the expense so incurred for breach of contract enforceable in a state court—Wooster v Chicago & N. W. Ry. Co., 166 N.W. 431, 167 Wis. 6.

24. Tex.—International & Great Northern Ry. Co. v. Kansas City Produce Co., Civ.App., 200 S.W 254, dismissed for want of jurisdiction.

25. Colo—Davis v. Fruita Mercantile Co, 220 P. 983, 74 Colo 247.
Tex—International & Great Northern Ry. Co v. Kansas City Produce Co, Civ.App., 200 S.W 254, dismissed for want of jurisdiction—Patterson & Roberts v. Quanah, A & P. Ry. Co, Civ.App., 195 S.W. 1163.

26. Mich—Stearns v. Grand Trunk R. Co., 111 N.W. 769, 148 Mich. 271.

27. Cal—Crinella v. Northwestern Pac R Co., 259 P. 774, 85 Cal. App 440—Pacific Heater Mfg Co v. Southern Pac. Co., 188 P. 600, 45 Cal.App. 748.
Ga—Sipple v. Seaboard Air Line Ry. Co., 114 S.E. 435, 151 Ga. 376, reversing 110 S.E. 39, 28 Ga App 16, conformed to 115 S.E 47, 29 Ga App 328.
Ind—Cleveland, C, C. & St L. Ry. Co. v. Bement-Rea Co, 154 N.E

practically valueless, having regard to the expense of acceptance and use, and to the purpose for which it was intended,[28] the consignee's remedy as stated infra § 273, in case of partial loss or of injury not rendering the property worthless, being to accept the goods and sue for damages, or, in case the injury renders the property valueless, to reject the consignment and sue for its full value. A consignee may not refuse to accept goods because of delay in delivery,[29] his remedy being to receive the goods and sue for the damages caused by the delay, as stated infra § 222. A consignee of goods which are of little or trifling value and unsalable, however, may refuse to accept them when tendered after a negligent delay in transportation thereof, and may recover damages and the statutory penalty for failure to adjust and pay the claim within the statutory time after filing thereof.[30]

Where a shipper refuses to accept goods consigned to himself, because of damage caused by the carrier, he has the right to order the goods redelivered to him at the point of shipment.[31] Where a carrier which had notified the shipper of the consignee's refusal to accept the goods, and, upon being directed to ship the goods to another point, advised the shipper that it could not comply with the directions because of garnishment proceedings affecting the shipment, but did comply with such directions within a reasonable time thereafter, the shipper could not defend an action for refusal to accept the goods at the point directed, on the ground that the carrier had renounced the contract of shipment.[32] A carrier which, at the shipper's request, agrees to divert the shipment in transit, because of a telegram from the original consignee refusing to receive the same, but which fails to do so, is liable to the shipper for damages resulting from the failure to divert.[33]

Upon refusal of the consignee to receive the goods, the ordinary presumption that he is the owner is destroyed, and the carrier is justified in assuming that such consignee has no authority to direct the further disposition of the goods.[34]

Rights and duties of assignee of bill of lading. The assignee of a bill of lading describing the goods as marked with certain initials, which was procured on the shipper's promise so to mark them, has no right to refuse a tender of the goods to him as holder of the bill, because the shipper failed to mark the goods in accordance with his promise.[35] Where a shipment of goods was diverted at the direction of the shipper, but such direction was not indorsed on the bill of lading, and the goods were

32, 86 Ind App. 67, rehearing denied 155 N.E. 46, 86 Ind.App. 67.
La.—Silverman v. St Louis, I, M & S. Ry. Co 26 So 447, 57 La Ann. 1785 Contra Meyer v. Vicksburg, S. & P. R. Co, 6 So. 218, 41 La. Ann. 639, 17 Am S.R. 408.
N.H—New Hampshire Wholesale Fruit Co. v. Payne, 120 A. 78, 80 N.H 54.
N.C—Whittington v. Southern Ry., 90 S.E. 505, 172 N.C. 501.
S.C.—Poor v. Southern Express Co., 86 S.E 21, 101 S.C. 504—McGrath v. Charleston, etc., R. Co., 75 S. E 44, 91 S C. 552, 42 L.R.A.,N S., 782, Ann Cas 1914A 64.
S.D.—Beck v. Chicago, M. & St. P. Ry. Co, 164 N.W. 74, 39 S D 297.
Tex—Quanah, A. & P. Ry. Co. v. Novit, Civ.App., 199 S.W. 496—Houston & T. C. Ry. Co. v. Iversen, Civ App., 196 S.W. 908—Patterson & Roberts v. Quanah, A & P. Ry Co., Civ.App, 195 S.W. 1163
10 C.J. p 404 note 71

This rule, although recognized, has been held inapplicable where the carrier, at the shipper's request, accepted the duty of disposing of a shipment of peaches damaged by delay—Wilson v. Hines, 196 P. 1007, 58 Utah 38.

In New York

(1) The rule stated in the text has been followed in some cases.—Brand v. Weir, 57 N.Y.S 731, 27 Misc 212—Mills v. National S. S. Co, 5 N.Y. S 258.

(2) But a contrary rule has been asserted in other cases.—Monell v Northern Cent. R. Co, 16 Hun 585—Freeman v. Weir, 94 N.Y.S. 327, 47 Misc. 681.

28. Cal—Crinella v. Northwestern Pac. R. Co, 259 P. 774, 85 Cal App. 440—Pacific Heater Co. v. Southern Pac. Co., 188 P. 600, 45 Cal App. 748.
Ga—Sipple v. Seaboard Air Line Ry. Co., 114 S E 435, 154 Ga 376, reversing 110 S E 39, 28 Ga App 16, conformed to 115 S.E. 47, 29 Ga. App. 328.
Ind—Cleveland, C, C & St. L Ry. Co. v. Bement-Rea Co, 154 N.E. 32, 86 Ind App 67, rehearing denied 155 N E 46, 86 Ind App. 67.
S D—Beck v Chicago, M & St P. Ry Co, 164 N W 74, 39 S D 297.
Tex—Quanah, A & P. Ry Co v Novit, Civ App, 199 S.W. 496—Houston & T. C. Ry. Co v. Iversen, Civ.App, 196 S.W. 908
Utah—Wilson v. Hines, 196 P. 1007, 58 Utah 38
10 C J. p 404 note 75.

29. Ark—Chicago, R. I. & P. Ry Co v Albert Pfeifer & Bro, 119 S.W. 642, 90 Ark. 524, 22 L.R.A., N S., 1107.
Ga—Southern Ry. Co. v Bunch, 102 S.E 462, 25 Ga App 45.
La—United Pants Mfg. Co. v. American Ry. Express Co., 2 La App. 7.
10 C J. p 307 note 95.

30. Miss.—American Ry Express Co. v. Pitts, 91 So. 571, 128 Miss. 875.
10 C J. p 309 note 9.

The Corpus Juris text has been quoted with full approval in American Ry Express Co. v. Pitts, 91 So 570, 128 Miss. 875.

31. Ohio—Roadway Express v. Fidelity & Guaranty Fire Corporation, 3 N E.2d 805, 52 Ohio App. 401

32. Minn—Davis v. Aslesen, 206 N. W. 405, 165 Minn. 239.

33. Mo—Amber v. Payne, App, 239 S W 588.

It is no defense that no proof of the shipper's right to divert had been made to the carrier before it agreed to divert the shipment, it not having exacted any such proof, to which it was entitled if it had seen fit to require it—Amber v. Payne, Mo App, 239 S W. 588

34. N.Y.—Sterling Button Co. v. Barrett, 171 N Y.S 326

35. Tex—Gulf, C. & S. F. Ry. Co v. Kempner, Com App, 282 S.W 795, reversing, Civ.App., 275 S.W. 459.

not delivered, but sold for charges, the title of the assignee of the bill of lading became absolute on notice that the person to be notified, as indicated on the bill, refused to accept the goods, and it was the duty of the assignee to pay the charges and take the goods, especially if the diversion was not the cause of such refusal and the carrier was not responsible for the diversion.[36]

The carrier's liability for delivery to the wrong person, as affected by the consignee's failure or refusal to accept the goods, is discussed supra § 174 c (1).

b. Duty to Notify Consignor

The prevailing rule is that, on failure or refusal of the consignee to accept the goods, the carrier must give the consignor notice thereof. A few authorities, however, hold that such notice is not necessary except under special circumstances. Where notice is given, the carrier holds the goods as bailee, subject to the consignor's order.

By the weight of authority, affirmed by statute in some jurisdictions, it is the duty of a carrier to exercise due diligence to give the consignor notice,[37] within a reasonable time,[38] of the consignee's failure or refusal to accept the goods, if it could by the exercise of ordinary diligence have known of such failure or refusal.[39] Some authorities, however, have held that the duty of the carrier to give the consignor notice of the consignee's failure or refusal to accept delivery depends upon the circumstances, and is not absolute;[40] that, in the absence of any such requirement in the bill of lading, the carrier is under no duty to give notice to the con-

36. S.C.—Liberty Nat. Bank v. Hines, 104 S.E. 313, 115 S.C. 82.

37. Ga.—Atlantic Coast Line R. Co v. Ousley Co., 150 S.E. 564, 40 Ga.App. 555—Atlantic Coast Line R. Co. v. Ousley Co., 139 S.E. 586, 37 Ga.App. 215—Moor v. Southern Pac. Co., 132 S.E. 920, 35 Ga.App 288—Bailey v. Georgia R. R., 126 S.E. 896, 33 Ga.App. 526—Atlantic Coast Line R. Co. v. Henderson Elevator Co., 88 S.E. 101, 18 Ga. App. 279.

Ohio.—Church v. Cleveland, C., C. & St. P. Ry. Co., 5 Ohio N.P.,N.S., 585.

Okl.—Chicago, R. I. & P. Ry. Co. v. Waldo, 216 P. 911, 912, 90 Okl. 185.

Or.—Stoddard Lumber Co. v. Oregon-Washington R. & Nav. Co., 165 P. 363, 84 Or. 399, 4 A.L.R. 1275.

Tex.—Texarkana & F. S. Ry. Co. v. Twin City Products Co., Civ.App., 208 S.W. 989, 990.

10 C.J. p 270 note 25.

Corpus Juris is cited in support of the proposition stated in the text.

Okl.—Chicago, R. I. & P. Ry. Co. v. Waldo, supra.

Tex.—Texarkana & F. S. Ry. Co. v. Twin City Products Co., supra.

To whom notice given

Where goods are shipped to the consignor's order, and the bills of lading are sent to a bank at destination, such bank is the consignor's agent for the purpose of presenting the draft only, and not for the purpose of receiving notice that the goods cannot be delivered.—Stoddard Lumber Co. v. Oregon-Washington R. & Nav. Co., 165 P. 363, 84 Or. 399, 4 A.L.R. 1275.

"Order notify" bill of lading

(1) Where goods are consigned by a shipper to its own order, with directions to notify a person named, upon failure of the carrier to deliver the goods, it is not sufficient that it notify such person; but it must notify the consignor, if the bill of lading is sufficient to show that he is the owner of the goods.—Stoddard Lumber Co. v. Oregon-Washington R. & Nav. Co., 165 P. 363, 84 Or. 399, 4 A.L.R. 1275.

(2) Consignor is not chargeable with notice of failure of the person to be notified to accept goods, and carrier must exercise due diligence in notifying consignor of such failure.—Atlantic Coast Line R. Co. v. Ousley Co., 139 S.W. 586, 37 Ga.App. 215.

(3) Where shipper consigned goods to himself for delivery to another on shipper's order, on refusal of third person to receive goods, shipper became unconditional consignee entitled to notice of arrival and reasonable time to make other disposition thereof.—New York, P. & N. R. Co. v. Chandler, 106 S.E. 684, 129 Va. 695.

Applicability of statute

Crawford & M.Dig. § 909, requiring carrier to notify consignor of consignee's refusal to accept freight, whereupon consignor must direct disposition, does not apply to shipment consigned to one not known to the carrier's agent, so as to authorize delivery to person for whom intended on receipt of information as to his identity in response to telegram requesting advice as to disposition.—Missouri Pac. R. Co. v. Toll, 261 S.W. 652, 164 Ark. 327.

38. Ark.—Missouri Pac. R. Co. v. Myers, 293 S.W. 15, 173 Ark. 747.

Ohio.—Davis v. Oswald & Taube, 149 N.E. 861, 113 Ohio St. 499, certiorari denied Mellon v. Oswald & Taube, 46 S.Ct. 354, 270 U.S. 658, 70 L.Ed. 785

Or.—Stoddard Lumber Co. v. Oregon-Washington R. & Nav. Co., 165 P. 363, 84 Or. 399, 4 A.L.R. 1275.

39. Ark.—Missouri Pac. R. Co. v. Myers, 293 S.W. 15, 173 Ark. 747.

Tex.—Missouri, etc., R. Co. v. Jenkins, 80 S.W. 428, 35 Tex.Civ.App 429.

Corpus Juris is quoted in Missouri Pac. R. Co. v. Myers, 293 S.W. 15, 18, 173 Ark. 747, as authority for this rule.

Absence of express refusal

A railroad was under no obligation to seek further instructions from shipper with regard to watermelon shipment, although consignee examined shipment and made no effort to accept it, in absence of express refusal of shipment by consignee.—Sowega Melon Growers Ass'n v. Pere Marquette Ry. Co., Ga.App., 194 S.E. 917.

40. N.Y.—Porter v. Pennsylvania R. Co., 215 N.Y.S. 727, 217 App.Div. 49—Markowitz v. New York Cent. R. Co., 172 N.Y.S. 233.

Tenn.—Epstein, Henning & Co. v. Nashville, Chattanooga & St. Louis Ry. Co., 4 Tenn.App. 412.

Question of fact for jury

Whether carrier violated duty in not notifying seller of buyer's refusal to accept shipment was held to be a question of fact for the jury.—Porter v. Pennsylvania R. Co., 231 N.Y.S. 432, 224 App.Div. 440—Porter v. Pennsylvania R. Co., 215 N.Y.S. 727, 217 App.Div. 49.

Effect of provision of demurrage tariff

Provisions of railroad's tariff relating to notice to consignor for purposes of demurrage charges do not fix definitely the duty of the carrier to notify consignor of consignee's failure to accept shipment, but is at least a recognition of the duty to give notice under certain circumstances, and a person familiar therewith may have right to rely on such notice.—Porter v. Pennsylvania R. Co., 215 N.Y.S. 727, 217 App.Div. 49.

signor,[41] unless, under the circumstances of the particular case reasonable care requires that notice be given,[42] or unless the consignor exercises the right of stoppage in transitu.[43] So it has been held that notice to the consignor is not necessary even though required by a rule of the carrier,[44] and that the duty to give such notice is not imposed by the provisions of the Carmack amendment relating to interstate transportation.[45] Notice of the consignee's failure or refusal to accept the goods is excused where the consignor obtains timely notice from other sources,[46] or where the consignee merely neglects to accept or unload the goods, but promises to do so shortly, or gives other indications of that purpose,[47] or where at the time the goods were left with the carrier for transportation the consignor did not disclose his name and residence.[48]

Where goods are shipped to the consignor's order, with directions to notify the purchaser of the goods, the carrier cannot extend credit to the purchaser but must give notice of nonacceptance not later than the day following that on which the goods were offered to him.[49] If the bill of lading provides that the purchaser shall have ten days within which to pay for the goods, the carrier need not give notice until after the expiration of such period.[50]

The return of a draft and bill of lading to the shipper, with notice that the draft has not been paid, is sufficient notice to him that the goods have not been accepted by, or delivered to, the consignee.[51]

Upon failure, without excuse, to give the consignor notice of the consignee's refusal to accept the goods, the carrier is liable to the consignor for the resulting damages,[52] and the burden is on the carrier to show facts relieving it from the duty to give notice.[53]

It has been held, however, that, even if it was the duty of an initial carrier to deliver the goods to the consignee rather than to a connecting carrier, and to give the consignor notice of the consignee's refusal to accept delivery, the mere failure

41. U.S.—Trinidad Bean & Elevator Co. v. Pennsylvania R. Co., C.C.A. Pa., 72 F.2d 371—Trinidad Bean & Elevator Co. v. Pennsylvania R. Co., D.C.Pa., 8 F.Supp. 888.
Pa.—McCarthy v. Pennsylvania R. Co., 97 Pa.Super. 570—Keystone Pub. Co. v. Pennsylvania R. Co., 78 Pa.Super. 486.
Contra Fineburg v. American Express, 71 Pa.Super. 407—Caps v. American Express, 2 Pa.Dist. & Co. 9.

"Notify party" not consignee
Where bill of lading named shipper as consignor and consignee, with directions to notify third person, such person was not a "consignee" as regards carrier's alleged duty to notify shipper of such person's failure to respond to notice.—Trinidad Bean & Elevator Co. v. Pennsylvania R. Co., C.C.A.Pa., 72 F.2d 371.

42. Tenn.—Epstein Henning & Co. v. Nashville, Chattanooga & St. Louis Ry. Co., 4 Tenn.App. 412—Kremer v. Southern Express Co., 6 Coldw. 356.
10 C.J. p 270 note 26.

In New York
(1) The rule stated in the text has been affirmed—Wien v. New York Central, 152 N.Y.S. 154, 166 App.Div. 766—Markowitz v. New York Cent. R. Co., 172 N.Y.S. 233.

(2) On the other hand, it has been held that the better opinion is that the carrier is bound to presume, from the consignee's refusal to accept the goods, that the consignor is still the owner thereof, and, to relieve itself from liability as carrier, it should store the goods and notify the consignor.—Fine v. Barrett, 142 N.Y.S. 533, 81 Misc. 234—Sterling Button Co. v. Barrett, 171 N.Y.S. 326—Sauer v. Lehigh Valley R. Co., 150 N.Y.S. 977.

(3) Even if bankruptcy of consignee, coupled with his failure to accept, be a special circumstance requiring carrier to give notice to consignor, loss because of the goods being specially made for consignee, and having no market value, could not be due to failure to give the notice, having already occurred.—Markowitz v. New York Cent. R. Co., 172 N.Y.S. 233.

43. Pa.—Mull v. Pennsylvania R. Co., 38 Pa.Super. 416.
10 C.J. p 270 note 27.

44. Tenn.—Epstein Henning & Co. v. Nashville, Chattanooga & St. Louis Ry. Co., 4 Tenn.App. 412.

45. Tenn.—Epstein Henning & Co. v. Nashville, Chattanooga & St. Louis Ry. Co., supra.

46. N.Y.—Porter v. Pennsylvania R. Co., 215 N.Y.S. 727, 217 App. Div. 49.
S.C.—Liberty Nat. Bank v. Hines, 104 S.E. 313, 115 S.C. 82.
10 C.J. p 271 note 28.

47. N.Y.—Porter v. Pennsylvania R. Co., 215 N.Y.S. 727, 217 App.Div. 49.
10 C.J. p 271 note 30.

48. Okl.—Chicago, R. I. & P. Ry. Co. v. Waldo, 216 P. 911, 90 Okl. 185.
10 C.J. p 271 note 29.

Corpus Juris is cited in Chicago, R. I. & P. Ry. Co. v. Waldo, 216 P. 911, 912, 90 Okl. 185, in support of this proposition.

The right to notice is slight in such case.—Porter v. Pennsylvania R. Co., 215 N.Y.S. 727, 217 App.Div. 49.

49. Or.—Stoddard Lumber Co. v. Oregon-Washington R. & Nav. Co., 165 P. 363, 84 Or. 399, 4 A.L.R. 1275.

50. Or.—Stoddard Lumber Co. v. Oregon-Washington R. & Nav. Co., supra.

51. N.Y.—Dodge & Dent Mfg. Co. v. Pennsylvania R. Co., 162 N.Y.S. 549, 175 App.Div. 823.

52. Ga.—Atlantic Coast Line R. Co. v. Ousley Co., 150 S.E. 564, 40 Ga.App. 555—Atlantic Coast Line R. Co. v. Ousley, 139 S.E. 586, 37 Ga.App. 215.

Under Arkansas statute
(1) Giving right of action for failure to notify consignee, the damages could be only such as, in parties' contemplation, would reasonably and probably result from railroad agent's failure promptly to give such notice.—Missouri Pac. R. Co. v. Armstrong, 44 S.W.2d 1093, 184 Ark. 1076.

(2) Damages were assessable as of time of railroad agent's failure to notify consignee of arrival of shipment.—Missouri Pac. R. Co. v. Armstrong, supra.

53. Or.—Stoddard Lumber Co. v. Oregon-Washington R. & Nav. Co., 165 P. 363, 84 Or. 399.

to give such notice would not, of itself, constitute a conversion.[54]

The necessity of notice to the consignor where the consignee refuses to accept a c. o. d. shipment is discussed infra § 186.

Effect of notice. After the carrier has notified the consignor that the consignee has refused the goods shipped, it is liable only as a bailee;[55] it holds the goods subject to the consignor's orders, although the consignee may have given verbal directions for their return,[56] and the consignor is bound to demand delivery of the goods to himself and to take charge of them.[57]

c. Duty to Return Goods

On refusal or failure of the consignee to receive the goods, the carrier need not return them to the consignor unless ordered to do so; but if the carrier receives such order and fails to return the goods it will be liable for the loss in the absence of facts creating an estoppel. Payment of charges may be required as a condition precedent to a return of the goods.

It is not the duty of a carrier, upon failure or refusal of the consignee to receive the goods, to return them to the consignor unless ordered to do so;[58] but the carrier may undertake to transport the goods back to the shipper,[59] or the consignor may order the goods returned to him;[60] and if the carrier on receiving such order acquiesces therein, but takes no action for several months, during which time the goods are destroyed by fire in a warehouse where they were stored, the carrier is liable for the loss;[61] but it has been held that, unless there is an absolute denial by a carrier of a shipper's right to a return of the goods, or unless the excuses for failure to return are unreasonable, inconsistent, or made in bad faith, there can be no conversion by the carrier, even on clear proof of demand by the shipper and failure to return.[62] Where the consignee wrongfully refuses to receive the goods and the carrier returns them to the consignor, on his order to do so, the consignee is estopped to sue the carrier for conversion.[63] The refusal of the owner of goods consigned to himself to accept the same constitutes an abandonment thereof, and precludes him from thereafter asserting that the carrier has converted them, no matter what disposition the carrier makes of them.[64]

Where at the request of the consignee the carrier holds a shipment in its freight station, and during this time an order of stoppage in transit is received from the consignor's assignee, and demand is made for a return of the shipment, the carrier is not bound to return the goods until it has received payment of both outgoing and return charges.[65]

§ 179. Duty to Warehouse Goods and Corresponding Liability of Warehouseman

Upon failure or refusal of the consignee to receive the goods, it is the carrier's duty to store them, and where such duty is performed the carrier becomes liable only as warehouseman or bailee.

Where the consignee fails or refuses to receive the goods shipped, it is the duty of the carrier to store the goods either in its own warehouse or in that of some responsible third person,[66] at the ship-

54. Ala.—Ocean S. S. Co. of Savannah v. People's Shoe Co., 81 So 241, 202 Ala 594, conformed to 81 So. 245, 17 Ala.App. 34.

Notice from initial carrier

Assuming that consignor of interstate shipment was entitled to notice of storage of goods in a warehouse, consignee having refused to accept the goods, notice from initial carrier to consignor was sufficient, in view of the Carmack Amendment—Ocean S S. Co. of Savannah v. People's Shoe Co, 81 So. 241, 202 Ala. 594, conformed to 81 So. 245, 17 Ala.App. 34.

55. Ark.—Missouri Pac. R. Co. v. Myers, 293 S.W. 15, 173 Ark. 747. N.Y.—Langsdorf v. New York Cent, etc., R. Co., 142 N.Y.S. 336, 81 Misc. 144.

Corpus Juris is quoted in Missouri Pac R. Co. v. Myers, supra, as authority for the rule stated in this and the following texts.

56. Ga.—Cincinnati, N. O. & T. P. Ry. Co. v. Malsby Co., 96 S.E. 710, 22 Ga.App. 595

57. Ark.—Missouri Pac. R. Co. v. Myers, 293 S.W. 15, 173 Ark. 747. 10 C.J. p 271 note 33.

58. Ill.—Louisville, etc, R. Co. v. Heilprin, 95 Ill App 402. La.—Monroe Mfg Co. v. New Orleans, etc, R. Co., 4 La.App., Orleans, 126.

59. Pa.—Aronson v. Cleveland, etc, R. Co, 70 Pa. 68.

Pleading construed

An allegation that defendant undertook to transport the goods back to the shipper on failure of the consignee to accept was held not to show liability as warehouseman but as common carrier—Aronson v. Cleveland & P. R. Co., 70 Pa. 68.

60. Ohio—Freiberg v. Cleveland, etc, R. Co, 30 Ohio Cir Ct. 669.

61. Ohio—Freiberg v. Cleveland, etc., R. Co, supra.

62. Ohio.—Rubin v. Wells Fargo Express Co., 85 N.Y.S. 1108. 10 C.J. p 271 note 37.

63. Ala.—Stafsky v. Southern R. Co., 39 So. 132, 143 Ala. 272

64. Ill.—Illinois Cent. R Co. v Carter, 46 N.E. 374, 165 Ill. 570, 36 L.R.A. 527.
Wash.—Beedy v. Pacer, 60 P. 56, 22 Wash. 94.

65. N.Y.—O. K. Display Fixture Co. v. American Ry. Exp. Co., 201 N.Y. S. 266, 121 Misc. 816.

66. U.S.—Estherville Produce Co. v. Chicago, R. I. & P. R Co, C.C.A. Iowa, 57 F.2d 50.
Ala.—American Ry. Express Co. v. Mobile Importing & Trading Co., 108 So. 238, 239, 214 Ala. 420—American Ry. Express Co v. Henderson, 107 So. 746, 214 Ala. 268—Louisville & N. R Co. v. B F Roden Grocery Co., 96 So. 912, 914, 209 Ala.App 694
Ark.—Yazoo & M V R. Co. v. Altman, 196 S.W. 122, 129 Ark. 358—

per's expense,[67] and to hold the goods subject to the order of the shipper[68] for a reasonable time.[69] It has no right to abandon the goods[70] or unnecessarily to expose them to loss or damage,[71] nor to convert the freight to its own use or to dispose of it contrary to law.[72] The carrier is not required, however, to store the goods at the place of destination, but may remove them to the most convenient and suitable place of storage, provided it holds itself ready to deliver on demand and in so doing, even without the knowledge or consent of the shipper, the carrier is not guilty of a conversion.[73]

Where the carrier has complied with its duty to warehouse the goods, its strict common-law liability as insurer is at an end, and thereafter its relation to the goods is only that of warehouseman or bailee,[74] and it is bound to the exercise of ordi-

Yazoo & M V. R. Co. v. Altman, 187 S W 656, 124 Ark. 490—Chicago, R. I. & P. Ry Co v. Albert Pfeifer & Bro, 119 Ark 642, 90 Ark. 524, 22 L R A,N.S., 1107.
Ga—Bailey v. Georgia R. R, 126 S E 896, 33 Ga App. 526.
Idaho—Columbia Motors Co. v Ada County, 247 P. 786, 788, 42 Idaho 678, 48 A L R. 950
Iowa.—Brunswick v U. S. Express Co, 46 Iowa 677
Tenn—Epstein Henning & Co. v. Nashville, Chattanooga & St. Louis Ry Co, 4 Tenn App. 412
W.Va—Belknap v. Baltimore & O. R. Co, 91 S E. 656, 79 W.Va. 691, L R.A.1917D 916
10 C J. p 269 note 19.

Corpus Juris is quoted with approval in support of this rule and the rules stated in the several following notes.
Ala.—American Ry. Express Co v. Mobile Importing & Trading Co, supra—American Ry. Express Co. v Henderson, supra—Louisville & N. R. Co v B. F. Roden Grocery Co., supra.
Idaho—Columbia Motors Co. v. Ada County, supra.

Where consignee or indorsee of bill of lading cannot be found it is carrier's duty to retain goods until claimed, or store them in a warehouse for and on account of owner, who is prima facie consignee or indorsee.—Ocean S. S. Co. of Savannah v. People's Shoe Co, 81 So. 241, 202 Ala 594, conformed to 81 So. 245, 17 Ala App 34

Effect of statute

The New York Railroad L. § 68, authorizing carrier to deliver unclaimed merchandise to warehouse company or person engaged in warehouse business, is merely permissive and for carrier's benefit, and imposes no duty on it so to deliver property instead of storing it in its own warehouse.—Erie R. Co. v. F Kieser & Son Co, 215 N.Y.S. 576, 216 App Div. 500, reversing Erie R. Co. v. F Kieser & Son Co, 211 N.Y.S. 362, 125 Misc. 283.

Transportation, as regulated by the Interstate Commerce Act as amended by the Carmack amendment, includes all services of connecting carrier as warehouseman of the goods after arrival at point of destination, and before actual delivery to consignee—Fleshnar & Adar v Southern Ry Co, 127 S E 768, 160 Ga 205, answers to certified questions conformed to 128 S E 78, 33 Ga App 823.

67. Iowa—Esthervile Produce Co v. Chicago, R I & P. R. Co., C. C A Iowa, 57 F 2d 50.
Tex—Reed v. Southern Pac. Co, Civ. App, 99 S.W.2d 1026, error dismissed.

68. Ala—American Ry. Express Co. v Mobile Importing & Trading Co, 108 So 238, 214 Ala 420—Louisville & N. R Co. v. B. F Roden Grocery Co, 96 So. 912, 209 Ala 694
Ga—Moor v Southern Pac Co., 132 S E 920, 35 Ga App 288—Bailey v Georgia R R, 126 S E 896, 33 Ga App 526—Atlantic Coast Line R Co. v. Henderson Elevator Co, 88 S E. 101, 18 Ga App. 279
Idaho—Columbia Motors Co. v. Ada County, 247 P. 786, 42 Idaho 678, 48 A.L.R. 950.
Iowa—Brunswick v. U. S. Express Co, 46 Iowa 677.
10 C J. p 270 note 20.

69. Ala.—American Ry. Express Co. v. Mobile Importing & Trading Co, 108 So. 238, 214 Ala. 420—Louisville & N R Co. v. B F Roden Grocery Co., 96 So. 912, 209 Ala 694.
Idaho—Columbia Motors Co. v. Ada County, 247 P. 786, 42 Idaho 678, 48 A L R 950
Tex—Houston & T. C Ry. Co. v. J. W. Geer & Sons, Civ App., 236 S W. 199.
10 C.J. p 270 note 20.

70. Ark—Yazoo & M. V. R. Co. v Altman, 196 S.W. 122, 129 Ark. 358—Yazoo & M V. R Co v. Altman, 187 S W. 656, 124 Ark. 490—Chicago, R. I & P Ry. Co. v. Albert Pfeifer & Bro, 119 S W. 642, 90 Ark. 524, 22 L.R.A.,N.S, 1107
Idaho—Columbia Motors Co v. Ada County, 247 P. 786, 42 Idaho 678, 48 A.L.R. 950.
N.Y.—Porter v. Pennsylvania R Co, 215 N.Y.S 727, 217 App.Div. 49
Tenn—Epstein Henning & Co. v. Nashville, Chattanooga & St. Louis Ry. Co., 4 Tenn App. 412.
10 C.J p 270 note 21.

71. Idaho.—Columbia Motors Co. v. Ada County, 247 P. 786, 42 Idaho 678, 48 A L.R. 950.
N Y.—Porter v Pennsylvania R Co, 215 N Y S 727, 217 App Div 49.
Tenn—Epstein Henning & Co. v. Nashville, Chattanooga & St. Louis, Ry. Co, 4 Tenn App 412.
10 C.J. p 270 note 21.

72. Ark—Yazoo & M. V. R. Co. v Altman, 196 S W 122, 129 Ark. 358—Yazoo & M V. R. Co v. Altman 187 S W. 656, 124 Ark. 490—Chicago, R. I. & P. Ry. Co. v Albert Pfeifer & Bro, 119 S.W. 642, 90 Ark. 524, 22 L R.A,N.S, 1107.
Idaho.—Columbia Motors Co. v Ada County, 247 P. 786, 42 Idaho 678, 48 A L R 950.
10 C J p 270 note 22.

73. Tex—Texas & N. O Ry. Co v. Patterson & Roberts, Civ.App, 192 S.W. 585.

74. Ala—Louisville & N. R Co. v. B. F Roden Grocery Co, 96 So 912, 209 Ala. 694
Ark.—Spears v Missouri Pac R. Co., 39 S W 2d 727, 183 Ark 945
Ga—Moor v Southern Pac Co, 132 S E 920, 35 Ga.App. 288—Bailey v. Georgia R. R, 126 S E. 896, 33 Ga. App 526—Atlantic Coast Line R. Co. v Henderson Elevator Co, 88 S E 101, 18 Ga App 279
Idaho—Columbia Motors Co. v. Ada County, 247 P 786, 42 Idaho 678, 48 A L R. 950
N.C—Efland Hosiery Mills v. Hines, 114 S E 472, 184 N C 356.
Tenn.—Epstein Henning & Co. v. Nashville, Chattanooga & St Louis Ry. Co., 4 Tenn App. 412.
Tex.—House v Soder, 36 Tex. 629—Reed v. Southern Pac Co, Civ. App, 99 S W 2d 1026, error dismissed—Houston & T C. Ry Co v. Iversen, Civ App, 196 S.W 908—American Express Co. v. Duncan, Civ App., 193 S W. 411.
10 C J. p 270 note 23.

Corpus Juris is quoted in Louisville & N R Co. v B. F. Roden Grocery Co., 96 So. 912, 914, 209 Ala. 694, as authority for this rule, and cited in Reed v. Southern Pac Co, Tex.Civ App., 99 S W.2d 1026, 1028.

If the goods are destroyed while in the carrier's possession more than a reasonable time after notice to consignee of arrival of shipment, and

nary care in preserving them,[75] although its liability as depositary, without any agreement for compensation, is for gross negligence only.[76] Where, however, the shipper consigned goods to himself to be delivered to a third person on his order, refusal of such person to receive the goods when he had no written order from the shipper, authorizing delivery to him, did not terminate the carrier's liability as such or render it liable thereafter only as warehouseman, since on such refusal the shipper became the unconditional consignee, and as such was entitled to notice of the arrival of the goods, and a reasonable time thereafter within which to make other disposition thereof.[77]

§ 180. Conversion by Carrier

Whether a carrier is guilty of a conversion where it allows an unauthorized inspection of the goods, supra § 170, or delivers the goods to the wrong person, supra § 174, or at the wrong place, supra § 176, is discussed in prior sections. The question of whether other acts of the carrier render it liable for conversion is discussed infra § 181.

§ 181. Acts Constituting Conversion and Rights and Liabilities Arising Therefrom

a. In general
b. Wrongful refusal to deliver
c. Other acts

a. In General

To be liable for conversion a carrier must wrongfully exercise dominion over the property intrusted to it for transportation, by some affirmative act. Mere nondelivery is not a conversion, nor is there a conversion where the property is lost. If the property is tendered to the consignee after demand, and before suit is brought, he cannot refuse to receive it and sue for conversion.

Not every wrongful act on the part of the common carrier authorizes an action against it for conversion.[78] It is only the wrongful exercise of dominion over another's property that constitutes a conversion,[79] and a mere nonfeasance or failure to perform a duty imposed by contract or implied by law is not a conversion.[80] Mere nondelivery does not constitute a conversion;[81] there must be proof of an actual conversion, not one implied from a failure to deliver.[82] So, the loss or destruction of the goods,

after consignee failed to pay freight and receive the tickets entitling owner to possession, the carrier's liability is that of a warehouseman—Houston & T C. Ry. Co. v. J. W Geer & Sons, Tex.Civ.App., 236 S.W. 199.

Effect of provisions in bill of lading

(1) Where a bill of lading provided that property not removed forty-eight hours after notice of its arrival might be kept, subject to charge for storage and to carrier's responsibility as warehouseman only, upon failure of a consignee to remove goods within forty-eight hours after notice from final carrier, liability of initial carrier as carrier ceased.—Dodge & Dent Mfg Co. v. Pennsylvania R. Co., 162 N.Y.S. 549, 175 App Div. 823.

(2) Under a bill of lading providing that property not removed by the person entitled to receive it within forty-eight hours after notice of arrival might be stored in a licensed warehouse at the cost and risk of the owner, a licensed warehouseman, to whom the carrier delivered the goods on performance of the contract of shipment and the consignee's refusal to accept and the shipper's failure to care for them after notice, was the agent of the shipper, through his own default, and was not the agent of the carrier—Model Mill Co. v. Carolina, C. & O. Ry. Co., 188 S.W. 936, 136 Tenn. 211.

Storage not negligence

Where goods were refused by consignee, it was not negligence for the carrier, as expressly allowed by the contract, to store them in a public warehouse, where they were damaged by fire thereafter.—Efland Hosiery Mills v. Hines, 114 S.E. 472, 184 N.C. 356.

75. Idaho.—Columbia Motors Co v Ada County, 247 P. 786, 42 Idaho 678, 48 A.L.R 950.
10 C.J. p 270 note 24.

76. Tenn.—Epstein Henning & Co. v. Nashville, Chattanooga & St. Louis Ry. Co., 4 Tenn.App. 412.

77. Va.—New York, P. & N. R. Co. v. Chandler, 106 S.E. 684, 129 Va. 695.

78. W.Va.—Dudley v. Chicago, etc., R. Co., 52 S.E 718, 58 W.Va. 604, 112 Am.S.R. 1027, 3 L.R.A.,N.S., 1135.

79. Neb.—Colley v. Chicago & N. W. Ry. Co., 187 N.W. 98, 107 Neb. 864
10 C.J. p 271 note 42.

Repossession of goods

As regards liability to shipper, carrier, after delivering shipment to and receiving payment from consignee, has no lawful right to repossess itself of property.—Baltimore & O. R. Co. v. McGill Bros Rice Mill, 46 S.W.2d 651, 185 Ark. 108.

Successor carrier

While a consignor of a shipment, delivered to a carrier which afterward goes out of business and is succeeded by another carrier may not, where there is no privity of contract between him and the latter carrier, recover against such carrier on the contract of shipment, yet, where the shipment was not lost through fault of the original carrier, but was delivered by the original carrier to the carrier succeeding to its business, and was by the latter lost, the consignor may recover against the latter carrier for the conversion of the shipment thus actually had and received—American Ry. Express Co. v. Archer, 104 S E. 92, 25 Ga App. 647.

80. Ind.—Vandalia R Co. v. Upson Nut Co., 101 N E. 114, 388, 55 Ind. App. 252.
Vt.—Oakdale Farms v. Rutland R. Co., 158 A. 678, 104 Vt. 279—Manly Bros. v. Boston & M. R R., 97 A. 674, 90 Vt. 218.

There must be an affirmative wrongful act

Ind.—Vandalia R. Co v. Upson Nut Co., 101 N.E. 114, 388, 55 Ind App. 252.

81. Ind.—Vandalia R Co. v. Upson Nut Co., 101 N.E 114, 388, 55 Ind App. 252.
N.Y.—Magnin v. Dinsmore, 70 N.Y. 410, 26 Am R 608.
Tex.—Panhandle & S. F. Ry. Co. v. Talmage, Civ.App., 206 S.W 862.
Vt.—Manly Bros v. Boston & M. R. R., 97 A. 674, 90 Vt. 218.

82. N.Y.—Miller v. Taylor, 164 N.Y. S. 823, 100 Misc. 18.

even though resulting from the carrier's negligence, does not amount to a conversion, and the remedy for nondelivery in these circumstances is not by action for conversion but for breach of the duty to transport and deliver,[83] although it has been held that an action for conversion will lie against a carrier for refusal to deliver goods under circumstances indicating that the goods were stolen by its employees.[84] Likewise, as is shown infra § 222, a mere delay in delivery, however unreasonable and long continued, does not, of itself, constitute a conversion. To constitute a conversion, however, it is not necessary that the carrier should have applied the property to its own use, or that it should have derived any benefit therefrom, it being sufficient that it has dealt with the property as if it were its own and in defiance of the owner's legal rights.[85] Whether a demand and a refusal to deliver is essential to a suit for conversion is discussed infra § 183 a. Even after demand, if the goods are tendered before suit brought, it is held by some authorities, the consignee cannot refuse to receive the goods and sue for conversion, his sole remedy being an action for damages resulting from the delay,[86] although, on the other hand, it has been held that, after a conversion of the goods by a carrier, the consignee is not bound to receive them, and that any loss of the goods thereafter must fall upon the carrier.[87]

b. Wrongful Refusal to Deliver

(1) In general
(2) What constitutes wrongful refusal in general
(3) Requiring payment of charges

(1) In General

A wrongful refusal of a carrier to deliver the goods to the person entitled thereto is a conversion, and, after waiting a reasonable time, he may, on demand, sue therefor.

A mere refusal by the carrier to deliver the goods is not conclusive evidence of conversion, although it may, in connection with other facts, establish it,[88] but the refusal of a carrier, without lawful excuse, to deliver the goods to the consignee or person rightfully entitled thereto, constitutes a conversion,[89] and after the consignee has waited a reasonable time he may, on demand, maintain an action for conversion.[90] Even though the consignee has refused, under the influence of a mistake, to receive goods from the carrier, he may maintain an action for refusal to deliver on his subsequent demand when they are still in the hands of the carrier and no other rights have intervened.[91] Al-

83. U.S.—Lawrence Leather Co. v. Norton, Lilly & Co., D.C.N.Y., 15 F.2d 101.
N.Y.—Salt Springs Nat. Bank v. Wheeler, 48 N.Y. 492, 8 Am.R. 564—Hawkins v. Hoffman, 6 Hill 586, 41 Am.D. 767—Packard v. Getman, 4 Wend. 613, 21 Am.D. 166.
Tex.—Williamson v. Texas & P. Ry. Co., 166 S.W. 692, 106 Tex. 294—American Ry. Express Co. v. Santa Anna Gas Co., Civ.App., 250 S.W. 271, petition dismissed 44 S.Ct. 3, 263 U.S. 725, 68 L.Ed. 526.
Vt.—Oakdale Farms v. Rutland R. Co., 158 A. 678, 104 Vt. 279—Manley Bros. v. Boston & M. R. R., 97 A. 674, 90 Vt. 218.
10 C.J. p. 272 note 44.
"Cause of action, if there be such, flows from default of the obligation of a common carrier."—Lewis Poultry Co. v. New York Cent. R. Co., 105 A. 109, 110, 117 Me. 482.

The negligence of a carrier, however extreme, and the consequent loss of goods in its hands for transportation is not alone sufficient to constitute conversion which requires that the act be positive and tortious—Colley v. Chicago & N. W. Ry. Co., 187 N.W. 98, 107 Neb. 864.

Carrier not liable for conversion unless the conversion is by the carrier itself.—Lawrence Leather Co. v. Norton, Lilly & Co., D.C.N.Y., 15 F.2d 101.

84. N.Y.—F. A. Straus & Co. v. Canadian Pac. R. Co., 238 N.Y.S. 50, 227 App.Div. 316, modifying 234 N.Y.S. 622, 134 Misc. 439, and modified on other grounds 173 N.E. 564, 254 N.Y. 407.

85. Ala.—St. Louis & S. F. Ry. Co. v. Georgia, F. & A. Ry. Co., 104 So. 33, 213 Ala. 108.
10 C.J. p. 272 note 43.

86. Iowa.—Clark v. American Express Co., 106 N.W. 642, 130 Iowa 254.
Tex.—Wells v. Hanson, 91 S.W. 321, 41 Tex.Civ.App. 321.
10 C.J. p. 272 note 47.

87. Ohio.—Baltimore & O. R. Co. v. O'Donnell, 32 N.E. 476, 49 Ohio St. 489.

88. N.H.—Hett v. Boston & M. R. R., 44 A. 910, 69 N.H. 139.
10 C.J. p. 272 note 54.
Liability of lessor railroad for the refusal of its lessee to deliver goods to the consignee see C.J.S. title Railroads § 355, also 51 C.J. p. 1093 note 71.

The mere showing of a breach of contract by the carrier does not necessarily prove a conversion.—Taugher v. Northern Pac. Ry. Co., 129 N.W. 747, 21 N.D. 111.

89. U.S.—New York Cent. & H. R. R. Co. v. Bank of Holly Springs, C.C.Miss., 236 F. 562, modified on other grounds 195 F. 456, 115 C.C.A. 358.
Neb.—Shellenberg v. Fremont, E. & M. V. R. Co., 63 N.W. 859, 45 Neb. 487.
N.Y.—Lester v. Delaware, L. & W. R. Co., 36 N.Y.S. 907, 92 Hun 342.
Tex.—St. Louis Southwestern Ry. Co. of Texas v. Kessinger, Civ.App., 72 S.W.2d 1105.
10 C.J. p. 262 note 57.

Delivery to holder of forged bill of lading

Where a railroad company delivered cotton to a holder of a forged bill of lading refusing to make delivery to a bank, holder of the genuine bills of lading with drafts annexed, the company was guilty of conversion, rendering it liable to the bank for the value of the cotton.—New York Cent. & H. R. R. Co. v. Bank of Holly Springs, C.C.Miss., 236 F. 562, modified on other grounds 195 F. 456, 115 C.C.A. 358.

90. Iowa.—Hamilton v. Chicago, etc., R. Co., 72 N.W. 536, 103 Iowa 325.
10 C.J. p. 272 note 50.

91. Pa.—Bacharach v. Chester Freight Line, 19 A. 409, 133 Pa. 414.

though the transportation of goods by a carrier on the requirement of a person unlawfully in possession thereof is not a conversion, as stated infra in subdivision c of this section, yet if the owner of the goods, before delivery, demands them, the carrier is liable for conversion if it refuses such demand.[92] After liability of the carrier for conversion has been established, it may, with reference to third persons, treat the property as its own and itself maintain an action for conversion of such property;[93] and after the shipper has elected to treat the property as converted, on account of wrongful refusal to deliver, and has notified the carrier of such election, he is under no obligation to defend suits relating to the property or to aid the carrier in disposing of it.[94]

(2) What Constitutes Wrongful Refusal in General

A carrier's refusal to deliver goods except on an unreasonable or unlawful condition, or on the signing of a receipt containing an erroneous statement as to the condition of the goods, is a conversion. The mistaken or erroneous statement by the carrier that the goods have not arrived is also a conversion, although there is contrary authority.

The refusal of a carrier to deliver goods except on a condition which is unreasonable or unlawful is equivalent to an absolute refusal and amounts to a conversion,[95] as where the carrier demands excessive or illegal freight or storage charges as appears infra in subdivision b (3) of this section. However, if the refusal to deliver is qualified, and the qualification attached to the refusal is reasonable and made in good faith, it does not constitute a conversion.[96] Since a carrier is not entitled to deliver the goods to a claimant who does not produce the bill of lading, as stated supra § 172, and is guilty of conversion for delivering to one not producing the bill, as shown supra § 174 a, a carrier is not guilty of conversion for refusing to deliver to a person demanding the goods, until such person reasonably shows his right to receive them by producing the bill of lading or otherwise.[97] The carrier is entitled to a reasonable time in which to investigate the claim of the person demanding delivery.[98] Where the consignee, holding a straight bill of lading, refuses to pay a draft for the price of the goods, but credits the amount on a claim against the consignor for prior defective shipments, the carrier is not liable to the consignee for conversion in diverting the shipment on the consignor's order.[99] The carrier has a right to demand a receipt for the goods as a condition of delivery,[1] and may insist on a receipt for the entire consignment where it is ready for delivery,[2] but not before an opportunity is afforded to determine that fact.[3] On refusal of the consignee to sign a receipt stating that the goods were delivered in good condition when in fact they had been unreasonably delayed and improperly cared for in transit, a sale thereof by the carrier constitutes a conversion.[4] Failure of a carrier to deliver a shipment to the consignee on de-

92. Nev.—Dixon v. Southern Pac. Co., 172 P 368, 42 Nev. 73, L R A 1918D 960, affirmed 177 P. 14, 42 Nev. 73, L R A 1918D 960.

93. Iowa.—Hamilton v. Chicago, etc, R. Co, 72 N.W. 536, 103 Iowa 325

Me—Maine Stage Co. v. Longley, 14 Me 444.

10 C.J. p 272 note 52.

94. Kan.—Atchison, etc., R. Co. v. Schriver, 84 P. 119, 72 Kan. 550, 4 L R.A.,N.S, 1056.

95. Neb.—Fred F. Shields Co. v. Chicago & N. W. Ry. Co, 186 N.W. 332, 107 Neb 472

N.Y—Lee v. Erie R Co, 158 N.Y.S 730, 173 App Div 75.

Tex—Panhandle & S. F. Ry. Co. v. Hubbard, Civ.App., 190 S.W. 793.

10 C J. p 273 note 55.

Nature of condition

Where an electric motor was delivered to a carrier for shipment, and the bill of lading acknowledged its receipt in good condition, but when it reached its destination it was found to be damaged, whether the damage occurred before or after the motor was received by the carrier being disputed, and the consignee demanded the motor and offered a receipt for it, but the carrier declined to deliver it unless the consignee would sign a receipt that it was turned over in good condition except "old break," the refusal to deliver the motor to the consignee unless he would sign such a receipt constituted a conversion—Fred F Shields Co. v. Chicago & N W Ry. Co, 186 N.W. 332, 107 Neb. 472.

96. N.Y.—McEntee v. New Jersey Steamboat Co, 45 N.Y. 34, 6 Am.R 28.

10 C.J. p 273 note 56.

97. Ga—Sellers v. Savannah, etc, R. Co, 51 S.E. 398, 123 Ga. 386.

Pa—Union Express Co. v. Shoop, 85 Pa. 325.

Tex.—Gulf, etc, R Co. v. Freeman, Civ.App, 16 S W. 109.

10 C J. p 273 note 57.

No conversion

Plaintiff forwarded to its selling agent over defendant railroad a carload of machinery by a straight bill of lading After the car reached its destination, defendant, at plaintiff's request, substituted an order bill of lading, in which plaintiff was the consignor and consignee, and which provided for the surrender of the bill of lading duly indorsed before delivery of the shipment. Where the goods were held ready for delivery on surrender of the bill of lading at the time of the commencement of the action, and where there was no demand for, or a surrender of, the order bill of lading, and plaintiff could have had the goods at any time if it had wanted them, there was no conversion by the carrier.—J. L. Owens Co. v. Chicago, R. I. & P. Ry. Co., 171 N W. 768, 142 Minn. 487.

98. Minn—Merz v. Chicago, etc., R Co, 90 N W. 7, 86 Minn. 33.

10 C J. p 273 note 58.

99. Mo—Turner Lumber & Investment Co v. Chicago, R I & P Ry. Co., 34 S.W.2d 1009, 225 Mo.App. 1002.

1. Iowa.—Skinner v. Chicago, etc, R. Co., 12 Iowa 191.

2. N J.—Morris, etc., R. Co. v. Ayres, 29 N.J.Law 393, 80 Am.D. 215

3. Minn—Christian v First Div. St. Paul, etc., R. Co., 20 Minn. 21

4. Ill.—Swift v. Louisville, etc., R. Co., 180 Ill.App. 104.

mand, on account of a temporary inability to make delivery, is not a conversion; such failure not being an absolute refusal to deliver, but only a failure to deliver at a particular time.[5]

A mere mistake of the carrier's agent in stating to the owner of the goods shipped that they have not arrived does not amount to a conversion.[6] On the other hand, it has been held that where goods have actually arrived at their destination, and the consignee, having been notified of their arrival, makes demand therefor, the refusal of the carrier to deliver them, although on the ground that they have not arrived, constitutes a conversion.[7]

Surrender of bill of lading. Under statutes requiring the carrier to deliver possession of goods to the owner on payment of freight charges as shown by the bill of lading, it has been held that the carrier has no right to impose as a condition of delivery the surrender of the bill of lading, but can require its production for inspection only, and its refusal to deliver the goods on tender of payment of freight charges as shown by the bill of lading constitutes a conversion.[8] It does not follow, it has been said, that the bill of lading should be surrendered from the fact that it is required to be presented in order to obtain possession of the goods.[9]

(3) Requiring Payment of Charges

Requiring payment of lawful freight charges before delivery of the goods is not a conversion, but it is otherwise as to a refusal to deliver unless illegal, or excessive freight or storage charges are paid.

As the carrier's lien for freight entitles it to retain possession until the freight is paid, it will not be guilty of conversion in making payment of freight a condition of delivery.[10] If, however, no valid lien for freight charges exists,[11] or excessive freight charges are demanded,[12] a refusal to deliver because of nonpayment of such charges will amount to a conversion, and this is so although only a small excess over the legal rate is demanded, and although the carrier's agent acted honestly and in good faith in demanding the excess.[13] It has also been held that where unlawful charges are demanded by the carrier, and the shipper offers to deposit the amount demanded with the understanding that he would pay the proper amount when ascertained, the carrier is guilty of conversion by withholding delivery, even though the shipper would have made the same tender if only lawful charges had been demanded, where it is also apparent that delivery would have been refused if the lawful charges had been tendered unconditionally.[14] There is a conversion if the carrier refuses to deliver the goods until payment not only of freight but also of charges for which it has no legal claim.[15] So, where there is a positive refusal to deliver unless the consignee pays illegal storage charges, the carrier is guilty of conversion, without any express or formal demand for the goods.[16]

c. Other Acts

An unauthorized delivery without performance of conditions of the shipment or sale of the goods may constitute a conversion, as may or may not other acts of the carrier, the question ordinarily being dependent upon the facts of the particular case.

The carrier is guilty of a conversion when, contrary to the orders of the shipper, it delivers the goods to the consignee without payment of the purchase price,[17] as where goods are sent c. o. d., infra § 186, or without performance of other conditions.[18] The misrouting of goods by the carrier will not constitute a conversion where plaintiff accepted and paid the freight at destination on several cars consigned by him.[19] Where, however, a carrier misdirects the shipment and attempts to

5. Ga.—Central of Georgia Ry. Co. v. Leverette, 129 S.E. 292, 34 Ga App. 304.

6. Tenn.—East Tennessee, etc, R Co. v. Kelly, 20 S.W. 314, 91 Tenn 708—East Tennessee, etc, R. Co v Kelly, 20 S W. 312, 91 Tenn 699, 30 Am S.R. 902, 17 L R.A. 691—Louisville, etc, R. Co. v. Campbell, 7 Heisk 253

7. Ky—Louisville & N. R Co. v. Lawson, 11 S.W. 511, 88 Ky. 496.

8. Tex—Dwyer v. Gulf, etc, R. Co, 7 S W 504, 69 Tex 707—Missouri, etc, R Co. v. Long, Civ.App, 167 S W. 769.

9. Tex—Dwyer v. Gulf, etc., R. Co, 7 S.W 504, 69 Tex. 707.

10. N Y.—Chandler v. Beldan, 18 Johns. 157, 9 Am.D. 193.

Va—Norfolk & W Ry Co. v. Potter, 66 S E 34, 110 Va 427.
10 C J p 273 note 63.

11. S C—Miami Powder Co v Port Royal & W C. Ry Co., 16 S E 339, 38 S C 78
10 C J. p 273 note 67

12. Tex—Panhandle & S F Ry. Co v Hubbard, Civ.App, 190 S W. 793
Va—Jennings Automatic Dump Body, Inc v. Virginian Ry. Co., 119 S.E. 147 151, 137 Va. 207.
10 C J p 273 note 64

Corpus Juris is cited in Jennings Automatic Dump Body, Inc. v. Virginian Ry. Co., supra, as authority for this rule.

Sale of goods on refusal to pay excessive freight charges

Where the carrier demands excessive and illegal freight charges, and on the refusal of the shipper to pay them declines to deliver the goods, and sells them for the charges, there is a conversion—Panhandle & S. F. Ry. Co. v Hubbard, Tex.Civ App, 190 S W. 793—Pecos & N. T Ry Co v Porter, Tex.Civ App., 183 S W 98.

13. Tex.—Pecos & N. T. Ry Co v. Porter, supra

14. U.S—Southern Pac Co. v. Potter, C C A Ariz., 26 F.2d 796

15. Mass—Adams v. Clark, 9 Cush. 215, 57 Am D. 41

16. Neb.—Colley v. Chicago & N. W. Ry. Co., 187 N W. 98, 107 Neb. 864.

17. Minn—Jellett v. St. Paul, etc., R. Co, 15 N W. 237, 30 Minn. 265.

18. N.Y—Gass v Astoria Veneer Mills, 118 N.Y.S. 982, 134 App.Div. 184.

19. Ill.—Shafton Co v. St. Louis, etc., R. Co, 174 Ill.App. 121.

place the additional charge on the shipper, it is answerable to him in conversion.[20] A carrier's failure to execute an order of diversion, which amounted merely to an order to delay completion of the transportation for two days, so that the shipment might reach its destination on a more favorable market, does not constitute a conversion.[21] The fact that goods shipped in a sealed car are transferred to another car for the convenience of the carrier, does not render it liable for conversion if the goods are actually transported to their destination.[22] A carrier removing animals injured by it during transportation for the purpose of having them treated is not guilty of converting them, although the removal was made over the objection of the shipper.[23] The carrier's refusal to spot cars at a designated point on its spur track as demanded by the consignee before paying the freight charges, is not a conversion where the freight charges were never tendered, the offer to give a check in payment did not include demurrage charges, and the check was never issued or tendered.[24] A pipe line company which delivers oil to a purchaser thereof in accordance with the directions of the seller is not liable for conversion in so doing.[25]

Warehousing goods. As has already been indicated supra § 179, the carrier on transporting to destination may place the goods in a public warehouse, and such act will not constitute a conversion.[26]

Transportation of goods for one illegally in possession. A carrier receiving goods from a person in actual, but illegal, possession thereof is not guilty of a conversion by reason of having transported the goods,[27] even though it afterward restores them to such person,[28] although, as stated supra § 181 b (1), the rule is otherwise where, before delivery, the real owner demands the goods, and such demand is refused.

Refusal to accept goods for transportation may render the carrier liable to the consignee for conversion. Thus, where the seller of coal had loaded it on cars for transportation to the buyer, and had done all that was required by the usage of business to further the shipment, but the carrier wrongfully refused to sign the bills of lading or accept the coal for transportation, the buyer had a right of action against the carrier for conversion, and such right was not destroyed because the seller subsequently, under compulsion, billed the coal to another.[29] On the other hand it has been held that a railroad company, having a contract with a coal company to furnish coal for its engines on which the coal company was delinquent, was entitled to refuse to accept for transportation cars of coal consigned to a commercial buyer, and to appropriate such coal to its own use under the contract, where it was necessary to enable the railroad company to operate its trains.[30]

Sale of goods. An unauthorized sale of the goods by the carrier constitutes a conversion.[31] So a railway company's act in disposing of a shipment of hogs after a lapse of only seven days, during which a connecting carrier refused to receive the shipment on account of a federal quarantine and the shipper refused to direct disposition, constituted a conversion where the shipment was sold in a market where the demand was slight and the prices low and the contract for transportation was such that the carrier could have claimed reimbursement for any cost occasioned in holding the shipment, and where it was not likely that the quarantine would last long.[32] On the other hand, as discussed in §

20. Ala.—James v. Alabama Great Southern R. Co., 81 So. 582, 202 Ala. 640.

21. Va.—Eastern Shore of Virginia Produce Exch. v. New York, P. & N. R. Co., 126 S.E. 674, 141 Va. 611.

22. Conn.—Tucker v. Housatonic R. Co., 39 Conn. 447.

23. Wash.—Spokane Grain Co. v. Great Northern Express Co., 104 P. 794, 55 Wash. 545.
10 C.J. p. 274 note 81.

24. Wis.—McDonald v. Chicago & N. W. Ry. Co., 266 N.W. 246, 221 Wis. 95.

25. Tex.—Texas Co. v. Beall, Civ. App., 3 S.W.2d 524, error refused.

26. Ga.—Rome R. Co. v. Sullivan, 14 Ga. 277.

27. Nev.—Dixon v. Southern Pac. Co., 172 P. 368, 42 Nev. 73, L.R.A. 1918D 960, affirmed 177 P. 14, 42 Nev. 73, L.R.A. 1918D 960.

Statute inapplicable

Acts 1920 c. 23, requiring pipe lines as common carriers to receive oil offered to them for transportation and to redeliver on order of the consignor, does not apply to the liability of the pipe line company for conversion of oil, which did not belong to the consignor, transported by it before the statute was enacted.—Hall v. Cumberland Pipe Line Co., 237 S.W. 405, 193 Ky. 728.

28. Mass.—Gurley v. Armstead, 19 N.E. 389, 148 Mass. 267, 12 Am. S.R. 555, 2 L.R.A. 80.
10 C.J. p. 274 note 80.

29. Ala.—St. Louis & S. F. Ry. Co. v. Georgia, F. & A. Ry. Co., 104 So. 33, 213 Ala. 108.

30. U.S.—Springfield Light, Heat & Power Co. v. Norfolk & W. Ry. Co., D.C.Ohio, 260 F. 254.

31. Mo.—F. W. Brockman Commission Co. v. Missouri Pac. R. Co., 188 S.W. 920, 195 Mo.App. 607.
N.J.—Standard Lumber Co. v. Pennsylvania R. Co., 139 A. 881, 6 N.J. Misc. 21.
N.Y.—Dobbins v. Delaware, L. & W. R. Co., 163 N.Y.S. 849, 177 App.Div. 132.—Liberty Sales Co. v. Davis, 198 N.Y.S. 253.
Ohio.—Pennsylvania R. Co. v. Gentile Bros. Co., 191 N.E. 369, 47 Ohio App. 162, error dismissed 190 N.E. 578, 128 Ohio St. 50.
S.C.—Dowling v. Seaboard Air Line Ry., 93 S.E. 863, 108 S.C. 186.

32. Md.—Norfolk, etc., R. Co. v. Langdon, 84 A. 473, 118 Md. 268.

48, the carrier may under the circumstances be under a duty to sell the goods in order to prevent loss to the shipper, such as in the case of perishable goods, and such a sale does not constitute a conversion,[33] particularly where it is made in conformity to statute and there has been a tender of the balance of the proceeds of sale after deduction for demurrage and advertising charges;[34] but where notice must be given the shipper, a sale without such notice will constitute a conversion rendering the carrier liable for the value of the goods as in other cases of conversion,[35] unless the owner of the goods consents thereto.[36]

§ 182. Waiver of Conversion

The shipper or owner of the goods may waive the wrongful acts of the carrier which would otherwise be the basis for an action in conversion.

The ratification or waiver of a misdelivery by the carrier is discussed supra § 174 c (3). Other acts of the carrier which would amount to a conversion of the goods may also be waived by the shipper or owner thereof.[37] Where a shipper takes possession of goods shipped with such knowledge and intention that a waiver of the carrier's conversion by change of the consignment results, he cannot recall the waiver.[38]

§ 183. Actions for Conversion

a. Conditions precedent
b. Defenses
c. Venue
d. Parties and persons entitled to sue
e. Pleading
f. Evidence
g. Trial

a. Conditions Precedent

A demand for the goods and a refusal and a tender of the freight charges is necessary when and only when it is requisite to establish the conversion.

Ordinarily a demand for and refusal to deliver the goods is a condition precedent to the right to sue.[39] No demand is necessary, however, where an actual conversion is shown[40] and, since it is the duty of a carrier to deliver the goods to the consignee in accordance with the contract of shipment, a carrier wrongfully refusing to perform such duty is liable for conversion without a previous demand.[41] If it appears that delivery was made to the wrong person, no demand is necessary because the evidence of the conversion is complete without it.[42] So, where a carrier delivered to one other than the person to whom the bill of lading was indorsed for delivery of the goods on payment of the draft, no demand is necessary to enable the indorsee of the bill to sue for conversion.[43] Where the carrier was never in a position to make delivery at the proper place, a demand is not a prerequisite to an action for conversion,[44] nor is a demand nec-

33. Iowa.—E. H. Emery & Co. v. Chicago, B. & Q. R. Co., 170 N.W. 540, 186 Iowa 1156, rehearing denied 173 N.W. 12.

34. Tex.—Patterson & Roberts v. Quanah, A. & P. Ry. Co., Civ.App., 195 S.W. 1163.

35. U.S.—Merchants' & Miners' Transp. Co. v. Branch, C.C.A.Va., 282 F. 494, 496.
Tex.—Patterson & Roberts v. Quanah, A. & P. Ry. Co., Civ.App., 195 S.W. 1163.
10 C.J. p 107 note 77.

The Corpus Juris text has been cited with full approval in Marchants' & Miners' Transp. Co. v. Branch, supra

A statute providing that, should any perishable property remain unclaimed, it shall be the duty of the carrier to sell it at public auction after giving five days' notice supersedes the common law with respect to the manner of selling, and a sale by a carrier without the notice required by statute was illegal, and might be made the basis of a suit for conversion, although the carrier complied with the common law rule with reference to the sale of goods.—Ft Worth & D. C. Ry. Co. v. W. A. Nabors Fruit Co, Tex.Civ.App, 200 S W. 420.

36. Ala.—Boshell v. Receivers of St. Louis & S. F. R. Co., 76 So 282, 200 Ala. 366.

37. **Reconsignment**
Where plaintiff consigned wool to itself at St. Louis, and wool was later consigned to plaintiff at Philadelphia, plaintiff's claim for conversion at Philadelphia by ultimate carrier waived any right based on conversion at St. Louis by reconsignment and ratified reconsignment.—Adams Seed Co. v. Chicago Great Western R Co., 165 N.W. 367, 181 Iowa 1052, L R A 1918B 622.

The consignee of a shipment of steel posts, who did not remove them from the station of delivery, and who had full knowledge that they were left by the railroad company exposed and unprotected, and after some had been stolen permitted the company to sell the remainder for storage charges without objection, was not entitled to recover for their conversion—Chicago Great Western R. Co. v. Davis, D.C.Iowa, 1 F.2d 729.

38. Mo.—People's State Savings Bank v. Missouri, etc., R Co, 178 S.W. 292, 192 Mo App. 614.

39. Mass.—Robinson v. Austin, 2 Gray 564.
Tex.—Panhandle & S. F. Ry. Co v. Talmage, Civ App, 206 S.W 862.
Vt.—Manley Bros v. Boston & M. R. R., 97 A. 674, 90 Vt. 218.
10 C.J. p 274 note 84.

Omission of carrier to deliver goods seasonably
An action of tort for the conversion of goods will not lie against a carrier for omitting seasonably to deliver the goods, without a previous demand.—Robinson v. Austin, 2 Gray, Mass., 564.

40. Ga.—Seaboard Air Line Ry. Co. v. Roberds, 159 S.E. 742, 43 Ga. App. 558.

41. Tex.—American Ry Express Co. v Santa Anna Gas Co, Civ.App., 250 S W 271, petition dismissed 44 S Ct. 3, 263 U.S. 725, 68 L Ed 526.

42. Tex.—Gulf, etc, R. Co. v. Humphries, 23 S.W. 556, 4 Tex Civ. App. 333.
10 C.J. p 275 note 86.

43. Ala.—Southern Ry. Co v Harris, 80 So. 101, 202 Ala, 263.

44. Minn.—Thompson, Felde & Co. v. Great Northern Ry. Co., 170 N. W. 703, 142 Minn. 60.

essary where the carrier refuses to deliver except on the payment of unauthorized freight charges.[45] A specific tender of the charges is not required where the acts of the carrier show that such tender would have been refused;[46] and, where the refusal to deliver is for other reasons than the nonpayment of freight charges, an action for conversion will lie without a previous demand or payment of such charges.[47] So a consignor's failure to tender the freight charge does not preclude an action against the carrier for conversion in delivering the goods after stoppage in transit where the arrangement between the carrier and shipper was such as fully to protect the carrier and there had been no request for or refusal to pay the charges.[48]

A carrier which wrongfully delivered goods without demanding surrender of the bill of lading is liable in an action of conversion to a bank to which a draft on the consignee with bill of lading attached had been assigned, although the bank did not first exhaust its remedy against the drawer of the draft.[49]

b. Defenses

In general, matter to constitute a valid defense must go to the establishment of the absence of a conversion.

It is not a defense to an action for the conversion of the property of a consignee that the consignor fraudulently misstated the weight of the goods, and that the consignee knew that the bill of lading stated the weight at less than it was and did not notify the carrier thereof,[50] or that a settlement by the carrier with the consignor had been made,[51] or that the consignee had not paid for the goods.[52] Restitution, if plaintiff assented thereto, is, of course, a defense available to the carrier.[53] It is no defense that, after suit was commenced, the carrier offered to deliver the goods.[54] It is a perfect defense for the carrier to show that it has delivered the goods to the true owner or to the person entitled to their possession regardless of the bill of lading.[55] The carrier, however, cannot defeat the consignee's action by showing title in another without connecting itself with the right of such person.[56] If the owner of the goods notifies the carrier of his ownership and that he believes a third person intends to steal and ship them as owner, the carrier, by avowing its intention to ship the goods if tendered to it, waives its right to defend an action by the owner for conversion on the ground that the description of the goods was insufficient to give it notice of the owner's title.[57] Where a carrier received railroad iron for transportation in good faith without knowledge that it was the carrier's own property and thereafter discovered such fact, the carrier could avail itself thereof as a defense to an action for conversion.[58] It is a good defense to a carrier's liability for conversion of the goods consigned for shipment that the goods were seized and destroyed under the police power of the state.[59]

45. Wash.—Lee v. Fidelity Storage & Transfer Co., 98 P. 658, 51 Wash. 208.

46. Okl.—Atchison, T. & S. F. Ry. Co. v. Etherton, 145 P. 779, 45 Okl. 260.

47. Mass.—Wiggin v. Boston, etc., R. Co., 120 Mass. 201.—Peebles v. Boston, etc., R. Co., 112 Mass. 498.

48. Wash.—Cashmere Fruit Growers' Union v. Great Northern Ry. Co., 270 P. 1038, 149 Wash. 319, certiorari denied Great Northern Ry. Co. v. Cashmere Fruit Growers' Union, 49 S.Ct. 347, 279 U.S. 851, 73 L.Ed. 991.

49. Tex.—Baker v. First Nat. Bank, Civ.App., 260 S.W. 220.

50. Mass.—Wiggin v. Boston, etc., R. Co., 120 Mass. 201.
10 C.J. p. 200 note 4.

51. Minn.—Sleepy Eye Milling Co. v. Chicago, etc., R. Co., 137 N.W. 813, 119 Minn. 199.

52. Tex.—Gulf, etc., R. Co. v. Rotter, Civ.App., 104 S.W. 402.

53. Minn.—Cohen v. Minneapolis, etc., R. Co., 158 N.W. 334, 133 Minn. 298.

No acceptance

Where consignee of apples, diverted on order of shipper, did not agree to accept another car delivered to it and not paid for, in lieu of that diverted, but although not complaining of quality or kind of apples delivered, would agree to nothing until its controversy with shipper over demurrage charges and quality of other shipments was settled, delivery of such other car was not defense to carrier when sued for conversion. — Michael-Swanson-Brady Produce Co. v. Oregon Short Line R. Co., 271 S.W. 854, 219 Mo.App. 419.

54. Iowa.—Hamilton v. Chicago, M. & St. P. R. Co., 72 N.W. 536, 103 Iowa 325.
10 C.J. p. 272 note 50.

Refusal to accept

In an action for damages for conversion of household goods by a dray company employed to move plaintiff's belongings, that plaintiff, after the goods were taken, refused to accept them when tendered, either out of court or in, did not preclude her from recovery for such conversion, since, having been put to the expense of replacing the goods converted, she was not obligated to accept the goods tendered thereafter.—Pittman v. Fort Worth Warehouse & Storage Co., Tex.Civ.App., 258 S.W. 1105, motion granted 263 S.W. 636.

55. Mo.—Turner Lumber & Investment Co. v. Chicago, R. I. & P. Ry. Co., 34 S.W.2d 1009, 225 Mo. App. 1002.

Interpleader unnecessary

In consignee's action against carrier, defense that carrier recognized consignor's diversion order was available, although carrier had not required claimants to interplead in legal proceeding.—Turner Lumber & Investment Co. v. Chicago, R. I. & P. Ry. Co., 34 S.W.2d 1009, 225 Mo. App. 1002.

56. Mo.—Buschow Lumber Co. v. Hines, 229 S.W. 451, 206 Mo.App. 681.

57. Nev.—Dixon v. Southern Pac. Co., 177 P. 14, 42 Nev. 73, L.R.A. 1918D 960, affirming 172 P. 368, 42 Nev. 73, L.R.A. 1918D 960.

58. N.Y.—Valentine v. Long Island R. Co., 79 N.E. 849, 187 N.Y. 121.
10 C.J. p. 275 note 95.

59. Ark.—St. Louis, etc., R. Co. v. Gans, 62 S.W. 738, 69 Ark. 252.

In an action against a carrier for conversion by sale on refusal of the shipper to pay excessive freight, the fact that the shipper and his attorney purchased most of the property was immaterial.[60]

Matters relieving the carrier from liability for conversion because of delivery to a person not entitled to the goods are discussed supra § 174 c.

The motive which controlled the carrier in the conversion is no defense, although it may be shown where exemplary damages are claimed.[61]

c. Venue

An action for conversion by a carrier may be brought where the conversion occurred.

An action against a carrier for the conversion of goods may be maintained in the county where the conversion took place, without regard to whether the carrier received the goods in interstate transportation.[62] If the conversion consists in failure to deliver at the designated destination, the action may be brought in the county where the failure to deliver occurred, that is, the county of destination.[63] When goods are delivered to a carrier for shipment from one county to another, but the goods are not transported at all, and cannot be produced by the carrier, an action for conversion may be brought in the county where the delivery to the carrier and the conversion took place.[64]

d. Parties and Persons Entitled to Sue

An action against a carrier for conversion must be brought by the person having title to or right to the possession of the goods. A person to whom the carrier has delivered the goods upon giving security to indemnify the carrier may intervene in an action against the carrier by the consignee.

As stated supra § 174 a, the shipper alone can sue for a breach of the contract by delivery of the goods to a person not entitled thereto; but where the consignee is the owner of the goods he is entitled to sue for a conversion.[65] A person authorized to take possession of the goods may maintain a suit against the carrier for conversion thereof, particularly where the carrier has accepted his receipt for the goods, as under such circumstances the carrier cannot be heard to question his right to possession.[66] Where plaintiff was the owner of the claim at the time suit was brought, he is entitled to maintain the action, although he was not the owner of the goods at the time of the conversion.[67] One to whom a bill of lading is negotiated, although as collateral security, is the proper party to sue for their entire loss from conversion by the carrier of the goods shipped, the bill of lading being indicia of title and operating to transfer the entire property.[68] Since the delivery of goods to a carrier ordinarily passes title to the consignee, the consignor has no right of action against the carrier for conversion in the absence of anything in the pleadings to take the case out of the general rule.[69]

Where, however, the consignor is also the holder of the bill of lading,[70] or is also the consignee,[71] he may maintain an action for conversion. Where

60. Tex.—Pecos, etc., R. Co. v. Porter, Civ. App., 183 S.W. 98.

61. Tenn.—Roth Coal Co. v. Louisville & N. R. Co., 215 S.W. 404, 142 Tenn. 52.

62. Ga.—Georgia, etc., R. Co. v. Blish Milling Co., 82 S.E. 784, 15 Ga. App. 142.

63. Ga.—Davis v. Seigel, 111 S.E. 439, 28 Ga.App. 418.—Burns v. Louisville & N. Ry. Co., 65 S.E. 582, 6 Ga. App. 614.

64. Ga.—Southern R. Co. v. Morrison, 70 S.E. 91, 8 Ga.App. 647.

65. Ky.—Louisville & N. R. Co. v. Johnson, 10 S.W.2d 1104, 226 Ky. 322.

Mo.—Turner Lumber & Investment Co. v. Chicago, R. I. & P. Ry. Co., 16 S.W.2d 705, 223 Mo.App. 564.—Buschow Lumber Co. v. Hines, 229 S.W. 451, 206 Mo.App. 681.

N.Y.—Koscherak Siphon Bottle Works v. North & East River S. S. Co., 239 N.Y.S. 351, 135 Misc. 635.

Right of property and possession

Although coal company, after tendering cars of coal and bills of lading, naming plaintiff as consignee, which carrier refused to sign, acquiesced as matter of necessity in carrier's acts in taking coal for its own use, or diverting it to others, right of property and right of possession were sufficiently perfected in plaintiff to support action for conversion.—St. Louis & S. F. Ry. Co. v. Georgia, F. & A. Ry. Co., 104 So. 33, 213 Ala. 108.

66. Tex.—Ft. Worth & D. C. Ry. Co. v. W. A. Nabors Fruit Co., Civ. App., 200 S.W. 420.

67. Mich.—Perkett v. Manistee, etc., R. Co., 141 N.W. 607, 175 Mich. 253.

10 C.J. p. 275 note 98.

68. Ill.—Merchants' State Bank of Centralia v. Chicago, B. & Q. R. Co., 245 Ill.App. 211, 220.

10 C.J. p. 275 note 99.

The Corpus Juris text has been cited with full approval in Merchants' State Bank of Centralia v. Chicago, B. & Q. R. Co., supra.

69. Ky.—Louisville & N. R. Co. v. Johnson, 10 S.W.2d 1104, 226 Ky. 322.

Railroad shipper's agent

Where eggs were shipped under a notify bill of lading and consignee thereof paid draft and shipper reimbursed consignee for eggs damaged in transit, which railroad salvaged and retained the proceeds of, since the railroad was the shipper's agent for delivery of eggs to the consignee, the shipper was authorized to maintain an action for the damaged eggs, notwithstanding he was no longer the holder of the bill of lading.—Amber v. Davis, 282 S.W. 459, 221 Mo.App. 448.

70. Ala.—Inland Waterways Corporation v. Sloss Sheffield Steel & Iron Co., 136 So. 849, 223 Ala. 397.

71. **Delivery without payment**

The shipper of goods consigned to himself with draft attached to bill of lading, not having parted with the ownership, may sue the carrier in conversion for delivering them to another without payment of the draft.—International & Great Northern Ry. Co. v. Kansas City Produce Co., Tex.Civ.App., 200 S.W. 254, dismissed for want of jurisdiction.

the buyer of goods to whom they were shipped by the seller, in accordance with the directions of the buyer, refused to accept the goods and they were sold by the carrier, the shipper could not maintain an action against the carrier for conversion, title to the goods having passed to the buyer.[72] In an action for conversion in delivering the goods to a third person not in possession of the bill of lading, such person, who had given indemnity to the carrier against liability because of such delivery, could intervene and set up the defense of a contract with the consignee.[73]

e. Pleading

The general rules of pleading, especially those applicable to actions for conversion generally, govern in actions against carriers for conversion of the goods intrusted to them for delivery.

The general rules of pleading, especially those applicable to pleadings in actions for conversion generally, are controlling in actions against carriers for conversion, with respect to the sufficiency of the petition or complaint,[74] or the plea, answer, or affidavit of defense,[75] and questions of issues, proof,

72. Colo.—McLaughlin v. Martin, 55 P. 195, 12 Colo.App. 268.

73. Tex.—Fleming v. St. Louis Southwestern Ry. Co. of Texas, Civ.App., 13 S.W.2d 440.

74. Tex.—American Ry. Express Co. v. Santa Anna Gas Co., Civ.App., 250 S.W. 271, petition dismissed 44 S.Ct. 3, 263 U.S. 725, 68 L.Ed. 526.

Matters of inducement

Where the petition alleged a conversion by the carrier of goods shipped, allegations as to the contract of shipment were merely matters of inducement, showing how the goods came into the possession of the carrier and did not allege a breach of contract as the cause of action.—American Ry. Express Co. v. Santa Anna Gas Co., Tex.Civ.App., 250 S.W. 271, petition dismissed 44 S.Ct. 3, 263 U.S. 725, 68 L.Ed. 526.

A demand, if necessary, is sufficiently pleaded by an allegation that defendant "failed and refused" to transport and deliver the goods, since a refusal implies a demand.—American Ry. Express Co. v. Santa Anna Gas Co., Tex.Civ.App., 250 S.W. 271, petition dismissed 44 S.Ct. 3, 263 U.S. 725, 68 L.Ed. 526.

Pleadings held sufficient

(1) A complaint, in an action against a carrier for nondelivery of a trunk, alleging that the carrier has refused and still refuses to deliver the trunk and contents, . . . to this plaintiff, and . . . defendant retains the same for his own use and benefit as notice has been given to . . . defendant and demand . . . made for the delivery of the trunk and contents, but . . . defendant has refused and still refuses to either deliver this trunk and contents or to pay plaintiff for same to the damage of this plaintiff, etc., sufficiently alleged nondelivery of the trunk.—Grover v. Hines, 213 P. 250, 66 Mont. 230.

(2) Count for nondelivery of lime by carrier, which was in code form, except that it averred that lime was consigned to third person, that defendant failed to deliver to consignee, and that consignor for valuable consideration transferred the car to plaintiff while in transit, stated cause of action.—Louisville & N. R. Co. v. B. F. Roden Grocery Co., 96 So. 912, 209 Ala. 694.

(3) The carrier could not complain that by counts in the complaint plaintiff assumed burden of proving nondelivery to itself or to original consignee.—Louisville & N. R. Co. v. B. F. Roden Grocery Co., supra.

(4) Counts alleging plaintiffs delivered lumber to carrier for shipment and that the carrier wrongfully delivered the bill of lading to a purchaser, and after notice of such wrongful issuance wrongfully delivered the lumber to the consignee in the bill of lading and that the purchaser had failed to pay for the lumber, alleged facts showing a duty, a breach of that duty, and a loss therefrom to plaintiffs, and were not demurrable under Code 1907 § 5546.—Louisville & N. R. Co. v. Williams, 97 So. 817, 210 Ala. 268.

(5) In an action by shippers against a carrier for wrongful issuance of bills of lading to the purchaser of the shipment and for wrongful delivery to the consignees named therein, the shippers were not required to allege that the carrier knew of the conditions of the sale by which bill of lading was to be retained by shippers, as it had no interest in the sale or its conditions.—Louisville & N. R. Co. v. Williams, supra.

(6) A petition, alleging plaintiff's delivery to an express company of goods for delivery to him in another state, and that thereafter its business was transferred to defendant, and that both companies had refused to deliver the goods, made such a case as, if made by the evidence, was not subject to a general demurrer.—American Ry. Express Co. v. Archer, 104 S.E. 92, 25 Ga.App. 647.

Pleadings held insufficient

(1) Where plaintiff in an action against a carrier for nondelivery of goods shipped on March 25, 1919, does not allege that he was the owner of the property after that date, the complaint does not state a cause of action in conversion, since it is made to appear the conversion, if any, occurred after the date of shipment, March 25, 1919.—Grover v. Hines, 213 P. 250, 66 Mont. 230.

(2) Under a statute which authorizes an allowance of attorney's fees if defendant acted in bad faith or was stubbornly litigious and caused plaintiff unnecessary trouble and expense, a complaint in an action against the carrier for conversion of goods which merely alleges that defendant had so acted as to compel plaintiff to bring a suit to recover the amount due it does not authorize the allowance of attorney's fees.—Central of Georgia R. Co. v. Chicago Portrait Co., 49 S.E. 727, 122 Ga. 11, 106 Am.S.R. 87.

75. Fla.—Atlantic Coast Line R. Co. v. Roe, 109 So. 205, 91 Fla. 762. 10 C.J. p. 276 note 5.

A plea of not guilty in an action against a common carrier for damages for the wrongful delivery of freight to the consignee, denies the wrong alleged as the basis of the action.—Atlantic Coast Line R. Co. v. Roe, 109 So. 205, 91 Fla. 762.

Pleadings held insufficient

(1) In action against express company for failure to deliver, plea not averring sufficient facts from which to deduce conclusion that delivery was made to authorized agent or consignee, or that delivery to one other than consignee was ratified was defective.—Devon Mfg. Co. v. Southern Express Co., 76 So. 39, 200 Ala. 273.

(2) In shipper's action against railroad for nondelivery, following railroad's delivery of goods to shipper's agent, pursuant to agent's plan to defraud shipper, special defense, alleging that shipper was negligent in permitting such agent to handle shipments and have possession of bills of lading in the manner in which the shipments were handled and the manner in which such agent had possession of the bills of lading, were demurrable for lack of any direct allegation that the agent did handle shipments and did have pos-

and variance.[76] A carrier, after answering a complaint for failure to deliver the goods on the theory that it complied with the requirement of the bill of lading with reference to giving notice of the arrival of the goods cannot assert that plaintiff waived notice, since such waiver must be pleaded.[77]

Amendments to plaintiff's pleadings which introduce a new cause of action, where defendant raises timely and appropriate objection thereto, are not allowable.[78]

Special damages are not recoverable unless the facts entitling plaintiff thereto are pleaded.[79]

f. Evidence

(1) Presumptions and burden of proof
(2) Admissibility
(3) Weight and sufficiency

(1) Presumptions and Burden of Proof

The general rules applicable to presumptions and burden of proof in civil actions and actions for conversion generally, are controlling in actions against carriers for conversion.

The general rules of evidence, and those applicable to actions for conversion generally, are controlling as to presumptions and burden of proof in actions against carriers for the conversion of goods received by them for transportation and delivery.[80] The presumption is that the consignee is the owner of the goods and entitled to receive them and sue for conversion thereof,[81] but such presumption is rebuttable.[82] In such cases the burden is on plaintiff to show that the carrier had notice that the named consignee was not the owner and was not entitled to receive the goods upon their arrival at the point of destination.[83] The burden is on the shipper to establish the fact of nondelivery of the goods to the proper party,[84] and that he was injured thereby;[85] and, where the carrier has entered a general denial, the owner has the burden of showing that the freight charges have been paid or tendered,

session of the bills of lading in connection with the shipper's business.—Hartford Distillery Co. v. New York, N. H. & H. R. Co., 115 A. 488, 97 Conn. 1.

76. Fla.—Atlantic Coast Line R. Co. v. Roe, 109 So. 205, 91 Fla. 762.
Mich.—Winget v. Grand Trunk Western Ry. Co., 177 N.W. 273, 210 Mich 100, certiorari denied Grand Trunk Western Ry. Co. v. Winget, 41 S.Ct. 6, 254 U.S. 629, 65 L.Ed. 447.
Tex.—St. Louis, etc., R. Co. v. Wallace, Civ.App., 176 S.W. 764.
Wash.—Spokane Grain Co. v. Great Northern Express Co., 104 P. 794, 85 Wash. 545.

Proof unnecessary

"In an action against a railroad company for the conversion of a car of grain covered by a bill of lading held by a bank, the railroad company paid into court the amount demanded by the bank. A milling company intervened in said action, claiming an interest in the money so paid into court. Held, that the railroad company having confessed its liability to pay the amount demanded by plaintiff, as between the plaintiff and the intervener no proof of the value of said car of grain was necessary."—Marsh Milling & Grain Co. v. Guaranty State Bank of Ardmore, 171 P. 1122, 69 Okl. 222, L.R.A.1918D 904.

Evidence admissible under plea of not guilty

In action against common carrier for wrongful delivery of interstate freight to consignee, on plea of not guilty, evidence that bill of lading issued by initial carrier was straight bill, under Act Congr. Aug. 29, 1916 §§ 1–8, 49 U.S.C.A. §§ 81–88, is admissible.—Atlantic Coast Line R. Co. v. Roe, 109 So. 205, 91 Fla. 762.

Variance held immaterial

A variance between declaration seeking recovery from initial carrier as a carrier for delivery without requiring surrender of bill of lading and proof that before the delivery the terminal carrier's liability had become that of warehouseman only, which did not mislead defendant or prevent it from setting up any defense, is immaterial.—Winget v. Grand Trunk Western Ry. Co., 177 N.W. 273, 210 Mich. 100, certiorari denied Grand Trunk Western Ry. Co. v. Winget, 41 S.Ct. 6, 254 U.S. 629, 65 L.Ed. 447.

77. Mo.—Hoyland Flour Mills Co. v. Missouri Pac. R. Co., 5 S.W.2d 125, 222 Mo.App. 599, certiorari denied Erie R. Co. v. Hoyland Flour Mills Co., 48 S.Ct. 433, 277 U.S. 586, 72 L.Ed. 1001.

78. Ga.—Southern Ry. Co. v. Bunch, 95 S.E. 323, 22 Ga.App. 42.

79. N.Y.—Smith v. New York, O. & W. R. Co., 196 N.Y.S. 521, 119 Misc. 506.

Prospective profits

A coal dealer, suing for wrongful delivery to others of a carload of coal consigned to him, cannot recover his prospective profits on the resale of the coal at retail, when no facts entitling him to special damages are pleaded.—Smith v. New York, O. & W. R. Co., 196 N.Y.S. 521, 119 Misc. 506.

80. Iowa.—Port Huron Machinery Co. v. Chicago, M. & St. P. Ry. Co., 201 N.W. 779, 199 Iowa 295.
N.Y.—Landau v. American Ry. Express Co., 197 N.Y.S. 704, 120 Misc 84.
S.C.—Liberty Nat. Bank v. Hines, 104 S.E. 313, 115 S.C. 82.
Tex.—American Ry. Express Co. v. Santa Anna Gas Co., Civ.App., 250 S.W. 271, petition dismissed 44 S.Ct. 3, 263 U.S. 725, 68 L.Ed. 526—Gulf, C. & S. F. Ry. Co. v. McKie, Civ.App., 217 S.W. 737.
10 C.J. p. 276 note 6.

Cause of injury

Before damages can be recovered as for a conversion of property by a carrier, there must be some evidence from which an inference may be drawn that a delict is the cause of the injury.—Liberty Nat. Bank v. Hines, 104 S.E. 313, 115 S.C. 82.

81. U.S.—King v. Barbarin, Mich., 249 F. 303, 161 C.C.A. 311.
Fla.—Atlantic Coast Line R. Co. v. Roe, 109 So. 205, 91 Fla. 762.
Md.—Adams Express Co. v. White, 104 A. 110, 132 Md. 626.

Presumption arising from bill of lading

A presumption of ownership arises from bill of lading in which consignee was named as consignor.—King v. Barbarin, Mich., 249 F. 303, 161 C.C.A. 311.

82. U.S.—King v. Barbarin, supra.
Fla.—Atlantic Coast Line R. Co. v. Roe, 109 So. 205, 91 Fla. 762.
Md.—Adams Express Co. v. White, 104 A. 110, 132 Md. 626.

83. Fla.—Atlantic Coast Line R. Co. v. Roe, 109 So. 205, 91 Fla. 762.

84. N.Y.—Hirsch v. Lehigh Valley R. Co., 174 N.Y.S. 68.
Tex.—Owosso Mfg. Co. v. Chicago, R. I. & P. R. Co., Civ.App., 203 S.W. 815.

85. Tex.—Owosso Mfg. Co. v. Chicago, R. I. & P. R. Co., supra.

in order to prove his right to immediate possession of the goods.[86] The burden of establishing a defense interposed by a carrier in an action for conversion is upon the carrier.[87] At common law, a carrier failing to deliver goods received by it for shipment is, with certain exceptions, conclusively presumed to have been negligent, and the burden is on it to prove itself within such exceptions.[88] In an action for misdelivery the carrier has the burden of showing that the person to whom delivery was made was entitled to receive the goods.[89] So the burden is on the carrier to establish a lawful excuse for refusal or failure to deliver the goods in compliance with the demand of the consignee or the holder of the bill of lading,[90] or to show a state of facts relieving it from its duty to notify the consignee, within a reasonable time, that it cannot make delivery;[91] and if the carrier makes delivery without requiring the production and surrender of the bill of lading it has the burden of proving a lawful excuse for such delivery.[92]

Although plaintiff, in an action against a carrier as warehouseman for delivery of the goods to a person not entitled thereto, makes a prima facie case by showing the bailment and loss, the burden of proof as to the carrier's negligence, in the end rests upon plaintiff.[93]

(2) Admissibility

The admissibility of evidence in an action against a carrier for conversion is governed by the general rules of evidence as well as the rules applicable to actions for conversion generally.

Any evidence which is relevant, material, and competent, under the general rules of evidence and the rules applicable to actions for conversion generally, to prove or disprove the issues raised, is admissible in an action against a carrier for conversion,[94] but evidence which is incompetent, or is

86. Ariz.—Wells Fargo & Co, Express, S A., v Tribolet, 50 P 2d 878, 46 Ariz. 311.

87. Iowa—Davenport Sav. Bank v Chicago, R I & P. Ry. Co., 158 N W. 737, 176 Iowa 745.
N Y.—Landau v. American Ry. Express Co., 197 N.Y.S 704, 120 Misc. 84.
Ohio.—Pennsylvania R. Co. v. Gentile Bros. Co., 191 N E. 369, 47 Ohio App 162, error dismissed 190 N. E. 578, 128 Ohio St. 50.
Tex.—Gulf, C & S. F. Ry Co. v. McKie, Civ.App, 217 S.W. 737.

Goods taken from carrier by attachment

In shipper's action against carrier for conversion where defense was that goods had been taken from carrier under writ of attachment, the burden of establishing such defense was upon carrier.—Gulf, C. & S F. Ry. Co v. McKie, Tex.Civ.App, 217 S W. 737.

Wrongful sale of goods; shifting burden of proof

(1) Burden was on railroad to justify sale of shipment of peaches on consignee's rejection thereof, and, if it failed to sustain such burden, sale amounted to conversion—Pennsylvania R Co v. Gentile Bros Co., 191 N E 369, 47 Ohio App 162, error dismissed 190 N.E 578, 128 Ohio St. 50.

(2) Where consignee showed that his goods were sold by carrier without his consent after they should have been delivered to him, the burden shifted to carrier to show some right to make this sale—Landau v. American Ry. Express Co., 197 N. Y S. 704, 120 Misc. 84.

88. U.S.—Inland Waterways Corporation v. Hallet & Carey Co., C.C. A.Minn, 52 F 2d 13.

89. Colo.—Davis v. Fruita Mercantile Co, 220 P. 983, 74 Colo. 247
Iowa—Port Huron Machinery Co. v Chicago, M & St P. Ry. Co, 201 N W. 779, 199 Iowa 295.
Miss—Abasi Bros. v. Louisville & N R Co, 76 So 665, 115 Miss 803, L R A 1918B 652, sustaining suggestion of error 75 So. 756, 115 Miss. 149.
Tex—Missouri Iron & Metal Co. v. Texas & P. Ry. Co., Civ App., 198 S W. 1067.

Particular facts

In an action against a carrier for misdelivery of a shipment on consignor's order bill of lading, with directions to notify proposed buyer and to deliver to him upon payment of draft, the burden was on the carrier to show that the shipper transferred title to the order bill of lading to proposed buyer to whom the goods were delivered—Davis v. Fruita Mercantile Co, 220 P. 983, 74 Colo. 247.

90. Mo.—Turner Lumber & Investment Co. v. Chicago, R. I & P. Ry. Co, 34 S.W 2d 1009, 225 Mo. App. 1002.

91. Or—Stoddard Lumber Co. v. Oregon-Washington R & Nav. Co, 165 P. 363, 84 Or. 399, 4 A L R 1275.

92. Conn—Alderman Bros. Co. v. New York, N H. & H. R. Co., 129 A. 47, 102 Conn 461.

93. U S.—Salomon Stern, Limited, of America v. Davis, D.C N.Y., 292 F. 221.

94. Ala—St. Louis & S. F. Ry. Co v. Georgia, F & A Ry Co., 104 So. 33, 213 Ala. 108—Alabama Great Southern R Co. v Longshore, 96 So 64, 209 Ala 227.
Ill—See Kaufman v. Chicago, L & L Ry. Co, 201 Ill App 491.
Iowa—Davenport Sav Bank v. Chicago, R I & P Ry. Co., 158 N W. 737, 176 Iowa 745
Ky—Louisville & N R. Co v. Johnson, 10 S.W.2d 1104, 226 Ky. 322—Southern Ry Co v Consumers' Fuel Co., 262 S W. 581, 203 Ky. 441
10 C J. p 276 note 7.

Evidence held admissible

(1) Testimony of plaintiff's representative respecting contract concerning cottonseed involved in action for conversion although alone it was insufficient to establish contract on which plaintiff based claim of ownership—Atlantic Coast Line R Co v J W Capps Gin Co., 142 So 74, 225 Ala. 166.

(2) Evidence of sale of cottonseed to third party by owner, as explaining loading and as touching damages suffered by carrier's issuance of bills of lading to another.—Atlantic Coast Line R Co. v. J. W. Capps Gin Co., supra.

(3) Evidence that owner offered bond to protect carrier—Atlantic Coast Line R Co. v. J. W. Capps Gin Co., supra

(4) Evidence that another to whom owner contracted cottonseed had advanced money for ginning operations, in owner's action against carrier for issuing bills of lading for seed to person who allegedly first refused to take delivery from owner.—Atlantic Coast Line R. Co. v. J. W. Capps Gin Co, supra.

(5) Evidence that neither of alleged buyers had insurance on cottonseed in controversy, in owner's

not relevant or material on any issue, is inadmissible.[95] Where a bank sued a carrier for conversion of goods shipped by a company which deposited its draft for the price with a bank as security, and later became bankrupt, the papers and files in the bankruptcy proceedings against the shipper should have been admitted in evidence.[96]

Evidence as to damages. The rules adverted to above apply to the admissibility of evidence affecting damages for conversion by a carrier.[97] Evidence of the condition of the goods at the time they were shipped is admissible as tending to show their condition at the point of destination;[98] but when the buyer paid for and inspected the goods at the point of shipment, the condition of the goods at the place of destination has been held immaterial.[99] In an action for conversion by delivery of melons to a produce company not entitled thereto, the testimony of a peddler to whom the carrier sold melons rejected by the produce company, as to the condition thereof, was competent on the question of damages, but not his testimony as to what he sold them for at retail.[1] In such case the court should have confined the evidence on the question of damages to the value of the melons at the time and place of conversion, and excluded testimony as to the expense to which plaintiff was put in investigating and preparing his case.[2]

(3) Weight and Sufficiency

The weight and sufficiency of the evidence to support the verdict, findings, or judgment are governed by the general rules of evidence.

The weight and sufficiency of the evidence in actions against carriers for conversion of the goods delivered to them for carriage are determined by the rules applicable in civil actions generally[3] It

action against carrier for conversion by issuing bills of lading.—Atlantic Coast Line R Co. v. J. W. Capps Gin Co., supra.

95. Ky.—Louisville & N. R. Co v. Johnson, 10 S.W.2d 1104, 226 Ky. 322.

Evidence held inadmissible

In an action against the successor to the business of an express company to which plaintiff had delivered goods for shipment for damages for the loss of the shipment, evidence that claims against defendant's predecessor, paid by defendant, were charged against its predecessor, was inadmissible.—American Ry. Express Co. v. Archer, 104 S.E. 92, 25 Ga. App. 647.

96. Iowa.—Davenport Sav. Bank v. Chicago, R. I & P. Ry. Co., 158 N.W. 737, 176 Iowa 745.

97. Ky.—Southern Ry. Co. v. Consumers' Fuel Co., 262 S.W. 581, 203 Ky. 441.

Va.—Norfolk & W. Ry. Co. v. Nottingham & Wrenn, 124 S.E. 398, 139 Va. 748.

Evidence held admissible

In action against railroad which confiscated coal under Lever Act § 25, U.S.Comp St.1918, U.S.Comp St. Suppl.Annot.1919 § 3115¼q, intended for export, court properly admitted evidence as to market for coal for export purposes at place from which coal was shipped.—Southern Ry. Co. v Consumers' Fuel Co., 262 S.W. 581, 203 Ky. 441.

Evidence held inadmissible

In shipper's action against carrier, confiscating coal in transit to tidewater piers for difference between amount paid by carrier and market value at destination, where there was very active spot market, deposition as to prices at which coal was sold by operators in other markets and interstate commerce commission's report to senate committee as to what other railways paid for fuel, held inadmissible.—Norfolk & W Ry. Co. v. Nottingham & Wrenn, 124 S.E. 398, 139 Va. 748.

98. Ill.—Merchants' State Bank of Centralia v. Chicago, B. & Q. R. Co., 245 Ill App. 211.

99. Ill.—Merchants' State Bank of Centralia v. Chicago, B. & Q. R. Co., supra.

1. Ky.—Louisville & N. R Co v. Johnson, 10 S.W.2d 1104, 226 Ky. 322.

2. Ky.—Louisville & N. R. Co. v. Johnson, supra.

3. U.S.—Salomon Stern, Limited, of America v. Davis, D.C.N.Y., 292 F 221.

Ala.—Southern Ry Co. v. Woodstock Mills, 161 So. 519, 230 Ala 494

Ark.—Southern Express Co v. Freeze, 216 S.W. 303, 141 Ark 161.

Cal.—Bedig v. Southern Pac. Co., 258 P. 148, 84 Cal App. 325.

Colo.—Davis v. Fruita Mercantile Co., 220 P. 983, 74 Colo 247.

Ga.—George C. Speir & Co. v. Atlantic Coast Line R. Co., 140 S.E. 43, 37 Ga App. 283.

Iowa.—Davenport Sav Bank v Chicago, R I. & P. Ry. Co., 158 N W 737, 176 Iowa 745.

Miss.—Southern Ry. Co. v. Elder, 80 So 333, 118 Miss 856.

Mo.—Amber v Davis, 282 S.W. 459, 221 Mo.App. 448—Wall v. American Ry. Express Co., 272 S.W. 76, 220 Mo App 989.

N.Y.—Dodge & Dent Mfg. Co v Pennsylvania R Co, 162 N.Y.S 549, 175 App.Div 823.

Tex.—Ft Worth & D. C. Ry Co. v. W. A. Nabors Fruit Co., Civ App., 200 S.W. 420—Missouri Iron & Metal Co. v. Texas & P. Ry. Co., Civ App, 198 S.W. 1067

Va.—Norfolk & W Ry. Co v Aylor, 150 S.E 252, 153 Va 575, certiorari denied 51 S.Ct 26, 282 U.S 847, 75 L.Ed 751.

10 C.J. p 276 note 8.

Evidence sufficient

(1) To establish prima facie case for plaintiff.—Davenport Sav. Bank v. Chicago, R I & P Ry. Co., 158 N.W. 737, 176 Iowa 745

(2) To show that plaintiff, who shipped on consignor's order bill of lading with directions indorsed thereon to notify prospective buyer and to deliver to him upon payment of draft, did not intend to and did not transfer the title of the bill to buyer for the goods represented, and that the prospective buyer, did not intend to buy or to receive the title, and that there was no agreement, express or implied, to that effect.—Davis v. Fruita Mercantile Co., 220 P. 983, 74 Colo 247.

(3) To show that shipment was under written contract.—American Ry. Express Co. v Santa Anna Gas Co., Tex.Civ.App., 250 S.W. 271, petition dismissed 44 S.Ct. 3, 263 U.S. 725, 68 L.Ed. 526.

(4) To sustain finding for plaintiff.—St Louis Southwestern Ry. Co. of Texas v. Waskom Coal Co, Tex.Civ App., 220 S.W. 280

(5) To warrant the inference that that plaintiff's bale of cotton had been lost by act of defendant, and warrant recovery by plaintiff of the value of the lost bale.—Alabama Great Southern R. Co. v. Longshore, 96 So. 64, 209 Ala. 227.

Evidence insufficient

(1) To show a conversion.—George C. Speir & Co. v. Atlantic Coast Line R. Co., 140 S.E. 43, 37 Ga.App. 283.

has been held that a prima facie case of conversion is established by evidence of the carrier's failure to transport and deliver the goods within a reasonable time;[4] that straight bills of lading and invoices using the word "sold," constitute substantial evidence of an outright sale to the consignee suing the carrier for conversion;[5] and that the fact that the goods were receipted for at their destination by one not the consignee is not evidence of nondelivery to the consignee, in the absence of proof that the receipting person was not authorized to accept the goods on his behalf.[6] Where a carrier, in an action against it for conversion of goods covered by a bill of lading held by a bank, paid into court the amount demanded by the bank, thereby admitting its liability, no proof of the value of the goods was neces-

(2) To support verdict for defendant.—Patterson & Roberts v. Quanah, A. & P. Ry. Co., Tex.Civ.App., 195 S.W. 1163.

(3) To sustain defense that the goods taken from the carrier under attachment were those shipped by plaintiff.—Gulf, C. & S. F. Ry. Co. v. McKie, Tex.Civ.App., 217 S.W. 737.

(4) To sustain judgment for plaintiff.—Texas & N. O. Ry. Co. v. Spencer, Tex.Civ.App., 210 S.W. 989.

Ownership or right of possession of goods

(1) Evidence held sufficient to support finding that plaintiff did not own the property, and was not entitled to possession thereof, at the time of the conversion.—Bedig v. Southern Pac. Co., 258 P. 148, 84 Cal. App. 325.

(2) Evidence held sufficient to support finding that plaintiff, suing carrier for conversion, did not employ carrier and that the goods belonged to another, who authorized transfer of bill of lading to person receiving goods.—Bedig v. Southern Pac. Co., supra.

(3) Evidence held insufficient to support jury's finding that shipper owned oil well casing alleged to have been converted by carrier.—Traweek v. Panhandle & S. F. Ry. Co., Tex.Civ.App., 298 S.W. 910.

Delivery to carrier for transportation

Evidence held insufficient to show that cattle were ever delivered to the carrier for shipments.—Southern Ry. Co. v. Elder, 80 So. 333, 118 Miss. 856.

Demand and refusal

Evidence held to sustain trial court's findings that plaintiff repeatedly demanded delivery of freight, but that defendant refused to deliver it.—St. Louis Southwestern Ry. Co. of Texas v. Kessinger, Tex.Civ.App., 72 S.W.2d 1105.

Authority to receive delivery

(1) Evidence held sufficient to show prima facie that person to whom delivery was made had authority to receive goods.—Missouri Iron & Metal Co. v. Texas & P. Ry. Co., Tex.Civ.App., 198 S.W. 1067.

(2) Evidence held insufficient to show that person presenting arrival notice and letter from consignee authorizing delivery, and to whom carrier issued paid freight bill which enabled holder to obtain delivery, was not consignee's agent.—Salomon Stern, Limited, of America v. Davis, D.C.N.Y., 292 F. 221.

(3) Evidence held insufficient to constitute person to whom shipment was delivered an agent for consignee to receive shipments without consignee's knowledge or consent.—Southern Express Co. v. Freeze, 216 S.W. 303, 141 Ark. 161.

(4) Evidence held insufficient to show delivery to "order notify" consignee.—George C. Speir & Co. v. Atlantic Coast Line R. Co., 140 S.E. 43, 37 Ga.App. 283.

Successor companies

(1) In suit for loss of a shipment delivered to an express company which was thereafter succeeded by defendant company, evidence that consignment had been delivered to defendant's predecessor, and that it had not delivered it to consignee, without evidence authorizing the inference that shipment had left possession of defendant's predecessor before its business had been taken over by defendant, authorized the inference that shipment remained in possession of defendant's predecessor, and was by it delivered to defendant, when it succeeded to its business.—American Ry. Express Co. v. Archer, 104 S.E. 92, 25 Ga.App 647.

(2) Possession, once proved in express company to which a shipment was delivered, is presumed to be in it until the contrary is shown; but, where its business was transferred within three months thereafter to defendant, the inference was authorized that all shipments then in its possession were transferred to defendant, so that whether or not it received shipment was a question for the jury.—American Ry. Express Co. v. Archer, supra.

Surrender of order bill of lading

(1) Evidence held sufficient to support conclusion that flour shipped under an order bill of lading was delivered without surrender of the bill.—Norfolk & W. Ry. Co. v. Aylor, 150 S.E. 252, 153 Va. 575, certiorari denied 51 S.Ct. 26, 282 U.S. 847, 75 L.Ed. 751.

(2) Evidence held sufficient to warrant finding that hay was delivered to party required to be notified by bill of lading without requiring payment of draft attached and production of bill.—Barton v. Louisville & N. R. Co., Mo.App., 196 S.W. 379

Ratification or waiver of wrongful delivery

(1) Evidence held sufficient to show that seller had ratified carrier's delivery, of goods shipped to buyer, to a third person by acceptance from the latter of a large part of purchase price.—Hayes v. Wells Fargo & Co. Express, Mo.App., 206 S.W. 229.

(2) Evidence held sufficient to support finding that the consignee did not waive the misdelivery.—Hines v. Jordan, Tex.Civ.App., 228 S.W. 633, error refused.

Value of goods

(1) Evidence held sufficient to sustain the verdict as to the fair market value of the coal at destination, the "fair market value" being the price which would be agreed on at a given time between a willing seller and a willing buyer in consummating a voluntary transaction.—Eastern Coal & Export Corporation v. Norfolk & W. Ry. Co., 113 S.E. 857, 133 Va. 525.

(2) Evidence held insufficient to sustain a judgment for plaintiff not showing the value of the lumber, the only testimony being as to its value if it was of certain grade, and it appearing that the lumber was not of that grade.—Buschow Lumber Co. v. Hines, 229 S.W. 451, 206 Mo. App. 681.

(3) Where the only evidence offered to show value was that the goods shipped were checked against an invoice, it not being shown how the invoice was prepared, a recovery based on the value stated in the receipt was not authorized.—Landau v. American Ry. Express Co., 197 N.Y.S. 704, 120 Misc. 84.

4. Tex.—American Ry. Express Co. v. Santa Anna Gas Co., Civ.App., 250 S.W. 271, petition dismissed 44 S.Ct. 3, 263 U.S. 725, 68 L.Ed. 526.

5. Mo.—Turner Lumber & Investment Co. v. Chicago, R. I. & P. Ry. Co., 16 S.W.2d 705, 223 Mo. App. 564.

6. N.Y.—Hirsch v. Lehigh Valley R. Co., 174 N.Y.S. 68.

sary as between plaintiff and an intervener claiming an interest in the money so deposited.[7]

g. Trial

(1) Questions of law and fact
(2) Instructions
(3) Findings

(1) Questions of Law and Fact

Where the evidence is conflicting the case should be submitted to the jury; but where the material facts are not in dispute or there is no legally sufficient evidence to warrant submission to the jury the question is one of law for the court.

In accordance with general rules, questions of fact on conflicting evidence should be submitted to the jury,[8] and it is error to withdraw such question from the jury by directing a verdict;[9] but where there is no dispute as to the material facts,[10] or no legally sufficient evidence upon the point involved,[11] the question is one of law for the court, and may be withdrawn by directing a verdict or granting a nonsuit.[12] Whether different conclusions can be drawn from the facts in evidence is a question of law for the court.[13]

7. Okl.—Marsh Milling & Grain Co v. Guaranty State Bank of Ardmore, 171 P. 1122, 69 Okl. 222, L.R.A.1918D 704.

8. Ala.—St. Louis & S. F. Ry. Co. v. Georgia, F. & A. Ry. Co., 104 So. 33, 213 Ala. 108.
Ark.—Baltimore & O. R. Co. v. McGill Bros. Rice Mill, 46 S.W.2d 651, 185 Ark 108—Carter v. St. Louis-San Francisco Ry. Co., 18 S.W.2d 376, 179 Ark. 865.
Fla.—Atlantic Coast Line R. Co. v. Roe, 109 So. 205, 91 Fla. 762.
Md.—Payne v. Roe, 122 A. 322, 143 Md. 282.
N.J.—Koch v. Delaware, L. & W. R. Co., 110 A. 128, 94 N.J.Law 30.
Ohio.—Pennsylvania R. Co. v. Gentile Bros. Co., 191 N.E. 369, 47 Ohio App. 162, error dismissed 190 N.E. 578, 128 Ohio St. 50.
Okl.—Atchison, T. & S. F. Ry. Co. v. Etherton, 145 P. 779, 45 Okl. 260.
Tex.—Traweek v. Pecos & N. T. Ry. Co., Civ.App., 288 S.W. 843.
10 C.J. p 276 notes 10, 11.

Particular issues for jury

(1) In trover for coal delivered to defendant carrier for plaintiff, evidence of number and contents and time of tender of cars was held sufficient for jury.—St. Louis & S. F. Ry. Co. v. Georgia, F. & A. Ry. Co., 104 So. 33, 213 Ala. 108.

(2) Whether consignee authorized delivery of shipment to another was held for jury.—Carter v. St. Louis-San Francisco Ry. Co., 18 S W 2d 376, 179 Ark. 865.

(3) State of deterioration of shipment of peaches rejected by consignee, necessity for immediate sale, opportunity to give notice to shipper, diligence in securing best price, care used in handling peaches, and time given consignee for inspection, were fact questions for jury in determining whether carrier's sale of shipment constituted conversion.—Pennsylvania R. Co. v. Gentile Bros. Co., 191 N.E. 369, 47 Ohio App. 162, error dismissed 190 N.E. 578, 128 Ohio St. 50.

Justification for sale of perishable goods

Whether a carrier is justified in selling perishable goods to prevent further loss, if the owner cannot be found, is a question for the jury.—Payne v. Roe, 122 A. 322, 143 Md. 282.

Legality of carrier's charges

In an action against a dray company for the conversion of plaintiff's household goods, which it was holding for charges of drayage, held, that the legality of the charge made by the company for the transportation of plaintiff's goods should have been submitted to the jury.—Pittman v. Fort Worth Warehouse & Storage Co., Tex.Civ.App., 258 S.W. 1105, motion granted 263 S.W. 636.

9. Fla.—Atlantic Coast Line R. Co. v. Roe, 109 So. 205, 91 Fla. 762.

Surrender of bill of lading

In action against interstate carrier for wrongful delivery of goods, evidence, contradicting plaintiff's evidence that consignee was not entitled to delivery until he had surrendered original bill of lading, was held to make directing verdict for plaintiff error.—Atlantic Coast Line R. Co. v. Roe, 109 So. 205, 91 Fla. 762.

10. Mo.—Clemmons Produce Co. v. St. Louis-San Francisco Ry. Co., App., 204 S.W. 590.
N.J.—Koch v. Delaware, L. & W. R. Co., 110 A. 128, 94 N.J.Law 30.
Pa.—Hilbert v. Pennsylvania R. Co., 120 A. 778, 277 Pa. 105.
Wash.—Johnson v. Western Express Co., 181 P. 693, 107 Wash. 339.

Reasonable time to make delivery

is for the court where there is no dispute as to the facts.—Hilbert v. Pennsylvania R. Co., 120 A. 778, 277 Pa. 105.

Time for removal of goods by consignee

Whether a carrier of goods allowed a consignee sufficient time for removal after notice is a question of fact and not of law, where the facts are in dispute or the inferences in doubt.—Koch v. Delaware, L. & W. R. Co., 110 A. 128, 94 N.J.Law 30.

Rule affirmed but held inapplicable

The rule that, where there is no dispute about the material facts, the question of reasonable time in which the goods should have been removed from the carrier's warehouse by the consignee is one of law for the court was held inapplicable.—Wichita Valley Ry. Co. v. Golden, Tex.Civ.App., 211 S.W. 465.

11. U.S.—Manby v. Union Pac. R. Co., C.C.A.Colo., 10 F.2d 327.

12. Ala.—Davis v. Hines, 85 So. 882, 17 Ala.App. 443.
Iowa.—Malvern Cold Storage Co. v. American Ry. Express Co., 220 N. W. 322, 206 Iowa 292.
Mo.—Clemmons Produce Co. v. St. Louis-San Francisco Ry. Co., App., 204 S.W. 590.
Wash.—Johnson v. Western Express Co., 181 P. 693, 107 Wash. 339.

A peremptory instruction for defendant is proper in an action against a railroad company, receivers, and railway company which purchased property on reorganization, for conversion of apples, where plaintiff, alleging railway company has purchased interest of receivers and railroad company and has assumed all obligations, but offered no evidence in support.—Clemmons Produce Co. v. St. Louis-San Francisco Ry. Co., Mo.App., 204 S.W. 590.

Nonsuit proper

In action against express company for conversion of trunk, where express company admitted the receipt of the trunk consigned to plaintiffs, court properly rendered judgment of nonsuit upon plaintiffs' failure to prove contents of trunk and value thereof, instead of giving plaintiffs judgment for value of the trunk itself, where there was no evidence as to value of trunk.—Johnson v. Western Express Co., 181 P. 693, 107 Wash. 339.

13. Tex.—American Ry Express Co. v. Patterson Produce Co., Com.App., 12 S.W.2d 158, reversing Patterson Produce Co. v. American Ry. Express Co., Civ.App., 1 S.W.2d 456.

Ratification of unauthorized delivery

Whether different conclusions can

(2) Instructions

The general rules relating to instructions in civil actions are applicable in actions against carriers for conversion.

The rules governing the giving of instructions in civil actions generally are applicable to actions against carriers for conversion. Thus it is the duty of the court to give full and correct instructions on the law applicable to the case.[14] As in other cases, the instructions must not be misleading,[15] or assume as proved matters which are in issue;[16] and instructions on matters not in issue or not warranted by the evidence,[17] or which ignore facts in evidence,[18] are erroneous. Plaintiff is entitled to a proper charge on the measure of damages, and an instruction that the jury should award such damages as they believe plaintiff has sustained, without giving any guide whereby to measure the damages is erroneous.[19]

(3) Findings

Findings must not be inconsistent with the uncontradicted evidence.

Findings by the court, which are inconsistent with the uncontradicted evidence, are erroneous.[20]

§ 184. Measure of Damages

a. In general
b. Damages other than, or in addition to, value of goods
c. Mitigation or reduction of damages

a. In General

The measure of damages for conversion by the carrier ordinarily is the market value of the goods at destination, less freight charges and expenses of sale. Only nominal damages are recoverable where the carrier, after conversion, tenders the goods to the consignee. When taking is willful, punitive damages may be recovered.

The measure of damages for conversion by a carrier of goods intrusted to it for transportation and delivery ordinarily is the value of the goods at the time and place of the conversion, or place of destination,[21] from which should be deducted the

be drawn from facts as to ratification of unauthorized delivery is question of law—American Ry. Exp Co. v. Patterson Produce Co., Tex Com App, 12 S.W.2d 158, reversing Patterson Produce Co. v American Ry. Express Co, Civ App, 1 S.W.2d 456.

14. Pa.—Freedman v. George W. Bush & Sons Co., 130 A. 263, 284 Pa. 16.
Tex—Gulf, C & S. F. Ry. Co v. Cleburne Ice & Cold Storage Co, Civ. App, 79 S.W. 836.

Liability of carrier as bailee

In consignees' action against carrier for value of goods delivered to wrong person, where court charged that, if plaintiffs neglected to get goods for forty eight hours after receiving notice of shipment, carrier's liability changed to that of warehouseman, plaintiffs were entitled to charge that carrier might still be liable as bailee for negligent misdelivery.—Freedman v. George W. Bush & Sons Co., 130 A. 263, 284 Pa. 16.

15. Ala—St Louis & S F. Ry. Co. v Georgia, F. & A. Ry. Co., 104 So 33, 213 Ala. 108.

16. Ga—Georgia R. Co. v. Richards, 72 S E. 48, 9 Ga App. 639.

Instruction erroneous

In an action against a carrier for conversion of goods shipped, defendant having denied that the goods were worth the amount claimed by plaintiff, and the evidence on this point being in conflict, the court erred in instructing the jury that, in the event they found for the full amount claimed.—Georgia R. Co. v. Richards, 72 S E. 48, 9 Ga.App. 639

17. U S—Southern Express Co. v. Reagin, S.C., 228 F. 14, 142 C.C.A. 470.
Ill—Hutchison Grocery Co. v. Louisville & N R. Co, 230 Ill.App 291.

18. Ill.—Hutchison Grocery Co. v. Louisville & N. R. Co., supra.

19. Ky—Louisville & N. R. Co. v Johnson, 10 S.W 2d 1104, 226 Ky. 322.

20. Tex.—Whitley v Gulf, C. & S F. R. Co., Civ App, 183 S W. 36.

Authority of carrier's agent

In an action against a carrier for conversion, where the testimony of the station agent at the point to which the consignee desired to have the goods reshipped that he had authority to arrange for such reshipment was not contradicted, a finding that an agreement with him for such reshipment was not binding was error—Whitley v. Gulf, etc., R. Co., Tex Civ App., 183 S W. 36.

21. U S.—Mitsubishi Shoji Kaisha v. Davis, C C.A N Y, 291 F. 57, certiorari denied 44 S Ct 34, 263 U.S 706, 68 L Ed. 516—Norfolk & W Ry. Co. v. Ft. Dearborn Coal & Export Co., C.C A.W Va., 280 F 264.
Ala—St. Louis & S F. Ry Co. v Georgia, F. & A. Ry. Co, 104 So 33, 213 Ala. 108—Zimmern v Southern Ry. Co, 92 So. 437, 207 Ala 169—Davis v. Hines, 85 So 882, 17 Ala.App. 443.
Cal—Stefani v. Southern Pac. Co, 5 P.2d 946, 119 Cal App. 69.
Ga—American Ry. Express Co. v. Estroff, 121 S E 711, 31 Ga App 736, conforming to McQuarie v State, 121 S.E. 316, 157 Ga 380, and affirmed 125 S.E 40, 159 Ga. 58.
Ill.—Merchants' State Bank of Centralia v. Chicago, B & Q. R. Co, 245 Ill App 211
Iowa—Keota Produce Co. v. Chicago, R. I. & P. R. Co., 179 N W. 834, 189 Iowa 1284.
Ky—Louisville & N R Co v. Johnson, 10 S W 2d 1104, 226 Ky. 322
La—Orange Nat. Bank v. Southern Pac. Co, 110 So. 329, 162 La. 223, 56 A L R. 1167.
Mich.—First Nat. Bank v. Grand Rapids & I. Ry. Co., 161 N.W. 859, 195 Mich. 1.
Mo—Buschow Lumber Co. v. Hines, 229 S W. 451, 206 Mo App 681.
Nev—Dixon v. Southern Pac. Co, 172 P. 368, 42 Nev 73, L R A 1918D 960, affirmed 177 P. 11, 42 Nev. 73, L R A.1918D 960
N Y—Smith v. New York, O. & W R. Co, 196 N Y.S. 521, 119 Misc 506—Liberty Sales Co. v. Davis, 198 N Y S. 253.
Tenn—Roth Coal Co v. Louisville & N. R. Co., 215 S.W. 404, 142 Tenn 52.
Tex—Gulf, C & S. F. Ry. Co v. Buckholts State Bank, Civ App, 258 S W. 491, reversed on other grounds, Com.App, 270 S W. 1008—Panhandle & S F. Ry. Co. v. Talmage, Civ.App, 206 S W. 862—International & Great Northern Ry. Co. v. Kansas City Produce

amount of freight charges legally due,[22] and in some cases, the expense incurred in effecting a sale at the place of destination.[23] The value to be taken in determining damages for conversion is the market value of the goods at the place of destination or conversion, if they have a market value capable of ascertainment,[24] and, if the market value is subject to fluctuation, the jury may in some jurisdic-

Co, Civ App., 200 S W. 254—Texas & N. O. Ry. Co. v. Patterson & Roberts, Civ App, 192 S W. 585—Kansas City, M. & O Ry. Co of Texas v. Corn, Civ.App., 186 S W. 807

Va—Eastern Shore of Virginia Produce Exch. v New York, P. & N. R Co, 126 S E 674, 141 Va 611—Norfolk & W. Ry. Co. v. Nottingham & Wrenn, 124 S E 398, 139 Va 748.

Wis—Waters v. Becker, 186 N.W. 167, 170, 175 Wis. 621.

10 C J p 277 note 14.

Corpus Juris is cited in support of this rule and the rule stated in the text next following.

La.—Orange Nat. Bank v. Southern Pac. Co, supra.

Wis.—Waters v. Becker, supra.

True value

Where it appeared that the goods after having been delivered to carrier for transportation and delivery to the consignee were neither delivered to the consignee nor returned to the shipper, a verdict for plaintiff in an amount equal to true value of goods was authorized—American Ry. Express Co. v. Estroff, 121 S E 711, 31 Ga App. 736, conforming to McQuarie v. State, 121 S E. 316, 157 Ga 380, and affirmed 125 S.E. 40, 159 Ga. 58

Provision in bill of lading

The measure of damages is the value of the goods at the time of the conversion, and a provision in the bill of lading fixing the damages for loss or injury does not apply.—Gulf, C. & S. F. Ry. Co. v. Buckholts State Bank, Tex.Civ.App., 258 S.W. 491, reversed on other grounds, Com App., 270 S.W. 1008.

Effect of federal statutes

(1) Under Cummins amendment of March 4, 1915, to Carmack amendment, U.S Comp St. § 8604a, 49 U.S. C.A. § 20, shippers of coal to tidewater piers, for sale in spot market thereat, could recover, on carrier's confiscation thereof, fair market value at destination, less cost of transportation and expense of sale, notwithstanding provision in tariffs approved by interstate commerce commission that recovery be computed on basis of value at time and place of shipment, there being no impress of nonadjacent foreign commerce, to which Cummins amendment does not apply.—Norfolk & W Ry. Co. v. Nottingham & Wrenn, 124 S E. 398, 139 Va. 748.

(2) Under such act, a provision in the bill of lading that the amount recoverable for loss or damage to the goods shall be their value at the time and place of shipment, is ineffective, and the common-law rule that the damages for misdelivery are the value of the goods at the place of destination at the time they should have been delivered prevails—Smith v. New York, O. & W. R Co., 196 N Y S. 521, 119 Misc. 506

Statute inapplicable

Code 1907 § 5514, specifying rule of damages for loss, injury, or delay in delivering goods, does not apply where property shipped was converted by carrier.—Southern Ry. Co v Harris, 80 So 101, 202 Ala. 263.

22. Ala—St. Louis & S. F. Ry. Co v. Georgia, F. & A. Ry. Co., 104 So. 33, 213 Ala. 108—Zimmern v. Southern Ry. Co, 92 So. 437, 207 Ala. 169.

Cal.—Stefani v. Southern Pac. Co., 5 P 2d 946, 119 Cal App. 69.

Ill.—Merchants' State Bank of Centralia v. Chicago, B. & Q. R. Co, 245 Ill App. 211.

Iowa.—Keota Produce Co v. Chicago, R. I. & P. R. Co, 179 N.W. 834, 189 Iowa 1284.

Ky.—Louisville & N. R. Co v. Johnson, 10 S W.2d 1104, 226 Ky. 322.

La—Orange Nat. Bank v. Southern Pac Co., 110 So. 329, 162 La. 223, 56 A L R. 1167.

Mich—First Nat. Bank v. Grand Rapids & I. Ry. Co., 161 N.W. 859, 195 Mich 1.

N.Y—Liberty Sales Co. v. Davis, 198 N.Y S. 253.

Tenn—Roth Coal Co. v. Louisville & N. R. Co., 215 S W. 404, 142 Tenn. 52

Tex.—Texas & N. O. Ry. Co. v. Patterson & Roberts, Civ.App., 192 S W. 585.

Va.—Eastern Shore of Virginia Produce Exch. v. New York, P. & N. R. Co, 126 S E. 674, 141 Va. 611—Norfolk & W. Ry. Co. v Nottingham & Wrenn, 124 S E 398, 139 Va. 748

Wis—Waters v Becker, 186 N W. 167, 175 Wis 621.

10 C.J. p 277 note 15

23. N.Y.—Liberty Sales Co. v. Davis, 198 N Y.S 253.

Va—Norfolk v W. Ry Co. v Nottingham & Wrenn, 124 S.E. 398, 139 Va. 748—Eastern Coal & Export Corporation v. Norfolk & W Ry. Co., 113 S.E. 857, 133 Va 525

24. U S.—Norfolk & W. Ry. Co v Ft. Dearborn Coal & Export Co, C C.A.W.Va., 292 F. 78—Norfolk & W. Ry. Co. v Ft. Dearborn Coal & Export Co, C.C A.W Va., 280 F 264—Marsh v. Union Pac. R. Co, C C Colo, 9 F. 873, 3 McCrary 236

Ala—Zimmern v. Southern Ry. Co, 92 So. 437, 207 Ala. 169

Cal—Stefani v. Southern Pac Co, 5 P.2d 946, 119 Cal App. 69

Ill—Merchants' State Bank of Centralia v Chicago, B & Q R. Co, 245 Ill.App. 211—Garden City Fan Co v. Pittsburgh, C., C & St. L. Ry. Co, 220 Ill.App. 126

Iowa—Keota Produce Co v Chicago, R I. & P. R. Co, 179 N.W. 834, 189 Iowa 1284.

Mo—Wall v. American Express Co, App., 272 S.W. 76

N Y—Smith v. New York, O & W. R. Co., 196 N.Y.S. 521, 119 Misc. 506—Liberty Sales Co. v. Davis, 198 N Y S. 253.

Tenn.—Roth Coal Co. v. Louisville & N R. Co., 215 S.W. 404, 142 Tenn. 52.

Tex.—International & Great Northern Ry. Co v. Kansas City Produce Co, Civ App, 200 S W. 254, dismissed for want of jurisdiction.

Va—Eastern Shore of Virginia Produce Exch. v. New York, P. & N R. Co, 126 S E 674, 141 Va 611—Norfolk & W. Ry. Co v. Nottingham & Wrenn, 124 S E 398, 139 Va. 748—Eastern Coal & Export Corporation v. Norfolk & W Ry. Co., 113 S E 857, 133 Va 525

Wis—Waters v. Becker, 186 N.W 167, 175 Wis. 621.

10 C J. p 277 note 14.

Corpus Juris is cited as supporting the rule that at common law, the value of the shipment at destination governs, in Wall v. American Ry Express Co., Mo App, 272 S W. 76, 79.

Confiscation of coal

(1) The measure of damages for confiscation of coal by a railroad company while in transit is the market value of the particular coal at the time and under the circumstances when it was taken.—Norfolk & W. Ry. Co v. Ft. Dearborn Coal & Export Co., C C A W.Va, 292 F 78

(2) Where it appeared that the shipper of the coal was a member of a shippers' pool, out of which each shipper was authorized to withdraw a quantity of coal equivalent to that shipped before arrival, the measure of recovery was the fair market value of the coal at destination, less the cost of transportation and the expenses of sale there.—Eastern Coal & Export Corporation v. Norfolk & W. Ry. Co., 113 S E 857, 133 Va. 525

(3) Where coal was in transit to the seaboard for export, and for two

tions ascertain and apply the highest market value between the date of the conversion and the day of the trial.[25]

Where some of the articles converted were second-hand and their market value, if any, would not adequately compensate plaintiff for his loss, the court may properly allow a recovery for the actual or intrinsic value of such articles.[26] Where the conversion consists in delivery at the wrong place, if the owner nevertheless receives the goods for sale and disposal there, the measure of damages is the value of the goods at that point when so received, less the price which they actually brought with due care at the sale, plus the cost of the carriage if the same had not been paid.[27] Where the conversion consists in refusal to deliver the goods on the production of the bill of lading, and a sale by the carrier for the payment of freight and other charges, it has been held that the measure of damages is the interest on the value of the property during its retention and any amount that the property depreciated in value while withheld.[28] If, after a conversion, the consignee accepts a return of the goods, but they are returned to him in a damaged condition, he is entitled to recover damages to cover the depreciation in their value as damaged.[29]

One who has only a special interest in the goods converted can recover only the value of his interest.[30]

Delivery without surrender or indorsement of bill of lading. The delivery of goods to the consignee without the consignor's indorsement on the bill of lading, in violation of its terms, renders the carrier liable, in an action for conversion, for the value of the goods.[31] Where the conversion consists in delivery of the goods without the surrender of the bill of lading, the fact that drafts attached to the bill were for more than the value of the goods does not affect the measure of damages,[32] and plaintiff can-

months or more at that time, owing to a strike in the British coal mines, the price of export coal was considerably higher than for coal for the domestic market, the shipper was entitled to the benefit of such enhanced price—Norfolk & W. Ry. Co. v. Ft. Dearborn Coal & Export Co., supra.

(4) Evidence offered by defendant that the coal, which plaintiff intended for export, was to be delivered to a coal pool at the point of destination, from which the shipper had no authority to divert it, and that on delivery there it would be merged in the pool, and the shipper given only a credit for an equal amount of coal in the pool, shows that the damage to the shipper by the confiscation of the coal was the market value of the credit for that amount of coal in the pool—Norfolk & W. Ry. Co. v. Ft. Dearborn Coal & Export Co., C.C.A.W.Va., 280 F. 264.

In absence of evidence of wholesale market price

(1) In shipper's action against carrier for loss caused by carrier's delivery of potatoes to other party without bill of lading, in which there was no definite evidence of the wholesale market price of potatoes at place of delivery, and the only definite measure of damages indicated by the evidence was the price at which the shipper had agreed to sell the potatoes to such other party, the adoption of such price as the fair wholesale market price was proper.—Merchants' & Miners' Transp Co v. Branch, C.C.A.Va., 282 F. 494.

(2) In an action by a coal company against a railroad for the conversion of carload lots of coal in transit, in the absence of anything to show that there was any wholesale market for coal in carload lots at destination at the time, the court of civil appeals was warranted in fixing the coal company's damages from the conversion at the retail price of coal at destination, less the cost of transportation and marketing—Roth Coal Co. v. Louisville & N. R. Co., 215 S.W. 404, 142 Tenn. 52.

Value at place of shipment

Plaintiff in an action for conversion after their arrival at destination, of goods shipped from New York to a foreign country, may not at his election prove the value of the goods in New York as a basis for measuring his damages—Mallory S. S. Co. v. Mitchell, C.C.A.N.Y., 291 F. 53.

The rule is inapplicable when the goods have no established market value, as in the case of used household goods.—Marsh v. Union Pac Ry. Co, C.C.Colo., 9 F. 873, 3 McCrary 236.

25. Ala.—Southern Ry. Co. v. Harris, 80 So. 101, 202 Ala. 263.
Highest intermediate value rule generally see C.J.S. title Trover and Conversion § 163, also 65 C.J. p. 138 note 20—p. 139 note 26.

26. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Kessinger, Civ.App., 72 S.W.2d 1105.
10 C.J. p. 277 note 14 [d].

27. Ark.—Little Rock, etc., R. Co. v. Miller Coal Co., 51 S.W. 1054, 66 Ark. 645.
10 C.J. p. 278 note 23.

Improper pen

In action against a carrier for delivering cattle at the quarantine pen in a stockyard, when they were entitled to be delivered at the "native pen" and were so labeled, the measure of damages is the difference in actual market value at the proper pen and the pen at which delivered, and not the average difference in value between such pens—Illinois Cent. R. Co. v. Smith, 75 So. 120, 114 Miss. 302.

28. Tex.—Missouri, etc., R. Co. v. Long, Civ.App., 167 S.W. 769.

29. Neb.—Colley v. Chicago & N. W. Ry. Co., 187 N.W. 98, 107 Neb. 864.

30. Ala.—W. O. Broyles Stove & Furniture Co. v. Hines, 87 So. 19, 204 Ala. 584.

Nature of interest

The shipper of furniture, bill of lading attached in the sum of fifty-four dollars, order to notify the consignee, the railroad having delivered the goods to the consignee without payment of the draft and bill of lading, with relation to its right to recover from the railroad as for a conversion, is in a position analogous to that of a lienee or mortgagee, and the measure of its recovery should be confined to the fifty-four dollars, with interest from time of the alleged conversion, the value of its special interest.—W. O. Broyles Stove & Furniture Co. v. Hines, 87 So. 19, 204 Ala. 584.

31. Mass.—Keystone Grape Co. v. Hustis, 122 N.E. 269, 232 Mass. 162.

32. Mich.—Winget v. Grand Trunk Western Ry. Co., 177 N.W. 273, 210 Mich. 100, certiorari denied Grand Trunk Western Ry. Co. v. Winget, 41 S.Ct. 6, 254 U.S. 629, 65 L.Ed. 447.

not recover from the carrier an amount which he voluntarily paid to the consignee in reduction of the purchase price for the inferiority of the goods.[33] So a carrier which delivers the goods without surrender of the bill of lading with draft attached is liable for no more than the actual value of the goods at destination; it is not liable for the amount of the draft unless it is less than such value.[34] On the other hand, it has been held that the receivers of a carrier which wrongfully delivers a shipment without requiring the surrender of the bill of lading are liable to a purchaser of the draft with bill of lading attached for the amount of the draft.[35] A bank which purchased a draft with bill of lading attached can recover for the wrongful delivery of the goods without surrender of the bill, the full amount of the draft, if less than the value of the goods although it charges a portion of the amount of the draft against an existing indebtedness of the customer from whom it purchased the draft.[36]

Nominal damages. Where, after delivery to the wrong person, the carrier secures the goods and tenders them to the consignee in good condition and before suit brought, the carrier is liable only for nominal damages, in the absence of any proof of damages from delay in tendering the goods.[37]

b. Damages Other than, or in Addition to, Value of Goods

Special damages may be recovered under particular circumstances, if not speculative, uncertain, or remote. Interest on the recovery is commonly allowed.

It has been held that where the goods converted had a market value at the destination at the time they should have been delivered, the shipper cannot recover special damages.[38] Nevertheless, special damages which might reasonably have been contemplated by the carrier or with respect to which it had notice, may be recovered.[39] So, where the shipper, at the time he notified the carrier that the original consignee was not entitled to eggs shipped, stated that he had sold them to a third person at a named price per dozen, the shipper was not confined to a recovery of the reasonable market value, but could recover, as special damages, the contract price of the sale to such third person.[40] Special damages not within the contemplation of the parties are not recoverable.[41]

Speculative and uncertain damages, such as loss of profits, cannot be recovered as damages for conversion,[42] nor can plaintiff recover for injury to his business.[43]

Expenses incurred. Expenses incurred while waiting for the delivery of the freight on the statement of the agent of the carrier that the same had not arrived, when in fact it was then in its possession, are too remote to be the basis of a recovery against the carrier.[44] The right to recover expenses incurred for breach of the contract of carriage,

Vt.—Belden v. Boston, etc., R. Co., 92 A. 212, 88 Vt. 300.

33. Mich.—Winget v. Grand Trunk Western Ry. Co., 177 N.W. 273, 210 Mich. 100, certiorari denied Grand Trunk Western Ry. Co. v. Winget, 41 S.Ct. 6, 254 U.S. 629, 65 L.Ed. 447.

34. N.Y.—Hatch v. New York Cent. R. Co., 203 N.Y.S. 807, 122 Misc. 707.

35. Tex.—Baker v. First Nat. Bank, Civ.App., 260 S.W. 220.

36. Wash.—National Bank of the Republic v. Hines, 192 P. 399, 112 Wash. 352.

37. Ill.—Hutchison Grocery Co. v. Louisville & N. R. Co., 230 Ill.App. 291.

38. U.S.—Mitsubishi Shoji Kaisha v. Davis, D.C.N.Y., 291 F. 882.

Resale price

A complaint alleging that plaintiff had contracted to sell the goods to a responsible purchaser at their destination for a stated sum, and that the initial carrier was advised to forward the goods promptly, so they could be delivered at the earliest practical time, in order to satisfy plaintiff's customers for or purchasers of the goods, was insufficient to show knowledge by the carrier of the resale of the goods at the stated price, and therefore did not authorize recovery of the resale price, which was in excess of the market price.—Mitsubishi Shoji Kaisha v. Davis, C.C.A.N.Y., 291 F. 57, certiorari denied 44 S.Ct. 34, 263 U.S. 706, 68 L.Ed. 516.

39. La.—Smedes Bros. v. Morgan's Louisiana & T. R. & S. S. Co., 110 So. 425, 162 La. 289.

N.C.—Harrill v. Seaboard Air Line Ry. Co., 107 S.E. 136, 181 N.C. 315.

Notice of facts

Where defendant railroad was fully notified as to what plaintiff intended to do with goods shipped him when they arrived at destination, such communication was sufficient to put the railroad on notice as to the resultant damages should it fail in the delivery of the goods.—Harrill v. Seaboard Air Line Ry. Co., 107 S.E. 136, 181 N.C. 315.

Where carrier knew or should have known of special circumstances which, if established, would authorize an award of special damages, actual notice is unnecessary.—Smedes Bros. v. Morgan's Louisiana & T. R. & S. S. Co., 110 So. 425, 162 La. 289.

40. Mo.—Amber v. Davis, 282 S.W. 459, 221 Mo.App. 448.

41. Minn.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Reeves Coal Co., 181 N.W. 335, 148 Minn. 196, 14 A.L.R. 405.

Deviation; loss of more favorable market

Where a deviation by a carrier from the route designated in the bill of lading prevented the shipper from diverting the shipment to a more favorable market, as he had intended to do, but the carrier had no knowledge of such intention, the loss of the more favorable market cannot be deemed to have been within the contemplation of the parties as a consequence which might result from misrouting.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Reeves Coal Co., 181 N.W. 335, 148 Minn. 196, 14 A.L.R. 405.

42. Iowa.—Keota Produce Co. v. Chicago, R. I. & P. R. Co., 179 N.W. 834, 189 Iowa 1284.

43. Md.—Baltimore, etc., R. Co. v. Pumphrey, 59 Md. 390.

44. Ga.—Central of Georgia R. Co.

is discussed in § 160 c (2) supra. What expenses are recoverable for delivery at the wrong place, in an action other than for conversion, is stated in § 176 supra.

Interest. Interest on the value of the goods or amount of recovery has been allowed in many cases;[45] it may usually be computed from the date of the conversion or time when delivery should have been made,[46] although it has been held that, where a carrier delivered goods on a forged bill of lading, interest should be allowed only from judicial demand, and not from the date of delivery, conversion not being willful,[47] and it has been held that where a carrier confiscated coal, but refused to pay the market value, interest may be recovered from the date of the demand.[48]

Statutory penalty. A statute providing that in case of a refusal to deliver property shipped the carrier shall pay the party aggrieved special damages at the rate of five per cent per month upon the value of the goods at the time of shipment for the negligent detention thereof does not apply in an action to recover the value of goods not delivered at all, but converted by the carrier.[49]

Exemplary damages may be recovered where the taking of the property was willful and without regard to plaintiff's rights.[50]

Attorney's fees. In a common-law action for conversion arising out of a carrier's sale of goods for demurrage charges alleged to be unlawful, because of an incorrect application of the published rules, plaintiff's attorney's fees are not recoverable, and the federal statute permitting the recovery of attorney's fees where damages are recovered for violation of the provisions of the federal law relating to discrimination, reparation, and the like is inapplicable.[51]

c. Mitigation or Reduction of Damages

Defendant may show in mitigation of damages for conversion any matters which go to reduce the amount required for just compensation.

Defendant carrier may show, in mitigation or reduction of damages for conversion, any circumstances tending to reduce the amount justly required to compensate plaintiff for his loss.[52] Where the conversion consists in a delivery to the wrong person, if the goods are reclaimed by the carrier and delivered or tendered to the consignee or a person entitled thereto,[53] or the proceeds of a sale of the goods are paid to him,[54] such delivery, tender, or payment will be considered in mitigation of damages.

Where the conversion consists in a delivery of the goods to the consignee without payment of the

v. Chicago Portrait Co., 49 S.E. 727, 122 Ga. 11, 106 Am.S.R. 87.

45. U.S.—Hubbard Bros & Co. v. Southern Pac. Co., La., 256 F. 761, 168 C.C.A. 107
Ala.—Southern Ry. Co. v. Harris, 80 So. 101, 202 Ala. 263—Davis v. Hines, 85 So. 882, 17 Ala.App. 443
Ill.—Northern Transp. Co. v. Sellick, 52 Ill. 249.
Iowa.—Keota Produce Co. v. Chicago, R. I. & P. R. Co., 179 N.W. 834, 189 Iowa 1284
10 C.J. p. 277 note 16.

In Missouri, under Rev.St.1919 § 4222, the jury may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion.—Amber v. Davis, 282 S.W. 459, 221 Mo.App. 448.

46. Ill.—Merchants' State Bank of Centralia v. Chicago, B. & Q. R. Co., 245 Ill.App. 211
La.—Orange Nat. Bank v. Southern Pac. Co., 110 So. 329, 162 La. 223, 56 A.L.R. 1167.
Nev.—Dixon v. Southern Pac. Co., 172 P. 368, 42 Nev. 73, L.R.A.1918D 960, affirmed 177 P. 14, 42 Nev. 73, L.R.A.1918D 960.
Tex.—Baker v. First Nat. Bank, Civ.App., 260 S.W. 220.

47. U.S.—Hubbard Bros & Co. v. Southern Pac. Co., La., 256 F. 761, 168 C.C.A. 107

48. Ky.—Southern Ry. Co. v. Consumers' Fuel Co., 262 S.W. 581, 203 Ky. 441.

49. Tex.—Panhandle & S. F. Ry. Co. v. Talmage, Civ.App., 206 S.W. 862—Missouri, K. & T. Ry. Co. of Texas v. C. H. Rines & Co., 84 S.W. 1092, 37 Tex.Civ.App. 618

50. Ala.—St. Louis & S. F. Ry. Co. v. Georgia, F. & A. Ry. Co., 104 So. 33, 213 Ala. 108.
Mo.—Blackmer v. Cleveland, etc., R. Co., 73 S.W. 913, 101 Mo.App. 557.

Priority of rights as excuse

In action by purchaser of coal against carrier for conversion which was willful, deliberate, and in utter disregard of plaintiff's rights and needs, carrier which had contract with same seller for coal was not excused from liability for punitive damages by virtue of any priority of rights, especially where it had received, not only its own maximum quantity, but in excess thereof, and to exclusion of plaintiff.—St. Louis & S. F. Ry. Co. v. Georgia, F. & A. Ry. Co., 104 So. 33, 213 Ala. 108

51. Mo.—Milne Lumber Co. v. Michigan Cent. R. Co., App., 57 S.W.2d 732.

52. Iowa.—Keota Produce Co. v. Chicago, R. I. & P. R. Co., 179 N.W. 834, 189 Iowa 1284
Mo.—Montgomery v. Davis, 240 S.W. 282, 209 Mo.App. 698.
Va.—Norfolk & W. Ry. Co. v. Nottingham & Wrenn, 124 S.E. 398, 139 Va. 743.

Matter not constituting ground for reduction of damages

A carrier could not reduce liability for confiscation of coal in transit over its line to tide water piers, for sale in spot market thereat, by allocating confiscated cars to Great Lakes' ports, after interstate commerce commission ordered embargo on shipments east until certain percentage of cars was consigned to lakes, its duty being to refuse to accept cars at mines, or stop them until properly rerouted.—Norfolk & W. Ry. Co. v. Nottingham & Wrenn, 124 S.E. 398, 139 Va. 748.

53. W.Va.—Clarke-Lawrence Co. v. Chesapeake & O. Ry. Co., 61 S.E. 364, 63 W.Va. 423.

54. Iowa.—Keota Produce Co. v. Chicago, R. I. & P. R. Co., 179 N.W. 834, 189 Iowa 1284.
Mo.—Montgomery v. Davis, 240 S.W. 282, 209 Mo.App. 698.

purchase price, contrary to the shipper's orders, the carrier may show in mitigation of damages that the consignee had paid for the goods subsequent to the conversion.[55]

The general rule that it is the duty of plaintiff to minimize damages so far as possible does not require the shipper of goods converted by the carrier by delivery to the consignee without the shipper's indorsement on the bill of lading to accept the consignee's check in partial payment of the demand in order to reduce the loss, even if the balance could afterward be collected.[56] A rejected offer of compromise, made to the consignee by a person to whom the goods were wrongfully delivered, for the purchase thereof and payment of a profit on the same, is not ground for mitigation of damages.[57]

The fact that plaintiff made no attempt to obtain a shipment from the carrier until many months after its misdelivery was not ground for mitigation of damages, since the cause of action arose from the moment defendant placed the goods beyond its power to deliver[58]

§ 185. Effect of Final Delivery

Broadly speaking, upon a final delivery the rights, duties, and liabilities of the carrier with respect to the goods are at an end.

The liability of a common carrier as such continues until there has been a sufficient delivery of the goods to the consignee or person entitled thereto,[59] or a waiver of such delivery;[60] but where there is a complete legal delivery in accordance with the rules stated supra § 160 et seq the rights of the carrier[61] and its duties and liabilities,[62] with respect to the goods, whether as carrier or warehouseman,[63] ordinarily terminate, even though the consignee refuses to receive them because damaged,[64] and any further obligation on its part must arise out of a new and different contract.[65] If the carrier subsequently delivers the goods to another at the consignee's request, it is acting as his agent.[66] In

55. Minn.—Jellett v St Paul, etc., R. Co., 15 N.W. 237, 30 Minn. 265

56. Mass.—Keystone Grape Co. v Hustis, 122 N.E. 269, 232 Mass 162.

57. W.Va.—Clarke-Lawrence Co. v Chesapeake, etc., R. Co., 61 S.E. 364, 63 W.Va. 423.

58. La.—Orange Nat. Bank v Southern Pac Co., 110 So. 329, 162 La. 223, 56 A.L.R. 1167.

59. Ark.—Missouri & N. A. R. Co. v. United Farmers of America, 292 S.W. 990, 173 Ark. 577

Ind.—Chicago, R. I. & P. Ry. Co. v. Stouffer, 111 N.E. 809, 61 Ind.App. 190

La.—Wood v. Louisiana & A. Ry. Co., 104 So. 306, 158 La. 504

Me.—Brown v. Railway Express Agency, 188 A. 716, 134 Me. 477.

Okl.—St. Louis & S. F. Ry. Co. v Royal Ins. Co., 227 P. 410, 100 Okl. 11.

Tex.—American Express Co. v. Duncan, Civ.App., 193 S.W. 411.

60. Ind.—American Ry. Express Co. v. Rhody, 143 N.E. 640, 84 Ind.App 283

61. Wis.—Madden Bros. v. Jacobs, 235 N.W. 780, 204 Wis. 376.

Rights of private carrier as bailee All rights of private carrier to possession of property as bailee were held to have ceased under an agreement when consignee signed contract and received goods.—Madden Bros. v. Jacobs, 235 N.W. 780, 204 Wis. 376

62. Ala.—James v. Alabama Great Southern R. Co., 81 So. 582, 202 Ala. 610

Ark.—Arkansas Railroad v. Winters, 265 S.W. 967, 166 Ark. 213—Yazoo & M. V. R. Co. v Altman, 187 S.W. 656, 124 Ark. 490—Arkadelphia Milling Co. v. Smoker Merchandise Co., 139 S.W. 680, 100 Ark. 37.

Ga.—Georgia Cotton Co. v Central of Georgia Ry. Co., 91 S.E. 933, 19 Ga.App. 576

Mo.—Bozworth v Wabash Ry. Co., 58 S.W.2d 448, 332 Mo. 277, affirming Bosworth v. Wabash Ry. Co., App., 21 S.W.2d 1110—Burton v. Wabash Ry. Co., 58 S.W.2d 443, 332 Mo. 268, affirming, App., 22 S.W.2d 201—Hayes v. Wells Fargo & Co. Express, App., 206 S.W. 229.

Neb.—Schneider v. Davis, 192 N.W. 230, 109 Neb. 638.

N.Y.—Anthony & Jones Co. v New York Cent. & H. R. R. Co., 119 N.E. 90, 233 N.Y. 21, L.R.A.1918F 1085, reversing 152 N.Y.S. 1097, 167 App.Div. 955—American Cotton Products Co. v. New York Cent. R. Co., 255 N.Y.S. 672, 142 Misc. 821.

Tex.—House v. Soder, 36 Tex. 629

Wis.—Northern Milling Co. v. Davis, 190 N.W. 351, 178 Wis. 493

10 C.J. p 248 note 12, p 256 note 6, p 260 note 41.

Under express statutory provisions in Georgia a carrier's responsibility ceases on delivery at destination according to sender's direction or according to the custom of trade.—Saunders Bros. v Payne, 116 S.E. 349, 29 Ga.App. 615.

Liability of stockyards company as common carrier ends with its delivery to the consignee, unless, by reason of such circumstances as unreasonable delay in acceptance, or other default on the part of the consignee, the relation changes to that of bailee.—Schneider v. Davis, 192 N.W. 230, 109 Neb. 638

63. Ky.—Gus Datillo Fruit Co. v Louisville & N. R. Co., 65 S.W.2d 683, 685, 251 Ky. 566.

10 C.J. p 248 note 12.

Corpus Juris is quoted in support of this rule in Gus Datillo Fruit Co. v. Louisville & N. R. Co., supra.

64. Tex.—Houston & T. C. Ry. Co. v. Iversen, Civ.App., 196 S.W. 908.

65. Ala.—Fred Henderson & Walters v. Atlantic Coast Line Ry. Co., 76 So. 309, 200 Ala. 393.

Ga.—Taylor v. Central of Georgia Ry. Co., 121 S.E. 348, 31 Ga.App. 374

Ill.—Wenatchee Valley Fruit Growers Ass'n v. Michigan Central R. Co., 215 Ill.App. 129.

N.Y.—American Cotton Products Co. v New York Cent. R. Co., 225 N.Y.S. 672, 142 Misc. 821

Reconsignment or diversion of goods (1) Whatever right of diversion, in the absence of provision therefor in a contract of shipment, a consignor of goods to himself or agent may have, no right to divert can be claimed after arrival of the goods at agreed destination, a further shipment requiring a new contract.—Taylor v. Central of Georgia Ry. Co., 121 S.E. 348, 31 Ga.App. 374.

(2) "Reconsignment" of cars to other destinations is effected by new agreement in addition to and extending terms of original contract of carriage over new and additional period of transportation.—Perkel v. Pennsylvania R. Co., 265 N.Y.S. 597, 148 Misc. 284.

66. Mo.—Hayes v. Wells Fargo & Co. Express, App., 206 S.W. 229.

accordance with the general rule above stated, where there has been a complete legal delivery, the carrier is relieved from liability for loss or injury thereafter occurring by fire or other cause, although the goods remain on the carrier's premises, and never come into the actual possession of the consignee or owner,[67] at least in the absence of gross negligence on the part of the carrier.[68] In case of live stock shipments, however, the liability of the carrier is not confined to losses occurring during the time the stock is actually in its possession. If the cause of a loss occurring after its delivery to the owner is a cause which began to operate while it was in the carrier's possession and is a cause for which it is responsible, it will be liable without regard to the time when the effects developed.[69] Although delivery is not made at the proper place, yet if the owner subsequently obtains possession of the goods, the carrier is not liable for a loss thereafter occurring.[70]

§ 186. Goods Carried C. O. D.

a. In general
b. Duties and liabilities of carrier
c. Remedies of carrier

a. In General

The duty of a carrier to collect the amount due the consignor, upon delivery of the goods, arises only by contract.

The peculiarity of shipment of goods c. o. d. (meaning collect on delivery), which is usually undertaken only by express companies, is that a condition is attached that the carrier on delivery to the consignee shall collect a specified sum of money, usually the purchase price of the goods (and other than transportation charges), and shall return the sum thus collected to the consignor. Since it is well settled that there is no common-law duty devolving on an express company or other common carrier to act as the collecting agent of the shipper, such obligation arises only by contract express or implied,[71] and is one which the carrier may enter into or refuse at its option.[72] A contract by which the carrier undertakes to collect on delivery may be verbal, and need not be incorporated in the receipt or bill of lading, although in such case the proof of the undertaking must be clear and explicit.[73] The contract may be implied where the carrier accepts the goods for transportation with instructions not to deliver them until they are paid for, or where they are so clearly marked as to indicate that payment is to be a condition of delivery;[74] but it has been

67. Colo.—Lynch v. Union Pac. R. Co., 172 P. 1061, 65 Colo. 152.
Ky.—Gus Datillo Fruit Co. v. Louisville & N. R. Co., 65 S.W.2d 683, 251 Ky. 566.
La.—Wood v. Louisiana & A. Ry. Co., 104 So. 306, 158 La. 504.
Mich.—Barber v. Detroit, G. H. & M. Ry. Co., 164 N.W. 377, 197 Mich. 643, Ann.Cas.1918E 1109.
10 C.J. p. 247 note 3, p. 252 note 57.

Loss by fire

(1) Where one car was unloaded by the carrier and the goods placed in a warehouse and another car was placed for unloading and a portion of the shipment removed by the consignee, who signed receipts for both cars, there was a delivery, relieving the carrier from liability for the subsequent destruction of the shipments by fire.—Denver & R. G. R. Co. v. Johnson, 193 P. 729, 69 Colo. 252.

(2) Where consignee had ample opportunity with which to remove the goods after notice of their arrival, the carrier is not liable for the subsequent destruction of the goods by fire.—Wood v. Louisiana & A. Ry. Co., 104 So. 306, 158 La. 504.

Loss by freezing

(1) Where railway delivers a carload of vegetables to consignee, who accepts same and starts removing vegetables from the car, the railway's responsibility for the safety of the vegetables ceased, and, where vegetables remaining in car freeze, the railway is not liable for damages sustained.—Lynch v. Union Pac. R. Co., 172 P. 1061, 65 Colo. 152.

(2) Where fruit dealer accepted carload of bananas, but was not permitted to unload until payment of freight, carrier was not liable either as carrier or as warehouseman when bananas became frozen and chilled, there having been a complete delivery.—Gus Datillo Fruit Co. v. Louisville & N. R. Co., 65 S.W.2d 683, 251 Ky. 566.

(3) Where potatoes shipped by rail and steamer had been in steamship company's warehouse at destination to knowledge of consignee more than six days, railroad which handled shipment was not liable for loss by freezing, its carrier's liability having terminated.—Barber v. Detroit, G. H. & M. Ry. Co., 164 N.W. 377, 197 Mich. 643, Ann.Cas.1918E 1109.

68. Ga.—Stewart v. Central of Georgia R. Co., 60 S.E. 1, 3 Ga.App. 397.

69. Mo.—Bell v. Chicago, etc., R. Co., App., 171 S.W. 41.
Tex.—Missouri Pac. R. Co. v. Edwards, 14 S.W. 607, 78 Tex. 307.

70. Ill.—Unger v. Parmelee Co., 225 Ill.App. 556.

71. Mo.—Rolla Produce Co. v. American Railway Express Co., 226 S.W. 582, 205 Mo.App. 646.
N.C.—Anthony v. American Express Co., 124 S.E. 753, 754, 188 N.C. 407, 36 A.L.R. 460.
Pa.—Warfel v. Hemp, 20 Pa.Dist. & Co. 598.
10 C.J. p. 278 note 28–11 C.J. p. 940 notes 47–50.

Corpus Juris is quoted in Anthony v. American Express Co., supra, in support of the rule stated in this and the next following text.

Implied contract not shown

As to prepaid shipments of coal consigned to a coal exchange for account of shipper and under regulations of exchange, loaded on ship for account of other members, course of dealing between shipper and carrier was held not to show an implied contract by carrier to collect, from those for whose account the coal was so reshipped, the freight prepaid by the original shipper.—Pennsylvania R. Co. v. S. M. Hamilton Coal Co., 125 A. 405, 144 Md. 556, 35 A.L.R. 478.

72. N.C.—Anthony v. American Express Co., 124 S.E. 753, 188 N.C. 407, 36 A.L.R. 460.
Pa.—Warfel v. Hemp, 20 Pa.Dist. & Co. 598.
10 C.J. p. 278 note 29.

73. Pa.—Union R., etc., Co. v. Riegel, 73 Pa. 72.

74. Ala.—Cox v. Columbus & W. Ry. Co., 8 So. 824, 91 Ala. 392.

held that where a receipt given by the carrier for the goods does not contain the condition that payment shall be made on delivery, the carrier is not bound although it was instructed to deliver with that condition;[75] that merely marking a package "c. o. d." is not sufficient where the receipt issued by the carrier contains no such characters, nor any language indicating an undertaking by the carrier to collect from the consignee the amount due;[76] and that the words "please collect," written on the bill accompanying a parcel is a request only, and the acceptance thereof by the carrier does not show a binding agreement to comply with the request.[77]

Title to goods in transit. There is a conflict of authority as to whether the delivery of goods to a carrier for shipment c. o. d. passes title to the buyer, as is discussed in the C.J.S. title Sales § 276, also 10 C.J. p 278 note 32–p 279 note 35, and 55 C.J. p 591 note 60–p 592 note 68. The question also arises in connection with the transportation of intoxicating liquors, in determining the place of sale as affecting criminal responsibility. This is treated in the C.J.S. title Intoxicating Liquors § 249, also 10 C.J. p 279 note 33, and 33 C.J. p 598 note 80 [a].

b. Duties and Liabilities of Carrier

(1) In general
(2) Failure of consignee to accept and pay for goods
(3) Liability for conversion
(4) Right of consignee to inspect goods
(5) Liability as warehouseman
(6) Actions against carrier

(1) In General

A carrier is bound to a strict compliance with its contract to act as agent for the consignor in collecting the amount due on a C. O. D. shipment, and is liable to the consignor for a failure to collect, unless the latter waives his rights, or unless other circumstances exist relieving the carrier from liability. The consignee must either pay for the goods or return them. A third person who pays the charges and receives the goods acquires an interest therein.

When a carrier makes a contract to collect on delivery, it stands with reference to it just as any other agent,[78] and is bound to a strict compliance with its undertaking.[79] The carrier acts as bailee to transport the goods,[80] and as agent to collect the price.[81] Where the carrier undertakes to transport goods C. O. D., it is bound to collect the amount due and return it to the shipper,[82] and, ordinarily, if the carrier delivers the goods without receiving the amount to be collected, it is liable to the consignor therefor,[83] but the consignor may by his acts waive any rights he may have against the carrier for its breach of duty in this regard.[84] Where the price of a C. O. D. shipment was paid to the carrier by the consignee, and by collusion between the carrier and consignee the money, while in the carrier's possession was garnisheed by the consignee, the consignor could recover from the carrier as for money had and received, and no duty rested on the consignor to defend the garnishment proceedings.[85] Under a rule adopted pursuant to the Interstate Commerce Act, requiring the consignor to mark on packages shipped C. O. D. those letters, together with the name and address of the shipper, and the amount to be collected, it is not the duty of the carrier to so mark the goods.[86]

Mass.—Lane v. Chadwick, 15 N.E. 121, 146 Mass. 68.
10 C.J. p 278 note 31.

75. Ala.—Smith v. Southern Express Co., 16 So. 62, 104 Ala. 387.

76. Ill.—Chicago, etc., R. Co. v. Merrill, 48 Ill. 425.

77. N.Y.—Tooker v. Gormer, 2 Hilt. 71.

78. N.C.—Anthony v. American Express Co., 124 S.E. 753, 188 N.C. 407.
10 C.J. p 279 note 36.
Corpus Juris is quoted in Anthony v. American Express Co., 124 S.E. 753, 755, 188 N.C. 407, in support of the rule stated in this and the next following text.

79. Ind.—Meyer v. Lemcke, 31 Ind. 208.
N.C.—Anthony v. American Express Co., 124 S.E. 753, 188 N.C. 407.

80. N.Y.—Joseph Mogul, Inc., v. C. Lewis Lavine, Inc., 159 N.E. 708, 247 N.Y. 20, 57 A.L.R. 934, reversing 221 N.Y.S. 391, 220 App.Div. 287.

81. Mo.—Rolla Produce Co. v. American Railway Express Co., 226 S.W. 582, 205 Mo.App. 646.
N.Y.—Joseph Mogul, Inc. v. C. Lewis Lavine, Inc., 159 N.E. 708, 247 N.Y. 20, 57 A.L.R. 934, reversing 221 N.Y.S. 391, 220 App.Div. 287.

82. Ind.—U. S. Express Co. v. Keefer, 59 Ind. 263.
Mich.—American Ry. Express Co. v. Ready, 206 N.W. 344, 232 Mich. 624.
Mo.—Rolla Produce Co. v. American Railway Express Co., 226 S.W. 582, 205 Mo.App. 646.
10 C.J. p 279 note 38.
Presumption is that carrier performed its duty to collect amount of C. O. D. charges.—American Ry. Express Co. v. Ready, 206 N.W. 344, 232 Mich. 624.

83. Ark.—Railway Express Agency v. McAdams, 85 S.W.2d 730, 191 Ark. 118.
N.C.—Anthony v. American Express Co., 124 S.E. 753, 188 N.C. 407.
10 C.J. p 279 note 40

84. N.Y.—Brooks v. American Express Co., 14 Hun 364.
10 C.J. p 279 note 41.
Corpus Juris text is cited with approval in Railway Express Co. v. Deroy, Pa., 167 A. 444.

85. Ala.—American Ry. Express Co. v. Henderson, 107 So. 746, 214 Ala. 268

86. N.Y.—Rothschild v. American Ry. Express Co., 234 N.Y.S. 454, 226 App.Div. 187.
Construction of receipt
Where two packages, intended to be shipped C. O. D. were delivered to the carrier, but one of the packages was not so marked, the issuance of a receipt by the carrier for "1 box & 1 bolt of cloth C. O. D." was not an agreement by the carrier to mark either of the packages for the consignor, and hence the carrier accepted for transportation and de-

Effect of fraud. Where the consignor informs the carrier's agent that he desires to send an interstate shipment C. O. D., but the agent fraudulently issues a straight bill of lading, which he represents to the consignor is an order bill, and the goods are delivered to the consignee without payment, the carrier is liable to the consignor for the value of the goods, and it is immaterial that the fraud was not willful, or that the consignor was negligent in failing to read the bill of lading.[87] Where, by the fraud of the consignor, the consignee becomes entitled to the return of the money paid by him on a C. O. D. shipment, the carrier may return it to the consignee without incurring any liability to the consignor.[88] Where goods were sent C. O. D. at the consignor's risk, and the carrier's agent knew that they showed signs of wet damage, it was his duty to disclose such fact to the consignee before demanding and receiving payment therefor; and the fact that the company had remitted the purchase price to the consignor before receiving notice from the consignee that the goods were worthless did not relieve it from liability, if the notice was within a reasonable time.[89]

Defenses to liability. A carrier is not liable for delivering the goods without making collection where the amount to be collected was thereafter paid by the consignee direct to the consignor;[90] but where a cause of action has accrued to the consignor because of the carrier's delivery of the goods without collecting the charges, the carrier cannot exonerate itself from liability by a return of, or an offer to return, the goods to the consignor.[91]

Duties of consignee. A consignee who receives a C. O. D. shipment is bound either to pay therefor or return the goods.[92]

Rights of third persons. A third person who, at the request of a buyer of goods shipped C. O. D., makes the required payment and receives the goods, acquires an interest therein sufficient to secure the amount paid by him, superior to any rights of the seller arising from an agreement between the latter and the buyer, not known to the payer.[93]

(2) Failure of Consignee to Accept and Pay for Goods.

The carrier fully performs its duty by tendering back the goods to the consignor after the consignee's refusal to accept and pay for them. Ordinarily, the carrier must give the consignor notice of such refusal, after affording the consignee a reasonable time in which to accept and pay the charges. A return of the goods to the consignor must be made within a reasonable time.

The duty of the carrier of goods shipped C. O. D. is fully performed where, after the consignee refuses to receive and pay for them, it tenders back the goods to the consignor.[94] Ordinarily, it is the duty of the carrier to give notice to the consignor of the failure or refusal of the consignee to accept and to pay for the goods,[95] after allowing the consignee a reasonable time in which to do so.[96] It has been held, however, that in the absence of an agreement there is no duty or obligation on the carrier to give such notice,[97] and that, where there has been no absolute refusal to accept the goods, and the consignee has promised to call for the goods and to take them away within a short time, the carrier is not chargeable with negligence in failing to give immediate notice to the consignor of a delay in the acceptance of the goods.[98] A return of the goods to the consignor after the consignee's refusal thereof must be made within a reasonable time.[99]

Where the consignee notified the carrier that he was not ready to take up a C. O. D. shipment on its arrival, it has been held to be the carrier's duty to store the goods and to hold them a reasonable time to enable the consignee to pay.[1]

livery two segregated packages, one for delivery C. O. D, and the other for delivery without collecting from the consignee—Rothschild v. American Ry. Express Co., 234 N.Y.S 454, 226 App.Div. 187.

87. Minn—Duholm v. Chicago, M & St P. R. Co., 177 N.W. 772, 146 Minn 1.

88. N Y—Herrick v. Gallagher, 60 Barb. 566.

89. Mass.—Hardy v. American Express Co., 65 N.E. 375, 182 Mass. 328, 59 L.R.A. 731.

90. Mo.—Rolla Produce Co. v. American Railway Express Co., 226 S W. 582, 205 Mo.App. 646

91. N.D.—Blaisdell v. American Ry. Express Co., 220 N.W. 634, 56 N.D. 870.

92. Mo—Rolla Produce Co v. American Railway Express Co., 226 S.W. 532, 205 Mo App. 646.

93. Mo—Frank Adam Co v. Orpheum Theater Co, 193 S W. 908, 195 Mo App. 413.

94. N.Y.—Rothschild v. American Ry. Express Co., 234 N Y S. 454, 226 App.Div. 187.

95. Mich.—Hasse v American Express Co, 53 N.W. 918, 94 Mich. 133, 34 Am S R 328.
10 C.J. p 280 note 53.

96. Mich.—Hasse v. American Express Co., 53 N.W. 918, 94 Mich. 133, 34 Am S R. 328.

97. N.Y.—Simon v. Universal Carloading & Distributing Co., 1 N.Y. S.2d 249.

98. N Y.—Weed v. Barney, 45 N Y 344, 6 Am.R 96—Grossman v. Fargo, 6 Hun 310.

99. N Y.—Spitzer v. Porto Rican Express Co., 183 N Y S 19, 112 Misc 453.

Eight months' delay in returning a C. O. D shipment by express, which had not been accepted, was unreasonable as matter of law, the shipper directing return of goods or money.—Spitzer v. Porto Rican Express Co, 183 N.Y.S. 19, 112 Misc. 453.

1. N Y.—Simon v. Universal Carloading & Distributing Co., 1 N.Y. S.2d 249.

(3) Liability for Conversion.

A carrier which delivers the goods but fails to collect from the consignee the amount of C. O D. charges is liable as for a conversion, although under some circumstances it has been held liable only for breach of contract.

A delivery to the consignee of goods accepted for shipment C. O. D., without collecting the charges, constitutes a conversion by the carrier.[2] So, a carrier wrongfully holding the proceeds of a C. O. D. shipment, in order to permit the consignee to garnishee the same, is liable for a conversion.[3] On the other hand, it has been held that a carrier is liable for breach of contract and not for conversion where, after having received a C. O. D. shipment for transportation, it returns it to the place of origin and offers to deliver it to the shipper on payment of the return charges, because of a statute preventing it from making delivery without paying a heavy occupation tax.[4]

(4) Right of Consignee to Inspect Goods

Ordinarily the carrier may allow the consignee to inspect goods shipped C. O. D., unless such inspection is forbidden by the consignee before payment, and in permitting an inspection and trial the carrier incurs no liability to the consignor even though the goods are rejected.

When goods are forwarded by an express company, to be paid for on delivery, the consignee is ordinarily entitled to a reasonable opportunity to examine the goods, to ascertain whether they answer the description of those ordered by him.[5] This right also exists in the case of interstate shipments,[6] although where a rule in the tariff on file with the interstate commerce commission forbids inspection unless instructions permitting it are written or printed on the C. O. D. envelope, or the consignor subsequently authorizes inspection, an express company must refuse to allow inspection by the consignee.[7] In any event, a C. O. D. shipment does not necessarily forbid an inspection and trial, and where the consignee, under the contract, is entitled to inspection and trial, the carrier, in permitting the same is not chargeable with conversion, even though it permits the temporary use and possession of the goods for the purpose of trial.[8] By permitting the consignee a reasonable opportunity to examine the goods, the carrier is not liable to the consignor, even though the examination results in rejection of the goods.[9] A carrier, however, should exercise care to prevent loss or injury to the goods during the inspection.[10] The consignee is not entitled to the right of inspection where the goods were put up and sealed in his presence and forwarded to him by his directions;[11] and if the consignor forbids the consignee to inspect the contents of the package until payment is made, it is the duty of the carrier to obey the instruction, and if in violation of such instruction it permits the examination of the contents, and the consignee refuses without cause to receive the goods and to pay the sum required, the company is liable to the consignor for damages.[12] Where the carrier is directed not to permit an inspection, it incurs no liability by returning the goods to the consignor on refusal of the consignee to accept the goods without examination.[13]

(5) Liability as Warehouseman.

Where a carrier has transported goods shipped C. O. D. and given the consignee a reasonable time for their removal, its liability as carrier ceases, and its liability as warehouseman begins.

Where the transportation of goods sent C. O D. has been completed and notice given to the consignee and a reasonable time allowed him for the removal of the goods, the liability of the carrier as such is at an end and the less stringent liability of warehouseman commences.[14] Such also is the lia-

2. U S—Rosenberger v. Pacific Exp. Co, 36 S.Ct. 510, 241 U S. 48, 60 L Ed 880, reversing 167 S.W 429, 258 Mo 97.
N D—Blaisdell v. American Ry. Exp Co, 220 N.W. 634, 56 N.D. 870.
Corpus Juris is cited in support of this rule in Blaisdell v. American Ry Express Co, 220 N W 634, 635, 56 N D. 870

3. Ala.—American Ry. Express Co v. Henderson, 107 So. 746, 214 Ala. 268.

4. Mo—Rosenberger v Pacific Express Co, 167 S.W. 429, 258 Mo. 97.

5. Ga.—Reed Oil Co. v Smith, 114 S E 56, 154 Ga. 183, reversing 109 S E 171, 27 Ga App. 470, conformed to 114 S E 721, 29 Ga App. 236. 10 C J p 279 note 42.
Corpus Juris is cited in support of this rule in Reed Oil Co. v. Smith, supra.

6. Ga.—Reed Oil Co. v. Smith, supra

7. La—Astugue v American Ry. Express Co, 131 So 62, 15 La App. 347.

8. Iowa.—Port Huron Machinery Co. v Chicago, M & St P Ry. Co, 201 N W 779, 199 Iowa 295

9. Miss—Southern Express Co v. Grace, 68 So. 172, 109 Miss 268
N H—Lyons v. Hill, 46 N.H. 49, 88 Am Dec. 189.

10. N Y.—Lyon v. Barrett, 156 N Y. S 461, 93 Misc 41

11. N H.—Wilson v. Elliott, 57 N.H 316.

12. N Y—Herrick v. Gallagher, 60 Barb. 566.

13. Iowa—Wiltse v Barnes, 46 Iowa 210.

14. Mich—Hasse v American Express Co., 53 N W 918, 94 Mich. 133 34 Am.S.R. 323.
N.Y.—Simon v Universal Carloading & Distributing Co., 1 N.Y S.2d 249
10 C.J p 280 note 51.
After lapse of free time allowed by a uniform bill of lading, in accordance with the terms of the bill of lading the carrier becomes a warehouseman of a C O. D shipment, and where it is destroyed by fire through no fault of the carrier, it is not liable therefor—Simon v. Universal Carloading & Distributing Co., 1 N. Y S 2d 249.

bility of the carrier where the consignee refuses to accept the goods.[15]

(6) Actions against Carrier

A condition on an express receipt that claims must be presented in writing within a specified time does not apply to a claim for money collected on a C. O. D. shipment. In an action against a carrier for failure to collect on such a shipment or to return the goods, the usual rules apply as to presumptions and burden of proof, questions of law and fact, and instructions The amount of recovery is ordinarily the amount which should have been collected.

A condition on an express receipt that claims must be made in writing, within a specified time, applies only to the express company's liability arising out of breach of duty as a common carrier, and not to claims for money collected on C. O. D. shipments and not remitted as required.[16] The consignor, and not the consignee to whom the carrier had delivered the goods without collecting the C. O. D. charges, is the proper party to sue the carrier for the loss sustained, where the consignee claimed no right to sue, and his acceptance of the shipment was not as consignee, but merely with the intention of minimizing the carrier's damages.[17] Where the carrier is sued for failure to remit the amount to be collected on a C. O. D. shipment, or to return the goods, or for unauthorized delivery to the consignee who refused to pay the charges, the usual rules are applicable with respect to presumptions and burden of proof,[18] questions of law and fact,[19] and instructions.[20] When plaintiff shows delivery of a C. O. D. shipment to defendant carrier, and defendant's failure to return the goods or remit the amount to be collected, the jury could infer that the goods had been delivered to the consignee, and the burden was on defendant to overcome such prima facie case.[21]

Amount of recovery. For breach of a carrier's duty to carry and deliver, as bailee of a C. O. D. shipment, the carrier is liable, as in any other case of misdelivery, for the value of the goods; but for breach of its duty, under such a shipment, to act as collecting agent for the consignor, the carrier is liable for whatever could have been collected if such duty had been performed,[22] and it has been held that if, in such case, the carrier can be sued in conversion for a delivery without making the required collection, nevertheless, the carrier's obligation arises from the contract, and the amount of recovery will be the contract amount, and not the value of the goods.[23] The amount of recovery is measured by the damage sustained, and is not a debt or other liquidated claim.[24] A carrier delivering a C. O. D. shipment of plants without collecting the charges, is liable for the loss occasioned by inability to complete a resale of the plants because of deterioration resulting from the delay incident to the unauthorized delivery, with credit for the express charges on the shipment.[25] Where the carrier delivered a C. O. D. shipment to the consignee, and in payment therefor accepted a forged check, and the presumption in favor of the collectability of the consignor's demand was rebutted by the circumstances, the limit of recovery was the value of the goods surrendered. In such case, the carrier may show, in mitigation of damages, that collection was impossible, although cash had been demanded.[26]

c. Remedies of Carrier

A carrier delivering goods without collecting C. O. D. charges has a right of action against the consignee for the amount paid by it to the consignor, the general rules as to presumptions and burden of proof and questions of law and fact apply.

Where a carrier delivers goods to the consignee without collecting the c. o. d. charges, and is compelled to pay the consignor the amount it should have collected, the carrier has a right of action

15. Ill.—American Express Co. v. Greenhalgh, 80 Ill. 68.

16. N.C.—Anthony v. American Express Co, 124 S.E. 753, 188 N.C 407, 36 A.L.R 460.

17. Ark.—Railway Express Agency v. McAdams, 85 S.W.2d 730, 191 Ark. 118.

18. Mich.—American Ry. Express Co. v. Ready, 206 N.W. 344, 232 Mich. 624.

N.C.—Anthony v. American Express Co, 124 S.E. 753, 188 N.C. 407, 36 A.L.R. 460.

19. Ala.—American Ry. Express Co v Henderson, 107 So. 746, 214 Ala. 268.

Ark.—Railway Express Agency v. McAdams, 85 S.W.2d 730, 191 Ark. 118.

Whether carrier conspired with consignee to have payment immediately garnisheed was held for jury, in action by shipper—American Ry Express Co. v Henderson, 107 So 746, 214 Ala. 268.

20. Ala.—American Ry. Express Co. v. Henderson, supra.

Misleading instruction

In action against express company by interstate C O. D shipper, instruction that court at destination had authority to pass on garnishment proceedings by which payment was garnisheed was held misleading. —American Ry. Express Co v. Henderson, 107 So. 746, 214 Ala. 268.

21. N.C.—Anthony v. American Express Co, 124 S.E. 753, 188 N.C. 407, 36 A.L.R 460.

22. N.Y.—Joseph Mogul, Inc., v. C. Lewis Lavine, Inc, 159 N.E. 708, 247 N.Y. 20, 57 A.L.R. 934, reversing 221 N.Y.S. 391, 220 App.Div. 287.

23. Mo.—Rolla Produce Co. v. American Railway Express Co., 226 S.W. 582, 205 Mo.App. 646.

24. N.Y.—Joseph Mogul, Inc. v C. Lewis Lavine, Inc, 159 N.E 708, 247 N.Y. 20, 57 A.L.R 934, reversing 221 N.Y.S. 391, 220 App.Div 287.

25. Ark.—Railway Express Agency v. McAdams, 85 S.W.2d 730, 191 Ark 118.

26. N.Y.—Joseph Mogul, Inc., v. C. Lewis Lavine, Inc., 159 N.E 708, 247 N.Y. 20, reversing 221 N.Y.S. 391, 220 App.Div. 287.

against the consignee for the money so paid.[27] Where a carrier sues as assignee of the consignor, to recover payment for goods shipped to defendant c. o. d. where plaintiff shows that delivery was made, payment will be presumed, and the burden is on plaintiff to rebut the same.[28] In an action by a carrier against the consignee for c. o. d. charges, the general rules as to questions of law and fact are applicable.[29]

Fraud of consignee. Where goods sent c. o. d. are fraudulently obtained from the express company by the consignee without payment therefor, he acquires no title thereto and the express company is entitled to a recovery of the goods.[30]

O. SEIZURE OF GOODS UNDER LEGAL PROCESS AS EXCUSE FOR NONDELIVERY

§ 187. In General

Where goods are taken from a common carrier under legal process, fair on its face, the carrier is excused from further liability.

While there is some authority to the contrary,[31] it is the general rule, so stated in Corpus Juris which has been cited as authority therefor,[32] that, where the goods are taken from the possession of a carrier, thereof by due legal process, such as attachment, replevin, or search warrant, against the owner, the carrier, subject to certain limitations hereafter enumerated in this section, is excused from further liability, if it acts in good faith and without negligence in surrendering the goods, and such surrender on the part of the carrier does not amount to conversion.[33] The remedy of the consignee or consignor, as the case may be, if he can show title in himself, is not against the carrier but against the officer who has wrongfully seized the goods, or against the party instituting the proceedings under which the seizure was made, if he directed the seizure.[34] In order for the carrier to be protected, however, it is necessary that the seizure be made without its own procurement, fraud, or connivance.[35] It is also necessary, if the carrier is to be protected, that the process, if the seizure be made under process, shall be fair on its face.[36] While it has been held to be the duty of the carrier

27. Ala.—George v. American Ry. Express Co., 101 So. 507, 20 Ala. App. 266.

Corpus Juris is cited in reference to this rule, in George v. American Ry. Express Co., 101 So. 507, 508, 20 Ala App. 266.

Complaint held to state a cause of action

Ala.—George v. American Ry. Express Co., 101 So. 507, 20 Ala App. 266.

28. Mich.—American Ry. Express Co. v. Ready, 206 N.W. 344, 232 Mich. 624.

29. Ala.—George v. American Ry. Express Co., 101 So. 507, 20 Ala. App. 266.

Pa.—Railway & Express Co. v. DeRoy, 167 A. 444.

Directed verdict was held properly refused where the evidence was in conflict.—George v. American Ry. Express Co., 101 So. 507, 20 Ala.App. 266.

Evidence was held insufficient to submit to the jury on the question as to the consignee's knowledge that a package delivered as an "open package" was in fact a C. O. D. shipment—Railway & Express Co. v. DeRoy, Pa., 167 A. 444.

30. Ill.—American Merchants' Union Express Co. v. Willsie, 79 Ill. 92.

31. **In West Virginia** it has been held that it is no defense to a claim of the consignee that the goods have been attached or seized by virtue of any judicial process. The contract of the carrier is that it will deliver the goods, in good order and condition, to the shipper or to his assigns. It thus guarantees to protect the possession of the shipper and his assigns. It has the right of possession of the goods as against the sheriff and can interpose in the replevin suit, and have an immediate trial of the right of the sheriff to take them from its possession—Neill v. Rogers Bros. Produce Co., 23 S.E. 702, 41 W.Va. 37.

32. Mo.—Brandom v. Power, App., 41 S.W.2d 879.

Tex.—St. Louis, B. & M. Ry. Co. v. Bath, Civ.App., 292 S.W. 552.

Wis.—Morgan v. Chicago & N. W. Ry. Co., 166 N.W. 777, 167 Wis. 48.

33. U.S.—Atchison, T. & S. F. Ry. Co. v. International Land & Investment Co., Neb., 247 F. 265, 159 C.C.A. 359.

Minn.—Burkee v. Great Northern Ry. Co., 158 N.W. 41, 133 Minn. 200.

Mo.—Puritan Pharmaceutical Co. v. Pennsylvania R. Co., App., 77 S.W. 2d 508—Chicago, B. & Q. R. Co. v. Fowler, 27 S.W.2d 72, 224 Mo.App. 736.

Tex.—Early-Foster Co. v. Latham & Co., Civ.App., 253 S.W. 663.

10 C.J. p 280 note 57.

At common law, when property received by a common carrier under contract of shipment is taken from its possession by a sheriff or other officer acting under judicial process, the carrier's liability ceases—Gulf, C. & S. F. Ry. Co. v. McKie, Tex.Civ. App., 191 S.W. 576.

Carrier as warehouseman

If goods, while in carrier's custody as warehouseman, are seized under process of law, carrier is relieved from liability to consignor on proof of prompt notification to shipper of such seizure—Moor v. Southern Pac. Co., 132 S.E. 920, 35 Ga.App. 288.

Good defense

That property was taken from carrier under fair legal process, notice of action being given to the shipper, is a defense to an action for failure to carry or deliver the property shipped—Pecos Valley Trading Co. v. Atchison, T. & S. F. Ry. Co., 174 P. 736, 24 N.M. 480.

34. U.S.—Stiles v. Davis, Ill., 1 Black 101, 17 L.Ed. 33

35. Mo.—Puritan Pharmaceutical Co. v. Pennsylvania R. Co., App., 77 S.W.2d 508—Brandom v. Power, App., 41 S.W.2d 879.

10 C.J. p 281 note 59

36. Mo.—Puritan Pharmaceutical Co. v. Pennsylvania R. Co., App., 77 S.W.2d 508.

N.M.—Pecos Valley Trading Co. v. Atchison, T. & S. F. Ry. Co., 174 P. 736, 24 N.M. 480.

10 C.J. p 281 note 60.

Order of bankruptcy court requiring carrier to deliver lumber to assignee's receiver in bankruptcy is a legal process fair on its face and sufficient to justify such delivery and relieve carrier from liability to shipper, who had attempted to stop the lumber in transit. Nevertheless the railroad company delivering lum-

to exercise due diligence to ascertain whether the process is in fact legal,[37] it has also been held that, if the process is fair on its face, the carrier need not go behind it to ascertain whether or not it is in fact valid.[38] If the process is void on its face, it affords no protection.[39]

If the goods are not actually taken from the carrier, legal process will furnish no excuse for failure to transport or to deliver.[40] Furthermore, a carrier will be liable for failure to deliver, in case the goods were not subject to seizure, as, for instance, where the goods were seized under process against one not the owner,[41] or where the goods cannot be lawfully attached on mesne process.[42]

Where the bill of lading exempts the carrier from liability for loss of goods taken from it by authority of law, the carrier is not liable if the goods are taken from it by legal process against the owner.[43]

Protection of carrier from loss under garnishment see the C.J.S. title Garnishment § 61, also 10 C.J. p 283 notes 86-92, 28 C.J. p 85 notes 5-8.

Notice to owner. Where a carrier having goods in its hands for carriage surrenders them under legal process, it should, to relieve itself from liability, at once notify the owner of the fact, in order that the latter may seasonably assert and fully protect all his interests.[44] On the failure of the carrier to give such notice, it either becomes absolutely liable or assumes the burden of proving the regularity of all proceedings on which the goods were taken, unless it can show that the owner had actual knowledge from other sources in due time to assert his rights, or unless, under the circumstances of the particular case, no notice could possibly have given the consignors an opportunity to protect themselves.[45] If the carrier has failed to give timely notice to the owner, it is not protected by the fact that the writ is regular on its face, if it is void in law.[46] If, however, the notice is promptly and properly given, an action for conversion will not lie, for the carrier has a right to presume that the party notified will attend to his property and protect it in the suit;[47] and no duty rests on the carrier to defend the suit or to exert itself to save the goods, where seasonable notice has been given the owner.[48]

Statute limiting seizure or levy. A statute providing that, if goods are delivered to a carrier by

ber which shipper had stopped in transit to consignee's receiver in bankruptcy is not liable to shipper, even though order of bankruptcy court for such delivery should not be considered legal process fair on its face, the delivery being damnum absque injuria, so far as plaintiff is concerned.—Morgan v. Chicago & N. W. Ry. Co., 166 N.W. 777, 167 Wis 48.

Property in possession of carrier at destination is under control of consignee, so that replevin process against consignee is valid on its face, protecting carrier.—Burkee v. Great Northern Ry. Co., 158 N.W. 41, 133 Minn 200.

37. Ga.—Georgia Southern, etc., R. Co. v. Knight, 75 S.E. 823, 11 Ga. App. 489

38. Mo.—Puritan Pharmaceutical Co. v. Pennsylvania R. Co, App., 77 S.W.2d 508.

39. Pa.—Automatic Merchandising Co. v. Delaware, etc., Co., 46 Pa. Super. 648
10 C.J. p 281 note 62.

40. Ga.—Western, etc., R. Co. v. Ohio Valley Banking, etc., Co., 33 S.E. 821, 107 Ga. 512.
10 C.J. p 282 note 73.

41. Wis.—Wells v. American Express Co, 11 N.W. 537, 12 N.W. 441, 55 Wis. 23, 42 Am.R. 695
10 C.J. p 282 note 74

42. Mass.—Kiff v. Old Colony, etc., R. Co., 117 Mass. 591, 19 Am.R. 429.

43. N.Y.—Peugeot Auto Import Co v. New York Cent. R. Co., 173 N.Y.S. 455.

44. U.S.—Atchison, T. & S. F. Ry. Co. v. International Land & Investment Co, Neb., 247 F. 265, 159 C.C.A. 359.
Minn.—Burkee v. Great Northern Ry. Co, 158 N.W. 41, 133 Minn. 200.
Mo.—Puritan Pharmaceutical Co. v. Pennsylvania R. Co, App, 77 S.W. 2d 508—Brandom v. Power, App, 41 S.W.2d 879.
N.M.—Pecos Valley Trading Co. v. Atchison, T. & S. F. Ry. Co, 174 P. 736, 24 N.M. 480.
Wis.—Morgan v. Chicago & N. W. Ry Co., 166 N.W. 777, 167 Wis. 48.
10 C.J. p 281 notes 63-65.

In absence of notice to, or knowledge of, shipper that goods were seized under process of law, mere seizure under valid process is insufficient to relieve carrier from liability for delivery to other than consignee.—Moor v. Southern Pac. Co., 132 S.E. 920, 35 Ga.App. 288.

Notice of ownership
Presenting bill of lading and claiming shortage is notice of plaintiff's ownership, requiring carrier to notify him of seizure under legal process. —St. Louis, B. & M. Ry. Co. v. Bath, Tex. Civ. App., 292 S.W. 552.

Where owner fails in his defense and the property seized is held or sold under judicial process, the carrier cannot thereafter be held responsible for yielding to what must be considered as vis major.—Morgan v. Chicago & N. W. Ry. Co, 166 N.W. 777, 167 Wis 48.

45. Mo.—Brandom v. Power, App, 41 S.W.2d 879.
Tex.—St. Louis, B. & M. Ry. Co. v. Bath, Civ. App, 292 S.W. 552
10 C.J. p 281 notes 66-68.

46. N.D.—Taugher v. Northern Pac. R. Co., 129 N.W. 747, 21 N.D. 111.

47. Ga.—Savannah, etc., R. Co. v. Wilcox, 48 Ga. 432
Minn.—Merz v. Chicago, etc., R. Co, 90 N.W. 7, 86 Minn. 33.
10 C.J. p 282 notes 70, 71.

Shipper's failure at own risk
Where shipper had due notice of proceedings in which property is taken from the carrier by attachment, if he fails to protect his interest, it is immaterial, in action against carrier, whether or not the attachment proceedings were erroneous as a matter of law.—Pecos Valley Trading Co. v. Atchison, T. & S. F. Ry. Co, 174 P. 736, 24 N.M. 480.

48. Mo.—Brandom v. Power, App, 41 S.W.2d 879—Chicago, B. & Q. R. Co. v. Fowler, 27 S.W.2d 72, 224 Mo.App. 736
N.M.—Pecos Valley Trading Co. v. Atchison, T. & S. F. R. Co, 174 P. 736, 24 N.M. 480.
Wis.—Morgan v. Chicago & N. W. Ry. Co, 166 N.W. 777, 167 Wis. 48.
10 C.J. p 282 note 72.

the owner, or by a person whose act in conveying title to them to a purchaser for value in good faith would bind the owner, and an order bill is issued for them, they cannot thereafter, while in the possession of the carrier, be attached by garnishment or otherwise be levied on under an execution, unless the bill first be surrendered to the carrier or its negotiation enjoined, requires, to exempt the carrier from liability, that the bill of lading shall have been delivered to the carrier by the owner or by a person who could convey title so as to bind the owner.[49] Such a provision does not prohibit the true owner of goods which a bailee has wrongfully shipped under an order bill from replevying the goods.[50] It does not apply to an injunction order or other process interfering with the rights of the holder of the bill; thus, while a carrier, restrained from removing, transporting, or disposing of a shipment of goods, must notify the shipper, it is not obliged to question the validity of the injunction and seek its dissolution, and it may obey the order without liability.[51]

Seizure in foreign country. The seizure and detention of goods in a foreign port by properly constituted legal officials under the existing laws is a legal excuse for the failure of the connecting carrier, from whom they were seized, to deliver them to the consignee.[52]

§ 188. Seizure under Police Regulations

A common carrier is not liable for goods seized under the police powers of the state. A seizure without process will not relieve the carrier of liability unless the seizure was made by authority of law.

According to the weight of authority, a common carrier is not liable if goods in its hands for carriage are or become, without its fault obnoxious under a statute or regulation promulgated under the police power of the state, and are seized or destroyed by public authority;[53] and, if the officer has authority to seize the goods, the carrier is protected, although the officer thereafter wrongfully destroys the goods, the act of the officer destroying the goods being his own act with which the carrier has nothing to do.[54] The fact that the statute under which the goods are seized is unconstitutional will not render the carrier liable, if, at the time of the seizure, the statute had not been judicially declared unconstitutional.[55] While the carrier may appear in court and contest for the rightfulness of its possession, it is not bound to do so, but may notify the owner of the property and call on him to carry on the litigation.[56] As in the case of goods seized under attachment or execution, in order to protect the carrier, it is necessary that the seizure be made without the procurement or contrivance of the carrier,[57] that the proceeding or process under which it was made appear to be valid,[58] and that the carrier give prompt notice to the owner.[59] It has

49. N.Y.—Salant v. Pennsylvania R. Co., 177 N.Y.S. 475, 188 App.Div. 851

No showing of surrender of bill by proper person

Where goods were rejected by buyer, statement of carrier's agent at place from which goods were shipped that he had bill of lading, and his direction to return goods, did not show or imply that the bill of lading was delivered to him by any person having authority to relieve carrier from failure to deliver goods to shipper, or account for their value—Meyers Lumber Co. v. Wayne Machinery Co., 206 N.Y.S. 1, 123 Misc. 517.

50. N.Y.—Salant v. Pennsylvania R. Co., 177 N.Y.S. 475, 188 App.Div. 851.

Owner of shirt materials

Under Bill of Lading Act Aug. 29, 1916 § 23, U.S.Comp.St. § 8604f, and Pers.Prop.L. § 210, the owner of shirt materials, who had delivered them to a bailee for manufacture under a contract providing for return and for payment on the week following delivery after completion, may replevy such materials from carrier, although the bailee shipped them on an order bill of lading, which was attached to draft, and the bill was not surrendered to the carrier nor impounded by a court, for the bailee could not pass title to a purchaser in good faith, and his sending the goods on an order bill of lading came perilously near to being larceny—Salant v. Pennsylvania R. Co., 177 N.Y.S. 475, 188 App.Div. 851

51. Mo.—Chicago, B. & Q. R. Co. v. Fowler, 27 S.W.2d 72, 224 Mo.App. 736.

Question for judicial determination

Whether injunction restraining railroad from removing, transporting, or disposing of hay shipment was regular was question to be determined by judicial authorities and not by party enjoined.—Chicago, B. & Q. R. Co. v. Fowler, 27 S.W.2d 72, 224 Mo.App. 736

Railroad is justified in refusing to deliver hay shipment, while enjoined, without contesting validity of injunction, merely because consignor or holder of bill of lading demanded possession—Chicago, B. & Q. R. Co. v. Fowler, 27 S.W.2d 72, 224 Mo.App. 736.

52. Ga.—Central of Georgia Ry. Co. v. Evans, 157 S.E. 313, 172 Ga. 53, answers to certified questions conformed to 159 S.E. 877, 43 Ga.App. 683

53. Fla.—Hammers v. Southern Express Co., 85 So. 246, 80 Fla. 51. 10 C.J. p. 282 note 77.

54. Mo.—Danciger v. Atchison, etc., R. Co., App., 179 S.W. 800.

55. Ga.—Southern Express Co. v. Sottile, 67 S.E. 414, 134 Ga. 40, 28 L.R.A.,N.S., 139.
Mo.—McAlister v. Chicago, etc., R. Co., 74 Mo. 351.

56. U.S.—American Express Co. v. Mullins, Ky., 29 S.Ct. 381, 212 U.S. 311, 53 L.Ed. 525, 15 Ann.Cas. 536.

57. Ohio—Baltimore, etc., R. Co. v. O'Donnell, 32 N.E. 476, 49 Ohio St. 489, 34 Am.S.R. 579, 21 L.R.A. 117.

58. Me.—Bennett v. American Express Co., 22 A. 159, 83 Me. 236, 23 Am.S.R. 774, 13 L.R.A. 33
10 C.J. p. 283 note 83.

59. Ohio—Baltimore, etc., R. Co. v. O'Donnell, 32 N.E. 476, 49 Ohio St. 489, 34 Am.S.R. 579, 21 L.R.A. 117.
10 C.J. p. 283 note 84.

been held, however, that, where the goods so seized are properly considered to be the property of the state, rather than as owned by the shipper or consignee, the carrier is accountable only to the state and is not obliged to give notice to the shipper or consignee of their seizure by a state officer.[60]

Seizure without process. To excuse a carrier from liability for the seizure of a shipment by officers acting without process, it must appear that the officers so acting were authorized by law to make the seizure.[61] Where public officers make an apparently lawful seizure of goods as an incident to the arrest of the consignor, the carrier is exempt from liability for the value of such goods where it is not negligent or at fault in yielding to such seizure.[62]

It has been held that, under the general principle that a common carrier is liable for all losses which occur while the goods are in his possession, not caused by act of God or by the public enemy, a carrier is liable for the value of liquor seized from it by the military by force and without legal process or justification.[63]

§ 189. Rights of Officer Levying on Goods

An officer paying the carrier's charges is subrogated to the carrier's lien.

If the officer seizing the goods under legal process pays the carrier's charges so that he may take the goods, on doing so he is subrogated to the carrier's lien.[64]

P. LIABILITY AND ACTIONS FOR DELAY

§ 190. General Rules of Liability

The federal law governs the question of a carrier's liability for delay in a case involving an interstate shipment.

The existence and nature of a liability on the part of a carrier because of a delay in the transportation depends primarily on whether there was, infra § 193, or was not, infra § 191, a special contract of carriage, and whether or not the delay was excusable, infra §§ 197–207. The existence and extent of the liability on the part of initial, intermediate, or terminal connecting carriers for delay is considered infra §§ 416, 425. Questions as to the limitation of a carrier's liability for delay is considered supra §§ 88–117. The liability of a lessor railroad for the negligence of its lessee causing a delay in the shipment of goods or live stock is treated in the C.J.S. title Railroads § 355, also 51 C.J. p 1093 notes 68, 69. The duty of a carrier to receive and transport property is considered supra §§ 27–34.

What law governs. The liability of a carrier, which accepts an interstate shipment, for damages under the common law for negligence in failing to deliver it promptly is to be determined under the federal laws.[65]

§ 191. In Absence of Special Contract Generally

a. In general
b. In time for particular market

a. In General

A carrier is not an insurer against delay, and ordinarily is bound to use only reasonable diligence to transport and deliver shipments.

As stated in Corpus Juris, frequently quoted and cited with approval,[66] in the absence of a special

60. Minn.—Thomas v. Northern Pac Express Co., 75 N.W. 1120, 73 Minn. 185.

61. Mo.—Puritan Pharmaceutical Co. v. Pennsylvania R. Co., App., 77 S.W.2d 508.

Seizure in warehouse without warrant unauthorized

Railroad was liable for loss of toilet preparations containing alcohol which were seized by federal prohibition officers in railroad warehouses without warrant or arrest, since National Prohibition Act authorizing seizure without warrant of liquor being transported in wagon, automobile, or other vehicle was inapplicable to railroad transportation under "ejusdem generis" rule, and shipment was not being transported in any vehicle when seized.—Puritan Pharmaceutical Co. v. Pennsylvania R. Co., Mo.App., 77 S.W.2d 508.

62. Fla.—Hammers v. Southern Express Co., 85 So. 246, 80 Fla. 51.

Where narcotics were delivered for interstate shipment, and the consignor attempted to sell and deliver them to a person there present in violation of U.S.Comp.St. §§ 6287h, 6287o, an apparently lawful seizure thereof by federal officers as incident to consignor's arrest exempted the carrier from liability for their value, where the seizure amounted to a vis major, and the carrier was not at fault.—Hammers v. Southern Express Co., 85 So. 246, 80 Fla. 51.

63. N.M.—Seligman v. Armijo, 1 N.M. 459.

64. Conn.—Thompson v. Rose, 16 Conn. 71, 41 Am.D. 121.
Kan.—Rucker v. Donovan, 13 Kan. 251, 19 Am.R. 84.

65. S.C.—Pastime Amusement Co. v. Southeastern Express Co., 186 S.E. 283, 181 S.C. 203, certiorari granted Southeastern Express Co. v. Pastime Amusement Co., 56 S.Ct. 954, 298 U.S. 653, 80 L.Ed. 1380, reversed on other grounds 57 S.Ct. 73, 299 U.S. 28, 81 L.Ed. 20.

66. Colo.—Union Pac. R. Co. v. Spano, 59 P.2d 75.
Conn.—New England Fruit & Produce Co. v. Hines, 116 A. 243, 97 Conn. 225
Idaho.—Ritchie v. Oregon Short Line R. Co., 244 P. 580, 42 Idaho 193, 45 A.L.R. 909.
Ky.—Leo Lococo's Sons v. Louisville & N. R. Co., 82 S.W.2d 332, 259 Ky. 299—Maloney v. Cleveland, C., C. & St. L. Ry. Co., 268 S.W. 1103, 207 Ky. 362—Hines v. Harris, 258 S.W. 930, 202 Ky. 75—Louisville & N. R. Co. v. Crain, 224 S.W. 1063, 189 Ky. 431—Adams Express Co. v. Burr Oak Jersey Farm, 206 S.W. 173, 182 Ky. 116.

contract a carrier is not an insurer against delay in the transportation of goods, and the principle on which the carrier's extraordinary liability, supra § 71, is founded does not extend to the time occupied in transporting the goods.[67] As to the time of delivery, the carrier's liability stands on the same ground as that of ordinary bailee for hire, being dependent on negligence.[68] The rule is, therefore, one of general application that, in the absence of special contract binding the carrier to deliver within a specified time, mere delay in transportation does not create any liability to respond in damages.[69] As to the diligence and care required in completing the express or implied contract for transportation only, the rule is that the carrier is bound to use reasonable diligence and care, and that only negligence will render it liable, unless a stipulated time is fixed in the contract.[70]

Me—Warren v. Portland Terminal Co., 116 A. 411, 121 Me. 157, 26 A.L.R. 304.
Minn—National Elevator Co. v. Great Northern Ry. Co., 170 N.W. 515, 141 Minn. 407.
Mo.—Frawley v. Atchison, T. & S. F. R. Co., 299 S.W. 93, 220 Mo.App. 1189.
Pa—Catanzaro & Sons v. Southern Pac. Co., 90 Pa.Super. 578.
Tex.—Fort Worth & D. C. Ry. Co. v. Dillehay, Civ.App., 297 S.W. 487.
Va—New York, P. & N. R. Co. v. Chandler, 106 S.E. 684, 129 Va. 695.

67. Conn.—Belkin v. New York, N. H. & H. R. Co., 146 A. 846, 109 Conn. 846.
Del.—Hardesty v. American Ry. Express Co., 119 A. 681, 2 W.W.Harr. 66.
Iowa.—Wallace-Farmer v. Davis, 199 N.W. 307.
Ky.—Chesapeake & O. R. Co. v. Coleman Fruit Co., 294 S.W. 463, 219 Ky. 794.
Minn.—Janesville Live Stock & Shipping Co. v. Hines, 178 N.W. 739, 146 Minn. 260.
Neb.—Burtis v. Chicago, B. & Q. R. Co., 247 N.W. 42, 124 Neb. 534.
Vt.—Saliba v. New York Cent. R. Co., 144 A. 194, 101 Vt. 427.
Va—Chesapeake & O. Ry. Co. v. W. C. Crenshaw & Co., 137 S.E. 515, 147 Va. 290—New York, P. & N. R. Co. v. Chandler, 106 S.E. 684, 129 Va. 695.
10 C.J. p 283 note 95, p 284 note 96.

Not applicable to prompt transport

The liability of a carrier as an insurer is applicable only to a failure to deliver the shipment intact and uninjured as it was when received, and is not applicable to prompt transportation, and as applied to animate freight relates only to a physical injury or destruction or loss of any of them, but even this rule does not apply when the shipper accompanies the shipments.—Hines v. Harris, 258 S.W. 930, 202 Ky. 75.

Not same diligence as in handling

A carrier is bound to exercise only reasonable diligence in promptly transporting freight to place of delivery, and is not bound to exercise the same degree of care which it must exercise in the safe handling of freight, either animate or inanimate.—Louisville & N. R. Co. v. Crain, 224 S.W. 1063, 189 Ky. 431.

68. Idaho.—Ritchie v. Oregon Short Line R. Co., 244 P. 580, 42 Idaho 193, 45 A.L.R. 909.
Iowa—Wallace-Farmer v. Davis, 199 N.W. 307.
Ky—Adams Express Co. v. Burr Oak Jersey Farm, 206 S.W. 173, 182 Ky. 116.
Vt.—Saliba v. New York Cent. R. Co., 144 A. 194, 101 Vt. 427.
Wis.—Stephens v. Chicago & N. W. Ry. Co., 227 N.W. 875, 200 Wis. 181.
10 C.J. p 284 note 97.

Only negligence will render carrier liable for unusual delay and its consequences unless there is valid contract for delivery within specified time—Leo Lococo's Sons v. Louisville & N. R. Co., 82 S.W.2d 332, 259 Ky. 299.

69. Ky.—Leo Lococo's Sons v. Louisville & N. R. Co., supra—Adams Express Co. v. Burr Oak Jersey Farm, 206 S.W. 173, 182 Ky. 116
Pa—Catanzaro & Sons v. Southern Pac. Co., 90 Pa.Super. 578, 582.
10 C.J. p 284 note 98.

Corpus Juris is quoted with approval

Pa—Catanzaro & Sons v. Southern Pac. Co., supra.
Tex—Fort Worth & D. C. Ry. Co. v. Dillehay, Civ.App., 297 S.W. 487.

70. Del.—Hardesty v. American Ry. Express Co., 119 A. 681, 2 W.W. Harr. 66.
Ga—Bugg v. Perry & Faircloth, 156 S.E. 708, 42 Ga.App. 523.
Idaho—Ritchie v. Oregon Short Line R. Co., 244 P. 580, 42 Idaho 193, 45 A.L.R. 909—Gray v. Oregon Short Line R. Co., 187 P. 540, 32 Idaho 701.
Ill—See Pennington v. Grand Trunk Western Ry. Co., 207 Ill.App. 145.
Iowa—Wallace-Farmer v. Davis, 199 N.W. 307.
Ky.—Leo Lococo's Sons v. Louisville & N. R. Co., 82 S.W.2d 332, 259 Ky. 299—Chesapeake & O. R. Co. v. Coleman Fruit Co., 294 S.W. 463, 219 Ky. 794—Cincinnati, N. O. & T. P. Ry. Co. v. Gano & Burgess, 284 S.W. 423, 215 Ky. 49—Maloney v. Cleveland, C., C. & St. L. Ry. Co., 268 S.W. 1103, 207 Ky. 262—Hines v. Harris, 258 S.W. 930, 202 Ky. 75—Louisville & N. R. Co. v. Crain, 224 S.W. 1063, 189 Ky. 431—Adams Express Co. v. Burr Oak Jersey Farm, 206 S.W. 173, 182 Ky. 116
Me—Warren v. Portland Terminal Co., 116 A. 411, 121 Me. 157, 26 A.L.R. 304—Stockman v. Boston & M. R. R. Co., 102 A. 560, 117 Me. 35—Smith & Hoyt v. Bangor & A. R. Co., 98 A. 737, 115 Me. 223
Md.—Bloecher & Schaff v. Pennsylvania R. Co., 160 A. 281, 162 Md. 463.
Mass.—Clapp v. American Express Co., 125 N.E. 162, 234 Mass. 174
Mich.—A. F. Young & Co. v. Grand Rapids & I. R. Co., 167 N.W. 11, 201 Mich. 39
Minn.—National Elevator Co. v. Great Northern Ry. Co., 170 N.W. 515, 141 Minn. 407.
Mo.—Security Stove & Mfg. Co. v. American Ry. Express Co., 51 S.W.2d 572, 227 Mo.App. 175—Vaughn v. St. Louis-San Francisco Ry., 15 S.W.2d 901, 223 Mo.App. 732—Mount Arbor Nursery v. New York, C. & St. L. Co., 273 S.W. 410, 217 Mo.App. 31—Howell v. Hines, App., 236 S.W. 886—Bland v. Chicago & A. R. Co., App., 232 S.W. 232—Miller v. Quincy, O. & K. C. R. Co., 225 S.W. 116, 205 Mo.App. 463.
N.Y.—Aristo Hosiery Co. v. Atlantic Coast Line R. Co., 218 N.Y.S. 287, 128 Misc. 238
Pa—McGowan v. Pennsylvania R. Co., 9 Pa.Dist. & Co.R. 575
S.C.—Allen v. Davis, 118 S.E. 614, 125 S.C. 256.
S.D.—Elliott v. Chicago, M. & St. P. Ry. Co., 161 N.W. 347, 38 S.D. 371.
Tex.—Davis v. McMillan, Civ.App., 241 S.W. 723.
Vt.—Saliba v. New York Cent. R. Co., 144 A. 194, 101 Vt. 427.
Va—Chesapeake & O. Ry. Co. v. Crenshaw & Co., 137 S.E. 515, 147 Va. 290—Eastern Shore of Virginia Produce Exch. v. New York, P. & N. R. Co., 126 S.E. 674, 141 Va. 611.
Wash.—John Vittucci Co. v. Canadian Pac. R. Co., 174 P. 981, 102 Wash. 686.
10 C.J. p 284 notes 99–2.

Corpus Juris was cited with approval in Nashville, C. & St. L. Ry. v. Davis, Tenn.App., 114 S.W.2d 830.

Absence of negligence is excuse

In cases where delay is the ground of a cause of action against a live

Nevertheless, if damage results from failure without good excuse, to deliver the goods at their destination within a reasonable time, the carrier is liable for such damage.[71] When a common carrier undertakes to convey goods, the law implies a contract that they shall be delivered at destination within a reasonable time, in the absence of any special agreement as to the time of delivery.[72] This duty, it is said, is as obligatory as the duty to deliver safely;[73] and the principle applies, although there is a written contract for the shipment which contains no stipulation as to the time within which the goods are to be delivered. The law will nevertheless imply an undertaking to carry within a reasonable time.[74] If a delay in transportation shall occur from whatever cause, the carrier must take care, by such steps as lie within its power, to protect the goods shipped, to the end that the same shall be fully insured against increased danger or injury on account thereof, and the requirement for commensurate care is equivalent to the highest degree of care possible to the situation and necessary to safety.[75]

Live stock and perishables. The general rule that, in the absence of special contract, a carrier is bound to transport and deliver goods with reasonable diligence, care, and dispatch and is liable only for negligent or unexplained unreasonable delay applies to shipments of live stock[76] and other perish-

stock carrier the absence of negligence excuses the carrier.—Crowdis v. Quincy, O & K. C. R. Co., Mo App, 255 S W. 347.

Delay must be unreasonable

Carrier held not liable for damages from delay in interstate fruit shipment, in absence of evidence of unreasonable delay.—Catanzaro & Sons v. Southern Pac. Co., 90 Pa.Super. 578.

Forwarding, delivering, and transporting goods

Railroad need use only reasonable care, diligence, and exertion in forwarding, transporting and delivering goods.—Free Bros. Co. v. Baltimore & O. R. Co, 146 A. 98, 296 Pa. 441.

Ordinary time and manner not criterion

In action for damages from delays to shipment of show cattle, special issue, making test of liability of railroad its failure to carry cattle in "usual and ordinary time and manner," was erroneous, as test of liability for damages, for delay is failure to transport with reasonable diligence and dispatch.—Davis v. Hill, Tex.Civ.App, 271 S.W. 281.

Distributive points

Carrier may make reasonable provision for distribution of freight from distributive points without being guilty of unreasonable delay.—Chesapeake & O R. Co. v. Coleman Fruit Co, 294 S W. 463, 219 Ky. 794

71. U S.—American Ry. Express Co v. Ewing Thomas Converting Co., C.C.A Pa, 292 F. 335.
Idaho.—Gray v Oregon Short Line R Co, 187 P. 540, 32 Idaho 701
Ky—Adams Express Co. v. Burr Oak Jersey Farm, 206 S W. 173, 182 Ky 116.
S.C—Pastime Amusement Co. v. Southeastern Express Co, 186 S E 283, 181 S C. 203, certiorari granted Southeastern Express Co v. Pastime Amusement Co., 56 S.Ct 954, 298 U.S. 653, 80 L.Ed. 1380, reversed on other grounds 57 S Ct. 73, 299 U S. 28, 81 L Ed 20.
Tenn.—Nashville, C & St. L. Ry v. Davis, App, 114 S W.2d 830.
Tex.—Texarkana & F. S. Ry. Co. v Brass, Civ App, 245 S.W. 457, affirmed, Com App, 260 S W 328
Va—New York, P & N. R. Co. v Chandler, 106 S E. 684, 129 Va. 695. 10 C J. p 284 note 3.

Damage resulting from neglect

Carrier's liability for delay is limited to that resulting from carrier's negligence—Mason v. Chicago & N W. Ry. Co, 262 Ill.App. 580.

72. Conn.—Belkin v New York, N. H. & H R Co., 146 A 846, 109 Conn 466—New England Fruit & Produce Co v. Hines, 116 A. 243, 97 Conn 225.
Ill—Mason v. Chicago & N. W. Ry. Co., 262 Ill App 580—Murphy v. Illinois Cent. R Co, 238 Ill App 553.
Iowa—Wallace-Farmer v. Davis, 199 N.W. 307
Ky—Chesapeake & O R Co. v. Coleman Fruit Co, 294 S W 463, 219 Ky. 794—Adams Express Co. v. Burr Oak Jersey Farm, 206 S.W. 173, 182 Ky 116.
Md.—Stevens v. Northern Cent. Ry. Co., 98 A. 551, 129 Md 215.
Minn—Janesville Live Stock & Shipping Co. v. Hines, 178 N W. 739, 146 Minn. 260.
Mo.—Frawley v. Atchison, T & S F. R Co, 299 S W. 93, 220 Mo.App. 1189.
Ohio—Wright v. Erie R Co., 14 Ohio St. 217.
Tex—Kansas City, M & O. Ry. Co of Texas v. Odom, Civ.App., 185 S W. 626.
Va—New York, P. & N R. Co. v. Chandler, 106 S.E. 684, 129 Va. 695
10 C.J p 285 note 5.

"All convenient dispatch"

In the absence of a special contract a carrier is bound to deliver a shipment at its destination with all convenient dispatch.—Southeastern Express Co. v Bowers, Inc., Tenn App, 109 S W 2d 851

By common law and statute

Under common law and Code Suppl. 1913 § 2116, a common carrier in absence of a contract for delivery of a shipment at a particular time must transport with all reasonable dispatch—Wallace-Farmer v. Davis, Iowa, 199 N W 307

"Insurer" against unreasonable delay

A common carrier of goods insures against unreasonable delay in delivery in the sense that the carrier is liable for an unreasonable delay—Piero v Southern Express Co, 88 S E. 269, 103 S C 467.

Interstate shipment

Carriers of goods in interstate commerce are liable for loss and damage proximately caused by failure to fulfill its common-law duty to transport goods with reasonable dispatch—Johnson v. Missouri Pac R Co, 249 S.W. 653, 211 Mo App 564

73. Ky.—Adams Express Co. v Burr Oak Jersey Farm, 206 S.W. 173, 182 Ky. 116.
Va—New York, P. & N. R Co v Chandler, 106 S E 684, 129 Va 695 10 C J p 285 note 6.

74. Ky.—Adams Express Co. v. Burr Oak Jersey Farm, 206 S W. 173, 182 Ky. 116
Va—New York, P & N R Co v Chandler, 106 S E. 684, 129 Va. 695.
10 C J. p 285 note 7.

75. Ind—Pittsburgh, C., C. & St L. Ry Co. v. Daniels & Pickering Co., 125 N.E 426, 71 Ind App 518
Ky.—Adams Express Co. v. Burr Oak Jersey Farm, 206 S.W 173, 182 Ky. 116.
10 C.J. p 285 note 8.

76. Ark—Payne v. Mallory, 230 S W 270, 148 Ark. 431—Chicago, R I. & P. Ry. Co. v Stallings, 201 S W. 294, 132 Ark. 446.
Ill.—Mason v. Chicago & N. W. R Co., 262 Ill.App. 580. See Crossley v.

able freight.[77] In the absence of special contract or special circumstances which take the case out of the general rule the carrier is not bound to use extraordinary means to forward perishable freight, or shipments of stock.[78] Thus, in the absence of a statute or a special contract obligating it to do so, a carrier of live stock or perishable goods is not obliged to run a special train to transport the shipment,[79] or to send it on the very next train after acceptance,[80] or on any particular train,[81] or even to send it on a fast train.[82]

Nevertheless it has been held that a railroad must transport live stock as expeditiously as possible.[83]

Speed statutes. It is within the power of the legislature to impose requirements as to speed in transporting shipments of live stock provided the statute enacted is a reasonable exercise of such power.[84] It has been held that a state statute requiring a common carrier to transport live stock from the initial point of shipment to destination at an average speed of not less than ten miles per hour is unconstitutional in rugged mountainous territory during certain of the autumn and winter months as constituting an unreasonable exercise of police power, such speed not being consistent with safety.[85] A statute requiring the safe and speedy transportation of property requires that the shipment be transported in a reasonable time and not merely that the carrier use reasonable care to transport within a reasonable time.[86] A statutory provision requiring common carriers to move live stock at the highest practica-

St. Louis, I. M. & S. Ry. Co., 199 Ill.App 195.

Iowa—Wallace-Farmer v. Davis, 199 N W. 307—Mackin v. Minneapolis & St. L. R Co, 157 N.W. 729, 176 Iowa 150.

Ky.—Cincinnati, N. O. & T. P Ry. Co v. Gano & Burgess, 284 S.W. 423, 215 Ky. 49—Louisville & N. R. Co. v. Crain, 224 S.W. 1063, 189 Ky. 431—Adams Express Co. v Burr Oak Jersey Farm, 206 S.W. 173 182 Ky. 116.

Me.—Stockman v. Boston & M. R R., 102 A. 560, 117 Me. 35.

Md—Bloecher & Schaff v. Pennsylvania R Co., 160 A. 281, 162 Md. 463.

Mass—Clapp v. American Express Co., 125 N E 162, 234 Mass. 174.

Minn—Janesville Live Stock & Shipping Co. v. Hines, 178 N.W. 739, 146 Minn. 260.

Mo—Vaughn v St. Louis-San Francisco Ry Co, 15 S.W 2d 901, 223 Mo App. 732.

N M—Pedrick v. Southern Pac. Co., 31 P 2d 705, 38 N M. 284.

Okl.—Chicago, R. I & P. Ry. Co v. White, 41 P.2d 847, 170 Okl 646—St. Louis & S F. Ry. Co. v. May, 236 P. 888, 110 Okl. 170.

S D.—Petro v. Davis, 195 N.W 504, 46 S D. 603.

Tex.—Panhandle & S F Ry. Co. v. Reynolds, Civ.App, 33 S W.2d 249—Panhandle & S. F. Ry. Co. v. Andrews, Civ.App, 278 S W. 478—Ft. Worth & R G Ry Co. v. Bryson & Burns, Civ App., 195 S W. 1165.

10 C J. p 285 note 4

Corpus Juris is quoted with approval in Hines v. Harris, 258 S.W. 930, 202 Ky 75.

The general duty resting on the carrier of live stock, when received and loaded according to agreement, is to transport it with all convenient dispatch, and with such suitable and sufficient means as it is required to provide in its business, that is, within a reasonable time.—Gray v. Oregon Short Line R. Co., 187 P. 540, 32 Idaho 701.

No negligent delay, no liability

Railroad delivering cattle as soon as reasonable care permitted was not liable for their loss of weight or depreciation in value or for loss from shipper's inability to sell on date of arrival—Fort Worth & D. C. Ry. Co. v. Dillehay, Tex.Civ.App., 297 S W. 487.

Reasonable effort to overcome obstacles

Carrier sued for delay and refusal to carry cattle to destination is required to make reasonable effort and exercise due diligence to overcome obstacles.—Riddle v. Chicago, B. & Q R Co, 210 N.W. 770, 203 Iowa 1232.

77. Ala—Louisville & N R. Co. v Farmers' Produce Co, 85 So 578, 17 Ala App 388.

Me—Smith & Hoyt v. Bangor & A. R Co, 98 A. 737, 115 Me. 223

Mo—Mount Arbor Nurseries v New York, C & St L R. Co, 273 S W. 410, 217 Mo.App. 31.

S C—Carter v Atlantic Coast Line R. Co, 192 S E 624, 184 S.C. 414.

78. Ky—Adams Express Co. v. Burr Oak Jersey Farm, 206 S.W. 173, 182 Ky. 116.

10 C J p 287 note 24.

79. Vt—Needham v. Boston, etc., R. Co, 74 A. 226, 82 Vt 518.

May await regular train

Carrier could hold three cars of cattle at junction point for regular freight train—Mars v. Panhandle & S. F. Ry. Co, Tex.Civ App., 25 S W. 2d 1004, error dismissed.

80. N M—Pedrick v. Southern Pac Co, 31 P.2d 705, 38 N M. 284.

81. S C.—Carter v. Atlantic Coast Line R. Co., 192 S E. 624, 184 S C. 414.

S D.—Elliott v Chicago, M. & St. P Ry. Co, 161 N.W. 347, 38 S.D 371.

Peony buds

Carrier is not required to transport car of peony buds by any particular train or otherwise than with reasonable dispatch—Johnston v. Chicago & N W Ry Co, 246 N W 336, 210 Wis. 227.

82. N M—Pedrick v Southern Pac. Co, 31 P.2d 705, 38 N M. 284.

83. La—Jennings v. Missouri Pac. R. Co, 134 So 694, 172 La 522.

Least possible hardship or delay

Railroad must carry live stock to destination as expeditiously as possible, with least possible hardship to animals and with the necessary breaks in the continuous confinement of the animals—Jennings v. Missouri Pac. R. Co., 134 So 694, 172 La. 522.

84. Colo—Freeman v. Boyer Bros., 261 P 864, 82 Colo. 509, 55 A.L.R. 1285

Not applicable to interstate shipment

Burns St Annot.1914 § 5205, requiring carload freight to be moved fifty miles per day is not controlling on question of reasonable time in interstate shipment of live stock, in view of § 5203 which provides that the act shall apply to intra-state carriers and shall not apply so as to regulate interstate commerce—Pittsburgh, C, C & St. L. R. Co v Hughes, 131 N E. 234, 76 Ind App 26.

85. Colo—Freeman v. Boyer Bros., 261 P 864, 82 Colo 509, 55 A.L.R. 1285.

86. Tex.—Texas & P. Ry. Co. v. Bufkin, Civ App, 46 S W.2d 714, error dismissed—Wichita Valley Ry. Co. v. Wallace, Civ App, 17 S.W.2d 150.

To markets or to pasture

Under Vernon's Sayles Civ.St Annot.1914 art 6687, it is the duty of a railroad company to furnish cars and transport live stock within a reasonable time to any point on its line, whether the shipment is to a general market, or to a special mar-

ble speed consistent with safety and the general movement of its traffic is to be construed in connection with the provisions following it which give a board of commissioners authority to investigate and regulate such shipments and to establish speed schedules therefor and a provision for the enforcement of its orders or rulings.[87]

Delay by agent. Where a carrier undertakes the transportation and delivery of goods at a certain point and employs a switching company as its agent to make the delivery, the switching company is its agent for whose negligent and unreasonable delay it is liable to the shipper for the loss occasioned thereby.[88]

Sunday. Even though a carrier has the right to stop running its trains on Sunday, yet if it failed to do so and undertook to forward freight it must be held to reasonable diligence in doing so.[89]

b. In Time for Particular Market

A carrier will not ordinarily be liable for failure to deliver a shipment to a particular market.

Ordinarily a carrier cannot be held liable for failure to deliver a shipment at its destination in time for a particular market in the absence of a valid special contract therefor.[90] Nevertheless, if there is an unreasonable delay caused by the carrier which deprives the shipper of the benefit of the market on a certain day necessitating a sale on a declining market, the shipper has a cause of action,[91] and, as shown infra § 221 b, the loss of the market may be considered in estimating his damages. Where a live-stock or perishable shipment is carried under a contract providing that the carrier is not bound to transport it in time for any particular market or otherwise than with reasonable dispatch, the fact that it fails to reach a particular market for which it was intended does not render the carrier liable therefor;[92] but the carrier may be liable under such provision if there was an unreasonable delay.[93]

§ 192. Effect of Statute Providing Penalty for Delay

The carrier's common-law duty to transport within a reasonable time is unaffected by statutory penalties for failure to transport within a given time.

Statutes which subject carriers to a penalty for failure to transport goods within a designated time do not in any way affect the carrier's common-law duty to transport within a reasonable time nor its consequent common-law liability for failure to perform such duty, and they have no application to an action to enforce such liability.[94]

ket, or for pasturage—Davis v. Morgan, Tex.Civ.App., 251 S.W. 310.

87. Iowa—Siegel v. Chicago, R. I. & P. Ry. Co., 208 N.W. 78, 201 Iowa 712.

No arbitrary power in carrier to fix schedule

The statute discussed in the above text relating to movement of cars of live stock takes away from the carrier the right arbitrarily to fix its own schedules for the transportation of live stock and requires railroad schedules to conform to orders of railroad commissioners—Siegel v. Chicago, R. I. & P. Ry. Co., 208 N.W. 78, 201 Iowa 712.

88. Tex.—Ft. Worth & R. G. Ry. Co. v. Hasse, Civ.App., 226 S.W. 448.

Duty may not be delegated

Carrier, having contracted to deliver a shipment of stock to certain parties at a certain point, could not, under Rev.St.1911 art 6687, delegate its duty to provide proper facilities for delivering the stock in question to a switching company and thereby escape liability for the negligence of the switching company—Ft. Worth & R. G. Ry. Co. v. Hasse, Tex.Civ.App., 226 S.W. 448.

89. Ark.—Kansas City Southern R. Co. v. Marby, 165 S.W. 279, 112 Ark. 110.

90. Mo.—Ozark Fruit Growers' Ass'n v. St. Louis-San Francisco R. Co., 46 S.W.2d 895, 226 Mo.App. 222.

91. Md.—Stevens v. Northern Cent. Ry. Co., 98 A. 551, 129 Md. 215.

Mo.—Ozark Fruit Growers' Ass'n v. St. Louis-San Francisco R. Co., 46 S.W.2d 895, 226 Mo.App. 222—Neely v. Hines, App., 237 S.W. 906.

92. S.C.—Carter v. Atlantic Coast Line R. Co., 192 S.E. 624, 184 S.C. 414.

93. Ga.—Central of Georgia Ry. Co. v. Griner & Rustin, 127 S.E. 878, 33 Ga.App. 705.

Effect of statute

Provision of bill of lading, that "no carrier is bound to transport said live stock by any particular train or in time for any particular market," did not relieve railroad from liability for unreasonable delay in transportation, in view of Civ.Code 1910 § 2773, specifying measure of damages for carrier's failure to deliver goods in a reasonable time, and of additional clause in bill of lading requiring transportation of shipment with "reasonable dispatch."—Central of Georgia Ry. Co. v. Griner & Rustin, 127 S.E. 878, 33 Ga.App. 705.

94. Mo.—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo.App. 314.

Neb.—Smith v. Chicago, St. P., M. & O. Ry. Co., 157 N.W. 622, 99 Neb. 719.

N.C.—Talley & Baugham v. Atlantic Coast Line R. Co., 152 S.E. 390, 198 N.C. 492.

S.C.—Middleton & Co. v. Atlantic Coast Line R. Co., 110 S.E. 796, 118 S.C. 351.

10 C.J. p. 286 note 9.

Penalties for delay in transportation generally see infra §§ 454–460.

Giving election of remedies

Rev.St.1913 §§ 6018, 6019, affording a shipper of live stock a statutory remedy for recovery of liquidated damages for unreasonable delay gives a remedy in addition to the common-law remedy, and do not limit liability of carriers in violation of Const. art. 11 § 4, providing that the liability of railroad corporations as carriers shall not be limited—Smith v. Chicago, St. P., M. & O. Ry. Co., 157 N.W. 622, 99 Neb. 719.

Time deductible

Statute allowing carrier deductible time before penalty attaches, namely, two days at the initial point and forty-eight hours at one intermediate point for each hundred miles, or fraction thereof, distance, does not apply to action for damages for delay.—Talley & Baugham v. Atlantic Coast Line R. Co., 152 S.E. 390, 198 N.C. 492.

§ 193. Rule as Affected by Special Contract

A carrier contracting specially to deliver within a certain time is liable for failure to perform his contract.

Where a carrier makes an express contract to carry and deliver goods within a specified time, it is bound to fulfill its obligation and the fact that it exercised diligence or that it would not be liable as a common carrier in the absence of the contract is immaterial.[95] Whether or not there has been such an undertaking on the part of the carrier is to be determined from the circumstances surrounding the case and by the application of the ordinary rules for the interpretation of contracts.[96] Where the contract provides that the shipment is not to be made within any specified time nor for any particular market, the carrier is liable only for unreasonable delay.[97] The use of the words "reasonable dispatch" in the bill of lading does not cast upon the carrier any greater burden than would have rested on it had the words been omitted.[98] In any event, although a carrier agrees to deliver goods within a specified time, it does not become an absolute insurer of the goods under obligation to deliver at all events or to pay for the property, and, if the goods are destroyed by an act of God or the public enemy before the time for delivering them has expired, this will excuse the carrier on the special contract.[99] The parties are presumed to contract with reference to the responsibility which the common law imposes on the carrier in ordinary cases, the carrier assuming the risk with respect to the time, and this is the limit of the liability assumed by the special agreement.[1]

Oral contract. Where a carrier undertakes the transportation of goods upon an oral agreement, and no bill of lading is issued, such carrier may be liable for negligence resulting in the delay and consequent damage to the goods.[2]

§ 194. What Is Reasonable Time

a. In general
b. Perishables
c. Live stock
d. Schedule time

a. In General

What constitutes a reasonable time for transportation depends largely on the nature of the shipment and other surrounding circumstances.

What is a reasonable time is not susceptible of being defined by any general rule, but the circumstances of each particular case must be adverted to in order to determine what is a reasonable time in that case;[3] this rule stated in Corpus Juris has often been quoted and cited with approval.[4] The mode of conveyance, the distance, the season of the year, the character of the weather, the ordinary facilities for transportation, and the volume of traffic are to be considered in determining whether in the particular case there has been an unreasonable delay.[5] So also in determining what is a reasonable

95. Mich.—Puffer v. American Ry. Express Co., 191 N.W. 27, 221 Mich. 426.
Wash.—John Vittucci Co. v. Canadian Pac. Ry. Co., 174 P. 981, 102 Wash. 686.
10 C.J. p 286 note 11.

Liability determined by contract
The carrier's liability for delay will be determined by the contract itself, and not by the reasonableness of the time within which delivery is made—Puffer v. American Ry. Express Co., 191 N.W. 27, 221 Mich. 426.

96. N.Y.—Frey v. New York Cent., etc., R. Co, 100 N.Y.S. 225, 114 App.Div. 747.
10 C.J. p 286 note 12.

97. Mo—Helm v. Missouri Pac. R. Co., 72 S.W. 148, 98 Mo.App. 419.

98. Mo.—Parsons v. Chicago, B. & Q. R. Co., App., 300 S.W. 324.

Means "reasonable time"
Requirement in bill of lading that carrier use "reasonable despatch" merely requires delivery of poultry shipment within reasonable time.—Parsons v. Chicago, B. & Q. R. Co., Mo.App., 300 S.W. 324.

99. Kan.—Sauter v. Atchison, etc., R. Co., 97 P. 434, 78 Kan. 331.
Wis.—Strohn v. Detroit, etc., R. Co., 23 Wis. 126, 99 Am.D. 114.

1. Wis.—Strohn v. Detroit, etc., R. Co., supra.

2. Ill.—American Fruit Growers v. San Antonio & A. P. Ry. Co., 239 Ill.App. 151.

3. Ill.—Alton v. Mineral Point & N. Ry. Co, 222 Ill.App. 105.
Ky.—Leo Lococo's Sons v. Louisville & N. R. Co., 82 S.W.2d 332, 259 Ky. 299.
Me—Smith & Hoyt v. Bangor & A. R. Co, 98 A. 737, 115 Me. 223
N.C.—Moore Bros. v. American Ry. Express Co., 107 S.E. 6, 181 N.C. 300.
S.D—Elliott v. Chicago, M & St. P. Ry. Co., 161 N.W. 347, 38 S.D. 371.
Vt.—Saliba v. New York Cent. R. Co, 144 A. 194, 101 Vt. 427.
10 C.J. p 286 notes 16, 17.

4. Ga.—American Ry. Express Co. v. Roberts, 111 S.E. 744, 28 Ga.App. 510.
Idaho.—Ritchie v. Oregon Short Line R. Co., 244 P. 580, 42 Idaho 193, 45 A.L.R. 909.
Ky.—Leo Lococo's Sons v. Louisville & N. R. Co., 82 S.W.2d 332, 259 Ky. 299—Maloney v. Cleveland, C., C. & St. L. Ry. Co, 268 S.W. 1103, 207 Ky. 262—Adams Express Co. v. Burr Oak Jersey Farm, 206 S.W. 173, 182 Ky. 116.
Me.—Warren v. Portland Terminal Co, 116 A. 411, 121 Me. 157.
Mich.—Harmon v. Michigan United Traction Co, 168 N.W. 521, 202 Mich. 298.
N.M.—Pedrick v. Southern Pac. Co, 31 P.2d 705, 38 N.M. 284.
N.D—O. J. Barnes Co. v. Northern Pac. Ry. Co., 173 N.W. 943, 42 N.D. 411
S.C.—Allen v. Davis, 118 S.E. 614.
Tenn.—Nashville, C. & St. L. Ry. v. Davis, App., 114 S.W.2d 830.

5. Ala.—Louisville & N. R. Co. v. Farmers' Produce Co., 85 So. 578, 17 Ala.App. 388.
Del—Hardesty v. American Ry. Express Co, 119 A. 681, 2 W.W.Harr. 66.
Iowa—Wallace-Farmer v. Davis, 199 N.W. 307.
Ky.—Adams Express Co. v. Burr Oak Jersey Farm, 206 S.W. 173, 182 Ky. 116.

time for transportation the character of the freight shipped is a very important consideration; it is obvious that what would be a reasonable time for the transportation of one kind of freight would not be for another kind.[6]

Delay itself does not constitute unreasonable delay; if the carrier can show that it was free from any negligence which contributed to the delay, the delay, however long, cannot be said to be unreasonable.[7] Furthermore, the mere fact that the time occupied in the transportation or delivery of the consignment is unusual is not of itself conclusive of unnecessary delay, unless it is so long as clearly to compel a conviction that it was longer than was necessary; it must be so unusual as to be more reasonably attributable to the negligence of the carrier than to any of the causes of delay to which the transportation by reason of the mode, time, route, speed of carriage, or other circumstances implying negligence is known to be exposed,[8] and this rule stated in Corpus Juris has been quoted with approval.[9] On the other hand, proof of delivery in the usual time according to the custom and the course of the company's business is held to be prima facie evidence of reasonable time.[10]

What is a reasonable time is not a time contingent upon the possible existence of unusual conditions not shown to exist.[11]

Applications of the foregoing rules have been made in cases of delays of one year,[12] seventy days,[13] thirty-four days,[14] thirty days,[15] seventeen days,[16] twelve or fifteen days,[17] eight days,[18] sixty-two hours,[19] twenty-four hours,[20] twenty-one hours,[21] and four and one-half hours.[22]

By statute in some jurisdictions definite limits are

N D.—O J. Barnes Co. v. Northern Pac R. Co., 173 N W. 943, 42 N D. 411.
Okl.—St Louis & S F. Ry. Co. v. May, 236 P. 888, 110 Okl. 170.
S.C.—Allen v. Davis, 118 S E 614.
10 C.J. p 287 note 18.

Express shipment
What is a reasonable time for delivery of an express shipment depends on the distance to be traveled, the situation of the parties, the character of the goods, and all the surrounding circumstances—Moore Bros v. American Ry. Express Co., 107 S.E. 6, 181 N C. 300.

6. Iowa—Wallace-Farmer v. Davis, 199 N.W. 307.
Ky—Leo Lococo's Sons v. Louisville & N. R Co, 82 S.W 2d 332, 259 Ky 299—Maloney v. Cleveland, C, C. & St. L Ry. Co., 268 S.W 1103, 207 Ky. 262—Adams Express Co. v. Burr Oak Jersey Farm, 206 S.W. 173, 182 Ky. 116.
N D—O J. Barnes Co. v. Northern Pac. Ry. Co., 173 N W. 943, 42 N. D. 411.
10 C.J. p 287 note 19.

7. Ill—Perkins v. Cleveland, etc, R Co, 183 Ill App. 531—Bacon v Cleveland, etc, R. Co, 155 Ill App. 40.

8. Mo.—Mount Arbor Nurseries v. New York, C & St. L. R. Co, 273 S W. 410, 217 Mo App 31.
N.H—Wood v. Boston & M R. R., 98 A. 480, 78 N H 207.
Wis.—Stephens v. Chicago & N. W. Ry. Co, 227 N.W. 875, 200 Wis. 181
10 C J. p 287 note 27.

Conditions excusing longer time
Reasonableness of time within which carrier must transport shipment is dependent on conditions and circumstances under which shipment is made, provided conditions are of nature excusing a longer time than usual time.—Texas & P Ry. Co. v Bufkin, Tex.Civ.App., 46 S.W.2d 714, error dismissed

9. Mo—Parsons v. Chicago, B. & Q R Co., 300 S W. 324.
Pa.—Catanzaro & Sons v. Southern Pac. Co, 90 Pa.Super. 578.

10. Ky—Leo Lococo's Sons v. Louisville & N R. Co, 82 S W 2d 332, 259 Ky. 299.
Pa—Carrier-McGowan v. Pennsylvania R Co., 9 Pa Dist. & Co. 575
10 C J p 287 note 28.

11. Va—Davis v. Rodgers, 124 S E. 408, 139 Va 618

12. **Conclusively an unreasonable time** for transportation of goods from a city in Massachusetts to a point in Wisconsin—Nudd v. Wells, 11 Wis 407.

13. **Unreasonable**
Ark—St Louis, etc, R Co. v. Heath, 41 Ark. 476.

14. **Unreasonable**
Under ordinary conditions, a delay of thirty-four days in the delivery of an express shipment from Brockton, Mass., to Thomasville, N C, would be unreasonable.—Moore Bros. v. American Ry Express Co., 107 S. E. 6, 181 N C. 300.

15. **Unreasonable**
Ill—Illinois Cent R. Co v. Cobb, 64 Ill. 128.
Ky.—Chesapeake, etc, R. Co v Saulsbury, 103 S W 254, 126 Ky. 179, 31 Ky.L 624, 12 L.R.A.,N.S., 431

16. **Negligent delay**
Seventeen days delay in shipment of carload of figs, when weather conditions were not unusual, held to support finding of negligence—Radovsky v New York, N H & H. R Co., 154 N E. 334, 258 Mass. 26.

17. **Unreasonable**
Ill.—Illinois Cent. R Co v. McClellan, 54 Ill 58, 5 Am R 83.
10 C J. p 288 note 32.

18. **Unreasonable**
Jury may infer without further proof that eight days is unreasonable time for transportation of goods by rail less than one hundred miles—Engemann v. Delaware, L. & W R. Co, 97 A 152, 88 N J.Law 451

19. **Unreasonable**
Tex—St. Louis, etc, R. Co. v. Gunter, 99 S W. 152, 44 Tex Civ.App. 480.

20. **Unreasonable**
U S—Ormsby v Union Pac R Co., C C.Colo, 4 F. 706, 2 McCrary, 48
Neb—Jeffries v. Chicago, etc, R. Co., 129 N W. 273, 88 Neb. 268

Not unreasonable
One day's delay, where no indication of a necessity for promptness in delivery is given by the shipper, will not render the carrier liable in damages.—Water Valley Bank v. Southern Express Co., 16 So. 300, 71 Miss. 741.

21. **Unreasonable**
Under the Carmack amendment an unexplained delay of at least twenty-one hours in the shipment of cattle a distance of one hundred and thirty eight miles is unreasonable and will support a recovery by the shipper.—Erickson v. Chicago, M. & St. P. Ry. Co., 170 N.W 144, 41 S.D. 243.

22. **Not unreasonable**
Carrier's failure to deliver car on public siding until four and one half hours after consignee, whose private siding was occupied, agreed thereto, held not breach of duty to make delivery within reasonable time as matter of law.—Belkin v. New York, N. H. & H. R. Co., 146 A. 846, 109 Conn. 466.

placed on what constitutes a reasonable time for transportation after acceptance of goods for shipment.[23]

b. Perishables

The perishability of the freight, the weather, and similar circumstances affecting its spoilage are to be weighed in determining the reasonableness of the time.

As shown supra § 191 a, in so far as its liability for delay is concerned a carrier of perishable freight is only obliged to transport it diligently and without unreasonable delay. Nevertheless the perishability of the shipment is an important circumstance to be considered in determining whether or not a delay is unreasonable.[24] Likewise the season of the year and the prevailing weather conditions, as these circumstances affect the perishability of the shipment, are to be weighed in determining the reasonableness of the time consumed.[25] Accordingly some cases hold that, where the goods are perishable or peculiarly liable to injury from delay, the carrier is bound to use more expedition than where ordinary freight is being carried, and the reasonable time in such instances is a shorter period than in other cases owing to the special circumstances known to the parties at the time the undertaking was entered into.[26] It has also been said that where the freight shipped is perishable it is the duty of the carrier to forward it by its earliest scheduled opportunity or by the earliest train it makes up in the course of its business.[27] There is, however, no absolute duty in every case to ship goods immediately on receipt of them merely because they are perishable, conceding that such freight should generally be given a preference, the demands of the carrier's business, time for regular departure of trains, contracts and obligations already incurred, and other like considerations ought to be regarded in determining whether in any case the carrier has been properly diligent in forwarding the goods after the receipt thereof.[28]

Where a carrier attempted to institute a two-day schedule for perishables between certain points but abandoned it and at a meeting with shipper's representatives a three-day schedule was adopted, a shipper not relying on any representation by the carrier that there would be a two-day schedule is bound by the three-day delivery as announced.[29]

c. Live Stock

The reasonable time for transporting live stock ordinarily contemplates greater dispatch than is necessary for dead freight.

The general rules as to what constitutes a reasonable time for transportation of freight, supra § 194 a, b, apply to delays in shipments of live stock.[30] A carrier accepting a shipment of live stock is chargeable with notice that such freight is highly perishable and that any delay in transporting it may result in damage.[31] The reasonable time required

23. Delay at initial point

Under Revisal 1905 § 2632, providing that two days' delay at initial point of shipment is not unreasonable, defendant express company, to which thirty crates of strawberries were tendered eight minutes before train time, held not liable for unreasonable delay for its failure to ship on such train—Shaw v. Southern Express Co., 88 S.E. 222, 171 N.C. 216.
10 C.J. p 286 note 16 [a].

24. Del.—Hardesty v. American Ry. Express Co., 119 A. 681, 2 W.W. Harr. 66.
Ky.—Leo Lococo's Sons v. Louisville & N. R. Co., 82 S.W.2d 332, 259 Ky. 299—Maloney v. Cleveland, C., C. & St. L. Ry. Co., 268 S.W. 1103, 207 Ky. 262—Adams Express Co. v. Burr Oak Jersey Farm, 206 S.W. 173, 182 Ky. 116.
Me.—Smith & Hoyt v. Bangor & A. R. Co., 98 A. 737, 115 Me. 223.
Vt.—Saliba v. New York Cent. R. Co., 144 A. 194, 101 Vt. 427.

25. Ala.—Louisville & N. R. Co. v. Farmer's Produce Co., 85 So. 578, 17 Ala. App. 388.
Me.—Smith & Hoyt v. Bangor & A. R. Co., 98 A. 737, 115 Me. 223.
N.D.—O. J. Barnes Co. v. Northern Pac. R. Co., 173 N.W. 943, 42 N.D. 411.

Freezing reasonably anticipated

Where carrier receives potatoes for shipment at a season when it is reasonable to anticipate freezing temperature, and where, following delay in shipment, they were damaged by freezing, their perishable nature is to be considered by jury in determining an unreasonable delay in shipment.—O. J. Barnes Co. v. Northern Pac. Ry. Co., 173 N.W. 943, 42 N.D. 411.

26. Ky.—Leo Lococo's Sons v. Louisville & N. R. Co., 82 S.W.2d 332, 259 Ky. 299—Adams Express Co. v. Burr Oak Jersey Farm, 206 S.W. 173, 182 Ky. 116.
Wis.—Peet v. Chicago & N. W. Ry. Co., 20 Wis. 594.
10 C.J. p 287 note 20.

Corpus Juris has been quoted or cited with approval

Ky.—Adams Express Co. v. Burr Oak Jersey Farm, 206 S.W. 173, 182 Ky. 116.
Pa.—Pennsylvania R. R. v. Rothstein, 165 A. 752, 109 Pa.Super. 96.

27. Ky.—Adams Express Co. v. Burr Oak Jersey Farm, 206 S.W. 173, 182 Ky. 116.
10 C.J. p 287 note 21.

28. Ky.—Adams Express Co. v. Burr Oak Jersey Farm, supra.
10 C.J. p 287 note 23.

29. Va.—Norfolk Southern R. Co. v. Hudgins, 142 S.E. 412, 150 Va. 229—Norfolk Southern R. Co. v. Hudgins, 142 S.E. 409, 150 Va. 219

30. S.D.—Elliott v. Chicago, M. & St. P. Ry. Co., 161 N.W. 347, 38 S.D. 371.
10 C.J. p 288 note 35.

As facts are known to carrier

What is reasonable time for carrier to transport shipment of animals depends upon facts surrounding each particular shipment as they are known to the carrier.—Elliott v. Chicago M. & St. P. Ry. Co., 161 N.W. 347, 38 S.D. 371.

31. Mo.—Neely v. Hines, App., 237 S.W. 906

Removal of dead cow

The stopping of car with cattle at station when there was no other train leaving in nineteen hours, for purpose of removing dead cow, instead of allowing car to go on to another city in same state and have dead cow removed there, constitut-

for the carriage and delivery of a shipment of live stock will ordinarily contemplate a greater dispatch than will the carriage of inanimate or nonperishable freight.[32]

Proper considerations in the determination of what will constitute a reasonable time in this connection may well include the number of animals in the shipment, the general movement of such freight from the particular territory involved and such movement over defendants' line, the volume of the general traffic, and defendants' available equipment.[33]

d. Schedule Time

Transportation within the carrier's regular reasonable schedule is held to be "within a reasonable time" although it is held not to be conclusive of the question.

A carrier may arrange such reasonable schedules for its trains in the carriage of freight as may be proper to the ordinary and economical conduct of its business[34] although the nature and perishability of the freight must be considered,[35] and in the absence of special contract or special circumstances taking the case out of the rule a shipper will be considered to have contemplated and consented to the carrier's ordinary schedule;[36] and hence, if he desires special service, he should contract for it.[37] Thus it is stated as a rule that unless a carrier has undertaken to furnish special service he is not chargeable with negligent or unreasonable delay where he transports a shipment in accordance with his established and published schedules.[38] Nevertheless it has frequently been held that transportation within the carrier's schedule, while an important consideration, is not conclusive on the question of whether the transportation was accomplished within a reasonable time since the schedule may have been unreasonably slow;[39] nor is the carrier's schedule conclusive as to the usual time in which the carrier customarily carried goods of the same kind between the initial and terminal points.[40] It has been held to be no excuse that the carrier maintained a schedule which resulted in delay[41] or that its regular schedule prevented delivery within a reasonable time.[42]

A carrier is not an insurer of the arrival of its

ed unreasonable delay, rendering railroad liable for damage to cattle caused by delay, where railroad through its agents knew that prompt delivery of shipment was essential. The railroad could not escape liability therefor on ground that law required carrier to feed cattle at end of thirty six hours and time required for shipment was more than thirty six hours, where only purpose of stopping car at station was to remove dead cow, and delay required feeding, and cattle would have arrived at destination within 34 hours but for such stop.—Nashville, C. & St. L Ry. v. Davis, Tenn.App., 114 S.W.2d 830.

32. Ky.—Leo Lococo's Sons v. Louisville & N. R. Co., 82 S.W.2d 332, 259 Ky. 299.

33. Okl.—St. Louis & S. F. Ry. Co. v. May, 236 P. 888, 110 Okl. 170.

34. Ky.—Chesapeake & O. R. Co. v. Coleman Fruit Co., 294 S.W. 463, 219 Ky. 794.

35. S.D.—Petro v. Davis, 195 N.W. 504, 46 S.D. 603.

36. Iowa—Wallace-Farmer v. Davis, 199 N.W. 307.
Minn.—Janesville Live Stock & Shipping Co. v. Hines, 178 N.W. 739, 146 Minn. 260.
10 C.J. p 287 note 25.

Corpus Juris has been quoted with approval in Adams Express Co. v Burr Oak Jersey Farm, 206 S.W. 173, 182 Ky. 116.

Affecting circumstance
The determination of what is a reasonable time for the transportation of a shipment of live stock may be affected by the regular train schedules established by the carrier.—Gray v. Oregon Short Line R. Co., 187 P. 540, 32 Idaho 701.

Shipper consents to ordinary schedule
In absence of special contract or special circumstances, carrier of live stock is not bound to use extraordinary means to forward shipment, but shipper will be held to have consented to carrier's ordinary schedule.—Payne v. Chicago, M. & St. P. Ry. Co., 157 N.W. 613, 99 Neb. 699.

Schedule must be followed
Subject to regulation of public authority, railroad schedules must be followed.—Siegel v. Chicago, R. I. & P. Ry. Co., 208 N.W. 78, 201 Iowa 712.

37. Ky.—Adams Express Co. v. Burr Oak Jersey Farm, 206 S.W. 173, 182 Ky. 116.
10 C.J. p 287 note 25.

38. Iowa—Wallace-Farmer v. Davis, 199 N.W. 307.
Minn.—McNeill & Scott Co. v. Great Northern R. Co., 194 N.W. 614, 156 Minn. 120—Janesville Live Stock & Shipping Co. v Hines, 178 N.W. 739, 146 Minn. 260.
Neb.—Burtis v. Chicago, B & Q. R. Co., 247 N.W. 42, 124 Neb. 534.
Wis.—Johnston v. Chicago & N. W. Ry. Co., 246 N.W. 336, 210 Wis. 227.

Overcomes inference of negligence
The inference of negligence arising from the length of time consumed in transporting a shipment of live stock was overcome by showing a delivery according to the time schedules then in force.—Janesville Live Stock & Shipping Co. v. Hines, 178 N.W. 739, 146 Minn. 260.

39. Ky.—Leo Lococo's Sons v. Louisville & N. R. Co., 82 S.W.2d 332, 259 Ky. 299—Maloney v Cleveland, C, C & St. L Ry. Co., 268 S.W. 1103, 207 Ky. 262.
Okl.—Chicago, R. I. & P. Ry. Co. v. Simms, 229 P. 638, 100 Okl. 138—Chicago, R. I. & P. Ry. Co. v. Simmons, 228 P. 923, 100 Okl. 164—Buel, Pryor & Daniel v. St. Louis & S. F. Ry. Co., 163 P. 536, 65 Okl. 108.
Tex.—Baker v. Nance Bros., Civ.App., 294 S.W. 290.

40. Tex.—Great Northern R. Co. v. Shaw & Stumberg, Civ.App., 45 S.W.2d 759.

Live stock
In suit for delay in transporting cattle, schedule is not conclusive as to time in which railroad customarily carried cattle between points of shipment.—International-Great Northern R. Co. v. Shaw & Stumberg, Tex.Civ.App., 45 S.W.2d 759.

41. Tex.—St. Louis, etc., R. Co. v. Armstrong, Civ.App., 166 S.W. 366.
10 C.J. p 295 note 30.

42. Okl.—Chicago, R. I. & P. Ry. Co. v. Haskell, 245 P. 858, 117 Okl. 185—Dickinson v. Seay, 175 P. 216, 71 Okl. 66, certiorari denied Chicago, R. I. & P. R. Co. v. Seay, 39 S.Ct. 257, 249 U.S. 598, 63 L.Ed. 795
10 C.J. p 295 note 31.

trains on schedule, even in the transportation of live stock.[43] Where a perishable shipment is carried under a contract providing that the carrier is not bound to transport it otherwise than with reasonable dispatch, the fact that it failed to reach its destination in the time indicated by the schedule is insufficient to render the carrier liable.[44]

§ 195. What Constitutes Negligence

What constitutes diligence or negligence on the part of the carrier depends largely on the circumstances of the particular case.

What constitutes reasonable diligence must depend on the circumstances of each case,[45] one important circumstance being the character of the shipment, which may indicate to the carrier the necessity of a more expeditious transportation, as, for example, perishable goods[46] or a corpse.[47] Mere lapse of time[48] or delay[49] does not of itself establish negligence.

A carrier is guilty of negligence where it accepts property for shipment when it knows or ought to know that it will be unable to transport it in a reasonable time.[50] The carrier will also be liable if the delay results from a wreck due to its negligence,[51] or if the delay is due to the overloading of the engine,[52] or if it carelessly carries goods beyond the destination specified by the shipper.[53] Negligence in ascertaining the location of the place to which the goods are to be transported may render the carrier liable for a consequent delay;[54] but, on the other hand, if some inquiry and exercise of judgment are required to ascertain whether goods are to be transported on a particular train or to a particular destination, delay resulting from the making of proper inquiry and exercise of proper discretion will not constitute negligence.[55]

Failure to delay a regular freight train in order to handle a shipment of cattle is not negligence;[56] nor is a carrier required to hold a train to permit a shipper to complete his loading after the train arrives.[57]

In general, the selection of a route, where more than one route is available to the carrier, will not render it liable if reasonable care is exercised in this respect, and especially is this true where by reason of some obstruction in the usual route, not due to the carrier's negligence, it becomes necessary to exercise judgment as to forwarding by another route.[58] It has been held, however, that where perishable goods could have been brought to destination in time for their marketing by transferring the shipment at an intermediate point to another train, failure to make such transfer is negligence rendering the carrier liable for the spoiling of the goods owing to the delay in shipment.[59] In such case, the carrier should employ the most direct route.[60]

A carrier may be liable for loss due to an unreasonable delay which was proximately caused by the

43. Neb.—Burtis v. Chicago, B. & Q. R. Co., 247 N.W. 42, 124 Neb. 531.

44. S.C.—Carter v. Atlantic Coast Line R. Co., 192 S.E. 624, 184 S. C. 414.

45. Me.—Stockman v. Boston & M. R. R., 102 A. 560, 117 Me. 35.
S.C.—Allen v. Davis, 118 S.E. 614, 125 S.C. 256.
10 C.J. p 288 note 36.

46. Del.—Hardesty v. American Ry. Express Co., 119 A. 681, 2 W.W. Harr. 66.
Vt.—Saliba v. New York Cent. R. Co., 144 A. 194, 101 Vt. 427.

Bananas

Carrier was held negligent in permitting four hours of a hot day to expire between the time bananas were at junction and when they were placed in position for unloading.—Galioto v. Erie R. Co., 148 A. 158, 8 N.J.Misc. 41, affirmed 154 A. 631, 107 N.J.Law 377.

47. Tex.—Wells v. Fuller, 35 S.W. 824, 13 Tex.Civ.App. 610.

48. Tex.—Texas & N. O. R. Co. v. Robinson, Civ.App., 57 S.W.2d 938.

Time lapse not sole test

Negligence of carrier company, transporting cattle by local freight train without fixed schedule, could not be predicated on lapse of time only, test being whether unnecessary or unreasonable time was consumed.—Texas & N. O. R. Co. v. Robinson, Tex.Civ.App., 57 S.W.2d 938.

49. Mo.—Mount Arbor Nurseries v. New York, C. & St. L. R. Co., 273 S.W. 410, 217 Mo.App. 31.

50. Ill.—Banks v. Hines, 217 Ill. App. 596.
10 C.J. p 288 note 39.

51. Tex.—St. Louis, etc., R. Co. v. Dean, Civ.App., 152 S.W. 1127.

52. Ind.—Cleveland, C., C. & St. L. R. Co. v. Heath, 53 N.E. 198, 22 Ind.App. 47.
10 C.J. p 288 note 41.

53. N.Y.—Waite v. New York Cent., etc., R. Co., 17 N.E. 730, 110 N.Y. 635.
10 C.J. p 288 note 38.

54. N.C.—Gatlin v. Norfolk-Southern R. Co., 102 S.E. 779, 179 N.C. 433.
10 C.J. p 288 note 45.

Failure to rectify error

Where defendant carrier, receiving shipment billed for station the name of which had been changed because of similarity to name of another station, sent the shipment to the wrong station, where it remained for two weeks, it was guilty of an act of negligence independent of that of the carrier from whom it received goods, and was liable in damages for delay.—Gatlin v. Norfolk-Southern R. Co., 102 S.E. 779, 179 N.C. 433.

55. Miss.—Alabama, etc., R. Co. v. Hayne, 24 So. 907, 76 Miss. 538.
10 C.J. p 288 note 46.

56. Tex.—San Antonio, etc., R. Co. v. Turner, Civ.App., 94 S.W. 214.
10 C.J. p 288 note 44.

57. Wis.—Stephens v. Chicago & N. W. Ry. Co., 227 N.W. 875, 200 Wis. 181.

58. Pa.—Empire Transp. Co. v. Wallace, 68 Pa. 302, 8 Am.R. 178.
10 C.J. p 288 note 48.

59. Mo.—Whittom v. Adams Express Co., App., 182 S.W. 137.

60. Tex.—Wells v. Fuller, 35 S.W. 824, 13 Tex.Civ.App. 610.

carrier's negligence in failing to inspect the freight tendered prior to issuing a bill of lading and accepting such goods as in apparent good order, where they were palpably improperly loaded and where such patent defect, if discovered, could have been remedied and the subsequent delay avoided.[61]

A delay caused by the carrier's negligence in permitting the goods to be stolen while in transit is a negligent delay for which the carrier is liable.[62]

Live stock. While, as shown supra § 191 a, a carrier which has not bound itself to do so need not transport a live stock shipment on any particular train, nevertheless, having started the shipment, it may not willfully delay it by cutting the car out of a train and sending it on a train which would arrive much later.[63] A carrier is liable to the shipper for the ensuing damages where it refuses or neglects to unload when such is its duty,[64] or where it negligently refuses[65] or unreasonably delays[66] in picking up the car containing the shipment. It has been held that a delay of twelve hours in transportation of live stock, caused by holding the cattle on account of the sickness and death of one, does not constitute negligence, where the remaining cattle are sent forward by the next train.[67]

A carrier of live stock is liable for all damage that is referable to the negligent prolongation of the transportation, through its natural effect on the physical condition or latent vicious propensities of the animals, whereby they are reduced in strength or weight more than they would have been had prompt carriage and delivery been made.[68]

Express company. Where defendant express company, although a common carrier, does not own the railroad lines over which it does business, the fact that a railroad detached the cars containing the shipment from a fast train not scheduled to stop at the destination of the shipment, and left them on a siding from which they were carried to their destination by the next train making a stop at such destination, does not make the express company liable as for negligent delay.[69]

§ 196. Delay as Proximate Cause of Injury

The delay for which damages are sought must be the proximate cause of the loss or injury complained of.

Where damages are sought to be recovered on the ground of delay in shipment, the delay must be the proximate cause of the loss or the injury complained of.[70] According to the weight of authority, the rule is that, if the loss or the injury complained of would have occurred notwithstanding the goods had been shipped in a reasonable time, the carrier is not liable;[71] and that, if the subsequent loss of the goods is due to an independent cause, the carrier will not be liable, although it has been guilty of a negligent delay in transportation.[72] If, however, the negligent delay occasions the ultimate injury which results from the goods not reaching their destination in time, the carrier

61. Ga.—Central of Georgia Ry. Co. v. Griner & Rustin, 127 S.E. 878, 33 Ga.App. 705.

62. Ala.—American Ry Express Co. v. Baer, 92 So. 652, 207 Ala. 355.

Goods stolen and held

Where a fur delivered to a carrier for shipment was stolen while in transit by an employee of the carrier, due to the negligence of the carrier, and later recovered by federal officials and retained by them as evidence in prosecuting the employee, the carrier was liable for the delay in delivery, the retention of the goods by the officers being a proximate result of carrier's negligence; hence there was no error in refusing an instruction that, if the fur was held by the federal officials, to be used as evidence in the case against the employee, defendant would not be liable.—American Ry Express Co. v. Baer, 92 So. 652, 207 Ala. 355.

63. S.D.—Elliott v. Chicago, M. & St. P. Ry. Co., 161 N.W. 347, 38 S.D. 371.

64. Ind.—Belt R. & Stockyards Co. v. Hammond, 124 N.E. 398, 71 Ind.App. 151.
10 C.J. p. 288 note 40.

65. Tex.—Gulf, C. & S. F. Ry. Co. v. Hamilton, Civ.App., 57 S.W.2d 309, appeal dismissed 89 S.W.2d 208, 126 Tex. 542.

66. Ark.—Chicago, R. I. & P. Ry. Co. v. Stallings, 201 S.W. 294, 132 Ark. 446.
Ill.—See Pennington v. Grand Trunk Western Ry. Co., 207 Ill.App. 145.

67. N.J.—Lewis v. Pennsylvania R. Co., 59 A. 1117, 71 N.J.Law 339.

68. N.M.—Pedrick v. Southern Pac. Co., 31 P.2d 705, 38 N.M. 284.

69. Ky.—Adams Express Co. v. Burr Oak Jersey Farm, 206 S.W. 173, 182 Ky. 116.

70. Mo.—Crowell v. St. Louis-San Francisco Ry. Co., App., 11 S.W.2d 1055.
Tex.—Mars v. Panhandle & S. F. Ry. Co., Civ.App., 25 S.W.2d 1004, error dismissed.
Va.—New York, P. & N. R. Co. v. Chandler, 106 S.E. 684, 129 Va. 695.
10 C.J. p. 289 note 52.

Perishables

In action for damages for negligent delay in transporting perishable vegetables, plaintiff must show that it was proximate cause of damage.—Sanders v. Charleston & W. C. Ry. Co., 141 S.E. 607, 143 S.C. 395.

71. Mo.—Crowell v. St. Louis-San Francisco Ry. Co., App., 11 S.W.2d 1055.
10 C.J. p. 289 note 53.

Market decline

Evidence that cattle were placed on market as soon as if there had been no delay in shipment precluded recovery for decline in market.—Crowell v. St. Louis-San Francisco Ry. Co., Mo.App., 11 S.W.2d 1055.

72. Ky.—Hines v. Harris, 258 S.W. 930, 202 Ky. 75.
10 C.J. p. 289 note 54.

Loss in stock pens

Carrier guilty of delay in shipment of cattle was not responsible for further shrinkage after delivery, the cattle being held in stock pens until sold subsequent to delivery.—Hines v. Harris, 258 S.W. 930, 202 Ky. 75.

is liable,[73] and this is so, although the loss does not directly result while the goods are in its possession.[74]

If the carrier's negligent delays in getting its train to its destination contributed proximately with delays which were not negligent, the carrier is liable.[75] Likewise, the carrier is liable for injuries to which its negligent delay contributes, although its conduct may not have been the sole cause of the injury.[76] Accordingly, it will be liable even if the concurrent negligence of another carrier,[77] or the inherent propensity of the animals being transported,[78] contributes to the loss. A cause cannot be concurrent with a proximate cause and be remote at the same time.[79]

Excuses which would have been good for a delay had there been no negligence on the part of the carrier will not be available where the injury results from negligence.[80] Where there has been delay, even though excusable, the carrier must take reasonable precautions to avoid injury resulting therefrom.[81] The carrier should notify the consignee of the delay if thereby resulting injury may be avoided.[82]

It is the rule in some jurisdictions that a delay at one point will not be regarded as the proximate cause of another delay due to an act of God which the shipment would have escaped had the first delay not occurred.[83] It has also been held that if the carrier's negligence mingled with the act of God in causing the delay, the carrier would be liable for the loss resulting from the delay.[84]

Where part of a shipment becomes delayed because of necessary repairs to the cars and the shipper refuses the carrier's offer to forward the rest of the shipment immediately, he may not recover for the additional delay of the residue of the shipment for which immediate transportation was offered.[85]

§ 197. Excuses for Delay

Any facts which the law recognizes as an excuse for a delay will constitute a good defense

Where damages are sought on the ground that the carrier has breached its common-law undertaking to transport with reasonable diligence, any facts which the law recognizes as an excuse for delay will constitute a good defense, although no exemption from liability on any such ground was in the contract of shipment.[86] Generally speaking, any delay due to such an occurrence as could not have been anticipated in the exercise by the carrier of reasonable prudence, diligence, and care is excusable.[87]

§ 198. Acts of Shipper

The carrier is not liable for a delay caused by the act or fault of the shipper.

If the delay is due to the act or fault of the shipper, the carrier cannot be held accountable for re-

73. Ala.—American Ry Express Co. v. Baer, 92 So 652, 207 Ala 355
Ga.—Central of Georgia Ry. Co. v. Griner & Rustin, 127 S E 878, 33 Ga App. 705
Va.—New York, P. & N. R Co v Chandler, 106 S E 684, 129 Va. 695
10 C J. p 289 note 55.

Change of destination

Where the proximate cause of injury to a carload of corn was the failure of one of the railroads which carried it to comply promptly with the request of the original consignee of the car to carry it to another point than it was originally billed to, which resulted in a delay of about one month, the railroad was liable as for a breach of its undertaking to transport to a new destination and make delivery within reasonable time, as evidenced by the bill of lading issued to the original consignee by its agent—Chicago & G W Ry. Co v Plano Milling Co, Tex Civ App, 214 S W. 833, affirmed Missouri, K. & T R Co. of Texas v Plano Milling Co., Com App, 231 S. W 100, certiorari denied 42 S Ct. 317, 258 U.S. 624, 66 L Ed. 797.

74. Iowa.—Wisecarver v. Chicago, etc, R. Co., 119 N.W. 532, 141 Iowa 121.
10 C J. p 289 note 56.

75. Mo.—Harrison v. Chicago & A. R. Co, 239 S W. 871, 209 Mo App 526

No intervening agency

Where there were several delays of a shipment, the fact that some of these delays were excusable will not relieve the carrier of liability for delay, where any of such delays were negligent, and there was no intervening agency affecting shipment in question—Foley v American Ry. Express Co, 232 P. 169, 69 Cal App. 669.

76. Iowa.—Wisecarver v Chicago, etc, R. Co., 119 N W. 532, 141 Iowa 121.

77. Tex.—Butterick Pub. Co v. Gulf, etc, R. Co., 88 S.W 299, 39 Tex.Civ.App. 640.
10 C J p 289 note 58.

78. Tex.—Galveston, etc, Co v. Herring, Civ App, 36 S.W. 129.

79. Tex.—Butterick Pub. Co v. Gulf, etc, R Co, 88 S.W. 299, 39 Tex.Civ.App. 640.

80. Iowa.—Hewett v. Chicago, etc, R Co, 19 N W. 790, 63 Iowa 611.
10 C.J. p 290 note 61

81. Ohio.—American Express Co. v. Smith, 33 Ohio St 511, 31 Am R. 561.
10 C J p 290 note 62.

82. Fla.—Norris v. Savannah, etc, R. Co, 1 So 475, 23 Fla. 182, 11 Am S R 355.
10 C.J p 290 note 63.

83. Tex.—Fort Worth & D C Ry Co v. Lemons, Civ.App, 258 S.W 1095

84. Mo.—Harrison v Chicago & A R Co, 239 S W 871, 209 Mo App 526

85. Tex.—Ft Worth & D. C. Ry. Co. v Gatewood, Civ.App, 185 S W 932, affirmed Gatewood v. Ft Worth & D C Ry. Co., 232 S W. 493, 111 Tex. 291.

86. Ill.—See Ford v. American Express Co., 203 Ill App 275.
Tex.—Missouri, etc, R. Co. v. Stark Grain Co, 131 S.W. 410.

87. Ky.—Leo Lococo's Sons v Louisville & N R. Co., 82 S W.2d 332, 259 Ky. 299.

sulting injury.[88] Thus, for example, where the delay is due to the fact that the shipper misdirected the goods the carrier is not liable.[89] Nevertheless, where after misdirecting the shipment, the shipper gives proper directions to the carrier, thereby creating a new contract, the carrier is liable for an unreasonable delay subsequently occurring.[90]

It has been held that if, notwithstanding the fault of the shipper, the carrier is guilty of some negligent act or omission without which the loss would not have occurred it will be liable.[91] The fact that a shipper was negligent in delaying the ordering of goods before he delivered them to a carrier for transportation, and that he had already sustained damages because of his delay, will not prevent him from recovering the damages arising from the negligence of the carrier in delaying such transportation, if such damages can be shown with reasonable certainty to have resulted therefrom.[92] Neglect of the consignee to unload perishable goods as soon as practicable will not excuse the carrier for decay caused by delay, if it appears that the loss had already occurred before arrival at destination.[93] It is not the law, however, that, if there is a delay causing some injury to the shipment at its destination, the carrier is responsible for the full damages, even though some of the damages resulted from the independent acts of the shipper.[94]

Knowledge by shipper's agent. The fact that an agent of the shipper knew that the carrier negligently placed a shipment of animals on a siding which was improperly ventilated and did not complain does not establish contributory negligence, in the absence of a showing that such agent knew that the car would remain there a considerable time, or that the agent was authorized to request their removal or that the carrier would have heeded such a request if made.[95]

Diversion or reshipment. Where live stock are shipped to one point with privilege of another destination and, at the shipper's request, are unloaded at the latter and again reshipped to the original destination, the carrier is not liable for the delay and shrinkage at the intermediate point.[96] Where goods have been shipped within a state consigned by the shipper to himself and, on arrival at their destination, the shipper-consignee does not receive them, as he could do, but orders them delivered to another carrier for further transportation, the

88. U.S.—American Ry. Express Co. v. Ewing Thomas Converting Co., C.C.A.Pa., 292 F. 335.
Ky.—Leo Lococo's Sons v. Louisville & N. R. Co., 82 S.W.2d 332, 259 Ky. 299.
Mo.—Wichita Poultry Co. v. Southern Pac. Ry. Co., 198 S.W. 82, 197 Mo.App. 578.
10 C.J. p 290 note 67.

Plaintiff's reasonable provision

In action against a common carrier for special damages because of a negligent delay in transportation of crates for use in shipping tomatoes, because tomatoes spoiled in the field and became too ripe for shipment, plaintiff, to recover, must show his reasonable provision for shipment of the tomatoes by delivering, in ample time, to the carrier for transportation a sufficient quantity of crate material for use when tomatoes were ready—Florida East Coast Ry. Co. v. Peters, 86 So. 217, 80 Fla. 382.

89. U.S.—American Ry. Express Co. v. Ewing Thomas Converting Co., C.C.A.Pa., 292 F. 335.
10 C.J. p 290 note 67 [c].

Express company

(1) Independent of statute, when a delay by an express company in delivering goods results solely from shipper's misdirection, the loss falls on the shipper whose careless conduct caused it.—American Ry. Express Co. v. Ewing Thomas Converting Co., C.C.A.Pa., 292 F. 335.

(2) An express company is not liable for delay in delivering an express package to a consignee, where the wrong address was given, and evidence is produced at the trial to show that the company made efforts to deliver the package, and had informed the consignor that it could not find the consignee at the address given. The express company fulfills its duty where it delivers the property intrusted to its care at the address given, and, when it cannot find the consignee, notifies the shipper of such fact, and it is not to blame for failure to get from other sources the information, in regard to the address, which the consignor should have supplied—Fineberg v American Express Co., 71 Pa.Super 407.

90. N.Y.—Bastian Bros. Co. v. American Ry. Express Co., 199 N.Y.S. 572, 205 App.Div. 432.

New contract after misdirection

Where plaintiff addressed a package containing invitations to high school commencement exercises to Leesburg, instead of Leechburgh, and, on notification from the Leesburg agent of the express company, plaintiff wrote a letter to the local agent, directing him to send the package to the proper town, and explaining the necessity for prompt shipment, the letter created a new contract, and the express company was liable for delivering the package three weeks later, when the invitations were worthless, where it was proved that the usual time was two or three days, and in view of the fact that defendant's agent in Leesburg notified plaintiff to deal with his local agent, the express company could not set up the defense that plaintiff notified the wrong office.—Bastian Bros. Co. v American Ry Express Co, 199 N.Y.S. 572, 205 App. Div. 432.

91. U.S.—American Ry. Express Co. v. Ewing Thomas Converting Co., C.C.A.Pa., 292 F. 335.

92. Tex.—Belcher v Missouri, etc., R. Co, 50 S.W. 559, 92 Tex. 593, reversing, Civ.App., 47 S.W. 1020.

93. Iowa—St. Clair v Chicago, etc., R. Co, 45 N.W. 570, 80 Iowa 304.

94. Tex.—Davis v. Hill, Civ.App., 271 S.W. 281.

Cattle shrinkage

If a shipper confines cattle in pens, causing shrinkage, even though the carrier may itself by negligent delay also cause a shrinkage, the shrinkage caused by the independent acts of the shipper cannot be assessed against the carrier—Davis v. Hill, Tex.Civ.App., 271 S.W. 281.

95. Mo.—Howell v. Davis, App., 236 S.W. 889.

96. Tex.—Panhandle & S. F. Ry. Co. v. Harp, Civ.App., 193 S.W. 438.

liability of the first carrier has been determined, so that it is not liable for damages due to delay in delivery by the terminal carrier.[97] A carrier which diverts a shipment as ordered by the consignor and ignores a subsequent notice by the consignee, having no knowledge that the latter is agent of the former, is not liable for the delay caused thereby, which is attributable to the consignor's neglect to notify the carrier of the agency.[98]

Substitution of goods. Where by the consent of the carrier and the consignor a bill of lading issued for an interstate shipment of a certain carload of sugar is made to cover another carload of the same commodity, the carrier cannot excuse its delay in delivering the substituted shipment on the ground that the consignor had made such substitution.[99]

§ 199. Advising Shipper as to Probable Delay

A carrier must advise the shipper of any circumstance likely to cause delay of which it knows or should know.

Where goods are tendered to a carrier for transportation, it is bound to advise the shipper as to any cause likely to delay transportation, which cause is within its knowledge, or within its fair and reasonable means of knowledge, and not within the knowledge of the shipper; and, if it fails in its duty in this respect, a delay in the transportation of the goods will not be excused, and that, too, irrespective of the nature of the cause.[1] The

97. Ga.—Taylor v. Central of Georgia Ry. Co., 121 S.E. 348, 31 Ga. App. 374.

98. Mo.—Wichita Poultry Co. v. Southern Pac. Ry. Co., 198 S.W. 82, 197 Mo.App. 578.

99. Ark.—St. Louis-San Francisco Ry. Co. v. A. B. Jones Co., 260 S.W. 34, 163 Ark. 429.

May sue for depreciation of carload shipped

Where by consent of defendant carrier and the consignor a bill of lading, issued for an interstate shipment and to cover a certain car of sugar, covered a substituted car of sugar loaded in the same car after an unloading of the original sugar therefrom on the consignor's discovery that the original sugar did not comply with plaintiff consignee's order, for a loss sustained from depreciation in the price of sugar, on account of delay in shipment, plaintiff was not required to sue for the value of the sugar first loaded as for conversion but was entitled to sue for depreciation in the value of the sugar which was in fact shipped.—St. Louis-San Francisco Ry. Co. v. A. B. Jones Co., 260 S.W. 34, 163 Ark. 429.

1. Ill.—Coyne v. Oregon Short Line R. Co., 244 Ill.App. 359—Conover v. Wabash Ry. Co., 208 Ill.App. 105—Warren Land Co. v. Chicago, St. P., M. & O. Ry. Co., 195 Ill.App. 157.
Ind.—Pittsburgh, C., C. & St. L. Ry. Co. v. Daniels & Pickering Co., 125 N.E. 426, 71 Ind.App. 518.
La.—Powell-Meyers Lumber Co. v. Tremont & Gulf Ry. Co., 2 La.App 164.
Mich.—Shier v. American Ry. Express Co., 208 N.W. 746, 234 Mich 505—Boyd v. King, 167 N.W 901, 201 Mich. 436, certiorari denied 39 S.Ct. 11, 248 U.S. 572, 63 L.Ed. 427.
Miss.—Yazoo & M. V R. Co. v. Ussery, 126 So. 16, 157 Miss. 383, suggestions of error overruled 127 So. 269, 157 Miss 383.
Mo.—Holland v. Hines, App., 234 S.W. 366.
N.Y.—Meany & Saisselin v. Erie R. Co., 173 N.Y.S. 96.
S.C.—Gray v. Seaboard Air Line Ry Co., 102 S.E 512, 113 S.C. 345, certiorari dismissed 40 S.Ct. 218, 251 U.S. 566, 64 L.Ed. 417.
Tex.—Texas & P. Ry. Co. v. Bufkin, Civ.App., 46 S.W.2d 714, error dismissed—Hill County v. St. Louis Southwestern Ry. Co., Civ.App., 31 S.W.2d 868—Panhandle & S. F. Ry. Co. v. Liske Grain Co., Civ. App., 13 S.W.2d 144—Galveston, H & S. A. Ry. Co. v. Buck, Civ.App., 230 S.W. 891—Ft. Worth & R. G. Co. v. Hasse, Civ.App., 226 S.W. 448—Gulf, C. & S. F. Ry. Co. v. Gross, Civ.App., 204 S.W. 693.
10 C.J. p 67 note 63, p 291 notes 70, 71.

Corpus Juris has been quoted and cited with approval in:
Ga.—Atlantic Coast Line R. Co. v. South Georgia Milling Co., 161 S.E 282, 44 Ga.App. 316.
Ill.—Mueller Grain Co. v. Lake Erie & W R Co., 213 Ill.App 108.
Kan.—Ott v. Atchison, T & S F Ry. Co., 169 P 957, 102 Kan. 254
N.Y.—Burns Grain Co. v. Erie R. Co., 172 N.Y.S. 740, 185 App Div. 169.

Acts of God

If a carrier accepts goods for shipment with full knowledge of floods and washouts on its line and the lines of connecting carriers, it should notify the shipper of the same, or stipulate against the consequences, and if it fails to do so it should not be heard to offer as an excuse that delay in shipment was caused by an act of God.

S.C.—Gray v. Seaboard Air Line Ry. Co., 102 S.E. 512, 113 S.C. 345, certiorari dismissed Seaboard Air Line Ry. Co. v. Gray, 40 S.Ct. 218, 251 U.S 566, 64 L.Ed. 417.
Tex.—Gulf, C. & S. F Ry Co v. Gross, Civ.App., 204 S.W. 693.
10 C.J. p 291 note 71 [a]

Congestion of traffic or press of business

(1) Where a carrier receives freight for transportation, unusual press of business or congestion of traffic will not excuse delay unless the shipper was notified at the time the shipment was received of such congestion.
Ill.—Conover v. Wabash Ry. Co., 208 Ill.App. 105—Warren Land Co v. Chicago, St. P., M. & O. Ry. Co., 195 Ill.App 157
N.Y.—Burns Grain Co v Erie R Co., 172 N.Y.S. 740, 185 App Div 169, affirming 168 N.Y.S. 154, 102 Misc. 28.
Tex.—Panhandle & S. F. Ry Co. v. Liske Grain Co., Civ.App., 13 S.W. 2d 144.

(2) A carrier should notify a shipper of stock of a crowded and congested condition at a connecting point which would cause delay in shipments, and, failing to do so, such congested condition would be no excuse for delay in shipment.—Ft. Worth & R. G. Ry. Co. v Hasse, Tex Civ.App., 226 S.W. 448
10 C.J. p 291 note 71 [b], [c], [d].

Embargo

(1) Where a carrier has accepted shipment of live stock with knowledge of an embargo on live stock shipments by a connecting carrier whereby it might become impossible to fulfill its contract of carriage, which the shipper did not know, and of which the carrier did not give him notice, it could not interpose such embargo as a defense to an action for delay and diversion of ship-

acceptance of goods for shipment without notifying the shipper of the fact that they cannot be promptly delivered is tantamount to an assurance that they will be delivered within a reasonable time, except for the intervening of excusing causes of subsequent occurrence.[2] This duty is in no way dependent on special agreement, but is a part of the duty imposed by law on carriers;[3] and the reason why the law has imposed it on the carrier is to give the shipper an opportunity to exercise his own discretion as to the propriety of making the shipment—to choose between the different courses open to him.[4] Thus, where a carrier receives goods under such circumstances without notice to the shipper of probable delay and fails to obtain his consent, express or implied, it is bound to transport the goods within a reasonable time, notwithstanding the emergency.[5]

When the carrier has complied with its duty in respect of giving notice, it should not be held responsible for a delay which it cannot prevent if the shipper still insists on delivering his property for shipment,[6] and an express agreement between the carrier and the shipper is not necessary to exempt the carrier from liability for delay in delivery due to such conditions.[7] However, any notice given can in no case operate further than the plain scope thereof.[8]

Cause not likely to interfere with transportation. A carrier is not bound to advise the shipper of a possible cause of delay which, in reasonable anticipation, will not interfere with the carrier's business.[9]

Independent knowledge by shipper. From the general rule heretofore stated, it seems that the duty to notify the shipper of circumstances likely to cause delay is obligatory only when such matters are not within the knowledge of the shipper. It is, however, the rule, in some jurisdictions at least, that public knowledge does not relieve the carrier of the duty to give actual notice to the shipper of conditions that may cause delay in delivery;[10] and that even actual knowledge by the shipper of the conditions will not excuse the carrier where the latter knowingly continues to receive shipments without a notification that the goods

ment—Boyd v King, 167 N.W. 901, 201 Mich 436, certiorari denied King v. Boyd, 39 S.Ct. 11, 248 U.S. 572, 63 L.Ed. 427.

(2) Carrier, knowing possibility of delayed shipments and not advising shipper, cannot defend because car might have been delayed for war embargoes—Powell-Meyers Lumber Co. v. Tremont & Gulf Ry. Co., 2 La. App. 164.

Quarantine

Carrier accepting manure for shipment through area in which state quarantine regulations, known to it but unknown to shipper, prevented movement in open cars, was liable to shipper for value of manure, where shipper was not informed of regulations and shipment was detained and later sold—Atlantic Coast Line R. Co. v. South Georgia Milling Co., 161 S.E. 282, 44 Ga. App. 316.

Water shortage and traffic congestion, not called to the attention of the shipper, did not justify carrier not notifying shipper thereof in failing to comply with its statutory duty to transport cattle "within reasonable time to destination."—Texas & P. Ry. Co. v. Bufkin, Tex. Civ. App., 46 S.W.2d 712, error dismissed.

Conductor's knowledge of probable delay

Where, when "stock pick-up extra" train reached a point forty-seven miles from the stockyards and market at 3 o'clock A. M., the conductor knew that there would be delays preventing the train from reaching the stockyards in time for the market at 8 o'clock A. M., it was negligence for the carrier to fail to notify the shipper, loading his cattle at that point, of that fact—Holland v. Hines, Mo. App., 234 S.W. 366.

2. Ga.—Atlantic Coast Line R. Co. v. South Georgia Milling Co., 161 S.E. 282, 44 Ga. App. 316.
Ill.—Mueller Grain Co. v. Lake Erie & W. R. Co., 213 Ill. App. 108—Conover v. Wabash Ry. Co., 208 Ill. App. 105.
N.Y.—Burns Grain Co. v. Erie R. Co., 172 N.Y.S. 740, 185 App. Div. 169.
10 C.J. p. 291 note 72.

3. Ga.—Atlantic Coast Line R. Co. v. South Georgia Milling Co., 161 S.E. 282, 44 Ga. App. 316.
Ill.—Mueller Grain Co. v. Lake Erie & W. R. Co., 213 Ill. App. 108.
10 C.J. p. 291 note 73.

4. Ga.—Atlantic Coast Line R. Co. v. South Georgia Milling Co., 161 S.E. 282, 44 Ga. App. 316.
Ill.—Mueller Grain Co. v. Lake Erie & W. R. Co., 213 Ill. App. 108.
10 C.J. p. 291 notes 74, 75.

5. Fla.—Florida East Coast Ry. Co. v. Peters, 73 So. 151, 72 Fla. 311, Ann. Cas. 1918D 121.
Pa.—Joynes v. Pennsylvania R. Co., 86 A. 1016, 235 Pa. 232, Ann. Cas. 1913D 964.

Subsequent embargo

The fact that the carrier laid an embargo on shipments of onions after a congestion had occurred cannot as a matter of law excuse him from liability for accepting prior to embargo shipments which could not be handled without delay—Meany & Saisselin v. Erie R. Co., 173 N.Y.S. 96.

6. Ill.—Coyne v. Oregon Short Line R. Co., 244 Ill. App. 359.
Mo.—Stewart v. Chicago, B. & Q. R. Co., App., 222 S.W. 1029.
10 C.J. p. 291 note 76.

This Corpus Juris statement is said to be the correct and controlling rule—Free Bros. Co. v. Baltimore & O. R. Co., 146 A. 98, 296 Pa. 441.

Good defense

If an embargo imposed by a carrier on all live stock shipments on account of extreme weather conditions was justified, it is a good defense, in an action for damages for failure to ship hogs promptly, that the shipper was promptly notified thereof, even after the hogs were in the pens ready for shipment—Stewart v. Chicago, B. & Q. R. Co., Mo. App., 222 S.W. 1029.

7. Pa.—Free Bros. Co. v. Baltimore & O. R. Co., 146 A. 98, 296 Pa. 441.
10 C.J. p. 291 note 77.

8. Ky.—Chesapeake, etc., R. Co. v. O'Gara, 139 S.W. 803, 144 Ky. 561.

9. Cal.—Palmer v. Atchison, etc., R. Co., 35 P. 630, 101 Cal. 187.

10. Ill.—Mueller Grain Co. v. Lake Erie & W. R. Co., 213 Ill. App. 108—Conover v. Wabash Ry. Co., 208 Ill. App. 105.

are accepted subject to delay.[11] In any event, where the shipper is well aware of the existence of circumstances rendering a delay probable and admittedly makes the shipment to take advantage of the higher prices caused thereby, he cannot recover for the delay.[12]

Notice to third person. Notice to a third person is not notice to the shipper or consignee, in the absence of a contract provision to that effect.[13] Where goods are shipped to a consignee with directions to notify a third person, the carrier is under no duty to notify such third person of a strike of railway employees at the point of destination.[14]

Express shipments. The general rule of the duty of the carrier to notify the shipper of probable delay has been held to apply to express companies.[15] However, it has been held that, where it is not shown and cannot reasonably be presumed that the shipper had no knowledge of any cause which might delay transportation, if the shipper does not possess all of the information he desires as to causes which might delay the delivery of the goods, it is more reasonable that he should inquire than that the express company carrier or its agents are in duty bound to state such circumstances.[16]

Shipments to foreign countries. The general principles stated in this section may to some extent be relaxed with reference to shipments to foreign countries, in which case the shipper is presumed to know that the point of destination lies within a foreign country. It is the shipper's duty in such case to acquaint himself with the laws of the foreign country governing the delivery of freight.[17]

§ 200. Press of Business, or Lack of Facilities

A carrier can excuse itself for delay on account of unusual press of business or lack of facilities only by showing that its facilities on hand were adequate to handle ordinary business with reasonable dispatch.

If the carrier has a reasonable equipment for all ordinary purposes, and the delay is occasioned by an unusual press of business, but the carrying is done with reasonable expedition under the circumstances, then it is not responsible for the delay.[18] Thus, if at the time of making a contract of shipment of freight a carrier has no doubt, and the condition of business on its line gives it no reason to doubt, that suitable facilities will be at its command to transport the shipment to its destination within the usual and ordinary time, taking into consideration the necessary care of the property en route, and a delay is occasioned by an extraordinary and unusual influx of freight on its line subsequent to the making of the contract, so that delivery, with

11. Ill.—Warren Land Co v. Chicago, St. P, M. & O. Ry. Co, 195 Ill App. 157.

Erroneous statement of rule

Where the carrier failed to give notice to the shipper at the time of acceptance of grain of conditions hindering transportation, an instruction that, if the shipper knew of such conditions when he made the shipment, he could not recover, was properly refused—Conover v. Wabash Ry. Co, 208 Ill.App. 105.

12. N Y.—Carr v. Long Island R. Co, 169 N.Y S 569, 102 Misc. 672, affirmed 172 N Y.S. 883, 186 App Div. 939.

13. Miss—Yazoo & M V. R Co. v. Ussery, 126 So. 16, 157 Miss. 383, suggestions of error overruled 127 So 269, 157 Miss 383.

14. Ill.—Sexton v. Grand Trunk Western R. Co, 260 Ill App. 448.

15. Tenn.—Southeastern Express Co v. Bowers, Inc, App, 109 S W.2d 851

As if goods were perishable

Express company, which failed to notify consignor of failure to ship hats on train contemplated as alleged result of unusual press of business, was liable for damages for delay in making shipments, since if timely notice had been given loss might have been avoided, and express company had duty to notify consignor the same as if the goods were of a perishable nature.—Southeastern Express Co. v. Bowers, Inc, Tenn App., 109 S.W.2d 851

16. Mich.—Feniger v. American Ry. Express Co, 197 N.W. 550, 226 Mich 106.

Strike conditions

On delivery of goods to express company under uniform express receipt exempting the company from liability for damage caused by strikes, where it is not shown the shipper had no knowledge of any cause which might delay transportation, the express company on receipt of goods was not required to advise shippers as to the existence of a strike which might cause delay, in the absence of a request for information from shippers, since the shippers were required to make inquiries from carrier as to existence of conditions which might delay shipment.—Feniger v American Ry. Express Co., 197 N W. 550, 226 Mich. 106.

17. Ga—Atlantic Coast Line R. Co. v. South Georgia Milling Co., 161 S.E 282, 44 Ga App. 316.

18. Mo—Fewel v St Louis & S. F. Ry. Co, App, 267 S W 960—Bragg v. Payne, App., 235 S W 148. Tenn.—Southeastern Express Co. v. Bowers, Inc, App, 109 S W.2d 851. Wyo.—Davis v. Graham, 225 P. 789, 31 Wyo 239
10 C J p 292 note 84

Corpus Juris is quoted with approval in L. J. Upton & Co v. Atlantic Coast Line R Co, 131 S E 827, 829, 146 Va. 475.

Extraordinary facilities not required

To require carriers to be prepared at all times to handle with promptness an extraordinary amount of business would be to place on them an intolerable burden, necessitating extraordinary facilities, in part unnecessary under ordinary conditions. Pa.—Free Bros Co. v Baltimore & O R. Co, 146 A. 98, 296 Pa. 441. Va—L J Upton & Co. v. Atlantic Coast Line R. Co, 131 S E. 827, 146 Va 475.

Congestion arising after contract

A carrier is not liable for delay caused by unexpected extraordinary and unusual influx of freight arising subsequent to making of contract—Davis v. Graham, 225 P. 789, 31 Wyo. 239.

proper diligence on its part, within a reasonable time, is thereby rendered impossible, the carrier is not liable for the consequent delay.[19] If, however, at the time the contract is made there is already an accumulation of business on the carrier's line which incapacitates it, or might reasonably be expected to incapacitate it from transporting and delivering the shipment within a reasonable time, and this is then known to the carrier, or might have been known with proper effort on its part,[20] or if there are then reasonable grounds for belief on the part of the carrier that such is the case at the time, then the carrier is liable for the delay, although it is occasioned by the accumulation of business,[21] at least, as shown supra § 199, in the absence of notification to, or knowledge of the condition by, the shipper.

The carrier can excuse itself for delay on account of unusual press of business or lack of facilities only by showing that the facilities it had available were sufficient to handle the usual volume of business with reasonable dispatch,[22] and by showing that it has made the best practicable use of its means of transportation.[23] A delay due to a shortage of cars is not excused by the acts or inefficiency of the carrier's agent employed to trace and return its cars to it from other lines.[24]

In general freight received is to be forwarded without discrimination, and a delay of one shipment on account of other shipments subsequently received is not excusable,[25] although it has been held that the carrier may give precedence to perishable freight as against that which will not suffer special injury on account of reasonable delay,[26] and to relief goods sent to sufferers from some calamity;[27] and the rule requiring the carrier to haul freight of the same kind in the order of its tender for shipment applies only to the station at which the freight is offered.[28] Delay of a shipment is not excused by the congestion of the carrier's terminal or unloading tracks due to its delay in unloading or moving the cars thereon,[29] nor

19. Wyo.—Davis v. Graham, supra. Press of business as excuse for refusal to accept for transportation see supra § 28.

Unusually busy season

It is not true, as a general proposition, that the insufficiency of the equipment of the carrier to accommodate freight offered during a season of the year when business is likely to be unusually heavy will render it liable for delay due to that cause.—Thayer v. Burchard, 99 Mass. 508.

20. N.Y.—Meany & Saisselin v. Erie R. Co., 173 N.Y.S. 96.
Tenn.—Southeastern Express Co. v. Bowers, Inc., App., 109 S.W.2d 851.
Wyo.—Davis v. Graham, 225 P. 789, 31 Wyo. 239.
10 C.J. p 292 note 81.

Shipment after embargo

Where carrier, because of congestion, placed embargo on shipment of onions, it is liable for late delivery of shipment of onions, received during embargo.—Meany & Saisselin v. Erie R. Co., 173 N.Y.S. 96.

21. Wyo.—Davis v. Graham, 225 P. 789, 31 Wyo 239.
10 C.J. p 292 note 81.

Must not have been foreseeable

To relieve a carrier from liability for delay in delivering shipment of cattle caused by congested traffic, it must appear that the carrier could not reasonably have foreseen the danger of a degree of congestion sufficient to cause such delay.—Lewis v Chicago & N. W. Ry. Co., 199 Ill.App. 438

22. Tenn.—Southeastern Express Co. v. Bowers, Inc., App., 109 S.W.2d 851.

Express company

Where express company alleged that delay in making a shipment of hats was result of a large shipment of refrigerators which had to be unloaded before outgoing express could be loaded, and that time available had not permitted loading of consignment on train contemplated, although it knew special damages might result from delay, company must also show that the facilities available were sufficient to handle usual volume of express with reasonable dispatch, and could not escape liability on ground that delay resulted from unusual press of business, in absence of such proof or proof that effort was made to provide additional help or to advise shipper of probable delay.—Southeastern Express Co. v. Bowers, Inc, Tenn App., 109 S.W 2d 851.

23. U S.—Ormsby v. Union Pac. R. Co., C.C.Colo., 4 F. 706, 2 McCrary 48.
Ky.—Newport News, etc., R. Co. v. Reed, 10 Ky L. 1020.
Tex.—International, etc, R. Co. v. Lewis, Civ App., 23 S.W. 323.

24. Ky.—McCord v. Louisville & N R. Co., 267 S W. 766, 206 Ky 501

Carrier cannot shift responsibility

A shortage of cars due to the fact that a considerable percentage of defendant carrier's cars are on other railroads whence they had been sent with interstate shipments and were not returned promptly, although defendant and other carriers employed an agent to look up and return cars engaged in interstate commerce, did not excuse its delay in furnishing cars to shipper, as it could not shift its responsibilities to its own agent.—McCord v. Louisville & N R Co, 267 S W. 766, 206 Ky. 501.

25. Mo.—Howell v. Hines, App., 236 S W. 886.
10 C J. p 292 note 85.

26. Wis.—Peet v. Chicago & N. W. Ry. Co, 20 Wis. 594, 91 Am.D. 446.
10 C J. p 292 note 87.

27. Mich.—Michigan Cent R. Co. v Burrows, 33 Mich. 6.

28. Mo.—Ballentine v. North Missouri R Co., 40 Mo. 491, 93 Am D. 315.

29. Ill.—Warren Land Co. v. Chicago, St. P, M. & O Ry. Co., 195 Ill.App. 157.

Blocked by other shipments to consignee

Where a carrier negligently delayed shipment of goods and the consignee refused to accept them, the fact that cars filled the consignee's tracks does not excuse the carrier's failure promptly to deliver other shipments.—Berger-Crittenden Co. v Chicago, etc, R Co., 150 N.W. 496, 159 Wis. 256.

Provision in bill of lading

Where a bill of lading provided for storage of property shipped if not removed by the consignee within a certain period, a contention of the carrier, in a suit by the consignee for delay, that such delay was caused by the congested condition of the terminal tracks due to the failure of consignee to remove the goods which arrived, would not excuse the carrier's delay.—Warren

is a delay in delivering perishables excused by a congestion caused by the filling of defendant's tracks with cars held for demurrage charges.[30]

Special equipment. A carrier is not bound to furnish a special engine for a train which would otherwise be overloaded by the taking of the goods offered.[31]

§ 201. Weather Conditions

Extreme weather conditions are usually a sufficient excuse for delay.

Extraordinary weather conditions, such as floods, snowstorms, and the like, will ordinarily constitute a sufficient excuse for delay in transportation,[32] even though such conditions or disturbances do not constitute acts of God;[33] and the carrier is not bound to divert the goods from its own to another route over which it has no control, unless in the exercise of a sound discretion it appears that the change of route would probably have prevented the loss from delay without incurring other dangers.[34] It is bound, however, to use reasonable care to avoid delay,[35] and should make reasonable provision for operating its trains in all kinds of weather, such as is expected in the particular latitude where its business is carried on.[36]

Where a carrier negligently delays the shipment of a perishable commodity at a season when it is reasonable to anticipate that a delay will subject the commodity to a temperature that is apt to destroy it and where such result actually follows, the loss results from the negligent delay for which the carrier is liable.[37]

Although there is a delay or interruption in the transportation due to an excepted cause, yet for loss subsequently occurring by reason of an independent cause the carrier will be liable.[38] It is, however, only the negligence of the carrier in not avoiding the threatened loss which will thus render it liable.[39]

§ 202. Strikes and Mobs

A peaceable strike of the carrier's employees will not, as a rule, excuse it from its duty to transport with reasonable dispatch, but violent strikes or mob interference may constitute such an excuse.

As is stated in Corpus Juris which has been quoted and cited as authority for the rule,[40] a carrier is liable for the negligent or wrongful acts of its servants during the course of their employment, and, therefore, as a general rule if its employees go on a strike, abandoning the performance of their duties and causing delay in the transportation of goods in their charge or control, the carrier is liable in the absence of a stipulation to the contrary, the delay being due to the employees' wrongful acts.[41] If the strikers cease to be servants of

Land Co. v. Chicago, St. P., M. & O. Ry. Co., 195 Ill App. 157.

30. Pa.—Free Bros. Co. v. Baltimore & O. R. Co., 146 A. 98, 296 Pa. 441.

31. Mich.—Michigan Southern, etc., R. Co. v. McDonough, 21 Mich. 165, 4 Am.R. 466.

32. Iowa.—Canady & Hodges v. Chicago, R I & P. Ry. Co., 212 N.W 322, 203 Iowa 12.
Mass.—Radovsky v. New York, N. H. & H. R. Co., 154 N.E. 334, 258 Mass. 26.
10 C J. p 292 note 90.

Where snow and cold were unprecedented, and were such as to prevent the prompt transportation of freight, a carrier was not liable for delay, under the circumstances, in furnishing cars for shipment of live stock, or in transporting the shipment to its destination.—Louisville & N. R. Co v. Crain, 224 S.W. 1063, 189 Ky. 431.

33. Ill.—Murphy v. Illinois Cent. R. Co., 238 Ill App. 553.

Extreme cold weather, which was not an act of God, could be defense for delay in shipment of cattle—Murphy v Illinois Cent. R. Co., 238 Ill.App. 553.

34. Ohio—American Express Co. v. Smith, 33 Ohio St. 511, 31 Am R 561.
Tex—St. Louis, etc, R Co. v. Jones, Civ.App, 29 S.W. 695.

35. Tex.—St. Louis, etc., R. Co. v. Bland, Civ.App, 34 S.W. 675.

36. Ind—Cleveland, etc., R. Co. v. Heath, 53 N.E. 198, 22 Ind.App. 47.

37. N.D.—O. J. Barnes Co. v. Northern Pac. Ry. Co., 173 N.W. 943, 42 N D. 411.

Not act of God
A carrier is not exempted, under the rule excusing it from liability for damages occasioned by an act of God, where perishable goods are damaged by freezing, following an unreasonable delay in shipment at a season when it was reasonable to anticipate a freezing temperature—O. J Barnes Co. v. Northern Pac. Ry. Co., 173 N.W. 943, 42 N D. 411.

Shipper's assumption of risk construed
Where goods are shipped under tariff option, whereby shipper assumes risk of damage from heat and cold, not the direct result of the carrier's negligence, the carrier is not relieved from liability, where its delay in shipment is the proximate cause of loss or damage by freezing.—O. J. Barnes Co v. Northern Pac. Ry. Co, 173 N.W. 943, 42 N.D 411.

38. Pa.—Lang v. Pennsylvania R. Co., 26 A. 370, 154 Pa 342, 35 Am. S.R 846, 20 L.R.A. 360.

39. Pa.—Scott v. Allegheny Valley R. Co, 33 A. 712, 172 Pa 646.

40. Ark.—Jonesboro, L. C & E. R. Co. v. Maddy, 248 S.W. 911, 157 Ark. 484, 28 A.L R 498.
Iowa.—Riddle v. Chicago, B. & Q. R Co, 210 N.W. 770, 203 Iowa 1232.
Mo.—Frawley v. Atchison, T & S F. R. Co, 299 S.W. 93, 220 Mo App. 1189—Buschow Lumber Co. v Union Pac R. Co, 276 S.W 409, 220 Mo.App 743.
Tex—Panhandle & S. F Ry Co v Thompson, Civ.App, 235 S W 913, dismissed for want of jurisdiction.

41. Idaho.—Ritchie v. Oregon Short Line R Co., 244 P. 580, 42 Idaho 193, 45 A L R. 909.
Md—American Ry. Express Co. v. Peninsula Produce Exch, 121 A. 240, 142 Md. 422
Mo.—Morrison v. St. Louis-San Francisco Ry Co., App., 264 S.W 449.
10 C J. p 293 note 98

Acceptance during peaceable strike
In action for delay in delivery of

the carrier, the latter, while no longer responsible for their acts, will be liable if it fails to exercise reasonable diligence in counteracting the effects of the strike,[42] and it has been held that, after the employees have quit the carrier's employment, it is its duty promptly to supply their places, if practicable.[43]

A limitation to this general rule of liability for delay due to strikes may arise where the prospective shipper has been notified by the carrier of the existence of a strike or of an anticipated strike, as discussed supra § 199.

Still another, and an important, limitation on the carrier's liability for delay caused by strikes is that the carrier will not be liable for such delay if the strike or refusal of its employees to work is accompanied by violent interference with the carrier's business.[44] If the strikers, after having abandoned the service of the carrier, proceed by lawless violence to obstruct the movement of its trains, an entirely different situation is presented and the delay thereby occasioned is excusable[45] whether the persons guilty of the lawless violence are considered to be its own employees who have abandoned its service,[46] or are deemed to be mere rioters no longer in the carrier's employ.[47] Indeed, if by any mob violence the carrier is prevented from performing its obligation to transport goods in its charge or control, it will be excused for resulting delay;[48] thus a carrier is not liable for delay due to a riot not engaged in by its employees, which riot renders the running of trains unsafe or impossible.[49] The only duty resting on the carrier not otherwise in fault is to use reasonable efforts and due diligence to overcome obstacles thus interposed and to forward the goods to their destination,[50] but this duty is one which it is bound to observe.[51]

One jurisdiction follows what appears to be a somewhat different rule which, while recognizing the carrier's duty to exercise reasonable diligence in averting strikes and saving its patrons from strike losses and minimizing the injurious consequences of such interference, holds that the carrier is not liable if it complies with such duty and its service is delayed by persons who, by striking, have ceased to be its employees, provided the carrier informs the shipper of the situation and keeps him so informed.[52]

§ 203. Accident

Accidents, even though not inevitable or amounting to acts of God, may excuse a delay.

The shipper assumes the risk of unavoidable ac-

a carload of strawberries intended for the first market following the day of shipment, where the carrier accepted the shipment with full knowledge of the existence of a strike which had existed for more than sixty days without suggestion of violence on the part of strikers, and there was ample time to place the car on the delivery track after its arrival before an accident caused a wreck and consequent delay in delivery to the proper track terminal, it was proper to refuse an instruction that the delay in the delivery of the car was due to the strike, and that plaintiff could not recover—American Ry Express Co. v. Peninsula Produce Exch., 121 A. 240, 142 Md. 422.

42. Idaho—Ritchie v. Oregon Short Line R Co, 244 P 580, 42 Idaho 193, 45 A L R 909

43. Idaho.—Ritchie v. Oregon Short Line R Co., supra.
Tex—Panhandle & S F Ry Co. v. Thompson, Civ App, 235 S W 913, dismissed for want of jurisdiction.
10 C.J. p 293 note 99.

44. Mo—Frawley v. Atchison, T. & S. F. R Co., 299 S.W 93, 220 Mo. App. 1189.
10 C J. p 293 note 3.

45. Idaho—Ritchie v Oregon Short Line R Co 244 P. 580, 42 Idaho 193, 45 A.L R. 909.

Mo—Frawley v. Atchison, T & S F. R Co., 299 S.W 93, 220 Mo App 1139.
10 C J. p 293 note 3

46. Idaho—Ritchie v. Oregon Short Line R Co, 244 P. 580, 42 Idaho 193, 45 A L.R 909

47. N Y—Greismer v. Lake Shore & M S R Co, 7 N E. 828, 102 N.Y 563, 55 Am R. 837.

48. Ga—Haas v. Kansas City, etc, R Co, 7 S E 629, 81 Ga. 792.
10 C J. p 294 note 4

49. Ind.—Bartlett v. Pittsburgh, etc, R Co, 94 Ind. 281.

50. N Y—Carr v Long Island R Co, 169 N Y S 569, 102 Misc 672, affirmed 172 N.Y S. 883, 186 App Div 939
10 C J p 294 note 5.

Congestion due to threatened strike

Carrier receiving a carload of potatoes on the afternoon of September 1, to be transported with "reasonable dispatch," and delivering them at 7 A. M. September 5, after an intervening holiday and a congestion at its yards, due to a threatened strike, has been held not to be guilty of a breach of contract—Carr v. Long Island R Co, 169 N Y S 569, 102 Misc 672, affirmed 172 N Y.S 883, 186 App Div. 939.

51. Ill.—Indianapolis, etc., R. Co. v. Juntgen, 10 Ill.App. 295.

52. Me—Warren v Portland Terminal Co, 116 A 411, 121 Me. 157, 26 A L R 304

Due diligence exercised

Where a terminal carrier which owned and operated wharves and a connecting line of railroad, by reason of a strike of longshoremen, failed from August 27 to September 10 to discharge a cargo of coal tendered it, but had endeavored to the best of its ability to continue operation of its facilities by trying to come to terms with the strikers, and by employment of strike breakers, and by doing all in its power to procure an opportunity to discharge the vessel at some other dock, it was held that it exercised reasonable diligence, and discharged the ship in a reasonable time in view of the unusual conditions—Warren v. Portland Terminal Co, 116 A. 411, 121 Me 157, 26 A L. R 304

Reemployment of discharged workman unnecessary

It cannot be said that a terminal carrier operating wharves and a connecting line of railroad was lacking in diligence in discharging coal from a ship, in that it could, but would not, stop a strike of longshoremen by reemploying a man justifiably discharged for insolence and insubordination—Warren v. Portland Terminal Co 116 A. 411, 121 Me. 157, 26 A. L.R. 304.

cidents.[53] Furthermore, as was stated in Corpus Juris which has been quoted and cited as authority for the proposition,[54] a carrier may excuse delay in the delivery of the goods caused by accident or misfortune which is not inevitable nor produced by the act of God or the public enemy.[55] In this respect the carrier occupies the same position as do other bailees.[56] All that can be required of it in any emergency is that it shall exercise due care and diligence to guard against delay and to forward the goods to their destination.[57] This rule is, of course, limited by the general duty of the carrier to exercise reasonable diligence to transport shipments with reasonable dispatch, see supra § 191. Thus the fact that a delay is caused by an accident to the carrier's engine furnishes no excuse for delay, where there were other engines available to move the cars.[58]

§ 204. Compliance with Law

A delay made necessary by compliance with the law is generally excusable.

As a general rule a carrier not otherwise negligent is not liable for a delay which is necessary to avoid a violation of law.[59] This rule has been held inapplicable where the delay is in obedience to an unconstitutional statute which, it is said, can be regarded neither as imposing obligations nor as affording protection;[60] neither is the rule applicable to a compliance with a board of health order forbidding the entrance of the shipment at its place of destination, where the carrier had stopped the shipment before the order was issued and where such order was canceled the very day of its issue.[61]

Animal health and quarantine regulations. Where cattle are delayed by a quarantine imposed by the public authorities in the exercise of police power, such delay and the resulting injury to the cattle cannot be charged as negligence against the carrier in possession thereof.[62] A carrier cannot be held liable for damages resulting from a delay in delivery due to the mistake of a government inspector in quarantining a live stock shipment where there was no fraud or collusion on its part.[63]

A shipper of live stock in interstate commerce under a state certificate insufficient to permit the stock to be put in pens certified by federal inspectors cannot complain of the delay caused by the carrier's failure to have a federal permit, where the duty is on the shipper as well as the carrier to have such permit.[64]

Where a carrier accepts a breeding animal for shipment into a state under a veterinarian's certificate of soundness required by such state, it cannot delay the shipment of the animal because it entertains doubt as to the sufficiency of its certificate, the state authorities not having objected to its sufficiency.[65]

Maximum working hours. Compliance with a statute prohibiting the working of train crews more than a specified number of hours will not necessarily excuse a delay as reasonable, since it is presumed that a railroad carrier has more than one crew available and that one is resting while another is working.[66]

Unloading and feeding regulations. A carrier is excused from liability for a delay due to a compliance with state or federal legislation requiring carriers to unload cattle for food, water, and rest,[67] unless the cattle were held at the point where they were unloaded for an unreasonable length of time.[68] Where, however, a delay at a point where the car-

53. Ky.—Adams Express Co. v Burr Oak Jersey Farm, 206 S W 173, 182 Ky 116
Pa.—Catanzaro & Sons v. Southern Pac. Co, 90 Pa Super. 578.
10 C J p 284 note 1.

54. Idaho—Ritchie v. Oregon Short Line R. Co, 244 P. 580, 42 Idaho 193, 45 A L R 909
Ill—Mueller Grain Co v Lake Erie & W. R Co, 213 Ill.App. 108.
Ky—Leo Lococo's Sons v Louisville & N R Co., 82 S W.2d 332, 259 Ky. 299.

55. Ill.—Murphy v. Illinois Cent R Co, 238 Ill App. 553.
N Y—Meany & Saisselin v. Erie R. Co, 173 N Y S. 96.
10 C J p 290 note 65, p 294 note 7

56. Mo—Ecton v Chicago, etc., R. Co., 102 S W. 575, 123 Mo.App. 223

57. Idaho—Ritchie v Oregon Short Line R. Co, 244 P 580, 42 Idaho 193, 45 A L R 909
Ky—Leo Lococo's Sons v Louisville & N. R Co, 82 S.W 2d 332, 259 Ky 299
N.Y.—Meany & Saisselin v. Erie R Co, 173 N.Y S 96
10 C J. p 294 note 9.

58. Tex.—Kansas City, etc, R Co v. West, Civ App, 149 S W. 206

59. Ark—Payne v. Cotner, 230 S W 275, 148 Ark 401.
Iowa—Canady & Hodges v Chicago, R I & P Ry Co., 212 N.W 322, 203 Iowa 12.
10 C J. p 294 note 11.

60. Ill—Chicago, etc., R Co v. Erickson, 91 Ill. 613, 33 Am.R 70.

61. Ky.—Louisville & N R Co. v. Hensley, 35 S W 2d 279, 237 Ky. 224.

62. N Y—New York Cent & H. R R. Co. v. Weil, 119 N.Y S. 676, 65 Misc. 179.

63. Ark—Payne v. Cotner, 230 S.W 275, 148 Ark. 401.

64. Tex—International-Great Northern R. Co. v Shaw & Stumberg, Civ App, 45 S W 2d 759

65. S.D—Elliott v Chicago, M & St P Ry. Co., 161 N W. 347, 38 S.D 371.

66. Tex—Kansas City, M. & O Ry. Co. of Texas v. Cliett, Civ.App, 207 S W. 166

67. Iowa—Canady & Hodges v. Chicago, R I. & P Ry Co., 212 N.W. 322, 203 Iowa 12
10 C.J. p 294 note 13

68. Ill—Murphy v. Illinois Cent. R Co, 238 Ill App. 553
10 C.J. p 294 note 14.

rier is required by law to unload a live-stock shipment was occasioned by the negligent delay of the carrier at a previous point, the carrier is liable for damages occasioned by the delay at the point where he was required to unload.[69] The test of the necessity of a delay for unloading stock at a rest and feeding stop is said to be whether or not the carrier is at fault in believing that it would be unable to deliver the shipment at its destination within the period prescribed by law for rest stops.[70]

Clearance. It has been held that, where a carrier agreed to deliver imported goods in bond to the consignee at an internal port of entry, it was liable for losses sustained while the goods were detained in a warehouse in the original port of entry, because of the carrier's failure to prepare and file the necessary clearance papers.[71] It has also been held, however, that where a delay of a shipment into the United States is occasioned by the failure of the shipper to obtain clearance papers the carrier is not liable therefor, since it is not obliged to perform such special service unless it contracts to do so.[72]

§ 205. · Custom or Usage

A delay due to the operation of a custom long established and well known is excusable.

Where a custom as to the transportation of freight has been long established and is well known, the parties are supposed silently to adopt it as a part of the contract, unless it conflicts with its express terms, and a delay occasioned by the operation of such custom will not render the carrier liable therefor.[73]

Custom and usage generally see C.J.S. title Customs and Usages.

§ 206. · Other Excuses for Delay

Other matters or circumstances have been considered by the courts as constituting or as not constituting valid excuses for delay, such as, inter alia, delays incidental to railroading, defects and repairs, and interference by third persons.

It has been held to be no excuse that regular trains of the carrier did not connect in time to avoid delay;[74] or that the carrier knew that its connecting line could not without unreasonable delay forward the goods, it being the duty of the carrier to deliver the goods at the point at which it contracts to deliver within a reasonable time.[75] Likewise, it has been held that a carrier delaying delivery of freight cannot excuse the delay on the ground that the bills of lading were not presented, where it did not decline to deliver because of such fact;[76] that a shipper tendered a check instead of money for freight charges where it appeared that the money, if tendered, would have been refused;[77] that the consignee did not tender the freight charges, where notice was given of the arrival of the goods shipped and demand was made for such charges;[78] that a shipper of live stock refused to comply with a provision of the contract requiring the shipper to accompany and care for them.[79] A carrier cannot excuse delay by reason of an invalid embargo which it has placed on particular classes of freight.[80] It is not a defense to an action for injuries caused by unreasonable delay in transportation that the contract of shipment was void under the Interstate

69. Tex.—Lancaster v. Johnson, Civ. App., 258 S.W. 214

Shipper's request immaterial

In live stock shipper's action for damages caused by delay in shipment, it was no defense that the shipper requested that the cattle be unloaded at a certain point and that the cattle would have arrived at destination within the required time if cattle had not been unloaded at such point, where the cattle were in the hands of the railroad while unloaded and it was the railroad's duty to unload the cattle at such point under the Federal Twenty-Eight Hour Law, U.S.Comp.St. §§ 8651–8654, and Vernon's Sayles Civ.St.Annot.1914 art. 714, since more than thirty-six hours had elapsed since they were loaded, the shipper's request in such case being merely a reminder to the railroad of its statutory duty.—Lancaster v. Johnson, Tex.Civ.App., 258 S.W. 214.

70. N.H.—Wood v. Boston & M. R. R., 98 A. 480, 78 N.H. 207.

71. Iowa.—J. H. Cownie Glove Co. v. Merchants' Dispatch Transp. Co., 106 N.W. 749, 130 Iowa 327, 114 Am.S.R. 419, 4 L.R.A.,N.S., 1060.

72. Minn.—McNeill & Scott Co. v. Great Northern R. Co., 194 N.W. 614, 156 Minn. 120.

Carrier need not pay duty

Damages caused by delay in the shipment of freight from Canada into this state at the international boundary because of failure to obtain an immediate transportation entry, permitting it to proceed before valuation and payment of duty, the customs bureau to which the freight was consigned for customs purposes only, declining to make entry before payment and guaranty of charges, of which the shipper was given timely notice by the carriers, cannot be recovered of the carrier, it not being the carrier's duty to contest or to pay customs duties.—Van Dusen-Harrington Co. v. Canadian Pac. Ry. Co., 191 N.W. 411, 154 Minn. 134.

73. Wis.—Stephens v. Chicago & N. W. Ry. Co., 227 N.W. 875, 200 Wis. 181.

74. Tex.—Gulf, etc., R. Co. v. Porter, 61 S.W. 343, 25 Tex.Civ.App. 491.

75. Ill.—Toledo, etc., R. Co. v. Lockhart, 71 Ill. 627.

76. Mo.—W. R. Hall Grain Co. v. Louisville, etc., R. Co., 128 S.W. 42, 148 Mo.App. 308.

77. Mo.—Cunningham v. Wabash R. Co., 149 S.W. 1151, 167 Mo.App. 273.

78. Ga.—Georgia, etc., R. Co. v. Elliott, 60 S.E. 363, 3 Ga.App. 373.

79. Mo.—Spalding v. Chicago, etc., R. Co., 73 S.W. 274, 101 Mo.App. 225.

80. Wis.—Berger-Crittenden Co. v. Chicago, etc., R. Co., 150 N.W. 496, 159 Wis. 256.

Commerce Act as discriminating in favor of the shipper by giving him too low a rate, although there can be no recovery on the contract.[81]

Incidental delays in general. The fact that a carrier takes a reasonable time to perform the ordinary and incidental acts required for efficient and safe railroading will not render it liable, as for unreasonable delay, for the time consumed thereby; the shipper is considered to have contemplated such incidental delays when he entered into the contract of carriage.[82] Nevertheless, such usual incidents to railroading as allowing trains to pass, taking water and fuel, waiting for signals, inspecting the train, waiting for locomotive, lunch for train crew, cutting out helper, loading for other shippers, and the like, are not valid excuses for failing to maintain schedule, as they must be taken into account by the carrier when fixing his schedule.[83]

Defects and repairs. Ordinarily, results attributed to a defective roadbed and equipment afford no excuse for the nonperformance of the duty to deliver a shipment at destination within a reasonable time.[84] While the fact that a defect occurred and was diligently repaired or the defective part replaced within a reasonable time may excuse the carrier from liability for loss due to the delay,[85] nevertheless this fact does not conclusively establish that there was no negligence or that the occurrence was unavoidable, since it is the carrier's duty to maintain its equipment in good order; the carrier should show that the defect which occurred was not known, and that by the exercise of ordinary care in the inspection of its equipment and by prudent operation and management, such defect, be it patent or latent, could not have been discovered and the incidental delay avoided.[86] Usual or ordinary defects or repairs such as hot boxes, removal of brake shoes, or the like, have been held not to be excuses for delay or failure to maintain schedule, since the schedule fixed must necessarily take into account a certain amount of delay due to such causes, and these incidents will not be considered to be unavoidable accidents excusing a delay in the absence of unusual conditions not preventable by

81. Ill.—Kirby v. Chicago, etc., R. Co., 90 N.E. 252, 242 Ill. 418, reversed on other grounds 32 S.Ct. 648, 225 U.S. 155, 56 L.Ed. 1033, Ann.Cas.1914A 501.

82. Ky.—Chesapeake & O. R Co. v Coleman Fruit Co., 294 S W. 463, 219 Ky. 794—Adams Express Co v. Burr Oak Jersey Farm, 206 S.W. 173, 182 Ky. 116.
Pa.—Catanzaro & Sons v. Southern Pac. Co., 90 Pa Super. 578.
Tex.—International & G. N. Ry. Co. v. Landa & Storey, Civ.App., 183 S.W. 384.
10 C.J. p 284 note 2.

Necessary connections
Carrier scheduling freight trains reasonably is not liable for delay caused by necessary connections in reaching destination—Chesapeake & O. R. Co. v. Coleman Fruit Co., 294 S.W. 463, 219 Ky. 794.

Switching
The stopping of a freight train to switch out cars of perishable freight is not a delay of which a shipper can complain.—St. Louis Merchants Bridge Terminal R. Co. v. Tassey, 122 Ill.App. 339.

Ordinary conduct of business
In action against defendant express company for delay of shipment of cattle, it was held that, under the particular circumstances, the "ordinary conduct of the carrier's business," the incidental delays of which the shipper is considered to have contemplated, was to transport the shipment by a fast passenger train to a point where some connecting carrier would take it with one of its trains which stopped at the point of destination—Adams Express Co. v. Burr Oak Jersey Farm, 206 S.W. 173, 182 Ky. 116.

83. Wyo.—Davis v. Graham, 225 P. 789, 31 Wyo. 239.

Picking up cars
Delays caused by setting out and picking up cars were not due to accidental causes.—Collins v. Texas & P. Ry. Co., 123 So. 504, 11 La.App. 445.

Under speed statute
Under Gen St 1915 §§ 8522, 8523, providing a minimum average of fifteen miles per hour for live stock trains, delays from the following causes are not excusable: Allowing trains to pass; track blocked by trains waiting for block; taking water and coal; inspecting train; lunch for train crew; waiting for engine; cutting out helper; hot box; sparks from brake shoe; and loading stock for other shippers.—Anderson v. Hines, 203 P. 726, 110 Kan. 250.

84. Ill.—See Marsh L. Brown & Co. v. Chicago, New York & Boston Refrigerator Co., 207 Ill.App. 89.
10 C.J. p 295 note 34.

Corpus Juris was cited with approval in Leo Lococo's Sons v. Louisville & N. R. Co., 82 S.W.2d 332, 259 Ky. 299.

Bad engine
For a carrier to send a train, carrying a shipment, out with a bad engine which should have been repaired before it was sent out is negligence.—Collins v. Texas & P. Ry. Co., 123 So. 504, 11 La.App. 445.

Bad road and bridges
A carrier not shown to be insolvent is liable to a shipper for damages resulting from a drop in prices of forest products tendered and awaiting shipment because of delay in transportation owing to the fact that the road and bridges were being repaired, where the repairs were unnecessarily delayed owing to a lack of money, which the carrier could have procured if it had used due diligence.—Bell Lumber Co v. Bayfield Transfer Ry. Co., 172 N.W. 955, 169 Wis. 357.

85. Tex.—Ft. Worth & D. C. Ry. Co. v. Gatewood, 135 S.W. 932, affirmed Gatewood v. Ft. Worth & D. C. Ry. Co., 232 S.W. 493, 111 Tex. 291.

Replacing wheels
Where a pair of wheels on a car carrying poultry were worn through the chill or tread, due to continuous wear, and not unfair handling, the carrier was not negligent, nor was there unreasonable delay, where the car was taken from the train, new wheels put on, and the car forwarded on the next fast freight, total loss of time being two hours and forty-two minutes.—Fleck & Hillman v. Delaware, L. & W. R. Co., 172 N.Y.S. 129.

86. Ky.—Leo Lococo's Sons v. Louisville & N. R. Co., 82 S.W.2d 332, 259 Ky. 299.

the exercise of due care,[87] nevertheless, it has also been held that the development of a hot box may excuse a particular delay if the carrier exercises diligence in caring for it when it does occur.[88]

Facilities for repairs. As regards the question of diligence in delivering a shipment of freight, a railroad carrier is not required to have facilities for repairs to cars, in which the shipment is being transported, all along its line or to keep its shops operating during the nighttime for car repairs.[89]

Interference by third persons. Ordinarily, a carrier is not excused for delay in transporting goods resulting from its compliance with stopping instructions given by a stranger to the bill of lading, who is not the owner of the goods or the agent of the shipper or consignee.[90] Where, however, property is in the hands of a common carrier, and possession thereof is demanded by a stranger to the bill of lading, prior to actual shipment and under a claim of ownership, the carrier, having reasonable doubt as to which party is entitled to possession and acting in good faith, may have a reasonable time within which to investigate the claims of the respective parties, and for this purpose may delay immediate shipment.[91]

Military control of railroad. If a railroad is under military control, the company will not be liable for delay due to such interference,[92] provided, of course, there is some interference.[93] If, however, the probability of delay on such account was known to the company at the time when the goods were received for transportation, it cannot rely on such defense;[94] it should in such case abdicate its functions as a common carrier and refuse to receive goods for transportation.[95]

§ 207. Special Contract as Affecting Excuse for Delay

A carrier specially contracting to deliver a shipment at a fixed time is liable for failing to do so, irrespective of the cause of its failure.

Where the carrier specifically agrees to deliver by a fixed time, it is bound to answer in damages for failure so to do, without regard to the cause of the delay; the general rule of the law of contracts, that the person undertaking to perform must do so at his peril, is applicable; and unavoidable accident, unexpected rush of business, or the like, will not furnish an excuse.[96] It has even been held that the liability of the carrier under such a contract will not be affected by a subsequent stipulation that, if the goods are not delivered within such time, a certain deduction shall be made from the freight charges.[97] Some holdings seem to excuse the carrier from literal performance when unforeseen circumstances, such as the law recognizes, are sufficient to occasion slight delays,[98] but other decisions require the carrier to fulfill its obligation notwithstanding any accident or delay by inevitable necessity, since it might have provided against such contingencies by contract.[99]

Implied contract for fast service. Where a common carrier holds itself out as willing to accept perishables for fast shipment to a certain point, it has the duty to perform as it held out to do, and it is no defense to an action for delay of such goods that they were shipped under an ordinary bill of lading not providing for special service.[1]

Failure to crate goods. Where defendant storage company contracts to pack and ship goods on a certain day, and after deciding what articles require crating also held other articles for that purpose, thereby delaying the shipment which is de-

87. Kan.—Anderson v. Hines, 203 P 726, 110 Kan 250.
Wyo.—Davis v. Graham, 225 P. 789, 31 Wyo. 239

88. Minn.—National Elevator Co. v. Great Northern Ry. Co., 170 N.W. 515, 141 Minn. 407.

89. Ky.—Leo Lococo's Sons v. Louisville & N. R. Co., 82 S.W.2d 332, 259 Ky 299.

90. Ky.—Louisville & N. R. Co v Hensley, 35 S.W.2d 279, 237 Ky. 224

Flood not affecting transportation
Where car of melons proceeding in fair time was stopped on order of third person before reaching destination, it was no defense to carrier that delay resulted from flood, where the only effect of the flood on the shipment was, perhaps, to alarm the third person and cause him to have it stopped.—Louisville & N. R. Co. v Hensley, 35 S.W.2d 279, 237 Ky. 224.

91. Minn.—Merz v. Chicago, etc., R. Co., 90 N.W. 7, 86 Minn 33.
What is a reasonable time for investigation by a carrier, to determine the ownership of goods claimed by two parties, is ordinarily a question for the jury.—Merz v Chicago, etc., R. Co., 90 N.W. 7, 86 Minn 33

92. Ill.—Illinois Cent R. Co. v. Ashmead, 58 Ill 487.

93. **If there is no interference** by the military authorities, the fact that they have assumed control of it will not excuse the carrier for delay.—Illinois Cent. R. Co v McClellan, 54 Ill 58, 5 Am.R 83.

94. Ill.—Illinois Cent. R. Co. v. Cobb, 64 Ill. 128.—Bacon v. Cobb, 45 Ill. 47.—Illinois Cent R. Co. v. Schwartz, 13 Ill.App 490

95. Mo.—Pruitt v. Hannibal, etc., R. Co., 62 Mo 527.

96. Mich.—Puffer v. American Ry. Express Co., 191 N.W. 27, 221 Mich. 426
Wash.—John Vittucci Co. v. Canadian Pac Ry Co., 174 P. 981, 102 Wash. 686.
10 C.J. p 296 note 42.

97. N.Y.—Harmony v. Bingham, 8 N.Y.Super. 209, affirmed 12 N.Y. 99.

98. Mo.—Pruitt v. Hannibal, etc., R. Co., 62 Mo 527.

99. Mich.—Puffer v. American Ry. Express Co., 191 N.W. 27, 221 Mich. 426

1. Pa.—Free Bros Co v Baltimore & O. R. Co., 146 A. 98, 296 Pa 441.

stroyed by fire in its warehouse, it cannot excuse its failure to ship the goods at the time agreed on, on the ground that plaintiff should have crated the articles.[2]

§ 208. Waiver of Right of Action Arising Out of Delay

A shipper may waive expressly or impliedly the carrier's liability to him for delay.

Generally speaking the shipper may, by express contract, waive the carrier's liability for loss resulting from delay or detention.[3] For a valuable consideration, the shipper may by the contract of shipment release the carrier from damages for its prior negligent delay in providing cars or in loading the shipment.[4] After the goods have been accepted and loaded for shipment, a contract releasing the carrier from liability for delay in forwarding the shipment after it was loaded is void, in the absence of consideration.[5]

Mere acceptance of the goods from the carrier on their arrival will not constitute a waiver of a claim for damages due to delay.[6] A shipper waives his right of action for delay, however, when he insists on a shipment of his goods after being informed of the fact that a delay is probable owing to conditions making a delay likely.[7] Similarly, where traffic over the direct line is impossible due to flood, and a shipper of cattle directs that they be sent by a circuitous and longer route, he cannot complain that the transportation takes more time, or that there is more shrinkage in the shipment on delivery than if they had been sent by the shorter route.[8] A shipper does not waive the right to damages for delay in furnishing a stock car after notice by a provision of a subsequent contract, to the effect that all prior contracts and understandings as to the receipt or transportation of stock or the furnishing of cars are waived by the shipper and merged in the agreement, the right to damages for the delay being based on the carrier's violation of its common-law duty, and not on its breach of contract.[9] An undertaking by the shipper to care for a perishable shipment and keep it in good condition while in transit does not absolve the carrier of its duty to exercise reasonable diligence to avoid delay.[10]

Release. A carrier which contracts to ship perishables to a certain place within a given time but fails even to transport them at all, and insists that the shipper take them back, is not released by reason of the fact that the shipper disposes of them elsewhere to minimize the damages.[11]

§ 209. Actions for Delay

In the following sections are discussed matters relating to right of action, venue, conditions precedent, parties, pleading, evidence, and trial of actions against carriers for damages for delay in transportation.

Actions for loss or injury to property generally see infra §§ 244–274.

§ 210. Right of Action and Defenses

A shipper's cause of action for the carrier's negligent failure to transport within a reasonable time may be in contract or in tort.

When a common carrier has accepted a shipment for transportation and negligently failed to transport it to its destination within a reasonable time, the aggrieved party may bring an action for the breach of a contract of carriage, or he may bring an action for the negligent breach of the duty imposed by law on the carrier.[12] It has been held

2. Cal.—Beall v. Bekins Van & Storage Co., 166 P. 370, 33 Cal.App. 652

3. Tex.—Gulf, etc., R. Co. v. Gatewood, 14 S.W. 913, 79 Tex. 89, 10 L.R.A. 419
10 C.J. p. 296 note 48.

4. Mo.—Holland v. Chicago, etc., R. Co., 123 S.W. 987, 139 Mo.App. 702

5. Tex.—Texas, etc., R. Co. v. Moore, Civ.App., 119 S.W. 697.
10 C.J. p. 296 note 49

6. Va.—Norfolk, etc., R. Co. v. Shipper's Compress Co., 2 S.E. 139, 83 Va. 272
10 C.J. p. 296 note 46.

7. Ill.—Coyne v. Oregon Short Line R. Co., 244 Ill.App. 359.
Mo.—Stewart v. Chicago, B. & Q. R. Co., App., 222 S.W. 1029.
Pa.—Free Bros. Co. v. Baltimore & O. R. Co., 146 A. 98, 296 Pa. 441
10 C.J. p. 296 note 47

8. La.—Neely v. Texas & P. Ry. Co., 82 So. 745, 147 La. 671.

9. Mo.—Howell v. Hines, App., 236 S.W. 886

10. Vt.—Saliba v. New York Cent. R. Co., 144 A. 194, 101 Vt. 427.

11. Mich.—Puffer v. American Ry. Express Co., 191 N.W. 27, 221 Mich. 426.

No release

Where express company entered into a special contract with shipper for delivery of strawberries to a certain point within a specified period, but thereafter insisted that the shipper take the berries and give up the receipt or bill of lading, and finally succeeded in inducing the shipper's wife to sign her husband's name to an order to hold the berries, the language of which was dictated by the express company's agent, the shipper by subsequently seeking to dispose of the berries in order to minimize his damages did not release the express company, the company having violated the contract prior to such efforts.—Puffer v. American Ry. Express Co., 191 N.W. 27, 221 Mich. 426

12. Ala.—White v. Louisville & N. R. Co., 79 So. 508, 16 Ala.App. 515.
N.C.—Winstead v. East Carolina Ry., 118 S.E. 887, 186 N.C. 58.

Title in shipper

In action by shippers for delay in delivery of cotton sold to a cotton buyer conditioned on delivery within forty-eight hours, title not having passed, the action for damages was

that in an action against an express company for negligent delay the liability in contract and the liability in tort is in general the same.[13] It has also been held that a statute providing that all claims or demands arising from unreasonable delay in transportation may be submitted to the public service commission, does not set up an exclusive remedy, but one that is cumulative only.[14] The Carmack amendment does not take away the right of a shipper to maintain an action on the carrier's common-law liability for negligent delay in shipping live stock, even though it be an interstate shipment.[15]

Right of action for loss or injury generally see infra § 245.

Defenses. Matters of defense to an action for damages for negligent or unreasonable delay are considered in those sections dealing with excuses for delay, supra §§ 197–207. Clearly, a showing that there had been no unreasonable delay is a good defense to an action against a carrier for a breach of his common-law duty to deliver within a reasonable time.[16]

Defenses in actions for loss or injury generally see infra § 245.

§ 211. · Jurisdiction and Venue

Venue in cases of this kind is regulated by statute.

The venue in actions of this character is a matter of statutory regulation, see C.J.S. title Venue. It has been held that, where an action against a carrier was properly brought in the county of plaintiff's residence, the fact that plaintiff joined therewith a cause for the statutory penalty for the same delay which did not arise in that county does not require a change of venue.[17] In a suit ex delicto for failure to deliver in a reasonable time, the tort is presumed to have occurred at the point of destination insofar as venue is concerned.[18]

Jurisdiction and venue in actions for loss or injury generally see infra § 246.

§ 212. · Time to Sue and Limitations

See generally title Limitations of Actions. Examine Pocket Parts for later cases.

§ 213. · Conditions Precedent

Payment of freight and other charges is not a condition precedent to the action.

The prepayment of freight is not essential to an action for damages for delay[19] unless required by the carrier.[20] Similarly, plaintiff's refusal on the arrival of the goods, to pay the freight, war tax, and demurrage charges, which prevents him from being entitled to immediate possession of the goods, does not preclude him from maintaining an action for damages for delay.[21]

Conditions precedent to actions for loss or injury generally see infra § 247. Notice of claim for damages see infra § 233 et seq.

§ 214. · Parties

The real party in interest, usually the owner, is the proper party plaintiff.

Where goods are intrusted to a carrier for transportation and delivery, the carrier thereby has notice of the interest of both the consignor and the consignee; and, if either suffers an injury through the negligent delay in the transportation or delivery of the goods, the person so suffering such injury may bring an action against the carrier to obtain redress for such injury.[22] The owner of

in shippers, and not in buyer.—St. Louis Southwestern Ry. Co of Texas v. York, Tex.Civ.App., 252 S.W. 890.

13. N.Y.—Lays Bros. & Boss v. American Ry Express Co., 239 N.Y.S. 478, 228 App.Div. 746.

14. Ohio—Wright v. Erie R Co, 14 Ohio App. 217.

15. Okl—St. Louis & S F. R Co. v. Ladd, 178 P. 125, 72 Okl. 55.

16. Wash—John Vittucci Co v. Canadian Pac. Ry. Co, 174 P. 981, 102 Wash. 686.

17. N.C.—McCullen v. Seaboard Air Line R. Co., 60 S.E. 506, 146 N.C. 568

18. Ga.—Wright v. Southern Ry. Co., 67 S.E. 272, 7 Ga.App. 542.

19. Tex—Dorrance v. International, etc., R. Co., Civ.App., 126 S.W. 694 10 C.J. p 297 note 56.

20. Ill—Galena, etc, R. Co. v. Rae, 18 Ill. 488, 68 Am.D. 574.

21. N.C—W. J. Bradshaw & Co. v. Boston & M R. R, 111 S.E 515, 183 N C 264

22. Fla—Florida East Coast Ry. Co. v. Peters, 73 So. 151, 72 Fla 311, Ann.Cas.1918D 121.

Absolute ownership unnecessary

"In order to maintain an action against a carrier for the recovery of damages occasioned by negligence in the transportation or delivery of goods, either ex contractu or ex delicto, the plaintiff need not be the absolute owner of the goods. If the plaintiff has a special interest therein and his legal rights have been invaded, that would entitle him to maintain the action."—Florida East Coast Ry. Co. v Peters, 73 So. 151, 72 Fla 311, Ann Cas 1918D 121

Consignee

(1) "Where the consignee has suffered special damages from the negligent delay in the transportation or delivery of goods by a carrier, the consignee is the proper party plaintiff in an action ex delicto, being 'the real party in interest' within the intent and meaning of section 1365 of the General Statutes of 1906, providing that 'any civil action at law may be maintained in the name of the real party in interest.' "—Florida East Coast Ry. Co. v. Peters, 73 So. 151, 152, 72 Fla. 311, Ann Cas.1918D 121.

(2) It has also been held that, notwithstanding title may have been

goods may maintain an action for delay in transporting them, although the shipment was made in the name of another person.[23] Where the consignor makes a contract of shipment with the carrier, it has been held that he may maintain an action thereon for damages due to delay in transportation, irrespective of the question of ownership,[24] and that a consignee cannot sue the carrier for loss caused by delay where the consignor made the contract of carriage, unless the bill of lading has been assigned or indorsed to him by the consignor.[25]

Under the Carmack amendment to the Interstate Commerce Act, an action against a carrier for negligent delay in an interstate shipment must be brought by the lawful holder of the bill of lading,[26] which may be the shipper, irrespective of the ownership of the goods.[27] Where the bill of lading has been surrendered to the carrier so that the owner might obtain possession of the goods,[28] or so that he might receive free transportation home from the destination of the shipment,[29] the provision of the Carmack amendment making the carrier liable to the lawful holder of the bill of lading does not prevent the owner from maintaining an action for the carrier's negligent delay.

The consignor may maintain an action without alleging ownership, especially where the declaration shows that the consignee was to sell the goods for him,[30] where it is doubtful whether the sale was complete and title passed on delivery of the goods to the carrier,[31] or where he sells goods to be delivered at a place and contracts with a carrier to transport them to the place of delivery.[32] Where the consignor and the consignee are the same, the presumption is that the ownership continued in the consignor and he may maintain an action for delay in delivery;[33] and where a shipment of this character is made, the buyer does not necessarily receive such a beneficial interest in the goods during transportation as to give him a right to sue the carrier for delay in transportation;[34] but a consignee of goods in whom title is vested, but who is not entitled to delivery of the goods by the carrier until payment of the price, may maintain an action for damages caused by delay in transportation.[35] An assignment by a consignor of a claim for damages for delay in the delivery of goods vests

retained by the consignor, the consignee of goods may sue the carrier for losses caused by delay in their transmission, although he refuses to accept them because not sooner delivered.—Clute v Chicago, etc., R. Co, 111 P. 431, 83 Kan. 333, 30 L.R.A.,N.S., 1071.

23. Mo.—Summers v. Wabash R. Co., 79 S.W. 481, 114 Mo.App. 452.
Tex.—Quanah, A. & P. Ry. Co. v. Bone, Civ.App., 199 S.W. 332.
10 C.J. p 297 note 59.

24. N.Y.—Porter v. Pennsylvania R. Co., 215 N.Y.S. 727, 217 App.Div. 49.
Va.—Norfolk Southern R. Co. v. Norfolk Truckers' Exchange, 88 S.E. 318, 118 Va. 650.
W.Va.—L. Blustein & Co. v. American Ry. Express Co., 123 S.E. 566, 95 W.Va. 643.

F. o. b. sale

The fact that plaintiff, before making a shipment of fruit by defendant express company, had sold the same to the consignees f. o. b. place of shipment, did not defeat its right to maintain an action for damages for negligent delay in transportation, causing damage to the fruit, where because of such damage the consignees refused to accept it, plaintiff released them from their contracts, and the fruit was sold for its account.—American Ry. Express Co. v. Island & Gypsum Fruit Co., C.C.A.Ohio, 300 F. 311.

Fruit brokers who shipped fruit could sue carrier in their names for damages resulting to them as brokers, or to principals, from negligent delay in delivering shipment, and the carrier could not on its own motion assert rights of owners of shipment to avoid plaintiffs' recovery.—Terry v. Pennsylvania R. Co., 156 A. 787, 5 W.W.Harr.Del. 1.

Shipment on consignment

One who ships goods on consignment is the party in interest, and may sue for damages for negligent delay in delivery.—Phillips v. Seaboard Air Line Ry., 89 S.E. 1057, 172 N.C. 86.

25. Ga.—Haas v. Kansas City, Ft. S. & G. R. Co., 7 S.E. 629, 81 Ga. 792.

Taking up bill of lading

Where seller shipped goods to buyer, order notify, with draft and bill of lading attached, under an agreement entitling buyers to pay the drafts, take up the bills of lading, sell the cotton, receive their commissions, and appropriate the balance, the buyers acquired title when they paid the drafts and took up the bills of lading, and could sue the carrier for negligent delay occurring in transportation thereafter.—Middleton & Co. v. Atlantic Coast Line R. Co., 110 S.E. 796, 118 S.C. 351

26. Ill.—American Fruit Growers v. San Antonio & A. P. Ry. Co., 239 Ill.App. 151
Ind.—Bruner v. Chicago & E. I. Ry. Co., 161 N.E. 630, 87 Ind.App. 374.

27. Cal.—Foley v. American Ry. Express Co., 232 P. 169, 69 Cal.App. 669.

28. Ill.—Beatrice Creamery Co. v. Missouri Pac. R. Co., 247 Ill.App. 325.

29. Va.—Norfolk Southern R. Co. v. Norfolk Truckers' Exchange, 88 S.E. 318, 118 Va. 650.

30. Fla.—Aultman v. Atlantic Coast Line R. Co., 71 So. 283, 71 Fla. 276.

31. Ark.—U. S. Express Co. v. Rea, 181 S.W. 888, 121 Ark. 284

32. Kan.—Atchison, etc., R. Co. v. Consolidated Cattle Co., 52 P. 71, 59 Kan. 111.

33. Tex.—Texas Cent. R. Co. v. Hannay-Frerichs, Civ.App., 142 S.W. 1163.

34. Tex.—Houston & T. C. R. Co. v. Robinson, Civ.App., 131 S.W. 444, reversed on other grounds Robinson v. Houston & T. C. R. Co., 146 S.W. 537, 105 Tex. 185

Order notify bill of lading

Right of action for delay in transporting goods consigned by bill of lading to shipper's order "Notify M." who did not pay draft drawn on him nor receive bill of lading to which attached until arrival, is not in him, but in consignee.—F. W. McNeely & Co. v. Lake Shore & M. S. Ry. Co., 115 N.E. 954, 64 Ind.App. 363.

35. Tex.—Robinson v. Houston & T. C. R. Co., 146 S.W. 537, reversing on other grounds Houston & T. C. R. Co. v. Robinson, Civ.App., 131 S.W. 444.

the right to sue for such damages in the assignee.[36] Where a contract of shipment is made by a manufacturer for the buyer's benefit on filling an order, the consignee, being the real party in interest, may recover thereon for a delay in shipment.[37]

The agent of the owner, who has made a contract of shipment, may sue for delay in delivery.[38] Where property has been consigned by the general owner to an agent who has a special interest therein, and the goods are negligently delayed in transit, and converted by the carrier, so that sales thereof previously made by the consignee are canceled, such consignee may maintain an action in his own name against the carrier for the recovery of damages on account of lost commissions and for the value of the property converted.[39]

Parties in actions for loss or injury generally see infra §§ 249, 250.

§ 215. Pleading

a. Complaint, declaration, or petition
b. Plea or answer
c. Other pleadings
d. Issues, proof, and variance

a. Complaint, Declaration, or Petition

Plaintiff's initial pleading must set out facts sufficient to make out a good cause of action for delay in transportation.

The complaint, declaration, or petition in an action for damages for delay in transportation must, in proper form, state facts sufficient to establish a good cause of action and to justify a recovery.[40] The pleading must so apprise defendant of the nature of the demand against it as will enable it to prepare its defenses.[41] It is not essential to allege a special contract, in order to render the carrier liable for an unreasonable delay in shipment.[42] it is sufficient for the complaint to show that the goods were received by the carrier for shipment.[43] Generally the consideration for the assumption of obligation by the carrier need not be alleged.[44] Furthermore, it is not essential that the complaint should allege that the freight charges were paid in advance,[45] or that an offer was made to pay such charges in advance.[46] Where, however, a special contract is relied on, the complaint should disclose its terms and character.[47]

Pleading in actions for loss or injury generally see infra §§ 251–253.

Time for transportation and delay. A complaint, in an action for damages for delay in transportation, should allege the carrier's duty to carry within a reasonable time,[48] and should plead the reasonable time for transportation of the shipment between the initial and terminal points of the carriage.[49] While

36. Tex.—Texas Cent. R. Co v Hannay-Frerichs, 142 S.W. 1163, 104 Tex 603.

37. Ky.—Illinois Cent. R. Co v Hopkinsville Canning Co, 116 S.W. 758, 132 Ky. 578

38. Tex.—Pecos, etc, R. Co. v. Cox, Civ.App., 150 S.W. 265.

39. Kan.—Missouri Pac. R. Co. v. Peru-Van Zandt Impl. Co., 85 P. 408, 87 P. 80, 73 Kan 295, 117 Am S.R. 468, 6 L.R.A.,N.S, 1058, 9 Ann.Cas. 790.

40. Tex.—Wichita Valley Ry. Co. v. Wallace, Civ App, 17 S.W 2d 150. 10 C.J. p 297 note 71.

Pleading held to state good cause of action

Ala.—Atlantic Coast Line R Co. v. J. W. Maddox & Co., 98 So. 276, 210 Ala. 444.

Ga.—Southern Ry. Co v. Bloch, 90 S.E. 656, 18 Ga.App. 767.

Ind.—Illinois Cent. R. Co. v. Mattingly, 119 N.E. 498, 69 Ind.App. 166.

Mo.—Security Stove & Mfg. Co. v. American Ry. Express Co., 51 S.W. 2d 572, 227 Mo.App. 175.

Tex.—Wichita Valley Ry. Co. v. Wallace, Civ.App., 17 S.W 2d 150.

Pleading legal effect sufficient

In action for damages by carrier's failure to transport merry-go-round in time agreed, petition pleading legal effect of acts of defendant's agents at points of shipment and destination and division freight agent, who made contract through such local agents, was held sufficient, although not directly alleging that contract was made by agent at point of shipment.—Gray v. Wabash Ry. Co., 277 S.W. 64, 220 Mo.App. 773

Pleadings held insufficient to state cause of action

S.D.—Armstrong v. Chicago, M. & St. P. Ry. Co., 152 N.W. 696, 35 S.D. 398.

Venue

A petition against a carrier, alleging that on a certain date defendant undertook to transport from L. in B. county, Georgia, to Atlanta, a carload of melons within a reasonable time, but failed to do so, sufficiently shows that the contract was entered into in B. county, where the suit was brought, and was, therefore, good as against a demurrer raising the question of venue.—Macon & B. Ry. Co. v. Walton, 56 S.E. 419, 127 Ga. 294.

41. Tex.—Missouri, etc, R. Co. v. Sproles, Civ App, 92 S.W. 40.—Townsend v. Texas, etc, R. Co., 88 S.W. 302, 40 Tex Civ App. 71.

42. Ark.—St. Louis, etc, R. Co v. Wilson, 107 S.W. 978, 85 Ark. 257. 10 C.J. p 297 note 73.

43. Mo.—Russell Grain Co v. Wabash R. Co, 89 S.W. 908, 114 Mo App 488.

10 C.J. p 297 note 74.

44. Mo.—Davis v. Jacksonville Southeastern Line, 28 S.W. 965, 126 Mo 69

N.H.—Hall v. Cheney, 36 N.H. 26.

45. Tex.—Dorrance v. International, etc, R. Co, Civ App., 126 S.W. 694

46. Ky.—Evans v. Mobile, etc., R. Co, 90 S.W. 588, 28 Ky.L. 834

47. Ga.—Harrell v Southern R. Co, 81 S.E. 384, 14 Ga.App 451.

No illegal contract alleged

Where, in a suit against a railroad for damages for delay of a shipment of cattle, plaintiff alleged that they were not shipped on a train on which the carrier's agent represented that they would be shipped, such averment did not allege a contract stipulating the particular time of shipment, train, and market, which would be in violation of law as being discriminatory.—Panhandle & S. F. Ry. Co. v. Andrews, Tex.Civ.App, 278 S.W. 478.

48. Tex.—Panhandle & S. F. Ry. Co. v. Liske Grain Co., Civ App, 13 S.W 2d 144.

10 C.J. p 297 note 75.

49. Iowa.—Wallace-Farmer v. Davis, 199 N.W. 307.

the complaint must show that there was an unreasonable delay in the transportation of the goods, a general allegation that by reason of defendant's negligence the goods were unreasonably delayed, without setting out the evidential facts, will be sufficient,[50] at least as against a general demurrer.[51] It has been held to be sufficient to allege facts showing an unreasonable time consumed in transit along with a general allegation that it was a negligent delay.[52] If, in addition to unreasonable delay in transportation, the complaint alleges failure to furnish cars within the time agreed, it should show what part of the delay was occasioned by the failure to furnish cars and what part occurred en route.[53]

Negativing defenses. Where the complaint charges an unreasonable delay, it is not necessary that it should go further and negative facts which would justify the delay, the same being matters of defense.[54]

Injury and damages. The complaint should show in what manner the injuries were sustained by the delay.[55] Damages which may be assumed to result necessarily from the unreasonable delay need not be specially alleged.[56] A petition not alleging the market value at the destination when delivery should be made, and when delivery was made, by some measure, as by the pound, but merely alleging that the market value of the shipment was less by a named sum, when sold, than it would have been but for the delay, is insufficient as against a special exception.[57] It has been held that a petition alleging a delay in the failure of a live stock shipment to arrive at its destination when it should have done so, requiring the shipper to hold it for a later market, is insufficient as against a special exception in failing to allege why the shipment was not sold on the market next after delivery, if in fact it was held over.[58] In order to entitle the shipper to special damages, that is, such damages as are not the ordinary consequence of the delay complained of, or which were not of a character to be reasonably anticipated by the parties at the time of the contract of shipment, it is essential that such damages be stated,[59] and also the facts which would make them legally recoverable.[60] It is in all cases necessary to plead notice to the carrier, at or before making the contract of shipment, of the special conditions rendering the special damages claimed the natural and probable result of the breach, under circumstances showing that the contract was to some extent based on such conditions.[61]

50. Miss—Alabama, etc, R. Co. v. Pounder, 35 So 155, 82 Miss. 568
10 C J. p 298 note 80.

Count not indefinite or uncertain

Count against carrier for damage to a shipment of mules from delay in transit, alleging that delivery was not made for more than twenty-four hours, although by the exercise of reasonable diligence it could have been delivered in twelve hours, and at the terminal point another four-law delay occurred before the shipment could be unloaded, was held not demurrable as indefinite and uncertain in failing to allege what acts are relied on to show negligence—Louisville & N. R. Co v. Kinney, 127 So 802, 221 Ala. 48.

51. Cal.—Palmer v Atchison, etc, R Co, 35 P. 630, 101 Cal. 187.

Special exception sustained

A petition alleging that a shipment of live stock should have arrived at a certain time but failed to do so, requiring the shipper to hold it over for a later market, is insufficient, as against a special exception, if it fails to allege when the shipment did in fact arrive.—International & G N R Co v. Landa & Storey, Tex Civ App, 183 S W. 384.

52. Mo—Baker v Bush, App, 194 S W. 1061

53. Wis—Ayres v. Chicago, etc, R. Co, 17 N W. 400, 58 Wis. 537.

54. Neb—Denman v. Chicago, etc, R. Co, 71 N.W 967, 52 Neb. 140

Nonexistence, modification, or merger of contract

Where the complaint, in an action for wrongful delay, bases the right of recovery on defendant's breach of a contract to transport the goods on a certain train, the fact that such contract was not made, or was subsequently modified or merged into another contract, was defensive matter, the absence of which from the complaint did not render it demurrable—Louisville, etc, R Co v. Jones, 60 So. 945, 6 Ala.App. 617.

55. Tex.—Chicago, R I. & G. Ry Co v. Manby, Civ App, 207 S.W. 157.
10 C J. p 298 note 85.

Allegations held sufficient

In action for delay in shipment of live stock, an allegation that the market had declined below that at time cattle should have arrived, and that cattle had lost in weight and marketable appearance, was sufficiently specific allegation of damage sustained.—Chicago, R I. & G. Ry. Co v. Manby, Tex.Civ App, 207 S W 157

56. N.Y.—Austin, Nichols & Co. v Chesapeake & O. Ry Co., 196 N Y S. 757, 119 Misc. 565.
10 C.J p 298 note 86.

No facts in addition to market value depreciation

Where a common carrier negligently omits to transport merchandise within a reasonable time, damages recoverable consisting of the difference in its value at the time and place it ought to have been delivered and at the time of actual delivery are general damages, being deemed, in the nature of things, to have been within the contemplation of the parties at the time of contracting, as a probable consequence of an unreasonable delay, and hence the shipper is not required to set forth in a complaint for negligent delay any facts, apart from decline in market value of the goods, showing actual loss from such cause—Austin, Nichols & Co v Chesapeake & O Ry. Co., 196 N Y S 757, 119 Misc. 565.

57. Tex—Gulf, C. & S. F. Ry. Co v. Dean, Civ.App, 261 S W. 520.

58. Tex—International & G. N. Ry Co v Landa & Storey, Civ App, 183 S W. 384.

59. Tex—American Ry. Express Co. v. Parisian Hat Co., Civ App, 240 S W 947
10 C J. p 298 note 87.

60. Fla—Florida East Coast Ry. Co v. Peters, 86 So. 217, 80 Fla. 382.
Mo—McCarten v. St. Louis-San Francisco R. Co., App., 264 S.W. 50
10 C J p 299 note 88.

61. Fla—Florida East Coast Ry. Co v. Peters, 86 So. 217, 80 Fla. 382.

The fact that plaintiff undertakes specifically to state erroneous elements of damages and how and wherein they accrued is a matter for special demurrer.[62] If punitive damages are sought, the pleading must set out such facts as will justify their allowance.[63] In an action against a carrier for negligent delay in delivering goods brought to recover exemplary damages, an allegation that the carrier "wantonly refused or failed to deliver" the goods does not warrant the recovery of exemplary damages, since the pleading is no stronger than its weakest alternative.[64]

Amendments. An amended petition stating an entirely different cause of action than that set out in the original petition is properly stricken.[65] The necessary allegation as to the carrier's duty to transport within a reasonable time may be supplied by amendment, and evidence may be introduced to show what is a reasonable time.[66]

b. Plea or Answer

Matters of excuse or other special defense must be specially pleaded.

Excuse for unusual delay is a matter of defense,[67] and if defendant relies on this defense, the pleading must show every fact essential to the legal validity of the excuse.[68] Thus, if a war-time embargo,[69] or government shipment preference,[70] or a strike[71] is relied on as a defense for delay in transportation, such defense, to be availed of, must be specially pleaded since it is not available under the general denial. Likewise, if the carrier attempts to excuse its delay on the ground of an unprecedented rush of business, it must plead such defense specially,[72] and it must allege notice of such circumstance to the shipper before the shipment was made.[73] Such defenses as waiver or estoppel of plaintiff,[74] contract provision limiting the carrier's liability,[75] or failure by plaintiff to make his claim within the time fixed by the shipping contract[76] must be specially pleaded to be availed of.

Mo.—McCarten v. St. Louis-San Francisco R. Co., App., 264 S.W. 50.
10 C.J. p 299 note 90.

62. Ga.—Southern Ry. Co. v. Bunch, 102 S.E. 462, 25 Ga.App. 45.

Not ground for general demurrer

In action for damages for an unreasonable delay in delivering shipment, petition alleging contract of carrier, its breach, and damages in a certain sum was sufficient to sustain at least a recovery for nominal damages, and the court did not err in overruling the general demurrer thereto; but the fact that it went further and undertook specifically to state what would be erroneous elements of such damage, and how and wherein they accrued, was matter for special demurrer.—Southern Ry. Co. v. Bunch, 102 S.E. 462, 25 Ga.App. 45.

63. S.C.—Pastime Amusement Co. v. Southeastern Express Co., 162 S.E. 621, 164 S.C. 512.

Complaint held sufficient

Motion picture exhibitor's complaint was held to state cause of action for actual and punitive damages for defendant express company's delayed delivery of films.—Pastime Amusement Co. v. Southeastern Express Co., 162 S.E. 621, 164 S.C. 512.

64. Ala.—White v. Louisville & N. R. Co., 79 So. 508, 16 Ala.App. 515.

65. Mo.—Ingwerson v. Chicago & A. Ry. Co., 130 S.W. 411, 150 Mo.App. 374.

Inconsistent claim

Complaint based on claims of consignors for delay or improper handling in transportation may not be amended to set up causes of action based on claims of consignees arising from same causes, since such actions cannot coexist, although consignors and consignees severally assigned their causes of action to plaintiff.—Branch v. New York Cent. R. Co., 209 N.Y.S. 270, 124 Misc. 555.

66. Ga.—Central R., etc., Co. v. Hasselkus, 17 S.E. 838, 91 Ga. 382, 44 Am.S.R. 37.

67. Neb.—Denman v. Chicago, etc., R. Co., 71 N.W. 967, 52 Neb. 140.

68. Mo.—Hunt v. Hines, 223 S.W. 798, 204 Mo.App. 318.
Tex.—Billberry v. Ft. Worth & R. G. Ry. Co., Civ.App., 236 S.W. 106.
10 C.J. p 299 note 92.

This Corpus Juris statement was cited with approval in Uhrich Mill Work Co. v. Missouri Pac. R. Co., 212 P. 654, 655, 112 Kan. 658.

69. Kan.—Uhrich Mill Work Co. v. Missouri Pac. R. Co., supra.

70. Mo.—Hunt v. Hines, 223 S.W. 798, 204 Mo.App. 318.

War-time government preference

The defense to action for negligent delay in transporting shipment, that delay was caused by preference given government war-time shipment, being matter of excuse arising after engagement to transport in a reasonable time, to be available must be pleaded.—Hunt v. Hines, 223 S.W. 798, 204 Mo.App. 318.

71. Tex.—St. Louis, etc., R. Co. v. Pumphrey, Civ.App., 42 S.W. 246.

72. Fla.—Seaboard Air Line R. Co. v. Rentz, 54 So. 13, 60 Fla. 429.
Tex.—Ft. Worth, etc., R. Co. v. Whiteside, Civ.App., 141 S.W. 1037.

73. Tex.—Billberry v. Ft. Worth & R. G. Ry. Co., Civ.App., 236 S.W. 106.

Exception for lack of notice

In an action for damage to stock from delay, an answer that the cattle were not delivered to the stockyards in the usual time, because the crowded condition of such stockyards prevented such delivery, and that such crowded condition had existed for a considerable time, was subject to the exception that it was not alleged that the carrier gave the shipper notice as to such crowded condition, nor that the shipper had such notice, nor that the carrier did not know of such condition, nor allege any cause why carrier could not have given notice to the shipper of such condition.—Billberry v. Ft. Worth & R. G. Ry. Co., Tex.Civ.App., 236 S.W. 106.

74. Mo.—Neely v. Hines, App., 237 S.W. 906.

Under general denial

In an action for negligent delay in transporting live stock to market, an objection that the shipper could not recover for negligence in placing the cars on a sidetrack and leaving the cattle where they could not get sufficient air and ventilation, since the shipper's agent saw where they were placed and made no complaint, was held untenable, it being tantamount to a plea of estoppel or waiver, and, since the answer was only a general denial, the carrier could not be heard to urge the defense.—Neely v. Hines, Mo.App., 237 S.W. 906.

75. Mont.—Wall v. Northern Pac. R. Co., 145 P. 291, 50 Mont. 122.
10 C.J. p 299 note 95.

76. Mich.—Boyd v. King, 167 N.W. 901, 201 Mich. 436, certiorari de-

If contributory negligence of plaintiff in failing to call for the goods for several days after arrival is relied on, the plea will be insufficient if it alleges no duty on plaintiff so to do, nor any notice of the arrival, nor any facts that would relieve defendant from giving notice.[77] A plea in an action against a carrier for failure to deliver freight within a reasonable time which does not show that the cars referred to therein contained the freight, or that the shipper was responsible for the matters set up, and which does not show that the matters alleged might not have had reference to a different shipment, is bad.[78] It has been held, however, that, under a general denial, the carrier has the right to show that the delay in fact occurred on a connecting line for which it was not liable.[79]

c. Other Pleadings

The general rules of pleading govern the sufficiency of plaintiff's replication.

Where, in an action against a carrier for delay in delivering goods, defendant pleaded a special contract exempting it from liability from delay caused by strikes or mobs, and that prompt delivery was prevented by mobs of strikers and sympathizers, a replication by plaintiff, professing to be an answer to the whole plea, alleging plaintiff's infancy when the contract was made, is insufficient since the defense alleged constitutes a defense irrespective of the contract and the replication fails to answer the whole plea[80]

d. Issues, Proof, and Variance

The general rules governing issues, proof, and variance control in actions against a carrier for delay in transportation.

The issues in an action for damages for delay in transportation are restricted to those raised by the pleadings.[81] In an action for damages for negligent delay in transporting a shipment plaintiff must show negligence arising out of an unreasonable delay,[82] and also that such negligence was the proximate cause of the damage.[83] Some competent evidence must be introduced tending to show what is a reasonable time or to show the length of time ordinarily required to transport such a shipment between the initial and terminal points,[84] and that a longer time was actually required.[85]

Plaintiff must prove facts on which the proper measure of his damages may be drawn.[86] Thus, in order for a shipper of goods, destined to be sold, to recover damages due to delay he must affirmatively show the difference between the market value of the goods on arrival and what would have been

nied King v. Boyd, 39 S.Ct. 11, 248 U S 572, 63 L Ed. 427.
10 C.J. p 299 note 95 [b].

77. Ala.—State Western R. Co. v. Hart, 49 So. 371, 160 Ala. 599.

78. Ala.—St. Louis, etc., R. Co v. Cash Grain Co., 50 So. 81, 161 Ala. 332.

79. Ind.—Cleveland, etc., R. Co. v. Heath, 53 N.E. 198, 22 Ind.App. 47.

80. Vt.—Leavens v. American Express Co., 89 A. 744, 87 Vt. 473.

81. **Negligence after acceptance**
In a case based solely on a carrier's delay in transportation within a reasonable time after its acceptance by the carrier for transportation, the inquiry should be confined to ascertaining whether there was negligence after the shipment was accepted.—Fairley v. Chicago, R. I & P. Ry. Co., Mo App., 32 S W.2d 109.

Petition insufficient to support issue
A petition in an action against a carrier for delay in transporting cattle to market, failing to allege that the shipper in the exercise of reasonable care under the circumstances was justified in believing that the cattle if reshipped to another market would sell for a higher price after deducting the extra expense, is insufficient to support the issue of whether the shipper exercised ordinary care in reshipping the cattle—Wichita Valley Ry Co v. Wallace, Tex.Civ.App., 17 S W 2d 150.

82. Ark.—Chicago, R I. & P. Ry Co. v. S L Robinson & Co, 298 S W. 873, 175 Ark. 35.

Affirmative proof required
Negligence of carrier alleged by plaintiff must be affirmatively established by plaintiff in action for negligent delay in transporting interstate shipments.—Mason v. Chicago & N. W. R. Co., 262 Ill App. 530.

Where plea of general issue negatived unreasonable delay in shipment of cattle, burden was on plaintiff to show delay through negligence.—Murphy v. Illinois Cent. R. Co, 238 Ill.App. 553.

83. S.C.—Sanders v. Charleston & W. C. Ry. Co., 141 S E. 607, 143 S C. 395—Van Epps v. Atlantic Coast Line R. Co, 89 S.E. 1035, 105 S C. 406.

Amount of damages proximately resulting
In action against carrier for delay in delivery of crate material for use in shipment of tomatoes, plaintiff must prove the amount of damages suffered as a proximate result of the delay.—Florida East Coast Ry. Co. v. Peters, 73 So. 151, 72 Fla. 311, Ann.Cas.1918D 121.

Proximate, natural, certain loss
Plaintiff suing for loss of tomatoes from carrier's delay in transporting crates must show carrier's negligence, a proximately resulting loss such as carrier from information or common knowledge should reasonably have regarded as natural to have proximately resulted or which was reasonably contemplated as proximate result, and that loss was not remote, contingent, or incapable of reasonably certain ascertainment.—Florida East Coast Ry. Co. v. Peters, 83 So. 559, 77 Fla 411.

84. Iowa—Wallace-Farmer v. Davis, 199 N.W 307.
Neb.—Cohn v. Chicago & N W Ry. Co., 158 N.W. 375, 100 Neb. 7.
Okl.—Lusk v Durant Nursery Co., 232 P 11, 73 Okl 269.

85. Neb—Cohn v Chicago & N. W. Ry. Co., 158 N W 375, 100 Neb. 7.
Okl—Lusk v Durant Nursery Co., 232 P 11, 73 Okl. 269.

86. Ill—Fox v Canadian Pac. Ry. Co, 260 Ill App. 482.

Value at point of shipment
Where the amount of loss from delay is governed by the value of the goods at the place and time of shipment and there is no evidence of such value but only of the value at the point of delivery, the action must fail—Fox v. Canadian Pac. Ry. Co., 260 Ill App. 482.

the market value had the shipment been delivered without delay.[87]

In accordance with the general principles applicable to civil actions generally, the pleadings and the proof must correspond.[88] The evidence offered must be limited to the issues made by the pleading, and a material variance between the pleadings and the proof will be fatal to a recovery.[89] Thus, where a particular affirmative defense is not pleaded, evidence thereof is not admissible.[90] Likewise, where special damages are not pleaded, they cannot be proved,[91] and, if sought, they must be proved.[92]

A general allegation of delay in transportation will justify proof of delay at any point along the journey.[93] Where plaintiff pleads a special agreement by the carrier to deliver before a certain time, there is no variance between such allegation and proof of a bill of lading containing an agreement to deliver with reasonable dispatch where parol evidence shows the carrier's understanding that "reasonable dispatch" in such agreement required delivery before the time alleged.[94] In order to set up defendant carrier's estoppel to rely on a contractual limitation of time within which an action for damages for delay might be brought plaintiff must affirmatively plead such estoppel.[95]

§ 216. Presumptions and Burden of Proof

a. Presumptions
b. Burden of proof

a. Presumptions

General rules apply as to presumptions in actions against a carrier for delay in transportation.

General rules as to presumptions, see C.J.S. title Evidence §§ 114–157, also 22 C.J. p 82 note 0–p 157 note 60, apply in actions against a carrier for delay in transportation. Thus, where a shipment ordered diverted by telegram is delayed because of a delay in the delivery of the telegram, due either to the negligence of the carrier or of the telegraph company, without evidence to support it, it cannot be presumed that the negligence was due to the car-

87. Tex.—Kansas City, M. & O. Ry. Co. of Texas v. Cliett, Civ.App., 207 S.W. 166.
10 C.J. p 304 note 48.

Market price at due date
In action against carrier for delay in transportation of eggs, proof of date when eggs should have been delivered to consignee and market value at such time was essential to proof of damages.—Barrett v. Van Pelt, 45 S.Ct. 437, 268 U.S. 85, 69 L.Ed. 857, reversing Van Pelt v. Barrett, 199 N.Y.S. 509, 205 App.Div. 332.

Market value on delivery date
Although carrier's liability for damages to onions in transit is proved, the shipper cannot recover if he fails to produce competent proof of the market value on delivery, as a basis for damages.—William R. Mankoff, Inc v. Erie R. Co., 161 N.Y.S. 346, 97 Misc. 415.

88. Mo.—Crowell v. St. Louis-San Francisco Ry. Co., App., 11 S.W.2d 1055—Thee v. Wabash Ry. Co., App., 217 S.W. 566.
Tex.—Wichita Valley Ry. Co v. Wallace, Civ.App., 17 S.W.2d 150.
10 C.J. p 300 note 99.

Contract proved not one alleged
In an action against a railroad for breach of an inseparable contract for the shipment of cattle and the furnishing of cars therefor which is the contract declared on, the cause alleged was not supported by evidence showing a contract made verbally over the telephone for the furnishing of cars, and a shipment contract in writing.—Thee v. Wabash Ry. Co., Mo.App., 217 S.W. 566.

89. Fla.—Florida East Coast Ry. Co. v. Peters, 73 So. 151, 72 Fla. 311, Ann.Cas 1918D 121.
Mo.—Mourer v. Wabash Ry. Co., 280 S.W. 1050, 222 Mo.App. 495
Tex.—International & G.N. Ry. Co. v. Landa & Storey, Civ.App., 183 S.W. 384.
10 C.J. p 300 note 1.

Injury not alleged
In an action for delay in the delivery of a trunk, where the complaint alleged that because of the delay plaintiff was deprived of the use of the trunk, but did not allege injury to its contents, evidence of deterioration of the contents because of the delay is inadmissible under the pleadings.—Lichterman v. Barrett, 157 N.Y.S. 882.

Liability as warehouseman or for conversion
In consignee's action for delayed delivery of goods resulting from deviation, questions of carrier's liability for conversion and of liability of warehousemen are irrelevant.—Levin v. International-Great Northern R. Co., Tex.Civ.App., 45 S.W.2d 435, error dismissed.

No excuse pleaded
In action for unreasonable delay in delivery of cattle shipment, plaintiffs cannot recover, where their evidence discloses an excusing cause, and no excusing cause was pleaded.—McMickle v. Wabash Ry. Co., Mo.App., 209 S.W. 611.

Shrinkage when not in transportation
In an action for damages for delay as to a shipment of live stock, testimony as to amount of shrinkage of sheep and lambs when taken by shipper from stock pens, and thus temporarily withdrawn from transportation, put on pasture, and later shipped to market, is incompetent as not within the issues of the cause.—Mourer v. Wabash Ry. Co., 280 S.W. 1050, 222 Mo.App. 495.

90. Wash.—John Vittucci Co v. Canadian Pac. Ry. Co., 174 P. 981, 102 Wash. 686.

91. Ill.—Wood & Co v. Chicago, M. & St. P. Ry. Co., 151 N.E. 229, 320 Ill. 341, reversing 236 Ill.App. 595
Okl.—Wichita Falls & N.W. Ry. Co. v. D. Cawley Co., 172 P. 70, 69 Okl. 251.

92. Tex.—American Ry. Express Co. v. Parisian Hat Co., Civ.App., 240 S.W. 947.

Loss of profits
Grounds for special damages on account of loss of profits from a carrier's negligent delay must be proved.—American Ry. Express Co. v. Parisian Hat Co., Tex.Civ.App., 240 S.W. 947.

93. Tex.—Atchison, T. & S.F. Ry. Co. v. Cade, Civ.App., 264 S.W. 1031.

94. Mich.—Harmon v. Michigan United Traction Co., 168 N.W. 521, 202 Mich. 398.

95. Ind.—American Ry. Exp. Co. v. Shideler, 165 N.E. 336, 88 Ind.App. 645.

rier.[96] In the light of evidence that similar conditions existed on defendant's terminal tracks several years before, it may be presumed that defendant by the exercise of reasonable care should have had knowledge of a congested condition on such tracks which occasioned the delay.[97]

Presumptions and burden of proof in actions for loss or injury generally see infra § 254.

b. Burden of Proof

(1) In general
(2) Excuse for delay
(3) Damages

(1) In General

The burden of proof in actions against a carrier for delay in transportation is governed by general rules.

General rules as to burden of proof, see C.J.S. title Evidence §§ 103–113, also 22 C.J. p 68 note 43–p 82 note 48, apply in actions against a carrier for delay in transportation. In an action to recover damages from an unreasonable delay in transportation of freight, the burden is on the shipper in the first instance to show delivery of the freight to the carrier for delivery at a certain destination.[98]

Where plaintiff bases his action for delay on an alleged promise to transport within a reasonable time, and defendant pleads the absence of such a promise, plaintiff has the burden of proving the promise in issue.[99] In order, however, that a carrier may avail itself of a clause in the bill of lading exempting it from liability for delay caused by a strike, it has the burden of establishing that the strike caused the particular delay.[1] Likewise, if the carrier seeks to avoid liability for delay in transportation under a contract by which a lower rate was charged, and in consideration of which defendant was exonerated from damages for negligent delay beyond the actual expense incurred, the burden is on it to show that plaintiff knew at the time of shipment the rates charged and the conditions under which the shipment was made, and that he agreed to ship under such rate [2]

The burden is on the shipper to show that the carrier failed to deliver the goods within a reasonable time.[3] In other words, it devolves on the shipper to prove that a longer time was actually consumed than was necessary for the purpose.[4]

Improper address. Where the delayed goods are shown by defendant express carrier to have been improperly addressed, resulting in the transportation of the goods to the wrong destination, the burden is on the shipper to show that the carrier was negligent in not making delivery to the proper consignee within a reasonable time thereafter.[5]

(2) Excuse for Delay

While there is some authority to the contrary, the rule is that when unusual delay is shown the prima facie case of negligence is made and the carrier has the burden of proving excuse for the delay. Bad condition of the goods shown by plaintiff to have been unreasonably delayed puts the burden on the carrier to excuse its negligence.

It is clearly the majority rule, as stated in Corpus Juris, which has often been quoted and cited as authority therefor,[6] that when evidence of unusual delay is adduced, a prima facie case of negligence is made out, and the burden then devolves on the car-

96. Va.—L. J. Upton & Co. v. Atlantic Coast Line R. Co., 131 S.E. 827, 146 Va. 475.

97. Ill.—Warren Land Co. v. Chicago, St. P., M. & O. Ry. Co., 195 Ill.App. 157.

98. Mo.—Russell Grain Co. v. Wabash R. Co., 89 S.W. 908, 114 Mo. App. 488.

99. Ill.—American Fruit Growers v. San Antonio & A. P. Ry. Co., 239 Ill.App. 151.

1. Ark.—Missouri Pac. R. Co. v. King, 268 S.W. 595, 167 Ark. 335.

2. Md.—Baltimore, etc., R. Co. v. Whitehill, 64 A. 1033, 104 Md. 295.

3. Ala.—H. J. Crenshaw & Co. v. Seaboard Air Line Ry. Co., 121 So. 736, 219 Ala. 206
Ark.—Missouri Pac. R. Co. v. Gilsinger, 35 S.W.2d 1003, 183 Ark. 371.
Conn.—Belkin v. New York, N. H. & H. R. Co., 146 A. 846, 109 Conn. 466.
Iowa.—Wallace-Farmer v. Davis, 199 N.W. 307.
Md.—Pennsylvania R. Co. v. Walker, 128 A. 45, 147 Md. 323.
Neb.—Cohn v. Chicago & N. W. Ry. Co., 158 N.W. 375, 100 Neb. 7.
10 C.J. p 301 note 4.

This Corpus Juris statement was cited with approval in L. J. Upton & Co. v. Atlantic Coast Line R. Co., 131 S.E. 827, 829, 146 Va. 475.

Authorized stop

If the carrier was authorized to stop the goods in transit for milling in transit purposes, it devolves on the shipper to show that the unreasonable delay in transportation was not due to that cause.—Stevens v. St. Louis Southwestern R. Co., Tex. Civ.App., 178 S.W. 810.

Plaintiff must prove delay before carrier has burden of justifying its time or proving that delay did not cause damage.—Pennsylvania R. Co. v. Walker, 128 A. 45, 147 Md. 323.

4. Neb.—Johnston v. Chicago, etc., R. Co., 97 N.W. 479, 70 Neb. 364.
10 C.J. p 301 note 5.

5. U.S.—American Ry. Express Co. v. Ewing Thomas Converting Co., C.C.A.Pa., 292 F. 335.

6. Ala.—H. J. Crenshaw & Co. v. Seaboard Air Line Ry. Co., 121 So. 736, 219 Ala. 206
Ky.—Leo Lococo's Sons v. Louisville & N. R. Co., 82 S.W.2d 332, 259 Ky. 299.
Minn.—National Elevator Co. v. Great Northern Ry. Co., 170 N.W. 515, 141 Minn. 407
N.Y.—Strahs v. New York Cent. R. Co., 184 N.Y.S. 362, 113 Misc. 273.
Okl.—Chicago, R. I. & P. Ry. Co. v. Bradshaw, 254 P. 725, 122 Okl. 282.—St. Louis & S. F. Ry. Co. v. May, 236 P. 888, 110 Okl. 170.—Eastern Elevator Co. v. Atchison, T. & S. F. Ry. Co., 219 P. 332, 93 Okl. 20.
Tex.—Gulf, C. & S. F. Ry. Co. v. Kempner, Civ.App., 275 S.W. 459.
Va.—New York, P. & N. R. Co. v. Chandler, 106 S.E. 684, 129 Va. 695.

rier to explain or excuse the delay and to show that it arose from some cause other than the carrier's negligence, or that of its agents or servants,[7] or to show that there was no delay,[8] or that the delay caused plaintiff no injury,[9] the reason being that such facts are generally peculiarly within the carrier's knowledge.[10] This rule applies although the contract was "subject to delay"[11]

It has been held that the burden of explaining the delay is not on defendant carrier if the shipper or his agent accompanied the shipment and knew the reason for the delay.[12] On the other hand, it has also been held that the burden is on the carrier to prove that the delay was not caused

7. Ala.—Louisville & N. R. Co. v. Kinney, 127 So. 802, 221 Ala. 48.
Ark.—Payne v. Mallory, 230 S.W. 270, 148 Ark. 431—Hines v. Helena Cotton Oil Co., 227 S.W. 418, 147 Ark. 328—Missouri Pac. R. Co. v. Block, 218 S.W. 682, 142 Ark. 127, certiorari denied 40 S.Ct. 586, 253 U.S. 493, 64 L.Ed. 1029.
Ill.—Alton v. Mineral Point & N. Ry. Co., 222 Ill.App. 105. See Marsh L. Brown & Co. v. Chicago, New York & Boston Refrigerator Co., 207 Ill.App. 89.
Ind.—Erie R. Co. v. C. Callahan Co., 184 N.E. 264, 204 Ind. 580, 87 A.L.R. 778—Pennsylvania R. Co. v. Beckett, 193 N.E. 706, 100 Ind.App. 250.
Iowa.—Wallace-Farmer v. Davis, 199 N.W. 307—Stillman v. Chicago, R. I. & P. Ry. Co., 192 N.W. 860, 196 Iowa 612.
Mich.—Purity Ice Cream & Dairy Co. v. Adams Express Co., 187 N.W. 296, 217 Mich. 593—A. F. Young & Co. v. Grand Rapids & I. R. Co., 167 N.W. 11, 201 Mich. 39.
Minn.—Janesville Live Stock & Shipping Co. v. Hines, 178 N.W. 739, 146 Minn. 260.
Neb.—Burtis v. Chicago, B. & Q. R. Co., 247 N.W. 42, 124 Neb. 534—McElwain v. Union Pacific R. Co., 163 N.W. 845, 101 Neb. 484, 1 A.L.R. 533.
N.Y.—Meany & Saisselin v. Erie R. Co., 173 N.Y.S. 96.
Okl.—Chicago, R. I. & P. Ry. Co. v. White, 41 P.2d 847, 170 Okl. 646—Payne v. Parsons, 223 P. 618, 97 Okl. 168.
S.C.—Middleton v. Atlantic Coast Line R. Co., 130 S.E. 552, 133 S.C. 23.
Tenn.—Southeastern Express Co. v. Bowers, Inc., App., 109 S.W.2d 851.
Tex.—Texas & P. Ry. Co. v. Bufkin, Civ.App., 46 S.W.2d 712, error dismissed—Gulf, C. & S. F. Ry. Co. v. Kempner, Civ.App., 275 S.W. 459, reversed on other grounds, Com.App., 282 S.W. 795.
Va.—L. J. Upton & Co. v. Atlantic Coast Line R. Co., 131 S.E. 827, 146 Va. 475.
10 C.J. p. 301 note 7.

Explanation required by plaintiff's showing

(1) Shipper presenting proof showing that his shipment was materially delayed beyond usual time, together with evidence of proximate loss, makes out prima facie case.—Leo Lococo's Sons v. Louisville & N. R. Co., 82 S.W.2d 332, 259 Ky. 299.

(2) Evidence as to unusual and long delay in delivering a carload of wheat puts the burden on the carrier of excusing its delay and of showing that it was not negligent.—National Elevator Co. v. Great Northern Ry. Co., 170 N.W. 515, 141 Minn. 407.

(3) Proof that car of grapes was delivered nearly nine hours after it arrived about one mile away required railroad to excuse delay.—Pusater v. New York, C. & St. L. R. Co., 220 N.Y.S. 438, 129 Misc. 24.

(4) Shipper, proving that it had taken fifty seven hours to transport car of bananas, that twenty seven hours was customary and usual time under ordinary conditions, and that delay prevented sale before fall in market price, made out prima facie case, requiring explanation or justification by carrier.—Leo Lococo's Sons v. Louisville & N. R. Co., supra.

Failure to maintain schedule

Liability for carrier's failure to run trains on scheduled time is not established by mere proof of delay, at most proof of delay does no more than to place on the carrier the duty of explaining such delay.—Stephens v. Chicago & N. W. Ry. Co., 227 N.W. 875, 200 Wis. 181.

Inability of train to carry shipment

In an action for damage to cotton seed from delay, the burden was on defendant to show that a train passing after the car in question was loaded and billed could not carry it on that day, since its servants made up the train and knew the conditions, and, failing therein, it cannot complain of the absence of plaintiff's evidence that it could.—Hines v. Helena Cotton Oil Co., 227 S.W. 418, 147 Ark. 328.

Not regular stops

In an action for damages sustained by reason of delays in the transportation of cattle, the burden of showing that certain stops complained of were not regular scheduled stops, and of explaining them in case they were not regular stops, is on defendant.—Alton v. Mineral Point & N. Ry. Co., 222 Ill.App. 105.

Overcoming obstacles

Carrier sued for delay and for refusal to carry cattle to destination bears the burden of proving that it exercised reasonable effort and due diligence to overcome obstacles.—Riddle v. Chicago, B. & Q. R. Co., 210 N.W. 770, 203 Iowa 1232.

Press of business

Where a shipper has shown an unreasonable delay by carrier in making shipment, carrier must show that equipment is adequate for all ordinary purposes and under ordinary conditions, and that delay occurred by reason of an unusual volume of business of which it had no notice at time shipment was accepted.—Southeastern Express Co. v. Bowers, Inc., Tenn.App., 109 S.W.2d 851.

Presumption not conclusive

Presumption of negligence of carrier arising from delay in shipment of stock can and must be rebutted and explained by defendant carrier.—Davis v. Graham, 225 P. 789, 31 Wyo. 239.

Proof of specific acts unnecessary

Proof of unusual or unreasonable delay in interstate transportation of live stock raises a presumption of the carrier's negligence without proof of specific acts thereof.—Chicago, R. I. & P. Ry. Co. v. Simmons, 228 P. 983, 101 Okl. 164.

Strike

Where carrier's answer set up a strike as a defense to an action for damages for delay in a shipment of cattle, the burden was on the carrier to prove the existence of the strike.—Stillman v. Chicago, R. I. & P. Ry. Co., 192 N.W. 860, 196 Iowa 612.

8. Ala.—Louisville & N. R. Co. v. Kinney, 127 So. 802, 221 Ala. 48.
Okl.—St. Louis & S. F. Ry. Co. v. May, 236 P. 888, 110 Okl. 170.

9. Ala.—Louisville & N. R. Co. v. Kinney, 127 So. 802, 221 Ala. 48.

10. Ky.—Leo Lococo's Sons v. Louisville & N. R. Co., 82 S.W.2d 332, 259 Ky. 299.
Tenn.—Southeastern Express Co. v. Bowers, Inc., App., 109 S.W.2d 851.

11. Mich.—Purity Ice Cream & Dairy Co. v. Adams Express Co., 187 N.W. 296, 217 Mich. 593.
10 C.J. p. 301 note 7 [c].

12. Ill.—Alton v. Mineral Point & N. Ry. Co., 222 Ill.App. 105.
10 C.J. p. 301 note 8.

by its negligence despite the fact that the owner of the shipment accompanied it,[13] and this holding has been held not to conflict with the rule that where, by contract, a shipper accompanies his live stock with tenders or caretakers no presumption of negligence on the part of the carrier arises merely from the proof that loss or injury has attended the shipment.[14]

Minority rule. In one jurisdiction the rule as to the burden of explaining or excusing the delay differs considerably from the general rule just discussed. Thus, it is held that in actions for damages from delay in transporting interstate shipments, the burden is on plaintiff not only to show the delay but to show that it was negligent.[15] This is said to be the common-law rule on the subject, as it was the law in this jurisdiction in cases involving intrastate shipments as well before it was changed by statute.[16] A showing of mere delay without explanation, or of unusual delay, is not of itself sufficient to give rise to a presumption of negligence,[17] it being necessary that some cause of the delay unexplained by defendant be shown by plaintiff.[18] Nevertheless, it is recognized that the cause of delays in carriage of freight is usually a matter peculiarly within the knowledge of defendant carrier,[19] and such being the case circumstances raising a fair or reasonable,[20] or even slight,[21] inference of negligence will authorize a recovery. Moreover, the delay itself is of probative force to

13. Wyo.—Davis v. Graham, 225 P. 789, 31 Wyo. 239.

14. Neb.—McElwain v. Union Pac. R. Co., 163 N.W. 845, 101 Neb. 484, 1 A.L.R. 533

15. Mo.—Smothers v. Chicago, R. I. & P. Ry. Co., App., 15 S.W.2d 884—Crowell v. St. Louis-San Francisco Ry. Co., App., 11 S.W.2d 1055—Parsons v. Chicago, B. & Q. R. Co., App., 300 S.W. 324—Mourer v. Wabash Ry. Co., 280 S.W. 1050, 222 Mo.App. 495—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo.App. 314—Phillippi v. Wabash Ry. Co., App., 267 S.W. 960—Sandker v. Wabash Ry. Co., App., 267 S.W. 957—Mason v. Chicago & A. R. Co., App., 247 S.W. 243—Cloyd v. Wabash Ry. Co., App., 240 S.W. 885—Harrison v. Chicago & A. R. Co., 239 S.W. 871, 209 Mo.App. 526—Neely v. Hines, App., 237 S.W. 906—Howell v. Davis, App., 236 S.W. 889—Howell v. Hines, App., 236 S.W. 886—Holland v. Hines, App., 234 S.W. 366—Bland v. Chicago & A. R. Co., App., 232 S.W. 232—Neeley v. Hines, 227 S.W. 650, 206 Mo.App. 621—Moore v. Chicago, B. & Q. R. Co., App., 223 S.W. 1079—Burgher v. Wabash R. Co., App., 217 S.W. 854—Baker v. Schaff, App., 211 S.W. 103—Robinson v. Bush, 200 S.W. 757, 199 Mo.App. 184—Smith v. Missouri Pac. Ry. Co.; App., 183 S.W. 701.
10 C.J. p 301 note 9.

However, it has been held that delay in shipment of an interstate live stock shipment prima facie establishes the carrier's negligence.—Rissler v. Missouri Pac. Ry. Co., Mo. App., 183 S.W. 676.

Burden remains throughout

In an action for damages for delay in delivery of an interstate shipment, plaintiff has the burden of showing that the delay was due to the carrier's negligence, which burden remains on plaintiff throughout the entire case.—Bland v. Chicago & A. R. Co., Mo.App., 232 S.W. 232.

Federal rule applies

In an action for damages due to delay in delivering a shipment of cattle from a point in Missouri to a point in Illinois, mere proof of delay will not establish prima facie the negligence of the carrier, for Rev.St.1919, §§ 9926, 10449, as to prima facie proof of negligence, are inapplicable, the shipment being interstate, so that the liability of the carrier is governed by the rules of decision in force in the federal courts.—Bland v. Chicago & A. R. Co., Mo.App., 232 S.W. 232.

Burden to show custom

Shipper of interstate cattle shipment had burden of showing negligence of stockyards to be carrier's negligence, and that carrier was party to custom to deliver into consignees' sales pens.—Bozworth v. Wabash Ry. Co., 58 S.W.2d 448, 332 Mo. 277, affirming Bosworth v. Wabash Ry. Co., App., 21 S.W.2d 1110—Burton v. Wabash Ry. Co., App., 22 S.W.2d 201, affirmed 58 S.W.2d 443, 332 Mo. 268.

16. Mo.—Bland v. Chicago & A. R. Co., App., 232 S.W. 232—Arky v. Wells Fargo & Co. Express, App., 229 S.W. 824.
10 C.J. p 301 note 9

At common law the burden is on the plaintiff to show that any delay complained of was due to carrier's negligence.—Bland v. Chicago & A. R. Co., Mo.App., 232 S.W. 232.

17. Mo.—Crowell v. St. Louis-San Francisco Ry. Co., App., 11 S.W.2d 1055—Parsons v. Chicago, B. & Q. R. Co., App., 300 S.W. 324—Mourer v. Wabash Ry. Co., 280 S.W. 1050, 222 Mo.App. 495—Harrison v. Chicago & A. R. Co., 239 S.W. 871, 209 Mo.App. 526—Howell v. Davis, App., 236 S.W. 889—Burgher v. Wabash Ry. Co., App., 217 S.W. 854.

18. Mo.—Smothers v. Chicago, R. I. & P. Ry. Co., App., 15 S.W.2d 884—Crowell v. St. Louis-San Francisco Ry. Co., App., 11 S.W.2d 1055—Howell v. Davis, App., 236 S.W. 889—Burgher v. Wabash Ry. Co., App., 217 S.W. 854.

19. Mo.—Crowell v. St. Louis-San Francisco Ry. Co., App., 11 S.W.2d 1055—Harrison v. Chicago & A. R. Co., 239 S.W. 871, 209 Mo.App. 526—Neely v. Hines, App., 237 S.W. 906—Howell v. Davis, App., 236 S.W. 889—Baker v. Schaff, App., 221 S.W. 743.
10 C.J. p 302 note 13.

20. Mo.—Neely v. Hines, App., 237 S.W. 906
10 C.J. p 302 note 11.

21. Mo.—Smothers v. Chicago, R. I. & P. Ry. Co., App., 15 S.W.2d 884,—Crowell v. St. Louis-San Francisco Ry. Co., App., 11 S.W.2d 1055—Harrison v. Chicago & A. R. Co., 239 S.W. 871, 209 Mo.App. 526—Neely v. Hines, App., 237 S.W. 906—Howell v. Davis, App., 236 S.W. 889—Bland v. Chicago & A. R. Co., App., 232 S.W. 232—Moore v. Chicago, B. & Q. R. Co., App., 223 S.W. 1079—Baker v. Schaff, App., 221 S.W. 743—Burgher v. Wabash Ry. Co., App., 217 S.W. 854—Smith v. Missouri Pac. Ry. Co., App., 183 S.W. 701.
10 C.J. p 302 note 12.

Burden held sustained

In an action for damages for delay in interstate shipment of sheep, evidence on the part of plaintiff was sufficient to sustain the burden on him to show some negligence on the part of the carrier in addition to delay.—Moore v. Chicago, B. & Q. R. Co., Mo.App., 223 S.W. 1079.

Direct evidence unnecessary

Where shipper of live stock alleged that railroad company was guilty of negligent delay in transportation, shipper, while having burden of proving such negligent delay, need not establish it by direct evidence.—Robinson v. Bush, 200 S.W. 757, 199 Mo.App. 184.

show negligence when connected with other evidence.[22] Where repeated delays are shown to have occurred en route a prima facie case of negligence will be made out unless defendant satisfactorily explains such delays.[23] The above rule insofar as it affects intrastate shipments has been changed by statute. Thus, by a statute so providing, the failure of the carrier to transport within a reasonable time constitutes prima facie evidence of negligence in transportation.[24]

In another jurisdiction, in a case involving an interstate shipment, it has been held that proof by plaintiff that a shipment of live stock has been delayed considerably longer than a reasonable time does not have any tendency to prove that defendant carrier was responsible for the delay.[25]

Condition of goods on arrival. The failure of a railroad carrier to deliver live stock in a proper condition within a reasonable time has been held to raise a presumption of negligence and place the burden on the carrier to excuse itself from negligence,[26] but it does not raise a presumption that bruises and scars on the animals were caused by such unreasonable delay.[27] Plaintiff does not have the burden of proving that the injuries to the live stock did not result from his own negligence in failing to care for them.[28] It has been held, however, that where live stock arrives at its destination in good condition and is in good condition when unloaded, the burden of proving unreasonable delay in spotting the shipment for unloading, whereby the stock is alleged to have been injured by the cold, is on plaintiff shipper.[29]

In the case of perishable food products, it has been held that where plaintiff has shown an unreasonable delay, the bad condition of goods, which were in good condition when accepted for shipment, will raise the question as to whether the carrier exercised the degree of care required of it.[30] It has also been held in an action for damages caused by alleged unreasonable delay in the shipment of perishable goods that, while the burden is on plaintiff to show that there was an unreasonable delay,

22. Mo.—Holland v. Atchison, etc., R Co, 114 S.W 61, 133 Mo App. 694—Ecton v. Chicago, etc., R Co, 102 S.W. 575, 125 Mo App. 223.

23. Mo—Smothers v. Chicago, R. I. & P. Ry Co, App, 15 S W.2d 884—Harrison v. Chicago & A. R Co, 239 S W. 871, 209 Mo App 526—Baker v. Schaff, App., 221 S W. 743—Gilbreath v. Atchison, T. & S F R R, App., 217 S.W. 636.

Failure to explain

If carrier attempts to explain repeated delays in transportation of shipment and explanation fails, carrier is liable.—Smothers v. Chicago, R. I. & P. Ry. Co., Mo App., 15 S.W. 2d 884.

Many delays

In an action by a shipper of cattle for damages caused by several unexplained delays in transit, some other delays being caused by unsuccessful attempts to make a coupling with a snowplow to show that delays were unavoidable, the burden is on the carrier to prove that the delays were unavoidable—Gilbreath v. Atchison, T. & S F. R. R., Mo App., 217 S W 636.

24. Mo—Cloyd v. Wabash Ry. Co, App., 240 S W. 885—Baker v. Schaff, App., 211 S W. 103—Dawson Bros. v. Chicago, B. & Q. R. Co, App., 194 S W. 743.
10 C.J. p 302 note 15.

Construction of statute

A statute providing that every common carrier is liable for loss, damage, or injury to goods caused by delay in transit due to negligence while the same is being carried by it, and further providing that in any action to recover for damages sustained by delay the burden of proof is on defendant to show that such delay was not due to negligence, has been construed to mean that, in all cases involving intrastate shipments by all common carriers, on proof by plaintiff of the delay and that damage or loss has resulted therefrom, the burden would then shift to defendant to show that such delay was not due to its negligence—Cunningham v. Chicago & A. R. Co., Mo, 215 S.W. 5—Arky v. Wells Fargo & Co. Express, Mo.App, 229 S.W. 824

Express company

Rev.St.1919 § 10449, providing that, on proof by plaintiff shipper of delay and damages caused thereby, the burden of proof shifts to defendant carrier to show that the delay was not due to its negligence, includes express companies.—Arky v. Wells Fargo & Co. Express, Mo App, 229 S W. 824.

Not applicable to interstate shipment

In action for delay in interstate shipment of live stock, burden of proving that delay was occasioned by defendant's negligence was on plaintiff, notwithstanding Laws 1913 p 177, making proof of unreasonable delay prima facie evidence of negligence, the burden of proof being a matter of substance, and hence governed, as to interstate shipments, by the federal laws, and not the state laws.—Baker v. Schaff, Mo. App, 211 S W 103.

25. N.H—Wood v. Boston & M. R R., 98 A. 480, 78 N.H. 207.

26. Ala—Louisville & N R Co v. Kinney, 127 So. 802, 221 Ala 48
Okl—Chicago, R I & P. Ry. Co v Garrison, 38 P.2d 502, 169 Okl 634—St Louis & S. F. Ry. Co v May, 236 P. 888, 110 Okl 170—Eastern Elevator Co. v. Atchison, T. & S. F. Ry. Co., 219 P. 332, 93 Okl. 20.

Prima facie case made out

Shipper suing railroad for delay in moving cattle to market makes out prima facie case of negligence, sufficient to go to jury on showing that cattle did not reach market in reasonably sound condition in time ordinarily required to transport such shipment to destination.—St. Louis & S F Ry. Co. v. May, 236 P 888, 110 Okl. 170

27. Okl.—Chicago, R I & P Ry. Co. v. Garrison, 38 P 2d 502, 169 Okl. 634.

28. Iowa—Riddle v. Chicago, B & Q R Co., 210 N W 770, 203 Iowa 1232.

29. Utah—Smart v Oregon Short Line R Co, 183 P 320, 54 Utah 606.

Burden to show proximate causation

In an action against a carrier for damages to sheep from delay in placing cars in position for unloading, the burden was on shipper to prove the carrier's negligence in delaying the unloading too late in the day, so that the sheep were chilled, was the proximate cause of their loss—Smart v. Oregon Short Line R. Co, 183 P 320, 54 Utah 606.

30. Mich.—A. F Young & Co v. Grand Rapids & I. R. Co, 167 N. W. 11, 201 Mich. 39.

this burden is prima facie met, unless the state of the pleadings changes the rule, if it is shown that the goods were injured during transportation, whereupon the burden is cast on defendant carrier to show want of liability on account of negligent delay or for any other cause.[31]

(3) Damages

One seeking to recover special damages for breach of a carriage contract must show that damages were within the contemplation of the parties. A carrier relying on a requirement in the contract requiring the shipper to give notice of claim for damages must prove the contract, its reasonableness, and its breach by the shipper.

As stated in Corpus Juris, which has been quoted as authority therefor,[32] one who seeks to recover special damages for breach of a contract of carriage must show that such damages were within the contemplation of both parties to the contract,[33] otherwise, he can recover only such damages as in the usual course of things flow from the breach.[34] He must also show notice to the carrier at the time of the shipment of special circumstances from which said damages might arise.[35]

Want of notice of damages. If the carrier relies on a contract requiring the shipper to give notice of claim for damage, the burden is on the carrier to prove such contract, and to show that it is reasonable,[36] and that the shipper failed to comply with the requirement.[37]

§ 217. Admissibility of Evidence

a. In general
b. Matters of defense or mitigation
c. Damages

a. In General

General rules of evidence in negligence cases govern the admissibility of evidence in actions against a carrier for negligent delay in transportation.

The admissibility of evidence to show negligence in actions of this character is controlled by the rules governing proof of negligence generally;[38] the inquiry should be limited to whether there was negligence after the carrier accepted the shipment.[39] On the question of defendant's negligence and unreasonable delay, evidence is admissible to show the actual time consumed in the shipment in controversy,[40] the distance between the initial and terminal points,[41] that the time consumed in transporting the goods was unusually long,[42] and the ex-

31. Ala.—H. J. Crenshaw & Co. v. Seaboard Air Line Ry. Co., 121 So. 736, 219 Ala. 206.

Where no injury is shown

Burden of showing unreasonable delay in shipment remained on plaintiff, where injury to goods during transportation was not shown.—H. J. Crenshaw & Co. v. Seaboard Air Line Ry. Co., 121 So. 736, 219 Ala. 206.

32. Mont.—Sankey v. Chicago, M. & St. P. Ry. Co., 198 P. 544, 60 Mont. 242.

33. Okl.—Missouri, K. & T. R. Co. v. Foote, 149 P. 223, 46 Okl. 578.
10 C.J. p. 302 note 20.

Clothing purchased because of delay

The burden of proving the value of clothing purchased because of delay in delivering a trunk at the time of delivery is on the plaintiff, and not on defendant, to show in mitigation of damages.—Lichterman v. Barrett, 157 N.Y.S. 882.

34. Mont.—Sankey v. Chicago, M. & St. P. Ry. Co., 198 P. 544, 60 Mont. 242.
10 C.J. p. 302 note 21.

35. Mont.—Sankey v. Chicago, M. & St. P. Ry. Co., supra.
10 C.J. p. 302 note 22.

36. Mont.—Wall v. Northern Pac. R. Co., 145 P. 291, 50 Mont. 122.

37. Ga.—Davis v. Mizell, 120 S.E. 690, 31 Ga.App. 439.—Southern Ry. Co. v. Bunch, 109 S.E. 523, 27 Ga. App. 689.
10 C.J. p. 302 note 19.

Suit on the tort

Where the consignee does not sue on the express contract evidenced by the bill of lading, but on the tort by the carrier of his breach of duty to transport within a reasonable time, and on the custom of the carrier to notify the consignee immediately after the arrival of the goods at their destination, and where the carrier sets up the bill of lading with a provision requiring notice of loss to be given to the carrier, the burden lies on the carrier to further sustain its affirmative plea and defense by showing the failure of plaintiff to give the notice as required.—Southern Ry. Co. v. Bunch, 109 S.E. 523, 27 Ga.App. 689.

38. Md.—Stevens v. Northern Cent. Ry. Co., 98 A. 551, 129 Md. 215.
10 C.J. p. 302 note 24.

Tariffs and rate schedules

(1) Rate schedules of an interstate carrier on file with the interstate commerce commission are admissible in an action for delay of an interstate shipment on the issue of the validity and effect of a limitation of liability in the bill of lading.—Southern Express Co. v. Byers, 36 S.Ct. 410, 240 U.S. 612, 60 L.Ed. 825, L.R.A.1917A. 197, reversing Byers v. Southern Express Co., 81 S.E. 741, 165 N.C. 542.

(2) Where bill of lading was expressly made subject to classification and tariffs, exclusion, in action for negligent delay in transportation of live stock, of portions of published tariff and classification requiring separation, by partitions, of different kinds of stock in same car, is error.—Central of Georgia Ry. Co. v. Griner & Rustin, 127 S.E. 878, 33 Ga.App. 705.

Proper matters of inquiry

In an action for delay in transportation of goods, the time ordinarily required for carriage, preparations by the carrier, the freight dispatched, the character of the freight, the information given to the shipper, or particular reasons for speedy transportation and delivery, and kindred circumstances are admissible.—Stevens v. Northern Cent. Ry. Co., 98 A. 551, 129 Md. 215.—10 C.J. p. 302 note 23.

39. Mo.—Fairley v. Chicago, R. I. & P. Ry. Co., App., 32 S.W.2d 109.—Strother v. Atchison, T. & S. F. R. Co., App., 212 S.W. 404.

40. Mich.—A. F. Young & Co. v. Grand Rapids & I. R. Co., 167 N.W. 11, 201 Mich. 39.

41. Mich.—A. F. Young & Co. v. Grand Rapids & I. R. Co., supra.

42. U.S.—Southern Pac. Co. v. Arnett, Utah, 111 F. 849, 50 C.C.A. 17.

act quantum of the wrongful delay.[43] Likewise, evidence of the usual or customary time in running trains from the point at which the shipment was made to its destination is admissible,[44] even over the lines of other carriers,[45] provided it is given by witnesses properly qualified to testify on the subject.[46] Evidence as to the time consumed by certain prior or subsequent shipments of similar freight over defendant's road is admissible,[47] provided the conditions are shown to be the same.[48] The fact that the shipments as to which testimony was given were made several years before does not render the testimony inadmissible for remoteness,[49] the difference in time affecting only its weight.[50]

On the question of the unreasonableness of the delay, evidence of information given by the carrier's agent as to when the shipment would reach its destination is admissible,[51] such evidence not being a showing of a special contract or a varying of the contract sued on[52] or of a promise to extend greater favor to plaintiff than those enjoyed by the public.[53] Where no contract to deliver a shipment at a definite time is pleaded, an agreement to deliver at a time certain is inadmissible where the bill of lading simply provides for reasonable dispatch.[54] Furthermore, it has been held that an alleged oral agreement by defendant's local agent to make certain connections so that a live stock shipment would arrive early at its destination should be excluded where the action is for negligent delay and not for deception.[55]

Admissibility of evidence in actions for loss or injury generally and including loss or injury by delay see infra § 255.

b. Matters of Defense or Mitigation

Defendant may introduce any relevant and material evidence to establish his defense.

43. N.C.—Harper Furniture Co. v. Southern Express Co., 57 S.E. 458, 144 N.C. 639, 12 Ann.Cas. 924.

44. Md.—Stevens v. Northern Cent. Ry. Co., 98 A. 551, 129 Md. 215
Mich.—A. F. Young & Co. v. Grand Rapids & I. R. Co., 167 N.W. 11, 201 Mich. 39
Tex.—International-Great Northern R. Co. v. Shaw & Stumberg, Civ. App., 45 S.W.2d 759—Baker v. Holman, Civ.App., 196 S.W. 728.
10 C.J. p. 303 note 26.

Schedules

In action for delay in delivery of wax beans to market, schedules showing the usual time necessary for transportation to market were admissible.—Stevens v. Northern Cent. Ry. Co., 98 A. 551, 129 Md. 215.

45. N.J.—Engemann v. Delaware, L. & W. R. Co., 97 A. 152, 88 N.J. Law 451.
Tex.—Baker v. Holman, Civ.App., 196 S.W. 728.

Some evidence

Time required by carrier other than defendant to transport goods between two points is some evidence of time that ought to be taken by defendant.—Engemann v. Delaware, L. & W. R. Co., 97 A. 152, 88 N.J.Law 451.

46. Tex.—Baker v. Holman, Civ. App., 196 S.W. 728.
10 C.J. p. 303 note 27

Sufficient basis for evidence

In suit for shrinkage of cattle shipped, from delay, testimony was admissible of usual time for such shipments, although given by witness who had accompanied only shipment in suit over the railroad involved, it appearing he had accompanied other shipments between such points over another route, and that the agent routed the shipment in suit upon application for most direct route.—Baker v. Holman, Tex. Civ.App., 196 S.W. 728.

Where based on limited experience

Shipper's evidence of time required for previous shipments based on his own limited experience held of little evidentiary value to prove unreasonable delay at the time in question.—Murphy v. Illinois Cent. R. Co., 238 Ill.App. 553.

47. Minn.—National Elevator Co. v. Great Northern Ry. Co., 170 N.W. 515, 141 Minn. 407.
Tex.—St. Louis Southwestern Ry. Co. of Texas v. York, Civ.App., 252 S.W. 890.

Prior shipment

In action for damages for delay in shipment of cotton under a contract to deliver within forty-eight hours, where the carrier defended on the ground that due to an embargo the shipment could not be made within the time agreed, there was no error in receiving evidence that defendant shipped other cotton from the place of consignment to destination prior to actual shipment of plaintiff's cotton.—St. Louis Southwestern Ry. Co. of Texas v. York, Tex.Civ.App., 252 S.W. 890.

Subsequent shipments

In action against a carrier for damages from delay in delivering a carload of wheat, evidence of time taken by five other shipments between same points within two months after the shipment involved was competent as to the usual and reasonable time.—National Elevator Co. v. Great Northern Ry. Co., 170 N.W. 515, 141 Minn. 407.

48. Ind.—Wells Fargo & Co. Express v. Allbright, 133 N.E. 753, 78 Ind.App. 574.
10 C.J. p. 303 note 30.

War time and peace time

In action for damages by delay in express shipment in 1917, a war year, plaintiff's testimony as to average time for such shipments at time of trial in 1920 was erroneously admitted.—Wells Fargo & Co. Express v. Allbright, 133 N.E. 753, 78 Ind. App. 574.

49. Tex.—Pecos, etc., R. Co. v. Dinwiddie, Civ.App., 146 S.W. 280.
10 C.J. p. 303 note 28

50. Tex.—Pecos, etc., R. Co. v. Gray, Civ.App., 145 S.W. 728

51. U.S.—Southern Pac. Co. v. Stephany, Cal., 255 F. 679, 167 C.C.A. 55
Iowa.—Heisel v. Minneapolis & St. L. R. Co., 171 N.W. 177, 185 Iowa 885

Where the bill of lading required the carrier to transport the goods with reasonable dispatch, it was not error, in an action for delay, to admit testimony of the shipper that he was told by defendant's clerk, through whom the shipment was made, when it would reach its destination.—Southern Pac. Co. v. Stephany, Cal., 255 F. 679, 167 C.C.A. 55

52. Ga.—Central of Georgia Ry. Co. v. Griner & Rustin, 127 S.E. 878, 33 Ga.App. 705

53. Iowa.—Heisel v. Minneapolis & St. L. R. Co., 171 N.W. 177, 185 Iowa 885

54. Mo.—Parsons v. Chicago, B. & Q. R. Co., App., 300 S.W. 324.

55. Iowa.—Hill v. Minneapolis & St. L. R. Co., 161 N.W. 444, 179 Iowa 406.

Evidence admissible. Defendant may introduce evidence as to the schedule and ordinary time required for transport between the points involved in the case, although evidence as to other shipments than the one in controversy will be excluded if the bearing is too remote.[56] Defendant may thus show also that it did not run freight trains on Sunday between specified points on the route of transportation as a matter to be considered by the jury in determining whether or not the delay which included a Sunday was excusable;[57] but so-called schedules offered by defendant which were in fact mere oral directions agreed to by its officials in informal conference and not filed or published are properly excluded.[58]

Defendant may show that before entering into the contract of shipment the shipper was notified of the conditions that would prevent prompt shipment,[59] but where defendant failed to give notice, at the time the shipment was accepted, of conditions likely to cause delay,[60] or where it failed to show that these conditions were unforeseeable or accidental,[61] evidence of such conditions is inadmissible.

Since the law forbids a carrier to grant any shipper a preference, defendant's evidence tending to prove that in the handling of the shipment in question defendant took into consideration the rights of other shippers loading and unloading should be admitted.[62]

Where material and competent on one of the issues in the case, evidence as to the limited facilities of the carrier is admissible.[63] To rebut the imputation of the carrier's negligence in failing to have its employees ready to make heavy repairs at night when the need therefor was discovered, evidence that other railroads operating where the delay occurred did not keep their employees on hand at night is admissible.[64] Defendant's evidence tending to show when in the usual course of its business switching crews were at work should be admitted when material.[65]

A carrier guilty of delay and rough handling in transporting cattle for pasturage may show that the cattle, although injured, soon recovered.[66] That a like shipment made the following day over the same route from the same place to the same destination arrived a day earlier is admissible to meet the defense of unavoidable delay caused by the burning of a bridge.[67]

Evidence inadmissible. Defendant's evidence of the time consumed in transit between the points involved in isolated instances is inadmissible, in the absence of a showing of the circumstances surrounding such shipments.[68] To show unavoidable delay on the day of the injury, it has been held that evidence of a congestion of traffic several days previous thereto is not admissible.[69] Where it was shown that the shipper's cattle were held in defendant's pens for four days, evidence that other owners

56. Md.—American Ry. Express Co. v. Peninsula Produce Exch., 121 A. 240, 142 Md. 422.

Testimony of shipper's agent

In action against an express company for failure to transport and deliver a carload of strawberries with reasonable dispatch, evidence of shipper's agent familiar with the usual running time for carload shipments by express as to the schedule time for arrival of the train to which the car of berries was attached, and the usual and ordinary time consumed in trip to point of destination, was competent.—American Ry. Express Co. v. Peninsula Produce Exch., 121 A. 240, 142 Md. 422.

Too remote

In action for delayed transportation of a carload of berries intended for market, evidence that other cars were placed on the delivery track at the same time as plaintiff's car, and were unloaded for the morning market, and that no claim was filed with the company on account of those cars, held too remote, in absence of evidence showing contents of such cars, and when such were sold, and with what result.—American Ry. Express Co. v. Peninsula Produce Exch., 121 A. 240, 142 Md. 422.

57. Tex.—Missouri, etc., R. Co. v. Howell, 126 S.W. 899, 59 Tex. Civ. App. 250.

58. Mo.—McFall v. St. Louis & S. F. R. Co., App., 185 S.W. 1157.

Rule of railroad inadmissible

In an action for delay in shipment of cattle, testimony as to a rule of the railroad as to period of time to be given for transportation of live stock from point where plaintiff's cattle were alleged to have been negligently delayed to the point to which such cattle were shipped held not admissible, since such testimony does not tend to either prove or disprove that the railroad was guilty of negligent delay in transporting cattle.—Wilkins v. Gulf, C. & S. F. Ry. Co., Tex. Civ. App., 260 S.W. 214.

59. Tex.—Sterling v. St. Louis, etc., R. Co., 86 S.W. 655, 38 Tex. Civ. App. 451.

60. Ga.—Payne v. Cheshire, 108 S.E. 207, 27 Ga. App. 324.
Ill.—Conover v. Wabash Ry. Co., 208 Ill. App. 105.

61. Ga.—Payne v. Cheshire, 108 S.E. 207, 27 Ga. App. 324.

62. Minn.—Allegrezza v. Great Northern Ry. Co., 221 N.W. 428, 175 Minn. 374.

63. Iowa.—Dunnegan & Briggs v. Chicago, R. I. & P. R. Co., 211 N.W. 364, 202 Iowa 787.

64. Tex.—Ft. Worth & D. C. Ry. Co. v. Gatewood, Civ. App., 185 S.W. 932, affirmed Gatewood v. Ft. Worth & D. C. Ry. Co., 232 S.W. 493, 111 Tex. 291.

65. Minn.—Allegrezza v. Great Northern Ry. Co., 221 N.W. 428, 175 Minn. 374.

66. Tex.—Houston, etc., R. Co. v. Lindsey, Civ. App., 175 S.W. 708.—Missouri, etc., R. Co. v. Mulkey, Civ. App., 159 S.W. 111.

67. Va.—Norfolk, etc., R. Co. v. Steele, 86 S.E. 124, 117 Va. 788.

68. Tex.—Wilkins v. Gulf, C. & S. F. Ry. Co., Civ. App., 260 S.W. 214.

69. Ky.—Louisville, etc., R. Co. v. McClintock, 152 S.W. 253, 151 Ky. 455.

of cattle had sometimes voluntarily left them in defendant's pens, while making arrangements to sell them, was properly excluded, where it appeared that plaintiffs were insisting upon prompt shipment.[70] Where plaintiff sues the carrier for goods delivered to it and injured in its warehouse before being shipped, claiming that it should have been shipped before the injury occurred, defendant's evidence that other shippers of the same commodity, injured at the same time, told it to ship the goods anyway is incompetent.[71] If the carrier has unconditionally agreed to transport within a given time, it cannot excuse nonperformance by alleging and proving an excuse which would otherwise be sufficient.[72]

Contributory negligence. On the question of the shipper's contributory negligence evidence as to the customary time for unloading a car of damaged fruit is admissible as bearing on the question whether the shipper proceeded with proper dispatch;[73] and where the carrier relied on the contributory negligence of plaintiff in failing to present the bill of lading, and the evidence showed that when the goods arrived at the point of destination the carrier charged the freight on them to plaintiff and accepted payment for the freight without the presentation of any bill of lading, evidence that it was not the custom of plaintiff to present bills of lading was admissible.[74]

c. Damages

Evidence material and relevant to the issue of the damages suffered by the plaintiff is admissible.

Evidence admissible. It is always competent to show knowledge by the contracting parties to a written contract of the circumstances on the basis of which the contract was made, for the purpose of showing what was within the contemplation of the parties in making the contract, whether a party seeks to recover general or special damages;[75] thus evidence tending to throw light on the preliminary negotiations between plaintiff and defendant carrier and to explain the notice of special damages given to defendant is admissible.[76] As a basis for the recovery of special damages, knowledge on the part of the carrier of circumstances requiring prompt shipment may be shown from circumstances in the case and need not be proved by direct and positive evidence of the communication of such circumstances to defendant.[77]

Any evidence which tends to throw light on the nature and to some extent the degree of deprivation suffered by the shipper owing to the carrier's negligence in delaying the goods shipped is relevant to the issue and admissible.[78] On the question of damages caused by unreasonable delay of goods shipped for sale, evidence of the difference between the market value at the time the shipment arrived and the market value at the time it should have arrived, if transported with reasonable dispatch, is admissible[79] and necessary, as shown supra § 215 d The admission of evidence of the market price of the goods shipped at a different place from its destination is not improper where it is shown that the

70. Tex.—Texas, etc, R. Co. v. Leslie, 131 S.W. 824, 62 Tex.Civ.App. 380.

71. N.C.—Lovelace v. Atlantic Coast Line R. Co, 89 S.E. 797, 172 N.C. 12.

Tobacco shipment

Where tobacco delivered to a carrier and placed in a warehouse was injured by water on the following day and the shipper sued, claiming that it should have been transported on the day it was received by the carrier, defendant's evidence that after the tobacco had been injured several tobacco shippers told carrier to ship the tobacco anyway, is incompetent as not tending to defeat plaintiff's contention that the carrier was negligent in not shipping the tobacco on day of delivery.—Lovelace v. Atlantic Coast Line R. Co., 89 S.E. 797, 172 N.C. 12.

72. Mo.—Russell Grain Co. v. Wabash R. Co., 89 S.W. 908, 114 Mo. App. 488—Gann v Chicago Great Western R. Co, 72 Mo App 34

73. Minn.—B. Presley Co v Illinois Cent. R. Co., 139 N.W. 609, 120 Minn. 295.

74. Vt.—Johnson v. Central Vermont R Co, 79 A. 1095, 84 Vt. 486.

75. Fla.—Florida East Coast Ry Co v. Peters, 73 So. 151, 72 Fla. 311, Ann Cas 1918D 121

Mass.—Weston v Boston, etc., R Co, 76 N.E 1050, 190 Mass. 298, 112 Am S R 330, 4 L R A ,N S, 569, 5 Ann Cas. 825.

76. Tenn.—Southeastern Express Co. v. Bowers, App., 109 S.W 2d 851.

Incomplete evidence

In action against carrier for delay, it may not constitute reversible error to permit documentary evidence consisting of letters and telegrams, even if incomplete in itself and insufficient to show notice to defendant of special damages, where it tended to throw light on preliminary negotiations and to explain subsequent notice to defendant—Florida East Coast Ry. Co. v. Peters, 73 So. 151, 72 Fla. 311, Ann Cas 1918D 121

77. Md.—Baltimore, etc, R Co. v. Whitehill, 64 A. 1033, 104 Md. 295. 10 C.J. p 304 note 56.

78. Ala.—Louisville & N R Co. v Jones, 99 So 919, 211 Ala. 158
N.C.—Harrill v. Seaboard Air Line Ry. Co, 107 S.E 136, 181 N.C. 315
S.C.—Piero v. Southern Express Co, 88 S.E. 269, 103 S.C. 467.
10 C.J. p 304 note 46.

Original account of sale

In an action for delay in transporting wax beans to market, original account of sales of car containing them was admissible—Stevens v. Northern Cent. Ry. Co, 98 A. 551, 129 Md. 215.

Probability of winning prize money

In an action for delay in transportation of hogs to be exhibited, evidence showing probability of plaintiff having won prize money is admissible—Kansas City, M & O Ry. Co v. Bell, Tex Civ App, 197 S.W. 322

79. Ala.—Louisville & N R. Co v. Jones, 99 So. 919, 211 Ala 158
Md.—Stevens v. Northern Cent. Ry. Co, 98 A. 551, 129 Md. 215.
Or.—Blackwell v Oregon Short Line Ry. Co, 161 P 565, 82 Or. 303.
10 C.J. p 304 note 47.

market price at the point of destination was controlled by the price at the other place.[80] Evidence as to the time a delayed shipment was sold at its destination is admissible as tending to prove an element of damage.[81]

Evidence that other cattle were unloaded later than plaintiff's cattle and sold on the same day is admissible on the issue of whether plaintiff could have sold his cattle on that day and avoided loss by the decline of the market on the following day.[82]

In an action for negligent delay in delivering a printing press, evidence of the rental value of the press and other parts connected with it is competent.[83] In an action by a performer against an express company for delay in shipping a piano needed for his show, plaintiff's testimony as to the difference in the earnings of his show without the instrument and the earnings with it in like towns is admissible to show actual damages.[84]

Deterioration in the intrinsic value of the goods, due to the delay, such as by shrinkage in weight of livestock, being an element of damages, may be shown;[85] but for this purpose only the best evidence is admissible,[86] and evidence as to shrinkage will be excluded if it is too remote or speculative.[87]

In an action for damage to live stock in transportation, where plaintiff testifies concerning the time taken in different parts of the transit, it is error on cross-examination to exclude a question as to whether the stock after being held at a certain place for several months was not sent on to its destination and delivered to the consignee on the original bill of lading, since such evidence would affect the measure of damages for unreasonable delay.[88] Evidence of extra expense caused by the delay for feed of live stock at destination and at another market to which they were reshipped on account of the fall in the market during the delay is admissible.[89]

Evidence as to the amount of freight collected on the shipment is admissible, since unless the freight charges were paid they would have to be deducted from the amount of damages allowed for the delay in shipment.[90]

Evidence inadmissible. Immaterial evidence as to damages is, of course, properly excluded.[91] Evidence of the condition of the market on a designated day is immaterial and inadmissible, where the goods would not have arrived in the usual course of transit until a later day.[92] It cannot be shown that plaintiff had contracted for the sale of the goods at destination, and that they were refused because not such as

80. Ark.—St. Louis-San Francisco Ry. Co. v. A. B. Jones Co., 260 S.W. 34, 163 Ark. 429.

81. S.C.—Van Epps v. Atlantic Coast Line R. Co., 89 S.E. 1035, 105 S.C. 406.

Notice to carrier's agent

In an action for negligent delay in transporting a shipment of beans, evidence that plaintiffs informed carrier's agent as to the time they were to be sold at destination was admissible, as tending to prove an element of damage.—Van Epps v. Atlantic Coast Line R. Co., 89 S.E. 1035, 105 S.C. 406.

82. Tex.—Fort Worth & D. C. Ry. Co. v. Dillehay, Civ.App., 297 S.W. 487.

83. N.C.—Harrill v. Seaboard Air Line Ry. Co., 107 S.E. 136, 181 N.C. 315.

84. S.C.—Piero v. Southern Express Co., 88 S.E. 269, 103 S.C. 467.

85. Or.—Blackwell v. Oregon Short Line Ry. Co., 161 P. 565, 82 Or. 303.

10 C.J. p. 304 note 51.

Condition of cattle at both points

In action for damages based on unreasonable delay in delivery of interstate shipment of cattle on through bill of lading in which plaintiff sought damages based on value at destination at the time they should have arrived, it was proper to show the condition of the cattle when loaded and at their destination, and to admit testimony as to their market value.—Louisville & N. R. Co. v. Jones, 99 So. 919, 211 Ala. 158.

86. Pa.—Keller v. Pennsylvania R. Co., 17 Pa.Dist. 920.

Commission company's account sales

In suit for shrinkage of cattle shipped from delay, the account sales rendered by commission company selling the cattle at destination was inadmissible to show weight when sold, such account sales not being proven by commission company.—Baker v. Holman, Tex.Civ.App., 196 S.W. 728.

87. Tenn.—Tennessee Cent. Ry. Co. v. Vance, 3 Tenn.App. 152.

Speculative estimate

In an action to recover damages for delay in a shipment of hogs where the only evidence to prove shrinkage was that the hogs shipped were a part of a larger drove and that the hogs that were not shipped had gained a pound a day and therefore it was estimated that these hogs had gained a pound a day held too remote and speculative and not admissible for the purpose of proving the shrinkage.—Tennessee Cent. Ry. Co. v. Vance, 3 Tenn.App. 152.

88. Ill.—Burtless v. Oregon Short Line R. Co., 180 Ill.App. 249.

89. Tex.—St. Louis, etc., R. Co. v. Gunter, 99 S.W. 152, 44 Tex.Civ.App. 480.

90. Tex.—Missouri, etc., R. Co. v. Jarrell, 86 S.W. 632, 38 Tex.Civ.App. 425.

91. **Copy of rates**

In shipper's action against express company for negligent delay, certified copy of rates of company, on file with interstate commerce commission held inadmissible, the shipper not suing for a total loss but for damages caused by negligent delay and the agreed value of the shipment shedding no light on such inquiry.—Southern Express Co. v. Malone, 78 So. 408, 16 Ala.App. 414, certiorari denied 78 So. 990, 201 Ala. 700.

Effect on market value

In action for damages to shipment of strawberries, where contract did not require delivery in time for special market and there was no delay in transportation, objection to question as to effect on market value of berries, that arrived after usual market hours, was properly sustained, and in any event was without error where same testimony was subsequently admitted.—Peninsula Produce Exch. v. American Ry. Express Co., 128 A. 403, 147 Md. 424.

92. Tex.—Galveston, etc., R. Co. v. Noelke, 125 S.W. 969, 59 Tex.Civ.App. 347.

had been represented, and not for, or on account of, their condition, as such testimony does not tend to show the amount or limit of damages suffered.[93] Evidence as to profits lost by the carrier's delay in delivery is inadmissible where the profits would depend upon uncertain, conditional, and indeterminable circumstances.[94]

§ 218. Weight and Sufficiency of Evidence

General rules control as to the weight and sufficiency of the evidence in actions of the character under consideration.

The general rules applicable to the weight and sufficiency of evidence in civil actions generally apply in actions to recover damages caused by unreasonable delay in transportation.[95] In the notes below are found cases in which the courts have held the evidence to be sufficient or to be insufficient to support a verdict or judgment for plaintiff[96] or for defendant,[97] or to show that the shipment was

93. Tex.—Gulf, etc., R. Co. v. McCorquodale, 9 S.W. 80, 71 Tex. 41.

94. N.C.—Sharpe v. Southern R. Co., 41 S.E. 799, 130 N.C. 613.

Special profit

Where, in an action against a railroad for negligently failing to deliver machinery, which caused the shutting down of a flouring-mill, the complaint did not allege nor the evidence show that any definite profit was lost, nor that the contract was such as to inform defendant that any loss of special profit would ensue, it was error to admit evidence showing what the special profit would have been during the time the mill was shut down, as the proper measure of damages was the legal interest on the capital invested, and such other damages as were the direct and necessary result of defendant's negligence.—Sharpe v. Southern R. Co., 41 S.E. 799, 130 N.C. 613.

95. Ark.—Hines v. Helena Cotton Oil Co., 227 S.W. 418, 147 Ark. 328.
Mont.—Morgan v. Hines, 211 P. 778, 65 Mont. 306.
10 C.J. p. 304 note 57, p. 305 note 58.

Preponderance necessary

In action for unreasonable delay in transportation of car of cattle, shipper must show by preponderance of evidence negligence and that car was delayed in transit longer than usual and customary time for transportation.—Nashville, C. & St. L. Ry. v. Davis, Tenn.App., 114 S.W.2d 830.

96. **Evidence held sufficient to support verdict**

(1) In general.

Ark.—Hines v. Helena Cotton Oil Co., 227 S.W. 418, 147 Ark. 328.
Ga.—Atlantic Coast Line R. Co. v. Tifton Produce Co., 194 S.E. 72, 56 Ga.App. 776.
Ky.—Louisville & C. Packet Co. v. Bottorff, 77 S.W. 920, 25 Ky.L. 1324.
Me.—Stockman v. Boston & M. R. R., 102 A. 560, 117 Me. 35.
Neb.—Petsch & McDonald v. Hines, 192 N.W. 963, 110 Neb. 1.
Okl.—St. Louis & S. F. Ry. Co. v. May, 236 P. 888, 110 Okl. 170.
S.D.—Lerum v. Chicago, M. & St. P. Ry. Co., 172 N.W. 878, 42 S.D. 103.
Tex.—Lancaster v. Johnson, Civ.App., 258 S.W. 214.—Panhandle & S. F. Ry. Co. v. Thompson, Civ.App., 250 S.W. 751.

(2) In an action for damages for delay of a shipment of cattle, evidence as to shrinkage of cattle due to delay in shipment held sufficient to support verdict.—Davis v. Graham, 225 P. 789, 31 Wyo. 239.

(3) Undisputed evidence showing shipment moved on first available train after diversion order did not support verdict against carrier based on negligent delay.—Missouri Pac. R. Co. v. Cole, 24 S.W.2d 319, 181 Ark. 1146.

Evidence held insufficient to support verdict

(1) In general.

Mo.—Argenbright v. St. Louis & S. F. Ry. Co., 267 S.W. 74, 218 Mo.App. 633.
Mont.—Morgan v. Hines, 211 P. 778, 65 Mont. 306.
Okl.—Wichita Falls & N. W. Ry. Co. v. D. Cawley Co., 172 P. 70, 69 Okl. 251.

(2) In an action for damages for delay in transportation of a shipment of horses, evidence held insufficient to support amount of plaintiff's verdict.—Cohn v. Chicago & N. W. Ry. Co., 158 N.W. 375, 100 Neb. 7.

(3) In action against railroad for delay in transporting stallions whereby shipper missed first day of sale, evidence held insufficient to sustain verdict for plaintiff without any showing that stallions such as his were sold on first day of sale, or that bidders were present to bid on such stallions.—Elliott v. Chicago, M. & St. P. Ry. Co., 161 N.W. 347, 38 S.D. 371.

Evidence held sufficient to sustain judgment

(1) In general.

S.C.—Diamond v. Southeastern Express Co., 128 S.E. 417, 131 S.C. 450.
Tex.—Panhandle & S. F. Ry. Co. v. Thompson, Civ.App., 250 S.W. 751.

(2) In suit by shipper of cattle against a railroad on account of unreasonable delay in shipment and mixture while in transit with other cattle, evidence of plaintiff's damages held sufficient to sustain finding and judgment in his favor.—Behrends v. Chicago, R. I. & P. Ry. Co., 198 Ill.App. 236.

(3) In an action against a common carrier for negligent delay in the interstate transportation of wheat, evidence held to sustain a judgment for damages in the sum of four hundred twenty-nine dollars and six cents.—Chicago, R. I. & P. Ry. Co. v. Lawton Grain Co., 221 P. 1013, 94 Okl. 289.

Evidence held insufficient to sustain judgment

(1) In general.

Okl.—St. Louis-San Francisco Ry. Co. v. Herman, 224 P. 508, 98 Okl. 187.
S.D.—Petro v. Davis, 195 N.W. 504, 46 S.D. 603.

(2) Judgment against carrier for failure to deliver potatoes on New York market in two days held against preponderance of evidence.—Norfolk Southern R. Co. v. Hudgins, 142 S.E. 412, 150 Va. 229.—Norfolk Southern R. Co. v. Hudgins, 142 S.E. 409, 150 Va. 219.

Mere supposition insufficient

In action for delay in delivery of shipment of horses, shippers' testimony as to death of mare from lockjaw that, "I suppose that this was caused by placing the horses in this hot pen and feeding them on this coarse sedge grass hay," without evidence as to real cause of mare's death, was insufficient basis for judgment of damages, since contraction of lockjaw from such source, being contrary to general rule, should have been established by something more than mere supposition.—Ft. Worth & R. G. Ry. Co. v. Fleming, Tex.Civ.App., 212 S.W. 233.

97. **Evidence showing delay caused no damage held to support judgment for defendant.**—Bollier v. Missouri Pac. R. Co., 254 P. 390, 123 Kan. 44.

Verdict warranted by evidence

In shipper's action against railroad for delay in transportation of live stock, in which the railroad present-

transported within a reasonable time,[98] or to show what is the usual and customary time,[99] or to establish a negligent[1] or an unreasonable[2] or wanted no evidence, but rested the case upon the theory that plaintiff had failed to make out a cause of action, plaintiff's evidence held to warrant jury in returning a verdict for defendant—Ratliff v. Fort Worth & R G Ry Co, Tex.Civ.App, 245 S. W. 83.

98. Prima facie evidence

Proof of carrier's delivery of freight in usual time according to custom and course of carrier's business is prima facie evidence of reasonable time as respects carrier's liability for unreasonable delay in transportation—Nashville, C. & St. L Ry. v. Davis, Tenn App., 114 S. W.2d 830.

What was reasonable time

(1) In action against express company for delay in transportation of eggs, evidence as to usual time made by passenger trains held insufficient to sustain finding as to what was a reasonable time for transportation and delivery—Barrett v. Van Pelt, 45 S Ct 437, 268 U.S 85, 69 L Ed. 857, reversing Van Pelt v. Barrett, 199 N Y S 509, 205 App.Div. 332.

(2) Evidence merely showing when live stock was shipped and received, without proof of when it should have been received held insufficient to show it was not transported within reasonable time.—Cincinnati, N O & T. P. Ry. Co. v. Gano & Burgess, 284 S.W. 423, 215 Ky. 423.

99. Evidence insufficient

In action for delay in transporting live stock, testimony based upon two shipments held insufficient to show usual and customary time consumed in shipments.—Fort Worth & D. C. Ry. Co. v. Helm, Tex.Civ App, 30 S W 2d 492

1. Evidence showing freedom from neglect

In action for damages for delay in transporting a carload of poultry, evidence held to show carrier's freedom from negligence in shipment of poultry delayed in transit by strike of its employees—Ross v. Fear-Campbell Co., 147 N.E. 720, 88 Ind. App 527.

Evidence held sufficient to show carrier's negligent delay

(1) In general—Chicago, R. I. & P. Ry. Co v. Cunningham Commission Co, 192 S W. 211, 127 Ark. 246

(2) Livestock.

Ark—Missouri Pac. R. Co. v. Martindale, 213 S.W. 777, 139 Ark. 143.

Mo—Holland v. Hines, App, 234 S W. 366

N.Y.—Intercontinental Rubber Co v. Chicago, B & Q. R Co., 179 N.Y.S 3, 189 App.Div. 649.

Tex—Wallace v Gerlach, Civ App, 249 S W. 895—St Louis, B & M Ry Co v Marcofich, Civ App, 185 S W. 51, affirmed, Com App, 221 S. W. 582

(3) Poultry—Stewart Poultry Co v Erie R Co., 163 P. 448, 99 Kan. 540

(4) Evidence held to warrant inference that delay in transporting and unloading shipment of hogs after arrival at terminal was due to negligence and not to unusual flood of business—Smith v. Missouri Pac. Ry. Co, Mo App, 183 S W. 701.

(5) Evidence held sufficient to sustain finding that the carrier was guilty of negligent delay in delivering shipment of poultry at destination—Vernon v American Ry. Express Co., Mo.App., 222 S W. 913.

(6) Evidence sustained finding of carrier's negligent delay in shipment of cattle.

Mo—Gilbreath v. Atchison, T. & S F. R R, App, 217 S.W 636.

Tex.—Gulf, C & S. F. Ry. Co v. Russell, Civ App, 27 S.W.2d 608

(7) Evidence held to authorize finding by jury of lack of reasonable care of carrier in transportation of car of potatoes, part of which froze, in not seasonably keeping track plowed, and in not using special service to move the car from where it was put off, on snowdrifts being encountered.—Smith & Hoyt v. Bangor & A. R. Co., 98 A. 737, 115 Me 223.

Evidence held insufficient to show negligent delay

(1) In general

Ill—Mason v Chicago & N. W. R. Co, 262 Ill.App. 580.

Mo.—Burgher v. Wabash Ry. Co, App, 217 S W. 854.

Tenn—Nashville, C & St. L Ry. v. Columbia Produce Co, 12 Tenn. App 609.

Tex—Hines v. First Guaranty State Bank of Aubrey, Civ.App, 230 S. W. 764.

(2) In a suit to recover damages caused by delay in the shipment of live stock, evidence held insufficient to show ultimate delay at destination or that such ultimate delay was negligent.—Phillippi v. Wabash Ry Co, Mo App, 267 S.W 960—Sandker v. Wabash Ry. Co, Mo App, 267 S W 957.

(3) In an action by the consignee of seed potatoes for delay in delivery against the seller and a carrier of the shipment, evidence held to sustain the finding of the jury as to damages and not to show that the consignee was entitled to recover more than the five hundred dollars damages found by the jury—Hudgins Produce Co. v Missouri Pac R. Co., 215 S.W 606, 139 Ark. 363.

Evidence held not to preponderate against finding that delay was due to carrier's negligence—Kirby v. American Ry. Express Co., 242 P. 24, 137 Wash. 241.

Evidence held to raise inference of carrier's negligence in failing to deliver cotton seed meal and hulls after notice of special need—Conn v. Texas & N. O Ry. Co., Tex Com App., 14 S W 2d 1004, reversing, Civ. App, 4 S.W 2d 193.

2. Evidence held sufficient to establish unreasonable delay

(1) Evidence held sufficient to support a finding that there was unreasonable delay in the transportation of potatoes, and that such delay caused the loss of a sale thereof by the shipper—New York, P & N. R. Co v. Chandler, 106 S E. 684, 129 Va. 695.

(2) Evidence held to show an unreasonable and unexplained delay in the transportation of cattle.—McMickle v. Wabash Ry. Co., Mo App., 209 S W. 611

Evidence held insufficient to show unreasonable delay

(1) In action for damages for delay in transporting a shipment of hogs, evidence held not to show an unreasonable delay under the particular circumstances.—Wallace-Farmer v. Davis, Iowa, 199 N W. 307.

(2) Evidence held not to sustain finding of unreasonable delay in delivering car of grapes and loss by reason thereof—Allegrezza v. Great Northern Ry. Co, 221 N.W. 428, 175 Minn 374.

(3) In an action for delay in delivery, finding that defendant did not transport the goods with reasonable dispatch held against the weight of the evidence—Stutson v. Atchison, T. & S. F R Co, 183 N Y.S. 417, 192 App Div 482.

(4) Evidence held to show that a shipment of live stock was delivered at the stockyards on the same day it was made, as claimed by the carrier, and not on the following day, as claimed by the shippers, and that a jury finding that there was an unreasonable delay was flagrantly against the evidence—Illinois Central R. Co. v. Tanner, 225 S W. 745, 189 Ky. 706.

Evidence held to show that there was no unreasonable delay in transporting live stock to market, if it was delivered at the stockyards on the same day it was shipped, as claimed by defendant.—Illinois Cen-

ton[3] delay, or other negligence on the carrier's part,[4] or to show that plaintiff's damage was caused by the carrier's delay.[5] In like manner the courts have frequently determined the sufficiency or insufficiency of the evidence to show a valid excuse for the carrier's delay,[6] or to show a special contract or agreement,[7] or compliance with a particular provision of the shipping contract,[8] or to establish the

tral R. Co. v. Tanner, 225 S.W. 745, 189 Ky. 706

Evidence held insufficient to establish a delay.—Goldsmith v. Florida East Coast Ry. Co., 217 Ill App 162.

3. Reckless indifference shown

In shipper's action against express company for delay, evidence, and inferences therefrom, held sufficient to authorize finding company acted with reckless indifference in failing to deliver, and with such disregard of consequences as to amount to wantonness authorizing punitive damages.—Southern Express Co. v. Malone, 78 So. 408, 16 Ala App. 414, certiorari denied 78 So. 990, 201 Ala. 700.

4. Care of shipment

Evidence held insufficient to show negligence on the part of a carrier in preserving meal after it arrived at point of destination in a heated condition, but, on the contrary, to tend to show the utmost care on part of the carrier—Hines v. First Guaranty State Bank of Aubrey, Tex.Civ.App., 230 S W. 764.

Delay due to unauthorized delivery

In action against carrier for delay in shipment of grain, evidence held to show that delay was a result of the unauthorized act of the carrier in delivering the car to the consignee first named in the bill of lading, where a new one issued provided for shipment to another city and to a different consignee.—Lusk v. Lawton Grain Co., 174 P. 793, 73 Okl. 43.

Negligence at connecting point

In an action for delay in shipment of live stock in transit, evidence held sufficient to justify finding of negligent refusal or failure of defendant railway to accept shipment at connecting point.—St. Louis Southwestern Ry. Co. of Texas v. Miller & White, Tex.Civ.App., 190 S. W. 819.

5. Finding not clearly wrong

In action upon a claim, with cross petition claiming damages for general deliveryman's failure to deliver ice cream within specified time, finding that damages were not caused by deliveryman's negligence held not so clearly wrong under evidence as to require a reversal—Reynolds v Hathaway, 167 N.W. 63, 102 Neb 299.

Negligence as proximate cause

(1) In a shipper's action against a carrier for negligent delay in transporting trainload of cattle from Vineyard, Tex., to Dickinson, N. D., evidence that the cattle were unloaded in a weakened, hungry, and almost dying condition, in a rainstorm, held to sustain a finding that defendant was negligent, and that such negligence was the proximate cause of the loss sustained—Richards v Northern Pac. Ry. Co, 173 N.W. 778, 42 N.D. 472.

(2) Evidence held to justify jury finding that delay in transportation was proximate cause of damage to plaintiff's horses, plaintiff, in directing amount of ventilation, having right to expect that transportation would be at night as usual—Stockman v Boston & M. R. R., 102 A. 560, 117 Me 35.

(3) Evidence that there was a delay of ten or twelve hours in transit, and that on arrival eight of the shipment of eighty-seven hogs were dead, and that this was an unusual number, held not enough, without more, to show that they died because of the delay or because of negligent handling of the car—Cloyd v. Wabash Ry. Co, Mo App., 240 S.W. 885.

10 C.J. p 304 note 57 [c].

6. Evidence insufficient to show excuse for delay

(1) Evidence offered by carrier held insufficient as an excuse for delay in delivery of a carload of wheat—National Elevator Co v Great Northern Ry. Co., 170 N W. 515, 141 Minn. 407.

(2) In an action against an express company for delay in delivery of a shipment of eggs, evidence held insufficient to show that the delay was caused by giving preference to governmental shipments.—Edwards v. American Ry Express Co, Mo. App., 216 S W. 781.

(3) Carrier sued for delay and refusal to carry cattle to destination because of strike of stockyard's employees held not to have shown that compliance with shipper's contract and demand for performance would have been unlawful discrimination—Riddle v. Chicago, B & Q R. Co., 210 N W. 770, 203 Iowa 1232.

Diligence in making repairs

Evidence disclosing that front drawbar of car in which bananas were being transported broke, that car was attached to end of next train traveling in opposite direction and taken back to most convenient place to be repaired, reaching there at 5 30 P. M., which was after shops had closed, and that car was promptly repaired on special service order the next morning, established reasonable diligence in repairing car—Leo Lococo's Sons v Louisville & N R. Co., 82 S W 2d 332, 259 Ky 299

Causal connection between delay and excusing circumstances

(1) Finding that delay in transportation of shipment of cattle was not shown to be caused by any strike in railroad shops held supported by evidence—Wichita Valley Ry. Co v. Baldwin, Tex Civ App, 270 S W. 1089.

(2) It being incumbent on carrier in suit against it for damages to cattle through alleged negligent delay in transit to show that delay in transportation was proximately caused by strike, evidence that shopmen's strike began three months before shipment in question, but not showing to what extent it affected movement of trains, does not sufficiently show causal connection between strike and delay.—Wichita Valley Ry Co v. Davis, Tex Civ App, 275 S.W. 169

7. Evidence held sufficient to show an express oral contract between plaintiff and defendant railroad to transport chestnuts to destination in time for the Christmas market.—John Vittucci Co. v. Canadian Pac Ry Co, 174 P. 981, 102 Wash. 686

Notice to carrier's agent

Evidence sustained finding, in shipper's action for damages for delay, that carrier's agent was informed of shipper's intention to have cars arrive at destination at particular time—Missouri & N. A Ry Co v. Potts, 10 S W.2d 515, 178 Ark 334.

Special limitation provision

Evidence in an action for damages for delay of a shipper that he signed one of the contracts for shipment and the other was signed by his agent, and that he has been engaged in shipping cattle about six years and has had in his possession contracts of this character signed by him in duplicate when shipping cattle, does not establish that he assented to the restrictions of the carrier's liability contained in such contracts—Banks v. Hines, 217 Ill.App. 596

8. Notice of claim

In suit for delay in shipment of cattle, letter from road's superintendent of freight loss admitting that a claim was filed concerning the shipment, treating matter as though notice required by the shipping contract had been given in proper time, held sufficient evidence of notice in

market value of the shipment,[9] or to show a decline in the market,[10] or the giving of notice of special damages,[11] or to establish other factual elements of the case.[12]

It has been held that where a case is tried by the court without a jury and the declaration of law is confined to a demurrer and judgment is given to plaintiff where the carrier has conceded the delay and excuses it on the ground of a government wartime preference, such excuse must be conclusively established under the rule that any substantial evidence in plaintiff's favor will justify the judgment.[13]

Possession of receipt. It has been held that the possession of a receipt by the shipper is but prima facie evidence, in an action for delay, of his assent to stipulations contained therein.[14]

Weight and sufficiency of evidence in actions for loss or injury generally see infra § 256.

§ 219. - · Trial

a. Questions of law or fact
b. Instructions
c. Verdict

a. Questions of Law or Fact

Where the evidence is conflicting and sufficient to go to the jury, questions of fact are for its determination.

If the evidence is in dispute[15] and is sufficient to

due time—McFall v. St. Louis & S F. R. Co, Mo App, 185 S.W. 1157.

9. Evidence held to establish the market value of cotton as basis for general damage for failure to ship promptly—Yazoo & M V. R Co. v. Ussery, 127 So 269, 157 Miss. 383, overruling suggestions of error 126 So 16, 157 Miss 383

Evidence held insufficient to show market value of cattle at destination when they would have arrived had they been transported without negligence.—Texas & P Ry. Co. v. Boaz, Tex Civ.App, 22 S.W.2d 492.

Evidence warranted finding that damages for delay in transporting eggs was difference between market price when delivered and market price when car should have arrived, with interest—Beatrice Creamery Co. v Missouri Pac. R Co., 247 Ill.App. 325.

10. Market report

In action for negligent delay in shipment of a carload of cattle, evidence of a market report showing that heifers of similar kind to those shipped sold at eleven dollars fifty cents and twelve dollars per hundredweight on December 16, and that the cattle shipped by plaintiffs sold the next day for eleven dollars, was evidence of a decline in the market—Marsh v. Davis, Mo.App, 251 S W. 390.

11. Conversation with carrier

In action by jobbing company against express company for damages resulting from alleged negligent delay in shipping a consignment of hats, as respects admissibility thereof, evidence that express truck was sent to jobbing company on afternoon of same day on which alleged telephonic conversation was had with express company relative to the shipment sustained finding that such conversation had actually taken place—Southeastern Express Co v. Bowers, Inc, Tenn.App., 109 S W 2d 851.

12. Agency of employees of other railroad

In an action against a carrier for delay in loading and shipping sheep, which were loaded on the cars by employees of another railroad who used the same yards and pens, evidence held sufficient to sustain a presumed finding by the trial judge that the relation of principal and agent existed between defendant carrier and the employees of the other railroad, the issue not having been submitted to the jury.—Panhandle & S F Ry. Co. v. Mayhugh, Tex Civ App., 235 S W. 915.

Avoidance of loss at market

In an action against an express company for damages for delay in delivery of shipment of eggs which the shipper asserted resulted from a fall in market, evidence held not to show conclusively that the broker to whom the eggs were assigned by promptness could have obtained the same price as had the shipment been delivered seasonably and thus avoided the fall in market—Edwards v. American Ry. Express Co., Mo.App, 216 S.W. 781.

Contract to ship corpse

In an action, by a relative of deceased, for damages for delay and deviation in the route of transportation of a corpse, evidence held to establish a contract between defendant and plaintiff, although the ticket purchased for plaintiff, who was to accompany the corpse, was purchased by her brother, and to establish that such brother was acting in her behalf—Lancaster v. Mebane, Tex Civ. App., 260 S W. 256.

Fraud or oppression

In action for delay in shipment of live stock, evidence held insufficient to show fraud or oppression relieving shipper from compliance with special contract.—St Louis & S. F. R. Co. v. Taliaferro, 156 P. 359, 56 Okl. 519.

Preparedness for shipment

Evidence, in an action for delay in transporting live stock, held to sustain a finding that the cattle were ready to be loaded, in accordance with an arrangement with the carrier, at the time of the departure of the train.—Blackwell v Oregon Short Line Ry. Co, 161 P. 565, 82 Or. 303.

Rerouting

Evidence held sufficient to establish a demand on the part of a shipper that a shipment of cattle, delayed because of a strike, be diverted to another route, and that, if the request had been granted, there would have been no further delay and injury would not have resulted—Chicago, R I & P. R Co v. Dawson, 248 S.W. 558, 157 Ark. 460.

Reconsignment

In a shipper's action for damages against a carrier for its failure to exercise ordinary care in bringing about a diversion and reconsignment of three carloads of potatoes, in that the reconsignment orders were given by mail instead of by wire, whereby the shipment was delayed, loss through falling markets resulting, evidence held insufficient to show that defendant was in possession of the shipment at the time the reconsignment orders were given to its alleged agent.—Cicardi Bros Fruit & Produce Co. v. Pennsylvania Co., 249 S W. 134, 211 Mo App 589

Weight as basis for damage

Evidence held to establish weight of cotton as basis for damage for failure to ship promptly—Yazoo & M V R. Co v. Ussery, 127 So 269, 157 Miss 383, overruling suggestions of error 126 So 16, 157 Miss 383.

13. Mo—Hunt v. Hines, 223 S.W. 798, 204 Mo.App 318

14. Wis—Strohn v Detroit, etc, R Co, 21 Wis. 554, 94 Am D. 564.

15. Conflicting evidence

(1) Conflicting evidence as to whether there was delay in transportation of live stock makes case for the jury—Missouri Pac. R Co v. Block, 218 S W. 682, 142 Ark. 127,

justify its submission to the jury,[16] the question as to what is a reasonable time for the transportation,[17] the actual time of the arrival of the goods at their destination,[18] whether or not there was a delivery within such reasonable time[19] or there was

certiorari denied 40 S.Ct. 586, 253 U.S. 493, 64 L.Ed. 1029.

(2) Where, in shipper's action against carrier, evidence was conflicting on issue whether watermelons shipped had been delivered or tendered to consignee within reasonable time, it was error to direct verdict.—Flowers v. Georgia Northern Ry. Co., 122 S.E. 647, 32 Ga.App. 52.

(3) In an action for negligent delay in the shipment of stock, where the published schedules of the carrier are not introduced in evidence, and where there is a conflict of evidence as to the schedule time, the question as to the time in which the stock was to be transported is for the jury.—Rose v. Chicago & N. W. Ry. Co., 197 N.W. 952, 111 Neb. 783.

Evidence being susceptible of more than one inference, the question whether a carrier failed to transport goods with reasonable dispatch was for the jury.—Van Epps v. Atlantic Coast Line R. Co., 89 S.E. 1035, 105 S.C. 406.

Directed verdict for undisputed evidence

(1) In railroad shipper's suit for damages from delay in delivery of cattle, court should have directed verdict for railroad under undisputed evidence showing that the cattle reached their destination as soon as possible.—Missouri Pac. R. Co. v. Gilsinger, 35 S.W.2d 1003, 183 Ark. 371.

(2) In action against railroads for negligent delay in transportation of cattle, in which the railroad's testimony that the delay at a certain point where cars were inspected and switched was a reasonable delay was not contradicted although plaintiff's agent accompanied the shipment, and there was no testimony to prove that delay at other points was not necessary to comply with U.S.Comp.St. § 8651, forbidding confinement of live stock in same cars for a longer period than thirty-six hours without unloading them for rest, water, and feeding for at least five consecutive hours, the court would have been warranted in peremptorily instructing the jury to return a verdict for the railroad.—Wilkins v. Gulf, C. & S. F. Ry. Co., Tex.Civ.App., 260 S.W. 214.

No dispute as to reasonable time

Where the facts were not in dispute, what constituted reasonable time for delivery of shipment by railroad to the consignee was a question of law.—Lazarus v. New York Cent. R. Co., C.C.A.N.Y., 299 F. 599, certiorari denied 45 S.Ct. 95, 266 U.S. 612, 69 L.Ed. 467.

16. Evidence held sufficient to go to jury

(1) In general.

Ark.—Missouri & N. A. Ry. Co. v. Potts, 10 S.W.2d 515, 178 Ark. 334.

Kan.—McKinley v. Hines, 215 P. 301, 113 Kan. 550.

Okl.—Chicago, R. I. & P. Ry. Co. v. Haskell, 245 P. 858, 117 Okl. 185.

(2) Agent's authority to contract specially.—Gray v. Wabash Ry. Co., 277 S.W. 64, 220 Mo.App. 773.

(3) Reasonable time for shipment.—Texas & P. Ry. Co. v. Moore, Tex.Civ.App., 7 S.W.2d 902, error dismissed.

(4) Negligent delay.

Iowa.—Bateham v. Chicago, M. & St. P. Ry. Co., 192 N.W. 818, 195 Iowa 650.

Mo.—Jackson v. Chicago, R. I. & P. Ry. Co., App., 265 S.W. 847.—Neely v. Hines, App., 237 S.W. 906.—Jordan v. Chicago, B. & Q. R. Co., 226 S.W. 1023, 206 Mo.App. 56.—Baker v. Schaff, App., 221 S.W. 743.—Baker v. Bush, App., 194 S.W. 1061.

Okl.—Chicago, R. I. & P. Ry. Co. v. Haskell, 245 P. 858, 117 Okl. 185.—Chicago, R. I. & P. Ry. Co. v. Lawton Grain Co., 221 P. 1013, 64 Okl. 289.

Wis.—Wooster v. Chicago & N. W. Ry. Co., 166 N.W. 431, 167 Wis. 6.

(5) Unnecessary delay.—Stewart Poultry Co. v. Erie R. Co., 163 P. 448, 99 Kan. 540.

Demurrer to evidence

In an action for delay in the shipment of live stock, where the evidence tended to show that plaintiffs, as joint owners, shipped seven carloads of cattle to market under a thirty-six hour release, and that one carload was unloaded and fed en route within thirty-six hours, and that six carloads were neither unloaded nor fed, and were forty-four hours on the way, and that there was a significant shrinkage in the weight, an order overruling a demurrer to the evidence was not erroneous.—Abell v. Atchison, T. & S. F. Ry. Co., 222 P. 91, 115 Kan. 132.—10 C.J. p. 305 note 61.

Evidence insufficient for submission to jury

(1) Negligent delay.

Mo.—Bland v. Chicago & A. R. Co., App., 232 S.W. 232.

Okl.—Chicago, R. I. & P. Ry. Co. v. White, 41 P.2d 847, 170 Okl. 646.

(2) In action for delay in delivery of live stock shipment, where there was no testimony of any contract by the carrier to transport the shipment to place of its destination, the court erred in submitting that issue to the jury and authorizing a recovery thereon.—Ft. Worth & R. G. Ry. Co. v. Jones, Tex.Civ.App., 212 S.W. 552.

Evidence not warranting peremptory charge

In action against carrier for injuries to cattle, court, held, under the evidence, to have properly refused to peremptorily instruct the jury not to consider delay at point of embarkation.—Panhandle & S. F. Ry. Co. v. McCrummen, Tex.Civ.App., 240 S.W. 607.

17. Idaho.—Gray v. Oregon Short Line R. Co., 187 P. 540, 32 Idaho 701.

Iowa.—Turkington v. Chicago, R. I. & P. Ry. Co., 194 N.W. 75, 196 Iowa 304.

Mo.—Dawson Bros. v. Chicago, B. & Q. R. Co., App., 194 S.W. 743.

N.M.—Pedrick v. Southern Pac. Co., 31 P.2d 705, 38 N.M. 284.

Okl.—Chicago, R. I. & P. Ry. Co. v. Haskell, 245 P. 853, 117 Okl. 185.—Chicago, R. I. & P. Ry. Co. v. Simms, 229 P. 638, 100 Okl. 138.—Chicago, R. I. & P. Ry. Co. v. Simmons, 228 P. 983, 100 Okl. 164.—Chicago, R. I. & P. Ry. Co. v. Lawton Grain Co., 221 P. 1013, 64 Okl. 289.—Dickinson v. Seay, 175 P. 216, 71 Okl. 66, certiorari denied Chicago, R. I. & P. R. Co. v. Seay, 39 S.Ct. 257, 249 U.S. 598, 63 L.Ed. 795.

W.Va.—Lowe v. Davis, 119 S.E. 477, 94 W.Va. 521.

10 C.J. p. 305 note 62.

Corpus Juris has been cited as authority for this statement in American Ry. Express Co. v. Roberts, 111 S.E. 744, 28 Ga.App. 510.

Reasonableness of schedule

While the reasonableness of schedules adopted by a railroad corporation may in certain cases present a jury question, in a shipper's action against a carrier for delay in transporting a carload of hogs court erred in allowing jury to determine whether or not the schedules in force were reasonable, since only question in the case was whether car was delivered with reasonable dispatch in accordance with train schedules in force.—Wallace-Farmer v. Davis, Iowa, 199 N.W. 307.

18. N.Y.—Intercontinental Rubber Co. v. Chicago, B. & Q. R. Co., 179 N.Y.S. 3, 189 App.Div. 649.

19. Ga.—Southern Ry. Co. v. Bloch, 90 S.E. 656, 18 Ga.App. 767.

Ky.—Maloney v. Cleveland, C., C. & St. L. Ry. Co., 268 S.W. 1103, 207 Ky. 262.

Mich.—Loveland & Hinyan Co. v. Waters, 159 N.W. 477, 192 Mich. 680.

a delay,[20] and whether such delay was unreasonable[21] or negligent,[22] is for the determination of the jury. The existence or nonexistence of a special agreement between the shipper and the carrier is also for the determination of the jury.[23]

Excuse for delay. If there is sufficient[24] conflicting[25] evidence to justify its submission to the jury, the issue of the reasonableness and sufficiency of the excuse which the carrier makes for delay[26] is for the determination of the jury, under proper

20. Tex.—Hines v. Davis, Civ.App., 225 S.W. 862.

21. Ga.—Central of Georgia Ry. Co. v. Griner & Rustin, 127 S.E. 878, 33 Ga.App. 705.
Ky.—Leo Lococo's Sons v. Louisville & N. R. Co., 82 S.W.2d 332, 259 Ky. 299—Crain v. Louisville & N. R. Co., 244 S.W. 59, 196 Ky. 23.
Mo.—Russell Grain Co. v. Chicago Great Western R. Co., 237 S.W. 159, 208 Mo.App. 435.
Okl.—Chicago, R. I. & P. Ry. Co. v. Haskell, 245 P. 858, 117 Okl. 185.
Tex.—Wichita Valley Ry. Co. v. Wallace, Civ.App., 17 S.W.2d 150.

After notice of diversion

In shippers' action against railroad for damage caused by delay in transporting perishable vegetables, whether there was an unreasonable delay by carrier in making shipment after notice of diversion was received held for jury.—Carter v. Atlantic Coast Line R. Co., 192 S.E. 624, 184 S.C. 414.

Perishables

What is unreasonable delay in the shipment of perishable goods is a question for the jury.—Louisville & N. R. Co. v. Farmers' Produce Co., 85 So. 578, 17 Ala.App. 388.

Unreasonable delay in unloading the cattle at the point of destination held for the jury.—Galveston, H. & S. A. Ry. Co. v. Buck, Tex.Civ.App., 230 S.W. 891.

22. Ind.—Belt R. & Stockyards Co. v. Hammond, 124 N.E. 398, 71 Ind.App. 151.
Md.—Stevens v. Northern Cent. Ry. Co., 98 A. 551, 129 Md. 215.
Mo.—Howell v. Davis, App., 236 S.W. 889.
N.Y.—Wallace v. Taylor, 198 N.Y.S. 60, 204 App.Div. 341.
Okl.—Chicago, R. I. & P. Ry. Co. v. Simms, 229 P. 638, 100 Okl. 138—Payne v. Parsons, 223 P. 618, 97 Okl. 168—Dickinson v. Seay, 175 P. 216, 71 Okl. 66, certiorari denied Chicago, R. I. & P. R. Co. v. Seay, 39 S.Ct. 257, 249 U.S. 598, 63 L.Ed. 795.
Tex.—Fort Worth & D. C. Ry. Co. v. Dillehay, Civ.App., 297 S.W. 487—Panhandle & S. F. Ry. Co. v. McCrummen, Civ.App., 240 S.W. 607.

Delay in starting shipment

It cannot be said, as a matter of law, that a carrier was not negligent in keeping sheep in cars overnight and forwarding them on the first regular train leaving after they were loaded; evidence of such matter simply raises an issue of fact for the jury.—Panhandle & S. F. Ry. Co. v. Mayhugh, Tex.Civ.App., 235 S.W. 915.

Negligence in discovering address

Although part of goods delivered to express company were wrongly addressed to Philadelphia, instead of Chester, Pa., where shipping receipt of which carrier had copy contained correct address, but goods were not delivered until about six months after they should have been delivered, if properly addressed, it was a question for the jury whether carrier was negligent in discovering proper address and making delivery.—American Ry. Express Co. v. Ewing Thomas Converting Co., C.C.A.Pa., 292 F. 335.

23. Ga.—Powell v. Seaboard Air Line Ry. Co., 90 S.E. 980, 19 Ga.App. 91.

Delivery irrespective of demurrage

In an action against a carrier for delay in shipment on which there were demurrage charges, held that question whether there was an agreement between carrier and consignee to deliver all its shipments without regard to any freight or demurrage that might be charged against same was for the jury.—Powell v. Seaboard Air Line Ry., 90 S.E. 980, 19 Ga.App. 91.

Scheduled time

In an action for damages for delay, whether the carrier specially contracted to move the freight by its scheduled train, promising to run it on schedule time, was for the jury.—Auditorium Theatre Co. v. Oregon-Washington R. & Navigation Co., 137 P. 489, 77 Wash. 277.

24. **Peremptory instruction not required**

In action by consignee against a carrier for damages for failure to notify plaintiff of arrival of bales of cotton sheeting, testimony that no notice had been received held to support verdict for plaintiffs, as against contention that peremptory instruction for defendant should have been given.—St. Louis Southwestern Ry. Co. v. T. F. Moody & Co., 268 S.W. 14, 167 Ark. 678.

25. **Where uncontroverted evidence** clearly proves the issue, the question may be treated as one of law and passed on by the court without any encroachment on the province of the jury.—Purity Ice Cream & Dairy Co. v. Adams Express Co., 187 N.W. 296, 217 Mich. 593—10 C.J. p. 306 note 65.

26. Mo.—Cunningham v. Chicago & A. R. Co., 215 S.W. 5—Smothers v. Chicago, R. I. & P. Ry. Co., App., 15 S.W.2d 884.
N.M.—Pedrick v. Southern Pac. Co., 31 P.2d 705, 38 N.M. 284.
Okl.—Chicago, R. I. & P. R. Co. v. Bradshaw, 254 P. 725, 122 Okl. 282—Chicago, R. I. & P. Ry. Co. v. Haskell, 245 P. 858, 117 Okl. 185—Chicago, R. I. & P. Ry. Co. v. Simms, 229 P. 638, 100 Okl. 138—Chicago, R. I. & P. Ry. Co. v. Simmons, 228 P. 983, 100 Okl. 164—Chicago, R. I. & P. Ry. Co. v. Lawton Grain Co., 221 P. 1013, 64 Okl. 289.
10 C.J. p. 306 note 64.

Corpus Juris has been cited as authority for this proposition.
Idaho.—Ritchie v. Oregon Short Line R. Co., 244 P. 580, 42 Idaho 193, 45 A.L.R. 909.
Okl.—Dickinson v. Seay, 175 P. 216, 71 Okl. 66, certiorari denied Chicago, R. I. & P. R. Co. v. Seay, 39 S.Ct. 257, 249 U.S. 598, 63 L.Ed. 795.

Notice of congestion

In stock shipper's action against railway for damages to cattle shipped, whether the railway in the exercise of ordinary care should have given the shipper information as to the probable congestion and inability to handle the cattle promptly at the point of destination, upon which he might not have made the shipment at all, or might have unloaded his cattle in transit for food and water, held for the jury.—Galveston, H. & S. A. Ry. Co. v. Buck, Tex.Civ.App., 230 S.W. 891.

Strike

(1) Whether there was a strike, as claimed by a carrier, delaying transportation of cattle, held for the jury.
Iowa.—Stillman v. Chicago, R. I. & P. Ry. Co., 192 N.W. 860, 196 Iowa 612.
Mo.—Warner v. St. Louis-San Francisco Ry. Co., 274 S.W. 90, 218 Mo.App. 314.

(2) Whether strike was unavoidable held for jury.—Warner v. St. Louis-San Francisco Ry. Co., supra.

(3) Whether carrier has exercised reasonable diligence to counteract effect of strike of employees is question of fact.—Ritchie v. Oregon Short Line R. Co., 244 P. 580, 42 Idaho 193, 45 A.L.R. 909.

(4) Whether defendant carrier exercised ordinary care and diligence to supply substitutes for striking employees held for the jury.—Panhandle & S. F. Ry. Co. v. Thompson,

instructions from the court. Likewise the existence of a custom excusing the carrier from its common-law duty to deliver within a reasonable time is a question for the jury.[27]

Injury and damages. Questions of fact relating to plaintiff's injury and damage suffered are properly submitted to the jury[28] where the evidence is sufficient to justify its submission.[29] Whether the delay was the proximate cause of the injury complained of is a question for the jury.[30] Likewise, whether the negligence of the shipper or his agent contributed to the injury complained of is a question of fact for the jury.[31]

Whether the damages sought to be recovered were within the contemplation of the parties at the time of the making of the contract for transportation is a question for the jury.[32] This, however, is not so where the testimony with regard to the notice given the carrier is incontrovertible and is clear and distinct,[33] or where it is insufficient for submission to the jury;[34] it is then a question of law for the court.[35]

Questions of law and fact in actions for loss or injury generally see infra § 258.

b. Instructions

Instructions in actions of this kind are governed by the rules regulating instructions in civil cases generally.

The rules governing instructions in civil actions generally apply in actions to recover damages alleged to have been caused by an unreasonable delay in transportation. Accordingly the instructions giv-

Tex.Civ.App., 235 S.W. 913, dismissed for want of jurisdiction.

27. N.J.—Carr v. Delaware, etc., R. Co., 79 A. 322, 81 N.J.Law 532—Runyan v. Central R. Co, 44 A 985, 64 N.J.Law 67, 48 L.R.A. 744.

28. N.Y.—Plass v. Barrett, 186 N. Y.S. 107, 181 App.Div. 131.
Tex.—Lide & Laney v. Texas & P Ry. Co, Civ App, 27 S.W.2d 836—Wallace v. Gerlach, Civ.App, 249 S.W. 895.

Amount of damage sustained by consignee due to delay resulting from carrier's deviation in route is for jury's determination.—Levin v. International-Great Northern R Co., Tex.Civ App., 45 S.W.2d 435, error dismissed.

Necessity for treatment

(1) Under the evidence in actions for expenses and damages from the taking of unnecessary treatment for hydrophobia in consequence of the defendant express company's delay in delivering the head of the suspected dog to the institute for examination, the question whether the treatment was unnecessary was for the jury.—Miller v. Southern Express Co., 83 S.E. 449, 99 S.C. 333.

(2) That the evidence in actions for expenses and damages from the taking of unnecessary treatment for hydrophobia in consequence of the defendant express company's delay in delivering the head of the suspected dog to an institute for examination was conflicting on whether the dog had rabies could not preclude submission of the case to the jury—Miller v. Southern Express Co., supra.

(3) Where the evidence was conflicting as to whether the proper course is to commence treatment at once, such question was for the jury.—Miller v. Southern Express Co., supra.

29. **Evidence held sufficient to go to jury**

(1) Money expended for extra feed for cattle because of railroad's negligent delay in transportation.—Lide & Laney v. Texas & P. Ry. Co, Tex.Civ App., 27 S.W.2d 836.

(2) Shrinkage.—Wallace v. Gerlach, Tex.Civ.App., 249 S.W. 895.

(3) Evidence held sufficient to make question for jury whether sickness and death of horses shipped by defendant express company was natural and probable result of negligent delay in transit.—Plass v. Barrett, 168 N.Y.S. 107, 181 App Div. 131.

Evidence held insufficient to go to jury

(1) Damages in difference in market value.—Lide & Laney v. Texas & P. Ry. Co., Tex Civ App, 27 S.W 2d 836.

(2) Shrinkage.—Midland Valley R Co v. Price, 260 P. 26, 127 Okl. 106.

No evidence of true measure

In an action against a carrier for losses resulting from delayed shipment, where there was no evidence on the true measure of damages, it was error to submit the case to the jury.—Keeney v. Chicago, B. & Q. R Co, 167 N.W. 475, 183 Iowa 522.

30. Ky.—Georgia, S. & F. Ry Co. v. Makeever, 15 S.W.2d 293, 228 Ky. 492.
N.Y.—Plass. v. Barrett, 168 N.Y.S. 107, 181 App.Div. 131.
10 C.J. p 306 note 67.

Condition of animals and cause therefor

In action against railroad for death of horses from negligent delay in transportation, question as to condition of horses, nature of disease from which they died, and whether such disease was caused by defendant's negligence, held question for jury.—Intercontinental Rubber Co. v. Chicago, B. & Q. R. Co, 179 N.Y.S. 3, 189 App Div. 649.

31. Iowa.—Daoust v Chicago, etc, R. Co, 128 N.W. 1106, 149 Iowa 650, 34 L.R.A.,N.S, 637.
10 C.J. p 306 note 71.

32. Ala.—White v. Louisville & N R. Co., 79 So. 508, 16 Ala.App 515
S.C.—Pastime Amusement Co v. Southeastern Express Co, 186 S.E 283, 181 S.C. 203, certiorari granted Southeastern Express Co v Pastime Amusement Co, 56 S.Ct 954, 298 U.S 653, 80 L.Ed 1380, reversed on other grounds 57 S.Ct. 73, 299 U.S. 28, 81 L.Ed. 20.
10 C.J. p 306 note 68.

Notice of special damages

Whether a carrier, at the time of a shipment of a road contractor's equipment, had notice from bill of lading and statements made by contractor of resulting special damages which would result from delay in shipment, held for jury—McCarten v. St. Louis-San Francisco R. Co, Mo.App, 264 S.W. 50

33. Tenn.—Illinois Cent. R Co v Johnson, 94 S.W. 600, 116 Tenn 624.

34. U.S.—Long v. American Ry. Express Co., C.C.A Tex., 30 F.2d 571, certiorari denied 50 S.Ct 24, 280 U S. 563, 74 L.Ed. 617.

Directed verdict

Evidence, relative to notice having been given to agent for express company of large possible loss, which the court would be justified in holding to be insufficient to support the inference that such notice was given, will warrant a directed verdict for express company—Long v American Ry. Express Co, C.C.A Tex, 30 F.2d 571, certiorari denied 50 S.Ct. 24, 280 U.S. 563, 74 L.Ed. 617.

35. Tenn.—Illinois Cent. R. Co. v. Johnson, 94 S.W. 600, 116 Tenn. 624.

en must fully[36] and correctly[37] state the law and must be appropriate and applicable to, and limited by, the facts and issues of the particular case[38] and must be warranted thereby,[39] and should not

36. Ill.—See Crossley v St Louis, I M & S. Ry. Co., 199 Ill.App. 195.
Mo.—Howell v Davis, App., 236 S.W. 889.

Negligent delay not explained

(1) In an action for delay in a shipment of hogs, in which there was evidence of minor delays which were explained and were not unusual, an instruction in favor of plaintiffs if the hogs were "negligently delayed" without informing jury what was meant by words "negligently delayed" held erroneous.—Howell v. Davis, Mo.App., 236 S.W. 889.

(2) In an action for negligent delay in transporting live stock, an instruction as to the burden of proving negligent delay, and that proof of delay alone was not sufficient to establish negligence, but authorizing the jury to infer negligence from facts and circumstances proved in evidence, was erroneous, where the jury were not told what facts and circumstances constituted negligence —Neely v. Hines, Mo.App., 237 S.W. 906

37. **Affirmative form required**

In action for delay in transporting live stock, defendant's contention, supported by evidence, that after arrival of shipment at connecting point it repaired defective cars and delivered to connecting road as quickly as possible should have been submitted to jury in affirmative form.—Ft. Worth & D C Ry Co v. Gatewood, Civ.App., 185 S.W. 932, affirmed Gatewood v. Ft Worth & D. C. Ry. Co., 232 S.W. 493, 111 Tex. 291.

Inaccurate terminology

In shipper's action for delay in transporting stallions, instruction on measure of damages held unfortunate in use of term "market price" rather than "market value."—Elliott v Chicago, M & St. P. Ry. Co., 161 N.W. 347, 38 S.D. 371.

Instructions held to be correct or not erroneous

(1) In an action against an express company for delay in transportation, charge held proper as simply meaning that defendant was liable for an unreasonable delay.—Piero v. Southern Express Co., 88 S.E. 269, 103 S.C. 467.

(2) In an action for damages resulting from delay in transporting a trainload of cattle, an instruction that in determining the question of transportation with reasonable dispatch the jury were to take in consideration all the circumstances affecting movement of the train held correct and properly given—Colson v Midland Valley R. Co., 215 P. 1004, 113 Kan. 667.

(3) Instruction on duty of carrier to maintain its tracks, etc., to withstand ordinary floods held not error. —Ft. Worth & D. C Ry. Co v Atterberry, Tex.Civ.App., 190 S.W. 1133.

(4) In action for negligent delay in transportation of live stock, under bill of lading providing for transportation "with reasonable dispatch," charge submitting question of whether the stock was accepted for "immediate transportation" held not erroneous, in view of construction of 'immediate" with reference to shipment as meaning with "reasonable promptitude" or within "reasonable time," although use of term "reasonable time" or "reasonable dispatch" would have been more accurate.—Central of Georgia Ry. Co v. Griner & Rustin, 127 S.E. 878, 33 Ga.App. 705.

(5) In shipper's action against carrier for injury to freight from unreasonable delay, instruction was proper that carrier was bound to exercise extraordinary diligence.—Atlantic Coast Line R. Co v. Tifton Produce Co., 194 S.E. 72, 56 Ga.App. 776.

Instructions held incorrect or erroneous

(1) Instruction that the reasonable time for transportation is the time consumed under ordinary circumstances is error—Dawson Bros. v. Chicago, B & Q. R. Co., Mo.App., 194 S.W. 743.

(2) It is error to instruct with reference to railroad's duty to ship by a shorter route than the one specified in the bill of lading—Illinois Cent. R. v. Luther, 283 S.W. 1013, 214 Ky. 658.

(3) Instruction that, if jury found defendant failed to transport live stock within reasonable time, burden was on defendant to prove failure was not due to negligence, held erroneous as applied to interstate shipment—Fairley v. Chicago, R. I. & P. Ry. Co., Mo.App., 32 S.W.2d 109

(4) Instruction that evidence that cattle were not transported in time ordinarily required warranted inference of carrier's negligence unless otherwise shown held erroneous, where shipment was interstate— Smothers v. Chicago, R. I. & P. Ry. Co., Mo.App., 15 S.W.2d 884.

(5) It is error to instruct that if special contract was made it could not be construed as assuming other than usual obligations of the carrier, but that, if it was the intention to extend extra facilities, the contract was void and illegal as discriminatory.—Hill v. Minneapolis & St. L. R. Co., 161 N.W. 444, 179 Iowa 406.

Not misleading

In action for negligent delay in shipment of a carload of cattle, where there was but one delay proved, which defendant explained in a manner consistent with the exercise of due care on its part, an instruction submitting generally the matter of delay was not misleading, in that it did not point out or define what would constitute negligence or any facts necessary to be found to convict defendant thereof—Marsh v. Davis, Mo.App., 251 S.W. 390.

Not prejudicial

In action for damages to interstate shipment from negligent delay, charge on presumption and burden of proof held not prejudicial, when considered as a whole, as ruling that mere delay tended to show negligence.—Van Epps v. Atlantic Coast Line R. Co., 89 S.E. 1035, 105 S.C. 406.

38. Va.—Norfolk Southern R. Co. v. Norfolk Trucking Exchange, 88 S.E. 318, 118 Va. 650.
10 C.J. p. 306 note 74.

Appropriate instruction

In action for damages for delay in transporting cattle, instruction as to carrier's liability for failure to inform shipper of conditions which might occasion delay held appropriate—Ott v. Atchison, T. & S. F. Ry Co., 169 P. 957, 102 Kan. 254.

Inapplicable instruction

In an action for delay in transporting a carload of hogs, instruction on carrier's liability for negligent handling was inapplicable under the evidence and should not have been given—Wallace-Farmer v. Davis, Iowa, 199 N.W. 307.

39. Tex.—Galveston, H. & S. A. Ry Co. v. Neville, Civ.App., 272 S.W. 597.

Instructions held to be improper as unsupported by the evidence in the case.

Ark.—Missouri Pac. R. Co. v. S. L. Robinson & Co., 65 S.W.2d 902, 188 Ark. 475.
Iowa.—Fay v. Chicago R. I. & P. Ry. Co., 173 N.W. 69, 186 Iowa 573.
Mo.—Vaughn v. St. Louis-San Francisco Ry. Co., 15 S.W.2d 901, 223 Mo.App. 732—Smothers v. Chicago, R. I. & P. Ry. Co., App., 15 S.W.2d 884—Phillippi v. Wabash Ry. Co., App., 267 S.W. 960—Sandker v. Wabash Ry. Co., App., 267 S.W. 957
Tex.—Ft. Worth & D. C. Ry. Co. v. Atterberry, Civ.App., 190 S.W. 1133.

Pleadings supporting instruction

(1) Where carrier's answer set up a strike as a defense to an action for damages for delay in shipping cattle, the allegations stood denied as a matter of law and supported an in-

exclude from the jury's consideration issues which there is evidence tending to support.[40] Requested instructions, on matters not already covered, which correctly state the law and are applicable to, and supported by, the evidence should be given,[41] but erroneous, misleading, or inapplicable instructions or instructions already covered by other charges are properly refused.[42] In instructing on the carrier's liability as such, the court should avoid imposing on it too high a degree of liability.[43] It is the duty of the court to instruct the jury correctly on the measure of damages.[44] Merely limiting the total

struction notwithstanding the failure of the reply to negative the allegations.—Stillman v. Chicago, R. I. & P. Ry. Co., 192 N.W. 860, 196 Iowa 612.

(2) In action by consignor against carrier for negligent delay, negligent icing and packing of shipment in improper car, instructions held not erroneous as being unsupported and unlimited by the declaration.—Norfolk Southern R. Co. v. Norfolk Truckers' Exchange, 88 S.E. 318, 118 Va. 650.

(3) Where, in an action against a carrier for damages based on shrinkage in weight of sheep alleged to have been caused by defendant's negligent delay in transporting shipment, plaintiff's claim for damages was based on the allegation that fifty lambs were damaged by being trampled and in bad condition, instruction that, if the delay caused more culls, jury could allow for the extra culls, held not to require reversal on the theory the instruction was broader than the pleadings, since, if the lambs were in bad condition, they would be culled.—Prebe v. Quincy, O. & K. C. R. Co., Mo.App., 260 S.W. 816.

40. Md.—Bloecher & Schaaf v. Pennsylvania R. Co., 160 A. 281, 162 Md. 463.
10 C.J. p 306 note 75.

Carrier's duty of reasonable dispatch
Where owner relied on and showed delay, instruction not including the duty of the carrier to transport live stock within a reasonable time was error.—Bloecher & Schaaf v. Pennsylvania R. Co., 160 A. 281, 162 Md. 463.

41. **Refusal of requested instruction erroneous**

(1) In an action by shippers of live stock for delay in transit, where the shipment was interstate and required at least sixty hours to make, it is error for the court to refuse a correct requested instruction concerning the requirements of the federal law as to the unloading of cattle for resting, watering, and feeding.—International & G. N. Ry. Co. v. Landa & Storey, Tex.Civ.App., 183 S.W. 384.

(2) In an action against a railroad by shippers of live stock for damages from delay in transit by loss of a market, the shippers' case being founded on negligence, a requested charge, defining negligence and fault as used in an issue submitted, should have been given.—Quanah, A. & P. Ry. Co. v. Collier, Tex.Com.App., 215 S.W. 838, reversing, Civ.App., 197 S.W. 96.

(3) Requested special charges submitting to jury whether carrier's delay in delivering cattle was caused by necessity of unloading other cattle should have been given.—Fort Worth & D. C. Ry. Co. v. Dillehay, Tex.Civ.App., 297 S.W. 487.

(4) In action by shipper who had prepaid the freight against railroads for refusal to deliver goods to shipper's buyer without payment of freight charges, in which railroads claimed the latter refused the goods because of inferior quality, and not because of railroads' demand for payment of charges and consequent delay until railroads' discovery of the mistake, it was error to refuse an instruction submitting such issue.—Russell Grain Co. v. Chicago Great Western R. Co., 237 S.W. 159, 208 Mo.App. 485.

Rest statutes
In case of an interstate shipment of live stock which required two or more days to make, the court, when requested, should instruct the jury with relation to the requirements of the federal statute as to unloading live stock for rest, water, and feed.—International, etc., R. Co. v. Landa, Tex.Civ.App., 183 S.W. 384.—10 C.J. p 307 note 81.

42. **Argumentative, incorrect, and unsupported instruction**
Requested charge that, if cattle arriving too late for market on date of arrival were delivered with usual dispatch, jury should not consider market values on days of arrival, even to show trend of market, held improper as on weight of evidence, argumentative, relieving defendant from duty to exercise ordinary care, and not warranted by evidence.—Galveston, H. & S. A. Ry. Co. v. Neville, Tex.Civ.App., 272 S.W. 597.

Requested instruction properly refused
(1) A requested instruction that, if shipper's failure to use refrigerator car or to order re-icing contributed to loss of spinach, the jury must find for defendant was properly refused, where evidence showed that such a car is not used for transportation of spinach.—Norfolk Southern R. Co. v. Norfolk Truckers' Exchange, 88 S.E. 318, 118 Va. 650.

(2) Court did not err in refusing instruction that carriers are not insurers of the safe delivery of the live stock at any particular time, but were bound to use only ordinary care under the circumstances of the shipment the charge given by the court being correct and adequate.—Panhandle & S. F. Ry. Co. v. Morrison, Tex.Civ.App., 191 S.W. 138.

(3) Court properly refused to instruct that "defendant is not liable for delays, if any, unless the same were due to its negligence, and if you find that delays, if any, were due to cold weather or other action of the elements, then the defendant is not liable for any damage to said stock caused by such delays as you may find were due solely to the weather," where no evidence was introduced to support it.—Rogness v. Northern Pac. Ry. Co., 196 P. 989, 59 Mont. 373

43. Okl.—Atchison, T. & S. F. Ry. Co. v. Ridley, 249 P. 289, 119 Okl. 138
10 C.J. p 306 note 76

Instruction erroneous
In action for damages to interstate shipment of live stock made under contract prescribed by interstate commerce commission, instruction that carrier had duty to handle shipment expeditiously and with reasonable dispatch was error as placing an additional duty on the carrier.—Atchison, T. & S. F. Ry. Co. v. Ridley, 249 P. 289, 119 Okl. 138.

44. Iowa.—Siegel v. Chicago, R. I. & P. Ry. Co., 208 N.W. 78, 201 Iowa 712.
10 C.J. p 307 note 77.

Double measure erroneous
Instruction taking in full scope of measure of damages for negligent delay by carrier in transportation of horses, and then allowing further damages for care and services to place horses in condition fit for market, is erroneous as allowing double measure of damages.—Siegel v. Chicago, R. I. & P. Ry. Co., 208 N.W. 78, 201 Iowa 712.

Instructions held proper or not erroneous on the measure of damages in actions for delay in transportation
Kan.—Stewart Poultry Co. v. Erie R. Co., 163 P. 448, 99 Kan. 540.
Mich.—Loveland & Hinyan Co. v. Waters, 159 N.W. 477, 192 Mich. 680
Or.—Blackwell v. Oregon Short Line Ry. Co., 161 P. 565, 82 Or. 303.

amount plaintiff may recover,[45] or merely instructing the jury to assess damages without any direction as to the rule by which such damages should be assessed,[46] is erroneous. An instruction which authorizes the recovery as damages of all the expense of handling, feeding, and watering live stock in transit is reversible error, in a case where all such expense as is not necessitated by the delay must be borne by the shipper.[47]

Instructions in actions for loss or injury generally see infra § 259.

c. Verdict

A special finding will not defeat a general verdict when they are consistent.

In an action against a carrier for delay in transporting live stock under a statute requiring transportation of such a shipment without delay and at not less than a prescribed speed, where a delay of three days was proved and the jury specially found that the carrier negligently billed the car to the wrong destination, such special finding does not defeat a general verdict for plaintiff since they are not inconsistent.[48]

§ 220. Judgment

The name of the carrier's agent, joined as defendant, should be stricken from the judgment where no cause of action was stated against him and he was ignored in the instructions.

Where an agent of defendant carrier was joined as a defendant in a suit for delay in transportation, but no cause of action was stated against him and the instructions were given as though the carrier was the sole defendant, the agent's name should be stricken from the judgment.[49]

§ 221. Damages for Delay

The damages recoverable in an action for delay in transportation are limited to those actually sustained and ascertainable from, and supported by, the evidence.

In actions for damages resulting from wrongful delay in transportation, plaintiff will ordinarily be confined to such damages as are actually sustained,[50] and which are supported by,[51] and can be ascertained from,[52] the evidence. Ordinarily, the damages recoverable are such and only such as are the proximate result of the delay, and not such as might have resulted from it.[53] Nevertheless, a pecuniary loss is not always required.[54] Conjectural, speculative, or remote damages cannot be recovered.[55] If during the negligent delay the

Shrinkage as element

In action against a carrier for damages from delay in shipment of cattle, court properly submitted shrinkage in weight of cattle as an element of damage, where there was evidence as to what the weight of the cattle should have been on the market had they been transported at the usual time, and as to what the cattle actually weighed when they were sold on the market.—Panhandle & S F. Ry. Co. v. Clarendon Grain Co., Tex.Civ.App., 215 S.W. 866

45. Mo.—Smith v. Chicago, etc., R Co., 170 S.W. 324, 183 Mo App. 180.

46. Miss.—Yazoo, etc., R Co. v. Christmas, 42 So 169, 89 Miss. 686. 10 C.J p 307 note 79.

47. Okl.—St Louis, etc., R. Co. v. Cox, 138 P. 144, 40 Okl. 258.

48. Kan.—Harper v. Davis, 215 P. 284, 113 Kan. 536.

49. Or.—Blackwell v. Oregon Short Line Ry. Co, 161 P. 565, 82 Or. 303

50. La.—United Pants Mfg. Co. v. American Ry. Express Co., 2 La. App. 7.
Ohio—C. L. Hils Co. v. Cincinnati, N O & T. P. Ry. Co., 181 N.E 819, 42 Ohio App 103
Tex.—Panhandle & S F. Ry Co. v. Talmage, Civ App, 206 S.W. 862. 10 C.J. p 307 note 83.

Not a penalty

The damages recoverable for a delay in delivery of a shipment are not to be identified as a penalty imposed on the carrier for his failure to deliver the goods on time.—C. L. Hils Co. v. Cincinnati, N. O & T. P. Ry. Co, 181 N E 819, 42 Ohio App. 103.

51. Ark.—Prescott & N. W. R Co v. Davis, 191 S.W. 210, 126 Ark 306.
Ind.—Williams v Pittsburgh, C., C. & St. L. Ry. Co., 120 N.E. 46, 68 Ind App. 93.
Ky.—Georgia, S. & F. Ry. Co v. Makeever, 15 S.W 2d 293, 228 Ky. 492.

Infected shipment

Where a shipment of cholera infected hogs was negligently delayed, thereby delaying innoculation at the destination, but the evidence showed that not more than eighty per cent of infected hogs could have been saved, failure to limit recovery against carrier for negligent delay was error.—Georgia, S. & F. Ry. Co. v. Makeever, 15 S W.2d 293, 228 Ky. 492.

52. Ind.—Williams v. Pittsburgh, C., C. & St. L. Ry. Co., 120 N.E. 46, 68 Ind App. 93.

53. N.C.—Pendergraph v. American Ry. Express Co, 100 S.E. 525, 178 N.C. 344.
10 C.J. p 307 note 84.

Application of rule difficult

In applying the principle set out in the above text, it has been well said that the difficulty experienced by the courts is not so much in the abstract principles, but in their application to special circumstances, so multiform and various in the transactions of actual life.—Vicksburg, etc., R. Co. v. Ragsdale, 46 Miss. 458.

54. **Pleasure automobile**

Damages for delay in the delivery of an automobile shipped over defendant's railroad were properly awarded, although the automobile was used for pleasure only, and there was no evidence of pecuniary loss.—McCabe v. Chicago & N W. Ry. Co., 215 Ill.App. 99

55. Ind.—Williams v. Pittsburgh, C., C. & St. L. Ry. Co., 120 N E. 46, 68 Ind App. 93.

Damages not speculative or uncertain

(1) Damages for express company's delay in delivery of picture film were neither so speculative nor special as to preclude recovery.—Diamond v. Southeastern Express Co., 128 S E. 417, 131 S C 450.

(2) Damages for loss of chance to compete for prize money are not too remote and speculative in action for delay in transporting hogs for exhibition purposes.—Kansas City, M. & O. Ry. Co. v. Bell, Tex.Civ.App., 197 S.W. 322.

market price at destination increases, the shipper is not injured and is not entitled to recover damages.[56] Where the character of a commodity is to be changed into a different commodity, affected by a different market and the prices prevailing therein, in the absence of a showing that the delay caused the transformed commodity to reach the market to the damage of the consignee, there is no damage compensation for which the carrier is liable.[57]

If no actual damages are shown, only nominal damages are recoverable,[58] and if negligent delay on the part of the carrier is shown, the shipper is in any event entitled to recover nominal damages.[59]

Where, on the consignee's refusal to accept goods because of delay, the shipper reshipped them back to the starting point under an agreement with the carrier to allow the profit lost on the shipment plus the difference between the freight rates, the fact that the goods were subsequently resold by the shipper at the regular price is immaterial in determining the loss of profits and freight charges resulting from the delay.[60]

The damages should be adequate but not excessive.[61] Where, however, there is competent evidence in support of a claim for damages resulting from the delay and from a consideration of which different minds might arrive at different amounts, the damages assessed by the jury will not be held to be excessive when they are within an amount which seems to be fair and reasonable under the evidence.[62]

Special damages are discussed, see infra § 229. Damages for loss or injury generally see infra §§ 262–274.

§ 222. · · Elements and Measure in General

a. In general
b. Value of goods
c. Loss of particular market

a. In General

The proper elements and measure of damages are dependent on the nature of the goods, the purpose of the shipment, and whether or not the action sounds in contract or tort.

The proper elements and measure of damages for delay in delivery in any particular case depend somewhat on the nature of the goods shipped and the purposes for which the shipment is made. The particular elements of damages recoverable are considered infra §§ 223–228.

It has been held that where the action sounds in tort, based on the negligent failure of the carrier to transport goods to their destination within a reasonable time the measure of damages is some-

(3) Where it appeared that the cattle delayed were "feeders" bought for resale; and plaintiff, who was an experienced cattleman, testified that when they arrived they looked gaunt, had lost thirty or thirty five pounds more in weight than they would have, had they not been delayed, and were not in a salable condition when they arrived, as they had been when they were shipped, the damages were not so uncertain and speculative as to be impossible of ascertainment—Hendrix v. Wabash R. Co., 80 S.W. 970, 107 Mo.App 127.

56. Tex—Stevens v. St. Louis Southwestern R. Co., Civ App., 178 S.W. 810.

57. Ohio.—C L Hils Co v. Cincinnati, N. O & T. P. Ry. Co, 181 N E 819, 42 Ohio App. 103.

Scrap iron to be broken

Carrier was not liable for damages from delay in shipping scrap iron intended to be broken up and sold as small scrap, in absence of showing delay caused damage to shipment as small scrap—C L Hils Co. v. Cincinnati, N. O & T. P. Ry. Co, 181 N E 819, 42 Ohio App. 103

58. Kan—Craig v. St. Louis-San Francisco Ry Co, 242 P 117, 120 Kan 105, rehearing denied 243 P 1050, 120 Kan. 427, certiorari denied 47 S Ct. 107, 273 U S. 714, 71 L Ed. 854

10 C J p 311 note 22

59. N C—Storry Lumber Co. v. Southern R. Co., 65 S E. 460, 151 N C 23.

10 C J. p 311 note 21.

Corpus Juris has been cited as authority for the proposition in Austin, Nichols & Co, Inc v. Chesapeake & O. Ry. Co., 196 N Y S 757, 759, 119 Misc. 565.

60. Ohio—Pennsylvania R. Co v. Ault Woodenware Co, 153 N.E 86, 21 Ohio App. 255.

61. **Damages held to be excessive**

(1) $500, for loss of profits and expenses, incurred because of carrier's failure to transport merry-go-round in time agreed, held excessive by amount in excess of $70—Gray v. Wabash Ry. Co, 277 S.W. 64, 220 Mo App. 773.

(2) On allegation that hogs delayed in shipment lost twenty five pounds per head and their value depreciated twenty five cents per hundredweight because thereof, verdict for more than amount of total weight lost is excessive—Kansas City, M & O Ry Co. v. Bell, Tex.Civ App, 197 S.W 322.

Damages not inadequate

In action for damages for delay in shipment of live stock, so that it brought a lower market price and shrunk in weight, verdict of fifty dollars was not so clearly inadequate as to justify setting it aside on that ground.—McArdle v. Chicago, M. & St P. Ry. Co., 165 N W. 232, 138 Minn. 379.

62. Neb—Petsch & McDonald v. Hines, 192 N W. 963, 110 Neb. 1.

Damages held not excessive

(1) $844, for delaying shipment and roughly handling cattle, resulting in death of five cows and nine calves, and injuries to others, held not excessive—Galveston, H & S. A. Ry. Co v. Hollan, Tex Civ App, 13 S W 2d 996.

(2) $650, held not excessive for damage to six carloads of cattle because of shrinkage and a drop in the market due to the carrier's delay in unloading and delivering.—Petsch & McDonald v. Hines, 192 N W 963, 110 Neb. 1.

(3) $150, where a carrier delayed a shipment of forty seven head of cattle for about a day, causing them to be without feed or water, the amount being based on the testimony of a cattleman as to their shrinkage in weight, is not excessige—Chicago, R I & P Ry. Co. v. Stallings, 201 S.W. 294, 132 Ark. 446.

what different than that applicable to actions for breach of contract, the carrier being liable for all consequences which naturally flow from its wrongful act, provided they are not too remote, and if they could have been reasonably anticipated, it being immaterial whether or not they were in the contemplation of the contract of carriage or not.[63]

Elements and measure of damages in actions for loss or injury see infra § 263.

b. Value of Goods

The measure of damages for a delay in transportation is not ordinarily the value of the goods shipped unless there has been a total loss.

The measure of damages for delay in transportation is not the value of the goods, since the bailor still retains the ownership, but the loss proximately caused by the delay. The carrier's liability is to compensate for the damages growing out of the delay, and not for loss, and the remedy of the person entitled to the goods is to sue for the damages he has sustained by reason of the delay. This rule proceeds on the theory that a party injured by the breach of a contract by another should take all reasonable steps to minimize the damage he will suffer.[64] The length of the delay does not in any way affect the operation of the rule.[65] Neither does the fact that the owner of the goods has been obliged to buy other like goods affect the rule;[66] he should accept the goods and sue for the damages caused by the delay.[67] The rule is not abrogated by a statute making the carrier liable for loss or damage to goods and to a penalty for failure to adjust the claim therefor within a time limited.[68]

A stipulation for a sum per day as damages for delay does not apply to injury to the goods due to delay.[69]

In case of damage to a part of the goods only by delay there can be recovery only for such partial damage.[70]

Where loss is total. An exception to the rule occurs where because of unreasonable delay the goods become valueless, or in other words, where the delay has caused what is equivalent to a total loss, to the owner; under these circumstances a recovery of the full value of the goods when and where they should have been delivered is proper.[71]

Sale by carrier. Where a delay in the transportation of goods has caused the loss of a sale at a stipulated price, such delay will be considered to be the proximate cause of the loss to the shipper of the full value of the goods, where the carrier subsequently wrongfully sold the goods, thus preventing the shipper from selling them on the market or taking any measures to minimize the damages.[72]

c. Loss of Particular Market

The loss of a particular market due to unreasonable delay in transportation is an element of damages.

Although, as heretofore shown in § 191 b, a carrier cannot as a rule be held liable for failure to deliver a shipment in time for a particular market, nevertheless, if there is a delay caused by the negligence of the carrier, which delay deprives the shipper of the benefit of the market on a certain day,

63. Ala.—White v. Louisville & N. R. Co., 79 So. 508, 16 Ala.App 515.

Any reasonably anticipated damages
Tort-feasor is liable for any damages consequent on his act which are directly traceable to it if they could reasonably have been anticipated as likely to have resulted from neglect; hence in shipper's action against express company, in recovering damages for delay, shipper was not limited to interest on value of shipment during period of delay.—Southern Express Co. v. Malone, 78 So. 408, 16 Ala.App. 414, certiorari denied 78 So. 990, 201 Ala. 700.

64. Ga.—Southern Express Co. v. Hanaw, 67 S.E. 944, 134 Ga. 445, 137 Am.S.R. 227.
10 C.J. p 308 notes 96–99.

Corpus Juris has been cited as authority for this proposition in:
Miss.—American Ry. Express Co. v. Peters, 91 So. 570, 571, 128 Miss. 875.
Va.—New York, P. & N. R. Co. v. Chandler, 106 S.E. 684, 690, 129 Va. 695.

Cattle shipment
Only in instances where there is no market value are the courts authorized to find the reasonable or the intrinsic value of the cattle shipped.—Davis v. Hill, Tex.Civ.App., 271 S.W. 281.

65. N.J.—Higgins v. U. S. Express Co., 85 A. 450, 83 N.J.Law 398.
10 C.J. p 308 note 1.

66. Tenn.—Illinois Cent. R. Co. v. Johnson, 94 S.W. 600, 116 Tenn. 624.
10 C.J. p 308 note 2.

67. Ark.—Chicago, etc., R. Co. v. Pfeiffer, 119 S.W. 642, 90 Ark. 524, 22 L.R.A.,N.S., 1107.

68. S.C.—Bullock v. Charleston, etc., R. Co., 64 S.E. 234, 82 S.C. 375—Cousar Mercantile Co. v. Southern R. Co., 64 S.E. 391, 82 S.C. 307—Moody v. Southern R. Co., 60 S.E. 711, 79 S.C. 297.

69. N.Y.—Harmony v. Bingham, 12 N.Y. 99, 62 Am.D. 142—Place v. Union Express Co., 2 Hilt. 19.

70. Tex.—St. Louis, etc., R. Co. v. Cates, 38 S.W. 648, 15 Tex.Civ.App. 135.

71. N.C.—Lambert-Murray Co. v. Southern Express Co., 59 S.E. 991, 146 N.C. 321.
10 C.J. p 308 note 7, p 309 note 8

Corpus Juris has been cited as authority for this proposition in Uhrich Mill Work Co. v. Missouri Pac. R. Co., 212 P. 654, 655, 112 Kan. 658.

Goods not salable
Where goods of special design are delayed in shipment so that the consignee has to supply his wants elsewhere, and the goods are consequently rendered worthless and cannot be sold for any price, damages for the full value of the goods may be properly awarded.—Uhrich Mill Work Co. v. Missouri Pac. R. Co., 212 P. 654, 112 Kan. 658.

72. Va.—New York, P. & N. R. Co. v. Chandler, 106 S.E. 684, 129 Va. 695.

and he is damaged thereby, the loss of that market may be considered in estimating his damages.[73] General damages resulting from a delay in transporting goods to a market whereby a special sales day is lost may be recovered from the carrier, even though the goods had not been sold under a definite contract before shipment.[74] Where a shipment could not have been delivered in time for a sale on a certain day, damages for any decline of the market from that time until the time when they should have been delivered are not recoverable.[75] Where, however, a carrier contracts to deliver cattle in time for a particular market, but it fails to make delivery in time to permit the animals to be fed and watered before market, as is customary, so that they are held over for the next day's market, the carrier is liable for a loss occasioned by a decline in the market.[76]

In cases of negligent delay in delivery, market conditions and practices rather than market rule hours will govern, and the injurious consequences of delivery too late for market on the day of arrival are to be regarded as consequences of delivery for the next day's market.[77]

The measure of damages for the loss of a particular sale due to delay in delivery is considered infra § 229.

§ 223. Depreciation in Market Value Generally

a. As ordinary measure of damages
b. Goods not shipped for sale

a. As Ordinary Measure of Damages

(1) In general
(2) Intrinsic deterioration or shrinkage
(3) Seasonal goods

(1) In General

The difference between the market value of the goods at the time they should have been delivered and such value when actually delivered is a proper measure of damages for delay.

It is the general rule, so stated in Corpus Juris which has been quoted and cited as authority therefor,[78] that for unreasonable delay in the transportation of nearly all classes of goods the shipper is entitled to recover the difference between the market value of the goods at the time and place at which delivery should have been made, and their market value when delivery was actually made.[79]

73. Mo.—Ozark Fruit Growers' Ass'n v. St. Louis-San Francisco R. Co., 46 S.W.2d 895, 226 Mo.App. 222.
W.Va.—Lowe v. Davis, 119 S.E. 477, 94 W.Va. 521.

74. Tex.—Davis v. Morgan, Civ.App., 251 S.W. 310.

75. Ky.—Illinois Central R. Co. v. Tanner, 225 S.W. 745, 189 Ky. 706.

76. Tex.—St. Louis & S. F. R. Co. v. White, Civ.App., 160 S.W. 1128, affirmed 222 S.W. 963, 110 Tex. 585.

77. Kan.—Kirby v. Missouri, K. & T. R. Co., 246 P. 1005, 121 Kan. 275.

78. Ala.—American Ry. Express Co. v. Baer, 92 So. 652, 207 Ala. 355.
Kan.—Uhrich Mill Work Co. v. Missouri Pac. R. Co., 212 P. 654, 112 Kan. 816.
N.Y.—Austin, Nichols & Co., Inc. v. Chesapeake & O. Ry. Co., 196 N.Y.S. 757, 119 Misc. 565.
W.Va.—L. Blustein & Co. v. American Ry. Express Co., 123 S.E. 566, 95 W.Va. 643.

79. U.S.—Pennsylvania R. Co. v. Wm. H. Muller & Co., C.C.A.Md., 15 F.2d 535, certiorari denied 47 S.Ct. 449, 273 U.S. 748, 71 L.Ed. 872—Pomona Products Co. v. Southern Ry. Co., D.C.Ga., 294 F. 982—American Ry. Express Co. v. Ewing Thomas Converting Co., C.C.A.Pa., 292 F. 335.
Ala.—Atlantic Coast Line R. Co. v. Enterprise Oil Co., 101 So. 605, 211 Ala. 676.
Ark.—Missouri Pac. R. Co. v. S. L. Robinson & Co., 65 S.W.2d 902, 188 Ark. 475—H. Rouw Co. v. Kansas City Southern Ry. Co., 288 S.W. 900, 172 Ark. 252—Chicago, R. I. & P. Ry. Co. v. Cunningham Commission Co., 192 S.W. 211, 127 Ark. 246—Murrell v. Pacific Exp. Co., 14 S.W. 1098, 54 Ark. 22, 26 Am.S.R. 17.
Ga.—Southern Ry. Co. v. Bunch, 109 S.E. 523, 27 Ga.App. 689—Seaboard Air Line Ry. Co. v. Pruitt, 102 S.E. 182, 24 Ga.App. 748.
Ill.—Marsh L. Brown & Co. v. Chicago, New York & Boston Refrigerator Co., 207 Ill.App. 89—Behrends v. Chicago, R. I. & P. Ry. Co., 198 Ill.App. 236—Warren Land Co. v. Chicago, St. P., M. & O. Ry. Co., 195 Ill.App. 157.
Ind.—Pennsylvania R. Co. v. Beckett, 193 N.E. 706, 100 Ind.App. 250—Williams v. Pittsburgh, C., C. & St. L. Ry. Co., 120 N.E. 46, 68 Ind.App. 93.
Iowa.—International Harvester Co. of America v. Chicago, M. & St. P. Ry. Co., 172 N.W. 471, 186 Iowa 86.
Md.—Stevens v. Northern Cent. Ry. Co., 98 A. 551, 129 Md. 215.
Miss.—Yazoo & M. V. R. Co. v. Ussery, 127 So. 269, 157 Miss. 383, overruling suggestions of error 126 So. 16, 157 Miss. 383—Yazoo & M. V. R. Co. v. Armstrong & Co., 71 So. 905, 111 Miss. 652.
Mo.—Security Stove & Mfg. Co. v. American Ry. Express Co., 51 S.W.2d 572, 227 Mo.App. 175.
N.Y.—American Locomotive Co. v. New York Cent. R. Co., 179 N.Y.S. 851, 190 App.Div. 372—Steinberg v. Erie R. Co., 170 N.Y.S. 893, 103 Misc. 573, affirmed 172 N.Y.S. 921, 186 App.Div. 939—William R. Mankoff, Inc., v. Erie R. Co., 161 N.Y.S. 346, 97 Misc. 415.
Okl.—Wichita Falls & N. W. Ry. Co. v. D. Cawley Co., 172 P. 70, 69 Okl. 251.
Pa.—Pennsylvania R. R. v. Rothstein, 165 A. 752, 109 Pa.Super. 96.
S.C.—Middleton & Co. v. Atlantic Coast Line R. Co., 130 S.E. 552, 133 S.C. 23—Middleton & Co. v. Atlantic Coast Line R. Co., 110 S.E. 796, 118 S.C. 351.
S.D.—Willer v. Chicago, M. & St. P. Ry. Co., 210 N.W. 81, 50 S.D. 319.
Tex.—Texas & P. Ry. Co. v. Boaz, Civ.App., 22 S.W.2d 492—Baker v. Nance Bros., Civ.App., 294 S.W. 290—St. Louis, B. & M. Ry. Co. v. Bath, Civ.App., 292 S.W. 552—Hines v. Edwards, Civ.App., 228 S.W. 1117—Houston & T. C. R. Co. v. Westbury, Civ.App., 208 S.W. 383—Gulf, C. & S. F. Ry. Co. v. Gross, Civ.App., 204 S.W. 693—Galveston, H. & S. A. Ry. Co. v. Gibbons, Civ.App., 202 S.W. 352—Panhandle & S. F. Ry. Co. v. Harp, Civ.App., 193 S.W. 438—Interna-

In the nature of things, such damage, it is said, is deemed to have been within the contemplation of the parties at the time the contract was made, as a probable consequence of an unreasonable delay.[80]

If there is no market on the day of delivery the market value at the next available market will control.[81] If there is no market value at the destination it has been held that the market price at the nearest place where there is a market for the quality specified will control.[82] It has also been held that if by reason of the delay there is no market value for the goods at their destination and in consequence they are shipped to another market, the measure is the difference in market value at destination when they should have arrived and what they sold for on the market to which they were shipped.[83] Where, however, a shipper diverted his shipment to another market with the carrier's consent, and it was undisputed that the same facilities would have been furnished for shipment to the second market and that the damage to the shipment was caused by failure to ice the car before loading, the measure of damages should be based on the market value at the destination to which the car was finally sent, not that at the original destination, since the shipper was entitled to the benefit of his right to reship to a better market.[84] Where a railway agent at the point to which goods were consigned agrees to send a car containing them, as soon as it arrives, to another point, thus changing their destination to the latter point, the measure of damages for delay in holding the car at the original destination is the difference in values at the changed destination.[85] Where the value of the goods where they were manufactured is shown and when it is also shown that such goods were shipped all over the country from the point of manufacture, it has been held to be a fair deduction that the goods are at least of the same value at the point of destination and plaintiff's damages may be ascertained therefrom.[86]

Depreciation in value of goods in actions for loss or injury generally see infra § 264.

Amount paid for, or brought by, goods. The general rule heretofore stated applies with full force and effect, irrespective of the amount paid for the goods; and it is of no importance whether the price was too low or that it was exorbitant.[87]

tional & G. N. Ry. Co. v. Landa & Storey, Civ.App., 183 S.W. 384
10 C.J. p 309 note 10.

Live stock

(1) The measure of damages for unreasonable delay in the delivery of a shipment of live stock is the difference in the market value of such stock at the time when it was actually delivered and at the time it should have been delivered.

Neb.—Berliner v. Director General of Railroads, 184 N.W. 914, 106 Neb. 801.

Tenn.—Nashville, C. & St. L. Ry. v. Davis, App., 114 S.W.2d 830.

W.Va.—Lowe v. Davis, 119 S.E. 477, 94 W.Va. 521.

Wyo.—Davis v. Graham 225 P. 789, 31 Wyo. 239.

(2) Where carrier was negligent in unloading and delaying a shipment of cattle at a certain intermediate point until its freight traffic, interrupted by a strike, could be resumed to their destination, treatment of the cattle at such point becomes immaterial, and the general rule as to the measure of damages for the delay applies.—Panhandle & S. F. Ry. Co. v. Thompson, Tex.Civ.App., 235 S.W. 913, dismissed for want of jurisdiction.

Exclusive measure

In the absence of a special contract the measure of damages for delay set out in the above text, with interest less unpaid freight, is exclusive.—Southern Ry. Co. v. Bunch, 102 S.E. 462, 25 Ga.App. 45.

No change by statute

Amendment to Interstate Commerce Act providing liability for full actual loss leaves measure of damages same as it was at common law.—Wood & Co. v. Chicago, M. & St. P. Ry. Co., 151 N.E. 229, 320 Ill. 341, reversing 236 Ill.App. 595.

Valuation in claim

A shipper is not bound by the valuation stated by him in the claim filed with the express company especially where he stated he placed a reduced value in the claim upon the articles to procure an immediate settlement.—Southern Express Co. v. Couch, 249 S.W. 559, 157 Ark. 604

Where limited liability clause is void

Damages is the common-law measure, namely, the value of the shipment at point of destination, when it should have been delivered, where clause in bill of lading, limiting liability, was void under Cummins Amendment.—Davis v. Hunter, 138 N.E. 785, 79 Ind.App. 462.

80. Ala.—American Ry. Express Co. v. Baer, 92 So. 652, 207 Ala. 355.
N.Y.—Austin, Nichols & Co., Inc. v. Chesapeake & O. Ry. Co., 196 N.Y.S. 757, 119 Misc. 565.
10 C.J. p 310 note 11.

81. Neb.—Berliner v. Director General of Railroads, 184 N.W. 914, 106 Neb. 801.

82. Ill.—Wood & Co. v. Chicago, M. & St. P. Ry. Co., 151 N.E. 229, 320 Ill. 341, reversing 236 Ill.App. 595.—Illinois Cent. R. Co. v. Cobb, 72 Ill. 148.

On date delivery was due

Proper measure of damages for delay in transporting carload of beverage, was market price of beverage at shipping point on date beverage was to arrive at destination, where shipping point was nearest place there was a market.—Wood & Co. v. Chicago, M. & St. P. Ry. Co., 151 N.E. 229, 320 Ill. 341, reversing 236 Ill.App. 595.

Wholesale market

If a wholesale shipment is involved and there is no wholesale market at the place where the shipment should have been delivered, it has been held that the actual value of the shipment at the nearest wholesale market may be considered.—American Ry. Express Co. v. Parisian Hat Co., Tex.Civ.App., 240 S.W. 947.

83. Tex.—Missouri R. Co. v. Carpenter, 114 S.W. 900, 52 Tex.Civ.App. 585
10 C.J. p 311 note 17.

84. Ark.—St. Louis, etc., R. Co. v. Tilby, 174 S.W. 1167, 117 Ark. 163.

85. Tex.—San Antonio, etc., R. Co. v. Thompson, Civ.App., 66 S.W. 792.

86. Kan.—Uhrich Mill Work Co. v. Missouri Pac. R. Co., 212 P. 654, 112 Kan. 658.

87. S.C.—Rutland v. Southern R. Co., 62 S.E. 865, 81 S.C. 448.

Nevertheless, where the only evidence tending to show that the goods had a market value at their destination when they should have been delivered greater than the price at which they were sold by plaintiff consignor, after the buyer had refused to accept them, was the sale made by plaintiff to the consignee, the court may assume that the sale to the consignee was at market price.[88] Proof of the actual sale price of the goods after delivery is unnecessary.[89]

Contract for delivery within specified time. It is of no importance whether or not the carrier had undertaken specially to deliver by a fixed day, as this is a matter which affects merely the liability of the company and not the measure of damages recoverable.[90]

Special agreement as to damages in case of loss. The rule also applies, notwithstanding a stipulation in the bill of lading that, in the event of loss of property, the value of the same at the point of shipment shall govern, inasmuch as the stipulation refers to property lost in transit and not to property damaged by the delay of the carriers.[91]

Shipment to foreign country. The fact that the goods are shipped to a foreign country where a different standard of money prevails does not affect the operation of the rule, but the standard of the United States must be taken in both places as the measure of value in money.[92]

Where goods are returned to place of shipment from the point of destination because of refusal to receive them, and the shipper is not promptly notified of the return, the measure of damages is the difference in the value of the shipment at the time and the place it ought to have been delivered and its value at the time when plaintiff was notified of its return.[93]

Delays for different periods of time. Where two portions of a shipment are delayed and one longer than the other, and a profit is made on the one portion in consequence of the delay, it should be deducted from the loss sustained as to the other part by reason of the delay.[94]

(2) Intrinsic Deterioration or Shrinkage

The general measure of damages applies whether the damage results from market decline, intrinsic deterioration, shrinkage, or a combination of these causes.

The rule that the measure of damages is the difference between the market value of the goods at the time when delivery should have been made and the market value when and where delivery was actually made applies whether the damages result from a decline in the market, or from intrinsic deterioration, shrinkage, or a combination of these causes.[95] Thus, if injury to the goods results from unreasonable delay in transportation, the shipper may recover not only the depreciation caused by a decline in the market value thereof at the time they were delivered and that at the time they should have been delivered, but he is entitled also to recover damages for the injury to the goods.[96]

The measure of damages for delay of a shipment of live stock is the difference between its value at the time and place of delivery in an uninjured condition and its value in the depreciated condition in which it was actually delivered.[97] It has been held that, if there is no difference in the market value at the time the stock was delivered and that at the time it should have been delivered, plaintiff can recover only for the injury to its fitness for market resulting from the delay, and the cost of feeding and caring for it during the

88. Tex.—Houston & T. C. R. Co. v. Westbury, Civ App., 208 S.W. 383.

89. S.C.—Middleton & Co. v. Atlantic Coast Line R. Co., 130 S.E. 552, 133 S.C. 23.

90. Ill.—Chicago, etc., R. Co. v. Thrapp, 5 Ill App 502.
Mass.—Cutting v. Grand Trunk R. Co., 13 Allen 381.

91. Mo.—Hardin Grain Co. v. Missouri Pac. R. Co., 96 S.W. 681, 120 Mo.App. 203.

92. Tex.—Mexican Nat. R. Co. v. Garcia, Civ App., 26 S.W. 780.

93. N.Y.—G. S. Roth Clothing Co. v. Maine S.S. Co., 86 N.Y.S. 25, 42 Misc. 550.

94. Tex.—Gulf, etc., R. Co. v. Hughes, Civ App., 31 S.W. 411.

95. W.Va.—L. Blustein & Co. v. American Ry. Express Co., 123 S.E. 566, 95 W. Va. 643.

96. Md.—Stevens v. Northern Cent. Ry. Co., 98 A. 551, 129 Md. 215.
10 C.J. p. 314 note 58.
Corpus Juris has been cited in support of this proposition.
Mo.—Morrow v. Wabash Ry. Co., App., 265 S.W. 851.
N.Y.—Austin, Nichols & Co. v. Chesapeake & O. Ry. Co., 196 N.Y.S. 757, 119 Misc. 565.

97. Mo.—Phillippi v. Wabash Ry. Co., App., 267 S.W. 960—Sandker v. Wabash Ry. Co., 267 S.W. 957—Morrow v. Wabash Ry. Co., 265 S.W. 851, 219 Mo.App. 62.
Tex.—Davis v. Hill, Civ App., 271 S.W. 281—Ft. Worth & D. C. Ry. Co. v. Gatewood, Civ App., 185 S.W. 932, affirmed Gatewood v. Ft. Worth & D. C. Ry. Co., 232 S.W. 493, 111 Tex. 291.
Wyo.—Davis v. Graham, 225 P. 789, 31 Wyo. 239.

Selling delayed shipment with another

Where cattle composing two shipments were worth one dollar per head less on the market when they reached their destination than they would have been, had they arrived at the time and in the condition they would have been, had it not been for defendant's negligence, the mingling of the cattle and selling both shipments together was not prejudicial to defendant, in an action for damages sustained by the delay in shipment, as the damages would have been the same, had the shipments been sold separately.—Gulf, W. T. & P. Ry. Co. v. McCampbell, Civ. App., 85 S.W. 1158, modifying 85 S.W. 854.

delay.[98] It has uniformly been held that shrinkage in weight due to the delay is a proper element of damage to be allowed.[99] Furthermore, if the negligent delay caused a loss of weight and this loss caused the remaining weight to be worth less on the market than it would otherwise have been, both the value of the lost weight and the depreciation of the remaining weight are proper elements of damage.[1] It has also been held that where a negligent delay in delivering live stock resulted in the loss of the market on the day of arrival as there was no time to shape it for market on that day, the proper measure of damages is the difference between the market value, had it arrived without delay or injury and the market value on the first market after its arrival for which it could be prepared by the exercise of reasonable diligence.[2]

Damages may be allowed for other physical injuries than shrinkage resulting from the delay.[3] Where some of the live stock were dead when the shipment arrived at its destination due to a negligent delay at an intermediate point, the measure of the shipper's damage for the dead animals is their market value on arrival had no delay occurred.[4] If a carrier negligently delayed a shipment of live stock, any damage suffered by the stock by reason of being placed in the sun in a badly ventilated place while being moved is recoverable as an item of damages regardless of whether the carrier was negligent in so placing the stock; if, however, the delay was not caused by the carrier's negligence it is not liable for injury to the stock by being so placed unless it was negligent in so placing the stock.[5]

Live stock shipped to pasture. When cattle are transported to pasture or feeding pens to prepare them for market, the proper measure of damages for loss in weight occasioned by the actionable delay of the carrier has been held to be the expense of reproducing the weight lost by reason of the delay, market value rule not being pertinent[6]

Stipulation or special contract. Where it is stipulated that any recovery is to be based on value at the place of shipment, it has been held that damages for delay and consequent deterioration are to be measured by the difference of value due to that cause, not exceeding the value at the place of shipment.[7] It has also been held that, where the parties contract that the amount of the loss shall be computed on the value of the property at the place and time of shipment, the shipper can recover for loss from delay only the difference between such value and the salvage price plus any charges paid.[8]

(3) Seasonal Goods

Unusual loss from delay in carrying seasonal goods is not recoverable as general damages.

General damage through the carrier's delay in delivering freight cannot become special damage because of unusual loss caused by the delay in carrying seasonal goods and does not create an exception to the ordinary or market-value rule.[9] The term "market value" in determining the measure

98. Ky.—Newport News, etc., R. Co. v. Mercer, 29 S.W. 301, 96 Ky. 475, 16 Ky.L. 555.

99. Tex.—Kansas City, M. & O. Ry Co. v. McMullan, Civ App., 48 S.W.2d 445—Kansas City, M. & O Ry. Co. of Texas v. Bomar, Civ. App., 207 S.W. 570.
W.Va.—L. Blustein & Co. v. American Ry. Express Co., 123 S.E. 566, 95 W.Va. 643.
Wyo.—Davis v Graham, 225 P. 789, 31 Wyo. 239
10 C.J. p 314 note 60.

1. Tex.—Kansas City, M. & O Ry. Co. of Texas v. McMullan, Civ. App., 48 S.W.2d 445, error dismissed—Kansas City, M. & O. Ry. Co. of Texas v. Bomar, Civ.App., 207 S.W. 570.

2. Tex.—St. Louis & S. F. R Co. v. White, 222 S.W. 963, 110 Tex 585, affirming, Civ App., 160 S.W. 1128.

3. Ill.—Priestly v. Northern Indiana, etc, R Co, 26 Ill. 205, 79 Am D. 369
10 C.J. p 314 note 61.

Disease
Jury having found that hogs shipped were free from disease when delivered to carrier, that negligent delay proximately caused them to become diseased, that all of loss in value was proximately caused by such delay, and that hogs were sold as soon as practicable, held, that carrier was liable for loss in value on hogs.—Davis v. Cochran, Tex Civ. App., 275 S.W. 423.

4. Tex.—Ft. Worth & D. C Ry. Co v. Gatewood, Civ App., 185 S.W. 932, affirmed Gatewood v Ft Worth & D. C. Ry. Co., 232 S.W 493, 111 Tex 291.

5. Mo.—Neeley v. Hines, 227 S.W. 650, 206 Mo App. 621.

6. Kan.—Colson v Midland Valley R. Co, 215 P. 1004, 113 Kan 667.

7. U.S.—Southern Pac. Co v. Arnett, Utah, 111 F. 849, 50 C.C.A 17.

8. Iowa.—Keeney v. Chicago, B & Q R. Co, 167 N.W. 475, 183 Iowa 522.

9. N.Y.—Steinberg v. Erie R Co., 170 N.Y.S 893, 103 Misc. 573, affirming 172 N.Y.S. 921, 186 App. Div. 939.
Okl.—Wichita Falls & N. W. Ry. Co. v. D. Cawley Co, 172 P. 70, 69 Okl. 251.
Tex.—American Ry. Express Co v. Parisian Hat Co., Civ App., 240 S.W. 947.

Fur coats
In an action against a carrier for delay in delivering two fur coats, the measure of damage is the difference between the market value when the goods should have arrived and the value at the time of delivery, notwithstanding the goods are "seasonable" and depreciate in value because of change of style.—Bawer v. Barrett, 171 N.Y.S 322

Straw hats
Unusual loss to shipper of seasonal goods, such as straw hats, caused by carrier's delay in returning goods after refusal by consignee, does not create exception to ordinary or market value rule of damages, carrier being liable for difference in market

of damages for depreciation in the value of seasonal goods delayed in transportation has however been held to mean the price at which such merchandise would sell in the open market, in quantities as shipped, at the point of destination.[10]

b. Goods Not Shipped for Sale

It is a general, but not universal, rule that the fact that goods are not shipped for sale or for immediate sale does not alter the rule as to the measure of damages for delay. The rental value during period of delay, of machinery or tools shipped for use is generally regarded as the proper measure of damages for their unreasonable delay.

While in the majority of cases in which the general rule, stated above in subdivision a, was announced the goods unreasonably delayed were shipped for sale, the rule ordinarily applies whether property is shipped to market or held for some other purpose, or whether it is intended for immediate sale or not;[11] thus the fact that live stock was shipped for exhibition rather than for immediate sale does not affect the application of this general rule.[12] In some jurisdictions, however, an exception to the rule allowing as damages for unreasonable delay the difference between the market value of the goods at the time they are delivered and their market value at the time they should have been delivered is recognized in a number of decisions in the case of goods not intended for market but for some special purpose of the owner;[13] and it has been held that where the consignee does not expect or intend to sell on delivery but intends to store the goods for better prices the general rule as to the measure of damages does not apply.[14] As shown below, this exception is applicable particularly to machinery and tools, and to household goods and wearing apparel, see infra § 225.

Machinery and implements. The measure of damages for unreasonable delay in transportation of machinery, in the absence of notice of special damages, is its rental value during the time it was improperly delayed, or, in other words, the value of its use to the owner;[15] and to this may be added such reasonable expense as may be incurred by the shipper in making a search for the goods or in endeavoring to secure delivery.[16] It is said that a loss of the use of machinery during the time delivery was delayed is the natural and proximate result flowing from the delay.[17] Rental value is properly allowed as the measure of damages for an automobile intended to be used for pleasure only, even though the evidence discloses that plaintiff did not hire another automobile except an occasional taxi.[18] There is authority, however, to the effect that loss of rental value is a special damage for which notice must have been given if it is to be recovered.[19]

Where the carrier admits unreasonable delay in the shipment of implements, which were not damaged, and no fluctuation occurred in their market value, the shipper has been held to be entitled to recover only their reasonable rental value for the time of the unreasonable delay.[20]

§ 224. Depreciation in Market Value between Time of Arrival and Time of Sale

No recovery is allowed for depreciation occurring after the goods arrived and could have been sold.

Where goods have unreasonably been delayed there can be no recovery for depreciation in market value occurring after the time the goods actually arrived and could have been sold,[21] nor after

value between time of arrival and time when goods should have arrived—Steinberg v. Erie R. Co., 170 N.Y.S. 893, 103 Misc. 573, affirming 172 N.Y.S. 921, 186 App.Div. 939.

10. Tex.—American Ry. Express Co. v. Parisian Hat Co., Civ.App., 240 S.W. 947.

11. S.C.—Middleton & Co. v. Atlantic Coast Line R. Co., 130 S.E. 552, 133 S.C. 23.
10 C.J. p 310 note 12.

12. Tex.—Kansas City, M. & O. Ry. Co. v. Bell, Civ.App., 197 S.W. 322.

Proof of sale after exhibition insufficient

In action for delaying shipment of hogs intended for exhibition, proof of sale price several days after arrival and after being exhibited held not to furnish proper facts for assessing actual damages.—Kansas City, M. & O. Ry. Co. v. Bell, Tex. Civ.App., 197 S.W. 322.

13. Ala.—American Ry. Express v. Baer, 92 So. 652, 207 Ala. 355.
10 C.J. p 311 note 27.

Sale implied

The ordinary measure of damages implies that the shipper proposes to sell the goods on arrival—Pennsylvania R. Co. v. Wm. H. Muller & Co., C.C.A.Md., 15 F.2d 535, certiorari denied 47 S.Ct. 449, 273 U.S. 748, 71 L.Ed. 872.

14. S.C.—Middleton & Co. v. Atlantic Coast Line R. Co., 110 S.E. 796, 118 S.C. 351.

15. Ala.—Brothers v. Illinois Cent. R. Co., 77 So. 423, 16 Ala.App. 273.
Okl.—Atchison, T. & S. F. Ry. Co. v. Sun Drilling Co., 165 P. 1133, 65 Okl. 239.
10 C.J. p 312 note 29.

16. Okl.—Atchison, T. & S. F. Ry. Co. v. Sun Drilling Co., supra.
10 C.J. p 312 note 32.

17. Ala.—Brothers v. Illinois Cent. R. Co., 77 So. 423, 16 Ala.App. 273
10 C.J. p 312 note 31.

18. Ill.—McCabe v. Chicago & N. W. Ry. Co., 215 Ill.App. 99.
No notice of the use for which a car shipped over a railroad was intended is required, where the owner sought no special damages for the delay.—McCabe v. Chicago & N. W. Ry. Co., 215 Ill.App. 99.

19. Ark.—Chicago, etc., R. Co. v. Newhouse Mill, etc., Co., 119 S.W. 646, 90 Ark. 452.

20. Miss.—New Orleans & N.E. R. Co. v. J. H. Miner Saw Mfg. Co., 78 So. 577, 117 Miss. 646.

21. Kan.—Anderson v. Atchison, T. & S.F. Ry. Co., 192 P. 755, 107 Kan. 537.
10 C.J. p 314 note 66.

such time can there be any recovery for the expense of keeping the goods, or for shrinkage in weight, or depreciation in actual value.[22]

Generally, where there is a market for live stock upon arrival after a negligent delay by the carrier, the shipper must sell immediately, whereupon he can recover the difference between the price received and what the shipment would have brought except for the delay; he may not hold the shipment over and speculate on a better price; but this rule, presupposes a fair or reasonable market or a fair opportunity to sell and the shipper need not sell a delayed shipment immediately upon arrival unless there is such a fair opportunity to sell.[23]

§ 225. Household Goods and Wearing Apparel

The rental value during period of delay is the measure for household goods. As to goods without rental value, such as clothing, the reasonable value of the use is the proper measure.

The rule stated in Corpus Juris quoted with approval,[24] is that, where goods are not intended for the market, but are household goods intended to serve some specific purpose of the owner, the measure of damages for delay in transportation is, as often held, the rental value of the goods during the period of delay.[25]

If the goods consist of clothing, or similar domestic or household goods which cannot properly be said to have any rental value, the measure of damages is ordinarily the reasonable value of the use of the property to the owner during the time of the delay,[26] although it has been held that the carrier must have had notice of its intended use as wearing apparel by the owner or the general rule as to depreciation of market value at the place of delivery will apply.[27]

It has been held that, where delay in delivery wearing apparel renders necessary the purchase of clothing for immediate use, the measure of damages for delay in delivering the clothing shipped is the difference between the cost of that purchased and its value to the owner at the time of the delivery of the clothing delayed in shipment,[28] and that if there is no evidence to show the value, to the owner, of the clothing purchased at the time the clothing delayed in shipment was delivered, there is no basis on which damages can be awarded.[29]

§ 226. Incidental Expenses and Damages

The carrier is liable for any incidental damages proximately resulting from the delay in transportation, in addition to the depreciation in market value.

In addition to the difference between the market value of the goods at the time and place when they should have been delivered and the time and place when they were delivered, the carrier is liable for any other and incidental damages naturally and proximately flowing from such delay.[30] It is very generally held that necessary expenses incurred

22. Kan.—Anderson v. Atchison, T & S F. Ry. Co, supra.
Tex—Gulf, C. & S. F. Ry. Co. v. Dean, Civ App, 261 S.W. 520.
10 C J. p 315 note 67.

No sale at next market
Where, because of a carrier's negligence, cattle shipped to the Kansas City market did not arrive in time for Thursday's market and were held over until Friday, which was a regular market day, but, the market being inactive, the cattle did not sell and were held over until Saturday, when they were shipped to another market, held that, for purposes of computing the damages resulting from shrinkage, the cattle were delivered for the Friday market, and damages for shrinkage subsequent to delivery should not be allowed, the delay having no causal relation to the inactivity of the market.—Anderson v. Atchison, T. & S F. Ry. Co., 192 P. 755, 107 Kan. 537.

Subsequent deterioration
Carrier is liable for delay of perishable produce, only for deterioration at time of delivery, and it was insufficient to show deterioration when produce was sold several days later.—Gulf, C & S. F. Ry. Co. v. Dean, Tex.Civ.App., 261 S.W 520.

23. Tex—Gulf, C. & S. F. Ry. Co v. Russell, Civ.App., 27 S.W.2d 608.

No fair bids
Where cattle through carrier's negligent delay arrived too late for morning market and in afternoon commission men could not secure fair bids, shipper holding part of cattle over until following morning when lower market was encountered could recover losses from carrier.—Gulf, C. & S. F. Ry. Co. v. Russell, Tex.Civ App., 27 S.W.2d 608.

Where there is no market for goods when delivered and the consignor uses due diligence to dispose of them and later does dispose of them at the best price obtainable, such delay will not affect his right to maintain an action for damages due to delay in transportation by carrier.—L. Blustein & Co. v. American Ry Express Co., 123 S.E. 566, 95 W Va. 643.

24. Ala.—American Ry. Express Co v. Baer, 92 So 652, 207 Ala. 355

25. Tex—Brown v. Adams, 3 Tex. A.Civ.Cas. § 390.

26. Tex.—Pecos & N. T. Ry. Co v. Grundy, Civ App., 171 S.W. 318.
10 C.J. p 312 note 35.

27. Ala.—American Ry. Express Co. v. Baer, 92 So. 652, 207 Ala. 355

A question of a witness as to what was the depreciation of a fur scarf during the time of delay should have called for the market value of the fur at the place of delivery at the time it should have been delivered and the market value there when actually delivered if the defendant had no notice at the time of shipment that it was intended for wearing apparel of the owner—American Ry. Express Co. v. Baer, 92 So 652, 207 Ala. 355.

28. N.Y.—Bridge v. New York Cent, etc, R. Co, 150 N Y S. 146, 88 Misc. 35.

29. N.Y.—Lichterman v. Barrett, 157 N.Y.S 882

30. Ill.—Behrends v. Chicago, R. I. & P. Ry Co, 198 Ill.App. 236.
10 C.J. p 312 note 38.

by the owner of the goods on account of negligent delay of the carrier in delivering them at their destination may be recovered;[31] this is in accordance with the well settled principle that one who is injured by the negligence of another is bound to use all reasonable means at his command to lessen the damages which would otherwise result from such negligence,[32] and he cannot recover damages for such loss as might have been avoided by a compliance with the rule.[33] On complying with this rule, it is only fair that he should be allowed the necessary expense to which he is put in reducing the damages.[34] Nevertheless, plaintiff is not entitled to damages for inconvenience and expense to which he was put by the delay where he offers no evidence on the subject; and under these circumstances he is entitled to only nominal damages, if to any at all, for his inconvenience and expense.[35]

In applying the foregoing principles to dead freight, it has been held that expenses incurred in securing the safety of the goods are recoverable[36] and also expense incurred in reshipping to another market, made necessary because by reason of negligent delay the original place of destination ceased to be a market for the class of goods shipped.[37]

Although it has been held that damages are not recoverable for loss of time while waiting for the goods to arrive,[38] it has been held that insurance which the shipper may have had to pay by reason of increased risk caused by the delay is recoverable,[39] as is demurrage on vessels awaiting the delayed shipment.[40] According to some decisions expenses incurred in searching for or attempting to locate the goods are recoverable[41] unless such expenditures were unreasonable or unnecessary.[42]

Expense cannot be included which might have been avoided by the exercise of reasonable care,[43] or which does not grow out of the delay.[44] Interest paid on a debt which the consignee expected to discharge by delivery of the goods is not recoverable.[45]

Where perishables are lost in packing houses and fields due to the carrier's negligent delay in the transportation of crates to be used in packing them, the measure of damages is the value of the perishables at the time and in the place where they were lost.[46]

Incidental damages in actions for loss or injury in general see infra § 266.

Retail expense. Where wholesale merchandise is shipped in bulk it is error to allow as damages the profits which it might have received above the wholesale price from a sale at retail without deducting the expense that would have been incurred in retailing the goods.[47]

Live stock. The general rule has found frequent application in respect of negligent delay in the transportation of live stock, and it is very generally held that the shipper is entitled to recover all incidental expense rendered necessary by the delay,[48] as, for instance, the expense of feeding[49] or caring

31. U S.—Pennsylvania R Co. v. Wm H Muller & Co, C C A.Md., 15 F.2d 535, certiorari denied 47 S Ct. 449, 273 U S. 748, 71 L Ed. 872
Ga.—Seaboard Air Line Ry. Co v Pruitt, 102 S E. 182, 24 Ga App. 748
Tex—Lide & Laney v. Texas & P Ry. Co, Civ.App, 27 S.W 2d 836.
10 C J. p 312 note 39.

32. Tex—Ft. Worth, etc., R. Co. v Daggett, 28 S.W. 525, 87 Tex. 322

33. Tex—Gulf, etc, R Co. v. Chinski, 114 S.W. 851, 53 Tex Civ.App 21.

34. Ind—Pittsburgh, etc, R. Co. v. Wood, 84 N.E. 1009, 88 N E. 709, 45 Ind App. 1.

35. Ala—Louisville & N. R. Co. v Cheatwood, 68 So. 720, 14 Ala.App 175.
N.Y.—Lichterman v. Barrett, 157 N Y.S. 882.

36. Ohio.—Davis v. Cincinnati, etc, R. Co, 1 Disn. 23, 12 Ohio Dec, Reprint 463.
Tex.—Missouri, etc, R Co. v. Gray, Civ.App, 160 S.W 434.

37. Ark—St. Louis, etc, R. Co v. Allen, 175 S W 514, 119 Ark. 266.
Ill—Illinois Cent. R Co. v. Cobb, 72 Ill. 148.

38. Mass—Ingledew v. Northern R. R, 7 Gray, 86.
10 C J. p 313 note 49.

39. U S—The J. C. Stevenson, D C Md., 17 F 540.

40. U S—Pennsylvania R. Co. v. Wm. H. Muller & Co, C C A.Md., 15 F.2d 535, certiorari denied 47 S Ct. 449, 273 U S. 748, 71 L.Ed. 872.

Natural result of delay

Demurrage paid on ocean-going vessels by shipper because of unreasonable delay of railroad in transporting grain for export is proper element of damages since they are the natural and almost inevitable result of the failure of the carrier to timely deliver the grain to the seaport—Pennsylvania R. Co. v. Wm H Muller & Co, C C A Md., 15 F 2d 535, certiorari denied 47 S Ct. 449, 273 U S. 748, 71 L Ed 872.

41. Okl.—Atchison, T. & S. F. Ry Co. v. Sun Drilling Co, 165 P 1133, 65 Okl 239.
10 C.J. p 313 note 48.

42. N Y—Lichterman v. Barrett, 157 N Y S 882.

43. N Y—DeLeon v McKernan, 54 N.Y S. 167, 25 Misc 182
Tex—Belcher v. Missouri, etc, R. Co., 50 S W. 559, 92 Tex. 593.
10 C.J. p 313 note 50.

44. Ill—Igo v. Cleveland, etc, R. Co, 156 Ill.App. 190

45. Tex—Houston, etc, R. Co v. Jackson, 62 Tex. 209.

46. Fla.—Florida East Coast Ry Co. v. Peters, 83 So 559, 77 Fla 411.

47. Tex.—American Ry Express Co v. Parisian Hat Co., Civ.App, 240 S.W. 947.

48. Ga—Seaboard Air Line Ry. Co v. Pruitt, 102 S E. 182, 24 Ga App. 748.
10 C.J. p 313 note 53

49. Ga.—Seaboard Air Line Ry. Co. v Pruitt, supra.
Idaho.—Ritchie v. Oregon Short Line

for the stock,[50] of reshipment because of loss of market from the point of original destination to another market,[51] or of employing men to look after the stock and the cost of feed for horses used for that purpose,[52] and also expenses incurred in doctoring stock for sickness which has resulted from the delay.[53]

§ 227. Interest; Deduction of Freight Charges

As damages for delay in transportation the shipper is entitled to recover interest on the value of the shipment during the period of delay, but unpaid freight charges should be deducted.

The decisions in many cases in which the complaint has demanded interest hold that interest on the value of the shipment during the time of the reasonable delay is recoverable as damages,[54] although it is otherwise where interest is forbidden by statute.[55] It has been held that interest allowed by the court should not be construed as interest eo nomine but as part of the damages,[56] and it has been held that the fact that a greater rate of interest than the legal rate is demanded does not prevent a recovery of the legal rate.[57]

Unpaid freight is to be deducted from the amount of damage, as the owner receives the advantage of the transportation.[58] Likewise, where the shipper has already paid the freight charges, he is not entitled to recover them back in addition to the damages occasioned to him by the delay, as this would make him better off because of the delay than if the shipment had been made promptly.[59] Where an express shipment for which charges were paid was negligently delayed, the shipper's only claim is by way of damages and he cannot recover on the theory of money had and received, the consideration paid, or any such part of it as exceeds the reasonable value of the services rendered, namely, freight services.[60] Where, however, the consignee buyer, who refused to accept a shipment because defendant carrier did not deliver it within a reasonable time, was to pay the freight charges, consignor who sold the goods at a lower price after having paid the freight charges is entitled to have such freight paid included as damages [61]

Deducting freight charges in actions for loss or injury generally see infra § 272. Interest on damages for loss or injury generally see infra § 265.

§ 228. Exemplary or Punitive Damages

Where the carrier is guilty of reckless or wanton conduct, punitive damages have been allowed.

Exemplary or punitive damages are not recoverable for unreasonable delay in transportation, unless such delay was due to gross negligence or oppression, or to a willful, conscious, or wanton disregard of the shipper's rights.[62] Where, however,

R Co., 244 P. 580, 42 Idaho 193, 45 A.L.R. 909
Tenn.—Tennessee Cent. Ry. Co. v. Vance, 3 Tenn App 152
Tex.—Lide & Laney v. Texas & P. Ry Co., Civ App., 27 S.W.2d 836.
10 C.J. p 313 note 54

A charge by a carrier for the feeding of live stock rendered necessary by a negligent delay in transportation is a proper element of damages to the shipper—Tobin v Lake Shore & M. S. Ry. Co., 159 N.W. 389, 192 Mich 549.

50. Ga.—Seaboard Air Line Ry Co. v. Pruitt, 102 S.E. 182, 24 Ga.App. 748

51. Tex.—St Louis, etc., R. Co v. Gunter, 86 S.W. 938, 39 Tex.Civ. App. 129.
10 C.J. p 313 note 55

Test of right to reship
Where cattle shipped to market failed to reach their destination in time for the morning market, due to the carrier's delay, whereby the shipper was unable to obtain the best price obtainable, to justify reshipping cattle to another market, under his duty to minimize the damages shipper must be justified in believing higher price obtainable, warranting additional expense—Wichita Valley Ry. Co v Wallace, Tex.Civ.App., 17 S.W.2d 150

52. Tex.—Southern Kansas R Co. v. Samples, Civ.App., 109 S.W. 417

53. Ill.—Chicago, etc., R. Co v. Calumet Stock Farm, 61 N.E. 1095, 194 Ill 9

54. Ark.—H Rouw Co v Kansas City Southern Ry Co., 288 S.W. 900, 172 Ark 252.
Ga.—Southern Ry. Co v Bunch, 109 S.E. 523, 27 Ga.App. 689—Southern Ry Co v Bunch, 102 S.E. 462, 25 Ga.App. 45
Tex.—Fort Worth & D. C Ry. Co v Helm, Civ.App., 30 S.W.2d 492—International & G N. R. Co v Dimmit County Pasture Co., 23 S.W. 754, 5 Tex.Civ.App. 186.
Wyo.—Davis v Graham, 225 P. 789, 31 Wyo 279
10 C.J. p 311 note 13.

55. Tenn.—Illinois Cent. R. Co v Southern Seating, etc., Co., 58 S.W. 303, 104 Tenn. 568, 78 Am.S.R. 933, 50 L.R.A. 729

56. Tex.—Fort Worth & D C Ry. Co v Helm, Civ.App., 30 S.W.2d 492.

Under prayer therefor
Interest is recoverable, in action for delay in transporting shipment, as part of damages, if there be prayer in plaintiff's pleadings and cause of action established by competent proof.—Fort Worth & D C. Ry Co. v. Helm, Tex.Civ.App., 30 S.W.2d 492.

57. Tex.—Dorrance v. International, etc., R Co., 125 S.W. 561, 103 Tex. 200

58. Ga.—Southern Ry Co. v Bunch, 109 S.E. 523, 27 Ga.App. 689—Southern Ry Co v Bunch, 102 S.E. 462, 25 Ga.App. 45.
Mo.—Morrow v Wabash Ry. Co., App., 265 S.W. 851.
10 C.J. p 314 note 65.

Corpus Juris was cited with approval in Uhrich Mill Work Co v. Missouri Pac. R. Co., 212 P. 654, 112 Kan. 658

59. Kan.—Uhrich Mill Work Co v. Missouri Pac R Co., supra

60. N.Y.—International Coal Products Corporation v Fargo, 196 N.Y.S. 831, 203 App.Div. 713.

61. Tex.—Houston & T C R Co. v. Westbury, Civ.App., 208 S.W. 383.

62. Tex.—Gulf, C. & S. F Ry Co. v Hamilton, Civ.App., 57 S.W.2d 309.
10 C.J. p 315 note 68.

the carrier's conduct in delaying the shipments showed a reckless and wanton disregard of the shipper's rights, punitive damages are proper in jurisdiction where such damages are allowable.[63] Where an interstate shipment is involved, the federal law on the subject of punitive damages is controlling, and, where the delay of such a shipment is occasioned by acts and circumstances indicating willfulness on the part of the carrier's agents or servants, punitive damages are not recoverable therefor unless the carrier either initially authorized such acts or ratified them.[64]

Exemplary damages in actions for loss or injury generally see infra § 269.

§ 229. Special Damages

a. Recovery dependent on notice
b. Time of giving notice
c. To whom notice given
d. Requisites of notice
e. Rules applied

a. Recovery Dependent on Notice

Special damages are not recoverable unless the carrier is informed of special circumstances rendering prompt transportation necessary, but, where it has such notice, they may be recoverable.

It is the general rule, so stated in Corpus Juris which has been cited as authority therefor,[65] that damages recoverable for delay in transportation must be such as might reasonably have been contemplated by the parties at the time the contract of carriage was made, and that special damages for delay are recoverable only in case the shipper, at or before the time he tendered his goods for shipment, informed the carrier of the special circumstances which rendered a prompt transportation and delivery of the goods at their destination necessary,[66] or if the carrier has constructive notice of the special losses which are likely to follow from

No inferable malice

Parent of child bitten by a dog, suing express company for negligent delay in delivery of the dog's head to laboratory for examination for rabies, requiring the child to undergo the Pasteur treatment, could not recover punitive damages from the express company in the absence of facts from which malice might be inferred.—Miles v. American Ry. Express Co., 233 S.W. 930, 150 Ark. 114.

63. Ala.—Southern Express Co. v. Malone, 78 So. 408, 16 Ala.App. 414, certiorari denied 78 So. 990, 201 Ala. 700.
S.C.—Piero v. Southern Express Co., 88 S.E. 269, 103 S.C. 467.
10 C.J. p 315 note 69.

Corpus Juris was quoted in Gulf, C. & S. F. Ry. Co. v. Hamilton, Civ. App., 57 S.W.2d 309, appeal dismissed 89 S.W.2d 208, 126 Tex. 542.

Damages held excessive

In shipper's action against express company for negligent delay amounting to wantonness in shipping automobile magneto for repairs to maker, punitive damages of four hundred ninety dollars were excessive by two hundred forty dollars, and will be reduced, or case reversed.—Southern Express Co. v. Malone, 78 So. 408, 16 Ala.App. 414, certiorari denied 78 So. 990, 201 Ala. 700.

64. S.C.—Huddy v. Railway Express Agency, 188 S.E. 247, 181 S.C. 508—Harman v. Southern Ry. Co., 90 S.E. 1023, 106 S.C. 209.

Under the Carmack amendment of the interstate commerce act, punitive damages were not recoverable against a carrier for unauthorized willful or wanton acts of its servants in delaying transportation of goods shipped, notwithstanding the later enactment of the Cummins amendment, making carriers liable for "actual loss."—De Loach v. Southern Ry. Co., 90 S.E. 701, 106 S.C. 155.

65. La.—Miller Engineering Co. v. Louisiana Ry. & Nav. Co., 82 So. 413, 145 La. 460.
Wash.—Kirby v. American Ry. Express Co., 242 P. 24, 137 Wash. 241.

66. U.S.—Pomona Products Co. v. Southern Ry. Co., D.C.Ga., 294 F. 982.
Ala.—White v. Louisville & N. R. Co., 79 So. 508, 16 Ala.App. 515
Ark.—Missouri Pac. R. Co. v. S. L. Robinson & Co., 65 S.W.2d 902, 188 Ark. 475—Southern Express Co. v. Couch, 220 S.W. 823, 143 Ark. 513—Chicago, R. I. & P. Ry. Co. v. Cunningham Commission Co., 192 S.W. 211, 127 Ark. 246.
Fla.—East Coast Ry. Co. v. Peters, 83 So. 559, 77 Fla. 411.
Iowa.—Percy v. Chicago, R. I. & P. Ry. Co., 223 N.W. 879, 207 Iowa 889.
Miss.—New Orleans & N. E. R. Co. v. J. H. Miner Saw Mfg. Co., 78 So. 577, 117 Miss. 646.
Mont.—Sankey v. Chicago, M. & St. P. Ry. Co., 198 P. 544, 60 Mont. 242.
N.Y.—Rives v. American Ry. Express Co., 237 N.Y.S. 429, 227 App.Div. 375.
Okl.—Wichita Falls & N. W. Ry. Co. v. D. Cawley Co., 172 P. 70, 69 Okl. 251.
S.C.—Pastime Amusement Co. v. Southeastern Express Co., 186 S.E. 283, 181 S.C. 203, certiorari granted Southeastern Express Co. v. Pastime Amusement Co., 56 S.Ct. 954, 298 U.S. 653, 80 L.Ed. 1380, reversed on other grounds 57 S.Ct. 73, 299 U.S. 28, 81 L.Ed. 20
Tenn.—Southeastern Express Co. v. Bowers, Inc., App., 109 S.W.2d 851.
Tex.—Payne v. Reynolds, Civ.App., 239 S.W. 985—American Ry. Express Co. v. Bean, Civ.App., 233 S.W. 561.
10 C.J. p 315 note 72.

It ought to appear clearly and certainly that at the time of the making of the contract the carrier had reasonable notice of the special circumstances rendering such damage the probable and natural result of the delay.
Fla.—Florida East Coast Ry. Co. v. Peters, 73 So. 151, 72 Fla. 311, Ann. Cas. 1918D, 121.
Miss.—Yazoo & M. V. R. Co. v. Ussery, 127 So. 269, 157 Miss. 383, overruling suggestion of error 126 So. 16, 157 Miss. 383—Yazoo & M. V. R. Co. v. Jacobson, 72 So. 889, 112 Miss. 158.

Intention to exhibit

In absence of notice that hogs are to be exhibited, carrier is not liable for loss of prize money caused by delay in transportation.—Kansas City, M. & O. Ry. Co. v. Bell, Tex. Civ.App., 197 S.W. 322.

"Special damage," as applied to delay in delivering a shipment of goods, is something other and beyond the damage occasioned by the mere difference in the market price, being an element which the carrier cannot be presumed to have knowledge of without special notice.—Bawer v. Barrett, 171 N.Y.S. 322.

the delay, as indicated infra subdivision d. The rule in its application is not limited to contracts of sale in contemplation by the shipper, but is applied to the varying phases of mercantile life, on the theory that unless the carrier be made aware by the shipper, at the time of shipment, of the urgency, and the circumstances that require unusual dispatch or care in transportation, it cannot be presumed to know the facts, the existence and knowledge of which upon its part present the legal status on which its liability for more than ordinary damages can be predicated.[67] In every instance, it is said, the shipper has it within his power to protect himself against all damages, both general and special, caused by delays or losses in shipment, by giving notice to the carrier when the contract is made; if he fails to avail himself of this privilege he must suffer the consequences of his own neglect.[68]

One reason for this rule is that the party undertaking the delivery is held to assume, when he makes his contract, a liability only for those damages which would, in the usual and ordinary course of things, result from his failure to perform, because it is only these that he is required to foresee, unless it is shown that knowledge of an unusual situation of the other party, in which extraordinary injury may be caused by nondelivery, has been brought to his attention, and that he has contracted with reference thereto; to allow other damages would be to add to the terms of the contract another element of damages not contemplated by the parties.[69] Another reason for requiring the notice is to give the carrier an opportunity to protect itself by special precaution against delay in transportation,[70] or to enable it to decline the shipment if by reason of unusual conditions it cannot transport promptly.[71] Other reasons usually assigned for the rule as applied to contracts generally, such as that the person to whom the notice is given may have an opportunity of demanding additional compensation, if he so desires, or of refusing to make the contract, have been said to have no application in carrier law, because the carrier is not at liberty to require the one or to refuse the other.[72]

When notice has been given. The rule is equally well settled, and Corpus Juris has been quoted as authority for it,[73] that special damages for delay in the shipment of goods are recoverable when the carrier has notice that a delay in delivery will result in such damages.[74] As otherwise expressed, where at the time of entering into a contract both parties knew and contemplated that, if a breach is committed, some injury will occur in addition to the natural and ordinary consequences of the breach, the person committing the breach will be liable to give compensation or damages on the occurrence of the injury.[75] Notice of special circumstances, it is said, puts on the carrier the duty to use diligence commensurate with the requirements of the case.[76] The carrier's duty, however, is fully performed when on receiving the notice it uses reasonable diligence to forward the goods promptly.[77] In the application of the rule, it is of no importance that the amount of the damages cannot be estimated at the time the contract of shipment is entered into.[78] The important consideration on which the right to recover special damages depends is not that the extent or amount of such damages was estimated by the parties, but that, when the contract was made, the fact that such special damages might follow

67. N.J.—Higgins v. U. S. Express Co., 85 A. 450, 83 N.J.Law 398, 399.

68. Tex.—Pacific Express Co. v. Jones, 113 S.W. 952, 52 Tex.Civ. App. 367, 371.

69. Ala.—Illinois Cent. R. Co. v. Brothers, 67 So. 628, 12 Ala App. 351, 355.
Fla.—Florida East Coast Ry. Co. v. Peters, 73 So. 151, 72 Fla. 311, Ann. Cas.1918D 121.
10 C.J. p 316 notes 76, 77.

70. U.S.—Pomona Products Co. v. Southern Ry. Co., D.C.Ga., 294 F. 982.
Ark.—Southern Express Co. v. Couch, 220 S.W. 823, 143 Ark. 513.
10 C.J. p 316 note 78.

71. U.S.—Pomona Products Co. v. Southern Ry. Co., D.C.Ga., 294 F. 982.

72. Ark.—Chicago, etc., R. Co. v. King, 148 S.W. 1035, 104 Ark. 215.
10 C.J. p 316 note 80.

73. La.—Smedes Bros., Inc. v. Morgan's Louisiana & T. R. & S. S. Co., 110 So. 425, 162 La. 289.

74. U.S.—Illinois Cent. R. Co. v. Horace Turner Corporation, C.C.A. Ala., 9 F.2d 6.
Ala.—White v. Louisville & N. R. Co., 79 So. 508, 16 Ala.App. 515.
Ark.—Miles v. American Ry. Express Co., 233 S.W. 930, 150 Ark. 114.
Kan.—St. Louis & S. F. R. Co. v. Gaha, 97 P. 435, 78 Kan. 432.
Mo.—Security Stove & Mfg. Co. v. American Ry. Express Co., 51 S.W. 2d 572, 227 Mo.App. 175.
N.C.—Thompson v. American Ry. Express Co., 103 S.E. 898, 190 N.C. 42.
Tex.—Davis v. Morgan, Civ.App., 251 S.W. 310—Quanah, A. & P. Ry. Co. v. Bone, Civ.App., 199 S.W. 332.
Va.—Adams Express Co. v. Allen, 100 S.E. 473, 125 Va. 530.
10 C.J. p 316 note 81.

Loss of prize money

General notice to carrier that hogs are to be exhibited authorizes recovery for loss of prize money caused by delay in transportation.—Kansas City, M. & O. Ry. Co. v. Bell, Tex. Civ.App., 197 S.W. 322.

75. La.—Smedes Bros., Inc. v. Morgan's Louisiana & T. R. & S. S. Co., 110 So. 425, 162 La. 289.
N.C.—Thompson v. American Ry. Express Co., 103 S.E. 898, 180 N.C. 42—Pendergraph v. American Ry. Express Co., 100 S.E. 525, 178 N.C. 344.
10 C.J. p 317 note 82.

76. Ark.—Chicago, etc., R. Co. v. Planters' Gin, etc., Co., 113 S.W. 352, 88 Ark. 77.

77. Ark.—Chicago, etc., R. Co. v. Planters' Gin, etc., Co., supra.

78. N.Y.—Gladhill Wall Paper Co. v. Baltimore, etc., R. Co., 119 N.Y.S. 623.

the breach was contemplated by the parties.[79]

Agent's representations as basis for special damages. A representation by an agent of the carrier to the shipper's agent that the shipment was only a short distance away from its destination, but not stating when it would arrive, is not a representation on which may be founded any special damages for a delay.[80]

b. Time of Giving Notice

Ordinarily the notice must be given at or before the time of making the contract for shipment. In some jurisdictions, however, a notice during transit will support special damages subsequently occurring.

To render effective the notice of special circumstances, it should be given at or before the time of the making of the contract of shipment.[81] Indeed, it appears to be the general rule that a notice of the circumstances rendering prompt transportation necessary, given after the carrier has accepted the goods for transportation, does not affect the original contract and is not sufficient to fasten on the carrier a liability for special damages growing out of such circumstances on account of delay occurring during transportation.[82] In the application of the rule, it has been held to make no difference that the notice so given was given in time for the carrier to prevent the delay.[83] Thus it has been held that the notice is insufficient on which to base a recovery of special damages if it is given after the carrier's acceptance of the goods for shipment but before it has left the point of origin,[84] or after the shipment has started on its way and before it has reached its destination,[85] or after the damages have already accrued,[86] or after a reasonable time for the delivery of the goods.[87] Where, however, the breach consists in the failure to make delivery after the shipment reaches its destination, and when nothing remains to be done by the carrier except to make delivery, the carrier is responsible for such special damages as it was then informed would likely result from its negligence in that regard; under these circumstances the reason for the rule ceases.[88]

Nevertheless, it is the rule in several jurisdictions that the carrier's failure to use diligence to expedite delivery after notice of special damages has been given during transit may subject the carrier to liability for special damages subsequently occurring,[89] although the notice will not relate back to negligence occurring prior thereto,[90] for example, subsequent notice of the effect of further delay after the goods should have been delivered may render the carrier liable for damages accruing after that time by reason of its negligence in not tracing and finding the goods.[91] Also the rule is stated broadly that a carrier is liable for special damages in a case of negligence after its agent acquires knowledge of special circumstances causing such damages.[92]

79. La.—Smedes Bros., Inc., v. Morgan's Louisiana & T. R. & S. S. Co., 110 So. 425, 162 La. 289
Tenn.—Southeastern Express Co. v. Bowers, Inc., App., 109 S.W.2d 851.
10 C.J. p 317 note 86

80. Iowa.—Percy v. Chicago, R. I. & P. Ry. Co., 223 N.W. 879, 207 Iowa 889.

81. U.S.—Pomona Products Co. v. Southern Ry. Co., D.C.Ga., 294 F. 982
Ark.—Missouri Pac. R. Co. v. S. L. Robinson & Co., 65 S.W.2d 902, 188 Ark. 475.
Iowa.—Percy v. Chicago, R. I. & P. Ry. Co., 223 N.W. 879, 207 Iowa 889
La.—Miller Engineering Co. v. Louisiana Ry. & Nav. Co., 82 So. 413, 145 La. 460.
Miss.—New Orleans & N. E. R. Co. v. J. H. Miner Saw Mfg. Co., 78 So. 577, 117 Miss. 646.
10 C.J. p 317 notes 88–92.

82. Ark.—Missouri Pac. R. Co. v. S. L. Robinson & Co., 65 S.W.2d 902, 188 Ark. 475—Southern Express Co. v. Couch, 220 S.W. 823, 143 Ark. 513.
Iowa.—Percy v. Chicago, R. I. & P. Ry. Co., 223 N.W. 879, 207 Iowa 889.
Miss.—New Orleans & N. E. R. Co. v. J. H. Miner Saw Mfg. Co., 78 So. 577, 117 Miss. 646
10 C.J. p 317 note 88.

83. Tex.—Missouri, etc., R. Co. v. Belcher, 35 S.W. 6, 89 Tex. 428.
Wis.—Bradley v. Chicago, etc., R. Co., 68 N.W. 410, 94 Wis. 44.

84. Miss.—New Orleans & N. E. R. Co. v. J. H. Miner Saw Mfg. Co., 78 So. 577, 117 Miss. 646.

85. Iowa.—Percy v. Chicago, R. I. & P. Ry. Co., 223 N.W. 879, 207 Iowa 884.

86. Ark.—Southern Express Co. v. Couch, 220 S.W. 823, 143 Ark. 513
10 C.J. p 317 note 90.

87. Ky.—Illinois Cent. R. Co. v. Nelson, 97 S.W. 757, 30 Ky.L. 114
10 C.J. p 317 note 91.

88. Ark.—Southern Express Co. v. Couch, 220 S.W. 823, 143 Ark. 513
10 C.J. p 318 note 94

Corpus Juris was cited with approval of this statement in Miller Engineering Co. v. Louisiana Ry. & Nav. Co., 82 So. 413, 145 La. 460.

89. U.S.—Pomona Products Co. v. Southern Ry. Co., D.C.Ga., 294 F. 982.
N.C.—Virginia-Carolina Peanut Co. v. Atlantic Coast Line R. Co., 71 S.E. 71, 155 N.C. 148.

90. Fla.—Florida East Coast Ry. Co. v. Peters, 73 So. 151, 72 Fla. 311, Ann.Cas.1918D 121
Tex.—Conn. v. Texas & N. O. Ry. Co., Com.App., 14 S.W.2d 1001, reversing, Civ.App., 4 S.W.2d 193.

91. Okl.—Lusk v. Kennedy, 176 P. 502, 73 Okl. 307.
Wash.—Kirby v. American Ry. Express Co., 242 P. 24, 137 Wash. 241.
10 C.J. p 318 note 93.

92. Tex.—Conn. v. Texas & N. O. Ry. Co., Com.App., 14 S.W.2d 1004, reversing, Civ.App., 4 S.W.2d 193—Atchison, T. & S. F. Ry. Co. v. Butler, Civ.App., 89 S.W.2d 791, error dismissed, and certiorari dismissed, Sup., 93 S.W.2d 143.

Notice after arrival of part

Where consignee of two castings, when only one arrived, informed carrier's agent that unless the other casting was delivered immediately consignee's production would be seriously curtailed, and carrier failed to use ordinary care in delivering such casting, the carrier is liable for damage caused to consignee—Atchison, T. & S. F. Ry. Co. v. Butler, Tex.Civ.App., 89 S.W.2d 791, er-

Subsequent notice of erroneous address. A letter to an express company's agent, notifying him that a package had been wrongly addressed and delivered to the wrong town, and that due to its character it would be worthless if not delivered to the proper addressee within a certain number of days, has been held to be sufficient notice of special circumstances requiring prompt delivery to make the express company liable for special damages, on the theory that a new contract arose from the letter.[93]

c. To Whom Notice Given

The notice should be given to the carrier or to an agent whose duty it is to receive such notice or to act on it.

The notice may, and ordinarily should, be given to the carrier, if a natural person,[94] or to an agent of the carrier in position to act thereon or whose duty it is to receive such notice and cause others to act.[95] The agent who entered into the particular contract or who received the goods for shipment or under whose authority such acts were performed is the obvious and generally the proper medium for such notice.[96] In an action against an express company for delay in shipping goods a notice to the truck driver who issued the bill of lading has been held to be sufficient.[97] The notice need not necessarily be given to the agent having jurisdiction in the matter of delivery.[98] Notice to the carrier's agent as to the point of destination,[99] or notice to a superior traffic officer,[1] may be sufficient under some circumstances.

It has been held that, where mill machinery was shipped to be repaired, and then by a separate contract shipped back, in order to give the carrier notice of special circumstances from which damage would arise from delay in transportation, so as to make it liable therefor, it is not enough that the agent with whom the first contract was made knew thereof, there having been no delay in the first shipment, but the agent with whom the second contract was made must have been informed of such circumstances.[2]

d. Requisites of Notice

The notice should be of matters which naturally and reasonably apprise the carrier of the consequences which would result from a delay in the transportation. Constructive notice may be sufficient.

The carrier will be responsible for the damages sustained if the notice given is of such character and goes to such extent in informing it of the situation that the carrier will be presumed to have contracted with reference thereto.[3] The notice should be of such special matters as naturally and reasonably apprise the person to be charged of the probable consequences of its breach.[4] In other words, the shipper must communicate to the carrier all the facts and circumstances of the case which do not ordinarily attend the carriage of such freight, or the peculiar character and value of the property carried.[5] The notice should ordinarily disclose to the carrier the purpose or use for which the shipment is intended,[6] and the necessity of prompt ship-

ror dismissed, and certiorari dismissed, Sup., 93 S.W.2d 143.

Formerly in Texas the rule was that a plaintiff in order to recover special damages was obliged to show that at the date of the contract defendant had notice of the special conditions rendering such damages the natural and probable consequences of the breach thereof.—Missouri, K. & T Ry Co. v. Belcher, 35 S.W. 6, 89 Tex. 428—Gulf, C. & S. F. Ry. Co. v. Cherry, Civ.App., 129 S.W. 152—Pacific Express Co v. Jones, 113 S. W 952, 52 Tex Civ.App. 367—Gulf, C. & S. F Ry. Co. v. Gilbert, 22 S W. 760, 23 S.W. 320, 4 Tex.Civ App 366—Ligon v. Missouri Pac. R. Co., 3 Tex.A.Civ.Cas. § 1.

93. N.Y.—Bastian Bros. Co v. American Ry. Express Co., 199 N Y.S. 572, 205 App.Div. 432.

94. Ky—Louisville, etc, R. Co. v Mink, 103 S.W. 294, 126 Ky. 337, 31 Ky.L. 833.

95. U S.—Pomona Products Co. v Southern Ry. Co, D C Ga., 294 F 982.

96. U.S.—Pomona Products Co. v. Southern Ry. Co., supra.
10 C.J. p 318 note 96.

97. Tenn.—Southeastern Express Co. v. Bowers, Inc, App., 109 S. W 2d 851.

98. Tex.—Conn v. Texas & N. O. Ry. Co., Com.App., 14 S W 2d 1001, reversing, Civ.App., 4 S.W.2d 193.

99. Tex—Pacific Express Co. v. Jones, 113 S.W. 952, 52 Tex.Civ. App. 367.

1. Tex—Gulf, etc., R Co. v. Nelson, Tex Civ App., 139 S.W. 81.

2. Ky—Louisville, etc, R Co. v. Mink, 103 S W. 294, 126 Ky 337, 31 Ky L 833

3. Mo—Security Stove & Mfg Co. v. American Ry Express Co, 51 S.W 2d 572, 227 Mo App 175
N C—Harrill v. Seaboard Air Line Ry. Co, 107 S E 136, 181 N C 315.
Okl.—Lusk v. Kennedy, 176 P 502, 73 Okl 307.

4. U.S.—Pomona Products Co v Southern Ry. Co., D C Ga., 294 F. 982
Tenn—Southeastern Express Co v. Bowers, Inc, App., 109 S.W 2d 851.
10 C.J. p 318 note 1

5. Fla—Florida East Coast Ry. Co v. Peters, 73 So. 151, 72 Fla. 311, Ann Cas 1918D 121.
10 C.J. p 318 note 2

This Corpus Juris statement is quoted with approval in Southeastern Express Co. v Bowers, Inc, Tenn App, 109 S W 2d 851

6. Iowa—Percy v. Chicago, R. I. & P. Ry. Co., 223 N.W. 879, 207 Iowa 889
10 C.J. p 319 note 3.

Intended use disclosed

Where defendant railroad was fully notified as to what plaintiff intended to do with goods shipped him when they arrived at destination, such communication was sufficient to put the railroad on notice as to the resultant damages should it fail or delay in the delivery of the goods—Harrill v. Seaboard Air Line Ry. Co, 107 S.E. 136, 181 N.C. 315.

ment and delivery.[7]

Repetition of notice. Under an agreement for the carriage of many carloads of construction material, to be used for a special purpose of which the carriers had notice, it was unnecessary to repeat such notice on each shipment, in order to charge the carriers with special damages resulting from delay in transportation.[8]

Constructive notice. The weight of authority supports the rule that, if it appears from the nature of the goods shipped or from other circumstances that the carrier ought to have known of the consequences which would follow from a delay in transportation, it is charged with notice of such circumstances, although no actual notice was given.[9] Under these circumstances the court may justly infer knowledge.[10] In such a case it is not necessary that the special purpose or intended special use of the goods either be mentioned in the negotiations or be expressly made a part of the contract.[11]

Whether the facts in any given case satisfy this rule is often a very close question; in the notes decisions are referred to where the facts were held to show constructive notice,[12] and also where the facts were held not to show constructive notice.[13]

Delivery to an express company for shipment does not of itself necessarily indicate that speed of delivery is the chief consideration, even if this be assumed; however, it does not follow therefrom that it is contemplated that special damages might result from the carrier's failure to exercise speed.[14]

e. Rules Applied

(1) Goods for household or purely personal use
(2) Goods for use in business
(3) Goods for sale at particular market
(4) Goods under contract of sale

(1) Goods for Household or Purely Personal Use

Special damages are not recoverable for a delay of goods intended for purely personal or household use in the absence of notice.

Where the proximate result of the delay is the loss of the use of goods shipped for purely personal use and the carrier has notice or knowledge of facts that would apprise it that plaintiff would sustain loss in that particular, the measure of damages is the value of the use during the time of delay.[15] Where the carrier is not apprised that any special

7. Iowa.—Percy v. Chicago, R. I & P. Ry. Co., 223 N.W. 879, 207 Iowa 889.
Mont.—Sankey v. Chicago, M. & St. P. Ry. Co., 198 P. 544, 60 Mont 242.

8. Tex.—Gulf, etc., R. Co. v. Nelson, Civ.App., 139 S.W. 81.

9. Ala.—White v. Louisville & N. R. Co., 79 So. 508, 16 Ala.App. 515.
Ark.—Missouri Pac. R. Co. v. S. L. Robinson & Co., 65 S.W.2d 902, 188 Ark. 475.
Fla.—Florida East Coast Ry. Co. v. Peters, 73 So. 151, 72 Fla. 311, Ann. Cas.1918D 121.
N.C.—Harrill v. Seaboard Air Line Ry. Co., 107 S.E. 137, 181 N.C. 315.
Okl.—Lusk v. Kennedy, 176 P. 502, 73 Okl. 307.
10 C.J. p 319 note 7.

This statement in Corpus Juris has been quoted in Smedes Bros., Inc. v. Morgan's Louisiana, T. R. & S. S. Co., 110 So. 425, 162 La. 289.

However, it has also been held or said that constructive notice does not satisfy the requirements of the rule as to notice of special circumstances.—Missouri, etc., R. Co. v. Sproles, Tex.Civ.App., 92 S.W. 40

Known special purpose or present use intended

Where goods are ordered for a special purpose or for present use in a given way and these facts are known to the carrier, he is responsible for the damages fairly attributable to the delay and in reference to the purpose or the use indicated —Thompson v. American Ry. Express Co., 103 S.E. 998, 180 N.C. 42

10. La.—Smedes Bros. Inc. v. Morgan's Louisiana, T. R. & S. S. Co., 110 So. 425, 162 La. 289.
10 C.J. p 319 note 8.

11. N.C.—Thompson v. American Ry. Express Co., 103 S.E. 898, 180 N.C. 42.

12. **Constructive notice shown**

(1) Where an express company, receiving tools for shipment from carpenters, was told through its agent that the carpenters wanted them shipped to a point where there were other government construction camps, the express company, by the exercise of ordinary care, would have known for what purpose the tools were to be shipped, and is responsible for any loss proximately caused by its negligence in failing to transport.—Pendergraph v. American Ry. Express Co., 100 S.E. 525, 178 N.C. 344.

(2) That tobacco flues, shipped uncovered, and used only for tobacco curing, were shipped in a locality where tobacco is generally grown, and in the midst of the curing season, warrants finding of notice to carrier of their purpose and immediate need, so as to authorize recovery of special damages from spoiling of tobacco for delay in transportation and delivery.—Thompson v. American Ry. Express Co., 103 S.E. 898, 180 N.C. 42.
10 C.J. p 319 note 10 [a].

13. **Constructive notice not established**

(1) Knowledge that a shipper has four hundred acres planted in tomatoes would not carry notice when they would be ready for shipment or that a few days' delay in transportation of crates would result in special damages.—Florida East Coast Ry. Co. v. Peters, 73 So. 151, 72 Fla. 311, Ann.Cas.1918D 121.

(2) Carrier held not chargeable under circumstances with notice of necessity for prompt movement of carloads of cans so as to authorize recovery of special damages, where it was not notified that the cans were sold to a canning company and shipped for the purpose of immediately canning corn, the amount of the injury which is sought to be recovered.—Percy v. Chicago, R. I. & P. Ry. Co., 223 N.W. 879, 207 Iowa 889.
10 C.J. p 320 note 11.

14. Wash.—Kirby v. American Ry. Express Co., 242 P. 24, 137 Wash. 241.

15. Ala.—American Ry. Express Co. v. Baer, 92 So. 652, 207 Ala. 355.
10 C.J. p 325 note 59.

damages would ensue from delay in transporting a car of household goods, recovery cannot be had for board bills and room rent paid by the owner while awaiting their arrival.[16] The suffering of plaintiffs' families, from cold and inconvenience, by the failure of defendant to deliver them a bill of lading of clothing and household goods shipped, is not the natural and proximate result of a breach of the shipping contract, where defendant was not informed by plaintiffs of their necessitous condition, and the consequent suffering from cold that might ensue from their inability to buy other clothing and goods if those shipped were not promptly delivered.[17] It has been held by an evenly divided court that, where defendant carrier knew of the special circumstances making necessary the presence of plaintiff's trunk at the steamship pier to which it was to be delivered, and that special damages would follow if it was not there on time for the sailing of the ship on which plaintiff had engaged passage, plaintiff might recover not only for such physical suffering, discomfort, and inconvenience as resulted to her directly because of the breach of contract, but also for such mental suffering as resulted from loss of social enjoyment on the trip, by reason of such breach.[18]

(2) Goods for Use in Business

The rules as to the necessity for and the requisites of notice to a carrier in order to recover special damages for delay in transportations have been applied to goods shipped for use in business, such as machinery, feed for stock, fertilizer, and other shipments.

To authorize a recovery for losses of profits in business because of an unreasonable delay of goods to be used in such business, it is essential that the carrier should have had notice either from the nature of the contract itself or by explanation of the circumstances at the time the contract was made that such damages would ensue from nonperformance.[19] It is further essential that the data of estimating such damages should be so definite and certain that they can be ascertained reasonably by calculation, for speculative or uncertain profits are not recoverable.[20] Although the damages claimed may be the ordinary, natural, and even necessary result of the breach, yet, if they are in their nature uncertain, they must be rejected.[21] Other special damages not recoverable in the absence of notice of special circumstances making prompt transportation necessary are losses incurred in paying labor during the stoppage of the business,[22] and interest on the capital invested in a plant during the time it was necessarily idle as a result of the delay.[23]

On the other hand, where the carrier has notice of special circumstances requiring prompt delivery of goods to be used in the shipper's business, and the profits that would have accrued during the time the goods were unreasonably delayed are so definite and certain that they can be ascertained reasonably by calculation, such profits constitute an element of damage for which the shipper may recover;[24] also the expense incurred in paying labor rendered idle because of the unreasonable delay is recoverable, where the carrier knew that this would be the result of the delay.[25]

Losses paid by the consignor to the consignee as liquidated damages previously agreed on for a delay have been held to be recoverable, where made in good faith and not excessive, where the carrier was properly notified as to the intended use of the material shipped.[26]

16. Tex.—Pecos, etc., R. Co v. Grundy, Civ.App., 171 S.W. 318.

17. Tex.—St Louis Southwestern R. Co. v. May, Civ.App., 44 S.W. 408.

18. Mich.—McConnell v. U. S. Express Co., 146 N.W. 428, 179 Mich. 522, Ann.Cas.1915D 80.

19. Iowa.—Percy v. Chicago R. I. & P. Ry. Co., 223 N.W. 879, 207 Iowa 889.

N.Y.—Rives v. American Ry. Express Co., 237 N.Y.S. 429, 227 App. Div. 375

10 C.J. p 320 note 12.

20. S.C.—Pastime Amusement Co. v. Southeastern Express Co., 186 S.E. 283, 181 S.C. 203, certiorari granted Southeastern Express Co. v. Pastime Amusement Co., 56 S. Ct. 954, 298 U.S. 653, 80 L.Ed. 1380, reversed on other grounds 57 S.Ct. 73, 299 U.S. 28, 81 L.Ed. 20.

10 C.J. p 320 note 14.

Anticipated profits to manufacturer from sales of ladies' suits is too speculative and remote to warrant recovery thereof from express company, which unreasonably delayed delivery of salesman's samples.—American Ry. Express Co. v. Steinberg, 270 S.W. 765, 208 Ky. 351, 42 A.L.R. 705.

21. Ala.—Southern R. Co. v. Coleman, 44 So. 837, 153 Ala. 266.

22. Mass.—Swift River Co. v. Fitchburg R. Co., 47 N.E. 1015, 169 Mass. 326, 61 Am.S.R. 288.

10 C.J. p 320 note 16.

23. N.C.—Asheboro Wheelbarrow, etc., Co. v. Southern R. Co., 62 S.E. 1091, 149 N.C. 261.

24. Mo.—Morrow v. Missouri Pac. R. Co., 123 S.W. 1034, 140 Mo.App. 200.

10 C.J. p 320 note 18.

25. Ga.—Savannah F. & W. Ry. Co. v. Pritchard, 1 S.E. 261, 77 Ga. 412, 4 Am.S.R. 92

10 C.J. p 321 note 19.

Delayed building materials

Where defendant carrier was notified that delay in transporting materials would cause plaintiff building contractor's employees to be idle, it is liable for special damages thereafter caused by delay and consequent idleness of employees.—Quanah, A. & P. Ry. Co. v. Bone, Tex.Civ.App., 199 S.W. 332.

26. Kan.—St Louis & S. F. R. Co. v. Gaba, 97 P. 435, 78 Kan. 432

Where materials for a building had been delivered to a carrier, and transportation was unreasonably delayed, and the consignor paid the contractor, the consignee, an amount previously agreed on as damages for delay caused by failure to receive the material in due time, the carrier would be held liable for such amount,

Machinery. The rule, laid down in a leading case, that, "if the delay is in the transportation of machinery, to be applied to a special use, and that is known to the carrier, he is responsible for such damages as are fairly attributable to the delay, such as the value of the use of the machinery, to be tested by its rental price, or other proximate means, the expenses of idle hands, the loss of gain on work contracted to be done for another person, if such work could have been done if the machinery had been delivered, and the gain thereby definitely ascertained in proper time,"[27] has been followed in subsequent decisions in which the question has arisen.[28] It is said that notice of special circumstances which would result in special damages to a shipper from delay in transportation of machinery imposes on the carrier the duty to use diligence commensurate with the requirements of the case.[29] In order to recover for profits alleged to have been lost because of unreasonable delay in transportation of machinery, it is essential that they may be computed with reasonable accuracy, since remote and conjectural profits are not recoverable.[30]

Equally well settled as the foregoing doctrine is the principle that unless notice is brought home to the carrier of the special circumstances which render a prompt delivery of the machinery necessary, there can be no recovery of special damages for wrongful delay, such as loss of profits to the business resulting from the delay, expense incurred in paying idle labor, and the interest on the capital invested in a plant during the time it was necessarily idle because of the delay.[31]

Feed for live stock. A carrier is not liable for special damages for failure to deliver cattle feed within a reasonable time after receiving it, where it did not, at the time of such receipt, have notice of the purpose for which the shipment was intended or the urgent necessity of its prompt delivery; to authorize a recovery, the carrier must be notified of the special circumstances from which such damage would probably flow, in case of delay.[32] On the other hand, where the carrier unreasonably delayed a shipment of cattle feed and had notice that it was intended to feed plaintiff's cattle and that plaintiff was dependent thereon for the feed, and plaintiff's supply of feed was exhausted by reason of the delay, the carrier is liable for the depreciation in the value of the cattle caused directly and proximately by the delay.[33]

Fertilizer. It has been held that, where, on shipment of fertilizer, there was no notice to the carrier of any special use to which it was to be applied nor of such scarcity of fertilizer as to prevent another purchase of a like amount by plaintiff, plaintiff is not entitled to special damages for failure to deliver the fertilizer.[34] On the other hand, in a suit for injury to plaintiff's crop by reason of the carrier's delay in transporting a shipment of nitrate of soda for fertilizer, it has been considered to be hardly possible that defendant carrier did not know the purpose of the shipment, and it has been held liable for such damages.[35]

Other shipments. Other applications of these rules as to the necessity and sufficiency of notice, actual or constructive, for the recovery of special damages for delay, have been made to shipments of actor's paraphernalia,[36] automobiles,[37] building

in the absence of evidence of bad faith, or that the amount was excessive, if notified at the time of shipment of the consequences of delay—St. Louis & S. F. R. Co. v. Gaba, 97 P. 435, 78 Kan. 432

27. Miss.—Vicksburg, etc., R. Co. v. Ragsdale, 46 Miss. 458.

28. Tenn.—Illinois Central R. Co. v. Johnson, 94 S.W. 690, 116 Tenn. 624.
10 C.J. p. 321 note 21.

Corpus Juris has been quoted in Smedes Bros., Inc. v. Morgan's Louisiana & T. R. & S. S. Co., 110 So. 425, 162 La. 289.

29. Ark.—Chicago, etc., R. Co. v. Planters' Gin, etc., Co., 113 S.W. 352, 88 Ark. 77.

30. Ark.—Chicago, etc., R. Co. v. Planters' Gin, etc., Co., supra.
10 C.J. p. 321 note 24.

31. Ala.—Brothers v. Illinois Cent. R. Co., 77 So. 423, 16 Ala. App. 273
10 C.J. p. 322 note 25.

32. Mont.—Sankey v. Chicago, M. & St. P. Ry. Co., 198 P. 544, 60 Mont. 242.
Tex.—Payne v. Reynolds, Civ.App., 239 S.W. 985.
10 C.J. p. 322 note 27.

Sufficient notice

Where shipper of cotton seed cake, known by carrier's agent to have been purchased to feed shipper's cattle, at time of contract for shipment informed agent that he needed it and was told that it would promptly arrive, the conversation and circumstances gave carrier notice of intended use, so as to authorize recovery for depreciation in stock resulting from negligent failure to deliver as agreed.—Lusk v. Kennedy, 176 P. 502, 73 Okl. 307.

33. Ky.—Illinois Cent. R. Co. v. Watkins, 91 S.W. 1122, 28 Ky.L. 1254—Illinois Cent. R. Co. v. Mossbarger, 91 S.W. 1121, 28 Ky.L. 1217.

34. S.C.—Matheson v. Southern R. Co., 60 S.E. 437, 79 S.C. 155.

35. N.C.—Gatlin v. Norfolk-Southern R. Co., 102 S.E. 779, 179 N.C. 433.

36. N.Y.—Brown v. Weir, 88 N.Y.S. 479, 95 App. Div. 78.
10 C.J. p. 322 note 30.

Actor's trunks

Loss of engagement due to delay in forwarding actor's trunks held not contemplated and not recoverable as damages for delay in forwarding trunks, where the carrier was not notified of the necessity for prompt delivery.—Rives v. American Ry. Express Co., 237 N.Y.S. 429, 227 App. Div. 375.

37. S.D.—Armstrong v. Chicago, etc., R. Co., 152 N.W. 696, 35 S.D. 398.

Damages not speculative or remote

In a shipper's action for special damages for the breach of a carrier's obligation to deliver an automobile engine shipped to a factory for repairs, loss of the net rental value of the automobile during unreason-

and construction materials,[38] carpenter's tools;[39] cotton,[40] drummer's samples,[41] exhibits,[42] furnaces,[43] golf clubs,[44] ice,[45] live stock,[46] medicines or articles for medical examination,[47] motion picture films,[48] oil,[49] photographer's supplies,[50] pop corn wagon,[51] raw materials to be manufactured,[52] receptacles for fruit or vegetables,[53] stone for sink-

able delay in delivery is not too remote and speculative to be recoverable—Armstrong v. Chicago, etc., R Co, 152 N.W. 696, 35 S D. 398.

38. N C—Davidson Development Co v. Southern R. Co., 61 S E. 381, 147 N C. 503.
10 C J. p 323 notes 32–34.

Consequent damage and expense

Where defendant carrier was notified as to particular damage and expense which would be caused by delay of building materials, it is liable therefor where such materials were negligently delayed.—Quanah, A. & P. Ry. Co. v. Bone, Tex.Civ. App., 199 S.W. 332.

39. N C—Pendergraph v. American Ry Express Co., 100 S E. 525, 178 N C. 344.

Items for estimating loss

In an action by carpenters against an express company for delay in transporting tools, the expense and loss of time in returning home to get new sets of tools, and for the loss in having a double set each, were not items of loss, but for consideration by the jury in estimating plaintiff's loss—Pendergraph v. American Ry. Express Co., 100 S.E. 525, 178 N.C. 344.

40. Miss—Yazoo & M. V. R. Co. v. Jacobson, 72 So. 889, 112 Miss. 158.

Insufficient notice

Notice given railroad's agent by cotton buyer that unless there was a prompt shipment of cotton he would be financially disabled from carrying on his business was held insufficient to warrant buyer's recovering special damages by suspension of his business for want of finances or credit arising from inability to move out cotton on hand—Yazoo & M. V. R Co. v. Jacobson, 72 So. 889, 112 Miss. 158.

41. Ga.—Seaboard Air Line R. Co. v. Harris, 49 S E. 703, 121 Ga 707.
10 C J p 323 note 38.

Notice insufficient

Notice to express company simply stating that package delivered to it contained salesman's samples is alone insufficient notice to make it liable for loss of prospective profits arising from delay in delivering such samples—American Ry. Express Co. v. Steinberg, 270 S.W. 765, 208 Ky. 251, 42 A.L R. 705.

42. Mo.—Security Stove & Mfg. Co v. American Ry Express Co., 51 S W.2d 572, 227 Mo.App. 175.

Expense incurred by shipper in renting space at exhibit before contracting with carrier for shipment of exhibit could be recovered as damages for carrier's unreasonable delay.—Security Stove & Mfg Co. v. American Ry. Express Co., 51 S.W. 2d 572, 227 Mo App. 175.

43. Mo—Security Stove & Mfg. Co. v. American Ry. Express Co, supra.

Carrier contracting with knowledge that furnace was being shipped for displaying at convention, but failing to deliver furnace within reasonable time, was held liable to shipper for expenses.—Security Stove & Mfg. Co v. American Ry. Express Co., 51 S. W.2d 572, 227 Mo.App. 175.

44. N Y.—Jessup v. Platt, 135 N.Y. S. 635, 76 Misc. 466.
10 C J. p 323 note 39.

45. N.C.—Lewark v. Norfolk, etc., R. Co, 49 S.E 882, 137 N.C. 383.
10 C.J. p 323 note 40.

46. U S—Port Blakely Mill Co. v. Sharkey, Wash., 102 F. 259, 42 C. C A. 329.
Ky.—Louisville & N. R. Co. v. Gormley, 109 S.W. 346, 139 Ky. 848, 23 Ky.L. 188, rehearing denied 111 S W. 289, 33 Ky.L. 802.
10 C J. p 323 notes 36, 37.

Expenses for care and feeding

Where carrier was told at time of shipment of live stock that shipper was supplied with abundant pasturage at place of destination, shipper, on carrier's abandonment of contract and reshipment of stock to place of consignment, could recover as damages difference between expenses of feeding and caring for cattle at place of consignment, pending subsequent shipment, and reasonable value of pasturage which cattle would have consumed at place of destination, and reasonable expense of caring for cattle at such place during such time, such expenses, in view of notice given carrier, having been in contemplation of parties.—Louisville & N. R. Co. v. Murphy, 206 S W. 268, 182 Ky. 136.

47. Ark—Miles v American Ry Express Co., 233 S.W. 930, 150 Ark. 114
Va—Adams Express Co. v. Allen, 100 S.E. 473, 125 Va. 530.

Hog serum

Express company, by which the department of agriculture of Virginia made a shipment of hog cholera serum, informed that it was such serum, and of the importance of prompt dispatch, while the words "Please rush" appeared on the face of the express receipt, was held chargeable with notice that the serum was intended by the consignee for preventive treatment of hogs.—Adams Express Co v. Allen, 100 S E. 473, 125 Va. 530.

Where head of dog which had bitten a child was so delayed in transportation to a laboratory for microscopic examination that it decomposed before delivery, rendering an examination impossible, the carrier, which had notice of the facts, was liable for the expense of giving the Pasteur treatment, since it might have anticipated such a precaution in the event of such delay—Miles v. American Ry. Express Co., 233 S.W. 930, 150 Ark. 114.

48. N Y.—Chapman v. Fargo, 119 N. E 76, 223 N.Y. 32, L R.A 1918F 1049, Ann Cas 1918E 1054, reversing 150 N Y S. 1080, 165 App Div. 950.

Insufficient notification

Notification of express company by shipper to rush moving picture films for exhibition was held insufficient to render express company, delaying shipment, liable for special damages for loss of profits, or to show that such damages were within the contemplation of the parties.—Chapman v. Fargo, 119 N.E. 76, 223 N Y 32, L R A 1918F 1049, Ann Cas.1918E 1054, reversing 150 N Y.S. 1080, 165 App Div. 950.

49. Tex.—San Antonio, etc, R Co. v. Houston Packing Co, Civ App, 167 S.W. 228.
10 C.J. p 323 note 41.

50. Wis—Bradley v. Chicago, etc, R. Co, 68 N W 410, 94 Wis. 44.
10 C.J p 324 note 44.

51. Tex.—Gulf, etc, R Co. v. Compton, Civ App., 38 S W 220.
10 C J. p 323 note 42.

52. Tex—Dorrance v. International, etc, R Co, Civ App, 126 S W 694.
10 C J. p 323 note 35.

53. Fla—Williams v. Atlantic Coast Line R Co, 48 So 209, 56 Fla. 735, 131 Am S R. 169, 24 L R.A., N.S, 134.
10 C.J. p 323 note 43.

Crates for immediate resale

In suit by company handling strawberry crates for negligent delay in transportation of car of crates against railroad which had no notice or knowledge that crates were ordered for immediate resale, loss of profit during period of delay when company was left without crates to sell was held not recoverable.—Missouri Pac. R. Co. v. S. L. Robinson & Co, 65 S.W.2d 902, 188 Ark. 475.

ing river mats,[54] and the rules have been applied to shipments for a museum.[55]

(3) Goods for Sale at Particular Market

If the carrier has notice that goods are being transported to a particular market and transportation is unreasonably delayed, it is liable for special damages ensuing.

If it is within the knowledge of the carrier at the time the contract of shipment is entered into that the goods are to be transported for sale at a particular market and the transportation is unreasonably delayed, whereby the shipper loses the benefit of such market, the carrier will be liable for any special damages resulting from such delay.[56] It has been held that, under these circumstances, the shipper may recover the difference between the price at which he was obliged to sell the property when it did arrive and that which he would have received at the time at which it should have arrived;[57] but it would seem that no notice of special circumstances would have been necessary in these cases in order to recover such damages, as these cases are clearly within the general rule stated supra §§ 222 c, 223.

Special damages resulting from a delay in transporting live stock to a market in time for a special sales day may be recovered, even though the stock had not been sold under a definite contract before shipment was made, such damages not being speculative or conjectural on that account.[58]

(4) Goods under Contract of Sale

Special damages for the loss of a sale occasioned by delay are not recoverable unless the carrier was notified of such contract.

A carrier who unreasonably delays the transportation of goods shipped under a contract of sale is not liable for any special damages occasioned by the loss of the sale, as for instance, any profits the shipper would have made by delivery of the goods at destination according to the contract of sale, unless at or before the day of the shipment the carrier was notified of the existence of the contract and that the goods were being shipped in accordance therewith,[59] under such circumstances the rule stated supra § 223 a governs, that is, the measure of damages is the difference between the market value of the goods at the time they ought to have been delivered and their value at the time they were actually delivered,[60] with such other and incidental damages as proximately flow from the delay,[61] with added interest and the unpaid cost of transportation deducted.[62]

Where, however, goods are contracted to be sold at a fixed price and to be delivered at a particular place, and the carrier undertakes the transportation thereof, with full notice that the goods are to be sold if forwarded seasonably, the consignor will be entitled to recover the difference between the contract price and the value of the goods when actually delivered, if by reason of unreasonable delay in transportation he loses the sale;[63] under these circumstances, the undertaking is special and the loss

54. La.—Miller Engineering Co. v. Louisiana Ry. & Nav. Co., 82 So. 413, 145 La. 460

Damages not recoverable

Damages resulting from the washing away of a mat because of sudden rise in the river was not such as reasonably entered into the contemplation of the parties at the time of making the contract, whereby defendant railway was to carry stone which was to be used by plaintiff for sinking the mat against the bank of the river, and to render defendant liable for damages due to delay in transportation, since the carrier could not have reasonably foreseen the heavy rains or sudden rise in the river—Miller Engineering Co. v. Louisiana Ry & Nav. Co., 82 So. 413, 145 La. 460.

55. Tex.—Yoakum v Dunn, 21 S.W. 411, 1 Tex.Civ App. 524.
10 C.J. p 324 note 45.

56. Tex—Davis v. Morgan, Civ.App., 251 S.W. 310.
10 C.J. p 325 note 54.

Notice held sufficient

Statement by a shipper to a local agent that he wanted to get his mules to market for special sales days, and that he would not ship unless he could get them there for such sale, and his engagement and loading a car on agent's promise that the car would be ready for shipment for the time specified, is a sufficient notice to the railroad to warrant the recovery of special damages for failure to transport the mules to the market as specified—Davis v. Morgan, Tex.Civ App., 251 S.W 310.

57. Ark—Chicago, etc., R Co. v. Niles, 123 S.W 775, 124 S W. 1043, 92 Ark. 573.
Vt.—King v. Woodbridge, 34 Vt. 565.

58. Tex—Davis v. Morgan, Civ.App., 251 S W. 310.

59. Miss.—Yazoo & M. V. R. Co. v. Ussery, 127 So 269, 157 Miss. 383, overruling suggestions of error 126 So. 16, 157 Miss 383.
Pa.—Pennsylvania R. R v. Rothstein, 165 A. 752, 109 Pa.Super. 96.
10 C J p 324 note 46.

60. Miss.—Yazoo & M. V. R. Co. v. Ussery, 127 So. 269, 157 Miss. 383, overruling suggestions of error 126 So. 16, 157 Miss 383.
10 C.J. p 324 note 48.

61. Ark—Murrell v. Pacific Express Co., 14 S.W. 1098, 54 Ark. 22, 26 Am S.R. 17.
10 C.J. p 324 note 49.

62. Ark.—St. Louis, etc., R. Co v. Mudford, 3 S.W. 814, 48 Ark. 502
Ga.—East Tennessee, etc., R. Co v. Johnson, 11 S E. 809, 85 Ga 497.

63. Tenn—Southeastern Express Co. v Bowers, Inc, App., 109 S.W.2d 851.
10 C.J p 324 note 51.

Hat shipment

Where express company had notice that unless shipment of hats arrived at destination on a certain date, a loss of sale was probable, but failed to establish excuse for delay, jobber was entitled to recover difference between sale price and market value of hats when they arrived at destination.—Southeastern Express Co. v. Bowers, Inc., Tenn.App., 109 S.W.2d 851.

and liability are special.[64]

Sale in foreign country. Where a carrier, agreeing to ship grain for export to a foreign country with notice that it has been sold there for future delivery, unreasonably delays delivery to the ship, the shipper can recover the difference between the price at which the shipper sold the grain and the market price in the foreign country at the time the shipper breached its contract, as it was compelled to do by the delay.[65]

Shipper unable to dispose of goods. In an action for damages for loss of a sale of a consignment of goods, evidence that the shipper had been unable to dispose of the goods after several attempts does not authorize a recovery of the full amount of the sale price as special damage, this not being evidence that they had no market value.[66]

§ 230. Delay in Transportation of Corpse

The cases are not in harmony as to the liability of a carrier for damages for mental anguish for delay in the delivery of a corpse.

In a number of states it is held that damages are recoverable for mental suffering caused by negligent delay of a carrier in transporting a corpse of a near relative, such as a husband, son, wife, or father.[67] A recovery, however, is permitted only for the mental suffering felt by plaintiff on account of the wrongful delay;[68] he is not entitled to recover for mental suffering of other near relatives of deceased caused by such delay;[69] and, where the contract for transportation of the corpse is made by a stranger, and the existence of the parents of deceased is not disclosed to the carrier, the mental anguish of the mother, resulting from wrongful delay in transportation, is not recoverable.[70] Damages are not allowable for mental anguish claimed to have been suffered on account of the postponement of a funeral, where, notwithstanding the delay, the corpse arrived an hour before the time appointed for the funeral and was prepared for burial at the time, and where plaintiff of her own accord postponed the funeral until the following day.[71] So it has been held that a mother is not entitled to recover for mental anguish for delay in delivering a coffin, necessitating burial of a child in a different burying ground than that intended, where her condition was such that she did not know of the delay, the intention to bury in the other burying ground, or where the body was buried.[72] Damages are not allowable for reembalming the body, where this is necessitated by the voluntary act of plaintiff in postponing the funeral.[73]

It is the rule in some jurisdictions that there can be no recovery of damages because of mental pain and anguish alone from the carrier's negligent delay in transporting a corpse, where there was no physical tort resulting in injury to plaintiff's person or any pecuniary loss.[74] In still other jurisdictions, in the absence of willful and malicious misconduct on the part of the carrier or its agents, damages for mental anguish for a delay in the shipment of a corpse are not recoverable.[75]

Damages for injury to corpse generally see infra § 273.

64. Tenn.—Southeastern Express Co. v. Bowers, Inc, supra.
10 C.J. p 325 note 52.

65. U.S.—Pennsylvania R. Co. v. Wm. H. Muller & Co., C.C.A.Md., 15 F.2d 535, certiorari denied 47 S.Ct. 449, 273 U.S. 748, 71 L.Ed. 872.

Measure not limited by contract provision

Provision in defendant's tariffs governing export grain rates that railroad, on expiration of five days after elevation of grain, assumes cost of storage was held not to limit measure of damages for unreasonable delay thereto, having no such purpose.—Pennsylvania R. Co. v. Wm. H. Muller & Co., C.C.A.Md., 15 F.2d 535, certiorari denied 47 S.Ct. 449, 273 U.S. 748, 71 L.Ed. 872.

66. Tenn.—Southeastern Express Co. v. Bowers, Inc., App., 109 S.W.2d 851.

67. Ky.—Louisville & N. R. Co. v. Hull, 68 S.W. 433, 113 Ky. 561, 24 Ky.L. 375, 57 L.R.A. 771.
10 C.J. p 325 note 61.

Notice sufficient

Evidence that plaintiff's son made arrangements with the carrier's ticket agent to ship corpse over a certain route, paid for its transportation, and bought tickets for four persons to accompany it, shows facts sufficient to put the agent on inquiry as to the identity of the persons who were to use the tickets and as to their relationship to deceased, so that the carrier was charged with notice that the corpse was that of plaintiff's deceased wife, and of the fact that one of the tickets was for use by him, and should be held to have contemplated that he would undergo mental suffering if the contract was breached.—Lancaster v. Mebane, Tex.Civ.App., 247 S.W. 926.

68. Tex.—Missouri, etc., R. Co. v. Vandiver, 122 S.W. 955, 57 Tex.Civ. App. 470.

69. Tex.—Missouri, etc., R. Co. v. Vandiver, supra.

70. Tex.—Nichols v. Eddy, Civ.App., 24 S.W. 316.

71. Ala.—Alabama City, etc., R. Co. v. Brady, 49 So. 351, 160 Ala. 615.

72. N.C.—Cooper v. Southern Express Co., 81 S.E. 743, 165 N.C. 538.

73. Ala.—Alabama City, etc., R. Co. v. Brady, 49 So. 351, 160 Ala. 615.

74. Ga.—McNeal v. Seaboard Air Line Ry. Co., 98 S.E. 409, 23 Ga. App. 473.

75. Minn.—Beaulieu v. Great Northern R. Co., 114 N.W. 353, 103 Minn. 47, 19 L.R.A.,N.S., 564, 14 Ann.Cas. 462.

Q. CLAIMS FOR DAMAGES, WAIVER, NOTICE OF CLAIM, AND CONTRACTUAL LIMITATION OF TIME TO SUE

§ 231. Claims in General

Statutes which impose certain burdens on carriers because of their failure to settle, pay, or reject claims for loss and damages within a specified time have been upheld.

The validity of various state statutes which impose certain burdens on carriers in case they do not proceed within a certain time to settle, pay, or reject claims for loss or damage has been upheld against objections that such statutes were violative of the federal constitution,[76] including the due process clause of the Fourteenth Amendment,[77] and of the state constitution.[78] In some jurisdictions, statutes have been enacted which impose penalties on carriers for failure, within a designated time, to adjust claims for loss of, or injury to, goods, and these statutes are considered below in §§ 474–480.

§ 232. Waiver of Claim

While acceptance of the goods by the consignee, without objection and with knowledge of their defective condition, may prevent recovery for the loss, acceptance does not under all circumstances defeat a right to recover.

Acceptance of the goods by the consignee, without objection and with knowledge of their defective condition, may preclude recovery for damages thereto,[79] or for loss or destruction subsequent to delivery due to such defective condition.[80] The consignee is entitled, however, to a reasonable opportunity for examination, and acceptance for that purpose will not be a waiver;[81] nor will acceptance waive objection for damage not apparent.[82] Indeed, the receipt of the goods alone, with no stipulation that they are accepted in full performance of the contract, does not, it seems, constitute a waiver of claim for damages for which the carrier may be liable.[83] A receipt acknowledging a delivery of the goods in good condition is only prima facie evidence of the fact.[84]

Where, if the carrier had performed its duty of unloading an animal instead of permitting the consignee to unload, the carrier could, or should, have discovered an apparent injury, it cannot complain of a lost opportunity to discover the injury, as bearing on the right of the consignee to claim damages for the injury, notwithstanding he had discovered the injury before accepting the animal.[85]

The retaking of a claim filed by the shipper, after it has been considered and rejected by the carrier's agent, does not amount to a withdrawal of the claim, unless so intended.[86]

Where the initial carrier delivered the wrong kind of a car for the shipment contemplated by the consignor, his direction, after delivery to the connecting carrier, to transport the goods to destination does not absolve the initial carrier from liability for injuries to the goods caused by such improper car, where the consignor did not discover the damage until the car reached destination.[87]

Acceptance of a portion of the goods will not waive objection on account of the damaged condition of the balance.[88] If, however, the consignee desires to recover damages for breach of the entire contract, in excess of the value of the goods not delivered, he should, after discovering the inability of the carrier to deliver the balance, tender the return of the portion accepted.[89]

76. Ind.—Jackson v. Mauck, 126 N.E. 851, 189 Ind. 262—Clift v. Southern Ry. Co., 124 N.E. 457, 188 Ind. 472.

77. U.S.—Southern Ry. Co. v. Clift, 43 S.Ct. 125, 260 U.S. 316, 67 L.Ed. 283, affirming 131 N.E. 4, 190 Ind. 536.

Claim not paid or rejected stands admitted

Indiana statute, Acts 1911 c. 183, applicable to intra-state shipments providing that, if a claim for loss or damage shall not be paid or rejected within ninety days, it shall stand admitted for the full amount did not violate the Fourteenth Amendment.

U.S.—Southern Ry. Co. v. Clift, 43 S.Ct. 126, 260 U.S. 316, 67 L.Ed. 283, affirming 131 N.E. 4, 190 Ind. 536.

Ind.—Clift v. Southern Ry. Co., 124 N.E. 457, 188 Ind. 472.

78. Ind.—Clift v. Southern Ry. Co., supra.

79. La.—Marcy v. Warner, 17 La. Ann. 34—Monro v. Ship Baltic, 1 Mart. 194.

80. Wash.—Rothchild v. Northern Pac. R. Co., 123 P. 1011, 68 Wash. 527, 40 L.R.A.,N.S., 773.
10 C.J. p. 326 note 69.

81. U.S.—Bradstreet v. Heran, C.C.N.Y., 3 F.Cas.No.1,792a, 2 Blatchf. 116.
S.C.—Ferebee v. Atlantic Coast Line R. Co., 95 S.E. 349, 109 S.C. 105.

82. La.—Oakey v. Russell, 6 Mart., N.S., 58.
10 C.J. p. 326 note 71.

83. U.S.—The Elmira Shepherd, C.C.N.Y., 8 F.Cas.No.4,418, 8 Blatchf. 341.
10 C.J. p. 326 note 72.

84. S.C.—Ferebee v. Atlantic Coast Line R. Co., 95 S.E. 349, 109 S.C. 105.
10 C.J. p. 326 note 73.

85. S.C.—Ferebee v. Atlantic Coast Line R. Co., supra.

86. Tex.—Missouri, etc., R. Co. v. Harriman, Civ.App., 128 S.W. 932.

87. Mo.—Smith v. Wabash R. Co., App., 182 S.W. 764.

88. Minn.—Brown, etc., Co. v. Pennsylvania Co., 65 N.W. 961, 63 Minn. 546.
N.Y.—Scheu v. Benedict, 22 N.E. 1073, 116 N.Y. 510, 15 Am.S.R. 426.

89. U.S.—Conner v. The Sarah Sands, D.C.N.Y., 6 F.Cas.No.3,115.

Payment of the freight charges is not a waiver of the right to recover damages, as the consignee may maintain action therefor without interposing it by way of offset or counterclaim as against the freight.[90]

Release executed without authority. A release of damages by the consignor is not binding on the consignee if executed without his authority.[91]

§ 233. Notice of Claim for Damages

Stipulations in shipping contracts requiring notice to the carrier of a claim for loss or damage are usual but do not restrict the time within which action may be brought and do not exempt the carrier from liability for negligence.

Stipulations in bills of lading or other contracts of shipment that written notice of a claim for loss of, or damage to, the goods shipped shall be given to the carrier or his agent within a designated time, and that unless such notice is given there will be no liability on the part of the carrier, are very generally upheld in so far as they are found to be reasonable, as shown infra § 237, unless there are constitutional or statutory provisions directly or by implication forbidding them, as shown infra § 236. According to some cases, they are conditions in the nature of estoppels.[92] They operate to prevent the enforcement of the obligations of the contract when not complied with as shown below in § 234, and are not the equivalent of statutes of limitation restricting the time within which actions may be brought,[93] nor are they in any sense an exemption from liability for negligence directly or indirectly.[94] There is a difference of opinion as to whether these contracts are limitations of the carrier's common-law liability. A number of decisions maintain that they are not, unless the time required for giving notice is unnecessarily short,[95] and a similar view has prevailed in some jurisdictions in respect of a stipulation for the making of a written claim within a specified time.[96] Other decisions take the contrary view and hold that these stipulations are in effect a limitation of the carrier's common-law liability.[97] The operation and effect of this diversity of views is shown in subsequent sections.

While, according to some cases, stipulations of the general type here under consideration do not apply where the shipment is made under parol contract and not under the bill of lading,[98] a stipulation for claim in writing within a specified time in a uniform bill of lading prescribed by the interstate commerce commission has been given effect in the case of an interstate shipment, notwithstanding no bill of lading was issued in the particular case.[99]

§ 234. Necessity for Notice

a. Want of requirement in contract
b. Stipulation requiring notice

a. Want of Requirement in Contract

Notice to the carrier of loss of, or injury to, goods shipped is not a condition precedent to an action for such loss or injury in the absence of any provision in the shipping contract requiring notice.

In the absence of some special provision in the contract of shipment requiring it, it is not a condition precedent to a suit for loss of, or injury to, the goods shipped that notice thereof shall be given to the carrier, or that claim shall be made,[1] and, where there is no binding stipulation in that regard, the shipper may sue on his claim at any time

90. Minn.—Brown, etc., Co. v. Pennsylvania Co., 65 N.W. 961, 63 Minn 546.
N.Y.—Schwinger v. Raymond, 83 N.Y. 192, 38 Am.R. 415.

91. Wis.—Cream City R. Co. v. Chicago, etc., R. Co., 23 N.W. 425, 63 Wis 93, 53 Am.R. 267.

92. N.C.—Kime v. Southern Ry. Co., 69 S.E. 264, 153 N.C. 398.
10 C.J. p 327 note 84.

93. N.C.—Dixie Cigar Co. v. Southern Express Co., 27 S.E. 73, 120 N.C. 348, 58 Am.S.R. 795.
10 C.J. p 327 note 86.

94. Colo.—Atchison, T. & S. F. Ry. Co. v. Miller, 163 P. 836, 63 Colo 46
Ga.—Southern Ry. Co. v. Simpson, 93 S.E. 47, 20 Ga.App. 290.
Mo.—Bilby v. Atchison, T. & S. F. Ry. Co., 199 S.W. 1004.
W.Va.—Kahn v. American Railway Express Co., 106 S.E. 126, 88 W.Va. 17.
10 C.J. p 327 note 87, p 333 note 79

Corpus Juris text has been cited with approval in Moore Bros. v. American Ry. Express Co., 107 S.E. 6, 7, 181 N.C. 300.

95. U.S.—Missouri, etc., R. Co. v. Harriman Tex., 33 S.Ct. 397, 227 U.S. 657, 57 L.Ed. 690.
10 C.J. p 327 note 88.

96. Ga.—Southern Ry. Co. v. Simpson, 93 S.E. 47, 20 Ga.App. 290.

97. Mo.—George v. Chicago, etc., R. Co., 113 S.W. 1099, 214 Mo. 551, 127 Am.S.R. 690.
10 C.J. p 329 note 14, p 330 note 22

98. Mo.—Green v. Pacific Express Co., 37 Mo.App. 537.
Tex.—McCarty v. Gulf, etc., R. Co., 15 S.W. 164, 79 Tex. 33—Missouri, etc., R. Co. v. Graves, App., 16 S.W. 102

99. W.Va.—Wholesale Coal Co. v. Chesapeake & O. Ry. Co., 144 S.E. 715, 106 W.Va. 53

1. Ind.—Ohio, etc., R. Co. v. Nickless, 73 Ind. 382.
La.—H. P. Richard & Sons v. Director General of Railroads, 107 So. 891, 160 La. 1019.
Tenn.—Southwestern Ry. Co. v. Shipley, 245 S.W. 524, 147 Tenn. 40.

Live stock

Even though the delivery of live stock to a carrier for shipment is the beginning of transportation, either at common law or under the statute, there is no duty imposed by law on the shipper to give notice of any claim for damages arising thereafter, and such notice can be imposed only by contract.—Southern Ry. Co. v. Shipley, 245 S.W. 524, 147 Tenn. 40.

within that fixed by the statute of limitations of the jurisdiction in which the suit is brought.[2]

b. Stipulation Requiring Notice

In general, a claimant is not entitled to recover from the carrier in the absence of due compliance with stipulations in the shipping contract as to giving notice or making claim.

Stipulations in bills of lading or other contracts of shipment which require written notice of a claim for loss of, or damage to, the goods shipped in order to impose liability on the carrier are, according to some cases, conditions in the nature of estoppels, as shown in § 233; if the stipulation is valid and effective, under the rules set forth in §§ 236, 237, it operates to prevent the enforcement of the contract when not complied with,[3] that is, notice is a condition precedent and the carrier is not liable if notice is not given in accordance with the stipulation.[4] A like rule applies to a requirement of the contract of shipment for the presentation or filing of a written claim for loss or damage within a stated time.[5]

2. U.S.—Southern R. Co. v. Mooresville Cotton Mills, N.C., 187 F. 72, 109 C.C.A. 390.

3. Okl.—Chicago, R. I. & P. Ry. Co. v. Gray, 165 P. 157, 65 Okl. 181—Chicago, R. I. & P. Ry. Co. v. Brightwell, 162 P. 484, 62 Okl. 149—St. Louis & S. F. R. Co. v. Taliaferro, 156 P. 359, 56 Okl. 519.
10 C.J. p. 327 note 84.

4. Ala.—Nashville, C. & St. L. Ry. Co. v. Camper, 78 So. 925, 201 Ala. 581.
Ark.—Chicago, R. I. & P. Ry. Co. v. Robinson & Co., 298 S.W. 873, 175 Ark. 35.
Ga.—Louisville & N. R. Co. v. Harrell & Murphy, 120 S.E. 35, 31 Ga. App. 126.
Ill.—Sexton v. Grand Trunk Western R. Co., 260 Ill. App. 448—Newman v. Union Pac. R. Co., 210 Ill. App. 13—Conover v. Wabash Ry. Co., 208 Ill.App. 105—Sweetser v. Chicago & Alton R. Co., 196 Ill. App. 623.
Okl.—Atchison, T. & S. F. Ry. Co. v. Cooper, 175 P. 539, 71 Okl. 112—Chicago, R. I. & P. Ry. Co. v. Gray, 165 P. 157, 65 Okl. 181—Kansas City, M. & O. Ry. Co. of Texas v. Gleason, 158 P. 365, 59 Okl. 87—Chicago, R. I. & P. R. Co. v. Craig, 157 P. 87, 59 Okl. 18.
10 C.J. p. 327 note 84.

Prior oral contract

A shipper of live stock is bound by provision of the contract, signed by him with the second carrier, requiring notice of injury to stock, if he had opportunity to read the contract before signing it, although he testified he had a previous oral contract with the initial carrier for the shipment to final destination.—San Antonio & A. P. Ry. Co. v. Miller, Tex.Civ.App., 213 S.W. 734.

5. U.S.—Chesapeake & O. Ry. Co. v. A. F. Thompson Mfg. Co., 46 S.Ct. 318, 270 U.S. 416, 70 L.Ed. 654, reversing A. F. Thompson Mfg. Co. v. Chesapeake & O. Ry. Co., 123 S.E. 421, 95 W.Va. 670, certiorari granted Chesapeake & O. R. Co. v. A. F. Thompson Mfg. Co., 45 S.Ct. 352, 267 U.S. 588, 69 L.Ed. 801—Davis v. John L. Roper Lumber Co., 46 S.Ct. 28, 269 U.S. 158, 70 L.Ed. 209, 44 A.L.R. 1357, reversing 122 S.E. 113, 133 Va. 377, certiorari granted 44 S.Ct. 639, 265 U.S. 579, 68 L.Ed. 1189—Barrett v. Van Pelt, 45 S.Ct. 437, 268 U.S. 85, 69 L.Ed. 857, reversing Van Pelt v. Barrett, 199 N.Y.S. 509, 205 App.Div. 332—Erie R. Co. v. Shuart, 39 S.Ct. 519, 250 U.S. 465, 63 L.Ed. 1088, reversing Schuart v. Erie R. Co., 117 N.E. 1084, 221 N.Y. 680, which affirmed Shuart v. Erie R. Co., 150 N.Y.S. 1112, 166 App.Div. 895—Baltimore & O. R. Co. v. Leach, 39 S.Ct. 254, 249 U.S. 217, 63 L.Ed. 570, reversing 191 S.W. 310, 173 Ky. 452—Southern Pac. Co. v. Stewart, Ariz., 39 S.Ct. 139, 248 U.S. 446, 63 L.Ed. 350, reversing 233 F. 956, 147 C.C.A. 630, in which error is dismissed 38 S.Ct. 130, 245 U.S. 359, 62 L.Ed. 345, rehearing granted 38 S.Ct. 203, 245 U.S. 562, 62 L.Ed. 472—Erie R. Co. v. Stone, Ohio, 37 S.Ct. 633, 244 U.S. 332, 61 L.Ed. 1173—Chesapeake & O. R. Co. v. McLaughlin, W.Va., 37 S.Ct. 40, 242 U.S. 142, 61 L.Ed. 207—Manby v. Union Pac. R. Co., C.C.A.Colo., 10 F.2d 327—Gillette Safety Razor Co. v. Davis, C.C.A.Mass., 278 F. 864, certiorari denied 42 S.Ct. 590, 259 U.S. 587, 66 L.Ed. 1077.
Ariz.—Wells Fargo & Co. Express, S. A., v. Tribolet, 50 P.2d 878, 46 Ariz. 311.
D.C.—American Ry. Express Co. v. Fashion Shop, 10 F.2d 909, 56 App.D.C. 114.
Ga.—Davis v. Mizell, 120 S.E. 690, 31 Ga.App. 439—Southern Ry. Co. v. Bunch, 109 S.E. 523, 27 Ga.App. 689.
Ill.—E. B. Conover & Co. v. Baltimore & O. R. Co., 212 Ill.App. 29—Newman v. Union Pac. R. Co., 210 Ill. App. 13—Conover v. Wabash Ry. Co., 208 Ill.App. 105—Hudson v. Grand Rapids & I. Ry. Co., 203 Ill.App. 377—Keasler v. Baltimore & O. S. W. R. Co., 203 Ill.App. 61 See Simpson v. Grand Trunk Western Ry. Co., 210 Ill.App. 269—Chesney v. Union Pac. R. Co., 209 Ill.App. 494—Hamilton v. Cleveland, C., C. & St. L. Ry. Co., 206 Ill.App. 270—Ed. Hockaday & Co. v. Chicago, M. & St. P. Ry. Co., 201 Ill.App. 453—Mays v. Wells Fargo & Co., 199 Ill.App. 443.
Iowa.—Keeney v. Chicago, B. & Q. R. Co., 167 N.W. 475, 183 Iowa 522.
Kan.—Stevens-Scott Grain Co. v. Chicago, R. I. & P. Ry. Co., 221 P. 1117, 115 Kan. 188.
Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Luke, 184 S.W. 1132, 169 Ky. 560, rehearing denied 186 S.W. 875, 171 Ky. 50.
Mass.—Metz Co. v. Boston & M. R. R., 116 N.E. 475, 227 Mass. 307.
Mich.—Douglas Shoe Co. v. Pere Marquette Ry. Co., 217 N.W. 12, 241 Mich. 297—Otto v. Manistee & N. E. R. Co., 163 N.W. 49, 196 Mich. 746.
Minn.—Benson v. Davis, 194 N.W. 771, 156 Minn. 354.
Mo.—Detmer, Bruner & Mason v. New York Cent. R. Co., 80 S.W.2d 222, 229 Mo.App. 702, transferred Sup., 72 S.W.2d 984—Mt. Arbor Nurseries v. American Ry. Express Co., 300 S.W. 1051, 221 Mo.App. 241—Jordan v. Chicago, B. & Q. R. Co., 226 S.W. 1023, 206 Mo.App. 56—Cudahy Packing Co. v. Atchison, T. & S. F. Ry., 201 S.W. 623, 198 Mo.App. 520—Johnson v. Missouri Pac. Ry. Co., App., 187 S.W. 282.
N.H.—Apostolou v. American Ry. Express Co., 122 A. 326, 81 N.H. 115—Ostroff v. Hustis, 114 A. 27, 80 N.H. 141.
N.Y.—Lays Bros. & Boss v. American Ry. Express Co., 239 N.Y.S. 478, 228 App.Div. 746—Liesberger v. Bush Terminal R. Co., 197 N.Y.S. 281, 119 Misc. 891.
N.C.—Taft & Vandyke v. Atlantic Coast Line R. Co., 93 S.E. 752, 174 N.C. 211.
Ohio.—Norfolk & W. Ry. Co. v. Cosmopolitan Bank & Trust Co., 174 N.E. 801, 37 Ohio App. 323—Thomas v. Baltimore & O. R. Co., 16 Ohio N.P.,N.S., 194.
Okl.—Chicago, R. I. & P. Ry. Co. v. Brockmeier, 168 P. 1011, 66 Okl. 280—Atchison, T. & S. F. Ry. Co. v. Cozart, 158 P. 933, 59 Okl. 136.
Pa.—Hilbert v. Pennsylvania R. Co., 120 A. 778, 277 Pa. 105—U. S. Metallic Packing Co. v. American Ry.

§ 235. · Purpose and Validity of Provisions for Notice

The purpose of requiring notice of, or the making or presenting of, claim for loss, damage, or injury is to give the carrier opportunity to investigate or inquire while the facts bearing on the justice of the claim are readily available.

As shown in §§ 236, 237, stipulations requiring notice of claim or the making of a claim in writing are usually upheld where they are reasonable and do not contravene any constitutional or statutory provision. The purpose of requiring such notice or claim is to enable the carrier, while the occurrence is recent, to inform itself of the actual facts occasioning the loss or injury, that it may protect itself against claims which might be made on it after such lapse of time as to make it difficult, if not impossible, to ascertain the truth;[6] or, as otherwise expressed, the purpose of a notice of claim or of the presentation of a written claim is to afford the carrier an opportunity to investigate,[7] or to facilitate prompt investigation.[8]

§ 236. · Effect of Special Constitutional and Statutory Provisions on Power to Stipulate for Notice

a. State constitutional and statutory provisions

b. Federal legislation

Express Co., 87 Pa.Super. 119—Central R. Co. of New Jersey v. Parry, 18 Pa.Dist. & Co. 184.

S.C.—Bowman v. Northwestern R. Co. of South Carolina, 130 S.E. 878, 133 S.C. 298—Freeman v. Atlantic Coast Line R. Co., 113 S.E. 69, 120 S.C. 199.

S.D.—Strommer v. Chicago, M. & St. P. Ry. Co., 161 N.W. 346, 38 S.D. 368.

Tex.—Schaff v. Ike Exstein & Bro., Civ.App., 270 S.W. 589.

10 C.J. p 327 note 84.

Right of shipper not restored by order of interstate commerce commission

Shipper who failed to comply with stipulation requiring making claim in writing within a specified time after delivery could not claim the benefit of the order of the interstate commerce commission allowing the filing of all loss and damage claims that accrued within two years prior to February 9, 1914, where the interstate shipment in question had actually been delivered to the consignee more than two years prior to such date.

Iowa.—J. C. Hubinger Bros. Co. v. Chicago, B. & Q. R. Co., 195 N.W. 762, 197 Iowa 374.

Mich.—Otto v. Manistee & N. E. R. Co., 163 N.W. 49, 196 Mich. 746.

Loss of shipment

In an action for the value of goods shipped to a foreign country, shipper's contention that proof of delivery and acceptance of goods by carrier and its failure to make delivery at destination established a prima facie case, and imposed the burden on carried to prove that the loss resulted from a cause for which it was not responsible, is no answer to carrier's defense that shipper failed to present claim within four months as required by the shipping contract, as a condition precedent to recovery.—Apostolou v. American Ry. Express Co., 122 A. 326, 81 N.H. 115.

Mexican carrier

Where bill of lading issued by Mexican carrier provided that shipment was subject to conditions of bills of lading of participating carriers, Mexican carrier was not liable for alleged conversion of goods, which it had transported, where no written claim had been filed with it or its connecting carrier within time required by provision in bill of lading issued by connecting carrier.—Wells Fargo & Co., Express, S. A., v. Tribolet, 50 P.2d 878, 46 Ariz. 311.

Notice timely

Where the agent of the delivering carrier was present at the unloading of the stock and saw their condition, a written notice containing an itemized statement of plaintiff's claim given to such agent some days thereafter was sufficient, even though a stipulation in the contract of shipment provided that a notice of claim for damages should be given in writing before removal of the stock and before it was mingled with other stock.—Chicago, I. & L. Ry. Co. v. Priddy, 115 N.E. 266, 65 Ind.App. 552.

6. N.C.—Moore Bros. v. American Ry. Express Co., 107 S.E. 6, 181 N.C. 300.

10 C.J. p 328 notes 93, 92 [a].

Corpus Juris has been quoted in Moore Bros v. American Ry Express Co., 107 S.E. 6, 7, 181 N.C. 300.

Other statements of purpose

(1) "The manifest object of such a provision is to force those claiming to be damaged by the carrier's negligence, to promptly present their claims for adjustment while the facts and circumstances upon which they are based are fresh in the memories of the parties and witnesses, and to prevent being harassed or imposed upon by dishonest claimants."—Black v. Wabash, etc., R. Co., 111 Ill. 351, 358, 53 Am.R. 628—Sweetser v. Chicago & Alton R. Co., 196 Ill.App. 623, 628—Baltimore, etc., R. Co. v. Ross, 105 Ill.App. 54, 61.

(2) "The purpose of requiring notice is to give the carrier a fair opportunity to investigate the merits of the alleged loss, so that unjust claims may be thwarted; to give the carrier an opportunity to investigate the merits of the claim when the facts are fresh and the information is readily obtainable."—R. W. Gess Commission Co. v. Illinois Cent. R. Co., 186 S.W. 1136, 1137, 193 Mo.App. 677.

(3) "It is merely intended to give reasonable notice to the railroad company while the facts are still fresh, in order to permit a reasonable investigation and examination of the claim."—Cohen v. Southern Ry. Co., 193 N.E. 480, 483, 358 Ill. 532, affirming 273 Ill.App. 116.

(4) "A notice of claim is solely to put the railway company on inquiry as to the facts upon which the claim is based, so that it may be informed as to the situation and conditions, at a time when the evidence may be more easily investigated, and possibly before recollection of the facts may have disappeared from the minds of those familiar therewith, and in order that there may be no unreasonable delay in bringing actions."—Parham v. Chicago, M. & St. P. Ry. Co., 189 P. 227, 233, 57 Mont. 492.

7. Minn.—Benson v. Davis, 194 N.W. 771, 156 Minn. 364.

Tex.—Texas & P. Ry. Co. v. McMillen, Civ.App., 183 S.W. 773.

Wyo.—Union Pac. R. Co. v. Pacific Market Co., 200 P. 108, 27 Wyo. 501, rehearing denied 206 P. 143, 28 Wyo. 461.

8. U.S.—Georgia, F. & A. R. Co. v. Blish Milling Co., 36 S.Ct. 541, 241 U.S. 190, 60 L.Ed. 948, affirming 82 S.E. 784, 15 Ga.App. 142.

a. State Constitutional and Statutory Provisions

State constitutional and statutory provisions regulating notice of, and claims for, loss or injury are given effect in so far as they apply to intra-state shipments and are otherwise valid.

A state has the right to enact statutes applicable to intra-state shipments, which are designed to safeguard the rights of shippers as to provisions for notice,[9] and a provision of a state constitution that a stipulation in a contract or agreement for notice or demand other than provided by law as a condition precedent to liability shall be null and void applies to contracts for intra-state shipments and renders void and ineffective provisions in such a contract which contravene such constitutional provision.[10]

In a number of jurisdictions where constitutional or statutory provisions prohibit carriers from limiting their common-law liability, it is held that provisions of the character under consideration are limitations of liability and void,[11] and it is immaterial that there was a consideration consisting in a reduced rate of transportation.[12] In other jurisdictions the opposite conclusion has been reached.[13]

Limitations of this character are not prohibited by a statute which prohibits a common carrier from limiting by contract, rule, or regulation its liability for damages resulting from its own negligence or the negligence of any other common carrier in whose possession the property may be for transportation by virtue of the bill of lading which a statute requires the initial carrier to issue to the shipper,[14] nor by a statute which provides that every condition of a contract restricting another from enforcing his rights thereunder, or limiting the time for so doing, is void.[15] The view has been taken, however, that a statutory provision that

9. Ala.—Davis v. Dawkins, 95 So. 188, 209 Ala. 45.

10. Okl.—Missouri, K. & T. Ry. Co. v. Williamson, 180 P. 961, 75 Okl. 36—Missouri, K. & T. Ry. Co. v. Chowning, 162 P. 1105, 62 Okl. 302—Chicago, etc., R. Co. v. Harrington, 143 P. 325, 44 Okl. 41.

Effect of statute

Rev.L.1910 § 828, providing that a bill of lading may include reasonable requirements as to notice and demand of damages, did not except from the operation of Const. art. 23 § 9, which contains the provision set forth in the text, a provision in a contract of shipment requiring notice of damages.—Missouri, K. & T. Ry. Co. v. Williamson, 180 P. 961, 75 Okl. 36.

11. Iowa.—Grieve v. Illinois Cent. R. Co., 74 N.W. 192, 104 Iowa 659. 10 C.J. p. 328 note 96, p. 332 note 66 [b], p. 333 note 71 [c] (2).

In Texas

(1) The rule stated in the text has been applied or recognized.—St. Louis, B. & M. Ry. Co. v. Marcofich, Com.App., 221 S.W. 582, affirming, Civ.App., 185 S.W. 51—Missouri, etc., R. Co. v. Allen, 87 S.W. 168, 39 Tex. Civ.App. 236.

(2) Rev.St.1911 art. 708, first enacted in 1863, prohibiting carriers from limiting or restricting their common-law liability, was not repealed by implication by art. 5714, which, without special reference to carriers, prohibits stipulations requiring notice of any claim for damages within a less period than ninety days.—St. Louis, B. & M. Ry. Co. v. Marcofich, supra.

(3) A stipulation of a contract for the shipment of live stock that, as a condition precedent to the shipper's right to recover for loss or injury, he will give notice in writing of his claim before the live stock is removed from the place of destination or from the place of delivery and before it is mingled with other stock, violated the statute prohibiting carriers from limiting their common-law liability.—Gulf, C. & S. F. Ry. Co. v. Trawick, 4 S.W. 567, 68 Tex. 314, 2 Am.S.R. 494.

(4) So, a stipulation for notice before removal of the live stock from the cars was invalid.—Missouri, etc., R. Co. v. Allen, supra.

(5) Some of the earlier cases apparently upheld stipulations for notice before removal of stock.—Texas, etc., R. Co. v. Hamm, 2 Tex.A.Civ.Cas. § 491—Galveston, etc., R. Co. v. Harman, 2 Tex.A.Civ.Cas. § 136.

(6) The statutory provision against limiting common-law liability rendered invalid a stipulation that, as a condition precedent to the recovery of damages for injury to live stock in transit, notice of damage should be given within ninety-one days after such damage occurred, notwithstanding another and subsequently enacted statute provided that a stipulation in any contract requiring notice of claim for damages as a condition precedent shall be void if the time fixed for giving notice shall be less than ninety days.—St. Louis, B. & M. Ry. Co. v. Marcofich, supra.

(7) Prior to the decision in St. Louis, B. & M. Ry. Co. v. Marofich supra, the ninety-day statute was considered in declaring invalid stipulations which allowed less than ninety days.—Texas, etc., R. Co. v. Langbehn, Civ.App., 150 S.W. 1188, rehearing denied 158 S.W. 244.—10 C.J. p. 331 note 44 [a], p. 332 note 66 [c] (3).

(8) Furthermore, stipulations which allowed more than ninety days were upheld in some cases.—Turner v. Henderson, Civ.App., 183 S.W. 51.—10 C.J. p. 332 note 66 [c] (4), (5).

(9) Even since the decision in St. Louis, B. & M. Ry. Co. v. Marcofich, supra, the ninety-day statute has been considered in asserting that a stipulation for notice of claim within one hundred and twenty days was reasonable and could be enforced.—St. Louis Southwestern Ry. Co. of Texas v. Seale & Jones, Civ.App., 247 S.W. 883, modified on other grounds, Com.App., 267 S.W. 676.

12. Ky.—Illinois Cent. R. Co. v. Radford, 64 S.W. 511, 23 Ky.L. 886.

13. Ark.—St. Louis Southwestern R. Co. v. Haynie, 179 S.W. 170, 120 Ark. 26.
10 C.J. p. 328 note 98.

14. Kan.—Ray v. Missouri, etc., R. Co., 133 P. 847, 90 Kan. 244.

In North Dakota it has been held that a clause in a special contract with a common carrier, providing that, when property is injured the shipper must, as a condition precedent to recovery therefor, give notice in writing before the property is removed from the place of destination, is not prohibited by Rev.Code 1905 § 5678, providing that a common carrier cannot be exonerated by any agreement in anticipation thereof from liability for the gross negligence, fraud, or willful wrong of itself or its employees.—Cooke v. Northern Pac. R. Co., 133 N.W. 303, 22 N.D. 266.

15. Okl.—Midland Valley R. Co. v. Ezell, 116 P. 163, 29 Okl. 40.
10 C.J. p. 328 note 1.

limitations prescribed by statute shall not be changed by contract and that any attempted change by contract shall be void rendered ineffective a provision of a contract of shipment requiring the presentation of a written claim to the carrier within a specified time.[16]

A statute which makes void all stipulations forfeiting any right of action for failure to present a claim for damages unless the event pertaining to the loss or injury is peculiarly within the knowledge of one party renders ineffective a provision, in a contract to which the statute applies, requiring notice of claim where claimant does not come within the provision as to knowledge.[17] Such statute does not require the contract itself, in providing for notice, to contain the statement that the event is peculiarly within the knowledge of the party required to give notice.[18]

Under some statutes the stipulation is not binding unless the signature of the shipper to the contract in which it was incorporated was obtained.[19]

b. Federal Legislation

The Carmack amendment did not invalidate stipulations for notice or claim in contracts of shipment. There must, however, be due compliance with subsequent federal statutes applicable to such stipulations.

The Carmack amendment, Act of June 29, 1906, 34 U.S.St. at L. p 593 c 3591 § 7, 49 U.S.C.A. § 20 par (11), although it prohibits a common carrier from limiting its liability for damages resulting from its own negligence or that of any other common carrier into whose possession the property may come for transportation by virtue of the bill of lading which the section requires the initial carrier to issue to the shipper, as shown above in § 99 and below in § 407, does not limit the right of the carrier to make a reasonable contract with the shipper requiring notice of loss or damage or making or filing of claim in writing.[20] Prior to the enactment of the Carmack amendment the supreme court of the United States had declared such notices valid;[21] and inasmuch as the Carmack amendment supersedes all state decisions, statutes, and policies on the subject of interstate commerce shipments,[22] state constitutional and statutory provisions which prohibit contracts requiring notice of loss or injury are rendered void and inoperative so far as interstate shipments are concerned.[23]

Statutes fixing minimum periods. The first Cummins amendment, Act of March 4, 1915, 38 U.S.St. at L. p 1196 c 176, as amended by Act of March 4, 1927, 44 U.S.St. at L. p 1448 c 510 § 3, 49 U.S. C.A. § 20 par (11), which did not apply to a case which arose prior to its enactment,[24] forbidding carriers to provide a shorter period for giving notice of claims than ninety days and for the filing of claims than four months has again been amended by Act of April 23, 1930, 46 U.S.St. at L. p 251 c 208, 49 U.S.C.A. § 20 par (11), which omits any restriction as to giving notice of claim and fixes the minimum time which may be provided within which to file claim at nine months.[25] While the governing statute renders ineffective a provision in a shipping

16. Miss.—Illinois Cent. R. Co. v. Jordan, 66 So 406, 108 Miss. 140. 10 C.J. p 328 note 1.

17. Ala.—Southern Ry. Co. v. Harris, 80 So. 101, 202 Ala. 262. 10 C.J. p 332 note 66 [a].

Persons not covered by provision

Neither consignors-consignees of intra-state shipment, nor indorsees of bill of lading, were under the evidence, parties possessing, peculiarly, knowledge affecting conversion by misdelivery, which they should, under provision of Code 1907 § 4297, have communicated to carrier.—Southern Ry. Co. v. Harris, 80 So 101, 202 Ala. 263.

18. Ala.—Nashville, etc, R. Co. v. Hinds, 59 So 669, 178 Ala. 657. 10 C J p 329 note 2.

19. Cal.—Jolly v. Atchison, etc, R. Co, 131 P. 1057, 21 Cal.App. 368.

In Dakota, under a statute which provided that a consignor or a consignee, by accepting a bill of lading or a written contract of carriage with a knowledge of its terms, assented to the rate of hire and to the time, place, and manner of delivery therein stated, but that his assent to any modification of the carrier's obligations contained in such instrument could be manifested only by his signature to the same, it was held that a condition in a receipt that the carrier would not be liable for loss or damage, unless claim therefor was presented within a given time, was not binding on the shipper unless he signed the receipt. —Hartwell v. Northern Pac. Express Co., 41 N.W. 732, 5 Dak. 463, 3 L R.A. 342.

20. Ill.—Sweetser v. Chicago & Alton R. Co, 196 Ill.App. 623.
Okl.—Atchison, T. & S. F. Ry. Co v. Cozart, 158 P. 933, 59 Okl. 136 10 C.J. p 329 note 3.

Prior oral contract

In a case which was governed by the law in force prior to the first Cummins amendment, the view was expressed that the written contract for an interstate shipment, contemplated by Carmack amendment, being free from fraud, prevails over a precedent oral contract, so that provision of the written contract for notice of claim of damages, if reasonable, controls.—Panhandle & S. F. Ry. Co. v. Bell, Tex.Civ.App, 189 S. W. 1097.

21. U.S.—Southern Express Co. v. Caldwell, Tenn, 21 Wall. 264, 22 L.Ed. 556.

22. U.S.—Missouri, etc., R. Co v Harriman, Tex., 33 S.Ct. 397, 227 U.S. 657, 57 L.Ed. 690.
Okl.—St. Louis, etc, R Co. v Wynn, 153 P. 1156, 54 Okl. 482.

23. Okl.—St. Louis, etc., R. Co. v Wynn, supra.

24. Ga.—Nashville, etc, R. Co. v. Truitt, 86 S.E. 421, 17 Ga.App. 236.

25. **Notice of claim**

(1) The ninety-day provision of the statute, prior to the amendment of 1930, rendered ineffective a provision in a shipping contract subject to the statute which required the giving of notice of claim within a period less than that fixed in the statute.
Ariz.—Southern Pac. R. Co. of Mexico v Gonzalez, 61 P.2d 377, 48 Ariz. 260.

contract subject thereto which requires the filing of a claim within a period less than that fixed in the applicable statute,[26] it is permissible for the carrier to fix a period for filing claim which is not less,[27] or which is greater,[28] than the minimum so fixed, and a stipulation that claim for loss, in case of failure to deliver, must be made within a specified time, not less than the minimum fixed by the statute, after the lapse of a reasonable time for delivery, is permissible and valid under the statute and is controlling.[29]

Requirement of notice or claim forbidden. Another provision of the first Cummins amendment, as amended, which provided that, in the cases included, no notice of claim nor filing of claim shall be required as a condition precedent to recovery has been omitted from the statute as again amended by Act of April 23, 1930, 46 U.S.St. at L. p 251 c 208, 49 U.S.C.A. § 20 par (11).[30] The provision of the first Cummins amendment that no notice of claim nor filing of claim shall be required embraced three classes of claims: loss, damage, or injury due to delay; damage while the shipment was being loaded or unloaded; and damage in transit,[31] and carelessness or negligence of the

Ark.—Missouri Pac. R Co. v. Martindale, 213 S.W. 777, 139 Ark. 143

S C.—Ingram v. Davis, 131 S.E. 677, 134 S C. 93.

(2) The view was taken that such provision prevented the carrier from making a binding stipulation that the shipper of live stock should give notice of his claim before removal of stock from place of destination or of delivery and before mingling with other animals.—Ingram v. Davis, supra.

(3) The ninety-day provision of the statute applied to a provision in the shipping contract as to notice regarding loss or injury, because the claim must necessarily be founded on the loss or injury, and the word "claim," as used in the statute, was broad enough to cover loss or injury. —Missouri Pac. R. Co. v. Martindale, supra.

(4) The view was taken that such provision prevented the carrier from contracting with the shipper for written notice of loss or injury to cattle before they were removed from unloading pens.—Missouri Pac. R. Co. v. Martindale, supra.

(5) Provision of contract of shipment of live stock for written notice to carrier, before removal of the stock from carrier's possession, of any visible or manifest injury, was invalid, in case of interstate shipment, under the ninety-day provision.—Wichita Valley Ry. Co. v. Baldwin, Tex.Civ.App., 270 S.W. 1089.

(6) The supreme court of the United States, in referring to the provision in the uniform live stock contract for information in writing of injury before removal from possession of carrier or mingling with other live stock, said that the provision did not purport to make compliance a condition precedent and that it was unnecessary to decide whether in any case it could be so read.—Missouri Pac. R. Co. v. Hartley Bros., 54 S.Ct. 271, 290 U.S. 576, 78 L.Ed. 510, affirming 19 P.2d 337, 162 Okl. 194, certiorari granted 54 S.Ct. 63, 290 U.S. 613, 78 L.Ed. 536.

26. U.S.—Hartness v. Iberia & V. R Co., D.C.La., 297 F. 622

Ariz.—Southern Pac. R. Co. of Mexico v. Gonzalez, 61 P.2d 377, 48 Ariz. 260.

27. U.S.—Barrett v. Van Pelt, 45 S Ct. 437, 268 U.S. 85, 69 L.Ed. 857, reversing Van Pelt v. Barrett, 199 N.Y.S. 509, 205 App.Div. 332

Ill.—Sexton v. Grand Trunk Western R. Co., 260 Ill.App. 448—E. B. Conover & Co. v. Baltimore & O. R Co., 212 Ill.App. 29.

N.C.—St. Sing v. American Ry. Express Co., 111 S.E. 710, 183 N.C. 405

Tex.—Schaff v. Ike Exstein & Bro., Civ.App., 270 S.W. 589.

W.Va.—Kahn v. American Railway Express Co., 106 S.E. 126, 88 W. Va. 17.

28. U.S.—Hartness v. Iberia & V. R. Co., D.C.La., 297 F. 622

Tex.—Davis v. First Nat. Bank of Longview, Civ.App., 245 S.W. 1009.

Va.—Chesapeake & O. Ry. Co. v. National Fruit Products Co., 155 S.E. 630, 155 Va. 438, 72 A.L.R. 878.

Under first Cummins amendment

In a case arising under the first Cummins amendment, provision in bill of lading covering shipment of live stock for written notice of claim within ninety-five days, and verified itemized claim within one hundred and twenty-five days, after loss or injury occurred was upheld.—Cunningham v. Missouri Pac. R. Co., Mo. App., 219 S.W. 1003.

29. U.S.—Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 453, 283 U.S. 209, 75 L.Ed. 983, reversing 143 S. E. 629, 154 Va. 1, and Chesapeake & O. Ry. Co. v. Martin & Porter, 152 S.E. 335, 154 Va. 1, certiorari granted Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 23, 282 U.S. 819, 75 L.Ed. 732.

Stipulation valid prior to amendment of 1930

(1) Six months.

U.S.—Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 453, 283 U.S. 209, 75 L.Ed. 983, reversing 143 S.E. 629, 154 Va. 1, and Chesapeake & O. Ry. Co. v. Martin & Porter, 152 S.E. 335, 154 Va. 1, certiorari granted Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 23, 282 U.S. 819, 75 L.Ed. 732.

Ga.—Davis v. Mizell, 120 S.E. 690, 31 Ga.App. 439.

Me.—R. P. Hazzard Co. v. Maine Cent. R. Co., 116 A. 258, 121 Me. 199.

Tex.—Schaff v. Ike Exstein & Bro., Civ.App., 270 S.W. 589.

(2) Four months.

Ill.—E. B. Conover & Co. v. Baltimore & O. S. R. Co., 212 Ill.App. 29.

N.C.—St. Sing v. American Ry. Express Co., 111 S.E. 710, 183 N.C. 405.

Pa.—De Angelis v. American Ry. Express Co., 2 Pa.Dist. & Co. 493.

W.Va.—Kahn v. American Railway Express Co., 106 S.E. 126, 88 W.Va. 17.

30. Ohio.—Zang v. Railway Express Co., 196 N.E. 901, 130 Ohio St. 17.

31. U.S.—Davis v. John L. Roper Lumber Co., 46 S.Ct. 28, 269 U. S. 158, 70 L.Ed. 209, 44 A.L.R. 1357, reversing 122 S.E. 113, 133 Va. 377, certiorari granted 44 S.Ct. 639, 265 U.S. 579, 68 L.Ed. 1189.

"In transit"

"In transit," as used in the statutory provision under consideration, meant in course of passing from point to point.—Davis v. First Nat. Bank of Longview, Tex.Civ.App., 245 S.W. 1009.

Failure to deliver or misdelivery

(1) A misdelivery or a failure to make delivery in accordance with the bill of lading was not a claim which fell within the purview of such provision.

U.S.—Davis v. John L. Roper Lumber Co., 46 S.Ct. 28, 269 U.S. 158, 70 L.Ed. 209, 44 A.L.R. 1357, reversing 122 S.E. 113, 133 Va. 377, certiorari granted 44 S.Ct. 639, 265 U.S. 579, 68 L.Ed. 1189.

Ohio.—Norfolk & W. Ry. Co. v. Cos-

carrier was a necessary element in each case of loss, damage, or injury referred to, in order to bring a case within the prohibition of the statute.[32] A subsequent amendment, Act of March 4, 1927, 44

mopolitan Bank & Trust Co., 174 N E 801, 37 Ohio App 323.

(2) "Damage in transit," as used in the statute, did not include a misdelivery; in the ordinary and usual meaning of the word, "transit" ends before delivery at destination

U S —Davis v. John L. Roper Lumber Co., supra.

Tex —Davis v. First Nat. Bank of Longview, Civ.App., 245 S.W. 1009.

(3) So, it was held that the statutory provision did not apply to a failure to deliver —U. S. Metallic Packing Co. v. American Ry. Express Co., 87 Pa.Super. 119.

(4) It was also held that the statutory provision did not apply where the property shipped was lost in transit.

Ill.—E. B. Conover & Co. v. Baltimore & O. S. W. R. Co, 212 Ill. App. 29.

Minn —Henningsen Produce Co. v. American Ry Express Co., 138 N. W. 272, 152 Minn. 209.

Mo.—Mt. Arbor Nurseries v. American Ry. Express Co., 300 S.W. 1051, 221 Mo.App. 241.

(5) There was, however, authority to the contrary.

N.C.—Scott v. American Ry. Express Co., 127 S.E. 252, 189 N.C. 377—Winstead v. East Carolina Ry., 118 S.E 887, 186 N.C. 58

Ohio.—Baltimore & Ohio R. Co. v. Fish & Lybarger Co., 155 N.E. 508, 23 Ohio App. 179.

(6) But, even in a jurisdiction where such contrary view was taken, it was held that the statutory provision did not apply where the goods were never received by the consignee and were sold as unclaimed —St. Sing v. American Ry. Express Co., 111 S E. 710, 133 N.C. 405.

(7) Goods delivered to the person designated by the consignee, who was not the holder of the order bill of lading, and unloaded by the person to whom they were delivered, not by the carrier, were not lost to the holder of the bill of lading while being unloaded, within the meaning of the statute under consideration. —Davis v. First Nat. Bank of Longview, Tex.Civ.App., 245 S.W. 1009.

Classification made in earlier case

In one of the early cases in which the classification of claims under the first Cummins amendment was considered, the view was expressed that two classes were contemplated by the amendment: those for loss due to delay or damage while being loaded or unloaded, or damaged in transit, which might be called "transit claims"; and those for loss otherwise sustained, called "nontransit claims"; and that, as to the "transit claims," the carrier could not require the filing of claim as a condition precedent to recovery, but that as to nontransit claims the rule was otherwise —Bell v. New York Cent. R. Co, 175 N.Y S 712, 187 App Div. 564.

32. U S —Missouri Pac. R Co v Hartley Bros, 54 S.Ct. 271, 290 U. S. 576, 78 L Ed. 510, affirming 19 P 2d 337, 162 Okl. 194, certiorari granted 54 S Ct. 63, 290 U S. 613, 78 L Ed. 536—Chesapeake & O Ry. Co. v. A. F. Thompson Mfg Co, 46 S Ct. 318, 270 U S. 416, 70 L.Ed 654, reversing A. F. Thompson Mfg. Co. v. Chesapeake & O. Ry Co, 123 S.E. 421, 95 W Va. 670, certiorari granted Chesapeake & O R. Co. v. A. F Thompson Mfg. Co, 45 S.Ct. 352, 267 U S. 588, 69 L Ed. 801—Barrett v. Van Pelt, 45 S Ct. 437, 268 U S. 85, 69 L Ed. 857, reversing Van Pelt v Barrett, 199 N.Y S. 509, 205 App Div. 332 —Gillette Safety Razor Co. v Davis, C C A.Mass, 278 F. 864, certiorari denied 42 S.Ct. 590, 259 U S. 587, 66 L Ed. 1077.

Ark —Chicago, R. I. & P. Ry. Co. v. S. L. Robinson & Co, 298 S W. 873, 175 Ark. 35.

Ind —Erie R. Co. v. C. Callahan Co., 184 N.E 264, 204 Ind. 580, 87 A.L.R. 778.

Ky —Forkner v. Louisville & N R Co, 24 S.W 2d 290, 232 Ky. 579.

Mich —Douglas Shoe Co. v Pere Marquette Ry. Co., 217 N.W. 12, 241 Mich. 297.

Mo —Mt. Arbor Nurseries v. American Ry. Express Co, 300 S W. 1051, 221 Mo App 241.

N C.—Mann v. Fairfield & E C. Transp. Co., 96 S E. 731, 176 N C 104.

Okl —Missouri Pac. R. Co. v. Hartley Bros., 19 P 2d 337, 162 Okl. 194, certiorari granted 54 S Ct. 63, 290 U S. 613, 78 L Ed 536, affirmed 54 S Ct. 271, 290 U S. 576, 78 L Ed. 510.

Pa.—U. S. Metallic Packing Co. v American Ry. Express Co, 87 Pa Super. 119

W Va —A F. Thompson Mfg. Co. v Chesapeake & O. Ry. Co, 115 S E 877, 93 W.Va 3.

But, in a case decided before the question was definitely settled by the supreme court of the United States, the necessity for the existence of negligence was not emphasized — Talbott v. Payne, 111 S E 328, 90 W. Va. 280.

Construction of amendment

In construing the provision in question which actually read: "Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery," it was held that the provision should be read as though the comma were omitted after "unloaded," and as though the word "damaged" were "damage."—Chesapeake & O. Ry. Co v. A F Thompson Mfg Co, 46 S Ct. 318, 270 U.S. 416 70 L Ed. 654, reversing A F Thompson Mfg. Co v. Chesapeake & O Ry. Co, 123 S. E 421, 95 W Va. 670, certiorari granted Chesapeake & O R Co. v. A F. Thompson Mfg. Co., 45 S.Ct. 352, 267 U S. 588, 69 L.Ed. 801— Barrett v. Van Pelt, 45 S.Ct. 437, 268 U S 85, 69 L Ed. 857, reversing Van Pelt v. Barrett, 199 N.Y S. 509, 205 App Div. 332

Failure safely to transport live stock

The statutory provision did not apply where shipper predicated liability of the carrier solely on failure safely to transport live stock, without relying on carelessness or negligence as a basis of liability.—Cunningham v. Missouri Pac. R Co., Mo. App., 219 S W. 1003.

Actual carelessness or negligence

(1) The phrase "carelessness or negligence," as used in the statute, referred to actual negligence or negligence in fact.

U S.—Chesapeake & O. Ry. Co v. A. F Thompson Mfg Co, 46 S.Ct. 318, 319, 320, 270 U S. 416, 70 L. Ed. 654, reversing A. F. Thompson Mfg Co v. Chesapeake & O Ry Co, 123 S E. 421, 95 W Va. 670, certiorari granted Chesapeake & O R Co v. A. F. Thompson Mfg Co, 45 S Ct. 352, 267 U S. 588, 69 L Ed. 801.

Mo —Mt. Arbor Nurseries v. American Ry Express, Co, 300 S.W. 1051, 1053, 221 Mo.App. 241.

(2) The phrase did not refer to a presumption of negligence.

U.S —Chesapeake & O. Ry. Co. v A. F. Thompson Mfg. Co., supra.

Mo.—Mt Arbor Nurseries v. American Ry Express Co, supra.

Delay in delivery

(1) The carrier could properly require a written notice of claim based on delay in delivery within a specified time, where there was no carelessness or negligence on the part of the carrier —Barrett v. Van Pelt, 45 S.Ct. 437, 268 U S 85, 69 L Ed. 857, reversing Van Pelt v. Barrett, 199 N.Y.S. 509, 205 App Div. 332

(2) In a case decided before the decision in Barrett v Van Pelt, supra, it was held that the statutory provision forbidding the carrier to

U.S.St. at L. p 1449 c 510 § 3, which changed the language of the foregoing provision to read that, if the loss, damage, or injury complained of was due to carelessness or negligence while the property was in transit, or while the property was being loaded or unloaded, or was due to unreasonable delay in transit or in loading or unloading, no notice of claim or filing of claim shall be required as a condition precedent to recovery controlled and rendered unnecessary a notice of claim or filing of claim in cases to which such subsequent amendment applied.[33]

Notice of injury. The direction in each of the foregoing amendments that no "notice of claim" shall be required included a written notice of injury.[34]

Notice to connecting carriers. Since, under the Carmack amendment, as hereinafter discussed in § 406, whenever an initial carrier accepts goods for shipment to a point on another line in another state, it is conclusively treated as having made a through contract of shipment and will be liable for any loss or injury occurring on any connecting line over which the shipment may pass, as well as for loss or injury occurring on its own line, to require the shipper of an interstate shipment, in order to recover for a loss, to file his verified claim with the connecting carrier which caused the injury

require notice or the filing of claim applied where the wrongful delay in the interstate transportation of merchandise had resulted in a loss to the shipper due to a fall in the market price of the commodity—Gamble-Robinson Co. v. Chicago, R. I. & P. Ry. Co., 196 N.W. 938, 158 Minn. 115.

Existence of carelessness or negligence in general

Where the carrier was guilty of carelessness or negligence and the loss or damage was otherwise within the statutory prohibition, the carrier could not require notice or filing of claim

U.S.—Missouri Pac. R. Co. v. Hartley Bros., 54 S.Ct. 271, 290 U.S. 576, 78 L.Ed. 510, affirming 19 P.2d 337, 162 Okl. 194, certiorari granted 54 S.Ct. 63, 290 U.S. 613, 78 L.Ed. 536—Barrett v. Van Pelt, 45 S.Ct. 437, 268 U.S. 85, 69 L.Ed. 857, reversing Van Pelt v. Barrett, 199 N.Y.S. 509, 205 App.Div. 332—Gillette Safety Razor Co. v. Davis, C.C.A.Mass., 278 F. 864, certiorari denied 42 S.Ct. 590, 259 U.S. 587, 66 L.Ed. 1077.

Ark.—Chicago, R. I. & P. Ry. Co. v. S. L. Robinson & Co., 298 S.W. 873, 175 Ark. 35—American Ry. Express Co. v. H. Rouw Co., 294 S.W. 416, 174 Ark. 6.

Ga.—Hicklin v. Central of Georgia Ry. Co., 149 S.E. 286, 40 Ga.App. 297, opinion supplemented 149 S.E. 428, 40 Ga.App. 297—Southern Ry. Co. v. Atlantic Ice & Coal Co., 149 S.E. 71, 40 Ga.App. 103—Southern Pac. Co. v. Di Cristina, 137 S.E. 79, 36 Ga.App. 433.

Idaho.—Ritchie v. Oregon Short Line R. Co., 244 P. 580, 42 Idaho 193, 45 A.L.R. 909.

Ill.—Conover v. Wabash Ry. Co., 208 Ill.App. 105.

Ind.—Erie R. Co. v. C. Callahan Co., 184 N.E. 264, 204 Ind. 580, 87 A.L.R. 778

Ky.—Forkner v. Louisville & N. R. Co., 24 S.W.2d 290, 232 Ky. 579.

Mass.—Radovsky v. New York, N. H. & H. R. Co., 154 N.E. 334, 258 Mass. 26.

Mo.—Green v. American Ry. Express Co., App., 34 S.W.2d 1039—Whiteside v. Chicago, M. & St. P. Ry. Co., App., 239 S.W. 150.

N.C.—Winstead v. East Carolina Ry., 118 S.E. 887, 186 N.C. 58

Pa.—Worthington v. Adams Exp. Co., 72 Pa.Super. 292.

Tenn.—Nashville, C. & St. L. Ry. v. Columbia Produce Co., 12 Tenn.App. 609.

Tex.—Wichita Valley Ry. Co. v. Davis, Civ.App., 275 S.W. 169.

Notice or claim unnecessary

(1) Injury to commodity in transit—Chicago, R. I. & P. Ry. Co. v. S. L. Robinson & Co., 298 S.W. 873, 175 Ark. 35.

(2) Injury to live stock in transit.

Ga.—Southern Ry. Co. v. Atlantic Ice & Coal Co., 149 S.E. 71, 40 Ga.App. 103.

Ky.—Forkner v. Louisville & N. R. Co., 24 S.W.2d 290, 232 Ky. 579.

(3) Negligent delay in transportation of live stock—Phillippi v. Wabash Ry. Co., Mo.App., 267 S.W. 960—Sandker v. Wabash Ry. Co., 267 S.W. 957—Hunt v. Hines, 223 S.W. 798, 204 Mo.App. 318

(4) Unnecessarily and negligently holding horses in railroad yards at intermediate point—Hailey v. Oregon Short Line R. Co., D.C.Idaho, 253 F. 569

(5) Negligent delay in transporting commodity.

Ill.—E. B. Conover & Co. v. Baltimore & O. S. W. R. Co., 212 Ill.App. 29—Conover v. Wabash Ry. Co., 208 Ill.App. 105

Ind.—Erie R. Co. v. C. Callahan Co., 184 N.E. 264, 204 Ind. 580, 87 A.L.R. 778.

(6) Negligent delay in transportation on line of connecting carrier, causing loss of market, where action brought against initial carrier.—Nashville, C. & St. L. Ry. v. Columbia Produce Co., 12 Tenn.App. 609.

(7) Negligent delay in delivering goods shipped.—Diamond v. Southeastern Express Co., 128 S.E. 417, 131 S.C. 450

33. N.M.—Evans v. Atchison, T. & S. F. Ry. Co., 20 P.2d 932, 37 N.M. 218.

N.Y.—Lefcort v. Railway Express Agency, 278 N.Y.S. 238, 154 Misc. 630

Ohio—Zang v. Railway Express Co., 196 N.E. 901, 130 Ohio St. 17

Misdelivery of property

Filing of claim was not required where there was a misdelivery of property due to carelessness or negligence—Lefcort v. Railway Express Agency, 278 N.Y.S. 238, 154 Misc. 630

34. U.S.—Louis Ilfeld Co. v. Southern Pac. Co-Pacific System, C.C.A.N.M., 48 F.2d 1056.

Mo.—Sandker v. Wabash Ry. Co., App., 267 S.W. 957.

N.M.—Evans v. Atchison, T. & S. F. Ry. Co., 20 P.2d 932, 37 N.M. 218

Wash.—Hill v. Great Northern Ry. Co., 287 P. 665, 156 Wash. 567.

Live stock shipment

The rule stated in the text was applied or recognized where a provision in a contract for the shipment of live stock, which required a shipper, consignee, owner, or agent, before removal or mingling of live stock, to inform in writing the delivering carrier of any visible or manifest injury, was involved

U.S.—Louis Ilfeld Co. v. Southern Pac. Co. Pacific System, C.C.A.N.M., 48 F.2d 1056.

Ga.—Hicklin v. Central of Georgia Ry. Co., 149 S.E. 286, 40 Ga.App. 297, opinion supplemented 149 S.E. 428, 40 Ga.App. 297—Southern Ry. Co. v. Atlantic Ice & Coal Co., 149 S.E. 71, 40 Ga.App. 103

Ky.—Forkner v. Louisville & N. R. Co., 24 S.W.2d 290, 232 Ky. 579.

Mo.—Sandker v. Wabash Ry. Co., App., 267 S.W. 957.

N.M.—Evans v. Atchison, T. & S. F. Ry. Co., 20 P.2d 932, 37 N.M. 218

Wash.—Hill v. Great Northern Ry. Co., 287 P. 665, 156 Wash. 567.

would defeat the purpose of the amendment, which was to relieve shippers of the difficult and almost impossible task of determining on which of several connecting lines the damage occurred.[35]

§ 237. Requisites and Validity of Stipulations for Notice

a. In general
b. Consideration
c. Reasonableness in general
d. Time

a. In General

In the absence of contravening constitutional or statutory provisions, stipulations in shipping contracts for written notice of claim or for written claim are in general valid and effective where they are reasonable.

In the absence of contravening constitutional or statutory provisions, considered above in § 236, stipulations in bills of lading or other contracts of shipment which require written notice of a claim for loss of, or damage to, goods shipped[36] or the making or filing of a written claim[37] are valid and are very generally upheld, in so far as they are found to be reasonable, being usually regarded as a fair, just, and reasonable protection to the carrier,[38] and, working no hardship on the shipper, compliance with their requirements benefits both the carrier and the shipper.[39] These stipulations are not against public policy.[40]

Contractual requirements for written notice of claim for loss or damage to goods shipped are viewed with some strictness by the law, and unless the exemption from liability is clearly expressed it should not be allowed.[41] So, it has been held that a stipulation for notice in a bill of lading or other contract is of no force unless it is personally assented to by the shipper.[42]

Where provisions of the character under consideration are considered limitations of the common-law liability, it has been held that the general rule requiring that the shipper shall be given his option whether or not to ship under the limited liability contract applies; and, if not given this option, the requirement as to notice is void.[43]

The view has been expressed that the validity of notices of this character as applied to interstate shipments is not affected by the fact that the carrier has not filed a schedule of rates.[44]

b. Consideration

Consideration for a stipulation for notice or claim is necessary where and only where such stipulation is re-

35. U.S.—Missouri, K. & T. Ry. Co. of Texas v. Ward, Tex., 37 S.Ct. 617, 244 U.S. 383, 61 L.Ed. 1213.

However, it has been held that a provision of an interstate shipment contract that neither the initial carrier nor any connecting carrier should be liable for any damage to the animals shipped, unless claim be made within ten days from the time the animals were removed, to the carrier on whose line the damage occurred, was valid.—Jordan v. Chicago, B. & Q. R. Co., App., 196 S.W. 417, transferred 191 S.W. 70, 269 Mo. 281.

36. Ala.—Nashville, C. & St. L. Ry. Co., 78 So. 925, 201 Ala. 581.
Ariz.—Southern Pac. R. Co. v. Gonzalez, 61 P.2d 377, 48 Ariz. 260
Colo.—Atchison, T. & S. F. Ry. Co. v. Miller, 163 P. 836, 63 Colo. 46.
Ill.—Sweetser v. Chicago & Alton R. Co., 196 Ill.App. 623.
Mo.—Bilby v. Atchison, T. & S. F. Ry. Co., 199 S.W. 1004—Moler v. Louisville & N. R. Co., App., 195 S.W. 524.
Okl.—Kansas City, M. & O. Ry. Co. of Texas v. Gleason, 158 P. 365, 59 Okl. 87.
Tex.—Davis v. First Nat. Bank of Longview, Civ.App., 245 S.W. 1009.
10 C.J. p. 327 note 82, p. 328 notes 91, 92.

Corpus Juris text has been cited in Moore Bros. v. American Ry. Express Co., 107 S.E. 6, 7, 181 N.C. 500.

Interstate shipment of live stock
Okl.—Kansas City, M. & O. Ry. Co. of Texas v. Gleason, 158 P. 365, 59 Okl. 87.

37. Ga.—Southern Ry. Co. v. Bunch, 109 S.E. 523, 27 Ga.App. 689.
Ill.—Conover v. Wabash Ry. Co., 208 Ill.App. 105
Ky.—Cincinnati, N. O. & T. P. Ry. Co., 184 S.W. 1132, 169 Ky. 560, rehearing denied 186 S.W. 875, 171 Ky. 50.
N.H.—Apostolou v. American Ry. Express Co., 122 A. 326, 81 N.H. 115.
N.Y.—Jennings v. Barrett, 194 N.Y.S. 679.
N.C.—Skyland Hosiery Co. v. American Ry. Express Co., 114 S.E. 823, 184 N.C. 478—Taft & Vandyke v. Atlantic Coast Line R. Co., 93 S.E. 752, 174 N.C. 211.
Ohio.—Thomas v. Baltimore & O. R. Co., 16 Ohio N.P.,N.S., 194.
S.C.—Kershaw Oil Mill v. Northwestern R. Co. of South Carolina, 130 S.E. 647, 133 S.C. 226.
10 C.J. p. 327 note 82, p. 328 notes 91, 92.

38. U.S.—Southern Express Co. v. Caldwell, Tenn., 21 Wall. 264, 22 L.Ed. 556.
10 C.J. p. 328 note 91.

Ground for upholding
In respect of a requirement of a claim in writing, the view has been expressed that the ground on which such requirement is regarded as reasonable is that the notice to the carrier permits it to preserve evidence of the transaction so that it may defend itself.—Kershaw Oil Mill v. Northwestern R. Co. of South Carolina, 130 S.E. 647, 133 S.C. 226.

39. W.Va.—Williamsport Hardwood Lumber Co. v. Baltimore, etc., R. Co., 77 S.E. 333, 71 W.Va. 741.
10 C.J. p. 328 note 92.

40. U.S.—Georgia, F. & A. R. Co. v. Blish Milling Co., 36 S.Ct. 541, 241 U.S. 190, 60 L.Ed. 948, affirming 82 S.E. 784, 15 Ga.App. 142.
N.C.—Taft & Vandyke v. Atlantic Coast Line R. Co., 93 S.E. 752, 174 N.C. 211.
10 C.J. p. 327 note 85.

41. Kan.—Atchison, etc., R. Co. v. Poole, 87 P. 465, 73 Kan. 466.
Mo.—Dunn v. Hannibal, etc., R. Co., 68 Mo. 268
N.Y.—Browning v. Long Island R. Co., 2 Daly 117.
10 C.J. p. 329 note 10.

42. Ill.—Tate v. Missouri Pac. R. Co., 157 Ill.App. 105.

43. Ind.—Toledo, etc., R. Co. v. Milner, App., 110 N.E. 756.

44. Ky.—Adams Express Co. v. Cook, 172 S.W. 1096, 162 Ky. 592.
10 C.J. p. 329 note 16.

garded as a limitation of the carrier's common-law liability.

In view of the general rule, set forth above in § 95, that a contract limiting a carrier's common-law liability must be supported by an independent consideration, whether or not a new consideration is necessary to support a contract providing for notice of loss or injury or for making claims in writing, depends on whether or not a contract of this character is considered as one which limits the carrier's common-law liability. In jurisdictions where the view is taken that the contract does not amount to a limitation of the carrier's common-law liability no independent consideration is necessary;[45] but in jurisdictions where it is considered that the stipulation does operate as a limitation of liability, an independent consideration is regarded as necessary.[46] In any event, a reduction in the rates of freight is a sufficient consideration for a stipulation requiring notice of loss or injury or making of claim in writing.[47]

Interstate shipments. As shown above in § 236, the Carmack amendment and subsequent federal statutes do not render void and ineffective all stipulations for notice of claim or of injury or for making claim in writing, and a contract for an interstate shipment containing a clause of the character under consideration may be valid even though not supported by an independent consideration.[48] On the contrary, such a contract, even though made in a state where the provision is considered a limitation of the carrier's common-law liability and void unless supported by an independent consideration, is none the less valid, although not supported by such consideration,[49] in view of the operation and effect of the federal statutes governing interstate commerce, considered in general aspects above in § 17. In some cases involving interstate shipments, the added fact that there was a reduction in rate as a consideration has been considered in recognizing the binding effect of the stipulation.[50]

c. Reasonableness in General

Stipulations requiring notice must be reasonable.

Stipulations requiring notice of loss or injury must be reasonable; otherwise they will not be enforced.[51] While the view has been taken that, in determining the general validity of such a stipulation, the question is not what might have been done in a particular case, but what might ordinarily be expected in the exercise of reasonable diligence,[52] it has been held or recognized that stipulations must be reasonably and justly construed in their application to the facts of each case,[53] so as not to exempt the carrier from the performance of any part of its contractual or legal duties with the shipper.[54] While the carrier may invoke the stipulation as a shield to guard itself against possible imposition, the stipulation cannot be used as a sword with which to defeat its adversary, without regard to the merits or justice of the course.[55] The question as to whether a stipulation is reasonable depends to a great extent on whether or not sufficient time is allowed to discover the loss and to give notice, as shown in the following subdivision of this section, and on all the other circumstances of the case.[56]

If there is indefiniteness and uncertainty as to the agent to whom notice is to be given, or an agent is named to whom it would be impracticable to give

45. Ga.—Southern Ry. Co. v. Simpson, 93 S.E. 47, 20 Ga.App. 290.
10 C.J. p 329 note 20.

46. Miss.—Bernstein v. Yazoo & M. V. R. Co., 72 So. 132, 111 Miss. 697.
10 C.J. p 330 note 22.

47. Miss.—Illinois Cent. R. Co. v. W. J. Davis & Co., 72 So. 874, 112 Miss. 119.
Mo.—Bilby v. Atchison, T. & S. F. Ry. Co., 199 S.W. 1004—Schade v. Missouri Pac. R. Co., 221 S.W. 146, 204 Mo.App. 88—Hull v. Chicago Great Western R. Co., 185 S.W. 1155, 193 Mo.App. 425.
10 C.J. p 330 note 23.

48. Minn.—Henningsen Produce Co. v. American Ry. Express Co., 188 N.W. 272, 152 Minn. 209.
10 C.J. p 330 note 24.

49. Mo.—Johnson v. Missouri Pac. Ry. Co., App., 187 S.W. 282.
10 C.J. p 330 note 22.
But in some cases involving interstate shipments the necessity for a consideration has been recognized—Bernstein v. Yazoo & M. V. R. Co., 72 So. 132, 111 Miss. 697—Yazoo, etc., R. Co. v. Bell, 71 So. 272, 111 Miss. 82.

50. Colo.—Atchison, T. & S. F. Ry. Co. v. Miller, 163 P. 836, 63 Colo. 46.
Miss.—Illinois Cent. R. Co. v. W. J. Davis & Co., 72 So. 874, 112 Miss. 119.
Mo.—Bilby v. Atchison, T. & S. F. Ry. Co., 199 S.W. 1004.

Shipment of live stock
Where live stock was shipped under special contract relating to notice of claim, at reduced rate published and filed with interstate commerce commission, carrier was not liable in absence of fraud, attempted rebating, or unlawful billing, where shipper failed to comply with provision of contract.—St. Louis & S. F. R. Co. v. Taliaferro, 156 P. 359, 56 Okl. 519.

51. Ind.—Chicago, I. & L. Ry. Co. v. Priddy, 115 N.E. 266, 65 Ind.App. 552
10 C.J. p 330 note 28.

52. Mass.—Cox v. Central Vermont R. Co., 49 N.E. 97, 170 Mass. 129

53. Ind.—Chicago, I. & L. Ry. Co. v. Priddy, 115 N.E. 266, 65 Ind.App. 552.
10 C.J. p 330 note 30.

54. N.C.—Austin-Stephenson Co. v. Southern R. Co., 65 S.E. 757, 151 N.C. 137

55. Mo.—Holland v. Chicago, etc., R. Co., 123 S.W. 987, 139 Mo.App. 702.

56. U.S.—The Queen of the Pacific, Cal., 21 S.Ct. 278, 180 U.S. 49, 45 L.Ed. 419.
Ark.—St. Louis, etc., R. Co. v. Hurst, 55 S.W. 215, 67 Ark. 407.

notice, or if there is no agent reasonably accessible, the stipulation is unreasonable.[57] Such, also, is the case in respect of stipulations so broad as to cover any loss whatever,[58] or which are uncertain as to the time from which the specified limitation is to run, as shown in the following subdivision of this section.

A contract exempting the carrier from liability except for willful or gross negligence, and then only on presentation of a claim, is void.[59]

A stipulation which limits the claimant's right to recover to the damages set forth in the written notice and claim and fixes the limit of recovery at the amount therein claimed has been regarded as reasonable.[60]

d. Time

(1) In general
(2) Live stock shipments

(1) In General

Whether or not the time allowed in a stipulation for giving notice or making claim is reasonable depends largely on the facts of the particular case.

Whether or not the time allowed in a requirement for notice is reasonable depends largely on the character of the shipment, the situation of the parties, and the circumstances of each particular case,[61] or, as sometimes stated, on whether or not sufficient time is given to permit claimant, with reasonable diligence, to discover the damage and give notice;[62] and it seems that the determination as to reasonableness may depend on opportunities to know of the loss.[63]

In the absence of constitutional or statutory regulations, considered above in § 236, there is some diversity in the conclusions of the courts as to what is a reasonable time within which notice or claim may be required to be given or made. If the time specified is to date from the delivery of the goods to the carrier or from the date of the contract of shipment, it may be unreasonable, at least where the time allowed might be largely consumed in the performance of the contract before it could be determined whether or not there was any breach.[64] So, a requirement that notice be given or claim be made within thirty days[65] or within thirty-two days[66] after the date of issuance of the receipt has been regarded as void. On the other hand, a stipulation providing for notice within ninety days after issuance of a receipt or bill of lading by the carrier has been held reasonable,[67] as has a limitation of sixty days from the date of the receipt for the goods issued by the carrier,[68] and even of thirty days from such date.[69]

A stipulation that claims for loss or damage shall be presented within four months after delivery, or after a reasonable time for delivery, is reasonable and valid,[70] as is a similar stipulation fix-

57. Ill.—Baxter v. Louisville, etc., R. Co., 45 N.E. 1003, 165 Ill. 78.
Tex.—Gulf, etc., R. Co. v. Vaughn, Civ.App., 16 S.W. 775.
10 C.J. p 330 note 39.

58. S.C.—Porter v. Southern Express Co., 4 S.C. 135, 16 Am.R. 762.

59. Utah.—Houtz v. Union Pac. R. Co., 93 P. 439, 33 Utah 175, 17 L. R.A.,N.S., 628.

60. Kan.—Caston v. Schaff, 185 P. 33, 105 Kan. 487.

61. U.S.—St. Louis, I. M. & S. Ry. Co. v. Starbird, Ark., 37 S.Ct. 462, 243 U.S. 592, 61 L.Ed. 917.
Mo.—Smith v. St. Louis, etc., R. Co., 177 S.W. 632, 184 Mo.App. 709.

62. Ark.—St. Louis, etc., R. Co. v. Furlow, 117 S.W. 517, 89 Ark. 404.
10 C.J. p 330 note 36 [a].

63. Ala.—Nashville, etc., R. Co. v. Long, 50 So. 130, 163 Ala. 165.

64. N.C.—Dixie Cigar Co. v. Southern Express Co., 27 S.E. 73, 120 N. C. 348, 58 Am.S.R. 795.
10 C.J. p 331 note 46.

65. Ala.—Southern Express Co. v. Caperton, 44 Ala. 101, 41 Am.R. 118.

66. Ala.—Southern Express Co. v. Tepelo Bank, 18 So. 664, 108 Ala. 517.

67. U.S.—Southern Express Co. v. Caldwell, Tenn., 21 Wall. 264, 22 L.Ed. 556.
10 C.J. p 331 note 48.

68. Pa.—Edelsohn v. U. S. Express Co., 4 Lack.Jur. 61.
10 C.J. p 331 note 49.

69. Ind.—U. S. Express Co. v. Harris, 51 Ind. 127.

70. Kan.—Farmers' Grain & Supply Co. v. Atchison, T. & S. F. Ry. Co., 245 P. 734, 120 Kan. 21, 121 Kan. 10.
N.Y.—Jennings v. Barrett, 194 N.Y.S. 679.
10 C.J. p 331 note 47.

Interstate shipment

(1) In respect of interstate shipments, the reasonableness of the stipulation set forth in the text was recognized in cases which were governed by the laws in force prior to the enactment of Act of April 23, 1930, 46 U.S.St. at L. p. 251 c. 208, 49 U.S.C.A. § 20 par. (11).
Ga.—Southern Ry. Co. v. Bunch, 109 S.E. 523, 27 Ga.App. 689.
Ill.—See Hamilton v. Cleveland, C., C. & St. L. Ry. Co., 206 Ill.App. 270.
Iowa.—Erisman v. Chicago, B. & Q. R. Co., 163 N.W. 627, 180 Iowa 759.
Mass.—Metz Co. v. Boston & M. R. R., 116 N.E. 475, 227 Mass. 307.
Okl.—Atchison, T. & S. F. Ry. Co. v. Cozart, 158 P. 933, 59 Okl. 136.

(2) The validity of the stipulation was recognized or upheld in respect of shipments prior to the first Cummins amendment.
Mo.—Barton v. Louisville & N. R. Co., App., 196 S.W. 379—Kemper Mill Co. v. Missouri Pac. R. Co., 186 S.W. 8, 193 Mo.App. 466, transferred Kemper Mill & Elevator Co. v. Missouri Pac. R. Co., 178 S.W. 502—Banaka v. Missouri Pac. Ry. Co., 186 S.W. 7, 193 Mo.App. 345.
N.H.—Higgins v. Boston & M. R. R., 102 A. 533, 78 N.H. 609.
N.C.—Aydlett v. Norfolk-Southern R. Co., 89 S.E. 1000, 172 N.C. 47.
Okl.—Atchison, T. & S. F. Ry. Co. v. Cozart, 158 P. 933, 59 Okl. 136.
S.D.—Strommer v. Chicago, M. & St. P. Ry. Co., 161 N.W. 346, 38 S.D. 368.
Tex.—Houston E. & W. T. Ry. Co. v. Houston Packing Co., Civ.App., 203 S.W. 1140.

(3) Effect of statutory regulations see supra § 236.

ing a limitation period of six months.[71] A provision that claim for damages for loss or injury shall be made within thirty days from the time the goods were delivered, or after a reasonable time for delivery, has also been regarded as reasonable;[72] but there are decisions which maintain the contrary view.[73] It has been held or recognized that a requirement of notice or of making claim in writing within ten days,[74] five days,[75] thirty-six hours,[76] thirty-four hours,[77] and even thirty hours,[78] from the time of the delivery of the goods by the carrier may, under the circumstances, be held reasonable, and, in respect of perishable goods, a stipulation requiring the consignee to report a claim for damages to the delivering line within thirty-six hours after the consignee has been notified of the arrival of the goods at the place of destination has been regarded as reasonable.[79] The fact that in the case of a through interstate shipment, the stipulation requires that notice of claim shall be given within one day after delivery of the property at destination to the agent for the initial carrier does not render the stipulation unreasonable, in view of the rule that the delivering carrier is the agent of the initial carrier.[80]

It is apparent, in cases of these short-limitation stipulations, that their validity must depend largely on the facts of the particular case,[81] and where it appears that, under the circumstances, the time was unreasonably short they cannot be upheld.[82] Ordinarily, the question of reasonableness is for the jury;[83] but where the evidence shows conclusively that notice of injury could not have been given within the time limited, it is error to submit to the jury the question whether the time allowed for giving the notice was reasonable.[84]

A stipulation may be unreasonable because there is uncertainty as to the time from which the specified limitation is to run.[85]

(2) Live Stock Shipments

In the absence of contravening constitutional or statutory provisions, stipulations allowing comparatively short periods for giving notice or making claims in respect of loss of, or injury to, live stock have been upheld.

The controlling considerations bearing on the reasonableness of a stipulation as to the time within which notice of a claim for damages shall be given in case of shipments of live stock are somewhat different from those applicable to inanimate freight, and provisions for notice of loss or injury more stringent than those ordinarily upheld in the case of inanimate freight have been sustained. Thus, while there are a few decisions to the contrary,[86] in the absence of statutory or constitutional provisions affecting the question, considered in § 236 supra, the weight of authority upholds stipulations that a notice of claim or claim for damages shall be made before the animals are removed from the place of destination or of delivery and mingled with other animals, as a condition precedent to the right to recover therefor,[87] and the courts have

71. N.Y.—Brewster v. Davis, 202 N.Y.S. 574, 207 App.Div. 461.
Va.—Chesapeake & O. Ry. Co. v. National Fruit Products Co., 155 S.E. 630, 155 Va. 438, 73 A.L.R. 878.

72. Minn.—Armstrong v. Chicago, etc., R. Co., 54 N.W. 1059, 53 Minn. 183.
10 C.J. p. 331 note 53.

73. Ala.—Nashville, etc., R. Co. v. Long, 50 So. 130, 163 Ala. 165.
N.C.—Deans v. Atlantic Coast Line R. Co., 67 S.E. 332, 152 N.C. 171—Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co., 38 S.E. 894, 128 N.C. 280, 83 Am.S.R. 675.

74. S.C.—Murray v. Atlantic Coast Line R. Co., 93 S.E. 387, 108 S.C. 88.
10 C.J. p. 331 note 55.

Notice at point of destination.
The fact that the shipper was situated at a considerable distance from the point of destination did not render unreasonable a stipulation for making written claim in not more than ten days at point of destination, since the shipper's agents at point of destination could have made the claim without communicating with him.—Murray v. Atlantic Coast Line R. Co., 93 S.E. 387, 108 S.C. 88.

75. Ill.—Black v. Wabash, etc., R. Co., 111 Ill. 351, 53 Am.R. 628.
10 C.J. p. 331 note 56.

76. Ark.—Cumbie v. St. Louis, etc., R. Co., 151 S.W. 237, 105 Ark. 406.
10 C.J. p. 331 note 58.

77. Ark.—St. Louis, etc., R. Co. v. Hurst, 55 S.W. 215, 67 Ark. 407.

78. Ark.—St. Louis, etc., R. Co. v. Keller, 119 S.W. 254, 90 Ark. 308.

79. U.S.—St. Louis, I. M. & S. Ry. Co. v. Starbird, Ark., 37 S.Ct. 462, 243 U.S. 592, 61 L.Ed. 917.

80. Tex.—Chicago, R. I. & G. Ry. Co. v. Whaley, Civ.App., 190 S.W. 833.

81. U.S.—St. Louis, I. M. & S. Ry. Co. v. Starbird, Ark., 37 S.Ct. 462, 243 U.S. 592, 61 L.Ed. 917.
10 C.J. p. 332 note 61.

82. N.Y.—Jennings v. Grand Trunk R. Co., 28 N.E. 394, 127 N.Y. 438.
10 C.J. p. 332 note 61.

Perishable goods.
(1) The view has been expressed that, in respect of notice of a claim for damages, there should not be any distinction between perishable products and other goods.—Phillips v. Seaboard Air Line Ry., 89 S.E. 1057, 172 N.C. 86.

(2) Provision for making claim in writing within not more than ten days after delivery, in the case of a shipment of berries, was unreasonable and void.—Phillips v. Seaboard Air Line Ry., supra.

83. Ark.—St. Louis, etc., R. Co. v. Furlow, 117 S.W. 517, 89 Ark. 404.
10 C.J. p. 332 note 62.

84. S.C.—Crawford v. Southern R. Co., 86 S.E. 19, 101 S.C. 522.
10 C.J. p. 332 note 62 [a].

85. N.C.—Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co., 38 S.E. 894, 128 N.C. 280, 83 Am.S.R. 675.

86. U.S.—Ormsby v. Union Pac. R. Co., C.C.Colo., 4 F. 706, 2 McCrary 48.
Ill.—Coles v. Louisville, etc., R. Co., 41 Ill.App. 607.

87. Ga.—Louisville & N. R. Co. v. Harrell & Murphy, 120 S.E. 35, 31 Ga.App. 126—Heath v. Sandersville R. Co., 98 S.E. 92, 23 Ga.App. 255.
10 C.J. p. 332 note 67.

upheld a stipulation where, in addition to the foregoing provision, it contains also a provision requiring notice within one day after delivery of stock at destination [88] A consignor entering into a valid and binding agreement of this nature is not entitled to recover from a carrier damages for loss or injury to live stock unless it is shown that such notice has been given.[89] So, it has been held that the owner of cattle who has entered into such stipulation cannot recover on failure to give such notice, even though he did not go in person nor send an agent with his stock, in order that the consignee might comply with his stipulation;[90] and under these circumstances, it is his duty to send a copy of the contract to the consignee, so that the latter may comply with the stipulation.[91] Other stipulations for a short period for giving notice of, or making claim for, damages in respect of live stock have commonly been sustained.[92] The stipulation as to notice is unreasonable and void where under

Interstate shipments

(1) The rule stated in the text has been applied or recognized in various state courts, in respect of the requirement of written notice of claim affecting interstate shipments, in cases which apparently were governed by the law as it stood before congress made provision by statute as to time for giving notice and filing claim

Colo.—Atchison T. & S. F. Ry. Co. v. Miller, 163 P. 836.

Ill.—Newman v. Union Pac. R. Co., 210 Ill App 13.

Ky.—Louisville & N. R Co. v Johnson, 206 S.W. 638, 182 Ky. 418

Mo.—Bilby v Atchison, T. & S F. Ry Co, 199 S W. 1004—O'Briant v Pryor, App, 195 S W. 759—Johnson v Missouri Pac Ry. Co, App, 187 S W 282—Thompson v. Atchison, T & S. F. R. Co., App, 185 S W 1145

N.C.—Bryan v. Louisville & N. R Co, 93 S E 750, 174 N C 177—Schloss-Bear-Davis Co v Louisville & N R Co, 88 S E 476, 171 N C. 350.

Okl.—Atchison, T. & S F Ry. Co. v. Cooper, 175 P 539, 71 Okl. 112.

Tex.—Panhandle & S F Ry Co v Bell, Civ App., 189 S W. 1097.

(2) Such provision for notice and the further provision that the shipper should not remove the stock for three hours after giving such notice were regarded as separable, so that any validity in the latter provision did not affect the other—Panhandle & S. F. Ry. Co. v. Bell, supra

(3) But apparently there was authority for the view that a provision for notice before removal was not binding in a case in which an interstate shipment was involved—Southern Ry. Co v Propst & Duckworth, 76 So 470, 16 Ala App 186

Visible or manifest injury

Where injuries to cattle shipped are visible or manifest, written notice must be given, where the contract so provides, before they are removed from carrier's possession—Wichita Valley Ry Co v Baldwin, Tex Civ.App, 270 S W. 1089.

88. Interstate shipments

The rule stated in the text has been applied or recognized in certain state court cases which involved interstate shipments and which apparently arose before congress had enacted any statute regulating the time for giving notice or making claim.

Ark.—Lusk v. Long, 192 S.W. 213, 127 Ark 261.

Okl.—St Louis, I M. & S. Ry. Co v Evans, 183 P. 609—St. Louis & S F R Co v Ladd, 178 P 125, 72 Okl. 55—St Louis & S F. R Co. v Sparks, 178 P. 90, 72 Okl 53—Chicago, R. I. & P. Ry. Co. v Brockmeier, 168 P. 1011, 66 Okl 280—St Louis & S. F Ry Co. v. Taliaferro, 168 P 438, 66 Okl 121—Chicago, R. I & P Ry Co v. Gray, 165 P. 157, 65 Okl 181—Chicago, R I & R Ry. Co v. Parsons, 162 P. 955, 62 Okl 290—Kansas City, M. & O Ry. Co. of Texas v. Gleason, 158 P. 365, 59 Okl 87—Chicago R I. & P Ry Co. v. Craig, 157 P. 87, 59 Okl 18.

Tex.—Chicago, R I & G Ry Co v. Whaley, Civ.App, 190 S W. 833.

89. Ga.—Harrell v. Murphy, 120 S. E. 35, 31 Ga App. 126.

Ill.—Newman v. Union Pac. R Co, 210 Ill App 13

Ky.—Louisville & N. R Co. v Johnson, 206 S W. 638, 182 Ky 418

Mo.—Bilby v. Atchison, T & S F. Ry. Co., 199 S.W 1004—O'Briant v Pryor, App, 195 S W. 759

Okl.—St Louis & S F R Co. v Sparks, 178 P 90, 72 Okl 53.

Tex.—Panhandle & S. F Ry. Co. v. Bell, Civ App., 189 S W 1097.

10 C J p 332 note 67, p 333 note 68.

90. Okl.—St. Louis, etc, R Co. v. Phillips, 87 P. 470, 17 Okl 264

Tex.—Galveston, etc, R Co v Harman, 2 Tex A Civ.Cas. § 136

91. Tex.—Galveston, etc., R. Co v. Harman, supra.

92. U S.—Erie R Co. v. Shuart, 39 S Ct. 519, 250 U.S. 465, 63 L Ed. 1088, reversing Schuart v Erie R Co, 117 N E 1084, 221 N Y. 680, which affirmed Shuart v Erie R Co, 150 N.Y S. 1112, 166 App Div 895—Southern Pac Co. v. Stewart, Ariz, 39 S Ct. 139, 248 U S. 446, 63 L.Ed 350, reversing 233 F 956, 147 C.C A. 630, in which error is dismissed 38 S.Ct. 130, 245 U S 359, 62 L Ed. 345, rehearing granted 38 S Ct. 203, 245 U S. 562, 62 L Ed 472—Erie R Co. v. Stone, Ohio, 37 S Ct. 633, 244 U S 332, 61 L Ed. 1173—Chesapeake & O. R. Co v McLaughlin, W.Va, 37 S Ct. 40, 242 U.S. 142, 61 L.Ed. 207.

Ill.—See Crossley v St. Louis, I. M. & S Ry. Co., 199 Ill.App 195

Mass.—Fletcher v. New York Cent. & H R R. Co., 118 N.E. 294, 229 Mass. 258.

10 C J. p 333 note 71.

Interstate shipments prior to statutory regulation as to time

(1) In respect of interstate shipments which apparently were made before congress had enacted any statute regulating the time for giving of notice or making claims, the validity and binding effect of a stipulation requiring the making of claim in writing within five days from the time stock was removed from car was recognized or upheld.

U.S.—Erie R Co. v Shuart, 39 S Ct. 519, 250 U S 465, 63 L Ed 1088, reversing Schuart v Erie R Co, 117 N.E. 1084, 221 N Y 680, which affirmed Shuart v. Erie R Co., 150 N Y S. 1112, 166 App.Div. 895—Baltimore & O R Co v Leach, 39 S Ct 254, 249 U S. 217, 63 L Ed 570, reversing 191 S.W. 310, 173 Ky. 452—Erie R. Co. v Stone, Ohio, 37 S. Ct 633, 244 U S. 332, 61 L.Ed. 1173—Chesapeake & O R. Co. v. McLaughlin, W.Va, 37 S Ct. 40, 242 U.S. 142, 61 L.Ed. 207.

Ill.—Hudson v. Grand Rapids & I Ry. Co., 203 Ill.App. 377.

Mass.—Fletcher v. New York Cent & H R R. Co., 118 N E. 294, 229 Mass. 258.

(2) A like rule was applied as to a requirement for a claim in writing in five days from delivery of stock at destination—Chicago, I. & L Ry. Co v. Blankenship, 127 N E. 209, 77 Ind App. 225—10 C J. p 333 note 71 [b].

(3) The same view was taken as to a requirement of a claim in writing within ten days from time of removal from car or from unloading.

U S.—Southern Pac. Co. v. Stewart, Ariz., 39 S Ct 139, 248 U S 446, 63 L.Ed. 350, reversing 233 F. 956, 147 C C A. 630, in which error is dismissed 38 S.Ct. 130, 245 U S. 359, 62 L Ed. 345, rehearing granted 38 S

the circumstances notice could not have been given within the time allowed,[93] as where the nature and extent of the damages could not have been ascertained within the time limited,[94] and where there was no agent of the carrier at the point of destination to whom the notice could have been given.[95] A stipulation requiring notice of injuries to be given to the carrier at a town en route where the stock was not unloaded is unreasonable, the shipper having had no opportunity to determine the extent of the injuries until the cattle were unloaded at destination,[96] and a like rule has been recognized in respect of a requirement that notice be given to the initial carrier at a junction point before transfer to a connecting carrier.[97]

As shown in § 240 infra, in a number of decisions it has been held that, if the time for giving notice is unreasonably short, this will not relieve the shipper from giving any notice at all of his claims, but he will still be required to give notice within a reasonable time, although there is authority in conflict with this view.

§ 238. To What Claims Stipulations Apply

a. Loss or damage due to negligence in general
b. Damages due to delay
c. Failure to deliver and misdelivery
d. Other claims

a. Loss or Damage Due to Negligence in General

In the absence of contravening constitutional, statutory, or contract provisions, stipulations for notice or claim may apply to a loss or injury caused by negligence.

Stipulations for notice or claim may be applicable to a loss or injury caused by negligence in accordance with the view that these stipulations are not a limitation of the carrier's common-law liability and are not in any sense stipulations that the carrier shall be exempted from the effects of its negligence or the negligence of its servants in the performance of those duties assumed in the contract.[98] In other words, these stipulations amount to a condition of recovery and not an exemption from liability.[99] According to some cases, however, a stipulation which does not in terms refer to negligence does not apply where the claim is based on negligence.[1] Of course, no claim for damages need be made in a case based on the carrier's negligence, where the shipping contract expressly exempts or excepts loss, damage, or injury due to negligence from the operation of a provision for filing claim.[2]

As shown in § 236 supra, the provision of the federal statute which prohibited requirements for notice of claims and for filing of claims in certain cases involving carelessness or negligence on the part of the carrier, has been omitted from the statute which now governs the matter.

Ct 203, 245 U.S. 562, 62 L.Ed. 472—Olson v. Chicago, B. & Q. R. Co., Iowa, 250 F. 372, 162 C.C.A. 442.
Ill.—Newman v. Union Pac. R. Co., 210 Ill.App. 13.
Miss.—Illinois Cent. R. Co. v. Bauer, 75 So. 376, 114 Miss. 516—Illinois Cent. R. Co. v. W. J. Davis & Co., 72 So. 874, 112 Miss. 119.
Wyo.—Union Pac. R. Co. v. Pacific Market Co., 200 P. 108, 27 Wyo. 501, rehearing denied 206 P. 143, 28 Wyo. 461.
10 C.J. p. 333 note 71 [c] (1).

(4) In a case which involved an interstate shipment which apparently was made before congress had enacted any statute regulating the time for giving notice or making claim, it was held that a stipulation that claimant shall give notice in writing of a claim for damages not later than ninety days after the date of the loss or injury claimed was reasonable and binding on the shipper, notwithstanding he had complied with another stipulation requiring written notice of loss or injury within one day after delivery of stock at destination.—Chicago, R. I. & P. Ry. Co. v. McElreath, 169 P. 628, 69 Okl. 9, L.R.A.1918C 425.

(5) Provision for notice of claim within five days after live stock was shipped was upheld, the language being plain and its meaning certain, and the question being a federal question.—Sweetser v. Chicago & Alton R. Co., 196 Ill.App. 623.

93. Tex.—Hovey v. Tankersley, Civ.App., 177 S.W. 153

94. Ark.—Eoff v. Scullin, 179 S.W. 663, 120 Ark. 452
S.C.—Crawford v. Southern R. Co., 86 S.E. 19, 101 S.C. 522.

95. Tex.—Chicago, etc., R. Co. v. Whaley, Civ.App., 177 S.W. 543.

96. Ark.—St. Louis, etc., R. Co. v. Dunn, 127 S.W. 464, 94 Ark. 407.

97. Utah.—Baird v. Denver & R. G. R. Co., 162 P. 79, 49 Utah 58.

98. U.S.—Southern Express Co. v. Caldwell, Tenn., 21 Wall. 264, 22 L.Ed. 556.
10 C.J. p. 333 note 79

99. Kan.—Kalina v. Union Pac. R. Co., 76 P. 438, 69 Kan. 172.

1. N.Y.—Westcott v. Fargo, 6 Lans. 319, 63 Barb. 349, affirmed 61 N.Y. 542, 19 Am.R. 300
10 C.J. p. 333 note 78.

2. U.S.—Hailey v. Oregon Short Line, D.C.Idaho, 253 F. 569.
Ala.—C. M. McMahen & Sons v. Louisville & N. R. Co., 106 So. 56, 21 Ala.App. 66, certiorari denied Ex parte C. M. McMahen & Sons, 106 So. 57, 213 Ala. 642.
Ark.—American Ry. Express Co. v. H. Rouw Co., 294 S.W. 401, 173 Ark. 810—Barrett v. St. Louis Southwestern Ry. Co., 235 S.W. 800, 151 Ark. 215.
Idaho.—Ritchie v. Oregon Short Line R. Co., 244 P. 580, 42 Idaho 193, 45 A.L.R. 909.
Mich.—Hankins v. Payne, 214 N.W. 99, 239 Mich. 155.

Damage in transit

In determining whether or not injury to certain horses could be regarded as damage in transit by carelessness or negligence within the meaning of a provision in the shipping contract excepting from the requirement as to making claim cases of such damage, the car containing the horses was to be regarded as having been in transit from the time it was loaded until it was unloaded.—Green v. American Ry. Express Co., Mo.App., 34 S.W.2d 1039.

b. Damages Due to Delay

In the absence of a provision in the stipulation indicating an intention to make the requirement of notice or of claim applicable to special damages due to delay, the stipulation does not, in general, require notice or claim in a case of such damages.

If because of wrongful delay the shipment sustains physical injury and in consequence a depreciation in value, a valid and binding provision in the contract of shipment requiring notice of claim for damages for loss or injury to the shipment or notice of injury is applicable.[3] This principle has found frequent application in the shrinkage in weight of live stock because of a wrongful delay in transportation.[4] On the other hand, while there is authority to the contrary in respect of an interstate shipment,[5] it has frequently been held or recognized that a stipulation for notice or for claim, of this general character, applies only to a loss of, or physical injury to, a shipment of dead freight,[6] or to injury to a shipment of live stock caused by delay and consequent depreciation in value.[7] In other words, where the shipper suffers special damages because of wrongful delay, no compliance with the stipulation is necessary to entitle him to recover for such special damages,[8] and the reason is that the notice would be useless in determining the amount of such loss.[9] In conformity with this principle, it has uniformly been held or recognized that a stipulation that notice of claim or of damages should be a condition precedent to recovery for any injury to the shipment during transportation has no application to damages caused by the loss of market,[10] to loss resulting from a decline in the market value of the shipment,[11] or to the expense of feeding stock, resulting from delay in transportation.[12] No notice is necessary to authorize the recovery of damages from shrinkage resulting from the holding of the cattle after transportation was completed, due to the loss of market.[13] It has also been held that a provision in a bill of lading for a shipment of live stock, requiring notice to the carrier as a condition precedent to any right of action for damages for loss or injuries, delay in transportation, or decline in the market, does not apply to damages to stock while in shipping pens due to the carrier's failure to ship them at once as agreed.[14]

3. Kan.—Reedy v. Missouri Pac. R Co., 255 P. 683, 123 Kan. 600.
10 C.J. p 334 note 81.

Statement in Corpus Juris of the rules involved in this section has been quoted at length and with approval in McElwain v. Union Pac. R. Co., 163 N.W. 845, 101 Neb. 484, 1 A.L.R. 533.

Injury to fowl
It has been held that the requirement as to notice applies in case of physical injuries to chickens.—Jett v. Southern R. Co., 169 S.W. 767, 130 Tenn. 237.

4. Kan.—Reedy v. Missouri Pac R Co., 255 P. 683, 123 Kan. 600—Hylton v. Hines, 206 P. 871, 111 Kan. 220.
10 C.J. p 334 note 82.

5. **Decline in market**
(1) In a case which involved an interstate shipment which was made before congress had enacted any statute regulating notice or claim, it was held that compliance with a provision of the contract of shipment for written notice of claims for loss or damage was necessary where the claim was based on delay in transportation resulting in loss due to decline in the market—Goldsmith v. Florida East Coast Ry. Co., 217 Ill. App. 162.

(2) In this connection, the court said that there would be no hardship in requiring the notice; that such notice would put in permanent form the evidence of an intention to claim damages and would serve to call the attention of the carrier to that fact with resultant opportunity to investigate—Goldsmith v. Florida East Coast Ry. Co., 217 Ill.App. 162.

6. Fla.—Florida East Coast Ry. Co. v. Peters, 73 So. 151, 72 Fla. 311, Ann.Cas 1918D 121
W.Va.—Williamsport Hardwood Lumber Co v Baltimore, etc., R. Co., 77 S.E 333, 71 W Va 741, 745.

7. Neb.—McElwain v. Union Pac. R. Co., 163 N.W. 845, 101 Neb. 484, 1 A.L.R. 533.
10 C.J. p 334 note 86.

8. Fla.—Florida East Coast Ry. Co. v. Peters, 73 So. 151, 72 Fla. 311, Ann.Cas 1918D 121.
Neb.—McElwain v Union Pac. R. Co., 163 N.W. 845, 101 Neb 484, 1 A.L R. 533.
N.Y.—Gifford v. Fargo, 176 N.Y.S. 568, 106 Misc. 599.
10 C.J. p 334 note 86.

9. Kan.—Gault v. Atchison, etc., R Co., 139 P. 1014, 92 Kan. 464.
Ky.—Louisville, etc., R Co. v. Bell, 13 Ky.L. 393.
Neb.—McElwain v. Union Pac. R Co., 163 N.W. 845, 101 Neb 484, 1 A.L.R. 533.

10. Kan.—Ott v. Atchison, T & S. F. Ry. Co., 169 P. 957, 102 Kan. 254.
Neb.—McElwain v. Union Pac R Co., 163 N.W. 845, 101 Neb. 484, 1 A.L R. 533
10 C.J. p 334 note 88.

11. Kan.—Reedy v. Missouri Pac R. Co., 255 P 683, 123 Kan. 600.
Neb.—McElwain v. Union Pac. R Co., 163 N.W 845, 101 Neb. 484, 1 A.L.R 533.
Tenn.—National C. & St L. Ry. v. Columbia Produce Co., 12 Tenn. App 609.
Tex.—Panhandle & S. F Ry Co. v. Bell, Civ App., 189 S.W. 1097
10 C.J. p 334 note 89.

12. Mo.—Aull v. Missouri Pac R. Co., 116 S.W. 1122, 136 Mo.App. 291
Neb.—McElwain v. Union Pac. R Co., 163 N.W. 845, 101 Neb. 484, 1 A. L.R. 533
Tex.—St Louis, etc., R Co. v. Hurst, Civ App., 135 S.W. 599.

After transportation
(1) Notice in respect of extra feeding after transportation had ended was not required—Ott v. Atchison, T. & S F. Ry. Co., 169 P. 957, 102 Kan. 254

(2) Notice was not required in respect of a claim based on the expense of feeding at destination—McElwain v. Union Pac R Co., 163 N.W 845, 101 Neb. 484, 1 A.L.R. 533.

13. Kan.—Ott v. Atchison, T. & S. F. Ry. Co., 169 P. 957, 102 Kan. 254—Gault v. Atchison, etc., R Co., 139 P 1014, 92 Kan. 464.
Neb.—McElwain v. Union Pac R. Co., 163 N.W. 845, 101 Neb. 484, 1 A. L R. 533.

14. Tex.—Wichita Valley R. Co v. Boger, Civ.App., 167 S.W. 767.
10 C.J. p 335 note 92.

Some stipulations requiring the making of claims in writing within a specified time are sufficiently broad to include claims for delay in transit or transportation,[15] and it has been held that, where the provision requiring notice is not confined to loss of, or injury to, live stock covered by the contract, but expressly includes damages for delay, it must be construed as including a loss sustained by a decline in the market;[16] and that a provision in a bill of lading to the effect that claims for loss, damage, or delay must be made in order to render the carrier liable was not limited to claims for damages to the goods shipped, but extended to damages from delay whereby apples which the consignee intended to pack in the barrels shipped could not be picked until after they were overripe and injured for storage purposes.[17]

c. Failure to Deliver and Misdelivery

Stipulations for notice or claim do not usually apply to cases of nondelivery in the absence of specific provision covering the matter.

In the absence of a specific provision of the contract in respect of failure to deliver, it has frequently been held or recognized that stipulations of the character under consideration have no application where the goods are never delivered.[18] This principle has been applied in case of a conversion of the goods by the carrier.[19] So, it has been held

15. N Y—Lissberger v. Bush Terminal R. Co., 197 N.Y.S. 281, 119 Misc. 691.

Uniform shipping contract

(1) The necessity for making a written claim in accordance with the terms of the uniform express receipt covering an interstate shipment made in 1918 was apparently recognized where the claim was for loss in market value due to delay in transportation and there was no showing of loss or damage due to delay caused by carelessness or negligence.—Barrett v. Van Pelt, 45 S Ct. 437, 268 U.S. 85, 69 L Ed. 857, reversing Van Pelt v Barrett, 199 N.Y S. 509, 205 App Div. 332.

(2) But, in considering a similar provision in a bill of lading, the court, in a case in which the question as to the necessity of making a claim was not presented, said, "if we understand the quoted provision concerning the presentation of claim for damages, appellee [shipper] was not required to file or present any claim before commencing suit."—Ross v. Fear-Campbell Co., 147 N.E. 720, 88 Ind.App. 527.

(3) In considering the terms of a bill of lading similar to those of the above uniform express receipt, it was held that a claim based on delay in transportation was not a loss, damage, or injury "due to delay or damage while being loaded or unloaded," within the meaning of the provision excepting such loss, damage, or injury from the requirement of making a written claim, where claimant did his own unloading and there was no claim in respect of loading or unloading—Lissberger v. Bush Terminal R. Co., 197 N.Y S. 281, 119 Misc. 691.

(4) Nor was such claim for delay in transportation a claim within the exception of "damages in transit by carelessness or negligence"—Lissberger v. Bush Terminal R Co, supra.

(5) In a comparatively recent case, the view has been expressed that as to delays in transit, under the uniform bill of lading presentation of a claim is an essential condition precedent to the right to recover for damages resulting therefrom, and that, as to delays in loading and unloading, presentation of a claim is not a prerequisite—Lays Bros & Boss v. American Ry. Express Co., 239 N Y.S 478, 228 App Div 746

Effect in general of federal statutes regulating notice or claim see supra § 236

16. Okl.—St Louis, etc, R Co v Zickafoose, 135 P. 406, 39 Okl 302

17. Mo —Bailey v Missouri Pac R Co, 171 S.W 44, 184 Mo App. 457, 462.

10 C J. p 335 note 94.

18. S.C —Deaver-Jeter Co v. Southern R. Co., 74 S E. 1071, 91 S.C 503, 505, Ann Cas 1914A 230.

Live stock

(1) Live stock which died in transit was not within the terms of a stipulation between the shipper and the carrier for notice of claim for damages before the stock was removed or mingled with others —Kansas, etc, R Co v. Ayers, 38 S W 515, 63 Ark 331—10 C J p 335 note 95 [a].

(2) Live stock that is removed from the car during the course of the shipment, and not delivered at destination, is not within a clause of the contract of shipment requiring the shipper, as a condition precedent to his right to recover any loss, damage, or injury caused by the carrier, to give notice in writing to the delivering carrier of any visible or manifest injury to the live stock before same is removed from the possession of the carrier or mingled with other live stock —Deming v. Missouri, K & T R. Co., 281 P. 240, 138 Okl 276

(3) The provision in a contract which covered an interstate shipment, requiring the shipper, as a condition precedent to recovery of damages for delay in transit or for loss or injury to the stock, to give notice in writing of his claim to some officer or station agent of defendant "within 90 days after delivery of such stock at destination," was not applicable where it appeared that the stock was never delivered at destination and damages claimed were for nondelivery —Morrell v. Northern Pac Ry. Co., 179 N.W 922, 924, 46 N D 535.

(4) In reaching the foregoing conclusion the court cited Corpus Juris. —Morrell v. Northern Pac R. Co., supra.

Demand for excessive rate and refusal to deliver

Where railroad company sold hay to enforce its lien for freight and other charges after refusal to deliver same on being tendered lawful rate, it was held, in action to recover value of hay at destination on day of arrival, that action was not barred by failure to file claim in writing within four months as provided by bill of lading. —Temple v Southern R. Co, 129 S E 815, 190 N C 438.

Claim after delivery

Stipulation for presentation of claim a specified time after delivery did not apply to a case where the consignee refused to receive the property on the ground that it was not tendered in proper condition.—Gulf, etc, R. Co. v. Golding, 3 Tex A Civ Cas. § 33

19. Ala —Southern Ry. Co v. Harris, 80 So. 101, 202 Ala. 263.

10 C J p 335 note 96.

Action in tort

The view has been taken that the presentation of a claim in writing within ninety days from the date of loss was not a condition precedent to an action against the broker for conversion, notwithstanding the shipping contract provided that the carrier would not be liable unless claim for loss, damage, or detention was presented in writing within nine-

that the stipulation does not apply in case of a misdelivery.[20]

A stipulation which makes specific provision for making claim in writing within a specified time after a reasonable time for delivery has elapsed, in the case of failure to make delivery, is given effect if otherwise reasonable and valid,[21] and, in an action on a shipping contract providing for notice or claim in case of failure to make delivery, such notice or claim is a condition precedent in an action based on a misdelivery of the goods.[22] A stipula-

ty days from the date of loss—Southern Express Co. v. Smith, 122 N.E. 427, 69 Ind.App. 574.

20. Ala.—Southern Ry. Co. v. Harris, 80 So. 101, 202 Ala. 263. 10 C.J. p. 335 note 97.

Action in tort

(1) Stipulation for notice of claim of loss or damage did not apply where the carrier's absolute duty was breached by delivery to the wrong person, constituting a conversion, and the action was in tort for conversion.

Ala.—Southern Ry. Co. v. Harris, 80 So. 101, 202 Ala. 263.

Ill.—But see Mays v. Wells Fargo & Co., 199 Ill.App. 443.

(2) It has been held that where the action was in tort for conversion, plaintiff was not required to show compliance with a stipulation for presentation of written claim for damage, loss, or detention within ninety days after the date of loss—Southern Express Co. v. Smith, 122 N.E. 427, 69 Ind.App. 574.

Live stock

Where an interstate shipment of hogs was not in charge of the shipper or his agent, and it was not delivered to the consignees, but the carrier delivered it to another than consignees, and they were never carried to their destination, the provisions of the contract of shipment requiring as a condition precedent to a claim for loss or injury during transportation that notice thereof be given by the shipper or agent in charge thereof before removal of the hogs from the station or stockyards at destination was not applicable—Jonesboro, L. C. & E. R. Co. v. Maddy, 248 S.W. 911, 157 Ark. 484, 28 A.L.R. 498.

21. U.S.—Gillette Safety Razor Co. v. Davis, C.C.A.Mass., 278 F. 864, certiorari denied 42 S.Ct. 590, 259 U.S. 587, 66 L.Ed. 1077.

Ala.—Ex parte Ry. Express Co., 106 So. 197, 213 Ala. 151, granting certiorari Farmers' & Merchants' Bank of Samson v. American Ry. Express Co., 106 So. 195, 21 Ala.App. 133.

D.C.—American Ry. Express Co. v. Fashion Shop, 10 F.2d 909, 56 App. D.C. 114.

Ill.—See Ed Hockaday & Co. v. Chicago, M. & St. P. Ry. Co., 201 Ill. App. 453.

Minn.—Henningsen Produce Co. v. American Ry. Express Co., 188 N.W. 272, 152 Minn. 209.

Mo.—Mt. Arbor Nurseries v. American Ry. Express Co., 300 S.W. 1051, 221 Mo.App. 241—Barton v. Louisville & N. R. Co., App., 196 S.W. 379.

N.H.—Apostolou v. American Ry. Express Co., 122 A. 326, 81 N.H. 115.

N.Y.—Brewster v. Davis, 202 N.Y.S. 574, 207 App.Div. 461.

N.C.—St. Sing v. American Ry. Express Co., 111 S.E. 710, 183 N.C. 405.

Pa.—Hilbert v. Pennsylvania R. Co., 120 A. 778, 277 Pa. 105.

S.C.—Watts v. Southern Ry. Co., 138 S.E. 290, 139 S.C. 516, certiorari denied 47 S.Ct. 964, 274 U.S. 749, 71 L.Ed. 1331—Allen v. Davis, 118 S.E. 614, 125 S.C. 256.

W.Va.—Kahn v. American Railway Express Co., 106 S.E. 126, 88 W.Va. 17.

Interstate shipment

(1) The rule stated in the text was applied where property shipped by express under a receipt which was in conformity with the applicable federal statute was lost and was never delivered.

Minn.—Henningsen Produce Co. v. American Ry. Express Co., 188 N.W. 272, 152 Minn. 209.

Pa.—U. S. Metallic Packing Co. v. American Ry. Express Co., 87 Pa. Super. 119.

(2) In the case of an interstate shipment of currency, part of which was not delivered, it was held that the loss through theft was not "damage in transit by carelessness or neglect" and did not, therefore, fall within an exception to a stipulation requiring the making of claim—Ex parte American Ry. Express Co., 106 So. 197, 213 Ala. 151, granting certiorari Farmers' & Merchants' Bank of Samson v. American Ry. Express Co., 106 So. 195, 21 Ala.App. 133.

(3) Where the claim was based on an absolute loss of goods, it was not a claim for loss, damage, or injury "due to delay or damage" and was not within an exception in the uniform bill of lading.—Allen v. Davis, 118 S.E. 614, 125 S.C. 256.

(4) Shipper who did not file claim with carrier as required by stipulation in bill of lading for loss of goods stolen in transit and did not show any negligence of carrier could not recover.—Douglas Shoe Co. v. Pere Marquette Ry. Co., 217 N.W. 12, 241 Mich. 297.

(5) A claim for a shortage in the weight of the goods below that stated in the bill of lading has been regarded as a "claim for loss" within the meaning of a provision as to written claim for loss in a bill of lading issued under the Federal Bill of Lading Act for an interstate shipment.—Stevens-Scott Grain Co. v. Chicago, R. I. & P. Ry. Co., 221 P. 1117, 115 Kan. 188.

(6) The provision in question was applicable to a claim for the loss of a portion of a package of goods, due to theft in transit and consequent failure to deliver.—Kahn v. American Railway Express Co., 106 S.E. 126, 88 W.Va. 17.

(7) Where an interstate shipment of household goods was not delivered to shipper and consignee on arrival but was sent to storage warehouse, the shipper's claim for the value of the goods, asserted in an action for trespass, was not within the exceptions in the uniform bill of lading from the requirement of making claim within a specified time after a reasonable time for delivery.—Hilbert v. Pennsylvania R. Co., 120 A. 778, 277 Pa. 105.

(8) In an action against a common carrier for failure to notify the consignor of nondelivery, failure to present a formal bill as a claim for damages within the time limited in the contract was not fatal, where defendant was notified in writing that the consignor had a claim against them and insisted on its payment; such notification having been given in due time.—Stoddard Lumber Co. v. Oregon-Washington R. & Nav. Co., 165 P. 363, 84 Or. 399, 4 A.L.R. 1275.

Refusal of consignee to accept

Consignee's refusal to accept goods constituted a "failure of delivery," requiring filing of claim as condition precedent to recovery by shipper.—Watts v. Southern Ry. Co., 138 S.E. 290, 139 S.C. 516, certiorari denied 47 S.Ct. 764, 274 U.S. 749, 71 L.Ed. 1331.

22. U.S.—Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 453, 283 U.S. 209, 75 L.Ed. 983, reversing 143 S.E. 629, 154 Va. 1, and Chesapeake & O. Ry. Co. v. Martin & Porter, 152 S.E. 335, 154 Va. 1, certiorari granted Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 23, 282 U.S. 819, 75 L.Ed. 732—Davis v. John L. Roper Lumber Co., 46 S.Ct. 28, 269 U.S. 158, 70 L.Ed. 209, 44 A.L.R. 1357, reversing 122 S.E.

tion requiring the making of claim in writing within a specified time after a reasonable time for delivery has elapsed applies to a claim based on a conversion by the carrier by the sale of the property.[23] So, the view has been taken that such stipulation and similar stipulations apply to a claim based on a conversion by a misdelivery,[24] but it has been held that such stipulation does not apply where the action sounds in tort for conversion based on the shipper's delivery to consignee, notwithstanding the consignor's attempted stoppage in transitu.[25]

d. Other Claims

Whether or not stipulations for notice or for claim are required sometimes depends on whether or not the loss or injury involved occurred in the course of transportation and while the shipping contract was in force.

A stipulation for a written claim for damages which may accrue under the contract, within a specified time after removal of the shipment, is controlling as to any liability arising from the beginning to the end of the transportation covered by the shipping contract;[26] and, in respect of interstate shipments, the view has been taken that a stipulation for notice of claim applies to injuries to live stock occasioned by delay at the pens before loading into cars.[27] It has been held or recognized, however, that stipulations for notice do not apply to damages for failure to comply with a statutory duty to furnish cars,[28] or to damages for failure to comply with a contract to furnish cars at a specified time and place,[29] even though the shipment is interstate.[30] It has been held to apply,

113, 133 Va. 377, certiorari granted 44 S.Ct. 639, 265 U.S. 579, 68 L.Ed. 1189—Georgia, etc., R. Co. v. Blish Milling Co., 36 S.Ct. 541, 241 U.S. 190, affirming 82 S.E. 784, 15 Ga.App. 142—Manby v. Union Pac. R. Co., C.C.A.Colo., 10 F.2d 327.

Kan.—Kelly v. Atchison, T. & S. F. Ry. Co., 270 P. 586, 126 Kan. 651—Farmers' Grain & Supply Co. v. Atchison, T. & S. F. Ry. Co., 245 P. 734, 120 Kan. 21, 121 Kan. 10

Mo.—Kemper Mill Co. v. Missouri Pac. Ry. Co., 186 S.W. 8, 193 Mo.App. 466, transferred Kemper Mill & Elevator Co. v. Missouri Pac. Ry. Co., 178 S.W. 502.

Ohio—Norfolk & W. Ry. Co. v. Cosmopolitan Bank & Trust Co., 174 N.E. 801, 37 Ohio App. 323.

Pa.—Coroneos Bros. v. Pennsylvania R. Co., 75 Pa.Super. 222.

W.Va.—Wholesale Coal Co. v. Chesapeake & O. Ry. Co., 144 S.E. 715, 106 W.Va. 53.

Effect of Bill of Lading Act

The failure of the holder of a bill of lading to make claim for misdelivery of goods within the time specified in the bill of lading is not excused by Bill of Lading Act § 10, 39 U.S.St. at L. p. 540, c. 415, 49 U.S.C.A. § 90, which imposes a rule of liability merely for such misdelivery, which rule of liability is not inconsistent with Act March 4, 1915, 38 U.S.St. at L. p. 1196, c. 176, § 20, 49 U.S.C.A. § 20 par. (11), relating to time for filing claim.

U.S.—Davis v. John L. Roper Lumber Co., 46 S.Ct. 28, 269 U.S. 158, 70 L.Ed. 209, 44 A.L.R. 1357, reversing 122 S.E. 113, 133 Va. 377, certiorari granted 44 S.Ct. 639, 265 U.S. 579, 68 L.Ed. 1189.

Ohio.—Norfolk & W. Ry. Co. v. Cosmopolitan Bank & Trust Co., 174 N.E. 801, 37 Ohio App. 323.

23. U.S.—Georgia, etc., R. Co. v. Blish Milling Co., 36 S.Ct. 541, 241 U.S. 190, 60 L.Ed. 948, affirming 82 S.E. 784, 15 Ga.App. 142.

S.C.—Watts v. Southern Ry. Co., 138 S.E. 290, 139 S.C. 516, certiorari denied 47 S.Ct. 764, 274 U.S. 749, 71 L.Ed. 1331.

The contrary view has been taken in Landau v. American Ry. Express Co., 197 N.Y.S. 704, 120 Misc. 84.

But it has been held that a provision of bill of lading, requiring, as condition to liability of carrier, filing of claims for loss, damage, or delay, has no application in action for conversion by carrier, refusing tender of all charges and selling the goods—Dowling v. Seaboard Air Line Ry., 93 S.E. 863, 108 S.C. 186.

24. Kan.—Farmers' Grain & Supply Co. v. Atchison, T. & S. F. Ry. Co., 245 P. 734, 120 Kan. 21, 121 Kan. 10.

N.Y.—Dodge & Dent Mfg. Co. v. Pennsylvania R. Co., 162 N.Y.S. 549, 175 App.Div. 823.

Tex.—Davis v. First Nat. Bank of Longview, Civ.App., 245 S.W. 1009. 10 C.J. p. 275 note 87.

25. Wash.—Cashmere Fruit Growers' Union v. Great Northern Ry. Co., 270 P. 1038, 149 Wash. 319, certiorari denied Great Northern Ry. Co. v. Cashmere Fruit Growers' Union, 49 S.Ct. 347, 279 U.S. 851, 73 L.Ed. 994.

26. U.S.—Erie R. Co. v. Shuart, 39 S.Ct. 519, 250 U.S. 465, 63 L.Ed. 1088, reversing Schuart v. Erie R. Co., 117 N.E. 1084, 221 N.Y. 680, affirming Shuart v. Erie R. Co., 150 N.Y.S. 1112, 166 App.Div. 895.

Tenn.—Southern Ry. Co. v. Shipley, 245 S.W. 524, 147 Tenn. 40.

Live stock

Even though a car containing an interstate shipment of horses had arrived at its destination, and the consignees were proceeding to unload the animals through a cattle chute owned and operated by the carrier, the transportation was not complete, and, where the horses were injured when other cars were pushed against the one being unloaded, written claim of loss, made a condition to liability in bill of lading, must be given in order to support recovery against the carrier—Erie R. Co. v. Shuart, 39 S.Ct. 519, 250 U.S. 465, 63 L.Ed. 1088, reversing Schuart v. Erie R. Co., 117 N.E. 1084, 221 N.Y. 680, affirming Shuart v. Erie R. Co., 150 N.Y.S. 1112, 166 App.Div. 895.

27. Tex.—Chicago, R. I. & G. Ry. Co. v. Whaley, Civ.App., 190 S.W. 833.

"Delay in transportation"

The rule stated in the text was applied where the stipulation for notice of claim referred to claim for "delay in transportation."—Chicago, R. I. & G. Ry. Co. v. Whaley, Tex.Civ.App., 190 S.W. 833.

28. Ark.—Hines v. Mason, 221 S.W. 861, 144 Ark. 11.

Live stock

Stipulations for written notice of loss of, or injury to, live stock before removal, for written notice of claim within a specified time, and for making itemized claim within a specified time, did not apply where the action was for failure to furnish a car at a certain time and was founded on Kirby Dig. § 6808.—Hines v. Mason, 221 S.W. 861, 144 Ark. 11.

29. Tenn.—Southern Ry. Co. v. Shipley, 245 S.W. 524, 147 Tenn. 40—N., C. & St. L. R. Co. v. Pounders, 4 Tenn.Civ.App. 372.

30. Tenn.—Southern Ry. Co. v. Shipley, 245 S.W. 524, 147 Tenn. 40.

Live stock

(1) Even in the case of an interstate shipment, a bill of lading for a carload of live stock, which recited that the live stock had been received by the carrier and that the shipper had examined the car furnished him, and which otherwise used the future tense, by its grammatical construction excluded the idea that it was intended to affect the rights of the

however, when the promise or agreement to furnish a car was a mere fact or incident of the contract to carry and deliver.[31] There is authority for the view that a stipulation for making written claim for loss or damage within a specified time after delivery applies to a claim for damage to the goods shipped which occurred before they were loaded.[32]

According to some cases, stipulations of the type here under consideration do not apply to damage occurring before execution of the contract.[33] So, a stipulation for notice of claim of loss or injury does not apply where the carrier abandons the contract of shipment and returns the property to shipper at the place of consignment over the protest of the shipper.[34] The view has been taken that, where the carrier was the first to discover injury to live stock and unloaded the animals and terminated the shipment prematurely without notice to the shipper, failure to give notice in writing of visible or manifest injury before removal of the animals from the possession of the carrier, under a stipulation of the shipping contract, does not defeat a recovery.[35] On the theory that a stipulation for a written claim for loss or damage to live stock within a specified time after removal from cars refers to some physical impairment of, or injury to, the animals,[36] such stipulation does not apply to a claim to recover for a breach by the carrier to permit the removal of the animals at an intermediate point for sale,[37] nor to a claim based on the carrier's noncompliance with quarantine regulations with resultant loss to the shipper due to reduced price received for the animals.[38]

There is authority for the view that stipulations of the type here under consideration do not apply to a claim for loss of animals which died during the transportation, of which fact the carrier had actual knowledge,[39] or to injuries to live stock apparent after they had been kept at the quarantine yards for several days and dipped by the carrier's servants under government supervision.[40] It has been held, however, that a stipulation for a demand or claim in writing for loss or damage within a specified time after the unloading of live stock includes all loss and damage by injury or death en route as well as at terminals.[41]

These stipulations do not usually at least apply to losses for which the carrier stipulates that it is not to be liable;[42] or to injury to any articles other than those which the provisions of the contract designate.[43] It has been held that a stipulation requiring a shipper of stock to give notice of any claim for damages before the stock was removed from its place of destination does not apply to removal by the carrier or its servants, but only to

parties prior to the time the car was furnished, so that the provision requiring notice of claim for damages did not require such notice of claim for damages caused by breach of contract to furnish the car at the time agreed on.—Southern Ry. Co v. Shipley, 245 S.W. 524, 147 Tenn. 40.

(2) The rule applied even if the Carmack amendment requiring a carrier receiving property for transportation to issue a bill of lading therefor, required the issuance of the bill of lading on the delivery of live stock to the carrier's stock pen for shipment—Southern Ry. Co. v. Shipley, supra.

31. Ky—Cecil v. Southern Express Co., 229 S.W. 1041, 191 Ky. 252.

Loss from failure to furnish car

Under the Hepburn Act of June 29, 1906, U S Comp.St. § 8563[2], as well as the subsequent Carmack amendment, U S.Comp St. §§ 8604a, 8604aa, an agreement by an express company, which is included in the term "common carrier" as defined by the Hepburn Act, to furnish a car for an interstate shipment, is not an independent contract separate and distinct from the contract of shipment; so, where the car was not furnished within the time required, and loss resulted, recovery cannot be had where notice was not given within the four-month period fixed by the rules of the Interstate Commerce Commission, for congress included in the term "transportation" all preliminary services.—Cecil v. Southern Express Co, 229 S W. 1041, 191 Ky. 252.

32. S C—Bowman v. Northwestern R. Co. of South Carolina, 130 S E 878, 133 S C. 298.

33. Ark—St. Louis, etc, R. Co. v. Law, 57 S.W. 258, 68 Ark. 218.
Tex.—Wichita Valley R Co. v. Boger, Civ App., 167 S.W. 767—Pecos, etc, R. Co. v. Crews, Civ.App., 139 S.W. 1049.

34. Ky.—Louisville & N. R. Co. v. Murphy, 206 S W. 268, 182 Ky. 136.

Live stock

The rule stated in the text was applied where the contract of shipment provided for notice of claim for loss or injury to live stock before removal from place of destination or of delivery and before mingling with other animals, since such provision was intended to apply only to a case where the carrier transported the stock to the place of destination named in the contract or to some other place of delivery voluntarily selected by the shipper.—Louisville & N R Co v. Murphy, 206 S W. 268, 182 Ky 136

35. Mo—Morrow v. Wabash Ry. Co., 265 S.W 851, 219 Mo App 62.

36. Ky—Cincinnati, N O. & T. P. Ry Co. v. Luke, 184 S.W 1132, 169 Ky. 560, rehearing denied 186 S W. 875, 171 Ky. 50
Miss—Illinois Cent. R. Co. v Smith, 80 So. 776, 119 Miss. 308

37. Ky.—Cincinnati, N. O & T P. Ry Co. v. Luke, 184 S W. 1132, 169 Ky. 560, rehearing denied 186 S.W. 875, 171 Ky. 50.

38. Miss—Illinois Cent. R Co v. Smith, 80 So. 776, 119 Miss 308

39. Ark—Lusk v Long, 192 S.W 213, 127 Ark 261.
10 C.J p 335 note 5.

40. Kan—Broadhead v. Atchison, etc., R. Co, 155 P. 20.
10 C J. p 335 note 6.

41. U.S.—Olson v. Chicago, B. & Q. R. Co., Iowa, 250 F. 372, 162 C. C.A. 442.

42. Mo.—Davis v. Wabash R. Co., 99 S W 17, 122 Mo.App. 637.
10 C J p 335 note 7.

43. Va.—Norfolk, etc., R. Co. v Harman, 52 S E. 368, 104 Va. 501.
10 C.J. p 336 note 9.

removal by the shipper or owner;[44] nor does such a stipulation apply where the injury complained of is the delivering of animals different from those shipped.[45]

As to the carrier's conduct as warehouseman, it has been both asserted[46] and denied[47] that such stipulations apply.

These stipulations have been held applicable to shipments beyond the carrier's line as well as to shipments to points on its own line.[48]

Money received. A stipulation of the character under consideration has been held inapplicable to a claim for the carrier's failure or neglect to pay the shipper the amount collected from the consignee for the goods.[49]

§ 239. Requisites and Sufficiency of Notice

Substantial compliance with a stipulation requiring claim or notice is sufficient

As regards the sufficiency of the notice of a claim, or of a claim, for loss of, or injuries to, property shipped, the stipulation requiring such notice or claim is given a reasonable construction,[50] and it is very generally held or recognized that no particular form of notice or of claim is necessary,[51] that neither formality[52] nor technical exactness[53] is necessary, and that a substantial compliance with the stipulation is all that is required.[54] It "is ad-

44. Ark.—Kansas, etc., R. Co. v. Ayers, 38 S.W. 515, 63 Ark. 331.
Kan.—Missouri, etc., R. Co. v. Frogley, 89 P. 903, 75 Kan. 440.
Mo.—Baker v. Missouri Pac. R. Co., 34 Mo.App. 98.

45. Mo.—Wilson v. Wabash, etc., R. Co., 23 Mo.App. 50.

46. Minn.—Armstrong v. Chicago, etc., R. Co., 54 N.W. 1059, 53 Minn. 183.

47. N.Y.—Smith v. Dinsmore, 9 Daly 188.

48. N.Y.—Jennings v. Grand Trunk R. Co., 28 N.E. 394, 127 N.Y. 438.

49. Minn.—Bardwell v. American Express Co., 28 N.W. 925, 35 Minn. 344.

Action for conversion

The provisions of a bill of lading that suits for loss or damage to shipment must be brought within a specified time, and that notice of loss or damage must be filed in writing within a certain time, do not cover a loss in an action for conversion against the last carrier of an interstate shipment shipped under order bill of lading by plaintiff to its order, "Notify B.," where the defendant's agent, without bill of lading being presented, delivered the goods, received full payment, and absconded with the money.—M. W. Savage Factories v. Canadian Northern Ry. Co., Minn., 184 N.W. 367.

50. N.J.—Hyatt Roller Bearing Co. v. Pennsylvania R. Co., 104 A. 82, 92 N.J.Law 94, affirmed 106 A. 891, 92 N.J.Law 631.
Or.—United Brokers' Co. v. Southern Pac. Co., 169 P. 114, 86 Or. 607, Ann.Cas.1918D 814.

51. U.S.—Georgia, F. & A. R. Co. v. Blish Milling Co., Ga., 241 U.S. 190, 36 S.Ct. 541, 60 L.Ed. 948.
Ala.—Farmers' & Merchants' Bank of Samson v. American Ry. Express Co., 106 So. 195, 21 Ala.App. 133, on hearing after certiorari granted Ex parte American Ry. Express Co., 106 So. 197, 213 Ala. 151.
Ark.—Hines v. Mason, 221 S.W. 861, 144 Ark. 11.
N.C.—Phillips v. Seaboard Air Line Ry., 89 S.E. 1057, 172 N.C. 86.
Okl.—Chicago, R. I. & P. Ry. Co. v. Pruitt, 171 P. 718, 68 Okl. 58.
Pa.—Dobransky v. Adams Express Co., 76 Pa.Super. 284.
Tex.—Payne v. Smith, Civ.App., 268 S.W. 243, 245.

The text of Corpus Juris is cited with approval in Payne v. Smith, supra.

Claim

(1) Any form which amounts to a demand for compensation for loss sustained or gives notice of intent to claim compensation is sufficient.—Payne v. Smith, Tex.Civ.App., 268 S.W. 243.

(2) That letters demanded delivery of shipment or, in alternative, payment of its value, did not defeat their efficacy as a claim in writing within stipulation in bill of lading requiring claim within particular time.—Payne v. Smith, supra.

Presentation of claims to director general of railroads

Order No. 41, of the Director General, made Aug. 28, 1918, regulating disposition of interroad freight claims for loss or damages, was for guidance in settlement of such claims between carriers under the director general's control, and was not intended to prescribe the manner in which owners of claims should present the same to him.—Davis v. First Nat. Bank of Longview, Tex.Civ.App., 245 S.W. 1009.

52. Ill.—Cohen v. Southern Ry. Co., 193 N.E. 480, 358 Ill. 532, affirming 273 Ill.App. 116.
N.Y.—Brewster v. Davis, 202 N.Y.S. 574, 207 App.Div. 461.

53. Ill.—Cohen v. Southern Ry. Co., 193 N.E. 480, 358 Ill. 532, affirming 273 Ill.App. 116.
Mo.—R. W. Gess Commission Co. v. Illinois Cent. R. Co., 186 S.W. 1136, 193 Mo.App. 677.

Cause of damage or injury

Under an interstate shipping contract requiring the shipper to give written notice to carrier within four months of delivery, for loss, damage or delay, notice of damage to berries "on account of delay," could not mislead nor relieve the carrier of liability, where the damage was caused not by delay but by improper care in transit.—R. W. Gess Commission Co. v. Illinois Cent. R. Co., 186 S.W. 1136, 193 Mo.App. 677.

54. Mich.—Snyder v. King, 165 N.W. 840, 199 Mich. 345, 1 A.L.R. 893.
Miss.—New Orleans & N.E.R. Co. v. Wood, 73 So. 615, 112 Miss. 614.
N.J.—Hyatt Roller Bearing Co. v. Pennsylvania R. Co., 104 A. 82, 92 N.J.Law 94, affirmed 106 A. 891, 92 N.J.Law 631.
Okl.—Chicago, R. I. & P. Ry. Co. v. Pruitt, 171 P. 718, 68 Okl. 58.
Or.—United Brokers' Co. v. Southern Pac. Co., 169 P. 114, 86 Or. 607, Ann.Cas.1918D 814.
10 C.J. p. 336 note 16.

The Corpus Juris text has been cited with approval.
N.J.—Hyatt Roller Bearing Co., 104 A. 82, 83, 92 N.J.Law 94, affirmed 106 A. 891, 92 N.J.Law 631.
Or.—United Brokers' Co. v. Southern Pac. Co., 169 P. 114, 117, 86 Or. 607, Ann.Cas.1918D 814.

Purpose to make claim or hold carrier liable

(1) Use of the words "I will claim," instead of "I do claim," in a notice of claim against a carrier for injuries to a stock shipment, will be regarded as technical, and not substantial, defect under a provision in an interstate bill of lading requiring claim to be presented within a certain time, especially where the

dressed to a practical exigency and it is to be construed in a practical way."[55] In the absence of any requirement therefor in the stipulation, a claim need not set forth all particulars[56] and it is not insufficient merely because there is no formal demand for money damages[57] nor because it does not set forth the damages claimed.[58] If it is presented in time and in the form required, it is sufficient if it gives the carrier reasonable notice of the character of the demand.[59] Where a claim sufficient in substance is filed within the time limited by the contract, the fact that another claim is filed after the expiration of the time fixed will not prevent a recovery under the first claim.[60]

There must be at least a substantial compliance with the stipulations here under consideration,[61]

claim was fully and properly investigated by the carrier—Union Pac. R Co v Pacific Market Co, 200 P. 108, 27 Wyo 501, rehearing denied 206 P 143, 28 Wyo. 461

(2) Where damaged shipments had been inspected by agents of carrier and consignee, and inspection report and notation on freight receipt made, notice that consignee would file claim for damages, though in future tense, was sufficient, in connection with matters referred to in the notice, including the inspection report, to satisfy requirement of bill of lading, covering interstate shipment, for claim in writing—E H Emery & Co v. Wabash R Co, 166 N.W. 600, 183 Iowa 687.

(3) Notice that customer would not accept shipment unless delivered at once, and that it would be necessary to enter claim with railroad company covering it was a sufficient notice of claim for damages for loss of misdelivered goods—Fisk Rubber Co of New York v. New York, N. H. & H R. R, 132 N E 714, 240 Mass. 40.

(4) Notification to the carrier by telegram containing shipping directions that shipper of live stock would hold it liable for damages was a sufficient compliance with the shipping contract requiring claim of damages to be made within a specified time—Boyd v. King, 167 N W. 901, 201 Mich 436, certiorari denied King v Boyd, 39 S Ct. 11, 248 U S. 572, 63 L Ed 427.

(5) Telegram stating, "We will make claim against railroad for entire contents of car at invoice price Must refuse shipment as we cannot handle," was sufficient notice, in view of other telegrams between the parties whereby the shipment had been adequately identified—Georgia, F & A Ry Co v Blish Milling Co, 36 S Ct. 541, 241 U S. 190, 60 L Ed 948, affirming 82 S E 184, 15 Ga App. 112

(6) Shipper who, on day following delivery of shipment of meat, sent carrier's agent, at place of delivery, letter specifying shipment and notifying agent that meat was in spoilt condition, that claim would be filed and that investigation of cause of damage should be made, substantially complied with the provision in bill of lading requiring claim in writing—Cudahy Packing Co v Bixby, 205 S W 865, 199 Mo App. 589 certiorari denied, 39 S Ct. 19, 248 U S 577, 63 L Ed. 429.

Typographical error

Shipper's timely claim for damages to a shipment of live stock was not invalid because "1907" instead of "1913" was written therein as the date of the shipment where the statements in the claim were sufficient to identify the shipment.—Baird v. Denver & R. G. R. Co, 162 P. 79, 49 Utah 58.

Other notices or claims sufficient

Ala—Farmers' & Merchants' Bank of Samson v. American Ry. Express Co, 106 So. 195, 21 Ala App 133, certiorari granted Ex parte American Ry. Express Co, 106 So 197, 213 Ala. 151.

Ark—Railway Express Agency v. H. Rouw Co, 52 S.W 2d 624, 186 Ark 111—Hines v. Mason, 221 S.W. 861, 144 Ark. 11.

Minn—Benson v. Davis, 194 N.W. 771, 156 Minn. 354.

N J—Hyatt Roller Bearing Co. v. Pennsylvania R. Co., 104 A. 82, 92 N.J Law 94, affirmed 106 A. 891, 92 N J.Law 631.

N C—McCotter v. Norfolk Southern R Co, 100 S E. 326, 178 N C. 159

Okl.—Chicago, R I. & P. Ry. Co. v. Pruitt, 171 P. 718, 68 Okl. 53.

55. U S—Georgia, F. & A. R Co. v. Blish Milling Co., Ga., 36 S Ct 541, 241 U S. 190, 60 L Ed. 948.

56. Wyo—Union Pac R Co v Pacific Market Co, 200 P. 108 27 Wyo 501, rehearing denied 206 P. 143, 28 Wyo 461.

57. Minn.—Benson v. Davis, 194 N W. 771, 156 Minn 354.

58. Pa—Dobransky v. Adams Express Co, 76 Pa Super. 281.

Amount of damages in written notice of claim

Written notice within time stipulated of a claim for damages complies with a stipulation in through bill of lading for interstate shipment requiring report by consignee to terminal carrier after notice of arrival of freight even though amount of damages is not stated.—St Louis, I. M & S Ry. Co v. Starbird, Ark., 37 S.Ct 462, 243 U.S 592, 61 L Ed. 917.

59. Wyo.—Union Pac. R. Co. v. Pacific Market Co., 200 P. 108, 27 Wyo. 501, rehearing denied 206 P. 143, 28 Wyo 461.

60. S C—Jenkins v Atlantic Coast Line R. Co., 65 S E. 636, 83 S C. 473.

Tex—Payne v Smith, Civ.App, 268 S W. 243, 245

The Corpus Juris text has been cited with approval in Payne v. Smith, supra.

61. N Y—Calumet & Hecla Mining Co. v. Delaware, L & W. R Co, 190 N.Y.S 410, 198 App Div 348

Okl—Chicago, R I. & P Ry Co v. Brockmeier, 168 P. 1011, 66 Okl. 280.

10 C J. p 337 note 19.

Direction for reshipment

Shipper's letter to carrier, requesting reshipment after consignee's refusal to accept delivery, was not claim for loss—Watts v Southern Ry. Co., 138 S E 290, 139 S C. 516, certiorari denied 47 S Ct. 764, 274 U. S. 749, 71 L Ed 1331

Correspondence between carrier and shipper

Requirement in bill of lading that claims for loss, damage, or delay should be presented within stipulated time was not complied with by correspondence between carrier and shipper relating to lost consignment.—Kusin v. Chicago, R. I. & P. Ry. Co, 270 S.W. 597, 168 Ark. 293.

Statements insufficient

Statements by a stock shipper in conversation that the animals did not need dipping, and would shrink if dipped, was not a notice of claim within a provision in an interstate bill of lading requiring notice of claim of damages to be made within ten days, such conversation taking place before any substantial injury was suffered, and not directing carrier's attention to any act of negligence by which the shipper claimed he was injured.—Union Pac. R Co. v. Pacific Market Co, 200 P 108, 27 Wyo. 501, rehearing denied 206 P. 143, 28 Wyo 461.

Failure to notify of arrival as notice of loss

Shipper's contention that carrier's failure to notify him of the arrival of goods at destination was notice to carrier of the loss of the goods, and that therefore the purpose of the shipping contract requirement

and, according to some cases, where the shipping contract requires the making of a claim, the notice given must possess the characteristics of a claim; that is to say, it must amount to a demand for compensation, or it must give notice of an intention to claim compensation for loss sustained,[62] and must furnish sufficient information as to the character of the claim.[63] So it has been held or recognized that the giving of information to the carrier's agent that the shipper will present a claim for damages,[64] calling the attention of the carrier's agent to the condition of animals shipped,[65] a mere inquiry requesting that the property shipped be traced,[66] even though the inquiry states the supposed value of the shipment,[67] or a mere statement to an agent of the carrier that the shipment was in bad condition, without in any way suggesting that the carrier was responsible for that condition, or that anyone was claiming that it was,[68] is not sufficient. The necessity of compliance with a stipulation for the presentation of a definite claim in writing specifying the character and amount of claim has been recognized.[69]

It has been stated broadly that the fact that the carrier made an investigation as to an injury to property shipped has no bearing on the sufficiency of a claim of injury.[70]

Necessity of writing and verification. Unless the contract of shipment requires it, the notice need not be in writing.[71] Where, however, the contract requires a written notice or a written claim, oral notice or claim will not in general suffice.[72] In the case of an intra-state shipment, however, the view has been taken that, while the agent for the carrier is not bound to recognize an oral notice of claim,[73] if he does recognize such notice, it is sufficient.[74]

that presentation of a written claim be made within four months as a condition precedent to recovery, was thereby sufficiently complied with, was untenable.—Apostolou v. American Ry. Express Co., 122 A. 326, 81 N.H. 115.

62. Md.—Bronstein v. Payne, 113 A. 648, 139 Md. 116.
Mo.—Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co., 201 S.W. 623, 198 Mo.App. 520.
N.Y.—Brewster v. Davis, 202 N.Y.S. 574, 207 App.Div. 461—Dworsky v. Pennsylvania R. Co., 239 N.Y.S. 932, 160 Misc. 360—Browning, King & Co. v. Davis, 199 N.Y.S. 775, 120 Misc. 520, affirmed 203 N.Y.S. 922, 208 App.Div. 780
S.C.—Watts v. Southern Ry. Co., 138 S.E. 290, 139 S.C. 516, certiorari denied 47 S.Ct. 764, 274 U.S. 749, 71 L.Ed. 1331.

Letters not sufficient

Mo.—Cudahy Packing Co. v. Bixby, 205 S.W. 865, 199 Mo.App. 589, certiorari denied 39 S.Ct. 19, 248 U.S. 577, 63 L.Ed. 429—Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co., 201 S.W. 623, 198 Mo. App. 520.

Notations insufficient

Where consignees claimed shortage of three boxes of shoes, written notation, by delivering carrier's agent, on freight and expense bills, that shipment checked three cases short, in connection with verbal notice by consignee, did not constitute claim for loss made to delivering carrier. —Schaff v. Ike Exstein & Bro., Tex.Civ.App., 270 S.W. 589.

63. N.Y.—Brewster v. Davis, 202 N.Y.S. 574, 207 App.Div. 461.
S.C.—Watts v. Southern Ry. Co., 138 S.E. 290, 139 S.C. 516, certiorari denied 47 S.Ct. 764, 274 U.S. 749, 71 L.Ed. 1331.

Basis of claim

Letters written by the consignee to the carrier before the delivery of the goods, demanding their delivery or making claim for loss of the goods, are not a notice of claim for damages from delay in delivery within the requirement of the bill of lading.—Lissberger v. Bush Terminal R. Co., 197 N.Y.S. 281, 119 Misc. 691

64. U.S.—Kidwell v. Oregon Short Line R. Co., Or., 208 F. 1, 125 C.C.A. 313.
10 C.J. p. 337 note 19.

65. Tenn.—Illinois Cent. R. Co. v. Wade, 1 Tenn.Civ.A. 780.
10 C.J. p. 337 note 20.

66. Me.—R. P. Hazzard Co. v. Maine Cent. R. Co., 116 A. 258, 121 Me. 199.
Md.—Bronstein v. Payne, 113 A. 648, 139 Md. 116.
N.Y.—Browning, King & Co. v. Davis, 199 N.Y.S. 775, 120 Misc. 520, affirmed 203 N.Y.S. 922, 208 App. Div. 780

67. Va.—Atlantic Coast Line R. Co. v. Bryan, 65 S.E. 30, 109 Va. 523.

68. Ill.—Waxelbaum v. Southern R. Co., 168 Ill.App. 66.

69. U.S.—Manby v. Union Pac. R. Co., C.C.A.Colo., 10 F.2d 327

Shipper's letter to general freight agent insufficient

U.S.—Manby v. Union Pac. R. Co., C.C.A.Colo., 10 F.2d 327.

70. Wyo.—Union Pac. R. Co. v. Pacific Market Co., 206 P. 143, 28 Wyo. 461, denying rehearing 200 P. 108, 27 Wyo. 501.

71. Mo.—Blair Horse, etc., Co. v. St. Joseph, etc., R. Co., App., 180 S.W. 412.

72. U.S.—St. Louis, I.M. & S. Ry. Co. v. Starbird, 37 S.Ct. 462, 243 U.S. 592, 61 L.Ed. 917, reversing in part 177 S.W. 912, 118 Ark. 485—Manby v. Union Pac. R. Co., C.C.A.Colo., 10 F.2d 327—Olson v. Chicago, B. & Q. R. Co., Iowa, 250 F. 372, 162 C.C.A. 442
Minn.—Carbic Mfg. Co. v. Western Express Co., 181 N.W. 35, 149 Minn. 467.
Mo.—Mt. Arbor Nurseries v. American Ry. Express Co., 300 S.W. 1051, 221 Mo.App. 241—Johnson v. Missouri Pac. Ry. Co., App., 187 S.W. 282.
Tex.—Schaff v. Ike Exstein & Bro., Civ.App., 270 S.W. 589.

Oral request to trace shipment

(1) The fact that the carrier sent out a written tracer for the shipment, on the oral request of claimant, does not constitute compliance with a stipulation for making claim in writing within a specified time. —Carbic Mfg. Co. v. Western Express Co., 184 N.W. 35, 149 Minn. 467.

(2) But, even in the case of an interstate shipment, there is authority for the view that, where the shipper made an oral complaint and the carrier promised to send tracers and to make an investigation and complied with such promise, there was a compliance with a stipulation for a claim in writing.—Shark v. Great Northern Ry. Co., 164 N.W. 39, 37 N.D. 342.

Oral notice to clerk

In respect of an interstate shipment, it has been held that oral notice to a clerk in the office of a carrier was not a compliance with a provision for notice in writing of a claim for loss or injury.—Bryan v. Louisville & N. R. Co., 93 S.E. 750, 174 N.C. 177.

73. Ga.—Heath v. Sandersville R. Co., 98 S.E. 92, 23 Ga.App. 255.

74. Ga.—Heath v. Sandersville R. Co., supra.

While it has been held that a verification of the claim is required by the contract, such verification is a condition precedent to the right to recover,[75] there is authority for the view that, where there has been a substantial compliance with a stipulation for making a claim, the fact that it is not verified by the affidavit of the shipper or his agent, as provided in the stipulation, does not of itself defeat a recovery,[76] especially where the carrier did not insist on a verification.[77]

The foregoing rules as to the necessity of writing and verification should be considered in connection with the rules as to what are valid excuses for failure to comply with stipulations, considered below in § 240, and as to waiver, considered below in § 241.

Delivery receipt in general. It has been held or recognized that a delivery receipt executed by the consignee or shipper may not be regarded as a written claim,[78] even though it contains a notation concerning a shortage.[79] The view has been taken, however, that, where a contract for shipment of cattle stipulates that, as a condition precedent to the shipper's right to recover damages for their injury, he will give written notice of his claim to the carrier before removal from destination, the shipper's failure to give a formal written notice of his intention to demand compensation will not preclude recovery, where he signed a receipt for the cattle at destination "under protest," because of their damaged condition.[80]

Bringing suit. Where the shipping contract provides for giving written notice of claim, or a written claim for loss, damage, or injury within a specified time, bringing or filing suit on the claim, within the time specified is a sufficient compliance.[81]

Notice of claim for less amount than sued for. In the absence of a provision to the contrary, it is no defense to an action for loss or injury that the claim filed, with notice of damages to a shipment, was for less than the amount sued for,[82] except possibly where the sum claimed has been tendered in settlement;[83] the parties seeking to recover are not confined to any special amount by the contract, but are merely required to give notice, in order that the carrier may investigate before the witnesses or the evidence is beyond its reach.[84] Claimant cannot recover more than the amount set forth in his written claim, however, where the contract so provides.[85]

By whom served or given. Ordinarily notice or claim of loss should be given the carrier by the person, if any, designated in the stipulation.[86] Where the bill of lading required the shippers to serve notice of a claim for injuries to live stock, the

75. Ohio—Baltimore, etc., R. Co. v. Hubbard, 74 N.E. 214, 72 Ohio St. 302.

Evidence in carrier's action for refund of claim was held to sustain finding that affidavit on which claim was filed was not false.—Chicago, M & St. P. Ry. Co. v. Malleable Iron Range Co., 212 N.W. 279, 192 Wis 139.

76. Mich.—Snyder v. King, 165 N.W. 840, 199 Mich. 345, 1 A.L.R. 893.
Miss—Illinois Cent. R. Co. v. Wm. Atkinson & McDonald Co., 74 So. 616, 113 Miss. 678.

77. Mich.—Slider v. Pere Marquette R. Co., 161 N.W. 961, 194 Mich. 961.
Miss—Illinois Cent. R. Co. v. Wm Atkinson & McDonald Co., 74 So 616, 113 Miss. 678.

78. Mo—Johnson v. Missouri Pac Ry. Co., App., 187 S.W. 282.

79. N.Y.—Brewster v. Davis, 202 N.Y.S. 574, 207 App.Div. 461.

Transfer from railroad to steamship
Shipper's receipt given railroad company in exchange for steamship receipts received by such company on delivery of billets of copper to steamship company, reading: "Ten (10) billets . . . in dispute. If on board, to be delivered," was not a sufficient notice of claim for loss of the ten billets, under bill of lading requiring written claim for loss to carrier within specified period.—Calumet & Hecla Mining Co. v. Delaware, L. & W. R. Co., 190 N.Y.S 410, 198 App.Div. 348.

80. N.C.—Hinkle v. Southern R. Co., 36 S.E. 348, 126 N.C. 932, 78 Am S.R. 685.
10 C.J. p 337 note 30.

81. Ark—St. Louis-San Francisco Ry. Co. v. Cole, 294 S.W. 357, 174 Ark. 10.
Ga—Atlantic Coast Line R. Co. v. Varner, 137 S.E. 83, 36 Ga.App. 441.
Mo—Morrow v. Wabash Ry. Co., App., 6 S.W.2d 628.
S.C.—J. Van Lindley Nursery Co. v. Southern Ry. Co., 96 S.E 221, 109 S.C. 433.
Tex.—Galveston, H & S. A. Ry Co. v. Gibbons, Civ.App., 202 S.W. 352.
10 C.J. p 336 note 16 [b].

The Corpus Juris statement has been cited with approval in Atlantic Coast Line R. Co. v. Varner, 137 S.E 83, 36 Ga.App. 441.

Service of summons
Service on the carrier of justice court's summons in action to recover for misdelivery of express shipment within time specified by contract for making claim was sufficient written claim for damage—Blaisdell v. American Ry. Exp. Co., 220 N.W. 634, 56 N.D. 870.

82. Mont.—Parham v. Chicago, M. & St. P. Ry. Co., 189 P. 227, 57 Mont. 492.
10 C.J. p 337 note 24.

83. Mont.—Parham v. Chicago, M. & St. P. Ry. Co., supra.

84. Tex.—Pecos, etc., R. Co v. Holmes, Civ.App., 177 S.W. 505.

85. Kan.—Caston v. Schaff, 185 P. 33, 105 Kan. 487.

86. Tex.—Schaff v. Ike Exstein & Bro., Civ.App., 270 S.W. 589.

Local agent of another carrier
Under a stipulation requiring the claim to emanate from claimant or his authorized agent, where the consignee made claim to the wrong carrier, a letter written by the local agent of such carrier to the proper carrier, in connection with the claim, is not equivalent to a substantial compliance with the stipulation Under such circumstances the local agent could not be considered either as agent of initial carrier or consignees in presentation of claim—Schaff v Ike Exstein & Bro., Tex. Civ.App., 270 S.W. 589.

consignee, although he was part owner of the animals and joined in an action to recover for damages, need not serve such notice, it having been served by the shipper.[87] A claim for a loss in transit which is made by the consignee is sufficient provided it is otherwise in conformity with the stipulation, notwithstanding the consignor is the real party in interest.[88] Where the contract does not specify who shall make the claim, a claim made by the consignor has been recognized as sufficient in an action by the consignee.[89] So it has been held or recognized that an effective notice or claim may be given or made by the shipper's attorney,[90] by the factor who sold the goods shipped and who subsequently became owner of the bill of lading by assignment,[91] and by the broker for the shipper.[92]

According to some cases, there is a sufficient compliance with a stipulation requiring written claim where the shipper or consignee orally communicates the facts or makes complaint to the local agent of the carrier and such agent reduces the facts to writing which is sent to his superiors.[93] It has also been held that a report of damages made and signed by an inspector for the carrier, after the consignee has called the inspector's attention to the condition of the shipment, is a sufficient claim in writing.[94] It has been held, however, that there is not a compliance with a requirement for written notice or written claim where the local agent makes a report of a type required of him in every instance of shortage or damage,[95] or where he merely makes a notation as to injuries or damages on the bill or receipt for freight charges.[96]

To what agent notice given. If the contract provides for notice to the carrier's general freight agent, notice to the general claim agent will not suffice.[97] A notice given to the depot manager at the place of destination may be sufficient, however, where such complaints are customarily made to him.[98] Notice of injury to a shipment of live stock given to an employee of the carrier who had charge of the unloading and delivery of the cattle is sufficient notice to the carrier,[99] but merely calling attention of an employee of the carrier to the condition of animals is not sufficient where such employee does not have authority to receive notice or to deal with the matter.[1]

87. Tex.—Texas, etc., R. Co. v. McMillen, Civ.App., 183 S.W. 773.

88. Minn.—Beltrami Co-op. Creamery Ass'n v. American Ry. Express Co., 199 N.W. 568, 160 Minn. 221.

89. Ill.—Cohen v. Southern Ry. Co., 193 N.E. 480, 358 Ill. 532, affirming 273 Ill.App. 116.

90. Ark.—Hines v. Mason, 221 S.W. 861, 144 Ark. 11.

91. Ga.—Layton v. Central of Georgia Ry. Co., 149 S.E. 431, 40 Ga.App. 330.

92. N.C.—McColter v. Norfolk Southern R. Co., 100 S.E. 326, 178 N.C. 159.

93. Iowa.—E. H. Emery & Co. v. Wabash R. Co., 166 N.W. 600, 183 Iowa 687.
Mich.—Snyder v. King, 165 N.W. 840, 199 Mich. 345, 1 A.L.R. 893.

Writings on which notations made

(1) The rule stated in the text was applied where the notation by the local agent was made on the freight receipt.—E. H. Emery & Co. v. Wabash R. Co., 166 N.W. 600, 183 Iowa 687.

(2) Where, before accepting the shipment of stock at destination, shippers required agent of the terminal carrier to note on the freight bill that "shipper received stock under condition stock in bad shape account overrun and lack feed and water," contract of shipment requiring notice of claim within one day after delivery at destination, as condition precedent to right of recovery, was sufficiently complied with.—Illinois Cent. R. Co. v. Rogers & Hurdle, 76 So. 686, 116 Miss. 99.

94. Or.—United Brokers' Co. v. Southern Pac. Co., 169 P. 114, 86 Or. 607, Ann.Cas.1918D 814.

95. N.Y.—Dworsky v. Pennsylvania R. Co., 289 N.Y.S. 932, 160 Misc. 360.

No demand for compensation

A mere communication from a local agent of the type required of him in every instance of shortage or damage which contains no statement that the consignee is demanding, or intends to demand, compensation is not a compliance with a stipulation requiring a written claim, at least where the consignee did not suggest that the agent make the report.—Dworsky v. Pennsylvania R. Co., 289 N.Y.S. 932, 160 Misc. 360.

Interstate shipments

(1) In Missouri it has been held, in the case of an interstate shipment, that the fact that the local agent of the carrier promised to, and did, send a "bad order" report to the company was not sufficient.—O'Briant v. Pryor, Mo.App., 195 S.W. 759.

(2) In an earlier case involving an interstate shipment, the view was taken that a bad order report made by the local agent for the carrier after a discussion with the claimant was sufficient, the court taking the view that the local agent acted as the agent for claimant in such transaction.—McElvain v. St. Louis, etc., R. Co., Mo.App., 180 S.W. 1018.

96. Mo.—Johnson v. Missouri Pac. Ry. Co., App., 187 S.W. 282
N.C.—Taft & Vandyke v. Atlantic Coast Line R. Co., 93 S.E. 752, 174 N.C. 211.
Tex.—St. Louis, etc., R. Co. v. Overton, Civ.App., 178 S.W. 814.

97. Mo.—Letts v. Wabash R. Co., 111 S.W. 138, 131 Mo.App. 270

98. U.S.—Northern Pac. Ry. Co. v. Wall, 36 S.Ct. 493, 241 U.S. 87, 60 L.Ed. 905, reversing Wall v. Northern Pac. Ry. Co., 145 P. 291, 50 Mont. 122.
Ark.—St. Louis, etc., R. Co. v. Heyser, 130 S.W. 562, 95 Ark. 412, Ann.Cas.1912A. 610.

99. N.C.—Southerland v. Atlantic Coast Line R. Co., 74 S.E. 102, 158 N.C. 327.
10 C.J. p. 338 note 43.

1. N.C.—Duvall v. Norfolk Southern R. Co., 83 S.E. 21, 167 N.C. 24.
10 C.J. p. 337 note 21.

Oral mention of damage or loss

Oral mention of damage or loss by shipper of live stock, made to carrier's agent not authorized to receive such notice, was not a compliance with a contract of shipment requiring written notice thereof to be filed with named agents within ten days after delivery.—Illinois Cent. R. Co. v. W. J. Davis & Co., 72 So. 874, 112 Miss. 119.

Filing claim for injuries with the cashier at the office of the carrier at the destination of the shipment, such cashier being in charge of the business in the absence of the agent having general charge, was a sufficient compliance with a requirement that the claim be filed with the agent of the carrier at the point of destination.[2]

Where the agent for a railroad company is also the agent for an express company, a claim against the express company may properly be submitted to such agent.[3]

At what place given. The requirement of a contract of shipment that notice of claim for loss be given at either the point of shipment or of delivery is not satisfied by mailing it to another point.[4] While the view has been taken that the "place of destination," as used in contract requiring a shipper of live stock to give notice of injury before the stock has been removed from the place of destination, cannot be limited to the premises of the carrier, but means the town to which the shipment is made, and the giving of notice before the stock has been removed beyond the limits of the town and mingled with other stock will be sufficient,[5] it has been held that live stock which has been taken several miles from the place where received by the shipper from the carrier is not at the "place of destination" or "place of delivery," so that notice after such removal is not sufficient.[6]

Where a shipper addressed his notice of claim to the building of another railroad company which was a part of defendant's system, and defendant's claim agent replied to the notice, the fact that it was not addressed to defendant is no ground for objecting.[7]

In a stipulation that a claim for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within a specified number of months after the delivery or a reasonable time for delivery, the words "carrier at the point of delivery or at the point of origin" have been regarded as descriptive of the carrier to whom notice is to be given rather than of the place at which notice is to be filed, and, in accordance with this construction, it has been held that a written claim made to the freight claim agent of the carrier at a place other than the point of delivery or of origin is sufficient,[8] but the view has been taken that this does not constitute a compliance with such stipulation[9] and that a like rule applies to a claim filed with a local agent of the carrier at a place other than the point of delivery or of origin.[10] It has been held that, where the carrier has by advice to claimant induced the latter to file his claim with the freight claim agent at a place other than the point of delivery or of origin, the carrier is estopped to assert that the stipulation has not been complied with and such filing may be regarded as sufficient.[11]

Several carriers. Notice to one carrier or to several connecting carriers is not notice to another connecting carrier whom it is sought to hold liable for loss or injury, where, under the contract of shipment, each carrier is liable for damages occurring on its own line.[12] Where an intra-state bill of lading required the filing of claim against the carrier, the filing of a claim against the delivering carrier, not as agent of the initial carrier, was held to be insufficient to support an action against the initial carrier.[13] A notice of claim against railroad companies acting as partners for damages to a shipment of cattle need not, however, be filed with each company; it is sufficient if it is filed with one of them.[14] It has also been held that, where a shipping contract provided that no claim for damages should be allowed unless a verified claim should be made and delivered to the carrier, and that a connecting carrier should not be liable for any damage occurring on its line unless a like claim should be made and delivered to it, the shipper claiming damages from the connecting carrier need not give notice to the initial carrier, but a notice to the connecting carrier is sufficient.[15]

As to interstate shipments, notice to one of several connecting carriers is notice to all, under the Carmack amendment, each carrier being an agent for the other.[16] Even where the contract provided for notice to the carrier at the point of delivery or

2. S C—Walker v. Southern R. Co., 56 S E. 592, 76 S C 308

3. Ky—American Ry. Express Co v. McGee, 4 S W.2d 679, 223 Ky 681.

4. Mo—Equity El. Co v. Union Pac. R. Co, App, 177 S W. 773.

5. N D—Welch v. Northern Pac. R Co., 103 N W. 396, 14 N D. 19, 22.

6. Ky—Louisville & N. R. Co. v. Johnson, 206 S W. 638, 182 Ky. 418

7. Mo—Rissler v Missouri Pac. R. Co, App, 183 S W. 676.

8. Ill—Babbitt v. Grand Trunk Western Ry Co, 120 N.E 803, 285 Ill 267, affirming 209 Ill.App. 183

9. Mo—Cudahy Packing Co. v. Bixby, 205 S W 865, 199 Mo App. 589, certiorari denied, 39 S Ct. 19, 248 U S 577, 63 L Ed. 429.

10. S D—Strommer v. Chicago, M & St. P. Ry. Co, 161 N W. 346, 38 S D. 368

11. U.S—Lehigh Valley R. Co. v. State of Russia, C C A N Y., 21 F 2d 396, certiorari denied 48 S.Ct. 159, 275 U.S. 571, 72 L Ed. 432.

12. Ill.—Waxelbaum v. Southern R Co., 168 Ill App. 66.
Tex—Houston, etc, R Co. v Mayes, 97 S W. 318, 44 Tex.Civ App. 31

13. S C—Kershaw Oil Mill v. Northwestern R Co of South Carolina, 130 S E. 647, 133 S C. 226.

14. Tex—Texas Cent. R. Co. v Pool, 114 S W. 685, 52 Tex Civ App. 307.

15. Vt.—Needham v. Boston, etc., R. Co., 74 A. 226, 82 Vt. 518.

16. U S—Northern Pac Ry Co. v. Wall, Mont., 36 S Ct. 493, 241 U.S.

at the point of origin, it was held that such provision did not render ineffective a claim presented to an intermediate carrier that actually caused the injury to the property shipped.[17] Prior to the enactment of the Carmack amendment, where a contract for the transportation of goods over several lines of railroad provided that notice of claim for injury should be given "to the agent at point of delivery," and the damage occurred while the goods were in the hands of the initial carrier, notice given to the agent of the final or delivering carrier was held to be a sufficient compliance with the terms of the contract,[18] even though the initial or intermediate carrier had an agent at the point of destination.[19]

Time. Where a shipping contract provides that claims in case of failure to make delivery must be made within a specified time after a reasonable time for delivery has elapsed, what constitutes a reasonable time for delivery depends on the circumstances of the particular case,[20] and means such time as is necessary conveniently to transport and make delivery of the shipment in the ordinary course of business, in the light of the circumstances and conditions surrounding the transaction,[21] reasonable time for delivery does not require the lapse of such a period as would indicate a strong probability that the property shipped would never in fact be deliv-

87, 60 L.Ed. 905, reversing Wall v. Northern Pac. Ry. Co., 145 P. 291, 50 Mont. 122.

N.H.—Ostroff v. Hustis, 114 A. 27, 80 N.H. 141.

N.C.—Gillikin & Edwards v. Norfolk Southern R. Co., 93 S.E. 469, 174 N.C. 111.

S.C.—Rubin v. Northwestern R. Co. of South Carolina, 130 S.E. 549, 133 S.C. 41.

10 C.J. p. 338 note 50

The Corpus Juris text has been cited with approval in Kershaw Oil Mill v. Northwestern R. Co. of South Carolina, 130 S.E. 647, 133 S.C. 226.

Initial carrier

(1) Under live stock shipping contract providing for notice only to agent of initial carrier, notice to the initial carrier was notice to connecting carriers.—Galveston, H. & S. A. Ry. Co. v. Gibbons, Tex.Civ.App., 202 S.W. 352.

(2) An interstate shipment contract was to require notice of damages to the initial carrier only when that carrier was sought to be held and the negligence occurred on its line.—Jordan v. Chicago, B. & Q. R. Co., App., 196 S.W. 417, transferred 191 S.W. 70, 269 Mo. 281.

17. N.C.—Aydlett v. Norfolk-Southern R. Co., 89 S.E. 1000, 172 N.C. 47.

18. Kan.—Wichita, etc., R. Co. v. Koch, 28 P. 1013, 47 Kan. 753.

Minn.—Mulrooney, etc., Co. v. Western Transit Co., 112 N.W. 988, 102 Minn. 142.

19. Minn.—Mulrooney, etc., Co. v. Western Transit Co., supra.

20. U.S.—Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 453, 283 U.S. 209, 75 L.Ed. 983, reversing judgments 143 S.E. 629, 154 Va. 1, and Chesapeake & O. Ry. Co. v. Martin & Porter, 152 S.E. 335, 154 Va. 1, certiorari granted Chesapeake & O. R. Co. v. Martin, 51 S.Ct. 23, 282 U.S. 819, 75 L.Ed. 732.

Ga.—American Ry. Express Co. v. Roberts, 111 S.E. 744, 28 Ga.App. 510.

Ill.—Cohen v. Southern Ry. Co., 193 N.E. 480, 358 Ill. 532, affirming 273 Ill.App. 116. See Hughes v. Dobson, 202 Ill.App. 54

Me.—R. P. Hazzard Co. v. Maine Cent. R. Co., 116 A. 258, 121 Me. 199.

N.Y.—Herring Bros. v. American Ry. Express Co., 192 N.Y.S. 871.

Tex.—Payne v. Smith, Civ.App., 268 S.W. 243.

Unusual period not necessarily unreasonable

That time occupied in transporting and delivering particular shipment is unusual does not conclusively show that it was unreasonable.—Payne v. Smith, Tex.Civ.App., 268 S.W. 243.

Knowledge of shipment

Under a bill of lading providing that in case of loss or failure to deliver after a reasonable time for delivery consignee to recover the value of the goods should file a claim in writing within six months thereafter, consignee should present his written claim within six months of date of shipment, and not within six months after definitely ascertaining that it had been made, unless carrier concealed the shipment from consignee or refused to issue a duplicate bill of lading on request, in which case the six months' period would date from the time shipment was disclosed to consignee.—Missouri Pac. R. Co. v. Reed, 228 S.W. 1047, 148 Ark. 118.

21. U.S.—Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 453, 283 U.S. 209, 75 L.Ed. 983, reversing 143 S.E. 629, 154 Va. 1, and Chesapeake & O. Ry. Co. v. Martin & Porter, 152 S.E. 335, 154 Va. 1, certiorari granted Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 23, 282 U.S. 819, 75 L.Ed. 732.

Ill.—Cohen v. Southern Ry. Co., 193 N.E. 480, 358 Ill. 532, affirming 273 Ill.App. 116

Me.—R. P. Hazzard Co. v. Maine Cent. R. Co., 116 A. 258, 121 Me. 199.

Facts to be considered

(1) The distance to be traveled, the transportation facilities, the time ordinarily required for like carriage, the character of the freight, the season and weather conditions, and any unusual circumstances affecting the traffic.—American Ry. Express Co. v. Roberts, 111 S.E. 744, 28 Ga.App. 510.

(2) The distance to be traveled, the situation of the parties, the character of the goods, and all the surrounding circumstances.—Moore Bros. v. American Ry. Express Co., 107 S.E. 6, 181 N.C. 300.

(3) The distance, the season of the year, weather conditions, labor conditions, and other accompanying elements.—R. P. Hazzard Co. v. Maine Cent. R. Co., 116 A. 258, 121 Me. 199.

Claim not made within time specified

Me.—R. P. Hazzard Co. v. Maine Cent. R. Co., 116 A. 258, 121 Me. 199.

N.Y.—Herring Bros. v. American Ry. Express Co., 192 N.Y.S. 871.

N.D.—Shark v. Great Northern Ry. Co., 164 N.W. 39, 37 N.D. 342.

Pa.—De Angelis v. American Ry. Express Co., 2 Pa.Dist. & Co. 493

Va.—Davis v. Rodgers, 124 S.E. 408, 139 Va. 618.

Claim made within time specified

Ill.—Cohen v. Southern Ry. Co., 193 N.E. 480, 358 Ill. 532, affirming 273 Ill.App. 116.—Babbitt v. Grand Trunk Western Ry. Co., 120 N.E. 803, 285 Ill. 267, affirming 209 Ill.App. 183.

Part of shipment lost

It has been held that, where part of a shipment was lost and was not delivered, the time within which claim must be made commenced to run from the date on which the other part of the shipment was delivered.—Jenckes Spinning Co. v. New York, N.H. & H. R. Co., 129 A. 815, 47 R.I. 72.

ered.[22] This rule applies in the case of a misdelivery.[23]

The time for making demand or claim for loss or damage in respect of a shipment of live stock may, under the particular circumstances, commence to run from the time the animals were unloaded at an intermediate station.[24] Under a stipulation requiring presentation of a written claim for damages within a specified period after it accrued, it has been held that such period began to run from the time of the wrongful delivery on which the claim was based,[25] and not from the time when claimant knew, or in the exercise of due diligence should have known, of the wrongful delivery.[26]

Notification of possible injury to a shipment before injury or damages occurred and before the shipment has reached destination is not a compliance with a stipulation for presenting or making claim within a specific time after unloading.[27]

A stipulation requiring claims to be made on taking delivery has been construed to conclude the consignee only when he has had a reasonable opportunity to examine the property involved.[28] As shown in § 240, infra, a five-day period from removal from cars for filing claims for damages to a shipment of live stock does not begin to run when they are unloaded if an opportunity to inspect them is refused.

§ 240. Excuses for Failure to Give Notice

a. Actual knowledge on part of carrier
b. Impossibility of performance; failure to discover loss or injury
c. Prevention by act of carrier
d. Want of knowledge of stipulation and loss of possession of contract
e. Other excuses

a. Actual Knowledge on Part of Carrier

State courts have frequently held that knowledge of loss or injury on the part of the carrier excuses the giving of notice of claim. As to interstate shipments, the fact that an agent of the carrier has knowledge of loss or injury does not of itself excuse a failure to comply with a stipulation as to notice or claim.

According to the view taken by various state courts, the giving of notice of claim for loss or injury provided for by the shipping contract is excused where the carrier has actual knowledge of loss or injury,[29] as in these circumstances the ne-

22. Me.—R. P. Hazzard Co. v. Maine Cent. R. Co., 116 A. 258, 121 Me. 199.

23. U.S.—Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 453, 283 U.S. 209, 75 L.Ed. 983, reversing 143 S.E. 629, 154 Va. 1, and Chesapeake & O. Ry. Co. v. Martin & Porter, 152 S.E. 335, 154 Va. 1, certiorari granted Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 23, 282 U.S. 819, 75 L.Ed. 732.

Claim not made within time specified

U.S.—Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 453, 283 U.S. 209, 75 L.Ed. 983, reversing 143 S.E. 629, 154 Va. 1, and Chesapeake & O. Ry. Co. v. Martin & Porter, 152 S.E. 335, 154 Va. 1, certiorari granted Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 23, 283 U.S. 819, 75 L.Ed. 732.

Pa.—Coroneos Bros. v. Pennsylvania R. Co., 75 Pa.Super. 222.

Time when information as to misdelivery acquired

(1) In certain state court cases, decided before Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 453, 283 U.S. 209, 75 L.Ed. 983, reversing 143 S.E. 629, 154 Va. 1, and Chesapeake & O. Ry. Co. v. Martin & Porter, 152 S.E. 335, 154 Va. 1, certiorari granted Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 23, 282 U.S. 819, 75 L.Ed. 732, which cases involved interstate shipments and misdeliveries, the view was taken that the time for making claim commenced to run from the time the shipper had knowledge or information of the misdelivery.

Ark.—St. Louis, etc., R. Co. v. Bliss-Cook Oak Co., 176 S.W. 325, 118 Ark. 323

Ohio.—Davis, Agent v. Oswald & Taube, 149 N.E. 861, 113 Ohio St. 499—Norfolk & W. Ry. Co. v. Cosmopolitan Bank & Trust Co., 174 N.E. 801, 37 Ohio App. 323.

(2) In this connection the view was expressed that the shipper has the right to assume that the delivering carrier will not make an unauthorized delivery; hence, he is not chargeable with notice of such misdelivery.—St. Louis, etc., R. Co. v. Bliss-Cook Oak Co., supra.

(3) In the particular case under consideration, the view was taken that the claim was not made in time within the meaning of the stipulation as so construed.—Norfolk & W. Ry. Co. v. Cosmopolitan Bank & Trust Co., 174 N.E. 801, 37 Ohio App. 323.

24. U.S.—Olson v. Chicago, B. & Q. R. Co., Iowa, 250 F. 372, 162 C.C.A. 442.

Loss and damage before leaving intermediate station

Where cattle, injured during first part of journey, were unloaded at way station, and shipper, having there disposed of bulk of the animals, had remainder transported under original bill of lading to destination named, but cattle were not injured in latter carriage, the ten-day period after unloading, within which demand or claim of loss was required to be given by bill of lading, ran from time of unloading at way station.—Olson v. Chicago, B. & Q. R. Co., Iowa, 250 F. 372, 162 C.C.A. 442.

25. Tex.—Davis v. First Nat. Bank of Longview, Civ.App., 245 S.W. 1009.

26. Tex.—Davis v. First Nat. Bank of Longview, supra.

27. U.S.—Olson v. Chicago, B. & Q. R. Co., Iowa, 250 F. 372, 162 C.C.A. 442.

Wyo.—Union Pac. R. Co. v. Pacific Market Co., 200 P. 108, 27 Wyo. 501, rehearing denied 206 P. 143, 28 Wyo. 461.

Telegram

A notification by telegram before damages were sustained, of the danger to which live stock was exposed, is not a compliance with a stipulation for written claim within a specified time after unloading.—Olson v. Chicago, B. & Q. R. Co., Iowa, 250 F. 372, 162 C.C.A. 442.

28. U.S.—The Texas Maru, C.C.A.N.Y., 13 F.2d 538, certiorari denied Lamborn v. The Texas Maru, 47 S.Ct. 244, 273 U.S. 736, 71 L.Ed. 866.

29. La.—Jennings v. Missouri Pac. R. Co., 134 So. 694, 697, 172 La. 522.

cessity for notice is obviated.[30] This rule is enforced against a carrier who has had possession of the property, with every opportunity to know the extent of the injury and its cause.[31] Compliance with a requirement for notice of loss or damage is not excused, however, by the fact that some agent or employee of the delivering carrier whose duties did not include the investigation of such matters or the report thereof to some agent in authority knew of the damaged condition of the shipment on arrival at destination, no agent in authority knowing that the shipment was damaged or that a claim for damages was made.[32]

A distinction has been drawn between cases where the contract merely requires notice of loss or damage and an intention to make a claim therefor, and a contract contemplating the presentation of a formal claim for damages, specifying what was lost or damaged and the amount thereof, and in the latter class of cases it has been held or recognized that, although the carrier's agent at the point of delivery was apprised of the loss, the notice required by the contract must nevertheless be given.[33] So, in the case of an intra-state shipment, it has been held that claimant cannot maintain an action for a conversion based on a misdelivery by the carrier without filing a written claim as provided for by the contract, notwithstanding the carrier participated in the wrongful conversion and that some of its employees had knowledge of the wrong and injury.[34]

Interstate shipments. The supreme court of the United States has taken the view that the mere fact that certain agents of the carrier have knowledge of the loss or injury does not relieve claimant from the necessity of reporting or making claim in writing,[35] and other courts have also held or recognized that the agent's knowledge does not of itself dispense with the obligation to comply with a stipulation for making a written claim,[36] for a written notice of claim,[37] or for a written notice of injury.[38] In some of the earlier cases in which interstate shipments were involved, state courts applied the rule that the giving of a written notice of claim for loss or injury is excused where the carried has actual knowledge of loss or injury.[39]

b. Impossibility of Performance; Failure to Discover Loss or Injury

While, according to some cases, impossibility of compliance with a stipulation as to notice or claim may excuse strict compliance, in respect of interstate shipments it has been held that mere failure to discover the loss within the time for making claim fixed by the contract does not excuse noncompliance where the carrier does not prevent the discovery.

According to some cases the shipper is excused from giving notice or making claim within the time specified in the contract, where, with the exercise of reasonable diligence, a compliance with the contract is impossible;[40] especially is this true where

Mo—Schade v. Missouri Pac R. Co., 221 S.W. 146, 204 Mo App. 88.
10 C.J. p 338 note 52.

The Corpus Juris text has been quoted with approval in Jennings v Missouri Pac. R Co., supra.

Intra-state shipment
La—Jennings v Missouri Pac. R Co., 134 So. 694, 172 La 522.
Mo.—Schade v. Missouri Pac. R Co., 221 S.W 146, 204 Mo App. 88

30. La—Jennings v. Missouri Pac R Co., 134 So. 694, 697, 172 La 522.
10 C.J p 338 note 52.

The Corpus Juris text has been quoted or cited with approval.
U.S—The Henry S Grove, D.C Wash., 292 F. 502, 504
La—Jennings v. Missouri Pac. R Co., supra.

31. La.—Jennings v. Missouri Pac. R. Co., supra
N.C—Baldwin v. Atlantic Coast Line R Co., 86 S.E 776, 170 N.C 12.

32. Ark—St. Louis, etc., R Co. v Cumbie, 177 S.W 910, 118 Ark 473
10 C.J. p 339 note 56

33. Ark.—Cumbie v. St Louis, etc., R. Co., 151 S.W. 237, 105 Ark. 406—Chicago, etc., R Co v. Williams, 142 S.W 826, 101 Ark 436.

34. Kan—Farmers' Grain & Supply Co v. Atchison, T & S F. Ry Co., 245 P. 734, 120 Kan 21, 121 Kan. 10.

35. U.S—Baltimore & O R Co v. Leach, 39 S.Ct 254, 249 U.S. 217, 63 L.Ed 570, reversing 191 S.W 310, 173 Ky 452—Southern Pac Co. v Stewart, Ariz, 39 S.Ct 139, 248 U.S 446, 63 L.Ed. 350, reversing 233 F. 956, 147 C.C.A 630, error dismissed 38 S.Ct. 130, 245 U.S 359, 62 L.Ed 345, rehearing granted 38 S.Ct 203, 245 U.S 562, 62 L Ed 473—St. Louis I M & S Ry Co v Starbird, 37 S.Ct 462, 243 U S 593, 61 L.Ed 917, reversing in part 177 S.W 912, 118 Ark 485

36. Mich—Douglas Shoe Co v. Pere Marquette Ry. Co., 217 N.W. 12, 241 Mich. 297
N.C.—Taft & Vandyke v. Atlantic Coast Line R. Co., 93 S.E. 752, 174 N.C 211.

37. Mo.—Cunningham v. Missouri Pac. R Co., App, 219 S.W. 1003—O'Briant v Pryor, App, 195 S.W. 759—Johnson v Missouri Pac. Ry. Co., App, 187 S.W. 282.

38. Kan—Kirby v. Missouri, K. & T R Co., 246 P 1005, 121 Kan 275

Presence of carrier's representative
Presence of representative of carrier at unloading will not obviate compliance with interstate live stock shipping contract providing for written notice of visible injury to stock before removal from carrier's possession or mingling with other stock—Kirby v. Missouri, K. & T. R. Co., 246 P. 1005, 121 Kan. 275

Acquisition of knowledge and termination of shipment
The view was taken that the shipper's right to recover was not defeated by a failure to give written notice of visible or manifest injury to animals before removal from possession of carrier, where carrier was the first to discover injury and unloaded the animals and terminated the shipment prematurely, without notice to the shipper—Morrow v Wabash Ry. Co., 265 S.W. 851, 219 Mo.App 62.

39. N.C—Washington Horse Exch v. Louisville, etc., R. Co., 87 S.E. 941, 171 N.C. 65
10 C.J. p 338 note 52.

40. Cal—Bliss v. Southern Pac. Co., 172 P. 760, 36 Cal.App. 536.

the impossibility of performance is caused by the act of the carrier itself, as shown in the following subdivision of this section. To hold that a stipulation required notice of damages to be given before it was discovered, or could by the exercise of ordinary care have been discovered, would be to give the stipulation an unreasonable construction.[41] However, the fact that the shipper notified the carrier of the injury to the goods will not exempt him from the operation of the requirement, where he made no effort to discover the condition of the goods until after the time for giving notice had expired.[42] It has been held, in respect of an interstate shipment, that mere failure to discover the loss within the time for making claim fixed by the shipping contract does not excuse a failure to comply with the requirement where the carrier does not do anything to prevent the discovery of the loss.[43]

While there is authority for the contrary view,[44] it has been held that, even though the time allowed for giving notice or making claim is unreasonably short,[45] or there is a reasonable excuse for not complying with the stipulation,[46] it is none the less necessary that notice should be given within a reasonable time. Notice given within such a reasonably short time as will effectually secure the carrier from fraud will satisfy the requirement of this rule.[47]

c. Prevention by Act of Carrier

An act of the carrier which renders compliance with a stipulation impossible excuses failure to comply.

Failure to give notice in time is excused when some act of the carrier renders it impossible to comply with the stipulation requiring it.[48] A five-day period from removal from cars for filing claims for damages to a shipment of live stock will not begin to run when they are unloaded if an opportunity to inspect them is refused.[49]

d. Want of Knowledge of Stipulation and Loss of Possession of Contract

Want of actual notice of a stipulation in a contract covering an interstate shipment does not necessarily excuse the shipper's noncompliance with such stipulation.

The fact that the shipper did not have actual notice of a stipulation in a contract covering an interstate shipment requiring claim in writing within a specified time does not excuse his failure to comply with such stipulation where the agent of the shipper signed the contract and the tariffs filed by the carrier with the interstate commerce commission provides for such a stipulation.[50] The mere fact that the copy of the contract given to the shipper's agent who accompanied a shipment of live stock was used as transportation on the return trip of said

Ohio—Davis v. Oswald & Taube, 149 N.E. 861, 113 Ohio St. 499, certiorari denied Mellon v. Oswald & Taube, 46 S.Ct. 354, 270 U.S. 658, 70 L.Ed 785.
10 C.J. p 339 note 59.

Live stock
Shipper of live stock was not required to give written notice of loss within ten days after unloading as specified by contract, where extent and character of damage could not be ascertained within such time—Bliss v. Southern Pac. Co., 172 P. 760, 36 Cal.App. 536.

41. Ga.—Louisville, etc., R. Co. v. Tharpe, 75 S.E. 677, 11 Ga.App. 465.

Disease in live stock developing after arrival
Where pneumonia in live stock did not develop until three days after arrival, there was a reasonable excuse for not presenting claim within five days from the arrival of such stock at destination—Chicago, I. & L. Ry. Co. v. Blankenship, 127 N.E. 209, 77 Ind.App. 225.

42. Mo.—Freeman v. Kansas City Southern R. Co., 93 S.W. 302, 118 Mo.App. 526

43. W.Va.—Kahn v. American Railway Express Co., 106 S.E. 126, 88 W.Va. 17.

Notice given when negligence of carrier discovered
(1) It has been held that failure to present claim based on the carrier's delivery of live stock different from, and inferior to, the animals shipped, within the period fixed in the stipulation after removal from cars did not preclude recovery where notice of the claim was given without delay as soon as the negligence of the carrier which occasioned the loss was discovered, in a case in which an interstate shipment was involved—Chesapeake & O. Ry. Co. v. Rebman & Clark, 90 S.E. 629, 120 Va. 71.

(2) But the supreme court of the United States in commenting on the case of Chesapeake & O. Ry. Co. v. Rebman & Clark, supra, and the fact that that case had been followed in the case at bar said that "the vice of this position is that, in following its own prior decision, the court ignored the decision of this court to the contrary"—Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 453, 458, 283 U.S. 209, 75 L.Ed. 983, reversing 143 S.E. 629, 154 Va. 1, and Chesapeake & O. Ry. Co. v. Martin & Porter, 152 S.E. 335, 154 Va. 1, certiorari granted Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 23, 282 U.S. 819, 75 L.Ed. 732.

44. Ark.—Eoff v. Scullin, 179 S.W. 663, 120 Ark. 452.
10 C.J. p 333 note 77.

45. U.S.—The St. Hubert, D.C.Pa., 102 F. 362, affirmed 107 F. 727, 46 C.C.A. 603, certiorari denied 21 S.Ct. 925, 181 U.S. 621, 45 L.Ed 1032.
Mo.—Letts v. Wabash R. Co., 111 S.W. 138, 131 Mo.App. 270
N.Y.—Osterhoudt v. Southern Pac. Co., 62 N.Y.S. 134, 47 App.Div. 146.
N.C.—Deans v. Atlantic Coast Line R. Co., 67 S.E. 332, 152 N.C. 171
10 C.J. p 333 note 76.

46. Ind.—Chicago, I. & L. Ry. Co. v. Blankenship, 127 N.E. 209, 77 Ind.App. 225

Live stock
Where pneumonia in live stock did not develop until three days after delivery, shipper was not relieved entirely from giving notice within reasonable time, and seventy-five days was not reasonable time.—Chicago, I. & L. Ry. Co. v. Blankenship, 127 N.E. 209, 77 Ind.App. 225.

47. Ala.—Louisville, etc., R. Co. v. Landers, 33 So. 482, 135 Ala. 504.
Mo.—Harned v. Missouri Pac. R. Co., 51 Mo.App. 482.
Okl.—Chicago, etc., R. Co. v. Spears, 122 P. 228, 31 Okl. 469.

48. Ind.—Cleveland, etc., R. Co. v. Hayes, 102 N.E. 34, 103 N.E. 839, 104 N.E. 581, 181 Ind. 87.
10 C.J. p 340 note 66.

49. Ind.—Cleveland, etc., R. Co. v. Hayes, 102 N.E. 34, 103 N.E. 839, 104 N.E. 581, 181 Ind. 87

50. Ill.—Keasler v. Baltimore & O. S.W. R. Co., 203 Ill.App. 61.

agent and was taken up at the end of the trip did not excuse compliance with a stipulation for the giving of notice of claim for damages before removal of animals from place of destination or of delivery.[51] It has been held, however, in the case of an interstate shipment, that the shipper is not bound by a stipulation requiring a claim in writing if he was not given opportunity to ascertain that such stipulation was embodied in the writing and knew nothing of it before his property was loaded and started en route.[52]

e. Other Excuses

According to some cases, failure of the claimant to file claim or notice within the time fixed may be excused by the fact that the carrier undertook to trace the goods or by the fact that a duly authorized agent of the carrier has granted an extension of time.

Where, as soon as he was apprised of the loss, the shipper called on the carrier for an explanation, and time was taken by the carrier in searching for and tracing goods which it finally stated could not be found, such facts excuse the shipper from presenting a formal claim in writing, in compliance with the shipping contract, at an earlier date.[53]

In respect of an interstate shipment, the view has been taken that an extension of time for filing a notice of a claim for loss or injury, granted by a duly authorized agent of the carrier, is valid, and that such an extension does not amount to a violation of the interstate commerce commission's rules and regulations. An extension may be made by indorsing the same on the receipted freight bill delivered to the shipper.[54] This asserted right of an agent to extend the time should, however, be considered with the view taken in more recent cases which deny the power of a carrier to waive stipulations for notice or claim in contracts for interstate shipments, set forth in § 241 infra.

As pointed out in § 241, however, it has frequently been held or recognized that stipulations of the type here under consideration cannot be waived in the case of an interstate shipment.

§ 241. Waiver of Notice of Claim for Loss or Injury

a. In general
b. What amounts to waiver
c. Time for waiver
d. Who may waive for carrier
e. Contractual prohibition against waiver

a. In General

As to interstate shipments, the carrier does not have unlimited power to waive stipulations for notice or claim. As to intra-state shipments, in some jurisdictions at least these stipulations may be waived.

It has frequently been held or recognized that, so far as interstate shipments are concerned, a stipulation in the shipping contract for making a written claim,[55] a stipulation in the shipping contract

51. Mo.—Bilby v. Atchison, T. & S. F. Ry. Co., App., 199 S.W. 1004.

52. Tex.—Pecos, etc., R. Co. v. Crews, Civ.App., 139 S.W. 1049.

53. N.Y.—Ghormley v. Dinsmore, 51 N.Y.Super. 196, reversed on other grounds 53 N.Y.Super. 36.

54. Ill.—Clingan v. Cleveland, etc., R. Co., 184 Ill.App. 202.

55. U.S.—Georgia, F. & A. R. Co. v. Blish Milling Co., 36 S.Ct. 541, 241 U.S. 190, 60 L.Ed. 948.
Ark.—Kusin v. Chicago, R. I. & P. Ry. Co., 270 S.W. 597, 168 Ark. 293.
D.C.—American Ry. Express Co. v. Fashion Shop, 10 F.2d 909, 56 App. D.C. 114.
Ga.—American Ry. Express Co. v. Roberts, 111 S.E. 744, 28 Ga.App. 510, overruling American Ry. Express Co. v. Bothwell, 104 S.E. 644, 25 Ga.App. 728.
Ind.—Herran v. Chicago & E. R. Co., 135 N.E. 253, 78 Ind.App. 253.
Md.—Bronstein v. Payne, 113 A. 648, 138 Md. 116.
Mass.—Metz Co. v. B. & M. R. R., 116 N.E. 475, 227 Mass. 307.
Minn.—Carbic Mfg. Co. v. Western Express Co., 184 N.W. 35, 149 Minn. 467.
N.Y.—Meyers v. Cleveland, C., C. & St. L. R. Co., 171 N.Y.S. 71, 185 App.Div. 453—Dworsky v. Pennsylvania R. Co., 289 N.Y.S. 932, 160 Misc. 360.
Pa.—De Angelis v. American Ry. Express Co., 2 Pa.Dist. & Co. 493.
R.I.—Jenckes Spinning Co. v. New York, N. H. & H. R. Co., 129 A. 815, 47 R.I. 72.
S.C.—Murray v. Atlantic Coast Line R. Co., 93 S.E. 387, 108 S.C. 88.
Tex.—Schaff v. Ike Exstein & Bro., Civ.App., 270 S.W. 589.
Va.—Chesapeake & O. Ry. Co. v. National Fruit Products Co., 155 S.E. 630, 155 Va. 438, 72 A.L.R. 878.
10 C.J. p. 340 note 71.

The Corpus Juris text has been quoted or cited with approval.
N.Y.—Meyers v. Cleveland, C., C. & St. L. R. Co., 171 N.Y.S. 71, 73, 183 App.Div. 453.
Va.—Chesapeake & O. Ry. Co. v. National Fruit Products Co., 155 S.E. 630, 634, 155 Va. 438, 72 A.L.R. 878.

Custom cannot effect waiver
In a case in which the court apparently recognized the rule stated in the text, the view was expressed that custom of shipper of cotton to delay ascertainment of shortages in shipments until end of busy season could not effect a waiver of stipulation for claim within period required by bill of lading.—Davis v. Rodgers, 124 S.E. 408, 139 Va. 618.

Even prior to the decision in the Blish case, some state courts had determined that a stipulation for written claim in a contract covering an interstate shipment could not be waived.—Kemper Mill Co. v. Missouri Pac. Ry. Co., 186 S.W. 8, 193 Mo.App. 466—Banaka v. Missouri Pac. Ry. Co., 186 S.W. 7, 193 Mo.App. 345—Hull v. Chicago Great Western R. Co., 185 S.W. 1155, 193 Mo.App. 425.

Authority of interstate commerce commission
"It will be readily seen from the statement of the Interstate Commerce Commission itself . . . that that Commission was clearly of the opinion that it had no authority to authorize appellant [carrier] to waive the stipulation in question [claim in writing within four months after delivery], same being a part of its traffic schedule; and if it be true

for notice of claim,[56] or for notice of loss or injury,[57] cannot be waived, and that such a waiver would constitute an invalid discrimination, as shown in § 364 infra. Since the decision in Georgia, F. & A. R. Co. v. Blish Milling Co., 36 S. Ct. 541, 241 U.S. 190, 60 L.Ed. 948, some state courts have regarded the rule as settled that there cannot be a waiver of stipulations of the type here under consideration in the case of interstate shipments,[58] but even since such decision some state court decisions have recognized the operative effect of waivers in respect of such stipulations and in the case of interstate shipments.[59] The supreme court of the United States has apparently not made a definite ruling as to the scope and extent of the rule against waiver in interstate cases, and, in a comparatively recent case in which the Blish case was cited with approval and it was held that the carrier was not estopped to claim the benefit of a stipulation requiring a written claim where there had been a misdelivery of the property shipped,[60] the court said that it was unnecessary to decide whether or not under any circumstances the shipper may rely on the doctrine of estoppel to avoid the clause of the contract as to the time for making claim.[61]

Prior to the decision in the Blish case it was very

that the Interstate Commerce Commission had no authority to authorize appellant to waive this stipulation, and if appellant, without such authorization, was without authority to waive the same, then it follows that, from a legal standpoint, there could be no waiver of this stipulation in this bill of lading, either express or by implication; and we are inclined to think that the Interstate Commerce Commission did not, as admitted by it, have the authority to empower appellant, as an interstate commerce carrier, to do that which, under the acts of Congress, appellant was forbidden to do."—Houston E. & W. T. Ry. Co. v. Houston Packing Co., Tex.Civ.App., 203 S.W. 1140, 1144.

Conversion of goods by carrier

The rule stated in the text was recognized as applicable in cases in which the goods are converted by the carrier—Georgia, etc., R. Co. v. Blish Milling Co., 36 S.Ct. 541, 241 U.S. 190, affirming on other grounds 82 S.E. 784, 15 Ga.App. 142.

56. Colo.—Atchison, T. & S. F. Ry. Co. v. Miller, 163 P. 836, 63 Colo. 46
Mo.—O'Briant v. Pryor, App., 195 S.W. 759—Johnson v. Missouri Pac. Ry. Co., App., 187 S.W. 282—Thompson v. Atchison, T. & S. F. R. Co., App., 185 S.W. 1145.
S.C.—Dean v. Southern Ry. Co., 91 S.E. 1042, 107 S.C. 25.

Live stock

Verbal notice of injury to live stock given to a clerk in office of delivering carrier was not a waiver of original carrier's stipulation requiring written notice of claim—Bryan v. Louisville & N. R. Co., 93 S.E. 750, 174 N.C. 177.

57. Mo.—Donoho v. Missouri Pac. Ry. Co., 187 S.W. 141, 193 Mo.App. 610
Okl.—Chicago, R. I. & P. Ry. Co. v. Brockmeier, 168 P. 1011, 66 Okl. 280—Chicago, R. I. & P. Ry. Co. v. Gray, 165 P. 157, 65 Okl. 181—Chicago, R. I. & P. Ry. Co. v. Parsons, 162 P. 955, 62 Okl. 290.

58. Ga.—American Ry. Express Co. v. Roberts, 111 S.E. 744, 28 Ga.App. 510.
Md.—Bronstein v. Payne, 113 A. 648, 138 Md. 116.
Mass.—Metz Co. v. Boston & M. R. R., 116 N.E. 475, 227 Mass. 307.
Okl.—Chicago, R. I. & P. Ry. Co. v. Gray, 165 P. 157, 65 Okl. 181.
10 C.J. p. 340 note 73.

59. **Waiver has been recognized or upheld**

(1) As to requirement of claim in writing.
Ark.—American Railway Express Co. v. Thompson, 43 S.W.2d 750, 184 Ark. 898—Wells Fargo & Co. Express v. Townsend & Freeman Co., 204 S.W. 417, 134 Ark. 560.
Miss.—Bernstein v. Yazoo & M. V. R. Co., 77 So. 146, 116 Miss. 682.
N.C.—Reynolds v. Adams Express Co., 90 S.E. 510, 172 N.C. 487, Ann.Cas.1918C 1071, error dismissed Adams Express Co. v. Reynolds, 39 S.Ct. 183, 248 U.S. 548, 63 L.Ed. 416.

(2) As to notice of claim.
Ark.—H. Rouw Co. v. St. Louis-San Francisco Ry. Co., 290 S.W. 936, 172 Ark. 881.
Miss.—Illinois Cent. R. Co. v. Bauer, 75 So. 376, 114 Miss. 516.

(3) As to time for giving written notice of claim.—New Orleans & N. E. R. Co. v. Wood, 73 So. 615, 112 Miss. 614.

(4) As to notice of loss or damage.—Bush v. Curry, 199 S.W. 375, 131 Ark. 237.

(5) Apparently also, as to verification of written claim by shipper or his agent.—Slider v. Pere Marquette R. Co., 161 N.W. 961, 194 Mich. 581.

View that stipulation may be waived

The view was expressed in a syllabus by the court, in a case involving an interstate shipment, that a carrier may waive the benefit of a limitation as to presentation of written claim by express agreement or inconsistent conduct, but it was held that in the case involved there was not a waiver.—Kahn v. American Railway Express Co., 106 S.E. 126, 88 W.Va. 17.

60. U.S.—Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 453, 283 U.S. 209, 75 L.Ed. 983, reversing 143 S.E. 629, 154 Va. 1, and Chesapeake & O. Ry. Co. v. Martin & Porter, 152 S.E. 335, 154 Va. 1, certiorari granted Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 23, 282 U.S. 819, 75 L.Ed. 732.

Delivery contrary to instructions

The fact that delivery was made contrary to instructions, due to the misunderstanding or negligence of the carrier, cannot be set up as an estoppel against the claim of a failure to comply with the requirement of a provision of the contract that a written claim shall be made within a specified time.—Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 453, 283 U.S. 209, 75 L.Ed. 983, reversing 143 S.E. 629, 154 Va. 1, and Chesapeake & O. Ry. Co. v. Martin & Porter, 152 S.E. 335, 154 Va. 1, certiorari granted Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 23, 282 U.S. 819, 75 L.Ed. 732.

61. U.S.—Chesapeake & O. Ry. Co. v. Martin, supra.

Facts insufficient to show waiver

With regard to a requirement for a demand or claim in writing within a specified time, the court considered certain circumstances relied on by the shipper to show a waiver and held that such circumstances were inadequate to show a waiver by the carrier of written notice required by the contract—Southern Pac. Co. v. Stewart, Ariz., 39 S.Ct. 139, 248 U.S. 446, 63 L.Ed. 350, reversing 233 F. 956, 147 C.C.A. 630, in which error is dismissed 38 S.Ct. 130, 245 U.S. 359, 62 L.Ed. 345, rehearing granted 38 S.Ct. 203, 254 U.S. 562, 62 L.Ed. 472.

Estoppel

(1) In a case in which it does not appear whether the shipment was interstate or intra-state, it was held that, while the carrier could not waive the provision of the contract for making a written claim within a specified time, it was estopped to set up, in a suit by the shipper, the

generally held both in respect of intra-state and interstate shipments that the provision was for the benefit of the carrier and might be waived,[62] in which case the action could not be defeated because of such omission.[63] This principle still applies, in some jurisdictions at least, so far as intra-state shipments are concerned.[64]

It has been stated broadly that the carrier, in order to avail itself of stipulations of this nature, must show that it has done nothing to mislead the shipper or cause him to believe that he has waived the requirement.[65]

b. What Amounts to Waiver

(1) In general
(2) Failure to object to oral notice or claim
(3) Failure to object for want of verification
(4) Rejecting claims or grounds other than want of, or defect in, notice or claim
(5) Misleading claimant as to necessity of notice or claim
(6) Other acts or conduct

(1) In General

Waiver, if permissible, may be express or implied from conduct.

The waiver need not be and seldom is express, but may be implied from the conduct of the carrier.[66] It has been held, however, that, if waiver by conduct is relied on, it must appear that the shipper was caused to occupy a more disadvantageous position than he would have occupied but for that conduct;[67] in other words the conduct of the carrier must have misled claimant to his detriment or prejudice.[68]

Where the requirement as to making a claim for damages within the time and in the manner specified can be waived, it may be waived by failing to object to the form of a defective notice, or by entertaining and proceeding to consider and negotiate with reference to the claim,[69] but it has been held

fact that written claim had not been filed within the time fixed where it had prevented the shipper from filing the claim by informing him that the consignee, and not the shipper, was the proper person to file the claim.—Pope v. American Ry. Express Co., 110 S.E. 514, 28 Ga.App. 190.

(2) In the case of an interstate shipment, it has been held that a carrier may be estopped from asserting the insufficiency of a claim which the carrier has treated, and acted on, as sufficient.—S. L. Jones & Co. v. Davis, 223 P. 560, 65 Cal.App. 164.

(3) In a case in which the view was apparently taken that the stipulation for written claim did not apply, there are intimations that if claimant was induced by the carrier to, withhold claim, the latter could not take advantage of a failure to file in time.—Baltimore & O. R. Co. v. Fish & Lybarger Co., 155 N.E. 508, 23 Ohio App. 179.

62. Md.—Bronstein v. Payne, 113 A. 648, 138 Md. 116.
N.C.—Schloss-Bear-Davis Co. v. Louisville & N. R. Co., 88 S.E. 476, 171 N.C. 350.
10 C.J. p. 340 note 76.

Ruling of interstate commerce commission

In one of the earlier cases involving an interstate shipment, in which it was held that the written notice of claim for damages could be waived, it was also held that the ruling of the interstate commerce commission No. 456 dealing with the form of written notice did not show that there could not be a waiver.—Schloss-Bear-Davis Co. v. Louisville & N. R. Co., 88 S.E. 476, 171 N.C. 350.

63. Mo.—Blackmer, etc., Pipe Co. v. Mobile, etc., R. Co., 119 S.W. 1, 137 Mo.App. 479.—Summers v. Wabash R. Co., 79 S.W. 481, 114 Mo.App. 452, appeal dismissed 26 S.Ct. 745, 199 U.S. 610, 50 L.Ed. 332.
10 C.J. p. 340 note 76.

64. Ga.—Heath v. Sandersville R. Co., 98 S.E. 92, 23 Ga.App. 255.
Mich.—Ithaca Roller Mills v. Ann Arbor R. Co., 163 N.W. 934, 197 Mich. 440.
Minn.—E. L. Welch Co. v. Chicago, M. & St. P. Ry. Co., 175 N.W. 100, 144 Minn. 471.
Mo.—Schade v. Missouri Pac. R. Co., 221 S.W. 146, 204 Mo.App. 88.—Hull v. Chicago Great Western R. Co., 185 S.W. 1155, 193 Mo.App. 425.
10 C.J. p. 340 note 76, p. 341 note 78.

65. Miss.—Lasky v. Southern Express Co., 45 So. 869, 92 Miss. 268.

66. Okl.—St. Louis, etc., R. Co. v. Ladd, 124 P. 461, 33 Okl. 160.
10 C.J. p. 341 note 80.

Care of property after injury

Requirement in contract of shipment of horse for written notice of claim within thirty days was waived, where carrier's agents had actual notice of accident and circumstances, and the carrier sent a veterinarian to treat the horse.—Reynolds v. Adams Express Co., 90 S.E. 510, 172 N.C. 487, Ann.Cas.1918C 1071, error dismissed Adams Exp. Co. v. Reynolds, 39 S.Ct. 183, 248 U.S. 548, 63 L.Ed. 416.

67. Ga.—Lynch v. Southern Express Co., 90 S.E. 655, 18 Ga.App. 761, conforming to answers to certified questions 90 S.E. 527, 146 Ga. 68.
10 C.J. p. 341 note 81.

68. S.C.—Manning Oil Mill v. Northwestern R. Co. of South Carolina, 105 S.E. 343, 115 S.C. 224.
Tex.—International & G. N. R. Co. v. Hudson, Civ.App., 188 S.W. 277.

Denial of liability

Railroad company, did not waive its right to written claim for damages provided for by bill of lading, where it denied liability for such damages, and did nothing to mislead the shipper to its detriment or prejudice.—Manning Oil Mill v. Northwestern R. Co. of South Carolina, 105 S.E. 343, 115 S.C. 224.

Notice of injury

In view of the fact that waiver is founded largely on the doctrine of estoppel, the conduct of the carrier must have misled claimant and prevented him from giving notice as to injury to live stock required by the contract, in order that such conduct may constitute a waiver.—International & G. N. R. Co. v. Hudson, Tex.Civ.App., 188 S.W. 277.

69. Iowa.—E. H. Emery & Co. v. Wabash R. Co., 166 N.W. 600, 183 Iowa 687.
Miss.—Illinois Cent. R. Co. v. Bauer, 75 So. 376, 114 Miss. 516.
10 C.J. p. 341 note 83.

Facts not presenting case of waiver

Utah.—Baird v. Denver & R. G. R. Co., 162 P. 79, 49 Utah 58.

that the mere receipt and investigation of a written claim which is not filed in time does not necessarily constitute a waiver.[70] A waiver of the benefit of a stipulation for written claim may not be predicated on conduct which neither admits liability nor denies it, on receipt of oral notice of loss after expiration of the time fixed, where the carrier later invokes the protection of the stipulation on disclosure of the fact of loss, the time, and the surrounding circumstances.[71]

(2) Failure to Object to Oral Notice or Claim

Waiver of requirement that claim shall be in writing may be effected by the carrier's receiving, and acting on, an oral claim without objection.

Where a waiver is permissible, a carrier by accepting a verbal claim for loss or injury without protest, and by undertaking to deal with the claim, thereby waives the requirement in the contract of shipment that claims shall be in writing,[72] and a like rule applies to a failure to object to an oral notice of claim for damage.[73]

(3) Failure to Object for Want of Verification

Want of verification of a claim may be waived by receiving, and acting on, an unverified claim without objection to absence of verification.

Where waiver is permissible, failure to object to a claim for want of verification in accordance with the contract of shipment, and entering into negotiations for a settlement thereof,[74] or investigating the merits of the claim,[75] or a direct denial of liability for the loss or injury sustained,[76] amounts to a waiver of an objection on the ground that the claim was not verified.

(4) Rejecting Claims or Grounds Other than Want of, or Defect in, Notice or Claim

Rejection of a claim on a particular ground ordinarily is a waiver of other grounds of objection not asserted by the carrier.

Where waiver is permissible, the rejection of a claim on grounds other than noncompliance or an insufficient compliance with a contractual requirement that notice of claim for loss or injury shall be given or claim made operates as a waiver of the contractual requirement.[77] In other words, where the carrier states a specific ground of objection, any other objection which it could have made is waived.[78] There is not a waiver, however, where claimant was not induced to delay action or to act to his injury by the conduct of the carrier.[79]

70. Ill—Pennsylvania Co. v. M. Piowaty & Sons, 207 Ill App 176

71. W Va.—Kahn v. American Railway Express Co, 106 S E. 126, 88 W Va. 17.

72. Cal.—Bliss v. Southern Pac. Co., 172 P. 760, 36 Cal.App. 536.
Miss—Bernstein v. Yazoo & M. V. R Co, 77 So 146, 116 Miss. 382.
10 C J p 341 note 85.

The Corpus Juris text has been cited with approval in The Henry S. Grove, D C Wash, 292 F. 502, 505.

Goods lost in transit

Where carrier made an investigation on verbal notice, reported to claimant that failure to deliver was due to negligence of carrier's agent, and led claimant to believe that there was no necessity for written notice, there was a waiver of stipulation for written claim.—American Railway Express Co v. Thompson, 43 S W 2d 750, 184 Ark. 893.

Investigation and suggestions or directions as to care of property

The right to written notice of damages is waived if after receiving less formal notice, the carrier proceeds to investigate the damage suffered and makes suggestions, or gives directions as to the care or disposition of the damaged property—Bliss v. Southern Pac. Co., 172 P. 760, 36 Cal App. 536.

73. Ga—Heath v Sandersville R Co., 98 S E 92, 23 Ga.App 255.

Injury to animal

Where, in an action for injuries to a jack shipped, plaintiff called the attention of defendant's agent to the condition of the animal when unloaded at destination, and such agent suggested that a named veterinary be called, a written notice of claim for damage was waived—Schade v. Missouri Pac. R. Co., 221 S W. 146, 204 Mo App. 88.

74. Mich—Soper v. Pontiac, etc, R Co, 71 N W. 853, 113 Mich 443.
Miss—Williams v. Yazoo, etc, R Co, 46 So 399, 93 Miss. 77—Illinois Cent R. Co. v. Bogard, 27 So 879, 78 Miss. 11.
Mo—Summers v. Wabash R Co, 79 S W. 481, 114 Mo App. 452, appeal dismissed 26 S Ct. 745, 199 U.S 610, 50 L Ed 332.

75. Mo—Farmers' Bank v St Louis, etc., R Co, 95 S.W. 286, 119 Mo App. 1—Bushnell v Wabash R Co, 94 S W. 1001, 118 Mo.App. 618

76. Mo—Ingwersen v. St. Louis, etc, R. Co., 92 S.W. 357, 116 Mo App. 139.

77. Ga.—Post v. Atlantic Coast Line R Co., 76 S.E 45, 138 Ga. 763
10 C.J p 342 note 91.

Live stock

Carrier, by treating claim of shipper of hogs for shrinkage as filed in time and being formally sufficient, denying liability on the merits, waived formal compliance with provision of contract of shipment requiring written notice of claims for damages within ten days—Hull v. Chicago Great Western R. Co., 185 S.W 1155, 193 Mo.App. 425.

Retention of claim and rejection on distinct grounds

Although the shipper did not make a claim for damages to goods shipped over its railroad within the time provided by the bill of lading, where the claim filed was retained by defendant almost a year without protest, and defendant placed its refusal to adjust on distinct grounds, it waived the right to insist, after plaintiff had incurred the expense of litigation, on another defense that the claim was not filed within such time—Ithaca Roller Mills v Ann Arbor R. Co, 163 N W. 934, 197 Mich. 440

78. Ind.—Cleveland, etc, R. Co v. Heath, 53 N E. 198, 22 Ind App. 47.

79. U.S—The Texas Maru, C C.A N. Y, 13 F.2d 538, certiorari denied Lamborn v. The Texas Maru, 47 S.Ct. 244, 273 U.S 736, 71 L Ed. 866
Ga—Lynch v Southern Express Co., 90 S.E. 655, 18 Ga.App. 761, con-

(5) Misleading Claimant as to Necessity of Notice or Claim

In general, conduct of the carrier which misleads the claimant as to the necessity of giving notice constitutes a waiver.

Where waiver is permissible, and the acts of the carrier are such as to mislead the owner of the goods as to the necessity of giving notice, it must be considered to have waived notice.[80] Even though the act of the carrier was unintentional, it cannot claim through the very acts which misled the owner.[81]

(6) Other Acts or Conduct

Waiver may be effected by acts of the carrier or its attorney on the trial of the action based on the claim in question. Correspondence between the carrier and the claimant relative to the claim or the knowledge of the existence of a possible claim, on the part of the carrier's representative, does not necessarily constitute a waiver.

Where waiver is permissible, the requirement of notice is waived where in an action for damages caused by delay defendant moves for a nonsuit, and failure to give the required notice is not made a ground of the motion.[82] Likewise a provision for notice of claim may be waived by express statement of the attorney for defendant carrier at the trial of the action based on the claim.[83] Where the carrier included in his statement of defense the alleged failure of claimant to make claim in writing in accordance with contract stipulation and facts as to the time of making claim were developed in the evidence, there was not a waiver of the stipulation on the part of the carrier.[84]

Where the routing in a shipper's receipt is deviated from by the fault of an initial carrier, it cannot take advantage of a stipulation in the bill of lading concerning the time for giving notice of a claim for damages or valuation of property in case of loss.[85]

A letter from the claim agent of the carrier, written soon after the shipment was lost, admitting the loss and directing the shipper to replace the shipment at the carrier's expense is a waiver of a stipulation for written claim.[86] Sending a letter by the agent of the carrier to the shipper after his failure to file notice of claim within the required time, which does no more than show a possible willingness to treat with the shipper after receiving and examining papers asked for, does not amount to a waiver of the requirement of notice.[87]

The act of the carrier in sending out tracers for a lost shipment after its exemption from liability has attached under a provision of the bill of lading requiring written claim for loss within a specified time is not a waiver of the exemption.[88]

Mere knowledge on the part of the claim agent of a railway company that the shipper claimed damages for injuries to his cattle, unaccompanied by any act on the part of the claim agent looking to the adjustment of the loss, is not sufficient to constitute a waiver of the stipulation requiring the claim to be made in writing within a prescribed time.[89] The mere fact that defendant's veterinary surgeon examined stock transported and reported the result of his examination to one of defendant's officers is not enough to warrant a reasonable inference of the waiver of the stipulation requiring notice.[90]

Where, in an action against a carrier of live stock for shrinkage and loss by decline in the market by delay in transportation, the parties by stipulation fixed the loss by decline in market and the loss from shrinkage, and agreed that the shipment was under a special contract limiting the liability of the carrier, and that the condition of the stock was poor when it arrived at destination too late for the market on the day of arrival, the stipulation was held not a waiver of notice by the shipper of loss from shrinkage.[91]

c. Time for Waiver

There is authority both in support of and also against the view that the acts constituting the alleged waiver must occur before the time limited for compliance with the stipulation has expired.

In a number of decisions it is held that acts relied on to constitute a waiver of a contractual re-

forming to answers to certified questions 90 S.E. 527, 146 Ga. 68.

80. N.Y.—Marrus v. New Haven Steamboat Co., 62 N.Y.S. 474, 30 Misc. 421, reversing 60 N.Y.S. 994 10 C.J. p 342 note 94.

81. N.Y.—Marrus v. New Haven Steamboat Co., 62 N.Y.S. 474, 30 Misc. 421, reversing 60 N.Y.S. 994.

82. N.Y.—Richardson v. New York Cent., etc., R. Co., 106 N.Y.S. 702, 122 App.Div. 120.

83. Ark.—H. Rouw Co. v. St. Louis-San Francisco Ry. Co., 200 S.W. 936, 172 Ark. 881.

84. Va.—Chesapeake & O. Ry. Co. v. National Fruit Products Co., 155 S.E. 630, 155 Va. 438, 72 A.L.R. 878.

85. Ill.—Watson v. Missouri Pac. R. Co., 187 Ill.App. 220.

86. Ark.—Wells Fargo & Co. Express v. Townsend & Freeman Co., 204 S.W. 417, 134 Ark. 560.

87. Va.—Atlantic Coast Line R. Co. v. Bryan, 65 S.E. 30, 109 Va. 523

88. Va.—Old Dominion SS. Co. v. Flanary, 69 S.E. 1107, 111 Va. 816. 10 C.J. p 342 note 1.

89. Ark.—St. Louis, etc., R. Co. v. Shepherd, 168 S.W. 137, 113 Ark. 248.

90. S.C.—Crawford v. Southern R. Co., 86 S.E. 19, 101 S.C. 522.

91. Mo.—Riddler v. Missouri Pac. R. Co., 171 S.W. 632, 184 Mo.App. 709. 10 C.J. p 343 note 4.

quirement as to notice must occur before the expiration of the time limited for giving notice; otherwise they do not amount to a waiver.[92] The weight of authority, however, is to the contrary,[93] the view being taken that "it is inconsistent with the claim of immunity from liability that it should recognize any obligation to the plaintiff after the expiration" of the time limited for presenting the notice.[94]

d. Who May Waive for Carrier

In general, agents authorized to receive, on behalf of the carrier, claims for damages may, under certain circumstances, waive stipulations here under consideration if waiver is otherwise permissible.

Where waiver is permissible in general, agents authorized to receive claims or notice for damages have power to waive compliance by acts or conduct reasonably calculated to induce the shipper to believe that written notice would not be required.[95] There is authority for the view that a station agent without express authority has no power to waive a stipulation in a contract of shipment requiring notice of claim for loss or damages,[96] and, in the case of an interstate shipment, the right of an agent of the delivering carrier to waive by his conduct, in connection with the fact that he had oral notice of the claim, a verified written claim has been denied.[97]

In case of connecting carriers, it has been held that the terminal carrier does not have power as agent of the initial carrier to bind the initial carrier by a custom or agreement waiving a stipulation that notice of claim be filed within a certain time.[98]

e. Contractual Prohibition against Waiver

A provision of the shipping contract that no agent of the carrier may waive any of its provisions applies to a stipulation for notice of claim.

A provision in a shipping contract that no agent of the carrier shall have power to waive any of its provisions is valid,[99] and under a provision of this character it has been held or recognized that no agent of the carrier has power to waive a requirement that notice of claim for damages shall be given.[1] There is authority for the view, however, that an agent authorized to receive notice may waive notice even though there is a stipulation attempting to limit the authority of the agent with regard to waiver.[2] Furthermore it seems that the unauthorized act of the agent in assuming to waive a requirement of this nature may be ratified by the carrier in a case in which waiver is permissible generally.[3]

§ 242. Contractual Limitations as to Time of Bringing Suit

a. In general

b. Constitutional or statutory provisions

92. Minn.—Gamble-Robinson Commn. Co. v. Northern Pac R. Co., 137 N.W. 19, 119 Minn. 40.
10 C.J. p 343 note 5

Interstate shipment

(1) In a case involving an interstate shipment, in which the court apparently took the view that in any event the carrier could not waive the requirement that a claim in writing, verified by the shipper or his agent, should be made within a specified time, it was held that where a claim was presented long after the period specified, the fact that the carrier, investigated the claim and rejected it without objecting to want of verification was not a waiver of such provision of the contract. —Herran v. Chicago & E. R. Co., 135 N.E. 253, 78 Ind.App. 253.

(2) Where defense of failure to present claim within time specified in shipping contract covering interstate shipment was complete when loss of goods through wrongful delivery was first brought to attention of road, road could not waive it by investigating claim and rejecting it on ground different than that of failure to give notice—Harelson v. St. Louis & S. F. R. Co., Mo.App., 191 S.W. 1068

93. Mich.—Ithaca Roller Mills v. Ann Arbor R. Co., 163 N.W. 934, 197 Mich. 440.
10 C.J. p 343 note 7.

94. N.Y.—Cheney Piano Co. v. New York Cent., etc., R. Co., 148 N.Y.S. 108, 85 Misc. 157, 161.

95. Ark.—Bush v. Curry, 199 S.W. 375, 131 Ark. 237.
Ky.—Howard v. Illinois Cent. R. Co., 171 S.W. 442, 161 Ky. 788

The agent of a delivering carrier in an interstate shipment of cattle was the agent of the initial carrier for purposes of delivery, and could waive notice of injury required by bill of lading issued by initial carrier—Baltimore & Ohio R. Co. v. Leach, 191 S.W. 310, 173 Ky. 452, reversed on the grounds that a shipper must comply with a stipulation requiring claim to be made in writing 39 S.Ct. 254, 249 U.S. 217, 63 L.Ed. 470.

96. Okl.—Missouri, etc., R. Co. v. Davis, 104 P. 37, 24 Okl. 677, 24 L.R.A.,N.S., 866—St. Louis, etc., R. Co. v. Phillips, 87 P. 470, 17 Okl. 264, 280
10 C.J. p 343 note 11.

97. N.Y.—Meyers v. Cleveland, C., C. & St. L. R. Co., 171 N.Y.S. 71, 183 App.Div. 453.

Live stock

Live stock agent of delivering carrier of live stock shipped in interstate commerce under limited liability live stock contract, on through bill of lading, could not waive, by his conduct, a provision of bill of lading requiring verified written claim for damages to be delivered to freight claim agent of initial carrier within five days—Meyers v. Cleveland, C., C. & St. L. R. Co., 171 N.Y.S. 71, 183 App.Div. 453.

98. **Custom and agreement** between consignee of cotton and terminal carrier that claims for loss should not be filed until end of the cotton year were not effectual as waiver of stipulation in bill of lading as to time of filing claim of loss as between shipper and initial carrier.—Rogers & Co. v. East Carolina Ry., 118 S.E. 885, 186 N.C. 86

99. U.S.—Clegg v. St. Louis & S. F. R. Co., Okl., 203 F. 971, 122 C.C.A. 273.

1. U.S.—Clegg v. St. Louis & S. F. R. Co., supra.
Kan.—Missouri, etc., R. Co. v. Kirkham, 65 P. 261, 63 Kan. 255
Mo.—McElvain v. St. Louis, etc., R. Co., App., 180 S.W. 1018.

2. Ark.—Bush v. Curry, 199 S.W. 375, 131 Ark. 237.

3. Mo.—McElvain v. St. Louis, etc., R. Co., App., 180 S.W. 1018.

a. In General

In general a provision in a contract of shipment limiting the period in which action may be brought is valid and binding even though the period is less than that fixed by the statute of limitations.

In the absence of constitutional or statutory prohibition, it is usually held or recognized that it is competent for the parties to a contract of shipment to agree on a limitation of time[4] shorter than the statutory period,[5] within which action for breach of the contract shall be brought, and such a limitation will be enforced if reasonable, although there is some authority to the contrary.[6]

Stipulations of this character are not opposed to public policy,[7] and do not operate as a restriction on the common-law liability of the carrier.[8] In respect of an intra-state shipment however, it has been held that a stipulation of the type here considered is not binding on a claimant unless there was a consideration therefor, either in a reduction in rate or some other special inducement.[9]

Broadly speaking, a valid and binding stipulation of the type here under consideration takes the place of the statute of limitations[10] and is governed by the same rules.[11] In order to be effective the limitation must be reasonable;[12] and it has been said

4. U S—U. S. v. Seaboard Air Line Ry. Co., C C.A.Va., 22 F.2d 113—The Eldridge, D.C.Wash., 295 F. 696—The Turrett Crown, D.C.Va., 275 F. 961, affirmed, C.C.A., 284 F. 439, certiorari denied 43 S Ct. 520, 262 U.S. 742, 67 L Ed. 1210
Ga—Golden Live Stock Co. v. Hines, 107 S E. 361, 26 Ga App. 751—Cherokee Sawmill Co. v. Nashville C. & St L. Ry., 91 S E. 790, 19 Ga. App. 475
La.—John Bonura & Co. v. Southern Pac. Co., 2 La App. 4.
Me—Mason v. Maine Cent. R. Co., 110 A. 425, 119 Me. 195.
Mo—Thompson v. Atchison, T. & S F. R. Co., App., 185 S W. 1145.
N Y.—Brewster v. Davis, 202 N.Y.S. 574, 207 App Div. 461—Robert Reiner, Inc, v. Hamburg-American Line, 260 N.Y.S. 498, 145 Misc. 592—Jones v. Cunard S. S. Co., 257 N.Y S. 786, 144 Misc. 336, reversed on other grounds 263 N.Y.S. 769, 238 App.Div. 172—Jennings v. Barrett, 194 N.Y.S. 679
N C—Skyland Hosiery Co v. American Ry. Express Co., 120 S.E. 228, 186 N.C. 556, 114 S E. 823, 184 N.C 478
10 C J. p 344 note 16.

The text of Corpus Juris has been cited with approval in J. Aron & Co., Inc., v. Panama R. Co., 175 N.E. 273, 274, 255 N.Y. 513.

Amendments to petition
Where petition against initial carrier for conversion of goods by delivering carrier was amended, so as to change the cause of action from tort to contract, more than two years and one day after delivery of goods, within which bill of lading required actions to be brought, to claim damages for breach of contract, it was barred by limitation—Illinois Cent. R Co. v. Stimson, 268 S.W. 835, 207 Ky. 78.

Government bill of lading
(1) Government bill of lading covering intra-state shipment providing that, unless otherwise specifically provided therein, it was subject to same rules and conditions as govern commercial shipments under carrier's usual forms, incorporated as condition thereof a provision of carrier's usual bill of lading requiring suits for loss, damage, or delay to be instituted within two years and one day after delivery of the property, or after a reasonable time for delivery has elapsed, in the absence of any contrary provision therein.—U. S. v. Seaboard Air Line Ry. Co., C.C.A.Va., 22 F.2d 113.

(2) Such provision of the carrier's usual bill of lading was valid where it covered an intra-state shipment made before the enactment of the federal Transportation Act of 1920.—U. S. v. Seaboard Air Line Ry. Co., supra.

Stipulation construed
In a bill of lading providing that, "except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damage in transit by carelessness or negligence, as condition precedent to recovery, claims must be made in writing to the originating or delivering carrier within six months after delivery of the property, or, in case of failure to make delivery, then within six months after reasonable time for delivery has elapsed, and suit for loss, damage, or delay shall be instituted within two years and one day after delivery of the property, or, in case of a failure to make delivery, then, within two years and one day after a reasonable time for delivery has elapsed," the exception in the bill as to damage to property in transit applies only to the notice in writing of the claim required to be given to the originating or delivering carrier, and does not relate to the time in which suit must be commenced.—Farr v St. Louis Southwestern Ry. Co., 243 S W. 800, 154 Ark 585.

5. N.C—Winstead v. East Carolina Ry., 118 S.E. 887, 186 N C. 58—Dixon v. Davis, 114 S E 8, 184 N.C. 207—Thigpen v. East Carolina Ry., 113 S.E. 562, 184 N C. 33.
Ohio—Gatton v. U. S. Exp. Co., 14 Ohio Cir.Ct.,N.S, 125.
10 C J. p 344 note 16.

Statutory authorization
The right of the carrier to provide for such a limitation does not depend on statutory authorization—New York Cent R Co v. Lazarus, C C.A.,N Y. 278 F. 900, reversing, D. C, Lazarus v. New York Cent. R. R, 271 F. 93.

6. Ky.—Adams Express Co. v. Walker, 83 S W. 106, 119 Ky. 121, 26 Ky L. 1025, 67 L R A 412.
10 C J. p 344 note 17.

7. U S—The Turrett Crown, D C Va, 275 F. 961, affirmed, C C A, 284 F. 439, certiorari denied 43 S Ct. 520, 262 U.S. 742, 67 L Ed. 1210.
Colo—Atchison, etc., R Co v. Baldwin, 128 P. 449, 53 Colo 416.
La—John Bonura & Co. v. Southern Pac. Co., 2 La App. 4.
Ohio—Gatton v. U S Exp. Co, 14 Ohio Cir Ct N.S., 125.

8. Tex.—Gulf, etc, R Co v. Trawick, 4 S W. 567, 68 Tex. 314, 2 Am S.R. 494
10 C.J. p 344 note 22.

9. Mo—Peters v. American Ry. Express Co., App., 256 S W 100.

10. Ga—Cherokee Sawmill Co. v. Nashville, C & St. L Ry., 91 S E 790, 19 Ga App. 475

11. Ga—Cherokee Sawmill Co. v. Nashville, C. & St. L. Ry, supra

12. Miss—Lasky v. Southern Express Co, 45 So. 869, 92 Miss 268
N Y.—South & Central American Commercial Co. v. Panama R Co, 142 N.E 666, 237 N Y 287, affirming 199 N.Y S. 92, 205 App Div. 123.
10 C.J. p 344 note 18.

The Corpus Juris statement containing illustrations of periods held reasonable has been cited with approval.
Cal.—Beeson v. Schloss, 192 P. 292, 294, 183 Cal. 618.
Conn.—Humphrey-Cornell Co. v. Hines, 115 A. 561, 563, 97 Conn. 21.

that the only limitations as to the validity of such contracts are that they must be reasonable,[13] and that there must be prompt action on the part of the carrier in denying its liability, to the end that the shipper may be duly apprised of the fact that suit will be necessary.[14] In respect of a carrier subject to the control of congress but not made subject to the provisions of the Interstate Commerce Act, the view has been expressed that the standards fixed by such act are relevant in determining whether or not a stipulation limiting the time for bringing suit is reasonable.[15]

The mere fact that the shipper did not read the shipping contract containing a stipulation of the character here under consideration does not prevent his being bound by the limitation.[16]

A failure to bring suit within the time fixed by the stipulation will not affect the shipper's right of recovery where it can be made to appear that the failure to sue was caused by the fraud or misrepresentation of the carrier or its agent, whereby the shipper was induced to delay his suit until the time had expired.[17] According to some cases, however, actual fraud is necessary in order to prevent the operation of the contractual limitation,[18] that is, there must be such fraud as involves moral turpitude,[19] and the mere fact that the carrier neither paid nor declined to pay the claim within the period of limitation is not sufficient.[20] Of course, where the stipulation provides that suit shall be instituted not later than a certain time after notice in writing is given by the carrier to claimant that the carrier has disallowed the claim, it does not apply where the carrier has not given such notice of rejection of the claim.[21]

To what claim stipulations applicable. Some limitations of the character under consideration are not applicable to actions for damages due to delay,[22] or to actions against a carrier not strictly for the loss of, or damage to, the goods during transportation.[23] So the view has been taken that a live stock shipping contract which provides that no claim for damages can be enforced unless suit is brought within six months after the injury relates only to such injuries as occur while the stock is in transit, and does not apply to damages sustained by the escape of the stock from the stockyards while awaiting shipment.[24]

According to some cases, a stipulation requiring suits for loss, damage, or delay to be brought within a specified time after delivery, or after a reasonable time for delivery has elapsed, applies to a suit based on a failure to deliver either because of misdelivery or refusal to deliver,[25] to a suit by the holder of a bill of lading against the carrier to recover for a shortage measured by the difference in weight of the commodity delivered and the weight as shown on the bill of lading,[26] and to a

What limitations reasonable

(1) Two years and one day after reasonable time for delivery had elapsed—Brewster v. Davis, 202 N.Y.S. 574, 207 App.Div. 461.

(2) Two years after delivery or, in case of failure to deliver, two years after a reasonable time for delivery had elapsed—Jennings v. Barrett, 194 N.Y.S. 679.

(3) One year—Skyland Hosiery Co. v. American Ry. Express Co., 120 S.E. 228, 186 N.C. 556, 114 S.E. 823, 184 N.C. 478—10 C.J. p. 344 note 18 [a] (1).

(4) One year from date of loss—Barter v. Barrett, 174 N.Y.S. 779, 186 App.Div. 715, affirming 163 N.Y.S. 244, 98 Misc. 646.

(5) Six months.

Ga.—Golden Live Stock Co. v. Hines, 107 S.E. 361, 26 Ga.App. 751—Cherokee Sawmill Co. v. Nashville, C. & St. L. Ry., 91 S.E. 790, 19 Ga.App. 475.

La.—John Bonura & Co. v. Southern Pac. Co., 2 La.App. 4.

10 C.J. p. 344 note 18 [a] (2).

13. Okl.—Missouri, etc., R. Co. v. Hancock, 109 P. 220, 26 Okl. 254. 10 C.J. p. 344 note 19.

14. N.D.—Cook v. Northern Pac. R. Co., 155 N.W. 867, 32 N.D. 349, L.R.A.1916D 345.

15. N.Y.—South & Central American Commercial Co. v. Panama R. Co., 142 N.E. 666, 237 N.Y. 287, affirming 199 N.Y.S. 92, 205 App.Div. 123.

16. N.Y.—Barter v. Barrett, 174 N.Y.S. 779, 186 App.Div. 715, affirming 163 N.Y.S. 244, 98 Misc. 646.

Interstate shipment

Rule has been applied or recognized in respect of an interstate shipment.

Ohio.—Galton v. The United States Express Co., 14 Ohio Cir.Ct.,N.S., 125.

Tex.—Atchison, T. & S. F. Ry. Co. v. White, Civ.App., 188 S.W. 714, error refused.

17. Tex.—Gulf, etc., R. Co. v. Trawick, 4 S.W. 567, 68 Tex. 314, 2 Am.S.R. 494—Galveston, etc., R. Co. v. Kelley, Civ.App., 26 S.W. 470—Galveston, etc., R. Co. v. Silegman, Civ.App., 23 S.W. 298.

18. Ga.—Southern Express Co. v. Oliver, 93 S.E. 109, 20 Ga.App. 467

Ohio—Galton v. U. S. Express Co., 14 Ohio Cir.Ct.,N.S., 125.

19. Ga.—Cherokee Sawmill Co. v. Nashville, C. & St. L. Ry., 91 S.E. 790, 19 Ga.App. 475

20. Ga.—Southern Express Co. v. Oliver, 93 S.E. 109, 20 Ga.App. 467

21. S.C.—Neuss, Hesslein & Co. v. Bamberg, E. & W. Ry. Co., 123 S.E. 327, 129 S.C. 197.

22. Tex.—Gulf, etc., R. Co. v. Hume, 27 S.W. 110, 87 Tex. 211—Gulf, etc., R. Co. v. Elliott, Civ.App., 26 S.W. 636.

23. Tex.—Gulf, etc., R. Co. v. Trawick, 15 S.W. 568, 18 S.W. 948, 80 Tex. 270—Gulf, etc., R. Co. v. Gray, Civ.App., 24 S.W. 837.

24. Kan.—St. Louis, etc., R. Co. v. Beets, 89 P. 683, 75 Kan. 295, 10 L.R.A.,N.S., 571

25. Pa.—Hilbert v. Pennsylvania R. Co., 120 A. 778, 277 Pa. 105, affirming 1 Pa.Dist. & Co. 349

26. U.S.—Leigh Ellis & Co. v. Davis, Ga., 43 S.Ct. 243, 260 U.S. 682, 67 L.Ed. 460, affirming, C.C.A., 276 F. 400, certiorari denied 42 S.Ct. 187, 257 U.S. 659, 66 L.Ed. 422, and which affirms, D.C., Leigh Ellis & Co. v. Payne, 274 F. 443.

"Loss"

The suit described in the text was a suit for a "loss" within the meaning of the stipulation.—Leigh Ellis

suit based on damage in transit by carelessness or negligence.[27] So a stipulation for limitation of the time to sue may control notwithstanding claimant's action is based on the carrier's common-law liability.[28]

It has been held that the fact that the carrier diverted the shipment from the consignee and delivered it to another does not give the consignee the right to disregard a valid and binding provision of the contract limiting the time within which action should be brought,[29] but in respect of an intrastate shipment it has been held that the carrier cannot claim the benefit of a provision of the contract requiring the shipper to bring his action within a specified limited period where the carrier abandoned the contract by making a misdelivery and the shipper sues in tort for the conversion.[30]

What constitutes commencement of action. Issuance of the summons constitutes the commencement of the action within the meaning of a provision of a shipping contract of the type here under consideration, and, where the summons is issued within the period fixed by such provision, the provision is satisfied. Even though the action is brought in a county in which service of summons cannot be had and jurisdiction obtained other than by appearance of defendant carrier, waiver of service by appearance relates back to the commencement of the action so as to satisfy the contract provision.[31]

Running of statutory limitation. A stipulation that suits for loss, damage, or delay shall be instituted only within a specified time after delivery, or, in case of failure to make delivery, within such specified time after a reasonable time for delivery has elapsed has been construed to mean that such suits are to be instituted only within the specified time after delivery when delivered within a reasonable time, or, in case of failure to make delivery within a reasonable time, then within the specified time after a reasonable time for delivery has elapsed.[32] What constitutes a reasonable time within the meaning of a stipulation that, in case of failure to make delivery, suit shall be commenced within a specified time after a reasonable time for delivery has elapsed depends on the facts of the particular case.[33] Where such a stipulation is valid and binding on the parties, claimant may not successfully maintain the claim that the period of limitation commences to run from the time claimant was notified by the carrier of the denial of the claim.[34]

Where the contract period of limitation commences to run from the time that notice in writing is given by the carrier that the claim is disallowed in whole or in part, it is not necessary for the

& Co v Davis, Ga., 43 S Ct 243, 260 U.S 682, 67 L.Ed 460, affirming, C C A., 276 F 400, certiorari denied 42 S Ct. 187, 257 U.S 659, 66 L Ed 422, and which affirms, D C, Leigh Ellis & Co v. Payne, 274 F 443.

27. Mich —Thomas Canning Co. v Southern Pac Co, 193 N W. 793, 223 Mich. 154.
Vt.—N. Pelaggi & Co v. Central Vermont Ry Co, 121 A. 441, 97 Vt. 1

Exception in bill of lading

It was held that the exception in the bill of lading in respect of carelessness or negligence referred to the necessity of making claim and did not relieve claimant from the necessity of bringing action within the time specified in the contract, even though the action was based on damages in transit based on carelessness or negligence —N. Pelaggi & Co. v. Central Vermont Ry. Co., 121 A 441, 97 Vt. 1.

28. Ill —See Mays v Wells Fargo & Co, 199 Ill.App 443.
Vt —Oakdale Farms v. Rutland R Co, 158 A. 678, 104 Vt 279

Loss

Bill of lading limiting time within which shipper might sue for loss of milk was controlling in action for carrier's tort resulting in loss.—Oakdale Farms v Rutland R Co, 158 A 678, 104 Vt. 279.

Delay

Action for delay in interstate shipments of cattle not commenced within two years after delivery of cattle, in which the pleadings showed that the shipment had been made on a written contract requiring the action to be brought within such two-year period, was barred, regardless of whether the form of the pleading made the action one on the contract or an action on the carrier's common-law liability —Salmans v. Atchison, T & S F R. Co, 206 P. 1111, 111 Kan. 297.

29. W.Va —Wholesale Coal Co v. Chesapeake & O. Ry. Co., 144 S.E 715, 106 W.Va 53.

30. Ind —Southern Express Co. v. Smith, 122 N E. 427, 69 Ind App. 574

31. Ark.—St Louis-San Francisco Ry Co. v Solomon & Wineberg, 256 S W 862, 161 Ark 552.

32. N C.—Corbett & Moore v Payne, 121 S E. 435, 187 N.C. 161—Winstead v East Carolina Ry., 118 S. E. 887, 186 N.C. 58.

Delay in delivery

Where property was not delivered within reasonable time, but was delivered subsequently, time for suit for delay ran from expiration of reasonable time, as the stipulation must be interpreted with regard to the law requiring delivery within reasonable time.—Corbett & Moore v Payne, 121 S E. 435, 187 N.C. 161—Winstead v. East Carolina Ry, 118 S E 887, 186 N.C. 58.

33. Va —Davis v. Rodgers, 124 S. E 408, 139 Va. 618.

Action barred

U.S —Lazarus v. New York Cent. R Co., C.C A N.Y., 299 F. 599, certiorari denied 45 S.Ct. 95, 266 U.S 612, 69 L Ed. 467.
Conn.—Humphrey-Cornell Co. v. Hines, 115 A 561, 97 Conn 21
N Y —Liberty Sales Co. v. Davis, 198 N Y.S 253
Pa —Hilbert v. Pennsylvania R Co., 120 A. 778, 277 Pa. 105, affirming 1 Pa Dist. & Co. 349.
S C.—Spartan Mills v. Davis, 119 S E 905, 126 S.C. 312.
Va —Davis v. Rodgers, 124 S E. 408, 139 Va. 618.

Action seasonably begun

Mass.—Fisk Rubber Co. of New York v New York, N. H. & H R R., 132 N.E 714, 240 Mass 40

34. Conn —Humphrey-Cornell Co. v. Hines, 115 A 561, 97 Conn. 21.

carrier to state in so many words, or in the language of the contract, that the claim is disallowed either in whole or in part;[35] it is sufficient if the carrier uses such terms as convey to claimant the information that the claim is disallowed.[36] Where the carrier has duly disallowed the claim so as to set the period of limitation running, subsequent correspondence between the parties in which the carrier neither agrees to pay nor recedes from the original position of disallowing the claim does not prevent the running of such period.[37] A letter from the carrier which is merely part of negotiations looking to a settlement is not, however, necessarily a disallowance which will start the running of such period.[38] Where the limitation runs from the day of disallowance, the view has been expressed that it is impossible for a claim for injury and loss to be disallowed before delivery to claimant.[39]

Under a stipulation that no suit shall be maintainable unless instituted within a specified time after happening of injuries, delay, or delays, it has been held that, in the case of damage to live stock, the period of limitation begins to run from the date of the delivery of live stock at destination.[40]

Failure of an express company which took over and actually operated the business of another company immediately to obtain a license to do business does not interrupt the running of the contractual period of limitation on a cause of action which had arisen against such other company where the first-mentioned company could have been served with process and sued at any time after taking over such business.[41]

b. Constitutional or Statutory Provisions

Stipulations in shipping contracts limiting the time within which suit may be brought may be rendered invalid and inoperative by constitutional or statutory provisions.

State constitutional or statutory provisions prohibiting stipulations in shipping contracts limiting the time to sue are given effect in so far as they are applicable.[42] A statutory provision that, if a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof and the action survives, an action may be commenced after the expiration of that time and within one year from his death does not apply so as to extend the time for suit fixed by provision in a shipping contract,[43] nor does a statutory provision that a suit in renewal of one dismissed, but which has been brought in time, shall stand on the same footing as to limitation as the original suit.[44]

Interstate shipments. Reasonable provisions in the shipping contract for limitations[45] shorter than

35. S.D.—Tribby v. Chicago & N. W. Ry. Co., 264 N.W. 185.

36. S.D.—Tribby v. Chicago & N. W. Ry. Co., supra.

Disallowance shown

A written statement on behalf of the carrier that, "we respectfully decline the claim," is equivalent to a disallowance of the claim.—American Ry. Express Co. v. Shideler, 165 N. E. 336, 88 Ind. App. 645.

37. Ind.—American Ry. Express Co. v. Shideler, supra.

38. N.Y.—Chappell v. New York, O. & W. Ry. Co., 289 N.Y.S. 52, 248 App. Div. 804.

Offer of specified amount

Evidence showing numerous letters, none of which contained language of finality until letter written about two months before bringing of action for damage to goods in transit, justified verdict that carrier did not reject claim at any time prior to maximum period limited in bill of lading for bringing action, as against contention that railroad's letter offering eight hundred dollars by way of settlement of claim for one thousand one hundred and fifteen dollars for repairing goods pursuant to railroad's authorization constituted disallowance of claim within meaning of bill of lading.—Chappell v. New York O. & W. Ry. Co., 289 N.Y.S. 52, 248 App. Div. 804.

39. La.—Gardner v. Louisiana Western R. Co., 1 La. App. 360.

40. Okl.—Ezell v. Midland Valley R. Co., 174 P. 781, 73 Okl. 40.

41. Mo.—Goodwin & Jean v. American Ry. Express Co., 294 S.W. 100, 220 Mo. App. 695.

42. Okl.—Missouri, K. & T. Ry. Co. v. Williamson, 180 P. 961, 75 Okl. 36.—St. Louis, etc., R. Co. v. James, 128 P. 279, 36 Okl. 196.
10 C.J. p. 343 note 15.

Constitutional provision

(1) Const. art. 23, § 9, providing that any provisions of any contract or agreement, express or implied, stipulating for notice or demand otherwise than as may be provided by law, as a condition precedent to establish any claim, demand or liability, shall be null and void, construed as aimed at an attempt to abridge the time within which rights under the law may be enforced, prohibited a provision limiting the time in which to sue in a contract covering an intra-state shipment.—Missouri, K. & T. Ry. Co. v. Williamson, 180 P. 961, 75 Okl. 36.

(2) The provision of Rev.L.1910 § 828 permitting the inclusion in a bill of lading of reasonable requirements as to notice and demand of damages did not permit the insertion of such provision for limitation.—Missouri, K. & T. Ry. Co. v. Williamson, supra.

43. N.C.—Thigpen v. East Carolina Ry., 113 S.E. 562, 184 N.C. 33.

44. U.S.—Leigh Ellis & Co. v. Payne, D.C.Ga., 274 F. 443, affirmed, C.C.A., Leigh Ellis & Co. v. Davis, 276 F. 400, certiorari denied 42 S.Ct. 187, 257 U.S. 659, 66 L.Ed. 422, and affirmed 43 S.Ct. 243, 260 U.S. 682, 67 L.Ed. 460.

45. Del.—Hercules Powder Co. v. Pennsylvania R. Co., 122 A. 546, 2 W.W.Harr. 309.
Ga.—Southern Express Co. v. Oliver, 93 S.E. 109, 20 Ga. App. 467.—Nashville, etc., R. Co. v. C. V. Truitt Co., 86 S.E. 421, 17 Ga. App. 236.
Ill.—See Crossley v. St. Louis, I. M. & S. Ry. Co., 199 Ill. App. 195.
Kan.—Achen v. Atchison, T. & S. F. Ry. Co., 175 P. 980, 103 Kan. 668.
Me.—Mason v. Maine Cent. R. Co., 110 A. 425, 119 Me. 195.
Miss.—Illinois Cent. R. Co. v. Rogers & Hurdle, 76 So. 686, 116 Miss. 99.
Mo.—Donoho v. Missouri Pac. Ry. Co., 187 S.W. 141, 193 Mo. App. 610, 184 S.W. 1149.—Howard v. Chicago,

the statutory period[46] were not prohibited by the Carmack amendment, Act of June 29, 1906, 34 U.S. St. at L. p 595, c 3591, § 7, 49 U S.C.A. § 20 par (11), which prohibits a common carrier from limiting by contract, rule, or regulation its liability for damages resulting from its own negligence or the negligence of any other common carrier into whose possession the property may come for transportation by virtue of the bill of lading which the statute requires the initial carrier to issue to the shipper; and inasmuch as the Carmack amendment supersedes state legislation on the subject, a limitation of the character under consideration in a contract for interstate shipment will be valid, notwithstanding any state legislation to the contrary.[47] So it has been held that a valid limitation in a shipping contract requiring suit to be brought within a designated time is not affected by another limitation of liability in the contract which is void because in violation of the Interstate Commerce Act.[48]

Even though no bill of lading was issued, where the shipper paid the reduced rate provided in the tariffs and classification filed with the interstate commerce commission for shipments subject to a uniform bill of lading containing a stipulation limiting the time to sue, such stipulation binds the shipper,[49] and it has also been held that, even though a bill of lading was issued which did not contain the limitation provision, the omission does not affect the liability of the parties where the rate charged corresponded to that for shipments subject to the limitation clause as fixed by tariffs filed with, and approved by, the interstate commerce commission.[50] There is authority for the view, however, that where there is a written contract covering the shipment, the carrier may not claim the benefit of a stipulation limiting the period for suit unless such stipulation is incorporated into the contract,[51]

R. I. & P. Ry. Co., App, 184 S. W. 906.
N C—Rogers & Co. v. East Carolina Ry., 118 S E 885, 186 N C 86
Okl—St. Louis, I M. & S Ry. Co. v. Bentley, 176 P. 250, 71 Okl. 165—Overstreet v. Wichita Falls & N. W. R. Co, 175 P 354, 73 Okl 191—St. Louis & S. F. R Co. v. Taliaferro, 168 P. 438, 66 Okl 121.
Tex—Chicago, R I. & G Ry. Co. v. Shroyer, Civ.App, 197 S W. 773, judgment reversed on other grounds Shroyer v. Chicago, R I. & G. R. Co., Com.App, 222 S W. 1095, 111 Tex. 24, which is modified on other grounds 226 S.W. 140, 111 Tex. 24.
10 C J. p 344 note 23.

Stipulations reasonable and enforceable if otherwise valid, prior to statutory restrictions

(1) One year.
Ga.—Southern Express Co. v. Oliver, 93 S.E. 109, 20 Ga App 467.
Ill.—See Mays v. Wells Fargo & Co., 199 Ill App. 443.
10 C J. p 344 note 18 [a] (1).

(2) Six months.—Gatton v. The United States Express Co, 14 Ohio Cir Ct ,N.S, 125—10 C J. p 344 note 18 [a] (2).

(3) Six months after the accrual or occurrence of cause of action or of damage, loss, or injury.
Kan—Achen v Atchison, T & S F. Ry. Co, 175 P 980, 103 Kan 668.
Miss—Illinois Cent. R. Co v. Rogers & Hurdle, 76 So. 686, 116 Miss. 99.
Mo.—Donoho v. Missouri Pac. Ry. Co., 187 S.W. 141, 193 Mo App 610, transferred, Sup., 184 S.W. 1149.
Okl—St. Louis, I M. & S Ry. Co. v. Patterson, 132 P. 701, 75 Okl. 204—St Louis, I. M. & S. Ry. Co v. Bentley, 176 P. 250, 71 Okl. 165—Atchison, T. & S. F. Ry. Co. v. Cooper, 175 P. 539, 71 Okl. 112—St. Louis & S. F R Co v Taliaferro, 168 P. 438, 66 Okl. 121—Chicago, R I & P. Ry Co v. Paden, 162 P. 727, 63 Okl 51—St. Louis & S F R Co v Taliaferro, 156 P. 359, 56 Okl 519.
Tex—Shroyer v. Chicago, R. I & G Ry. Co., 222 S W. 1095, 111 Tex. 24, reversing Chicago, R. I. & G Ry. Co v Shroyer, Civ App, 197 S W. 773, modified on other grounds Shroyer v. Chicago, R I. & G R Co, 226 S W. 140, 111 Tex 24—Atchison, T. & S F Ry Co. v. Smyth, Civ App, 189 S W. 70—Atchison, T. & S F Ry. Co. v. White, Civ.App, 188 S.W. 714, error refused.

(4) Six months after delivery or arrival at destination
Iowa—Tuller v Chicago, R. I & P Ry. Co., 168 N W. 301, 186 Iowa 1070.
Mo.—Howard v. Chicago, R I. & P. Ry. Co, App, 184 S W. 906.

(5) Ninety-one days after injuries, delay, or cause of action
Okl.—Overstreet v. Wichita Falls & N W R. Co, 175 P 354, 73 Okl 191—Ezell v. Midland Valley R Co, 174 P 781, 73 Okl. 40.
Tex—Kansas City, M & O Ry. Co. v. Hansard, Civ App, 184 S W. 329.
10 C.J p 344 note 18 [a] (4).

(6) Forty days after damages occurred—Betka v. Houston & T. C R. Co, Tex Civ App, 189 S W. 532—10 C J. p 344 note 18 [a] (8).

(7) Six-month period was approved by four of the nine sitting justices of the United States supreme court—Texas & P. Ry. Co v. Leatherwood, Tex., 39 S Ct. 517, 250 U S. 478, 63 L Ed 1096.

46. U.S.—New York Cent. R. Co. v. Lazarus, C C A.N Y, 278 F 900, reversing, D.C, Lazarus v New York Cent R R, 271 F. 93.
10 C J p 344 note 23

Shorter than period in state statute

There is nothing in the Carmack amendment which forbids the parties to a contract for an interstate shipment to provide for a shorter period of limitation than that provided in the state statute, if the time is not unreasonably short—St. Louis, I M & S. Ry Co. v. Patterson, 132 P 701, 75 Okl 204—Atchison, T & S F Ry Co. v. Cooper, 175 P. 539, 71 Okl 112.

47. U S—Missouri, Kansas & Texas Ry Co v. Harriman, Tex, 33 S Ct 397, 227 U S. 657, 57 L Ed 690
Tex—Betka v. Houston & T. C R Co, Civ.App., 189 S W. 532—Texas, etc, R Co. v. Langbehn, Civ App, 158 S W. 244.

48. Kan—Achen v Atchison, T. & S F Ry Co., 175 P 980, 103 Kan 668—Miller v Atchison, T. & S F Ry. Co, 156 P. 780, 97 Kan. 782

49. U S—New York Cent. R. Co v Lazarus, C C A.N Y, 278 F 900, reversing, D C, Lazarus v. New York Cent. R R., 271 F 93.

50. Md—Acme-Evans Co v. Baltimore & O R Co., 121 A. 571, 142 Md 658.

51. Me—Mason v Maine Cent. R Co, 110 A. 425, 119 Me 195.

Shipper not charged with notice

A bill of lading bearing on an adhesive slip the stamped words, "Section 3 is amended as per classification governing" did not charge a shipper with notice that the time for suing for delay in delivery was limited to two years and one day, § 3 of the conditions covering the shipment not referring to limitations.

even though a form of contract containing the stipulation has been filed with, and approved by, the interstate commerce commission.[52] It has been held that a stipulation which was not a part of the schedule filed by the carrier with the interstate commerce commission was not binding on the shipper, on the theory that such stipulation affected or tended to determine the rate.[53]

The fact that the carrier offered no alternative rate as a consideration for the inclusion in the shipping contract of a stipulation limiting the time for bringing suit does not render the stipulation inoperative where it conforms to the controlling statutory provision, since such stipulation is not a limitation of liability.[54] It has been held in respect of an interstate shipment, however, that, where a valid oral contract has previously been made a stipulation in a subsequent written contract that suit for damages must be brought within a specified time is not binding without some new consideration.[55] In the absence of any evidence showing that the rate charged was not authorized by the interstate commerce commission and, therefore, illegal, the right of claimant to avoid the effect of a stipulation limiting the time to sue on the ground that the rate was less than that authorized has been denied.[56]

The Cummins amendment, Act of March 4, 1915, 38 U.S.St. at L. p 1197 c 176, 49 U.S.C.A. § 20 par (11), which modified the Carmack amendment and directed that it shall be unlawful for common carriers subject to the statute to provide a shorter period for the institution of suits than two years, was amended or supplemented by the more definite provision of the Act of February 28, 1920, 41 U.S.St. at L. p 494, c 91, 49 U.S.C.A. § 20, par (11), that it shall be unlawful to provide a shorter period for the institution of suits than two years, such period to be computed from the day when notice in writing is given by the carrier to claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice,[57] which latter provision is still in force under the most recent amendment, Act of April 23, 1930, 46 U.S.St. at L. p 252 c 208, 49 U.S.C.A. § 20 par (11). Neither the foregoing provision of the Cummins amendment nor such later provision applied to a case which arose before its enactment.[58]

These statutory provisions which prescribe a minimum period of limitation which may be provided for by a shipping contract do not operate as a statute of limitations.[59] They permit, but do not require, the insertion of a provision as to limitation in the contract of shipment.[60] Furthermore, the carrier does not derive from such statutory provisions the right to provide by contract for a reasonable period of limitation;[61] as shown in the preceding subdivision of this section, such right does not depend on statutory authorization. The contract of shipment may properly provide for a period longer than the minimum prescribed in a statutory provision of this type,[62] but it may not provide for

—Mason v. Maine Cent. R. Co., 110 A. 425, 119 Me. 195.

52. Me.—Mason v. Maine Cent. R. Co., supra.

53. Tex.—Shroyer v. Chicago, R. I. & G. Ry. Co., 222 S.W. 1095, 111 Tex. 24, reversing Chicago, R. I. & G. Ry. Co. v. Shroyer, Civ.App., 197 S.W. 773, modified on other grounds Shroyer v. Chicago, R. I. & G. R. Co., 236 S.W. 140, 111 Tex. 24.

54. Minn.—Henningsen Produce Co. v. American Ry. Express Co., 188 N.W. 272, 152 Minn. 209.

55. Tex.—Kansas City, etc., R. Co. v. Hansard, Civ.App., 184 S.W. 329.

56. Tex.—Betka v. Houston & T. C. R. Co., Civ.App., 189 S.W. 532, error refused.

57. Del.—Hercules Powder Co. v. Pennsylvania R. Co., 122 A. 546, 2 W.W.Harr. 309.

58. Del.—Hercules Powder Co. v. Pennsylvania R. Co., supra.

Ga.—Nashville, etc., R. Co. v. C. V. Truitt Co., 86 S.E. 421, 17 Ga.App. 236.

Kan.—Farmers' Grain Union v. Davis, 240 P. 843, 119 Kan. 556.

Mich.—Hankins v. Payne, 214 N.W. 99, 239 Mich. 155.

Tex.—Betka v. Houston & T. C. R. Co., Civ.App., 189 S.W. 532, error refused.

Act of 1920

(1) The provision of the Act of Febr. 28, 1920, that the two-year period shall be computed from the day notice in writing of disallowance is given did not apply to a shipment which was in transit when the statute was enacted so as to render inoperative a stipulation requiring suit to be brought within two years and one day after delivery or after a reasonable time for delivery.—Small v. Pittsburgh, C., C. & St. L. R. Co., 89 Pa.Super. 64.

(2) Such provision did not affect the rights of the parties which had been determined by expiration of the limitation period under bill of lading before that amendment was adopted, since it would raise a serious constitutional question to give the amendment that effect.—N. Pelaggi & Co. v. Central Vermont Ry. Co., 121 A. 441, 97 Vt. 1.

59. U.S.—Louisiana & W. R. Co. v. Gardiner, La., 47 S.Ct. 386, 273 U.S. 280, 71 L.Ed. 644.

Ohio.—Norfolk & W. Ry. Co. v. Cosmopolitan Bank & Trust Co., 174 N.E. 801, 37 Ohio App. 323.

Stipulation not incorporated into contract

The shipper's right to recover is not defeated by the operation of such statutory provision if no stipulation for limitation of period for suit is incorporated into written contract of shipment.—Mason v. Maine Cent. R. Co., 110 A. 425, 119 Me. 195.

60. Fla.—Atlantic Coast Line R. Co. v. Chase & Co., 146 So. 658, 109 Fla. 50.

61. U.S.—New York Cent. R. Co. v. Lazarus, C.C.A.N.Y., 278 F. 900, reversing, D.C., Lazarus v. New York Cent. R. R., 271 F. 93.

Me.—Mason v. Maine Cent. R. Co., 110 A. 425, 119 Me. 195.

62. U.S.—Hartness v. Iberia & V. R. Co., D.C.La., 297 F. 622.

Del.—Hercules Powder Co. v. Pennsylvania R. Co., 122 A. 546, 2 W.W.Harr. 300.

a shorter period.[63]

In the case of shipments made after the enactment of the provision of the Cummins amendment which was silent as to the time from which the period of limitation should run, and before the enactment of the amending or supplementing provision of the Act of February 28, 1920, the validity and binding effect of a stipulation of a bill of lading or other shipping contract that suit shall be instituted only within two years and one day after delivery of the property, or, in case of failure to deliver, within two years and one day after a reasonable time for delivery has elapsed was frequently recognized or upheld.[64] The later statutory provision, however, for computing the period of limitation from the day of disallowance of the claim renders invalid and ineffective a stipulation which restricts the institution of suits for loss, damage or delay, to two years and one day after the delivery of the property[65] and also a stipulation containing such attempted restriction and, in respect of failure to make delivery, the further provision, in the alternative, of two years and one day after a reasonable time for delivery has elapsed,[66] the court cannot give effect to the stipulation by reading into it such provision of the later statute as to the time from which the limitation is to run.[67] The validity and binding effect of certain other provisions for limitations in shipping contracts have, however,

63. U S —Hartness v. Iberia & V. R. Co, D C La, 297 F. 622
Ark —Missouri Pac. R. Co v. Martindale, 213 S.W. 777, 139 Ark. 143.

64. U.S —Leigh Ellis & Co. v. Davis, Ga, 43 S Ct. 243, 260 U S. 682, 67 L Ed. 460, affirming, C C A., 276 F 400, certiorari denied 42 S Ct. 187, 257 U.S 659, 66 L Ed 422, and which affirms, D C., Leigh Ellis & Co v. Payne, 274 F. 443—Chicago & N. W Ry. Co v Bewsher, C C A Neb, 6 F 2d 947, certiorari denied 46 S.Ct 205, 270 U S. 641, 70 L.Ed 775—New York Cent. R Co. v. Lazarus, C C.A N Y, 278 F. 900, reversing, D.C., Lazarus v. New York Cent. R. R. Co., 271 F 93.
Ark —Bernstein v. Reid, 2 S.W.2d 1078, 176 Ark. 296.
Conn —Humphrey-Cornell Co. v. Hines, 115 A. 561, 97 Conn. 21.
Del —Hercules Powder Co. v. Pennsylvania R. Co., 122 A 546, 2 W.W Harr. 309.
Ky —American Oak Leather Co. v Cleveland, C, C & St. L. R. Co, 288 S W. 347, 216 Ky. 611—Belknap Hardware & Mfg. Co. v Adams Express Co, 261 S W. 599, 202 Ky. 804.
Me —Mason v. Maine Cent. R. Co., 110 A. 425, 119 Me. 195
Neb —Colburn v Davis, 196 N.W 893, 111 Neb. 496.
N H —Wright v. Boston & M. R. R., 125 A. 431, 81 N H 254
N.Y.—Mozier v. Barrett, 193 N.Y.S 579.
N.C —Winstead v East Carolina Ry., 118 S E 887, 186 N.C 58—Rogers & Co v East Carolina Ry, 118 S E 885, 186 N C 36—Thigpen v. East Carolina Ry., 113 S.E. 562, 184 N.C. 33.
Pa.—Hilbert v. Pennsylvania R. Co., 120 A. 778, 277 Pa 105, affirming 1 Pa Dist. & Co 349.
Vt.—N. Pelaggi & Co v. Central Vermont Ry Co, 121 A. 441, 97 Vt. 1
Wis.—Northern Milling Co. v. Davis, 190 N W. 351, 178 Wis. 493.

Stipulation reasonable

The stipulation set forth in the text was reasonable.
U S —Leigh Ellis & Co. v. Davis, Ga, 43 S Ct. 243, 260 U.S. 682, 67 L Ed. 460, affirming, C.C.A., 276 F 400, certiorari denied 42 S Ct. 187, 257 U S 659, 66 L Ed 422, and which affirms, D.C, Leigh Ellis & Co. v Payne, 274 F. 443.
Mo —Goodwin & Jean v. American Ry. Express Co., 294 S W. 100, 220 Mo App. 695.

Who could take advantage of stipulation

The stipulation set forth in the text and contained in an express receipt could be set up by express company taking over the business of the company issuing the receipt, although the latter company immediately removed from the state with its agents —Belknap Hardware & Mfg Co. v. Adams Express Co, 261 S W. 599, 202 Ky. 804.

Ruling of interstate commerce commission

(1) In a case in which the bill of lading provision set forth in the text was involved it was held that, where the interstate commerce commission in ruling, in December, 1919, that bills of lading limiting the time for bringing suit should allow six months after the rejection of the claim by the carrier, unless rejected more than six months before the expiration of the period of limitation, entered no order but simply provided that carriers would be expected to modify their bills of lading in accordance therewith and that further action might be taken if this was not done, the proposed change was prospective and did not affect a prior bill of lading under which the rights of the parties had become fixed.
Conn.—Humphrey-Cornell Co v. Hines, 115 A. 561, 97 Conn. 21.
Vt.—N Pelaggi & Co v. Central Vermont Ry. Co., 121 A. 441, 97 Vt. 1.

(2) There was a recognition of the legality of a contract containing a limitation in accordance with that set forth in the text, first prescribed by the interstate commerce commission in the uniform bill of lading, and of the fact that a period of two years was not necessarily unreasonable — Humphrey-Cornell Co. v. Hines, supra

Effect of unnecessary claim

Where, in a stipulation similar to the one set forth in the text, there was an added provision that no claims not in suit will be paid after the lapse of two years as above, unless made in writing within four months as above specified, the fact that a notice was given although not required did not render inoperative the stipulation limiting the time for bringing suit or extend the period for bringing suit —Hankins v. Payne, 214 N W. 99, 239 Mich. 155

Setting off claim for damage against claim for freight

The claim of a shipper for damages, although under the terms of the bills of lading action thereon was barred by limitation, could be set off by a receiver for shipper against claims of the carrier for freight —First Nat Bank of Chicago v. Rogers, Brown & Co, D C Wash, 299 F. 602.

65. U S —Louisiana & W. R. Co. v. Gardiner, La., 47 S Ct 386, 273 U. S. 280, 71 L Ed. 644.
Ohio —Norfolk & W. Ry. Co. v Cosmopolitan Bank & Trust Co, 174 N.E. 801, 37 Ohio App 323

66. U S —Chicago & N. W. Ry Co v. Bewsher, C.C.A.Neb, 6 F 2d 947, certiorari denied 46 S Ct 205, 270 U.S. 641, 70 L.Ed 775
Tenn —Tennessee Cent. Ry. Co. v. Russell, 15 Tenn App 312.

67. U S —Chicago & N. W Ry. Co. v Bewsher, C C.A.Neb., 6 F.2d 947, certiorari denied 46 S Ct. 205, 270 U.S. 641, 70 L.Ed. 775.

been recognized under such later statutory provision.[68] Where the contractual provision is in conformity with the statutory provision restricting the carrier's rights in this regard and is otherwise valid and binding, failure to bring the action within the time fixed by such contractual provision bars an action by claimant,[69] even though the time fixed is shorter than that fixed in the statute of limitations[70] and a statute of the state of the forum might prevent the operation of the contract provision if the shipment were not interstate.[71]

War-time federal control of carriers. The provision of the Act of February 28, 1920, 41 U S St. at L. p 462, c 91 § 206 f, that the period of federal control shall not be computed as a part of the periods of limitation in actions against carriers for causes of actions arising prior to federal control applies to limitations prescribed by state or federal statutes[72] and not to a stipulation in a shipping contract limiting the time within which suit must be brought.[73] There is also authority for the view that such statutory provision did not reach back

68. Ind.—American Ry. Express Co v Shideler, 165 N.E. 336, 88 Ind App 645

Contract provision valid and binding

(1) Provision fixing two years and one day after delivery or, in case of failure to make delivery, two years and one day after a reasonable time for delivery had elapsed, provided that in case the claim on which suit is based was made in writing within six months, whether or not filing of such claim is required as a condition precedent to recovery, suit shall be instituted not later than two years and one day after notice in writing shall be given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice

Fla.—Atlantic Coast Line R. Co. v. Chase, 146 So. 658, 109 Fla. 50—Atlantic Coast Line R. Co. v. Wauchula Truck Growers' Ass'n, 118 So. 52, 95 Fla. 392

Iowa—Taylor v. Chicago, R. I. & P Ry. Co, 227 N.W. 407, 208 Iowa 1396.

S.D.—Tribby v. Chicago & N. W. Ry. Co, 264 N.W. 185.

(2) Suits for loss, damages or delay shall be instituted only within two years and one day after the date when notice in writing is given by the carrier to claimant that the carrier has disallowed the claim or any part or parts thereof.—American Ry. Express Co. v. Shideler, 165 N.E. 336, 88 Ind.App. 645.

69. U.S.—Leigh Ellis & Co. v. Davis, Ga., 43 S.Ct. 243, 260 U.S. 662, 67 L.Ed. 460, affirming, C.C.A., 276 F. 400, certiorari denied 42 S.Ct. 187, 257 U.S. 659, 66 L.Ed. 422, and which affirms, D.C., Leigh Ellis & Co v Payne, 274 F. 443.

Ark.—Bernstein v Reid, 2 S.W.2d 1078, 176 Ark 296.

Conn.—Humphrey-Cornell Co. v. Hines, 115 A. 561, 97 Conn 21.

Fla.—Atlantic Coast Line R. Co v. Wauchula Truck Growers' Ass'n, 118 So. 52, 95 Fla. 392

Ind.—American Ry. Express Co v. Shideler, 165 N.E. 336, 88 Ind.App. 645.

Iowa—Taylor v. Chicago, R. I. & P. Ry. Co., 227 N.W. 407, 208 Iowa 1396

Ky.—Belknap Hardware & Mfg. Co. v. Adams Express Co., 261 S.W. 599, 202 Ky. 804

Me.—Mason v Maine Cent. R. Co., 110 A. 425, 119 Me. 195.

Md.—Noblesville Milling Co. v. Baltimore & O. R. Co, 121 A. 576, 142 Md. 673—Acme-Evans Co. v Baltimore & O. R. Co, 121 A. 571, 142 Md 658.

Mich.—Hankins v. Payne, 214 N.W. 99, 239 Mich 155

Mo.—Goodwin & Jean v. American Ry Express Co., 294 S.W. 100, 220 Mo App. 695

Neb.—Colburn v. Davis, 196 N.W. 893, 111 Neb 496

N.H.—Wright v Boston & M. R. R., 125 A. 431, 81 N.H. 254.

N.Y.—Bell v New York Cent R. Co., 175 N.Y.S. 712, 187 App Div. 564—Lissberger v. Bush Terminal R. Co, 197 N.Y.S. 281, 119 Misc 691—Mozier v. Barrett, 193 N.Y.S. 579

N.C.—Winstead v. East Carolina Ry., 118 S.E. 887, 186 N.C. 58—Rogers & Co v. East Carolina Ry, 118 S.E. 885, 186 N.C. 86—Thigpen v East Carolina Ry, 113 S.E. 562, 184 N.C. 33

Pa.—Hilbert v. Pennsylvania R. Co., 120 A. 778, 277 Pa. 105, affirming 1 Pa.Dist. & Co. 349—Central R. Co of New Jersey v. Parry, 18 Pa.Dist. & Co. 184.

S.D.—Tribby v Chicago & N. W. Ry Co, 264 N.W. 185

Vt.—N. Pelaggi & Co v. Central Vermont Ry Co, 121 A. 441, 97 Vt. 1.

Wis.—Northern Milling Co. v. Davis, 190 N.W. 351, 178 Wis. 493.

Bills of lading covering intrastate and interstate transportation

Where grain was transported within the state, without loss, to destination, and sold to purchaser, to whom indorsed shipper's order bill of lading was delivered, and who surrendered it for shipper's order bill of lading for transportation to another place outside the state over connecting lines, during which some grain was lost, and limitation on time for instituting suit, contained in carrier's tariff schedule on file with interstate commerce commission was inserted in second bill of lading, but not in first, liability for loss arose under second bill of lading, and failure to sue within time specified barred action by first shipper to recover from carrier issuing bill of lading.—Farmers' Grain Union v Davis, 240 P. 843, 119 Kan. 556.

70. N.H.—Wright v. Boston & M. R. R., 125 A. 431, 81 N.H. 254.

Stipulation not affected by general statute of limitations

A limitation of two years and one day after reasonable time for delivery as a defense to an action brought against a carrier after that time under the act to regulate commerce could not be avoided by the shipper on the theory of unreasonableness, such provision, being the subject of special contract in the bill of lading, was not affected by the general statute of limitations, state or federal.—William F. Mosser Co. v. Payne, 114 S.E. 365, 92 W.Va. 41.

71. U.S.—Leigh Ellis & Co v Davis, Ga., 43 S.Ct. 243, 260 U.S. 682, 67 L.Ed. 460, affirming, C.C.A., 276 F. 400, certiorari denied 42 S.Ct. 187, 257 U.S. 659, 66 L.Ed. 422, and which affirms, D.C., Leigh Ellis & Co v Payne, 274 F. 443

S.D.—Tribby v. Chicago & N. W. Ry Co., 264 N.W. 185.

72. U.S.—New York Cent R. Co v. Lazarus, C.C.A.N.Y., 278 F. 900, reversing, D.C., Lazarus v New York Cent R. R., 271 F. 93

Ill.—Louisiana Lumber Co. v. Michigan Cent. R. Co., 230 Ill.App. 33

Ky.—American Oak Leather Co v Cleveland, C., C. & St. L. R. Co., 288 S.W. 347, 216 Ky. 611.

Md.—Noblesville Milling Co. v. Baltimore & O. R. Co., 121 A. 576, 142 Md. 673—Acme-Evans Co v. Baltimore & O. R. Co., 121 A. 571, 142 Md. 658.

Mich.—Thomas Canning Co. v. Southern Pac. Co., 193 N.W. 793, 223 Mich. 154, 189 N.W. 210, 219 Mich 388

N.Y.—Mallory v. Barrett, 194 N.Y.S. 677, 118 Misc. 749.

73. U.S.—New York Cent. R. Co v Lazarus, C.C.A.N.Y., 278 F. 900, reversing, D.C., Lazarus v. New York Cent R. R., 271 F. 93.

and revive a right of action against the carrier where the full period for bringing the action as fixed by the shipping contract had expired before the enactment of such statutory provision.[74]

In view of the fact that the purpose of § 206 a of such Act which provided that actions may be brought against the agent designated by the president, arising out of federal control, and that such actions may be brought within the periods of limitation prescribed by state or federal statutes but not later than two years from the date of the passage of the act was to limit and not to extend rights of action[75] such provision did not invalidate prior valid contracts limiting the period for bringing suit,[76] and did not restore the right to sue to those who had lost such right because of noncompliance with such a valid contract.[77]

§ 243. Waiver of Limitation

As to interstate shipments, there is authority for the view that the carrier may not waive a stipulation limiting the time within which to sue. As to intra-state shipments, the right to waive is usually recognized.

Since the decision of the supreme court of the United States in Georgia, F. & A. Ry. Co. v. Blish Milling Co., Ga., 36 S.Ct. 541, 241 U.S. 190, 60 L. Ed. 948, which involved the waiver of a stipulation for making a written claim, considered above in § 241, it has frequently been held or recognized that the carrier may not, in case of an interstate shipment, waive a provision in a contract of shipment limiting the time within which suit for loss or injury must be brought[78] notwithstanding the alleged waiver occurs before the time limit has expired.[79] The view has been taken that such a waiver would constitute an invalid discrimination, as shown below in § 364. It has been held, however, that even in the case of an interstate shipment, the carrier is estopped to assert the contractual limitation where he has induced claimant to delay bringing suit beyond the period of limitation.[80] While in a case in the supreme court of the United States in which a stipulation limiting the time in which to sue was involved, the justice who announced the decision cited the Blish case with approval and expressed the view that the parties to a bill of lading cannot waive its terms, nor can the carrier by its conduct give the shipper a right to ignore them, it may be noted that only four of the nine sitting justices expressed concurrence in such view.[81]

Ill.—Louisiana Lumber Co. v. Michigan Cent. R. Co., 230 Ill App 33.

Ky.—American Oak Leather Co. v Cleveland, C., C. & St. L. R. Co., 288 S.W. 347, 216 Ky. 611.

Md.—Noblesville Milling Co. v. Baltimore & O. R. Co., 121 A. 576, 142 Md 673—Acme-Evans Co. v. Baltimore & O. R. Co., 121 A. 571, 142 Md 658.

Mich.—Thomas Canning Co. v. Southern Pac. Co., 193 N.W. 793, 223 Mich. 154, 189 N.W. 210, 219 Mich. 388.

N.Y.—Mallory v. Barrett, 194 N.Y.S. 677, 118 Misc. 749.

Vt.—N. Pelaggi & Co. v. Central Vermont Ry. Co., 121 A. 441, 97 Vt. 1.

74. Ky.—American Oak Leather Co v. Cleveland, C., C & St. L. R. Co., 288 S.W. 347, 216 Ky 611.

Neb.—Colburn v. Davis, 196 N.W. 893, 111 Neb. 496.

75. U.S.—Leigh Ellis & Co. v. Davis, Ga., 43 S.Ct. 243, 260 U.S. 682, 67 L.Ed. 460, affirming, C.C.A., 276 F. 400, certiorari denied 42 S.Ct. 187, 257 U.S. 659, 66 L.Ed 422, and which affirms, D.C., Leigh Ellis & Co v. Payne, 274 F. 443

Wis.—Northern Milling Co. v. Davis, 190 N.W. 351, 178 Wis. 493.

Construction of statute

In construing the above statutory provision in a case in which a contractual limitation was involved it was held that such statutory provision did not extend the time, as state or federal laws were to govern if they did not extend the time of bringing actions beyond two years from the passage of the act, and, if they did, then the act limited them to two years from its passage—Northern Milling Co. v. Davis, 190 N.W. 351, 178 Wis. 493.

76. U.S.—Leigh Ellis & Co v. Davis, Ga., 43 S.Ct. 243, 260 U.S. 682, 67 L.Ed 460, affirming, C.C.A., 276 F. 400, certiorari denied 42 S.Ct. 187, 257 U.S. 659, 66 L.Ed 422, and which affirms, D.C., Leigh Ellis & Co., 274 F. 443.

Kan.—Farmers' Grain Union v. Davis, 240 P. 843, 119 Kan 556.

77. N.H.—Wright v. Boston & M. R. R., 125 A. 431, 81 N.H. 254.

78. Mo.—Blair-Baker Horse Co. v. Atchison, T. & S. F. Ry. Co., App., 200 S.W. 109.

Okl.—Overstreet v. Wichita Falls & N. W. R. Co., 175 P. 354, 73 Okl 191.

Tex.—Shroyer v. Chicago, R. I. & G. Ry. Co., 222 S.W. 1095, 111 Tex 24, reversing Chicago, R. I. & G. Ry. Co. v. Shroyer, Civ.App., 197 S.W. 773, modified on other grounds Shroyer v. Chicago, R. I. & G. R. Co., 226 S.W. 140, 111 Tex 24.

Vt.—N. Pelaggi & Co. v. Central Vermont Ry. Co., 121 A. 441, 97 Vt. 1.

79. Mo.—Blair-Baker Horse Co. v. Atchison, T. & S. F. Ry. Co., App., 200 S.W. 109.

Estoppel

The carrier may not lose the right to set up limitation provision by estoppel whether the acts constituting the alleged estoppel occurred before or after the time limit expired.—Blair-Baker Horse Co. v. Atchison, T. & S. F. Ry. Co., Mo.App., 200 S.W. 109.

80. Ky.—American Oak Leather Co v. Cleveland, C., C. & St. L. R. Co., 288 S.W. 347, 216 Ky. 611.

81. U.S.—Texas & P. Ry Co v Leatherwood, Tex., 39 S.Ct. 517, 250 U.S. 478, 63 L.Ed. 1096.

Division in court

Three other justices concurred in the opinion containing the view set forth in the text, rendered by Mr. Justice Brandeis in announcing the judgment of reversal, three justices dissented, and Mr. Justice McReynolds, with whom another justice concurred, concurred in the judgment for reversal but said: "The broad declaration that the parties to a bill of lading cannot waive its terms nor can the carrier, by its conduct, give the shipper the right to ignore them goes beyond what is necessary to the decision and I am not prepared to assent to it as a proposition of law"—Texas & P. Ry. Co. v Leatherwood, Tex., 39 S.Ct. 517, 518, 250 U.S. 478, 63 L.Ed. 1096.

Prior to the decision in the Blish Case, it was generally recognized, without making the distinction as to interstate shipments, that a limitation of time within which action shall be brought might be waived by any conduct of the carrier calculated to induce, and which has induced, the owner to delay the bringing of suit beyond the time stipulated.[82] In the absence of a contravening constitutional or statutory provision, a contractual limitation is still subject to waiver in respect of intra-state shipments[83]

The mere fact that the carrier indicates to claimant that time for an investigation is desired does not constitute a waiver where there is nothing in the negotiations from which claimant may reasonably assume that the carrier intends to settle the claim without suit.[84] The claimant may not rely on a letter from the carrier stating that the matter would be taken up with claimant after the receipt of definite information as a waiver of the stipulation fixing a limitation on the time to sue where such letter was received more than a year before the time to sue had expired.[85]

R. ACTIONS FOR LOSS OF, OR INJURY TO PROPERTY

§ 244. Nature and Form

Where goods are injured only, the owner's remedy against the carrier is for damages, and not for the value of the goods. For injury to an interstate shipment the owner may sue the carrier at common law for negligence, although there is contrary authority.

Where goods intrusted to a carrier for transportation and delivery are injured only, the owner's remedy is an action for damages, and not for the value of the goods.[86]

Interstate shipments. It has been held that the owner of property delivered to a carrier for interstate transportation has a right of action against the carrier at common law for negligence causing injury to the property, notwithstanding the federal statutes,[87] and that, although a shipper of live stock under a written contract for interstate shipment cannot avoid the effect of a provision in the contract requiring notice to the carrier of loss or damage to the stock in transit, as noted supra § 237, he may nevertheless sue in tort for such loss or damage.[88] On the other hand, it has been held that the common-law action for damages to an interstate shipment of live stock has been superseded by federal legislation and the rules of the interstate commerce commission.[89] Where the complaint charged negligent failure to deliver goods, and there was evidence of loss, raising a presumption of negligence, the action was in tort, based on negligence, although the issue submitted said nothing about negligence.[90]

Election of form. The right of a shipper to elect whether to sue the carrier in contract or tort for injury to, or loss of, property intrusted to it has been discussed in the C.J.S. title Actions § 49 c (4).

§ 245. Right of Action and Defenses

a. Right of action
b. Defenses

a. Right of Action

Questions as to the right of action against a carrier for loss of, or injury to, goods, in so far as they relate to matters of substantive law, are necessarily involved in the question of the carrier's liability for such loss or injury, supra §§ 71–118. In so

82. Kan.—Donohoo Horse, etc., Co v. Missouri, etc., R. Co., 149 P. 436, 95 Kan. 681.
10 C.J. p. 345 note 33.

83. N.M.—Mersfelder v. Atchison, T. & S. F. Ry. Co., 174 P. 989, 24 N.M. 518.

84. N.C.—Skyland Hosiery Co. v. American Ry. Express Co., 120 S.E. 228, 186 N.C. 556

Waiver or estoppel not shown in respect of interstate shipment

(1) Even assuming that there could have been a waiver or estoppel in respect of an interstate shipment, it was held that no such waiver or estoppel was shown by the communications between the shipper's attorney and the agent of the carrier.—Blair-Baker Horse Co. v. Atchison, T. & S. F. Ry. Co., Mo.App., 200 S.W. 109.

(2) In respect of damages to live stock, there was no waiver of six months' limitation for bringing suit as provided by bill of lading by virtue of correspondence with reference to stock.—Illinois Cent. R. Co. v. Rogers & Hurdle, 76 So. 686, 116 Miss. 99.

85. N.Y.—Jennings v. Barrett, 194 N.Y.S. 679.

86. Ind.—Cleveland, C., C. & St. L. Ry. Co. v. Bement-Rea Co., 154 N.E. 32, 86 Ind.App. 67, rehearing denied 155 N.E. 46, 86 Ind.App. 67.

87. Ga.—Southwestern R. Co. v. Davies, 186 S.E. 899, 53 Ga.App. 712.
Ill.—Hartford Live Stock Ins. Co. v. Railway Express Agency, 274 Ill.App. 585
Ind.—Chesapeake & O. Ry. Co. of Indiana v. Jordan, 114 N.E. 461, 63 Ind.App. 365.

No provision of the Interstate Commerce Act or the amendments thereto requires the shipper to bring his action on the contract, or deprives him of his right to proceed against the carrier in a tort action, based on its common-law liability. —Hartford Live Stock Ins. Co. v. Railway Express Agency, 274 Ill.App. 583.

88. Ill.—Newman v. Union Pac. R. Co., 210 Ill.App. 13.

89. Kan.—Reedy v. Missouri Pac. R. Co., 255 P. 683, 123 Kan. 600.

90. N.C.—Winstead v. East Carolina Ry., 118 S.E. 887, 186 N.C. 53.

far as the right of action relates only to the question as to who is entitled to maintain the action, it is treated infra § 249 in connection with the discussion as to the proper parties plaintiff.

b. Defenses

Among the many defenses that have been interposed in actions against carriers for loss of, or injury to, property in their custody, some have been held good, and others insufficient, depending on the nature of the defense and the rules of law regulating the carrier's liability.

The defenses generally available to a carrier sued for loss of, or injury to, goods while in its possession, which, as already considered in §§ 75–79, are (1) an act of God, (2) the public enemy, (3) the act of the shipper, or (4) the inherent nature of the goods themselves, are affirmative defenses.[91]

A carrier cannot set up the congestion of traffic[92] and the consequent difficulties and interferences in procuring cars for shipment,[93] as an excuse for injury to goods in transit; nor can the carrier defend in action for loss of goods in transit on the ground of a nonfraudulent misstatement as to the contents of a package delivered to it for transportation, whereby a lower freight rate was charged than that fixed by the tariff.[94]

A carrier's failure to issue a bill of lading or receipt for an interstate shipment, as required by the federal statute, is no defense to an action against the carrier for the loss of, or injury to, the shipment,[95] nor is it a defense that plaintiff could not recover under a bill of lading held as collateral security.[96]

A shipper cannot recover from a carrier for damage to cattle sold after shipment under an option contract entered into before the shipment;[97] but the shipper's right of action is not affected by a sale of the cattle, when, on their arrival, the buyer refused, because of the damage to the cattle, to purchase them, although he did subsequently purchase them, but not under the option contract.[98]

The fact that the United States government has levied a fine against a carrier for the loss of registered mail while in the carrier's custody and control is no bar to an action of tort, to which the government is not a party, brought by the owner of the mail matter against the carrier to recover for the loss.[99]

Where the consignee of cotton damaged while in the carrier's possession paid a draft for the gin weight under a custom that compress weight on delivery, if different, governed, and that the difference would be adjusted, the mere fact that the adjustment had not been made at the time of the trial, did not relieve the carrier from liability.[1]

Where a shipper sues a carrier to recover the value of a substantial part of a shipment of freight which was lost or destroyed in transit, failure to pay the freight charges and demurrage does not defeat the right to recover, if plaintiff had offered to pay the freight, and remove his goods, during the free period, on condition that the agents of defendant should check up the lost and injured property with him.[2]

Diversion of shipment. The diversion of a shipment with the carriers' consent from its original destination to a better market is no defense to an action for damages to the goods.[3]

Rule or practice of carrier. The custom of a switching carrier operating between terminals to make no inspection and do no re-icing of cars containing perishable food products, although known to the consignee, is no defense to an action by the consignee for loss caused by failure properly to ice the car,[4] nor can a rule or regulation for the conduct of its business which the carrier habitually and systematically disregards be set up as a defense in an action for loss of goods accepted in contravention of such rule.[5]

91. Ariz—Southern Pac. Co. v. Itule, 74 P 2d 38.

92. Ill—Mueller Grain Co. v. Lake Erie & W. R. Co, 213 Ill.App. 108

93. Ark—Ft Smith, S. & R I. R. Co. v Scroggins, 234 S W. 999, 150 Ark. 571.

94. N Y.—Gassman v. New York Cent. R. Co, 201 N.Y S. 740, 207 App Div 15

95. Idaho.—Barrett v Northern Pac. Ry. Co, 157 P. 1016, 29 Idaho 139
Ill—See Cocrane v Chicago Great Western R. Co, 199 Ill.App. 469
Ind—Chesapeake & O. Ry Co of Indiana v. Jordan, 114 N E. 461, 63 Ind.App. 365.

96. Mo—First Nat Bank v. Missouri Pac. Ry. Co, 278 S.W. 1075, 220 Mo App. 941.

97. Tex—Ft. Worth & D. C. Ry. Co. v. Hill, Civ App, 213 S W. 952.

98. Tex—Ft. Worth & D. C. Ry. Co. v. Hill, supra

99. Ill—Ætna Ins. Co v. Illinois Cent R Co, 283 Ill App 527.

1. Tex—Davis v. Wylie & Jackson, Com App, 256 S W. 256, affirming, Civ App., 241 S.W. 1114.

2. Pa—Clark v. Baltimore & O. R Co, 79 Pa Super 159

3. Ark.—St. Louis, etc, R Co. v Tilby, 174 S W 1167, 117 Ark. 163.

4. Mass.—Batchelder & Snyder Co v. Union Freight R Co, 156 N E. 698, 700, 259 Mass. 368, 54 A L R 616, certiorari denied Union Freight R. Co v. Batchelder & Snyder Co, 48 S.Ct. 117, 275 U S 556, 72 L Ed 424.
"Doubtless this custom enters into the implied contract of carriage . . . but it does not go far enough to relieve the defendant of its obligation as a common carrier to protect while it has sole control and before delivery or its equivalent."—Batchelder & Snyder Co. v. Union Freight R. Co, supra

5. Tex.—Gulf, etc, R Co. v. Cage, Civ.App, 174 S.W. 855.

Other cases in which particular defenses have been sustained[6] or denied[7] appear in the notes.

§ 246. Jurisdiction and Venue

a. Jurisdiction

b. Venue

a. Jurisdiction

State courts have jurisdiction of actions for loss of, or injury to, an interstate shipment. Whether a state court has jurisdiction of such an action brought against a foreign carrier depends on the residence of the parties and the place where the cause of action arose.

State courts have jurisdiction of actions for loss of, or injury to, an interstate shipment,[8] and a shipper who has suffered damage through an interstate shipment by reason of a failure on the part of the carrier to perform duties imposed by a federal statute in the matter of caring for the shipment may bring suit therefor in a state court.[9]

Actions against foreign carriers. It has been held that a state court has no jurisdiction of an action against a foreign express company by a nonresident of the state to recover for injury to an interstate shipment, where the cause of action arose elsewhere, out of a transportation beginning and ending in other states and not passing through any point within the state,[10] and even, it has been held, though the shipment passed through the state to reach its destination;[11] and a like rule has been held in an action against a railroad carrier having a soliciting agent within the state.[12] A state court, however, has jurisdiction of an action by a resident of the state against a foreign express company doing business within the state for injury to goods shipped from a point without the state to a point within;[13] and the same rule has been applied even where the contract of carriage was made and performed in other states.[14] So it has been held that a foreign express company doing business in the District of Columbia through officers or agents fully authorized to represent the company there may be sued for injury to goods, the shipment of which began and was completed in distant states, and did not pass through the District.[15]

b. Venue

The venue of actions against carriers for loss of, or injury to, goods is governed by general or special statutes.

The question of venue in actions for loss of, or injury to, goods may be determined by an application of general laws; but, for the most part is a matter of special statutory regulation.[16]

6. Estoppel as defense

That a shipper of live stock, being present and fully aware of the extent and condition of the bedding then in the cars, accepted it as bedded, and so is estopped to claim improper bedding as cause of injury, is proper matter of defense in action for damages to the shipment.—Kansas City, M. & O Ry. Co of Texas v. Weatherby, Tex Civ App, 203 S W. 793.

7. Fraud

Carrier having granted shipper of ore special privilege of having car placed on siding en route for sampling of ore, in violation of law, should not be permitted to defend, in shipper's action for loss of ore by theft, on ground that the separation of metallics from other ore constituted fraud, so as to release carrier from liability.—Siebert v. Erie R Co, 179 N.Y S. 136, 189 App Div. 586

Refusal of consignee to receive goods

In action against carrier for damages to goods, wherein plaintiff recovered as damages the difference between their value in their damaged condition and their value had they not been damaged, his recovery will not be denied because of his refusal to receive them, when such refusal in no way increased carrier's liability—Whittington v. Southern Ry., 90 S.E 505, 172 N.C. 501.

8. N Y.—Cheney Piano Action Co v New York Cent, etc, R. Co., 152 N.Y.S 285.

9. Okl—St Louis, etc., R. Co. v. Piburn, 120 P. 923, 30 Okl. 262

10. Ohio.—Iron City Produce Co v. American Ry. Express Co, 153 N. E 316, 22 Ohio App. 165.

11. Ohio—S. Catanzaro & Sons v. Central of Georgia R. Co, 26 Ohio N P.,N S., 530.

12. U S.—Davis v. Farmers' Co-op Equity Co, Minn, 43 S Ct. 556, 262 U S. 312, 67 L Ed 996.

13. Ohio.—I. N. Price & Co. v. Davis, 153 N.E. 529, 22 Ohio App 388.

14. Ark—American Ry. Express Co. v. H. Rouw Co, 294 S W. 401, 173 Ark 810.

15. D.C.—Harris v. American Ry Express Co., 12 F 2d 487, 56 App. D.C 264, certiorari denied American Ry Express Co. v. Harris, 47 S Ct. 92, 273 U S. 695, 71 L.Ed 845.

16. In Georgia

(1) Civ Code 1895 § 2334, fixing the venue of suits against railroad companies, is as follows: "All railroad companies shall be sued in the county in which the cause of action originated, by any one whose . . . property has been injured by such railroad company . . . for the purpose of recovering damages for such injuries; and also on all contracts made or to be performed in the county where suit is brought, any judgment rendered in any other county than the one in which the cause so originated shall be utterly void. But if the cause of action arises in a county where the railroad company liable to suit has no agent, then suit may be brought in the county of the residence of such company." The venue of all cases not falling within the provisions of this section is governed by the general law—Lytle v. Southern R. Co, 59 S E 595, 3 Ga App. 219

(2) Foreign corporations are within the purview of this section as to contracts made and torts committed in the state—Hazlehurst v. Seaboard Air Line R. Co., 45 S E 703, 118 Ga. 858—10 C J. p 345 note 41

(3) But the statute does not cover the case of a tort committed in another state by a nonresident corporation—Reeves v. Southern R. Co, 49 S E. 674, 121 Ga. 561, 70 L.R.A. 513, 2 Ann.Cas 207—10 C.J p 345 note 42.

(4) In such case an action of tort may be brought in any county in the state in which legal service of process can be made.—Lytle v. Southern R. Co, supra.

(5) By the express provisions of the statute a judgment against a

§ 247. Conditions Precedent

A demand is not a prerequisite to an action of contract against a carrier for loss or destruction of goods; nor is payment of the freight charges a condition precedent to an action by the consignor for damages to the goods which the carrier accepted without demanding prepayment of such charges.

No demand is necessary before commencing an action of contract against a carrier for neglecting to carry and to deliver the goods according to the contract, if the goods are lost or destroyed;[17] but, as stated supra § 234, where the contract of shipment contains a reasonable requirement of giving notice of loss of, or injury to, the goods, the giving of such notice is a condition precedent to the action for loss or injury. Where the carrier has accepted goods for transportation without demanding prepayment of freight, payment of freight by the consignor of whom the carrier has not demanded payment thereof is not a condition precedent to a suit by the consignor for loss of, or injury to, the goods shipped.[18]

§ 248. Time to Sue, and Limitations

Actions against carriers for the loss of, or injury to, goods must be brought within the time prescribed by special statutes limiting the time for bringing such actions.

Under the United States Code, 49 U.S.C.A § 20 par 11, as amended March 4, 1927, an action for

railroad company on a suit for damages resulting from an injury to property, rendered in any other county than the one in which the cause of action originated, is "utterly void," except in cases where the suit is brought in the county where the principal office of the company is located, and where it is shown that the company had no agent in the county where the cause of action originated—Southern R. Co. v. Brock, 42 S.E. 65, 115 Ga. 721.

(6) An action for injury to a shipment, based on the contract of affreightment, may be brought either in the county in which the contract was entered into or in the county where the carrier undertook to render full performance by delivery of the shipment in good order to the person entitled to receive it.—Friedman v. Seaboard Air-Line R. Co., 52 S.E. 763, 124 Ga. 472.

(7) An action for loss of the goods based on the contract may be brought in the county where the contract was executed.—Albany, etc., R Co v. Merchants', etc., Bank, 73 S E 637, 137 Ga. 391—10 C J. p 346 note 46.

(8) By virtue of another statute, Civ Code 1895 § 2004, every express company doing business in the state is subject to suit for failure to perform its duties as a carrier, either in the county where the goods are received for shipment or in the county where the delivery of the goods is directed to be made; and this is true notwithstanding provision is made in a special charter granted to a particular company that it shall be liable to suit in any county wherein it may tortiously injure the person or property of another, or where any contract to which it is a party may be made or is to be performed. —Southern Express Co v. B. R. Electric Co, 55 S E 254, 126 Ga. 472.

In Kentucky

(1) Civ Code § 73 provides that an action against a common carrier on a contract to carry property must be brought in the county in which defendant or either of several defendants resides, or in which the contract is made, or in which the carrier agrees to deliver the property, and under such provision it has been held that an action on a contract of shipment for loss of, or injury to, the goods shipped may be brought in the county in which the contract was made, or in which defendant resides, or where the goods were to be delivered—Wilson v. Louisville, etc, R Co., 112 S W. 585, 33 Ky L 985—Plotz v. Miller, 51 S W. 176, 21 Ky L. 257—Nashville, etc., R. Co. v. Carrico, 14 Ky.L 431.

(2) On the other hand, suit cannot be brought for loss or injury on the contract of shipment in a county which was neither the residence of defendant, the place where the contract was made, nor the place where the goods were to be delivered—Jewell v. Louisville, etc., R. Co, 140 S W. 689, 145 Ky. 493.

(3) Under Civ Code § 73, the provisions of which have already been set out, and § 92, providing that a special demurrer is an objection to a pleading which shows that the court has no jurisdiction of defendant, etc, a demurrer to the petition in such an action for want of jurisdiction of the cause of action is bad, where the petition does not show that the county where the action is brought is not the county where the contract was made nor where defendant resides, and the objection of want of jurisdiction over defendant, not being raised by answer, is waived—Richardson v. Louisville, etc, R. Co, 111 S W. 343, 129 Ky 449, 33 Ky L 916, rehearing denied 112 S.W. 582, 129 Ky. 449, 33 Ky L. 972

(4) A carrier "resides" in the county where its chief officer or agent and place of business are when the action is commenced—Knight v Pennsylvania R. Co., 94 S W.2d 1013, 264 Ky 412.

In Louisiana a statute authorizing actions against carriers for failure to deliver a shipment to be brought, at plaintiff's option, either in the parish where the goods were to be delivered, or at the domicile of the carrier, was amended so as also to permit such actions to be brought at the place of shipment, and it was held that such amendment was valid and was applicable to a pending action in which a plea to the jurisdiction had been filed, but not tried, when the amendment was passed—Bass v. Yazoo & M. V. R Co., 65 So. 355, 136 La 528.

In Virginia

(1) Under a statute providing that an action may be brought in any county or corporation where the cause of action or any part thereof arose, although none of defendants resides therein, a cause of action by a carrier's failure to deliver a shipment in good condition at the point of destination arises at the point of destination—Norfolk, etc, R. Co. v Crull, 70 S E 521, 112 Va. 151—Chesapeake, etc, R. Co v. American Exch. Bank, 23 S E 935, 92 Va. 495, 44 L R A 449

(2) An action for the value of produce rendered worthless by delay in making delivery lies in the county in which the produce was delivered to, and accepted by, the carrier for transportation, even though the contract was made in another county, since the contract was not complete until such delivery to, and acceptance by, the carrier.—Reed & Rice Co v. Wood, 120 S E 874, 138 Va. 187.

17. Mass.—Alden v Pearson, 3 Gray 342

18. Ala—Louisville, etc, R. Co. v. Allgood, 20 So. 986, 113 Ala 163 Ind—Cleveland, etc., R Co v. Rudy, 89 N.E. 951, 173 Ind 181.

loss of, or injury to, an interstate shipment was requested to be brought within three years from the time the cause of action accrued, and this limitation has been held applicable to an action brought after the amendment of paragraph 11 by Act April 23, 1930, which omitted the clause relating to limitations.[19] The term "date of shipment," as used in a state statute relating to prescription in actions against carriers for loss of, or damage to, goods, is the date when the goods were delivered to the carrier and a bill of lading issued by it.[20] As to the applicability of general statutes of limitations, questions as to what statute applies to actions based on breach of the carrier's contract, resulting in the loss of the goods, are discussed in the C.J.S. title Limitation of Actions § 48, also 37 C.J. p 749 note 21. The question as to the time of accrual of the cause of action, for the purpose of computing the period of limitations, is discussed in the C.J.S. title Limitation of Actions § 143, also 37 C.J. p 841 notes 40-45.

§ 249. Parties Plaintiff

a. Owner in general
b. Consignor as owner
c. Consignor as contracting party
d. Consignee in general
e. Consignee as actual owner
f. Consignee making advances
g. Consignee directing mode of shipment
h. Consignor as agent of consignee
i. Consignee without special or general property
j. Shipper both consignor and consignee
k. Persons having special or beneficial interest
l. Holder of bill of lading
m. Persons to be notified
n. Assignees
o. Joinder of parties plaintiff

a. Owner in General

The owner of the goods is the proper party plaintiff in an action of tort to recover for their loss or injury. If the action is for breach of contract, the owner may sue if the contract was made with him or for his benefit.

The right to recover for loss of goods shipped depends entirely on the title to the goods.[21] The owner of the goods is entitled to maintain an action of tort against the carrier for loss of, or injury to, the goods, although he is not the party with whom the contract of shipment was made;[22] and such tort action should be brought by the owner and by him only, whether he be the consignor, consignee, or a third person,[23] although, as shown infra § 249 k, he need not be the absolute owner, but may have merely a special interest. Where a seller, who is both consignor and consignee, indorses the bill of lading, the real purchaser, having paid a draft on the ostensible purchaser and received the goods, may sue the carrier for their injury.[24] If the action is for breach of contract the owner may sue if he is the party with whom or for whose benefit the contract was made.[25] Thus, if the contract is made by an agent, the action may be brought by the owner.[26] While the effect of a consignment of goods generally is to vest the property in the consignee, so that he may sue for loss or injury, as stated infra subdivision d of this section, yet, if the bill of lading is special to deliver the goods to A for the use of B, the property vests in B, and the action must be brought in his name in case of loss or damage.[27] An assignment by the shipper of his account against the consignee is not an assignment of the goods shipped under a straight bill of lading, so as to permit the assignee, who had no title to the goods, to sue the carrier for loss.[28]

Purchaser of goods in transit. A person who purchases a carload shipment in transit, without inspection, or actual or constructive knowledge of injury thereto while in the carrier's possession, and assuming payment of the freight charges, may recover from the carrier for the injury,[29] but, when the goods are inspected by the purchaser, or are displayed for inspection, he takes them in the condition in which they are offered for sale, without re-

19. Ohio—Zang v. Railway Express Co, 196 N.E. 901, 130 Ohio St. 17.

20. La.—Paul Klopstock & Co. v. United Fruit Co, 131 So. 25, 171 La. 296.

21. Wis.—State Bank of De Pere v. Chicago & N. W. Ry. Co., 248 N. W. 423, 211 Wis. 465.

22. N.D.—Schlosser v. Great Northern R. Co, 127 N.W. 502, 20 N.D. 406.
Tex.—Gulf, etc, R. Co. v. Drahn, Civ. App., 163 S.W. 330.
Corpus Juris is quoted in Sindle v. American Ry. Express Co, 8 Tenn. App. 594, 601, in support of this rule and the rule next following.

23. Tenn.—Sindle v. American Ry. Express Co, supra
10 C.J. p 346 note 64.

24. Ala.—Nashville, C. & St. L. Ry. v. Abramson-Boone Produce Co, 74 So. 350, 199 Ala. 271.

25. Ind.—Cincinnati, I., St. L. & C. Ry. Co. v. Case, 23 N.E. 797, 122 Ind. 310.
Va.—Norfolk & W. Ry. Co. v. Crull, 70 S.E. 521, 112 Va. 151.
10 C.J. p 347 note 65.

26. Va.—Norfolk & W. Ry. Co. v. Crull, supra
10 C.J. p 347 note 66.

27. U.S.—Grove v. Brien, D.C., 8 How. 429, 12 L.Ed. 1142.

28. Wis.—State Bank of De Pere v. Chicago & N. W. Ry. Co, 248 N.W. 423, 211 Wis. 465.
Assignees as parties plaintiff generally see infra subdivision n of this section.

29. N.Y.—Perkel v. Pennsylvania R. Co., 265 N.Y.S. 597, 148 Misc. 284.

dress against the carrier for prior damage thereto.[30] However, if the goods should suffer further injury at the hands of the carrier for which it would be responsible, whether in transit, awaiting delivery, or while being transported after reconsignment, the purchaser would have a cause of action against the carrier for the additional damage.[31]

b. Consignor as Owner

A consignor who has title to the property shipped is entitled to sue the carrier for loss thereof, or injury thereto.

Where the consignor has parted with his title to, and ownership of, the goods, he cannot maintain an action against the carrier for injury thereto,[32] unless there has been an assignment to him of the consignee's right to recover from the carrier.[33]

But, in the absence of statutory provisions to the contrary,[34] where title to the goods shipped remains in the consignor,[35] or has revested in him subsequent to the shipment of the goods,[36] he is entitled to sue for loss thereof, or injury thereto, since he is the person who has sustained the loss or injury,[37] and the fact that he has not secured by assignment the consignee's rights is immaterial.[38] This rule has been applied in cases where the goods are not to become the property of the consignee until delivery,[39] where title does not pass because the contract of sale of the goods shipped is bad for noncompliance with the statute of frauds,[40] where the contract of sale of the goods shipped is rescinded by agreement of the parties;[41] where the consignee refuses to receive the goods and they are thrown back on the consignor;[42] where the consignor ships

30. N.Y.—Perkel v. Pennsylvania R Co., supra.

31. N.Y.—Perkel v Pennsylvania R Co., supra

32. La.—Strawberry & Vegetable Auction v Railway Express Agency, App., 143 So. 665.

33. **Assignees as parties plaintiff** generally see infra subdivision n of this section.

Equitable assignment

Where goods are shipped on open bills of lading, so that title passes, but the price of the goods to the consignee is docked the amount of any loss or damage, the adjustment amounts to an equitable assignment to the consignor of the consignee's right to recover of the carrier.—Produce Trading Co v. Norfolk Southern R. Co., 100 S.E. 316, 178 N.C. 175.

34. In Kansas, under Gen.St.1901 § 5943, L.1893, p. 176, c. 100 § 6, giving the consignee of grain the right to recover from a railway company for loss thereof, the owner and consignor of grain cannot recover from a railway for loss or shortage.—Weber v Chicago, etc., R. Co., 77 P. 533, 69 Kan. 611

35. Ga.—Davis v. Carroll, 119 S.E. 422, 30 Ga.App. 719.
Ill.—Transformer Corporation of America v Hinchcliff, 279 Ill.App. 152.—Shellabarger Elevator Co. v. Illinois Cent. R. Co., 212 Ill.App. 1.—Farmers' Grain Co. of Dorans v Illinois Cent. R. Co., 201 Ill.App. 261
Ind.—Clift v Southern Ry. Co., 124 N.E. 457, 188 Ind. 472
Mich.—Ithaca Roller Mills v. Ann Arbor R. Co., 163 N.W. 934, 197 Mich. 440
N.Y.—Kent-Costikyan Trading Co v American Ry. Express Co., 208 N.Y.S. 445, 124 Misc. 510.
N.C.—Anderson v American Ry. Express Co., 121 S.E. 354, 187 N.C. 171.—Aydlett v. Norfolk-Southern R. Co., 89 S.E. 1000, 172 N.C. 47.—Parker Buggy Corporation v. Atlantic Coast Line R. Co., 67 S.E. 251, 152 N.C. 119.
Pa.—Potamkin v Wells Fargo & Co., 63 Pa.Super. 222.
10 C.J. p. 347 note 70, p. 348 note 80

Corpus Juris is quoted in Sindle v. American Ry. Express Co., 8 Tenn.App. 594, 601.

Bill of lading evidences shipper's ownership, so as to entitle him to sue for loss or nondelivery.—Gulf, C. & S. F. Ry. Co. v. Galbraith, Tex.Civ.App., 39 S.W.2d 91.

Consignor who has guaranteed safe delivery, and has made good to the consignee the loss sustained by the carrier's failure safely to deliver, may maintain an action for such loss.—Claggett v. Chicago, M. & St. P. Ry. Co., 193 N.W. 957, 156 Minn. 37.

36. N.C.—Parker Buggy Corporation v. Atlantic Coast Line R. Co., 67 S.E. 251, 152 N.C. 119.

37. Pa.—Turner v. Central R. Co., 11 Kulp 179.
Tenn.—Sindle v. American Ry. Express Co., 8 Tenn.App. 594

38. Mich.—Ithaca Roller Mills v. Ann Arbor R. Co., 163 N.W. 934, 197 Mich. 440

39. N.C.—Anderson v American Ry. Express Co., 121 S.E. 354, 187 N.C. 171.
10 C.J. p. 347 note 72

40. N.Y.—Kent-Costikyan Trading Co v American Ry. Express Co., 208 N.Y.S. 445, 124 Misc. 510.
10 C.J. p. 347 note 73

41. Mo.—Norris v St. Joseph, etc., R. Co., 101 S.W. 159, 124 Mo.App. 16
N.C.—Anderson v American Ry. Express Co., 121 S.E. 354, 187 N.C. 171.

Acts constituting rescission

Refusal of the consignee of a dressed hog to accept it because in bad and unusable condition, and the act of the consignor in bringing an action against the carrier for negligence in handling, constitutes a rescission of the contract and a restoration of title to the consignor, so as to entitle him to sue notwithstanding the general rule that a common carrier on open bill of lading is an agent of the consignee.—Anderson v. American Ry. Express Co., 121 S.E. 354, 187 N.C. 171.

42. Ga.—Atlantic Coast Line R. Co. v. Hogrefe, 141 S.E. 214, 37 Ga.App. 636.—American Ry. Express Co. v Dubois Bros., 111 S.E. 70, 28 Ga.App. 274.
Ill.—Transformer Corporation of America v. Hinchcliff, 279 Ill.App. 152.
Mich.—Ithaca Roller Mills v. Ann Arbor R. Co., 163 N.W. 934, 197 Mich. 440.
Minn.—Claggett v. Chicago, M. & St. P. Ry. Co., 193 N.W. 957, 156 Minn. 37.
N.C.—Hardison v. Norfolk Southern R. Co., 131 S.E. 728, 191 N.C. 365.—Piner Bros. v. Norfolk-Southern R. Co., 124 S.E. 626, 188 N.C. 339.—Anderson v. American Ry. Express Co., 124 S.E. 354, 187 N.C. 171.—Aydlett v. Norfolk-Southern R. Co., 89 S.E. 1000, 172 N.C. 47.—Parker Buggy Corporation v. Atlantic Coast Line R. Co., 67 S.E. 251, 152 N.C. 119
10 C.J. p. 348 note 75.

Acts not constituting acceptance

Where goods had been injured in transit, that consignee inspected goods at destination did not constitute acceptance making good delivery placing title in consignee, so as to require it to sue for their damage.—Ithaca Roller Mills v. Ann Arbor R. Co., 163 N.W. 934, 197 Mich. 440

goods to be sold by the consignee for his benefit;[43] where goods are shipped to a customer to be tested by him and purchased if satisfactory,[44] where a shipment is made to the consignee who has not agreed to accept the same unless the goods are up to a certain grade;[45] or where a contract of sale allows a purchaser and a consignee to refuse the goods if not in good condition on arrival.[46]

So it has been held that, in a suit by the consignor against the carrier to recover the loss caused by damage to the goods shipped, where no exception has been filed in limine to the right of such consignor to sue, and where the consignee appears and testifies for plaintiff on the merits, the defense by the carrier that the consignor, not being the owner of the goods, has no cause of action cannot avail it, since the only object of the carrier in seeking to have the proper plaintiff is to avoid double payment for the damage claimed;[47] and the action of the consignee in testifying for plaintiff consignor is tantamount to an acquiescence by the consignee, and he is thereby estopped from recovering on the same cause of action.[48]

Although the statutes of another state make it illegal for any unlicensed person to ship fish caught in the waters of that state, and also make it illegal for any carrier to receive from such person a shipment of fish, an unlicensed person who ships fish in violation of the statute may nevertheless sue the carrier for the loss of the shipment, plaintiff not requiring the aid of an illegal transaction to make out his case.[49]

c. Consignor as Contracting Party

(1) Actions ex contractu
(2) Actions ex delicto

(1) Actions ex Contractu

By the weight of authority a consignor who makes an express or implied contract for the transportation of property is entitled to sue thereon for loss of, or injury to, the property, irrespective of ownership, but the action will inure to the benefit of the consignee or real owner.

As elsewhere shown, infra subdivision e of this section, there are a considerable number of decisions which hold that a consignor who has no title or interest in the goods shipped is not entitled to sue for loss of, or injury to, the goods, although he has made the contract of shipment. The decided weight of authority, however, is opposed to this view, and the better doctrine is that, where the consignor makes the contract of shipment with the carrier, he may maintain an action thereon for loss of, or injury to, the consignment, irrespective of the question of ownership, in such case it being considered that the privity of contract between the consignor and the carrier is a sufficient foundation on which to base the action,[50] and the fact that the consignor has sold the goods and has indorsed and delivered the bill of lading does not affect his right to sue.[51] This principle applies with equal force whether there is an express contract of shipment between the carrier and the consignor, or whether the contract is merely implied.[52] So the consignor may recover under the Interstate Commerce Act, as amended by the Carmack amendment, although he holds no bill of lading.[53] It has been held that the consignor's right of action on the contract is not affected by statutory provisions requiring every action to be brought in the name of the real party in

43. N.C.—Anderson v. American Ry. Express Co., 121 S.E. 354, 187 N.C. 171.
10 C.J. p. 348 note 76.

44. N.C.—Anderson v. American Ry. Express Co., supra.
10 C.J. p. 348 note 77.

45. Ill.—Chicago, etc., R. Co. v. Boggs, 134 Ill.App. 348.

46. Ark.—Yazoo, etc., R. Co. v. Soloman, 184 S.W. 418, 123 Ark. 66—Gibson v. Inman Packet Co., 164 S.W. 280, 111 Ark. 521, Ann.Cas. 1916A 1043.

47. La.—Posner v. Missouri Pac. Ry. Co., 1 La.App. 410.

48. La.—Werlein v. Texas, etc., R. Co., 5 La.App., Orleans, 216.

Corpus Juris is quoted in Anderson v. American Ry. Express Co., 121 S.E. 354, 356, 187 N.C. 171.

49. Pa.—Potamkin v. Wells Fargo & Co., 62 Pa.Super. 222.

50. Ark.—American Ry. Express Co. v. Cole, 37 S.W.2d 699, 183 Ark. 557.
Ga.—Black v. Southern Ry. Co., 173 S.E. 199, 48 Ga.App. 445—Allen v. Southern Ry. Co., 126 S.E. 722, 33 Ga.App. 209
Mo.—Gratiot St. Warehouse Co. v. Missouri, etc., R. Co., 102 S.W. 11, 124 Mo.App. 545
Pa.—Tentzer v. Reading Co., 101 Pa.Super. 238—Robb v. American Railway Express Co., 78 Pa.Super. 1.
Tenn.—Nashville, C. & St. L. Ry. Co. v. Southern Nursery Company, 3 Tenn.App. 148.
Tex.—Richardson v. D. S. Cage Co., Com.App., 252 S.W. 747.
10 C.J. p. 348 note 84.

Corpus Juris is cited in support of this rule in:

Mont.—Grover v. Hines, 213 P. 250, 252, 66 Mont. 230
W.Va.—L. Blustein & Co. v. American Ry. Express Co., 123 S.E. 566, 567, 95 W.Va. 643

Consignor to whom bill of lading was issued could, under agreement, sue carrier for entire damage resulting from carrier's breach of contract, notwithstanding consignee had paid consignor one half of loss—American Ry. Express Co. v. Cole, 37 S.W.2d 699, 183 Ark. 557.

51. Tex.—St. Louis, etc., R. Co. v. Brass, Civ.App., 133 S.W. 1075

52. Ga.—Southern R. Co. v. Johnson, 58 S.E. 333, 2 Ga.App. 36.
Mass.—Finn v. Western R. Corp., 112 Mass. 524, 17 Am.R. 128.

53. Del.—Bowden v. Philadelphia, etc., R. Co., 91 A. 209, 5 Boyce 146.
Fla.—Aultman v. Atlantic Coast Line R. Co., 71 So. 283, 71 Fla. 276.

interest;[54] but there are cases to the contrary.[55]

Action inures to benefit of owner or consignee. If the consignor has no interest in the goods, and his right of action is based solely on privity of contract, an action by him for failure to carry and to deliver safely to the consignee will inure to the benefit of the consignee or real owner; in such case the consignor is considered the trustee of an express trust.[56]

(2) Actions ex Delicto

The consignor cannot sue ex delicto for loss or injury where he has no interest in the property, although he made the contract of shipment and has the right of stoppage in transitu.

Where the consignor, although he has made the contract of shipment, has no general or special interest in the property, he cannot maintain an action in tort for loss or injury to the property;[57] and this is so, although he may have the right of stoppage in transitu;[58] but the consignor may bring suit in the name of the consignee with the latter's consent;[59] and the same rule applies where the consignor ships the goods to his own order, with directions to notify the buyer.[60]

d. Consignee in General

The consignee is presumptively the owner of the goods shipped and as such is entitled to sue for their loss or injury, although such presumption may be rebutted.

In so far as affects the question of who may sue for the loss of, or injury to, goods transported by a carrier, the presumption is that title to the goods passed to the consignee,[61] named in an open bill of lading,[62] and he is considered the person prima facie entitled to sue for loss or injury to goods shipped,[63] although the contract of affreightment was made with the consignor.[64] Nevertheless the presumption that the consignee is the owner of the goods is not conclusive and may be rebutted,[65] and, if the presumption is overcome, the action may properly be brought in the name of the consignor.[66]

Effect of special agreement. Even though there is a special agreement between the consignor and the consignee that the latter shall not become the absolute owner until the merchandise is inspected at the place of destination, the consignee may nevertheless sue for failure to deliver, if he holds bills of lading

54. Mo—Gratiot St. Warehouse Co v. Missouri, etc., R. Co., 102 S.W 11, 124 Mo App 545.
Wis—Hooper v. Chicago, etc, R. Co., 27 Wis. 81, 9 Am R. 439

55. Ark—Warren, etc., R. Co v Southern Lumber Co., 170 S.W. 998, 115 Ark. 221.
Neb—Union Pac. R Co. v. Metcalf, 69 N W. 961, 50 Neb 452.

56. Ga—Carter v. Southern R Co., 36 S E. 308, 111 Ga. 38, 50 L.R A 354.
Mass.—Finn v Webster R. Corp., 112 Mass. 524, 17 Am.R. 128.
10 C J. p 349 note 91.
"No case can be found where the consignor was permitted to recover against the carrier when the proof showed that he was not the real owner, except on the theory that the suit was by the presumed request of the owner and for his benefit."—Richardson v. D S. Cage Co., Tex. Com.App., 252 S W. 747, 750.

57. Mo—Bennett v. Chicago, R I. & P. Ry. Co, 131 S.W. 770, 151 Mo App. 293.
10 C J. p 350 note 94.

58. Ill.—Northern Pac. R. Co. v. Lewis, 89 Ill App. 30.

59. Ill—Armour Grain Co. v. Davis, 233 Ill.App 1

60. Tex—Davis v Wylie & Jackson, Com App, 256 S W. 256, affirming, Civ App, 241 S.W. 1114.
Consent of buyer presumed
Where consignor shipped cotton, which was damaged through carrier's negligence, consigned to consignor's order notifying E, although E had purchased the cotton and had paid the drafts attached to the bill of lading, carrier was liable to consignor, since contract was made with him, and, unless E objected, presumption was that suit was prosecuted with E's consent and for his benefit.—Davis v. Wylie & Jackson, Tex Com App, 256 S W 256, affirming, Civ App., 241 S W. 1114.

61. U S—Grove v. Brien, D C., 8 How. 429, 12 L Ed 1142.
Ga—Black v Southern Ry. Co, 173 S.E. 199, 48 Ga App. 445—Allen v. Southern Ry. Co, 126 S E. 722, 33 Ga App. 209
Wis.—State Bank of De Pere v. Chicago & N. W Ry. Co., 248 N.W 423, 211 Wis. 465.
10 C J. p 350 note 3.
Corpus Juris has been quoted and cited as authority for this rule.
Md—Adams Express Co. v. White, 104 A. 110, 111, 132 Md. 626
Tex—Richardson v. D S Cage Co, Com App, 252 S W. 747, 750.

62. N C.—Aydlett v. Norfolk-Southern R Co, 89 S E. 1000, 172 N C 47—Ellington & Guy v. Norfolk Southern R Co, 86 S E 693, 170 N C 36
10 C J. p 351 note 12

63. Ga—Allen v Southern Ry. Co, 126 S E 722, 33 Ga App 209.
Kan—Bennett v. Dickinson, 190 P 757, 107 Kan 17, affirming 186 P 1005, 106 Kan 95
Md—Adams Express Co. v. White, 104 A. 110, 132 Md. 626.
N C.—Parker Buggy Corporation v. Atlantic Coast Line R. Co., 67 S E 251, 152 N C. 76.
Tex—Richardson v. D. S. Cage Co., Com App, 252 S W. 747.
10 C J p 350 note 4.
Only person
Prima facie a bill of lading operates as a transfer to the consignee of the title to the goods shipped, and, in the absence of evidence removing the presumption, an action against the carrier for failure to deliver, or for loss or injury to the goods while in its possession, will lie only at the suit of the consignee—Clark v. Louisville & N. R Co, 114 So. 295, 216 Ala 637

64. Ga—Allen v. Southern Ry Co., 126 S E. 722, 33 Ga.App. 209
Tex—Richardson v D. S Cage Co, Com App, 252 S W. 747.
10 C J. p 350 note 5

65. Ga—Allen v. Southern Ry Co, 126 S E. 722, 33 Ga App 209.
N Y—Kent-Costikyan Trading Co v American Rv Express Co, 208 N. Y S 445, 124 Misc. 510.
Tex.—Richardson v. D S. Cage Co., Com App, 252 S W. 747.
10 C J p 351 note 9
Corpus Juris is cited in Adams Express Co v White, 104 A 110, 111, 132 Md 626, in support of this rule.

66. N.Y—Kent-Costikyan Trading Co. v. American Ry. Express Co., 208 N Y S 445, 124 Misc 510.
Tex.—Richardson v D S. Cage Co., Com App, 252 S W. 747.
10 C.J. p 351 note 10.

therefor and has paid drafts for the cost.[67] Where the consignor makes a special contract varying the carriers' common-law liability, a consignee who has title to the goods may sue for injury thereto, but his rights will be limited by such special contract.[68] On the other hand, it has been held that the consignee cannot sue upon a special contract of shipment made with the consignor.[69]

Where drafts drawn on general account. It has been held, however, that if the drafts paid are drawn on a general account, and not on any specific consignment, the consignee has no such interest as will entitle him to sue.[70]

Sale of damaged goods by consignee. Since a cause of action for damage to perishable goods in transit arises when the damage occurred, a consignee who sold the goods as damaged shipments, and not the purchaser at such sale, is the proper person to sue the carrier for the damage sustained.[71]

e. Consignee as Actual Owner

Where the consignee is the actual owner of the goods he may sue for loss of or injury thereto, and some authorities hold that he is the sole party entitled to sue, although the contract was made with the consignor.

Where the consignee is the actual owner of the goods he may, of course, maintain an action against the carrier for their loss or injury,[72] whether or not he has paid for the goods.[73] So, when the consignor releases all claim to goods lost in transit, the consignee is the proper party to sue for the loss.[74] Likewise, if the seller of goods, after delivery thereof to the carrier, sued the consignee buyer for the price, he abandoned any title to the goods which he might have, and the buyer had sufficient title to maintain an action against the carrier for loss of the goods.[75] Although as stated supra subdivision c of this section, the weight of authority is to the effect that the shipper, who makes the contract of shipment, is entitled to sue thereon for loss of injury to the goods, irrespective of the question of ownership, there are nevertheless some cases in which the right of the shipper to sue by virtue of the contract is ignored, and the consignee is held the only party entitled to sue, where the entire property in the consignment is vested in him.[76] Here even the consignor's right of stoppage in transit is not considered as affecting the question of parties, and the consignor, in making the contract of affreightment, is deemed merely an agent of the consignee, although the latter may be a stranger to the carrier.[77] Where the legal title to the goods was in the consignee, but the bill of lading was transferred to a purchaser after payment of the attached draft, and the damage to the goods occurred before such payment, an action for the damage was properly maintained in the name of the consignee for the use and benefit of the purchaser.[78]

f. Consignee Making Advances

A consignee making advances on the shipment has a lien or interest entitling him to sue for loss or injury thereto.

A consignee who has made advances on the consignment has a lien or property interest thereon, so as to entitle him to maintain an action against the carrier for loss of or injury thereto.[79]

g. Consignee Directing Mode of Shipment

A consignee who orders goods from the consignor, with directions to ship them over a particular route or by a particular mode of conveyance, may sue for loss or injury, unless it appears that the parties did not intend title to pass by delivery of the goods to the carrier.

67. Ill.—Illinois Cent. R. Co. v. Cobb, 64 Ill 128.

68. Mass.—Henry J Perkins Co. v American Express Co, 85 N E 895, 199 Mass. 561.

69. N Y.—Dows v. Cobb, 12 Barb 310

70. Ill.—Cobb v. Illinois Cent. R Co, 88 Ill 394

71. N Y.—Perkel v Pennsylvania R Co, 265 N.Y S 597, 148 Misc. 284

72. Ill.—Pacific Exp Co. v. Spaulding & Co, 199 Ill App. 474
Mo.—American Fruit Growers v St. Louis, B. & M. Ry. Co, App, 261 S W 949, certiorari denied St. Louis, B. & M R Co v American Fruit Growers, 45 S Ct 94, 266 U S 611, 69 L Ed. 467.
N C.—Aydlett v Norfolk-Southern R Co, 89 S E 1000, 172 N C 47—Parker Buggy Corporation v. Atlantic Coast Line R. Co, 67 S E. 251, 152 N C 119.
10 C J p 351 note 15.

73. Ga.—American Ry. Express Co. v. Bothwell, 112 S E. 380, 28 Ga. App 594
Miss.—Jordon v Gulf & S. I. R. Co, 58 So 595, 102 Miss. 21

74. Kan.—Bennett v. Dickinson, 190 P. 757, 107 Kan. 17, affirming 186 P. 1005, 106 Kan. 95.

75. Ga.—American Ry. Express Co v. Bothwell, 112 S E 380, 28 Ga. App. 594.

76. Neb.—Union Pac R. Co. v. Metcalf, 69 N.W. 961, 50 Neb 452
N.Y.—Krulder v. Ellison, 47 N Y. 36, 7 Am R. 402
N C.—Ellington & Guy v. Norfolk Southern R. Co, 86 S E 693, 170 N C. 36—Parker Buggy Corporation v Atlantic Coast Line R Co., 67 S E. 251, 152 N C 119

Title having passed to purchaser on payment of draft attached to "shipper's order bill of lading," the seller, suing the carrier for the amount shown by the difference in weights at points of loading and destination, was not the real party in interest.—Farmers' Union & Co-op Ass'n v Payne, 205 P 1035, 111 Kan 96—10 C J. p 351 note 17.

77. N Y.—Krulder v. Ellison, 47 N. Y. 36, 7 Am.R 402.
N C.—Gwyn v Richmond, etc., R. Co., 85 N C. 429, 39 Am.R. 708

78. Ala.—Southern Ry Co. v Northwestern Fruit Exch., 98 So. 382, 210 Ala. 519

79. U.S.—Burritt v. Rench, C.C Ohio, 4 F.Cas No.2,201, 4 McLean 325
N Y.—Adams v. Bissell, 28 Barb. 382.
10 C.J. p 352 notes 20, 21.

Where a consignee orders goods of the consignor, to be forwarded over a designated route or by a particular mode of conveyance, the title passes to him on delivery to the carrier, and he is entitled to sue for loss of, or injury to, the goods,[80] and the same rule has been held applicable even where the consignee ordering goods names no particular carrier.[81] This rule, however, has no application, if it is apparent that the parties did not intend to pass title to the property by delivery to the carrier.[82]

h. Consignor as Agent of Consignee

The right to sue for loss of, or injury to, a shipment by the consignor acting merely as agent of the consignee is in the consignee.

If the consignor is the mere agent of the consignee in delivering the goods for transportation, the right of action for loss or injury is of course in the consignee.[83]

i. Consignee without Special or General Property

A consignee who has no special or general property in the goods, and incurs no risk in their transportation, cannot sue the carrier for their loss or injury.

Where a consignee has no special or general property in goods consigned to him and incurs no risk in their transportation, he cannot maintain an action against the carrier for loss or injury to the goods;[84] and the fact that such consignee purchases the goods or pays the draft attached to the bill of lading subsequently to the injury thereof does not act retroactively so as to give him a right of action.[85]

j. Shipper Both Consignor and Consignee

Where the shipper is both consignor and consignee he will be presumed, in the absence of evidence to the contrary, to have sufficient title to sue the carrier for loss of, or injury to, the consignment.

Where a shipper makes a contract for the transportation of goods in his control, designating himself as consignee, it will be presumed that he has sufficient title to maintain an action against the carrier for loss of, or injury to, the goods during transit,[86] and the rule applies where goods are shipped to the order of the consignor and seller, with directions to notify the buyer.[87] The shipper is not, in such case, precluded from recovery because, before shipment, he had executed an assignment of the goods as security for an indebtedness not yet paid;[88] but the above presumption is rebuttable.[89]

k. Persons Having Special or Beneficial Interest

One who has a special property in the goods shipped, or a beneficial interest in the performance of the contract, such as a broker, factor, or bailee, may sue the carrier to recover for loss of, or injury to the goods, although the general owner may also sue.

One who has a special property or interest in the goods shipped, or a beneficial interest in the performance of the contract, is entitled to maintain an action for their loss or injury.[90]

80. N.Y.—Krulder v. Ellison, 47 N. Y. 36, 7 Am R. 402.
10 C.J. p 352 note 23.

81. Ga.—Watkins v. Paine, 57 Ga. 50.
10 C.J p 352 note 24.

82. Ark.—Gibson v. Inman Packet Co., 164 S.W. 280, 111 Ark. 521, Ann Cas 1916A 1043—Garner v. St. Louis, etc., R. Co., 96 S W. 187, 79 Ark. 353, 116 Am S.R. 83.

83. N.Y.—Thompson v. Fargo, 49 N. Y. 188, 10 Am.R 342, 63 N.Y. 479.

84. Ga.—Black v. Southern Ry. Co., 173 S E. 199, 48 Ga App. 445—Central of Georgia Ry. Co. v J. K. Shippey & Bro, 146 S E. 343, 39 Ga.App. 94—Allen v. Southern Ry. Co., 126 S E 722, 33 Ga.App 209.
Ill.—Lepman & Heggie v. Chicago, R. I. & P. Ry. Co., 195 Ill App. 370 See Ed Hockaday & Co. v. Chicago, M. & St.,P. Ry. Co., 201 Ill App. 453.
Kan.—Bennett v. Dickinson, 150 P. 757, 107 Kan 17, affirming 186 P. 1005, 106 Kan 95.
10 C J p 353 note 28.
Corpus Juris is quoted as authority for this rule in Davis v. Guitar, Tex.Civ.App., 248 S W. 759, 760
Shipment to consignee as agent of owner
Where calculating machines returned by a prospective purchaser as unsatisfactory were shipped to consignee as agent of the owner and seller, the consignee had no beneficial interest entitling him to sue carrier for failure to deliver, regardless of whether he was selling on a commission basis or working on a salary.—Adams Express Co. v. White, 104 A. 110, 132 Md. 626
Purchase of interest after property reaches destination
Consignee and another who did not buy an interest in cattle until they reached their destination would have no right to recover against carriers for cattle killed and injured in transit, owner not having sold them an interest in chose in action—Ponder v. Crenwelge, Tex Civ.App., 203 S W. 1125, reversed on other grounds Crenwelge v. Ponder, Com App., 228 S W. 145

85. Ill.—Lepman & Heggie v. Chicago, R. I & P. Ry Co, 195 Ill App. 370.
Kan.—Bennett v. Dickinson, 190 P 757, 107 Kan 17, affirming 186 P 1005, 106 Kan. 95.

86. N Y—Swift v. Pacific Mail S S Co, 12 N E. 583, 106 N.Y. 206.
Tex.—Houston & T C Ry. Co. v. Robinson & Martin, Civ.App., 131 S W. 444.
10 C J. p 353 note 29.

87. Okl.—St. Louis, etc, R. Co v Allen, 120 P 1090, 31 Okl. 248, 39 L R A,N S, 309.

88. Ga.—Black v. Southern Ry. Co., 173 S E. 199, 48 Ga App. 445

89. Neb.—Missouri Pac R. Co. v Lau, 78 N W. 291, 57 Neb 559

90. Ga.—Black v. Southern Ry. Co, 173 S E. 199, 48 Ga App 445—Allen v Southern Ry. Co., 126 S E 722, 33 Ga App. 209
Ill.—American Cranberry Exchange v. Pennsylvania R. Co., 233 Ill App 43.
Kan.—Bennett v Dickinson, 190 P 757, 107 Kan 17, affirming 186 P 1005, 106 Kan 95
La.—Dejean v Louisiana Western R Co, 118 So 822, 167 La 111—Morgan v. Bell, 4 Mart. 615.

A bailee has such special property in the goods as entitles him to maintain an action for loss of or injury thereto.[91]

If the consignee has a special property in the goods as factor or broker, he has such an interest in the shipment as will entitle him to maintain an action for loss of or injury thereto.[92] It is not necessary to his capacity as a plaintiff that he is entitled to all the damage, although he may recover the full damage done;[93] the judgment would bar another action by the real owner, and the owner's share would be held by the consignee to be accounted for by him.[94]

An agent who consigns goods to his principal has a sufficient interest to maintain an action for their loss or injury.[95]

General or special owner. The right of one having a special or beneficial interest in the goods shipped to maintain the action, as stated above, does not preclude an action by the general owner. Either one may sue,[96] and whichever first obtains damages it is a full satisfaction.[97]

Injury to dead body. Where a dead body is injured in transit, the next of kin may sue for such injury, although the contract of carriage was made by another.[98]

1. Holder of Bill of Lading

Where a bill of lading has been issued by the carrier, the holder of the bill of lading may, and usually must, sue for loss of, or injury to, a shipment. At common law the transferee of a bill of lading cannot sue in his own name on the contract, but under some statutes he may maintain such action.

Any lawful holder of a bill of lading issued by the initial carrier pursuant to the Carmack amendment or a state statute enacted in conformity therewith, may maintain an action for loss of, or damage or injury to, the property;[99] and ordinarily the holder of the bill must bring such action.[1] However, where no bill of lading is given, the shipper himself stands in the same position as if he were the lawful holder thereof, and the liability of the carrier to him is the same liability as is imposed in favor of the lawful holder of a receipt or bill of lading.[2] So it has been held that, notwithstanding the provision of the Carmack amendment that the carrier

Md.—Adams Express Co. v. White, 104 A. 110, 132 Md. 626.
10 C.J. p 353 note 31.

Manager of stock shippers' association

Manager of farmers' live stock shippers' association, who attended to shipping hogs and received and distributed returns, had a sufficient interest to maintain action against carrier for loss in shipment.—Griggs v. St. Louis & H. R. Co., Mo.App., 285 S.W. 159.

91. Ill.—American Cranberry Exchange v. Pennsylvania R. Co., 233 Ill.App. 43.
10 C.J. p 354 note 35.

Corpus Juris is cited as an authority for this rule in Terry v. Pennsylvania R. Co., 156 A. 787, 789, 5 W.W.Harr., Del., 1.

A liberal rule should be applied where it cannot in any way result in any injustice or hardship to defendant.—American Cranberry Exchange v. Pennsylvania R. Co., 233 Ill.App. 43.

92. Ga.—Allen v. Southern Ry. Co., 126 S.E. 722, 33 Ga.App. 209.
Mo.—Griggs v. St. Louis & H. R. Co., App., 285 S.W. 159.
10 C.J. p 353 note 32.

Corpus Juris is cited in support of this rule in Terry v. Pennsylvania R. Co., 156 A. 787, 789, 5 W.W.Harr., Del., 1.

93. Del.—Terry v. Pennsylvania R. Co., supra.

Mo.—Collins v. Denver, etc., R. Co., 167 S.W. 1178, 181 Mo.App. 213.

94. Mo.—Collins v. Denver, etc., R. Co., supra.

95. Ala.—Southern Express Co. v. Caperton, 44 Ala. 101, 4 Am.R. 118.
Pa.—Baltimore & Philadelphia Steamboat Co. v. Atkins & Co., 22 Pa. 522.

96. Del.—Terry v. Pennsylvania R. Co., 156 A. 787, 5 W.W.Harr. 1.
Ill.—Edgerton v. Chicago, R. I. & P. Ry. Co., 88 N.E. 808, 240 Ill. 311.
10 C.J. p 354 note 39.

97. Ill.—Edgerton v. Chicago, R. I. & P. Ry. Co., supra.

98. Vt.—Nichols v. Central Vermont Ry. Co., 109 A. 905, 94 Vt. 14, 12 A.L.R. 333.

99. U.S.—Adams Express Co. v. Croninger, Ky., 33 S.Ct. 148, 226 U.S. 491, 57 L.Ed. 314, 44 L.R.A.,N.S., 257—Davis v. Livingston, C.C.A. Cal., 13 F.2d 605.
Fla.—Chase & Co. v. Atlantic Coast Line R. Co., 115 So. 185, 94 Fla. 922.
Ga.—Central of Georgia Ry. Co. v. J. K. Shippey & Bro., 146 S.E. 343, 39 Ga.App. 94—J. H. Walker Co. v. Atlantic Coast Line R. Co., 143 S.E. 782, 33 Ga.App. 284.
Ill.—Farmers' Grain Co. of Dorans v. Illinois Cent. R. Co., 201 Ill.App. 261.
N.J.—Carr v. Pennsylvania R. Co., 96 A. 588, 88 N.J.Law 235.
Pa.—Tentzer v. Reading Co., 101 Pa.Super. 238—Robb v. American Railway Express Co., 78 Pa.Super. 1.

Consignors as holders of bill

Consignors depositing bill of lading, issued to them to order of consignee, for collection by bank, which presented it to consignee with draft, which was not honored, whereupon bill was returned to bank, were holders of bill entitled under Carmack Amendment, U.S.Comp.St.1916 §§ 8604a, 8604aa, to claim for loss of goods delivered without surrender of bill as stipulated therein.—Babbitt v. Grand Trunk Western Ry. Co., 120 N.E. 803, 285 Ill. 267, affirming 209 Ill.App. 183.

Construction of statute

The word "lawful holder," as used in Carmack Amendment of June 29, 1906 § 7 pars 11 and 12, to Act Febr. 4, 1887 § 20, was held not to mean alone owner of shipment or his authorized agent with power to act so as to render judgment in action against carrier res judicata, although by § 8 of the earlier act carrier is made liable to person or persons injured.—Pennsylvania R. Co. v. Olivit Bros., N.J., 37 S.Ct. 468, 243 U.S. 574, 61 L.Ed. 908.

1. Ill.—Gamble-Robinson Commn. Co. v. Union Pac. R. Co., 180 Ill.App. 256, affirmed 104 N.E. 606, 262 Ill. 400, Ann.Cas.1915B 89—Burtless v. Oregon Short Line R. Co., 180 Ill.App. 249.

2. Ill.—Ricks Sheep Co. v. Oregon Short Line R. Co., 180 Ill.App. 220.
N.J.—International Watch Co. v. Delaware, etc., R. Co., 78 A. 49, 80 N.J.Law 553, affirmed 82 A. 730, 82 N.J.Law 528.

shall be liable to the lawful holder of the bill of lading, a shipper, or one who has succeeded to his rights, may sue the carrier for loss of, or injury to the goods shipped, even though he does not hold a bill of lading.[3] It has been held that, since a bill of lading is not an instrument for "the payment of money" within a statute requiring actions on such instruments to be prosecuted in the name of the real party in interest, an action ex contractu on a bill of lading for the loss of the goods cannot be maintained by the owner of the goods who is not in possession of the bill, but should be brought in the name of the consignor for the use of such owner.[4] On the other hand, it has been held that the person beneficially interested, although not in possession of the bill of lading for an interstate shipment, may recover for loss of, or injury to, the goods shipped.[5]

Indorsee or assignee of bill. Bills of lading stand in the place of the goods which they represent, and delivery or indorsement of them transfers the right of property in the goods, but not in the contract itself, as stated supra § 128, and the transferee cannot, therefore, maintain at common law an action in his own name on the contract,[6] but must sue in the name of the assignor for the latter's use.[7] However, in some jurisdictions bills of lading are negotiable by express enactment, as stated supra § 128, and assignees or indorsees thereof may bring action on them for loss or injury,[8] whether the loss or injury occurred before or after the bill of lading was transferred;[9] and it has also been held that such action is authorized by code provisions enabling the real party in interest to sue in his own name on any contract which has been transferred to him.[10] The indorsee or assignee, however, acquires no other or greater rights than the assignor had, since by the transfer only such title as the transferor had at the time passes.[11] The transferee of an "order notify" bill of lading who, after paying the draft attached, obtains possession of the bill, thereby acquiring legal title to the goods mentioned therein, may sue the carrier for any shortage in the shipment occurring after such transfer of title, and before delivery to him, where the shortage is traced to the carrier.[12] So it has been held that where a bill of lading is transferred by delivery, with intent to pass the title, the transferee has a right of action for damage to the goods in transit.[13]

m. Person to Be Notified

An action cannot be maintained against a carrier for loss of goods by one whose only interest is that he was mentioned in the bill of lading as the person to be notified of the arrival of the goods.

One who is mentioned in the bill of lading as the person to be notified on arrival of the goods has no such interest as will authorize him to maintain an action for loss of the goods shipped, in the absence of any evidence that he was either shipper or consignee,[14] or has title to the property.[15] So, where

3. Del.—Bowden v. Philadelphia, B. & W. R Co., 91 A. 209, 5 Boyce 146
Fla.—Aultman v. Atlantic Coast Line R. Co, 71 So. 283, 71 Fla. 276.
Ga.—J H Walker Co. v. Atlantic Coast Line R. Co, 143 S.E. 782, 38 Ga.App. 284.

Person beneficially interested

Under Carmack amendment, person beneficially interested is entitled to recover for loss or injury, although not having the bill of lading in his possession.—Norfolk Southern R. Co. v. Norfolk Truckers' Exchange, 88 S.E. 318, 118 Va. 650.

"We construe the statute to extend its remedy directly against the carrier to whom goods are delivered for shipment, and in behalf of the shipper who delivered the same for shipment, or in behalf of one who, by some lawful transaction, has succeeded to the shipper's rights. Such a person may or may not hold the bill of lading, and his failure to hold a bill of lading, upon proof of his right otherwise to recover, will no more defeat that right than will the mere possession of a bill of lading confer a right of recovery upon one otherwise without a right to recover In fact goods may be and frequently are delivered and received for shipment without a bill of lading being issued therefor. Certainly, if a bill of lading was never issued to a shipper, the carrier's failure to evidence its contract in this form would neither withdraw from the shipper his right to recover, nor relieve the carrier from its liability to pay for loss of goods delivered and received for shipment, under the right conferred and the liability fixed by the statute."—Bowden v. Philadelphia, B. & W. R. Co., 91 A. 209, 210, 5 Boyce, Del., 146.

4. Ala.—Alabama Great Southern R Co. v. Lawler, 104 So. 412, 213 Ala. 119.

5. Va.—Norfolk Southern R. Co. v. Norfolk Truckers' Exch, 88 S.E. 318, 118 Va. 650.

6. Cal.—Dodge v. Meyer, 61 Cal. 405
Md.—Baltimore, etc, R Co. v. Wilkens, 44 Md. 11, 22 Am R 26.
10 C.J. p 202 note 24, p 354 note 46

Plaintiff not succeeding to rights of holder of bill

Plaintiff, receiving oranges in representative capacity, did not succeed to shipper's rights authorizing him to sue for freezing in transit either at common law, or under the federal statute as the "direct obligee" of the transferor's rights.—L. E Fosgate Co v Atlantic Coast Line R. R., 160 N.E. 783, 263 Mass 192.

7. Ill.—Knight v. St. Louis, etc, R. Co, 30 N.E. 543, 141 Ill 110, affirming 40 Ill App. 471.

8. Ga.—Canby v. Merchants' & Miners' Transp. Co, 85 S.E 361, 16 Ga. App. 362.
Mo.—First Nat. Bank v Missouri Pac Ry. Co., 278 S.W. 1075, 220 Mo. App. 941.
10 C.J. p 354 note 48

9. Ga.—Askew v. Southern R. Co, 58 S.E. 242, 1 Ga.App. 79.

10. Mo.—Kirkpatrick v Kansas City, etc, R. Co, 86 Mo 341.
N.Y.—Merchants' Bank v. Union R, etc, Co., 69 N.Y. 373

11. Mo.—Dickson v. Merchants' El. Co, 44 Mo App. 498.

12. Ga.—Southern Ry. Co. v Hunt, 102 S.E 757, 25 Ga App. 116

13. N.C.—Lawshe v Norfolk-Southern R Co, 132 S.E 160, 191 N.C. 473.

14. Tex.—Dalbey v. Mexican Central R Co, Civ App, 105 S.W 1154

Corpus Juris is quoted as authority for this rule in Bennett v Dickinson, 190 P. 757, 761, 107 Kan 17.

15. Kan.—Bennett v. Dickinson, 186 P. 1005, 106 Kan. 95, affirmed 190 P. 757, 107 Kan. 17.

goods are shipped under a bill of lading to the seller, with directions to notify the buyer, and deliver to him on payment of the attached draft, delivery of the goods to the buyer upon payment of the draft did not give the buyer a right of action to recover for injury occurring prior to such payment.[16] On the other hand, it has been held that, where goods are consigned to the shipper's "order notify" the buyer, and the buyer pays the drafts attached to the bill of lading, the latter may sue for loss of the goods, although such loss occurred before the buyer paid the drafts.[17]

n. Assignees

The assignee of a claim for loss of, or injury to, goods shipped may sue on such claim in his own name.

Under the rule announced in the C.J.S. title Assignments § 125 permitting an assignee to sue in his own name, where the consignee assigns to the consignor his claim for loss of, or injury to, goods shipped, the latter may maintain an action therefor,[18] and where the consignor assigns his right to damages, the assignee may bring suit therefor.[19] On the other hand, where a cause of action for a tort cannot be assigned, an assignment, after loss of the property, by a consignee of all his rights on account of the tort to the consignor will not invest the consignor with title to the goods so as to enable him to maintain an action for the loss.[20]

o. Joinder of Parties Plaintiff

The general rules relating to joinder of parties plaintiff are applicable to actions against carriers for loss of, or injury to, goods while being transported.

If one of two or more joint owners or partners makes the contracts of shipment, he may sue alone for loss or injury.[21] Nevertheless, all joint owners may join in an action for loss of, or injury to, the consignment,[22] although the contract of shipment was made out in the names of two of them, the joint ownership of the other plaintiff or plaintiffs being unknown to the carrier.[23] Where an agent ships, in his own name under one bill of lading, goods belonging to different persons, acting as the agent of each separately, and not as the agent of the owners jointly, each owner can maintain his separate action for the damages sustained by him.[24]

Consignment to one of two owners. Where goods are consigned to one of two joint owners, the one to whom the consignment was made has been held entitled to sue alone for loss or injury thereto.[25] On the other hand, it has been held that both owners must join.[26]

§ 250. Parties Defendant

Employers of a servant who was not authorized to receive goods for transportation cannot be sued for the loss of, or injury to, the goods where they were not entitled to a share of the profits.

If property is intrusted for transportation to a servant not authorized to receive it by the ordinary business of his employers, and they are not entitled

Title of purchaser; necessity of payment of draft

Where plaintiff contracted to purchase a carload of corn through a shipper at Clayton, Kan., "basis track Clayton buyer's routing," the shipper in a letter of confirmation being directed to bill the car "via Colby and draw on us in the usual manner with papers attached," the shipper procuring a "shipper's order notify" bill of lading with customer's draft attached drawn on purchaser, and corn was damaged in transit, title not having passed to the purchaser until payment of draft, he could not maintain an action for damages occurring in transit.—Bennett v. Dickinson, 186 P. 1005, 106 Kan. 95, affirmed 190 P. 757, 107 Kan. 17.

16. Ala.—Louisville & N. R. Co. v. Sarris & Collas, 95 So. 903, 209 Ala. 217.
N.Y.—Kleinhans v. Canadian Pac. Ry. Co., 196 N.Y.S. 862, 203 App.Div. 715, reversing 193 N.Y.S. 25, 118 Misc. 251.

Plaintiff not "real party in interest"

Where R delivered to defendant railway a car of corn consigned by himself to himself for intra-state transportation, and procured a "shipper's order notify" bill of lading with draft attached on plaintiff and sent it to a bank for collection, and corn was damaged in transit and draft was paid by plaintiff on day car reached destination, the title not having passed to him until draft was paid, he could not sue carrier for damages because he was not the "real party in interest."—Bennett v. Dickinson, 190 P. 757, 107 Kan. 17, affirming 186 P. 1005, 106 Kan. 95.

Delivery of goods after loss did not operate as an assignment of the right to recover the damages.—Louisville & N. R. Co. v. Sarris & Collas, 95 So. 903, 209 Ala. 217.

17. La.—Anderson, Clayton & Co. v. Yazoo & M. V. R. Co., 141 So. 453, 174 La. 762.
N.C.—Watts v. Norfolk Southern R. Co., 110 S.E. 582, 183 N.C. 12.

18. Mo.—Hy. Bromschwig Tailors' Trimming Co. v. Missouri, etc., R. Co., 147 S.W. 175, 165 Mo.App. 350.

19. Ky.—Potts v. Bowler, 1 Ky.Op. 133.

20. Ga.—Lowden v. Merchants' & Miners' Transp. Co., 93 S.E. 45, 20 Ga.App. 283.

21. Tex.—Southern Kansas R. Co. v. Morris, 102 S.W. 396, 100 Tex. 396, 123 Am.St.R. 834, affirming, Civ.App., 99 S.W. 433.

22. Mo.—McMickle v. Wabash Ry. Co., App., 209 S.W. 611.
Tex.—Texas & P. Ry. Co. v. Andrews, Civ.App., 80 S.W. 390.
Vt.—Day v. Ridley, 16 Vt. 48, 42 Am.D. 489.

Joint owners of a shipment of cattle may jointly sue for damages sustained by each, arising from injuries to cattle during transportation.
Mo.—McMickle v. Wabash Ry. Co., App., 209 S.W. 611.
Tex.—Texas & P. Ry. Co. v. Andrews, Civ.App., 80 S.W. 390.

23. Vt.—Day v. Ridley, 16 Vt. 48, 42 Am.D. 489.

24. Ky.—Baughman v. Louisville, etc., R. Co., 14 Ky.L. 268.

25. Ala.—Southern Express Co. v. Armstead, 50 Ala. 350.

26. Tex.—Missouri Pac. R. Co. v. Rushin, 3 Tex.A.Civ.Cas. § 317.

to a share of the profits, they cannot be sued for loss or injury.[27]

Joinder of parties defendant. Where the liability of a railroad company as a common carrier, for the wrecking of machinery during transit, and that of the shipper as bailee for hire, arose from the single incident of the wrecking of the machinery, the owner of the machinery could properly join the carrier and the shipper as defendants in his action to recover for the injury.[28]

§ 251. Declaration, Complaint, or Petition

a. Statement of cause of action in general
b. Right to sue
c. Consideration for carriage
d. Delivery to, and acceptance by, carrier
e. Description and condition of property
f. Negligence
g. Statement of contract or duty
h. Notice of claim for loss or damage
i. Damage or injury sustained
j. Anticipating and negativing defenses
k. Amendment

a. Statement of Cause of Action in General

In an action against a carrier for loss of, or injury to property, plaintiff must allege facts constituting a good cause of action, and the fact that defendant is a common carrier must be alleged, or facts stated from which the law will infer such capacity, unless defendant is sued on a special contract of shipment. The usual rules relating to the construction of pleadings apply. If the form of complaint is prescribed by statute, it is sufficient to follow the statutory form.

The plaintiff's initial pleading in an action against a carrier for loss of, or injury to property shipped must allege, definitely and clearly,[29] facts constituting a good cause of action;[30] and, if the liability of defendant exists only by virtue of a statute, the complaint must allege facts constituting such liability.[31] In an action for injury to live stock, based on the carrier's common-law liability for failure to receive and transport the stock with reasonable care and diligence, where plaintiff alleged that several trains passed the carrier's pens in which the stock was awaiting shipment, but refused to take up such stock, it was not necessary for the petition to specify what time the trains arrived or to describe such trains in detail.[32] Where plaintiff sues for damage to a shipment, special notice of facts necessarily disclosed by inspection when the shipment was

27. U.S.—Citizens' Bank v. Nantucket Steamboat Co., C.C.Mass., 5 F. Cas.No.2,730, 2 Story 34.
N.H.—Elkins v. Boston & M. R. Co., 23 N.H. 275—Shelden v. Robinson, 7 N.H. 157, 26 Am.D. 726.

28. Wash.—Western Machinery Exchange v. Northern Pac. Ry. Co., 254 P. 248, 252, 142 Wash. 675.
"While recovery against these two defendants was sought by the machinery exchange on somewhat different theories as to their respective liability it seems plain that at all events the liability arose because of the single incident of the wrecking of the crane. This, we think under the modern liberal rule of allowing the joinder of parties defendant, constitutes such a situation as entitled the machinery exchange to join these defendants and seek relief as against both of them in this action."—Western Machinery Exchange v. Northern Pac. Ry. Co., supra.

29. Ga.—Southwestern R. Co. v. Davies, 186 S.E. 899, 53 Ga.App. 712.

Pleading not demurrable as vague and indefinite

In action against railroad for damage to asparagus shipment caused by failure of lessee to furnish proper refrigeration equipment, allegations of petition as to difference in proper refrigeration between larger car, previously furnished, and smaller car furnished on occasion in question, were held not demurrable as vague, indefinite, and insufficient in law.—Southwestern R. Co. v. Davies, 186 S.E. 899, 53 Ga.App. 712.

30. Ala.—Southern Ry. Co. v. Northwestern Fruit Exch., 98 So. 322, 210 Ala. 519.
Ga.—Southwestern R. Co. v. Davies, 186 S.E. 899, 53 Ga.App. 712.
Ky.—Great Atlantic & Pacific Tea Co. v. Lexington-Hazard Express Co.'s Receivers, 54 S.W.2d 631, 246 Ky. 102.
N.C.—Whittington v. Southern Ry., 90 S.E. 505, 172 N.C. 501.
Tex.—Gulf, C. & S. F. Ry. Co. v. Lipshitz, Civ.App., 29 S.W.2d 905. 10 C.J. p 356 note 77, p 358 note 3.

Pleadings held sufficient

Generally.
Ala.—Southern Ry. Co. v. Northwestern Fruit Exch., 98 So. 382, 210 Ala. 519.
Ga.—Atlantic Coast Line R. Co. v. Hogrefe, 159 S.E. 760, 43 Ga.App. 520.
Ky.—Great Atlantic & Pacific Tea Co. v. Lexington-Hazard Express Co.'s Receivers, 54 S.W.2d 631, 246 Ky. 102.
N.C.—Whittington v. Southern Ry., 90 S.E. 505, 172 N.C. 501
Tex.—Texas & New Orleans Ry. Co. v. Booth, Civ.App., 99 S.W.2d 430, error dismissed—Gulf, C. & S. F. Ry. Co. v. Lipshitz, Civ.App., 29 S.W.2d 905, error refused

Relevancy and materiality

(1) In action against railroad for damage to asparagus shipment caused by failure of lessee to furnish proper refrigeration equipment, allegations of petition relative to customary furnishing of suitable refrigerator cars to plaintiff for two years and familiarity of carrier with refrigerating requirements were held not subject to special demurrer as irrelevant and immaterial.—Southwestern R. Co. v. Davies, 186 S.E. 899, 53 Ga.App. 712.

(2) But allegations as to what lessee did with reference to refrigerating equipment after time of shipment in question were held demurrable as irrelevant.—Southwestern R. Co. v. Davies, supra.

Fraud

In an action in a case against a common carrier for negligently billing a tank car consigned to plaintiff as containing gasoline, when in fact it contained kerosene, in consequence of which plaintiff innocently pumped the contents of the car into his gasoline tank, thereby totally destroying the gasoline in his tank as well as the kerosene in the car, it is not essential to aver in the declaration that the carrier fraudulently billed the car as containing gasoline, and fraudulently represented it to be such on delivery.—Ohio-West Virginia Co. v. Chesapeake & O. Ry. Co., 124 S.E. 537, 97 W.Va. 61, 38 A.L.R. 1439.

31. N.Y.—Hempstead v. New York Cent. R. Co., 28 Barb. 485.

32. Tex.—Panhandle & S. F. Ry. Co. v. Andrews, Civ.App., 278 S.W. 478

received need not be alleged.[33]

That defendant is a common carrier must be expressly alleged,[34] or facts must be stated from which the law will infer such capacity,[35] unless defendant is sued on a special contract of shipment, and not as a common carrier.[36]

Construction of pleadings. The general rules laid down in the C.J.S. title Pleading § 53, also 49 C.J. p 105 notes 11–16, p 117 note 91–p 119 note 6, are applicable in actions against carriers for loss of, or injury to, property, in construing the allegations of the petition or complaint and determining the nature and theory of the action.[37]

Statutory form of complaint. Where the form of the complaint in actions against carriers is prescribed by statute, it is sufficient for the pleading to follow the statutory form.[38]

Special exception to the petition as seeking to enforce a contract alleged as violating federal laws relating to rates on interstate shipments, need not name the particular laws.[39]

b. Right to Sue

Plaintiff must show that he has a general or special ownership in the property, or that the contract of shipment was made with him.

It must appear from the petition or complaint that plaintiff has a right to bring the action[40] as general or special owner of the property lost or injured,[41] or that he is the party with whom the contract of shipment was made;[42] but a petition alleging facts

33. La.—Powell-Myers Lumber Co. v. Tremont & Gulf Ry. Co., 2 La. App. 164.

34. Ala.—Louisville & N. Ry. Co. v. Gerson, 14 So. 872, 102 Ala 420
10 C.J. p 357 note 85.

35. Ill.—Toledo, etc., R. Co. v. Roberts, 71 Ill. 540.
W.Va.—Baltimore, etc., R. Co. v. Morehead, 5 W.Va. 293.
10 C.J. p 357 note 86.

36. S.C.—Dunbar v. Port Royal, etc., R. Co., 15 S.E. 357, 36 S.C. 110, 31 Am.S.R. 860.

37. Tex.—St. Louis, B. & M. Ry. Co. v. Marcofich, Civ.App., 185 S.W. 51, affirmed, Com.App., 221 S.W. 532.

Common-law liability

(1) A petition to recover for injury to an interstate shipment of live stock, charging that the stock was delivered to the carrier in good condition and that, when received by the consignee, some of the stock was dead or injured, is based on the carrier's common-law liability.—Dillen v. Wabash Ry. Co., Mo.App., 294 S.W. 439—Griggs v. St. Louis & H. R. Co., Mo.App., 285 S.W. 159.

(2) Where shipper of cattle suing carrier for damages in transit alleged carrier received cattle for shipment, received reward in payment for services, and caused damage by its negligence, there was sufficient allegation of common-law liability of carrier.—International & G. N. Ry. Co. v. Reed, Tex.Civ.App., 203 S.W. 410.

(3) But it was held that a petition for death of hogs in transit alleging fourteen hours was a reasonable time for transportation, but that defendant negligently handled the car while transporting the hogs and did not transport them in fourteen hours, and that, by reason of the negligent handling of the hogs, and the failure to deliver them in a reasonable time, certain of them died, was based on negligence both in the handling of the car and in delay, and not on the carrier's common-law liability—Cloyd v. Wabash Ry. Co., Mo.App., 240 S.W. 885.

Negligence or contract

In action for damages for injury to a shipment of sheep, plaintiff's right to recover under the complaint was held not based on an alleged oral contract with defendant's dispatcher for speedy unloading but on negligence of defendant in performing the obligation of a common carrier.—Smith v. Hines, 196 P. 1032, 33 Idaho 582

Negligence or conversion

Allegations in shipper's complaint were held not to show conversion of milk by carrier, but to set forth action of tort for negligence causing loss during transportation—Oakdale Farms v. Rutland R. Co., 158 A. 678, 104 Vt. 279.

Theft by carrier's employees

Petition of plaintiff seeking to recover for loss of shipment of tin was held to charge theft by employees of carrier acting in their own interests and against the interest of the carrier.—Moore v. Duncan, Ohio, 237 F. 780, 150 C.C.A. 534

Double damages

Plaintiff, suing railroad for damages to cattle in delayed shipment for loss because of treatment given cattle, and because market dropped before their arrival at destination, but after they should have arrived, did not sue for double damages, and the allegations are not subject to such construction.—Panhandle & S. F. Ry. Co. v. Andrews, Tex.Civ.App., 278 S.W. 478.

Continuous interstate shipment

Where wheat was lost in transit, petition which alleged delivery to original carrier, that it was sold in transit and reconsigned to buyer in Illinois, when construed as whole was held to warrant inference that it was delivered to carrier by which it was shipped after reconsignment under new contract and as initial carrier—Forest Green Farmers' Elevator Co. v. Davis, 270 S.W. 394, 216 Mo.App. 545.

38. Ala.—Louisville & N. R. Co. v. Hendricks, 171 So. 273, 233 Ala. 259—Davis v. Dawkins, 95 So. 188, 209 Ala. 45—Louisville & N. Ry. Co. v. Farmers' Produce Co., 85 So. 578, 17 Ala.App. 383.
10 C.J. p 366 note 80.

39. Tex.—St. Louis, I. M. & S. Ry. Co. v. Landa & Storey, Civ.App., 187 S.W. 358

40. Ark.—Temple Cotton Oil Co. v. Davis, 268 S.W. 38, 167 Ark. 448
Fla.—Aultman v. Atlantic Coast Line R. Co., 71 So. 283, 71 Fla. 276
10 C.J. p 356 note 78

Pleading insufficient

In action ex contractu on bill of lading for loss of goods, count alleging damages for failure to deliver certain described goods consigned to another, and that plaintiff was owner of goods, was subject to demurrer, as it failed to show any right of action in plaintiff, but showed that right was in consignor, no assignment of it to plaintiff being alleged nor suit brought in name of consignor for use of plaintiff as owner, as it should have been.—Alabama Great Southern R. Co. v. Lawler, 104 So. 412, 213 Ala. 119.

41. Ga.—Reed Oil Co. v. Georgia, F. & A. Ry. Co., 94 S.E. 281, 21 Ga.App. 321—Lowden v. Merchants' & Miners' Transp. Co., 93 S.E. 45, 20 Ga.App. 283.
10 C.J. p 356 notes 78–80, p 357 note 81.

42. Ind.—Cincinnati, etc., R. Co. v. Case, 23 N.E. 797, 122 Ind. 310.
Ky.—U. S. Mail Line Co. v. Carrollton Furniture Mfg. Co., 42 S.W. 342, 101 Ky. 658, 19 Ky.L. 833.
Mo.—Davis v. Jacksonville South-

from which plaintiff's ownership may be inferred is sufficient as against a general demurrer.[43]

A complaint which alleged that plaintiff had been engaged in handling shipments of the commodity damaged, as a general consignee, for several years, and also alleged that the particular shipment was billed by him at the place of shipment and consigned to himself at the place of destination was sufficient, without averring whether or not the legal title was in himself or in others.[44] In an action under the Carmack amendment to the Interstate Commerce Act, the declaration must allege that plaintiff is the lawful holder of the bill of lading, or, if no bill of lading was issued, must allege plaintiff's right to recover had it been issued, and show whether or not a bill was issued.[45]

c. Consideration for Carriage

In actions ex contractu for loss of, or injury to, the goods, plaintiff should allege that the defendant was to receive a consideration; but no consideration need be alleged in actions ex delicto. An allegation of payment or tender of the freight charges is, ordinarily, not essential.

In actions ex contractu for loss of, or injury to, the goods, the complaint should allege that defendant was to receive a consideration for transporting the goods,[46] but it will be sufficient to allege generally that the conveyance of the goods was in consideration of a reward to be paid, without specifying what the reward was.[47] In an action ex delicto for injury to the goods, it is unnecessary for plaintiff to allege that any consideration was paid or agreed to be paid,[48] and it would seem that such allegation would not only be unnecessary, but improper.[49]

Alleging payment or tender of freight charges. Ordinarily, it is not essential to allege payment or tender of the freight charges,[50] at least where it appears that plaintiff's claim for damages is sufficient to offset defendant's claim for freight.[51]

d. Delivery to, and Acceptance by, Carrier

The plaintiff must state facts showing delivery of the goods to, and acceptance by the defendant as a common carrier for hire, and the time of such delivery and acceptance.

The petition or complaint must, by sufficient averments, allege a delivery of the property to the carrier,[52] and that defendant accepted or undertook to carry the goods so delivered to it,[53] as a common carrier for hire.[54]

Time of delivery and acceptance. The petition or complaint should allege,[55] at least in general terms,[56] the time when the property was delivered to defendant for transportation.

e. Description and Condition of Property

The plaintiff's pleading should describe the property lost or injured with reasonable certainty. If the shipment is under a bill of lading, the description need not be more particular than that in the bill. The necessity of alleging delivery of the property to the carrier in good condition has been both affirmed and denied.

The petition or complaint should show what the shipment was,[57] and describe the property lost or injured with a reasonable degree of certainty.[58] If the goods are shipped under a bill of lading, it is not necessary to describe them more particularly than they are described in that instrument.[59]

eastern Line, 28 S.W. 965, 126 Mo. 69.
10 C.J. p 357 note 82.

43. Ga.—J. H. Walker Co. v Atlantic Coast Line R Co, 143 S E. 782, 38 Ga.App. 284—Central of Georgia Ry. Co. v. Cooper, 82 S E. 310, 14 Ga App. 738.

44. Ga.—Southwestern R. Co. v. Davies, 186 S E. 899, 53 Ga App. 712.

45. Fla.—Chase & Co. v. Atlantic Coast Line R. Co, 115 So 185, 94 Fla. 922—Aultman v. Atlantic Coast Line R. Co., 71 So. 283, 71 Fla. 276.

46. N Y.—Bristol v. Rensselaer & S. R. Co, 9 Barb. 158.

47. Tenn.—Carter v. Graves, 9 Yerg. 446.

48. N.H.—Hall v. Cheney, 36 N H. 26.

49. U.S.—Whittenton Mfg. Co. v. Memphis, etc., Packet Co, C.C. Tenn, 21 F 896.
Pa.—Smith v. Seward, 3 Pa. 342.

50. Ind.—Evansville, etc., R. Co. v. Keith, 35 N.E. 296, 8 Ind.App 57.
Md.—Ferguson v. Cappeau, 6 Harr. & J. 394.
Vt.—Waterman v. Vermont Cent. R. Co., 25 Vt. 707.

51. S.C.—Miami Powder Co. v. Port Royal & W. C. Ry. Co., 25 S E. 153, 47 S C. 324, 58 Am S R. 880

52. Fla.—Wilson & Toomer Fertilizer Co. v. Atlantic Coast Line Ry Co, 136 So. 339, 102 Fla. 324.
10 C J p 358 notes 95, 96.

53. Ala.—Southern R Co. v. Proctor, 57 So. 513, 3 Ala App. 413.
Mo.—Davis v. Jacksonville Southeastern Line, 28 S.W. 965, 126 Mo. 69.

54. Ala.—Southern R Co v. Proctor, 57 So. 513, 3 Ala App. 413.

55. Fla.—Wilson & Toomer Fertilizer Co v Atlantic Coast Line Ry. Co, 136 So 339, 102 Fla 324.

Where usage and custom are relied on to show delivery to, and acceptance by, the carrier, the declaration in action against carrier for loss of, or damage to, shipment should allege when delivery under usage or custom occurred.—Wilson & Toomer Fertilizer Co. v. Atlantic Coast Line Ry. Co., 136 So. 339, 102 Fla. 324.

56. S.C.—Dunbar v Port Royal & A. Ry. Co., 19 S C. 601.

57. Ga.—Nathan v. Lamb, 88 S E. 794, 18 Ga App 39.

58. Ga.—Atlantic Coast Line R Co v. Ousley, 139 S E. 586, 37 Ga App 215.
10 C J. p 359 note 13.

Description held sufficient

Petition for damages to carload of watermelons, describing car by number, road, and average weight of melons, contains sufficient description without alleging the number of melons in the car—Atlantic Coast Line R Co v. Ousley, 139 S E 586, 37 Ga.App. 215

59. Mo.—Camden v. The Georgia, 6 Mo. 381.

Condition of property. In an action for damage to a shipment, it is necessary to allege that the property was in good condition when it was delivered to the carrier;[60] but there is contrary authority.[61]

f. Negligence

(1) Necessity and propriety of pleading
(2) Sufficiency of allegations

(1) Necessity and Propriety of Pleading

In a common-law action against a carrier for loss or injury to property shipped, the plaintiff need not allege that the defendant was negligent, except where such negligence is made essential by reason of special contractual limitations on the carrier's common-law liability. Negligence of a private carrier must be alleged.

Since a carrier is liable at common law, regardless of its negligence, for all loss or injury to the property in its possession as carrier, not caused by the act of God or the public enemy, or by the inherent nature of the property, or by the act or fault of the shipper, as stated supra § 71 et seq, plaintiff in a common-law action to recover for loss or injury to goods shipped need not allege negligence on the part of the carrier,[62] although it is not unusual to insert such allegation in the declaration,[63] both in actions of tort,[64] and in actions of contract.[65] So, a declaration in assumpsit, alleging a contract by defendant to transport and deliver the property in as good condition as when it was received by the carrier is not rendered insufficient by an allegation that defendant's conduct was negligent, the allegation of negligence being mere surplusage.[66] If, by reason of special contractual provisions limiting the carrier's common-law liability, negligence on the part of the carrier becomes an essential element of a right of action for loss of, or injury to, the goods shipped, it is of course necessary that the declaration should allege negligence on the part of the carrier.[67] Where an interstate shipment was transported on a through bill of lading, the petition need not allege that the loss or injury was due to the carrier's negligence, except in cases where no notice of plaintiff's claim was given, or where no claim was filed within the time required by the bill of lading or shipping receipt.[68]

Negligence of private carrier. Where recovery is sought for loss of goods transported by a private carrier, the consignor must plead that the loss was due to the carrier's neglect.[69]

(2) Sufficiency of Allegations

A direct allegation that the defendant was negligent is unnecessary where the facts stated warrant an inference of negligence. Negligence may be charged in general terms, although there is contrary authority.

The general rules as to the sufficiency of plaintiff's initial pleading, especially in actions for negligence, are usually applicable in actions against carriers for loss or injury to property shipped, due to the carrier's negligence.[70] A direct allegation

60. Ky.—Chesapeake & O. R. Co. v. Coleman Fruit Co., 294 S.W. 463, 219 Ky. 794.

61. Iowa.—Swiney v. American Express Co., 115 N.W. 212, 144 Iowa 342

62. Ind.—New York, C. & St. L. Ry. Co. v. White, 192 N.E. 846, 99 Ind. App. 454.
Mo.—Erisman v. Wabash Ry. Co., App., 243 S.W. 237—Cudahy Packing Co. v. Atchison, T. & S. F. R. Co., 187 S.W. 149, 193 Mo.App. 572.
Pa.—Crescent Athletic Club v. Melville, etc., 23 Pa.Dist. & Co., 581.
Vt.—Saliba v. New York Cent. R. Co., 140 A. 491, 101 Vt. 56.
Wyo.—Chicago, B. & Q. R. Co. v. Tolman, 224 P. 671, 31 Wyo. 175.
10 C.J. p 360 notes 20, 21.

Sufficient allegations

(1) Plaintiff need only allege delivery of goods to carrier, delay in arrival, and consequent injury.—Saliba v. New York Cent. R. Co., 140 A. 491, 101 Vt. 56.

(2) It is sufficient to allege that goods were in good condition when loaded and in damaged condition when delivered.—New York, C. & St. L. Ry. Co. v. White, 192 N.E. 846, 99 Ind.App. 454.

63. Mass.—Medfield School Dist. v. Boston, H. & E. R. Co., 102 Mass. 552, 3 Am.R. 502.
Vt.—Sargent v. Birchard, 43 Vt. 570
10 C.J. p 360 note 21.

64. Vt.—Sargent v. Birchard, supra.
W.Va.—Williams v. Baltimore, etc., R. Co., 9 W.Va. 33.

65. Mass.—Medfield School Dist. v. Boston, etc., R. Co., 102 Mass. 552, 3 Am.R. 502.

66. W.Va.—Max Biederman, Inc., v. Henderson, 176 S.E. 433, 434, 115 W.Va. 374.
"It is true that it [the declaration] alleges that the conduct of the defendant, relied upon to show a breach of the contract, was negligent, but it alleges a promise on the part of the defendant that would necessarily be breached by the alleged conduct, whether negligently performed, or not, so that we believe the allegation of negligence is merely surplusage."—Max Biederman, Inc. v. Henderson, supra.

67. Iowa.—Colsch v. Chicago, etc., R. Co., 127 N.W. 198, 149 Iowa 176, 34 L.R.A.,N.S., 1013, Ann.Cas.1912C 915.
10 C.J. p 360 note 26.

68. Okl.—Deming v. Missouri, K. & T. R. Co., 281 P. 240, 138 Okl. 276.

69. N.Y.—Gerhard & Hey v. Cattaraugus Tanning Co., 150 N.E. 500, 241 N.Y. 413, modifying 207 N.Y.S. 842, 212 App.Div. 812, motion denied 152 N.E. 444, 242 N.Y. 600

70. W.Va.—Ohio-West Virginia Co. v. Chesapeake & O. Ry. Co., 124 S.E. 587, 97 W.Va. 61, 38 A.L.R. 1439.

Pleading held sufficient

(1) In an action for failure to deliver produce and injury to it while delayed by act of God, allegations that defendant failed to notify the shipper to procure retransportation, or to make extra efforts to preserve the shipment, were not erroneous on the ground that no duty rested on defendant to give such notice as a matter of law, since the matters pleaded might be considered in determining whether or not defendant used due care.—American Ry. Express Co. v. Home Star Produce Co., Tex.Civ.App., 276 S.W. 790.

(2) Complaint alleging that defendant railroad as a common carrier accepted specified quantity of flour for shipment, and that defendant "was negligent in and about the handling of such flour on said shipment, in this, that the defendant negligently allowed or permitted the said flour to become wet and damaged by wa-

that defendant was negligent is not necessary where facts are alleged which warrant an inference of negligence.[71]

Specifying acts of negligence. It is sufficient to charge negligence on the carrier's part in general terms, without specifying the particular acts of negligence,[72] and allegations of specific acts may be treated as surplusage.[73] On the other hand, it has been held that defendant has the right to require a clear and specific statement of what facts are relied on by plaintiff to show negligence,[74] but that the deficiency of the petition in this respect can be reached only by a special exception,[75] and not by a general demurrer.[76]

g. Statement of Contract or Duty

(1) Actions ex contractu
(2) Actions ex delicto

(1) Actions ex Contractu

In actions ex contractu for loss or injury to property shipped, the general rules of pleading govern so far as applicable. The plaintiff must state what the contract was. Under the Carmack amendment the plaintiff need not plead that the contract was in writing.

In an action ex contractu for loss of or injury to goods shipped, plaintiff must allege contractual relations between plaintiff and defendant,[77] and state what the contract was;[78] and, under some statutes, where the contract is evidenced by a bill of lading, the bill, or a copy thereof, must be filed with the complaint.[79] In assumpsit on a contract of interstate carriage, an averment of defendant's undertaking and breach thereof, in general terms, is sufficient, without declaring specially on the receipt or bill of lading.[80] Under the Carmack amendment requiring contracts for shipment in interstate commerce to be in writing, but not providing that a contract not in writing shall be void, plaintiff need not plead a written contract of shipment.[81]

In accordance with the general rules of pleading, the allegations of the declaration must not be inconsistent,[82] and if the contract is in the alterna-

ter, to the plaintiffs' damage aforesaid," was held sufficient to plead defendant's negligence.—Louisville & N. R. Co. v. Sarris & Collas, 95 So. 903, 209 Ala. 217.

Negligence of servants

Complaint, in action for injuries to shipment of mules, alleged to have resulted from the negligence and misconduct of the carrier or its servants or agents, was held sufficiently to show that the agents were acting within the scope of their employment.—Louisville & N. R. Co. v. Benton Mercantile Co., 121 So. 716, 219 Ala. 223.

71. Tex.—Panhandle & S. F. Ry. Co. v. Thompson, Civ.App., 250 S.W. 751.

Pleadings held sufficient

(1) Allegation by shipper of cattle that there was a long and unreasonable delay in the shipment by the carrier, by reason of which the cattle were injured, imputed negligence without a statement charging failure to use ordinary care.—Panhandle & S. F. Ry. Co. v. Thompson, Tex.Civ. App., 250 S.W. 751.

(2) So, a petition setting up the fact that defendant's loading pens were so muddy as not to be proper for the loading of cattle was not subject to general demurrer, although not charging in specific words that defendant was guilty of actionable negligence.—Lancaster v. Sayles, Tex.Civ.App., 234 S.W. 227.

72. Ala.—Louisville & N. R. Co. v. Benton Mercantile Co., 121 So. 716, 219 Ala. 223.

Ga.—Southern Ry. Co. v. Bateman Fruit Exchange, 162 S.E. 112, 173 Ga. 826, answers conformed to 163 S.E. 219, 44 Ga.App. 802.

Mo.—Browning v. Wells Fargo & Co. Express, App., 219 S.W. 665

10 C.J. p. 360 note 27.

73. Ga.—Hogg v. Louisville & N. R. Co., 127 S.E. 330, 33 Ga.App. 773.—Heath v. Sandersville R. Co., 98 S.E. 92, 23 Ga.App. 255.

74. N.Y.—Rubens v. Ludgate Hill SS. Co., 2 N.Y.S. 30, 21 Abb.N.Cas. 464.

Tex.—Texas & N. O. R. Co. v. Neubauer, Civ.App., 103 S.W.2d 182.

Sufficiency of pleading

In shipper's action against railroad for damage to cattle, shipper's allegations that the railroad was negligent by reason of delays on sidings and switches, rough handling, and sudden stop of train because of collision, or near collision, with motor car or section hand car, resulting in damage to cattle, were sufficient, as against objection that allegations were too general and did not specify in what the alleged negligence consisted.—Panhandle & S. F. Ry. Co. v. Sanderson, Tex.Civ.App., 218 S.W. 540, dismissed for want of jurisdiction.

75. Tex.—St. Louis, B. & M. Ry. Co. v. Marcofich, Civ.App., 185 S.W. 51, affirmed, Com.App., 221 S.W. 582.

76. Tex.—Texas & N. O. R. Co. v. Neubauer, Civ.App., 103 S.W.2d 182

Sufficiency as against general demurrer

(1) A petition for injuries to live stock was held not subject to general demurrer, where it alleged that it was defendant's duty to notify plaintiff of the arrival of the shipment, that it failed to do so, and that defendant negligently placed them in open and unprotected pens, thereby exposing the stock to the heat of the sun, in direct consequence of which several of the animals died and others were injured, although there was no direct allegation as to how or in what manner it became defendant's duty to notify plaintiff of the arrival of the live stock.—Hovencamp v. Union Stockyards Co., 180 S.W. 225 107 Tex. 421, modifying Union Stockyards Co. v. Hovencamp, Civ.App., 144 S.W. 704.

(2) A petition alleging railroad roughly, carelessly and recklessly handled cattle during transportation, unloading, and reloading, was held sufficient against general demurrer.—Texas & N. O. R. Co. v. Conn, Tex.Civ.App., 30 S.W.2d 939

77. Ga.—Nathan v. Lamb, 88 S.E. 794, 18 Ga.App. 39.

78. Ga.—Nathan v. Lamb, supra.

10 C.J. p. 361 note 31.

79. Ind.—Chicago, I. & L. R. Co. v. Reyman, 73 N.E. 587, superseded by 76 N.E. 970, 166 Ind. 278.—Indianapolis, etc., R. Co. v. Remmy, 13 Ind. 518.

80. W.Va.—McCormick v. Southern Express Co., 93 S.E. 1048, 81 W.Va. 87.

81. Mo.—Bowles v. Quincy, O. & K. C. R. Co., App., 187 S.W. 131.

82. Del.—Thomas v. Pennsylvania R. Co., 50 A. 285, 19 Del. 81.

Nature of inconsistency

A demurrer will be sustained to a declaration which alleges an agreement that the goods consigned should

tive, it should be so counted on in the declaration.[83] It is not necessary to aver the meaning of terms used in the complaint that have acquired a fixed and definite meaning that courts and juries will readily understand.[84] Conditions in the contract limiting the carrier's liability should be stated in order to admit proof thereof, as will appear infra § 253½. If there are provisions in the contract other than are usually embodied therein, it is not necessary to aver the reasons that influenced, or the purposes that controlled, the shipper or the carrier in inserting them.[85]

Collateral stipulations. Where the contract contains several distinct parts and collateral provisions, it will be sufficient to state so much of it as contains the entire act or duty which is to be performed and the entire consideration for such act or duty.[86]

(2) Actions ex Delicto

In actions ex delicto the plaintiff need not set out the precise terms of the contract of shipment or the legal duty arising therefrom. A statute requiring a copy of the contract sued on to be filed is not applicable to a tort action for injury to a shipment.

Where a shipper elects to bring an action ex delicto against a carrier for damages arising from failure on its part to perform its duties as common carrier, he need not set out the precise terms of the contract of shipment, and the legal duty to be adduced therefrom, since, if the declaration alleges that defendant is a common carrier, duties imposed on it by the common law follow as a matter of course.[87] So, it is not necessary to allege that it was defendant's duty to carry the goods safely, such duty being implied by law from the relation of common carrier to the goods.[88] A statute requiring a copy of the contract sued on to be filed with the declaration is not applicable in an action on the case for injury to a shipment.[89]

h. Notice of Claim for Loss or Damage

According to some decisions the plaintiff must plead compliance with a stipulation of the contract of shipment for presentation of a notice of the claim for damage to the property, while other cases hold that this is a matter of defense. Compliance by the plaintiff with such provision need not be averred when he sues in tort. A complaint alleging the giving of notice to the defendant's agent is not defective for failure to state the agent's name; and an allegation in a suit by the consignor and consignee that the consignor presented the claim has been held sufficient.

It has been held by many authorities that, where the contract of shipment contains a valid requirement that a claim for damages for loss or injury shall be given within a specified time, the declaration or complaint in an action on the contract must allege the giving of such notice, or allege a waiver by the carrier of a compliance with the requirement, or state facts which would amount to an excuse for failure to do so.[90] There are, however, a number of cases, even in jurisdictions where the above rule has been upheld, where the courts have taken the view that the contractual provision for notice of the claim is a matter of defense, and hence that plaintiff need not aver compliance therewith,[91] and this would seem to be the rule where plaintiff does not sue on the contract but seeks to recover in tort on defendant's common-law liability.[92]

Sufficiency of pleading. An allegation in a petition for injury to an intra-state shipment of live

be delivered in accordance with the directions of the consignor and not to the consignee, and which further alleges that such agreement was subject to the conditions of a written bill of lading which directed the delivery of the goods to the consignee. —Thomas v. Pennsylvania R. Co., 50 A. 285, 19 Del. 81.

83. N.Y.—Stone v. Knowlton, 3 Wend. 374.
10 C.J. p 362 note 39.

84. Ind—U. S. Express Co. v. Keefer, 59 Ind. 263.

85. Ind.—Jeffersonville, etc., R. Co. v. Irvin, 46 Ind. 180.

86. S.C.—Brenan v. Shelton, 2 Bailey 152.

87. Vt.—Saliba v. New York Cent. R. Co., 140 A. 491, 101 Vt. 56.
10 C.J. p 364 note 54.

88. Conn—Lang v. Brady, 49 A. 199, 73 Conn. 707.
10 C.J. p 364 note 62.

89. Ill—Hartford Live Stock Ins. Co. v. Railway Express Agency, 274 Ill.App. 585.

90. Ariz.—Atchison, T. & S. F. Ry. Co. v. Coffin, 108 P. 480, 13 Ariz. 144.
Ind—Cleveland, C., C. & St L. Ry Co. v. Rudy, 89 N.E. 951, 173 Ind. 181.
Mo—Baker v. Missouri Pac. R. Co., 19 Mo.App. 321.
W.Va.—Hubbard Grocery Co. v. Payne, 118 S.E. 152, 94 W.Va. 273.
10 C.J. p 364 notes 64, 65, p 365 note 66.

Corpus Juris is cited in support of the rule in The Sagadahoc, D.C. Wash., 291 F. 920, 921.

"Provision in the bill of lading being a condition precedent to a right of action, the performance must be stated, or a waiver pleaded, or excuse given for noncompliance."—The Sagadahoc, D.C.Wash., 291 F. 920, 921.

It is a sufficient excuse that compliance with the stipulation was rendered impossible by defendant's own act—Baker v. Missouri Pac. R. Co., 19 Mo.App. 321.

91. U.S.—Central Vermont R. Co. v. Soper, Mass., 59 F. 879, 8 C.C.A. 341.
N.Y.—Hoye v. Pennsylvania R. Co., 83 N.E. 586, 191 N.Y. 101, 17 L.R.A.,N.S., 641, 14 Ann.Cas. 414.
N.D.—Hatch v. Minneapolis, St. P. & S. S. M. Ry. Co., 107 N.W. 1087, 15 N.D. 490.
10 C.J. p 365 note 68.

"Condition . . . is not strictly a condition precedent, and it is not part of the cause of action"—Hatch v. Minneapolis, St. P. & S. S. M. Ry. Co., 107 N.W. 1087, 1088, 15 N.D. 490.

92. U.S.—The Sagadahoc, D.C.Wash., 291 F. 920—Southern Ry. Co. v. Mooresville Cotton Mills, N.C., 187 F. 72, 109 C.C.A. 390.
Mo.—Libby v. St. Louis, I. M. & S. Ry. Co., 117 S.W. 659, 137 Mo.App. 276.

stock that notice of a claim for the damage was given to an agent of the carrier is not insufficient for failure to set forth the name of the agent.[93] A complaint by a consignor, in which the consignee was joined as a party plaintiff, alleging that the consignor presented a claim for loss within the time required by the bill of lading, was not demurrable on the ground that title to the goods had passed to the consignee, and that no claim had been presented by him, where it did not appear from the complaint that a claim for loss must be filed by the consignee, or that it may not be filed by the consignor.[94]

i. Damage or Injury Sustained

A plaintiff suing a carrier for loss or injury to property shipped must allege the nature of the damages sought to be recovered. Special damages should be specially pleaded.

The petition or complaint in an action for loss or injury to property shipped should allege clearly the nature and amount of the damage for which recovery is sought,[95] or state facts sufficient to furnish a basis for the calculation of such damage;[96] but the measure of damages, being a rule of law governing the admission of evidence, need not be pleaded in order to state a cause of action.[97] Where there are several acts of negligence, plaintiff need not allege separately the several items of damages, or the amount thereof, arising from each act of negligence.[98] Immaterial allegations may be ignored as merely surplusage.[99]

Special damages for injury to, or loss of, a shipment must be specially pleaded.[1]

Expenses incurred or paid, if sought to be recovered as part of the damage sustained, must be sufficiently pleaded[2] and alleged to be reasonable and necessary.[3] A petition which alleges that plaintiff

93. Ga.—Heath v. Sandersville R. Co., 98 S.E. 92, 23 Ga.App. 255.

94. N.C.—Star Furniture Co. v. Carolina & N. W. Ry. Co., 143 S.E. 242, 195 N.C. 636.

95. Ga.—J. H. Walker Co. v. Atlantic Coast Line R. Co., 143 S.E. 782, 38 Ga.App. 284
Tex.—Panhandle & S. F. Ry. Co. v. Thompson, Civ.App., 250 S.W. 751. 10 C.J. p 365 note 72.

Pleadings sufficient

(1) Petition against carrier by consignor-consignee who refused to accept delivery of watermelons because of depreciation caused by delay in delivery, alleging damage in amount of specified market value of melons at time they should have arrived, was held not generally demurrable, although petition showed that melons had some value on their arrival and did not specify such value.—Atlantic Coast Line R. Co. v. Tifton Produce Co., 179 S.E. 125, 50 Ga.App. 614, conforming to answers 176 S.E. 624, 179 Ga. 624, 96 A.L.R. 772.

(2) A petition alleging the number of sacks of potatoes shipped, the gross weight and value of the shipment, and the percentage of damaged potatoes, together with the amount claimed therefor, is sufficiently definite.—J. H. Walker Co. v. Atlantic Coast Line R. Co., 143 S.E. 782, 38 Ga.App. 284.

(3) A petition by a shipper for injury to live stock was sufficient against special exception that it did not apprise defendant of nature of damages or elements thereof, and that plaintiff was required to plead the same with particularity, where the petition alleged the injury to consist of delayed delivery and unreasonable confinement of the stock without food and water, and fixed damage at a specified sum measured by the difference between the value of the animals in the condition in which they arrived and the value in the condition in which they should have arrived.—Panhandle & S. F. Ry. Co. v. Thompson, Tex.Civ.App., 250 S.W. 751.

96. Tex.—Panhandle & S. F. Ry. Co. v. Lockhart, Civ.App., 277 S.W. 230.—Gulf, C. & S. F. Ry. Co. v. Wilhelm, Civ.App., 16 S.W. 109.

97. Tex.—Missouri, K. & T. Ry. Co. v. Mulkey, Civ.App., 159 S.W. 111.

Petition sufficient

(1) A shipper's petition is not subject to general demurrer because it does not specifically set up the true measure of damages, where it charged that the cattle were deteriorated in value in a definite sum on account of being covered with mud when loaded.—Lancaster v. Sayles, Tex.Civ.App., 234 S.W. 227.

(2) A petition in an action for injuries to a shipment of live stock alleging generally that it was damaged to the extent of six hundred dollars, without allegation as to its market value at the point of destination, is sufficient, since when there is evidence to take the case to the jury it is for the court to instruct on the measure of damages.—Gulf, C. & S. F. Ry. Co. v. King, Tex.Civ.App., 174 S.W. 960.

98. Tex.—Panhandle & S. F. Ry. Co. v. Andrews, Civ.App., 278 S.W. 478

99. Tex.—Fort Worth & Denver City Ry. Co. v. Motley, Civ.App., 87 S.W. 2d 551, error dismissed.

Itemized statement of damages

In shipper's action against carrier for damage to live stock, fact that pleading included itemized statement of nature and amount of damages to each animal did not preclude plaintiff from recovering aggregate amount claimed under allegation of general damages.—Fort Worth & Denver City Ry. Co. v. Motley, Tex.Civ.App., 87 S.W.2d 551, error dismissed.

1. U.S.—Crail v. Illinois Cent. R. Co., D.C.Minn., 2 F.2d 287, reversed on other grounds, C.C.A., 13 F.2d 459, reversed Illinois Cent. R. Co. v. Crail, 50 S.Ct. 180, 281 U.S. 57, 74 L.Ed. 699, 67 A.L.R. 1423

Pleading sufficient

In shipper's action against live stock carrier, allegation that on arrival of shipment at destination shipper was compelled to pay freight charges in amount in excess of what he would have paid if shipment had been continued to destination in two cars as called for by contract instead of three was a proper pleading of special damages.—Fort Worth & Denver City Ry. Co. v. Motley, Tex.Civ.App., 87 S.W.2d 551, error dismissed.

2. Ga.—Louisville & N. Ry. Co. v. Harrell & Murphy, 120 S.E. 35, 31 Ga.App. 126.

3. Tex.—Panhandle & S.F. R. Co. v. Shell, Civ.App., 265 S.W. 758.

Petition sufficient

Allegation of petition for damages to shipment of grain that, after rejection thereof by buyer, plaintiffs made diligent, but unsuccessful efforts to sell to others at destination, and were compelled to reship to elevator company elsewhere to have grain put in salable condition and diminish resulting damages, was held tantamount to allegation that expenditures for such purposes were reasonable and necessary.—Panhandle & S.F. R. Co. v. Shell, Tex.Civ.App., 265 S.W. 758.

incurred expense in treating an injured animal, but fails to state the amount of the expense, is demurrable.[4]

Interest as damages is sufficiently alleged in a petition praying, in the body and in the prayer for relief, for judgment for the difference between the invoice price of the goods and their value in their damaged condition at destination in a certain sum, with interest from the date of shipment.[5]

j. Anticipating and Negativing Defenses

Plaintiff need not negative matters of defense.

Plaintiff, in his initial pleading, need not anticipate and negative or avoid matters of defense. The fact that the loss or injury complained of was due to a cause which would exempt the carrier from its common-law liability, such as an act of God[6] or of the public enemy,[7] an inherent or latent defect in the property or natural deterioration,[8] or, where live stock is injured, the evil propensities of the animals,[9] is a matter of defense, and need not be negatived by plaintiff. So, also, a limitation of liability contained in the contract of shipment is a matter of defense which need not be negatived by plaintiff.[10]

k. Amendment

Amendments of the declaration or complaint may be allowed if they do not introduce a new cause of action.

In accordance with the general rules of pleading, amendments of the declaration, petition, or complaint may be allowed, in the discretion of the court, provided a new or different cause of action is not introduced.[11] The pleading cannot be amended so as to change an action ex contractu to one ex de-

4. Ga.—Louisville & N. R. Co. v. Harrell & Murphy, 120 S.E. 35, 31 Ga.App. 126.

5. Tex.—St. Louis Southwestern Ry. Co. v. Texas Packing Co., Civ.App., 253 S.W. 864.

6. Mo.—Boyd v. St. Louis Express Co., App., 211 S.W. 702.

Injury due to rain and mud

In action against railroad where petition alleged part of damages to be occasioned by rain and mud in carrier's pens in which cattle were confined, court did not err in overruling special exceptions to such petition on ground that rain and mud were acts of God.—Panhandle & S. F. Ry. Co. v. Lockhart, Tex.Civ.App., 277 S.W. 230.

7. Mo.—Boyd v. St. Louis Express Co., App., 211 S.W. 702.

8. Ala.—Louisville & N. R. Co. v. Farmers' Produce Co., 85 So. 578, 17 Ala.App. 388.

Ga.—Southern Ry. Co. v. Bateman Fruit Exchange, 162 S.E. 112, 173 Ga. 826, answers conformed to 163 S.E. 219, 44 Ga.App. 802.—Louisville, etc., R. Co. v. McHan, 87 S.E. 889, 144 Ga. 683.

9. Mo.—Boyd v. St. Louis Express Co., App., 211 S.W. 702.

10. Ky.—Louisville, etc., R. Co. v. Woodford, 153 S.W. 722, 152 Ky. 398.

Tex.—Texas & P. Ry. Co. v. Gist, Civ.App., 53 S.W.2d 304.

11. Ga.—Southern Ry. Co. v. Williams, 77 S.E. 168, 139 Ga. 339.

Iowa.—Batcham v. Chicago, M. & St. P. Ry. Co., 192 N.W. 818, 195 Iowa 659.

Amendments allowable

(1) Where a petition alleged that a shipment of lumber was never delivered, but was destroyed through negligence of the carrier, it was not error at the trial, three years after action brought, to allow an amendment alleging that, if any part of the lumber was delivered, it was after it had been wrecked and had become worthless, on account of which the consignee refused it.—Southern Ry. Co. v. Williams, 77 S.E. 168, 139 Ga. 339.

(2) Where, in an action to recover for damages to horses in transit, the statement of claim asked for damages on the implied or common-law liability of the carrier, the court may, after verdict for defendant and grant of a new trial, allow plaintiff to amend his statement, so as to charge the negligence more in detail, and refer to a special contract under which the shipment was made.—Vervaeke v. Adams Express Co., 79 A. 764, 230 Pa. 647.

Amendments not introducing new cause of action

(1) In shipper's action for damage to goods, petition alleging that they were consigned to third person, and failing to allege that title was in plaintiff, was subject to amendment by alleging that goods were consigned to plaintiff under order notify bill of lading and alleging plaintiff's title, this not setting up new cause of action.—Davis v. Carroll, 119 S.E. 422, 30 Ga.App. 719.

(2) In an action against a carrier for loss of freight burned at the place of delivery to the carrier, an amendment changing the destination from a point from without to a point within the same state does not introduce a new cause of action.—Charleston & W. C. Ry. Co. v. Duckworth, 66 S.E. 1018, 7 Ga.App. 350.

(3) In an action for injury to live stock in transit by defendant's alleged negligence from improper handling and delay in transportation, it was not error to permit an amendment particularizing the acts of negligence, in that the shipment was conveyed on trains slower than the regular trains, that it was mishandled between certain places and held for a stated number of hours at certain points, that a feed trough had been wrongfully permitted to remain in the car with the hogs, that the cattle were confined for a longer period than twenty eight hours, and that the shipment should have reached destination October 14 and did not arrive until the evening of October 16, the matters pleaded in the amendment being germane to the cause of action alleged in the original petition and merely making more definite the former allegations of negligence.—Batcham v. Chicago, M. & St. P. Ry. Co., 192 N.W. 818, 195 Iowa 659.

(4) Amendment of complaint, in an action for injury to stock while being carried on defendant's line, changing the destination of the stock from the end of defendant's line, as alleged in the original complaint, to a place beyond, is not a change of cause of action, and its allowance is not error, the damages being confined to the injuries occurring on defendant's line.—Fell v. Union Pac. Ry. Co., 88 P. 1003, 32 Utah 101, 28 L.R.A.,N.S., 1, 13 Ann.Cas. 1137.

In South Carolina

(1) The court may allow an amendment alleging a new cause of action for the same injury and negligence alleged in the original complaint.—Holliday Co. v. Raleigh & C. R. Co., 74 S.E. 41, 91 S.C. 51.

(2) In an action against a carrier for negligently transporting live stock, the court under Code Civ.Proc. 1902 § 194, is authorized to allow an amendment to the complaint by eliminating allegation that plaintiff filed a claim, and that defendant was responsible for the loss, and

licto,[12] nor can a declaration stating a cause of action at common law be so amended as to charge a purely statutory liability;[13] and where a petition alleges shipment, but not a special contract, plaintiff cannot be required to amend by stating whether he shipped under an oral or written contract;[14] but an amendment may properly be allowed to meet a variance between the declaration or complaint and the evidence, such as a variance with respect to the place of destination of the shipment,[15] or where the complaint sets up one contract and the proof tends to show a different contract.[16]

§ 252. Plea or Answer

a. In general
b. Exceptions to common-law liability
c. Contractual limitation of liability

a. In General

The plea or answer must comply with the general rules of pleading and state facts constituting a good defense. Defense available under the general issue need not be specially pleaded; otherwise a special plea is ordinarily required. A plea of the general issue admits the competency of the defendant to be sued by the name given in the declaration.

The plea or answer in an action against a carrier for loss of or injury to property in its possession must comply with the general rules of pleading and state facts constituting a good defense.[17] Matters of defense admissible under a plea of the general issue at common law, or under a general denial in code states, are discussed infra § 253½. As to defenses which are admissible under the general issue a special plea is not necessary,[18] and, if interposed, is bad as amounting to the general issue;[19] but the objection must be taken by special demurrer.[20]

On the other hand, defenses not admissible under the general issue or a general denial,[21] such as contributory negligence on the part of the shipper,[22] or the absence of negligence on the part of the carrier proximately contributing to the loss or the injury,[23] must be specially pleaded. Matters of confession and avoidance must be specially pleaded,[24] and the

allow a new complaint setting out the same injury and negligence but omitting such allegation.—Holliday Co. v. Raleigh & C. R. Co., supra.

12. Ga.—Cox v. Richmond, etc., R. Co., 13 S.E. 327, 87 Ga. 747—Mitchell v. Georgia R. Co., 68 Ga. 644.

13. Ga.—Exposition Cotton Mills v. Western, etc., R. Co., 10 S.E. 113, 83 Ga. 441.

14. Kan.—Union Pac. R. Co. v. Beardwell, 99 P. 214, 79 Kan. 40.

15. Ill.—McCollom v. Indianapolis, etc., R. Co., 94 Ill. 534
Tex.—Davis v. Four Lakes Cattle Co., Civ.App., 245 S.W. 711.

16. S.C.—Dunbar v. Port Royal, etc., R. Co., 15 S.E. 357, 36 S.C. 110, 31 Am.S.R. 860.

17. Ky.—A. Arnold & Son Transfer & Storage Co. v. Weisiger, 6 S.W. 2d 1084, 224 Ky. 659.

Sufficiency of pleading

(1) In an action against a railroad company for loss of property destroyed while standing in defendant's terminal yard by an explosion of explosives in other cars in the yard, where it was alleged that defendant was negligent in failing to provide watchman or fire equipment, an answer alleging that the fire which caused the explosion originated on a boat lying at the terminal over which defendant had no control did not state a defense.—Lehigh Valley R. Co. v. John Lysaght, Limited, C.C.A.N.Y., 271 F. 906, affirming, D.C., John Lysaght v. Lehigh Valley R. Co., 254 F. 351, certiorari denied Lehigh Valley R. Co. v. John Lysaght, Limited, 41 S.Ct. 625, 256 U.S. 704, 65 L.Ed. 1180, error dismissed 42 S.Ct. 53, 257 U.S. 613, 66 L.Ed. 397.

(2) In action against carrier for failure to deliver goods to consignee, plea that goods not delivered were such as could not be transported by carrier under its tariff provisions, which was not disclosed by inspection of the containers, could be interpreted as referring to all articles sued for and therefore was not objectionable on ground that it did not name articles to which it related.—Alabama Great Southern R. Co. v. Herring, 174 So. 502, 234 Ala. 238.

Due care

Where form of complaint predicates action on a duty as a common carrier, in order to acquit itself of liability on plea that it was not liable as common carrier because goods not delivered to consignee were such as could not be transported by carrier under its tariff provisions, carrier should assert that it did use due care.—Alabama Great Southern R. Co. v. Herring, 174 So. 502, 234 Ala. 238.

Estoppel

(1) Carrier's answer, alleging shipper's false statement of value of property destroyed, thereby obtaining a lower rate of transportation, without stating facts showing that defendant was deceived, and that such statement was material, did not set forth facts constituting estoppel —A. Arnold & Son Transfer & Storage Co. v. Weisiger, 6 S.W.2d 1084, 224 Ky. 659.

(2) Ground of defense, in action against carrier for damages to intrastate shipment, was held not to allege fraud supporting estoppel against shipper to assert value contrary to representation.—Chesapeake & O. Ry. Co. v. Osborne, 153 S.E. 865, 154 Va. 477.

Fraud

Answer alleging shipper's false statement of value of property destroyed, thereby obtaining a lower rate of transportation, held defective, so far as relying on the shipper's fraud, in not stating facts showing that carrier was deceived A. Arnold & Son Transfer & Storage Co. v. Weisiger, 6 S.W.2d 1084, 224 Ky. 659.

18. Fla.—Atlantic Coast Line R. Co. v. Baynard, 151 So. 5, 112 Fla. 544
10 C.J. p 366 note 87.

19. Ill.—Illinois Cent. R. Co. v. Johnson, 34 Ill. 389.
10 C.J. p 366 notes 88, 91, p 367 note 92.

20. Ill.—Cushman v. Hayes, 46 Ill. 145.

21. Mo.—Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co., 201 S.W. 623, 198 Mo.App. 520
10 C.J. p 367 note 93

22. Fla.—Seaboard Air Line R. Co. v. Rentz, 54 So. 20, 60 Fla. 449.
Mo.—Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co., 201 S.W. 623, 198 Mo.App. 520
10 C.J. p 367 note 94.

23. Ala.—Louisville, etc., R. Co. v. Shepherd, 61 So. 14, 7 Ala.App. 496.

24. Mich.—Tobin v. Lake Shore &

same is true of the defenses of estoppel,[25] partial loss only,[26] release of shipping contract,[27] that the contract of shipment is in violation of a rule of the railroad commission,[28] that part of the goods do not belong to plaintiff,[29] that the goods were injured by a connecting carrier and not by defendant,[30] and a waiver of the conditions of a special contract of shipment.[31] In order that the carrier may have unpaid freight charges deducted from the damages for goods destroyed it must plead them by way of counterclaim or set-off.[32]

A special plea must be sufficient to present the defense relied on,[33] and be responsive to, or as broad as, the declaration or complaint.[34] Where injury to perishable goods is caused by delay in transit, the causes of the delay are particularly within the knowledge of the carrier, and it is for it to excuse or explain such delay, and bring itself within an exception to its liability, if such exists.[35]

Plea in abatement. The necessity of a plea in abatement to raise the question of the nonexistence of a corporation being sued as a carrier follows the rules treated in the C.J.S. title Abatement and Revival § 91.

Admissions. In case for loss of goods, a plea of the general issue admits the competency of defendants to be sued by the name given in the declaration.[36]

b. Exceptions to Common-Law Liability

Matters constituting exceptions to defendant's common-law liability should ordinarily be pleaded.

Matters constituting exceptions to defendant's common-law liability as a common carrier must be specially pleaded.[37] Thus, where the carrier claims that the loss or injury was occasioned by the act of God or the public enemy,[38] or was due to the fault of the shipper,[39] it must allege such exception to the rule; and if the carrier relies on the fault of the shipper as exempting it from liability, the plea must negative all contributory fault on defendant's part.[40] On the other hand, it has been held that the defense that the injury to cattle was due to their inherent nature need not be specially pleaded, unless it appears that there was some inherent vice not common to cattle generally.[41]

c. Contractual Limitation of Liability

(1) In general
(2) Failure to give notice of claim
(3) Failure to sue within time limited

(1) In General

Contractual limitations on the defendant's common-law liability ordinarily require a special plea, except where the plaintiff has offered the bill of lading in evidence, and the defendant must allege facts showing that the limitation was reasonable and based on a sufficient consideration. The contract should be set out, together with the particulars in which the shipper failed to comply therewith.

Contractual limitations on the carrier's common-law liability must be specially pleaded by defend-

M. S. Ry. Co., 159 N.W. 389, 192 Mich. 549.
10 C.J. p 368 note 7.

25. Ky.—Southern Express Co. v. Fox, 117 S.W. 270, 115 S.W. 184, 131 Ky. 257, 133 Am.S.R. 241.

26. Tex.—Houston & Texas Central Ry. Co. v. Harn, 44 Tex. 628.

27. Tex.—Houston & Texas Central R. Co. v. Harn, supra.

28. Tex.—Houston, etc., R. Co. v. Hamilton Lumber Co., Civ.App., 135 S.W. 605.

29. Or.—McGregor v. Oregon R. Co., 93 P. 465, 50 Or. 527, 14 L.R.A., N.S., 668.

30. S.C.—Whittle v. Southern R. Co., 70 S.E. 456, 88 S.C. 172.

31. Iowa.—Winn v. American Express Co., 128 N.W. 663, 149 Iowa 259.

32. Wash.—Lagomarsino v. Pacific Alaska Nav. Co., 170 P. 368, 100 Wash. 105.

33. Ala.—Atlantic Coast Line Ry. v. Enterprise Cotton Oil Co., 74 So. 232, 199 Ala. 57.

34. Ala.—Davis v. Dawkins, 95 So. 188, 209 Ala. 45.

Fla.—Atlantic Coast Line R. Co. v. Baynard, 151 So. 5, 112 Fla. 544.

Insufficient pleas

(1) Railroad company's plea, in shipper's action for negligent failure to transport carload of fruit, that plaintiff abandoned fruit and that defendant tried to reduce loss by selling it to best advantage and tendered proceeds to plaintiff, was held bad as interposing defense not responsive to case made by declaration —Atlantic Coast Line R. Co. v. Baynard, 151 So. 5, 112 Fla. 544.

(2) Portion of defendant railroad company's plea, referring to state railroad commission's rule requiring shipper to give two days' notice of day on which he desires to ship fruit, held irrelevant where the declaration is not based on the failure of defendant to furnish a car, but on the negligent failure to transport loaded car of fruit—Atlantic Coast Line R. Co. v. Baynard, supra.

(3) Where the complaint by a shipper against the carrier was in the code form, a special plea that, if plaintiff's mule was injured as the result of any defect in the car in which it was transported, defendant was not liable because of a provision in the bill of lading whereby the shipper agreed that he had examined the car, and that it was suitable, was demurrable because not so broad as the complaint.—Davis v. Dawkins, 95 So. 188, 209 Ala. 45.

35. Vt.—Saliba v. New York Cent. R. Co., 140 A. 491, 101 Vt. 56.

36. Me.—Moran v. Portland Steam Packet Co., 35 Me. 55.

37. Iowa.—Smith v. Louisville & N. R. Co., 209 N.W. 465, 202 Iowa 292.
Mo.—Burgher v. Wabash Ry. Co., App., 217 S.W. 854.
Tex.—Texas & P. Ry. Co. v. Gist, Civ.App., 53 S.W.2d 304.
10 C.J. p 367 notes 94, 95, p 368 note 18.

38. Ala.—Atlantic Coast Line Ry. v. Enterprise Cotton Oil Co., 74 So. 232, 199 Ala. 57.

39. Ala.—Atlantic Coast Line Ry. v. Enterprise Cotton Oil Co., supra.

40. Ala.—Atlantic Coast Line Ry. v. Enterprise Cotton Oil Co., supra.

41. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Kerr, Civ. App., 184 S.W. 1058.

ant,[42] although there are decisions to the contrary in some jurisdictions where the common-law rules of pleading obtain.[43] Where, however, the bill of lading has been offered in evidence by plaintiff, its provisions limiting liability or the amount of recovery are available to the carrier without a special plea.[44]

It also devolves on the carrier to allege such facts as will show that the limitation is a reasonable one[45] and supported by a sufficient consideration.[46] If the carrier relies on the failure of the shipper to comply with the provisions of a special contract limiting the carrier's common-law liability, the contract must be set out in the answer and also the particulars in which the shipper has failed to comply with it,[47] although a defect of this nature has been allowed to be cured by amendment.[48] If a carrier relies on a special contract requiring the shipper to bed cars for live stock shipped, it must be alleged that he was given an opportunity so to do and that, if the cars were not properly bedded, it was through the shipper's fault.[49] Where the petition alleged that defendant failed to take proper care of stock shipped, and that it failed properly to water the stock, defendant might plead a contract of afreightment which requires the owner to accompany and to feed and water the stock himself.[50] It has also been held necessary to allege that the carrier was not guilty of any negligence contributing to the injury complained of.[51]

Limitation as to value. A plea setting up a stipulation that the liability of the carrier shall be computed on the basis of the invoice price of the goods, regardless of whether the loss was due to negligence, must allege that the loss was not due to wanton or willful misconduct amounting to a conversion or an affirmative repudiation of the duty to carry and deliver, but need not negative negligence.[52]

(2) Failure to Give Notice of Claim

Failure to give the defendant the notice of claim required by the contract must be specially pleaded, and facts stated showing the stipulation is reasonable and that there was no excuse for noncompliance therewith.

Some authorities have held that failure of plaintiff to give timely notice of his claim for loss or injury, as required by the contract of shipment, is a matter of defense which must be specially pleaded by defendant,[53] and an amendment seeking to cure

42. Ala.—Davis v. Dawkins, 95 So 188, 209 Ala. 45
Conn.—New England Fruit & Produce Co. v. Hines, 116 A. 243, 97 Conn. 225.
Fla.—Walton Land & Timber Co. v. Louisville & N. R. Co, 72 So. 485, 72 Fla. 66.
Mo—Bowles v. Quincy, O & K. C. R. Co., App., 187 S.W. 131.
Tex—Texas & P. Ry. Co. v. Gist, Civ App., 53 S.W.2d 304.
10 C.J. p 366 note 90, p 368 note 19.

Storm or obstruction of track

Where the shipping contract released the carrier from liability for loss or injury to live stock due to a storm or obstruction of the track, allegations that storm released railway from liability was a complete defense, in absence of allegations of other negligence.—Hull v. Chicago, R. I. & P. Ry. Co., 293 P. 479, 131 Kan. 781.

Strikes

A plea by a carrier alleging existence of a strike participated in by employees of the carrier, whose refusal to render services for which they were employed rendered it impossible to effect safe and expeditious delivery, under a contract limiting liability for delays in transportation due to strikes, is a good plea —American Ry Express Co. v. Johnson, 100 So. 743, 87 Fla. 451.

Allegation of contributory negligence

In action for damages to shipment of live stock under contract requiring shipper to feed and care for it and hold the carrier harmless for damages, except from its negligence, the allegations were held sufficiently to set up shipper's contributory negligence—Ft. Worth & D. C. Ry. Co. v. Allen, Tex Civ.App., 189 S.W. 765

Insufficient allegations

Allegations in the answer by railroad sued for injuries in intra-state shipment of live stock, setting out stipulations binding shippers to care for stock at own risk, were held insufficient as matter of law—Chauncey v. Kansas City, M. & O Ry. Co., Tex.Civ App., 32 S.W.2d 369

In Kentucky an answer alleging false statement of value of property destroyed thereby obtaining lower transportation rate, was held bad in asserting contract relieving carrier from common-law liability contrary to express provisions of Const § 196 —A. Arnold & Son Transfer & Storage Co. v. Weisiger, 6 S.W.2d 1084, 224 Ky. 659.

43. Del.—Klair v. Philadelphia, B & W. R. Co., 78 A. 1085, 2 Boyce 274.
10 C.J. p 366 note 88.

44. Ala.—Davis v. Zimmern, 99 So 307, 211 Ala. 63—Davis v Dawkins, 95 So. 188, 209 Ala 45—Ex p Kilgore, 67 So 1002, 191 Ala. 671
10 C.J. p 369 note 20

45. Utah.—Houtz v Union Pac. R Co, 93 P 439, 33 Utah 175, 17 L.R.A.,N.S., 628.
10 C.J. p 369 note 21.

46. Cal—Reeder v. Wells, 113 P. 343, 14 Cal App 790.

47. Ark—Kansas City, P & G Ry. Co v. Pace, 63 S.W 62, 69 Ark. 256.
10 C.J. p 369 note 23

48. Ga—Weaver v Southern R Co, 70 S.E. 232, 9 Ga App. 34.

49. Tex—Gulf, etc, R Co. v. Boger, Civ App, 169 S.W. 1093

50. Ga—Cranor v. Southern R Co, 78 S.E 1014, 13 Ga App 86

51. Ind—Anderson v. Lake Shore, etc, R Co., 59 N.E 396, 26 Ind. App 196.
Pa—Penn Clothing Co v. U. S. Express Co, 48 Pa Super 520.

52. Ala—Davis v. Zimmern, 99 So. 307, 211 Ala 63.

53. Ark—Kansas City, P & G Ry. Co, 63 S.W. 62, 69 Ark 256
Ga—Heath v. Sandersville R. Co, 98 S.E 92, 23 Ga App 255.
Mich—Tobin v Lake Shore & M S. Ry Co, 159 N.W. 389, 192 Mich. 549
Pa.—Dobransky v. Adams Express Co, 76 Pa Super 284
10 C.J p 367 note 97, p 369 note 31.

Verification of plea

(1) Where a statute provides that want of notice of claim shall be specially pleaded under oath, a plea alleging failure to give notice is in-

such a defect has been denied,[54] although, on the other hand, it has been held that the carrier is not precluded from setting up noncompliance with the stipulation for notice, because it did not set up such defense until the filing of the second amended answer.[55] The carrier of an interstate shipment is not precluded from setting up in its answer the failure of the shipper to give notice of his claim, merely because the action was brought in the form of a common-law action for damages.[56]

Facts must be stated from which it will appear that the stipulation is reasonable,[57] and that no excuse existed for a noncompliance therewith.[58] Where a shipping contract provided that a written claim should be presented within a specified time, except where the loss or damage was due to specified causes, a plea which set up such provision, but failed to allege that the damage was not due to the excepted causes, was defective, and subject to demurrer.[59]

(3) Failure to Sue within Time Limited

Failure to comply with a stipulation requiring suit on a claim for loss or injury to be brought within a designated time must be specially pleaded, and facts must be alleged showing the reasonableness of the stipulation, unless the shipper has introduced in evidence the contract containing such stipulation.

If the carrier relies on a failure of the shipper to comply with a provision in the contract of shipment requiring suit to be brought within a designated time for loss or injury to the goods shipped, the contract must be specially pleaded,[60] and facts must be alleged showing that the stipulation was reasonable;[61] but the carrier is entitled to the benefit of such a provision where the contract containing it is introduced into evidence by the shipper.[62] The carrier of an interstate shipment is not precluded from pleading violation by the shipper of a stipulation in the contract of shipment requiring suit to be begun within a designated time, by the fact that plaintiff commenced his action in the form of a common-law action for damages.[63]

§ 253. Replication or Reply

Ordinarily, matters avoiding special defenses alleged in the answer should be set up in the reply.

Where the defense to an action for injury to goods is special,[64] as, for instance, nonpresentment of a claim for damages to goods within the period required by the contract,[65] or failure to bring suit within the time specified by the contract,[66] plaintiff should, unless otherwise provided by statute,[67] set up by reply matter avoiding such defense. So if a shipper claims that a release pleaded by the carrier was fraudulently obtained, this issue must be tendered by proper averments in the reply.[68] Where a shipper sues a carrier for loss of freight, without specifying any particular negligence as the cause of the loss, and the carrier charges that the loss was due to the shipper's negligence, the shipper must,

sufficient unless sworn to.—International & G N R Co. v. Williams, Tex Civ App, 129 S W. 847.

(2) The affidavit supporting the plea must be positive—Missouri, K & T Ry Co v Pietzsch, 30 S W. 1083, 10 Tex Civ.App. 572

54. N.Y.—Kaplan v. Metropolitan Express Co, 98 N.Y.S. 228.

55. Mo—Cudahy Packing Co. v Bixby, 205 S W. 865, 199 Mo App. 589, certiorari denied 39 S Ct. 19, 248 U.S. 577, 63 L Ed 429.

56. Okl—Missouri, K. & T. Ry. Co v Isaac & Marx, 192 P. 1094, 79 Okl. 265.

57. Tex—Western Union Telegraph Co v Cates, Civ.App., 282 S W 661, reversed on another ground, Com App, 291 S W. 193—St Louis, B & M Ry Co v. Marcofich, Civ. App., 185 S W 51, affirmed, Com. App., 221 S.W 582.
10 C J p 370 note 33.

58. Tex—St Louis, etc, R. Co. v. Brass, Civ App., 133 S W. 1075.

59. Ala.—Southern Ry. Co v. Northwestern Fruit Exch., 98 So. 382, 210 Ala 519.

60. Neb—Gilinsky v. Illinois Central R. Co, 154 N.W. 730, 98 Neb 858
10 C J p 370 note 36.

Corpus Juris is cited in support of this statement in Green Star S S Co. v. Nanyang Bros. Tobacco Co., C C.A China, 3 F 2d 369, 370.

61. Tex—Texas, etc, R Co. v. Reeves, 39 S W. 564, 90 Tex 499

62. N Y—Rudolph Wurlitzer Co. v. Barrett, 154 N Y S 226
10 C.J. p 370 note 37

63. Okl—Missouri, K. & T Ry. Co v. Isaac & Marx, 192 P. 1094, 79 Okl. 265.

64. Mo—McElvain v. St. Louis & S F. R Co, 131 S.W. 736, 151 Mo App. 126
Okl—St Louis & S. F. R Co. v. Zickafoose, 135 P. 406, 39 Okl. 302.
10 C J p 370 note 41.

65. Colo—Atchison, T. & S F. Ry Co v. Baldwin, 128 P. 449, 53 Colo 416.
Miss—Southern Express Co v. Hunnicutt, 54 Miss 566, 28 Am R. 385.
Reply or demurrer
Plaintiff may test the defense by reply or demurrer—Southern Express Co v Hunnicutt, 54 Miss. 566, 28 Am.R. 385.

66. Tex—Gulf, C & S F Ry. Co. v Trawick, 15 S W. 568, 18 S.W. 948, 80 Tex 270.
Sufficient replication
Where a company is sued for injuries to live stock during transportation, and sets up a special agreement to the effect that the owner was to give notice within forty days of his claim for injuries as a condition precedent to the right to sue, the effect of such defense is avoided by a replication showing that within three days after the injury defendant's agent promised to pay the damages if plaintiff would put them in a reasonable sum, that he was misled by various promises to pay until after the lapse of the forty days, and that during that time he acted under the belief that defendant meant to pay without suit—Gulf, C. & S F. Ry Co v. Trawick, 15 S.W. 568, 18 S.W. 948, 80 Tex. 270

67. S C—Frasier v Charleston & W. C. Ry. Co, 52 S E. 964, 73 S C. 140.

68. Mo—McElvain v St. Louis & S. F. R Co., 131 S.W. 736, 151 Mo. App 126—Freeman v St. Louis & S. F R Co., 122 S.W. 1, 138 Mo.App. 322.

under some statutes, reply to such new matter in the answer or be nonsuited.[69]

Admissions in reply. Where defendant pleads a condition requiring plaintiff to file a claim for damages within a specified time and his failure to do so, and the reply alleges that the condition is void, the admission in the reply of the existence of the condition not being express, its existence must be taken as denied by the denial implied by law to the allegation in the answer.[70]

§ 253½. Issues, Proof, and Variance

a. In general
b. Matters to be proved
c. Evidence admissible under pleadings
d. Variance

a. In General

The issues in an action against a carrier are only those arising from the pleadings.

The issues which arise for determination in an action against a carrier for loss of or injury to property shipped are those, and only those, properly presented by the pleadings,[71] although, as indicated infra subdivision c, an issue may under certain circumstances be raised by the evidence.

b. Matters to Be Proved

Ordinarily all material allegations in the pleadings must be proved as alleged.

In accordance with the general rule, every material allegation in the pleadings must be proved as alleged.[72] Where plaintiff pleads that the loss or injury was due to the negligence of the carrier he must prove the negligence as alleged,[73] even though the facts would permit suit against the carrier as an insurer;[74] and if specific acts of negligence are alleged plaintiff must prove such acts[75] and cannot rely on the presumption that arises from the damaged condition of the property on arrival, after de-

69. U.S.—Atchison, T. & S. F. Ry. Co. v. A. B. C. Fireproof Warehouse Co., C.C.A.Mo., 82 F.2d 505, certiorari denied A. B. C. Fireproof Warehouse Co. v. Atchison, T. & S. F. Ry. Co., 57 S.Ct. 17.

70. Iowa.—Nichols v. Chicago G. W. Ry. Co., 62 N.W. 769, 94 Iowa 202.

71. Ill.—American Fruit Growers v. San Antonio & A. P. Ry. Co., 239 Ill.App. 151.
Iowa.—Ruebel Bros. v. American Express Co., 180 N.W. 658, 190 Iowa 600.

Pleadings sufficient to present issue

(1) Carrier's allegation in plea that act of God was proximate cause of loss to goods presented issue of negligence after notice of danger or negligence in not appreciating danger, regardless of where burden of proof existed.—Louisville & N. R. Co. v. Finlay, Ala., 170 So. 207.

(2) Liability as warehouseman was held sufficiently presented.—Hill Mfg. Co. v. New Orleans, M. & C. R. R. Co., 78 So. 187, 117 Miss. 548, certiorari denied New Orleans, M. & C. R. Co. v. Hill Mfg. Co., 39 S.Ct. 11, 248 U.S. 571, 63 L.Ed. 426.

Pleadings insufficient to present issue

(1) General allegation of damage to mule did not cover loss of services and cost of doctoring.—San Antonio & A. P. Ry. Co. v. Turner, Tex.Civ.App., 291 S.W. 329.

(2) General allegation of damage to cow in transportation did not cover loss of milk and cost of doctoring.—San Antonio & A. P. Ry. Co. v. Turner, supra.

Rule of court

In an action for loss of freight, where defendant's agent attached to the bill of lading, a copy of which plaintiff attached to his declaration, a notation of the shortage, the failure of defendant, which pleaded the general issue, to file an affidavit denying the execution of the notation, did not preclude it from denying the same, or from questioning the authority of the agent, under a rule of court providing that, on plea of the general issue "in an action upon any written instrument," plaintiff shall not be put to proof of the execution of the instrument unless defendant shall file an affidavit denying the same. The rule applies only to an instrument sued on.—Oceana Canning Co. v. King, 161 N.W. 895, 195 Mich. 628.

72. **Proof of bill of lading alleged**

Plaintiff, having chosen to found action on issuance of bill of lading instead of verbal contract for shipment, was bound to prove bill as condition to recovery.—Cudahy Packing Co. v. Chicago & N. W. Ry. Co., 196 S.W. 406, 196 Mo.App. 528.

Notice of claim for damages must be averred and proved.—Heath v. Sandersville R. Co., 98 S.E. 92, 23 Ga.App. 255.

Construction of pleadings as to matters alleged

(1) Allegations as to jerking of train causing injury to cattle were not specific allegations of negligence which plaintiff was required to prove, but merely of general rough handling.—St. Louis Southwestern Ry. Co. of Texas v. Weathersbee, Tex.Civ.App., 22 S.W.2d 986.

(2) Complaint alleging cattle were jostled and jolted, bruised and battered, during shipment, did not plead specific act of negligence so as to require proof thereof in order to warrant recovery.—Texas & N. O. R. Co. v. Miller Bros., Tex.Civ.App., 22 S.W.2d 988.

Specific acts of negligence

Where there is an unaccompanied shipment of live stock, either interstate or intra-state, and death of animal occurs while in custody of carrier, shipper need not prove, under general allegation of negligence, specific acts of negligence on part of carrier, but it is sufficient if there is substantial evidence from which reasonable inference of negligence may be drawn.—Long v. American Ry. Express Co., 274 S.W. 906, 219 Mo.App. 451.

73. U.S.—Atchison, T. & S. F. Ry. Co. v. A. B. C. Fireproof Warehouse Co., C.C.A.Mo., 82 F.2d 505, certiorari denied A. B. C. Fireproof Warehouse Co. v. Atchison, T. & S. F. Ry. Co., 57 S.Ct. 17, 299 U.S. 555, 81 L.Ed. 409.
Mo.—State ex rel. Atchison, T. & S. F. Ry. Co. v. Trimble, 257 S.W. 194, 302 Mo. 8.—Ozark Fruit Growers' Ass'n v. St. Louis-San Francisco R. Co., 46 S.W.2d 895, 226 Mo.App. 222.—Crow v. Bush, App., 200 S.W. 762.—Robinson v. Bush, 200 S.W. 757, 199 Mo.App. 184.

74. Mo.—Ozark Fruit Growers' Ass'n v. St. Louis-San Francisco R. Co., 46 S.W.2d 895, 226 Mo.App. 222.—Robinson v. Bush, 200 S.W. 757, 199 Mo.App. 184.

75. Ark.—American Ry. Express Co. v. H. Rouw Co., 48 S.W.2d 220, 185 Ark. 526.
Tex.—Myers v. Texas Land & Development Co., Civ.App., 282 S.W. 919.

Specific acts not alleged

In action for damages for injury

livery to the carrier in good condition.[76]

Where, however, plaintiff's pleading in an action for loss of oil in transit counted on defendant's common-law liability as insurer, an allegation that "defendant wrongfully drew out the oil" was held not to charge a specific act of negligence which plaintiff was required to prove as laid, but related rather to the alleged breach of defendant's obligation as insurer.[77] A plaintiff who merely pleads delivery of live stock to carrier in a sound condition, and failure to deliver to the consignee, may rely on the prima facie case of negligence arising from proof of such allegations.[78] Under a general allegation of negligence, a shipper suing for injury to an unaccompanied shipment of live stock need not prove specific acts of negligence.[79] A carrier delivering different shipments under different bills of lading, so commingled that it was impossible to prove the specific loss on each shipment, cannot require proof as to the particular damage to each particular shipment;[80] nor is plaintiff required to introduce in evidence a contract which was not made a part of his case against the carrier.[81] The carrier need not prove all the matters set up in its plea, if it proves enough to make out its defense.[82]

c. Evidence Admissible under Pleadings

(1) In general

(2) Under general issue or general denial

(1) In General

The proof must ordinarily be confined to the issues raised by the pleadings; but the scope of the pleadings may be enlarged by the evidence.

Ordinarily the proof must be confined to the issues raised by the pleadings, and evidence of matters not put in issue by the pleadings is not admissible.[83] Thus, in an action for damages to a ship-

to live stock allegations of shipper of live stock against carrier held not to constitute specific allegations of negligence, hence shipper was not precluded from recovering for negligence not alleged—St. Louis, B. & M. Ry. Co. v. Murray, Tex.Civ.App., 40 S.W.2d 949.

76. Mo—Cole v. American Ry. Express Co., 68 S.W.2d 736, 228 Mo. App. 78.

77. Mo—Zerilli v. Ross, App., 198 S. W. 487.

78. Iowa.—Ruebel Bros. v. American Express Co., 180 N.W. 658, 190 Iowa 600.

79. Mo.—Shaffer v. American Ry. Express Co., App., 282 S.W. 725.

80. N.Y.—Upson Co. v. Erie R. Co., 210 N.Y.S. 112, 213 App.Div. 262.

81. Mo.—Morrow v. Wabash Ry. Co., App., 289 S.W. 343.

82. Ala.—Alabama Great Southern R. Co. v. Herring, 174 So. 502, 234 Ala. 238.

Proof held sufficient

In action against carrier for failure to deliver goods to consignee, on plea that goods not delivered were such as could not be transported by carrier under its tariff provisions, which was not disclosed by inspection of the containers, proof was not required to extend to all articles, but if proof was made as to any of them, to that extent the plea was proven—Alabama Great Southern R Co. v. Herring, 174 So 502, 234 Ala. 238.

83. Ark.—H. Rouw Co v American Ry Express Co., 291 S.W. 1001, 173 Ark. 84.

Ill—Nellis v. Grand Trunk Western Ry. Co., 220 Ill.App. 445.

Me—Witzler v. Collins, 70 Me. 290, 35 Am.R. 327

Mo—Boyd v St. Louis Express Co., App., 211 S.W. 702.

Mont—Wahle v Great Northern R. Co., 109 P. 713, 41 Mont. 326.

Okl—Chicago, R. I. & P. Ry Co. v. Burke, 198 P. 620, 82 Okl 114.

S.D—Gifford v. Payne, 199 N.W. 119, 47 S.D. 410, certiorari denied Davies v. Gifford, 45 S.Ct. 96, 266 U.S. 615, 69 L.Ed. 469.

Tex—Gray v. Missouri, K. & T. R. Co. of Texas, Civ.App., 45 S.W.2d 267—Ft. Worth & R. G. Ry. Co. v. Bryson & Burns, Civ.App., 195 S. W. 1165.

10 C.J. p 360 note 27 [c].

Matters not pleaded by plaintiff

(1) Where a carrier sent away and had repaired automobile injured in shipment, and consignee then refused it, proof in consignee's action should have been limited to value of machine at time of its return after being repaired, the carrier's subsequent liability as warehouseman not being pleaded.—Houston & T. C. Ry. Co. v. Iversen, Tex.Civ.App., 196 S.W. 908.

(2) In an action for injury to mules while in transit, evidence that the mules were "skinned up" when they arrived at their destination was inadmissible, where there was no allegation in the complaint of any external injury to the mules—Leddy v. Great Northern Ry. Co., 210 P. 354, 122 Wash. 136.

Defenses not pleaded

(1) In an action for damage to a shipment of cotton delayed in transportation, the court did not err in refusing to permit defendant to prove that unusual conditions existed which made it impossible to procure cars for more expeditious transportation, where the pleadings raised no such issue—Payne v. Orton, 234 S.W. 469, 150 Ark. 307.

(2) Where express company sued for loss of hog, did not plead the defense that the loss was caused by the inherent viciousness of propensities of the hog, defendant had no right to show it or claim protection from it, unless it appeared in the testimony of plaintiff—Boyd v. St. Louis Express Co., Mo.App., 211 S. W. 702.

(3) In shipper's action against carrier for loss resulting because carrier unauthorizedly permitted pickery to recondition cotton, evidence showing that reconditioning process was necessary under statute of state into which cotton was shipped was inadmissible where carrier did not plead facts and statute showing necessity for reconditioning—Atchison, T. & S. F. Ry. Co v. Weaver, 47 P.2d 104, 173 Okl. 156.

(4) In shipper's action against railroad for loss of potatoes defended on ground that railroad had not accepted the shipment in any capacity, evidence was not admissible to show that it had accepted the shipment as an intermediate carrier, since such evidence would have been inconsistent with its defense—American Fruit Growers v. King, 114 S.E. 861, 122 S.C. 69.

Contributory negligence

In a shipper's action for the loss of sheep through drinking unwholesome water in a yard furnished by defendant, it was not error to exclude the shipping contract to show that the shipper himself undertook to unload the sheep and that he was guilty of contributory negligence, no

ment of cattle, the admission of evidence on the issue of a waiver of the terms of the shipment contract is error, where such issue was not raised by the pleadings.[84] So, in the absence of an allegation that special damages were incurred, evidence of special damages is not admissible.[85] Where plaintiff undertakes to specify the acts of negligence on the part of the carrier, he will be confined in his proofs within the limits of his specification,[86] although it has been held that this rule applies only to cases in which the action is based on negligence alone, and not where the petition alleges facts showing a contract relationship between plaintiff and the carrier.[87] Where the action is for negligent delay causing injury to live stock, and plaintiff pleads delays at certain designated stations, it is error to admit evidence that the stock was handled roughly all along the route.[88]

Enlarging scope of pleadings. It has been held that the carrier's evidence may broaden the pleadings, so as to permit proof of facts not expressly pleaded by plaintiff.[89] It has also been held that, where a written contract of shipment is definitely established by the evidence, the contract is admissible, although its issuance or contents was not pleaded by either party.[90]

(2) Under General Issue or General Denial

Under the general issue or a general denial a carrier may prove matters tending to controvert the case made by the plaintiff's pleadings. Evidence of a contract limiting defendant's common-law liability is usually admissible under the general issue; but in code states a general denial does not ordinarily authorize the introduction of such evidence.

A carrier sued for loss of, or injury to, property transported may, under the general issue, prove facts tending to controvert the allegations of the declaration or complaint which plaintiff must establish to sustain his claim.[91] It has also been held

such defense nor any special contract having been pleaded—Byram v Payne, 201 P. 401, 58 Utah 536, 18 A.L.R. 1110.

Fraud

In action to recover for injury to a horse shipped, excluding testimony of carrier's agent showing shipper's fraud in representing value of intrastate shipment was not error, where fraud was not alleged as defense.—Chesapeake & O. Ry. Co. v. Osborne, 153 S.E 865, 154 Va 477.

Limitation of liability

Express receipt, stating value of interstate shipment, was held properly excluded in absence of pleadings raising issue of limitation of liability—American Ry. Express Co. v. Thompson, Tex.Civ.App., 2 S.W.2d 493.

Evidence warranted by pleadings

(1) In shipper's action against carrier for damages alleged resulting because carrier took live stock out of two cars and reloaded them in three, damages shown by testimony that after stock had been reloaded in three cars they had too much room and stood so far apart that they did not support each other held pertinent to facts alleged—Fort Worth & Denver City Ry. Co. v. Motley, Tex.Civ.App., 87 S.W.2d 551, error dismissed.

(2) In an action against a carrier for loss of oil by leakage, defendant's answer that its failure to deliver it was due to the shipper's fault in loading and forwarding it in a defective and insecure car and failing to properly close the outlet valve, was held sufficient to let in proof of the rusted condition of such valve at the time of the loss of a subsequent shipment in such car.—American Cotton Oil Co v. Davis, 224 P 23, 129 Wash. 24.

(3) Allegations that cotton was in sound condition when delivered to carrier, and damaged when delivered after unusual delay, were held sufficient to admit proof of damages caused by long delay, and, under Civ.Code art 2754, placing on carrier burden of showing loss was not due to its negligence—H P Richard & Sons v. Director General of Railroads, 107 So. 891, 160 La. 1019.

(4) Under allegations that live stock was not "safely" carried, but was injured by defendant's negligence, evidence as to the quality of hay and water furnished by defendant is within the issues—Heitman v Chicago, M. & St P. Ry. Co., 123 P. 401, 45 Mont. 406.

84. Okl—Atchison, T. & S F. Ry. Co. v. Lynn & Hudson, 154 P. 657, 54 Okl. 701.

85. Tex—Texas, etc., R. Co v. Ellerd, 87 S.W. 362, 38 Tex.Civ.App 596.
10 C.J. p 365 note 73.

86. Iowa—Wiederin v. Chicago & N. W. Ry. Co., 237 N.W 344, 212 Iowa 1103
10 C.J. p 361 note 29.
Corpus Juris is cited as authority for this rule in New England Fruit & Produce Co. v. Hines, 116 A. 242, 247, 97 Conn. 225.

87. Iowa—McCoy v. Wabash Ry Co., 231 N.W. 353, 210 Iowa 1075

88. Tex.—Lancaster v. Daggett, Civ. App., 272 S.W. 340.

89. La—Ker Texada v. Texas & P Ry. Co., 133 So 415, 16 La App 66.
Mo.—Cravens v. Hines, App., 218 S W. 912.

Acts of negligence

Carrier's evidence that in loading cattle it failed to install partition separating small cattle from large heavy cattle was held to enlarge shipper's pleading in action for damages so as to permit proof of improper loading, although not alleged by the shipper—Ker Texada v. Texas & P. Ry. Co, 133 So. 415, 16 La App. 66.

Condition of cattle prior to shipment

In action for damages to a shipment of live stock, evidence as to the condition of the cattle prior to shipment was not incompetent, notwithstanding there was no allegation in the complaint that the cattle were in good condition when received for shipment, defendants having raised the issue in the answer—Cravens v. Hines, Mo App, 218 S W 912

90. Kan—Abell v. Missouri Pac. R Co, 243 P 1031, 1032, 120 Kan 362, rehearing denied 244 P. 1044, 120 Kan 553
"The fact having been thus definitely established that the shipment was made under a written contract, the trial should not have proceeded upon the theory that such was not the case, and, with or without an amendment to the defendant's answer, the writing should have been admitted in evidence. . . . The practice of trying a claim against the carrier upon a theory directly contrary to the established and admitted facts, if permitted, would afford a ready means of evading that equality of treatment which is required in both interstate and local commerce"—Abell v. Missouri Pac. R. Co, supra.

91. Mich—Oceana Canning Co v King, 161 N.W. 895, 195 Mich. 628
10 C.J. p 366 note 87.

that the carrier ordinarily may, under the general issue, prove a contract limiting its common-law liability,[92] although there is apparent authority to the contrary.[93] In those jurisdictions which have adopted the code system of pleading, it is always competent to prove under the general denial any facts which controvert the material allegations of the complaint.[94] Thus, under a general denial of the negligence charged by plaintiff as causing injury to animals, defendant may show that the injury was due to the inherent nature of the animals.[95] So, where the carrier pleads that the act of God was the proximate cause of the loss, a general denial by plaintiff raises the issue of whether something else was the sole proximate cause;[96] but a general denial does not authorize the introduction of evidence not controverting or tending to disprove any fact which plaintiff is bound to establish to sustain his cause of action, as that the goods were transported by an independent carrier from an intervening point to their destination, where they were damaged,[97] that the loss was only partial,[98] or that plaintiff had released the contract of shipment;[99] nor is a defense that the damage to a shipment of meat was caused by being packed by plaintiff in defective refrigerator cars covered by a general denial.[1] In an action on a carrier's common-law liability for the loss of property shipped, evidence that the shipment was made under a written contract limiting defendant's common-law liability is not usually admissible under a general denial,[2] although some authorities have held that a general denial authorizes the admission of such contract.[3]

d. Variance

A substantial variance between the pleadings and proof precludes recovery. The plaintiff cannot declare on one contract and recover on another, nor can the defendant succeed on a defense not pleaded; but an immaterial variance will be disregarded, and this applies to a variance between the notice of claim and the pleading and proof thereof.

As in other civil actions, any substantial variance between the allegations of the pleadings and the evidence is fatal to recovery.[4] Plaintiff cannot set up one cause of action and recover on another;[5] nor

92. Del.—Klair v. Philadelphia, etc., R. Co., 78 A. 1085, 25 Del. 274.
10 C.J. p. 366 note 88.

93. Ill.—Louisville & N. R. Co. v. Cunningham, 88 Ill. App. 289

94. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Kerr, Civ.App., 184 S.W. 1058
10 C.J. p. 368 note 4.

95. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Kerr, supra.

96. Ala.—Louisville & N. R. Co. v. Finlay, 170 So. 207.

97. S.C.—Whittle v. Southern R. Co., 70 S.E. 456, 88 S.C. 172.

98. Tex.—Houston, etc., R. Co. v. Harn, 44 Tex. 628.

99. Tex.—Houston, etc., R. Co. v. Harn, supra.

1. Mo.—Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co., 201 S.W. 623, 198 Mo. App. 520.

2. Tex.—Texas & P. Ry. Co. v. Gist, Civ. App., 53 S.W.2d 304

3. Ind.—Cleveland, C., C. & St. L. R. Co. v. Hollowell, 88 N.E. 680, 172 Ind. 466—Baltimore & O. S.W. Ry. Co. v. Ragsdale, 42 N.E. 1106, 14 Ind. App. 406

4. Mo.—Morrow v. Wabash Ry. Co., 265 S.W. 851, 219 Mo. App. 62.
Mont.—Wahle v. Great Northern R. Co., 109 P. 713, 41 Mont. 326.
Or.—Normile v. Oregon Nav. Co., 69 P. 928, 41 Or. 177.
Tex.—International & G. N. Ry. Co. v. Reed, Civ.App., 189 S.W. 997.
10 C.J. p. 361 note 31.

Ownership of property
There is a fatal variance between a petition alleging injury to cattle jointly owned by the plaintiffs and praying for a joint recovery and proof of a separate cause of action in favor of each plaintiff.—International & G. N. Ry. Co. v. Reed, Tex. Civ.App., 189 S.W. 997

Time of shipment or delivery
In assumpsit against a carrier for loss of goods, evidence of a loss of goods shipped or delivered at any other time than that alleged in the writ constitutes a variance.—Witzler v. Collins, 70 Me. 290, 35 Am.R. 327

Identity of consignee
In buyer's action against carrier for damage to goods sustained during transportation, variance between pleadings alleging that the carrier had accepted the goods for shipment to the buyer and proof that the seller had in fact consigned the shipment to himself for delivery to buyer on payment of draft with bill of lading attached was fatal.—Louisville & N.R. Co. v. Sarris & Collas, 95 So. 903, 209 Ala. 217.

Liability as warehouseman
Plaintiff, having sued defendant on its liability as a common carrier, cannot recover on its liability as a warehouseman.—Normile v. Oregon Nav. Co., 69 P. 928, 41 Or. 177.

Liability as private carrier
Under a complaint charging defendant as a common carrier, no recovery can be had on proof of a liability as a private carrier only.—Honeyman v. Oregon, etc., R. Co., 10 P. 628, 13 Or. 352, 57 Am.R. 20.

No variance
(1) In action for damages to a shipment of horses, there was no variance between allegations of breach of contract to transport horses in properly constructed and maintained standard express car and proof of uniform live stock contract for transportation of other than ordinary live stock.—Green v. American Ry. Express Co., Mo.App., 34 S.W. 2d 1039

(2) Petition against carrier for damage to merchandise, not alleging joint ownership of merchandise by various plaintiffs, was not at variance with proof of plaintiffs' ownership.—Atlanta, B. & C.R. Co. v. Hart, 155 S.E. 375, 42 Ga.App. 194

No failure of proof
In an action ex delicto against a carrier of live stock, there is no failure of proof as against motion to dismiss where there is sufficient evidence to prove breach of duty, and no substantial ground of error where it appears that the carrier was given the benefit of the valid and applicable limitations in the shipping contract.—Werner v. United States Railway Administration, 181 N.W. 80, 47 N.D. 49.

5. Ill.—Nellis v. Grand Trunk Western Ry. Co., 220 Ill. App. 445.
Mo.—Morrow v. Wabash Ry. Co., 265 S.W. 851, 219 Mo.App. 62
10 C.J. p. 362 note 33.

Pleading delay and proving negligence
Where shipper's complaint for

can defendant succeed on a defense not pleaded.[6] Where plaintiff does not allege that defendant was a common carrier, no recovery can be had against it in that character.[7] Either the duty on which defendant's liability is alleged to be founded or the contract out of which its tort arises must be stated, and a material variance between the duty or the contract as stated and the proof in support thereof may be fatal to a recovery;[8] for, whether the action is in form ex contractu or ex delicto, if the cause of action as set forth originates in a contract, the contract must be proved as laid.[9] Where plaintiff declares on a common-law or implied contract and proves a special contract inconsistent with defendant's common-law liability, there is a fatal variance;[10] and, conversely, if a special contract is pleaded there can be no recovery on an implied contract.[11] So, unless there is some statutory authority to the contrary,[12] if a parol contract is pleaded, there can be no recovery on proof of a written contract.[13] Where a declaration is on a promise to do several things, and only one is proved, there is a material variance.[14] If the declaration alleges an unqualified contract to carry, and the contract proved is to carry, defendant not being answerable for certain risks, there is a variance.[15] Where a complaint in an action against a carrier charges a nondelivery of the goods consigned for carriage, no recovery can be had for an injury to the goods in transportation.[16]

An immaterial variance will not preclude recovery,[17] and a variance is not regarded as material if the adverse party is not surprised or misled thereby to his prejudice.[18] Failure to prove a particular al-

damage to shipment is based on unreasonable delay in transportation, recovery could not be had on ground of negligence in failing to heat car properly and take necessary precautions against freezing of shipment.—Rezsek v. Southern Pac Co., 181 N.Y.S 117, 111 Misc. 180

Negligence not specified

(1) Plaintiff could not recover damages caused by rough handling of stock shipment where the only negligence alleged was carrier's delay.—Baker v. Bush, Mo.App., 194 S W 1061.

(2) The court can only submit to jury and plaintiff can only recover on special acts of negligence pleaded and relied on to support cause of action for delay and injury to cattle shipment—Lancaster v. Daggett, Tex Civ.App, 272 S.W. 340.

6. Ark.—Kansas City, P. & G. Ry. Co v. Pace, 63 S W. 62, 69 Ark. 256.
Mont.—Wahle v. Great Northern R Co, 109 P. 713, 41 Mont 326.
Okl.—Missouri, K. & T. Ry. Co. v Williamson, 180 P. 961, 75 Okl. 36.

New contract diverting shipment

Where the consignee, after the goods have reached their original destination, orders them diverted to another point, a new contract of transportation is made, which constitutes a variance from the contract alleged in the declaration.—Nellis v. Grand Trunk Western Ry. Co, 220 Ill.App 445.

7. N.Y.—Bristol v. Rensselaer, etc., R Co, 9 Barb. 158.

8. Mo.—Ingwerson v Chicago & A Ry Co., 103 S.W. 1143, 205 Mo 328.
10 C J. p 364 notes 55, 56

9. Mo.—Ingwerson v. Chicago & A. Ry Co., supra.
10 C J. p 364 note 57.

10. Mo—Morrow v. Wabash Ry. Co, 265 S W. 851, 219 Mo App 62.
10 C J p 362 note 35

11. Ind—Jefferson, M & I. R. Co v. Worland, 50 Ind 339.
10 C.J p 362 note 34

12. Ky.—Baltimore, etc., R Co v. Wood, 114 S W. 734, 130 Ky. 839—Illinois Cent R Co. v. Curry, 106 S W 294, 127 Ky. 643, 32 Ky.L. 513

13. Ind—Evansville & T. H R Co v. McKinney, 73 N E. 148, 34 Ind App 402.
10 C J. p 362 note 37.

14. N.Y—Weed v Saratoga, etc, R. Co., 19 Wend. 534.

15. Pa—Stump v. Hutchinson, 11 Pa 533.
10 C J. p 363 note 44.

16. Ala—Alabama Great Southern R. Co. v Grabfelder, 3 So. 432, 83 Ala. 200—South, etc, R Co. v. Wilson, 78 Ala 587.
Wis—Nudd v. Wells, 11 Wis. 407.

17. Wis—Lawrence v. Milwaukee, etc, R. Co, 54 N.W. 797, 84 Wis 427.
10 C J p 360 note 18.

Time of issuance of bill of lading

Declaration on bill of lading, alleged to have been issued before goods were laden, held not material variance with proof of execution after cars were loaded.—Charles J. Webb & Sons v. Central R Co of New Jersey, C.C.A N Y., 36 F 2d 702, affirming, D.C, Charles J Webb Sons Co v. Central R. Co. of New Jersey, 28 F 2d 392

Description of property

In an action against a carrier for failure to comply with a contract to carry and deliver a draft, a variance between the complaint alleging that it was signed "John Q. Jackson," and proof that it was signed "John Q. Jackson, Agent," was immaterial—Zeigler v. Wells, 28 Cal. 263.

Weight of goods

In assumpsit against a carrier where the declaration alleged that plaintiffs delivered to defendant a large quantity of wool, namely, seven thousand eight hundred and thirty pounds, which defendant promised to transport, and the proof was of a less quantity, there was no variance—Deming v. Grand Trunk R. Co., 48 N H. 455, 2 Am R 267.

Assignment of claim

In an action on an assigned claim for damages to a shipment of live stock through delay in transportation, variance between the complaint, alleging the shipper assigned the claim for valuable consideration to plaintiff, and proof, showing the assignment was merely for collection, and that the shipper retained his beneficial interest, held immaterial, and not amounting to a failure of proof—Rice v Chicago, M. & St P Ry. Co, 197 P. 999, 59 Mont. 570

Identity of consignee and place of destination

In action for injury to mules while in transit, based on defendant's common-law liability as common carrier, fact that bill of lading named another than plaintiff as consignee, and a place other than point of delivery as destination, did not show a fatal variance, and bill of lading, as part of named consignee's deposition, was admissible for purpose of identification.—Atlantic Coast Line R. Co v. J S Carroll Mercantile Co., 104 So 413, 213 Ala 234.

18. Ala.—Southern Ry. Co. v. Northwestern Fruit Exch., 98 So. 382, 210 Ala. 519

Pleading liability as common carrier and proof of liability as warehouseman

In consignee's action for damages

legation which is not essential to the cause of action is not a material variance.[19] So, where negligence is alleged in an action based on the carrier's common-law liability, failure to prove negligence is not a variance, and plaintiff may recover if he proves a case under the common-law rule respecting the carrier's liability.[20] On the other hand, if plaintiff actually proves the allegations of negligence he may recover, even if there are circumstances limiting the responsibility of the carrier below the common-law rule.[21] In an action based on the carrier's failure to redeliver all of the cattle consigned to it for shipment, and for negligence in permitting cattle to escape from stock pens, failure to prove the allegations of negligence does not preclude recovery for failure to redeliver all the cattle shipped.[22] Where a complaint is in the code form for injury to animals, based on the carrier's common-law liability, recovery may be had, on proper proof, for breach of the carrier's contractual obligation at common law, or on the bill of lading,[23] and, under such a complaint, the fact that the evidence showed that the shipment was made under bill of lading containing special limitations on the carrier's liability did not constitute a variance.[24] The fact that the petition in an action for injury to live stock, pleading specific injury to specific animals, included an itemized statement of the nature and amount of damage to each animal would not prevent recovery of the aggregate amount claimed under an allegation of general damage;[25] and, under a petition charging that contracts of shipment were entered into between plaintiff and defendant, plaintiff could recover on proof that contracts were made in the name under which it transacted business in certain territory.[26]

Absolute or alternative contract. When the contract stated is absolute, and the contract proved is in the alternative, the variance will be fatal.[27] On the other hand, a declaration alleging an alternative contract to deliver to plaintiff, or to a person named for plaintiff, is not supported by proof of a contract to deliver to and for such person;[28] nor does such proof support the allegation of a contract to deliver generally for plaintiff, without specifying to whom.[29]

Description of termini. Where the proof as to the termini of the transportation varies materially from the allegations of the declaration in that regard, such variance will be fatal to a recovery;[30] but a merely nominal variance is harmless.[31]

Interest as damages may be allowed, it seems, although not asked in the petition.[32]

Pleading and proof varying from notice of claim. A discrepancy of three days in the date of delivery specified in plaintiff's notice of claim and the date specified in the complaint and established by the evidence is not fatal to recovery.[33]

§ 254. Presumptions and Burden of Proof

a. In general
b. Right to sue
c. Delivery to, and acceptance by, carrier

to shipment after arrival at destination, variance between declaration based on liability as a common carrier and proof of liability as a warehouseman was not fatal, where consignee in opening statement admitted that railroad's liability was that of a warehouseman rather than that of a common carrier, and where railroad's attorney did not claim surprise or object to admission of evidence on the theory that railroad's liability was that of a warehouseman, since in such case court could have permitted amendment to declaration—Thomas Canning Co. v. Pere Marquette Ry. Co., 178 N.W. 851, 211 Mich. 326.

19. U.S.—Charles J. Webb Sons Co. v. Central R. Co. of New Jersey, D.C.N.Y., 28 F.2d 392, affirmed, C.C.A., 36 F.2d 702.
Tex.—Texas Mexican Ry. Co. v. Canales, Civ.App., 299 S.W. 668.

20. Vt.—Saliba v. New York Cent. R. Co., 140 A. 491, 101 Vt. 56.
Wyo.—Chicago, B. & Q. R. Co. v. Tolman, 224 P. 671, 31 Wyo. 175.
10 C.J. p 360 note 24.

21. Vt.—Sargent v. Birchard, 43 Vt. 570

22. Tex.—Texas & N. O. R. Co. v. Willis, Civ.App., 94 S.W.2d 235.

23. Ala.—Atlantic Coast Line R. Co. v. J. S. Carroll Mercantile Co., 104 So. 413, 213 Ala. 234.

24. Ala.—Davis v. Dawkins, 95 So. 188, 209 Ala. 45.
10 C.J. p 366 note 80 [a] (1).

25. Tex.—Fort Worth & Denver City Ry. Co. v. Motley, Civ.App., 87 S.W.2d 551, error dismissed.

26. Mo.—American Fruit Growers v. St. Louis, B. & M. Ry. Co., App., 261 S.W. 949, certiorari denied St. Louis, B. & M. R. Co. v. American Fruit Growers, 45 S.Ct. 94, 266 U.S. 611, 69 L.Ed. 467.

27. N.Y.—Stone v. Knowlton, 3 Wend. 374.

28. Ga.—Atlanta, etc., R. Co. v. Texas Grate Co., 9 S.E. 600, 81 Ga. 602.

29. Ga.—Atlanta, etc., R. Co. v. Texas Grate Co., supra.

30. Ga.—Central R. etc., Co., v. Tucker, 4 S.E. 5, 79 Ga. 128
10 C.J. p 360 note 17.

31. Mo.—Cash v. Wabash R. Co., 81 Mo.App. 109.
10 C.J. p 360 note 18.

32. Tex.—Ft. Worth & D. C. Ry. Co. v. Greathouse, 17 S.W. 834, 82 Tex. 104.
10 C.J. p 365 note 75.

In South Carolina
The statute making the carrier liable for the amount of loss or damage to freight en route, together with interest thereon from the date of filing the claim until its payment, fixes the measure of damages for loss in such case, so that the complaint in an action against the carrier therefor need not demand interest in order to recover it.—Harter v. Charleston, etc., R. Co., 67 S.E. 290, 85 S.C. 192.

33. Minn.—Licht v. American Ry. Exp. Co., 188 N.W. 219, 152 Minn. 154.

d. Condition of goods when delivered to carrier
e. Proper packing, marking, and loading
f. Nondelivery by carrier or delivery in bad condition
g. Injury to goods while in possession of carrier as such
h. Exceptions to common-law liability
i. Contractual limitation or extension of liability
j. Negligence in carriage of inanimate freight
k. Negligence in carriage of live stock
l. Damages
m. Miscellaneous issues

a. In General

The burden is on the plaintiff to prove the essential elements of his cause of action, and on the defendant to prove his defenses. The burden is on the party to prove facts peculiarly within his knowledge.

In an action against a carrier for loss of, or injury to, goods, plaintiff has, of course, the burden of proving the essential elements of his cause of action,[34] such as the fact that defendant is a common carrier.[35] Where the liability of a carrier has come into existence in relation to a shipment, it will be presumed that a loss in whole or in part occurred while the status of common carrier existed,[36] and if the loss did not occur during the status of common carrier, the burden is on the carrier to show the change in the relation to the shipment.[37]

In general, the burden is on plaintiff to show delivery of the goods to the carrier, an undertaking, express or implied, on the carrier's part to transport them, and nondelivery of the goods, or delivery in a damaged condition,[38] and until this is established, the carrier is not required to offer any evidence.[39] The carrier's general denial of a loss in transit casts on plaintiff the burden of establishing a prima facie case[40] Where, however, plaintiff has established a prima facie case, the burden is on the carrier to prove the matters of defense relied on[41]

Matters within knowledge of party. It is a general rule that the burden is on a party to such action to prove facts which are peculiarly or exclusively within his knowledge.[42]

34. Ala.—Louisville & N. R. Co. v. Hendricks, 171 So. 273, 233 Ala. 259.
Conn.—New England Fruit & Produce Co. v. Hines, 116 A. 243, 97 Conn. 225
Ga.—Louisville & N. R Co. v. Stewart, 100 S.E. 22, 24 Ga.App. 67.
Mo.—Inzerillo v. Chicago, B. & Q. R. Co, 35 S.W.2d 44, 225 Mo.App. 1213
N C—Skyland Hosiery Co. v. American Ry. Express Co., 114 S E 823, 184 N.C. 478
10 C.J. p 371 note 49.

35. U.S—Citizens' Bank v. Nantucket Steam Boat Co., C.C Mass, 5 F.Cas No.2,730, 2 Story 16
Cal.—Ringgold v Haven, 1 Cal. 108.
Tex—Missouri Pac. R. Co. v. Douglas, 2 Tex.A Civ.Cas. § 28

36. Okl.—Oklahoma, N. M. & P. Ry. Co. v. H. M. S. Drilling Co, 229 P 420, 100 Okl. 260.

37. Okl—Oklahoma, N. M. & P Ry. Co. v. H M. S. Drilling Co, 229 P. 420, 100 Okl. 260.

38. Ala—Louisville & N. R Co. v. Hendricks, 171 So. 273, 233 Ala. 259.

39. N.C—Skyland Hosiery Co. v. American Ry Express Co., 114 S. E 823, 184 N.C. 478.

40. Tex—Gulf, C. & S. F. Ry. Co. v. Galbraith, Civ.App., 39 S W 2d 91

41. Cal—American Fruit Distributors of California v. Hines, 203 P. 821, 55 Cal.App. 377.
Ga.—Southern Ry. Co. v. Bunch, 109 S E. 523, 27 Ga App. 689.
Ky.—Merchants' Transfer Co. v. Kiser, 200 S.W. 454, 179 Ky. 324, L R A 1918C 658.
La.—Shearing v. Louisiana Ry. & Nav. Co., 120 So. 703, 10 La.App. 478.
Minn—De Vita v. Payne, 184 N.W. 184, 149 Minn 405
Miss—Spann v. Alabama & V. R. Co, 74 So. 141, 113 Miss 239.
Mo—Ford v. Wabash Ry. Co, 300 S W. 769, 318 Mo 723, affirming, App, 266 S W. 1032
Pa.—Atlantic Refining Co. v. Pennsylvania R. Co., 113 A. 570, 270 Pa 415
S.C—Anderson v. Atlantic Coast Line R. Co., 161 S E. 533, 163 S C 350.
Tex—Gulf, C. & S F. Ry. Co. v. Galbraith, Civ.App, 39 S W 2d 91—Davis v. Clement Grain Co., Civ. App, 251 S W. 545—Houston & T C R Co v. Parker, Civ App, 138 S W. 437.
Wash—Western Machinery Exchange v Northern Pac. Ry. Co, 254 P. 248, 142 Wash. 675.

Affirmative defenses

"It is well-settled that, in a case such as this, the plaintiff would have been entitled to a verdict upon its prima facie case, if no evidence had been introduced by the defendant, and, as the evidence introduced by the defendant was in support of an affirmative defense set up by it, and not merely in denial of the showing made by the plaintiff in its prima facie case, we think there is abundant authority to the effect that, as to such affirmative defense, the defendant was confronted with the necessity of establishing it, regardless of whether such necessity be called burden of proof, burden of evidence, or duty to go forward with evidence."—Vander Beek v. Chicago & N. W Ry. Co, Iowa, 278 N W. 201, 206.

Statutory rule

Rule of Civ Code 1910 § 3469, that in all cases of bailment after proof of loss the burden of proof is on the bailee to show proper diligence, is applicable to intra-state shipments "loss" meaning injury or damage to goods as well as their destruction or disappearance—Allen v Southern Ry Co, 126 S E. 722, 33 Ga App 209.

42. Mo—Vernon v. American Ry. Express Co., App, 222 S W. 913.
N C—Skyland Hosiery Co v American Ry. Express Co., 114 S E 823, 184 N C. 478—Bivens Bros v Atlantic Coast Line R Co, 97 S.E. 215, 176 N C 414
Okl—Oklahoma, N M & P. Ry Co. v. H M. S. Drilling Co, 229 P. 420, 100 Okl 260

Cause of injury

Burden was on carrier to show cause of injury to shipment, where facts were peculiarly within knowledge of its agents—Rio Grande & E. P. Ry Co. v T A Austin & Co, Tex Civ App, 12 S W 2d 1070, reversed on other grounds, Com.App., 25 S W. 2d 306.

b. Right to Sue

The burden is on the plaintiff to establish his right to sue.

The burden of proof is on plaintiff to show that the right of action, if any exists, is in him, as for instance that he is the owner of the goods.[43] While the possession of the bill of lading, even by assignment or mere delivery, raises the presumption that the one in possession is the "lawful holder," entitled to sue for loss of goods in transit under the Carmack amendment, such presumption is not conclusive but may be overcome by evidence that he is not the lawful holder of the bill.[44]

c. Delivery to, and Acceptance by, Carrier

The plaintiff has the burden of proving delivery of the goods to, and acceptance thereof by, the carrier in its capacity as a common carrier; but when the plaintiff has made a prima facie case on this issue, the burden is on the carrier to prove nondelivery, or that it did not receive the goods as a common carrier.

The burden is on plaintiff to show a delivery of the goods to, and acceptance thereof by, the carrier for transportation,[45] and where plaintiff establishes a prima facie case of delivery and acceptance,[46] as by the recitals of a receipt or bill of lading issued by the carrier,[47] the burden is on the carrier to prove nondelivery to it; and plaintiff's prima facie case is not overcome by a notation on the bill of lading, "shipper's load and count."[48] So, where an express company accepts a package with the shipper's valuation thereof, and without investigation, and issues a receipt acknowledging that it received property of that value, it has the burden of showing that the package did not contain articles of that value.[49] Proof that goods were delivered to a vehicle owned by the carrier, in charge of a person prima facie in the carrier's employment, places on the carrier the burden of proving that the inference of ownership and agency relied on by plaintiff was wrong.[50] Where usage and custom is relied on to show a constructive delivery of goods to a common carrier for transportation, the burden is on the party relying on such custom and usage to establish it.[51]

Plaintiff has the burden of showing that the goods were accepted by defendant in its capacity as a common carrier,[52] but delivery to the carrier raises a presumption that it received the goods as such, and places the burden on the carrier to show that it received them as warehouseman only.[53] In an action against a carrier for failure to protect freight in cars from injury by flood, plaintiff must show that the goods were in defendant's possession either as a carrier or as a warehouseman; and where the evidence shows that the goods were in plaintiff's possession his case fails.[54]

Amount delivered. Where the shipper undertakes to load and weigh or count the goods when delivered to the carrier, the burden is on him to show the amount delivered to the carrier.[55] On the other hand, the weight of the goods, stated in the bill of lading, being prima facie evidence of the amount

Ability to procure car in place of defective car

In action for damages to shipment of strawberries from defective refrigerator car, carrier could not avoid liability on account of shipper's knowledge of defects in car, without showing that another car could have been procured which would have materially avoided loss—Seneker v Lusk, Mo.App., 190 S.W. 96

43. Mass—Coleman v. New York, etc., R Co, 102 N.E. 92, 215 Mass. 45
10 C J. p 371 notes 54, 55.

44. Ill—Farmers' Grain Co. of Dorans v. Illinois Cent. R. Co, 201 Ill. App. 261.

45. Ala.—Louisville & N. R Co v. Hendricks, 171 So. 273, 233 Ala 259.
Fla.—Wilson & Toomer Fertilizer Co v. Atlantic Coast Line Ry. Co, 136 So 332, 102 Fla. 324.
N C—Skyland Hosiery Co. v. American Ry Express Co, 114 S E 823, 184 N.C 478.
Va.—Reed & Rice Co. v. Wood, 120 S E 874, 138 Va. 187.
10 C.J. p 371 note 56.

Where only a part of the goods are received by the consignee, plaintiff has the burden of showing that all of the goods were delivered to the carrier.—Hines v. Warden, Tex Civ App, 229 S.W. 957.

46. Mo.—First Nat. Bank v. Missouri Pac. Ry. Co, 278 S.W 1075, 220 Mo App. 941.

47. Iowa.—Effron, Kushner & Co. v. American Ry. Express Co, 193 N. W. 539, 195 Iowa 1168.
Ky.—Mussellam v. Cincinnati, etc, R. Co, 104 S W. 337, 31 Ky L 908
Mo.—First Nat. Bank v. Missouri Pac. Ry. Co., 278 S W. 1075, 220 Mo App. 941.
Tex—Gulf, C & S. F. Ry Co v. Galbraith, Civ App, 39 S.W.2d 91.
10 C J. p 371 note 59

Explaining or contradicting receipt

The burden is on the carrier, after plaintiff has made a prima facie showing of delivery by introducing a receipt issued by the carrier, to explain or contradict the receipt.—Effron, Kushner & Co v. American Ry Express Co, 193 N W. 539, 195 Iowa 1168.

48. Mo.—First Nat Bank v. Missouri Pac. Ry. Co., 278 S W. 1075, 220 Mo.App. 941.

49. La—Raphiel v. American Ry Express Co., 120 So. 786, 10 La. App. 463

50. Pa—Dintenfass v. American Railway Express Co, 78 Pa Super. 395.

51. Fla—Gulf Coast Transp Co. v. Howell, 70 So. 567, 70 Fla 544.

52. Ala.—Tallassee Falls Mfg. Co. v. Western R Co., 23 So. 139, 117 Ala 520, 67 Am S R 179
Tex—Missouri Pac. R. Co. v. Douglas, 2 Tex A.Civ.Cas. § 28.

53. N C—Berry v. Southern R. Co, 30 S E 14, 122 N C 1002.
Corpus Juris is quoted as authority for this statement, in Walworth Bros. v. Guerin, 142 A 613, 614, 49 R. I. 329

54. Mo—Kingman St. Louis Impl. Co. v. Southern R. Co., 112 S.W. 721, 133 Mo.App. 317.

55. Iowa.—Almon v. Chicago, etc., R. Co, 144 N.W. 997, 163 Iowa 449.
N C—Produce Trading Co. v. Norfolk Southern R Co., 100 S.E. 316, 178 N C. 175.

received by the carrier, it has the burden of proving that it did not receive such amount.[56]

d. Condition of Goods When Delivered to Carrier

The burden is on the plaintiff to show that the goods were in good condition when delivered to the carrier, but when the facts raise a presumption that the goods were in good condition when delivered to the carrier, the latter has the burden of showing that they were not in good condition. If the goods were open to inspection, the burden of proving their bad condition when the carrier received them is on the carrier.

The ordinary presumption is that goods transported by a carrier arrived at destination in the same condition in which they were shipped.[57] Hence, in an action for injury to the goods, the burden is on plaintiff to prove that the property was in good condition when delivered to the carrier,[58] or to show a receipt acknowledging the good condition of the goods at that time,[59] or, at least, to show that the goods were in a better condition when delivered to the carrier than they were on arrival at destination.[60]

No presumption exists that the goods were in good condition when delivered to the carrier.[61] The presumption arises, however, from the fact of the receipt of the goods by the carrier without objection or exception noted in the bill of lading or shipping receipt, that as far as the condition was apparent on ordinary inspection the goods were in good condition.[62] Similarly, a carrier's acceptance of extra charges for heating and its issuance of a receipt therefor is prima facie evidence that goods were in good condition, and in case of damage from freezing the burden of proof is on defendant to show that it arose from a cause for which it was not responsible.[63]

A notation or statement in a bill of lading that the goods were received by the carrier in apparent good order or condition makes a prima facie case, and the burden is then on the carrier to prove that they were not in good condition when received,[64] and the same rule has been applied where the bill of lading admits that the goods were received in good order, except that the contents or condition of the contents of the packages were unknown.[65] On the other hand, it has been held that a mere recital in the receipt that the contents and condition of the packages were unknown does not raise a presumption that they were in good order when received by the carrier;[66] that no such presumption arises from a receipt reciting that the goods were in good condition, where they were not open to in-

56. Tex.—Baker v. H. Dittlinger Roller Mills Co., Civ.App., 203 S.W. 798.

57. N.J.—Kaufherr & Co. v. Pennsylvania R. Co., 174 A. 27, 12 N.J. Misc. 542.

10 C.J. p. 372 note 72.

Shipment shown to have been properly loaded while in good condition presumably remains in that condition until the contrary is shown.—Barrett v. Northern Pac. Ry. Co., 157 P. 1016, 29 Idaho 139.

58. U.S.—Monnier v. U. S., D.C.N.Y., 16 F.2d 812, affirmed, C.C.A., 16 F.2d 815.

Ala.—Atlantic Coast Line R. Co. v. Enterprise Oil Co., 101 So. 605, 211 Ala. 676.

Ark.—American Ry. Express Co. v. H. Rouw Co., 294 S.W. 401, 173 Ark. 810.

Ill.—Chicago & A. R. Co. v. Benjamin, 63 Ill. 283—House v. Wheelock, 254 Ill.App. 149.

Iowa.—Vander Beek v. Chicago & N. W. Ry. Co., 278 N.W. 201.

Ky.—Chesapeake & O. R. Co. v. Coleman Fruit Co., 294 S.W. 463, 219 Ky. 794.

La.—Fowles v. Louisville & N. R. Co., 132 So. 240, 15 La.App. 421.

Mo.—Peycke Bros. Commission Co. v. Lehigh Valley R. Co., App., 224 S.W. 71—Cudahy Packing Co. v. Atkinson, T. & S. F. R. Co., 187 S.W. 149, 193 Mo.App. 572.

N.Y.—Annunziato v. New York, N. H. & H. R. Co., 253 N.Y.S. 626, 142 Misc. 327.

Or.—Michellod v. Oregon-Washington R. & Nav. Co., 168 P. 620, 86 Or. 329.

S.C.—Gramling Electric Refrigeration v. Southern Ry. Co., 152 S.E. 670, 155 S.C. 394.

Tex.—Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 184 S.W. 1070, reversed on other grounds, Com.App., 221 S.W. 270—Leon v. Hines, Civ.App., 223 S.W. 239.

Va.—Chesapeake & O. Ry. Co. v. W. C. Crenshaw & Co., 137 S.E. 515, 147 Va. 290.

10 C.J. p. 371 note 63.

Corpus Juris is cited in support of this statement in Louisville & N. R. Co. v. Hendricks, 171 So. 273, 374, 233 Ala. 259.

59. Me.—Goldberg v. New York, N. H. & H. R. Co., 153 A. 812, 130 Me. 96.

N.J.—McMahon v. American Ry. Express Co., 141 A. 566, 6 N.J.Misc. 468, affirmed 144 A. 920, 105 N.J. Law 494.

60. U.S.—Ohio Galvanizing & Mfg. Co. v. Southern Pac. Co., C.C.A.Ky., 39 F.2d 840, certiorari denied 51 S.Ct. 83, 282 U.S. 879, 75 L.Ed. 776.

Me.—Goldberg v. New York, N. H. & H. R. Co., 153 A. 812, 130 Me. 96.

61. N.Y.—Smith v. New York Cent. R. Co., 43 Barb. 225, affirmed 41 N.Y. 620.

10 C.J. p. 371 note 64.

62. Iowa.—Swiney v. American Express Co., 115 N.W. 212.

10 C.J. p. 371 note 65.

Corpus Juris is cited as authority in Adams Express Co. v. White, 104 A. 110, 111, 132 Md. 626.

63. Me.—Ross v. Maine Cent. R. Co., 96 A. 223, 114 Me. 287.

64. Ala.—Southern Ry. Co. v. Northwestern Fruit Exch., 98 So. 382, 210 Ala. 519.

Ark.—Payne v. Orton, 234 S.W. 469, 150 Ark. 307.

Ill.—Lino v. Northwestern Pac. R. Co., 246 Ill.App. 451, reversed on another ground 163 N.E. 316, 332 Ill. 93.

N.J.—Jefferson Macaroni Co. v. Pennsylvania R. Co., 154 A. 188, 9 N.J. Misc. 405, affirmed 160 A. 635, 109 N.J. Law 266.

Or.—Carroll v. Royal Mail Steam Packet Co., 279 P. 861, 130 Or. 294.

10 C.J. p. 372 note 67.

65. Pa.—Beresin v. Pennsylvania R. Co., 176 A. 774, 116 Pa.Super. 291.

66. Ill.—House v. Wheelock, 254 Ill. App. 149.

S.C.—Gramling Electric Refrigeration v. Southern Ry. Co., 152 S.E. 670, 155 S.C. 394.

10 C.J. p. 371 note 66.

spection;[67] and that, where the shipper loads the goods and the carrier merely issues a uniform bill of lading without special examination, a formal declaration that the goods were received in apparent good order does not require the carrier to assume the burden of showing its freedom from negligence.[68] If the damage to goods by water was apparent from exterior inspection on their arrival at destination, the carrier's failure to note the condition when receiving the goods, raises the presumption that the condition did not then exist.[69] The burden is on the carrier to show that goods open to inspection were in bad condition when received by it.[70] Where there is proof that the goods were damaged in transit, the burden is on the carrier to show that they were in bad condition at the time of shipment.[71] Proof of delivery of goods to a city expressman in good condition raises a presumption of delivery to the carrier in good condition;[72] but the rule that proof of delivery of the goods to a warehouseman in good condition raises a presumption of delivery to the carrier in good condition, does not apply where the goods have been stored with the warehouseman for a considerable time before their delivery to the carrier.[73] The carrier has the burden of proving that property delivered in a damaged condition was not that for which the bill of lading was issued.[74]

Where the defense is that the goods reached destination in good condition, it is immaterial whether the burden of proving that the goods were in good condition when received by the carrier is placed on plaintiff or on defendant.[75]

e. Proper Packing, Marking, and Loading

The burden is on the plaintiff to show that goods were properly packed and labeled.

Plaintiff has the burden of showing that the goods were properly packed, marked, and loaded, where these duties devolved on him.[76] However, where the carrier seeks to avoid liability because of the shipper's failure to mark the freight, as required by the regulations, it has the burden of proving what portion of the freight was not so marked.[77]

f. Nondelivery by Carrier or Delivery in Bad Condition

Ordinarily, the burden is on the plaintiff to show loss or nondelivery of the goods by the carrier, or a failure to deliver them in proper condition, and that the loss or injury occurred while they were in the carrier's possession. Where the plaintiff makes a prima facie case, the carrier has the burden of accounting for the loss or nondelivery.

The burden ordinarily is on plaintiff to show the loss or nondelivery of the goods by the carrier,[78] or a failure to deliver them in proper condition,[79] and and that the loss or injury occurred while the goods

67. Me.—Goldberg v. New York, N H. & H. R. Co., 153 A. 812, 130 Me. 96.

68. N.Y.—Orunsten v. New York Cent. R Co., 165 N.Y S. 996, 179 App Div. 465.

69. Me.—Goldberg v. New York, N. H. & H. R. Co., 153 A. 812, 130 Me. 96.

70. La.—Kelly v. Illinois Cent R. Co., 8 La App. 413.

71. Tex.—Davis v. Clement Grain Co., Civ.App., 251 S.W. 545.

72. S C.—Willett v. Southern R. Co., 45 S.E 93, 66 S.C. 477, 479.

73. Tex.—Hines v. Warden, Civ. App, 229 S W. 957.

74. La.—Shearing v. Louisiana Ry. & Nav. Co, 120 So. 703, 10 La App. 478.

75. Ala.—St. Louis, etc., R. Co. v. Musgrove, 45 So. 229, 153 Ala. 274

76. La.—Breazeale v. American Ry. Exp. Co., 137 So. 585, 18 La.App 59—Fowles v. Louisville & N. R Co., 132 So. 240, 15 La App 421.
N.Y.—Annunziato v New York, N. H. & H. R Co., 253 N Y.S 626, 142 Misc. 327.
Ohio.—St. Louis-San Francisco Ry Co. v. Glow Electric Co., 172 N E. 425, 35 Ohio App. 291.
Wis.—Best v. Great Northern R. Co, 150 N W. 484, 159 Wis. 429.

Extent of burden

Plaintiff introducing evidence of proper loading by shipper was not required to prove compliance with tariff regulations as to loading and bracing.—St. Louis-San Francisco Ry Co v. Glow Electric Co., 172 N.E. 425, 35 Ohio App. 291.

77. Pa.—Grammes v. Central R. Co. of New Jersey, 112 A. 533, 269 Pa. 466.

78. Mich.—Dwinnell v. Duluth, S. S. & A. Ry. Co, 218 N.W. 649, 242 Mich. 357.
Neb.—Nye-Schneider-Fowler Co. v Chicago & N. W. Ry. Co, 182 N W. 967, 106 Neb. 149
N.Y.—Turkel v. American Ry. Express Co., 188 N Y.S. 207.
10 C.J. p 372 note 75.

Corpus Juris is cited as authority for this statement in:
U S.—Julius Klugman's Sons v. Oceanic Steam Nav. Co, D.C N.Y., 42 F 2d 461, 462.
N.C.—Skyland Hosiery Co. v American Ry Express Co, 114 S E 823, 824, 184 N.C. 478.

Loss in weight of coal

In an action for loss of coal during transportation, plaintiff had the burden of proving that there was an actual loss of coal, notwithstanding loss in weight of coal during transportation, which might have been due to evaporation of moisture.—Davis v. Zimmern, 99 So. 307, 211 Ala 63.

Facts peculiarly within knowledge of plaintiff

Where a shipment of currency and coins was delivered to the carrier in a sealed sack, and the sack with the seal on it was delivered by the carrier to the consignee, who opened it out of the presence of any agent of the carrier, and claimed that the currency had been abstracted therefrom, the burden of proof on the issue as to whether the currency was delivered by the carrier to the consignee was on the consignee, since it was a fact peculiarly within his knowledge.—Skyland Hosiery Co. v. American Ry. Express Co., 114 S E. 823, 184 N.C 478.

79. Ala.—Atlantic Coast Line R. Co. v. Enterprise Oil Co., 101 So 605, 211 Ala. 676.
10 C J p 372 note 75.

Corpus Juris is cited in Skyland Hosiery Co v. American Ry. Express Co, 114 S.E. 823, 184 N C. 478, as authority for the rule there stated.

were in the carrier's possession, it being insufficient to show a state of facts as consistent with the occurrence of the loss after delivery by the carrier as before.[80] It has been held that, when plaintiff has established a prima facie case by showing delivery of the goods to the carrier, the latter has the burden of proving that they were not lost while in its possession.[81] Proof that the injury occurred in transit may be made directly, or by means of the presumption arising from the fact that the goods were delivered by the carrier in a bad condition,[82] and such presumption continues throughout the trial;[83] but no such presumption arises where the shipment was twice broken, and its condition on reshipment was not shown.[84] Where plaintiff makes a prima facie case by showing delivery of the goods to the carrier and a loss thereof or failure to deliver,[85] or shows prima facie an unreasonable delay in making delivery of goods or live stock, resulting in loss or injury,[86] the burden then devolves on the carrier to excuse or account for the loss, nondelivery, or delay. So, where it is shown that goods were received by the carrier in good condition and delivered by it in bad condition, the burden is on the carrier to show that the injury did not occur while it had possession thereof,[87] or that the injury was due to some excepted cause, as stated infra this section subdivision h. The rule that proof of delivery to a railroad company of an interstate consignment in good condition and of its receipt in bad condition is a sufficient prima facie showing to establish the carrier's liability is not affected by the Carmack amendment.[88]

Slight evidence of nondelivery, however, is sufficient to throw the burden on the carrier of accounting for the goods.[89]

It has been held in some cases that, on proof of delivery to the carrier, the burden is on the carrier to establish that it delivered the goods to the consignee,[90] and that, on proof that the carrier received the goods in good condition, the burden then rests on it to show delivery in the same condition to the consignee.[91]

g. Injury to Goods While in Possession of Carrier as Such

The burden is on the plaintiff to prove that the damage occurred while the goods were in possession of the carrier, and before its liability had terminated, although some authorities have held that proof that the goods were received by the carrier in good condition, and subsequently damaged, casts on the carrier the burden of proving that the carriage of the goods had terminated prior to the damage.

In an action for damage to the goods, it is for plaintiff to prove that the damage occurred while the goods were in the possession of the carrier as such, and not after its liability as carrier had termi-

80. Ark.—American Ry. Express Co v H Rouw Co., 294 S.W. 401, 173 Ark 810
N.Y.—Silverman v. Cleveland, C., C. & St. L. Ry. Co., 157 N.Y.S. 876.
S.C.—Nimmer v. Northwestern R. Co., 107 S.E. 479, 116 S.C. 190.
10 C.J. p 372 note 76.

Corpus Juris is cited in support of this rule in Julius Klugman's Sons v. Oceanic Steam Nav. Co., D.C.N.Y., 42 F.2d 461.

81. N.Y.—Pereira v. American Ry. Express Co., 202 N.Y.S. 789, 207 App.Div. 692.
In the city court of Niagara Falls it was held that a shipper, suing for value of goods lost in transit, has burden of showing who had custody of goods at time when portion thereof was stolen.—Wallens v. New York Cent. & H.R.R. Co., 166 N.Y.S. 1083

82. S.C.—Nimmer v. Northwestern R. Co., 107 S.E. 479, 116 S.C. 190.

Presumption based on another presumption

Where consignee of plate glass accepted it as in good order, but when it was uncrated some months later it was found broken, recovery against the carrier cannot be based on the presumption that the glass was broken when delivered, and the further presumption that the terminal carrier caused the breakage, for that would be basing presumption on presumption.—Nimmer v. Northwestern R. Co., 107 S.E. 479, 116 S.C. 190.

83. S.C.—Huggins v. Atlantic Coast Line R. Co., 119 S.E. 908, 126 S.C. 327

84. S.C.—Gramling Electric Refrigeration v. Southern Ry. Co., 152 S.E. 670, 155 S.C. 394

85. Ill.—Shellabarger Elevator Co v. Illinois Cent. R. Co., 212 Ill.App. 1
Ind.—Chicago, R. I. & P. Ry. Co. v Stouffer, 111 N.E. 809, 61 Ind.App. 190
La.—Raphiel v. American Ry. Express Co., 120 So. 786, 10 La.App. 463
Mass.—Northern Industrial Chemical Co. v. Davis, 144 N.E. 64, 249 Mass. 246.
N.C.—Acme Mfg. Co. v. Tucker & Nobles, 111 S.E. 525, 183 N.C. 303
Tenn.—Nashville, C. & St. L. Ry. Co. v. Sparkman, Petty & Jameson, 8 Tenn.App. 683.
10 C.J. p 372 note 78

Corpus Juris is quoted in Armour Grain Co. v. Davis, 233 Ill.App. 1, 5

86. Ky.—Chesapeake & O.R. Co. v Coleman Fruit Co., 294 S.W. 463, 219 Ky. 794.
Mo.—Johnson v. Missouri Pac. R. Co., 249 S.W. 658, 211 Mo.App. 564
—Vernon v. American Ry. Express Co., App., 222 S.W. 913
N.C.—Bivens Bros. v. Atlantic Coast Line R. Co., 97 S.E. 215, 176 N.C. 414
Pa.—Free Bros. Co. v. Baltimore & O. R. Co., 146 A. 98, 296 Pa. 441.
Tex.—Galveston, H. & S.A. Ry. Co. v. Buck, Civ.App., 230 S.W. 891—Ft. Worth & R.G. Ry. Co. v. Hasse, Civ.App., 226 S.W. 448

87. Miss.—Spann v. Alabama & V. R. Co., 74 So. 141, 113 Miss. 239

88. Mo.—Collins v. Denver, etc., R. Co., 167 S.W. 1178, 181 Mo.App. 213

89. Ill.—Shellabarger Elevator Co v. Illinois Cent. R. Co., 212 Ill.App. 1.
10 C.J. p 372 note 77.

Corpus Juris is quoted in Armour Grain Co. v. Davis, 233 Ill.App. 1, 5, and cited in Grover v. Hines, 213 P. 250, 253, 66 Mont. 230

90. Mo.—Wheeler v. St. Louis, etc., R. Co., 3 Mo.App. 358
N.C.—Dunie v. Atlantic Coast Line R. Co., 77 S.E. 756, 161 N.C. 520.

91. Md.—Orem Fruit, etc., Co. v. Northern Central R. Co., 66 A. 436, 106 Md. 1, 124 Am.St.R. 462
N.C.—Meredith v. Seaboard Air Line R. Co., 50 S.E. 1, 137 N.C. 478.

nated.[92] However, it has been held that on proof that the goods were received by the carrier in good condition, and subsequently damaged, the carrier has the burden of proving that the transit of the goods had terminated prior to the damage.[93]

h. Exceptions to Common-Law Liability

The burden is on the carrier to show that the loss or injury to goods in its possession was due to a cause within the exceptions to its common-law liability.

Where loss of, or injury to, goods while in the carrier's possession is shown, as by proof that the goods were received by the carrier in good condition and delivered by it in bad condition, a prima facie case is made out against it, and the burden is then on the carrier to show that such loss or injury was proximately due to a cause within the exceptions to its common-law liability as insurer,[94] or was due to a cause against which it had relieved

92. Ala.—Louisville & N. R. Co. v. John W. O'Neill Co., 85 So. 482, 204 Ala. 154.
Mo.—Niedt v. American Ry. Express Co., App., 6 S.W.2d 973.
10 C.J. p. 372 note 80.

93. Ark.—St. Louis, I. M. & S. Ry. Co. v. Cunningham Commission Co., 188 S.W. 1177, 125 Ark. 577.
10 C.J. p. 373 note 81.

94. U.S.—Galveston, H. & S. A. R. Co. v. Wallace, Tex., 32 S.Ct. 205, 223 U.S. 491, 56 L.Ed. 516—Lehigh Valley R. Co. v. State of Russia, C.C.A.N.Y., 21 F.2d 396, certiorari denied 48 S.Ct. 159, 275 U.S. 571, 72 L.Ed. 432—Chicago & E. I. R. Co. v. Collins Produce Co., Ill., 235 F. 857, 149 C.C.A. 169, affirmed 39 S.Ct. 139, 249 U.S. 186, 63 L.Ed. 552.
Ark.—Payne v. Orton, 234 S.W. 469, 150 Ark. 307.
Ky.—Merchants' Transfer Co. v. Kiser, 200 S.W. 454, 179 Ky. 324, L.R.A.1918C, 658.
La.—Alexander v. Texas & P. Ry. Co., 120 So. 419, 14 La.App. 245.
Minn.—De Vita v. Payne, 184 N.W. 184, 149 Minn. 405.
Miss.—Baltimore & O. R. Co. v. Johl & Bergman, 177 So. 778—Spann v. Alabama & V. R. Co., 74 So. 141, 113 Miss. 239.
Mo.—Hurley v. Illinois Cent. R. Co., 282 S.W. 97, 221 Mo.App. 478—Cudahy Packing Co. v. Atchison, T. & S. F. R. Co., 187 S.W. 149, 193 Mo.App. 572.
N.C.—Morris v. American Ry. Express Co., 110 S.E. 855, 183 N.C. 144—Perry v. Seaboard Air Line R. Co., 88 S.E. 156, 171 N.C. 158, L.R.A.1916E 478.
Pa.—Dreibelbis & Co. v. Philadelphia & Reading R. Co., 28 Pa.Dist. 488.
Tex.—Gulf, C. & S. F. Ry. Co. v. Galbraith, Civ.App., 39 S.W.2d 91—Kansas City, M. & O. Ry. Co. v. Cauble, Civ.App., 286 S.W. 478.
Vt.—Haglin-Stahr Co. v. Montpelier & W. R. Co., 102 A. 940, 92 Vt. 258.
10 C.J. p. 373 note 95.

Corpus Juris has been quoted or cited as authority for this rule.
La.—Anderson, Clayton & Co. v. Yazoo & M. V. R. Co., 141 So. 453, 455, 174 La. 762.
Neb.—N. H. Nelson & Co. v. Chicago & N. W. Ry. Co., 167 N.W. 574, 575, 102 Neb. 439.
Okl.—St. Louis-San Francisco Ry. Co. v. Bengal Lumber Co., 292 P. 52, 54, 145 Okl. 124.
Tenn.—Tennessee Ry. Co. v. Riddle Coal Co., 1 Tenn.App. 129, 133.

Act of God in general

Where a prima facie case is made out by plaintiff, the burden is on the carrier to prove that the loss or injury was due to the act of God if it relies on such defense.
Mo.—Ford v. Wabash Ry. Co., 300 S.W. 769, 318 Mo. 723, affirming, App., 266 S.W. 1032—Sullivan v. American Ry. Express Co., 245 S.W. 375, 211 Mo.App. 123—Singer v. American Express Co., 219 S.W. 662, 203 Mo.App. 158, certiorari denied 41 S.Ct. 8, 254 U.S. 632, 65 L.Ed. 448.
Neb.—N. H. Nelson & Co. v. Chicago & N. W. Ry. Co., 167 N.W. 574, 102 Neb. 439.
Tex.—Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 209 S.W. 775.

Flood

(1) Carrier had burden of proving that damage to seed in transit from flood was caused by act of God.—Feld v. Columbus & G. Ry. Co., 121 So. 272, 153 Miss. 601.

(2) Carrier has the burden of proof on its defense that damage to freight was caused by an unprecedented flood.—St. Louis Southwestern Ry. Co. of Texas v. Hughston Grain Co., Tex.Civ.App., 186 S.W. 429.

Inherent nature or defects

(1) When goods are received by the carrier in good condition and delivered by it in bad condition, it has the burden of proving the defense that the injury was due to the inherent nature of, or defects in, the goods.
La.—Anderson, Clayton & Co. v. Yazoo & M. V. R. Co., 141 So. 453, 174 La. 762.
Mo.—Singer v. American Express Co., 219 S.W. 662, 203 Mo.App. 158, certiorari denied 41 S.Ct. 8, 254 U.S. 632, 65 L.Ed. 448.
Tex.—Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 209 S.W. 775.
Va.—Chesapeake & O. Ry. Co. v. W. C. Crenshaw & Co., 137 S.E. 515, 147 Va. 290.

(2) Carrier sued for damage to perishable goods has burden to show that goods possessed inherent defects.—Southern Ry. Co. v. Bateman Fruit Exchange, 162 S.E. 112, 173 Ga. 826, answers conformed to 163 S.E. 219, 44 Ga.App. 802.

(3) Carrier must show that loss of animal was due to its inherent vice or nature.—Sullivan v. American Ry. Express Co., 245 S.W. 375, 211 Mo.App. 123—Burgher v. Wabash Ry. Co., Mo.App., 217 S.W. 854—Boyd v. St. Louis Express Co., Mo.App., 211 S.W. 702.

(4) To relieve a carrier, not owning, furnishing, or supervising the loading of a car of oil, nor examining it for latent defects, from its common-law liability for safe delivery of the contents, the burden is on it to prove such defect and the reason therefor.—American Cotton Oil Co. v. Davis, 224 P. 23, 129 Wash. 24.

Natural evaporation

Carrier sued for shortage in shipment of coal has burden of proving defense that shortage was caused by natural evaporation.—Smith v. Louisville & N. R. Co., 209 N.W. 465, 202 Iowa 292.

Acts or negligence of shipper in general

(1) The burden is on the carrier to show that the injury was due to the fault of the shipper.
Minn.—Levine v. Duluth & I. R. Co., 214 N.W. 17, 171 Minn. 205.
Mo.—Missouri Cobalt Co. v. Missouri Pac. R. Co., App., 255 S.W. 970—Sullivan v. American Ry. Express Co., 245 S.W. 375, 211 Mo.App. 123.
Ohio.—St. Louis-San Francisco Ry. Co. v. Glow Electric Co., 172 N.E. 425, 35 Ohio App. 291.
Tex.—International & G. N. Ry. Co. v. Ash, Civ.App., 204 S.W. 668, dismissed for want of jurisdiction—Houston, etc., R. Co. v. Parker, Civ.App., 138 S.W. 437.

(2) Carrier, sued for damage to iced car of eggs, resulting from delay in transportation, had burden of showing that shipper was negligent in not billing car more promptly.—Chicago, R. I. & G. Ry. Co. v. Abdou, Tex.Civ.App., 1 S.W.2d 493, error dismissed.

Improper packing, loading, or preparation for shipment

(1) The burden rests on a carrier to establish its defense that the loss

itself from liability in the shipping contract, as shown infra subdivision i, of this section, the presumption being that the loss or injury resulted from some cause other than one which would exempt the carrier from liability,[95] and this rule is not affected by the Carmack amendment relating to the liability of interstate carriers.[96] So, where loss of the goods is conceded, the burden is on the carrier to show that such loss was due to some cause for which, as carrier, it was not legally liable.[97] The question as to the burden of proving negligence on the part of the carrier, where plaintiff's prima facie case has been met by proof that the loss or injury came within a contractually excepted cause is discussed infra subdivision 1 of this section.

i. Contractual Limitation or Extension of Liability

(1) Limitations in general
(2) Value of property; rates based on value
(3) Notice of claim and time for bringing suit

(1) Limitations in General

(a) General rules
(b) Reasonableness of stipulations
(c) Consideration
(d) Shipper's knowledge of, and assent to, limitations

(a) General Rules

The burden is on a carrier setting up a contract limiting its liability to prove the existence of a valid contract and to show that the loss or injury was due to a cause excepted therein; but, where this proof is made, the shipper, to avoid its effect, must show that the contract is invalid. The burden is on the carrier to prove a custom relieving it from liability.

No presumptions will be indulged in in favor of exemptions from common-law liability.[98] On the other hand, in the absence of proof to the contrary, it is a general rule that the liability of a carrier will be presumed to be its common-law liability, and any party attempting to show a greater or a less liability must assume the burden of proving the contract by which the common-law liability was affected,[99] nor is this rule affected by the fact that it is shown that the carrier was accustomed always to give to shippers a receipt limiting its common-law liability;[1] but it has been held that, where a live stock shipment is controlled by federal statutes and the regulations fixed by the interstate commerce com-

to goods was due to improper loading or packing.
Ala.—Atlantic Coast Line Ry. v. Enterprise Cotton Oil Co., 74 So. 232, 199 Ala. 57.
Ky.—Louisville & N. R. Co. v. Hensley, 35 S.W.2d 279, 237 Ky. 224.
Tenn.—Tennessee Ry. Co. v. Riddle Coal Co., 1 Tenn. App. 129.
Wash.—Wilson & Co. v. Hines, 213 P. 5, 123 Wash. 643.

(2) Railroad had burden of proof of affirmative defense that damage to crane was due to manner of preparation for shipment.—Western Machinery Exchange v. Northern Pac. Ry. Co., 254 P. 248, 142 Wash. 675.

(3) Burden is on carrier of live stock to show that injury thereto was due to the fault of the shipper or his agent in overloading the car in which the stock was transported.—Davis v. Sullivan & Opry, Tex.Com App., 258 S.W. 157, affirming, Civ App., 242 S.W. 764—Fort Worth & Denver City Ry. Co. v. Motley, Tex Civ App., 87 S.W.2d 551, error dismissed—Massey v. Texas & P. Ry. Co., Tex.Civ App., 200 S.W. 409.

Selection of vehicle

If the carrier relies on an act of the shipper in selecting vehicles for the transportation of the goods as excusing the carrier's liability with reference thereto, the burden of showing knowledge on the part of the shipper as to the defects in the vehicle, or that they were plainly apparent or visible, is on the carrier.—Harris v. Northern Indiana R. Co., 20 N.Y. 232.

Under the civil code of Louisiana, applicable to intra-state shipments, the carrier must prove that the loss or damage was caused by an accidental and uncontrollable event, construed by the courts as meaning a fortuitous or irresistible force.—Dejean v. Louisiana Western R. Co., 118 So. 822, 167 La. 111—National Rice Milling Co. v. New Orleans & N. E. R. Co., 61 So. 708, 132 La. 615—Noel Bros. v. Texas & P. Ry. Co., 133 So. 830, 16 La. App. 622—Shearing v. Louisiana Ry. & Nav. Co., 120 So. 703, 10 La. App. 478—Japhet & Co. v. Southern Rv. Co., 8 La. App. 706—Griggs v. Tremont & Gulf Ry. Co., 8 La. App. 601.

95. Neb.—Eckman Chemical Co. v. Chicago & N. W. Ry. Co., 185 N.W. 444, 107 Neb. 268—Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry. Co., 182 N.W. 967, 106 Neb. 149.

Extent of presumption

Where goods are shipped in good condition and arrive at destination in a damaged condition, a party relying on the presumption that the damage resulted from some cause other than one that would exempt the carrier from liability has a right to rest secure until prima facie evidence has been adduced by the opposite party, but the presumption should never be placed in the scales to be weighed as evidence.—Eckman Chemical Co. v. Chicago & N. W. Ry. Co., 185 N.W. 444, 107 Neb. 268.

96. Vt.—Haglin-Stahr Co. v. Montpelier & W. R. R. Co., 102 A. 940, 92 Vt. 258.

The Carmack amendment which invalidates the provisions of any state law nullifying contracts limiting a carrier's liability for loss or damage to the agreed value, and which makes no provision as to evidence, does not invalidate a state law expressly placing the burden of proof on the carrier to show that loss or injury occurred by reason of an excepted cause.—National Rice Mill Co. v. New Orleans, etc., R. Co., 61 So. 708, 132 La. 615, Ann.Cas 1914D 1099.

97. Ala.—Davis v. Zimmern, 99 So. 307, 211 Ala. 63.

98. N.J.—Russell v. Erie R. Co., 59 A. 150, 70 N.J.Law 808, 67 L.R.A. 433, 1 Ann.Cas. 672.

99. N.J.—Russel v. Erie R. Co., supra.
10 C.J. p. 110 note 1, p. 375 note 2.

Corpus Juris has been cited and quoted.
N.C.—M. V. Moore & Co. v. Southern Ry. Co., 111 S.E. 166, 167, 183 N.C. 213.
Tenn.—Tennessee Railway Co. v. Riddle Coal Co., 1 Tenn.App. 129, 133.

1. N.Y.—London, etc., F. Ins. Co. v. Rome, etc., R. Co., 23 N.Y.S. 231, 68 Hun 598, affirmed 39 N.E. 79, 144 N.Y. 200, 43 Am.S.R. 752.

mission, and the extent of the carrier's liability depends on the rate paid, there is no presumption that the carrier assumed the common-law liability, and the burden is on plaintiff to prove that he accepted the schedule rate therefor.[2] In accordance with the general rule stated above, where the loss of, or injury to, property in the carrier's possession is shown, and the carrier relies as a defense on a contract relieving it from liability for certain excepted causes, the burden is on it to prove the existence of the contract,[3] and to show that the loss or injury complained of was due to a cause within the exceptions.[4] The burden also rests on the carrier to show such facts as will establish the validity of the contract,[5] as that the limitations in the contract are reasonable and supported by a sufficient consideration, as stated infra subdivisions (b), (c) of this section. On the other hand, when the carrier has shown that the loss or injury was within the contract exceptions, if the shipper seeks to avoid its effect, the burden is on him to show facts which invalidate the contract,[6] as that the contract was unfair and was imposed on him in such a way that he could not read or understand it.[7]

Stipulations in a contract limiting the carrier's liability, being generally matters of defense, it is not necessary that plaintiff produce the contract in making out his case;[8] but, where it appears from plaintiff's evidence that a written contract of shipment was entered into, and the carrier asserts a written contract containing limitations on its liability, it is incumbent on plaintiff to introduce the entire contract in evidence, and, if defendant introduces evidence as to the application of any provision therein precluding recovery, plaintiff must show why the provision relied on by the carrier did not control.[9]

It has been held that, where cotton was placed on a compress platform, and bills of lading were issued therefor, the inference is that the cotton was placed there for immediate transportation, and hence was on defendant's through route, so as not to fall within a clause of the bill of lading absolving a carrier from liability for loss or injury not occurring on its own road, or its portion of the through route.[10]

Special custom. If the carrier relies on a special custom to relieve it from liability, the burden is on it to establish such custom.[11]

(b) Reasonableness of Stipulations

The burden is on the carrier to show that the stipulations limiting its liability are reasonable, except where they have been approved by the interstate commerce commission.

2. Iowa—Tuller v. Chicago, R. I. & P Ry. Co., 168 N.W. 301, 186 Iowa 1070.

3. N J—Reich v. McGill, 196 A. 651, 119 N J Law 358.
Tex—Panhandle & S. F. Ry. Co. v. Lockhart, Civ.App., 277 S.W. 230.
Va.—Chesapeake & O. Ry. Co of Indiana v. National Bank of Commerce of Norfolk, 95 S E. 454, 122 Va. 471, certiorari denied 38 S Ct. 582, 247 U.S. 519, 62 L Ed. 1246.
10 C J p 374 note 1.

4. U S—Callister v. U. S. Shipping Board Merchant Fleet Corporation, D C.N.Y., 21 F.2d 447, affirmed, C. C A., Callister v. U. S Shipping Emergency Fleet Corporation, 30 F 2d 1008.
Ala—Davis v. Zimmern, 99 So. 307, 211 Ala 63.
La—Alexander v. Texas & P. Ry. Co., 129 So 419, 14 La.App. 245—John Bonura & Co v. Texas & N. O. R Co., 126 So 593, 14 La App. 351, rehearing denied 128 So. 68, 14 La App. 351, certiorari denied Texas & N O. R. Co. v. John Bonura & Co, 51 S.Ct. 80, 282 U S. 875, 75 L Ed. 773—Joseph Chalona Co v. American Ry. Express Co., 123 So. 147, 11 La App. 18.
Tex—Gulf, C & S F Ry. Co. v. Galbraith, Civ.App., 39 S.W 2d 91.
10 C J. p 375 note 10.
Corpus Juris is cited in support of this rule in Chesapeake & O. Ry. Co of Indiana v. National Bank of Commerce of Norfolk, 95 S E. 454, 462, 122 Va. 471, certiorari denied 38 S Ct. 582, 247 U.S. 519, 62 L.Ed 1246.
Loss while property is in consignee's hands
Where express company exacted release for damage to goods accepted for delivery, subject to inspection, while in hands of consignee, it had the burden of proving that the damage occurred while the goods were in the consignee's hands—Lichtenstein v. Wells Fargo & Co. Express, 174 N.Y.S. 191, 106 Misc. 143.
Strikes
Although a bill of lading provided that the carrier should not be liable for loss caused by strikes, to make out a prima facie case the shipper is only required to show delivery to the carrier and failure to deliver at destination, and the burden of showing the facts necessary to exempt it from liability is on the carrier.—American Fruit Distributors of California v. Hines, 203 P. 821, 55 Cal.App 377.
Act or fault of shipper
Where the carrier asserted as a defense that the loss occurred by reason of the act or fault of the shipper, within a provision of the bill of lading exempting the carrier from liability for such loss, the burden is on the carrier to show that the loss was within the exception.—Atlantic Refining Co v. Pennsylvania R Co., 113 A. 570, 270 Pa 415.

5. S.C—Anderson v. Atlantic Coast Line R. Co, 161 S.E. 523, 163 S C. 350.
Tex.—Gulf, C. & S F. Ry. Co v. Galbraith, Civ App., 39 S.W.2d 91.
10 C.J p 375 note 4.
Under the Indiana statute the carrier has burden of showing that contract limiting liability was fairly entered into, after shipper had opportunity to ship at reasonable rate, without limitation as to liability.—Cleveland, C, C & St. L Ry Co. v. Blind, 117 N E 641, 186 Ind 628, transferred 116 N E. 590, 64 Ind App. 704.

6. Ky.—Adams Express Co v. Loeb, 6 Ky.Op. 7.

7. Ky.—Adams Express Co. v. Guthrie, 8 Ky.Op. 454

8. Ill—Crossley v. St Louis, I M. & S Ry. Co, 199 Ill App 195.

9. Ill—Finkelstein v. Illinois Cent. R. Co, 198 Ill App 75.

10. Tex.—Texarkana & Ft. S Ry. Co. v. Brass, Com App, 260 S W. 828, affirming, Civ App, 245 S W. 457, rehearing overruled, Com App, 262 S.W. 737.

11. Minn—Irish v. Milwaukee, etc., R. Co., 19 Minn. 376, 18 Am.R. 340.

The burden ordinarily is on the carrier to show that stipulations limiting its liability are reasonable,[12] although it has been held that limitations approved by the interstate commerce commission are conclusively presumed to be reasonable.[13]

(c) Consideration

According to some authorities a shipper seeking to avoid an agreement limiting the carrier's liability has the burden of proving want of consideration, while other authorities hold that this burden of showing a sufficient consideration is on the carrier in the absence of any evidence that a consideration was in fact given. It will be presumed that a private carrier's charges included compensation for an agreement extending its liability.

Some authorities have held that, where a contract limiting the carrier's liability is shown, the presumption is that there was a sufficient consideration consisting in a reduced rate or otherwise, and the burden is on the shipper, if he seeks to avoid the limitation on the ground of want of consideration, to establish that fact;[14] but, if abatement of rates is expressly forbidden by statute, there can be no presumption of a reduced rate.[15] Other authorities have held that, unless it appears from a recital in the contract, or otherwise, that a reduced freight rate or other consideration for the contract was given, the burden is on the carrier to prove that the contract for limitation of liability was supported by a sufficient consideration;[16] but, where this view prevails, the recital of a reduced freight rate is sufficient prima facie evidence of that fact, and casts on the shipper the burden of proving want of consideration.[17] The fact that a limitation of value of live stock appears in writing on the bill of lading does not raise a presumption of consideration for the limitation as against a showing on the face of the record that there was no consideration.[18]

Extension of liability of private carrier. In the absence of evidence to the contrary, it may be presumed that a private carrier's charges included compensation for a special contract imposing on him liability as insurer, a greater liability than the ordinary care imposed on him by law.[19]

(d) Shipper's Knowledge of, and Assent to, Limitations

In some cases the burden is held to be on the carrier to show assent by the shipper to a contract limiting the carrier's liability, while in others, the shipper has the burden of showing want of assent.

In jurisdictions where assent of a shipper to the terms of a contract limiting liability contained in a bill of lading is necessary, the burden is on the carrier, seeking to avail itself of such limitation, to prove that the shipper assented thereto,[20] in the absence of a statute otherwise providing,[21] although the rule has been held inapplicable to interstate shipments.[22] It has been held also that, even though the shipper signs the bill of lading containing limitations of the liability of the carrier, the burden is still on the carrier to show by evidence aliunde that the restrictions or limitations of the common-law liability contained therein were assented to by the shipper.[23] On the other hand, it has

12. N.C.—Phillips v. Seaboard Air Line Ry., 89 S.E. 1057, 172 N.C. 86.
Tex.—Mexico Northwestern Ry. Co. v. Williams, Civ.App., 208 S.W. 712, affirmed, Com.App., 229 S.W. 476, certiorari denied 42 S.Ct. 54, 257 U.S. 644, 66 L.Ed. 413.
Vt.—Piper v. Boston & M. R. R., 97 A. 508, 90 Vt. 176, affirmed Boston & M. R. R. v. Piper, 38 S.Ct. 354, 246 U.S. 439, 62 L.Ed. 820.
10 C.J. p. 375 note 5.

13. Vt.—N. Pelaggi & Co. v. Central Vermont Ry. Co., 121 A. 441, 97 Vt. 1—Piper v. Boston & M. R. R., 97 A. 508, 90 Vt. 176, affirmed Boston & M. R. R. v. Piper, 38 S.Ct. 354, 246 U.S. 439, 62 L.Ed. 820.

14. U.S.—Cau v. Texas & P. R. Co., La., 24 S.Ct. 663, 194 U.S. 427, 48 L.Ed. 1053.
Ill.—Brown v. Louisville, etc., R. Co., 36 Ill.App. 140.
Okl.—Thomas L. Leedom Co. v. Rosser-Casebeer Furniture Co., 232 P. 405, 105 Okl. 278.
S.D.—Stratton v. Chicago, M. & St. P. Ry. Co., 168 N.W. 757, 41 S.D. 105.
Wis.—Schaller v. Chicago & N. W. Ry. Co., 71 N.W. 1042, 97 Wis. 31.
10 C.J. p. 153 note 77.

15. Minn.—Wehmann v. Minneapolis, etc., R. Co., 59 N.W. 546, 58 Minn. 22.

16. Ga.—Georgia Southern & F. Ry. Co. v. Greer, 58 S.E. 728, 2 Ga.App. 516.
Idaho.—McIntosh v. Oregon R. & Nav. Co., 105 P. 66, 17 Idaho 100.
Mo.—Ficklin v. Wabash R. Co., 93 S.W. 847, 117 Mo.App. 221.
10 C.J. p. 153 note 78, p. 375 note 6.

17. Mo.—Freeman v. St. Louis, etc., R. Co., 122 S.W. 1, 138 Mo.App. 322—Shelton v. St. Louis, etc., R. Co., 110 S.W. 627, 131 Mo.App. 560.
10 C.J. p. 153 note 79.

18. Cal.—Murray v. Southern Pac. Co., 296 P. 667, 112 Cal.App. 150.

19. Cal.—Klein v. Baker, 296 P. 631, 112 Cal.App. 157.

20. Ill.—Shapleigh Hardware Co. v. Southern Ry. Co., 222 Ill.App. 360—Banks v. Hines, 217 Ill.App. 596—Moyers v. Illinois Cent. R. Co., 197 Ill.App. 179.
S.C.—Anderson v. Atlantic Coast Line R. Co., 161 S.E. 523, 163 S.C. 350—Faulk v. Columbia, etc., R. Co., 64 S.E. 383, 82 S.C. 369.
10 C.J. p. 145 note 11, p. 375 note 9.

21. Ill.—House v. Wheelock, 254 Ill.App. 149.
Former rule changed by statute
The rule that the carrier is bound to prove the shipper's knowledge of, and assent to, stipulations limiting the carrier's liability was changed by Uniform Bills of Lading Act, Cahill Rev.St.1927 c. 27 par. 11, providing that, where it is established that the shipper has received a bill of lading containing such stipulations, and makes no objection thereto, and particularly when he has signed the same, he is conclusively presumed to have known of and assented to, the limitation.—House v. Wheelock, 254 Ill.App. 149.

22. Ill.—Shellabarger Elevator Co. v. Illinois Cent. R. Co., 212 Ill.App. 1.

23. Ill.—Illinois Match Co. v. Chicago, etc., R. Co., 95 N.E. 492, 250 Ill. 396, 401—Wabash R. Co. v. Thomas, 78 N.E. 777, 222 Ill. 337, 7 L.R.A.,N.S., 1041.

been held that the acceptance by the shipper, without objection, of a bill of lading or shipping receipt containing a limitation of the carrier's liability raises a presumption that he knew of, and consented to, the limitation,[24] especially where he or his agent prepared the receipt.[25] Such presumption, however, is not conclusive, but is subject to rebuttal.[26]

Presumptions and burden of proof as to shipper's knowledge of, and consent to, limitations in respect of value of property shipped see infra subdivision (2) immediately following.

(2) Value of Property; Rates Based on Value

The carrier ordinarily must prove facts entitling it to a limitation as to value of the property. The circumstances may raise a presumption of authority on the carrier's part to maintain rates based on an agreed valuation, that the rates were based on such valuation, and that the shipper had knowledge thereof; and that alternative rates were offered the shipper.

A carrier setting up a contractual limitation of liability to the value of the property received for shipment ordinarily has the burden of proving facts necessary to entitle it to such limitation.[27] Proof that a carrier had filed with the interstate commerce commission a tariff specifically referring to an order of the commission in proceedings to which the carrier was not a party, which permitted a limitation of liability to a stated value, and containing the form of receipt therein authorized, and that thereafter the carrier made its charges in conformity with such tariff, raises a presumption that the carrier was authorized by the commission to establish and maintain rates dependent on declared or agreed values.[28] A clause in the bill of lading stating that the agreed valuation of the property was on the basis of adjusted freight rates, which valuation is the limit of the carrier's liability, is prima facie evidence that the rate charged was based on the agreed valuation, from which it may be inferred that a choice of rates was given.[29] So, where a bill of lading signed by both parties recites that lawful alternate rates based on specified values were offered, such recitals constitute admissions by the shipper and sufficient prima facie evidence of choice; for, if in such a case the shipper wishes to contradict his own admissions, the burden of proof is on him.[30]

Knowledge of shipper. Where the carrier defends on the ground that the goods were shipped under the lower of two rates, thereby relieving the carrier from liability for a particular cause of loss or injury, the shipper is presumed to have had knowledge of the existence of the two rates.[31] So the shipper will be presumed to have had actual knowledge that the rates were based on the value of the property, where the rates covering the shipment had been duly established and maintained by the interstate commerce commission,[32] but, while this is the general rule, it has no application where the property is shipped free, pursuant to an act of congress.[33]

(3) Notice of Claim and Time for Bringing Suit

In some jurisdictions the burden is on the shipper to prove compliance with a stipulation for notice of his claim, or a waiver thereof, or excuse for failure to comply. In other jurisdictions the burden is on the carrier to show the existence of a contract for notice of claim, the reasonableness of the requirement, and noncompliance therewith. The carrier also has the burden of showing the existence of a limitation as to the time of commencing suit against it.

In those cases in which it is held that plaintiff

24. Mich.—Mosier v American Ry Express Co., 178 N.W. 81, 211 Mich. 19
N.Y.—Brewster v. Davis, 202 N.Y.S. 574, 207 App.Div. 461.
Vt.—Oakdale Farms v. Rutland R. Co., 158 A. 678, 104 Vt. 279.
10 C.J. p. 140 note 70, p. 143 note 98, p. 144 note 2

25. N.J.—Perrin v. U. S. Express Co., 74 A. 462, 78 N.J.Law 515, 28 L.R.A.,N.S., 645.

26. Mich.—Mosier v American Ry. Express Co., 178 N.W. 81, 211 Mich. 19.
10 C.J. p. 141 note 72.

27. Cal.—Scranton v. Southern Pac. Co., 245 P. 1102, 77 Cal.App. 132

28. U.S.—American Ry. Express Co. v. Lindenburg, 43 S.Ct. 206, 260 U.S. 584, 67 L.Ed. 414, reversing Lindenburg v. American Ry. Express Co., 106 S.E. 884, 88 W.Va. 439.

29. N.Y.—Glanzer v. Cunard S. S. Co., 212 N.Y.S. 500, 214 App.Div. 473

30. U.S.—Cincinnati etc., R. Co. v. Rankin, Tenn., 36 S.Ct. 555, 241 U.S. 319, 60 L.Ed. 1022, L.R.A.1917A 265
Miss.—Illinois Cent. R. Co. v. Rogers & Hurdle, 76 So. 686, 116 Miss. 99
N.Y.—Burke v. Union Pac. R. Co., 124 N.E. 119, 226 N.Y. 534, reversing 166 N.Y.S. 100, 178 App.Div. 783, certiorari granted Union Pac. R. Co. v. Burke, 40 S.Ct. 56, 251 U.S. 548, 64 L.Ed. 409, and affirmed 41 S.Ct. 283, 255 U.S. 317, 65 L.Ed. 656.
Pa.—Rothstein v. Railway Express Agency, 170 A. 406, 111 Pa.Super. 466.

Burden is on shipper to show that he had been refused an alternative rate by the carrier, or that an alternative rate was not in existence—Mariani Bros. v. Thomas Wilson, Sons & Co., 177 N.Y.S. 335, 188 App.Div. 617.

31. Mo.—Blackmer & Post Pipe Co. v. Mobile & O. R. Co., 190 S.W. 1032, 196 Mo.App. 139.

32. Ga.—DeBow v. Vicksburg, S. & P. Ry. Co., 95 S.E. 261, 21 Ga.App. 732, reversed on other grounds Vicksburg, S. & P. Ry. v. DeBow, 98 S.E. 381, 148 Ga. 738.
N.Y.—Haddad v. Southern Pac. Co., 173 N.Y.S. 256, 185 App.Div. 500.

33. Ga.—De Bow v. Vicksburg, S. & P. Ry. Co., 95 S.E. 261, 21 Ga.App. 732, reversed on other grounds Vicksburg, S. & P. Ry. v. De Bow, 98 S.E. 381, 148 Ga. 738.

must plead the giving of notice of his claim for loss of, or injury to, property in possession of a carrier, as stated supra § 251 h, the burden is on plaintiff to prove a compliance with such requirement,[34] or a waiver thereof,[35] or excuses for failure to comply;[36] and it has been held that this is so, although plaintiff did not sue on the written contract, but alleged a contract in general terms, and the carrier set up the contract in the answer.[37] Also the burden is on the shipper suing for damage to live stock to show that there was no consideration for a provision in the bill of lading covering an interstate shipment requiring notice of a claim for damages to be given within five days after the stock was unloaded.[38]

Where the rule obtains that failure to give the required notice of claim is a matter of defense to be specially pleaded by the carrier, as stated supra § 252, the burden rests on the carrier to show the existence of a contract containing such requirement,[39] the reasonableness of the requirement,[40] and a noncompliance therewith on the part of the shipper.[41]

Limitation as to time for bringing suit. Where the carrier asserts as a defense that it had filed with the interstate commerce commission a schedule and form of receipt containing a stipulation as to the time when suit must be commenced, and that the suit was not brought within the stipulated time, it has the burden of proving the existence of such stipulation.[42]

j. Negligence in Carriage of Inanimate Freight

(1) In general
(2) Where negligence is in issue in general
(3) Where defense is based on common-law exception

(1) In General

Ordinarily it is not incumbent on the plaintiff to prove negligence on the part of the carrier in an action to enforce its common-law liability.

The liability of a carrier for loss of, or injury to, goods in its possession being that of an insurer, no proof of negligence is ordinarily necessary,[43] although it has been held that, if plaintiff unnecessarily alleges that the loss or injury was due to specific acts of negligence, the burden is on him to prove them.[44]

(2) Where Negligence Is in Issue in General

Where the burden is on the plaintiff to prove that the loss of, or injury to, goods was due to the carrier's negligence, proof that the goods were received by the carrier in good condition and delivered by it in bad condition establishes a prima facie case for plaintiff, which the carrier must overcome; and, when the defendant has adduced evidence to rebut the presumption, the burden of proof shifts to the plaintiff.

Although, where the action against a carrier for the loss of, or injury to, goods is based on the carrier's negligence, the burden is on plaintiff to prove

34. Kan.—Reedy v Missouri Pac. R Co, 255 P 683, 123 Kan. 600.
Minn—Benson v. Davis, 194 N W. 771, 156 Minn 354.
N C—Smith v. Seaboard Air Line Ry. Co, 93 S E. 469, 174 N C. 111.
Okl.—Atchison, T & S F. Ry. Co v. Cooper, 175 P. 539, 71 Okl. 112.
W Va—Hubbard Grocery Co. v Payne, 118 S.E. 152, 94 W.Va. 273.
10 C.J p 373 note 84.

There is no presumption of law that a shipper claiming damages for delay in transportation of goods gave written notice of claim required by bill of lading—Murray v Atlantic Coast Line R. Co., 93 S.E. 387, 108 S C. 88.

Terms of notice must be shown

In action against carrier for damages to goods, bill of lading requiring written statement of loss, plaintiff must show not only that he delivered such statement, but terms of statement itself—Erisman v. Chicago, B & Q. R. Co., 163 N W. 627, 180 Iowa 759.

35. Ill.—See Hamilton v. Cleveland, C., C & St L Ry. Co, 206 Ill. App. 270.
Ind.—Parrill v. Cleveland, etc., R. Co., 55 N.E. 1026, 23 Ind.App. 638.
W.Va.—Hubbard Grocery Co. v. Payne, 118 S E 152, 94 W Va 273.

36. Ark.—St. Louis, etc, R. Co v. Cumbie, 177 S W 910, 118 Ark 478.
W Va.—Hubbard Grocery Co. v. Payne, 118 S E 152, 94 W Va. 273.

37. Ky.—Adams Express Co. v. Cook, 172 S W 1096, 162 Ky 592.
10 C.J. p 373 note 88.

Corpus Juris is quoted in Hubbard Grocery Co. v. Payne, 118 S E 152, 153, 94 W Va. 273.

38. Mo—Hamilton v Chicago, etc, R. Co., 164 S.W. 248, 177 Mo.App 145.

39. Tex—Wichita Valley Ry. Co. v. Brown, Civ App, 270 S.W 1112—St. Louis, etc., R Co v. Bryce, 110 S W. 529, 49 Tex Civ.App. 608—St Louis, etc, R. Co. v. Hays, 35 S W 476, 13 Tex.Civ.App 577.

In Georgia, where the consignee in a bill of lading, providing for presentation of written claim for damages within six months, does not sue on the express contract evidenced by the bill, but in tort, based solely on a breach of the public duty of the carrier to transport and deliver, and the carrier defends on the ground of a failure of plaintiff to comply with the stipulation, it has the burden of showing such want of compliance—Davis v. Mizell, 120 S E. 690, 31 Ga App 439—Payne v Duncan & Nelms, 111 S.E 209, 28 Ga.App. 399—Southern Ry. Co v. Bunch, 109 S.E 523, 27 Ga App 689

40. Tex—St Louis, B. & M Ry. Co v. Marcofich, Civ App., 185 S. W. 51, affirmed, Com.App., 221 S.W. 582—Kansas City, M & O Ry. Co. v. Hansard, Civ App, 181 S.W. 329.
10 C.J. p 373 note 93.

41. Mo.—Amber v. Davis, 282 S W. 459, 221 Mo App. 448.
Tex—Wichita Valley Ry. Co. v. Brown, Civ App, 270 S.W. 1112.
10 C J. p 373 note 92.

42. Pa—Shatz v. American Ry. Express Co, 80 Pa.Super. 335.

43. Ark—Chicago, R I & P. Ry Co v S L Robinson & Co, 298 S.W. 873, 175 Ark. 35
10 C J. p 376 note 16.

44. Iowa—Taft Co v. American Express Co., 110 N W. 897, 133 Iowa 522, 119 Am.S R 642.
10 C.J. p 376 note 17.

Corpus Juris is quoted in Snowden v. Tremont & G. Ry. Co., La.App, 140 So 122, 126.

such negligence,[45] and to show that it was the proximate cause of the loss or injury,[46] it is nevertheless a general rule that proof that the goods, although of a perishable nature, were received by the carrier in good condition and delivered by it in bad condition,[47] or that there was a total or partial fail-

45. U.S.—Gillette Safety Razor Co. v. Davis, C.C.A.Mass., 278 F. 864, certiorari denied 42 S.Ct. 590, 259 U.S. 587, 66 L.Ed. 1077.
Ark.—American Ry. Express Co. v. Cole, 48 S.W.2d 223, 185 Ark. 532—American Ry. Exp. Co. v. Cole, 42 S.W.2d 772, 184 Ark. 485—Railway Exp. Agency v. H. Rouw Co., 42 S.W.2d 761, 184 Ark. 482—Missouri Pac. R. Co. v. Fine, 34 S.W.2d 755, 183 Ark. 13—H. Rouw Co. v. St. Louis-San Francisco Ry. Co., 290 S.W. 936, 172 Ark. 881.
Mich.—Douglas Shoe Co. v. Pere Marquette Ry. Co., 217 N.W. 12, 241 Mich. 297.
Mo.—State ex rel. Atchison, T. & S. F. Ry. Co. v. Trimble, 257 S.W. 104, 302 Mo. 8.
Okl.—Davis v. Rivers, 229 P. 571, 103 Okl. 198—Stone v. Case, 124 P. 960, 34 Okl. 5, 43 L.R.A.,N.S., 1168.
Wis.—Ashton v. Chicago & N. W. Ry. Co., 225 N.W. 328, 198 Wis. 618.

Delay causing damage

(1) Where plaintiff, suing for damages to shipments of fruit, claimed that the damaged condition was due to delay in shipment and rough and careless handling, it was essential to a recovery that he establish that the damage was due either to negligent delay in transportation or to violent injury to the fruit during transportation.—Bromberg v. Chicago, R. I. & P. Ry. Co., 190 N.W. 955, 194 Iowa 1337.

(2) To establish delay, proof of the usual and ordinary time consumed in such transportation, together with proof that the carrier in the case at bar consumed greater time, was necessary.—Bromberg v. Chicago, R. I. & P. Ry. Co., supra.

Free carriage of employee's goods

In an action against a carrier for injury to the household goods of an employee of the carrier which are shipped without payment of freight charges, the fact that the car in which the goods were placed jumped the track does not raise a presumption of gross negligence, and the burden is on plaintiff to prove such negligence.—Tennessee & A. G. Ry. Co. v. Hunt, 13 Tenn.App. 590.

46. N.C.—Bivens Bros. v. Atlantic Coast Line R. Co., 97 S.E. 215, 176 N.C. 414.
S.C.—Sanders v. Charleston & W. C. Ry. Co., 145 S.E. 400, 147 S.C. 487.

Negligent delay

Shipper suing for negligent delay in transporting perishable vegetables must show negligence arising from unreasonable delay which was proximate cause of damage.—Sanders v. Charleston & W. C. Ry. Co., 145 S.E. 400, 147 S.C. 487.

47. U.S.—Southern Ry. Co. v. Petit Tenn., 257 F. 663, 168 C.C.A. 613, certiorari denied 39 S.Ct. 290, 249 U.S. 607, 63 L.Ed. 799
Ala.—C. M. McMahen & Sons v. Louisville & N. R. Co., 106 So. 56, 121 Ala.App. 66, certiorari denied Ex parte C. M. McMahen & Sons, 106 So. 57, 213 Ala. 642.
Ariz.—Southern Pac. Co. v. Itule, 74 P.2d 38.
Ark.—Missouri Pac. R. Co. v. S. L. Robinson & Co., 62 S.W.2d 965, 187 Ark. 1163—Chicago, R. I. & P. Ry. Co. v. Greer, 58 S.W.2d 424, 187 Ark. 101—Railway Express Agency v. H. Rouw Co., 52 S.W.2d 624, 186 Ark. 111—American Ry. Express Co. v. H. Rouw Co., 48 S.W.2d 220, 185 Ark. 526—Railway Express Agency v. S. L. Robinson & Co., 43 S.W.2d 543, 184 Ark. 660—St. Louis-San Francisco Ry. Co. v. Cole, 294 S.W. 357, 174 Ark. 10—Missouri Pac. R. Co. v. Myers, 293 S.W. 15, 173 Ark. 747—H. Rouw Co. v. St. Louis-San Francisco Ry. Co., 290 S.W. 936, 172 Ark. 881—Missouri Pac. R. Co. v. Wellborn & Walls, 280 S.W. 18, 170 Ark. 469, certiorari denied Missouri Pac. R. Co. v. Wellborn, 47 S.Ct. 91, 273 U.S. 694, 71 L.Ed. 844—Missouri Pac. R. Co. v. Bell, 259 S.W. 745, 163 Ark. 284, certiorari denied 45 S.Ct. 125, 266 U.S. 625, 69 L.Ed. 474—Chicago, R. I. & P. Ry. Co. v. Walker & Haley, 227 S.W. 12, 147 Ark. 109.
Del.—Hardesty v. American Ry. Express Co., 119 A. 681, 2 W.W.Harr. 66.
Fla.—American Ry. Exp. Co. v. Fegenbush, 144 So. 320, 107 Fla. 145
Ga.—Atlantic Coast Line R. Co. v. Varner, 137 S.E. 83, 36 Ga.App. 441—Southern Ry. Co. v. Standard Growers' Exch., 130 S.E. 373, 34 Ga.App. 534.
Ill.—Hartford Live Stock Ins. Co. v. Railway Express Agency, 274 Ill.App. 585—Freedman v. Erie R. Co., 246 Ill.App. 479—Lino v. Northwestern Pac. R. Co., 246 Ill.App. 451, reversed on another ground 163 N.E. 316, 332 Ill. 93—House v. Wheelock, 244 Ill.App. 270—Cochrane v. Chicago Great Western R. Co., 199 Ill.App. 469—Jennings v. Baltimore & O. R. Co., 194 Ill.App. 358
Iowa.—Dye Produce Co. v. Davis, 209 N.W. 744, 202 Iowa 1008.
La.—Bonura & Co. v. Payne, 7 La.App. 754—Guidry v. Texas & P. Ry. Co., 6 La.App. 169.
Me.—Goldberg v. New York, N. H. & H. R. Co., 153 A. 812, 130 Me. 96.
Md.—Pennsylvania R. Co. v. Walker, 128 A. 45, 147 Md. 323.
Mass.—Bonfiglio v. New York, N. H. & H. R. Co., 198 N.E. 236.
Mich.—Purity Ice Cream & Dairy Co. v. Adams Express Co., 187 N.W. 296, 217 Mich. 593.
Minn.—W. A. White Brokerage Co. v. American Ry. Express Co., 219 N.W. 290, 174 Minn. 377—McNeill & Scott Co. v. Great Northern R. Co., 194 N.W. 614, 156 Minn. 120—Geo. B. Higgins & Co. v. Chicago, B. & Q. R. Co., 161 N.W. 145, 135 Minn. 402, L.R.A.1917C 507—Victor Produce Co. v. Chicago & N. W. Ry. Co., 160 N.W. 201, 135 Minn. 49—Lewer v. Minneapolis, etc., R. Co., 156 N.W. 6, 132 Minn. 173—Fockens v. U. S. Express Co., 109 N.W. 834, 99 Minn. 404
Mo.—Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co., 187 S.W. 149, 193 Mo.App. 572.
N.Y.—Orunsten v. New York Cent. R. Co., 165 N.Y.S. 996, 179 App.Div. 465—Perkel v. Pennsylvania R. Co., 265 N.Y.S. 597, 148 Misc. 284—Gruenwald v. American Ry. Express Co., 217 N.Y.S. 767, 128 Misc. 206—Fish v. Seaboard Air Line Ry., 163 N.Y.S. 439, 98 Misc. 662.
N.C.—McDaniel v. Atlantic Coast Line Ry., 130 S.E. 208, 190 N.C. 474.
Ohio.—Fean v. Alabama Great Southern R. Co., 159 N.E. 487, 26 Ohio App. 96.
Pa.—Thomas McCabe Industries v. Pennsylvania R. Co., 11 Pa.Dist. & Co. 460—Wray, Moore & Co. v. American Ry. Express Co., 75 Pa.Super. 425.
Tenn.—Sindle v. American Ry. Express Co., 8 Tenn.App. 594—Southeastern Express Co. v. Fry Produce Co., 2 Tenn.App. 37.
Tex.—Railway Express Agency v. McCarrick, Civ.App., 69 S.W.2d 803—Texas & N. O. R. Co. v. East, Civ.App., 57 S.W.2d 175—Galveston, H. & S. A. Ry. Co. v. Tullis, Civ.App., 8 S.W.2d 247, error dismissed—Lancaster v. McCarty, Civ.App., 248 S.W. 816, reversed on another ground 45 S.Ct. 342, 267 U.S. 427, 69 L.Ed. 696—Rhodes v. Gulf, C. & S. F. Ry. Co., Civ.App., 202 S.W. 815.
Vt.—Saliba v. New York Cent. R. Co., 144 A. 194, 101 Vt. 427—Haglin-Stahr Co. v. Montpelier & W. R. R. Co., 102 A. 940, 92 Vt. 258.
Va.—Chesapeake & O. Ry. Co. v. W. C. Crenshaw & Co., 138 S.E. 467, 148 Va. 48, 53 A.L.R. 990—Chesapeake & O. Ry. Co. v. Timber-Lake, Currie & Co., 137 S.E. 507, 147 Va.

ure to deliver the goods received for transportation,[48] raises a presumption of negligence and establishes a prima facie case, which the carrier must overcome, the burden being on it to show its freedom from negligence, or that the damage was due to some cause for which it is not liable,[49] unless,

304—Hines v Buchanan, 109 S E 219, 131 Va. 88.
10 C J p 378 note 25.

That no claim was filed does not affect rule—Crinella v. Northwestern Pac R. Co, 259 P. 774, 85 Cal App. 440.

Doctrine of res ipsa loquitur is applicable where cotton linters delivered in marketable condition arrived at destination wet and worthless—Galveston, H & S A. Ry. Co v. Tullis, Tex.Civ App, 8 S.W.2d 247, error dismissed.

An application of the presumption of continuity has made a rule that, if goods are shipped in sound condition, and carrier delivers them in a damaged state, something done during transit has caused the damage.—Yarcho v Chicago, R I & P. Ry Co, 168 N W 336, 183 Iowa 1180

Prima facie case

In action against railroad for damage to a shipment of tomatoes, evidence that tomatoes were shipped in a good condition but, when received, were partially decayed, sustained plaintiff's burden of making a prima facie case—Southern Pac. Co. v. Itule, Ariz, 74 P.2d 38.

48. U S.—Gillette Razor Co. v. Davis, C.C A Mass., 273 F. 864, certiorari denied 42 S.Ct. 590, 259 U.S 587, 66 L Ed. 1077.
Cal.—American Fruit Distributors of California v. Hines, 203 P. 821, 55 Cal App. 377.
Del.—Hardesty v. American Ry. Express Co, 119 A. 681, 2 W W Harr. 66.
Ill.—Beatrice Creamery Co v. Fisher, 10 N E 2d 220, 291 Ill App. 495—Transformer Corporation of America v. Hinchcliff, 279 Ill.App. 152
Iowa.—Effron, Kushner & Co. v. American Ry. Express Co, 193 N. W. 539, 195 Iowa 1168—Buck v. American Railway Express Co, 192 N.W. 277, 195 Iowa 1024.
Mich—Douglas Shoe Co. v Pere Marquette Ry. Co., 217 N.W. 12, 241 Mich. 297
Minn—National Elevator Co v Great Northern Ry. Co, 163 N.W 164, 137 Minn. 217.
Mo—Viviano v. Davis, App., 258 S. W. 69.
N.Y—Balice v Erie R Co., 203 N.Y. S. 636, 208 App.Div. 427—U. S. ex rel Matthews v. Massachusetts Bonding & Insurance Co., 202 N Y. S. 867, 207 App Div. 619, reversed on other grounds 144 N E 631, 238 N Y. 334, reargument denied 147 N E 172, 239 N.Y. 507—Magnus v Platt, 115 N Y.S. 824, 62 Misc. 499.
N.C—Winstead v. East Carolina Ry, 118 S E 887, 186 N C. 58.
Tex—Brass v. Texarkana & Ft Smith Ry Co, 218 S W 1040, 110 Tex. 281, reversing Texarkana & Ft. S Ry. Co v Brass, Civ.App, 175 S.W 778—Texarkana & Ft. S Ry. Co. v. Brass, Com App., 260 S W. 828, affirming, Civ App., 245 S W 457, rehearing overruled, Com App, 262 S W 737—Bergman Produce Co v. American Ry. Express Co, Civ App, 262 S.W. 891—St Louis Southwestern Ry Co. v. Cox, Civ App., 221 S W 1043.
10 C.J. p 378 note 25.

Prima facie case is made in an action to recover value of wheat lost in transit, by the introduction of bill of lading, weighmaster's certificate, which, under Gen St 1923 § 5046, is prima facie evidence of facts stated therein, and proof of market price of wheat—Great Western Grain Co v. Chicago, M & St P. Ry. Co, 204 N W. 47, 163 Minn 371

49. U S.—Southern Ry Co. v Petit, Tenn, 257 F. 663, 168 C.C A. 613, certiorari denied 39 S.Ct. 290, 249 U.S 607, 63 L Ed 799
Ala—Louisville & N. R. Co. v. Kinney, 127 So. 802, 221 Ala. 48—C M. McMahen & Sons v Louisville & N R Co, 106 So 56, 121 Ala. App 66, certiorari denied Ex parte C M McMahen & Sons, 106 So. 57, 213 Ala 642.
Ark—Chicago, R. I & P Ry. Co. v. Greer, 58 S W 2d 424, 187 Ark. 101—Railway Express Agency v. H. Rouw Co, 52 S W 2d 624, 186 Ark. 111—American Ry. Express Co. v H. Rouw Co, 48 S.W 2d 220, 185 Ark. 526—Railway Express Agency v. S L Robinson & Co, 43 S W 2d 543, 184 Ark 660—Missouri Pac. R. Co v Bell, 259 S W 745, 163 Ark 284, certiorari denied 45 S Ct. 125, 266 U S 635, 69 L Ed. 474—Chicago, R I & P. Ry Co v Walker & Haley, 227 S.W. 12, 147 Ark 109.
Cal—American Fruit Distributors of California v Hines, 203 P. 821, 55 Cal App 377.
Ill—Hartford Live Stock Ins Co. v. Railway Express Agency, 274 Ill. App 585.
La—John Bonura & Co v Texas & N. O. R. Co, 126 So 593, 14 La. App 351, rehearing denied 128 So. 68, 14 La App 351, certiorari denied Texas & N O R Co v. John Bonura & Co, 51 S Ct 80, 282 U. S 875, 75 L Ed 773—Guidry v. Texas & Pacific Ry Co, 6 La.App 169—Calhoun v. American Ry. Express Co., 3 La App 628
Mass—L L Cohen & Co v. Davis, 142 N E 75, 247 Mass. 259, reversed on another ground Davis v. L L Cohen & Co, 45 S.Ct. 633, 268 U S 638, 69 L Ed. 1129
Minn—W A. White Brokerage Co v. American Ry. Express Co, 219 N W. 290, 174 Minn. 377—Geo. B Higgins & Co v. Chicago, B. & Q R Co, 161 N W. 145, 135 Minn. 402, L R.A.1917C 507—Victor Produce Co v. Chicago & N W. Ry Co, 160 N W. 201, 135 Minn 49.
Mo—Wentworth Fruit Growers' Ass'n v. American Ry. Express Co, 1 S W 2d 1028, 222 Mo App. 1189—Mount Arbor Nurseries v New York, C & St. L R. Co, 273 S.W 410, 217 Mo.App 31—Clemons Produce Co. v Denver & R. G. R. R, 219 S W. 660, 203 Mo App. 100
N.Y—Orunsten v. New York Cent R. Co, 165 N.Y.S 996, 179 App. Div 465—Perkel v Pennsylvania R Co, 265 N.Y S 597, 148 Misc 284—Fish v. Seaboard Air Line Ry., 163 N Y S. 439, 98 Misc 662
N D.—Gehrke v American Ry Express Co, 240 N W. 321, 61 N D 668, 81 A L R. 808.
Tenn—Southeastern Express Co v. Fry Produce Co., 2 Tenn App. 37
Tex.—Gulf, C & S. F Ry. Co. v Downs, Civ.App, 70 S W 2d 318, error refused—Gulf, C. & S. F Ry Co v Morrow, Civ App., 66 S W 2d 481, error dismissed—Gulf, C. & S. F Ry Co v Lipshitz, Civ App, 29 S W 2d 905. error refused—Nabors v Colorado & S Ry Co, Civ App, 210 S W 276—Wells Fargo & Co. v Sprague, Civ App, 199 S W 657—Texas & P Ry Co. v. R W Williamson & Co, Civ App., 187 S W 354, affirmed, Com.App, 221 S W 571
Vt—Saliba v. New York Cent. R Co, 144 A 194, 101 Vt 427.
Va—Chesapeake & O Ry Co v W C. Crenshaw & Co, 138 S E 467, 148 Va 48, 53 A L R 990—Chesapeake & O Ry. Co v Timber-Lake, Currie & Co., 137 S E 507, 147 Va 304
10 C J. p 378 note 25, p 379 note 27

Emergency justifying change from express to freight service

In action against express company for loss from delay of shipment of car lot of milk and cream, evidence that the time actually consumed was at least three times the usual running time, that for most of the route the car was carried in freight trains, instead of by express service, etc, made out a prima facie case of negligence, casting the burden on defendant of showing that the delay arose from some other cause than its negligence, although the contract was made "subject to delay on account of congestion;" and it was

by the contract of shipment, plaintiff has assumed the burden of proof;[50] and this principle has been applied where it was sought to charge the carrier with liability as warehouseman.[51] It has been held, however, that, while the prima facie case so established must be met and overcome by the carrier, and this is often spoken of as the burden of proof, the burden of establishing the truth of the issue by a preponderance of the evidence does not shift, but remains with plaintiff.[52] If the shipper pleads specific acts of negligence, he cannot invoke the presumption arising from the receipt of goods in good condition and their arrival in bad condition.[53] Moreover, no presumption of negligence arises, and no duty is cast on the carrier to show its freedom from negligence, by proof that the goods were in bad condition when received from the carrier, in the absence of evidence that they were in good condition when delivered to it.[54] It has also been held that a prima case of negligence is not made out by mere proof of delay in an interstate shipment[55] or by proof of theft of the goods, without showing the surrounding circumstances;[56] and that the mere happening of a loss while the goods were in possession of the carrier does not raise a presumption of negligence under the doctrine of res ipsa loquitur.[57] On the other hand, it has been held that evidence that goods became water-soaked while in the carrier's possession makes a prima facie case against the carrier,[58] and that proof of delay in the transportation and delivery of perishable goods may be considered by the jury as prima facie evidence of negligence on the part of the carrier, which it may rebut by proof that such delay was not caused by its negligence.[59] While nondelivery without excuse is at common law regarded as making a prima facie case of negligence, yet where it appears that the goods were stolen, and the circumstances do not authorize the inference of lack of reasonable care, plaintiff must go forward with the evidence and prove negligence.[60] Where the carrier has introduced evidence to rebut the presump-

on defendant to prove an emergency justifying deviation of the car from express service to freight service—Purity Ice Cream & Dairy Co v. Adams Express Co, 187 N W 296, 217 Mich. 593

If the jury are unable to determine whether the injury was due to the carrier's negligence or the inherent condition of the property, it should find for plaintiff, where the carrier has the burden of disproving negligence—Hurley v. Illinois Cent R Co, 282 S.W. 97, 221 Mo App 478.

Preponderance of proof necessary to rebut presumption

Fla—American Ry. Exp Co v. Fegenbush, 144 So. 320, 107 Fla 145

Minn—National Elevator Co v Great Northern Ry. Co, 163 N W 164, 137 Minn 217—Fockens v United States Express Co., 109 N W 834, 99 Minn. 404

Proof sufficient to rebut presumption

Fla—American Ry. Exp Co. v Fegenbush, 144 So 320, 107 Fla 115

Minn—Geo. B. Higgins & Co v. Chicago, B. & Q. R. Co, 161 N W. 145, 135 Minn. 402, L R A 1917C 507.

Va.—Hines v Buchanan, 109 S E 219, 131 Va 88

Proof insufficient to rebut presumption

Ark—Missouri Pac R. Co. v S. L Robinson & Co., 61 S.W 2d 700, 187 Ark. 1163

Ill—Jennings v Baltimore & O. R. Co., 194 Ill App 358.

Tex—Rhodes v Gulf, C. & S F Ry Co, Civ.App., 202 S.W. 815.

50. N Y.—Gruenwald v. American Ry. Express Co., 217 N.Y S. 767, 128 Misc. 206.

Evidence insufficient to sustain burden

(1) Where horses were shipped under contract requiring proof of carrier's negligence before shipper could recover, proving delivery in damaged condition did not make prima facie case—J F Bell & Sons Co. v. American Ry Exp Co, 149 A. 497, 84 N H. 273

(2) Evidence showing manner of injury to horses shipped, without showing carrier's negligence, was held not to make case—J F. Bell & Sons Co v. American Ry. Exp Co, supra

(3) Evidence which only showed possible causes did not amount to proof—J. F Bell & Sons Co. v American Ry Exp. Co, supra.

51. Conn.—Boies v Hartford, etc, R. Co, 37 Conn 272, 9 Am.R. 347.

52. Ill—House v Wheelock, 244 Ill. App. 270

Mich.—Douglas Shoe Co. v. Pere Marquette Ry Co, 217 N.W. 12, 241 Mich 297

Minn—McNeill & Scott Co v Great Northern R Co, 194 N.W. 614, 156 Minn 120.

N C—McDaniel v Atlantic Coast Line Ry., 130 S E. 208, 190 N.C. 474.

"The burden of proof . . . is not shifted where the plaintiff makes out a prima facie case, nor is the defendant required to offer evidence to rebut a prima facie showing, or to escape liability on such showing A 'prima facie case' means and means no more than evidence sufficient to justify, but not to compel, an inference of liability, if the jury so find. It furnishes evidence to be weighed, but not necessarily to be accepted, by the jury."—McDaniel v. Atlantic Coast Line Ry, 130 S E 208, 190 N C 474.

53. Mo—Wentworth Fruit Growers' Ass'n v. American Ry. Express Co, 1 S.W.2d 1028, 222 Mo App 1189.

54. N Y—Orunsten v. New York Cent R. Co., 165 N.Y.S. 996, 179 App Div 465.

Tex—Galveston, H & S. A. Ry. Co. v. John Muennink & Son, Civ.App., 195 S.W. 613.

55. Mo—Inzerillo v. Chicago, B. & Q R Co, 35 S W 2d 44, 225 Mo. App 1213—Rudy v. Cleveland, C, C & St. L. R Co, App, 278 S W. 814.

State statute making failure to transport within a reasonable time prima facie evidence of negligent delay is not applicable to an interstate shipment—Berry v Chicago & A. R. Co, Mo App, 208 S.W. 622.

56. Mich—Douglas Shoe Co v. Pere Marquette Ry. Co, 217 N.W 12, 241 Mich 297.

57. Wis—Ashton v. Chicago & N. W. Ry. Co, 225 N W. 328, 198 Wis. 618

58. Mo.—Ford v Wabash Ry. Co, 300 S W 769, 318 Mo. 723, affirming, App., 266 S W. 1032.

Vt—Saliba v New York Cent. R. Co, 114 A 194, 101 Vt. 427.

59. Del—Hardesty v. American Ry. Express Co., 119 A. 681, 2 W W. Harr. 66.

60. U.S—Gillette Safety Razor Co. v Davis, C C.A Mass, 278 F. 864, certiorari denied 42 S Ct. 590, 259 U.S. 587, 66 L Ed. 1077.

tion raised by the failure to deliver the goods or their delivery in bad condition, the burden of proof shifts to plaintiff[61] who must then show that the carrier was in fact guilty of negligence causing or contributing to the loss.[62] The failure of plaintiff to show that goods delivered to the carrier were properly packed and marked by him makes it incumbent on him to prove that the carrier was negligent.[63]

To recover against a private carrier for loss of goods plaintiff must prove that the loss was due to the carrier's negligence.[64]

(3) Where Defense Is Based on Common-Law Exception

Some authorities place the burden of showing freedom from negligence on the carrier where it seeks to avoid liability because of a common-law or contract exception, while others hold that where a loss within an exception is shown, the burden is on plaintiff to prove negligence. Under a statute dispensing with notice of claim where the loss or injury was due to the carrier's negligence, plaintiff, failing to give notice, must show that the loss or injury was caused by the negligence of the carrier.

An issue may arise as to negligence and does arise where the carrier seeks to escape liability by reason of a common-law exception or one embodied in a valid contract; and in such case there is a conflict in the decisions on the burden of proof, as appears in the following notes.[65] According to some authorities, if the carrier seeks to escape liability by reason of a common-law or contract exception, the burden rests on it, not only to show that the loss or injury falls within such exception, as heretofore stated supra subdivisions h and i of this section, but also that it occurred without negligence on its part;[66] at least where the shipment is intra-state,[67] and this rule has been held applicable in case of loss by fire or flood, where that is a liability excepted in the contract.[68] Where the carrier, pursuant to such rule, makes out a prima facie case of exemption from liability, the burden is on plaintiff to prove lack of due care and reasonable diligence on defendant's part.[69]

On the other hand, the rule established by the federal courts, and in a number of the state courts, is that, where the carrier shows the loss to be within an excepted cause, either at common law or under a valid contract exemption, it is not bound to go further and explain the particulars of the loss or injury for the purpose of showing that it was free from negligence in connection therewith, but that the burden of proving negligence such as will render the carrier liable notwithstanding the common-law or contract exception, is on plaintiff,[70] and this

61. N.Y.—Balice v. Erie R. Co., 203 N.Y.S. 636, 208 App.Div. 427.
Tex.—Gulf, C. & S. F. Ry. Co. v. Downs, Civ.App., 70 S.W.2d 318, error refused.

62. Ill.—Beatrice Creamery Co. v. Fisher, 10 N.E.2d 220, 291 Ill.App. 495.
N.Y.—Balice v. Erie R. Co., 203 N.Y.S. 636, 208 App.Div. 427.

63. La.—Breazeale v. American Ry. Exp. Co., 137 So. 585, 18 La.App. 59.

64. N.Y.—Gerhard & Hey v. Cattaraugus Tanning Co., 150 N.E. 500, 241 N.Y. 413, modifying 207 N.Y.S. 842, 212 App.Div. 812, motion denied 152 N.E. 444, 242 N.Y. 600.

65. **This statement in Corpus Juris** has been referred to in Bergman Produce Co. v. American Ry. Express Co., Tex.Civ.App., 262 S.W. 891, 893.

66. Ala.—Alabama Great Southern R. Co. v. Herring, 174 So. 502, 234 Ala. 238.
Ohio—Walls v. Adams Express Co., 19 Ohio N.P.,N.S., 156.
Tenn.—Tennessee Ry. Co. v. Riddle Coal Co., 1 Tenn.App. 129.
10 C.J. p. 377 note 21

Common-law exceptions to liability

(1) Common carrier seeking to be relieved from liability for loss of goods by act of God must trace loss to such act without negligence by it.
Ala.—Louisville & N. R. Co. v. Finlay, 170 So. 207, 233 Ala. 128.
Ga.—Bugg v. Perry & Faircloth, 156 S.E. 708, 42 Ga.App. 523.

(2) If petition for damage to goods intrusted to carrier for shipment discloses that injury was occasioned by act of God, and thus within exceptions to rule of carrier's absolute liability, action becomes restricted to negligence, and carrier must show that its own negligence did not contribute to loss.—Southern Ry. Co. v. Standard Growers' Exch., 130 S.E. 373, 34 Ga.App. 534

(3) Carrier claiming loss to shipment was caused by shipper or his agent, must negative contributory negligence.—Bugg v. Perry & Faircloth, supra.

Contract limitations of liability

When, under a bill of lading exempting the carrier from damage by fire or flood, a shipper shows that the goods were delivered to the carrier and that they were not delivered by it to the consignee, a prima facie case is made against the carrier, and the onus is cast on it to go forward with the evidence and to show that the damage or loss occurred from fire or flood excepted in the bill of lading and in addition to make out a prima facie case of diligence and freedom from fault or negligence on its part.—Central of Georgia Ry. Co. v. Patterson, 84 So. 471, 17 Ala.App. 305

67. Tex.—Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas, Com.App., 221 S.W. 270, reversing, Civ.App., 184 S.W. 1070—American Ry. Express Co. v. Home Star Produce Co., Civ.App., 276 S.W. 790.

68. Ala.—Central of Georgia Ry. Co. v. Patterson, 84 So. 471, 17 Ala.App. 305.
Tex.—Texarkana & Ft. S. Ry. Co. v. Brass, Com.App., 260 S.W. 828, affirming, Civ.App., 245 S.W. 457, rehearing overruled, Com.App., 262 S.W. 737—Gulf, C. & S. F. Ry. Co. v. Lipshitz, Civ.App., 29 S.W.2d 905, error refused.
10 C.J. p. 377 note 22.

69. Ala.—Central of Georgia Ry. Co. v. Patterson, 84 So. 471, 17 Ala.App. 305

70. N.Y.—Slinn Co. v. American Ry. Express Co., 220 N.Y.S. 391.
Wis.—Ashton v. Chicago & N.W. Ry. Co., 225 N.W. 328, 198 Wis. 618.
10 C.J. p. 374 notes 97, 98, p. 378 note 23

Common-law exceptions to liability

Where a carrier shows that property was destroyed by act of God, a shipper has burden of proving that carrier's negligence contributed to loss as claimed.

rule would seem to be especially applicable where the contract is that the carrier shall not be liable except in case of negligence.[71]

The federal rule placing the burden of proving negligence on the shipper governs interstate shipments where the carrier is sued in a state court, regardless of the rule prevailing in that state with regard to intra-state shipments,[72] in the absence of a provision in the bill of lading as to the burden of proof.[73]

Want of notice of claim. Under the last provision of the Cummins amendment of the Interstate Commerce Act, providing that no notice of claim by the shipper shall be required where the loss or injury was due to the carelessness or negligence of the carrier, the burden is on a shipper who has not given notice of his claim within the required time, to prove that the loss or injury was due to the carrier's negligence.[74]

k. Negligence in Carriage of Live Stock

(1) Stock not accompanied by shipper
(2) Stock accompanied by shipper

(1) Stock Not Accompanied by Shipper

Proof that live stock, not accompanied by a caretaker, was received by the carrier in good condition and delivered at destination in bad condition ordinarily casts on the carrier the burden of showing that a loss or injury was due to some cause which would exempt it from liability and was not the result of the negligence. The rule is subject to a number of exceptions and qualifications, as where recovery is sought for sickness, or death resulting from sickness, or where specific negligence is charged by plaintiff.

Subject to some exceptions and qualifications, it is a general rule that proof that live stock, not ac-

Minn.—Northwestern Consol. Milling Co. v. Chicago, B & Q. R Co., 160 N.W. 1028, 135 Minn. 363, certiorari denied 38 S.Ct. 8, 245 U.S. 644, 62 L.Ed. 528

Mo.—Ford v Wabash Ry. Co., App., 266 S.W. 1032, affirmed 300 S.W. 769, 318 Mo. 723.

N.Y.—Rezsek v. Southern Pac. Co., 181 N.Y.S. 117, 111 Misc. 180.

Contract limitation of liability

Where both initial and terminal carrier of oil were exempted from liability for leakage by bill of lading, shipper had burden of proving that leakage was caused by active negligence of one carrier or other.—Florida Cotton Oil Co v. Clyde S. S. Co., 125 N.E. 855, 235 Mass. 10.

In Louisiana

(1) It has been held, in accordance with the rule stated in the text, that where the bill of lading exempts the carrier from liability for loss by fire of cotton shipped, the burden of proof is on the shipper to show negligence of carrier avoiding the exemption—E. Borneman & Co. v New Orleans, M. & C. R. Co., 81 So. 832, 145 La. 150.

(2) On the other hand, it has been held that the rule under the civil code, as stated in a note to § 254 d supra, that, to relieve itself from liability, the carrier must prove that the loss or damage was occasioned by accidental or uncontrollable event, "involves the proposition that the carrier must prove that it was free from fault"—National Rice Milling Co v New Orleans & N. E. R. Co., 61 So. 708, 132 La. 615—Japhet & Co. v Southern Ry. Co., 8 La.App. 706.

71. Pa.—Witmer v. Pennsylvania R. Co., 30 Pa.Dist.R. 112.
10 C.J. p. 378 note 24.

72. Conn.—New England Fruit & Produce Co. v. Hines, 116 A. 243, 97 Conn. 225

Ill.—Arakelian v. Southern Pac. Co., 220 Ill.App. 160.

Ky.—Julius Kessler & Co. v. Southern Ry. Co. in Kentucky, 255 S.W. 535, 200 Ky. 713.

Ohio—Walls v. Adams Express Co., 19 Ohio N.P.,N.S., 156

Common-law exceptions to liability

(1) The rule in federal courts that owner of goods has burden of alleging and proving negligence of carrier when act of God is immediate cause of loss prevails where shipment is interstate, notwithstanding rule in Alabama courts that carrier has burden of showing due diligence—Louisville & N. R. Co. v. Finlay, 170 So. 207, 233 Ala. 128.

(2) In action against carrier for goods lost, where carrier proves that loss occurred by act of God, burden shifts to plaintiff to prove that, notwithstanding such act of God, negligence of carrier was proximate cause of loss—Bergman Produce Co. v. American Ry. Express Co., Tex.Civ.App., 262 S.W. 891—Mistrot-Calahan Co. v. Missouri, K. & T. Ry. Co. of Texas, Tex.Civ.App., 209 S.W. 775.

(3) Under federal rule, when carrier shows damage resulted from inherent infirmity of goods transported under circumstances not shown to be negligent, burden of proving negligence rests on shipper.

Fla.—American Ry. Exp. Co. v. Fegenbush, 144 So. 320, 107 Fla. 145.

Tex.—Galveston, H. & S. A. Ry. Co. v. Licata, Com.App., 280 S.W. 540, reversing, Civ.App., 269 S.W. 821—Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas, Com.App., 221 S.W. 270, reversing, Civ.App., 184 S.W. 1070

Violation of interstate commerce commission rule

The rule of the interstate commerce commission that carriers shall be relieved for failure to keep cars under refrigeration before the first re-icing station is reached, if shippers delay the cars at loading station more than twenty-four hours, casts the burden on the shipper in such case to prove that damage from insufficient refrigeration was caused by negligence of carrier after reaching the re-icing station — Brown v. Southern Ry. Co., 96 S.E. 298, 110 S.C. 243

Loss by fire; liability as warehouseman

Where a bill of lading in an interstate shipment stipulates that carrier shall be liable only as warehouseman for goods not removed within a specified time after arrival at destination and where the goods are admittedly destroyed by fire after the expiration of the time specified, the burden is on plaintiff to prove that defendant was negligent—Davis v. Pearlman, 113 S.E. 44, 29 Ga.App. 12—Central of Georgia Ry. Co. v. Owens, 110 S.E. 339, 28 Ga.App. 140.

73. Conn.—New England Fruit & Produce Co. v. Hines, 116 A. 243, 97 Conn. 225.

74. U.S.—Chesapeake & O. Ry. Co. v. A. F. Thompson Mfg. Co., 46 S.Ct. 318, 270 U.S. 416, 70 L.Ed. 654, reversing A. F. Thompson Mfg. Co. v. Chesapeake & O. Ry. Co., 123 S.E. 421, 95 W.Va. 670.

Ark.—St. Louis-San Francisco Ry. Co. v. Burford, 22 S.W.2d 378, 180 Ark. 562—American Ry. Express Co. v. H. Rouw Co., 294 S.W. 416, 174 Ark. 6—St. Louis-San Francisco Ry. Co. v. H. Rouw Co., 294 S.W. 414, 174 Ark. 1.

Tenn.—Nashville, C. & St. L. Ry. Co. v. Columbia Produce Co., 12 Tenn.App. 609.

companied by the shipper, was received by the carrier in good condition, and that it was not delivered, or reached the point of destination in bad condition, raises a presumption of negligence, casting on the carrier the burden of showing that the loss or injury was due to some cause which would exempt it from liability, and was not the result of its negligence;[75] and this rule is unaffected by a provision

75. Ala.—Louisville & N. R. Co. v. Strickland, 122 So. 693, 219 Ala. 581—Atlantic Coast Line R. Co. v. J. W. Maddox & Co., 98 So. 276, 210 Ala. 444—American Ry. Express Co. v. Dunnaway & Lambert, 92 So. 780, 207 Ala. 392—American Ry. Express Co. v. Dunnaway & Lambert, 88 So. 60, 17 Ala.App. 649.

Fla.—Atlantic Coast Line R. Co. v. Farris & Co., 149 So. 561, 111 Fla. 412—Walton Land & Timber Co. v. Louisville & N. R. Co., 72 So. 485, 72 Fla. 66.

Ga.—Ragsdale-Lawhon Mule & Horse Co. v. Davis, 119 S.E. 428, 30 Ga.App. 752.

Idaho.—Cooper v. Oregon Short Line R. Co., 262 P. 873, 45 Idaho 313.

Iowa.—Vander Beek v. Chicago & N. W. Ry. Co., 278 N.W. 201—Brower v. Chicago, R. I. & P. Ry. Co., 252 N.W. 755, 218 Iowa 317—McCoy v. Wabash Ry. Co., 231 N.W. 353, 210 Iowa 1075—Alexander v. American Ry. Express Co., 193 N.W. 560, 195 Iowa 1155—Buck v. American Railway Express Co., 192 N.W. 277, 195 Iowa 1024—Bateham v. Chicago, M. & St. P. Ry. Co., 192 N.W. 818, 195 Iowa 659—Ruebel Bros. v. American Express Co., 180 N.W. 658, 190 Iowa 600.

Ky.—Louisville & N. R. Co. v. Hunter, 214 S.W. 914, 185 Ky. 165—Louisville & N. R. Co. v. Taylor, 205 S.W. 934, 181 Ky. 794.

La.—Astugue v. American Ry. Express Co., 131 So. 62, 15 La.App. 347—Smith v. New Orleans & G. N. R. Co., 122 So. 724, 11 La.App. 386.

Md.—Bloecher & Schaaf v. Pennsylvania R. Co., 160 A. 281, 162 Md. 463.

Miss.—Yazoo & M. V. R. Co. v. Bell, 71 So. 272, 111 Miss. 82.

Mo.—Vaughn v. St. Louis-San Francisco Ry. Co., 15 S.W.2d 901, 223 Mo.App. 732—Dillen v. Wabash Ry. Co., App., 294 S.W. 439—Morrow v. Wabash Ry. Co., App., 289 S.W. 343—Griggs v. St. Louis & H. R. Co., App., 285 S.W. 159—Morrow v. Wabash Ry. Co., 276 S.W. 1030, 220 Mo.App. 518.

Neb.—Johnson v. Payne, 191 N.W. 696, 109 Neb. 531.

N.C.—Schloss-Bear-Davis Co. v. Louisville & N. R. Co., 88 S.E. 476, 171 N.C. 350.

Okl.—Chicago, R. I. & P. R. Co. v. Bradshaw, 254 P. 725, 122 Okl. 282.

S.C.—Ingram v. Davis, 125 S.E. 920, 131 S.C. 326.

Tex.—G., C. & S. F. Ry. Co. v. Taylor, Civ.App., 101 S.W.2d 642—Texas & N. O. R. Co. v. Hellen, Civ.App., 47 S.W.2d 1112—St. Louis, B. & M. Ry. Co. v. Murray, Civ.App., 40 S.W.2d 949—Texas & N. O. R. Co. v. Miller Bros., Civ.App., 22 S.W.2d 988—Texas Mexican Ry. Co. v. Canales, Civ.App., 299 S.W. 668—Kansas City, M. & O. Ry. Co. v. Cauble, Civ.App., 286 S.W. 478—Galveston, H. & S. A. Ry. Co. v. Neville, Civ.App., 272 S.W. 597—Galveston, H. & S. A. Ry. Co. v. Friedrichs, Civ.App., 252 S.W. 346—St. Louis, B. & M. Ry. Co. v. Sutherland, Civ.App., 207 S.W. 982.

Va.—Southern Ry. Co. v. Finley & Seymour, 102 S.E. 559, 127 Va. 132.

10 C.J. p. 379 note 28

Corpus Juris quoted or cited.

La.—Bowie Lumber Co. v. Yazoo & M. V. R. Co., 131 So. 689, 690, 14 La.App. 454.

Neb.—Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry. Co., 179 N.W. 503, 504, 105 Neb. 151.

S.D.—Bates v. American Ry. Express Co., 187 N.W. 634, 635, 45 S.D. 373, distinguishing Peterson v. Chicago, M. & St. P. Ry. Co., 102 N.W. 595, 19 S.D. 122.

"The general rule . . . has its foundation in the fact that the subject matter of the transportation contract is committed to the exclusive possession of the carrier, and he alone is in position to know and to disclose the cause of injury thereto on transit. The shipper is wholly without such knowledge, and must submit to his loss unless the carrier be required by the law to explain the occasion thereof and to exonerate himself from blame."—Zimmerman v. Northern Pac. Ry. Co., 167 N.W. 546, 140 Minn. 212.

This presumption is not evidence and expires when sufficient evidence is introduced of the facts out of which the damage arises to support a finding that it was from a cause for which the carrier would not be liable.—Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry. Co., 179 N.W. 503, 105 Neb. 151.

The Carmack amendment, 49 U.S.C.A. § 20, by reestablishing the common-law rule of liability on interstate shipments of live stock, relieved the carrier of liability as insurer, but a prima facie case is made by showing receipt of stock by carrier in good condition and delivery at destination in bad condition, and the negligence of the carrier is presumed when such prima facie case is made.—Panhandle & S. F. Ry. Co. v. Andrews, Tex.Civ.App., 278 S.W. 478.

Plaintiff need not prove what specific acts the carrier did or failed to do which resulted in the death of a hog in transit.—Buck v. American Railway Express Co., 192 N.W. 277, 109 Neb. 638.

Carrier may rebut presumption

Carrier by affirmative evidence may rebut presumption of negligence arising from delivery to it of cattle in good condition and delivery at destination of cattle in bad condition.—Texas & N. O. R. Co. v. East, Tex.Civ.App., 57 S.W.2d 175.

Sufficiency of evidence to overcome presumption

(1) Where death from natural causes of an animal in transit is pleaded as an excuse, the carrier must show that death was the result of natural causes, and that the disease was contracted through no fault of the carrier, and evidence of proper feeding and watering at certain points does not conclusively rebut the presumption of the carrier's negligence.—Ragsdale-Lawhon Mule & Horse Co. v. Davis, 119 S.E. 428, 30 Ga.App. 752.

(2) Presumption of negligence against a carrier from the arrival of a shipment of cattle, which had been unaccompanied, in an injured condition is rebutted by showing that there was no delay in handling the cattle and that they were transported without negligence.—Leon v. Hines, Tex.Civ.App., 223 S.W. 239.

(3) A shipper's prima facie case for loss of hogs in transit made by proof of delivery to a carrier in good condition and death of some of them when delivered by the carrier was not overcome by evidence that they died from congestion of the lungs, it not appearing that was the sole cause of death.—Hartford Fire Ins. Co. v. Payne, App., 243 S.W. 357, certiorari quashed State ex rel. Hartford Fire Ins. Co. v. Trimble, 250 S.W. 393, 298 Mo. 418.

(4) A prima facie showing of negligence of the carrier in action for damages to live stock shipped is not met by proof that the cattle when shipped were securely tied by the shipper, and while in the exclusive charge of the carrier became untied.—San Antonio & A. P. Ry. Co. v. Jackson & Allen, Tex.Civ.App., 187 S.W. 488.

(5) Train records and notations of no rough handling, made by the carrier's freight train conductor and confined to the breaking of, or damage to, some part of a car or the parting of the train, are of little pro-

in the bill of lading or contract of shipment relieving the carrier from liability for injury unless caused by its negligence,[76] or providing that the burden shall be on the shipper to prove that the carrier was negligent.[77] In some decisions the rule is laid down even more broadly, it being stated that proof that live stock delivered to the carrier was lost or injured while in its possession throws on the carrier the burden of showing that the loss or injury was not due to its negligence.[78]

Extent and qualifications of rule in general. While it is necessary, in order to raise the presumption of negligence on the part of the carrier, for plaintiff to show that the live stock was delivered to the carrier in good condition,[79] such rule does not apply where plaintiff charges specifically that the stock was damaged by some act of negligence done after its receipt by the carrier, such as exposure thereof to a storm.[80] There is no presumption against the carrier where it appears that the consignee, in receiving the shipment and paying the freight charges, executed a written receipt therefor as "in good order," and there was then no visible indication to the contrary;[81] and if the carrier proves that live stock was delivered to it for shipment in a damaged condition the burden is on plaintiff to show that the carrier was negligent.[82] Although plaintiff in a common-law action need not in the first instance prove negligence on the part of the carrier but may wait until the carrier pleads and proves facts tending to bring the loss or injury within one of the exceptions to a carrier's common law liability,[83] yet, where the carrier meets the burden of proving, or the evidence shows prima facie, that the loss or injury resulted from a cause excepted in the shipping contract, the burden is on plaintiff to prove that the carrier was negligent.[84] Also, in accordance with the rule already discussed in § 79 that the carrier is relieved from liability if he has provided suitable means of transportation and exercised that degree of care which the nature of the property requires, or has not otherwise contributed to the injury, if the carrier shows such facts he need not go further and make a specific showing that the injury was actually caused by one of excepted causes exempting him from liability.[85]

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bative force to rebut the presumption of negligence arising from the unexplained injury to live stock in transit, since there might be much rough handling indicated by such records.—Daily v Chicago, St. P., M & O. R. Co., 194 N.W 676, 110 Neb. 481.

A Louisiana statute, Civ.Code art 2754, making carriers liable for loss or injury unless caused by accidental or uncontrollable events, does not render a railroad liable for death of a horse in transit because it fails to show the cause of death, where the horse is carried under bill of lading providing that railroad should not be liable for death unless caused by its negligence, as to which there was no evidence—McHenry Horse Exch. v. Illinois Cent. R. Co., 86 So. 649, 148 La. 49

76. Md.—Bloecher & Schaaf v. Pennsylvania R. Co., 160 A 281, 162 Md. 463.

77. Mo—Shaffer v American Ry Express Co, App., 282 S W 725—Long v American Ry Express Co, App., 274 S W 906.

78. Ala.—Atlantic Coast Line R Co. v. J. S. Carroll Mercantile Co, 97 So. 904, 210 Ala 284.
Ark.—Missouri Pac. R Co. v. Martindale, 213 S W. 177, 139 Ark 143
N C.—Davis Live Stock Co v Davis, 124 S.E 157, 188 N C 220—Barden v. American Ry Express Co, 106 S.E 462, 181 N.C. 483—Osborne v. Southern R. Co, 96 S E 34, 175 N C. 594—Teeter v. Southern Express Co., 90 S.E. 761, 172 N C 616, reargument denied 90 S E 927, 172 N.C. 620.
10 C J. p 380 note 29

Negligent delay
Shipper suing carrier for negligent delay makes prima facie case by showing loss or injury in transit, shifting burden to carrier to acquit itself of negligence.
Ala—Louisville & N R Co. v Kinney, 127 So 804, 221 Ala 136.
Ark—Missouri Pac. R Co v. Martindale, 213 S W. 777, 139 Ark 143.

79. Md—Bloecher & Schaaf v. Pennsylvania R. Co, 160 A 281, 162 Md 463.
Minn—Garbisch v. American Ry Express Co, 225 N W. 432, 177 Minn. 494.

80. Iowa—McNamara v. Chicago, R. I & P. Ry. Co., 165 N W 1008, 183 Iowa 577

81. Ga—Hogg v. Louisville & N. R Co, 127 S E 830, 33 Ga App. 773
Corpus Juris is cited with relation to this proposition in Hogg v Louisville & N. R. Co, supra.

82. Tex—Jones v. Galveston, H. & S A Ry. Co., Civ.App, 193 S W 373

83. Mo—Mourer v. Wabash Ry. Co, 280 S.W 1050, 222 Mo App. 495—Erisman v. Wabash Ry. Co., App, 243 S.W 237.

84. Me—Grant v. American Ry. Express Co., 139 A. 784, 126 Me 489—Morse v. Canadian Pac. Ry. Co, 53 A. 874, 97 Me. 77.
Mo—Mourer v. Wabash Ry. Co., 280 S.W 1050, 222 Mo App. 495.
S C.—Sweeney v. Southern Ry. Co, 163 S E. 838, 165 S.C. 380.

Delay due to strike
Where the carrier showed that a delay causing injury to live stock was due to a strike, within a contract exempting it from liability for losses caused by strikes, the burden was on plaintiff to show the carrier's negligence in connection with such strike and delay—Mourer v. Wabash Ry Co, 280 S W. 1050, 222 Mo.App 495

85. Ariz—Southern Pac. Co. v. Itule, 74 P.2d 38.
10 C.J. p 380 notes 30, 31.

Corpus Juris is quoted in Bowie Lumber Co v Yazoo & M V. R. Co, 131 So. 689, 690, 14 La App. 454.

Different quantum of proof
"We think this apparent exception to the general rule is, in reality, only a recognition of the different quantum of evidence required to establish the same defense under different circumstances It is a well-known fact that the majority of inanimate objects, when they are delivered to the carrier in good condition, will almost invariably remain in the same state until they reach the consignee at the end of the route, in the absence of some human instrumentality which injures them. Such being the case, it is but reasonable that, in case such objects arrived in a damaged condition, the carrier should prove affirmatively the damage was caused by one of the

Showing loss or injury due to human agency. In some cases, even in jurisdictions where the general rule is approved, a qualification or limitation has been made to the effect that, inasmuch as the carrier is not liable for the death of animals during transportation due to natural causes or to their inherent vice or natural disposition, mere proof that the animals died while in the possession of the carrier is not sufficient to establish liability, but the evidence must further show that the loss was due to human agency,[86] after which showing the carrier has the burden of proving due diligence on its part.[87] No presumption of negligence, it has been held, arises against the carrier from mere injury as arises in the case of inanimate objects;[88] but where this view prevails it is said that the burden on plaintiff is sustained by very slight proof, and may be established by collateral circumstances affording a reasonable inference of negligence on the carrier's part.[89]

Where specific negligence is charged. Another exception to the general rule, as held in a number of cases, is that the presumption of negligence arising from the receipt of live stock by the carrier in good condition and the delivery thereof in bad condition, does not apply where plaintiff alleges specific acts or omissions as constituting negligence, instead of relying on the carrier's liability as insurer;[90] in such case plaintiff has the burden of proving negligence of the carrier causing or contributing to the damage,[91] and mere proof of injury in transit will not make a prima facie showing of negligence so as to cast on the carrier the burden of disproving negligence;[92] but, where plaintiff makes a prima facie showing of negligence, the burden is on the carrier to prove its freedom from negligence.[93]

Sickness of live stock. An important limitation on the general rule, recognized by some decisions, is

four things above set forth, since they were the only matters which released it from the obligation of an insurer imposed on it by public policy. For instance, a plate glass mirror, which is in good condition, will remain so indefinitely unless injured by an act of God or some human violence applied thereto directly or indirectly. And, since the carrier is in the exclusive possession of the goods during their carriage, it is in the best position of any one to show affirmatively the real cause of the damage. It is apparent, however, that animate objects, such as livestock, are in an entirely different category They may be injured, or even killed, by acts arising out of their own inherent nature and unaccompanied by any human agency or negligence. Even with the best of care on the part of all who come in contact with them during the shipment, they often fail to arrive at their destination in good condition. The apparent exception is merely a recognition of this fact, and, if the carrier proves the exercise of due care on its part, the natural presumption is that the damage was caused by the nature of the animals, and not by any human agency."—Southern Pac. Co. v. Itule, Ariz, 74 P.2d 38, 41.

86. Iowa—Nugent v. Chicago & N. W. Ry. Co., 166 N.W. 592, 183 Iowa 1073.
Mo—Moran v. Chicago, B. & Q. R. Co., App., 255 S.W. 331—Byrum v. Chicago & A. R. Co., App, 226 S.W. 91.
10 C.J. p 380 note 34.

87. Iowa—McCoy v Wabash Ry. Co., 231 N.W. 353, 210 Iowa 1075
Mo—Moran v Chicago, B. & Q. R Co., App., 255 S.W. 331.

If condition of animal suggests injuries from external violence during transportation, and evinces a condition not usually attendant on carriage with due care, it is sufficient to repel presumption pertaining to proper vice, and to cast burden on carrier of showing no negligence—Morrow v. Wabash Ry. Co, 265 S.W. 851, 219 Mo.App. 62.

88. Pa—Maiorano v. American Ry. Express Co, 86 Pa.Super 88—Bair v. Adams Express Co., 66 Pa Super. 106—Blackburn v. Adams Express Co., 43 Pa.Super. 276, affirmed 79 A 760, 230 Pa 635

89. Mo.—Byrum v. Chicago & A. R. Co., App., 226 S.W. 91—Cunningham v. Wabash R. Co., 149 S.E. 1151, 167 Mo.App 273.
10 C.J. p 381 note 36.

90. Mo.—Vaughn v. St. Louis-San Francisco Ry Co, 15 S.W.2d 901, 223 Mo.App. 732—Howell v. Hines, App., 227 S.W. 619—Schade v. Missouri Pac. R. Co, 221 S.W. 146, 204 Mo.App. 88.
Tex.—Hines v. Whiteman, Civ.App., 228 S.W. 979.

91. Me—Edwards v. American Ry Express Co., 148 A. 679, 128 Me. 470
Mo—Cole v. American Ry. Express Co, 68 S.W.2d 736, 228 Mo.App 78—Sinclair v. Missouri, K & T Ry. Co, App, 253 S.W. 380—Sullivan v American Ry Express Co., 245 S.W. 375, 211 Mo.App 123—Rhodes v. Missouri Pac. R. Co., App, 234 S.W. 1026
Tex—Panhandle & S F Ry. Co v Key, Civ.App., 20 S.W.2d 260.

92. Mo.—Cloyd v. Wabash Ry. Co., App, 240 S.W 885—Robinson v. Bush, 200 S.W. 757, 199 Mo App 184.

93. Cal.—Murray v. Southern Pac. Co, 265 P. 337, 89 Cal App 741.

Evidence sufficient to put burden on carrier

(1) Evidence of failure to sand floors of cattle car and of violent jerking was held sufficient to place burden on carrier of showing freedom from negligence—Murray v Southern Pac. Co., 265 P. 337, 89 Cal. App. 741.

(2) In an action to recover damages for injury to a horse which was being carried in a railroad car, that proof that the injury was occasioned by a sudden stopping of the car, so violent that a wooden bar in front of the horse was broken in two, and two halters secured to the top of the car were snapped, and the horse was thrown down and his back broken, and that employees of the company at once entered the car to see if injury had been done, raises a presumption of negligence on the part of the company.—Newman v Pennsylvania R. Co, 53 N.Y.S. 456, 33 App Div. 171, 27 N.Y.Civ Proc 377

In Missouri, under L.1913 p 177, proof of carrier's failure to transport live stock within a reasonable time is prima facie proof of negligence, and the burden is then on the carrier to show that its failure was not due to its negligence; but this statute does not apply to interstate shipments, and in such cases the burden is on plaintiff not only to show delay, but to show a negligent delay—Cunningham v. Chicago & A R Co., App., 215 S.W. 5—Berry v Chicago & A. R. Co., App., 208 S W 622—Baker v. Bush, App., 194 S W. 1061.

that where a recovery is sought for the sickness of live stock in transit, or from death resulting from sickness the fact that the stock was apparently sound when delivered for shipment raises no presumption of negligence, but the burden is on plaintiff to prove the carrier's negligence,[94] and that such negligence was the proximate cause of the damage,[95] the reason for this exception to the general rule being that sickness of live stock, or death from sickness, may be due to a diseased condition existing at the time of or prior to its delivery to the carrier, although not discovered by its owner or the carrier, or may be due to atmospheric, climatic, or other conditions over which the carrier has no control, and for which it would not be responsible.[96] So, where plaintiff averred failure of the carrier to furnish clean cars, as required by a rule of the state sanitary stock commission, whereby live stock became sick and died, and the carrier charged that the stock became infected before the shipment began, the burden is on plaintiff to prove his averment.[97]

Effect of provisions in bill of lading. Where a shipping contract stipulates that, as a condition precedent to recovery for loss of, or injury to, animals shipped, the shipper must prove that the loss or injury was due to the carrier's negligence, the burden is on the shipper, and the doctrine of res ipsa loquitur does not apply;[98] but, where the carrier departs from the agreed route, it has the burden of proving, notwithstanding such stipulation, not only due care on its part, but also that the loss or injury was not due to the change of route.[99] So, although the contract places on the shipper the burden of proving negligence, where there is an unreasonable delay sufficient to raise an inference of negligence on the part of the carrier, the burden shifts to the carrier to show that the delay was beyond its control.[1]

(2) Stock Accompanied by Shipper

It is a general rule, with some exceptions and qualifications, that where the owner undertakes to accompany live stock for the purpose of caring therefor, the burden is on him to show that loss of, or injury to, the stock was due to the carrier's negligence. Ordinarily the burden is on a shipper accompanying live stock to show that loss of, or injury to, the stock was not caused by his negligence.

Although there is some authority to the contrary,[2] the general rule is that, where by special agreement the owner of stock or his agent accompanies the shipment for the purpose of giving care and attention to the stock, the burden is on the owner, in an action for damages for loss or injury alleged to be due to the negligence of the carrier, to prove that the loss or injury was the result of the carrier's negligence, either in transporting the stock or in failing to afford facilities for caring therefor,[3] in

94. Ky.—Georgia, S. & F Ry Co. v. Makeever, 15 S.W.2d 293, 228 Ky. 492—Louisville & N. R. Co. v. Taylor, 205 S.W. 934, 181 Ky. 794.
Md.—Bloecher & Schaaf v. Pennsylvania R. Co, 160 A. 281, 162 Md 463—Baltimore & O. R Co. v. Dever, 75 A. 352, 112 Md. 296, 26 L. R A.,N.S., 712.
Mo —Vaughn v. St. Louis-San Francisco Ry. Co, 15 S.W.2d 901, 223 Mo.App. 732—Bragg v. Payne, App., 235 S.W. 148.
10 C.J. p 380 note 32.
Corpus Juris is quoted in Chicago, L & L Ry. Co v. Blankenship, 127 N E. 209, 212, 77 Ind App. 225, as sustaining the rule with reference to sick or diseased animals when delivered at destination.

95. Ky.—Georgia, S & F Ry. Co. v. Makeever, 15 S.W.2d 293, 228 Ky. 492.

96. Mo.—Vaughn v. St. Louis-San Francisco Ry. Co., 15 S.W.2d 901, 223 Mo App. 732.

97. Tex.—Clampitt v. St. Louis Southwestern Ry. Co. of Texas, Civ App., 185 S.W. 342, error refused.

98. N.H.—J. F. Bell & Sons Co v. American Ry. Exp. Co., 149 A. 497, 84 N.H. 273.

99. N Y.—Ely v. Barrett, 168 N.Y S. 419, 181 App Div. 176, appeal dismissed 120 N.E 60, 224 N.Y. 550.

1. Tenn —Louisville & N. R Co. v. Montgomery, 188 S.W. 1146, 136 Tenn. 171.

2. S.C —Crawford v. Southern R Co., 34 S.E. 80, 56 S C. 136—Johnston v. Richmond, etc., R. Co., 17 S E 512, 39 S C. 55—Wallingford v. Columbia, etc., R. Co, 2 S.E. 19, 26 S C. 258.

3. Ark —Arkansas Western Ry. Co v. Robson, 285 S W. 372, 171 Ark. 698.
Iowa —Vander Beek v. Chicago & N W. Ry. Co., 278 N.W. 201—Wiederin v. Chicago & N. W. Ry. Co, 237 N W 344, 212 Iowa 1103—Vincent, Albin & Strahl v. Hines, 200 N W. 1, 198 Iowa 1224—Gibson v. Adams Express Co., 175 N.W. 331, 187 Iowa 1259.
Mont —Kirby v. Oregon Short Line R Co., 197 P. 254, 59 Mont. 425.
Neb —Egan v. Chicago, B. & Q R. Co, 191 N.W. 708, 109 Neb. 567—Starr v. Chicago, B. & Q. R. Co., 173 N.W 682, 103 Neb. 645
S D —Sheehan v. Minneapolis & St. L R Co, 193 N.W. 597, 46 S.D. 429.
Tex.—Chauncey v Kansas City, M & O. Ry. Co., Civ App., 32 S.W.2d 369—Houston E. & W. T Ry Co. v. Southern Pine Lumber Co., Civ. App , 6 S.W 2d 418—Ft. Worth & D. C. Ry. Co. v. Allen, Civ.App, 189 S W. 765.
Utah.—Byram v. Payne, 201 P 401, 58 Utah 536, 18 A L R 1110
Wis —Chamson v. American Ry Express Co., 189 N.W. 529, 178 Wis. 286.
10 C J. p 381 note 38, p 382 notes 39, 40
Corpus Juris is cited in support of this rule.
Idaho.—Lane v. Oregon Short Line R. Co., 198 P. 671, 34 Idaho 37, 15 A.L R 197.
Kan.—Abell .v. Missouri Pac R Co., 243 P. 1031, 1032, 120 Kan. 362, rehearing denied 244 P. 1044, 120 Kan. 553.
Minn —Zimmerman v. Northern Pac. Ry. Co., 167 N.W. 546, 140 Minn. 212.

Extent of burden
Shipper accompanying shipment had to establish that he could not observe car containing horses at place where injuries occurred before burden shifted to carrier to show lack of negligence.—Cooper v. Oregon Short Line R. Co., 262 P. 873, 45 Idaho 313.

the absence of a statute to the contrary;[4] there being no presumption of negligence from the fact that live stock was in good condition when shipped and in bad condition at destination, or from mere proof of injury.[5] The reason for this is that the shipper is in as good a position as the carrier to know what was the cause of the loss or injury and whether such loss or injury was the result of the carrier's negligence.[6] The burden of showing the reasonableness of a demand by the shipper that live stock which had become unmanageable be unloaded at an intermediate point is on plaintiff.[7]

Extent and qualifications of rule. The rule placing the burden on the owner accompanying the stock to prove the carrier's negligence obtains where the consignor agreed to accompany the shipment, but failed to do so,[8] although it has been held otherwise where the carrier knew that he was not accompanying the shipment pursuant to his agreement.[9] The fact that the owner accompanying the shipment was not negligent does not operate to relieve him of the burden of proving that the injury to the stock was due to the carrier's negligence.[10] So it has been held that a statute which requires carriers to furnish shippers of live stock free transportation to and from destination does not alter the rule that no presumption of the carrier's negligence arises from the injury of live stock in transportation, where in accordance with the shipping contract the shipper accompanies the shipment.[11] Nevertheless it has been held that the mere fact that the shipper accompanies the shipment will not place on him the burden of proving negligence on the part of the carrier where there is no proof that he assumed the duty of taking care of the stock shipped,[12] the presumption, in such case being that the carrier accepted the shipment under its full common-law liability for the safe transportation thereof, so as to place on it the burden of showing freedom from negligence.[13] Moreover, where injury to cattle is caused by delay in transportation it is not to be presumed that the caretaker, concerned with the duty of keeping the cattle on their feet and preventing unnecessary damage thereto, would be charged with notice of the reasons for the various delays, and be required to show that such delays were negligent, since unexplained and unusual delays in transporting cattle would raise a presumption, or make a prima facie case, of negligence on the part of the carrier,[14] casting on it the burden of proving a legal excuse.[15] If the presence of a caretaker, or his acts or conduct, prevented the carrier from in any manner discharging its duties as a common carrier, the burden of proving such matters, it has been held, is on the carrier.[16] The general rule placing the burden of proof on a shipper accompanying the live stock has no application where the shipper is not afforded an opportunity to accompany the stock;[17] nor is the rule applicable where the loss or injury was not caused by the shipper's failure to perform his agreement to care

4. Statutory provisions

Under Code Suppl 1913 § 2116, as amended, declaring that, in an action against a railroad corporation to enforce rights under the statute, the burden of proving that the statute has been complied with by the railroad corporation shall be on such corporation, the fact that the shipper accompanies the stock does not relieve the carrier of the burden of proof—Mackin v. Minneapolis & St L. R Co., 157 N.W. 729, 176 Iowa 150.

5. Idaho.—Cooper v Oregon Short Line R. Co., 262 P. 873, 45 Idaho 313.
Minn.—Zimmerman v Northern Pac Ry. Co, 167 N W. 546, 140 Minn 212
Tex.—Panhandle & S F R Co. v. Ross, Civ App 80 S W 2d 427—Chauncey v. Kansas City, M. & O Ry. Co, Civ App, 32 S W 2d 369—Texas & N O R. Co. v Conn, Civ App, 30 S.W 2d 939
Wis.—Chaimson v. American Ry. Express Co., 189 N W. 529, 178 Wis 286

6. Idaho—Cooper v. Oregon Short Line R. Co., 262 P. 873, 45 Idaho 313.
Iowa—Gibson v Adams Express Co., 175 N W. 331, 187 Iowa 1259.
Minn—Zimmerman v. Northern Pac Ry. Co., 167 N.W 546, 140 Minn 212
S D—Bates v. American Ry. Express Co, 187 N W 634, 45 S D. 373
Wis—Chaimson v. American Ry Express Co, 189 N W. 529, 178 Wis 286
10 C J. p 382 note 41.

7. La.—Regan v. Adams Express Co, 22 So 835, 49 La.Ann 1579

8. S D—Mix v Chicago, etc, R Co., 149 N.W. 727, 34 S.D. 613

9. Okl—Davis v. Miller, 232 P. 75, 105 Okl. 158.

Statement of rule

Where a shipment of live stock is made under a special contract providing that the shipper will care for the animals and attend to feeding and watering them, and the carrier is aware that the shipper is not accompanying the animals to care for them and undertakes to feed and water them, the special contract does not change the general rule that proof of delivery to carrier in good condition and delivery by the carrier at destination in bad condition makes a prima facie case of negligence and the burden is on defendant to overcome such prima facie case—Chicago, R. I. & P. Ry. Co v W. T Hales & Co, 214 P 170, 89 Okl 130

10. Iowa.—Hanley v Chicago, etc, R Co., 134 N W 417, 154 Iowa 60

11. Ark—Arkansas Western Ry. Co. v. Robson, 285 S W 372, 171 Ark. 698—St. Louis, etc., R. Co v. Wells, 99 S.W. 534, 81 Ark 469.

12. Tex.—G., C. & S F Ry. Co. v Taylor, Civ.App., 101 S W 2d 642—Texas, etc, R. Co v Dishman, 85 S.W. 319, 38 Tex Civ.App. 277.

13. Tex—G., C & S F Ry Co. v. Taylor, Civ.App, 101 S W.2d 642.

14. Tex—Kansas City, M. & O Ry Co v. Cauble, Civ.App., 286 S W. 478.
Wyo—Davis v. Graham, 225 P. 789, 31 Wyo. 239.

15. Wyo.—Davis v. Graham, supra.

Burden of overcoming prima facie case not sustained

Wyo—Davis v Graham, 225 P. 789, 31 Wyo. 239.

16. Mont—Nelson v Great Northern R Co, 72 P. 642, 28 Mont 297.

17. Tex.—Texas, etc, R. Co. v. Tomlinson, Civ.App., 166 S.W. 446.

for the stock, and the presumption of the carrier's negligence arising from proof of loss or injury of stock while in the carrier's control is not affected by an agreement that plaintiff, given free transportation, agreed to care for the stock, where the damage was not caused by his failure to perform his agreement, especially where for a time during the transportation plaintiff was not in attendance on the stock, which was during such period in the complete control and custody of the carrier.[18] It has also been held that the doctrine that, where a caretaker accompanies a live stock shipment, no presumption obtains, in the absence of proof of how the injury to the stock occurred that it was due to the carrier's negligence, does not apply where the attendant shows that there was rough handling of the stock and an inexcusable delay in transit, from which a presumption of injury therefrom arises, and the carrier offers no evidence to contravene such presumption,[19] and that, where the carrier violates a provision of a statute prescribing the length of time that live stock may be confined without unloading, feeding, and watering, a presumption of negligence on the part of the carrier arises, casting on it the burden of showing a legal excuse for such violation.[20] On the same principle, where the carrier fails to comply with the contract of shipment requiring live stock to be unloaded, fed, and watered after a specified period of confinement, the carrier has the burden of proving that it was not negligent in this respect.[21]

Burden of showing absence of negligence of caretaker. Where by agreement the shipper accompanies the stock for the purpose of taking care of it during transportation, the burden is on him in an action for loss or injury to show that such loss or injury was not due to any negligence on his part in the performance of the duties assumed by him,[22] since he assumes duties as fully and explicitly as does the carrier;[23] but where the shipper shows the performance of the things he undertook to do and that the stock was not injured by anything he was to do or did, and that it was delivered in bad condition on reaching the point of destination, the inference that the injury was the result of the carrier's negligence is justified, and the carrier must meet such case by evidence.[24]

1. Damages

The burden is on the plaintiff to prove the amount and extent of damages, but where the defendant alleges a stipulation fixing the market value of the property at the time and place of shipment, and the plaintiff establishes a different market value, the burden is on the defendant to show the correct value. The burden is also on the defendant to prove matters in reduction of damages.

In an action for the loss of, or injury to, property while in the possession of a carrier for transportation, the burden is on plaintiff to prove not only that damages resulted from the loss or injury,[25] but also to show, with reasonable certainty,[26] the amount and extent of such damages,[27] and his failure to establish the measure of damages is fatal to a recovery.[28] So, where the damage is partial only, the burden is on plaintiff to present evidence

18. N C—Barden v. American Ry. Express Co., 106 S E 462, 181 N C 483

19. Tex—Ft. Worth, etc, R Co v Montgomery, Civ App, 141 S W 813.

20. Wyo—Davis v Graham, 225 P. 789, 31 Wyo. 239.

21. Wyo—Worland v. Davis, 223 P 227, 31 Wyo 108

22. Tex—Kansas City, M. & O Ry Co of Texas v. James, Civ.App, 190 S.W 1136.
10 C J p 382 note 48.

23. Ind.—Terre Haute, etc, R Co v. Sherwood, 31 N E 781, 132 Ind 129, 32 Am S R. 239, 17 L R A. 339

24. Iowa—Mosteller v Iowa Cent. R Co 133 N.W. 748, 153 Iowa 390.
Minn—Cole v Minneapolis, etc, R Co., 134 N W. 296, 117 Minn 33.

25. Ala—Louisville & N. R Co v. Hendricks, 171 So. 273, 233 Ala. 259
Tex—Kansas City, M. & O Ry Co. v McMullen, Civ App., 19 S.W 2d 98, error dismissed

26. U S.—Baltimore & O. C. Terminal R. Co v Becker Milling Mach. Co, C C A Ill, 272 F 933
Mont—Kirby v Oregon Short Line R Co, 197 P 254, 59 Mont 425.
Va—Southern Ry. Co v Burton & Briel, 141 S E 113, 149 Va. 364

27. U S—Ohio Galvanizing & Mfg Co v Southern Pac. Co, C.C A Ky, 39 F 2d 840, certiorari denied 51 S Ct 83, 282 U S 879, 75 L Ed 776
Idaho—Gray v Oregon Short Line R Co, 187 P 540, 32 Idaho 701
Ill.—Mueller Grain Co v Lake Erie & W R Co, 213 Ill App 108.
Neb—Nye-Schneider-Fowler Co v Chicago & N. W. Ry. Co, 182 N W 967, 106 Neb. 149.
Tex—Kansas City, M & O Ry Co v McMullen, Civ App, 19 S.W.2d 98, error dismissed.

Burden not sustained

In action against carrier for loss of baled cotton by fire, plaintiff had the burden of showing the amount of his damage, which was not discharged by evidence failing to show the grade of the cotton or number of pounds destroyed—Brass v. Texarkana & Ft. Smith Ry. Co, 218 S.W 1040, 110 Tex. 281, reversing Texarkana & Ft S Ry. Co v Brass, Civ. App, 175 S W. 778

Shrinkage in weight of grain

In an action against a carrier for loss of grain shipped, where evidence is introduced to show that grain would shrink in weight during shipment, owing to loss of moisture content, mere discrepancy in weight before and after shipment cannot be relied on alone to prove actual loss, and the burden of showing the shrinkage and of making allowance therefor is on the shipper—Nye-Schneider-Fowler Co. v Chicago & N W Ry. Co., 182 N W. 967, 106 Neb. 149

Loss in weight of live stock

Where loss in weight of live stock is claimed as a result of delay in starting a shipment which arrived at its destination within a reasonable time after loading, the burden is upon the shipper to show that upon its arrival it weighed less than it would have weighed if the delay had not occurred.—Gray v Oregon Short Line R. Co, 187 P. 540, 32 Idaho 701.

28. Tex.—Dickerson v. San Antonio, etc., R. Co., Civ.App., 170 S.W 1045.

from which the exact amount of damages may, with reasonable certainty, be determined.[29]

As affecting the damages recoverable for the loss of or injury to property, the burden of proof is on plaintiff to show the value of the goods;[30] and, if the action is based on contractual liability, this principle applies whether the contract is considered as fixing the measure of damages or as limiting defendant's liability.[31] Under the Interstate Commerce Act providing that the value of interstate shipments declared by the shipper shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared, the burden is on the shipper suing for loss or injury to prove the true value of the goods, since the carrier is not bound by the declared value.[32] Where defendant sets up as a defense a stipulation fixing the market value of the property at the place and time of shipment, and plaintiff establishes a market value not in accordance with the stipulation, the burden is on defendant to show the correct one if prejudiced by plaintiff's estimate.[33] The rule has been laid down that goods are presumed to be worth as much or more at the place of destination as at the point of shipment, until the presumption is rebutted by proof.[34] Where it appears that most of the damage was done before the act of negligence by the company on which the claim for recovery is based, plaintiff must show what injury, if any, resulted after the act.[35]

Special damages. The burden is on plaintiff to prove special damages sought to be recovered,[36] and to show that such damages were contemplated by the carrier when the property was received for shipment.[37] If plaintiff seeks to recover as damages an amount alleged to have been expended for medicines and the care of injured live stock, he has the burden of establishing that such amount was reasonable and necessary.[38]

Reduction of damages; avoidable consequences. The burden is on the carrier to show that the consequences of the injury could have been avoided or the amount of damages reduced by the exercise of proper care on plaintiff's part.[39] The carrier also has the burden of establishing any offset which it claims against the damage to the property.[40]

29. Ga.—Southern Ry. Co. v. Black, 186 S.E. 779, 53 Ga.App. 701.

Value of damaged goods

If goods damaged had some value, and the evidence fails to furnish sufficient data from which a jury might infer such value, plaintiff cannot recover.—Atlantic Coast Line R. Co. v. Hogrefe, 141 S.E. 214, 37 Ga. App. 636—American Ry. Express Co. v. Dubois Bros., 111 S.E. 70, 28 Ga. App. 274—Southern Express Co. v. Bass, 102 S.E. 168, 24 Ga.App. 742.

30. U.S.—Seller v. The Pacific, D.C. Or., 21 F.Cas.No.12,644, Deady 17, 1 Or. 409.
N.Y.—Warshawsky v. Gates, 142 N.Y.S. 271.
Tex.—Gulf, C. & S. F. Ry. Co. v. Helms Bros., Civ.App., 210 S.W. 853.

Market value

(1) The burden is on plaintiff seeking to recover the value of an animal killed in transit to show the market value of the animal, if it had a market value.—Gulf, C. & S. F. Ry. Co. v. Mitchell, Tex.Civ.App., 261 S.W. 548.

(2) Where plaintiff sues for damages to perishable goods, the burden is on him to prove their market value on the day they were received by the consignee.—Railway Express Agency v. McCarrick, Tex.Civ.App., 69 S.W.2d 803.

Intrinsic value

Where live stock had an intrinsic value at destination after injury thereto, the burden is on plaintiff to show what that value was.—Gulf, C. & S. F. Ry. Co. v. Helms Bros., Tex.Civ.App., 210 S.W. 853.

31. N.Y.—Greenfield v. Wells, 134 N.Y.S. 913.

32. Pa.—Rothstein v. Railway Express Agency, 170 A. 406, 111 Pa.Super. 466.

33. S.C.—Gray v. Seaboard Air Line Ry. Co., 102 S.E. 512, 113 S.C. 345, certiorari dismissed Seaboard Air Line Ry. Co. v. Gray, 40 S.Ct. 218, 251 U.S. 566, 64 L.Ed. 417.

34. Ga.—Atlantic Coast Line R. Co. v. Stovall-Pace Co., 118 S.E. 62, 30 Ga.App. 326.

35. Mich.—Heller v. Chicago, etc., R. Co., 66 N.W. 667, 109 Mich. 53, 63 Am.S.R. 541.

36. U.S.—Crail v. Illinois Cent. R. Co., D.C.Minn., 2 F.2d 287, reversed on other grounds, C.C.A., 13 F.2d 459, reversed Illinois Cent. R. Co. v. Crail, 50 S.Ct. 180, 281 U.S. 57, 74 L.Ed. 699, 67 A.L.R. 1423.

37. Tex.—Houston, etc., R. Co. v. Brown, 76 S.W. 580, 33 Tex.Civ.App. 237.

38. Tex.—Panhandle & S. F. Ry. Co. v. Norton, Civ.App., 188 S.W. 1011.

39. Mo.—Hurley v. Illinois Cent. R. Co., 282 S.W. 97, 221 Mo.App. 478
N.Y.—Perkel v. Pennsylvania R. Co., 265 N.Y.S. 597, 148 Misc. 284

Plaintiff's negligence enhancing damages

Shippers, whose corn was damaged during shipment, are prima facie entitled to recover all damages sustained on showing negligence of carrier, and carrier has burden of proving negligence by which shippers enhanced damages, and extent of enhancement of such damages.—Hurley v. Illinois Cent. R. Co., 282 S.W. 97, 221 Mo.App. 478.

Damage to perishable articles

(1) Where the carrier claims that plaintiff, in order to mitigate the damages to a shipment of melons, was required to accept the melons, unload them, and in that way ascertain the number actually injured, the burden was on the carrier to show how such action by plaintiff would mitigate the damages.—Perkel v. Pennsylvania R. Co., 265 N.Y.S. 597, 148 Misc. 284.

(2) In action against railroad for injuries to grapes in transit wherein plaintiff showed that damaged grapes were disposed of by auction sale on railroad company's piers at place of destination in accordance with usage and custom of trade, railroad had burden of going forward with proof to show that disposition of damaged grapes in some other manner would have mitigated plaintiff's damages.—Schwalb v. Erie R. Co., 293 N.Y.S. 842, 161 Misc. 743.

40. Va.—Southern Ry. Co. v. Cohen Weenen & Co., 157 S.E. 563, 156 Va. 313

Credit for expenses

A claim for credit for costs of uncoopering and redrying damaged tobacco against gross damage is in nature of offset to be established by carrier.—Southern Ry. Co. v. Cohen

Where the carrier asserts as a defense that plaintiff had agreed to insure the goods against theft in consideration of lower rates for transportation, and had collected the insurance for the goods stolen, the burden of proving such defense is on the carrier.[41]

m. Miscellaneous Issues

The general rules affecting presumptions and burden of proof have been applied to various issues, other than those heretofore discussed, arising in actions against carriers for the loss of, or injury to, goods delivered to the carrier for transportation.

In an action under the Carmack amendment for loss of, or injury to, property transported from a point in one state to a point in another, it is presumed that a bill of lading was issued as the statute requires.[42] Where the petition alleges a contract for shipment, which contract is apparently valid, the burden of proving that the contract is in violation of the Interstate Commerce Law is on the carrier.[43] On the other hand, where the carrier alleges that cotton, which was burned while on its platform, was placed there by plaintiff in violation of a rule of the carrier, and plaintiff alleges that the rule had been waived, the burden is on him to prove such waiver.[44] In an action by the shippers of live stock for damage from breach of an express provision of the contract of carriage that the stock should not be unloaded at a certain point, it was incumbent on plaintiffs to prove that the contract contained the stipulation regarding unloading.[45] When a shipping contract recites that the shipper examined the car in which the stock was to be transported and found it safe and suitable for the intended purposes, the burden is on him to show that it was unsafe,[46] and that a defect alleged to have caused the injury was not patent when he examined the car.[47] In an action against an express company for the loss of goods, defended on the ground that the person receipting for the goods and wearing a cap and badge of the company was not its agent, the burden is on plaintiff to prove that such person was the company's agent.[48] The burden of proving an emergency justifying deviation is on the carrier.[49] The carrier also has the burden of proving that a loss, for which it would not have become liable except for a deviation, would have occurred had there been no deviation.[50] Where plaintiff relies on notice given by him to the carrier to divert a shipment, the burden is on him in an action for loss of the goods to prove that such notice was received by the carrier before delivery was completed.[51]

§ 255. Admissibility of Evidence

a. In general
b. Right of action
c. Contract of shipment
d. Delivery to, and acceptance by, carrier
e. Condition and identity of property
f. Negligence of carrier in general
g. Deterioration or other injury from delay
h. Acts or negligence of shipper
i. Proof of loss of property
j. Limitation of liability in general
k. Notice of claim
l. Damages

a. In General

The general rules as to the admissibility of evidence are applicable in actions against carrier for loss of, or injury to, property delivered to it for transportation.

In an action against a carrier for loss of, or injury to, goods, any evidence which is relevant and material to prove or disprove a particular issue is admissible, if competent under the general rules of evidence,[52] and, conversely, evidence which is ir-

Weenen & Co., 157 S.E. 563, 156 Va. 313

41. N.Y.—Levinson v. Morris Transfer Co., 186 N.Y.S. 563.

42. Ill.—Burtless v. Oregon Short Line R. Co., 180 Ill.App. 249.

43. Tex.—St. Louis, etc., R. Co. v. Birge-Forbes Co., Civ.App., 139 S.W. 3.

44. Tenn.—Nashville, C. & St. L. Ry. v. Mayo, 14 Tenn.App. 28.

45. Ala.—Nashville, C. & St. L. Ry. v. Farrell, 70 So. 986, 14 Ala.App. 380.

46. Ala.—Western Railway of Alabama v. Harwell, 8 So. 649, 91 Ala. 340.

47. Ga.—Williams v. Central of Georgia R. Co., 43 S.E. 980, 117 Ga. 830.

48. Mass.—Rudy v. American Ry. Exp. Co., 145 N.E. 454, 250 Mass. 351.

49. N.Y.—Le Sage v. Great Western R. Co., 1 Daly 306—Ackley v. Kellogg, 8 Cow. 223.
Pa.—Hand v. Baynes, 4 Whart. 204, 33 Am.D. 54.

50. N.Y.—Maghee v. Camden, etc., R. Transp. Co., 45 N.Y. 514, 523, 6 Am.R. 124—Ely v. Barrett, 168 N.Y.S. 419, 422, 181 App.Div. 176, appeal dismissed 120 N.E. 60, 224 N.Y. 550.

51. U.S.—Wilkinson & Carroll Cotton Co. v. Chicago, M. & G.R. Co., C.C.A.Tenn., 32 F.2d 553.

52. Ill.—See Bass v. Erie R. Co., 195 Ill.App. 508
Kan.—Parker Corn Co. v. Chicago, B. & Q.R. Co., 244 P. 240, 120 Kan. 484.
Pa.—Resnick & Cohen v. Firth, 73 Pa.Super. 604.

Schedules and rules of carrier
In suit for damage to interstate shipment, certified copy of carrier's schedules and rules as filed with interstate commerce commission, was admissible as against claim bill of lading controlled.—Breazeale v. American Ry. Exp. Co., 137 So. 585, 18 La.App. 59.

relevant or immaterial,[53] or which from its nature is incompetent under the general rules,[54] is inadmissible. In a suit against a carrier for loss of freight in a car loaded by plaintiff, but the keys thereof retained by agents of the company, it is not error to exclude evidence that it was the custom of the carrier not to be responsible for the conduct of its agents who held the keys, particularly if there was no notice of such custom brought home to plaintiff.[55] When the manner in which plaintiff's goods were loaded is shown by positive testimony, evidence as to the manner in which similar goods were usually loaded is inadmissible.[56]

b. Right of Action

Subject to the general rules of evidence, plaintiff may show that he is the owner of the goods lost or injured.

In an action for loss of or injury to goods in possession of a carrier, plaintiff consignor may show that he, and not the consignee, is the owner of the goods[57] and this may be proved by parol,[58] but, where in such action plaintiff produces a bill of lading, this constitutes an admission that the undertaking of the carrier is in writing, and parol proof that the goods were shipped by the shipper named therein as plaintiff's agent is inadmissible,[59] nor can plaintiff testify to the contents of the bill of lading in order to show that he was the owner, the bill not having been produced and no notice having been given to defendant to produce it.[60]

c. Contract of Shipment

Evidence which is relevant and material as to the existence and terms of the contract of shipment is admissible, and the contract itself may be admitted, provided it was signed by the plaintiff, or it may be proved by circumstantial evidence.

The published rules of the carrier, or the contract under which a service on its part is to be performed, are admissible in an action against the carrier for negligently failing to perform such service,[61] and the bill of lading, waybill, or receipt, evidencing such contract, is competent to prove that the goods described therein were delivered to the carrier for shipment, as stated infra subdivision d of this section. Where an action against a carrier for negligence was based on a written contract of carriage, and defendant alleged failure of plaintiff to comply with its terms, defendant was entitled to have the contract put in evidence and construed by the court, and it was error to exclude it,[62] but a contract not signed by plaintiff or his agent is properly excluded.[63] In an action for injury to a shipment, the contract of shipment may be proved by circumstantial evidence;[64] but, in an action for breach of a contract of carriage resulting in loss of the goods shipped, evidence that it was impracticable to carry such goods on ordinary cars was not admissible to show that such a contract was not made.[65] The bill of lading is the best evidence of

53. Ark.—Missouri Pac. R. Co. v. Bradley, 215 S.W. 668, 144 Ark. 641
Ill.—Mueller Grain Co. v. Lake Erie & W. R. Co., 213 Ill. App. 108
Mass.—Claff v. American Express Co., 125 N.E. 162, 234 Mass. 174
Mich.—Mosier v. American Ry. Express Co., 178 N.W. 81, 211 Mich. 19.
Tex.—Kansas City, M. & O. Ry. Co. of Texas v. Corn, Civ.App., 186 S.W. 807.

Evidence inadmissible

(1) In an action by consignee against carrier for loss of goods shipped, evidence of the receipt of shipments other than the one sued on, and what was done with them, was properly excluded as being irrelevant.—American Ry. Express Co. v. Stanley, 92 So. 642, 207 Ala. 355

(2) In action for damages to cattle in shipment, exclusion of conductor's reply to question whether any other claims were "put in at Fort Worth" for damages to cattle in other cars on same train was not error, in absence of showing that Fort Worth was place where claims, if any, would have been made.—St. Louis Southwestern Ry. Co. of Texas v. Hill Bros., Tex.Civ.App., 80 S.W. 2d 432.

Existence of insurance

In an action against a railroad company for destruction of a carload of household goods and merchandise, by fire alleged to have been caused by sparks from a passing locomotive, evidence that plaintiff had or thought he had considerable insurance on the property destroyed was improperly admitted, in the absence of any evidence indicating that plaintiff set the car on fire, or that he did not use reasonable diligence in extinguishing the fire.—Mount v. Louisville & N. R. Co., C.C.A.Ala., 287 F. 617.

54. Ky.—Gus Datillo Fruit Co. v. Louisville & N. R. Co., 11 S.W.2d 953, 226 Ky. 813.

Contract between carrier and third person

In action for cotton destroyed by fire after delivery to a warehouseman, with which consignee had made arrangements to receive the goods from defendant railway, there was no error in excluding contract between the railway company and the warehouseman under which the latter assumed responsibility for cotton delivered at its warehouse, plaintiff not being a party thereto.—Bush v. Southern Grocery Co., 208 S.W. 299, 137 Ark. 262.

55. Ga.—Central Railroad & Banking Co. v. Anderson, 58 Ga. 393.

56. Tex.—Gulf Coast Transp. Co. v. Standard Milling Co., Civ.App., 197 S.W. 874, reversed on other grounds, Com.App., 252 S.W. 751.

57. N.C.—Whittington v. Southern Ry., 90 S.E. 505, 172 N.C. 501.

58. Ind.—Harrison v. Hixson, 4 Blackf. 226.

59. Ala.—Peck v. Dinsmore, 4 Port. 212

60. Tex.—Texas Cent. R. Co. v. Fowler, Civ.App., 102 S.W. 732

61. Fla.—Atlantic Coast Line R. Co. v. Florida Fine Fruit Co., 112 So. 66, 93 Fla. 161, affirmed 113 So. 384, 93 Fla. 161, 171.

62. Okl.—Midland Valley R. Co. v. Ezell, 162 P. 228, 62 Okl. 109

63. Mo.—Dillen v. Wabash Ry. Co., App., 294 S.W. 439.—Johnson v. American Ry. Express Co., App., 245 S.W. 1071.

64. Tex.—St. Louis, etc., R. Co. v. Watkins, 100 S.W. 162, 45 Tex.Civ.App. 321.

65. Minn.—Ames v. First Div. St. Paul, etc., R. Co., 12 Minn. 412.

the contract of shipment.[66] In an action for injuries to a shipment of horses, an objection to a question, inquiring of the conductor whether any "exceptions" were noted on the bill of lading when the horses were turned over to him was properly sustained, since an answer to the question, if affirmative, would have been incompetent, as hearsay, and, if negative, would have shown nothing as to the condition of the horses on delivery to the consignee or as to how they were injured.[67] Where the form in a bill of lading to be filled out in case a caretaker accompanied the stock was not filled out, but the bill had a pencil notation "caretaker to W.," it was competent for the shipper to testify that he did not state to the carrier that he would accompany the stock, and did not know how the notation got on the bill.[68]

d. Delivery to, and Acceptance by, Carrier

Delivery of the goods to and acceptance of the carrier may be proved or disproved by any competent evidence, such as bills of lading or shipping receipts. The custom of the carrier with respect to the receipt of goods for immediate shipment may be shown.

Any competent evidence, relevant and material to prove or disprove the delivery and acceptance of the property to the carrier for transportation, is admissible.[69] Bills of lading, waybills, or shipping receipts are competent evidence to prove delivery for shipment of the articles therein described;[70] and, while it is not necessary to introduce the bill of lading when the action is for negligence in failing to deliver goods, and not in contract, the bill may nevertheless be received in evidence to show how the goods came into the carrier's possession.[71] A letter written by the carrier's agent after the destruction of the goods by fire stating that the carrier would not assume further responsibility for the freight is admissible to show knowledge on the part of the agent that the goods had been delivered for shipment.[72] So it has been held that, where goods delivered for immediate shipment have been lost by fire, evidence of the carrier's custom with respect to receipt of goods for immediate shipment is admissible.[73]

e. Condition and Identity of Property

Evidence is ordinarily admissible to show the condition of the property when received by the carrier, or upon arrival at destination; and, for the purpose of showing the true condition and extent of injury, evidence of the condition of the property when sold subsequent to its arrival has been admitted.

In an action for injury to property in transit, evidence is admissible to show the condition of the property at the time it was received by the carrier,[74] as to its condition before delivery by the

66. Ala.—Louisville, etc., R. Co. v. Moorer, 70 So. 277, 195 Ala. 344—Tallassee Falls Mfg. Co. v. Western R. Co., 23 So. 139, 117 Ala. 520, 67 Am. S. R. 179.
Ill.—American Fruit Growers v. San Antonio & A. P. Ry. Co., 239 Ill. App. 151.

67. Ala.—Louisville, etc., R. Co. v. Moorer, 70 So. 277, 195 Ala. 344.

68. Tex.—Panhandle & S. F. R. Co. v. Ross, Civ. App., 80 S.W. 2d 427.

69. **To show delivery**
(1) Testimony of an officer of the carrier that the goods had been in the carrier's possession is admissible to show delivery to the carrier.—Harnett v. Westcott, 3 N.Y.S. 7, 56 N.Y. Super. 213.

(2) In action for damages to two cars of onions, evidence was admissible that while the two carloads had been taken up in first place by one of the terminal railroad associations of the city of shipment, such association was in fact acting for defendant railroad, and that that was the usual practice between the plaintiff and defendant and the association.—Jones v. Toledo, St. L. & W. R. Co., Mo. App., 202 S.W. 433.

To show acceptance
(1) Statements made by carrier's agent to the shipper's authorized agent, as to an order of the carrier not to place cotton, subsequently destroyed by fire, on the carrier's platform unless for immediate shipment were admissible on the issue of acceptance by the carrier.—W. F. Bogart & Co. v. Wade, 200 S.W. 148, 132 Ark. 49.

(2) Where, as bearing on the question whether a railroad company had received cotton for transportation as a common carrier, and as confirmatory of the statement of an agent that it had not, defendant offered to ask the agent whether it was not the custom to weigh and mark goods as they were taken for transportation, the goods in question not having been weighed and marked, it was held that the evidence was admissible.—Vaughan v. Raleigh, etc., R. Co., 63 N.C. 11.

(3) In shipper's action against railroad for loss of potatoes defended on ground that railroad had not accepted the shipment in any capacity, evidence that a certain transportation company with which barge owners had a working agreement was a participating carrier was not admissible, having no bearing on the issue of whether the defendant had accepted the shipment.—American Fruit Growers v. King, 114 S.E. 861, 122 S.C. 69.

70. S.C.—American Fruit Growers v. King, supra.
10 C.J. p. 383 note 71.

71. Ga.—Atlantic Coast Line R. Co. v. Stovall-Pace Co., 118 S.E. 62, 30 Ga. App. 326.

72. Ark.—St. Louis, etc., R. Co. v. Burrow, 116 S.W. 198, 89 Ark. 178.

73. Ark.—St. Louis, etc., R. Co. v. Burrow, supra.

74. Va.—Chesapeake & O. Ry. Co. v. Timber-Lake, Currie & Co., 137 S.E. 507, 147 Va. 304.

Evidence of good condition
(1) In action for injury to potatoes in shipment, testimony of witness that potatoes when loaded were not diseased was relevant and competent.—C. M. McMahen & Sons v. Louisville & N. R. Co., 106 So. 56, 21 Ala. App. 66, certiorari denied Ex parte C. M. McMahen & Sons, 106 So. 57, 213 Ala. 642.

(2) Evidence that shipment was accepted by carrier's employee held admissible to show good condition and proper loading when delivered to carrier.—St. Louis-San Francisco Ry. Co. v. Glow Electric Co., 172 N.E. 425, 35 Ohio App. 291.

Evidence of bad condition
Where a carrier receiving for shipment a crop of rice, part of which was owned by the landlord of the land on which it was raised, and part

carrier,[75] and as to its condition after arrival at destination, up to the time of delivery to the consignee;[76] but it is error to allow a witness who has not properly identified the goods to testify as to their bad condition at the time of shipment,[77] or to permit a witness who, although he had helped in the loading of fruit into a car, did not see the fruit picked, sorted, or packed, nor examine the same when it was being loaded, to testify to the condition of the fruit when shipped.[78] Evidence that the property, on being returned to the point of shipment after the buyer's refusal to accept it, was in the same condition as when first shipped, is relevant on the issue as to its condition at the time of the first shipment.[79] Where the carrier claims that live stock was in such poor condition that it could not endure transportation, evidence that the stock was in better condition when shipped than it was when brought from another point to the point of shipment is admissible.[80]

The condition of the property may be shown by evidence of an examination of part of the shipment where a thorough inspection of the entire shipment was impracticable.[81] To establish that injuries to live stock were received in transit, it is competent to show the condition of the stock when it reached its destination, and that some of the stock died after arrival.[82] So it has been held that evidence of the condition of live stock at the time of their sale subsequent to arrival at destination was admissible as tending to show the true condition of the stock and the extent of the injury to it at the time of its arrival.[83] Where goods were delivered by the carrier to the consignee, who thereafter made sales thereof from the railroad car, evidence as to the condition of the goods at the time of such sales is inadmissible.[84] Where the carrier claims that the shipper misrepresented the contents of a box of goods, evidence as to its contents is admissible.[85] So, where it is claimed that some of the goods in a box were lost, and others injured, in transit, it is competent to show what goods were in the box when it was shipped, and when it was delivered, and for that purpose to show the weight of the box at the beginning and end of the transportation.[86]

f. Negligence of Carrier in General

(1) Inanimate freight
(2) Live stock

(1) Inanimate Freight

The admissibility of evidence as to the carrier's negligence in the transportation of goods is governed by the general rules of evidence.

The general rules of evidence, particularly those governing proof of negligence generally, are applicable in an action against a carrier for loss of, or injury to, goods, to prove or disprove negligence on the part of the carrier,[87] and this applies to is-

by the tenant, is sued by the landlord for injury to his part, and the carrier claims that the injury was caused by the rice getting wet while being harvested, and not by the manner in which it was handled in transit, the testimony of a witness who at destination had examined and graded the tenant's part of the crop, which was harvested and warehoused under substantially the same conditions, that it was in bad condition when received by the carrier, was admissible as tending to show that the landlord's part was also in bad condition at the time of shipment—Gulf Coast Transp Co v. Standard Milling Co., Tex.Com App, 252 S.W. 751, reversing, Civ.App., 197 S W 874.

75. Tex—Illinois Cent R. Co. v. Freeman, Civ App, 182 S.W 369.

76. Mo—Dillen v Wabash Ry Co., App, 294 S W. 439.
S.D.—Lerum v Chicago, M. & St. P Ry. Co., 172 N.W. 878, 42 S D. 103

Certificate of health commissioner

In an action for damages to a shipment a certificate of a health commissioner, showing the condemnation of similar goods shipped by others than plaintiff, is admissible where the record shows that all of the goods covered by the certificate were embraced in the shipment—Perkett v. Manistee & N. E R. Co, 157 N.W. 388, 191 Mich 106

77. N.Y—Fish v. Seaboard Air Line Ry., 163 N Y.S. 439, 98 Misc 662.

78. Ill.—House v Wheelock, 254 Ill App. 149

79. Minn—Harris v. Great Northern R. Co., 145 N.W 115, 124 Minn. 357

80. Mo.—Cravens v. Hines, App, 218 S W 912.

81. Ill—Sparr v Southern Pac. Co., 220 Ill App 180

Proportion examined

Evidence of the examination of thirteen boxes of different brands of oranges out of a total of three hundred ninety-six shipped was held admissible to show the condition of the balance of the car—Sparr v. Southern Pac. Co, 220 Ill.App 180.

82. Tex.—Lancaster v. Hollebeke, Civ.App., 235 S.W. 1113

83. Tex.—Ft. Worth & D. C Ry. Co. v. Hill, Civ.App, 213 S W 952—Atchison, T & S. F Ry Co. v Word, Civ.App., 159 S W 375—Ft Worth & R G Ry Co. v. Word, 111 S.W 753, 51 Tex.Civ.App. 206

84. Tex.—Rio Grande & E. P. R. Co v. T. A. Austin & Co, Com.App., 25 S W 2d 306, reversing, Civ App, 12 S W.2d 1070

85. S.C.—Bottun v. Charleston, etc, R. Co, 51 S.E. 985, 72 S.C. 375, 110 Am S R 610, 2 L R A.,N S, 773, 5 Ann Cas. 118.

86. Ga—Louisville & N R. Co v Yudelson, 70 S.E. 576, 135 Ga. 731
However, it was not error, on objection, to exclude testimony that plaintiff knowingly paid the freight rate on only two hundred and twenty-five pounds of freight from the point of shipment to the point of delivery.—Louisville & N. R. Co v Yudelson, 70 S.E. 576, 135 Ga. 731.

87. Tex—American Ry. Express Co v. Home Star Produce Co, Civ App, 276 S.W. 790.

Injury occurring after goods unloaded

In an action for damage to merchandise after it had been unloaded from the cars, and after the consignee had been notified that it was exposed and could not be stored, evidence for defendants that the consignee was usually notified, on the arrival of merchandise for him, that it could not be stored and must be immediately removed is admissible, as bearing both on defendant's negligence and on the reasonableness of

sues as to whether the cars furnished were defective,[88] or were properly equipped and kept in condition for transporting perishable property,[89] whether the goods were properly loaded,[90] and whether the car or other vehicle was properly handled during transportation.[91] The fact that the shipper places a small value on his property is admissible on the question of its true value, and to show whether the methods of care adopted by the carrier were adequate in view of such valuation.[92] While negligence is not the gist of an action based on the carrier's breach of contract to carry safely, nevertheless evidence of the carrier's freedom from negligence in transporting perishable articles is admissible as tending to show that the damage to such articles was due to their own inherent tendencies[93]

In an action for damages to meat, the carrier, to prove that the meat spoiled from inherent defects or improper preparation, may introduce direct or circumstantial evidence tending to eliminate every other cause,[94] and under the Carmack amendment providing that a carrier shall be liable for any loss caused by it, the carrier may show that a loss of grain was due to shrinkage from natural causes[95]

Loss or injury from fire or flood. Evidence is admissible to show whether proper precautions were taken by the carrier to guard against and control fires.[96] Where the carrier defends an action for loss of household goods on the ground that the

a delay on the part of the consignee in removing the goods.—Stowe v New York, etc., R Co, 113 Mass. 521.

Skill or caution of conductor

Where a claim for damages for loss of goods shipped is not predicated on want of skill or caution on the part of the conductor of the train on which the goods were shipped, evidence to show his caution and skill is not admissible.—Montgomery, etc., R. Co. v. Edmonds, 41 Ala. 667.

Negligence of private carrier

Where goods were stolen while the truck in which they were being hauled was left standing in front of a restaurant into which the driver had gone for lunch, the jury had a right to consider the value of the goods, the length of the haul, the character of the neighborhood where the theft occurred, and all the facts and circumstances bearing on the question of ordinary care.—Langendorf Clothing Co. v. Fara, 272 Ill App. 160.

Precautions against apprehended riots

In an action for loss of shipment destroyed by fire in consequence of a race riot, where plaintiff introduced proof of the conduct and declarations of the rioters as evidence of the situation then existing and also newspaper publications indicating the notoriety of the affair as evidence of notice to defendant's agents of incendiarism, it was not error to admit proof of a meeting of citizens and militia officers to show what steps were being taken to preserve public peace as affecting defendant's duty in the matter of precautions against apprehended danger.—Julius Kessler & Co v Southern Ry. Co in Kentucky, 255 S W. 535, 200 Ky. 713.

Precautions against collision

In an action for loss of goods caused by a collision, evidence may be introduced as to contrivances employed by other carriers to prevent similar accidents and to show that such contrivances were not in use by defendant.—Boscowitz v. Adams Express Co., 93 Ill 523, 34 Am.R. 191

88. Iowa—Stone v. Chicago, R. I. & P. R Co, 128 N.W. 354, 149 Iowa 240

89. Ga.—Georgia Southern, etc., R Co v. Barfield, 58 S.E. 236, 1 Ga App 203

Proper refrigeration

In action for carrier's alleged failure to safely refrigerate and transport vegetables, excluding testimony as to how much top ice should have been in car on arrival at destination was held proper, in absence of evidence regarding refrigeration experience of witness or as to weather conditions existing at time ice was placed in car—Shapiro v. Pennsylvania R Co., 83 F.2d 581, 65 App D.C 324.

Custom of carrier as to re-icing

The carrier may show a custom on its part, known to the shipper, not to re-ice cars unless so ordered by the shipper—House v. Wheelock, 254 Ill App. 149

Injury from freezing

In action against carrier for damages from freezing of a beverage, evidence that car used was of kind usually employed for carriage of perishable freight in the winter, and the best known vehicle for that purpose, was admissible.—Michellod v. Oregon-Washington R. & Nav. Co., 168 P. 620, 86 Or. 329.

Unventilated car

In an action for injuries to peanuts which plaintiff claimed resulted from unventilated car, evidence that green peanuts, if confined before sufficiently dry, would necessarily be damaged is admissible.—Cleburne Peanut & Products Co v. Missouri, K. & T Ry. Co. of Texas, Tex.Civ.App, 184 S W. 1070, reversed on other grounds, Com. App, 221 S.W. 270.

90. Ky—Louisville & N R Co. v Hensley, 35 S W.2d 279, 237 Ky. 224.

Evidence admissible

Where drag line was injured in transportation by rail, allegedly from improper loading, evidence of damage to passing train from contact with superstructure of drag line was admissible.—Thomson v. Chicago, M. & St P. Ry. Co, 217 N W. 927, 195 Wis. 78.

91. Ark—St. Louis-San Francisco Ry Co. v. Ozark White Lime Co., 9 S W.2d 17, 177 Ark. 1018

Intoxication of driver

If the injury complained of was caused by the method of driving employed by the carrier's servant, it is competent to show that at the time of the injury the driver was drunk.—Kates Transfer, etc., Co v. Klassen, 59 So 355, 6 Ala.App. 301.

92. Iowa.—Winn v. American Express Co., 128 N.W. 663, 149 Iowa 259.

93. Ill.—Sparr v. Southern Pac. Co., 220 Ill.App. 172—Arakelian v. Southern Pac. Co., 220 Ill.App. 160.

94. Mo—Cudahy Packing Co. v Atchison, T. & S F R. Co., 187 S.W 149, 193 Mo App 572

95. Ill.—Shellabarger Elevator Co v. Illinois Cent. R. Co., 212 Ill App. 1.

96. U S.—Texas & P. R. Co v. Coutourie, N.Y., 135 F. 465, 68 C C.A. 177.

N.H.—Peerless Mfg. Co. v New York, etc., R. Co, 61 A 511, 73 N.H. 328.

Employment of watchmen

On the issue as to the negligence of a railroad company in failing to employ a sufficient number of watchmen to guard against fire goods piled on its wharf, evidence as to the existence, at the time, of labor disturbances relating to men employed on ships loading at such wharf was competent.—Texas & P. R. Co. v. Coutourie, N.Y., 135 F. 465, 68 C.C.A. 177.

Facilities provided by city

If the question of defendant's negligence in failing to control a fire which started in its yards is raised, evidence as to the facilities provided

flood causing the loss was unprecedented, evidence for plaintiff that, according to the history of the stream, the flood in question was not unprecedented was admissible.[97] In an action for the destruction of goods by fire from a car of unslaked lime fired in the carrier's yards by a flood, a rule of the American Railway Association and a regulation of the interstate commerce commission as to the transportation of unslaked lime, known to the carrier's agents, were admissible.[98]

Predictions of the weather forecaster, and knowledge of the carrier's agent as to previous floods, were admissible on the question of the carrier's negligence with relation to a fire caused by a flood.[99] On the other hand, it has been held that in an action for loss of goods from an unprecedented flood, evidence that a weather observer had issued a flood warning for a rise in a river which would not have endangered the cars, and that he had issued a warning of a higher rise, without a showing of the facts on which the prediction was made, or that it was brought to the carrier's knowledge, was inadmissible to show the carrier's negligence.[1] So a newspaper article based on the weather observer's forecast, not shown to have been read by the carrier's agent, has been held inadmissible.[2]

Other shipments. If the injuries are alleged to have been caused by neglect to ice cars properly, evidence that other cars shipped in the same way just before and just after the injured shipment arrived in good condition is irrelevant and inadmissible.[3] So where goods are lost from the carrier's depot after transportation, proof that other freight of the same kind was always cared for by it in the same manner, and that none had ever been lost is immaterial.[4]

(2) Live Stock

The general rules apply to the admissibility of evidence on the issue of the carrier's negligence in transporting live stock. Evidence as to matters relating to other shipments is admissible when, and only when, conditions are similar. Customary methods of performing the carrier's duties may be shown.

The general rules of evidence govern the admissibility of evidence in an action against a carrier for loss of, or injury to, live stock, to prove or disprove negligence on the part of the carrier,[5] as in furnishing defective or improperly equipped cars[6] or cat-

by the city for extinguishing such fires is properly admitted.—Peerless Mfg. Co v New York, etc, R Co, 61 A 511, 73 N H. 328

97. Tex—International, etc., R Co. v. Penney, Civ App., 178 S W. 970.

98. Vt—Porter Screen Mfg Co v. Central Vermont Ry. Co, 102 A 44, 92 Vt. 1.

99. Vt—Porter Screen Mfg Co v. Central Vermont Ry. Co., supra.

1. N Y—International Paper Co v. New York Cent R Co, 166 N.Y S 751, 100 Misc 683

2. Vt—Porter Screen Mfg Co. v Central Vermont Ry. Co., 102 A 44, 92 Vt. 1.

3. Tex—Ft. Worth, etc., R Co. v. Harlan, Civ App., 62 S W. 971

4. Mass.—Lane v. Boston, etc., R Co, 112 Mass. 455

5. Iowa—Gibson v Adams Express Co, 175 N.W 331, 187 Iowa 1259
Kan.—Parks v Atchison, T. & S F. Ry Co, 163 P. 1066, 100 Kan 219.
Mich.—Shier v. American Ry Express Co., 208 N.W. 746, 234 Mich. 505.
Mo.—Long v. American Ry. Express Co, 274 S W 906, 219 Mo App 451.
Tex—Gulf, etc, R Co. v. Irvine, Civ.App, 73 S W. 540

Notice that shipper was not accompanying stock

In an action against an express company for damage to a shipment of horses, testimony of plaintiff that when he arrived on the train with the horses at a point in Iowa he was informed by a stranger, who told him he was agent of the express company in charge of another car, that he could not ride to Chicago on the train with the horses, etc., was admissible to show plaintiff did not accompany the stock; and to impart notice of that fact to the express company—Gibson v Adams Express Co., 175 N W 331, 187 Iowa 1259.

Rough handling and jolting

In an action for damages to a shipment of cattle, where it appeared that during transportation some of the cows calved prematurely, evidence as to whether rough handling and jolting during transit would cause such calving, in view of evidence upon which the jury might find rough handling and jolting, is admissible to prove a cause for calving—Greening v Chicago & N W. Ry. Co, Mo App., 183 S.W. 1121

Loss or injury due to inherent propensities

(1) Evidence that the cattle were wild, and, when confined in a car, became frightened when other trains passed, and crowded into one end of the car, throwing each other down on the floor, was admissible to sustain the carrier's defense that the injury to the cattle was due to their natural propensities—Texas & N O. R. Co. v Conn, Tex Civ.App., 30 S W 2d 939.

(2) In an action for the loss of an animal which escaped after completion of the transportation, evidence which would tend to show that the escape was not due to the inherent viciousness of the animal is competent.—Deake v. U S Express Co, 138 N W. 196, 172 Mich. 451

The character and extent of the injuries are properly to be considered by the jury in deciding whether those in charge of the train had been guilty of negligence.—Louisville, etc, R Co v Lockman, 9 Ky Op 817.

Where the injuries result from infection

(1) It may be shown by those in a position to observe the physical surroundings that the car containing plaintiff's stock could have been moved to and from the point of destination without being first switched into the infected district.—Council v. St Louis, etc, R Co, 100 S W. 57, 123 Mo App 432.

(2) Evidence that subsequent to the transportation the animals affected communicated the disease to other animals is admissible—Council v St Louis, etc, R Co, supra.

Death of cattle subsequent to arrival

Testimony as to the death of cattle several days after leaving the cars is competent, although perhaps not entitled to much weight—Gulf, etc, R Co. v. Irvine, Tex Civ App, 73 S W. 540.

6. U S—Adams Express Co v. Darden, C.C.A Tenn., 286 F. 61, affirmed

tle pens or railroad yards,[7] failing to perform its duties as to providing food, water, and rest for the stock,[8] negligently managing cars or trains,[9] failing to unload upon the arrival of the stock at destination,[10] or failing to provide suitable facilities for unloading.[11] Where an animal dies after completion of the transportation, it is competent, in order to show negligence on the part of the carrier, to prove that it had agreed to notify the consignee of the arrival of the animal, which it failed to do, and that by reason of such default the animal died.[12]

Conversations between the shipper and an authorized agent or employee of the carrier are admissible if relevant to the issue of the carrier's negligence;[13] but conversations with persons not shown to be employees of the carrier or authorized to represent it are inadmissible.[14] As tending to prove negligence causing injury to plaintiff's live stock,

44 S.Ct. 502, 265 U.S. 265, 68 L.Ed 1010

Ky.—Southern Express Co. v. Fox, 115 S.W. 184, 117 S.W. 270, 131 Ky 257, 133 Am.S.R. 241.

Tex.—Ft. Worth & R. G. Ry. Co. v. Hasse, Civ.App., 226 S.W. 448.

Evidence admissible

In an action for damages to a mule during shipment, testimony that the plank in the side of the car where the mule's foot was caught in a crack was split off, and that the break was an old one, was competent.—Smith v. Atlantic Coast Line R. Co., 79 S.E. 433, 163 N.C. 143.

Agreement to furnish particular kind of car

In an action for the loss of plaintiff's race horses during shipment by express, where the negligence relied on was the furnishing of an insecure wooden car which was demolished in a wreck, evidence of the carrier's agreement to furnish a different kind of car was pertinent to the question of negligence.—Adams Express Co. v. Darden, C.C.A.Tenn., 286 F. 61, affirmed 44 S.Ct. 502, 265 U.S. 265, 68 L.Ed 1010.

Acts of carrier after injury

In an action for the death of animals smothered in an ordinary express car, evidence that after complaint was made by the shipper the carrier began to use another kind of a car for like shipments is not admissible.—Wells v. Mitchell, Tex.Civ.App., 139 S.W. 926.

7. U.S.—Southern Pac. Co. v. Stewart, Ariz., 233 F. 956, 147 C.C.A. 630, error dismissed 38 S.Ct. 130, 245 U.S. 359, 62 L.Ed 345, rehearing granted 38 S.Ct. 203, 245 U.S. 562, 62 L.Ed 472, and reversed on other grounds 39 S.Ct. 139, 248 U.S. 446, 63 L.Ed 350.

Ice in cattle yard

In an action for damages for rough handling of cattle, evidence as to ice on the ground in a cattle yard was admissible as bearing on the charge that they were driven from the yards into the cars with vicious dogs, it appearing that while being so dogged the cattle went on the ice and slipped and fell.—Rogness v. Northern Pac. Ry. Co., 196 P. 989, 59 Mont. 373.

Escape of animals before loading

If the injuries charged are due to the escape of the animals before loading because of defects in the carrier's pens, evidence of due care in transportation is irrelevant and inadmissible.—Louisville, etc., R. Co. v. Thompson, 139 S.W. 939, 144 Ky. 765.

Conditions subsequently existing

A shipper, suing for injury to live stock, may show conditions of carrier's cattle pens several months after his cattle were detained there, the pens being permanent.—Bush v. Altschul, 193 S.W. 280, 128 Ark. 103.

8. Iowa.—Bateham v. Chicago, M. & St. P. Ry. Co., 192 N.W. 818, 195 Iowa 659.

Evidence admissible

If the injuries are alleged to have been caused by failure to feed and water, the admission of evidence that the stock was injured by drinking too much water at a certain station was proper, there being other evidence that this was caused by a failure properly to feed and water before arrival at that station.—Gulf, etc., R. Co. v. Dunn, Tex.Civ.App., 78 S.W. 1080.

Admissibility of shipping contract

In an action against a railway for failing to water cattle before dipping them, although plaintiff contends that the contract for dipping was an independent oral contract, exclusion of the shipping contract set up as a defense is error.—Missouri, K. & T. Ry. Co. v. Skinner, 160 P. 875, 61 Okl. 189.

Request by shipper to extend time of confinement

(1) In a shipper's action against a carrier for injury to an interstate shipment of live stock from improper handling and delay, wherein it was claimed that the stock had been confined more than twenty eight consecutive hours, bills of lading reciting that the time had been extended by the owner to thirty six hours were incompetent to prove the written request for extension required by Act Congr. June 29, 1906, § 1, U.S.Comp.St. § 8651, to be separate and apart from any printed bill of lading or other railroad form.—Bateham v. Chicago, M. & St. P. Ry. Co., 192 N.W. 818, 195 Iowa 659.

(2) Where the shipment was intra-state, a written request to railroad to extend time of confinement of stock as prescribed by act of congress was properly excluded.—Bugg v. Perry & Faircloth, 156 S.E. 708, 42 Ga.App. 523.

(3) Even if such request could have any bearing on the question of the carrier's negligence, it was properly excluded where not acted on by the carrier.—Bugg v. Perry & Faircloth, supra.

(4) There being no consideration for such request, it was properly excluded, even if otherwise admissible.—Bugg v. Perry & Faircloth, supra.

9. Tex.—Wichita Valley Ry. Co. v. Baldwin, Civ.App., 263 S.W. 1090.

Incompetency of carrier's employee

Where injury is caused by violently bringing together uncoupled cars in which the animals were loaded, it may be shown that a brakeman on the train on which the injury occurred was unfit for service.—Galveston, etc., R. Co. v. Johnson, Tex., 19 S.W. 867.

10. Tex.—Chicago, R. I. & G. Ry. Co. v. Pavillard, Civ.App., 187 S.W. 998.

11. N.C.—Meeder & Co. v. Seaboard Air Line Ry., 91 S.E. 704, 173 N.C. 70.

Precautions against further accidents

Where one of the issues was as to defendant's negligence in not providing suitable facilities for unloading stock, the fact that precautions were taken after the injury by constructing improvements for that purpose is not an admission of prior negligence, and is admissible.—Hines v. Duncan & Nelms, 104 S.E. 519, 25 Ga.App. 712.

12. Tex.—Pacific Express R. Co. v. Lothrup, 49 S.W. 898, 20 Tex.Civ.App. 339.

13. Mass.—Clapp v. American Express Co., 125 N.E. 162, 234 Mass. 174.

Tex.—Texas & P. Ry. Co. v. Moore, Civ.App., 7 S.W.2d 902, error dismissed—Galveston, H. & S. A. Ry. Co. v. Harris Bros., Civ.App., 211 S.W. 255, error refused.

14. Tex.—Houston E. & W. T. Ry. Co. v. Southern Pine Lumber Co., Civ.App., 6 S.W.2d 418—Texas &

the fact that other shipments, made under similar conditions, reached their destination without injury may be shown;[15] but such evidence is not admissible where the shipments were not made under the same conditions,[16] or over the same route.[17] So, where carriers claimed that damages to a shipment of cattle were due to plaintiff's negligence in unloading and dipping them under quarantine regulations, evidence that the same treatment was accorded other cattle which were not injured is properly excluded, in the absence of a showing that they were in the same physical condition.[18] Evidence of injury or want of injury to other live stock, belonging either to plaintiff or to others, and shipped at the same time on the same cars or train has been held admissible on the issue of negligence.[19] So, in an action for injuries to a shipment of live stock in several cars, evidence of the condition of animals in a car as to which no notice of damage was filed is admissible to show the condition of animals in other cars, all animals being commingled at destination.[20] Where it was shown that plaintiff's stock was in the same condition as the stock of another shipper at the time of shipment and that both shipments were in good condition when they reached the point where plaintiff's stock alone was switched, evidence that, after the switching, plaintiff's stock was found injured, while the stock of the other shipper was unhurt, was admissible;[21] but evidence as to the condition of other stock handled on the same train and arriving at the same destination is not admissible where there is nothing to show that the conditions were the same or similar.[22] Evidence that plaintiff's stock, on a former shipment, was roughly treated is inadmissible.[23] The carrier cannot show in defense of an action for negligently unloading stock in defective pens that such pens were similar to those on other portions of its line.[24] Plaintiff may testify as to whether he ever had any cattle killed in the same quantity, at any other time when shipped over defendant's road.[25]

Customary methods. The customary manner of performing the carrier's duties in transporting live stock may be shown on the issue of negligence.[26] Accordingly, evidence of the customary time and method of assembling stock for shipment is admissible on the issue whether defendant carrier had so equipped its yard that animals awaiting shipment could receive proper care during a reasonable time prior to loading.[27] So, to refute negligence in the care of animals injured in transit, the carrier may show by persons qualified to testify that the car stall was put up in the customary manner of erecting stalls for the shipment of animals, and that it was reasonably safe;[28] but it has been held that evidence of the carrier's former custom to unload live stock upon its arrival at a certain point is in-

P. Ry. Co. v. Thorp, Civ.App., 198 S.W. 335.

15. Mo.—Shaffer v. American Ry. Express Co., App., 282 S.W. 725.

16. Tex.—International, etc., R. Co. v. Boykin, 89 S.W. 639, 99 Tex. 259—Missouri Pac. R. Co. v. Smith, 19 S.W. 509, 84 Tex. 348—Texas, etc., R. Co. v. Good, Civ.App., 151 S.W. 617.

17. Tex.—Houston, etc., R. Co. v. Wilson, Civ.App., 50 S.W. 156.

Bedding of cars for other shipments

The fact that a shipment of cattle, in cars bedded by the shipper, arrived in good condition may not be proved to show that the death of cattle, in another shipment of the same character, loaded in about the same manner, in about the same kind of cars, and made at the same time, for about the same distance, but over another route, was caused by negligence of the carrier in bedding the cars.—Houston, etc., R. Co. v. Wilson, Tex.Civ.App., 50 S.W. 156

18. Tex.—Good v. Texas, etc., R. Co., Civ.App., 166 S.W. 670.

19. Fla.—Walton Land & Timber Co. v. Louisville & N. R. Co., 72 So. 485, 72 Fla. 66

Tex.—Wichita Valley Ry. Co. v. Baldwin, Civ.App., 263 S.W. 1090.

To rebut presumption of negligence

the carrier may show that other animals on the same train and in another car reached their destination without injury.—Sinsabaugh v. Cleveland, etc., R. Co., 149 Ill.App 642.

Accounting for want of injury to other stock

Where cattle of another shipper, loaded near the front end of train, were not injured by head-on collision, proof that jolt to plaintiff's cattle loaded at the rear end of the train was more severe than the jolt to the cattle loaded near the front was proper, to account for the difference in effect of the collision on plaintiff's cattle and the other cattle.—Wichita Valley Ry. Co. v. Baldwin, Tex.Civ.App., 263 S.W. 1090

20. Tex.—Texas, etc., R. Co. v. McMillen, Civ.App., 183 S.W. 773.

21. N.M.—Rarey v. McAdoo, 205 P. 731, 28 N.M. 14.

22. Iowa.—Crozier v. U. S. Railroad Administration, 181 N.W. 695.

There was no proof in this case

that the hogs of the other shipper were of like character to the hogs shipped by plaintiff, or were from the same neighborhood, or how they were loaded or bedded.—Crozier v. U. S. Railroad Administration, Iowa, 181 N.W. 695.

23. W.Va.—Geyer v. Chesapeake & O. Ry. Co., 168 S.E. 380, 113 W.Va. 401.

24. U.S.—Southern Pac. Co. v. Stewart, Ariz., 233 F. 956, 147 C.C.A. 630, error dismissed 38 S.Ct. 130, 245 U.S. 359, 62 L.Ed. 345, rehearing granted 38 S.Ct. 203, 245 U.S. 562, 62 L.Ed. 472, and reversed on other grounds 39 S.Ct. 139, 248 U.S. 446, 63 L.Ed. 350

25. Tex.—Ft. Worth & R. G. Ry. Co. v. Hasse, Civ.App., 226 S.W. 448.

26. Mass.—Hendrick v. Boston, etc., R. Co., 48 N.E. 835, 170 Mass. 44

Tex.—Chicago, etc., R. Co. v. Clements, 115 S.W. 664, 53 Tex.Civ.App. 143.

Wis.—Stephens v. Chicago & N. W. Ry. Co., 227 N.W. 875, 200 Wis. 181.

27. Minn.—Zakrzewski v. Great Northern R. Co., 154 N.W. 966, 131 Minn. 175.

28. Ky.—Southern Express Co. v. Fox, 115 S.W. 184, 117 S.W. 270, 131 Ky. 257, 133 Am.S.R. 241.

competent to prove negligence of the carrier in not unloading stock upon its arrival at that point.[29]

g. Deterioration or Other Injury from Delay

Where it is sought to recover for injury to inanimate freight or live stock, due to the negligent delay of the carrier, the admissibility of evidence is governed by the usual rules Evidence as to the usual running time between two points is admissible. The time taken for other shipments may be shown where the conditions are similar

In an action for injury to goods, such as injury due to deterioration of perishable articles, caused by delay in delivery by the carrier, any competent evidence which is relevant and material on the issue of delay, and the liability of the carrier for consequent injuries, is admissible,[30] and this applies to actions for injury to live stock due to delay.[31] Evidence as to the usual running time between two points on defendant's line is admissible on the issue of negligent delay causing injury to perishable goods[32] or live stock,[33] but evidence which is irrelevant or immaterial is properly excluded.[34] Thus evidence as to the time it would have taken to ship plaintiff's live stock by another route, over other lines than those of defendant, is inadmissible.[35] So evidence that the delay which resulted in injury to perishable goods was caused by congestion in traffic is inadmissible, since such congestion, as stated supra § 245, does not excuse the carrier's negligence in causing injury to property transported by it.[36]

Admissibility of evidence in actions for delay generally see supra § 217.

Similar occurrences, other shipments. Evidence as to the time it took to deliver other shipments over the same line is admissible where the testimony shows that the conditions connected with the shipments were similar,[37] but in the absence of any showing that the conditions of the shipments were similar, such evidence is inadmissible.[38] On the same principle, evidence as to the time it took witness to drive a truck over a stated route is inadmissible, in the absence of evidence showing that the conditions as to the size of the truck, the traffic, and the weather, were similar to the conditions existing when defendant's driver made the trip in question.[39]

h. Acts or Negligence of Shipper

That the loss or injury was due to the acts or negligence of the shipper may be proved or disproved by any competent, relevant, and material evidence.

29. Tex.—Chicago, R. I. & G. Ry. Co. v. Pavillard, Civ App., 187 S W 998.

30. Fla.—Atlantic Coast Line R. Co v. Mach, 109 So 457, 92 Fla 442

Evidence admissible

In suit for failure to deliver produce, and for injuries while delayed five days in shipment, testimony of a packer as to number of days particular kinds of produce could stand without rotting was pertinent and relevant.—American Ry. Express Co v Home Star Produce Co., Tex Civ. App, 276 S W 790.

Plaintiff's knowledge of congestion in traffic

Refusal to admit evidence that plaintiff knew of congestion resulting from failure of consignees to unload cars, but nevertheless persisted in shipping perishable produce, held error in action against carrier for delay whereby the produce deteriorated in transit.—Free Bros. Co. v Baltimore & O R. Co, 146 A. 98, 296 Pa. 441.

31. Tex.—Baker v. East, Civ.App., 197 S W. 1123.

32. Md.—Stevens v. Northern Cent. Ry. Co., 98 A. 551, 129 Md. 215.
Mich.—Shier v American Ry. Express Co., 208 N.W. 746, 234 Mich. 505
Vt.—Saliba v New York Cent R Co., 144 A. 194, 101 Vt 427

Schedules showing the usual time necessary for transportation are admissible—Stevens v Northern Cent. Ry Co, 98 A. 551, 129 Md. 215

33. Idaho.—Ritchie v Oregon Short Line R. Co, 244 P. 580, 42 Idaho 193
Mo.—Prebe v. Quincy, O & K C R Co., App, 260 S W. 816.
Tex.—Baker v Holman, Civ.App., 196 S W. 728

34. Ill.—Mueller Grain Co. v. Lake Erie & W. R Co., 213 Ill App 108.
Md.—Peninsula Produce Exch. v American Ry. Express Co., 128 A 403, 147 Md 424.
Tex.—Lancaster v. Daggett, Civ App., 272 S.W. 340

Evidence irrelevant

In action for damages to shipment of strawberries, objection to question as to whether produce trains did not sometimes arrive at point of destination earlier than regular running time was properly sustained, as it had no bearing on question of delay, and would serve to confuse and mislead jury.—Peninsula Produce Exch. v. American Ry. Express Co, 128 A 403, 147 Md 424.

35. Tex.—St. Louis, B & M. Ry Co. v Freasier, Civ App., 237 S.W 344.

36. Ill.—See Mueller Grain Co. v. Lake Erie & W. R Co, 213 Ill. App 108.

37. Tex.—Panhandle & S. F. Ry Co. v Vaughn, Civ.App, 191 S W. 142, affirmed, Com App, 222 S W. 206.

38. U S.—Atchison, T. & S. F. Ry Co. v. Merchants' Live Stock Co, C.C.A N M., 273 F 130.
Ky.—Chesapeake & O R Co v. Coleman Fruit Co., 294 S W. 463, 219 Ky. 794.
Tex.—Gulf, C. & S F Ry Co. v. Rodriquez, Civ.App., 185 S W. 311.

Former shipment of perishable goods

In suit against railroad for spoilage of fruit and vegetables from delay, bills of lading and proof of the due arrival of prior shipments were incompetent, without proof of times of delivery to carriers.—Chesapeake & O R Co. v. Coleman Fruit Co., 294 S W. 463, 219 Ky. 794.

Subsequent shipment of live stock

On an issue as to liability of a railroad company for loss and damage to stock in shipment, alleged to have been due to improper handling and delay in the transportation, evidence that another shipment a month later went through in two days' less time and with much smaller loss, without showing the comparative condition of the cattle, the conditions under which the shipments were made, or whether the time made was usual or unusual, was incompetent, as introducing collateral and irrelevant issues.—Atchison, T. & S F Ry. Co. v. Merchants' Live Stock Co., C.C.A N M, 273 F. 130.

39. N.Y.—Thompson v. P. H. Keahon, Inc., 197 N Y.S. 686, 120 Misc. 70.

Any competent evidence is admissible which tends to prove or disprove the contention that the loss or injury complained of was due to the acts or negligence of the shipper,[40] such as improperly packing the property[41] or in loading the car, where the duty of loading devolved on the shipper.[42] So, where the car in which the freight was transported was furnished by the shipper, the carrier may show that it was inadequate for the purpose;[43] and evidence that the car was owned and loaded by the shipper is competent.[44] To show negligence on the part of the shipper, evidence is competent that the stock was not in fit condition to stand transportation by rail at the time of the year when shipment was made, and that the effect of the cold would cause the cattle to become numb and lie down, and then be unable to get up.[45] Since a carrier is not liable for damages caused by following the instructions of the owner or his representative accompanying the shipment, as stated supra § 78, it is error to exclude evidence that the conductor obeyed instructions of the messenger who accompanied the goods, although there was no direct evidence that the messenger was employed by the shipper;[46] and it is also error to exclude a contract between the consignor and consignee authorizing the employment of a messenger to care for the goods.[47]

Evidence as to other property on same train. In an action for injuries to a shipment of hogs, the carrier defending on the ground that the shipper was negligent in bedding the car, evidence that twenty other cars of hogs were carried in the same train differently bedded were subjected to the same treatment, and were uninjured is admissible.[48]

1. Proof of Loss of Property

Evidence is admissible which tends to show that the shipment, or a part of it, was lost; but evidence as to losses of other freight is inadmissible.

Plaintiff may introduce any competent evidence tending to show the loss of all or a part of the property received by the carrier for transportation,[49] and for this purpose evidence that the car was sealed at the loading point and remained sealed

40. Iowa—Gibson v. Adams Express Co, 175 N.W. 331, 187 Iowa 1259
Mich—Shier v. American Ry. Express Co, 208 N.W. 746, 234 Mich 505.

Disproving negligence of shipper

(1) In an action against an express company for damage to a shipment of horses, testimony of plaintiff that when he arrived on the train with the horses at a point in Iowa he was informed by a stranger, who told him he was agent of the express company in charge of another car, that he could not ride to Chicago on the train with the horses, etc, was admissible to repel the allegation that plaintiff was negligent in failing to exercise his contract privilege to travel with the shipment—Gibson v. Adams Express Co., 175 N.W. 331, 187 Iowa 1259.

(2) Evidence that the shipper of a convict car destroyed by fire while on defendant's flat car gave directions to his servant to look after the fire in a stove which was in the car is not admissible—Coweta County v Central of Georgia Ry. Co., 60 S.E. 1018, 4 Ga.App. 94.

(3) To show due care on his part, the shipper may testify that he did not know that a permit to unload cattle in the state of destination was necessary.—Hendrick v Boston, etc. R. Co, 48 N.E. 835, 170 Mass 44.

41. Ill—S. Valentine & Co. v Atchison, T. & S. F. Ry. Co, 220 Ill. App 188

Inadequate crate for animal

Where, in an action for value of hog lost in transit defendant carrier interposed the defense that the crate used by the shipper was too small for the hog, testimony of plaintiff's witnesses that they saw the crate in defendant's office at destination at the time of trial was properly admitted, where plaintiff had the right to compel the production of the crate in court to show what the actual measurements of the crate were, but did not know where it was until trial—Buck v American Railway Express Co, 192 N.W. 277, 195 Iowa 1024.

Improper containers for oil

The carrier may show that the shipper packed oil in wooden barrels wholly unsuited for the purpose—S. Valentine & Co v Atchison, T. & S. F. Ry. Co., 220 Ill.App. 188.

42. U.S.—South Carolina Asparagus Growers' Ass'n v Southern Ry Co, C.C.A.S.C, 46 F.2d 452
Mo—Dillen v. Wabash Ry. Co., App, 294 S.W. 439.
Wash.—American Cotton Oil Co v Davis, 224 P 23, 129 Wash 24

Knowledge of carrier's agent as to shipper's negligence

Where the bill of lading placed the duty of proper loading on the shipper, evidence that the carrier's local agent saw the car before it was shipped was inadmissible—South Carolina Asparagus Growers' Ass'n v Southern Ry Co, C.C.A.S.C, 46 F.2d 452.

43. Mo—Cudahy Packing Co. v Atchison, T & S F. R Co., 137 S.W. 149, 193 Mo App 572

Inadequate refrigerator car

Where meat shipped was delivered to the carrier sealed in plaintiff's refrigerator car, evidence by defendant, that the capacity of ice bumpers in plaintiff's refrigerator cars is not sufficiently large to keep the meat cool enough to preserve it from decay, is admissible—Cudahy Packing Co. v Atchison, T & S F R Co, 137 S.W. 149, 193 Mo App. 572

44. Tex.—Gulf, C. & S. F. Ry Co v. Lakeside Irr. Co., Civ.App., 292 S.W. 939

45. U.S.—Southern Pac Co. v Arnett, Utah, 111 F. 849, 50 C.C.A. 17.

46. Tex.—Gulf, C. & S. F. Ry Co v. Persky, Civ.App., 200 S.W. 606

47. Tex.—Gulf, C. & S. F. Ry Co v. Persky, supra.

48. Iowa—Heilman v. Chicago, etc., R Co, 149 N.W. 436, 167 Iowa 313

49. Ala.—South & North Alabama R. Co v. Wood, 66 Ala. 167, 41 Am. R. 749.
Ill—Farmers' Grain Co. of Dorans v. Illinois Cent. R. Co, 201 Ill App 261
Minn.—State Elevator Co v. Great Northern Ry. Co., 158 N.W. 399, 133 Minn. 295.

Condition of container when delivered to consignee

In action for loss of goods in cases in transit, testimony of shipping clerk of consignor, and of witnesses, as to condition of straps on case from which goods were alleged to have been taken, and of cartons therein when opened at store of consignee, was competent to show the loss.—Riff v Yadkin R. Co., 127 S.E. 588, 189 N.C. 585.

until delivery of the goods to the consignee is admissible.[50] So evidence that the consignees had never received the goods is admissible as tending to show that the carrier had never delivered them at the place of destination as provided for by the contract of shipment,[51] but evidence as to losses or thefts of other freight belonging to other persons is not admissible.[52] A shipper suing the carrier as for loss of goods shipped may, on the carrier's showing an offer to deliver, show the conduct of the carrier estopping it to contend that the goods were not lost but only delayed, as, for instance, a statement by the carrier that they were lost and could not be found, relying on which plaintiff bought new goods.[53]

j. Limitation of Liability in General

A contract limiting the carrier's liability may be shown, if valid, and assented to by the shipper; otherwise not.

In an action for loss of, or injury to, property received by the carrier for transportation, a contract limiting the carrier's liability, signed by the shipper, is ordinarily admissible in behalf of the carrier.[54] The carrier may show that under the contract it was liable only for negligence,[55] or that the contract exempted it from liability for loss by fire,[56] but where the statute forbids common carriers to limit or restrict their common-law liability, a contract of shipment containing such limitation is inadmissible.[57] So, where a carrier's liability for goods destroyed before their delivery to the consignee was tried on the single issue of defendant's negligence, and was so submitted to the jury, the exclusion of an alleged contract offered by defendant, whereby its liability was limited, was held not to be error, since a carrier cannot limit its liability for negligence,[58] and a bill of lading limiting the carrier's liability, signed by an employee of the shipper, is properly excluded where it appears that such employee had no authority to sign and that the shipper did not consent to the limitation.[59] Evidence of shippers of live stock that the carrier had never offered them any contract of shipment except one containing a limitation of its liability was admissible to show that the carrier did not hold itself ready to make a contract assuming common-law liability.[60] A provision of a shipping contract releasing the carrier from liability for loss from delay due to storms or floods is properly excluded as immaterial, in an action for damage to live stock from delay.[61] Where it was not shown that the agent of the carrier or the shipper knew that a special rate would be or was given, in consideration of a waiver by the shipper of liability by the carrier for loss or damage by fire, it was not error to refuse to permit a clerk in the general freight department to testify that the carrier had in force two rates,

Inquiries by plaintiff

The fact that plaintiff after the time when the goods should have been delivered made inquiries for them of the carrier is admissible to show the loss of the goods—Ingledew v. Northern R Co., 7 Gray, Mass, 86.

Affidavits of weighers of boards of trade is admissible under Illinois statute providing that sworn statement of a person having personal knowledge of the weight of grain delivered for shipment shall be taken as true—Farmers' Grain Co of Dorans v. Illinois Cent. R. Co, 201 Ill. App 261

Report of stockyards company

Where carrier agreed to deliver hogs shipped to commission company at point of destination, which was done through a stockyards company, the report of that company that seventy five live hogs and eight dead ones had been received by it was admissible in shipper's action.—Galveston, H & S A Ry Co. v Friedrichs, Tex Civ App, 252 S.W. 346

50. Kan.—Missouri, etc, R. Co v Simonson, 68 P 653, 64 Kan 802, 91 Am.S R 248, 57 L R A 765.

51. Ala—Alabama Midland R Co v. Thompson, 32 So. 672, 134 Ala 232.

52. Ga—Central R Co. v. Brunson, 63 Ga 504.
N H—Sheldon v. Robinson, 7 N H 157, 26 Am D 726.
S.C—Ragsdale v. Southern R Co, 48 S E. 466, 69 S C 429

53. S C—Givens v Seaboard Air Line R Co, 86 S E 24, 102 S C 1.

54. Ga—Weaver v Southern R. Co., 70 S E. 222, 9 Ga.App. 34.

55. N Y—Castiglione v. Austro-Americana SS. Co., 149 N Y S 898, 87 Misc 288

56. Ala—Mouton v. Louisville, etc, R Co, 29 So 602, 128 Ala 537.

57. Mo.—Johnson v. American Ry. Express Co, App., 245 S W 1071.
Tex—Panhandle & S. F Ry Co v. Snodgrass, Civ App, 278 S.W. 337—San Antonio & A P. Ry. Co v. Jackson & Allen, Civ.App., 187 S W. 488.

Nature of restriction

In action for damage to a shipment of live stock because of rough handling and severe weather, it was not error to exclude the shipping contract whereby the shipper assumed all risk and expense of feeding, watering, and caring for the shipment, in effect shipping the cattle at his own risk, in view of L 1911 p 153, providing that no carrier can by contract exempt itself from liability as a common carrier—Cravens v. Hines, Mo App., 218 S. W 912

58. Ky—Louisville & N R Co. v. Plummer, 35 S W. 1113, 18 Ky.L. 228

59. Ill—New v. Chicago, etc, R Co., 171 Ill App. 488.

60. Tenn—Nashville, etc, R Co. v. Stone, 79 S W 1031, 112 Tenn. 348, 105 Am S.R. 955

61. Tex.—Ft. Worth & D. C. Ry. Co. v. Atterberry, Civ App, 190 S W. 1133.

Reason for exclusion

Under such contract provision, if the storm or flood was so unprecedented that it could not reasonably have been anticipated and guarded against, the carrier would be excused without regard to such provision, and if the storm or flood, although extraordinary and unusual, might, reasonably have been anticipated and guarded against, failure to take precautions might be considered by the jury as negligence, against which a carrier cannot contract.—Ft. Worth & D. C. Ry. Co. v Atterberry, Tex.Civ.App, 190 S. W. 1133.

one by which less was charged, in consideration of such a waiver, than where there was no such waiver.[62] So, where a contract limiting liability is extorted from the shipper by refusal to ship except on these terms, he may show the falsity of recitals in the contract that opportunity was given him to ship on more favorable terms, and that he elected to accept the restrictive contract on a lower rate.[63]

Assent of shipper. In jurisdictions where express assent by the shipper to exemptions inserted in a contract of shipment must be shown by the carrier, see supra §§ 91, 254, the fact that the consignor had on prior occasions signed similar contracts of shipment is competent as tending to show knowledge of the restrictive conditions contained in the particular contract in suit.[64] The nondelivery of a bill of lading until several days after receipt of the goods by the carrier is admissible to prove nonassent by the shipper to the restrictive provisions contained in the bill of lading.[65] It is competent for the shipper and his witnesses to testify that they had never read the bill of lading; that they did not know at the time of receiving it what provisions were contained therein; that they did not have any talk with any agent of the carrier concerning the terms and conditions of the bill of lading, and that their attention had never, up to the time of the loss sued for, been called to the conditions and limitations contained in such bill of lading.[66] So evidence that the shipper never read a receipt limiting the carrier's liability is admissible on the question whether he consented to vary an oral contract of shipment so as to make it accord with such receipt.[67]

k. Notice of Claim

The general rules govern the admissibility of evidence to show compliance with a requirement of notice of claim, or a waiver thereof by the carrier.

In an action for loss of, or injury to, property delivered to a carrier for transportation, the general rules govern the admissibility of evidence as to whether notice of a claim for loss or injury, required by the contract of shipment, was given[68] within the prescribed time,[69] and whether such requirement was waived by the carrier.[70] Plaintiff's testimony that he prepared a written notice as required by the contract of shipment, and left it with his commission firm at destination of the goods, and that they afterward wrote him that they had filed it with defendant, is incompetent.[71] A claim for property lost in transit, presented to the carrier in accordance with the requirement of the bill of lading, is admissible, not to establish the price of the property, although such claim set forth the price, but to show compliance with the requirement of notice.[72]

62. Idaho.—McIntosh v. Oregon R., etc., Co., 100 P. 66, 17 Idaho 100.

63. Ark.—St. Louis, etc., R. Co. v. Wells, 99 S.W. 534, 81 Ark. 469.

64. Ill.—Wabash, etc., R. Co. v. Jaggerman, 4 N.E. 641, 115 Ill. 407—Chicago, etc., R. Co. v. Igo, 130 Ill.App. 373—Cleveland, etc., R. Co. v. Shoot, 130 Ill.App. 139.

65. Ill.—Coats v. Chicago, etc., R. Co., 134 Ill.App. 217.

66. Ill.—Illinois Match Co. v. Chicago, etc., R. Co., 153 Ill.App. 568, reversed on other grounds 95 N.E. 492, 250 Ill. 396.

67. N.Y.—Coggswell v. Weir, 101 N.Y.S. 188.

68. Okl.—Chicago, etc., R. Co. v. Conway, 125 P. 1110, 34 Okl. 356.

Letters

(1) To show notice of claim for damages, letters by the shipper to the claim agent itemizing the loss are the best evidence that notice was given and are admissible.—Berry v. Chicago, etc., R. Co., 124 N.W. 859, 24 S.D. 611.

(2) In an action against an initial carrier for damages to a shipment, a letter written to a connecting carrier's claim agent is admissible to show that notice of the claim required by the shipping contract was given to the claim agent.—Galveston, etc., R. Co. v. Itule, Tex.Civ.App., 172 S.W. 1123.

69. N.C.—Moore Bros. v. American Ry. Express Co., 107 S.E. 6, 181 N.C. 300.

Evidence admissible

(1) Where an express receipt required notice of claim within four months after reasonable time for delivery, the consignee's testimony that traffic conditions were congested, and he had much delay and trouble in receiving his goods, was admissible on the question of reasonable time.—American Ry. Express Co. v. Roberts, 111 S.E. 744, 28 Ga.App. 510.

(2) In an action to recover the value of shoes shipped to plaintiffs by defendant express company under a contract providing that, in case of failure to make delivery, claims must be made in writing within four months after a reasonable time for delivery had elapsed, evidence offered by plaintiff consignees that on account of war conditions and an influenza epidemic shipments were much delayed, so that thirty four days was not an unreasonable time to wait for delivery, was admissible on the question whether notice of claim was filed by plaintiff consignees within four months after a reasonable time for delivery has elapsed.—Moore Bros. v. American Ry. Express Co., 107 S.E. 6, 181 N.C. 300.

70. Minn.—Naumen v. Great Northern R. Co., 154 N.W. 1076, 131 Minn. 217.

Acts, declarations, and correspondence

(1) Evidence of a conversation between the shippers and the claim agent, when they were making an effort to adjust the loss is admissible to show waiver of the notice of loss.—Jones v. Quincy, etc., R. Co., 94 S.W. 735, 117 Mo.App. 523.

(2) Correspondence between the parties tending to show a waiver of a stipulation limiting the time to sue is admissible.—Naumen v. Great Northern R. Co., 154 N.W. 1076, 131 Minn. 217.

(3) But evidence of acts and declarations of the carriers after the time prescribed for making the claim, which evidence did not show a previous intention to waive notice, is not admissible to prove a waiver thereof.—Hamilton v. Westcott, 80 Mo.App. 597.

71. Okl.—Chicago, etc., R. Co. v. Conway, 125 P. 1110, 34 Okl. 356.

72. U.S.—Chicago & E.I.R. Co. v. Collins Produce Co., Ill., 235 F.

I. Damages
- (1) In general
- (2) Market value
- (3) Where property has no market value at destination
- (4) Value or method of computing same fixed by contract
- (5) Claim for damages

(1) In General

General rules apply in determining the admissibility of evidence on the question of damages for loss of, or injury to, property in transit. Evidence is admissible to show the plaintiff's efforts to minimize the damages.

General rules apply in determining the admissibility of evidence of damages for loss of, or injury to, property received by a carrier for transportation. Any evidence, which is otherwise competent, is admissible when, and only when it is relevant and material to the issue.[73] In an action for loss of a portion of the goods shipped, evidence as to the value of those delivered is admissible as fixing relatively the value of those not delivered;[74] and, if the goods have been shipped in fraud of the revenue laws, without payment of the tax due thereon, the amount of tax which should have been paid may be taken into account in determining the value of the goods.[75] In an action for injury to cattle by dipping in crude oil, general evidence as to the tendency of such action to injure stock is admissible, as tending to show the amount of damage.[76] Where a shipper paid the regular rate for the shipment of used motors, a bill of lading mailed to the shipper after transportation had begun, in which there was no agreed valuation or stated rate, was inadmissible to show that the motors were shipped as junk, and hence to diminish the amount of recovery, although such bill of lading contained a statement by the carrier's agent that the shipment was "junk motors."[77] In an action for injury to goods, the original and amended petitions were not admissible as a whole to show that plaintiff demanded a greater sum in his amended petition than he demanded in his original petition.[78]

Expenses. Evidence of the cost of returning a model, damaged in transit, to plaintiff's shop for repairs, is admissible;[79] and where such expense is claimed as an element of damage it is error to exclude evidence as to the necessity of returning the model to the shop had it not been damaged.[80] Where it is claimed that separate shipments by plaintiff were commingled, evidence of the amount paid by him to have the shipments assorted at destination was admissible.[81] Evidence of the cost of reshipping cattle, injured in transit, from the place of destination to the place where they were ulti-

857, 149 C C A 169, affirmed 39 S Ct. 189, 249 U S. 186, 63 L.Ed 552

73. Minn.—Geo. B Higgins & Co v Chicago, B & Q. R. Co, 161 N W. 145, 135 Minn. 402, L.R A 1917C 507.

Tex.—Hines v. Davis, Civ.App., 225 S W 862—Galveston, H & S. A. Ry. Co v. Hartford Fire Ins Co, Civ.App, 220 S.W. 781, reversed on other grounds Hartford Fire Ins. Co. v. Galveston, H & S. A. R. Co, 239 S.W. 919—Kansas City, M & O. Ry. Co. v. Blackstone & Slaughter, Civ.App, 217 S W. 208, rehearing overruled 218 S.W 552, error granted—Panhandle & S. F. Ry. Co. v. Vaughn, Civ.App. 191 S W 142, affirmed, Com.App, 222 S W 206

Wash.—Leddy v Great Northern Ry. Co, 210 P. 354, 122 Wash. 136.

Injury to live stock

(1) In action for injuries to cattle, wherein plaintiff did not seek recovery for value of calves lost, and there was no issue that would permit such recovery, but there was testimony that the negligence, want of feed and water, and exposure complained of would tend to cause cows bearing calves to lose them and thus injure the cows, evidence as to the number of calves he lost the next spring from the cows was relevant to the issue of the damage to the cows.—Payne v. Richards, Tex Civ. App., 248 S W. 771.

(2) The carrier when sued for injuries to cattle in transit may offer evidence of improvement of such cattle or recovery from their injuries, to show the extent of the injury at the time of their arrival and the resulting damages.—Panhandle & S. F. Ry Co v Norton, Tex Civ App., 188 S W. 1011.

(3) In an action against a railroad for damage to castrated bulls through delay in transit, it was held that plaintiff's testimony, showing the difference in the weight of the cattle at shipping point and their weight when unloaded at destination, was not improperly received, as not taking into consideration the fact that the cattle were castrated just before being shipped.—Cunningham v. Chicago & A. R. Co., Mo., 215 S. W. 5

(4) In suit for damages to horses and mules during transportation, account of sales shown to have been correct was admissible to show number of animals damaged.—Jones v. St. Louis-San Francisco Ry. Co, 50 S.W 2d 217, 226 Mo.App. 1152.

(5) In shipper's action for the death of a buffalo, due to the carrier's negligence, there was no error in excluding evidence as to the value of the robe which the carrier was not entitled to salvage, and which plaintiff had made from the hide, which was not shown to have any value.—Johnson v. American Ry. Express Co., Mo.App., 245 S.W 1071.

74. N Y.—Marquis v. Wood, 61 N.Y. S. 251, 29 Misc. 590

75. Ill.—Toledo, etc., R. Co. v. Kichler, 48 Ill. 438

76. Tex.—Missouri, etc., R. Co v. Cauble, Civ.App., 174 S.W. 880.

77. Mo.—Bachos v. Chicago, R I & P. Ry. Co, App., 61 S W 2d 416.

78. Iowa.—Glassman v Chicago, R. I. & P. Ry Co., 147 N.W. 757, 166 Iowa 254

79. N.J.—Cordery v. American Ry. Express Co., 137 A. 719, 5 N J. Misc 600, affirmed 140 A. 416, 104 N.J.Law 434

Cost of changes in reproduction of model could be shown.—Cordery v American Ry. Express Co., 137 A. 719, 5 N J.Misc 600, affirmed 140 A. 416, 104 N.J Law 434

80. N.J.—Cordery v. American Ry. Express Co, supra.

81. Ala.—Inland Waterways Corporation v. Sloss Sheffield Steel & Iron Co., 136 So. 849, 223 Ala. 397.

mately sold, is inadmissible.[82]

Efforts to minimize damages. In an action by the consignee for injury to goods, plaintiff may show his own efforts to minimize the damage; and for that purpose his testimony that he tried to sell the goods, but that certain firms refused to make an offer, was admissible.[83]

(2) Market Value

General rules are applicable in determining the admissibility of evidence relating to the market value of property lost or injured by a carrier. Evidence of actual or intrinsic value is inadmissible where the property has a market value. To show the market value of injured property evidence of the price realized therefor at a sale is admissible, unless the sale occurred some time after delivery.

The general rule, hereinafter stated, infra § 264, is that the market value of goods shipped at the place of destination is the criterion of value by which the amount of damages for loss of, or injury to, the goods is to be determined. To establish that the goods had a market value at the place of destination, it is necessary to show that goods of like quality had been bought and sold at that place during the season in sufficient quantity and often enough to show a market value, and evidence which fulfills the requirements of such rule is admissible.[84] To prove what such market value is, it is proper to admit any evidence which is relevant and material to the issue and is competent under the general rules,[85] but evidence which does not meet the issue or is otherwise inadmissible under the general rules should be excluded.[86] Any evidence which would tend to fix the amount which the injured property would have brought if it had reached its destination in good condition is admissible.[87] Where it is shown that there was a market value at the place of destination for the kind of property shipped, plaintiff may testify as to what that market value of the property was in the condition in which it was delivered at that place,[88] or state the difference in market value in the condition in which the property arrived at destination and in "good condition."[89] Where perishable property would have arrived at its destination in the good marketable condition in which it was delivered to the carrier had the carrier performed its duty, evidence of the market value of the goods at destination is admissible without making any allowance for the natural deterioration during transportation.[90] The market quotations in centers of trade may be shown as proof of the price at which such property was selling on a particular day,[91] but the statements of plaintiff's broker as to the condition of the market is hearsay, and inadmissible.[92]

In an action for loss of, or injury to, live stock in transit, evidence as to the value of the animals at destination, and as to what would have been their value had they arrived in the condition in which they were loaded at the starting point, was admissible to establish plaintiff's damages,[93] although there was no evidence to show what their condition at destination would have been had they been transported with ordinary care.[94] The fact that cattle had to be fed and cared for some time after the injury before they began to show signs of improvement may be shown to enable the jury to judge of the correctness of the estimate of depreciation,[95] and it may be shown that the injured cattle did not fatten or respond to feed as well as did uninjured cattle in the same shipment, so that, although treated in the same way, they made much less gain than they should have made.[96]

82. Ky.—Illinois Cent. R. Co. v Luther, 283 S.W. 1013, 214 Ky 658.

83. Tex.—Houston, E & W T. Ry Co. v. Brackin, Civ.App., 191 S.W 804.

84. N.Y.—Harris v Panama R Co., 58 N.Y. 660—Gulf, etc., R. Co. v. Jackson, 89 S.W. 968, 99 Tex 343—Pacific Express Co. v Lothrop, 49 S.W. 898, 20 Tex Civ App 339.

85. Cal.—Murray v. Southern Pac Co., 296 P. 667, 112 Cal.App 150.
Mo.—Green v American Ry. Express Co., App., 34 S.W.2d 1039
Tex.—Missouri Pac R Co v. German, 19 S.W. 461, 84 Tex. 141.

86. Tex.—Hines v Edwards, Civ. App., 228 S.W. 1117.
Evidence inadmissible
In an action for injury to cattle, testimony that, because of negligent handling, the cattle were depreciated at least five dollars per head, was held inadmissible because it did not meet the question of market value, and for the further reason that it involved a mixed question of law and fact—Hines v Edwards, Tex Civ App., 228 S.W. 1117.
Account sales rendered by a commission company selling cattle at destination, not being proved to be correct, were inadmissible to show the weight of cattle at the time of sale—Baker v. Holman, Tex Civ App., 196 S.W. 728.

87. Tex.—Gulf, C & S F. Ry Co v Mathews, 76 S.W. 607, 33 Tex Civ App 285

88. Tex.—Galveston, H & S A. Ry. Co. v. Gibbons, Civ App., 202 S W. 352

89. Tex.—Baker v. Herndon, Civ. App., 209 S.W. 165.

90. Ill.—Sparr v. Southern Pac Co., 220 Ill App 180

91. Ga.—Central R., etc., Co. v Skellie, 12 S.E. 1017, 86 Ga 636
Mich.—Sisson v Cleveland, etc., R Co., 14 Mich 489, 90 Am D 252.

92. Iowa.—Voorhees v. Chicago, etc., R Co., 30 N.W. 29, 71 Iowa 735, 60 Am.R. 823.

93. Ark.—St Louis, etc., R. Co v Laser Grain Co., 179 S.W 189, 120 Ark. 119
Neb.—Ralston v Union Pac R. Co., 147 N.W. 478, 96 Neb. 199.
Tex.—Gulf, etc., R Co. v. King, Civ App., 174 S.W 960.

94. Tex.—Kansas City, etc., R. Co. v. Cave, Civ.App., 174 S.W 872

95. Mo.—Sandker v. Wabash Ry. Co., App., 267 S.W. 957

96. Mo.—Carpenter v. Hines, App., 239 S.W. 593.

Evidence of the market value of the property at a place other than its destination is not admissible,[97] although evidence as to the market value at a place near the point of destination has been held admissible.[98] Where the property is shown to have a market value at destination, evidence of the price paid for it,[99] or for similar property,[1] or evidence of its intrinsic value,[2] is inadmissible.

The law relating to the admissibility of evidence to show the market value of personal property generally is discussed in the C.J.S. title Evidence § 183, also C.J. p 186 note 91–p 189 note 25.

Price obtained on sale of property. To show the market value of property lost, evidence as to what was received from the sale of the remaining property of the same shipment at place of destination at time of delivery is admissible.[3] Where property is injured in transit, evidence of the amount realized at a sale of the property is admissible to show the difference between its value in a sound condition and as injured;[4] but since the value is to be estimated as of the time of delivery, evidence as to what the property sold for at some time later than the delivery is inadmissible.[5] So, in an action for damages to cattle, where they were fed for three or four months after the injury and then were sold, testimony as to whether the owner received the full market value should be excluded, because tending to carry the inquiry into collateral and speculative issues;[6] and such evidence is not admissible as tending to lessen the damages because not furnishing a correct basis for determining the injury.[7]

(3) Where Property Has No Market Value at Destination

Evidence that the property lost or injured has no market value is admissible Where no market value is shown, the actual or intrinsic value may be proved by any relevant and material evidence admissible under the general rules.

In an action for loss or injury to goods or live stock shipped, it is competent to show that there was no market for the property at the place of destination.[8] Where the property is without market value, or has no market value at the place of shipment,[9] or where it is doubtful whether the jury would find that it had a market value at the place of destination,[10] evidence of its actual or intrinsic value is admissible.

For the purpose of showing actual value, any facts are admissible which will enable the jury intelligently to arrive at a fair valuation.[11] Thus ev-

97. Mass.—Hendrick v. Boston R Co., 48 N.E. 835, 170 Mass. 44.
10 C.J. p 386 note 50.

Corpus Juris is cited in Morrow v Wabash Ry Co., 265 S.W. 851, 851, 219 Mo.App. 62, as authority for a holding that evidence of market value before the injury is not admissible

98. Tex.—Hovey v. Kirby, Civ.App., 189 S.W. 794
However, it has been said that, "while the price paid for an article of merchandise may not necessarily determine its value, still occasions sometimes arise where the price paid for an article may be shown and considered by the jury as tending to show its value"—Hines v. Dinovo, 14 Ohio App. 119, 123.

Value in pasture near place of destination
In action for injuring cattle shipped, to be placed on pasture in ranches near the point of destination, testimony as to their market value in that section of the country was admissible, where witness testified that the market value would be the same all over that section, which included the place of destination.—Hovey v. Kirby, Tex.Civ.App., 189 S.W. 794

99. Tex.—Chicago, R. I. & G. Ry. Co. v. Rogers, 129 S.W. 1155, 61 Tex.Civ.App. 603
10 C.J. p 386 note 51.

1. Tex.—St. Louis, S. F. & T. Ry. Co. v. J. G. Henderson Cut Stone Co., Civ.App., 275 S.W. 603

2. Tex.—Panhandle & S. F. Ry. Co. v. Miller, Civ.App., 64 S.W.2d 1076, error dismissed—Kansas City, M. & O. Ry. Co. of Texas v. Moore, Civ.App., 11 S.W.2d 335—Panhandle & S. F. Ry. Co. v. Snodgrass, Civ.App., 278 S.W. 337—Gulf, C. & S. F. Ry. Co. v. Roberts, Civ.App., 85 S.W. 479

3. Ill.—Field v. St. Louis, etc., R. Co., 152 Ill. 562.

4. Ga.—Southwestern R. Co. v. Davies, 186 S.E. 899, 53 Ga.App. 712
Miss.—Yazoo & M. V. R. Co. v. Peeples, 64 So. 262, 106 Miss. 604
Tex.—San Antonio, etc., R. Co. v. Bracht, Civ.App., 172 S.W. 1116.
10 C.J. p 387 note 57.

Corpus Juris is quoted in Vaccaro Bros & Co. v. Louisville & N. R. Co., 123 So. 355, 357, 11 La.App. 348

Original account of sales at destination of a car of tomatoes is admissible, in an action against a carrier for injury to the tomatoes from failure to re-ice the car at points on the route as agreed, to show the amount realized.—Pennsylvania R. Co. v. Orem Fruit, etc., Co., 73 A. 571, 111 Md. 356.

5. Tex.—Panhandle & S. F. R. Co. v. Ross, Civ.App., 80 S.W.2d 427.
10 C.J. p 387 note 58.

6. Tex.—Missouri, etc., R. Co. v. Mulkey, Civ.App., 159 S.W. 111

7. Tex.—Missouri, etc., R. Co. v. Mulkey, supra.

8. Tex.—Missouri, etc., R. Co. v. Wasson, 126 S.W. 664, 59 Tex.Civ.App. 239

Corpus Juris is quoted in Leddy v. Great Northern Ry. Co., 210 P. 354, 356, 122 Wash. 136.

9. Tex.—Lancaster v. Tudor, Civ.App., 222 S.W. 990
Wash.—Leddy v. Great Northern Ry. Co., 210 P. 354, 122 Wash. 136
10 C.J. p 387 note 62

10. Tex.—Galveston, H. & S. A. R. Co. v. Powers, 117 S.W. 459, 51 Tex.Civ.App. 168.
10 C.J. p 387 note 63.

11. **Evidence admissible on question of value**
(1) Cost of transportation.—Galveston, etc., R. Co. v. Crippen, Tex.Civ.App., 147 S.W. 361—Pacific Express Co. v. Lothrop, 49 S.W. 898, 20 Tex.Civ.App. 339

(2) Cost of making repairs.—Chicago, etc., R. Co. v. Calvert, 91 S.W. 825, 41 Tex.Civ.App. 236.

(3) Manner in which property has been used.—Jacksonville, etc., R. Co. v. Peninsula Land, etc., Mfg. Co., 9 So. 661, 27 Fla. 1, 157, 17 L.R.A. 33, 65

(4) General condition and quality of property and the percentage of

idence may be admitted to show the cost of the property,[12] its value at the point of shipment[13] or at other markets,[14] the price for which other property of the same kind was previously sold by plaintiff a short time before the loss or the injury complained of,[15] and the price at which plaintiff had contracted to sell the property at the point of destination.[16] Where, however, there is no evidence of market value either in the injured condition of cattle when delivered or in the condition in which they should have arrived, evidence that the cattle were worth a certain sum less per head than they would have been worth had they been transported without negligence is inadmissible.[17] It has been held that the value of a portion of the property may be estimated with reference to the value of the remaining property or to the total value of the whole.[18] So, where animals, such as race horses, have no market value at the place of destination, evidence of the condition, temper, disposition, and character of the horses when received by the carrier, and of the effect of these traits on their value, and that the injuries received would affect their racing qualities and value is competent in determining the actual value of the horses,[19] as is also evidence of the number of races the horses have won, and of the class of horses raced with.[20] On the other hand, where, in an action against a carrier for injury to colts while in transit, the shipper shows as his damages the difference in the value of the colts before and after the injury, by estimating their value at the point of shipment and what they brought at the point of destination at a sale, the carrier is entitled to show that the sale at the point of destination was a failure, and that the price offered for colts there was not a fair test of their value.[21]

(4) Value or Method of Computing Same Fixed by Contract

A contract fixing the value of the property shipped is admissible, and such contract may be proved by any competent evidence. If the shipping contract fixes the value of property at the place of shipment, evidence of its value at the place of destination is inadmissible.

The value of the property shipped, fixed by a valid contract of shipment, is ordinarily controlling in an action to recover for loss of, or injury to, the property, as previously stated, supra § 113. Such contract, signed by the shipper or his agent, is competent evidence.[22] However, where the shipping contract limits the value of live stock shipped to a designated amount for each, the shipper, in an action for injuries to the stock, is not thereby precluded from showing that the actual value of the stock injured exceeded the designated sum, not for the purpose of allowing a greater recovery per head, but to enable the jury to estimate the damage done to each animal within the limits specified.[23] Evidence that the shipper's agent falsely stated the value of the property, thereby obtaining a lower freight rate, and preventing the carrier from providing adequate insurance, is admissible so far as relevant on the question of value.[24] Where the carrier charged a rate fixed on the valuation of the property by the shipper, and would not be liable in case of loss for an amount greater than the declared value, it was error to exclude a schedule filed with the interstate commerce commission showing graduated rates based on valuations.[25] So, in an action to recover for cattle killed in shipment, an order published by a state corporation commission prescribing rates to be charged for carrying certain grades or values of cattle, is competent to prove the rates so fixed;[26] and testimony on behalf of the carrier as to the rates actually charged by the carrier and paid by the shipper is competent to show the class or grade under which plaintiff shipped his cattle;[27] but the classification of the interstate commerce commission based on a valuation clause in a bill of lading for a stock shipment is inadmissible in an action for damages to stock where there was not in evidence a

their depreciation from damage, use, age, decay, or otherwise.—Jacksonville, etc, R Co v. Peninsula Land, etc., Mfg Co., supra.

12. Tex.—Chicago, R. I. & G. Ry. Co. v. Rogers, 129 S W 1155, 61 Tex.Civ App 603.
10 C.J. p 387 note 65.

13. Ala.—Echols v Louisville & N. R. Co., 7 So 655, 90 Ala 366.
10 C J. p 388 note 66.

14. Ark.—St Louis Southwestern Ry. Co v Kilberry, 102 S.W. 894, 83 Ark 87
10 C.J. p 388 note 67.

15. Tenn.—Cole v. Rankin, Ch.A., 42 S W. 72.

16. Iowa.—Clements v. Burlington, etc., R. Co., 38 N.W. 144, 74 Iowa 442.

17. Tex.—Ft. Worth, etc., R Co v Shank, Civ.App, 167 S.W. 1093.

18. N Y.—Marquis v. Wood, 61 N.Y S. 251, 29 Misc 590.
S.C.—Crawford v. Southern R. Co., 34 S E. 80, 56 S.C 136.
Tex.—Missouri Pac. R Co v Sherwood, 19 S.W. 455, 84 Tex. 125, 17 L.R A 643.

19. Ky.—Cincinnati, etc., R. Co v Logan, 96 S.W. 910, 29 Ky L. 1123.

20. Tex.—Galveston, etc., R. Co v Crippen, Civ.App., 147 S W. 361

21. Ky.—Cincinnati, etc., R Co v. Logan, 96 S W. 910, 29 Ky L. 1123.

22. Okl.—Shaff v. Kramer, 235 P. 517, 109 Okl. 109

23. S C.—Winslow v Atlantic Coast Line R Co, 60 S.E. 709, 79 S C. 344.

24. Ky.—A. Arnold & Son Transfer & Storage Co v. Weisiger, 6 S. W.2d 1084, 224 Ky. 659.

25. U S.—American Ry Express Co v. Daniel, 46 S.Ct. 15, 269 U S. 40, 70 L Ed. 154, reversing 121 S E 686, 157 Ga. 731, certiorari granted 44 S.Ct. 461, 265 U.S 576, 68 L Ed 1187, which affirmed 116 S E 660, 29 Ga.App. 780, vacated 132 S.E 144, 35 Ga App. 81.

26. Okl.—Shaff v. Kramer, 235 P. 517, 109 Okl. 109

27. Okl.—Shaff v. Kramer, supra.

bill of lading containing a valuation clause.[28] Where plaintiff denied that he gave any valuation of the property to the agent of the carrier who made out the contract of shipment, and whether there was a declared or release value was open to question under the written evidence, it was proper to ask the agent what he said to plaintiff regarding the release value, and what plaintiff said to him.[29]

Provision for computing value at place of shipment. Evidence of the value of the property at the place of destination is inadmissible where the contract of shipment provides that the amount of loss or injury shall be computed at the value of the property at the place of shipment.[30]

(5) Claim for Damages

A claim for damages filed before suit is ordinarily admissible to show that at that time plaintiff claimed a less amount of damages than that stated in his petition.

Ordinarily plaintiff's claim for damages filed before suit is brought for injury to property shipped is admissible to show that at that time he claimed a less amount of damages than that stated in the petition[31] or testified to by him as a witness;[32] and such evidence is not objectionable as being an offer of compromise;[33] but where the legal measure of damages was the market value of the several pieces of machinery broken in transit, and not of substituted pieces subsequently purchased, it was proper to exclude a written claim presented by plaintiff which specified articles alleged to have been lost, giving the price thereof, and including the cost of machine work and expense in putting in new parts.[34]

§ 256. Weight and Sufficiency of Evidence

The weight and sufficiency of the evidence in an action against a carrier for the loss of, or injury to, property is governed by the general rules of evidence.

The general rules as to the weight and sufficiency of evidence are applicable in an action against a carrier for loss of, or injury to, property delivered to it for transportation.[35] These rules have been applied to evidence offered to show plaintiff's right

28. N.C.—Smith v. Atlantic Coast Line R. Co., 79 S.E. 433, 163 N.C. 143.

29. Mich.—Shier v. American Ry. Express Co., 208 N.W. 746, 234 Mich. 505.

30. Ala.—Southern Ry. Co. v. Propst & Duckworth, 76 So. 470, 16 Ala. App. 186.
Mo.—Caples v. Louisville, E. & St. L. Ry. Co., 17 Mo. App. 14.
Okl.—St. Louis & S. F. R. Co. v. First Nat. Bank, 171 P. 467, 68 Okl. 68.

31. Tex.—Missouri, etc., R. Co. v. Clayton, Civ.App., 84 S.W. 1069.

32. Tex.—Ft. Worth, etc., R. Co. v. Lock, 70 S.W. 456, 30 Tex.Civ.App. 426

33. Tex.—Ft. Worth, etc., R. Co. v. Lock, supra.

34. Tex.—St. Louis, S. F. & T. Ry. Co. v. J. G. Henderson Cut Stone Co., Civ.App., 275 S.W. 603.

35. Ala.—Southern Ry. Co. v. Frank De Latour, Inc., 135 So. 187, 223 Ala. 245
Ark.—American Ry. Express Co. v. H. Rouw Co., 48 S.W.2d 220, 185 Ark. 526
Ill.—McCarthy v. Chicago & N. W. Ry. Co., 198 Ill.App. 405.
Mo.—Bragg v. Payne, App., 235 S.W. 148.
Neb.—Wegner v. Chicago, St. P., M. & O. R. Co., 186 N.W. 971, 107 Neb. 628.
Pa.—Hightstown Smyrna Rug Co. v. American Ry. Express Co., 84 Pa. Super. 607.
Tenn.—Louisville & N. R. Co. v. Hobbs, 190 S.W. 461, 136 Tenn. 512.

Evidence sufficient

(1) To sustain verdict or judgment for plaintiff
U.S.—Lehigh Valley R. Co. v. State of Russia, C.C.A.N.Y., 21 F.2d 396, certiorari denied 48 S.Ct. 159, 275 U.S. 571, 72 L.Ed. 432—Southern Ry. Co. v. Pettit, Tenn., 257 F. 663, 168 C.C.A. 613, certiorari denied 39 S.Ct. 290, 249 U.S. 607, 63 L.Ed. 799
Ark.—American Ry. Express Co. v. H. Rouw Co., 48 S.W.2d 220, 185 Ark. 526—St. Louis-San Francisco Ry. Co. v. Solomon & Wineberg, 256 S.W. 862, 161 Ark. 552—Hines v. Helena Cotton Oil Co., 227 S.W. 418, 147 Ark. 328.
Colo.—Freeman v. Boyer Bros., 261 P. 864, 82 Colo. 509, 55 A.L.R. 1285.
Fla.—Atlantic Coast Line R. Co. v. Mach, 109 So. 457, 92 Fla. 442
Ga.—Atlantic Coast Line R. Co. v. McLemore, 164 S.E. 464, 45 Ga. App. 154—Atlantic Coast Line R. Co. v. Hogrefe, 159 S.E. 760, 43 Ga. App. 520—Davis v. Hayes, 115 S.E. 148, 29 Ga. App. 330.
Idaho.—Wood Livestock Co. v. Oregon Short Line R. Co., 298 P. 371, 50 Idaho 524.
Ill.—Warren Land Co. v. Chicago, St. P. M. & O. Ry. Co., 205 Ill.App. 425—Hughes v. Dobson, 202 Ill.App. 54—Mueller Grain Co. v. Chicago, P. & St. L. R. Co., 200 Ill.App. 347
Kan.—Parker Corn Co. v. Chicago, B. & Q. R. Co., 244 P. 240, 120 Kan. 484—Nelson v. Union Pac. R. Co., 225 P. 1065, 116 Kan. 35
La.—Raphiel v. Louisiana Ry. & Nav. Co., 99 So. 459, 155 La. 590—Alexander v. Texas & P. Ry. Co., 129 So. 419, 14 La.App. 245
Me.—Goldberg v. New York, N. H. & H. R. Co., 153 A. 812, 130 Me. 96.
Minn.—Levine v. Duluth & I. R. Co., 214 N.W. 17, 171 Minn. 205—S. G. Palmer Co. v. Illinois Cent. R. Co., 204 N.W. 566, 164 Minn. 68
Mo.—Green v. American Ry. Express Co., App., 34 S.W.2d 1039—Baker v. Bush, App., 194 S.W. 1061
Ohio.—St. Louis-San Francisco Ry. Co. v. Glow Electric Co., 172 N.E. 425, 35 Ohio App. 291.
Okl.—Chicago, R. I. & P. Ry. Co. v. Great Western Oil Co., 250 P. 776, 120 Okl. 150.
Pa.—Beresin v. Pennsylvania R. Co., 176 A. 774, 116 Pa.Super. 291.
S.C.—Palmetto Ice Cream Co. v. Southern Express Co., 101 S.E. 862.
Tex.—Texas & N. O. R. Co. v. Roy Campbell, Wise & Wright, Civ. App., 110 S.W.2d 171—Gulf, C. & S. F. Ry. Co. v. Lipshitz, Civ.App., 29 S.W.2d 905, error refused—Fort Worth & D. C. Ry. Co. v. Harle, Civ.App., 240 S.W. 1004, error refused—Schaff v. Fancher, Civ.App., 215 S.W. 861—San Antonio & A. P. Ry. Co. v. Hinnant, Civ.App., 206 S.W. 860
Va.—Chesapeake & O. Ry. Co. v. Timberlake, Currie & Co., 137 S.E. 507, 147 Va. 304.
Wyo.—Davis v. Graham, 225 P. 789, 31 Wyo. 239

(2) To sustain verdict or judgment for carrier.
Ark.—Oil Trough Gin Co. v. Director

to sue;[36] that defendant is a common carrier;[37] the making of a contract of shipment;[38] delivery of the property lost or injured to, and acceptance by, the carrier;[39] the identity and amount of prop-

General of Railroads, 216 S.W. 310, 141 Ark 133.
Okl.—Baker Cotton Oil Co v. St Louis & S. F. Ry. Co., 232 P. 20, 105 Okl. 226.

(3) To support findings that storage company agreed to pack plaintiff's goods as required for shipment, and that plaintiff relied thereon—Beall v Bekins Van & Storage Co, 166 P 370, 33 Cal App 652.

(4) To justify ruling that lighterage company was independent contractor, and not consignee's agent, in transporting explosives to defendant railway's terminal—Lehigh Valley R Co. v. State of Russia, C C.A N.Y, 21 F 2d 396, certiorari denied 48 S Ct 159, 275 U S 571, 72 L Ed. 432

(5) To support finding that cotton was delivered in accordance with original directions before defendants were notified to divert it to another place—Wilkinson & Carroll Cotton Co v. Chicago, M & G. R. Co., C C A.Tenn., 32 F 2d 553.

(6) To show that shipper's caretakers accompanied shipment of live stock—Gray v. Missouri, K & T. R Co of Texas, Tex Civ.App., 45 S.W. 2d 267.

(7) To show that a forwarder acted as agent in delivering plaintiff's goods to the carrier and in receiving its bill of lading, and acted as agent for the shipper in valuing the goods. — Michelson v. Judon Freight Forwarding Co., 109 N E 381, 268 Ill. 546.

Evidence insufficient

(1) To support verdict or judgment for plaintiff
U.S.—Julius Klugman's Sons v Oceanic Steam Nav. Co, D.C.N.Y., 42 F 2d 461.
Ga.—Hines v. Vann, 106 S E. 921, 26 Ga App. 704.
Ill.—Weinberg v Nicodemus, App., 3 N.E.2d 173—House v. Wheelock, 254 Ill.App. 149 — Cardwell v. Payne, 226 Ill.App 227.
La.—Breazeale v. American Ry. Exp Co., 137 So. 585, 18 La App 59—Weaver Bros. v. Texas & P. Ry Co., 123 So. 195, 11 La App 412
Mo.—Rudy v. Cleveland, C., C. & St L. R Co., App, 278 S.W. 814.
N.Y.—Turkel v American Ry. Express Co., 188 N.Y.S. 207—Edwin B. Stimpson Co. v. Chicago, B & Q. R Co, 164 N Y.S 68
Okl.—Schaff v. Richardson, 250 P. 133, 119 Okl. 160—Parker-Gordon Cigar Co v Chicago, R. I & P. Ry Co, 221 P. 711, 94 Okl 149
Pa.—Mohawk Glove Corporation v. Philadelphia & R. Ry. Co, 92 Pa. Super 460.
Tex.—Gulf, C. & S F. Ry. Co. v. Mitchell, Civ App., 261 S.W. 548—Lancaster v. Sayles, Civ.App., 234 S.W. 227—Gulf, C. & S. F. Ry. Co. v. Helms Bros., Civ.App., 210 S W 853.
Va.—Southern Ry Co v. Burton & Briel, 141 S E. 113, 149 Va. 364.

(2) To sustain a recovery on a carrier's common-law liability as insurer.—Southern R Co v W. T. Adams Mach. Co., 51 So. 779, 165 Ala. 436

(3) To prove that railroad agreed to transport live stock shipment over a route other than that followed.—Intercontinental Rubber Co. v. Chicago, B. & Q. R. Co., 179 N.Y. S. 3, 189 App.Div. 649.

(4) To show carrier's liability as warehouseman.—Chicago, R I. & P. Ry Co v Stouffer, 111 N.E. 809, 61 Ind.App. 190.

(5) To sustain a finding that plaintiff agreed to insure the goods against theft in consideration of lower trucking rates—Levinson v Morris Transfer Co., 186 N Y.S. 563

Preponderance of evidence is essential to prove any fact on which plaintiff relies for recovery—Sterling v. St Louis, etc., R Co., 86 S.W. 655, 38 Tex.Civ.App. 451.

36. Ala.—Atlantic Coast Line R. Co v. J. S. Carroll Mercantile Co., 104 So. 413, 213 Ala 234.
S.C.—Deaver-Jeter Co. v. Southern R. Co., 74 S E. 1071, 91 S.C. 503, Ann Cas.1914A 230.
10 C.J. p 389 note 88.

Evidence sufficient

Ala.—Atlantic Coast Line R Co. v J. S. Carroll Mercantile Co, 104 So. 413, 213 Ala. 234.
Ark.—St. Louis-San Francisco Ry Co. v. Ozark White Lime Co., 9 S.W 2d 17, 177 Ark. 1018
Ill.—Ætna Ins Co v. Illinois Cent. R. Co, 283 Ill App 527.
Wash.—Gray & Barash v. Puget Sound Nav. Co, 203 P. 975, 118 Wash. 376.

Evidence insufficient

(1) To show title in plaintiff—Bennett v. Dickison, 186 P. 1005, 106 Kan 95, affirmed 190 P. 757, 107 Kan. 17.

(2) In suit by holder of "an order notify" bill of lading, who has paid the draft attached and obtained possession of the bill of lading and title of the goods mentioned therein, against the carrier, for a shortage resulting after the transfer, wherein the bill of lading is not in evidence and there is no evidence of amount of goods in carrier's possession and delivered to transferee, there is a failure to prove a loss after obtaining title to the goods—Southern Ry Co v. Hunt, 102 S.E. 757, 25 Ga.App. 116.

Degree of proof

Where a carrier has wrongfully injured property in its possession for purpose of carriage, the same high degree of proof of ownership is not required in an action against it for damages to the property as is required when the contest is between individuals each claiming the title, although a carrier who wrongfully injures property is not called on to answer to one without interest, even though the party in interest refuses to assert his right.—Gray & Barash v. Puget Sound Nav. Co, 203 P. 975, 118 Wash. 376.

37. Ala.—Southern Express Co v Ashford, 28 So 732, 126 Ala. 591.
10 C J. p 389 note 89.

Evidence sufficient

Ill.—Transformer Corporation of America v. Hinchcliff, 279 Ill App. 152. See Dahlgren v. Israel, 204 Ill.App. 340.
Mass.—Houle v. Lewonis, 140 N.E. 427, 245 Mass. 254

38. Tex.—Lancaster v. Mebane, Civ. App., 260 S W. 256
10 C J p 389 note 90.

Evidence sufficient

(1) Generally.
Ill.—Finkelstein v. Illinois Cent. R. Co, 198 Ill App 75
Tex.—Lancaster v. Mebane, Civ.App, 260 S W. 256.

(2) To show authority of party making contract.
La.—Luckett & Hunter v. Texas & P. Ry. Co., 1 La App 434, reinstated 108 So 405, 161 La. 175, annulling 2 La App. 752
Okl.—St Louis-San Francisco Ry. Co v. Hensley, 241 P. 135, 113 Okl. 232.

Evidence insufficient

Tex.—Atchison, T & S. F Ry. Co. v. White, Civ App, 188 S W 714, error refused—International & G. N. R Co. v. Hudson, Civ.App., 188 S W. 277.

Existence of special contract

Where agents for a railroad stated to the owner of perishable goods that the company had a schedule for one of its trains between Savannah and New York of forty-three hours, and expected to maintain it, and such owner, acting on the belief induced by such statement, made shipments of such goods from Savannah to New York, a special contract to transport the shipments in forty-three hours was not shown.—Atlantic Coast Line R. Co. v. Wells, 60 S.E. 170, 130 Ga. 55.

39. Fla.—Gulf Coast Transp. Co. v. Howell, 70 So 567, 70 Fla. 544.
La.—W H & C. B. Hodges v Louisiana Ry. & Nav. Co., 156 So. 26, 180 La. 3.
10 C.J. p 389 notes 91, 93.

erty so delivered,[40] and its condition at that time;[41] injury or loss occurring while the property was in the possession of the carrier;[42] the cause of the in-

Evidence sufficient
Ill.—Independent Breweries Co. v. Wabash Ry. Co., 223 Ill.App. 156
La.—W. H. & C. B. Hodges v. Louisiana Ry. & Nav. Co., 156 So. 26, 180 La. 3
Mont.—Parham v. Chicago, M. & St. P. Ry. Co., 189 P. 227, 57 Mont. 492
Pa.—Dintenfass v. American Railway Express Co., 78 Pa.Super. 395
Tex.—Texarkana & F. S. Ry. Co. v. Brass, Com.App., 262 S.W. 737, overruling 260 S.W. 828, which affirmed, Civ.App., 245 S.W. 457—Myers v. Texas Land & Development Co., Civ.App., 282 S.W. 919—Gulf, C. & S. F. Ry. Co. v. Bostick, Civ.App., 233 S.W. 112—Hines v. Steele, Civ.App., 224 S.W. 606, dismissed for want of jurisdiction—Gulf, C. & S. F. Ry. Co. v. Anderson, Clayton & Co., Civ.App., 212 S.W. 814, error granted—Sugarland Ry. Co. v. Dew Bros., Civ.App., 212 S.W. 190, dismissed for want of jurisdiction—Gulf, C. & S. F. Ry. Co. v. Rosenthal Dry Goods Co., Civ.App., 207 S.W. 167.
Va.—American Ry. Express Co. v. Downing, 111 S.E. 265, 132 Va. 139

Evidence insufficient
S.C.—Parler v. Davis, 115 S.E. 818, 123 S.C. 39.
Tex.—Universal Carloading & Distributing Co. of Texas v. Dreyfuss & Son, Civ.App., 46 S.W.2d 378—Fort Worth & D. C. Ry. Co. v. Tomson, Civ.App., 250 S.W. 747.

Degree of proof

The requirement that the consignee to recover for loss of goods must show that they were delivered to the carrier does not require the proof to be such as to shut out every possibility of error, but requires only such proof as will convince a reasonable man.—Gulf, C. & S. F. Ry. Co. v. Rosenthal Dry Goods Co., Tex.Civ.App., 207 S.W. 167.

When custom or usage is relied on to show a constructive delivery of the goods to the carrier, such custom or usage must be clearly and definitely shown, and where the evidence is uncertain and contradictory it will be deemed insufficient.—Gulf Coast Transp. Co. v. Howell, 70 So. 567, 70 Fla. 544

Preponderance of evidence

A carrier which seeks to impeach its own receipt, introduced by plaintiff to show delivery of goods to carrier, must explain or contradict it by a preponderance of the evidence.—Effron, Kushner & Co. v. American Ry. Express Co., 193 N.W. 539, 195 Iowa 1168

40. Ark.—American Ry. Express Co. v. Collins, 222 S.W. 1059, 144 Ark. 509
Ga.—Atlantic Coast Line R. Co. v. Stovall-Pace Co., 118 S.E. 62, 30 Ga.App. 326.
S.C.—Ragin v. Northwestern R. Co. of South Carolina, 93 S.E. 860, 108 S.C. 171.
Tex.—Schaff v. Hill & Thompson, Civ.App., 238 S.W. 1037.

Evidence sufficient to identify property
Ark.—American Ry. Express Co. v. Collins, 222 S.W. 1059, 144 Ark. 509

Evidence sufficient to show amount or weight
Ill.—Armour Grain Co. v. Davis, 233 Ill.App. 1—Shellabarger Elevator Co. v. Illinois Cent. R. Co., 212 Ill.App. 1—Marsh L. Brown & Co. v. Chicago, New York & Boston Refrigerator Co., 207 Ill.App. 89. See Dahlgren v. Israel, 204 Ill.App. 340.
S.C.—Ragin v. Northwestern R. Co. of South Carolina, 93 S.E. 860, 108 S.C. 171.
Tex.—Schaff v. Hill & Thompson, Civ.App., 238 S.W. 1037.

Evidence insufficient to prove amount asserted by plaintiff
Me.—Lewis Poultry Co. v. New York Cent. R. Co., 105 A. 109, 117 Me. 432

Recital in bill of lading, although prima facie correct, was held overcome by evidence.—St. Louis, etc., R. Co. v. Woodruff Mills, 62 So. 171, 105 Miss. 214

41. Minn.—Pressley Co. v. Illinois Central R. Co., 136 N.W. 11, 117 Minn. 399
10 C.J. p. 389 note 92.

Evidence sufficient

(1) To show property delivered to carrier in good condition.
Ark.—American Ry. Exp. Co. v. Cole, 42 S.W.2d 772, 184 Ark. 485.
Iowa.—Ball v. Chicago, R. I. & P. Ry. Co., 181 N.W. 469, 190 Iowa 977.
La.—H. P. Richard & Sons v. Director General of Railroads, 107 So. 891, 160 La. 1019—John Bonura & Co. v. Texas & N. O. R. Co., 126 So. 593, 14 La.App. 351, rehearing denied 128 So. 68, 14 La.App. 351, and certiorari denied Texas & N. O. R. Co. v. John Bonura & Co., 51 S.Ct. 80, 282 U.S. 875, 75 L.Ed. 773
Mo.—Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co., 201 S.W. 623, 198 Mo.App. 520.
S.C.—Ragin v. Northwestern R. Co. of South Carolina, 93 S.E. 860, 108 S.C. 171.
Tex.—Galveston, H. & S. A. Ry. Co. v. Licata, Civ.App., 269 S.W. 821, reversed on another ground, Com.App., 280 S.W. 540—Baker v. Lyons, Civ.App., 218 S.W. 1090.

(2) To show that cause of sickness of horses antedated their delivery to carrier for transportation.—Siegel v. Chicago, R. I. & P. Ry. Co., 208 N.W. 78, 201 Iowa 712.

Evidence insufficient to show property delivered to carrier in good condition
La.—Fowles v. Louisville & N. R. Co., 132 So. 240, 15 La.App. 421
Mo.—Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co., 187 S.W. 149, 193 Mo.App. 572.
Tex.—Galveston, H. & S. A. Ry. Co. v. John Muennink & Son, Civ.App., 195 S.W. 613

Clear and satisfactory evidence is essential to prove that the goods, for the loss of, or injury to, which recovery is sought, were not in good condition when delivered to the carrier.
U.S.—Tan Bark Case, D.C.Mich., 23 F.Cas.No.13,742, Brown Adm. 131
La.—Bond v. Frost, 6 La.Ann. 801.

Preponderance of evidence is essential to show that goods were not in good condition.—Kelly v. Illinois Cent. R. Co., 8 La.App. 413.

42. Ala.—Louisville & N. R. Co. v. John W. O'Neill Co., 85 So. 482, 204 Ala. 154.
Neb.—Leypoldt & Pennington Co. v. Davis, 199 N.W. 463, 112 Neb. 350—Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry. Co., 182 N.W. 967, 106 Neb. 149
10 C.J. p. 389 notes 94–96.

Evidence sufficient

(1) Evidence was held to establish that loss or injury occurred while property was in possession of carrier.
Ala.—Louisville & N. R. Co. v. John W. O'Neill Co., 85 So. 482, 204 Ala. 154.
Colo.—Lynch v. Union Pac. R. Co., 172 P. 1061, 65 Colo. 152.
Ill.—Bruner v. Grand Trunk Western Ry. Co., 150 N.E. 266, 319 Ill. 421, affirming 236 Ill.App. 541.
La.—Shearing v. Louisiana Ry. & Nav. Co., 120 So. 703, 10 La.App. 478
Mo.—Niedt v. American Ry. Express Co., App., 6 S.W.2d 973.
N.Y.—Balice v. Erie R. Co., 203 N.Y.S. 636, 208 App.Div. 427—Pereira v. American Ry. Express Co., 202 N.Y.S. 789, 207 App.Div. 692.
Tex.—Texas & N. O. R. Co. v. Pipkin, Civ.App., 209 S.W. 757

(2) Evidence that a mule was in good condition a few days before shipment, and testimony that he was still in good condition and uninjured at a point en route where he was temporarily unloaded was held suf-

jury generally;[43] loss or injury due to act of God or other excepted cause;[44] negligence of the carrier, generally, with respect to goods[45] or live

ficient to sustain a finding that injuries existing at the time of delivery were sustained en route.—Central of Georgia Ry. Co v. Camp Hill Trading Co., 94 So. 350, 208 Ala 315.

(3) Where wheat was weighed by shipper on his own scales at time of shipment, but when weighed by the carrier at destination, showed a less amount, it was held that the evidence was sufficient to authorize recovery by the shipper for loss indicated by the difference in the weights, although there was no other proof of loss or of any leakage in the cars.—Pennsylvania R. Co. v Windfall Grain Co., 177 N.E. 902, 93 Ind App. 194.

Evidence insufficient to show loss or injury to property while in carrier's possession.

Ill.—Childers & Lillienstein v. Illinois Cent R. Co., 206 Ill.App. 535, 540.

N.Y.—Annunziato v. New York, N. H. & H. R. Co., 253 N.Y.S. 626, 142 Misc 327.

Pa.—Isdaner v Central R. Co. of New Jersey, 65 Pa.Super. 156

S.C.—Ragin v. Northwestern R. Co. of South Carolina, 93 S.E. 860, 108 S.C. 171.

43. Ark.—Burke Const. Co. v. St. Louis & S. F. Ry. Co., 214 S.W. 13, 139 Ark. 199.

Evidence sufficient

(1) To justify finding that the proximate cause of the wreck destroying a steam shovel and steam shovel boom was an undiscoverable defect in the shovel car.—Burke Const. Co. v. St. Louis & S. F. Ry. Co., 214 S.W. 13, 139 Ark. 199.

(2) To show that injury to live stock was caused by freezing

Iowa.—Colsch v. Chicago, etc., R. Co., 153 N.W. 327, 171 Iowa 78.

La.—Pohlman v. Yazoo & M. V. R. Co., 130 So. 263, 14 La.App. 498.

Evidence insufficient

(1) To justify finding that death of cattle was due to freezing while shipment thereof was wrongfully diverted.—McKinster v. Great Northern Ry. Co., 218 P. 87, 67 Mont. 134

(2) To show that death of cattle was caused by tick fever.—Smith v. New Orleans & G. N. R. Co., 122 So. 724, 11 La.App. 386.

Circumstantial evidence

In shipper's action for death of hogs, circumstantial evidence regarding cause of death must be more than consistent with plaintiff's theory, in that it must exclude every other reasonable hypothesis.—Wiederin v. Chicago & N. W. Ry. Co., 237 N.W. 344, 212 Iowa 1103

Origin of fire in stock car may be shown by circumstantial evidence, and no witness need testify that he saw sparks coming from the engine, in the absence of evidence of other origin of the fire, which was a matter of defense.—Osborne v Southern R. Co., 96 S.E. 34, 175 N.C. 594.

44. Ga.—Southern Ry. Co. v Standard Growers' Exch., 130 S.E. 373, 34 Ga.App. 534.

Tex.—Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter, Civ. App., 217 S.W. 208, overruled 218 S.W. 552, error granted.

Evidence sufficient

(1) To show loss was caused by act of God.—Forth Worth Elevators Co. v. Keel & Son, Tex.Civ.App., 231 S.W. 481, error refused.

(2) To show that injury to live stock was due to the inherent nature or propensities of the animals

N.Y.—Clay v. New York Cent. R. Co., 231 N.Y.S. 424, 224 App.Div. 508.

W.Va.—Talbott v. Payne, 111 S.E. 328, 90 W.Va. 280.

(3) To sustain finding that deterioration of butter during interstate shipment did not result from inherent vice therein.—Farmers' Union Co-op. Creamery v Atchison, T. & S. F. Ry. Co., 288 P. 569, 130 Kan 831.

(4) That an unprecedented flood was sole proximate cause of loss of shoes being transported by carrier in interstate commerce, precluding recovery of damages, notwithstanding, if shipment had been halted in a different yard than that in which it was halted at time of flood, injury would not have occurred, where there had been no warning given to common carrier that there would be or might be an unprecedented flood impending.—Baltimore & O. R. Co. v. Johl & Bergman, Miss., 177 So. 778.

Evidence insufficient

(1) To show injury by act of God.—Southern Ry. Co. v. Standard Growers' Exch., 130 S.E. 373, 34 Ga.App 534.

(2) To show that delay was due to unprecedented floods, that is, an act of God.—Kansas City, M. & O. Ry. Co. v Blackstone & Slaughter, Tex. Civ.App., 217 S.W. 208, overruled 218 S.W. 552, error granted

(3) To show that the loss of a mule was caused by the inherent viciousness of the animal itself.—Arkansas Cent. R. Co. v. McCuen, 234 S.W. 617, 149 Ark. 669.

(4) To show that loss was due to natural decay.—Mailhes v. Southern Pac. Co., 6 La.App., Orleans, 96

(5) Carrier's perfect refrigeration record was inadequate to prove that deterioration of lettuce, in good condition when shipped, was due to inherent vice.—John Bonura & Co. v. Texas & N. O. R. Co., 126 So. 593, 14 La.App. 351, rehearing denied 128 So. 68, 14 La.App 351, and certiorari denied Texas & N. O. R. Co. v. John Bonura & Co., 51 S.Ct. 80, 282 U.S. 875, 75 L.Ed 773.

Degree of proof

(1) Clear, positive, and unequivocal evidence must be adduced by the carrier to show that the damage to goods in transit was caused by the act of God.—Ford v. Wabash Ry. Co., Mo.App., 266 S.W. 1032, affirmed 300 S.W. 769, 318 Mo. 723

(2) Defense that natural propensities of animals caused injury without causative negligence of carrier must be proved to reasonable satisfaction of jury.—Lynn v. Mellon, 131 So. 458, 24 Ala.App 144.

45. Ky.—Merchants' Transfer Co. v. Kiser, 200 S.W. 454, 179 Ky. 324, L.R.A.1918C 658.

Mass.—Noble v. American Express Co., 125 N.E. 598, 234 Mass. 536.

N.Y.—Orunsten v. New York Cent. R. Co., 165 N.Y.S. 996, 179 App.Div. 465

Tenn.—Nashville, Carolina & St. L. Railway v. Mayo, 14 Tenn.App. 28. 10 C.J. p 389 notes 97, 98.

Evidence sufficient

(1) To show negligence of carrier generally.

U.S.—American Express Co. v. Farmington Shoe Mfg. Co., C.C.A.Mass., 299 F. 86, error dismissed 45 S.Ct. 512, 268 U.S. 707, 69 L.Ed. 1168.

Ala.—American Ry. Express Co. v. Mobile Importing & Trading Co., 108 So. 238, 214 Ala. 420.

Cal.—W. C. Cook & Co. v. White Truck & Transfer Co., 13 P.2d 549, 124 Cal.App. 721.

Ga.—Southern Pac. Co. v. Di Cristina, 137 S.E. 79, 36 Ga.App. 433.

Ill.—Fox v. Chicago & N. W. Ry. Co., 199 Ill.App. 453.

Ind.—Pittsburgh, C., C. & St. L. Ry. Co. v Daniels & Pickering Co., 125 N.E. 426, 71 Ind.App. 518.

La.—Southern Cotton Oil Co. v. New Orleans & N. E. R. Co., 83 So. 821, 146 La. 541.

Mass.—Noble v. American Express Co., 125 N.E. 598, 234 Mass. 536.—South Deerfield Onion Storage Co. v New York, etc., R. Co., 111 N. E. 367, 222 Mass 535.

Mich.—Tobin v. Lake Shore & M. S. Ry. Co., 159 N.W. 389, 192 Mich. 549

Minn.—S. G. Palmer Co. v. Illinois Cent. R. Co., 204 N.W. 566, 164 Minn. 68

Mo.—Viviano v. Davis, App., 258 S. W. 69.—Blackmer & Post Pipe Co. v. Mobile & O. R. Co., 190 S.W. 1032, 196 Mo.App. 139.

stock,[46] and whether the negligence of the carrier caused or was the moving cause of the dam-

N Y —Perkel v Pennysylvania R Co., 265 N Y.S. 597, 148 Misc. 284—Schules Pure Grape Juice Co v Mills, 263 N.Y.S 754, 146 Misc 823—Lichtenstein v. Wells Fargo & Co Express, 174 N Y.S 191, 106 Misc 143

N C —Newman v. Seaboard Air Line Ry Co, 124 S E. 627, 188 N C 341

Okl —Harrell v. Dutton, 232 P. 33, 105 Okl 169.

Tenn —Tennessee Ry. Co. v. Riddle Coal Co., 1 Tenn.App. 129

Tex.—Payne v. Texas Mercantile Co, Civ.App., 248 S.W. 79.

(2) To show negligent failure to maintain proper temperature or refrigeration

Ark —Railway Express Agency v. H. Rouw Co., 52 S W 2d 624, 186 Ark 111—American Ry. Express Co v H Rouw Co, 294 S W. 416, 174 Ark. 6—St. Louis-San Francisco Ry Co. v H. Rouw Co, 294 S W. 414, 174 Ark. 1—Chicago, R I. & P. Ry Co v. Walker & Haley, 227 S W. 12, 147 Ark. 109.

Mo —Tri-State Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co, App., 264 S.W. 445.

(3) To prove that carrier did not make a practice of inspecting carloads loaded by shippers.—Hines v. Buchanan, 109 S E 219, 131 Va. 88.

(4) To show freedom from negligence.

Ariz —Southern Pac. Co. v. Itule, 74 P 2d 38.

Minn —Howe v. Great Northern Ry. Co., 222 N W. 290, 176 Minn. 46—Victor Produce Co v. Chicago & N. W. Ry Co, 160 N.W. 201, 135 Minn. 49.

Pa —Farris Bros. & Co. v. Pennsylvania R. Co., 98 Pa Super 123.

Tex —Myers v. Texas Land & Development Co, Civ.App., 282 S W. 919—Missouri, K. & T Ry. Co. of Texas v. McLean, 118 S W. 161, 55 Tex.Civ.App. 130.

Evidence insufficient

(1) To show negligence generally.

Ark —Railway Express Agency v. S L. Robinson & Co., 43 S W 2d 543, 184 Ark. 660—Spears v. Missouri Pac R. Co., 39 S.W.2d 727, 183 Ark. 945

D C.—Shapiro v. Pennsylvania R. Co., 83 F.2d 581, 65 App D C. 324

La.—Gibsland Oil Mills & Fertilizer Co. v. Louisiana & N. W. R. Co., 111 So 169, 162 La. 801—Snowden v Tremont & G. Ry. Co., App., 140 So. 122.

Mich —Standard Pickle Co. v. Pere Marquette Ry. Co, 193 N W. 300, 222 Mich. 639.

Minn.—Northwestern Consol. Milling Co. v. Chicago, B. & Q R. Co, 160 N W. 1028, 135 Minn 363, certiorari denied 38 S.Ct. 8, 245 U.S. 644, 62 L.Ed. 528.

Mo.—Ford v. Wabash Ry. Co, App., 266 S W. 1032, affirmed 300 S.W. 769, 318 Mo 723

Neb.—Meyer v Chicago & N. W Ry. Co, 164 N W 1048, 101 Neb 756.

N Y —Barnet v New York Cent. & H R R Co, 118 N.E. 625, 222 N Y. 195, reversing 153 N.Y S 374, 167 App Div 738—Joseph Walker Const Co. v Delaware & Hudson Co, 165 N Y.S 931, 179 App.Div. 469—Parsons Wagon Co v. Long Island R. Co., 162 N Y S 367, 176 App Div. 137—French v. Buffalo, N. Y. & E R Co., 2 Abb Dec. 196, 43 N Y 108, 4 Keyes 108.

S C —Brown v. Southern Ry. Co, 96 S E 298, 110 S C 243.

Tex —Gulf, C. & S F. Ry Co. v Downs, Civ App, 70 S W.2d 318, error refused—Texas Midland R Co v Cummer Mfg. Co, Civ App, 207 S W. 617—Baker v. H Dittlinger Roller Mills Co, Civ.App, 203 S W. 798

Va.—Chesapeake & O Ry. Co. v. National Fruit Products Co, 155 S E. 630, 155 Va 438, 72 A.L R 878.

W.Va —Lyon v Norfolk & W. Ry Co, 136 S E. 694, 103 W Va. 73

(2) To show negligence in furnishing improperly constructed or equipped refrigerator car —American Ry. Express Co. v Cole, 48 S W.2d 223, 185 Ark. 532—Railway Express Agency v. J. W Myers Commission Co, 45 S.W 2d 14, 184 Ark. 1123.

(3) To show refrigerator car was kept in a well-iced condition —Joseph Chalona Co. v. American Ry. Express Co, 123 So. 147, 11 La.App. 18.

(4) To show failure to refrigerate shipment of fruit —Inzerillo v. Chicago, B. & Q R. Co, 35 S.W.2d 44, 225 Mo App. 1213

(5) To show freedom from negligence.

La.—Bonura & Co. v. Payne, 7 La App 754.

Tex.—Texarkana & Ft. S. Ry Co v Brass, Com App., 260 S.W. 828, affirming, Civ.App., 245 S W 457, overruled 262 S.W. 737—American Ry. Express Co. v Home Star Produce Co, Civ.App, 276 S.W 790.

Wash —Western Machinery Exchange v. Northern Pac. Ry. Co, 254 P 248, 142 Wash. 675

Preponderance of evidence is essential.—Douglas Shoe Co. v. Pere Marquette Ry. Co, 217 N.W 12, 241 Mich. 297.

46. Idaho —Cooper v. Oregon Short Line R. Co., 262 P. 873, 45 Idaho 313

Ill.—See Farrand v Chicago, M & St P. Ry. Co, 211 Ill.App. 251—Albright v. Illinois Cent. R Co, 211 Ill.App 134.

Iowa.—Buck v. American Railway Express Co, 192 N.W. 277, 195 Iowa 1024.

Me.—Edwards v. American Ry. Express Co., 148 A. 679, 128 Me 470.

Mo —Green v American Ry. Express Co., App., 34 S W 2d 1039—Akeman v. Wabash Ry. Co., App, 201 S.W. 590.

10 C J p 389 notes 97, 98.

Evidence sufficient

(1) To show negligence of carrier generally.

Ala —Nashville, C & St. L Ry. v. Farrell & Braley, 70 So. 986, 14 Ala App 330.

Ark —Missouri Pac. R. Co v. Bennett, 4 S W 2d 22, 176 Ark. 802—Missouri Pac. R. Co v. Hill, 215 S W. 676, 144 Ark 641—Bush v. Beason 198 S W. 130, 130 Ark 569.

Ga —Hicklin v. Central of Georgia Ry. Co, 149 S E 286, 40 Ga.App. 297, opinion supplemented Wicklin v. Central of Georgia Ry. Co., 149 S E 428, 40 Ga.App 297.

Iowa —Buck v. American Railway Express Co, 192 N W. 277, 195 Iowa 1024—Ruebel Bros. v. American Express Co., 180 N.W. 658, 190 Iowa 600.

La —Collins v. Texas & P Ry. Co., 123 So 504, 11 La.App. 445

Me —Hopkins Bros. Co. v. American Ry Express Co, 131 A. 145, 125 Me 118.

Minn —Garbisch v. American Ry. Express Co, 225 N.W. 432, 177 Minn 494

Mo.—Browning v Wells Fargo & Co. Express, App, 243 S.W. 190—Ray v. Wabash Ry. Co, App., 232 S.W. 268—Cravens v. Hines, App., 218 S W. 912—Berry v. Chicago & A R. Co, App, 208 S.W. 622.

Neb.—Thompson v. Davis, 194 N.W. 434, 110 Neb 491.

N Y.—Ely v. Barrett, 168 N Y S. 419, 181 App Div. 176, appeal dismissed 120 N E. 60, 224 N Y 550

Okl —St. Louis & S. F Ry. Co v. Slade, 291 P. 107, 144 Okl 216.

S D —Willer v Chicago, M & St. P. Ry Co, 210 N.W 81, 50 S D 319—Sheehan v. Minneapolis & St L. R. Co, 193 N.W 597, 46 S D. 429.

Tex.—Texas & N. O. R. Co v. Rachel, Civ.App, 59 S W.2d 218—Texas & N O. R. Co. v. Miller Bros, Civ App., 22 S.W 2d 988—St. Louis Southwestern Ry. Co. of Texas v. Weathersbee, Civ.App., 22 S W 2d 986—Texas Mexican Ry. Co. v Driscoll, Civ.App., 238 S.W. 346—Panhandle & S. F Ry. Co v. Griffith, Civ.App., 226 S W. 688—Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter, Civ App, 217 S.W. 208, overruled 218 S.W. 552, error granted.

Utah —Byram v. Payne, 201 P. 401, 58 Utah 536, 18 A.L.R. 1110.

Wash.—Hill v. Great Northern Ry. Co, 287 P. 665, 156 Wash. 567—Bennington v Northern Pac. Ry. Co, 192 P. 1073, 113 Wash. 1.

age or injury;[47] negligent or unreasonable delay | in the transportation and delivery of perishable

(2) To show defective or unsuitable engine, cars, or stock pens.
Ark.—Bush v. Altschul, 193 S.W. 280, 128 Ark. 103
La.—Ker Texada v. Texas & P. Ry. Co., 133 So. 415, 16 La.App. 66—Luckett & Hunter v. Texas & P. Ry. Co., 1 La.App. 434, reinstated 108 So. 405, 161 La. 175, annulling 2 La.App. 752.
Tex.—Texas & New Orleans Ry. Co. v. Booth, Civ.App., 99 S.W.2d 430, error dismissed—Galveston, H. & S. A. Ry. Co. v. Booth, Civ.App., 209 S.W. 198—International & G. N. Ry. Co. v. Mudd, Civ.App., 194 S.W. 960—Ft. Worth & R. G. Ry. Co. v. Albin, Civ.App., 185 S.W. 647.

(3) To show that carrier placed cattle in unclean pens.—Hines v. Davis, Tex.Civ.App., 225 S.W. 862.

(4) To show negligent failure to feed or water.
Fla.—Atlantic Coast Line R. Co. v. J. M. Griffin Lumber Co., 129 So. 845, 100 Fla. 623.
Iowa.—McCoy v. Wabash Ry. Co., 231 N.W. 353, 210 Iowa 1075.

(5) To warrant a finding of negligence in failure properly to bed the car and to drench the stock with water.—Panhandle & S. F. Ry. Co. v. Griffith, Tex.Civ.App., 226 S.W. 688.

(6) To show freedom from negligence.
La.—Bowie Lumber Co. v. Yazoo & M. V. R. Co., 131 So. 689, 14 La.App. 454.
Tex.—Jones v. Galveston, H. & S. A. Ry. Co., Civ.App., 193 S.W. 373.

Evidence insufficient

(1) To show negligence of carrier generally
Ala.—Atlantic Coast Line R. Co. v. J. S. Carroll Mercantile Co., 89 So. 509, 206 Ala. 320.
Idaho.—Cooper v. Oregon Short Line R. Co., 262 P. 873, 45 Idaho 313.
Ill.—Libro v. Cleveland, C., C. & St. L. Ry. Co., 202 Ill.App. 418.
Ind.—Chicago, I. & L. Ry. Co. v. Blankenship, 127 N.E. 209, 77 Ind.App. 225.
Iowa.—Bolton v. Chicago & N. W. Ry. Co., 182 N.W. 374.
Kan.—Beeler v. Atchison, T. & S. F. Ry. Co., 192 P. 741, 107 Kan. 522, reversed on motion to modify order 193 P. 902—Russell v. Considine, 168 P. 1095, 101 Kan. 631
Me.—Edwards v. American Ry. Express Co., 148 A. 679, 128 Me. 470
Miss.—Illinois Cent. R. Co. v. Wm. Atkinson & McDonald Co., 74 So. 616, 113 Miss. 678.
Pa.—Bair v. Adams Express Co., 66 Pa.Super. 106
S.D.—Tribby v. Chicago & N. W. Ry. Co., 252 N.W. 20, 62 S.D. 154.
Tex.—Texas & N. O. R. Co. v. Neubauer, Civ.App., 103 S.W.2d 182—Galveston, H. & S. A. R. Co. v. Canales, Civ.App., 3 S.W.2d 589—Baker v. Landrum, Civ.App., 244 S.W. 577.
Utah.—Smart v. Oregon Short Line R. Co., 183 P. 320, 54 Utah 606
W.Va.—Geyer v. Chesapeake & O. Ry. Co., 168 S.E. 380, 113 W.Va. 401.

(2) To show negligent failure properly to ventilate the box car in which plaintiff's horses were shipped because carrier failed to nail strips across the open north door of the car through which the horses were loaded, but instead shut the door.—Gulf, C. & S. F. Ry. Co. v. Culwell, Tex.Civ.App., 216 S.W. 457.

(3) To show that contraction of disease by horses was due to negligence of carrier.—Illinois Cent. R. Co. v. Ainsworth, 75 So. 755, 115 Miss. 20.

(4) To show that the cars furnished were infected.—Clampitt v. St. Louis Southwestern Ry. Co. of Texas, Tex.Civ.App., 185 S.W. 342, error refused.

Preponderance of evidence is essential and sufficient.
Iowa.—Ruebel Bros. v. American Express Co., 180 N.W. 658, 190 Iowa 600
Tex.—Gulf, C. & S. F. Ry. Co. v. Helms Bros., Civ.App., 210 S.W. 853.

Effect of compliance with statute as to rest, water, and feed

In action for damage to live stock during transportation, railroad's compliance with Act Congr. June 29, 1906 § 1, U.S.Comp.St. § 8651, prohibiting confinement of live stock for more than twenty-eight consecutive hours, without unloading for rest, water, and feeding, is strongly evidential of railroad's diligent performance of its common-law duties of feeding, watering, and resting stock, but not conclusive.—Hogg v. Louisville & N. R. Co., 127 S.E. 830, 33 Ga.App. 773.

Mere conjecture insufficient

(1) Mere conjecture cannot be indulged in to establish negligence of carrier.—Cooper v. Oregon Short Line R. Co., 262 P. 873, 45 Idaho 313.

(2) In an action for injuries to animals alleged to have been received between certain points on defendant carrier's line, testimony that the animals looked like they had been knocked down in the car "by a heavy jerk or something" was too vague to be of value, and was obviously the mere conjecture of the witness, and was insufficient to show negligence of the carrier.—Atlantic Coast Line R. Co. v. J. S. Carroll Mercantile Co., 89 So. 509, 206 Ala. 320.

47. Tex.—Houston & T. C. R. Co. v. Patterson, Civ.App., 192 S.W. 1103. 10 C.J. p. 389 note 4.

Evidence sufficient

(1) To show negligence of carrier was cause of injury
Cal.—American Fruit Distributors of California v. Hines, 203 P. 821, 55 Cal.App. 377
Ga.—Collins & G. R. Co. v. Beasley, 136 S.E. 167, 36 Ga.App. 241.
Tex.—Davis v. Simmons, Civ.App., 240 S.W. 970, dismissed for want of jurisdiction—Houston & T. C. R. Co. v. Patterson, Civ.App., 192 S.W. 1103.
Wyo.—Chicago, etc., R. Co. v. Morris, 93 P. 664, 16 Wyo. 308

(2) To justify finding that the damage to fruit by cold resulted from negligence of defendant in leaving a door open at destination all night, and not from cold weather encountered for a short time en route.—Ferraris v. Southern Pac. Co., 191 P. 45, 47 Cal.App. 560.

(3) To support court's finding for plaintiff that rot and decay of lettuce was due to improper refrigeration by defendant and connecting carriers.—American Fruit Growers of California v. Pacific Electric Ry. Co., 238 P. 105, 72 Cal.App. 682.

(4) To show that injury was caused by failure to furnish a properly iced car.—Missouri Pac. R. Co. v. S. L. Robinson & Co., 66 S.W.2d 1055, 188 Ark. 1167—10 C.J. p. 390 note 6 [a].

(5) In cases of shipment of perishable fruits and vegetables, when carrier shows affirmatively that it handled them in a method requested by shipper, and that it exercised reasonable care to prevent any damage from any cause not necessarily involved in the method of transportation so chosen, it has satisfied requirements of law in regard to quantum of proof required to establish a defense in an action for damages to the shipment.—Southern Pac. Co. v. Itule, Ariz., 74 P.2d 38.

Evidence insufficient

(1) To show that negligence of carrier was cause of injury
La.—Scripture v. Texas & P. Ry. Co., 120 So. 706, 11 La.App. 108.
N.C.—Ireland v. Atlantic Coast Line R. Co., 182 S.E. 374, 208 N.C. 852.
Wis.—Ashton v. Chicago & N. W. Ry. Co., 225 N.W. 328, 198 Wis. 618—Chaimson v. American Ry. Express Co., 189 N.W. 529, 178 Wis. 286.

(2) To show causal connection between disease, killing dog, shipped by express, and carrier's alleged negligence.—Astugue v. American Ry. Express Co., 131 So. 62, 15 La.App. 347.

goods[48] or of live stock;[49] willful misconduct on the part of carrier;[50] diversion of shipment a deviation in route;[51] acts or negligence of the shipper or his agent precluding recovery;[52] concealment of the

(3) To show that general decay throughout carload of lettuce affecting only outer leaves showed damage was caused by improper refrigeration, not by inherent vice—John Bonura & Co v. Texas & N. O R. Co., 126 So 593, 14 La App. 351, rehearing denied 128 So. 68, 14 La. App. 351, and certiorari denied Texas & N O. R. Co. v. John Bonura & Co, 51 S.Ct. 80, 282 U.S. 875, 75 L. Ed. 773.

(4) To sustain verdict for plaintiff, in action for damages for hogs condemned by government inspector, where evidence that hogs were overheated in defendant carrier's pen before being loaded and shipped failed to connect overheating with condemnation—McSpadden v. Lusk, Mo.App., 186 S.W. 731.

That part of shrinkage of cattle in course of long transportation which was caused by negligence must be shown for judgment on account thereof.—Atchison, T. & S. F. Ry. Co. v. Abercrombie, Tex Civ.App., 283 S. W. 294.

48. Ark.—American Ry. Express Co. v. Cole, 48 S.W.2d 223, 185 Ark. 532.

Tex—Missouri-Pac. R. Co. v. Waugh, Civ.App., 74 S.W.2d 554, error dismissed.

Weight and sufficiency of evidence in actions for delay generally see supra § 218.

Evidence sufficient

(1) Generally.

Ga.—Atlantic Coast Line R. Co. v. Fugazzi, 165 S.E. 840, 45 Ga.App. 750.

Mo—Johnson v. Missouri Pac. R. Co, 249 S.W. 658, 211 Mo.App. 564—Vernon v. American Ry. Express Co., App., 222 S.W. 913

Tex—Chicago, R. I. & G Ry. Co v. Abdou, Civ App, 1 S.W.2d 493, error dismissed.

(2) Evidence that the usual time for transportation between the point of delivery and the point of destination was three days, and that the car in which shipper's romaine, a highly perishable vegetable, was transported, arrived at its destination in a damaged condition six days from the date of shipment, was held to sustain a recovery by shipper.—Beaufort Truck Growers' Ass n v. Seaboard Air Line Ry. Co., 121 S.E. 554, 128 S.C. 1.

(3) The arrival of part of a consignment thirteen days after shipment, in the absence of other evidence, was sufficient to establish thirteen days as a reasonable time for the transportation of a trunk shipped at the same time, which was never received.—Brewster v. Davis, 202 N.Y.S 574, 207 App.Div. 461.

(4) Evidence that carload of onion plants was in transit nine days, and that usual time for shipment was from three to four days, warranted jury's findings in shipper's action against railroad company for damages that there was unreasonable delay proximately causing damaged condition of plants on arrival—Missouri-Pac. R. Co. v. Waugh, Tex Civ App, 74 S W 2d 554, error dismissed

Evidence insufficient

(1) Generally.

Ark.—American Ry Express Co. v. Cole, 48 S W.2d 223, 185 Ark. 532

Md—Peninsula Produce Exch. v. American Ry Express Co, 128 A 403, 147 Md. 424

Mo.—Inzerillo v Chicago, B. & Q. R. Co., 35 S W.2d 44, 225 Mo App. 1213

N.Y.—William R. Mankoff, Inc., v. Erie R. Co., 161 N Y.S. 345, 97 Misc. 421.

Tex—Hines v. First Guaranty State Bank of Aubrey, Civ App, 230 S. W. 764.

(2) To show justification for delay.—Purity Ice Cream & Dairy Co. v. Adam, Express Co., 187 N.W. 296, 217 Mich. 593.

Where record shows that bill of lading was issued shipper cannot recover for damages caused by delay if he fails to introduce the bill in evidence—American Fruit Growers v. San Antonio & A. P. Ry Co., 239 Ill App. 151.

49. Kan—Caston v. Schaff, 185 P. 33, 105 Kan. 487.

N Y.—Clay v New York Cent. R. Co, 231 N.Y.S. 424, 224 App.Div 508

Tex—Gulf, C. & S. F Ry Co. v. Hines, Civ App., 239 S.W 244, affirmed, Com App, 250 S W. 1013.

Evidence sufficient

(1) To show negligent or unreasonable delay.

Ill.—Kingsbury v Chicago & A R Co., 213 Ill App. 439—Crossley v. St. Louis, I M & S. Ry. Co, 199 Ill.App. 195.

Kan—Caston v Schaff, 185 P. 33, 105 Kan. 487.

Mo—Strother v. Atchison, T & S F. Ry Co, App., 212 S.W. 404

Tex—Galveston, H. & S. A. Ry. Co. v. Hollan, Civ.App, 13 S.W 2d 996—Kansas City, M. & O Ry. Co. v. Cauble, Civ.App, 286 S W. 478—Wichita Valley Ry. Co. v Brown, Civ App., 274 S W. 305—Atchison, T. & S F. Ry. Co. v. Cade, Civ. App, 264 S.W. 1031.

(2) To show that more than sixteen hours should have been allowed as time in which delivery should have been made—Baker v. Nance, Tex.Civ App., 211 S W. 615.

(3) Evidence that it took railroad more than forty hours to transport shipment two hundred and twenty one miles and that there were two delays of eight hours each, was sufficient, in the absence of explanation on part of railroad justifying delays to warrant finding that delay was unreasonable.—Baker v. Brown, Tex. Civ.App., 210 S.W. 312.

Evidence insufficient

(1) To show negligent delay.

Mo.—Berry v Chicago & A. R. Co, App, 208 S W 622.

Tex—Panhandle & S. F. Ry. Co. v. Arnett, Civ.App., 219 S.W. 232, dismissed for want of jurisdiction.

(2) To show negligent delay caused injury.

N.Y.—Ploss v. Barrett, 168 N Y S. 107, 181 App.Div. 131.

Okl.—Atchison, T. & S F. Ry. Co. v. Clark, 244 P. 769, 117 Okl. 52.

Mere proof of delay is insufficient to warrant recovery for injury to live stock, where suit is grounded on carrier's negligence.—Sinclair v. Missouri, K. & T. Ry. Co., Mo.App., 253 S W. 380.

50. Eng—Forder v. Great Western R. Co., 1905, 2 K B. 532.

51. **Deviation**

Evidence that carrier transported shipment in hired truck, but not showing shipment moved over route other than usually followed, did not establish deviation from carrier's lines.—Mavis Hosiery Co. v. Pennsylvania Transp. Co., 239 N.Y.S. 713, 135 Misc. 636.

Diversion

In shipper's action for damages for delay of express shipment, evidence of common use and understanding of trade was held to warrant finding that order diverting shipment to another destination set at large original routing, and imposed on carrier duty so to route car as to send it forward without unnecessary delay, notwithstanding words 'follow billing" in diversion order.—Foley v. American Ry. Express Co, 232 P. 169, 69 Cal App. 669.

52. Mo.—Schreiber Milling & Grain Co v Chicago Great Western R. Co, App, 246 S W. 647.

Tex.—Missouri-Pac R Co. v. Waugh, Civ.App, 74 S W 2d 554, error dismissed—N. Nigro & Co. v. Houston & T. C R. Co, Civ.App., 250 S W. 739

Wash—Wilson & Co. v. Hines, 213 P. 5, 123 Wash 643.

Evidence sufficient

(1) To show loss or injury caused by act or negligence of shipper generally.

Ark.—Burke Const. Co. v. St Louis & S F. Ry. Co., 214 S.W. 13, 139 Ark. 199.

nature of the goods by the shipper;[53] that the shipper had assumed the care of the live stock during shipment;[54] limitation of liability generally;[55] the giving of due notice of claim for loss or injury,[56]

Tex.—McFaddin Rice Milling Co. v. Texas & N. O. Ry. Co., Civ.App., 277 S.W. 191

Va.—Adams Express Co. v. Scott, 73 S.E. 450, 113 Va. 1, Ann.Cas.1913D 972.

(2) To show improper loading or packing.

La.—Caldwell v. Texas & P. Ry. Co., 157 So. 790, 180 La. 863.

N.Y.—Robinson v. New York Cent. R. Co., 282 N.Y.S. 877, 245 App. Div. 378, affirmed 1 N.E.2d 985, 270 N.Y. 659

Va.—Hines v. Buchanan, 109 S.E. 219, 131 Va. 88.

(3) To establish that the shipper of an oil tank car did not properly adjust a valve and outlet cap so as reasonably to obviate the leakage of oil during transit.—Southern Cotton Oil Co. v. New Orleans & N. E. R. Co., 83 So. 821, 146 La. 541.

(4) To show death of cattle in transit was due to shipper's failure in duty to fasten securely bulls in car.—Smith v. New Orleans & G. N. R. Co., 122 So. 724, 11 La.App. 386.

(5) To support finding that consignee was real shipper, as regards necessity for procuring health certificate for hogs.—Little v. Dickey Bros., Tex.Civ.App., 38 S.W.2d 388, error dismissed.

(6) To establish that proximate cause of death of cattle was arsenic poisoning, caused by loading them into car while wet after dipping.—Glaser v. New Orleans, T. & M. Ry. Co., 120 So. 798, 10 La.App. 755.

(7) To show shipper's freedom from negligence or other fault.—Texas & N. O. R. Co. v. Hellen, Tex. Civ.App., 47 S.W.2d 1112.—Chicago, R. I. & G. Ry. Co. v. Abdou, Tex.Civ. App., 1 S.W.2d 493, error dismissed.—Kansas City, etc., R. Co. v. Beckham, Tex.Civ.App., 168 S.W. 399.

Evidence insufficient

(1) To show loss or injury caused by act or negligence of shipper generally.

U.S.—Wells Fargo & Co. v. Potter, N.J., 188 F. 888, 110 C.C.A. 522.

La.—Anderson, Clayton & Co. v. Yazoo & M. V. R. Co., 141 So. 453, 174 La. 762.—Gibsland Oil Mills & Fertilizer Co. v. Louisiana & N. W. R. Co., 111 So. 169, 162 La. 801.

(2) To show improper loading or packing.

La.—Weaver Bros. v. Texas & P. Ry. Co., 123 So. 195, 11 La.App. 412.—Smith v. New Orleans & G. N. R. Co., 122 So. 724, 11 La.App. 386

N.Y.—Remington v. Barrett, 188 N.Y.S. 174, 196 App.Div. 838.

Wash.—Wilson & Co. v. Hines, 213 P. 5, 123 Wash. 643.

(3) To require finding that shipper was negligent in installation or care of heater to protect fruit, or, if found negligent, that such negligence was sole cause of damage to fruit.—S. G. Palmer Co. v. Illinois Cent. R. Co., 204 N.W. 566, 164 Minn. 68.

(4) To show fraud of shipper.

Ga.—Atlanta & West Point R. Co. v. Fairburn Marble Co., 89 S.E. 817, 145 Ga. 708.

N.C.—Morris v. American Ry. Express Co., 110 S.E. 855, 183 N.C. 144.

(5) That shipper placed cotton on the compress platform as a place of storage and testified that he did not think it was considered a dangerous place for the cotton, was no evidence that an ordinarily prudent person would have done nothing to remove the cotton from its exposed position, or to protect it from danger by fire for five days.—Texarkana & Ft. S. Ry. Co. v. Brass, Com.App., 260 S.W. 823, affirming, Civ.App., 245 S.W. 457, overruled, Com.App., 262 S.W. 737.

Preponderance of evidence is essential.—Galveston, H. & S. A. Ry. Co. v. Crowley, Tex.Civ.App., 214 S.W. 721.

53. Ga.—Central of Georgia R. Co. v. Jones, 66 S.E. 492, 7 Ga.App. 165.

54. Ky.—Cincinnati, etc., R. Co. v. Grover, 11 Ky.L. 236.

55. Ga.—Atlanta & West Point R. Co. v. Fairburn Marble Co., 89 S.E. 817, 145 Ga. 708

Ind.—Chesapeake & O. Ry. Co. of Indiana v. Jordan, 114 N.E. 461, 63 Ind.App. 365.

Mo.—Stubblefield v. St. Louis & S. F. R. Co., 184 S.W. 149, 194 Mo.App. 396.

Wash.—Wall-A-Hee v. Northern Pac. Ry. Co., 41 P.2d 786, 180 Wash. 656.

Evidence sufficient

(1) To show consideration for contract.

Ill.—Wabash R. Co. v. Curtis, 134 Ill.App. 409.

Ind.—Chicago, etc., R. Co. v. Hare, 75 N.E. 867, 36 Ind.App. 422

(2) To show shipper's assent to contract.—Donchian v. Brink's Chicago City Express Co., 217 Ill.App. 124.

(3) To show authority of carrier's agent to make a contract limiting the carrier's liability.—Blair v. American Forwarding Co., 159 Ill.App. 511.

(4) To show that shipper's release of carrier for failure to inspect cars was not executed under duress.—McFaddin Rice Milling Co. v. Texas & N. O. Ry. Co., Tex.Civ.App., 277 S.W. 191.

(5) To establish that shipper signed thirty six-hour release, relieving carrier of duty of feeding and watering cattle during such period.—Glaser v. New Orleans, T. & M. Ry. Co., 120 So. 798, 10 La.App. 755.

Evidence insufficient

(1) To establish contract of limitation.—Crossley v. St. Louis, I. M. & S. Ry. Co., 199 Ill.App. 195.

(2) To show contract procured by fraud of carrier's agent.—Tuller v. Chicago, R. I. & P. Ry. Co., 168 N.W. 301, 186 Iowa 1070.

(3) To show consideration for contract.—Schaller v. Chicago, etc., R. Co., 71 N.W. 1042, 97 Wis. 31.

(4) To show that plaintiff accepted by securing free transportation for employees, so as to make him subject to provision for released value of horse injured in transit.—Hunter v. American Ry. Express Co., Mo.App., 4 S.W.2d 847.

(5) To show shipper's assent to contract.

Ark.—Scullin v. Eoff, 191 S.W. 31, 126 Ark. 523

Ill.—Illinois Match Co. v. Chicago, etc., R. Co., 153 Ill.App. 568, reversed on other grounds 95 N.E. 492, 250 Ill. 396.

(6) To show authority of person assuming to bind shipper by contract.—Wall-A-Hee v. Northern Pac. Ry. Co., 41 P.2d 786, 180 Wash. 656.

(7) To show loss or injury within exemption clause of contract.

Ark.—Missouri Pac. R. Co. v. Block, 281 S.W. 897, 170 Ark. 1194.

Cal.—Foley v. American Ry. Express Co., 232 P. 169, 69 Cal.App. 669.

La.—Stinson v. Yazoo & M. V. R. Co., App., 159 So. 422.

Me.—Hopkins Bros. Co. v. American Ry. Express Co., 131 A. 145, 125 Me. 118.

(8) To sustain a finding of actual conversion making the carrier liable for the full value of property lost, notwithstanding the limitation of liability in the express receipt issued pursuant to the Cummins amendment of August 9, 1916, U.S.Comp.St. § 8604a.—Sands v. American Ry. Express Co., 198 N.W. 402, 159 Minn. 25.

56. Ill.—Cohen v. Southern Ry. Co., 193 N.E. 480, 358 Ill. 532, affirming 273 Ill.App. 116.

Evidence sufficient

(1) Generally.

Ala.—Southern R. Co. v. Proctor, 57 So. 513, 3 Ala.App. 413.

Ill.—Cohen v. Southern Ry. Co., 193 N.E. 480, 358 Ill. 532, affirming

or waiver thereof;[57] and the existence and amount or extent of damages sustained by the loss of, or injury to, goods[58] or live stock.[59] In an action for the value of goods injured by delay in shipment,

273 Ill App. 116—Babbitt v. Grand Trunk Western Ry. Co, 120 N.E. 803, 285 Ill 267, affirming 209 Ill. App 183—Marsh L. Brown & Co. v. Chicago, New York & Boston Refrigerator Co., 207 Ill.App 89.
Kan—Case v Union Pac. R. Co, 241 P. 693, 119 Kan 706.
Mo—Thee v. Wabash Ry. Co., App, 217 S.W. 566.
Okl—St. Louis, etc, R. Co. v. Walker, 133 P 185, 37 Okl. 784, 138 P 144, 41 Okl. 382.
Tex—Payne v. Smith, Civ.App., 268 S W. 243.

(3) To sustain a finding that sixteen days was not an unreasonable time for delivery of express shipment originating at Beltrami, Minn., and consigned to New York City, within provision of receipt as to time for filing claim.—Beltrami Co-op Creamery Ass'n v American Ry Express Co., 199 N W. 568, 160 Minn 221.

Evidence insufficient
Ill—Newman v. Union Pac. R. Co, 210 Ill.App 13
Mo.—Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co., 201 S W. 623, 198 Mo App. 520.
N Y—Herring Bros v. American Ry. Express Co., 192 N.Y S 871
N.C.—St. Sing v. American Ry. Express Co., 111 S E. 710, 183 N.C 410.
Okl.—Chicago, R. I & P. Ry. Co. v. McElreath, 169 P. 628, 69 Okl. 9, L R A 1918C 425
S C—Murray v. Atlantic Coast Line R Co., 93 S E 387, 108 S.C. 88
Wyo—Union Pac R. Co. v. Pacific Market Co, 206 P. 143, 28 Wyo. 461, denying rehearing 200 P. 108, 27 Wyo. 501.

Preponderance of evidence is essential.—Pennsylvania Co. v. M. Piowaty & Sons, 207 Ill App. 176.

57. Minn—Banks v. Pennsylvania R. Co., 126 N W. 410, 111 Minn. 48.
10 C J. p 390 note 10.

Evidence sufficient to show waiver
Miss—New Orleans & N. E R Co. v. Wood, 73 So. 615, 112 Miss. 614.
N.Y.—Brewster v. Davis, 202 N Y.S. 574, 207 App Div. 461.

Evidence insufficient to show waiver—Indian Refining Co v. Mellon, 246 Ill.App 580—Childers & Lilliensteln v. Illinois Cent. R. Co., 206 Ill. App. 535, 540.

58. U.S—Southern Ry. Co. v. Pettit, Tenn, 257 F. 663, 168 C C.A. 613, certiorari denied 39 S Ct. 290, 249 U S. 607, 63 L Ed. 799.
Tenn—Henderson Co. v. Southern Ry Co., 3 Tenn App. 396.
10 C.J. p 390 note 16.

Evidence sufficient
(1) To establish existence and amount of damages sustained generally.
U S.—Southern Ry Co v Pettit, Tenn, 257 F 663, 168 C.C A 613, certiorari denied 39 S Ct. 290, 249 U.S 607, 63 L Ed. 799
Ark.—Southern Express Co. v Couch, 249 S W. 559, 157 Ark 604—St. Louis, etc, R. Co v Nunley, 179 S W. 369, 120 Ark. 119
Cal.—W C Cook & Co v. White Truck & Transfer Co., 13 P.2d 549, 124 Cal.App. 721—Mitchell v. North Pac. S S Co., 213 P. 293, 60 Cal. App. 554—Pacific Heater Mfg Co v. Southern Pac Co, 188 P. 600, 45 Cal App. 748.
Ga.—Southern Ry Co v Black, 186 S.E 779, 53 Ga App 701—Collins & G R. Co v. Beasley, 136 S E 167, 36 Ga.App. 241—Atlantic Coast Line R Co. v. Stovall-Pace Co., 118 S E. 62, 30 Ga App. 326.
Ill.—See Dahlgren v. Israel, 204 Ill App. 340.
Ind—Cleveland, C., C. & St L. Ry Co v Stormont, 187 N E. 838, 99 Ind App. 61.
La—Raphiel v. American Ry. Express Co, 130 So 786, 10 La App 463.
Minn—Geo B Higgins & Co. v. Chicago, B & Q R. Co, 161 N.W. 145, 135 Minn. 402, L R A.1917C 507—Wood v. Chicago, etc, R. Co, 136 N.W. 1095, 118 Minn 362.
Mo—Jones v. Toledo, St L. & W R. Co., App., 202 S W. 433.
N Y.—Schwalb v. Erie R Co, 293 N Y S 842, 161 Misc 743.
Tex—El Paso & S. W. R. Co v. Keeble, Civ App, 258 S W. 859—Panhandle Grain & Elevator Co. v. Dowlin, Civ App, 247 S W. 873—Payne v. White House Lumber Co, Civ App, 231 S.W. 417

(2) To establish the fair cash market value of the goods at the time when they were lost—Hughes v. Dobson, 202 Ill.App. 54.

(3) To sustain finding that corn had no market value in damaged condition at destination or place of damage—Houston & T C. R Co. v. Clement Grain Co, Tex Civ.App., 10 S.W.2d 400

(4) To warrant recovery of expenses.
Kan—Wilson Poultry & Egg Co. v. Missouri Pac. R Co., 215 P. 1020, 113 Kan 646.
Ga.—Allen v. Southern Ry. Co., 126 S.E. 722, 33 Ga App. 209.
Tex.—Davis v. Standard Rice Co., Civ.App., 292 S W 593

(5) To justify finding that potatoes were in such a damaged condition as to justify plaintiff in abandoning the shipment—Beck v. Chicago, M & St. P. Ry. Co, 164 N. W. 74, 39 S D. 297.

(6) To show that melons were not total loss as result of delay—Atlantic Coast Line R Co. v. Tifton Produce Co., 179 S E 125, 50 Ga.App. 614, conforming to answers 176 S E. 624, 179 Ga. 624, 96 A.L.R 772.

Evidence insufficient
(1) To establish existence and amount of damage sustained generally.
Ga—Atlantic Coast Line R Co v Hogrefe, 141 S.E 214, 37 Ga App 636—American Ry. Express Co. v. Dubois Bros., 111 S.E 70, 28 Ga. App. 274—Southern Express Co v. Bass, 102 S E 168, 24 Ga App. 742.
La.—Dejean v Louisiana Western R Co, 118 So 822, 167 La. 111.
Miss.—Yazoo & M. V. R. Co v M. Levy & Sons, 106 So 525, 141 Miss. 199.
N.Y—Litt v. Wabash R. Co, 64 N.Y. S. 108, 50 App.Div 550
Tex—Railway Express Agency v. McCarrick, Civ App, 69 S W 2d 803.
Va—Southern Ry. Co. v. Burton & Briel, 141 S E. 113, 149 Va. 364.

(2) To disprove recitals of receipt showing value—Raphiel v. American Ry Express Co., 120 So. 786, 10 La. App. 463.

Transportation of corpse
Where plaintiff sued a carrier for damages in allowing a coffin containing the body of her brother to remain on the platform in the rain, evidence that she had agreed with a brother who had paid the express charges to pay a part thereof, showed no loss in property or estate, authorizing recovery for any damages other than for mental anguish—Deavors v Southern Express Co, 76 So 288, 200 Ala. 372

Mitigation of damages
In an action for damage to watermelons in transit, the evidence was held to show that plaintiff could not have mitigated damages by accepting and unloading melons and ascertaining number actually injured—Perkel v Pennsylvania R. Co., 265 N Y S 597, 148 Misc. 284.

Opinion evidence unnecessary
Proof necessary to show difference in value of shipment before and after breakage is not confined to opinion evidence—Western Machinery Exchange v. Northern Pac Ry. Co, 254 P 248, 142 Wash. 675.

59. Tex—St. Louis, I. M. & S. Ry. Co. v. Berry, 93 S.W. 1107, 42 Tex. Civ App. 470.
Wash—Hill v Great Northern Ry. Co, 287 P. 665, 156 Wash. 567.
10 C.J. p 390 note 16.

where the only evidence of value was the price at which they were sold, this, in the absence of evidence to the contrary, is sufficient to establish their market value.[60] The sufficiency of the evidence to establish a prima facie case, and of evidence to overcome such prima facie case or the presumptions arising from the evidence of the adverse party, is discussed supra § 254, in connection with the discussion as to presumptions and burden of proof.

§ 257. Trial

The matters relating to the trial of actions against carriers for loss of, or injury to property, discussed herein, are confined to the determination of what are questions of law for the court, and what are questions of fact for the jury, infra § 258; the necessity, propriety and sufficiency of the instructions to the jury, infra § 259; and the sufficiency and effect of the verdict and findings, infra § 260.

§ 258. Questions of Law and Fact

a. In general
b. Particular questions of fact
c. Particular questions of law

a. In General

Whether an issue in an action against a carrier for the loss of, or injury to, property should be submitted to the jury or determined by the court as a matter of law is governed by the rules applicable in civil actions generally.

In accordance with the general rules, where the evidence in an action against a carrier for loss of, or injury to, property is conflicting and different conclusions could be drawn therefrom,[61] or where plaintiff has made out a prima facie case against the carrier,[62] the issue should be submitted to the

Evidence sufficient

(1) To establish existence and amount of damages sustained generally.

Ark.—St. Louis-San Francisco Ry Co. v. McDonald, 299 S.W. 999, 175 Ark. 630—Missouri Pac R Co. v. Hill, 215 S.W. 676, 144 Ark. 641—Missouri Pac. R. Co. v Bradley, 215 S.W. 668, 144 Ark. 641—Bush v. Beason, 198 S.W. 130, 130 Ark 569.

La.—Collins v. Texas & P. Ry. Co., 123 So. 504, 11 La App. 445.

Mo.—Nigh v. Chicago, R. I & P. Ry Co, 276 S.W. 1038, 220 Mo App 766

Pa.—Karnofsky Bros v Delaware & H. Co, 123 A. 317, 278 Pa. 379.

Tex.—Galveston, H. & S A. Ry. Co. v Neville, Civ.App., 272 S.W. 597—Rio Grande, E. P. & S. F. R Co v. Kraft & Madero, Civ.App., 212 S.W. 981, dismissed for want of jurisdiction—Houston & T C. R Co. v. Derden, Civ.App., 194 S.W. 489.

Utah.—Dee v. San Pedro, L A & S. L R Co., 167 P. 246, 50 Utah 167.

(2) To support judgment for actual value.—Hunter v. American Ry. Express Co., Mo.App, 4 S.W.2d 847.

(3) To show that injured horses were valueless.—Green v. American Ry. Express Co., Mo App, 34 S.W 2d 1039.

Evidence insufficient

(1) To establish existence and amount of damages sustained generally.

Iowa.—Cogley v. Chicago, B & Q R Co, 171 N.W 745, 185 Iowa 1080

Miss.—Yazoo & M. V. R Co. v. Armstrong & Co, 71 So. 905, 111 Miss 652

Tex.—Texas & N O R Co v. Neubauer, Civ App, 103 S.W 2d 182—King v. Galveston, H. & S. A. Ry. Co, Civ.App, 279 S.W 491—Gulf, C. & S F. Ry. Co v. King, Civ. App, 258 S.W. 198—Kansas City, M & O Ry Co of Texas v. Cliett, Civ.App, 216 S.W. 682.

(2) To authorize recovery of expenses.—Kansas City, M & O Ry. Co. of Texas v. Cliett, Tex.Civ App, 216 S.W. 682—Lancaster v. Whittle, Tex Civ.App, 210 S.W. 334.

(3) Evidence of value at destination two days before hogs should have been delivered was insufficient to support judgment for damages based on value at destination.—Davis v Hunter, 138 N.E. 785, 79 Ind App. 462.

Nominal damages

In action against railroad for damages to horses from watering too soon after leaving the train, evidence was held to justify verdict for nominal damages of one dollar only in that its great weight tended to show that plaintiff suffered no damages from the cause alleged.—Cogley v. Chicago, B. & Q R. Co, 171 N.W. 745, 185 Iowa 1080.

Degree of proof

Amount of loss must be established with reasonable certainty and by a preponderance of the evidence.—Kirby v Oregon Short Line R. Co, 197 P. 254, 59 Mont. 425.

60. Miss.—Yazoo, etc, R. Co v. Peeples, 64 So 262, 106 Miss. 604

Corpus Juris is quoted in Vaccaro Bros & Co v Louisville & N. R. Co, La, 123 So. 355, 357.

61. Ala.—Louisville & N R. Co. v Hendricks, 171 So. 273, 233 Ala. 259—Atlantic Coast Line R Co v. J S. Carroll Mercantile Co, 104 So 413, 213 Ala. 234—Central of Georgia Ry. Co. v. Broda, 67 So 437, 109 Ala 266—Atlantic Coast Line R. Co. v. Dothan Ins. Agency, 80 So. 627, 16 Ala App. 623—Smiley Son & Co. v. Keith, 57 So. 127, 3 Ala App. 354.

Ind.—Jackson v Mauck, 126 N.E 851, 189 Ind 262.

Ky.—Illinois Cent. R. Co. v. Luther, 283 S.W. 1013, 214 Ky 658

Miss.—Bew v. Davis, 105 So. 760, 140 Miss. 360.

Mo.—Dillen v Wabash Ry. Co, App, 294 S.W 439.

N.C.—Produce Trading Co. v. Norfolk Southern R Co., 100 S.E 316, 178 N.C. 175

Pa.—Dooley v New York Cent. R. R. Co, 62 Pa.Super. 237.

S.C.—White v. Payne, 110 S.E 463, 118 S.C. 381—Terry Packing Co v. Atlantic Coast Line R. Co., 108 S.E 151, 116 S.C. 382.

Tex.—Panhandle & S. F. Ry. Co. v. Cowan, Civ App, 243 S.W. 912—Gulf, C. & S. F. Ry. Co. v Clements, Civ.App, 203 S.W 623.

Vt.—Porter Screen Mfg. Co. v. Central Vermont Ry. Co, 102 A. 44, 92 Vt. 1.

Wash.—Lagomarsino v. Pacific Alaska Nav. Co, 170 P. 368, 100 Wash. 105.

Intention of parties

Where there was evidence to justify a finding that, while potatoes were delivered to carrier pursuant to a contract of sale, the parties intended transportation should be completed and delivery made to consignee before the sale was consummated, it was for the jury to determine what the intention of the parties was.—Barrett v. St. Louis Southwestern Ry. Co., 235 S.W. 800, 151 Ark. 215.

62. Mo.—Morrow v. Wabash Ry. Co, App., 6 S.W 2d 628—First Nat Bank v. Missouri Pac. Ry. Co., 278 S.W. 1075, 220 Mo.App. 941—

jury, and not be withdrawn by directing a verdict, granting a nonsuit, or sustaining a demurrer to the evidence.[63] On the other hand, where the facts in such action are undisputed or there is no substantial conflict in the evidence, and but one conclusion could reasonably be drawn therefrom, the question is one of law for the court,[64] and in such case the court may or should take the case from the jury by directing a verdict, granting a nonsuit, or sustaining a demurrer to the evidence.[65]

Determination of right to nonsuit. In passing on the carrier's motion for nonsuit, a contract of carriage not offered or admitted in evidence cannot be considered by the court.[66]

b. Particular Questions of Fact

Where the evidence is conflicting and different conclusions could reasonably be drawn therefrom, it is for the jury to determine the question of plaintiff's right to sue, the delivery of the property to the carrier, its loss or injury in transit, the cause of such loss or injury, the negligence of the carrier, the contributory negligence of the plaintiff, and the various other issues arising in the action.

Where the evidence is conflicting and different conclusions could be drawn therefrom, it is for the jury to determine whether plaintiff is the owner of the property lost or injured,[67] and is entitled, otherwise, to maintain the action,[68] whether defendant

Moran v. Chicago, B. & Q. R. Co., App., 255 S.W. 331.
N.C.—Austin v. Seaboard Air Line Ry., 121 S.E. 1, 187 N.C. 7—Morris v. American Ry. Express Co., 110 S.E. 855, 183 N.C. 144—Aman v. Dover & Southbound R. Co., 102 S.E. 392, 179 N.C. 310.
Okl.—Atchison, T. & S. F. Ry. Co. v. Eddie, 61 P.2d 681.
Tenn.—Sindle v. American Ry. Express Co., 8 Tenn.App. 594.
Tex.—Ft. Worth & R. G. Ry. Co. v. Bryson & Burns, Civ.App., 195 S.W. 1165.
Utah.—Byram v. Payne, 201 P. 401, 58 Utah 536, 18 A.L.R. 1110

63. Ala.—Louisville & N. R. Co. v. Hendricks, 171 So. 273, 233 Ala. 259—Louisville & N. R. Co. v. Benton Mercantile Co., 121 So. 716, 219 Ala. 223—Louisville & N. R. Co. v. Long, 105 So. 890, 213 Ala. 679—Central of Georgia Ry. Co. v. Broda, 67 So. 437, 109 Ala. 266—Smiley Son & Co. v. Keith, 57 So. 127, 3 Ala.App. 354.
Ga.—Allen v. Southern Ry. Co., 126 S.E. 722, 33 Ga.App. 209—Ragsdale-Lawhon Mule & Horse Co. v. Davis, 119 S.E. 428, 30 Ga.App. 752
Ill.—S. Valentine & Co. v. Atchison, T. & S. F. Ry. Co., 220 Ill.App. 188.
Ind.—Jackson v. Mauck, 126 N.E. 851, 189 Ind. 262.
Ky.—Illinois Cent. R. Co. v. Luther, 283 S.W. 1013, 214 Ky. 658—Director General of Railroads v. A. C. Schaff & Co., 237 S.W. 410, 193 Ky. 737.
Mich.—Shier v. American Ry. Express Co., 208 N.W. 746, 234 Mich. 505.
Miss.—Bew v. Davis, 105 So. 760, 140 Miss. 360—Illinois Cent. R. Co. v. Threefoot Bros. & Co., 83 So. 635, 121 Miss. 468.
Mo.—First Nat. Bank v. Missouri Pac. Ry. Co., 278 S.W. 1075, 220 Mo.App. 941—Morrow v. Wabash Ry. Co., 276 S.W. 1030, 220 Mo.App. 518—Erisman v. Wabash Ry. Co., App., 243 S.W. 237.
N.J.—A. Hollander & Son v. Ruder, 137 A. 405, 103 N.J.Law 658.
N.C.—Coley Farming Co. v. Seaboard Air Line Ry. Co., 126 S.E. 167, 189 N.C. 63.
S.C.—Sanders v. Charleston & W. C. Ry. Co., 141 S.E. 607, 143 S.C. 395—White v. Payne, 110 S.E. 463, 118 S.C. 381.
Tex.—Texarkana & Ft. S. Ry. Co. v. Brass, Com.App., 260 S.W. 828, affirming, Civ.App., 245 S.W. 457, rehearing overruled, Com.App., 262 S.W. 737—Panhandle & S. F. Ry. Co. v. Cowan, Civ.App., 243 S.W. 912.
Utah.—Paradise Land & Live Stock Co. v. Davis, 207 P. 145, 60 Utah 189—Byram v. Payne, 201 P. 401, 58 Utah 536, 18 A.L.R. 1110.
10 C.J. p. 392 note 50
64. Ala.—Manistee & R. R. Co. v. Rumbley, 81 So. 857, 17 Ala.App. 79.
Ark.—Suckle v. Missouri Pac. R. Co., 241 S.W. 368, 154 Ark. 168
Iowa.—Cogley v. Chicago, B. & Q. R. Co., 171 N.W. 745, 185 Iowa 1080
Or.—Cripe v. Davis, 214 P. 343, 107 Or. 142.
Pa.—Dooley v. New York Cent. & H. R. R. Co., 62 Pa.Super. 237.
Tex.—Panhandle & S. F. Ry. Co. v. Harp, Civ.App., 193 S.W. 438—Betka v. Houston & T. C. R. Co., Civ.App., 189 S.W. 532, error refused—Texas Glass & Paint Co. v. Darnell Lumber Corp., Civ.App., 185 S.W. 965.
10 C.J. p. 392 note 41.

More than a scintilla of evidence is required, in South Carolina, for submission to the jury in an action for negligent delay in transporting perishable vegetables. — Sanders v. Charleston & W. C. Ry. Co., 145 S.E. 400, 417 S.C. 487.

65. Ala.—Atlantic Coast Line R. Co. v. Enterprise Oil Co., 101 So. 605, 211 Ala. 676—Manistee & R. R. Co. v. Rumbley, 81 So. 857, 17 Ala.App. 79.
Ark.—City Fuel Co. v. Torreyson, 224 S.W. 727, 145 Ark. 399
Idaho.—Cooper v. Oregon Short Line R. Co., 262 P. 873, 45 Idaho 313.
Mo.—Inzerillo v. Chicago, B. & Q. R. Co., 35 S.W.2d 44, 225 Mo.App. 1213
Okl.—Davis v. Rivers, 229 P. 571, 103 Okl. 198.
Pa.—Makransky v. Weston, 155 A. 741, 304 Pa. 383—Consolidated Cigar Corporation v. Corbin, 132 A. 364, 285 Pa. 273
S.D.—Willer v. Chicago, M. & St. P. Ry. Co., 210 N.W. 81, 50 S.D. 319
Tex.—Texas & P. Ry. Co. v. Woldert Grocery Co., Civ.App., 199 S.W. 1139—Texas Glass & Paint Co. v. Darnell Lumber Corp., Civ.App., 185 S.W. 965.
Wash.—Johnson v. Western Express Co., 181 P. 693, 107 Wash. 339.
10 C.J. p. 392 note 49

Admission of receipt of goods and loss thereof by carrier warranted a directed verdict for shippers.—A. Arnold & Son Transfer & Storage Co. v. Weisiger, 6 S.W.2d 1084, 224 Ky. 659.

Where the affidavit of defense denies liability and denies that plaintiff suffered the damage complained of or that any damage sustained was due to neglect of defendant, a verdict should not be directed for plaintiff, although defendant introduces no evidence.—Payette Fruit Packing Co. v. Oregon Short Line R. Co., 180 Ill.App. 253.

66. Cal.—Murray v. Southern Pac. Co., 265 P. 337, 89 Cal.App. 741.

67. Iowa.—Makin v. Minneapolis & St. L. R. Co., 157 N.W. 729, 176 Iowa 150.
N.Y.—Porter v. Pennsylvania R. Co., 231 N.Y.S. 432, 224 App.Div. 440.
N.C.—Lawshe v. Norfolk-Southern R. Co., 132 S.E. 160, 191 N.C. 473.
Pa.—Dooley v. New York Cent. & H. R. R. Co., 62 Pa.Super. 237.

68. Ky.—Louisville & N. R. Co. v. Hall, 293 S.W. 1091, 219 Ky. 528.

s a common carrier;[69] whether defendant as common carrier was acting as a private carrier under special agreement and hence not as an insurer,[70] whether the goods were shipped under a special contract for transportation;[71] who were the parties to the contract;[72] whether the contract of shipment was signed by a certain person as agent for the carrier;[73] whether the agent assuming to act for the carrier had authority to make such contract;[74] what were the rights of the shipper under the contract in view of its ambiguity and evidence in explanation thereof;[75] whether the carrier repudiated the contract and tendered the remainder of the shipment to the shipper after a loss by fire, on the ground that the shipment was delivered to it in violation of law;[76] whether there was a mutual rescission of the contract;[77] whether the property was delivered to, and accepted by, the carrier for transportation;[78] the amount of property received by the carrier,[79] and its condition at that time[80] and at destination;[81] whether there was a loss of the property or a part thereof,[82] whether the loss or

Injury to corpse

A peremptory instruction for defendant carrier is not authorized in an action by a widow for the negligent mutilation of the dead body of her daughter on the ground that the contract for transportation was not made by plaintiff, where there was evidence that the contract was made by her son, acting for her and for her benefit.—Louisville & N. R. Co. v. Hall, 293 S.W. 1091, 219 Ky. 528.

69. Ill.—Hinchliffe v. Wenig Teaming Co., 113 N.E. 707, 274 Ill. 417, affirming 194 Ill.App. 627—Beatrice Creamery Co. v. Fisher, 10 N.E.2d 220, 291 Ill.App. 495
R.I.—Walworth Bros. v. Guerin, 142 A. 613, 49 R.I. 329.

70. Mich.—Toledo Plate & Window Glass Co. v. John Henry & Schram Storage & Trucking Co., 230 N.W. 939, 250 Mich. 648.

71. Mass.—Henry J. Perkins Co. v. American Express Co., 85 N.E. 895, 199 Mass. 561.
S.C.—Wallingford v. Columbia, etc., R. Co., 2 S.E. 19, 26 S.C. 258.

72. Tex.—Billberry v. Ft. Worth & R. G. Ry. Co., Civ.App., 236 S.W. 106.

73. Ala.—Tishomingo Sav. Inst. v. Johnson, Nesbitt & Co., 40 So. 503, 146 Ala. 691.

74. Ind.—Lake Erie, etc., R. Co. v. Seeley, 86 N.E. 1002, 43 Ind.App. 70.
N.Y.—Thurman v. Wells, 18 Barb. 500.

75. Mo.—Bailey v. St. Louis & S. F. Ry. Co., App., 290 S.W. 630.

76. Tex.—Gulf, C. & S. F. Ry. Co. v. Lipshitz, Civ.App., 29 S.W.2d 905, error refused.

77. Iowa.—Stillman v. Chicago, R. I. & P. Ry. Co., 192 N.W. 860, 196 Iowa 612.

78. Ala.—Louisville & N. R. Co. v. Long, 105 So. 890, 213 Ala. 679.
Ark.—American Ry. Express Co. v. Collins, 222 S.W. 1059, 144 Ark. 509.
Iowa.—Mackin v. Minneapolis & St. L. R. Co., 157 N.W. 729, 176 Iowa 150.
Ky.—American Ry. Express Co. v. McGee, 4 S.W.2d 679, 223 Ky. 681.
Miss.—Illinois Cent. R. Co. v. Threefoot Bros. & Co., 83 So. 635, 121 Miss. 468.
Mo.—Carr v. St. Louis-San Francisco Ry. Co., App., 284 S.W. 184—First Nat. Bank v. Missouri Pac. Ry. Co., 278 S.W. 1075, 220 Mo.App. 941.
N.C.—Riff v. Yadkin R. Co., 127 S.E. 588, 189 N.C. 585.
Pa.—Robb v. American Railway Express Co., 78 Pa.Super. 1—Resnick & Cohen v. Firth, 73 Pa.Super. 604.
S.C.—American Fruit Growers v. King, 114 S.E. 861, 122 S.C. 69.
10 C.J. p. 390 notes 20, 21.

Agency of compress company

Under the evidence it was held a question of fact whether a compress company held possession of cotton as agent for the railroad company or as agent of the shipper to compress, mark, and deliver the cotton to the carrier.—Gulf, C. & S. F. Ry. Co. v. Anderson, Clayton & Co., Tex.Com.App., 246 S.W. 1031, reversing, Civ.App., 212 S.W. 814.

Possession before shipment

(1) Where goods were lost while on carrier's platform before shipment, it was held that, under the evidence, it was a question for the jury whether the goods had been so placed for immediate shipment, or shipment as soon as practicable in the usual course of business, so that such goods were in the possession and control of the carrier.
Ark.—W. F. Bogart & Co. v. Wade, 200 S.W. 148, 132 Ark. 49.
Vt.—Dionne v. American Express Co., 101 A. 209, 91 Vt. 521.

(2) In an action for damages to hogs alleged to have been caused by overheating in carrier's pen before shipment, whether the hogs were placed in pen an unreasonably early time before shipment relieving carrier of relation of insurer was held a question for jury.—McSpadden v. Lusk, Mo.App., 186 S.W. 731.

79. Iowa.—Coad v. Pennsylvania Ry. Co., 175 N.W. 344, 187 Iowa 1025.
Me.—Lewis Poultry Co. v. New York Cent. R. Co., 105 A. 109, 117 Me. 482.
Mich.—Shier v. American Ry. Express Co., 208 N.W. 746, 234 Mich. 505.

80. Ark.—American Ry. Exp. Co. v. Cole, 42 S.W.2d 772, 184 Ark. 485
Fla.—American Ry. Exp. Co. v. Fegenbush, 144 So. 320, 107 Fla. 145.
Iowa.—Dye Produce Co. v. Davis, 209 N.W. 744, 202 Iowa 1008—Ball v. Chicago, R. I. & P. Ry. Co., 181 N.W. 469, 190 Iowa 977.
Miss.—Bew v. Davis, 105 So. 760, 140 Miss. 360.
Mo.—Equity Elevator Co. v. Union Pac. R. Co., App., 191 S.W. 1067
Tex.—Texas & N. O. Ry. Co. v. Coker, Civ.App., 24 S.W.2d 447.
Wash.—W. E. Roche Fruit Co. v. Northern Pac. Ry. Co., 52 P.2d 325, 184 Wash. 695.

Notation on waybills and bills of lading

Whether notation concerning condition of cattle transported by railroad when received for shipment was on waybills and bills of lading when signed by shipper was held for jury.—Arkansas Western Ry. Co. v. Robson, 285 S.W. 372, 171 Ark. 698.

Testimony held not uncontradicted

Where shipper's witnesses testified that box was delivered in good condition to railroad, and railroad's witnesses unequivocally testified that boxes were not tampered with while in railroad's possession, held, testimony for shipper was not "uncontradicted."—Zorub v. Missouri Pac. R. Co., 31 S.W.2d 421, 182 Ark. 232.

81. Ark.—Arkansas Western Ry. Co. v. Robson, 285 S.W. 372, 171 Ark. 698
Wash.—W. E. Roche Fruit Co. v. Northern Pac. Ry. Co., 52 P.2d 325, 184 Wash. 695.

82. Ark.—St. Louis-San Francisco Ry. Co. v. McDonald, 299 S.W. 999, 175 Ark. 630—Southern Grocery Co. v. Bush, 198 S.W. 136, 131 Ark. 153.
Ind.—Grand Trunk & Western R. R. v. Glinski, 125 N.E. 53, 71 Ind.App. 397.
Mich.—Oceana Canning Co. v. King, 161 N.W. 895, 195 Mich. 628.

injury occurred while the property was in the possession and control of the carrier, or after its liability has terminated by delivery pursuant to the contract;[83] whether a reasonable time has been allowed the consignee for removal of the goods after completion of the transportation;[84] whether the goods were lost before or after the carrier had deposited them in its warehouse;[85] the cause of loss or injury in general;[86] negligence on the part of the carrier resulting in the loss of or injury to goods[87] or resulting in the loss of or injury

Or—Cripe v. Davis, 214 P. 343, 107 Or. 142

Tex—Jackson v. Seley-Cornforth Grain Co, Civ.App., 289 S.W. 164.

10 C.J. p 391 note 27.

83. Ariz.—Southern Pac. R. Co. of Mexico v. Gonzalez, 61 P.2d 377.

Ark—Kansas City Southern Ry. Co v H Rouw Co., 238 S.W. 901, 172 Ark. 273—Barrett v. St. Louis Southwestern Ry. Co, 235 S.W. 800, 151 Ark. 215.

Iowa—Coad v Pennsylvania Ry. Co., 175 N.W. 344, 187 Iowa 1025

Me—Goldberg v. New York, N. H. & H. R. Co., 153 A. 812, 130 Me. 96.

Neb—Leypoldt & Pennington Co v Davis, 199 N.W. 463, 112 Neb. 350

N.Y—Crittenden v. American Ry Express Co., 199 N.Y.S. 521, 205 App Div. 228, affirmed 144 N.E. 899, 238 N.Y. 578.

Tex—Jackson v. Seley-Cornforth Grain Co., Civ.App., 289 S.W. 164

84. Ky.—Lewis v. Louisville, etc., R Co., 122 S.W. 184, 135 Ky. 361, 25 L.R.A.,N.S., 938, 21 Ann.Cas. 527.

10 C.J. p 392 note 38.

This may be a question of law, a question of fact, or a question of mixed law and fact

Me.—Brown v. Railway Express Agency, 188 A. 716, 134 Me. 477.

Dependent on opportunity afforded

Reasonable time for owner to receive goods delivered on dock by carrier is not a question of hours, but of opportunity afforded, which the jury should determine from the facts—Lagomarsino v. Pacific Alaska Nav. Co., 170 P. 368, 100 Wash. 105.

85. Mass—Sessions v. Western R. Corp., 16 Gray 132.

86. U.S.—Southern Ry. Co. v. Pettit, Tenn., 257 F. 663, 168 C.C.A. 613, certiorari denied 39 S.Ct. 290, 249 U.S. 607, 63 L.Ed. 799—Southern Pac. Co. v. Stewart, Ariz., 233 F. 956, 147 C.C.A. 630, error dismissed 38 S.Ct. 130, 245 U.S. 359, 62 L.Ed. 345, rehearing granted 38 S.Ct. 203, 245 U.S. 562, 62 L.Ed. 472, and reversed on another ground 39 S.Ct. 139, 248 U.S. 446, 63 L.Ed. 350.

Ark.—American Ry. Express Co v. Cole, 37 S.W.2d 699, 183 Ark. 557—Missouri Pac. R. Co. v. Block, 218 S.W. 682, 142 Ark. 127, certiorari denied 40 S.Ct. 586, 253 U.S. 493, 64 L.Ed. 1029.

Fla.—American Ry. Exp. Co. v Fegenbush, 144 So. 320, 107 Fla. 145.

Mo.—Hurley v. Illinois Cent. R. Co., 282 S.W. 97, 221 Mo.App. 478—Cudahy Packing Co v Atchison, T. & S. F. Ry. Co., 187 S.W. 149, 193 Mo.App. 572

Tex.—St. Louis Southwestern Ry Co of Texas v Hill Bros, Civ.App., 80 S.W.2d 432—Galveston, H. & S. A. R. Co. v. Stovall, 3 Tex.A.Civ. Cas. § 251.

10 C.J. p 391 note 29.

Cause of fire

Tex.—Gulf, C. & S. F. Ry. Co v. Lipshitz, Civ.App., 29 S.W.2d 905, error refused.

Inherent nature of, or defects in, goods

Ala.—Louisville & N. R. Co. v. Allegri, 109 So. 881, 215 Ala. 148.

Ill.—S. Valentine & Co v. Atchison, T. & S. F. Ry. Co., 220 Ill.App. 188.

Mo.—Schreiber Milling & Grain Co. v. Chicago Great Western R. Co., App., 246 S.W. 647.

Tex.—Galveston, H. & S. A. Ry. Co. v. Licata, Com.App., 280 S.W. 540, reversing, Civ.App., 269 S.W. 821.

Wash.—W. E. Roche Fruit Co. v. Northern Pac. Ry. Co., 52 P.2d 325, 184 Wash. 695.

Nature of animals

Mich.—Snyder v. King, 165 N.W. 840, 199 Mich. 345, 1 A.L.R. 893.

Dipping cattle before shipment

In an action for the death of several cows while in transit, whether the loss of the cows was due to the cows being dipped in a solution of arsenic before being loaded in the cars held for the jury.

S.C.—Smith v. Southern Ry. Co., 113 S.E. 465, 121 S.C. 94

Tex.—Texas & N. O. R. Co. v. East, Civ.App., 57 S.W.2d 175.

Slight evidence sufficient

In an action against a railroad for death of a stallion caused by failure to transport as expeditiously as required by a Kansas statute, slight evidence is sufficient to maintain the shipper's burden of proof as to the cause of death to make a case for the jury—Strother v Atchison, T. & S. F. Ry. Co., Mo.App., 212 S.W. 404.

87. U.S.—Chesapeake & O. Ry. Co v. J. Wix & Sons, C.C.A.Va., 87 F.2d 257—Alabama & V. Ry. Co v American Cotton Oil Co, Miss., 249 F. 308, 161 C.C.A. 316.

Ark.—Missouri Pac. R. Co. v. S. L. Robinson & Co., 62 S.W.2d 965, 187 Ark. 1163—Chicago, R. I. & P. Ry Co. v. Greer, 58 S.W.2d 424, 187 Ark. 101—Chicago, R. I. & P. Ry Co v. S. L. Robinson & Co, 298 S.W. 873, 175 Ark. 35—St. Louis-San Francisco Ry Co v. Cole, 294 S.W. 357, 174 Ark. 10—Mellon v. Stein 287 S.W. 382, 171 Ark. 1092—Missouri Pac. R. Co. v. Goodwin & Jean, 249 S.W. 5, 158 Ark. 642—Chickasaw Cooperage Co. v. Yazoo & M. V. R. Co., 215 S.W. 897, 141 Ark. 71—Chicago, R. I. & P. Ry Co. v. Burkholder & Tuggle, 195 S.W. 1073, 129 Ark. 316.

Ga.—Allen v. Southern Ry. Co., 126 S.E. 722, 33 Ga.App. 209.

Idaho—Wood Livestock Co. v. Oregon Short Line R. Co, 298 P. 371, 50 Idaho 524.

Ky.—Chesapeake & O. R. Co. v Coleman Fruit Co, 294 S.W. 463, 219 Ky. 794—Julius Kessler & Co v. Southern Ry. Co. in Kentucky, 255 S.W. 535, 200 Ky. 713—Merchants' Transfer Co v Kiser, 200 S.W. 454, 179 Ky. 324, L.R.A.1918C 658.

Mass.—South Deerfield Onion Storage Co v. New York, N. H. & H. R. Co., 111 N.E. 367, 222 Mass. 535.

Miss.—Feld v. Columbus & G. Ry Co, 121 So. 272, 153 Miss. 601—Chas. W. Sheppard Cotton Co v New Orleans, M. & C. R. Co, 78 So. 193, 118 Miss. 464

Mo.—Holloway Cotton & Grain Co v. Missouri Pac. R. Co., App., 77 S.W.2d 189—Hurley v Illinois Cent. R. Co, 282 S.W. 97, 221 Mo. App. 478.

N.J.—Heller-Rickards, Inc, v Berla, 132 A. 482, 4 N.J.Misc. 284, affirmed 134 A. 917, 103 N.J.Law 196.

N.Y.—Porter v Pennsylvania R. Co, 231 N.Y.S. 432, 224 App.Div. 440—Bobzein v. New York Cent. R. Co, 176 N.Y.S. 407, 187 App.Div. 767.

Ohio—Hines v Dinovo, 14 Ohio App. 119.

Okl.—Atchison, T. & S. F. Ry. Co v. Eddie, 61 P.2d 681.

Tex.—Texarkana & Ft. S. Ry. Co v. Brass, Com.App., 260 S.W. 828, affirming, Civ.App., 245 S.W. 457, rehearing overruled, Com.App., 262 S.W. 737.

Vt.—Saliba v New York Cent. R. Co., 144 A. 194, 101 Vt. 427—Porter Screen Mfg. Co. v. Central Vermont Ry. Co., 102 A. 44, 92 Vt. 1.

Va.—Chesapeake & O. Ry. Co v. Timber-Lake, Currie & Co, 137 S.E. 507, 147 Va. 304.

10 C.J. p 391 note 30

Failure to ice car properly

Ark.—American Ry. Exp. Co. v. Cole, 42 S.W.2d 772, 184 Ark. 485—Mis-

to live stock;[88] failure of the carrier to perform its common-law duty as to transportation and deliv-

souri Pac. R Co v. Fine, 34 S W. 2d 755, 183 Ark. 13.
Cal.—Crinella v. Northwestern Pac R Co., 259 P. 774, 85 Cal App. 440.
Ky.—Chesapeake & O R. Co. v Coleman Fruit Co., 294 S W. 463, 219 Ky. 794—Illinois Cent. R. Co. v Heimerdinger, 291 S.W. 1027, 218 Ky. 600.
Mo.—Aurora Fruit Growers' Ass'n v St Louis-San Francisco Ry. Co., 297 S.W. 440, 220 Mo App. 1316.
Okl.—Kurn v W. D. Wright Produce Co., 76 P.2d 1037.

Flood of side track lower than main line tracks was held not as matter of law an act of God, relieving carrier from liability for resulting loss.—St. Louis-San Francisco Ry. Co. v. Ozark White Lime Co., 9 S.W.2d 17, 177 Ark. 1018.

Rebuttal of presumption

Whether presumption of negligence arising on proof of loss or injury in transit was sufficiently rebutted was for the jury.
U.S.—Alabama & V. Ry. Co. v. American Cotton Oil Co., Miss., 249 F 308, 161 C.C.A. 316.
Ga.—Western & A. R. Co. v. Waldrip, 89 S.E. 346, 18 Ga.App. 263.

Proximate cause of injury held a question for jury.
Ariz.—Southern Pac. R. Co. of Mexico v Gonzalez, 61 P 2d 377.
Ga.—Allen v. Southern Ry. Co., 126 S.E 722, 33 Ga App. 209.
Me.—Young v. Maine Cent. R Co., 93 A. 48, 113 Me. 113.
Wis.—Congar v. Galena, etc., R. Co., 17 Wis. 477.

88. Ala.—Louisville & N. R. Co. v. Benton Mercantile Co., 121 So. 716, 219 Ala. 223—Nashville, C. & St. L. Ry. v. Farrell & Braley, 70 So. 986, 14 Ala.App 380.
Ark.—St Louis-San Francisco Ry. Co. v. Chastain, 25 S.W.2d 28, 181 Ark. 192—Arkansas Western Ry. Co. v. Robson, 285 S.W. 372, 171 Ark. 698.
Ga.—Ragsdale-Lawhon Mule & Horse Co. v. Davis, 119 S.E 428, 30 Ga. App. 752.
Iowa.—Vander Beek v. Chicago & N. W. Ry. Co., 278 N W. 201—McCoy v. Wabash Ry. Co., 231 N W. 353, 210 Iowa 1075—Vincent, Albin & Strahl v. Hines, 200 N.W. 1, 198 Iowa 1224—Buck v. American Railway Express Co., 192 N.W. 277, 195 Iowa 1024—Crozier v. U. S. Railroad Administration, 181 N W. 695.
Ky.—Louisville & N R Co. v. Hunter, 214 S.W. 914, 185 Ky. 165.
Mass.—Clapp v. American Express Co., 125 N.E. 162, 234 Mass. 174.
Mich.—Shier v. American Ry. Express Co., 208 N.W. 746, 234 Mich. 505—H. Ginsberg & Sons v. Wabash R Co., 189 N.W. 1018, 219 Mich 665, 28 A L R 518, affirmed Ginsberg v. Wabash R Co, 193 N. W. 286, 222 Mich 560—Snyder v. King, 165 N.W 840, 199 Mich. 345, 1 A L.R. 893.
Miss.—Bernstein v Yazoo & M. V. R. Co, 72 So 132, 111 Miss. 697.
Mo.—Cole v. American Ry Express Co, 68 S.W.2d 736, 228 Mo App. 78—Jones v. St. Louis-San Francisco Ry. Co., 50 S.W 2d 217, 226 Mo.App. 1152—Shaffer v American Ry. Express Co, App, 282 S W. 725—Morrow v. Wabash Ry. Co., 276 S W. 1030, 220 Mo App. 518—Long v. American Ry Express Co., 274 S.W. 906, 219 Mo App. 451—Morrow v. Wabash Ry. Co, 265 S. W. 851, 219 Mo App. 62—Moran v. Chicago, B. & Q. R Co, App., 255 S W. 331—Johnson v. Wabash Ry. Co, App., 251 S W. 719—Stallings v. Missouri Pac. R. Co., App., 251 S W. 143—Hartford Fire Ins. Co. v. Payne, App., 243 S W 357, certiorari quashed State ex rel. Hartford Fire Ins Co. v. Trimble, 250 S.W. 393, 298 Mo. 418—Byrum v. Chicago & A. R. Co, App., 226 S.W. 91—Schade v. Missouri Pac. R. Co., 221 S W. 146, 204 Mo.App. 88—Berry v. Chicago & A. R. Co., App, 208 S.W. 622—Robinson v. Bush, 200 S W. 757, 199 Mo.App. 184—Bowles v. Quincy, O. & K. C R. Co, App., 187 S.W. 131—Greening v. Chicago & N. W. Ry. Co., App., 183 S W. 1121.
Neb.—Allender v. Chicago & N. W. Ry. Co., 230 N W. 102, 119 Neb. 559—Peterson & Howe v. Davis, 196 N W. 113, 111 Neb 265.
N J.—Fry v. American Ry. Express Co., 142 A. 568, 6 N.J Misc. 720.
Pa.—Witmer v. Pennsylvania R Co., 30 Pa Dist. 112.
Tex.—Hartford Fire Ins. Co. v. Galveston, H. & S. A Ry. Co., Com. App., 239 S.W. 919, reversing Galveston, H. & S. A Ry. Co. v. Hartford Fire Ins. Co., Civ App., 220 S. W. 781—St Louis Southwestern Ry. Co. of Texas v. Hill Bros., Civ.App., 80 S W 2d 432—Houston E. & W. T. Ry. Co v Southern Pine Lumber Co., Civ App., 38 S W.2d 156—Texas Mexican Ry. Co. v. Canales, Civ App., 299 S.W. 668—Panhandle & S. F Ry. Co v. Cowan, Civ App., 243 S.W. 912—Gulf, C. & S. F. Ry. Co. v Clements, Civ App., 203 S.W. 623—Ft. Worth & R G. Ry Co. v. Bryson & Burns, Civ App, 195 S W. 1165—Panhandle & S. F. Ry. Co. v Harp, Civ.App, 193 S.W. 438—Gulf, C. & S. F. Ry. Co. v. Green, Civ.App., 176 S.W. 63.
Utah.—Paradise Land & Live Stock Co. v. Davis, 207 P. 145, 60 Utah 189—Byram v. Payne, 201 P. 401, 58 Utah 536, 18 A L.R. 1110.
Va.—Chesapeake & O. Ry. Co. v Osborne, 153 S E 865, 154 Va. 477.
Wash.—Bennington v. Northern Pac. Ry Co, 192 P 1073, 113 Wash 1
10 C J p 391 note 30.

Failure to provide water, feed, and rest

Ark.—St. Louis-San Francisco Ry. Co. v. Chastain, 25 S.W.2d 28, 181 Ark. 192.
Ga.—Hogg v. Louisville & N R. Co., 127 S.E. 830, 33 Ga.App. 773
Iowa.—Brower v. Chicago, R I & P Ry. Co., 252 N.W. 755, 218 Iowa 317—Bateham v. Chicago, M. & St. P Ry. Co, 192 N.W. 818, 195 Iowa 659.
N.Y.—Walrath v. American Ry. Express Co., 216 N.Y.S. 545, 217 App. Div 83.
Okl.—Payne v. Parsons, 223 P. 618, 97 Okl. 168.
Pa.—Karnofsky Bros. v. Delaware & Hudson Co., 117 A. 783, 274 Pa. 272.
Tex.—St. Louis Southwestern R Co. v. Dolan, Civ.App., 77 S W. 415.
Wyo.—Worland v. Davis, 223 P. 227, 31 Wyo. 108.

Dipping cattle

Whether carrier exercised ordinary care in dipping cattle was a question of fact for the jury.—Schaff v Hudgins, 225 P. 913, 98 Okl. 219—Schaff v. Hudgins, 221 P. 90, 96 Okl. 173, certiorari denied 44 S.Ct. 454, 264 U.S 595, 68 L.Ed. 867—Missouri, K & T. Ry. Co. v. Williamson, 180 P. 961, 75 Okl. 36.

Guttie

Where there was conflict in evidence as to whether guttie was cause of death of stallion while in transportation in railroad car, whether guttie was result of inherent weakness or propensity and whether guttie could result from external violence for which carrier would be liable, court could not say as matter of law that evidence conclusively showed that death was due to inherent weakness or propensity alone, and direct verdict for railroad—Vander Beek v. Chicago & N. W. Ry. Co., Iowa, 278 N.W. 201.

Negligence of carrier or inherent viciousness of animals

Iowa.—Vincent, Albin & Strahl v. Hines, 200 N W. 1, 198 Iowa 1224.

Negligence or previous diseased condition

(1) In an action against an express company for damages for the death of a sow shipped in a crate, whether the death resulted from the defendant's neglect or from a diseased condition which might have existed before shipment was held, in view of the evidence, for the jury.—Alexan-

ery;[89] whether the instrumentalities for receiving,[90] transporting,[91] or unloading[92] were sufficient; whether the carrier's negligence concurred with an act of God in causing the injury;[93] whether there was negligent or unreasonable delay causing damage to the goods[94] or live stock;[95] what is the prop-

der v. American Ry. Express Co., 193 N.W. 560, 195 Iowa 1155.

(2) In an action by the shipper against a carrier for death of a hog in shipment, where plaintiff's evidence tended to show that the death of the hog was caused by negligent transporting in a sealed car not properly ventilated, and defendant's evidence tended to show that the death was caused by a disease contracted by the hog before it was delivered to the carrier, a refusal to give a general affirmative charge for defendant, and leaving the question of the cause of the death of the hog to the jury, was proper.—American Ry. Express Co. v. Dunnaway & Lambert, 92 So. 780, 207 Ala. 392.

Negligence and proximate cause of loss were held questions for jury, in shipper's action against carriers for death of cattle due to negligent failure to unload cattle already dead.—Houston E. & W. T. Ry. Co. v. Southern Pine Lumber Co., Tex.Civ. App., 6 S.W.2d 418.

Gross negligence

Whether conductor's refusal to take stock on through train as designated constituted gross negligence rendering railroad liable for exemplary damages was held a question for jury—Gulf, C. & S. F. Ry Co. v Hamilton, Civ.App., 57 S.W.2d 309, appeal dismissed 89 S.W.2d 208, 126 Tex. 542.

Rebuttal of presumption

Where a shipper has made a prima facie case of negligence against the carrier by proving delivery of live stock to it in good condition and failure of the carrier so to deliver it to consignee, testimony by the carrier's employees that the shipment was handled without negligence, even though not contradicted by testimony as to manner of handling, does not as a matter of law establish the carrier's freedom from negligence.—Ruebel Bros. v. American Express Co., 180 N.W. 658, 190 Iowa 600.

89. Mo.—Erisman v. Wabash Ry. Co., App., 243 S.W. 237.

90. N.D.—Booke & Olson v. Payne, 184 N.W. 803, 48 N.D. 435.
10 C.J. p. 392 note 34.

91. Ala.—Davis v. Dawkins, 95 So. 188, 209 Ala. 45.
Mo.—Rhodes v. Missouri Pac. R. Co., App., 234 S.W. 1026.
N.C.—Hardison v. Norfolk Southern R. Co., 139 S.E. 439, 194 N.C. 791.
Ohio—Fean v. Alabama Great Southern R. Co., 159 N.E. 487, 26 Ohio App. 96.
10 C.J. p. 392 note 35.

Refrigeration

Whether car furnished on plaintiff's requisition afforded standard refrigeration for service specified was question for jury on conflicting evidence—Central of Georgia Ry. Co. v. Evans, 134 S.E. 122, 35 Ga.App. 438.

Carrying fruit in ordinary box cars

Question whether carrier was negligent in carrying cherries in ordinary box cars during season when freezing weather was likely to occur in region in which destination of shipment lay held for jury, especially where shipper had agreed with carrier, through its employee, that insulated cars should be used—Norfolk & W. Ry. Co. v. Keystone Packing Co., 195 N.E. 403, 49 Ohio App. 136.

Infected car

Evidence held to present jury question whether car furnished by carrier was infected with cholera and whether hogs shipped contracted cholera therefrom.—St. Louis & S. F. Ry. Co. v. Slade, 291 P. 107, 144 Okl. 216.

Defective car or vicious propensities of animals

In an action against a railroad for injuries to horses sustained when they became prostrate because of legs protruding out of door, and were injured by other horses in same shipment, question whether injuries were caused by a defective door of the car, as claimed by shipper, or by the vicious propensities of the horses, as claimed by the railroad, held for jury—Moran v. Chicago, B. & Q. R. Co., Mo.App., 255 S.W. 331.

Condition of spark arrester

In action for damages by fire from engine sparks, which set fire to a live stock car, where there was testimony that the spark arrester was defective, testimony of engineer that it was in good condition on the day after the fire made a jury question whether it was in good condition the night of the fire—Osborne v. Southern R. Co., 96 S.E. 34, 175 N.C. 594.

92. Okl.—Midland Valley R. Co. v. Price, 260 P. 26, 127 Okl. 106.
Tex.—Austin v. Chicago, R. I. & G. Ry. Co., Civ.App., 18 S.W.2d 733.

93. Mo.—Ford v. Wabash Ry. Co., 300 S.W. 769, 318 Mo. 723, reversing, App., 266 S.W. 1032.

94. Cal.—Crinella v. Northwestern Pac. R. Co., 259 P. 774, 85 Cal.App. 440.
Fla.—Atlantic Coast Line R. Co. v. Mach, 109 So. 457, 92 Fla. 442.
Ga.—Saunders Bros. v. Payne, 116 S.E. 349, 29 Ga.App. 615.
Iowa.—Bromberg v. Chicago, R. I. & P. Ry. Co., 190 N.W. 955, 194 Iowa 1337.
Mich.—Bernstein v. Illinois Cent. R. Co., 208 N.W. 679, 234 Mich. 614.
Miss.—Bew v. Davis, 105 So. 760, 140 Miss. 360.
Mo.—Mount Arbor Nurseries v. New York, C. & St. L. R. Co., 273 S.W. 410, 217 Mo.App. 31.
N.Y.—Aristo Hosiery Co. v. Atlantic Coast Line R. Co., 218 N.Y.S. 287, 128 Misc. 238.
N.C.—Talley & Baugham v. Atlantic Coast Line R. Co., 152 S.E. 390, 198 N.C. 492.
S.C.—Sanders v. Charleston & W. C. Ry. Co., 149 S.E. 109, 151 S.C. 362.—Sanders v. Charleston & W. C. Ry. Co., 145 S.E. 400, 147 S.C. 487.—Allen v. Davis, 118 S.E. 614, 125 S.C. 256.
Vt.—Saliba v. New York Cent. R. Co., 144 A. 194, 101 Vt. 427.

Delay as proximate cause of damage

(1) Whether delay due to "tie-up" when train crew had worked maximum time under statute was proximate cause of damage to shipment was held a question for jury.—Saliba v. New York Cent. R. Co., 144 A. 194, 101 Vt. 427.

(2) Under the evidence, whether the carrier's negligent delay in shipment of apples was proximate cause of freezing of shipment was held a question for jury.—Bernstein v. Illinois Cent. R. Co., 208 N.W. 679, 234 Mich. 614.

Whether carrier furnished adequate facilities for ordinary conditions was question for jury in action for delay in delivering perishable goods—Free Bros. Co. v. Baltimore & O. R. Co., 146 A. 98, 296 Pa. 441.

Excuse for delay

Evidence of notice that congestion existed in produce yards and that plaintiff nevertheless insisted on having perishable goods forwarded makes issue for jury as to whether carrier's delay is excused—Free Bros. Co. v. Baltimore & O. R. Co., 146 A. 98, 296 Pa. 441.

Concurrence of negligence and act of God

Where the carrier, on receipt of a shipment of potatoes in December, agreed to deliver them immediately to connecting carriers, but failed to do so for nearly a week, and the potatoes were damaged by freezing, the question whether the carrier's negligent failure to make immediate delivery of the shipment as agreed, concurred with the act of God, so as to make it liable was held to be a question for the jury.—Merchants' & Miners' Transp. Co. v. L. J. Upton & Co., 103 S.E. 616, 127 Va. 406.

95. Ark.—Bush v. Curry, 199 S.W. 375, 131 Ark. 237.

er place for delivery where a shipment is billed to a point which is not on a railroad but near it;[96] whether there was a deviation without reasonable necessity,[97] whether the shipper has been guilty of such acts or negligence as will relieve the carrier from liability,[98] and whether the carrier had knowledge thereof;[99] whether the loss or injury was due to the negligence of the carrier or to the act or negligence of the shipper[1] or of his caretaker accompanying a shipment of live stock;[2] the existence, reasonableness, and effect of a provision limiting the carrier's liability[3] and whether the lim-

Iowa.—Crozier v U. S Railroad Administration, 181 N.W. 695.
Mich.—H. Ginsberg & Sons v Wabash R. Co., 189 N.W. 1018, 219 Mich. 665, 28 A.L.R. 518, affirmed Ginsberg v. Wabash R. Co, 193 N.W. 286, 222 Mich 560.
Mo.—Crow v. Bush, App., 200 S.W. 762—Robinson v. Bush, 200 S.W. 757, 199 Mo App. 184.
Tex.—Kansas City, M. & O. Ry. Co. v. Cauble, Civ.App., 286 S.W. 478.

96. Ala.—Louisville, etc, R. Co. v. Bernheim, 21 So 405, 113 Ala 489.

97. Conn.—Crosby v Fitch, 12 Conn. 410, 31 Am.D. 745.
N.Y.—Brown v. Betts, 9 Cow. 208.

98. Iowa.—McCoy v. Wabash Ry. Co, 231 N.W. 353, 210 Iowa 1075.
Ky.—Director General of Railroads v. A. C. Schuff & Co., 237 S.W. 410, 193 Ky. 737.
Mich.—Shier v. American Ry. Express Co., 208 N.W. 746, 234 Mich. 505.
Mo.—Missouri Cobalt Co. v. Missouri Pac. R Co., App, 255 S.W. 970.
N.D.—Booke & Olson v. Payne, 184 N.W. 803, 48 N.D. 435.
Tex.—Panhandle & S. F. Ry. Co. v Cowan, Civ App., 243 S.W. 912—Chicago, R. I. & G. Ry. Co. v. Pavillard, Civ.App., 187 S.W. 998.
10 C.J. p 392 note 33.

Improper loading or packing
Iowa.—McCoy v Wabash Ry. Co., 231 N.W. 353, 210 Iowa 1075.
Ky.—Pollack v. Southern Ry. Co. in Kentucky, 295 S.W. 150, 220 Ky. 302.
N.C.—Coburn v. American Ry. Express Co, 108 S.E. 375, 182 N.C. 762.
Ohio.—St. Louis-San Francisco Ry. Co. v. Glow Electric Co., 172 N.E. 425, 35 Ohio App. 291.
Tex.—Texas & N. O. R. Co. v. Binswanger & Co. of Texas, Civ App., 41 S.W.2d 256—Panhandle & S. F. Ry. Co. v. Sanderson, Civ App., 218 S.W. 540, dismissed for want of jurisdiction.

Improper bedding
In action for injuries to cattle in shipment, testimony of plaintiff's agent that cars were not properly bedded, and that he knew that cattle could not properly be shipped in unbedded cars for long distances, did not show contributory negligence as a matter of law, in the absence of evidence as to the distance the cattle were shipped.—Beaumont, S. L. & W. Ry Co. v. Milby, Tex.Civ. App., 204 S.W. 444.

Misdirection of shipment
Ark.—Mellon v Stein, 287 S.W 382, 171 Ark. 1092.

Delay in unloading
Ill.—House v. Wheelock, 254 Ill.App 149

Negligence of shipper accompanying shipment of horses in failing to inspect them in transit, was held properly submitted to jury.—Shier v American Ry. Express Co., 208 N.W. 746, 234 Mich 505

Shipper's nonperformance of rule of carrier
Rule of carrier that heater in cars to protect goods must be securely fastened and braced is not such term of contract that nonperformance by shipper relieves carrier of liability, or charges shipper with contributory negligence, as matter of law.—S. G. Palmer Co. v. Illinois Cent. R. Co, 204 N.W. 566, 164 Minn 68.

99. Iowa.—Wiersma v. Chicago & N. W. Ry. Co, 238 N.W. 579, 213 Iowa 223.

Knowledge of improper loading
In action for damages on account of transportation of horses loaded by shipper after dark, whether carrier's agent knew or might have known of overloading was held a jury question.—Wiersma v. Chicago & N. W. Ry. Co, 238 N.W. 579, 213 Iowa 223.

1. Iowa.—McCoy v. Wabash Ry. Co, 231 N.W. 353, 210 Iowa 1075
Tex.—Texas & N. O. R. Co. v. East, Civ.App., 57 S.W.2d 175.

Unloading goods
(1) In action for damages to shipment of steel girders, whether crane operator whose negligence caused damage to girders was in employ of railroad or consignee was held a question for jury, notwithstanding consignee paid costs of a crane for unloading the girders and operation of crane.—Indemnity Ins. Co. of North America v. Atchison, T. & S. F. Ry. Co, C.C.A.Ariz., 85 F.2d 438, rehearing denied 85 F.2d 1006.

(2) Tariff rule requiring consignee to unload from cars freight received by carriers carried at carload ratings held not to compel inference that unloading of interstate shipment of girders was performed by consignee, rather than railroad, where transportation of girders from destination to point of unloading was not under tariffs, but on a new and entirely separate and unusual compensation for special and intricate services.—Indemnity Ins. Co of North America v. Atchison, T & S. F. Ry Co, supra

2. Iowa.—Vincent, Albin & Strahl v. Hines, 200 N.W. 1, 198 Iowa 1224

3. U.S.—Galveston, H. & S. A. Ry. Co. v Hall, C.C.A.Tex., 70 F.2d 608
Conn.—Humphrey-Cornell Co v. Hines, 115 A. 561, 97 Conn. 21.
La.—Lawes v. New Orleans Transfer Co, 123 So. 144, 11 La.App. 170.
Minn.—O'Connor v. Great Northern R. Co, 136 N.W. 743, 118 Minn 223—Ostrott v. Northern Pac. R. Co., 127 N.W 177, 111 Minn. 504.
Okl.—Chicago, R. I. & P. Ry Co. v. Great Western Oil Co., 250 P. 776, 120 Okl. 150.
Pa.—Atlantic Refining Co v Pennsylvania R. Co., 113 A. 570, 270 Pa. 415.
S.C.—Poliakoff v. American Ry. Express Co, 105 S.E. 745, 115 S.C. 350
10 C.J. p 390 note 25.

Assent of shipper to limitation
Whether restrictions on carrier's liability for loss of property are understood and assented to by the shipper is a question of fact.
Ill.—Dwyer v. American Railway Express Co., 280 Ill App. 11.
La.—Lawes v. New Orleans Transfer Co., 123 So. 144, 11 La App. 170.
Mich.—Michigan Cent. R Co. v. Hale, 6 Mich. 243.
N.J.—Cohen v. U. S. Express Co., 79 A. 1053, 81 N.J Law 355—Hayes v. Adams Express Co., 65 A. 1044, 74 N.J Law 537.
10 C.J. p 145 note 15, p 390 note 25 [b].

Limitation of amount of liability
(1) Where a shipper's agent, not knowing the value of the goods shipped, on suggestion of the carrier's agent, arbitrarily fixed a sum far below the true value, and the rate was based on such fixed value, the arrangement could not as matter of law be held a bona fide effort to fix the value, so as to limit recovery to the amount agreed on.—Bailey v. American Ry Express Co, 108 S.E. 303, 27 Ga App 364, affirmed American Ry. Express Co v. Bailey, 113 S.E 551, 154 Ga. 96.

(2) In shipper's action for lost goods, whether valuation limiting carrier's liability appeared on shipping order when signed by shipper was held for jury.—Anderson v. At-

itation has been waived;[4] whether a stipulation in the contract of shipment limiting the time within which notice of a claim for damages was reasonable;[5] whether such notice was given in accordance with the requirements of the contract;[6] whether the limitation was waived by the carrier;[7] what is a reasonable time for delivery of the property within a provision requiring notice of the claim to be given within a specified time after the lapse of a reasonable time for delivery;[8] whether there was negligence on the part of the carrier obviating the necessity of giving timely notice, within the Cummins amendment permitting recovery for loss due to negligence, although no claim is filed;[9] whether the company is liable as a carrier or as a warehouseman;[10] the nature and extent of the damages resulting from the loss or injury;[11] and whether plaintiff has used proper efforts to reduce the dam-

lantic Coast Line R. Co., 161 S.E. 523, 163 S.C. 350.

Limitation of time for bringing suit

(1) Reasonableness of, and compliance with, limitation.—Jackson v. Mauck, 126 N.E. 851, 189 Ind. 262.

(2) Under a provision of the uniform bill of lading requiring suits to be brought within two years and one day after a reasonable time for delivery has elapsed, ascertainment of what was a reasonable time for delivery was a question of fact for the jury, or for the court in a case tried by the court.

Conn.—Humphrey-Cornell Co. v. Hines, 115 A. 561, 97 Conn. 21.

Okl.—Chicago, R. I. & P. Ry. Co. v. Great Western Oil Co., 250 P. 776, 120 Okl. 150.

Limitation of liability to that of warehouseman

In action against a railroad company to recover for a carload of tin plate destroyed by fire while awaiting transfer to steamer at a port of export, defended on ground that, by giving notice of arrival to the steamship company, which was to export the goods, and to which the carrier had been directed to deliver the goods, the carrier had reduced its liability to that of warehouseman, it was held, under the evidence, that, whether the steamship company was the authorized agent of the party "entitled to receive" the goods, to whom it was proper to give such notice of arrival, was for the jury. —Baltimore & O. R. Co. v. Jones & Laughlin Steel Co., 114 A. 730, 138 Md. 604.

Construction and effect of limitation

Where goods loaded in car on shipper's private siding were destroyed by fire after the carrier had moved it by its switch engine from the place of loading to another switch within the shipper's plant, it was a question for the jury whether the car had been attached to a train within a provision of the bill of lading exempting the carrier from liability until such goods were so attached, the definition of train as a continuous or connected line of cars on a railroad, adopted in the construction of other statutes, being of little assistance in construing that provision.—Atlantic Refining Co. v. Pennsylvania R. Co., 113 A. 570, 270 Pa. 415.

4. N.Y.—Rathbone v. New York Cent., etc., R. Co., 35 N.E. 418, 140 N.Y. 48.

5. Tex.—Western Union Telegraph Co. v. Cates, Civ.App., 282 S.W. 661, reversed on another ground, Com.App., 291 S.W. 193.

6. Miss.—Pickle v. Receivers of St. Louis & S. F. R. Co., 75 So. 448, 115 Miss. 322.

10 C.J. p. 392 note 36.

7. Ga.—J. N. Mitchell & Co. v. Atlantic Coast Line R. Co., 129 S.E. 901, 34 Ga.App. 437.—American Ry. Express Co. v. J. T. Bothwell Grocery Co., 104 S.E. 644, 25 Ga.App. 728.

10 C.J. p. 392 note 37.

8. Ga.—American Ry. Express Co. v. Miller Mfg., 112 S.E. 653, 28 Ga.App. 622.—American Ry. Express Co. v. Roberts, 111 S.E. 744, 28 Ga.App. 510.—American Ry. Express Co. v. J. T. Bothwell Grocery Co., 104 S.E. 644, 25 Ga.App. 728.

N.Y.—Herring Bros. v. American Ry. Express Co., 192 N.Y.S. 871.

Pa.—De Angelis v. American Ry. Express Co., 2 Pa.Dist. & Co. 493.

9. U.S.—Chesapeake & O. Ry. Co. v. A. F. Thompson Mfg. Co., 46 S.Ct. 318, 270 U.S. 416, 70 L.Ed. 654, reversing A. F. Thompson Mfg. Co. v. Chesapeake & O. Ry. Co., 123 S.E. 421, 95 W.Va. 670.

10. Colo.—Denver, etc., R. Co. v. Peterson, 69 P. 578, 30 Colo. 77, 97 Am.S.R. 76.

N.Y.—Laporte v. Wells, 48 N.Y.S. 292, 23 App.Div. 267.

11. Ala.—American Ry. Express Co. v. Judd, 104 So. 418, 213 Ala. 242.

Ark.—Mellon v. Stein, 287 S.W. 382, 171 Ark. 1092.

Ga.—J. H. Walker Co. v. Atlantic Coast Line R. Co., 143 S.E. 782, 38 Ga.App. 284.

Ill.—Transformer Corporation of America v. Hinchcliff, 279 Ill.App. 152.

Iowa.—Mackin v. Minneapolis & St. L. R. Co., 157 N.W. 729, 176 Iowa 150.

Mich.—Perkett v. Manistee & N. E. R. Co., 173 N.W. 359, 207 Mich. 32.

Mo.—Gillette v. St. Louis-San Francisco Ry. Co., App., 24 S.W.2d 1050.

Neb.—Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry. Co., 182 N.W. 967, 106 Neb. 146.

Ohio.—American Ry. Express Co. v. Bender, 152 N.E. 197, 20 Ohio App. 436.

Pa.—Jakway v. Lehigh Valley R. Co., 98 Pa.Super. 300.

S.D.—Sheehan v. Minneapolis & St. L. R. Co., 193 N.W. 597, 46 S.D. 429.

Tex.—Davis v. Wylie & Jackson, Com.App., 256 S.W. 256, affirming, Civ.App., 241 S.W. 1114.—Gulf, C. & S. F. Ry. Co. v. Hines, Com.App., 250 S.W. 1013, affirming, Civ.App., 239 S.W. 244.—Houston E. & W. T. Ry. Co. v. Southern Pine Lumber Co., Civ.App., 6 S.W.2d 418.—Coulter v. Gulf, C. & S. F. Ry. Co., Civ.App., 248 S.W. 788.—Fort Worth & D. C. Ry. Co. v. Harle, Civ.App., 240 S.W. 1004, error refused.

Utah.—Wilson v. Hines, 196 P. 1007, 58 Utah 38.

Va.—Chesapeake & O. Ry. Co. v. Osborne, 153 S.E. 865, 154 Va. 477.

Value of property

(1) Generally.

Ala.—Kates Transfer & Warehouse Co. v. Klassen, 59 So. 355, 6 Ala.App. 301.

Ky.—Louisville & N. R. Co. v. Hensley, 35 S.W.2d 279, 237 Ky. 224.

Mo.—Taylor v. St. Louis & H. R. Co., App., 256 S.W. 499.

Pa.—Resnick & Cohen v. Firth, 73 Pa.Super. 604.

Tex.—Sugarland Ry. Co. v. Dew Bros., Civ.App., 212 S.W. 190.

Wis.—Thomson v. Chicago, M. & St. P. Ry. Co., 217 N.W. 927, 195 Wis. 78.

Wyo.—Shikany v. Salt Creek Transp. Co., 45 P.2d 645, 48 Wyo. 190.

(2) In a shipper's action for damages for sheep killed during transportation by drinking poisonous water, the value of the sheep held sufficiently proved, as against motion for a nonsuit, although testimony of value at an intermediate point merely, and not at destination, was given.—Byram v. Payne, 201 P. 401, 58 Utah 536, 18 A.L.R. 1110.—Dee v. San Pedro, L. A. & S. L. R. Co., 167 P. 246, 50 Utah 167.

(3) Market value.

Ark.—Arkansas Western Ry. Co. v. Robson, 285 S.W. 372, 171 Ark. 698.

ages.[12] Cases involving other issues which were held, under the evidence, to be for the jury to determine are set out in the notes.[13]

c. Particular Questions of Law

Where the evidence as to delivery of the property to the carrier, the carrier's negligence, the shipper's contributory negligence, and as to other issues affecting the carrier's liability for loss or injury, is undisputed, and but one conclusion can reasonably be drawn therefrom, the determination of the issue is a matter of law for the court.

Where the facts are undisputed or susceptible of but one conclusion, it is for the court to determine whether a contract of transportation was entered into between the shipper and carrier,[14] whether the property was delivered to and accepted by the carrier,[15] and the identity and value of the property;[16] whether the carrier was bound to know the character of the contents of packages intrusted to it;[17] the condition of the property upon arrival at the point of destination;[18] its delivery to the consignee;[19] whether the carrier was negligent generally, and whether such negligence caused the loss or injury;[20] whether there was negligent

Cal.—Crinella v. Northwestern Pac. R. Co, 259 P. 774, 85 Cal App 440.

(4) Where the evidence leaves it doubtful whether there was no market value of cattle at the place of delivery, the question becomes one for the jury.—Lancaster v. Tudor, Tex Civ App., 222 S W. 990.

(5) Depreciation in market value —Hines v. Davis, Tex.Civ.App., 225 S W. 862.

Expenses

Whether shippers' expenses, in reshipping damaged grain from point of destination to another city to be cleaned and prepared for market, were necessary and reasonable, was held to be a question for jury.—Panhandle & S. F. R. Co. v. Shell, Tex. Civ.App, 265 S W. 758.

Evidence held not undisputed

The question of amount of damage from crippling cattle in a live stock shipment cannot be taken from the jury, on the theory of undisputed testimony, because of an expert's estimate, what should go to the jury with all the other evidence tending to show the condition and value of the cattle —Bush v. Altschul, 193 S. W. 280, 128 Ark. 103.

12. Ill.—Wabash R. Co. v. Campbell, 76 N E. 346, 219 Ill. 312, 3 L R A., N.S., 1092.

13. **Confiscation of property**

Whether a shipment of chickens in possession of a carrier, which was caught in a flood, was confiscated by military authorities, martial law being declared in the district, so as to free the carrier from responsibility, was held under the evidence for the jury.—Chicago & E. I R Co. v. Collins Produce Co, Ill., 235 F. 857, 149 C C A. 169, affirmed 39 S.Ct. 189, 249 U.S. 186, 63 L Ed 552.

Offer to pay freight charges

In an action for the value of freight lost in transit, where the carrier charged that the shipper failed to pay the freight charges, there having been a conflict of testimony as to the shipper's offer to pay the freight, the question was for the jury—Clark v Baltimore & O. Ry. Co., 79 Pa.Super. 159.

Unreasonableness of shipper's instructions to carrier

Whether a particular request or instruction of the shipper is reasonable or unreasonable is a question for the jury.—Keat v. Chicago, etc., R. Co., 154 N.W. 220, 98 Neb. 641.

14. N.C.—Bryan v. Louisville & N R. Co, 93 S.E. 750, 174 N.C. 177.

15. Okl.—St. Louis-San Francisco Ry. Co. v. Slade, 293 P. 547, 146 Okl. 173.

16. Ark —Suckle v. Missouri Pac. R. Co, 241 S.W. 368, 154 Ark. 168.

Erroneous submission to jury

In an action against a railroad for the value of goods lost or destroyed in transit, the undisputed testimony of plaintiff's clerk, who did most of the packing preparatory to shipment, that the invoices contained in a book, in which an itemized statement of each article packed and the value thereof was entered, were carefully and correctly made, and that the goods specified as being in each box were placed therein by him or under his supervision and were contained therein when shipped, constituted such definite proof of the contents of the boxes and value of the goods therein as rendered the submission of such questions to the jury reversible error—Suckle v. Missouri Pac. R Co., 241 S W. 368, 154 Ark 168.

17. N.Y.—Berley v. Newton, 10 How.Pr. 490

18. Ala.—Atlantic Coast Line R. Co. v Enterprise Oil Co, 101 So. 605, 211 Ala. 676.

19. Or.—Cripe v. Davis, 214 P. 343, 107 Or. 142.

Where the evidence is plain, clear, and undisputed, showing that personal property was received, transported, and put into the possession of, and under the dominion of, consignee at the point of destination, it is proper for the court to instruct the jury as matter of law that delivery had been made by the carrier.—Cripe v. Davis, 214 P. 343, 107 Or. 142.

20. U S.—Lehigh Valley R. Co v. State of Russia, C.C.A.N.Y, 21 F. 2d 396, certiorari denied 48 S Ct. 159, 275 U.S. 571, 72 L.Ed. 432.

Ala —Southern Ry. Co. v. Scottsboro Wholesale Co., 119 So. 241, 22 Ala. App 636, certiorari denied 119 So. 242, 218 Ala. 511.

Ark.—Railway Express Agency v. H. Rouw Co., 45 S.W 2d 515, 184 Ark. 1194.

Cal —Brounton v. Southern Pac. Co., 83 P. 265, 2 Cal App. 173.

Idaho —Cooper v. Oregon Short Line R Co., 262 P. 873, 45 Idaho 313.

Mich —Perkett v. Manistee & N. E. R. Co, 157 N.W. 388, 191 Mich. 106.

Mo.—Aurora Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co., 297 S.W 440, 220 Mo App. 1316.

Ohio —Louisville & N. R Co v. Riley, 160 N.E. 730, 27 Ohio App. 188.

S C—Sweeney v Southern Ry Co, 163 S E. 838, 165 S C. 380.

Tex.—Fentiman v. Atchison, T. & S. F R Co., 98 S.W. 939, 44 Tex Civ App. 455.

Proximate cause

Evidence that alleged rough handling of train caused congestion of lungs which killed hogs in plaintiff's shipment was held insufficient to warrant submission to the jury on the question of negligence as the proximate cause of the loss.—Wiederin v. Chicago & N. W. Ry. Co., 237 N W 344, 212 Iowa 1103.

Testimony of caretaker accompanying cattle that at one station the train was cut in two, and one part was switched out of his sight, was held insufficient to warrant submission of the carrier's negligence in handling the train, such caretaker also having testified that when the train is in motion the cattle will stand and ride, and when not in motion will fight, lie down, and be trampled upon.—Galveston, H. & S. A. Ry. Co. v. Crowley, Tex Civ App., 214 S.W. 721.

Direction of verdict required

(1) Motion for directed verdict should be granted, where plaintiff shows nothing to establish his claim of carrier's negligence.—Cooper v. Oregon Short Line R Co., 262 P. 873, 45 Idaho 313.

(2) Where the evidence showed

or unreasonable delay in transportation and delivery;[21] whether the consignee was guilty of contributory negligence;[22] whether the shipper's instructions to the carrier were violated;[23] what is a reasonable time for removal of shipment from carrier's premises;[24] and the extent of the damages sustained.[25]

Limitation of liability. Where the facts are undisputed or but one conclusion can be drawn therefrom, the liability of the carrier under a limitation clause in the contract,[26] including the reasonableness of the limitation,[27] and the reasonableness of the time for delivery under a contract requiring claims for loss to be made within a designated time after the lapse of a reasonable time for delivery,[28] are questions of law for the court; and in some cases it has been held, without discussion of the evidence, that the reasonableness of a limitation of liability is for the court.[29]

that perishable goods were injured solely because of improper ventilation while awaiting unloading, and the contract provided that the ventilation should be taken care of by the shipper's messenger, refusal to direct a verdict for defendant carrier was error.—Louisville & N R Co. v. Riley, 160 N.E. 730, 27 Ohio App 188.

Demurrer to evidence properly sustained

(1) Demurrer to evidence was properly sustained, where shipper, having elected to stand upon specific grounds of carrier's negligence, failed to prove case as alleged.—Inzerillo v. Chicago, B. & Q R Co., 35 S. W.2d 44, 225 Mo.App 1213.

(2) Order overruling defendant's demurrer to evidence in action against carrier for goods alleged destroyed by fire erroneous, where plaintiff's evidence wholly fails to prove any act of negligence or fact from which inference of defendant's negligence can be reasonably drawn.—Davis v. Rivers, 229 P. 571, 103 Okl 198.

21. Minn.—McNeill & Scott Co. v. Great Northern R. Co, 194 N W. 614, 156 Minn 120.
Wis.—Johnston v Chicago & N. W. Ry. Co, 246 N.W. 336, 210 Wis. 227.

Reasonable time

Although generally what is a reasonable time for transportation and the reasonableness and sufficiency of excuse for delay are for the jury, yet, where the evidence is uncontroverted, the question may be treated as one of law.—Purity Ice Cream & Dairy Co v. Adams Express Co., 187 N W. 296, 217 Mich. 593.

22. U.S.—Lehigh Valley R. Co. v. State of Russia, C.C.A.N.Y., 21 F. 2d 396, certiorari denied 48 S.Ct. 159, 275 U S 571, 72 L Ed. 432.

Facts not raising issue

Where consignee has no duty to watch explosives in carrier's care, fact that detectives hired by consignee failed to prevent explosion cannot raise contributory negligence issue.—Lehigh Valley R. Co v State of Russia, C C.A.N.Y., 21 F 2d 396, certiorari denied 48 S Ct. 159, 275 U. S. 571, 72 L.Ed. 432.

23. Ky.—Gus Datillo Fruit Co. v. Illinois Cent R. Co., 299 S.W 1089, 222 Ky. 41.

24. Ala.—American Ry Express Co. v Judd, 104 So 418, 213 Ala 242.

25. Mich.—Perkett v. Manistee & N. E. R. Co, 157 N W. 388, 191 Mich. 106
S.C.—Smith v. Southern Ry. Co., 113 S E. 465, 121 S C. 94.

Guess or vague estimate

(1) In action against railroad for damages to live stock, an item of damages pertaining to a horse with an injured knee, the evidence relied on by plaintiff in support of such item being a mere guess, was properly withdrawn by the court as not having sufficient support in evidence.—Cogley v. Chicago, B & Q R Co., 171 N.W. 745, 185 Iowa 1080.

(2) A vague estimate as to damage to a shipment based on a witness's examination of twelve to fifteen packages out of three hundred twenty-seven at the time of receipt, and the amount for which he sold them thirty or sixty days thereafter, was held insufficient to warrant submission to the jury of the amount of damage to the shipment.—Perkett v. Manistee & N E. R. Co, 157 N.W 388, 191 Mich 106.

Market value

Where measure of damage was based on market values, and no evidence was offered to show market condition, directing verdict for defendant was proper.—Willer v Chicago, M & St. P. Ry. Co, 210 N W. 81, 50 S D. 319.

26. Ala.—Central of Georgia Ry. Co. v. Patterson, 84 So 471, 17 Ala. App. 305.

Damages from fire or flood

In a shipper's action against a carrier for failure to deliver goods shipped, and which had been destroyed by fire, where there was no conflict as to the time, origin, and progress of the fire, the question of the sufficiency of the evidence, under special pleas that the carrier was not liable under limitation of bill of lading for damages from fire or flood not caused by its negligence, was held a matter of law for the court.—Central of Georgia Ry. Co. v. Patterson, 84 So. 471, 17 Ala.App 305

27. Tex.—St. Louis, B. & M. Ry. Co. v. Marcofich, Civ.App, 185 S.W. 51, affirmed, Com.App., 231 S W. 582.

Notice of claim for damages

Whether limitation in a contract of live stock shipment of time to ninety-one days for notice of claim for damages is reasonable, and so valid, under Vernon's Sayles Civ.St. Annot 1914 art 5714, is a question for the jury, unless only one inference can be drawn from the testimony.—St. Louis, B & M. Ry Co. v. Marcofich, Tex Civ.App., 185 S.W. 51, affirmed, Com.App, 221 S.W. 582

28. U.S.—Chesapeake & O. Ry Co. v. Martin, 51 S.Ct. 453, 283 U S. 209, 75 L Ed. 983, reversing 143 S E 629, 154 Va. 1, and Chesapeake & O Ry. Co v. Martin & Porter, 152 S E 335, 154 Va. 1, certiorari granted Chesapeake & O Ry. Co. v Martin, 51 S.Ct. 23, 282 U.S. 819, 75 L Ed. 732.

Rule stated

(1) Under an interstate express receipt requiring notice of a claim for failure to deliver to be made within four months after a reasonable time for delivery has elapsed, what is a reasonable time for transportation is a question for the court, where the undisputed facts show so clear and manifest delay that the court may hold it unreasonable as matter of law.—American Ry. Express Co. v Roberts, 111 S E 744, 28 Ga.App. 510.

(2) If, upon the question of reasonableness of time for delivery under a shipper's contract requiring claim for loss to be made within four months after reasonable time for delivery, the facts are such as afford no ground for two different and intelligent opinions respecting it, the court may determine it as one of law.—Kahn v American Railway Express Co, 106 S E. 126, 88 W Va. 17.

29. U.S.—Leigh Ellis & Co. v Davis, Ga., 43 S.Ct. 243, 260 U S 682, 67 L Ed. 460, affirming, C.C.A., 276 F 400, which affirms, D C., Leigh Ellis & Co v. Payne, 274 F. 443, and certiorari denied 42 S Ct. 187, 257 U.S 659, 66 L.Ed. 422.—Missouri, K & T. R Co. v. Harriman Bros., Tex., 33 S Ct. 397, 227 U.S. 657, 57 L Ed. 690.
Neb.—Colburn v. Davis, 196 N.W. 893, 111 Neb. 496.

Construction of writings. The construction of the shipper's written instructions to the carrier as to the ventilation of a fruit car is a matter of law for the court to determine.[30]

§ 259. Instructions

a. In general
b. Negligence of carrier in general
c. Exceptions to common-law liability
d. Contractual limitation of liability
e. Damages
f. Presumptions and burden of proof

a. In General

The instructions in actions against carriers for loss of, or injury to, property transported are governed by the rules applicable in civil actions generally. An instruction which imposes a higher degree of proof than the law requires is erroneous.

The rules governing instructions in civil actions generally apply in actions against common carriers to recover for loss of or injury to property. Pursuant to such rules, it is the duty of the court to give correct instructions as to the law applicable to the case.[31] The instructions should not be contradictory,[32] vague or indefinite,[33] or otherwise misleading;[34] and if an instruction, as requested, is erroneous, indefinite, or incomplete, the court may modify it.[35] The instructions must be applicable to and limited by the issues raised by the pleadings and evidence;[36] and should not ignore any issues which there is evidence tending to support.[37] So the instructions must not invade the province of the jury,[38] exclude from the jury evidence

Tex.—Betka v. Houston & T. C. R. Co., Civ.App., 189 S.W. 532, error refused.

30. Ky.—Gus Datillo Fruit Co. v. Illinois Cent. R. Co., 299 S.W. 1089, 222 Ky. 41.

31. Ark.—Missouri Pac. R. Co. v. Fine, 34 S.W.2d 755, 183 Ark. 13.
Ky.—Illinois Cent. R. Co. v. Luther, 283 S.W. 1013, 214 Ky. 658.
10 C.J. p 393 note 53.

Instruction held proper
Ala.—Louisville & N. R. Co. v. Long, 105 So. 890, 213 Ala. 679.

Distinction between private and common carriers
Where evidence as to long-distance trips by truckman did not show whether they were made as common carrier or under special contract, requested rulings that, unless he held himself out to all as ready to do moving jobs like that undertaken for plaintiff in regular practice of his business, he was not common carrier, and that, if he only undertook such work occasionally by special bargain, he was not common carrier with reference to plaintiff's job, should have been given.—Houle v. Lewonis, 140 N.E. 427, 245 Mass. 254.

Law of agency
In an action against a transfer and baggage company for loss of a suitcase, call for which was taken by the baggage company's agent, its codefendant, the trial court properly charged the law of agency, and explained how the relationship of principal and agent may be created, the evidence and issues making it necessary.—Lee v. City Transfer & Baggage Co., 106 S.E. 506, 115 S.C. 517.

Destination of shipment
In a shipper's action against a carrier for injuries to live stock while in transit, it was not error in the charge to treat a certain point as the destination of the shipment, although such point was a different one from that designated in the contract of shipment, the undisputed testimony showing that the destination was by agreement changed while the shipment was in transit.—Hines v. Thornton, Tex.Civ.App., 251 S.W. 523.

Commencement of liability
Instruction as to when carrier's liability attached in cattle shipment was held proper.—Panhandle & S. F. Ry. Co. v. Andrews, Tex.Civ.App., 278 S.W. 478.

Termination of liability
In action for damages to shipment of cattle from delay in transit, charge that responsibility of railroad ceased when cattle were delivered to stockyards company at destination and unloaded into pens was held as favorable as defendant railroads could ask.—Panhandle & S. F. Ry. Co. v. Crawford, Tex.Civ.App., 198 S.W. 1079.

32. Minn.—McNeill & Scott Co. v. Great Northern R. Co., 194 N.W. 614, 156 Minn. 120.
10 C.J. p 393 note 54.

Instructions held not contradictory
Ark.—American Ry. Express Co. v. H. Rouw Co., 294 S.W. 401, 173 Ark. 810.

33. Ark.—W. F. Bogart & Co. v. Wade, 200 S.W. 148, 132 Ark. 49.
Mo.—Cornett v. Chicago, etc., R. Co., 138 S.W. 51, 158 Mo.App. 360

34. Ill.—Harshaw, Fuller & Goodwin Co. v. Illinois Cent. R. Co., 252 Ill.App. 253.
Minn.—McNeill & Scott Co. v. Great Northern R. Co., 191 N.W. 614, 156 Minn. 120.
Mo.—Mount Arbor Nurseries v. New York, C. & St. L. R. Co., 273 S.W. 410, 217 Mo.App. 31.
10 C.J. p 393 note 56.

Instruction held not misleading
Ark.—American Ry. Express Co. v. H. Rouw Co., 294 S.W. 401, 173 Ark. 810.

35. Or.—Michellod v. Oregon-Washington R. & Nav. Co., 168 P. 620, 86 Or. 329.

Instances of proper modification
(1) Where the only issue was whether the cotton was placed on the platform for immediate shipment and so received by the railroad company, the modification of an instruction, on carrier's liability for loss by adding to the words "placed on the platform in the usual way" the words "for shipment," was proper.—W. F. Bogart & Co. v. Wade, 200 S.W. 148, 132 Ark. 49.

(2) Instruction stating that bill of lading recited that goods were in good order was properly modified, to state, according to the fact, that it recited that they were in apparently good condition, but that contents and condition of contents were unknown.—Michellod v. Oregon-Washington R. & Nav. Co., 168 P. 620, 86 Or. 329.

(3) Modification of instruction, that if consignee refused delivery carrier was not liable for resulting damage, by adding "without lawful reason" after "refused delivery," is not indefinite for failure to instruct as to what constitutes a lawful reason.—Crinella v. Northwestern Pac. R. Co., 259 P. 774, 85 Cal.App. 440.

36. Ill.—Harshaw, Fuller & Goodwin Co. v. Illinois Cent. R. Co., 252 Ill.App. 253.
Va.—Seaboard Air Line Ry. Co. v. J. E. Bowden & Co., 131 S.E. 245, 144 Va. 154.
10 C.J. p 393 note 60.

37. Okl.—Midland Valley R. Co. v. Price, 260 P. 26, 127 Okl. 106.
10 C.J. p 394 note 61.

38. Ala.—Louisville, etc., R. Co. v. Smitha, 40 So. 117, 145 Ala. 686.

which should be considered by them,[39] or assume as proved matters which are in issue.[40]

Definition of proximate cause. An instruction defining proximate cause as the efficient and moving cause without which the injury would not have occurred was not objectionable for failing to define the term "efficient and moving cause."[41]

Status as carrier or warehouseman. Instructions distinguishing the liability of a carrier as such and that of a warehouseman are properly given, where it was a question of fact in which of the two capacities the carrier acted,[42] but where the declaration charges defendant only as a common carrier an instruction submitting defendant's liability on the theory that he was a warehouseman is erroneous.[43] Instructions as to the termination of defendant's liability as carrier and commencement of liability as warehouseman should be correct in their statement of the law, and not misleading.[44]

Degree of proof. An instruction requiring a higher degree of proof than a preponderance of the evidence should not be given.[45] So an instruction that, in order to rebut the prima facie case made by the bill of lading as to the condition of the goods when received for transportation, the carrier must "show" that it was deceived and defrauded when the bill was signed, has been held erroneous as imposing on the carrier too high a degree of proof.[46]

b. Negligence of Carrier in General

The rules governing the necessity and propriety of instructions in civil actions generally are applicable to the instructions with respect to the negligence of a carrier sued for loss of, or injury to, property transported.

The general rules governing the sufficiency of instructions are applicable to instructions on the issue of the carrier's negligence. It is the duty of the court to instruct the jury as to the law applicable to the case.[47] The law should be cor-

39. Ky.—Kelly v. Adams Express Co., 119 S.W. 747, 134 Ky. 208.
Md.—Baltimore, etc., R. Co. v. Whitehill, 64 A. 1033, 104 Md. 295.

40. Mo.—Blackmer & Post Pipe Co. v. Mobile & O. R. Co., 119 S.W. 1, 137 Mo.App. 479.
Instruction held not to assume matters in issue
Tex.—Texas & P. Ry. Co. v. Thorp, Civ.App., 198 S.W. 335.

41. Tex.—Panhandle & S. F. Ry. Co. v. Reynolds, Civ.App., 33 S.W.2d 249.

42. Kan.—North Missouri R. Co. v. Akers, 4 Kan. 453, 96 Am.D. 183

43. R.I.—Walworth Bros. v. Guerin, 142 A. 613, 49 R.I. 329.

44. Ga.—Davis v. Pearlman, 113 S.E. 44, 29 Ga.App. 12.
Instruction held correct
In action for failure to deliver cotton and for its injury by fire while held by defendant as common carrier, wherein it appeared that the shipper was consignee and the bill of lading provided for notice of its arrival to another, and for liability as warehouseman after forty-eight hours from such notice, and evidence showed its arrival at destination on July 24, and injury by fire in the carrier's warehouse nine days later, an instruction inaccurate in stating that, if notice was given consignee of its arrival on July 24, "defendant's duty and liability as a carrier terminated," was perhaps misleading, but was practically correct when applied to the facts, evidence showing notice on July 24, nine days before the admitted date of injury.—H. & L. M. Warten Cotton Co. v. Southern Ry. Co., 94 So. 726, 208 Ala. 417.
Instruction held erroneous
Where, in an interstate shipment, the bill of lading provides that if property is not removed within forty-eight hours exclusive of legal holidays after arrival, it may be kept subject to carrier's responsibility as warehouseman only, it was error in consignee's suit for value of goods burned after expiration of such time, to charge that status as carrier would not change to that of warehouseman until after the lapse of a "reasonable time" after such notice was given and received.—Davis v. Pearlman, 113 S.E. 44, 29 Ga.App. 12.

45. Ala.—Southern R. Co. v. Aldredge, 38 So. 805, 142 Ala. 368—Smiley v. Keith, 57 So. 127, 3 Ala.App. 354.
Mo.—Humphreys v. St. Louis, etc., R. Co., 178 S.W. 233, 191 Mo.App. 710

46. Ill.—Harshaw, Fuller & Goodwin Co. v. Illinois Cent. R. Co., 252 Ill.App. 253.

47. Mont.—Phelps v. Great Northern Ry. Co., 213 P. 610, 66 Mont. 198, writ of certiorari dismissed Great Northern Ry. Co. v. Galbreath Cattle Co., 44 S.Ct. 334, 264 U.S. 571, 68 L.Ed. 855, and reversed on other grounds 46 S.Ct. 439, 271 U.S. 99, 70 L.Ed. 854
Tex.—Croom v. Galveston, H. & S. A. Ry. Co., Civ.App., 238 S.W. 733.
Instructions improperly refused
In action against carrier for injuries to mules in transit, carrier was entitled to charge that a common carrier is not an insurer of live stock received for transportation, but liable only for injuries caused by its own negligence.—Gulf, C. & S. F. Ry. Co. v. Helms Bros., Tex.Civ.App., 210 S.W. 853.
Care required of carrier
Court should instruct that carrier is liable to consignee for want of reasonable care in transporting vegetables received in good condition.—Chesapeake & O. R. Co. v. Coleman Fruit Co., 294 S.W. 463, 219 Ky. 794.
Presenting defenses
(1) In action against carrier for injury to shipment of horses, in that one of the horses delivered by the carrier was injured and died a few days after delivery, where defendant pleaded two defenses, that it was not negligent in transporting the horse and that it delivered the horse in good condition and that it died later from a natural illness for which defendant was not responsible, as to which defenses the evidence was conflicting, and the general charge was insufficient to affirmatively present such defenses, the carrier was entitled, not only to a special charge presenting its defense of absence of negligence limited to the period ending with delivery of the horse, but also to a special charge presenting its defense of sickness and consequent death of the horse at any time, although it happened after the company had surrendered entire charge of the animal.—Gulf, C. & S. F. Ry. Co. v. Gorman, 245 S.W. 418, 112 Tex. 147.

(2) Where, in an action for damage to a shipment of rice, the main issue was whether the injury was caused by the rice getting wet while being threshed or by the manner of handling during transportation, evidence held to entitle defendant carrier to special requested instruction

rectly[48] stated. Further, the law, under the general | rules governing the sufficiency of the instructions,

that if damage shown was a result of a wet or damp condition of the rice when threshed, and of its subsequently being loaded in closed box cars, jury should find for defendant —Gulf Coast Transp Co v Standard Milling Co, Tex.Com App., 252 S W 751, reversing, Civ App, 197 S.W. 874

(3) In action for damages to shipment of cattle, where defendant, by its pleading and evidence, raised issue that damages were proximately caused by condition of cattle at time of delivery for shipment, and that they were in poor and weak condition, and unable to withstand ordinary incidents of transportation, court should have submitted such issue to jury, especially where it had instructed jury as to amount they could find for damages —Lancaster v. Daggett, Tex.Civ App, 272 S.W. 340.

48. Ark.—Arkansas Western Ry. Co. v. Robson, 2 S.W.2d 3, 176 Ark. 182.
Ill.—House v. Wheelock, 244 Ill.App. 270.
Iowa—Siegel v. Chicago, R. I. & P. Ry. Co., 208 N.W. 78, 201 Iowa 712.
Kan—Parker Corn Co. v. Chicago, B. & Q. R Co., 244 P. 240, 120 Kan 484.
Md.—Peninsula Produce Exch. v. American Ry. Express Co, 128 A. 403, 147 Md. 424.
Mo.—Wentworth Fruit Growers' Ass'n v. American Ry. Express Co., 1 S.W.2d 1028, 222 Mo.App. 1189.
N.C—Meeder & Co. v. Seaboard Air Line Ry, 91 S E. 704, 173 N.C. 70.
Tex—Gulf, C. & S. F. Ry. Co. v. Gorman, 245 S.W. 418, 112 Tex. 147—Cleburne Peanut & Products Co. v. Missouri, K. & T Ry. Co. of Texas, Com.App., 221 S.W. 270, reversing, Civ.App., 184 S.W. 1070.

Instructions as to negligence generally held proper

(1) In an action for damages for deterioration in car of strawberries, instruction that carrier was liable, if it failed to furnish car properly equipped for refrigeration, or properly to refrigerate such car, when furnished to shipper, and contents were thereby damaged, was not objectionable as requiring carrier to have car iced to capacity at moment of delivery to shipper.—Tri-State Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co., Mo.App, 264 S.W. 445.

(2) Where only fault imputed to carrier was in allowing beverage to freeze, instruction that although the beverage was frozen on its arrival the jury could not find for plaintiff, unless the evidence showed that its faulty or flat condition was due to the freezing, was proper.—Michellod v. Oregon-Washington R. & Nav. Co., 168 P 620, 86 Or 329.

(3) Other instructions held proper and sufficient.
Ark.—Missouri Pac. R Co. v Bennett, 4 S.W.2d 22, 176 Ark. 802
N.C.—Edgerton v Southern Ry. Co, 165 S.E 689, 203 N.C. 281, certiorari denied Southern Ry Co. v Edgerton, 53 S.Ct. 396, 288 U S. 605, 77 L.Ed 980
N.D.—Werner v. United States Railway Administration, 181 N W. 80, 47 N D 49.
Ohio.—Fean v. Alabama Great Southern R. Co., 159 N.E. 487, 26 Ohio App. 96
Tex.—Davis v Simmons, Civ.App., 240 S.W 970, dismissed for want of jurisdiction.
Utah—Smith v. Payne, 206 P. 715, 60 Utah 89
Wash.—Lagomarsino v Pacific Alaska Nav. Co., 170 P. 368, 100 Wash 105.

Instructions as to negligent delay held proper

(1) In an action for damage to banana shipment through carrier's unreasonable delay, a charge that carrier was liable if delivery of shipment in damaged condition might have been avoided "or prevented" by reasonable prudence not exercised, was not error, although the care of the bananas was in the hands of the shipper—Saliba v. New York Cent. R. Co., 144 A. 194, 101 Vt. 427

(2) In action for damages to shipment of cattle by negligent delay and lack of care, which cattle the shipping contract obligated plaintiffs to care for as respects unloading and watering and feeding in transit, where there was evidence that, after the cattle were unloaded in transit, plaintiffs' employees cared for some of them, an instruction as to defendant's duty when the cattle were unloaded to feed and water them properly was erroneous, as failing to differentiate between the cattle actually taken charge of, herded, and cared for by plaintiffs and those which remained in defendant's charge—Phelps v. Great Northern Ry. Co., 213 P. 610, 66 Mont. 198, certiorari dismissed Great Northern Ry Co. v. Galbreath Cattle Co., 44 S Ct. 334, 264 U.S 571, 68 L Ed 855, reversed on other grounds 46 S Ct. 439, 271 U.S. 99, 70 L.Ed. 854.

(3) Other instructions as to negligent delay held proper.
U S—American Ry. Express Co. v. Island & Gypsum Fruit Co., C.C. A Ohio, 300 F. 311.
Ill—See Crossley v. St. Louis, I. M. & S Ry. Co., 199 Ill.App 195.
Md.—Atlantic Fruit Co. v. Pennsylvania R. Co, 130 A. 63, 147 Md. 1.
Mo.—Mount Arbor Nurseries v. New York, C & St. L R Co., 273 S.W. 410, 217 Mo.App. 31.

Instructions as to negligence generally held improper

(1) Instruction that carrier would be liable for damage to seed received from ocean steamer and delivered in moldy condition, if some negligence of carrier concurred in causing damage, was erroneous, since the carrier would be liable only for such negligence as proximately contributed to the injury.—Harshaw, Fuller & Goodwin Co v. Illinois Cent. R. Co., 252 Ill App. 253.

(2) In an action for damages for deterioration in car of strawberries, an instruction barring shipper's recovery, if shipper's negligence contributed in any degree to damage of berries, was properly refused, words "in any degree" being improper.—Tri-State Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co., Mo. App., 264 S.W. 445.

(3) An instruction which in effect tells the jury that plaintiff was entitled to recover only in the event the peanuts were damaged after delivery to the carrier in proper condition for shipment, and that the carrier was not liable if they were delivered to it green and uncured, regardless of whether they were thereafter damaged through the carrier's negligence, was erroneous.—Cleburne Peanut & Products Co. v. Missouri, K & T Ry Co. of Texas, Com App., 221 S W. 270, reversing Civ.App., 184 S.W. 1070.

(4) A general charge which permitted the jury to pass on adequacy of carrier's facilities for shipment was reversible error, where shipments were routed according to tariffs filed—Jakway v. Lehigh Valley R. Co, 98 Pa.Super. 300

(5) Other instructions held improper or insufficient.
Ala—Lynn v. Mellon, 131 So. 458, 24 Ala.App. 144
Ky.—Chesapeake & O. R. Co. v. Coleman Fruit Co., 294 S.W. 463, 219 Ky. 794.
Mo.—Gillette v. St. Louis-San Francisco Ry Co, App., 24 S W 2d 1050
Ohio.—Louisville & N. R. Co. v Riley, 160 N.E. 730, 27 Ohio App. 188.
Okl—Midland Valley R. Co. v. Price, 260 P. 26, 127 Okl. 106.

Instruction as to negligent delay held improper

In an action for injuries caused by negligent delay in the transportation of horses, causing influenza, and for injury to other horses which became infected with the same disease, an instruction placing the carrier's liability for injury to the horses transported and to the other horses on the same ground, was improper, since the

must be clearly stated,[49] and must not be contradictory[50] or misleading.[51] The instructions must be applicable to, and warranted by, the pleadings and evidence,[52] and abstract instructions although stat-

carrier's liability for injury to the transported horses would be predicated on its duty as a common carrier, and it never sustained such relation as to the other horses.—Siegel v. Chicago, R I & P. Ry Co, 208 N.W. 78, 201 Iowa 712.

Care required of common carrier

(1) A charge stating that the evidence showed that the fire which destroyed plaintiff's goods while in possession of defendant carrier was started between 7 and 8 o'clock in the evening, that defendant was not required to take precaution against fire resulting from the riot till it could reasonably have anticipated danger to plaintiff's goods, but that, if the time came during the day or night in question that defendant could reasonably have anticipated such danger, then and only then it was required to exercise ordinary care in protecting the goods, was not subject to the exception that it limited the time during which defendant was required to exercise care to the time at which the fire started —Simmons Hardware Co. v Southern Ry. Co., C C.A Mo, 279 F. 929, certiorari denied 43 S Ct. 96, 260 U.S 739, 67 L.Ed. 490.

(2) In an interstate shipper's action against a carrier for injury to live stock by improper handling and delay, an instruction under Code Suppl.1913 § 2157s, that it was the duty of common carriers to move cars containing live stock at the highest practicable speed consistent with safety and, if defendant failed to do so, such failure would constitute negligence, was not erroneous as placing upon the carrier a higher degree of care than required in an interstate shipment—Bateham v. Chicago, M & St. P. Ry. Co, 192 N. W. 818, 195 Iowa 659.

(3) An instruction that, if the manifestations of mob violence were such as to induce a reasonably prudent person to believe that there was imminent danger of the destruction of property in the vicinity by mob violence, then it was the duty of a carrier to exercise ordinary care to preserve and protect shipments in cars in that vicinity, was erroneous by reason of the use of the word "imminent," because it was the duty of the carrier to exercise ordinary care for the protection of the property when it or its servants knew, or should have known, of such condition, although the danger was not "imminent," that is, near at hand, immediate, or impending—Julius Kessler & Co. v. Southern Ry. Co. in Kentucky, 255 S.W. 535, 200 Ky. 713.

(4) As it was carrier's duty under U S Comp.St. §§ 8651, 8652, to use ordinary care to provide properly equipped pens to hold horses while resting, there was no error in refusing its instruction that its only duty was to handle and care for them in removing from car, feeding, watering, and resting, with due care, skill, and diligence—Terrill v. Payne, 124 A. 462, 81 N.H 164

(5) In an action against a carrier for damages to shipment of cattle, the court's instruction that. "'Negligence' means that failure to exercise ordinary care. 'Ordinary care' means the doing of that which an ordinarily prudent man would do under the same or similar circumstances or not doing that which under the same or similar circumstances an ordinarily prudent man would not do"—as applied to handling of stock, is substantially correct.—Galveston, H & S. A Ry Co v. Harris Bros, Tex. Civ App, 211 S.W. 255, error refused.

Care required of private carrier

Plaintiff suing defendant as private carrier cannot complain of instruction that defendant was charged with ordinary care only.—Bloomberg-Michael Furniture Co v Urquhart, 143 S E 789, 38 Ga.App. 304.

Use of word "careless"

In action against carrier for injuries to mules in transit, instruction that common carrier is not an insurer of live stock received by it for transportation, but responsible only if careless and negligent, etc., was held improper, on account of the use of the word "careless"—Gulf, C. & S F. Ry Co. v. Helms Bros., Tex Civ App, 210 S W 853

49. Mo—Cornett v Chicago, etc, R Co., 138 S W. 51, 158 Mo App. 360

50. Minn—McNeill & Scott Co. v Great Northern R. Co., 194 N.W 614, 156 Minn 120
Tex—Galveston, etc, R. Co. v. Sparks, Civ.App., 162 S W 943.

51. Ark—Payne v. Orton, 234 S W. 469, 150 Ark 307.
Ky—Julius Kessler & Co. v Southern Ry. Co in Kentucky, 255 S W. 535, 200 Ky. 713.
Minn—McNeill & Scott Co. v. Great Northern R. Co, 194 N.W. 614, 156 Minn 120.
Mo—Mount Arbor Nurseries v. New York, C & St L R Co., 273 S W. 410, 217 Mo App 31—Moran v. Chicago, B. & Q R. Co, App, 255 S W. 331.

Instructions held misleading

(1) In an action for loss of a shipment destroyed by fire during a race riot, an instruction that, if manifestations of mob violence were such as to induce a reasonably prudent person to believe that there was danger of destruction of property, then it became the duty of the carrier and its agents to exercise ordinary care "in the use of the means and facilities at their command" to preserve and protect the property, was confusing when they had time and opportunity for wide discretion in the matter of precautions.—Julius Kessler & Co. v Southern Ry. Co. in Kentucky, 255 S W. 535, 200 Ky. 713

(2) In an action against carriers for damage to a shipment of potatoes, an instruction that it was the duty of the carrier to see that the car was properly ventilated, if it needed ventilation, to exercise reasonable care to keep the car ventilated, and to furnish a suitable car for the transportation of the particular class of goods intended to be shipped, held erroneous as misleading.—McNeill & Scott Co. v. Great Northern R. Co, 194 N.W 614, 156 Minn. 120.

(3) Where it was claimed that railroad cars were disinfected with a solution containing an excessive amount of cresol, a poison, but there was no claim that it was improper to apply it with a cup, or bucket, or to mix it with water without lime, an instruction that plaintiff had not shown how the solution should have been applied, and therefore the jury might not find that it was negligently applied, was properly refused, as it might have been misleading—Smith v. Payne, 206 P. 715, 60 Utah 89.

Instruction held not misleading

Where carriers, sued for damage to shipment of live stock, failed to relieve themselves from the presumption of negligence arising from the shippers' prima facie case, by failing to explain delays causing ninety hours to be consumed in a journey of about two hundred forty-eight miles, held, that the jury could not have been misled by a charge that the carriers would be liable if loss was proximately caused by the fact that they handled the shipment in an "unnecessarily and unusually rough manner" and "failed to transport them in a reasonable time"—Davis v. Sullivan & Opry, Tex.Com. App, 258 S.W. 157, affirming, Civ. App, 242 S W. 764.

52. Ark—Missouri Pac. R Co. v. Fine, 34 S W.2d 755, 183 Ark. 13.
Iowa—Buck v. American Railway Express Co, 192 N.W. 277, 195 Iowa 1024.
Ky.—Julius Kessler & Co. v. Southern Ry. Co. in Kentucky, 255 S.W. 535, 200 Ky. 713.
Mo—Forest Green Farmers' Elevator Co. v. Davis, 270 S.W. 394, 216 Mo. App. 545.

ing correct propositions of law as to the carrier's negligence, should not be given.[53] Hence an instruction authorizing recovery on an implied contract of carriage, where plaintiff pleads and proves an express contract,[54] or submitting the case on the theory of the carrier's common-law liability as insurer where the action is based on the carrier's negligence,[55] is improper. So instructions should not be given which ignore or exclude issues raised by the pleadings and evidence.[56] The instructions as to the carrier's negligence should not invade the province of the jury[57] as by assuming the existence of a material fact in issue.[58] Instructions as to presumptions and burden of proof with relation to the

Tex.—Wichita Valley Ry. Co. v Anderson, Civ.App., 48 S.W.2d 361.

Va.—Seaboard Air Line Ry. Co. v. J. E Bowden & Co., 131 S.E 245, 144 Va. 154.

10 C J. p 393 note 60 [a] (2)–(4)

Instructions held proper

(1) Instruction that express company must use ordinary care to furnish proper shipping facilities for commodities transported, and to furnish properly constructed refrigerator car and sufficient ice to preserve strawberries, was held proper under pleadings and evidence.—American Ry. Exp. Co. v. Cole, 42 S.W.2d 772, 184 Ark. 485.

(2) In an action against a railroad for injuries to live stock shipment, petition containing a general allegation of negligence on the part of the railroad was held to authorize instruction as to negligence in failing to furnish a safe car.—Moran v. Chicago, B. & Q. R. Co., Mo App., 255 S.W. 331.

(3) Other instructions held proper.

Mo.—Owen v. Chicago Great Western R. Co., App., 47 S.W.2d 195—Nigh v. Chicago, R. I & P. Ry. Co, 276 S.W. 1038, 220 Mo.App. 766—Long v. American Ry. Express Co, 274 S.W. 906, 219 Mo App. 451.

Tex.—Texas & N. O. R. Co. v. East, Civ App., 58 S.W.2d 139—Baker v. Brown, Civ.App., 210 S W. 312.

Instructions held improper

(1) An instruction, in an action for negligent delay in delivering perishable goods, that the carrier must exercise ordinary care for the adoption of such means of transportation, and furnish such equipment as will accomplish that purpose, is erroneous, where there is nothing in the pleadings or evidence tending to show that proper equipment was not furnished.—Missouri Pac. R. Co. v. Fine, 34 S W.2d 755, 183 Ark. 13.

(2) In action against carrier for loss from delay in transporting bananas, refusal of prayer authorizing finding that loss occurred because cars did not arrive in time for market on certain day was proper, in absence of any evidence that market price on day when goods arrived was lower than on day when they should have arrived.—Atlantic Fruit Co. v. Pennsylvania R. Co., 130 A. 63, 147 Md. 1.

(3) Where petition for loss of wheat in transit was grounded on carrier's negligence and not on contract, instruction, which was not hypothesized on negligence and peremptorily required finding for plaintiff if jury found that certain quantity of wheat was delivered to carrier and car on delivery to consignee contained a less amount, was erroneous.—Forest Green Farmers' Elevator Co. v Davis, 270 S W. 394, 216 Mo App. 545

(4) In a shipper's action against a carrier for damages to a shipment of hogs, submission of negligence on the carrier's part in failing to water the hogs was erroneous in view of the shipping contract which required the caretaker to look after that matter.—Panhandle & S F. Ry Co. v. Griffith, Tex.Civ.App., 226 S.W. 688.

(5) Instruction that carriers were bound to re-ice cars only at regular icing stations was erroneous, as contrary to terms of contract.—Seaboard Air Line Ry Co. v J. E. Bowden & Co, 131 S E. 245, 144 Va. 154.

(6) Other instructions held improper.

U.S.—Payne v. Garth, C.C.A.Neb., 285 F. 301.

Iowa.—Bromberg v. Chicago, R. I. & P. Ry. Co., 190 N W. 955, 194 Iowa 1337.

Md.—Atlantic Fruit Co. v. Pennsylvania R. Co., 130 A. 63, 147 Md. 1.

Mo.—Howell v Hines, App., 227 S W. 619—Cudahy Packing Co v Atchison, T. & S F. Ry Co, 201 S.W. 623, 198 Mo.App. 520

Ohio.—Norfolk & W. Ry. Co. v. Keystone Packing Co., 195 N.E 403, 49 Ohio App. 136.

Tex.—Gulf, C & S. F. Ry. Co. v. Helms Bros., Civ.App., 210 S.W. 853.

Va.—Chesapeake & O. Ry. Co. v. Osborne, 153 S.E. 865, 154 Va. 477.

Refusal to define "negligence" is proper where no issue of negligence is involved, the action being on contract for injuries to live stock.—Wichita Valley Ry Co. v. Anderson, Tex.Civ App., 48 S.W.2d 361.

Interstate or intra-state shipment

There being no evidence of interstate shipment, court properly submitted case on theory shipment was, as matter of law, intra-state.—Bishop v St. Louis-San Francisco Ry. Co, Mo.App., 54 S W.2d 480

53. Mo.—Mount Arbor Nurseries v. New York, C. & St L. R. Co., 273 S.W. 410, 217 Mo.App. 31.

Duty of carrier

In an action for injury and death of horse during transportation, an instruction that it was defendant's duty to furnish a car that was reasonably safe and suitable, and that such duty required not only that it should be safe as originally furnished but also that it should be kept so and that its appurtenances should be so attended as to render the inclosure by the car safe, held erroneous in that it was an abstract proposition misleading to jury.—Moran v Chicago, B. & Q R Co., Mo.App., 255 S. W 331.

54. Ky.—American Ry. Express Co. v. McGee, 281 S.W 980, 213 Ky. 736.

55. Ark.—American Ry Express Co. v Cole, 37 S.W.2d 699, 183 Ark. 557—Missouri Pac. R. Co. v. Fine, 34 S W.2d 755, 183 Ark. 13—St. Louis-San Francisco Ry. Co. v. Greig & Smith, 31 S.W.2d 290, 182 Ark. 261.

56. Okl.—Midland Valley R. Co. v. Price, 260 P. 26, 127 Okl 106

10 C J. p 394 note 61.

Instruction properly refused

Where there was evidence that plaintiff's cattle were unloaded into an inadequate pen, an instruction to find for the carrier if the cattle died from injuries after being unloaded was properly refused.—Midland Valley R Co. v. Price, 260 P. 26, 127 Okl. 106

57. Ala.—Louisville & N. R. Co. v. Smitha, 40 So. 117, 145 Ala 686.

Tex.—Davis v. McMillan, Civ.App., 241 S.W. 723.

58. Tex.—Texas & P. Ry. Co. v. Thorp, Civ.App., 198 S.W. 335.

Instructions held not objectionable

(1) In an action against a railroad for damage to a shipment of sheep by delay, in view of the charge as a whole, special issue whether the sheep sustained damage as a proximate result of delays in transportation, which defendant railroad or any of its connecting carriers could have avoided by ordinary care, held not erroneous as assuming delays were caused by defendant's negligence.—Kansas City, M. & O. Ry. Co. v. Blackstone & Slaughter, Tex Civ. App., 217 S.W. 208, rehearing overruled 218 S.W. 552, error granted.

(2) Where plaintiff alleged negligence in failure to bed a car properly for shipping cattle, a charge on

carrier's negligence are discussed infra subdivision f of this section.

c. Exceptions to Common-Law Liability

Proper instructions must be given with relation to loss or injury caused by an act of God, the inherent nature of the property, or the fault or negligence of the shipper.

The court must give correct instructions with relation to loss or injury falling within the exceptions to the carrier's common-law liability, such as an act of God,[59] the inherent nature of the the property transported,[60] or the fault or negligence of the shipper,[61] and such instructions

negligence as the proximate cause, held not objectionable as assuming defendant's negligence in failing to bed the car.—Texas & P. Ry. Co v. Thorp, Tex.Civ.App., 198 S.W. 335.

59. Kan.—McKinley v. Hines, 215 P 301, 113 Kan. 550.

Instruction held proper

Tex.—International & G. N. R Co v. Barnes Bros., 294 S.W. 349, affirmed Barnes Bros. v. International & G. N. R. Co., Com.App., 1 S W 2d 273.

Instruction held improper

In an action for injury to a shipment of seed, by reason of a flood during transit, an instruction that the carrier was liable in case the seed would not have been injured if the train had been kept in the railroad yard was properly refused, since the fact that, after the injury, it could be seen that it might have been avoided is no proof of negligence.—Feld v. Columbus & G. Ry. Co., 121 So. 272, 153 Miss. 601.

Affirmative defenses

The defenses available to carrier at common law in action for damage to goods while in transit, that damage was caused either by act of God, of public enemy, of shipper, or by inherent nature of the goods themselves, were affirmative defenses, and, in absence of affirmative evidence to that effect, trial court had duty to instruct jury that carrier had not met burden imposed on it—Southern Pac. Co. v. Itule, Ariz., 74 P.2d 38.

60. Mo.—Vaughn v. St. Louis-San Francisco Ry. Co., 15 S.W.2d 901, 223 Mo App. 732.

Instructions held erroneous

(1) Where the carrier pleaded that the injury to live stock was due to the vicious propensities of the stock or to the fault of the owner, an instruction which in effect told the jury to find for plaintiff if they found that the injury was caused by the combination of the natural propensities of the stock with the fault of the owner in failing properly to bed the stock and in overloading the car, was erroneous.—Morrow v. Wabash R. Co., Mo.App., 289 S.W. 343.

(2) Instructions relieving carrier from liability if hogs became sick from exposure were properly refused, where carrier's negligence could have combined with weather to cause loss.—Vaughn v. St. Louis-San Francisco Ry. Co., 15 S.W.2d 901, 223 Mo App. 732.

Defining "inherent vice" in animal

An instruction that "inherent vice" in an animal is some quality or characteristic of the animal that brings about its own injury or destruction, without fault on the part of any other supervening cause, was in the main correct, and no probable error was shown by its submission.—Texas & P Ry. Co. v Prunty, 233 S W. 625, 111 Tex. 162, conforming to answer to certified questions, Sup., 230 S.W. 396.

61. Ala.—Atlantic Coast Line Ry. v. Enterprise Cotton Oil Co, 74 So. 232, 190 Ala. 57.

Tex.—Texas & P. Ry. Co. v. Thorp, Civ App, 198 S.W. 335.

Instructions held erroneous

(1) In an action against a railroad company for damages to goods and merchandise set on fire, while being unloaded, by sparks from a passing locomotive, instructions that plaintiff could not recover if he, or his agent in charge of the unloading, knew of the danger and probability of destruction from the emission of sparks and negligently failed to extinguish them, held erroneous, as not drawing a distinction between goods which were destroyed before such sparks could have been extinguished by the exercise of ordinary diligence, and such goods as were thereafter destroyed, and as not confining the defense to such goods as were destroyed after the failure of the plaintiff to extinguish the fire—Mount v. Louisville & N. R. Co., C.C.A.Ala., 287 F 617.

(2) Charge that carrier cannot complain of shipper's failure to load machinery, as required by law, if it examined and approved loading, was erroneous as precluding the carrier from relying on contributory negligence as a defense.—St. Louis-San Francisco Ry. Co. v. Glow Electric Co, 172 N.E 425, 35 Ohio App. 291

(3) Refusal of instructions for failure to negative contributory fault of the carrier and to set out carrier's liability as insurer was held proper—Atlantic Coast Line Ry. v. Enterprise Cotton Oil Co., 74 So. 232, 199 Ala. 57.

Instruction held not erroneous

An instruction, directing recovery for a shipper for damage to goods during shipment because of the leaky car in which it was shipped, was not erroneous as modified to deny recovery if the jury found the plaintiff knew of the leaky condition of the car, but was favorable to plaintiff for omitting the element of exercise of due care by plaintiff to observe the condition of the car in which the goods were loaded before they were tendered for shipment—Schreiber Milling & Grain Co v. Chicago Great Western R. Co, Mo App., 246 S W. 647.

Duty to charge

(1) Where, in an action for damages for loss of stock, contributory negligence of plaintiff is pleaded and evidence received tending to support the allegation, it is the duty of the court, upon its own motion, to instruct the jury on the law of contributory negligence, and it is error to refuse a request of defendant thereon.—Johnson v. Payne, 191 N.W. 696, 109 Neb 531.

(2) Refusal to submit the question of whether plaintiff overloaded the live stock was error, where there was evidence of such overloading—Panhandle & S. F. R. Co. v. Sanderson, Tex.Civ App., 218 S.W. 540.

Failure to charge not error

Failure to instruct on shipper's duty under the contract to care for cattle because of having sent an attendant with the cattle, and that the carrier would not be liable for delays caused by the fault of the attendant, was not error, where the carrier waived the provision of the contract and assumed the duty of caring for the cattle—Baker v. Nance Bros., Tex.Civ.App., 294 S.W. 290.

Construction of charge

In an action for injuries to cattle before being unloaded on arrival at destination, where the carrier pleaded contributory negligence of the shipper in failing to remove the stock already unloaded from the receiving pens, a charge submitting to the jury the effect of an agreement by the carrier's conductor to give the shipper a reasonable time to procure horses and men to hold the stock already unloaded, so as to empty the pen, was evidently not drawn to submit the issue of contributory negligence, but to submit the shipper's excuse relieving him from the charge of negligence.—Davis v. Simmons, Tex.Civ.App.,

must be confined to the pleadings and evidence.[62] In an action for loss of an animal killed in transit, an instruction limiting defendant's exemptions from liability to the inherent vice or vicious propensities of the animal was not erroneous, where no other exemptions, such as those arising from an act of God, or the public enemy, or the shipper's fault, were invoked by defendant.[63]

Proximate cause of loss or injury. Where the carrier relies as a defense on one of the exceptions to its common-law liability, proper instructions should be given on the issue of proximate cause,[64] unless unwarranted by the evidence.[65] In an action for damage to goods by delay in transportation, an instruction to find for the carrier only if the bad condition of the goods when delivered to it, due to excessive rains, moisture, and exposure, was the "sole" cause of its damaged condition, was correct, the carrier being liable for damage resulting from its negligence, concurring with an act of God or other cause.[66] So, in an action for injury to goods in transit by reason of a flood, an instruction as to the carrier's liability in case the damage was caused by an act of God, requiring it to be the immediate, proximate, and sole cause of the damage, not concurred in by the negligence of the carrier, was proper.[67]

240 S.W. 970, dismissed for want of jurisdiction.

"Acts" of shipper

Since all acts of a shipper do not relieve a carrier from liability, an instruction that a carrier, sued for loss of a hog, should not be held liable if its death was due to an act of plaintiff shipper, was erroneous, as excusing the carrier from liability if its death was due to any act of the shipper.—Browning v. Wells Fargo & Co. Express, Mo.App., 243 S.W 190.

62. U.S.—Mount v. Louisville & N. R. Co, C.C.A.Ala., 287 F. 617
Tex.—Galveston, H & S. A. Ry. Co. v. Buck, Civ.App., 230 S.W. 89.
Va.—Chesapeake & O. R. Co v. Osborne, 153 S.E. 865, 154 Va 477.

Instruction warranted by evidence

(1) Instruction that carrier was not liable if shipment was damaged while being transferred by plaintiff or its agent from one car to another was justified by evidence showing that defendant's consignor transhipped the goods to plaintiff.—Michellod v. Oregon-Washington R. & Nav. Co., 168 P. 620, 86 Or. 329.

(2) Instruction that railroads were not liable for injury to cattle shipment from act of God held proper under evidence.—International & G. N. R. Co. v. Barnes Bros, 294 S.W. 349, affirmed Barnes Bros. v. International & G. N. R. Co., Com.App., 1 S.W 2d 273.

(3) Instructions to find for carrier, if damage to strawberries resulted from inherent infirmity was not erroneous as abstract.—H Rouw Co. v American Ry Express Co, 291 S.W. 1001, 173 Ark. 84.

(4) Other instructions warranted by the evidence.—W. E. Neal & Son v Panhandle & S. F. Ry Co., Tex. Civ.App., 245 S.W. 452.

Instruction not warranted by evidence

(1) In an action for damages to household goods and merchandise destroyed by fire while being unloaded from a car, where the evidence showed that the initial fire had been apparently completely extinguished, and plaintiff's testimony tended to substantiate his theory that the subsequent fire was caused from an unperceived part of the initial fire, and there was no evidence from which it could be inferred that plaintiff was negligent in not extinguishing the fire, instructions predicated on such negligence were erroneous, as not supported by the evidence.—Mount v. Louisville & N. R Co, C.C.A.Ala., 287 F. 617.

(2) Refused instruction to find for defendants if plaintiff's negligence contributed to damage, although defendants were also negligent, held properly refused, as not based on evidence.—Seaboard Air Line Ry. Co v. J. E. Bowden & Co., 131 S.E. 245, 144 Va. 154

(3) In action against common carrier of goods by motor vehicle for loss of oriental rug in transit, where rug was seen by carrier's manager, was shipped with other household goods without concealment, and no inquiry was made as to its value, shipper could not be held guilty of fraud, and refusal to instruct on alleged fraud was proper.—Shikany v. Salt Creek Transp. Co., 45 P.2d 645, 48 Wyo. 190.

Instructions not warranted by pleadings

(1) The issue of failure of the caretakers properly to look after cattle shipped was not raised where, although the railway pleaded specially the stipulations of the shipping contract obligating the shipper to attend and take care of his cattle, there was no allegation of breach of this condition, nor any charge of contributory negligence in this respect and hence a special instruction on such issue was properly refused.—Galveston, H & S. A. Ry. Co v. Buck, 230 S.W. 891.

(2) Carrier's instruction predicated upon shipper's fraud in representing value of intra-state shipment was properly refused, where fraud was not alleged.—Chesapeake & O. Ry. Co. v. Osborne, 153 S.E. 865, 154 Va. 477.

63. Mo.—Ward v. American Ry. Express Co, App., 259 S.W. 514.

64. N.C.—Morris v. American Ry Express Co, 110 S.E. 855. 183 N.C. 144
Tex.—American Ry. Express Co. v. Home Star Produce Co., Civ.App., 276 S.W. 790.

Erroneous refusal to instruct

In suit against railroad for spoiling of tomatoes rained on while awaiting delayed freight train, refusal to instruct that, if person of ordinary care would have covered shipment and failure to do so was negligence, shipper's conduct was proximate cause of loss, was held error.—Gulf, C. & S. F. Ry. Co. v. Hill, Tex.Civ.App., 284 S.W. 594.

65. Md.—Atlantic Fruit Co. v. Pennsylvania R Co, 130 A. 63, 147 Md 1.

Instruction on contributory negligence as proximate cause held unnecessary

In action for loss in shipment of bananas, instruction that, if loss was caused by negligence of agent sent with shipment by shipper in failing to regulate temperature properly, causing bananas to ripen too soon, there could be no recovery, was held not erroneous, notwithstanding there was no requirement for jury to find such negligence was proximate cause or was not negatived by existence of concurring negligence, proximate cause and concurring negligence being inapplicable under the evidence.—Atlantic Fruit Co. v Pennsylvania R. Co., 130 A. 63, 147 Md. 1.

66. Ark.—Payne v. Orton, 234 S.W. 469, 150 Ark 307.

67. Miss.—Feld v. Columbus & G Ry. Co., 121 So. 272, 153 Miss. 601.

d. Contractual Limitation of Liability

The sufficiency of instructions with respect to limitations of the carrier's liability contained in the contract of shipment is governed by the general rules.

The jury are entitled to correct instructions on the issues arising under a contract limiting the common-law liability of the carrier,[68] and this applies to limitations as to the value of the property,[69] and to provisions requiring notice of the claim or injury.[70]

e. Damages

Correct instructions as to damages for loss of, or injury to, property transported must be given, and their propriety and sufficiency are governed by the rules applicable to civil actions generally.

It is the duty of the court to instruct the jury as to the proper basis upon which the damages are to be ascertained;[71] but where the damages sought are the difference in the market value of the property at destination in the condition delivered and the condition when properly delivered it is not necessary to charge on the measure of damages, it being sufficient for the court simply to submit to the jury a special issue calling for that difference in value.[72] The instructions given or offered must, of course, correctly state the law relating to the elements and measure of damages,[73] and instructions

68. Tex.—Panhandle & S. F. Ry. Co. v. Sanderson, Civ.App., 218 S.W. 540 dismissed for want of jurisdiction.

Instructions held proper

(1) Where a special contract exempted the carrier from liability for loss or injury resulting from the nature of, or inherent vice in, the property, unless caused in whole or in part by its negligence, an instruction that the carrier did not insure that perishable goods would reach their destination in good condition, and was bound only to exercise reasonable care, was proper.—Peninsula Produce Exch. v. American Ry. Express Co., 128 A. 403, 147 Md. 424.

(2) Where carrier set up special contract limiting liability, instructions as to recovery if contract was voluntarily made by shipper, and vice versa, were held sufficient.—Illinois Cent. R. Co. v. Mattingly, 119 N.E. 498, 69 Ind.App. 166.

(3) Instruction that limitation of liability is no defense of loss was caused by carrier's wanton or gross negligence, was held authorized by the evidence.—Kingsbury v. Chicago & A. R. Co., 213 Ill.App. 439.

Instructions properly refused

(1) Where a shipping contract provided that in case an employee of the shipper accompanied live stock, the carrier should not be liable for any defective ventilation, an instruction requiring verdict for carrier if shipper or attendant, after drop in temperature en route, failed to notify carrier of injuries and request repair of broken window, was properly refused as not justified by the contract.—Green v. American Ry. Express Co., Mo.App., 34 S.W.2d 1039.

(2) Magistrate's refusal to charge stipulation on back of bill of lading referring to cases in which carrier would not be liable was held justified, the cases being grouped together.—Ward v. Atlantic Coast Line R. Co., 151 S.E. 904, 155 S.C. 54.

69. Mo.—Green v. American Ry. Express Co., App., 34 S.W.2d 1039.

Instruction held erroneous

In action by intra-state shipper of a stallion in Kansas, under the declared valuation on which the rate was based, an instruction was erroneous which submitted to the jury the question of whether the shipper knowingly accepted the reduced rate based on the declared value, the shipper's knowledge of the lawful rate being conclusively presumed by Kansas law, which controlled.—Strother v. Atchison, T. & S. F. R. Co., Mo.App., 212 S.W. 404.

Instruction properly refused

Testimony of carrier's agent that owners' agent stated that amount obviously less than real value of property destroyed was sufficient valuation tended at most to prove a contract for relief against the carrier's common-law liability, contrary to the constitution, and did not warrant instruction that owners were estopped to claim more.—A. Arnold & Son Transfer & Storage Co. v. Weisiger, 6 S.W.2d 1034, 224 Ky. 659.

70. S.C.—Allen v. Davis, 118 S.E. 614, 125 S.C. 256.

Reasonable time for delivery as fixing time for notice

(1) An instruction that the jury should determine what was a reasonable time for delivery by a carrier, as bearing on the time for giving notice of claim under the conditions existing at the time of the shipment of the goods, was not erroneous, there being some evidence as to such conditions.—American Ry. Express Co. v. Roberts, 111 S.E. 744, 28 Ga.App. 510.

(2) An instruction to the effect that, under a provision of a bill of lading requiring claims for failure to deliver to be made in writing within six months after reasonable time for delivery had elapsed, a reasonable time for delivery is not considered to have elapsed until after carrier has been unable to trace or has abandoned a search for the undelivered freight, was erroneous as making reasonable time dependent on carrier's action and as being a charge on the facts.—Allen v. Davis, 118 S.E. 614, 125 S.C. 256.

Waiver of notice

Where contract for shipment of live stock required notice of claim for loss or injury to be given before removal, etc., instruction that if defendant waived its right to notice before stock was removed by its failure after notice to attempt to examine stock, etc., plaintiff could recover was error.—Chicago, R. I. & P. Ry. Co. v. Brightwell, 162 P. 484, 62 Okl. 149.

Knowledge of carrier as equivalent to notice

In an action for damage to live stock, an instruction that if defendant, within the time fixed by the contract for giving notice of damage, had knowledge of the damage, then, as a matter of law, the provision as to notice was complied with was improper.—Newman v. Union Pac. R. Co., 210 Ill.App. 13.

71. Tex.—Texas & P. Ry. Co. v. Bufkin, Civ.App., 19 S.W.2d 343.

Instructions must give jury guide or chart by which to measure damages.—Texas & P. Ry. Co. v. Bufkin, Tex.Civ.App., 20 S.W.2d 1119.—Texas & P. Ry. Co. v. Bufkin, Tex.Civ.App., 19 S.W.2d 343.

Basis for computing damages specified in contract for interstate shipment is subject to modification, and carrier is entitled to submission of case in harmony with rules of interstate commerce commission.—Shier v. American Ry. Express Co., 208 N.W. 746, 234 Mich. 505.

72. Tex.—Houston & T. C. R. Co. v. Stribling, Civ.App., 293 S.W. 890.

73. Tex.—Panhandle & S. F. Ry. Co. v. Parrish, Civ.App., 281 S.W. 887.

Instructions held proper

(1) In an action for damages to corn because mixed with coal dust in shipment, an instruction, that the

measure of damages was the difference between the fair and reasonable market value in clean condition at the time and place of delivery and its fair and reasonable market value at the same time and place in the condition in which delivered, was not erroneous as authorizing the assessment of special damages without showing notice of the special contract of sale, the fact that the sale price and market price were the same not changing the character of the damages from general to special.—Director General of Railroads v. A. C Schuff & Co., 237 S W. 410, 193 Ky. 737.

(2) Nor was such instruction erroneous as omitting to direct attention specifically to the part of the corn injured when delivered to the original purchaser, who refused to accept it on account of the coal dust, there being no evidence of negligence in handling the corn or adding injury thereafter.—Director General of Railroads v. A. C. Schuff & Co, supra.

(3) Instruction that measure of damages for injuries to live stock in transit was difference between reasonable market value at point of destination when they should have been delivered there, and such value at place where delivered and sold by plaintiffs, less expense of transporting them to destination, was not error as directing deduction of cost of transportation from reasonable market value at place of delivery.—Morrow v. Wabash Ry Co, 276 S.W. 1030, 220 Mo App. 518.

(4) In an action for damages to cattle during shipment, where the evidence showed that the cattle were weak and impoverished when shipped, charges by the court limiting the liability of defendant to damages resulting from the negligence of the carriers, and excluding all injuries or damages resulting from the condition of the cattle when shipped, were held to submit to the jury the correct basis upon which to estimate the damages for loss or injury to that class of cattle—Hartford Fire Ins. Co. v. Galveston H. & S. A Ry. Co., Tex.Com App, 239 S W. 919, reversing Galveston, H & S. A. Ry. Co. v. Hartford Fire Ins Co., Civ.App, 220 S.W. 781.

(5) Such charges were not erroneous as authorizing recovery for damages to which the carriers' negligence may have in any wise contributed, although in submitting the defensive issues growing out of the weakness and poverty of the cattle the court stated the carriers were not liable for damages not caused or contributed to by their negligence.—Hartford Fire Ins Co v. Galveston, H & S. A. Ry. Co, supra.

(6) In an action against a carrier for damages to cattle by delay, where there was evidence that a train wreck, and consequent delay and confinement for twelve hours, caused depreciation, an instruction that the plaintiff was entitled to recover for this element of damages was proper, although he was able to sell immediately upon arrival—Gulf, C & S. F. Ry. Co. v. Rodriquez, Tex Civ.App., 185 S W. 311.

(7) Instruction as to carrier's liability for injury to car of mustard greens was held not objectionable as authorizing damages for natural deterioration.—Rio Grande & E P. Ry Co. v T. A Austin & Co., Tex Civ App., 12 S W.2d 1070, reversed on another ground, Com App, 25 S.W.2d 306

(8) In a suit for injury to live stock in transit, a charge to consider the extent of recovery of the cattle from their injuries, and if recovery was complete, to find for the carrier, is not objectionable as confining consideration to complete recovery.—Panhandle & S F. Ry. Co. v. Norton, Tex Civ App., 188 S W. 1011.

(9) Other instructions held proper.

Ala.—Louisville & N. R. Co v. Kinney, 127 So. 802, 221 Ala 48—Southern Ry. Co v. Northwestern Fruit Exch, 98 So. 382, 210 Ala. 519

Ark—Missouri Pac. R Co. v. W. M. Smith & Co, 265 S.W 64, 165 Ark 546—Suckle v Missouri Pac R. Co., 241 S.W. 368, 154 Ark. 168.

Cal—Murray v. Southern Pac. Co., 296 P 667, 112 Cal App 150.

Ky.—A. Arnold & Son Transfer & Storage Co. v. Weisiger, 6 S.W.2d 1084, 224 Ky 659

Mo.—Green v American Ry. Express Co., App., 34 S.W 2d 1039.

N.C.—Coley Farming Co. v. Seaboard Air Line Ry. Co, 126 S E 167, 189 N.C. 63.

Tex.—Panhandle & S. F. Ry. Co. v. Key, Civ App., 20 S W 2d 260.

Vt—Saliba v New York Cent. R. Co, 144 A. 194, 101 Vt. 427.

Instructions held erroneous

(1) Instruction in shipper's action that damages for lost and damaged hogs were difference in value when delivered by and returned to consignors was held erroneous—Gillette v. St. Louis-San Francisco Ry Co, Mo.App., 24 S W.2d 1050.

(2) Instruction on measure of damages for injuries to animals sold at way point was held erroneous as not requiring finding that they had to be sold there because so badly injured that shipment could not be continued, in view of conflicting evidence as to extent of injury—Morrow v Wabash Ry. Co, 276 S.W. 1030, 220 Mo.App. 518.

(3) In an action against a transfer company for damages to household goods, an instruction that the measure of damages was the reasonable market value of the goods damaged and the usual value of the labor and material necessary to repair the same together with the difference between the reasonable market value of the goods just before the damage and just after the repair was made was erroneous as in effect authorizing a recovery for the value of the goods plus the difference between the market value before the damage and after the repair—Empire Transfer & Storage Co. v. Botte, Tex Civ App., 232 S W. 347

(4) Instruction that measure of damages for cattle that died as result of carrier's negligence was their intrinsic value at destination on day cattle were shipped, was erroneous, where it was not shown that cattle had no market value, and only proof of intrinsic value was incompetent testimony of shipper.—Wichita Valley Ry. Co. v Turbeville, Tex.Civ. App., 269 S.W. 498.

(5) In action for injury to live stock shipment, a requested instruction requiring a finding that there was no decline in market value of sheep, when there was such evidence as to either ewes or lambs, is erroneous, since the term "sheep" includes ewes and lambs—Panhandle & S. F. Ry. Co. v. Bell, Tex Civ App, 189 S.W. 1097.

(6) Instruction that the measure of damages for injuries to live stock was the difference between the market value of the stock as it should have arrived and as it did arrive, was erroneous, if there was no market value at the place of destination—Missouri, etc, R. Co. v. Mulkey, Tex.Civ App., 159 S W. 111.

(7) Other instructions held erroneous.—Panhandle & S. F Ry Co v. Parrish, Tex.Civ.App., 281 S.W 887—Rio Grande, E P & S. F R Co. v. Kraft & Madero, Tex.Civ App, 212 S W. 981, dismissed for want of jurisdiction—Panhandle & S. F Ry. Co. v. Brown, Tex.Civ.App, 198 S. W. 172.

Definition of terms

In action for damage to stock shipment caused by carrier's delay, instructions as to damages should have defined shrinkage for which plaintiff could recover, some shrinkage naturally occurring on such a shipment.—Baker v. Bush, Mo App., 194 S.W. 1061.

Punitive damages

In action against carrier, instruction which authorized jury to adjudge punitive damages if carrier's failure to perform its public duties was "reckless" or wanton, or grossly negligent, or willful, was not erroneous on ground that "reckless" means no more than simple negligence, since word imports heedless

which erroneously limit the damages to which plaintiff is entitled,[74] or, on the other hand, are so framed as to permit recovery for items which are not proper elements of damage,[75] should not be given. The instructions as to damages should be complete,[76] and not misleading.[77] They must also be confined to the issues raised by the pleadings and proof,[78] and must not ignore or exclude ma-

indifference to consequences, "recklessness" being synonymous with "gross negligence"—Tri-State Transit Co v Gay, Miss, 172 So. 742

74. N.J.—Cordery v American Ry Express Co, 137 A. 719, 5 N.J. Misc. 600, affirmed 140 A. 416, 104 N.J Law 434.

75. Ill—Conover v. Wabash Ry Co, 208 Ill App 105.
Md—Bloecher & Schaaf v Pennsylvania R. Co, 160 A. 281, 162 Md 463.

76. Mo—Dillen v. Wabash Ry. Co., App, 294 S.W. 439.
Tex—St. Louis Southwestern Ry Co. of Texas v Seale & Jones, Com App, 267 S.W 676, modifying, Civ App., 247 S.W. 833
Va.—Chesapeake & O. Ry. Co. v Osborne, 153 S.E. 865, 154 Va. 477.

77. Tex—Galveston, H & S. A Ry Co. v Buck, Civ App, 230 S.W 891

Instruction held misleading

In shipper's action for damages to cattle shipped, where the railway's right to have the jury exclude from the amount of damages found the usual and ordinary losses from shipment or those resulting from the condition of the cattle was safeguarded by the general charge, the carrier was not entitled further to a specific instruction, which required the jury to find no damages whatever if they should believe that the injuries to the cattle were caused in part by impoverished condition of the cattle unless they could separate such damages from those accruing from the negligence of the carrier; for in such a case the jury were not required to be able to "separate" damages caused by negligence from those resulting from other causes, as that term would ordinarily be understood by a jury, so that the requested instruction was incorrect and misleading—Galveston, H & S. A Ry Co. v. Buck, Tex.Civ App, 230 S.W. 891.

Instructions held not misleading

(1) In action for damage to goods in transit, instruction to allow difference between what they "would have brought in open market" on day of arrival at destination, had they arrived in good condition, and reasonable market value in damaged condition, was not misleading nor prejudicial to defendant, if technically erroneous—American Fruit Growers v. St. Louis, B & M. Ry. Co, Mo.App., 261 S.W 949, certiorari denied St. Louis, B. & M. R. Co. v American Fruit Growers, 45 S.Ct 94, 266 U.S 611, 69 L.Ed 467.

(2) In action for death of cattle from injuries received in transportation, an instruction as to measure of damages to be adopted "if you find that the defendant G. Railway Company or its connecting carriers were guilty of negligence, and that the plaintiff has been damaged as alleged," was not misleading as against contention that it did not confine jury to specific acts of negligence alleged, the words "as alleged" having reference "to the matter of negligence and damages"—Gulf, C. & S F Ry. Co v. Morris, Tex Civ App, 241 S.W. 235, affirmed, Com.App, 250 S.W 1017.

(3) In an action against a carrier for damage to cattle by delay an instruction that plaintiff might recover for extra shrinkage and bad appearance was not improper as misleading in mixing two elements of damage, since they are so nearly similar in character as to be substantially a common cause of loss.—Gulf, C & S F Ry Co. v. Rodriquez, Tex.Civ.App., 185 S.W. 311.

(4) Other instructions held not misleading
Ark.—American Ry. Exp. Co v. Cole, 42 S.W 2d 772, 184 Ark. 485.
Mo—Dillen v. Wabash Ry. Co., App, 294 S.W 439.
Tex.—Gulf, C. & S F. Ry. Co v. Rodriquez, Civ App, 185 S.W 311—Missouri, K & T Ry Co of Texas v. Western Automatic Music Co, Civ.App., 161 S.W. 380.

78. Ky—Davis v Rhodes, 266 S.W 1091, 206 Ky. 340.
Mo.—Forest Green Farmers' Elevator Co. v Davis, 270 S.W. 394, 216 Mo.App. 545.

Instructions held warranted by evidence

(1) Evidence that melons when received were worthless warranted instruction allowing consignee recovery against carrier for full market value, less freight charges.—Louisville & N R Co. v. Hensley, 35 S.W. 2d 279, 237 Ky 224.

(2) Other instructions held warranted by evidence.
Iowa—Batebam v. Chicago, M. & St P. Ry. Co., 192 N.W. 818, 195 Iowa 659
Mo—Nigh v. Chicago, R I. & P Ry. Co, 276 S.W. 1038, 220 Mo App. 766.
Mont.—Rice v. Chicago, M. & St. P Ry. Co, 197 P. 999, 59 Mont. 570
Tex.—Hartford Fire Ins. Co. v. Galveston, H & S. A. Ry. Co., Com App, 239 S.W 919, reversing Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co, Civ.App, 220 S.W 781—Panhandle & S F. Ry Co. v Vaughn, Civ.App., 191 S.W 142, affirmed, Com App, 222 S.W. 206.

Instructions held not warranted by evidence

(1) Where, in shipper's action for damages to cattle, three of which died, evidence showed that death of one of them was not attributable to the fault of defendant, instruction authorizing recovery for death of three cattle was broader than the evidence.—Sandker v. Wabash Ry Co, Mo App., 267 S.W 957.

(2) Where the cattle for the injury to which a suit was brought against a carrier were transported in eight separate shipments, and plaintiff introduced evidence by the caretakers in charge of some, but not all, of the shipments as to the depreciation in value of the particular shipment in charge of the witnesses, some of whom, however, did not qualify as knowing the market value at the place of destination, a charge that, if any of the cattle delivered alive at the point of destination were injured or damaged, and depreciated in value by the negligence of the carriers, to find for the plaintiff damages measured by the difference between the market value of such cattle in the condition in which they were delivered and in the condition they should and would have been delivered, was without sufficient basis in the evidence, and the giving thereof was reversible error—Hartford Fire Ins. Co v. Galveston, H. & S. A. Ry. Co., Tex Com. App, 239 S.W 919, reversing Galveston, H. & S A. Ry Co. v. Hartford Fire Ins. Co., Civ App., 220 S.W. 781.

(3) Other instructions held not warranted by evidence.
Mo.—Greening v. Chicago & N. W. Ry. Co, App., 183 S.W. 1121.
Tex—Schaff v. Hill & Thompson, Civ.App., 238 S.W. 1037.

Failure to confine recovery to issues

In action against carrier for loss of wheat in transit, instruction which failed to limit recovery to amount of wheat claimed to have been lost as shown by pleadings and evidence was erroneous, jury being authorized thereby to go beyond petition and proof.—Forest Green Farmers' Elevator Co. v. Davis, 270 S.W. 394, 216 Mo.App. 545.

terial issues or evidence from the consideration of the jury.[79] If the market value of live stock is shown by the evidence to exceed the value alleged in the petition, the court should instruct that the recovery for loss of, or injury to the stock could not exceed the amount claimed in the petition.[80]

Double damages. An instruction which is so framed as to authorize the recovery of double damages for injury to property transported is erroneous [81]

Apportionment of damages. Where the carrier's negligence contributed to the loss or injury, an instruction which permits the jury to apportion the damages if the loss was caused by an act of God,[82] or the negligence of the shipper,[83] is erroneous.

f. Presumptions and Burden of Proof

The general rules relating to instructions in civil actions are applicable to instructions as to presumptions and burden of proof in actions against carriers for loss of, or injury to, property.

The instructions as to presumptions and burden of proof in an action against a carrier for loss of, or injury to, property in its possession must, as in other civil actions, be sufficient in substance and form[84] and it is error to refuse a proper instruction;[85] but instructions which are misleading or confusing,[86] or ignore issues which there is evi-

79. Miss.—Covington v. Yazoo & M. V. Ry. Co., 71 So. 821, 111 Miss. 559.
Tex.—Ft. Worth & R. G. Ry. Co v. Ellis, Civ.App., 225 S.W 409, dismissed for want of jurisdiction

80. Tex.—Panhandle & S. F Ry. Co v. Snodgrass, Civ.App., 278 S.W. 337.

81. Tex.—Panhandle & S F. Ry. Co. v. Lockhart, Civ App., 277 S.W. 230 —Kansas City, M & O Ry. Co v Russell, Civ.App., 184 S.W. 299.
10 C.J. p 394 note 65.

82. Ga.—Central of Georgia Ry. Co v. Evans, 134 S E. 122, 35 Ga.App 438.

83. U.S.—Atchison, T & S F. Ry Co. v. Merchants' Live Stock Co., C.C.A.N.M., 293 F. 987.

84. Ariz.—Southern Pac. Co. v. Itule, 74 P.2d 38
Iowa.—Vander Beek v. Chicago & N. W. Ry. Co, 278 N W. 201.
Mo.—Green v. American Ry. Express Co., App, 34 S.W.2d 1039.

Instructions held proper

(1) In an action against a carrier for damages to a shipment of cattle through delay in transit occasioned in part by a blizzard and in part because of insufficient motive power, an instruction that the burden is on defendant to prove the necessity of detaching the engine by reason of storm, and of proving that the injury was solely the result of an act of God and to prove the negligence of defendant, and that his damage was occasioned therefrom, was not erroneous.—McKinley v. Hines, 215 P. 301, 113 Kan. 550.

(2) Failure to instruct that plaintiff has burden of proving carrier's negligence concurred with act of God was not error, where carrier's evidence tended to show such negligence.—Ford v Wabash Ry. Co, 300 S.W 769, 318 Mo. 723, affirming, App., 266 S.W. 1032.

(3) Other instructions held proper.

Ga.—Hogg v Louisville & N. R. Co., 127 S.E 830, 33 Ga.App. 773.
Ill.—Gardner v. Railway Express Agency, 274 Ill.App. 626.
Iowa.—Buck v. American Railway Express Co, 192 N.W. 277, 195 Iowa 1024
Ohio.—St. Louis-San Francisco Ry Co. v. Glow Electric Co, 172 N.E 425, 35 Ohio App. 291.—Fean v Alabama Great Southern R Co, 159 N.E. 487, 26 Ohio App. 96.

Instructions held improper

(1) In an action for damages to shipment of eggs wherein the evidence failed to show the extent of such damage, it was error to instruct that the burden was on defendant to prove the value of the eggs partially destroyed.—Southern Express Co. v. Bass, 102 S.E. 168, 24 Ga. App. 742

(2) Instruction placing burden on shipper of horses to show he notified carrier of broken windows and "requested" repair was held properly refused.—Green v. American Ry. Express Co., Mo App., 34 S W 2d 1039.

(3) In action against railroad for damage to shipment of tomatoes, instruction that railroad must show that damage was caused by inherent defect in the shipment, or by negligence of shipper, or by some other cause over which railroad had no control, in order not to be liable, was error, in view of rule in such cases that railroad need only satisfy jury that it handled the tomatoes in accordance with shipper's orders and in a reasonably prudent manner as to matters not covered by such orders.—Southern Pac. Co. v. Itule, Ariz, 74 P.2d 38.

(4) In action against railroad to recover value of stallion which died while in transportation, instruction which required railroad to show by preponderance of evidence that failure to transport horse to destination of shipment was not due to "any act or omission" upon its part was prejudicially erroneous, since instruction placed upon railroad a duty which is not imposed by law. —Vander Beek v. Chicago & N. W. Ry Co, Iowa, 278 N.W. 201.

Instruction erroneous in form

In action against carrier for injury to stock, charge that the burden is on plaintiff to "show or prove" that the carrier failed to deliver the stock within a reasonable time, instead of "reasonably satisfy," is bad in form and properly refused.—Louisville & N. R. Co. v. Kinney, 127 So. 804, 221 Ala. 136.

Ownership of property

In an action against a carrier for damages to a shipment of sheep, an instruction that it was "incumbent upon the plaintiffs to show ownership of the sheep" sufficiently charged that the burden was imposed upon plaintiffs to show ownership of the sheep in themselves before they were entitled to recover damages.—Cripe v. Davis, 214 P 343, 107 Or 142.

Delay causing injury

Charge that failure to explain delay from tie-up when train crew had worked maximum time raised presumption of negligence was not erroneous.—Saliba v. New York Cent. R Co, 144 A. 194, 101 Vt. 427.

85. Mich.—Shier v. American Ry. Express Co., 208 N.W. 746, 234 Mich. 505.

Instruction erroneously refused

In shipper's action for value of grain lost in transit, it is error to refuse to charge that carrier must prove that either the weight as shown by bill of lading or by state certificate of weight was incorrect. —National Elevator Co. v. Great Northern Ry. Co., 163 N W. 164, 137 Minn. 217.

86. Ill.—Shellabarger Elevator Co. v. Illinois Cent. R Co, 212 Ill. App. 1

Instructions not misleading or confusing

Ark.—American Ry. Express Co. v.

dence to support,[87] or place the burden of proof on the wrong party[88] are erroneous. So an instruction which places upon plaintiff a greater burden of proof than he is required by law to sustain is erroneous,[89] and an instruction which unduly minimizes the presumption of negligence arising from the fact that the carrier received perishable freight in good condition and delivered it at destination in bad condition is also erroneous.[90] The instructions must be applicable to and confined to the issues raised by the pleadings and evidence.[91] Where there was an issue under the pleadings and evidence as to whether the property was in good condition when delivered to the carrier for shipment, an instruction that the burden was on the carrier to show that the injury was caused by an excepted cause was properly refused.[92] So, where the shipper had introduced evidence that the goods were delivered to the carrier in good condition and arrived at destination in bad condition, it was not error to refuse an instruction placing on the carrier the burden of proving its freedom from negligence, plaintiff having based his action on specific acts of negligence.[93]

§ 260. Verdict and Findings

The rules as to verdicts and findings in civil actions generally are applicable in actions against carriers for loss of, or injury to, property.

The rules applicable to the verdict and findings in civil actions generally apply to actions against carriers for loss of, or injury to, property transported. The verdict or findings are insufficient if they are uncertain or ambiguous,[94] or are unsupported by the pleadings and evidence.[95] Special issues may be submitted to the jury when properly raised by the pleadings and supported by the evidence;[96] but it is not error to refuse to submit

H Rouw Co., 294 S.W. 401, 173 Ark. 810.

Ga.—Central of Georgia R Co v. Manchester Mfg. Co., 61 S E 1128, 6 Ga App. 254.

Ohio.—Fean v. Alabama Great Southern R Co., 159 N.E. 487, 26 Ohio App 96.

87. Iowa.—Wilke v Illinois Cent R Co., 133 N.W. 746, 153 Iowa 695, Ann.Cas.1913E 308.

Instruction properly refused

Refusal of instruction that condition of strawberries at destination was presumably caused by carrier's negligence was not error, in view of evidence of inherent infirmity.—H. Rouw Co v American Ry Express Co, 291 S.W 1001, 173 Ark. 84.

88. Ill.—Wabash R. Co. v. Johnson, 114 Ill App. 545

Tex.—Cleburne Peanut & Products Co v Missouri, K. & T. Ry. Co. of Texas Com.App, 221 S.W. 270, reversing, Civ.App., 184 S W 1070—Panhandle & S F. Ry. Co v. Andrews, Civ.App, 278 S W. 478.

Erroneous instructions

(1) Instruction placing burden of showing lack of negligence on carriers, in action for injury to stock by sickness, was error where shipper sued on theory that carrier was insurer, and did not allege any specific act of negligence.—Vaughn v. St Louis-San Francisco Ry. Co., 15 S W.2d 901, 223 Mo.App. 732.

(2) In action for loss of, and injury to, cattle when car containing them was burned on a siding alleged to have been caused by sparks from a passing engine, where the action was heard on the issue of negligence, it was reversible error to instruct, as to the negligence alleged, if it was found the cattle were injured in defendant's custody, the burden was on it to exculpate itself; that in shipments of live stock the burden is on defendant to show injuries in transportation were not caused by its negligence.—Austin v. Seaboard Air Line Ry., 121 S.E. 1, 187 N C. 7

(3) Charge putting burden of showing freedom from negligence on carrier was error, where evidence made question of whether damage to shipment was due to inherent infirmity of fruit one for jury.—Galveston, H. & S A. Ry. Co v. Licata, Tex Com App, 280 S W 540, reversing, Civ.App., 269 S.W. 821

89. Ill.—Transformer Corporation of America v. Hinchcliff, 279 Ill App. 152.

Erroneous instruction

In an action for damage to goods freezing in transit, an instruction requiring plaintiff to establish specific negligence, where he was bound only to establish delivery to carrier in unfrozen condition and delivery at destination in frozen condition, is erroneous.—Dye Produce Co v Davis, 209 N W. 744, 202 Iowa 1008

90. Minn.—W. A. White Brokerage Co v. American Ry Express Co., 219 N W 290, 174 Minn. 377.

91. Ill.—Harshaw, Fuller & Goodwin Co v. Illinois Cent. R. Co., 252 Ill App. 253.

Instruction held based on the evidence

Iowa.—Bateham v Chicago, M & St. P. Ry Co., 192 N W. 818, 195 Iowa 659.

92. Tex.—Leon v. Hines, Civ.App., 223 S W. 239.

93. Mo.—Wentworth Fruit Growers' Ass'n v American Ry. Express Co, 1 S.W.2d 1028, 222 Mo.App. 1189.

94. Tex.—Garlitz v. International-Great Northern Ry Co, Civ.App., 11 S W 2d 591.

Verdict or findings held not uncertain

Tex.—Gulf, C & S. F Ry. Co v. Morrow, Civ App., 66 S W 2d 481, error dismissed—Chauncey v. Kansas City, M & O Ry. Co., Civ. App, 32 S W 2d 369—Panhandle & S F. Ry. v. Harp, Civ.App., 193 S W. 438.

95. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Brown & Co, Civ.App., 248 S W. 97.

Finding held not supported by evidence

Tex.—Panhandle & S F Ry. v. Harp, Civ.App, 193 S W. 438

Findings as to value

In a shipper's action against a railroad company for the value of hogs escaped from the railway stock pen because of the negligent maintenance of the stock pen, a judgment for plaintiff must be reversed in the absence of evidence to support a finding as to the value of the hogs sued for.—St. Louis Southwestern Ry Co. of Texas v. Brown & Co., Tex.Civ.App., 248 S.W. 97.

96. Tex.—Texas & New Orleans Ry. Co. v. Booth, Civ.App, 99 S.W.2d 430, error dismissed

Issues held properly submitted

(1) In shipper's action against carrier for damage to cattle in transit, two separate special issues as to whether cars were properly bedded and whether there were cracks in floors of cars permitting bedding to sift out as cars were jostled and moved along were held properly submitted.—Texas & New Orleans Ry. Co. v. Booth, Tex.Civ App., 99 S.W. 2d 430, error dismissed.

the defense that the shipper failed to unload cattle after a sudden stop, in an effort to diminish or mitigate the damages, where there is no definite evidence that the unloading of the cattle would have resulted in any material benefit to them, or that any definite injury, which could be measured in dollars, properly resulted by failure to unload.[97] Findings which are inconsistent with each other,[98] or with the general verdict,[99] are also insufficient. Where the findings are inconsistent with the general verdict the court should render judgment on the findings, notwithstanding the general verdict;[1] and where the jury find generally for plaintiff, but specially find that the carrier's negligence consisted in something not charged in the petition, it is the duty of the court to render judgment for plaintiff.[2]

A finding of the jury as to the amount of damages warranted by the pleadings and evidence should be included in the verdict, although not mentioned in the court's charge.[3]

Construction and effect. The construction and effect of the findings are governed by the general rules.[4] A general verdict for the carrier in an action for injuries to live stock is a finding against negligence of the carrier.[5]

A clerical error in a finding as to the date agreed upon for delivery of the goods is rendered immaterial by another finding which states such date correctly.[6]

Mere surplusage in a finding will be disregarded.[7]

(2) Carrier being prohibited by Rev.St. art 708 from limiting liability, charge submitting special issue whether cattle were injured by reason of car floor not being bedded was proper, over objections that shipper was required by shipping contract to inspect car and that he knew car was not bedded—Houston & T. C. Ry. Co. v. Claybrook, Tex. Civ.App., 271 S.W. 195.

Sufficiency of issue presented

In an action for damage to goods in shipment where the charge clearly presented question whether the carrier was negligent, whether the negligence was the proximate cause of the injury, and the amount of damages, the simple issue whether defendant was indebted to plaintiff, and if so in what amount, was sufficient—Bivens Bros. v Atlantic Coast Line R. Co., 97 S.E. 215, 176 N.C. 414.

97. Tex.—Panhandle & S. F. Ry. Co. v. Sanderson, Civ.App., 218 S.W. 540, dismissed for want of jurisdiction.

98. N.C.—King Grocery Co. v. Southern Express Co., 100 S.E. 325, 178 N.C. 323.

Tex.—Barnes Bros. v. International & G. N. R. Co., Com.App., 1 S.W.2d 273, affirming International & G. N. R. Co. v. Barnes Bros., Civ. App., 294 S.W. 349—Garlitz v. International-Great Northern Ry. Co., Civ.App., 11 S.W.2d 591.

Findings held inconsistent

(1) Finding that injuries to live stock shipped were contributed to by disposition of animals, and further finding that disposition of animals did not cause injuries, were conflicting—Panhandle & S. F. Ry. Co. v. Key, Tex.Civ.App., 20 S.W.2d 260.

(2) In action against express companies for negligence, a finding by the jury that the S. Company, which transported the butter, is not liable for the loss, is inconsistent with a finding that the A. Company, which was organized subsequently to the loss and succeeded to the business of the S. Company, is liable, and cannot support a judgment against the A. Company—King Grocery Co. v. Southern Express Co., 100 S.E. 325, 178 N.C. 323.

Findings held not inconsistent

N.C.—Price v. Southern Ry. Co., 92 S.E. 182, 173 N.C. 394.

Tex.—Gulf, C. & S. F. Ry. Co. v. Morrow, Civ.App., 66 S.W.2d 481, error dismissed—Chauncey v. Kansas City, M. & O. Ry. Co., Civ.App., 32 S.W.2d 369.

99. Kan.—Hull v. Chicago, R. I. & P. Ry. Co., 293 P. 479, 131 Kan. 781.

Findings held not inconsistent with general verdict

Ind.—Cleveland, C., C. & St. L. Ry. Co. v. Blind, 117 N.E. 641, 186 Ind. 628, transferred 116 N.E. 590, 64 Ind.App. 704.

1. Kan.—Parker Corn Co. v. Chicago, B. & Q. R. Co., 244 P. 240, 120 Kan. 484.

Circumstances not requiring judgment on special findings

Kan.—Parker Corn Co. v. Chicago, B. & Q. R. Co., 244 P. 240, 120 Kan. 484—Dye v. Denver & R. G. R. Co., 168 P. 1087, 101 Kan. 666.

2. Kan.—Parks v. Atchison, T. & S. F. Ry. Co., 163 P. 1066, 100 Kan. 219.

3. Tex.—Panhandle & S. F. Ry. v. Harp, Civ.App., 193 S.W. 438.

4. Cal.—Price v. Hollywood Auto Transfer & Storage Co., 275 P. 471, 97 Cal.App. 420.

Particular findings construed

(1) In an action for the loss of goods shipped under a bill of lading requiring suits to be brought within two years and one day after the expiration of a reasonable time for delivery, the trial court's finding that a reasonable time for delivery would surely be considerably less than six months must be construed as allowing six months when no other time was specifically named.—Humphrey-Cornell Co. v. Hines, 115 A. 561, 97 Conn. 21.

(2) The jury's answer to the question whether notice of the claim for damages to cattle was given before they were removed from the station, "Yes, after the cattle were sold, but we don't know whether the cattle were removed or not," is equivalent to a finding that notice was not given before the cattle were removed—Atchison, etc., R. Co. v. Means, 80 P. 604, 71 Kan. 845, 846.

(3) Finding that injury to live stock from making a flying switch, whereby cars were shunted against a loaded car on a siding, was result of gross negligence, in absence of any evidence of exceptional circumstances, does not imply that injury was intentional or wanton, so as to take case out of valid shipping contract limiting liability for negligence.—Kennedy v. Atchison, T. & S. F. Ry. Co., 179 P. 314, 104 Kan. 129, 368, motion granted 181 P. 117, 104 Kan. 708.

5. Tex.—W. E. Neal & Son v. Panhandle & S. F. Ry. Co., Civ.App., 245 S.W. 452.

6. Cal.—Morris v. Bekin's Van, etc., Co., 92 P. 362, 6 Cal.App. 429.

7. N.C.—Bryan v. Louisville & N. R. Co., 93 S.E. 750, 174 N.C. 177.

Finding nonexistence of contract

A finding that a live stock shipper did not enter into a contract with the carrier was mere surplusage, the liability of the carrier being the same regardless of such contract—Bryan v. Louisville & N. R. Co., 93 S.E. 750, 174 N.C. 177.

§ 261. Judgment

The judgment must be supported by the findings. Under some circumstances the carrier will be permitted to keep the property damaged.

In accordance with the general rule, the judgment in an action against a carrier for loss of, or injury to, property transported must be supported by the findings;[8] and a finding by the jury that an unprecedented storm caused the loss, and that defendant was negligent, but that the negligence did not proximately cause the loss, precludes a judgment for plaintiff, except for the amount admitted to be due.[9]

Relief to defendant. In a shipper's action for damage to property, where plaintiff recovers the value thereof preceding shipment, the carrier will be permitted to keep the property, so that it may get the benefit of its value, if any.[10]

§ 262. Damages

The general rules affecting the measure and elements of damages are applicable in actions against carriers for injury to, or loss of, property in course of transportation.

§ 263. Measure and Elements in General

A carrier is liable, in case of loss of, or injury to, property, for all damages proximately caused by its breach of duty or negligence, but for nothing more. The damages should not be excessive.

The general rule is that, in case of loss of, or injury to, property, the carrier is liable for all damages proximately resulting from the carrier's breach of duty or of special contract, or due to its negligence,[11] to be ascertained according to the ordinary rules of evidence,[12] but for nothing beyond this.[13] Obviously, no damages should be allowed

8. Tex.—Bergman Produce Co v. American Ry. Express Co., Civ. App., 262 S.W. 891.

Judgment held supported by findings

Jury finding, that railroad failed to redeliver four head of cattle to shipper out of forty-three which had been delivered to railroad for shipment, supported judgment awarding shipper damages for loss of cattle. —Texas & N. O. R. Co. v. Willis, Tex. Civ.App., 94 S.W.2d 235.

9. Tex.—Bergman Produce Co. v. American Ry. Express Co., Civ. App., 262 S.W. 891.

10. N.C—Cauble v. Southern Express Co., 109 S.E. 267, 182 N.C 448.

11. U.S—Baltimore & O C. Terminal R. Co. v. Becker Milling Mach Co, C.C.A Ill., 272 F. 933.

N.Y.—Perkel v. Pennsylvania R Co., 265 N.Y.S. 597, 148 Misc 284

Ohio—Church v. Cleveland, C., C. & St. L. Ry. Co, 5 Ohio N.P.,N.S., 585.

Okl—Chicago, R I. & P. Ry. Co v Murphy, 229 P 210, 104 Okl. 34, certiorari denied 45 S.Ct. 512, 268 U.S 693, 69 L.Ed. 1161, error dismissed 46 S.Ct 472, 271 U.S. 642, 70 L.Ed. 1128.

Tex—Davis, Federal Agent v. Standard Rice Co, Civ.App., 293 S.W. 593.

10 C.J. p 395 note 70.

As otherwise stated plaintiff is entitled to be put in as good condition as he would have been if railroad had tendered the shipment uninjured, and is entitled to recover loss of what he would have had if contract had been performed and shipment had been conveyed safely. —Schwalb v. Erie R. Co., 293 N.Y.S. 842, 161 Misc. 743.

Full compensation

(1) Full compensation for loss or damage may be recovered by shipper —Woonsocket Machine & Press Co v. New York, N. H. & H. R Co., 131 N.E. 461, 239 Mass. 211.

(2) A common carrier is subject to common law of full liability for actual value of undelivered intrastate shipment, lost by reason of robbery, in absence of special agreement limiting his liability —Reich v. McGill, 196 A. 651, 119 N.J Law 358.

(3) Where carload of potatoes, shipped in charge of shipper's agent, under bill of lading, providing that carrier would not be liable for loss or damage unless caused by negligence of carrier, was destroyed by fire, not caused by carrier, and plaintiff, in action to recover for loss, relied solely on failure to furnish adequate fire protection, and failure to exercise due diligence in using such equipment, recovery, if any, should be limited to loss sustained after discovery of such fire—John Groves Co. v Bangor & A. R Co., 129 A. 823, 124 Me. 373.

Use for which shipment intended

In applying measure of damages recoverable from railroad for injuries to shipment in transit, regard must be had to use and purpose for which shipment is intended.— Schwalb v Erie R. Co., 293 N.Y.S 842, 161 Misc. 743—Perkel v Pennsylvania R. Co., 265 N.Y.S 597, 148 Misc. 284

Failure to recondition goods

Where shipment of shoes in interstate commerce was damaged by unprecedented flood, carrier was not liable for failure to recondition shoes while in transit, where carrier did not have facilities to enable it to recondition shoes.—Baltimore & O R Co v. Johl & Bergman, Miss., 177 So 778.

Injury to live stock; failure to breed

Where, in an action against a carrier for damages to sheep before delivery to consignee, it appeared that the market value of the sheep was depreciated, because they would not breed on account of the injuries sustained, and such element of damage flowed directly from the injuries in question, compensation for the loss thereby sustained was properly allowed —Smith v. Hines, 196 P. 1032, 33 Idaho 582.

Replacement of damaged property

Where a carrier destroys live stock, it would not be compensation to give plaintiff other stock, since it would be difficult, if not impossible, to furnish just such cattle as were destroyed —International Harvester Co of America v Chicago, M. & St. P. Ry. Co, 172 N.W 471, 186 Iowa 86.

12. La—Planters' Cotton Oil Co v. Texas & P. Ry Co., 71 So. 366, 139 La. 201.

Expert inspection and appraisement

Damages to carload of cotton seed delivered at way station in heated and rotten condition may be determined by expert inspection and appraisement after notice to railroad company—Planters' Cotton Oil Co. v. Texas & P. Ry. Co., 71 So 366, 139 La 201.

13. Ark—Missouri Pac R. Co. v. Armstrong, 44 S.W.2d 1093, 184 Ark 1076

10 C.J p 395 note 71

Erroneous measure of damages

(1) Where a manufacturer of a particular type of machine, being unable to supply the demand, engaged another company to fabricate two hundred of the machines furnishing special prints, patterns, tools, etc.,

which are not authorized by the pleadings;[14] and, where plaintiff produces no evidence to show the proper measure of damages under the pleadings, a judgment for nominal damages is proper.[15] The carrier is liable for the full value of an intra-state shipment lost in transit, and in case of damage thereto is liable for the full amount of damage;[16] but a shipper who misrepresents the value of such shipment in order to obtain a lower freight rate is guilty of fraud which, at common law, estops him from asserting a different value when suing for loss or injury.[17] Damages occurring before the goods are received for transportation, or after delivery to the consignee, are, of course, not recoverable.[18]

A consignee who has only a qualified interest, as, for instance, a lien for advances, can recover only the value of such interest.[19]

Excessive damages. Whether or not the damages awarded are excessive depends on the facts of the particular case. In the notes cases are referred to in which certain awards were held excessive and others not excessive.[20]

§ 264. Value of Goods Lost or Depreciation in Value of Goods Injured

a. General rule

b. Extent and limits of rule in general

and its own mechanical engineer to inspect the materials and workmanship, the amount paid such other company for each machine was not the measure of recovery against a carrier destroying two of the machines.—Baltimore & O. C. Terminal R. Co v. Becker Milling Mach. Co., C.C.A.Ill., 272 F. 933.

(2) Where an owner of a special type of machine, two of which were destroyed by a carrier, sold them through manufacturer's agents, who were either purchasers on their own account for resale at a uniform price, or selling agents on commission, such uniform selling price, without deduction of the selling cost, was not the measure of damages.—Baltimore & O. C. Terminal R. Co. v Becker Milling Mach. Co., supra.

Remote damages

Where carrier billed kerosene as gasoline, and represented that it was gasoline, causing consignee to unload it into tank with other gasoline and sell it as such, damage to business from refusal of purchasers and general public to deal further with plaintiff was not direct, natural, probable, and reasonable consequence of negligent act, and too remote and conjectural for recovery—Ohio West Virginia Co v. Chesapeake & O. Ry Co., 124 S.E. 587, 97 W.Va. 61, 38 A.L.R. 1439.

14. Fla.—Seaboard Air Line R. Co. v. Roberts, 70 So. 773.
Pa.—Stauffer v. New York Cent. & H. R. R. Co., 66 Pa.Super. 208.

15. U.S.—Leonard v. Pennsylvania R. Co., D.C.N.Y., 15 F.Supp. 55.
Fla.—Wynn v. Atlanta Coast Line R. Co., 64 So. 232, 66 Fla. 604.

Nominal damages improper

In suit for damages for injury to pecan trees from cold, while being held at defendant's depot, plaintiff's recovery was not limited to nominal damages where evidence showed market value of trees at point of destination and time of arrival and that after they were damaged by cold they were without value—American Ry. Express Co. v. Judd, 104 So. 418, 213 Ala. 242.

16. Va.—Chesapeake & O. Ry Co. v. Osborne, 153 S.E. 865, 154 Va. 477.

17. Va.—Chesapeake & O. Ry Co. v. Osborne, supra.

18. Tex.—Rio Grande & E. P. Ry. Co. v. T. A. Austin & Co., Civ. App., 12 S.W.2d 1070, reversed on another ground, Com.App., 25 S.W. 2d 306.

Delay in unloading

In a shipper's action against a carrier for damages to a shipment of strawberries, where there is evidence that part of the damages was due to delay in unloading after delivery to consignee, a recovery for the entire loss sustained by the shipper is not justified.—Atlantic Coast Line R. Co. v. Plant City Growers' Ass'n, 82 So. 599, 78 Fla. 2.

19. U.S.—Burritt v. Rench, C.C.Ohio, 4 F.Cas.No.2,201, 4 McLean 325.

20. **Damages held excessive**
(1) Generally.
Fla.—Atlantic Coast Line R. Co. v. J. M. Griffin Lumber Co., 129 So. 845, 100 Fla. 623.
Ill.—Mueller Grain Co. v. Lake Erie & W. R. Co., 213 Ill.App. 108
Tex.—Houston & T. C. Ry. Co. v. Lewis, Civ.App., 185 S.W. 593.

(2) Where plaintiff shipper of live stock shows that the value of the injured cow was sixty dollars when received by defendant railroad, and proves an expenditure of two dollars for care of the cow prior to its death after its arrival at destination, verdict for plaintiff shipper against defendant railroad for sixty five dollars is excessive by three dollars—Byrum v. Chicago & A. R. Co., Mo.App., 226 S.W. 91.

(3) Where plaintiff paid $8 for extra feed and lost value of shrinkage, $116.15, and there was no evidence of other loss, judgment for shipper for $178.30 was excessive in sum of $54.15—Pittsburgh, C., C. & St. L. R. Co. v. Hughes, 131 N.E. 234, 76 Ind.App. 26.

Damages held not excessive
(1) Generally.
Ark.—Kansas City Southern Ry. Co. v. H. Rouw Co., 288 S.W. 901, 172 Ark. 273—Chicago, R. I. & P. Ry. Co. v. Butler, 200 S.W. 144, 132 Ark. 37, L.R.A.1918C 537.
Ga.—Collins & G. R. Co. v. Beasley, 136 S.E. 167, 36 Ga.App. 241
Ky.—Illinois Cent. R. Co. v. Heimerdinger, 291 S.W. 1027, 218 Ky. 600.
Mo.—McNeill v. Wabash Ry. Co., 231 S.W. 649, 207 Mo.App. 161.
Tex.—St. Louis Southwestern Ry. Co. of Texas v. Weathersbee, Civ.App., 22 S.W.2d 986—Davis v. McMillan, Civ.App., 241 S.W. 723.

(2) In an action against a carrier for injury to stock in shipment, the evidence showed that one hundred and forty seven head died before they could be gotten to market; that they averaged seventy seven pounds each, and were worth from 7½ to 8 cents a pound at the point of destination. It was held that a verdict for $742, with interest, was not excessive—Norfolk & W. R. Co. v. Harman, 22 S.E. 490, 91 Va. 601, 44 L.R.A. 289, 50 Am.S.R. 855.

(3) A verdict for $800 against an express company for loss of a jack killed in transit was not excessive, in view of testimony that it was reasonably worth from $1,000 to $1,300 at the place of destination—Ward v. American Ry. Express Co., Mo.App., 259 S.W. 514.

(4) In an action against a carrier for damage to horses and mules in transit, three mules, valued at $250 to $300 each, having died, and a depreciation in value of other mules from $40 to $60 each having been testified to, verdict for the shippers for $1,200 was not excessive.—Louisville & N. R. Co. v. Hunter, 214 S.W. 914, 185 Ky. 165.

c. Where property has no market value
d. Where property has no market value at destination
e. Where property is shipped for sale or sold in transit for stipulated price

a. General Rule

The general rule is that the measure of damages for loss of property shipped is the market value at destination, and in case of injury, the difference between the value at the time and place of delivery in an uninjured condition and the value in the depreciated condition in which the property is actually delivered.

The criterion for determining the damages for loss of, or injury to, property in transit ordinarily is the market value at destination, if the property had a market value at that place,[21] and, where the original destination was changed by direction of the shipper, the market value at the new destination is the proper basis for estimating the damages;[22] but if the carrier is charged as warehouseman or bailee, the value of the property at the point of shipment would furnish the proper basis for estimating the damages.[23]

Where property is lost in transit, the general rule is that the carrier will be liable for its market value at the place of destination at the time when delivery should have been made,[24] less the unpaid freight charges as stated infra § 272.

21. U.S.—The Ansaldo San Giorgio I v Rheinstrom Bros Co., N.Y., 55 S Ct 483, 294 U S. 494, 79 L. Ed. 1016, affirming, C.C A., The Ansaldo San Giorgio I, 73 F 2d 40, reversing, D C, 3 F.Supp 579, certiorari granted The Ansaldo San Giorgio I v. Rheinstrom Bros. Co, 55 S Ct. 217, 293 U S 551, 79 L Ed. 654.

Ala.—Southern Ry. Co. v. Webb, 39 So 262, 143 Ala. 304, 111 Am S. R. 45.

Mass.—Woonsocket Machine & Press Co v New York, N H & H. R Co, 131 N.E 461, 239 Mass. 211.

Mo.—Green v. American Ry. Express Co, App, 34 S W 2d 1039.

Neb.—Johnson v Payne, 191 N.W. 696, 109 Neb 531.

N.M.—Diamond X Land & Cattle Co. v. Director General of Railroads, 205 P. 267, 27 N M 675.

Tex.—American Ry. Express Co v. McDaniel, Civ App, 20 S W 2d 1104—Kansas City, M & O Ry. Co. of Texas v. Moore, Civ App, 11 S W 2d 335—Panhandle & S. F. Ry. Co. v Snodgrass, Civ App, 278 S W 337—Panhandle & S. F R Co. v. Shell, Civ App, 265 S W. 758—Fort Worth & D C. Ry. Co. v. Tomson, Civ.App, 250 S W. 747—Lancaster v. Hollebeke, Civ.App., 235 S W. 1113.

Utah.—Barry v Los Angeles & S L. R Co, 189 P 70, 56 Utah 69

Value at place of shipment is immaterial.—St. Louis Southwestern Ry. Co. v. Cox, Tex Civ.App., 221 S W. 1043.

Price received at point other than destination has no proper place in applying the true measure of damages.—Gulf, C. & S. F Ry Co. v Helms Bros., Tex.Civ App., 210 S W 853

Intrinsic value not recoverable where property has market value at destination.—King v. Galveston, H. & S. A. Ry Co., Tex.Civ.App., 279 S W. 491.

Market value at retail

Where plaintiff did not receive carload of apples in damaged condition, so that expense of retailing was not incurred, market value of apples, if sold at retail, was not proper measure of recovery from railroad.—Quanah, A & P Ry. Co v. Novit, Tex Civ App, 199 S W. 496.

First market available

Damages for injury or delay from carrier's negligence are measured by market value of product on first market available after tender to consignee.—Rio Grande & E. P. Ry. Co v. T. A Austin & Co, Tex Civ App, 12 S W 2d 1070, reversed on another ground, Com.App., 25 S W 2d 306

Market value at destination must be alleged and proved

Tex.—Gulf, C & S. F. Ry. Co. v. Helms Bros, Civ App, 211 S.W. 597.

Rule of carrier requiring owners to load and unload cars carried at carload ratings, did not require consignee to accept and unload watermelons, delivered at destination in damaged condition, to recover damages measured by market value thereat.—Perkel v. Pennsylvania R Co, 265 N Y.S 597, 148 Misc. 284.

Value at time of shipment has been held proper measure of damages for goods lost.—Conover v. Wabash Ry Co, 208 Ill.App. 105.

22. Tex.—Panhandle & S F. Ry. Co v. Reynolds, Civ App, 33 S W 2d 249.

23. Tex.—Fort Worth & D C. Ry. Co v. Tomson, Civ App, 250 S.W. 747.

24. U S.—The Ansaldo San Giorgio I, C C.A N Y., 73 F 2d 40, reversing, D C, 3 F Supp 579, and certiorari granted The Ansaldo San Giorgio I v Rheinstrom Bros Co., 55 S Ct 217, 293 U S 551, 79 L.Ed 654, affirmed 55 S Ct. 483, 294 U S. 494, 79 L Ed 1016.

Ala.—Louisville & N R. Co. v. Jones, 99 So 919, 211 Ala 158—Atlantic Coast Line R Co v. Dothan Ins Agency, 80 So. 627, 16 Ala App. 623.

Ga.—Louisville & N R Co. v. Lovelace, 106 S.E. 6, 26 Ga App. 286.

Iowa.—Smith v Louisville & N R. Co, 209 N.W. 465, 202 Iowa 292

Mo.—Marshall Land & Mercantile Co. v Missouri Pac. R. Co, App, 270 S W 422—Bernet, Craft & Kauffman Milling Co v. New York, C & St. L. R Co., App., 260 S.W. 508.

Neb.—Johnson v Payne, 191 N.W. 696, 109 Neb 531.

N Y.—F. A Straus & Co v. Canadian Pac. Ry. Co, 173 N E. 564, 254 N Y. 407, modifying 238 N Y.S 50, 227 App Div. 316, which modified 234 N Y S 622, 134 Misc. 439—Chenango Textile Corporation v. Willock, 283 N.Y S 270, 247 App. Div 638—Kilthau v International Mercantile Marine Co., 215 N Y S. 718, 217 App Div. 22, affirmed 157 N.E 267, 245 N.Y. 361.

Tex.—Panhandle & S F. Ry. Co. v. Parrish, Civ.App., 281 S W. 887—Wichita Valley Ry. Co. v. Turbeville, Civ.App., 269 S.W. 498—Gulf, C. & S F Ry. Co v. Mitchell, Civ App., 261 S W. 548

Utah.—Byram v. Payne, 201 P. 401, 58 Utah 536, 18 A L R 1110.

10 C J. p 395 note 75.

Corpus Juris is quoted or cited as authority in:

Ind.—Lake Erie & W R Co. v. Fantz, App., 154 N E 875, 876.

Iowa.—Brown Coal Co. v. Illinois Cent R Co, 192 N W. 920, 921, 196 Iowa 562.

La.—Anderson, Clayton & Co. v. Yazoo & M V R Co, 141 So. 453, 455, 174 La. 762

Miss.—Yazoo & M V. R. Co. v. M. Levy & Sons, 106 So. 525, 526, 141 Miss. 199.

Mo.—Wall v. American Ry. Express Co., 272 S.W. 76, 78, 220 Mo.App. 989—Klingenberg v. Davis, 268 S. W. 99, 102, 219 Mo.App 1—Ward v American Ry. Express Co., App., 259 S.W. 514, 517.

Va.—New York, P & N. R Co. v. Bundick, Taylor, Corbin-Handy Co., 122 S.E. 261, 262, 138 Va. 535.

Where property is injured in transit, the general rule is that the measure of damages is the difference between the value of the property at the time and place of delivery in an uninjured condition and its value in the depreciated condition in which it was delivered,[25] less the freight charges to the

Retail value at destination governs, and not the wholesale value at the place of shipment, where it is impossible to replace the coal at the destination at wholesale rates—Heidritter Lumber Co v. Central R. Co. of New Jersey, 122 A. 691, 100 N.J.Law 402, 1 N J Misc 135, affirmed 125 A. 926, 100 N J.Law 402.

Effect of Cummins Carmack amendments

(1) Under the Cummins-Carmack amendments to the Interstate Commerce Act, making carriers liable for the "full actual loss, damage, or injury" to property in transit, a carrier's liability for loss of property is the same as at common law, namely, the value of the property at destination at the time it should have been delivered.

U.S.—McCaull-Dinsmore Co. v. Chicago, M. & St. P. Ry. Co., D.C Minn., 252 F. 664, affirmed Chicago, M. & St. P. Ry. Co. v. McCaull-Dinsmore Co., 260 F. 835, 171 C.C. A. 561, certiorari granted 40 S.Ct 219, 251 U.S 549, 64 L Ed. 409, and affirmed 40 S.Ct 504, 253 U S. 97, 64 L.Ed. 801.

Ala.—Nashville, C. & St L. Ry. v. W. L. Halsey Grocery Co., 121 So 16, 219 Ala 16—Southern Ry. Co v. Northwestern Fruit Exch., 98 So. 382, 210 Ala. 519.

Ind.—Davis v. Hunter, 138 N.E. 785, 79 Ind App. 462.

La.—Cottam & Co v. Illinois Central R. R. Co, 3 La App 240.

Mass—Leominster Fuel Co. v. New York, N. H & H R Co., 154 N.E. 831, 258 Mass. 149, 50 A.L.R. 1464.

Miss.—Yazoo & M V R. Co v Delta Grocery & Cotton Co, 98 So. 777, 134 Miss 846.

(2) The measure of damages for loss of coal shipped to a retail dealer is the market value of the coal at the time and place of delivery, whether the consignee actually bought coal to replace it or not, and notwithstanding such value included an element of retail profit due to the absence of a wholesale market at that place.—Leominster Fuel Co. v. New York, N H. & H. R. Co., supra.

(3) Such profit is not recoverable as separate element of damages.—Leominster Fuel Co. v. New York, N. H. & H R Co., supra.

(4) Under the statute, the measure of damages recoverable by a dealer in coal who sold at both retail and wholesale for loss of a portion of a carload of coal was not his loss of profit, either retail or wholesale, where he had coal in storage ample for his business needs, but was his full actual loss, including cost of coal at mine, plus freight, if paid, and war tax, but not including any allowance for unloading, cartage, overhead, or profit—Brown Coal Co v. Illinois Cent R Co., 192 N.W 920, 196 Iowa 562

(5) Under the statute the damages recoverable for shortage in a shipment of coal intended to be added to a stock of coal for resale, was the wholesale market price where the shortage was capable of replacement and was in fact replaced, in the course of business, from purchases made in carload lots at the wholesale price without added expense.—Illinois Cent. R Co. v. Crail, Minn., 50 S.Ct. 180, 281 U.S. 57, 74 L.Ed. 699, 67 A.L R 1423, reversing, C.C. A., Crail v. Illinois Cent. R. Co, 13 F.2d 459, reversing, D C., 2 F.2d 287, and, C C.A., Illinois Cent. R. Co. v. Crail, 31 F.2d 111, affirming, D. S, Crail v. Illinois Cent. R Co, 21 F 2d 836, certiorari granted Illinois Cent R. Co v Crail, 49 S.Ct. 483, 279 U.S. 833, 73 L Ed 982.

(6) Test of market value in determining damages recoverable for failure to deliver interstate shipment may be discarded, if inapplicable or not exact—Illinois Cent. R. Co. v. Crail, supra.

(7) But it has been held that the "full actual loss" recoverable under the amendment is not limited to the value of the property at destination. U. S.—Illinois Cent. R. Co. v. Crail, supra.

Mo.—Wall v. American Ry. Express Co, 272 S.W. 76, 220 Mo App 989—Forest Green Farmers' Elevator Co. v Davis, 270 S W 394, 216 Mo. App. 545—Bernet, Craft & Kauffman Milling Co. v. New York, C. & St. L. R. Co., App., 260 S.W. 508.

Bulk price

Damage for shortage in delivery of fungible goods, in the absence of special circumstances, is measured by the bulk price, both at common law and under the Uniform Sales Act § 44—Illinois Cent R. Co. v Crail, Minn, 50 S.Ct 180, 281 U S. 57, 74 L.Ed 699, 67 A.L R. 1423, reversing, C.C A., Crail v Illinois Cent. R Co., 13 F 2d 459, reversing, D C., 2 F.2d 287, and, C.C A, Illinois Cent. R Co. v. Crail, 31 F.2d 111, affirming, D.C., Crail v. Illinois Cent R Co, 21 F 2d 836, certiorari granted Illinois Cent R Co. v. Crail, 49 S.Ct. 483, 279 U S. 833, 73 L.Ed. 982.

Place of destruction

In suit for damages for goods destroyed in transit, reasonable market value of particular articles destroyed at time and place of destruction was proper measure of damages—St Louis, S F. & T. Ry. Co. v. J. G Henderson Cut Stone Co., Tex Civ App, 275 S.W 603.

In absence of evidence of value at destination and objection by carriers, the value of cotton at point of origin of shipment on day of fire destroying cotton was proper measure of damages—Anderson, Clayton & Co. v Yazoo & M V. R. Co., 141 So 453, 174 La. 762.

Evidence not objected to

In an action to recover for shortage of coal delivered to consignee where there was no objection to the introduction of a freight bill and expense bill showing the weight of a car of coal, the court was justified in allowing the amount therein stated—Payne v White House Lumber Co, Tex.Civ.App., 231 S.W. 417.

25. U S—Gulf, C. & S F Ry. Co v. Texas Packing Co, Tex., 37 S.Ct. 487, 244 U.S. 31, 61 L Ed. 970

Ark—Missouri Pac R Co. v. Alma Cash Store, 271 S W. 453, 168 Ark. 823—Missouri Pac. R. Co v Bell, 259 S W. 745, 163 Ark. 284, certiorari denied 45 S Ct. 125, 266 U S. 625, 69 L.Ed. 474—St Louis Southwestern Ry. Co. v. Tucker, 255 S W. 553, 161 Ark. 140—Chicago, R I & P. Ry Co. v Walker & Haley, 227 S W. 12, 147 Ark 109—Southern Express Co. v. Couch, 220 S W. 823, 143 Ark 513.

Cal.—W C. Cook & Co. v White Truck & Transfer Co., 13 P 2d 549, 124 Cal App. 721—Murray v. Southern Pac Co., 296 P. 667, 112 Cal App. 150—Murray v. Southern Pac Co, 265 P 337, 89 Cal App 741—American Fruit Growers of California v. Pacific Electric Ry. Co., 238 P 105, 72 Cal App. 682.

Del—Hardesty v. American Ry Express Co., Super., 119 A. 681, 2 W. W Harr. 66.

Ga.—Southwestern R. Co v. Davies, 186 S.E 899, 53 Ga.App 712

Ill.—House v. Wheelock, 244 Ill App 270—Cardwell v. Payne, 226 Ill. App. 227—Conover v. Wabash Ry. Co, 208 Ill App. 105.

Ky.—Gus Datillo Fruit Co. v. Louisville & N R. Co., 11 S.W.2d 953, 226 Ky. 813.

Mich—First Nat Bank v. Grand Rapids & I. Ry. Co., 161 N W. 859, 195 Mich. 1.

Minn—S G. Palmer Co. v. Illinois Cent. R. Co, 204 N.W. 566, 164 Minn 68.

Mo—Jones v. St. Louis-San Francisco Ry Co., 50 S.W 2d 217, 226 Mo. App 1152—Green v American Ry. Express Co, App, 34 S W 2d 1039—Aurora Fruit Growers' Ass'n v.

point of destination if they have not already been paid, as stated infra § 272, and not the difference between the value of the property when delivered to the carrier and the value at destination;[26] nor is the price at which the property is sold after arriving at its destination the proper measure of damages,[27] although, as stated supra § 255, evidence of the price obtained at such sale is admissible as

St Louis-San Francisco Ry. Co., 297 S.W. 440, 220 Mo.App. 1316—Morrow v. Wabash Ry. Co., 265 S.W. 851, 219 Mo App. 62—American Fruit Growers v. St. Louis, B. & M. Ry. Co., App., 261 S.W. 949, certiorari denied St. Louis, B. & M. R. Co v American Fruit Growers, 45 S.Ct 94, 266 U.S 611, 69 L.Ed. 467.

N.Y.—Schwalb v. Erie R. Co., 293 N.Y.S. 842, 161 Misc. 743—Perkel v. Pennsylvania R. Co., 265 N.Y.S 597, 148 Misc. 284—Greenwald v New York Cent. & H. R. R. Co., 159 N.Y.S. 15, 95 Misc 122.

N.C.—Whittington v. Southern Ry., 90 S.E. 505, 172 N.C. 501.

Tex.—Texas & P. Ry. Co v. Prunty, 230 S.W 396, 111 Tex 162, answers to certified questions conformed to, Civ.App., 233 S.W. 625—Rio Grande & E. P. R. Co. v. T. A. Austin & Co., Com.App., 25 S.W.2d 306, reversing, Civ.App., 12 S.W.2d 1070—Texas & P. Ry. Co v. Bufkin, Civ App., 20 S.W.2d 1119—Texas & P. Ry. Co. v. Bufkin, Civ.App., 19 S.W.2d 343—Coulter v. Gulf, C. & S. F. Ry. Co., Civ.App., 286 S.W. 559—Panhandle & S. F. Ry Co v. Parrish, Civ App., 281 S.W. 887—Wichita Valley Ry. Co. v. Turbeville, Civ.App., 269 S.W. 498—Panhandle & S. F. R. Co v. Shell, Civ. App., 265 S.W. 758—Lancaster v. Tudor, Civ.App., 222 S.W. 990—Gulf, C. & S. F. Ry Co. v. Helms Bros., Civ App., 211 S.W. 597—International & G. N. Ry. Co v Reed, Civ.App., 203 S.W. 410—Quanah, A. & P. Ry. Co v Novit, Civ.App., 199 S.W. 496—Houston, E. & W. T. Ry. Co. v. Brackin, Civ App., 191 S.W. 804—Panhandle & S. F. Ry. Co. v. Morrison, Civ App., 191 S.W. 138—Kansas City, M. & O. Ry. Co. of Texas v Corn, Civ.App., 186 S.W. 807—Ft. Worth & R. G. Ry. Co. v. Albin, Civ.App., 185 S.W. 647.

Wash.—Western Machinery Exchange v. Northern Pac Ry. Co., 254 P. 248, 142 Wash. 675.

10 C.J. p 396 note 77.

Corpus Juris is quoted or cited as authority in:

Cal.—Murray v. Southern Pac. Co., 265 P. 337, 338, 89 Cal.App. 741

Miss.—Yazoo & M. V. R. Co. v. M. Levy & Sons, 106 So. 525, 526, 141 Miss 199.

Mo.—Sandker v. Wabash Ry. Co., App., 267 S.W. 957, 959.

Or.—Carstens Packing Co. v. Southern Pac. Co., 292 P. 89, 92, 134 Or. 53

Utah.—Barry v. Los Angeles & S. L. R. Co., 189 P. 70, 72, 56 Utah 69.

Value at private sale at destination was erroneous basis for damages for carrier's injury to live stock.—Murray v. Southern Pac. Co., 296 P. 667, 112 Cal App 150.

Value on auction market

Actual loss which is sustained by plaintiff, whose shipment of goods is injured and which he is entitled to recover from railroad, is difference in value on auction market of shipment in condition in which it was tendered by railroad to plaintiff and in condition in which they were when shipped.—Schwalb v. Erie R. Co., 293 N.Y.S 842, 161 Misc. 743.

Where the property is rendered worthless by the injury, the measure of damages is the market value at time and place of tender.—St. Louis Southwestern Ry Co. of Texas v Hughston Grain Co., Tex.Civ. App., 186 S.W 429.

Neglect to protect shipment rejected by consignee

Consignor's damages for carrier's neglect to protect perishable shipment on consignor's rejection was difference in value at time carrier should have acted and sale.—Porter v. Pennsylvania R. Co., 231 N.Y.S 432, 224 App.Div. 440—Porter v. Pennsylvania R. Co., 215 N.Y.S. 727, 217 App Div 49.

Where carrier departs from method of shipment specified in contract, and the shipper seeks to recover damages done to the horses, and not the value of them, even if trover is the only remedy, the amount recoverable is the value of the horses when converted, less their value when redelivered to plaintiff.—McKahan v. American Express Co., 95 N.E. 785, 209 Mass. 270, 35 L.R.A.,N.S., 1046, Ann Cas 1912B 612.

Shrinkage and depreciation in market value are proper elements of damage for injury to live stock.—Panhandle & S. F. Ry. Co. v. Harp, Tex Civ App., 193 S.W. 438.

Physical injury caused by delay

(1) Measure of damages applied in actions for negligent injury while a consignment is in transit, which is the difference between market value of goods at time and place of delivery in an uninjured condition, and value in depreciated condition in which they were delivered, should be applied in an action for loss in quality and quantity in corn, alleged to be due to heating and spoiling because of delay in transit.—Mueller Grain Co v Lake Erie & W. R. Co., 213 Ill App. 108.

(2) The damage to live stock for delay in shipment is difference between market value of live stock in condition they were when delivered at destination and market value in condition they would have been in if delay had not occurred, rather than expense of reproducing weight lost, irrespective of whether live stock were intended to be immediately sold or to be kept for fattening.—Kurn v. Westheimer & Daube, Okl., 73 P 2d 835.

(3) If depreciated condition of stock resulted from carrier's delay in shipment, damages to shipper would be difference between market value at time of actual sale and at time stock should have been delivered.—Jakway v. Lehigh Valley R. Co., 98 Pa.Super. 300.

(4) Measure of damages to shipment of goods is difference between market value on day received and on day when shipment should have been received.—Swift & Co v. Texas & P. Ry. Co., 6 La.App. 7

Advance in price

(1) Where the goods are both damaged and delayed in transit, and during the delay the market price has risen so that the increased value through the rise in price is greater than the diminution through the injury, the shipper may recover damages resulting from the injury; the carrier cannot be exempt from the consequences of his own wrong by an advance in price.—Conover v. Wabash Ry. Co., 208 Ill.App. 105

(2) That market price of cotton when delivered to consignee is higher than it was when delivery should have been made does not affect carrier's liability for damage to the cotton by the wetting thereof while in its possession.—Missouri Pac. R. Co. v. W. M. Smith & Co., 265 S.W. 64, 165 Ark. 546

Under the Cummins-Carmack amendment to Interstate Commerce Act making carrier liable for the "full actual loss damage, or injury," the rule is the same as stated in the text.

Ind.—Cleveland, C., C. & St. L. Ry. Co v. Stormont, 187 N.E. 838, 99 Ind App. 61.

Mo.—Carpenter v. Hines, App., 239 S.W. 593.

26. Ky.—Gus Datillo Fruit Co. v. Louisville & N. R. Co., 11 S.W.2d 953, 226 Ky. 813.

Mo.—Morrow v Wabash Ry. Co., 265 S.W. 851, 219 Mo App. 62.

27. Ga.—Southwestern R. Co. v. Davies, 186 S.E. 899, 53 Ga.App. 712.

a circumstance in determining the market value of the property in its damaged condition.

Where goods were rejected by the consignee, and when tendered back to the shipper by the carrier were practically worthless, the shipper is entitled to recover their full value[28] So, where goods are shipped with directions to return in a specified time if not delivered, and the carrier fails to deliver or return the goods within a reasonable time, and because of the carrier's negligence they become practically worthless, the carrier is liable to the shipper for the depreciation in value.[29]

Whether freight charges which have been paid can be recovered as a part of the damages is discussed infra § 272. The effect of stipulations in the contract of shipment fixing the value of the property or the mode of computation thereof is discussed supra § 113.

b. Extent and Limits of Rule in General

(1) In case of loss
(2) In case of injury

(1) In Case of Loss

The rule as to the measure of damages for loss of property shipped applies both in actions of tort and in actions based on breach of contract; and its operation is not affected by the fact that the shipper was permitted to substitute other animals in place of those lost, or that the live stock was to be kept for use and was not intended for sale.

The rule stated above in respect of the amount recoverable in case of loss applies both in actions of tort and in actions based on a breach of the contract of shipment;[30] and the operation of the rule is not affected by the fact that the shipper was permitted to substitute animals other than those shipped in the place of those which were lost at a junction point on the route,[31] or that the stock shipped was to be kept for use and was not to be sold.[32]

(2) In Case of Injury

The rule as to the measure of damages for injury to property shipped applies irrespective of the character of the property or the use for which it is intended. Other circumstances connected with the shipment may or may not change or limit the rule.

The rule stated above as to the amount recoverable in case of injury applies irrespective of the character of the property,[33] or the purposes for which it was intended,[34] as for instance by the fact that the property was not intended to be placed on the market as soon as it reached its destination, but was shipped there for the purpose of getting it in condition for sale at that place,[35] or by the fact that the property shipped was intended to be kept for use and not for sale,[36] nor is the operation of the rule affected by the fact that the shipment was quarantined and sold at some place other than that of its destination because of the carrier's negligence,[37] that the property was taken for transportation to a point beyond defendant's line,[38] that each of several carriers over whose lines the property passed limited its liability to its own line,[39] that none of the carriers transported the property to the place of final destination,[40] that the carrier charged a reduced rate in consideration of an exemption from its liability as insurer, injury to the property

28. Miss.—American Ry. Express Co. v. Roby, 91 So. 449, 129 Miss. 120.

29. Miss.—American Ry. Express Co. v. Pitts, 91 So. 570, 128 Miss. 875.

30. Ala.—Southern R. Co. v. Hatter & Son, 51 So 723 165 Ala. 423.
10 C.J. p 397 note 81.

31. Tex.—El Paso, etc., R. Co. v. Lumbley, 120 S.W. 1050, 56 Tex. Civ.App. 418.

32. Tex.—Gulf, etc., R. Co. v. Gillespie, 118 S.W. 628, 54 Tex.Civ. App. 593.

33. Va.—Southern Express Co. v. Jacobs, 63 S.E. 17, 109 Va. 27.

34. Tex.—Gulf, etc., R. Co. v. Stanley, 33 S.W. 109, 89 Tex. 42—Texas & N. O. R. Co. v. Miller Bros., Civ.App., 22 S.W.2d 989—Pecos, etc., R Co v. Holmes, Civ App., 177 S.W. 505.

Whether or not property was intended for market does not affect rule—American Ry. Express Co. v. McDaniel, Tex Civ App., 20 S.W 2d 1104.

35. Tex.—Panhandle & S F. Ry. Co v. Norton, Civ App., 188 S.W. 1011.
10 C.J. p 397 note 89

Live stock intended for pasture

(1) The measure of damages for negligent injury of cattle in transit is the same, whether they are for immediate sale on the market or for pasture.—Panhandle & S. F Ry. Co. v. Norton, Tex Civ App., 188 S W. 1011.

(2) Reduced market value of cattle at destination resulting from carrier's negligence is test of recovery, although cattle were not intended for market but were to be put in pasture—Texas & N O. R. Co v. Miller Bros., Tex.Civ App, 22 S W. 2d 989—Texas & N. O R. Co v Miller Bros, Tex Civ App., 22 S W. 2d 988—Panhandle & S. F. Ry Co. v. Morrison, Tex Civ App, 191 S W. 138.

36. Tex.—Gulf, etc, R Co. v. Gillespie, 118 S W. 628, 54 Tex.Civ. App. 593

37. Tex.—St. Louis, etc., R. Co. v. Adams, 118 S.W. 1155, 55 Tex.Civ. App 245.

38. Ky.—Illinois Cent. R. Co. v. Curry, 106 S.W. 294, 127 Ky. 643, 32 Ky L 513.
Tex.—Missouri, etc, R. Co. v. Mulkey, Civ App., 159 S W. 111.
10 C J. p 397 note 92.

Diversion of shipment

Damages to mules shipped to market resulting from injury and delay by the initial carrier should not be estimated from their market value at the point for transfer to a connecting carrier, where because of their damaged condition the shippers diverted them to parties at another destination, but from their market value at the destination to which they were originally billed, and when they would have reached that place by ordinary diligence.—Lancaster v. Rogers & Adams, Tex Civ.App, 235 S W. 643, affirmed, Com.App., 248 S. W 660.

39. Tex.—Gulf, etc., R. Co. v. Houghton, Civ.App, 68 S W. 718.

40. Tex.—Gulf, etc., R Co. v. Houghton, supra.

having been sustained by the carrier's negligence,[41] or that the shipper repaired the injury without cost to the consignee, where such repairs were not made for the benefit of the carrier.[42] Where plaintiff made no objection to the fixing of the cost of repairs as the measure of damages to an article damaged in transit he will be deemed to have acquiesced in the assumption that the repairs restored the article to its former value.[43]

The general rule is not changed in the case of injury to cattle by the fact that, after their arrival at destination, they were fattened and treated by a veterinarian, so that their value was enhanced,[44] or that they were shipped for immediate slaughter, and not for the purpose of resale;[45] and the fact that live stock injured by dipping in crude oil recovered from such injury does not preclude the owner from recovery for any depreciation in value caused thereby.[46] Where the shipper elects to accept delivery of the goods shipped at some point short of the destination named in the contract of shipment, and the goods are injured in transportation, he may recover the difference in the value of the goods as delivered and what they would have been worth at the place of delivery if they had not been injured in transportation.[47] While, ordinarily, the measure of damages where live stock is injured is the difference between their value before and after their injury, yet, where the shipper refused to accept the injured live stock and the carrier sold it and retained the proceeds, the measure of damages is the difference between the market value of the stock before and after injury plus the proceeds of the sale, less necessary expenses.[48] Where live stock is injured and unloaded at an intermediate point, and kept there for several weeks to recondition, and is then reshipped to the point of destination, the measure of damages for the injury is the difference between the value of the stock when it should have been delivered and when actually delivered,[49] plus the cost of reconditioning and the expense of reshipment, infra § 266, less any unpaid freight charges, infra § 272. Where it is impossible to identify and value separately such of a shipment of cattle as died in transit, their value may be fixed at a general average price, considering as a basis the cattle that arrived at destination.[50] It has been held that where goods are sold in their damaged condition the measure of damages is the difference between the contract price and the market price, and not the difference between the sale price and market price had the goods been delivered in good condition.[51] It has also been held that a shipper can recover, for injury to goods in transit, the same amount received by him on a sale of the undamaged part of the shipment, less the sum for which the damaged part was sold, as stated infra § 271; but goods which were damaged when delivered to the carrier should not be included in the amount of recovery.[52] A carrier is not liable to a shipper for a loss, caused by market conditions, on undamaged goods which were sold with the damaged goods at a uniform price per pound.[53]

c. Where Property Has No Market Value

Where property lost in transit has no market value, the measure of damages is the actual loss to the owner. In case of injury to such property the measure of damages is the diminution of their reasonable value to the owner.

41. Mo.—Blackmer, etc., Pipe Co. v. Mobile, etc., R. Co., 119 S.W. 1, 137 Mo.App. 479.

42. N.C.—Little v. Atlantic Coast Line R. Co., 85 S.E. 18, 168 N.C. 658.

43. Ark.—St. Louis Southwestern Ry. Co. v. Tucker, 255 S.W. 553, 161 Ark. 140.

Reasonable expense

Where the sum expended for repairs to an article damaged in transit by a carrier was less than the difference between the market value of the article in its damaged and restored condition, the sum thus expended was not unreasonable.—St. Louis Southwestern Ry. Co. v. Tucker, 255 S.W. 553, 161 Ark. 140.

44. Cal.—Murray v. Southern Pac. Co., 265 P. 337, 89 Cal.App. 741.

45. Or.—Carstens Packing Co. v. Southern Pac. Co., 292 P. 89, 134 Or. 53.

46. Tex.—Missouri, etc., R. Co. v. Cauble, Civ.App., 174 S.W. 880.

47. Kan.—St. Louis, etc., R. Co. v. Lieurance, 102 P. 842, 80 Kan. 424.

48. Ky.—Rankin v. Cincinnati, etc., R. Co., 173 S.W. 377, 163 Ky. 183.—Cincinnati, etc., R. Co. v. Rankin, 157 S.W. 926, 154 Ky. 549, 156 S.W. 400, 153 Ky. 730, 45 L.R.A.,N.S., 529.

49. Mo.—Morrow v. Wabash Ry. Co., 265 S.W. 851, 219 Mo.App. 62.

50. Ark.—Bush v. Altschul, 193 S.W. 280, 128 Ark. 103.

51. Ark.—American Ry. Express Co. v. Cole, 37 S.W.2d 699, 183 Ark. 557.

52. La.—H. P. Richard & Sons v. Director General of Railroads, 107 So. 891, 160 La. 1019.

53. La.—American Trading Co. of New Orleans v. New Orleans & N. E. R. Co., 105 So. 82, 159 La. 9.

On the same principal where, at the carrier's request, the shipper accepted the damaged goods for salvage only, the carrier was not liable for that part of the shipment which arrived at destination in good condition, but was salvaged with the general damaged lot.—Norfolk & W. Ry. Co. v. Keystone Packing Co., 195 N.E. 403, 49 Ohio App. 136.

Measure of damages

Where exact value of damaged sugar at time of sale with undamaged sugar at uniform price per pound, cannot be ascertained, and shipper's failure to show greater loss was due to his own action in selling sugar as whole, damages will be allowed against carrier in amount of difference between contract price of sugar and amount actually realized from sale of damaged sugar, carrier not being entitled to complain because price obtained was greater than if such sugar had been sold separately.—American Trading Co. of New Orleans v. New Orleans & N. E. R. Co., 105 So. 82, 159 La. 9.

Where goods lost in transportation have no market value in the ordinary acceptation of the term, such for instance, as second-hand wearing apparel, household goods, etc., compensation for the actual loss is the fundamental principle on which the measure of damage rests.[54] The amount to be awarded as damages is ordinarily the actual value of the goods lost to the owner,[55] considering their cost, the practicability and expense of replacing them, and such other conditions as affect their value to the owner,[56] and not what the goods might bring if sold as second-hand goods,[57] or merely nominal damages,[58] since the latter basis of estimating damages, it is said, would be most unjust, as the amount awarded would then depend largely on circumstances which would have nothing to do with the intrinsic value of the articles or their actual worth to the owner.[59] The fact that the owner of the lost property had presented a claim for a certain sum did not estop him from recovering his actual loss, where there had been no payment in satisfaction of the claim.[60] However, the owner is not entitled to recover some fanciful or sentimental value which he might place on the lost goods, but should recover only such reasonable damage as from the nature of the goods or the nature of their use to him he has sustained by their loss.[61] Circumstances of inconvenience to the owner resulting from loss of the use of the property cannot be included.[62]

In case of injury. The measure of damages to used household goods injured in transit is not their decreased market value, but is the diminution of their reasonable value to the owner,[63] excluding sentimental or imaginary value;[64] and this rule applies although the goods were bequeathed to plaintiff and it was unnecessary to replace them because of his possession of other such goods.[65]

d. Where Property Has No Market Value at Destination

Where property has no market value at destination the measure of damages for its loss or injury is its intrinsic or actual value, and not its value at the nearest market, although some authorities have held that the measure of damages is fixed by the market value at the nearest market.

Where there is no market value for the property at the point of destination, the intrinsic or actual value is the basis for determining the amount of damages sustained by reason of loss of, or injury to, such property,[66] and not its market value at the

54. Pa.—Lloyd v. Haugh & Keenan Storage & Transfer Co., 72 A. 516, 223 Pa. 148, 21 L.R.A.,N.S., 138.
10 C.J. p. 398 note 3.

Corpus Juris is quoted in Davis v. Rhodes, 266 S.W. 1091, 1092, 206 Ky. 340, in support of this and the following statements.

55. N.C.—McRary v. Southern Ry. Co., 94 S.E. 107, 174 N.C. 563.
Tex.—American Ry. Express Co. v. Thompson, Civ.App., 2 S.W.2d 493.
10 C.J. p. 398 note 4.

Corpus Juris is cited as an authority in Shikany v. Salt Creek Transp. Co., 45 P.2d 645, 649, 48 Wyo. 190.

Fraudulent claim

Claim of five thousand three hundred eight dollars and forty-three cents against railroad for loss of coal miner's household goods, who received average monthly wage of one hundred forty-one dollars and thirteen cents, and was sole bread winner of family of eight, living in three rented rooms, was held fraudulent on its face.—Louisville & N. R. Co. v. Birochik, 269 S.W. 720, 207 Ky. 595.

56. Ky.—Davis v. Rhodes, 266 S.W. 1091, 206 Ky. 340.
La.—Flann v. House, 123 So. 406, 11 La.App. 469.
Pa.—Patterson v. Union Transfer Co., 84 Pa.Super. 273.
10 C.J. p. 398 note 5.

High explosive shells

Measure of damages to shipper for loss of interstate shipment of high explosive shells in February 1916, was held the actual value thereof at time and place of delivery, determined by cost of replacement or price for which similar shells could be manufactured by it with expenses reasonably incurred in procuring new contract, there being no market value, properly speaking, while purchase price was not decisive nor profits material on question of actual value.—Woonsocket Machine & Press Co. v. New York, N. H. & H. R. Co., 131 N.E. 461, 239 Mass. 211.

57. Ky.—Davis v. Rhodes, 266 S.W. 1091, 206 Ky. 340.
10 C.J. p. 398 note 6.

58. Ala.—Southern Express Co. v. Owens, 41 So. 752, 146 Ala. 412, 119 Am.S.R. 41, 8 L.R.A.,N.S., 369, 9 Ann.Cas. 1143.

59. Ill.—Parmelee v. Raymond, 43 Ill.App. 609.
Ky.—Davis v. Rhodes, 266 S.W. 1091, 206 Ky. 340.
Mass.—Wall v. Platt, 48 N.E. 270, 169 Mass. 398.
Okl.—St. Louis, etc., R. Co. v. Dunham, 129 P. 862, 36 Okl. 724.

60. N.C.—McRary v. Southern Ry. Co., 94 S.E. 107, 174 N.C. 563.

61. Ky.—Davis v. Rhodes, 266 S.W. 1091, 206 Ky. 340.
Pa.—Patterson v. Union Transfer Co., 84 Pa.Super. 273.
Tex.—Hines v. Warden, Civ.App., 229 S.W. 957—Quanah, A. & P. Ry. Co. v. Novit, Civ.App., 199 S.W. 496.
10 C.J. p. 399 notes 10, 11.

Corpus Juris is cited as an authority in Shikany v. Salt Creek Transp. Co., 45 P.2d 645, 649, 48 Wyo. 190.

"Real value to owner" and "owner's valuation" are not convertible terms. Where there is no market value, true measure of damages is actual value to the owner, not any fanciful or imaginary value, but the value of the articles in money to him.—Patterson v. Union Transfer Co., 84 Pa.Super. 273.

62. Ky.—Adams Express Co. v. Hoeing, 9 Ky. L. 814—Chesapeake, etc., R. Co. v. Webb, 8 Ky.L. 44.
Tex.—Missouri Pac. R. Co. v. Hewett, 2 Tex.A.Civ.Cas. § 273.

Rental value of property lost is not recoverable.—Missouri Pac. R. Co. v. Hewett, 2 Tex.A.Civ.Cas. § 273.

63. Tex.—Empire Transfer & Storage Co. v. Botto, Civ.App., 232 S.W. 347.
10 C.J. p. 399 note 13.

64. Ky.—Davis v. Rhodes, 266 S.W. 1091, 206 Ky. 340.

65. Ky.—A. Arnold & Son Transfer & Storage Co. v. Weisiger, 6 S.W.2d 1084, 224 Ky. 659.

66. N.M.—Diamond X Land & Cattle Co. v. Director General of Railroads, 205 P. 267, 27 N.M. 675.
Tex.—Kansas City, M. & O. Ry. Co. of Texas v. Moore, Civ.App., 11 S.W.2d 335—Panhandle & S. F. Ry. Co. v. Snodgrass, Civ.App., 278 S.W. 337—Schaff v. Farmer & Son, Civ.App., 243 S.W. 622.
10 C.J. p. 399 note 14.

nearest market;[67] but it has been held that where the injured property has no market value at the point of destination, the measure of damages is fixed by the market value at the nearest market.[68]

Where there is no market value for injured animals, the measure of damages is the difference between their market value had they arrived at destination without injury and their real or intrinsic value in the condition in which they did arrive.[69]

e. Where Property Is Shipped for Sale or Sold in Transit for Stipulated Price

Where property is shipped for sale at a specified price or is sold in transit, the damages recoverable are based on the contract price or on the market value at destination, according to the circumstances of the case.

Where goods are shipped in pursuance of a sale thereof at a stipulated price which is less than the market price at destination, damages for loss or injury must be estimated on the basis of the price to be received under the contract of sale,[70] but if the price contracted for is greater than the market value at destination, the estimate must be based on the market value, unless the carrier had been notified at the time of shipment of the fact that the goods had been sold for a higher figure.[71]

It has been variously held that the measure of damages for injury to goods by a carrier is the difference between the contract price and the price the shipper received from a sale of the property in its damaged condition,[72] that the measure of damages for delivery of goods in an unsalable condition, without knowledge on the part of the carrier of a special price fixed therein at such point, was the market value of the goods at the time of their arrival at destination;[73] that where goods damaged in transit were worth more at the point of destination than the price contracted for, and after the loss the consignor manufactured more to replace the loss, the carrier's liability for damages was measured by the cost of manufacturing the goods to replace the loss, rather than by either the market value or the contract price, although such liability could not in any event be less than the contract price,[74] and that where the shipper had sold the goods to the consignee at the place of shipment at a price which was the market price at that place, he was entitled to recover the difference between the contract price of the goods and their market value in their damaged condition at destination, where he was notified of their nonacceptance by the consignee.[75]

Where goods shipped under a contract of sale are damaged in transit while the title is still in the shipper, the latter could sue the carrier and recover as damages the contract price, less the value of the damaged goods; and where the purchaser pays the draft attached to the bill of lading and sues the carrier for damages to the shipment, he can recover only what the shipper could have recovered.[76]

Where animals were sold at a way point before reshipment, the shipper is entitled to recover the difference between the sale price and the market value of the entire shipment at destination in good condition, in the absence of a showing that so many were uninjured as to necessitate separation of the

67. Tex—Missouri, etc, R. Co. v. Wasson, 126 S.W. 664, 59 Tex Civ. App 239.

68. Ill—Pennsylvania R Co v John Anda Co, 131 Ill App 426.
Ky.—Gus Datillo Fruit Co. v. Illinois Cent R. Co, 299 S.W. 1089, 222 Ky. 41.

69. Tex—Davis v Cochran, Civ. App, 275 S W. 423—Gulf, C & S F. Ry Co v. Helms Bros., Civ App, 210 S.W 853

70. Tex.—Missouri, K. & T Ry Co of Texas v. Witherspoon, 45 S W. 424, 18 Tex Civ.App 615.

Option to purchase

Where an owner of goods ships them consigned to another, giving the consignee an option to take and pay for them at a price fixed or to return them, in an action against the carrier for their loss, the measure of damages is not the market value at the place of destination, but at most the price fixed with interest from a day when the goods, in the usual course of carriage, would have reached the consignee and have been accepted—Mangin v Dinsmore, 62 N. Y 35, 20 Am R. 442

71. Ark—Gibson v Inman Packet Co, 164 S W. 280, 111 Ark. 521
Tex—Missouri, K & T. Ry. Co of Texas v Witherspoon, 45 S.W. 424, 18 Tex Civ App. 615
10 C J p 399 note 17.

72. Ark.—St. Louis-San Francisco Ry. Co. v. Greig & Smith, 31 S W 2d 290, 182 Ark. 261—Chicago, R I. & P Ry. Co. v. Burkholder & Tuggle, 195 S.W 1073, 129 Ark 316
Tex.—Coulter v. Gulf, C & S F. Ry Co., Civ App., 248 S W. 788.

Best sale price at destination

Shipper's damages for machine broken in transit was difference between price and best sale price at destination after damage thereto—Gibs-Land Oil Mills & Fertilizer Co. v. Louisiana & N. W. R. Co., 111 So 169, 162 La. 801.

Sale in transit

In action against railroad for damage to car of tomatoes which shipper had sold as in good condition at certain price prior to their arrival, and which because of damage shipper was compelled to sell at lower price, measure of damages was difference between what shipper would have received and what he did receive, and not difference between market price had tomatoes arrived in good condition and their market value as damaged.—Southern Pac R Co of Mexico v. Gonzalez, Ariz, 61 P 2d 377.

73. Tex.—American Ry. Express Co. v McDaniel, Civ App, 20 S W.2d 1104.

74. Mo—Bernet, Craft & Kauffman Milling Co v. New York, C. & St. L R Co., App, 260 S W. 508

75. Utah—Wilson v. Hines, 196 P. 1007, 58 Utah 38.

76. S.C.—M C Johnson Motor Co. v. Payne, 107 S.E 252, 116 S C. 171.

shipment and the forwarding of the uninjured animals.[77]

Under the Cummins amendment to the Interstate Commerce Act, providing for the recovery of the "full actual loss," it has been held that a shipper's measure of damages for the loss of property which was sold by him in transit, and reconsigned to the purchaser, is the market value of the property at the point of origin or at destination, less unpaid freight, but not exceeding the price for which the property had been sold.[78]

§ 265. Interest and Costs

a. Interest
b. Attorney's fees

a. Interest

Interest is ordinarily recoverable as part of the damages for loss of, or injury to, property by a carrier, although in some cases the allowance has been held to be within the discretion of the court or jury.

Although there is some authority to the contrary, a plaintiff who recovers for the loss of, or injury to, property shipped ordinarily is entitled, as a part of his damage, to interest,[79] to be computed, in an action for loss of property, from the date of the loss, that is, from the time when the property should have been delivered,[80] or, in an action for injury to the property, from the date of the injury.[81]

Other cases have held that interest is allowable from the date the suit for the injuries was instituted,[82] from the date of shipment,[83] from the date of demand;[84] or from the time the goods arrived at destination to the time of trial, and not merely from the time the written notice required by the bill of lading was filed.[85]

The allowance of interest, according to some authorities is within the discretion of the court[86] or of the jury.[87]

77. Mo.—Morrow v. Wabash Ry. Co., 276 S.W. 1030, 220 Mo.App. 518.

78. Mo.—Forest Green Farmers' Elevator Co. v. Davis, 270 S.W. 394, 216 Mo.App. 545.

79. Fla.—Atlantic Coast Line Ry. Co. v. Roe, 118 So. 155, 96 Fla. 429.
Mo.—Ford v. Wabash Ry. Co., 300 S.W. 769, 318 Mo. 723, affirming, App., 266 S.W. 1032.
Okl.—Midland Valley R. Co. v. Price, 260 P. 26, 127 Okl. 106.
S.C.—Copeland Co. v. Davis, 119 S.E. 19, 125 S.C. 449.
Tex.—Gulf, C. & S. F. Ry. Co. v. McCarty, 18 S.W. 716, 82 Tex. 608—Norris v. Lancaster, Com.App., 280 S.W. 574, reversing Lancaster v. Norris, Civ.App., 271 S.W. 401—Galveston, H. & S. A. Ry. Co. v. Standard Rice Co., Civ.App., 34 S.W.2d 619, error dismissed—St. Louis Southwestern Ry. Co. v. Texas Packing Co., Civ.App., 253 S.W. 864—Ft. Worth & R. G. Ry. Co. v. Albin, Civ.App., 185 S.W. 647.

Certainty of claim

(1) Where carrier's liability was limited by bill of lading to value of goods at time and place of shipment, the shipper in case of partial loss could recover interest on claim under Civ.Code § 3287, the claim being capable of being made certain.—Olcovich v. Grand Trunk Ry. Co. of Canada, 176 P. 459, 179 Cal. 332.

(2) Where plaintiff was entitled to damages for live stock killed, and the expense of burying them, one of the items being fixed, and the other determinable by a fixed standard, interest may be recovered prior to the date of the judgment.—Midland Valley R. Co. v. Price, 260 P. 26, 127 Okl. 106.

Contrary minority rule

Kan.—Wallingford v. Atchison, T. & S. F. Ry. Co., 167 P. 1136, 101 Kan. 544, L.R.A.1918B 716—Stevens-Scott Grain Co. v. Atchison, etc., R. Co., 149 P. 744, 96 Kan. 1, rehearing denied in 150 P. 524, 96 Kan. 183.

80. U.S.—Lehigh Valley R. Co. v. State of Russia, C.C.A.N.Y., 21 F.2d 396, certiorari denied 48 S.Ct. 159, 275 U.S. 571, 72 L.Ed. 432.
Ill.—Chicago & N. W. R. Co. v. Ames, 40 Ill. 249.
Iowa.—Robinson Bros. & Gifford v. Merchants' Despatch Transp. Co., 45 Iowa 470.
Tex.—International & G. N. Ry. Co. v. Reed, Civ.App., 203 S.W. 410—Missouri Pac. R. Co. v. Hewett, 2 Tex.A.Civ.Cas. § 273.
Vt.—Blumenthal v. Brainerd, 38 Vt. 402, 91 Am.D. 349
10 C.J. p. 400 note 29.

Corpus Juris is cited in support of this rule in Southern Pac. Co. v. Haug, 182 P. 92, 96, 43 Nev. 102.

In Georgia

(1) Where a suit is for the total loss or destruction of the whole shipment or of a specific, definitely ascertained part thereof, caused by unreasonable delay, the owner thereof, in recovering the market value of the goods at destination, is entitled to interest therein from the time they should have been delivered.—Louisville & N. R. Co. v. Lovelace, 106 S.E. 6, 26 Ga.App. 286.

(2) Where the value of lost property proved was invoice price of staple merchandise fluctuating very little in price, the jury was authorized to include interest.—Atlantic Coast Line R. Co. v. Stovall-Pace Co., 118 S.E. 62, 30 Ga.App. 326.

(3) On the other hand, it has been held that a shipper's action to recover damages for partial destruction of shipment of eggs, being one in tort, a verdict for interest on the amount found was contrary to law.—Southern Express Co. v. Bass, 102 S.E. 168, 24 Ga.App. 742.

81. Tex.—Gulf, C. & S. F. Ry. Co. v. Morrow, Civ.App., 66 S.W.2d 481, error dismissed—Galveston, H. & S. A. Ry. Co. v. Standard Rice Co., Civ.App., 34 S.W.2d 619, error dismissed—Texas, etc., R. Co. v. Erwin, Civ.App., 180 S.W. 662.

82. Mo.—Ford v. Wabash Ry. Co., 300 S.W. 769, 318 Mo. 723, affirming, App., 266 S.W. 1032—Dunn v. Hannibal & St. J. R. Co., 68 Mo. 268.

83. Mo.—Goodman v. Missouri, etc., R. Co., 71 Mo.App. 460.

84. La.—H. P. Richard & Sons v. Director General of Railroads, 107 So. 891, 160 La. 1019.
Neb.—N. H. Nelson & Co. v. Chicago & N. W. Ry. Co., 167 N.W. 574, 102 Neb. 439.

85. Vt.—Haglin-Stahr Co. v. Montpelier & W. R. R. Co., 102 A. 940, 92 Vt. 258

86. Tenn.—West Const. Co. v. Seaboard Air Line Ry. Co., 210 S.W. 633, 141 Tenn. 342.

Interest on cost of repairs

In an action against a carrier for damages to an asphalt plant in transit, it was within the discretion of the chancellor to allow interest on cost of repairs paid by complainant recovery of which was sought from carrier.—West Const. Co. v. Seaboard Air Line Ry. Co., 210 S.W. 633, 141 Tenn. 342.

87. N.Y.—Black v. Camden & Amboy R. & Transp. Co., 45 Barb. 40
10 C.J. p. 400 note 31.

In some cases it has been held that no interest is allowable except where the loss or injury was due to the carrier's misconduct or fraud.[88]

The right to interest as an element of damages may be waived.[89]

b. Attorney's Fees

The right to an allowance of attorney's fees in an action for loss of, or injury to, property shipped is governed by statute.

The allowance of attorney's fees as costs in an action against a carrier for loss of, or injury to, property transported depends upon the statutes, and statutes authorizing such allowance have been held valid.[90] The Interstate Commerce Act relating to the allowance to a shipper of an attorney's fee applies only to suits based on orders of the interstate commerce commission and does not authorize the allowance of such fees in an action for loss or damage to property in shipment.[91]

§ 266. Incidental Damages

A carrier is liable for incidental damages naturally and proximately arising from the loss of, or injury to, property in its possession for transportation, including expenses reasonably and necessarily incurred by the plaintiff.

In addition to the damages heretofore considered, the carrier is also liable for any other and incidental damages which naturally and proximately result from the loss or the injury complained of,[92] including any expense reasonably and necessarily incurred by plaintiff,[93] such as the expense of reconditioning or putting in salable condition damaged

Where value of goods was not fixed by agreement or by operation of law, allowance of interest was within discretion of jury —Atlantic Coast Line R Co v. Henderson Elevator Co, 88 S E. 101, 18 Ga App 279.

88. Tex.—Fowler v. Davenport, 21 Tex 626.
10 C J. p 400 note 32.

In cases of gross negligence interest may be allowed from date goods should have been delivered —Gray v. Missouri River Packet Co., 64 Mo. 47

89. Tex —Norris v Lancaster, Com. App., 280 S.W. 574, reversing on other grounds Lancaster v. Norris, Civ.App, 271 S.W. 401.

Failure to ask an instruction on the question of interest as item of damages for injured shipment of vegetables waives the right to such interest.—Norris v. Lancaster, Tex. Com App., 280 S.W. 574, reversing on other grounds Lancaster v. Norris, Civ.App, 271 S.W. 401.

90. **In Kansas**
(1) Rev St 66—259, 66—305, making railroad company liable for reasonable attorney's fee when sued for shortage of grain shipped, after failure to pay or deliver on demand is valid exercise of police power —Baalmann v. Union Pac. R. Co., 235 P. 1062, 118 Kan. 540.

(2) That person suing railroad company for shortage of grain shipped recovered smaller sum than stated in demand does not defeat allowance of attorney's fee under the statute, where company resisted payment of entire loss and did not tender any amount nor base its refusal to comply with demand on ground that it was excessive.—Baalmann v. Union Pac R. Co., supra.

(3) In action by shipper against railroad company for damages to shipment, attorney's fee of seventy dollars held not unreasonable.—Case v. Union Pac. R. Co, 241 P. 693, 119 Kan. 706.

In Nebraska
(1) The allowance of attorney's fees in actions against carriers is in the nature of reimbursement of costs, and the law authorizing it is not unconstitutional as providing a penalty —Eckman Chemical Co. v. Chicago & N. W Ry. Co, 185 N W. 444, 107 Neb. 268—Nye-Schneider-Fowler Co. v Chicago & N W. Ry Co, 179 N.W. 503, 105 Neb. 151

(2) An allowance of attorney's fees, under a state statute providing that if a claim against a carrier is not adjusted within a certain time claimant shall, if successful, be allowed a reasonable attorney's fee, is proper, even though the shipment is an interstate one —Marsh & Marsh v. Chicago & N. W. Ry. Co, 173 N. W 679, 103 Neb. 654.

In Texas
(1) Under a statute allowing attorney's fees where a claim for lost or damaged freight is not paid within a designated time after presentment, the allowance to holder of claim for lost or damaged freight, for statutory attorney's fees, is limited to reasonable attorney's fees, not exceeding twenty dollars, where attorney is actually employed —Gulf, C. & S. F Ry Co. v. Pearlstone Mill & Elevator Co, Tex.Com App, 53 S W.2d 1001, reversing, Civ.App, 37 S.W 2d 299

(2) Holder of claim, to be entitled to statutory attorney's fees, must obtain judgment for full amount of claim as presented —Gulf, C. & S. F Ry. Co. v Pearlstone Mill & Elevator Co, supra.

(3) Claimant is not entitled to attorney's fee in action for death of cattle caused by carrier's negligence, where there was no evidence that claim was presented to carrier.—Texas & N. O R Co. v Houston, Tex. Civ.App, 38 S W.2d 882.

91. U S —Missouri Pac. R Co v. Harper, Ill., 201 F. 671, 121 C.C A 570

92. N J —Heidritter Lumber Co. v Central R Co of New Jersey, 122 A 691, 100 N.J Law 402, 1 N J Misc. 185, affirmed 125 A 926, 100 N.J Law 402.
Tex.—Davis v. Standard Rice Co., Civ App, 293 S W 593.
10 C.J p 400 note 38

93. N Y —Porter v Pennsylvania R Co., 215 N Y S 727, 217 App Div 49
Tex.—Davis v Cochran, Civ App, 275 S W 423—Ft. Worth & D. C Ry Co. v. Hill, Civ.App, 213 S W 952

Corpus Juris is cited in Morrow v Wabash Ry. Co, 265 S W 851, 854, 219 Mo App 62, in support of the general rule as to recovery of expenses incurred by the shipper.

Particular expenses recoverable
(1) Shippers' expenses in reshipping damaged grain to nearest point at which it could be cleaned and prepared for market, including freight charges and traveling expenses of caretaker, if reasonable in amount and necessary, are recoverable, not as special, but as consequential, damages —Panhandle & S F R Co v. Shell, Tex Civ App, 265 S W. 758.

(2) In an action against a carrier for the loss of a horse, the animal having died shortly after reaching destination, money expended by the owner to city scavengers for removing the carcass of the horse is recoverable.—Ft. Worth, etc, R Co. v. Jordan, Tex.Civ.App, 155 S W. 676.

(3) In determining the difference between what the shipper of cotton could have sold it for at the place of delivery, if delivered there in good condition, and what he could sell it for in its damaged condition, additional charges necessitated in reshipping the damaged cotton to a

goods or live stock.[94] So the owner's loss of the use of machinery during the time necessary to repair it has been held an element of damages.[95] It is not necessary to show that an item of expense due to the injury had actually been paid, it being sufficient to show that legal liability therefor had been incurred.[96]

However, expenses which are unreasonably or unnecessarily incurred,[97] or which are not definitely determinable,[98] are not recoverable; and where separate shipments became intermingled in transit the carrier is liable only for the reasonable cost of assorting the goods at final destination, regardless of the amount actually paid.[99] A carrier is not liable for expense incurred in discovering whether there has been injury.[1] It has been held that expense incurred in caring for injured live stock while recuperating could not be recovered in addition to the loss from shrinkage, since this would constitute double damages,[2] that, for the same reason, a shipper suing for injury to live stock cannot recover money paid for feed while the animals were recovering from the injury and also the difference in their market value had they arrived in good condition and their market value in their injured condition;[3] that a shipper recovering the value of dead cattle at the place of delivery was not entitled to recover the amount of freight paid on the dead cattle, since the freight charges entered into and became a part of the market value sued for and found by the jury;[4] that where the shipper recovered the value of live stock killed by the carrier's negligence he was not entitled to recover the amount expended in burning or otherwise disposing of the dead animals.[5]

So it has been held that, in an action for damages to animals in transit, the cost of feed and care after the injury had no proper place in applying the true measure of damages,[6] and that a shipper who has not paid charges for feeding is not entitled to

place where it could be marketed and for rehandling it were proper elements of damage.—Gibson v. Inman Packet Co., 164 S.W. 280, 111 Ark. 521, Ann.Cas.1916A. 1043.

(4) While contract of shipment of stock obligated plaintiff to pay feed bill at unloading station, such a provision would not prevent plaintiff from recovering the amount of feed bill paid by him, which became due as the result of carrier's negligence, and which arose by reason thereof, on the theory that the carrier could not contract against the result of its own negligence.—Johnson v. Wabash Ry. Co., Mo.App., 251 S.W. 719.

(5) Plaintiff may recover from the carrier any reasonable expense incurred in searching for, and regaining possession of, the goods, including a reward offered for their return. —Greenfield Bank v. Leavitt, 17 Pick., Mass., 1, 28 Am.D. 268.
10 C.J. p 401 note 39.

94. Cal.—Olcovich v. Grand Trunk Ry. Co. of Canada, 176 P. 459, 179 Cal. 332.
Tex.—Galveston, H. & S. A. Ry. Co. v. Standard Rice Co., Civ.App., 34 S.W.2d 619, error dismissed.
Wash.—Western Machinery Exchange v. Northern Pac. Ry. Co., 254 P. 248, 142 Wash. 675.
10 C.J. p 401 note 40.

Corpus Juris is quoted or cited in Davis v. Standard Rice Co., Tex.Civ. App., 293 S.W. 593, 597.—Panhandle & S. F. R. Co. v. Shell, Tex.Civ.App., 265 S.W. 758, 760.

Cost of reconditioning and shipping livestock

(1) Expenses of reconditioning mules occasioned by delay in putting them on market because of emaciated condition due to carrier's negligence was legitimate item of damage.—Collins v. Texas & P. Ry. Co., 123 So. 504, 11 La.App. 445.

(2) Where injured live stock was unloaded at an intermediate point and kept there several weeks for reconditioning, and then reshipped to the point of destination, the owner is entitled to recover, in addition to the difference in the value of the stock when it should have been delivered and when actually delivered, the cost of, reconditioning and the expenses of reshipment.—Morrow v. Wabash Ry. Co., 265 S.W. 851, 219 Mo.App. 62.

(3) Where animal has been killed or rendered worthless by injury in transit, a recovery may sometimes be had in excess of its value by reason of expenses of an unsuccessful, but reasonable, effort to restore it to usefulness, but this is true only of expenditures made in a just expectation of reducing carrier's liability by amount expended.—Kennedy v. Atchison, T. & S. F. Ry. Co., 181 P. 117, 104 Kan. 708, 5 A.L.R. 149, granting motion 179 P. 314, 104 Kan. 129, 368.

Private carrier was held liable for costs of reconditioning figs and fig paste damaged through its negligence and for freight to shipper's plant for reconditioning and returning merchandise to destination.—W. C. Cook & Co. v. White Truck & Transfer Co., 13 P.2d 549, 124 Cal. App. 721.

95. Wash.—Western Machinery Exchange v. Northern Pac. Ry. Co., 254 P. 248, 142 Wash. 675.

96. Ga.—Allen v. Southern Ry. Co., 126 S.E. 722, 33 Ga.App. 209.

97. Tex.—Ft. Worth & D. C. Ry. Co. v. Hill, Civ.App., 213 S.W. 952.

Expenses held unreasonable or unnecessary

(1) Judgment for shippers was held excessive to amount of claim for extra feed for live stock, where there was no evidence of its reasonableness.—Mourer v. Wabash Ry. Co., 280 S.W. 1050, 222 Mo.App. 495.

(2) In an action for injuries to machinery in transportation, plaintiff is not entitled to the expenses of maintaining and boarding three men for several days whom he had sent forward to set up the machine after he knew that it had been injured and before it had started finally for its destination.—Johnson & Swackhammer v. Lehigh Valley R. Co., 63 Pa. Super. 364.

98. La.—American Trading Co. of New Orleans v. New Orleans & N. E. R. Co., 105 So. 82, 159 La. 9.

99. Ala.—Inland Waterways Corporation v. Sloss Sheffield Steel & Iron Co., 136 So. 849, 223 Ala. 397.

1. U.S.—Western Mfg. Co. v. The Guiding Star, C.C.Ohio, 37 F. 641. N.Y.—Martin v. Delaware, etc., R. Co., 141 N.Y.S. 942.

2. Tex.—Ft. Worth & D. C. Ry. Co. v. Allen, Civ.App., 189 S.W. 765.

3. Tex.—Lancaster v. Whittle, Civ. App., 210 S.W. 334.

4. Tex.—Houston E. & W. T. Ry. Co. v. Southern Pine Lumber Co., Civ.App., 38 S.W.2d 156.

5. La.—Jennings v. Missouri Pac. R. Co., 134 So. 694, 172 La. 522.

6. Tex.—Gulf, C. & S. F. Ry. Co. v. Helms Bros., Civ.App., 210 S.W. 853.

add such charges to the value of the stock lost.[7] A shipper of live stock whose duty it is to see that a health certificate is procured and furnished to the carrier so that it may be attached to the waybill, is not entitled to damages resulting from the absence of the certificate.[8]

Where an interstate shipment of perishable goods was refused by the consignee because in bad condition, the shipper cannot, in a suit against the carrier, recover expenses incurred in sending a representative to inspect the goods at the point of destination.[9]

§ 267. Special Damages

Special damages are not recoverable in an action against a carrier for loss of, or injury to, property shipped, unless it had notice or knowledge of the peculiar circumstances from which such damages would flow; but, where the carrier had notice or knowledge of the circumstances, special damages may be recovered.

In an action for loss of, or injury to, goods shipped, only such damages are recoverable as were contemplated, or might reasonably have been contemplated, by the parties.[10] To authorize a recovery of such damages as would not ordinarily flow from the loss or injury, it is essential that at the time of shipment the peculiar circumstances from which special damages would arise because of such loss or injury should be made known to the carrier,[11] and this rule applies when it is sought to recover for loss of profits arising from the loss of the goods in transit.[12]

On the other hand, if the peculiar circumstances from which special damages would arise are made known to the carrier at the time that the property is delivered and accepted for transportation,[13] or if the carrier already knew, or in the exercise of ordinary care should have known, of the circumstances,[14] special damages are recoverable; and the

7. S.C.—Southern R. Co. v. Kimball, 88 S.E. 14, 103 S.C. 365.

8. Tex.—Little v. Dickey Bros., Civ.App., 38 S.W.2d 388, error dismissed.

9. Iowa.—E. H. Emery & Co. v. Chicago, B. & Q. R. Co., 170 N.W. 540, 186 Iowa 1156, rehearing denied 173 N.W. 12, 186 Iowa 1156.

10. Fla.—Florida East Coast Ry. Co. v. Peters, 83 So. 559, 77 Fla. 411.

Overhead expenses

In an action against a carrier for damage to an asphalt plant transported by it and wrecked in transit, no recovery could be had for overhead expenses due to the enforced idleness of plaintiff's workmen, such item of damages not being in contemplation of the parties.—West Const. Co. v. Seaboard Air Line Ry. Co., 210 S.W. 633, 141 Tenn. 342.

Loss of time

In action against railroad for value of goods lost and claim for loss of time, court properly sustained demurrer to latter claim.—Louisville & N. R. Co. v. Birochik, 269 S.W. 720, 207 Ky. 595.

11. Fla.—Florida East Coast Ry. Co. v. Peters, 83 So. 559, 77 Fla. 411. 10 C.J. p. 401 note 46

To make notice of the special circumstances sufficient to authorize recovery from a carrier for special damages, there must be imparted to the carrier information of such facts as will bring home to him the peculiar facts and conditions known to the shipper, which will entail on him a loss not ordinarily within the contemplation of the parties, if the shipment is lost.—Moss Jellico Coal Co. v. American Ry. Express Co., 248 S.W. 508, 198 Ky. 202.

Damages held not "special" within rule

(1) In an action by a shipper against a carrier for damages of hay while in transit, because of a leaky roof of the car in which the hay was shipped, expenses incurred in separating the good hay from that which had become worthless were not special damages within the rule requiring notice to the carrier in order to fix liability therefor.—Davis v. Clement Grain Co., Tex.Civ.App., 251 S.W. 545.

(2) Demurrage charges, which the shipper was compelled to pay while attempting to dispose of the damaged hay, were not special damages.—Davis v. Clement Grain Co., supra.

(3) In an action against a railroad for damages to dressed poultry shipped under a contract providing for computation of damages on the bona fide invoice price to consignee at the time and place of shipment, plaintiff was properly allowed damages computed on such basis, although he did not notify defendant that they would accrue, and did not plead them as required in order to recover special damages.—St. Louis Southwestern Ry. Co. v. Texas Packing Co., Tex.Civ.App., 253 S.W. 864.

12. Ky.—Moss Jellico Coal Co. v. American Ry. Express Co., 248 S.W. 508, 198 Ky. 202.

Notice insufficient

Notice to an express company that the shipper's mining plant could not be operated without the machinery shipped for repairs, without notice or knowledge that the plant would be operated, except for the lack of that machinery, or that it could be operated at a profit, is insufficient to charge the express company with liability for the loss of profits from the mine as special damages resulting from the loss of the machinery in shipment.—Moss Jellico Coal Co. v. American Ry. Express Co., 248 S.W. 508, 198 Ky. 202.

13. Ark.—Missouri Pac. R. Co. v. Burnett, 247 S.W. 1047, 157 Ark. 58, error and petition dismissed 44 S.Ct. 458, 266 U.S. 572, 583, 68 L.Ed. 1185

Mo.—Ryley-Wilson Grocer Co. v. St. Louis & S. F. R. Co., App., 184 S.W. 915.

10 C.J. p. 401 note 47.

Corpus Juris is cited in Amber v. Davis, Mo.App., 282 S.W. 459, 462, as authority for this rule.

14. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Culberson, Civ.App., 248 S.W. 111.

When carrier charged with notice

In view of the tick eradication law, requiring both the shipper and carrier of livestock, under a threat of penal prosecution, to dip all stock transported in an arsenical solution, notice by the shipper to the carrier that cattle delayed in transit had been dipped in such solution immediately before shipment and would likely be injured if not properly sheltered and cared for is unnecessary to render the carrier liable for injuries resulting from failure to shelter, feed, and water them properly, for the law requires the carrier to have notice of the dipping, while, as a carrier, it is charged with notice of the effect thereof, it being a matter of common knowledge that injury will result from exposure of cattle to heat immediately after such dipping.—St. Louis Southwestern Ry. Co. of Texas v. Culberson, Tex.Civ.App., 248 S.W. 111.

rule has been applied with respect to the allowance of such damages as arise from loss of a sale under a contract of which the carrier had knowledge,[15] damages for loss of the profits which would have been directly derived from the use of the property under circumstances with which the carrier was acquainted,[16] and for expenses incurred in renotifying and delivering to purchasers goods purchased to take the place of those lost or destroyed.[17]

§ 268. Remote or Speculative Damages

Remote or speculative damages are not recoverable in an action against a carrier for loss of, or injury to, property transported.

In an action against a carrier for loss of, or injury to, property transported, no recovery for remote or speculative damages is permissible.[18] Thus, where injuries to a mare in foal caused injury to, and the subsequent death of, the colt which was prematurely born, there can be no recovery based on what the colt would have been worth had it been born uninjured, such damages being speculative.[19]

§ 269. Exemplary Damages

Exemplary damages may be recovered against a carrier for gross negligence or willful breach of duty.

Exemplary or punitive damages may be allowed for gross negligence or willful breach of duty on the part of the carrier,[20] whether the action is based on breach of a contract or statutory duty,[21] but not otherwise.[22]

§ 270. Duty of Owner to Prevent or Reduce Damages

It is the duty of the property owner to make reasonable efforts to minimize the damages, and no recovery can be had for damage which such efforts would have prevented.

It is the duty of the owner of the property injured by the carrier during transportation to use all reasonable means to render the effect of the injury as light as possible, and no recovery can be had for damage which such care would have prevented;[23] but failure to prevent additional damage does not preclude recovery for that part of the damage not due to such failure, but to the carrier's negligence.[24] The general rule, however, does not impose upon the consignee the duty to unload the injured property on Sunday, for the purpose of reducing damages;[25] and where the goods have been stolen in transit and part of them are recovered and held by the police, the carrier is not thereby relieved of his obligation to deliver the goods so held, and no obligation rests on the owner to recover such goods from the police department for the purpose of reducing damages.[26] Where a carrier fails to deliver goods or return them to the shipper within a reasonable time, whereby they become practically val-

15. Mo.—Amber v. Davis, App., 282 S.W. 459
10 C.J. p 401 note 48.

16. Mo.—Ryley-Wilson Grocer Co. v St. Louis & S. F. R. Co., App., 184 S.W. 915.
10 C.J. p 402 note 49.

Purchaser's loss of profits of resale
In an action for damages for failure to deliver sugar, where the carrier knew that the sugar had been resold or was to be resold by the purchaser, the carrier was liable for consequential damages as loss of profits on resale.—Ryley-Wilson Grocer Co. v. St. Louis & S. F. R. Co., Mo.App., 184 S.W. 915.

17. Tex.—Pacific Express Co. v. Needham, 83 S.W. 22, 37 Tex.Civ. App. 129.

18. Tex.—Ft. Worth & D. C. Ry. Co. v. Willie S. & J. B. Ikard Co., Civ. App., 140 S.W. 502.
10 C.J. p 402 note 54.

19. Tex.—Texas & P. Ry. Co. v. Randle, 44 S.W. 603, 18 Tex.Civ. App. 348.

20. Miss.—Tri-State Transit Co. v. Gay, 172 So. 742.
Tex.—Gulf, C. & S. F. Ry. Co. v. Hamilton, Civ.App., 57 S.W.2d 309, appeal dismissed 89 S.W.2d 208, 126 Tex. 542
10 C.J. p 402 note 52.

21. Tex.—Gulf, C. & S. F. Ry. Co. v. Hamilton, supra.

22. S.C.—Mayfield v. Southern R. Co., 66 S.E. 405, 84 S.C. 393.

23. Ark.—St. Louis Southwestern Ry. Co. v. Tucker, 255 S.W. 553, 161 Ark. 140.
Mo.—Hurley v. Illinois Cent. R. Co., 282 S.W. 97, 221 Mo.App. 478.
N.C.—Pendergraph v. American Ry. Express Co., 100 S.E. 525, 178 N.C. 344.
Ohio.—Frank v. Louisville & N. R. Co., 19 Ohio N.P.,N.S., 574.
Tex.—Texas & P. Ry. Co. v. Bryan, Civ.App., 15 S.W.2d 1098—Ft. Worth & D. C. Ry. Co. v. Allen, Civ.App., 189 S.W. 765.
10 C.J. p 402 note 56

Only ordinary care is the measure of duty of a consignee of cotton to minimize damages from wetting thereof while in the carrier's possession.—Missouri Pac. R. Co. v. W. M. Smith & Co., 265 S.W. 64, 165 Ark. 546.

If damaged goods are not wholly worthless, consignee should receive and handle them to minimize damage if possible.—Houston E. & W. T. Ry. Co. v. Brackin, Tex.Civ.App., 191 S.W. 804.

Sufficiency of efforts to minimize damages
(1) Shipper held to have done all that he could to minimize damages to carrier.—Louisville & N. R. Co. v. Schaeffer, 280 S.W. 974, 213 Ky. 248

(2) Consignee of perishable goods arriving in bad condition discharged its whole duty to the carrier, where it sold the damaged goods for the best price obtainable.—Gulf, C. & S. F. R. Co. v. Texas Packing Co., Tex., 37 S.Ct. 487, 244 U.S. 31, 61 L.Ed. 970

(3) Consignee's acceptance of damaged lettuce four days after arrival and sale at auction within three days thereafter held sufficient attempt to minimize loss.—John Bonura & Co. v. Texas & N. O. R. Co., 126 So. 593, 14 La.App. 351, rehearing denied 128 So. 68, 14 La.App. 351, certiorari denied Texas & N. O. R. Co. v. John Bonura & Co., 51 S.Ct. 80, 282 U.S. 875, 75 L.Ed. 773.

24. Mo.—Hurley v. Illinois Cent. R. Co., 282 S.W. 97, 221 Mo.App. 478

25. Tex.—Missouri, etc., R. Co. v. Hopkins, 113 S.W. 306, 52 Tex.Civ. App. 166.

26. N.Y.—Heyman v. Stryker, 121 N.Y.S. 592, 67 Misc. 88.

useless, and the market therefor has closed for the season, the carrier, electing to keep the goods until the market reopens, cannot thereafter force the shipper to accept and dispose of the goods for the purpose of diminishing his damages.[27] So, where cattle were injured in transit, the owner was not required to place them, immediately on their arrival at destination, on an unfavorable market for sale, but was entitled to a reasonable time in which to prepare them for sale.[28]

§ 271. Matters in Mitigation

In awarding damages for loss of, or injury to, property, the carrier is entitled to any legitimate allowance in reduction of the amount awarded, such as the sum received by plaintiff on sale of the injured property, etc.

A carrier may show any facts connected with the loss or injury of property shipped which legitimately go to reduce the amount of damages.[29] Thus, in awarding damages for goods injured in transportation, the carrier should be credited with the amount realized from the sale of the goods,[30] and, where damages are claimed for loss of cattle killed in transit, a deduction should be allowed for the amount received for the carcasses.[31] Likewise, where the shipper removed, and sold the hides of cattle killed in transit, the carrier should be allowed the market value of the hides at the time when and the place where they were removed, not the actual price.[32] If by an actual sale and receipt of the price, the consignee protects himself against any loss resulting from the goods being damaged in transit, he cannot recover of the carrier anything beyond nominal damages and costs.[33]

In an action to recover for the loss of a draft, the carrier is at liberty to reduce the damages, which are prima facie the amount due on the draft, by proof of payment, insolvency, or any fact tending to invalidate the security;[34] but a carrier is not entitled to factor's commissions as an abatement of damages, where cotton consigned to the factor is lost by the carrier in transit,[35] although it has been held that where calculating machines sent to a prospective purchaser on trial was returned to the agent but lost by the carrier in transit, in an action by the agent as consignee the carrier was entitled, in determining the damages, to have commissions which plaintiff would have earned if he had sold the machines deducted from the selling price.[36]

The right of the carrier to a deduction or credit in fixing the amount of damages does not, of course, entitle it to credit for expenditures not actually incurred.[37]

§ 272. Deduction of Freight

Unpaid freight charges should be deducted from the damages awarded, and if prepaid cannot be recovered, in

27. Miss.—American Ry. Express Co. v. Pitts, 91 So. 570, 128 Miss 875.

28. Tex.—Gulf, C. & S. F. Ry. Co. v. Rodriquez, Civ.App., 185 S.W. 311

29. Mass.—Stevens v. Sayward, 8 Gray 215.

Deduction authorized

Where, after loss of a part of the goods shipped, the carrier sells the residue, without knowledge of the loss, and the consignee brings an action against the carrier for money had and received, constituting the proceeds of the sale, the carrier may deduct from the amount of recovery a discount which it allowed the purchaser of the goods on ascertaining the deficiency.—Stevens v. Sayward, 8 Gray, Mass., 215.

30. Ky.—Chesapeake, etc., R. Co. v. Lavin, 124 S.W. 274, 136 Ky 205.
La.—H. P. Richard & Sons v. Director General of Railroads, 107 So 891, 160 La. 1019.
Mo.—Aurora Fruit Growers' Ass'n v. St. Louis-San Francisco Ry. Co., 297 S.W. 440, 220 Mo.App. 1316.
Tex.—Fort Worth & D. C. Ry. Co. v. Tomson, Civ.App., 250 S.W. 747.

Action by owner of special interest

Where consignor retained title to machinery, but consignee had special property therein, in latter's action against carrier for injuries, interest of consignor was chargeable with amount realized on debt in its public sale of machinery after its return by consignee, and from any amount which jury might find to be market value of interests of both, there should be deducted amount received by consignor.—Allen v. Southern Ry. Co., 126 S.E. 722, 33 Ga.App. 209.

31. Neb.—Johnson v. Payne, 191 N. W. 696, 109 Neb. 531.

32. Tex.—Panhandle & S. F. Ry. Co. v. Norton, Civ.App., 188 S.W. 1011

33. Ga.—Henry v. Central R., etc., Co., 15 S.E. 757, 89 Ga. 815

34. Cal.—Zeigler v. Wells, 23 Cal. 179, 83 Am.D. 87.

35. S.C.—Kyle v. Laurens R. Co., 10 Rich. 382, 70 Am.D. 231.

36. Md.—Adams Express Co. v. White, 104 A. 110, 132 Md. 626

Cases distinguished

"The appellee relies upon the case of Kyle v. Laurens R. Co., 10 Rich., S.C., 382, 70 Am.D. 231, [cited in the preceding note] in opposition to this contention. This was a case concerning a consignment of cotton to a factor for sale and lost in transit, and the court there held that the measure of damages was the market value of the cotton at the place of destination, without deducting the factor's commissions. We think the present case is clearly distinguishable from that case. The goods in that case consisted of staple goods for which there was a ready and prompt market, and upon the receipt of them the factor could have readily earned the commission which had been agreed upon between him and the owner, while in the present case there was no ready market such as there is for staple articles like cotton, grain, and the like, and in fact they were not consigned to him for sale at all, but were merely returned to him as not satisfactory under the agreement of sale with the consignor."—Adams Express Co. v. White, 104 A. 110, 111, 132 Md. 626

37. Va.—Southern Ry. Co. v. Cohen Weenen & Co., 157 S.E. 563, 156 Va. 313.

Contention held untenable

Where tobacco, damaged by rain, was not uncoopered and redried, the contention that, had the carrier uncoopered the tobacco and found it not damaged, such carrier might have been liable for so handling the shipment, and that, therefore, it should be given credit for such expenditures as redrying would have necessitated, was held untenable.—Southern Ry. Co. v. Cohen Weenen & Co., 157 S.E. 563, 156 Va. 313.

the absence of a stipulation in the contract authorizing recovery thereof.

Since the value at destination is the basis for estimating the damages recoverable against a carrier for loss of, or injury to, property transported, as stated supra § 264, unpaid freight charges must be deducted from the amount awarded,[38] that is, the owner of the property is entitled to its net value at the place of destination;[39] and such charges, if paid in advance, cannot be recovered by him.[40] On the other hand, it has been held that where by the terms of the contract the damages are to be computed on the basis of the value of the property, being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid, at the place and time of shipment, plaintiff is entitled to recover freight paid by him as a part of the damages.[41]

Where the freight due the carrier enters into the amount of damages for which the carrier is liable for loss of goods shipped, limitations do not run against the carrier's right to have the freight deducted from such damages,[42] and no deduction on account of unpaid freight need be made where defendant makes no claim therefor.[43]

§ 273. Abandonment on Account of Damage

Where property is injured or part of it lost in transit, the consignee must accept the shipment and sue for damages; but where the property is so injured as to be worthless the consignee may refuse to accept it and sue for its full value.

Where the goods are injured during transportation, or part of them are lost, it is generally held that the consignee cannot abandon the consignment and sue for the full value, but must accept the goods as tendered, or the portion tendered, as stated supra § 178, and sue for damages.[44] It is impossible, it is said, to distinguish in principle between damage due to delay and damage due to impairment of value by a physical injury to the goods;[45] and as shown supra §§ 178 and 222, the person entitled to

38. Ga.—Louisville & N. R. Co. v. Lovelace, 106 S.E. 6, 26 Ga.App. 286.
Mich.—First Nat. Bank v. Grand Rapids & I. Ry. Co., 161 N.W. 859, 195 Mich. 1.
Mo.—Forest Green Farmers' Elevator Co. v. Davis, 270 S.W. 394, 216 Mo.App. 545—Morrow v. Wabash Ry. Co., 265 S.W. 851, 219 Mo.App. 62.
Tex.—Wichita Valley Ry. Co. v. Turbeville, Civ.App., 269 S.W. 498—Panhandle & S. F. R. Co. v. Shell, Civ.App., 265 S.W. 758—Quanah, A. & P. Ry. Co. v. Novit, Civ.App., 199 S.W. 496—Houston E. & W. T. Ry. Co. v. Brackin, Civ.App., 191 S.W. 804.
Va.—New York, P. & N. R. Co. v. Bundick, Taylor, Corbin-Handy Co., 122 S.E. 261, 138 Va. 535.
10 C.J. p 403 note 64.

Corpus Juris is quoted or cited, in support of this rule
Ala.—Louisville & N. R. Co. v. Allegri, 109 So. 881, 215 Ala. 148.
Ind.—Lake Erie & W. R. Co. v. Fantz, 154 N.E. 875, 876, 85 Ind.App. 569.
Iowa.—Brown Coal Co. v. Illinois Cent. R. Co., 192 N.W. 920, 921, 196 Iowa 562.
La.—Anderson, Clayton & Co. v. Yazoo & M. V. R. Co., 143 So. 453, 455, 174 La. 762.
Miss.—Yazoo & M. V. R. Co. v. M. Levy & Sons, 106 So. 525, 526, 141 Miss. 199.
Mo.—Klingsberg v. Davis, 268 S.W. 99, 102, 219 Mo.App. 1—Ward v. American Ry. Express Co., App., 259 S.W. 514, 517.
Wash.—Lagomarsino v. Pacific Alaska Nav. Co., 170 P. 368, 370, 100 Wash. 105.

39. U.S.—Woodward v. Illinois Cent. R. Co., C.C.Ill., 30 F.Cas.No.18,006, 1 Biss. 403, 30 F.Cas.No.18,007, 1 Biss. 447.
10 C.J. p 403 note 65.

40. Cal.—Olcovich v. Grand Trunk Ry. Co. of Canada, 176 P. 459, 179 Cal. 332.
Kan.—Kennedy v. Atchison, T. & S. F. Ry. Co., 181 P. 117, 104 Kan. 708, 5 A.L.R. 149, granting motion 179 P. 314, 104 Kan. 129, 368
La.—American Trading Co. of New Orleans v. New Orleans & N. E. R. Co., 105 So. 82, 159 La. 9—Planters' Cotton Oil Co. v. Texas & P. Ry. Co., 71 So. 366, 139 La. 201.
Tex.—Panhandle & S. F. R. Co. v. Shell, Civ.App., 265 S.W. 758.
Wis.—Feelyater v. Chicago, M. & St. P. Ry. Co., 190 N.W. 193, 178 Wis. 362.
10 C.J. p 403 note 66.

Return charges

Where damaged goods are rejected by the consignee, returned to the point of shipment and there sold, the shipper cannot recover return freight charges and demurrage, in the absence of proof as to why the property was not disposed of at destination.—Texas & P. Ry. Co. v. Beck-Mattox Brokerage Co., Tex.Civ.App., 279 S.W. 289

41. N.J.—Carr v. Pennsylvania R. Co., 96 A. 588, 88 N.J.Law 235.

42. Tex.—Texas & P. Ry. Co. v. Hoffecker, Civ.App., 123 S.W. 617.

43. S.C.—Bamberg v. South Carolina R. Co., 9 S.C. 61, 30 Am.R. 13.

44. Cal.—Pacific Heater Co. v. Southern Pac. Co., 188 P. 600, 45 Cal.App. 748
Ga.—Sipple v. Seaboard Air Line Ry. Co., 114 S.E. 435, 154 Ga. 376, reversing 110 S.E. 39, 28 Ga.App. 16, conformed to 115 S.E. 47, 29 Ga.App. 328.
Ind.—Cleveland, C., C. & St. L. Ry. Co. v. Bement-Rea Co., 154 N.E. 32, 86 Ind.App. 67, rehearing denied 155 N.E. 46, 86 Ind.App. 67.
N.H.—New Hampshire Wholesale Fruit Co. v. Payne, 120 A. 78, 80 N.H. 540.
N.C.—Whittington v. Southern Ry., 90 S.E. 505, 172 N.C. 501.
S.D.—Beck v. Chicago, M. & St. P. Ry. Co., 164 N.W. 74, 39 S.D. 297
Tex.—Patterson & Roberts v. Quanah, A. & P. Ry. Co., Civ.App., 195 S.W. 1163.
Contra Texas & P. Ry. Co. v. Martin, 2 Tex.A.Civ.Cas. § 342.
10 C.J. p 404 note 71.

In New York

(1) The rule stated in the text has been followed in some cases.—Brand v. Weir, 57 N.Y.S. 731, 27 Misc. 212—Mills v. National S. S. Co., 5 N.Y.S. 258.

(2) But the contrary has also been held.—Freeman v. Weir, 94 N.Y.S. 327, 47 Misc. 681.

(3) So it has been held that the consignee has an election to reject the property, dispose of it to the best advantage, and hold the carrier liable for the difference between the sum realized from the sale and what it would have been worth had it been delivered in good order.—Monell v. Northern Cent. R. Co., 16 Hun 585.

45. S.C.—McGrath v. Charleston, etc., R. Co., 75 S.E. 44, 91 S.C. 552, 42 L.R.A.,N.S., 782, Ann.Cas.1914A 64.

goods shipped cannot, on account of delay, refuse to receive them and sue for the full value.

However, the unlawful refusal of the consignee to accept damaged goods, and his action in bringing suit for their value, is of no consequence where it does not appear that any different result would have been reached had the consignees received the goods in their injured condition and then sued for damages.[46]

Limitation of rule. Where the goods are so materially damaged as to destroy their value, the consignee may, of course, refuse to accept as shown supra § 178 a and sue for the full value,[47] since in that event nothing that the consignee might do would lessen the loss and so diminish the carrier's liability.[48]

§ 274. Injury to Corpse

Damages are recoverable for the negligent handling of a corpse resulting in injury thereto, and, if the act of the carrier was willful, exemplary damages will be awarded. Damages for mental suffering of a surviving relative are recoverable, although there is also contrary authority.

Damages are recoverable from a carrier for negligent handling of a corpse resulting in injury thereto,[49] and, if the act was a wanton and willful breach of duty on the part of the carrier, exemplary damages will be allowed.[50] Damages for mental suffering may be recovered by a parent for negligent injury to the body of a child transported by a carrier,[51] by a son for injury to the body of his mother,[52] by a husband for injury to the body of his wife,[53] or by a sister for injury to the body of her brother;[54] and the fact that a mother, suing for the mutilation of her daughter's corpse, was not told before interment of the body that it has been mutilated, would not bar recovery of such damages.[55] On the other hand, it has been held that, in the absence of statute, the negligent injury of a dead body by a carrier gives to the mother, who had not contracted for the transportation of the body, no right to recover for mental suffering.[56]

S. CHARGES, LIENS, AND DEMURRAGE

1. Rates and Rate Making

§ 275. In General

a. General statement
b. Nature of rate-making power
c. Rate as controlling charges
d. Duration of rate
e. Milling in transit and similar privileges

a. General Statement

The rules governing the fixing and establishing of rates generally, more particularly freight rates, are considered in §§ 275–311 infra. Rules which seem to be exclusively applicable to rates for passenger traffic are treated in §§ 580–584 infra.

b. Nature of Rate-Making Power

The power of a board or commission or of the legislature to fix and establish rates for carriers is a legislative function, but the determination of whether a rate is unreasonable is the exercise of a judicial function

The power to fix rates is a legislative rather than a judicial function,[57] and the fixing of a rate is

46. Tex.—Gulf, etc., R. Co. v. Pitts, 83 S.W. 727, 37 Tex.Civ.App. 212.

47. Cal.—Pacific Heater Mfg. Co. v. Southern Pac. Co., 188 P. 600, 45 Cal.App. 748.

Ga.—Sipple v. Seaboard Air Line Ry. Co., 114 S.E. 435, 154 Ga. 376, reversing 110 S.E. 39, 28 Ga.App. 16, conformed to 115 S.E. 47, 29 Ga.App. 328.

10 C.J. p. 404 note 75.

Corpus Juris is quoted in Beck v. Chicago, M. & St. P. Ry. Co., 164 N.W. 74, 39 S.D. 297.

48. N.Y.—Brand v. Weir, 57 N.Y.S. 731, 27 Misc. 212.

S.D.—Beck v. Chicago, M. & St. P. Ry. Co., 164 N.W. 74, 39 S.D. 297.

49. Ala.—Deavors v. Southern Express Co., 76 So. 288, 200 Ala. 372.

Ky.—Louisville & N. R. Co. v. Hall, 293 S.W. 1091, 219 Ky. 528.

10 C.J. p. 404 note 77.

50. Mo.—Wall v. St. Louis & S. F. R. Co., 168 S.W. 257, 184 Mo.App. 127.

10 C.J. p. 405 note 78.

51. Ala.—Birmingham Transfer & Traffic Co. v. Still, 61 So. 611, 7 Ala.App. 556.

Tex.—Missouri, etc., R. Co. v. Hawkins, 109 S.W. 221, 50 Tex.Civ.App. 128.

Damages not excessive

Five hundred dollars damages for railroad's negligent dropping of casket and mutilation of corpse was held not excessive.—Louisville &. N. R. Co. v. Hall, 293 S.W. 1091, 219 Ky. 528.

52. Mo.—Wall v. St. Louis & S. F. R. Co., 168 S.W. 257, 184 Mo.App. 127.

53. Minn.—Lindh v. Great Northern R. Co., 109 N.W. 823, 99 Minn. 408, 7 L.R.A.,N.S., 1018.

Mo.—Wilson v. St. Louis & S. F. R. Co., 142 S.W. 775, 160 Mo.App. 649

54. Ala.—Deavors v. Southern Express Co., 76 So. 288, 200 Ala. 372.

55. Ky.—Louisville & N. R. Co. v. Hall, 293 S.W. 1091, 219 Ky. 528.

56. Vt.—Nichols v. Central Vermont Ry. Co., 109 A. 905, 94 Vt. 14, 2 A.L.R. 333.

57. Cal.—Southern Pac. Co. v. Railroad Commission of State of California, 231 P. 28, 194 Cal. 734.

Ill.—Indiana Harbor Belt R. Co. v. Illinois Commerce Commission, 172 N.E. 708, 340 Ill. 304

Ky.—Louisville & N. R. Co. v. Greenbrier Distillery Co., 187 S.W. 296, 170 Ky. 775.

Miss.—Illinois Cent. R. Co. v. Mississippi R. Commission, 109 So. 868, 143 Miss. 805.

N.M.—San Juan Coal & Coke Co. v.

legislative in character[58] and prospective in its application,[59] whether exercised by the legislature itself or by some subordinate body created for that purpose by it.[60] The determination that a rate charged and collected was unreasonable is the exercise of a judicial function,[61] as is also the determination of the character of a given commodity.[62] In some jurisdictions, the commission to which the subject is delegated has two functions with reference to rates, one legislative and the other judicial in character: in proceedings for the exercise of the commission's power to protect the public from future injury through the exaction of unreasonable rates, it acts in a quasi-legislative capacity, while in proceedings relating to the reasonableness of past rates and which have for their object the measuring and redressing of past injuries sustained by a private shipper, it acts in a quasi-judicial capacity.[63]

Santa Fe, S. J. & N Ry. Co., 2 P. 2d 305, 35 N.M 512.

Ohio.—Village of Wyoming v. Ohio Traction Co., 135 N.E. 675, 104 Ohio St. 325.

Pa.—City of Philadelphia v. Public Service Commission, 84 Pa Super. 135.

Tex.—Texarkana & Ft. S. Ry. Co. v. Houston Gas & Fuel Co, 51 S.W.2d 284, 121 Tex. 594—Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co., Com App., 221 S.W. 590, reversing, Civ App., 173 S.W. 222—Clayton Oil & Refining Co. v. Railroad Commission of Texas, Civ. App., 3 S W.2d 497—Missouri-Kansas & T R. Co. of Texas v. Railroad Commission of Texas, Civ. App, 3 S W 2d 489, affirmed Producers' Refining Co. v. Missouri, K. & T R. Co of Texas, Com.App., 13 S.W.2d 679, 680.

Utah.—Jeremy Fuel & Grain Co. v. Public Utilities Commission, 226 P. 456, 63 Utah 392.

Wash.—Great Northern Ry. Co. v. Department of Public Works of Washington, 296 P. 142, 161 Wash. 29.

10 C J. p 414 note 84.

58. U.S.—Southern Pac. Co. v. Bartine, D.C.Nev., 1 F.2d 323.

Ark.—Clear Creek Oil & Gas Co. v. Ft. Smith Spelter Co, 255 S.W. 903, 161 Ark. 12, affirmed Ft. Smith Spelter Co. v. Clear Creek Oil & Gas Co., 45 S.Ct. 263, 267 U.S. 231, 69 L.Ed. 588.

Cal.—Southern Pac. Co. v. Railroad Commission of State of California, 231 P. 28, 194 Cal. 734.

Tex.—Railroad Commission of Texas v Uvalde Const Co, Civ App, 49 S.W.2d 1113—Houston Chamber of Commerce v. Railroad Commission of Texas, Civ App., 19 S W.2d 583, affirmed Railroad Commission of Texas v. Houston Chamber of Commerce, 78 S W.2d 591, 124 Tex. 375.

Public welfare power

Orders of state fixing rates are exercise of state's public welfare power.—Vandalia R. Co. v. Schnull, 122 N.E. 225, 188 Ind 87, reversed on other grounds 41 S Ct. 324, 255 U.S. 113, 65 L.Ed. 539, conformed to 130 N.E. 865, 190 Ind. 698.

59. Cal.—Southern Pac. Co. v. Railroad Commission of State of California, 231 P. 28, 194 Cal. 734.

Mich.—Sparta Foundry Co. v. Michigan Public Utilities Commission, 267 N.W. 736, 275 Mich. 562

Tex.—Houston Chamber of Commerce v. Railroad Commission of Texas, Civ App, 19 S.W.2d 583, affirmed Railroad Commission of Texas v Houston Chamber of Commerce, 78 S.W.2d 591, 124 Tex. 375—Clayton Oil & Refining Co. v. Railroad Commission of Texas, Civ App, 3 S W.2d 497—Missouri-Kansas & T R. Co. of Texas v. Railroad Commission of Texas, Civ App., 3 S W 2d 489, affirmed Producers' Refining Co. v. Missouri K & T. R Co. of Texas, Com App., 13 S.W.2d 679, 680

60. Ark.—Clear Creek Oil & Gas Co v. Ft. Smith Spelter Co., 255 S.W. 903, 161 Ark. 12, affirmed Ft. Smith Spelter Co. v. Clear Creek Oil & Gas Co, 45 S.Ct. 263, 267 U.S. 231, 69 L.Ed. 588.

Fla.—State v. Railroad Com'rs of Florida, 84 So. 444, 79 Fla. 526.

Neb.—Central Bridge & Construction Co. v. Chicago & N. W. Ry. Co, 262 N.W. 852, 129 Neb. 726, vacating 260 N.W. 172, 128 Neb. 779.

Quasi-legislative

The power of a board or commission to fix reasonable and just freight and passenger rates to be charged by carriers is quasi-legislative in character.

U.S.—Ortega Co. v. Triay, Fla, 43 S Ct. 44, 260 U S 103, 67 L Ed 153.

Fla.—State v. Railroad Com'rs of Florida, 84 So 444, 79 Fla. 526.

Mich.—Sparta Foundry Co. v. Michigan Public Utilities Commission, 267 N.W. 736, 275 Mich. 562.

Mont.—Montana Horse Products Co v. Great Northern Ry. Co., 7 P. 2d 919, 91 Mont. 194.

61. Mont.—Montana Horse Products Co. v. Great Northern Ry. Co., supra.

Reasonableness of rate for reimbursement purposes

Inquiry as to justness, reasonableness, or discriminatory effect of rate as affects reimbursement constitutes judicial inquiry not within authority of railroad commission.—Clayton Oil & Refining Co. v. Railroad Commission of Texas, Tex Civ.App, 3 S. W.2d 497—Missouri-Kansas & T. R. Co of Texas v Railroad Commission of Texas, Tex.Civ App, 3 S W.2d 489, affirmed Producers' Refining Co. v. Missouri, K. & T. R Co. of Texas, Com App, 13 S.W.2d 679, 680.

62. U.S.—In re Independent Sewer Pipe Co., D.C.Cal., 248 F. 547.

Distinction between rate and commodity

What rate should be established for hauling a specified commodity is an administrative or legislative question, properly determinable by a railroad commission; but what a given commodity is, is a judicial question, over which railroad commission has no jurisdiction.—In re Independent Sewer Pipe Co., D.C.Cal., 248 F. 547.

Determination of commodity

Refusal of railroad commission to eliminate rate on sand between certain points is not conclusive whether material transported was clay or sand.—In re Independent Sewer Pipe Co., D.C Cal., 248 F. 547.

63. Cal.—Southern Pac. Co. v. Railroad Commission of State of California, 231 P. 28, 194 Cal 734.

Mich.—Sparta Foundry Co. v Michigan Public Utilities Commission, 267 N.W. 736, 275 Mich 562

Pa.—Pennsylvania R Co. v. Public Service Commission, 190 A. 367, 125 Pa Super. 558.

Reparation for overcharge

(1) In determining shipper's right to reparation from railroad because of excessive freight rates, duties of public utilities commission are quasi-judicial.—Sparta Foundry Co v. Michigan Public Utilities Commission, 267 N.W. 736, 275 Mich. 562.

(2) When claim for refund of illegal transportation charges is based on application of wrong rate, corporation commission's jurisdiction and power to determine whether different rate from that charged was legal rate is judicial and not legislative.—St. Louis & S F. Ry. Co. v. State, 244 P. 440, 116 Okl. 95, certiorari granted 46 S Ct. 630, 271 U. S. 656, 70 L Ed. 1135, and certiorari dismissed 47 S.Ct. 448, 273 U.S. 749, 779, 71 L.Ed 888.

c. Rate as Controlling Charges

The prescribed rate controls the amount to be charged.

The rates established by the appropriate authorities have the force and effect of statutes[64] so far as consistent with the law, but not where repugnant thereto.[65] The authority for any charge, condition, practice, or service must be found in the tariff, and nothing not so found can be inferred or added thereto.[66] Thus, when a tariff has become legally promulgated, it is binding on both the carrier and any shipper taking advantage of it, and its terms become in such respects, the only contract between the two allowed by law.[67] On interstate shipments the carrier must collect and the shipper is required to pay the rates named in the applicable tariffs filed with the interstate commerce commission.[68] As to intra-state shipments where a state board or commission fixes the rates, its tariffs and classifications and not those of the carriers are the only lawful ones; the carriers and all other parties are bound by them as long as they remain in force, and no deviation from the charges fixed can be made which have any binding effect without the approval of the board or commission.[69] A carrier can lawfully charge neither more nor less than the rate fixed by the tariff sheets on file,[70] and the carrier cannot justify the imposition of rates in excess of those prescribed by statute by showing that the amount charged was no more than a reasonable compensation for the services rendered.[71] Rules in the tariff as to conditions prerequisite must be complied with in order to validate the charges.[72]

Notice of rate. Tariff rates for transportation by common carriers are matters of law, of which all concerned are charged with notice.[73]

The form of rate schedule on interstate shipments is for the determination of the interstate commerce commission, and it can approve the splitting up of the charge made by a carrier for transportation and other service, as by making a line-

64. Ky.—Louisville & N. R. Co. v. Greenbrier Distillery Co., 187 S.W. 296, 170 Ky. 775.
Neb.—Central Bridge & Construction Co. v. Chicago & N. W. Ry. Co., 262 N.W. 852, 129 Neb. 726, vacating 260 N.W. 172, 128 Neb. 779.
Tex.—Clayton Oil & Refining Co. v. Railroad Commission of Texas, Civ.App., 3 S.W.2d 497—Missouri-Kansas & T. R. Co. of Texas v. Railroad Commission of Texas, Civ. App., 3 S.W.2d 489, affirmed Producers' Refining Co. v. Missouri, K. & T. R. Co. of Texas, Com.App., 13 S.W.2d 679, 680.

65. Vt.—Piper v. Boston & M. R. R., 97 A. 508, 90 Vt. 176, affirmed Boston & M. R. R. v. Piper, 38 S. Ct. 354, 246 U.S. 439, 62 L.Ed. 820.

66. U.S.—Union Wire Rope Corporation v. Atchison, T. & S. F. Ry. Co., C.C.A.Mo., 66 F.2d 965, reversing, D.C., Atchison, T. & S. F. R. Co. v. Union Wire Rope Corporation, 1 F.Supp. 399, certiorari denied 54 S.Ct. 122, 290 U.S. 686, 78 L.Ed. 591.

Carriers cannot collect any other transportation charges than those provided for by the tariffs in force.—Davis v. Ferguson, 132 So. 289, 17 La.App. 149, avoided on other grounds 136 So. 293, 173 La. 132.

67. U.S.—Union Wire Rope Corporation v. Atchison, T. & S. F. Ry. Co., C.C.A.Mo., 66 F.2d 965, reversing, D.C., Atchison, T. & S. F. R. Co. v. Union Wire Rope Corporation, 1 F.Supp. 399, certiorari denied 54 S.Ct. 122, 290 U.S. 686, 78 L.Ed. 591.
Ill.—Bush v. Carloading & Distributing Co., 210 Ill.App. 399.

Contract, estoppel, or waiver ineffective to alter rate

An interstate carrier cannot, by contract or otherwise, by estoppel or waiver, directly or indirectly, increase or decrease the duly established freight rates, and the shipper must make good any deficiency not collected, regardless of the cause, freight rates established by the approval of the interstate commerce commission dominating every shipment and contract, and this rule applies to a through rate made up of the sum of local rates of connecting carrier.—Lancaster v. Schreiner, 212 S.W. 19, 202 Mo.App. 459.

68. U.S.—Wheelock v. Walsh Fire Clay Products Co., C.C.A.Mo., 60 F.2d 415.

Government officers cannot contract for railroad rates higher than those tendered public.—Missouri Pac. R. Co. v. U. S., 71 Ct.Cl. 650.

69. Fla.—Reinschmidt v. Louisville & N. R. Co., 160 So. 69, 118 Fla. 237—Louisville & N. R. Co. v. Speed-Parker, Inc., 137 So. 724, 103 Fla. 439.
Miss.—Brookhaven Lumber & Mfg. Co. v. Mississippi Cent. R. Co., 122 So. 472, 154 Miss. 303.
Mont.—Montana Horse Products Co. v. Great Northern Ry. Co., 7 P.2d 919, 91 Mont. 194.
Va.—Mathieson Alkali Works v. Norfolk & W. Ry. Co., 137 S.E. 608, 147 Va. 426.

70. Kan.—Great Western Portland Cement Co. v. Public Service Commission of Kansas, 247 P. 881, 121 Kan. 531.

Rate established by former commission

Under the Public Utilities Act § 66(d), rates established by the railroad commission for certain periods must be accepted by the public utilities commission, its successor, as the reasonable rates for such terms.—Bonfils v. Public Utilities Commission of Colorado, 189 P. 775, 67 Colo. 563.

71. U.S.—Chicago, etc., R. Co. v. Ackley, Wis., 94 U.S. 179, 24 L.Ed. 99.
Iowa.—Heiserman v. Burlington, etc., R. Co., 18 N.W. 903, 63 Iowa 732.

72. U.S.—Lowden v. Simonds-Shields-Lonsdale Grain Co., D.C.Mo., 19 F.Supp. 438.

Waiver not permitted

(1) Under tariff providing that railroad will act as shipper's agent in installing grain doors at prescribed charge per car considerably above actual value of service, "prior arrangements for the service to be made," "prior arrangements" condition cannot be waived either by railroad or by shipper.—Lowden v. Simonds-Shields-Lonsdale Grain Co., D.C.Mo., 19 F.Supp. 438.

(2) Also, "prior arrangements" condition is not for sole benefit of railroad, and hence could not be waived by railroad to recover under tariff, in absence of "prior arrangements".—Lowden v. Simonds-Shields-Lonsdale Grain Co., supra.

73. Minn.—W. C. Goodnow Coal Co. v. Northern Pac. Ry. Co., 162 N.W. 519, 136 Minn. 420.

haul rate and a rental charge for refrigerator cars where they are required.[74]

d. Duration of Rate

An established rate is the rate in force until it is changed in a proper and lawful manner.

Where a freight rate has once been fixed, it is an established rate until it is changed in some manner allowed by law,[75] and the carrier cannot evade this rule by placing the articles for which the rate was established in another class.[76] Once lawfully established, a rate continues to be the legal rate until legally canceled, and subsequent tariffs naming new rates without canceling previous rates cannot carry the new rate into lawful effect.[77] Thus, where the statute fixes the maximum rate on intra-state freight as being the rate in force on a specified date, and a subsequent amendment authorizes the commission to change it, the maximum rate as fixed by the first act prevails until it is changed by the commission.[78]

e. Milling in Transit and Similar Privileges

Stoppage in transit privileges must be exercised under the tariff of the carrier or not at all, and must be accepted in their entirety.

Stoppage in transit for milling and similar privileges must be exercised under the tariff of the carrier and not otherwise,[79] and the inbound and outbound movements must be in fact parts of a single transaction.[80] Rates affording such rights are an entirety and must be accepted and carried out in their entirety or not at all.[81]

§ 276. Terminology

The courts have defined and explained various terms used in connection with the establishment and determination of the reasonableness of rates, as, for example, "rates," "class rate," "commodity rate," "joint rate," "proportional rate," "rates in force," "rate tariff," "transportation," "team track delivery," and "intermediate."

The word "rate" means a proportional estimation according to some standard.[82] The net amount which a carrier receives from a shipper and retains fixes the "rate" charged.[83] A prescribed rate may consist of a variety of elements, such as the character of the commodity to be transported, the distance of carriage, the privileges and facilities accorded, and the rules and regulations accompanying the tariff, or that may be imposed by the commission, and the like.[84]

74. U.S.—J. C. Famechon Co v Northern Pac. Ry. Co., D.C.Minn., 11 F.2d 312, affirmed, C.C.A., 23 F.2d 307.

75. U.S.—Union Pac. R. Co. v. U. S., 48 Ct.Cl. 99.

Intrastate freight rate between two stations in state remains in force until changed by state railway commission.—Fred F. Shields Co. v Chicago, B. & Q. R. Co., 276 N.W. 925, 133 Neb. 722.

76. U.S.—Union Pac. R. Co. v. U. S., 48 Ct.Cl. 99.

77. Neb.—Knight v. Chicago, B & Q R. Co, 207 N.W. 505, 114 Neb. 387, 207 N.W. 506, 114 Neb. 388—McCaffrey Bros. Co. v. Chicago, B. & Q. R. Co, 207 N.W. 503, 114 Neb. 382.

Supplement

(1) Supplement is as much part of tariff as if it originally was incorporated therein.—Knight v. Chicago, B. & Q. R. Co, 207 N.W. 505, 114 Neb. 387, 207 N.W. 506, 114 Neb. 388—McCaffrey Bros. Co. v Chicago, B. & Q. R. Co., 207 N.W. 503, 114 Neb. 382.

(2) Parts of freight tariff supplement may be canceled and remainder continue in effect.—Knight v. Chicago, B. & Q. R. Co, supra—McCaffrey Bros. Co. v. Chicago, B. & Q. R. Co., supra.

(3) Special tariff supplement issued by permission of interstate commerce commission, increasing rates, is valid, if it fairly sets forth amendments, cancellation of original rates, and where changes may be found.—Knight v Chicago, B & Q. R Co, supra—McCaffrey Bros. Co. v. Chicago, B. & Q. R. Co., supra.

(4) Special tariff supplement canceled prior rates on enumerated commodities and established new rates.—Knight v Chicago, B & Q R Co, supra—McCaffrey Bros. Co. v. Chicago, B. & Q. R. Co, supra.

78. Ala.—State v. Louisville & N R Co., 72 So 494, 197 Ala. 203.

Special or preferential rates not included

Acts 1907 p 80, fixing the maximum rate on intra-state freight, and amended by Acts 1907 p 711, giving the railroad commission authority to change the rate, not mentioning or attempting to provide special or preferential rates, relates to regular or normal rates, and does not affect a voluntary special or preferential rate, especially where special provision was made for special or preferential rates in another section.—State v. Louisville & N. R. Co., 72 So 494, 197 Ala. 203.

79. U.S.—Updike Grain Co. v Chicago & N. W Ry. Co, C.C.A.Neb, 35 F.2d 486

80. Ill.—Davis v. Naugle Pole & Tie Co., 238 Ill.App. 214.

81. Neb.—Fremont Milling Co. v Chicago & N. W Ry. Co, 163 N. W. 331, 101 Neb. 362.

Effect of failure to use transit credit

Shipper cannot recover for unused transit credits resulting from his failure to forward all the grain shipped with milling in transit privileges on shipments from points in state to points outside and to one point in the state, where parts of each car were forwarded indiscriminately to destination, and where milling in transit privileges have not been complied with.—Fremont Milling Co v. Chicago & N. W Ry Co., 163 N.W. 331, 101 Neb 362.

82. U.S.—Lothrop v. Spokane, P. & S Ry. Co., D.C.Or, 10 F.2d 225, reversed on other grounds, C.C.A., Southern Pac. Co. v Lothrop, 15 F. 2d 486, certiorari denied Lothrop v. Southern Pac Co, 47 S.Ct. 336, 273 U.S. 742, 71 L.Ed 869, Lothrop v. Spokane, P. & S R. Co., 47 S Ct. 336, 273 U.S. 742, 71 L.Ed. 869, and Lothrop v Oregon-Washington R & Nav Co., 47 S.Ct. 336, 273 U. S 742, 71 L.Ed 869.

83. Mich.—Federal Gravel Co. v. Detroit & M Ry. Co., 226 N.W. 677, 248 Mich. 49.

In phrase "highest rate and minimum weight"

Term "rate" as used in phrase "highest rate and minimum weight" in statute limiting charges for mixed carload shipments of live stock means the charge as finally computed on the basis of cents per hundred pounds as applied to applicable minimum weight.—Bennett Commission Co. v Northern Pac. Ry Co., 271 N.W 468, 199 Minn. 179.

84. U.S.—Lothrop v. Spokane, P. & S Ry. Co., D.C.Or., 10 F.2d 225, reversed on other grounds, C.C.A., Southern Pac. Co. v. Lothrop, 15

Class rate. Where a single rate applies to a number of articles of the same general character, it is a class rate.[85] A rate for a particular commodity to consist of a certain percentage of a class rate is a class rate and not a commodity rate.[86]

Commodity rate. Where a rate applies to a specific commodity alone, it is a commodity rate.[87]

Joint rate. A joint rate is a rate prescribed to be charged for the transportation of goods over the connecting lines of two or more railroads, and to be divided among them for the service rendered by each respectively.[88]

Proportional rate. A proportional rate is a part of a through rate;[89] a share of the aggregate charge from the origin to destination which one or more carriers accepts for performing a definite portion of the whole transportation service.[90]

Rates in force are those which a carrier establishes as its present charges for transportation, as distinguished from those which are absolute, tentative, or perhaps only to take effect in the future that is, rates in effect, those open to public inspection and on which shipments may be made, if offered.[91]

Rate tariff. A rate tariff is in essence a statement by the carrier to possible shippers that it will furnish certain services under certain conditions for a certain price.[92]

Transportation. "Transportation" within the meaning of a schedule of charges for transportation as used in the Interstate Commerce Act includes cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, storage, and handling of property transported.[93]

Distinction between transportation and switching service. Ordinarily, in rate making a transfer service is distinguished from transportation, and switching service is usually defined as one which precedes or follows transportation on which legal freight charges have already been earned or are to be earned.[94] However, the fact that the entire service rendered by a carrier is confined to its own sidetracks or switch tracks will not prevent it from being transportation,[95] and whether a particular service is switching or transportation service is not determined alone by whether the service is one which precedes or follows transportation service, but is also tested by whether the movement of the cars is under the direction of the yardmaster who has charge of the switching service or the trainmaster having charge of transportation service.[96]

Team track delivery. Team track delivery is a service for which no separate tariff charge is pro-

F.2d 486, certiorari denied Lothrop v. Southern Pac. Co., 47 S.Ct. 336, 273 U.S. 742, 71 L.Ed. 869, Lothrop v. Spokane, P. & S. R. Co., 47 S.Ct. 336, 273 U.S. 742, 71 L.Ed. 869, and Lothrop v. Oregon-Washington R. & Nav. Co., 47 S.Ct. 336, 273 U.S. 742, 71 L.Ed. 869.

85. Va.—Norfolk Southern R. Co. v. Freeman Supply Corporation, 133 S.E. 817, 145 Va. 207.

86. Va.—Norfolk Southern R. Co v. Freeman Supply Corporation, supra.

87. Va.—Norfolk Southern R Co v. Freeman Supply Corporation, supra.

88. Ga.—Hill v. Wadley Southern Ry. Co, 57 S.E. 795, 128 Ga. 705.

Continuous mileage rate as joint rate

Where the railroad commissioners declared that a "continuous mileage rate" should apply to two connecting railroad companies, the stock and bonds of one of which were owned by the other although each had its separate directors, and was operated separately, applying the rate previously fixed for the owning company, such rate was a joint rate within the meaning of a statute declaring that the railroad commissioners shall have power to make just and reasonable joint rates for all connecting railroads, and the action of the commissioners was not ipso facto illegal on the ground that it was not a joint rate and was not authorized by statute, if the rate so fixed was reasonable and just.—Hill v Wadley Southern R. Co, 128 Ga 705, 57 S E 795

89. Ill.—Davis v. Naugle Pole & Tie Co., 238 Ill App. 214.

Ohio.—Pittsburgh & L. E. R Co v Public Utilities Commission of Ohio, 191 N E 467, 128 Ohio St 388.

10 C J p 405 note 81.

90. Ohio.—Pittsburgh & L. E R Co v. Public Utilities Commission of Ohio, supra.

10 C J. p 405 note 81

91. U S.—New York Cent. & H. R R. Co. v. U. S., N.Y., 166 F. 267, 92 C.C A 331.

92. U S.—Union Wire Rope Corporation v. Atchison, T. & S. F. Ry Co, C.C A Mo, 66 F 2d 965, reversing, D C, Atchison, T. & S. F R. Co. v. Union Wire Rope Corporation 1 F.Supp 399, and certiorari denied 54 S.Ct. 122, 290 U.S 686, 78 L Ed. 596

93. Ohio.—Swift & Co. v. Hocking Valley Ry. Co, 112 N E 212, 93 Ohio St. 143, L R A 1917E 916, affirmed 37 S Ct. 287, 243 U S 281, 61 L Ed 722

94. U S.—Louisville Water Co. v. Illinois Cent R. Co., D.C Ky., 14 F Supp. 301

95. Ark.—St Louis, I. M. & S. Ry. Co v Clark Pressed Brick Co, 192 S W. 382, 127 Ark 474.

96. U S.—Louisville Water Co. v. Illinois Cent. R. Co, D.C Ky, 14 F. Supp. 301.

Ark.—St. Louis, I M & S. Ry. Co. v Clark Pressed Brick Co., 192 S. W. 382, 127 Ark 474.

Movement held transportation

Carriers have been held entitled, in establishing tariff, to treat movement after shipment reached city as transportation, as distinguished from switching, although movement was solely within terminals of carriers.—Louisville Water Co v. Illinois Cent. R. Co., D.C.Ky., 14 F.Supp. 301.

vided, and which is analogous to freight depot service for less than carload freight.[97]

Intermediate. In a railroad tariff fixing rates to and from stations named, and also providing for the rates to apply to "intermediate stations," the word "intermediate" refers to stations between those named.[98]

§ 277. Right of Carrier to Fix Rates

a. In general
b. Increase of rates by carrier

a. In General

Except as restricted by constitutional or statutory provisions, carriers are entitled to fix the rates for transportation.

Unless otherwise provided by statute, the carrier has the primary right to fix rates for transportation.[99] Where the carrier has the power and duty of initiating rates, it has the primary duty of fixing freight and other charges.[1] So, a carrier with knowledge of the possibility of large shipments from a certain point over its lines cannot excuse the failure to establish rates from such point by attempting to impose the duty on the shippers of requesting the establishment of a route and rate.[2]

As to interstate commerce, under the Interstate Commerce Act, except for the requirement provided in 49 U. S. C. A. § 4, that a carrier cannot charge more for a short haul than for a long haul where the shorter is included in the longer unless authorized by the interstate commerce commission,[3] the carrier retains the right to fix the rates;[4] and subject to the requirements that the rates be reasonable, considered in § 282 infra, that there be no discrimination, as shown in §§ 348-352 infra, and that the rates fixed do not menace steady and efficient service by the carriers, a carrier is entitled to initiate rates and to adopt such policy of rate-making as to it seems wise,[5] and may file two rates, one of which is the regular rate in which the common-law liability is preserved, and the other a lesser rate based on an agreed valuation of the commodity shipped and limiting the liability to that valuation; but such rates must be open to all the public.[6] If, after a hearing, rates are shown to be unreasonable, the commission may set them aside and require the substitution of just and reasonable for unjust and unreasonable charges;[7] except, however, that railroads have the power to fix rates as low as they choose and to reduce rates when they choose.[8] The jurisdiction of the interstate commerce commission to alter a rate fixed by the carrier depends on a finding, based on evidence, that such rate is unreasonable,[9] and the mere dis-

97. La.—Miller Engineering Co. v. Louisiana Ry. & Nav. Co., 81 So. 314, 144 La. 786.

98. U.S.—National Elevator Co. v. Chicago, M. & St. P. Ry. Co., Minn., 246 F. 588, 158 C.C.A. 558.

99. Ill.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 195 N. E. 32, 359 Ill. 563.
10 C.J. p 405 note 82.

Elevator charges
In the absence of statutory regulation elevator owners may compete freely, and establish such rates for elevating grain as they see fit.—Spencer Kellogg & Sons v. Delaware, L. & W. R. Co., 197 N.Y.S. 380, 204 App.Div. 243, affirming 195 N.Y.S. 69, 119 Misc. 174, affirmed 199 N.Y.S. 951, 206 App.Div. 735.

1. U.S.—Alton & S. R. R. v. U. S., D.C.Cal., 49 F.2d 414.
Icing charges
U.S.—Alton & S. R. R. v. U. S., D.C. Cal., 49 F.2d 414.

2. U.S.—Montrose Oil Refining Co. v. St. Louis-San Francisco Ry. Co., D.C.Tex., 25 F.2d 750, affirmed St. Louis-San Francisco Ry. Co. v. Montrose Oil & Refining Co., 25 F. 2d 755, certiorari denied 48 S.Ct. 560, 277 U.S. 598, 72 L.Ed. 1007.

3. U.S.—U. S. v. Louisville & N. R. Co., 35 S.Ct. 113, 235 U.S. 314, 323, 59 L.Ed. 245 reversing Com.C., Louisville & N. R. Co. v. U. S., 197 F. 58.
10 C.J. p 405 note 83.

4. U.S.—Skinner & Eddy Corporation v. U. S., Or., 39 S.Ct. 375, 249 U. S. 557, 63 L.Ed. 772—El Paso & S. W. R. Co. v. Arizona Corporation Commission, D.C.Ariz., 51 F.2d 573—Lothrop v. Spokane, P. & S. Ry. Co., D.C.Or., 10 F.2d 225, reversed on other grounds Southern Pac. Co. v. Lothrop, 15 F.2d 486, certiorari denied Lothrop v. Southern Pac. Co., 47 S.Ct. 336, 273 U.S. 742, 71 L.Ed. 869, Lothrop v. Spokane, P. & S. R. Co., 47 S.Ct. 336, 273 U.S. 742, 71 L.Ed. 869, and Lothrop v. Oregon-Washington R. & Nav. Co., 47 S.Ct. 336, 273 U.S. 742, 71 L.Ed. 869—Chicago, M., St. P. & P. R. Co. v. U. S., D.C.Ill., 8 F.Supp. 970, affirmed U. S. v. Chicago, M., St. P. & P. R. Co., 55 S.Ct. 462, 294 U.S. 499, 79 L.Ed. 1023.
Fla.—Louisville & N. R. Co. v. Speed-Parker, Inc., 137 So. 724, 103 Fla. 439.
Mont.—Montana Horse Products Co. v. Great Northern Ry. Co., 7 P.2d 919, 91 Mont. 194.
Tex.—Neubert v. Chicago, R. I. & G. Ry. Co., 296 S.W. 1090, 116 Tex. 644, 53 A.L.R. 1224.
10 C.J. p 405 note 84.

5. U.S.—U. S. v. Chicago, M., St. P. & P. R. Co., Ill., 55 S.Ct. 462, 294 U.S. 499, 79 L.Ed. 1023, affirming, D.C., Chicago, M., St. P. & P. R. Co. v. U. S., 8 F.Supp. 970—U. S. v. Illinois Cent. R. Co., Miss., 44 S.Ct. 189, 263 U.S. 515, 68 L.Ed. 417—Interstate Commerce Commission v. Chicago Great Western Ry. Co., Ill., 28 S.Ct. 493, 209 U. S. 108, 52 L.Ed. 705.

To meet water competition
Carriers may lawfully attempt to meet water competition of their own volition, and, within zone of reasonableness, reduce their rates for purpose of attracting traffic to their lines.—Pennsylvania R. Co. v. Public Service Commission, 190 A. 372, 126 Pa.Super. 1.

6. Mo.—Stubblefield v. St. Louis, etc., R. Co., 184 S.W. 149, 194 Mo. App. 396.

7. U.S.—Interstate Commerce Commn. v. Louisville, etc., R. Co., 33 S.Ct. 185, 227 U.S. 88, 57 L.Ed. 431.
10 C.J. p 405 note 89.

8. U.S.—Skinner & Eddy Corporation v. U. S., Or., 39 S.Ct. 375, 249 U. S. 557, 63 L.Ed. 772.

9. U.S.—Interstate Commerce Commn. v. Louisville, etc., R. Co., 33 S.Ct. 185, 227 U.S. 88, 57 L.Ed. 431.

ruption of the existing rate structure is insufficient to justify the cancellation of a carrier's proposed rates.[10]

In so far as intra-state commerce is concerned, the right of a carrier to fix its rates therefor varies in the different states. In some states the rate-making power over intra-state commerce has been taken away from the carriers and, as appears infra § 278, conferred upon state commissions, and the carrier is precluded from initiating rates and may only charge for transportation of persons and property over its lines according to the rates which have been approved and prescribed by such a commission.[11] In other states, rules and regulations modeled in varying degrees on the method employed by the federal government for the regulation of interstate commerce rates have been adopted. In some of these states the carrier retains the right to fix the rates for intra-state transportation of property or passengers over its lines, which rates, as appears infra § 278 d, are subject to control and revision by a state commission,[12] and rates filed and published by the carrier with the commission do not need approval by the commission before they become legal rates, but they may be suspended by the commission and their reasonableness ascertained.[13] In still other states, after the state regulatory commission has established a maximum schedule of rates, the carriers file their tariffs, which cannot exceed the maximum rates established, but which they may make as much less as they choose.[14] Under some statutes, the carriers publish and file with the state commission a schedule of rates which as to first instance rates become effective without further action; thereafter, a carrier may make a general horizontal reduction of rates without obtaining the consent of the commission by merely publishing and filing them with the commission, but any increase in rates by the carrier becomes effective only after a hearing on notice by the commission, a finding that the proposed increase is fair and reasonable, and an order or other action by the commission sanctioning the increase.[15] A statute granting railroads power to regulate tolls and compensation yields to a constitutional provision conferring upon a state commission the power to make rates.[16]

Under charter grant. In some states certain carriers have been granted the right in their charters to fix rates over their lines. Such grants of power are strictly construed against the carriers and in favor of the public,[17] and the rates must be fixed in the manner and by the agency designated.[18] However, within the limits of their grant

10. U.S.—U. S. v. Chicago, M., St. P. & P. R. Co., Ill., 55 S.Ct. 462, 294 U.S. 499, 79 L.Ed. 1023, affirming, D.C., Chicago, M., St. P. & P. R. Co. v. U. S., 8 F.Supp. 970.

11. U.S.—El Paso & S. W. R. Co. v. Arizona Corporation Commission, D.C.Ariz., 51 F.2d 573.
Fla.—Louisville & N. R. Co. v. Speed-Parker, Inc., 137 So. 724, 103 Fla. 439.
Ga.—Wight v. Pelham & H. R. Co., 89 S.E. 176, 18 Ga.App. 195.
Tex.—Texarkana & Ft. S. Ry. Co. v. Houston Gas & Fuel Co., 51 S.W. 2d 234, 121 Tex. 594—Railroad Commission of Texas v. Uvalde Const. Co., Civ.App., 49 S.W.2d 1113—Clayton Oil & Refining Co. v. Railroad Commission of Texas, Civ. App., 3 S.W.2d 497—Missouri-Kansas & T. R. Co. of Texas v. Railroad Commission of Texas, Civ. App., 3 S.W.2d 489, affirmed Producers Refining Co. v. Missouri, K. & T. R. Co. of Texas, Com.App., 13 S.W.2d 679, 680.

Intra-state rates not voluntary

Intra-state railroad rates in Montana are not voluntary rates initiated by carriers, but rates prescribed or approved by railroad commission.—Montana Horse Products Co. v. Great Northern Ry. Co., 7 P.2d 919, 91 Mont. 194.

12. N.J.—O'Brien v. Board of Public Utility Com'rs, 105 A. 132, 92 N.J.Law 44, affirmed 106 A. 414, 92 N.J.Law 587.
Or.—Hammond Lumber Co. v. Public Service Commission, 189 P. 639, 96 Or. 595, 9 A.L.R. 1223.

13. Mo.—Sonken-Galamba Corporation v. Missouri Pac. R. Co., 40 S.W.2d 524, 225 Mo.App. 1066.
N.J.—O'Brien v. Board of Public Utility Com'rs, 105 A. 132, 92 N.J.Law 44, affirmed 106 A. 414, 92 N.J.Law 587.

14. Ill.—State Public Utilities Commission of Ill. v. Atchison, T. & S. F. Ry. Co., 115 N.E. 904, 278 Ill. 58.

15. Minn.—National Elevator Co. v. Chicago, M. & St. P. Ry. Co., 173 N.W. 418, 143 Minn. 162—Bell Lumber Co. v. Great Northern Ry. Co., 160 N.W. 688, 135 Minn. 271.

"First instance" tariff

A schedule of rates published and filed by a railroad, providing for its absorption of switching charges of connecting carriers at destination, where, under previously filed and published rates shipper was required to pay such charges, was a change in an existing tariff, and not a "first instance" tariff, within L.1905 c. 176, Gen.St.1913 §§ 4290–4297.—National Elevator Co. v. Chicago, M. & St. P. Ry. Co., 173 N.W. 418, 143 Minn. 162.

Reinstatement of higher rate

After a voluntary reduction of rates to all shippers on all commodities at all stations in Minnesota, the original rates cannot be reinstated without consent of railroad and warehouse commission, after a hearing on notice, a finding that reinstatement will be a fair and reasonable change, and an order or other action sanctioning change.—National Elevator Co. v. Chicago, M. & St. P. Ry. Co., 173 N.W. 418, 143 Minn. 162.

16. N.M.—San Juan Coal & Coke Co. v. Santa Fé, S. J. & N. Ry. Co., 2 P.2d 305, 35 N.M. 512.

17. Miss.—Gulf & S. I. R. Co. v. Laurel Oil & Fertilizer Co., 158 So. 778, 172 Miss. 630, amended and suggestion of error overruled 159 So. 838, 172 Miss. 630, corrected 160 So. 564, 172 Miss. 630.

18. **Supervision by commission**

(1) Railroad commission was empowered to see that rates fixed by railroad's directors pursuant to power conferred by legislative charter do not exceed those fixed in statute.—Gulf & S. I. R. Co. v. Laurel Oil & Fertilizer Co., 158 So. 778, 172 Miss. 630, amended and suggestion of error overruled 159 So. 838, 172 Miss. 630, corrected 160 So. 564, 172 Miss. 630.

they are entitled to fix their rates,[19] and a railroad corporation, under a charter authorizing it to fix rates over its lines, is not limited in its right to fix its freight charges to commodities transported from one point on its line to another thereon, but it includes commodities which are transported in part over another line, although, of course, in the fixing of joint freight tariffs with other railroads it is limited in its action to that portion of the through tariff covering the transportation of commodities over its own line.[20]

Private carrier. A private carrier not engaged in the business of carrying as a public employment may contract for the delivery of goods in a particular case for a stipulated reward, unaffected by the rates fixed for the regulation of railroads or other public agencies.[21] An order of a state commission requiring a railroad to transport a show at a special rate and providing that the company may enter into a contract for the transportation on terms similar to existing contracts with other shows, does not deprive the carrier of its right to contract as a private carrier for the transportation of traveling shows.[22] It has been held that, where an Auto, Stage, and Truck Transportation Act defines transportation companies to include private carriers, they cannot raise any charge or rate without first securing the consent of the regulatory commission.[23]

b. Increase of Rates by Carrier

A carrier is entitled to advance rates where the ones in force are so low as to be unremunerative, and no presumption of wrong arises from an advance of rates by the carrier, but an unreasonable advance will be relieved against by the courts.

There is no presumption of wrong arising from a change of rate made by a carrier.[24] A carrier has the right to change rates which, to meet an exigency, have been made so low as to be unremunerative, when the necessity therefor has ceased to exist.[25] If rates have been fixed too low in the past, it has the right to meet changed conditions by increasing them if the increase is reasonable,[26] and a state statute which denies the carrier that right and forces it to continue rates which are unremunerative and confiscatory is unconstitutional and void.[27] When rates are changed, the carrier making the change must, when properly called on, be able to give a good reason therefor;[28] and if in a proper proceeding they are shown to be arbitrary and unreasonable, the courts will relieve against them.[29] If it has been stipulated by the

(2) Order making railroad commission's approval prerequisite to increase in intra-state railroad rates was within commission's authority. —Gulf & S. I. R. Co. v. Laurel Oil & Fertilizer Co., supra.

Action by majority of directors sufficient

Under legislative charter conferring upon railroad's directors power to fix rates, rate schedule must be approved by majority, but not by all of directors.—Gulf & S. I. R. Co. v. Laurel Oil & Fertilizer Co., 159 So. 838, 172 Miss. 630, amending and overruling suggestion of error 158 So. 778, 172 Miss. 630, corrected 160 So 564, 172 Miss. 630.

Delegation by directors of rate making power

(1) In legislative railroad charter conferring upon directors power to fix rates, section which validated acts of executive committee approved by quorum of directors had reference to general management and operation of railroad in its individual corporate action, and did not authorize board of directors to delegate to executive committee power to fix rates —Gulf & S. I. R. Co. v. Laurel Oil & Fertilizer Co., 159 So 838, 172 Miss 630, amending and overruling suggestion of error 158 So. 778, 172 Miss. 630, corrected 160 So. 564, 172 Miss. 630.

(2) Rates promulgated by freight agent without railroad commission's approval were ineffective and rates fixed by commission governed, entitling shipper to recover overcharges. —Gulf & S. I. R. Co. v. Laurel Oil & Fertilizer Co., 158 So. 778, 172 Miss. 630, amended and suggestion of error overruled 159 So. 838, 172 Miss 630, corrected 160 So. 564, 172 Miss. 630.

(3) Where freight agent promulgated rates without railroad commission's approval, attempted ratification thereof by railroad's directors, authorized by legislative charter to fix rates, subsequent to shipper's action for overcharges, was inoperative retroactively —Gulf & S I. R. Co. v. Laurel Oil & Fertilizer Co., supra.

19. Miss —Gulf & S. I. R. Co. v. Laurel Oil & Fertilizer Co., 159 So. 838, 172 Miss. 630, amending and overruling suggestion of error 158 So. 778, 172 Miss 630, corrected 160 So 564, 172 Miss 630.

20. Miss.—Illinois Cent. R. Co. v. Mississippi Cotton Seed Products Co, 148 So. 371, 166 Miss. 579.

21. La —National Sand & Gravel Co v. Janes Contracting Co., 126 So. 560, 13 La.App. 240.

22. U S —Southern Pac. Co. v State of Arizona, 39 S.Ct 313, 249 U.S 472, 63 L Ed. 713, affirming Southern Pac. Co. v. State, 165 P. 303, 19 Ariz. 20.

23. Cal —Frost v. Railroad Commission of California, 240 P. 26, 197 Cal. 230, affirmed 46 S.Ct. 605, 271 U.S. 583, 70 L.Ed 1101.

24. U.S. — Interstate Commerce Commn. v. Chicago Great Western R. Co, Ill., 28 S.Ct 493, 209 U. S. 108, 52 L.Ed. 705, affirming, C. C., 141 F. 1003—Louisville, etc, R. Co. v. Interstate Commerce Commn, Com Ct., 195 F. 541, reversed on other grounds 33 S.Ct. 185, 227 U S. 88, 57 L.Ed 431.
10 C.J. p 406 note 91.

25. Ky —Southern Ry. Co. of Kentucky v. Frankfort Distillery, 24 S W 2d 1025, 233 Ky. 771, certiorari denied 51 S.Ct. 75, 282 U S. 868, 75 L Ed. 767.
10 C J. p 406 note 92.

26. U S —Western R. Co. v. Alabama R. Commn., D C.Ala, 197 F. 954.

27. U.S —Western R Co. v. Alabama R. Commn, supra.

28. Ky.—Southern Ry. Co of Kentucky v. Frankfort Distillery, 26 S W 2d 1025, 233 Ky 771, certiorari denied 51 S Ct. 75, 282 U.S. 868, 75 L Ed. 767.
10 C.J. p 406 note 95

29. U S.—Tift v. Southern R. Co, C C Ga, 138 F. 753, affirmed 148 F. 1021, 79 C.C.A. 536, affirmed 27 S.

carrier that it would repay to the shippers the sum total of the increased exaction, if the increase should be held illegal, a reference will be ordered to ascertain the amount due complainants.[30]

That a provision of the Interstate Commerce Act, 49 U.S.C.A. § 4 (2), which provides that, where a carrier by railroad in competition with a water route or routes reduces the rates on the carriage of freight to or from competitive points, it shall not be permitted to increase such rates unless after a hearing by the commission it shall be found that such proposed increase rests on changed conditions other than the elimination of water competition, does not apply where the reduction in rates was with the approval of the commission, given after a hearing, by an order entered on the application of the carrier for relief from the operation of the section, so that, in such case, a proposed increase may be made without a prior finding by the commission, on proper hearing, that such increase rests on changed conditions other than the elimination of water competition.[31]

§ 278. Power of State to Fix or Regulate Rates

a. In general
b. State and federal control mutually exclusive
c. Effect of charter provisions
d. State commissions

a. In General

A state has power to regulate the rates for the transportation of persons and property within its jurisdiction by carriers, regardless of prior contract obligations of the carrier.

Common carriers are engaged in public employment affecting the public interest, and, subject to the constitutional limitations against the impairment of vested rights, or depriving persons of property without due process of law, or depriving them of the equal protection of the law, a state has power to regulate the amount of charges by such carriers for the transportation of persons and property within its own jurisdiction unless restricted by some contract in the charter,[32] even where the rates are not discriminatory and preferential,[33] and even where there is a blending of interstate and intra-state operations of the carriers unless congress has exercised its paramount constitutional power to limit the authority of the state.[34] This is so even though the property of the carrier may have been mortgaged[35] or its income pledged[36] as security for the payment of obligations incurred, or even though contracts have been previously entered into between the carrier and its patrons fixing the compensation to be paid for transporta-

Ct 706, 206 U.S. 428, 51 L.Ed. 1124, 11 Ann.Cas. 846.
10 C.J. p 406 note 96.

30. U.S.—Tift v. Southern R. Co., supra.

31. U.S.—Skinner & Eddy Corporation v. U. S., Or., 39 S.Ct. 375, 249 U.S. 557, 63 L.Ed. 772.

Rail rate not shown to have eliminated water competition

Where the commission found that the withdrawal of boats from coast to coast service was not on account of the rates made by the rail carriers with which the boats compete, but on account of slides in the Panama Canal and the extraordinary rise in ocean freights, and that the substantial disappearance of water competition was merely temporary, the changed conditions found were something other than the "elimination of water competition" which congress intended should not justify raising the reduced rates.—Skinner & Eddy Corporation v. U. S., Or., 39 S.Ct. 375, 249 U.S. 557, 63 L.Ed. 772.

32. Ill.—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 166 N.E. 466, 335 Ill. 70—Public Utilities Commission v. Springfield Terminal Ry. Co., 127 N.E. 128, 292 Ill. 505—State Public Utilities Commission of Ill. v. Atchison, T. & S. F. Ry. Co., 115 N.E. 904, 278 Ill. 58.
Iowa.—Hawkeye Portland Cement Co. v. Chicago R. I. & P. Ry. Co., 201 N.W. 16, 198 Iowa 1250.
Ky.—Louisville & N. R. Co. v. Greenbrier Distillery Co., 187 S.W. 296, 170 Ky. 775.
N.Y.—Murphy v. New York Central R. Co., 122 N.E. 700, 225 N.Y. 548, affirming 156 N.Y.S. 49, 170 App. Div. 788.
Tex.—Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co., Com. App., 221 S.W. 590, reversing, Civ. App., 173 S.W. 222.
10 C.J. p 406 note 1.
Equal protection of laws see Constitutional Law § 519, 12 C.J. p 1169 notes 68–83, p 1170 notes 84–5, p 1171 notes 6–16.

Corpus Juris text is cited with approval on a question of the right of the legislature to regulate and establish rates which a public service corporation generally may charge for its services in Degiovanni v. Public Service Commission, 197 P. 582, 583, 45 Nev. 74.

Elevator rates

The rates for elevating grain reaching Buffalo by lake for transfer to cars are subject to regulation by statute as a public service.—Spencer Kellogg & Sons v. Delaware, L. & W. R. Co., 197 N.Y.S. 380, 204 App. Div. 243, affirming 195 N.Y.S. 69, 119 Misc. 174, affirmed 199 N.Y.S. 951, 206 App. Div. 735.

33. Colo.—Consumers' League v. Colorado, etc., R. Co., 125 P. 577, 53 Colo. 54, Ann.Cas.1914A. 1158.

34. Ill.—State Public Utilities Commission of Ill. v. Atchison, T. & S. F. Ry. Co., 115 N.E. 904, 278 Ill. 58.

Limitation based on interstate commerce requirements

Subject to the power of congress to regulate intra-state rates in so far as necessary to prevent discrimination against interstate commerce, considered infra § 278 a (2), the state authorities may deal with intra-state rates on the general level which the commission has found fair to interstate commerce.—Atlantic Coast Line R. Co. v. Commonwealth, 133 S.E. 883, 145 Va. 62.

35. U.S.—Producers' Transp. Co. v. Railroad Commission of State of California, 40 S.Ct. 131, 251 U.S. 228, 64 L.Ed. 239, affirming 169 P. 59, 176 Cal. 499.

36. U.S.—Producers' Transp. Co. v. Railroad Commission of State of California, supra—Chicago, etc., R. Co. v. Cutts, Iowa, 94 U.S. 155, 24 L.Ed. 94.

tion.[37] Such power may be exercised by direct action of the legislature, even in the absence of specific authority such as is contained in the constitutions of a number of the states,[38] or by delegating the power to some appropriate agency,[39] such, for instance, as a municipal corporation,[40] or, as appears in subdivision d of this section, a state board or commission.

The power of the state to regulate freight charges includes the power to establish through rates over separate lines within its borders,[41] and where a joint tariff between two or more roads has been agreed on, such tariff is as much within the control of the legislature as if it related to transportation over a single line.[42] Where the state enacts legislation governing intra-state rates, such legislation supersedes common-law rights and liabilities of a carrier in that regard.[43]

b. State and Federal Control Mutually Exclusive

Except in so far as the federal government has control of intra-state rates so as to prevent unjust discrimination against interstate commerce, the power of the federal and state governments to control interstate and intra-state rates respectively are mutually exclusive of each other.

A state commission has no power to change and fix the relation between interstate and intra-state commerce rates,[44] and state regulation of rates should be so construed and applied as not to conflict with valid federal regulation of rates.[45] Neither a state commission nor the interstate commerce commission are subject to interference by

37. U.S.—Producers' Transp. Co. v. Railroad Commission of State of California, 40 S.Ct. 131, 251 U.S. 228, 64 L.Ed. 239, affirming 169 P. 59, 176 Cal. 499—Northern Pac. Ry. Co. v. St. Paul & Tacoma Lumber Co., C.C.A. Wash., 4 F.2d 359, reversing, D.C., St. Paul & Tacoma Lumber Co. v. Northern Pac. Ry. Co., 296 F. 749.
Iowa.—Hawkeye Portland Cement Co. v. Chicago, R. I. & P. Ry. Co., 201 N.W. 16, 198 Iowa 1250.
Miss.—Brookhaven Lumber & Mfg. Co. v. Mississippi R. Co., 122 So. 472, 154 Miss. 303.
N.Y.—Onondaga Golf and Country Club v. Syracuse & S. R. Co., 160 N.Y.S. 693, 96 Misc. 213.
Pa.—Leiper v. Baltimore & P. R. Co., 105 A. 551, 262 Pa. 328.
Va.—City of Richmond v. Virginia Ry. & Power Co., 126 S.E. 353, 141 Va. 69.
Wash.—Prater v. Department of Public Service of Washington, 60 P.2d 238, 187 Wash. 390.
Wis.—Nekoosa-Edwards Paper Co. v. Public Service Commission, 246 N.W. 428, 210 Wis. 644.
10 C.J. p 407 note 3.

Contract merely modified as to rate provision

A contract by a railroad company to transport logs for a lumber company at an agreed rate, made in connection with a sale to the lumber company of the land from which the logs were to be cut, is subject to the action of state authorities changing the lawful rate on such shipments, and is not destroyed by such action, but its terms are modified as was presumably contemplated by the parties.—Northern Pac. Ry. Co. v. St. Paul & Tacoma Lumber Co., C.C.A. Wash., 4 F.2d 359, reversing, D.C., St. Paul & Tacoma Lumber Co. v. Northern Pac. Ry. Co., 296 F. 749.

Contract carriers

Contracts between private parties and contract carriers using the public highways fixing the compensation to be paid for transportation are subject to the power of the state to regulate rates.—Prater v. Department of Public Service of Washington, 60 P.2d 238, 187 Wash. 390.

38. U.S.—Ortega Co. v. Triay, Fla., 43 S.Ct. 44, 260 U.S. 103, 67 L.Ed. 153—Vandalia R. Co. v. Schnull, 41 S.Ct. 324, 255 U.S. 113, 65 L.Ed. 539, reversing 122 N.E. 225, 188 Ind. 87, conformed to 130 N.E. 865, 190 Ind. 698—Westinghouse Electric & Mfg. Co. v. Binghampton Ry. Co., D.C.N.Y., 255 F. 378, appeal dismissed 257 F. 726, 169 C.C.A. 14.
Ky.—Louisville & N. R. Co. v. Greenbrier Distillery Co., 187 S.W. 296, 170 Ky. 775.
Minn.—Blake v. Winona & St. P. R. Co., 19 Minn. 418, 18 Am.R. 345, affirmed 94 U.S. 180, 24 L.Ed. 99.
Miss.—Illinois Cent. R. Co. v. Mississippi R. Commission, 109 So. 868, 143 Miss. 805.
Mo.—State ex rel. Rhodes v. Public Service Commission of Missouri, 194 S.W. 287, 270 Mo. 547.
N.Y.—Transit Commission v. Long Island R. Co., 288 N.Y.S. 938, 248 App.Div. 749, affirmed 3 N.E.2d 622, 272 N.Y. 27.
10 C.J. p 407 note 6.

In Puerto Rico the legislative assembly has power to enact legislation making it unlawful for a railroad company to charge other or different rates than those specified in a tariff schedule approved by the executive council.—People of Porto Rico v. American R. Co. of Porto Rico, Porto Rico, 254 F. 369, 165 C.C.A. 589, certiorari denied American R. Co. of Porto Rico v. People of Porto Rico, 39 S.Ct. 259, 249 U.S. 600, 63 L.Ed. 796.

39. Del.—Robertson v. Wilmington & P. Traction Co., 104 A. 839, 7 Boyce 155.
Miss.—Illinois Cent. R. Co. v. Mississippi R. Commission, 109 So. 868, 143 Miss. 805.
10 C.J. p 407 note 7.

In New Mexico

(1) Const. art. 11 § 7 amply provides power for the state corporation commission to fix intra-state rates for common carriers.—Kinney v. New Mexico Midland Ry. Co., 214 P. 754, 28 N.M. 451.

(2) The commission is not authorized, either by constitution or statute to suspend a proposed tariff of the railroads.—In re Coal Rates in New Mexico, 171 P. 506, 23 N.M. 704.

40. Del.—Robertson v. Wilmington & P. Traction Co., 104 A. 839, 7 Boyce 155.
Ill.—Chicago Union Tract. Co. v. Chicago, 65 N.E. 470, 199 Ill. 579.

41. Iowa.—Burlington, etc., R. Co. v. Dey, 48 N.W. 98, 82 Iowa 312, 31 Am.S.R. 477, 12 L.R.A. 436

42. U.S.—Minneapolis, etc., R. Co. v. Minnesota, Minn., 22 S.Ct. 900, 186 U.S. 257, 46 L.Ed. 1151.

43. Ill.—Medusa Portland Cement Co. v. Illinois Cent. R. Co., 5 N.E.2d 782, 287 Ill.App. 549.

44. Ill.—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 166 N.E. 466, 335 Ill. 70.

45. **In Virginia,** every rate of commerce within the state must be read in connection with Const.1902 § 153, which expressly declares that "the provisions of this article shall always be so restricted in their application as not to conflict with any of the provisions of the Constitution of the United States, and as if the necessary limitation upon their interpretation had been herein expressed in each case." — Atlantic Coast Line R. Co. v. Commonwealth, 118 S.E. 257, 136 Va. 134.

the other in the establishment of intra-state and interstate rates respectively.[46] The power of the federal government to regulate transportation is limited to commerce which is not intra-state, and the authority of a state to regulate transportation within its borders, including the power to prescribe rates for transportation, is in no sense restricted by federal legislation,[47] with the exception that under the Interstate Commerce Act the interstate commerce commission has authority to remove discriminations against interstate commerce, and to that end may control intra-state rates so far as necessary to remove unjust discriminations against interstate commerce resulting from the relation of interstate and intra-state rates which are reasonable in themselves.[48]

c. Effect of Charter Provisions

A state may exempt a carrier from legislative control over its rates in granting it a charter, but such exemption must be clear and unmistakable and will not be presumed from general language.

As intimated, supra § 278 a, a state in granting a charter to a common carrier may exempt it from legislative control over rates charged for transportation because this amounts to a contract between the state and the carrier, the obligations of which cannot be impaired;[49] but the exemption must be made in the charter by clear and unmistakable language inconsistent with the exercise of such power by the legislature.[50] A general charter provision giving power to charge and collect tolls necessarily implies that the charges shall be reasonable, and does not detract from the power of the state through its legislation, or the agency lawfully constituted thereby, to prescribe reasonable rates to be observed by the carrier;[51] nor does a charter giving a railroad company the exclusive right of transportation or conveyance of persons, merchandise, and produce, providing the charge shall not exceed a certain rate guarantee that the company shall always have right to charge the maximum rates named.[52] The power to regulate rates is continuing in its nature and cannot be bargained away except by words of positive grant or something equivalent thereto, and if there is a reasonable doubt, it must be resolved in favor of the existence of the power.[53] Where the exclusive power of fixing rates is not conferred on the carrier in express terms by statute or by charter, the state may afterward pass laws regulating such rates.[54] Charters are taken subject to constitutional provisions existing at the time they are granted, which authorize the legislature to pass laws establishing reasonable maximum rates of charges,[55] and notwithstanding the right is conferred upon the carrier by its charter to regulate its rates, the state may, nevertheless, exercise visitorial powers over the carrier to see that it keeps within its charter limits.[56] Where a carrier surrenders a charter

46. Ill—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 166 N.E. 466, 335 Ill. 70.

Effect of action of state commission subsequent to federal control

Public service commission's refusal to approve proposed changes in intra-state rates to be charged by railroads on termination of federal control operated to make effective after September 1, 1920, the date such control terminated, the rates which had existed pursuant to its authority prior to the period of federal control—People v. Long Island R. R., 185 N.Y.S. 594, 113 Misc. 700, reversed on other grounds 186 N.Y.S. 589, 195 App. Div. 897.

47. U.S.—Simpson v. Shepard, 33 S. Ct. 729, 230 U.S. 352, 57 L.Ed. 1511, 48 L.R.A.,N.S., 1151, Ann.Cas. 1916A 18

10 C.J. p. 407 note 4.

Intra-state shipment of logs imported from Canada

(1) Department of public works had jurisdiction to determine charge for intra-state transportation of logs, some of which shipper brought from Canada, and intra-state rates not interstate rates applied—State v. Department of Public Works, 270 P. 300, 149 Wash. 129, certiorari denied Chicago, M., St. P. & P. R. Co. v. Department of Public Works of Washington, 49 S.Ct. 350, 279 U.S. 854, 73 L.Ed. 996.

(2) That railroad furnished cars on which shipper brought logs from Canada to point of shipment was immaterial on question of jurisdiction of public works department to determine intra-state charges—State v. Department of Public Works, supra.

48. Ill.—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 166 N.E. 466, 335 Ill. 70.

Tariff provision construed

Railroad commission's adoption of interstate commerce commission's order authorizing increase of intra-state freight rates repeals conflicting tariff provisions of railroad commission.—Lutcher & Moore Lumber Co. v. Beaumont, S. L. & W. Ry. Co., Tex.Com.App., 49 S.W.2d 726, affirming, Civ.App., 33 S.W.2d 1077.

49. Del.—Philadelphia, etc., R. Co. v. Bowers, 9 Del. 506

10 C.J. p. 408 note 28

Application to other portions of same system

Granting a railroad a franchise between specified points on condition that only one fare shall be charged on said road has no application to charges made on other portions of the system of roads operated by the same company—Byars v. Bennington & H.V.R. Co., 90 N.Y.S. 736, 99 App.Div. 34, affirmed 76 N.E. 1090, 184 N.Y. 554.

50. Ga.—Georgia R. Co. v. Smith, 70 Ga. 694

10 C.J. p. 409 note 29.

51. Ill.—Ruggles v. People, 91 Ill. 256, affirmed 2 S.Ct. 832, 108 U.S. 526, 27 L.Ed. 812.

10 C.J. p. 409 note 30.

52. Ga.—Georgia R. Co. v. Smith, 70 Ga. 694

53. U.S.—Stone v. Farmers' L. & T. Co., Miss., 6 S.Ct. 334, 388, 1191, 116 U.S. 307, 29 L.Ed. 991.

54. U.S.—Georgia R., etc., Co. v. Smith, Ga., 9 S.Ct. 47, 128 U.S. 174, 32 L.Ed. 377—Chicago, etc., R. Co. v. Atty.-Gen., C.C.Iowa, 5 F.Cas. No. 2,666, affirmed 94 U.S. 155, 24 L.Ed. 94.

55. Minn.—Wellman v. Chicago, etc., R. Co., 47 N.W. 489, 83 Minn. 592.

56. Miss.—Gulf & S.I. R. Co. v. Laurel Oil & Fertilizer Co., 159

containing a provision that the legislature may so regulate its tolls that not more than a certain percentage shall be divided as profits to the stockholders and that the surplus shall be paid over to the state, and accepts a new charter without any such provision, and up to that time there had not been any attempt on the part of the state to regulate the tolls or to demand surplus earnings, the carrier is free from liability under the original charter, and subsequent legislation attempting to amend the charter or the general railroad law cannot affect its constitutional rights.[57]

d. State Commissions

(1) In general
(2) Powers of commissions
(3) Reparation

(1) In General

State boards or commissions have in general been established in the various states to regulate and control the carriers' rates, their authority ranging from the power to fix and establish the rates themselves to the power to supervise the rates established by the carriers and see that they are just and reasonable.

The power of a state to regulate or fix rates for intra-state traffic through a board or commission, considered in § 133 of the C.J.S. title Constitutional Law, also 12 C.J. p 852 note 89, p 853 note 93, has been exercised in the majority of the states by the establishment by the state constitution, or legislature, or both, of a state board or commission with power to regulate and fix intra-state rates.[58] The method of control differs in the various states. In some states the rates are established by a state board or commission, and are inoperative other than by force of the order of the commission or board;[59] in others a state commission establishes a maximum schedule of rates after which the carriers are required to file their tariffs which cannot

So. 838, 172 Miss. 630, amending and overruling suggestion of error 158 So. 778, 172 Miss. 630, corrected 160 So. 564, 172 Miss. 630.
10 C.J. p 409 note 34.

57. U.S.—Terre Haute, etc., R. Co. v. Indiana, 24 S.Ct. 767, 194 U.S. 579, 48 L.Ed. 1124, reversing 65 N.E. 401, 159 Ind. 438.

58. U.S.—Ortega Co. v. Triay, Fla., 43 S.Ct. 44, 260 U.S. 103, 67 L.Ed. 153—Producers' Transp. Co. v. Railroad Commission of State of California, 40 S.Ct. 131, 251 U.S. 228, 64 L.Ed. 239, affirming 169 P. 59, 176 Cal. 499—El Paso & S. W. R. Co. v. Arizona Corporation Commission, D.C.Ariz., 51 F.2d 573.
Ark.—Clear Creek Oil & Gas Co. v. Ft. Smith Spelter Co., 255 S.W. 903, 161 Ark. 12, affirmed Ft. Smith Spelter Co. v. Clear Creek Oil & Gas Co., 45 S.Ct. 263, 267 U.S. 231, 69 L.Ed. 588.
Ga.—Wight v. Pelham & H. R. Co., 89 S.E. 176, 18 Ga.App. 195.
Ill.—Des Plaines Lumber & Coal Co. v. Chicago, B. & Q. R. Co., 249 Ill.App. 383.
Ky.—Louisville & N. R. Co. v. Greenbrier Distillery Co., 187 S.W. 296, 170 Ky. 775.
La.—Empire Rice Milling Co. v. Railroad Commission of Louisiana, 79 So. 833, 143 La. 1036.
Miss.—Brookhaven Lumber & Mfg. Co. v. Mississippi R. Co., 122 So. 472, 154 Miss. 303.
Neb.—Fred F. Shields Co. v. Chicago, B. & Q. R. Co., 276 N.W. 925, 133 Neb. 722—Central Bridge & Construction Co. v. Chicago & N. W. Ry. Co., 262 N.W. 852, 129 Neb. 726, vacating 260 N.W. 172, 128 Neb. 779
N.C.—Corporation Commission v. Seaboard Air-Line System, 37 S.E. 266, 127 N.C. 283
Tex.—Texarkana & Ft. S. Ry. Co. v. Houston Gas & Fuel Co., 51 S.W.2d 284, 121 Tex. 594—Railroad Commission of Texas v. Uvalde Const. Co., Civ.App., 49 S.W.2d 1113—Clayton Oil & Refining Co. v. Railroad Commission of Texas, Civ. App., 3 S.W.2d 497—Missouri-Kansas & T. R. Co. of Texas v. Railroad Commission of Texas, Civ. App., 3 S.W.2d 489, affirmed Producers' Refining Co. v. Missouri, K. & T. R. Co. of Texas, Com.App., 13 S.W.2d 679, 680.
Va.—Norfolk, etc., Belt Line R. Co. v. Commonwealth, 49 S.E. 39, 103 Va. 289.

Independent governmental branch

In at least one jurisdiction the state constitution has expressly established a state railway commission independent of the executive, legislative, or judicial branch of the state government, and while under the constitution its powers may be controlled or limited by the legislature, unless there is specific legislation that might limit or affect its power, such commission has had conferred upon it all the control over the establishment of rates for common carriers that the state can exercise, and possesses such independent legislative, judicial, executive, and administrative powers as are necessarily involved in performing its duty to regulate and fix rates for common carriers.—In re Lincoln Traction Co., 171 N.W. 192, 103 Neb. 229

Subsequent to federal control

The public service commission of Pennsylvania has power to regulate intra-state freight rates for carrying coal during the two-year period subsequent to the termination of federal control, where such regulation does not interfere with, or show discrimination against, interstate commerce.—Lehigh & N. E. R. Co. v. Public Service Commission of Commonwealth of Pennsylvania, 79 Pa.Super. 540.

Contract carriers

(1) Provision in Motor Transportation Act authorizing commissioner of public utilities to regulate rates of contract carriers by motor vehicle is not invalid.—Anderson v. Thomas, 26 P.2d 60, 144 Or. 572.

(2) Statute authorizing department of public service to supervise, regulate, fix, alter, and amend just, fair, and reasonable classifications, rules, and regulations and minimum rates and charges of every contract carrier and special carrier in state is constitutional.—Prater v. Department of Public Service of Washington, 60 P.2d 238, 187 Wash. 335.

Spur track held subject to state regulatory power

Evidence that a railroad operated two industrial spur tracks, each about five miles in length, charging rates covered by tariffs on file with the public service commission, etc., was held to sustain commission's finding that such spurs were part of the railroad, although the railroad did not own the right of way on which they were constructed and used a different kind of engine in operating on the spurs, so as to subject them to regulation by the state regulatory commission.—Missouri Southern R. Co. v. Public Service Commission, 214 S.W. 379, 279 Mo. 484.

59. Mont.—Montana Horse Products

exceed the maximum rates established;[60] but which, as appears supra § 277 a, they can make as much less as they choose, and if made less than the maximum the commission cannot suspend them, unless specific power to do so is given it.[61] In others, so long as the carrier establishes reasonable rates, they cannot be lowered by commission or court, but when the carrier fails to do so the commission is authorized to prescribe just and reasonable maximum rates;[62] and in still others the legislature has not delegated to the commission the absolute power of fixing maximum rates, but the power only to ascertain and determine what rates are reasonable,[63] the rates themselves being fixed by the carriers with power to review their reasonableness vested in a state commission,[64] a method which, as appears from a consideration of the rules set forth infra § 279, is similar to that employed by the federal government in the regulation of interstate rates.

Where a commission makes a valid order for the observance of freight rates made and promulgated by it, it is the duty of the carrier to obey such order and to comply with all its requirements.[65]

(2) Powers of Commissions

A commission of the character under consideration has only those powers given it by constitutional or statutory provisions, which in general cover the fixing or regulating of all intra-state rates covering the transportation and services connected with intra-state traffic.

A state regulatory board or commission has no inherent power; all its powers are derivative and must be based on constitutional or statutory provisions.[66] Its powers are not as broad as the legislature's;[67] it has such power only as is conferred upon it either expressly or by fair implication,[68] which must be exercised in strict accordance

Co. v. Great Northern Ry. Co., 7 P.2d 919, 91 Mont. 194.

Tex.—Railroad Commission of Texas v. Uvalde Const. Co., Civ.App., 49 S.W.2d 1113—Texas Steel Co. v. Fort Worth & D. C. Ry. Co., Civ. App., 45 S.W.2d 794, certified questions answered 40 S.W.2d 78, 120 Tex. 597—Houston Chamber of Commerce v. Railroad Commission of Texas, Civ.App., 19 S.W.2d 583, affirmed Railroad Commission of Texas v. Houston Chamber of Commerce, 78 S.W.2d 591, 124 Tex. 375—Clayton Oil & Refining Co. v. Railroad Commission of Texas, Civ.App., 3 S.W.2d 497—Missouri-Kansas & T. R. Co. of Texas v. Railroad Commission of Texas, Civ.App., 3 S.W.2d 489, affirmed Producers' Refining Co. v. Missouri, K. & T. R. Co. of Texas, Com.App., 13 S.W.2d 679, 680.

Va.—Mathieson Alkali Works v. Norfolk & W. Ry. Co., 137 S.E. 608, 147 Va. 426.

"It is immaterial upon whose initiative the rates finally adopted by the Railroad Commission were proposed."—Texas Steel Co. v. Fort Worth & D. C. Ry. Co., Tex.Civ.App., 45 S.W.2d 794, 796, certified questions answered 40 S.W.2d 78, 120 Tex. 597.

Chief function of commission

Creation of railroad commission contemplates as its chief function fixing of rates binding on carrier and shipper, and revisable only in statutory mode—Producers' Refining Co. v. Missouri, K. & T. R. Co. of Texas, Tex.Com.App., 13 S.W.2d 679, affirming Missouri, K. & T. R. Co. of Texas v. Railroad Commission of Texas, Civ.App., 3 S.W.2d 489.

60. Ill.—State Public Utilities Commission of Ill. v. Atchison, T. & S. F. Ry. Co., 115 N.E. 904, 278 Ill. 58.

61. Ill.—State Public Utilities Commission of Ill. v. Atchison, T. & S. F. Ry. Co., supra.

62. Conn.—Turner v. Connecticut Co., 101 A. 88, 91 Conn. 692.

63. Mo.—State ex rel. Rhodes v. Public Service Commission of Missouri, 194 S.W. 287, 270 Mo. 547.

Reasonable rates as maximum

Public service commission has authority, on its own motion or on complaint, on a hearing to determine and fix just and reasonable rates, fares, and charges for common carriers operating in state, and to enforce such rates as maximum to be charged—State ex rel. and to Use of Alton R. Co. v. Public Service Commission, Mo.App., 110 S.W.2d 1121, transferred, Sup., 100 S.W.2d 474.

Validity

Public Service Commission Act § 47, conferring on commission power and duty to ascertain and establish reasonable maximum rates for carriage of persons and freight in intrastate traffic by railroads in state, is constitutional.—State ex rel. Rhodes v. Public Service Commission of Missouri, 194 S.W. 287, 270 Mo. 547.

64. Mo.—Sonken-Galamba Corporation v. Missouri Pac. R. Co., 40 S.W.2d 524, 225 Mo.App. 1066.

Or.—Hammond Lumber Co. v. Public Service Commission, 189 P. 639, 96 Or. 595, 9 A.L.R. 1223.

65. Fla.—State v. Atlantic Coast Line R. Co., 40 So. 875, 51 Fla. 578—State v. Atlantic Coast Line R. Co., 37 So. 652, 48 Fla. 114.

66. U.S.—Southern Pac. Co. v. Bartine, D.C.Nev., 1 F.2d 323.

Ill.—State Public Utilities Commission of Ill. v. Atchison, T. & S. F. Ry. Co., 115 N.E. 904, 278 Ill. 58.

Mich.—Sparta Foundry Co. v. Michigan Public Utilities Commission, 267 N.W. 736, 275 Mich. 562.

Mont.—Montana Horse Products Co. v. Great Northern Ry. Co., 7 P.2d 919, 91 Mont. 194.

Va.—City of Portsmouth v. Virginia Ry. & Power Co., 126 S.E. 362, 141 Va. 54, 39 A.L.R. 1510.

67. U.S.—Southern Pac. Co. v. Bartine, D.C.Nev., 1 F.2d 323.

68. U.S.—Ortega Co. v. Triay, Fla., 43 S.Ct. 44, 260 U.S. 103, 67 L.Ed. 153

10 C.J. p. 410 note 42.

Elimination of discrimination

In readjusting rates, readjustment of rates apart from the general schedule of rates may be made to eliminate discrimination—Atchison, T. & S. F. Ry. Co. v. State, 267 P. 253, 130 Okl. 263.

Power to change existing rates only in the event that such rates are found to be unreasonable cannot be otherwise exercised.—Valley & Siletz R. Co. v. Thomas, 48 P.2d 358, 151 Or. 80.

Power to make general schedule of maximum rates

(1) For the transportation of all commodities, on all railroads, to and from all points within the state, on a general and comprehensive complaint that rates are too high, or on like information of the commission itself, is not conferred upon the Kentucky railroad commission by the Kentucky act of March 10, 1900, Acts, 1900, p. 5, c. 2, authorizing it, on complaint that the rates of any railway company are extortionate, or on its own information, to fix a reasonable rate if, after hearing, it finds the rates extortionate.—Siler v. Illi-

with the statute conferring the power.[69] However, where the power conferred upon the commission is in general terms to be exercised in the public welfare, and a wide discretion is accorded it which is not constrained by peremptory instructions, the public welfare is the test and measure of its powers.[70] The power of a commission to which has been delegated the exercise of power relating to rates of carriers is exclusive;[71] and where the constitution of the state has created a state commission and conferred upon it power over rates of carriers such commission has all the power and the legislature has none of it.[72] Its power to establish or change rates is continuous, so that a material change in the conditions from those existing at the time rates were established will be ground for new action in the premises by the commission.[73]

The power of a state railroad commission to fix rates is in subordination to constitutional or statutory provisions prohibiting discrimination between long and short hauls.[74] Under a statute authorizing the commission to permit common carriers to establish special preferential industrial rates, the commission has no authority to establish special rates or require their continuance, but only to approve special rates submitted by a carrier, who may withdraw them at will, but cannot put a new rate into effect except on the approval of the commission.[75] Power given to a commission to make reasonable and just rates authorizes it to increase as well as to decrease rates.[76] Where power is conferred upon it to make and promulgate rates, the rates must be made general in their nature and applicable alike to all persons and corporations under like circumstances, and must not in terms be made applicable to only one person or corporation

nois Cent. R. Co., Ky., 29 S.Ct. 458, 213 U.S. 199, 53 L.Ed. 760—Siler v. Louisville, etc., R. Co., Ky., 29 S.Ct. 451, 457, 213 U.S. 175, 53 L.Ed. 753.

(2) "The difference between the fixing of one rate, or a few upon specific complaint or information, and the adoption of a general scheme of rates applicable in all cases to all the roads, is vast and important. In the one case it can be fairly accomplished, while in the other the chances of injustice and great inequalities are infinite and almost certain to concur. We do not say that under this statute, as we construe it, there must be a separate proceeding or complaint for each separate rate. A complaint, or a proceeding on information by the commission itself, in regard to any road, may include more than the rate on one commodity or more than one rate, but there must be some specific complaint or information in regard to each rate to be investigated, and there can be under this statute, no such wholesale complaint, which by its looseness and its generalities can be made applicable to every rate in operation on a railroad, or upon several or all of the railroads of the State. If the legislature intended to give such an universal and all-prevailing power it is not too much to say that the language used in giving it should be so plain as not to permit of doubt as to the legislative intent."—Siler v. Louisville, etc., R. Co., supra.

Expressman in city

Public Utilities Act, giving utilities commission power to regulate rates is held to apply only to companies organized for the purpose of carrying on a large and extensive business as a common carrier, and not to apply to one engaged in moving and express business in city, so that city ordinance regulating rates of same is valid—City of Chicago v. Mayer, 124 N.E. 842, 290 Ill. 142.

69. U.S.—Central of Georgia R. Co v. Georgia R. Commn., D.C.Ga., 215 F. 421.
10 C.J. p 410 note 43.

70. U.S.—Ortega Co. v. Triay, Fla., 43 S.Ct. 44, 260 U.S. 103, 67 L.Ed. 153.

71. Mo.—City of Cape Girardeau v. St. Louis-San Francisco Ry. Co., 267 S.W. 601, 305 Mo. 590, 36 A.L.R. 1488.

72. N.M.—San Juan Coal & Coke Co. v. Santa Fe, S. J & N. Ry. Co., 2 P.2d 305, 35 N.M. 512.

73. Ark.—Clear Creek Oil & Gas Co. v. Ft. Smith Spelter Co., 255 S.W. 903, 161 Ark. 12, affirmed Ft. Smith Spelter Co. v. Clear Creek Oil & Gas Co., 45 S.Ct. 263, 267 U.S. 231, 69 L.Ed. 588
Ind.—G. Ittenbach Co. v. Cleveland, C., C. & St. L. Ry. Co., 181 N.E. 382, 97 Ind.App. 332.

Continuous jurisdiction

(1) Public utilities commission has continuing jurisdiction over railroad rates, fares, and charges—Pittsburgh & L. E. R. Co. v. Public Utilities Commission of Ohio, 191 N.E. 467, 128 Ohio St. 388.

(2) Under L. O. L. § 6906, the matter of a railroad's rates is continually under the scrutiny of the public service commission in the exercise of a flexible, administrative authority, and can be reopened at any time, either on its own motion or the petition of interested parties.—Hammond Lumber Co. v. Public Service Commission, 189 P. 639, 96 Or. 595, 9 A.L.R. 1223

Power to set aside order

Order of railroad commission under Acts 1905 c. 53, fixing rates did not exhaust commission's power and although affirmed on appeal could still be set aside.—Vandalia R. Co. v. Schnull, 122 N.E. 225, 188 Ind. 87, reversed on other grounds 41 S.Ct. 324, 255 U.S. 113, 65 L.Ed. 539, conformed to 130 N.E. 865, 190 Ind. 698.

74. U.S.—California Adjustment Co. v. Southern Pac. Co., D.C.Cal., 226 F. 349, affirmed Southern Pac. Co. v. California Adjustment Co., 237 F. 954, 150 C.C.A. 604, certiorari dismissed 39 S.Ct. 182, 248 U.S. 595, 63 L.Ed. 438.

Exoneration from long and short haul provision

The railroad commissioners may consider the application of a railroad company, and determine that for the present and future it shall be relieved of the operation of § 218 of the Kentucky constitution and § 820 of Ky. Statutes, relating to charges for long and short hauls, in the transportation of a particular commodity between certain points—Illinois Cent. R. Co. v. Commonwealth, 63 S.W. 448, 23 Ky.L. 544.

75. Ala.—State v. Louisville & N. R. Co., 72 So. 494, 197 Ala. 203.

Formal, affirmative approval required

Under Acts 1907, Sp. Sess., p. 40 § 14½, giving the railroad commission authority to permit preferential industrial rates, in the case of a non-emergency special industrial rate, there must be an affirmative approval of record by the railroad commission, as a condition precedent to the establishment of the rate.—State v. Louisville & N. R. Co., 72 So. 494, 197 Ala. 203

76. U.S.—Ortega Co. v. Triay, Fla., 43 S.Ct. 44, 260 U.S. 103, 67 L.Ed. 153
10 C.J. p 410 note 42.

to the exclusion of other persons or corporations under like circumstances.[77]

The authority of a particular board or commission has been held to extend to rates for specific commodities and services,[78] including joint rates,[79] and the rates for various services, such as switching,[80] spotting cars for weighing,[81] dipping cattle pursuant to quarantine laws,[82] and stoppage in transit for milling or other change.[83] In fixing freight rates a state regulatory commission has power to regulate the amount of merchandise which shall constitute a transportation carload.[84]

In the establishment of a rate to supersede the one formerly in force, the commission is entitled to change the basis of the measurement of the rate.[85]

(3) Reparation

In some states the commission has power to award reparations for past shipments on the basis that the rates were unreasonable and excessive, and in others it does not have such power.

In the absence of constitutional or statutory authorization, a state regulatory commission has no power to make a reparation order directing a re-

77. Fla.—State v Atlantic Coast Line R. Co., 40 So. 875, 51 Fla. 578

78. **Rates commission authorized to regulate**

(1) The rates of a petroleum pipe line, which is a public utility, are subject to public regulation by a state through its railroad commission—Producers' Transp Co. v Railroad Commission of State of California, 40 S.Ct. 131, 251 U.S. 228, 64 L. Ed. 239, affirming 169 P. 59, 176 Cal. 499.

(2) Corporation commission has power to adopt and promulgate orders prescribing freight rates for carrying various kinds, classes, and grades of cattle, and to provide different rates based on shipper's valuation if such order is just and reasonable.—Shaff v. Kramer, 235 P. 517, 109 Okl. 109

(3) Under Const. art 9 §§ 6, 18, 22, the corporation commission was empowered to fix the rates to be charged by railroads for movement of cars, equipment, and employees of circuses from one point to another within the state and to promulgate rules regulating such services in order to prevent extortion and unfair discrimination.—Atchison, T & S. F. Ry. Co. v. State, 206 P. 252, 86 Okl. 65.

(4) Corporation commission's order promulgating rate of shipment of slack and mine run coal was held to be within constitutional duty—Atchison, T. & S. F. Ry. Co. v. State, 267 P 253, 130 Okl. 263.

Charges for dipping cattle

The dipping of cattle in vats by a railroad company transporting them from points below the quarantine line to points above it, under quarantine regulations prescribed by law, is so involved in the carriage of such cattle as to constitute a part of the carrier's public service, and the corporation commission has power to fix a reasonable charge to be paid by shippers to the carrier for the dipping of cattle brought above the quarantine line before delivery.—Midland Valley R Co. v. State, 130 P. 803, 35 Okl. 672.

79. Ky.—Southern Ry. Co. v. Louisville Cooperage Co., 266 S.W. 382, 205 Ky. 721.
10 C J p 410 note 42 [d].

Water and rail rates

Under Ky St. §§ 816, 821, 822, 825 828, 829, Acts 1916 c 18 § 14, railroad commission had jurisdiction to regulate joint rate of a railroad company and steamboat company. Acts 1920 c 26, and Acts 1922 c 102, authorizing the commission to regulate joint rates of two or more common carriers by rail or by rail and by water merely being declaratory of existing law—Southern Ry Co. v Louisville Cooperage Co., 266 S.W. 382, 205 Ky 721.

80. Okl.—St. Louis-San Francisco Ry. Co v Standard Paving Co., 224 P 296, 98 Okl. 71—St Louis-San Francisco Ry. Co v. State, 198 P. 73, 81 Okl 298.

Abolition of switching charge

Order of state railroad and warehouse commission requiring a railroad which had taken over a switching company to continue operation of company's lines without switching charge for services rendered was within its jurisdiction—Minneapolis Civic & Commerce Ass'n v. Great Northern Ry Co., 162 N.W. 689, 137 Minn. 10, rehearing denied 163 N.W. 294, 137 Minn. 10, error dismissed Great Northern R. Co v. Minneapolis Civic & Commerce Ass'n, 39 S.Ct. 385, 249 U.S. 622, 63 L.Ed. 806.

Between electric and steam railroads

Public utilities commission may be empowered to determine controversy between electric railway and steam railroads involving switching rates on intra-state shipments of commodities between such railroads whose tracks were physically connected, directly or indirectly, within particular switching district.—Baltimore & O. R. Co. v. Public Utilities Commission of Ohio, 198 N.E. 869, 130 Ohio St. 258.

Determination of what is switching service

The state corporation commission has jurisdiction and authority to determine what is a switching service, in connection with intra-state railroad transportation—St. Louis-San Francisco Ry. Co. v. Standard Paving Co., 224 P. 296, 98 Okl. 71.

81. Va.—Norfolk, etc., Belt Line R. Co v. Commonwealth, 49 S.E. 39, 103 Va 289.

82. Okl.—Midland Valley R Co. v. State, 130 P. 803, 35 Okl. 672

83. Fla.—State v Atlantic Coast Line R. Co., 52 So 4, 59 Fla 612. La.—Empire Rice Milling Co. v. Railroad Commission of Louisiana, 79 So. 833, 143 La 1036. S.D.—Chicago, M & St. P. Ry. Co. v. Board of Railroad Com'rs, 199 N.W. 453, 47 S.D. 395, error dismissed 46 S.Ct. 485, 271 U.S. 645, 70 L.Ed 1129.

84. N.C.—Corporation Commission v. Seaboard Air-Line System, 37 S.E. 266, 127 N.C. 283.

85. Or.—Valley & Siletz R. Co v. Thomas, 48 P 2d 358, 151 Or. 80.

Change of basis held justified

Order of public utilities commissioner changing freight rate on logs from scale measurement to carload lot basis is not subject to attack on ground that new basis would tend to overloading and greatly increase damage to roadbed and equipment, loss of logs in transportation, expense for salvaging and reloading, and claims for damages in view of commissioner's authority to limit load in event abuses developed and duty to enforce regulations to carry out intent of order, which court was required to assume was made with reference to average carload as established by evidence—Valley & Siletz R Co. v. Thomas, 48 P.2d 358, 151 Or 80.

Change of method for computing charge

Public works department's action in changing rate based on scaled measurement of logs to weight based on carloads was held arbitrary—Northern Pac. Ry. Co. v. Baker, D. C.Wash., 3 F.Supp. 1.

fund by a carrier to a shipper or a consignee of an overcharge for freight.[86]

In a number of states the commission cannot award reparation on the basis that the rates charged were unreasonable and excessive;[87] ordinarily, this is true where the charges, when made, were in accordance with rates fixed or approved by the commission.[88] In such cases, the commission's determination that an existing tariff is unreasonable affects only future rates and operates prospectively only and not retroactively,[89] and reparation cannot be awarded for a period prior to the time the carrier received notice that a rate formerly approved by the commission was now deemed excessive.[90] However, in some of these states the commission is entitled to order reparation where the rate was not fixed by the commission but was made by the carrier in the exercise of its own discretion,[91] or where no rate was prescribed by the commission at the time the charge was made and thereafter the commission established a rate lower than that charged by the carrier,[92] or where the carrier makes a charge for a service in excess of the rate fixed,[93] the rule being that a provision authorizing the commission to order reparation when a rate or charge collected is excessive, permits the commission to order a reparation only where the carrier has collected rates or charges in excess of those fixed and prescribed by the commission.[94] Also, in at least one state, the state commission may award a certificate of reparation in cases where the rates exacted were filed with the commission and perfunctorily approved by it without a hearing and determination of their reasonableness, and where they

86. N.M.—Santa Fé Gold, etc., Min. Co. v. Atchison, etc., R. Co., 155 P. 1093, 21 N.M. 496.
N.Y.—Murphy v. New York Cent., etc., R. Co., 156 N.Y.S. 49, 170 App. Div. 788
10 C.J. p. 440 note 47.

87. Mo.—State ex rel. and to Use of Missouri Pac. R. Co. v. Public Service Commission, 259 S.W. 445, 303 Mo. 212.
N.M.—Santa Fé Gold & Copper Mining Co. v. Atchison, T. & S. F. Ry. Co., 155 P. 1093, 21 N.M. 496
N.Y.—Murphy v. New York Central R. Co., 122 N.E. 700, 225 N.Y. 548, affirming 156 N.Y.S. 49, 170 App. Div. 788.

Track storage charges

Under Public Service Commission Law §§ 26, 40, 48, 49, commission has no power to allow recovery for "track storage" charges, and order permitting same is not prima facie proof in state courts of facts therein determined.—Murphy v. New York Cent. R. Co., 122 N.E. 700, 225 N.Y. 548, affirming 156 N.Y.S. 49, 170 App. Div. 788.

88. U.S.—El Paso & S. W. R. Co. v. Arizona Corporation Commission, D.C.Ariz., 51 F.2d 573.
Ala.—Western Ry. of Alabama v. Montgomery County, 153 So. 622, 228 Ala. 426.
Miss.—E. L. Young Heading Co. v. Payne, 89 So. 782, 127 Miss. 48.
Mont.—Sunburst Oil & Refining Co. v. Great Northern Ry. Co., 7 P.2d 927, 91 Mont. 216, certiorari granted Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 53 S.Ct. 7, 287 U.S. 580, 77 L.Ed. 508, affirmed 53 S.Ct. 145, 287 U.S. 358, 77 L.Ed. 360, 85 A.L.R. 254—Montana Horse Products Co. v. Great Northern Ry. Co., 7 P.2d 919, 91 Mont. 194
Okl.—St. Louis-San Francisco Ry. Co. v. State, 8 P.2d 744, 155 Okl. 236.
Pa.—Pennsylvania R. Co. v. Public Service Commission, 190 A. 367, 125 Pa.Super. 558.
Tex.—Producers' Refining Co. v. Missouri, K. & T. Ry. Co. of Texas, Com.App., 13 S.W.2d 680, affirming Missouri, K. & T. R. Co. of Texas v. Railroad Commission of Texas, Civ.App., 3 S.W.2d 489, affirmed Producers' Refining Co. v. Missouri, K. & T. Ry. Co. of Texas, Com.App., 13 S.W.2d 679—Clayton Oil & Refining Co. v. Railroad Commission of Texas, Civ.App., 3 S.W.2d 497.
Va.—Mathieson Alkali Works v. Norfolk & W. Ry. Co., 137 S.E. 608, 147 Va. 426.
Wash.—State ex rel. Standard Oil Co. of California v. Department of Public Works, 53 P.2d 313, 185 Wash. 235—Northern Pac. Ry. Co. v. Department of Public Works, 240 P. 362, 136 Wash. 389.

Prior practice of carrier immaterial

In proceeding under Remington Comp.St. § 10433, to recover alleged excess charge in shipment of wood, it was held that, where order of department of public works had fixed the rate for the shipment of such award, the alleged prior practice or custom relative thereto was immaterial.—Northern Pac. Ry. Co. v. Department of Public Works, 240 P. 362, 136 Wash. 389

Statutory requirement that rates be reasonable immaterial

In a proceeding to recover overcharges on shipments of wood, complainant's contention that, in view of Remington Comp.St. §§ 10345, 10434, a rate in order to be lawful must not only be the rate found in tariff of carrier on file, but must also be fair, reasonable, and sufficient, was without merit, in view of indication in § 10434 that refunds were to be restricted to overcharges on tariff rates lawfully fixed.—Northern Pac. Ry. Co. v. Department of Public Works, 240 P. 362, 136 Wash. 389.

89. Mont.—Sunburst Oil & Refining Co. v. Great Northern Ry. Co., 7 P.2d 927, 91 Mont. 216, certiorari granted Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 53 S.Ct. 7, 287 U.S. 580, 77 L.Ed. 508, affirmed 53 S.Ct. 145, 287 U.S. 358, 77 L.Ed. 360, 85 A.L.R. 254—Montana Horse Products Co. v. Great Northern Ry. Co., 7 P.2d 919, 91 Mont. 194.

90. Pa.—Pennsylvania R. Co. v. Public Service Commission, 190 A. 367, 125 Pa.Super. 558.

91. Ala.—Western Ry. of Alabama v. Montgomery County, 153 So. 622, 228 Ala. 426.

92. Okl.—Atchison, T. & S. F. Ry. Co. v. State, 206 P. 236, 85 Okl. 223
Wash.—Northern Pac. Ry. Co. v. Department of Public Works, 240 P. 362, 136 Wash. 389.

93. Okl.—Atchison, T. & S. F. Ry. Co. v. State, 206 P. 236, 85 Okl. 223.
Wash.—Northern Pac. Ry. Co. v. Department of Public Works, 240 P. 362, 136 Wash. 389.

94. U.S.—El Paso & S. W. R. Co. v. Arizona Corporation Commission, D.C.Ariz., 51 F.2d 573, 577.
"We are convinced that when the Arizona Corporation Commission has approved and authorized a rate to be collected, and the carrier has collected that rate and nothing in excess thereof while the rate was in force, the Commission has no authority to order a reparation, even though it should thereafter find, as it did in this case, that the rate so prescribed was excessive."—El Paso & S. W. R. Co. v. Arizona Corporation Commission, supra.

are subsequently found to be unjust, unreasonable, or otherwise unfair and discriminatory against the shipper; but where the carriers have exacted rates pursuant to a hearing and deliberative order of the commission, reparation cannot be awarded.[95]

In other states, the regulatory commission has power to establish retroactive rates and to award reparation for shipments made prior thereto.[96] In some of these states, the jurisdiction of the commission does not extend to cases in which the shipper seeks an award for charges in excess of the established rate, where the reasonableness of the established rate is not in issue;[97] but in others the regulatory commission has authority, after a proper investigation, to order a refund of such overcharges.[98] It has been held, however, that the commission has no jurisdiction to order a refund of charges collected in violation of a statute prohibiting a carrier to charge more for a short than a long haul, since the overcharge, if made, was unwarranted as a matter of law and constitutes a legal question with which the commission can have nothing to do;[99] but it is held in another jurisdiction that a greater charge for a short than for a longer haul is an overcharge, or a charge of more than is permitted by law, concerning which the regulatory commission is entitled to hear complaints, even though such charge is in accordance with the published tariff schedules.[1] Statutes authorizing a regulatory commission to award reparation or order a refund of overcharges are not in violation of the state or federal constitutions.[2]

95. Kan.—State v. Public Service Commission of Kansas, 11 P.2d 999, 135 Kan. 491

Statute authorizing reparation not retroactive

Provision for filing complaint for reparation certificate within three years after payment of unreasonable rate is valid as to shipper's contracts in futuro, but void in retroactive aspect—State v. Public Service Commission of Kansas, 11 P.2d 999, 135 Kan. 491.

Prior law

(1) Early statute authorizing commission charged with regulating railroad rates to find rate previously charged excessive, and by what amount, was repealed by omission from subsequent revision—Great Western Portland Cement Co. v Public Service Commission of Kansas, 247 P 881, 121 Kan. 531.

(2) However, a later statute, Sess. L 1929 c 223, provided for the issuing of reparation certificates to shippers for the exaction of unjust, unreasonable, discriminatory, or unduly preferential rates and charges by railroads and other common carriers—State v. Public Service Commission of Kansas, 11 P 2d 999, 135 Kan. 491.

96. U S.—Illinois Cent. R Co. v. Vest, D C Ky., 39 F.2d 658
Cal.—Southern Pac Co. v. Railroad Commission of State of California, 231 P. 28, 194 Cal. 734
Ill.—Terminal R. Ass'n of St. Louis v Public Utilities Commission, 136 N E. 797, 304 Ill 312.
Ind.—American Foundry Co v. Chicago, I & L. Ry. Co, 178 N E. 295, 100 Ind App. 111.
Ky—Southern Ry. Co. of Kentucky v. Frankfort Distillery, 26 S W 2d 1025, 233 Ky 771, certiorari denied 51 S Ct. 75, 282 U.S 868, 75 L Ed 767—Louisville & N R Co. v. Greenbrier Distillery Co., 187 S W. 296, 170 Ky. 775.
Neb.—Central Bridge & Construction Co. v. Chicago & N. W. Ry. Co., 262 N.W. 852, 129 Neb. 726, vacating 260 N W. 172, 128 Neb 779.
Or—Oregon-Washington R & Nav Co v. McColloch, 55 P 2d 1133, 153 Or. 32.
Wis.—Marinette, T. & W. R. Co. v. Railroad Commission of Wisconsin, 218 N.W. 724, 195 Wis. 462.
10 C.J. p 440 note 43.

Power not prohibited by federal statute

Transportation act does not deprive state railroad commission of power to award reparation to shippers for excessive rates, for past years
U S—Illinois Cent R. Co. v. Vest, D.C Ky., 39 F 2d 658.
Cal—Southern Pac. Co. v. Railroad Commission of State of California, 231 P. 28, 194 Cal. 734.

Constitution construed to permit refund

Const. art 9 § 23, is not an inhibition denying authority to pass L 1913 c 10 § 1, authorizing the corporation commission to find the amount of illegal unwarranted and discriminatory charges made by transportation and transmission companies for holding commodities and ordering a refund, since Const. art 9 § 35, gives the legislature power after the second Monday in January, 1909, to alter, amend, revise, or repeal §§ 18 to 34, inclusive, of such article—Atchison, T. & S. F. Ry. Co. v. State, 206 P. 236, 85 Okl 223.

Limitations on right to award reparations

The only demand for reparation which the commission may entertain is a demand for damages resulting from violation of the commission's orders, so that where public service commission had never made any rules or regulations relating to switching of cars at station involved, or determined what shipper should be paid by carrier for performing switching services at such station, commission was without jurisdiction to entertain shipper's demand for reimbursement for switching services performed at such station.—Parker Gravel Co v Louisiana Public Service Commission, 162 So. 64, 182 La. 524.

During pendency of proceedings

Railroad commission on establishing lower rate could authorize reparations of charges collected during pendency of proceeding as well as charges made prior thereto—Marinette, T & W. R. Co. v. Railroad Commission of Wisconsin, 218 N.W. 724, 195 Wis 462.

97. Or—Oregon-Washington R. & Nav Co v. McColloch, 55 P 2d 1133, 153 Or. 32

Administrative function or discretion must be involved

Statute, authorizing public utilities commissioner to order reparations by carriers to shippers charged unreasonable rates and determine amount thereof, is limited to instances in which administrative function or discretion is involved and does not include cases of which court has jurisdiction without prior finding or order by commissioner as to reasonableness of rate—Oregon-Washington R & Nav Co. v. McColloch, 55 P.2d 1133, 153 Or. 32.

98. Okl—St Louis & S F. Ry. Co v State, 244 P. 440, 116 Okl 95, certiorari granted 46 S Ct. 630, 271 U S 656, 70 L.Ed. 1135, and certiorari dismissed 47 S.Ct 448, 273 U S 747, 779, 71 L Ed. 888.

99. Cal.—Sunset Pacific Oil Co. v. Los Angeles & S. L R. Co, 290 P. 434, 110 Cal.App. 773.

1. Ohio—Cleveland, C., C. & St. L Ry. Co v. Mills Bros, 128 N.E. 81, 101 Ohio St. 173

2. Ky—Louisville & N. R Co. v. Greenbrier Distillery Co, 187 S.W. 296, 170 Ky. 775.

Where in an action by a carrier to set aside an order of a regulatory commission reducing rates, the order is suspended during the pendency of the action, on the carrier giving bond, and the carrier collects the rate in effect prior to the order, if the order of the commission is affirmed the remedy of a shipper to recover the amount he was overcharged is by an action on the bond in a court of competent jurisdiction, and not by proceedings before the regulatory commission.[3]

§ 279. Power of Federal Government to Fix or Regulate Rates

The federal government has the power to fix or regulate interstate rates, and to fix and regulate intra-state rates in so far as necessary to prevent their interference with interstate rates, which power has been vested in the interstate commerce commission to the extent that the commission has power to require that the rates initiated by the carriers are reasonable.

The federal government under the constitution has inherent power to regulate interstate rates,[4] and rates on traffic in and among the territories of the United States.[5] Even contracts between private parties and common carriers fixing compensation to be paid for transportation, although made under federal authority, are made subject to the right of the federal government to modify or annul them under the sovereign power to regulate rates.[6] Although the supervision of interstate rates is fully conferred upon the interstate commerce commission by various congressional acts, yet power is not conferred upon it to prescribe and establish railroad tariffs of rates to govern in the future; power to initiate interstate rates, as appears supra § 277 a, is left to the carrier, subject to the power of the interstate commerce commission to suspend, or after hearing, to set them aside, when shown to be unreasonable, and tariffs are framed by the railroads and filed with the interstate commerce commission, and become effective unless suspended or set aside by the commission.[7] However, as appears in the C.J.S. title Commerce § 143, also 12 C.J. p 125 note 61–p 126 note 81, the interstate commerce commission, although not entitled to fix interstate rates in the first instance, does have the power to determine the reasonableness of interstate rates initiated by the carriers, and, if it finds them unreasonable, to prescribe what rates or the maximum or minimum rates to be charged. The Transportation Act of 1920 does not give to the interstate commerce commission the power to regulate intra-state rates generally, but only in so far as may be necessary, under the paramount power of congress efficiently to regulate interstate commerce,[8] and, as appears infra § 376, to remove an existing discrimination against interstate commerce.

§ 280. Power of Courts to Fix Rates

Courts have no power to fix or establish rates for common carriers.

The courts have no authority to fix or establish rates;[9] nor, in some jurisdictions, may they be re-

Ohio.—Cleveland, C., C. & St. L. Ry. Co. v. Mills Bros., 128 N.E. 81, 101 Ohio St. 173.
10 C.J. p 440 note 44.

3. Ohio.—Taylor-Williams Coal Co. v. Public Utilities Commission of Ohio, 119 N.E. 459, 97 Ohio St. 224.

4. U.S.—Shepard v. Northern Pac. R. Co., C.C.Minn., 184 F. 765, modified on other grounds 33 S.Ct. 729, 230 U.S. 352, 57 L.Ed. 1511.

5. **Interterritorial rates**
Provisions of Choctaw, Oklahoma & Gulf Railway Company Right of Way Act, Act Congr. Feb. 18, 1888, prohibiting company from charging inhabitants of Indian Territory a freight rate higher than that authorized by laws of Arkansas and Texas for similar transportation, were abrogated by Organic Act May 2, 1890, organizing the territory of Oklahoma from the Indian Territory, in so far as shipments from Indian Territory to Oklahoma Territory were concerned.—Chicago, R. I. & P. Ry. Co. v. Gist, 190 P. 878, 79 Okl. 8

6. U.S.—Northern Pac. Ry. Co. v. St. Paul & Tacoma Lumber Co., C.C.A.Wash., 4 F.2d 359, reversing, D.C., St. Paul & Tacoma Lumber Co. v. Northern Pac. Ry. Co., 296 F. 749.
Iowa.—Hawkeye Portland Cement Co. v. Chicago, R. I. & P. Ry. Co., 201 N.W. 16, 198 Iowa 1250.
10 C.J. p 411 note 49.

Rate entering into consideration for sale
A contract by a railroad company to transport logs for a lumber company at an agreed rate, although made in connection with a sale to the lumber company of the land from which the logs were to be cut, and for the purpose of securing increased lumber traffic, is subject to the regulatory power of the national government over rates.—Northern Pac. Ry. Co. v. St. Paul & Tacoma Lumber Co., C.C.A.Wash., 4 F.2d 359, reversing, D.C., St. Paul & Tacoma Lumber Co. v. Northern Pac. Ry. Co., 296 F. 749.

7. Fla.—Louisville & N. R. Co. v. Speed-Parker, Inc., 137 So. 724, 103 Fla. 439.

8. Va.—Atlantic Coast Line R. Co. v. Commonwealth, 133 S.E. 883, 145 Va. 62.

9. Ark.—Clear Creek Oil & Gas Co. v. Ft. Smith Spelter Co., 255 S.W. 903, 161 Ark. 12, affirmed Ft. Smith Spelter Co. v. Clear Creek Oil & Gas Co., 45 S.Ct. 263, 267 U.S. 231, 69 L.Ed. 588.
Fla.—Reinschmidt v. Louisville & N. R. Co., 160 So. 69, 118 Fla. 237.
Ill.—Alton & S. R. Co. v. Illinois Commerce Commission, 147 N.E. 417, 316 Ill. 625.
Tex.—Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co., Com.App., 221 S.W. 590, reversing, Civ.App., 173 S.W. 222.—Railroad Commission of Texas v. Uvalde Const. Co., Civ.App., 49 S.W.2d 1113
Wash.—Northern Pac. Ry. Co. v. Department of Public Works, 217 P. 507, 125 Wash. 584, motion denied 45 S.Ct. 196, and reversed on other grounds 45 S.Ct. 412, 268 U.S. 39, 69 L.Ed. 837.
10 C.J. p 438 note 13.

Effect of varying terms of contract
To enforce a rate claimed to be established by a contract between express company and railroad company, the decree must follow the contract in its entirety, and any substantial variation therefrom, and substitution

quired to do so[10] Courts may inquire into the reasonableness of rates, and if found unreasonable restrain their enforcement.[11] They may not, however, as an original question exert authority over rates,[12] but the tariff must first be fixed so that the courts may be able to judge therefrom whether or not it is reasonable and proper or excessive;[13] nor, on deciding that rates fixed by statute or a railroad commission are unreasonable and confiscatory, can the courts revise such rates and prescribe other rates.[14] So far as interstate carriers are concerned, an order by a court fixing the maximum rate and enjoining the carrier from demanding more than the rates so established would in effect deprive the carrier of the right to fix its rate in the first instance and to change the same, which power is conceded to the carrier by the Interstate Commerce Act.[15]

Operation at a loss. Whether a carrier shall run some parts of its line at a loss, perhaps with a view to future development or future gain, perhaps with a view to greater public service, the loss to be made up from the profits on the operation of other parts of its line, is a business question to be determined by the carrier subject to the control of the regulatory commission.[16]

§ 281. Reciprocal Rights of Public and Carrier in Respect of Service and Rate of Compensation

The rights of carriers and the public with respect to rates are reciprocal, the carrier being entitled to a fair return on the value of its property devoted to the public use and the shipper to a rate not in excess of the value of the services rendered.

The rights of carriers and the public with respect to rates are reciprocal.[17] A carrier is entitled to just compensation.[18] It is entitled to ask a fair return on the value of that which it employs for the public convenience.[19] A rate must yield the carrier a reasonable return on the class of traffic to which

therefor, of the court's judgment, would be the fixing of the rate by the court in usurpation of a legislative function—Missouri, K. & T Ry. Co of Texas v. Empire Express Co., Tex Com.App, 221 S W. 590, reversing, Civ App, 173 S.W. 222.

In mandamus to compel carrier to furnish facilities

In mandamus to compel railroad to furnish express company facilities under Rev St 1911 arts 6616, 6617, court was not empowered to determine what constituted a reasonable rate for such facilities—Missouri, K. & T. Ry Co of Texas v. Empire Express Co., Tex Com App, 221 S W 590, reversing, Civ.App, 173 S.W. 222

10. Conn—Turner v. Connecticut Co., 101 A. 88, 91 Conn 692.

11. Tex—Missouri, K. & T. Ry. Co of Texas v. Empire Express Co., Com App, 221 S W. 590, reversing, Civ.App, 173 S.W. 222.

Injunction against enforcement see infra § 306

Proceedings by carrier for relief against unreasonable rates see infra §§ 305–308.

12. Ill.—Des Plaines Lumber & Coal Co v. Chicago, B. & Q R Co, 249 Ill App 383

Ohio—New York, C. & St. L R Co v. Miller City Tile Co, 19 Ohio N P.,N S., 244.

Quantum of charge

Rate of charge for storage by railroad is not question for courts, quantum of charge having been fixed by tariff established by railroad commission—Aleman Planting & Mfg Co v. Hines, 102 So 815, 157 La. 625.

13. Ill.—Des Plaines Lumber & Coal Co v. Chicago, B. & Q R. Co., 249 Ill App 383.

14. Ill.—Alton & S R Co. v. Illinois Commerce Commission, 147 N E. 417, 316 Ill. 625.

Tex—Missouri, K & T Ry Co of Texas v. Empire Express Co, Com. App., 221 S.W. 590, reversing, Civ. App., 173 S.W. 222—Railroad Commission of Texas v. Lamb, Civ. App., 81 S W 2d 161.

10 C J. p 432 note 41.

15. U.S—Southern Pac. Co. v. Colorado Fuel, etc., Co., Colo, 101 F 779, 42 C C A. 12, appeal dismissed 22 S Ct. 934, 46 L Ed. 1264.

16. N J—Inhabitants of City of Trenton v. Trenton & Mercer County Traction Corporation, 105 A. 136, 92 N J Law 61.

Loss from operation through thinly settled territory

Contention that loss sustained by carrier by its operation of lines through thinly populated territory cannot be made up by profit on the operation of lines through thickly settled territory, cannot be sustained—Inhabitants of City of Trenton v Trenton & Mercer County Traction Corporation, 105 A. 136, 92 N.J.Law 61.

Test is effect on entire line

The correct legal test in determining whether a railway company shall be allowed to run some parts of its lines at a loss is the effect on the railway's entire line, and not on that part which was formerly a part of one of the consolidating railways—Inhabitants of City of Trenton v. Trenton & Mercer County Traction Corporation, 105 A 136, 92 N.J.Law 61.

17. U S.—Arkansas Rate Cases, C. C Ark, 187 F. 290, reversed on other grounds 30 S Ct 1030, 230 U. S 553, 57 L Ed. 1625.

10 C J. p 411 note 51.

18. Ohio—Marietta & V. R Co v. Public Utilities Commission, 126 N E 889, 101 Ohio St 29

19. U S—International Ry. Co v. Prendergast, D C.N.Y., 52 F 2d 293.

Ark—Clear Creek Oil & Gas Co v. Ft. Smith Spelter Co., 255 S W. 903, 161 Ark 12, affirmed Ft Smith Spelter Co v. Clear Creek Oil & Gas Co, 45 S Ct. 263, 267 U.S 231, 69 L Ed 588.

Conn—Turner v. Connecticut Co., 101 A 88, 91 Conn 692.

Ill.—State Public Utilities Commission of Ill. v. Atchison, T & S F. Ry. Co., 115 N E 904, 278 Ill. 58.

Ind—Vandalia R Co v. Schnull, 122 N E 225, 188 Ind 87, reversed on other grounds 41 S.Ct. 324, 255 U S 113, 65 L Ed. 539, conformed to 130 N E. 865, 190 Ind 698.

La—Alexandria & W. Ry. Co v. Railroad Commission of Louisiana, 79 So. 863, 143 La 1067.

N.J.—O'Brien v Board of Public Utility Com'rs, 105 A. 132, 92 N. J Law 44, affirmed 106 A. 414, 92 N.J Law 587.

N Y.—George Adams Lumber Co v. Long Island R Co., 243 N.Y S. 430, 230 App Div. 260

S C—Blease v Charleston & W. C Ry. Co., 144 S E 233, 146 S C 496.

S D—Commercial Club of City of Mitchell v Chicago, M. & St P. Ry. Co., 170 N.W 149, 41 S.D. 314.

10 C J p 411 note 52.

Right protected by constitution

(1) The right of a carrier to just compensation, that is, a reasonable return on the value of its property

it applies.[20] Considerations of public interest cannot be invoked as a ground to compel a carrier to maintain a rate denying it proper compensation.[21] If a railroad is not ill conceived, greater in extent than it should be, or unduly expensive in construction, and is operated wisely and economically, rates producing no more than a reasonable return on its fair value would not be unjust to anyone.[22] The fact that a new road was built without expectation of an immediate realization of a fair return on the investment does not justify disallowance of such return if it can be earned without exaction of unreasonable rates.[23] On the other hand, shippers are entitled to reasonable rates.[24] The public is entitled to demand that no more be exacted from it than what the services rendered are reasonably worth.[25] The carrier must render adequate service at the lowest rates possible consistent with a fair return on its property.[26] The rate should be high enough to provide the user reasonable service.[27] Neither the legislature nor a commission acting under such authority can establish arbitrarily, and without regard to justice and right, a tariff of rates for transportation, which is so unreasonable as practically to destroy the value of property of persons engaged in the carrying business on the one hand,[28] or so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation on the other;[29] nor can the carrier make rates which are oppressive to those who by necessity are compelled to employ its service.[30] Reasonable compensation for the service actually rendered is all that a carrier is permitted to exact, either at common law or under statutes specially regulating the subject.[31] Carriers have no right to regulate their charges in proportion to the

used in the public service, is protected by constitutional safeguards, which may not be overridden by legislative enactment or considerations of public policy.—City of Paducah v. Paducah Ry. Co., Ky., 43 S.Ct. 335, 261 U.S. 267, 67 L.Ed. 647.

(2) State may not, through unreasonable regulation of railroad, prevent it from obtaining a fair return on the property used in the public service without violation of constitution of the United States.—Delaware & H R. Corporation v. Public Service Commission, 281 N.Y.S. 155, 245 App.Div. 66, affirmed 200 N.E. 298, 270 N.Y. 519.

Zone of reasonableness

Zone of reasonableness exists between maxima, beyond which charges are excessive, and minima, beyond which charges are too low.—U. S. v. Chicago, M., St. P. & P. R. Co., Ill., 55 S.Ct. 462, 294 U.S. 499, 79 L.Ed. 1023, affirming, D.C., Chicago, M., St. P. & P. R. Co. v. U. S., 8 F.Supp. 970.

Rate entailing exhaustion of capital

The public cannot require of a public service corporation the continued operation of its property under rates which would afford, not only no adequate return on the capital invested, but would entail a large continuing loss and the eventual exhaustion of the entire capital.—Charleston-Isle of Palms Traction Co. v. Shealy, D C.S C., 266 F. 406.

Increase held proper

When the evidence submitted in support of the new rate established that the company was not receiving a revenue sufficient to earn a proper return on the minimum valuation fixed in the former determination, and that the income from the new rate would not exceed its allowable gross revenue, an order permitting the filing of a new schedule is reasonable and in conformity with law.—City of Philadelphia v. Public Service Commission, 84 Pa Super. 135.

20. U.S.—Vandalia R Co. v. Schnull, 41 S.Ct. 324, 255 U.S. 113, 65 L.Ed. 539, reversing 122 N.E. 225, 188 Ind. 87, conformed to 130 N.E. 865, 190 Ind. 698.

21. Ohio.—Hocking Valley R. Co. v. State Public Utilities Commn., 110 N.E. 952, 92 Ohio St. 362.
10 C.J. p 411 note 53

22. U.S.—Missouri, etc., R. Co. v Love, C.C Okl., 177 F. 493, affirmed 185 F. 321, 107 C.C.A. 403, certiorari denied 31 S.Ct. 321, 220 U.S. 618, 55 L.Ed. 612.

23. W.Va.—Coal, etc., R Co. v. Conley, 67 S.E. 613, 67 W.Va 129.

24. U.S.—Great Northern Ry Co. v. Sullivan, C.C.A Minn., 72 F.2d 587, certiorari granted 55 S.Ct. 216, 293 U.S. 551, 79 L.Ed. 654, reversed on other grounds 55 S.Ct. 472, 294 U.S. 458, 79 L.Ed. 992—Algoma Coal & Coke Co. v. U. S., D.C.Va., 11 F.Supp. 487.
Va.—Manieri v. Seaboard Air Line Ry. Co., 137 S.E. 496, 147 Va. 415.

25. Ark.—Clear Creek Oil & Gas Co v. Ft. Smith Spelter Co., 255 S.W. 903, 161 Ark 12, affirmed Ft. Smith Spelter Co. v. Clear Creek Oil & Gas Co., 45 S.Ct. 263, 267 U.S. 231, 69 L.Ed. 588.
Ill.—State Public Utilities Commission of Ill. v Atchison, T & S F. Ry. Co., 115 N.E. 904, 278 Ill. 58
Ind.—Vandalia R. Co. v. Schnull, 122 N.E 225, 188 Ind 87, reversed on other grounds 41 S.Ct 324, 255 U.S. 113, 65 L.Ed. 539, conformed to 130 N.E 865, 190 Ind. 698
La.—Alexandria & W. Ry. Co. v. Railroad Commission of Louisiana, 79 So. 863, 143 La. 1067.
N.J.—O'Brien v Board of Public Utility Com'rs, 105 A. 132, 92 N.J. Law 44, affirmed 106 A. 414, 92 N. J Law 587
10 C.J. p 411 note 56.

26. Ky.—Louisville & N. R. Co. v. Johnson's Adm'x, 270 S.W 58, 207 Ky. 813.

27. Conn.—Turner v. Connecticut Co, 101 A. 88, 91 Conn. 692.

Former rule

Prior to Transportation Act Feb 28, 1920, carriers were at liberty to establish or maintain even unreasonably low rates, provided they were not discriminatory.—Keogh v. Chicago & N W. Ry Co., Ill., 43 S.Ct. 47, 260 U.S 156, 67 L.Ed. 183, affirming, C.C.A., 271 F 444, certiorari denied 41 S.Ct 537, 256 U.S 699, 65 L.Ed. 1177

28. U.S.—Chicago, etc., R Co. v. Minnesota, Minn., 10 S.Ct. 462, 134 U.S. 418, 36 L.Ed. 970—Arkansas Rate Cases, C.C.Ark., 187 F 290, reversed on other grounds 33 S.Ct. 1030, 230 U.S. 553, 57 L.Ed 1625.
Ind.—Southern R. Co. v. State R Commn., 83 N.E. 721, 42 Ind.App. 90.
10 C.J. p 412 note 57.

29. U.S.—Chicago, etc., R. Co. v. Minnesota, Minn., 10 S.Ct 462, 134 U.S. 418, 33 L.Ed 970.
Ind.—Southern R. Co. v. State R Commn., 83 N.E. 721, 42 Ind.App 90.

30. U.S.—Smyth v. Ames, Neb, 18 S.Ct 418, 169 U.S. 466, 42 L.Ed. 819, modified on other grounds 18 S.Ct 888, 171 U.S 361, 43 L.Ed 197—Arkansas Rate Cases, C.C Ark., 187 F. 290, reversed on other grounds 33 S.Ct. 1030, 230 U.S. 553, 57 L.Ed. 1625—Ohio Coal Co. v. Whitcomb, Wis., 123 F. 359, 59 C.C.A 487
10 C.J p 412 note 59.

31. U.S.—Interstate Commerce Commn. v. Chicago Great Western

prosperity which attends industries whose products they transport.[32] It happens not infrequently that the reciprocal rights under consideration cannot stand together, and for obvious reasons the right of the carrier must yield to the right of the public in that event.[33] In other words, the reasonable value of the services may be insisted on, even though charges so limited would fail to produce a fair return to the carrier on its investment.[34] If, for any reason, the carrier's business cannot reasonably be so conducted as to render a profit, the loss must fall on the carrier.[35] Easily understood applications of the principle occur where, in construction or purchase, more money has been put into a plant than is required for one adequate to the demands of the community in which such plant is located;[36] where the plant has been built at an extravagant and wasteful cost, or is not well adapted to the uses for which it was intended;[37] where the construction was at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value;[38] or where there is great waste and extravagance in the management of the carrier's property.[39]

§ 282. Reasonableness of Rates in General

a. Reasonable rate defined
b. Necessity that control be reasonable

a. Reasonable Rate Defined

A reasonable rate is one which is just to the carrier and to the shipper, but if it is higher or lower than the services are worth it is unreasonable. The question of reasonableness is one partaking of both a legislative and a judicial aspect.

A just and reasonable rate is one which is just to the carrier and to the shipper.[40] Ordinarily, a rate is "unreasonable, unjust, oppressive, and unlawful," where it does not fairly compensate the carrier for its services,[41] or where it is more than a fair compensation for the services rendered or constitutes an unjust discrimination.[42] A rate cannot include charges for services which are separate and distinct from the transportation service and rendered only in connection with certain parts of the service and not in all cases.[43]

Whether or not a rate is reasonable is a problem with a double aspect, legislative and judicial.[44] From the legislative standpoint that rate or return is reasonable which is not unfair to the shipper, and at the same time is large enough to meet the demands of legislative policy in promoting and encouraging railroad investments. The legislative administrative board takes into account the risk involved, the community service rendered, past or prospective unprofitable periods, and all other elements tending to determine what a wise policy may be, and it may well fix a rate contemplating a return much beyond the legal rate of interest for the money invested; in other words, from this point of view a very liberal return may be reasonable.[45] On the other hand, it cannot judicially be said that a rate is unreasonable unless it yields less than that minimum return which the invested capital has a right to demand; in other words, that increment which is so inherently incidental to the investment that destroying the increment is a confiscation of the property.[46]

A statute fixing maximum rates constitutes a dec-

R Co., C.C.Ill., 141 F. 1003, affirmed 28 S.Ct. 493, 209 U.S. 108, 52 L.Ed. 705.
10 C.J. p 412 note 60, p 441, notes 60, 61.

At common law

At common law shippers were entitled to reasonable rates.—Vandalia R. Co. v. Schnull, 122 N.E. 225, 188 Ind. 87, reversed on other grounds 41 S.Ct. 324, 255 U.S. 113, 65 L.Ed. 539, conformed to 130 N.E. 865, 190 Ind 698.

32. U.S.—Tift v. Southern R. Co., C.C.Ga., 138 F. 753, affirmed 148 F. 1021, 79 C.C.A. 536, affirmed 27 S.Ct. 709, 206 U.S. 428, 51 L.Ed. 1124, 11 Ann.Cas. 846.

33. Wash.—Puget Sound Electric R. Co. v. State R. Commn., 117 P. 739, 65 Wash. 75, 87, Ann.Cas.1913B 763
10 C.J. p 412 note 62.

34. U.S.—Smyth v. Ames, Neb., 18 S.Ct. 418, 169 U.S. 466, 42 L.Ed. 819, modified on other grounds 18 S.Ct. 888, 171 U.S. 361, 43 L.Ed. 197
10 C.J. p 412 note 63.

35. U.S.—Missouri, etc., R. Co. v. Interstate Commerce Commn., C.C.Mo., 164 F. 645.

Pa.—Pennsylvania R. Co. v. Philadelphia County, 68 A. 676, 220 Pa. 100, 15 L.R.A.,N.S., 108.
10 C.J. p 412 note 64.

36. U.S.—Minneapolis, etc., R. Co. v. Minnesota, Minn., 22 S.Ct. 900, 186 U.S. 257, 46 L.Ed. 1151.
10 C.J. p 412 note 65.

37. W.Va.—Coal, etc., R. Co. v. Conley, 67 S.E. 613, 67 W.Va. 129.

38. U.S.—Reagan v. Farmers' L. & T. Co., Tex., 14 S.Ct. 1047, 154 U.S. 362, 38 L.Ed. 1014.

39. U.S.—Smyth v. Ames, Neb., 18 S.Ct. 418, 169 U.S. 466, 42 L.Ed. 819, modified on other grounds 18 S.Ct. 888, 171 U.S. 361, 43 L.Ed. 197
10 C.J. p 413 note 68.

40. U.S.—Smyth v. Ames, Neb., 18 S.Ct. 418, 169 U.S. 466, 42 L.Ed. 819, modified on other grounds 18 S.Ct. 888, 171 U.S. 361, 43 L.Ed. 197
10 C.J. p 413 note 69.

41. Kan.—Union Pac. R. Co. v. Kansas Public Utilities Commn., 148 P. 667, 95 Kan. 604, modified on other grounds 150 P. 635, 96 Kan. 296

42. Tex.—State R. Commn. v. Weld, 73 S.W. 529, 96 Tex. 394.

43. Colo.—Consumers' League of Colorado v. Colorado & S. Ry. Co., 172 P. 1064, 64 Colo. 502.

Rule applied

To switching services.—Consumers' League of Colorado v. Colorado & S. Ry. Co., 172 P. 1064, 64 Colo. 502

44. U.S.—Detroit, etc., R. Co. v. Michigan R. Commn., D.C.Mich., 203 F. 864, affirmed 35 S.Ct. 126, 235 U.S. 402, 59 L.Ed. 288—Louisville, etc., R. Co. v. Siler, C.C.Ky., 186 F. 176, affirmed 34 S.Ct. 48, 231 U.S. 298, 58 L.Ed. 229.

45. U.S.—Detroit, etc., R. Co. v. Michigan R. Commn., D.C.Mich., 203 F. 864, affirmed 35 S.Ct. 126, 235 U.S. 402, 59 L.Ed. 288—Louisville, etc., R. Co. v. Siler, C.C.Ky., 186 F. 176, affirmed 34 S.Ct. 48, 231 U.S. 298, 58 L.Ed. 229

46. U.S.—Detroit, etc., R. Co. v. Michigan R. Commn., D.C.Mich.,

laration that rates below the maximum are reasonable.[47]

b. Necessity That Control Be Reasonable

Control of rates must be reasonable and such as to insure reasonable rates.

Railroad companies are not subject to the absolute control of the legislature as to rates for transportation;[48] and regulatory commissions may not lawfully compel railroads to reduce their rates below a reasonable level.[49] While a state, in prescribing rates for intra-state traffic, may make reasonable classifications of business[50] and may exercise a wide discretion in prescribing reasonable rates,[51] the control exercised must be reasonable and must afford just and reasonable compensation for the services performed and for the use of the property devoted to the business.[52] General power to legislate on the subject of rates and charges confers no right to take away or destroy the property or to annul the contracts of the carrier with third persons.[53] The state may not select a particular class of traffic for arbitrary control and regulation;[54] and under the pretense of regulating rates, the state cannot require a common carrier to carry persons or property without reward, nor can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law.[55] However, while the enforcement by a state of a general scheme of maximum rates so unreasonably low as to be unjust and unreasonable may be confiscation and amount to taking property without due process of law, the state has power to compel a railroad company to perform a particular and specified duty necessary for the convenience of the public, even though it may entail some pecuniary loss,[56] and the fact that state statutes fixing railroad rates are not enforceable as to particular railroads, because the rates as applied to such roads are not compensatory, does not render them invalid as to other roads.[57]

§ 283. Determination of Reasonableness

a. In general
b. Proceedings

a. In General

In general, the power to determine the reasonableness of rates is vested in regulatory commissions before whom the reasonableness of a rate must be tried before it can be tested by the courts. Statutory methods for determining the reasonableness of rates must be followed and such methods generally prescribe some proceeding for directly attacking the rate, collateral attacks not being allowed.

The matter of determining the reasonableness of rates for interstate transportation, filed with the interstate commerce commission, is primarily with such commission,[58] which is a tribunal created by the government to hear, investigate, and report on the reasonableness of rates, and to attempt the correction of inequality and injustice therein;[59] and in the case of intra-state transportation, it is primarily with the legislature or with bodies acting under its authority.[60] The authority of a state to pre-

203 F. 864, affirmed 35 S.Ct. 126, 235 U.S. 402, 59 L.Ed. 288—Louisville, etc., R. Co. v. Siler, C.C.Ky., 186 F. 176, affirmed 34 S.Ct. 48, 231 U.S. 298, 58 L.Ed. 229.

47. N.M.—Kemp Lumber Co. v. Atchison, T. & S. F. Ry. Co., 9 P.2d 387, 36 N.M. 126.

48. Miss.—Stone v. Natchez, etc., R. Co., 62 Miss. 646.

49. Pa.—Pennsylvania R. Co. v. Public Service Commission, 190 A. 372, 126 Pa.Super. 1.

To meet competition

Regulatory commissions may not lawfully compel railroads to reduce their rates below a reasonable level in order to meet water or truck competition.—Pennsylvania R. Co. v. Public Service Commission, 190 A. 372, 126 Pa.Super. 1.

50. Ohio.—Hocking Valley R. Co. v. State Public Utilities Commn., 110 N.E. 952, 92 Ohio St. 362.

51. U.S.—Northern Pac. R. Co. v. North Dakota, N.D., 35 S.Ct. 429, 236 U.S. 585, 59 L.Ed. 735, Ann.Cas. 1916A 1.

52. Ohio.—Village of Wyoming v. Ohio Traction Co., 135 N.E. 675, 104 Ohio St. 325.

10 C.J. p. 408 note 15.

Object to be attained

Under L. O. L. § 6887, the object to be obtained and the canon by which all the activities of the public service commission are controlled is to establish a reasonable rate for services rendered or to be rendered by the carrier, unjust and unreasonable charges being prohibited.—Hammond Lumber Co. v. Public Service Commission, 189 P. 639, 96 Or. 595, 9 A.L.R. 1223.

53. U.S.—Lake Shore, etc., R. Co. v. Smith, Mich., 19 S.Ct. 565, 173 U.S. 684, 43 L.Ed. 858.

Pa.—Leiper v. Baltimore & Philadelphia R. Co., 26 Pa.Dist. 358.

54. U.S.—Banton v. Belt Line Ry. Corporation, N.Y., 45 S.Ct. 534, 268 U.S. 413, 69 L.Ed. 1020.

55. U.S.—Stone v. Farmers' L. & T. Co., Miss., 6 S.Ct. 334, 388, 1191, 116 U.S. 307, 29 L.Ed. 636

56. U.S.—Atlantic Coast Line R. Co. v. North Carolina Corp. Commn., N.C., 27 S.Ct. 585, 206 U.S. 1, 51 L.Ed. 933, 11 Ann.Cas. 398—Smyth v. Ames, Neb., 18 S.Ct. 418, 169 U.S. 466, 42 L.Ed. 819, modified on other grounds 18 S.Ct. 888, 171 U.S. 361, 43 L.Ed. 197.

57. U.S.—St. Louis, etc., R. Co. v. Hadley, C.C.Mo., 168 F. 317, modified on other grounds 33 S.Ct. 975, 230 U.S. 474, 57 L.Ed. 1571.

58. Ohio.—New York, C. & St. L. R. Co. v. Miller City Tile Co., 19 Ohio N.P.,N.S., 244.

Pa.—Long Island R. Co. v. Keystone Iron & Metal Co., 5 Pa.Dist. & Co. 257.

10 C.J. p. 413 note 74.

59. U.S.—Chicago, etc., R. Co. v. Minnesota, Minn., 10 S.Ct. 462, 134 U.S. 418, 33 L.Ed. 970.

60. Ill.—State Public Utilities Commission v. Chicago & W. T. Ry. Co., 114 N.E. 325, 275 Ill. 555, Ann.Cas.1917C 50.

Pa.—American Lime & Stone Co. v. Public Service Commission, 100 Pa.Super. 158

10 C.J. p. 413 note 76.

scribe what shall be reasonable charges for intrastate transportation is state wide unless it is limited by the exertion of the constitutional power of congress with respect to interstate commerce and its instruments.[61] Ordinarily, the power to fix or approve a reasonable rate is vested in a state board or commission,[62] which board or commission also has the power and duty to determine whether rates fixed by a carrier under a power conferred by its charter conform to the power and classification provided therein,[63] and where the carrier fails to fix its rates in the manner provided by its charter it may still submit a schedule of rates to the commission for approval, which if approved become effective the same as rates submitted to the commission by other carriers become effective on such approval.[64]

A rate established by the commission is subject to revision only in the mode provided by statute,[65]

Only issue

In rate proceeding, only question is whether rates are unjust or unreasonable and will be for future.—Centre County Lime Co. v. Public Service Commission, 96 Pa.Super. 590.

Determination of zone lines

Determination where line should be drawn prescribing tariffs on same commodity for different zones, is largely administrative and for public service commission.—American Lime & Stone Co. v. Public Service Commission, 100 Pa.Super. 158.

Wisdom of group system

Wisdom of group system of making freight rates for coal from mines and fixing boundaries of various groups are administrative questions for commerce commission.—Illinois Commerce Commission v. Chicago & E. I. Ry. Co., 163 N.E. 664, 332 Ill. 243.

Effect of federal guaranty period

Transportation Act did not require conditional approval by interstate commerce commission to enable the state commission to entertain complaint against intra-state rate during six months' guaranty period ending September 1, 1920, but the federal commission merely acted as a reviewing body on the determination by the state commission and was required to approve it to make it effective.—Missouri, K. & T. Ry. Co. v. Dewey Portland Cement Co., 242 P. 257, 113 Okl. 142.

61. U.S.—Simpson v. Shepard, Minn., 33 S.Ct. 729, 230 U.S. 352, 57 L.Ed. 1511, 48 L.R.A.,N.S., 1151, Ann.Cas. 1916A. 18.

62. Ill.—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 166 N.E. 466, 335 Ill. 70

Minn.—St. Paul Ass'n of Commerce v. Chicago, B. & Q. R. Co., 158 N.W. 982, 134 Minn. 217, error dismissed Chicago, B. & Q. R. Co. v. St. Paul Ass'n of Commerce, 38 S.Ct. 336, 246 U.S. 679, 62 L.Ed. 935.

Cancellation because misleading

Where misleading symbol was used indicating reduction in charges would result from tariff, when in fact the tariff would increase the charges, the department of public works properly dismissed proceeding and canceled tariff.—North Pac. Coast Freight Bureau v. Department of Public Works, 286 P. 86, 156 Wash. 137.

Function of commission

In fixing reasonable railroad freight rates, public utilities commission applies the statutory rule fixed by the legislature, its function being to ascertain facts on which statutory rule becomes operative.—Sparta Foundry Co. v. Michigan Public Utilities Commission, 267 N.W. 736, 275 Mich. 562.

Regulation requiring approval of rate advance

Order of corporation commission that railroads should not advance freight or passenger rates until advance be approved by commission, is a reasonable exercise of power of commission conferred by Const. art. 9 § 18, invading no substantial state or federal rights of railroads in violation of Const. U.S. art. 1 § 8 par. 3, and Interstate Commerce Act.—Atchison, T. & S. F. Ry. Co. v. State, 171 P. 43, 67 Okl. 304.

63. Miss.—Gulf & S. I. R. Co. v. Laurel Oil & Fertilizer Co., 159 So. 838, amending and overruling suggestion of error 158 So. 778, 172 Miss. 630, and corrected 160 So. 564, 172 Miss. 630.

64. Miss.—Gulf & S. I. R. Co. v. Laurel Oil & Fertilizer Co., supra.

Authority of commission where rates improperly established

State authorities are not compelled to adopt railroad rates where they are not adopted by railroad's directors under power conferred by legislative charter, and, in such case, railroad commission would have power to see that proper rates only are made.—Gulf & S. I. R. Co. v. Laurel Oil & Fertilizer Co., 159 So. 838, 172 Miss. 630, amending and overruling suggestion of error 158 So. 778, 172 Miss. 630 and corrected 160 So. 564, 172 Miss. 630.

Approval of rates

(1) Rates fixed by railroad's directors under power conferred by legislative charter should be certified to railroad commission, which will determine whether rates come within grant of charter and within classification referred to therein, and, if so, commission should approve rates making note of their filing and its approval on minutes.—Gulf & S. I. R. Co. v. Laurel Oil & Fertilizer Co., 159 So. 838, 172 Miss. 630, amending and overruling suggestion of error 158 So. 778, 172 Miss. 630, and corrected 160 So. 564, 172 Miss. 630.

(2) Rates fixed by railroad's directors under rate-making power conferred by legislative charter should be filed with railroad commission and be within statutory classification and limits, and commission's approval should be requested and, if necessary, coerced by mandamus or certiorari.—Gulf & S. I. R. Co. v. Laurel Oil & Fertilizer Co., 158 So. 778, 172 Miss. 630, amended and suggestion of error overruled 159 So. 838, 172 Miss. 630, and corrected 160 So. 564, 172 Miss. 630.

(3) Railroad commission's approval of railroad's rates could be evidenced only by entry on commission's minutes.—Gulf & S. I. R. Co. v. Laurel Oil & Fertilizer Co., 158 So. 778, 172 Miss. 630, amended and suggestion of error overruled 159 So. 838, 172 Miss. 630, and corrected 160 So. 564, 172 Miss. 630.

(4) Railroad commission approving rates fixed by railroad's directors under power conferred by legislative charter need not enter rates on commission's minutes at large at that time, but should refer to rates in some sufficient manner as by number and date or other description that would point public to rates and where they could be seen.—Gulf & S. I. R. Co. v. Laurel Oil & Fertilizer Co., 159 So. 838, 172 Miss. 630, amending and overruling suggestion of error 158 So. 778, 172 Miss. 630, corrected 160 So. 564, 172 Miss. 630.

65. Tex.—Producers' Refining Co. v. Missouri, K. & T. R. Co. of Texas, Com.App., 13 S.W.2d 679, affirming Missouri, K. & T. R. Co. of Texas v. Railroad Commission of Texas, Civ.App., 3 S.W.2d 489.

Revision permitted only by commission or on proper application to court

Erroneous rate can be remedied only by commission, or by application to district court as provided by statute.—Producers' Refining Co. v. Missouri, K. & T. R. Co. of Texas, Tex.Com.App., 13 S.W.2d 679, affirming Missouri, K. & T. R. Co. of Texas v. Railroad Commission of Texas, Civ.App., 3 S.W.2d 489.

and it cannot be attacked at will by any person affected.[66] Ordinarily, a rate cannot be collaterally attacked in a judicial proceeding,[67] as in a common-law action,[68] or an action to recover excess charges.[69] Although it is held in at least one state where the regulatory commission has power to fix rates, that when it establishes a rate it necessarily finds that such rate is not unreasonable, and it is not necessary to submit the question of the reasonableness of the rate to the commission prior to testing it in the courts,[70] under the law as it exists in a number of jurisdictions, a question as to the reasonableness of a rate must first be submitted to the state commission, and, prior to its submission, a court is without jurisdiction to consider its reasonableness.[71]

Rates fixed by a state commission are conclusively presumed to be reasonable, just, and not discriminatory, until declared otherwise by a court of competent jurisdiction,[72] and subject to any right which may exist of appeal from the decision of the commission, or other prescribed method of review, the courts are precluded from questioning their reasonableness.[73] Under statutes authorizing a state commission to investigate rates and determine their reasonableness and establish reasonable rates to take effect in the future, the commission cannot determine the reasonableness of rates previously charged according to the then existing tariff.[74] The cause which induced the commission to investigate the rates does not affect the validity of the rates it fixes.[75]

Statutes authorizing a taxpayer to bring suit to test the reasonableness of rates of public utilities, including carriers, are remedial in nature and should be liberally construed.[76]

Commission's determination conclusive

Railroad commission's determination that freight rate is fair and reasonable is conclusive until set aside by courts in statutory manner.—Producers' Refining Co. v. Missouri, K. & T. Ry. Co. of Texas, Tex.Com.App., 13 S.W.2d 680, affirming Missouri, K & T. R Co. of Texas v. Railroad Commission of Texas, Civ.App, 3 S. W.2d 489, affirmed Producers' Refining Co. v. Missouri, K & T. Ry. Co. of Texas, Com.App., 13 S.W.2d 679.

66. Tex.—Producers' Refining Co. v. Missouri, K. & T. R. Co. of Texas, Com.App, 13 S.W.2d 679, affirming Missouri, K. & T. R. Co. of Texas v. Railroad Commission of Texas, Civ.App., 3 S.W.2d 489.

67. Fla.—Reinschmidt v. Louisville & N. R. Co., 160 So. 69, 118 Fla. 237.
Tex.—Texas Steel Co. v. Fort Worth & D. C. Ry. Co., 40 S.W.2d 78, 120 Tex. 597, answering certified questions, Civ.App., 45 S.W.2d 794.

Both shipper and carrier bound

Orders of railroad commission promulgating rates, if within jurisdiction of commission, are binding on both shipper and carriers.—Texas Steel Co. v. Fort Worth & D. C. Ry. Co., Civ.App., 45 S.W.2d 794, certified questions answered, 40 S.W.2d 78, 120 Tex. 597.

Court must apply tariff prescribed

In controversy over freight charges, court cannot inquire whether railroad commission tariff is just, reasonable, or otherwise proper as proposition of administrative scientific rate making, and must apply tariff prescribed for shipment in question —Reinschmidt v. Louisville & N. R. Co., 160 So. 69, 118 Fla. 237.

Orders without notice or hearing

That railroad commission's orders, regular on their face, were allegedly made without notice to railroads or shipper, without hearing or having case docketed, and under agreement with interstate commerce commission, does not render orders void and subject to collateral attack.—Texas Steel Co. v. Fort Worth & D. C. Ry. Co., 40 S.W 2d 78, 120 Tex. 597, answering certified questions, Civ. App., 45 S.W.2d 794.

Unreasonableness or grounds not going to legality

Tariff cannot be collaterally attacked for unreasonableness after it is prescribed in due form of procedure by railroad commission, nor attacked as matter of law on grounds not going to legality of procedure by which railroad commission arrived at tariff —Reinschmidt v. Louisville & N. R. Co., 160 So. 69, 118 Fla. 237.

68. N Y —Murphy v. New York Cent. R. Co., 122 N E. 700, 225 N. Y. 548, affirming 156 N Y.S. 49, 170 App.Div. 788.

69. Okl.—Chicago, R. I. & P. Ry. Co. v. Brown, 232 P. 43, 105 Okl. 133.

70. Tex.—Producers' Refining Co. v Missouri, K. & T. R. Co. of Texas, Com.App., 13 S W 2d 679, affirming Missouri, K. & T. R. Co. of Texas v. Railroad Commission of Texas, Civ.App, 3 S W.2d 489, affirmed Producers' Refining Co. v. Missouri, K. & T. Ry. Co. of Texas, Com. App., 13 S W.2d 680

71. Ind.—American Ry. Express Co. v. Johnson Butter Co, 187 N.E. 405, 97 Ind.App 537.
Mo.—Sonken-Galamba Corporation v Missouri Pac R. Co, 40 S W.2d 524, 225 Mo.App. 1066
Neb —Omaha & C B St Ry. Co. v. Nebraska State Railway Commission, 173 N.W. 690, 103 Neb. 695.
Okl —Chicago, R. I. & P. Ry. Co v. Brown, 232 P. 43, 105 Okl 133
Pa.—Leiper v. Baltimore & P. R. Co., 105 A. 551, 262 Pa. 328.

72. Ill.—Davis v. Keystone Steel & Wire Co, 148 N E. 47, 317 Ill. 278
Mont —Sunburst Oil & Refining Co v. Great Northern Ry. Co, 7 P.2d 927, 91 Mont. 216, certiorari granted Great Northern Ry. Co. v Sunburst Oil & Refining Co, 53 S Ct. 7, 287 U S. 580, 77 L Ed. 508, affirmed 53 S.Ct. 145, 287 U.S 358, 77 L Ed 360, 85 A.L.R. 254—Montana Horse Products Co. v. Great Northern Ry Co., 7 P 2d 919, 91 Mont. 194
Tex.—Railroad Commission of Texas v. Uvalde Const. Co., Civ.App, 49 S.W.2d 1113—Houston Chamber of Commerce v. Railroad Commission of Texas, Civ.App., 19 S.W.2d 583, affirmed Railroad Commission of Texas v. Houston Chamber of Commerce, 78 S.W.2d 591, 124 Tex. 375.
Va —Mathieson Alkali Works v. Norfolk & W. Ry. Co., 137 S.E. 608, 147 Va. 426.

73. Va.—Mathieson Alkali Works v. Norfolk & W. Ry. Co., supra.

74. Kan —Great Western Portland Cement Co. v. Public Service Commission of Kansas, 247 P. 881, 121 Kan. 531.

75. Or.—Oregon-Washington R. & Nav. Co. v. Corey, 252 P. 955, 120 Or. 517.

Financial distress of shippers

That financial distress of farmers induced commission to investigate rates did not affect validity of rates fixed by commission.—Oregon-Washington R & Nav. Co. v. Corey, 252 P. 955, 120 Or. 517.

76. Ohio.—Parks v. Cleveland Ry. Co., 177 N.E 28, 124 Ohio St. 79, affirming 176 N.E. 472, 38 Ohio App. 315.

b. Proceedings

Proceedings before a regulatory commission must follow statutory rules as to the procedure to be followed. Requirements as to the time within which a complaint may be filed, the necessity for notice, the form of the complaint, the evidence admissible, the findings required, and the order to be made must be followed.

In its investigation and determination as to the reasonableness of rates, a state board or commission must follow the procedure and rules prescribed for it by the legislature in order to give validity to its action,[77] but it may waive its own rules as to procedure.[78]

Ordinarily, investigations must be based on a written complaint either originating from the commission itself or from some interested party, and the defendants or parties interested have the right to file answers thereto,[79] and the evidence should be limited by the issues made.[80] The complaint must be filed within the time, if any, fixed by law,[81] and requirements as to notice should be complied with.[82] Strictness of pleading is not requir-

77. U.S.—Northern Pac Ry. Co. v Baker, D.C.Wash, 3 F.Supp 1.

Action by part of board

Where board of railroad commissioners, acting under L 1919 cc 192, 194, conducted a hearing on an application by carriers, attended throughout by only one member and a part of the time by two members, and thereafter discussed the application at a meeting, but took no vote, and where a claimed agreement was reached, but its minutes did not show what action, if any, was taken, a subsequent order under seal, signed by its secretary, disposing of application, released on an understanding with one member, was void for want of proper action by board.—State v. Chicago & N. W. Ry. Co., 179 N.W. 378, 46 N.D. 313.

Discontinuance

Railroad commission, failing to enter on its minutes order continuing proceeding to revise tariff charges after motions to adopt certain rates were lost for lack of seconds, finally discontinued cause, and could not revise charges at subsequent meeting without ten days' notice to railroads —Mississippi Railroad Commission v. Gulf, M. & N. R. Co., 155 So. 212, 170 Miss. 724.

Continuance

(1) Utilities commission may be empowered to allow continuance to applicant for change of tariff schedules to advertise in counties where publication was not theretofore made. —Liberty Highway Co v. Public Utilities Commission of Ohio, 172 N. E. 376, 121 Ohio St. 623.

(2) Allowance of month's continuance to applicant for change in tariff schedules to permit further publication has been held not unreasonable nor unlawful —Liberty Highway Co. v. Public Utilities Commission of Ohio, supra.

Rehearing

(1) Neither public service commission nor court can disregard statutory provisions and extend time for filing petition for rehearing with respect to order fixing rate; nor can such time be extended by agreement of the parties.—G. Ittenbach Co. v. Cleveland, C, C & St. L Ry. Co., 181 N.E. 382, 97 Ind.App. 332.

(2) The order of public service commission fixing intra-state rates, unless challenged as provided by statute, became final after thirty days —G Ittenbach Co. v Cleveland, C, C. & St. L. Ry. Co., supra.

78. N.Y.—City of New York v. Nixon, 183 N.Y.S. 6, 111 Misc. 224.

Form of application

The public service commission may waive the requirements of its rules as to the form of an application by a carrier for permission to put new rates into effect.—City of New York v. Nixon, 183 N.Y.S. 6, 111 Misc. 224

79. Ill.—Alton & S. R Co. v. Illinois Commerce Commission, 147 N.E. 417, 316 Ill. 625.

Agreement between board and carrier

(1) Where the statutes so provide, the state board or commission may fix just and reasonable rates after hearing on notice, or the carrier may fix its rates and the board or commission hear and determine whether the rate fixed by the carrier is just and reasonable, and it is proper for the carrier to petition the board or commission and ask its consent to an increase of rates instead of increasing the rates and then waiting for the board or commission to act.— O'Brien v Board of Public Utility Com'rs, 105 A 132, 92 N.J.Law 44, affirmed 106 A. 414, 92 N.J Law 587.

(2) Contention of prosecutor that board cannot proceed to fix rates without evidence or a hearing, even under Public Utility Act § 17 (h), cannot be sustained, since the same result would follow mere inaction on the part of the board.—O'Brien v. Board of Public Utility Com'rs, supra.

Statement of examiner insufficient to enlarge issue

Where complaint to commerce commission had been amended to eliminate charge of unreasonableness of rates, statement of examiner did not enlarge issue —Illinois Cent. R. Co v. Illinois Commerce Commission, 173 N.E. 804, 342 Ill 11

80. Ill.—Alton & S. R. Co. v. Illinois Commerce Commission, 147 N. E. 417, 316 Ill. 625.

81. Time of filing held sufficient

Complaint that proposed new freight rates are unreasonable need not be filed before they become effective, in order to authorize utilities commission to investigate.—S. D. Warren Co v Maine Cent. R. Co., 135 A. 526, 126 Me 23.

82. U.S.—Southern Pac Co. v. Bartine, D C Nev. 1 F 2d 323.

Parties entitled to notice

Only notice required to be given of hearing before railroad commission is that given to railroad companies whose interests are affected, shippers, localities, and others who may be affected or interested are not required to be given notice.— Houston Chamber of Commerce v. Railroad Commission of Texas, Civ. App., 19 S.W 2d 583, affirmed Railroad Commission of Texas v. Houston Chamber of Commerce, 78 S.W.2d 591, 124 Tex. 375

Strictness not required

(1) Respecting notice of proceedings before railroad commission to fix rates, same strictness is not required as in judicial proceedings.— Gulf & S I R. Co. v. Laurel Oil & Fertilizer Co., 158 So. 778, 172 Miss. 630, amended and suggestion of error overruled 159 So 838, 172 Miss. 630, corrected 160 So. 564, 172 Miss. 630.

(2) Statute governing service of notice of railroad commission's proceedings is merely directory, notice being sufficient if served so as to be received by railroad's officer having charge of matter before commission, or officer whose duty it would be to transmit notice to proper officer—Gulf & S I. R. Co. v. Laurel Oil & Fertilizer Co, supra.

Retention of jurisdiction

The public utilities commission cannot, by declaring that it retains jurisdiction of the matter in which it makes a complete order fixing railroad freight rates, in response to an application pending before it, defeat the necessity of giving the thirty days' notice required by Gen.St. 1915 § 8341, in a subsequent proceeding in the same matter to cancel the

ed,[83] and the pleading should be liberally construed, but, although no particular form is required, there must be a statement of the thing which is claimed to be wrong sufficiently plain to put the carrier on its defense.[84] All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal.[85] The hearing may be held before a qualified officer of the commission who need not necessarily be a commissioner or assistant commissioner.[86]

Findings. In some states detailed and specific findings of fact are not required, but a basic or essential finding that the existing rates are unreasonable is all that is required.[87] In other states specific findings of fact are mandatory,[88] and must be in direct and certain language, sufficiently clear as to leave no misunderstanding as to their meaning and purport,[89] and the failure of the board or commission to make the required findings will invalidate its order.[90] The findings must be based on evidence presented in the case.[91]

Order of commission. In some states the commission may frame its orders as the substantial justice of the case requires, irrespective of the relief asked for in the petition.[92] In others, however, the hearings of the commission and the orders entered

order first made, in view of §§ 8345, 8398, and 8433—State v. Atchison, T. & S. F. Ry Co., 197 P. 192, 108 Kan. 847.

Notice held sufficient

In shipper's action for overcharges, railroad commission's notice, mailed to person maintaining office in adjoining state and acting as assistant freight agent of defendant railroad and two other railroads, one of which had leased defendant railroad, was held sufficient, and hence defendant was bound by rate order made at meeting which such agent attended as part of his duties—Gulf & S I R Co. v. Laurel Oil & Fertilizer Co., 158 So. 778, 172 Miss. 630, amended and suggestion of error overruled 159 So. 838, 172 Miss 630, corrected 160 So 564, 172 Miss. 630.

83. Ind.—Southern Ry. Co. v. Hunt, 83 N.E. 721, 42 Ind.App. 90.

84. Ill—Alton & S. R. Co. v. Illinois Commerce Commission, 147 N.E. 417, 316 Ill. 625.

Complaint held sufficient

Shipper's complaint alleging rates and charges were, when exacted, and still are, unjust and unreasonable, in violation of Gen.Code § 504, raises issue of reasonableness of charge—Cleveland Provision Co. v. Public Utilities Commission, 135 N.E. 612, 104 Ohio St. 253, 23 A.L.R. 404.

85. U.S—Illinois Cent. R. Co. v. Railroad Commission of Kentucky, D C Ky, 1 F 2d 805—Southern Pac. Co v Bartine, D.C.Nev, 1 F.2d 323.

Ill.—Chicago & E. I. Ry. Co. v. Illinois Commerce Commission, 173 N.E 380, 341 Ill. 277—Atchison, T & S F. Ry Co. v. Commerce Commission, 167 N.E. 831, 335 Ill. 624.

Expense of cleaning cars

Where, in proceedings before the state public utilities commission, the carriers offered their evidence on the theory that they were entitled to include in the charge for cleaning and disinfecting stock cars the expense incurred in the ordinary cleaning, a decision of the commission adverse to this contention did not deprive them of their right to show what would be a reasonable and adequate charge for the additional service required by an order of the state board of live stock commissioners, and hence the commission, before attempting to fix rates for cleaning cars, should have required the carriers to make such proof.—State Public Utilities Commission v. Atchison, T. & S F Ry. Co, 116 N.E. 696, 279 Ill. 194.

86. Ill—Illinois Commerce Commission v. Cleveland, C., C. & St. L. Ry. Co., 150 N.E 678, 320 Ill. 214.

Rate expert

Appointment by Illinois commerce commission of its transportation rate expert as officer to hold investigations and hearings constituted him "officer" empowered to hold a hearing—Illinois Commerce Commission v. Cleveland, C, C & St. L. Ry. Co., 150 N E. 678, 320 Ill. 214.

87. Or.—Valley & Siletz R. Co. v. Thomas, 48 P.2d 358, 151 Or. 80.

88. U S.—Northern Pac Ry. Co. v. Baker, D C.Wash, 3 F.Supp. 1.

Ill.—Chicago & E I. Ry. Co. v. Illinois Commerce Commission, 173 N. E 380, 341 Ill. 277.

89. Ill.—Atchison, T. & S. F. Ry. Co. v. Commerce Commission, 167 N E 831, 335 Ill. 624.

Wash—Great Northern Ry. Co. v Department of Public Works of Washington, 296 P. 142, 161 Wash 29.

Sufficiency of findings required

Findings by commerce commission in reducing rates must be sufficiently specific to enable courts to determine whether decisions are based on findings—Chicago & E I. Ry. Co. v Illinois Commerce Commission, 173 N E. 380, 341 Ill 277.

Finding held sufficient

(1) Where commerce commission, in its order, referred to evidence introduced by complaining shipper and found it insufficient to show rate complained of was unreasonable and stated reasons for finding, it was unnecessary for commission to make any other finding on such part of case—Moline Consumers' Co. v. Illinois Commerce Commission ex rel. Chicago, B. & Q. R. Co., 187 N E. 161, 353 Ill. 119.

(2) On shipper's complaint against joint through rate, commerce commission's finding that certain switching rates referred to by shipper for comparison did not reflect cost of service performed was supported by the evidence and was not repugnant to finding that no evidence of cost of service was introduced.—Moline Consumers' Co. v. Illinois Commerce Commission ex rel. Chicago, B. & Q. R. Co, supra.

90. U S.—Northern Pac. Ry. Co. v. Baker, D C.Wash., 3 F Supp. 1

Ill.—People's Fruit & Vegetable Shippers' Ass'n v. Illinois Commerce Commission, 184 N.E. 615, 351 Ill. 329.

91. Ill—Chicago & E. I. Ry. Co. v. Illinois Commerce Commission, 173 N.E. 380, 341 Ill. 277.

Surplusage not fatal to finding

Where state commerce commission's finding that reciproval switching rates did not reflect cost of service was supported by uncontradicted evidence in record, references in commission's order to holdings and statements of interstate commerce commission that such charges were made without regard to cost of service will be considered surplusage, not to be regarded as the evidence on which the finding was based, so as not to invalidate the finding.—Moline Consumers' Co. v Illinois Commerce Commission ex rel. Chicago, B. & Q. R. Co, 187 N E. 161, 353 Ill. 119.

92. Ind—Southern Ry. Co. v. Hunt, 83 N.E. 721, 42 Ind.App 90.

Proper order defined

"Proper order" fixing maximum freight rate is not an order in any prescribed form, but one appropriate to the situation and to carry

therein are limited and circumscribed by the complaint filed, and the commission cannot enter a valid order which is broader than the written complaint filed in the case.[93] It is not essential that the commission dispose of a matter pending before it in a single order, but it may in a proper case make a preliminary disposition of the matter, and reserve for further consideration, and dispose of by subsequent order, other questions or issues involved in the main issue without further notice or hearing.[94] Statutes fixing a date on which orders of the commission relating to rates shall become effective have been held permissive and not mandatory.[95]

The content of an order of a state commission is what is expressly set out in the order or what the order itself incorporates by reference.[96] A report or an opinion of the commission that existing rates are unreasonable, without an order to change them, neither authorizes nor permits a departure from them;[97] but an order to remove an existing discrimination against interstate rates by ceasing to charge higher rates between designated interstate points and designated intra-state points, which includes as a part of the order a finding that the interstate rates are not shown to be unreasonable, impliedly authorizes the carrier to maintain the interstate rates and to raise to their level the intra-state rates involved.[98]

A finding by a state commission in a proceeding brought by a shipper that a certain rate is excessive and an order fixing a lower rate operates generally and inures to the benefit of all shippers similarly situated.[99]

§ 284. Review by the Courts

a. In general
b. Extent and limits of review

a. In General

Parties interested are entitled to a review by the courts of rates established by the legislature or regulatory commission, which review must be in the manner prescribed by the statute, where a statute authorizes a particular method of review.

When the legislature exercises its power to establish rates, the act by which the establishment is effected becomes a law, which the courts have no other choice than to enforce, unless the legislature has exceeded its constitutional authority.[1] However, the action of a legislature, of the interstate commerce commission, or of a state regulatory commission, is not conclusive as to the reasonableness of the rates so fixed. While a carrier has no right to escape the visitorial power of the state to ascertain whether it keeps within its charter rights, carriers are not subject to the absolute control of the legislature as to rates charged for transporta-

out the findings of the commission. —S. D. Warren Co. v. Maine Cent. R. Co., 135 A. 526, 126 Me. 23.

Order for refund construed

Utilities commission's order to refund collections exceeding maximum freight rate fixed thereby applies only to sums collected under schedules theretofore in effect—S. D. Warren Co. v. Maine Cent. R. Co., 135 A. 526, 126 Me. 23.

93. Ill.—Alton & S. R. Co. v. Illinois Commerce Commission, 147 N. E. 417, 316 Ill. 625.

Reduction limited to territory complained of

Where mining companies filed complaint against railroads for reduction of rates for transportation of coal within a twenty-mile radius of certain center, order of commission reducing rates within thirty-mile radius was beyond commission's jurisdiction and authority—Alton & S. R. Co. v. Illinois Commerce Commission, 147 N.E. 417, 316 Ill. 625.

94. Tex.—Houston Chamber of Commerce v. Railroad Commission of Texas, Civ.App., 19 S.W.2d 583, affirmed Railroad Commission of Texas v. Houston Chamber of Commerce, 78 S.W.2d 591, 124 Tex. 375.

95. Me.—S. D. Warren Co. v. Maine Cent. R. Co., 135 A. 526, 126 Me. 23.

Where no date fixed in order

Utilities commission's order fixing maximum freight rate becomes effective on signing and service, where no date is fixed—S. D. Warren Co. v. Maine Cent. R. Co., 135 A. 526, 126 Me. 23.

96. Ind.—Baltimore & O. R. Co. v. Public Service Commission of Indiana, 177 N.E. 260, 202 Ind. 618.

Order of commission construed

Public service commission's order merely extended effective date of order fixing freight rates, and did not affect finality of order fixing rates.—Baltimore & O. R. Co. v. Public Service Commission of Indiana, 177 N.E. 260, 202 Ind. 618.

Order held not too indefinite

In a proceeding to review order of public service commission, requiring railroads to establish joint through freight rates, where record does not show that order has been superseded and such order becomes effective in twenty days by Remington Code 1915 § 8626—81, it will be presumed after twenty days that order has been complied with, and such compliance would show that it was not too indefinite to be enforced as contended.—State v. Public Service Commission of Washington, 163 P. 1143, 95 Wash. 376, affirmed State v. Public Service Commission, 166 P. 793, 95 Wash. 376.

97. U.S.—Chicago, B. & Q. R. Co. v. Merriam & Millard Co., C.C.A.Neb., 297 F. 1, certiorari denied Merriam & Millard Co. v. Chicago, B. & Q. R. Co., 44 S.Ct. 637, 265 U.S. 592, 68 L.Ed. 1196, and error dismissed 45 S.Ct. 640, 268 U.S. 682, 69 L.Ed. 1155—North American Co. v. St. Louis & S. F. R. Co., D.C.Mo., 288 F. 612, reversed on other grounds, C.C.A., Spiller v. St. Louis & S. F. R. Co., 14 F.2d 284, certiorari granted St. Louis & S. F. R. Co. v. Spiller, 47 S.Ct. 111, 273 U.S. 680, 71 L.Ed. 830, affirmed in part and reversed in part on other grounds 47 S.Ct. 635, 274 U.S. 304, 71 L.Ed. 1060.

98. U.S.—American Exp. Co. v. State of South Dakota ex rel. Caldwell, S.D., 37 S.Ct. 656, 244 U.S. 617, 61 L.Ed. 1352.

99. Ill.—A. L. Jones Co. v. Chicago, M. & St. P. Ry. Co., 213 Ill.App. 283.

Ohio.—Taylor-Williams Coal Co. v. Public Utilities Commission of Ohio, 119 N.E. 459, 97 Ohio St. 224.

1. Ky.—Louisville & N. R. Co. v. Greenbrier Distillery Co., 187 S.W. 296, 170 Ky. 775.

tion.[2] The question of whether rates are not so unreasonably low as to deprive the carrier of its property without such compensation as the constitution secures cannot be so conclusively determined by the legislature of the state, or by regulations established under its authority, that the matter may not become the subject of judicial inquiry;[3] and a statute which provides that rates fixed by a railroad commission shall be final and conclusive as to the reasonableness of the rates, and that the question cannot be the subject of judicial inquiry, is void as depriving the carrier of its property without due process of law and as depriving it of the equal protection of the law.[4] The judiciary are the final judges of what is reasonable or of what impairs the right of the corporation to a reasonable compensation for services rendered;[5] and, although a state regulatory commission may have exceeded its jurisdiction in establishing rates, the court of last resort of the state has final jurisdiction to determine the reasonableness of the rates, and one who seeks to review the order is bound by the decree of such court.[6] Thus, the acts of a state commission in establishing rates are subject to review by the courts to determine whether a rate is unreasonable or unjust.[7]

The review must be in the manner prescribed by statute.[8] In a number of jurisdictions, under the statutes therein, an appeal is authorized from orders of railroad commissions fixing rates.[9] In others the courts have jurisdiction to set aside an order of the regulatory commission fixing rates where they are beyond its power or unreasonable and excessive.[10] In some jurisdictions certiorari will not lie to review an order of the railroad commission fixing intra-state freight rates.[11] Where the reasonableness of an established rate has been sustained by the courts, the question of the reasonableness of such rate cannot be litigated in a proceeding to recover from the carrier amounts exacted in excess thereof.[12]

An appeal must be taken within the time allowed by the provisions of the statute authorizing it,[13] and the steps required to perfect the appeal must be complied with.[14] It is not necessary that a motion for a new trial be filed and presented to the commission, in order to have the court on appeal determine the reasonableness and justness of the order of the commission from which the appeal is

2. Miss.—Stone v. Natchez, etc., R. Co., 62 Miss. 646

Protection of rights insured

That action of public service commission can by proper proceedings be reviewed by court furnishes one complaining of change in railroad rates, as fixed by his contract, a full opportunity to be properly protected in enjoyment of his rights.—Leiper v. Baltimore & P. R. Co, 105 A. 551, 262 Pa. 328.

3. U.S.—Smyth v. Ames, Neb., 18 S Ct. 418, 169 U.S 466, 42 L.Ed. 819—Chicago, etc., R. Co. v. Minnesota, 10 S.Ct. 462, 134 U S 418, 33 L Ed. 978, reversing 41 N.W. 465, 40 Minn. 156.

Private carrier

Reasonableness of rate fixed by department of public works for private carrier line, under Remington Comp. St. § 6749, is one of fact, reviewable by courts.—State v. Kuykendall, 228 P 853, 130 Wash. 674, affirmed 232 P. 695, 132 Wash. 700.

4. U.S.—Chicago, etc., R. Co. v. Minnesota, Minn., 10 S Ct. 462, 134 U S. 418, 33 L.Ed. 970.

5. U.S.—Reagan v. Farmers' L. & T. Co, Tex, 14 S.Ct. 1047, 154 U S 362, 38 L.Ed. 1014.
10 C.J. p 413 note 80.

6. U.S.—Detroit, etc., R. Co. v. Michigan R. Commn, Mich., 35 S Ct. 126, 235 U S. 402, 59 L.Ed. 288, affirming 203 F 864

7. Tex.—Railroad Commission of Texas v. Lamb, Civ App, 81 S.W. 2d 161—Clayton Oil & Refining Co v. Railroad Commission of Texas, Civ App., 3 S W.2d 497—Missouri-Kansas & T. R. Co. of Texas v. Railroad Commission of Texas, Civ App., 3 S.W 2d 489, affirmed Producers' Refining Co. v. Missouri, K. & T. R. Co of Texas, Com. App., 13 S.W.2d 67, and 13 S.W.2d 680.

Order vacating suspension of rates

Order of railroad commission vacating suspension of rates filed by rail carriers is reviewable since it is in effect an order approving and allowing rates as filed by carriers.—Lang v. Railroad Commission of California, 42 P.2d 639, 2 Cal 2d 550.

8. Ark.—Clear Creek Oil & Gas Co. v. Ft Smith Spelter Co., 255 S.W. 903, 161 Ark. 12, affirmed Ft. Smith Spelter Co. v. Clear Creek Oil & Gas Co, 45 S Ct. 263, 267 U S. 231, 69 L.Ed. 588.

9. Ark.—Clear Creek Oil & Gas Co v. Ft. Smith Spelter Co., supra.
Pa.—Allegheny Steel Co. v New York Cent. R. Co., 188 A. 332, 324 Pa. 353.
10 C.J. p 438 note 7.

10. La.—Empire Rice Milling Co. v. Railroad Commission of Louisiana, 79 So 833, 143 La. 1036.

Appeal not authorized

No law confers on the courts appellate jurisdiction over rulings of the railroad commission fixing rates.—Shreveport Window Glass Co. v. Railroad Commission of Louisiana, 79 So 407, 143 La. 794.

11. Miss.—Illinois Cent. R. Co v. Mississippi R. Commission, 109 So 868, 143 Miss. 805.

12. Mich.—Fletcher Paper Co. v. Detroit & M. Ry. Co, 164 N.W. 528, 198 Mich. 469, affirmed Detroit & M R. Co. v. Fletcher Paper Co, 39 S.Ct. 13, 248 U.S. 30, 63 L.Ed. 107.

13. Okl.—Atchison, etc., R. Co. v. Love, 99 P. 1081, 23 Okl. 192.

14. **Record for review**

"Any proper party feeling aggrieved may prosecute an appeal therefrom by making application to the chairman of said commission for him, under the seal of said commission, to certify to this court all the facts upon which the action appealed from was based, and which may be essential for the proper decision of the appeal, together with such evidence introduced before or considered by the commission as may be selected, specified, and required to be certified by any party in interest, as well as such other evidence so introduced or considered as the commission may deem proper, and also a written statement of the reasons upon which the action sought to be appealed from is based, to be filed with the record of the case, which will constitute the record for review in this court."—Atchison, etc., R. Co. v. Love, 99 P. 1081, 23 Okl. 192.

prosecuted.[15] An appeal by a carrier from a general order of the commission not directed against any specific company or companies by name will be dismissed when it does not appear from the record that the rates, schedule, facilities, or conveniences of such appellant company are affected by the order appealed from.[16]

In jurisdictions where the reasonableness of rates established by the regulatory commission may be reviewed by the courts in direct proceedings authorized for that purpose, it has been held that such proceedings may be instituted by parties interested in the rates promulgated, whether notified or not,[17] and that the trial in such proceeding is governed by the rules controlling in civil cases generally.[18]

On appeal from an order of the commission increasing rates, the court may permit the enforcement of the increased rates pending determination on the merits of the appeal, where essential to provide the carrier with funds necessary for the continued operation of its lines.[19] A statute requiring that no supersedeas shall be granted in any action or proceeding brought to review an order of the commission refusing to permit an increase in rates, pending final determination thereof, applies to an order refusing to permit an increase under a tariff by canceling the tariff.[20]

Effect of judgment on review. Under a statute making the provisions of a code of civil procedure relating to writs of review applicable to a review by a particular court of the orders of the state regulatory commission, the effect of the judgment of the court on review is precisely the same as provided by the code and the rules of the court in other cases, and the commission has no discretion but to obey the mandate of the court.[21]

Remand. A statute requiring the court, where it finds that the regulatory commission failed to receive evidence properly proffered, to remand the case to the commission with instructions to receive the evidence offered and enter a new order based on the evidence theretofore taken and the new evidence received, unless it appears that such new evidence would not be controlling, does not require the court to remand on an appeal to determine the reasonableness or lawfulness of an order of the commission, where the record does not show that the commission failed to receive any evidence properly proffered, but in such case the judgment of the court on the appeal is a final order confirming or setting aside the order of the commission.[22]

b. Extent and Limits of Review

Broadly speaking, the power of the courts in reviewing rates fixed by a legislative or regulating body is limited to a determination of whether they are confiscatory. They will not, as a rule, determine questions of fact although they may consider the legal sufficiency of evidence and findings; and, further, they may determine whether the legislature or board or commission has acted within its powers.

The courts do not sit as a board of review to substitute their judgment for that of the legislature or of those bodies legally constituted by them to act as to matters within the province of either,[23] and since, as is discussed in § 280 supra, they have no power to fix the rates themselves, they are not authorized to revise or to change a body of rates.[24]

15. Okl.—Atchison, etc., R. Co. v. Love, supra

16. Okl.—Gulf, etc., R. Co. v. State, 110 P. 651, 26 Okl. 761.

17. Tex.—Houston Chamber of Commerce v. Railroad Commission of Texas, Civ.App., 19 S.W.2d 583, affirmed Railroad Commission of Texas v. Houston Chamber of Commerce, 78 S.W.2d 591, 124 Tex. 375

18. Tex.—Houston Chamber of Commerce v. Railroad Commission of Texas, supra.

19. R.I.—Public Utilities Commission v. Rhode Island Co., 108 A. 66, 42 R.I. 394—Public Utilities Commission v. Rhode Island Co., 104 A. 690.

20. Wash.—North Pac. Coast Freight Bureau v. Department of Public Works, 286 P. 86, 156 Wash. 137.

21. Colo.—Denver & S. L. R. Co. v. Chicago, B. & Q. R. Co., 185 P. 817, 67 Colo. 155.

On remand

Where an order of the public service commission fixing division of rates between carriers was set aside and cause remanded, the commission must hear and determine the cause de novo in the light of the methods and principles announced by the court.—Denver & S. L. R. Co. v. Chicago, B. & Q. R. Co., 185 P. 817, 67 Colo. 155.

22. Ill.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 173 N.E. 804, 342 Ill. 11.

23. Ark.—Clear Creek Oil & Gas Co. v. Ft. Smith Spelter Co., 255 S.W. 903, 161 Ark. 12, affirmed Ft. Smith Spelter Co. v. Clear Creek Oil & Gas Co., 45 S.Ct. 263, 267 U.S. 231, 69 L.Ed. 588.

Ill.—Moline Consumers' Co. v. Illinois Commerce Commission ex rel. Chicago, B. & Q. R. Co., 187 N.E. 161, 353 Ill. 119.

Ohio—Baltimore & O. R. Co. v. Public Utilities Commission of Ohio, 198 N.E. 869, 130 Ohio St. 258.

Or.—Oregon-Washington R. & Nav. Co. v. Corey, 252 P. 955, 120 Or. 517

Utah—Jeremy Fuel & Grain Co. v. Public Utilities Commission, 226 P. 456, 63 Utah 392.

10 C.J. p. 414 note 83.

Order held proper

An order of the public service commission refusing to restrain a railroad company from increasing a freight rate on a particular commodity will not be reversed by the superior court, where it appears that the company assumed the burden of proof imposed by the Public Service Commission Act § 4 art. 5 that the evidence produced was duly heard by the commission, and that the order made was within the power of the commission and not unreasonable. —West Virginia Pulp & Paper Co. v. Public Service Commission, 65 Pa. Super. 5.

24. Colo.—Denver & S. L. R. Co. v. Chicago, B. & Q. R. Co., 171 P. 74, 64 Colo. 229.

Minn.—City of Duluth v. Railroad

They will not consider the expediency or wisdom of an order relating to rates or whether, on like testimony, they would have made a similar ruling.[25] Nevertheless, the power of the courts to review a schedule of rates is coextensive with the limits of the protection afforded by the constitution.[26] Even so, rate regulation will be reviewed by the courts only in so far as it is necessary to determine whether or not the rate established is so unreasonable and unjust as to cause a practical destruction of property rights or amount to a confiscation of the carrier's property.[27] They may consider whether the rates fixed or approved by the legislature or regulatory commission are confiscatory,[28] and, if they are, may restrain their enforcement;[29] and under some statutes they may hear and determine whether or not an order of the commission fixing maximum rates, or its order declining to change a rate fixed by the carrier, is valid, by ascertaining whether or not the rate so fixed or the rate unchanged was reasonable.[30] Other than this, however, the reasonableness or unreasonableness of the rates prescribed, or whether they were arbitrarily prescribed, is not reviewable.[31] To authorize action on the part of the court, it must clearly appear that the protection afforded by the constitution has in some degree been taken away,[32] and it must be made plainly to appear that the rates ordered are void.[33]

As a general rule, conclusions on a question of fact are not reviewable by the courts,[34] and unless arbitrarily reached without proper consideration of all the facts, or determined on a manifestly wrong basis, will be controlling.[35] Orders of the regulatory board or commission are presumed to be correct,[36] and, unless shown to be otherwise, will be affirmed.[37] Under some statutes the find-

and Warehouse Commission of State of Minnesota, 209 N.W. 10, 167 Minn. 311.

Tex.—Railroad Commission of Texas v. Uvalde Const. Co., Civ.App., 49 S.W.2d 1113.

10 C.J. p 414 note 84.

Cannot restore former rate

Court, on reviewing commerce commission's order reducing rate, had no authority to restore former rate. —Illinois Commerce Commission v. Chicago & E. I. Ry. Co., 163 N.E. 664, 332 Ill. 243.

25. U.S.—Illinois Cent. R. Co. v. Vest, D.C.Ky., 39 F.2d 658.

10 C.J. p 414 note 85.

Discretion of commission not interfered with

Discretion exercised by state corporation commission in reducing railroad rates cannot be interfered with by court of appeals unless rate fixed is unreasonable as matter of law.—Norfolk & W. Ry. Co. v. Commonwealth ex rel. Mathieson Alkali Works, 174 S.E. 85, 162 Va. 314.

26. U.S.—Hooker v. Interstate Commerce Commn., Com.Ct., 188 F. 242, 252, reversed on other grounds 32 S.Ct. 769, 225 U.S. 302, 56 L.Ed. 1099.

10 C.J. p 414 note 86.

27. U.S.—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360.

Ky.—Louisville & N. R. Co. v. Greenbrier Distillery Co., 187 S.W. 296, 170 Ky. 775.

10 C.J. p 414 note 87.

Analogous to review of jury verdict

The district court can review the findings of the commission only in so far as to determine whether the rates fixed are so unreasonable as to be confiscatory, just as an appellate court reviews the verdict of a jury for the purpose of determining whether it is so excessive that it cannot stand.—Steenerson v. Great Northern R. Co., 72 N.W. 713, 69 Minn. 353.

Clear evidence required

Courts will not interfere without clear evidence that the rate is unreasonable, discriminatory, or extortionate.—Empire Rice Milling Co v. Railroad Commission of Louisiana, 79 So. 833, 143 La. 1036.

28. Ark.—Clear Creek Oil & Gas Co. v. Ft. Smith Spelter Co., 255 S.W. 903, 161 Ark. 12, affirmed Ft. Smith Spelter Co. v. Clear Creek Oil & Gas Co., 45 S.Ct. 263, 267 U.S. 231, 69 L.Ed. 588.

Ill.—Indiana Harbor Belt R. Co. v. Illinois Commerce Commission, 172 N.E. 708, 340 Ill. 304.

Ky.—Louisville & N. R. Co. v. Greenbrier Distillery Co., 187 S.W. 297, 170 Ky. 775.

Minn.—City of Duluth v. Railroad and Warehouse Commission of State of Minnesota, 209 N.W. 10, 167 Minn. 311.

29. Ky.—Louisville & N. R. Co. v. Greenbrier Distillery Co., 187 S.W. 296, 170 Ky. 775

Tex.—Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co., Com. App., 221 S.W. 590, reversing, Civ. App., 173 S.W. 222.

10 C.J. p 438 note 12.

30. Conn.—Turner v. Connecticut Co., 101 A. 88, 91 Conn. 692.

31. U.S.—Westinghouse Electric & Mfg. Co. v. Binghamton Ry. Co., N.Y., 255 F. 378, appeal dismissed 257 F. 726, 169 C.C.A. 14

Ky.—Louisville & N. R. Co. v. Greenbrier Distillery Co., 187 S.W. 296, 170 Ky. 775.

32. U.S.—Hooker v. Interstate Commerce Commn., Com.Ct., 188 F. 242, 252, reversed on other grounds 32 S.Ct. 769, 225 U.S. 302, 56 L.Ed. 1099.

Ill.—Chicago Union Tract. Co. v. Chicago, 65 N.E. 451, 199 Ill. 484, 59 L.R.A. 631.

33. Neb.—Omaha & C. B. St. Ry. Co. v. Nebraska State Railway Commission, 173 N.W. 690, 103 Neb. 695.

10 C.J. p 414 note 89.

34. U.S.—Interstate Commerce Commn. v. Southern Pac. Co., Com. Ct., 34 S.Ct. 820, 234 U.S. 315, 58 L.Ed. 1329.

10 C.J. p 415 note 90.

35. Wash.—Northern Pac. Ry. Co. v. Department of Public Works, 217 P. 507, 125 Wash. 584, motion denied 45 S.Ct. 196, and reversed on other grounds 45 S.Ct. 412, 268 U.S. 39, 69 L.Ed. 837.

Failure to consider facts not shown

Ill.—Moline Consumers' Co. v. Illinois Commerce Commission ex rel. Chicago, B. & Q. R. Co., 187 N.E. 161, 353 Ill. 119.

Reasonable basis for order not shown

Ill.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 195 N.E. 32, 359 Ill. 563.

36. Ark.—St. Louis-San Francisco Ry. Co. v. Norris, 12 S.W.2d 915, 178 Ark. 940—Clear Creek Oil & Gas Co. v. Ft. Smith Spelter Co., 255 S.W. 903, 161 Ark. 12, affirmed Ft. Smith Spelter Co. v. Clear Creek Oil & Gas Co., 45 S.Ct. 263, 267 U.S. 231, 69 L.Ed. 588.

La.—Empire Rice Milling Co. v. Railroad Commission of Louisiana, 79 So. 833, 143 La. 1036.

10 C.J. p 438 note 15.

37. Va.—Washington Southern R. Co. v. Com., 71 S.E. 539, 112 Va. 515.

10 C.J. p 438 note 16.

ings of the commission, on appeal, are prima facie true.[38]

The order reviewed must be based on competent evidence,[39] and the courts must weigh and consider the evidence,[40] but have no power to pass on conflicts of testimony, nor to determine the weight of the evidence in its bearing on the reasonableness of the rate.[41] They are limited in their consideration of the evidence to a determination of whether the order has substantial foundation therein,[42] and if there is substantial evidence supporting the order it will be sustained,[43] even though the evidence is conflicting;[44] but an order indisputably contrary to the evidence, or without evidence, or otherwise not in conformity with the law will be set aside.[45]

A presumption will be indulged that a state railroad commission, in fixing intra-state railroad rates, acted with full knowledge of the situation, and, where the record does not disclose all the evidence, a rate sustained by the highest state court will not be held by the supreme court of the United States to be confiscatory as depriving the railroad company of its property without due process of law, where it appears by the report of the company that the rate exceeds the average rate received by the company during the previous year;[46] nor will the federal courts disturb, on the theory of

Points not urged before the commission cannot be considered—Lang v Railroad Commission of California, 42 P 2d 639, 2 Cal.2d 550.

Record held to show shipper's contention passed on

Ill—Moline Consumers' Co. v. Illinois Commerce Commission ex rel. Chicago, B. & Q. R. Co., 187 N.E 161, 353 Ill. 119.

38. Ill.—State Public Utilities Commission of Ill. v. Atchison, T. & S. F. Ry. Co., 115 N.E. 904, 278 Ill. 58

Findings essential to review

Where commerce commission did not make fact findings on issues raised by complaint respecting railroad's charges for refrigeration, court could not review decision.—People's Fruit & Vegetable Shippers' Ass'n v. Illinois Commerce Commission, 184 N.E. 615, 351 Ill. 329.

Validity of statute

Statute making findings of commission prima facie true on appeal is constitutional.—State Public Utilities Commission of Ill. v. Atchison, T. & S. F. Ry. Co., 115 N.E. 904, 278 Ill 58.

Where facts controverted

Where facts are controverted, courts will give great weight to finding of state commerce commission on complaint as to unreasonableness of freight rates.—Illinois Commerce Commission v. Illinois Traction, 167 N.E. 38, 335 Ill. 247.

39. Ill.—State Public Utilities Commission v. Toledo, St. L. & W. R. Co, 122 N.E. 158, 286 Ill. 582.

40. Ill.—Illinois Commerce Commission v. Illinois Traction, 167 N. E. 38, 335 Ill. 247.

41. Or.—Oregon-Washington R. & Nav Co. v. Corey, 252 P. 955, 120 Or. 517.

42. U S.—Illinois Cent. R Co. v. Vest, D C.Ky., 39 F.2d 658.

Ill.—Chicago & E. I. Ry. Co. v. Commerce Commission, 175 N.E. 8, 343 Ill. 117—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 166 N E. 466, 335 Ill. 70.

43. U S—Illinois Cent. R. Co. v. Vest, D C Ky, 39 F.2d 658.

Ill.—Moline Consumers' Co. v. Illinois Commerce Commission ex rel. Chicago, B & Q. R Co, 187 N. E. 161, 353 Ill. 119—Atchison, T. & S. F. Ry. Co v. Commerce Commission, 167 N E. 831, 335 Ill. 624—Illinois Commerce Commission v. Chicago & E. I. Ry. Co, 163 N. E. 664, 332 Ill. 243—State Public Utilities Commission v. Terminal R. Ass'n of St. Louis, 118 N.E. 71, 281 Ill. 181.

N.M.—San Juan Coal & Coke Co. v Santa Fé, S. J. & N. Ry. Co., 2 P 2d 305, 35 N.M. 512—Gilliland Oil Co. of New Mexico v. Atchison, T & S. F. Ry. Co, 275 P. 93, 33 N M. 638—Artesia Alfalfa Growers' Ass'n v. Atchison, T. & S. F. Ry Co, 270 P. 796, 33 N M. 468—Kinney v. New Mexico Midland Ry. Co, 214 P. 754, 28 N.M 451.

Pa.—American Lime & Stone Co. v. Public Service Commission, 100 Pa. Super. 158.

Va.—Norfolk & W. Ry. Co. v. Commonwealth ex rel. Mathieson Alkali Works, 174 S E. 85, 162 Va 314.

Wash.—Great Northern Ry Co. v Department of Public Works of Washington, 296 P. 142, 161 Wash 29.

Improper evidence

Order of state corporation commission reducing railroad rates, supported by proper evidence, will not be reversed because of admission of improper evidence unless order was controlled by such improper evidence.—Norfolk & W. Ry. Co v. Commonwealth ex rel. Mathieson Alkali Works, 174 S E. 85, 162 Va. 314.

Scintilla of evidence insufficient

The order must be supported by substantial evidence, and not merely a scintilla of evidence.

U S—Illinois Cent R. Co. v. Vest, D C Ky, 39 F.2d 658.

Ill.—Atchison, T. & S F. Ry. Co. v. Commerce Commission, 167 N.E. 831, 335 Ill 624.

44. Colo.—Atchison, T. & S F. Ry. Co. v. Public Utilities Commission, 188 P. 747, 68 Colo. 92

45. Colo.—Atchison, T. & S F. Ry. Co. v. Public Utilities Commission, supra.

Ill.—Chicago & E. I Ry. Co. v. Illinois Commerce Commission, 173 N.E. 380, 341 Ill 277.

Pa.—Baltimore & Ohio R. Co. v. Public Service Commission, 66 Pa.Super. 403—McCrady Bros. Co. v. Pittsburgh & Lake Erie Railroad Co., 66 Pa.Super. 307.

10 C.J. p 415 note 91.

Court will not make new findings

If the order of the commission is not sustained by the facts on which it was predicated the court will not enter into an independent investigation of the evidence to determine whether there are facts on which the order could be sustained.—Atchison, T. & S. F. Ry. Co. v. Commerce Commission, 167 N.E. 831, 335 Ill. 624.

New or additional evidence

(1) Under some statutes, on appeal from an order or decision of the state regulatory commission as to the reasonableness of a carrier's rates for transportation, new or additional evidence cannot be introduced, but the appeal must be heard on the record of the commission.

Ark.—Clear Creek Oil & Gas Co v. Ft Smith Spelter Co, 255 S.W 903, 161 Ark. 12, affirmed Ft. Smith Spelter Co v. Clear Creek Oil & Gas Co, 45 S Ct. 263, 267 U.S. 231, 69 L.Ed. 588.

Ill.—State Public Utilities Commission v. Atchison, T & S F. Ry. Co, 116 N E. 696, 279 Ill. 194.

(2) Ky.St. § 829, limiting evidence which can be heard in circuit court to that heard before railroad commission, is constitutional.—Louisville & N. R. Co. v. Greenbrier Distillery Co., 187 S.W. 296, 170 Ky. 775.

46. U.S.—Seaboard Air Line Ry. v Florida, 27 S.Ct. 109, 203 U.S. 261, 51 L.Ed. 175.

interference with interstate commerce, an order of a state railroad commission suspending an interstate railway company's supplemental tariff to give the commission an opportunity to investigate where the affidavits are conflicting.[47] So, it has been held that a court of equity should not hold invalid an act of the legislature or of a regulatory commission, fixing maximum rates of a carrier until a fair trial has been made of continuing business under the statute, and the practical result of such rates has been determined.[48]

The courts in reviewing an order of a regulatory commission fixing or determining the reasonableness of a rate have jurisdiction to determine their power to review the order of the commission,[49] and to determine whether the rates have been established in due form of law under a valid law and under a valid commission,[50] and whether the board or commission acted within the scope of its authority.[51] Also, where the state commission determines that rates fixed by a carrier under a power conferred by its charter do not conform to the power and classification provided therein, resort may be had to the courts by the commission or the carrier to determine the question.[52]

In Oklahoma by virtue of constitutional provisions, the court, in reviewing the order of the corporation commission, sits in a legislative and administrative capacity,[53] and is bound by the presumption created by the constitution, that the action of the commission is prima facie reasonable and just, but subject to be rebutted or overcome by the facts in the record as found and weighed by the court on review.[54]

§ 285. Matters Considered in Determining Reasonableness

There is no precise formula for determining a reasonable rate. It must be determined on a consideration of all the facts and circumstances of the particular case.

There is no precise formula for determining with fine accuracy the point of reasonableness of a carrier's rates.[55] There are many factors entering

47. U.S.—Grand Trunk R. Co. v. Michigan R. Commn., Mich., 34 S. Ct. 152, 231 U.S. 457, 58 L.Ed. 310, affirming, D.C., 198 F. 1009.

48. Neb.—State v. Adams Express Co., 122 N.W. 691, 85 Neb. 25, 42 L.R.A.,N.S., 396.

Logging rate

In view of the difficulty of measuring the reasonableness of freight charges by reference to the cost of transporting a particular commodity, an order of the department of public works, establishing uniform intrastate tariff rates for the transportation of logs and providing for a test period of twelve months to establish the reasonableness or unreasonableness thereof, will be affirmed without prejudice to the right of the carriers to reopen the case.—Northern Pac. Ry. Co. v. Department of Public Works, 217 P. 507, 125 Wash. 584, motion denied 45 S.Ct. 196, and reversed on other grounds 45 S.Ct. 412, 268 U.S. 39, 69 L.Ed. 837.

49. Ind.—Chicago, etc., R. Co. v. State R. Commn., 78 N.E. 338, 79 N.E. 520, 38 Ind.App. 439.
10 C.J. p. 438 note 10.

50. Ind.—Chicago, etc., R. Co. v. State R. Commn., 78 N.E. 338, 79 N.E. 520, 38 Ind.App. 439.

51. Colo.—Atchison, T. & S. F. Ry. Co. v. Public Utilities Commission, 188 P. 747, 68 Colo. 92.
Fla.—Reinschmidt v. Louisville & N. R. Co., 160 So. 69, 118 Fla. 237.
Ill.—Moline Consumers' Co. v. Illinois Commerce Commission ex rel. Chicago, B. & Q. R. Co., 187 N.E. 161, 353 Ill. 119—Chicago & E. I. Ry. Co. v. Commerce Commission, 175 N.E. 8, 343 Ill. 117—Indiana Harbor Belt R. Co. v. Illinois Commerce Commission, 172 N.E. 708, 340 Ill. 304.

On own motion

On appeal by railroads from order of public utilities commission reforming switching rates in Denver railway yards, supreme court will take notice of its own motion of jurisdictional question that part of industrial switching carried on between points within city and county of Denver is beyond jurisdiction of public utilities commission.—Atchison, T. & S. F. Ry. Co. v. Public Utilities Commission, 188 P. 747, 68 Colo. 92.

52. Miss.—Gulf & S. I. R. Co. v. Laurel Oil & Fertilizer Co., 159 So. 838, 172 Miss. 630, amending and overruling suggestion of error 158 So. 778, 172 Miss. 630, and corrected 160 So. 564, 172 Miss. 630.

Mandamus or certiorari

If railroad commission should not be of opinion that rates fixed by railroad's directors under power conferred by legislative charter conform to charter provisions, railroad should either compel by mandamus, or, if a disputed issue, review matter by certiorari, and rates, if correct, would be effective from date they were filed with commission.—Gulf & S. I. R. Co. v. Laurel Oil & Fertilizer Co., 159 So. 838, 172 Miss. 630, amending and overruling suggestion of error 158 So. 778, 172 Miss. 630, and corrected 160 So. 564, 172 Miss. 630.

53. Okl.—St. Louis-San Francisco Ry. Co. v. State, 198 P. 73, 81 Okl. 298.
10 C.J. p. 415 note 95.

Case tried de novo

When an appeal is taken from an order of the corporation commission, fixing a rate to be charged by a public service transportation or transmission company, to the supreme court, it is tried by the supreme court de novo on the record and evidence before the commission or certified by the court, and it is the duty of the supreme court to judicially determine and fix such rate as is just, reasonable, and correct, irrespective of who appeals, so that a cross-appeal is not necessary.—St. Louis-San Francisco Ry. Co. v. State, 198 P. 73, 81 Okl. 298.

54. Okl.—Atchison, T. & S. F. Ry. Co. v. State, 267 P. 253, 130 Okl. 263—St. Louis-San Francisco Ry. Co. v. State, 198 P. 73, 81 Okl. 298.
10 C.J. p. 415 note 96.

Presumption held overthrown by evidence on an appeal from an order fixing switching rates.—St. Louis-San Francisco Ry. Co. v. State, 198 P. 73, 81 Okl. 298.

Rate extended to other commodities

Under the evidence, it is held that a rate fixed by the corporation commission should apply to all crushed rock, gravel, and sand transported by the railroad companies in territory covered by the railroads and to that extent the order of the commission should be modified.—Atchison, T. & S. F. Ry. Co. v. State, 200 P. 232, 82 Okl. 288.

55. Ky.—Southern Ry. Co. of Kentucky v. Frankfort Distillery, 26

into the consideration;[56] and the final result is to be determined, not from the consideration of a single circumstance, but from a general view of all conditions affecting the transportation,[57] and a consideration of all parties directly and materially affected.[58] All the facts and circumstances must be considered by such appropriate processes and standards of reasoning and computation as are afforded by law, or by common experience, and the dictates of right and justice.[59] A rate just and reasonable when prescribed may become too low, unreasonable, and confiscatory;[60] and it does not necessarily follow that a rate which should be reduced for the future was unreasonable in the past, particularly where it was put into effect in good faith and maintained without challenge for a considerable length of time.[61]

Same tests for minimum rates. No different tests or standards are prescribed for the determination of a just and reasonable minimum rate than for a just and reasonable maximum rate.[62]

Abnormal conditions. Abnormal conditions which will exist for only a brief period of time do not necessarily require a change of rates, but if it is uncertain, and seems improbable, that conditions

S.W.2d 1025, 233 Ky. 771, certiorari denied 51 S.Ct. 75, 282 U.S. 868, 75 L.Ed. 767.

Intention to secure rate reasonable to all parties

Rate making for carriers is not a scientific process, but is intended to secure rates which shall be as nearly as possible just and reasonable to all parties concerned, and to provide that all persons shipping similar products under similar circumstances for like distances should be treated alike as nearly as possible, and should not be discriminated against.—Public Service Commission of Washington v. State, 204 P. 791, 118 Wash. 629, 25 A.L.R. 186, affirmed 207 P. 688, 118 Wash. 629, 25 A.L.R. 186.

56. Ill.—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 166 N.E. 466, 335 Ill. 70. Ky.—Southern Ry. Co. of Kentucky v. Frankfort Distillery, 26 S.W.2d 1025, 233 Ky. 771, certiorari denied 51 S.Ct. 75, 282 U.S. 868, 75 L.Ed. 767.

Need for money

The mere fact that the carrier needs money, entirely apart from the reasons for the need, do not alone determine what are reasonable rates.—Algoma Coal & Coke Co. v. U. S., D.C.Va., 11 F.Supp. 487.

Speculative benefits, standing alone, will not justify interference by a state commission with existing rates otherwise reasonable.—North Hennepin Producers' Ass'n v. Chicago, St. P., M. & O. Ry. Co., 200 N.W. 808, 160 Minn. 506.

57. Ill.—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 166 N.E. 466, 335 Ill. 70.

Circumstances of particular case determine whether a rate regulation by a state commission is unreasonable.—St. Louis, I. M. & S. Ry. Co. v. Clark Pressed Brick Co., 192 S.W. 382, 127 Ark. 474.

Entire system

In general, the true test of the reasonableness of a rate is its effect on the entire system, and not whether a particular part thereof is operated at a profit or loss under the prescribed rate.—Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin, 177 N.W. 25, 171 Wis. 297.

Existing conditions

The rate must be based on existing conditions.—Illinois Commerce Commission v. Cleveland, C., C. & St. L. Ry. Co., 150 N.E. 678, 320 Ill. 214.—State Public Utilities Commission v. Chicago & N. W. Ry. Co., 121 N.E. 260, 286 Ill. 53.

Extent of switching district

A railroad switching district, established for purpose of fixing switching rates, must terminate within reasonable limits, and boundaries should be determined by consideration of all circumstances of particular case including industries located therein, relative mileage, transportation conditions, and commercial competition.—New York, C. & St. L. R. Co. v. Public Service Commission of Indiana, Ind., 199 N.E. 573.

Rate to individual

Whether carrier gave reasonable rates to complainant must be determined by general rules governing powers of rate-making body when determining reasonableness.—Great Northern Ry. Co. v. Department of Public Works of Washington, 296 P. 142, 161 Wash. 29.

Statutory factors

Where a statute designates certain matters which the state commission shall consider in fixing rates, while the commission may not be necessarily limited to such matters, an order of the commission should not stand that does not give full consideration to such matters.—State ex rel. and to Use of Alton R. Co. v. Public Service Commission, Mo.App., 110 S.W.2d 1121, transferred, Sup., 100 S.W.2d 474.

58. Fla.—State v. Louisville, etc., R. Co., 57 So. 175, 62 Fla. 315. 10 C.J. p. 415 note 97.

59. U.S.—Atchison, etc., R. Co. v. Interstate Commerce Commn., Com. Ct., 190 F. 591. Fla.—State v. Louisville, etc., R. Co., 57 So. 175, 62 Fla. 315.

Changed conditions

Where rates fixed by public service commission's order for transportation of coal in carload lots between points in Missouri, where distance involved was ninety-five miles or less, were reasonable and lawful, to authorize change in rates required changed condition which makes original rates unreasonable and unlawful.—State ex rel. and to Use of Alton R. Co. v. Public Service Commission, Mo.App., 110 S.W.2d 1121, transferred, Sup., 100 S.W.2d 474.

Order based on prior order

Order of public utilities commission requiring extension of rate zone, entered without hearing of evidence as to reasonableness or fairness, and made pursuant to void order of railroad and warehouse commission, entered more than two years before, cannot be construed as original order to extend district.—State Public Utilities Commission v. Chicago & N. W. Ry. Co., 121 N.E. 260, 286 Ill. 53.

Former error cannot be considered

New order of Illinois commerce commission fixing rate must be based on evidence as to what is presently reasonable rate, without regard to previous error in former orders fixing rates.—Illinois Commerce Commission v. Cleveland, C., C. & St. L. Ry. Co., 150 N.E. 678, 320 Ill. 214.

Reasonableness at time

Order by commerce commission fixing rate must be based on reasonableness at time.—Chicago & E. I. Ry. Co. v. Illinois Commerce Commission, 173 N.E. 380, 341 Ill. 277.

60. U.S.—Banton v. Belt Line Ry. Corporation, N.Y., 45 S.Ct. 534, 268 U.S. 413, 69 L.Ed. 1020.

61. Pa.—Pennsylvania R. Co. v. Public Service Commission, 190 A. 367, 125 Pa.Super. 558.

62. U.S.—Jefferson Island Salt Mining Co. v. U. S., D.C.Ohio, 6 F.2d 315.

will become more favorable for adequate earnings in the near future, the propriety of emergency rates would seem to be indicated.[63] Evidence that rates fixed by commission were in force for only short period of time during which conditions were abnormal is insufficient to show the rates confiscatory.[64]

Cost and value of service. Freight rates must be fixed with reasonable reference to the responsibility and the cost and value of the service which the carrier and the shipper undertake respectively to assume and render.[65]

Ownership of goods. The fact that the same ownership controls the freight offered and the stock of a railroad company which is a common carrier does not justify the imposition of different rates for proprietary freight and freight independently owned.[66]

§ 286. Value of Property Devoted to Public Service and Methods by Which It Is Determined

a. General rule
b. How determined

a. General Rule

The present fair value of the property being used by a carrier for the convenience of the public is to be considered as a rate base in determining the reasonableness of rates.

In the determination of the reasonableness of rates to be charged by a carrier the fair value of the property being used by it for the convenience of the public is to be considered as a rate base,[67] but it is not conclusive.[68] Such value is to be determined as of the time when the inquiry with regard to rates is being made,[69] but where present values are greatly inflated, due to the transitory conditions arising from a war or the after effects thereof, a valuation based on future price trends and below the present inflated value may be made.[70] Where there is no statutory requirement to that effect the commission is not required in all cases to fix a definite valuation on a carrier's property, whenever there is a complaint against its rates; it may be made when necessary or desirable.[71] So an appraisement of the value of all of a carrier's property is not a prerequisite, when not required by statute, to an increase in intra-state rates of the carrier sufficient to prevent a deficit in operations due to increased taxes and labor cost caused by extraordinary conditions resulting from the na-

63. Neb.—In re Lincoln Traction Co, 171 N.W. 192, 103 Neb. 229.

Evidence based on temporary abnormal conditions

If evidence tending to show that rates are not remunerative, while based on actual experience in the operation of road, relates only to a brief period when conditions were abnormal, it will not necessarily require a change of rates.—In re Lincoln Traction Co., 171 N.W. 192, 103 Neb. 229.

64. U.S.—Darnell v. Edwards, Miss., 37 S.Ct. 701, 244 U.S. 564, 61 L.Ed. 1317.

65. U.S.—Tripp v. Michigan Cent. R. Co., Mich., 238 F. 449, 151 C.C.A. 385, certiorari denied Michigan Cent. R. Co. v. Tripp, 37 S.Ct. 475, 243 U.S. 648, 61 L.Ed. 945.

66. U.S.—U. S. v. Butler County R. Co, Com.Ct., 34 S.Ct. 748, 234 U. S. 29, 58 L.Ed. 1196.

67. U.S.—Galveston Electric Co. v. City of Galveston, Tex., 42 S.Ct. 351, 258 U.S. 388, 66 L.Ed. 678, affirming, D.C., 272 F. 147—Darnell v. Edwards, 37 S.Ct. 701, Miss., 244 U.S. 564, 61 L.Ed. 1317—Los Angeles Ry. Corporation v. Railroad Commission of California, D. C.Cal., 29 F.2d 140, affirmed Railroad Commission of California v. Los Angeles Ry. Corporation, 50 S. Ct. 71, 280 U.S. 145, 74 L.Ed. 234—Kansas City Southern Ry. Co. v. U. S., D.C.Mo., 19 F.2d 591, reversed on other grounds U. S. v. Kansas City Southern Ry. Co., 48 S.Ct. 140, 275 U.S. 500, 72 L.Ed. 394—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360 Mo.—State ex rel. and to Use of City of St. Louis v. Public Service Commission, 34 S.W.2d 507, 326 Mo. 751.
Neb.—In re Lincoln Traction Co, 171 N.W. 192, 103 Neb. 229.
N.J.—O'Brien v. Board of Public Utility Com'rs, 105 A. 132, 92 N.J.Law 44, affirmed 106 A. 414, 92 N.J.Law 587.
10 C.J. p. 416 note 8.

Property valued for intra-state rate base

Where the question is as to the profitableness of the intra-state business as a whole under a general scheme of rates, the carrier must satisfactorily prove the fair value of the property employed in its intra-state business and show that it has been denied a fair return on that value.—Northern Pac. R. Co. v. North Dakota, N.D., 35 S.Ct. 429, 236 U.S. 585, 59 L.Ed. 735, Ann.Cas.1916A 1 and note.

Commission authorized to make valuation

Commission has authority under statute to order appraisal of property on petition for increased rates.—Dyer v. Virginia Ry. & Power Co., 136 S.E. 499, 147 Va. 98.

68. N.J.—O'Brien v. Board of Public Utility Com'rs, 105 A. 132, 92 N.J.Law 44, affirmed 106 A. 414, 92 N.J.Law 587.

69. U.S.—Willcox v. New York Consolidated Gas Co., N.Y., 29 S.Ct. 192, 212 U.S. 19, 53 L.Ed. 382, 48 L.R.A.,N.S., 1134, 15 Ann.Cas. 1034—Matthews v. North Carolina Bd. of Corp. Comrs., C.C.N.C., 106 F. 7. Minn.—State v. Minneapolis, etc., R. Co, 83 N.W. 60, 80 Minn. 191, 89 Am.S.R. 514, affirmed 22 S.Ct. 900, 186 U.S. 257, 46 L.Ed. 1151.

Pre-war cost valuation improper

In a proceeding by a carrier for a permit to increase its rates it was error to fix the valuation of the company's property at the pre-war cost, less the subsequent depreciations, and not consider the valuation during and after the war.—People ex rel. New York State Rys. v. Public Service Commission, 195 N.Y.S. 174, 202 App.Div. 576.

70. U.S.—Galveston Electric Co. v. City of Galveston, D.C.Tex., 272 F. 147, affirmed 42 S.Ct. 351, 258 U.S. 388, 66 L.Ed. 678.

71. Pa.—City of Philadelphia v. Public Service Commission, 84 Pa. Super. 135—City of Philadelphia v. Public Service Commission, 83 Pa. Super. 8.

tion being at war;[72] nor is a revaluation of a carrier's property necessary, or even proper, where it was valued for rate making purposes about one year before and there has been no substantial changes in the valuation in the interval.[73] Excessive valuation or fictitious capitalization will not serve as an excuse for excessive rates.[74]

b. How Determined

There is no exact formula for the ascertainment of the fair value of the carrier's property, but there must be a reasonable judgment based on all relevant facts and without any weight being given to speculative factors or factors dependent for their value on the rate being considered.

There is no formula for the ascertainment of the fair value of property used for the convenience of the public, but there must be a reasonable judgment having as its basis a proper consideration of all relevant facts.[75] The valuation of the carrier's property is not intended as a buying and selling price;[76] and in determining the fair value of a carrier's property for rate making purposes such value as is attributable to the property of the carrier by reason of its earnings should not be included, for the reason that the earnings on which the value of the property depends are largely controlled and determined by the rate which is allowed to be charged for the service rendered.[77] A speculative increase of value beyond the value of similar property owned by others, solely by reason of its public character, cannot be allowed.[78] It is the duty of a carrier to keep its accounts as required by the state commission and to render all possible assistance to enable the commission to ascertain the true values of its property, and if it fails to do so it is in no position to complain of the findings of the commission thereon.[79]

Cost of reproduction. It is very generally held that the cost of reproducing the property used by the carrier for the public benefit may be taken into consideration in determining the value of the property.[80] When an estimate of value is based

72. N.J.—O'Brien v. Board of Public Utilities Com'rs, 106 A. 414, 92 N.J.Law 587, affirming 105 A. 132, 92 N.J.Law 44.

Effect of statutes

While contention that reasonableness of rates can only be determined by first ascertaining value of property devoted to public service would have some force if § 16 (c), providing for proceedings by the commission adverse to the carrier and authorizing the commission to require the carrier to do what it may not want to do, were the only section of the Public Utility Act applicable, it cannot be sustained, since § 17 (h) provides for increase by public utility itself and subsequent approval by board of public utility commissioners.—O'Brien v. Board of Public Utility Com'rs, 105 A. 132, 92 N.J.Law 44, affirmed 106 A. 414, 92 N.J.Law 587.

73. Va.—Dyer v. Virginia Ry. & Power Co., 136 S.E. 499, 147 Va. 98.

74. U.S.—Smyth v. Ames, Neb., 18 S.Ct. 418, 169 U.S. 466, 544, 42 L.Ed. 819.
W.Va.—Coal, etc., R. Co. v. Conley, 67 S.E. 613, 67 W.Va. 129.
10 C.J. p. 416 note 10.

75. U.S.—Galveston Electric Co. v. City of Galveston, D.C.Tex., 272 F. 147, affirmed 42 S.Ct. 351, 258 U.S. 388, 66 L.Ed. 678.—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360.
Mo.—State ex rel. and to Use of City of St. Louis v. Public Service Commission, 34 S.W.2d 507, 510, 326 Mo. 751.
N.Y.—People ex rel. New York State Rys. v. Public Service Commission, 195 N.Y.S. 174, 202 App.Div. 576.
10 C.J. p. 416 note 11.

"All competent evidence must be received and given such weight as under the circumstances of the case is just and right. . . . It follows that the stress or weight to be given the several factors that go to make up present fair value depends upon the circumstances disclosed by the evidence in the particular case."—State ex rel. and to Use of City of St. Louis v. Public Service Commission, supra.

Grade raising

It appearing that expense of grade raising has added to the value of a carrier at least to the amount of the expenditure, it is a proper item of allowance in determining the value of its property for rate-fixing purposes.—Galveston Electric Co. v. City of Galveston, D.C.Tex., 272 F. 147, affirmed 42 S.Ct. 351, 258 U.S. 388, 66 L.Ed. 678.

Contract for electric power

An advantageous contract for the furnishing of electric power to the carrier which permits the carrier to dismantle its plant for the production of electricity is a thing of value to be considered in the fixing of rates.—Duluth St. Ry. Co. v. Railroad and Warehouse Commission of Minnesota, D.C.Minn., 4 F.2d 543, affirmed Railroad and Warehouse Commission of Minnesota v. Duluth Street Ry. Co., 47 S.Ct. 489, 273 U.S. 625, 71 L.Ed. 807.

76. U.S.—Temmer v. Denver Tramway Co., C.C.A.Colo., 18 F.2d 226.
D.C.—Public Utilities Commission of District of Columbia v. Capital Traction Co., 17 F.2d 673, 57 App.D.C. 85.

Same processes not involved

For rate making purposes the consideration of value does not involve the same processes and degrees of exactness that would be applied for sale or condemnation purposes.—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360.

77. U.S.—Temmer v. Denver Tramway Co., C.C.A.Colo., 18 F.2d 226.
Md.—Miles v. West, 135 A. 579, 151 Md. 337, 59 A.L.R. 1470.

78. U.S.—Simpson v. Shepard, Minn., 33 S.Ct. 729, 230 U.S. 352, 455, 57 L.Ed. 1511, 48 L.R.A.,N.S., 1151 and note, Ann.Cas.1916A. 18.
10 C.J. p. 417 note 29.

79. Neb.—In re Lincoln Traction Co., 171 N.W. 192, 103 Neb. 229.

80. U.S.—Galveston Electric Co. v. City of Galveston, Tex., 42 S.Ct. 351, 258 U.S. 388, 66 L.Ed. 678, affirming, D.C., 272 F. 147.—Westinghouse Electric & Mfg. Co. v. Denver Tramway Co., D.C.Colo., 3 F.2d 285, transferred City and County of Denver v. Stenger, 47 S.Ct. 343, 273 U.S. 657, 71 L.Ed. 826.—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360.—Ann Arbor R. Co. v. Fellows, D.C.Mich., 236 F. 387, appeal dismissed Ann Arbor R. Co. v. Glasgow, 39 S.Ct. 5, 248 U.S. 588, 63 L.Ed. 434.
D.C.—Public Utilities Commission of District of Columbia v. Capital Traction Co., 17 F.2d 673, 57 App.D.C. 85.
Neb.—In re Lincoln Traction Co., 171 N.W. 192, 103 Neb. 229.
N.J.—O'Brien v. Board of Public Utility Com'rs, 105 A. 132, 92 N.J.

on the cost of reproduction new the extent of the existing depreciation may and should ordinarily be shown and deducted,[81] although where an adequate sinking fund for depreciation is maintained sufficient to balance the actual depreciation of the property, and the property is maintained in the highest condition in point of material construction and efficiency, the failure to make deduction for depreciation from reproduction cost is proper.[82] Allowance may be made for construction overhead costs,[83] but interest during construction on the estimated cost of reproduction of railroad property cannot lawfully be allowed,[84] nor can brokerage fees[85] or promotion and consolidation expenses.[86] Ordinarily the reproduction cost new, less depreciation, is the dominant factor in determining the present fair value of the carrier's property for rate-making purposes,[87] and, according to some decisions, it is the fundamental and generally controlling inquiry.[88] It need not, however, be adopted as the exact measure of the present value of a carrier's property,[89] and it has been said that a system of rates and charges that looks to a valuation fixed on so narrow a basis as the cost of reproducing the property, and which permits no account for betterments made necessary by the growth of trade, comes clearly within the constitutional prohibition against depriving any person of property without due process of law,[90] and that courts cannot assume that the cost of reproduction of a line of railroad is what the road has cost up to the time of trial.[91]

Cost of construction. The reasonable cost of construction is to be considered in determining the fair value of the company's property as an element entering into the question of reasonableness of rates,[92] which cost includes all of the elements

Law 44, affirmed 106 A. 414, 92 N.J.Law 587.

Pa.—City of Philadelphia v. Public Service Commission, 84 Pa.Super 135.

10 C.J. p 417 note 21.

81. U.S.—Westinghouse Electric & Mfg. Co. v. Denver Tramway Co., D.C.Colo., 3 F.2d 285, transferred City and County of Denver v. Stenger, 47 S.Ct. 343, 273 U.S. 657, 71 L.Ed. 826—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360—Ann Arbor R. Co. v. Fellows, D.C.Mich., 236 F. 387, appeal dismissed Ann Arbor R. Co. v. Glasgow, 39 S.Ct. 5, 248 U.S. 588, 63 L.Ed. 434.

Mo.—State ex rel. and to Use of City of St. Louis v. Public Service Commission, 34 S.W.2d 507, 326 Mo. 751.

10 C.J. p 417 note 25.

How determined

(1) Depreciation is a question of fact to be determined from all the evidence.—International Ry. Co. v. Prendergast, D.C.N.Y., 1 F.Supp. 623.

(2) In valuation of carrier's property for rate-making purposes, accrued depreciation is a fact to be determined by inspection.—Westinghouse Electric & Mfg. Co. v. Denver Tramway Co., D.C.Colo., 3 F.2d 285, transferred City and County of Denver v. Stenger, 47 S.Ct. 343, 273 U.S. 657, 71 L.Ed. 826.

82. D.C.—Public Utilities Commission of District of Columbia v. Capital Traction Co., 17 F.2d 673, 57 App.D.C. 85.

83. U.S.—Ann Arbor R. Co. v. Fellows, D.C.Mich., 236 F. 387, appeal dismissed Ann Arbor R. Co. v. Glasgow, 39 S.Ct. 5, 248 U.S. 588, 63 L.Ed. 434.

Mo.—State ex rel. and to Use of City of St. Louis v. Public Service Commission, 34 S.W.2d 507, 326 Mo. 751.

Appreciation

Although, in appreciating pre-war costs, to arrive at reproduction value of a street railroad plant, overhead items should not as items be increased in value, yet, since their amount was arrived at by taking a percentage of the physical property when that is appreciated, the overheads must necessarily increase in the same ratio.—Galveston Electric Co. v. City of Galveston, D.C.Tex., 272 F. 147 affirmed 42 S.Ct. 351, 258 U.S. 388, 66 L.Ed. 678.

84. U.S.—Simpson v. Shepard, Minn., 33 S.Ct. 729, 230 U.S. 352, 57 L.Ed. 1511, modifying, C.C., 184 F. 765.

85. U.S.—Galveston Electric Co. v. City of Galveston, Tex., 42 S.Ct. 351, 258 U.S. 388, 66 L.Ed. 678, affirming, D.C., 272 F. 147.

86. Mo.—State ex rel. and to Use of City of St. Louis v. Public Service Commission, 34 S.W.2d 507, 326 Mo. 751.

87. U.S.—Westinghouse Electric & Mfg. Co. v. Denver Tramway Co., D.C.Colo., 3 F.2d 285, transferred City and County of Denver v. Stenger, 47 S.Ct. 343, 273 U.S. 657, 71 L.Ed. 826.

Sliding on reproduction cost permitted

Since the weight to be given the different factors in determining the fair value of the property varies with the circumstances of each particular case, the fact that the commission put stress on reproduction cost in a particular case is insufficient to condemn the fair value found as not just and right.—State ex rel. and to Use of City of St. Louis v. Public Service Commission, 34 S.W.2d 507, 326 Mo. 751.

88. U.S.—Westinghouse Electric & Mfg. Co. v. Denver Tramway Co., D.C.Colo., 3 F.2d 285, transferred City and County of Denver v. Stenger, 47 S.Ct. 343, 273 U.S. 657, 71 L.Ed. 826.

10 C.J. p 417 note 22.

89. Pa.—City of Philadelphia v. Public Service Commission, 84 Pa. Super. 135.

90. U.S.—Metropolitan Trust Co. v. Houston, etc., R. Co., C.C.Tex., 90 F. 683.

Criticism of rule as sole method

The method of ascertaining the present value of railroad property by taking the cost of reproduction less accumulative depreciation, while perhaps the best general method yet devised, cannot be applied in all cases and under all conditions. In its use some important elements of value are ignored, such as density of population and traffic and obsolescence of equipment.—Ann Arbor R. Co. v. Fellows, D.C.Mich., 236 F. 387, appeal dismissed Ann Arbor R. Co. v. Glasgow, 39 S.Ct. 5, 248 U.S. 588, 63 L.Ed. 434.

91. Minn.—State v. Minneapolis, etc., R. Co., 83 N.W. 60, 80 Minn. 191, 89 Am.S.R. 514.

92. U.S.—Los Angeles Ry. Corporation v. Railroad Commission of California, D.C.Cal., 29 F.2d 140, affirmed Railroad Commission of California v. Los Angeles Ry. Corporation, 50 S.Ct. 71, 280 U.S. 145, 74 L.Ed. 234—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360.

Mo.—State ex rel. and to Use of City

of fair and reasonable expense in establishing it,[93] including promotion and consolidation expenses,[94] and construction overhead costs.[95] Although in some instances the cost of construction of the carrier's property may determine its present value, as when it is of very recent construction,[96] ordinarily it is of little assistance in that regard.[97] From the cost of construction deduction must be made for depreciation in the condition of the property.[98] Also the community does not underwrite reckless or improvident losses in investments.[99] On the other hand, as the carrier may not be protected in its actual investment if the value of its property is plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it is more than its cost.[1]

Market value of outstanding securities. While the market value of the carrier's stocks and bonds may be considered in estimating the value of the property,[2] by itself such market value is not an accurate criterion of value[3] or in any sense conclusive on that question,[4] and cannot, except in a very slight measure, indicate what that value is as a matter of fact.[5] Thus evidence that the rates are not a fair return on the amount of the bonded debt, capital stock, and current debts is insufficient to overcome the presumption of reasonableness of the rates adopted, unless it is also shown that the value of the road equals such outstanding liabilities.[6]

Land. In determining the fair value of the carrier's property, the fair market value of land owned by the carrier may be considered.[7]

Easements. In ascertaining the fair value of the property of a carrier for rate making purposes, easements owned by the carrier should be considered.[8] Such easements should be valued at whatever value they have as an interest in real estate,[9] but any value attributable to these easements which might be affected by the rate which the carrier may be allowed to charge, or such value as is dependent on the use which the franchise of the carrier permits the easement to be put, cannot be included.[10]

Working capital. In the ascertainment of the fair value of the property used by the carrier for the convenience of the public, the working capital, that is, the items required to be on hand in the operation of the property, such as materials, supplies and cash, should be considered.[11]

Dividends used for capital outlay. When dividends are fairly earned under the rates allowed, and are declared, such dividends become the prop-

of St. Louis v. Public Service Commission, 34 S.W.2d 507, 326 Mo. 751.

Neb.—In re Lincoln Traction Co., 171 N.W. 192, 103 Neb. 229.

N.J.—O'Brien v. Board of Public Utility Com'rs, 105 A. 132, 92 N.J. Law 44, affirmed 106 A. 414, 92 N.J. Law 587.

10 C.J. p 416 note 16.

Net balance in depreciation reserve

Under facts, public service commission properly declined to deduct net balance in depreciation reserve account from original cost.—State ex rel. and to Use of City of St. Louis v. Public Service Commission, 34 S.W.2d 507, 326 Mo. 751.

93. Or.—Hammond Lumber Co. v. Public Service Commission, 189 P. 639, 96 Or. 595, 9 A.L.R. 1223.

Interest from beginning of undertaking

In fixing rates for a railroad, a reasonable rate of interest on the investment in the property should be allowed from the beginning of the undertaking.—Hammond Lumber Co. v. Public Service Commission, 189 P. 639, 96 Or. 595, 9 A.L.R. 1223.

94. Mo.—State ex rel. and to Use of City of St. Louis v. Public Service Commission, 34 S.W.2d 507, 326 Mo. 751.

95. Mo.—State ex rel. and to Use of City of St. Louis v. Public Service Commission, supra.

96. U.S.—Louisville, etc., R. Co. v. Alabama R. Commn., D.C.Ala., 196 F. 800.

97. U.S.—Louisville, etc., R. Co. v. Alabama R. Commn., supra.

10 C.J. p 416 note 18.

98. U.S.—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360.

99. U.S.—Simpson v. Shepard, Minn., 33 S.Ct. 729, 230 U.S. 352, 454, 57 L.Ed. 1511, 48 L.R.A.,N.S., 1151, Ann.Cas.1916A. 18

10 C.J. p 416 note 19.

1. U.S.—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360.

10 C.J. p 417 note 20.

2. U.S.—Los Angeles Ry. Corporation v. Railroad Commission of California, D.C.Cal., 29 F.2d 140, affirmed Railroad Commission of California v. Los Angeles Ry. Corporation, 50 S.Ct. 71, 280 U.S. 145, 74 L.Ed. 234.

Neb.—In re Lincoln Traction Co., 171 N.W. 192, 103 Neb. 229.

N.J.—O'Brien v. Board of Public Utility Com'rs, 105 A. 132, 92 N.J. Law 44, affirmed 106 A. 414, 92 N.J. Law 587.

10 C.J. p 416 note 12.

3. U.S.—Smyth v. Ames, Neb., 18 S.Ct. 418, 169 U.S. 466, 42 L.Ed. 819.

10 C.J. p 416 note 13

4. W.Va.—Coal, etc., R. Co. v. Conley, 67 S.E. 613, 67 W.Va. 129.

5. U.S.—Louisville, etc., R. Co. v. Alabama R. Commn., D.C.Ala., 196 F. 800

10 C.J. p 416 note 15.

6. Or.—State v. Southern Pac. Co., 31 P. 960, 23 Or. 424.

7. Mo.—State ex rel. and to Use of City of St. Louis v. Public Service Commission, 34 S.W.2d 507, 326 Mo. 751

8. Md.—Miles v. West, 135 A. 579, 151 Md. 337, 49 A.L.R. 1470.

9. Md.—Miles v. West, supra.

10. Md.—Miles v. West, supra.

Taxable value

A valuation of an easement based on an assessment made for tax purposes is erroneous, since the tax assessment necessarily included value resulting from earnings.—Miles v. West, 135 A. 579, 151 Md. 337, 59 A.L.R. 1470.

11. U.S.—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360.—Ann Arbor R. Co. v. Fellows, D.C.Mich., 236 F. 387, appeal dismissed Ann Arbor R. Co. v. Glasgow, 39 S.Ct. 5, 248 U.S. 588, 63 L.Ed. 434.

erty of the stockholders, and, if used to make proper additions to the property, such additions should be considered in adjusting rates.[12]

Going concern value or development cost. In determining the fair value of the carrier's property an allowance may be made for going value or development cost, since a property with its business attached and in successful operation has a greater value than the same property ready to operate, but not operating, and without any attached business,[13] but the cost of developing the carrier system into a financially successful concern based on the capitalized value of the net balance of the operating deficits for the first year cannot be included in determining the base value as a development cost of the system.[14] However, since the reproduction method of valuation presupposes conditions as they now exist, so that the present patronage would be available when the plant is put in operation, no appreciable development cost would be incurred, at least to such a comparatively negligible extent as should exclude its consideration under that method.[15]

Goodwill. Although it has been held that the value of a railroad like that of any other business property may be a matter of growth, and its location, goodwill, and established business are elements to be considered in determining the value,[16] other cases have held that the item of goodwill is not to be considered in determining the value of the property.[17]

Value of franchise. It has been held, although there is authority to the contrary,[18] that in estimating the value of a carrier's property for the purpose of determining the validity of a statute regulating its rates, the carrier's franchise is to be

12. Neb.—In re Lincoln Traction Co., 171 N.W. 192, 103 Neb. 229.

13. U.S.—Los Angeles Ry. Corporation v. Railroad Commission of California, D.C.Cal., 29 F.2d 140, affirmed Railroad Commission of California v. Los Angeles Ry. Corporation, 50 S.Ct. 71, 280 U.S. 145, 74 L.Ed. 234—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360.

Mo.—State ex rel. and to Use of City of St. Louis v. Public Service Commission, 34 S.W.2d 507, 326 Mo. 751.

Basis for allowance

"The allowance in its larger sense is designed to give the owner the benefit of that value that inheres in his plant as an established concern, already operating and earning, with a trained organization, having knowledge of the business, its requirements, and best proven methods for meeting them, and embodying all the experience of the past, with the known results of experiments made, and how best to adapt the business to the changing needs of a growing community."—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360, 362.

Items included

Partly in detail, the development cost embraces preliminary outlays and unrecovered costs in operating the plant itself until a paying business has been established, and subsequently for extensions into sparsely settled territory, until the growth of that particular section affords an adequate return. This cost continues with the continued extension and development of the plant—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360.

Overhead expenses by regular staff properly included

In valuing a carrier and equipment as a basis for fixing rates, preliminary legal, administration, and engineering expenses, claimed as overhead expenses in construction, organization, and development, were improperly excluded, on the theory that this work was done by the company's regular staff and charged to operating expenses, and hence would necessitate a revision of past operating expenses resulting in larger net earnings, as the larger net earnings thus produced would relate to a period when they would not affect present net earnings, and what would have been past profits or "larger net earnings" by a readjustment of operating expenses may not be considered in determining the rate base and whether the present rate is confiscatory.—People ex rel. New York State Rys. v. Public Service Commission, 195 N.Y.S. 174, 202 App. Div. 576.

Amount allowed held proper

Evidence held to sustain allowance by special master of ten per cent. of present value of physical properties of carrier system for going value in rate case—International Ry. Co. v. Prendergast, D.C.N.Y., 1 F. Supp. 623.

14. U.S.—Galveston Electric Co. v. City of Galveston, Tex., 42 S.Ct. 351, 258 U.S. 388, 66 L.Ed. 678, affirming, D.C., 272 F. 147—International Ry. Co. v. Prendergast, D.C.N.Y., 1 F.Supp. 623

15. U.S.—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360.

16. U.S.—Metropolitan Trust Co. v. Houston & T. C. R. Co., C.C.Tex., 90 F. 683.

17. D.C.—Public Utilities Commission of District of Columbia v. Capital Traction Co., 17 F.2d 673, 57 App.D.C. 85.

Neb.—In re Lincoln Traction Co., 171 N.W. 192, 103 Neb. 229.

Reason for rule

"The value of the good will depends upon dividends, and the certainty of receiving them, and they in turn depend upon the rates allowed. To consider good will as value in fixing rates would lead to the most confusing uncertainties."—In re Lincoln Traction Co., 171 N.W. 192, 194, 195, 103 Neb. 229.

Goodwill of company previously consolidated

Rate base valuation of carrier improperly included item representing goodwill of one of companies previously consolidated.—Public Utilities Commission of District of Columbia v. Capital Traction Co., 17 F.2d 673, 57 App.D.C. 85.

Not considered in determining whether rates confiscatory

Although the goodwill and earning power of a business, due to effective organization, are important elements in determining the value as between buyer and seller, and must be compensated for when the public acquires the business, and, like past losses, must be considered in determining whether a rate charged by utility is reasonable, they are not to be included in fixing the base value, for the purpose of determining whether the rates fixed by ordinance are confiscatory.—Galveston Electric Co. v. City of Galveston, Tex., 42 S.Ct. 351, 258 U.S. 388, 66 L.Ed. 678, affirming, D.C., 272 F. 147.

18. D.C.—Public Utilities Commission of District of Columbia v. Capital Traction Co., 17 F.2d 673, 57 App.D.C. 85.

included, and where the state by its tax commission has placed a value on such franchise for taxation purposes, it may fairly be taken by the court as a basis for its findings.[19]

Reserve for depreciation. Money raised by a carrier to pay for depreciation should not be considered as capital on which a return is to be made to the stockholders as dividends in the future.[20]

Assets and property of the carrier not used in the transportation business cannot be included in the valuation as a basis for rate making.[21]

Valuation fixed by carrier. The valuation placed by a carrier on its property is not binding on a railroad commission in estimating the valuation on which it should earn an income, or on which it should fix its rates.[22]

Return of value for purposes of taxation. A sworn return of the value of a carrier's property for the purpose of taxation is some evidence of the value of the property to be considered in determining the rates fixed by the state for carriage of freight,[23] but it is not conclusive on the carrier for that purpose;[24] and, in any event, it cannot be regarded as sufficient evidence as to the value of the property, especially when the principles governing the assessments are not properly shown.[25]

Future price trend. The future price trend or level of prices may be considered in arriving at the fair value of the property.[26]

§ 287. Value of Service to Public and General Public Good

The value of the service rendered and the general public good are proper items to be considered in the determination of the reasonableness of rates, but the effect on an individual shipper or particular member of the public is of little consequence.

As appears supra § 281, the public is entitled to demand that no more shall be exacted from it than the services rendered are reasonably worth, and this right takes precedence even over the right of the carrier to a fair return on its investment when the two rights cannot stand together. In consequence, although the carrier cannot be compelled to maintain on a particular commodity a rate which is less than reasonable, or which is practically gratuitous, on the ground of the public good,[27] even though the carrier is permitted to make up its loss by charges on other classes of traffic,[28] yet the value of the services to the public is an important factor in determining the reasonableness of the rates charged therefor.[29] This, it has been said, is considered an ideal method if not interfered with by competition or other factors, and if it is based on an idea similar to taxation.[30] The general public good may be considered in rate making,[31] and the rate-making body may consid-

19. U.S.—Louisville, etc., R. Co. v. Alabama R. Commn., D.C.Ala., 196 F. 800.

20. Neb.—In re Lincoln Traction Co., 171 N.W. 192, 103 Neb. 229.

21. U.S.—Simpson v. Shepard, Minn., 33 S.Ct. 729, 230 U.S. 352, 57 L.Ed. 1511, 48 L.R.A.,N.S., 1151, Ann.Cas. 1916A 18.

22. Neb.—State v. Lincoln Tract. Co., 134 N.W. 278, 90 Neb. 535.

23. U.S.—Louisville, etc., R. Co. v. Brown, C.C.Fla., 123 F. 946—Southern Pac. Co. v. Board of R. Comrs., C.C.Cal., 87 F. 21.

24. U.S.—Southern Pac. Co. v. Board of R. Comrs., supra.

25. U.S.—Knott v. Chicago, B. & Q. R. Co., Mo., 33 S.Ct. 975, 230 U.S. 474, 57 L.Ed. 1571—Simpson v. Shepard, Minn., 33 S.Ct. 729, 230 U.S. 352, 57 L.Ed. 1511, 48 L.R.A., N.S., 1151, Ann.Cas.1916A 18.
10 C.J. p. 417 note 34.

26. U.S.—Galveston Electric Co. v. City of Galveston, D.C.Tex., 272 F. 147, affirmed 42 S.Ct. 351, 258 U.S. 388, 66 L.Ed. 678—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360.
Mo.—State ex rel. and to Use of City of St. Louis v. Public Service Commission, 34 S.W.2d 507, 326 Mo. 751.

27. U.S.—Northern Pac. R. Co. v. North Dakota, 35 S.Ct. 429, 236 U.S. 585, 59 L.Ed. 735, Ann.Cas.1916A 1, reversing 145 N.W. 135, 26 N.D. 438
10 C.J. p. 418 note 39.

28. U.S.—Northern Pac. R. Co. v. North Dakota, supra.
10 C.J. p. 418 note 40.

29. N.J.—New Jersey Central Traction Co. v. Board of Public Utility Com'rs, 113 A. 692, 96 N.J.Law 90.
Pa.—McCrady Bros. Co. v. Pittsburgh & L. R. Co., 66 Pa.Super. 307.
Va.—Dyer v. Virginia Ry. & Power Co., 136 S.E. 499, 147 Va. 98.
10 C.J. p. 418 note 36.

Safety, sufficiency and adequacy of service

(1) In view of Public Utilities Act §§ 15, 16 subds. "d," "e," § 17 subds. "b," "h," and § 18 subd. "c" giving authority and jurisdiction to the board of public utility commissioners to control public utilities, fix rates and charges, make regulations, and require, safe, proper, and adequate service, as well as universally recognized business principles, such board may, in determining whether a proposed increase in railway fare is unjust and unreasonable, consider the safety, sufficiency, and adequacy of the service rendered.—New Jersey Central Traction Co. v. Board of Public Utility Com'rs, 113 A. 692, 96 N.J.Law 90.

(2) On application for increase of fare it was proper for the board of public utility commissioners to consider the character of service rendered, and that its being uncomfortable as well as dangerous to passengers materially affected the revenue, and the consideration of such facts was not in violation of Const. art. 1 par. 16, providing against taking of property for public use without just compensation, or of U.S.Const. Amendm. 14, relating to due process.—New Jersey Central Traction Co. v. Board of Public Utility Com'rs, supra.

30. U.S. — Interstate Commerce Commn. v. Baltimore, etc., R. Co., C.C.Ohio, 43 F. 37, affirmed 12 S.Ct. 844, 145 U.S. 263, 36 L.Ed. 699.

31. Ill.—State Public Utilities Commission v. Cleveland, C., C. & St. L. Ry. Co., 123 N.E. 547, 288 Ill. 502.
Wash.—Great Northern Ry. Co. v.

er the effect that a change in an established rate will have upon the community at large,[32] and a natural and proper development of the country as a whole;[33] and also they should consider its effect upon the maintenance of an adequate system of transportation.[34] The controlling consideration is the relation between the carrier and the general public, not any particular member of it.[35] The effect a rate will have on an individual shipper is of but little consequence, if the rate is reasonable as it relates to the general public.[36] The mere fact that advances in rates on certain goods would be severely felt by certain shippers is not a sufficient reason for holding that the advances were not properly made.[37] Accordingly the demand of the shipper for protection from legitimate competition, domestic or foreign,[38] for unlimited markets,[39] or for the enforcement of equitable estoppels arising from a justifiable expectation that past rates will be maintained,[40] and the demand of the carrier for the maximum rate under which the traffic will move freely[41] must be disregarded. In no event can the reasonableness of rates be determined solely on a consideration of the particular carrier whose rates are directly involved.[42] On the contrary, the rates in a particular territory and the rates of other carriers to be affected by the change in the particular rate or rates in question must be considered.[43]

Effect of rates charged on growth of city. In determining whether the rates charged to and from a city are unjust and unreasonable in themselves, the effect of the rates charged on the growth and prosperity of the city may be considered. However, comparison cannot be made alone with another city where competition has produced unusually low rates, but should be made with other cities where the circumstances and conditions are similar.[44]

§ 288. Earnings

The net earnings of a carrier may be considered in determining the reasonableness of rates where the general level of rates is in issue, but not where the reasonableness of a particular rate is in issue.

Although the reasonableness of rates cannot be based on a consideration of earnings alone,[45] in

Department of Public Works of Washington, 296 P. 142, 161 Wash 29.

10 C.J. p 418 note 38.

Of controlling consideration

Public convenience and necessity are controlling considerations in railroad freight rate hearing for establishment of through route and joint rate, and the public to be considered in establishing grain rates is producer and consumer, and where on such hearing there is no evidence that public convenience and necessity demanded particular order and same contained no finding of public convenience or necessity, circuit court was unwarranted in confirming same.—State Public Utilities Commission v. Cleveland, C, C. & St. L. Ry. Co, 123 N.E. 547, 288 Ill. 502

32. Wash.—Great Northern Ry. Co v. Department of Public Works of Washington, 296 P. 142, 161 Wash. 29.

33. U.S.—Ann Arbor R. Co. v. U. S, Cal, 50 S.Ct. 444, 281 U.S. 658, 74 L.Ed. 1098.

34. U.S.—Ann Arbor R. Co. v. U. S, supra.

35. La.—Shreveport Window Glass Co. v. Railroad Commission of Louisiana, 79 So 407, 143 La. 794. 10 C.J. p 415 note 99.

Desires and dissatisfaction of shipper immaterial

The desires and dissatisfaction of a shipper with a rate rule of the railroad commission of the state are no grounds for abrogation of the rule.—Shreveport Window Glass Co. v. Railroad Commission of Louisiana, 79 So. 407, 143 La. 794.

Interest of individual shipper not sole issue

Question before department is not solely how complainant would be affected by rates fixed, but whether rate is just and reasonable to carrier and public.—Great Northern Ry. Co. v. Department of Public Works of Washington, 296 P. 142, 161 Wash. 29.

36. Wash.—Great Northern Ry. Co. v. Department of Public Works of Washington, supra.

Private conferences between carrier and shipper

In fixing rate, department should not give weight to conferences between railroad and complainant in which the carrier assured the shipper he would be given fair and reasonable rates, or other matters in which general public has no interest.—Great Northern Ry Co. v Department of Public Works of Washington, 296 P. 142, 161 Wash. 29

37. U.S.—Louisville, & N. R. R. Co v. Interstate Commerce Commn, 195 F 541, reversed on other grounds 33 S.Ct 185, 227 U.S. 88, 57 L.Ed. 431.

38. U.S.—Atchison, etc., R Co. v. Interstate Commerce Commn., Com Ct, 190 F 591
Tex.—State R. Commn v. Weld, 77 S.W 529, 96 Tex. 394

39. U.S.—Atchison, etc., R. Co. v. Interstate Commerce Commn, Com. Ct., 190 F. 591.

40. U.S.—Atchison, etc., R. Co. v. Interstate Commerce Commn, supra.

41. U.S.—Atchison, etc., R. Co v. Interstate Commerce Commn, supra.

42. U.S.—Hooker v. Interstate Commerce Commn, Com Ct., 188 F. 242, reversed on other grounds 32 S.Ct. 769, 225 U.S. 302, 56 L.Ed 1099.

Carrier's need for funds

Where a railway company's track is unsafe, imperiling life and limb of passengers, and its condition makes riding physically uncomfortable and trains are not run according to schedule, and the equipment is insufficient, such defects diminish the company's revenue, and its excuse for allowing such a situation to exist after having been ordered by the board of public utilities to remedy such defects that it has no money with which to do so is no reason why the railway should be equipped and operated at public expense.—New Jersey Central Traction Co. v. Board of Public Utility Com'rs, 113 A. 692, 96 N.J. Law 90.

43. U.S.—Hooker v. Interstate Commerce Commn, Com.Ct, 188 F 242, reversed on other grounds 32 S.Ct. 769, 225 U.S. 302, 56 L.Ed. 1099.

44. U.S. — Interstate Commerce Commn. v. Southern R. Co., C.C. Va., 117 F. 741, affirmed 60 C.C.A. 540, 122 F. 800.

45. U.S.—Hooker v. Interstate Commerce Commn., Com Ct., 188 F. 242,

determining the reasonableness of rates, earnings are to be taken into consideration,[46] and it is proper to consider the dividends that have been declared in the recent past under ordinary conditions;[47] but a carrier cannot be required to operate at a loss because large returns were had by the stockholders in prior years,[48] and if, owing to changed conditions, the net earnings of a carrier, properly managed, drop so as not to amount to a fair return upon the fair value of its property, the rate should be increased without imposing impossible or unnecessary conditions.[49] The total net return, however, may be considered only where the general level of rates is in issue, and need not be considered at all where the reasonableness of a particular rate or class of rates is in issue,[50] but the reasonableness of a particular rate or class of rates depends on whether the entire revenue from the particular traffic affords a substantial income for the service over its cost.[51] In considering the validity of a rate prescribed for one class of traffic, a comparison should be made between the cost of handling that particular class of traffic and the revenue derived from the entire traffic in that class, and if it should appear that the rate would compel the carrier to carry the particular class of freight at cost or below the cost of handling it, or so little above the cost of handling as not to amount to a substantial income for the service over the cost of rendering it, the rate is unreasonable. However, the rate is not required to be such as to assure a net profit from every mile, section, or other part into which the road might be divided; the entire traffic in the particular class over the entire line to which the rate applies must be considered in order to determine whether the rate as made is reasonable and proper, and account cannot be taken of each distance to which the

reversed on other grounds 32 S.Ct. 769, 225 U.S. 302, 56 L.Ed. 1099.
10 C.J. p 418 note 42.

46. U.S.—Dayton-Goose Creek Ry. Co. v. U. S., Tex., 44 S.Ct. 169, 263 U.S. 456, 68 L.Ed. 388, 33 A.L.R. 472, affirming, D.C., 287 F. 728.
Va.—Dyer v. Virginia Ry. & Power Co., 136 S.E. 499, 147 Va. 98.
10 C.J. p 418 note 41.

Fair return of operating profit as test

(1) A fair return of operating profit may be used as a standard of reasonableness of rates, when the issue is as to the general level of all the rates received by the carrier—Dayton-Goose Creek Ry. Co. v. U. S., Tex., 44 S.Ct. 169, 263 U.S. 456, 68 L.Ed. 388, 33 A.L.R. 472, affirming, D.C., 287 F. 728.

(2) A carrier owning and operating a railroad, however strong financially, however economical in its facilities, or favorably situated as to traffic, is not entitled as of constitutional right to more than a fair net operating income on the value of its properties which are being devoted to transportation.—Dayton-Goose Creek Ry. Co. v. U. S., supra.

(3) Rates which as a body enable all the railroads, necessary to do the business of a rate territory or section, to enjoy not more than a fair net operating income on the aggregate value of their properties therein economically and efficiently operated, are reasonable from the standpoint of the individual shipper in that section; for each shipper, being interested in having no congestion, is properly required, in the rates he pays, to share in the burden of maintaining adequate railway capacity—Dayton-Goose Creek Ry. Co. v. U. S., supra.

Dividends as capital in considering percentage of profit

Where by the terms of a statute under which a railroad company was organized, no reduction of its freight or passenger rates could be made by the legislature unless its net profits exceeded ten per cent on its capital, stock dividends cannot be considered as capital in determining what profits were made.—Iron Ry. Co. v. Lawrence Furnace Co., 30 N.E. 616, 49 Ohio St. 102.

47. Neb.—In re Lincoln Traction Co., 171 N.W. 192, 103 Neb. 229.

Distribution of dividends

(1) If dividends paid by traction company were not greater than a fair return on actual value of the property would justify, and did not exceed net earnings, the disposition of those dividends among stockholders would not affect public interest—In re Lincoln Traction Co., 171 N.W. 192, 103 Neb. 229.

(2) If dividends paid by traction company to its stockholders were more than a fair return upon property, or were in excess of company's net earnings, it would devolve upon it to make good the deficiency, and render such service as is due public and is required by state railway commission—In re Lincoln Traction Co., supra.

48. U.S.—Chicago Rys. Co. v. Illinois Commerce Commission, D.C. Ill., 277 F. 970.

49. Neb.—In re Lincoln Traction Co., 171 N.W. 192, 103 Neb. 229.

50. U.S.—Dayton-Goose Creek Ry. Co. v. U. S., Tex., 44 S.Ct. 169, 263 U.S. 456, 68 L.Ed. 388, 33 A.L.R. 472, affirming, D.C., 287 F. 728.
Fla.—State v. Florida East Coast Ry. Co., 73 So. 171, 72 Fla. 379, Ann.Cas.1918E 1206.
Mo.—State ex rel. and to Use of Pugh v. Public Service Commission, 10 S.W.2d 946, 321 Mo. 297

Reason for rule

If the total income of the carrier enabled it to declare a dividend, that would not justify an order requiring it to carry one class of freight for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, the railroad commissioners would not be warranted, nor would the corporation be justified, in making an order or fixing a rate unreasonably high on any one class.—State v. Florida East Coast Ry. Co., 73 So. 171, 72 Fla. 379, Ann.Cas. 1918E 1206.

Reasonable net profit immaterial as regards particular rate

That railroad earns reasonable profit on business as whole does not alone justify denying increase in rates for particular service—State ex rel. and to Use of Pugh v. Public Service Commission, 10 S.W.2d 946, 321 Mo. 297.

51. Fla.—State v. Florida East Coast Ry. Co., 73 So. 171, 72 Fla. 379, Ann.Cas.1918E 1206.

However, it has been said that in determining reasonableness of rate fixed by legislative authority on particular commodity, proper test is not whether as to that commodity the rate gives carrier fair compensation after legitimate expenses, but whether on its total freight receipts it can earn enough over operating expenses to give fair and reasonable profit upon its investment.—Alexandria & W. Ry. Co. v. Railroad Commission of Louisiana, 79 So. 863, 143 La. 1067.

rate applies and each item of the schedule declared reasonable or unreasonable accordingly as the revenue derived from that particular haul is greater or less than the cost of handling the freight for that distance.[52] The earnings to be considered are, of course, net earnings. The amount of gross receipts is no criterion for determining the reasonableness of rates; the question of expenses incurred in producing those receipts must be always taken into account, for it is only by striking the balance between the two that it can be determined that the business is profitable.[53] Thus there must be considered the gross income yielded in the operation of the property, and the expenses incurred in such operation,[54] including taxes,[55] repairs,[56] and the interest on a valid bonded debt, contracted in a careful, economical, and honest administration of the carrier's business.[57] However, a schedule of railroad rates established by a state authority is not unreasonably low as to a particular road merely because it will not enable the company to accumulate from its net earnings a sinking fund for the payment of its indebtedness.[58] Earnings of a railroad, applied to the purchase of additional equipment and other improvements, must be regarded as a part of its net earnings on an inquiry as to whether a rate statute is confiscatory.[59] Consideration must be had of the earning capacity of the whole route or road and not of segregated or individual portions of the line.[60] The fair rental value of the dining room, saloon, check stand, etc., privileges in a passenger station must be included in estimating earnings, although the carrier in fact grants such privileges for a merely nominal rental.[61] Income from property devoted to uses other than transportation purposes or uses incidental thereto must be distinguished and accounted for as other earnings,[62] and cannot be considered in determining the reasonableness of the transportation rate.[63]

Contract to furnish freight providing specified earnings. Under a contract providing that the total earnings of freight furnished by defendant to plaintiff carrier should amount to not less than a specified sum each and every year for a stated number of years, the excess of the earnings of freight furnished in one year cannot be credited on deficiencies in other years during the life of the contract.[64]

§ 289. Cost of Plant and Deterioration

In determining what is a reasonable rate, the cost of construction of the system and the amount necessary to provide for the annual depreciation should be considered.

As shown supra § 286, cost of construction may be

52. Fla.—State v. Live Oak, P. & G. R. Co., 77 So 223, 74 Fla. 361, 369.

53. U.S.—Knott v. Chicago, etc., R. Co., Mo., 33 S.Ct. 975, 230 U.S. 474, 57 L.Ed. 1571.
10 C.J. p 418 note 45.

54. U.S.—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360.

Share of earnings paid as rental on property

The share of the earnings of a carrier paid to a city for the use of its streets is an overhead expense, to be paid before dividends or interest on invested capital can be estimated, and cannot be included in estimating net earnings to the shareholders for rate-fixing purposes—Chicago Rys. Co. v. Illinois Commerce Commission, D.C.Ill., 277 F. 970.

55. U.S.—Galveston Electric Co. v. City of Galveston, Tex., 42 S.Ct. 351, 258 U.S. 388, 66 L.Ed. 678, affirming, D.C., 272 F. 147—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360.

Income taxes

(1) In determining the net revenue of a carrier in fixing compensatory rates, the amount paid by the company for taxes, including the federal income taxes, is to be deducted from the gross revenues.—Galveston Electric Co. v. City of Galveston, Tex., 42 S.Ct. 351, 258 U.S. 388, 66 L.Ed. 678, affirming, D.C., 272 F. 147.

(2) In determining the sufficiency of carrier fares, the amount paid by the corporation as income tax to the federal government should be considered as a part of the return to the stockholders, who are not required to pay normal income tax on dividends received from the corporation—Galveston Electric Co. v. City of Galveston, supra.

Failure to consider income tax immaterial where earnings adequate

A uniform intra-state tariff rate sufficient to secure to the carriers a six per cent return is not inadequate because the income tax was not included as part of the operating expense in estimating the net income, where the rate as established was sufficient after deducting the income tax to secure to the carriers a five and three-fourths per cent return—Northern Pac. Ry. Co. v. Department of Public Works, 217 P. 507, 125 Wash. 534, motion denied 45 S.Ct. 196, and reversed on other grounds 45 S.Ct. 412, 268 U.S. 39, 69 L.Ed. 837.

56. U.S.—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360.

Annual maintenance and depreciation as deductible from gross revenue see infra § 289

57. U.S.—Chicago, etc., R. Co. v. Smith, C.C.S.D., 110 F. 473

58. U.S.—Houston, etc., R. Co. v. Storey, C.C.Tex., 149 F. 499, disapproving Brymer v. Butler Water Co., 36 A. 249, 179 Pa. 231, 36 L.R.A. 260.

59. W.Va.—Coal, etc., R. Co. v. Conley, 67 S.E. 613, 67 W.Va. 129

60. Ill.—Chicago Union Tract Co. v. Chicago, 65 N.E. 470, 199 Ill. 579

61. U.S.—Arkansas Rate Cases, C.C. Ark., 187 F. 290, reversed on other grounds 33 S.Ct. 1030, 230 U.S. 553, 57 L.Ed. 1625.

62. Neb.—In re Lincoln Traction Co., 171 N.W. 192, 103 Neb. 229

63. Wis.—City of Milwaukee v. Railroad Commission, 240 N.W. 165, 206 Wis. 339

Rates requiring earnings from other property to meet deficit unfair

Commission's rates, which fail to net reasonably adequate return on value of railway property, and compel owner to use earnings from public utility operations to meet deficit in railway operations, are unauthorized—City of Milwaukee v. Railroad Commission, 240 N.W. 165, 206 Wis. 339.

64. Mo.—Morley & M. R. Co. v. Himmelberger, 152 S.W. 86, 247 Mo. 179.

considered in determining the value of the carrier's property; and necessarily it may be considered as an element entering into the question of reasonableness of rates.[65] Where a road or a part of a road is built through a mountainous country or other region, thus entailing expensive construction, the charge may be greater than on other portions of such road, or on other roads, where the cost of construction per mile is less.[66] Cost of construction, however, is not to be deducted from earnings, in ascertaining the reasonableness of rates, for under such rule the public would be compelled to pay for constructing the road without being entitled to its ownership.[67] Expenditures for additions to construction and equipment, like expenditures for original construction and equipment, should be reimbursed by all of the traffic which they accommodate during the period of their duration, and the cost of improvements or additions that will last for many years should not be charged wholly against the revenue of a single year.[68] Also the carrier is entitled to such rates as will not only yield a reasonable return on the value of the property employed, but also such as will provide for absorbing its depreciation.[69] In determining what is a reasonable rate the wear and tear of equipment may be considered,[70] and ordinary repairs and deterioration should be met out of gross earnings, so that each year may carry the burden of its own wear and tear,[71] but deferred maintenance cannot be charged against gross revenues.[72] The proportionate amount required to provide gradually for replacement of property or compensation to the owner at the end of the life of such property should be considered.[73] However, an owner who agrees to maintain and operate a railroad for twenty years after which it is to become the property of another company cannot charge one twentieth of the amount expended by the owner in the construction of the railroad against annual operating revenue in determining the reasonableness of the rates.[74]

§ 290. Cost of Transportation to Carrier

a. General rule
b. Operating expenses

a. General Rule

The cost of transportation to the carrier is a very important factor in the determination of the reasonableness of rates.

The cost of transportation to the carrier may be considered in fixing rates,[75] and it is a very im-

65. Fla.—State v. Seaboard Air Line R. Co., 37 So. 314, 48 Fla. 139, affirmed 27 S.Ct. 109, 203 U.S. 261, 51 L.Ed. 175
Ind.—Southern R. Co. v. State R. Commn., 83 N.E. 721, 42 Ind.App. 90.

66. Ill.—State v. Illinois Cent. R. Co., 92 N.E. 814, 246 Ill. 188.
10 C.J. p. 419 note 51.

67. Fla.—State v. Seaboard Air Line R. Co., 37 So. 314, 48 Fla. 129, affirmed 27 S.Ct. 109, 203 U.S. 261, 51 L.Ed. 175.

68. U.S.—Illinois Cent. R. Co. v. Interstate Commerce Commn., La., 27 S.Ct. 700, 206 U.S. 441, 51 L.Ed. 1128, distinguishing Union Pac. R. Co. v. U.S., 99 U.S. 402, 25 L.Ed. 274.
10 C.J. p. 419 note 53.

69. D.C.—Public Utilities Commission of District of Columbia v. Capital Traction Co., 17 F.2d 673, 57 App.D.C. 85.
Or.—Hammond Lumber Co. v. Public Service Commission, 189 P. 639, 96 Or. 595, 9 A.L.R. 1223

Amortization of logging railroad

A railroad which serves a logging territory and will be without value save as junk on exhaustion of timber resources is entitled to charge such rates as will provide for amortization of the plant.—Hammond Lumber Co. v. Public Service Commission, 189 P. 639, 96 Or. 595, 9 A.L.R. 1223.

70. Or.—Service Lumber Co. v. Sumpter Valley R. Co., 135 P. 539, 67 Or. 63.

71. U.S.—Galveston Electric Co. v. City of Galveston, Tex., 42 S.Ct. 351, 258 U.S. 388, 66 L.Ed. 678, affirming, D.C., 272 F. 147.
10 C.J. p. 419 note 54.

Proper annual maintenance charge

The proper annual charge for maintenance which may be deducted from gross revenues in the determination of the net revenues is the amount normally required for that purpose during the period; it is not necessarily the amount actually expended within the year.—Galveston Electric Co. v. City of Galveston, Tex., 42 S.Ct. 351, 258 U.S. 388, 66 L.Ed. 678, affirming, D.C., 272 F. 147.

72. U.S.—Galveston Electric Co. v. City of Galveston, supra

73. U.S.—United Rys. & Electric Co. of Baltimore v. West, 50 S.Ct. 123, 280 U.S. 234, 74 L.Ed. 390, reversing 145 A. 340, 157 Md. 70.—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360.

Depreciation defined

Depreciation in the property of carriers, as affecting rates chargeable, means "the loss in value of some destructible property over and above current repairs." — Chicago Rys. Co. v. Illinois Commerce Commission, D.C.Ill., 277 F. 970, 979.

Allowance determined on present value

Allowance for annual depreciation for rate-making purposes must be based on present value.—United Rys. & Electric Co. of Baltimore v. West, 50 S.Ct. 123, 280 U.S. 234, 74 L.Ed. 390, reversing 145 A. 340, 157 Md. 70.

Exclusion of overhead construction items

In determining the depreciation annuity which a carrier can deduct from its gross revenues in estimating the sufficiency of rates based on a percentage of the cost of the property, many of the items of overhead expense incurred in construction of the system may be excluded.—Galveston Electric Co. v. City of Galveston, Tex., 42 S.Ct. 351, 258 U.S. 388, 66 L.Ed. 678, affirming, D.C., 272 F. 147.

74. U.S.—Darnell v. Edwards, Miss., 37 S.Ct. 701, 244 U.S. 564, 61 L.Ed. 1317.

75. Ill.—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 166 N.E. 466, 335 Ill. 70
Ohio.—New York Cent. R. Co. v. Public Utilities Commission of Ohio, 155 N.E. 862, 116 Ohio St. 120.

portant factor.[76] However, while the cost can be reached approximately, it cannot be reached accurately enough to make this fact controlling.[77] The ratio of total operating expenses to total earnings does not in itself afford a sufficient basis for determining the cost of the transportation of a specified portion of the traffic. Before such a ratio could properly be used in setting forth the cost of a specified portion of the traffic it would be necessary to have evidence either justifying the conclusion that the cost in proportion to the revenue was substantially the same for that part of the traffic as for the whole, or, if there was a material difference, satisfactorily showing its nature and extent.[78]

b. Operating Expenses

The operating expenses of handling the traffic, including a fair proportion of the overhead expenses, should be considered in determining the reasonableness of rates.

The operating expenses, or expense of handling the traffic, should be considered in fixing or determining the reasonableness of rates,[79] since it is only by comparison between the gross receipts and the cost of doing the business that the net earnings can be determined.[80] In determining the cost of the transportation of a particular commodity, all the outlays which pertain to it, including switching and spotting cars for unloading, must be considered.[81] There must also be included its fair apportionment of the general expenses which are applicable to all traffic.[82] So sums paid out by the carrier for taxes[83] or for injuries to persons,[84] and, under the provisions of some statutes, an amortized allowance for

Pa.—McCrady Bros. Co v Pittsburgh & L R. Co, 66 Pa.Super. 307.
10 C J p 419 note 56

In fixing minimum rates

In fixing minimum rates on specific commodity from different points of origin to common destination, interstate commerce commission may consider peculiarities in transportation which affect general transportation costs.—Jefferson Island Salt Mining Co. v U. S, D C Ohio, 6 F 2d 315.

Switching rate

On complaint of shipper the regulatory commission will not hold a switching charge of seven dollars per car, unreasonable where the undisputed evidence showed the actual expense to the carrier to be in excess thereof.—Cleveland Provision Co. v. Public Utilities Commission, 135 N. E 612, 104 Ohio St. 253, 23 A.L.R. 404.

Rates below transportation cost improper

Coal rates below transportation cost will not be enforced, where such commodity is practically entire tonnage and there is no other commodity from which loss might be recouped.—San Juan Coal & Coke Co. v Santa Fé, S J. & N. Ry. Co, 291 P. 920, 35 N.M. 189

Increase in rate sufficient only to meet increased expenses

(1) Where petition of railway company for increase of rates was granted by board of public utility commissioners, the company cannot complain, although increase was only enough to enable it to meet increased expense forced upon it by order of war labor board of the federal government—O'Brien v Board of Public Utility Com'rs, 105 A. 132, 92 N J. Law 44, affirmed 106 A 414, 92 N J Law 587.

(2) Addition to rates of public utility of just enough to cover increased expense, forced upon utility by order of war labor board of federal government, would not make unreasonable a rate which was not unreasonable before increase—O'Brien v Board of Public Utility Com'rs, supra.

76. Ohio.—Shaw-Fahrer Grain Co. v. Public Utilities Commission of Ohio, 183 N.E 922, 126 Ohio St 74
10 C J. p 419 note 57.

Determining factor

Expense to carrier incident to shipment is determining factor on question of correctness of freight rate—Shaw-Fahrer Grain Co. v. Public Utilities Commission of Ohio, 183 N. E. 922, 126 Ohio St 74.

77. U S — Interstate Commerce Commn. v. Chicago Great Western R. Co, C C.Ill, 141 F 1003, affirmed 28 S Ct. 493, 209 U S. 108, 5 L.Ed. 705.

78. U S—Wood v. Vandalia R. Co, Ind, 34 S.Ct. 7, 231 U S 1, 58 L Ed 97.

79. U S—Algoma Coal & Coke Co. v. U S., D C.Va, 11 F.Supp. 487—Houston Electric Co. v City of Houston, D.C.Tex., 265 F. 360.
10 C J. p 419 note 60.

Increase in operating expenses sufficient for rate increase

Marked increase in operating expenses due to rapidly changing general economic conditions is not insufficient basis for conclusion of interstate commerce commission that permitted temporary rate increases would not be excessive, in view of amended statute declaring rule of rate-making.—Algoma Coal & Coke Co v. U. S, D C.Va, 11 F.Supp. 487

Comparison with other companies to show mismanagement

In absence of evidence that all businesses of the same nature are mismanaged, there is no better way of determining whether a street railroad is mismanaged, for rate-making purposes, than to compare its operating costs with other businesses of a similar character.—Chicago Rys. Co v Illinois Commerce Commission, D.C Ill, 277 F. 970.

Increased expense of operating as test of validity

Increase in cost of operating express business, after ordinance fixing rates for express business was passed, is immaterial as affects validity of ordinance fixing rates, reasonableness or unreasonableness being controlling—City of Chicago v. Mayer, 124 N E 842, 290 Ill. 142.

Possible savings in operating expenses not shown

U S—Chicago Rys. Co. v Illinois Commerce Commission, D C Ill, 277 F. 970.

80. U S—Chicago, M. & St. P. R. Co v Tompkins, S D., 20 S Ct 336, 176 U S. 167, 44 L Ed 417.

81. Ohio—New York Cent R Co v. Public Utilities Commission of Ohio, 155 N.E. 862, 116 Ohio St. 120.

82. U S—Northern Pac R Co v. North Dakota, N.D, 35 S Ct 429, 236 U S. 585, 59 L Ed. 735, Ann Cas. 1916A 1.
10 C J. p 419 note 62.

83. U S—Houston Electric Co v. City of Houston, D C Tex., 265 F 360.
10 C J p 419 note 64.

Income tax

The federal income tax should be included in "operating expenses."—Duluth St Ry. Co. v. Railroad and Warehouse Commission of Minnesota, D C Minn, 4 F 2d 543, affirmed Railroad and Warehouse Commission of Minnesota v Duluth Street Ry Co, 47 S Ct. 489, 273 U S. 625, 71 L.Ed. 807.

84. U S.—Arkansas Rate Cases, C. C Ark, 187 F 290, reversed on other grounds 33 S.Ct. 1030, 230 U. S. 553, 57 L Ed. 1625.

expenses of litigation[85] may be included in operating expenses; but in ascertaining the cost to, or expense incurred by, a railroad carrier in handling a particular class of traffic, it has been held that interest on bonds and taxes should not be included in the estimate, but they are matters to be considered in determining whether the rate to be enforced provides a reasonable or fair compensation.[86] In ascertaining the cost of operating a railroad, with reference to determining the reasonableness of rates, the expenses of operation are not to be strictly limited to the cost of running trains, excluding all betterments, but the cost of reasonable renewals and improvements of roadbed, track, and equipment should be included in the operating expenses.[87]

When estimating the cost of operating a railway per ton of freight per mile of carriage, for the purpose of determining the reasonableness of a tariff of rates, it is error to take into consideration an amount of the earnings which has been appropriated and paid out as dividends on stock shares of such railroad.[88]

In fixing switching rates to be charged by railroads in terminal yards, the line-haul charges are to be considered and required to bear a part of the burden of the expenses of the yard, because the property devoted to switching is a part of the terminal facilities in use with and really a part of the line itself.[89]

Shipper's services reducing transportation costs. Since it is not contemplated that the charge by a carrier for a particular service shall always be exactly the same to all shippers in establishing rates, the commission cannot consider all the services performed by individual shippers which enable the carriers to transport the product more cheaply and establish rates based on the different services which the individual shippers perform,[90] but they can do so only when they are of such importance that they at once distinguish such shippers from others to an extent sufficient to make them a separate class.[91]

Adjustment of costs to mileage scale. A mileage scale of rates leaves out of consideration the many inequalities in handling costs due to the varied local conditions everywhere encountered in rail transportation. The cost element is adjusted by a general average of cost differences.[92]

Cost of services auxiliary to transportation. General traffic expenses should not be included in determining the charge for a transportation service furnished as an auxiliary to the traffic;[93] and items of expense included in the determination of the line-haul rate should be excluded from consideration.[94] So, in determining the reasonableness of a

85. U.S.—Duluth St. Ry. Co v. Railroad and Warehouse Commission of Minnesota, D.C.Minn., 4 F. 2d 543, affirmed Railroad and Warehouse Commission of Minnesota v. Duluth Street Ry. Co., 47 S. Ct. 489, 273 U.S. 625, 71 L.Ed. 807.

86. Fla.—State v. Florida East Coast Ry. Co., 73 So. 171, 72 Fla. 379, Ann.Cas.1918E 1206.

87. U.S.—Southern Pac. Co. v. Board of R. R. Comrs., C.C.Cal., 78 F. 236.

88. Minn.—State v. Minneapolis, etc., R. Co., 83 N.W. 60, 80 Minn. 191, 89 Am.S.R. 514, affirmed 22 S. Ct. 900, 186 U.S. 257, 46 L.Ed. 1151.

89. Colo.—Atchison, T. & S. F. Ry. Co. v. Public Utilities Commission, 188 P. 747, 68 Colo. 92.

Foreign company switching not compelled at a loss

The rule that the line haul should produce part of the revenue due to the terminal property used for switching does not compel the companies who own the terminal to do switching for foreign companies at less than cost if the terminal is considered as partly belonging to the main line, and operated and maintained partly by the revenue from the line haul.—Atchison, T. & S. F. Ry. Co. v. Public Utilities Commission, 188 P. 747, 68 Colo. 92.

Carrier should offer proof

In proceedings before public utilities commission by shippers to reform rates in terminal yards, railroads involved should have offered proof as to line haul charges which was relevant to question of reasonableness of reciprocal switching charges in yards.—Atchison, T. & S. F. Ry. Co. v. Public Utilities Commission, 188 P. 747, 68 Colo. 92.

90. Wash.—Public Service Commission of Washington v. State, 204 P. 791, 118 Wash. 629, 25 A.L.R. 186, affirmed 207 P. 688, 118 Wash. 629, 25 A.L.R. 186.

Shipper compensated by improved service

The services rendered by a shipper in providing trainloads of its goods all loaded and ready to move, and in providing special facilities for unloading trains at destination, including crews to work at night, so that there was no loss in the use of the cars, are compensated for by the improved services the shipper obtains, and do not entitle it to cheaper rates for the transportation.—Public Service Commission of Washington v. State, 204 P. 791, 118 Wash. 629, 25 A.L.R. 186, affirmed 207 P. 688, 118 Wash. 629, 25 A.L.R. 186.

91. Wash.—Public Service Commission of Washington v. State, supra.

92. Tex.—Houston Chamber of Commerce v. Railroad Commission of Texas, Civ.App., 19 S.W.2d 583, affirmed, Com.App., Railroad Commission of Texas v. Houston Chamber of Commerce, 78 S.W.2d 591, 124 Tex. 375.

Terminal costs

In mileage scale rate-making, differences in terminal and other costs are equalized and spread over the entire traffic.—Houston Chamber of Commerce v. Railroad Commission of Texas, Tex.Civ.App., 19 S.W.2d 583, affirmed Railroad Commission of Texas v. Houston Chamber of Commerce, 78 S.W.2d 591, 124 Tex. 375.

93. U.S.—Atlantic Coast Line R. Co. v. U. S., D.C.Va., 33 F.2d 130.

Icing and refrigeration service

U.S.—Atlantic Coast Line R. Co. v. U. S., D.C.Va., 33 F.2d 130.

94. Ill.—State Public Utilities Commission v. Atchison, T. & S. F. Ry. Co., 116 N.E. 696, 279 Ill. 194.

Cleaning and disinfecting cars

Miscellaneous items of expense incurred as a result of the ordinary cleaning of cars and not from any additional services required by an order of the state board of live stock commissioners for the cleaning and disinfecting of cars, which expense of ordinary cleaning had been included in the line-haul charge, should be

charge for a service, such as icing, the regulatory commission has a right to consider the elements of cost which the carriers themselves assigned to this charge and to ignore other items which the railroads assigned to the line-haul freight rate;[95] but the regulatory body in substituting for a "stated charge" for refrigeration, because unreasonable, a "cost of ice" basis, must absorb in the substituted charge items of cost covered in the charge abrogated as unreasonable.[96]

§ 291. Mileage

Mileage is an important factor in fixing or determining the reasonableness of rates.

In fixing or determining the reasonableness of rates, mileage is always an important factor[97] to be considered, in connection with all the other facts and circumstances,[98] and it has been said that, "in the absence of other influential circumstances, distance may fairly be considered a controlling element in fixing reasonable rates."[99] Nevertheless it is not necessarily controlling,[1] and it is well recognized that the cost of transportation, per mile, decreases as the length of the haul increases.[2] In fixing a rate, ordinarily it is the shortest route between the points that must primarily be considered to control the rate;[3] and in some states rates must be based on distance.[4] However, where goods are shipped over the longer of two possible routes, and it does not appear that the shorter route is available, or that the carrier whose road comprises part of the shorter route is a party to the proceedings, the regulatory commission should not fix a rate based upon what the rate should be for the shorter route,[5] and in the fixing of rates under a statute requiring them to be based on distance, zones within which certain rates are applicable may be established, and the zones as they are extended may lengthen in distance and may vary in different cases to suit the exigencies of the particular movement of particular goods,[6] and a rate discrepancy cannot be proved by a comparison alone of equal length of hauls from different producing points into different territories, since groupings are permitted to the carriers and no satisfactory comparison can be made without them.[7] Thus, communities may be united into common rate points.[8] Requirements for dis-

excluded from a charge for the extra cleaning and disinfecting required — State Public Utilities Commission v. Atchison, T. & S. F. Ry. Co., 116 N. E. 696, 279 Ill. 194.

95. U.S.—Alton & S. R. R. v. U. S., D.C.Cal., 49 F.2d 414.

The charge need not necessarily include every element in the cost of refrigeration which could be properly assigned by competent experts to the cost thereof.—Alton & S. R. R. v. U. S., D.C.Cal., 49 F.2d 414.

Charges applicable to other commodities

Requiring carrier, in making icing charges on poultry and dairy products, to conform to such charges applied to other perishable commodities, is not incorrect because charge, per se, did not include elements which expert bookkeepers determined as part of refrigerating cost.—Alton & S. R. R. v. U. S., D.C.Cal., 49 F.2d 414.

96. U.S.—Alton & S. R. R. v. U. S., supra.

Stated charge held unreasonable

U.S.—Alton & S. R. R. v. U. S., D.C.Cal., 49 F.2d 414.

97. Pa.—McCrady Bros. Co. v. Pittsburgh & L. E. R. Co., 66 Pa.Super. 307.

10 C.J. p. 420 note 67.

Purpose of statute requiring distance factor in rate schedules

The purpose of the distance tariff law, requiring rates to be based on distance and requiring the railroad and warehouse commission to promulgate schedules of rates based upon that principle, is to prevent unjust discrimination.—Hallett Const. Co. v. Foley Bros., 254 N.W. 435, 191 Minn. 335.

98. U.S.—Jefferson Island Salt Mining Co. v. U.S., D.C.Ohio, 6 F.2d 315—Interstate Commerce Commn. v. Louisville & N. R. Co., C.C.Tenn., 73 F. 409.

99. Tex.—Galveston Chamber of Commerce v. State R. Commn., Civ. App., 137 S.W. 737, 748.

1. U.S.—Louisville & N. R. Co. v. U. S., Tenn., 35 S.Ct. 696, 238 U.S. 1, 13, 59 L.Ed. 1177.

10 C.J. p. 420 note 70

2. U.S.—Northern Pac. R. Co. v. Keyes, C.C.N.D., 91 F. 47.

10 C.J. p. 420 note 71.

3. Pa.—McCrady Bros. Co. v. Pittsburgh & L. E. R. Co., 66 Pa.Super. 307.

Shortest line distance

The rate should be based on the shortest line distance between the points of shipment and delivery.—St. Louis-San Francisco Ry. Co. v. Standard Paving Co., 224 P. 296, 98 Okl. 71.

4. Minn.—Hallett Const. Co. v. Foley Bros., 254 N.W. 435, 191 Minn. 335

Rate held to comply

Freight rate schedule, approved by railroad and warehouse commission, which did not allow railroads to charge higher rate for lesser or equal distance than for greater distance, complied with distance tariff law.—Hallett Const. Co. v. Foley Bros., 254 N.W. 435, 191 Minn. 335.

5. Pa.—McCrady Bros. Co. v. Pittsburgh & L. E. R. Co., 66 Pa.Super. 307.

6. Minn.—Hallett Const. Co. v. Foley Bros., 254 N.W. 435, 191 Minn. 335.

Within discretion of commission

The matter rests to a great extent in the sound discretion of the commission.—Hallett Const. Co. v. Foley Bros., 254 N.W. 435, 191 Minn. 335.

7. U.S.—Baltimore & O. R. Co. v. U.S., D.C.Del., 12 F.Supp. 261, appeal dismissed, C.C.A., 87 F.2d 605

8. Minn.—St. Paul Ass'n of Commerce v. Chicago, B. & Q. R. Co., 158 N.W. 982, 134 Minn. 217, error dismissed Chicago, B. & Q. R. Co. v. St. Paul Ass'n of Commerce, 38 S.Ct. 336, 246 U.S. 679, 62 L.Ed. 935.

Tex.—Houston Chamber of Commerce v. Railroad Commission of Texas, Civ.App., 19 S.W.2d 583, affirmed Railroad Commission of Texas v. Houston Chamber of Commerce, 78 S.W.2d 591, 124 Tex. 375.

Equalization order improper

A railroad commission circular, equalizing intra-state carload rates on sugar and molasses shipments, was not a proper exercise of the group-making power, where limited to a single territorial location.—Houston Chamber of Commerce v. Railroad Commission of Texas, Civ. App., 19 S.W.2d 583, affirmed Rail-

tance tariff rates do not apply to rates for switching operations or to movements from place to place within a single shipping point, but for such operations a rate may be required and charged different from those made applicable to line hauls.[9] In the determination of the limits of a shipping point so as to determine the reasonableness of the rates applicable or their applicability thereto, the important question is whether the district is a single industrial center, and, in determining whether a district is a single industrial center for the purpose of determining the limits of a shipping point, the extent of the district, the industrial relation of one part to another, the nature of the traffic, the manner of handling the traffic, whether it is handled by train crews or switching crews and whether on waybills or switching orders, and whether or not the carrier and the public have acquiesced in applying a switching tariff are all to be considered.[10] When considering the reasonableness of rates, courts and commissions may take into consideration commercial necessity, that is, the application of principles in fixing rates which are forced on common carriers by various conditions and circumstances and are in common practice among them—a business policy which influences the carriers themselves to disregard a rule of strict comparison in respect of distance of carriage.[11] Competition is a factor which may overcome mere distance.[12]

§ 292. Competition

Competition is one of the factors which is to be considered in determining the reasonableness of rates.

Competition with other carriers and other fields and in the market reached is an important factor and may be considered in determining the reasonableness of rates,[13] provided the competition is genuine and not a pretense[14] and possesses the attribute of producing a substantial and material effect on traffic and rate making.[15] Carriers must be allowed to meet competition or they must go out of business.[16] In initiating rates they may adjust them to competitive conditions and, within the zone of reasonableness, prescribe such rates as will obtain or retain desired traffic for their lines,[17] and, to augment their traffic, establish rates on particular commodities on an out of pocket plus basis, that is, rates which are sufficient to more than meet all actual and immediate costs of transportation, but are not necessarily sufficient to pay their full share of transportation expenses including all operating expenses and fixed charges, and, in addition thereto, interest on bonded indebtedness and reasonable return to capital invested in the carrier service.[18]

road Commission of Texas v. Houston Chamber of Commerce, 78 S.W.2d 591, 124 Tex. 375.

9. Minn.—Commercial Club of City of Duluth v Northern Pac. Ry Co., 165 N.W. 270, 138 Minn. 449.
10 C.J. p 420 note 71 [b].

Difference in conditions

The state railway commission may make different intra-state freight rates from initial shipping point to different places in same switching district and station to which shipments are consigned, where difference in condition warrants different rates—Fred F. Shields Co v. Chicago, B. & Q. R. Co, Neb, 276 N.W. 925

10. Minn—Commercial Club of City of Duluth v. Northern Pac. Ry Co, 165 N.W. 270, 138 Minn. 449.

11. Minn.—State v. Minneapolis, etc, R. Co., 83 N.W. 60, 80 Minn. 191, 89 Am.S.R. 514, affirmed 22 S.Ct. 900, 186 U.S. 257, 46 L.Ed. 1151.

12. U.S.—Louisville & N. R. Co. v. U. S., Tenn., 35 S.Ct. 696, 238 U.S. 1, 12, 59 L.Ed. 1177

13. Ill.—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 166 N.E. 466, 335 Ill. 70.
Ky.—Southern Ry. Co. of Kentucky v. Frankfort Distillery, 26 S.W.2d 1025, 233 Ky. 771, certiorari denied 51 S.Ct. 75, 282 U.S. 868, 75 L.Ed. 767.
Va.—Dver v. Virginia Ry. & Power Co., 136 S.E. 499, 147 Va. 98.
10 C.J. p 405 note 86, p 420 note 79

Economic conditions

In determining the reasonableness of a particular rate, the economic conditions in the industry involved may be considered.—Atchison, T. & S. F. Ry. Co v Illinois Commerce Commission, 166 N.E. 466, 335 Ill. 70.

Monopoly

A monopoly does not permit a carrier to disregard the right of the shippers and exact more than what the services rendered are reasonably worth.—Southern Ry. Co. of Kentucky v. Frankfort Distillery, 26 S.W. 2d 1025, 233 Ky. 771, certiorari denied 51 S.Ct. 75, 282 U.S. 868, 75 L. Ed. 767

Consideration of water and rail carriers shown

U.S.—Youngstown Sheet & Tube Co v U. S., D.C.Ohio, 7 F.Supp. 33, affirmed 55 S.Ct. 822, 295 U.S. 476, 79 L.Ed. 1553, rehearing denied 56 S.Ct. 81, 296 U.S. 661, 80 L.Ed. 471

14. U.S. — Interstate Commerce Commn v. Chicago Great Western R. Co., Ill., 28 S.Ct. 493, 209 U.S. 108, 52 L.Ed. 705, affirming, C.C., 141 F. 1003
10 C.J. p 405 note 86.

15. U.S.—Interstate Commerce Commn v. Southern R. Co., C.C. Ala., 105 F. 703.

16. Tex.—Galveston Chamber of Commerce v State R. Commn., Civ. App., 137 S.W. 737.

17. U.S.—Texas & P. Ry. Co. v. U. S., Tex., 53 S.Ct. 768, 289 U.S. 627, 77 L.Ed. 1410, reversing, D.C., 42 F.2d 281—Chicago, M., St. P. & P. R. Co. v. U. S., D.C.Ill., 8 F.Supp. 970, affirmed U. S. v. Chicago, M., St. P. & P. R. Co., 55 S.Ct. 462, 294 U.S. 499, 79 L.Ed. 1023.
Cal.—Lang v. Railroad Commission of California, 42 P.2d 639, 2 Cal. 2d 550.
Pa.—Pennsylvania R. Co v. Public Service Commission, 190 A. 372, 126 Pa. Super. 1.

Evidence held to justify competitive rate to meet competition of truck carriers—Lang v. Railroad Commission of California, 42 P.2d 639, 2 Cal.2d 550

Statutes held inapplicable to competitive rate

Cal.—Lang v. Railroad Commission of California, 42 P.2d 639, 2 Cal.2d 550.

18. Cal.—Lang v. Railroad Commission of California, supra.

Distinction between commission made and carrier initiated rates

The rule in cases where some regulatory agency is attempting to

However, carriers have no right to recapture traffic which they originated by applying thereto unreasonable rates;[19] and, while the carriers may meet competition by equalizing rates or maintaining differentials both to interior points and to ports, they may not adjust their rates with the motive of injuring or aiding a shipper, a particular kind of traffic, or a locality.[20]

In deciding whether rates and charges, made at a low rate to secure foreign freights which would otherwise go by other competitive routes, are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered.[21] Consideration must be given to the right of shippers to avail themselves of advantages which one form of transportation may have over another.[22] A carrier cannot be compelled to reduce a reasonable rate in order to enable shippers to meet competition, where the carrier is not responsible for the existing competitive conditions,[23] nor may a regulatory commission compel railroads to reduce their rates below a reasonable level in order to meet water or truck competition;[24] and the fact that a carrier has voluntarily depressed rates to a given point in order to meet competition does not compel it to lower a higher reasonable rate to other destinations.[25] The fact that the competition originated with the carriers whose rates are complained of will not prevent its consideration in determining whether the rates are unreasonable.[26]

Extent of consideration. A decision as to the reasonableness of rates cannot be based entirely on economic conditions;[27] the factor of competition is not the only matter to be considered, and, while it may be controlling, it is not necessarily so,[28] and will not be where other considerations render the rate reasonable or unreasonable as the case may be.[29]

impose maximum rates which a carrier claims are confiscatory is entirely different from that governing cases where the carrier is voluntarily offering the rates. Where a rate is imposed by a regulatory body it may not be based alone on the out-of-pocket costs ascribed to that particular traffic, but to be lawful the rate must be sufficient to cover a ratable proportion of the average cost of traffic generally, including a return on the property devoted to public service. To hold otherwise would compel the performance of a certain specified kind of service by the carrier at less than average cost. The extension of this principle to other classes of traffic, if pursued far enough, would bankrupt the road. Where, however, carriers voluntarily propose to reduce certain rates to an out-of-pocket plus basis in order to augment the total traffic carried, a wholly different situation is presented. The menace of confiscation is absent, for volenti non fit injuria; and the additional traffic, if secured with a resulting augmentation of net revenue instead of laying a burden upon other traffic, affords the possibility of lightening the burden thereon by bringing a greater tonnage under contribution to net revenue. The criteria of a reasonably compensatory rate in a confiscation case are therefore essentially distinct from the criteria of a reasonably compensatory rate where carriers volunteer a reduction on certain rates to an out-of-pocket plus basis.—Lang v. Railroad Commission of California, 42 P.2d 639, 2 Cal.2d 550.

19. U.S.—Atchison, T. & S. F. Ry. Co. v. U. S., Ill., 49 S.Ct. 494, 279 U.S. 768, 73 L.Ed. 947, affirming, D.C., 33 F.2d 345.

20. U.S.—Texas & P. Ry. Co. v. U. S., Tex., 53 S.Ct. 768, 289 U.S. 627, 77 L.Ed. 1410, reversing, D.C., 42 F.2d 281.

21. U.S.—Interstate Commerce Commn. v. Southern R. Co., C.C. Ala., 105 F. 703.

22. U.S.—Youngstown Sheet & Tube Co. v. U. S., D.C.Ohio, 7 F.Supp. 33, affirmed 55 S.Ct. 822, 295 U.S. 476, 79 L.Ed. 1553, rehearing denied 56 S.Ct. 81, 296 U.S. 661, 80 L.Ed. 471.

Water transportation

Within zone of reasonableness, in fixing ex-river rates, consideration must be given to right of shippers to avail themselves of advantages of water transportation in so far as it is possible to do so without bringing about evils in railroad transportation which rate legislation was designed to correct.—Youngstown Sheet & Tube Co. v. U. S., D.C.Ohio, 7 F.Supp. 33, affirmed 55 S.Ct. 822, 295 U.S. 476, 79 L.Ed. 1553, rehearing denied 56 S.Ct. 81, 296 U.S. 661, 80 L.Ed. 471.

23. Ohio.—Shaw-Fahrer Grain Co. v. Public Utilities Commission of Ohio, 183 N.E. 922, 126 Ohio St. 74.

24. Pa.—Pennsylvania R. Co. v. Public Service Commission, 190 A. 372, 126 Pa.Super. 1.

25. Ohio.—Shaw-Fahrer Grain Co. v. Public Utilities Commission of Ohio, 183 N.E. 922, 126 Ohio St. 74.

26. U.S.—Interstate Commerce Commn. v. Chicago Great Western R. Co., C.C.Ill., 141 F. 1003, affirmed 28 S.Ct. 493, 209 U.S. 108, 52 L.Ed. 705.

27. Ill.—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 166 N.E. 466, 335 Ill. 70.

28. U.S.—Interstate Commerce Commn. v. Chicago Great Western R. Co., C.C.Ill., 141 F. 1003, affirmed 28 S.Ct. 493, 209 U.S. 108, 52 L.Ed. 705.

29. U.S.—Youngstown Sheet & Tube Co. v. U. S., D.C.Ohio, 7 F.Supp. 33, affirmed 55 S.Ct. 822, 295 U.S. 476, 79 L.Ed. 1553, rehearing denied 56 S.Ct. 81, 296 U.S. 661, 80 L.Ed. 471.
Ohio.—Cincinnati Northern R. Co. v. Public Utilities Commission of Ohio, 156 N.E. 506, 116 Ohio St. 397.

Competition does not make unreasonable rate reasonable

Railroad freight rate which is unreasonable because it fails to give carrier adequate return, because it unreasonably threatens rate structure, or because it creates undue prejudice or preference as between individuals or localities, is still unreasonable and must be suspended although its raising or lowering may adversely affect competitive water transportation.—Youngstown Sheet & Tube Co. v. U. S., D.C.Ohio, 7 F.Supp. 33, affirmed 55 S.Ct. 822, 295 U.S. 476, 79 L.Ed. 1553, rehearing denied 56 S.Ct. 81, 296 U.S. 661, 80 L.Ed. 471.

Competition does not make reasonable rate unreasonable

Rate for common commodity to common market cannot be reduced on line having longer haul to enable shipper having longer haul to compete with shippers on other lines who have a shorter haul without proving the longer haul rate excessive.—Cincinnati Northern R. Co. v. Public Utilities Commission of Ohio, 156 N.E. 506, 116 Ohio St. 397.

Competition between shippers. A regulatory commission has no authority to fix a rate for the sole purpose of enabling shippers to meet commercial competition but it is entitled to consider commercial competition in connection with other evidence in determining a proper rate.[30] The mere fact that a proposed rate will enable one or more shippers to benefit from a natural location is not sufficient to warrant its rejection, since the regulatory commission does not have the duty or the power to equalize profit and loss results of competing companies in different localities by overcoming geographical and commercial advantages with rate adjustments.[31]

§ 293. Character and Value of Goods Shipped

The character and value of the goods shipped and their weight, bulk, and convenience of handling are factors to be considered in determining the reasonableness of rates, but they are not conclusive thereon.

The rate for transportation and delivery is largely regulated by the character of the commodity, and as some classes of goods are more valuable and involve greater responsibility, and some are more difficult to handle and involve greater expense than others, the charge for carriage, handling, and delivering may be determined accordingly.[32] Their character,[33] value,[34] weight and bulk,[35] the convenience to the carrier in transporting them,[36] and the liability assumed[37] are factors to be considered in determining the reasonableness of rates charged; but they are in no sense conclusive,[38] and where a difference in value of a product transported from different sections does not justify it, it is proper not to consider it.[39] Thus, a lower rate properly may be applied to a product when in an unfinished condition than that applicable to it when finished.[40] Nevertheless, while there may be a good reason for a lower rate on bulky freight of a low class than that charged for carrying articles of a different sort, yet the mere grade of the commodity cannot be regarded as furnishing a sufficient ground for compelling the carrier to transport it for less than cost or without substantial reward.[41]

§ 294. Local or Through Freight

In determining the reasonableness of rates, whether the traffic is local or through traffic is to be considered; ordinarily the through rate should not exceed the aggregate of the intermediate rates.

Length of haul is an element of prime importance in determining the rates for transportation.[42] The question of whether the traffic is local or through traffic is to be considered in determining the reasonableness of a rate for transportation,[43] as the conditions which surround them are dissimilar;[44] and, since the cost of moving local freight is obviously greater than that of moving through freight,[45] a through rate may properly be lower than a local rate.[46] Apart from statutory enactment, it is prima facie unreasonable to charge more

Rate based solely on what traffic can bear is improper

U S —Northern Pac Ry. Co. v. Baker, D C Wash., 3 F Supp. 1.

30. Ill —Indiana Harbor Belt R. Co. v. Illinois Commerce Commission, 172 N E. 708, 340 Ill 304.

31. Ill —Illinois Cent. R Co. v. Illinois Commerce Commission, 195 N. E. 32, 359 Ill. 563.

32. La.—Vicksburg, etc., R. Co. v. State R. Commn., 69 So. 161, 137 La. 747.

33. Ohio —Socialist Co-Operative Publishing Co. v. American Express Co, 13 Ohio N.P.,N S., 403.
10 C J. p 421 note 90.

34. U S — Interstate Commerce Commn. v. Chicago Great Western R Co, C C Ill, 141 F. 1003, affirmed 28 S Ct 493, 209 U.S 108, 52 L.Ed. 705—Interstate Commerce Commn. v. Delaware, L. & W. R Co, C C N.Y, 64 F. 723.
10 C.J. p 421 note 91.

35. Ill.—State v. Illinois Cent. R. Co, 92 N E 814, 246 Ill 188.
10 C J p 421 note 92.

36. U S — Interstate Commerce Commn v. Chicago Great Western R Co., C C.Ill., 141 F 1003, affirmed 28 S.Ct. 493, 209 U S 108, 52 L.Ed 705.

37. Mo —State ex rel. Western Union Telegraph Co v. Public Service Commission, 264 S W. 669, 304 Mo. 505, 35 A L R. 328.

Not a limitation on liability

The basing of rates by common carriers in part on the liability involved in a given service is not a limitation of liability; it is a mere determination in advance of the maximum amount thereof, a liquidation of the damages contingent upon the nonperformance or the negligent performance of the service.—State ex rel. Western Union Telegraph Co. v Public Service Commission, 264 S W. 669, 304 Mo. 505, 35 A.L.R. 328.

38. Minn.—State v. Minneapolis, etc, R Co., 83 N.W. 60, 80 Minn. 191, 89 Am S R 514, affirmed 22 S Ct. 900, 186 U S 257, 46 L Ed 1151.

39. Or.—Oregon-Washington R. & Nav. Co. v. Corey, 252 P. 955, 120 Or. 517.

40. U S —U S. v. Gulf Refining Co, Okl., 45 S.Ct 597, 268 U S 542, 69 L Ed. 1082, affirming, C.C A, Gulf Refining Co. v U. S., 284 F. 90.

41. U S —Northern Pac. R Co. v. North Dakota, 35 S Ct. 429, 236 U S 585, 59 L Ed 735, Ann Cas.1916A 1, reversing 145 N.W. 135, 26 N D. 438.

42. U S —Northern Pac. R Co. v. Keyes, C C N D, 91 F 47

43. U.S —Minneapolis & St. L. R Co. v. State of Minnesota, 22 S Ct. 900, 186 U.S. 257, 46 L Ed 1151, affirming 83 N W 60, 80 Minn 191, 89 Am S R 514—Texas & P. R Co. v. Interstate Commerce Commission, N Y, 16 S Ct 666, 162 U S. 197, 40 L Ed. 940.
Ill —State v. Illinois Cent. R Co., 92 N E 814, 246 Ill. 188

44. Ill —Atchison, T. & S F. Ry. Co. v. Commerce Commission, 167 N E. 831, 335 Ill. 624.

45. U S.—Chicago, M. & St. P. R. Co v. Tompkins S.D, 20 S.Ct. 336, 176 U.S 167, 44 L Ed 417.
10 C.J. p 422 note 99.

46. Ill —Atchison, T. & S. F. Ry. Co v Commerce Commission, 167 N E. 831, 335 Ill. 624.

Higher local rate proper

Where the local traffic consists mostly of merchandise, and is light in volume, short in haul, and small

for a through haul than the aggregate of the intermediate rates,[47] and, in a number of jurisdictions, carriers are prohibited by statute from charging any greater compensation as a through rate than the aggregate of the intermediate rates, except that it is generally provided that, after proper application by the carrier and due investigation by the regulatory board or commission, the carrier in a proper case may be authorized to charge more for the through rate than the aggregate of the intermediates.[48] A through freight rate is not necessarily reasonable because it does not exceed the aggregate of two reasonable local rates.[49]

The testimony of experts as to the relative cost of doing local and through business is not to be disregarded simply because it cannot demonstrate by figures the exact amount of percentage of the extra cost, as it is almost, if not quite, impossible to determine the difference with mathematical certainty.[50]

§ 295. Charging More for Short than for Long Haul

In general it is unreasonable to charge more for a shorter than a longer haul where the conditions are similar, and this rule is embodied in statutes in many jurisdictions, provision ordinarily being made for allowing exceptions thereto in proper cases after proper investigation by a regulatory commission or board.

Apart from statutory enactment, it is prima facie unreasonable to charge more for a shorter than for a longer haul,[51] and in some states statutory or constitutional provisions or orders of regulatory commissions prohibit carriers from charging more for a short than a long haul over the same line or route, in the same direction, the shorter being included within the longer distance,[52] or from charging, for any distance within the state, a larger sum than is charged for an equal or greater distance over the same road and connecting lines of road.[53] Such statutes or constitutional provisions, however, usually provide that, on application by a carrier to a regulatory board or commission, such board or commission, after investigation, may authorize the carrier to charge more for a short than a long haul, where the facts warrant it,[54] as, for example, in

in individual shipments, thereby adding materially to the costs of transportation, rates above the average of those for the entire business of the carrier are justified.—Northern Pac. R. Co v. Keyes, C.C.N.D., 91 F. 47.

47. U.S.—Patterson v. Louisville & N.R.Co., Ga., 46 S.Ct. 8, 269 U.S. 1, 70 L.Ed. 131, affirming, C.C.A., 2 F.2d 592.
S.D.—Turner Creamery Co. v. Chicago, etc., R. Co., 154 N.W. 819, 36 S.D. 310.

48. U.S.—Patterson v. Louisville & N. R. Co., Ga., 46 S.Ct. 8, 269 U.S. 1, 70 L.Ed. 131, affirming, C.C.A., 2 F.2d 592.

Legality of rate in existence prior to statute

A through rate for long haul, greater than aggregate of intermediate rates in force and lawful on June 18, 1910, when Act to Regulate Commerce § 4 was amended by Act June 18, 1910, § 8, Comp.St. § 8566, by addition thereto of clause declaring it unlawful for carrier to charge any greater compensation as a through rate than the aggregate of the intermediates, remains lawful, provided an application to suspend operation of the section was made and either allowed or remained undetermined.—Patterson v. Louisville & N. R. Co., Ga., 46 S.Ct. 8, 269 U.S. 1, 70 L.Ed. 131, affirming, C.C.A., 2 F.2d 592.

49. U.S.—Minneapolis & St. L. R. Co. v. State of Minnesota, 22 S.Ct. 900, 186 U.S. 257, 46 L.Ed. 1151, affirming 83 N.W. 60, 80 Minn. 191, 89 Am.S.R. 514.
10 C.J. p. 422 note 2.

50. U.S.—Chicago, M. & St. P. R. Co. v. Tompkins, S.D., 20 S.Ct. 336, 176 U.S. 167, 44 L.Ed. 417.

51. U.S.—Patterson v. Louisville & N. R. Co., Ga., 46 S.Ct. 8, 269 U.S. 1, 70 L.Ed. 131, affirming, C.C.A., 2 F.2d 592.
S.D.—Turner Creamery Co. v. Chicago, etc., R. Co., 154 N.W. 819, 36 S.D. 310.

Violation of long and short haul provision shown

Charge for transportation over given distance in excess of charges for shipment originating at more distant point is violation of "long and short haul" provision.—Sunset Pacific Oil Co. v. Los Angeles & S. L. R. Co., 290 P. 434, 110 Cal.App., Supp., 773.

52. Ill.—A. L. Jones Co. v. Chicago, M. & St. P. Ry. Co., 213 Ill.App. 283.
Minn.—Hallett Const. Co. v. Foley Bros., 254 N.W. 435, 191 Minn. 335
Ohio.—Pittsburgh & L. E. R. Co. v. Public Utilities Commission of Ohio, 191 N.E. 467, 128 Ohio St. 388.

Rates held to comply with statute

Freight rate schedule, under which rates per ton mile receded in almost perfect proportion, complied with so-called long and short haul statute.—Hallett Const. Co. v. Foley Bros., 254 N.W. 435, 191 Minn. 335.

53. Ohio.—Cleveland, C., C. & St. L. Ry. Co. v. Mills Bros., 128 N.E. 81, 101 Ohio St. 173.

54. Cal.—California Adjustment Co. v. Atchison, T. & S. F. Ry. Co., 175 P. 682, 179 Cal. 140, 13 A.L.R. 274.

Determination by carrier prohibited

Since the amendment of Interstate Commerce Act § 4, by Act June 18, 1910, Comp.St. § 8566, a carrier no longer has the right as it did prior thereto to determine in the first instance whether a dissimilarity in conditions justifies the charge of a greater rate for a shorter haul than for a longer haul over the same route, but any such charge is prohibited, unless the commission has previously made an order consenting to the higher rate to the intermediate point.—Davis v. Parrington, C.C.A. Minn., Or., 281 F. 10, certiorari granted, 43 S.Ct. 95, 260 U.S. 717, 67 L.Ed. 479, and reversed on other grounds 44 S.Ct. 380, 264 U.S. 403, 68 L.Ed. 762.

Application to, and investigation by, commission required

Under Const. art. 12 § 21, as amended, relating to freight rates, the railroad commission can relieve a carrier from the prohibition of the long and short haul clause only on application by the carrier after investigation.—California Adjustment Co. v. Atchison, T. & S. F. Ry. Co., 175 P. 682, 179 Cal. 140, 13 A.L.R. 274.

Authorization not shown

Under state constitution authorizing state regulatory commission to

order to meet competition;[55] but the plight of the industry involved in the transportation service is not alone sufficient.[56] Such statutes and constitutional provisions are valid[57] and rates in violation thereof are unlawful and may be abrogated without any finding by the regulatory commission that they are unreasonable.[58] They have reference to shipments made over a direct and ordinary route[59] and where the longer shipment is made over the regular and ordinary route the fact that it could have been made over a shorter route does not prevent it from constituting a violation;[60] nor does the fact that deliveries are made on spurs or sidetracks from the main line of track take a shipment out of the application of the rule.[61] Such a statute is violated by the publication of the lower rate for the longer haul without permission, and the fact that property has not been moved over the longer distance at the lower published rate is immaterial.[62] Where the statute limits the prohibition against charging more for a short than for a long haul to a point where the haul is over the same line or route, in the same direction, the shorter being included within the longer distance, it does not apply where the destination of the shipment is on another line and is not an intermediate point on the direct or ordinary route,[63] or where the two hauls are in different directions and made under substantially different circumstances and conditions.[64]

Where a statute fixes a maximum rate for a des-

authorize a deviation from the constitutional provision prohibiting a carrier from charging more for a short than a long haul over the same line or route in the same direction, the shorter being included within the longer distance, only upon application of the carrier and after an investigation by the commission, and not authorizing it to fix temporary rates pending investigation, orders of the commission permitting railroads to file schedules with applications for desired changes in rates, and to continue rates then in force pending investigation, do not legalize rates subsequently charged in violation of the constitutional prohibition against charging more for a short than a long haul, it not appearing that the commission ever investigated or approved such charges.—Southern Pac Co. v. California Adjustment Co, Cal., 237 F. 954, 150 C. C A. 604, certiorari dismissed 39 S Ct. 132, 248 U.S. 595, 63 L.Ed. 438, and affirming, D C, California Adjustment Co. v. Southern Pac. Co., 226 F. 349.

Effect of general order authorizing general increase

General Orders, order No. 28 of the Interstate Commerce Commission authorizing a general increase in rates, and permitting carriers to violate the long and short haul clause in so far as necessary to permit the increase to go into effect, merely permitted such violation in cases where the greater charge for the shorter haul had been previously authorized, and did not legalize a continued violation by the carrier, which had previously violated Interstate Commerce Act § 4, as amended, Comp St. § 8566—Davis v. Parrington, C C A, Minn, Or, 281 F. 10, certiorari granted, 43 S Ct. 95, 260 U S. 717, 67 L Ed 479, and reversed 44 S Ct. 380, 264 U S. 403, 68 L Ed. 762

55. U.S.—Texas & P. Ry Co v. U. S, Tex., 53 S.Ct. 768, 289 U S. 627, 77 L Ed. 1410, reversing, D C., 42 F 2d 281.

56. **Logging industry**

Public works department's finding as to extent of discrimination in railroad's proposed sawlog rates favoring short haul at expense of longer haul may be held invalid because of controlling consideration given plight of logging industry and failure to determine rate base and revenue received from, and expense chargeable to, log carriage—Northern Pac Ry. Co. v. Baker, D C.Wash., 3 F Supp 1.

57. U.S.—Missouri Pac R. Co. v. McGrew Coal Co, Mo, 37 S Ct. 518, 244 U S. 191, 61 L.Ed. 1075—Southern Pac Co v California Adjustment Co, Cal, 237 F. 954, 150 C C A. 604, certiorari dismissed 39 S Ct 182, 248 U.S. 595, 63 L Ed. 438, and affirming, D.C, California Adjustment Co. v. Southern Pac. Co., 226 F. 349

58. Mo.—Missouri Southern R. Co. v. Public Service Commission, 214 S.W. 379, 279 Mo. 484

Evidence held not to show violation

Ill—Moline Consumers' Co. v Illinois Commerce Commission ex rel. Chicago, B & Q R Co, 187 N E. 161, 353 Ill. 119

59. Ind.—Cleveland, C., C & St L. Ry. Co. v. Summitville Drain Tile Co, 151 N.E 365, 85 Ind App 49.

Includes transportation over connecting lines

Since Interstate Commerce Act § 4, Comp St § 8566, which originally prohibited a greater rate under substantially similar circumstances for a shorter than for a longer haul over the same line, was amended by Act June 18, 1910, which added the words "or route" after the word "line," the long and short haul clause is no longer limited to transportation over the line of a single carrier, but includes transportation under a joint rate by connecting carriers.—Davis v. Parrington, C.C A Minn, Or., 281 F. 10, certiorari granted, 43 S Ct. 95, 260 U S. 717, 67 L Ed 479, and reversed on other grounds 44 S Ct 380, 264 U S 403, 68 L Ed 762.

Option of shipper as to routes

Shipper does not have option of transporting grain at through rate by longer of two possible routes, but must pay tariff rate plus proportional rate, where rate to certain intermediate destinations along longer route was greater than through rate from point of origin—Great Northern Ry. Co v. Delmar Co, Minn., 51 S Ct 579, 283 U S 686, 75 L Ed 1349, reversing, C C A, 43 F 2d 780, certiorari granted 51 S Ct 212, 282 U.S 836, 75 L Ed 742, which affirmed, D C, Delmar Co. v. Great Northern Ry Co, 34 F 2d 221.

60. U S—Davis v. Parrington, C C A.Minn, Or, 281 F. 10, certiorari granted, 43 S Ct. 95, 260 U S 717, 67 L Ed 479, and reversed on other grounds 44 S Ct 380, 264 U.S. 403, 68 L.Ed 762.

61. Ohio—Pittsburgh & L. E R. Co v. Public Utilities Commission of Ohio, 191 N E 467, 128 Ohio St 338

62. U S—Davis v. Portland Seed Co, Minn., 44 S Ct 380, 264 U S. 403, 68 L Ed 762, reversing, C.C A, 281 F. 10, in which certiorari is granted, 43 S Ct 95, 260 U S 717, 67 L Ed. 479 Reversing McCaull-Dinsmore Co. v. Great Northern Ry Co, 191 N W 42, 154 Minn. 28, in which certiorari is granted Great Northern Ry Co v McCaull-Dinsmore Co, 43 S.Ct 361, 261 U. S. 610, 67 L Ed 825

63. Ind—Cleveland, C., C. & St. L. Ry Co. v Summitville Drain Tile Co, 151 N E 365, 85 Ind App. 49.

64. Mo—McGrew Coal Co v. Mellon, 287 S W. 450, 315 Mo 798, certiorari denied 47 S Ct 456, 273 U S. 752, 71 L Ed. 874.

Statute held to repeal prior act

Statute which prohibited greater charge for short haul than for longer haul in any direction on and over

ignated distance, a rate in excess of that so designated for a shorter haul has been held unreasonable as a matter of law.[65]

A statute requiring a carrier to carry freights over longer lines for the same rates as required by any railroad company for hauling the same freight between the same points by a shorter line, no matter how great the disparity in the length of such hauls may be, is unconstitutional, where such statute is an absolute finality, without the right of judicial investigation by due process of law.[66]

The fact that a carrier charges a higher rate to an intermediate point than to a more distant point does not prove the reasonableness or unreasonableness of the higher rate, for the question of reasonableness is always a question of fact, depending upon the proof in each case.[67]

§ 296. Confiscatory Rates

Rates which are confiscatory are unreasonable, but the mere fact that rates are not confiscatory does not make them reasonable.

To require carriers to perform services for less than cost amounts to confiscation and is unlawful.[68] To constitute a rate confiscatory it is not essential that there should be a total deprivation of reward for the use of the carrier's property or a taking of the corpus of the property; if the law renders it impossible to obtain from the use of the property a reasonable and fair return it is confiscatory in its operation and effect.[69] An order by the regulatory commission fixing a rate which necessitates the carrier using the earnings from property employed other than in the transportation service to meet deficits from its carrier operations is confiscatory.[70] To render rates unreasonable, it is not essential that they should amount to practical confiscation,[71] and rates are not necessarily reasonable when they allow any dividend, however small.[72] The mere fact that a rate is nonconfiscatory does not indicate that it must be deemed to be just and reasonable.[73] Rates which are substantially higher than rates which are merely nonconfiscatory may be deemed to be just and reasonable.[74]

§ 297. Other Matters Considered

a. In general
b. Rates not exceeding, or less than, out-of-pocket expense
c. Apportionment of value and operating expenses between interstate and intra-state traffic

any part of the same road held impliedly repealed by later statute prohibiting greater charge for short than for longer haul in the same direction.—McGrew Coal Co. v. Mellon, 287 S.W. 450, 315 Mo. 798, certiorari denied 47 S.Ct. 456, 273 U.S. 752, 71 L.Ed. 874.

65. Ohio.—Campbell v. Marietta, etc., R. Co., 23 Ohio St. 168.

66. Neb.—State v. Sioux City, etc., R. Co., 65 N.W. 766, 46 Neb. 682, 31 L.R.A. 47.

67. U.S.—Jones v. Alton & S. R. Co., D.C.Ill., 6 F.Supp. 807.

68. U.S.—Texas & N. O. R. Co. v. Louisiana Public Service Commission, D.C.La., 2 F.Supp. 622.
Mo.—City of St. Louis v. Public Service Commission, 207 S.W. 805—City of St. Louis v. Public Service Commission of Missouri, 207 S.W. 799, 276 Mo. 509.
10 C.J. p. 424 note 22.

As to specific class of freight

Rev.St.1909 § 3241, prescribing a confiscatory rate for shipment of railroad ties by railroad given certain classification by § 3231, was void as to such confiscatory rate, regardless of whether the rates prescribed by the statute as a whole would give adequate returns on the investment.—Hackworth v. Missouri Southern R. Co., 227 S.W. 1032, 286 Mo. 282, 15 A.L.R. 170.

Neither the legislature nor its administrative agency can fix rates which are confiscatory of the property of the carrier.—City of St. Louis v. Public Service Commission, Mo., 207 S.W. 805—City of St. Louis v. Public Service Commission, of Missouri, 207 S.W. 799, 276 Mo. 509.

69. U.S.—Darnell v. Edwards, D.C. Miss., 209 F. 99, modified on other grounds 37 S.Ct. 701, 244 U.S. 564, 61 L.Ed. 1317.
W.Va.—Coal, etc., R. Co. v. Conley, 67 S.E. 613, 67 W.Va. 129.
10 C.J. p. 424 note 23.

Return equal to that of similar business ventures

"Rates which, with efficient and economical management, yield a return equal to that received in other business ventures of similar character and attended with like risks, can never be adjudged to be confiscatory."—Ann Arbor R. Co. v. Fellows, D.C.Mich., 236 F. 387, 390, appeal dismissed Ann Arbor R. Co. v. Glasgow, 39 S.Ct. 5, 248 U.S. 588, 63 L.Ed. 434.

Rate held confiscatory

Rate schedule permitting carrier to earn by reasonably efficient management 6.26 per cent on fair value of property may be confiscatory.—United Rys. & Electric Co. of Baltimore v. West, 50 S.Ct. 123, 280 U.S. 234, 74 L.Ed. 390, reversing 145 A. 340, 157 Md. 70.

Rate held not confiscatory

U.S.—Alton & S. R. R. v. U. S., D.C. Cal., 49 F.2d 414—Beaumont, S. L. & W. Ry. Co. v. U. S., D.C.Mo., 36 F.2d 789, affirmed 51 S.Ct. 1, 282 U.S. 74, 75 L.Ed. 221—International Ry. Co. v. Prendergast, D.C.N.Y., 1 F.Supp. 623—Ann Arbor R. Co. v. Fellows, D.C.Mich., 236 F. 387, appeal dismissed Ann Arbor R. Co. v. Glasgow, 39 S.Ct. 5, 248 U.S. 588, 63 L.Ed. 434.
Ind.—Public Service Commission of Indiana v. Baltimore & O. R. Co., 169 N.E. 530, 202 Ind. 449, rehearing denied 176 N.E. 551, 202 Ind. 449

70. Wis.—City of Milwaukee v. Railroad Commission, 240 N.W. 165, 206 Wis. 339

71. U.S.—Southern Pac. Co. v. Board of Com'rs of California, C.C.Cal., 78 F. 236.
Tex.—State Railroad Commission v. Houston, etc., R. Co., 38 S.W. 750, 90 Tex. 340.
10 C.J. p. 424 note 24

72. U.S.—Southern Pac. Co. v. Board of Com'rs of California, C.C.Cal., 78 F. 236.

73. U.S.—Banton v. Belt Line Ry. Corporation, N.Y., 45 S.Ct. 534, 268 U.S. 413, 69 L.Ed. 1020

74. U.S.—Banton v. Belt Line Ry. Corporation, supra.

d. Volume of traffic
e. Rates on branch lines and feeders
f. Comparison with other rates
g. Effect of operation in connection with other lines
h. Effect of consolidation of several roads
i. Unreasonableness of one charge as affecting another charge not unreasonable in itself
j. Consideration of interstate and intrastate business
k. Economic conditions
l. Use of estimated weight for tariff computation
m. Acquiescence of carrier in rates fixed by commission

a. In General

All matters affecting the reasonableness of the rates should be considered, including the revenue per ton mile, per car mile, and per car, and the engine ratings. It is not necessary, however, that each unit or type of business return the same percentage of profit.

In addition to the matters considered supra §§ 285-296, any matter which, in the particular case, affects the reasonableness of the rate in question should be considered. The requirement in the Interstate Commerce Act that all charges in the transportation of property or in connection therewith shall be just and reasonable does not require that each element of the same transportation shall be in and of itself wholly compensatory.[75] The governing agency has a wide range of discretion in the exercise of the power to prescribe reasonable charges,[76] and is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business.[77]

Revenue. In fixing minimum rates on a specific commodity it is proper for the interstate commerce commission to consider the revenue per car mile and per ton mile,[78] and the earnings per car.[79]

Engine ratings. In establishing rates or determining their reasonableness, a regulatory commission may consider comparisons of engine ratings.[80]

Compensation for use of facilities by other carrier. Where a carrier is required by statutory provisions to permit other carriers desiring to do so to use its bridges, it is entitled to receive from every carrier using its bridge a fair share of the annual charge for operation and maintenance and a fair proportion of the interest on its investment, regardless of the fluctuations of traffic over the bridge;[81] and contracts for the use of a bridge by other carriers which do not show any uniform practice with regard to the amount charged are immaterial in proceedings to determine the compensation to be paid.[82]

Cessation of movement. In considering the reasonableness of rates for a manufactured commodity, the cessation of materials entering into the manufacture of the commodity must be taken into consideration, but it will not be presumed that they have been moved at noncompensable rates, voluntarily established.[83]

b. Rates Not Exceeding, or Less than, Out-of-Pocket Expense

(1) In general
(2) Unprofitable rates for particular service

(1) In General

Ordinarily rates which return less than, or not exceeding, the out-of-pocket expenses of the service are unreasonable and invalid.

In the absence of extraordinary conditions and circumstances justifying it, the fixing of rates at a sum less than, or not exceeding, out-of-pocket expense of the service is unreasonable and invalid.[84]

75. U.S.—Merchant Truckmen's Bureau of New York v. Reardon, D.C. N.Y., 10 F.Supp. 358.

Store door delivery

A carrier which furnishes line haul and store door delivery service as part of the same transportation is not required to show that the charges are such that the compensation for the store door delivery service is wholly compensatory of the expense to which it is put for that element of the transportation.—Merchant Truckmen's Bureau of New York v. Reardon, D.C.N.Y., 10 F.Supp. 358.

76. U.S.—Vandalia R. Co. v. Schnull, 41 S.Ct. 324, 255 U.S. 113, 65 L.Ed. 539, reversing 122 N.E. 225, 188 Ind. 87, conformed to 130 N.E. 865, 190 Ind. 698.

Or.—Valley & Siletz R. Co. v. Thomas, 48 P.2d 358, 151 Or. 80.

77. U.S.—Vandalia R. Co. v. Schnull, 41 S.Ct. 324, 255 U.S. 113, 65 L.Ed. 539, reversing 122 N.E. 225, 188 Ind. 87, conformed to 130 N.E. 865, 190 Ind. 698.

Or.—Valley & Siletz R. Co. v. Thomas, 48 P.2d 358, 151 Or. 80.

Same rate of return not required

Carrier has no constitutional right to same rate of return on all its business.—State ex rel. and to Use of Pugh v. Public Service Commission, 10 S.W.2d 946, 321 Mo. 297.

78. U.S.—Jefferson Island Salt Mining Co. v. U. S., D.C.Ohio, 6 F.2d 315.

Pa.—McCrady Bros. Co. v. Pittsburgh & L.E.R. Co., 66 Pa.Super. 307.

79. U.S.—Illinois Cent. R. Co. v. Vest, D.C.Ky., 39 F.2d 658.

Pa.—McCrady Bros. Co. v. Pittsburgh & L.E.R. Co., 66 Pa.Super. 307.

80. U.S.—Illinois Cent. R. Co. v. Vest, D.C.Ky., 39 F.2d 658.

81. Or.—Oregon-Washington R. & Nav. Co. v. Spokane, P. & S. Ry. Co., 163 P. 989, 83 Or. 528, denying rehearing 163 P. 600, 83 Or. 528.

82. Or.—Oregon-Washington R. & Nav. Co. v. Spokane, P. & S. Ry. Co., supra.

83. Ky.—Southern Ry. Co. of Kentucky v. Frankfort Distillery, 26 S.W.2d 1025, 233 Ky. 771, certiorari denied 51 S.Ct. 75, 282 U.S. 868, 75 L.Ed. 767.

84. U.S.—Atchison, T. & S. F. Ry.

The carrier is entitled to receive compensation beyond the mere cost for that which it does,[85] including services which are not strictly a part of the transportation but are outside of and supplementary thereto;[86] and it has been held that, where a carrier is operating at a loss which it can reduce by charging rates in excess of a requirement of a special statutory provision regulating rates, but within the limit which the law would otherwise permit, and can in this manner obtain a proper return on its capital, it will be relieved from compliance with the statute, under a constitutional provision that the legislature can alter an existing charter only in such a way that no injustice shall be done to incorporators.[87]

(2) Unprofitable Rates for Particular Service

Although in the exercise of a proper discretion in prescribing rates it is not necessary that they shall be made uniform for all commodities and so as to yield the same percentage of profit on every sort of business, yet a carrier cannot be compelled to transport a commodity or class of traffic either at less than cost or for a compensation that is merely nominal.

While it is recognized that the state has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction, and that it is not necessary that there should be uniform rates for all commodities or the same percentage of profit on every sort of business,[88] it is now settled that the state has no arbitrary power over rates and may not select a commodity or class of traffic and, instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost or for a compensation that is merely nominal.[89] The fact that the entire intrastate business shows a reasonable return on the carrier's investment does not affect the operation of the rule;[90] and where it appears that the state has segregated a commodity or a class of traffic and has attempted to compel the carrier to transport it at a loss or without substantial compensation, even though the entire traffic to which the rate is applied is taken into account, the presumption of reasonableness of a rate fixed by a state legislative act or regulatory commission is rebutted.[91] In some of the earlier cases some courts had reached conclusions squarely in conflict with this rule and had held in effect that the rate on each and every commodity transported in interstate commerce need not return a profit, provided the entire intra-state business showed a reasonable return on the carrier's investment.[92] These decisions, however, were based on, and assumed to follow, decisions of the United States supreme court, which have been distinguished and explained.[93]

Co.—v. U S, Com.Ct, 203 F 56—Northern Pac. R. Co. v. Keyes, C. C.N D., 91 F. 47.

La.—Louisville R., etc, Co. v. State R. Commission, 59 So. 820, 131 La 387.

10 C J. p 424 note 26.

85. U S—Southern R. Co. v. St. Louis Hay & Grain Co., Ill., 29 S Ct. 678, 214 U S. 297, 53 L Ed. 1004

86. U.S.—Geraty v. Atlantic Coast Line R. Co., D.C.S C, 211 F. 227.

Icing charges

A carrier is not limited in its charge for icing services to the mere cost of such services, but is entitled to make a reasonable profit thereon, so that the fact that a charge for icing exceeds the actual cost of icing does not alone justify the inference of unreasonableness—Geraty v Atlantic Coast Line R. Co., D C S C., 211 F 227.

87. Pa.—Philadelphia, etc., R. Co. v. Philadelphia County, 77 A 892, 228 Pa 505, 21 Ann Cas. 188—Pennsylvania R. Co. v. Philadelphia County, 68 A. 676, 220 Pa. 100, 15 L R.A., N S, 108.

88. U S.—Vandalia R. Co. v. Schnull, 41 S Ct. 324, 255 U S 113, 65 L Ed. 539, reversing decree, 1919, 122 N.E. 225, 188 Ind. 87, conformed to 130 N.E 865, 190 Ind. 698—Ann Arbor R. Co. v. U. S., D C Cal, 30 F.2d 940.

Proportional share of expenses not required

Carrier cannot complain of violation of constitutional rights because compelled to make rate for some particular service which will not equal proportionate share of entire expense of road.—Valley & Siletz R Co. v. Thomas, 48 P 2d 358, 151 Or. 80

Fair return on particular class of freight not required

Carriers have no right to receive fair return on particular class of freight, independently of other business or considerations—Ann Arbor R Co. v. U. S, D C.Cal., 30 F.2d 940.

89. U.S—Banton v. Belt Line Ry. Corporation, N Y, 45 S Ct. 534, 268 U S 413, 69 L Ed 1020—Vandalia R Co. v. Schnull, 41 S.Ct. 324, 255 U S 113, 65 L Ed. 539, reversing 122 N.E. 225, 188 Ind 87, conformed to 130 N E. 865, 190 Ind. 698.

10 C J. p 424 note 29

Transportation of slag free

An order of the public service commission abolishing a published schedule of rates for slag without establishing another schedule in its place will be reversed by the superior court, in the absence of any finding that the railroads receive compensation for the disposition of the slag, by reason of favorable rates charged for the freight of the shipping companies.—Baltimore & O. R. Co. v Public Service Commission, 68 Pa Super. 503.

90. U S.—Northern Pac. R. Co v North Dakota, 35 S Ct. 429, 236 U S 585, 59 L.Ed. 735, reversing 145 N. W. 135, 26 N D. 438

91. U.S.—Vandalia R. Co. v. Schnull, 41 S Ct. 324, 255 U S 113, 65 L. Ed. 539, reversing 122 N E 225, 188 Ind 87, conformed to 130 N E. 865, 190 Ind. 698—Northern Pac R. Co v. North Dakota, 35 S.Ct. 429, 236 U.S 585, 59 L.Ed 735, Ann Cas 1916A 1, reversing 145 N.W. 135, 26 N.D. 438.

92. U.S —Atchison, T. & S. F. Ry Co. v. U. S., Com Ct., 203 F 56

Fla.—State v. Florida East Coast R. Co., 62 So. 591, 65 Fla. 424.

N.D —State v Northern Pac. R Co., 120 N.W 869, 19 N.D. 45, 25 L R. A,N S, 1001.

10 C.J. p 425 note 31.

93. U S —Northern Pac. R. Co. v North Dakota, ex rel. McCue, N.D, 35 S.Ct. 429, 236 U S. 585, 59 L Ed. 735, Ann Cas 1916A 1.

10 C.J. p 425 note 32.

Itemization of charges within gross charge. In so far as the power of the rate regulatory body is concerned, decisions holding that, in determining the reasonable rate of return for a service rendered, the interstate commerce commission cannot look to other rates on other freight shipped by other people to compensate for the ascertained loss or lack of profit upon the particular transaction involved, have no application to the separate charges included in the gross charges required by the carrier from the shipper, so that if the gross charge provides a compensation for the service rendered, it is immaterial whether the itemization thereof is accurate or inaccurate.[94]

c. Apportionment of Value and Operating Expenses between Interstate and Intra-State Traffic

In determining the reasonableness of interstate or intra-state rates, the value of the carrier's plant and its operating expenses must be apportioned between its interstate and intra-state traffic.

While, as appears infra in subdivision j of this section, no part of the earnings or losses from interstate and foreign business can be charged to or against the income account of the carrier, in determining the reasonableness of rates for intra-state business, in fixing rates for intra-state traffic, or in determining their reasonableness as fixed, it is essential to apportion the value of the carrier's plant and its operating expenses between interstate and intra-state traffic,[95] and the results of the entire intra-state business must be taken into account.[96] In apportioning the value of the property employed, as between intra-state and interstate traffic, there should be assigned to each that proportion of the total value which corresponds to the extent of its employment in that class of traffic.[97] This apportionment may be arrived at on the basis of comparative revenue.[98]

An apportionment of operating expenses must take into consideration the difference in revenue with relation to the cost of the two classes of traffic.[99] It is a well recognized fact that the production of a given amount of revenue is attended with greater cost in intra-state than in interstate business;[1] and this difference furnishes a standard by which to apportion the total cost between traffic which is intra-state and that which is interstate.[2]

d. Volume of Traffic

The amount or volume of traffic is an important factor which should be considered in determining the reasonableness of rates. A difference in the volume of traffic may authorize different rates for opposite directions and seasonal variations in traffic may authorize seasonal variations in the rates.

In determining the reasonableness of a freight rate, the amount[3] or volume[4] of traffic may be considered. Density of traffic is an important factor in rate making.[5] No rule is more firmly grounded in reason or more universally recognized by carriers than that the greater the tonnage to be transported the lower the rate of freight charges therefor;[6] and when the locality through which a carrier runs is sparsely settled, and the demand and necessity for transportation small, these matters must be taken into consideration and more than the rate customary in more favorable districts allowed.[7] Nevertheless the reasonableness of rates cannot be

94. U.S.—Alton & S. R. R. v. U. S., D.C.Cal., 49 F.2d 414.

95. U.S.—Rowland v. Boyle, Ark., 37 S.Ct. 577, 244 U.S. 106, 61 L.Ed. 1022, affirming, D.C., Boyle v. St. Louis & S. F. R. Co., 222 F. 539.
10 C.J. p. 425 note 35.

Length of investigation required
Two months of investigation by the carrier, during which it caused the most minute and specific reports to be made of all the facts that, by the formulas prepared for the division of expenses and income between state and interstate business would throw light upon that problem, which investigation is too expensive to be kept up for more than a limited time, affords a basis for the determination of constant conditions.—Rowland v. Boyle, Ark., 37 S.Ct. 577, 244 U.S. 106, 61 L.Ed. 1022, affirming, D.C., Boyle v. St. Louis & S. F. R. Co., 222 F. 539.

96. U.S.—Minnesota Rate Cases, 33 S.Ct. 729, 230 U.S. 352, 57 L.Ed. 1511, Ann.Cas.1916A. 18.

97. U.S.—Minnesota Rate Cases, 33 S.Ct. 729, 230 U.S. 352, 461, 57 L.Ed. 1511, Ann.Cas.1916A. 18.
10 C.J. p. 426 note 37.

98. U.S.—Shepard v. Northern Pac. R. Co., C.C.Minn., 184 F. 765, modified on other grounds 33 S.Ct. 729, 230 U.S. 352, 57 L.Ed. 1511, 48 L.R.A.,N.S., 1151, Ann.Cas.1916A. 18.

99. U.S.—Missouri Rate Cases, 33 S.Ct. 975, 230 U.S. 474, 57 L.Ed. 1571.

1. U.S.—Minneapolis & St. L. R. Co. v. State of Minnesota, 22 S.Ct. 900, 186 U.S. 257, 46 L.Ed. 1151.
10 C.J. p. 426 note 40.

2. U.S.—In re Arkansas Railroad Rates, C.C.Ark., 163 F. 141.
10 C.J. p. 426 note 41.

3. Ill.—State v. Illinois Cent. R. Co., 92 N.E. 814, 246 Ill. 188.
Ind.—Southern R. Co. v. State R. Commission, 83 N.E. 721, 42 Ind. App. 90.

4. Ill.—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 166 N.E. 466, 335 Ill. 70.
Pa.—McCrady Bros. Co. v. Pittsburgh & L. E. R. Co., 66 Pa.Super. 307.

5. U.S.—Jefferson Island Salt Mining Co. v. U.S., D.C.Ohio, 6 F.2d 315.
Ky.—Southern Ry. Co. of Kentucky v. Frankfort Distillery, 26 S.W.2d 1025, 233 Ky. 771, certiorari denied 51 S.Ct. 75, 282 U.S. 868, 75 L.Ed. 767.
Tex.—Galveston Chamber of Commerce v. State R. Commn., Civ.App., 137 S.W. 737.

6. U.S.—Tift v. Southern R. Co., C.C.Ga., 138 F. 753, affirmed 148 F. 1021, 79 C.C.A. 536, affirmed 27 S.Ct. 709, 206 U.S. 428, 51 L.Ed. 1124, 11 Ann.Cas. 846.

7. Ohio.—Marietta & V. R. Co. v. Public Utilities Commission, 126 N.E. 889, 101 Ohio St. 29.

determined alone from the kind or amount of business done by the carrier.[8]

The mere fact that a rate established by a carrier is higher one way between the same points than it is the other does not of itself show that the higher rate is unreasonable, and this is particularly true where there is a preponderance of cars moving in one direction.[9]

In determining the reasonableness of a freight charge, the season of the year during which the rates are in force may be considered.[10] Thus a carrier may properly charge lower rates on coal in the summer months in order to keep its coal cars and coal crew employed during that season of the year, provided such rates are offered in good faith to all persons on equal terms.[11]

e. Rates on Branch Lines and Feeders

The difference in ton mile cost between branch line and main line traffic may be considered, but this must be limited by the benefits which accrue to the carrier from branch lines which serve as feeders.

In its consideration of rates, a regulatory commission is entitled to take into consideration the fact that the cost per ton per mile is greater for branch line traffic than for main line traffic, and may establish a rate sufficient in its judgment to compensate the carrier for this difference.[12] However, where carriers construct branch lines within a state through new sections, to serve as feeders and to enable them to obtain shorter lines for interstate traffic, they are not necessarily entitled to charge on intra-state traffic rates sufficiently high to enable them to earn a specified percentage on their investment.[13]

f. Comparison with Other Rates

In fixing rates or determining their reasonableness, comparisons may be made with other rates provided the conditions are essentially the same, but where the conditions are dissimilar such comparisons have little, if any, probative value.

The question whether rates are just and reasonable in themselves is in some degree a relative one;[14] and in determining the reasonableness of rates they may be compared with other rates provided conditions are substantially the same;[15] and

8. U.S.—Reagan v. Farmers' L. & T. Co, Tex, 14 S.Ct. 1047, 154 U.S. 362, 38 L.Ed. 1014.
10 C.J. p 420 note 77.

9. U.S.—Louisville & N. R. R. v. Interstate Commerce Commission, Com.Ct., 195 F. 541, reversed on other grounds 33 S.Ct. 185, 227 U.S. 88, 57 L.Ed. 431.

10. U.S.—Interstate Commerce Commission v. Louisville & N. R. Co, C.C.Tenn., 73 F. 409.
Ill.—State v. Illinois Cent. R. Co., 92 N.E. 814, 246 Ill. 188.

11. U.S.—Interstate Commerce Commission v. Louisville & N., etc., R. Co., C.C.Tenn., 73 F. 409.
10 C.J. p 422 note 12.

12. Or.—Oregon-Washington R. & Nav. Co. v. Corey, 252 P. 955, 120 Or. 517.

Arbitrary charge

The commission has power to abolish an arbitrary charge included in the charge for shipments over branch roads and make rate to apply equally on branch and main lines of carrier, if it is sufficient to compensate carrier for greater cost of branch line service.—Oregon-Washington R. & Nav. Co. v. Corey, 252 P. 955, 120 Or. 517

13. U.S.—In re Arkansas Railroad Rates, C.C.Ark, 168 F. 720.
10 C.J. p 425 note 33.

14. Ky.—Southern Ry. Co. of Kentucky v. Frankfort Distillery, 26 S.W.2d 1025, 233 Ky. 771, certiorari denied 51 S.Ct. 75, 282 U.S. 868, 75 L.Ed. 767.
10 C.J. p 421 note 85.

15. U.S.—Illinois Cent. R. Co. v. Vest, D.C.Ky., 39 F.2d 658—Montrose Oil Refining Co. v. St. Louis-San Francisco Ry. Co., D.C.Tex., 25 F.2d 750, affirmed, C.C.A., St. Louis-San Francisco Ry. Co. v. Montrose Oil & Refining Co., 25 F.2d 755, certiorari denied 48 S.Ct. 560, 277 U.S. 598, 72 L.Ed. 1007—Jefferson Island Salt Mining Co. v. U. S., D.C.Ohio, 6 F.2d 315—Illinois Cent. R. Co. v. Railroad Commission of Kentucky, D.C.Ky., 1 F.2d 805.
Ill.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 195 N.E. 32, 359 Ill. 563—Chicago & E. I. Ry. Co. v. Illinois Commerce Commission, 173 N.E. 380, 341 Ill. 277—Atchison, T. & S. F. Ry. Co. v. Commerce Commission, 167 N.E. 831, 335 Ill. 624.
Ind.—Southern Ry. Co. v. Hunt, 83 N.E. 721, 42 Ind. 90.
Ohio—Hocking Valley Ry. Co. v. Public Utilities Commission, 158 N.E. 648, 117 Ohio St. 304
Okl.—Atchison, T. & S. F. Ry. Co. v. State, 267 P. 253, 130 Okl. 263.
Pa.—McCrady Bros. Co. v. Pittsburgh & L. E. R. Co., 66 Pa. Super. 307
Wash.—Great Northern Ry. Co. v. Department of Public Works of Washington, 296 P. 142, 161 Wash. 29.
10 C.J. p 421 note 86.

Statute requiring comparative rate valid

Statute providing that subsidiary domestic railroad corporation shall not charge rate within city exceeding rate charged by parent foreign corporation for similar service to adjacent state is not invalid.—Transit Commission v. Long Island R. Co., 288 N.Y.S. 938, 248 App.Div. 749, affirmed 3 N.E.2d 622, 272 N.Y. 27.

Presumption as to normality of expense

Where operating conditions under rate sought to be revised are normal, movements of freight between similar points of comparison are presumed normal as to expense of operation.—Hocking Valley Ry. Co. v. Public Utilities Commission, 158 N.E. 648, 117 Ohio St. 304.

Rates for opposite direction

In a proceeding to revise freight rates on a certain commodity from a certain shipping point, the rates established by the railroad company over its road between the same points in the opposite direction may properly be considered, where the grades on the road and the expense of moving trains in either direction are not essentially different.—Southern Ry. Co. v. Hunt, 83 N.E. 721, 42 Ind. 90.

Inferior service

(1) The fact that truck hauler, whose service was inferior in delivery of an inferior prepared product, in having no storage supply, in having no system of credit, and perhaps inferior in service respecting weights, hauled at a less rate than that fixed for railroads as reasonable and lawful did not present such changed condition as to justify lowering of railroad rate.—State ex rel. and to Use of Alton R. Co. v. Public Service Commission, App., 110

a comparison with other rates on the same commodity for comparable distances may make a prima facie case of the unreasonableness of rates attacked.[16] However, a simple comparison with other rates, although admissible as evidence and proper to be considered,[17] does not prove much,[18] and is not controlling.[19] A rate must stand upon its being fair and reasonable, not upon a comparison with another rate;[20] and whether a case concerns simply the reasonableness of a rate or whether it involves an order awarding reparation, that the commission has not fixed the same rate for services of a substantially identical character, as where the rates on a commodity are different to different territories, does not necessarily indicate that either is unreasonable.[21] Before a comparison of existing transportation charges can have probative value in determining what rates are reasonable, a similarity of conditions of operation must be shown.[22] Rates prevailing in other localities or

S.W.2d 1121, transferred, Mo., 100 S.W.2d 474.

(2) Accordingly, an order of public service commission lowering rates fixed for railroad transportation of coal between points in Missouri where distance involved was ninety five miles or less was unauthorized and not supported by evidence, where based primarily on evidence showing that truck haulers rendering inferior service charged lower rates.—State ex rel and to Use of Alton R. Co. v. Public Service Commission, supra.

Existing charges and ton-mile earnings

In determining what are reasonable rates comparisons of existing charges and ton-mile earnings constitute proper elements for consideration provided they are under similar conditions of operation.—Chicago & E. I. Ry. Co. v. Commerce Commission, 175 N.E. 8, 343 Ill. 117—Atchison, T. & S. F. Ry. Co. v. Commerce Commission, 167 N.E. 831, 335 Ill. 624.

Comparison with switching rate

(1) When the distance rate on coal maintained by a carrier is eighty four cents per ton for a haul of ten miles and under, and the carrier has in effect a switching rate of nine dollars per car applying only on coal and coke moving five miles or under, between plants of producing coal and coke operations in a specified district, the public service commission, in determining a specific rate per car on coal moving within the five-mile limit in such district, may consider a switching rate maintained by a railroad company to make a comparison of services performed by the carrier under the switching rate with the service required under the specific rate, and in establishing such specific rate it is not as a matter of law compelled to inquire into the reasonableness of the whole schedule of the carrier's distance rates.—Norfolk & W. Ry. Co. v. Public Service Commission, 110 S.E. 704, 90 W.Va. 264.

(2) The public service commission may establish a specified rate per car on coal moving within the five-mile limit in such district, although the coal be consigned by a coal company not to itself for use in its own operations, but to an electric power company, it appearing that the rate so established works no injustice to the carrier.—Norfolk & W. Ry. Co. v. Public Service Commission, supra.

Other commodities

The court may consider a comparison of rates on other commodities of equal or higher value.—McCrady Bros Co. v. Pittsburgh & L. E. R. Co., 66 Pa.Super. 307.

Relation of rates between logs and lumber

The published rates for interstate transportation of lumber being assumed to be reasonable, in absence of contrary showing, rates of sixty five per cent thereof for interstate shipments of logs between same points are reasonable and charges exceeding them unreasonable.—Western Maryland Ry. Co. v. Penn Veneer Co., C.C.A.Pa., 92 F.2d 146, certiorari denied 58 S.Ct. 146.

16. N.M.—San Juan Coal & Coke Co. v. Santa Fé, S. J. & N. Ry. Co., 2 P.2d 305, 35 N.M. 512.

17. Md.—State Public Service Commn. v. Baltimore, etc., R. Co., 90 A. 119, 122 Md. 393—State Public Service Commn. v. Northern Cent. R. Co., 90 A. 105, 122 Md. 355.

18. Wash.—Great Northern Ry. Co. v. Department of Public Works of Washington, 296 P. 142, 161 Wash. 29.

Of little probative value

Mere comparison of carrier's rates, without showing conditions under which they were established, similarity of conditions, volume of movement, and traffic and transportation conditions, is of little probative value.—Hope Natural Gas Co. v. Public Service Commission, 164 S.E. 248, 112 W.Va. 223.

19. Neb.—In re Lincoln Traction Co., 171 N.W. 192, 103 Neb. 229.

Rate to express companies

That railroad had made contract with express company fixing its rate for facilities furnished the company at certain per cent of its gross receipts with a guaranteed minimum payment did not estop it from denying reasonableness of similar rate fixed by court for facilities to be furnished another express company doing a much smaller business in a much smaller territory without such a guaranty as to minimum payment, since such rate might be reasonable as to the one company and not reasonable as to the other in view of difference in the extent and nature of the business of the two companies.—Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co., Tex.Com.App., 221 S.W. 590, reversing, Civ.App., 173 S.W. 222.

20. U.S.—Baltimore & O. R. Co. v. U. S., D.C.Del., 12 F.Supp. 261, appeal dismissed, C.C.A., 87 F.2d 605

21. D.C.—Central of Georgia Ry. Co. v. West Virginia Pulp & Paper Co., 92 F.2d 292, 67 App.D.C. 309.

22. U.S.—Texas & N. O. R. Co. v. Louisiana Public Service Commission, D.C.La., 2 F.Supp. 622—Illinois Cent. R. Co. v. Railroad Commission of Kentucky, D.C.Ky., 1 F.2d 805.

Ill.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 195 N.E. 32, 359 Ill. 563—Moline Consumers' Co. v. Illinois Commerce Commission ex rel. Chicago, B. & Q. R. Co., 187 N.E. 161, 353 Ill. 119—Chicago & E. I. Ry. Co. v. Commerce Commission, 175 N.E. 8, 343 Ill. 117—Chicago & E. I. Ry. Co. v. Illinois Commerce Commission, 173 N.E. 380, 341 Ill. 277—Atchison, T. & S. F. Ry. Co. v. Commerce Commission, 167 N.E. 831, 335 Ill. 624.

Wash.—Great Northern Ry. Co. v. Department of Public Works of Washington, 296 P. 142, 161 Wash. 29.

Similarity of conditions essential

Commerce commission's order declaring existing freight rate unjust and discriminatory cannot be sustained upon mere findings making comparison between rates attacked and rates and ton-mile earnings elsewhere with no findings of fact showing similar conditions of operation.—Chicago & E. I. Ry. Co. v. Commerce Commission, 175 N.E. 8, 343 Ill. 117.

Evidence held insufficient

Evidence which consisted of comparison between proposed rate and rates in force for hauling finished products and disclosed mere difference in rates to same destination but did not give operating conditions and

states have no bearing and cannot be considered for purposes of comparison where the conditions are dissimilar;[23] and evidence of differences in conditions offered to rebut a prima facie case of the reasonableness or unreasonableness of rates made by comparison with other rates should furnish data by which to measure the differences and means of arriving at the weight to be given such differences.[24] However, when due allowance is made for all factors entering into the question, a comparison of rates between two points on the same road, or with charges on other roads, may furnish evidence of probative value.[25] Thus a decision based on a comparison of rates alone, without any showing of similarity of conditions, is insufficient to sustain an order permitting an advance in rates.[26] Evidence merely that rates charged by a railroad company for shipments to a particular point are higher than rates charged between the initial points and two other points will not, in the absence of allegation and proof that the rates complained of are unreasonable, unjust, or discriminatory, authorize an order of the state railroad commission reducing the rates.[27]

Comparison based on comparison of percentage of change. In determining the reasonableness of rates, comparisons of the percentage increases in the rates in issue with the percentage increases made in other rates may be considered,[28] but a comparison of the percentages of increase of a particular rate with the percentage of increase of rates generally is not alone a proper foundation for an order fixing the particular rate, since the order must be based upon what is reasonable at the time, and a mere difference of percentage of increase or decrease of rate is not, of itself, evidence that any rate is too high or too low.[29]

g. Effect of Operation in Connection with Other Lines

A carrier operated in connection with other lines owned by the same company, but under separate charters, may be considered as a separate and independent line in determining the reasonableness of its rates.

The fact that a line of railroad is operated in

circumstances under which comparative rates were effective was held insufficient to support commerce commission's finding that proposed rate was unreasonable—Illinois Cent. R Co. v. Illinois Commerce Commission, 195 N.E. 32, 359 Ill. 563.

Matters to be considered

The fact that the average logging rate of other railroads for transportation of logs for a similar distance is the same as that fixed by the commission in the particular case does not alone justify the rate fixed, since the commission, in comparing the rates, should take into consideration all of the circumstances, such as the distance of the haul, the amount of competition and the investment in the particular roadbed and equipment, and other like circumstances, and the average rate for hauling logs is especially unfitted as a basis, in view of the commission's finding that the logging rates of the state as a whole were inequitably constructed, and in many cases were neither fair nor just, and its statement that it was investigating all of such rates with a view of establishing a fair and equitable tariff—Public Service Commission of Washington v. State, 204 P. 791, 118 Wash 629, 25 A.L.R. 186, affirmed 207 P. 688, 118 Wash 629, 25 A.L.R 186.

Facts found in other cases before other tribunals between different parties on different issues are no evidence to sustain commerce commission's action in fixing reasonable coal rates.—Chicago & E. I. Ry. Co. v. Illinois Commerce Commission, 173 N.E. 380, 341 Ill. 277.

Comparative earnings per ton mile

That a rate established by a railroad company on sand and gravel between two points gives it a higher rate per ton mile than its average earnings on all commodities is not evidence that such rate is unreasonable or excessive, without taking into consideration the length of the haul, as compared with the average haul, and other essential factors which may affect the question—Illinois Cent. R. Co. v. Railroad Commission of Kentucky, D.C.Ky., 1 F. 2d 805.

23. U.S.—Railway Express Agency v. U. S., D.C.N.Y., 6 F.Supp. 249, appeal dismissed Wishnatzki & Nathel v. Railway Express Agency, 55 S.Ct. 212, 293 U.S. 532, 79 L. Ed. 640.
Ill.—Atchison, T. & S. F. Ry. Co. v. Commerce Commission, 167 N.E. 831, 335 Ill. 624
10 C.J. p 421 note 87.

Difference in service rendered

More expensive service given strawberry shipments from another district because of their inability to stand transportation as well as Florida berries is not norm by which to measure rates on strawberry shipments from Florida which receive same service as that given to other perishable freight—Railway Express Agency v. U. S., D.C.N.Y., 6 F.Supp 249, appeal dismissed Wishnatzki & Nathel v. Railway Express Agency, 55 S.Ct. 212, 293 U.S. 532, 79 L.Ed. 640.

Paper rates

Paper rates, that is, rates under which no traffic moves or has moved, other than in isolated instances, wide apart with respect to time and few in number, furnish no substantial basis for measuring an existing rate under which traffic does move.—Great Northern Ry. Co. v. Department of Public Works of Washington, 296 P. 142, 161 Wash 29.

24. N.M.—San Juan Coal & Coke Co. v. Santa Fe, S. J. & N. Ry. Co., 2 P.2d 305, 35 N.M. 512.

25. Ky.—Southern Ry. Co. of Kentucky v. Frankfort Distillery, 26 S.W.2d 1025, 233 Ky. 771, certiorari denied 51 S.Ct. 75, 282 U.S. 868, 75 L.Ed. 767.
N.M.—John Becker Co. v. Atchison, T. & S. F. Ry. Co., 291 P. 919, 35 N.M. 187
10 C.J. p 421 note 88

26. W.Va.—Hope Natural Gas Co. v. Public Service Commission, 164 S.E. 248, 112 W.Va. 223

27. Neb.—Byington v. Chicago, etc., R. Co., 148 N.W. 520, 96 Neb. 584

28. Ill.—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 166 N.E. 466, 335 Ill. 70.

29. Ill.—Chicago & E. I. Ry. Co. v. Commerce Commission, 175 N.E. 8, 343 Ill. 117—Chicago & E. I. Ry. Co. v. Illinois Commerce Commission, 173 N.E. 380, 341 Ill. 277—Atchison, T. & S. F. Ry. Co. v. Commerce Commission, 167 N.E. 831, 335 Ill. 624.

connection with other lines owned by the same company, but under separate charters, whereby the earnings of such line are increased and its operating expenses reduced, does not prevent its being considered as a separate and independent line for the purpose of determining the reasonableness of rates thereon, fixed by the state, full consideration of the joint operation being given when the road is credited for the increased business and reduced expenses [30]

h. Effect of Consolidation of Several Roads

Rates prescribed for a carrier which has been consolidated with other carriers must be considered, in determining their reasonableness, with relation to their effect on the consolidated line as a whole.

When, by legislation and consolidation, a railroad which was originally all in one state becomes consolidated with other roads in other states, and the state originally incorporating it enacts laws to regulate the rates of the consolidated road within its borders, the proper test as to the reasonableness of these rates is as to their effect on the consolidated line as a whole.[31]

i. Unreasonableness of One Charge as Affecting Another Charge Not Unreasonable in Itself

A terminal charge may be reasonable, although prior charges render the total charge to the shipper unreasonable.

If a terminal charge is just and reasonable, it cannot be condemned or the carrier required to change it on the ground that, taken in connection with prior charges of transportation over the lines of the carrier or of connecting carriers, the total charge to the shipper is unreasonable; that which must be corrected and condemned is not the just and reasonable terminal charge, but those prior charges which must of themselves, be unreasonable in order to make the aggregate of the charge from the point of shipment to that of delivery unreasonable and unjust.[32]

j. Consideration of Interstate and Intra-State Business

Neither interstate nor intra-state traffic can be made to bear the losses of the other, so that the reasonableness of rates for the one must be determined without reference to the business or profits derived from the other.

The reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it.[33] Interstate traffic cannot be made to bear the losses of intra-state business, nor vice versa.[34] The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for out of, a common fund; and that its capitalization is on its entire line within and without the state, can have no application where the state is without authority over rates on the entire line, and can deal only with local rates, and make such regulations as are necessary to give just compensation on local business.[35] However, an order of the interstate commerce commission for an increase of intra-state rates so as to restore a proper relationship between interstate and intra-state rates is prima facie reasonable where interstate rates, which the commission had increased, were expressly found reasonable;[36] but a finding by the interstate commerce commission that discrimination exists due to a difference between interstate and intra-state rates and that the interstate rates are reasonable does not necessarily imply that the intra-state rates are unreasonable.[37]

Limitation of rule. The supreme court of Virginia has engrafted an important limitation on the general principle heretofore stated, and holds that it has no application, where the road is built, maintained, and operated essentially for interstate purposes, and where the intra-state business is incidental merely and confessedly too inconsiderable to render feasible the fixing of a reasonable maximum rate with sole reference to it.[38]

k. Economic Conditions

Economic conditions and the needs of a particular industry are factors to be considered in determining the reasonableness of rates.

Economic conditions are to be considered in the

30. U.S.—Louisville & N. R. Co. v. Brown, C.C.Fla., 123 F. 946.

31. U.S.—St. Louis & S. F. Ry. Co. v. Gill, Ark., 15 S.Ct. 484, 156 U.S. 649, 39 L.Ed. 567.
10 C.J. p. 423 note 14.

32. U.S.—Interstate Commerce Commn. v. Stickney, Minn., 30 S.Ct. 66, 215 U.S. 98, 54 L.Ed. 112.

33. U.S.—Smyth v. Ames, Neb., 18 S.Ct. 418, 169 U.S. 466, 42 L.Ed. 819, modified on other grounds 18 S.Ct. 888, 171 U.S. 361, 43 L.Ed. 197.
10 C.J. p. 423 note 15

34. U.S.—Dayton-Goose Creek Ry. Co. v. U.S., Tex., 44 S.Ct. 169, 263 U.S. 456, 68 L.Ed. 388, 33 A.L.R. 472, affirming, D.C., 287 F. 728.
10 C.J. p. 423 note 16.

35. U.S.—Smyth v. Ames, Neb., 18 S.Ct. 418, 169 U.S. 466, 42 L.Ed. 819, modified on other grounds 18 S.Ct. 888, 171 U.S. 361, 43 L.Ed. 197.

36. U.S.—State of Montana v. U.S., D.C.Mont., 2 F.Supp. 448, affirmed 54 S.Ct. 125, 290 U.S. 593, 78 L.Ed. 523.

37. U.S.—American Exp. Co. v. State of South Dakota ex rel. Caldwell, S.D., 37 S.Ct. 656, 244 U.S. 617, 61 L.Ed. 1352.

38. Va.—Washington Southern R. Co. v. Com., 71 S.E. 539, 112 Va. 515.

fixing of rates,[39] and the conditions in a particular industry may and should be considered along with other factors in fixing rates for that industry and in determining their reasonableness.[40] So far as can be done with due regard for the interests affected, rates should be such as will permit the commodities to which they relate to move freely in the channels of commerce,[41] but the mere fact that a rate is prohibitive and traffic does not move thereunder does not make it per se unlawful.[42] The commission should consider the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years.[43] In rate making the prohibition in section 3(1) of the Interstate Commerce Act of any undue preference of one locality over another is treated as intended to prevent the use of rates as a means of promoting artificial development of one locality to the detriment of another.[44]

l. Use of Estimated Weight for Tariff Computation

It is proper to fix an estimated weight for the computation of tariffs for commodities such as petroleum.

It is a common practice with respect to commodities like petroleum to fix an estimated weight which shall govern in the computation of the tariff rather than the actual weight. The application of estimated weights, where for practical reasons it is inconvenient or impossible to ascertain actual weights, benefits both shipper and carrier, and is not improper except where it appears that the estimate is not fairly representative of the actual weights.[45]

m. Acquiescence of Carrier in Rates Fixed by Commission

A carrier's acquiescence in rates established by a regulatory commission raises a presumption of their reasonableness, although mere conformity thereto, where there is a penalty for their violation, will not.

Acquiescence by the carrier in a rate established by the regulatory commission in general raises the presumption that the rate is reasonable.[46] However, the mere performance of services for a rate fixed by the commission will not of itself justify the conclusion that the rates are reasonable where the legislature has prescribed a penalty for violation of the rates fixed.[47]

§ 298. Standard of Adequate Return

a. In general
b. Recapture of excess profits

a. In General

There is no fixed rule for determining what constitutes an adequate return on the capital invested. Consideration must be given to what is sufficient to induce the investment of capital, and the prevailing interest rates, including the legal rate of interest.

The reasonableness of a rate depends upon whether it furnishes a reasonable and adequate return for the service rendered, and a reasonable and adequate return must pay the cost of the service rendered, as distinguished from all other service, plus a reasonable profit thereon.[48] There is no absolute and

39. Or.—Valley & Siletz R. Co. v. Thomas, 48 P.2d 358, 151 Or. 80.

40. U.S.—Ann Arbor R. Co v. U. S., Cal., 50 S.Ct. 444, 281 U.S. 658, 74 L.Ed. 1098
Or.—Valley & Siletz R. Co. v. Thomas, 48 P.2d 358, 151 Or. 80.

41. U.S.—Ann Arbor R. Co. v. U. S., Cal., 50 S.Ct. 444, 281 U.S. 658, 74 L.Ed. 1098.

Effect of joint resolution

Joint resolution of congress requiring "lawful changes" in rate structure to promote movement of agricultural products did not change existing law by placing agricultural products in a most favored class and justify a reduction in rates on fruit, notwithstanding the carriers have not made a fair return, but merely requires that the existing law be given effect, and does not make unlawful any rate which under the existing law is lawful.—Ann Arbor R. Co. v. U.S., Cal., 50 S.Ct. 444, 281 U.S. 658, 74 L.Ed. 1098.

42. Pa.—Pennsylvania R. Co. v. Public Service Commission, 190 A. 372, 126 Pa.Super. 1—McCrady Bros. Co. v. Pittsburgh & L.E.R. Co., 66 Pa. Super. 307.

43. U.S.—Ann Arbor R. Co. v. U.S., Cal., 50 S.Ct. 444, 281 U.S. 658, 74 L.Ed. 1098.

44. U.S.—Ann Arbor R. Co. v. U.S., supra.

45. Mont.—Sunburst Oil & Refining Co. v. Great Northern Ry. Co., 7 P.2d 927, 91 Mont. 216, certiorari granted Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 53 S.Ct. 7, 287 U.S. 580, 77 L.Ed. 508, and affirmed 53 S.Ct. 145, 287 U.S. 358, 77 L.Ed. 360, 85 A.L.R. 254.

46. Ky.—Southern Ry. Co. of Kentucky v. Frankfort Distillery, 26 S.W.2d 1025, 233 Ky. 771, certiorari denied 51 S.Ct. 75, 282 U.S. 868, 75 L.Ed. 767.
10 C.J. p. 424 note 20.

47. Mich.—Detroit, etc., R. Co. v. Michigan R. Commn., 137 N.W. 329, 171 Mich. 335.

48. U.S.—Alton & S. R.R. v. U.S., D.C.Cal., 49 F.2d 414.

Profit in excess of cost allowed

A freight rate that does not embrace a reasonable profit over and above the actual cost and expense to the carrier is not a reasonable rate.—New York Cent. R. Co. v. Public Utilities Commission of Ohio, 155 N.E. 862, 116 Ohio St. 120.

Proper return and actual return must be found

The regulatory commission must make fact findings of what is a fair rate of return to which the carrier is entitled, and the rate of return actually received under the rate as fixed.—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360.

Terminal

Railroads are entitled to rates for switching services rendered in terminal yards such that maintenance, interest, taxes, and a reasonable net revenue will be yielded by the terminal.—Atchison, T. & S.F. Ry. Co. v. Public Utilities Commission, 188 P. 747, 68 Colo. 92.

definite standard by which it may be determined in all cases what is a fair and reasonable return on the capital invested. It is always a question of fact dependent on the circumstances of each particular case.[49] It has been said that a just and reasonable rate must be sufficient to induce the investment of capital in the business and its continuance therein.[50] The prevailing interest rates should be considered;[51] and the courts have very generally adopted as a standard of adequate return where the carrier's rates are reasonable at least as high a measure of profit as the current rate of return on enterprises of a similar character in the localities where the carrier's business is transacted,[52] and a number of decisions fix the minimum return which will be considered adequate as the legal rate of interest in the locality where the carrier is transacting its business.[53] In any event no complaint can be made of a reduction of rates where the reduced rates will make a larger profit on the investment than realized by the average investor.[54]

Private carrier. In fixing a rate to be charged by a private carrier, a regulatory commission errs by arbitrarily disregarding the right of such carrier to make a charge which will cover amortization and interest on the money invested.[55]

b. Recapture of Excess Profits

Under the Transportation Act one half of the excess of net earnings over six per cent net on the valuation of a railroad's property is to be paid to the interstate commerce commission and used by it for the benefit of the weaker roads.

The so-called recapture paragraphs of the Transportation Act, 49 U.S.C.A. § 15 a, which provide substantially that all railroads shall hold one half of the excess of net earnings over six per cent net on the valuation of their property as determined by the interstate commerce commission as trustee for, and pay the same to, the United States, which sums shall be collected by the interstate commerce commission and used by it in furtherance of the public interest in railway transportation, either by making loans to carriers to meet expenditures of capital account or to refund maturing securities, or by purchasing transportation equipment and facilities and leasing the same to carriers, are constitutional.[56] The only power the interstate commerce commission has to make any recapture order arises from the statute, and any action taken therein, beyond the authority granted, is invalid. The provision requiring the commission, in determining the valuation of a railroad's property for the purposes of recapture to "give due consideration to all the elements of value recognized by the law of the land for rate-making purposes" is an express command which the carrier has a clear right to demand compliance with.[57] The commission is not required to fix a general level of rates intended

49. W.Va.—Coal, etc., R. Co. v. Conley, 67 S.E. 613, 67 W.Va. 129.
10 C.J. p 426 notes 42, 43.

50. **Rule inapplicable to voluntary rate**
Failure to allow any return on capital invested would, if the case were one where board fixed rate instead of approving rate fixed by the utility, be a violation of the principle that a just and reasonable rate must be sufficient to induce the investment of capital in the business and its continuance therein.—O'Brien v. Board of Public Utility Com'rs, 105 A. 132, 92 N.J.Law 44, affirmed 106 A. 414, 92 N.J.Law 587.

51. U.S.—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360.

52. U.S.—St. Louis & S. F. R. Co. v. Hadley, C.C.Mo., 168 F. 317, modified on other grounds 33 S.Ct. 975, 230 U.S. 474, 57 L.Ed. 1571, 33 S.Ct. 983, 230 U.S. 512, 57 L.Ed. 1596, 33 S.Ct. 985, 230 U.S. 509, 57 L.Ed. 1595—Central of Georgia R. Co. v. Alabama R. Commission, C.C.Ala., 161 F. 925, reversed on other grounds 170 F. 225, 95 C.C.A. 117.
W.Va.—Coal, etc., R. Co. v. Conley, 67 S.E. 613, 67 W.Va. 129.
10 C.J. p 426 note 44.

Return held adequate
Mo.—State ex rel. and to Use of City of St. Louis v. Public Service Commission, 34 S.W.2d 507, 326 Mo. 751.

53. U.S.—Western Ry. of Alabama v. Alabama R. Commission, D.C.Ala., 197 F. 954.
10 C.J. p 426 note 45.

Legal interest rate not inadequate
"While the rate of interest established by law upon money investments, in the absence of express contract, may not measure correctly, or even with approximate accuracy, the return which, as a matter of business policy, railroad carriers should be permitted to earn upon the fair value of their properties employed in the public service, it may well be doubted that any court would be justified in setting aside and holding for naught a legislative enactment which permitted net earnings equal to or not materially less than the interest allowed by statute upon obligations containing no specific agreement in that regard. At any rate, the circumstances would have to be very unusual and the showing very convincing to persuade a court so to do."—Ann Arbor R. Co. v. Fellows, D.C.Mich., 236 F. 387, 390, appeal dismissed Ann Arbor R. Co. v. Glasgow, 39 S.Ct. 5, 248 U.S. 588, 63 L.Ed. 434.

54. N.Y.—Bridge Operating Co. v. Public Service Commn., 138 N.Y.S. 434, 153 App.Div. 129.

55. Wash.—State v. Kuykendall, 228 P. 853, 130 Wash. 674, affirmed 232 P. 695, 132 Wash. 700.

56. U.S.—Dayton-Goose Creek Ry. Co. v. U.S., Tex., 44 S.Ct. 169, 263 U.S. 456, 68 L.Ed. 388, 33 A.L.R. 472, affirming, D.C., 287 F. 728.

Not void for restricting use of property
U.S.—St. Louis & O'F. Ry. Co. v. U.S., D.C.Mo., 22 F.2d 920 reversed on other grounds 49 S.Ct. 384, 279 U.S. 461, 73 L.Ed. 798.

Carriers held not to constitute one system
Switching railroad and coal-carrying railroad were not "under common control and management and operated as single system" within recapture statute.—St. Louis & O'F. Ry. Co. v. U.S., Mo., 49 S.Ct. 384, 279 U.S. 461, 73 L.Ed. 798, reversing, D.C., 22 F.2d 980.

57. U.S.—St. Louis & O'F. Ry. Co. v. U.S., Mo., 49 S.Ct. 384, 279 U.S. 461, 73 L.Ed. 798, reversing, D.C., 22 F.2d 980.

to yield a fair return upon the aggregate value of carrier property either as a whole, or in some prescribed rate or territorial group before railroad excess earnings are recoverable.[58] The moneys payable under the provisions of the act are not public moneys which are payable into the treasury of the United States for ordinary governmental uses, and the United States possesses no direct beneficiary interest in the fund, but is to hold it, through the instrumentality of the interstate commerce commission, when and as it is paid, as trustee and upon the trusts named in the Transportation Act.[59] A carrier entering a bona fide denial of any excess income for recapture purposes, under circumstances sufficient to justify a contest, is not liable for interest on the recapture payments prior to final order requiring them.[60]

§ 299. Evidence as to Reasonableness

The rates established by legislative act or regulatory commission, or initiated by a carrier in states where it is authorized to do so, are presumed just and reasonable, and the burden is on the party assailing the rate to establish its invalidity or unreasonableness. This presumption is a strong presumption which can be overcome only by clear and convincing evidence. In determining the reasonableness of a rate great latitude is permitted in the admission of evidence. However, a commission can act only on evidence properly presented, and its orders will be relieved against where made without evidence or contrary to the evidence.

The rates established in accordance with law[61] by legislative act, state[62] or national,[63] or by the interstate commerce commission,[64] or a state regulatory commission,[65] or initiated by a carrier in due form according to the power vested in it in certain states and under the Interstate Commerce Act of initiating its rates, as appears supra § 280,[66] are presumed to be just and reasonable, and arrived at in due form of procedure.[67] However, no presumption of law arises that a rate is reasonable merely because such rate has been filed with

Present or reproduction cost

Failure of interstate commerce commission, in determining value of railway property for purposes of recapture, to consider present or reproduction cost, was error.—St. Louis & O.'F Ry. Co v. U S, Mo, 49 S Ct 384, 279 U.S. 461, 73 L Ed. 798, reversing, D.C., 22 F 2d 980.

58. U S—St Louis & O.'F. Ry. Co. v. U. S., supra

Period prior to increased rate schedule

Carrier's excess earnings for period prior to time increased rate schedule became effective may be recaptured.—St Louis & O.'F. Ry. Co. v. U. S, D C Mo, 22 F 2d 980, reversed 49 S.Ct. 384, 279 U.S. 461, 73 L Ed. 798.

59. D C.—Richmond, F. & P. R. Co. v. McCarl, 62 F 2d 203, 61 App D.C. 290, certiorari denied 53 S Ct. 506, 288 U.S. 615, 77 L.Ed. 988.

60. U S—St. Louis & O'F. Ry. Co. v. U. S, 49 S Ct. 384, 279 U.S. 461, 73 L Ed. 798, reversing, D.C., 22 F.2d 980.

61. U S—Allen v. St. Louis Southwestern R. Co, Ark, 33 S Ct. 1030, 230 U.S. 553, 57 L Ed. 1625—Hooker v Interstate Commerce Commn., Com Ct., 188 F. 242, reversed on other grounds 32 S Ct. 769, 225 U. S. 302, 56 L.Ed. 1099.

62. U.S—Seaboard Air-Line R. Co v. Railroad Commission of Alabama, C.C A.Ala., 155 F. 792.

Ind—Vandalia R Co v. Schnull 122 N.E 225, 188 Ind. 87, reversed on other grounds 41 S Ct. 324, 255 U. S. 113, 65 L Ed 539, conformed to 130 N E. 865, 190 Ind. 698

Mo.—Hackworth v. Missouri Southern R. Co., 227 S.W. 1032, 286 Mo. 282, 15 A L R. 170.

10 C.J. p 426 note 49.

63. U.S—Chicago & G. T. Ry. Co v. Wellman, Mich, 12 S Ct. 400, 143 U.S. 339, 36 L Ed. 176.

64. U.S—Southern R Co. v. Reid, N.C, 32 S Ct. 140, 222 U.S. 424, 56 L Ed. 257.

10 C.J. p 427 note 51.

Presumption in favor of findings of interstate commerce commission see C.J.S. title Commerce § 148, also 12 C J. p 137 note 70—p 138 note 87.

65. U S.—Banton v. Belt Line Ry. Corporation, N Y., 45 S Ct. 534, 268 U.S. 413, 69 L Ed. 1020—Bush v. Texas & P. Ry. Co., D C La, 290 F. 1008—Public Service Ry. Co. v. Board of Public Utility Commissioners, D.C.N J., 276 F. 979, appeal dismissed Board of Public Utility Com'rs of State of New Jersey v. Public Service R. Co, 45 S.Ct. 9, 266 U.S 636, 69 L Ed 481.

Ark.—Clear Creek Oil & Gas Co. v. Ft. Smith Spelter Co, 255 S W. 903, 161 Ark. 12, affirmed Ft. Smith Spelter Co. v. Clear Creek Oil & Gas Co., 45 S Ct. 263, 267 U S. 231, 69 L Ed. 588.

Fla—State v. Florida East Coast Ry. Co., 73 So. 171, 72 Fla. 379, Ann. Cas 1918E 1206.

Ill.—Illinois Commerce Commission v. Cleveland, C, C. & St. L. Ry. Co., 150 N E. 678, 320 Ill. 214

Ind.—Vandalia R Co. v. Schnull, 122 N E 225, 188 Ind 87, reversed on other grounds 41 S Ct. 324, 255 U.S 113, 65 L Ed 539, conformed to 130 N E. 865, 190 Ind. 698

Mass—Donham v. Public Service Commission, 122 N E. 397, 232 Mass. 309.

Mont—Sunburst Oil & Refining Co. v. Great Northern Ry. Co., 7 P.2d 927, 91 Mont 216, certiorari granted Great Northern Ry. Co v. Sunburst Oil & Refining Co, 53 S Ct. 7, 287 U S 580, 77 L Ed. 508, affirmed 53 S Ct. 145, 287 U S 358, 77 L Ed 360, 85 A L R 254.

Tenn—Nashville, C. & St. L. Ry v. Railroad and Public Utilities Commission, 32 S.W 2d 1043, 161 Tenn 592

Tex—Railroad Commission of Texas v. Houston Chamber of Commerce, 78 S W.2d 591, 124 Tex 375, affirming Houston Chamber of Commerce v. Railroad Commission of Texas, Civ App, 19 S.W 2d 583.

Va—Atlantic Coast Line R Co v. Commonwealth, 118 S E. 257, 136 Va 134

10 C J. p 427 note 52.

Over carrier's opposition

A rate established by a state regulatory commission after hearing, over the opposition of the railroad, is presumed reasonable—Bush v Texas & P. Ry. Co, D C La, 290 F. 1008.

Prior rates

In action involving question of whether rates fixed by statute were confiscatory, it will be presumed that the rates previously charged which were fixed by the state regulatory commission were reasonable—Hackworth v. Missouri Southern R Co, 227 S W. 1032, 286 Mo. 282, 15 A L R 170.

66. U.S—Oregon Short Line R. Co. v Teton Coal Co., C C A Idaho, 35 F.2d 919.

Carrier's published tariff

Prima facie carrier's published tariff is reasonable.—Oregon Short Line R. Co v. Teton Coal Co, C C.A Idaho, 35 F 2d 919.

67. Fla—State v. Florida East Coast Ry. Co, 73 So 171, 72 Fla. 379, Ann.Cas.1918E 1206.

the interstate commerce commission[68] or posted in compliance with a state statute;[69] and the mere filing of a schedule of rates raises no inference that the commission approves them.[70]

Although, in certain jurisdictions, it is held that the burden is on the carrier to show that the rates are reasonable and just and not excessive on appeal by the carrier from an order of the commission in proceedings instituted by customers of the carrier,[71] in general the burden is on the party assailing the rate to establish the invalidity of the order of the commission,[72] or the unreasonableness of the rate attacked,[73] especially where the rate has been in force for a long period, during which time the traffic has greatly increased in volume,[74] and it has been said that great difficulty in furnishing data to show the unreasonableness of rates established will not excuse a carrier which assails the rates from so doing where it has it in its power to present accurate data which would permit the court to draw correct conclusions.[75]

This presumption of reasonableness arises independently of any statute so providing,[76] but it is not conclusive and may be rebutted in proper proceedings had for determining the question of reasonableness,[77] as, for instance, by showing that the rate is noncompensatory.[78] Where a carrier, given the alternative of raising one rate or of lowering another in order to remove discrimination, elects to raise one of the rates, it has the burden of justifying its increase,[79] but in doing so it has the advantage of a presumption in favor of the reasonableness of maintaining the higher rate.[80] A carrier seeking from a state regulatory commission authority to increase its rate has the burden of showing that the increased rate proposed by it is not more than the service is reasonably worth.[81] On appeal from an order of a state regulatory commission refusing reparation, the making of the order, in the exercise of the powers conferred upon the commission by statute, is prima facie evidence of its reasonableness, and the burden of proving the contrary is on appellant.[82]

68. U S —Illinois Cent. R. Co. v. Interstate Commerce Commn., La., 27 S.Ct. 700, 206 U S. 441, 51 L Ed. 1128.
Tenn.—Rather v. Nashville, etc., R. Co, 174 S.W. 1113, 131 Tenn. 289
10 C J. p 428 note 70.

69. N.Y —Murphy v. New York Cent R. Co, 122 N.E. 700, 225 N Y 548, affirming 156 N.Y.S. 49, 170 App Div. 788.
10 C J. p 428 note 71.

70. Iowa.—Cramer v. Chicago, etc., R Co., 133 N.W. 387, 153 Iowa 103.

71. Ill —State Public Utilities Commission v. Chicago & W. T. Ry. Co, 114 N E. 325, 275 Ill. 555, Ann. Cas.1917C 50.

72. U S.—Banton v. Belt Line Ry. Corporation, N.Y., 45 S.Ct. 534, 268 U S 413, 69 L Ed. 1020.

73. U.S —Southern Pac. Co. v. Bartine, D C Nev., 1 F 2d 323—International Ry. Co. v Prendergast, D.C. N Y, 1 F Supp. 623—Public Service Ry Co v Board of Public Utility Commissioners, D.C.N J, 276 F 979, appeal dismissed Board of Public Utility Com'rs of State of New Jersey v. Public Service R. Co, 45 S Ct. 9, 266 U S. 636, 69 L. Ed 481—Seaboard Air Line Ry Co v. Railroad Commission of Alabama, C C Ala., 155 F. 792.
Ark —Clear Creek Oil & Gas Co. v Ft. Smith Spelter Co., 255 S W. 903, 161 Ark 12, affirmed Ft. Smith Spelter Co v Clear Creek Oil & Gas Co, 45 S Ct 263, 267 U.S. 231, 69 L Ed 588.
Fla.—State v Florida East Coast Ry. Co., 73 So 171, 72 Fla. 379, Ann. Cas 1918E 1206.
Ill.—Moline Consumers' Co. v. Illinois Commerce Commission ex rel. Chicago, B & Q. R Co, 187 N E. 161, 353 Ill. 119—Chicago & E I Ry Co. v. Commerce Commission, 175 N E. 8, 343 Ill. 117—Atchison, T. & S. F. Ry Co. v. Commerce Commission, 167 N E 831, 335 Ill. 624—Illinois Commerce Commission v. Illinois Traction, 167 N E. 38, 335 Ill. 247—Illinois Commerce Commission v. Cleveland, C, C. & St. L. Ry. Co., 150 N E. 678, 320 Ill. 214.
Pa —City of Philadelphia v. Public Service Commission, 84 Pa Super. 135.
Tenn —Nashville, C. & St L. Ry. v. Railroad and Public Utilities Commission, 32 S W 2d 1043, 161 Tenn. 592.

In New Mexico

(1) Where, under the state constitution, orders of the commission, made in accordance with the power and duty given it by the constitution to fix, determine, supervise, regulate, and control all charges and rates of railway and other companies, before being enforceable, must be passed upon by the supreme court, and such orders cannot be held valid and enforced by the court unless based upon sufficient evidence heard by the commission and preserved in the record, the burden is not cast upon the railway company to justify a rate or proposed tariff, but rests upon the commission to produce evidence warranting its action in fixing a rate, or other action taken —In re Coal Rates in New Mexico, 171 P. 506, 23 N M. 704.

(2) The state corporation commission cannot cast the burden of justifying a rate upon the carrier, by serving it with an order to show cause why a given rate should not be established.—In re Coal Rates in New Mexico, supra.

74. U S —Louisville & N R. Co v U. S, Tenn., 35 S Ct. 696, 238 U S. 1, 50 L.Ed 1177.

75. U.S —Minnesota Rate Cases, Minn, 33 S.Ct. 729, 230 U S 352 57 L Ed. 1511, Ann.Cas 1916A 18.

76. U.S —Minneapolis & St. L R Co v. State of Minnesota, 22 S Ct 900, 186 U S 257, 46 L.Ed 1151
10 C.J. p 427 note 56.

77. Fla —State v Florida East Coast Ry. Co, 73 So 171, 72 Fla 379, Ann Cas 1918E 1206.
10 C.J. p 427 note 57.

78. U S —Northern Pac R. Co v North Dakota, ex rel. McCue, N. D, 35 S Ct 429, 236 U S 585, 59 L Ed 735, Ann Cas.1916A 1.

79. Pa.—Pennsylvania R Co. v. Public Service Commission, 190 A 372, 126 Pa Super 1.

80. Pa —Pennsylvania R. Co. v Public Service Commission, supra.

81. N J.—New Jersey Central Traction Co v. Board of Public Utility Com'rs, 113 A 692, 96 N J Law 90
W Va —Hope Natural Gas Co v. Public Service Commission, 164 S E. 248, 112 W.Va. 223.

82. Pa —Chemical Lime Co. v Public Service Commission, 157 A. 820, 103 Pa Super 195, 197—Chemical Lime Co. v Public Service Commission, 157 A. 820, 103 Pa.Super. 194—Centre County Lime Co. v Public Service Commission of

Although in some states, under the statutes therein, on appeal from an order of the state commission relating to rates, the controversy as to the reasonableness of the rates is to be determined so far as the burden of proof is concerned by the rules governing in ordinary civil cases,[83] in general, to overcome the presumption the evidence must be clear and convincing,[84] every reasonable doubt being yielded in favor of the rate.[85] The fullest disclosure of all material facts must be made,[86] and mere speculative suggestions as to what might possibly result with no showing of an actual test are insufficient to overcome the presumption.[87] A carrier, however, may sufficiently maintain the burden of showing that a rate on a particular commodity is unreasonable or noncompensatory by whatever evidence is available, without undertaking to prove by facts and figures with the precision of a mathematical theorem that the rate is unreasonable or noncompensatory.[88] The presumption as to reasonableness may be overcome by admissions in pleadings which clearly show the invalidity of the order, or which admit that it is unreasonable and arbitrarily made without evidence or due consideration.[89] The presumption in favor of the finding of a master, based on evidence, and the results of actual operation under the rates in question is superior to the original presumption in favor of the reasonableness of the rates.[90] The presumption that rates for intra-state traffic established by a state regulatory commission are fair, just, and reasonable cannot be overcome by the voluntary act of the carrier in merely publishing rates which differ.[91]

Admissibility of evidence. In determining what are just and reasonable rates, great latitude is allowed in the admission of evidence.[92] A regula-

Pennsylvania, 157 A. 820, 103 Pa. Super. 192, 193—Centre County Lime Co. v. Public Service Commission of Pennsylvania, 157 A. 815, 103 Pa.Super. 179.

83. Tex.—Railroad Commission of Texas v. Houston Chamber of Commerce, 78 S.W.2d 591, 124 Tex. 375, affirming Houston Chamber of Commerce v. Railroad Commission of Texas, Civ.App., 19 S.W.2d 583.

84. Fla.—State v. Florida East Coast Ry. Co., 73 So. 171, 72 Fla. 379, Ann.Cas.1918E 1206.
10 C.J. p 427 note 59.

Presumption not overthrown

Evidence held not to clearly show that order by railroad commissioners, affecting commodities in Class P, would compel defendant to carry the commodities at a loss or without substantial compensation—State v. Florida East Coast Ry. Co., 73 So. 171, 72 Fla. 379, Ann.Cas.1918E 1206.

85. Fla.—State v. Louisville, etc., R. Co., 57 So. 175, 62 Fla. 315.

Beyond any doubt

To overcome the presumption in favor of the validity of a rate fixed by an administrative board, after a full hearing, the company, on an application for a preliminary injunction, must show beyond any just or fair doubt that the action of the board was in fact confiscatory—Public Service Ry. Co. v. Board of Public Utility Commissioners, D.C.N.J., 276 F. 979, appeal dismissed Board of Public Utility Com'rs of State of New Jersey v. Public Service R. Co., 45 S.Ct. 9, 266 U.S. 636, 69 L.Ed. 481.

86. U.S.—Louisville & N. R. Co. v. Kentucky R. Commission, D.C.Ky., 214 F. 465, affirmed 35 S.Ct. 146, 235 U.S. 601, 59 L.Ed. 379—Atlantic, etc., R. Co. v. U. S., 76 F. 186.
10 C.J. p 427 note 62.

87. Fla.—State v. Seaboard Air Line R. Co., 37 So. 658, 48 Fla. 150, 152, affirmed 27 S.Ct. 109, 203 U.S. 261, 51 L.Ed. 175.

88. Kan.—Missouri, K. & T. Ry. Co. v. Public Utilities Commission, 172 P. 1022, 103 Kan. 111.

Testimony of witnesses unnecessary

In determining the reasonableness of a rule issued by a carrier which causes an increase of switching charges, it is not necessary that any witness should express an opinion that the rate fixed by the new rule was unreasonable or that any one should testify to the various details making up the cost of operation, but the commission can determine from the facts proved whether or not the tariff applied is reasonable—State Public Utilities Commission v. Chicago, P. & St. L. R. Co., 118 N.E. 427, 282 Ill. 158.

89. Fla.—State v. Florida East Coast R. Co., 59 So. 385, 64 Fla. 112.

Admission of record by party

Telegram from railroad company to state corporation commission reciting that company did not object to reduction in rates made by commission was properly made part of record, since telegram was in nature of pleading, and fact that other railway companies involved in proceeding were not notified of telegram was not error, where rate reduction was not based upon telegram.—Norfolk & W. Ry. Co. v. Commonwealth ex rel. Mathieson Alkali Works, 174 S.E. 85, 162 Va. 314.

90. U.S.—Shepard v. Northern Pac. R. Co., C.C.Minn., 184 F. 765, modified on other grounds 33 S.Ct. 729, 230 U.S. 352, 57 L.Ed. 1511, 48 L.R.A.,N.S., 1151, Ann.Cas.1916A 18.

91. Va.—Atlantic Coast Line R. Co. v. Commonwealth, 118 S.E. 257, 136 Va. 134.

92. U.S.—Southern Pac. Co. v. Bartine, D.C.Nev., 1 F.2d 323.
Minn.—Appeal of Great Northern Ry. Co., 62 N.W. 826, 60 Minn. 461.
Wis.—Chicago, etc., R. Co. v. State R. Commn., 145 N.W. 216, 974, 156 Wis. 47.

In behalf of any interested party

The commission, and, on appeal, the court, may receive evidence and hear arguments in behalf of any person or corporation interested in the result.—Appeal of Great Northern Ry. Co., 62 N.W. 826, 60 Minn. 461—Steenerson v. Great Northern Ry. Co., 62 N.W. 826, 60 Minn. 461.

Opportunity to explain erroneous reports

In proceeding to fix rates, if reports of carrier were incorrect or manifestly erroneous, it should have been given opportunity to correct or explain same before they were used as basis for rates, and fixing of rates by department of public works without other evidence was arbitrary and unlawful—State v. Kuykendall, 228 P. 853, 130 Wash. 674, affirmed 232 P. 695, 132 Wash. 700.

Evidence held incompetent

That witness had traveled extensively on railroads and had testified many times before interstate commerce commission had no tendency to prove anything with regard to the operating conditions of the carrier whose rates were in question for freight rate purposes.—Atchison, T. & S. F. Ry. Co. v. Commerce Commission, 167 N.E. 331, 335 Ill. 624.

tory commission is entitled to consider any and all evidence bearing on the question,[93] and is not limited by the strict rules as to the admissibility of evidence which prevail in suits between private parties.[94] Voluntary maintenance of rates by the carrier for a considerable period of time is evidence that such rates are reasonable.[95] On appeal from the decision of a regulatory commission, the determination of the interstate commerce commission as to the rates to be operative thereafter, invalid because of procedural errors, does not have the force of res judicata in respect of past transactions, but, nevertheless, is entitled to great respect, representing, as it does, the opinion of a body of experts upon matters within their special knowledge and experience.[96] A regulatory commission may not treat statements or decisions of another commission in other cases as evidence in a case before the commission.[97] On the question of whether the regulatory commissioners made an order as to rates without any evidence, they may be called as witnesses.[98]

Sufficiency of evidence. Whether a rate is reasonable or unreasonable must be decided in the light of the evidence and the decided cases, so that where there is evidence for, and no evidence against, a particular rate, and no decided case holding the particular rate to be unreasonable, the tribunal, whatever it may be, is compelled to the inference of reasonableness.[99] An order of a commission fixing a rate, or determining its reasonableness, must be based upon evidence presented to the commission.[1] Nothing can be treated as evidence which was not introduced as such.[2] The commissioners cannot act upon their own information, but are limited to a consideration of what has been admitted in evidence in the instant hearing,[3] and are entitled to assume that representatives of the

Evidence held immaterial

(1) That railroad furnished cars on which shipper brought logs from Canada to point of shipment was immaterial on question of intra-state transportation charges.—State v. Department of Public Works, 270 P. 300, 149 Wash. 129, certiorari denied Chicago, M., St. P. & P. R. Co. v. Department of Public Works of Washington, 49 S.Ct. 350, 279 U.S. 854, 73 L.Ed. 996.

(2) That logs brought in from Canada were subject to tariff laws was immaterial on question of charges for intra-state transportation.—State v. Department of Public Works, supra.

Charge for parking showman's cars

In an action to recover back an amount paid a railroad company by a showman for parking his cars on its tracks for a period of forty-five days, where it had filed no schedule of charges for such service with the railroad commission, evidence that the charge made was a reasonable charge, and evidence as to the reasonable expense of moving the cars from place to place during the forty-five days, was erroneously excluded.—Ex parte Alabama Great Southern R. Co., 90 So. 502, 206 Ala. 400, 19 A.L.R. 978, reversing Alabama Great Southern R. Co. v. Wood, 90 So. 503, 18 Ala.App. 147.

93. Ill.—State Public Utilities Commission v. Chicago & W. T. Ry. Co., 114 N.E. 325, 275 Ill. 555, Ann.Cas.1917C 50.
Ind.—Southern Ry. Co. v. Hunt, 83 N.E. 721, 42 Ind. 90.

94. U.S.—Southern Pac. Co. v. Bartine, D.C.Nev., 1 F.2d 323.

95. Idaho.—Chicago, M. & St. P. Ry. Co. v. Public Utilities Commission of Idaho, 238 P. 970, 41 Idaho 181, certiorari granted 46 S.Ct. 201, 269 U.S. 550, 70 L.Ed. 406, reversed on other grounds 47 S.Ct. 604, 274 U.S. 344, 71 L.Ed. 1085.
10 C.J. p. 428 note 64.

96. U.S.—State of Florida v. U. S., D.C.Ga., 11 F.Supp. 36, reversed on other grounds Atlantic Coast Line R. Co. v. State of Florida, 55 S.Ct. 713, 295 U.S. 301, 79 L.Ed. 1451, rehearing denied 55 S.Ct. 918, 295 U.S. 769, 79 L.Ed. 1710, and State of Florida v. U. S., 55 S.Ct. 918, 295 U.S. 769, 79 L.Ed. 1710.

97. Ill.—Moline Consumers' Co. v. Illinois Commerce Commission ex rel. Chicago, B. & Q. R. Co., 187 N.E. 161, 353 Ill. 119.—Atchison, T. & S. F. Ry. Co. v. Commerce Commission, 167 N.E. 831, 335 Ill. 624.

98. Fla.—State v. Florida East Coast Ry. Co., 73 So. 171, 72 Fla. 379, Ann.Cas.1918E 1206.

99. N.J.—O'Brien v. Board of Public Utility Com'rs, 105 A. 132, 92 N.J.Law 44, affirmed 106 A. 414, 92 N.J.Law 587.

Party offering no evidence cannot complain

Where increase in rates was just enough to enable railway to meet increased expense, forced upon it by order of war labor board of federal government, prosecutor who offered no evidence to contradict evidence of railway, but contented himself with urging that there was no evidence of the value of property of the railway, was in no position to complain.—O'Brien v. Board of Public Utility Com'rs, 105 A. 132, 92 N.J.Law 44, affirmed 106 A. 414, 92 N.J.Law 587.

1. Ill.—Atchison, T. & S. F. Ry. Co. v. Commerce Commission, 167 N.E. 831, 335 Ill. 624.—State Public Utilities Commission v. Atchison, T. & S. F. Ry. Co., 116 N.E. 696, 279 Ill. 194.

Commissioners making decision must hear evidence

Under L.1919 c. 194 § 10, a member of the board of railroad commissioners, who had attended the hearings on an application by carriers for a rate increase, could not properly assent to its order increasing rates without having heard the evidence, or read it, nor does anything in Transportation Act, Act Congr. Febr. 28, 1920, justify such consideration, in view of L.1919 c. 192, §§ 35, 43, providing that the findings of the commission shall be admissible as evidence in proceedings before the commissioners or in any court, and that they shall be conclusive evidence of the facts therein stated, and that on appeal no new evidence shall be taken and the lawfulness of the decision of the commissioners inquired into and determined on the record of the commission.—State v. Chicago & N.W. Ry. Co., 179 N.W. 378, 46 N.D. 313.

2. Ill.—Atchison, T. & S. F. Ry. Co. v. Commerce Commission, 167 N.E. 831, 335 Ill. 624.

3. U.S.—Illinois Cent. R. Co. v. Railroad Commission of Kentucky, D.C.Ky., 1 F.2d 805.—Southern Pac. Co. v. Bartine, D.C.Nev., 1 F.2d 323.
Ill.—Atchison, T. & S. F. Ry. Co. v. Commerce Commission, 167 N.E. 831, 335 Ill. 624.
Pa.—City of Philadelphia v. Public Service Commission, 84 Pa.Super. 135.

Information in files

A commission cannot base a find-

public taking part in the proceeding will fairly and sufficiently present such facts as are necessary to protect the public and need not assign their own experts to the task of obtaining such information and presenting it as evidence.[4] Thus, on an appeal from the decision of a regulatory commission, the presumption in favor of its order establishing a rate or determining the reasonableness thereof will be overcome and the order relieved against by the courts, where it is made to appear that the order was made without evidence, or upon evidence which clearly does not support it or is contrary to it;[5] but on such appeal a carrier is not in as strong a position to urge the insufficiency of evidence procured against it, where the facts are peculiarly within its knowledge, as if all possible knowledge as to the justness of the rates had been laid before the commission.[6]

No hard and fast rule can be laid down as to the quantum and quality of evidence necessary to support a finding that past rates were unjust and unreasonable, but the state regulatory commission in the exercise of a flexible limit of judgment must in each individual case determine, under the particular facts there developed, whether past rates have been unreasonable to the extent of involving elements of legal oppression and extortion.[7]

§ 300. Joint Rates and Division of Rates

a. In general
b. Establishment
c. Division and apportionment
d. Actions or proceedings for recovery or accounting

a. In General

A joint rate is one prescribed or established for the transportation of goods over the connecting lines of two

ing upon the schedules and other general information which it has in its files, unless they were put in evidence in the particular proceeding —Illinois Cent. R Co. v. Railroad Commission of Kentucky, D C.Ky., 1 F.2d 805.

4. Pa.—City of Philadelphia v. Public Service Commission, 84 Pa.Super. 135.

5. U S.—Northern Pac. Ry. Co. v. Department of Public Works of Washington, 45 S Ct. 412, 268 U. S. 39, 69 L Ed 837, reversing 217 P. 507, 125 Wash. 584—Illinois Cent. R. Co. v Railroad Commission of Kentucky, D C Ky., 1 F. 2d 805—Chicago Rys Co. v. Illinois Commerce Commission, D.C. Ill., 277 F. 970.
Fla.—State v. Florida East Coast Ry. Co., 73 So. 171, 72 Fla. 379, Ann Cas.1918E 1206.
Ill.—Illinois Commerce Commission v. Cleveland, C, C. & St. L. Ry. Co, 150 N E 678, 320 Ill. 214.

Evidence held sufficient
U.S.—Illinois Cent R. Co. v. Vest, D C Ky, 39 F.2d 658—Baltimore & O R. Co. v. U. S., D.C.Del, 12 F. Supp. 261, appeal dismissed, C C.A., 87 F 2d 695
Ill.—Indiana Harbor Belt R. Co. v. Illinois Commerce Commission, 172 N.E. 708, 340 Ill. 304—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 166 N E. 466, 335 Ill. 70—Illinois Commerce Commission v. Chicago & E. I. Ry. Co., 163 N E 664, 332 Ill. 243.
Ind.—New York, C. & St L R. Co. v. Public Service Commission of Indiana, 199 N E 573
Kan.—Missouri, K. & T. Ry. Co v. Public Utilities Commission, 172 P. 1022, 103 Kan. 111.
N.D.—State v. Great Northern Ry Co, 219 N.W. 295, 56 N D. 822.
Ohio.—Baltimore & O R. Co. v. Public Utilities Commission of Ohio, 198 N E. 869, 130 Ohio St. 258—Marietta & V. R. Co. v. Public Utilities Commission, 126 N.E. 889, 101 Ohio St. 29.
Okl.—St. Louis-San Francisco Ry. Co. v. Standard Paving Co., 224 P. 296, 98 Okl. 71—Atchison, T. & S. F. Ry. Co. v. State, 206 P. 252, 86 Okl. 65.
Va.—Norfolk & W. R. Co. v. Commonwealth ex rel. Mathieson Alkali Works, 174 S.E 85, 162 Va. 314.

Evidence held insufficient
U S.—Illinois Cent. R Co. v. Railroad Commission of Kentucky, D C. Ky, 1 F 2d 805.
Ill.—Chicago & E. I Ry. Co. v. Commerce Commission, 175 N.E. 8, 343 Ill. 117—Illinois Cent. R. Co. v Illinois Commerce Commission, 173 N.E. 804, 342 Ill. 11—Illinois Commerce Commission v. Illinois Traction, 167 N E 38, 335 Ill. 247—State Public Utilities Commission v. Atchison, T & S F. Ry. Co., 116 N E. 696, 279 Ill 194.
La.—Alexandria & W. Ry Co. v. Railroad Commission of Louisiana, 79 So. 863, 143 La 1067.
Wash.—Great Northern Ry. Co. v Department of Public Works of Washington, 296 P 142, 161 Wash 29—State v. Public Service Commission of Washington, 163 P 1143, 95 Wash. 376, affirmed State v. Public Service Commission, 166 P. 793, 95 Wash 376

Evidence held to show rates excessive
Okl.—Atchison, T & S. F. Ry Co. v State, 200 P. 232, 82 Okl. 288—St. Louis-San Francisco Ry. Co. v. State, 198 P. 73, 81 Okl. 298.

Making order for experimental period unavailing
Invalidity of order of department of public works fixing railroad rates, because based on finding not supported by evidence, was not avoided by making the order, in terms, for an experimental period, where the railroad's evidence tended to show existing rates, although higher than those fixed by order, to be confiscatory—Northern Pac. Ry. Co v Department of Public Works of Washington, 45 S.Ct. 412, 268 U.S. 39, 69 L.Ed. 837, reversing 217 P. 507, 125 Wash. 584

Abolishment of switching charges held proper
Where a railroad and terminal switching company was absorbed by railroad company as a terminal switching facility, order of railroad and warehouse commission abolishing switching charges by the railroad and terminal company was not unlawful or unreasonable—Minneapolis Civic & Commerce Ass'n v Great Northern Ry. Co., 162 N W. 689, 137 Minn. 10, rehearing denied 163 N W 294, 137 Minn. 10, writ of error dismissed Great Northern R Co. v. Minneapolis Civic & Commerce Ass'n, 39 S Ct. 385, 249 U.S. 622, 63 L Ed 806

6. Colo.—Atchison, T. & S F Ry Co. v. Public Utilities Commission, 188 P. 747, 68 Colo. 92.

7. Pa.—Pennsylvania R. Co v. Public Service Commission, 190 A. 367, 125 Pa Super. 558.

Evidence held sufficient
Pa.—Pennsylvania R Co. v. Public Service Commission, 190 A. 367 125 Pa.Super. 558.

or more carriers, and which is to be divided among them for the services rendered by each respectively.

A joint rate is one which has been prescribed or established for the transportation of goods over the connecting lines of two or more carriers, and which is to be divided among them for the service rendered by each respectively.[8]

The divisions made among themselves of a joint rate by the participating carriers are not of themselves standards by which the justness and reasonableness of the joint rate can properly be measured, for the whole rate may be just and reasonable, although some of the divisions may be unreasonable; but evidence of the divisions made of the rate is admissible on the question of what it costs each participating carrier to handle the traffic.[9]

The mere fact that one railroad company owns a controlling interest in the stock of another company owning and operating a connecting line does not authorize the application of rules as to traffic relations between them different from those applied to connecting lines.[10]

b. Establishment

(1) In general
(2) Under the Interstate Commerce Act
(3) Under state statutes

(1) In General

In the absence of applicable statute or regulation, the establishment of joint rates is a matter of contract or agreement between the participating carriers.

In the absence of an applicable statute or regulation prescribing such a rate, the establishment of a joint rate is ordinarily dependent on a contract or agreement between the carriers concerned;[11] and, as will be seen in § 315, if a rate of this character has not been established, the charges for a carriage over several lines is generally the total of the rates established by the participating carriers for their shares of the carriage.

Except where the charter of a carrier entitles it to fix rates only for transportation over its own lines,[12] connecting carriers may unite in establishing a joint through rate for the transportation of freight over their respective lines,[13] and the fact that such connecting carriers might be regarded as competing roads does not affect this right.[14]

(2) Under the Interstate Commerce Act

Under the Interstate Commerce Act, if interstate carriers do not establish joint rates by voluntary agreement, they may be compelled to do so by the interstate commerce commission.

Prior to the amendment of the Interstate Commerce Act in 1906 by the Mann-Elkins Act, interstate carriers were free to adopt or refuse to adopt joint through tariff rates,[15] the whole matter being left to the voluntary action of the carriers;[16] and it was well settled that no power resided in either court or commission to compel connecting carriers to unite in a joint tariff for interstate traffic.[17] However, under the act as presently amended, 49 U.S.C.A. § 15 (3), the interstate commerce commission has the power to establish joint classifications and joint rates as the maximum to be charged, and prescribe the division of such rates whenever the carriers themselves shall have refused or neglected to establish voluntarily such joint rates.[18]

Where connecting carriers make a joint rate on interstate shipments, each carrier is brought within the scope of the Interstate Commerce Act and rendered responsible for the rate so made without regard to the proportion thereof received for its own service.[19]

Carriers subject to the Interstate Commerce Act cannot make a joint rate with an ocean carrier, but the transportation within the country must be treat-

8. Ga.—Hill v. Wadley Southern Ry. Co., 57 S.E. 795, 128 Ga. 705.

9. Va.—Norfolk & W. Ry. Co. v. Commonwealth ex rel. Mathieson Alkali Works, 174 S.E. 85, 162 Va. 314.

10. U.S.—Georgia S. & F. Ry. Co. v. Georgia Public Service Commission, D.C.Ga., 289 F. 878.

11. U.S.—Union Pac. R. Co. v. U. S., Ct.Cl., 6 S.Ct. 772, 117 U.S. 355, 29 L.Ed. 920.

12. Miss.—Illinois Cent. R. Co. v. Mississippi Cotton Seed Products Co., 148 So. 371, 166 Miss. 579.

13. U.S.—Illinois Cent. R. Co. v. Brooks-Scanlon Co., La., 241 F. 445, 154 C.C.A. 277.
10 C.J. p. 428 note 74.

14. U.S.—Southern Pac. Co. v. Interstate Commerce Commn., Cal., 26 S.Ct. 330, 200 U.S. 536, 50 L.Ed. 585.
10 C.J. p. 428 note 75.

15. U.S.—Express Cases, Ark., 6 S.Ct. 542, 628, 117 U.S. 1, 29 L.Ed. 791

16. U.S.—Southern Pac. Co. v. Interstate Commerce Commn., Cal., 26 S.Ct. 330, 200 U.S. 536, 50 L.Ed. 585.
10 C.J. p. 428 note 80.

17. U.S.—U.S. v. Union Pac. Co., C.C.Utah, 188 F. 102, reversed on other grounds 33 S.Ct. 53, 226 U.S. 61, 57 L.Ed. 124.
10 C.J. p. 428 note 79.

18. U.S.—U.S. v. American Ry. Express Co., Ga., 44 S.Ct. 560, 265 U.S. 425, 68 L.Ed. 1087, reversing American Ry. Express Co. v. U.S., D.C., 293 F. 31—St. Louis Southwestern Ry. Co. v. U.S., Ky., 38 S.Ct. 49, 245 U.S. 136, 62 L.Ed. 199, affirming, D.C., 234 F. 668.

Failure to fix division

An order establishing an additional route over connecting express lines is not subject to objection, because it does not fix the division of rates as between the express companies.—American Ry. Express Co. v. U.S., D.C.Ga., 293 F. 31, reversed on other grounds U.S. v. American Ry. Express Co., 44 S.Ct. 560, 265 U.S. 425, 68 L.Ed. 1087.

19. U.S. — Interstate Commerce Commn. v. Louisville, etc., R. Co., C.C.Ga., 118 F. 613.

ed as a separate transportation, subject to the terms of the act.[20]

As noted in § 302 (4) infra, joint rates agreed to by the carriers can become legally operative only by being filed and published as required by the Interstate Commerce Act.

(3) Under State Statutes

State statutes may authorize the establishment and regulation of joint rates for intra-state shipments by a state regulatory commission.

Under statutory provisions granting it such power a state commission may have the authority to establish joint rates for intra-state shipments over connecting lines,[21] provided the prescribed procedure has been pursued.[22] Commission orders relative to joint rates have been sustained as against the objection that they were an abuse of police power,[23] confiscatory,[24] or too uncertain.[25]

It has been held that, although the authorizing statute contains no express requirement to that effect, to justify the establishment of joint rates it must be made to appear that the lines affected by the rates are each common carriers having physical connections, and that there is an existing public necessity for through routes and joint rates between stations within the state on the lines of the connecting carriers. While it is not requisite that an absolute and indispensable necessity should be shown, it must at least appear that the reasonable accommodation and convenience of shippers and receivers of freight necessitates the establishment of such joint rates; and, if there is no sufficient evidence to show the existence of such a public necessity, an order for the establishment of joint rates cannot be sustained;[26] but a finding of public necessity may be sustained by the fact that only one person asked for the joint rate, as the existence of public necessity is not necessarily determined by the number of people asking for the rate.[27]

Proper statutes may permit the establishment of joint rates between connecting lines separately owned,[28] between a steam railroad and an interurban,[29] or between a lumber company carrier authorized to act as a common carrier and a standard carrier;[30] but it has been held that a common carrier cannot be compelled to adopt joint rates with a private carrier.[31] Where one carrier owns and operates

20. U.S.—Pacific Mail S. S. Co. v. Western Pac. R. Co., Cal., 251 F. 218, 163 C.C.A. 374.
Wis.—Waters v. Pfister & Vogel Leather Co., 186 N.W. 173, 176 Wis. 16.

21. Ill.—State Public Utilities Commission v. Toledo, St. L. & W. R. Co., 122 N.E. 158, 286 Ill. 582.
Ind.—Indiana Harbor Belt R. Co. v. Public Service Commission of Indiana, 121 N.E. 540, 187 Ind. 660
N.M.—San Juan Coal & Coke Co. v. Santa Fé, S. J. & N. Ry. Co., 2 P. 2d 305, 35 N.M. 512.
N.C.—Corporation Commission v. Atlantic Coast Line R. Co., 121 S.E. 767, 187 N.C. 424.
Pa.—Lehigh Valley Transit Co. v. Public Service Commission, 78 Pa. Super. 105.
10 C.J. p. 429 note 84.

Intra-city shipments
A statute authorizing the commission to fix joint rates between points in the statute empowers it to fix a joint rate, although the services of the intermediate and delivering carriers are rendered wholly within the limits of one city.—State Public Utilities Commission v. Chicago & N. W. Ry. Co., 116 N.E. 620, 279 Ill. 110.

Statute valid
A state statute authorizing the railroad commission to order railroads to establish through routes and empowering the commission to establish joint rates, and to order that carload freight shall be carried by a different railroad without being transferred from the original cars, is not in violation of any federal or state constitutional provision, and an order of the commission establishing a joint rate for a given service and apportioning the rate between connecting carriers, leaving to them the practicable way of complying with the order either by sending the loaded cars through to their destination or by transferring the load from the cars of one carrier to those of the other at the connecting point, is not invalid as beyond the power of the commission to make.—State v. State Public Service Commn., 137 P. 132, 76 Wash. 625.

22. U.S.—American Ry. Express Co. v. Railroad Commission of Georgia, D.C.Ga., 274 F. 649.

Notice to carriers
Where an express company filed a schedule containing joint rates with another, and the public utility commission changed provisions of the schedule as to joint rates, making them more extensive, in the absence of thirty days' notice to carriers, as provided by statute, the joint rates are invalid.—American Ry. Express Co. v. Railroad Commission of Georgia, D.C.Ga., 274 F. 649

23. Wash.—State v. Public Service Commission of Washington, 163 P. 1143, 95 Wash. 376, affirmed State v. Public Service Commission, 166 P. 793, 95 Wash. 376.

24. Ill.—State Public Utilities Commission v. Chicago & N. W. Ry. Co., 116 N.E. 620, 279 Ill. 110.
Or.—Valley & Siletz R. Co. v. Thomas, 48 P.2d 358, 151 Or. 80.

25. U.S.—American Ry. Express Co. v. Railroad Commission of Georgia, D.C.Ga., 274 F. 649.

26. Ind.—Indiana Harbor Belt R. Co. v. Public Service Commission of Indiana, 121 N.E. 540, 187 Ind. 660.

Evidence held to show that through rates and joint rates between short freight line and through railroad were not necessary to accommodate reasonable requirements of shippers.—Public Service Commission of Indiana v. Cleveland, C., C. & St. L. Ry. Co., 121 N.E. 116, 188 Ind. 197.

27. Wash.—State v. Public Service Commission of Washington, 163 P. 1143, 95 Wash. 376, affirmed State v. Public Service Commission, 166 P. 793, 95 Wash. 376.

28. Ohio.—Hocking Valley Ry. Co. v. Public Utilities Commission, 140 N.E. 667, 107 Ohio St. 43.
Or.—Oregon-Washington R. & Nav. Co. v. Corey, 252 P. 955, 120 Or. 517.

29. Ohio.—Hocking Valley Ry. Co. v. Public Utilities Commission, 140 N.E. 667, 107 Ohio St. 43.

30. N.C.—Raleigh Granite Co. v. Atlantic Coast Line R. Co., 121 S.E. 767, 187 N.C. 424.

31. Wash.—State v. Kuykendall, 228

another carrier as a part of its system and as a continuous line so that they are in effect but one road, a commission has been held without power to establish joint rates between such carriers;[32] but the establishment of a joint rate has been held authorized where the two carriers had separate directors and were operated separately, although one carrier owned all the stock and bonds of the other,[33] and, where the relationship between the two carriers is one of cooperation merely, the establishment of a joint rate has been held authorized.[34]

Where one carrier has united with another in a joint through traffic agreement, under which one carrier carries through shipments over the lines of the other, the connecting roads form practically a new and independent continuous line,[35] and a statute prescribing a general tariff as to all shipments over one continuous line, whether owned by two or more companies, or whether the line be created by joint traffic agreement, may constitutionally apply to a carrier so using the lines of another, and a statute fixing joint rates has no application to such a situation.[36] Also, where single-line and joint-line scales of rates have been established, two carriers under common management and control must apply the single-line scale of rates rather than the joint-line scale of rates.[37] On the other hand, a commission has been held without power, under the particular statutory and constitutional provisions involved, to prescribe a single continuous rate as to joint intra-state freight traffic moving over two connecting lines, owned and operated separately by different companies, merely because one company owned a controlling interest in the stock of the other.[38]

Method of fixing amount. It has been held that, under a statute authorizing a commission to establish joint rates, the amount of such a rate may be fixed by deducting some prescribed per centum from each of the local rates and adding together the two rates thus reduced, although such method is not exclusive.[39]

Modification or abrogation. A joint rate which has been put into effect in compliance with an order of the state commission cannot be modified or abrogated on an ex parte application by one of the carriers.[40]

c. Division and Apportionment

Joint rates are usually divided or apportioned among the participating carriers in accordance with the rate of division or apportionment agreed on by them or the divisions ordered by a duly authorized commission after proper proceedings have been entertained.

As a general rule, the participating carriers are entitled to have a joint rate divided or apportioned among them in accordance with the terms of their agreement,[41] or, in the absence of agreement, in accordance with a fair, just, and equitable division, so that each will receive a fair and reasonable compensation in proportion to the amount and cost of service rendered by it.[42] A carrier is entitled to participate in the division of a joint through rate over its own line, although the transportation involves a carriage of its own property.[43]

In view of the provisions of § 1 (4) of the Interstate Commerce Act, 49 U.S.C.A. § 1 (4), interstate carriers have the right and duty to establish just, reasonable, and equitable divisions of joint rates by agreement.[44] If the parties have thus established a division they are entitled to have it adhered to so long as it has not been readjusted by

P. 853, 130 Wash. 674, affirmed 232 P. 695, 132 Wash. 700.

32. Mich.—Pontiac, O. & N. R. Co. v. Michigan Railroad Commission, 168 N.W. 927, 203 Mich. 258, certiorari denied 39 S.Ct. 136, 248 U.S. 584, 63 L.Ed. 432.
Minn.—State v. Chicago & N. W. Ry. Co., 158 N.W. 627, 133 Minn. 413.

33. Ga.—Hill v. Wadley Southern Ry. Co., 57 S.E. 795, 128 Ga. 705

34. Mich.—Pontiac, O. & N. R. Co. v. Michigan Railroad Commission, 168 N.W. 927, 203 Mich. 258, certiorari denied 39 S.Ct. 136, 248 U.S. 584, 63 L.Ed. 432.

35. Minn.—State v. Chicago, M. & St. P. Ry. Co., 165 N.W. 869, 139 Minn. 55.

36. Minn.—State v. Chicago, M. & St. P. Ry. Co., supra.

37. Ala.—Western Ry. of Alabama v. Montgomery County, 153 So. 622, 228 Ala. 426.

38. U.S.—Georgia S. & F. Ry. Co. v. Georgia Public Service Commission, D.C.Ga., 289 F. 878.

39. Ga.—Hill v. Wadley Southern Ry. Co., 57 S.E. 795, 128 Ga. 705.

40. Neb.—Platte Sand & Gravel Co. v. Chicago, B. & Q. R. Co., 238 N.W. 766, 121 Neb. 855

41. U.S.—Alton R. Co. v. United States, Ill., 53 S.Ct. 124, 287 U.S. 229, 77 L.Ed. 275, reversing, D.C., 58 F.2d 399—Northern Pac. Terminal Co. of Oregon v. Spokane, P. & S. Ry., C.C.A.Or., 79 F.2d 773.
Colo.—Denver & S. L. R. Co. v. Chicago, B. & Q. R. Co., 171 P. 74, 64 Colo. 229

42. U.S.—Atlantic Coast Line R. Co. v. Delaware & H. R. Corp., C.C.A.N.Y., 86 F.2d 721—Abilene & S. Ry. Co. v. U. S., D.C.Kan., 288 F. 102, affirmed U. S. v. Abilene & S. R. Co., 44 S.Ct. 565, 265 U.S. 274, 68 L.Ed. 1016—Atlantic Coast Line R. Co. v. Baltimore & O. R. Co., D.C.Md., 16 F.Supp. 647—Atlantic Coast Line R. Co. v. Pennsylvania R. Co., D.C.Pa., 12 F.Supp. 720
Ga.—Hill v. Wadley Southern Ry. Co., 57 S.E. 795, 128 Ga. 705.
Tex.—Railroad Commission of Texas v. Rio Grande & E. P. Ry. Co., 230 S.W. 974, 111 Tex. 178, reversing Rio Grande & E. P. Ry. Co. v. Railroad Commission of Texas, Civ.App., 175 S.W. 1116.

43. Tex.—Railroad Commission of Texas v. Rio Grande & E. R. Ry. Co., supra

44. U.S.—Abilene & S. Ry. Co. v. U. S., D.C.Kan., 288 F. 102, affirmed U. S. v. Abilene & S. R. Co., 44 S.Ct. 565, 265 U.S. 274, 68 L.Ed. 1016.

them or by the interstate commerce commission,[45] and such an agreed division need not be filed with the commission in order to be effective if the commission has not undertaken to impose such a requirement.[46] It is proper and well established practice among carriers participating in a joint through haul to allow the carrier originating the business an advantage in such distributions or "divisions," for creating, so to speak, the traffic.[47]

Under § 15 (6) of the Act, 49 U.S.C.A. § 15 (6), the interstate commerce commission has the power, after full hearing on complaint or on its own initiative, to prescribe by order the just, reasonable, and equitable divisions to be received by the participating carriers, whenever it is of opinion that the applicable divisions are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers.[48] Even prior to the enactment of this provision, it was held that the commission had the power to prescribe the allowance which trunk lines might make to tap lines out of joint rates,[49] but a tap line, in order to be entitled to share in a division of joint rates, must be a common carrier, and not a mere plant facility.[50] As the law presumes that the participating carriers performed their duty to agree on divisions and that their divisions were just and reasonable,[51] at least where the conditions remain unchanged,[52] the commission has no power to prescribe new divisions unless, after full hearing, it is of opinion that the existing divisions are unjust, and there is sufficient competent evidence presented to sustain such conclusion,[53] but a readjustment of established rates may be justified by a substantial change in conditions.[54]

By reason of state statute, state regulatory commissions often have the power to prescribe the apportionment or division of intra-state joint rates,[55]

45. U S—Alton R. Co. v. United States, Ill., 53 S.Ct 124, 287 U.S 229, 77 L Ed. 275, reversing, D C., 58 F 2d 399—Atlantic Coast Line R. Co v. Boston & M. R. Co., D C. Mass, 18 F Supp. 886.

Attempted reduction by part of carriers

Connecting carriers could not reduce intermediate carrier's divisions over its objection.—Alton R Co. v U S., Ill., 53 S Ct. 124, 287 U.S. 229, 77 L.Ed. 275, reversing, D C., 58 F 2d 399.

46. U S—Alton R. Co. v. U. S., D C Ill, 58 F 2d 399, reversed on other grounds 53 S Ct. 124, 287 U.S. 229, 77 L Ed. 275.

47. Tenn—Carolina Spruce Co. v. Black Mountain R. Co, 201 S.W. 154, 139 Tenn. 137, writ of error dismissed 39 S.Ct. 184, 248 U.S. 597, 63 L.Ed. 439

48. U.S.—U. S v. Abilene & S. Ry Co., Kan, 44 S Ct. 565, 265 U.S. 274, 68 L.Ed. 1016, affirming, D C., Abilene & S. Ry Co v. U S., 288 F. 102—Akron, C. & Y Ry. Co v U. S, D C N Y., 282 F. 306, affirmed 43 S.Ct 270, 261 U S. 184, 67 L Ed 605.

49. U S.—O'Keefe v U. S., La, 36 S Ct 313, 240 U S. 294, 60 L Ed. 651.
10 C.J p 429 note 83.

50. U S—St Louis Southwestern Ry. Co. v. S. H. Bolinger & Co, C.C A La, 279 F. 564.

51. U S—Abilene & S Ry. Co. v. U. S., D C Kan., 288 F. 102, affirmed U. S. v Abilene & S. R Co., 44 S Ct 565, 265 U.S. 274, 68 L.Ed. 1016.

52. U S—Akron, C. & Y Ry Co v U. S., D C.N.Y., 282 F. 306, affirmed 43 S Ct. 270, 261 U.S. 184, 67 L Ed. 605.

53. U S—Baltimore & O. R. Co. v U S., Va, 56 S Ct 797, 298 U S 349, 80 L.Ed 1209, affirming, D C, 9 F.Supp. 181—Abilene & S Ry Co. v. U S., D C Kan, 288 F. 102, affirmed U S v. Abilene & S R. Co., 44 S.Ct. 565, 265 U.S. 274, 68 L.Ed. 1016.

Insufficient evidence to show unjustness

(1) Exhibits at a hearing on the division of joint rates, which showed that the complaining carrier received, under the existing division, more per ton mile than the other carriers, without showing any extra service rendered by that carrier, or any ground for complaint, except that its revenues were insufficient to meet its operating expenses, did not alone show that the divisions of joint rates were unjust, so as to sustain an order of the commission prescribing new divisions.—Abilene & S. Ry. Co v. U. S, D C Kan, 288 F. 102, affirmed U. S v. Abilene & S. R. Co, 44 S.Ct. 565, 265 U S. 274, 68 L Ed 1016.

(2) Annual reports by connecting carriers to the interstate commerce commission, which showed that the connecting carriers all made a profit in their operation, while the carrier which objected to the division of the rates was operated at a loss, but which were based on total revenue, both freight and passenger, and joint and local, and showed that the objecting carrier received more per ton mile than any of the connecting carriers, and more per car mile and per train mile than some of the connecting carriers, did not show that the divisions were unjust—Abilene & S Ry. Co. v. U. S., supra.

Sufficiency of typical evidence

(1) Under § 15(6), the commission is authorized to base findings in respect of each division of each rate of every carrier in a particular group upon evidence typical in character and ample in quantity, as it must be assumed that congress knew of the practice of the commission to adjudicate comprehensively on substantially all rates in a large territory and knew that to require specific evidence and separate adjudication respecting each division of each rate would be tantamount to a denial of relief—Akron, C & Y Ry Co. v. U. S, N Y, 43 S Ct. 270, 261 U.S 184, 67 L.Ed. 605, affirming, D C., 282 F. 306.

(2) The Interstate Commerce Act, as thus construed, is not unconstitutional—Akron, C. & Y. Ry. Co v. U. S, supra.

(3) However, evidence as to averages or the aggregate traffic is insufficient—U S v Abilene & S. R. Co., Kan, 44 S Ct 565, 265 U S 274, 68 L Ed. 1016, affirming, D.C., Abilene & S. Ry Co. v. U. S., 288 F 102

54. U.S—Akron, C. & Y. Ry Co v. U S, D.C N.Y, 282 F. 306, affirmed 43 S.Ct 270, 261 U S. 184, 67 L. Ed 605

55. U S—Backus-Brooks Co v. Northern Pacific Ry, C C A Minn., 21 F.2d 4, certiorari denied 48 S. Ct. 120, 275 U S 562, 72 L Ed. 427—American Ry Express Co. v. Railroad Commission of Georgia, D C Ga, 274 F 649.
Colo.—Denver & S L R Co v Chicago, B & Q. R. Co., 171 P 74, 64 Colo. 229.
N.M—San Juan Coal & Coke Co. v. Santa Fé, S J. & N. Ry. Co., 2 P 2d 305, 35 N M. 512—San Juan Coal & Coke Co. v. Santa Fé, S.

provided all statutory restrictions and limitations, such as those requiring proper proceedings and due hearing, have fully been complied with.[56] A statute providing that the court reviewing an order of the commission relative to the division of rates shall enter judgment either affirming, setting aside, or modifying the order of the commission gives the court no authority to fix divisions, as that is entirely a rate-making function within the jurisdiction of the commission.[57]

Whether by reason of the provisions of the statutes involved, or otherwise, it is usually deemed requisite that a commission's order of division or apportionment be a just and reasonable one in view of all the factors and circumstances properly to be considered,[58] and that it be supported by sufficient competent evidence,[59] but the party attacking a division order has the burden of showing that it is unjust and unreasonable.[60] By express provision, the interstate commerce commission is required, in prescribing and determining the divisions of joint rates, to give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for, and used in, the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate.[61] While the mileage covered by each carrier is an important factor which may and must be considered,[62] the division need not necessarily be in

J & N. Ry. Co., 291 P. 920, 35 N. M. 189.

Tex.—Railroad Commission of Texas v. Rio Grande & E. P. Ry. Co., 230 S.W. 974, 111 Tex. 178, reversing Rio Grande & E. P. Ry. Co. v. Railroad Commission of Texas, Civ. App., 175 S.W. 1116.

Implied authorization

State statute authorizing state railroad and warehouse commission to fix joint rates was held by implication to authorize commission to fix division of such rates.—Backus-Brooks Co. v. Northern Pac. Ry. Co., C.C.A. Minn., 21 F.2d 4, certiorari denied 48 S.Ct. 120, 275 U.S. 562, 72 L. Ed. 427.

56. U.S.—American Ry. Express Co. v. Railroad Commission of Georgia, D.C.Ga., 274 F. 649.

57. Colo.—Denver & S. L. R. Co. v. Chicago, B. & Q. R. Co., 171 P. 74, 64 Colo. 229.

58. U.S.—Baltimore & O. R. Co. v. U. S., Va., 56 S.Ct. 797, 298 U.S. 349, 80 L.Ed. 1209, affirming, D. C., 9 F.Supp. 181.

Colo.—Denver & S. L. R. Co. v. Chicago, B. & Q. R. Co., 171 P. 74, 64 Colo. 229.

Division held unreasonable

(1) A division of freight rates between railroads by a public utilities commission that gives far less than the average ton-mile rate on the through haul to the railroad that has necessarily the highest ton-mile cost is unjust and unreasonable.—Denver & S. L. R. Co. v. Chicago, B. & Q. R. Co., 171 P. 74, 64 Colo. 229.

(2) In making joint rates between express companies, a public utility commission may not require one express company to make short hauls for a pro rata share of the joint rate, since to do so would be to require the carrier making the short haul to render service for an unjust and unreasonable rate.—American Ry. Express Co. v. Railroad Commission of Georgia, D.C.Ga., 274 F. 649.

Division order held just and reasonable

Where a railroad commission established a joint through rate from one point to another, and where the terminal carrier purchased coal at the point of commencement for shipment between such points without an agreement with initial carrier as to division of the through rate, the commission's order, dividing the through rate for shipment of such coal in proportion to the local rates of the carriers, was valid, as against contention that terminal railroad was not entitled to a revenue prorate for hauling its own coal over its own line.—Texas-Mexican Ry. Co. v. Rio Grande & E. P. Ry. Co., Tex., 231 S.W. 308, reversing in part and affirming in part Rio Grande & E. P. Ry. Co. v. Texas-Mexican Ry. Co., Civ. App., 173 S.W. 236.—Railroad Commission of Texas v. Rio Grande & E. P. Ry. Co., 230 S.W. 974, 111 Tex. 178, reversing Rio Grande & E. P. Ry. Co. v. Railroad Commission of Texas, Civ. App., 175 S.W. 1116.

59. U.S.—Baltimore & O. R. Co. v. U. S., Va., 56 S.Ct. 797, 298 U.S. 349, 80 L.Ed. 1209, affirming, D.C., 9 F.Supp. 181.

Colo.—Chicago, R. I. & P. Ry. Co. v. Public Utilities Commission of Colorado, 171 P. 86, 64 Colo. 263.—Denver & S. L. R. Co. v. Chicago, B. & Q. R. Co., 171 P. 74, 64 Colo. 229.

Consideration of local rates not offered in evidence held improper.—Denver & S. L. R. Co. v. Chicago, B. & Q. R. Co., 171 P. 74, 64 Colo. 229.

Evidence held sufficient to sustain findings of commission fixing division of coal rates between petitioner and initial carrier on same basis as that for division of rates between other railroad companies and initial carrier.—Chicago R. I. & P. Ry. Co. v. Public Utilities Commission of Colorado, 171 P. 86, 64 Colo. 263.

60. U.S.—Baltimore & O. R. Co. v. U. S., Va., 56 S.Ct. 797, 298 U.S. 349, 80 L.Ed. 1209, affirming, D.C., 9 F.Supp. 181.

Tex.—Railroad Commission of Texas v. Rio Grande & E. P. Ry. Co., 230 S.W. 974, 111 Tex. 178, reversing Rio Grande & E. P. Ry. Co. v. Railroad Commission of Texas, Civ. App., 175 S.W. 1116.

61. U.S.—Baltimore & O. R. Co. v. U. S., Va., 56 S.Ct. 797, 298 U.S. 349, 80 L.Ed. 1209, affirming, D.C., 9 F.Supp. 181.—U. S. v. Abilene & S. Ry. Co., Kan., 44 S.Ct. 565, 265 U.S. 274, 68 L.Ed. 1016, affirming, D.C., Abilene & S. Ry. Co. v. U. S., 288 F. 102.

Construction of provision

This provision of the Interstate Commerce Act § 15 (6), must be construed as not limited to the paragraph relating to authority to prescribe divisions of joint rates, but to the entire section, so that some of the elements therein mentioned, which are immaterial on the division of the rates, are not to be considered on that issue, but on issues arising under other paragraphs.—Abilene & S. Ry. Co. v. U. S., D.C.Kan., 288 F. 102, affirmed U. S. v. Abilene & S. R. Co., 44 S.Ct. 565, 265 U.S. 274, 68 L. Ed. 1016.

62. Colo.—Denver & S. L. R. Co. v. Chicago, B. & Q. R. Co., 171 P. 74, 64 Colo. 229.

proportion thereto if there are other factors which would render a division in proportion to mileage inequitable.[63] Other important factors which may and should be considered are the services rendered by each carrier,[64] their respective expenses or costs of transportation,[65] the strategic position of the road of one of the carriers,[66] and the topography of the land[67] and the density of the traffic[68] in the area covered by a particular carrier's line. Also, it has been held that, in view of the provisions of the Interstate Commerce Act, the interstate commerce commission need not make the division solely on the basis of the relative amount and cost of service, but that it may, in the public interest, take into consideration the financial needs of a weaker road, and give it a larger division than justice would seem to suggest, in order to maintain it in effective operation as part of an adequate transportation system, provided the share left to the other carriers is adequate to avoid a confiscatory result;[69] and that it may be just to give a prosperous carrier a smaller portion of an increased rate than of the original rate.[70] The fact that the act, as thus construed, permits the commission to consider the needs of particular carriers does not render it unconstitutional on the ground that it deprives carriers of their just share of the joint rate, as it is for the commission to determine what is just, reasonable, and equitable.[71] A participating carrier cannot complain of the commission's consideration of a particular condition or factor which it at the same time relies on to justify another division in its favor.[72] On the other hand, as a carrier may voluntarily agree to a division which it could not be required to accept,[73] it is erroneous to take into consideration a division previously agreed to by the carriers,[74] at least after a deduction of the joint rate,[75] and a carrier's acceptance of a prior division of rates, based on agreement, is not conclusive evidence of a division ordered by the commission after it reduced the joint through rate on the ground that it was too high.[76] It has been held that the relative number of cars furnished by the respective carriers on through hauls is not a factor to be considered in fixing a division of the joint rates, as such matter is one which is to be adjusted separately; and natural advantages of one of the carriers should not be made a basis for discriminating against it in the division.[77]

d. Actions or Proceedings for Recovery or Accounting

Except in so far as the remedy has been changed or modified by statute, a participating carrier may bring an action to recover its share of a joint rate, or, if the division has not been agreed on or prescribed, it may maintain a bill for an accounting, and a collecting carrier which has paid another carrier more than the share to which the latter is entitled may maintain an action to recover the overpayment so made.

If the carrier collecting a joint rate or charge fails or refuses to pay another participating carrier its proper or just proportion thereof, the latter may, as a general rule, bring an action for recovery or accounting;[78] and it has been held that, since the awarding of reparation for past unjust divisions is a judicial function, a proceeding to obtain such relief is not within the jurisdiction of a state regulatory commission.[79] In a suit by one carrier against another for an accounting of joint rates collected by the latter, the jurisdiction invoked is that of a court

63. U.S.—Atlantic Coast Line R Co. v. Baltimore & O. R. Co, D.C.Md., 16 F Supp. 647.

64. Colo.—Denver & S. L. R. Co. v. Chicago, B & Q. R. Co, 171 P. 74, 64 Colo. 229.

65. U.S.—Atlantic Coast Line R. Co. v. Baltimore & O. R. Co, D.C Md, 16 F. Supp. 647.
Colo.—Denver & S. L. R. Co. v. Chicago, B. & Q. R. Co., 171 P. 74, 64 Colo. 229.

66. Colo.—Denver & S. L. R. Co v Chicago, B. & Q. R. Co, supra.

67. U.S.—Atlantic Coast Line R. Co. v. Baltimore & O. R. Co., D.C.Md., 16 F Supp. 647.

68. U.S—Atlantic Coast Line R Co v. Baltimore & O. R. Co., supra.

69. U.S—U. S v. Abilene & S Ry Co., Kan, 44 S Ct. 565, 265 U.S 274, 68 L Ed 1016, affirming, D.C., Abilene & S Ry. Co. v. U. S., 288 F 102—Akron, C. & Y Ry. Co. v. U. S., N.Y., 43 S Ct. 270, 261 U.S. 184, 67 L.Ed. 605, affirming, D.C, 282 F. 306.

70. U.S.—Akron, C. & Y. Ry. Co. v. U. S, supra.

Supplement to increase order
Where the interstate commerce commission, at all times having the special needs of New England roads before it, granted an increase in rates to all roads in the Eastern group, and thereafter made an order increasing the share of New England roads in joint rates on traffic between New England and other parts of the country, the order may properly be deemed a supplement to, or modification of, the order granting the increase, and the fact that two orders, instead of one, were made, is of no legal significance.—Akron, C & Y Ry Co. v. U. S, N Y, 43 S.Ct. 270, 261 U S. 184, 67 L Ed. 605, affirming, D.C., 282 F. 306.

71. U.S.—Akron, C. & Y. Ry. Co. v U. S., supra.

72. Colo.—Denver & S. L. R. Co. v. Chicago, B. & Q R. Co., 171 P. 74, 64 Colo 229.

73. U S.—Baltimore & O. R. Co v. U. S, Va., 56 S Ct. 797, 293 U.S. 349, 80 L Ed 1209, affirming, D.C, 9 F Supp. 181.
Colo—Denver & S L. R Co. v. Chicago, B & Q. R Co., 171 P 74, 64 Colo 229

74. Colo.—Denver & S L. R Co. v. Chicago, B. & Q. R. Co, supra.

75. Colo—Denver & S. L. R Co. v. Chicago, B & Q R. Co, supra.

76. Colo—Denver & S L R Co v. Chicago, B. & Q. R Co., supra.

77. Colo.—Denver & S. L. R Co v. Chicago, B. & Q R Co., supra.

78. U.S—Atlantic Coast Line R Co. v. Delaware & H. R Corp, C C A N Y., 86 F 2d 721—Atlantic Coast Line R Co v Boston & M. R. Co., D C Mass, 18 F.Supp. 886

79. Ill—Marion & Eastern R. Co. v Illinois Cent. R. Co., 245 Ill App. 83, certiorari denied 48 S Ct. 320, 276 U.S. 626, 72 L.Ed. 738.

of equity to enforce a fair account from one who has received money for another, or one who has engaged in a joint enterprise with another and collected more than his share of the profits, and, except so far as prevented by statute, the principles of equity used in such situations, or used at law in actions for money had and received, are applicable.[80]

While the right to enforce a binding division agreed to by the parties is not affected thereby,[81] according to some authority, the common-law remedy for an accounting to obtain a just division, where no division has been agreed on or established, is supplanted or modified by the Interstate Commerce Act.[82]

It has thus been held that a court will not entertain a suit by a participating carrier for an equitable division, unless and until the interstate commerce commission has made a finding and determination of the question involved.[83] Furthermore, in view of the provisions of § 15(6) of the Act, 49 U.S.C.A. § 15(6), limiting the power of the commission to adjust divisions retroactively to the period subsequent to the filing of the complaint or the making of the order of investigation, it has been held that, as to charges collected prior to the date of the filing of the complaint or the making of the order for investigation, a participating carrier is without a remedy by which to attack a division made by the collecting carrier as unjust or unreasonable.[84] On the other hand, it has been declared that the right of a connecting carrier to its fair share of a joint rate established by the interstate commerce commission is an equitable right which exists wholly independent of the Interstate Commerce Act, and is neither conferred nor taken away by it, so that the enforcement of such right is in no way dependent on a prior determination by the commission as to what constitutes the carrier's fair share,[85] and that a bill for accounting will lie where the commission has prescribed no division or apportionment.[86] Also, it has been suggested that, after the commission has fixed on a just and reasonable division, the courts may award relief as to charges collected prior to the filing of the complaint or the order for investigation;[87] and that in a suit to obtain such relief the court may apply the determination of the commission as a basis of division.[88] An action for accounting, maintainable under the view expressed by these latter cases, has been held not governed by the limitation provisions of the Interstate Commerce Act relative to actions for charges, overcharges, or damages,[89] but rather by the state statute of limitations,[90] which does not commence to run until action has been taken by the commission with respect to the proper division;[91] and it has been held that such a suit is not barred by laches apparent on the face of the bill.[92] A bill of this character is not maintainable if other participating carriers are not made parties and no reason is given for their absence;[93] but additional collecting carriers are not indispensable parties where no relief is asked against them and they are not subject to service of process from the court in which the suit is brought;[94] and the fact that some of the traffic moved over the lines of carriers in addition to the complaining carrier does not require a dismissal of the bill for defect in parties, since the objection goes to only part of the bill.[95] In addition the courts have, in connection with such proceedings, passed on questions relating to the burden of proof,[96] the admissibility[97] and weight and suffi-

80. U.S.—Morgenthau v Sugar Land Ry. Co, C.C.A.Tex, 83 F.2d 72.

81. U.S.—Atlantic Coast Line R Co v Boston & M R. Co., D.C.Mass, 18 F.Supp. 886.

82. U.S.—Atlantic Coast Line R. Co. v Delaware & H. R. Corp., C.C.A. N.Y, 86 F.2d 721.

83. U.S.—Atlantic Coast Line R Co. v Delaware & H R. Corp, supra—Atlantic Coast Line R. Co. v. Boston & M R. Co., D.C.Mass., 18 F. Supp. 886.

84. U.S.—Atlantic Coast Line R Co v Delaware & H. R Corp., C.C.A. N.Y., 86 F.2d 721.

85. U.S.—Atlantic Coast Line R Co. v. Pennsylvania R Co, D.C.Pa., 12 F.Supp. 720.

86. U.S.—Atlantic Coast Line R Co. v. Pennsylvania R Co., supra.

87. U.S.—Backus-Brooks Co. v. Northern Pac. R Co, C.C.A.Minn, 21 F.2d 4, 17—Atlantic Coast Line R Co v. Baltimore & O. R. Co., D.C.Md, 16 F.Supp 647

88. U.S.—Atlantic Coast Line R Co v. Baltimore & O. R. Co, supra.

89. U.S.—Atlantic Coast Line R. Co v. Baltimore & O R. Co., D.C.Md, 12 F.Supp. 711.

90. U.S.—Atlantic Coast Line R Co v. Baltimore & O R Co., D.C.Md, 12 F.Supp 711.

91. U.S.—Atlantic Coast Line R Co v. Baltimore & O. R. Co, D.C.Md., 12 F.Supp. 711.

92. U.S.—Atlantic Coast Line R. Co. v. Pennsylvania R. Co., D.C.Pa., 12 F.Supp. 720.

93. U.S.—Atlantic Coast Line R Co. v. Pennsylvania R. Co., supra.

94. U.S.—Atlantic Coast Line R Co. v. Baltimore & O. R. Co., D.C. Md., 12 F.Supp. 711.

95. U.S.—Atlantic Coast Line R. Co. v. Baltimore & O R. Co, supra.

96. **Inequitable retention by defendant**

Initial carrier suing delivering carrier for accounting and adjustment of joint rates collected by delivering carrier had burden to show that delivering carrier had retained moneys that equitably it was required to pay over to initial carrier—Atlantic Coast Line R Co. v Baltimore & O. R. Co., D.C.Md., 16 F.Supp. 647.

97. **Evidence held admissible**

In initial carrier's suit against delivering carrier for accounting and recovery of just division of joint rail rates for period prior to time interstate commerce commission had determined proper division, commission's divisional order was admissible evidence which court was required to consider, although commission's findings were not conclusive.—Atlantic

ciency[98] of evidence, and the allowance of interest on the share recovered by plaintiff.[99]

The declaration, in an action by a participating carrier to recover its share in accordance with a division made by a regulatory commission, must allege or show a fulfillment of all conditions prescribed by statute;[1] and, if the declaration is thus defective, no recovery can be had on the ground that plaintiff is entitled to just compensation for services performed.[2]

Where a collecting carrier has paid another carrier a division or share of the charges to which the latter is not lawfully entitled, the payment so made may be recovered back; and, if such a payment would be in violation of the Interstate Commerce Act, the right of recovery cannot be defeated on the ground that the payment was voluntarily made with full knowledge of all the facts; and it has been held that the right of recovery is not affected by the fact that the payment was voluntarily made with full knowledge of all the facts, because, if a carrier were permitted to make voluntary payments, the purposes of the Interstate Commerce Act would be defeated, or the carrier would be violating the duties enjoined on it as a "public corporation;" but, if plaintiff is not entitled to all the payments so made, it must prove its case by showing the amounts to which it is entitled.[3] In a suit to recover funds, which it is claimed were erroneously paid as a division, the question whether a railroad is a participating carrier so as to share in revenues with a common carrier under a switching tariff should be determined by the intention of the railroad as to where the common carrier movement is to end.[4]

§ 301. Pooling Arrangements

Pooling arrangements are prohibited both at common law and under the express provisions of the Interstate Commerce Act, although where it is in the interest of better public service, the interstate commerce commission may authorize a pooling agreement if assented to by all the carriers involved.

Independent of any statutory provision on the subject, it is very generally held that pooling arrangements entered into between competing railroad companies or other common carriers, the purpose of which is to suppress or limit competition between the contracting companies in respect of the traffic covered by the agreement and to establish rates without regard to their reasonableness, are against public policy and void.[5]

Under special legislation. The Interstate Commerce Act, 49 U.S.C.A. § 5(1), subject to an exception involving the approval of the commission, makes it unlawful for a carrier engaged in interstate commerce to enter into any contract, agreement, or to combine with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof, and in any case of an agreement for the pooling of freights each day of its continuance is made a separate offense. This statute applies to freight as distinguished from passenger traffic,[6] and prohibits either a distribution of property offered for transportation among different and competing railroads in proportions and on percentages previously agreed on, or a money pool whereby the aggregate or net proceeds of certain different and competing railroads are divided among them.[7] Any arrangement, verbal or otherwise, which has for its purpose and eventuates in the pooling of freights of different and competing railroads is within the prohibition of the act.[8]

Coast Line R. Co. v. Baltimore & O. R. Co., D.C.Md., 16 F.Supp. 647.

98. Evidence held sufficient to establish that amount of joint freight rates retained by delivering carrier was more than its fair, just, and equitable share as against initial carrier—Atlantic Coast Line R. Co. v. Baltimore & O. R. Co., D.C.Md., 16 F.Supp. 647.

99. Discretion of court

(1) Interest allowance to successful plaintiff carrier suing for just division of joint rail rates is discretionary and not as a matter of right—Atlantic Coast Line R. Co. v. Baltimore & O. R. Co., D.C.Md., 16 F.Supp. 647.

(2) In the exercise of such discretion plaintiff has been held entitled to interest on excess divisions retained by collecting carrier from dates several portions thereof were respectively payable.—Atlantic Coast Line R. Co. v. Baltimore & O. R. Co., supra.

1. U.S.—Marion & Eastern R. Co. v. Illinois Cent. R. Co., 245 Ill.App. 83, certiorari denied 48 S.Ct. 320, 276 U.S. 626, 72 L.Ed. 738.

2. U.S.—Marion & Eastern R. Co. v. Illinois Cent. R. Co., supra.

3. U.S.—Washington & C. Ry. Co. v. Mobile & O. R. Co., Ala., 255 F. 12, 166 C.C.A. 340, reversing, D.C., Mobile & O. R. Co. v. Washington & C. Ry. Co., 242 F. 531.

4. U.S.—Northern Pac. Terminal Co. of Oregon v. Spokane P. & S. Ry., C.C.A.Or., 79 F.2d 773.

Carrier held not "participating carrier"

Where railroad to which fuel oil was consigned had interchange track and unloading track on its own spur at point of designation named in bill of lading, designation in bill meant interchange track and common carrier movement ended there, since common carrier had no right to move over railroad's tracks beyond interchange track, and hence railroad was not "participating carrier" entitled to share in revenues pursuant to switching tariff.—Northern Pac. Terminal Co. of Oregon v. Spokane P. & S. Ry., C.C.A.Or., 79 F.2d 773.

5. La.—Texas, etc., R. Co. v. Southern Pacific R. Co., 6 So. 888, 41 La.Ann. 970, 17 Am.S.R. 445, affirmed 118 S.Ct. 10, 137 U.S. 48, 34 L.Ed. 614.
10 C.J. p. 429 note 85.

6. U.S.—Interstate Commerce Commission v. Southern Pac. Co., C.C.A.Cal., 132 F. 829.

7. U.S.—In re Pooling Freights, D.C.Tenn., 115 F. 588.

8. U.S.—In re Pooling Freights, supra.

A reserved right of routing shipments is not an illegal pooling, although the carrier promises fair treatment to connecting lines.[9]

The proviso in the act as amended authorizing the commission to permit pooling agreements if assented to by all the carriers involved does not require the assent of a carrier not a party to the proposed agreement.[10]

§ 302. Filing, Publication, and Posting of Rates

a. Interstate rates
b. Intra-state rates

a. Interstate Rates

(1) In general
(2) Requisites and sufficiency
(3) Operation and effect
(4) Joint rates

(1) In general

Under the Interstate Commerce Act, common carriers can establish interstate rates, and put them into effect, only by filing a proper and sufficient schedule with the interstate commerce commission and duly publishing the same; but a compliance with the requirement that copies of rate schedules be posted is not essential to the establishment of the rates.

Under the provisions of the Interstate Commerce Act common carriers are required to file with the interstate commerce commission their schedules of rates for interstate transportation of freight,[11] and also to publish or promulgate or distribute the same for the information and benefit of the public.[12] Rates or charges not properly filed and published in accordance with these requirements cannot be collected.[13] In fact, a carrier must refuse to accept freight for which there is no rate or charge filed and published as required,[14] and where it has received such freight it must return it to the shipper on demand.[15] The liability of a carrier for an injury to an interstate shipment is not limited where the schedule of rates, although filed with the interstate commerce commission, was not published at the point of shipment.[16]

Posting. The Interstate Commerce Act requires that copies of rates for interstate transportation, filed with the interstate commerce commission, shall be kept posted in public and conspicuous places in every station where freight is received for transportation, and a noncompliance with this requirement renders the carrier liable to a penalty. The purpose of this requirement is to afford special facilities to the public for ascertaining the rates actually in force.[17] Nevertheless, it is well settled that post-

9. U.S.—Southern Pac. Co. v. Interstate Commerce Commn., Cal., 26 S.Ct. 330, 200 U.S. 536, 50 L.Ed. 585.
10 C.J. p 429 note 89.

10. U.S.—Escanaba & Lake Superior R. Co. v. U. S., Mich., 58 S.Ct. 556, affirming, D.C., 21 F.Supp. 151.

Lessor of tracks
A railroad which contracted for use of its tracks by second railroad for carrying iron ore from certain mines was not a "carrier involved" in agreement between second railroad and third railroad for pooling iron ore traffic from such mines, to be carried over tracks of third railroad, and of receipts from interchange traffic with first railroad, within the Interstate Commerce Act respecting pooling agreements, and hence assent of first railroad to pooling agreement was unnecessary. Interstate Commerce Act § 5 (1), 49 U.S.C.A. § 5 (1).—Escanaba & Lake Superior R. Co. v. U. S., 58 S.Ct. 556, affirming 21 F.Supp. 151.

11. Ill.—Chicago & E. I. Ry. Co. v. Chicago Heights Terminal Transfer R. Co., 147 N.E. 666, 317 Ill. 65, error dismissed 46 S.Ct. 207, 270 U.S. 629, 70 L.Ed. 767.
Minn.—Schaff v. J. C. Famechon Co., 176 N.W. 197, 145 Minn. 108, error dismissed 42 S.Ct. 189, 258 U.S. 76, 66 L.Ed. 472.
10 C.J. p 429 note 91, p 430 note 97.

Shipment to foreign country
A shipment from the city of New York to Port au Prince in the republic of Haiti was not an interstate shipment, and the carrier was not required to file any tariff with the interstate commerce commission.—Achille Starace & Co. v. Raporel S. S. Line, 186 N.Y.S. 130, 114 Misc. 111.

Terminal railway
In view of Transportation Act § 400 par 3, amending Interstate Commerce Act § 1, where service rendered by terminal railway was that of common carrier, it was subject to rules and regulations to which common carriers are subject, including Interstate Commerce Act § 6, par 1, as amended by Act June 29, 1906, § 2 of which provides for filing schedule of rates, fares, and transportation charges.—Chicago & E. I. Ry. Co. v. Chicago Heights Terminal Transfer R. Co., 147 N.E. 666, 317 Ill. 65, error dismissed 46 S.Ct. 207, 270 U.S. 626, 70 L.Ed. 767.

12. U.S.—Swift & Co. v. U. S., C.C.A.Ill., 255 F. 291, 166 C.C.A. 461
Minn.—Schaff v. J. C. Famechon Co., 176 N.W. 197, 145 Minn. 108, error dismissed 42 S.Ct. 189, 258 U.S. 76, 66 L.Ed. 472.
10 C.J. p 429 note 91, p 430 note 97.

Purpose of requirement
The purpose of the statute in requiring such publication of rates is for the inspection, information, and advantage of the public.
U.S.—Swift & Co. v. U. S., Ill., 255 F. 291, 166 C.C.A. 461.
Minn.—Schaff v. J. C. Famechon Co., 176 N.W. 197, 145 Minn. 108, error dismissed 42 S.Ct. 189, 258 U.S. 76, 66 L.Ed. 472.
10 C.J. p 430 note 98

The publication intended by statute consists in promulgating and distributing the tariff in printed form preparatory to putting it into effect.—U. S. v. Miller, Ga., 32 S.Ct. 323, 223 U.S. 599, 56 L.Ed. 568.—10 C.J. p 430 note 97.

13. Va.—Norfolk Tidewater Terminals v. Norfolk & P. Belt Line R. Co., 195 S.E. 634.
10 C.J. p 429 note 92.

14. Tex.—Davis v. Bassett, Civ.App., 257 S.W. 601.—Payne v. Bassett, Civ.App., 235 S.W. 917.

15. Tex.—Davis v. Bassett, Civ.App., 257 S.W. 601.

16. Pa.—U. S. Horse Shoe Co. v. American Express Co., 95 A. 706, 250 Pa. 527.

17. U.S.—Swift & Co. v. U. S., C.C.A.Ill., 255 F. 291, 166 C.C.A. 461.
Ohio.—Lyman Perin & Co. v. Penn-

ing is not essential to the establishment of rates under the statute. Where a tariff of rates has been filed and published in accordance with the provisions of the statute, it is in force and operative notwithstanding a noncompliance by the carrier with the provisions requiring copies thereof to be posted.[18] While publication is a step toward establishing rates, posting is a duty arising out of the fact that they have been established.[19] The posting of copies of rates at a railroad station, where they are afterward torn down, is not a compliance with the act, it being no answer for their absence from public inspection that they have been removed.[20]

(2) Requisites and Sufficiency

The filed and published schedules of interstate rates and charges must be expressed in clear and plain terms, and must be framed and drawn in the manner, and contain all the information, required by the Interstate Commerce Act and the rules and regulations of the interstate commerce commission.

A carrier's filed and published schedules of interstate rates or charges must be expressed in clear and plain terms,[21] and must be framed in the manner,[22] and contain all the information,[23] required by the Interstate Commerce Act.

By express provisions of the act the schedules are required to show not only all the rates, fares, and charges for transportation between points on the carrier's own route,[24] but also between points on its own route and points on the route of any other carrier by rail, pipe line, or by water when a through route and a joint rate have been established,[25] and rates for transportation in commerce with foreign countries as well as transportation in commerce between the several states.[26] However, interstate rates to and from ports of entry must be published and filed as independent from ocean transportation, and classifications and schedules of inland carriers must be limited to inland transportation.[27]

The schedules must contain the classification of freight[28] and the rates[29] presently in force. The

sylvania R. Co., 194 N.E. 398, 48 Ohio App. 339.
10 C.J. p 432 note 28.

18. U.S.—Payne v. Clarke, D.C.Cal., 271 F. 525.
Ill.—Pennsylvania R. Co. v. Cunningham, 224 Ill.App. 584.
Ky.—Blackford v. St. Louis, I. M. & S. Ry. Co., 203 S.W. 867, 181 Ky. 70.
Mo.—Bush v. Miller, 216 S.W. 989, 205 Mo.App. 38.
Ohio.—Lyman Perin & Co. v. Pennsylvania R. Co., 194 N.E. 398, 48 Ohio App. 339.
S.C.—Southern Ry. Co. v. Wilmont Oil Mills, 89 S.E. 476, 105 S.C. 51
10 C.J. p 432 note 29.

19. U.S.—U. S. v. Miller, Ga., 32 S.Ct. 323, 223 U.S. 599, 56 L.Ed. 568

20. Mo.—Griffin v. Wabash R. Co., 91 S.W. 1015, 115 Mo.App. 549.

21. U.S.—Atlantic Coast Line R. Co. v. Atlantic Bridge Co., C.C.A.Fla., 57 F.2d 654, affirming, D.C., Atlantic Bridge Co. v. Atlantic Coast Line R. Co., 56 F.2d 163.

22. U.S.—Alton & S. R. R. v. U. S., D.C.Cal., 49 F.2d 414—Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & St. P. Ry. Co., D.C.Mo., 2 F.2d 291.

23. U.S.—Chandler v. Pennsylvania R. Co., C.C.A.Va., 11 F.2d 39, affirming, D.C., 9 F.2d 703—Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & St. P. Ry. Co., D.C.Mo., 2 F.2d 291.

24. Tex.—Davis v. Bassett, Civ.App., 257 S.W. 601.

25. U.S.—U. S. v. Munson S.S. Line, Md., 51 S.Ct. 360, 283 U.S. 43, 75 L.Ed. 830, affirming, C.C.A., 37 F.2d 681, which affirmed, D.C., 33 F.2d 211, and certiorari granted 50 S.Ct. 460, 281 U.S. 715, 74 L.Ed. 1136.

"Common arrangement" necessary

(1) Steamship line which maintained independent rates, issued separate contracts, and received direct instructions from shipper was not acting under "common arrangement" with railroads for rail and water shipments within statute requiring filing of schedules with interstate commerce commission.—U. S. v. Munson S. S. Line, Md., 51 S.Ct. 360, 283 U.S. 43, 75 L.Ed. 830, affirming, C.C.A., 37 F.2d 681, which affirmed, D.C., 33 F.2d 211, and certiorari granted 50 S.Ct. 460, 281 U.S. 715, 74 L.Ed. 1136.

(2) Although a common arrangement, within the meaning of the statute, may exist without the issuance of a through bill of lading or any particular formality, it is not to be inferred from circumstances which are entirely consistent with the independence which the statute recognizes.
U.S.—U. S. v. Munson S. S. Line, supra.

26. U.S.—Chandler v. Pennsylvania R. Co., C.C.A.Va., 11 F.2d 39, affirming, D.C., 9 F.2d 703
10 C.J. p 430 note 94.

Transportation from international boundary

Under the Interstate Commerce Act a railroad has a duty to publish a just and reasonable rate for the transportation of freight from the international boundary to points in the United States.—Great Northern Ry. Co. v. Sullivan, C.C.A.Minn., 72 F.2d 587, certiorari granted 55 S.Ct. 216, 293 U.S. 551, 79 L.Ed. 654, reversed on other grounds 55 S.Ct. 472, 294 U.S. 458, 79 L.Ed. 992

Unpublished through rate for foreign port

It has been held that a carrier which has never published or filed with the interstate commerce commission a through rate for a foreign port is neither required to make, nor can it make, a through rate to such port.—Stevens v. Atchison, T. & S.F. Ry. Co., 202 N.Y.S. 195, 207 App.Div. 442, affirmed 147 N.E. 200, 239 N.Y. 572, certiorari denied 45 S.Ct. 463, 267 U.S. 603, 69 L.Ed. 809—10 C.J. p 430 note 95.

27. N.Y.—Burke v. Union Pac. R. Co., 124 N.E. 119, 226 N.Y. 534, reversing 166 N.Y.S. 100, 178 App.Div. 783, certiorari granted Union Pac. R. Co. v. Burke, 40 S.Ct. 56, 251 U.S. 548, 64 L.Ed. 409, and affirmed 41 S.Ct. 283, 255 U.S. 317, 65 L.Ed. 656.

28. U.S.—U. S. v. Standard Oil Co., D.C.Ill., 170 F. 988.

Reference to classification of others

Freight rates required to be established by the statute are not established by tariffs naming class rates that do not contain a classification of freight, but merely refer to a classification published by other parties and subject to change by such parties.—U. S. v. Standard Oil Co., D.C.Ill., 170 F. 988.

Schedule applicable only to government property

There is no authority in law for a transportation company to publish a schedule of tariff rates applicable to government property only.—Illinois Cent. R. Co. v. U. S., 58 Ct.Cl. 182.

29. U.S.—New York Cent. & H. R. R. Co. v. U. S., N.Y., 166 F. 267, 92

requirement that the rates and charges for "transportation" be filed and published is not strictly limited to rates or charges for carriage service, but requires the filing and publication of the rates and charges for all services rendered in connection with a transportation or shipment.[30] Furthermore, it is expressly required that the schedules state separately all terminal charges,[31] icing charges,[32] and all other charges which the commission may require,[33] and all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of the rates, fares, and charges, or the value of the service rendered to the shipper or consignee.[34] These requirements for the separate statement of various types of charges were not intended to set up a system of bookkeeping for interstate carriers.[35] The carrier may state separately its rate for the carriage of ordinary commodities of a particular class and its charge for icing cars when commodities of the same class are of a character requiring to be shipped under refrigeration, and its collection of both charges when refrigeration is used is lawful, provided each is reasonable and does not cover double compensation for the same service.[36] However, no duty rests on the carrier to publish the fact of free cartage in its schedule of rates, in the absence of any general order by the interstate commerce commission requiring such publication;[37] and trucking charges have been held sufficiently stated separately where the schedule disclosed a progressive charge for truckage and that truckage was free when the freight carried was of a certain weight.[38]

(3) Operation and Effect

When interstate rate schedules have been duly filed and published they have the force and effect of a statute binding upon the carrier and the members of the shipping public alike.

As a general rule, where a schedule or tariff of interstate rates has been duly filed and published as provided by the Interstate Commerce Act, the rates thereby established become the only legal lawful

C.C.A. 331, reversing D.C., 153 F. 630.

Tentative or obsolete rates not sufficient

The rates which the carrier is required to file and to publish are not alone those under which transportation has actually taken place, but those which the carrier has established as its present charges, as distinguished from those which are obsolete and tentative or perhaps only to take effect in the future, that is to say, they are the rates on which shipments may be made if offered.—New York Cent. & H. R. R. Co. v. U. S., N.Y., 166 F. 267, 92 C.C.A. 331, reversing, D.C., 153 F. 630.

30. U.S.—Turner, Dennis & Lowry Lumber Co. v. Chicago, M & St. P. Ry. Co., D.C.Mo., 2 F.2d 291—Aron v. Pennsylvania R. Co., D.C.N.Y., 10 F.Supp. 756, affirmed, C.C.A., 80 F.2d 100, 103 A.L.R. 1367, certiorari denied 56 S.Ct. 680, 298 U.S. 658, 80 L.Ed. 1384.

Ill.—Chicago & E. I. Ry. Co. v. Chicago Heights Terminal Transfer R. Co., 147 N.E. 666, 317 Ill. 65, error dismissed 46 S.Ct. 207, 270 U.S. 629, 70 L.Ed. 767—Davis v. Naugle Pole & Tie Co., 238 Ill.App. 214.

Care and feeding of live stock

Charge made by carrier for services in connection with caring for live stock during stop-over was a charge for "transportation" within statute requiring carrier to file tariff with interstate commerce commission showing transportation charges.—Aron v. Pennsylvania R. Co., C.C.A. N.Y., 80 F.2d 100, 103 A.L.R. 1367, affirming, D.C., 10 F.Supp. 756, certiorari denied 56 S.Ct. 680, 298 U.S. 658, 80 L.Ed. 1384.

Rental for refrigerator car

To establish and render operative a five dollar rental for a refrigerator car, in which potatoes are shipped from points in Minnesota to points in Oklahoma, over connecting lines, the tariff schedule must be filed and published at the point of origin.—Schaff v. J. C. Famechon Co., 176 N.W. 197, 145 Minn. 108, error dismissed 42 S.Ct. 189, 258 U.S. 76, 66 L.Ed. 472.

Question of fact

Under statute requiring carrier to file tariff with interstate commerce commission showing transportation charges, whether certain services are within definition of transportation is not purely law question, but involves determination of fact.—Aron v. Pennsylvania R. Co., C.C.A.N.Y., 80 F.2d 100, 103 A.L.R. 1367, affirming, D.C., 10 F.Supp. 756, certiorari denied 56 S.Ct. 680, 298 U.S. 658, 80 L.Ed. 1384.

31. U.S.—Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & St. P. Ry. Co., D.C.Mo., 2 F.2d 291. 10 C.J. p. 430 notes 1, 6.

Necessary to validity

In order to avail itself of the principle that a reasonable terminal or other special charge cannot be condemned because, taken in connection with the prior charges for transportation, the total charge is unreasonable, the carrier must, under the provisions of the statute, separately state such terminal or other special charge.—Interstate Commerce Commn. v. Stickney, Minn., 30 S.Ct. 66, 215 U.S. 98, 54 L.Ed. 112.

32. U.S.—Alton & S. R. R. v. U. S., D.C.Cal., 49 F.2d 414.

33. U.S.—Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & St. P. Ry. Co., D.C.Mo., 2 F.2d 291.

34. Okl.—St. Louis & S. F. R. Co. v. Wm. Bondies & Co., 166 P. 179, 64 Okl. 88.

35. U.S.—Alton & S. R. R. v. U. S., D.C.Cal., 49 F.2d 414.

36. U.S.—Knudsen-Ferguson Fruit Co. v. Michigan Cent. R. Co., Minn., 148 F. 968, 79 C.C.A. 46, certiorari denied 27 S.Ct. 786, 204 U.S. 671, 51 L.Ed. 672.

37. U.S.—Interstate Commerce Commn. v. Detroit, G. H. & M. R. Co., Mich., 17 S.Ct. 986, 167 U.S. 633, 646, 42 L.Ed. 306, affirming 74 F. 803, 21 C.C.A. 103.

Reasons

The statute has in view only the transportation of property and passengers by rail, and when property has been discharged from the cars at the carrier's warehouse or station the duties and obligations cast on it by the statute are fulfilled and satisfied.—Interstate Commerce Commn. v. Detroit, G. H. & M. R. Co., Mich., 17 S.Ct. 986, 167 U.S. 633, 644, 42 L.Ed. 306, affirming 74 F. 803, 21 C.C.A. 103.

38. U.S.—Fitzhenry v. Erie R. Co., D.C.N.Y., 7 F.Supp. 880.

rates,[39] until properly changed[40] or set aside,[41] or until superseded or canceled by the filing and publication of a subsequent tariff.[42] The schedule or tariff has the force and effect of a statute[43] which

39. U.S.—Keogh v. Chicago & N. W. Ry. Co., 43 S.Ct. 47, 260 U.S. 156, 67 L.Ed. 183, affirming, C.C.A., 271 F. 444, in which certiorari is denied 41 S.Ct. 537, 256 U.S. 699, 65 L.Ed. 1177—Eagle Cotton Oil Co. v. Southern Ry. Co., D.C.Miss., 46 F.2d 1006, reversed on other grounds, C.C.A., 51 F.2d 443, certiorari denied Southern R. Co. v. Eagle Cotton Oil Co., 52 S.Ct. 130, 284 U.S. 675, 76 L.Ed. 571—Chicago, I. & L. Ry. Co. v. International Milling Co., C.C.A.Minn., 43 F.2d 93, affirming, D.C., 33 F.2d 636, and certiorari denied 51 S.Ct. 89, 282 U.S. 885, 75 L.Ed. 781—Chicago, B. & Q. R. Co. v. Merriam & Millard Co., C.C.A.Neb., 297 F. 1, certiorari denied Merriam & Millard Co. v. Chicago, B. & Q. R. Co., 44 S.Ct. 637, 265 U.S. 592, 68 L.Ed. 1196, and error dismissed 45 S.Ct. 640, 268 U.S. 682, 69 L.Ed. 1155—Galveston, H. & S. A. Ry. Co. v. Lykes Bros., D.C.Tex., 294 F. 963.

Cal.—Frost v. Railroad Commission of California, 240 P. 26, 197 Cal. 230, affirmed 46 S.Ct. 605, 271 U.S. 583, 70 L.Ed. 1101.

Me.—Mason v. Maine Cent. R. Co., 110 A. 425, 119 Me. 195

Minn.—Reliance Elevator Co. v. Chicago, M. & St. P. Ry. Co., 165 N.W. 867, 139 Minn. 69.

Mo.—Mobile & O. R. Co. v. Southern Sawmill Co., 251 S.W. 434, 212 Mo. App. 117.

Ohio.—New York Cent. R. Co. v. Peak, 6 Ohio App. 399.

Or.—Black v. Southern Pac. Co., 171 P. 878, 88 Or. 533.

Conclusively presumed legal

Interstate rate filed with commission and published is conclusively presumed to be lawful rate.—Magnolia Provision Co. v. Beaumont, S. L. & W. Ry. Co., D.C.Tex., 20 F.2d 384, affirmed Beaumont, S. L. & W. Ry. Co. v. Magnolia Provision Co., C.C.A., 26 F.2d 72, certiorari denied 49 S.Ct. 23, 278 U.S. 620, 73 L.Ed. 542.

40. Minn.—Illinois Cent. R. Co. v. Van Dusen, Harrington Co., 214 N.W. 278, 170 Minn. 488, certiorari denied Van Dusen, Harrington Co. v. Illinois Cent. R. Co., 48 S.Ct. 116, 275 U.S. 554, 72 L.Ed. 422—Illinois Cent. R. Co. v. Van Dusen, Harrington Co., 212 N.W. 940, 170 Minn. 488—Reliance Elevator Co. v. Chicago, M. & St. P. Ry. Co., 165 N.W. 867, 139 Minn. 69.

Amendatory matter

Prior rates may be abrogated by amendatory matter in derogation thereof.—Lothrop v. Spokane, P. & S. Ry. Co., D.C.Or., 10 F.2d 225, reversed on other grounds, C.C.A., Southern Pac. Co. v. Lothrop, 15 F.2d 486, certiorari denied Lothrop v. Southern Pac. Co., 47 S.Ct. 336, 273 U.S. 742, 71 L.Ed. 869, Lothrop v. Spokane, P. & S. R. Co., 47 S.Ct. 336, 273 U.S. 742, 71 L.Ed. 869, Lothrop v. Oregon-Washington R. & Nav. Co., 47 S.Ct. 336, 273 U.S. 742, 71 L.Ed. 869

Notice of change essential

(1) Under the act rates which have been properly filed and published may not be changed or altered except after thirty days' notice to the commission and to the public, unless this requirement is waived by the commission, on good cause shown.—Kanotex Refining Co. v. Atchison, T. & S. F. Ry. Co., 46 P.2d 16, 142 Kan. 139.

(2) A shipper in contracting with the carrier is charged with notice of this requirement.—Kanotex Refining Co. v. Atchison, T. & S. F. Ry. Co., supra

41. U.S.—Keogh v. Chicago & N. W. Ry. Co., 43 S.Ct. 47, 260 U.S. 156, 67 L.Ed. 183, affirming, C.C.A., 271 F. 444, in which certiorari is denied 41 S.Ct. 537, 256 U.S. 699, 65 L.Ed. 1177.

Ind.—Cleveland, C., C. & St. L. Ry. Co. v. Talge Mahogany Co., 112 N.E. 890, 185 Ind. 11.

N.Y.—Mozier v. Barrett, 193 N.Y.S. 579.

Tex.—Clayton Oil & Refining Co. v. Railroad Commission of Texas, Civ.App., 3 S.W.2d 197—Missouri-Kansas & T. R. Co. of Texas v. Railroad Commission of Texas, Civ.App., 3 S.W.2d 489, affirmed Producers' Refining Co. v. Missouri, K. & T. R. Co. of Texas, Com.App., 13 S.W.2d 679, and 13 S.W.2d 680.

42. U.S.—Chicago, I. & L. Ry. Co. v. International Milling Co., C.C.A.Minn., 43 F.2d 93, affirming, D.C., 33 F.2d 636, and certiorari denied 51 S.Ct. 89, 282 U.S. 885, 75 L.Ed. 781.

Express cancellation unnecessary

Where such is the evident intention, the publication and filing of new rate tariffs may operate to cancel and abrogate the rates prescribed by an older tariff although it is not expressly stated that they shall be canceled or superseded.

U.S.—Chicago, I. & L. Ry. Co. v. International Milling Co., C.C.A.Minn., 43 F.2d 93, affirming, D.C., 33 F.2d 636, and certiorari denied 51 S.Ct. 89, 282 U.S. 885, 75 L.Ed. 781.

Minn.—Crookston Milling Co. v. Great Northern Ry. Co., 242 N.W. 287, 185 Minn. 563.

43. U.S.—Chicago Great Western R. Co. v. Farmers' Shipping Ass'n, C.C.A.Kan., 59 F.2d 657—Atlantic Coast Line R. Co. v. Atlantic Bridge Co., C.C.A.Fla., 57 F.2d 654, affirming, D.C., Atlantic Bridge Co. v. Atlantic Coast Line R. Co., 56 F.2d 163—American Ry. Express Co. v. American Trust Co., C.C.A.Ind., 47 F.2d 16, reversing, D.C., American Trust Co. v. American Ry. Express Co., 42 F.2d 272, and certiorari denied 52 S.Ct. 13, 284 U.S. 629, 76 L.Ed. 536—Eagle Cotton Oil Co. v. Southern Ry. Co., D.C.Miss., 46 F.2d 1006, reversed on other grounds, C.C.A., 51 F.2d 443, certiorari denied Southern R. Co. v. Eagle Cotton Oil Co., 52 S.Ct. 130, 284 U.S. 675, 76 L.Ed. 571—Chicago, I. & L. Ry. Co. v. International Milling Co., C.C.A.Minn., 43 F.2d 93, affirming, D.C., 33 F.2d 636, and certiorari denied 51 S.Ct. 89, 282 U.S. 885, 75 L.Ed. 781—Updike Grain Co. v. Chicago & N. W. Ry. Co., C.C.A.Neb., 35 F.2d 486—Pillsbury Flour Mills Co. v. Great Northern Ry. Co., C.C.A.Minn., 25 F.2d 66—W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co., D.C.Ky., 7 F.Supp. 593, affirmed, C.C.A., 82 F.2d 94, certiorari granted 57 S.Ct. 14, 299 U.S. 524, 81 L.Ed. 385, affirmed 57 S.Ct. 265, 299 U.S. 393, 81 L.Ed. 301—North American Co. v. St. Louis & S. F. R. Co., D.C.Mo., 288 F. 612, reversed on other grounds, C.C.A., Spiller v. St. Louis & S. F. R. Co., 14 F.2d 284, certiorari granted St. Louis & S. F. R. Co. v. Spiller, 47 S.Ct. 111, 273 U.S. 680, 71 L.Ed. 837, affirmed in part and reversed in part on other grounds 47 S.Ct. 635, 274 U.S. 304, 71 L.Ed. 1060—Moore v. Duncan, Ohio, 237 F. 780, 150 C.C.A. 534

Kan.—Atchison, T. & S. F. Ry. Co. v. Young, 171 P. 1156, 102 Kan. 875.

La.—Breazeale v. American Ry. Exp. Co., 137 So. 585, 18 La.App. 59.

Mass.—New York Cent. & H. R. R. Co. v. York & Whitney Co., 119 N.E. 855, 230 Mass. 206, affirmed in part and reversed in part on other grounds 41 S.Ct. 509, 256 U.S. 406, 65 L.Ed. 1016.

Mo.—Cicardi Bros. Fruit & Produce Co. v. Pennsylvania Co., 213 S.W. 531, 201 Mo.App. 609

Mont.—Doney v. Northern Pac. Ry. Co., 199 P. 432, 60 Mont. 209.

Ohio.—Anthony Carlin Co. v. Hines, 140 N.E. 99, 107 Ohio St. 328—New York, C. & St. L. R. Co. v. Miller City Tile Co., 19 Ohio N.P., N.S., 244

Pa.—Rau v. Wilkes-Barre & E. R. Co., 167 A. 230, 311 Pa. 510

W.Va.—Chesapeake & O. Ry. Co. v. Glogora Coal Co., 169 S.E. 471, 113 W.Va. 796, certiorari denied Glogora Coal Co. v. Chesapeake &

controls the legal rights of the parties,[44] and enters into, and forms a part of, all contracts of carriage to which it is applicable,[45] notwithstanding any contrary requirement made by state statute,[46] and regardless of the fact that the carrier's line lies wholly within one state.[47] It is binding and conclusive upon the carrier, shipper, and consignee alike;[48] and each and all of them are as a matter of law charged with notice or knowledge of the contents of the schedule and the rates prescribed therein,[49] which, as more fully discussed in §§ 392–395 infra, cannot be departed from by contract or

O Ry. Co., 54 S.Ct. 73, 290 U.S. 658, 78 L.Ed. 569.

44. U.S.—Keogh v. Chicago & N. W. Ry. Co., 43 S.Ct. 47, 260 U.S. 156, 67 L.Ed. 183, affirming, C.C.A., 271 F. 444, in which certiorari is denied 41 S.Ct. 537, 256 U.S. 699, 65 L.Ed. 1177—Baltimore & O. S. W. R. Co. v. Settle, 43 S.Ct. 28, 260 U.S. 166, 67 L.Ed. 189, affirming, C.C.A., Baltimore & O. S. W. R. R. v. Settle, 272 F. 675—Pillsbury Flour Mills Co. v. Great Northern Ry. Co., C.C.A. Minn., 25 F.2d 66

Kan.—Kanotex Refining Co. v. Atchison, T. & S. F. Ry. Co., 46 P.2d 16, 142 Kan. 139.

Mo.—Cicardi Bros. Fruit & Produce Co. v. Pennsylvania Co., 213 S.W. 531, 201 Mo.App. 609.

45. U.S.—Union Wire Rope Corporation v. Atchison, T. & S. F. Ry. Co., C.C.A.Mo., 66 F.2d 965, reversing, D.C., Atchison, T. & S. F. R. Co. v. Union Wire Rope Corporation, 1 F.Supp. 399, certiorari denied 54 S.Ct. 122, 290 U.S. 686, 78 L.Ed. 591—American Ry. Express Co. v. American Trust Co., C.C.A. Ind., 47 F.2d 16, reversing, D.C., American Trust Co. v. American Ry. Express Co., 42 F.2d 272, and certiorari denied 52 S.Ct. 13, 284 U.S. 629, 76 L.Ed. 536—Hartness v. Iberia & V. R. Co., D.C.La., 297 F. 622.

Ala.—Hurt v. Atlanta, B. & A. Ry. Co., 84 So. 631, 17 Ala.App. 241.

Del.—Windsor v. American Ry. Exp. Co., 143 A. 37, 4 W.W.Harr. 16.

Mich. — Thomas Canning Co. v. Southern Pac. Co., 189 N.W. 210, 219 Mich. 388.

Mont.—Cook v. Northern Pac. Ry. Co., 203 P. 512, 61 Mont. 573.

N.Y.—D'Utassy v. Southern Pac. Co., 161 N.Y.S. 222, 174 App.Div. 547—Strahs v. New York Cent. R. Co., 184 N.Y.S. 362, 113 Misc. 273.

Contract with express company

Uniform express receipts prescribed by interstate commerce commission, pursuant to which shipment moved, together with classification schedules of carrier on file with commission, constitute contract of carriage.—Feynman v. American Ry. Exp. Co., 234 N.Y.S. 727, 134 Misc. 223—O. K. Display Fixture Co. v. American Ry. Exp. Co., 201 N.Y.S. 266, 121 Misc. 816.

Express incorporation in bill of lading

A clause in a bill of lading for an interstate shipment, making it subject to the tariffs then in effect, makes the tariffs a part of the contract of carriage.—McGuire v. Atlantic Coast Line R. Co., 118 S.E. 225, 136 Va. 382

46. U.S.—Gulf, C. & S. F. Ry. Co. v. Hefley, Tex., 15 S.Ct. 802, 158 U.S. 98, 39 L.Ed. 910

47. La.—Louisiana R., etc., Co. v. Holly, 53 So. 882, 127 La. 615.

48. U.S.—Union Wire Rope Corporation v. Atchison, T. & S. F. Ry. Co., C.C.A.Mo., 66 F.2d 965, reversing, D.C., Atchison, T. & S. F. R. Co. v. Union Wire Rope Corporation, 1 F.Supp. 399, certiorari denied 54 S.Ct. 122, 290 U.S. 686, 78 L.Ed. 591—Eagle Cotton Oil Co. v. Southern Ry. Co., D.C.Miss., 46 F.2d 1006, reversed on other grounds, C.C.A., 51 F.2d 443, certiorari denied Southern R. Co. v. Eagle Cotton Oil Co., 52 S.Ct. 130, 284 U.S. 675, 76 L.Ed. 571—Pillsbury Flour Mills Co. v. Great Northern Ry. Co., C.C.A.Minn., 25 F.2d 66—Moore v. Duncan, Ohio, 237 F. 780, 150 C.C.A. 534.

Colo.—Fort v. Denver & R. G. R. Co., 195 P. 109, 69 Colo. 441.

Ind.—Clark v. Southern Ry. Co., 119 N.E. 539, 69 Ind.App. 697.

Ky.—Blackford v. St. Louis, I. M. & S. Ry. Co., 203 S.W. 867, 181 Ky. 70.

Mass.—New York Cent. & H. R. R. Co. v. York & Whitney Co., 119 N.E. 855, 230 Mass. 206, affirmed in part and reversed in part on other grounds 41 S.Ct. 509, 256 U.S. 406, 65 L.Ed. 1016

Mich. — Thomas Canning Co. v. Southern Pac. Co., 189 N.W. 210, 219 Mich. 388.

Minn.—Illinois Cent. R. Co. v. Van Dusen, Harrington Co., 214 N.W. 278, 170 Minn. 488, certiorari denied Van Dusen, Harrington Co. v. Illinois Cent. R. Co., 48 S.Ct. 116, 275 U.S. 554, 72 L.Ed. 422—Illinois Cent. R. Co. v. Van Dusen, Harrington Co., 212 N.W. 940, 170 Minn. 488

Mo.—Pioneer Trust Co. v. Nashville, C. & St. L. R. Co., 224 S.W. 109, 204 Mo.App. 328—Cicardi Bros. Fruit & Produce Co. v. Pennsylvania Co., 213 S.W. 531, 201 Mo. App. 609.

Mont.—Doney v. Northern Pac. Ry. Co., 199 P. 432, 60 Mont. 209.

Neb.—Fremont Milling Co. v. Chicago & N. W. Ry. Co., 163 N.W. 331, 101 Neb. 362.

N.Y.—Haddad v. Southern Pac. Co., 173 N.Y.S. 256, 185 App.Div. 500—Mozier v. Barrett, 193 N.Y.S. 579—Lehigh Valley R. Co. v. Weyant, 165 N.Y.S. 391

Ohio.—Anthony Carlin Co. v. Hines, 140 N.E. 99, 107 Ohio St. 328—New York Cent. R. Co. v. Peak, 6 Ohio App. 399—New York, C. & St. L. R. Co. v. Miller City Tile Co., 19 Ohio N.P.,N.S., 244.

Pa.—Rau v. Wilkes-Barre & E. R. Co., 167 A. 230, 311 Pa. 510—Erie R. Co. v. Kreitner Bros., Inc., 3 Pa. Dist. & Co. 251.

Tenn.—Blow Stave Co. v. Hattendorf, 7 Tenn.Civ.App. 415

Tex.—Texas & N. O. R. Co. v. Wolfson, Civ.App., 23 S.W.2d 455, error dismissed

Va.—Old Dominion S. S. Co. v. Blakeman, 105 S.E. 752, 129 Va. 206.

W.Va.—Chesapeake & O. Ry. Co. v. Glogora Coal Co., 169 S.E. 471, 113 W.Va. 796, certiorari denied Glogora Coal Co. v. Chesapeake & O. Ry. Co., 54 S.Ct. 73, 290 U.S. 658, 78 L.Ed. 569.

Wis.—Bassett v. Chicago & N. W. Ry. Co., 171 N.W. 749, 168 Wis. 617, rehearing denied 171 N.W. 752, 168 Wis. 617.

10 C.J. p. 431 note 8.

Provisions as to diversion or reconsignment of shipment

Tariff rules and regulations in schedules filed with the interstate commerce commission, relating to conditions upon which a shipper might be permitted to divert or reconsign a shipment in transit by exchanging bills of lading are under the Interstate Commerce Act binding on the parties, this being a service in connection with the transportation.—Pioneer Trust Co. v. Nashville, C. & St. L. R. Co., 224 S.W. 109, 204 Mo.App. 328

49. U.S.—American Ry. Express Co. v. Daniel, 46 S.Ct. 15, 269 U.S. 40, 70 L.Ed. 154, reversing 121 S.E. 686, 157 Ga. 731, certiorari granted 44 S.Ct. 461, 265 U.S. 576, 68 L.Ed. 1187, which affirmed 116 S.E. 660, 29 Ga.App. 780, vacated 132 S.E. 144, 35 Ga.App. 81—Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & St. P. Ry. Co., D.C.Mo., 2 F.2d 291, affirmed 46 S.Ct. 530, 271 U.S. 259, 70 L.Ed. 934.

Ala.—Emerson v. Central of Georgia Ry. Co., 72 So. 120, 196 Ala. 280, L.R.A. 1916F 120.

Ill.—See Jackson v. M. Piowaty & Sons, 205 Ill.App. 329.

agreement of the parties.

The foregoing rules, requiring the duly scheduled and established rates to be adhered to, apply where connecting carriers engaged in interstate transportation, although not agreeing on any joint tariff, establish and publish in the manner prescribed by the statute separate rates covering such transportation,[50] and if freight is shipped over connecting lines which have agreed on a joint tariff of rates in compliance with the Interstate Commerce Act, the delivering line must collect the interstate commerce rate, and not that named in the bill of lading.[51]

It has been held, however, that binding and conclusive effect will not be given to a tariff or schedule which is without statutory authorization,[52] or which has not been filed and published as required by law;[53] and where, through a printing error, a rate different from that authorized by the commission is included in the published tariff, such rate does not become the lawful rate.[54]

Although a tariff is improperly drawn so as to act retroactively, it is not thereby rendered void in its prospective operation.[55]

(4) Joint Rates

Joint rates are required to be filed and published the same as other rates.

Joint rates, as well as other rates, are required by the Interstate Commerce Act to be filed and published;[56] and hence, where connecting carriers agree on a joint through rate, the rate so agreed on can become legally operative only by being filed and established as prescribed by the statute.[57] However, the statute does not require either of two connecting lines to publish its joint tariff at a noncompeting point;[58] and a carrier is not prohibited by the statute from receiving freight for transportation to another state by the fact that no through route and joint rates have been established between the points of shipment and delivery.[59]

Prior to the order of the interstate commerce

Ky.—Blackford v. St. Louis, I. M. & S. Ry. Co., 203 S.W. 867, 181 Ky. 70.

Mich.—Pennsylvania R. Co. v. Marcelletti, 240 N.W. 4, 256 Mich. 411, 78 A.L.R. 923.

Miss.—Alabama Great Southern R. Co. v. F. A. Hulett & Son, 131 So. 814, 159 Miss. 333.

Mont.—Cook v. Northern Pac. Ry. Co., 203 P. 512, 61 Mont. 573.

N.M.—Enderstein v. Atchison, T. & S. F. Ry. Co., 157 P. 670, 21 N.M. 548.

N.Y.—O. K. Display Fixture Co. v. American Ry. Exp. Co., 201 N.Y.S. 266, 121 Misc. 816—Lehigh Valley R. Co. v. Weyant, 165 N.Y.S. 391.

Okl.—St. Louis & S. F. R. Co. v. Wm. Bondies & Co., 166 P. 179, 64 Okl. 88.

Pa.—Kaplan v. Director General of Railroads, 78 Pa.Super. 195—Pennsylvania R. Co. v. Whitney & Kemmerer, 73 Pa.Super. 588—West Jersey & S. R. Co. v. Whiting Lumber Co., 71 Pa.Super. 161—Erie R. Co. v. Kreitner Bros., Inc., 3 Pa.Dist. & Co. 251.

Tenn.—Louisville & N. R. Co. v. Hobbs, 190 S.W. 461, 136 Tenn. 512—Blow Stave Co. v. Hattendorf, 7 Tenn.Civ.App. 415.

Tex.—Shroyer v. Chicago, R. I. & G. Ry. Co., 222 S.W. 1095, 111 Tex. 24, reversing Chicago, R. I. & G. Ry. Co. v. Shroyer, Civ.App., 197 S.W. 773, and modified on other grounds Shroyer v. Chicago, R. I. & G. Ry. Co., 226 S.W. 140, 111 Tex. 24.

Va.—Old Dominion S. S. Co. v. Blakeman, 105 S.E. 752, 129 Va. 206

Wis.—Bassett v. Chicago & N. W. Ry. Co., 171 N.W. 749, 168 Wis. 617, rehearing denied 171 N.W. 752, 168 Wis. 617.

10 C.J. p. 431 note 15.

Duty of carrier to quote correctly

Carrier, in delivering goods to point within state from point without state, was under no legal duty to correctly quote purchaser from consignee rates upon connecting line to another point within state, as such rates are matters of law of which both shipper and carrier are bound to take notice.—W. C. Goodnow Coal Co. v. Northern Pac. Ry. Co., 162 N.W. 519, 136 Minn. 420.

50. Tex.—Gulf, etc., R. Co. v. Dimmitt, 42 S.W. 583, 17 Tex.Civ.App. 255

10 C.J. p. 431 note 13.

51. Gulf, etc., R. Co. v. Hefley, 15 S.Ct. 802, 158 U.S. 98, 39 L.Ed. 910—Missouri, etc., R. Co. v. Stoner, 23 S.W. 1020, 5 Tex.Civ.App. 50

52. U.S.—Southern Pac. Co. v. U. S., 47 S.Ct. 123, 272 U.S. 445, 71 L.Ed. 343, affirming 60 Ct.Cl. 662, appeal dismissed and certiorari granted 46 S.Ct. 242, 270 U.S. 103, 70 L.Ed. 489.

53. Ky.—Andrews Steel Co. v. Davis, 276 S.W. 148, 210 Ky. 473

54. Minn.—Illinois Cent. R. Co. v. Van Dusen, Harrington Co., 214 N.W. 278, 170 Minn. 488, certiorari denied Van Dusen, Harrington Co. v. Illinois Cent. R. Co., 48 S.Ct. 116, 275 U.S. 554, 72 L.Ed. 422—Illinois Cent. R. Co. v. Van Dusen, Harrington Co., 212 N.W. 940, 170 Minn. 488.

55. Mo.—Mobile & O. R. Co. v. Southern Sawmill Co., 251 S.W. 434, 212 Mo.App. 117.

56. U.S.—McFadden v. Alabama Great Southern R. Co., Pa., 241 F. 562, 154 C.C.A. 338, affirming, D.C., Alabama Great Southern R. Co. v. George H. McFadden & Bros., 232 F. 1000

10 C.J. p. 431 note 20.

Through rate only lawful rate

Where cotton consigned to the shipper's order was shipped over the lines of connecting carriers to B. in the state of origin, where it was compressed by the carrier and rebilled to points outside the state, the through rate from point of shipment was the legal rate, and a rate consisting of the initial carrier's intrastate rate to the junction point and the connecting carrier's interstate rate from that point was not a lawful rate for such shipment, under Interstate Commerce Act Feb. 4, 1887, c. 104, § 6, 24 U.S.St. at L. p. 380, Comp.St.1916, § 8569, requiring the filing of through rates when established; such intra-state rate not being filed with the interstate commerce commission.—McFadden v. Alabama Great Southern R. Co., C.C.A.Pa., 241 F. 562, 563, affirming, D.C., Alabama Great Southern R. Co. v. McFadden & Bros., 232 F. 1000

57. U.S.—Kansas City Southern R. Co. v. C. H. Albers Commn. Co., Kan., 32 S.Ct. 316, 223 U.S. 573, 56 L.Ed. 556

10 C.J. p. 428 note 76.

58. U.S.—Chicago & N. W. Ry. Co. v. Osborne, Iowa, 52 F. 912, 3 C.C.A. 347.

59. N.C.—Reid v. Southern R. Co., 69 S.E. 618, 153 N.C. 490.

commission of May, 1907, which requires connecting carriers to accept joint rates specifically, no formal acceptance, by a connecting carrier, of a through rate, filed with the commission by an initial carrier, was necessary, and the receipt of the tariff and the acceptance of freight thereunder were sufficient to put the joint rate into effect[60] as effectively as if the rate had actually been published and filed by the participating carrier.[61] By the order of the interstate commerce commission of May, 1907, connecting carriers are required to accept joint rates specifically;[62] but where a joint tariff is received and stamped by a connecting carrier which thereafter receives freight under the schedule of the filed tariff, the requirements of the rule are satisfied, and the rate thereby becomes a joint one, and there can be no departure therefrom.[63] The sanction, by connecting carriers, of through rates filed and published by another carrier is only essential to their application to the haul from common points,[64] and the failure of a connecting carrier to participate in the publication of a through rate will not render it inapplicable over its lines;[65] but one carrier may not bind a joint carrier by publication of special rate tariffs for its line.[66]

b. Intra-State Rates

Under state statutes similar to the Interstate Commerce Act, schedules of intra-state rates are often required to be filed with a state regulatory commission, and published.

Under state statutes more or less similar to the provisions of the Interstate Commerce Act, carriers are often required to prepare and publish schedules of intra-state rates and file them with a designated state regulatory commission.[67] The main purpose of such statutes is to compel the establishment of uniform rates for all persons entitled to transport goods over the roads and to afford convenient facilities for ascertaining what are the established rates.[68] The schedules and rates so fixed and published have the same force and effect as those filed and published under the Interstate Commerce Act.[69] They are binding upon both the carrier and the members of the public,[70] are controlling upon the courts in determining the rights of the parties,[71] and the scheduled rate is the only lawful rate which may be charged;[72] but it has been held that the filing does not give notice to all the world or have any effect beyond preventing discrimination.[73] Under some statutes, however, a carrier is not prohibited from making a contract for the carriage of goods, where no tariff has been filed.[74]

Where the statute requires the filing of printed schedules, typewritten copies are insufficient,[75] but it is not necessary to show in the schedules the rate

60. U.S.—Dayton Coal & Iron Co v. Cincinnati, N. O. & T P. R. Co, Tenn, 36 S Ct. 137, 239 U S. 446, 60 L Ed. 375
10 C.J. p 431 note 22.

61. U S—U. S v. New York Cent & H R R. Co, N.Y., 29 S.Ct. 313, 212 U S 509, 53 L.Ed. 629.

62. U.S.—Dayton Coal & Iron Co v. Cincinnati, N. O. & T. P R. Co., Tenn, 36 S Ct. 137, 239 U S. 446, 60 L.Ed 375.

Tap lines

To entitle a tap line to avail itself of the milling in transit privilege, it must make reports to the interstate commerce commission and file or concur in the controlling tariff—St Louis Southwestern Ry. Co v S H Bolinger & Co, C C A La, 279 F. 564.

63. U S—Dayton Coal & Iron Co. v. Cincinnati, N. O. & T P. R. Co, Tenn, 36 S Ct. 137, 239 U S. 446, 60 L Ed 375

64. U S.—Kansas City Southern R. Co. v. C H Albers Commn. Co, 32 S Ct 316, 223 U S. 573, 595, 56 L. Ed 556, reversing 99 P. 813, 79 Kan. 59.

65. U S—Montrose Oil Refining Co. v. St. Louis-San Francisco Ry. Co, D C.Tex., 25 F 2d 750, affirmed, C.C. A., St Louis-San Francisco Ry Co. v. Montrose Oil & Refining Co, 25 F 2d 755, certiorari denied 48 S. Ct. 560, 277 U.S. 598, 72 L Ed. 1007

66. Ky.—Rowan County Freestone Co. v. Chesapeake & O. Ry. Co., 95 S W 2d 575, 264 Ky. 785.

67. Miss—E. L. Young Heading Co v. Payne, 89 So. 782, 127 Miss. 48
Vt—Simpson v. Central Vermont Ry. Co, 115 A. 299, 95 Vt. 388.
10 C J. p 432 note 32.

68. Wash.—United Artists Corporation v. Puget Sound Electric Ry., 211 P. 873, 122 Wash 537.
10 C J. p 432 note 33.

69. Ala.—T. R Miller Mill Co. v Louisville & N. R. Co, 92 So. 797, 207 Ala. 253.

70. U S—Woodrich v. Northern Pac. Ry. Co, C.C.A.N D, 71 F.2d 732, 97 A.L.R. 401.
Ala.—T R. Miller Mill Co. v. Louisville & N. R. Co., 92 So. 797, 207 Ala. 253.

71. U S—Woodrich v. Northern Pac Ry. Co, C C A N D., 71 F.2d 732, 97 A.L.R. 401.

72. Ala.—T. R. Miller Mill Co v Louisville & N. R. Co., 92 So. 797, 207 Ala 253
N.Y.—Purcell v. New York Cent R Co, 275 N.Y.S. 70, 242 App.Div 292, affirmed 197 N E. 182, 268 N Y 164, certiorari denied 56 S.Ct. 173, 296 U.S. 545, 80 L.Ed. 387.

Approval by commission

(1) In view of Code 1907 §§ 5669, 5678, providing for changes of freight tariffs being effective only in the future, printed and published freight schedules being by § 5527 lawful rates when approved by the commission, such schedules cannot be made unlawful for and during the period of their approved operation by any subsequent retroactive finding and order of the commission—T R. Miller Mill Co v Louisville & N. R. Co, 92 So 797, 207 Ala 253.

(2) Where the carrier filed with the railroad commission a tariff covering a designated field, but not in harmony with the original requirements of the commission, and the commission approved the tariff as filed, its approval was ipso facto a cancellation of its previous order so far as it was inconsistent with the approved tariff, and by Code 1907 § 5525, the rates so approved became the lawful rate, binding on carrier and shipper alike until discontinued by a valid order of the commission. —T. R Miller Mill Co. v. Louisville & N. R. Co., supra.

73. Wash—United Artists Corporation v. Puget Sound Electric Ry., 211 P. 873, 122 Wash 537.

74. Miss.—Illinois Cent R. Co. v. King, 88 So. 322, 125 Miss. 734.

75. Mich.—Michigan R. Commn. v.

per mile, nor the distances between stations, in the absence of any law or rule of the commission requiring it.[76]

Where the jurisdiction of a commission to make an order requiring the filing of schedules depends upon whether the person against whom the order is directed is engaged in business as a carrier the commission has the power to determine the business in which such person is engaged.[77]

Under statutes specifically so providing, carriers may be required to post schedules of their rates in their stations,[78] or to file them in their offices.[79] Such a requirement as to posting is not complied with by binding the schedules together and leaving them open to the public on a prominent desk in the waiting room of the station; and it is not sufficient for the carriers to send schedules to their agents with instructions to post, but they must see that they are continually kept posted as required by law. However, the schedule of rates may be printed on two cards, so posted as to read as one, and the carrier is not required to post special rates which it is authorized to make for temporary use for particular persons and places.[80]

The failure of a carrier to post a statutory notice stating where the tariff may be examined, has been held not to invalidate the tariff.[81]

§ 303. Construction of Particular Tariffs

Generally, freight rate tariffs are construed according to the same rules as are other written documents, such as statutes and contracts.

The construction of a freight tariff is not a matter sui generis, but ordinarily presents questions similar to those presented when the construction of any other written document is in dispute.[82] Consequently, although there are a few rules of construction that are particularly applicable,[83] the rules commonly used in the construction of other documents, such as statutes and contracts may generally be resorted to.[84]

While the intention of the parties is the guiding factor,[85] it must be determined from the written language of the tariff,[86] which must be fairly and reasonably construed in accordance with the proper meaning of the words used.[87] In the absence of ambiguity, no effect will be given to an intention of the carrier not expressed in the language of the

Detroit, etc., R. Co., 150 N.W. 861, 184 Mich 242.

76. Fla—State v. Pensacola, etc., R Co, 9 So 89, 27 Fla. 403.

77. U S—Producers' Transp Co. v Railroad Commission of California, 169 P. 59, 176 Cal. 499, affirmed 40 S.Ct. 131, 251 U S. 228, 64 L Ed 239.

A pipe line company engaged in transporting oil by means of pipe line held subject to Public Utilities Act, making order of railroad commission requiring it to show cause why it should not file rates and schedules warranted in view of St 1913 p 657, and Const. art 12 § 23 —Producers' Transp. Co. v. Railroad Commission of California, 169 P. 59, 176 Cal. 499, affirmed 40 S.Ct. 131, 251 U.S. 228, 64 L.Ed. 239.

78. Fla.—State v. Pensacola, etc., R. Co, 9 So. 89, 27 Fla. 403.
N.H—Locke v. Concord R. Corp, 60 N.H. 552.

79. Vt.—Simpson v. Central Vermont Ry. Co, 115 A. 299, 95 Vt 388.

80. Fla—State v Pensacola, etc., R. Co, 9 So. 89, 27 Fla. 403.

81. N.Y—Minturn v. New York Cent. R. Co, 220 N Y S. 789, 220 App Div 222.

82. U S—W. P. Brown & Sons Lumber Co v Louisville & N. R. Co, 57 S Ct. 265, 299 U S. 393, 81 L Ed 301, affirming, C C.A., 82 F 2d 94, which affirmed, D C, 7 F Supp 593, certiorari granted 57 S.Ct. 14, 299 U S. 524, 81 L Ed. 385—Pillsbury Flour Mills Co. v. Great Northern Ry. Co, C C A Minn., 25 F.2d 66.
Ky.—Louisville Water Co v. Louisville, H. & St L. Ry. Co, 110 S W 2d 668, 270 Ky. 833.

83. U.S—Pillsbury Flour Mills Co v. Great Northern Ry. Co., C C A Minn, 25 F.2d 66.

84. U.S—Wheelock v. Walsh Fire Clay Products Co, C C A.Mo, 60 F.2d 415—Chicago Great Western R. Co v Farmers' Shipping Ass'n, C C A.Kan, 59 F 2d 657—Hohenberg v. Louisville & N R. Co, C C A Ala, 46 F 2d 952, certiorari denied 52 S Ct. 6, 284 U S. 617, 76 L Ed 527—Updike Grain Co. v Chicago & N W Ry. Co., C C A Neb, 35 F 2d 486—Pillsbury Flour Mills Co v. Great Northern Ry Co, C C A Minn, 25 F 2d 66
Fla—Louisville & N. R Co. v Speed-Parker, Inc., 137 So. 724, 103 Fla 439.

85. N.C—Davis v. Latham-Bradshaw Cotton Co., 117 S E. 391, 185 N.C 387
10 C J. p 430 note 7.

86. U S—W P Brown & Sons Lumber Co v. Louisville & N. R Co, C C A Ky., 82 F.2d 94, affirming, D.C, 7 F Supp 593, certiorari granted 57 S Ct 14, 299 U S 524, 81 L Ed 385, affirmed 57 S Ct. 265, 299 U S. 393, 81 L Ed 301—Lothrop v. Spokane, P & S. Ry. Co, D C. Or., 10 F.2d 225, reversed on other grounds, C C A, Southern Pac. Co v. Lothrop, 15 F 2d 486, certiorari denied Lothrop v. Southern Pac Co, 47 S Ct 336, 273 U S 712, 71 L Ed. 869, Lothrop v. Spokane P & S. R Co, 47 S Ct 336, 273 U S. 742, 71 L Ed 869, and Lothrop v. Oregon-Washington R & Nav Co, 47 S Ct. 336, 273 U S. 742, 71 L Ed 869
Va—Smokeless Fuel Co v Chesapeake & O. Ry. Co., 128 S.E 624, 142 Va. 355.

87. U S—Atlantic Bridge Co v. Atlantic Coast Line R. Co., D.C Fla, 56 F 2d 163, affirmed, C C A, Atlantic Coast Line Co v. Atlantic Bridge Co, 57 F 2d 651—Western Grain Co. v. St Louis-San Francisco Ry. Co., C C A Ala., 56 F.2d 160.
Utah—Jeremy Fuel & Grain Co v Public Utilities Commission, 226 P 456, 63 Utah 392.
Va—Smokeless Fuel Co v. Chesapeake & O. Ry. Co, 128 S E 624, 142 Va 355.

Tariff not applicable to international shipments

A tariff limited to shipments originating on carrier's line within United States does not apply to American part of transportation of international shipment on through bill of lading.—Lewis-Simas-Jones Co. v Southern Pac. Co, 51 S.Ct. 592, 283 U.S 651, 75 L.Ed 1333, reversing 289 P 643, 106 Cal App. 137, certiorari granted 51 S.Ct. 102, 282 U.S. 833, 75 L.Ed. 741.

tariff,[88] and the language of the tariff cannot be varied or defeated by a practical construction by the parties,[89] or by an announcement or construction by the carrier.[90] Nevertheless, where the actual meaning of a provision is open to construction in the connection used, the existing facts and circumstances attending its adoption,[91] the object sought to be accomplished thereby,[92] and the practical construction given it by the officers whose duty it is to administer the law under which it was adopted,[93] may be considered in its construction.

Generally the words used will be given their common meaning,[94] or the meaning which they might reasonably carry to the shippers to whom they are addressed.[95] If a tariff is addressed to a special class of shippers and uses words which have a particular or customary import among such class of shippers, that meaning should apply.[96] Technical terms used in the tariff must be given their full meaning.[97]

In construing a tariff, as in the case of other documents, the entire instrument must be visualized, and, if possible, effect must be given to every word, clause, and sentence[98] to the end that general and

88. U.S.—Atlantic Coast Line R. Co v. Atlantic Bridge Co, C.C.A.Fla., 57 F.2d 654, affirming, D.C., Atlantic Bridge Co. v. Atlantic Coast Line R. Co., 56 F.2d 163—Great Northern Ry. Co. v. Delmar Co, C C A Minn, 43 F.2d 780, affirming, D.C., Delmar Co. v. Great Northern Ry. Co, 34 F.2d 221, certiorari granted Great Northern Ry. Co. v. Delmar Co., 51 S.Ct. 212, 282 U S. 836, 75 L Ed 742, reversed on other grounds 51 S.Ct. 579, 283 U S. 686, 75 L Ed. 1349—Southern Pac Co. v. Lothrop, C C A.Or., 15 F 2d 486, reversing, D.C, Lothrop v Spokane, P. & S. Ry. Co., 10 F. 2d 225, and certiorari denied Lothrop v. Southern Pac. Co, 47 S Ct. 336, 273 U.S. 742, 71 L Ed. 869, Lothrop v. Spokane, P. & S. R. Co, 47 S Ct. 336, 273 U.S. 742, 71 L Ed 869, and Lothrop v. Oregon-Washington R. & Nav. Co., 47 S.Ct. 336, 273 U S. 742, 71 L.Ed. 869.

Va.—Smokeless Fuel Co. v. Chesapeake & O. Ry. Co., 128 S.E. 624, 142 Va. 355.

89. U S.—W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co, C.C A.Ky, 82 F 2d 94, affirming, D C, 7 F Supp. 593, certiorari granted 57 S Ct. 14, 299 U.S 524, 81 L Ed 385, affirmed 57 S Ct. 265, 299 U.S. 393, 81 L Ed. 301—Lakewood Engineering Co v. New York Cent. R. Co., Ohio, 259 F. 61, 170 C.C.A. 129, error dismissed 41 S.Ct. 60, 254 U.S. 661, 65 L.Ed. 463.

90. Ala.—Priebe v. Southern Ry Co, 75 So. 409, 200 Ala. 81.

Fla.—Louisville & N. R. Co. v. Speed-Parker, Inc., 137 So. 724, 103 Fla. 439.

91. U S—Carpenter v. Texas & N. O. R. Co., C C.A.Tex, 89 F 2d 274.

Mich.—New York Cent. Ry. Co. v. Calvert, 193 N.W. 295, 222 Mich. 488.

92. Va.—Smokeless Fuel Co. v Chesapeake & O. Ry. Co., 128 S E. 624, 142 Va. 355.

93. Mich.—New York Cent. Ry. Co. v. Calvert, 193 N W. 295, 222 Mich 488

94. U S—American Ry Express Co v. Price Bros, C.C.A.Tex., 54 F 2d 67

Va—Smokeless Fuel Co. v. Chesapeake & O Ry. Co., 128 S E. 624, 142 Va. 355.

Wash—Northern Pac. Ry. Co. v Sauk River Lumber Co., 295 P. 926, 160 Wash 691.

"Actual cost" of repairing cars

In carrier's tariff provision that, when material for repairing cars is furnished by shipper, carrier will pay actual cost of the same, the words "actual cost of the same" include cost of material and labor, but not of inspecting or cleaning cars, or of attaching grain doors—Rock Milling & Elevator Co. v. Atchison, T. & S. F Ry. Co., 158 P 859, 98 Kan. 478, affirming 154 P. 254.

95. U S—Union Wire Rope Corporation v. Atchison, T & S. F. Ry. Co., C C A Mo., 66 F 2d 965, reversing, D.C., Atchison, T. & S. F. R. Co. v. Union Wire Rope Corporation, 1 F Supp 399, certiorari denied 51 S Ct. 122, 290 U.S. 686, 78 L Ed 591.

Obvious meaning

A shipper who consults a tariff has a right to rely upon its obvious meaning He cannot be charged with knowledge of the intention of the framer's or the carrier's canons of construction or some other tariff not even referred to in the one carrying the rate.—Swift & Co. v. U. S., Ill., 255 F. 291, 166 C C A. 461.

96. Union Wire Rope Corporation v. Atchison, T. & S. F. Ry. Co., C C A Mo, 66 F 2d 965, reversing, D.C, Atchison, T. & S. F. R. Co. v. Union Wire Rope Corporation, 1 F Supp 399, and certiorari denied 54 S.Ct. 122, 290 U.S 686, 78 L.Ed. 591.

97. Utah.—Jeremy Fuel & Grain Co v. Public Utilities Commission, 226 P. 456, 63 Utah 392.

98. U.S—Carpenter v. Texas & N. O R. Co, C C.A.Tex, 89 F 2d 274—W. P. Brown & Sons Lumber Co v. Louisville & N R. Co, C. C A Ky., 82 F.2d 94, affirming, D C, 7 F Supp 593, certiorari granted 57 S Ct 14, 299 U.S 524, 81 L. Ed 385, affirmed 57 S Ct 265, 299 U.S. 393, 81 L.Ed 301—Chicago Great Western R. Co. v. Farmers Shipping Ass'n, C.C A Kan, 59 F. 2d 657—Updike Grain Corporation v St. Louis & S F. Ry Co, C. C A Neb, 52 F.2d 94—Updike Grain Co v. Chicago & N. W. Ry. Co., C C A Neb, 35 F.2d 486—Van Dusen Harrington Co. v. Northern Pac. Ry. Co, C.C.A Minn, 32 F 2d 466—Pillsbury Flour Mills Co. v. Great Northern Ry. Co., C.C A Minn., 25 F 2d 66—Lothrop v. Spokane, P. & S. Ry Co, D C Or, 10 F.2d 225, reversed on other grounds, C C A., Southern Pac. Co v. Lothrop, 15 F.2d 486, certiorari denied Lothrop v. Southern Pac. Co., 47 S.Ct. 336, 273 U.S 742, 71 L.Ed. 869, Lothrop v. Spokane, P. & S R. Co, 47 S Ct. 336, 273 U. S. 742, 71 L Ed. 869, and Lothrop v. Oregon-Washington R. & Nav. Co, 47 S.Ct. 336, 273 U S 742, 71 L Ed. 869—Louisville Water Co. v. Illinois Cent. R. Co, D C.Ky, 14 F Supp. 301—Portland Cattle Loan Co. v. Oregon Short Line R Co., Or., 251 F. 33, 163 C C.A. 283, affirming, D C., Oregon Short Line R Co v. Portland Cattle Loan Co., 245 F 214.

Or—Black v. Southern Pac Co, 171 P 878, 88 Or. 533.

Va—Smokeless Fuel Co v. Chesapeake & O Ry. Co, 128 S.E. 624, 142 Va. 355.

In determining the meaning of part of the tariff, resort may be had to other parts, in order that the whole may stand.—Updike Grain Corporation v. St. Louis & S. F. Ry Co, C C A.Neb, 52 F 2d 94—Updike Grain Co. v. Chicago & N. W. Ry. Co., C C.A Neb., 35 F 2d 486—Pillsbury Flour Mills Co. v Great Northern Ry. Co., C C.A Minn., 25 F.2d 66.

Tariff or supplement must be construed in its entirety, considering limitations on the title page and the rules therein.—Knight v. Chicago, B. & Q. R. Co, 207 N.W. 506, 114 Neb. 388—Knight v. Chicago, B. & Q. R. Co, 207 N W 505, 114 Neb. 387—McCaffrey Bros. Co. v. Chicago,

specific provisions in apparent contradiction may subsist together,[99] and apparent inconsistencies be reconciled.[1] Similarly, where more than one tariff may be applicable to the same service, they must be considered together and conflicts avoided wherever possible.[2] Furthermore, a tariff must be construed in connection with the rules of a state commission, referred to on its title pages, in such a way as to harmonize therewith, unless irreconcilable conflict appears.[3]

General and specific provisions of the tariff must be construed so as to harmonize, where this is reasonably possible,[4] but the general rule that special provisions always control general provisions applies.[5] So, where general and specific provisions are in apparent contradiction, the specific is construed as qualifying and supplying exceptions to the general.[6]

Although a general rule of a state railroad commission has the force of general law,[7] it will not be held to set aside the provisions of a tariff schedule, unless the two are clearly inconsistent.[8]

Because the tariff is written by the carrier, all ambiguities or reasonable doubts as to its meaning must be resolved against the carrier,[9] and in favor of the shipper.[10]

Since, as noted in § 302 supra, a freight tariff has the force and effect of a statute where it is

B & Q. R. Co., 207 N.W. 503, 114 Neb. 382.

Footnotes and extraneous matters

While freight tariffs should be construed according to plain import of language employed, particular phrases or sentences in tariff sheet must be considered in connection with subject matter and circumstances to which language refers, such as footnotes or other extraneous matters.—Jeremy Fuel & Grain Co. v. Public Utilities Commission, 226 P. 456, 63 Utah 392.

99. U S —Van Dusen Harrington Co. v. Northern Pac. Ry. Co., C.C.A. Minn., 32 F.2d 466.

1. Va.—Smokeless Fuel Co. v. Chesapeake & O. Ry. Co., 128 S E. 624, 142 Va. 355.

2. U.S.—Louisville Water Co. v. Illinois Cent. R. Co., D.C.Ky., 14 F. Supp. 301.

3. Fla —Louisville & N. R. Co. v. Speed-Parker, Inc., 137 So. 724, 103 Fla. 439.

4. Fla.—Louisville & N. R. Co. v. Speed-Parker, Inc., supra.

5. U.S.—Louisville Water Co. v. Illinois Cent. R. Co., D.C.Ky, 14 F. Supp. 301.

Tex.—Lutcher & Moore Lumber Co v. Beaumont, S. L. & W. Ry. Co., Civ.App., 33 S.W 2d 1077, affirmed, Com.App., 49 S.W.2d 726—King v. Chicago, R. I. & G. Ry. Co., Civ. App, 241 S.W. 180

6. U.S.—Pillsbury Flour Mills Co. v. Great Northern Ry. Co., C C.A. Minn., 25 F 2d 66.

Ohio —New York, C. & St. L. R Co v. Miller City Tile Co, 19 Ohio N P ,N.S., 244.

7. Fla —Louisville & N. R. Co. v Speed-Parker, Inc., 137 So. 724, 103 Fla 439

Commission regulations govern tariff

Regulations contained in railroad commission's classification must govern, unless local intra-state tariff expressly provides otherwise, or contains inconsistent provisions.—Louisville & N. R Co v Speed-Parker, Inc, 137 So. 724, 103 Fla. 439.

8. Fla —Louisville & N. R Co v. Speed-Parker, Inc., supra.

9. U S.—Chicago & N. W Ry. Co. v. Wilcox Co., C C A.Ill, 68 F 2d 883, certiorari denied 55 S.Ct. 72, 293 U S. 560, 79 L Ed. 661—Union Wire Rope Corporation v. Atchison, T. & S. F. Ry. Co, C.C A Mo, 66 F 2d 965, reversing, D C., Atchison, T. & S. F. R. Co v. Union Wire Rope Corporation, 1 F Supp 399 and certiorari denied 54 S Ct. 122, 290 U.S 686, 78 L Ed. 591.

Ark —Swift & Co. v. Ft. Smith & W. Ry. Co., 16 S W.2d 1001, 179 Ark. 516.

Tex —Texarkana & Ft. S. Ry. Co. v Houston Gas & Fuel Co, 51 S W.2d 284, 121 Tex. 594—International-Great Northern R. Co v. Singer Iron & Steel Co, Civ.App., 96 S. W 2d 1003.

Va —Smokeless Fuel Co. v. Chesapeake & O Ry. Co, 128 S E 624, 142 Va. 355.

Wash —Northern Pac. Ry. Co v. Sauk River Lumber Co, 295 P. 926, 160 Wash. 691.

Not entitled to liberal construction

Carrier, having prepared tariff schedule for interstate shipments, is not entitled to have them liberally construed in its own favor, and the rule of fair and reasonable construction applies.—Raymond Hadley Corporation v. Boston & M R R., 174 N Y S. 342, 186 App.Div. 341, appeal dismissed on condition 123 N E. 886, 226 N Y. 711, and affirmed 126 N.E 921, 227 N Y 648.

Diversion and reconsigning tariffs are construed strictly; the carrier, not being compelled to publish such tariffs in any particular terms, must abide by the terms he has chosen — Van Dusen Harrington Co. v Northern Pac. Ry Co, C C A.Minn., 32 F 2d 466.

10. U.S —Union Wire Rope Corporation v. Atchison, T. & S. F. Ry. Co, C C.A Mo, 66 F 2d 965, reversing, D C, Atchison, T & S F. Ry. Co. v. Union Wire Rope Corporation, 1 F.Supp 399, certiorari denied 54 S Ct 122, 290 U S. 686, 78 L Ed. 591—Atlantic Bridge Co v Atlantic Coast Line R Co., D.C Fla., 56 F.2d 163, affirmed, C.C.A, Atlantic Coast Line Co v. Atlantic Bridge Co., 57 F 2d 654—American Trust Co v. American Ry Exp Co, D C Ind, 42 F 2d 272, reversed on other grounds, C C A, American Ry Express Co. v. American Trust Co, 47 F.2d 16, certiorari denied American Trust Co v American Ry Express Co, 52 S Ct. 13, 284 U S 629, 76 L Ed 536—Southern Pac Co v. Lothrop, C C A Or., 15 F 2d 486, reversing on other grounds, D C, Lothrop v. Spokane, P & S. Ry. Co., 10 F.2d 225, and certiorari denied Lothrop v. Southern Pac. Co, 47 S Ct. 336, 273 U S 742, 71 L Ed. 869, Lothrop v Spokane, P. & S. R Co, 47 S.Ct. 336, 273 U.S. 742, 71 L Ed. 869, and Lothrop v. Oregon-Washington R. & Nav. Co, 47 S Ct. 336, 273 U S. 742, 71 L Ed 869.

Ark.—Swift & Co. v. Ft. Smith & W Ry Co, 16 S.W 2d 1001, 179 Ark 516.

Or —Green Mountain Log Co. v. Columbia & N R R. R, 16 P 2d 1106, 141 Or 188.

Tex.—International-Great Northern R Co v. Singer Iron & Steel Co, Civ.App, 96 S W.2d 1003

Rates fixed by traffic bureaus and organizations are construed liberally in favor of shipper in case of ambiguity.—Lothrop v. Spokane, P. & S Ry. Co., D C Or., 10 F 2d 225, reversed on other grounds, C C.A., Southern Pac. Co v. Lothrop, 15 F. 2d 486, certiorari denied Lothrop v. Southern Pac Co, 47 S Ct 336, 273 U S 742, 71 L.Ed. 869, Lothrop v. Spokane, P. & S. R Co, 47 S Ct 336, 273 U.S 742, 71 L Ed 869, and Lothrop v Oregon-Washington R & Nav. Co, 47 S.Ct. 336, 273 U S. 742, 71 L. Ed. 869.

properly filed and published, it is often treated as a statute for purposes of construction.[11] Manifest omissions from a freight tariff may, in accordance with the rules stated in the C.J.S. title Statutes § 328, also 59 C.J. p 974 note 15, be supplied in order to avoid absurd consequences and to effectuate the intention as ascertainable from the context.[12] When its meaning is ascertained the tariff operates as law which the court must apply as any other law.[13]

Ordinarily, the construction of a tariff presents a question of law;[14] but the relation of tariffs one to another in a common territory is not entirely a question of law, but more in the nature of a mixed question of law and fact;[15] and the conformity of a special contract between carrier and shipper, to the controlling tariff, is a question of fact.[16]

Where the meaning of a freight rate tariff promulgated by a state commission is plain, there is no occasion to apply to the commission for a construction thereof;[17] but otherwise, it is a matter primarily for the commission.[18]

In an interstate carrier's suit in a state court to recover an alleged deficiency of freight charged under a published schedule, the state court has jurisdiction to construe the schedule filed with the interstate commerce commission to determine whether the rate so charged is illegal.[19]

§ 304. Proceedings to Enforce Compliance by Carrier with Rates Fixed by Statute or Railroad Commission

Independently of statute a court of equity has jurisdiction to enjoin a carrier from collecting other than the prescribed rates, which suit may be commenced by the state or representative thereof, but not in some states by a shipper, and may be instituted regardless of any laches in the commencement of the proceeding. The prescribed rate is presumed proper and the carrier has the burden of showing that it is unreasonable.

Independently of any remedy given by law, a court of equity has inherent jurisdiction to enjoin a carrier from collecting rates other than those prescribed by the legislature or regulatory commission,[20] and in a proper case may and should issue a preliminary injunction to compel the carrier to charge the prescribed rate until the determination of the suit.[21] An information in the nature of a

11. U.S.—Updike Grain Co. v. Chicago & N. W. Ry. Co., C.C.A.Neb., 35 F.2d 486—Pillsbury Flour Mills Co. v. Great Northern Ry. Co., C.C.A.Minn., 25 F.2d 66.

12. Utah—Gunnison Sugar Co. v. Public Utilities Commission of Utah, 256 P. 790, 69 Utah 521.

As to rate on sugar

Freight tariff was held to quote sugar rates in cents per hundred pounds, not per ton, as indicated at top of sheet containing last of stone schedule since rates in cents per ton would be absurdly unreasonable while such rates in hundred pounds would be appropriate and reasonable.—Gunnison Sugar Co. v. Public Utilities Commission of Utah, 256 P. 790, 69 Utah 521.

13. Kan.—Atchison, T. & S. F. Ry. Co. v. Young, 171 P. 1156, 102 Kan. 875.

14. U.S.—W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co., 57 S.Ct. 265, 299 U.S. 393, 81 L.Ed. 301, affirming, C.C.A., 82 F.2d 94, affirming, D.C., 7 F.Supp. 593, certiorari granted 57 S.Ct. 14, 299 U.S. 524, 81 L.Ed. 385—Southern Ry. Co. v. Eichler, C.C.A.Mo., 56 F.2d 1010—Hohenberg v. Louisville & N. R. Co., C.C.A.Ala., 46 F.2d 952, certiorari denied 52 S.Ct. 6, 284 U.S. 617, 76 L.Ed. 527—Pillsbury Flour Mills Co. v. Great Northern Ry. Co., C.C.A.Minn., 25 F.2d 66—Davis v. Prairie Pipe Line Co., C.C.A.Kan., 298 F. 393.

Fla.—Louisville & N. R. Co. v. Speed-Parker, Inc., 137 So. 724, 103 Fla. 439.

15. U.S.—Davis v. Prairie Pipe Line Co., C.C.A.Kan., 298 F. 393.

16. Mich.—Grand Trunk Western R. Co. v. Mount Clemens Sugar Co., 269 N.W. 208, 277 Mich. 366.

Engine hire agreement

Whether the services contemplated in an engine hire agreement are identical with those covered by the controlling tariffs is a question of specific fact, not a mere matter of resemblance—Grand Trunk Western R. Co. v. Mount Clemens Sugar Co., 269 N.W. 208, 277 Mich. 366.

17. U.S.—St. Louis, I. M. & S. Ry. Co. v. J. F. Hasty & Sons, Ark., 41 S.Ct. 269, 255 U.S. 252, 65 L.Ed. 614.

18. Wash.—Northern Pac. Ry. Co. v. Sauk River Lumber Co., 295 P. 926, 160 Wash. 691.

"Board measure"

(1) Meaning of words "board measure" in railroad's tariff was primarily for department of public works to determine, where not defined in tariff—Northern Pac. Ry. Co. v. Sauk River Lumber Co., 295 P. 926, 160 Wash. 691.

(2) Such department's action in applying scaling bureau's construction of "board measure" was not arbitrary or capricious—Northern Pac. Ry. Co. v. Sauk River Lumber Co., supra.

19. Wash.—Southern Pac. Co. v. Frye, 143 P. 163, 82 Wash. 9.

20. U.S.—People of Porto Rico v. American R. Co. of Porto Rico, C.C.A.Porto Rico, 254 F. 369, 165 C.C.A. 589, certiorari denied American R. Co. of Porto Rico v. People of Porto Rico, 39 S.Ct. 259, 249 U.S. 600, 63 L.Ed. 796

N.D.—State v. Chicago & N. W. Ry. Co., 179 N.W. 378, 46 N.D. 313.

10 C.J. p 433 note 46

Mandamus to enforce compliance by carrier with prescribed rate see C.J.S. title Mandamus § 231, also 10 C.J. p 433 note 56—p 434 note 61.

21. Md.—Towers v. Kensington Ry. Co. of Montgomery County, 102 A. 1011, 131 Md. 649.

Temporary injunction held proper

(1) In transit commission's proceeding against railroad under statute providing that subsidiary domestic railroad shall not charge rate within city exceeding rate charged by parent foreign corporation for similar service to adjacent state, granting of temporary injunction held proper exercise of discretion, in view of benefits enjoyed by defendant railroad for sixteen years under rates fixed by interstate commerce commission greater than those fixed by state statute.—Transit Commission v. Long Island R. Co., 288 N.Y.S. 938, 248 App.Div. 749, affirmed 3 N.E.2d 622, 272 N.Y. 27.

(2) Because of the many small sums which may be collected, rendering restitution practically impossible, injunction pendente lite should issue in suit by the state to enjoin express companies, as unauthorized,

quo warranto against a railroad persistently charging, and threatening to charge in the future, rates in excess of the maximum fixed by the legislature affords no adequate remedy.[22] Such action may be maintained by the state[23] or by the state regulatory commission;[24] and, although in some states, an injunction will not lie on the suit of a shipper to compel a carrier to transport goods at the rate fixed by law,[25] in others, suits by shippers to restrain a carrier from charging and collecting any other than the prescribed rate have been maintained.[26] This right is not affected by the failure of the state, for a number of years, to institute proceedings to prevent the charging of rates in excess of those fixed by statute;[27] nor can its delay in instituting proceedings be construed as an acquiescence in the acts of the carrier in charging excessive rates, and as a waiver of its right to enforce compliance with the statute.[28] In such a proceeding the carrier can defend on the ground that the prescribed rates are not compensatory for the service rendered.[29] The court will start with the presumption that the statute is a valid and constitutional exercise of the legislative power;[30] and if the carrier makes the defense that the statute is unconstitutional, as prescribing rates which are unreasonable or confiscatory, the burden of proof is on it to show this fact by a clear preponderance of the evidence;[31] and it must make a full, fair, and complete disclosure of all the facts to enable the court to determine whether or not the rates are unreasonable.[32] In a proceeding by information before the commission because of violation by a railroad company of an order of the commission as to switching charges, the carrier will be permitted to introduce evidence to controvert the reasonableness of the regulations sought to be enforced.[33] In such a proceeding an answer will be construed reasonably and in the light of the complaint with reference to which it was drawn.[34] The fact that the bill does not show specific injury to the public will not prevent the granting of an injunction; it is sufficient that the facts alleged satisfy the court that defendant's disobedience of the law may be productive of public injury.[35]

Notice of hearing. Where a railroad company has had ample opportunity to be heard on an amendment to a rule of the railroad commissioners, it cannot complain, in a proceeding against it to en-

from putting in effect higher rates, the complaint stating a cause of action.—State v. American Ry. Express Co., 170 N.W. 570, 41 S.D. 337.

22. N.H.—State v. Boston, etc., R. Co., 74 A. 542, 75 N.H. 327, 340.
10 C.J. p 433 note 47.

23. N.Y.—People v. Long Island R. R., 185 N.Y.S. 594, 113 Misc. 700, reversed on other grounds 186 N.Y.S. 589, 195 App.Div. 897.
10 C.J. p 433 note 48.

Institution of proceeding by attorney general

Under Const.1846 art 5 § 1, and Executive L. § 62, the attorney general was empowered to bring an action in the name of the people of the state to enjoin railroads from charging unlawful rates.—People v. Long Island R. R., 185 N.Y.S. 594, 113 Misc. Rep. 700, reversed on other grounds 186 N.Y.S. 589, 195 App.Div. 897.

24. Ind.—Chicago & E. I. Ry. Co. v. Public Service Commission of Indiana, 186 N.E. 330, 205 Ind. 253, certiorari denied 54 S.Ct. 123, 290 U.S. 688, 78 L.Ed. 592.

25. N.J.—Rogers Locomotive, etc., Works v. Erie R. Co., 20 N.J.Eq. 379.

26. U.S.—Vandalia R. Co. v. Schnull, 41 S.Ct. 324, 255 U.S. 113, 65 L.Ed. 539, reversing 122 N.E. 225, 188 Ind. 87, conformed to 130 N.E. 865, 190 Ind. 698.

27. N.H.—State v. Boston, etc., R. Co., 74 A. 542, 75 N.H. 327.
10 C.J. p 433 note 49.

28. N.H.—State v. Boston, etc., R. Co., supra.
10 C.J. p 433 note 50.

29. U.S.—Vandalia R. Co. v. Schnull, 41 S.Ct. 324, 255 U.S. 113, 65 L.Ed. 539, reversing 122 N.E. 225, 188 Ind. 87, conformed to 130 N.E. 865, 190 Ind. 698.

Failure to appeal from commission's order immaterial

Such defense is not prevented by the fact that the carrier had not appealed from the order of the commission as authorized by the state law, especially where the contention was first made in the United States supreme court on writ of error to the state court.—Vandalia R. Co. v. Schnull, 41 S.Ct. 324, 255 U.S. 113, 65 L.Ed. 539, reversing 122 N.E. 225, 188 Ind. 87, conformed to 130 N.E. 865, 190 Ind. 698.

30. Neb.—State v. Adams Express Co., 122 N.W. 691, 85 Neb. 25, 42 L.R.A.,N.S., 396.

31. Neb.—State v. Adams Express Co., supra.

Evidence held to show intra-state rate applicable

Evidence held to support finding that transportation of coal, purchased by railroad, from mine to point of interchange between buyer railroad and transporting railroad, where coal was diverted for consumption, constituted movement in "intra-state commerce," and therefore intra-state rate rather than interstate rate was controlling.—Chicago & E. I. Ry. Co. v. Public Service Commission of Indiana, 186 N.E. 330, 205 Ind. 253, certiorari denied 54 S.Ct. 123, 290 U.S. 688, 78 L.Ed. 592.

32. Neb.—State v. Adams Express Co., 122 N.W. 691, 85 Neb. 25, 42 L.R.A.,N.S., 396.

33. Okl.—Atchison, etc., R. Co. v. State, 109 P. 218, 26 Okl. 166.

34. U.S.—Vandalia R. Co. v. Schnull, 41 S.Ct. 324, 255 U.S. 113, 65 L.Ed. 539, reversing 122 N.E. 225, 188 Ind. 87, conformed to 130 N.E. 865, 190 Ind. 698.

Answer held not demurrable

In a suit by shippers to restrain a carrier from charging more than specified rates fixed by a state commission, an answer alleging that the rates so fixed were not compensatory was not demurrable for failing to allege that the cost of service referred to therein was the cost of service between the particular stations to which the rates apply, since the answer manifestly related to the rates and service referred to in the complaint, and was so regarded by the state supreme court, whose judgment was under review.—Vandalia R. Co. v. Schnull, 41 S.Ct. 324, 255 U.S. 113, 65 L.Ed. 539, reversing 122 N.E. 225, 188 Ind. 87, conformed to 130 N.E. 865, 190 Ind. 698.

35. Wis.—Atty-Gen. v. Chicago, etc., R. Co., 35 Wis. 425.

force observance of the rule, that the notice of hearing did not strictly comply with the statute.[36]

§ 305. Proceedings by Carrier for Relief against Unreasonable Rates

If prescribed rates are unreasonable a carrier cannot for that reason refuse to give service, but its remedy is to apply to the regulatory commission or the courts for relief, a remedy to which it is entitled even though it has put the rates into effect. The carrier must base its case on the unreasonableness of the rate as to itself, not as to others. A minority stockholder may, on a proper showing, bring a proceeding to secure a revision of rates.

If the rates fixed by a regulatory commission are unreasonable or confiscatory the carriers cannot retire from business, but their remedy lies in appeal to the commission and the courts for relief against the rates so established.[37] They may contest rates fixed by a state regulatory commission, if found to be confiscatory;[38] and this right is not impaired by their action in putting the rates into effect.[39] The question whether rates for transportation fixed by a state constitution, statute, or a railroad commission are so unreasonably low as to deprive the carrier of just compensation is a subject of judicial inquiry in a court of competent jurisdiction[40] which, as is shown supra § 284, is the final judge of what is reasonable, of what impairs the right of a corporation to reasonable compensation, or of what amounts to confiscation. A carrier must base its attack on prescribed rates on the ground that they are unreasonable or confiscatory as to it, and cannot avail itself of any grievance which other carriers may have because of such rates.[41] A carrier cannot recover on a quantum meruit basis for services performed for another carrier in intrastate commerce where the question as to the right to charge for such services and the amount therefor is pending before a state regulatory commission.[42]

In a shipper's action to enforce an award based on a prescribed rate, a carrier cannot assail as confiscatory such rate, but can do so only by an action for that purpose, as by a suit in equity, in a court having jurisdiction, which can for once and for all determine its validity.[43]

Proceedings by stockholder. A minority stockholder of a carrier may file a complaint with a state regulatory commission, and, on a proper showing, secure a revision of rates.[44]

§ 306. Injunction

a. Right to injunction
b. Jurisdiction
c. Suspension of rate or penalty pending suit
d. Defenses
e. Parties
f. Pleading and evidence
g. Decree

a. Right to Injunction

(1) In general
(2) Preliminary injunctions

(1) In General

On a bill filed by a carrier the courts, after ascertaining the facts, may enjoin the enforcement of rates which are clearly shown to be unreasonable and confiscatory; but they cannot enjoin the exercise by a regulatory commission of its power to fix rates.

36. Fla.—State v. Florida East Coast R. Co., 68 So. 729, 69 Fla. 480.

37. Colo.—Denver & S. L. R. Co. v. Chicago, B. & Q. R. Co., 171 P. 74, 64 Colo. 229.

Increase in rate proper remedy

If the rate in force is not sufficient to compensate railroad company for service of stoppage in transit as to intra-state shipments, remedy is an increase in rate, rather than denial of the service.—Chicago, M. & St. P. Ry. Co. v. Board of Railroad Com'rs, 199 N.W. 453, 47 S.D. 395, error dismissed 46 S.Ct. 485, 271 U.S. 645, 70 L.Ed. 1129.

38. U.S.—Augusta-Aiken Ry. & Electric Corporation v. Railroad Commission of South Carolina, C.C.A. S.C., 281 F. 977.

No estoppel

Under S.C.Civ.Code 1912 §§ 3174, 3175, authorizing the state railroad commission to fix reasonable rates, there is no contract between a railroad company and the state respecting rates so fixed which estops the company from contesting the reasonableness or asserting the confiscatory character of such rates.—Augusta-Aiken Ry. & Electric Corporation v. Railroad Commission of South Carolina, C.C.A.S.C., 281 F. 977.

39. U.S.—Allen v. St. Louis Southwestern R. Co., Ark., 33 S.Ct. 1030, 230 U.S. 553, 57 L.Ed. 1625.
Ind.—Cleveland, etc., R. Co. v. Blind, 105 N.E. 483, 182 Ind. 398.

40. U.S.—Montana, W. & S. R. Co. v. Morley, D.C.Mont., 198 F. 991.
10 C.J. p. 434 note 63.

41. Or.—Valley & Siletz R. Co. v. Thomas, 48 P.2d 358, 151 Or. 80.

42. Pa.—Pittsburgh & L. E. R. Co. v. South Shore R. Co., 107 A. 680, 264 Pa. 162.

Switching services

If a railroad, operating only as a switching facility at a plant, has applied to a state public service commission to annul cancellation of an agreement as to compensation for the switching services by the line carrier and for the allowance of a fair compensation for such services in intra-state commerce, which application was pending at trial of action involving the charges, the switching company could not recover as to claims which may be disallowed by the commission.—Pittsburgh & L. E. R. Co. v. South Shore R. Co., 107 A. 680, 264 Pa. 162.

43. Ky.—Louisville & N. R. Co. v. Greenbrier Distillery Co., 187 S.W. 296, 170 Ky. 775.

44. **Joint rates**

Minority stockholder of railroad may file complaint with state commission, and on proper showing secure revision of joint intra-state rates and divisions thereof.—Backus-Brooks Co. v. Northern Pac. Ry. Co., C.C.A.Minn., 21 F.2d 4, certiorari denied 48 S.Ct. 120, 275 U.S. 562, 72 L.Ed. 427.

On a bill filed by a carrier the courts will enjoin the enforcement of rates which are clearly shown to be unreasonable in their operation against the carrier and of a confiscatory nature.[45] Nevertheless, courts have no power to enjoin the exercise by a board of commissioners of its power to fix rates; it is only when rates have been fixed that the court has power to review them.[46] However, when rates, either tentative or final, have been put in force and are maintained in actual operation under penalty of fines, the carrier is entitled to an injunction against their continuance, if shown to be confiscatory;[47] and it has been held that, where commissioners have advertised that a schedule prepared by them will be put in force on a day named, this will be sufficient to give a court of equity jurisdiction, on the application of a carrier before the expiration of the time to restrain the enforcement of the schedule.[48] In a proceeding in the federal court by a carrier to restrain the enforcement of an order made on application of a shipper by a state regulatory commission which canceled a prior order amending a tariff, which cancellation order was affirmed on appeal to the courts, if the state regulatory commission had jurisdiction to control the making or changing of the tariff, the procedure whereby it made the cancellation order and the appeal to the courts constituted the administrative action prerequisite to judicial action, so as to present a justiciable question to the federal court.[49]

When asked to enjoin the enforcement of rates as being unreasonable and confiscatory, the court must ascertain the facts on which the reasonableness of the rates depends,[50] it being of the utmost importance that the facts shall be clearly and accurately found.[51] In proceedings of this nature, the general rule, considered supra § 299, as to the burden of proof where a rate is attacked and the presumption of validity of a rate established or approved by act of the legislature or regulatory commission, applies so that the court starts with the presumption that the act of the legislature or of the regulatory commission is valid, and the burden of proving the contrary rests on the carrier,[52] especially where the rates complained of were adopted at the special request of the carrier and other railroad companies.[53] To authorize the issuance of an injunction it is essential that it be clearly shown that the rates are unreasonable and in violation of the carrier's constitutional rights;[54] and, as appears infra § 306, this is especially true in respect of injunctions before final hearing. The jurisdiction of the court should not be exercised except in a case reasonably free from doubt.[55] If there is room for a difference of intelligent opinion as to whether rates complained of will be remunerative, the courts should not interfere, but the reasonableness of the rates should be left to the test of experiment.[56] Where, by statute, the railroad commission is empowered to grant a rehearing in any case in which it has made a final order, or to modify any final order made by it, such statute must be construed as giving the commission unlimited power to effect or to modify any order, and to correct its own errors, and the court will not grant relief in the first instance where relief is within the power of the commission to give on proper application therefor.[57]

45. U.S.—Philadelphia & R. R. Co. v. U. S., Pa., 36 S.Ct. 354, 240 U.S. 334, 60 L.Ed. 675.
10 C.J. p 434 note 65.

46. U.S.—Chicago, B. & Q. R. Co. v. Winnett, Eighth Circuit, 162 F. 242, 89 C.C.A. 222.
10 C.J. p 435 note 66.

47. U.S.—Love v. Atchison, T. & S. F. R. Co., Okl., 185 F. 321, 327, 107 C.C.A. 403, affirming 174 F. 59, 177 F. 493.
10 C.J. p 435 note 67.

48. U.S.—Chicago & N. W. R. Co. v. Dey, C.C.Iowa, 35 F. 866, 1 L.R.A. 744.

49. U.S.—Missouri Pac. R. R. Corporation in Nebraska v. Nebraska State Ry. Commission, C.C.A.Neb., 65 F.2d 557, certiorari denied 54 S.Ct. 72, 290 U.S. 656, 78 L.Ed. 568

50. U.S.—Seaboard Air Line R. Co. v. Railroad Commission of Alabama, C.C.Ala. 155 F. 792

51. U.S.—Chicago, M. & St. P. R. Co. v. Tompkins, S.D., 20 S.Ct. 336, 176 U.S. 167, 44 L.Ed. 417.

52. U.S.—Chicago, M. & St. P. R. Co. v. Tompkins, S.D., 20 S.Ct. 336, 176 U.S. 167, 44 L.Ed. 417.
Mich.—Michigan Cent. R. Co. v. Wayne Cir. Judge, 120 N.W. 1073, 156 Mich. 459

53. U.S.—Bush v. Texas & P. Ry. Co., D.C.La., 290 F. 1008

54. U.S.—Chicago, M. & St. P. R. Co. v. Tompkins, S.D., 20 S.Ct. 336, 176 U.S. 167, 44 L.Ed. 417.
10 C.J. p 435 note 72.

55. U.S.—Ex p. Young, Minn., 28 S.Ct. 441, 209 U.S. 123, 52 L.Ed. 714, 13 L.R.A.,N.S., 932, 14 Ann.Cas. 764
10 C.J. p 435 note 74.

56. U.S.—Chicago, B. & Q. R. Co. v. Dey, C.C.Iowa, 38 F. 656.
10 C.J. p 435 note 75.

57. Ind.—Chicago, etc., R. Co. v. State R. Commn., 95 N.E. 364, 175 Ind. 630.

Petition for rehearing condition precedent to jurisdiction

Where the statute provides that the filing of a petition for rehearing within twenty days after the entry of a final order by the regulatory commission is a condition precedent to a court's acquiring jurisdiction to review such order, a railroad not petitioning for rehearing within twenty days cannot have order fixing freight rates set aside and enforcement enjoined.—Baltimore & O. R. Co. v. Public Service Commission of Indiana, 177 N.E. 260, 202 Ind. 618.

Probable delay in action by commission immaterial

Under a statute providing that the orders of the regulatory commission shall take effect not more than thirty days after entry thereof, unless suspended or modified by the commission, impliedly authorizes the commission to suspend the taking effect of any order pending a petition for rehearing or a modification thereof, so that a party aggrieved by an order

(2) Preliminary Injunctions

In accordance with the rules governing the granting of preliminary injunctions generally, the granting or refusal of a preliminary injunction against the enforcement of a rate or an order relating thereto rests in the sound discretion of the court. It will ordinarily be granted only where a reasonably clear showing is made that the rate attacked is unreasonable and will be invalidated on final hearing, and the failure to grant will cause irreparable injury.

Conformably to the rule applicable to preliminary injunctions generally, considered in the C.J.S. title Injunctions § 14, also 32 C.J. p 31 note 17, the granting or refusal of a preliminary injunction against the enforcement of rates or an order relating thereto rests in the sound discretion of the court.[58] Such an injunction may not be granted for merely the asking, but there must be at least a prima facie showing to the court that complainant has a right to the final relief asked.[59] It must be shown clearly that the rates are unreasonable and in violation of the carrier's constitutional rights.[60] A preliminary injunction against the enforcement of rates already in effect will be denied where the rate attacked is not violative of either the federal or state constitution and there is no conclusive proof offered that it is unreasonable,[61] or where complainant fails to introduce evidence to show that the order of the commission establishing the rate attacked was either arbitrary, unjust, unreasonable, or illegal, or which would overthrow the presumption of reasonableness which exists in favor of the action of the commission,[62] or where the alleged confiscatory rates have not gone into effect, and it is probable that a practical test will be required for the purpose of determining whether they are in fact confiscatory;[63] and where this state of facts exists the fact that bonds have been given by complainants to protect the interests of shippers will constitute no ground for granting the injunction in case the bonds do not afford adequate protection.[64] Where it is claimed on reasonable grounds and in good faith that the rates attacked are not confiscatory, the court should not destroy the status quo by issuing a preliminary injunction against the enforcement of rates already in force.[65] The fact that the penalty for violation of the orders of a regulatory commission fixing rates may be excessive or exorbitant affords no ground for a preliminary injunction, since such penalties are separable from the order of the commission, and it is not necessary for the court to pass judgment on the penalty provisions in advance of any attempt to enforce them.[66] However, where the rates fixed by a regulatory commission are subject to grave and serious doubt, an interlocutory injunction may be granted pending a judicial determination of the reasonableness of the rate.[67] Also, where the rates attacked are apparently so flagrantly unjust and so in conflict with experience and common knowledge as to what is right as to appear unfair and probably confiscatory on their face, a preliminary injunction may be granted in advance of an actual test to determine their reasonableness;[68] and in accordance with the principle that courts of equity may by a preliminary injunction effect a change in the status quo, if it is necessary to do so to avoid an irreparable injury from a continuing wrong, a preliminary injunction may be granted to restrain the further enforcement of rates established by a commission, and may be continued in force for a sufficient length of time to show that they are unreasonable and confiscatory.[69] Also, where a state of facts appears which shows a reasonable probability that the rates may be adjudged invalid on

of the commission cannot resort to the courts merely on the ground that a petition for rehearing will not probably be acted on by the commission before the time fixed by the statute for the taking effect of the order unless suspended by the commission—Chicago, etc., R Co v. State R. Commn, 95 N.E 364, 175 Ind 630

58. U.S.—Trenton & Mercer County Traction Corp. v. Board of Public Utility Com'rs of New Jersey, N. J, 229 F 140, 143 C.C.A. 416.
10 C.J. p 435 note 77.

59. Ind.—Public Service Commission of Indiana v. Baltimore & O R Co., 169 N E. 530, 202 Ind 449, rehearing denied 176 N.E. 551, 202 Ind. 449.

60. U S—Winthrop v. Fellows, D.C. Mich., 230 F. 702.

61. U.S—Bush v. Texas & P. Ry Co, D C La, 290 F. 1008.

62. Ind.—Public Service Commission of Indiana v. Baltimore & O. R Co, 169 N E. 530, 202 Ind 449, rehearing denied 176 N.E. 551, 202 Ind 449.

63. U.S—Alabama R. Commn v Central of Georgia R Co., Ala, 170 F 225, 95 C.C.A. 117, reversing 161 F. 925
10 C.J. p 436 note 80.

64. U S—Alabama R. Commn v. Central of Georgia R Co, supra.

65. U S—Perkins v. Northern Pac. Ry. Co, C.C.Minn., 155 F 445.

In stockholders' suit

Where rates of charge by railroad companies for the intra-state carriage of commodities and passengers have been fixed by the state, and such rates have been accepted and put into operation by the railroad companies, a preliminary injunction will not be granted at suit of stockholders of such companies to restrain further enforcement of such rates by the state or obedience thereto by the companies, the legitimate purpose of such an injunction, except in cases of fraud, being to preserve the status quo pending a final hearing on the merits.—Perkins v. Northern Pac. Ry. Co., C C.Minn., 155 F. 445

66. U.S.—Bush v. Texas & P. Ry. Co., D C.La., 290 F. 1008.

67. U.S.—Atchison, T. & S F R. Co. v Interstate Commerce Commn., C. C Kan., 182 F. 189.

68. U.S—Perkins v. Northern Pac. Ry Co., C.C Minn, 155 F. 445.
10 C.J. p 435 note 79.

69. U.S.—In re Arkansas R. Rates, C C.Ark., 163 F. 141.
10 C.J. p 435 note 78.

final hearing, and a prima facie case of irreparable injury is made out if the rates be not suspended, while the interests of the public can be protected by exacting bonds to refund the amount of any excess rate if complainants lose in the suit a preliminary injunction may be issued against the enforcement of rates fixed by statute.[70]

Pending appeal. Where the railroad company will lose but little if the rates are enforced pending appeal, the trial court will not restrain the enforcement of the order fixing the rates, but will leave that matter to the supreme court.[71]

It is not a violation of a temporary injunction against putting in force a schedule of rates, on the ground that they were unreasonably low, for the commissioners to make another schedule after investigating a complaint filed against rates charged by a railroad company, although the purpose of those making the complaint was to evade the injunction, and their conduct in attempting to procure a favorable decision on the complaint was improper, as the duty of the commissioners under the statute was to hear the complaint and to establish proper rates.[72]

b. Jurisdiction

State and federal courts have jurisdiction to enjoin the enforcement of rates found to be confiscatory, and to enjoin prosecuting officers from taking action to enforce rates pending the determination of their validity by the court.

State courts in the exercise of their equity powers have jurisdiction to enjoin freight rates promulgated by boards of state railroad commissioners if found to be confiscatory;[73] and the federal courts also have jurisdiction of a suit to enjoin the enforcement of a state statute or of an order by a state railroad commission regulating rates on the ground that the rates are confiscatory,[74] notwithstanding an objection that a court of equity cannot enjoin criminal prosecutions.[75]

Injunction against arrests and in aid of jurisdiction. A federal court of equity which has acquired jurisdiction of a suit to enjoin the enforcement of a state statute fixing railroad rates on domestic shipments, and has not only granted a preliminary injunction but has also, under authority given by the statute itself, suspended its operation pending a final hearing, has power, on the filing of an amended bill, also to enjoin the county solicitors and sheriffs from taking threatened action under such suspended statute either by civil or criminal proceedings against employees of a railroad company, the effect of which would be to interfere with the operation of its road and to obstruct both local and interstate commerce, and by which irreparable injury would be caused to complainant.[76]

c. Suspension of Rate or Penalty pending Suit

Penalties for violation of prescribed rates, but not the rates themselves, are suspended pending an injunction suit testing the validity of the rate.

During the pendency of an injunction suit testing the validity of a statute prescribing rates for carriers, the rates are not suspended while enforcement of the rates is enjoined by the court, but penalties for violation of the rates are suspended during the pendency of such suit.[77]

d. Defenses

It is not a defense to a suit to enjoin an unreasonable rate that the carrier may cease to do business when it becomes unprofitable, or that it can make up its losses through its other business, or that the carrier has acquiesced in the rates or delayed in seeking relief against them, or that the reduced rates may increase the volume of business to such an extent as to make the rate profitable.

It is not a defense to a proceeding to restrain the enforcement of an unreasonable rate that plaintiff is a foreign corporation doing business in the state only as a matter of grace, and may retire when the business ceases to be profitable,[78] or that it operates through other states where no rates are fixed, which will enable it to make a profit;[79] nor is it any reason to deny relief by injunction against rates claimed to be unreasonable that the carrier put into effect for a time the rates complained of, to save itself the imposition of drastic penalties to which it would otherwise be liable.[80] Compliance

70. U.S.—Seaboard Air Line Ry. Co. v. Railroad Commission of Alabama, C.C.Ala., 155 F. 792.

71. U.S.—Louisville & N. R. Co. v. Kentucky R. Commn., D.C.Ky., 214 F. 465, affirmed 35 S.Ct. 146, 235 U.S. 601, 59 L.Ed. 379.

72. U.S.—Chicago, B. & Q. R. Co. v. Dey, C.C.Iowa, 38 F. 656

73. U.S.—Ex p. Young, Minn., 28 S.Ct. 441, 209 U.S. 123, 52 L.Ed. 714, 13 L.R.A.,N.S., 932, 14 Ann.Cas. 764 and note.

Tex.—Gulf, etc., R. Co. v. State R. Commn., 113 S.W. 741, 116 S.W. 795, 102 Tex. 338.

74. U.S.—Central of Georgia R. Co. v. McLendon, C.C.Ga., 157 F. 961—Perkins v. Northern Pac. R. Co., C.C.Minn., 155 F. 445

75. U.S.—Southern Pac. Co. v. California R. Comrs., C.C.Cal., 78 F. 236
10 C.J. p. 436 note 86

76. U.S.—Louisville & N. R. Co. v. Alabama R. Commn., C.C.Ala., 157 F. 944
10 C.J. p. 436 note 87.

77. Mo.—White v. Delano, 191 S.W. 1012, 270 Mo. 16.

78. U.S.—Chicago & N. W. R. Co. v. Dey, C.C.Iowa, 35 F. 866, 1 L.R.A. 744.
10 C.J. p. 436 note 88.

79. U.S.—Chicago & N. W. R. Co. v. Dey, supra.

80. U.S.—Love v. Atchison, T. & S. F. R. Co., Okl., 185 F. 321, 107 C.

with an order establishing rates for a period as long as five years will not estop the carrier from thereafter bringing suit to enjoin the enforcement of such rates as noncompensatory, where it is clearly shown that conditions are so changed by the increase of operating expense or otherwise that the net earnings on their entire intra-state business have ceased to be compensatory.[81] A suit by a carrier to restrain the enforcement of rates established by a regulatory commission is not barred by laches based on a statute of limitations providing that such suit shall be brought within a specified time after the order complained of is issued and becomes effective, since the orders, if in fact violative of the constitution as a taking of property without due process of law, constitute a continuous taking and plaintiff's remedy cannot be lost by delay in seeking relief;[82] nor is it a defense that the reduced rates may increase the volume of business and make it more remunerative than at present, as the court must determine rates on existing facts.[83]

e. Parties

The carrier, its stockholders or mortgage bondholders, or other parties having a proper interest, are proper parties to file a bill to enjoin the enforcement of rates, which bill may be brought against the members of a regulatory commission or other state officers having the duty of securing the enforcement of the rates attacked, who represent the shippers and other interested parties, although they may also be joined in the suit.

The carrier, its stockholders, its mortgage bondholders, or any other person or corporation having the proper interest is a proper party to file a bill in equity to enjoin the enforcement of rates.[84] Shippers of articles affected by the rates, the enforcement of which the carrier seeks to enjoin, can properly be joined as defendants as representatives of their class, on an allegation that unless enjoined they will attempt to enforce such rates.[85] Where, by the provisions of statutes fixing rates, the members of the railroad commission as well as the attorney general are charged with the duty of securing the enforcement of the statutes, they are the proper parties to a proceeding to enjoin the enforcement of the rates so fixed.[86] However, where the relation of the attorney general of a state to a state railroad commission and the enforcement of its orders is simply that of his general official relation as the principal law officer of the state, he is not a necessary or a proper party to a suit to enjoin the enforcement of an order made by the commission.[87] A shipper, although not made a party to proceedings by a carrier against a regulatory commission to enjoin the enforcement of rates fixed by the commission in which a preliminary injunction, with bond by the carrier, is issued, is entitled, where final decision is against the carrier, to come in by intervention in a reference before a master to determine damages and obtain restitution for overcharges during the continuance of the injunction, being the difference between what he paid and what he would have paid if the rates fixed by the commission had been charged.[88]

f. Pleading and Evidence

In a suit to enjoin rates the complaint should state clearly every fact which shows the unreasonableness or confiscatory nature of the rates attacked. Ordinarily, however, the suit will not be disposed of on demurrer. A preponderance of the evidence is sufficient to make out the carrier's case.

A complaint which seeks to enjoin rates as being unreasonable and confiscatory should state facts which show that the rates do not afford a fair return on the value of complainant's property.[89] For this purpose, every fact which would have a tendency to enable the court to arrive at the fair value of complainant's property devoted to the service to which the rates are applicable,[90] and the cost

C.A. 403, certiorari denied 31 S.Ct. 721, 220 U.S. 618, 55 L.Ed. 612
10 C.J. p 436 note 90.

81. U.S.—Arkansas Rate Cases, C.C. Ark., 187 F. 290, reversed on other grounds but approved on this 33 S.Ct. 1030, 230 U.S. 553, 57 L.Ed. 1625

82. U.S.—Bush v. Texas & P. Ry. Co., D.C.La., 290 F. 1008.

83. U.S.—Chicago & N.W. R. Co. v. Dey, C.C.Iowa, 35 F. 866, 1 L.R.A. 744.

84. U.S.—Chicago, B. & Q. R. Co. v. Winnett, Eighth Circuit, 162 F. 242, 89 C.C.A. 222.

Federal government as intervener

The Thurman Act of May 7, 1878, 20 U.S.St. at L. p. 59, U.S.Comp.St. 1901 p. 3570, giving to the United States government a substantial interest in the revenues of the Union and Central Pacific Railroad companies because of aid given by the government in the construction of the roads, authorizes an intervention by the government, in a proceeding involving the validity of an order made by state railroad commissioners reducing the rates chargeable by one of such companies.—Southern Pac. Co. v. Board of Railroad Com'rs, C.C.Cal., 71 F. 437.

85. U.S.—Northern Pac. R. Co. v. Lee, D.C.Wash., 199 F. 621.
10 C.J. p 437 note 93.

86. U.S.—Southern R. Co. v. McNeil, C.C.N.C., 155 F. 756.

87. U.S.—Central of Georgia R. Co. v. McLendon, C.C.Ga., 157 F. 961.

88. U.S.—Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co., 39 S.Ct. 237, 249 U.S. 134, 63 L.Ed. 517, motion denied 39 S.Ct. 387.

Commission representative of shippers

The regulatory commission in defending the rates against the attack of the carrier represents all the shippers.—Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co., Ark., 39 S.Ct. 237, 249 U.S. 134, 63 L.Ed. 517, motion denied 39 S.Ct. 387.

89. Tex.—Houston Electric Co. v. City of Houston, Tex.Civ.App., 212 S.W. 198, error granted.
10 C.J. p 437 note 96.

90. U.S.—Houston & T.C.R. Co. v. Storey, C.C.Tex., 149 F. 499.
10 C.J. p 437 note 97.

of such service, should be alleged, as, in the absence of such data, it is impossible for the court to say whether the rates fixed are unreasonably low or not.[91] Where several orders are made reducing rates, a bill alleging that the effect of such orders is to take complainant's property without just compensation is not demurrable because it does not allege that each order taken by itself is confiscatory.[92]

For the purposes of a ruling on a motion for a temporary injunction, the allegations of the complaint are not to be taken as true;[93] and even if the complaint should be considered as a part of the evidence and taken as true, it would be insufficient to authorize a temporary injunction where it merely alleges the conclusion of the pleader that the rates attacked are unreasonable without alleging any facts from which the court could draw that conclusion.[94]

Demurrer. A suit to enjoin the enforcement of railroad rates established by a state commission is of such general importance and so far independent of the particular facts which may be developed by the proofs that it will not be disposed of on demurrer, unless the bill is clearly insufficient.[95] Allegations in a bill that the rate fixed by the commission is unreasonable, and that, if enforced, it will result in a large loss of revenue to complainant, are not in general to be considered as admitted by demurrer.[96] However, where defendant first filed answers tendering issue on the matters of fact, and testimony was taken, after which the answers were withdrawn and demurrers filed, it must be assumed that, on the taking of testimony, defendants became satisfied that the particular facts were as stated in the bill, and that the conclusions to be drawn from such facts could not be overthrown by any other matters.[97]

Evidence. A preponderance of the evidence, as in other civil cases, is sufficient to make out the carrier's case against the enforcement of rates.[98]

g. Decree

A decree enjoining the enforcement of a prescribed rate should permit defendant to obtain its vacation if altered circumstances render the rate reasonable. Provisions in a preliminary injunction order not carried forward into the final decree are not thereafter in force. The final decree need not expressly declare the conditions in a preliminary injunction bond violated where it in effect shows it.

In a suit to enjoin the enforcement of a prescribed rate as confiscatory, the decree should be without prejudice to the right to proceed in the future if altered circumstances render the rate upheld confiscatory or the rate enjoined no longer confiscatory.[99] Where in a suit to enjoin the enforcement of rates fixed by statute, a requirement in an order for temporary injunction for the carrier's preservation of waybills, pending the further hearing and determination of the case, is not carried forward in the final decree in favor of the carrier, the carrier's destruction of waybills after entry of the final decree is not a violation of any court order.[1] The condition of a bond given by a carrier on obtaining a preliminary injunction in a suit to enjoin rates prescribed by a regulatory commission, that the carrier should make refund if it should eventually be decided that the order inhibiting the enforcement of the commission rates should not have been made, does not require an express adjudication that the preliminary injunction should not have been made, but it is enough that the carrier fails to sustain its burden to show that the commission's rates are inadequate, since by such failure it shows that the injunction ought not to have been allowed.[2]

§ 307. Appeal from Order of Commission Fixing Rates

Under appropriate statutory provisions the carrier

91. U.S.—Oregon, R., etc., Co. v. Campbell, C.C.Or., 173 F. 957, affirmed 33 S.Ct. 1026, 230 U.S. 525, 57 L.Ed. 1604.

92. U.S.—Love v. Atchison, T. & S. F. R Co., Okl., 185 F. 321, 107 C.C.A. 403, certiorari denied 31 S.Ct. 721, 220 U.S. 618, 55 L.Ed. 612.
10 C.J. p 437 note 99.

93. Ind.—Public Service Commission of Indiana v. Baltimore & O. R Co., 169 N.E. 530, 202 Ind. 449, rehearing denied 176 N.E. 551, 202 Ind. 449.

94. Ind.—Public Service Commission of Indiana v. Baltimore & O. R Co, supra.

95. U.S.—Houston & T. C R. Co. v. Storey, C.C.Tex., 149 F. 499.

96. U.S.—Central of Georgia R Co. v. McLendon, C.C.Ga., 157 F. 961
10 C.J. p 437 note 2.

97. U.S.—Reagan v. Farmers' L & T. Co., Tex., 14 S.Ct. 1047, 154 U.S. 362, 38 L.Ed. 1014.

98. U.S.—Western R. Co. v. Alabama R. Commn, D.C.Ala., 197 F 954.
10 C.J. p 438 note 4.

Evidence held to show rate confiscatory
U.S.—Texas & N. O R. Co. v. Louisiana Public Service Commission, D.C.La., 2 F.Supp. 622.

99. U.S.—Darnell v. Edwards, Miss, 37 S.Ct. 701, 244 U.S. 564, 61 L.Ed. 1317.
10 C.J. p 438 note 6.

1. U.S.—Berthold-Jennings Lumber Co v St. Louis, I. M & S Ry. Co, C.C.A.Mo, 80 F.2d 32, 102 A.L.R. 688, certiorari denied 56 S.Ct. 591, 297 U.S. 715, 80 L.Ed. 1001.

2. U.S.—Arkadelphia Milling Co v. St. Louis Southwestern Ry. Co, Ark., 39 S.Ct 237, 249 U.S. 134, 63 L.Ed. 517, motion denied 39 S.Ct. 387.

may have a remedy to review the order of a regulatory commission.

In a proceeding by a carrier to review an order of a state regulatory commission requiring it to charge intra-state rates on freight shipments instead of interstate rates which it claims to be proper, the rights of the parties depend on the status of their dealings which existed when the complaint was filed, and not on subsequent conditions or shipments.[3] On a writ to review an order of a regulatory commission requiring a carrier to file a schedule of rates, objections based on apprehension of results which may follow future action taken by the commission are immaterial and need not be considered, since the question presented is one as to the power of the commission, not as to its policy.[4] A statute authorizing any person affected by any order of the commission to apply for a writ of review applies to a carrier affected by an order of reparation, and the carrier need not wait to urge its contentions until the shipper brings suit to recover the amount awarded by the order of the commission when the findings and order of the commission will be prima facie evidence of the facts therein stated.[5] A carrier's failure to appeal from the decision of a state regulatory commission holding lower rates proper is not a waiver of the right to resist in the United States supreme court, under a writ of certiorari, the enforcement of a subsequent order for reparation on the ground that the order of the state commission violated a federal statute prohibiting the reduction of railroad rates within a specified period following the termination of federal control, unless approved by the interstate commerce commission.[6]

Where an order of the commission as to rates is reversed on appeal and the cause remanded for another hearing, the commission has power to order any restitution which the new hearing may develop is due to the carriers who obeyed the original order pending appeal.[7]

§ 308. Action to Set Aside Order of Commission Fixing Rates or Ordering Refund

In a number of states carriers are empowered to maintain an action to set aside an order of the commission fixing rates, and in some, but not all, an order awarding reparation. The petition should state facts, which, if true, would show the rates to be unreasonable as a matter of law. In most states the court merely determines if there is any evidence to support the findings of the commission, although in a few the court hears the case de novo and weighs the evidence.

By the statutes of some states, carriers are empowered to maintain an action to set aside the orders of railroad commissions fixing rates,[8] and, in some of them, an order ordering a refund of excessive charges,[9] although in others, a court of equity does not have jurisdiction to set aside an order of the regulatory commission awarding reparation.[10] On the commencement of such action, the court may suspend the order of the commission during the pendency of the action on the giving of a proper bond by the carrier, the effect of which is merely a temporary suspension of the enforcement of the rate of the commission and not a vacation and nullification of it, so that where the order of the commission is upheld in the action the carrier becomes liable to refund the excess collected above the rate established by the commission.[11]

The petition should allege facts and circumstances which, if true, would authorize the court to adjudge the rates unjust and unreasonable as a matter of law.[12]

3. Mo.—Lusk v. Atkinson, 186 S.W. 703, 268 Mo. 109.

4. Cal.—Producers' Transp. Co. v. Railroad Commission of California, 169 P. 59, 176 Cal. 499, affirmed 40 S.Ct. 131, 251 U.S. 228, 64 L.Ed. 239.

5. Wash.—State v. Public Service Commission of Washington, 173 P 626, 102 Wash. 589.

6. U.S.—New York Cent. R. Co. v New York & Pennsylvania Co, 46 S Ct. 447, 271 U S. 124, 70 L Ed 865, reversing New York & Pennsylvania Co v New York Cent. R Co, 126 A. 382, 281 Pa. 257.

7. Colo.—Denver & S. L. R Co. v. Chicago, B & Q. R. Co., 185 P. 817, 67 Colo. 155

Compliance with order pending appeal immaterial

The fact that carriers appealing from an order of the public utilities commission fixing a division of joint rates complied with such order pending appeal is not a voluntary acceptance of the rates precluding restitution to such carriers, on setting aside of the order, since heavy penalties are provided for refusal to comply with commission's orders—Denver & S. L. R. Co. v. Chicago, B. & Q. R. Co, 185 P. 817, 67 Colo. 155.

Failure to secure stay immaterial

The fact that carriers securing reversal of an order of the public utilities commission as to rates did not secure a stay of the order pending appeal does not prejudice their right of review by precluding restitution to them for the period the order was in effect.—Denver & S L R Co v Chicago, B. & Q. R. Co., 185 P 817, 67 Colo. 155

8. Or.—Hammond Lumber Co. v Public Service Commission, 189 P 639, 96 Or. 595, 9 A.L.R. 1223.

Tex.—Producers' Refining Co v. Missouri, K. & T. Ry. Co. of Texas, Com.App., 13 S W.2d 680, affirming Missouri, K & T. R. Co. of Texas v. Railroad Commission of Texas, Civ.App, 3 S W 2d 489.

10 C J. p 438 note 19

9. Wis.—Chicago, etc, R Co v. State R. Commn, 145 N W 216, 974, 156 Wis 47.

10. Or.—Oregon-Washington R. & Nav. Co. v. McColloch, 55 P 2d 1133.

11. Ohio—Big 4 Coal Co v Hocking Valley Ry Co., 11 Ohio App 88.

12. Tex.—Gulf, etc., R Co. v. Railroad Commn., 113 S W. 741, 116 S. W. 795, 102 Tex. 338.

10 C J p 439 note 24.

Complaint held sufficient

Or.—Oregon-Washington R. & Nav. Co. v. McColloch, 55 P 2d 1133.

A competing carrier which intervened in proceedings instituted by a regulatory commission to determine the reasonableness of reduced rates filed by a carrier is a proper party to petition the court to annul the order of the commission upholding the reduced rate.[13]

In some states, the function of the court is to review the proceedings of the commission and to ascertain if it has violated any principle of law or gone beyond the scope of its duty in making the order.[14] The only justiciable question is the reasonableness of the rate,[15] and the court will not assume the place of the commission or set its order aside on the court's conception of its wisdom.[16] The burden of proof is on the carrier to show that the rates are unreasonable by clear and satisfactory proof.[17] If there is any evidence to sustain the findings of the commission the court will not set them aside; but a finding without evidence or against the evidence is arbitrary and beyond the power of the commission, and an order based thereon is contrary to law and subject to be set aside by a court of competent jurisdiction,[18] although, it has been held, however, that the commission because of its administrative nature and expert knowledge may apply that knowledge in determining the reasonableness of rates, without having any basis therefor in evidence.[19] In other states, however, the court hears the case de novo and determines it from the evidence adduced at the trial, the findings of fact made by the commission not being conclusive on the court.[20]

Where the statute provides that the petition may set forth a particular cause of objection to the rates, or to either or all of them, the carrier is not required to attack all the rates but may attack one only.[21]

It has been held that an order for refund of charges is subject to review on appeal from the judgment of the court affirming the order of the commission.[22]

§ 309. Proceedings by Shipper or Consignee for Relief against Unreasonable Rates

a. Interstate rates
b. Intra-state rates

a. Interstate Rates

Shippers may bring an action in court to recover charges in excess of the established rate, but where they desire to recover an award on the ground that the rate charged was unreasonable and excessive they must apply to the Interstate Commerce Commission, within the time prescribed by statute, for an award of reparation, and if the award is not paid they may bring an action in court for its enforcement.

A shipper has the right in any appropriate proceeding to attack the rate or classification.[23] As appears infra § 320, an action lies at common law to recover an amount charged for transportation in excess of that fixed by law, which rule applies to charges in excess of the schedule of rates filed with the interstate commerce commission, and, as appears infra § 323, no prior application to the commission is necessary before bringing an action to recover the excess over the rate filed. However, a shipper who has not been charged rates in excess of those filed with the commission may complain that the rates are nevertheless excessive and unreasonable. As is shown supra § 302, where common carriers have adopted, filed, and published schedules of rates for interstate shipments, carriers, shippers, and consignees alike are bound thereby, and the courts must enforce the schedule rates in fixing the rights and liabilities of the parties.[24] Individual

13. Cal.—Lang v. Railroad Commission of California, 42 P.2d 639, 2 Cal.2d 550.

14. Or.—Valley & Siletz R Co. v. Thomas, 48 P.2d 358, 151 Or 80—Hammond Lumber Co. v. Public Service Commission, 189 P. 639, 96 Or. 595, 9 A.L.R. 1223

15. Or.—Hammond Lumber Co. v. Public Service Commission, supra.

16. Or.—Valley & Siletz R Co. v Thomas, 48 P 2d 358, 151 Or 80—Hammond Lumber Co v. Public Service Commission, 189 P. 639, 96 Or. 595, 9 A.L.R. 1223

17. Or.—Oregon-Washington R & Nav. Co. v. Corey, 252 P. 955, 120 Or. 517.

Carrier must show

Carrier, attacking intra-state rate established by commission, must show that order is not supported by substantial evidence or for some other reason is unlawful, unreasonable, or unjustly discriminatory—Oregon-Washington R & Nav. Co. v. Corey, 252 P. 955, 120 Or. 517.

Failure to show decrease in earnings

Where evidence did not show to what extent earnings of carriers had decreased because of new rates, court could not set aside or vacate rates on ground of their being confiscatory—Oregon-Washington R. & Nav Co. v. Corey, 252 P. 955, 120 Or. 517—10 C J. p 439 note 23.

18. Or.—Hammond Lumber Co. v. Public Service Commission, 189 P. 639, 96 Or. 595, 9 A.L.R 1223

19. Wis.—Chicago, etc, R. Co. v. State R. Commn, 145 N.W. 216, 974, 156 Wis. 47.

20. Ind.—Public Service Commission of Indiana v. Lake Erie & W R. Co., 133 N.E 492, 191 Ind. 436.

Public necessity for order not shown

Ind.—Public Service Commission of Indiana v Lake Erie & W. R. Co., 133 N E 492, 191 Ind. 436.

21. Tex.—Gulf, etc, R Co. v. Railroad Commn, 113 S W. 741, 116 S. W. 795, 102 Tex. 338.

22. Wis.—Minneapolis, etc, R Co. v. State R. Commn, 147 N.W 366, 158 Wis 102—Chicago, etc., R. Co. v. State R Commn, 145 N.W. 216, 974, 156 Wis. 47.

23. Colo.—Fort v Denver & R G. R Co., 195 P. 109, 69 Colo. 441.

24. U.S.—Great Northern R. Co. v. O'Connor, Minn., 34 S.Ct. 380, 232 U.S. 508, 58 L.Ed. 703.

shippers are not entitled to raise the question of the reasonableness of such rates in an action brought by them against the carrier, as that would result in discrimination.[25] It is well settled, as appears infra § 320, that the Interstate Commerce Act abrogates the common-law remedy for recovery of alleged unreasonable freight charges on interstate shipments where the rates charged are those duly fixed by the carrier according to the act and have not been found unreasonable by the interstate commerce commission. However, a shipper has the right by appropriate proceedings before the commission to attack the rate or the classification, and if either or both are held to be unreasonable, he may secure appropriate relief by a reparation order from the commission,[26] or, as appears infra § 323, by suit in court after a finding by the commission that the rates are unreasonable, and the making of a reparation order which the carrier fails to comply with. Although, an injunction will lie to restrain the enforcement of a schedule of unreasonable rates by a carrier or a change to unjust or unreasonable rates, pending a decision thereon by the interstate commerce commission,[27] primarily, redress must be sought through the interstate commerce commission which alone has power to alter an established schedule on the ground that the rates fixed therein are unreasonable.[28] This is so, even when the exaction of such excessive rates was the result of a combination and conspiracy made unlawful by the Sherman Anti-Trust Law.[29]

Time within which proceeding must be commenced. The provisions of the Interstate Commerce Act limiting the time within which a complaint for the recovery of damages may be filed with the interstate commerce commission, 49 U.S.C.A. § 16, are not mere statutes of limitation, but are jurisdictional, limiting the power of the commission;[30] and neither proceedings begun by other shippers nor findings of unreasonableness and orders issued thereon by the commission will save the rights of those who disregard it.[31]

b. Intra-State Rates

(1) In general
(2) Reparation
(3) Review of reparation proceeding

(1) In General

Except in states where a shipper is entitled to bring suit in a court of competent jurisdiction to set aside a rate prescribed by a state regulatory commission, a shipper's remedy against unreasonable rates is ordinarily by application to the proper regulatory commission for a reduction of the rates and not by a common-law action or a suit in equity.

In general a shipper's remedy against unreasonable rates is by application to the proper regulatory commission for reduction of the rates.[32] Common-

25. Tenn.—Rather v. Nashville, etc., R. Co., 174 S.W. 1113, 131 Tenn. 289.

26. U.S.—Chicago, M. & St. P. Ry. Co. v. George A. Hormel & Co., Minn., 240 F. 381, 153 C.C.A. 307.
Colo.—Fort v. Denver & R. G. R. Co., 195 P. 109, 69 Colo. 441.
10 C.J. p. 439 note 35.

Allowance of interest

The interstate commerce commission may allow interest on rates found to be excessive when the charges have been paid under protest.—Chicago, M. & St. P. Ry. Co. v. George A. Hormel & Co., Minn., 240 F. 381, 153 C.C.A. 307.

27. U.S.—Kalispell Lumber Co. v. Great Northern R. Co., C.C.Mont., 157 F. 845.
Suit by shipper to enjoin railroad companies from filing with the interstate commerce commission and from enforcing a schedule of rates see C.J.S. title Commerce § 147, also 10 C.J. p. 63 note 32½—p. 64 note 37; 12 C.J. p. 135 notes 25–27.

28. U.S.—Skinner & Eddy Corporation v. U. S., Or., 39 S.Ct. 375, 249 U.S. 557, 63 L.Ed. 772.
10 C.J. p. 439 note 36.

29. U.S.—Meeker v. Lehigh Valley R. Co., C.C.N.Y., 162 F. 354.
10 C.J. p. 439 note 37.

30. U.S.—U. S. ex rel. Louisville Cement Co. v. Interstate Commerce Commission, 38 S.Ct. 408, 246 U.S. 638, 62 L.Ed. 914, reversing 42 App. D.C. 514.

Time cause of action accrues

Prior to 1920, when § 16 subd. e was added to the Interstate Commerce Act, 49 U.S.C.A. § 16 (e), which provides that "The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after," it was held that a cause of action to recover damages for exacting an unreasonable rate accrued when such rate was paid, and not when the shipments were made.—U. S. ex rel. Louisville Cement Co. v. Interstate Commerce Commission, 38 S.Ct. 408, 246 U.S. 638, 62 L.Ed. 914, reversing 42 App.D.C. 514.

Holding of commission construed

Where interstate commerce commission held that claim for overcharges could not be considered because complaint for recovery was not made within two years from time cause of action accrued, holding of commission must be interpreted, not as one that it had jurisdiction over claim and that it was barred by limitations, but that claim was without its jurisdiction.—U. S. ex rel. Louisville Cement Co. v. Interstate Commerce Commission, 38 S.Ct. 408, 246 U.S. 638, 62 L.Ed. 914, reversing 42 App.D.C. 514.

31. U.S.—A. J. Phillips Co. v. Grand Trunk Western R. Co., Mich., 35 S.Ct. 444, 236 U.S. 662, 59 L.Ed. 774, affirming 195 F. 12, 115 C.C.A. 94.

32. U.S.—Woodrich v. Northern Pac. Ry. Co., C.C.A.N.D., 71 F.2d 732, 97 A.L.R. 401.
Ill.—State Public Utilities Commission of Ill. v. Atchison, T. & S. F. Ry. Co., 115 N.E. 904, 278 Ill. 58.
Miss.—E. L. Young Heading Co. v. Payne, 89 So. 782, 127 Miss. 48.
Mont.—Doney v. Northern Pac. Ry. Co., 199 P. 432, 60 Mont. 209.
Pa.—Leiper v. Baltimore & P. R. Co., 105 A. 551, 262 Pa. 328.

Disposition of case on reversal on appeal

Where on objection by shippers to rates published by carrier which were less than the maximum prescribed by the regulatory commission, the commission suspended the rates and in its consideration of the reasonableness of the rates objected to held the burden of proof to be on the carrier, the commission committed error, and, on appeal from its

law remedies are not available to him;[33] nor can he maintain a suit in equity to restrain a carrier from charging a higher rate than that fixed by a contract made with him, where the carrier is charging the regular rates filed with the regulatory commission.[34] However, in some states it is not necessary for a party aggrieved by a rate fixed by the regulatory commission first to apply to the commission to undo or modify it.[35] The commission cannot set aside, annul, or grant relief from the effect of, any rate it may make; it may modify or repeal, and so extend relief prospectively, but in so far as its orders already made are concerned, the courts alone can give relief.[36] A shipper may, in a direct proceeding, bring suit in a court of competent jurisdiction to set aside rates prescribed by a state regulatory commission as unfair and unreasonable.[37] In such case the trial is governed by the same rule as civil causes generally, and there is no limitation other than that which affects civil causes generally on the rights of the parties to be heard or to introduce evidence.[38] The shipper must show that the rate is unreasonable and unjust as to him;[39] and the inquiry is not limited to whether the rate is so unreasonable and unjust as to amount to the taking of property without due process of law.[40] The fact that the commission, in prescribing the rates attacked, failed to give the carriers notice of the hearing prior to the fixing of the rates, as required by the statute, cannot be taken advantage of by the shipper.[41] In accordance with the general rule that the courts have no power to fix and establish rates, considered supra § 280, a court has no power pending final determination of the shipper's suit to put in force a temporary rate in place of the rate attacked;[42] but when the rates attacked are suspended by injunction, the old rates which were supplanted by those attacked become effective and fix the charges to be made by the carrier.[43]

(2) Reparation

In jurisdictions wherein the regulatory commission has power to award reparations, shippers are entitled to apply therefor, provided they bring their proceedings within the time limit provided by statute. In such proceeding the statutory provisions applicable in the particular jurisdiction control the proceedings.

In jurisdictions where the regulatory commission has power to award reparation, considered supra § 278 a (4) (c), shippers who have been charged unreasonable rates are entitled to apply to the commission for an award of reparation.[44] As appears infra §§ 320, 323, under the statutory provisions ap-

order, the court will remand the case to the commission with orders that the petition filed by the shippers in the proceeding before the commission be treated as a protest against the rates published by the carrier and further evidence heard as to the reasonableness of the rates.—State Public Utilities Commission of Ill. v. Atchison, T. & S. F. Ry. Co., 115 N.E. 904, 278 Ill. 58.

33. Mont.—Doney v. Northern Pac. Ry. Co., 199 P. 432, 60 Mont. 209.

Preservation of common-law rights immaterial

Although the Railroad Commission Law, L.1907 c. 37, Rev.Codes § 4398, provides that "this act shall not have the effect to release or waive any right of action . . . for any right, penalty or forfeiture which may have arisen, or may hereafter arise, under any law of this state," the remedies for enforcing such rights are exclusively governed by the act, so that the rates established by the commission cannot be attacked in a common-law action.—Doney v. Northern Pac. Ry. Co., 199 P. 432, 60 Mont. 209.

Common-law right of action for overcharge see infra § 320.

34. Pa.—Leiper v. Baltimore & P. R. Co., 105 A. 551, 262 Pa. 328

35. Tex.—Houston Chamber of Commerce v. Railroad Commission of Texas, Civ.App., 19 S.W.2d 583, affirmed Railroad Commission of Texas v. Houston Chamber of Commerce, 78 S.W.2d 591, 124 Tex. 375.

36. Tex.—Houston Chamber of Commerce v. Railroad Commission of Texas, supra.

37. Tex.—Producers' Refining Co. v. Missouri, K. & T. Ry. Co. of Texas, Com.App., 13 S.W.2d 680, affirming Missouri, K. & T. R. Co. of Texas v. Railroad Commission of Texas, Civ.App., 3 S.W.2d 489, affirmed Producers' Refining Co. v. Missouri, K. & T. Ry. Co. of Texas, Com.App., 13 S.W.2d 679—Texas Steel Co. v. Fort Worth & D. C. Ry. Co., Civ.App., 45 S.W.2d 794, certified questions answered 40 S.W.2d 78, 120 Tex. 597—Houston Chamber of Commerce v. Railroad Commission of Texas, Civ. App., 19 S.W.2d 583, affirmed Railroad Commission of Texas v. Houston Chamber of Commerce, 78 S.W.2d 591, 124 Tex. 375.

Proper court

Suit seeking to set aside tariffs adopted by railroad commission should be brought in district court of Travis county.—Texas Steel Co. v. Fort Worth & D. C. Ry. Co., Tex. Civ.App., 45 S.W.2d 794, certified questions answered 40 S.W.2d 78, 120 Tex. 597

38. Tex.—Houston Chamber of Commerce v. Railroad Commission of Texas, Civ.App., 19 S.W.2d 583, affirmed Railroad Commission of Texas v. Houston Chamber of Commerce, 78 S.W.2d 591, 124 Tex. 375.

39. Tex.—Texas R. Commn. v. Weld, 73 S.W. 529, 96 Tex. 394, reversing, Civ.App., 68 S.W. 1117.

40. Tex.—Texas R. Commn. v. Weld, supra.

10 C.J. p. 63 note 32

41. Tex.—Texas Steel Co. v. Fort Worth & D. C. Ry. Co., Civ.App., 45 S.W.2d 794, certified questions answered 40 S.W.2d 78, 120 Tex. 597.

42. Tex.—Railroad Commission of Texas v. Uvalde Const. Co., Civ. App., 49 S.W.2d 1113.

43. Tex.—Railroad Commission of Texas v. Uvalde Const. Co., supra.

44. Or.—Oregon-Washington R. & Nav. Co. v. McColloch, 55 P.2d 1133.

Shippers purchasing goods shipped on basis of freight rates

Fact that shippers, complaining of unreasonable rates charged by carriers, were grain brokers or dealers purchasing grain on basis of market prices at place of delivery, less freight charges thereto, did not bar their right to reparation.—Oregon-Washington R. & Nav. Co. v. McColloch, Or., 55 P.2d 1133.

plicable in many states, a shipper is not entitled to apply directly to the courts for reparation where the charges made were in accordance with the scheduled rates, but must first apply to the state regulatory commission, which is empowered by law to determine the reasonableness of the rates, the common-law remedy therefor having been abolished. It is essential to the recovery of such excess charges that there should be a complaint to the commission, and the fact that another shipper made complaint to the commission which found the charges excessive and ordered their reduction does not relieve the shipper suing to recover excess charges paid under the former rates from making complaint thereof to the commission.[45] The commission, however, is not given power to enforce the refund, but, as appears infra § 323, the party aggrieved may after the finding maintain an action in the courts to recover the amount of the excessive charge as found by the commission.[46]

In some states the regulatory commission is authorized to award reparation in the same proceeding in which the shipper makes application to the commission to fix a rate to be charged for a specific service, where he sets out facts entitling him thereto.[47] In others, proceedings for the determination of the reasonableness of existing and of past rates are separate and distinct and brought under different statutory provisions, so that findings on whether existing rates are then unreasonable and will be for the future furnish no basis for awarding or refusing reparation;[48] nor can the commission in a proceeding for the determination of the reasonableness of existing rates, in which it finds the existing rates unreasonable, include a finding as to past rates which will bar a subsequent proceeding for reparations.[49] The proceedings for the determination of the unreasonableness of the rates in the past and for the award of reparation may also be separate, it being proper to file the petition for reparation after final decision by the commission on the question of the reasonableness of the rates.[50] However, there is no objection against combining a complaint against past rates and a petition for reparation;[51]

45. Wis.—Graham Ice Co. v. Chicago, etc., R. Co., 140 N.W. 1097, 153 Wis. 145.

46. Ky.—Southern Ry. Co. of Kentucky v. Frankfort Distillery, 26 S.W.2d 1025, 233 Ky. 771, certiorari denied 51 S.Ct. 75, 282 U.S. 868, 75 L.Ed. 767—Louisville & N. R. Co. v. Greenbrier Distillery Co., 187 S.W. 296, 170 Ky. 775.
Neb.—Central Bridge & Construction Co. v. Chicago & N. W. Ry. Co., 262 N.W. 852, 129 Neb. 726, vacating former opinion 260 N.W. 172, 128 Neb. 779.
Or.—Oregon-Washington R. & Nav. Co. v. McColloch, 55 P.2d 1133.
Wash.—State v. Public Service Commission, 192 P. 1079, 112 Wash. 629.
Wis.—Chicago, M. & St. P. Ry. Co. v. Railroad Commission, 215 N.W. 442, 194 Wis. 24.
10 C.J. p. 440 note 45.

Court action not prevented thereby

Railroad commission's order, permitting railroad to refund excess demurrage charges, did not deprive railroad company of right to have claims passed on by courts.—Chicago, M. & St. P. Ry. Co. v. Railroad Commission, 215 N.W. 442, 194 Wis. 24.

Demurrage

Railroad commission had authority, under statute, to determine that excess payment for demurrage was erroneous, and to make order permitting refund.—Chicago, M. & St. P. Ry. Co. v. Railroad Commission, 215 N.W. 442, 194 Wis. 24.

47. Okl.—Atchison, T. & S. F. Ry. Co. v. State, 206 P. 236, 85 Okl. 223.

48. Pa.—Pennsylvania R. Co. v. Public Service Commission, 190 A. 367, 125 Pa.Super. 558—Central Pennsylvania Lumber Co. v. Public Service Commission, 98 Pa.Super. 514—Atlantic Refining Co. v. Public Service Commission, 97 Pa.Super. 106—Centre County Lime Co. v. Public Service Commission, 96 Pa.Super. 590.

49. Pa.—Central Pennsylvania Lumber Co. v. Public Service Commission, 98 Pa.Super. 514—Centre County Lime Co. v. Public Service Commission, 96 Pa.Super. 590, 599.
"Question of reparation cannot properly be determined by the commission until it has been presented to it in the manner prescribed by the act, nor should it be prejudiced, or the door closed against it, by a declaration in advance of a hearing."—Centre County Lime Co. v. Public Service Commission, supra.

Order ineffective

Portion of order, reducing railroad rates, stating situation did not warrant reparation award, has no legal effect on subsequent proceeding for reparation.—Alan Wood Iron & Steel Co. v. Public Service Commission, 97 Pa.Super. 1.

Expunging findings

Petition for order directing public service commission to expunge from record, in proceeding against railroad, rates paragraph respecting reparation will be refused, since such paragraph is extraneous and irrelevant to the issues involved in that proceeding and without any legal effect.—Alan Wood Iron & Steel Co. v. Public Service Commission, 97 Pa.Super. 1.

Dismissal without hearing

Dismissal without hearing of petition for reparation after reduction of railroad rates and inclusion in commission's report of statement that case did not warrant reparation award, was not proper procedure.—Centre County Lime Co. v. Public Service Commission, 96 Pa.Super. 590.

50. Pa.—New York & Pennsylvania Co. v. New York Cent. R. Co., 110 A. 286, 267 Pa. 64.

Request for reparation in prior proceeding

The fact that a petitioner asking the public service commission to declare a carrier's rates unreasonable also asked to award a reparation for excessive charges collected, which should have been made by separate petition after the determination of unreasonableness, and did not ask a rehearing by the commission which found the rates unreasonable but properly did not award reparation, does not preclude petitioner from filing a subsequent petition for reparation.—New York & Pennsylvania Co. v. New York Cent. R. Co., 110 A. 286, 267 Pa. 64.

51. Pa.—Chemical Lime Co. v. Public Service Commission, 157 A. 820, 103 Pa.Super. 195, 197—Chemical Lime Co. v. Public Service Commission, 157 A. 820, 103 Pa.Super. 194—Centre County Lime Co. v. Public Service Commission, 157 A.

under such a complaint it is the duty of the commission to determine, in the first place, whether the rates were unreasonable in the past, and, if so, proceed, in the second place, to ascertain what damages, if any, complainant sustained, and make such an appropriate order awarding or refusing reparation as the evidence might warrant.[52] In such proceeding the carrier cannot raise again the issues determined against it in the prior proceedings in which the reasonableness of the rates was determined.[53]

The procedure followed by the commission must conform to constitutional and statutory requirements, and where it has power to adopt rules of practice and procedure, such rules must conform thereto, and be in conflict therewith. A regulatory commission may waive its rules as to the form in which complaints against carriers for refund of charges in excess of those legally collectable by the carrier must be presented.[54] In a reparation proceeding before a regulatory commission, before ordering reparation the commission must first find that the rates complained of are unreasonable.[55] Thus, the effect of an order of reparation by a state commission is to determine that the carrier has exacted more than reasonable rates and that it is not entitled to retain the excess, but is obliged to refund it.[56]

Under a statute which authorizes the regulatory commission to order reparations only where no discrimination will result, the supreme court, on writ of review, will not direct the commission to allow or disallow reparations on shipments where the shippers sold the commodities shipped to their customers in accordance with the tariff rates paid by them.[57]

In a proceeding to obtain reparation from an express company for allegedly unreasonable and excessive express rates, the commission may deny reparation, where the rates charged were in accordance with a contract between the express company and the railroad company over which the express was shipped, on the ground that the commission cannot impair the contractual rights of the express company and the railroad, particularly where the shipper knew of the contract between the express company and the railroad and deliberately chose to avail itself of the express rates, and during their existence failed to seek redress through the commission by a proceeding against the railroad and express company jointly.[58]

Time within which to bring proceeding. Statutory provisions limiting the time after the cause of action accrues within which proceedings for reparation may be brought before the regulatory commission, have been held restrictions on the jurisdiction of the commission which cannot be extended or suspended.[59] Proceedings for reparations or the recovery of overcharges must be instituted within the period provided by a statute of limitations.[60] For the purpose of determining the period of limi-

820, 103 Pa Super. 192, 193—Centre County Lime Co. v. Public Service Commission of Pennsylvania, 157 A. 815, 103 Pa.Super. 179.

52. Pa.—Chemical Lime Co. v. Public Service Commission, 157 A. 820, 103 Pa.Super. 195, 197—Chemical Lime Co. v. Public Service Commission, 157 A. 820, 103 Pa Super. 194—Centre County Lime Co v. Public Service Commission, 157 A. 820, 103 Pa Super. 192, 193—Centre County Lime Co. v. Public Service Commission of Pennsylvania, 157 A. 815, 103 Pa.Super. 179.

Procedure held proper

Order of public service commission reciting that past freight rates were unreasonable and that commission would conduct further hearing to ascertain damages complainant had sustained was proper—Pennsylvania R. Co. v. Public Service Commission, 190 A. 367, 125 Pa.Super. 558.

Time to offer evidence as to damages

Evidence, at hearing before public service commission on complaint against past freight rates and petition for reparation, showing damages from allegedly excessive past rates, since offered before commission made finding as to whether past rates had been unreasonable, was properly excluded—Chemical Lime Co v Public Service Commission, 157 A 820, 103 Pa Super 195, 197—Chemical Lime Co. v. Public Service Commission, 157 A. 820, 103 Pa Super 194—Centre County Lime Co. v. Public Service Commission, 157 A. 820, 103 Pa.Super. 192, 193—Centre County Lime Co. v. Public Service Commission of Pennsylvania, 157 A. 815, 103 Pa.Super. 179.

53. Pa.—New York & Pennsylvania Co. v. New York Cent. R. Co, 110 A. 286, 267 Pa. 64.

54. Cal.—Los Angeles & S L R Co. v. Railroad Commission of California, 277 P. 324, 207 Cal. 123

55. Or.—Oregon-Washington R. & Nav. Co. v. McColloch, 55 P.2d 1133.

56. Pa.—Allegheny Steel Co. v New York Cent. R. Co, 188 A 332, 324 Pa 353.

57. Utah—Jeremy Fuel & Grain Co v. Public Utilities Commission, 226 P. 456, 63 Utah 392

58. Ill—Pioneer Creamery Co v. American Ry. Express Co., 180 N.E. 406, 348 Ill. 30.

59. Wash.—Northern Pac Ry. Co. v. Department of Public Works, 211 P. 876, 122 Wash. 673.

Federal control

The limitation of two years, prescribed by Remington Code 1915 § 8626—91, for the presentation of a claim for reparations was not suspended during the period of federal control of the railroads.—Northern Pac. Ry Co. v. Department of Public Works, 211 P. 876, 122 Wash 673.

Statute not retroactive

Public Utilities Act § 56 (b), providing all complaints concerning excessive charges shall be filed with the commission within two years, does not apply to causes of action existing when the statute was passed so as to make it retrospective in operation, contrary to Const. art 2 § 11, despite general language of section—Bonfils v. Public Utilities Commission of Colorado, 189 P. 775, 67 Colo 563.

60. Cal—Los Angeles & S. L. R Co. v Railroad Commission of California, 277 P. 324, 207 Cal 123—Sunset Pacific Oil Co v Los Angeles & S. L R. Co., 290 P. 434, 110 Cal App. 773.

tations, the cause of action accrues when the charges are paid;[61] and, in states where the proceedings for the determination of the unreasonableness of the rates in the past and for the award of reparation may be separate, the proceeding is commenced when the complaint challenging as unreasonable the rates collected in the past is filed, whether brought by a shipper or a body representing shippers generally or instituted by the commission of its own motion, and not when the petition for an award of reparation is filed, which is after final decision by the commission on the question of the reasonableness of the rates.[62]

Measure of carrier's liability. In reparation proceedings, the measure of the carrier's liability is the excess of the rate collected above that found reasonable by the commission.[63]

(3) Review of Reparation Proceeding

The right to appeal from the decision of a regulatory commission in a reparation proceeding is dependent on the statutes in force in the particular jurisdiction, the right depending in certain states on whether the commission awarded or refused reparation.

No appeal lies from the action of the commission except as prescribed by statute, and this right of appeal cannot be extended to cases not within the statute.[64]

Under a statute authorizing an appeal from an affirmative order of the commission only, an appeal will not lie from an order of the commission denying reparation to a shipper from a railroad, even though the commission determined that the shipper has a right to reduced rates on future shipments.[65]

In states where an order of the regulatory commission awarding reparation is not enforceable as such, but an action must be brought thereon in a court of competent jurisdiction, although it is held, in at least one jurisdiction, that, if the decision is adverse to the shipper and an award of reparation refused or the amount awarded is less than he claims, the shipper is without remedy and cannot apply to the courts to have the refusal of the commission to award reparation reversed or the amount awarded increased,[66] in other jurisdictions, it is held that an appeal will lie from an order of the commission refusing reparation,[67] but that an appeal will not lie from an order of the commission awarding reparation;[68] and although, under the broad language of a statute rendering reviewable proceedings before the commission to recover from a railroad excessive charges, such proceedings are reviewable in the courts, such review is limited to questions which may be decided purely as questions of law, such as the jurisdiction of the commission, and does not include a review of the merits of the decision of the commission, since a review of the merits would be to try issues which must ultimately be tried in the action which may be brought to recover the award of the commission.[69] It has also been held that a court of equity has no jurisdiction to set aside an order awarding reparation to a shipper, but that a determination by the commission in the reparation proceeding as to the reasonableness of the rates complained of adverse to the carrier is subject to review in court.[70]

§ 310. Proceedings by Bondholders for Relief against Unreasonable Rates

A bondholder of a carrier cannot enjoin enforce-

Filing of informal complaint as tolling statute

(1) Letter to railroad commission setting forth claim against carrier for refund, and requesting commission to refer matter to carrier for purpose of bringing about informal adjustment, is not complaint avoiding limitation statute.—Los Angeles & S. L R Co v. Railroad Commission of California, 277 P. 324, 207 Cal. 123

(2) Reference in letter filed with railroad commission to avoidance of limitation did not make letter legal complaint within limitation statute —Los Angeles & S. L. R. Co. v. Railroad Commission of California, supra.

(3) Practice followed before railroad commission of filing informal complaint against carriers preceding formal complaint did not avoid effect of limitation statute, where no legal complaint was filed within time.—Los Angeles & S L. R. Co. v. Railroad Commission of California, supra.

Failure of commission to serve copy of complaint on carrier

Failure of railroad commission to serve copy of complaint presented to it on carrier will not prejudice complainant's rights—Los Angeles & S. L R. Co. v. Railroad Commission of California, 277 P. 324, 207 Cal. 123.

61. Pa.—Allegheny Steel Co. v. New York Central R. Co, 188 A. 332, 324 Pa. 353.

62. Pa.—Allegheny Steel Co. v. New York Cent. R. Co., supra.

63. Pa.—New York & Pennsylvania Co. v. New York Cent. R Co., 110 A. 286, 267 Pa. 64.

64. Mich.—Sparta Foundry Co v Michigan Public Utilities Commission, 267 N.W. 736, 275 Mich 562

65. Mich.—Sparta Foundry Co. v. Michigan Public Utilities Commission, supra.

66. Ky.—Southern Ry. Co of Kentucky v. Frankfort Distillery, 26 S. W.2d 1025, 233 Ky. 771, certiorari denied 51 S.Ct. 75, 282 U.S. 868, 75 L.Ed. 767.

67. Ill.—Terminal R. Ass'n of St. Louis v. Public Utilities Commission, 136 N.E 797, 304 Ill. 312

Pa.—Centre County Lime Co v. Public Service Commission, 96 Pa.Super. 590.

68. Ill.—Terminal R Ass'n of St. Louis v. Public Utilities Commission, 136 N.E 797, 304 Ill 312

Pa.—Centre County Lime Co v. Public Service Commission, 96 Pa.Super. 590.

69. Wash.—State v. Public Service Commission, 192 P. 1079, 112 Wash. 629.

70. Or.—Oregon-Washington R. & Nav. Co. v. McColloch, 55 P.2d 1133.

ment of a prescribed rate without showing that its enforcement will render his bonds noncollectable.

A person holding bonds of a railroad company secured by mortgage cannot enjoin enforcement of a statute prescribing rates by merely showing that rates are confiscatory; he must further show that the bonds will not be collectable if such rates are enforced.[71]

§ 311. Effect of Change of Rates after Shipment Has Commenced

A change of the rate in force after the contract of shipment becomes complete by execution and delivery of the bill of lading or after the shipment begins to move will not be applied to the shipment.

The rate applicable is that in force when the contract of shipment becomes complete by the execution and delivery of the bill of lading. This is so although movement of the shipment is not to commence until a later date; and the fact that a substitute bill of lading is issued on a subsequent reconsignment of the shipment does not prevent the application of the rate in force at the time the original bill is issued.[72] Thus, changes in freight rates of interstate shipments from the rate given in the tariff schedules in force at the time the shipment begins to move, will not be given a retroactive effect.[73]

2. Freight Charges and Liens

§ 312. Charges Generally

A carrier of goods or live stock may make proper charges for its services, and the obligation to pay for the same may be based on an express or implied contract or a liability imposed by law.

Carriers of goods or live stock have an undoubted right to impose or collect proper charges for their services.[74] Indeed, in order that the carrier may be chargeable as common carrier, the service must be for compensation, see supra § 3; and, as shown in § 376 infra, the rules against discrimination are usually held to prevent favoritism in the way of gratuitous services.

To entitle a carrier to collect or recover charges not paid in advance it is usually essential that there be some sort of a contract or undertaking to pay for the same.[75] However, a contract to compensate a carrier for its services may be either express or implied;[76] and the law will usually imply an agreement to compensate a carrier for its services in the absence of circumstances which would warrant an inference that the services were intended to be gratuitous.[77]

Problems relating to the making or establishment of the rates or tariffs on which the charges shall be based, including the respective powers of the carrier and federal or state rate-making bodies, have already been considered in §§ 275–311 supra. Where there is an applicable state or federal law requiring the carrier to charge for its services according to its properly established schedule or tariff, and the schedule or tariff has become binding on both the carrier and the public, see supra § 302, the obligation to compensate the carrier for its services is one imposed by law.[78] This obligation or liability cannot ordinarily be avoided or escaped through any contract with the carrier, see infra §§ 392–397; and it cannot estop itself from collecting

71. U.S.—Winthrop v. Fellows, D.C. Mich., 230 F. 702.

72. N.Y.—Rutland R. Co. v. Doud, 235 N.Y.S. 160, 134 Misc. 44

73. U.S.—Horton v. Tonopah & G. R. Co., D.C.Nev., 225 F. 406.
10 C.J. p 440 note 49.

74. U.S.—Hygrade Food Products Corporation v. Chicago, M., St P. & P. R. Co., C.C.A.N.Y., 85 F.2d 113, reversing, D.C., 10 F.Supp. 767—Van Dusen Harrington Co. v. Northern Pac. Ry. Co., C.C.A. Minn., 32 F.2d 466—Central Warehouse Co. v. Chicago, R. I. & P. Ry. Co., C.C.A.Minn., 20 F.2d 828, affirming, D.C., Chicago, R. I. & P. Ry. Co. v. Central Warehouse Co., 14 F.2d 123—Allen v. New York, P. & N. R. Co., C.C.A.Va., 15 F.2d 532, certiorari denied 47 S.Ct. 459, 273 U.S. 756, 71 L.Ed. 876—Baltimore & O. R. Co. v. Carnegie Steel Co., D.C.Pa., 251 F. 682.
Ala.—James v. Alabama Great Southern R. Co., 81 So. 582, 202 Ala. 640.
Cal.—Heath v. Judson Freight Forwarding Co., 190 P. 839, 47 Cal. App. 426
Kan.—Hebrlee v. Hawley, 211 P. 129, 112 Kan. 398.
La.—Morley Cypress Co. v. Hines, 107 So. 487, 160 La. 676.
N.Y.—Stevens v. Atchison, T. & S. F. Ry. Co., 202 N.Y.S. 195, 207 App.Div. 442, affirmed 147 N.E. 200, 234 N.Y. 572, certiorari denied 45 S.Ct. 463, 267 U.S. 603, 69 L.Ed. 809
Pa.—Baltimore & O. R. Co. v. Public Service Commission, 68 Pa. Super. 503
10 C.J. p 106 note 64.

75. N.D.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Washburn Lignite Coal Co., 168 N.W. 684, 40 N.D. 69, 12 A.L.R. 744, error dismissed 41 S.Ct. 140, 254 U.S. 370, 65 L.Ed. 310.

76. Ala.—Alabama Great Southern R. Co. v. Herring, 174 So. 502, 234 Ala. 238.
Cal.—Heath v. Judson Freight Forwarding Co., 190 P. 839, 47 Cal. App. 426.

77. Ala.—Alabama Great Southern R. Co. v. Herring, 174 So. 502, 234 Ala. 238.
Ill.—New York Cent. R. Co. v. Lehigh Stone Co., 220 Ill.App. 563
Va.—Chesapeake & O. Ry. Co. v. Osborne, 153 S.E. 865, 154 Va. 477.

78. U.S.—Central Warehouse Co. v. Chicago, R. I. & P. Ry. Co., C.C.A. Minn., 20 F.2d 828, affirming, D.C., Chicago, R. I. & P. Ry. Co. v. Central Warehouse Co., 14 F.2d 123
Pa.—Pennsylvania R. Co. v. De Marto, 90 Pa.Super. 216.

the charges;[79] but all conditions and terms prescribed by the tariff must be complied with before the rates or charges provided for therein can be collected,[80] and the carrier is not entitled to scheduled charges for which it has rendered no services or benefits.[81]

After the parties have agreed on the terms and conditions of the payment of the freight charges, and the shipment has been started, the terms or conditions so fixed cannot be changed or canceled without the consent of the carrier.[82]

Medium of payment. If the medium of payment is not specified, payment of the charges must ordinarily be made in the currency of the country where the payment is to be made or the contract fulfilled.[83] The freight charges on international shipments between United States and Canada are, under tariffs and regulations requiring payment of the scheduled rates in dollars and cents, payable in the money of the country where the collection is made regardless of any difference in the exchange value of the money of the respective countries.[84]

§ 313. Necessity for Prepayment

A carrier may demand payment of its charges in advance, but is not required to do so; and prepaid freight may be recovered back if the carrier fails to perform its contract.

A carrier has the right to demand that its charges be paid in advance,[85] and to refuse to accept the goods for carriage until such prepayment has been made, see supra § 31. This is on the principle that carriers have the same rights as individuals or other corporations to require payment for a service before it is rendered or to extend credit for such service.[86] This common-law rule is not abrogated by state and federal legislation for the supervision of common carriers.[87] However, as shown in § 372, it is usually held, although not without some difference of opinion, that the carrier may lawfully give credit to some parties and require prepayment of others; and it is not necessary that charges be tendered in advance unless demanded.[88] The right to prepayment of charges is deemed to have been waived where the carrier accepts the goods from the shipper for transportation without exacting payment in advance.[89] Liability will attach in such cases as though the freight were actually prepaid;[90] and it then becomes the duty of the carrier to transport the goods to their destination or to deliver them to the next receiving carrier.[91]

When the charges have been prepaid, the carrier is under a duty to deliver the goods without further exaction; and, where the charges have been prepaid on goods shipped with a view to export, the carrier cannot require that a transhipper, in whose hands the goods are placed by the consignee, refund or repay the freight charges.[92]

Prepaid freight, on failure of the carrier to perform the contract of carriage, may be recovered in an action for money had and received, no express contract to the contrary appearing.[93] The consid-

79. U.S.—Central Warehouse Co v. Chicago, R. I. & P. Ry. Co, C C A Minn., 20 F.2d 828, affirming, D. C, Chicago, R. I. & P. Ry. Co. v. Central Warehouse Co., 14 F 2d 123.
Minn.—Davis v. Aslesen, 206 N W. 405, 165 Minn. 239.
Issuance of bill of lading as "prepaid" by mistake held not to estop carrier from collecting lawful charges.—Central Warehouse Co. v. Chicago, R. I. & P. Ry. Co, C.C.A. Minn., 20 F 2d 828, affirming, D C, Chicago, R. I. & P. Ry. Co. v. Central Warehouse Co., 14 F.2d 123.

80. U.S.—Van Dusen Harrington Co. v. Northern Pac Ry. Co., C.C.A Minn, 32 F 2d 466

81. Ky.—Louisville & N. R. Co. v. Johnson, 10 S W 2d 1104, 226 Ky. 322—Louisville & N. R Co v. Murphy, 206 S W. 268, 182 Ky. 136
N C.—W. L. Hall & Co v. Norfolk Southern R. Co., 91 S E 607, 173 N.C. 108
Return of goods
A carrier of live stock, abandoning contract because of federal quarantine order, and returning stock to shipper at place of consignment, is not entitled to freight charges, under Interstate Commerce Act and state law, the transportation having resulted in no service or benefit to the shipper.—Louisville & N. R. Co. v. Murphy, 206 S W. 268, 182 Ky. 136

82. Pa.—Chicago & N. W. R. Co. v. Picard, 98 Pa Super. 134.

83. U S—New York & Pennsylvania Co. v. Davis, D.C.N.Y., 8 F.2d 662.

84. U S—New York & Pennsylvania Co. v. Davis, supra—New York & Pennsylvania Co. v. Davis, D.C.Pa., 2 F 2d 858, affirmed, C.C.A., 9 F. 2d 911.

85. U S—Lowden v. Iroquois Coal Co, D C.Ill., 18 F Supp. 923.
Mo—Metzger v. Columbia Terminals Co., 50 S.W 2d 680, 227 Mo App. 135
Pa—Chicago & N. W. R. Co. v. Picard, 98 Pa Super. 134.
10 C J. p 359 note 7, p 441 note 52

86. Miss.—A. G. Russell Co. v. Miller, 53 So. 495, 98 Miss. 185

87. U S—Louisville & N R. Co. v Central Iron & Coal Co, Ala., 44 S Ct 441, 265 U.S. 59, 68 L Ed 900, affirming. C C A., 284 F. 250
Cal.—New York Cent. R. Co. v. Frank H Buck Co., 41 P.2d 547, 2 Cal.2d 384.
Tenn.—Nashville, C. & St. L. Ry. v. Murphree, 2 Tenn App. 482.
10 C.J. p 441 note 54.

88. Ind.—Grand Rapids, etc., R. Co. v. Diether, 37 N.E 39, 1069, 10 Ind. App. 206, 53 Am S R. 385.
10 C J. p 441 note 55

89. U.S.—Southern Indiana Express Co. v. U. S. Express Co., Ind., 92 F. 1022, 35 C.C.A. 172.
Mo—Gratiot St Warehouse Co. v. Missouri, etc., R Co., 102 S W. 11, 124 Mo.App 545.
10 C.J. p 359 note 7, p 441 note 56

90. Mo—Gratiot St. Warehouse Co. v. Missouri, etc., R. Co, 102 S.W. 11, 124 Mo App. 545.

91. U.S.—Southern Indiana Express Co. v. U S. Express Co., Ind., 92 F. 1022, 35 C.C A 172.

92. Md—Pennsylvania R. Co. v. S. M. Hamilton Coal Co, 125 A. 405, 144 Md. 556, 35 A L.R. 478.

93. Ala—Hunter v. Lauderdale Cotton Mills, 112 So. 215, 215 Ala. 638
Retention of bills of lading
However, in an action for money had and received, alleging breach

eration for the advance payment having failed, the money paid becomes ex equo et bono the property of the shipper, and the law raises an implied contract to refund. Such right of recovery cannot be defeated by the fact that the carrier has already used the money in payment of its own obligations.[94] However, where the carrier has fully complied with its contract, but is unable to unload the shipment at the point of destination because of quarantine laws and returns the shipment at the request of the owner, the freight charges paid the carrier cannot be recovered back.[95]

§ 314. Amount Allowable

a. In general
b. Particular items or services

a. In General

The amount of the charges is ordinarily to be determined in accordance with the applicable scheduled or established rates; or, in the absence thereof, by the contract of the parties, or, if there is no express contract, by an ascertainment of what would constitute a reasonable compensation for the services rendered.

In the absence of special statutory regulation of rates to be paid or of a contract fixing the amount of compensation to be paid, the law implies a reasonable compensation to be determined in an action in which the question as to the amount of compensation arises, and to be measured by what is ordinarily charged for like services under like conditions;[96] and, as fully discussed in § 281 supra, both the carrier and the public have reciprocal rights to have the rate of compensation be a reasonable one so that the carrier cannot exact any more nor be compelled to take any less.

When the rates of compensation have been fixed or established by a regulatory body or by a properly filed and published schedule of tariffs, the carrier is ordinarily entitled to charge for its services in accordance therewith,[97] and shippers are required to know the contents of published tariffs, so that the carrier cannot be estopped from charging the lawful rate so shown or established.[98] Indeed, it is often the absolute duty of the carrier to charge according to the scheduled or established rates. So far as interstate shipments are concerned, the right of private contract as to rates between the shipper and the carrier has been entirely abrogated by the enactment of the Interstate Commerce Act. The schedules of rates filed with the interstate commerce commission are absolutely binding, both on the carriers and the shippers, see supra § 302; and any attempt to deviate from the rates so fixed is unlawful and ineffective, see infra §§ 392, 393. Also, the state, in the exercise of its regulatory powers, may take away the right of the parties to contract with reference to the rates for intra-state shipments, see supra § 278; and under state legislation similar to the Interstate Commerce Act it is often held that the parties are prohibited from departing from the established intra-state rate, see infra §§ 396, 397.

Where the rate prescribed by statute has been paid, there is no implied contractual undertaking to pay the carrier a reasonable rate in the event the statute is subsequently declared invalid,[99] nor is there any obligation to pay a reasonable rate as a matter of law.[1]

In the absence of prohibitory statutory provisions, under a contract to maintain a specified rate for the benefit of a certain shipper, the shipper may recover damages resulting from the refusal of the carrier to maintain the rate;[2] but, if an offered rate is not accepted when made, a shipper cannot complain that a higher rate was subsequently charged if the rate charged was not in excess of that al-

of an affreightment contract by a carrier's failure to ship goods, plaintiff cannot retain the bills of lading, which may be negotiable, and recover the amount paid for freight on the theory that the goods were not timely shipped, particularly if carrier's obligation to carry continues—Calumet & Hecla Mining Co. v. Equitable Trust Co., 174 N.Y.S. 319, 186 App.Div. 330.

94. Ala.—Hunter v. Lauderdale Cotton Mills, 112 So. 215, 215 Ala. 638.

95. Tex.—Clement Grain Co. v. St. Louis Southwestern Ry. Co. of Texas, Civ.App., 35 S.W.2d 516.

96. U.S.—State of Florida v. U. S., D.C.Ga., 11 F.Supp. 36.
Ala.—Alabama Great Southern R. Co. v. Herring, 174 So. 502, 234 Ala. 238.
Cal.—Heath v. Judson Freight Forwarding Co., 190 P. 839, 47 Cal. App. 426.
10 C.J. p. 441 note 60.
Corpus Juris cited in State of Florida v. U. S., D.C.Ga., 11 F.Supp. 36, 42.

97. U.S.—Baltimore & O. R. Co. v. Carnegie Steel Co., D.C.Pa., 251 F. 682, 684.
Ark.—Missouri Pac. R. Co. v. Sisk, 295 S.W. 55, 174 Ark. 168.
N.Y.—New York Cent. R. Co. v. Rudolph Wurlitzer Mfg. Co., 225 N.Y.S. 652, 222 App.Div. 716.
10 C.J. p. 441 note 64 [a]
"If a transportation service be performed by the carrier, the rate applicable to such service as specified in tariffs relating thereto, which are duly filed and published, must be paid by the person for whom such service was rendered."—Baltimore & O. R. Co. v. Carnegie Steel Co., supra.

98. U.S.—Hygrade Food Products Corporation v. Chicago, M., St. P. & P. R. Co., C.C.A.N.Y., 85 F.2d 113, reversing, D.C., 10 F.Supp. 767

99. N.D.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Washburn Lignite Coal Co., 168 N.W. 684, 40 N.D. 69, 12 A.L.R. 744, error dismissed 41 S.Ct. 140, 254 U.S. 370, 65 L.Ed. 310.

1. N.D.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Washburn Lignite Coal Co., supra.

2. Ky.—Newport News, etc., Co. v. McDonald Brick Co., 59 S.W. 332, 109 Ky. 408, 22 Ky.L. 934.

lowed by law at the time of the shipment.[3]

A private carrier, which is not subject to the established rates and classifications applicable to common carriers, may be free to contract for such compensation as it can get;[4] and, where it has so contracted, it cannot charge in excess of the rate fixed by the contract.[5] After oral negotiations have been merged in the bill of lading, which becomes the contract of the parties, a carrier cannot be held to a prior oral quotation of a rate.[6]

b. Particular Items or Services

(1) Transportation or carriage
(2) Other items or services

(1) Transportation or Carriage

A carrier is ordinarily entitled to compensation for its service in carrying or transporting the shipment, the amount of such compensation or charge being determined by computation in accordance with the applicable rate.

The primary or ordinary service for which a carrier is entitled to compensation is that of carrying or transporting the goods or live stock involved between the point of shipment and the point of destination.[7] The amount of the charge for this service is usually determined by computation in accordance with the scheduled or established rate applicable to shipments of the type and between the points involved.[8] In computing freight charges, the rate applicable and the weight of the shipment are the usual factors in the equation.[9]

The application of a particular rate is ordinarily dependent on a proper construction of the governing tariffs or rate regulations in existence at the time when the shipment was made.[10] Where such factors are essential elements of the rate classifications made by the tariff or regulatory statute, the applicability of a particular rate in a given case may depend on whether, within the meaning of the tariff, as construed in accordance with the rules stated

3. Tex.—Dillingham v. Labatt, Civ. App., 30 S.W. 370.

4. Minn.—Northwest Tablet Co. v. Universal Carloading & Distributing Co., 250 N.W. 456, 189 Minn. 582.

5. Minn.—Northwest Tablet Co. v. Universal Carloading & Distributing Co., supra.

6. Wis.—Chicago, M. & St. P. Ry. Co. v. Jewett, 171 N.W. 757, 169 Wis. 102.

7. U.S.—Nocatee Crate Co. v. Atlantic Coast Line R. Co., C.C.A. Fla., 26 F.2d 670—Butler Motor Co. v. Atchison, T. & S. F. Ry. Co., C.C.A. Mo., 272 F. 683.
Ga.—Clemons v. Payne, 105 S.E. 623, 26 Ga.App. 142.
Kan.—Hebrlee v. Hawley, 211 P. 129, 112 Kan. 398.
N.Y.—Stevens v. Atchison, T. & S. F. Ry. Co., 202 N.Y.S. 195, 207 App.Div. 442, affirmed 147 N.E. 200, 234 N.Y. 572, certiorari denied 45 S.Ct. 463, 267 U.S. 603, 69 L.Ed. 809.

8. U.S.—U. S. v. Gulf Refining Co., Okl., 45 S.Ct. 597, 268 U.S. 542, 69 L.Ed. 1082, affirming, C.C.A., Gulf Refining Co. v. U. S., 284 F. 90—St. Louis, I. M. & S. Ry. Co. v. J. F. Hasty & Sons, Ark., 41 S.Ct. 269, 255 U.S. 252, 65 L.Ed. 614—Chicago Great Western R. Co. v. Farmers' Shipping Ass'n, C.C.A. Kan., 59 F.2d 657—Atlantic Bridge Co. v. Atlantic Coast Line R. Co., D.C. Fla., 56 F.2d 163, affirmed, C.C.A., Atlantic Coast Line R. Co. v. Atlantic Bridge Co., 57 F.2d 654—American Ry. Express Co. v. Price Bros., C.C.A. Tex., 54 F.2d 67—S. A. Gerrard Co. v. American Ry. Express Co., C.C.A. Ohio, 35 F.2d 861—Updike Grain Co. v. Chicago & N. W. Ry. Co., C.C.A. Neb., 35 F.2d 486—Nocatee Crate Co. v. Atlantic Coast Line R. Co., C.C.A. Fla., 26 F.2d 670—Missouri Pac. R. Co. v. Rea-Patterson Milling Co., C.C.A. Kan., 273 F. 518—Butler Motor Co. v. Atchison, T. & S. F. Ry. Co., C.C.A. Mo., 272 F. 683—Lakewood Engineering Co. v. New York Cent. R. Co., C.C.A. Ohio, 259 F. 61, 170 C.C.A. 129, error dismissed 41 S.Ct. 60, 254 U.S. 661, 65 L.Ed. 463—In re Independent Sewer Pipe Co., D.C.Cal., 248 F. 547—Southern Pac. Co. v. U. S., 62 Ct.Cl. 391.
Ala.—Robert S. Armstrong & Bros. Co. v. Rowland, 118 So. 502, 22 Ala.App. 613.
Fla.—Louisville & N. R. Co. v. Speed-Parker, Inc., 137 So. 724, 103 Fla. 439.
Ga.—Clemons v. Payne, 105 S.E. 623, 26 Ga.App. 142.
Ind.—American Ry. Express Co. v. Johnson Butter Co., 187 N.E. 405, 97 Ind.App. 537.
Kan.—Missouri Pac. R. Co. v. Red Star Milling Co., 251 P. 417, 122 Kan. 122.
La.—Louisiana Ry. & Nav. Co. v. Lawrence, 5 La.App. 722.
Minn.—Crookston Milling Co. v. Great Northern Ry. Co., 242 N.W. 287, 185 Minn. 563.
Mont.—Sunburst Oil & Refining Co. v. Great Northern Ry. Co., 7 P.2d 927, 91 Mont. 216, certiorari granted Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 53 S.Ct. 7, 287 U.S. 580, 77 L.Ed. 508, and affirmed 53 S.Ct. 145, 287 U.S. 358, 77 L.Ed. 360, 85 A.L.R. 254.
N.H.—New York, N. H. & H. R. R. v. Tonella, 111 A. 341, 79 N.H. 464.
Pa.—Crane R. Co. v. Philadelphia & R. Ry. Co., 97 A. 1055, 253 Pa. 246.
Tex.—Texarkana & Ft. S. Ry. Co. v. Houston Gas & Fuel Co., 51 S.W.2d 284, 121 Tex. 594—San Antonio & A. P. Ry. Co. v. D. M. Picton & Co., Civ.App., 111 S.W.2d 842, error refused.

9. Fla.—Louisville & N. R. Co. v. Speed-Parker, Inc., 137 So. 724, 103 Fla. 439.
Ga.—Seaboard Air Line Ry. Co. v. Lumberman's Co., 149 S.E. 128, 168 Ga. 351, reversing Lumberman's Co. v. Seaboard Air Line Ry. Co., 139 S.E. 116, 37 Ga.App. 176, vacated 149 S.E. 303, 40 Ga.App. 238, conformed to 149 S.E. 303, 40 Ga. App. 238.
Mont.—Sunburst Oil & Refining Co. v. Great Northern Ry. Co., 7 P.2d 927, 91 Mont. 216, certiorari granted Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 53 S.Ct. 7, 287 U.S. 580, 77 L.Ed. 508, and affirmed 53 S.Ct. 145, 287 U.S. 358, 77 L.Ed. 360, 85 A.L.R. 254.

Adoption of improper weight

That weighing coal on railroad scales would have required carrier to make an extra haul, which was impracticable under war-time conditions, did not excuse billing of coal without notice to consignee at inaccurate tipple weights, and carrier should have attempted to reach an agreement with consignee for a proper allowance, or made allowance in its best judgment subject to adjustment.—New York & Pennsylvania Co. v. New York Cent. R. Co., 124 A. 428, 280 Pa. 297.

10. Fla.—Louisville & N. R. Co. v. Speed-Parker, Inc., 137 So. 724, 103 Fla. 439.

in § 303 supra, the shipment is of a proper type of | goods or commodity,[11] is packed or crated in a par-

11. U S—U S. v. Gulf Refining Co., Okl, 45 S Ct 597, 268 U S. 542, 69 L.Ed. 1082, affirming, C.C A., Gulf Refining Co. v. U S., 284 F. 90—St Louis, I. M. & S. Ry. Co. v. J. F. Hasty & Sons, Ark., 41 S Ct 269, 255 U.S 252, 65 L Ed. 614—Chesapeake & O Ry. Co. v. Indiana Fibre Products Co, D.C Ind, 6 F.Supp. 339, affirmed, C.C A., 75 F 2d 193—Atchison, T. & S. F. Ry. Co. v U. S, 74 Ct Cl. 154—Arizona Eastern R. Co. v. U. S., 63 Ct Cl. 60—Southern Pac Co. v. U. S, 62 Ct Cl 649.
Fla.—Louisville & N R. Co. v. Speed-Parker, Inc, 137 So. 724, 103 Fla 439
S.C—Gibbes Machinery Co. v. Southern Ry. Co., 93 S E 718, 108 S.C. 159.
Tex.—Bedford-Carthage Stone Corporation v. Missouri-Kansas-Texas R. Co. of Texas, Civ.App., 25 S.W.2d 930.
Va—Norfolk Southern R. Co. v. Freeman Supply Corporation, 133 S.E. 817, 145 Va. 207.
10 C.J. p 430 note 7 [b].

Articles of foreign commerce

Commodity, purchased in and shipped from foreign country, took railway freight rate for articles of foreign commerce, and such character thereof was not changed by necessary incidents of transportation.—Chesapeake & O. Ry. Co. v. Indiana Fibre Products Co, D C.Ind., 6 F. Supp. 339, affirmed, C C.A., 75 F.2d 193.

Bomb sights and bomb release mechanisms for airplanes are analogous, for freight classification purposes, to scientific instruments, and subject to the same freight rate.—Erie R. Co. v. U. S., 79 Ct.Cl. 102.

Coal

(1) Under tariffs prescribing one rate for the shipment of coal generally and a lower rate for "furnace material," shipped to, and for the use of, pig iron furnace companies at a particular point, a shipment of coal by an iron and steel company from its mines to such point where it maintains a furnace is not entitled to the lower rate where the coal is not used at that point but is reconsigned to other points for use in iron ore mining—Republic Iron & Steel Co. v. Davis, 98 So. 197, 210 Ala. 361.

(2) "Prepared and anthracite briquettes and boulets" in carriers' tariff schedule included anthracite coal in native form in sizes above pea and briquettes and boulets made from anthracite coal, since "prepared coal in anthracite coal trade means sizes of coal above pea."—New York, N. H & H. R. Co. v. Salter, 134 A. 220, 104 Conn. 728.

Crêpe paper bandages, manufactured and intended for use as a paper bandage for surgical dressing, come within a rate classification for the transportation of "surgical bandages."—Pennsylvania R. Co. v. U. S, Ct.Cl, 42 F.2d 600.

Dunnage on automobile shipments, consisting of wooden braces and blocking used to keep the automobiles steady in cars, belongs to the category of crating and boxing employed to protect more valuable articles in shipping, the weight of which, unless some provision to the contrary appears, naturally takes the rate applicable to the contents, and hence, in the absence of other provision, the dunnage is subject to the automobile, rather than the lumber, rate, particularly where the tariff provides that, unless otherwise provided, "charges shall be computed on gross weights."—Butler Motor Co v. Atchison, T. & S. F. Ry. Co, C. C.A.Mo, 272 F. 683.

Federal military equipment takes rates open to public for like transportation.—Houston E. & W. T. Ry. Co. v. U. S., 63 Ct.Cl. 576—Arizona Eastern R. Co. v. U. S., 63 Ct.Cl 60.

Lime Cola syrup has been held not to fall under the classification of "molasses and syrups," in a rate tariff, but instead under a higher rating given to "fountain syrups, fruit syrups, or syrups not otherwise indexed by name."—Louisville & N R. Co. v. Lime Cola Bottling Co., 101 So 678, 212 Ala. 52.

Logs, wood, and lumber

(1) A tariff of freight rates containing a table of "rough material rates applicable on rough lumber, staves, flitches, bolts and logs," conditional on the manufactured product being reshipped in specified proportions, and including, in the table of percentages applicable, "finished staves" and "staves and headings," gave the benefit of such milling in transit rates to rough material for heading for barrels, as the word "bolt" should be understood in its generic sense as meaning a mass or block of wood from which anything may be cut or formed.—St. Louis, I M. & S. Ry. Co. v J. F. Hasty & Sons, Ark, 41 S Ct. 269, 255 U.S. 252, 65 L.Ed. 614.

(2) However, in a shipper's suit for overcharge on shipments of rough sawed heading, where there were two tariffs on file with the railroad commission, one fixing the rate on heading bolts, and the other on rough sawed heading, and the testimony showed a substantial difference between the two, it was held that the tariff on the latter applied because dealing specifically with the identical materials shipped—E. L. Young Heading Co. v. Payne, 89 So 782, 127 Miss. 48.

(3) Log rate, and not fuel wood rate, is applicable to shipments of stave bolts and headings used in manufacture of barrels entitling railroad to recover alleged undercharge due on shipments thereof.—Reinschmidt v. Louisville & N. R. Co, 169 So. 491, 124 Fla. 814.

(4) Mahogany logs were embraced within class set forth in the governing rate tariff as "lumber, telegraph poles, or similar lading."—Cleveland, C, C. & St. L Ry. Co v. Talge Mahogany Co., 112 N.E. 890, 185 Ind 11.

(5) Redwood coffin stock planed and cut to size and shape comes under the freight classification of "lumber: built-up, combined or veneered wood, except woods of value," and the freight rates on carload lots thereof shipped from Santa Clara, Cal, to Minneapolis, Minn., in October, 1919, was ninety cents per hundred under the published tariffs then in force.—Minnesota-Koll Casket Co v. Payne, 188 N.W. 560, 152 Minn 238.

(6) Certain lumber brought from the Philippine Islands and commonly known as Philippine mahogany, when in fact it was not mahogany, being used as a substitute for, and costing less than, Mexican or African mahogany, is not "mahogany" within the meaning of the railway tariff for foreign woods including mahogany, such tariff schedule enumerating woods all of which are of tropical or subtropical nature and of high cost, and the denomination of the wood as Philippine mahogany is not conclusive of its character.—New York Cent. R. Co. v. Warren Ross Lumber Co., 190 N.Y.S. 835.

(7) By analogy to Act Congr Oct. 3, 1913 c 16, § 4c, relating to tariff on goods shipped from the Philippine Islands and which distinguishes between the Philippine Islands and foreign countries, so that "Philippine mahogany" is not being included in the term "foreign woods" of the tariff schedule, it not being an expensive wood as compared with all the other foreign woods, Philippine mahogany does not fall within a railway rate schedule providing rates on "foreign woods (mahogany, etc.)"—New York Cent R Co v. Warren Ross Lumber Co., supra.

(8) In determining whether a commodity is to be classified as "wood pulp" or "wood pulp board" under a rate schedule, classifications by customs officials and railway company's solicitors and agents are persuasive, but not conclusive, in determining proper freight rate therefor.—Chesa-

ticular manner,[12] is in carload or less than carload | lots,[13] whether the shipment is for export or domes-

peake & O Ry. Co v. Indiana Fibre Products Co., D.C Ind., 6 F.Supp. 339, affirmed, C.C A., 75 F 2d 193.

Machinery and appendages

(1) Low rate assigned in exception to general tariff classification to "machines rated Sixth Class" is applicable to crane, hoisting engine, and "whirley," an apparatus combining steam engine and hoist with projecting arm, although general classification specifically described cranes and derricks as having sixth class rating —Atlantic Coast Line R. Co. v. Atlantic Bridge Co., C.C.A Fla., 57 F 2d 654, affirming, D.C., Atlantic Bridge Co v. Atlantic Coast Line R. Co, 56 F 2d 163

(2) A tank wagon necessary to use with a traction engine and shipped with the engine should be shipped under the same classification as to freight rates as the engine, and it is immaterial that each could be used without the other.—Louisville & N. R. Co. v. Newell, 77 So. 553, 201 Ala. 129.

(3) That all parties to such a shipment considered a tank wagon as part of a traction engine, and so treated it, may be considered in determining the proper classification of the tank in regard to freight rates.—Louisville & N. R. Co. v. Newell, supra.

(4) Used electrical machinery, parts of which were loaded on railroad cars after dismantling necessary for shipment, is erroneously classified in bills of lading as "scrap iron and steel" for purpose of computing freight charges, and carrier could reclassify shipment as second-hand machinery and demand lawful rates on its arrival at destination — Southern Ry. Co. v. Woodstock Mills, 161 So. 519, 230 Ala. 494.

(5) A shipper of partially burned engines to the factory for rebuilding cannot recover the difference between the rate on engines and that on scrap iron when at the factory it is discovered that the engines cannot be rebuilt —Gibbes Machinery Co. v. Southern Ry. Co., 93 S E. 718, 108 S C 159

Personal effects and goods of United States army officers

(1) In determining whether a shipment of personal effects of army officers, changing location by orders of the war department, which includes boxes, barrels, packages of household goods, personal effects, and professional goods, comes within the higher rate classification of "household goods," or a lower rate classification as to "emigrant moveables," the same rules apply as if private individuals or shippers were involved —Chesapeake & O R. Co. v. U. S, D.C.Va., 1 F.Supp. 350.

(2) Such a shipment has been held subject to the "household goods" rate notwithstanding the inclusion of the officers' personal effects and professional books.—Chesapeake & O. R Co. v. U. S, supra.

"Pig lead"

As regards application of special freight rates for "pig lead," lead in pigs is "pig-lead," whether produced from lead ore or scrap lead —Yazoo & M V R. Co. v. A. Marx & Sons, 135 So 64, 17 La App. 172, rehearing denied 135 So. 675, 17 La.App. 172.

Scrap iron

(1) The Interstate Commerce Commission's interpretation of the tariff on scrap iron and scrap steel does not contemplate that pieces of iron or steel, tendered for shipment as scrap, must be mutilated, bent, or twisted in order to constitute scrap metal.—U. S. ex rel. Sonken-Galamba Corporation v. Missouri-Kansas-Texas R. Co., D.C.Mo., 21 F.Supp. 931.

(2) Scrap steel consisting chiefly of steel plates obtained from the dismantling of antiquated tanks for storing crude oil is entitled to be carried under tariff rates governing "scrap iron and scrap steel" as distinguished from "secondhand material," even though a negligible number of the old plates were used in constructing smaller, temporary oil tanks —U. S. ex rel Sonken-Galamba Corporation v. Missouri-Kansas-Texas R Co., supra.

Ship plates

Special reduced intra-state rates fixed by schedules for steel ship plates are not applicable to plates not intended for, and not used in, construction of ships.—Willamette Iron & Steel Works v. Baltimore & O R. Co, D.C.Or., 25 F.2d 522, affirmed, C.C.A., 29 F.2d 80.

Use of article

The intended use of an article may be helpful in determining whether it falls within one classification or another, but, if is intended for a use which would entitle it to be classified as a particular type of article, it is not deprived of that classification because it could be used for other purposes.—Pennsylvania R. Co v. U. S, Ct.Cl., 42 F 2d 600.

12. U S.—S. A. Gerrard Co. v. American Ry Express Co., C.C.A.Ohio, 35 F.2d 861.

13. U S.—David v. Kelly-Weber & Co., D C.La., 24 F.2d 708—Swift & Co. v. U. S, Ill., 255 F. 291, 166 C C A 461.
N C.—Corporation Commission v. Sea Board Air-Line System, 37 S E. 266, 127 N.C 283.
S C —Byrd v Atlantic Coast Line R. Co., 90 S.E. 181, 106 S.C. 1.

Carload character determined as of time of shipment

The carload character of a freight shipment must be determined at the time the shipment begins and cannot be changed, so far as the application of rates is concerned, by the subsequent conduct of either consignor or consignee —Swift & Co v. U. S, Ill, 255 F. 291, 166 C C.A. 461

Carload shipments of live stock

(1) Statute and tariff prescribing rates to be charged for carload shipments of mixed live stock construed and applied —Bennett Commission Co. v. Northern Pac. Ry. Co., 261 N. W. 593, 195 Minn. 7.

(2) Where freight rate per hundred pounds for carload shipment of cattle was less than for hogs, but minimum weight allowed was greater, charge for mixed carload shipment of cattle and hogs, weighing less than either minimum, based on cattle rate per hundred pounds and accompanying cattle minimum weight, was permissible under statute prohibiting rate for mixed shipment in excess of highest rate and minimum weight charged by carrier for any kind of stock in car, the word "highest" modifying entire phrase "rate and minimum weight" —Bennett Commission Co v. Northern Pac. Ry. Co, 271 N.W 468, 190 Minn. 179.

(3) Carrier's schedules for live stock shipments on file with interstate commerce commission did not limit carload to twenty-eight horses, for other than rate purposes —Shaffer v. American Ry. Express Co., Mo. App., 282 S.W. 725.

Excess weight

(1) Where the applicable schedules or tariffs so provide, a carload shipper may be required to pay not only the carload rate, but also for an excess in weight over a specified carload weight in proportion to the carload rate
Fla.—Louisville & N R Co. v. Speed-Parker, Inc., 137 So. 724, 103 Fla. 439.
Ga.—Seaboard Air Line Ry Co v. Lumberman's Co., 149 S.E 128, 168 Ga. 851, reversing Lumberman's Co v. Seaboard Air Line Ry Co., 139 S E. 116, 37 Ga App. 176, vacated 149 S E. 303, 40 Ga.App 238, conformed to 149 S.E. 303, 40 Ga. App 238.

(2) Words "per car" in rate schedules, covering intra-state sand and gravel shipments, when read in connection with rule in railroad commission's classifications, governing carload shipments, necessarily mean a minimum car and do not preclude application of rule requiring any excess over minimum to be charged for in proportion.—Louisville & N. R. Co. v.

tic use,[14] is over a particular route,[15] or between particular points.[16] In a tariff providing that rates to a specified point will also apply to "directly intermediate points," a directly intermediate point is a point on a route reasonably direct from the point of origin to the specified destination and not one on a circuitous route, wholly outside and remote from the trade territory embraced in the tariff.[17]

Speed-Parker, Inc., 137 So. 724, 103 Fla. 439.

Separate ownership of different parts of shipment

(1) A carload lot presented for shipment by one person is entitled to be carried at carload rates, although all of the goods do not actually belong to one shipper.—Great Northern Ry Co. v. O'Connor, Minn., 34 S Ct. 380, 232 U.S. 508, 58 L.Ed. 703.

(2) A shipper making shipments in carload lots has the right to bill to a single consignee, although the contents of the car may be intended for different individuals, and may thereby obtain the benefit of carload rates —Swift & Co. v. U. S., Ill., 255 F 291, 166 C.C.A 461.

(3) Where a carload shipment has been received from one consignor under one bill of lading, consigned to himself as consignee and paid for at carload rates, the carrier cannot, under a tariff providing that the carload rate will apply only on shipments received from one consignor under one bill of lading, delivered under one expense bill to one consignee, collect more than the carload rate because part of the shipment was owned by another person and seized on replevin at the point of destination.—St. Louis & S F. R. Co. v. First Nat. Bank, 171 P. 467, 68 Okl. 68.

14. U S.—Carpenter v. Texas & N. O. R. Co., C C.A Tex., 89 F 2d 274.

Emergency export rates

(1) Under a tariff providing a reduced emergency export rate on wheat in order to effect a reduction of a surplus wheat supply and prevent a lowering of prices, and requiring, in order for the rate to apply, that there be proof of exportation at time of shipment, and that there be an actual exportation on or before a specified date, a shipper not complying with the conditions and limitations so imposed is not entitled to the benefit of the emergency rates — Carpenter v. Texas & N. O. R. Co., C. C.A Tex., 89 F.2d 274

(2) In determining whether a shipment is for export, so as to become entitled to such a rate, a predetermined intention of the shipper to export is an important element, but not to the exclusion of the giving of due consideration and effect to all parts of the contract of carriage —Carpenter v. Texas & N. O. R. Co, supra.

15. U S.—Western Grain Co v St Louis-San Francisco Ry. Co, C C A. Ala., 56 F.2d 160—Great Northern Ry. Co. v. Delmar Co, Minn., 51 S.Ct 579, 283 U S 686, 75 L.Ed. 1349, reversing, C C A, 43 F.2d 780, which affirmed, D C, Delmar Co v Great Northern Ry. Co, 34 F.2d 221, certiorari granted Great Northern Ry. Co v. Delmar Co, 51 S.Ct 213, 282 U.S. 836, 75 L Ed 742—Chandler v. Pennsylvania R Co., C.C A Va, 11 F.2d 39, affirming, D C., 9 F.2d 703—Missouri Pac. R Co. v. Rea-Patterson Milling Co, C C A Kan, 273 F. 518—Oregon Short Line R Co. v. Portland Cattle Loan Co, D C Or, 245 F. 214, affirmed Portland Cattle Loan Co. v. Oregon Short Line R. Co., 251 F. 33, 163 C.C.A. 233, and Portland Feeder Co v. Oregon Short Line R Co., 251 F. 36, 163 C C.A. 236— Wheeling & L. E Ry. Co. v. Standard Envelope Mfg. Co., D C Ohio, 2 F.Supp. 637

La.—Vicksburg, S. & P. Ry. Co. v. Kidd-Russ Trunk & Bag Co., 130 So. 630, 15 La App. 374.

10 C J p 430 note 7 [a].

Usual route

Railroad, by becoming party to intermediate tariff provision, merely agreed to handle shipments over its usual route between two named points for rate published —Lafond Motor Co. v. Northern Pac. Ry. Co., D.C Minn., 2 F.Supp. 658.

16. U S —International Milling Co v. Lowden, C.C A Minn., 91 F.2d 270 —Chicago Great Western R. Co v. Farmers' Shipping Ass'n, C.C.A Kan., 59 F.2d 657.

Ind.—American Ry. Express Co. v. Johnson Butter Co, 187 N.E. 405, 97 Ind App. 537.

Change in point of destination

If the contract of shipment contemplates the possibility of the goods being taken at an intermediate point, and the owner does thus take them, he is liable for the tariff schedule rate to that point, although more than a pro rata charge as computed on the charge for the entire transportation.—Sherman, S & S. R. Co. v. Beebe, 39 S W 1102, 15 Tex Civ App 685—Southern Pac R. Co. v. Haas, Tex.Civ.App, 21 S.W 1021.

Export rates held inapplicable to domestic shipment

(1) Under a tariff schedule containing three sections prescribing classes of rates for domestic shipments to the Pacific coast and a fourth section prescribing export rates for goods shipped to Hawaiian Islands, and containing alternative application clause to effect that rate of any other section should be applied if lower, the export rate is not applicable to domestic shipments — Southern Pac Co v. Lothrop, C C A. Or, 15 F.2d 486, reversing, D C, Lothrop v. Spokane, P. & S Ry Co, 10 F.2d 225, and certiorari denied Lothrop v. Southern Pac Co, 47 S Ct 336, 273 U S. 742, 71 L Ed 869, Lothrop v. Spokane, P. & S R Co, 47 S Ct. 336, 273 U.S. 742, 71 L Ed. 869 and Lothrop v. Oregon-Washington R & Nav. Co., 47 S Ct. 336, 273 U. S. 742, 71 L.Ed. 869.

(2) The abandonment by carrier of alternative application clause pending suit is not an implied admission that such clause made tariff on shipments to Hawaiian Islands applicable to other shipments.—Southern Pac. Co v. Lothrop, supra.

Long and short haul clause

Tariff sheet of railroad naming rates on coal between two points on its line to a common destination within the state, the higher rate being named for the shorter distance, the further clause appearing on the sheet, "On interstate traffic a higher rate must not be charged for a shorter than a longer distance over the same line," did not affect the named rates, and was not an offer to transport coal from the further point at the same rate charged from the point nearer the common destination, although the ultimate destination of the shipments was beyond the state. —Sunderland Bros. Co. v. Baltimore & O. S. W. R. Co., 190 S W. 650, 196 Mo App. 154.

Tariff specifically referring to points involved

Shipment of corn from Bondurant, Iowa, to Chicago, was held governed by specific rate of eighteen and five-tenths cents per hundred pounds provided in tariff schedule, and not by general provisions of supplemental tariff, fixing rate of sixteen cents per hundred pounds for shipments between certain other stations on the line and "intermediate points."—Chicago Great Western R. Co v. Farmers' Shipping Ass'n, C.C.A Kan, 59 F. 2d 657.

17. U S.—Standard Oil Co. v. Pennsylvania R Co, C C A Ill., 40 F.2d 52, certiorari denied Standard Oil Co (Indiana) v. Pennsylvania R. Co, 51 S Ct. 78, 282 U S 872, 75 L Ed 770—Updike Grain Corporation v. St. Louis & S. F. Ry. Co., C C.A.Neb., 52 F.2d 94

"Directly intermediate point"

A provision in a carrier's schedule of rates, under the heading, "Intermediate Application," that the rates will apply to directly intermediate points does not mean that the rates

Where a commodity shipped is included in more than one tariff designation, that which is more specific will be held applicable;[18] and, where two descriptions and tariffs are equally appropriate, the

apply to localities between stations, the word "points" referring to stations, and "directly intermediate points" to parts of the schedule in which only a part of the stations are named.—Schanen-Blair Co. v. Southern Pac. Co., 136 P. 886, 68 Or. 106.

"Intermediate points" construed

Points of destination of goods shipped on railway on one of whose not unduly circuitous routes such points lay between points of origin and point accorded specific rates therefrom by railway tariff were "intermediate points" within tariff provision making rates to intermediate points the same as to next more distant point accorded specific rates, as against contention that rates were determined by direct routes from points of origin to point accorded specific rates and thence to points of destination.—Chicago & N. W. Ry. Co. v. Wilcox Co., C.C.A.Ill., 68 F.2d 883, certiorari denied 55 S.Ct. 72, 293 U.S. 560, 79 L.Ed. 661.

Point held not intermediate

(1) Birmingham, Ala., was held not "directly intermediate" between shipping point in Nebraska and Vicksburg, Miss., under tariff, words quoted suggesting point on route reasonably direct from point of origin to specified destination.—Updike Grain Corporation v. St. Louis & S. F. Ry. Co., C.C.A.Neb., 52 F.2d 94.

(2) Tariff specifying rates to named Illinois and northwestern Indiana points, with provision for application to intermediate points of rate to first specified point beyond, did not fix rates to other Indiana points.—Standard Oil Co. v. Pennsylvania R. Co., C.C.A.Ill., 40 F.2d 52, certiorari denied Standard Oil Co. (Indiana) v. Pennsylvania R. Co., 51 S.Ct. 78, 282 U.S. 872, 75 L.Ed. 770.

Provision limited to unnamed intermediate points

A provision in a tariff to the effect that "Between stations on the C., M. & St. P. Ry. rates to and from intermediate stations will be the same as shown to or from the next more distant station to or from which rates are named" was held to apply only to shipping points to or from which a specific rate is not named and which points are between specifically named shipping points.

U.S.—National Elevator Co. v. Chicago, M. & St. P. Ry. Co., Minn., 246 F. 588, 158 C.C.A. 558.

Minn.—Reliance Elevator Co. v. Chicago, M. & St. P. Ry. Co., 165 N.W. 867, 139 Minn. 69.

[18] U.S.—U.S. v. Gulf Refining Co., Okl., 45 S.Ct. 597, 268 U.S. 542, 69 L.Ed. 1082, affirming, C.C.A., Gulf Refining Co. v. U.S., 284 F. 90—Gideon-Anderson Lumber Co. v. St. Louis Southwestern Ry. Co., C.C.A.Mo., 88 F.2d 232—American Ry. Express Co. v. Price Bros., C.C.A.Tex., 54 F.2d 67—Nocatee Crate Co. v. Atlantic Coast Line R. Co., C.C.A.Fla., 26 F.2d 670—Pillsbury Flour Mills Co. v. Great Northern Ry. Co., C.C.A.Minn., 25 F.2d 66—Davis v. Prairie Pipe Line Co., C.C.A.Kan., 298 F. 393—Lakewood Engineering Co. v. New York Cent. R. Co., Ohio, 259 F. 61, 170 C.C.A. 129, error dismissed, 41 S.Ct. 60, 254 U.S. 661, 65 L.Ed. 463.

Fla.—Reinschmidt v. Louisville & N. R. Co., 160 So. 69, 118 Fla. 237.

Miss.—E. L. Young Heading Co. v. Payne, 89 So. 782, 127 Miss. 48.

Exception

Where one rating is provided in tariff classification proper, and another in exception, exception takes precedence, although description in classification proper is more specific.—Atlantic Bridge Co. v. Atlantic Coast Line R. Co., D.C.Fla., 56 F.2d 163, affirmed, C.C.A., Atlantic Coast Line R. Co. v. Atlantic Bridge Co., 57 F.2d 654.

"Lumber" and "dressed lumber"

Under a tariff giving proportionate or lower rates on incoming lumber where a certain percentage or tonnage of the manufactured product is shipped out over the same road within a specified time, and classifying lumber as "lumber," "lumber dressed," and "lumber rough," and setting opposite each the varieties of manufactured products which must be shipped out in a certain tonnage to give the incoming commodity the lower rate, a shipper of "dressed lumber" must ship out the required tonnage of the types of manufactured products set opposite that class of lumber rather than the types set opposite "lumber," for the classification of dressed lumber is more specific and hence controlling.—Gideon-Anderson Lumber Co. v. St. Louis Southwestern Ry. Co., C.C.A.Mo., 88 F.2d 232.

Onions

Small onions, having part of growing foliage on them when shipped, are subject to published rate on "onions, green," rather than higher rate for "plants, strawberry and vegetable."—American Ry. Express Co. v. Price Bros., C.C.A.Tex., 54 F.2d 67.

Short logs

Higher rate on logs under six feet is applicable to shipment of short logs, although lower rate was prescribed for logs generally.—Nocatee Crate Co. v. Atlantic Coast Line R. Co., C.C.A.Fla., 26 F.2d 670.

"Steel rails and ties" and "portable railway tracks"

Where a manufacturer of portable railway track did not attach to the rails the plates and bolts, but shipped sections consisting of two steel rails and steel crossties, which were riveted together, it was held that the article was a "portable railway track set up in sections," within the tariff providing for that class of articles, and shipper was not entitled to a lower commodity tariff on iron and steel rails and crossties.—Lakewood Engineering Co. v. New York Cent. R. Co., Ohio, 259 F. 61, 170 C.C.A. 129, error dismissed 41 S.Ct. 60, 254 U.S. 661, 65 L.Ed. 463.

Commodity and class rates or tariffs

(1) Where a commodity rate is made in a tariff, it supersedes the class rate, and is the only lawful rate that may be charged.—Galveston, H. & S. A. Ry. Co. v. Lykes Bros., D.C.Tex., 294 F. 963—Chicago, B. & Q. R. Co. v. U.S., 73 Ct.Cl. 250, certiorari denied 53 S.Ct. 12, 287 U.S. 599, 77 L.Ed. 522.

(2) Where common carriers published a "class" rate as applicable to "high explosives, viz. explosive projectiles," and a "commodity" rate as applicable to "fixed ammunition," and the article transported was both fixed ammunition and a high-explosive projectile, the "commodity" rate, under the published tariffs, and the regulations of the interstate commerce commission, governed.—Chicago, B. & Q. R. Co. v. U.S., supra.

(3) Where an express company had established a general tariff of charges for merchandise, a tariff of rates for other classes of goods, and a commodities tariff, a provision of the commodities tariff, that all classes of business not rated higher than merchandise between certain localities are put on a commodities rate, applies only to those articles having a special classification, and not to articles under the general classification of merchandise, especially where such interpretation had been adopted by the carrier in making some of its charges.—Gimbel Bros., Inc., v. Barrett, D.C.Pa., 218 F. 880, reversed on other grounds 226 F. 623, 141 C.C.A. 379.

(4) A provision in the commodities tariff of an express company fixing a minimum rate on all classes of business between certain localities, the charges to be graduated according to the scale on shipments under one hundred pounds, applies only to shipments of the commodities class, and not to shipments classified generally as merchandise.—Gimbel Bros., Inc. v. Barrett, supra.

shipper is entitled to have applied the one specifying the lower rate.[19] Under an express company's rule that two or more packages forwarded at the same time from the same place to the same consignee must be charged for on the aggregate weight, if a lower charge is made thereby, not all of such shipments shall be taken in making up the aggregate on which the weight is based, but only such as will result in a reduced charge because of the aggregation.[20] If there is any doubt as to which rate is applicable, the court may be justified in considering how the rates claimed as applicable would operate as a matter of justice.[21] The shipper has the full right to refrain from assembling the ultimate product or to disassemble the same for shipment in any way which will make the shipment take a lower tariff rate than if the article were in final form.[22] A rule in tariff regulations that commodity rates shall govern only when lower than specified class rates is not abrogated by another rule providing that, when a commodity rate has been "established," it removes the application of the class rates to or from the same point on that commodity, where a commodity rate higher than an existing class rate can be established only on special authority from the commission having control of rates.[23]

If the shipper has selected the route, the rate prescribed for that route is applicable and recoverable, although there is another route on which the rate would have been less,[24] but the carrier is not entitled to additional charges for additional services rendered without the owner's consent by reason of sending the goods to their destination by a roundabout way,[25] or to additional charges incurred because of the carrier's sending the shipment over a route other than that designated by the shipper;[26] and, where the shipper designates the route over which the goods are to travel, he is not liable for a higher rate resulting from a combination of the local rates over a different route over which the goods were actually sent and over which there was no through rate.[27] Where throughout a tariff in-

19. U.S.—U. S. v. Gulf Refining Co., Okl., 45 S.Ct. 597, 268 U.S. 542, 69 L.Ed. 1082, affirming, C.C.A., Gulf Refining Co. v. U. S., 284 F. 90—International Milling Co. v. Lowden, C.C.A.Minn., 91 F.2d 270—Atlantic Coast Line R. Co. v. Atlantic Bridge Co., C.C.A.Fla., 57 F.2d 654, 656, affirming, D.C., Atlantic Bridge Co. v. Atlantic Coast Line R. Co., 56 F.2d 163—Western Grain Co. v. St. Louis-San Francisco Ry. Co., C.C.A.Ala., 56 F.2d 160—American Ry. Express Co. v. Price Bros., C.C.A.Tex., 54 F.2d 67.

Ark.—Swift & Co. v. Ft. Smith & W. Ry. Co., 16 S.W.2d 1001, 179 Ark. 516.

Va.—Norfolk Southern R. Co. v. Freeman Supply Corporation, 133 S.E. 817, 145 Va. 207.

"A carrier may not, under a tariff couched in general terms, which, if interpreted in one way, will produce a higher, in another a lower, rate, insist upon the interpretation which gives it the higher rate. In short, in a situation of that kind, the shipper who has to pay the freight may call the tune"—Atlantic Coast Line R. Co. v. Atlantic Bridge Co., supra.

Contemporaneous conflicting rates

(1) Where a carrier has published conflicting rates effective contemporaneously in the same tariff, the shipper is entitled to the lower of these rates.—Dreyfuss v. Pennsylvania R. Co., 153 N.Y.S. 966, 90 Misc. 581.

(2) A shipper is entitled to the lowest of two published charges equally applicable to the same shipment.—Louisville Water Co. v. Illinois Cent. R. Co., D.C.Ky., 14 F.Supp. 301.

20. U.S.—Gimbel Bros., Inc. v. Barrett, D.C.Pa., 218 F. 880, reversed on other grounds 226 F. 623, 141 C.C.A. 379.

21. U.S.—Hohenberg v. Louisville & N. R. Co., C.C.A.Ala., 46 F.2d 952, certiorari denied 52 S.Ct. 6, 284 U.S. 617, 76 L.Ed. 527—Davis v. Prairie Pipe Line Co., C.C.A.Kan., 298 F. 393.

Fla.—Louisville & N. R. Co. v. Speed-Parker, Inc., 137 So. 724, 103 Fla. 439.

22. U.S.—Lakewood Engineering Co. v. New York Cent. R. Co., Ohio, 259 F. 61, 170 C.C.A. 129, error dismissed 41 S.Ct. 60, 254 U.S. 661, 65 L.Ed. 463.

23. Va.—Norfolk Southern R. Co. v. Freeman Supply Corporation, 133 S.E. 817, 145 Va. 207.

24. La.—Vicksburg, S. & P. Ry. Co. v. Kidd-Russ Trunk & Bag Co., 130 So. 630, 15 La.App. 374.

N.Y.—Davis v. Cayuga Operating Co., 216 N.Y.S. 186, 217 App.Div. 675

Tex.—E. W. & F. D. Jones Drilling Co. v. Baldwin, Civ.App., 97 S.W.2d 1022, error dismissed.

Wis.—Mellon v. Johnson Co., 219 N.W. 352, 196 Wis. 64.

Designation of rate

Where three routes are available, two of which carry a higher rate in the same amount and a third which has a lower rate, and the bill of lading, without designating a particular route, recites that the rate is that fixed for the two more expensive routes, this has been held a sufficient designation of the route to render the shipper liable for the highest rate rather than the lower rate which would have prevailed for the cheapest route.—Davis v. Cayuga Operating Co., 216 N.Y.S. 186, 217 App.Div. 675.

25. Me.—Jones v. Boston, etc., R. Co., 63 Me. 188

Neb.—Burlington, etc., R. Co. v. Chicago Lumber Co., 19 N.W. 451, 15 Neb. 390.

26. La.—Texas & P. Ry. Co. v. Consolidated Companies, App., 151 So. 433, affirmed 156 So. 215, 180 La. 180.

27. Mo.—Lancaster v. Schreiner, 212 S.W. 19, 202 Mo.App. 459.

Responsibility for misrouting

(1) Where a shipper delivered an interstate shipment of goods to a carrier and directed it to be sent over a route having an established through charge, the initial carrier was charged with the duty to make necessary notations on the waybill, and the shipper had the right to assume compliance with that duty, and he was not responsible for any misrouting.—Lancaster v. Schreiner, 212 S.W. 19, 202 Mo.App. 459

(2) In case an interstate shipment of freight is misrouted so that the shipper or consignee is compelled to pay a larger amount of freight charges than the established through rate, the carrier or carriers, whether initial or connecting, which are guilty of the misrouting must stand the loss, and cannot collect the excess charges caused by the misrouting, and, if paid by the shipper or consignee, must refund the overcharge.—Lancaster v. Schreiner, supra.

(3) The spirit of the Interstate Commerce Act with the Carmack amendment, U.S.Comp.St. §§ 8604a, 8604aa, is to treat connecting lines

complete routings are supplemented by the words "and lines beyond," a shipper may not complete a routing with the lines of other participating carriers, save where, in the tariff, the routing is followed by such words.[28]

Where a shipper has given no directions as to routing, he is entitled to have the goods moved by the cheapest available route and at the lowest rate applicable thereto;[29] and the same is true where the shipper has originally specified the route but has subsequently given a diversion order without specifying the diversion route.[30]

Application of through rate or of local rates to shipments. A through shipment between certain points may be entitled to the benefit of a through rate which is less than the total of the local rates between the intermediate points;[31] conversely, where through shipments are made, the rates applicable are through rates, even though a combination of intermediate rates would make a lower rate;[32] and the mere fact that the shipment was billed to an intermediate point and there reconsigned to its destination will not convert it into a local shipment so as to permit the local rates instead of the through rates to be charged,[33] but a practice

of transportation as one line so far as the shipper is concerned, and to compel the different companies forming a through route to deal as a unit with the shipper, and then to adjust all differences as to individual liability among themselves, and thus, where a shipment was misrouted and the proper charges were paid to the terminal carrier, such terminal carrier should not be allowed to sue the shipper for the local established charges over the actual route of the shipment, but should be required to settle the matter with the other carriers, because to collect the money from the shipper would be to collect money for the benefit of an offending carrier, money which must again be returned to the shipper by the offending carrier.—Lancaster v. Schreiner, supra.

(4) A connecting carrier receiving a shipment of goods which was not routed over its line will be charged with knowledge that it was aiding in misrouting the shipment, where the bill of lading and waybill designated the proper route.—Lancaster v. Schreiner, supra.

(5) Where shipper ascertained through rate and designated the proper route and paid the correct amount of charges for the through shipment, the initial carrier was responsible for the through shipment, although part of the route was over a connecting carrier, the connecting carrier becoming in a measure at least the agent of the initial carrier to complete the shipment, and there was such contractual relation between the two carriers that the connecting carrier could hold the initial carrier for its lawful share of freight charges.—Lancaster v. Schreiner, supra.

Shipping papers presumed to designate route

In an action by a carrier to recover charges, where neither the bill of lading nor the waybill issued by the initial carrier was introduced in evidence, it must be presumed that they designated the routing of the shipment as stated in a receipt issued by such carrier to the shipper, especially in view of Interstate Commerce Act, § 20, U.S.Comp.St. §§ 8604a, 8604aa, providing a penalty for issuing a false bill of lading.—Lancaster v. Schreiner, 212 S.W. 19, 202 Mo. App. 459.

28. U.S.—Western Grain Co. v. St. Louis-San Francisco Ry. Co., C.C.A.Ala., 56 F.2d 160—Updike Grain Corporation v. St. Louis & S. F. Ry. Co., C.C.A.Neb., 52 F.2d 94.

Actual tariff must exist

There must be actual tariff in existence at time of shipment and shipper cannot create one by his own piecing.—Western Grain Co. v. St. Louis-San Francisco Ry. Co., C.C.A. Ala., 56 F.2d 160.

29. U.S.—Galveston, H. & S. A. Ry. Co. v. Lykes Bros., D.C.Tex., 294 F. 968.

Ala.—W. L. Shepherd Lumber Co. v. Atlantic Coast Line R. Co., 112 So. 323, 216 Ala. 89.

Iowa.—Miller v. Davis, 240 N.W. 743, 213 Iowa 1091, 78 A.L.R. 1541.

Alternative routes

Where a shipper delivers goods to a carrier, he is entitled to have them sent over the cheapest of two or more alternative routes, even without making a selection.—Lancaster v. Schreiner, 212 S.W. 19, 202 Mo. App. 459.

Initial carrier is not justified in forwarding a shipment over a route carrying a higher rate than another, because it will thereby obtain a greater portion of the haul.—Galveston, H. & S. A. Ry. Co. v. Lykes Bros., D.C.Tex., 294 F. 968.

30. Ala.—W. L. Shepherd Lumber Co. v. Atlantic Coast Line R. Co., 112 So. 323, 216 Ala. 89.

31. U.S.—State of Texas v. Anderson, Clayton & Co., C.C.A.Tex., 92 F.2d 104, certiorari denied 58 S.Ct. 265, 302 U.S. 747, rehearing denied 58 S.Ct. 366, 302 U.S. 780—Union Wire Rope Corporation v. Atchison, T. & S. F. Ry. Co., C.C.A.Mo., 66 F.2d 965, reversing, D.C., Atchison, T. & S. F. R. Co. v. Union Wire Rope Corporation, 1 F.Supp. 399, and certiorari denied 54 S.Ct. 122, 290 U.S. 686, 78 L.Ed. 591.

Through rate held inapplicable

Carrier's error in computation of rate did not make through rates applicable where tariff merely made through rates apply in case of error of carrier in routing.—Lyman Perin & Co. v. Pennsylvania R. Co., 194 N.E. 398, 48 Ohio App. 339.

32. U.S.—Marshall Mfg. Co. v. Texas & P. Ry. Co., C.C.A.Tex., 29 F.2d 660—Davis v. Krauss Bros. Lumber Co., D.C.La., 25 F.2d 888.

33. U.S.—Baltimore & O. S. W. R. Co. v. Settle, Ohio, 43 S.Ct. 28, 260 U.S. 166, 67 L.Ed. 189, affirming, C.C.A., Baltimore & O. S. W. R. R. v. Settle, 272 F. 675—Marshall Mfg. Co. v. Texas & P. Ry. Co., C.C.A. Tex., 29 F.2d 660.

Minn.—Becher-Bartlett-Lockerby Co. v. Northern Pac. Ry. Co., 197 N.W. 103, 158 Minn. 77.

N.C.—Davis v. Latham-Bradshaw Cotton Co., 117 S.E. 391, 185 N.C. 387.

Reconsigned shipments held through shipments

(1) Shipments from Iuka, Miss., to Memphis, Tenn., reconsigned to cities in Arkansas, were through shipments for rate purposes.—Davis v. Krauss Bros. Lumber Co., D.C.La., 25 F.2d 888.

(2) Where, under rates filed with, and approved by, the interstate commerce commission, shipments of cotton originating on the carrier's line were permitted to be forwarded to a concentration point and there unloaded, and later reshipped at a through rate, it was held that shipments of cotton which in fact started at various points other than those on the carrier's line, but which had been shipped to those points and from there rebilled in the same cars, with seals unbroken, to the point of concentration, did not "originate" on the carrier's line within the meaning of the statute and were not entitled to the reshipment privileges and reduced charges.—Davis v. Latham-

whereby grain shipped to a primary market is given the benefit of a through rate, if subsequently reshipped, known as the through rates with transit privilege, cannot convert the subsequent independent shipment from the primary market on a new bill of lading of grain whose only destination, when shipped from a country point, was the primary market, into a through movement, as against the contention that an additional charge made in connection therewith, which was ordered canceled by the interstate commerce commission as unreasonable, was legally part of a through rate.[34] Although a through rate between two points is not expressly restricted in its application to the shorter and more direct of several available routes between such points, it will be construed to be so restricted where to construe it otherwise would result in a violation of the provisions of the Interstate Commerce Act against charging more for a short haul than for a longer haul.[35]

Stoppage or milling in transit. A stoppage of the shipment at an intermediate point will not preclude the application of the through rate where such stoppage is in accordance with a transit privilege granted by the applicable tariff or schedule [36]

Bradshaw Cotton Co., 117 S.E. 391, 185 N.C. 387.

34. U.S.—Atchison, T. & S. F. Ry Co. v. U. S., Ill., 49 S.Ct. 494, 279 U.S. 768, 73 L.Ed. 947, affirming, D.C., 33 F.2d 345.

Interstate shipment cannot be converted into intra-state

A carrier cannot, by separating the rate into its component parts, charging local rates and issuing local waybills, convert an interstate shipment into intra-state transportation, and thereby deprive a shipper of an interstate rate.—Becher-Bartlett-Lockerby Co. v. Northern Pac. Ry. Co., 197 N.W. 103, 158 Minn. 77.

Additional charge to primary market unreasonable

Additional charge for bringing merchandise into city, imposed only if merchandise is afterward shipped out over another railroad, is unreasonable.—Atchison, T. & S. F. Ry. Co. v. U. S., Ill., 49 S.Ct. 494, 279 U.S. 768, 73 L.Ed. 947, affirming, D.C., 33 F.2d 345.

35. U.S.—Great Northern Ry. Co. v. Delmar Co., Minn., 51 S.Ct. 579, 283 U.S. 686, 75 L.Ed. 1349, reversing, C.C.A., 43 F.2d 780, which affirmed, D.C., Delmar Co. v. Great Northern Ry. Co., 34 F.2d 221, certiorari granted Great Northern Ry. Co. v. Delmar Co., 51 S.Ct. 212, 282 U.S. 836, 75 L.Ed. 742.

36. U.S.—State of Texas v. Anderson, Clayton & Co., C.C.A.Tex., 92 F.2d 104, certiorari denied 58 S.Ct. 265, 302 U.S. 747, rehearing denied 58 S.Ct. 366, 302 U.S. 780.—Union Wire Rope Corporation v. Atchison, T. & S. F. Ry. Co., C.C.A.Mo., 66 F.2d 965, reversing, D.C., Atchison, T. & S. F. R. Co. v. Union Wire Rope Corporation, 1 F.Supp. 399, and certiorari denied 54 S.Ct. 122, 290 U.S. 686, 78 L.Ed. 591.

La.—Texas & P. Ry. Co. v. H. D. Foote Lumber Co., 162 So. 16, 182 La. 372.

Minn.—Big Diamond Mills Co. v. Chicago, Great Western R. Co., 227 N.W. 430, 178 Minn. 432.

Mo.—Southern Ry. Co. v. Berthold & Jennings Lumber Co., App., 247 S.W. 219.

Tex.—Schaff v. Kennedy, Civ.App., 220 S.W. 223.

Wash.—Chicago, M. & St. P. Ry. Co. v. Frye & Co., 186 P. 668, 109 Wash. 68.

Procedure for obtaining transit privilege

"In order to give manufacturers the equivalent of through freight rates, the Interstate and Intrastate Commerce Commissions have authorized what are called 'milling-in-transit' contracts. There are two modes of procedure under the tariffs by which a transit operator or manufacturer may avail himself of the 'milling-in-transit' privileges. The manufacturer may pay the normal nontransit rate from origin of the rough material to the mill and thereafter secure a refund down to the depressed rate by making reshipments of the finished product via the rails of the same carrier within one year. The manufacturer is given the option of executing a contract and bond guaranteeing the observance of the requirements of the tariff, thereby securing the right to have the rough materials delivered to him by the carrier upon payment of the depressed nontransit rate. Under this arrangement he must also reship the finished product over the contracting carrier's lines within one year, at the full published tariff rates, otherwise he must pay the full normal rate. The contract and bond arrangement gives the manufacturer the advantage of not having his capital tied up in freight charges subject to rebate."—Texas & P. Ry. Co. v. H. D. Foote Lumber Co., 162 So. 16, 17, 182 La. 372.

Reshipment of products of different goods

Under a tariff giving a through rate on logs, with a milling-in-transit privilege if an equal amount of the manufactured product were shipped out over the carrier's lines, a shipper has been held entitled to the milling-in-transit rate, although the manufactured product shipped out by him was not derived from the identical logs delivered by the carrier.—Fletcher Paper Co. v. Detroit & M. Ry. Co., 164 N.W. 528, 198 Mich. 469, affirmed Detroit & M. R. Co. v. Fletcher Paper Co., 39 S.Ct. 13, 248 U.S. 30, 63 L.Ed. 107.

Sale of finished product to carrier

Contracts for sale of finished lumber to railway company f. o. b. its rails at seller's mill for price based on depressed transit rates, collected by such company on shipments of rough lumber to seller under milling-in-transit contract, and regular commercial bills of lading under which finished lumber was shipped, obligate railway company as consignee, to pay or charge itself for freight, precluding railroad from collecting full commercial freight rate on previous inbound shipments of rough lumber, subject to credit of depressed transit rate already paid.—Texas & P. Ry. Co. v. H. D. Foote Lumber Co., 162 So. 16, 182 La. 372.

Stoppage for "reworking or reassembling"

(1) Under a tariff giving shippers of iron and steel articles the benefit of a joint through rate with a transit privilege entitling them to stop the shipment at a transit point for the purpose of "reworking or reassembling (called "fabrication" herein)" the article shipped, a shipper of steel rods who makes them into steel wire and wire rope at a transit point is entitled to the benefit of the joint through rates on his shipments of wire and rope from the transit point.—Union Wire Rope Corporation v. Atchison, T. & S. F. Ry. Co., C.C.A.Mo., 66 F.2d 965, reversing, D.C., Atchison, T. & S. F. R. Co. v. Union Wire Rope Corporation, 1 F.Supp. 399, and certiorari denied 54 S.Ct. 122, 290 U.S. 686, 78 L.Ed. 591.

(2) In such a tariff the word "fabrication" includes making of wire and wire rope, although within some meaning of word "manufacture."—Union Wire Rope Corporation v. Atchison, T. & S. F. Ry. Co., supra.

The privilege of thus stopping a commodity in transit for the purpose of subjecting it to treatment and then to further transportation in its altered state, without losing the benefit of the through rate, is termed "milling in transit."[37] The object of the practice is to escape a local rate to and from the point of treatment, and to secure a through rate to the ultimate destination.[38] However, a transit privilege is not a matter of right;[39] and all conditions and limitations prescribed with reference to it must be observed;[40] and, if the transit privilege is availed of, the through rate applicable may, where it is so provided by the tariff, be greater than the ordinary through rate between the point of origin and the point of destination.[41] Hence, where the tariff provides that shipments from an intermediate point are entitled to transit privileges only on payment of the through rate from a point beyond, this is the rate applicable to a shipment from an intermediate point for which transit privileges have been exercised at the point of transit rather than the through rate from the true point of origin.[42] Under a tariff giving a milling privilege entitling the shipper to ship the finished product from the transit point to the point of destination for the difference between the rate paid to the transit station and the through transit rate from the point of origin to the point of destination, it has been held that, where wheat is milled into flour at the point of transit, the rate applicable on the flour shipment from the point of transit to the point of destination is the lower rate for wheat shipments rather than the flour rate.[43] Where partial carload shipments have been permitted to be concentrated at certain concentration points and there reloaded so as to reduce the number of cars, it has been held that the carrier is entitled to the through rates on the loads shipped through and the local rate on the abandoned cars from the loading point to the point of concentration.[44]

Where a party paying for a shipment on a through rate has unlawfully been granted the privilege of unloading part of a carload at an intermediate point, he is liable for the difference between the rate charged and the lawful rate consisting of the through rate on the entire car from the point of

(3) Also, the word "reworking" may mean and include "manufacture."—Union Wire Rope Corporation v Atchison, T & S F. Ry. Co, supra.

37. N C—Hilton Lumber Co. v. Atlantic Coast Line R. Co, 48 S E 813, 136 N C 479, 1 Ann.Cas 52.
10 C J. p 498 note 58 [a].

38. U S—Lewis v. Southern R. Co, Tenn, 217 F. 321, 133 C.C.A. 237.
10 C J p 499 note 59.

39. Ala—Priebe v Southern R. Co, 66 So 573, 189 Ala 427.
10 C J. p 499 note 61.

40. U.S—International Milling Co. v. Lowden, C C A Minn, 91 F.2d 270—Gideon-Anderson Lumber Co v St. Louis Southwestern Ry. Co, C C A Mo, 88 F 2d 232
Ga.—Williamson-Inman Co. v. Nashville, C & St L. Ry Co, 160 S E. 687, 44 Ga App. 129.
Kan.—McCullough v. Missouri Pac. Ry Co., 160 P. 214, 98 Kan. 710.
10 C J p 499 note 62.

Assignment of right to refund

Purchaser of cotton need not assign concentration rights to owner having right to refund of freight paid for concentration on subsequent reshipment, where tariff required such indorsement or assignment only for refunds to other than original owner—Galveston, H. & S. A Ry Co v Wilson, Tex.Civ App., 1 S.W. 2d 480, certiorari denied 48 S Ct 529, 277 U S 594, 72 L Ed. 1005.

Conditions imposed

Provisions of carrier's tariff giving privilege of milling in transit "subject to conditions herein named" referred to conditions specified in preceding portions as well as in the same paragraph—McCullough v. Missouri Pac Ry. Co, 160 P. 214, 98 Kan 710.

Reshipment to proper point

Where the tariff gives the milling-in-transit privilege only if the product is reshipped to specified termini, a shipper who has reshipped to a terminal not so specified is not entitled to the benefit of the milling-in-transit privilege.—Priebe v. Southern Ry. Co, 75 So. 409, 200 Ala. 81.

Reshipment within time limit

Where the lower rate is conditioned on reshipment within a specified time after the date of the original inbound freight bill, except where the shipper has obtained an extension of time on written application therefor, a shipper who has not reshipped within the time specified is not entitled to the benefit of the lower rate, and amendments to the tariff, providing for an extension of time, are of no avail to him where the right to an extension is still conditioned on a written application which he has not made—Gideon-Anderson Lumber Co. v. St. Louis Southwestern Ry. Co., C C.A.Mo, 88 F 2d 232

Reshipment of required tonnage

Shipper's failure to reship tonnage required to entitle him to proportionate rates may not be asserted by the carrier where the shipper's failure in this respect is due to the failure of the carrier to furnish sufficient cars.—Davis v. Hampton Stave Co, 291 S.W. 979, 173 Ark. 70.

Transit rate an entirety

A milling-in-transit rate is an entirety and must be accepted and carried out in its entirety or not at all. It is applicable only when all of its substantial terms and provisions are observed. A shipper who fails to conform to these terms cannot claim the privilege.
U.S—Carson Lumber Co v. St. Louis, etc., R. Co, Okl., 209 F. 191, 126 C C A. 139.
Okl.—St Louis, etc., R. Co. v. Walton-Chandler Lumber Co., 145 P. 340, 44 Okl. 452

Effect of commission's order

Where carriers had accorded to grain shipments milling-in-transit privilege at some intermediate point on their individual lines, public service commission's order respecting joint rates, providing that it did not change existing rates, did not entitle miller to receive grain at Portland on one line and reship flour to point on another line under through rate with milling-in-transit privilege.—Crown Mills v. Oregon Electric Ry Co, 21 P 2d 214, 144 Or. 25.

41. U S—Updike Grain Co. v. Chicago & N. W. Ry. Co, C C.A.Neb, 35 F 2d 486

42. U S—Updike Grain Co v Chicago & N. W. Ry Co, supra.

43. Minn—Big Diamond Mills Co v. Chicago, Great Western R Co, 227 N W 430, 178 Minn. 432.

44. Wash—Chicago, M. & St. P. Ry. Co v Frye & Co., 186 P. 668, 109 Wash 68.

shipment to the point of destination and the local rate on the goods unloaded at the intermediate point from the point of destination back to the intermediate point.[45]

Misrepresentation or fraud as to matters affecting amount of rate or charge. Where the amount of the rate is dependent on the kind, grade, or value of the property transported, the carrier has at common law the right to make such inquiry as to the kind, grade, or value of the property as will enable it to determine which rate is applicable; and it is the duty of the shipper to answer truthfully.[46] Although there is apparent authority to the contrary,[47] it is usually held that, if misrepresentations are made as to such matters, the carrier is entitled to collect in accordance with the rate properly applicable.[48] This is true however, only when the proper rate on the actual shipment, under the circumstances surrounding the transportation, can lawfully be collected by the carrier, and it has no right to collect the rate on a shipment which it could not lawfully make.[49] If goods which the carrier could not lawfully carry are represented to it as being a different kind of goods which could lawfully be handled, the carrier cannot collect the rate prescribed for goods of the type of which the shipment actually consisted,[50] but, if it acted innocently, it may collect the rate prescribed for the type of goods which it supposed to be in the shipment.[51]

Where, because of the fraud of the carrier's agent, false shipping receipts have been issued showing the shipment of the goods for a lesser distance than they were actually shipped, an innocent consignee who has paid the charges based on the distance as shown cannot subsequently be compelled to pay for the additional distance.[52]

Movement of privately owned empty cars. Under a rule of the interstate commerce commission providing that freight cars of private ownership will be moved empty without charge, except that the aggregate mileage of each owner's cars must be equalized as between empty or loaded movement by the owner, either by mileage equivalent in loaded movement or by payment for the excess mileage at a specified rate, refrigerator cars owned by a refrigerator line company are cars of private ownership on which excess mileage must be paid, although another railroad company has the prior but not the exclusive right to use the cars.[53] Such rule is not so vague and indefinite as to be incapable of enforcement as it sufficiently incorporates or indicates the rate to be paid by reference and discloses an intention to give the owner a reasonable time within which to make the equalization.[54]

Transportation of waste for disposal. Carriers are entitled to compensation for the disposition of waste slag or other materials;[55] and, where the transportation is for the purpose of disposing of waste material which the shipper desires to get rid of, the right of the carrier to recover at the established rate is not affected by the fact that the carrier used the waste material for its own purposes.[56]

United States government shipments. Under the Army Transportation Act, whereby congress provided for the movement of government troops and property over land grant railroads at fifty per centum of the rates charged the general public, and a "freight land grant equalization agreement," whereby a nonland grant railroad agreed to transport property moved by the quartermaster's department, United States army, United States interior department, or United States reclamation service at the re-

45. Miss.—Alabama Great Southern R. Co. v. F. A. Hulett & Son, 131 So. 814, 159 Miss. 333.

46. Va.—Chesapeake & O. Ry. Co. v. Osborne, 153 S.E. 865, 154 Va. 477.

47. Minn.—U. S. Express Co. v. Koerner, 68 N.W. 181, 65 Minn. 540, 33 L.R.A. 600.
10 C.J. p 443 note 92.

48. U.S.—Northern Pac. Ry. Co. v. Sommers Bros. Mfg. Co., D.C.Idaho, 34 F.2d 56—Chicago, B. & Q. R. Co. v. U. S., 73 Ct.Cl. 250, certiorari denied 53 S.Ct. 12, 287 U.S. 599, 77 L.Ed. 522.
Ga.—Clemons v. Payne, 105 S.E. 623, 26 Ga.App. 142.
N.Y.—Gassman v. New York Cent. R. Co., 201 N.Y.S. 740, 207 App. Div. 15.
Va.—Chesapeake & O. Ry. Co. v. Osborne, 153 S.E. 865, 154 Va. 477.
10 C.J. p 443 note 91.

Discovery of fraud before delivery

Where the shipper misrepresents the character of the goods, and the carrier, without notice or knowledge that they are of a different kind, accepts the goods, and fixes and accepts the freight, and delivers to the consignor a bill of lading on the basis that the goods are of the character stated by the consignor when in fact the goods are of an entirely different character, on which the carrier would be lawfully entitled to charge a higher rate of freight, the carrier may, on discovering this fact before the goods are delivered to the consignee at the place of destination, charge the excess of the freight against the goods, and hold the shipment until the additional charges are paid.—Illinois Cent. R. Co. v. Seitz, 73 N.E. 585, 214 Ill. 350, 105 Am.S.R. 108—10 C.J. p 443 note 91.

49. Ga.—Clemons v. Payne, 105 S.E. 623, 26 Ga.App. 142.

50. Ga.—Clemons v. Payne, supra

51. Ga.—Clemons v. Payne, supra

52. U.S.—American Express Co. v. Sweeney, D.C.Mass., 283 F. 691.

53. U.S.—North Western Refrigerator Line Co. v. Ervin, C.C.A.Miss., 78 F.2d 186, certiorari denied 56 S.Ct. 143, 296 U.S. 622, 80 L.Ed. 442.

54. U.S.—North Western Refrigerator Line Co. v. Ervin, supra.

55. Pa.—Baltimore & O. R. Co. v. Public Service Commission, 68 Pa. Super. 503.

56. U.S.—Baltimore & O. R. Co. v. Carnegie Steel Co., D.C.Pa., 251 F. 682.

duced rates effective on land grant railroads, the contracting railroad was held not required to transport fuel oil shipped by the Emergency Fleet Corporation at the reduced rates;[57] and an earlier federal statute making the quartermaster-general exclusively responsible for the transportation of government property did not bring the shipments by the Emergency Fleet Corporation within the carrier's agreement.[58]

(2) Other Items or Services

A carrier may ordinarily make an extra charge for additional items or services, unless they are a necessary element of the transportation service or included in the charge therefor, or they have been rendered necessary by reason of the carrier's negligence or default, or the owner or shipper has directed that they be not rendered.

In addition to the charges for transportation, the carrier is entitled to charge reasonable sums for other services incidental or accessorial to the transportation, which are not included in, or covered by, the transportation rate or charge,[59] provided, under the Interstate Commerce Act and state statutes similar thereto, such services and the charges therefor are properly provided for in the filed and published tariff, see supra § 302. Further, it has been said that the law implies an agreement by the owner to pay a reasonable charge for any extra services that may be necessitated by his exercise of his right to control the shipment;[60] and a charge may be made for items which the parties have properly contracted shall be paid to the carrier.[61] On the other hand, a carrier may not lawfully make a separate and additional charge for an item or service which is one of the necessary elements of the transportation,[62] or which is included in, and covered by, the line-haul or transportation charge fixed by the applicable tariff or rate order.[63] Also, it cannot make a charge for extra expense caused by the negligence or default of itself or its agents;[64] and where the carrier is instructed by the owner of a shipment to omit a service or the performance of a duty usually incident to the contract of carriage, it cannot demand compensation for the performance of the service or duty, unless it is a service or duty required by law.[65]

Car rental. The duty or authority of a carrier to make an extra charge for the rental of special cars depends on a proper construction of the governing tariff.[66] Where a movement of cars from one point in the same terminal to another is in itself a complete movement so as to be regarded as a transportation, the carrier cannot make a car rental charge in addition to the published rate denominated as a "switching charge," as the use of the car is one of the necessary elements of the transportation.[67]

Feeding and care of live stock. Generally, where the owner or shipper of live stock has failed to feed and care for the same in transit, the carrier is entitled to be reimbursed for expenses it has incur-

57. U.S.—U. S. v. New York, C. & St. L. R. Co., C.C.A.Ohio, 32 F.2d 887.

58. U.S.—U. S. v. New York, C. & St. L. R. Co., supra.

59. Ky.—Andrews Steel Co. v. Davis, 276 S.W. 148, 210 Ky. 473.
N.D.—State v. Great Northern Ry. Co., 219 N.W. 295, 56 N.D. 822.
10 C.J. p 442 notes 71, 78.

60. Cal.—Heath v. Judson Freight Forwarding Co., 190 P. 839, 47 Cal App. 426.

61. Tex.—Houston Belt & Terminal Ry Co. v. Davis, Civ.App., 273 S.W. 676.

Cost of compensating injured employee

Under contract for carriage of earth by railway, wherein contractor agreed to pay certain kinds of expenses, incurred by railway in carrying out contract, "and one-half all other expenses of every kind, which might be directly allocated to the use of such trains," it was held that the amount paid railway employee for injuries received by him while assisting in operation of a train in performing work undertaken under contract was an expense "which might be directly allocated" to use of railway's trains in carrying out contract; rule of ejusdem generis being inapplicable.—Houston Belt & Terminal Ry. Co. v. Davis, Tex.Civ.App., 273 S.W. 676.

62. D.C.—U. S. ex rel. Kroger Grocery & Baking Co. v. Interstate Commerce Commission, 73 F.2d 948, 64 App.D.C. 43, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed. 1246.
Ky.—Andrews Steel Co. v. Davis, 276 S.W. 148, 210 Ky. 473.

63. U.S.—Chesapeake & O. Ry. Co. v. Westinghouse, Church, Kerr & Co., 46 S.Ct. 220, 270 U.S. 260, 70 L.Ed. 576, affirming 123 S.E. 352, 138 Va. 647, certiorari granted 45 S.Ct. 98, 266 U.S. 598, 69 L.Ed. 460.
Tex.—Houston Belt & Terminal Ry. Co. v. Davis, Civ.App., 273 S.W. 676.
Wash.—Chicago, M. & St. P. Ry. Co. v. Frye & Co., 186 P. 668, 109 Wash. 68.
10 C.J. p 441 note 61 [a].

64. Mo.—Buschow Lumber Co. v. Union Pac. R. Co., 276 S.W. 409, 220 Mo.App. 743.
N.C.—W. L. Hall & Co. v. Norfolk Southern R. Co., 91 S.E. 607, 173 N.C. 108.
10 C.J. p 443 note 88.

65. Ark.—Missouri Pac. R. Co. v. Fields Bros., 203 S.W. 1036, 134 Ark. 273.
Mass.—New York Cent. R. Co. v. Sturtevant & Haley Beef & Supply Co., 127 N.E. 509, 236 Mass. 16.
10 C.J. p 443 note 89.

66. U.S.—James v. Davis, C.C.A. Neb., 280 F. 780.

Tariff not abrogated by circular

A note in the printed tariff and classification filed by a railroad company, stating that it was not obligated to furnish special poultry cars, and requiring shippers to pay the rental for such cars, which the company did not own, was not abrogated by a circular containing exceptions to the "classification" which did not contain the note, but provided a different classification and a lower rate for live poultry in carload lots.—James v. Davis, C.C.A.Neb., 280 F. 780.

67. Ky.—Andrews Steel Co. v. Davis, 276 S.W. 148, 210 Ky. 473.

red in feeding or caring for the animals with the assent or acquiescence of the owner.[68]

Under the federal twenty-eight hour law, requiring shipments of live stock to be unloaded for water, feed, and rest at designated periods, and providing that animals so unloaded shall be properly watered and fed during such rest by the owner or person in charge, or, in case of his default, by the railroad at the reasonable expense of the owner, the carrier is entitled to recover the reasonable expense incurred in properly feeding a shipment of live stock during the rest period, if the shipper has not assumed the entire duty of providing feed. If the carrier has provided an amount of food which would otherwise be proper, its right to recover therefor cannot be lessened or decreased because the shipper has partially fed the stock at other times and places or placed feed in the car.[69] The statute, however, gives the carrier no right to recover for extra feed placed in the cars after the stock has been reloaded,[70] and, if recovery is to be had for such an expense, an express or implied contract to pay therefor must be properly asserted and established.[71] Where the carrier has been paid for feed furnished during the rest period and has been expressly requested not to place extra feed in the cars, it cannot recover therefor nor can it apply the prior payments on the car feedings and in turn seek to hold the owner or shipper for feed properly furnished.[72]

Reconsignment charges. Proper reconsignment charges have often been held recoverable,[73] at least where the tariff provides for the imposition or collection of such charges,[74] but if the tariff prescribes conditions precedent to the right to impose reconsignment charges, such conditions must be observed before the charges can be collected,[75] and the exaction of reconsignment charges is improper where the shipment comes within an express exception to the tariff provision providing for such charges.[76]

Refrigeration and icing charges. Where the rules and tariff so permit, the carrier may make an additional charge for icing or refrigeration service rendered at the instance or request of the owner or shipper,[77] or it may make a so-called service charge for the transportation of ice put in the car by the

68. Mass.—New York Cent. R. Co. v. Sturtevant & Haley Beef & Supply Co., 127 N.E. 509, 236 Mass. 16.

69. U.S.—Pennsylvania R. Co. v. Swift & Co., D.C.Pa., 248 F. 315, reversed on other grounds 258 F. 289, 169 C.C.A. 305.

70. U.S.—Pennsylvania R. Co. v. Swift & Co., Pa., 258 F. 289, 169 C.C.A. 305, affirming in part and reversing in part, D.C., 248 F. 315.

71. U.S.—Pennsylvania R. Co. v. Swift & Co., C.C.A.Pa., 4 F.2d 61—Pennsylvania R. Co. v. Swift & Co., Pa., 258 F. 289, 169 C.C.A. 305, affirming in part and reversing in part, D.C., 248 F. 315.

72. Mass.—New York Cent. R. Co. v. Sturtevant & Haley Beef & Supply Co., 127 N.E. 509, 236 Mass. 16.

73. U.S.—Van Dusen Harrington Co. v. Northern Pac. Ry. Co., C.C.A.Minn., 32 F.2d 466.
10 C.J. p. 442 note 77.

74. U.S.—Van Dusen Harrington Co. v. Northern Pac. Ry. Co., supra—Baltimore & O. R. Co. v. Cincinnati Grain & Hay Co., D.C.Ohio, 300 F. 674.

Delay in giving disposition order

Under a tariff providing that, when a disposition order with reference to cars held by the carrier is not given until after the expiration of free time allowed by the rules, a reconsignment charge of a certain amount shall be made, the reconsignment charges may be collected if the disposition order is not given before the expiration of the free time.—Van Dusen Harrington Co. v. Northern Pac. Ry. Co., C.C.A.Minn., 32 F.2d 466.

75. U.S.—Van Dusen Harrington Co. v. Northern Pac. Ry. Co., supra.

Notice of location of cars

(1) Where the rules require as a basis for a reconsignment charge that the carrier give a notice showing the location of the tracks on which the cars are held, a failure of the notice to give the location will preclude the carrier from recovering the reconsignment charges.—Van Dusen Harrington Co. v. Northern Pac. Ry. Co., C.C.A.Minn., 32 F.2d 466.

(2) Where a carrier's tariff, imposing a reconsignment charge on each car of coal reconsigned after it reached the city, required the carrier to notify the consignee when the cars passed certain points outside of the city, but the interstate commerce commission had found that the giving of such notice was impracticable, and that the requirement of such notice as a condition precedent would have worked inequitably with discriminatory results, the notice was held not a condition precedent to the recovery of the reconsignment charge, and such charge can be recovered, even though one railroad was both the carrier and delivering railroad within the meaning of that tariff—New York Cent. Ry. Co. v. Calvert, 193 N.W. 295, 222 Mich. 488.

Proper diversion or reconsignment

Under tariff provisions relative to inspection and reconsignment charges, and note making them applicable to particular track, subject to conditions as to switching charges, it was held that, on cars of hay unloaded on such track, no inspection or reconsignment charges could be made, and on reconsigned cars only the charges specified in the note could be collected—Baltimore & O. R. Co. v. Cincinnati Grain & Hay Co., D.C.Ohio, 300 F. 674.

76. Minn.—Merchants' Elevator Co. v. Great Northern Ry. Co., 180 N.W. 105, 147 Minn. 251, certiorari granted Great Northern R. Co. v. Merchants' Elevator Co., 41 S.Ct. 322, 255 U.S. 567, 65 L.Ed. 789.

77. U.S.—Allen v. New York, P. & N. R. Co., C.C.A.Va., 15 F.2d 532, certiorari denied 47 S.Ct. 459, 273 U.S. 756, 71 L.Ed. 876.
Ark.—Swift & Co. v. Ft. Smith & W. Ry. Co., 16 S.W.2d 1001, 179 Ark. 516.
Ill.—Union Pac. R. Co. v. Denney & Co., 237 Ill.App. 483.
Or.—Black v. Southern Pac. Co., 171 P. 878, 88 Or. 533.

Flat carload charge

Under a tariff requiring a shipper of strawberries on a carload lot basis to pay, in addition to the transportation charge, a flat charge per car for icing, a shipper taking a car at the carload rate is required to pay the flat charge for icing, although for the better preservation of the berries he does not choose to

shipper in order to preserve the perishables being shipped.[78] However, the carrier cannot compel the shipper to pay the higher rate for an iced car, where the shipper has demanded the use of a common box car and it is practicable to ship the commodity involved in that way;[79] and it has been held that, where a refrigerator or other insulated car is the only proper and suitable type of car by which to transport a particular commodity during the entire year, the use of such equipment is included in the line-haul charge and a separate charge therefor is unauthorized.[80]

Return and reshipment expenses. If the consignee refuses to receive the goods, the carrier may recover from the consignor the expense of returning the goods, not exceeding their value,[81] or, if payment of the freight charges has been refused, the carrier is entitled to collect the charges for removing the goods from the point of destination to another place where a sale as provided by law may be effected.[82]

If a shipment miscarries due to the fault or negligence of the shipper, the carrier is entitled to collect any extra freight charges incurred in transporting the goods from the erroneous destination to the true destination.[83] If, however, the shipper is in no way at fault, he is under no legal duty to pay for the extra charges so incurred;[84] and a carrier which has, due to its own fault, carried the shipment beyond its point of destination cannot collect charges beyond that point,[85] nor can charges be made for a wrongful reshipment of the goods from their destination after they have been delivered there.[86]

Spotting. "Spotting" is the practice of hauling cars to points along the spur convenient to the shipper or consignee.[87] Where the service of spotting is included in the line-haul charge under both interstate and state tariffs, the carrier can make no additional charge for such service;[88] and the fact that there are abnormal conditions which would have relieved the carrier from giving such service does not entitle it to charge for the service if it is rendered notwithstanding such conditions.[89]

Storage. The entire compensation for transportation and storage may be included in a general charge, or the two services may be charged separately.[90] If proper provision has been made therefor in the tariff, a carrier is entitled to charge a reasonable sum for storage, where the consignee is not ready to receive the goods on arrival at destination,[91] or at the expiration of a certain stipulated

load his car to the maximum.—Allen v. New York, P & N. R. Co., C.C.A. Va., 15 F.2d 532, certiorari denied 47 S.Ct. 459, 273 U.S. 756, 71 L.Ed. 876.

Rules of perishable protective tariff

A shipper of perishables, who has had the exclusive use of a refrigerator car under a contract entitling him to such use, is liable for the higher rate fixed by Rule 630 of the perishable protective tariff for refrigerator service under such circumstances, rather than the lower rate fixed by Rule 610 providing for scheduled refrigerator car service in less than carload lots.—Swift & Co. v. Ft. Smith & W. Ry. Co., 16 S.W.2d 1001, 179 Ark. 516.

78. U.S.—Texas & N. O. R. Co. v. Baldwin, C.C.A. Tex., 63 F.2d 328, certiorari denied Baldwin v. Texas & N. O. R. Co., 53 S.Ct. 794, 289 U.S. 761, 77 L.Ed. 1504.

79. Ark.—Missouri Pac. R. Co. v. Fields Bros., 203 S.W. 1036, 134 Ark. 273.

80. Minn.—J. C. Famechon Co. v. Hines, 187 N.W. 974, 151 Minn. 9, reversing 185 N.W. 941, 151 Minn. 9.

81. Mo.—Steamboat Keystone v. Moies, 28 Mo. 243, 75 Am.D. 123.

82. Tenn.—Nashville, C. & St. L. Ry. v. Murphree, 2 Tenn.App. 482.

83. Ala.—Louisville & N. R. Co. v. James, 86 So. 906, 204 Ala. 604—James v. Alabama Great Southern R. Co., 81 So. 582, 202 Ala. 640—Louisville & N. R. Co. v. Johnson, 88 So. 925, 18 Ala.App. 691.

84. Ala.—Louisville & N. R. Co. v. James, 93 So. 701, 208 Ala. 6—Louisville & N. R. Co. v. James, 86 So. 906, 204 Ala. 604—Louisville & N. R. Co. v. Johnson, 88 So. 925, 18 Ala.App. 691.

85. N.C.—W. L. Hall & Co. v. Norfolk Southern R. Co., 91 S.E. 607, 173 N.C. 108.
10 C.J. p. 443 note 93.

Ratification of carrier's act

Acceptance of the goods and payment of freight thereon does not amount to a ratification of the carrier's act in transporting them beyond their destination, where the amount was paid under protest to get possession of the goods which defendant wrongfully withheld.—Wichman v. Atlantic Coast Line R. Co., 84 S.E. 420, 100 S.C. 138.

86. W.Va.—Belknap v. Baltimore & O. R. Co., 91 S.E. 656, 79 W.Va. 691, L.R.A.1917D 916.

87. N.Y.—New York Cent. & H. R. R. Co. v. General Electric Co., 114 N.E. 115, 219 N.Y. 227, 1 A.L.R. 1417.

88. U.S.—Chesapeake & O. Ry. Co. v. Westinghouse, Church, Kerr & Co., 46 S.Ct. 220, 270 U.S. 260, 70 L.Ed. 576, affirming 123 S.E. 352, 138 Va. 647, certiorari granted 45 S.Ct. 98, 266 U.S. 598, 69 L.Ed. 460—American Sheet & Tin Plate Co. v. U. S., D.C.Pa., 15 F. Supp. 711.

89. U.S.—Chesapeake & O. Ry. Co. v. Westinghouse, Church, Kerr & Co., 46 S.Ct. 220, 270 U.S. 260, 70 L.Ed. 576, affirming 123 S.E. 352, 138 Va. 647, certiorari granted 45 S.Ct. 98, 266 U.S. 598, 69 L.Ed. 460.

90. Conn.—Hurd v. Hartford, etc., Steamboat Co., 40 Conn. 48.

91. U.S.—Pittsburgh, C., C. & St. L. Ry. Co. v. Freedom Oil Works, D.C.Pa., 247 F. 573, reversed on other grounds Freedom Oil Works Co. v. Pittsburgh, C., C. & St. L. R. Co., 254 F. 800, 166 C.C.A. 246.
Del.—In re Arlington Hotel Co., 98 A. 186, 11 Del.Ch. 137.
Ga.—Allen v. Southern Ry. Co., 126 S.E. 722, 33 Ga.App. 209.
Me.—Northern Pac. Ry. Co. v. Pleasant River Granite Co., 102 A. 298, 116 Me. 496.
N.Y.—Erie R. Co. v. F. Kieser & Son Co., 215 N.Y.S. 576, 216 App.Div. 500, reversing 211 N.Y.S. 362, 125 Misc. 283—Central Railroad of New Jersey v. Berry, 165 N.Y.S. 1041, 99 Misc. 560.
N.C.—Holloman v. Southern Ry. Co.,

time after arrival at the destination;[92] and this is so, although the freight has not actually been placed inside the depot or freight warehouse but remains in the cars.[93] Storage charges may be collected, notwithstanding the storage is rendered necessary by a strike which has prevented delivery of the goods to the steamship line which was to take them for export, and the export bill of lading relieves the carrier from liability for losses caused by strikes.[94] However, if the detention of the goods is wrongful the carrier, of course, has no valid claim for storage.[95] In order for a carrier to charge for storage, it is essential that storage and protection of the property in some reasonable degree be provided,[96] and it has been held that the carrier cannot charge the shipper storage for holding the shipment, pending the adjustment of a dispute between the shipper and the consignee, where the circumstances were such that the shipper was led to believe that no storage charge would be made.[97] A tariff provision providing for storage charges on certain types of freight does not justify the collection of such charges with respect to other types;[98] and a provision for storage charges on goods received for delivery, or held to complete a shipment, does not entitle the carrier to collect storage charges on account of goods placed on the carrier's premises but in no way delivered or intended to be delivered to the carrier for transportation.[99] Also, a provision for storage charges on freight received for delivery or held for forwarding directions and stored in or on railroad premises, does not justify the collection of storage charges on account of the fact that flat cars belonging to another have been left on the sidetracks of the carrier for a period of days.[1] Under a bill of lading providing for storage charges for property kept in car, depot, place of delivery, or warehouse, a carrier is not entitled to storage charges on property it has moved from its platform and placed in an unguarded spot along the right of way;[2] nor can a carrier charge for the storage of goods in a public street where charges are authorized by the tariff only for storage "in or on railroad premises."[3] Where the tariff provides for storage on goods left on a wharf at the point of destination, after expiration of the free period,

90 S.E. 292, 172 N.C 372, L.R.A. 1917C 416, Ann.Cas.1917E 1069.
Tex.—Reed v. Southern Pac. Co., Civ.App., 99 S.W.2d 1026, error dismissed.
10 C.J. p 442 note 72.

Claim not defeated by notice of sale
That carrier notified shipper that, unless disposition orders were received, refused merchandise would be sold at public auction to highest bidder without further notice, was not a sufficient act of dominion, inconsistent with shipper's title or carrier's rights as bailee, to constitute conversion and defeat carrier's claim for storage charges.—Erie R. Co. v. F. Kieser & Son, 211 N.Y.S. 362, 125 Misc. 283, reversed on other grounds 215 N.Y.S. 576, 216 App.Div. 500.

Goods for export
The tariffs of a railway filed with the interstate commerce commission, which included a storage charge on the goods for export after twenty days' free storage, and provided that such charges were in addition to transportation rate on all property passing over the company's wharves or stored in warehouses or storehouses, or on other property operated by the railway, authorizes the carrier to collect storage charges from goods for export held in its cars more than twenty days, the provision not being limited to goods which had been removed from the cars to warehouses.—Seaboard Air Line Ry. Co. v. New Orleans Export Co., C.C.A.La., 271 F. 861.

Terminal company which contracted with railroad to transship, freight at certain rate, there being no provision requiring terminal company to furnish storage, is entitled to recover of road reasonable storage charges for carload of hay refused by consignee and stored at road's request for year till it could be sold.—Brooklyn Eastern Dist. Terminal v. Central R. Co. of New Jersey, 162 N.Y.S. 911, 176 App.Div. 352.

92. N.Y.—Raymond Hadley Corporation v. Boston & M. R. R., 174 N.Y.S. 342, 186 App.Div. 341, appeal dismissed 123 N.E. 886, 226 N.Y. 711, and affirmed 126 N.E. 921, 226 N.Y. 648.
10 C.J. p 442 note 73.

Nonexpiration of free period
Charges cannot be collected for storage where the period of free storage allowed by the tariff has not expired.—Raymond Hadley Corporation v. Boston & M. R. R., 174 N.Y.S. 342, 186 App.Div. 341, appeal dismissed 123 N.E. 886, 226 N.Y. 711, and affirmed 126 N.E. 921, 226 N.Y. 648.

93. Ga.—Dixon v. Central of Georgia R. Co., 35 S.E. 369, 110 Ga. 173.
10 C.J. p 442 note 74.

94. Mass.—Boston & M. R. R. v. Oceanic Steam Nav. Co., 116 N.E. 260, 226 Mass. 509.

95. Tex.—Panhandle & S. F. Ry. Co. v. Hubbard, Civ.App., 190 S.W. 793.
10 C.J. p 442 note 76.

96. U.S.—Chicago Great Western R. Co. v. Davis, D.C.Iowa, 1 F.2d 729.
Ind.—New York Cent. R. Co. v. Buckley Rubber Co., 187 N.E. 353, 99 Ind.App. 191.
N.Y.—New England S. S. Co. v. Geo. H. Merrill Co. of New York, 194 N.Y.S. 908, 118 Misc. 715.

97. La.—Morley Cypress Co. v. Hines, 107 So. 487, 160 La. 676.

98. U.S.—Payne v. Rogers, C.C.A.Ohio, 4 F.2d 827.

Freight subject to damage by elements
Tariff schedule, fixing storage charges for storage of freight, which is liable to be damaged by the elements, and must be stored at carrier's risk, either in carrier's warehouse, or, at carrier's option, in public warehouse, was inapplicable to lumber piled on railroad's right of way, in view of note to tariff schedule rule providing for storage, free of charge, of freight which is not liable to damage from the elements, and is not to be handled through freighthouses on railroad's vacant land at owner's risk.—Payne v. Rogers, C.C.A.Ohio, 4 F.2d 827.

99. U.S.—Davis v. Continental Sugar Co., C.C.A.Ohio, 5 F.2d 420.
Wis.—Davis v. Williams Creamery Co., 202 N.W. 663, 186 Wis. 382, 38 A.L.R. 674.

1. Ala.—Louisville & N. R. Co. v. Kilby Car & Foundry Co., 75 So. 394, 200 Ala. 66.

2. U.S.—Chicago Great Western R. Co. v. Davis, D.C.Iowa, 1 F.2d 729.

3. N.Y.—New England S. S. Co. v. Geo. H. Merrill Co. of New York, 194 N.Y.S. 908, 118 Misc. 715.

but because of a shipping emergency for which the tariff makes no provision, the carrier is compelled to move the goods to a public warehouse it can make no charge for the expense of removing and storing the goods elsewhere but it is entitled only to such storage charges as would have accrued had the goods remained on the wharf.[4]

Switching, terminal, and sidetracking charges. A carrier is not entitled to switching charges in addition to the through rate charged where the switching is essential to effect the delivery which the carrier has undertaken to make;[5] nor is a carrier entitled to a terminal charge in addition to the regular charge of transportation, where no additional service is rendered.[6] When the carrier could not make a switching or terminal charge if it directly owned the tracks over which the switching or terminal services are rendered, an additional charge cannot be made because the tracks are owned by a trunk line company where the entire stock of the latter is owned and controlled by the carrier.[7] If, however, the service involves a delivery or movement beyond that which the carrier has undertaken as a part of the transportation, it may properly collect a switching,[8] terminal,[9] or sidetracking[10] charge. Hence, where a carrier renders additional services in carrying freight to or from points on private or industrial sidetracks, it is entitled to recover reasonable additional compensation therefor,[11] and is not limited to the actual cost of the services rendered.[12] Also, switching services rendered entirely independently of any line transportation may properly be charged for in accordance with the published or established rates.[13] It has often been held, however, for the purpose of fixing the amount of the charges that a switching or transfer service as distinguished from a transportation service is one which precedes or follows a transportation service,[14] for which legal freight charges have already been earned or are to be earned,[15] and that an inde-

4. N.Y.—Raymond Hadley Corporation v. Boston & M. R. R., 174 N.Y.S. 342, 186 App.Div. 341, appeal dismissed 123 N.E. 886, 226 N.Y. 711, and affirmed 126 N.E. 921, 226 N.Y. 648.

5. U.S.—American Sheet & Tin Plate Co. v. U. S., D.C.Pa., 15 F. Supp. 711.

Ark.—Missouri Pac. R. Co. v. Whelen Springs Gravel Co., 49 S.W.2d 374, 185 Ark. 669, certiorari denied 53 S.Ct. 87, 287 U.S. 638, 77 L.Ed. 553

Tex.—Texas-Mexican Ry. Co. v. Rio Grande & E. P. Ry. Co., 231 S.W. 308, reversing in part and affirming in part Rio Grande & E. P. Ry. Co. v. Texas-Mexican Ry. Co., Civ.App., 173 S.W. 236.

Wash.—Chicago, M. & St. P. Ry. Co. v. Frye & Co., 186 P. 668, 109 Wash. 68

6. U.S.—Camblos v. Philadelphia, etc., R. Co., C.C., 4 F.Cas.No.2,331, 4 Brewst., Pa., 563, 9 Phila., Pa., 411.

10 C.J. p. 443 note 87.

7. U.S.—Chicago, M. & St. P. Ry. Co. v. Minneapolis Civic & Commerce Ass'n, 38 S.Ct. 553, 247 U.S. 490, 62 L.Ed. 1229, affirming Minneapolis Civic & Commerce Ass'n v. Chicago, M. & St. P. Ry. Co., 158 N.W. 817, 134 Minn. 169.

8. Tex.—White Rock Gravel & Sand Co. v. International & G. N. Ry. Co., Civ.App., 188 S.W. 280, error refused.

10 C.J. p. 442 note 79.

9. U.S. — Interstate Commerce Commn. v. Stickney, Minn., 30 S.Ct. 66, 215 U.S. 98, 54 L.Ed. 112.

10. Fla.—Henderson v. Hines, 98 So. 333, 86 Fla. 494.

10 C.J. p. 442 note 82.

11. Ark.—St. Louis, I. M. & S. Ry. Co. v. Ft. Smith & V. B. Ry. Co., 191 S.W. 902, 127 Ark. 238

10 C.J. p. 442 note 83.

12. Fla.—State v. Florida East Coast Line R. Co., 68 So. 761, 69 Fla. 491.

13. Ariz.—Southern Pac. Co. v. State Corporation Commission, 3 P.2d 518, 39 Ariz. 1.

Between industries on own line

Under a contract whereby a company bound itself to switch cars between industries on its line at a certain charge, the words "on the line" refer to physical line, and it cannot be required to switch cars for the agreed charge, where to do so would necessitate the use of tracks of another company.—National Enameling & Stamping Co. v. Granite City & M. B. L. R. Co., Mo., 199 S.W. 238.

"Intra-plant and intra-terminal switching"

(1) Intra-plant switching is no duty of a common carrier and is not a part of "transportation."—Grand Trunk Western R. Co. v. Mount Clemens Sugar Co., 269 N.W. 208, 277 Mich. 366.

(2) The distinction between transportation and plant service is not dependent upon the distance that the goods are moved.—Louisiana & P. Ry. Co. v. U. S., Com.C., 209 F. 244, affirmed 34 S.Ct. 741, 234 U.S. 1, 58 L.Ed. 1185.

(3) Whether a particular hauling of goods is transportation or industrial depends upon whether, on the one hand, it is an interindustry act, a step in the manufacturing process, or, on the other hand, a movement of raw materials from without to the plant or finished products from the plant to the market.—Louisiana & P. Ry. Co. v. U. S., supra

(4) Under a tariff prescribing different rates for "intra-plant switching," "intra-terminal switching," and "inter-terminal switching," and defining the first type of service as a movement from one track to another within the same plant or industry, a movement of cars over a spur track from a mine of a mining company to a main line, a considerable distance over the latter, and thence over a spur to an ore-reducing mill of the company is subject to the higher rate of an "intra-terminal" movement.—Southern Pac. Co. v. State Corporation Commission, 3 P.2d 518, 39 Ariz. 1.

(5) The right of the carrier to collect such rate is dependent entirely upon the nature and character of the switching movements, and not at all upon the reasons for the shipment or the ability of the commodity to stand the charges.—Southern Pac. Co. v. State Corporation Commission, supra.

14. Ga.—Dixon v. Georgia Cent. R. Co., 35 S.E. 369, 110 Ga. 173.

Ky.—Andrews Steel Co. v. Davis, 276 S.W. 148, 210 Ky. 473

Ohio.—J. B. Doppes Sons Lumber Co. v. Cincinnati, N. O. & T. P. Ry. Co., 110 N.E. 640, 92 Ohio St. 206, L.R.A.1916D 452.—Richter Grain Co. v. Cincinnati, H. & D. Ry. Co., 16 Ohio N.P.,N.S., 81, affirmed 4 Ohio App. 22, 21 Ohio Cir.Ct., N.S., 49, 25 Ohio Cir.Dec. 453.

60 C.J. p. 1201 note 53.

15. La.—Vicksburg, S. & P. Ry. Co. v. Railroad Commission of Louisiana, 69 So. 161, 137 La. 747.

pendent movement, complete in itself, which neither precedes nor follows a transportation is itself a transportation service, rather than a switching or transfer service, although carried on within the limits of the same terminal or plant.[16] On this theory a movement between two points within the industrial or switching district of a carrier has been held subject to line haul rather than switching rates,[17] and a statute fixing the charge for switching service does not limit the rate which a carrier may charge for a movement from one track to another within the same terminal limits.[18] A switching rate for movements between connections of other lines and industries located on the tracks of the carrier, rather than a "line haul rate between stations," has been held applicable to a transfer from a connecting line to a point on an industrial track of the carrier although neither consignor nor consignee had an industry on such track.[19]

Unloading and weighing. Where the owner rescinds his order for the shipment of goods and requests that they be unloaded the law will imply an agreement to pay a reasonable charge for the unloading where it can be done without any great inconvenience or without involving an expense out of all proportion to the value of the goods.[20] If freight is unloaded for the consignee at unusual hours and in a special way, so as to convenience the consignee and to save him expense, imposing special expense on the carrier, it has a right to charge compensation for such services in addition to the freight rates, where it has given notice to the consignee that extra compensation would be charged for such services.[21]

Under § 15(5) of the Interstate Commerce Act, 49 U.S.C.A. § 15(5), requiring a carrier of live stock to place the stock in suitable pens without extra charge to the consignee, the carrier can make no extra charge for services incident to the carriage and unloading of the stock including the ascertainment in some way of the accurate weight of the shipment which forms the basis of the transportation charge.[22] Furthermore, another person or corporation to whom the carrier has delegated the duty of maintaining proper yards or pens cannot make an extra charge for merely receiving or delivering the stock in and through the yards.[23] There is, however, nothing which requires the carrier to ascertain the weight in any particular manner.[24] If the carrier provides a proper and fair method of unloading

Ohio.—J B Doppes Sons Lumber Co v Cincinnati, N. O & T. P Ry. Co, 110 N E 640, 92 Ohio St. 206, 212, L R.A 1916D 452.

16. Ga.—Dixon v. Central of Georgia R. Co, 35 S.E. 369, 110 Ga. 173, 180
Ky.—Andrews Steel Co. v. Davis, 276 S W 148, 210 Ky 473.
Ohio—Richter Grain Co. v. Cincinnati, H. & D Ry Co, 16 Ohio N.P., N S, 81, affirmed 4 Ohio App. 22, 21 Ohio Cir.Ct.,N.S., 49, 25 Ohio Cir. Dec. 453.

Use of main line not test

The test of the distinction between transportation and switching service is not whether the movement of cars involves the use of a portion of the company's main line or that of another, for there may be a transportation service over one or more spur tracks of the same company
Ky.—Andrews Steel Co. v. Davis, 276 S W 148, 210 Ky. 473.
La.—Vicksburg, etc, Ry Co v. Railroad Commission of Louisiana, 69 So. 161, 137 La 747
60 C.J p 1201 note 56.

17. Iowa.—Cummings Sand & Gravel Co. v. Minneapolis & St. L Ry. Co., 166 N.W. 354, 182 Iowa 955, L.R.A. 1918C 797

Movement within terminals of connecting carriers

Line-haul rather than switching tariff, was applicable to movement of intra-state coal shipment, originating in western Kentucky, from initial carrier's Louisville terminal over line of connecting carrier to destination within corporate limits of Louisville, where such destination was designated in bill of lading, although movement was solely within terminals of initial and connecting carriers.—Louisville Water Co. v Illinois Cent. R. Co., D C Ky., 14 F Supp. 301

The line-haul rather than the switching tariff applied to movement of intra-state coal shipments which were delivered by initial carrier to connecting carrier and by it transported to destination, where line haul rate to destination from point of receipt of shipment was definite, while area covered by switching district within which destination was allegedly included was not, and shipper over period of years had paid initial carrier the line haul tariff without objection.—Louisville Water Co. v. Louisville, H. & St. L. Ry. Co, 110 S W.2d 668, 270 Ky. 833.

18. Ohio.—Richter Grain Co. v. Cincinnati, H & D Ry Co, 16 Ohio N P.,N S, 81, affirmed 4 Ohio App. 22, 21 Ohio Cir.Ct,N S, 49, 25 Ohio Cir.Dec 453.

19. Ark.—St. Louis, I. M. & S. Ry. Co v. Ft. Smith & V. B. Ry. Co, 191 S W. 902, 127 Ark. 238.

20. Cal.—Heath v. Judson Freight Forwarding Co., 190 P. 839, 47 Cal App. 426.

21. Ill.—Illinois Cent. R. Co. v. Goodrich, 163 Ill.App. 268.

22. U S.—Adams v. Mills, Ill, 52 S Ct 589, 286 U S. 397, 76 L Ed 1184, reversing, C C A., Adams v. Mellan, 51 F 2d 620, affirming, D.C., 39 F. 2d 80, and certiorari granted 52 S Ct. 208, 284 U S. 614, 76 L Ed 525.
D C.—U. S ex rel. Kroger Grocery & Baking Co, v. Interstate Commerce Commission, 73 F 2d 948, 64 App. D.C. 43, certiorari denied 55 S Ct 508, 294 U.S. 712, 79 L.Ed. 1246.

23. Mo.—Bozworth v. Wabash Ry Co, 58 S W 2d 448, 332 Mo 277, affirming Bosworth v. Wabash Ry. Co, App., 21 S.W.2d 1110—Burton v. Wabash Ry Co., App., 22 S W 2d 201, affirmed 58 S W.2d 443, 332 Mo. 268

24. D.C.—U. S. ex rel. Kroger Grocery & Baking Co. v. Interstate Commerce Commission, 73 F.2d 948, 64 App D C. 43, certiorari denied 55 S Ct. 508, 294 U S. 712, 79 L.Ed. 1246

Tariff method held not exclusive

Tariff applicable to transportation of live stock, providing that, if proper facilities are furnished at destination for obtaining hoof weights, weights so obtained will be proper basis for assessing freight charges, is not mandatory and exclusive method of determining weight of live stock as basis for transportation charges.—U. S. ex rel. Kroger

and weighing the stock without extra charge to the shipper this is all it is required to do, and if the shipper elects to unload or weigh in a different manner through a stock yards company these are properly stock yards services with which the carrier is not concerned and for which an extra charge may be made.[25]

§ 315. Charges as Affected by Transportation over Several Lines

a. In general
b. Payment and collection

a. In General

Where a shipment is transported over several lines, each of the carriers involved is entitled to be compensated for the services rendered by it, the charges of each carrier being fixed by its usual rates unless a joint through rate has properly been established or agreed upon.

In an ordinary case where a carrier has received goods or property for transportation to a destination beyond its own line, the succeeding carrier to whom the goods are offered is, in the absence of statute otherwise providing, in the same situation as an independent carrier, and is entitled to freight charges in accordance with its usual rates, regardless of any contract of the initial carrier of which it has no knowledge or by which it is not bound.[26] Especially is this the case where the initial carrier has charged a rate lower than that fixed by the railroad commission,[27] or a rate at which the connecting carrier cannot lawfully transport the goods.[28] If the first carrier has, without authority, contracted for the rate for the entire transportation, and the charges exacted by connecting carriers are such as to render the entire charge greater than that contracted for, the remedy of the consignor or owner is against the carrier with whom the contract was made.[29]

From the foregoing it results that, if a joint through rate has not in some manner properly been established, the charge for a shipment over several lines is usually the combination or total of the rates charged by each carrier between the points on its own line.[30] This has frequently been held to be the rule with respect to interstate shipments over several lines,[31] except in so far as modified by the so-called Jones-Kelley rule for constructing combination rates.[32] If, however, there is a joint through rate, which has been properly established

Grocery & Baking Co. v. Interstate Commerce Commission, 73 F.2d 948, 64 App.D.C. 43, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed. 1246.

25. D.C.—U.S. ex rel. Kroger Grocery & Baking Co. v. Interstate Commerce Commission, supra.

26. U.S.—Ranier Brewing Co. v. Great Northern Pac. S. S. Co., Wash., 42 S.Ct. 436, 259 U.S. 150, 66 L.Ed. 868, affirming, C.C.A., 270 F. 436—Wheelock v. Walsh Fire Clay Products Co., C.C.A.Mo., 60 F.2d 415.
10 C.J. p. 443 note 97.

27. Tex.—Texas Cent. R. Co. v. Kerns, Civ.App., 108 S.W. 187.

28. U.S.—Ranier Brewing Co. v. Great Northern Pac. S. S. Co., Wash., 42 S.Ct. 436, 259 U.S. 150, 66 L.Ed. 868, affirming, C.C.A., 270 F. 436.

Carload transportation and delivery unlawful

Although a shipment has been given a carload rate at the point of origin, which has been paid, a connecting carrier is entitled to collect the difference between the carload and less than carload rates where it cannot lawfully transport the goods to the point of destination, and deliver them to the consignee, in carload lots.—Ranier Brewing Co. v. Great Northern Pac. S. S. Co., Wash., 42 S.Ct. 436, 259 U.S. 150, 66 L.Ed. 868, affirming, C.C.A., 270 F. 436.

29. Ga.—Goodin v. Southern R. Co., 54 S.E. 720, 125 Ga. 630, 636, 6 L.R.A.,N.S., 1054, 5 Ann.Cas. 573.
10 C.J. p. 444 note 99.

30. U.S.—Wheeling & L.E. Ry. Co. v. Standard Envelope Mfg. Co., D.C.Ohio, 2 F.Supp. 637
Va.—Norfolk Southern R. Co. v. Freeman Supply Corporation, 133 S.E. 817, 145 Va. 207.

31. U.S.—Hygrade Food Products Corporation v. Chicago, M., St. P. & P. R. Co., C.C.A.N.Y., 85 F.2d 113, reversing, D.C., 10 F.Supp. 767—Davis v. Kelly-Weber & Co., D.C.La., 24 F.2d 708—Missouri Pac. R. Co. v. Rea-Patterson Milling Co., C.C.A.Kan., 273 F. 518—Portland Cattle Loan Co. v. Oregon Short Line R. Co., Or., 251 F. 33, 163 C.C.A. 283, affirming, D.C., Oregon Short Line R. Co. v. Portland Cattle Loan Co., 245 F. 214.
10 C.J. p. 428 note 81, p. 431 note 13 [a].

Intermediate rate applicable

In making up the through rate on such a shipment, where it appears that one of the connecting carriers had published a rate from one point to another on its line, for shipments originating in the first point, and a higher rate on commodities moving into the first point destined for the latter point, the higher rate must be taken in making up the combination.—Missouri Pac. R. Co. v. Rea-Patterson Milling Co., C.C.A.Kan., 273 F. 518.

Through bill of lading

Where no applicable through rate has been established, shipments, although moving on through bills of lading, take the lawful rates lawfully established on each line unless displaced by lawful special agreement.
U.S.—Kansas City Southern R. Co. v. C.H. Albers Commn. Co., Kan., 32 S.Ct. 316, 223 U.S. 573, 56 L.Ed. 556.

32. Va.—Norfolk Southern R. Co. v. Freeman Supply Corporation, 133 S.E. 617, 145 Va. 207.

Scope and applicability of rule

(1) The so-called "Jones Rules for Constructing Combination Rates," by which the flat increase in rates made by the director general of railroads in 1918 was rendered less than the aggregate of the increases on the several constitutent rates or factors in the case of a joint carriage by several carriers in order to avoid the duplication resulting in the increase when the through rate was a combination of intermediate rates to which the increase was applied, is, because of its express terms, inapplicable where all of the participating carriers have not concurred therein. — Hygrade Food Products Corporation v. Chicago, M., St. P. & P. R. Co., C.C.A.N.Y., 85 F.2d 113, reversing, D.C., 10 F.Supp. 767—Wheelock v. Walsh Fire Clay Products Co., C.C.A.Mo., 60 F.2d 415.

in accordance with the rules stated in § 300 supra, such rate is controlling;[33] and if there is a contract for a through rate which is binding on the last carrier, the consignee is entitled to the goods on tendering the agreed rate,[34] while the connecting carrier cannot subject the consignor to any greater liability than that undertaken by the latter in his contract with the initial carrier.[35]

In constructing a through rate by combining the local rates contained in one tariff with the local rates contained in another, the rule published by the initial carrier for the computation of the through rate is binding, notwithstanding the tariff of the connecting carrier does not contain such rule, it not being required in order to change a through combination rate by rule or regulation that such rule or regulation be actually contained in both tariffs, or made a part of both tariffs by cross reference.[36]

Under the statute which establishes the rule known as the "Jones" or "combination" rule for computing combination rates and provides that it is to be applied "where no published through rates are in effect from point of origin to destination," such rule has no application where lawfully published through rates are in effect from point of origin to destination,[37] even though shipments are made over routes from point of origin to destination different from the route covered by the through rate.[38]

Where connecting carriers act under joint arrangement as to rates, each is entitled to proportionate compensation out of the charge for the entire transportation.[39] Where several carriers have by agreement established combination rates, consisting of the sum of proportionals made by the respective carriers, each proportional is necessarily a part of the through rate and capable of use only as such. Such proportionals show the basis of division of the charges between the connecting carriers and serve precisely as do agreed divisions of charges based on joint rates. They differ from local rates in that they cover only terminal service at place or at place of delivery but cannot, as do local rates, cover both.[40]

A shipper who has contracted to pay the originating carrier a fixed rate is not entitled to have such rate reduced by allowances made the originating carrier out of the through rate by other participating carriers.[41]

(2) In other words, the rule is applicable only to rates contained in tariffs specifically referring to it—Hohenberg v. Louisville & N. R. Co., C.C.A.Ala., 46 F.2d 952, certiorari denied 52 S.Ct. 6, 284 U.S. 617, 76 L.Ed. 527.

(3) Both tariffs containing both rates or factors must refer to the rule and specify that it is applicable in order for both rates to be used as proportional factors or part of a combination transit rate—Wheelock v. Walsh Fire Clay Products Co., C.C.A.Mo., 60 F.2d 415—Hohenberg v. Louisville & N. R. Co., supra.

(4) Furthermore, in view of its clear wording to that effect, this rule has no application where there are published through rates from point of origin to point of destination.—W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co., Ky., 57 S.Ct. 265, 299 U.S. 393, 81 L.Ed. 301, affirming, C.C.A., 82 F.2d 94, affirming, D.C., 7 F.Supp. 593, certiorari granted 57 S.Ct. 14, 299 U.S. 524, 81 L.Ed. 385.

(5) In such a case the fact that combination tariff rates, if not reduced by combination rule for computing rates on lumber where no published through rates exist from point of origin to destination, might be prohibitively high cannot be considered in determining applicability of combination rule.—W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co., supra.

33. U.S.—State of Texas v. Anderson, Clayton & Co., C.C.A.Tex., 92 F.2d 104, certiorari denied 58 S.Ct. 265, 302 U.S. 747, rehearing denied 58 S.Ct. 366, 302 U.S. 780—Union Wire Rope Corporation v. Atchison, T. & S. F. Ry. Co., C.C.A.Mo., 66 F.2d 965, reversing, D.C., Atchison, T. & S. F. R. Co. v. Union Wire Rope Corporation, 1 F.Supp. 399, and certiorari denied 54 S.Ct. 122, 290 U.S. 686, 78 L.Ed. 591.

34. Ind.—Evansville, etc., R. Co. v. Marsh, 57 Ind. 505.

35. U.S.—In re O'Gara Coal Co., C.C.A.Ill., 294 F. 89.

Change in point of destination

Where the consignor has contracted with the initial carrier for transportation to a particular point of destination on the connecting carrier's lines at the duly established rates, such contract is binding on the connecting carrier as agent for the initial carrier, and the connecting carrier cannot, without the consent of the consignor, subject him to a greater liability by delivering the shipment to the consignee at a point other than that specified by the consignor.—In re O'Gara Coal Co., C.C.A.Ill., 294 F. 89.

36. U.S.—Empire Refining Co. v. Davis, D.C.Okl., 6 F.2d 305.

Charges as affected by transportation over several lines see infra § 315

37. U.S.—W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co., D.C.Ky., 7 F.Supp. 593, affirmed, C.C.A., 82 F.2d 94, certiorari granted 57 S.Ct. 14, 299 U.S. 524, 81 L.Ed. 385, affirmed 57 S.Ct. 265, 299 U.S. 393, 81 L.Ed. 301.

D.C.—Baltimore & O. R. Co. v. Domestic Hardwoods, 65 F.2d 488, 62 App.D.C. 142, certiorari denied 54 S.Ct. 64, 290 U.S. 647, 78 L.Ed. 561.

38. U.S.—W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co., Ky., 57 S.Ct. 265, 299 U.S. 393, 81 L.Ed. 301, affirming, C.C.A., 82 F.2d 94, certiorari granted 57 S.Ct. 14, 299 U.S. 524, 81 L.Ed. 385, affirming, D.C., 7 F.Supp. 593, and overruling in effect Baltimore & O. R. Co. v. Domestic Hardwoods, 65 F.2d 488, 62 App.D.C. 142, certiorari denied 54 S.Ct. 64, 290 U.S. 647, 78 L.Ed. 561.

39. U.S.—Atlantic Coast Line R. Co. v. Pennsylvania R. Co., D.C.Pa., 12 F.Supp. 720

10 C.J. p. 443 note 95.

40. U.S.—Great Northern Ry. Co. v. Sullivan, Minn., 55 S.Ct. 472, 294 U.S. 458, 79 L.Ed. 992, reversing, C.C.A., 72 F.2d 587, certiorari granted 55 S.Ct. 216, 293 U.S. 551, 79 L.Ed. 654.

41. Tenn.—Carolina Spruce Co. v. Black Mountain R. Co., 201 S.W.

b. Payment and Collection

An initial carrier contracting for a through shipment may collect the charges for the entire transportation. A connecting carrier is entitled to demand that its charges be paid in advance; and it is not required to make advances or give credit for charges earned or paid by a preceding carrier, although it may properly do so and thereupon become entitled to collect not only its own charges at the end of the transportation, but also the other charges for which an advancement was made or credit given.

Where goods are accepted in an interstate shipment by a carrier on a through bill of lading to a point of destination upon the line of another carrier, the initial carrier, by reason of its contract to transport the goods to the point of destination, becomes entitled to collect the legal charges due for the entire transportation. This is true although the goods are entitled to a transit privilege and are carried from the point of transit by another carrier.[42] In receipting for the charges on a through shipment over several lines, the initial or receiving carrier acts as the agent for the others and they are bound thereby.[43]

A connecting carrier is entitled to demand prepayment of its charges before receiving or accepting the goods.[44] If it fails to do so, however, it is not entitled to demand payment until delivery of the goods;[45] but it may withhold delivery to a succeeding carrier until its charges have been paid, see infra § 410. If a succeeding carrier accepts delivery of goods on which charges have accrued, after notice has been given by the prior carrier that it will hold the succeeding carrier for such charges, the latter thereby impliedly contracts to pay the same.[46]

Ordinarily, a connecting carrier is under no obligation to make advances for charges earned or paid by a preceding carrier or to give credit therefor, even though it is customary so to do.[47] If it takes the shipment without paying the preceding carrier's charges, it may be regarded as the agent of the preceding carrier to collect such charges,[48] although in this event the charges are due to the preceding carrier and not to the connecting carrier.[49] Nevertheless a connecting carrier may advance the charges of the preceding carrier, including charges which the preceding carrier may have already advanced in the same way, and thereupon become entitled to collect or demand not only the full amount of its own charges, but also the advancements, at the end of the transportation,[50] unless it has notice or knowledge that, in the particular

154, 139 Tenn. 137, error dismissed 39 S.Ct. 184, 248 U.S. 597, 63 L.Ed. 439.

42. Ga.—Williamson-Inman Co. v Nashville, C. & St. L. Ry. Co., 160 S.E. 687, 44 Ga.App. 129.

43. N.C.—Reidsville Paper Box Co. v. Southern Ry., 99 S.E. 23, 177 N.C. 351.

44. U.S.—Wadley Southern R. Co. v Georgia, Ga., 35 S.Ct. 214, 235 U.S. 651, 59 L.Ed. 405
10 C.J. p 441 note 52 [b] (1).

45. Ind.—Grand Rapids, etc., R. Co v. Diether, 37 N.E. 39, 1069, 10 Ind.App. 206.

46. Mass.—Boston & M. R. R. v. Oceanic Steam Nav. Co., 116 N.E. 260, 226 Mass. 509.

47. U.S.—Southern Indiana Express Co. v. U. S. Express Co., C.C.Ind., 88 F. 659, affirmed 92 F. 1022, 35 C.C.A. 172
10 C.J. p 444 note 2.

48. N.Y.—Grand Trunk Ry. Co. of Canada v. Satuloff, 182 N.Y.S. 81.
N.C.—Reidsville Paper Box Co. v. Southern Ry., 99 S.E. 23, 177 N.C. 351.
10 C.J. p 444 note 3.

Receipt of terminal carrier binding on all

Where a shipment passes through the hands of several carriers and the last carrier presents a freight bill therefor and receipts it, it does so as agent, not only for itself, but for all the carriers among whom the freight charges are to be apportioned, and they are bound thereby.—Reidsville Paper Box Co. v. Southern Ry., 99 S.E. 23, 177 N.C. 351.

49. Mass.—Gould v. Newburyport R. Co., 14 Gray 472

50. U.S.—Granger v. Davis, C.C.A. Ohio, 2 F.2d 695—Galveston, H. & S. A. Ry. Co. v. Lykes Bros., D.C.Tex., 294 F. 968.
Cal.—Southern California Commercial Co. v Alberti, 207 P. 1023, 58 Cal.App. 84.
Ill.—New York Cent. R. Co. v. Platt & Brahm Coal Co., 236 Ill.App. 150. See Crane v. Tooker Storage & Forwarding Co., 204 Ill.App. 354
Ind.—Michigan Cent. R. Co. v. S. J. Peabody Lumber Co., 131 N.E. 841, 76 Ind.App. 222.
Me.—Northern Pac. Ry. Co. v. Pleasant River Granite Co., 102 A. 298, 116 Me. 496.
N.Y.—Central Railroad of New Jersey v Berry, 165 N.Y.S. 1041, 99 Misc. 560—Grand Trunk Ry. Co. of Canada v. Satuloff, 182 N.Y.S. 81.
10 C.J. p 444 note 5

Breach of contract by preceding carrier

Where shipment was diverted from original consignee to parties who ordered further diversion, railroad then having shipment agreeing to deliver car in time for certain train on terminal road, but car was not so delivered in time, and parties to whom shipment had been diverted suffered damage thereby, terminal road, suing them for its and all prior charges, could collect those accruing to railroad which had been in default in failing to deliver car to terminal road in time for its train, such recovery not precluding parties from suing road in default directly to recover their damages.—Grand Trunk Ry. Co. of Canada v. Satuloff, 182 N.Y.S. 81.

Collection from consignor

A terminal carrier may pay the charges of preceding carriers and recover such charges, together with its own charges, from the consignor.—Central of Georgia Ry. Co. v Lovell, 180 N.Y.S. 922 111 Misc. 735—Central Railroad of New Jersey v Berry, 165 N.Y.S. 1041, 99 Misc. 560

Final carrier as consignee

Where a final carrier was to collect freight due on a shipment from a consignee, payment by it to the initial and the intermediate carriers of their part of the freight by operation of law constituted an assignment to the final carrier of the right of the initial and intermediate carriers to recover for the services rendered by them.—Southern California Commercial Co. v. Alberti, 207 P. 1023, 58 Cal.App. 84.

case the charge of the preceding carrier is unlawful,[51] or the charge is for services not constituting a part of the transportation of the particular consignment.[52] This, it is said, is a right long sanctioned by law and custom, and is founded on public convenience and common sense.[53] The doctrine has been held to apply notwithstanding the goods were improperly routed,[54] provided the connecting carrier had no knowledge or notice of the agreement between the owner of the goods and the initial carrier as to a different routing of the goods.[55] If the connecting carrier has knowledge or notice that the charges to the point of destination have been paid to the initial carrier, it is not justified, without express authority from the consignee, in paying charges claimed by preceding carriers,[56] especially where no question as to the correctness of the rate or the amount charged by the initial carrier is raised.[57] Also, it has been held that where a contract specifying a destination which would require carriage over a connecting carrier's line has been rescinded and a new contract made for transportation to a different destination not involving the use of the connecting carrier's lines, but the initial carrier has wrongfully shipped the goods in accordance with the abrogated contract, the connecting carrier cannot recover its charges from the shipper but its sole recourse is against the initial carrier,[58] and it has been held that where the shipment has been sent over a more expensive route than that designated by the shipper the connecting carrier cannot collect charges in excess of those which would have been due had the proper route been followed,[59] although the shipper in changing an original route designation to the one finally fixed failed to surrender his bill of lading as required by a rule of the carrier.[60]

§ 316. Who Liable for Charges

a. In general
b. Consignor
c. Consignee

a. In General

Only those persons are liable for freight charges who have by some sufficient voluntary act or undertaking subjected themselves to such liability.

In accordance with the underlying concept that a carrier's right to freight charges is dependent upon contract, see supra § 312, it may be stated generally that the liability of a particular person for the charges on a given shipment is dependent upon his having committed, or entered into, some sufficient voluntary act or undertaking.[61] Liability cannot ordinarily be imposed upon a person who has not in some manner expressly or impliedly undertaken to pay the freight charges;[62] but, on the other

51. Ala.—Louisville & N. R. Co. v. James, 93 So. 701, 208 Ala. 6.
10 C.J. p. 444 note 6.

52. Ga.—Robinson v. Dover, etc., R. Co., 27 S.E. 713, 99 Ga. 480.

Services not part of transportation.
(1) The connecting carrier is not entitled to insist on payment of charges advanced for services not constituting a part of the transportation of the particular consignment.
Ga.—Robinson v. Dover, etc., R. Co., 27 S.E. 713, 99 Ga. 480.
Mo.—Steamboat Virginia v. Kraft, 25 Mo. 76.

(2) So, where the goods have reached the destination contemplated in the original contract of shipment, and another carrier, a volunteer, undertakes to transport them from the depot of the last carrier to the place of business of the consignee, it has no right to pay the charges and collect them from such consignee.—Kansas City Transfer Co. v. Neiswanger, 18 Mo.App. 103.

53. Cal.—Southern California Commercial Co. v. Alberti, 207 P. 1023, 58 Cal.App. 84.
10 C.J. p. 444 note 7.

54. Ala.—Ex parte Louisville & N. Ry. Co., 79 So. 139, 201 Ala. 667, reversing Oden-Elliott Lumber Co. v. Louisville & N. R. Co., 77 So. 240, 16 Ala.App. 251.
Ind.—Michigan Cent. R. Co. v. S. J. Peabody Lumber Co., 131 N.E. 841, 76 Ind.App. 222.
10 C.J. p. 444 note 8.

55. Ga.—Seaboard Air Line R. Co. v. Southern Flour, etc., Co., 75 S.E. 654, 138 Ga. 604.

56. Ala.—Converse Bridge Co. v. Collins, 24 So. 561, 119 Ala. 534.
10 C.J. p. 444 note 10.

Constructive notice sufficient.
The rule of the text applies if the connecting carrier, although not having actual notice, has knowledge of facts which should put it on inquiry and which, if followed up, would lead to such notice.—Converse Bridge Co. v. Collins, 24 So. 561, 119 Ala. 534.—10 C.J. p. 444 note 12.

57. Ala.—Converse Bridge Co. v. Collins, 24 So. 561, 119 Ala. 534.

58. U.S.—Delaware, L. & W. Ry. Co. v. Johnson-Brown Co., D.C.Ga., 270 F. 679.

59. La.—Texas & P. Ry. Co. v. Consolidated Companies, App., 151 So. 433, affirmed 156 So. 215, 180 La. 180.

60. La.—Texas & P. Ry. Co. v. Consolidated Companies, supra.

61. U.S.—Wallingford Bros. v. Bush, Kan., 255 F. 949, 167 C.C.A. 241.
Iowa.—Des Moines & Central Iowa R. R. v. American Employers Ins. Co., 276 N.W. 56.
Ky.—Louisville & N. R. Co. v. Perry Ice & Bottling Co., 10 S.W.2d 1091, 226 Ky. 286.
Minn.—Chicago Junction Ry. Co. v. Duluth Log Co., 202 N.W. 24, 161 Minn. 466.
N.J.—Pennsylvania R. Co. v. Townsend, 100 A. 855, 90 N.J.Law 75.
Pa.—Davis v. Richardson, 87 Pa.Super. 205.
Tenn.—Cleveland, C., C. & St. L. Ry. Co. v. Southern Coal & Coke Co., 248 S.W. 297, 147 Tenn. 433.

Corpus Juris cited and approved.
U.S.—Wallingford Bros. v. Bush, Kan., 255 F. 949, 950, 167 C.C.A. 241.
Minn.—Chicago Junction Ry. Co. v. Duluth Log Co., 202 N.W. 24, 25, 161 Minn. 466.
Tenn.—Cleveland, C., C. & St. L. Ry. Co. v. Southern Coal & Coke Co., 248 S.W. 297, 300, 147 Tenn. 433.

62. U.S.—Cincinnati Northern R. Co. v. Beveridge, D.C.Va., 8 F.2d 372—Wallingford Bros. v. Bush, Kan., 255 F. 949, 167 C.C.A. 241.
Ga.—Smith Bros. Co. v. Charleston & W. C. Ry. Co., 137 S.E. 115, 36 Ga.App. 480.
Ill.—Pere Marquette R. Co. v. American Coal & Supply Co., 239 Ill.App. 139.

hand, practically any person who has no undertaken to pay the charges is subject to liability therefor.[63]

Subject to the hereinafter discussed rules and statutes against discrimination,[64] the person or persons liable for freight charges may be determined by the express contract made between the parties,[65] as sometimes evidenced by the bill of lading.[66] Hence, a person may subject himself to liability by express contract, notwithstanding he is not the owner of the goods.[67] An express contract or undertaking is not, however, absolutely essential to the existence of liability.[68]

Unless the contract or intention of the parties is shown to have been otherwise,[69] the person who delivers the goods to the carrier for shipment impliedly assumes an obligation to pay the freight charges.[70]

Also, an obligation to pay the charges may generally be implied or incurred by reason of the fact that a person accepts or receives the shipment from the carrier,[71] or otherwise exercises dominion over

Iowa—Des Moines & Central Iowa R R v American Employers Ins Co, 276 N W. 56.
Ky.—Louisville & N. R. Co. v. Perry Ice & Bottling Co., 10 S W 2d 1091, 226 Ky 286.
Mass—American Ry Express Co v Mohawk Co, 144 N.E 721, 250 Mass 1, 35 A L R 14.
Mo—Chicago, B & Q. R Co v. Evans, 228 S W. 853, 206 Mo App. 553
N J—Pennsylvania R. Co. v. Townsend, 100 A. 855, 90 N J Law 75
Pa—Philadelphia & R R. Co. v. International Motor Co, 84 Pa Super 582—Dempsey v. Philadelphia & Reading R. Co, 14 Pa Dist. 111.
S C—Davis v Allen, 117 S.E 547, 124 S C 297
Tenn—Cleveland, C, C. & St L Ry Co v Southern Coal & Coke Co, 248 S.W 297, 147 Tenn. 433
10 C J p 446 note 26.

Corpus Juris cited in Wallingford Bros. v. Bush, Kan, 255 F. 949, 950, 167 C.C.A. 241

63. Cal.—New York Cent R Co. v Frank H Buck Co, 41 P.2d 547, 2 Cal 2d 384.

64. U S—Louisville & N. R. Co. v Central Iron & Coal Co., Ala, 44 S Ct 441, 265 U S 59, 68 L Ed 900, affirming, C C A, 284 F 250—Lowden v. Iroquois Coal Co, D C Ill, 18 F Supp 923.
Ala.—Moss Lumber Co. v Michigan Cent R. Co, 123 So 90, 219 Ala 593, reversing 123 So. 89, 23 Ala. App 199
Cal.—New York Cent. R. Co v Frank H Buck Co, 41 P 2d 547, 2 Cal 2d 384
Mass.—Pennsylvania R Co v. Lord & Spencer, 3 N E 2d 231, 105 A L R 1211—American Ry Express Co v Mohawk Dairy Co, 144 N E 721, 250 Mass 1, 35 A L.R 14.
Mich—Michigan Cent R. Co. v. Saginaw Milling Co, 262 N.W. 425, 272 Mich 625
Pa—Chicago & N R. Co. v. Picard, 98 Pa.Super. 134.
Tenn—Nashville, C. & St. L. Ry v. Murphree, 2 Tenn.App. 482.

65. U S.—Louisville & N R. Co. v. Central Iron & Coal Co., Ala., 44 S Ct 441, 265 U.S 59, 68 L Ed. 900, affirming, C C A, 284 F 250—Houston & T. C. R. Co. v Lee County Produce Co, D C.Tex., 14 F.2d 145—St. Louis-San Francisco Ry. Co v. Republic Box Co, D.C Tex, 12 F 2d 441—Lowden v. Iroquois Coal Co, D C Ill., 18 F Supp. 923.
Ala.—Moss Lumber Co v. Michigan Cent. R. Co, 123 So. 90, 219 Ala 593, reversing 123 So. 89, 23 Ala. App. 199.
Cal—New York Cent. R. Co. v. Frank H Buck Co., 41 P.2d 547, 2 Cal 2d 384
Ill—Chesapeake & Ohio Ry Co. v. Southern Coal, Coke & Mining Co., 254 Ill App. 238, certiorari denied 51 S Ct. 34, 282 U.S 860, 75 L Ed 761.
Mass—Pennsylvania R. Co. v. Lord & Spencer, 3 N E 2d 231, 105 A L.R. 1211—American Ry Express Co v. Mohawk Dairy Co., 144 N E 721, 250 Mass 1, 35 A L.R. 14.
Mich—Michigan Cent. R Co v. Saginaw Milling Co., 262 N.W. 425, 272 Mich. 625
N.Y—Grand Trunk Western R. Co v. Makris, 255 N Y.S 443, 142 Misc. 807
Pa—Chicago & N R. Co. v Picard, 98 Pa Super. 134
Tenn—Nashville, C & St. L. Ry. v Murphree, 2 Tenn.App. 482.

66. U S—Louisville & N R Co v Central Iron & Coal Co, Ala, 44 S. Ct 441, 265 U S 59, 68 L Ed 900, affirming, C C.A, 284 F. 250
Cal—New York Cent R. Co v Frank H Buck Co, 41 P 2d 547, 2 Cal 2d 384.

67. Cal—New York Cent. R. Co. v Frank H Buck Co, supra.

68. U.S—Louisville & N. R. Co. v Central Iron & Coal Co, Ala, 44 S.Ct 441, 265 U.S 59, 68 L.Ed. 900, affirming, C.C.A, 284 F 250.
Ill—New York Cent R. Co v Platt & Brahm Coal Co, 236 Ill App. 150
Mich.—Michigan Cent. R. Co. v Saginaw Milling Co, 262 N.W 425, 272 Mich 625.

69. U.S—Louisville & N. R. Co. v Central Iron & Coal Co, Ala., 44 S Ct 441, 265 U.S. 59, 68 L Ed 900, affirming, C.C A., 284 F. 250—Lowden v. Iroquois Coal Co., D.C.Ill, 18 F.Supp. 923.
Ala—Moss Lumber Co v. Michigan Cent. R. Co, 123 So. 90, 219 Ala. 593, reversing 123 So. 89, 23 Ala. App 199
Cal—New York Cent R Co. v. Frank H Buck Co, 41 P.2d 547, 2 Cal 2d 384
Tenn.—Davis v. Hunt, Washington & Smith, 6 Tenn.App 292—Nashville, C. & St L. Ry. v. Murphree, 2 Tenn.App. 482.

70. U S—Louisville & N R Co. v Central Iron & Coal Co, Ala., 44 S.Ct. 441, 265 U S. 59, 68 L.Ed. 900, affirming, C C.A, 284 F. 250
Ala—Moss Lumber Co v. Michigan Cent R Co, 123 So 90, 219 Ala. 593, reversing judgment 123 So. 89, 23 Ala App 199.
Cal—New York Cent. R. Co. v Frank H Buck Co., 41 P.2d 547, 2 Cal. 2d 384
Kan—Atchison, T & S F. Ry. Co. v. F H Stannard & Co, 162 P. 1176, 99 Kan. 730, L.R.A.1917C 1124.
Mass.—Pennsylvania R. Co v. Lord & Spencer, 3 N.E 2d 231, 105 A.L R. 1211.
Pa.—Delaware, L & W R. Co v. Ludwig, 94 Pa Super 289—Director General of Railroads v Birdsboro Stone Co, 86 Pa Super. 587.
W Va—Chesapeake & O. Ry Co. v. Glogora Coal Co., 169 S E 471, 113 W Va. 796, certiorari denied Glogora Coal Co v Chesapeake & O Ry. Co, 54 S Ct 73, 290 U S. 658, 78 L Ed 569.

71. U S.—Wabash Ry Co v Horn, C C A Ill, 40 F.2d 905—Dare v. New York Cent R Co, C C.A.N Y., 20 F.2d 379.
Ill—Atchison, T & S F. R. Co. v. Kirby, 280 Ill App. 481—Mellon v. Landeck, 248 Ill App. 353—New York Cent. R. Co. v. Platt & Brahm Coal Co, 236 Ill.App 150
Kan—Case v Union Pac. R. Co., 241 P. 693, 119 Kan. 706.
Mass—Pennsylvania R. Co v. Lord & Spencer, 3 N E.2d 231, 105 A.L. R. 1211—New York Cent. & H. R. R. Co v York & Whitney Co., 119 N.E. 855, 230 Mass 206, affirmed in part and reversed in part

it while in the carrier's hands,[72] as by directing that it be reshipped or reconsigned.[73] If the person so accepting the shipment, or exercising control over it, holds himself out as the apparent owner of the goods, he may render himself subject to liability in this manner notwithstanding he is not the actual owner,[74] or has not been designated as consignee in the bill of lading.[75] In view of the Interstate Commerce Act, and similar state statutes, and the rules developed thereunder that estoppel, misrepresentation, or mistake cannot be asserted to defeat a carrier's right to collect the full amount of the duly published and established rates, see infra §§ 392–397, it is often held that a person who accepts, or exercises control over, the shipment impliedly agrees to pay or is liable for the full legal charges, notwithstanding he acted on the representation or understanding that the charges had been prepaid,[76] or he accepted the goods with the thought that the charges then demanded by the carrier and paid by him was the full amount lawfully due.[77]

Opposed to these authorities, however, are holdings to the effect that where a person who is neither consignor or consignee is induced to accept the shipment upon the representation that the charges have been prepaid is not subject to liability therefor because his acceptance cannot be said to constitute either an express or implied agreement to pay the same;[78] and that such a person who accepts the goods and pays all the charges demanded by the carrier is not liable for an undercharge,[79] or, at least not primarily, so that recovery may be had from him without first resorting to the shipper.[80]

On the other hand, a person is not ordinarily subject to liability merely because he is or was the owner of the goods involved,[81] or the holder or assignee

on other grounds 41 S.Ct. 509, 256 U.S. 406, 65 L.Ed. 1016.

Mich.—New York Cent. R. Co. v. Brown, 274 N.W. 715, 281 Mich. 74—Michigan Cent. R. Co. v. Saginaw Milling Co., 262 N.W. 425, 272 Mich. 625—Wabash Ry. Co. v. Bloomgarden, 180 N.W. 443, 212 Mich. 410.

Minn.—Chicago Great Western R. Co. v. Schmit, 203 N.W. 618, 163 Minn. 194.

N.J.—New York Cent. R. Co. v. Stanziale, 147 A. 457, 105 N.J.Law 593, reversing 143 A. 834, 6 N.J. Misc. 1116.

N.Y.—New York Cent. R. Co. v. Maloney, 244 N.Y.S. 394, 137 Misc. 751—Central R. of New Jersey v. Williams, 180 N.Y.S. 925, 111 Misc. 730.

Pa.—Pennsylvania R. Co. v. De Marto, 90 Pa.Super. 216—Pennsylvania R. Co. v. Young, 88 Pa.Super. 332—West Jersey & S. R. Co. v. Whiting Lumber Co., 71 Pa.Super. 161.

S.C.—Southern Ry. Co. v. Herndon, 179 S.E. 306, 175 S.C. 361.

W.Va.—Norfolk & W. Ry. Co. v. Williamson Grocery Co., 138 S.E. 102, 103 W.Va. 532.

72. Mich.—New York Cent. R. Co. v. Brown, 274 N.W. 715, 281 Mich. 74.

Ohio.—C. L. Hils Co. v. Louisville & N. R. Co., 162 N.E. 761, 28 Ohio App. 459.

Pa.—Philadelphia & R. Ry. Co. v. Taylor, 156 A. 587, 102 Pa.Super. 31.

73. Ill.—Indiana Harbor Belt R. Co. v. Lieberman, 245 Ill.App. 503—New York Cent. R. Co. v. Platt & Brahm Coal Co., 236 Ill.App. 150.

Mich.—New York Cent. R. Co. v. Guyan Coal & Coke Co., 274 N.W. 718, 281 Mich. 82.

74. Kan.—Farrar v. Perkins, 251 P. 440, 122 Kan. 141.

N.Y.—Erie R. Co. v. H. Rosenstein, Inc., 164 N.E. 37, 249 N.Y. 241, 61 A.L.R. 415, affirming 227 N.Y.S. 99, 222 App.Div. 509—Central R. of New Jersey v. Williams, 180 N.Y.S. 925, 111 Misc. 730.

75. Kan.—Farrar v. Perkins, 251 P. 440, 122 Kan. 141—Case v. Union Pac. R. Co., 241 P. 693, 119 Kan. 706.

76. U.S.—Central Warehouse Co. v. Chicago, R. I. & P. Ry. Co., C.C.A.Minn., 20 F.2d 828, affirming, D.C., Chicago, R. I. & P. Ry. Co. v. Central Warehouse Co., 14 F.2d 123—Western & Atlantic R. Co. v. Underwood, D.C.Ga., 281 F. 891—Great Northern Ry. Co. v. Hyder, D.C.Wash., 279 F. 783.

Mass.—New York, N. H. & H. R. Co. v. Lord & Spencer, 174 N.E. 179, 273 Mass. 583.

Tex.—Houston & T. C. R. Co. v. Johnson, Com.App., 41 S.W.2d 14, 83 A.L.R. 241, reversing, Civ.App., 1 S.W.2d 706.

W.Va.—Norfolk & W. Ry. Co. v. Williamson Grocery Co., 138 S.E. 102, 103 W.Va. 532.

Wis.—Chicago & N. W. Ry. Co. v. J. I. Case Plow Works, 180 N.W. 846, 173 Wis. 237.

77. Kan.—Atchison, T. & S. F. Ry. Co. v. Wagner, 172 P. 519, 102 Kan. 817, L.R.A.1918D 1105.

Minn.—Chicago Great Western R. Co. v. Schmit, 203 N.W. 618, 163 Minn. 194.

S.C.—Southern Ry. Co. v. Herndon, 179 S.E. 306, 175 S.C. 361.

78. U.S.—Cincinnati Northern R. Co. v. Beveridge, D.C.Va., 8 F.2d 372.

79. Ga.—Smith Bros. Co. v. Charleston & W. C. Ry. Co., 137 S.E. 115, 36 Ga.App. 480.

N.J.—Pennsylvania R. Co. v. Townsend, 100 A. 855, 90 N.J.Law 75.

10 C.J. p. 447 note 37.

Reasons for rule

(1) A carrier's "right and duty to collect the correct freight from some one . . . does not necessarily mean that . . . [it] should collect it from the person to whom . . . [it] delivered the goods. If that were true, every drayman, porter, employee, or servant who calls for and receives the goods of another would himself become liable for the freight charges. This would be stretching the law into an absurdity."—Smith Bros. Co. v. Charleston & W. C. Ry. Co., 137 S.E. 115, 118, 36 Ga.App. 480.

(2) "No doubt, if Townsend as assignee of the bill of lading had accepted and removed the goods without paying the charges, with knowledge that the carrier was giving up for his benefit a lien upon the goods for a stated amount, that would be cogent evidence from which to imply an agreement on his part to pay the known amount of the freight charges. But the mere acceptance and removal of goods by the assignee of a bill of lading, upon payment of the freight bill as made out by the carrier, without knowledge by the assignee that the same was an undercharge, does not create any further liability on his part, even though, by mistake of the carrier, the bill as rendered did not include the entire charge."—Pennsylvania R. Co. v. Townsend, 100 A. 855, 856, 90 N.J.Law 75.

80. Neb.—Union Pac. R. Co. v. W. L. Stickel Lumber Co., 156 N.W. 1082, 99 Neb. 564.

10 C.J. p. 445 note 17 [a], p. 447 note 42.

81. U.S. — Wallingford Bros. v.

of the bill of lading covering the shipment,[82] or because he has used the goods after they have been delivered by the carrier,[83] and it has been held that the carrier cannot recover undercharges from one who merely purchases the shipment,[84] or the consignee's business,[85] after the shipment has been delivered to, and the charges demanded have been paid by, the consignee. Also, one who purchased, and exercised dominion over, a shipment only after it had been delivered at the point of destination and refused by the person to whom it was delivered has been held not liable for the freight charges to such point.[86] Of course, the owner may be rendered liable due to the fact that the shipment was made for his benefit or under his direction,[87] and the assignee or holder of a bill of lading who receives the goods or exercises dominion over them is generally held bound to pay the transportation charges[88] although he was ignorant that the carrier looked to him for payment.[89]

If a person has so acted or contracted as to make himself liable to the carrier under the foregoing rules he cannot avoid, or be relieved from, liability because some other person has likewise subjected himself to liability for the same charges,[90] or because of a direction to the carrier to collect the freight from such other person.[91] In such a case the carrier may recover the charges from either of the parties, if it has not in some manner restricted its rights to only one of them;[92] but the primary

Bush, Kan., 255 F. 949, 167 C C A. 241.

Ark.—Davis v. City Fuel Co., 248 S W 572, 157 Ark. 455

Mass.—American Ry. Express Co. v Mohawk Dairy Co., 144 N E. 721, 250 Mass. 1, 35 A L R 14.

N J.—New York Cent. R Co v. Stanziale, 143 A 834, 6 N J Misc. 1116, reversed on other grounds 147 A. 457, 105 N J.Law 593.

N.Y.—Central of Georgia Ry Co v. Lovell, 180 N.Y S. 922, 111 Misc. 735

Corpus Juris cited in Wallingford Bros. v. Bush, Kan., 255 F. 949, 950, 167 C C A. 241.

Ownership as test of liability

(1) Ownership of property is not of itself the test for determining liability for freightage—Chicago, B & Q. R. Co. v. Evans, 288 S.W. 73, 221 Mo.App. 757.

(2) "Ownership is important in connection with other factors in determining liability for transportation charges, but apart from other considerations is not decisive."—American Ry. Express Co v. Mohawk Dairy Co., 144 N E. 721, 724, 250 Mass. 1, 35 A L R. 14.

Ownership beginning and ending during transit is insufficient to fix liability

U S.—Wallingford Bros v. Bush, Kan., 255 F. 949, 167 C C A. 241.

Ark.—Davis v City Fuel Co., 248 S. W. 572, 155 Ark 455.

82. N C—Southern Ry. Co. v. W. A. Simpkins Co., 100 S E. 418, 178 N. C. 273.

83. Iowa—Des Moines & Central Iowa R. R. v American Employers Ins. Co., 276 N.W. 56.

84. N.Y.—Erie R Co. v. McDonald, 249 N.Y S. 323, 140 Misc 208.

85. Ky—Louisville & N. R. Co v. Perry Ice & Bottling Co., 10 S W. 2d 1091, 226 Ky 286.

Purchaser's debt to consignee does not entitle the carrier to recover unpaid freight charges from the purchaser where the carrier has not attached or otherwise subjected the fund—Louisville & N. R Co. v Perry Ice & Bottling Co., 10 S W 2d 1091, 226 Ky 286.

86. Tex—Texarkana & Ft S. Ry Co v. Brewer, Civ.App., 19 S W 2d 334.

87. U S—New York Cent. R. Co v. Union Oil Co of Pennsylvania, D C Pa., 53 F.2d 1066—Wabash Ry Co. v. Horn, C C A.Ill., 40 F 2d 905.

Ark.—Missouri Pac R Co v Pfeiffer Stone Co., 266 S W. 82, 166 Ark 226—Davis v. City Fuel Co., 248 S W. 572, 157 Ark 455.

Mass.—Boston & M. R R. v. National Orange Co., 122 N E. 313, 232 Mass 351.

Minn.—Chicago, M & St P. Ry. Co. v Greenberg, 166 N W. 1073, 139 Minn 428, L R.A 1918D 158, Ann Cas 1918E 456.

Or.—Southern Pac Co v. Oregon Growers' Co-op Ass'n, 272 P 281, 127 Or 364

Pa.—Philadelphia & R. R. Co. v. International Motor Co., 84 Pa.Super 582.

10 C J. p 447 note 38.

Corpus Juris cited in Chicago, M. & St P. Ry. Co. v. Greenberg, 166 N W. 1073, 1074, 139 Minn. 428, L.R.A 1918D 158, Ann.Cas.1918E 456.

Consignor held owner as to liability

As regards his liability for freight under a bill of lading providing that the owner or consignee shall pay the freight, a shipper who is both the consignor and consignee is the owner of the goods until a draft accompanying the bill of lading is paid, or the goods are delivered to the indorsee of such bill

U S.—Atchison, T. & S. F. Ry. Co. v Hunt Bros. Fruit Co., D.C Mo., 34 F.2d 582.

Or.—Southern Pac. Co. v. Oregon Growers' Co-op. Ass'n, 272 P. 281, 127 Or. 364.

88. U.S.—Central Warehouse Co. v. Chicago, R. I & P. Ry. Co., C.C A Minn., 20 F 2d 828, affirming, D. C., Chicago, R. I. & P. Ry. Co. v. Central Warehouse Co., 14 F 2d 123—Dare v New York Cent. R. Co., C C A.N.Y., 20 F.2d 379.

Kan.—Case v Union Pac. R. Co., 241 P. 693, 119 Kan. 706

N J.—Pennsylvania R Co v. Townsend, 100 A. 855, 90 N.J.Law 75

Pa.—Pennsylvania R. Co v De Marto, 90 Pa.Super. 216—Pennsylvania R. Co. v A. J Cameron & Co., 78 Pa Super 497.

10 C J. p 447 note 39.

Assignee for security

(1) The fact that an assignee accepting delivery of the goods holds the bill of lading only as security does not prevent him from becoming subject to liability.—Dare v. New York Cent R. Co., C C.A.N.Y., 20 F. 2d 379.

(2) However, an assignee of the bill of lading for security only is not liable for freight beyond the value of the goods—Swett v. Black, D. C Mass., 23 F Cas No.13,691, 2 Sprague 49.

Rate specified in bill of lading

The assignee of bills of lading upon which are indorsed conditions as to the rate of exchange applicable to the payment of ocean freight charges obligates himself to pay the charges at the rates indicated where he uses the bills to obtain the goods. —Pennsylvania R Co v. A J. Cameron & Co., 78 Pa.Super. 497.

89. Mass.—New York, etc., R Co. v. Sampson, 110 N.E. 964, 222 Mass. 311.

90. Ill.—Atchison, T & S. F. R. Co. v. Kirby, 280 Ill App 481.

Kan.—Farrar v. Perkins, 251 P. 440, 122 Kan. 141

91. U.S.—Dare v New York Cent. R. Co., C.C A.N.Y., 20 F.2d 379.

92. Ga.—Southern Cotton Oil Co. v. Southern Ry. Co., 95 S.E 251, 147 Ga. 646, affirming Southern Ry. Co. v. Southern Cotton Oil Co., 91 S.E.

liability and right of reimbursement as between the several parties who may be liable is dependent upon the contract or relationship existing between them.[93] An agent of the carrier who, to save his job, has paid the charges on a shipment taken by another without payment thereof is entitled to collect the charges from the recipient of the goods, irrespective of an illegal compromise, or the fact that the shipper of the goods had contracted to pay the charges.[94]

Agents and factors. A person who has taken some step or done some act which would otherwise subject him to liability may be excused therefrom by reason of the fact that he was acting merely as an agent or factor if such fact was properly made known to the carrier with whom the dealings were had.[95] If, however, the carrier had no knowledge or notice of the agency an agent or factor may become liable for the charges in the same manner and to the same extent as if he had been acting on his own behalf,[96] and even where the agency is known an agent or factor may render himself liable by an express undertaking.[97]

b. Consignor

Unless a contrary intention or contract is sufficiently shown or established, the consignor of a freight shipment is ordinarily primarily liable for the charges thereon.

The consignor, by or for whom the shipment is made, is ordinarily regarded as the party primarily liable for the payment of the full amount of the freight charges, whether or not he is the owner of the goods.[98] While a consignor's liability may arise

876, 19 Ga.App. 453—Central of Georgia Ry Co v Brown, 155 S.E. 787, 42 Ga.App. 278—Western & A. R. R. v. Legg, 123 S.E. 31, 32 Ga. App. 368—Seaboard Air Line Ry Co. v. Montgomery, 112 S.E. 652, 28 Ga.App. 639.

Miss.—Gulf, M. & N. R Co v Riverside Brick & Mfg Co., 107 So. 193, 141 Miss. 505.

N.Y.—New York Cent R Co. v. Federal Sugar Refining Co., 139 N.E. 234, 235 N.Y. 182, 26 A.L.R. 1312, reversing judgment 194 N.Y.S. 467, 201 App.Div. 467.

N.C.—Southern Ry. Co. v. Latham, 97 S.E. 234, 176 N.C. 417.

Pa.—Central Railroad Co of N. J. v. Vulcanite Portland Cement Co., 29 Pa.Dist. 20.

Wis.—Great Northern Ry. Co. v. Hocking Valley Fire Clay Co., 166 N.W. 41, 166 Wis. 465.

93. Ala.—Robert S. Armstrong & Bros Co v. Rowland, 118 So. 502, 22 Ala.App. 613.

La.—Hardin v Federal Rice Mill Co., 113 So. 760, 164 La. 49.

Mo.—State ex rel. City of St. Charles v. Becker, 83 S.W.2d 583, 336 Mo. 1187, modifying City of St. Charles v. Wabash Ry. Co., App., 65 S.W.2d 655.

94. Kan.—Farrar v. Perkins, 251 P. 440, 122 Kan. 141.

95. Ga.—Baltimore & O. R. Co v. Johnson-Battle Lumber Co., 141 S.E. 678, 37 Ga.App. 729—Smith Bros. Co. v Charleston & W C Ry Co., 137 S.E. 115, 36 Ga.App. 480.

La.—Davis v. Ducote, App., 145 So. 717.

N.Y.—New York Cent. R Co v. Sharp, 213 N.Y.S. 867, 215 App.Div. 794, affirming 206 N.Y.S. 755, 124 Misc.R. 265.

96. N.Y.—Erie R Co v. H. Rosenstein, Inc., 227 N.Y.S. 99, 222 App.Div. 509, affirmed 164 N.E. 37, 249 N.Y. 241, 61 A.L.R. 415—Central R of New Jersey v. Williams, 180 N.Y.S. 925, 111 Misc. 730.

Ohio—C. L. Hils Co. v. Louisville & N. R. Co., 162 N.E. 761, 28 Ohio App. 459.

Pa.—Pennsylvania R. Co. v. Rothstein, 176 A. 861, 116 Pa.Super. 156.

Diversion order itself must disclose the agency.—Pennsylvania R. Co. v. Rothstein, 176 A. 861, 116 Pa. Super. 156.

97. Cal.—New York Cent. R. Co v. Frank H. Buck & Co., 41 P.2d 547, 2 Cal.2d 384.

Shipper's agency, although known to the carrier, is not a defense to an action by the carrier against the shipper for freight charges where the shipper has expressly contracted, as consignor or consignee, or both, to pay such charges.—New York Cent. R. Co. v. Frank H. Buck Co., 41 P. 2d 547, 2 Cal.2d 384.

98. U.S.—Louisville & N. R. Co. v. Central Iron & Coal Co., Ala., 44 S.Ct. 441, 265 U.S. 59, 68 L.Ed. 900, affirming, C.C.A., 284 F. 250—New York Cent. R. Co. v. Union Oil Co. of Pennsylvania, D.C.Pa., 53 F.2d 1066—Atchison, T. & S. F. Ry. Co. v. Hunt Bros. Fruit Co., D.C.Mo., 34 F.2d 582—Maryland Casualty Co. v. Ohio River Gravel Co., C.C.A.W.Va., 20 F.2d 514, rehearing denied 21 F.2d 744, certiorari denied 48 S.Ct. 157, 275 U.S. 570, 72 L.Ed. 431—Gulf, C. & S. F. Ry. Co. v. Beatty Brokerage Co., D.C.La., 13 F.2d 950, affirmed Beatty Brokerage Co. v. Gulf, C. & S. F. Ry. Co., C.C.A., 17 F.2d 480—Missouri-Pacific R. Co. v. Sorrell, D.C.Tex., 21 F.Supp. 886—Wells Fargo & Co. v. Cunes, D.C. N.Y., 241 F. 727.

Ala.—Moss Lumber Co. v. Michigan Cent. R. Co., 123 So. 90, 219 Ala. 593, reversing 123 So. 89, 23 Ala. App. 199.

Ark.—Missouri Pac. R. Co. v. Pfeiffer Stone Co., 266 S.W. 82, 166 Ark. 226.

Cal.—New York Cent. R. Co. v. Frank H. Buck Co., 41 P.2d 547, 2 Cal.2d 384—Southern California Commercial Co. v. Alberti, 207 P. 1023, 58 Cal.App. 84.

Ga.—Southern Cotton Oil Co. v. Southern Ry. Co., 95 S.E. 251, 147 Ga. 646, affirming Southern Ry. Co. v. Southern Cotton Oil Co., 91 S.E. 876, 19 Ga.App. 453—Central of Georgia Ry. Co. v. Brown, 155 S.E. 787, 42 Ga.App. 278—Western & A. R. R. v. Legg, 123 S.E. 31, 32 Ga.App. 368—Seaboard Air Line Ry. Co. v. Montgomery, 112 S.E. 652, 28 Ga.App. 639.

Ill.—New York Cent. R. Co. v. Philadelphia & Reading Coal & Iron Co., 121 N.E. 581, 286 Ill. 267, affirming 210 Ill.App. 267—Erie Railroad Co. v. Nieman Bros., 281 Ill.App. 45—New York Cent. R. Co. v. Lehigh Stone Co., 220 Ill.App. 563.

Kan.—Atchison, T. & S. F. Ry. Co. v. F. H. Stannard & Co., 162 P. 1176, 99 Kan. 720, L.R.A.1917C 1124.

La.—Davis v. Ducote, App., 145 So. 717.

Me.—Northern Pac. Ry. Co. v. Pleasant River Granite Co., 102 A. 298, 116 Me. 496.

Mass.—Pennsylvania R. Co. v. Lord & Spencer, 3 N.E.2d 231, 105 A.L.R. 1211—American Ry. Express Co. v. Mohawk Dairy Co., 144 N.E. 721, 250 Mass. 1, 35 A.L.R. 14—Boston & M. R. R. v. National Orange Co., 122 N.E. 313, 232 Mass. 351.

Mich.—Pennsylvania R. Co. v. Marcelletti, 240 N.W. 4, 256 Mich. 411, 78 A.L.R. 923.

Minn.—Chicago Junction Ry. Co. v. Duluth Log Co., 202 N.W. 24, 161 Minn. 466—Chicago, M. & St. P. Ry. Co. v. Greenberg, 166 N.W. 1073, 139 Minn. 428, L.R.A.1918D 158, Ann.Cas.1918E 456.

by reason of express agreement,[99] it is ordinarily predicated on the fact that, in the absence of circumstances to establish the contrary, the consignor by placing, or having the goods placed, in the hands of the carrier for the purpose of being transported thereby impliedly contracts to pay for such service.[1] As the liability of the consignor thus becomes fixed upon the acceptance of the goods for shipment, the enforcement of his liability is not conditional upon a delivery of the goods to the consignee,[2] or a prior suit against him.[3] However, the consignor is not liable for storage charges incurred at the point of destination by agreement between the carrier and the owner of the goods.[4]

Although there are a few cases which appear to have reached a contrary conclusion, on the ground that under the Interstate Commerce Act and similar statutes the mere fact of delivery of goods for shipment imports an absolute promise to pay the charges as a matter of law so that an agreement to the

Miss.—Gulf, M. & N. R. Co. v. Riverside Brick & Mfg. Co., 107 So. 193, 141 Miss. 505.

Mo.—Chicago, B. & Q. R. Co. v. Evans, 288 S.W. 73, 221 Mo.App. 757—Chicago & E. R. Co. v. Lightfoot, 232 S.W. 176, 206 Mo.App. 436—Yazoo & M. V. R. Co. v. Picher Lead Co., App., 190 S.W. 387.

Neb.—Chicago & N. W. Ry. Co. v. Queenan, 167 N.W. 410, 102 Neb. 391, L.R.A.1918D 946.

N.H.—New York, N. H. & H. R. R. v. Tonella, 111 A. 341, 79 N.H. 464.

N.J.—New York Cent. R. Co. v. Stanziale, 143 A. 834, 6 N.J.Misc. 1116, reversed on other grounds 147 A. 457, 105 N.J.Law 593—Pennsylvania R. Co. v. Townsend, 100 A. 855, 90 N.J.Law 75—New York Cent. R. Co. v. Singer Mfg. Co., 131 A. 111, 3 N.J.Misc. 1137.

N.Y.—Grand Trunk Western R. Co. v. Makris, 255 N.Y.S. 443, 142 Misc. 807—Central of Georgia Ry. Co. v. Lovell, 180 N.Y.S. 922, 111 Misc. 735—Central Railroad of New Jersey v. Berry, 165 N.Y.S. 1041, 99 Misc. 560.

N.C.—Southern Ry. Co. v. Latham, 97 S.E. 234, 176 N.C. 417.

Ohio.—Cleveland, C., C. & St. L. Ry. Co. v. McKenzie Lumber Co., 147 N.E. 8, 112 Ohio St. 80—C. L. Hils Co. v. Louisville & N. R. Co., 162 N.E. 761, 28 Ohio App. 459.

Or.—Southern Pac. Co. v. Oregon Growers' Co-op. Ass'n, 272 P. 281, 127 Or. 364.

Pa.—Delaware, L. & W. R. Co. v. Ludwig, 94 Pa.Super. 289—Lapat Co. v. Northern Metal Co., 92 Pa.Super. 63—Director General of Railroads v. Birdsboro Stone Co., 86 Pa.Super. 587—Chicago, B. & Q. R. R. v. Berry's Sons, 86 Pa.Super. 1—Baltimore & O. R. Co. v. L. B. Foster Co., 81 Pa.Super. 304—Pennsylvania R. Co. v. General Crushed Stone Co., 76 Pa.Super. 186—Pennsylvania R. Co. v. Whitney & Kemmerer, 73 Pa.Super. 588—Beecher v. Reading Co., 22 Pa.Dist. & Co. 364—Central R. Co. of New Jersey v. Parry, 18 Pa.Dist. & Co. 184—Chicago Great Western R. R. Co. v. Federal Stock Food Co., 8 Pa.Dist. & Co. 217—Erie R. Co. v. Kreitner Bros., Inc., 3 Pa.Dist. & Co. 251—Central Railroad Co. of N. J. v. Vulcanite Portland Cement Co., 29 Pa.Dist. 20.

S.C.—Davis v. Allen, 117 S.E. 547, 124 S.C. 297.

Tenn.—Cleveland, C., C. & St. L. Ry. Co. v. Southern Coal & Coke Co., 248 S.W. 297, 147 Tenn. 433—Cleveland, C., C. & St. L. Ry. Co. v. Hazard Blue Grass Coal Co., 10 Tenn.App. 590.

Tex.—Miller & Vidor Lumber Co. v. Atchison, T. & S. F. Ry. Co., Civ.App., 192 S.W. 354.

Vt.—Montpelier & W. R. R. v. Charles Bianchi & Sons, 113 A. 534, 95 Vt. 81.

W.Va.—Chesapeake & O. Ry. Co. v. Glogora Coal Co., 169 S.E. 471, 113 W.Va. 796, certiorari denied Glogora Coal Co. v. Chesapeake & O. Ry. Co., 54 S.Ct. 73, 290 U.S. 658, 78 L.Ed. 569.

Wis.—Chicago, I. & L. Ry. Co. v. Peterson, 169 N.W. 558, 168 Wis. 193—Great Northern Ry. Co. v. Hocking Valley Fire Clay Co., 166 N.W. 41, 166 Wis. 465.

10 C.J. p. 445 note 15.

The corresponding text statement in Corpus Juris is cited with approval.

Minn.—Chicago Junction Ry. Co. v. Duluth Log Co., 202 N.W. 24, 25, 161 Minn. 466—Chicago, M. & St. P. Ry. Co. v. Greenberg, 166 N.W. 1073, 139 Minn. 428, L.R.A.1918D 158, Ann.Cas.1918E 456.

Tenn.—Cleveland, C., C. & St. L. Ry. Co. v. Southern Coal & Coke Co., 248 S.W. 297, 300, 147 Tenn. 433.

Vt.—Montpelier & W. R. R. v. Charles Bianchi & Sons, 113 A. 534, 535, 95 Vt. 81.

Reason for rule as stated in Corpus Juris is quoted in Cleveland, C., C. & St. L. Ry. Co. v. Southern Coal & Coke Co., 248 S.W. 297, 300, 147 Tenn. 433.

Bond for prepayment

The consignor cannot escape liability where he has executed a surety bond for prepayment of the freight charges.—Southern Pac. Co. v. Oregon Growers' Co-op. Ass'n, 272 P. 281, 127 Or. 364.

99. U.S.—Louisville & N. R. Co. v. Central Iron & Coal Co., Ala., 44 S.Ct. 441, 265 U.S. 59, 68 L.Ed. 900, affirming, C.C.A., 284 F. 250.

Pa.—Chicago & N. R. Co. v. Picard, 98 Pa.Super. 134—Pennsylvania R. Co. v. General Crushed Stone Co., 76 Pa.Super. 186.

Storage charges

Consignor of interstate shipment held liable to delivering carrier for storage charges on goods not called for after arrival at destination, where bill of lading provided consignor should be liable for all lawful charges.—Grand Trunk Western R. Co. v. Makris, 255 N.Y.S. 443, 142 Misc. 807.

1. U.S.—Louisville & N. R. Co. v. Central Iron & Coal Co., Ala., 44 S.Ct. 441, 265 U.S. 59, 68 L.Ed. 900, affirming, C.C.A., 284 F. 250—Wells Fargo & Co. v. Cuneo, D.C.N.Y., 241 F. 727.

Ala.—Moss Lumber Co. v. Michigan Cent. R. Co., 123 So. 90, 219 Ala. 593, reversing 123 So. 89, 23 Ala.App. 199.

Cal.—New York Cent. R. Co. v. Frank H. Buck Co., 41 P.2d 547, 2 Cal.2d 384.

Me.—Northern Pac. Ry. Co. v. Pleasant River Granite Co., 102 A. 298, 116 Me. 496.

Mass.—Pennsylvania R. Co. v. Lord & Spencer, 3 N.E.2d 231, 105 A.L.R. 1211.

Neb.—Chicago & N. W. Ry. Co. v. Queenan, 167 N.W. 410, 102 Neb. 391, L.R.A.1918D 946.

N.J.—New York Cent. R. Co. v. Singer Mfg. Co., 131 A. 111, 3 N.J.Misc. 1137.

Pa.—Director General of Railroads v. Birdsboro Stone Co., 86 Pa.Super. 587—Pennsylvania R. Co. v. General Crushed Stone Co., 76 Pa.Super. 186.

S.C.—Davis v. Allen, 117 S.E. 547, 124 S.C. 297.

Wis.—Great Northern Ry. Co. v. Hocking Valley Fire Clay Co., 166 N.W. 41, 166 Wis. 465.

10 C.J. p. 445 note 16.

2. Ill.—New York Cent. R. Co. v. Lehigh Stone Co., 220 Ill.App. 563.

3. U.S.—Wells Fargo & Co. v. Cuneo, D.C.N.Y., 241 F. 727.

Tenn.—Cleveland, C., C. & St. L. Ry. Co. v. Hazard Blue Grass Coal Co., 10 Tenn.App. 590.

4. U.S.—Davis v. Adams, C.C.A.Cal., 293 F. 890.

contrary is void,[5] it now seems to be well settled that, notwithstanding such statutes, the consignor can avoid or rebut the implication or presumption of his assumption of primary liability for the charges by showing some special circumstance or contract to establish that the parties intended that he should not assume any liability whatsoever,[6] or that he should assume only a secondary liability.[7] However, the fact that the consignor was not the owner of the goods and acted solely for another in making the shipment does not prevent him from incurring liability where such fact was not disclosed to the carrier at the time of the shipment;[8] and stipulations or directions for the collection of the freight from, or payment by, the consignee are usually held not such special contracts as will defeat the liability

5. U.S.—Wells Fargo & Co. v. Cuneo, D.C.N.Y., 241 F. 727.
Tenn.—Cleveland, C., C. & St. L. Ry. Co. v. Southern Coal & Coke Co., 248 S.W. 297, 147 Tenn. 433.

Tariff requiring prepayment of the freight charges renders the consignor primarily liable for the freight irrespective of any agreement to the contrary.—Central Railroad Co. of New Jersey v. Vulcanite Portland Cement Co., 29 Pa.Dist. 20.

6. U.S.—Louisville & N. R. Co. v. Central Iron & Coal Co., Ala., 44 S.Ct. 441, 265 U.S. 59, 68 L.Ed. 900, affirming, C.C.A., 284 F. 250—Houston & T. C. R. Co. v. Lee County Produce Co., D.C.Tex., 14 F.2d 145—St. Louis-San Francisco Ry. Co. v. Republic Box Co., D.C.Tex., 12 F.2d 441—Lowden v. Iroquois Coal Co., D.C.Ill., 18 F.Supp. 923.
Ala.—Moss Lumber Co. v. Michigan Cent. R. Co., 123 So. 90, 219 Ala. 593, reversing 123 So. 89, 23 Ala. App. 199.
Cal.—New York Cent. R. Co. v. Frank H. Buck Co., 41 P.2d 547, 2 Cal.2d 384.
Mass.—Pennsylvania R. Co. v. Lord & Spencer, 3 N.E.2d 231, 105 A.L.R. 1211.
Mich.—Michigan Cent. R. Co. v. Saginaw Milling Co., 262 N.W. 425, 272 Mich. 625—Pennsylvania R. Co. v. Marcelletti, 240 N.W. 4, 256 Mich. 411, 78 A.L.R. 923—King v. Van Slack, 159 N.W. 157, 193 Mich. 105.
Miss.—Gulf, M. & N. R. Co. v. Riverside Brick & Mfg. Co., 107 So. 193, 141 Miss. 505.
Tenn.—Davis v. Hunt, Washington & Smith, 6 Tenn.App. 292.
Tex.—Galveston, H. & S. A. Ry. Co. v. American Salvage & Supply Co., Civ.App., 15 S.W.2d 25.
10 C.J. p. 445 note 24.

"Ordinarily, the person from whom the goods are received for shipment assumes the obligation to pay the freight charges, and his obligation is ordinarily a primary one. This is true, even where the bill of lading contains, as here, a provision imposing liability upon the consignee, for the shipper is presumably the consignor, the transportation ordered by him is presumably on his own behalf, and a promise by him to pay therefor is inferred (that is, implied in fact), as a promise to pay for goods is implied, when one orders them from a dealer. But this inference may be rebutted, as in the case of other contracts. It may be shown, by the bill of lading or otherwise, that the shipper of the goods was not acting on his own behalf, that this fact was known by the carrier; that the parties intended not only that the consignee should assume an obligation to pay the freight charges, but that the shipper should not assume any liability whatsoever, therefor, or that he should assume only a secondary liability."—Louisville & N. R. Co. v. Central Iron & Coal Co., Ala., 44 S.Ct. 441, 443, 265 U.S. 59, 68 L.Ed. 900, affirming, C.C.A., 284 F. 250.

Agreement of initial carrier

In action by delivering carrier against consignor for balance of freight due, where agent of initial carrier agreed to look to consignee alone to pay freight charges agent of initial carrier was agent of delivering carrier under through bill of lading issued by him under specific provisions of statute.—Galveston, H. & S. A. Ry. Co. v. American Salvage & Supply Co., Tex.Civ.App., 15 S.W.2d 25.

Carrier's promise to pay

A shipper is not liable for express charges where he shipped goods at the order of the carrier and in reliance on the carrier's promise to pay the charges.—Frank Livery & Undertaking Co. v. American Ry. Express Co., Mo.App., 247 S.W. 1031.

Provision of uniform bill of lading

(1) The consignor may avoid liability by signing a provision of the uniform bill of lading relieving him of liability where the carrier delivers the shipment without demanding the charges from the person to whom delivery is made.
U.S.—Lowden v. Iroquois Coal Co., D.C.Ill., 18 F.Supp. 923.
Ill.—Chesapeake & Ohio Ry. Co. v. Southern Coal, Coke & Mining Co., 254 Ill.App. 238, certiorari denied 51 S.Ct. 34, 282 U.S. 860, 75 L.Ed. 761.
Mich.—Michigan Cent. R. Co. v. Saginaw Milling Co., 262 N.W. 425, 272 Mich. 625.

(2) This has been held to be so although the receipts issued by the initial carrier did not contain such a provision, but stated merely that the shipment was subject to the terms of the uniform bill of lading.—Lowden v. Iroquois Coal Co., supra.

(3) However, a nonrecourse provision will not relieve the consignor from liability where he fails to sign a statement which the bill of lading requires him to sign in order to make the nonrecourse provision operative.
Mich.—Pennsylvania R. Co. v. Marcelletti, 240 N.W. 4, 256 Mich. 411, 78 A.L.R. 923.
N.Y.—Grand Trunk Western R. Co. v. Makris, 255 N.Y.S. 443, 142 Misc. 807.
W.Va.—Western Maryland Ry. Co. v. Cross, 123 S.E. 572, 96 W.Va. 666.

Regulation permitting credit

A regulation of the interstate commerce commission permitting carriers to extend limited credit to the consignee does not throw the liability for the charges back on the consignor when the consignee has failed to pay.—Lowden v. Iroquois Coal Co., D.C.Ill., 18 F.Supp. 923.

7. U.S.—Louisville & N. R. Co. v. Central Iron & Coal Co., Ala., 44 S.Ct. 441, 265 U.S. 59, 68 L.Ed. 900, affirming, C.C.A., 284 F. 250—Atchison, T. & S. F. Ry. Co. v. Hunt Bros. Fruit Co., D.C.Mo., 34 F.2d 582—St. Louis-San Francisco Ry. Co. v. Republic Box Co., D.C.Tex., 12 F.2d 441—Lowden v. Iroquois Coal Co., D.C.Ill., 18 F.Supp. 923.
Ala.—Moss Lumber Co. v. Michigan Cent. R. Co., 123 So. 90, 219 Ala. 593, reversing 123 So. 89, 23 Ala. App. 199.
Cal.—New York Cent. R. Co. v. Frank H. Buck Co., 41 P.2d 547, 2 Cal.2d 384.
Mass.—Pennsylvania R. Co. v. Lord & Spencer, 3 N.E.2d 231, 105 A.L.R. 1211.
Pa.—Delaware, L. & W. R. Co. v. Ludwig, 94 Pa.Super. 289.

8. Ala.—Moss Lumber Co. v. Michigan Cent. R. Co., 123 So. 90, 219 Ala. 593, reversing 123 So. 89, 23 Ala.App. 199.
Pa.—Director General of Railroads v. Birdsboro Stone Co., 86 Pa.Super. 587.
Vt.—Montpelier & W. R. R. R. v. Charles Bianchi & Sons, 113 A. 534, 95 Vt. 81.
Wis.—Great Northern Ry. Co. v. Hocking Valley Fire Clay Co., 166 N.W. 41, 166 Wis. 465.
10 C.J. p. 445 note 15 [b].

of the consignor.[9] Further, many statements are to be found to the effect that the only way a consignor can be relieved from his primary liability is by full payment of the charges by himself or some other person who is legally liable therefor.[10] At any rate the liability of the consignor has been held not avoided or affected by reason of the fact that the consignee or another became liable for the charges by acceptance of the shipment or in some other manner,[11] that the carrier waived its lien

9. U.S.—Louisville & N. R. Co v. Central Iron & Coal Co, Ala, 44 S Ct 441, 265 U S 59, 68 L Ed 900, affirming, C C A, 284 F. 250—New York Cent R Co. v. Union Oil Co of Pennsylvania, D C Pa, 53 F 2d 1066—Atchison, T & S F. Ry. Co v. Hunt Bros. Fruit Co., D.C Mo., 34 F 2d 582.

Ala.—Moss Lumber Co. v Michigan Cent. R. Co, 123 So. 90, 219 Ala. 593, reversing 123 So. 89, 23 Ala. App 199.

Ark.—Missouri Pac R. Co v. Pfeiffer Stone Co., 266 S.W. 82, 166 Ark. 226

Cal.—New York Cent R. Co. v. Frank H Buck Co, 41 P.2d 547, 2 Cal.2d 384.

Ga.—Central of Georgia Ry. Co. v. Brown, 155 S E. 787, 42 Ga App 278—Seaboard Air Line Ry. Co. v. Montgomery, 112 S E. 652, 28 Ga. App 639—Southern Ry Co v. Southern Cotton Oil Co., 91 S E. 876, 19 Ga App 453, affirmed Southern Cotton Oil Co. v. Southern R. Co, 95 S E 251, 147 Ga. 646

Ill.—Erie Railroad Co. v. Neiman Bros, 281 Ill App. 45

Me—Northern Pac. Ry. Co. v. Pleasant River Granite Co, 102 A 298, 116 Me. 496.

Mass.—Pennsylvania R Co. v. Lord & Spencer, 3 N.E 2d 231, 105 A.L R 1211.

Mich—Pennsylvania R Co v. Marcelletti, 240 N W. 4, 256 Mich. 411, 78 A.L R. 923

Minn—Chicago Junction Ry. Co. v. Duluth Log Co, 202 N.W 24, 161 Minn. 466

Mo.—Chicago & E R Co v. Lightfoot, 232 S.W. 176, 206 Mo App 436—Yazoo & M. V. R Co. v Picher Lead Co., App, 190 S W. 387.

Neb.—Chicago & N. W. Ry. Co. v. Queenan, 167 N W. 410, 102 Neb 391, L R A 1918D 946

N H.—New York, N H & H R. R. v. Tonella, 111 A. 341, 79 N H 464

N J.—Pennsylvania R. Co. v. Townsend, 100 A. 855, 90 N J Law 75.

N.Y.—Central of Georgia Ry. Co. v. Lovell, 180 N.Y.S. 922, 111 Misc. 735.

N.C.—Davis v. Ford, 137 S.E. 328, 193 N C. 444

Or.—Southern Pac. Co. v Oregon Growers' Co-op. Ass'n, 272 P. 281, 127 Or 364.

Pa.—Delaware, L. & W. R. Co. v. Ludwig, 94 Pa Super. 289—Director General of Railroads v. Birdsboro Stone Co, 86 Pa.Super. 587—Baltimore & O R. Co. v. L. B. Foster Co., 81 Pa.Super. 304—Pennsylvania R Co v. Whitney & Kemmerer, 73 Pa Super 588—Beecher v. Reading Company, 22 Pa Dist. & Co 364—Central R. Co. of New Jersey v. Parry, 18 Pa.Dist. & Co. 184—Central Railroad Co. of N J v Vulcanite Portland Cement Co., 29 Pa. Dist. 20

Tenn—Cleveland, C, C. & St. L Ry. Co v Southern Coal & Coke Co., 248 S W 297, 147 Tenn. 433

Tex—Miller & Vidor Lumber Co. v Atchison, T. & S. F Ry. Co., Civ. App, 192 S W. 354

Vt—Montpelier & W. R. R. R v. Charles Bianchi & Sons, 113 A. 534, 95 Vt. 81

W Va.—Chesapeake & O Ry. Co. v Glogora Coal Co, 169 S.E. 471, 113 W Va 796, certiorari denied Glogora Coal Co. v Chesapeake & O Ry. Co, 54 S Ct. 73, 290 U.S. 658, 78 L Ed 569—Western Maryland Ry. Co v. Cross, 123 S E 572, 96 W Va 666.

Wis.—Chicago, I. & L Ry. Co v. Peterson, 169 N.W 558, 168 Wis 198—Great Northern Ry. Co v. Hocking Valley Fire Clay Co., 166 N W. 41, 166 Wis. 465.

10 C J. p 445 note 23.

Corpus Juris quoted

Tenn.—Cleveland, C, C. & St. L Ry Co. v Southern Coal & Coke Co, 248 S W 297, 300, 147 Tenn. 433.

Reason for rule

"Stipulations in a bill of lading that the goods are to be delivered to the consignee, 'he paying freight,' or any similar provision, are for the benefit of the carrier."

Ark.—Missouri Pac. R Co. v. Pfeiffer Stone Co., 266 S.W 82, 83, 166 Ark 226

N C—Davis v Ford, 137 S E. 328, 193 N C 444.

Carrier's direction to own agents to collect charges on shipments before delivery does not affect the consignor's primary liability for charges, such direction being for the benefit of the carrier, not of the consignor—Pennsylvania R Co. v. General Crushed Stone Co, 76 Pa Super. 186.

Custom requiring payment by consignee

The carrier's knowledge of a custom whereby the consignee was expected to pay the charges and deduct them from the purchase price due the consignor has been held not to preclude liability on the part of the consignor

Ala—Moss Lumber Co. v. Michigan Cent. R. Co., 123 So. 90, 219 Ala 593, reversing 123 So. 89, 23 Ala. App. 199.

Cal—New York Cent R Co v. Frank H Buck Co, 41 P.2d 547, 2 Cal.2d 384.

10. Cal.—Southern California Commercial Co. v Alberti, 207 P. 1023, 58 Cal App. 84.

Ill—New York Cent R. Co. v. Philadelphia & Reading Coal & Iron Co., 121 N.E. 581, 286 Ill. 267, affirming 210 Ill.App. 267.

Tenn—Cleveland, C, C. & St L Ry. Co v. Southern Coal & Coke Co, 248 S.W. 297, 147 Tenn. 433—Cleveland, C., C & St. L Ry. Co. v. Hazard Blue Grass Coal Co., 10 Tenn App 590.

10 C J. p 445 note 17.

Corpus Juris is cited as authority for the text rule in Cleveland, C., C. & St. L Ry. Co v. Southern Coal & Coke Co, 248 S.W. 297, 300, 147 Tenn. 433.

11. Pa—Pennsylvania R. Co. v. General Crushed Stone Co, 76 Pa Super. 186—Pennsylvania R Co v. Whitney & Kemmerer, 73 Pa.Super. 588.

Vt—Montpelier & W R. R R v. Charles Bianchi & Sons, 113 A. 534, 95 Vt 81.

Wis.—Great Northern Ry. Co. v. Hocking Valley Fire Clay Co., 166 N W 41, 166 Wis. 465

10 C J p 445 notes 18–21.

Acceptance of shipment by consignee

U S—New York Cent. R. Co. v. Union Oil Co. of Pennsylvania, D.C. Pa., 53 F.2d 1066—Atchison, T. & S F. Ry Co. v. Hunt Bros. Fruit Co., D C Mo, 34 F 2d 582.

Ala—Moss Lumber Co. v. Michigan Cent R. Co, 123 So. 90, 219 Ala. 593, reversing 123 So. 89, 23 Ala. App 199.

Ark—Missouri Pac R. Co v. Pfeiffer Stone Co., 266 S.W 82, 166 Ark. 226

Cal.—New York Cent R Co v. Frank H Buck Co., 41 P 2d 547, 2 Cal.2d 384.

N.J—New York Cent. R Co. v. Singer Mfg Co., 131 A 111, 3 N J. Misc. 1137

10 C J p 445 notes 15 [a] (2), 18.

Reconsignment of shipment by consignee—Cleveland, C., C. & St. L. Ry Co. v. Southern Coal & Coke Co., 248 S.W. 297, 147 Tenn. 433—10 C J. p 445 note 21.

Reason for rule

The two contracts are independent, and not inconsistent one with the other.

U.S.—Atchison, T. & S. F. Ry Co. v. Hunt Bros. Fruit Co., D.C.Mo., 34 F. 2d 582.

by delivering the goods to the consignee;[12] that the carrier permitted an inspection of the goods contrary to the consignor's instructions;[13] that the carrier attempted to collect the charges from the consignee,[4] or failed to notify the consignor that the consignee or the person to whom the shipment was delivered did not accept it[15] or pay the charges;[16] that the consignor transferred or assigned the bill of lading;[17] or that the carrier has delayed seeking to enforce the liability of the consignor until after the consignee has become insolvent so that the former's right of reimbursement against the latter has become worthless.[18] Also, a partial payment of the charges by the consignee has been held not to prevent the carrier's recovery of the balance from the consignor;[19] but other cases have deemed the partial collection from the consignee an election by the carrier to look to the consignee alone so as thereby to waive or defeat the right to recover from the consignor.[20]

Ark.—Missouri Pac. R. Co. v. Pfeiffer Stone Co., 266 S.W. 82, 166 Ark. 226

Me.—Northern Pac. Ry. Co. v. Pleasant River Granite Co., 102 A. 298, 116 Me. 496.

10 C.J. p. 445 note 19

12. Ala.—Moss Lumber Co. v. Michigan Cent. R. Co., 123 So. 90, 219 Ala. 593, reversing 123 So. 89, 23 Ala.App. 199

Ark.—Missouri Pac. R. Co. v. Pfeiffer Stone Co., 266 S.W. 82, 166 Ark. 226.

Ga.—Southern Cotton Oil Co. v. Southern Ry. Co., 95 S.E. 251, 147 Ga. 646, affirming Southern Ry. Co. v. Southern Cotton Oil Co., 91 S.E. 876, 19 Ga.App. 453—Western & A. R. R. v. Legg, 123 S.E. 31, 32 Ga.App. 368—Seaboard Air Line Ry. Co. v. Montgomery, 112 S.E. 652, 28 Ga.App. 639

Minn.—Chicago Junction Ry. Co. v. Duluth Log Co., 202 N.W. 24, 161 Minn. 466.

N.J.—New York Cent. R. Co. v. Singer Mfg. Co., 131 A. 111, 3 N.J. Misc. 1137

N.Y.—New York Cent. R. Co. v. Federal Sugar Refining Co., 139 N.E. 234, 235 N.Y. 182, 26 A.L.R. 1312, reversing 194 N.Y.S. 467, 201 App. Div. 467.

Or.—Southern Pac. Co. v. Oregon Growers' Co-op. Ass'n, 272 P. 281, 127 Or. 364.

Tenn.—Cleveland, C., C. & St. L. Ry. Co. v. Southern Coal & Coke Co., 248 S.W. 297, 147 Tenn. 433.

Wis.—Chicago, I. & L. Ry. Co. v. Peterson, 169 N.W. 558, 168 Wis. 193—Great Northern Ry. Co. v. Hocking Valley Fire Clay Co., 166 N.W. 41, 166 Wis. 465.

10 C.J. p. 445 note 22.

Reason for rule

"The lien of the carrier upon the shipment for its charges is a right which is conferred exclusively upon the carrier and is for the carrier's benefit and not for the protection of the shipper"—Southern Pac. Co. v. Oregon Growers' Co-op. Ass'n, 272 P. 281, 284, 127 Or. 364

Extension of credit to consignee

(1) The consignor has been held not relieved from liability by reason of the fact that the carrier extended credit to the consignee.

Ala.—Moss Lumber Co. v. Michigan Cent. R. Co., 123 So. 90, 219 Ala. 593, reversing 123 So. 89, 23 Ala. App. 199.

Cal.—New York Cent. R. Co. v. Frank H. Buck Co., 41 P.2d 547, 2 Cal.2d 384.

Ga.—Central of Georgia Ry. Co. v. Brown, 155 S.E. 787, 42 Ga.App. 273—Seaboard Air Line Ry. Co. v. Montgomery, 112 S.E. 652, 28 Ga. App. 639.

Ill.—See New York Cent. R. Co. v. Philadelphia & Reading Coal & Iron Co., 210 Ill.App. 267, affirmed 121 N.E. 581, 286 Ill. 267

Mass.—Boston & M. R. R. v. National Orange Co., 122 N.E. 313, 232 Mass. 351.

(2) The carrier's acceptance of the consignee's note for freight charges does not ordinarily relieve the consignor of its primary liability.

Cal.—New York Cent. R. Co. v. Frank H. Buck Co., 41 P.2d 547, 2 Cal.2d 384.

Wis.—Great Northern Ry. Co. v. Hocking Valley Fire Clay Co., 166 N.W. 41, 166 Wis. 465

(3) However, the rule has been said to be otherwise where the carrier accepts the note as payment—Great Northern Ry. Co. v. Hocking Valley Fire Clay Co., supra

Statute prohibiting delivery without collection of all charges does not relieve the consignor of his primary liability

Minn.—Chicago Junction Ry. Co. v. Duluth Log Co., 202 N.W. 24, 161 Minn. 466.

W.Va.—Western Maryland Ry. Co. v. Cross, 123 S.E. 572, 96 W.Va. 666.

13. Cal.—Southern California Commercial Co. v. Alberti, 207 P. 1023, 58 Cal.App. 84.

14. Cal.—New York Cent. R. Co. v. Frank H. Buck Co., 41 P.2d 547, 2 Cal.2d 384.

N.Y.—Central of Georgia Ry. Co. v. Lovell, 180 N.Y.S. 922, 111 Misc. 735

Filing of claim by the carrier against the consignee's bankrupt estate does not relieve the consignor of his primary liability—New York Cent. R. Co. v. Frank H. Buck Co., 41 P.2d 547, 2 Cal.2d 384.

15. U.S.—Gulf, C. & S. F. Ry. Co. v. Beatty Brokerage Co., D.C.La., 13 F.2d 950.

16. U.S.—Gulf, C. & S. F. Ry. Co. v. Beatty Brokerage Co., D.C.La., 13 F.2d 950, affirmed, C.C.A., Beatty Brokerage Co. v. Gulf, C. & S. F. Ry. Co., 17 F.2d 480.

Cal.—New York Cent. R. Co. v. Frank H. Buck Co., 41 P.2d 547, 2 Cal. 2d 384.

Ill.—New York Cent. R. Co. v. Philadelphia & Reading Coal & Iron Co., 121 N.E. 581, 286 Ill. 267, affirming 210 Ill.App. 267.

Kan.—Atchison, T. & S. F. Ry. Co. v. F. H. Stannard & Co., 162 P. 1176, 99 Kan. 720, L.R.A.1917C 1124.

Mass.—Boston & M. R. R. v. National Orange Co., 122 N.E. 313, 232 Mass. 351.

Tenn.—Cleveland, C., C. & St. L. Ry. Co. v. Southern Coal & Coke Co., 248 S.W. 297, 147 Tenn. 433.

17. Cal.—Southern California Commercial Co. v. Alberti, 207 P. 1023, 58 Cal.App. 84.

18. Ala.—Moss Lumber Co. v. Michigan Cent. R. Co., 123 So. 90, 219 Ala. 593, reversing 123 So. 89, 23 Ala.App. 199.

Ga.—Southern Ry. Co. v. Southern Cotton Oil Co., 91 S.E. 876, 19 Ga. App. 453, affirmed Southern Cotton Oil Co. v. Southern R. Co., 95 S.E. 251, 147 Ga. 646.

N.H.—New York, N. H. & H. R. R. v. Tonella, 111 A. 341, 79 N.H. 464.

N.J.—New York Cent. R. Co. v. Singer Mfg. Co., 131 A. 111, 3 N.J.Misc. 1137.

19. Ark.—Missouri Pac. R. Co. v. Pfeiffer Stone Co., 266 S.W. 82, 166 Ark. 226.

N.H.—New York, N. H. & H. R. R. v. Tonella, 111 A. 341, 79 N.H. 464.

N.J.—New York Cent. R. Co. v. Singer Mfg. Co., 131 A. 111, 3 N.J. Misc. 1137

N.Y.—Pennsylvania R. Co. v. E. D. Morse & Son, 284 N.Y.S. 669, 157 Misc. 798.

20. U.S.—St. Louis-San Francisco Ry. Co. v. Republic Box Co., D.C. Tex., 12 F.2d 441—Yazoo & M. V. R. Co. v. Zemurray, La., 238 F. 789, 151 C.C.A. 639.

c. Consignee

The mere relationship of consignee imposes no liability for freight charges; but a consignee may assume such liability by an express or implied contract or undertaking.

In the absence of some sufficient agreement or undertaking, express or implied, the consignee of a shipment is generally not liable for the freight charges thereon,[21] since the mere designation of him as consignee creates no contractual relation or obligation to the carrier.[22] Under the rules stated in subsection a, supra, a consignee may usually render himself liable for the charges by an express contract or undertaking,[23] by reason of the fact that he is the owner of the goods and the shipment is made on his behalf or at his direction,[24] or by an acceptance of the shipment from the carrier,[25] and this latter is true irrespective of wheth-

Ala.—Western Ry. of Alabama v. Collins, 78 So. 833, 201 Ala. 455.

21. Mass.—American Ry. Express Co. v. Mohawk Dairy Co., 144 N.E. 721, 250 Mass. 1, 35 A.L.R. 14.

Mo.—Chicago, B. & Q. R. Co. v. Evans, 288 S.W. 73, 221 Mo.App. 757.

N.J.—Pennsylvania R. Co. v. Townsend, 100 A. 855, 90 N.J.Law 75—New York Cent. R. Co. v. Stanziale, 143 A. 834, 6 N.J.Misc. 1116, reversed on other grounds 147 A. 457, 105 N.J.Law 593.

Pa.—Philadelphia & R. Ry. Co. v. International Motor Co., 84 Pa.Super. 582.

S.C.—Davis v. Allen, 117 S.E. 547, 124 S.C. 297.

10 C.J. p. 446 note 26.

Liability for return charges

(1) Where the parties' understanding and the custom of the trade is that the carrier by whom milk is carried shall return the empty cans free of charge to the point from which the milk is shipped, the consignee of the empty cans is not liable to the carrier for charges to some other point, especially where the consignee refused to accept the cans at such point.—American Ry. Express Co. v. Mohawk Dairy Co., 144 N.E. 721, 250 Mass. 1, 35 A.L.R. 14.

(2) A tag on empty milk cans, describing their former contents, but not mentioning their return, has been held not to constitute a shipping direction rendering the consignee and person named on the tag as owner liable for the return charges.—American Ry. Express Co. v. Mohawk Dairy Co., supra.

(3) Although an express receipt, containing the word "collect" on its face, indicated that shipper and carrier intended consignee should pay transportation charges, consignee was not rendered liable unless he authorized the shipper to act for him.—American Ry. Express Co. v. Mohawk Dairy Co., supra.

Shipment f. o. b. seller's station does not establish agreement rendering consignee liable to carrier for freightage.—Chicago, B. & Q. R. Co. v. Evans, 288 S.W. 73, 221 Mo.App. 757.

22. Mo.—Chicago, B. & Q. R. Co. v. Evans, 288 S.W. 73, 221 Mo.App. 757—Chicago, B. & Q. R. Co. v. Evans, 228 S.W. 853, 206 Mo.App. 553.

N.J.—Pennsylvania R. Co. v. Townsend, 100 A. 855, 90 N.J.Law 75—New York Cent. R. Co. v. Stanziale, 143 A. 834, 6 N.J.Misc. 1116, reversed on other grounds 147 A. 457, 105 N.J.Law 593.

Pa.—Philadelphia & R. Ry. Co. v. International Motor Co., 84 Pa.Super. 582—West Jersey & S. R. Co. v. Whiting Lumber Co., 71 Pa.Super. 161.

S.C.—Davis v. Allen, 117 S.E. 547, 124 S.C. 297.

10 C.J. p. 446 note 25.

The rule as stated in Corpus Juris

(1) Is quoted with approval in Chicago, B. & Q. R. Co. v. Evans, 288 S.W. 73, 221 Mo.App. 757.

(2) Is cited with approval in Chicago, B. & Q. R. Co. v. Evans, 228 S.W. 853, 854, 206 Mo.App. 553.

Reason for rule

"A contract on the consignee's part to pay the carrier's charges may not be implied from the mere presumption of ownership arising from his designation by the shipper as the consignee, since the indulgence of such implication would be tantamount to mounting a presumption upon a presumption."

Pa.—Philadelphia & R. R. Co. v. International Motor Co., 84 Pa.Super. 582, 586.

S.C.—Davis v. Allen, 117 S.E. 547, 548, 124 S.C. 297.

23. Cal.—New York Cent. R. Co. v. Frank H. Buck Co., 41 P.2d 547, 2 Cal.2d 384.

Mass.—American Ry. Express Co. v. Mohawk Dairy Co., 144 N.E. 721, 250 Mass. 1, 35 A.L.R. 14.

Pa.—Philadelphia & R. Ry. Co. v. Taylor, 156 A. 587, 102 Pa.Super. 31.

C. o. d. shipment

A consignee who agrees that goods shipped to him, in which an understood charge is made, shall be shipped c. o. d., in effect agrees that he will pay the charge and that the shipper or his agent will retain possession until the payment is made.

N.Y.—Howatt v. Barrett, 137 N.Y.S. 915, 78 Misc. 156.

Or.—Pacific Aviation Co. v. Wells, 128 P. 438, 64 Or. 530.

24. Ga.—Southern Flour & Grain Co. v. Seaboard Air Line Ry., 95 S.E. 997, 22 Ga.App. 403.

Mo.—Chicago, B. & Q. R. Co. v. Evans, 288 S.W. 73, 221 Mo.App. 757.

Pa.—Philadelphia & R. R. Co. v. International Motor Co., 84 Pa.Super. 582—Philadelphia & Reading Ry. Co. v. Parry, 66 Pa.Super. 49.

Consignee presumptive owner of shipment

Ill.—Elgin, J. & E. Ry. Co. v. Rockwell Lime Co., 213 Ill.App. 25.

Mass.—American Ry. Express Co. v. Mohawk Dairy Co., 144 N.E. 721, 250 Mass. 1, 35 A.L.R. 14.

Mich.—King v. Van Slack, 159 N.W. 157, 193 Mich. 105.

Minn.—Chicago, M. & St. P. Ry. Co. v. Greenberg, 166 N.W. 1073, 139 Minn. 428, L.R.A.1918D 158, Ann.Cas.1918E 456.

N.Y.—New York Cent. R. Co. v. Warren Ross Lumber Co., 137 N.E. 324, 234 N.Y. 261, 24 A.L.R. 1160, reversing 191 N.Y.S. 940, 200 App.Div. 851.

10 C.J. p. 446 note 31 [b].

25. U.S.—Adams v. Mills, Ill., 52 S.Ct. 589, 286 U.S. 397, 76 L.Ed. 1184, reversing, C.C.A., Adams v. Mellan, 51 F.2d 620, affirming, D.C., 39 F.2d 80, certiorari granted 52 S.Ct. 208, 284 U.S. 614, 76 L.Ed. 525—Louisville & N. R. Co. v. U.S., 45 S.Ct. 233, 267 U.S. 395, 69 L.Ed. 678, affirming 57 Ct.Cl. 268—New York Cent. & H. R. R. Co. v. York & Whitney Co., 41 S.Ct. 509, 256 U.S. 406, 65 L.Ed. 1016, affirming in part and reversing in part 119 N.E. 855, 230 Mass. 206—Pittsburgh, C., C. & St. L. Ry. Co. v. Fink, 40 S.Ct. 27, 250 U.S. 577, 63 L.Ed. 1151, reversing Fink v. Pittsburgh, C., C. & St. L. Ry. Co., 2 Ohio App. 235, 19 Ohio Cir.Ct.R.,N.S., 103—Dare v. New York Cent. R. Co., C.C.A.N.Y., 20 F.2d 379—St. Louis-San Francisco Ry. Co. v. Republic Box Co., D.C.Tex., 12 F.2d 441—Western & Atlantic R. Co. v. Underwood, D.C.Ga., 281 F. 891—Great Northern Ry. Co. v. Hyder, D.C.Wash., 279 F. 783.

Ala.—Louisville & N. R. Co. v. A. N. Chappell & Co., 109 So. 574, 215 Ala. 31, reversing 109 So. 573, 21 Ala.App. 531.

Ill.—Atchison, T. & S. F. R. Co. v.

er his contract with the shipper requires the latter to pay the charges,[26] or whether or not they are demanded at the time of delivery.[27] Also, it is often held that the consignee assumes liability by exercising some act of dominion over the shipment,[28] such as by reconsigning the goods or directing their delivery to a third person.[29] The assumption of liability in this latter instance has been

Kirby, 280 Ill App 481—Chesapeake & Ohio Ry. Co v. Southern Coal, Coke & Mining Co, 254 Ill App 238, certiorari denied 51 S Ct. 34, 282 U S. 860, 75 L Ed. 761—Mellon v. Landeck, 248 Ill App 353—Illinois Cent. R. Co. v. Belson, 237 Ill App. 425—New York Cent. R. Co. v. Platt & Brahm Coal Co, 236 Ill App 150—Elgin, J & E Ry Co. v Rockwell Lime Co, 213 Ill App. 25—Chicago, I. & S. R Co. v. D E McMillan & Bro. Coal Co., 207 Ill App. 58 See Jackson v. M Piowaty & Sons, 205 Ill.App. 329.

Ind—American Ry. Express Co. v. Johnson Butter Co., 187 N E 405, 97 Ind App. 537.

Mass—Pennsylvania R. Co v. Lord & Spencer, 3 N E.2d 231, 105 A. L R. 1211.

Mich—King v. Van Slack, 159 N.W. 157, 193 Mich 105.

Minn.—Chicago, M. & St. P. Ry. Co. v. Greenberg, 166 N.W. 1073, 139 Minn. 428, L.R A.1918D 158, Ann. Cas 1918E 456.

Mo.—Bozworth v. Wabash Ry. Co., 58 S W.2d 448, 332 Mo. 277, affirming Bosworth v Wabash Ry. Co, App, 21 S W.2d 1110—Burton v. Wabash Ry Co., 58 S.W.2d 443, 332 Mo. 268, affirming, App, 22 S.W.2d 201—City of St. Charles v. Wabash Ry. Co, App., 65 S.W 2d 655, modified on other grounds State ex rel. City of St. Charles v. Becker, 83 S. W 2d 583, 336 Mo. 1187—Chicago, B & Q R. Co. v. Evans, 288 S. W. 73, 221 Mo App. 757—Mobile & O R. Co. v. Laclede Lumber Co., 216 S W. 798, 202 Mo App 630—Yazoo & M. V. R. Co. v Picher Lead Co., App., 190 S.W. 387.

N.J—Central R. Co of New Jersey v National Asbestos Mfg. Co, Sup, 127 A. 184.

N.Y.—New York Cent. R. Co. v. Warren Ross Lumber Co., 137 N.E. 324, 234 N.Y. 261, 24 A L.R. 1160, reversing 191 N.Y.S. 940, 200 App. Div. 851—New York Cent R. Co v Maloney, 244 N.Y S. 394, 137 Misc. 751—American Ry. Exp Co. v. Heilbrunn, 198 N Y.S. 801, 120 Misc. 501.

N.C.—Davis v. Gulley, 188 N.C. 80, 123 S E. 318.

Ohio.—C. L Hils Co. v Louisville & N R. Co., 162 N E 761, 28 Ohio App 459.

Pa.—Pennsylvania R. Co. v. De Marto, 90 Pa.Super. 216—Philadelphia & R. R Co v. International Motor Co., 84 Pa.Super 582.

S.C—Southern Ry Co. v. Calhoun Twine Mill, 180 S.E. 557, 176 S.C. 538—Southern Ry. Co. v. Collins, 119 S E 833, 127 S.C 219—Davis v. Allen, 117 S E 547, 124 S C 297.

Tenn—Cleveland, C., C & St. L. Ry Co v. Southern Coal & Coke Co, 248 S W. 297, 147 Tenn 433—Nashville, C & St. L Ry. Co. v Commercial Nursery Co., 8 Tenn App 16.

Wis—Waters v. Pfister & Vogel Leather Co, 186 N W. 173, 176 Wis 16

10 C J: p 446 notes 31, 32.

The text of Corpus Juris is cited with approval

U. S—Duncan v. United Steel Co., D C.Ohio, 244 F 258, 260

Tenn.—Cleveland, C, C & St L Ry. Co. v Southern Coal & Coke Co, 248 S.W 297, 300, 147 Tenn 433.

Storage charges at destination

(1) Where he is otherwise liable for charges, the consignee's refusal to accept a shipment does not relieve him of liability for reasonable storage charges pending the carrier's disposition of the shipment for the freight and storage charges—Norfolk & S R Co. v New Bern Iron Works & Supply Co, 90 S E. 149, 172 N.C. 188

(2) A consignee who has claimed the goods as his own, but declined to accept them until certain damage is adjusted, becomes liable, if the goods are not so damaged as to be entirely worthless, for the reasonable storage charges from the time the carrier has refused to recognize any claim for damages—Holloman v Southern Ry. Co, 90 S E 292, 172 N C 372, L R A 1917C 416, Ann Cas 1917E 1069.

(3) Likewise, where the consignee accepts a shipment, pays the freight, and receives a portion of the goods, he is liable for storage charges accruing after his acceptance and pending negotiations with the vendor for the return of the shipment—Bailey v. Georgia R R, 126 S E 896, 33 Ga App 526.

26. U S—Pittsburgh, C, C & St. L Ry. Co. v Fink, 40 S Ct. 27, 250 U S. 577, 63 L Ed 1151, reversing Fink v Pittsburgh, C, C & St. L. Ry Co, 2 Ohio App 235, 19 Ohio Cir Ct R, N S., 103.

Mo.—Mobile & O R. Co v Laclede Lumber Co, 216 S.W. 798, 202 Mo App 630.

N.Y.—Transmarine Corporation v Delaware & H Co., 216 N.Y S. 623, 127 Misc. 812.

27. U.S.—Louisville & N. R. Co. v. Central Iron & Coal Co., Ala., 44 S Ct. 441, 265 U S 59, 68 L Ed. 900, affirming, C C A., 284 F. 250—Callaway v Atchison, T. & S. F. Ry Co, C C.A Mo, 35 F.2d 319

Cal—New York Cent R Co v. Frank H Buck Co., 41 P 2d 547, 2 Cal. 2d 384.

28. U S—Wabash Ry. Co v Horn, C C.A Ill, 40 F 2d 905—Dare v. New York Cent. R Co, C.C A N.Y., 20 F 2d 379

Ala—Western Ry. of Alabama v. Collins, 78 So 833, 201 Ala. 455.

Cal—New York Cent. R Co. v. Frank H Buck Co, 41 P.2d 547, 2 Cal. 2d 384.

Ill—Indiana Harbor Belt R. Co. v. Lieberman, 245 Ill App. 503.

Mass—Pennsylvania R Co. v. Lord & Spencer, 3 N.E 2d 231, 105 A L. R. 1211.

Mich.—New York Cent. R Co. v. Guyan Coal & Coke Co, 274 N W. 718, 281 Mich. 82

N.J—New York Cent. R. Co v. Stanziale, 147 A. 457, 105 N J.Law 593, reversing 143 A 834, 6 N J Misc. 1116—Central R. Co. of New Jersey v National Asbestos Mfg. Co, Sup, 127 A 184.

N Y—New York Cent R. Co. v. Warren Ross Lumber Co., 137 N E 324, 234 N Y 261, 24 A.L.R. 1160, reversing 191 N.Y S. 940, 200 App. Div 851—New York Cent. R. Co. v. Maloney, 244 N.Y S. 394, 137 Misc 751—New York Cent R. Co. v Satuloff, 202 N Y.S. 297, 122 Misc 119

Ohio—Pennsylvania R Co. v Rice Coal Co, 148 N.E. 349, 113 Ohio St. 34.

Pa—Pennsylvania R. R. v. Rothstein, 165 A. 752, 109 Pa Super. 96—West Jersey & S. R Co v. Whiting Lumber Co, 71 Pa.Super 161—Chicago Great Western R. R Co. v Federal Stock Food Co., 8 Pa. Dist & Co 217.

29. Ill—Mellon v. Landeck, 248 Ill App. 353—Pere Marquette R Co. v American Coal & Supply Co, 239 Ill.App 139—New York Cent. R Co. v Platt & Brahm Coal Co, 236 Ill App 150

Mich.—New York Cent. R. Co. v. Guyan Coal & Coke Co, 274 N.W. 718, 281 Mich 82—New York Cent. R Co v. Brown, 274 N W 715.

N J—New York Cent R. Co. v. Stanziale, 147 A. 457, 105 N.J Law 593, reversing 143 A. 834, 6 N J.Misc. 1116

Ohio.—S. A Gerrard Co. v. New York, N. H. & H. R. Co., 176 N.E. 126, 39 Ohio App. 84.

Reason for rule

"When a consignee orders a re-

held not defeated or avoided by reason of directions or stipulations for the collection of the charges from the person receiving the shipment,[30] or such person's partial payment of the charges.[31] However, there is some authority to the effect that the consignee does not subject himself to liability by directing or authorizing delivery of the shipment to another,[32] unless the latter accepts it as the consignee's agent;[33] and particularly has this been held where there are provisions or stipulations indicating an intention to have the carrier look solely to the recipient of the goods for the collection of the charges,[34] and such person accepts the shipment.[35]

Due to the Interstate Commerce Act and similar state statutes imposing an absolute duty on the carrier to collect the full amount of the lawful or established charges, see infra §§ 393 and 397, many cases have held that the consignee becomes liable for the full amount of the charges which the carrier is required by law to collect notwithstanding the consignee would not have accepted or exercised dominion over the shipment but for a representation that the charges had been prepaid,[36] or a mistaken understanding or belief that the charges demanded by, and paid to, the carrier at the time of the acceptance or delivery constituted the full amount of the charges that could and would be collected or de-

shipment, acceptance of the shipment is necessarily implied"
Ill.—Mellon v Landeck, 248 Ill App. 353, 356.
N Y.—New York Cent R. Co. v. Ross Lumber Co, 137 N E. 324, 325, 234 N.Y. 261, 265, 24 A L R. 1160, reversing 191 N Y S. 940, 200 App Div. 851.

Notice of the failure of one to whom the shipment was delivered, on the consignee's order, to pay the freight is unnecessary to render the consignee liable therefor.—New York Cent. R Co. v Frank H. Buck Co, 41 P.2d 547, 2 Cal.2d 384.

30. U S.—Wabash Ry. Co. v Horn, C C A Ill, 40 F 2d 905—Dare v New York Cent. R. Co, C.C.A N Y, 20 F.2d 379
Ala.—Western Ry of Alabama v. Collins, 78 So 833, 201 Ala 455.
Cal.—New York Cent. R Co. v. Frank H. Buck Co., 41 P 2d 547, 2 Cal. 2d 384.
Ill.—New York Cent. R Co. v. Platt & Brahm Coal Co., 236 Ill App. 150
Mass.—Pennsylvania R Co. v Lord & Spencer, 3 N E 2d 231, 105 A L R. 1211.
Mich.—New York Cent. R. Co. v. Guyan Coal & Coke Co, 274 N W. 718, 281 Mich 82—New York Cent. R. Co. v Brown, 274 N W. 715, 281 Mich. 74.
N.J.—New York Cent. R. Co v. Stanziale, 147 A. 457, 105 N J.Law 593, reversing 143 A. 834, 6 N.J.Misc. 1116.
N.Y.—New York Cent. R. Co. v Warren Ross Lumber Co, 137 N E. 324, 234 N.Y 261, 24 A.L R. 1160, reversing 191 N Y S. 940, 200 App. Div. 851—New York Cent R Co v. Satuloff, 202 N.Y.S. 297, 122 Misc. 119.

Reason for rule
"The directions were for the benefit of the carrier, not for the benefit of the . . . [consignee.] The carrier was not bound at its peril to enforce payment of the freight from the . . . [person to whom it delivered the goods.] The language used . . . was not contractual Its effect was merely to give . . . [the carrier] an option to demand payment from the person to whom it delivered the goods."—New York Cent R. Co. v Ross Lumber Co, 137 N E. 324, 325, 234 N.Y 261, 266, 24 A L.R. 1160, reversing 191 N Y.S. 940, 200 App Div. 851.

Delivery held not grant of credit by carrier to purchaser of goods from consignee.—Wabash Ry. Co v. Horn, C C A Ill, 40 F.2d 905

31. Ill.—New York Cent. R. Co v. Platt & Brahm Coal Co., 236 Ill. App. 150.

32. Ark.—Davis v. City Fuel Co., 248 S W. 572, 157 Ark 455.
Ill.—Pere Marquette R. Co. v. American Coal & Supply Co., 239 Ill App 139.
Tenn.—Cleveland, C., C. & St. L. Ry. Co. v. Southern Coal & Coke Co., 248 S W. 297, 147 Tenn 433.
10 C J. p 446 note 27.

Reasons for rule
(1) "The fact that an original consignee reconsigns the goods shipped and that the railroad complies with the order, is no indication either actual or constructive, that the railroad is looking to the consignee for the payment of the freight, or that the railroad is giving up the lien it has upon the goods, for the amount of the freight charges."—Pere Marquette R. Co v. American Coal & Supply Co, 239 Ill.App. 139, 148.

(2) Further, it has been said that in such circumstances the consignment is in effect a single one from the point of origin to the last-named destination, that liability for the entire charges cannot be split, and that the consignee is not liable for any of the charges inasmuch as he ceases to be the consignee before the transportation service is completed.—Davis v. City Fuel Co., 248 S W 572, 157 Ark. 455.

Assignment of bill of lading
(1) Where a consignee, in a bill of lading stipulating that the owner or the consignee shall pay the freight, assigns the bill of lading before delivery, and the carrier makes delivery to the assignee who purchased the goods from the consignee, the consignee is not liable for the freight.—St. Louis Southwestern R. Co. v. Browne Grain Co., Tex Civ App, 166 S.W 40

(2) The rule as stated has been quoted from Corpus Juris.—Cleveland, C, C & St. L. Ry. Co. v. Southern Coal & Coke Co., 248 S W. 297, 301, 147 Tenn 433

33. Ill.—Chicago, I. & S. R Co. v. D. E. McMillan & Bro. Coal Co., 207 Ill App 58
Tenn.—Cleveland, C, C. & St. L. Ry Co v Southern Coal & Coke Co., 248 S.W. 297, 147 Tenn. 433
10 C J. p 446 note 28.

34. Ill.—Chesapeake & Ohio Ry. Co. v Southern Coal, Coke & Mining Co, 254 Ill App. 238, certiorari denied 51 S Ct. 34, 282 U S. 860, 75 L Ed 761—Chicago, I. & S R. Co. v. D E. McMillan & Bro Coal Co., 207 Ill.App 58.

Carrier held to have contracted to collect the charges from the person to whom the shipment is delivered, provided such person accepts the shipment.—Chesapeake & Ohio Ry. Co v. Southern Coal, Coke & Mining Co., 254 Ill.App. 238, certiorari denied 51 S Ct. 34, 282 U.S. 860, 75 L. Ed 761.

Direction that "charges follow"
Ill.—Chicago, I. & S. R. Co. v D E McMillan & Bro Coal Co., 207 Ill App. 58.

35. Ill.—Chesapeake & Ohio Ry Co. v. Southern Coal, Coke & Mining Co, 254 Ill App. 238, certiorari denied 51 S Ct. 34, 282 U.S. 860, 75 L Ed 761.

36. U S.—Western & Atlantic R Co. v. Underwood, D.C.Ga, 281 F. 891—Great Northern Ry. Co v. Hyder, D.C.Wash., 279 F 783.
Ohio.—Louisville & Nashville R. Co. v. Magnus Co., 13 Ohio Cir.Ct.,N.S., 305.
Tenn.—Nashville, C. & St. L. Ry. Co. v. Commercial Nursery Co., 8 Tenn. App. 16.

manded;[37] and this is so although the carrier has delayed seeking to enforce the liability of the consignee until after the consignor who has agreed to pay the charges has become insolvent.[38] However, there are some cases to the effect that these statutes do not require that a consignee accepting the goods be held liable for the full legal charges under any and all circumstances.[39] The consignee has been held not liable where the carrier agreed to look solely to the consignor,[40] or the charges were such that the consignee had no actual or constructive knowledge thereof at the time of his acceptance;[41] and where the consignor was the owner of the goods, to the knowledge of the carrier, a consignee paying the full charges demanded when he accepts the goods has been held under no obligation to pay charges beyond the amount stated, although the carrier made a mistake as to the amount.[42]

Where no route has been designated, a consignee who has become liable for the charges can be held for the charges over the usual route,[43] and if the consignor has designated the route the consignee can be compelled to pay the charges over the route so designated, although a cheaper route was available,[44] but the consignee is not liable, despite his acceptance of the shipment, for additional charges over a route other than the one selected by the consignor.[45]

Freight charges may be recovered or collected from a consignee who has assumed liability therefor notwithstanding a failure of the carrier to exhaust its remedies against the consignor or show the latter to be insolvent.[46]

Agency of consignee. There are a number of cases to the effect that a consignee who, to the knowledge of the carrier, acts as an agent or factor in accepting or exercising dominion over the shipment does not become liable for the charges,[47] unless he has expressly undertaken to pay the same.[48] However, the agency of the consignee does not prevent him from becoming liable where the carrier has no knowledge or notice thereof at the time of the delivery and acceptance of the goods;[49] and in such a case if the carrier has made a mistake as to the amount of the charges and accepted less than the full amount it may subsequently recover the un-

37. U S —Adams v. Mills, Ill., 52 S Ct 589, 286 U.S. 397, 76 L Ed 1184, reversing, C C.A., Adams v Mellan, 51 F.2d 620, affirming, D. C., 39 F 2d 80, certiorari granted 52 S Ct. 208, 284 U S. 614, 76 L Ed. 525—Louisville & N R Co. v. Central Iron & Coal Co., Ala., 44 S Ct. 441, 265 U S 59, 68 L.Ed. 900, affirming, C.C A., 284 F. 250—New York Cent. & H. R. R Co. v. York & Whitney Co., 41 S Ct. 509, 256 U S 406, 65 L Ed 1016, affirming in part and reversing in part 119 N E. 855, 230 Mass. 206—Pittsburgh, C., C & St L Ry Co. v. Fink, 40 S.Ct. 27, 250 U.S. 577, 63 L Ed. 1151, reversing Fink v. Pittsburgh, C., C. & St. L Ry. Co., 2 Ohio App 235, 19 Ohio Cir. Ct.,N.S , 103—Western Grain Co. v. St Louis-San Francisco Ry Co, C C.A.Ala., 56 F.2d 160—Callaway v. Atchison, T. & S. F. Ry Co., C. C A.Mo , 35 F 2d 319—St. Louis-San Francisco Ry. Co. v. Republic Box Co, D.C Tex., 12 F.2d 441—Davis v. Akron Feed & Milling Co., C C. A Ohio, 296 F 675.

Ala.—Louisville & N. R. Co. v. A. N. Chappell & Co., 109 So. 574, 215 Ala. 31, reversing 109 So 573, 21 Ala App. 531.

Ill.—Illinois Cent. R. Co. v. Belson, 237 Ill.App. 425—Elgin, J. & E Ry. Co. v. Rockwell Lime Co, 213 Ill.App. 25.

Ind.—American Ry. Express Co. v. Johnson Butter Co, 187 N E. 405, 97 Ind.App. 537.

Kan.—Atchison, T. & S. F. Ry. Co. v. Wagner, 172 P 519, 102 Kan 817, L R A 1918D 1105.

Mich.—King v Van Slack, 159 N.W. 157, 193 Mich 105

Minn.—Chicago, M & St. P. Ry. Co v. Greenberg, 166 N.W 1073, 139 Minn 428, L R.A 1918D 158, Ann Cas 1918E 456

Mo.—Mobile & O R Co v. Laclede Lumber Co., 216 S W. 798, 202 Mo. App 630—Yazoo & M. V. R Co. v Picher Lead Co, App., 190 S.W 387.

N.C —Davis v. Gulley, 188 N.C. 80, 123 S E. 318

Pa —Pennsylvania R. Co. v. De Marto, 90 Pa Super. 216.

S.C —Southern Ry Co v. Calhoun Twine Mill, 180 S E 557, 176 S C 538—Southern Ry Co v. Collins, 119 S.E. 833, 127 S C. 219.

Wis —Waters v. Pfister & Vogel Leather Co., 186 N.W 173, 176 Wis 16

10 C J. p 446 notes 30, 31, 35, p 447 note 36.

38. U S.—Callaway v. Atchison, T & S. F Ry. Co, C C.A.Mo., 35 F 2d 319

Mo.—Mobile & O. R Co v. Laclede Lumber Co, 216 S.W. 798, 202 Mo App 630.

39. Ohio —Cleveland, C., C. & St L Ry Co. v. McKenzie Lumber Co., 147 N.E 8, 112 Ohio St. 80.

40. Ohio —Cleveland, C., C. & St. L Ry Co. v. McKenzie Lumber Co, supra.

Pa.—Chicago Great Western R Co v. Federal Stock Food Co., 8 Pa Dist. & Co. 217.

41. Ohio.—Cleveland, C., C & St. L Ry. Co. v McKenzie Lumber Co, 147 N E 8, 112 Ohio St 80.

42. Ala —Central of Georgia R. Co v. Southern Ferro Concrete Co., 68 So. 981, 193 Ala 108, Ann.Cas 1916E 376.

10 C.J. p 447 note 37.

43. Pa.—Philadelphia & Reading Ry Co. v. Parry, 66 Pa Super. 49.

44. La.—Vicksburg, S & P. Ry. Co v. Kidd-Russ Trunk & Bag Co., 130 So 630, 15 La App 374.

45. La —Texas & P. Ry Co v Consolidated Companies, 156 So 215, 180 La. 180, affirming, App., 151 So 433

46. Tenn —Nashville, C & St L. Ry Co v. Commercial Nursery Co., 8 Tenn App. 16

47. Mass —Boston, etc, R Co. v. Whichter, 1 Allen 497.

N Y.—Dart v Ensign, 47 N Y 619.

10 C J. p 446 note 33.

48. U S —Rice v Louisville & N. R Co, C C A La., 264 F. 427.

49. Ill.—See Jackson v. M. Piowaty & Sons, 205 Ill App 329

Mass —Pennsylvania R Co. v. Lord & Spencer, 3 N E 2d 231, 105 A L. R 1211.

Pa.—Pennsylvania R R. v. Rothstein, 165 A. 752, 109 Pa Super. 96.

10 C J. p 446 note 34.

Prior notice insufficient

Mass —Pennsylvania R Co. v. Lord & Spencer, 3 N.E 2d 231, 105 A.L.R. 1211.

Pa.—Pennsylvania R. R. v. Rothstein, 165 A. 752, 109 Pa.Super. 96.

dercharge from the consignee.[50] Furthermore, it has often been held that, under the Interstate Commerce Act and similar state statutes, a consignee accepting or exercising dominion of the shipment is liable for the full legal charges, although he is, to the knowledge of the carrier, a mere agent or factor.[51] The provisions of § 3 (2) of the Interstate Commerce Act, 49 U.S.C.A. § 3 (2) as amended March 4, 1927 c 510 § 1, 44 U.S.St. at L. p 1447, to the effect that a consignee shall not be legally liable for charges beyond those demanded of him at the time of the delivery if he is only an agent and prior to delivery of the property has notified the carrier in writing of such agency, have been held inapplicable where the consignee instead of accepting the goods refused to accept the shipment,[52] or reconsigned it to another who subsequently refused it, or where the charges were not of the type specified.[53]

§ 317. Payment of Charges at End of Transportation

If the charges have not been prepaid, the carrier's duty to deliver the goods and the consignee's duty to pay the charges at the end of the transportation are generally concurrent.

Where prepayment has not been demanded, see supra § 313, it is generally held, since a carrier has a lien for its charges, see infra § 325, that its duty to deliver the possession of the goods at the end of the transportation, and the consignee's duty to pay, are concurrent.[54]

In accordance with the foregoing, the carrier is not ordinarily entitled to its freight charges, until it is ready to fulfill its contract and make complete and final delivery of the possession of the goods,[55] in the condition in which they were received.[56] The interruption of delivery by some cause not the fault of the consignee will not excuse the complete delivery required as a condition to the right to freight,[57] but, when the consignee is notified of the arrival of the goods and the carrier's readiness to deliver, freight is due, although it may be necessary or desirable, in making actual delivery, to switch the car containing the goods to a particular track,[58] and the consignee cannot require delivery at an impossible place not in accordance with the contract.[59] Also, the carrier may be entitled to compensation, notwithstanding the transportation is not completed and the goods are not delivered at the terminus, if it was without negligence and the interruption or nondelivery was due to the wrong of the shipper.[60]

The consignee, on the other hand, must usually pay or tender the freight properly and lawfully due before he will be entitled to possession of the goods,[61] unless there has been a waiver of this requirement.[62] The amount due should be tendered,

50. Mass.—New York, etc., R. Co. v. York, etc., Co., 102 N.E. 366, 215 Mass. 36.
10 C.J. p. 446 note 35.

51. U.S.—Adams v. Mills, Ill., 52 S. Ct. 589, 286 U.S. 397, 76 L.Ed. 1184, reversing, C.C.A., Adams v. Mellan, 51 F.2d 620, affirming, D.C., 39 F.2d 80, and certiorari granted 52 S.Ct. 208, 284 U.S. 614, 76 L.Ed. 525—New York Cent. & H. R. R. Co. v. York & Whitney Co., 41 S. Ct. 509, 256 U.S. 406, 65 L.Ed. 1016, affirming in part and reversing in part 119 N.E. 855, 230 Mass. 206—Callaway v. Atchison, T. & S. F. Ry. Co., C.C.A.Mo., 35 F.2d 319—Western & Atlantic R. Co. v. Underwood, D.C.Ga., 281 F. 891.
Ala.—Louisville & N. R. Co. v. A. N. Chappell & Co., 109 So. 574, 215 Ala. 31, reversing 109 So. 573, 21 Ala.App. 531.

52. Mass.—Pennsylvania R. Co. v. Lord & Spencer, 3 N.E.2d 231, 105 A.L.R. 1211.

53. Pa.—Pennsylvania R. R. v. Rothstein, 165 A. 752, 109 Pa.Super. 96

54. U.S.—Louisville & N. R. Co. v. Central Iron & Coal Co., Ala., 44 S. Ct. 441, 265 U.S. 59, 68 L.Ed. 900, affirming, C.C.A., 284 F. 250—Lowden v. Iroquois Coal Co., D.C.Ill., 18 F.Supp. 923
Ala.—Emerson v. Central of Georgia Ry. Co., 72 So. 120, 196 Ala. 280, L.R.A.1916F 120.
Pa.—Chicago & N. W. R. Co. v. Picard, 98 Pa.Super. 134.
10 C.J. p. 447 note 45.

55. Ky.—Louisville & N. R. Co. v. Johnson, 10 S.W.2d 1104, 226 Ky. 322.
N.J.—Jefferson Macaroni Co. v. Pennsylvania R. Co., 154 A. 188, 9 N.J.Misc. 405, affirmed 160 A. 635, 109 N.J.Law 266
Tex.—Pittman v. Fort Worth Warehouse & Storage Co., 258 S.W. 1105, motion to recall mandate granted 263 S.W. 636.
10 C.J. p. 447 note 47.

Corpus Juris cited in Jefferson Macaroni Co. v. Pennsylvania R. Co., 154 A. 188, 189, 9 N.J.Misc. 405, affirmed 160 A. 635, 109 N.J.Law 266.

Delivery to wrong person.
If prepayment has not been exacted a carrier is not entitled to its freight until it has transported and delivered the shipment in accordance with the bill of lading, and, if it converts the shipment by delivering it to one not the true owner, it cannot collect the freight from the true owner.—Louisville & N. R. Co. v. Johnson, 10 S.W.2d 1104, 226 Ky. 322

56. N.J.—Jefferson Macaroni Co. v. Pennsylvania R. Co., 154 A. 188, 9 N.J.Misc. 405, affirmed 160 A. 635, 109 N.J.Law 266.

57. N.Y.—Rowland v. Miln, 2 Hilt. 150

58. Wis.—McDonald v. Chicago & N. W. Ry. Co., 266 N.W. 246, 221 Wis. 95
10 C.J. p. 447 note 48.

59. U.S.—O'Rourke v. Two Hundred and Twenty-One Tons of Coal, D.C.N.Y., 1 F. 619

60. Kan.—Hebrlee v. Hawley, 211 P. 129, 112 Kan. 398.

61. Ala.—Southern Ry. Co. v. Woodstock Mills, 161 So. 519, 230 Ala. 494.
Ariz.—Wells Fargo & Co., Express, S. A. v. Tribolet, 50 P.2d 878, 46 Ariz. 311
Kan.—Strong v. Atchison, T. & S. F. Ry. Co., 254 P. 405, 123 Kan. 161.
Okl.—St. Louis, I. M. & S. Ry. Co. v. McNabb, 162 P. 811, 63 Okl. 87.
10 C.J. p. 447 note 52.

62. Ariz.—Wells Fargo & Co., Express, S. A. v. Tribolet, 50 P.2d 878, 46 Ariz. 311.
Pa.—Chicago & N. W. R. Co. v. Picard, 98 Pa.Super. 134.
10 C.J. p. 448 note 53.

even though excessive freight is demanded,[63] unless the extortionate charge is made under such circumstances as to make it clear that a tender of the lawful charges would be refused, or the carrier refuses unequivocally to accept any amount less than that demanded, under which circumstances the shipper is excused from making a formal tender before treating the carrier's refusal to deliver as a conversion, as the law does not require one to do a vain thing.[64]

The consignee has a right to examine the goods as to quantity, quality, and condition before accepting delivery and becoming liable for freight.[65] If the goods have been damaged, due to the fault of the carrier, neither the consignee nor the shipper is obliged to accept the damaged goods and pay freight thereon,[66] and, as discussed in § 318 infra, a claim for damages for which the carrier is liable may be offset against its claim for freight. A tender of freight has been held excused where the amount of damage to the consignment is greater than the freight,[67] and, if part of the goods has been damaged, the shipper or consignee is entitled to have the undamaged goods released from the carrier's lien on payment of the freight charges thereon, without payment of the freight on the damaged goods,[68] and the consignee is justified in refusing to receive the entire shipment on the refusal of the carrier to receive freight for the undamaged part and to make delivery thereof or to make allowance for the damage.[69] If, however, the contract is divisible, the carrier may be entitled to its charges for the transportation of that part of the shipment which has not been damaged or lost,[70] and, if the carrier has completely rendered the service required of it by its contract and unloaded the goods and tendered them to the owner, it is entitled to its freight, although the owner refuses to accept actual delivery of the goods because of their damaged condition, where the carrier is not responsible for such damage and no claim is made against it on account of the damage.[71] Where the tariff rules forbid an inspection on c. o. d. shipments without the consent of the shipper, a consignee who, on being denied a right of inspection because of lack of the shipper's consent, has paid the charges and accepted possession of the goods cannot thereafter recover the charges back on the theory that he was wrongfully denied an inspection.[72]

§ 318. Actions to Recover Charges

a. In general
b. Defenses and counterclaim or set-off
c. Limitations and time to sue
d. Pleadings
e. Evidence
f. Trial

a. In General

Actions to recover charges are generally in the nature of an action ex contractu, such as in assumpsit, and are governed by the rules relating to civil actions generally.

An action ex contractu, such as of assumpsit on the common counts, is generally the proper form of action by which a carrier may recover its charges from the person legally liable therefor;[73] and,

What constitutes a waiver

(1) Surety bond, given by owner of goods to carrier, which recited that carrier would transport goods without first exacting freight charges, has been held not extension of credit for shipments or a waiver of the carrier's lien, which would entitle owner to possession of goods without payment of freight charges, but only a waiver of prepayment of charges.—Wells Fargo & Co, Express, S A. v. Tribolet, 50 P.2d 878, 46 Ariz 311.

(2) Carrier does not waive its right to have freight charges paid before delivery of goods to owner because it directs owner to make demand for goods from consignee who is in possession of bills of lading.—Wells Fargo & Co., Express, S A. v. Tribolet, supra.

(3) Further illustrations see 10 C J. p 448 note 53 [a], [b].

63. Ark.—Loewenberg v. Arkansas, etc., R. Co., 19 S.W. 1051, 56 Ark. 439.

64. Kan.—Missouri Pac. R. Co v. Peru-Van Zandt Impl. Co, 85 P. 408, 87 P. 80, 73 Kan. 295, 117 Am. S R. 468, 6 L R A.,N.S., 1058, 9 Ann. Cas 790.
10 C J. p 448 note 57.

65. U S.—Brittan v. Barnaby, Cal., 21 How. 527, 16 L Ed. 177.
10 C J p 447 note 51.

66. N J.—Jefferson Macaroni Co. v. Pennsylvania R Co, 154 A. 188, 9 N J Misc 405, affirmed 160 A. 635, 109 N.J Law 266.
10 C J. p 448 note 60.

67. S C.—Miami Powder Co v Port Royal, etc., R. Co, 25 S.E 153, 47 S.C. 324, 58 Am S R. 880.
10 C J p 448 note 58

68. N J.—Jefferson Macaroni Co v Pennsylvania R Co, 154 A 188, 9 N J.Misc. 405, affirmed 160 A. 635, 109 N.J.Law 266.

69. N.J.—Jefferson Macaroni Co. v. Pennsylvania R. Co., supra.

70. Mass.—Boston, etc., R. Co. v Brown, 15 Gray 223.

Mo.—Dean v. Toledo, St. L. & W. R. Co, 128 S.W. 10, 148 Mo.App 428.

71. N Y.—Stevens v. Atchison, T. & S. F. Ry. Co, 202 N.Y.S 195, 207 App Div 442, affirmed 147 N.E. 200, 234 N Y 572, certiorari denied 45 S.Ct. 463, 267 U.S 603, 69 L.Ed 809.

72. La.—Astugue v. American Ry. Express Co, 131 So. 62, 15 La.App. 347.

73. U.S.—Chicago, I. & L Ry. Co. v. International Milling Co., D.C. Minn, 33 F 2d 636, affirmed, C.C.A., 43 F 2d 93, certiorari denied 51 S. Ct. 89, 282 U S 885, 75 L Ed 781—Davis v Smutzinger, C.C.A.Pa., 281 F. 640
Ala.—Hurt v Atlanta, B & A Ry. Co, 84 So. 631, 17 Ala.App. 241.
N D.—Minneapolis, St P. & S. S. M. Ry. Co. v. Washburn Lignite Coal Co, 168 N W 684, 40 N D. 69, 12 A.L R. 744, error dismissed 41 S Ct. 140, 254 U S. 370, 65 L.Ed. 310.

Recovery on quantum meruit

Plaintiff's agreement with defendant railroad, as to compensation for

for the most part, such actions are governed by the rules relating to ordinary civil actions.[74] Except in so far as such jurisdiction has been ousted by the Interstate Commerce Act, the state courts have jurisdiction of actions for charges on interstate transportation, and, where charges for intra-state transportation are involved, the state courts are not ousted of jurisdiction by an agreement that disputes as to rates should be adjusted by the interstate commerce commission.[75]

Parties. Usually, any carrier who could properly have collected the charges is a proper party plaintiff to bring an action for the recovery thereof.[76] Actions to recover charges for shipments over several lines have been held properly brought both by the initial,[77] and the terminal or delivering,[78] carrier; and the initial carrier has been held not a necessary party to the terminal carrier's action for charges, although charges advanced to the initial carrier are included and the shipper is asserting a claim based on the latter's negligence.[79] Either or all of the persons who may be liable for the charges, under the rules stated in § 316 supra, are proper parties defendant.[80]

Amount of recovery. Apart from the fact that interest may be allowed in the discretion of the court,[81] the amount recoverable, in an action for charges, is ordinarily fixed by the amount the carrier is entitled to collect or charge under the rules stated in § 314 supra. Where the applicable legal rate is established or proved, the amount of recovery is fixed thereby and no question can be raised, or inquiry made, as to its reasonableness.[82]

b. Defenses and Counterclaim or Set-Off

Defendant may assert any proper defense, or may enforce, by way of set-off or counterclaim, a valid claim or demand against the carrier.

Practically any matter which tends to defeat or diminish the carrier's right of recovery, either in whole or in part, may be asserted by way of defense,[83] provided it has been properly pleaded.[84] Also, it is generally held that defendant may set off, or counterclaim for, a valid claim or demand against the carrier, either to defeat or reduce its recovery,[85] or to obtain affirmative relief against

switching of cars engaged in state traffic, that a dispute in rates should be adjusted by interstate commerce commission, did not oust the jurisdiction of the state courts, and recovery might be had against plaintiff on a quantum meruit, as to such cars, where it had made payments at scheduled rates which were less than actual cost of service.—Pittsburgh & L. E. R. Co. v. South Shore R. Co., 107 A. 680, 264 Pa. 162.

74. U.S.—Chicago, I. & L. Ry. Co. v. International Milling Co., D.C. Minn., 33 F.2d 636, affirmed, C.C.A., 43 F.2d 93, certiorari denied 51 S. Ct. 89, 282 U.S. 885, 75 L.Ed. 781.

75. Pa.—Pittsburgh & L. E. R. Co. v. South Shore R. Co., 107 A. 680, 264 Pa. 162.

76. Tex.—United Hay Co. v. St. Louis, B. & M. Ry. Co., Civ.App., 74 S.W.2d 766.

77. Ark.—St. Louis S. W. R. Co. v. Gramling, 133 S.W. 1129, 97 Ark. 353.

Tex.—United Hay Co. v. St. Louis, B. & M. Ry. Co., Civ.App., 74 S.W.2d 766.

78. Ark.—Price v. New York, C. & St. L. R. Co., 300 S.W. 373, 175 Ark. 688.

Ill.—Pennsylvania R. Co. v. Cunningham, 224 Ill.App. 584.

La.—Yazoo & M. V. R. Co. v. A. Marx & Sons, 135 So. 64, 17 La.App. 172, rehearing denied 135 So. 675, 17 La.App. 172.

Minn.—Illinois Cent. R. Co. v. Van Dusen, Harrington Co., 212 N.W. 940, 214 N.W. 278, 170 Minn. 488, certiorari denied 48 S.Ct. 116, 275 U.S. 554, 72 L.Ed. 422.

10 C.J. p. 449 note 68.

79. Ark.—Price v. New York, C. & St. L. R. Co., 300 S.W. 373, 175 Ark. 688.

10 C.J. p. 449 note 69.

80. Ga.—Clemons v. Payne, 105 S.E. 623, 26 Ga.App. 142.

81. Tenn.—Oman v. Tennessee Central Ry. Co., 7 Tenn.App. 141.

Wis.—Mellon v. Johnson Co., 219 N.W. 352, 196 Wis. 64.

82. Wis.—Mellon v. Johnson Co., supra.

10 C.J. p. 449 note 76.

83. U.S.—Fullerton Lumber Co. v. Chicago, M., St. P. & P. R. Co., Minn., 51 S.Ct. 227, 282 U.S. 520, 75 L.Ed. 502, reversing, C.C.A., 36 F.2d 180, certiorari granted 50 S.Ct. 249, 281 U.S. 709, 74 L.Ed. 1132.

Lack of notice or knowledge of bill of lading's contents

In an action for freight charges on an interstate shipment, where a statement sets forth a uniform bill of lading issued by all carriers under the federal law and containing notice of the various stipulations which, after approval in the manner provided by law, become binding on every party concerned, it is no defense that defendant never received a copy of the bill nor affirmative notice of its contents.—West Jersey & S. R. Co. v. Whiting Lumber Co., 71 Pa.Super. 161.

Payment constitutes a defense.

U.S.—Fullerton Lumber Co. v. Chicago, M., St. P. & P. R. Co., Minn., 51 S.Ct. 227, 282 U.S. 520, 75 L.Ed. 502, reversing, C.C.A., 36 F.2d 180, certiorari granted 50 S.Ct. 249, 281 U.S. 709, 74 L.Ed. 1132.

N.Y.—Lehigh Valley R. Co. v. Weyant, 165 N.Y.S. 391.

84. Cal.—Southern California Commercial Co. v. Alberti, 207 P. 1023, 58 Cal.App. 84.

85. U.S.—Chicago, M. & St. P. Ry. Co. v. Pioneer Grain Corporation, D.C. Minn., 26 F.2d 90.—Payne v. Clarke, D.C. Cal., 271 F. 525.

Ala.—Central of Georgia Ry. Co. v. Birmingham Sand & Brick Co., 64 So. 202, 9 Ala.App. 419.

N.Y.—New York Cent. R. Co. v. Federal Sugar Refining Co., 194 N.Y.S. 467, 201 App.Div. 467.

10 C.J. p. 448 note 60.

Corpus Juris is cited in St. Louis-San Francisco Ry. Co. v. Morgan, Mo.App., 297 S.W. 717, 718.

Claim arising out of different shipment

(1) It has been held that damages from railroad's failure to accept cars cannot be set off against legitimate freight charges on different shipment.—New York Susquehanna & Western R. Co. v. Ruthven, 88 Pa.Super. 501.

(2) Other authority, however, has held defendant entitled to counterclaim for damages for goods lost on other shipments.—Chicago & N. W. Ry. Co. v. E. C. Tecktonius Mfg. Co., D.C. Wis., 262 F. 715.

Counterclaim inconsistent with contract

Shipper's counterclaim for dam-

it for any excess.[86] It is now fairly well established that this right of set-off or counterclaim is not affected or restricted by the provisions of the Interstate Commerce Act, or similar state statutes,[87] but prior to the decision of the United States supreme court in Chicago & N. W. Ry. Co. v. Lindell,[88] a number of cases, most of which may now be regarded as overruled, denied the right to maintain a counterclaim or set-off, on the theory that the allowance thereof would be to provide a means for avoiding statutory rules and restrictions against discrimination and rebates.[89] However, in the absence of some special contract or statutory provision changing the rule, the right of the consignee or owner to offset damages against freight charges cannot be asserted against the last carrier with reference to damages on the line of the preceding carrier, either as to the last carrier's charges or the charges which it has advanced to the preceding carrier, the remedy being against the carrier in whose hands the damage occurred.[90]

The defense of waiver or acquiescence is not available where the railroad accepted payment on the basis of a lower classification of the goods shipped but insisted on, and sued for, the balance claimed under a higher classification.[91]

c. Limitations and Time to Sue

While mere delay is not fatal, an action for charges may be barred if not brought within the time prescribed by the applicable statute of limitations.

While mere delay or laches does not necessarily bar a carrier's right to bring an action for charges,[92] such an action cannot be brought after the expiration of the time prescribed by an applicable statute of limitations.[93] In the absence of federal

ages because of substitution was inconsistent with shipper's unconditional agreement, made after alleged damages accrued, to pay all tariff charges, and was accordingly denied. —Philadelphia & R. Ry Co. v. Taylor, 156 A. 587, 102 Pa. Super. 31.

Set-off between carriers

In assumpsit by plaintiff railroad, defendant railroad, a plant facility, switching cars for plaintiff, might set off the difference, if any, between the actual cost of service rendered in state traffic, and the amount received on account prior to the effectiveness of the Public Service Act, but the allowance of a set-off for services thereafter rendered, and for services in interstate traffic would require a new trial.—Pittsburgh & L. E. R. Co. v. South Shore R. Co., 107 A. 680, 264 Pa. 162.

86. Ga.—Battle v. Atkinson, 71 S.E. 775, 9 Ga.App. 488.

87. U.S.—Chicago & N. W. Ry. Co. v. Lindell, 50 S.Ct. 200, 281 U.S. 14, 74 L.Ed. 670, followed in, C.C.A., 39 F.2d 1021—Wells Fargo & Co. v. Cuneo, D.C.N.Y., 241 F. 727.
N.Y.—New York Cent. R. Co. v. De May, 277 N.Y.S. 17, 154 Misc. 373—Pennsylvania R. Co. v. Bellinger, 166 N.Y.S. 652, 101 Misc. 105.
Tenn.—Nashville, C. & St. L. Ry. v. Tennessee Mill Co., 227 S.W. 443, 143 Tenn. 237.
10 C.J. p. 448 note 62.

Formal counterclaim unnecessary before commission

In a proceeding before the interstate commerce commission to recover undercharges, defendant may recover an overpayment of freight charges to a carrier, notwithstanding the absence of a formal counterclaim —Chicago, B. & Q. R. Co. v. U. S., 73 Ct.Cl. 250, certiorari denied 53 S.Ct. 12, 287 U.S. 599, 77 L.Ed. 522.

88. U.S.—Chicago & N. W. Ry. Co. v. Lindell, Cal., 50 S.Ct. 200, 281 U.S. 14, 74 L.Ed. 670.

89. U.S.—Michigan Cent. R. Co. v. Carl & W. J. Prowaty, D.C.Ill., 36 F.2d 604—Fullerton Lumber Co. v. Chicago, M., St. P. & P. R. Co., Minn., 36 F.2d 180, certiorari granted 50 S.Ct. 249, 281 U.S. 709, 74 L.Ed. 1132, reversed on other grounds 51 S.Ct. 227, 282 U.S. 520, 75 L.Ed. 502—Pennsylvania R. Co. v. South Carolina Produce Ass'n, D.C.S.C., 25 F.2d 315—Johnson-Brown Co. v. Delaware, L. & W. R. Co., D.C.Ga., 239 F. 590—Chicago & N. W. Ry. Co. v. William S. Stein Co., D.C.Neb., 233 F. 716—Illinois Cent. R. Co. v. W. L. Hoopes & Sons, D.C.Iowa, 233 F. 135.
Mo.—St. Louis-San Francisco Ry. Co. v. Morgan, 297 S.W. 717, 221 Mo.App. 43.
N.J.—Delaware, L. & W. R. Co. v. Henry Nuhs Co., 111 A. 223, 93 N.J.Law 309.
Or.—Oregon-Washington R. & Nav. Co. v. Cascade Contract Co., 197 P. 1085, 101 Or. 582, petition denied 200 P. 1034, 101 Or. 582.
Pa.—New York, Susquehanna & Western R. Co. v. Ruthven, 88 Pa. Super. 501—Adams Express Co. v. Albright Bros., 75 Pa. Super. 410.

90. Ark.—Price v. New York, C. & St. L. R. Co., 300 S.W. 373, 175 Ark. 688.
N.Y.—Grand Trunk Ry. Co. of Canada v. Satuloff, 181 N.Y.S. 81.
10 C.J. p. 449 note 63.

91. U.S.—Chesapeake & O. R. Co. v. U. S., D.C.Va., 1 F.Supp. 350.
92. Ill.—New York Cent. R. Co. v. Philadelphia & Reading Coal & Iron Co., 121 N.E. 581, 286 Ill. 267, affirming 210 Ill.App. 267.
Tenn.—Cleveland, C., C. & St. L. Ry. Co. v. Southern Coal & Coke Co., 248 S.W. 297, 147 Tenn. 433.

Delay of fifteen months

The delay of the carrier for fifteen months in bringing its action to recover freight is of no importance so long as the action is commenced within the time allowed by statute. —Pennsylvania R. Co. v. Titus, 138 N.Y.S. 325, 78 Misc. 347, reversed on other grounds 142 N.Y.S. 43, 156 App.Div. 830, reversed on other grounds 109 N.E. 857, 216 N.Y. 17, L.R.A. 1916C 1127.

93. U.S.—Pennsylvania R. Co. v. Carolina Portland Cement Co., C.C.A.S.C., 16 F.2d 760—Button v. Atchison, T. & S. F. Ry. Co., C.C.A.Okl., 1 F.2d 709, error dismissed Atchison, T. & S. F. Ry. Co. v. Butten, 46 S.Ct. 349, 270 U.S. 670, 70 L.Ed. 791.
La.—Wight v. Zemurray, 91 So. 301, 150 La. 929—Davis v. O'Neal, 1 La.App. 681.

Action for erroneous rebate

Railroad's action against shipper to recover rebate erroneously allowed as the cost of loading freight was an action for "recovery of erroneous freight charges" within statute requiring such action to be brought within two years, and not an action within statute requiring personal actions not theretofore mentioned to be brought within ten years.—Wight v. Zemurray, 91 So. 301, 150 La. 929.

Estoppel to set up limitations

Fact that limitation period against carrier's action for recovery of freight charges ran while dispute as to charges was being considered by interstate commerce commission at shipper's request did not estop shipper from setting up defense of statute of limitations to carrier's action —Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., C.C.A.Ill., 88 F.2d 459.

legislation thereon, an action to recover charges for an interstate shipment may be barred by a state statute of limitations;[94] but by the provision of the Interstate Commerce Act § 16 (3) (a), 49 U.S.C.A. § 16 (3) (a), requiring all actions at law by carriers for the recovery of their charges, or any part thereof, to be begun within a specified period from the time the cause of action accrues, congress created not only a bar of the remedy but a limitation or condition effecting a destruction of the liability or right itself after the lapse of the statutory period.[95] This statute, rather than the state law, now generally governs with respect to actions to recover charges for interstate shipments,[96] except that neither this statute, nor a state statute of limitations, applies to actions by the director general of Railroads on behalf of the United States in its governmental capacity,[97] and the statute does not apply retroactively to causes of action that were already in existence at the time the statute went into effect.[98] By express provision, the cause of action, for the purposes of this section, is deemed to accrue on delivery or tender of the shipment by the carrier and not thereafter.[99] An action by a carrier to recover an excessive refund on a freight overcharge is an action on an implied contract to refund money, and § 16(3) (a) has no application thereto.[1]

d. Pleadings

The pleadings, in actions by carriers to recover their charges, must meet the usual requirements as to form and contents.

The pleadings, in actions by carriers to recover their charges, must meet the usual requirements as to form and contents.[2] The petition, declaration, or complaint of the carrier must sufficiently allege all facts necessary to show a cause of action or right to recover,[3] but if it does this it is ordinarily sufficient.[4] It is not necessary to declare for the tolls

94. Miss.—Yazoo & M. V. R. Co. v Willis, 71 So. 563, 111 Miss. 303.

95. U.S.—Wisconsin Bridge & Iron Co. v. Illinois Terminal Co, C.C. A Ill, 88 F.2d 459

96. U S.—Strawberry Growers' Selling Co. v. American Ry. Express Co, C C A.La., 31 F 2d 947.
Ill.—Cleveland, C, C & St L. R. Co v. Edgewater Coal Co, 272 Ill App. 149.

97. La.—Davis v. Selig & Baughman Hardware Co, 2 La.App. 665.

98. U S—New York Cent. R Co v Wheeling Can Co., 48 S Ct 33, 275 U S. 490, 72 L Ed 389, reversing 130 S E 288, 100 W.Va 132, certiorari denied 46 S Ct. 336, 270 U.S. 645, 70 L Ed. 778, and certiorari granted 46 S Ct. 470, 270 U S. 640, 70 L Ed. 775—U. S. v. St Louis, S. F. & T Ry Co, 46 S.Ct. 182, 270 U.S 1, 70 L Ed 435, affirming Wabash Ry. Co v U. S, 59 Ct.Cl. 322 and U. S. v St. Louis, S. F. & T. Ry. Co, 59 Ct.Cl. 975.

99. Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., C.C.A Ill, 88 F.2d 459—Pennsylvania R. Co. v. Carolina Portland Cement Co, C C. A S C., 16 F.2d 760.

Movement of empty oil tank cars

(1) Movement of empty oil tank cars is not "shipment" of property within act fixing time when cause of action for carrier's charges accrues. —Chicago, R I & P. Ry Co. v. Petroleum Refining Co., D.C Ky., 39 F 2d 629.

(2) Cause of action for carrier's charges for moving empty oil tank cars does not accrue when carrier merely parts with possession thereof, but such act must be a final separation from the carrier.—Chicago, R. I. & P. Ry. Co. v. Petroleum Refining Co, supra.

1. U S—T. M. Partridge Lumber Co. v Michigan Cent R. Co, C C.A. Minn, 26 F.2d 615, reversing, D C., Michigan Cent R Co. v T. M. Partridge Lumber Co, 17 F.2d 657.

2. N Y.—Erie R Co. v F. Kieser & Son Co, 215 N Y S. 576, 216 App. Div. 500, reversing 211 N.Y.S 362, 125 Misc. 283.

3. Mo—Chicago, B & Q. R. Co. v. Evans, 228 S W. 853, 206 Mo App. 553.
N D—Minneapolis, St. P & S S M Ry. Co. v. Washburn Lignite Coal Co, 168 N.W. 684, 40 N.D. 69, 12 A L R 744, error dismissed 41 S.Ct 140, 254 U.S 370, 65 L Ed. 310

Allegations held insufficient

(1) In carrier's action to recover prescribed rates on ground that shipments originating in state were part of intended movement in interstate commerce, allegations that shipments did move in such commerce and that shipper knew in advance to what particular group of orders and group of cargoes shipments would be applied was not a sufficient allegation of the shipper's intent.—Oregon-Washington R & Nav Co v. Strauss & Co, C C A Or., 73 F 2d 912, certiorari denied 55 S Ct. 551, 294 U S. 723, 79 L Ed. 1255.

(2) A petition by a carrier against a consignee for freight was demurrable where it did not allege that defendant was a party to the contract of transportation or had received or accepted the freight, the relation of carrier and consignee not being sufficient, and ownership of goods not being determinative.—Chicago, B. & Q R. Co. v. Evans, 228 S. W. 853, 206 Mo.App. 553.

(3) Complaint in action against shipper for difference between rates under statute, and alleged reasonable rate not alleging circumstances from which contract might be implied in fact or any promise did not state a cause of action on contract implied in fact.—Minneapolis, St. P. & S. S M Ry. Co v Washburn Lignite Coal Co., 168 N W. 684, 40 N.D 69, 12 A. L.R 744, error dismissed 41 S.Ct. 140, 254 U S. 370, 65 L.Ed 310.

(4) Where petition in suit by carrier's receiver against original consignor to recover freight on interstate shipment showed carrier's failure to give notice to original consignor of refusal of a new consignee, under consignee's reconsignment of original bill of lading, to accept goods and carrier's disposition and conversion of proceeds to its own use, without showing that notice was impracticable under circumstances, a demurrer was properly sustained—Heed v. J. O. Dorris & Co., 100 S E. 717, 24 Ga.App. 293.

Undercharges

Where carrier, in accordance with Remington & Ballinger Code §§ 8627–8661, establishes and publishes uniform freight rates, such carrier may, where through inadvertence a shipper has been charged less than the established rate on an intra-state shipment, recover the amount of the undercharge, and a complaint, setting out such facts, is good against demurrer.—Oregon-Washington R. & Nav. Co. v. Seattle Grain Co., 178 P 648, 106 Wash. 1, affirmed 185 P. 583, 106 Wash. 1.

4. U.S.—Northern Pac. Ry. Co. v. Sommers Bros. Mfg. Co, D C.Idaho, 34 F.2d 56—Duncan v. United Steel Co., D.C.Ohio, 244 F. 258.

as such, as they may be satisfactorily described in terms of the service or the like for which the tolls are charged.[5]

Defendant's answer should ordinarily either place the allegations of plaintiff's pleading in issue,[6] or sufficiently allege matters properly constituting a defense to the cause of action asserted by the carrier.[7] The carrier's failure to bring its action for charges within the time prescribed by the Interstate Commerce Act may properly be raised by demurrer, where the declaration or complaint shows on its face that the statutory period has expired.[8]

Subject to ordinary restrictions, proper amendments to the pleadings may be permitted.[9]

Under general rules as to issues, proof, and variance, it is usually essential that the pleadings be sustained by, and conform to, the proof,[10] except where the matter is one of law on which no proof is necessary.[11] In assumpsit on a claim for unpaid freight, the contention that the claim was not owned by plaintiff can be raised under the general issue.[12] It has been held that a petition by a carrier to recover transportation charges advanced by it to the initial carrier, its own charges, and charges advanced to the final connecting carrier, alleging that defendant requested plaintiff carrier to forward the cars over its own and connecting lines, and directed plaintiff to pay the charges, and promised to repay the sums so paid out, declares on an express contract as to a promise to repay plaintiff, but not as to the amounts of the charges to be paid, and it is not error to allow plaintiff to prove that the charges paid to the other carriers and its own were reasonable,[13] and that a carrier which has alleged an express agreement to pay a stated amount of freight may recover on the theory that, through a mutual mistake, the rate charged was less than that authorized by the tariff.[14]

e. Evidence

General rules of evidence apply.

Although the parties may be aided by proper presumptions or inferences, the same as in other actions,[15] the carrier generally has the burden of proving all the essential elements of its cause of

Ala.—Hurt v. Atlanta, B. & A. Ry. Co., 84 So. 631, 17 Ala App. 241

Tex.—United Hay Co. v. St. Louis, B & M. Ry. Co., Civ.App., 74 S.W.2d 766

Allegations held unnecessary

In an action by a railroad to recover from the consignor the freight charge for carrying a carload of coal in interstate commerce, the declaration was not demurrable because it failed to name the consignee, or to aver the delivery of the coal to, or nonpayment of the freight charge by, the consignee, where it shows the coal was shipped by consignor, that he made an unconditional promise to pay the freight charges, and has failed and refused to pay it.—Western Maryland Ry. Co. v. Cross, 114 S.E. 438, 92 W.Va. 9.

5. N.H.—Manchester, etc., R. Co. v. Fisk, 33 N.H. 297.

6. N.Y.—Erie R. Co. v. F. Kieser & Son Co., 215 N.Y.S. 576, 216 App. Div. 500, reversing 211 N.Y.S. 362, 125 Misc. 283.

Answer held sufficient

In carrier's suit against shipper to recover alleged undercharges, allegations of plea was sufficient to put in issue allegation of declaration, in effect, that defendants had not paid lawful tariff rate.—Reinschmidt v. Louisville & N. R. Co., 150 So. 266, 112 Fla. 267.

7. N.Y.—Erie R. Co. v. F. Kieser & Son Co., 215 N.Y.S. 576, 216 App. Div. 500, reversing 211 N.Y.S. 362, 125 Misc. 283.

Pa.—Crane R. Co. v. Philadelphia & R. Ry. Co., 97 A. 1055, 253 Pa. 246—Chicago & N. W. R. Co. v. Picard, 98 Pa.Super. 134—Delaware, L. & W. R. Co. v. Andrews Bros. Co., 90 Pa.Super. 574—Davis v. Kehota Mining Co., 86 Pa.Super. 443—Chicago, B. & Q. R. R. v. Berry's Sons, 86 Pa.Super. 1—West Jersey & S. R. Co. v. Whiting Lumber Co., 71 Pa.Super. 161—Pennsylvania R. Co. v. A. J. Cameron & Co., 30 Pa.Dist. 721, affirmed 124 A. 638, 280 Pa. 458.

Lack of joint liability

Where declaration showed joint liability of defendants for freight charges, affidavit of defense that defendants were separate corporations, owning their own railroads, failed to show that there was not joint liability.—Crane R. Co. v. Philadelphia & R. Ry. Co., 97 A. 1055, 253 Pa. 246.

Answer held sufficient

(1) Answer alleging shipment to another place and sale there, in violation of statute, without notifying shipper of consignee's refusal to pay charges as excessive, was sufficient as against prayer for recovery of demurrage, reconsignment and freight charges accruing after car reached destination.—Michigan Cent. R. Co. v. S. J. Peabody Lumber Co., 131 N.E. 841, 76 Ind.App. 222.

(2) In carrier's action for inadvertent undercharge on interstate flour shipment, affidavit of defense was held sufficient which averred that defendant as consignee's agent sold flour and delivered bill of lading to buyer.—Davis v. Richardson, 87 Pa.Super. 205.

8. U.S.—Pennsylvania R. Co. v. Carolina Portland Cement Co., C.C.A.S.C., 16 F.2d 760.

9. Ga.—Williamson-Inman Co. v. Nashville, C. & St. L. Ry. Co., 160 S.E. 687, 44 Ga.App. 129.

Amendment held proper

In carrier's suit for undercharge, permitting amendment to petition alleging that acts of connecting carrier in connection with reshipment were done as plaintiff's agent was not error.—Williamson-Inman Co. v. Nashville, C. & St. L. Ry. Co., 160 S.E. 687, 44 Ga.App. 129.

10. La.—Davis v. Selig & Baughman Hardware Co., 2 La.App. 665.

11. La.—Davis v. Selig & Baughman Hardware Co., supra.

12. Ala.—Hurt v. Atlanta, B. & A. Ry. Co., 84 So. 631, 17 Ala.App. 241.

13. Mo.—Chicago, etc., R. Co. v. Bay Shore Lumber Co., 119 S.W. 973, 140 Mo.App. 52.

14. N.C.—Southern Ry. Co. v. Latham, 97 S.E. 234, 176 N.C. 417

15. U.S.—Southern Cotton Oil Co. v. Central of Georgia Ry. Co., Ga., 228 F. 335, 142 C.C.A. 627, affirming, D.C., 204 F. 476.

Ill.—Indiana Harbor Belt R. Co. v. Lieberman, 245 Ill.App. 503—New York Cent. R. Co. v. Lehigh Stone Co., 220 Ill.App. 563.

N.J.—New York Cent. R. Co. v. Singer Mfg. Co., 131 A. 111, 3 N.J.Misc. 1137

Carrier's compliance with legal requirements

(1) In a suit to recover the bal-

action,[16] while defendant has the burden on all matters of affirmative defense.[17] The admissibility of evidence,[18] and its weight and sufficiency,[19] are

ance of freight charges due, proof of the filing with the interstate commerce commission of a supplemental tariff changing rates previously in force prima facie establishes that the carrier had taken all steps required to make the new rates valid.—New York, N. H & H R. Co. v. Salter, 134 A. 220, 104 Conn. 728.

(2) Where it is admitted that schedule of rates was duly filed and approved by interstate commerce commission, the presumption is that the rates were duly published, and against there being a violation of the Elkins Act imposing penalties for failure to publish rates.—Atchison, T & S. F. Ry. Co. v. Wagner, 172 P. 519, 102 Kan. 817, L.R.A.1918D 1105.

Identity of shipper and consignor

In the absence of rebutting evidence, a person who ships or handles the goods is ordinarily presumed to be the consignor.

N.J.—New York Cent. R. Co. v. Singer Mfg. Co., 131 A. 111, 3 N.J.Misc. 1137.

Tenn.—Nashville, C. & St. L. Ry. v. Murphree, 2 Tenn. App. 482.

Payment presumed from delivery

When the property has been delivered to the consignee, a presumption arises that the freight has been paid.—Shea v. Minneapolis, etc., R. Co., 65 N.W. 458, 63 Minn. 228.

16. U.S.—Southern Pac. Co. v. U. S., 47 S.Ct. 123, 272 U.S. 445, 71 L.Ed. 343, affirming 60 Ct.Cl. 662, appeal dismissed and certiorari granted 46 S.Ct. 242, 270 U.S. 103, 70 L.Ed. 489.—Gideon-Anderson Lumber Co. v. St. Louis Southwestern Ry. Co., C.C.A.Mo., 88 F.2d 232.

Ill.—Baltimore & O. R. Co. v. Denney & Co., 246 Ill.App. 22. See St. Louis, I. M. & S. Ry. Co. v. H. H. Hall Const. Co., 194 Ill.App. 146.

La.—St. Louis Southwestern Ry. Co. v. Rivers, 130 So. 641, 15 La.App. 167.

Tenn.—Nashville, C. & St. L. Ry. v. Murphree, 2 Tenn.App. 482.

Tex.—American Ry. Express Co. v. Magnolia Fish & Oyster Co., Civ.App., 255 S.W. 459.

Classification or applicability of particular rate

(1) The carrier has the burden of showing that the rates sought to be charged by it were legally established as required by law.

U.S.—Central R. Co. of New Jersey v. U. S. Pipe Line Co., 1 F.2d 866, affirming, D.C., 290 F. 983.

N.Y.—Erie R. Co. v. F. Kieser & Son Co., 215 N.Y.S. 576, 216 App.Div. 500, reversing 211 N.Y.S. 362, 125 Misc. 283.

(2) In a suit to recover an undercharge, the carrier has the burden of proving that the shipper's exclusive use of a refrigerator car warranted the application of a certain tariff covering perishables.—Swift & Co. v. Ft. Smith & W. Ry. Co., 16 S.W.2d 1001, 179 Ark. 516.

(3) A carrier claiming remaining unpaid charges because of its agent's undercharge for a shipment has the burden of showing by a preponderance of evidence that the shipment was erroneously classified by its agent as was claimed by it.—American Ry. Express Co. v. Magnolia Fish & Oyster Co., Tex.Civ.App., 255 S.W. 459.

(4) Where a carrier by cross action sought to recover freight charges under an interstate rate, and plaintiff traversed, as required by statute, that the freight was such as to fall within the rate, the burden was on the carrier to prove the fact.—International, etc., R. Co. v. Carter, Tex.Civ.App., 180 S.W. 663.

Delivery of shipment

In an action for freight charges, the burden is on the carrier to show that the goods were delivered to the consignee.—St. Louis, etc., R. Co. v. H. H. Hall Constr. Co., 194 Ill.App. 146.

Proof necessary for prima facie case

In action to collect balance due for freight, plaintiff, to establish a prima facie case, must prove that carload was delivered as alleged, what correct amount of freight charges were, what balance was due, demand for payment, and refusal to pay.—Lehigh Valley R. Co. v. Weyant, 165 N.Y.S. 391.

17. La.—Green v. Hawkins & Antoon, App., 142 So. 742, modified on other grounds 144 So. 271.—Louisiana Ry. & Nav. Co. v. Lawrence, 5 La.App. 722.

Nonapplicability of regular tariff rate

La.—Louisiana Ry. & Nav. Co. v. Lawrence, 5 La.App. 722.

18. Evidence held admissible

(1) Evidence of state law providing for sale of goods for charges.—Central R. Co. of New Jersey v. Schick, C.C.A.Pa., 38 F.2d 968.

(2) In carrier's action against live stock shippers to recover charges for car feedings in transit, evidence as to feeding of animals before they left point of shipment, instructions to initial carrier, and, plaintiff's change in method of feeding in its yard at intermediate point.—New York Cent. R. Co. v. Sturtevant & Haley Beef & Supply Co., 127 N.E. 509, 236 Mass. 16.

(3) Duly filed and published tariff schedules or rate classifications.

Ala.—Emerson v. Central of Georgia Ry. Co., 72 So. 120, 196 Ala. 280, L.R.A.1916F 120.

Ill.—Union Pac. R. Co. v. Denney & Co., 237 Ill.App. 483.

Mich.—Michigan Cent. R. Co. v. Claspy, 226 N.W. 216, 247 Mich. 549.

(4) An expense bill submitted by carrier.—See St. Louis I. M. & S. Ry. Co. v. H. H. Hall Const. Co., 194 Ill.App. 146.

(5) Where bill of lading stated that specified weight of shipment was subject to correction, and carrier brought action to recover freight charges on the theory of a mistake in the weight of the shipment, both parties were entitled to introduce evidence as to the correct weight, and have that issue submitted to the jury.—Southern Ry. Co. v. Collins, 119 S.E. 833, 127 S.C. 219.

(6) Where plaintiff relied on a special promise to pay made by defendant before the car had gone forward, but after a bill of lading had been issued, providing that the consignee should pay the freight, the bill of lading is admissible as a step in the transaction.—Montpelier, etc., R. Co. v. Macchi, 52 A. 960, 74 Vt. 403.

Evidence held inadmissible

(1) In action for amount of freight undercharge computed by schedule in force and governing the subject, it was error to receive and consider proof that commodities shipped were not correctly classified in schedule.—Atchison, T & S. F. Ry. Co. v. Young, 171 P. 1156, 102 Kan. 875.

(2) Evidence of ownership of shipment by one other than defendant is inadmissible in the absence of proof of any notice to the carrier of such fact.—Illinois Cent. R. Co. v. Belson, 237 Ill.App. 425.

(3) In an action by a carrier against the consignors of certain goods to recover freight charges, evidence as to plaintiff's agreement to accept goods on condition of collecting the freight charges from the consignee is inadmissible, as tending to vary the terms of the written bill of lading.—Pennsylvania R. Co. v. Reifel, 154 N.Y.S. 203, 90 Misc. 696.

(4) In an action for balance due on freight shipments of coal, evidence of the practice under similar tariffs is properly excluded because the construction of the tariff is a matter of law, and an improper usage could not justify an incorrect construction.—Republic Iron & Steel Co. v. Davis, 98 So. 197, 210 Ala. 361.

19. Evidence held sufficient

(1) To support or authorize recovery by plaintiff.

usually determined in accordance with the general rules stated in the title Evidence.

f. Trial

The trial, in actions by carriers for their charges, is governed by ordinary rules.

In actions by carriers to recover charges for goods transported, as in other actions, questions of law are ordinarily for the court,[20] while questions of

Ga.—Central of Georgia Ry. Co v. City Supply Co, 135 S E 767, 36 Ga App 104.

Ill.—See Chicago, I. & L Ry. Co v. Monarch Lumber Co, 202 Ill.App. 20.

Okl.—Chicago, R. I. & P Ry Co. v. Howe-McCurtain Coal & Coke Co, 247 P 986, 119 Okl. 49, certiorari denied 47 S Ct 243, 273 U S. 734, 71 L Ed. 865.

Tenn.—Oman v. Tennessee Central Ry. Co, 7 Tenn.App. 141

(2) To sustain verdict or findings generally.

U.S.—Kimball v Chicago, R I. & P. Ry. Co., C C A Neb, 271 F 469.

Ark.—Swift & Co. v. Ft Smith & W. Ry Co, 16 S.W 2d 1001, 179 Ark 516.

Kan.—Atchison, T & S. F. Ry Co. v Boyle Commission Co., 178 P. 614, 104 Kan 166.

Mass.—New York Cent. & H. R. R Co v York & Whitney Co., 119 N. E. 855, 230 Mass. 206.

(3) To show that shipments were made under through bills of lading and were such shipments as would make initial railroad's connecting carriers its agents in performing interstate shipping contracts, so as to authorize initial carrier to sue for undercharges in transporting shipments.—United Hay Co v. St. Louis, B & M. Ry. Co., Tex Civ.App., 74 S. W.2d 766.

(4) To establish that person paying freight was agent of buyer from consignee, not of consignee, hence buyer was liable for additional freight charges because of error in original charges.—Erie R Co v. McDonald, 249 N.Y.S. 323, 140 Misc. 208.

(5) To establish special contract for movement of garbage cars for city at specified rate which could not be abrogated without formal notice.—New Orleans & N. E R. Co. v City of New Orleans, 123 So. 323, 168 La. 781.

(6) To show that commodity transported was clay, and not sand, to which a different rate applied.—In re Independent Sewer Pipe Co, D.C Cal, 248 F. 547

(7) To show that goods, although not exceeding seventeen thousand one hundred pounds, constituted a carload liable for carload rates fixed by interstate commerce commission based on weight of twenty-four thousand.—Northern Pac. Ry. Co. v. Pleasant River Granite Co., 102 A. 298, 116 Me. 496.

(8) To justify finding that two corporations were separate entities as respects right of marketing corporation to benefit of lower rate on lumber, reshipped over lines of carrier seeking to recover undercharges, but wherein required contract was executed only by manufacturing corporation.—Gideon-Anderson Lumber Co. v. St. Louis Southwestern Ry. Co, C C A.Mo, 88 F.2d 232.

(9) To sustain finding that damage to watermelon shipment was not caused by unreasonable delay of railroad in transporting shipment.—Sowega Melon Growers' Ass'n v Pere Marquette Ry. Co., 194 S E 917, 57 Ga.App. 225

(10) To support finding that oral ore hauling contract wherein mining company guaranteed certain tonnage was not variation of original written contract not containing tonnage guaranty, but new and independent agreement.—Dover Copper Mining Co v. Doenges, 12 P 2d 288, 40 Ariz 349.

(11) Evidence that a car was delivered at a place about a mile from its destination, the usual place of delivery of cars consigned to the destination, justified a finding that the car was duly delivered to the destination — Southern California Commercial Co. v Alberti, 207 P 1023, 58 Cal.App. 84.

(12) Where it appeared that, at the time a conveyance of right of way was made to a carrier, no charge was made by the carrier for ferrying service for any shipper, and the object of the shipper was to secure a contract for such service, the evidence sustained a finding that the promise to make no charge was not the consideration for the conveyance, since, under the circumstances, that agreement was simply to secure the service on the same terms as other shippers.—Boston & M. R. R v. Great Falls Mfg. Co., 111 A 691, 79 N H. 467.

(13) Finding that consignee only is responsible for charges is warranted if consignor merely loaded shipment, it being intended that consignor should not be liable, and receiving railroad knew facts.—T. S Faulk & Co. v Chicago, I. & L. Ry Co., 111 So. 196, 21 Ala.App 617, certiorari denied 111 So. 199, 215 Ala. 488.

(14) A showing that a railroad, seeking to recover freight on an import shipment at the normal rate of exchange provided for in bill of lading rather than at current rate, had paid steamship at the normal rate, established that it was not attempting to recover for itself alone.—Pennsylvania R. Co. v. Cameron, 124 A. 638, 280 Pa. 458, 33 A L R. 1281.

(15) To show shipper did not promise to pay the freight.—Davis v Hunt, Washington & Smith, 6 Tenn App 292.

Evidence held insufficient

(1) To show that consignee of empty milk cans, although owner thereof, had assumed by his conduct obligation to pay charges.—American Ry. Express Co. v. Mohawk Dairy Co, 144 N.E 721, 250 Mass 1, 35 A L R 14.

(2) To make seller party to contract and bind it for payment of hauling.—Reeves v G. & G. Pumping Co, La App, 151 So. 679

(3) To sustain carrier's burden of proving additional charge due for carrying freight, in action against shipper.—St Louis Southwestern Ry Co. v Rivers, 130 So. 641, 15 La App. 167

(4) To compel a finding that carrier knew that defendant, a commission company, in making a shipment was acting solely as owner's agent, even if that were a fact.—Atchison, T. & S F Ry Co. v. Boyle Commission Co, 178 P. 614, 104 Kan 166.

(5) To show that the conveyance of the land to the carrier was substantially equivalent in value to the carrier's agreement in perpetuity to make no charge against the grantor for ferrying.—Boston & M. R. R. v. Great Falls Mfg. Co, 111 A. 691, 79 N.H 467.

(6) To sustain verdict for shipper sued for undercharge in freight rates, shown by undisputed evidence to be less than tariffs on file with interstate commerce commission.—Western & A. R. R v. Aiken, 139 S E. 914, 37 Ga.App. 271.

20. Fla.—Reinschmidt v. Louisville & N. R. Co., 160 So. 69, 118 Fla. 237.

Va.—Eastern Coal & Export Corporation v. Norfolk & W. Ry. Co., 138 S E 471, 148 Va 140, certiorari denied 48 S Ct. 207, 276 U.S 615, 72 L.Ed. 732.

Construction of tariffs and classifications is a matter of law for the court.

Fla.—Reinschmidt v. Louisville & N. R. Co., 160 So. 69, 118 Fla. 237.

fact[21] and mixed questions of law and fact[22] are for the jury under proper instructions from the court,[23] unless the state of the evidence is such as to justify or require the taking of the case or question from the jury by the direction of a verdict or otherwise.[24]

Ill.—Davis v. Naugle Pole & Tie Co., 238 Ill.App. 214.

21. U.S.—Baltimore & O. S. W. R. Co. v. Settle, Ohio, 43 S.Ct. 28, 260 U.S. 166, 67 L.Ed. 189, reversing, C.C.A., 272 F. 675—Seaboard Air Line Ry. Co. v. New Orleans Export Co., C.C.A.La., 271 F. 861.

Ga.—Sowega Melon Growers' Ass'n v. Pere Marquette Ry. Co., 194 S.E. 917, 57 Ga.App. 225—Western & A. R. R. v. Legg, 123 S.E. 31, 32 Ga.App. 368.

Md.—Pennsylvania R. Co. v. Quality Products, 189 A. 200, 171 Md. 291.

Mass.—New York Cent. & H. R. R. Co. v. York & Whitney Co., 119 N.E. 855, 230 Mass. 206, affirmed in part and reversed in part on other grounds 41 S.Ct. 509, 256 U.S. 406, 65 L.Ed. 1016.

Mich.—Wabash Ry. Co. v. Bloomgarden, 180 N.W. 443, 212 Mich. 410.

N.J.—West Jersey & S. S. R. Co. v. Lake & Risley Co., 145 A. 336, 105 N.J.Law 314—Atlantic City R. Co. v. Packman, 147 A. 635, 7 N.J.Misc. 945.

N.C.—Davis v. Ford, 137 S.E. 328, 193 N.C. 444.

Pa.—Erie R. Co. v. Kreitner Bros., Inc., 3 Pa.Dist. & Co. 251.

S.C.—Boney v. Atlantic Coast Line R. Co., 126 S.E. 46, 130 S.C. 439, 37 A.L.R. 1331.

Tex.—Reed v. Southern Pac. Co., Civ.App., 99 S.W.2d 1026, error dismissed.

Questions held for jury

(1) Whether seller, directing shipment by another, was consignor, and liable for freight charges.—Central R. Co. of New Jersey v. H. H. Lineaweaver Co., C.C.A.Pa., 27 F.2d 25.

(2) Whether interstate shipment was delivered to railroad by defendant sued for charges, or by consignee's agent.—T. S. Faulk & Co. v. Chicago, I. & L. Ry. Co., 111 So. 196, 21 Ala.App. 617, certiorari denied 111 So. 199, 215 Ala. 488.

(3) Whether consignor of interstate shipment was merely agent for consignee.—T. S. Faulk & Co. v. Chicago, I. & L. Ry. Co., supra.

(4) Whether interstate bill of lading was properly made out and whether signature was authorized.—T. S. Faulk & Co. v. Chicago, I. & L. Ry. Co., supra.

(5) Whether consignor and consignee of interstate shipment intended that consignor should not be liable.—T. S. Faulk & Co. v. Chicago, I. & L. Ry. Co., supra.

(6) Whether railroad knew that consignor of interstate shipment was consignee's agent and intended that consignor should not be liable for charges.—T. S. Faulk & Co. v. Chicago, I. & L. Ry. Co., supra.

(7) Whether melons were to be classified for charges by a carrier as a vegetable or a fruit.—American Ry. Express Co. v. Magnolia Fish & Oyster Co., Tex.Civ.App., 255 S.W. 459.

(8) Whether two small samples of metal showed shipments to be white metal alloy scrap.—Pennsylvania R. Co. v. Fox & London, C.C.A.N.Y., 93 F.2d 669, certiorari denied Fox & London v. Pennsylvania R. Co., 58 S.Ct. 949.

(9) Whether particular shipments of stave bolts and headings sued for were within general class of shipments of short pieces of wood, or within special class of shipments of wood for fuel, bearing special lower rate, not whether shipments were in all respects analogous to shipments of wood for fuel.—Reinschmidt v. Louisville & N. R. Co., 160 So. 69, 118 Fla. 237.

(10) Whether a shipment of coal a short distance from the railroad would be "at the point of destination."—Republic Iron & Steel Co. v. Davis, 98 So. 197, 210 Ala. 361.

(11) Whether the shipper's failure to strip the percentage of its finished product required by a contract granting a special rate to the company on rough material was due to lack of cars.—Davis v. Hampton Stave Co., 291 S.W. 979, 173 Ark. 70.

(12) Whether contract between shipper of cotton linters on export bill of lading and railroad whereby railroad agreed to absorb cost of ordinary compression if cotton were compressed to high density at point of shipment, was for benefit of railroad or was a disguised rebate so as to entitle railroad to recover amount paid by it for such compression.—Louisville & N. R. Co. v. Williamson, C.C.A.Ga., 87 F.2d 34.

22. Pa.—West Jersey & S. R. Co. v. Whiting Lumber Co., 71 Pa.Super. 161.

Questions held mixed questions of law and fact

(1) Whether rate was prescribed by tariffs approved by railroad commission, and whether shipper paid applicable rate.—Reinschmidt v. Louisville & N. R. Co., 150 So. 266, 112 Fla. 267.

(2) Whether a charge was uncalled for and unreasonable, under all the circumstances of the case.—West Jersey & S. R. Co. v. Whiting Lumber Co., 71 Pa.Super. 161.

23. U.S.—Baltimore & O. S. W. R. R. v. Settle, C.C.A.Ohio, 272 F. 675, affirmed 43 S.Ct. 28, 260 U.S. 166, 67 L.Ed. 189.

Ill.—See Chicago, I. & L. Ry. Co. v. Monarch Lumber Co., 202 Ill.App. 20.

Pa.—West Jersey & S. R. Co. v. Whiting Lumber Co., 71 Pa.Super. 161.

Instructions held proper

(1) In a carrier's action against consignor for balance due on freight, plaintiff's instruction, fixing the property as being shipped from Missouri to New York, did not mislead the jury, where the evidence clearly showed the whole transaction, and that some of the cars were shipped from Chicago, and only one from Missouri.—Chicago & E. R. Co. v. Lightfoot, 232 S.W. 176, 206 Mo.App. 436.

(2) In a carrier's action against consignor for balance due for freight on an interstate shipment, defended on the ground that the carrier had agreed to collect the freight from others, to whom consignor sold the cars while in transit, it was proper to instruct that the tariffs were fixed by the interstate commerce commission, and if through a mistake a lesser rate was collected the difference between such rate and the regular rate is still due and collectible from consignor.—Chicago & E. R. Co. v. Lightfoot, supra.

24. Ark.—Missouri Pac. R. Co. v. Sisk, 295 S.W. 55, 174 Ark. 168.

Mich.—Michigan Cent. R. Co. v. Claspy, 226 N.W. 216, 247 Mich. 549.

Pa.—Railway & Express Co. v. DeRoy, 167 A. 444, 110 Pa.Super. 138.

Tenn.—Frazier & Crews v. Louisville & N. R. Co., 13 Tenn.App. 387.

Direction of verdict against carrier

Directed verdict against railroad, suing for balance due on correct freight charge was proper, in absence of competent evidence of shipments and weights.—Missouri Pac. R. Co. v. Sisk, 295 S.W. 55, 174 Ark. 168.

Direction of verdict for carrier

(1) Under statutes requiring the published rate to be collected, the carrier has been held entitled to affirmative charge in action against consignee for difference between freight paid and published rate.—Emerson v. Central of Georgia Ry. Co., 72 So. 120, 196 Ala. 280, L.R.A.1916F 120.

(2) However, a directed verdict for railroad suing for unpaid freight charges was held error under con-

§ 319. Overcharges

As proceedings before the interstate commerce commission or state regulatory commissions to obtain a reparation order or relief from unreasonable rates have already been fully considered in § 309, this and the sections immediately following will be limited to the recovery of excessive charges by court action.

§ 320. Right to Recover

Except in so far as such right has been abrogated or modified by applicable state or federal statute, a person who has involuntarily paid a carrier an excessive charge for its services is entitled to recover the overcharge by common-law action.

It is a well settled general rule that, where a carrier refuses to accept goods offered for transportation, or to deliver goods accepted for transportation, unless paid a sum in excess of what is reasonable, or in excess of an amount fixed by law or contract, and the sum so demanded is paid under protest, an action lies at common law in favor of the consignor or the consignee, as the case may be, to recover back the unlawful excess.[25] According to a number of decisions, any payment made in accordance with the demands of a carrier is not voluntary in the legal sense, and such excess may be recovered even where no protest was made at the time of payment,[26] but other decisions take the view that the payment of excessive freight charges without protest is a voluntary payment, and that the excess cannot be recovered back, in the absence of fraud or deception.[27] Excessive charges paid to a common carrier, without knowledge that they are in excess of those charged other shippers, and in reliance on the representation of the carrier that all its charges are uniform, are not voluntary payments, and the excess over the lawful charge may therefore be recovered from the carrier.[28] Where the consignor and the consignee agree that the latter shall pay the freight and deduct it from the purchase price, and the carrier collects freight in excess of the amount which it agreed with the consignor should be charged, the consignee, being in ignorance of such agreement, cannot be said to have made a voluntary payment of the excess and may recover it back.[29] If, however, a shipper has other facilities for transportation at a reasonable cost and merely used the facilities afforded by defendant because it was more convenient to him, the fact that he paid charges which he claimed to be exorbitant under protest does not make his act other than a voluntary one, and he cannot recover back the charges.[30] A payment of charges is voluntary and cannot be recovered back if there is no duress and the goods have previously been delivered or surrendered to the payor;[31] and a voluntary settlement of alleged excess charges with full knowledge of all

flicting evidence of proper classification of interstate shipment.—Southern Gravure Corporation v. Cleveland, C., C. & St L. R. Co., 142 S. E. 190, 37 Ga App. 805.

25. Ala.—W. L. Shepherd Lumber Co. v Atlantic Coast Line R. Co., 112 So. 323, 216 Ala. 89.
Ark.—Missouri Pac. R. Co. v. Fields Bros., 203 S.W. 1036, 134 Ark. 273.
Colo.—Bonfils v. Public Utilities Commission of Colorado, 189 P. 775, 67 Colo. 563.
Fla.—Florida East Coast Ry. Co. v. State, 82 So. 136, 77 Fla. 571.
Ky.—Southern Ry. Co. of Kentucky v. Frankfort Distillery, 26 S.W.2d 1025, 233 Ky. 771, certiorari denied 51 S.Ct. 75, 282 U.S. 868, 75 L.Ed. 767.
La.—McAdams v. Wells Fargo & Co. Express, 71 So. 945, 139 La. 681.
Me.—S. D. Warren Co. v. Maine Cent. R. Co., 135 A. 526, 126 Me. 23.
Mich.—Fletcher Paper Co. v. Detroit & M. Ry. Co., 164 N.W. 528, 198 Mich. 469, affirmed Detroit & M. R. Co. v. Fletcher Paper Co., 39 S.Ct. 13, 248 U.S. 30, 63 L.Ed. 107.
Mo.—Sonken-Galamba Corporation v. Missouri Pac. R. Co., 40 S.W.2d 524, 225 Mo.App. 1066.
Mont.—Montana Horse Products Co. v. Great Northern Ry. Co., 7 P.2d 919, 91 Mont. 194.
Neb.—Central Bridge & Construction Co. v. Chicago & N. W. Ry. Co., 262 N.W. 852, 129 Neb. 726.
N.Y.—Baldwin v. Liverpool & G. W. S. S. Co., 74 N.Y. 125, 30 Am.R. 277, affirming 11 Hun 496.
Okl.—Chicago, R. I. & P. Ry. Co. v. Gist, 190 P. 878, 79 Okl. 8.
Tenn.—West Const Co. v. Seaboard Air Line Ry. Co., 210 S.W. 633, 141 Tenn. 342.
Tex.—Bowers v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 241 S.W. 509.
10 C.J. p 449 note 79
Proceedings by shipper or consignee for relief against unreasonable rates see supra § 309.

26. U.S.—Southern Pac. Co. v. California Adjustment Co., Cal., 237 F. 954, 150 C.C.A. 604, certiorari dismissed California Adjustment Co. v. Southern Pac. Co., 39 S.Ct. 182, 248 U.S. 595, 63 L.Ed. 438, and affirming, D.C., 226 F. 349.
Cal.—California Adjustment Co. v. Atchison, T. & S. F. Ry. Co., 175 P. 682, 179 Cal. 140, 13 A.L.R. 274.
Me.—S. D. Warren Co. v. Maine Cent. R. Co., 135 A. 526, 126 Me. 23.
10 C.J. p 449 note 80.

Corpus Juris quoted in Northern Pac. Ry. Co. v. Department of Public Works, 217 P. 13, 14, 125 Wash. 428.

27. N.Y.—Murphy v. New York Cent. R. Co., 122 N.E. 700, 225 N.Y. 548, affirming 156 N.Y.S. 49, 170 App.Div. 788.—Henry L. Hunter, Inc., v. New York, N. H. & H. R. Co., 166 N.Y.S. 237, 179 App. Div. 52, affirming 161 N.Y.S. 10, 97 Misc. 26.
10 C.J. p 450 note 82

28. Iowa.—Cook v. Chicago, etc., R. Co., 46 N.W. 1080, 81 Iowa 551, 25 Am.S.R. 512, 9 L.R.A. 764.

29. Ga.—Georgia R., etc., Co. v. Crossley, 57 S.E. 97, 128 Ga. 35.

30. N.C.—Bernhardt v. Carolina, etc., R. Co., 47 S.E. 427, 135 N. C. 258.
10 C.J. p 450 note 85.

31. U.S.—Knudsen-Ferguson Fruit Co. v. Chicago, St. P., M. & O. Ry. Co., Wis., 149 F. 973, 79 C.C.A. 483, certiorari denied 27 S.Ct. 786, 204 U.S. 670, 51 L.Ed. 672.

the facts, where payment has not been exacted as a condition of acceptance or delivery of the goods, will preclude recovery back of the charges paid.[32] Moreover, a carrier has been held not liable for an overcharge from which it received no benefit, and which, unknown to the carrier, was fraudulently collected by its agent in collusion with an employee of the shipper for their own purposes;[33] but there is authority to the effect that the carrier may be liable for excess charges paid upon fraudulent misrepresentations of the carrier's agent where the latter is acting within the scope of his authority, although for his own benefit,[34] provided the person paying the charges acts in good faith and without negligence.[35]

The right to recover overcharges cannot be defeated or limited by a clause in the bill of lading limiting the carrier's liability for loss,[36] except, perhaps, where, due to the status or nature of the pleadings, the action is regarded as being founded on the contract evidenced by the bill of lading.[37]

Foreign transportation. At common law no action will lie against a common carrier for unreasonable and excessive charges for foreign transportation.[38]

Lien. In the absence of statute providing therefor, an overcharge in freight rates does not entitle the person overcharged to a lien on the carrier's roadbed, and a statute giving a lien to persons sustaining loss or damage to property for which the carrier is liable has no application to excess payments of freight rates.[39]

Payment of a refund to an authorized agent of the person entitled to recover the same discharges the carrier from liability therefor, notwithstanding a subsequent conversion or embezzlement of the proceeds by the agent.[40]

Under state statutes. The common-law remedy for excessive freight charges is not abrogated by a statute authorizing the recovery of charges collected in excess of the rates properly chargeable under a railroad commission law,[41] or by state rate-regulating statutes which provide penalties only for their enforcement and furnish no civil remedy therefor.[42] In such cases, the common-law remedy remains and may be enforced, even though the statutory remedy is extinguished by lapse of time.[43] Observance by a railroad company of a schedule rate fixed by the railroad commissioners will not defeat a common-law action for charges in excess of a reasonable rate, where the statute provides that the schedule so fixed by the commissioners shall be prima facie evidence that the rates therein fixed are reasonable.[44] Under state statutes similar to the Interstate Commerce Act, the right to recover exorbitant and unreasonable charges on intra-state shipments remains,[45] but if such charges are in accord with the scheduled rates the common-law remedy is abrogated and the party aggrieved must first bring reparation proceedings before the state commission within the time prescribed by statute for the institution of such proceedings,[46] and obtain a proper and sufficient order for refund,[47] although

32. Wash.—Northern Pac. Ry. Co. v. Department of Public Works, 217 P. 13, 125 Wash. 428, error dismissed Tacoma Grain Co. v. Northern Pac. Ry. Co., 44 S.Ct. 401, 264 U.S. 571, 68 L.Ed. 855.

33. U.S.—Scullin Steel Co. v. North American Co., Mo., 255 F. 945, 167 C.C.A. 237.

34. Wis.—Ripon Knitting Works v. Railway Express Agency, 240 N.W. 840, 207 Wis. 452.

35. Wis.—Ripon Knitting Works v. Railway Express Agency, supra.

36. N.Y.—Meyer v. Central R. Co. of New Jersey, 174 N.Y.S. 93, 185 App. Div. 812.

37. S.D.—J. F. Anderson Lumber Co. v. Davis, 212 N.W. 917, 51 S.D. 146.

38. U.S.—Geraty v. Atlantic Coast Line R. Co., D.C.S.C., 211 F. 227.

39. Ark.—Gallup v. St. Louis, I.M. & S. R. Co., 215 S.W. 586, 140 Ark. 347.

40. U.S.—Acme-Evans Co. v. Cleveland, C., C. & St. L. Ry. Co., C.C.A.Ind., 78 F.2d 543.

41. Fla.—Cullen v. Seaboard Air Line R. Co., 58 So. 182, 63 Fla. 122.

Mich.—Fletcher Paper Co. v. Detroit & M. Ry. Co., 164 N.W. 528, 198 Mich. 469, affirmed Detroit & M. R. Co. v. Fletcher Paper Co., 39 S.Ct. 13, 248 U.S. 30, 63 L.Ed. 107.

Utah.—Jeremy Fuel & Grain Co. v. Denver & R. G. R. Co., 207 P. 155, 60 Utah 153.

The Corpus Juris text is quoted with approval in Jeremy Fuel & Grain Co. v. Denver & R. G. R. Co., 207 P. 155, 158, 60 Utah 153.

42. Neb.—Central Bridge & Construction Co. v. Chicago & N. W. Ry. Co., 262 N.W. 852, 129 Neb. 726.

43. Utah.—Jeremy Fuel & Grain Co. v. Denver & R. G. R. Co., 207 P. 155, 60 Utah 153.

10 C.J. p. 451 note 89.

44. Iowa.—Barris v. Chicago, etc., R. Co., 71 N.W. 339, 102 Iowa 375, 63 Am.S.R. 449.

10 C.J. p. 451 note 90.

45. Colo.—Bonfils v. Public Utilities Commission of Colorado, 189 P. 775, 67 Colo. 563.

Ky.—Southern Ry. Co. of Kentucky v. Frankfort Distillery, 26 S.W.2d 1025, 233 Ky. 771, certiorari denied 51 S.Ct. 75, 282 U.S. 868, 75 L.Ed. 767.

Neb.—Central Bridge & Construction Co. v. Chicago & N. W. Ry. Co., 262 N.W. 852, 129 Neb. 726.

46. Ill.—Des Plaines Lumber & Coal Co. v. Chicago, B. & Q. R. Co., 249 Ill.App. 383.

Wash.—Hewitt Logging Co. v. Northern Pac. Ry. Co., 166 P. 1153, 97 Wash. 597.

47. U.S.—Northern Pac. Ry. Co. v. Sauk River Lumber Co., C.C.A. Wash., 82 F.2d 519, certiorari denied Sauk River Lumber Co. v. Northern Pac. Ry. Co., 57 S.Ct. 10, 299 U.S. 547, 81 L.Ed. 403—Woodrich v. Northern Pac. Ry. Co., C.C.A.N.D., 71 F.2d 732, 97 A.L.R. 401.

Ill.—Medusa Portland Cement Co. v. Illinois Cent. R. Co., 5 N.E.2d 782, 287 Ill.App. 549.

after a refund or reparation order is obtained he may then bring an action to enforce the same in accordance with the provisions of the applicable statute providing for such an action.[48] Such statutes do not affect the right to maintain a common-law action to recover overcharges in excess of the lawfully established rate,[49] and it has been held that a bond given, in accordance with statute, to secure repayment of any excess collected during the stay of an order fixing the rate while its validity is contested provides merely an additional or cumulative remedy which does not preclude a common-law action independently of the bond.[50] Statutes making the filed rates of the carrier the only lawful and proper rates to be charged until changed by the commission, and containing no provision permitting the commission to order a refund, have been held to provide an exclusive remedy and completely abrogate any right to bring a court action to recover alleged unreasonable charges which are in accordance with the rates on file.[51] Under a statute empowering a state commission to fix rates and hear complaints, and giving the person aggrieved by rates the right to complain and to recover excess charges paid, the common-law remedy is not saved, and one who has made no complaint to the commission cannot recover excess charges;[52] and the fact that another shipper had made complaint to the commission which had found the charges excessive and had ordered their reduction does not relieve a shipper, suing to recover excess charges paid under the former rates from making complaint thereof to the commission.[53]

A statute providing for recovery of damages produced by violation of any rule or regulation made by the state regulatory commission, gives a right of action for the recovery of charges paid on intrastate shipments in excess of the rates and tariff fixed by the state commission;[54] but a statute imposing liability for mere nonfeasance in omitting to do any act required by an order of the commission does not impose liability for the positive acts of charging and collecting freight in excess of the rates and tariffs fixed by the commission.[55]

Under Interstate Commerce Act. The right to maintain an action at common law to recover the excess of freight charged on an interstate shipment, over the duly published or established rate

Ky.—Southern Ry. Co. of Kentucky v Frankfort Distillery, 26 S W.2d 1025, 233 Ky. 771, certiorari denied 51 S Ct. 75, 282 U S 868, 75 L.Ed 767.

Miss—E. L Young Heading Co. v. Payne, 89 So. 782, 127 Miss. 48.

N M—Kemp Lumber Co. v. Atchison, T. & S F. Ry. Co., 9 P.2d 387, 36 N M. 126.

Wash—Belcher v. Tacoma Eastern R. Co., 168 P. 782, 99 Wash. 34.

Order held insufficient

Order of department of public works notifying carrier to pay to department as reparation all sums in excess of stated amount paid by shipper to carrier on logs shipped between certain dates, together with interest, but not determining amount of such excess, was held insufficient basis for shipper's action to recover alleged overcharge.—Northern Pac. Ry. Co. v. Sauk River Lumber Co, C.C A Wash, 82 F.2d 519, certiorari denied Sauk River Lumber Co v. Northern Pac. Ry. Co., 57 S.Ct 10, 299 U S. 547, 81 L.Ed. 403.

Reduction of award on rehearing

Where order was made by commerce commission determining railroad rate charged shipper to be unreasonable and discriminatory and on rehearing commission made new order determining amount to be returned to shipper, which was less than amount due under original order, shipper which accepted amount repaid in compliance with second order was held not entitled subsequently to bring common-law action against carrier for excessive amount charged, based on commission's first order—Medusa Portland Cement Co. v. Illinois Cent. R. Co., 5 N.E 2d 782, 287 Ill App 549.

Statute saving common law remedies

A provision, similar to that found in the Interstate Commerce Act and providing that "Nothing in this act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions thereof are in addition to such remedies," has been held not to prevent the abrogation of common-law actions to recover allegedly unreasonable rates where they are charged in accordance with filed schedules—Woodrich v. Northern Pac. Ry. Co., C C A.N.D., 71 F 2d 732, 97 A.L R. 401.

Statute so abrogating common law remedy held valid

Wash—Hewitt Logging Co. v. Northern Pac Ry. Co., 166 P. 1153, 97 Wash 597.

48. U S—Sauk River Lumber Co v. Northern Pac. Ry. Co., D C. Wash., 56 F 2d 656

Me—S. D Warren Co. v. Maine Cent. R. Co, 135 A. 526, 126 Me. 23

Pa—Allegheny Steel Co. v. New York Cent. R. Co., 188 A. 332, 324 Pa. 353.

49. Ill—A. L Jones Co. v. Chicago, M. & St. P. Ry. Co., 213 Ill.App. 283.

Mich—Fletcher Paper Co. v. Detroit & M. Ry. Co, 164 N.W. 528, 198 Mich. 469, affirmed Detroit & M. R. Co. v. Fletcher Paper Co., 39 S Ct. 13, 248 U S 30, 63 L Ed 107.

Neb—Central Bridge & Construction Co. v. Chicago & N. W Ry. Co, 262 N.W. 852, 129 Neb 726.

50. Ohio—Big 4 Coal Co. v. Hocking Valley Ry. Co, 11 Ohio App 88.

51. Mo—Sonken-Galamba Corporation v. Missouri Pac. R. Co., 40 S W 2d 524, 225 Mo App. 1066.

N Y—Purcell v New York Cent. R Co., 197 N.E 182, 268 N Y. 164, affirming 275 N Y S 70, 242 App. Div. 292, and certiorari denied 56 S Ct 173, 296 U S 545, 80 L Ed. 387.

52. Mass.—Gurney Heater Mfg. Co. v. New York, N. H & H. R. Co, 162 N E. 897, 264 Mass 427.
10 C.J p 451 note 91.

Corpus Juris cited in E. L. Young Heading Co v. Payne, 89 So. 782, 786, 127 Miss. 48.

53. Wis—Frank A. Graham Ice Co. v. Chicago, etc, R. Co., 140 N.W. 1097, 153 Wis. 145.

54. Ga—Atlantic Log & Export Co v Central of Georgia Ry. Co., 155 S E. 525, 171 Ga. 175, answers to certified questions conformed to 155 S.E. 530, 42 Ga.App. 256.

55. Ga—Atlantic Log & Export Co. v. Central of Georgia Ry. Co., supra.

is not affected by any of the provisions of the Interstate Commerce Act;[56] and it has been held that a charge in excess of the rate fixed by contract between the parties may be recovered as an overcharge where the rate in accordance with which the charge is made is not on file with, or approved by, the interstate commerce commission.[57] The common-law right to recover the difference between the amount of a reasonable charge and the amount of an exorbitant charge coercively exacted by a carrier still remains,[58] but, if the charges have been made in accordance with filed and published rates, the common-law remedy for the enforcement of such right is abrogated, and the enforcement thereof is dependent upon the injured party's first filing a timely complaint with the interstate commerce commission and obtaining a finding by that body that the rate charged was unreasonable, and the amount of the overcharge.[59] In a common-law action the only question between the shipper and the carrier is what were the legal published rates and regulations, and not what they should have been.[60] A prior application to the commission is necessary not only where the overcharge is asserted because of the alleged unreasonableness of the rate but where the alleged overcharge is due to the alleged unreasonable practice of the carrier in sending the shipment over the longer and more expensive of two available routes one of which is interstate and the other intra-state.[61] Excessive charges may be recovered by common-law action, however, where the carrier has failed to post, file, and establish a rate as required by the act;[62] and, if a reparation order finding the scheduled rates unreasonable has been obtained in accordance with the rules stated in § 309, then a court action may be brought to enforce the award or to recover the overcharge found by the commission to exist.[63]

Under provisions of the Interstate Commerce Act requiring that a carrier's charges be just and reasonable, and providing that a person injured by the carrier's violation of any of the provisions of the act may recover the actual damages sustained, it is well established that the exaction of an unreasonable and exorbitant charge constitutes a tort,[64] and justifies a recovery of the difference between an ex-

56. U S—Macon, D. & S R Co v General Reduction Co., C C A Ga, 44 F 2d 499, certiorari denied 51 S Ct. 345, 283 U S 821, 75 L Ed 1436

Mo—Mobile & O R. Co. v. Southern Sawmill Co, 251 S.W. 434, 212 Mo App. 117.

S C—Huddy v Railway Express Agency, 188 S E. 247, 181 S.C. 508.

10 C.J. p 451 note 93.

Corpus Juris quoted in Kemp Lumber Co. v Atchison, T & S. F Ry. Co, 9 P 2d 387, 391, 36 N M 126.

57. Tex—Bowers v Missouri, K & T Ry Co of Texas, Civ App., 241 S W. 509

58. U.S.—Swift & Co. v. New York Cent R Co, C C A N.Y, 16 F 2d 17, reversing, D C, 3 F.2d 826—Cocke v Morgan's Louisiana & Texas R. & S S. Co, C C A.Miss, 4 F.2d 961, certiorari granted Morgan's Louisiana & Texas R. & S S Co. v. Cocke, 45 S Ct 639, 268 U S 685, 69 L Ed. 1156, and reversed on other grounds 47 S Ct. 342, 273 U.S. 656, 71 L Ed 825

59. U S.—Lewis-Simas-Jones Co. v Southern Pac. Co, 51 S.Ct. 592, 283 U S 654, 75 L Ed. 1333, reversing 289 P. 643, 106 Cal App. 437, certiorari granted 51 S.Ct. 102, 282 U.S. 833, 75 L Ed. 741—Spiller v. St. Louis & S F. R. Co, C.C A. Mo, 14 F 2d 284, reversing, D.C., North American Co. v St. Louis & S. F. R. Co, 288 F. 612, and certiorari granted St. Louis & S. F R. Co. v. Spiller, 47 S.Ct. 111, 273 U. S. 680, 71 L Ed. 837, affirmed in part and reversed in part on other grounds, St. Louis & S. F. R. Co v. Spiller, 47 S Ct. 635, 274 U S 304, 71 L Ed 1060, motion denied 48 S.Ct 96, 275 U.S 156, 72 L Ed 214.

Okl—Chicago, R I. & P. Ry. Co. v Gist, 190 P 878, 79 Okl. 8.

10 C J p 451 note 94.

Corpus Juris quoted in Kemp Lumber Co v. Atchison. T & S. F Ry. Co., 9 P.2d 387, 391, 36 N M. 126.

Provision saving common-law remedies

A provision of the Interstate Commerce Act, that nothing therein "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," cannot be construed as continuing in the shippers a common-law right, the continued existence of which would be absolutely inconsistent with the other provisions of the statute—Texas, etc., R. Co v. Abilene Cotton Oil Co., 27 S Ct. 350, 204 U.S 426, 51 L Ed. 553, 9 Ann.Cas. 1075, reversing 85 S.W. 1052, 38 Tex Civ.App. 366.

60. U.S.—Carson Lumber Co. v. St. Louis, etc, R Co, D C.Okl, 198 F 311, affirmed 209 F. 191, 126 C.C A 139.

61. U S—Northern Pac. R. Co. v Solum, 38 S Ct. 550, 247 U S 477, 62 L Ed. 1221, reversing Monarch Elevator Co. v Northern Pac. Ry Co, 157 N.W. 998, 133 Minn. 461, and Solum v. Northern Pac. Ry. Co, 157 N.W 996, 133 Minn. 93.

62. U.S—St. Louis Southwestern R. Co. v Lewellen, Tex, 192 F. 540, 113 C C A. 414, certiorari denied 32 S.Ct 835, 225 U.S. 701, 56 L Ed 1264.

10 C J. p 452 note 95.

63. U S—Lewis-Simas-Jones Co. v Southern Pac. Co. 51 S.Ct. 592, 283 U S. 654, 75 L.Ed. 1333, reversing 289 P. 643, 106 Cal.App. 437, certiorari granted 51 S.Ct. 102, 282 U. S 833, 75 L Ed 741.

64. U.S—Adams v Mills, Ill, 52 S. Ct 589, 286 U S. 397, 76 L.Ed. 1184, reversing, C C.A., Adams v. Mellon, 51 F.2d 620, affirming, D. C, 39 F.2d 80, and certiorari granted 52 S Ct. 208, 284 U S. 614, 76 L Ed. 525—Lewis-Simas-Jones Co. v. Southern Pac. Co., 51 S.Ct. 592, 283 U.S. 654, 75 L Ed. 1333, reversing 289 P 643, 106 Cal.App. 437, certiorari granted 51 S Ct. 102, 282 U S. 833, 75 L Ed. 741—Great Northern Ry. Co v Sullivan, C.C A Minn, 72 F.2d 587, certiorari granted 55 S Ct. 216, 293 U S. 551, 79 L.Ed 654, reversed on other grounds 55 S Ct. 472, 294 U S. 458, 79 L.Ed. 992—Spiller v. St. Louis & S F R. Co., C.C.A. Mo, 14 F.2d 284, reversing, D.C., North American Co. v. St. Louis & S F. R. Co., 288 F. 612, and certiorari granted St Louis & S. F. R Co. v. Spiller, 47 S.Ct. 111, 273 U S. 680, 71 L.Ed 837, affirmed in part and reversed in part on other grounds St Louis & S. F.

cessive or unlawful charge and a reasonable or lawful one.[65] Also, where a charge is collected which is not provided for in the schedule or tariff as required by the act, recovery may be had for the difference between a reasonable charge and the charge collected;[66] but only the excess over a reasonable charge for the service may be recovered.[67] Before an action can be maintained for damages alleged to have been caused by the exaction of excessive rates,[68] or charges not provided for in the schedule or tariff,[69] the reasonableness of the rate or charge exacted must first be passed on and determined by the interstate commerce commission. If the commission determines that the rates charged were not unreasonable no recovery can be had.[70] Where a through charge for an international shipment is reasonable as a whole, the shipper has no right to recover damages or an alleged excess from the United States carrier on the ground that its proportional of the through rate is unreasonable and it receives an undue proportion of the charges.[71]

§ 321. What Constitutes an Overcharge

Where the rates have been fixed by law, there usually is, and can be, a recoverable overcharge only to the extent that the charges exceed the rates so fixed, but, if the rates have not been so fixed, an overcharge may consist of an excess over the charge fixed by contract or a reasonable charge

Practically any charge in excess of the amount which the carrier is entitled to collect, under the rules stated in §§ 312–314 supra, constitutes an overcharge to the extent of the excess,[72] while sums which the carrier was lawfully entitled to collect cannot ordinarily be recovered as an overcharge,[73] although they were in excess of the rates charged a favored shipper.[74] Thus, there may be an over-

R Co. v. Spiller, 47 S.Ct. 635, 274 U.S. 304, 71 L.Ed. 1060, motion denied 48 S.Ct. 96, 275 U.S. 156, 72 L.Ed. 214—Jones v. Alton & S. R. Co., D.C.Ill., 6 F.Supp. 807.

65. U.S.—Lewis-Simas-Jones Co. v. Southern Pac. Co., 51 S.Ct. 592, 283 U.S. 654, 75 L.Ed. 1333, reversing 289 P. 643, 106 Cal.App. 437, certiorari granted 51 S.Ct. 102, 282 U.S. 833, 75 L.Ed. 741—Great Northern Ry. Co. v. Sullivan, C.C.A.Minn., 72 F.2d 587, certiorari granted 55 S.Ct. 216, 293 U.S. 551, 79 L.Ed. 654, reversed on other grounds 55 S.Ct. 472, 294 U.S. 458, 79 L.Ed. 992—Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co., C.C.A.Ala., 295 F. 53, affirmed 46 S.Ct. 73, 269 U.S. 217, 70 L.Ed. 242

66. U.S.—Great Northern Ry. Co. v. Sullivan, Minn., 55 S.Ct. 472, 294 U.S. 458, 79 L.Ed. 654, reversing, C.C.A., 72 F.2d 587, certiorari granted 55 S.Ct. 216, 293 U.S. 551, 79 L.Ed. 654—Aron v. Pennsylvania R. Co., C.C.A.N.Y., 80 F.2d 100, 103 A.L.R. 1367, affirming, D.C., 10 F.Supp. 756, certiorari denied 56 S.Ct. 680, 298 U.S. 658, 80 L.Ed. 1384.

67. U.S.—Aron v. Pennsylvania R. Co., supra
10 C.J. p. 501 note 90 [a].

68. U.S.—Lewis-Simas-Jones Co. v. Southern Pac. Co., 51 S.Ct. 592, 283 U.S. 654, 75 L.Ed. 1333, reversing 289 P. 643, 106 Cal.App. 437, certiorari granted 51 S.Ct. 102, 282 U.S. 833, 75 L.Ed. 741

69. U.S.—Aron v. Pennsylvania R. Co., C.C.A.N.Y., 80 F.2d 100, 103 A.L.R. 1367, affirming, D.C., 10 F. Supp. 756, certiorari denied 56 S.Ct. 680, 298 U.S. 658, 80 L.Ed. 1384.

70. U.S.—Aron v. Pennsylvania R. Co., supra

71. U.S.—Great Northern Ry. Co. v. Sullivan, Minn., 55 S.Ct. 472, 294 U.S. 458, 79 L.Ed. 992, reversing, C.C.A., 72 F.2d 587, certiorari granted 55 S.Ct. 216, 293 U.S. 551, 79 L.Ed. 651

72. U.S.—International Milling Co. v. Lowden, C.C.A.Miss., 91 F.2d 270.
Ark.—Missouri Pac. R. Co. v. Fields Bros., 203 S.W. 1036, 134 Ark. 273.
Iowa.—Miller v. Davis, 240 N.W. 743, 213 Iowa 1001, 78 A.L.R. 1541.
Mich.—Fletcher Paper Co. v. Detroit & M. Ry. Co., 164 N.W. 528, 198 Mich. 469, affirmed Detroit & M. R. Co. v. Fletcher Paper Co., 39 S.Ct. 13, 248 U.S. 30, 63 L.Ed. 107.
Neb.—Central Bridge & Construction Co. v. Chicago & N. W. Ry. Co., 262 N.W. 852, 129 Neb. 726.

Acquiescence or continued habit or course of conduct between shipper and railroad would not operate to relieve railroad from its obligation to furnish service at the applicable tariff rates.—Louisville Water Co. v. Louisville, H. & St. L. Ry. Co., 110 S.W.2d 668, 270 Ky. 833.

73. Fla.—Henderson v. Hines, 98 So. 333, 86 Fla. 494.
Ga.—Seaboard Air Line Ry. Co. v. Lumberman's Co., 149 S.E. 128, 168 Ga. 851, reversing Lumberman's Co. v. Seaboard Air Line Ry. Co., 139 S.E. 116, 37 Ga.App. 176, vacated 149 S.E. 303, 40 Ga.App. 238, conformed to 149 S.E. 303, 40 Ga.App. 238.
Kan.—Goffee & Carkener v. Missouri Pac. R. Co., 276 P. 834, 128 Kan. 245.
Neb.—Fred F. Shields Co. v. Chicago, B. & Q. R. Co., 276 N.W. 925.
S.C.—Gibbes Machinery Co. v. Southern Ry. Co., 93 S.E. 718, 108 S.C. 159

Additional charges agreed on
When unexpected difficulties occur in the transportation of property by a carrier, and the consignor agrees, in view of them, to pay a sum for the carriage, in addition to what had previously been fixed on, and pays the same, he cannot recover it back as paid without consideration.—Detroit, etc., R. Co. v. McKenzie, 5 N.W. 1031, 43 Mich. 609.

Charges of connecting carrier
A consignee is bound on an implied contract to reimburse a forwarding line for demurrage charges which it was obliged to pay to a connecting railroad, and cannot complain of such charges as an overcharge.—Quanah, etc., R. Co. v. Drummond, Tex.Civ.App., 147 S.W. 728.

74. Wash.—Oregon-Washington R. & Nav. Co. v. Department of Public Works, 275 P. 87, 89, 151 Wash. 142.
'Mere discrimination, it seems to us, is not of itself sufficient to call for reparation, however much it may call for some other relief or disciplinary measures against the offending carrier. The right of reparation in favor of a complaining shipper, as we understand the law in this state, results only from an overcharge exacted from the complaining shipper, and not from an insufficient charge made to some other favored shipper. If this is not the law, then a carrier's giving a rebate, or making less than a regular tariff shipping charge, to a favored shipper, would mean that the offending carrier would have to make reparation accordingly to all shippers who had paid the regular,

charge because the rate or charge applied violates a contract between the parties,[75] is unreasonable,[76] is above the lawful tariff rate[77] or in excess of the rate fixed by law,[78] because an error was made by the carrier in the figuring of the mileage covered by the carriage,[79] more goods were charged for than were actually carried,[80] the charges were computed on the basis of a weight which was inaccurate and improper,[81] the charges included an additional charge for an item or service for which the carrier is not entitled to be compensated,[82] or because the carrier has shipped the goods over a longer route and charged the tariff rate therefor when a shorter and cheaper route was available.[83] A charge in excess of the lawfully established rate is an overcharge which may be recovered back, although it is collected pending a contest by the carrier of the validity of the rate so fixed,[84] and the enforcement of the rate has been enjoined or stayed during that period.[85] On the other hand, a charge made in accordance with the rates fixed by the lawful rate-making authority cannot generally be said to constitute an overcharge,[86] although such authority subsequently determines that it is excessive,[87] or the

legally established tariff during the same period, the shipments being accompanied by the same conditions." — Oregon-Washington R & Nav Co v. Department of Public Works, supra.

75. Ala.—Southern R. Co. v. Lowe, 54 So. 51, 170 Ala. 598

76. N.Y.—Purcell v New York Cent. R. Co., 197 N.E. 182, 268 N.Y. 164, affirming 275 N.Y.S. 70, 242 App.Div. 292, and certiorari denied 56 S.Ct. 173, 296 U.S. 545, 80 L.Ed. 387.

77. Mo.—Greenslade Oil Co. v. Roxana Petroleum Corporation, App., 6 S.W.2d 1020.

Ohio.—Beeghly v. Public Utilities Commission, 135 N.E. 641, 104 Ohio St. 158 — Taylor-Williams Coal Co. v. Public Utilities Commission of Ohio, 119 N.E. 459, 97 Ohio St. 234—Crook v. Baltimore & O.R. Co., 167 N.E. 899, 32 Ohio App. 263.

Or.—Black v. Southern Pac. Co., 171 P. 878, 88 Or. 533

46 C.J. p. 1161 note 33.

78. Ala.—Western Ry. of Alabama v. Montgomery County, 153 So. 622, 228 Ala. 426.

Kan.—Ft. Morgan Bean Co. v. Chicago, B. & Q.R. Co., 288 P. 589, 130 Kan. 859, affirmed 293 P. 526, 131 Kan. 679.

La.—McAdams v. Wells Fargo & Co. Express, 71 So. 945, 139 La. 681.

Mich.—Fletcher Paper Co. v. Detroit & M. Ry. Co., 164 N.W. 528, 198 Mich. 469, affirmed Detroit & M.R. Co. v. Fletcher Paper Co., 39 S.Ct. 13, 248 U.S. 30, 63 L.Ed. 107

N.D.—C.L. Merrick Co. v. Minneapolis, St. P. & S.S.M. Ry. Co., 160 N.W. 140, 35 N.D. 331, error dismissed 41 S.Ct. 142, 254 U.S. 376, 65 L.Ed. 312

10 C.J. p. 452 note 2—46 C.J. p. 1161 note 34.

79. Neb.—Central Bridge & Construction Co. v. Chicago & N.W. Ry. Co., 262 N.W. 852, 129 Neb. 726.

80. Iowa.—Coad v. Pennsylvania Ry. Co., 175 N.W. 344, 187 Iowa 1025.

Negligence unnecessary

The liability of a carrier for an overcharge, resulting from its having charged for more goods than it actually carried, is not affected by the fact that the absence of the excess goods for which it had charged was in no way due to its negligence.—Coad v. Pennsylvania Ry. Co., 175 N.W. 344, 187 Iowa 1025.

81. Pa.—New York & Pennsylvania Co. v. New York Cent. R. Co., 124 A. 428, 280 Pa. 297—Brown v. Pennsylvania R. Co., 66 Pa. Super. 483.

Tex.—Gulf, C. & S.F. Ry. Co. v. Minton, Civ.App., 14 S.W.2d 888, reversed on other grounds, Com.App., 24 S.W.2d 12.

Inaccuracy of weight held not established

Tex.—Gulf, C. & S.F. Ry. Co. v. Minton, Com.App., 24 S.W.2d 12, reversing, Civ.App., 14 S.W.2d 888.

82. Ala.—Seaboard Air Line Ry. Co. v. McWhorter, 108 So. 242, 214 Ala. 472

Ark.—Missouri Pac. R. Co. v. Fields Bros., 203 S.W. 1036, 134 Ark. 73

N.C.—W.L. Hall & Co. v. Norfolk Southern R. Co., 91 S.E. 607, 173 N.C. 108.

Tex.—Texas & N.O.R. Co. v. H. & C. Newman, Civ.App., 273 S.W. 335.

Care and feeding of live stock

A shipper of cattle, who is obliged to pay a feed bill in order to obtain possession of them from the carrier, is entitled to recover from the carrier the amount of such bill, with interest, if the cattle were not in fact fed, or if they were fed contrary to the shipper's directions not to feed them en route.—Galveston, etc., R. Co. v. Botts, Tex.Civ.App., 70 S.W. 113.

Expenses due to carrier's negligence

Excess freight which the owner of goods is compelled to pay by reason of a misshipment of the goods, due to the negligence of the carrier, is an overcharge for which a recovery may be had.—Read v. Central Vermont R. Co., 86 A. 161, 76 N.H. 555

83. Iowa.—Miller v. Davis, 240 N.W. 743, 213 Iowa 1091, 78 A.L.R. 1541.

However, it has been held, in view of Acts 1909 p. 210 § 2, prohibiting carriage charge greater or less than specified in published rates, that a shipper whose lumber is carried to destination by roundabout, and not by most direct, route cannot recover difference between lawful rate over roundabout route and lower lawful rate over direct route.—Oden-Elliott Lumber Co. v. Louisville & N.R. Co., 79 So. 400, 16 Ala.App. 495, certiorari denied 78 So. 989, 201 Ala. 700.

Lack of published rate for more direct route

Where a carrier sends goods by a more circuitious route and charges the established rates therefor, because there is no published or established rates for the more direct route over which the shipper requests the shipment to be made, there is an overcharge which the shipper is entitled to recover to the extent that the charges for the circuitous route are in excess of what would be a reasonable charge for the direct route.—Swift & Co. v. New York Cent. R. Co., C.C.A.N.Y., 16 F.2d 17, reversing, D.C., 3 F.2d 826.

84. Mich.—Fletcher Paper Co. v. Detroit & M. Ry. Co., 164 N.W. 528, 198 Mich. 469, affirmed Detroit & M.R. Co. v. Fletcher Paper Co., 39 S.Ct. 13, 248 U.S. 30, 63 L.Ed. 107.

85. Mo.—White v. Delano, 191 S.W. 1012, 270 Mo. 16.

Ohio.—Big 4 Coal Co. v. Hocking Valley Ry. Co., 11 Ohio App. 88.

86. U.S.—Woodrich v. Northern Pac. Ry. Co., C.C.A.N.D., 71 F.2d 732, 97 A.L.R. 401.

Ohio.—Crook v. Baltimore & O.R. Co., 167 N.E. 899, 32 Ohio App. 263.

87. U.S.—El Paso & S.W.R. Co. v. Arizona Corporation Commission, D.C.Ariz., 51 F.2d 573.

Va.—Mathieson Alkali Works v. Norfolk & W. Ry. Co., 137 S.E. 608, 147 Va. 426.

carrier subsequently requests that it be permitted to reduce such rates;[88] and where, under the statutes of the particular jurisdiction, the rates filed by the carrier are the only lawful rates which may be charged or collected, charges made in accordance therewith are not overcharges, although the filed rates are subsequently determined to be unreasonable.[89] Under the Interstate Commerce Act and state enactments similar thereto, an alleged unreasonable or exorbitant charge, which is in accordance with the scheduled rates or tariffs initiated and filed by the carrier, will not constitute an overcharge,[90] unless it has been so determined by the proper regulatory commission;[91] and this is so, although by mistake of the carrier's agent a rate lower than that filed was quoted to the shipper,[92] or although the parties have contracted for lower rates.[93]

§ 322. Liability of Connecting Carriers for Overcharge

A carrier participating in the carriage of goods over several lines may be liable for overcharges on such shipment where it has collected the same or they have been collected by another carrier as its agent; and, under the Interstate Commerce Act and state statutes similar thereto, all carriers participating in the establishment of a joint rate which is exorbitant and unreasonable are jointly and severally liable for the entirety of the excess charge.

A carrier participating in a carriage over several lines may be subject to liability for overcharges on the shipment where it has collected or received the benefit of the same,[94] another has collected the charges as its agent,[95] or the excessive charge is due to its fault or misconduct,[96] and, under the Interstate Commerce Act and other statutes similar thereto, making the exaction of unreasonable and exorbitant charges a tort for which damages may be recovered, carriers which have participated in the establishment of an unreasonable and exorbitant joint rate are each jointly and severally liable for the entirety of the excess or all damages sustained.[97] A delivering carrier who is a party to a contract of through shipment, made by the initial carrier having authority to make such contract, is

Nevertheless, it has been held that, if previously the state supreme court has erroneously construed the applicable statutes as permitting a recovery of the excess over reasonable charges, although the charges made were in accordance with the rates fixed by the commission, a judgment permitting such recovery will be sustained notwithstanding the supreme court reverses itself as to the construction of the statute.—Sunburst Oil & Refining Co. v. Great Northern Ry. Co., 7 P.2d 927, 91 Mont. 216, certiorari granted Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 53 S.Ct. 7, 287 U.S. 580, 77 L.Ed. 508, affirmed 53 S.Ct. 145, 287 U.S. 358, 77 L.Ed. 360, 85 A.L.R. 254.

88. Mont.—Montana Horse Products Co. v. Great Northern Ry. Co., 7 P.2d 919, 91 Mont. 194.

89. N.M.—Kemp Lumber Co. v. Atchison, T. & S. F. Ry. Co., 9 P.2d 387, 36 N.M. 126.

Wash.—State ex rel. Standard Oil Co. of California v. Department of Public Works, 53 P.2d 318, 185 Wash. 235.

Different substantive right held not created by amendment dealing with the procedure for the recovery of overcharges.—State ex rel. Standard Oil Co. of California v. Department of Public Works, 53 P.2d 318, 185 Wash. 235.

Retrospective operation of order

Order of Texas railroad commission, recognizing that rates published by agent for director general of railroads had been continuously applied and recognized by the commission, could have no retroactive effect, and hence could not affect rates on shipments theretofore made as respects right to recover alleged overcharge by shipper.—San Antonio & A. P. Ry. Co. v. D. M. Picton & Co., Tex.Civ.App., 111 S.W.2d 842, error refused.

90. U.S.—Adams v. Mellon, C.C.A. Ill., 51 F.2d 620, modifying, D.C., 39 F.2d 80, and certiorari granted 52 S.Ct. 208, 284 U.S. 614, 76 L.Ed. 525, reversed on other grounds Adams v. Mills, 52 S.Ct. 589, 286 U.S. 397, 76 L.Ed. 1184.—New York & Pennsylvania Co. v. Davis, D.C.N.Y., 8 F.2d 662

Miss.—E. L. Young Heading Co. v. Payne, 89 So. 782, 127 Miss. 48

Or.—Oregon-Washington R. & Nav. Co. v. Cascade Contract Co., 197 P. 1085, 101 Or. 582, petition denied 200 P. 1034, 101 Or. 582

91. Ky.—Southern Ry. Co. of Kentucky v. Frankfort Distillery, 26 S.W.2d 1025, 233 Ky. 771, certiorari denied 51 S.Ct. 75, 282 U.S. 868, 75 L.Ed. 767.

92. Ohio.—Cleveland Store Fixture Co. v. Cleveland, C., C. & St. L. Ry. Co., 1 Ohio N.P.,N.S., 242

10 C.J. p. 452 note 6.

93. Miss.—Brookhaven Lumber & Mfg. Co. v. Mississippi Cent. R. Co., 122 So. 472, 154 Miss. 303

94. U.S.—Great Northern Ry. Co. v. Sullivan, Minn., 55 S.Ct. 472, 294 U.S. 458, 79 L.Ed. 992, reversing, C.C.A., 72 F.2d 587, certiorari granted 55 S.Ct. 216, 293 U.S. 551, 79 L.Ed. 654

95. U.S.—Ingalls v. Maine Cent. R. Co., D.C.Me., 49 F.2d 631.

96. Pa.—New York & Pennsylvania Co. v. New York Cent. R. Co., 124 A. 428, 280 Pa. 297.

97. U.S.—Great Northern Ry. Co. v. Sullivan, Minn., 55 S.Ct. 472, 294 U.S. 458, 79 L.Ed. 992, reversing, C.C.A., 72 F.2d 587, certiorari granted 55 S.Ct. 216, 293 U.S. 551, 79 L.Ed. 654.—Lewis-Simas-Jones Co. v. Southern Pac. Co., 51 S.Ct. 592, 283 U.S. 654, 75 L.Ed. 1333, reversing 289 P. 643, 106 Cal.App. 437, certiorari granted 51 S.Ct. 102, 282 U.S. 833, 75 L.Ed. 741.—Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co., Ala., 46 S.Ct. 73, 269 U.S. 217, 70 L.Ed. 242, affirming, C.C.A., 295 F. 53.—Glens Falls Portland Cement Co. v. Delaware & Hudson Co., C.C.A.N.Y., 66 F.2d 490, affirming, D.C., 55 F.2d 971, and certiorari denied Delaware & Hudson Co. v. Glens Falls Portland Cement Co., 54 S.Ct. 132, 290 U.S. 697, 78 L.Ed. 599.—World Pub. Co. v. Davis, D.C.Okl., 16 F.2d 130, affirmed, C.C.A., Mellon v. World Pub. Co., 20 F.2d 613, certiorari denied 48 S.Ct. 119, 275 U.S. 561, 72 L.Ed. 426.

W.Va.—Kanawha Black Band Coal Co. v. Chesapeake & O. Ry. Co., 148 S.E. 855, 107 W.Va. 469, certiorari denied Chesapeake & O. Ry. Co. v. Kanawha Black Band Coal Co., 50 S.Ct. 85, 280 U.S. 602, 74 L.Ed. 647.

Reasons for rule

"It is true that participation in joint rates does not make connecting

bound to pay back to the shipper any excess of freight charges received,[98] and it cannot escape liability for excess charges collected, because the railroad commission did not apportion the rates fixed by it between the initial and the delivering carriers, or because when it received the cars from the initial carrier it also received statements of the freight charges at the unlawful rates and paid to the initial carrier a part or all of the excess freight collected.[99] However, a carrier which contracts to transport goods for a certain sum is not liable for the excess over that amount paid by the consignee to the delivering carrier on its refusal to deliver the goods on other terms, where it is not shown that defendant received any part of the sum so collected,[1] and, where no freight charges were paid in advance, but each succeeding carrier advanced to its predecessor the charges up to its own line, so that the terminal carrier collected all charges at destination, plaintiff, in order to recover for an overcharge from the initial carrier, must show that parts of the alleged overcharge by the terminal carrier reached the initial carrier.[2] If the total freight charges paid by the consignee to the last carrier were in excess of the legal charges for transportation by the cheapest route because of a misrouting by the initial carrier, but none of the carriers received more than the lawful rate for carrying the goods over the route by which they were actually sent, the remedy of the consignee is not against the last carrier.[3] A shipper who billed goods through at a guaranteed freight rate, sold them in transit, and changed the delivery accordingly, without the consent of the initial carrier, while the goods were in the hands of connecting carriers, and who expected when the shipment was made so to change the delivery, cannot recover from the initial carrier its proportion of the amount charged by the connecting carriers in excess of the guaranteed rate, but only the difference between the amount received by the initial carrier and the amount it would have received had the goods originally been billed to the points where they were delivered.[4]

§ 323. Actions for Overcharge

a. In general
b. Jurisdiction and venue
c. Conditions precedent
d. Limitations and time to sue
e. Parties
f. Pleadings
g. Evidence
h. Trial
i. Judgment and items or amount of recovery

a. In General

Actions for overcharges are for the most part governed by the rules relating to civil actions generally, and may be in the form either of an action of assumpsit or an action ex delicto.

Under the common law an action of assumpsit as for money had and received is ordinarily regarded as the proper form of action by which to recover back an illegal overcharge exacted by a carrier.[5]

carriers partners and that each does not become liable like a partner for every tort of any of the others engaged in the common enterprise. . . . But the establishment of a joint rate by the concurrence of connecting carriers is necessarily the act of each, because the establishment of the rate is done by their joint agreement . . . The liability in the case at bar arises out of the wrongful exaction from the shipper, not out of the unlawful receipt or unjust enrichment by the carrier. Every carrier who participates in the infliction of this wrong is liable in solido like every other joint tort-feasor."—Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co., Ala., 46 S.Ct. 73, 78, 269 U.S. 217, 70 L.Ed. 242, affirming, C.C.A., 295 F. 53

International shipment

A United States carrier establishing an excessive joint rate with a Canadian carrier for international shipments is liable for the full amount of the excess collected without regard to the proportion of the charges attributable to the foreign transportation or paid to the foreign carrier.—Lewis-Simas-Jones Co. v. Southern Pac. Co., 51 S.Ct. 592, 283 U.S. 654, 75 L.Ed. 1333, reversing 289 P. 643, 106 Cal.App. 437, certiorari granted 51 S.Ct. 102, 282 U.S. 833, 75 L.Ed. 741.

Last carrier

Where by statute recovery of excessive charges is by way of damages as for tort, the last connecting carrier is liable for the entire damage, although the freight charged was for transportation over different lines.—Osborne v. Chicago, etc., R. Co., C.C.Iowa, 48 F. 49, reversed on other grounds 52 F. 912, 3 C.C.A. 347.

98. S.C.—Reynolds v. Seaboard Air Line R. Co., 62 S.E. 445, 81 S.C. 383.

99. Ind.—Baltimore, etc., R. Co. v. Shirk, 104 N.E. 864, 56 Ind.App. 42.

10 C.J. p 453 note 11.

1. Tex.—Chicago, etc., R. Co. v. Henderson, Civ.App., 73 S.W. 36.

2. Iowa.—McManus v. Chicago Great Western R. Co., 136 N.W. 769, 156 Iowa 359.

10 C.J. p 453 note 15

3. Ala.—Ex parte Louisville & N. R. Co., 79 So. 139, 201 Ala. 667, reversing Oden-Elliott Lumber Co. v. Louisville & N. R. Co., 77 So. 240, 16 Ala.App. 251.

10 C.J. p 453 note 16.

4. Tex.—Sherman, etc., R. Co. v. Beebe, 39 S.W. 1102, 15 Tex.Civ.App. 685.

5. Ill.—A. L. Jones Co. v. Chicago, M. & St. P. Ry. Co., 213 Ill.App. 283

Mich.—Fletcher Paper Co. v. Detroit & M. Ry. Co., 164 N.W. 528, 198 Mich. 469, affirmed Detroit & M. R. Co. v. Fletcher Paper Co., 39 S.Ct. 13, 248 U.S. 30, 63 L.Ed. 107.

Tex.—Bowers v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 241 S.W. 509.

Utah.—Jeremy Fuel & Grain Co. v. Denver & R. G. R. Co., 207 P. 155, 60 Utah 153.

10 C.J. p 454 note 36.

Proceedings by shipper or consignee for relief against unreasonable rates see supra § 309.

This form of action has been held to be proper whether the charges are in excess of reasonable rates at common law or of rates prescribed and made prima facie reasonable under statutory authority.[6] In accordance with the general rule that the shipper has an election to bring an action in contract or in tort for the carrier's breach of a duty imposed by law, see the C.J.S. title Actions § 49 e (4), it is held that the party aggrieved is not limited to assumpsit or a contractual action for the overcharge, but may sue in tort.[7] A bill in equity to recover overcharges has been held nonmaintainable on the ground that the liability is purely a legal one,[8] but equity may have jurisdiction where the remedy at law is inadequate;[9] and it has been held that, after a judgment based upon an award has been recovered, an equitable proceeding may properly be brought in aid of the judgment to impress a trust on the excess exactions in the hands of the carrier as a trustee ex maleficio,[10] and that the Interstate Commerce Act does not preclude such remedy.[11]

It has been said that an action under the Interstate Commerce Act and similar state statutes for the recovery of damages resulting from the exaction of unreasonable or exorbitant charges by a carrier is in the nature of a tort or penal action;[12] but it has been held that, if plaintiff so elects, he may waive the tort and sue in assumpsit to recover the excess found by the commission to be an unreasonable charge.[13] The basis of such an action is not the award, which is simply a condition precedent to suit and evidentiary in character, but the original tort or wrong of the carrier in exacting the excessive charges.[14]

Where a state statute providing for reparation awards, and the court procedure to enforce the same, is complete in itself, the remedy afforded thereby is exclusive, and an action for enforcement cannot be brought under other statutory provisions providing for the recovery of damages from carriers failing to comply with applicable laws or regulations.[15]

b. Jurisdiction and Venue

Jurisdiction and venue for actions to recover overcharges are determined by ordinary rules and applicable statutory and constitutional provisions.

If a carrier charges for an interstate shipment more than the rate set out in the published schedule, nothing in the act will prevent the bringing of an action in a state court for the difference between the schedule rate and that charged;[16] and indeed the right of action in the state court is reserved by the provisions of the Interstate Commerce Act.[17] Moreover, an action by a shipper of an interstate shipment to recover freight charges paid under protest in excess of the charges specified in the contract of shipment is within the jurisdiction of a state court, where the carrier does not show that any rate was ever filed with, or approved by, the interstate commerce commission or in any manner promulgated as a lawful freight rate.[18] Under the express terms of the Interstate Commerce Act, state courts of general jurisdiction have jurisdiction of actions to recover excessive charges for which an award has been made by the commission.[19] The jurisdiction of the courts of an action to recover an illegal overcharge in plain violation of law is not ousted by statutes establishing commis-

6. Fla.—Cullen v. Seaboard Air Line R. Co, 58 So. 182, 63 Fla. 122.

7. Wis.—Smith v. Chicago, etc., R. Co., 5 N.W. 240, 49 Wis. 443.

8. N.J.—Scott v. Erie R. Co., 34 N. J.Eq. 354.
10 C.J. p 454 note 39.

9. U.S.—Standard Oil Co of Kentucky v. Atlantic Coast Line R. Co, D.C.Ky., 13 F.2d 633, modified on other grounds, C.C.A., Atlantic Coast Line R Co v. Standard Oil Co. of Kentucky, 16 F.2d 441, certiorari granted Standard Oil Co. v. Atlantic Coast Line R. Co., 47 S.Ct 475, 273 U.S. 691, 71 L.Ed. 842, affirmed in part and reversed in part on other grounds Atlantic Coast Line R. Co v. Standard Oil Co, 48 S.Ct. 107, 275 U.S. 257, 72 L.Ed. 270.

10. U.S.—Spiller v. St. Louis & S. F. R. Co., C.C.A.Mo., 14 F.2d 284, reversing, D.C., North American Co v. St. Louis & S F. R. Co, 288 F. 612, and certiorari granted St. Louis & S. F. R. Co. v Spiller, 47 S.Ct. 111, 273 U.S. 680, 71 L Ed. 837, affirmed in part and reversed in part on other grounds St. Louis & S F R. Co. v. Spiller, 47 S.Ct. 635, 274 U.S. 304, 71 L.Ed. 1060, motion denied 48 S.Ct. 96, 275 U.S. 156, 72 L.Ed 214.

11. U.S.—Spiller v. St Louis & S F. R. Co., supra.

12. U.S.—Ingalls v. Maine Cent R Co., D.C.Me, 49 F.2d 631—Louisville & N. R Co v. Sloss-Sheffield Steel & Iron Co, C.C.A.Ala, 295 F. 53, affirmed 46 S.Ct. 73, 269 U. S. 217, 70 L.Ed. 242.

13. U.S.—Jones v. Alton & S. R. Co., D.C.Ill., 6 F.Supp. 807.

14. U.S.—Lewis-Simas-Jones Co. v Southern Pac. Co, 51 S.Ct 592, 283 U.S. 654, 75 L.Ed. 1333, reversing 289 P. 643, 106 Cal.App. 437, certiorari granted 51 S.Ct. 102, 282 U.S. 833, 75 L.Ed 741.
D.C.—Central of Georgia Ry. Co. v. West Virginia Pulp & Paper Co., 92 F.2d 292, 67 App.D.C 309.

15. Ill.—Medusa Portland Cement Co v. Illinois Cent R. Co., 5 N.E 2d 782, 287 Ill.App. 549.

16. Ark.—Chicago, etc, R. Co v. Lena Lumber Co., 137 S.W. 562, 99 Ark 105.
10 C.J p 453 note 18.

17. W.Va.—Robinson v. Baltimore, etc, R Co., 63 S.E 323, 64 W. Va 406.

18. Mo.—Mott Store Co. v. St. Louis, etc., R Co., 168 S.W. 322, 184 Mo.App. 50.
10 C.J p 453 note 20.

19. U.S.—Darnell v. Illinois Cent. R. Co., Tenn, 32 S.Ct. 760, 225 U.S. 243, 56 L.Ed. 1072.

sions with power to fix rates and to award reparation;[20] but where an order of the state commission awarding reparation for charges in excess of reasonable rates is reviewable only by the state supreme court, the lower court, in an action to recover the amount of the award, has no jurisdiction to review or annul the order of the commission.[21]

An action to recover an excess of freight charged may be brought in the county in which the contract for shipment was made, although the freight was not paid there;[22] but, under a state venue statute, it has been held that a suit against a carrier which is a foreign corporation can be brought only in the county where the cause of action arose by reason of payment of the overcharge,[23] regardless of whether the action is regarded as ex delicto or ex contractu.[24]

c. Conditions Precedent

All statutory conditions and limitations must be complied with as conditions precedent to suit, but the action may be brought without a prior demand or the doing of other acts not essential to the existence of the right of action.

If payment has been made, no demand for the return of the excessive freight is necessary before bringing action.[25] All lawful conditions and limitations prescribed by statute must be complied with;[26] and as heretofore shown in § 319, under the Interstate Commerce Act and similar state statutes, if the right of action is predicated on the alleged unreasonableness of the established or published rates it is a condition precedent to suit that there first have been reparation proceedings before the commission and a proper order and findings obtained. However, if an action is brought to recover an excess over the rate filed with the interstate commerce commission, no prior application to the interstate commerce commission is necessary,[27] although under the Interstate Commerce Act it is permissible to make such application and thereafter to enforce such award as the commission may make by action brought in the circuit court.[28]

d. Limitations and Time to Sue

Mere delay does not bar the right to bring an action for overcharges, but the action must ordinarily be brought within the time prescribed by the applicable statute of limitations unless the bar has been waived or removed by the making of a new promise.

Unless there is a new promise which is sufficient to remove the statutory bar,[29] an action to recover overcharges must be brought within the period prescribed by the applicable statute of limitations,[30] but if it is commenced within the period thus prescribed the action is generally timely,[31] and mere delay which is not of itself unreasonable or inequitable will not of itself bar the right to bring the action.[32] If the action is based on a statute requiring it to be brought within a specified time after the alleged overcharge is made, the time thus limited is a condition precedent to the suit, and is a part of the right of action, and after it has elapsed the right of action is extinguished.[33] A statute relating

20. Cal.—Southern Pac Co. v. Kern County Super Ct., 150 P. 397, 404, 27 Cal.App 240.
10 C.J. p 453 note 21.

21. Cal.—Carter v. Southern Pac Co., 49 P.2d 1132, 9 Cal.App.2d 290.

22. Ky.—Conn v. Louisville, etc., R. Co., 51 S.W. 617, 21 Ky.L. 469.

23. Ga.—Drake v. Davis, 116 S.E. 552, 29 Ga.App. 795
Mont.—Doney v. Northern Pac. Ry. Co., 199 P. 432, 60 Mont. 209.

24. Ga.—Drake v. Davis, 116 S.E. 552, 29 Ga.App. 790.

25. Ind.—Baltimore, etc., R. Co. v. Shirk, 104 N.E. 864, 56 Ind.App. 42.
10 C.J. p 454 note 31.

26. Ohio.—Crook v. Baltimore & O. R. Co., 167 N.E. 899, 32 Ohio App. 263.

27. U.S.—National Pole Co. v. Chicago & N. W. R. Co., Wis., 211 F. 65, 127 C.C.A. 561.
Ark.—Kansas City Southern R. Co. v. Tonn, 143 S.W. 577, 102 Ark. 20
10 C.J. p 454 note 34.

28. U.S.—Chicago, B. & Q. R. Co. v. Feintuch, Cal., 191 F. 482, 112 C.C.A. 126.

29. Minn.—Big Diamond Milling Co. v. Chicago, M. & St. P. Ry. Co., 171 N.W. 799, 142 Minn. 181, 8 A.L.R. 1254.

Conditional promise to pay properly supported claims for overcharges held sufficient to remove bar of statute of limitations with respect to claim which plaintiff attempted to prove to carrier but carrier rejected solely on the ground that it was unable to verify the correctness of the claim due to the destruction of its records.—Big Diamond Milling Co. v. Chicago, M. & St. P. Ry. Co., 171 N.W. 799, 142 Minn. 181, 8 A.L.R. 1254.

30. U.S.—Kansas City Southern Ry. Co. v. Wolf, Mo., 43 S.Ct. 259, 261 U.S. 133, 67 L.Ed. 571, reversing, C.C.A., 272 F. 681.
Cal.—Sunset Pacific Oil Co. v. Los Angeles & S. L. R. Co., 290 P. 434, 110 Cal.App. 773
N.Y.—Cuneo Importing Co. v. New York Cent. R. Co., 170 N.Y.S. 940.
Wash.—Hewitt v. Logging Co. v. Northern Pac. Ry. Co., 166 P. 1153, 97 Wash. 597.

31. Neb.—Central Bridge & Construction Co. v. Chicago & N. W. Ry. Co., 362 N.W. 852, 129 Neb. 726.
Pa.—New York & Pennsylvania Co. v. New York Cent. R. Co., 150 A. 480, 300 Pa. 242

32. Pa.—New York & Pennsylvania Co. v. New York Cent. R. Co., supra.

Delay of approximately seven years from time of decision of public service commission determining rates charged by carriers to be unlawful to time of bringing suit to recover reparations is not unreasonable.—New York & Pennsylvania Co. v. New York Cent. R. Co., 150 A. 480, 300 Pa. 242.

33. U.S.—Kansas City Southern Ry. Co. v. Wolf, Mo., 43 S.Ct. 259, 261 U.S. 133, 67 L.Ed. 571, reversing, C.C.A., 272 F. 681.
Ga.—Atlantic Log & Export Co. v. Central of Georgia Ry. Co., 155 S.E. 525, 171 Ga. 175, answers to certified questions conformed to 155 S.E. 530, 42 Ga.App. 256.
10 C.J. p 454 note 32.

to or affecting the time within which the attorney general may bring suit for excess charges has no application to an action by a shipper.[34] A statutory limitation on the time complaints must be filed with a state commission for the reparation of excessive charges has been held to have no application to actions for excessive charges filed ab initio in the state courts;[35] and a statute limiting the time for bringing actions to recover triple damages on account of unlawful discrimination or rebates has no application to an action to recover overcharges.[36] However, the provisions of the Interstate Commerce Act, which existed prior to amendment by the Transportation Act of 1920, and provided that a complaint or petition for reparation must be filed with the commission within two years after the cause of action accrued and a petition for enforcement of an order of reparation within one year from the date of the order, were held to bar an action for overcharges not brought within two years, although the overcharge consisted of an excess over the filed and published tariff rates so that a prior application to the commission was not essential to the maintenance of the action.[37] Since the amendment, by the addition of § 16(3) (c), 49 U.S.C.A. § 16(3)' (c), an action for overcharges arising out of a violation of the Interstate Commerce Act is timely if brought within three years from the date the cause of action accrued, and if the claim for the overcharge has been sufficiently presented to the carrier in writing within the three-year period the time may be extended six months from the time of the rejection of the claim;[38] but the time for bringing an action which has already been barred by the expiration of the two-year period at the time the amendment took effect is in no way extended by the provisions of § 16(3) (h), although the action is sought to be brought in a state court.[39]

For the purposes of limitations the cause of action is ordinarily regarded as having accrued at the time the freight charges were paid or collected.[40] Thus, the cause of action for charges collected in excess of the rate fixed by the state regulatory body accrues when the overcharges are collected, and the running of the statute of limitations is not tolled pending a contest of the validity of the rate fixed.[41] A statute requiring actions to enforce a reparation order to be brought within a specified time from "the date of the order," has been held not to start running until the date the order becomes of binding effect, so as to be capable of enforcement, although made prior to that time.[42]

As shown in § 309 supra, a complaint or petition for reparation must be filed with the proper commission within the time prescribed by applicable statute; and in an action to enforce a reparation order defendant may defend on the ground that the petition for reparation was not filed with the commission within the time required, although such defense was not raised in the reparation proceeding.[43]

e. Parties

Questions relating to parties are usually resolved in accordance with the general rules relating to that subject. According to most cases, a person who has either paid the charges or ultimately borne the expense of the transportation is a proper party plaintiff to bring the action.

An action to recover overcharges can be maintained only by a proper party in interest.[44] As a general rule, the person who has borne the expenses of the transportation is a proper party plaintiff to bring an action to recover overcharges thereon, either at common law[45] or under statutes permitting damages to be recovered for the exaction of unreasonable or exorbitant charges,[46] but on this

34. Minn.—Big Diamond Milling Co. v. Chicago, M. & St. P. Ry. Co., 171 N.W 799, 142 Minn. 181, 8 A.L.R. 1254.

35. Cal.—Sunset Pacific Oil Co. v. Los Angeles & S. L. R Co., 290 P. 434, 110 Cal.App., Supp., 773.

36. Or.—Service Lumber Co. v. Sumpter Valley R. Co, 135 P. 539, 67 Or. 63.

37. U.S.—Kansas City Southern Ry Co. v Wolf, Mo, 43 S Ct 259, 261 U S 133, 67 L Ed. 571, reversing, C C.A, 272 F 681.
Md.—Peninsula Produce Exchange v. New York, P. & N. R., 137 A. 350, 152 Md. 594, affirmed 48 S Ct. 322, 276 U.S 599, 72 L Ed. 724.
S.D.—J. F. Anderson Lumber Co. v. Davis, 212 N.W. 917, 51 S D 146.

38. D.C.—Baltimore & O. R. Co. v. Domestic Hardwoods, 65 F.2d 488, 62 App D C. 142, certiorari denied 54 S.Ct. 64, 290 U S. 647, 78 L Ed 561.

39. Md.—Peninsula Produce Exchange v New York, P. & N. R. Co, 137 A. 350, 152 Md 594, affirmed 48 S Ct. 322, 276 U S. 599, 72 L.Ed 724

40. Pa.—Allegheny Steel Co v. New York Cent. R. Co, 188 A. 332, 324 Pa. 353.

41. Fla.—State v. Florida East Coast Ry., 86 So. 691, 80 Fla. 411.

42. Pa.—New York & Pennsylvania Co. v. New York Cent. R. Co, 150 A. 480, 300 Pa 242.

43. Pa.—Allegheny Steel Co. v. New York Cent. R Co., 188 A. 332, 324 Pa. 353.

44. Tex.—Gulf, C. & S. F. R. Co. v. Bartlett, Civ App., 75 S W 56

45. Minn.—Jennison Bros. & Co. v. Chicago & N W Ry. Co., 158 N. W. 398, 133 Minn. 268
Mo.—Cobbs v. Joyce-Watkins Co., 228 S W. 504, 287 Mo. 39.
Principal
Where agent purchased and shipped railroad ties to principal who paid freight thereon, the principal, and not the agent, was entitled to recover the excess freight charges.—Joyce-Watkins Co. v. P. R. Walsh Tie & Timber Co., Mo.App., 236 S.W. 1105.

46. U.S.—Gulf, M & N. R. Co. v. Merchants' Specialty Co, C C.A Miss, 50 F.2d 21—Louisville & N. R Co. v. Sloss-Sheffield Steel & Iron Co., C.C.A.Ala., 295 F. 53, af-

latter point there is some authority to the effect that the party who physically pays the freight is the only one who has the cause of action.[47] On the other hand, it is frequently held that a person who has advanced or paid the charges is a proper party to bring the action, although he has been reimbursed or has passed the loss or expense on to another,[48] but as to this there is some contrary authority;[49] and the person bearing the expense is the one ultimately entitled to the overcharges so that if they are recovered or collected by one who has merely advanced or paid them they may in turn be recovered from him by the former.[50]

In accordance with the foregoing, one with whom a contract of carriage is made, and who is described therein as the consignor, consignee, and sole owner, may maintain an action for overcharges.[51] A shipper or consignor who has paid the excess charges is entitled to sue,[52] regardless of whether, in the course of his business, he has recouped the loss or passed it on to others;[53] and a consignor may be a proper party plaintiff to recover an overcharge paid by the consignee, where the freight, pursuant to a contract between the parties, is charged against the consignor as payment on the purchase price.[54] It has been held, however, that a seller of goods who has voluntarily reimbursed the purchaser for storage charges wrongfully exacted by the carrier and paid by the purchaser cannot sue to recover damages on account of the exaction of such charges.[55] A consignee who has paid the charges is entitled to recover an overcharge,[56] although he is a purchaser who has been given credit for the freight on the purchase price,[57] or a commission merchant who reimbursed himself from the proceeds of the sale of the principal's shipment;[58] but if a consignee, who has received a refund on an overcharge has been given credit for the freight charges by the consignor, the latter is entitled to sue the consignee for the overcharges so refunded.[59] However, a statute authorizing the party aggrieved

firmed 46 S.Ct. 73, 269 U.S. 217, 70 L.Ed. 242

Mo.—McGrew Coal Co. v. Missouri Pac. Ry. Co., 217 S.W. 984, 280 Mo. 466, 13 A.L.R. 283, affirmed Missouri Pac. R. Co. v. McGrew Coal Co., 41 S.Ct. 404, 256 U.S. 134, 65 L.Ed. 864.

47. U.S.—Johnson v. Atchison, T. & S. F. Ry. Co., D.C.Tex., 17 F.Supp. 720.

48. U.S.—Adams v. Mills, Ill., 52 S.Ct. 589, 286 U.S. 397, 76 L.Ed. 1184, reversing, C.C.A., Adams v. Mellon, 51 F.2d 620, affirming, D.C., 39 F. 2d 80, and certiorari granted 52 S.Ct. 208, 284 U.S. 614, 76 L.Ed. 525—Southern Pac. Co. v. Darnell-Taenzer Lumber Co., Tenn., 38 S.Ct. 186, 245 U.S. 531, 62 L.Ed. 451, affirming 229 F. 1022, 143 C.C.A. 663—Consolidated Cut Stone Co. v. Atchison, T. & S. F. Ry. Co., D.C. Okl., 39 F.2d 661, affirmed, C.C.A., Atchison, T. & S. F. Ry. Co. v. Consolidated Cut Stone Co., 47 F. 2d 226, certiorari denied 51 S.Ct. 490, 283 U.S. 843, 75 L.Ed. 1453—New York, N. H. & H. R. Co. v. Ballou & Wright, Or., 242 F. 862, 155 C.C.A. 450.

Colo.—Bonfils v. Public Utilities Commission of Colorado, 189 P. 775, 67 Colo. 563.

49. Ill.—Andalman v. Chicago, etc., R. Co., 153 Ill.App. 169.

Vt.—State v. Central Vermont R. Co., 71 A. 193, 81 Vt. 459, 21 L.R.A., N.S., 949.

50. Mo.—Cobbs v. Joyce-Watkins Co., 228 S.W. 504, 287 Mo. 39—Joyce-Watkins Co. v. P. R. Walsh Tie & Timber Co., App., 236 S.W. 1105.

10 C.J. p. 453 note 26.

51. Wis.—Waterman v. Chicago, etc., R. Co., 21 N.W. 611, 61 Wis. 464, 50 Am.R. 145.

52. U.S.—Illinois Cent. R. Co. v. Vest, D.C.Ky., 39 F.2d 658.

53. U.S.—Southern Pac. Co. v. Darnell-Taenzer Lumber Co., Tenn., 38 S.Ct. 186, 245 U.S. 531, 62 L.Ed. 451, affirming 229 F. 1022, 143 C.C.A. 663—Illinois Cent. R. Co. v. Vest, D.C.Ky., 39 F.2d 658.

Colo.—Bonfils v. Public Utilities Commission of Colorado, 189 P. 775, 67 Colo. 563.

54. U.S.—Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co., C.C.A.Ala., 295 F. 53, affirmed 46 S.Ct. 73, 269 U.S. 217, 70 L.Ed. 242

Va.—Norfolk Southern R. Co. v. Freeman Supply Corporation, 133 S.E. 817, 145 Va. 207.

Assignment from consignee unnecessary

Va.—Norfolk Southern R. Co. v. Freeman Supply Corporation, 133 S.E. 817, 145 Va. 207.

10 C.J. p. 453 note 27.

Effect of contract provision

Where a commodity was sold, to be delivered at destination, freight to be paid by consignee and deducted from the purchase price, a provision of the contract that consignee should have the benefit, or bear the burden, of any change in the freight rate, does not preclude the consignor from recovering reparation on account of an unjust and unreasonable rate charged, where there was no change in the rate making such provision operative.—Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co., C.C.A.Ala., 295 F. 53, affirmed 46 S.Ct. 73, 269 U.S. 217, 70 L.Ed. 242.

55. Mo.—Luck Const. Co. v. Chicago & A. R. Co., 207 S.W. 840, 200 Mo. App. 450

56. U.S.—Adams v. Mills, Ill., 52 S.Ct. 589, 286 U.S. 397, 76 L.Ed. 1184, reversing, C.C.A., Adams v. Mellon, 51 F.2d 620, affirming, D.C., 39 F.2d 80, and certiorari granted 52 S.Ct. 208, 284 U.S. 614, 76 L.Ed. 525—Gulf, M. & N. R. Co. v. Merchants' Specialty Co., C.C.A.Miss., 50 F.2d 21.

Shipper reimbursed

Overcharges of freight on interstate shipments, although paid by the shipper, may be recovered by the consignee, under reparation orders of the interstate commerce commission, where the consignee has reimbursed the shipper and bears the burden of the unlawful charge.—Gabbert v. Atchison, T. & S. F. Ry. Co., C.C.A.Tex., 93 F.2d 562, reversing Johnson v. Atchison, T. & S. F. Ry. Co., 17 F. Supp. 720

57. U.S.—Atchison, T. & S. F. Ry. Co. v. Consolidated Cut Stone Co., C.C.A.Okl., 47 F.2d 226, affirming, D.C., Consolidated Cut Stone Co. v. Atchison, T. & S. F. Ry. Co., 39 F. 2d 661, and certiorari denied Atchison, T. & S. F. Ry. Co. v. Consolidated Cut Stone Co., 51 S.Ct. 490, 283 U.S. 843, 75 L.Ed. 1453.

58. U.S.—Adams v. Mills, Ill., 52 S. Ct. 589, 286 U.S. 397, 76 L.Ed. 1184, reversing, C.C.A., Adams v. Mellon, 51 F.2d 620, affirming, D.C., 39 F. 2d 80, and certiorari granted 52 S.Ct. 208, 284 U.S. 614, 76 L.Ed. 525.

59. Minn.—Jennison Bros. & Co. v. Chicago & N. W. Ry. Co., 158 N.W. 398, 133 Minn. 268.

to recover from a carrier an overcharge for freight has been held not to permit a buyer to sue a carrier for an overcharge collected from the seller for transporting the goods, and included by the seller in the price, and paid to him by the buyer.[60]

A statute providing that all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs does not permit several persons having distinct and separate claims against a carrier for overcharges to join as plaintiffs in a suit in equity to impress a trust on the property and assets of the carrier, whether to prevent a multiplicity of suits or otherwise.[61] Where, pending the determination by the United States supreme court of the validity of state statutes fixing the maximum railroad rates for intra-state transportation, a railroad exacted rates in excess of those fixed by the statutes, the state, suing, after determination of the validity of the rate statutes, in its private capacity on the relation of the attorney-general, to recover the excessive charges paid by it, cannot join as parties plaintiff with it private parties likewise charged excessive rates, praying a general accounting against the road to impound all excess charges exacted during the period of the illegal rates, since, while the state may maintain such a suit by itself in its private capacity, when it does so it is bound by the established rules of pleading and practice, as any private litigant, and each illegal exaction gives rise to an individual right of action, several or all of which may not be joined.[62]

Defendants. The liability of the delivering carrier, in an action to recover excess freight charges collected by it, does not depend on whether the terminal and initial carriers were joint tort-feasors; and hence the initial carrier need not be joined as a defendant in such action.[63] It has been held that an intermediate carrier, which did not participate in the fixing of the combination rates fixed by the initial and terminal carriers, but which has received compensation from the charges made by the other carriers and paid by plaintiff, is a proper and necessary party defendant to an action to recover the overcharges so paid.[64] Where the assets of the carrier which made the overcharge, and against whom the order of reparation was entered, have been taken over by another carrier which has assumed and agreed to pay its liabilities the latter carrier may, with the permission of the court, properly be made a party defendant.[65]

f. Pleadings

The form and sufficiency of the pleadings and other matters of pleading, such as issues, proof and variance, are governed by the ordinary rules.

It is generally essential that the petition, declaration, or complaint of plaintiff sufficiently allege all facts necessary to state a cause of action and show his right to recover,[66] and if it does this that is usually all that is required.[67] It is not necessary to allege that a demand was made before suit[68] but the declaration or complaint must state or show that the charge collected was excessive or unlawful,[69] and either that plaintiff paid the excessive

60. Vt.—State v. Central Vermont R Co., 71 A. 193, 81 Vt. 459, 21 L R.A.,N S., 949.

61. Mo.—Ballew Lumber & Hardware Co. v. Missouri Pac Ry. Co., 232 S.W. 1015, 288 Mo. 473

62. Mo.—State v. Chicago, etc, R. Co., 178 S W 129, 265 Mo 646, L. R A.1916C 309

63. Ind.—Baltimore, etc, R Co. v. Shirk, 104 N.E. 864, 56 Ind App 42.

64. U S.—Hygrade Food Products Corporation v. Chicago, M, St. P. & P R Co., D C.N Y, 10 F.Supp 767, reversed on other grounds, C C.A., 85 F 2d 113.

65. U S.—Jones v Alton & S. R. Co, D.C.Ill., 6 F Supp. 807.

66. U S—Northern Pac Ry. Co. v Sauk River Lumber Co., C C A Wash, 82 F.2d 519, certiorari denied Sauk River Lumber Co v Northern Pac Ry Co, 57 S Ct 10, 299 U.S. 547, 81 L Ed 403—Louisville & N. R Co. v Hussey-Hobbs Tie Co., C C A Mo., 47 F.2d 1061.

Ga.—Payne v. Monroe, 110 S E. 34, 28 Ga App. 6

Idaho.—Campbell v. Oregon Short Line R Co., 275 P. 576, 47 Idaho 223.

Or.—Crown Mills v. Oregon Electric Ry Co., 21 P 2d 214, 144 Or 25.

Pa.—Campbell Coal & Coke Co v Pennsylvania R Co, 142 A 210, 293 Pa. 243—Shenango Limestone Co v Buffalo, R & P. Ry Co, 105 A. 558, 262 Pa 446

Compliance with tariff provisions

In an action by a shipper to recover a rebate allowed by a tariff, upon the production of evidence satisfactory to the carrier that coal shipped thereunder has been placed in government naval vessels, the shipper must allege and prove either that the carrier was satisfied with the evidence produced or that its dissatisfaction therewith was arbitrary or capricious.—Campbell Coal & Coke Co. v. Pennsylvania R. Co., 142 A. 210, 293 Pa. 243

67. Ga.—Seaboard Air Line Ry. Co v Daugherty-McKey & Co., 149 S E. 92, 40 Ga App. 190.

Miss.—Southern Ry. Co in Mississippi v. Buckeye Cotton Oil Co, 89 So 228, 126 Miss. 562

10 C.J p 454 note 40 [a], [b].

Unnecessary allegations

In an action against a carrier to recover demurrage charges paid under protest, it is not necessary to allege that demurrage has been exacted in excess of the amount due under the interstate commerce commission rules where the cause of action was not for excessive demurrage but to recover demurrage improperly exacted.—Meyer v. Central R. Co of New Jersey, 174 N Y.S 93, 185 App. Div. 812

68. Ind.—Baltimore, etc., R Co v. Shirk, 104 N E 864, 56 Ind App. 42

69. Ga.—Southern Ry. Co. v Morris, 95 S E 284, 147 Ga 729, reversing Morris v Southern Ry. Co., 91 S E 878, 19 Ga App. 495, conformed to 95 S.E. 741, 22 Ga App. 154.

Mo.—Sonken-Galamba Corporation v. Missouri Pac. R. Co., 40 S.W.2d 524, 225 Mo.App. 1066.

rate or that it was paid by some one for him;[70] and if the action for overcharge is based on a statute, the declaration must state every fact necessary to constitute a cause of action within the statute.[71] In an action to recover charges asserted to be in excess of lawful interstate rates, plaintiff must, by clear and unmistakable allegations, show that the rates alleged to be the proper ones were properly established and filed with the interstate commerce commission.[72] An allegation that, if the rate charged was the true tariff rate, then defendant, through its agent, falsely and wrongfully stated the rate to plaintiff at a lesser sum, which he paid at the time of making the shipment, was consistent with the fact that the agent made a mistake or gave a lower rate to favor plaintiff, in either of which events the rate would be "false" and "wrongful."[73] In an action to recover for overcharges on an interstate shipment for which an award of damages has been made by the interstate commerce commission, an allegation that such charges were unjust, unreasonable, and in violation of law is one largely of fact and is sufficiently specific as against a general demurrer.[74] Under a statute providing that, if an award for overcharges by a railroad commission is not satisfied within ten days, the chairman shall file a copy of the award in the circuit court and a summons shall be issued as in other cases, the copy of the award is a sufficient basis for the action, and a petition need not be filed.[75]

The answer of defendant must usually allege sufficient facts to constitute a defense;[76] but an affidavit of defense which does this is sufficient to prevent the entry of a judgment against defendant for want of a sufficient affidavit of defense.[77]

Joinder of causes. A complaint that plaintiff who was compelled to ship his lumber over defendant's road was charged excessive and unreasonable rates and more than those to competing shippers sought only to recover money had and received in the form of freight overcharges, and was not an action for damages for discrimination between shippers, and hence was not objectionable as stating two causes of action or joining them in one count.[78] It has been held that where several shipments and overcharges have been made each transaction constitutes a separate cause of action and should be separately stated and numbered in plaintiff's pleading in order that the issue of alleged overcharge may be met with respect to each cause of action.[79]

Striking out averments. Where evidence as to the rate on logs was admissible in determining the reasonableness of the rate on lumber, the allegation in a shipper's action to recover overcharges on lumber that shippers of logs were charged a lesser rate was merely a pleading of evidence, and, redundancy not having been urged, the court below was justified in overruling the motion to strike out such allegation as immaterial.[80]

Variance. The general rule requiring the proof to conform with the pleading applies in actions of this nature.[81] Where, after a carrier quoted a rate on an interstate shipment and the animals to be transported were loaded in cars, the carrier quoted a higher rate which the shipper paid under protest, in an action for excess charges defendant cannot show under the general issue that the rate first quoted was less than the established rate and therefore illegal.[82] It has been held, however, that defendant may show and rely on the fact that the contract relied upon to establish the excessiveness of the charge is illegal as being in violation of the Interstate Commerce Act, although the defense of illegality is not alleged or pleaded in the answer.[83]

70. U.S.—Davis v. Mobile & O. R. Co., Miss., 194 F. 374, 114 C.C.A. 8. 10 C.J. p 454 note 41.

71. Mont.—Doney v. Northern Pac. Ry. Co., 199 P. 432, 60 Mont. 209. 10 C.J. p 455 note 43

72. U.S.—Bushwick McPhilben Corporation v. Bush Terminal R. Co., D.C.N.Y., 8 F.Supp. 684.

73. Iowa.—Herminghausen v. Adams Express Co., 149 N.W. 234, 167 Iowa 230.

74. U.S.—Denver & R.G.R. Co. v. Baer Bros. Mercantile Co., Colo., 209 F. 577, 126 C.C.A. 399

75. Ky.—Louisville & N. R. Co. v. Greenbrier Distillery Co., 187 S.W. 296, 170 Ky. 775.

76. N.Y.—Meyer v. Central R. Co. of New Jersey, 174 N.Y.S. 93, 185 App.Div. 812.

Averments insufficient

Under Ky.St. § 829, averments of want of evidence before the railroad commission to support its findings, or of evidence that the shipper suffered damages in the amount of the award, did not constitute a defense to recovery of judgment on the award, since the amount paid was a proper inquiry in the trial court, and, if put in issue, the carrier would have been entitled to a jury trial.—Louisville & N. R. Co. v. Greenbrier Distillery Co., 187 S.W. 296, 170 Ky. 775.

77. Pa.—Campbell Coal & Coke Co. v. Pennsylvania R. Co., 135 A. 650, 288 Pa. 36.

78. Or.—Service Lumber Co. v. Sumpter Valley R. Co., 135 P. 539, 67 Or. 63

79. U.S.—Bushwick McPhilben Corporation v. Bush Terminal R. Co., D.C.N.Y., 8 F.Supp. 684.

80. Or.—Service Lumber Co. v. Sumpter Valley R. Co., 135 P. 539, 67 Or. 63

81. Pa.—Shenango Limestone Co. v. Buffalo, R. & P. Ry. Co., 105 A. 558, 262 Pa. 446. 10 C.J. p 455 note 48.

Fatal variance

No recovery may be had upon the basis of a breach of covenant where the pleadings rest plaintiffs' cause of action upon an agreement to pay rent.—State Line & S. R. Co. v. Lehigh Valley R. Co., 120 A. 829, 277 Pa. 227.

82. Or.—Baldwin Sheep, etc., Co. v. Columbia R. Co., 114 P. 469, 58 Or. 285.

83. Kan.—Kanotex Refining Co. v.

g. Evidence

For the most part, the general rules of evidence are applicable in actions for overcharges.

In accordance with the general rules discussed in the title Evidence, all reasonable and proper presumptions or inferences will be indulged in an action for overcharges,[84] and plaintiff has the burden of proving all the essential elements of his cause of action,[85] while defendant has the burden on all matters of affirmative defense.[86] By requiring the fixing and publication of freight rates to be charged by common carriers, the Interstate Commerce Act supplies prima facie evidence of the contract rate which can be overcome only by evidence in avoidance thereof;[87] and a freight charge made by a common carrier, which conforms to the schedule of rates required to be fixed and published by the Interstate Commerce Act, is prima facie a reasonable charge.[88] Usually it is incumbent upon plaintiff to establish the amount of his damages or the overcharges with reasonable certainty;[89] but in an action under the Interstate Commerce Act and similar statutes for reparation awarded by a commission on account of charges of excessive rates on interstate shipments, payment of unreasonably excessive charges is presumptive evidence of damage to plaintiff to the extent of such excessive charges,[90] and recovery may be had without proof of specific pecuniary loss.[91] Where the action is to recover an overcharge, rather than damages on ac-

Atchison, T. & S. F. Ry. Co., 46 P.2d 16, 142 Kan. 139.

84. U.S.—Jones v. Alton & S. R. Co., D.C.Ill., 6 F.Supp. 807.
Mont.—Doney v. Northern Pac. Ry. Co., 199 P. 432, 60 Mont. 209.

Custom as to routing

Where a custom as to the routing of shipments is proved, it will be inferred, in the absence of contrary evidence, that the carrier followed this custom in routing the particular shipment involved.—Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Ry. Co., C.C.A.Mo., 80 F.2d 32, 102 A.L.R. 688, certiorari denied 56 S.Ct. 591, 297 U.S. 715, 80 L.Ed. 1001

Lawfulness of action presumed

It will be presumed that a railroad in charging a freight rate has complied with the law and that the rate charged is in accordance with the published and approved tariff.
Ind.—St. Louis Southern Ry. Co. v. J. S. Patterson Const. Co., 104 N.E. 512, 181 Ind. 304.
Iowa.—Herminghausen v. Adams Express Co., 149 N.W. 234, 167 Iowa 230.
Mont.—Doney v. Northern Pac. Ry. Co., 199 P. 432, 60 Mont. 209.

Negligence not presumed from mere delay

Mere showing of delay in transportation does not give rise to presumption of negligence, but if some cause for delay, unexplained by carrier, is shown such a presumption will arise.—Buschow Lumber Co. v. Union Pac. R. Co., 276 S.W. 409, 220 Mo.App. 743.

Presumption against carrier adopting wrong weight

(1) Where a carrier wrongfully fails to weigh a shipment, and adopts the weights given by the shipper, thereby overcharging the consignee, all reasonable doubts and presumptions will be resolved against the carrier.—New York & Pennsylvania Co. v. New York Cent. R. Co., 124 A. 428, 280 Pa. 297.

(2) Hence, in such a case, it has been held that a carrier is entitled to be paid on basis of minimum carload weights only, in absence of evidence of greater weights, it being presumed that the actual weights were no greater than the minimum.—New York & Pennsylvania Co. v. New York Cent. R. Co., supra.

85. U.S.—Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Ry. Co., C.C.A.Mo., 80 F.2d 32, 102 A.L.R. 688, certiorari denied 56 S.Ct. 591, 297 U.S. 715, 80 L.Ed. 1001—Louisville & N. R. Co. v. Hussey-Hobbs Tie Co., C.C.A.Mo., 47 F.2d 1061.
Idaho.—Campbell v. Oregon Short Line R. Co., 275 P. 576, 47 Idaho 223.

Special privilege

Shipper, claiming special rate privilege under contract with carrier, has burden of bringing itself within provisions of statute authorizing such contracts for protection and development of new industries.—Hawkeye Portland Cement Co. v. Chicago, R. I. & P. Ry. Co., 201 N.W. 16, 198 Iowa 1250.

Excessiveness of charge

Where it is alleged that the amount charged by defendant is in excess of the rate specified in the tariffs filed with a state railroad commission, the burden is on plaintiff to prove it.—Blalock Hardware Co. v. Seaboard Air Line R. Co., 86 S.E. 1025, 170 N.C. 395.

86. U.S.—Texas & P. Ry. Co. v. Thompson, C.C.A.La., 288 F. 167.

Illegality of rate violated or exceeded

(1) If the carrier desires to relieve itself from the consequences of collecting an excess over the contract rate on the ground that the contract was illegal under the Interstate Commerce Law, the burden is on it to prove such fact.—Southern Kansas R. Co. v. J. W. Burgess Co., Tex.Civ.App., 90 S.W. 189

(2) Where, in an action against a carrier to recover an overcharge on its proportion of a joint rate, the carrier alleged that the joint rate was unlawful because in conflict with legally established rates, the burden is on it to establish that fact.—Kansas City Southern R. Co. v. C. H. Albers Commn. Co., 99 P. 819, 79 Kan. 59.

87. N.Y.—Baltimore, etc., R. Co. v. La Due, 108 N.Y.S. 659, 57 Misc. 614, reversed on other grounds 112 N.Y.S. 964, 128 App.Div. 594
N.C.—Blalock Hardware Co. v. Seaboard Air Line R. Co., 86 S.E. 1025, 170 N.C. 395

88. U.S.—Great Northern Ry. Co. v. Sullivan, Minn., 55 S.Ct. 472, 294 U.S. 458, 79 L.Ed. 992, reversing, C.C.A., 72 F.2d 587, certiorari granted 55 S.Ct. 216, 293 U.S. 551, 79 L.Ed. 654—State of Florida v. U. S., D.C.Ga., 11 F.Supp. 36, reversed on other grounds Atlantic Coast Line R. Co. v. State of Florida, 55 S.Ct. 713, 295 U.S. 301, 79 L.Ed. 1451, rehearing denied 55 S.Ct. 918, 295 U.S. 769, 79 L.Ed. 1710, and State of Florida v. U. S., 55 S.Ct. 918, 295 U.S. 769, 79 L.Ed. 1710.
10 C.J. p. 455 note 53.

89. U.S.—Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Ry. Co., C.C.A.Mo., 80 F.2d 32, 102 A.L.R. 688, certiorari denied 56 S.Ct. 591, 297 U.S. 715, 80 L.Ed. 1001—State of Florida v. U. S., D.C.Ga., 11 F.Supp. 36, reversed on other grounds Atlantic Coast Line R. Co. v. State of Florida, 55 S.Ct. 713, 295 U.S. 301, 79 L.Ed. 1451, rehearing denied 55 S.Ct. 918, 295 U.S. 769, 79 L.Ed. 1710, and State of Florida v. U. S., 55 S.Ct. 918, 295 U.S. 769, 79 L.Ed. 1710
Tex.—Gulf, C. & S. F. Ry. Co. v. Minton, Com.App., 24 S.W.2d 12, reversing, Civ.App., 14 S.W.2d 888.

90. Pa.—Allegheny Steel Co. v. New York Cent. R. Co., 188 A. 332, 324 Pa. 353
10 C.J. p. 455 note 54.

91. U.S.—Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co., Ala., 46 S.Ct. 73, 269 U.S. 217, 70

count of an overcharge, plaintiff need prove only the overcharge and proof of special damages is unnecessary.[92] Under the Interstate Commerce Act and similar state statutes a sufficient reparation order finding the charges collected to be unreasonable makes out a prima facie case against the carrier which it must overcome by evidence,[93] but the findings and determination of the commission are usually held to have only a prima facie status and are not conclusive or in the nature of a judgment[94] although, in view of the wording of the particular statute involved, it has also been held that the carrier cannot introduce evidence to show that the rates charged were not in fact unreasonable as found by the commission.[95] While the parties to an interstate transportation contract cannot, by agreement, mistake, or otherwise fix a rate different from any established under the Interstate Commerce Act, nevertheless proof that a rate less than that charged by the carrier at destination was contracted for, and inserted by, the carrier's agent in the bill of lading, and that plaintiff paid the increased rate at destination under protest, is sufficient to establish a prima facie case, the burden then shifting to the carrier to show that the higher rate has been established in accordance with the requirements of the Interstate Commerce Act.[96]

For evidence offered to be entitled to admission, it is essential that it be competent and relevant to the issues involved;[97] and if it has these characteristics it is usually admissible.[98]

L.Ed. 242, affirming, C.C.A., 295 F. 53—Southern Pac. Co. v. Darnell-Taenzer Lumber Co., Tenn., 38 S.Ct. 186, 245 U.S. 531, 62 L.Ed 451, affirming 229 F. 1022, 143 C.C.A. 663—Atchison, T. & S. F. Ry. Co. v. Spiller, Mo., 249 F. 677, 161 C.C.A. 587, modifying 246 F. 1, 158 C.C.A. 227, reversed on other grounds Spiller v. Atchison, T. & S. F. R. Co., 40 S.Ct. 466, 253 U.S. 117, 64 L.Ed. 810.

92. Kan.—Ft. Morgan Bean Co. v. Chicago, B. & Q. R. Co., 288 P. 589, 130 Kan. 859, affirmed 293 P. 526, 131 Kan. 679.

U.S.—Jones v. Alton & S. R. Co., D.C.Ill., 6 F.Supp. 807—Corray v. Baltimore & O. R. Co., D.C.Ill., 2 F.Supp. 829.

Ky.—Southern Ry. Co. of Kentucky v. Frankfort Distillery, 26 S.W.2d 1025, 233 Ky. 771, certiorari denied 51 S.Ct. 75, 282 U.S. 868, 75 L.Ed. 767.

Pa.—New York & Pennsylvania Co. v. New York Cent. R. Co., 110 A. 286, 267 Pa. 64.

93. Neb.—Central Bridge & Construction Co. v. Chicago & N. W. Ry. Co., 262 N.W. 852, 129 Neb. 726.

Wash.—State v. Public Service Commission, 192 P. 1079, 112 Wash. 629.

Wis.—Chicago, M. & St. P. Ry. Co. v. Railroad Commission, 215 N.W. 442, 194 Wis. 24.

94. Pa.—Allegheny Steel Co. v. New York Cent. R. Co., 188 A. 332, 324 Pa. 353.

95. Mo.—Hunter v. St. Louis, etc., R. Co., 150 S.W. 733, 167 Mo.App. 624.

96. U.S.—Louisville & N. R. Co. v. Hussey-Hobbs Tie Co., C.C.A.Mo., 47 F.2d 1061.

Wash.—Northern Pac. Ry. Co. v. Sauk River Lumber Co., 295 P. 926, 160 Wash. 691.

Amendment of rate schedule

In suit to recover alleged overcharges on intra-state carload shipments, railroad's amendment of rate schedule after controversy arose was held irrelevant and inadmissible.—Louisville & N. R. Co. v. Speed-Parker, Inc., 137 So. 724, 103 Fla. 439.

Evidence as to reasonableness or propriety of rates held inadmissible

(1) On the question of the reasonableness of charges, evidence of charges of another carrier for hauling similar material, although under different conditions, is not admissible.—Anniston Mfg. Co. v. Southern R. Co., 40 So. 965, 145 Ala. 351.

(2) Evidence that plaintiff, in an action to recover an overcharge on an interstate shipment three years prior to the shipment in question, had secured a lower rate is irrelevant and inadmissible to show the correct rate at the time of shipment.—Texas, etc., R. Co. v. Dickson, Tex.Civ.App., 167 S.W. 33.

(3) The question as to what was considered among railroad men as a reasonable rate, the question not being limited to the rate between the points in issue, is properly disallowed.—Anniston Mfg. Co. v. Southern R. Co., supra.

(4) In an action to recover freight overcharges on an interstate shipment, evidence as to the rate on a shipment based on two local rates, and not on a through shipment at a through rate, is inadmissible.—Texas, etc., R. Co. v. Dickson, supra.

Opinions or decisions of interstate commerce commission

(1) In an action against a railroad for overcharges on a shipment of "ties" which it was claimed that defendant had, by a special agreement to carry "lumber," contracted to carry at a certain rate, an opinion of the interstate commerce commission to the effect that ties should be put in the same classification as lumber is irrelevant and prejudicial.—Greason v. St. Louis, etc., R. Co., 86 S.W. 722, 112 Mo.App. 116.

(2) In an action to recover an overcharge on the theory that the shipment of wastes, overflows, and traps was brass goods, subject to a lower scheduled rate than plumber's supplies, the rate charged, a decision of the interstate commerce commission that the mixing of wastes and overflows with conceded plumbers' supplies, under the rule that, where several articles are shipped in one box, the rate which is applicable is that applicable to the highest rated article in the box, is irrelevant.—Wolverine Brass Works v. Southern Pac. Co., 153 N.W. 778, 187 Mich. 393.

Immaterial contract

Evidence of contract between timber company and railroad company concerning sale of timber scaled in accordance with commercial scale is inadmissible in action against railroad company for overcharges based on freight scale of logs shipped.—Green Mountain Log Co. v. Columbia & N. R. R. R., 16 P.2d 1106, 141 Or. 188.

98. Ala.—Louisville & N. R. Co. v. Camody, 85 So. 846, 17 Ala.App. 370, conforming to 84 So. 824, 203 Ala. 522, which reversed 82 So. 648, 17 Ala.App. 158.

Iowa.—Coad v. Pennsylvania Ry. Co., 175 N.W. 344, 187 Iowa 1025.

Evidence as to reasonableness of rates held admissible

(1) In a common-law action to recover for an overcharge, evidence as to the usual and customary rate for transporting the same commodity for a like distance is admissible, subject to the carrier's right to show dissimilarity in the circumstances and conditions affecting the rates, such as the greater expense of the transportation, the difference in the cost of construction and operation, or the volume of business.—Kindel

General rules as to the weight and sufficiency of evidence are applicable and, in accordance therewith, the evidence in actions against carriers for overcharges has been held sufficient[99] and has been

v. Colorado, etc., R. Co., 139 P. 1105, 57 Colo. 1, Ann Cas 1916A 57.

(2) In a shipper's action to recover overcharges, evidence as to rates paid by another shipper during the same time is admissible as being in the nature of an admission against the road's interest, the inference being that, as it would not likely charge less than was reasonable in its dealings with such other shipper, the greater rate exacted from plaintiff was unreasonable.—Service Lumber Co. v Sumpter Valley R Co, 135 P. 539, 67 Or. 63.

(3) In an action for overcharges on shipments of lumber, the fact that defendant classified logs and lumber under the same tariff rates is admissible on the question of the reasonableness of the rates for lumber, and the rate for logs is also admissible.—Service Lumber Co. v. Sumpter Valley R. Co, supra.

(4) Where a common-law right of action to recover freight charges collected in excess of reasonable charges exists and is shown by proper pleadings, the rates fixed by the commissioners may be given in evidence to show prima facie what was a reasonable rate, that being the effect of the provision of the statute making the commission rates prima facie evidence of reasonable rates in "all suits brought against any railroad corporation wherein is involved the rates of any such railroad corporation for the transportation of freight."—State of Florida v. U. S, D C Ga, 11 F Supp. 36, reversed on other grounds Atlantic Coast Line R. Co. v. State of Florida, 55 S Ct 713, 295 U S. 301, 79 L.Ed 1451, rehearing denied 55 S Ct. 918, 295 U S. 769, 79 L Ed. 1710, and State of Florida v. U S., 55 S Ct. 918, 295 U.S. 769, 79 L Ed 1710.
10 C.J. p 456 note 59.

Letter quoting rate

Where a shipper and a carrier have agreed on a rate to be charged, admission of a letter from the carrier's general freight agent to the shipper, written in accordance with the agreement and quoting such rate, is not erroneous.—Gulf, etc., R. Co. v. Leatherwood, 69 S W. 119, 29 Tex.Civ. App. 507.

Misconduct of plaintiff

In an action against a carrier to recover demurrage charges exacted on lumber shipped, it was error to exclude evidence by defendant that the delay in the delivery of the lumber on which the charges were founded was the result of tortious or unlawful conduct of plaintiff.—Louisville & N. R. Co v. Camody, 85 So. 846, 17 Ala.App 370, conforming to 84 So. 824, 203 Ala 522, which reversed 82 So 648, 17 Ala App. 158

Plaintiff's knowledge of meaning of tariff

In action for alleged overcharges on log shipments, testimony that, at plaintiff's request, there had been rescale of certain rafts for freight purposes in accordance with "freight scale" is admissible as tending to show plaintiff knew railroad's tariff contemplated making of "freight scale," not "commercial scale."—Green Mountain Log Co. v. Columbia & N R. R R, 30 P 2d 1047, 146 Or. 461.

Printed tariff schedule

Printed tariff schedule of railroad rates produced by the railroad company under subpœna duces tecum, and shown to be identical with its posted rates, is admissible in an action for overcharges to show the existence of a milling-in-transit privilege as an admission by the company—Priebe v. Southern Ry. Co, 66 So. 573, 189 Ala. 427.

Rebuttal evidence

When shipper, suing railroad company for overcharges based on "freight scale" of logs shipped, introduced evidence that defendant based charges for certain other shipments on "commercial scale," in order to establish a custom, it was proper for defendant to show circumstances under which latter shipments were made and relationship between shipper and carrier—Green Mountain Log Co. v. Columbia & N. R R R, 16 P.2d 1106, 141 Or. 188.

99. Evidence held sufficient

(1) To afford sufficient basis for finding, in action for excess demurrage and penalty charges paid, that carrier allowed cars to remain at original consignment point without consignee's knowledge—Buschow Lumber Co v Union Pac R. Co, 276 S.W. 409, 220 Mo App. 743.

(2) To establish proof of service on defendant of order of interstate commerce commission directing railroad to pay such excessive charges.—Jones v Alton & S. R. Co, D.C.Ill., 6 F.Supp. 807.

(3) To establish that defendant railways operated under common management, requiring application of single-line rate for shipments of gravel.—Western Ry. of Alabama v. Montgomery County, 153 So 622, 228 Ala 426.

(4) To prove that defendant purchased and shipped ties to plaintiff as plaintiff's agent, and that plaintiff paid the freight—Joyce-Watkins Co v. P. R Walsh Tie & Timber Co, Mo App, 236 S W 1105.

(5) To show that parties in hearing before interstate commerce commission examiner understood that commission's finding and order in similar case were in record so that they could be looked to for support of order subsequently entered—Corray v. Baltimore & O. R Co, D.C Ill, 2 F Supp 829.

(6) To show that rates were "established" rates as required by Interstate Commerce Act—Foster Lumber Co. v Atchison, T. & S F Ry. Co, 194 S.W. 281, 270 Mo. 629, L.R A.1918A 768.

(7) To show that wheat rate, and not wheat products rate, applied to shipments of wheat with milling in transit privilege—Sheffield King Milling Co v. Chicago Great Western R Co., 210 N W. 232, 168 Minn 402.

(8) To support finding that certain railroad line was direct line within tariff rule for ascertaining correct rate, in absence of specified rate.—Thomas v. Chicago, B & Q R Co, 273 P. 451, 127 Kan. 326, 64 A.L.R. 322.

(9) To support master's finding of reasonable charge applicable in determining amount of restitution to shippers after reversal of order upholding intrastate rates on logs fixed by interstate commerce commission.—State of Florida v. U. S, D.C.Ga., 11 F Supp 36, reversed on other grounds Atlantic Coast Line R Co v. State of Florida, 55 S.Ct 713, 295 U S 301, 79 L Ed 1451, rehearing denied 55 S Ct 918, 295 U S 769, 79 L. Ed. 1710, and State of Florida v. U. S., 55 S Ct. 918, 295 U S. 769, 79 L. Ed. 1710.

(10) To sustain allegation of overcharge for demurrage and freight—Buschow Lumber Co. v. Union Pac. R Co., supra.

(11) To sustain allegations of carrier's negligence in not reconsigning goods on consignee's order and notifying latter of such failure.—Buschow Lumber Co. v. Union Pac. R. Co, supra.

(12) To sustain finding of overcharges.—Sheffield King Milling Co. v. Chicago Great Western R Co, supra

(13) To warrant the referee in finding that one defendant bought the ties as agent for another defendant after, as well as before, expiration of a contract between them, and paid all the freight charges on the ties bought by it prior to the appointment of receivers for the railroad which carried the ties—Cobbs v. Joyce-Watkins Co., 228 S W. 504, 287 Mo 39.

Persuasive influence

In shipper's suit against initial carrier for alleged excess freight

held insufficient.[1] A deficiency in plaintiff's proof may be cured by evidence introduced by defendant.[2] The schedules of freight rates prescribed and certified as required by law must in all suits brought against any railroad, including the common-law action to recover excess charges, be deemed prima facie evidence that such rates are just and reasonable.[3] The interstate commerce commission is regarded by the courts as a technical authority on the question of railroad rates, and its decisions as to the matters which may properly be considered in determining a reasonable rate are given great weight.[4]

h. Trial

The trial is usually conducted in the same manner as ordinary civil trials, questions of fact being for the jury and questions of law for the court.

Under statutes so providing, the trial of an action to enforce a reparation order is conducted in the same manner as trial of ordinary civil cases;[5] and a constitutional provision providing for summary trial of cases involving a contest of commission orders fixing rates, tolls, fares, or charges has no application.[6] Under some statutes the hearing in the court in an action on an award of reparation is de novo, but on the evidence submitted to the railroad commission, although additional evidence, in the trial court's discretion, may be heard.[7] The carrier, in such a trial, has no right to require the shipper to file a record of all the proceedings before the railroad commission where the statute does not require the shipper to do so.[8]

Questions of law are for the court,[9] while, if there is sufficient evidence thereon, questions of fact are usually for the jury.[10] In a common-law action to recover the excess above a reasonable charge, the question of reasonableness is for the jury.[11] The interstate or intra-state character of the shipment involved is likewise a question of fact for the jury, unless the evidence thereon is conclusive; and a bill of lading is not conclusive, so that the court's construction thereof would be decisive, but is only evidence of the character of the shipment.[12] It is not necessary, however, to submit the question of the reasonableness of an increased rate paid by plaintiff where there is no proof of its unreasonableness and where the shipper voluntarily

charges based on theory that switching tariff which initial carrier had agreed to absorb applied and not the line haul tariff, conduct of parties and interpretation they placed upon tariff of connecting carrier had a persuasive influence in determining and giving effect to intention and meaning of tariff provisions; at least where switching tariff was of doubtful application, and rate charged under line haul tariff was specific—Louisville Water Co v Louisville, H & St L Ry Co., 110 S W.2d 668, 270 Ky. 833.

1. Evidence held insufficient

(1) To overcome interstate commerce commission's finding that specific rates were unreasonable, particularly in absence of evidence as to comparative conditions prevailing in districts where higher rates were charged according to evidence offered by defendant—Corray v. Baltimore & O R Co., D.C.Ill., 2 F.Supp. 829

(2) To sustain finding that rates collected by railroad had been prescribed by interstate commerce commission—Eagle Cotton Oil Co. v. Southern Ry Co., 51 F.2d 443, reversing judgment, D.C., 46 F.2d 1006, and certiorari denied Southern R. Co. v Eagle Cotton Oil Co., 52 S Ct. 130, 284 U.S. 675, 76 L.Ed. 571.

(3) Penal laws with respect to false weights were inapplicable as to alleged freight overcharge on shipments weighed by shipper at point of origin and furnished no evidence of the inaccuracy of weights declared by the shipper.—Gulf, C. & S. F. Ry Co. v. Minton, Tex Com. App., 24 S W 2d 12, reversing, Civ. App., 14 S.W 2d 888

2. Mo.—Buschow Lumber Co. v. Union Pac. R Co, 276 S.W 409, 220 Mo App. 743.

3. Fla.—Cullen v. Seaboard Air Line R Co, 58 So. 182, 63 Fla. 122.

4. Colo.—Kindel v. Colorado, etc., R. Co., 139 P. 1105, 57 Colo. 1, Ann.Cas 1916A 57.

5. La.—Henderson Cotton Oil Co v. Louisiana Ry. & Nav. Co., 97 So. 751, 154 La. 504.

6. La.—Henderson Cotton Oil Co. v. Louisiana Ry. & Nav. Co., supra.

7. Ky.—Southern Ry Co. of Kentucky v. Frankfort Distillery, 26 S.W.2d 1025, 233 Ky. 771, certiorari denied 51 S Ct. 75, 282 U.S. 868, 75 L Ed. 767.

Waiver of right

In action in court on a reparation award, carrier's failure, on transfer to circuit court of proceedings before railroad commission for reparation order covering extortionate rates, to offer additional evidence constitutes waiver of right.—Southern Ry. Co of Kentucky v Frankfort Distillery, 26 S W 2d 1025, 233 Ky. 771, certiorari denied 51 S Ct. 75, 282 U.S. 868, 75 L Ed. 767

8. Ky.—Louisville & N. R. Co. v. Greenbrier Distillery Co., 187 S.W. 296, 170 Ky 775.

9. Or.—Service v. Sumpter Valley Ry. Co., 171 P. 202, 88 Or. 554.

Construction of tariff

Under Lord L § 136, specifying what questions are to be decided by court, in action to recover excess freight charges paid railroad, it is province of court to construe tariff provisions involved, and it is error to permit rate experts to construe them.—Black v. Southern Pac. Co, 171 P. 878, 88 Or. 533.

10. Ark.—Kansas City Southern Ry. Co. v. Bull, 179 S W. 172, 120 Ark. 43.

Iowa.—Coad v. Pennsylvania Ry Co, 175 N W 344, 187 Iowa 1025

Mich.—Mt Clemens Sugar Co v. Grand Trunk Ry Co., 166 N.W 531, 200 Mich. 33, certiorari denied Grand Trunk Ry Co. of Canada v. Mt Clemens Sugar Co, 39 S.Ct. 9, 248 U.S 568, 63 L Ed. 425

N C.—W. L Hall & Co v Norfolk Southern R. Co, 91 S.E 607, 173 N C. 108.

Evidence held to make jury question

Admissions in duplicate bills of lading and shipping receipts with evidence regarding calculations and measurements made at destination have been held to make a jury question whether defendant carrier charged freight on a greater weight of gasoline than it delivered to the consignee.—Coad v. Pennsylvania Ry. Co., 175 N W. 344, 187 Iowa 1025.

11. Fla.—Florida East Coast Ry. Co. v. State, 82 So. 136, 77 Fla. 571.

12. Or.—Service v. Sumpter Valley Ry. Co., 171 P. 202, 88 Or. 554

paid it, thereby implying its reasonableness.[13]

Where the case is tried on an agreed statement of facts issues or questions which are concluded thereby cannot be raised or considered.[14]

i. Judgment and Items or Amount of Recovery

The judgment should conform to the pleadings and proof. The ordinary measure of recovery is the amount by which the charges collected or exacted exceed those the carrier was lawfully entitled to collect, together with interest; but attorney's fees may also be allowed the plaintiff under statutes providing therefor.

The judgment must be supported by, and conform to, the pleadings and the proof.[15] A judgment for plaintiff is properly rendered on findings of the trial court showing a charge in excess of the lawfully established rates,[16] while a judgment for defendant is sustained by a finding of a fact which shows that the rate relied on by plaintiff to establish the alleged overcharge is inapplicable.[17]

As already implied by the statements contained in § 319 supra, the usual measure of recovery is the amount by which the charges collected or exacted exceed the lawful or reasonable charges which the carrier was entitled to collect;[18] and this is so although the action is not at common law but is under the Interstate Commerce Act or similar state statutes for damages resulting from excessive charges as evidenced by a reparation order or award made by the proper commission.[19] In an action for overcharges arising out of the carrier's improperly weighing the shipment, damages which do not naturally flow from the carrier's wrong and are not within its contemplation cannot be recovered.[20] The fact that the wrong weighing has resulted in the consignee's being overcharged on the purchase price for the shipment is a new and independent wrong and the carrier is not liable for this loss.[21]

Attorney's fees. In the absence of applicable statutory provision providing therefor, attorney's fees are ordinarily not recoverable.[22] However, statutes providing for the allowance of a reasonable attorney's fee to the plaintiff to be taxed and collected as a part of the costs, if he finally prevails in an action to enforce a reparation award or recover damages resulting from the exaction of unlawful charges, are constitutional,[23] and will justify an allowance of attorney's fees,[24] provided a proper application is made to the trial court.[25] Where a carrier brings error to review the judgment in such a suit, which is affirmed, an allowance of attorney's fees on account of the appellate proceedings may properly be made in addition to that made by the trial court.[26]

The amount to be allowed for attorney's fees is a reasonable one,[27] and is to be fixed with reference to the amount actually recovered rather than the amount claimed.[28]

Interest. Plaintiff, in a suit for overcharges, is usually entitled to interest on the sums recovered,[29] although the right to such interest has

13. N Y—Strough v. New York Cent., etc, R. Co., 87 N.Y S. 30, 92 App Div. 584, affirmed 73 N E. 1133, 181 N.Y. 533.

14. Miss.—Illinois Cent. R. Co. v. Mississippi Cotton Seed Products Co., 148 So 371, 166 Miss. 579.

15. Tex—Gulf, C & S. F. Ry. Co v. Minton, Com.App, 24 S W.2d 12, reversing, Civ.App., 14 S.W.2d 888.

16. Kan—Hodgson-Cauthorn Grain Co v. Chicago, R I & P. Ry. Co., 293 P. 520, 131 Kan. 695

17. U S.—S A. Gerrard Co. v. American Ry. Express Co., C.C A. Ohio, 35 F 2d 861

18. U S—State of Florida v. U. S., D.C Ga., 11 F.Supp. 36, reversed on other grounds Atlantic Coast Line R Co v. State of Florida, 55 S.Ct. 713, 295 U S 301, 79 L Ed. 1451, rehearing denied 55 S Ct. 918, 295 U. S 769, 79 L Ed 1710, and State of Florida v. U. S, 55 S.Ct. 918, 295 U.S 769, 79 L Ed. 1710.
Mo.—White v Delano, 191 S W. 1012, 270 Mo 16.
Neb.—Central Bridge & Construction Co. v. Chicago & N. W. Ry. Co, 262 N.W. 852, 129 Neb. 726.
Pa.—New York & Pennsylvania Co. v. New York Cent R. Co., 124 A. 428, 280 Pa. 297.

19. U S.—Louisville & N. R Co. v Sloss-Sheffield Steel & Iron Co, Ala., 46 S Ct. 73, 269 U.S. 217, 70 L Ed. 242, affirming, C C A, 295 F. 53—New York, N. H. & H. R Co v Ballou & Wright, Or., 242 F. 862, 155 C.C A. 450.
Cal—Sunset Pacific Oil Co. v. Los Angeles & S. L R Co., 290 P. 434, 110 Cal.App. 773.

20. Pa.—New York & Pennsylvania Co. v. New York Cent. R. Co., 124 A. 428, 280 Pa. 297.

21. Pa—New York & Pennsylvania Co. v. New York Cent. R. Co., supra.

22. Fla.—Atlantic Coast Line R. R. v. Connell, 151 So. 381, 111 Fla. 572, supplementing 149 So. 596, 111 Fla. 572

23. Neb—Smith v. Chicago, St. P, M. & O Ry. Co., 157 N W. 622, 99 Neb. 719.
10 C J. p 440 note 40.

24. U S.—Lothrop v. Spokane, P. & S Ry. Co, D C.Or, 10 F 2d 225, reversed on other grounds, C.C A, Southern Pac. Co. v. Lothrop, 15 F.2d 486, certiorari denied Lothrop v. Southern Pac Co, 47 S.Ct. 336, 273 U S 742, 71 L.Ed. 869, Lothrop v Spokane, P & S. R. Co, 47 S Ct. 336, 273 U.S. 742, 71 L Ed 869, and Lothrop v Oregon-Washington R & Nav. Co, 47 S.Ct. 336, 273 U.S. 742, 71 L Ed. 869—Ingalls v. Maine Cent. R. Co, D C Me, 51 F.2d 310.
Ala—W. L. Shepherd Lumber Co. v. Atlantic Coast Line R Co, 112 So. 323, 216 Ala. 89.
Kan.—Thomas v. Chicago, B & Q. R Co., 273 P. 451, 127 Kan. 326, 64 A L R. 322.
Neb—Smith v. Chicago, St. P., M. & O. Ry. Co., 157 N.W. 622, 99 Neb. 719.

25. U.S—Swift & Co. v. New York Cent. R Co., C C.A.N.Y., 16 F.2d 17, reversing, D.C., 3 F 2d 826.

26. U.S—Louisville & N. R Co. v. Dickerson, 191 F. 705, 112 C C.A. 295, affirming, C.C, 187 F. 874.

27. U S.—Ingalls v. Maine Cent. R. Co., D.C Me., 51 F 2d 310.

28. U.S.—Ingalls v. Maine Cent. R. Co., supra.

29. Fla.—Atlantic Coast Line R. R. v. Connell, 151 So. 381, 111 Fla. 572, supplementing 149 So. 596, 111 Fla. 572.

sometimes been denied.[30] Various conclusions have been reached as to the date from which the interest should be allowed. Usually it would seem that interest should be allowed from the date the overcharges were paid,[31] but it has been held that interest should be calculated from the date of the judgment in the lower court rather than from the date of the judgment in the appellate court,[32] and, where the suit was brought to recover both for excess sums collected prior to the date of an order by the state commission for the repayment thereof, and sums collected subsequent to such order in excess of the rates fixed by it, it was held that interest on the first sums ran from the date the order required the refund to be made, and interest on the latter sums from the date of the collection.[33] In a suit for damages under the Interstate Commerce Act it has been held permissible for the court in its discretion to allow interest on the excess charges from the date of their payment, and at a rate fixed by the court.[34]

§ 324. Liens

As will be seen in the succeeding sections carrier's liens may be founded on the common-law right of tradesmen, artisans, and other bailees to retain the property in their possession until paid for their services, on statutory enactment, or on contractual stipulations between the parties.

§ 325. Right to Lien

A carrier has a lien on the goods or property transported for the freight and other charges or expenses lawfully incurred in connection with that particular shipment or transaction.

It is a well settled common-law rule that a common carrier of goods, like any other tradesman, artisan, or bailee has a right to a specific lien on the property or shipment in its hands;[35] which entitles it to withhold or retain the same until all lawful charges have been tendered or paid.[36] This lien has been said to attach when the goods come into the possession of the carrier,[37] or at the time and place where the carrier first began performance of the transportation contract.[38] The carrier is not, however, entitled to assert a lien or retain the goods if for some reason it is not lawfully entitled to collect the charges claimed;[39] and in such

Me.—S D Warren Co. v. Maine Cent R Co, 135 A. 526, 126 Me 23.

30. Or—Service v. Sumpter Valley Ry Co., 171 P. 202, 88 Or 554.

31. U.S.—Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co., 39 S.Ct. 237, 249 U S 134 63 L.Ed. 517, motion denied St. Louis, I M & S. R. Co v Southern Cotton Oil Co, 39 S Ct 387—Atlantic Coast Line R Co v Standard Oil Co of Kentucky, C C.A Ky, 16 F 2d 441, modifying, D C., Standard Oil Co of Kentucky v. Atlantic Coast Line R. Co, 13 F 2d 633, certiorari granted 47 S Ct 475, 273 U S 691, 71 L Ed 842, affirmed in part and reversed in part on other grounds Atlantic Coast Line R Co v. Standard Oil Co, 48 S Ct 107, 275 U S 257, 72 L Ed. 270.

32. Miss.—Gulf & S I. R Co. v. Laurel Oil & Fertilizer Co, 160 So 564, 172 Miss. 630, correcting 159 So 838, 172 Miss. 630, amending and overruling suggestion of error 158 So. 778, 172 Miss. 630.

33. Me—S. D. Warren Co v. Maine Cent. R Co, 135 A. 526, 126 Me 23

34. Ala.—Louisville & N. R. Co v. Sloss-Sheffield Steel & Iron Co, 295 F. 53, affirmed 46 S Ct. 73, 269 U.S. 217, 70 L.Ed. 242

35. U.S.—Pittsburgh, C, C. & St. L Ry. Co v. Fink, 40 S Ct 27, 250 U S 577, 63 L Ed 1151, reversing Fink v. Pittsburgh, C, C. & St L Ry. Co, 19 Ohio Cir Ct ,N.S, 103—Central R Co. of New Jersey v Schick, C C.A Pa., 38 F.2d 968.

Kan.—Swinson v Atchison, T. & S F. Ry. Co., 230 P 1046, 117 Kan 258, 39 A.L.R. 165.

Ohio.—Pennsylvania R Co. v. Gentile Bros. Co., 191 N E. 369, 47 Ohio App. 162, error dismissed 190 N E 578, 128 Ohio St 50.

Tex.—Jackson v State, 298 S.W 907, 107 Tex Cr. 557—Brown v. State, 298 S.W 907, 107 Tex.Cr 559

10 C J. p 456 note 71, p 457 note 80.

36. U S—Central R. Co. of New Jersey v. Schick, C C.A.Pa, 38 F 2d 968.

Ariz.—Wells Fargo & Co, Express, S A, v Tribolet, 50 P 2d 878, 46 Ariz 311.

Del.—State v Ætna Casualty & Surety Co., 145 A 172, 4 W.W Harr 158

Ga.—Powell v. Seaboard Air Line Ry., 90 S.E. 980, 19 Ga.App 91.

Kan.—Swinson v. Atchison, T. & S F. Ry. Co, 230 P. 1046, 117 Kan 258, 39 A.L R. 165

Ky.—Blackford v. St. Louis, I. M. & S. Ry. Co 203 S.W. 867, 181 Ky 70

Me.—Northern Pac Ry. Co. v. Pleasant River Granite Co., 102 A. 298, 116 Me 496.

Mo.—Yazoo & M. V. R Co. v Picher Lead Co., App, 190 S W. 387.

N C.—Hammer Lumber Co v. Seaboard Air Line Ry., 102 S E 508, 179 N.C 359.

Ohio.—Pennsylvania R Co. v Gentile Bros. Co., 191 N E 369, 47 Ohio App. 162, error dismissed 190 N.E 578, 128 Ohio St 50.

Tex.—Jackson v. State, 298 S.W. 907, 107 Tex.Cr. 557—Brown v. State, 298 S W. 907, 107 Tex.Cr. 559.

10 C J. p 457 note 72

Corpus Juris is cited with approval in Blackford v. St Louis, I. M. & S. Ry Co, 203 S W. 867, 869, 181 Ky. 70

Mere right of retention

"What is a carrier's lien? It is simply the right to hold the consignee's cargo until payment is made for the work of transporting it. In simple terms it is the right to withhold the enjoyment by another of the fruits of work done in his behalf until he pays therefor. The carrier is authorized by the law of liens to say in substance what an ordinary laborer or vendor of goods is in position to say, viz, pay me for my labor in advance or for my goods before delivery, otherwise you shall not enjoy the benefits of the one or possess the other. The carrier, notwithstanding the cargo is the consignee's, can similarly say—before I complete the labor of transportation by delivery to you, pay me for my work. That is all the lien is. It does not follow the goods when delivered, nor can the consignee be compelled to pay until they are delivered."—State v. Ætna Casualty & Surety Co., 145 A. 172, 176, 4 W.W.Harr., Del., 158.

37. Ala.—Southern Ry Co v. Woodstock Mills, 161 So. 519, 230 Ala. 494

38. Tex.—Trans-Continental Freight Co. v. Packard North Texas Motor Co., Civ App, 11 S W.2d 362.

39. Kan.—Missouri Pac. R. Co. v.

a case, an action of trover may be maintained against the carrier for recovery of the goods without payment of the freight.[40] Hence, a carrier has no lien, if by reason of damage to the goods to an amount exceeding the freight it is not entitled to collect any charges,[41] or if it is in default for having failed to complete its contract.[42]

A carrier is entitled to a lien not only to secure the payment of the charges or costs of the transportation or carriage;[43] but also for all such other legal charges and expenses as may have been properly incurred in connection with the care, custody, or preservation of the shipment.[44] The lien, however, is a specific, and not a general, lien; that is, it attaches to the goods involved in one transaction, or constituting a part of one consignment, for charges relating to that transaction, or connected with that consignment, and does not extend to charges for other shipments under a separate contract.[45] Nevertheless, if one consignment covers several lots or parcels of goods, there is a lien on each lot or parcel for the charges for the whole consignment.[46] Also, a reconsignment or diversion of the goods in transit does not so sever the connection with the original transaction as to prevent the carrier from asserting a lien for the charges accruing during the whole transportation.[47]

Under statutes. The carrier's right to a lien may be based on statutory provisions which are mainly declaratory of the common-law rule discussed above,[48] or, where mechanics' lien and public works laws are construed as giving a lien for transportation services, see the C.J.S. title Mechanics' Liens § 50, also 40 C.J. p 87 note 3, a carrier which has transported materials and supplies to a building or construction project may become entitled to a lien giving it the right to have the transportation charges accorded prior payment out of the property which is being improved or the proceeds of the building contract.[49] However, a statute, giving persons who labor or furnish the material for the carrying on of a mill a lien on the same for the amount due them therefor, has been held to give a carrier no lien for its freight charges in transporting ore belonging to another to an ore mill.[50] Under the Federal Twenty-Eight Hour Law, a carrier which has cared for live stock during the required rest periods has a "lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected."[51]

§ 326. Carriers Entitled to Lien in General

Practically any carrier having the status or position

Peru-Van Zandt Impl. Co., 85 P. 408, 87 P. 80, 73 Kan. 295, 117 Am. S.R. 468, 6 L.R.A.,N.S., 1058, 9 Ann. Cas. 790.

40. Kan.—Missouri Pac. R. Co. v. Peru-Van Zandt Impl. Co., supra.

41. Ky.—Southern Ry. Co. v. Avey, 191 S.W. 460, 173 Ky. 598.
10 C.J. p 457 note 75

42. Ga.—Breed v. Mitchell, 48 Ga. 533.
10 C.J. p 457 note 77

43. Ariz.—Wells Fargo & Co., Express, S. A., v. Tribolet, 50 P.2d 878, 46 Ariz. 311.
Ark.—Mays v. Missouri & N. A. Ry. Co., 271 S.W. 977, 168 Ark. 908.
Me.—Brown v. Railway Express Agency, 188 A. 716, 134 Me. 477.
N.C.—Hammer Lumber Co. v. Seaboard Air Line Ry., 102 S.E. 508, 179 N.C. 359.
10 C.J. p 456 note 71.

44. Ariz.—Wells Fargo & Co., Express, S. A. v. Tribolet, 50 P.2d 878, 46 Ariz. 311.
Ga.—Dixon v. Central of Georgia R. Co., 35 S.E. 369, 110 Ga. 173.
Mass.—Boston & M. R. R. v. Oceanic Steam Nav. Co., 116 N.E. 260, 226 Mass. 509.
N.C.—Hammer Lumber Co. v. Seaboard Air Line Ry., 102 S.E. 508, 179 N.C. 359.
10 C.J. p 457 notes 79, 80.
Demurrage charges see infra § 346.

Import duties

(1) A common carrier has, under the laws of the United States, a lien on goods in transit over its lines entitling it to possession until paid for legal import duties paid thereon by it.—Wabash R. Co. v. Pearce, Mo., 24 S.Ct. 231, 192 U.S. 179, 48 L.Ed. 397—10 C.J. p 457 note 83.

(2) This is so whether the duties have been paid directly to the government or to a connecting carrier which has already paid the same.—Wabash R. Co. v. Pearce, supra.

Storage charges

U.S.—Central R. Co. of New Jersey v. Schick, C.C.A.Pa., 38 F.2d 968.
Ga.—Dixon v. Central of Georgia R. Co., 35 S.E. 369, 110 Ga. 173.
Mass.—Boston & M. R. R. v. Oceanic Steam Nav. Co., 116 N.E. 260, 226 Mass. 509.
10 C.J. p 457 note 81.

45. N.C.—Hammer Lumber Co. v. Seaboard Air Line Ry., 102 S.E. 508, 179 N.C. 359.
10 C.J. p 457 note 73

46. Ga.—Dixon v. Georgia Cent. R. Co., 35 S.E. 369, 110 Ga. 173.—Pennsylvania Steel Co. v. Georgia R., etc., Co., 21 S.E. 577, 94 Ga. 636.

47. N.C.—Hammer Lumber Co. v. Seaboard Air Line Ry., 102 S.E. 508, 179 N.C. 359.

48. Ga.—Powell v. Sea-Board Air Line Ry., 90 S.E. 980, 19 Ga.App. 91.
Okl.—St. Louis, I. M. & S. Ry. Co. v. McNabb, 162 P. 811, 63 Okl. 87.

In Louisiana

(1) Civil Code art. 3217 par. 9 gives a carrier a privilege on the thing carried for the carrier's charges and accessory expenses, including necessary charges and expenses paid by the carrier.—Kocke v. Garnier, 131 So. 198, 15 La.App. 461.

(2) This privilege must be strictly construed.—Green v. Hawkins & Antoon, App., 144 So. 271, modifying 142 So. 742.

49. N.J.—Central R. Co. of New Jersey v. Gallena-Poole, Inc., 152 A. 251, 107 N.J.Eq. 267, affirmed 160 A. 507, 110 N.J.Eq. 559
Wash.—Siler Mill Co. v. Charles Nelson Co., 162 P. 590, 94 Wash. 477.

50. Ariz.—Santa Fé, etc., R. Co. v. Arizona Smelting Co., 108 P. 256, 13 Ariz. 95.

51. Mass.—New York Cent. R. Co. v. Sturtevant & Haley Beef & Supply Co., 127 N.E. 509, 236 Mass. 16
N.H.—Terrill v. Payne, 124 A. 462, 81 N.H. 164.

of a common carrier is entitled to a lien for its charges; and a connecting carrier may assert a lien for all advances made to other carriers as well as its own charges.

Practically any carrier occupying the position or status of a common carrier is entitled to the benefit of a lien for its charges.[52] While an examination of the cases cited in the preceding section will disclose that in most of them the carrier involved, and in whose favor the lien was recognized, was a railroad company, the right to a lien is not limited to common carriers of this type. Railway express agencies,[53] transfer and forwarding companies,[54] and public cartmen[55] have been held entitled to a lien to secure their compensation for services rendered by them as common carriers. However, a transfer and forwarding company has no right to a lien under circumstances showing that the company is not acting as a carrier,[56] as where it is merely the agent of the last carrier,[57] or where it has no contract, express or implied, to receive and carry the goods.[58] Likewise, for a cartman to be entitled to a lien, the services for which the lien is sought to be enforced must have been rendered by the cartman as carrier.[59] No lien can be enforced for such services as loading goods on a car.[60] In New York, a public cartman, seeking a lien on property under the ordinances of New York city, must convey the property to the property clerk of the police department or to a convenient storage warehouse and not keep it in his own possession,[61] and he must also send a notice in writing, with a brief statement of the particulars, to the bureau of licenses;[62] but he is not entitled to such lien where the goods are damaged in transit to an amount in excess of the charges for cartage.[63]

Connecting carriers. A connecting carrier is ordinarily entitled to a lien not only for its own charges, but also for all charges and expenses properly advanced by it to the preceding carrier.[64] Although there is some authority apparently to the contrary,[65] the right of a connecting carrier to a lien for its own charges and those advanced is usually not affected by the fact that they exceed the charge for the entire transportation as contracted for by the first carrier,[66] unless it has notice of the first carrier's contract.[67] Also, the lien will not be affected by the fact that the previous carrier has been in default by reason of damage to the goods,[68] nor by the fact that the settlement of the proportionate freight charges due to the connecting carriers was made at stated intervals instead of being paid at the junctional point by the receiving to the delivering line.[69] However, the last carrier cannot hold the shipment for charges advanced by it on claims other than for carriage charges where it has been notified by the consignee not to make such advances.[70]

If a carrier orders the return of goods not received by the consignee or not delivered by reason of misdirection, the carrier who returns the goods may recover not only the charges therefor, but also the charges on the first transportation.[71] The fact that it may have failed to perform its own part of the transportation and had no lien for charges for transportation performed by itself will not prevent a lien attaching for advances made by it for charges of preceding carriers.[72]

Where the initial carrier wrongfully disobeys routing instructions, and the connecting carrier over whose line the goods are shipped in disobedience of the routing instructions is aware of this fact, it is not entitled to a lien either for advances made to preceding carriers or for its own charges for trans-

52. Me.—Brown v. Railway Express Agency, 188 A. 716, 134 Me. 477.
N.C.—Hammer Lumber Co. v. Seaboard Air Line Ry., 102 S.E. 508, 179 N.C. 359.

53. Me.—Brown v. Railway Express Agency, 188 A. 716, 134 Me. 477.

54. Ill.—Judson Freight Forwarding Co. v. Delaware, etc., R. Co., 163 Ill.App. 22.
10 C.J. p. 459 note 1.

55. N.Y.—Taylor v. Smith, 84 N.Y.S. 13, 87 App.Div. 78.

56. Mo.—Kansas City Transfer Co. v. Neiswanger, 18 Mo.App. 103.

57. Mo.—Kansas City Transfer Co. v. Neiswanger, supra.

58. Mo.—Kansas City Transfer Co. v. Neiswanger, supra.

59. N.Y.—Taylor v. Smith, 84 N.Y.S. 13, 87 App.Div. 78.

60. N.Y.—Taylor v. Smith, supra.

61. N.Y.—Taylor v. Smith, supra.—Browning v. Belford, 82 N.Y.S. 489, 83 App.Div. 144, 13 N.Y.Ann.Cas. 154.

62. N.Y.—Browning v. Belford, supra.

63. N.Y.—Browning v. Belford, supra.

64. N.C.—Hammer Lumber Co. v. Seaboard Air Line Ry., 102 S.E. 508, 179 N.C. 359.
10 C.J. p. 457 note 86.

65. D.C.—Beasley v. Baltimore, etc., R. Co., 27 App.D.C. 595, 6 L.R.A., N.S., 1048.

66. Conn.—Rowland v. New York, etc., R. Co., 23 A. 755, 61 Conn. 103, 29 Am.S.R. 175.
10 C.J. p. 458 note 88.

67. Ga.—American Nat. Bank v. Georgia R. Co., 23 S.E. 898, 96 Ga. 665, 51 Am.S.R. 155.
10 C.J. p. 458 note 89.

68. Ky.—Thomas v. Frankfort, etc., R. Co. 76 S.W. 1093, 116 Ky. 879, 25 Ky.L. 1051.
10 C.J. p. 458 note 90.

69. Ga.—Seaboard Air Line R. Co. v. Southern Flour, etc., Co., 75 S.E. 654, 138 Ga. 604.

70. Ind.—Cleveland, etc., R. Co. v. Anderson Tool Co., 103 N.E. 102, 180 Ind. 453, 49 L.R.A.,N.S., 749, Ann.Cas.1916B 1217 and note.

71. Ill.—U. S. Express Co. v. Haines, 67 Ill. 137.
Mass.—Briggs v. Boston, etc., R. Co., 6 Allen 246, 83 Am.D. 626.
R.I.—Vaughan v. Providence, etc., R. Co., 13 R.I. 578.

72. N.Y.—Western Transp. Co. v. Hoyt, 69 N.Y. 230, 25 Am.R. 175.

portation;[73] and some decisions hold without qualification that it has no lien, irrespective of knowledge or absence of knowledge of the diversion,[74] but other cases have ruled that, if the connecting carrier receives the goods in good faith in the ordinary and usual course of business between connecting lines without notice of any special directions on the part of the consignor, it will have a lien for reasonable charges for transporting the goods over its line, and also for such reasonable charges as it may have advanced to preceding carriers, notwithstanding the initial carrier's disobedience of routing instructions.[75] Also, a terminal carrier will have a lien for charges advanced where the diversion of the shipment, if it amounted to such, was due to an emergency[76] and in no way affected the substantial rights of the shipper.[77]

§ 327. · Private Carrier

A private carrier is generally held to have no right to a lien for his services, unless such right is given by statute or special agreement.

While no good reason has apparently been assigned therefor, it has generally been held that a private carrier has no lien for his charges on goods transported by him,[78] unless a lien is reserved by special agreement,[79] or the right to a lien is, by statute, given to all carriers without regard to whether they are common or private carriers.[80]

§ 328. · Property Subject to Lien

All property included in the shipment or consignment for which the charges were incurred is subject to the lien for such charges, unless the person placing the property in possession of the carrier had no right or authority to do so.

The lien of a carrier is generally limited to the property received and transported under the particular consignment or contract pursuant to which the charges asserted were incurred,[81] but the lien extends to the whole of such property,[82] even though the goods may be delivered in different parcels and at different times;[83] and the carrier may detain any portion of the goods as a lien on the whole, even if it has delivered a part.[84]

A carrier has a lien for freight charges on government property carried by it.[85]

Property wrongfully delivered or possessed. In order for the lien to exist, the relation of debtor and creditor must exist between the owner of the goods and the carrier, so that an action may be maintained for the payment of the charges sought to be enforced by the lien claimed;[86] and there is no lien in favor of the carrier, where the goods have been received by it from one who has come into their possession tortiously or from one not authorized to ship them.[87] A limitation of this principle, however, is that the carrier may still claim a lien, although the goods were so delivered, where the real owner by his own negligent act clothes another with apparent authority over his goods and thus enables him to defraud the carrier.[88]

§ 329. · Priority of Lien over Other Claims

If the goods have rightfully been acquired from, or with the authority of, the lawful owner, the carrier's lien thereon is superior to the rights and claims of the owner, his general creditors, and persons acquiring liens or rights while the goods are in the carrier's possession; but the lien is inferior to the claims or rights of third

73. Colo.—Denver, etc, R. Co v. Hill, 21 P 914, 13 Colo 35, 4 L R A. 376
Ga.—Bird v. Georgia R. Co., 72 Ga. 655.
Tex.—Liefert v. Galveston, etc, R. Co, Civ App., 57 S W. 899.
10 C.J. p 458 note 94.

74. U.S.—Marsh v. Union Pac R. Co, C C.Colo., 9 F 873, 3 McCrary 236
Mich.—Fitch v. Newberry, 1 Dougl 1, 40 Am.D. 33.
10 C.J. p 458 note 95.

75. Ill.—Crane v. Taft, 203 Ill.App. 253—See Crane v. Tooker Storage & Forwarding Co, 204 Ill.App. 354
10 C.J. p 458 note 96.

76. Wash.—Andus v. Columbia, etc., Steamboat Co., 92 P. 128, 47 Wash. 333.

77. Wash.—Andus v. Columbia, etc., Steamboat Co., supra.

78. Mo.—Campbell v. A. B. C. Storage, etc., Co, 174 S.W. 140, 187 Mo.App 565
10 C J p 39 note 27.

79. Pa.—Fuller v. Bradley, 25 Pa. 120.

80. La.—Gulf Motor Lines v European Agencies, App, 155 So 523—Brown v David, App., 141 So 418—Kocke v Garnier, 131 So. 198, 15 La App. 461.

81. La.—Green v. Hawkins & Antoon, App, 142 So. 742, modified on other grounds 144 So. 271
Wash.—Contractors' Machinery & Storage Co v Gueguen, 260 P. 669, 145 Wash 430.
10 C J. p 459 notes 16, 17.

82. Ill.—Knapp v. McCaffrey, 52 N E 898, 178 Ill. 107, 69 Am S R. 290, affirmed 20 S Ct 824, 177 U.S. 638, 44 L Ed. 921
Tex.—Texas, etc, R. Co. v. Rucker, 88 S.W. 815, 38 Tex.Civ App. 591.
10 C.J p 459 note 13.

83. Ill.—Knapp v. McCaffrey, 52 N. E. 898, 178 Ill. 107, 69 Am S.R. 290, affirmed 20 S Ct. 824, 177 U S 638, 44 L.Ed 921.

84. Ill.—Knapp v. McCaffrey, supra

85. Wyo.—Union Pac. R. Co. v. U S., 2 Wyo. 170.

86. Kan.—Swinson v. Atchison, T. & S F Ry. Co, 230 P 1046, 117 Kan. 258, 39 A.L.R 165.
10 C.J p 459 note 18

87. Ga.—Ocean S S Co. v. Southern States Naval Stores Co, 89 S E. 838, 145 Ga. 798.
Kan.—Swinson v Atchison, T. & S. F. Ry. Co, 230 P. 1046, 117 Kan. 258, 39 A L R. 165.
N J.—Hudson Motor Car Co of New York v Erie R Co., 162 A. 604, 109 N.J.Law 431
10 C J. p 459 note 19.

88. Mich.—Hoffman v. Lake Shore, etc., R Co, 84 N.W. 55, 125 Mich. 201.
R I.—Vaughan v. Providence, etc., R. Co, 13 R I 578.
10 C.J. p 460 note 20.

persons holding preexisting liens or mortgages of which the carrier had actual or constructive notice.

If the goods have rightfully been acquired from, or with the authority of, the lawful owner, the carrier's lien thereon is ordinarily superior not only to the rights or claims of the owner,[89] but also to the rights of the latter's general creditors,[90] and any claims of a pledgee of the goods whose rights accrue while they are in the carrier's possession.[91] Hence, the lien is usually prior to the rights of the seller, as against whom the carrier may insist on retaining possession until the charges are paid.[92] In so far as the carrier's lien exists merely for freight charges on the particular transportation in progress, when the right of stoppage in transit is exercised, the lien of the carrier is superior and may be asserted as against the seller attempting to exercise that right;[93] but the carrier's lien is inferior to the right of the seller to stop goods in transit, in so far as it exists, for a general balance due to it from the consignor or the consignee provided for by special contract.[94]

Under a statute requiring the privilege of a carrier to be recorded to be effective against "third persons," a lessor of personal property which has been shipped by the lessee is bound by, and subject to, an unrecorded carrier's privilege for the charges so incurred, if the lessor was present when the contract of carriage was entered into and witnessed the same,[95] or consented to the imposition of the carrier's privilege as an incident to the contract of carriage,[96] for in such cases the lessor is not a "third person," within the protection of the recording statute. Such a statute, however, renders an unrecorded carrier's privilege inferior to the claims of a third person to whom the property is subsequently sold by the shipper.[97]

As shown in the preceding section, where the goods have been placed in the carrier's possession wrongfully or without authority from the true owner, the latter's rights are superior to those of the carrier. Also the carrier's lien is inferior to the right of a mortgagee of the property under a preexisting mortgage of which the carrier has actual or constructive knowledge;[98] and to the lien of a warehouseman for storage, the goods having been delivered by the carrier to the warehouseman without requiring advancement of freight charges.[99]

§ 330. Waiver or Forfeiture of Lien

The right of a carrier to a lien may be lost by waiver or forfeiture.

The common-law lien of the carrier, being a mere right to retain the goods until payment of the charges due thereon, may be waived.[1] Such a waiver may be effected in many ways.

The parties may make an express agreement for the waiver of the lien. However, a written contract of shipment does not waive the lien unless it contains provisions inconsistent with the assertion of the lien, or unless an intent to waive is clearly shown.[2]

Continuance of a common-law lien is ordinarily dependent on the carrier's retention of dominion, possession, or control, over the goods involved;[3] and, hence, one of the easiest and most common ways in which a carrier's lien can be lost or waived is by a delivery or surrender of possession of the goods without first exacting payment of the charges against them.[4] After such a surrender or delivery, the carrier is remanded or restricted to its personal

89. La.—Brown v. David, App., 141 So. 418.

90. Me.—Newhall v. Vargas, 15 Me. 314, 33 Am.D. 617.
10 C.J. p 460 note 22.

91. Minn.—Cooley v Minnesota Transfer R. Co., 55 N.W 141, 53 Minn. 327, 39 Am.S.R 609.

92. Kan.—Rucker v Donovan, 13 Kan 251, 19 Am R 84.

93. Ga.—Pennsylvania Steel Co. v. Georgia R., etc., Co., 21 S.E. 577, 94 Ga 636
10 C.J. p 460 note 31.

94. N.C.—Farrell v. Richmond, etc., R. Co., 9 S.E 302, 102 N.C 390, 11 Am.S.R. 760, 3 L.R.A. 647.
Pa.—Pennsylvania R. Co. v. American Oil Works, 17 A. 671, 126 Pa. 485, 12 Am.S.R. 885.

95. La.—Brown v. David, App., 141 So. 418.

96. La.—Brown v. David, supra.

97. La.—Reeves v. G. & G. Pumping Co., App., 151 So. 679.

98. Ill.—Hayden v Wabash Ry Co., 269 Ill.App. 356, transferred 180 N.E. 795, 348 Ill 126
Mo.—Metzger v. Columbia Terminals Co., 50 S.W.2d 680, 227 Mo.App. 135.
N.J.—Hudson Motor Car Co. of New York v Erie R. Co., 162 A. 604, 109 N.J Law 431
Tex.—Trans-Continental Freight Co. v Packard North Texas Motor Co., Civ.App., 11 S.W.2d 362.
10 C.J. p 460 note 29.

Law by which priority determined

Law of forum is applicable in determining whether chattel mortgagee's lien or carrier's lien on mortgaged automobile taken into another state and shipped back to mortgagee was superior.—Metzger v Columbia Terminals Co., 50 S.W.2d 680, 227 Mo. App. 135.

99. La.—Powers v. Sixty Tons of Marble, 21 La.Ann. 402.

1. Ark.—St. Louis-San Francisco Ry. Co. v. Chastain, 25 S.W.2d 28, 181 Ark. 192
10 C.J. p 460 note 35.

2. Kan.—Atchison, etc., R. Co. v. Hinsdell, 90 P. 800, 76 Kan. 74, 12 L.R.A.,N.S., 94, 13 Ann.Cas. 981.
10 C.J. p 460 note 38.

3. Ark.—Mays v. Missouri & N. A. Ry. Co., 271 S.W 977, 168 Ark. 908.
Fla.—Beckwith v Atlantic Coast Line R. Co., 73 So 593, 72 Fla. 522.
Tex.—Whaley Lumber Co. v. Reliance Brick Co., Civ.App., 2 S.W.2d 911.

4. U.S.—Pittsburgh, C., C. & St. L. Ry. Co. v Fink, 40 S.Ct 27, 250 U.S 577, 63 L.Ed. 1151, reversing Fink v. Pittsburgh, C., C. & St. L. Ry. Co., 19 Ohio Cir.Ct.,N.S., 103.
Ark.—Missouri Pac. R. Co. v. Pfeif-

or contract rights against the person liable for the charges,[5] and a lien so lost is not reacquired by reason of the fact that the carrier subsequently regains possession of the goods.[6] For the lien to be lost or waived in this manner, however, it is essential that the delivery or surrender of possession be complete and absolute;[7] and the carrier's change of character into that of an agent to keep the goods for the buyer is not at all inconsistent with the right to retain the goods in its custody until its lien on them for carriage or other charges is satisfied.[8] The lien is not lost by a delivery of only a part of the goods,[9] unless the carrier so intended;[10] nor does a delivery to the assignee of the owner, who has made an assignment for the benefit of creditors, operate as a waiver of the lien.[11] Where the goods are not delivered by the carrier but the owner takes them from the carrier without its consent, the lien is not lost;[12] nor is the lien divested where the consignor obtains possession of the goods by legal process.[13] Also, if the receiver of the goods obtains possession by fraud, the right to pursue the goods still remains.[14] If the consignee fails or refuses to receive and the carrier stores the goods in its own warehouse, or with some independent warehouseman not the consignee's agent, its lien is not thereby lost,[15] but may be enforced with the lien of the warehouseman added;[16] and it is immaterial whether the carrier deposited the goods in its own name or in that of the owner subject to its lien.[17] The parties may agree that the goods may be deposited in the warehouse of the consignee or the owner and that the transfer and deposit shall not be regarded as a waiver of the lien.[18] Furthermore, a statutory lien, in the nature of a maritime or mechanics' lien which attaches to the finished building or structure for which the carrier has carried materials, is not lost by a delivery or surrender of possession of the materials carried.[19]

In addition to the foregoing, a carrier's lien has been held defeated or lost by reason of its failure to set up a lien either when the property was demanded or a suit in replevin brought,[20] its conversion or illegal sale of the goods,[21] the giving of credit,[22] or the carrier's refusal of the consignee's demand for possession accompanied by a tender of the full amount of freight properly due.[23] If a lien is claimed for an excessive amount, the consignee may recover possession of the goods or sue for conversion without a formal tender of the

fer Stone Co., 266 S.W. 82, 166 Ark. 226.

Fla.—Beckwith v. Atlantic Coast Line R. Co., 73 So. 593, 72 Fla. 522.

Mass.—New York Cent. & H. R. R. Co. v. York & Whitney Co., 119 N.E. 855, 230 Mass. 206, affirmed in part and reversed in part on other grounds 41 S.Ct. 509, 256 U.S. 406, 65 L.Ed. 1016.

Tex.—Whaley Lumber Co. v. Reliance Brick Co., Civ.App., 2 S.W.2d 911.

Wash.—Contractors' Machinery & Storage Co. v. Gueguen, 260 P. 669, 145 Wash. 430.

Wis.—Madden Bros. v. Jacobs, 235 N.W. 780, 204 Wis. 376.

10 C.J. p. 460 note 40.

5. Mass.—New York Cent. & H. R. R. Co. v. York & Whitney Co., 119 N.E. 855, 230 Mass. 206, affirmed in part and reversed in part on other grounds 41 S.Ct. 509, 256 U.S. 406, 65 L.Ed. 1016.

10 C.J. p. 461 note 41.

6. Wash.—Contractors' Machinery & Storage Co. v. Gueguen, 260 P. 669, 145 Wash. 430.

Wis.—Madden Bros. v. Jacobs, 235 N.W. 780, 204 Wis. 376.

7. Ala.—Southern Ry. Co. v. Woodstock Mills, 161 So. 519, 230 Ala. 494.

10 C.J. p. 461 note 42.

Placement on tracks without surrender of bill of lading

No waiver occurs where goods are placed on a private track at the request of the consignee's officers but the carrier has not surrendered the bill of lading, duly indorsed.—Southern Ry. Co. v. Woodstock Mills, 161 So. 519, 230 Ala. 494.

8. N.H.—Hall v. Dimond, 3 A. 423, 63 N.H. 565.

9. Mass.—Sheppard v. New York, N. H. & H. R. Co., 116 N.E. 556, 227 Mass. 234.

10 C.J. p. 461 note 43.

10. Mass.—Sheppard v. New York, N. H. & H. R. Co., supra.

Jury question

It is ordinarily a question for the jury whether a carrier in delivering a portion of the consignment before payment of its charges intended to waive its lien.—Sheppard v. New York, N. H. & H. R. Co., 116 N.E. 556, 227 Mass. 234.

11. Ky.—Caye v. Pool, 55 S.W. 887, 108 Ky. 124, 21 Ky.L. 1600, 94 Am. S.R. 348, 49 L.R.A. 251.

10 C.J. p. 461 note 44.

12. U.S.—In re British American Cedar Co., D.C.Wash., 217 F. 163.

Mo.—Darlington v. Missouri Pac. R. Co., 72 S.W. 122, 99 Mo.App. 1.

Tex.—Hahl v. Laux, 93 S.W. 1080, 42 Tex.Civ.App. 182.

10 C.J. p. 461 note 45.

13. Me.—Newhall v. Vargas, 15 Me. 314, 33 Am.D. 617.

14. N.J.—Lembeck v. Jarvis Terminal Cold Storage Co., 59 A. 360, 68 N.J.Eq. 492, affirmed 63 A. 257, 69 N.J.Eq. 781, 7 Ann.Cas. 960.

10 C.J. p. 461 note 47.

15. U.S.—Mordecai v. Lindsay, S.C., 5 Wall. 481, 18 L.Ed. 486.

10 C.J. p. 462 note 53.

16. Ill.—Gregg v. Illinois Cent. R. Co., 35 N.E. 343, 147 Ill. 550, 37 Am.S.R. 238.

10 C.J. p. 462 note 53.

17. N.Y.—Western Transp. Co. v. Barber, 56 N.Y. 544.

18. U.S.—Mordecai v. Lindsay, S.C., 5 Wall. 481, 18 L.Ed. 486.—Sears v. Wills, Mass., 1 Black 108, 17 L.Ed. 35.—Costello v. 734,700 Laths, etc., D.C.N.Y., 44 F. 105.

19. Wash.—Siler Mill Co. v. Charles Nelson Co., 162 P. 590, 94 Wash. 477.

20. Cal.—Yokohama Specie Bank v. Trans-Oceanic Co., 202 P. 346, 54 Cal.App. 533.

21. Ga.—Seaboard Air Line Ry. Co. v. Roberds, 159 S.E. 742, 43 Ga.App. 558.

22. Mass.—Sears v. Wills, 4 Allen 212.

10 C.J. p. 461 note 48.

23. N.Y.—Neustadt v. Lehigh Valley R. Co., 144 N.Y.S. 911, 159 App.Div. 667.

Liability to consignee

In such a case the carrier becomes liable to the consignee in either replevin or trover.—Neustadt v. Lehigh Valley R. Co., 144 N.Y.S. 911, 159 App.Div. 667.

amount to which the carrier is entitled,[24] provided it appears that he was ready and willing to pay the just charges.[25] If the carrier asserts a right to retain possession of the goods on another ground than that of a lien for charges, it cannot afterward assert a right of possession under a claim for such lien;[26] and, if it claims a lien for a debt other than transportation charges on the goods, for which it is not entitled to a lien, the consignee may replevy the goods without tendering the amount of transportation charges.[27] On the other hand, it has been held that suing for freight charges and attaching other goods for the debt will not waive the lien possessed by the carrier.[28]

§ 331. Enforcement of Lien

At common law a carrier could enforce its lien only by retention of the goods or by proper court proceedings; but statutes in many states now permit the lien to be enforced by a sale of the goods, provided all statutory terms and conditions are strictly complied with.

At common law, the carrier's lien, like other bailees' liens, see the C.J.S. title Bailments § 35 e, gives only a right of possession or detention until the charges legally due are paid, without the right or power to sell the goods,[29] unless such a right has been given by special agreement;[30] and if the carrier sells the goods without such a special provision it is liable to the owner in an action for damages for the market value, less the amount of the charges under the lien.[31]

Nevertheless, the lien is enforceable in a proper court by a proceeding in rem.[32] Also, a lien may be enforced by an ordinary action at law against the owner or the consignee in which the goods may be subjected to the carrier's demand by attachment or execution.[33] However, a bill in equity for the enforcement of the lien lies only when a proper case for equitable enforcement is made out.[34]

Where title is vested in the consignee, and he refuses to receive the goods, the carrier may, with the consent of the consignee, sell the goods to satisfy its lien for freight and other charges;[35] and, in the absence of any statutory prohibition, the carrier may take the property off the hands of the shipper in payment of the carrying charge where the consignee refuses to receive it, provided the transaction involved no discrimination or rebate.[36]

Under statutes. By virtue of statutes which have been adopted in many jurisdictions, a carrier may be entitled to enforce his lien by a sale of the goods after a specified time if the freight remains unpaid;[37] and especially is this true in the case of perishable goods.[38] If the statutory provisions are strictly complied with, the carrier is not liable as for conversion.[39] It is essential, however, that there be strict compliance with all material provisions,[40] such as those relating to notice to the owner[41] or advertisement of the sale;[42] and, unless there has been a waiver of the statutory requirements by the owner of the goods,[43] a sale of property by the carrier amounts to a conversion when it is not made in accordance with the statute au-

24. Wash.—Contractors' Machinery & Storage Co. v. Gueguen, 260 P. 669, 145 Wash. 430.
10 C.J. p. 462 note 51.

25. Ill.—Schumacher v. Chicago, etc., R. Co., 108 Ill.App. 520, affirmed 69 N.E. 825, 207 Ill. 199.

26. Ohio—Baltimore, etc., R. Co. v. O'Donnell, 32 N.E. 476, 49 Ohio St. 489, 34 Am.S.R. 579, 21 L.R.A. 117 and note.
10 C.J. p. 462 note 59.

27. U.S.—Sicard v. Buffalo, etc., R. Co., C.C.N.Y., 22 F.Cas.No.12,831, 15 Blatchf. 525.
Mass.—Adams v. Clark, 9 Cush. 215, 57 Am.D. 41.
S.C.—Blair v. Jeffries, 23 S.C.L. 59.

28. Me.—Barnard v. Wheeler, 24 Me. 412.

29. Del.—State v. Aetna Casualty & Surety Co., 145 A. 172, 4 W.W.Harr. 158.
10 C.J. p. 462 note 62.

30. Tex.—Texas, etc., R. Co. v. Rucker, 88 S.W. 815, 38 Tex.Civ.App. 591.

31. Mass.—Briggs v. Boston, etc., R. Co., 6 Allen 246, 83 Am.D. 626.

32. U.S.—In re British American Cedar Co., D.C.Wash., 217 F. 163.
Va.—Galt v. Archer, 7 Gratt. 307, 48 Va. 307.

33. Va.—Galt v. Archer, supra.

34. Ala.—Crass v. Memphis, etc., R. Co., 11 So. 480, 96 Ala. 447.
10 C.J. p. 462 note 69.

35. Pa.—Mull v. Pennsylvania R. Co., 38 Pa.Super. 416.

36. Pa.—Pennsylvania Co. v. Kissock, 55 Pa.Super. 196.

37. Ga.—Morgan v. J. B. Colt Co., 130 S.E. 600, 34 Ga.App. 630.
N.C.—Norfolk & S. R. Co. v. New Bern Iron Works & Supply Co., 90 S.E. 149, 172 N.C. 188.
S.C.—Thomas v. Northwestern R. Co. of South Carolina, 98 S.E. 336, 111 S.C. 475.
10 C.J. p. 462 note 71.

Length of time not unreasonable
Provision of statute requiring carrier to hold goods for six months before selling goods for freight and other charges held not unreasonable—Central R. Co. of New Jersey v. Schick, C.C.A.Pa., 38 F.2d 968.

Statute not repealed
State statute providing for sale of goods for freight and other charges held not superseded or repealed by statute relating to amount of demurrage.—Central R. Co. of New Jersey v. Schick, C.C.A.Pa., 38 F.2d 968.

38. Tex.—Gulf, etc., R. Co. v. North Texas Grain Co., 74 S.W. 567, 32 Tex.Civ.App. 93.
10 C.J. p. 463 note 72.

39. Okl.—Atchison, T. & S. F. Ry. Co. v. Tulsa Rig, Reel & Mfg. Co., 225 P. 696, 99 Okl. 40.
10 C.J. p. 463 note 75.

40. Ga.—Seaboard Air Line Ry. Co. v. Roberds, 159 S.E. 742, 43 Ga.App. 558.
Tex.—Reed v. Southern Pac. Co., Civ.App., 99 S.W.2d 1026, error dismissed.
10 C.J. p. 463 note 73.

41. U.S.—Davis v. Smutzinger, C.C.A.Pa., 281 F. 640.
10 C.J. p. 463 note 76.

42. Ala.—Western R. Co. v. Rembert, 50 Ala. 25.

43. Tex.—Reed v. Southern Pac. Co., Civ.App., 99 S.W.2d 1026, error dismissed.

thorizing it.[44] Where there are different provisions for the enforcement of bailee's liens generally, and carrier's liens, a carrier which has a claim for storage only must proceed in accordance with the provisions relating to the enforcement of bailee's liens rather than those relating to the enforcement of carrier's liens.[45] Notwithstanding a statute authorizes the sale of goods for the satisfaction of a lien, no valid sale can be made pending an adjustment of the carrier's claims for freight and without affording the consignor an opportunity to pay all just demands.[46]

It has been held that it is the carrier's duty to sell the goods for the best market price available at the time and place of sale;[47] and it seems also that the sale is to be of the contents of the packages, and not of the packages unopened.[48] The statute being silent as to the place of sale, the sale need not be made at the point of destination, but may be made at some point where the carrier might be able to sell the goods at less cost and for a better price.[49] A waiver by the owner of the required statutory notice and advertisement of sale does not of itself exempt the carrier of its duty to give such notice and make the sale in such manner and at such place as will reasonably assure that the goods will bring their fair market value.[50]

If the goods sell for more than the amount of the charges due, the carrier is liable or accountable to the owner of the goods for the balance of the proceeds,[51] and may be chargeable with interest on the proceeds in excess of the freight while they are withheld from the shipper.[52] When a carrier offers to carry the goods of a shipper for a certain price per carload and the shipper accepts such offer and ships his goods thereunder, the carrier is bound thereby and cannot be heard to say that it will not abide by its terms; and if a greater sum is retained by the carrier on the sale of the goods, it will be required to respond to the shipper for such excess.[53] On the other hand, where the carrier waives prepayment and the consignee refuses to take the goods and pay the transportation charges, and the carrier in strict conformity with law sells the goods to enforce its lien for charges, and there is still a balance due, the consignor is liable to the carrier therefor,[54] and this liability of the consignor under such circumstances applies as much to a charge for demurrage as to a freight or other lawful charge which the carrier is bound to collect.[55]

In Louisiana it has been held that the proper method by which to enforce a carrier's privilege is by a writ of sequestration rather than a provisional seizure;[56] but the mistaken procurement of a provisional seizure will not deprive the carrier of an admitted privilege which is alleged and proved,[57] nor will an attempt to enforce the privilege as a laborer's or mechanic's privilege[58] It is essential, however, that the privilege be clearly alleged and proved;[59] and before a sale can legally be made the registered notice required by statute must properly be given to the consignee.[60]

§ 332. Assignability of Lien

A carrier's lien can neither be sold nor assigned.

The lien of a carrier for freight is neither property nor a debt, but a mere right to have a debt satisfied out of certain specified property, and is a personal right which cannot be sold or assigned.[61]

44. Ga.—Seaboard Air Line Ry. Co. v. Roberds, 159 S.E. 742, 43 Ga.App. 553
Mo.—Bufton v. Southern Express Co., App., 217 S.W. 630.
10 C.J. p. 463 note 74.

45. Ga.—Seaboard Air Line Ry. Co. v. Roberds, 159 S.E. 742, 43 Ga.App. 553—Netzow Mfg. Co. v. Southern Ry. Co., 66 S.E. 399, 7 Ga.App. 163.

46. Ga.—Southern R. Co. v. Born Steel Range Co., 55 S.E. 173, 126 Ga. 527.
10 C.J. p. 463 note 80.

47. Pa.—Long Island R. Co. v. Keystone Iron & Metal Co., 5 Pa.Dist. & Co. 257.

48. Ala.—Nathan v. Shivers, 71 Ala. 117, 46 Am.R. 303.
Pa.—Adams Express Co. v. Schlessinger, 75 Pa. 246.
10 C.J. p. 463 note 79.

49. Tex.—Slayden-Kirksey Woolen Mill v. Houston, etc., R. Co., Civ.App., 132 S.W. 77.

50. Tex.—Reed v. Southern Pac. Co., Civ.App., 99 S.W.2d 1026, error dismissed.

51. N.C.—Temple v. Southern R. Co., 129 S.E. 815, 190 N.C. 438

52. Kan.—Stevens-Scott Grain Co. v. Atchison, etc., R. Co., 149 P. 744, 96 Kan. 1, rehearing denied 150 P. 524, 96 Kan. 133.

53. Neb.—Atchison, etc., R. Co. v. Miller, 21 N.W. 451, 16 Neb. 661.

54. Ga.—Bewley-Darst Coal Co. v. Western, etc., R. Co., 87 S.E. 702, 17 Ga.App. 464—Jelks v. Philadelphia, etc., R. Co., 80 S.E. 216, 14 Ga.App. 96.

55. Ga.—Jelks v. Philadelphia, etc., R. Co., supra.

56. La.—Green v. Hawkins & Antoon, App., 142 So. 742, modified on other grounds 144 So. 271.

57. La.—Green v. Hawkins & Antoon, supra.

58. La.—Green v. Hawkins & Antoon, supra.

59. La.—Green v. Hawkins & Antoon, App., 144 So. 271, modifying 142 So. 742.
Petition held sufficient
La.—Green v. Hawkins & Antoon, App., 144 So. 271, modifying 142 So. 742.

60. La.—New Orleans & G. N. R. R. Co. v. Cousin, 4 La.App. 638.

61. Tex.—Whaley Lumber Co. v. Reliance Brick Co., Civ.App., 2 S.W.2d 911.
10 C.J. p. 463 note 87.
Corpus Juris is cited with approval in Whaley Lumber Co. v. Reliance Brick Co., Tex.Civ.App., 2 S.W.2d 911, 914.

§ 333. Liability of Carrier While Retaining Goods under a Lien for Charges

A carrier retaining goods under a lien is ordinarily liable only for loss or injury resulting from its failure to exercise due care for the protection and preservation of the goods; and it cannot be held responsible for loss resulting purely and solely from the detention.

The carrier is bound to exercise ordinary care for the protection of goods retained under its lien for charges and is responsible for any loss or injury which such care might have avoided.[62] However, the right to a lien on the goods carried necessarily implies the right to retain such goods until the proper charges are paid, and the carrier is not liable for any loss which results purely from such detention.[63] In such case the loss is regarded as directly attributable to the fault of the consignee in not paying the charges and securing the goods, and he cannot fix the responsibility on the carrier.[64]

So long as the carrier acts with reasonable prudence and discretion it may incur necessary and reasonable expenses in keeping possession and caring for the property.[65]

3. Demurrage

§ 334. Definition, Nature, and Object of Demurrage Charges

Demurrage is a charge by a carrier for the detention of cars beyond a reasonable time, for the purpose of compensating the carrier and of securing a prompt release of cars. Reciprocal demurrage is a charge by a shipper for a carrier's delay in furnishing cars.

While the term "demurrage" originated in the maritime law,[66] and its use was perhaps originally confined to carriers by water,[67] its application to carriers by rail is now undoubted, and as so applied it ordinarily means or denotes a charge made by the carrier for an unreasonable detention of cars in which goods are shipped.[68] Such a charge is permitted and recognized not only because it may afford compensation to the carrier for an additional service,[69] but because of the usefulness and importance of its main object, which is to obtain a prompt release of cars and thus prevent interference with the general traffic of the carrier.[70] In view of this latter purpose a demurrage charge is not objectionable as being a device or pretext for exacting from the shipper or consignee more than the rate prescribed by law and fixed by schedule.[71]

For most purposes demurrage charges are regarded as something apart and separate and distinct from the transportation charges as they do not arise, if at all, until the transportation is ended.[72] Rather, they have been said to be more closely anal-

62. S.D.—Dunlap v. Great Northern R. Co., 148 N.W. 529, 34 S.D. 320.
10 C.J. p. 464 note 88.

63. Ga.—Georgia R., etc., Co. v. Murrah, 11 S.E. 779, 85 Ga. 343

64. Ga.—Georgia R., etc., Co. v. Murrah, supra.

65. Me.—Northern Pac. Ry. Co. v. Pleasant River Granite Co., 102 A. 298, 116 Me. 496.

66. W.Va.—New York Cent. R. Co. v. West Virginia Eagle Coal Co., 148 S.E. 493, 107 W.Va. 429
10 C.J. p. 464 notes 92, 95 [b].

67. Okl.—Gault Lumber Co. v. Atchison, etc., R. Co., 130 P. 291, 37 Okl. 24.
10 C.J. p. 464 note 5.

68. Ala.—Louisville & N. R. Co. v. Camody, 84 So. 824, 203 Ala. 522, reversing 82 So. 648, 17 Ala. App. 158, conformed to 85 So. 846, 17 Ala. App. 370
Mich.—Grand Rapids & I. Ry. Co. v. Cobbs & Mitchell, 168 N.W. 961, 203 Mich. 133.
Miss.—Vanderbilt v. Planters' Oil Mill & Gin Co., 106 So. 14, 140 Miss. 427.
N.J.—Central R. Co. of New Jersey v. Gallena-Poole, Inc., 152 A. 251, 107 N.J.Eq. 267, affirmed 160 A. 507, 110 N.J.Eq. 559.
Va.—James v. Norfolk & W. Ry. Co., 129 S.E. 321, 143 Va. 865.
10 C.J. p. 464 notes 93–95, p. 465 note 6.

The text of Corpus Juris is cited in Cumberland Pipe Line Co. v. Commonwealth, 79 S.W.2d 366, 370, 258 Ky. 90.

69. U.S.—Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & St. P. Ry. Co., Mo., 46 S.Ct. 530, 271 U.S. 259, 70 L.Ed. 934, affirming, D.C., 2 F.2d 291.
La.—City of New Orleans, by and through Public Belt Railroad Commission, v. New Orleans Coal & Bisso Towboat Co., 124 So. 693, 12 La. App. 124, transferred from 123 So. 724, 168 La. 1093.
N.J.—Central R. Co. of New Jersey v. Gallena-Poole, Inc., 152 A. 251, 107 N.J.Eq. 267, affirmed 160 A. 507, 110 N.J.Eq. 559.
10 C.J. p. 464 note 99

70. U.S.—Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & St. P. Ry. Co., Mo., 46 S.Ct. 530, 271 U.S. 259, 70 L.Ed. 934, affirming, D.C., 2 F.2d 291.
Mich.—Grand Rapids & I. Ry. Co. v. Cobbs & Mitchell, 168 N.W. 961, 203 Mich. 133.
Ohio.—Cleveland, C., C. & St. L. Ry. Co. v. Mayer, 7 Ohio App. 44.
Va.—Eastern Coal & Export Corporation v. Norfolk & W. Ry. Co., 138 S.E. 471, 148 Va. 140, certiorari denied 48 S.Ct. 207, 276 U.S. 615, 72 L.Ed. 732—Smokeless Fuel Co. v. Chesapeake & O. Ry. Co., 128 S.E. 624, 142 Va. 355.
W.Va.—New York Cent. R. Co. v. West Virginia Eagle Coal Co., 148 S.E. 493, 107 W.Va. 429.
10 C.J. p. 464 note 1.
"It is not intended that . . . [demurrage charges] shall be so liberal as to defeat the end sought to be attained, but to stimulate the shipper to release cars, and thus enable the carrier to serve all shippers"—Pennsylvania, etc., R. Co. v. Fraser Co., 175 Ill.App. 645, 648.

Revenue not purpose of demurrage charges—Eastern Coal & Export Corporation v. Norfolk & W. Ry. Co., 138 S.E. 471, 148 Va. 140, certiorari denied 48 S.Ct. 207, 276 U.S. 615, 72 L.Ed. 732—10 C.J. p. 464 note 1 [a].

71. Va.—Norfolk, etc., R. Co. v. Adams, 18 S.E. 673, 90 Va. 393, 44 Am. S.R. 916, 22 L.R.A. 530.

72. Ill.—Chicago, etc., R. Co. v. Berwind-White Coal Min. Co., 171 Ill. App. 302, affirmed 35 S.Ct. 131, 235 U.S. 371, 59 L.Ed. 275. See Pitts-

ogous to a "storage" charge.[73] As will be noted in the following section, however, it has often been held that for the purposes of the provisions of the Interstate Commerce Act, and similar state statutes, which regulate transportation rates and charges without express mention of demurrage charges, the latter are to be regarded as part and parcel of the transportation charges and subject to the same rules and regulations.

Reciprocal demurrage. Charges recoverable by a shipper from a carrier for delay in furnishing cars have been termed reciprocal demurrage.[74]

§ 335. Right to Demurrage Charges in General

Subject to proper and applicable rules and regulations, a carrier has a right to exact a reasonable demurrage charge for the detention of cars beyond a reasonable time; and under statute a shipper may be entitled to recover what is called a reciprocal demurrage charge for delay of the carrier in furnishing cars.

While some of the earlier cases were inclined to deny the right of a carrier by rail to demurrage, in the absence of statute or special contract,[75] it is now well settled that, subject to proper and applicable regulatory measures, a carrier by rail has, independent of statute or special contract, the right to impose and collect a reasonable charge for the detention of its cars or vehicles beyond a reasonable time;[76] and, of course, such a charge is permissible where specially provided for by contract,[77] or authorized by statute.[78] Demurrage may be collected for detention at initial points as well as at points of destination.[79] Furthermore the right to such charges is not limited to cases involving the carrier's own cars, but exists also as to other cars in the carrier's service.[80] Thus the carrier may collect demurrage charges for the detention of other carriers' cars transported by it,[81] or for the detention of privately owned cars in its service,[82] even

burgh, C., C & St L. Ry. Co. v. Hedrich, 202 Ill App. 48.
Va.—Norfolk & W R. Co v. Adams, 18 S E 673, 90 Va 393, 44 Am S.R 916, 22 L R A. 530.
10 C J. p 464 note 96.

73. La.—City of New Orleans, by and through Public Belt Railroad Commission v. New Orleans Coal & Bisso Towboat Co., 124 So 693, 12 La App. 124, transferred from 123 So 724, 168 La 1093

74. Ga.—Southern R. Co. v. Melton, 65 S E. 665, 133 Ga. 277.

75. Ill.—Chicago, etc., R. Co. v. Jenkins, 103 Ill. 588, 600—Cleveland, etc., R Co. v. Lamm, 73 Ill. App 592—Cleveland, etc., R. Co. v. Holden, 73 Ill App. 582
Neb.—Burlington, etc, R. Co. v. Chicago Lumber Co., 19 N.W. 451, 15 Neb. 390.
10 C.J p 464 note 5.

76. U S.—Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & St. P. Ry Co, Mo, 46 S Ct. 530, 271 U S. 259, 70 L.Ed. 934, affirming, D. C., 2 F.2d 291—Krauss Bros Lumber Co. v. Mellon, C C.A.-Ala, 30 F 2d 901, conforming to mandate 48 S.Ct. 358, 276 U S. 386, 72 L Ed. 620, which reversed, C C.A., 18 F. 2d 369, certiorari granted 48 S.Ct. 35, 276 U.S. 513, 72 L.Ed. 400, judgment as to costs amended 48 S Ct. 527, 72 L.Ed. 1018, certiorari denied 49 S.Ct. 513, 279 U S. 872, 73 L.Ed 1008.
Ala.—Louisville & N R Co v. Camody, 84 So. 824, 203 Ala. 522, reversing 82 So. 648, 17 Ala App. 158, conformed to 85 So. 846, 17 Ala. App. 370
Md.—Penn Oil Co. v. Triangle Petroleum & Gasoline Co, 111 A. 482, 136 Md. 559
Okl.—Atchison, T & S. F. Ry. Co v Johnson, 225 P 939, 99 Okl. 72
S C.—Thomas v. Northwestern R Co. of South Carolina, 98 S.E. 336, 111 S C. 475.
Tex.—Reed v. Southern Pac Co., Civ App, 99 S W.2d 1026, error dismissed—Ft. Worth & D. C Ry. Co. v. W. A Nabors Fruit Co., Civ. App., 200 S.W. 420.
Va.—Smokeless Fuel Co. v. Chesapeake & O. Ry. Co., 128 S.E 624, 142 Va. 355
W.Va.—New York Cent. R. Co. v West Virginia Eagle Coal Co., 148 S.E. 493, 107 W Va 429
10 C.J. p 465 notes 6, 9.

So-called penalty exacted for detention of cars containing interstate shipment of lumber awaiting reconsignment may be held in essence an additional demurrage charge, not improperly exacted, having been found reasonable by interstate commerce commission.—Turner, Dennis & Lowry Lumber Co. v Chicago, M & St P. Ry. Co., Mo., 46 S Ct. 530, 271 U. S 259, 70 L.Ed. 934, affirming, D C., 2 F.2d 291.

77. Miss.—Yazoo, etc, R Co v. Searles, 37 So 939, 85 Miss. 520, 68 L R A 715
10 C.J. p 65 note 50, p 465 note 7.

78. Miss.—Vanderbilt v. Planters' Oil Mill & Gin Co., 106 So. 14, 140 Miss. 427.
10 C.J. p 465 note 8.

Demurrage prior to acceptance
Prior to a carrier's acceptance of a shipment for transportation, a shipper's loading of cars and refusal to unload has been held not to constitute a use of cars for transportation under a statute authorizing a carrier to charge demurrage for such use.—Chicago & N W. Ry Co v Pulp Wood Co, 159 N.W. 734, 164 Wis 200

Switching carrier
A statute permitting a railroad company to charge demurrage has been held not to authorize such charges by a carrier which only switches cars, but to authorize them only by carriers from whom cars are ordered or by whom they are hauled.—Chicago, R I & P. Ry Co. v Ball & Philpot, 203 S.W. 284, 134 Ark. 142.

79. U S.—Krauss Bros. Lumber Co v. Mellon, C.C.A Ala, 30 F 2d 901, conforming to mandate 48 S Ct 358, 276 U.S 386, 72 L Ed. 620, which reversed, C C.A, 18 F 2d 369, certiorari granted 48 S Ct 35, 275 U.S 513, 72 L Ed 400, judgment as to costs amended 48 S.Ct 527, 72 L Ed. 1018, certiorari denied 49 S.Ct 513, 279 U S. 872, 73 L Ed. 1008

80. U S.—Swift & Co v. Hocking Valley Ry Co, 37 S Ct. 287, 243 U S 281, 61 L.Ed. 722, affirming 112 N E 212, 93 Ohio St 143—Pittsburgh, C, C. & St. L. Ry. Co. v. Freedom Oil Works, D C.Pa, 247 F. 573, reversed on other grounds Freedom Oil Works Co. v. Pittsburgh, C, C & St. L R Co., 254 F. 800, 166 C C A. 246.

81. Md.—Penn Oil Co. v. Triangle Petroleum & Gasoline Co, 111 A. 482, 136 Md. 559.
10 C J p 465 note 11.

82. U.S.—Swift & Co. v. Hocking Valley Ry. Co, 37 S.Ct. 287, 243 U. S. 281, 61 L.Ed. 722, affirming 112 N E. 212, 93 Ohio St. 143—Pitts-

though the cars are detained on private tracks[83] Under a contract between defendant and plaintiff railroad, making a switch track plaintiff's property, and limiting defendant's use thereof to shipment purposes, defendant cannot use it for storing its own cars, without being subject to demurrage charges.[84]

For the purpose of fixing the terms and conditions of such a charge, the carrier has the right to establish reasonable demurrage rules and regulations;[85] and the shipper or his consignee are deemed to have impliedly contracted to submit to the same,[86] so that where the terms and conditions of the rules and regulations have been fulfilled the carrier is entitled to recover its demurrage charges in accordance therewith.[87] The carrier's right to recover the charges so fixed is not affected by the fact that the person sought to be charged was not consulted with reference to the framing of the demurrage rules and regulations.[88]

The right to demurrage applies equally to cars in intra-state and in interstate commerce,[89] at least where proper provision is made therefor in the applicable tariff.[90] However, under the Inter-

burgh, C, C. & St. L. Ry. Co v. Freedom Oil Works, D.C Pa, 247 F. 573, reversed on other grounds Freedom Oil Works Co. v. Pittsburgh, C., C. & St. L. R. Co., 254 F. 800, 166 C.C.A. 246.

La.—Kansas City Southern Ry. v. Baker Gasoline Co., 127 So. 442, 13 La App. 106.

Miss.—Vanderbilt v. Planters' Oil Mill & Gin Co., 106 So. 14, 140 Miss. 427.

10 C.J. p 466 notes 12, 13.

Corpus Juris is cited with approval in Vanderbilt v. Planters' Oil Mill & Gin Co., 106 So. 14, 16, 140 Miss. 427.

83. Pa.—Pennsylvania R. Co. v. Waverly Oil Works, 58 Pa.Super. 154.

10 C.J. p 466 note 13.

84. U.S.—St. Louis, I. M. & S. R. Co. v. National Refining Co., D. C.Ohio, 226 F. 357.

85. U.S.—Emmons Coal Mining Co. v. Norfolk & W. Ry. Co., Pa., 47 S.Ct. 254, 272 U.S. 709, 71 L.Ed. 485, affirming, C.C.A., 3 F.2d 525—Turner, Dennis & Lowry Lumber Co v. Chicago, M. & St. P. Ry Co., D.C.Mo., 2 F.2d 291, affirmed 46 S. Ct. 530, 271 U.S. 259, 70 L.Ed. 934.

10 C.J. p 65 note 50.

86. Ala.—Louisville & N. R. Co. v. Camody, 84 So. 824, 825, 203 Ala 522, reversing 82 So 648, 17 Ala. App. 158, conformed to 85 So. 846, 17 Ala App 370

To same effect New York Cent. R. Co. v. West Virginia Eagle Coal Co., 148 S.E. 493, 107 W.Va. 429.

87. U.S.—Emmons Coal Mining Co. v. Norfolk & W. Ry. Co., Pa., 47 S.Ct. 254, 272 U.S. 709, 71 L.Ed. 485, affirming, C.C.A., 3 F.2d 525—Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & St. P. Ry. Co., Mo., 46 S.Ct. 530, 271 U.S. 259, 70 L.Ed 934, affirming, D.C., 2 F. 2d 291—Swift & Co. v. Hocking Valley Ry. Co., 37 S.Ct. 287, 243 U.S. 281, 61 L.Ed 722, affirming 112 N.E. 212, 93 Ohio St. 143—Becher-Barrett-Lockerby Co. v. Northern Pac Ry Co., C.C.A.Minn., 89 F.2d 752—Central R. Co of New Jersey v. Schick, C.C.A.Pa., 38 F.2d 968—Davis v. Timmonsville Oil Co., C.C.A.S.C., 285 F. 470—Sinclair Refin. Co. v. Schaff, C.C.A.Kan., 275 F. 769—Minneapolis, St. P. & S. M. Ry. Co. v. Van Dusen Harrington Co., C.C.A.Minn., 272 F. 255—Pittsburgh, C. C. & St. L. Ry. Co. v. Freedom Oil Works, D.C.Pa., 247 F. 573, reversed on other grounds Freedom Oil Works Co. v. Pittsburgh, C. C. & St. L. R. Co., 254 F. 800, 166 C.C.A. 246—Chesapeake & Ohio Coal & Coke Co. v. Toledo & O. C. Ry. Co., W.Va., 245 F. 917, 158 C.C.A. 205, affirming, D.C., Toledo & O. C. Ry. Co. v. Chesapeake & Ohio Coal & Coke Co., 238 F. 629, error allowed 247 F. 1002, 159 C.C.A. 662, and error dismissed Chesapeake & Ohio Coal & Coke Co. v. Toledo & O. C. Ry. Co., 39 S.Ct. 289, 249 U.S. 585, 63 L.Ed. 788—Denver & R. G. R. Co. v. U. S., 53 Ct.Cl. 155.

Ill.—Davis v. Keystone Steel & Wire Co., 148 N.E. 47, 317 Ill. 278

La.—Davis v. Ferguson, 132 So. 289, 17 La.App. 149, avoided on other grounds 136 So. 293, 173 La. 132—Kansas City Southern Ry. v. Baker Gasoline Co., 127 So. 442, 13 La. App. 106

Md.—Penn Oil Co. v. Triangle Petroleum & Gasoline Co., 111 A. 482, 136 Md. 559

N.Y.—Henry L. Hunter, Inc., v. New York, N. H. & H. R. Co., 166 N.Y.S. 237, 179 App.Div. 52, affirming 161 N.Y.S. 10, 97 Misc. 26.

N.C.—Davis v. Greensboro Warehouse & Storage Co., 120 S.E. 462, 186 N.C. 676, certiorari denied Greensboro Warehouse & Storage Co. v. Davis, 44 S.Ct. 453, 264 U.S. 594, 68 L.Ed. 866

Okl.—Atchison, T. & S. F. Ry. Co. v. Johnson, 225 P. 939, 99 Okl. 72.

Pa.—Bessemer & L. E. R. Co. v. Ford Collieries Co., 116 A. 802, 273 Pa. 166.

Va.—Smokeless Fuel Co. v. Chesapeake & O. Ry. Co., 140 S.E. 823, 149 Va. 13—James v. Norfolk & W. Ry. Co., 129 S.E. 321, 143 Va. 865—Smokeless Fuel Co. v. Chesapeake & O. Ry. Co., 128 S.E. 624, 142 Va. 355.

W.Va.—New York Cent. R. Co. v. West Virginia Eagle Coal Co., 148 S.E. 493, 107 W.Va. 429—Baltimore & O. R. Co. v. Dellslow Co., 127 S.E. 43, 98 W.Va. 194.

Wis.—Chicago, St. P., M. & O. Ry. Co. v. New Dells Lumber Co., 197 N.W. 713, 183 Wis. 309.

Holding cars on consignee's order

(1) Thus, under a tariff rule so providing, cars held by a carrier on the order of the consignee prior to placement are subject to demurrage charges.

U.S.—Denver & R. G. R. Co. v. U. S., 53 Ct.Cl. 155.

N.Y.—Henry L. Hunter, Inc., v. New York, N. H. & H. R. Co., 166 N.Y.S. 237, 179 App.Div. 52, affirming 161 N.Y.S. 10, 97 Misc. 26.

(2) Moreover the consignee is estopped to assert, in such circumstances, that the carrier ought not have complied with the former's order to hold the cars—Denver & R. G. R. Co. v. U. S., supra.

Charges after release or unloading of car

Where the rules of a car service association, regularly filed with the interstate commerce commission, prohibited agents from storing carload freight in warehouses, or on ground belonging to the railroad company, without adding car service charges, the same as though the freight had been left in the car, the carrier's right to collect demurrage does not end when the shipment is unloaded and the car is released for service, the rule being obligatory on the carrier—Horton v. Tonopah, & G. R. Co., D.C.Nev., 225 F. 406.

88. Ky.—Kentucky Wagon Mfg. Co. v. Ohio, etc., R. Co., 32 S.W. 595, 98 Ky. 152, 17 Ky.L. 726, 56 Am.S.R. 326, 36 L.R.A. 850.

Pa.—Pennsylvania R. Co v. Midvale Steel Co., 51 A. 313, 201 Pa. 624, 631, 88 Am.S.R. 836

10 C.J. p 467 note 25.

89. Pa.—Pennsylvania R. Co. v. Waverly Oil Works, 58 Pa.Super. 154.

90. N.C. — Davis v. Greensboro Warehouse & Storage Co., 120 S.

state Commerce Act, and similar state regulatory statutes discussed more fully in § 302 supra and §§ 392–397 infra, the right of a carrier to collect demurrage has been held subject to all provisions regulating and restricting transportation charges, although not expressly mentioned therein, on the theory that for the purposes of such statutes demurrage charges are to be regarded as part and parcel of the transportation charges.[91] By virtue of such statutes it may be the right and duty of the carrier to establish its demurrage charges and rules in its duly filed and published tariff, see infra § 339; and such charges are not a matter of mere contract between the parties.[92] It becomes not only the right, but the absolute duty, of the carrier to collect or enforce the demurrage so fixed or provided for;[93] and such right and duty cannot be avoided or affected by matters which might otherwise give rise to a waiver or estoppel.[94]

Amount of charges and period for which made. Ordinarily the demurrage charges may and must be reasonable in amount.[95] However, under the Interstate Commerce Act and similar state statutes, the rate fixed in the filed and published tariff is conclusively presumed to be a reasonable one until proper action has been taken thereon by the commission.[96]

Demurrage charges can usually be made only for a reasonable length of time, for thereafter it becomes the duty of the carrier to unload the cars and terminate the detention,[97] and, if the shipper notifies the carrier to unload, the carrier is entitled to demurrage only until it has had a reasonable time to comply with such order.[98]

Changes in rates and tariffs. Where the free period allowed by the tariff on file has expired, the demurrage rates may be advanced and collected after that time without being objectionable as affecting

E. 462, 186 N C 676, certiorari denied Greensboro Warehouse & Storage Co. v Davis, 44 S Ct. 453, 264 U S. 594, 68 L Ed 866.

91. U.S —Davis v. Timmonsville Oil Co, C C A S C., 285 F 470—Michie v New York, N. H. & H. R. Co, C C Mass, 151 F 694
Ill —Davis v Keystone Steel & Wire Co., 148 N E 47, 317 Ill 278.
La.—Davis v. Ferguson, 132 So. 289, 17 La App 149, avoided on other grounds 136 So. 293, 173 La 132.
Mo.—St. Louis-San Francisco Ry. Co. v. Morgan, 297 S.W. 717, 221 Mo.App 43.

92. U.S —Davis v. Timmonsville Oil Co., C C A S C, 285 F. 470—Sinclair Refining Co. v. Schaff, C. C.A Kan., 275 F 769.
Va.—Smokeless Fuel Co v Chesapeake & O. Ry. Co., 128 S E 624, 142 Va. 355

Contract not within statute

Contract between railroads, if construed as not entitling one of them to charge demurrage on cars loaded with ties of the other at creosoting plant, held not to result in violation of provision of Interstate Commerce Act as to discrimination, since the contract was for service not within the scope of the carrier's duty as such.—Cleveland, C, C. & St L. Ry. Co. v New York, C & St L. Ry. Co, C.C.A Ind, 11 F 2d 850.

93. U S.—Norfolk & W Ry. Co v Emmons Coal Mining Co., D.C.Pa., 287 F. 168, affirmed, C C A, Emmons Coal Mining Co. v. Norfolk & W. Ry Co., 3 F.2d 525, affirmed 47 S Ct. 254, 272 U.S. 709, 71 L. Ed. 485—Davis v. Timmonsville Oil Co, C C A.S.C, 285 F 470—Sinclair Refining Co v. Schaff, C C.A Kan., 275 F. 769.
La —Davis v. Ferguson, 132 So 289, 17 La App 149, avoided on other grounds 136 So. 293, 173 La 132

94. U S —Davis v. Timmonsville Oil Co, C C A S C., 285 F. 470
Minn.—Minneapolis, St. P. & S. S. M. Ry Co. v Reeves Coal Co., 181 N W. 335, 148 Minn 196, 14 A. L.R. 405
Va.—Smokeless Fuel Co. v. Chesapeake & O. Ry. Co, 128 S E. 624, 142 Va 355
W.Va.—New York Cent R Co. v West Virginia Eagle Coal Co., 148 S E. 493, 107 W Va. 429

95. U S.—Michie v. New York, N H. & H R. Co, C C Mass., 151 F. 694.
10 C J. p 466 note 20.

Barge rates

Where there is no prohibition in the shipping contract against using a water route for part of the transportation, and it appears that it would have been difficult to make delivery without the use of water transportation, the carrier is entitled to base its demurrage charges on barge instead of car rates, although the barge rates are considerably higher than car rates —Levenson Wrecking Co v. New York Cent, etc, R. Co, 156 N Y.S. 656, 93 Misc 75.

Under a bill of lading providing that the demurrage charges shall not exceed a designated amount, the carrier can charge only for an unreasonable detention within the limit fixed by the contract, and only a reasonable amount within such limit —McGee v. Chicago, etc., R Co., 71 Mo.App. 310.

96. N.J.—Erie R. Co. v. Wanaque Lumber Co, 69 A. 168, 75 N J. L. 878.

97. Me —Northern Pac. Ry. Co v. Pleasant River Granite Co, 102 A 298, 116 Me 496
Wis —Waters v. Becker, 186 N.W. 167, 175 Wis. 621.

Refusal of consignee to accept

Where consignee refuses to accept car, carrier must make disposition thereof within reasonable time and demurrage charge can be made for only reasonable time.—Toledo & Ohio Central Ry Co v Wilson, 26 Ohio Cir.Ct ,N S, 476, 28 O C D 154, affirming 15 Ohio N P ,N.S, 513

Unloading held unreasonably delayed

Where terminal carrier knew that shipper was unlikely to order disposition of shipment, its keeping of goods on flat car at demurrage charge for eighty-six days was unreasonable, and after twenty-six days it should have unloaded goods and released car, so that its right to demurrage ceased thereafter — Northern Pac Ry. Co. v. Pleasant River Granite Co., 102 A. 298, 116 Me 496.

Effect of bill of lading provision as to storage

A bill of lading covering a shipment of coal, and giving the carrier the right to make a reasonable charge for storage of property not removed within forty-eight hours, gives it no right to store the coal in the cars for six months after the consignee refused to accept it and charge storage therefor, where the refusal to accept was due to an excessive freight rate.—Waters v. Becker, 186 N.W. 167, 175 Wis. 621.

98. Tex.—Reed v. Southern Pac. Co, Civ App., 99 S.W.2d 1026, error dismissed.

preexisting rights;[99] and a tariff shortening the free period may apply to cars received for transportation before the tariff was issued and filed with the commission.[1]

Car service associations. A carrier may enforce demurrage charges through a combination of carriers, commonly known as a car service association, organized for that purpose, and such a combination is not rendered invalid by the fact that all members agree to make a uniform charge for detention.[2] Hence the fact that a bill for demurrage charges due a railroad was made out by direction of a car service association to which the railroad intrusted its business in the collection of demurrage, and on its letter heads, does not justify the consignee in refusing to pay such demurrage.[3]

Reciprocal demurrage. So-called reciprocal demurrage statutes or regulations have often been held valid and effective to give a shipper the right to recover damages from the carrier on account of its delay in furnishing cars.[4] However, the applicability of such a statute may be limited to cases where there has been a violation of the carrier's public duty irrespective of contract;[5] and in one jurisdiction a reciprocal demurrage statute, imposing an additional fine or penalty to be paid to the injured party, has been held violative of a constitutional provision requiring that all fines and penalties arising under the general laws go exclusively to the school fund.[6]

Apart from statute, the owner of a car negligently detained by a carrier is entitled to recover the reasonable rental of such car during the period of unnecessary detention, and the amount of recovery is not limited by a rule of the interstate commerce commission fixing the amount of compensation due from a carrier for the use of private cars.[7]

§ 336. Conditions Precedent to Right

Demurrage charges cannot be collected until all conditions precedent have been complied with.

Demurrage charges cannot be collected until the terms and conditions of the carrier's demurrage rules and regulations, and all duties imposed by law as conditions precedent, have been complied with.[8]

§ 337. Reasonableness of Rules and Regulations

To entitle a carrier to recover demurrage charges in accordance with its rules and regulations, such rules and regulations must be reasonable.

To justify a carrier in collecting demurrage charges, the rules and regulations providing for these charges must be reasonable.[9] Thus it has been held that a carrier's demurrage rules and regulations must be reasonable as regards the classification of freight,[10] the amount of the charges, see supra § 335, the cars made subject to such charges,[11] and the time allowed for loading or unloading.[12]

99. U.S.—Horton v. Tonopah & G. R. Co., D.C.Nev., 225 F. 406

1. U.S.—Chesapeake & Ohio Coal & Coke Co. v. Toledo & O. C. Ry. Co., W.Va., 245 F. 917, 158 C.C.A. 205, affirming, D.C., Toledo & O. C. Ry. Co. v. Chesapeake & Ohio Coal & Coke Co., 238 F. 629, and error allowed 247 F. 1002, 159 C.C.A. 662, error dismissed Chesapeake & Ohio Coal & Coke Co. v. Toledo & O. C. Ry. Co., 39 S.Ct. 289, 249 U.S. 585, 63 L.Ed. 788.

2. Ky.—Kentucky Wagon Mfg. Co. v. Ohio, etc., R. Co., 32 S.W. 595, 98 Ky. 152, 17 Ky.L. 726, 56 Am.S.R. 326, 36 L.R.A. 850

10 C.J. p. 466 note 16.

3. Miss.—Yazoo, etc., R. Co. v. Searles, 37 So. 939, 85 Miss. 520, 68 L.R.A. 715.

4. Kan.—Offerle Grain & Supply Co. v. Atchison, T. & S. F. Ry. Co., 182 P. 405, 105 Kan. 272.

Wash.—State v. Public Service Commission, of Washington, 162 P. 523, 94 Wash. 274.

Apparent attempt to regulate interstate commerce

Where it is plain that the purpose of a rule of the public service commission providing reciprocal demurrage charges was merely to regulate intra-state commerce, the fact that the language of such rule is broad enough to apply to interstate commerce will not render it unconstitutional.—State v. Public Service Commission of Washington, 162 P. 523, 94 Wash. 274.

5. Ga.—Georgia Northern R. Co. v. Snellgrove, 85 S.E. 790, 16 Ga.App. 344.—Georgia Coast, etc., R. Co. v. Durrence, 65 S.E. 583, 6 Ga.App. 615.

6. Neb.—Sunderland Bros. Co. v. Chicago, B. & Q. R. Co., 177 N.W. 156, 104 Neb. 319, rehearing overruled 179 N.W. 546, 104 Neb. 319.

7. Ill.—Gustafson v. Michigan Cent. R. Co., 218 Ill.App. 402, affirmed 129 N.E. 516, 296 Ill. 41.

Reason for rule

"Damages caused by the negligence of a carrier are not within the act of Congress to regulate interstate commerce."—Gustafson v. Michigan Cent. R. Co., 218 Ill.App. 402, 407, affirmed 129 N.E. 516, 296 Ill. 41.

8. Mo.—Milne Lumber Co. v. Michigan Cent. R. Co., App., 57 S.W.2d 732.

Tex.—Hill County v. St. Louis Southwestern Ry. Co., Civ.App., 31 S.W.2d 868.

9. U.S.—Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & St. P. Ry. Co., D.C.Mo., 2 F.2d 291, affirmed 46 S.Ct. 530, 271 U.S. 259, 70 L.Ed. 934

10 C.J. p. 65 note 50 [a], p. 466 note 19.

10. U.S.—Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & St. P. Ry. Co., supra.

Differentiation between kinds of freight

A demurrage rule prohibiting a discrimination between persons and providing that if car service be collected from one person, it must be collected from all who are liable, does not prevent demurrage being collected for cars loaded with certain kinds of freight, although not charged for cars loaded with other kinds.—New Orleans, etc., R. Co. v. George, 35 So. 193, 82 Miss. 710.

11. U.S.—Emmons Coal Mining Co. v. Norfolk & W. Ry. Co., Pa., 47 S.Ct. 254, 272 U.S. 709, 71 L.Ed. 485, affirming, C.C.A., 3 F.2d 525.

12. Ky.—Kentucky Wagon Mfg. Co. v. Ohio, etc., R. Co., 32 S.W. 595,

In determining whether demurrage rules and regulations are reasonable, regard is had not only to the rights and interests of the shippers, but also to the rights and interests of the carrier and of the general public.[13] A rule is not unreasonable merely because it does not excuse a detention in circumstances which are exceptional or beyond the control of the shipper or consignee, such as unfavorable weather,[14] or a sudden business depression,[15] since to be beneficial to all alike, the rule must be of universal application.[16] A rule which authorizes a substitution of cars as among the members of a shippers' organization, and demurrage charges against the owners of such cars, is not unreasonable where it inures to the benefit of shippers as well as of the carrier and harms no one.[17]

Under the Interstate Commerce Act and similar state statutes, the reasonableness of demurrage rules and regulations contained in a properly filed and published tariff cannot be determined by a court until they have first been passed on by the proper commission.[18]

§ 338. Notice of Demurrage Rules or of Contract Provisions

Before demurrage charges can be collected the person sought to be charged must ordinarily have notice or knowledge of the rules or regulations providing for the imposition.

To entitle a carrier to collect demurrage charges, the person sought to be charged must usually have had notice of the demurrage rules, or regulations providing for the imposition, since a person cannot be deemed to have agreed to rules of which he has no notice.[19]

Some authority appears to require actual knowledge on the part of the person sought to be charged.[20] Other decisions have held, however, that notice to the particular person to be charged is unnecessary.[21] In any event, a shipper is sufficiently charged with knowledge of a demurrage rule by the regular rendering to it of bills for violation thereof.[22] Rules contained in the bill of lading are binding upon consignees, although they are in fact ignorant of the existence of such rules, since, having been embodied in the contract, the law will impute knowledge of their terms.[23] Also, the law will impute notice of demurrage rules included in the carrier's tariff filed with the interstate commerce commission and available for inspection at the carrier's stations.[24]

§ 339. Filing Tariff Schedules and Posting Demurrage Rules

While, under the Interstate Commerce Act and similar regulatory statutes, the tariff schedules containing the demurrage rules and regulations properly may and should be filed and posted, a failure to do so has been held not to defeat the right to recover the charges so provided for.

Under the Interstate Commerce Act, a demurrage charge stands upon the same footing as any other charge made by a carrier in connection with the transportation of property, and it and the rules and regulations pertaining thereto may, and properly should, be included in the tariff or schedule required to be filed and published, in accordance with the rules stated in § 302 supra;[25] and should be posted and kept open for inspection at all stations by all interested, especially shippers.[26] Nevertheless, it has been held that, while the carrier

98 Ky 152, 17 Ky L 726, 56 Am. S.R 326, 36 L.R.A. 850
10 C.J. p 466 note 19.

13. U.S.—Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & St P. Ry Co, D.C Mo, 2 F 2d 291, affirmed 46 S Ct. 530, 271 U S 259, 70 L.Ed. 934

14. Ky.—Kentucky Wagon Mfg Co v. Ohio, etc., R. Co, 32 S W. 595, 98 Ky. 152, 17 Ky.L. 726, 56 Am S.R. 326, 36 L R.A. 850

15. Va.—Smokeless Fuel Co v. Chesapeake & O. Ry. Co., 140 S. E 823, 149 Va. 13.

16. Ky—Kentucky Wagon Mfg. Co. v. Ohio, etc, R. Co, 32 S W. 595, 98 Ky. 152, 17 Ky.L 726, 56 Am S R. 326, 36 L.R A. 850.

17. U S.—Emmons Coal Mining Co. v. Norfolk & W Ry. Co., Pa, 47 S.Ct. 254, 272 U.S 709, 71 L Ed. 485, affirming, C C A., 3 F.2d 525.

18. U.S.—Norfolk & W. Ry. Co. v. Emmons Coal Mining Co., D C.Pa, 287 F. 168

19. Tex.—Baumbach v. Gulf, etc, R. Co., 23 S.W 693, 4 Tex.Civ App 650.

20. Ohio—Baltimore, etc., R. Co. v. Fisher, 5 Ohio S & C P. 659, 3 Ohio N.P. 122
10 C.J. p 467 note 24.

21. Miss.—Yazoo, etc, R Co. v. Searles, 37 So. 939, 85 Miss 520, 68 L.R A 715.
10 C J. p 467 notes 25, 26.

22. Pa—Pennsylvania R. Co v. Midvale Steel Co., 51 A. 313, 201 Pa. 624, 88 Am S R. 836

23. Miss.—Yazoo, etc., R Co. v. Searles, 37 So. 939, 85 Miss. 520, 523, 68 L R.A 715.

24. W.Va—Baltimore & O R. Co v. Dellslow Coal Co., 127 S E 43, 98 W Va. 194.

Notice of exemption

A shipper is charged with notice of a provision of the carrier's demurrage tariff that unless the shipper brings itself within the carrier's car distribution rule it will not be exempted from the operation of the demurrage rules—Baltimore & O. R. Co. v. Dellslow Coal Co., 127 S.E. 43, 98 W.Va. 194.

25. Ill.—Davis v Keystone Steel & Wire Co, 148 N E. 47, 317 Ill 278.

Demurrage rules of coal exchange

Where demurrage rates charged by carrier against coal exchange, as general consignee, were based solely on its tariffs, recourse to rules and regulations of exchange to determine amount of demurrage was not necessary, and it was not necessary for the rules and regulations of the exchange relating to demurrage charges to be filed with the interstate commerce commission.—Smokeless Fuel Co. v. Chesapeake & O. Ry. Co, 128 S E. 624, 142 Va. 355

26. W.Va.—Baltimore & O. R. Co.

may thereby subject itself to penalties imposed by law, its right to collect demurrage is not defeated by reason of the fact that it has failed to file its tariff schedules as required,[27] or has failed to post the demurrage rules in its stations.[28]

§ 340. Delivery

Usually a proper and sufficient delivery of the cars is a condition precedent to the right to collect demurrage for their detention.

Inasmuch as the primary duty of a carrier in carrying goods includes delivery of the goods to the proper person, as shown supra § 160, it is generally not entitled to charge demurrage on cars until it has made a proper and sufficient delivery thereof,[29] unless the delivery is not completed because of the fault of the other party or his agent.[30] If the other party is not at fault or in some way responsible therefor, the duty to make a sufficient delivery is not avoided or dispensed with because such delivery has become impossible due to the insufficiency of the carrier's trackage,[31] or because of conditions beyond the carrier's control and for which it is in no way responsible.[32]

While the propriety or sufficiency of a delivery for the purpose of fixing the right to demurrage may be dependent upon, and determined by, the construction or operation of an applicable statute,[33] a custom[34] or agreement[35] between the parties, or

v. Dellslow Coal Co., 127 S.E. 43, 98 W.Va. 194

27. Ill.—Chicago, etc., R. Co. v. Berwind-White Coal Min. Co., 171 Ill.App. 302

Rules of coal exchange

Where the carrier's tariffs on file with the interstate commerce commission provide for every essential element of the claim for demurrage, it is immaterial that the rules of a coal exchange, by compliance with which the shipper brought itself within the terms of the tariff, were not filed with such commission.—Norfolk & W. Ry. Co. v. Emmons Coal Mining Co., D.C.Pa., 287 F. 168.

28. Ill.—Chicago, etc., R. Co. v. Berwind-White Coal Min. Co., 171 Ill.App. 302.

29. U.S.—Granger v. Davis, C.C.A.Ohio, 2 F.2d 695.

Ala.—U.S. Fidelity & Guaranty Co. v. Central of Georgia Ry. Co., 147 So. 891, 226 Ala. 606, 87 A.L.R. 1028

Ga.—Seaboard Air Line Ry. Co. v. Daugherty-McKey & Co., 149 S.E. 92, 40 Ga.App. 190.

N.Y.—Lee v. Erie R. Co., 158 N.Y.S. 730, 173 App.Div. 75.

Ohio—A. M. Lewin Lumber Co. v. Louisville & N. Ry. Co., 19 Ohio App. 152

Okl.—Chicago, R. I. & P. Ry. Co. v. State, 186 P. 234, 77 Okl. 63.

Pa.—Bessemer & L. E. R. Co. v. Ford Collieries Co., 116 A. 802, 273 Pa. 166—Pennsylvania R. Co. v. Coles, 87 Pa.Super. 432.

Tex.—Hill County v. St. Louis Southwestern Ry. Co., Civ.App., 31 S.W.2d 868.

Va.—North Shore Improvement Co. v. New York, P. & N. R. Co., 108 S.E. 11, 130 Va. 464.

Wash.—Oregon-Washington R. & Nav. Co. v. McGoldbrick Lumber Co., 204 P. 1059, 119 Wash. 119.

10 C.J. p 467 note 32.

30. S.C.—Thomas v. Northwestern R. Co. of South Carolina, 98 S.E. 336, 111 S.C. 475.

31. Ala.—U.S. Fidelity & Guaranty Co. v. Central of Georgia Ry. Co., 147 So. 891, 226 Ala. 606, 87 A.L.R. 1028.

10 C.J. p 467 note 32 [a].

32. Wash.—Oregon-Washington R. & Nav. Co. v. McGoldbrick Lumber Co., 204 P. 1059, 119 Wash. 119.

33. Ala.—U.S. Fidelity & Guaranty Co. v. Central of Georgia Ry. Co., 147 So. 891, 226 Ala. 606, 87 A.L.R. 1028

Statute relating to track deliveries construed

(1) Under a statute requiring the carrier, in case of "track delivery," to "place loaded cars at an accessible place for unloading within twenty four hours after arrival," and carload shipments for track delivery to be placed at an accessible place for unloading, the words "track delivery" and "accessible" refer to team or sidetracks where the carrier has only such sidetracks for unloading at the point of delivery.—U.S. Fidelity & Guaranty Co. v. Central of Georgia Ry. Co., 147 So. 891, 226 Ala. 606, 87 A.L.R. 1028.

(2) The placement required is an actual placement consisting of a spotting of the cars in an accessible place for unloading.—U.S. Fidelity & Guaranty Co. v. Central of Georgia Ry. Co., supra

(3) The carrier cannot make a constructive placement which will satisfy the requirements of such a statute, and entitle it to charge demurrage, by reason of the fact that it has assigned particular tracks for delivery without the express or implied consent of the consignee and then kept the place assigned constantly filled with other cars so as to prevent the unloading of the cars on which the demurrage is sought to be charged.—U.S. Fidelity & Guaranty Co. v. Central of Georgia Ry. Co., supra.

34. U.S.—Raleigh Smokeless Fuel Co. v. Virginian Ry. Co., C.C.A.Va., 43 F.2d 555

Wash.—Oregon-Washington R. & Nav. Co. v. McGoldbrick Lumber Co., 204 P. 1059, 119 Wash. 119.

10 C.J. p 467 note 32 [b].

Consignee's boom

Where it is customary to place cars of logs at such a point that they can be unloaded into the consignee's boom, cars placed where they cannot be so unloaded without further moving are not delivered.—Oregon-Washington R. & Nav. Co. v. McGoldbrick Lumber Co., 204 P. 1059, 119 Wash. 119.

Holding yards

Cars are delivered, for purposes of demurrage, where they have arrived at yards within which cars are customarily held awaiting unloading at a point several miles away.—Raleigh Smokeless Fuel Co. v. Virginian Ry. Co., C.C.A.Va., 43 F.2d 555—10 C.J. p 467 note 32 [b].

Custom cannot vary written contract

Although it was the custom of carriers to tender delivery of cars consigned to Norfolk at Port Norfolk, yet where a bill of lading called for a delivery at a particular siding in Norfolk, the custom cannot modify the written contract of the parties, and until delivery is made at such siding demurrage cannot be charged.—North Shore Improvement Co. v. New York, P. & N. R. Co., 108 S.E. 11, 130 Va. 464.

35. N.Y.—Lee v. Erie R. Co., 158 N.Y.S. 730, 173 App.Div. 75.

Va.—North Shore Improvement Co. v. New York, P. & N. R. Co., 108 S.E. 11, 130 Va. 464

Wis.—Chicago, St. P., M. & O. Ry. Co. v. New Dells Lumber Co., 197 N.W. 713, 183 Wis. 309

Bill of lading provision

A bill of lading, providing that the carrier may charge for the detention of cars after they have been held forty-eight hours for unloading, and may hold the property subject

the rules or regulations of the carrier,[36] if the requirements have not been so lessened or varied, the delivery must normally be made at the point of destination,[37] and in such a manner as to permit the goods to be received and unloaded without inconvenience, delay, or interruption.[38] However, if a car has been placed and kept in a suitable place for unloading for the free period without being unloaded by the consignee, he will be liable for car service thereafter, although the car may not at all times thereafter be in a convenient place for unloading, provided he is not thereafter unreasonably hindered and delayed in unloading.[39] Also, the fact that terminal yards in which the cars stood were six miles in length, so that the cars were not actually on the pier at their final destination, does not prevent the cars from being subject to demurrage while standing in such yards awaiting the convenience of the consignee or the arrival of the vessel into which they were to be loaded, since the leaving of the cars in the yards does not prejudice the consignee.[40]

Delivery to a private or designated assigned track may be required by custom, agreement, or special regulation;[41] and, if the other party is not at fault, such a delivery is not ordinarily excused because it is rendered impossible by conditions beyond the carrier's control.[42] If, however, the consignee has required, or expressly or impliedly contracted for, the delivery of the cars to private or designated tracks, and the placement of the cars on such tracks is rendered impossible because of the fault or conduct of the consignee, the carrier will then be justified in making a "constructive placement" at the destination or some near available hold point which will entitle it to demurrage thereafter.[43] Indeed,

to a lien therefor, merely authorizes the carrier to charge demurrage when the cars have been held for unloading, and not to give such right where they have been placed on a storage track awaiting switching to a place where they could be unloaded—Carrizzo v New York, etc, R. Co, 123 N.Y.S 173, 66 Misc 243, reversed on other grounds 129 N.Y.S. 914, 145 App Div. 566.

36. U.S.—Davis v. Timmonsville Oil Co., C C A S C, 285 F 470.
Wis.—Chicago, St. P, M & O. Ry Co v. New Dells Lumber Co., 197 N.W. 713, 183 Wis. 309.
10 C J. p 468 note 44 [a], [b].

Exemption under tariff providing for cartage delivery

(1) Under a cartage tariff providing for cartage delivery to the premises of the consignee by a cartage agent as agent of the carrier, and providing that "Shipments so handled will not be subject to car service or storage charges, accruing through failure on part of this company to make delivery within specified free time," the consignee is exempt from liability for demurrage under the demurrage tariff only if the company or its agent by its own default failed to make cartage delivery within the specified free time.—Michigan Cent. R. Co v. U. S., Mich., 246 F 353, 158 C.C.A. 417, certiorari denied 38 S.Ct. 333, 246 U.S. 663, 62 L.Ed. 928.

(2) The delivery referred to is the cartage delivery to be made by the company's cartage agent from the car duly placed and to the terminal cartage point.—Michigan Cent. R. Co. v. U S., supra.

(3) Consequently, such a tariff does not exempt a consignee from liability on a cartage shipment where the carrier has duly placed the cars on the delivery track, but the consignee has refused to accept cartage delivery from the cartage agent who was ready and willing to perform.—Michigan Cent R. Co. v. U. S., supra.

Placement for inspection

A tariff providing for the accrual of demurrage within a specified time following the placement of cars for inspection, and notice of arrival, has been held to be applicable only to cars actually placed and bulletined, not to cars held out because of congestion on the tracks to which they were consigned or ordered.—Granger v. Davis, C C.A.Ohio, 2 F 2d 695.

37. U S—U. S. v. Philadelphia & R. Ry. Co, D.C.Pa, 232 F. 953.
Pa.—Bessemer & L. E R. Co. v Ford Collieries Co, 116 A 802, 273 Pa. 166.

38. Ala.—U. S. Fidelity & Guaranty Co. v. Central of Georgia Ry. Co., 147 So 891, 226 Ala 606, 87 A.L.R. 1028.
Ga.—Seaboard Air Line Ry. Co. v Daugherty-McKey & Co., 149 S E 92, 40 Ga.App 190.
N Y—Lee v. Erie R. Co., 158 N Y. S. 730, 173 App Div. 75.
Pa.—Pennsylvania R. Co. v. Coles, 87 Pa.Super 432.
Wash.—Oregon-Washington R. & Nav. Co. v. McGoldbrick Lumber Co., 204 P. 1059, 119 Wash. 119.
10 C.J. p 467 notes 32 [a] (1), 33.

39. Ohio.—Baltimore, etc, R Co. v Fisher, 5 Ohio S. & C.P. 659, 3 Ohio N P. 122

40. Va.—Citizens' Bank v. Norfolk, etc, R. Co., 78 S E. 568, 115 Va. 45.

41. N Y.—Lee v. Erie R Co, 158 N. Y S 730, 173 App Div. 75.
Okl.—Chicago, R. I. & P. Ry. Co. v. State, 186 P. 234, 77 Okl. 63
Wash.—Oregon-Washington R. & Nav. Co. v McGoldbrick Lumber Co., 204 P. 1059, 119 Wash 119.
10 C J. p 467 note 33 [a] (1).

Unavailability

Where the shipper notifies the carrier to deliver a carload at a designated place which is afterward found unavailable, failure of the carrier to notify the shipper that such place is unavailable is not a defense to a claim for demurrage while holding the car for further orders where the charges of the carrier have been approved by the state public service commission.—Pennsylvania R. Co. v. Silberman, 29 Pa. Dist. 605.

42. Wash.—Oregon-Washington R & Nav Co v. McGoldbrick Lumber Co, 204 P. 1059, 119 Wash. 119

Flood conditions

Where, because of unprecedented flood conditions, cars of logs could not be delivered at the usual and customary unloading place on a spur track next to the boom connected with consignee's mill plant, but were left at a distance outside consignee's mill premises, there was no delivery, and therefore there could be no demurrage.—Oregon-Washington R. & Nav. Co v. McGoldbrick Lumber Co, 204 P. 1059, 119 Wash. 119.

43. Ala.—U. S. Fidelity & Guaranty Co v. Central of Georgia Ry. Co., 147 So. 891, 226 Ala. 606, 87 A L.R 1028.

Order by consignee

Where carrier knows that consignee wishes cars placed on assigned tracks or private tracks, and there are no other accessible tracks, consignee will be considered to have ordered cars so placed, and, if they cannot be so placed through consignee's fault, he is liable for demurrage.—U. S. Fidelity & Guaranty Co. v. Central of Georgia Ry.

the rules and regulations of the carrier may justify a "constructive placement" whenever delivery or placement on the private or designated tracks is rendered impossible by reasons or circumstances beyond the carrier's control,[44] or when such tracks are "full;"[45] and, in such a case, if the consignee refuses to accept delivery on other than the designated track the carrier is not even bound to place the cars elsewhere before the commencement of the running of the time after which demurrage is to be charged.[46] A rule providing for constructive placement of cars consigned or ordered to "other than a public delivery track," may be applicable even though the track or yard involved is not strictly a private one.[47] Nevertheless, a "constructive placement" is not justified, nor sufficient to form a basis for demurrage, if the consignee has not ordered, or expressly impliedly agreed to, delivery to a private or specified track;[48] or if actual placement is not rendered impossible by circumstances beyond the carrier's control;[49] and in making a constructive placement the carrier must comply with all demurrage rules relating thereto.[50]

Where coal is shipped to be delivered into vessels, a contract that the shipper is to pay all demurrage charges assessed by a pooling exchange organized to facilitate the loading of vessels is not invalid on the ground that the carrier furnished a limited service without giving the shipper the option of a lower rate, as the service contracted for and performed is the transportation of coal and its delivery into the vessel, and the value of the service to the shipper is not lessened or impaired, nor the liability of the carrier in any way diminished by dumping the cars out of order of arrival, in accordance with the rules of the exchange.[51]

§ 341. Notice of Readiness to Deliver

Notice of the arrival of the cars, or of their placement for purposes of unloading, is often a condition precedent to the right to collect demurrage charges; and, before the consignor can be held responsible for demurrage on cars which the consignee or other person directed to unload them has refused to accept, the consignor must be given notice of such nonacceptance.

Notice of the arrival of the cars may be a condition precedent to the right to collect demurrage thereon, where such notice is required by statute[52]

Co., 147 So 891, 226 Ala. 606, 87 A.L.R 1028.

44. U S—Davis v. Timmonsville Oil Co, C.C.A.S C, 285 F. 470 Wis.—Chicago, St P, M & O. Ry Co v. New Dells Lumber Co, 197 N.W. 713, 183 Wis 309—Wooley v. Chicago, etc., R Co, 136 N.W. 616, 150 Wis 183.

Option to place in or outside consignee's yards

(1) Under rules, made part of agreement between carrier and consignee, it has been held that, where consignee's regular unloading track was occupied by loaded cars used for ballast purposes during a flood, carrier could at its option make constructive placement either by actually delivering the incoming car at other points in consignee's yards instead of giving notice, or by placing the cars elsewhere and giving notice, but that the option belonged to it and not to the consignee—Chicago, St. P, M. & O. Ry. Co v. New Dells Lumber Co., 197 N W. 713, 183 Wis 309.

(3) Hence, in such a case, the fact that the carrier, on learning that loaded cars were occupying a portion of defendant's spur track upon which prior shipments had been unloaded, did not offer to place the incoming cars upon other parts of defendant's spur tracks where unloading would have been possible, is insufficient to prevent demurrage, where consignee was promptly informed that carrier considered its use of the spur track as inability to receive new shipments.—Chicago, St P., M & O. Ry. Co. v. New Dells Lumber Co, supra.

45. U S—Menasha Paper Co. v Chicago & N. W Ry Co., 36 S Ct 501, 241 U S. 55, 60 L Ed. 885, affirming Chicago & N. W. Ry Co v Menasha Paper Co., 149 N.W. 751, 159 Wis 508.

Meaning of "full"

A private switch track is "full" within carrier's rules relating to car service and demurrage charges, where, although the track will hold more cars, there are upon it all the cars that the consignee can unload —Menasha Paper Co. v. Chicago & N. W. Ry. Co., 36 S.Ct. 501, 241 U S 55, 60 L.Ed. 885, affirming Chicago & N. W Ry Co. v Menasha Paper Co, 149 N.W. 751, 159 Wis. 508.

46. Wis.—Wooley v. Chicago, etc, R Co., 136 N.W. 616, 150 Wis 183.

Corpus Juris cited in United States Fidelity & Guaranty Co. v Central of Georgia Ry. Co, 147 So 844, 891, 226 Ala 606, 87 A L R 1028.

47. U.S—Granger v. Davis, C.C.A Ohio, 2 F.2d 695.

Yard leased to hay and grain exchange

Within the meaning of such a rule a yard leased to a hay and grain exchange for exclusive use by its members was "other than a public delivery track," irrespective of whether or not all hay and grain dealers in the locality were eligible to membership.—Granger v. Davis, C C A Ohio, 2 F.2d 695.

48. Ala—U. S Fidelity & Guaranty Co. v. Central of Georgia Ry. Co, 147 So 891, 226 Ala. 606, 87 A L R. 1028

Assignment of tracks by carrier alone

(1) A carrier cannot limit the unloading space of a consignee, without his consent, and charge demurrage on cars not unloaded because such space is constantly filled.—U. S Fidelity & Guaranty Co. v. Central of Georgia Ry. Co, 147 So. 891, 226 Ala. 606, 87 A.L.R. 1028.

(2) Hence, where a carrier for its own purposes, and without the express or implied consent of the consignee, designates certain tracks for delivery of the consignee's cars, and declares that it will not spot the cars elsewhere although other accessible track is available, it cannot make a charge for demurrage upon constructive placement merely because such assigned space is kept filled, without spotting on accessible tracks, nor attempting to do so.—U. S Fidelity & Guaranty Co. v. Central of Georgia Ry. Co, supra

49. U.S—Granger v. Davis, C.C.A. Ohio, 2 F.2d 695.

50. Tex.—Hill County v. St. Louis Southwestern Ry. Co, Civ.App, 31 S W.2d 868.

51. Va.—Smokeless Fuel Co. v. Chesapeake & O. Ry. Co., 128 S E. 624, 142 Va 355

52. La—New Orleans & G N. R. R. Co. v. Cousin, 4 La.App. 638.

or the demurrage rules of the carrier,[53] and the same is true of notice of the placement of the cars for the purpose of unloading them;[54] but it has been held that, under rules requiring notice of both arrival and placement, a failure to give notice of arrival does not defeat the right to demurrage where notice of placement is subsequently given,[55] and that failure to give notice of arrival will defeat recovery only where it is shown that the consignee had been prejudiced or had no actual notice.[56] However, in the absence of some provision therefor, notice of arrival has been held unnecessary, even where it was customary to give such notice;[57] but as to this latter there is some authority to the contrary.[58] Of course, a notice of arrival does not fix liability for demurrage until the car has actually arrived.[59]

If no formal requirements are expressly prescribed, the notice required under the foregoing rules need be in no particular form, and it is sufficient if the consignee is adequately advised of the arrival of the cars or their location as the case may be;[60] and a party may be precluded from questioning the sufficiency of a notice by his acts or conduct.[61] Where, however, the form and manner of the notice are prescribed by rule or statute, they must ordinarily be in conformity therewith,[62] but a

53. U.S.—Virginian Ry. Co. v. Lake & Export Coal Corporation, C.C.A. Va., 5 F.2d 496.
Ill.—See Pittsburgh, C., C. & St. L. R. Co. v. Templeton, 210 Ill.App. 377.
La.—Davis v. Ferguson, 136 So. 293, 173 La. 132, avoiding 132 So. 289, 17 La.App. 149.
Mo.—Milne Lumber Co. v. Michigan Cent. R. Co., App., 57 S.W.2d 732.—Chicago, B. & Q. R. Co. v. Fowler, 27 S.W.2d 72, 224 Mo.App. 736.
Pa.—Norfolk & W. Ry. Co. v. Swift & Co., 69 Pa.Super. 132.
Tex.—Hill County v. St. Louis Southwestern Ry. Co., Civ.App., 31 S.W.2d 868.
10 C.J. p. 468 note 36.

Computation of free time

Where, under an agreement between the carrier and the members of a coal exchange, cars are deemed to have arrived on the day notice of arrival is given, a carrier is not entitled to collect demurrage from a particular member where, because of a failure of the carrier to give notice of arrival as to a large number of cars, the carrier is unable to compute the days of credit to which such member is entitled, and, consequently, the sum, if any, owed by such member.—Virginian Ry. Co. v. Lake & Export Coal Corporation, C.C.A. Va., 5 F.2d 496.

Placement on private tracks

Sidetracks constituting a part of the carrier's system, although used exclusively for the consignee's business, are not "private tracks" within the meaning of a carrier's rule providing that placement on private tracks shall constitute a sufficient notice of arrival.—Norfolk & W. Ry. Co. v. Swift & Co., 69 Pa.Super. 132.

54. Pa.—Norfolk & W. Ry. Co. v. Swift & Co., 69 Pa.Super. 132.
Tex.—Hill County v. St. Louis Southwestern Ry. Co., Civ.App., 31 S.W.2d 868.
10 C.J. p. 468 note 36.

Failure to place on public delivery track

Under a carrier's tariff so providing, notice of placement must be given where the carrier does not place the cars on a public delivery track within a specified time after giving notice of their arrival.—Norfolk & W. Ry. Co. v. Swift & Co., 69 Pa.Super. 132.

Want of space at destination

Under a carrier's rule to such effect, a consignee is not chargeable with demurrage where there is no space at the point of destination for unloading, unless he is given notice of the place where his car can be unloaded, as well as notice of its arrival.—Hill County v. St. Louis Southwestern Ry. Co., Tex.Civ.App., 31 S.W.2d 868.

55. U.S.—Michigan Cent. R. Co. v. U. S., Mich., 246 F. 353, 158 C.C.A. 417, certiorari denied 38 S.Ct. 333, 248 U.S. 663, 62 L.Ed. 928.

56. La.—Kansas City Southern Ry. v. Baker Gasoline Co., 127 So. 442, 13 La.App. 106.

57. U.S.—Chesapeake & Ohio Coal & Coke Co. v. Toledo & O. C. Ry. Co., W.Va., 245 F. 917, 158 C.C.A. 205, affirming, D.C., Toledo & O. C. Ry. Co. v. Chesapeake & Ohio Coal & Coke Co., 238 F. 629, error allowed 247 F. 1002, 159 C.C.A. 662, error dismissed 39 S.Ct. 289, 249 U.S. 585, 63 L.Ed. 788.

58. Tex.—Gulf, C. & S. F. Ry. Co. v. Galbraith, Civ.App., 39 S.W.2d 91.

59. U.S.—U. S. v. Philadelphia & R. Ry. Co., D.C.Pa., 232 F. 953.

60. U.S.—U. S. v. Erie R. Co., D.C. N.Y., 209 F. 283.
10 C.J. p. 468 note 38.

61. Va.—Citizens' Bank v. Norfolk, etc., R. Co., 78 S.E. 568, 115 Va. 45.

Statement to carrier

Where a bank which had agreed to pay the freight and demurrage charges on coal shipments stated, in answer to a communication from the carrier as to what kind of notification it desired of the consignments, that notification of the shipments in transit was sufficient, the bank could not afterward claim that demurrage could not be recoverable unless it was notified of the arrival of the cars by a notice containing the point of shipment, initials, numbers, and contents.—Citizens' Bank v. Norfolk, etc., R. Co., 78 S.E. 568, 115 Va. 45.

62. La.—Davis v. Ferguson, 136 So. 293, 173 La. 132, avoiding 132 So. 289, 17 La.App. 149.—New Orleans & G. N. R. R. Co. v. Cousin, 4 La.App. 638.
Mo.—Milne Lumber Co. v. Michigan Cent. R. Co., App., 57 S.W.2d 732.
Pa.—Norfolk & W. Ry. Co. v. Swift & Co., 69 Pa.Super. 132.
Tex.—Hill County v. St. Louis Southwestern Ry. Co., Civ.App., 31 S.W.2d 868.

Registered mail required to be used.—New Orleans & G. N. R. R. Co. v. Cousin, 4 La.App. 638.

Notice to wrong person

(1) Where the carrier's tariff requires that notice of placement be sent to the consignee, notice to an agent of the consignee not authorized to receive such notice is insufficient.—Hill County v. St. Louis Southwestern Ry. Co., Tex.Civ.App., 31 S.W.2d 868.

(2) Where the consignee was a county, it was held that notice must be sent to the county judge or the commissioners' court, and that notice to the county auditor was not notice to the county, since the auditor was without authority to bind the county in such matters.—Hill County v. St. Louis Southwestern Ry. Co., supra.

Use of proper address

It has been held, under a tariff providing for mailing in case the consignee's address does not appear on the billing and is unknown, that such notice must be mailed to the consignee's address where such ad-

notice thus made is, of course, sufficient;[63] and, according to some authority, substantial compliance appears to be all that is necessary,[64] at least where the consignee accepts the notice as given, and acts thereon without objection.[65] A rule providing for notice either in the manner prescribed therein, or as otherwise agreed, justifies any type of notice to which the parties have agreed,[66] whether expressly or by implication;[67] or, if it is so stipulated, the notice may be given in accordance with the practice "in vogue."[68]

Notice of nonacceptance. Whether or not so pro-

dress is specified in the billing, and that a mailing to the point of destination is insufficient—Milne Lumber Co v Michigan Cent. R. Co, Mo. App, 57 S.W 2d 732.

Written notice

(1) Where the rules so provide, written notice is essential

La.—Davis v Ferguson, 136 So. 293, 173 La 132, avoiding 132 So. 289, 17 La App 149.

Pa—Norfolk & W Ry. Co v. Swift & Co, 69 Pa Super. 132.

(2) This requirement is not dispensed with by the consignee's knowledge that the cars have arrived and his payment of the storage—Davis v. Ferguson, supra.

(3) The carrier's oral request that the consignee accept delivery will not dispense with written notice—Davis v. Ferguson, supra.

63. U S—Becher-Barrett-Lockerby Co v Northern Pac. Ry. Co, C. C A Minn, 89 F 2d 752—Davis v. Timmonsville Oil Co, C C A S C., 285 F. 470—Minneapolis, St P & S. S M. Ry Co. v. Van Dusen Harrington Co., C C.A.Minn, 272 F 255—Michigan Cent R Co. v. U S, Mich., 246 F. 353, 158 C.C. A 417, certiorari denied 38 S Ct. 333, 246 U.S. 663, 62 L Ed. 928.

Ga—Payne v. Monroe, 110 S E 34, 28 Ga App 6.

Ind—Ross v. Indiana Natural Gas & Oil Co, 131 N E 794, 78 Ind. App 219, denying rehearing 130 N E 440, 78 Ind App 219.

N C—Davis v. Greensboro Warehouse & Storage Co, 120 S E 462, 186 N.C. 676, certiorari denied Greensboro Warehouse & Storage Co. v Davis, 44 S.Ct. 453, 264 U. S. 594, 68 L Ed 866

Ohio.—Cleveland, C., C. & St. L. Ry Co. v. Mayer, 7 Ohio App 44

S C—Boney v. Atlantic Coast Line R. Co, 126 S E. 46, 130 S.C. 439, 37 A.L.R. 1331.

Notice by mail

(1) Under rules providing therefor, notice by mail may be sufficient

Ga—Payne v. Monroe, 110 S.E. 34, 28 Ga App. 6.

S C.—Boney v. Atlantic Coast Line R. Co., 126 S E 46, 130, S C. 439, 37 A L.R. 1331

(2) Hence, under demurrage rules in tariff filed with interstate commerce commission, providing for notice to consignee within twenty-four hours after arrival of shipment as condition precedent to imposition of demurrage charges, and for deposit of notice in United States mail, "when address of consignee does not appear on billing and is not known," deposit of notice in mail is sufficient, if both conditions exist—Boney v. Atlantic Coast Line R Co, supra.

(3) As provided by a rule of the railroad commission, where a consignor ships goods to himself or to his order, notice mailed to the consignee at the point of delivery is sufficient whether or not the consignee actually receives such notice. —Payne v. Monroe, supra.

64. U S—Davis v. Timmonsville Oil Co, C C.A.S.C, 285 F. 470

N C—Davis v. Greensboro Warehouse & Storage Co, 120 S E. 462 186 N C 676, certiorari denied Greensboro Warehouse & Storage Co v. Davis, 44 S.Ct. 453, 264 U S. 594, 68 L.Ed. 866.

Notice of constructive placement

(1) It has been held that a provision of the carrier's tariff permitting constructive placement on written notice to the consignee is sufficiently complied with where the consignee has received adequate information as to the identity, location, and date of arrival of the car

U S—Davis v. Timmonsville Oil Co, C C A.S.C., 285 F. 470.

N.C.—Davis v Greensboro Warehouse & Storage Co., 120 S.E 462, 186 N C. 676, certiorari denied Greensboro Warehouse & Storage Co v. Davis, 44 S Ct. 453, 264 U S 594, 68 L Ed. 866

(2) Hence, failure to give formal written notice was held not fatal, where notice was given by telephone, on receipt of waybills, of the car numbers and initials, number of bales of cotton, and marks thereon, where it was from, and any other information asked for, followed by the carrier's signature of a form on which the information was entered by the traffic manager in duplicate —Davis v. Greensboro Warehouse & Storage Co, supra.

(3) Also, it has been held that a notice of constructive placement is not rendered insufficient by the mere fact that it fails to state that actual placement was prevented by the consignee's inability to receive actual placement—Davis v. Timmonsville Oil Co, supra

65. Pa—Davis v. Carroll-Porter Boiler & Tank Co, 119 A. 742, 276 Pa. 71.

66. U.S—Minneapolis, St. P & S. S. M. Ry Co v. Van Dusen Harrington Co, C C A.Minn, 272 F. 255—Michigan Cent R Co v. U. S, C.C.A.Mich, 246 F. 353, 158 C C A. 417, certiorari denied 38 S Ct. 333, 246 U S. 663, 62 L Ed. 928

Ind—Ross v. Indiana Natural Gas & Oil Co, 131 N E 794, 78 Ind App. 219, denying rehearing 130 N.E. 440, 78 Ind App 219.

67. U S—Minneapolis, St. P. & S. S. M. Ry. Co. v. Van Dusen Harrington Co., C C A Minn., 272 F. 255

Acquiescence in general practice

(1) Under the demurrage rule which recognizes the validity of agreements in lieu of the written notice required by the rule, a general practice existing at a terminal, for the mutual benefit of consignees and carriers, and generally acquiesced in by the former, is equivalent to an agreement.—Minneapolis, St. P & S. S. M. Ry Co v. Van Dusen Harrington Co., C.C.A.Minn., 272 F 255

(2) Thus, where the carrier, the state commission, and the representatives of shippers, in order to avoid congestion at a terminal, have agreed that cars of wheat shall be inspected at outside points before arrival, and that manifests sent to shippers shall be in lieu of the written notice of arrival required by the carrier's tariff, a shipper who has acquiesced in such practice by receiving such manifests and paying demurrage is liable for demurrage on subsequent shipments until he gives notice of refusal to abide by such practice, although he previously paid demurrage on cars the arrival of which he had personal knowledge—Minneapolis, St. P & S S. M Ry Co v. Van Dusen Harrington Co, C C.A.Minn, 272 F. 255

Acting on information without objection

Notice is given in accordance with the parties' agreement, within the meaning of the rule of the text, where the party to whom the shipment is directed has received all the information to which he is entitled and acts on it without objection.—Ross v. Indiana Natural Gas & Oil Co., 131 N E 794, 78 Ind App. 219, denying rehearing 130 N.E 440, 78 Ind App 219.

68. U.S.—Becher-Barrett-Lockerby

vided by the demurrage rules, a carrier generally cannot charge a consignor or shipper with demurrage on a carload shipment, which the consignee or person to whom it was directed has refused to accept, until the consignor has been properly notified of such nonacceptance [69] However, it has been held that any notice is sufficient which informs the consignor that the shipment has not been accepted, even though the carrier's tariff requires that notice be given in a particular manner,[70] and this is especially so where the circumstances render it impossible to give notice in the particular manner prescribed.[71]

A statute requiring notice to the consignor by telegraph when the shipment has remained unclaimed for a certain number of days has application only where an effort is made to hold the consignor for demurrage charges, and compliance therewith is in no way essential when the liability is asserted against the consignee.[72]

§ 342. Failure of Consignee to Unload in Required Time

The right to demurrage accrues only where the cars have not been unloaded within the time required by the carrier's rules, because of the fault of the person whose duty it is to unload them.

Although it may be otherwise where the cars are used under such circumstances that there is no right to a free period for loading or unloading,[73] or where the charge is for detention at the initial point, as noted in § 335 supra, as a general rule, the right to demurrage accrues only where, because of the fault of a person other than the carrier whose duty it is to unload them, the cars have not been unloaded within the free period allowed or the time required by the rules of the carrier after a proper delivery has been made.[74] Hence, the carrier is not

Co v. Northern Pac. Ry., C.C.A. Minn., 89 F.2d 752

Posting on bulletin board

The practice of posting a notice of the location of a car on a bulletin board is "in vogue," within the meaning of a carrier's reconsignment tariff permitting notification by such means where such practice is in vogue, and a notice so given is sufficient, where the carrier has followed such practice for two years, even though such practice may not have been followed by carriers generally.—Becher-Barrett-Lockerby Co. v. Northern Pac. Ry. Co., C.C.A. Minn., 89 F.2d 752.

69. Ala.—Nashville, C. & St. L. Ry Co. v. Winters Bros., 135 So. 403, 24 Ala App. 342.
Mo.—Chicago, B. & Q. R Co. v. Fowler, 27 S.W.2d 72, 224 Mo. App. 736
Okl.—Chicago, R. I. & P. Ry. Co v. Waldo, 216 P. 911, 90 Okl. 185, 32 A.L.R. 638
10 C.J. p 468 note 39.

Shipment to consignor's order with directions to notify third person

Where goods are shipped to the consignor's order with directions to notify another person, if such person refuses to accept the shipment, it is the duty of the carrier to notify the consignor of such refusal, and the consignor is not liable for demurrage until he is so notified of such refusal.—Chicago, R. I. & P Ry Co v. Waldo, 216 P. 911, 90 Okl 185, 32 A.L.R. 638.

70. Mo.—Chicago, B. & Q. R Co v. Fowler, 27 S.W.2d 72, 224 Mo App 736

Notice by mail

(1) Notice by mail has been held to be sufficient, even though the carrier's tariff provides that notice shall be by wire.—Chicago, B & Q. R Co. v. Fowler, 27 S.W.2d 72, 224 Mo App 736.

(2) The only effect of a carrier's notification of a consignor by mail, rather than by wire, as provided for in a rule of the carrier, is to defer the time when demurrage begins to accrue.—Nashville, C. & St. L. Ry Co v. Winter Bros., 135 So. 403, 24 Ala App. 342.

71. Ala.—Nashville, C. & St L. Ry. Co. v. Winter Bros., supra.

Impossibility of notice by wire

Where there is no telegraphic service in the consignor's community, notice to the consignor by mail is sufficient, even though a rule of the carrier provides that notice shall be sent to the consignor by wire—Nashville, C. & St L. Ry Co. v. Winter Bros., 135 So. 403, 24 Ala App 342.

72. S.C.—Boney v. Atlantic Coast Line R Co., 126 S.E 46, 130 S.C. 439, 37 A.L.R. 1331

73. Mich.—Saginaw Valley Lumber Dealers' Ass'n v Michigan Public Utilities Commission, 218 N.W 695, 242 Mich. 383

Use in industrial plant

Where cars are used by an industry in intra-plant service, there is no "loading" or "unloading" within the meaning of a tariff allowing a free period for loading and unloading, and there is liability for demurrage without any free-time allowance.—Saginaw Valley Lumber Dealers' Ass'n v Michigan Public Utilities Commission, 218 N.W 695, 242 Mich 383

74. U.S.—Cleveland, C, C. & St. L Ry. Co v New York, C. & St L Ry Co., C.C.A Ind, 11 F.2d 850.
Ala.—U S Fidelity & Guaranty Co v. Central of Georgia Ry Co, 147 So. 891, 226 Ala 606, 87 A.L.R. 1028—Louisville & N R Co v Camody, 84 So 824, 203 Ala 522, reversing 82 So 648, 17 Ala App. 158, conformed to 85 So. 846, 17 Ala App. 370—Nashville, C. & St. L. Ry Co. v. Winters Bros, 135 So. 403, 24 Ala App. 342
Miss.—Lexington Compress & Oil Mill Co v. Yazoo & M. V. R. Co., 95 So 92, 131 Miss 49.
N.J.—New York, S & W. R. Co. v. Taylor-Fichter Steel Const Co., 189 A 52, 117 N.J Law 425, affirming 186 A 462, 14 N.J Misc. 567
Okl.—Garrison Coal Co v. Hines, 247 P. 62, 118 Okl. 251, 46 A.L.R 1151—Atchison, T. & S. F Ry Co. v. Johnson, 225 P 939, 99 Okl. 72.
Tex.—Payne v White House Lumber Co., Civ.App, 231 S.W 417.
10 C.J. p 468 notes 40–42.

Carrier's agreement to unload

An agreement by which a carrier is to unload cars cannot render the consignee liable for demurrage charges in the absence of a showing that the delay in unloading is attributable to the fault of the consignee.—New York, S & W R Co. v. Taylor-Fichter Steel Const. Co, 189 A. 52, 117 N.J Law, 425, affirming 186 A. 462, 14 N.J Misc 567.

Timely unloading held to preclude demurrage

Where the rules of a carrier provided that forty-eight hours' free time would be allowed on all commodities for loading and unloading, and the carrier had led a consignee to believe that freight would not be due until a car was delivered on a siding, the consignee had forty-eight hours, after the car was placed on such siding in a proper position for

entitled to demurrage merely because it is unable to handle incoming cars immediately,[75] or because a car is not unloaded immediately after placement;[76] and, as will be seen in § 345 infra, it is usually held that the payment of demurrage is excused if the detention or delay in unloading for which the charge is sought to be made was due to the fault of the carrier or vis major.

§ 343. Construction of Demurrage Rules and Contracts

Demurrage rules and contracts are to be given such effect as was intended by the parties.

Generally speaking, demurrage rules or contracts are to be given such effect as was intended by the parties.[77] In order to ascertain such intention, resort is to be had primarily to the language of the rule or contract.[78] Where it is clear and unambiguous, the language used is conclusive, and the rule or contract will be enforced according to its terms.[79] In such circumstances, an intention or understanding at variance with that clearly expressed by the language employed,[80] such as a usage or custom of the parties to other effect,[81] is immaterial and of no effect.

On the other hand, if the language employed is ambiguous, resort will be had to construction in order to ascertain and give effect to the parties' intention.[82] In such a case the intention of the parties may be gathered not only from the language as

unloading, within which to unload the car and pay the freight charges, and, where the freight charges were paid and the car was unloaded within the forty-eight hours, demurrage was improperly collected.—Fennell Infirmary v. Southern R. Co., 85 S.E. 237, 101 S C 134.
Penalty for failure to unload within required time see infra § 513.

75. Ala.—U. S. Fidelity & Guaranty Co v. Central of Georgia Ry. Co, 147 So. 891, 226 Ala. 606, 87 A.L R 1028.

76. Wis.—Wooley v. Chicago, etc., R Co., 136 N W. 616, 150 Wis. 183.

77. U S.—Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & St P Ry Co., Mo., 46 S Ct 530, 271 U. S 259, 70 L Ed. 934, affirming, D C, 2 F.2d 291—Menasha Paper Co. v Chicago & N. W. Ry. Co, 36 S. Ct 501, 241 U S. 55, 60 L.Ed 885, affirming Chicago & N. W. Ry. Co v. Menasha Paper Co, 149 N.W 751, 159 Wis. 508—Raleigh Smokeless Fuel Co. v. Virginian Ry. Co., C.C A.Va., 43 F 2d 555—Krauss Bros Lumber Co v. Mellon, C C A Ala., 30 F 2d 901, conforming to mandate 48 S.Ct 358, 276 U.S 386, 72 L Ed. 620, which reversed, C C A., 18 F.2d 369, certiorari granted 48 S Ct 35, 275 U.S. 513, 72 L Ed. 400, amended 48 S.Ct. 527, 72 L Ed. 1018, certiorari denied 49 S Ct 513, 279 U S 872, 73 L Ed 1008—Main Island Creek Coal Co. v Chesapeake & O. Ry Co, C C A Ky, 23 F. 2d 248—Emmons Coal Mining Co v. Norfolk & W. Ry. Co., C C A.Pa, 3 F 2d 525, affirmed 47 S Ct 254, 272 U S 709, 71 L.Ed 485—Granger v. Davis, C C.A Ohio, 2 F.2d 695—Toledo & O C. Ry. Co v Chesapeake & Ohio Coal & Coke Co., D C.W.Va., 238 F 629, affirmed Chesapeake & Ohio Coal & Coke Co v. Toledo & O. C Ry Co, 245 F 917, 158 C C.A 205, error allowed Chesapeake & Ohio Coal & Coke Co. v. Toledo & O. C Ry. Co., 247 F. 1002, 159 C.C.A. 662, and error dismissed 39 S.Ct 289, 249 U S. 585, 63 L.Ed. 788—National Refining Co v St. Louis, I. M. & S. Ry. Co., C.C A Ohio, 237 F. 347, 150 C. C.A. 361, affirming, D.C, St. Louis, I M & S Ry. Co. v. National Refining Co, 226 F. 357.
Ala.—U. S Fidelity & Guaranty Co v. Central of Georgia Ry Co., 147 So 891, 226 Ala. 606, 87 A.L R 1028.
Cal.—Southern Pac Co. v Grangers' Business Ass'n, 1 P.2d 477, 115 Cal App 256.
Ind.—Davis v. Steele, 146 N E. 425, 83 Ind App. 300, petition denied 147 N E 632, 83 Ind App 300.
La.—Mellon v. J. M. Burguieres Co., 120 So. 15, 167 La 583, mandate conformed to, App, 121 So. 215—Davis v. Ferguson, 132 So. 289, 17 La App. 149, avoided on other grounds 136 So. 293, 173 La. 132—Kansas City Southern Ry. v. Baker Gasoline Co, 127 So. 442, 13 La. App. 106.
Mo.—Milne Lumber Co v. Michigan Cent. R. Co, App, 57 S.W.2d 732.
N J.—New York, S. & W. R. Co v. Taylor-Fichter Steel Const. Co., 186 A. 462, 14 N J Misc. 567, affirmed 189 A 52, 117 N J.Law 425.
Ohio—Baltimore & O. S R. Co v. Proctor & Gamble Co, 31 Ohio N. P.,N S, 169.
Va.—Smokeless Fuel Co v. Chesapeake & O. Ry. Co., 140 S.E 823, 149 Va 13—James v. Norfolk & W Ry Co, 129 S E 321, 143 Va 865—North Shore Improvement Co v New York, P. & N. R Co., 108 S E. 11, 130 Va. 464
Wash.—State v. Public Service Commission of Washington, 162 P. 523, 94 Wash 274.

78. U.S.—Main Island Creek Coal Co v Chesapeake & O Ry. Co, C. C A Ky, 23 F 2d 248
Cal.—Southern Pac. Co v. Grangers' Business Ass'n, 1 P.2d 477, 115 Cal App. 256
Ind.—Davis v. Steele, 146 N.E. 425, 83 Ind App. 300, petition denied 147 N.E. 632, 83 Ind.App. 300.
Ohio.—Baltimore & O. S R Co. v. Proctor & Gamble Co., 21 Ohio N. P.,N S, 169
Va.—North Shore Improvement Co. v. New York, P. & N. R. Co, 108 S.E. 11, 130 Va. 464.
10 C J. p 468 note 44.

79. U.S.—Main Island Creek Coal Co v. Chesapeake & O. Ry Co., C C.A.Ky, 23 F 2d 248.
Cal.—Southern Pac. Co. v. Grangers' Business Ass'n, 1 P.2d 477, 115 Cal App. 256.
Ind.—Davis v. Steele, 146 N.E. 425, 83 Ind App 300, petition denied 147 N E. 632, 83 Ind App. 300
Mo.—McGee v. Chicago, etc., R. Co., 71 Mo App. 310
Ohio.—Baltimore & O. S. R. Co. v. Proctor & Gamble Co, 21 Ohio N. P.,N S, 169
Va.—North Shore Improvement Co. v. New York, P. & N R. Co., 108 S E. 11, 130 Va. 464.

80. U.S.—Main Island Creek Coal Co. v. Chesapeake & O. Ry Co, C. C.A Ky., 23 F 2d 248
Ohio.—Baltimore & O. S. R. Co v. Proctor & Gamble Co, 21 Ohio N. P.,N.S, 169.
Va.—North Shore Improvement Co v. New York, P. & N. R. Co, 108 S E. 11, 130 Va. 464.

81. U S.—Main Island Creek Coal Co v. Chesapeake & O Ry. Co, C. C A Ky, 23 F 2d 248
Va.—North Shore Improvement Co. v. New York, P. & N. R. Co., 108 S E 11, 130 Va. 464

82. U S.—Raleigh Smokeless Fuel Co v. Virginian Ry. Co, C C.A Va., 43 F 2d 555—National Refining Co. v. St Louis, I M & S. Ry. Co, Ohio, 237 F. 347, 150 C C.A. 361, affirming, D C, St. Louis, I M & S. Ry Co. v National Refining Co, 226 F. 357
Ala.—U S Fidelity & Guaranty Co. v. Central of Georgia Ry. Co, 147

a whole,[83] but consideration may be given to extrinsic circumstances,[84] such as the purpose sought to be achieved,[85] or a custom or usage of the parties[86]

If the ambiguity occurs in a rule promulgated by the carrier, such rule will be construed most strongly against the carrier and in favor of the person whose duty it is to load or unload and who had no part in the formulation of the rule;[87] and the court will not give a rule a broader construction than its language indicates, unless the reason of the thing and the surrounding circumstances require it so to do.[88]

Where a demurrage rule or contract is reasonably susceptible of two constructions, one of which is legal and the other of which would render it illegal, the courts will ordinarily adopt the construction which will sustain the legality of the rule or contract,[89] since an illegal result will not be presumed to have been intended.[90]

A joint practical construction acquiesced in by the carrier during the existence of an emergency is not available to the shipper with respect to a demurrage claim arising after the emergency has passed and the carrier has given notice that the practice will be discontinued.[91]

If the parties have agreed that a proposed demurrage agreement shall not be effective until the carrier has furnished the other party a signed copy of it, the receipt of an unsigned copy imposes no liability although it is accompanied by a letter stating that it has been signed.[92]

Pursuant to the foregoing rules, and the rules already discussed in § 303 supra, the courts have construed and given effect to demurrage rules or provisions relating to the period or time during which the demurrage tariff should be in effect,[93] the time from which the free period for unloading should be computed,[94] the length of such period,[95] the time when, and circumstances under which, a car should be regarded as released,[96] the particular type of

So 891, 226 Ala. 606, 87 A.L.R 1028.

83. U S —Emmons Coal Mining Co. v Norfolk & W. Ry Co, C C A Pa, 3 F.2d 525, affirmed 47 S Ct. 254, 272 U.S. 709, 71 L Ed. 485.

Va.—Smokeless Fuel Co v. Chesapeake & O Ry. Co, 140 S.E. 823, 149 Va. 13.

84. U S —Raleigh Smokeless Fuel Co. v. Virginian Ry Co, C C A.Va., 43 F.2d 555—National Refining Co v. St Louis, I. M. & S Ry. Co, Ohio, 237 F. 347, 150 C C.A. 361, affirming, D C., St. Louis, I M. & S Ry Co v. National Refining Co., 226 F. 357.

85. U S.—National Refining Co. v St. Louis, I. M. & S Ry. Co, supra

86. U S —Raleigh Smokeless Fuel Co. v Virginian Ry. Co, C C A Va., 43 F.2d 555.

87. Ala.—U. S Fidelity & Guaranty Co. v Central of Georgia Ry Co, 147 So. 891, 226 Ala 606, 87 A.L.R 1028.
10 C.J. p 468 note 44

88. U S.—Raleigh Smokeless Fuel Co. v Virginian Ry. Co, C C.A.Va., 43 F 2d 555
Ala.—U. S. Fidelity & Guaranty Co v. Central of Georgia Ry Co, 147 So 891, 226 Ala. 606, 87 A.L R. 1028.
10 C.J. p 468 note 44.

89. Wash —State v Public Service Commission of Washington, 162 P 523, 94 Wash 274

Illegal application to interstate commerce

A reciprocal demurrage rule has been held not to be applicable to cars in interstate commerce where it is not expressly applicable thereto, and, if applicable, would be illegal. —State v Public Service Commission of Washington, 162 P. 523, 94 Wash. 274.

90. Wash.—State v. Public Service Commission of Washington, supra.

91. U S.—Main Island Creek Coal Co. v. Chesapeake & O. Ry. Co, C.C.A.Ky, 23 F 2d 248.

92. N.J —New York, S & W. R. Co. v. Taylor-Fichter Steel Const. Co, 186 A. 462, 14 N.J Misc. 567, affirmed 189 A. 52, 117 N.J.Law 425.

93. **Seasonal tariff**

A local tariff providing special demurrage rules and charges on particular property held for transhipment during a specified season of the year has been held to be only a seasonal tariff, and not to preclude the recovery of demurrage on shipments commenced between such seasons, although such recovery is based on a tariff which does not go into effect until after the commencement of such shipments —Toledo & O C Ry. Co v. Chesapeake & Ohio Coal & Coke Co., D C W Va., 238 F. 629, affirmed Chesapeake & Ohio Coal & Coke Co v. Toledo & O C Ry. Co, 245 F. 917, 158 C C A. 205, error allowed Chesapeake & Ohio Coal & Coke Co v Toledo & O C Ry. Co., 247 F 1002, 159 C C A 662, and error dismissed 39 S Ct 289, 249 U.S. 585, 63 L.Ed. 788.

94. **Computation from day after arrival**

(1) Under the rules of the interstate commerce commission, demurrage must be computed from seven A. M. of the day following the arrival of the car in the railroad yard, thus excluding the day on which the car actually arrives, but including the day of its release —New Jersey Cent R. Co v Morrisdale Coal Co, 22 Pa Dist. 712, 714.

(2) Such method of computing the free time is in accordance with a statutory provision that, "time in all cases shall be so computed as to exclude the first and include the last days of any such prescribed period or duration of time."—New Jersey Cent. R Co. v Morrisdale Coal Co, supra.

95. **Length of time dependent on "capacity" of cars**

The word "capacity" in a statute allowing a specified time for unloading cars of a particular capacity has been held to mean, not the estimated carrying capacity of the car, but the weight of the load —E R. Darlington Lumber Co. v. Missouri Pac. R. Co, 116 S W 530, 216 Mo 658.

96. **Release and substitution of cars held by coal exchange**

(1) A coal tariff providing for demurrage until coal is ordered out by the shipper has been construed to authorize the charging of demurrage against a member of a shippers' coal exchange until he has ordered out a quantity of coal equal to that shipped by him, notwithstanding his cars have already been ordered out by another member, where, in accordance with an agreement of the members of the coal exchange, substituted cars are held awaiting the order of the first member
U.S —Emmons Coal Mining Co. v. Norfolk & W. Ry. Co, C.C.A.Pa.,

car[97] or holding[98] for which demurrage is to be charged, or the type of place or track on which the cars must be held or detained to be subject to, or exempt from, demurrage.[99] The construction of provisions relating to matters specifically dealt with in the preceding and following sections on demurrage will be found considered in those sections.

§ 344. Who Liable for Demurrage

As a general rule, the person primarily liable for

3 F.2d 525, affirmed 47 S.Ct. 254, 272 U.S. 709, 71 L.Ed. 485.
Va.—James v. Norfolk & W. Ry. Co., 129 S.E. 321, 143 Va. 865—Smokeless Fuel Co. v. Chesapeake & O. Ry. Co., 128 S.E. 624, 142 Va. 355

(2) In such a case, the shipping member is not relieved by a tariff rule providing that coal car should be deemed released when vessel registered for cargo or fuel supply, "except that, when cars are unloaded before vessel registers, such cars shall be released when unloaded."
U.S.—Emmons Coal Mining Co. v. Norfolk & W. Ry. Co., supra.
Va.—Smokeless Fuel Co. v. Chesapeake & O. Ry. Co., supra.

(3) Such a practice does not constitute the giving of a service to members not given to nonmembers under the tariff, since the substitution does not essentially change the situation between the shipper and the carrier from what it was prior to substitution, in that the carrier continues to have its cars detained and the shipper continues to have title to an amount of coal equal to that originally shipped by him.
U.S.—Emmons Coal Mining Co. v. Norfolk & W. Ry. Co., supra.
Va.—James v. Norfolk & W. Ry. Co., supra—Smokeless Fuel Co. v. Chesapeake & O. Ry. Co., supra.

(4) Moreover, this is so although the amount paid by a particular member is different from what it would be if he were a nonmember where the rate charged by the carrier is the same irrespective of whether the shipper is a member or nonmember.—Smokeless Fuel Co. v. Chesapeake & O. Ry. Co., supra.

Unloading in order of arrival

(1) Under a tariff and agreement not requiring a carrier to unload cars in the order of their arrival demurrage may be computed by any rule not increasing its aggregate amount over what it would be were cars unloaded in the order of arrival.—Smokeless Fuel Co. v. Chesapeake & O. Ry. Co., 140 S.E. 823, 149 Va. 13.

(2) Thus, although not expressly authorizing demurrage on cars not unloaded in the order of arrival, a coal tariff providing for settlement on the basis of detention of cars released during a month has been construed to authorize the charging of demurrage, computed in accordance with an "average demurrage agreement" of the members of a shippers' coal exchange, on cars not unloaded by the carrier in the order of arrival, provided the aggregate amount of such charge is not increased over what it would be were the cars unloaded in the order of arrival.—Smokeless Fuel Co. v. Chesapeake & O. Ry. Co., supra.

97. "Cars in railroad service"

(1) Cars to which a carrier may resort for the purpose of discharging its duty to supply cars necessary to accommodate the traffic passing over its road have been held to be "in railroad service" within the meaning of a carrier's tariff imposing demurrage on such cars.—National Refining Co. v. St. Louis, I. M. & S. Ry. Co., Ohio, 237 F. 347, 150 C.C.A. 361, affirming, D.C., St. Louis, I. M. & S. Ry. Co. v. National Refining Co., 226 F. 357.

(2) In accordance therewith, private cars used for transportation purposes by the carrier with the owner's consent have been held to be "in railroad service" within the meaning of such tariff.—National Refining Co. v. St. Louis, I. M. & S. Ry. Co., supra.

Nature or type of load

(1) A tariff providing for demurrage except as to cars loaded with specified types of freight has been held to authorize demurrage on cars loaded with types of freight not expressly excepted.—Davis v. Ferguson, 132 So. 289, 17 La.App. 149, avoided on other grounds 136 So. 293, 173 La. 132.

(2) Thus a tariff not expressly excepting from its operation cars loaded with hay has been held to authorize demurrage on cars so loaded.—Davis v. Ferguson, supra.

"Private cars"

(1) A demurrage tariff provision, exempting "private cars," including leased cars, from demurrage, is not limited in its application to cars leased from an owner other than a railroad.—Mellon v. J. M. Burguieres Co., 120 So. 15, 167 La. 583, mandate conformed to, App., 121 So. 215.

(2) Hence, railroad cars, assigned exclusively to sugar manufacturer for sugar-making season, are "private cars" within such exemption.—Mellon v. J. M. Burguieres Co., supra.

98. Holding for reconsignment or reshipment

(1) Cars consigned to members of hay and grain exchange, whose yards could not hold them, necessitating storage by railroad elsewhere, although not intended to be unloaded in plugging yard of consignee but merely to be plugged and inspected for resale on sample, are subject to demurrage, under a demurrage tariff imposing such charge on "cars held for or by consignors or consignees for loading, unloading, forwarding directions, or for any other purposes."—Granger v. Davis, C.C.A. Ohio, 2 F.2d 695.

(2) In such a case, since the cars are merely "plugged" or unloaded to the extent necessary for inspection they are not cars held for "loading or unloading."—Granger v. Davis, supra.

(3) They are, however, cars held for "reshipment or reconsignment" and are governed by rule published in demurrage tariff providing for free time where cars "are held" for consignment or reshipment in same car, the words "are held" meaning held either by consignors or consignees.—Granger v. Davis, supra.

Reconsignment to embargo points

A rule providing that demurrage is not collectable, under tariffs containing no restrictions against reconsignment to embargo points, has been held inapplicable to shipper intending to evade embargo.—Krauss Bros. Lumber Co. v. Mellon, C.C.A.Ala., 30 F.2d 901, conforming to 48 S.Ct. 358, 276 U.S. 386, 72 L.Ed. 620, which reversed, C.C.A., 18 F.2d 369, certiorari granted 48 S.Ct. 35, 275 U.S. 513, 72 L.Ed. 400, amended 48 S.Ct. 527, 72 L.Ed. 1018, certiorari denied 49 S.Ct. 513, 279 U.S. 872, 73 L.Ed. 1008.

99. Cars held at "mine sidings"

Carrier's yard tracks one hundred miles from the shipper's mines have been held not to constitute "mine sidings," within the meaning of a tariff excepting loaded coal cars held at mine sidings from demurrage, even where by usage such yards had been regarded as mine sidings for the purposes of such tariff.—Main Island Creek Coal Co. v. Chesapeake & O. Ry. Co., C.C.A.Ky., 23 F.2d 248.

Privately owned tracks

(1) A track owned by the carrier is not a private track within the meaning of a tariff excepting private cars from demurrage where held on tracks owned by the owner of the cars.—Kansas City Southern Ry. v. Baker Gasoline Co., 127 So. 442, 13 La.App. 106.

(2) Furthermore, this is so although the track is situated on the consignee's premises.—National Refining Co. v. St. Louis, I. M. & S. Ry. Co., Ohio, 237 F. 347, 150 C.C.A. 361, affirming, D.C., St. Louis, I. M. & S. Ry. Co. v. National Refining Co., 226 F. 357.

demurrage charges is the one through whose default or breach of duty the detention or delay in unloading occurred.

As a general rule, the person primarily liable for demurrage charges is the one through whose default or breach of duty the detention or delay in unloading occurred.[1]

Very often the consignee is the person held liable for demurrage charges due to the fact that, in accordance with the rules stated in § 316 supra, he has in some sufficient manner assumed the responsibility therefor or the duty to unload the shipment.[2] Moreover, if the consignee has bound himself to accept the shipment, he cannot relieve himself from liability for demurrage charges thereon by requesting the carrier not to make delivery,[3] or by refusing to accept the goods,[4] nor can he escape liability for such charges by setting up lack of notice of the rescission of an illegal embargo.[5] Also, if the consignee assumes liability by exercising control over the shipment, his liability is not affected by the fact that the goods contained in the shipment do not conform to the contract between him and the consignor.[6] The consignee is not liable for demurrage, however, if he has in no manner authorized the shipment to be made in his behalf or assumed to exercise control or dominion over it; and he cannot be held responsible for demurrage if he countermands his order for the shipment before the goods have been delivered to the carrier and refuses to accept them upon their arrival.[7] It has been held that a consignee accepting and unloading a shipment does not impliedly contract to pay unknown demurrage charges which accrued because the cars were kept out of service at intermediate points; and that the carrier may be estopped to collect such charges from the consignee where it delays for many years and instructs him to pay the full purchase price to the vendor who was primarily responsible for the charges.[8] A shipping exchange or association, which received shipments only as agent for the shippers and owners, is not liable for demurrage, although named as consignee in the bills of lading, where the contract with the carrier clearly contemplated that the members of the exchange rather than the exchange itself should be liable for demurrage.[9]

It has been said that a person who is both consignor and consignee is the party primarily responsible for demurrage; and the carrier may collect the charges from him after the goods have been delivered to a third person at his positive and unconditional direction.[10] The shipper or consignor may be subject to liability where the consignee has refused to receive the shipment and the former has been given notice of such nonacceptance,[11] or

1. U.S.—Emmons Coal Mining Co. v. Norfolk & W. Ry. Co., C C A Pa., 3 F 2d 525, affirming, D.C., Norfolk & W. Ry. Co v. Emmons Coal Mining Co, 287 F. 168, affirmed 47 S Ct. 254, 272 U.S 709, 71 L Ed 485
Miss.—Vanderbilt v. Planters' Oil Mill & Gin Co, 106 So. 14, 140 Miss. 427.
Pa.—Baltimore & O. R. Co. v L. B Foster Co, 81 Pa Super. 304.
W.Va.—Davis v. Lawrence Oil & Gas Co., 117 S E 692, 94 W.Va. 73, 30 A.L R 163

2. U S—Davis v. Timmonsville Oil Co., C C A S.C, 285 F 470.
Ill.—Indiana Harbor Belt R Co. v. Lieberman, 245 Ill App. 503
N C.—Davis v Greensboro Warehouse & Storage Co., 120 S E 462, 186 N.C. 676, certiorari denied Greensboro Warehouse & Storage Co. v. Davis, 44 S.Ct. 453, 264 U. S. 594, 68 L.Ed 866
Ohio.—Pennsylvania R Co. v. Rice Coal Co., 148 N E. 349, 113 Ohio St 34—S. A. Gerrard Co v New York, N H & H R Co, 176 N E 126, 39 Ohio App. 84
S C.—Boney v Atlantic Coast Line R Co, 126 S E. 46, 130 S C 439, 37 A L R- 1313
Va.—Eastern Coal & Export Corporation v. Norfolk & W. Ry. Co, 138 S.E. 471, 148 Va. 140, certiorari denied 48 S Ct 207, 276 U.S 615, 72 L Ed 732.
W.Va—Davis v Lawrence Oil & Gas Co, 117 S.E 692, 94 W Va 73, 30 A L R. 163.
10 C.J. p 470 note 69.

Acceptance and unloading of cars by consignee renders him liable for demurrage charges although the shipment was unauthorized and he did everything within his power to prevent it from being made.—Davis v Timmonsville Oil Co., C C A S C, 285 F. 470.

Original consignee giving diversion order held liable for demurrage charges where consignee in diversion order refused shipment.—S. A Gerrard Co. v. New York, N. H & H R Co., 176 N.E 126, 39 Ohio App. 84

3. U.S.—Menasha Paper Co v. Chicago & Northwestern Ry. Co., Wis, 36 S.Ct. 501, 241 U S. 55, 60 L Ed. 885.

4. Ga—Southern Flour & Grain Co v. Seaboard Air Line Ry, 95 S E. 997, 22 Ga.App. 403.

5. U S.—Menasha Paper Co. v. Chicago & Northwestern Ry. Co., Wis, 36 S Ct. 501, 241 U S. 55, 60 L Ed 885

6. W Va—Davis v Lawrence Oil & Gas Co, 117 S.E. 692, 94 W.Va 73, 30 A.L.R. 163

7. S C—Davis v. Allen, 117 S.E 547, 124 S C 297

8. Ohio—Cleveland, C, C. & St. L Ry Co v McKenzie Lumber Co, 147 N E. 8, 112 Ohio St. 80

9. U S—In re Tidewater Coal Exch, D C.Va, 292 F 225, affirmed, C.C A, 296 F. 701, certiorari denied Davis v. Coyle, 44 S.Ct. 454, 264 U S. 596, 68 L Ed. 868.
Va—James v Norfolk & W. Ry. Co, 129 S E 321, 143 Va. 865.

10. Pa—Baltimore & O R. Co. v. L. B Foster Co., 81 Pa Super. 304.

11. Ohio—S. A. Gerrard Co v. New York, N H & H. R Co., 176 N E. 126, 39 Ohio App 84—Moores Lime Co v Norfolk & W. Ry. Co, 6 Ohio App 159.
Tex.—Reed v. Southern Pac. Co., Civ. App., 99 S W 2d 1026, error dismissed
10 C J. p 469 note 53.

After rejection by reconsignee

Where the consignor has notice that a consignee had refused to accept carloads of goods, and directs the carrier to reship them, with direction "to allow all charges to follow," and the second consignee also refuses to accept the goods, the consignor will be liable for demurrage. —Baltimore, etc, R. Co. v. Samuel, 48 Pa Super. 274.

where the shipper knows that the consignee cannot pay for the goods, and that he himself is expected to pay for the use of the car while the goods are in it, and he allows them to remain on the tracks until sold to another party.[12] Under a tariff providing for the collection of demurrage charges from the owner or consignee, the carrier does not waive its right to collect demurrage from the consignor, as owner, by collecting the regular charges from the consignee without demanding the payment of demurrage by the latter.[13] A consignor cannot be held for demurrage charges where the carrier fails to comply with an order of the director of railroads requiring goods to be sold before the charges thereon equalled or exceeded their value.[14]

A person, who is neither the consignor nor consignee, may assume liability for demurrage charges by express contract or undertaking,[15] or by accepting or exercising dominion over the shipment;[16] and it is immaterial that he was acting as an agent for the consignor or consignee if he entered into the contract as a principal.[17] However, in the absence of special arrangement, a railroad normally has no right to collect demurrage from a vessel which has discharged the cargo into the cars, or the owner of such vessel.[18]

The assignee of the bill of lading who receives the goods thereunder is liable for demurrage when demurrage is due,[19] and it is immaterial that the purchase of the freight by obtaining the bills of lading properly indorsed was made after the arrival of the freight which had been shipped to the order of the consignor.[20] Moreover, the assignee of the bill of lading is not relieved from liability by reason of the fact that notice of arrival was only given to the consignee as required by the terms of the bill of lading.[21]

One carrier detaining the cars of another road may be liable to the latter for their use during such detention.[22]

Stockyards company. Under a carrier's demurrage rules, a stockyards company operating a terminal railroad may be liable for demurrage on cars delivered to it as consignee, but not on cars delivered to it as a connecting carrier for transportation to consignees whose plants were reached by such terminal company's lines.[23]

A cotton compress company which does not authorize shippers to consign cotton to it and does not

Sale for charges

A consignor is liable for demurrage charges from the date it receives notice of the consignee's refusal to accept the shipment to the date on which the carrier is entitled, under a statute, to sell the shipment for its charges—Lancaster & Wallace v Louisiana Cypress Lumber Co, 7 La App. 9.

Necessity of notice of nonacceptance to hold shipper see supra § 341

12. Tex.—Hunt v. Missouri, etc, R. Co, Civ App, 31 S W 523.

13. U.S—Main Island Creek Coal Co v. Chesapeake & O Ry. Co, C C.A Ky., 23 F.2d 248

14. U S—Davis v. Smutzinger, C C. A Pa, 281 F 640

15. U S—Emmons Coal Mining Co v. Norfolk & W Ry. Co., Pa, 47 S Ct. 254, 272 U.S 709, 71 L Ed 485, affirming, C C A, 3 F 2d 525, affirming, D C, Norfolk & W. Ry. Co v Emmons Coal Mining Co., 287 F. 168

Cal—Southern Pac. Co. v Grangers' Business Ass'n, 1 P 2d 477, 115 Cal App 256

Va—James v Norfolk & W Ry. Co, 129 S.E 321, 143 Va. 865

Shipping exchange

(1) Member of shipping exchange may assume liability for demurrage on shipments of which exchange is consignee by contract entered into when he became a member of the exchange.

U S—Emmons Coal Mining Co. v Norfolk & W. Ry. Co, Pa., 47 S Ct. 254, 272 U S. 709, 71 L Ed 485, affirming, C.C A., 3 F 2d 525, affirming, D C, Norfolk & W. Ry Co v. Emmons Coal Mining Co., 287 F 168.

Va.—J Aron & Co. v. Chesapeake & O Ry Co, 151 S E 126, 153 Va 691—Smokeless Fuel Co v Chesapeake & O Ry Co., 140 S E. 823, 149 Va 13—James v. Norfolk & W Ry. Co., 129 S.E. 321, 143 Va 865.

(2) Where the pooling agreement prohibits a transfer of shipments after they are placed in the pool, a member cannot relieve himself from liability for subsequently accruing demurrage by a transfer of his shipment to another member, although the tariff provides that the transfer of a shipment will relieve the transferor from liability for subsequently accruing demurrage, as such provision applies only where the right to transfer has not been surrendered by contract

U S—Emmons Coal Mining Company v Norfolk & W Ry. Co, C C A.Pa, 3 F 2d 525, affirming, D C, Norfolk & W Ry. Co v Emmons Coal Mining Co, 287 F 168, and affirmed 47 S.Ct. 254, 272 U.S 709, 71 L Ed 485

Va—Eastern Coal & Export Corporation v Norfolk & W. Ry. Co, 138 S E. 471, 148 Va. 140, certiorari denied 48 S Ct. 207, 276 U.S. 615, 72 L Ed 732.

16. N.Y.—New York Cent. R Co. v. Hendel, 207 N.Y S. 234, 123 Misc. 907.

Pa.—Pennsylvania Railroad Co. v. Young, 88 Pa Super 332.

17. Cal.—Southern Pac Co. v Grangers' Business Ass'n, 1 P 2d 477, 115 Cal App. 256.

Warehouseman may be liable for demurrage on cars shipped by others in its care, where it contracts as principal to be liable for such charges—Southern Pac Co v. Grangers' Business Ass'n, 1 P.2d 477, 115 Cal App. 256

18. U.S—California & Eastern S S Co. v. 138,000 Feet of Lumber, D C Md, 23 F.2d 95.

19. N.Y—New York Cent. R Co. v Hendel, 207 N Y S. 234, 123 Misc. 907.

Okl—Atchison, T & S F. Ry. Co v. Johnson, 225 P 939, 99 Okl 72. 10 C J. p 469 note 55.

20. Ohio—Cincinnati, etc, Tract Co. v Norfolk, etc, R. Co, 28 Ohio Cir. Ct 543

21. Okl.—Atchison, T. & S. F. Ry. Co v Johnson, 225 P. 939, 99 Okl. 72

22. Ky.—Kentucky Wagon Mfg Co. v. Ohio, etc, R. Co., 32 S.W. 595, 98 Ky. 152, 17 Ky.L. 726, 56 Am.S. R 326, 36 L R A 850.

23. U.S—Missouri Pac. R. Co. v. Union Stockyards Co., Neb., 204 F. 757, 123 C C.A. 131.

accept cotton as a consignee, but as an agent of the owners delivers cotton to a railroad for transportation and collects from it the compress charges, is not liable to the carrier for demurrage.[24]

§ 345. Excuses for Nonpayment

The payment of demurrage charges may be excused or avoided if the detention or delay in unloading for which the charge is sought to be made was due to the fault of the carrier or the intervention of vis major.

Payment of demurrage is usually excused or avoided if the detention or delay in unloading for which the charge is sought to be made was due to the fault of the carrier rather than a default or breach of duty of the consignee or shipper;[25] and it has also been held that the fact that the detention or delay was due to the intervention of vis major may constitute an excuse, where the obligation to pay is imposed by law instead of by express contract between the parties,[26] but there is other authority to the effect that if the demurrage rules provide no exception from liability under such circumstances the courts can make none.[27]

In accordance with the foregoing, it has been held that a carrier is not entitled to collect demurrage for a detention or delay due to the fact that the carrier detained the cars because of a strike on another line;[28] that the carrier failed to perform its contract to unload the shipment;[29] that the carrier failed to notify the shipper of an embargo until after cars were loaded;[30] that the carrier had gotten into a controversy with associated carriers as to the division of joint rates;[31] that the carrier placed obstructions in the way of the unloading by delivering the cars in unreasonably large numbers or otherwise choking or overtaxing the consignee's unloading facilities;[32] that the carrier refused to sur-

24. Tex.—Missouri, etc., R. Co. v. Capital Compress Co., 110 S.W. 1014, 50 Tex.Civ.App. 572.

25. U.S.—Cleveland C., C. & St. L. Ry. Co. v. New York, C. & St. L. Ry. Co., C.C.A.Ind., 11 F.2d 850—Granger v. Davis, C.C.A.Ohio, 2 F.2d 695.
Ark.—Kansas City Southern Ry. Co. v. Ft. Smith Compress Co., 210 S.W. 147, 138 Ark. 1.
Miss.—Lexington Compress & Oil Mill Co. v. Yazoo & M. V. R. Co., 95 So. 92, 131 Miss. 49.
Mo.—Milne Lumber Co. v. Michigan Cent. R. Co., App., 57 S.W.2d 732—Buschow Lumber Co. v. Union Pac. R. Co., 276 S.W. 409, 220 Mo.App. 743.
N.Y.—Lee v. Erie R. Co., 158 N.Y.S. 730, 173 App.Div. 75.
Ohio—Troy Wagon Works Co. v. C., H. & D. Ry. Co., 3 Ohio N.P.,N.S., 412.
Pa.—Clark v. Baltimore & O. R. Co., 79 Pa.Super. 159.
Tex.—Hill County v. St. Louis Southwestern Ry. Co., Civ.App., 31 S.W.2d 868—Davis v. Martin, Civ.App., 287 S.W. 113.
Va.—Smokeless Fuel Co. v. Chesapeake & O. Ry. Co., 140 S.E. 823, 149 Va. 13.
10 C.J. p. 469 notes 60–62.

Limitation of rule

"Fault on the part of the carrier, does not preclude the collection of demurrage from the consignee for detention for which the latter is responsible, but it does preclude the collection of demurrage for detention due to the fault of the carrier"—Smokeless Fuel Co. v. Chesapeake & O. Ry. Co., 140 S.E. 823, 829, 149 Va. 13.

Default under contract with compress company

(1) A stipulation, in an agreement between a railroad and a cotton compress company, that latter would not hold railroad for penalties or damages for failure to furnish cars, was not an agreement on part of compress company not to set up as a defense, in a suit by the railroad for demurrage on unloaded cars, that it was prevented from carrying out its contract to unload cars by refusal of railroad to furnish cars to load out cotton already compressed.—Kansas City Southern Ry. Co. v. Ft. Smith Compress Co., 210 S.W. 147, 138 Ark. 1.

(2) In view of the evidence it was held that, under such a contract, it was not contemplated that compress company was to depend upon other railroads for empty cars to be loaded with outbound cotton, so as to relieve the contracting railroad of duty to furnish such cars.—Kansas City Southern Ry. Co. v. Ft. Smith Compress Co., supra.

(3) The fact the compress company did not give written notice of congestion in accordance with contract provision that compress company could by giving written notice of a congestion refuse to receive more cotton, did not entitle carrier to recover demurrage on unloaded cars due to congestion, where its agents had knowledge of congestion at all times and that situation was being constantly accentuated.—Kansas City Southern Ry. Co. v. Ft. Smith Compress Co., supra.

Provision of a demurrage tariff, that no demurrage charges shall be assessed for detention of cars through railroad errors or omissions, refers to such errors and omissions after placement of the cars on delivery track and notice thereof.—Michigan Cent. R. Co. v. U. S., Mich., 246 F. 353, 158 C.C.A. 417, certiorari denied 38 S.Ct. 333, 246 U.S. 663, 62 L.Ed. 928.

26. U.S.—Southern Ry. Co. v. White, C.C.A.Tenn., 284 F. 560, 26 A.L.R. 1429.
Ohio.—Joslin-Schmidt Co. v. Baltimore & O. S. W. R. Co., 6 Ohio App. 193.
W.Va.—Chesapeake & O. Ry. Co. v. Board, 130 S.E. 524, 100 W.Va. 222, 44 A.L.R. 826.

Reason for rule

"Demurrage charges are assessed by operation of law, and are not the result of contract between carrier and consignee. It is a well-established principle of law that, while an 'act of God,' unavoidable accident, or the stress of circumstance, may not excuse the nonperformance of an obligation created by contract, they will excuse the nonperformance of a duty imposed by law."—Chesapeake & O. Ry. Co. v. Board, 130 S.E. 524, 525, 100 W.Va. 222, 44 A.L.R. 826.

27. U.S.—North American Coal Corporation v. Wheeling & L. E. Ry. Co., C.C.A.Ohio, 49 F.2d 253, certiorari denied 52 S.Ct. 33, 284 U.S. 655, 76 L.Ed. 555.

28. Mo.—Buschow Lumber Co. v. Union Pac. R. Co., 276 S.W. 409, 220 Mo.App. 743.

29. U.S.—Cleveland, C., C. & St. L. Ry. Co. v. New York, C. & St. L. Ry. Co., C.C.A.Ind., 11 F.2d 850.

30. Tex.—Davis v. Martin, Civ.App., 287 S.W. 113.

31. Ohio.—Maynard Coal Co. v. Chicago, K. & S. Ry. Co., 4 Ohio App. 459.

32. Tex.—Texas, etc., R. Co. v. Kolp, Civ.App., 88 S.W. 417.
10 C.J. p. 469 note 62.

Tariff provision relative to "bunching"

Under provision of a demurrage

render the shipment or permit it to be unloaded except on the payment of excessive or improper charges;[33] that armed insurrectionists prevented the unloading of the cars by threats and force;[34] or that the destruction of a bridge by storm delayed the return of loaded cars to the carrier.[35]

On the other hand, a person has been held not excused or released from liability for demurrage because the detention or delay resulted from a strike by his employees,[36] his mere inability to receive and unload the cars within the free time allowed, after notice of their arrival,[37] or an injunction restraining the carrier from delivering the shipment;[38] or because of the fact that the carrier, due to a flood, could not have made use of the cars had they been delivered or released during the free time,[39] that he has an unadjusted claim for damages against the carrier,[40] that the carrier demanded excessive charges where it offered to deliver the shipment upon payment of the amount admittedly due,[41] that the carrier had knowledge that a delay would occur,[42] that by the carrier's act the shipper is prevented from earning credit days to offset the debit days,[43] or because the carrier transferred the shipment from one car to another during the period of detention.[44] If the bill of lading contains a stipulation as to the time for unloading the cars, the consignee is not excused from unloading within that time because of unfavorable weather conditions;[45] and a person who has entered into an average agreement not exempting him from liability for demurrage under such circumstances is not excused because the delay was due to a bunching of cars which was wholly caused by conditions created by a heavy snowfall, severe storms, and protracted intensely cold weather;[46] but an average agreement waiving the benefit of a tariff "bunching" provision exempting from liability for demurrage where the delay is due to a "bunching" through "act or neglect of the" carrier does not waive the right to be relieved from liability for demurrage on account of a delay

tariff for extra free time in case of bunching as the direct result of the act or neglect of the carriers, bunching as the result of the consignee's previous fault in not accepting will not avail.—Michigan Cent. R. Co. v. U. S., Mich., 246 F. 353, 158 C.C.A. 417, certiorari denied 38 S.Ct. 333, 246 U.S. 663, 62 L.Ed. 928.

33. Miss.—Lexington Compress & Oil Mill Co. v. Yazoo & M. V. R. Co., 95 So. 92, 131 Miss. 49.
Mo.—Milne Lumber Co. v. Michigan Cent. R. Co., App., 57 S.W.2d 732.
Wis.—Waters v. Becker, 186 N.W. 167, 175 Wis. 621.
10 C.J. p. 469 notes 60, 61.

Necessity of tender of proper charges

When a carrier demands from consignee excessive freight on a car containing goods consigned to him, he is under no duty to tender to the carrier the correct amount of freight due on the car in order to relieve himself from liability for demurrage for delay in unloading, but the carrier, to charge the consignee with demurrage, must put him in default by tendering to him the car either on payment of the amount actually due for transporting it or without such payment in advance leaving the amount thereof if in dispute to be thereafter adjusted.—Lexington Compress & Oil Mill Co. v. Yazoo & M. V. R. Co., 95 So. 92, 131 Miss. 49.

Express exception in demurrage rules

(1) Under a demurrage rule providing that no demurrage will be collected for the detention of cars due to the demand of the carrier for the payment of "transportation charges" in excess of the tariff authority, the term "transportation charges" includes demurrage charges and demurrage cannot be collected for a detention due to the carrier's demand for excess demurrage charges.—Milne Lumber Co. v. Michigan Cent. R. Co., Mo.App., 57 S.W.2d 732.

(2) However, the demand for the excess payment must be the proximate cause of the detention or delay.—Milne Lumber Co. v. Michigan Cent. R. Co., supra.

34. W.Va.—Chesapeake & O. Ry. Co. v. Board, 130 S.E. 524, 100 W.Va. 222, 44 A.L.R. 826.

35. U.S.—Southern Ry. Co. v. White, C.C.A.Tenn., 284 F. 560, 26 A.L.R. 1429.

36. U.S.—Sinclair Refining Co. v. Schaff, C.C.A.Kan., 275 F. 769.
Ill.—Davis v. Keystone Steel & Wire Co., 148 N.E. 47, 317 Ill. 278.

37. Ind.—Davis v. Steele, 146 N.E. 425, 83 Ind.App. 300, petition denied 147 N.E. 632, 83 Ind.App. 300.
10 C.J. p. 469 note 63.

Inapplicability of provision excusing because of weather conditions

Carrier's demurrage rules, providing that when condition of weather made it impossible to unload cars without serious injury to freight free time should be extended, was inapplicable to delay in unloading car of oil for use on streets, because consignee, who had no storage facilities, could not, under his contract, place oil on streets while it was raining or while streets were not in fit condition due to rain.—Davis v. Steele, 146 N.E. 425, 83 Ind.App. 300, petition denied 147 N.E. 632, 83 Ind. App. 300.

38. Mo.—Chicago, B. & Q. R. Co. v. Fowler, 27 S.W.2d 72, 224 Mo.App. 736.

39. Pa.—Pennsylvania R. Co. v. Kittanning Iron & Steel Mfg. Co., 106 A. 207, 263 Pa. 205, reversed on other grounds 40 S.Ct. 532, 253 U.S. 319, 64 L.Ed. 928.

40. Miss.—Yazoo, etc., R. Co. v. Searles, 37 So. 939, 85 Miss. 520, 564, 68 L.R.A. 715.
10 C.J. p. 469 note 65.

41. Miss.—Lexington Compress & Oil Mill Co. v. Yazoo & M. V. R. Co., 95 So. 92, 131 Miss. 49.

Conditional tender of admitted charges

Where the carrier offers to make delivery on payment of the amount admitted by such person to be due, the fact that such person tenders such amount on the condition that the carrier promises not to attempt to collect the difference thereafter, and that the carrier declines to make such promise, does not relieve such person of liability for demurrage in case he fails to unload.—Lexington Compress & Oil Mill Co. v. Yazoo & M. V. R. Co., 95 So. 92, 131 Miss. 49.

42. Pa.—Baltimore & Ohio R. Co. v. Noah H. Swayne & Co., 26 Pa. Dist. 946.

43. Ohio.—Harmon v. Jewett, Bigelow & Brooks, 9 Ohio App. 350.

44. U.S.—Central R. Co. of New Jersey v. Schick, C.C.A.Pa., 38 F. 2d 968.

45. Mo.—Darlington v. Missouri Pac. R. Co., 72 S.W. 122, 99 Mo. App. 1, 18.
10 C.J. p. 469 note 64.

46. Ohio.—Anthony Carlin Co. v. Hines, 140 N.E. 99, 107 Ohio St. 328.

resulting from a "bunching" brought about by an act of God.[47] Also, it has been held that, although the carrier may, upon learning that the consignor's possession of the goods is claimed to be wrongful, refuse to deliver to the consignee unless the latter furnishes a sufficient bond, the failure or refusal of the consignee to make such a bond cannot be attributed to him as a fault and neither the shipper or consignee can be held responsible for demurrage incurred solely because of the failure or refusal to give such a bond.[48] The fact that the tariff made it the duty of the carrier to load and unload the cars does not prevent it from charging demurrage for delay, where the warehouseman sought to be charged had as a matter of practice handled the placing and unloading of cars in his warehouse.[49]

A rule exempting the consignee from liability for demurrage for detention beyond the "free time . . . when shipments are frozen while in transit so as to prevent unloading during the prescribed free time," has been held not to exempt carloads of ore frozen in transit from demurrage where the consignee had facilities for unloading a limited number of cars of frozen ore daily and the delay in unloading beyond the free time was due not to the frozen condition of the ore but to there being so great an accumulation of cars as to exceed the unloading capacity.[50]

§ 346. Lien

Although there are some cases recognizing the carrier's right to a common-law lien for demurrage charges, the more usually accepted view seems to be that there is no right to a lien therefor unless it is authorized or allowed by statute, contract, or custom.

Although there are a number of cases which might be said to recognize a carrier's right to a common-law lien for demurrage charges,[51] the more usually accepted rule appears to be that, in the absence of usage, statute, or contract providing for it, a carrier, although entitled to charge demurrage for unreasonable delay in unloading cars, has no lien for such demurrage,[52] it being considered as a mere breach of contract for which the party must seek his redress in the ordinary manner, and not by a detention of the goods.[53] However, a carrier is entitled to a lien for demurrage, where express provision therefor is made by the contract of shipment or the bill of lading,[54] where there is a usage by which a demurrage charge of a fixed amount per car for each day during which the car is unloaded is known to the consignee,[55] or where such a lien is authorized by statute.[56] It has been held that demurrage is one of the "other charges" authorized by the Interstate Commerce Act, so that a carrier has the right thereunder to a lien on shipments for demurrage as well as for freight or other terminal charges.[57] A statute which gives a lien for freight and storage, coupled with a power to sell therefor, applies to, and gives a lien for demurrage charges for delay in unloading cars. The lien so given exists only while the carrier retains dominion or control of the cars, and is lost if the carrier surrenders possession of them. Furthermore, the lien cannot be sold or assigned, and is completely discharged by a payment of the demurrage charges by the person responsible therefor.[58]

While a mechanics' or works' lien law, giving a lien to those who perform labor or furnish materials, may afford a carrier protection with respect to its transportation charges, see supra § 325, such a law gives no lien for demurrage charges as they cannot be regarded as for labor performed.[59]

Demurrage on several cars. Where a lien for demurrage is enforceable and demurrage is due on several cars constituting the shipment, the charge for each car need not be enforced against it separately, but enough cars may be retained to satisfy the charge against all.[60]

§ 347. Enforcement of Demurrage Charges

Claims for demurrage charges or demurrage overcharges ordinarily may and must be enforced in accordance with the rules relating to actions for the recovery of charges or overcharges respectively.

47. Ohio—Joslin-Schmidt Co v. Baltimore & O. S. W. R. Co, 6 Ohio App 193.

48. Ala.—Louisville & N R. Co. v Camody, 84 So 824, 203 Ala 522, reversing 82 So. 648, 17 Ala.App. 158, conformed to 85 So 846, 17 Ala App. 370.

49. Cal.—Southern Pac. Co. v Grangers' Business Ass'n, 1 P 2d 477, 115 Cal.App 256

50. U.S.—Pennsylvania R Co. v. Kittaning Iron & Steel Mfg Co., 40 S Ct 532, 253 U.S 319, 64 L Ed 928, reversing 106 A 207, 263 Pa. 205

51. N.C.—Hammer Lumber Co. v Seaboard Air Line Ry., 102 S.E. 508, 179 N.C 359.

S.C.—Thomas v. Northwestern R. Co of South Carolina, 98 S E 336, 111 S.C 475

10 C.J p 470 note 72.

52. Pa.—Nicolette Lumber Co. v People's Coal Co., 62 A 1060, 213 Pa. 379, 3 L.R.A.,N.S., 327, 110 Am S.R 550, 5 Ann.Cas. 387, reversing 26 Pa.Super 575

10 C.J p 470 note 73.

53. N.Y.—Crommelin v. New York, etc, R Co, 1 Abb Dec 472, 4 Keyes 90.

54. Ohio—Thomas Phillips Co. v. Erie R Co, 27 Ohio Cir.Ct 486.

10 C.J p 470 note 76

55. Mass.—Miller v. Mansfield, 112 Mass 260

56. Ga.—Powell v. Seaboard Air Line Ry., 90 S.E. 980, 19 Ga.App. 91

57. Okl.—Gault Lumber Co. v. Atchison, etc, R. Co., 130 P 291, 37 Okl. 24.

58. Miss.—Vanderbilt v. Planters' Oil Mill & Gin Co., 106 So. 14, 140 Miss 427

10 C.J p 470 note 78.

59. N.J.—Central R. Co. of New Jersey v. Gallena-Poole, Inc, 152 A 251, 107 N.J.Eq 267, affirmed 160 A. 507, 110 N.J.Eq. 559.

60. Ga.—Pennsylvania Steel Co. v. Georgia R., etc., Co., 21 S.E. 577, 94 Ga. 636

Miss.—New Orleans, etc, R. Co. v. George, 35 So. 193, 82 Miss. 710.

10 C.J. p 471 note 82.

A carrier ordinarily may and must enforce payment of its claims for demurrage by an appropriate action or proceeding,[61] and not by a refusal to furnish facilities for shipment in contravention of its common-law obligations;[62] but it has been held that, on an arbitrary refusal to pay demurrage charges accruing in the past, the carrier is warranted in refusing to switch and place cars at the warehouse of a consignee.[63]

An action for the recovery of demurrage charges is ordinarily ex contractu in nature,[64] and may be in the form of an action of assumpsit on the common counts.[65]

Such an action may properly be brought only by a carrier who is entitled to collect the demurrage charges sued for; and one carrier cannot recover demurrage which belongs to another which is a separate and distinct corporation, although they are both part of the same unincorporated railway system.[66] Where the members of a shipping exchange have agreed, by assenting to the rules and regulations of the exchange, to be liable for the share of demurrage charges apportioned to them by the commissioner of the exchange, a carrier, in whose favor demurrage charges have been incurred by the exchange as consignee, may, under a statute permitting suits by a third party beneficiary, maintain an action against the members of the exchange for the amount of demurrage charges apportioned to them; and after a cause of action has thus accrued in favor of the carrier it is not affected by a subsequent attempt of the exchange to rescind its apportionment of demurrage charges among the members.[67] Both consignor and consignee may be joined as parties defendant where they have a common interest or are jointly liable.[68]

The period of limitations prescribed by the Interstate Commerce Act for actions to recover "charges or any part thereof," is applicable to a carrier's action to recover demurrage charges, and the same must be brought within the prescribed time after the cause of action accrues,[69] unless the parties have properly extended the time by agreement.[70]

A state court has no jurisdiction to pass on a claim for demurrage, the validity of which rests on an interpretation of interstate tariffs, which is within the exclusive jurisdiction of the federal courts and the interstate commerce commission.[71]

For the most part, the usual rules and those prevailing with respect to actions to recover charges generally, see supra § 318, are determinative of questions relating to the form and sufficiency of the pleadings,[72] such as a petition, declaration, or statement of claim,[73] or an affidavit of defense;[74] ques-

61. U S—Norfolk & W. Ry. Co. v Emmons Coal Mining Co, D.C.Pa., 287 F 168

62. Miss.—Yazoo, etc., R. Co v. Searles, 37 So. 939, 85 Miss 520, 68 L.R.A. 715.
Tenn—Dunlap Lumber Co. v. Nashville, etc, R. Co, 165 S.W 224, 129 Tenn 163
10 C J p 471 note 85

63. Miss.—Yazoo, etc, R. Co. v. Searles, 37 So 939, 85 Miss. 520, 68 L.R A 715
10 C J p 471 note 81.

64. U S—Pennsylvania R. Co. v Susquehanna Collieries Co, D C Ohio, 23 F.2d 499.

65. W Va—Davis v Lawrence Oil & Gas Co., 117 S E 692, 94 W Va. 73, 30 A.L R. 163.

66. Mich—Detroit, G H & M. Ry. Co v. Owosso Sugar Co, 159 N. W 378, 192 Mich. 533.

67. Va—Smokeless Fuel Co. v. Chesapeake & O Ry. Co, 128 S E. 624, 142 Va. 355.

68. La—Morgan's Louisiana & Texas R R & S. S Co v Godchaux Sugars, Inc., 3 La App 236

69. Pa—Philadelphia, B & W. R Co. v. Quaker City Flour Mills Co., 127 A 845, 282 Pa. 362.

Operation of statute on preexisting causes of action

As Transportation Act, 49 U S.C.A. § 16 (3), requiring that "all actions" for carriers' charges be prosecuted within three years "from the time the cause of action accrues," specifies no time in future when it is to be operative, it affects all causes of action from date of enactment and gives causes already accrued full three years from passage, if not barred in less time by state statute in effect when cause accrued, although cause arose more than three years before passage of federal act.—Philadelphia, B. & W R. Co. v. Quaker City Flour Mills Co, 127 A. 845, 282 Pa 362

70. U S.—Pennsylvania R. Co. v. Susquehanna Collieries Co, D.C Ohio, 23 F.2d 499.

71. Ohio—Hines v Anthony Carlin Co, 23 Ohio N.P.,N S., 457.

72. U S.—Davis v Smutzinger, C C A Pa. 281 F. 640

73. **Petition, declaration, or statement held sufficient**

(1) A declaration alleging that plaintiff and defendant were parties to a contract of shipment over plaintiff's road and that since the demurrage rule was adopted it had formed part of the contract of shipment, sufficiently alleges an implied contract to pay demurrage.—Pennsylvania R Co. v. Midvale Steel Co, 51 A. 313, 201 Pa. 624, 88 Am S.R 836.

(2) As a lien for demurrage exists independently of contract, in those jurisdictions where such a lien is recognized, see supra § 346, it is not necessary to allege or to prove a special contract with reference thereto.—Pittsburgh, etc, R Co. v H L. Mooar Lumber Co, 27 Ohio Cir Ct. 588.

Petition, declaration, or statement held insufficient

(1) In an action for demurrage, where it did not appear in the statement of the claim that carrier notified shipper of consignee's refusal, as required by the demurrage rules, the statement of claim was insufficient—Davis v. Smutzinger, C C.A. Pa., 281 F 640

(2) Averment that demurrage was for detention of car on interchange tracks will not support charge for time between arrival of car and placement.—Pennsylvania R Co v. Coles, 87 Pa.Super. 432.

(3) Carrier has been held not entitled to recover demurrage, where number of cars held at receiving point, because consignee's track was filled, was not shown—Hill County v. St. Louis Southwestern Ry. Co., Tex Civ.App., 31 S W 2d 868

74. **Affidavit of defense held sufficient**

(1) Where the action is based on a rule of the carrier's own making,

tions relating to presumptions and burden of proof,[75] and the admissibility[76] and weight and sufficiency of evidence;[77] and matters pertaining to

an affidavit of defense specifically denying the existence of the rule is sufficient to prevent judgment for want of a sufficient affidavit of defense—Pennsylvania Co. v Marquis Limestone, etc, Co., 31 Pa Super. 198

(2) So an affidavit of defense alleging that defendant was not in default as respects the detention of any of the cars, that he wished to unload them within the free time allowed, but was prevented from doing so by the railroad company, stating the causes which brought about such prevention, is sufficient.—Pennsylvania R. Co v. Keally, 81 A. 646, 232 Pa. 567.

Affidavit of defense held insufficient

(1) In an action to recover demurrage charges on an interstate commerce shipment, where the statement sets forth that plaintiff received for shipment certain cars of coal from consignor, which consignee refused to accept, the consignor is liable for the demurrage charges, and an affidavit of defense is insufficient which admits that the cars were shipped at the order of defendants and does not specifically deny they were the shippers of the coal.—Pennsylvania R Co v. Whitney & Kemmerer, 73 Pa.Super 588.

(2) Furthermore, the fact that coal was shipped by another company at the order of the defendants did not constitute a defense, where the affidavit admitted that defendants had ordered the coal company to make the shipment, as that would confer upon that company authority to name defendants as consignors, or if the coal company had made the shipment in its own name, it was the agent of the defendants, and the latter were undisclosed consignors, and consequently liable for the demurrage which accrued when the consignee refused to accept the shipment.—Pennsylvania R. Co. v. Whitney & Kemmerer, supra.

75. Inference of owner's liability

Where a builder arranged with the carrier to store steel until used, the owner, in seeking to avoid liability for storage charge, was bound to show that by its contract with the builder he was ultimately liable for such charges, and if he does not the inference arises that he was ultimately liable—In re Arlington Hotel Co, 98 A. 186, 11 Del Ch. 137

Burden of proof

(1) Where a carrier under a rule entitling it to demurrage on cars of coal held at a certain harbor at the terminus of its line "or intermediate storage yards for transshipment," sues for demurrage on cars consigned to such place, but held in transit at storage yards fourteen miles therefrom, it must plead and prove such rule, and that consignee did not have facilities at the dock to receive the freight during the time for which demurrage was claimed—Bessemer & L E R Co. v Ford Collieries Co, 116 A 802, 273 Pa 166.

(2) A party relying on an exception to make out his defense, such as the fact that a car on a private track is not subject to the demurrage rules of the carrier, has the burden of alleging and proving facts necessary to bring him within the exception—Davis v. Steele, 147 N E 632, 83 Ind App 300, denying petition 146 N.E 425, 83 Ind.App 300

(3) Where the carrier contracted with the consignee to store certain steel, and sought to hold the owner liable for the charges, it had the burden of showing that the consignee acted as the owner's agent in the contract—In re Arlington Hotel Co, 98 A. 186, 11 Del Ch 137.

(4) A carrier may make a prima facie case for the recovery of demurrage charges, by showing a delay in unloading after the lapse of the freetime period—Garrison Coal Co. v. Hines, 247 P 62, 118 Okl 251, 46 A.L.R. 1151.

(5) However, the consignee may make out a prima facie defense by showing displacement of the cars during such time and then the burden is on the carrier to show that the displacement of cars resulted from reasonable conduct—Garrison Coal Co. v. Hines, supra.

76. Evidence held admissible

(1) In an action to recover demurrage charges on an interstate shipment, the court may properly permit the introduction in evidence of a state law providing for the sale of goods for charges.—Central R. Co of N. J. v. Schick, C C.A Pa, 38 F 2d 968.

(2) Testimony by agent that he mailed notices that certain cars were held for demurrage has been held admissible, although agent's notice was based on information received from other sources—Hill County v. St. Louis Southwestern Ry. Co., Tex. Civ App., 31 S W 2d 868

(3) In action by director general of railways to recover demurrage charge, it was held error to exclude testimony undertaking to show period of time cars were interfered with by carrier through switching within forty-eight hours' free time for unloading shipment—Garrison Coal Co. v. Hines, 247 P. 62, 118 Okl. 251, 46 A.L.R. 1151.

(4) A person suing for a carrier's unreasonable detention of a private car is entitled to introduce evidence as to the reasonable rental value of the car—Gustafson v. Michigan Cent. R Co, 218 Ill App. 402, affirmed 129 N E. 516, 296 Ill 41.

Evidence held inadmissible

(1) Schedule of demurrage charges not authorized by state public service commission was properly rejected in railway suit against shipper for demurrage on intra-state shipment.—Seaboard Air Line Ry. Co. v Trask, 136 S.E. 106, 36 Ga. App. 236.

(2) Testimony that carrier did not place cars at places convenient for unloading was inadmissible in suit for demurrage, where no such defense was pleaded.—Kansas City Southern Ry. v. Baker Gasoline Co., 127 So 442, 13 La App 106.

(3) Testimony as to agreement by consignee's employee to pay demurrage charges claimed prior to time car was delivered to consignee—A M. Lewin Lumber Co. v Louisville & N. Ry Co., 19 Ohio App 152

77. Ill—Grand Trunk Western Ry. Co. v. Hales & Hunter Co., 233 Ill. App 109—Gustafson v. Michigan Cent. R. Co, 218 Ill App. 402, affirmed 129 N E. 516, 296 Ill. 41. See Chicago & A R. Co. v. Woolner Distilling Co., 196 Ill.App. 412. 10 C J p 471 note 94

Evidence held sufficient

(1) To go to the jury.—Norfolk & S. R. Co v Albemarle Fertilizer Co., 124 S E 127, 188 N C 137.

(2) To show that railroad to which cars had been delivered under an agreement was either the agent or part of the plant equipment of defendant steel company — Pittsburgh & L. E R Co. v Clinton Iron & Steel Co, 101 A. 1048, 258 Pa. 338

(3) To show that scrap iron was delivered in railroad cars at "ship-side."—International-Great Northern R. Co. v. Singer Iron & Steel Co, Tex.Civ.App, 96 S.W 2d 1003.

(4) To show that ten days was a reasonable time for unloading and storing coal.—Waters v. Becker, 186 N.W. 167, 175 Wis 621.

(5) To show that warehouseman received notice of arrival of cars as required by tariffs—Southern Pac. Co v Grangers' Business Ass'n, 1 P 2d 477, 115 Cal App. 256

(6) To support finding that cars were held in order to permit railroad to determine applicable tariff rates.—Pacific Electric Ry. Co v Petroleum Midway Co., 282 P. 402, 101 Cal.App. 715.

the trial.[78] The reasonableness or correctness of the charges claimed cannot be passed on where such issue or question has not been raised by the pleadings or evidence,[79] nor can the reasonableness of the demurrage rules be submitted to the jury in the absence of evidence thereon,[80] and a shipper sued on a check given by him for demurrage charges which he considered illegal in order to obtain a release of the cars, and upon which he subsequently stopped payment, is estopped to question the validity of the demurrage charges in the absence of a showing of fraud or concealment of material facts.[81]

Amount of recovery and interest thereon. Where there are several possible rules under which the amount of the demurrage charges might be computed, the carrier cannot be compelled to elect the rule of computation to be applied, but it is entitled to have the rule applied which fits the facts.[82] Interest has been held allowable on the theory that one of the purposes of demurrage charges is to afford compensation to the carrier.[83]

Set-off and counterclaim. In accordance with the general rule stated in § 318 e, supra, a defendant sued for demurrage charges has been held to have the right, under general statutes relating to set-offs and counterclaims, to assert a set-off or counterclaim based on a claim for damages for which the carrier is liable;[84] and in an action for demurrage charges imposed under a rule of the carrier, independently of statute, defendants may set up as a counterclaim that the delay in unloading the cars was due to the failure of plaintiff to furnish them sufficient cars in which to ship their grain, and that, for that reason, their elevator became filled and they were unable to unload the grain shipped to them.[85] In a number of cases, however, the right to assert a set-off or counterclaim has been denied, either because of the minority view, now discredited by the United States supreme court, see supra § 318 e, that to permit the same would be to violate state or federal statutes against discrimination and

(7) To support finding that the consignee did not refuse to accept delivery on other than a particular track—Wooley v. Chicago, etc, R Co, 136 N.W. 616, 150 Wis. 183

(8) To sustain finding that track on which cars were delivered was "industrial track," rendering notification to consignee unnecessary to recover demurrage. — Kansas City Southern Ry. v. Baker Gasoline Co., 127 So 442, 13 La App. 106.

Evidence held insufficient

(1) To establish charges authorized by state public service commission.—Seaboard Air Line Ry. Co v Trask, 136 S E 106, 36 Ga App. 236

(2) To excuse unloading delay of approximately a month under rule extending time for bad weather.—Davis v. Steele, 146 N E 425, 83 Ind App. 300, petition denied 147 N E 632, 83 Ind App. 300

(3) To show that demurrage commenced before expiration of free time.—Southern Pac. Co. v. Grangers' Business Ass'n, 1 P.2d 477, 115 Cal App. 256.

78. Instructions

In action by railroad's receivers to recover against drawer of check given in payment of demurrage charges of freight delivered to drawer, instructions that if check was given to obtain merchandise, and if payment on check was thereafter stopped, and if railroad gave sufficient notice of arrival, drawer was liable, were proper.—Suffolk Fertilizer Co. v. Powell, 180 S E. 149, 164 Va. 425.

Nonsuit

Railway suing for demurrage charges on intra-state shipment was properly nonsuited, in absence of schedule authorized by state public service commission.—Seaboard Air Line Ry Co v. Trask, 136 S E. 106, 36 Ga App. 236.

Questions of law and fact

(1) Questions of law are for the court.—Garrison Coal Co. v. Hines, 247 P. 62, 118 Okl. 251, 46 A L R 1151.

(2) On the other hand, questions of fact are for the jury.

Pa.—Davis v. Carroll-Porter Boiler & Tank Co., 119 A 742, 276 Pa. 71 —Long Island R. Co v. Keystone Iron & Metal Co, 5 Pa Dist & Co. 257.

Va.—Smokeless Fuel Co v Chesapeake & O. Ry. Co., 140 S E 823, 149 Va 13.

(3) And the same is true of mixed questions of law and fact.—Garrison Coal Co v. Hines, supra.

(4) The question of whether the car was delivered at a place reasonably accessible for unloading is for the jury—Hines v. Thomasville Light & Power Co, 90 So. 316, 206 Ala. 420.

(5) In an action for demurrage charges on three cars of lumber tendered by defendant to plaintiff, but refused by plaintiff because of a war department embargo on the shipment, the right of plaintiff to recover demurrage charges, resisted on the ground that defendant's notice to plaintiff's agent of its refusal to unload the cars on the ground imposed a duty on plaintiff to minimize its loss by itself having the cars unloaded, was a jury question, there being evidence that defendant would not allow plaintiff's agent to go on the premises for the purpose of unloading the cars—Davis v Hilton Lumber Co., 117 S E. 50, 185 N.C 227.

79. Pa.—Pittsburgh & L. E. R. Co. v. Clinton Iron & Steel Co, 101 A. 1048, 258 Pa. 338.
10 C.J. p 471 note 93.

80. Pa.—Pennsylvania R. Co. v. Joseph Furnace, etc., Co., 93 A. 22, 247 Pa 99

81. Va.—Suffolk Fertilizer Co. v. Powell, 180 S.E. 149, 164 Va. 425

82. Mich.—Grand Trunk Western R Co v. Mount Clemens Sugar Co., 269 N.W. 208, 277 Mich. 366.

83. La.—City of New Orleans, by and through Public Belt Railroad Commission, v New Orleans Coal & Bisso Towboat Co, 124 So 693, 12 La.App. 124, transferred 123 So. 724, 168 La 1093

84. Ind.—Cleveland, C, C & St. L Ry Co v. Partlow, 123 N E 838, 70 Ind.App. 616.

Reconsignee's claim for delay

One to whom coal in transit was reconsigned at consignee's request must be treated as consignee, in whom title presumptively vests, and hence entitled, in action against him for demurrage, to counterclaim for damages for failure to transport with promptness required by Burns St.Annot.1914 § 5205.—Cleveland, C., C & St L. Ry. Co v. Partlow, 123 N E. 838, 70 Ind App 616.

85. Ky.—Louisville, etc., R. Co v. Waller, 159 S.W. 590, 154 Ky. 811.

rebates,[86] because the claims were not mutual due to the fact that the claim for demurrage was founded on statute while the set-off was based on the carrier's breach of its common-law duties,[87] or because the contract on which the defendant's claim was founded was illegal and void.[88]

Overcharges. A person who has been charged demurrage in excess of that to which the carrier is lawfully entitled has a right to bring an action for the excess[89] against the carrier which has collected the same,[90] and such an action is governed by the rules discussed in § 323 supra, which prevail with respect to actions to recover overcharges generally.[91]

T. DISCRIMINATION

1. In General

§ 348. Prohibition of Discrimination Generally

Prohibition of discrimination at common law is hereinafter discussed in § 349, and prohibition by constitution or statute is discussed in § 350.

§ 349. At Common Law

At common law it is the duty of a carrier of goods and live stock to serve the public without unreasonable discrimination.

Although, as shown in § 376 infra, there are a few decisions in which it is held or said that a common carrier may discriminate with respect to rates of transportation, at common law the decided weight of authority is that the right to the transportation service of the common carrier is a common right belonging to everyone alike, and that it is the duty of a common carrier to serve the public impartially and without unreasonable discrimination in any respect,[92] and no length of time or habit of deal-

86. Mo—St. Louis-San Francisco Ry. Co v. Morgan, 297 S W 717, 221 Mo.App. 43.

87. U S—Louisville & N. R. Co v. Empire State Chemical Co, C.C.A. Ga, 189 F. 174

88. Mich—Grand Rapids & I. Ry Co. v Cobbs & Mitchell, 168 N W 961, 203 Mich. 133.

89. Miss—Southern Ry Co in Mississippi v Buckeye Cotton Oil Co., 89 So 228, 126 Miss 562

Tex—Davis v. Martin, Civ.App., 287 S W 113.

Lack of protest

Receivers of interstate carload freight could recover improper demurrage charges from railroad, although payments were voluntarily made without protest.—Wilson v. Long Island R. Co, 165 N.Y S. 913, 178 App Div. 799.

90. Ga.—Seaboard Air Line Ry. Co v. Daugherty-McKey & Co., 149 S. E 92, 40 Ga.App. 190.

91. **Who entitled to sue**

Consignor selling at delivered prices may sue carrier for demurrage illegally exacted of purchaser at destination—Seaboard Air Line Ry. Co v. Daugherty-McKey & Co., 149 S E 92, 40 Ga.App 190.

Admissibility of evidence

National car demurrage rules and charges held inadmissible in action by shipper to recover demurrage charges improperly exacted—Davis v Martin, Tex.Civ App., 287 S.W. 113.

Action on reparation order

(1) Under state statutes providing for reparation proceedings before a state commission, a direct review of the commission's order by writ of review, and that the pendency of a writ of review shall not of itself stay or suspend the operation of the order although the court might issue a stay in its discretion, and further providing that, if the carrier does not comply with the order for payment of the overcharge within the time limited in such order, suit may be instituted in any court of competent jurisdiction to recover the same, an independent suit may be instituted in a state court to enforce a reparation order for an excess demurrage charge although a writ for the review of such order is pending if a stay has not been issued.—Tacoma Grain Co v Northern Pac. Ry. Co., 213 P. 22, 123 Wash 664.

(2) In such case the objection that the order of the commission is a judgment which must be enforced in accordance with other statutes relating to the enforcement of judgments cannot be sustained—Tacoma Grain Co. v. Northern Pac. Ry Co, supra.

(3) Nor will the contention be sustained that the review proceedings constitute a further proceeding in the same action which divests any court of jurisdiction to proceed in another action to determine the lawfulness of the order.—Tacoma Grain Co. v. Northern Pac Ry. Co, supra.

92. U S—Michigan Public Utilities Commission v. Duke, Mich, 45 S Ct. 191, 266 U S 570, 69 L.Ed. 445, 36 A.L R 1105

Fla.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.

Ky—Casteel v American Airways, 88 S W 2d 976, 261 Ky 818.

Mo.—McGrew Coal Co. v. Mellon, 287 S W 450, 315 Mo 798, certiorari denied 47 S Ct. 456, 273 U S 752, 71 L Ed 874.

N H—Boston & M R R. v. Great Falls Mfg Co., 111 A. 691, 79 N.H 467

N J—National Radiator Co. v Pennsylvania R. Co., 143 A. 85, 6 N J Misc. 778

N Y.—Burgess Bros Co v Stewart, 184 N Y S 199, 112 Misc 347, affirmed 185 N.Y S. 85, 194 App Div 813

Utah—Jeremy Fuel & Grain Co. v Denver & R G R Co, 207 P 155, 60 Utah 153

10 C J. p 471 note 98, p 472 note 1

Penalties and statutory damages for unjust discrimination see infra §§ 510–512

Corpus Juris text has been cited and the rule as there stated followed in

Fla—State v. Jacksonville Terminal Co, 106 So 576, 584, 90 Fla. 721

Utah.—Jeremy Fuel & Grain Co v Denver & R. G R. Co, 207 P. 155, 157, 60 Utah 153.

Affirmative duty

Common carriers have an affirmative duty to perform impartial service, and cannot lawfully discriminate against and subject a shipper to undue prejudice—Burgess Bros. Co v Stewart, 184 N.Y.S. 199, 112 Misc 347, affirmed 185 N Y.S 85, 194 App Div 913.

Discrimination by agents

A common carrier is bound to see that no discrimination is practiced by any of its employees or agents.

ing[93] or contract or practice to the contrary[94] will discharge a carrier's duty to serve the public without discrimination. The failure to perform such duty is a tort.[95]

§ 350. By Constitution or Statute

Under state and federal statutes and some state constitutions, it is the duty of a carrier of goods and live stock to serve the public without unreasonable discrimination.

Under the Interstate Commerce Act and amendments thereto, unjust discrimination[96] of every form[97] is prohibited, regardless of which side profits.[98] The primary purpose of this legislation is to secure equality of treatment and prevent unjust favoritism and discrimination,[99] and the actual situation underlying the shipment, rather than recitals in the shipping documents, control its application.[1]

State constitutions and statutes. It is clearly

—Spencer Kellogg & Sons v. Delaware, L & W R Co, 195 N Y S 69, 119 Misc. 174, affirmed 197 N Y. S 380, 204 App Div 243.

Inequalities in carrier rates are never sustained except for compelling reasons. — Norfolk Tidewater Terminals v. Norfolk & P Belt Line R Co., Va., 195 S E 684.

Under illegal embargo

That a railroad embargo was illegal does not make discriminatory transportation under it legal—U. S v Lehigh Valley Ry. Co, D C N Y, 254 F 332

93. Ky.—Crescent Coal Co. v. Louisville etc., R. Co., 135 S W. 768, 143 Ky 73
10 C.J p 472 note 99.

94. Fla—State v. Jacksonville Terminal Co, 106 So. 576, 90 Fla. 721

95. N.Y.—Burgess Bros. Co v. Stewart, 184 N Y.S 199, 112 Misc. 347, affirmed 185 N Y.S. 85, 194 App Div. 913.

96. Miss—Pitman v Yazoo & M V. R. Co, 158 So 547, 171 Miss 799.
Mo.—Foster Lumber Co v Atchison, T & S F. Ry. Co, 194 S W 281, 270 Mo. 629, L R.A.1918A 768
Tex.—Shroyer v. Chicago, R. I & G. Ry. Co, 222 S W. 1095, 111 Tex 24, reversing Chicago, R. I. & G. Ry. Co. v. Shroyer, Civ App, 197 S.W 773, and modified on other grounds Shroyer v. Chicago, R I & G Ry Co, 226 S W 140, 111 Tex 24—Neubert v. Chicago, R. I & G. Ry. Co, 296 S W 1090, 116 Tex. 644, 53 A L R. 1224—Houston & T C. R Co v. Johnson, Com. App., 41 S W 2d 14, 83 A L R 241, reversing, Civ.App, 1 S W 2d 706
Wash—State v Public Service Commission, 192 P. 1075, 112 Wash. 520
Wis—Chicago & N W Ry Co. v. J. I Case Plow Works, 130 N W 846, 173 Wis 237
10 C J. p 472 note 2.

Second Cumming Amendment to the Interstate Commerce Act passed Aug. 9, 1916, U S Comp St. § 8604a, authorizing express companies to limit their liability for the loss of property carried on the basis of its declared or agreed value, does not conflict with the Interstate Commerce Act, U S Comp St. §§ 8564, 8565, prohibiting preferences and unjust discrimination—Lindenburg v. American Railway Express Co, 106 S.E. 884, 88 W.Va. 439, certiorari granted American Ry. Express Co. v. Lindenburg, 42 S Ct 52, 257 U.S. 627, 66 L.Ed. 404, and reversed on other grounds 43 S.Ct. 206, 260 U.S. 584, 67 L.Ed. 414.

Contracts containing unlawful preferences and discriminations are void—Fort Worth & R. G. Ry. Co v Burns, Tex Civ.App., 242 S.W. 295

97. U.S—Chesapeake & O Ry Co. v U. S, D.C.W.Va., 11 F Supp. 588, affirmed 56 S.Ct 164, 296 U S. 187, 80 L Ed. 147.

98. U.S—China Fire Ins. Co. v. Davis, C.C A.N.Y., 50 F 2d 389, 76 A L R 1259, certiorari denied Mellon v China Fire Ins Co., 52 S. Ct 36, 284 U.S. 658, 76 L.Ed 558.

99. U.S—Texas & P. Ry. Co. v U. S., Tex., 53 S.Ct. 768, 289 U S 627, 77 L Ed. 1410—Chesapeake & O Ry Co. v. U S, D.C W Va., 11 F Supp. 588, affirmed 56 S Ct. 164, 296 U.S 187, 80 L.Ed. 147.
N.Y—Rothschild v American Ry Express Co, 234 N.Y S. 454, 226 App Div 187
Tex—Fort Worth & R G Ry. Co. v. Burns, Civ App., 242 S W 295
Wash—State v Public Service Commission, 192 P. 1075, 112 Wash 520
W Va.—William F. Mosser Co v. Payne, 114 S.E. 365, 92 W Va 41
10 C J p 472 note 2 [a], p 475 note 29 [a]

Purpose of Act

(1) "The purpose of sections 2, 3, and 4, 49 U S C A §§ 2–4, as exhibited by committee reports and explained by those in charge of the bill in Congress, was to prevent unjust discrimination resulting from existing practices Similar commodities were, without reason or excuse, carried at different rates Shippers similarly situated were put on unequal terms Producers and consumers at points of origin and destination were prejudiced by unequal treatment in the matter of rates or services. Obviously localities of origin or destination might also be prejudiced by undue discrimination One of the most prevalent and reprehensible practices at which the act was aimed was the charging of a less or an equal rate for a longer haul upon the same line or route. The act was passed for the protection of those who pay or bear the rates The standards it establishes are transportation standards, not criteria of general welfare."—Texas & P. Ry. Co. v. U. S., Tex., 53 S.Ct. 768, 772, 289 U.S. 627, 77 L Ed. 1410.

(2) "Besides, the purpose of the act was not merely to compel honest competition among railroads engaged in interstate commerce, but to prevent unjust discrimination among shippers, to prevent one customer from obtaining in freight rates on interstate shipments an undue advantage of another customer; to promote, as far as the carriers affected the situation, free competition and equality of opportunities among the shippers engaged in maintaining industries which have need of the carriers' lines. Congress in passing the act doubtless had in mind the many instances within the common knowledge where large dealers, by reason of rebates and drawbacks and the advantages derived from them, were enabled to crush out smaller competitors who had no such advantage"—Foster Lumber Co v Atchison, T & S. F. Ry Co, 194 S W. 281, 285, 270 Mo. 629, L R.A.1918A 768.

Purpose of Elkins Act was to eliminate every form of discrimination, favoritism, and inequality and to prohibit all rebates, concessions, or discrimination with respect to railroad transportation—U S. v. Altman, D C N Y., 8 F Supp. 880.

"In order to prevent rebates and discrimination, the Act to Regulate Commerce, U S.Comp St. § 8563 et seq., and the tariffs, rules, and regulations promulgated in pursuance thereof, constitute the contract of affreightment between the carrier and shipper, which can neither be altered or amended by agreement or conduct of the parties, and has been so imbedded in the law of interstate commerce as never to be questioned."—Norfolk & W. Ry. Co. v. Nottingham & Wrenn, 124 S.E. 398, 400, 139 Va. 748.

1. U.S.—Merchants' Warehouse Co.

within the legislative power of a state to enact regulations by which unjust discriminations by common carriers may be prevented and redressed,[2] and in many jurisdictions statutes or constitutional provisions exist prohibiting unjust discrimination by common carriers.[3] Such statutes, to be valid, must, of course, be certain,[4] and must not transcend the guaranties laid down by the constitution of the United States.[5]

Where such statutes are penal in character they must be strictly construed,[6] but they will always be construed according to their true intent and meaning.[7] Legislation of this character is, of course, applicable to intra-state shipments only, whether in terms so limited or not,[8] and conversely, federal legislation has no application except to shipments not intra-state. Some of such provisions supersede the common law,[9] while others are merely declaratory thereof.[10]

Where a state delegates its power to prohibit unjust discrimination to a commission, it may promulgate rules requiring carriers to afford all persons equal facilities in transportation without unjust discrimination.[11] Under some statutes, a street railway engaged in the carrying of light freight in addition to passengers is subject to regulation by such a commission.[12] The laws creating such a commission and prescribing its powers and jurisdiction are to be liberally construed to effect the purposes for which they were created.[13]

§ 351. Nature of Discrimination Prohibited; Unjust Discrimination

Generally, only unjust or unreasonable discrimination is prohibited by the common law and state and federal legislation.

At common law only unjust discrimination by carriers is condemned,[14] and the constitutional and

v. U S., D C Pa., 44 F.2d 379, affirmed 51 S Ct 505, 283 U.S 501, 75 L Ed. 1227—Terminal Warehouse Co. of Baltimore City v. U. S, D C Md, 31 F.2d 951.

2. Fla—State v. Burr, 84 So. 61, 79 Fla. 290.
10 C J. p 53 note 91, p 473 note 3.

Duty to serve public

A common carrier by organizing under a general railroad act of a particular state, assumes a duty to serve the public without discrimination and subject to the full regulatory power vested in the general assembly.—Kenna v Calumet, H. & S. E R Co, 206 Ill.App. 17, affirmed 120 N E. 259, 284 Ill. 301.

3. Fla—State v Jacksonville Terminal Co., 106 So 576, 90 Fla. 721.
N H.—Milford Quarry & Construction Co v. Boston & M. R R., 151 A. 336, 84 N H 407—Boston & M R R v. Great Falls Mfg Co, 111 A. 691, 79 N H. 467.
N.J.—National Radiator Co. v Pennsylvania R. Co, 143 A. 85, 6 N J.Misc. 778
Ohio.—Johnson Coal Mining Co v Hocking Valley R. Co., 1 Ohio N P,N.S., 385
10 C.J. p 472 note 2.

Corpus Juris text is cited in State v. Jacksonville Terminal Co., 106 So. 576, 584, 90 Fla 721.

Idea prominent in Texas legislation as to receiving and transporting freight is equality, and carriers are not permitted to exercise their charter rights so as to benefit an individual of the community to detriment of another—Quanah, A. & P. Ry. Co v. Moore, Tex Civ App, 189 S.W 322, dismissed for want of jurisdiction.

Elementary principle underlying Florida system of public regulation of intra-state carriers is uniformity of treatment and elimination of unjust discriminations—Louisville & N. R Co v Speed-Parker, Inc., 137 So 724, 103 Fla 439.

Preëxisting contracts

A statute making discrimination by common carriers unlawful, did not exempt from its operation special contracts existing at the time of its enactment, which were not common to all shippers for a like kind of traffic—Grand Rapids & I Ry. Co. v. Cobbs & Mitchell, 168 N. W. 961, 203 Mich. 133

4. Ky—Com. v. Louisville, etc., R. Co, 46 S.W. 700, 20 Ky.L. 491.
10 C.J. p 473 note 5.

5. Tex.—Texoma Natural Gas Co v. Railroad Commission of Texas, D.C Tex, 59 F.2d 750

Private pipe line carriers

An act requiring both common and private pipe line carriers to purchase gas without discrimination between producers was held to be unconstitutional under the constitution of the United States.—Texoma Natural Gas Co. v. Railroad Commission of Texas, D.C.Tex., 59 F.2d 750.

6. Mo.—Tucker v. St. Louis-San Francisco Ry Co, 250 S W 390, 298 Mo 51, affirming, App., 233 S. W 512—Alexander v. Chicago, M & St. P. R Co., 221 S W. 712, 282 Mo. 236, 11 A.L.R 867.

7. Mo—Alexander v. Chicago, M. & St. P. R. Co, supra.

8. Mo—Fairley v. Chicago, R. I. & P. Ry Co, App., 32 S.W 2d 109
10 C.J. p 473 note 6.

Shipments of live stock

Statute requiring that live stock be shipped speedily without discrimination applies only to intra-state shipments—Fairley v. Chicago, R. I. & P. Ry. Co., Mo App, 32 S.W.2d 109.

9. Ill—Medusa Portland Cement Co v Illinois Cent. R. Co, 5 N. E 2d 782, 287 Ill App 549—Terminal R Ass'n of St. Louis v Public Utilities Commission, 136 N E 797, 304 Ill 312
Mont—Doney v. Northern Pac. Ry. Co, 199 P. 432, 60 Mont 209.

10. Mo—Canary Taxicab Co. v. Terminal Ry. Ass'n of St. Louis, 294 S W. 88, 316 Mo 709.
N.H.—Milford Quarry & Construction Co v Boston & M R. R., 151 A 336, 84 N H. 407.
Ohio—Johnson Coal Mining Co. v. Hocking Valley R. Co., 1 Ohio N. P,N.S, 385.
10 C.J. p 472 note 98 [d].

11. Ga—Augusta Brokerage Co. v. Central of Georgia R. Co., 48 S. E. 714, 121 Ga 48

12. Pa.—Lehigh Valley Transit Co. v. Public Service Commission, 78 Pa Super. 105.

13. Ark—Missouri Pac. R. Co. v Whelen Springs Gravel Co., 49 S W 2d 374, 185 Ark. 669, certiorari denied 53 S Ct. 87, 287 U.S. 638, 77 L Ed. 553.

14. Mo.—Brunswig v. Bush, 221 S W 759, App, certiorari dismissed Bush v Brunswig, 41 S Ct. 9, 254 U S. 660, 65 L Ed. 462.
10 C.J p 473 note 14.

Corpus Juris text has been cited with approval in Brunswig v. Bush, Mo.App., 221 S.W. 759, 761, certiorari dismissed 41 S.Ct. 9, 254 U.S. 660, 65 L.Ed. 462.

statutory provisions of the state and federal governments prohibiting discrimination are very generally held to prohibit only undue, unreasonable, or unjust discrimination.[15] The fact that the statute omits the word "unjust" makes no difference; the word "discrimination" implies an unjust or unfair distinction.[16] To constitute actionable discrimination, the law contemplates an undue preference, or some undue, unjust, or unreasonable discrimination.[17] There can be no objectionable discrimination between those whose situations and relations to the carrier with reference to the commodity to be shipped are so different as to justify or demand a difference in treatment.[18] The full measure of the duty of the carrier is to furnish equal facilities to all persons similarly situated.[19] Application of these rules to particular classes of cases will be subsequently discussed in §§ 364-385.

§ 352. Unjust Discrimination as Question of Law or Fact

Generally, the question of whether there is unjust discrimination is one of fact.

Usually, the question of whether there is an unjust discrimination is a question of fact for the jury, or for the court acting in its stead,[20] but when the facts are ascertained the question of unreasonable discrimination is one for the court.[21] Where it is difficult to point out clearly the circumstances or conditions which produce the dissimilarity, the doubt should be resolved in favor of the object of the law, and the circumstances and conditions should be taken as substantially similar.[22]

Where the matter is before the interstate commerce commission for decision, the determination is also to be made, as a question of fact, on the matters proved in the particular case.[23] The com-

15. U.S.—U. S v. Illinois Cent. R. Co., Miss, 44 S.Ct 189, 263 U.S. 515, 68 L.Ed. 417—Nashville, C. & St L. Ry. v. State of Tennessee, Tenn., 43 S.Ct. 583, 262 U.S 318, 67 L.Ed. 999, reversing, D.C., State of Tennessee v. U. S., 284 F. 371—Archibald McNeil & Sons Co, of New York v Western Maryland Ry. Co., D.C.Pa., 42 F.2d 669, affirmed, C.C.A., 51 F.2d 1073, certiorari denied 52 S.Ct 41, 284 U.S 665, 76 L.Ed. 563—Berwind-White Coal-Mining Co. v. U. S., D.C.Pa., 9 F.2d 429, reversed on other grounds, Assigned Car Cases, 47 S Ct 727, 274 U.S. 564, 71 L.Ed. 1204.

Ill.—Illinois Cent. R Co. v. Illinois Commerce Commission, 173 N.E 804, 342 Ill 11—Atchison, T. & S. F Ry. Co. v. Illinois Commerce Commission, 166 N.E 466, 335 Ill. 70.

Me.—Willband v. Knox County Grain Co., 145 A. 405, 128 Me. 62

Neb.—State v. Chicago, B. & Q. R. Co., 199 N.W. 534, 112 Neb. 248.

Ohio.—Bennett v. Pennsylvania Co., 25 Ohio Cir.Ct.,N.S., 335, 27 Ohio Cir.Dec. 413, reversing 17 Ohio N.P.,N.S., 42.

Tex.—Dallas Power & Light Co. v. Carrington, Civ.App., 245 S.W. 1046.

Wash.—State v. Public Service Commission, 192 P. 1075, 112 Wash 520

W.Va.—Baltimore & O. R Co v. Public Service Commission, 94 S.E 545, 81 W.Va 457, L.R.A.1918D 268

10 C.J. p 473 note 15.

"Undue" discrimination, as used in a statute, has been defined as "excessive, inordinate, and disproportionate" "Unreasonable" is used in such statute in the sense of not having any sound basis or justification in reason.—Houston Chamber of Commerce v. Railroad Commission of Texas, Civ.App., 19 S.W.2d 583, affirmed Railroad Commission of Texas v Houston Chamber of Commerce, 78 S.W.2d 591, 124 Tex 375

Unjust discrimination forbidden by federal statutes is different treatment of persons of the same class, under like or similar conditions—Lindenburg v American Ry. Express Co., 106 S.E. 884, 88 W.Va. 439, certiorari granted American Ry. Express Co v. Lindenburg, 42 S.Ct 52, and reversed on other grounds 43 S.Ct. 206, 260 U.S. 584, 67 L.Ed 414.

Existing contracts

Discrimination by a common carrier may be as unjust and unfair, when provided for in a contract existing at the time a law prohibiting such discrimination went into effect, as though indulged in without prearrangement, and, in the absence of a provision to the contrary, such contracts are not exempt from the operation of an act of this character—Grand Rapids & I. Ry. Co. v. Cobbs & Mitchell, 168 N.W. 961, 203 Mich. 133.

16. U.S.—U. S v. Wells-Fargo Express Co., C.C.Ill., 161 F 606, affirmed 29 S.Ct. 315, 212 U.S. 522, 53 L.Ed. 635.

10 C.J. p 474 note 16.

17. Ark.—Choctaw, etc., R. Co. v. State, 84 S.W. 502, 92 S.W 26, 73 Ark 373

Mo.—Wynn v. Wabash R Co, 86 S.W. 562, 111 Mo.App. 642.

18. U.S.—U. S. v. Oregon R., etc., Co, C.C.Or., 159 F 975.

Ark.—Choctaw, etc., R. Co. v State, 84 S.W. 502, 92 S.W. 26, 73 Ark. 373

10 C.J. p 474 note 19.

Under statute

The duty of a common carrier under a statute prohibiting any "undue or unreasonable preference" to any shipper or locality or to any particular description of traffic, applies only to circumstances or conditions substantially similar.—Cleveland Provision Co v. Public Utilities Commission, 135 N.E 612, 104 Ohio St. 253, 23 A.L.R. 404.

19. Ark.—St. Louis, etc., R. Co. v. Dixie Cotton Oil Co., 165 S.W. 251, 112 Ark 147.

10 C.J. p 474 note 20

20. U.S.—Archibald McNeil & Sons Co. of New York v Western Maryland Ry. Co, D.C.Pa., 42 F.2d 669, affirmed, C.C.A., 51 F.2d 1073, certiorari denied 52 S.Ct. 41, 284 U.S. 665, 76 L.Ed. 563

10 C.J. p 508 note 75.

Circumstances considered

In determining whether a carrier has unjustly discriminated, a court acting in a fact-finding capacity may properly take into consideration, besides the mere differences in charges, various elements, such as the convenience of the public, the fair interest of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company, and the situation and circumstances of the respective customers with reference to each other, as competitive or otherwise—Archibald McNeil & Sons Co. of New York v Western Maryland Ry Co, D.C. Pa, 42 F.2d 669, affirmed, C.C.A., 51 F.2d 1073, certiorari denied 52 S.Ct. 41, 284 U.S. 665, 76 L.Ed 563

21. Mo.—McGrew v. Missouri Pac. R Co., 132 S.W. 1076, 230 Mo. 496.

Pa.—Hoover v. Pennsylvania R. Co, 27 A. 282, 156 Pa. 220, 36 Am.S.R. 43, 22 L.R.A. 263.

22. U.S.—Missouri Pac R. Co. v. Texas, etc., R. Co., C.C.La., 31 F. 862.

23. U.S.—Nashville, C. & St. L. Ry.

mission may conclude that a preference given is not unreasonable, undue, or unjust, where it does not, in fact, result in any prejudice or disadvantage to any other person, locality, commodity, or class of traffic.[24] On the other hand, preferential treatment of a class, ordinarily harmless, may become undue, because under the special circumstances, it results in prejudice or disadvantage to some other person, commodity, or locality, or to interstate commerce.[25]

§ 353. Offer of Discrimination

A mere offer of discrimination is not illegal.

In the absence of a statute to the contrary, the mere making or offering of a discriminating rate, under which it is not shown that any shipment was ever made, constitutes no legal injury to a shipper who is charged a higher rate.[26]

§ 354. Who Amenable to Law against Discrimination

Generally, all common carriers are amenable to the law against unjust discrimination.

As will be seen from the rules already discussed in §§ 349–350, all common carriers whether by land or water are amenable to the law against unjust discrimination. Where two or more carriers owning connecting lines of road voluntarily unite in a joint through tariff, they virtually form for the connected roads a new and independent line, and as such become subject to the law against unreasonable discrimination.[27] An initial carrier which has become a party to a joint through rate for the transportation of property over its own and connecting lines between two points in different states, which rate has been filed and published as required by the act, cannot lawfully transport property between such points at a less and unpublished rate over another route and with different connections.[28] However, a connecting carrier which takes the cars as they are delivered to it by the initial carrier is not liable for a discrimination in favor of shippers of products in tank cars and against shippers of the same products in barrels, which may be practiced by the initial carrier, merely because the connecting carrier has participated in the adoption of a joint through rate for barrel shipments, which is in itself reasonable.[29]

Companies engaged in switching. A railroad company holding itself out to the public as ready to do switching, which requires it to have its own rails and right of way, and to go on the rails and right of way of another company with which it has no express contract relating either to compensation for switching or to track rights, is a common carrier, and as such must switch cars without discrimination against a disfavored shipper.[30]

§ 355. In Whose Favor Law against Discrimination Operative

Although particular statutes may be applicable only to particular persons or facilities, ordinarily the rule against unjust discrimination is one of general application.

Common carriers owe an affirmative duty to perform impartial service and it is unlawful to subject any individual to undue prejudice;[31] but statutes and constitutional provisions against discrimination as to particular facilities or services protect only those who have a right to demand and receive such facilities or services from the carrier.[32]

Under the Interstate Commerce Act a carrier cannot discriminate between warehousemen, and a competing warehouse company which is so discriminated against is entitled to complain.[33]

v. State of Tennessee, Tenn., 43 S.Ct. 583, 262 U.S. 318, 67 L.Ed 999, reversing, D.C., State of Tennessee v U. S., 284 F. 371—Manufacturers' Ry. Co v. U. S., Mo., 38 S.Ct. 383, 246 U.S 457, 62 L.Ed 831.

24. U.S.—Nashville, C. & St. L. Ry v. State of Tennessee, supra

25. U.S.—Nashville, C. & St. L. Ry v. State of Tennessee, supra

26. U.S.—Lehigh Valley R. Co. v Rainey, C.C.Pa., 112 F. 487.
10 C.J. p 474 note 22.

27. U.S.—Cincinnati, etc., R. Co v Interstate Commerce Commn., Ga., 16 S.Ct 700, 162 U.S 184, 40 L.Ed. 935, affirming 9 C.C.A. 689, reversing, C.C., 56 F. 925.
10 C.J. p 474 note 25.

28. U.S.—U. S v. Vacuum Oil Co., D.C.N.Y., 153 F 598.

29. U.S.—Penn Refining Co. v. Western New York, etc., R. Co., Pa., 28 S.Ct 268, 208 U.S. 208, 52 L.Ed. 456, affirming 137 F. 343, 70 C.C.A. 23.
10 C.J. p 474 note 27.

30. Kan.—Larabee Flour Mills Co. v. Missouri Pac. R. Co., 88 P. 72, 74 Kan. 808
10 C.J. p 475 note 28.

31. N.Y.—Burgess Bros Co. v. Stewart, 184 N.Y.S. 199, 112 Misc. 347, affirmed 185 N.Y.S. 85, 194 App.Div. 813.

32. Mo.—Canary Taxicab Co. v. Terminal Ry. Ass'n of St Louis, 294 S.W. 88, 316 Mo 709.

Discrimination between individuals
A statute inhibiting discrimination in charges or facilities "between transportation companies and individuals," being penal in character, must be strictly construed, and the quoted section cannot be held to apply in cases of discrimination between individual shippers—Tucker v. St Louis-San Francisco Ry. Co., 250 S.W. 390, 298 Mo. 51, affirming, App., 233 S.W. 512.

Steel for railroad's use
Statute forbidding discrimination by railroads between shippers of freight was inapplicable, where railroad demanded that steel company's steel be tested before it would permit its use in construction of railroad bridge—Texas Steel Co v. Texas & P. Ry. Co., Tex.Civ.App., 62 S.W.2d 670, error refused.

33. U.S.—Terminal Warehouse Co of Baltimore City v. U. S., D.C. Md., 31 F.2d 951.

§ 356. Shippers

The law against discrimination operates in favor of all shippers.

The doctrine of the common law as well as the provisions of statutes against undue preferences are for the benefit of all shippers.[34] On the other hand, the provisions of the Interstate Commerce Act inhibiting undue discrimination are not violated where the persons injured by the carrier's alleged discriminatory acts are not shippers.[35]

§ 357. Connecting Carriers

The rule as to unjust discrimination operates in favor of connecting carriers.

The common-law obligations of a railroad company to a connecting line, as will be hereinafter discussed in § 449, are the same as to reception, transportation, and delivery of freight as those existing between a railroad and an individual shipper; and there must be no discrimination in rates, charges, and facilities in favor of one connecting line or against others; equal rates and facilities for equal service must be given to all,[36] although there are no direct physical connections between the two lines.[37] However, whatever rights or privileges other than those belonging to a natural person are claimed by one railroad company against a connecting company must be found either in the charters of the company or arise from contract.[38] At common law a carrier is not bound to carry except on its own line; if it contracts to go beyond, it may, in the absence of statutory regulation, determine for itself what agencies it will employ,[39] and the Interstate Commerce Act does not take away this right.[40] In consequence a railroad company, by contracting for the shipment and delivery of goods beyond its own terminus over a particular one of its connecting lines, will not be treated as unjustly discriminating against another connecting line, because the first mentioned company refuses to issue through bills of lading for the shipment over the latter of goods consigned to the same point of destination.[41] Also, in the absence of constitutional or statutory provisions to the contrary, the carrier may enter into a contract with one connecting carrier for through transportation, through traffic, through billing, and for the division of through freights, without being obligated to enter into a similar contract with another connecting carrier.[42] A provision in a state constitution which forbids a railroad company to make discrimination in rates is not violated by refusing to give to a connecting road the same arrangements as to through rates which are given to another connecting line, unless the conditions as to the service are substantially alike in both cases.[43]

§ 358. Telegraph Companies

The rule against discrimination operates in favor of telegraph companies.

Where a railroad company is voluntarily transporting and delivering, between stations on its line, employees and freight for an incorporated public telegraph company, and refuses similar service to others without sufficient excuse, it is guilty of unjust discrimination, and may be compelled to perform such service for a reasonable compensation to another incorporated public telegraph company, although the service rendered is under a contract, where it does not differ from that performed for other shippers, except as to delivery between stations.[44] A contract to perform such services for one telegraph company and not to perform similar services for another is against public policy and void.[45]

§ 359. Express Companies

In the absence of a statute to the contrary, railroad companies generally are not obliged to furnish an express company with facilities for doing an express business on their lines of road, such as they provide for themselves or afford to other express companies.

34. N.J.—National Radiator Co. v. Pennsylvania R. Co., 143 A. 85, 6 N.J Misc 778.
10 C.J. p 475 note 29.

35. Ky.—Indian Refining Co v Kellar, 263 S.W. 9, 203 Ky. 720.

36. U.S.—Louisville, etc., R Co. v. U S, Tenn, 35 S Ct 696, 238 U. S 1, 51 L.Ed. 1177, affirming, D. C, 216 F. 672.
10 C.J. p 476 note 40.
Liability of connecting carriers for unjust discrimination see infra § 401

37. U.S.—Chicago, I. & L. Ry. Co v. U S, Ind, 46 S Ct. 226, 270 U. S. 287, 70 L.Ed. 590.

38. Ky.—Shelbyville R. Co. v. Louisville, etc., R Co, 82 Ky. 541.
10 C J. p 476 note 41.

39. U.S.—Atchison, etc, R. Co. v. Denver, etc, R Co., Colo, 4 S.Ct. 185, 110 U S 667, 28 L Ed 291.
10 C.J. p 476 note 42

40. U.S.—Prescott, etc. R. Co. v. Atchison, etc, R. Co, C.C N Y, 73 F 438—Little Rock, etc, R Co v. St. Louis, etc, R. Co., C.C.Ark., 41 F. 559, appeal dismissed 13 S. Ct. 1049, 149 U.S 779, 37 L Ed 963.

41. Ga.—State v. Wrightsville, etc, R. Co., 30 S.E. 891, 104 Ga. 437.
Traffic arrangements between carriers as affecting connecting carriers see infra § 448.

42. U S.—Gulf, etc, R Co v Miami SS Co, Tex, 86 F. 407, 30 C.C.A. 142.
10 C.J p 476 note 44.

43. U S.—Atchison, etc., R Co v. Denver, etc., R Co., Colo., 4 S. Ct. 185, 110 U S. 667, 28 L.Ed 291.

44. Fla.—State v Atlantic Coast Line R. Co., 40 So 875, 51 Fla 578—State v. Atlantic Coast Line R. Co., 41 So. 529, 51 Fla. 543.

45. La.—Cumberland Tel, etc, Co. v. Morgan's Louisiana, etc., R. Co., 24 So. 803, 51 La.Ann. 29, 72 Am. S.R. 442.

It is generally held, in the absence of statute or usage, that railroad companies are not obliged to furnish an express company with facilities for doing an express business on their lines of road, such as they provide for themselves or afford to another express company under special agreement;[46] that to entitle an express company to facilities for transacting its express business on a railroad a special contract is necessary;[47] and that it is not enough to establish a usage to carry for some express company or to furnish the public in some way with the advantages of an express service over the road.[48] The basis for this rule is that railroad companies are not required by usage or common law to transport the traffic of independent express companies over their lines in the manner in which the traffic is usually carried and handled,[49] and that they perform their whole duty to the public at large and to each individual when they afford the public all reasonable express accommodations.[50] The rule is not affected by a statute making it unlawful for any common carrier to give any unreasonable preference to any particular person, company, or locality, or to any particular description of traffic, or to subject any person, company, or locality, or any particular description of traffic, to any undue disadvantage,[51] nor by a rule of a railroad commission providing that no railroad company shall, by reason of any contract with any express or other company, refuse to act as a common carrier to transport any article proper for transportation by the train for which it is offered.[52] A statute requiring each railroad company to give all persons or companies reasonable and equal terms and facilities for transportation does not preclude a railroad company from carrying on the express business itself to the exclusion of all other parties.[53]

On the other hand, in some jurisdictions, frequently because of statutory provision, railroad companies cannot grant special facilities for transportation to one express company and deny them to another, but must extend equal facilities to all.[54] The validity of such statutes has been upheld.[55] A limitation imposed on the right by some statutes is that an express company requesting the facilities must obligate itself to perform the same services for the carrier that the other express companies to whom the facilities have been extended perform.[56]

§ 360. Discrimination as to Localities

Common carriers must not unjustly discriminate in favor of one locality to the disadvantage of another.

The rule both at common law and under statutes prohibiting unjust discrimination is that common carriers must not unjustly discriminate in favor of the business of one locality or station to the disadvantage of other localities or stations,[57] even though the rate complained of is, if considered by itself, reasonable.[58] However, neither at common law nor under the statutes, state or federal, is the carrier prohibited from giving a preference or advantage, or from discriminating between localities, provided such preference, advantage, or discrimination is not unreasonable,[59] although it is no justification for

46. U.S.—St. Louis, I. M. & S. R. Co. v. Southern Express Co., Ark., 6 S.Ct. 542, 628, 117 U.S. 1, 29 L.Ed. 791, reversing, C.C., Southern Express Co. v. St. Louis & I. M. & S. R. Co., 10 F. 210, 869.
10 C.J. p. 477 note 50.

47. U.S.—Memphis, etc., R. Co. v. Southern Express Co., Ark., 6 S.Ct. 542, 628, 117 U.S. 1, 29 L.Ed. 791.
Ind.—Louisville, etc., R. Co. v. Keefer, 44 N.E. 796, 146 Ind. 21, 58 Am.S.R. 348, 38 L.R.A. 93.

48. U.S.—St. Louis, etc., R. Co. v. Southern Express Co., Ark., 6 S.Ct. 542, 628, 117 U.S. 1, 29 L.Ed. 791
10 C.J. p. 477 note 52.

49. U.S.—Memphis, etc., R. Co. v. Southern Express Co., supra
10 C.J. p. 476 note 48.

50. U.S.—St. Louis, etc., R. Co. v. Southern Express Co., supra.

51. N.C.—Atlantic Express Co. v. Wilmington, etc., R. Co., 16 S.E. 393, 111 N.C. 463, 32 Am.S.R. 805, 18 L.R.A. 393.

52. N.C.—Atlantic Express Co. v. Wilmington, etc., R. Co., supra.
10 C.J. p. 477 note 54.

53. Mass.—Sargent v. Boston, etc., R. Co., 115 Mass. 416.

54. Me.—International Express Co. v. Grand Trunk R. Co., 16 A. 370, 81 Me. 92.
10 C.J. p. 477 note 56, p. 478 note 57.

55. Tex.—Missouri, etc., R. Co. v. Empire Express Co., Civ.App., 173 S.W. 222—Trinity, etc., R. Co. v. Empire Express Co., Civ.App., 173 S.W. 217
10 C.J. p. 478 note 58.

56. Tex.—Missouri, etc., R. Co. v. Empire Express Co., Civ.App., 173 S.W. 222

57. Okl.—Atchison, T. & S. F. Ry. Co. v. State, 206 P. 236, 85 Okl. 223.
10 C.J. p. 475 note 31.

In Missouri, it has been said that the common law did not make unlawful mere unjust discriminations between localities, although it made such discriminations between individual shippers unlawful. The manifest purpose of the act of 1872 prohibiting discriminations was to make it unlawful for railroads to discriminate unjustly between localities.—McGrew Coal Co. v. Mellon, 287 S.W. 450, 315 Mo. 798, certiorari denied 47 S.Ct. 456, 273 U.S. 752, 71 L.Ed. 874.

58. Okl.—Kansas, O. & G. Ry. Co. v. State, 260 P. 468, 127 Okl. 240.

59. Ill.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 173 N.E. 804, 342 Ill. 11.
10 C.J. p. 475 note 32.

Where no undue discrimination by defendant carrier against the shipper or the locality of its plant is found, and the community declared to be prejudiced by the established conditions has not complained and is not a party to the proceeding, and the rate complained of is intrinsically reasonable, the mere fact that other carriers have adopted a lower schedule from the shipper's district to points other than the one designated affords no foundation for a finding by the interstate commerce commission that

discriminating in favor of one locality and against another that the latter is possessed of greater natural advantages than the former.[60] Likewise, a carrier is not justified in discriminating in favor of one locality to the disadvantage of another because of the fact that the former has made subscriptions in aid of building its road.[61] The element of distance may be a controlling factor in determining whether a carrier's rates to different localities similarly situated are discriminatory, but this is not invariably true.[62]

"Locality," as used in the Interstate Commerce Act prohibiting unreasonable preferences to localities, denotes the origin or destination of traffic and the shipping, producing, and consuming areas affected by rates and practices of carriers. The word, however, is not intended to cover a junction, a way station, a gateway, or a port, as respects traffic passing through it.[63]

§ 361. Discrimination as to Particular Commodities

Carriers must not unjustly discriminate against particular commodities.

Under the third section of the Interstate Commerce Act, which prohibits carriers from giving any undue or unreasonable preference or advantage to any particular description of traffic, and under state legislation of similar import, there may be an unjust discrimination as to particular commodities as well as against particular shippers.[64] However, discrimination by a carrier against a particular commodity is not necessarily unlawful, if reasonable grounds therefor can be shown;[65] and proper classification of freight according to its character and value is not discrimination, although differences in charges and in the terms of conditions of carriage are made between the different classes.[66] Ordinarily, the rates on raw material should not be higher than on the manufactured product, but a rate on the manufactured article resulting from genuine competition and natural conditions is not necessarily undue and unreasonable discrimination against a manufacturing community, merely because it is lower than the rate on the raw material.[67] It has also been held that a rule promulgated by a state railroad commission that carriers shall afford all persons, in the conduct of their interstate business, equal facilities in the transportation and delivery of freight, prohibits discrimination only against shippers and not against commodities, and a carrier may discriminate against a particular commodity, provided all shippers of that commodity are treated alike.[68]

An express company may not refuse to receive and carry intoxicating liquors C. O. D., and to collect and return the purchase money from the consignee in accordance with the general custom of the business, where it follows such custom with respect to other commodities;[69] but a rule of an express company by which it declines to receive shipments of liquor C. O. D. is reasonable and valid where it applies to all shippers and all localities alike, and where it is shown that the acceptance of such business has resulted in loss to the company and detriment to its business through unclaimed packages, delays in deliveries, rendering its places of business

such rate is unreasonable and discriminatory as matter of law—Philadelphia, etc., R. Co. v. U. S., Pa., 36 S.Ct. 354, 240 U.S. 334, 60 L.Ed. 675, reversing, D.C., 219 F. 988.

60. Ill.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 173 N.E. 804, 342 Ill. 11.
Tex.—Railroad Commission of Texas v. Houston Chamber of Commerce, 78 S.W.2d 591, 124 Tex. 375, affirming Houston Chamber of Commerce v. Railroad Commission of Texas, Civ.App., 19 S.W.2d 583.
10 C.J. p. 473 note 12, p. 475 note 34.

Group rates

While statute permits group rates for railroads and they are applied both by interstate commerce commission and state commissions in proper cases, they must not be unjustly discriminatory, although locality may possess advantage over other localities because of location or some other reason.—Railroad Commission of Texas v. Houston Chamber of Commerce, 78 S.W.2d 591, 124 Tex. 375, affirming Houston Chamber of Commerce v. Railroad Commission of Texas, Civ.App., 19 S.W.2d 583.

61. Or.—Portland R., etc., Co. v. State R. Commn., 105 P. 709, 109 P. 273, 56 Or. 468.

62. Conn.—Turner v. Connecticut Co., 101 A. 88, 91 Conn. 692.

63. U.S.—Texas & P. Ry. Co. v. U. S., Tex., 53 S.Ct. 768, 289 U.S. 627, 77 L.Ed. 1410, reversing, D.C., 42 F.2d 281.

Ports are not "localities," susceptible of undue preference or prejudice by carriers, as respects export and import traffic routed through them, under the Interstate Commerce Act § 3 (1), 49 U.S.C.A. § 3 (1).—Texas & P. Ry. Co. v. U. S., Tex., 53 S.Ct. 768, 289 U.S. 627, 77 L.Ed. 1410, reversing, D.C., 42 F.2d 281.

64. U.S.—American Tie, etc., Co. v. Kansas City Southern R. Co., Tex., 175 F. 28, 99 C.C.A. 44.
10 C.J. p. 478 note 61.

65. U.S.—Davis Hotel Co. v. Platt, C.C.W.Va., 172 F. 775.—Interstate Commerce Commn. v. Chicago Great Western R. Co., C.C.Ill., 141 F. 1003, affirmed 28 S.Ct. 493, 209 U.S. 108, 52 L.Ed. 705.

66. Mo.—Wynn v. Wabash R. Co., 86 S.W. 562, 111 Mo.App. 642.
10 C.J. p. 478 note 63 [a].

67. U.S.—Interstate Commerce Commn. v. Chicago Great Western R. Co., Ill., 28 S.Ct. 493, 209 U.S. 108, 52 L.Ed. 705.

68. Ga.—Central of Georgia R. Co. v. Augusta Brokerage Co., 50 S.E. 473, 122 Ga. 646, 69 L.R.A. 119.—Augusta Brokerage Co. v. Central of Georgia R. Co., 62 S.E. 996, 5 Ga.App. 187.
10 C.J. p. 479 note 68.

69. U.S.—Crescent Liquor Co. v. Platt, C.C.W.Va., 148 F. 894.

unpleasant to other patrons, and in other ways, such as to justify the rule as a business regulation.[70]

§ 362. Services outside Scope of Carrier's Duty as Such

The rule against unjust discrimination does not apply to services outside the scope of the carrier's duty as such.

The rules, both common law and statutory, prohibiting discrimination, do not apply to services outside the scope of a common carrier's duty as such.[71] Accordingly, a statute inhibiting discrimination does not apply to a contract between a railroad company and a construction company for a reduced rate of transportation of men and materials required by the company in grading an extension, and entered into in good faith,[72] nor to a contract for the transportation of a circus train providing that the carrier should furnish motive power, etc., and, in consideration of a reduced rate, should not be liable for injuries caused by its negligence in performing the contract.[73] Contracts of this character lie outside the purpose of the statutes,[74] and should not be held to embrace services which common carriers have never been obligated to perform, but which they have rendered to the public from time to time under special contracts.[75]

§ 363. Competition as Justifying Discrimination

Competition of a substantial character between carriers generally justifies them in discriminating between shippers.

Competition between common carriers, when it is of a substantial and real nature, is very generally held, in the absence of an express statute to the contrary, to justify carriers in discriminating between shippers in respect of facilities furnished for the shipment of goods, rates of freight charges, etc.[76] The basis for this rule is that a carrier is entitled to a fair return on its capital judiciously and honestly expended, and is entitled to meet competition;[77] and the prohibition of the rule is directed against unjust discrimination arising from the voluntary and wrongful act of the carrier, and does not relate to acts which are the result of conditions beyond the control of the carrier.[78]

Under the Interstate Commerce Act the phrase

70. U.S.—Davis Hotel Co. v. Platt, C.C.W.Va., 172 F. 775

71. Ga.—Williams-Thompson Co. v. Louisville & N. R. Co., 126 S.E. 833, 159 Ga. 793.
10 C.J. p. 479 note 69.

Coal bin

Refusal by railroad to permit coal dealer to construct coal bin along sidetrack, which had been given to others, does not constitute discrimination, which applies only to discharge of "carrier service" duties—Browning v. Louisville & N. R. Co., 281 S.W. 490, 213 Ky. 376, 44 A.L.R. 1522.

Loading freight

(1) Since a railroad company is not bound as a common carrier to furnish facilities for loading freight at points between stations, it may grant that privilege to one person to the exclusion of all others.—Yazoo, etc., R. Co. v. Crawford, 65 So. 462, 107 Miss. 355, L.R.A.1915C 250.

(2) Thus, the fact that a railroad company had for a long time allowed private individuals to engage in the business of loading logs at points between stations, and that plaintiff had built up a profitable business under that arrangement, does not give plaintiff any right to insist that it be continued, and he cannot object that the railroad company thereafter gave another the exclusive license to load logs between stations—Yazoo, etc., R. Co. v. Crawford, supra.

Parking of cars

A statute requiring the schedules of a common carrier filed with the railroad commission to contain all charges for track and car service or rental, and for switching, demurrage, terminal, and transfer service, and for rendering any other service in connection with the transportation of passengers and property, refers to such rental and service as are to be performed in its capacity as a common carrier, and does not extend to a charge made to a showman for parking his cars on the carrier's tracks for a period of forty-five days, and it is entitled to make such charge, although not contained in its schedules—Ex parte Alabama Great Southern R. Co., 90 So. 502, 206 Ala. 400, 19 A.L.R. 978, reversing Alabama Great Southern R. Co. v. Wood, 90 So. 503, 18 Ala.App. 147.

Warehouse facilities

Where a railroad acquired land from city for terminals, and on portion remaining after such use erected building, which it divided into sections and leased to produce merchants who utilized its lines for shipping, it was held that this use of the building was merely to facilitate the railroad's business as carrier, and refusal to renew lease was not unjust discrimination, within Interstate Commerce Act, 1887, §§ 2, 3, U.S.Comp.St. §§ 8564, 8565, and § 1, subd. 6, as amended by Act Feb. 28, 1920, U.S.Comp.St.Annot.Suppl., 1923, § 8563, or within the Georgia constitution art. 4 § 2 par. 1.—Williams-Thompson Co. v. Louisville & N. R. Co., 126 S.E. 833, 159 Ga. 793.

72. U.S.—Santa Fe, etc., R. Co. v. Grant Bros. Constr. Co., 33 S.Ct. 474, 228 U.S. 177, 57 L.Ed. 787, reversing 108 P. 467, 13 Ariz. 186.

73. U.S.—Sager v. Northern Pac. R. Co., C.C.Minn., 166 F. 526.

74. U.S.—Santa Fe, etc., R. Co. v. Grant Bros. Constr. Co., 33 S.Ct. 474, 228 U.S. 177, 57 L.Ed. 787, reversing 108 P. 467, 13 Ariz. 186.

75. U.S.—Sager v. Northern Pac. R. Co., C.C.Minn., 166 F. 526.

76. U.S.—Texas & P. Ry. Co. v. U.S., Tex., 53 S.Ct. 768, 289 U.S. 627, 77 L.Ed. 1410, reversing, D.C., 42 F.2d 281.
10 C.J. p. 479 note 77
Competition as justifying greater charge for short than for long haul see infra § 378.

Equalization of export or import rates by railroad lines serving several ports in order to meet competition is not prohibited by Interstate Commerce Act § 3 (1), 49 U.S.C.A. § 3 (1)—Texas & P. Ry. Co. v. U.S., Tex., 53 S.Ct. 768, 289 U.S. 627, 77 L.Ed. 1410, reversing, D.C., 42 F.2d 281.

77. Or.—Service Lumber Co. v. Sumpter Valley R. Co., 135 P. 539, 67 Or. 63

78. U.S.—East Tennessee, etc., R. Co. v. Interstate Commerce Commn., Tenn., 21 S.Ct. 516, 181 U.S. 1, 45 L.Ed. 719.
10 C.J. p. 480 note 79.

"under substantially similar circumstances and conditions," as used in the second section of the act which prohibits discrimination in charges, refers to the matter of carriage, and does not include competition between rival routes which therefore cannot be considered.[79] However, it is well settled that, in considering whether the circumstances and conditions are substantially similar, within the meaning of the third and fourth sections, relating to undue preferences and to long and short hauls, competition is one of the most important conditions which may and must be taken into consideration.[80] The advantageous position of one trader in having his works so placed that he has two competing routes is as much a circumstance to be taken into consideration as the geographical position of another trader who, although he has not the advantage of competition, is situated at a point on the line nearer the market.[81] Potential water competition, although there is at the time but little actual competition, is a circumstance to be considered.[82] In the case of traffic originating in foreign countries, the courts may and must take into consideration, as constituting dissimilar conditions, circumstances existing beyond the seaboard of the United States, such as competition by ocean freights, as well as conditions prevailing within the United States.[83]

The mere existence of competition, however, does not necessarily exempt the carrier from the restraint of the act, without regard to the nature and extent of the competition.[84] It is, of course, essential that the competition be genuine and not a pretense,[85] and that it be not artificial, or merely conjectural, but material and substantial, as will be subsequently discussed in § 378. Discrimination in favor of particular shippers to induce them not to divert traffic from the carrier, or to induce them to transfer traffic from one carrier which would otherwise go to another carrier, is unlawful and cannot be justified on the ground of profit to the carrier allowing them.[86]

2. Particular Kinds of Discrimination

§ 364. In General

Generally speaking, the inhibition of discrimination extends to virtually any act or conduct of either carrier, shipper, or consignee producing such a result.

Under the Interstate Commerce Act, individual shippers may not secure any special advantage or discrimination by contract or otherwise.[87] The provisions of this act are sufficiently broad in their scope to bar not only inequality of charges and inequality of facilities, but also the giving of prefer-

79. U.S. — Interstate Commerce Commn v. Alabama Midland R. Co., Ala., 18 S.Ct. 45, 168 U.S. 144, 42 L.Ed. 414
10 C.J. p 480 note 80

80. U.S. — Interstate Commerce Commn v. Alabama Midland R. Co., supra
10 C.J. p 480 note 81.

81. U.S. — Interstate Commerce Commn v Baltimore, etc., R. Co., Ohio, 12 S.Ct. 844, 145 U.S. 263, 36 L.Ed. 699—Interstate Commerce Commn. v Louisville, etc., R. Co., C.C.Tenn., 73 F. 409.
10 C.J. p 480 note 82.

82. U.S. — Interstate Commerce Commn. v. Alabama Midland R. Co., Ala., 74 F. 715, 21 C.C.A. 51, affirmed 18 S.Ct. 45, 168 U.S. 144, 62 L.Ed. 414.

83. U.S.—Texas, etc., R. Co. v Interstate Commerce Commn., N.Y., 16 S.Ct. 666, 162 U.S. 197, 40 L.Ed. 940.
10 C.J. p 480 note 84

84. U.S.—State of Ohio v. U. S., D.C.Ohio, 6 F.Supp. 386, vacated U.S. v. State of Ohio, 54 S.Ct. 452, 291 U.S. 644, 78 L.Ed. 1041, and U.S. v. Wheeling & L.E.R. Co., 54 S.Ct. 452, 291 U.S. 644, 78 L.Ed. 1041, affirmed State of Ohio v. U.S., 54 S.Ct. 792, 292 U.S. 498, 78 L.Ed. 1388, rehearing granted 55 S.Ct. 66, 293 U.S. 627, 79 L.Ed. 714, affirmed 55 S.Ct. 146, 293 U.S. 528, 79 L.Ed. 638.
10 C.J. p 480 note 87.

85. U.S. — Interstate Commerce Commn. v. Chicago Great Western R. Co., Ill., 28 S.Ct. 493, 209 U.S. 108, 52 L.Ed. 705.
10 C.J. p 480 note 85.

86. U.S. — Interstate Commerce Commn. v. Texas & P. R. Co., C.C.N.Y., 52 F. 187, affirmed 57 F. 948, 6 C.C.A. 653, reversed on other grounds Texas & P. R. Co. v. Interstate Commerce Commn., 16 S.Ct. 666, 162 U.S. 197, 40 L.Ed. 940
10 C.J. p 480 note 88.

87. Ala.—Louisville & N. R. Co. v. A. H. Cleaver & Co., 101 So. 597, 211 Ala. 661.

Contracts held discriminatory

(1) Contract of interstate carrier to furnish rails, lay ballast, operate trains and haul logs at specified rate on logging company's line, was held to be void as giving undue preference under the Interstate Commerce Act as amended, 49 U.S.C.A. § 1 et seq.—Holt Lumber Co. v Duluth, S. S. & A. Ry. Co., 238 N.W. 839, 206 Wis. 77.

(2) The liability of the carrier being fixed by the federal law to the amount of damage caused by it, where purchaser, en route, of strawberries consigned from Mississippi to Ohio entered into collateral agreement with carrier's agent to accept berries, pay charges, and dispose of them at best price obtainable, if carrier would pay his claim for loss resulting from damaged condition of berries, such contract on which purchaser sought to recover from carrier was held to be violative of the Interstate Commerce Act as an evasion of the whole scheme of uniformity of rates and dealings.—Carollo v. Railway Express Agency, 3 N.E.2d 659, 52 Ohio App. 272

Judgment for damages to shipment held not to be discriminatory within the federal statutes.—Kuney v. Chicago & N. W. Ry. Co., 197 N.W. 708, 183 Wis. 569.

Mistakes of agent

Express company is not liable for mistake of its agent in violating rules of interstate commerce commission, regarding special instructions concerning delivery of shipment, where so to hold would nullify rules and regulations on file, for that would work discrimination among shippers.—Wall v. American Ry. Express Co., 272 S.W. 76, 220 Mo.App. 989.

ences by means of consent judgments or the waiver of defenses open to the carrier,[88] or the waiver of any requirement of the Act or any stipulation or contract made pursuant thereto.[89] Accordingly, the terms of an interstate bill of lading or shipping contract cannot be modified or waived by the parties thereto, nor can the carrier by its conduct give the shipper a right to ignore the terms thereof,[90] as this would constitute a discrimination, void as against public policy.[91] Also, although there is authority to the contrary,[92] it is generally held that stipulations in such contracts requiring a written claim or notice of loss or damage to be presented within a specified time,[93] or limiting the time with-

88. U.S.—Phillips Co. v. Grand Trunk Western R. Co., Mich., 35 S.Ct. 444, 236 U.S. 662, 59 L.Ed. 774.

89. Tex.—Shroyer v. Chicago, R. I. & G. Ry. Co., 222 S.W. 1095, 111 Tex. 24, reversing Chicago, R. I. & G. Ry. Co. v. Shroyer, Civ.App., 197 S.W. 773, and modified on other grounds Shroyer v. Chicago, R. I. & G. Ry. Co., 226 S.W. 140, 111 Tex. 24.

Liability of initial carrier for damages caused by connecting carriers of interstate shipment under Cummins amendment, U.S.Comp.St. § 8604a, are not ordinarily subject to waiver by carrier or shipper.—Burd v. San Antonio Southern Ry. Co., Tex.Com.App., 261 S.W. 1021, modifying San Antonio Southern Ry. Co. v. Burd, Civ.App., 246 S.W. 1060.

90. U.S.—Georgia, F. & A. Ry. Co. v. Blish Milling Co., 36 S.Ct. 541, 241 U.S. 190, 60 L.Ed. 948, affirming 82 S.E. 794, 15 Ga.App. 142.

Cal.—New York Cent. R. Co. v. Frank H. Buck Co., 41 P.2d 547, 2 Cal.2d 384.

Ga.—Louisville & N. R. Co. v. Harrell & Murphy, 120 S.E. 35, 31 Ga.App. 126—American Ry. Express Co. v. Roberts, 111 S.E. 744, 28 Ga.App. 510.

Ind.—Herran v. Chicago & E. R. Co., 135 N.E. 235, 78 Ind.App. 253.

Mo.—Cudahy Packing Co. v. Bixby, 205 S.W. 865, 199 Mo.App. 589, certiorari denied 39 S.Ct. 19, 248 U.S. 577, 63 L.Ed. 429—Barton v. Louisville & N. R. Co., App., 196 S.W. 379.

N.Y.—American Cotton Products Co. v. New York Cent. R. Co., 255 N.Y.S. 672, 142 Misc. 821—Grand Trunk Western R. Co. v. Makris, 255 N.Y.S. 443, 142 Misc. 807.

N.C.—Norfolk Southern R. Co. v. Armfield Co., 127 S.E. 557, 189 N.C. 581.

S.D.—Christensen v. Minneapolis, St. P. & S.S.M. Ry. Co., 252 N.W. 738, 62 S.D. 264.

Tenn.—Southern Ry. Co. v. Lewis & Adcock Co., 201 S.W. 131, 139 Tenn. 37, L.R.A.1918C 976.

Tex.—Burd v. San Antonio Southern Ry. Co., Com.App., 261 S.W. 1021, modifying San Antonio Southern Ry. Co. v. Burd, Civ.App., 246 S.W. 1060.

Va.—Southern Produce Co. v. Norfolk Southern R. Co., 132 S.E. 360, 144 Va. 422.

W.Va.—Hubbard Grocery Co. v. Payne, 118 S.E. 152, 94 W.Va. 273.—William F. Mosser Co. v. Payne, 114 S.E. 365, 92 W.Va. 41.

Damages

(1) The terminal carrier of an interstate shipment by rail, when sued for damage to the shipment, could not waive provision of the standard form bill of lading fixing the damages as the invoice price of the goods shipped, where the bill was issued as required by an order of the interstate commerce commission pursuant to the Carmack amendment of the Interstate Commerce Act.—Houston & T. C. R. Co. v. Reichardt & Schulte Co., Tex.Civ.App., 212 S.W. 208.

(2) Where the shipping contract provides that the carrier shall not be liable for losses not occurring on its own road, the carrier is guilty of an illegal discrimination violative of the Interstate Commerce Act if it agrees to pay for losses not occurring on its road.—Southern Ry. Co. v. Lewis & Adcock Co., 201 S.W. 131, 139 Tenn. 37, L.R.A.1918C 976.

Person liable for freight charges

A custom whereby an interstate carrier, contrary to the express terms of the bill of lading, holds the person to whom certain commodities are shipped liable for the freight charges thereon rather than the shipper, is an illegal discrimination under the Interstate Commerce Act.—Chicago, I. & L. Ry. Co. v. Peterson, 169 N.W. 558, 168 Wis. 193.

91. Ind.—Herran v. Chicago & E. R. Co., 135 N.E. 253, 78 Ind.App. 253.

92. Ill.—Doster & McKibben v. Michigan Cent. R. Co., 196 Ill.App. 49. But see Simpson v. Grand Trunk Western Ry. Co., 210 Ill.App. 269—Hart v. Oregon Short Line R. Co., 207 Ill.App. 290.

Sole benefit of carrier

"The stipulation as to notice was for the sole benefit of the carrier, and before the passage of the act the courts repeatedly held that similar provisions could be waived, and as the present one was not determinative of the rate in the contract, we fail to see any good reason for holding that it would be a violation of the act for the defendant to waive the same."—Doster & McKibben v. Michigan Cent. R. Co., 196 Ill.App. 49, 64.

93. U.S.—Georgia, F. & A. Ry. Co. v. Blish Milling Co., 36 S.Ct. 541, 241 U.S. 190, 60 L.Ed. 948, affirming 82 S.E. 784, 15 Ga.App. 142—Olson v. Chicago, B. & Q. R. Co., Iowa, 250 F. 372, 162 C.C.A. 442.

Ark.—Hines v. Mason, 221 S.W. 861, 144 Ark. 11.

Colo.—Denver & R. G. R. Co. v. Caddo Realty Co., 182 P. 877, 66 Colo. 403.

Ga.—Louisville & N. R. Co. v. Harrell & Murphy, 120 S.E. 35, 31 Ga.App. 126—American Ry. Express Co. v. Roberts, 111 S.E. 744, 28 Ga.App. 510.

Ind.—Herran v. Chicago & E. R. Co., 135 N.E. 253, 78 Ind.App. 253.

Iowa.—Fay v. Chicago, R. I. & P. Ry. Co., 173 N.W. 69, 186 Iowa 573.—Keeney v. Chicago, B. & Q. R. Co., 167 N.W. 475, 183 Iowa 522.

Kan.—Abell v. Atchison, T. & S. F. Ry. Co., 164 P. 269, 100 Kan. 238, L.R.A.1918E 782.

Ky.—Louisville & N. R. Co. v. Johnson, 206 S.W. 633, 182 Ky. 418.

Md.—Bronstein v. Payne, 113 A. 648, 138 Md. 116.

Mass.—Metz Co. v. Boston & M. R. R., 116 N.E. 475, 227 Mass. 307.

Minn.—Carbic Mfg. Co. v. Western Express Co., 184 N.W. 35, 149 Minn. 467.

Mo.—Mt. Arbor Nurseries v. American Ry. Express Co., 300 S.W. 1051, 221 Mo.App. 241—Cudahy Packing Co. v. Chicago & N. W. Ry. Co., App., 201 S.W. 596—Johnson v. Missouri Pac. Ry. Co., App., 187 S.W. 282—Donoho v. Missouri Pac. Ry. Co., 187 S.W. 141, 193 Mo.App. 610, transferred, Sup., 184 S.W. 1149—Kemper Mill Co. v. Missouri Pac. Ry. Co., 186 S.W. 8, 193 Mo.App. 466, transferred Kemper Mill & Elevator Co. v. Missouri Pac. Ry. Co., Sup., 178 S.W. 502—Banaka v. Missouri Pac. R. Co., 186 S.W. 7, 193 Mo.App. 345.

Mont.—Wall v. Northern Pac. Ry. Co., 161 P. 518, 53 Mont. 81, L.R.A.1917C 433.

N.Y.—Browning, King & Co. v. Davis, 199 N.Y.S. 775, 120 Misc. 520.

N.C.—Rogers & Co. v. East Carolina Ry., 118 S.E. 885, 186 N.C. 86.

Okl.—St. Louis & S. F. R. Co. v. Ladd, 178 P. 125, 72 Okl. 55—St. Louis & S. F. R. Co. v. Sparks, 178 P. 90, 72 Okl. 53—Chicago, R. I. & P. Ry. Co. v. Brockmeier, 168 P. 1011, 66 Okl. 280—Chicago, R. I. & P. Ry. Co. v. Gray, 165 P. 157, 65 Okl. 181.

in which the shipper may sue for damages,[94] cannot be waived by the carrier, even where the shipper is also a common carrier.[95] Likewise, since the Interstate Commerce Act makes it unlawful for a shipper to receive any benefit or advantage to which all other shippers are not entitled at the hands of a carrier, an estoppel cannot be invoked to obtain an unlawful preference for an interstate shipper.[96] However, particular acts of the carrier are not necessarily discriminatory merely because they work to its advantage, as where it adopts a particular method of settling for damages to goods transported.[97] Neither does an interstate carrier unduly discriminate when it exercises its discretion in employing agents and employees to perform transportation services,[98] and the mere granting of privileges which are incidentally part of the compensation for services rendered, is not unlawful as preferential as against others who are not thus selected.[99]

While the Interstate Commerce Act does not undertake to define the particular acts which constitute unlawful discrimination, it undoubtedly commits that to the interstate commerce commission and its findings are conclusive.[1]

State statutes. Generally, the statutes prohibiting unjust discriminations by carriers do not attempt to list the specific discriminations condemned as unjust, and each case must be decided on its own facts.[2] Accordingly, under the facts in the case,

Pa.—Scattergood v. Michigan Cent. R. Co., 69 Pa.Super. 367—Concordia Silk Hosiery Co. v. Pennsylvania R. Co., 69 Pa.Super. 361.

S.C.—Dean v. Southern Ry. Co., 91 S.E. 1042, 107 S.C. 25.

Tex.—Schaff v. Ike Exstein & Bro., Civ.App., 270 S.W. 589—Mexico Northwestern Ry. Co. v. Williams, Civ.App., 208 S.W. 712, affirmed, Com.App., 229 S.W. 476, certiorari denied 42 S.Ct. 54, 257 U.S. 644, 66 L.Ed. 413—Houston E. & W. T. Ry. Co. v. Houston Packing Co., Civ.App., 203 S.W. 1140.

Va.—Chesapeake & O. Ry. Co., v. National Fruit Products Co., 155 S.E. 630, 155 Va. 438, 72 A.L.R. 878.

W.Va.—Hubbard Grocery Co. v. Payne, 118 S.E. 152, 94 W.Va. 273. 10 C.J. p. 340 note 73.

Acceptance of claim

Railroad by accepting shipper's claim for loss after elapse of time stipulated and by declining to pay on other grounds than want of notice cannot commit discrimination by waiving requirement of notice in four months.—Banaka v. Missouri Pac. Ry. Co., 186 S.W. 7, 193 Mo.App. 345.

Provision of uniform express receipt requiring shipper to notify carrier of nondelivery within a reasonable time cannot be waived by carrier.—Stern v. American Railway Express Co., 198 N.Y.S. 531, 120 Misc. 110.

Door opened to discrimination and favoritism

Common carriers could not be allowed to waive provisions of a bill of lading covering an interstate shipment, requiring the giving and filing of notice and of a verified claim within times specified without opening wide the door to discrimination and favoritism.—Cunningham v. Missouri Pac. R. Co., Mo.App., 219 S.W. 1003.

Injuries to caretaker

Where notice of injuries received by a caretaker accompanying an interstate shipment of live stock was a condition precedent to recovery, such notice cannot be waived by the carrier, for to do so would work a discrimination.—Missouri, K. & T. Ry. Co. v. Lynn, 161 P. 1058, 62 Okl. 17.

Same rule as rates

Under the federal decisions the carrier can no more release the shipper from such a stipulation as to notice than it could excuse him from the payment of the established freight rate.—Concordia Silk Hosiery Co. v. Pennsylvania R. Co., 69 Pa.Super. 361.

94. Ill.—Indian Refining Co. v. Mellon, 246 Ill.App. 580.

Ind.—American Ry. Exp. Co. v. Shideler, 165 N.E. 336, 88 Ind.App. 645.

Kan.—Easdale v. Atchison, T. & S. F. Ry. Co., 164 P. 164, 100 Kan. 305.

N.M.—Mersfelder v. Atchison, T. & S. F. Ry. Co., 174 P. 989, 24 N.M. 518.

Okl.—St. Louis, I. M. & S. Ry. Co. v. Patterson, 182 P. 701, 75 Okl. 204.

S.C.—Spartan Mills v. Davis, 119 S.E. 905, 126 S.C. 312.

Tex.—Shroyer v. Chicago, R. I. & G. Ry. Co., 222 S.W. 1095, 111 Tex. 24, reversing Chicago, R. I. & G. Ry. Co. v. Shroyer, Civ.App., 197 S.W. 773, and modified on other grounds Shroyer v. Chicago, R. I. & G. Ry. Co., 226 S.W. 140, 111 Tex. 24—Cudahy Packing Co. v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 206 S.W. 854, error refused.

Vt.—N. Pelaggi & Co. v. Central Vermont Ry. Co., 121 A. 441, 97 Vt. 1.

W.Va.—William F. Mosser Co. v. Payne, 114 S.E. 365, 92 W.Va. 41.

Carrier bound to set up defense

The provisions of the Interstate Commerce Act respecting uniformity require an interstate carrier to set up in an action against it for damages to an interstate shipment the defense that the period of limitations fixed by the contract had expired before the suit was brought.—N. Pelaggi & Co. v. Central Vermont Ry. Co., 121 A. 441, 97 Vt. 1.

95. Va.—Chesapeake & O. Ry. Co. v. National Fruit Products Co., 155 S.E. 630, 155 Va. 438, 72 A.L.R. 878.

96. Tenn.—Southern Ry. Co. v. Lewis & Adcock Co., 201 S.W. 131, 139 Tenn. 37, L.R.A.1918C 976.

Provision limiting liability

A connecting carrier is not estopped to rely on a provision in a bill of lading limiting liability to loss occurring on its own lines to defeat recovery on an unlawful contract made by its agent to pay such loss on interstate shipment, since estoppel cannot be invoked to obtain for shipper an illegal preference.—Southern Ry. Co. v. Lewis & Adcock Co., 201 S.W. 131, 139 Tenn. 37, L.R.A.1918C 976.

97. Mo.—Amber v. Davis, 282 S.W. 459, 221 Mo.App. 448.

98. U.S.—Merchants' Warehouse Co. v. U. S., D.C.Pa., 44 F.2d 379, affirmed 51 S.Ct. 505, 283 U.S. 501, 75 L.Ed. 1227—Terminal Warehouse Co. of Baltimore City v. U. S., D.C.Md., 31 F.2d 951.

Selection of exclusive agent

Carrier may select its own agents to perform transportation service in its behalf, and employ one exclusively without violating the Interstate Commerce Act.—Terminal Warehouse Co. of Baltimore City v. U. S., D.C. Md., 31 F.2d 951.

Performance of part of services

U.S.—Merchants' Warehouse Co. v. U. S., D.C.Pa., 44 F.2d 379, affirmed 51 S.Ct. 505, 283 U.S. 501, 75 L.Ed. 1227.

99. U.S.—Merchants' Warehouse Co. v. U. S., supra.

1. U.S.—Seaboard Air Line Ry. Co. v. U. S., D.C.Va., 249 F. 368, affirmed 41 S.Ct. 24, 254 U.S. 57, 65 L.Ed. 129.

2. Mo.—McGrew v. Missouri Pac. Ry. Co., 132 S.W. 1076, 230 Mo.

particular acts[3] and contracts[4] have been held to constitute unjust discriminations.

Under some statutes, two kinds of discrimination are prohibited; first, the giving of an unreasonable preference to a particular person, and second, the subjecting of a person to an unreasonable prejudice.[5] Subjecting a person to an unreasonable prejudice does not contemplate malicious intent on the part of the carrier toward the person prejudiced.[6]

Under statutes merely prohibiting discrimination as to charges for transportation, a carrier is not guilty of unlawful discrimination in waiving a contractual limitation on the time within which a shipper may sue for damages to the freight;[7] and the rule permitting knowledge of the loss or injury to supply the place of a written notice is not a discrimination between railroads, nor is it a preference in favor of a particular shipper at the expense of others, as it is a mode of proof, applicable alike to all railroads and in favor of all shippers.[8]

§ 365. Discrimination in Furnishing Facilities for Transportation

A common carrier must not discriminate unjustly between shippers in furnishing facilities for transportation.

Both at common law and under federal and state legislation, a common carrier is bound to furnish facilities for transportation to all persons without discrimination for service under like conditions,[9] and under the Interstate Commerce Act an interstate carrier is not permitted to extend to a shipper any facilities in the transportation of property, except such as are specified in tariffs prepared and filed as therein prescribed.[10] Particular acts by carriers constituting unreasonable discrimination in furnishing facilities for transportation include: refusing to transport the product of one shipper while at the same time transporting the product of other shippers from practically the same territory, at the same rates, to the same territory;[11] discontinuing a

496—Brunswig v. Bush, App., 221 S.W. 759, certiorari dismissed Bush v. Brunswig, 41 S.Ct. 9, 254 U.S. 660, 65 L.Ed 462

3. Mich.—Federal Gravel Co. v. Detroit & M Ry. Co., 248 N.W. 831, 263 Mich 341

Organization and operation of gravel company

Acts of railroad carrier in organizing, financing, and managing corporation to remove and sell gravel from land owned by carrier for nominal consideration, for primary purpose of securing freight revenue, was held to constitute unjust discrimination under Comp.L.1929 §§ 11032–11035—Federal Gravel Co. v. Detroit & M. Ry. Co, 248 N.W. 831, 263 Mich. 341.

4. N.J.—Lehigh Valley R Co. v. Maas & Waldstein Co., 131 A. 884, 102 N.J.Law 332.

Agreement to waive provisions of Railroad Act, Pub.L.1907 p 648, 3 Comp.St.1910 p 4242 § 47, limiting intra-state demurrage charges to one dollar per day, was held illegal and unenforceable—Lehigh Valley R Co. v. Maas & Waldstein Co., 131 A 884, 102 N.J Law 332

5. Mo.—Alexander v Chicago, M. & St P. R Co, 221 S.W. 712, 282 Mo. 236, 11 A.L.R 867

6. Mo.—Alexander v. Chicago, M. & St P R Co, supra

7. N.M.—Mersfelder v. Atchison, T. & S. F Ry. Co, 174 P. 989, 24 N. M. 518

8. La.—Jennings v. Missouri Pac. R Co., 134 So 694, 172 La. 522.
10 C.J p 339 note 54.

9. Fla.—State v. Atlantic Coast Line R. Co., 119 So. 110, 96 Fla. 646.

Iowa.—Northern Gravel Co. v Muscatine North & S Ry. Co, 171 N W. 787, 185 Iowa 1259

Ohio.—Quinn Coal Co. v Hocking Valley Ry, 20 Ohio Cir.Ct.,N.S., 420—Johnson Coal Mining Co v. Hocking Valley R. Co, 1 Ohio N.P, N.S, 385.

Okl.—Bromide Crushed Rock Co. v. Dolese Bros. Co., 247 P. 74, 121 Okl. 40.

10 C.J. p 480 note 90.

"Facilities"

Term "facilities," as used in statutory and constitutional provision regarding discrimination, includes only those employed in transportation and which railroad undertakes to furnish as common carrier—Canary Taxicab Co v Terminal Ry. Ass'n of St. Louis, 294 S.W. 88, 316 Mo. 709.

Lessee railways

Railroad companies, created and organized as common carriers to which a railroad is leased, are required to furnish reasonably adequate shipping facilities to the public without discrimination—Barlotti & Son v Public Utilities Commission, 134 N.E 468, 103 Ohio St. 647.

Special services

Whatever special services a railway carrier may extend to a shipper of goods must be open to all shippers alike, pursuant to freight tariffs and schedules of charges for such services filed with the public service commission and the interstate commerce commission—Parker Corn Co v. Chicago, B & Q R. Co, 244 P 240, 120 Kan 484.

10. La.—Davis v. Ferguson, 132 So 289, 17 La.App 149, avoided 136 So 293, 173 La. 132.

Miss.—Pitman v Yazoo & M. V R Co, 158 So 547, 171 Miss 799

S.C.—May v. Seaboard Air Line Ry Co, 96 S.E 482, 110 S C 84

Wis.—Northern Wisconsin Produce Co. v. Chicago & N. W. Ry. Co, 234 N.W. 726, 203 Wis. 549.

Heating cars

(1) An interstate carrier's action in heating particular cars constitutes a discrimination violative of the Interstate Commerce Act, where such carrier's posted and published tariff rates make no provision therefor.

Ill.—Northwestern Fruit Exchange v. Erie R. Co, 248 Ill.App. 193.

Mass.—W. H Blodget Co. v. New York Cent. R Co., 159 N.E. 45, 261 Mass 365.

Mo.—Clemons Produce Co. v Denver & R. G. R. R., 219 S.W. 660, 203 Mo App. 100.

(2) This rule applies under the Interstate Commerce Act, notwithstanding Cummins amendment of 1915, U.S.Comp St. § 8604a, making interstate carriers liable for loss, damage, or injury to property caused by such carrier or connecting carrier, despite limitation of liability, such amendment not affecting the requirement that the loss, to render carrier liable, shall have been caused by the carrier.—Clemons Produce Co. v. Denver & R G R. R., supra.

(3) Under the Interstate Commerce Act, a carrier is obligated not to furnish heat for less than a carload interstate shipment of eggs, where the tariff does not call for such service on less than carload shipments—Northern Wisconsin Produce Co. v. Chicago & N. W Ry. Co., 234 N.W 726, 203 Wis 549.

11. U.S.—U. S. v. Louisville, etc., R. Co., Com.C., 195 F. 88.

particular service as to one and continuing it as to others;[12] and contracting with a corporation or individual to give exclusive rights to the use of any portion of its main line or general system of railway so as to prejudice other patrons or the public in general.[13] Carriers are not excused from their duty to furnish equal facilities by reason of unusual traffic conditions attendant on a general strike.[14]

On the other hand, under the express provisions of the Interstate Commerce Act and some state constitutions, these rules do not apply to the carriage, storage, or handling of property of the United States, states, or municipal governments.[15] Also, the duty of the carrier extends only to such transportation facilities as it owns or controls.[16] Different facilities furnished under circumstances essentially different do not constitute an unjust discrimination, when the difference in the facilities furnished is in accordance with the difference in circumstances and not intended to injure another shipper or to give one shipper material advantages over another in competitive business.[17] In this connection, a difference in the character of commodities offered for shipment, because of which one is easier to handle than the other, will justify the carrier in refusing to furnish equal facilities for the shipment of the two kinds of commodities.[18] Thus, the difference between live stock and inanimate freight is such as to justify a refusal to deliver or receive live stock in carload lots on sidetracks at private stockyards,[19] and where a railroad company has by contract with a stockyards company made adequate provision for the discharge of its duty as a common carrier with respect to live stock shipped over its line to a city, it is not required by the common law, or by state or federal legislation relating to discrimination, to make deliveries of stock to other stockyards in the same city.[20]

A carrier cannot be required, at its own expense, to provide such equal facilities and conveniences between private persons or corporations as to overcome or equalize disadvantages caused by dissimilarity of location; and this rule is not affected by a constitutional provision that the state corporation commission shall require carriers to establish and maintain such public facilities as may be reasonable and from time to time to make and enforce such requirements and regulations as may be necessary

Connecting carrier

Under Rev.St 1911 arts 6670, 6671, carrier was liable for damages for discrimination in refusing delivery to connecting carrier, although shipment is not a through shipment.—Quanah, A. & P. Ry. Co v. Warren, Tex.Civ.App., 184 S.W. 232.

Embargo as to some shippers

Transportation pursuant to authorizations given one shipper while an embargo was enforced against others is an unlawful "discrimination."—U. S v Lehigh Valley Ry. Co, D.C.N Y., 254 F. 332.

12. Ala.—Agee v. Louisville, etc., R. Co., 37 So. 680, 142 Ala. 344.
10 C.J. p 481 note 92.

13. Okl.—Bromide Crushed Rock Co v Dolese Bros. Co, 247 P. 74, 121 Okl. 40

14. Pa.—Minds v. Pennsylvania R. Co, 77 A. 909, 228 Pa. 575.

15. La.—Miller Engineering Co. v Louisiana Ry & Nav. Co, 81 So. 314, 144 La. 786

16. Ala.—Alabama Cent. R. Co. v. Alabama Public Service Commission, 76 So. 862, 200 Ala. 536, L.R.A 1918C 293.

17. Mo.—Brunswig v. Bush, App., 221 S.W. 759, certiorari dismissed Bush v. Brunswig, 41 S.Ct. 9, 254 U.S. 660, 65 L.Ed. 462
Ohio.—Cleveland Provision Co. v. Public Utilities Commission, 135 N.E. 612, 104 Ohio St. 253, 23 A.L.R. 404.
10 C.J. p 481 note 94.

Corpus Juris text is cited with approval in Porter v Long Island R. Co., 225 N.Y.S. 365, 368, 221 App. Div. 713, affirmed 164 N.E. 595, 249 N.Y. 591.

Coal cars

In so far as Code 1916 c 54 § 66c, contemplates equality of transportation facilities among shippers of coal, in point of mere convenience, not reasonable means of transportation, within carrier's ability, it applies only to mining industries having usual equipment for loading coal cars.—Baltimore & O R Co v. Public Service Commission, 94 S.E. 545, 81 W.Va. 457, L.R.A 1918D 268.

Later registered vessel

Common carrier's permitting later registered vessel to load cargo at its coal pier before vessel which previously registered because of yard congestion and the construction of the ships and the rights of other shippers, was not "undue preference or unreasonable discrimination"—Archibald McNeil & Sons Co. of New York v Western Maryland Ry. Co., D.C.Pa., 42 F.2d 669, affirmed, C.C.A., 51 F.2d 1073, certiorari denied 52 S.Ct. 41, 284 U.S. 665, 76 L.Ed. 563.

Transportation without reloading

Where a carrier agreed to transport corn from a point in the United States into Mexico without reloading into other cars, the provision, even if discriminatory, will not render the contract invalid, the discrimination in no sense being unjust.—Brunswig v. Bush, Mo.App., 221 S.W. 759, certiorari dismissed Bush v. Brunswig, 41 S.Ct. 9, 254 U.S. 660, 65 L.Ed 462

Yard of delivery

Insertion in bills of lading, without interstate commerce commission's consent, of particular yard in general terminal to which cars were deliverable, was not illegal, as discriminatory.—Porter v Long Island R. Co., 225 N.Y.S 365, 221 App.Div. 713, affirmed 164 N.E. 595, 249 N.Y. 591

18. U.S.—Butchers', etc., Stock-Yards Co v. Louisville, etc., R. Co., Tenn., 67 F. 35, 14 C.C.A. 290.
Tenn.—Smith v. Louisville, etc., R. Co., 175 S.W. 557, 131 Tenn 531, L.R.A.1916A 1107.

19. U.S.—Butchers', etc., Stock-Yards Co. v. Louisville, etc., R. Co., Tenn., 67 F. 35, 14 C.C.A. 290.

Tenn.—Smith v. Louisville, etc., R. Co., 175 S.W. 557, 131 Tenn. 531, L.R.A 1916A 1107
10 C.J. p 482 note 96

20. U.S.—Central Stock Yards Co v. Louisville, etc., R. Co., Ky., 24 S.Ct. 339, 192 U.S. 568, 48 L.Ed 565, affirming 118 F. 113, 55 C.C.A. 63, 63 L.R.A. 213—Butchers', etc., Stock-Yards Co. v. Louisville, etc., R. Co., Tenn., 67 F. 35, 14 C.C.A 290.
Tenn.—Smith v. Louisville, etc., R. Co., 175 S.W. 557, 131 Tenn. 531, L.R.A.1916A 1107.
10 C.J. p 482 note 97.

to prevent unjust or unreasonable discrimination in favor of any person, locality, etc., in the matter of car service or efficiency of transportation[21] Also, the rule was not intended to require that precisely the same accommodation should be made for freight traffic at every station on a line or road, irrespective of its size or importance.[22]

Express companies. In the absence of any showing of a reason therefor, an express company may not furnish a pick-up service to some shippers and decline it to others.[23]

§ 366. Distribution of Cars

The rule against unjust discrimination applies to the distribution of cars by carriers.

It is the duty of the carrier to give a fair and impartial car service as between different shippers and localities, having regard to all the circumstances, and any failure to do so constitutes unjust discrimination.[24] Accordingly, in the distribution of cars, shippers similarly situated at the same place must be treated alike,[25] and their rights are necessarily equal when they are applying for cars under the same circumstances from stations of equal importance.[26] Shippers located on branch or lateral lines of a railroad are entitled to the same treatment as is accorded to those whose business is situated on the main line[27] As between different stations, cars should be distributed as nearly as may be, in proportion to the ordinary business requirements at the time, in order that shipments may be made with reasonable celerity.[28] Where, from causes not within its control, the carrier cannot supply a sufficient number of cars temporarily made necessary by unusual demands therefor, it is not only entitled, but is also bound, to apportion its cars in a fair and equitable manner among patrons similarly situated, and cannot be compelled to provide one shipper with cars to the exclusion of others.[29]

A carrier does not unjustly discriminate by furnishing cars to be loaded by a wagon on its tracks at a station, with coal for shipment in one direction to points within the state, while it refuses to furnish cars to be so loaded for interstate shipments in the opposite direction, where the order under which the cars are furnished applies to all persons alike;[30] nor does a refusal of a carrier to grant permission to a shipper to purchase and use on the carrier's line a number of cars of a kind used by other shippers on such line amount to a discrimination in the distribution of cars, so as to entitle the shipper to recover damages[31] A contract requiring that cars be supplied on reasonable demand therefor is not discriminatory,[32] and a contract by a carrier

21. Okl.—Chicago, etc., R. Co. v. State, 99 P. 901, 23 Okl. 94.
10 C J. p 482 note 98.

22. U.S.—Michie v. New York, etc., R. Co., C C Mass., 151 F. 694.
10 C J p 475 note 33.

23. S.D.—John Morrell & Co. v American Ry. Express Co., 187 N W. 724, 45 S.D. 399.

Order proper

Where the evidence showed that an express company furnished pick-up and delivery service to places in the same city as petitioner which were situated farther from appellee's place of business than the petitioner, and which did not furnish as much business as petitioner, and that it furnished similar services to several of plaintiff's competitors in other cities, although they were situated farther from its offices than was petitioner, and that pick-up and delivery service within reasonable limits was included in the service for which charge was made, an order requiring the company to furnish pick-up and delivery service to petitioner was reasonable.—John Morrell & Co. v. American Ry Express Co., 187 N.W. 724, 45 S D 399.

24. U S.—James v. Davis, C.C.A Neb., 280 F. 780
Ark.—St. Louis-San Francisco Ry Co. v. Watts, 271 S W. 464, 168 Ark 804.
10 C J. p 482 note 1.
Duty to furnish cars generally see supra §§ 35–39.

Regulations held reasonable

Railroad regulations applicable to all mines, assigning open-top cars to properly equipped mines and box cars to those loading without tipples, etc, during car shortage, were neither unreasonable nor unjustly discriminatory.—Baltimore & O R Co v Public Service Commission, 94 S E. 545, 81 W.Va. 457, L.R.A.1918D 268.

25. Pa.—Wright v Baltimore, etc., R. Co., 32 Pa Super 5.

26. Mo.—Howell v. Hines, App., 236 S W 886
10 C J. p 483 note 3.

27. Ark.—Chicago, R I. & P. Ry. Co v. Sims, 256 S.W. 33, 161 Ark. 289
10 C J. p 483 note 6

28. Wis.—Ayres v Chicago, etc., R Co., 37 N W. 432, 71 Wis. 372, 5 Am S R 226

29. Ark.—Dickinson v. Robertson, 223 S W. 12, 144 Ark. 515
La.—George H. Koepp, Inc., v. New Orleans Great Northern R Co., 110 So. 729, 162 La. 487.
Mich.—Anderson v. Chicago, M. & St P Ry. Co., 175 N.W. 246, 208 Mich 424.
10 C J p 483 note 5.

30. U S.—Harp v Choctaw, etc., R. Co., C.C.Ark., 118 F. 169, affirmed 125 F. 445, 61 C C A. 405.

31. Pa.—Walnut Coal Co. v. Pennsylvania R Co., 85 A. 440, 237 Pa. 410
10 C.J p 483 note 10

32. U S.—Northern Pac. Ry. Co. v. St Paul & Tacoma Lumber Co., C.C.A.Wash., 4 F 2d 359, reversing, D C, St Paul & Tacoma Lumber Co. v Northern Pac. Ry. Co., 296 F 749.

Contract for shipment of lumber

A contract made in 1888 by a manufacturer of lumber to ship a certain proportion of its product over the lines of a railroad company, which implied an agreement by the railroad company to furnish cars for such shipments, was not invalid as in violation of Interstate Commerce Act, prohibiting discrimination and undue preferences, as requiring the company to furnish the cars regardless of the rights of other shippers, but its obligation is to be construed as one to furnish cars on reasonable and lawful demand therefor.—Northern Pac. Ry. Co. v. St Paul & Tacoma Lumber Co., C C A.Wash., 4 F. 2d 359, reversing, D.C., St. Paul &

to furnish a specified number of cars on specified dates and at specified places does not constitute an unjust discrimination, unless the contract if performed will extend to that shipper an undue preference over other shippers,[33] although, under the Interstate Commerce Act, such a contract is deemed to involve an undue preference if it imposes a greater obligation on the carrier than that implied in the tariff.[34] Further, a contract binding a carrier to receive cars of another carrier and to deliver them to the shipper for the reception of his freight is not invalid as creating an unjust discrimination, in the absence of any showing that the contract gave the shipper a preference over shippers of other similar freight who could secure cars from other carriers;[35] and a judgment requiring a carrier to furnish more cars than its rules prescribe does not create a discrimination, where other shippers under similar circumstances would have the same right.[36]

Discrimination in furnishing cars to shippers for transportation of freight in interstate commerce is governed exclusively by the acts of congress and the state law has no application.[37] If an interstate carrier has established a rule for the distribution of cars, and administers it fairly and equally between applicants, the authority to determine whether the rule is reasonable rests with the interstate commerce commission and no court has jurisdiction until the commission has determined that question.[38] This commission may promulgate reasonable rules governing the distribution of coal cars generally,[39] or of privately owned coal cars assigned by the owner, known technically as "assigned cars,"[40] which in its judgment are necessary to prevent unjust discrimination among shippers of coal

Matters to be considered in determining correct apportionment. Any inequality in the matter of the distribution of cars must be justified by a difference of circumstances and situation.[41] Where all shippers in the same situation at a given point are treated alike in the matter of furnishing cars, the mere fact that shippers who own spur tracks or who furnish cars are given preference over those who do not own tracks, but require the use of a railroad company's sidetracks which are needed by it to conduct its general business and to serve the public, is not an unjust discrimination.[42] Where, however, a railroad company permits the building of grain warehouses along its track, in which warehouses the warehouse proprietors store, for hire, the grain of producers, as well as grain which they have themselves purchased, the relative circumstances and conditions of the warehousemen as producers and exporters of grain are not materially dissimilar to those of the producers for whom they store the grain and do not warrant a discrimination in the distribution of cars for the transportation of the grain.[43] Also, in the distribution of cars, the

Tacoma Lumber Co. v Northern Pac. Ry Co, 296 F 749.

33. Iowa—Vander Zyl v. Chicago, R I & P. Ry. Co, 189 N W. 953, 195 Iowa 901, error dismissed Chicago, R I. & P Ry Co. v. Vander Zyl, 45 S Ct. 10, 266 U S. 636, 69 L.Ed 481
10 C J p 213 notes 54, 55, p 483 note 7.

Contract not discriminatory

A contract to furnish a car for a certain date, to be carried by a train regularly operating over the carrier's line is not unduly discriminatory—Stewart v. Chicago, etc., R. Co, 151 N W. 485, 172 Iowa 313

34. U.S—Davis v. Cornwell, 44 S Ct 410, 264 U S. 560, 68 L.Ed 848, reversing Cornwell v. Davis, 213 P. 218, 66 Mont 100, mandate conformed to Cornwell v. Davis, 226 P. 1117, 70 Mont. 608.
Tenn—Louisville & Nashville R Co. v. Hardiman, 5 Tenn App. 289.

Contracts discriminatory

(1) A contract to furnish cars on certain day imposes greater obligation than that implied in tariff, in that proof of due diligence would not excuse a failure to perform, and hence is illegal preference, although no preference actually resulted.

U S.—Davis v Cornwell, 44 S.Ct. 410, 264 U.S. 560, 68 L Ed 848, reversing Cornwell v. Davis, 213 P. 218, 66 Mont 100
Mo—Dollinger v. Missouri Pac. R Co., App, 282 S.W 1047.

(2) To guarantee that a special car will be furnished at a particular time and place, for the transportation of a common commodity and thereby create an advantage or preference which is not available to all, and which is not provided for in the published tariffs, constitutes a violation of the Interstate Commerce Act—American Ry. Express Co v Peninsula Produce Exch, 130 A 346, 148 Md 465

(3) A station agent of a railroad operating under federal control has no authority to make an absolute and unconditional contract to have cattle cars ready at a certain place or date, irrespective of the government's needs or of general service to the public, such a contract being special and discriminatory, and violative of the Commerce Act—Underwood v. Hines, Mo App, 222 S.W. 1037

35. Tex.—Texas, etc., R Co v Shawnee Cotton Oil Co, 118 S W 776, 55 Tex.Civ.App. 183

36. Iowa—Baird Bros. v. Minneapolis & St. L. R. Co., 165 N.W. 412, 181 Iowa 1104.

37. U.S—Missouri Pac R. Co v. Stroud, 45 S.Ct. 243, 267 U.S. 404, 69 L Ed. 683, reversing Stroud v. Missouri Pac. R. Co., 254 S W 111, 212 Mo.App 512, certiorari granted Missouri Pac. R. Co v Stroud, 44 S Ct. 37, 263 U S. 694, 68 L Ed. 510.

38. Ill—State Public Utilities Commission v Baltimore & O S W. R. Co, 118 N.E. 81, 281 Ill 405

39. U S.—U. S v. New River Co, W Va., 44 S Ct 610, 265 U S 533, 68 L Ed 1165, reversing, D.C, New River Co v. Chesapeake & O. Ry. Co., 293 F. 460.

40. U S.—Assigned Car Cases, Pa., 47 S Ct. 727, 274 U S. 564, 71 L Ed. 1204, reversing, D C, Berwind-White Coal-Mining Co. v. U. S., 9 F.2d 429.

41. Pa.—Wright v Baltimore, etc., R. Co., 32 Pa Super. 5.

42. U S.—Harp v Choctaw, etc, R. Co, Ark, 125 F. 445 161 C.C.A. 405, affirming, C C., 118 F. 169.
Ark—Choctaw, etc., R Co. v State, 84 S.W 502, 92 S.W. 26, 73 Ark. 373.

43. U.S.—U. S. v. Oregon R., etc., Co, C.C Or., 159 F. 975.
10 C.J. p 484 note 14.

cars owned by the carrier, those of other carriers on its line to be loaded, and cars owned by any individual shipper must be placed absolutely on the same basis as together forming the available car equipment of the road as a whole;[44] and it is no justification for giving a shipper a preference that the preference arises from the fact that the carrier chose to purchase its coal or fuel supply from that particular shipper.[45] Each shipper is entitled to his percentage of all the available cars, whether owned by the company or individually, in so far as it will not interfere with the right of individual owners to the exclusive use of their own cars,[46] and in determining the percentage of cars to which a particular shipper is entitled, the carrier should be guided by the capacity of the shipper to furnish freight for shipment.[47] The allowance of an extra percentage of cars to a shipper who during the preceding month has unloaded and returned his cars within a certain average time, such practice having been adopted instead of the imposition of a demurrage charge to encourage prompt return of cars and to enlarge the supply available for use, and being open to all alike, has nevertheless been condemned as giving an undue preference or advantage in violation of the Interstate Commerce Act.[48]

Embargo at consignee's request. An embargo by which a carrier at the request of a consignee, and not by reason of any conditions on its line necessitating it, refuses to furnish cars to the consignors for shipments to the consignee is an unlawful discrimination, and, in the absence of any agreement that notice shall be given of the removal of the embargo, no duty rests on the carrier to notify the consignee before raising it.[49]

§ 367. Switch Connections and Services

The rule prohibiting unjust discrimination applies to the furnishing of switch connections and services by carriers.

A common carrier cannot lawfully deny switch connections or service to one person, locality, or kind of traffic which it furnishes to others similarly situated;[50] and the fact that a carrier's line is congested is not an excuse for refusing a siding to one shipper while affording siding facilities to others.[51] However, only such discriminations in the furnishing of switch connections and services as are undue or unreasonable are illegal,[52] and there can be no unjust discrimination in this regard as between

44. U S — Interstate Commerce Commn. v. Illinois Cent. R Co, Ill., 30 S Ct. 155, 215 U.S 452, 54 L Ed. 280—U S. v. Baltimore, etc., R Co, Md, 165 F. 113, 91 C.C.A. 147, reversed on other grounds 30 S.Ct. 164, 215 U S 481, 54 L Ed. 292.
10 C J. p 484 note 17.

45. U.S. — Interstate Commerce Commn v. Illinois Cent R. Co., Ill, 30 S Ct. 155, 215 U.S. 452, 54 L.Ed. 280.
10 C.J p 484 note 15.

46. U.S.—U. S. v. Baltimore, etc., R. Co., Md., 165 F. 113, 91 C.C A. 147, reversed on other grounds 30 S.Ct. 164, 215 U.S 481, 54 L Ed 292.
10 C.J p 484 note 16.

47. U.S —U. S. v. Baltimore, etc., R. Co, Md., 165 F. 113, 91 C.C.A. 147, reversing, C C, 154 F. 108, and reversed on other grounds 30 S.Ct. 164, 215 U S. 481, 54 L Ed. 292—U S v. West Virginia R Co, C.C. W Va., 125 F. 252, affirmed 134 F. 198, 67 C C.A 220.
10 C J p 484 note 18.

48. U S—U. S v Baltimore, etc., R. Co., Md, 165 F 113, 91 C C.A. 147, reversing, C C, 154 F 108, and reversed on other grounds 30 S Ct 164, 215 U.S 481, 54 L Ed. 292.

49. U S—Menasha Paper Co v. Chicago & N. W. Ry. Co., 36 S.Ct 501, 241 U S. 55, 60 L.Ed 885, affirming Chicago & N W Ry. Co v. Menasha Paper Co., 149 N.W 751, 159 Wis. 508.

50. Ga.—Augusta Brokerage Co. v. Central of Georgia R Co, 48 S.E. 714, 121 Ga. 48.
Iowa.—Northern Gravel Co v. Muscatine North & S Ry. Co., 171 N W. 787, 185 Iowa 1259.
Ohio—Quinn Coal Co. v. Hocking Valley Ry., 20 Ohio Cir Ct.,N S, 420—Johnson Coal Mining Co. v. Hocking Valley R Co., 1 Ohio N P, N S, 385.
10 C J. p 484 note 22
Furnishing facilities by carrier to connecting lines see infra § 449.

Spur track

Where a railroad company has constructed a spur track for the convenience of shippers in a limited territory, it cannot grant, nor can a particular shipper acquire, a right to the use of such spur track for his particular business of shipping sand and gravel to the exclusion of other shippers engaged in similar business.
Ark—Missouri Pac. R Co. v. Whelen Springs Gravel Co, 49 S W 2d 374, 185 Ark 669, certiorari denied 53 S Ct 87, 287 U S. 638, 77 L.Ed. 553.
Iowa.—Northern Gravel Co. v. Muscatine North & S. Ry. Co., 171 N.W. 787, 185 Iowa 1259

"Facility" includes switching connection

A switch track for loading and unloading freight is clearly a "facility" within the inhibition against discrimination by common carriers in charges or facilities.—Tucker v. St. Louis-San Francisco Ry. Co, 250 S W. 390, 298 Mo 51, affirming, App., 233 S.W. 512—10 C.J. p 484 note 22 [b].

Test of distinction between "transportation" and "switching" service of freight cars, in an action to recover for unjust discrimination, is not only whether the switching service follows transportation, but whether the movement of cars is under the yardmaster's direction, in which case it is switching service, or under trainmaster's direction, in which case it is transportation service—St. Louis, I. M. & S Ry. Co v. Clark Pressed Brick Co., 192 S.W. 382, 127 Ark. 474

51. Pa.—Cox v. Pennsylvania R. Co., 85 A 863.
10 C.J p 485 note 23.

52. Fla—State v. Atlantic Coast Line R. Co., 119 So. 110, 96 Fla. 646.
Me—Willband v. Knox County Grain Co., 145 A. 405, 128 Me. 62.

Statute not violated

Where there was no evidence of general undertaking of carrier to perform switching service on shippers' premises without agreement, carrier's failure to give plaintiff service on sidetrack without agreement did not violate statute requiring railroads to furnish all persons reasonable and equal facilities—Milford Quarry & Construction Co v. Boston & M. R. R., 151 A. 336, 84 N. H. 407.

shippers who are not similarly situated.[53] Also, a carrier is not guilty of illegal discrimination, where it receives and delivers freight on private spur tracks pursuant to contracts, and the contracts offered to all of its customers are identical,[54] and it is not required to permit a shipper to connect a track with its track, except where it has already granted such privilege to others.[55]

A state railroad commission may make reasonable orders to remove the causes for unjust discrimination by an intra-state railway carrier.[56]

Connecting carriers. Where a reciprocal switching operation is carried on by two connecting carriers, constituting a facility for the interchange of traffic between two railroads, equal facilities must be afforded all other lines for like interchange of traffic without discrimination,[57] even though they are not directly connected with the offending lines.[58] Similarly, it is unlawful for connecting railroads to use each other's tracks and terminal facilities within a specified zone in a city so as to favor certain shippers and prejudice others.[59] The interstate commerce commission has authority to require all railroads performing such service to desist from any discriminatory practice in respect of such switching operation,[60] and an order of this nature is not invalid as taking property without due process of law,[61] nor does such an order require the carriers to give the use of their tracks and terminal facilities to the competing carrier within the meaning of the provision in the Interstate Commerce Act,[62] or of a like provision in a state public utilities act,[63] declaring that such act shall not be considered as re-

53. Ark.—St Louis, etc., R. Co v. Dixie Cotton Oil Co., 165 S.W. 251, 112 Ark. 147.
10 C J. p 485 note 26 [a].

Line-haul movements

(1) Railroad's failure to make rules affecting line-haul movements applicable to industrial switching was not violative of Gen Code § 567, prohibiting preferences, such statute applying only to conditions substantially similar.—Cleveland Provision Co. v Public Utilities Commission, 135 N E. 612, 104 Ohio St. 253, 23 A.L R. 404.

(2) Acts 1917 c 7320, providing that a railroad company in switching cars "shall not make a charge therefor if it has the line haul" construed with reference to Const. art 16 § 30, which renders the legislature powerless to pass laws requiring or permitting unjust discrimination by common carriers, does not require railroad common carrier to render for the line-haul charge an extra service for switching in receiving or delivering cars on its line or any side or spur track, when such service costs more than ordinary or substituted service rendered public generally, and is rendered under special circumstances, and its cost is not included in line-haul charge.—Burr v Florida East Coast Ry. Co, 81 So. 464, 77 Fla. 259.

54. Iowa.—Cedar Rapids, etc., R. Co v Chicago, etc, R Co., 124 N. W. 323, 145 Iowa 528
Miss.—Gulf Compress Co. v. Alabama Great Southern R Co., 56 So 666, 100 Miss 582.

55. U S.—Johnson Coal Mining Co. v Hocking Valley R. Co., 1 Ohio N.P.,N S, 385.
10 C J. p 485 note 25.

56. Fla.—State v. Atlantic Coast Line R. Co, 119 So. 110, 96 Fla 646.

Order reasonable

"An order of the railroad commissioners requiring a railroad company to enlarge its switching limits at Sanford to include a spur track known as Whitner's siding, and to apply to shipments to and from said siding the same rates and treatment applied to like shipments to and from other points within the switching limits of Sanford, held reasonable, it appearing that there exists no substantial operating objections to such enlargement, and that the location of Whitner's siding relative to the freight station and assembly and break-up yards of the carrier, and other conditions affecting the operation and service to and from said siding, are substantially the same as those pertaining to two other sidings of relatively similar location and use which are now voluntarily included by the carrier within its switching limits, and to which the carrier voluntarily applies the Sanford freight rate, which is lower than the rate now applied to shipments to and from Whitner's siding, nothing being shown to afford a just basis for discrimination in rates or service between Whitner's siding and the other sidings mentioned."—State v. Atlantic Coast Line R. Co., 119 So 110, 96 Fla. 646

57. U.S.—Chicago, I. & L. Ry. Co v. U S., Ind., 46 S.Ct. 226, 270 U.S 287, 70 L.Ed 590
10 C J p 485 note 27.

Between steam and electric roads

Alleged lack of reciprocity and other matters of dissimilarity between steam and electric roads were held not, as matter of law, to negative discrimination in refusal of steam roads to establish reciprocal switching services with electric road —Chicago, I. & L Ry. Co. v. U. S, Ind, 46 S Ct. 226, 270 U.S. 287, 70 L. Ed. 590.

58. U.S.—Chicago, I & L Ry. Co. v. U. S, supra.

59. U S.—U. S. v Pennsylvania R. Co, Pa., 45 S.Ct. 43, 266 U.S. 191, 69 L.Ed. 243, reversing, D.C., 295 F. 523.

60. U S.—Louisville, etc, R Co v. U. S., Tenn, 35 S.Ct. 696, 238 U.S. 1, 51 L.Ed 1177, affirming, D C., 216 F. 672—Pennsylvania Co v. U. S., Pa, 35 S.Ct. 370, 236 U.S 351, 59 L.Ed. 616, affirming, D.C., 214 F. 445—Grand Trunk R. Co v. Michigan R Commn, Mich., 34 S.Ct. 152, 231 U S. 457, 58 L Ed 310—Louisville, etc, R. Co v. U S., D C. Tenn., 227 F. 273, reversed on other grounds 37 S Ct 61, 242 U.S. 60, 61 L Ed 152.

61. U.S.—Louisville, etc, R. Co. v. U S., Tenn., 35 S Ct. 696, 238 U.S. 1, 51 L Ed. 1177, affirming, D.C., 216 F 672—Grand Trunk R. Co. v Michigan R. Commn, Mich., 34 S Ct 152, 231 U.S 457, 58 L.Ed. 310 —Louisville, etc, R. Co. v. U. S., D.C Tenn, 227 F. 273, reversed on other grounds 37 S.Ct. 61, 242 U. S 60, 61 L.Ed. 152.

62. U.S.—U. S. v. Pennsylvania R. Co., Pa., 45 S.Ct 43, 266 U.S. 191, 69 L.Ed. 243, reversing, D C, 295 F. 523
10 C J. p 486 note 30.

Purpose of provision

The clause mentioned in the text was inserted in the Interstate Commerce Act to make it clear that the mere grant to one carrier of the use of tracks or terminal facilities for the purpose of interchanging traffic and the refusal of such facilities to another, does not make the preference given illegal. The clause had no other effect.—U. S. v. Pennsylvania R. Co, Pa., 45 S Ct. 43, 266 U.S. 191, 69 L.Ed. 243, reversing, D C., 295 F. 523.

63. Ill.—Public Utilities Commission

quiring a carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business. However, the fact that a railroad company interchanges traffic with certain railroads at its regular, established yard or depot, where it has provided all reasonable, proper, and equal facilities for that purpose, and refuses to interchange traffic with a new road at a point of connection where no such facilities exist, does not constitute any "discrimination," or any "undue or unreasonable preference or advantage," in favor of the railroads with which such interchange is made.[64] It is also not discriminatory for two railway carriers, jointly owning a terminal and maintaining joint switching services therein, to refuse to switch the cars of a third carrier on the same basis.[65]

§ 368. Terminal Facilities

The rule prohibiting unjust discrimination applies to the furnishing of terminal facilities by carriers.

Terminal facilities are within the rule forbidding unjust discrimination as much as any other facilities used in the transportation of goods.[66] Thus, a carrier may not discriminate with respect to the use of its docks, wharves, and piers,[67] or other facilities for loading or unloading freight.[68] Under the Interstate Commerce Act, the carrier may not lawfully pay for a terminal service rendered the shipper's goods, unless the service is performed for all shippers alike at the carrier's station,[69] and as the terminal services incident to an interstate shipment are within the federal act and the condition of liability while the goods are retained after notice of arrival are stipulated in the bill of lading under the filed regulations, the conditions thus fixed are controlling and the parties cannot substitute therefor a special agreement.[70]

On the other hand, under the express provisions of the Interstate Commerce Act and some state constitutions, these rules do not apply to the carriage, storage, or handling of property of the United States, states, or municipal governments.[71] The common use of a railroad terminal by several trunk lines under a single arrangement as to the absorption of the terminal charges does not, as a matter of law, entitle a railway which has no trunk line and does terminal switching alone, to precisely the same treatment.[72] The duty of a carrier to accept goods tendered at its station does not extend to the acceptance of cars offered to it at an arbitrary point near its terminus by a competing road, for the purpose of reaching and using its terminal station.[73] A transportation company operating a railway and a connecting steamboat line does not violate the prohibition of the Interstate Commerce Act against discrimination, by refusing to allow the boats of a competitor to land at its wharf.[74] It is, likewise, permissible for a railroad company to establish a

v. Cleveland, C., C. & St. L. Ry. Co., 133 N.E. 722, 301 Ill. 219.

64. U.S.—Kentucky & I. Bridge Co. v. Louisville & N. R. Co., C.C.Ky., 37 F. 567, 628, 2 L.R.A. 289, appeal dismissed 13 S.Ct. 1048, 149 U.S. 777, 37 L.Ed. 964.

65. U.S.—Louisville & N. R. Co. v. U. S., Tenn., 37 S.Ct. 61, 242 U.S. 60, 61 L.Ed. 152, reversing, D. C., 227 F. 258, modified on other grounds 227 F. 273.

Commission cannot interfere

Two railway carriers, joint owners of terminals in a city, may not be compelled by interstate commerce commission under Act Feb. 4, 1887 § 3, to discontinue as discriminatory their refusal to switch interstate traffic to and from tracks of third carrier on the same terms as similar shipments from their own tracks in said city.—Louisville & N. R. Co. v. U. S., Tenn., 37 S.Ct. 61, 242 U.S. 60, 61 L.Ed. 152, reversing, D.C., 227 F. 258, modified on other grounds 227 F. 273.

66. N.Y.—Windsor v. New York Cent., etc., R. Co., 143 N.Y.S. 645, 82 Misc. 38.

Ohio.—Youghiogheny, etc., Coal Co. v. Erie R. Co., 24 Ohio Cir.Ct. 289.

67. Idaho. — Cœur D'Alene, etc., Transp. Co. v. Ferrell, 128 P. 565, 22 Idaho 752, 43 L.R.A.,N.S., 965
10 C.J. p. 486 note 36

68. Ohio.—Youghiogheny, etc., Coal Co. v. Erie R. Co., 24 Ohio Cir.Ct. 289.
10 C.J. p. 486 note 37.

69. U.S.—Terminal Warehouse Co. of Baltimore City v. U. S., D.C. Md., 31 F.2d 951.

Exclusive allowance to warehouse

(1) The Interstate Commerce Act § 3 (1), 49 U.S.C.A. § 3 (1), against discrimination, has been held to be violated by a carrier's making of an exclusive allowance to a warehouse for its performance of terminal services in connection with the loading and unloading of carload package freight, where the warehouse was not a public terminal or freight station, as it was in substance the consignor or consignee of the goods handled, and similar allowances were not made to other warehouses—Terminal Warehouse Co. of Baltimore City v. U. S., D.C.Md., 31 F.2d 951.

(2) Such allowances are not validated because the warehouse is not designated as consignor or consignee in the bill of lading—Terminal Warehouse Co. of Baltimore City v. U. S., supra.

70. U.S.—Southern R. Co. v. Prescott, S.C., 36 S.Ct. 469, 240 U.S. 632, 60 L.Ed. 836.

71. La.—Miller Engineering Co. v. Louisiana Ry. & Nav. Co., 81 So. 314, 144 La. 786.

72. U.S.—Manufacturers' Ry. Co. v. U. S., Mo., 38 S.Ct. 383, 246 U.S. 457, 62 L.Ed. 831

73. U.S.—Louisville, etc., R. Co. v. Central Stock Yards Co., 29 S.Ct. 246, 212 U.S. 132, 53 L.Ed. 441, reversing 97 S.W. 778, 133 Ky. 148, 30 Ky.L. 18
10 C.J. p. 486 note 38.

74. U.S.—Ilwaco Ry. & Nav. Co. v. Oregon Short Line & U. N. Ry. Co., Wash., 57 F. 673, 676, 6 C.C.A. 495, reversing, C.C., Oregon Short Line & U. N. Ry. Co. v. Ilwaco Ry. & Nav. Co., 51 F. 611. "The Act contemplates, we think, independent carriers capable of mutual relations, and capable of being objects of favor or prejudice. There must be at least two carriers besides the offending one. For a carrier to prefer itself in its own proper business is not the discrimination which is condemned."—Ilwaco Ry. & Nav.

terminal district,[75] and to include all the industries within that district in a group freight rate. This power includes the right to absorb all reasonable switching charges on line-haul freight.[76]

Stockyards. The rule against discrimination has been applied in respect of stockyards maintained by a carrier on premises acquired and held by it for its purposes as such.[77] While it is not the duty of a carrier to keep and maintain a stockyard, yet if it does so without other authority than its charter as a transportation corporation, and as incidental to its transportation business, it is its duty, even in the absence of statute, to serve the public without unjust discrimination.[78] A preferential contract by a carrier to deliver all live-stock shipments at a certain privately owned stockyard, and not to establish any other yard within the city, has been held void under a constitutional provision prohibiting discrimination.[79]

§ 369. Shipments to Points on Line of Connecting Carrier

A common carrier may not unjustly discriminate against shipments to points on lines of connecting carriers.

If the carrier holds itself out to the public as a through carrier to points beyond its own lines, it must afford the same facilities to all shippers along its lines doing business under similar or like circumstances; it cannot grant this accommodation to one shipper and refuse it to others standing in the same relation, as this would amount to an unjust discrimination.[80] Statutory codifications of this rule have been held to be valid.[81]

§ 370. Expediting or Diverting Shipments

An agreement by a carrier to expedite or divert shipments, which privilege is not offered to the public generally or included in its published tariffs, constitutes an unjust discrimination.

A carrier contracting to deliver a commodity within a specified time thereby extends to the shipper an advantage, and imposes on itself an obligation, not contemplated in the usual method of shipment.[82] While an interstate carrier can assume an extra liability for expediting shipments, provided it makes and publishes a rate therefor and extends it to all, yet to agree with a particular shipper to expedite a shipment at regular rates, when no rate has been published for the expediting, is a discrimination, and as such is in violation of the Interstate Commerce Act.[83] Accordingly, a carrier is guilty

Co. v. Oregon Short Line & U. N. Ry. Co., supra.

75. W.Va.—Zenith Sand Co. v. Public Service Commission, 151 S.E. 433, 108 W.Va. 413.
10 C.J. p 486 note 33.

76. W.Va.—Zenith Sand Co. v. Public Service Commission, 151 S.E. 433, 108 W.Va. 413.

77. N.Y.—Windsor v. New York Cent., etc., R. Co., 143 N.Y.S. 645, 647, 82 Misc. 38.
10 C.J. p 486 note 39.
"Of what avail is it that the carrier is prohibited from discriminating with respect to rates, if it may discriminate with respect to facilities either at the point of shipment or the point of delivery? If the court is powerless to intervene on behalf of the plaintiffs on the facts now presented for adjudication, then the defendant is at liberty to contract with one shipper to receive into its stockyards and care for his stock and afford him an opportunity of exhibiting it there for sale without other charge than for the actual expense in feeding and caring for the stock, or without charge even for those items, and to charge another shipper the same freight rate and to require him to remove his stock from its cars and premises within a reasonable time after its arrival at the point of destination, and to refuse to care for or feed the stock after its arrival or to afford the owner facilities for exhibiting it for sale while on the defendant's premises. In the early days when the courts declared it to be the duty of common carriers to serve the public without unjust discrimination, carriers neither conducted warehouses nor stockyards; but the warehouse and stockyard business as conducted by common carriers under their charters as transportation corporations is incidental to their business as common carriers and is directly connected therewith. On principle, therefore, the same rule should be applicable to the warehouse and stockyard business with respect to discrimination as to the transportation of freight. The common law is elastic; and it expands to meet changed conditions and methods of transacting business. I do not say that it is the duty of the defendant to establish and maintain a stockyard; but I hold that, since it has established and does maintain a stockyard without other authority than its charter as a transportation corporation and as incidental to its transportation business, it is its duty, even though there be no statute enjoining such duty, to serve the public, whom it has invited by this long-existing custom and still invites to make use of its stockyards, without unjust discrimination, and that it is within the province of the court to enforce this duty by mandamus or injunction."—Windsor v. New York Cent., etc., R. Co., supra.

78. N.Y.—Windsor v. New York Cent., etc., R. Co., supra.

79. Ky.—Louisville, etc., R. Co. v. Central Stock Yards Co., 97 S.W. 778, 133 Ky. 148, 30 Ky.L. 18, reversed on other grounds 29 S.Ct. 246, 212 U.S. 132, 53 L.Ed. 441.

80. Ga.—Georgia Coast, etc., Ry. Co. v. Durrence, 65 S.E. 583, 6 Ga. App. 615
Ind.—Pittsburgh, etc., R. Co. v. Wood, 84 N.E. 1009, 88 N.E. 709, 45 Ind.App. 1.

81. Tex.—Quanah, A. & P. Ry. Co. v. Warren, Civ.App., 184 S.W. 232.

82. Ky.—Louisville & N. R. Co. v. Warren County Strawberry Growers' Ass'n, 267 S.W. 551, 206 Ky. 482.

83. Ind.—Baltimore & O. R. Co. v. Maurer, 127 N.E. 294, 73 Ind.App. 296.
N.Y.—Emil Grossman Mfg. Co. v. New York Cent. R. Co., 169 N.Y.S. 213, 181 App.Div. 764.
Tenn.—Roberts v. Nashville, C. & St. L. Ry. Co., 185 S.W. 69, 135 Tenn. 48.
10 C.J. p 487 note 48.

of illegal discrimination if it contracts for the delivery of commodities or live stock at a specified time, when its tariffs on file with the interstate commerce commission contain no provision fixing the schedule of time for delivery.[84] On the other hand, there is no invariable rule requiring freight to be carried in the order in which it is received without regard to its character or condition, or its liability to perish,[85] and giving preference to relief goods sent to sufferers from fire, or flood, or other calamity is not an illegal discrimination.[86] Also, where there is a press of business, perishable goods, or goods the inherent character of which is such as to render them peculiarly liable to serious injury from delay, and which must be transported promptly or else lost or greatly damaged, the circumstances must be considered as of such exceptional character as to authorize a reasonable preference, as to expedition in hauling them, over freight not of such a character, in the absence of express statutory regulation on the subject.[87] This rule, however, does not authorize a preference on account of merely slight differences in commodities,[88] nor can the rule be invoked as a cloak for making illegal discriminations in favor of one shipper or class of shippers as against another without real ground for its application.[89]

Diverting or delaying shipments. It is unlawful under the Interstate Commerce Act to contract to divert or delay particular interstate shipments, in the absence of the publication of a special rate therefor;[90] but an agreement on the part of the

Guarantee of connection

A carrier violates the Interstate Commerce Act when it enters into an agreement to guarantee a particular connection and transportation by a particular train, so as to give a preference not open to all and not provided for in the published tariffs—Cicardi Bros. Fruit & Produce Co. v. Pennsylvania Co., 213 S.W. 531, 201 Mo.App. 609.

It is unlawful to contract to expedite an interstate shipment.—Eastern Shore of Virginia Produce Exch. v. New York, P. & N. R. Co., 126 S.E. 674, 141 Va. 611.

Transportation of live stock on fast train, which it was advertised would carry only perishable freight beyond the destination of the cattle, would be discriminatory, and the carrier's refusal so to transport the stock is not negligence.—Baltimore & O. R. Co. v. Maurer, 127 N.E 294, 73 Ind App. 296.

84. Ky.—Louisville & N. R. Co. v. Warren County Strawberry Growers' Ass'n, 267 S.W. 551, 206 Ky. 482.

Mo.—Vaughn v. St. Louis-San Francisco Ry. Co, 15 S.W.2d 901, 223 Mo.App. 732.

S.D.—Willer v. Chicago, M. & St. P. Ry. Co., 210 N.W. 81, 50 S.D. 319.

Tex.—Texas & P. Ry. Co. v. West Bros, Com App, 207 S.W. 918, affirming in part and reversing in part St. Louis, I. M. & S Ry. Co v. West Bros., 159 S.W. 142, rehearing denied Texas & P. Ry Co v. West Bros., Com.App., 214 S.W. 808

Reason for rule

"If in the tariffs of a carrier on file with the Interstate Commerce Commission there is no provision fixing the schedule of time for delivery of commodities shipped under those tariffs, and if for that reason the carrier may contract with whomsoever it chooses to deliver within a specified time, and decline to so contract with others with whom it may not desire to do so, the entire scheme of prevention of discrimination by carriers devised by the federal Congress would be rendered of no value. Such shipments with delivery so contracted for would universally be given every service preference at the hands of the carrier Such preference would be discrimination of the most pernicious character. The selection of the beneficiary of such discrimination under those conditions would be left entirely to the carrier. It is certainly true that a carrier may institute a service for a particular freight commodity, and in so doing may fix time schedules for delivery of the commodity, but whenever it does so, and the time of delivery is intended to be a part of the service, it is indispensably necessary that such be published as a part of the tariffs, and be filed with the Interstate Commerce Commission. Then such service would be open to the shipping public at large, on equal terms"—Louisville & N R. Co v Warren County Strawberry Growers' Ass'n, 267 S.W. 551, 552, 206 Ky. 482.

Declarations by station agent

That a station agent after telegraphing told a shipper that a train arriving during the night would carry his cattle did not constitute a contract for special service and a discrimination in violation of the Elkins Act—Chicago, R. I & P. Ry Co. v. Stallings, 201 S.W. 294, 132 Ark 446.

85. Wis.—Peet v. Chicago, etc., R Co, 20 Wis. 594, 91 Am D. 446

86. Mich.—Michigan Cent. R. Co. v. Burrows, 33 Mich. 6.

87. Ga.—Southern R. Co. v. Atlanta Sand, etc, Co, 68 S.E. 807, 135 Ga. 35.

10 C.J. p 486 note 44.

88. Ga.—Ocean SS Co v. Savannah Locomotive Works, etc., Co, 63 S.E 577, 131 Ga. 831, 127 Am S.R. 265, 20 L.R.A.,N.S., 867, 15 Ann Cas. 1044.

89. Ga.—Southern R. Co v Atlanta Sand, etc., Co, 68 S.E. 807, 135 Ga. 35—Ocean SS. Co. v. Savannah Locomotive Works, etc, Co., 63 S.E 577, 131 Ga. 831, 127 Am. S.R. 265, 20 L.R.A.,N.S., 867, 15 Ann Cas. 1044.

90. Va.—Eastern Shore of Virginia Produce Exch. v. New York, P. & N. R. Co., 126 S.E. 674, 141 Va. 611.

Delay in unloading live stock

If a carrier of live stock agreed to carry the stock without unloading past the twenty-eight-hour limit imposed by Twenty-eight-Hour Law § 1, U.S.Comp St. § 8651, and past the regular unloading place for such period, at regular rates, it was a special agreement imposing special duties which would be void as a discrimination in the absence of a corresponding rate therefor.—Bradford v Hines, 227 S.W. 889, 206 Mo.App. 582

Reconsignment of potatoes

A special contract entered into at St. Louis, Mo., between a shipper and a carrier, whereby the carrier was to divert or reconsign a shipment of potatoes at Pittsburg, Pa., to Chicago, Ill, by wire, so as to have it go on a particular train arriving at Chicago on a particular date, was an agreement for special services prohibited by the Interstate Commerce Act as amended by the Elkins Act—Cicardi Bros Fruit & Produce Co v. Pennsylvania Co, 213 S.W. 531, 201 Mo.App. 609.

carrier, in compliance with the shipper's request, to extend the twenty-eight hour period for unloading live stock to thirty-six hours, is open to every shipper and is not a preferential contract.[91]

Where pursuant to a rule of the interstate commerce commission a carrier adopts a tariff and conditions on which diversion would be made, which provided that parties making request for change of destination must furnish satisfactory proof of ownership and acceptable form of bond, the carrier cannot without unjust discrimination waive its regulation and allow a diversion in any unauthorized measure.[92]

§ 371. Stop-Over Privileges

Under the Interstate Commerce Act stop-over privileges cannot be granted to the shipper contrary to the provisions of the carrier's published tariff.

Under a provision of the Interstate Commerce Act that no carrier shall engage in the transportation of property unless the rates for which the same is transported have been filed and published in accordance with the act, and that no carrier can extend any privileges in the transportation of property except such as are specified in the tariff, where the schedule of rates filed with the interstate commerce commission provides for stop-over privileges for certain commodities and not for others, an agreement for stop-over privileges for such other commodities is invalid and unenforceable, for the reason that such privileges cannot be demanded by other persons.[93] Likewise, where goods are shipped at the rate published for through shipments, permitting a shipper to unload part of the shipment at an intermediate point is an unjust discrimination where the tariff permits no such privilege.[94] When freight is divided into groups and classes for the purpose of fixing charges for transportation and other purposes in connection therewith, each separate group or class and all the commodities belonging to it must be considered as distinct objects of contract, and each handled according to the public schedules and tariffs applicable thereto. The granting of stop-over privileges to one shipper, where such privilege is not granted to the public generally by the published schedules and tariffs, constitutes an unjust discrimination.[95]

§ 372. Giving Credit to Some Parties and Requiring Payment of Others

Generally, the demanding of prepayment of freight charges from some shippers while not requiring such prepayment from others does not constitute an unjust discrimination, but granting credit to some shippers for the freight charges on goods sent as prepaid does constitute such discrimination.

It is generally held that a common carrier, both at common law and under the Interstate Commerce Act, may demand prepayment of freight charges for goods delivered to it by a connecting carrier or an individual shipper without exacting such prepayment when delivered by another connecting carrier or individual shipper; such discrimination does not amount to an unreasonable discrimination, or an undue or unreasonable prejudice or disadvantage, within the meaning of the statute,[96] and the carrier's purpose or motive in making such discrimination is immaterial.[97] The granting of credit to the shipper for freight charges on goods sent as pre-

91. Ind.—Baltimore & O. S. W. R. Co. v. Bower, 127 N.E. 458, 73 Ind App. 367.

92. Va.—Norfolk Southern R Co. v. Whitehurst, 85 S.E. 458, 117 Va. 542.

10 C.J. p 487 note 49.

93. Tex.—Bergin v. Missouri, etc., R. Co., Civ App., 150 S.W. 1184.

94. Miss.—Alabama Great Southern R. Co v F. A. Hulett & Son, 131 So. 814, 159 Miss. 333.

95. Tex.—Bergin v. Missouri, etc., R. Co., Civ.App., 150 S W. 1184.

96. U S.—Gamble-Robinson Commn Co v. Chicago, etc., R Co., Minn., 168 F. 161, 94 C.C.A 217, 21 L. R.A.,N.S., 982, 16 Ann.Cas. 613.

10 C.J. p 487 note 53

Extension proper

Railroad company's extension of time for payment of freight charges by company to which cars were delivered on shipper's instruction was not violation of clause in bill of lading, prohibiting delivery until all charges were paid, in view of authority granted carrier by interstate commerce commission to extend time.—New York Cent. R. Co. v. Frank H Buck Co., 41 P.2d 547, 2 Cal.2d 384.

Carrier's continued delivery of shipments to company for which they were intended under twenty-four-hour credit arrangement, notwithstanding company's failure to pay freight charges on prior deliveries, was not a violation of interstate commerce commission's order allowing ninety-six-hour extension of credit so as to give shipper contracting to pay freight charges action for damages against carrier, under Interstate Commerce Act § 3 subd 2, 49 U.S.C.A. § 3 subd 2.—New York Cent R Co. v Frank H Buck Co., 41 P.2d 547, 2 Cal 2d 384

In Georgia, however, under its power to make rules to prevent discrimination, it is competent for the railroad commission to declare an unlawful discrimination a course of conduct whereby a railroad company connecting with other railroad companies at each of its termini which converge to a common point, affording a choice of routes from the common point to stations on its own line, receives from one of its connections freights destined to points on its own line without requiring prepayment of the earned charges of the favored carrier, and declines to receive from the connecting carrier at the other terminus freight destined to points on its own line without prepayment of the freight charges earned by that connecting carrier, where the conditions are substantially similar and the effect of the course of conduct is seriously to curtail competition in rates and service to the patrons on its own line.—Wadley Southern R. Co. v. State, 73 S.E. 741, 137 Ga. 497.

97. U.S.—Gamble-Robinson Commn Co. v. Chicago, etc., R Co., Minn., 168 F. 161, 169, 94 C.C.A. 217, 21 L.R.A.,N.S., 982, 16 Ann.Cas 613.

10 C.J. p 487 note 54.

paid, however, in lieu of payment in money, constitutes an unjust discrimination.[98] The purpose of the rule that payment of a carrier's charges must be made in money, and that it must be cash as distinguished from credit, is solely to prevent rebates or unjust discrimination and to insure observance of the tariff rates.[99] The Interstate Commerce Act does not prescribe, or absolutely require, that the charges be paid in money, and payment may properly be made, without constituting an unjust discrimination, by means of a check payable on demand drawn on a going bank in which the drawer has an ample deposit.[1]

§ 373. Connecting Carriers

Generally, a carrier does not commit an unjust discrimination by requiring prepayment of freight from one connecting carrier and not from others.

Although there is some authority to the contrary,[2] a railroad company may without being guilty of unjust discrimination require prepayment of freight from one connecting carrier, although it does not exact such prepayment from other connecting carriers,[3] and it has similarly been held that a carrier may advance freight charges to one connecting carrier without advancing such charges to another connecting carrier, without laying itself open to the charge of unjust discrimination.[4] There is nothing, however, in the federal constitution prohibiting a state from requiring common carriers to treat all connecting carriers alike in regard to the prepayment of freight, and a decision of the state supreme court upholding a statute of this character is controlling on the United States supreme court.[5]

Where the published tariffs provide that carload shipments will not be delivered to a line which performs only switching services until freight charges are paid, the carrier cannot make a delivery to such line without first requiring the payment of charges, as such a delivery would be an unjust discrimination.[6]

§ 374. Receiving Compensation Other than That Allowed by Law

The carrier is not permitted to exchange transportation for services or property by way of barter.

Under statutes prohibiting discrimination, the carrier is not permitted to exchange transportation for services or property by way of barter.[7] So, the compromise and settlement of an unliquidated claim by a shipper against a carrier furnishes no justification for the action of the carrier in charging him less rates than it charges other shippers for like services.[8]

§ 375. Discrimination in Freight Rates

Particular matters with regard to discrimination in freight rates will be discussed in detail in the sections immediately following. Freight charges and liens generally are discussed in §§ 312–333 supra. Examine pocket parts for later cases.

§ 376. Duty of Carrier to Maintain Equality of Charges

A carrier is bound to carry freight and live stock at equal rates for all customers for substantially similar services under like conditions.

It is generally held that, independently of any constitutional or statutory regulation on the subject, the carrier is bound to carry at an equal rate for all customers for substantially similar services and under substantially similar conditions.[9] Al-

98. U.S.—U. S. v. Sunday Creek Co., D.C.Ohio, 194 F. 252, affirmed 210 F. 747, 127 C.C.A. 297.
10 C.J. p. 488 note 55.

99. U.S.—Fullerton Lumber Co. v. Chicago, M., St. P. & P. R. Co., Minn., 51 S.Ct. 227, 282 U.S. 520, 75 L.Ed. 502, reversing, C.C.A., 36 F.2d 180, certiorari granted 50 S.Ct. 249, 281 U.S. 709, 74 L.Ed. 1132.

1. U.S.—Fullerton Lumber Co. v. Chicago, M., St. P. & P. R. Co., supra.

2. U.S.—Baltimore, etc., R. Co. v. Adams Express Co., C.C.Md., 22 F. 404
10 C.J. p. 489 note 60

3. U.S.—Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., Ark., 63 F. 775, 11 C.C.A. 417, 26 L.R.A. 192, affirming, C.C., 59 F. 400.
10 C.J. p. 488 note 58.

4. U.S.—Gulf, etc., R. Co. v. Miami S.S. Co., Tex., 86 F. 407, 30 C.C.A. 142.

5. U.S.—Wadley Southern R. Co. v. Georgia, 35 S.Ct. 214, 235 U.S. 651, 59 L.Ed. 405, affirming 73 S.E. 741, 137 Ga. 497.

6. Va.—McGuire v. Atlantic Coast Line R. Co., 118 S.E. 225, 136 Va. 382.

7. U.S.—Lake & Export Coal Corporation v. Chesapeake & O. Ry. Co., C.C.A.W.Va., 1 F.2d 968
Pa.—Adams Express Co. v. Albright Bros., 75 Pa.Super. 410.
10 C.J. p. 489 note 62.

Exchange for coal

A railroad common carrier was without legal authority to purchase coal and pay for the same by releasing a claim for freight and demurrage.—Lake & Export Coal Corporation v. Chesapeake & O. Ry. Co., C.C.A.W.Va., 1 F.2d 968.

Set-off

In an action by an express company, for express charges made under existing tariffs duly filed, defendant cannot set off a claim against plaintiff for goods lost or damaged in transit, this being a discrimination within the meaning of the Interstate Commerce Act.—Adams Express Co. v. Albright Bros., 75 Pa.Super. 410.

8. U.S.—Union Pac. R. Co. v. Taggart, Colo., 13 S.Ct. 977, 149 U.S. 698, 37 L.Ed. 905—Union Pac. R. Co. v. Goodridge, Colo., 13 S.Ct. 970, 149 U.S. 680, 37 L.Ed. 936.
10 C.J. p. 489 note 63.

9. Fla.—State ex rel. Burr v. Atlantic Coast Line R. Co., 119 So. 110, 96 Fla. 646
N.H.—Boston & M. R. R. v. Great

though expressions may be found in some decisions to the effect that at common law a common carrier of goods is under no obligation to treat all customers equally in the matter of rates charged for transportation; that there is nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonable rate, or even gratis; and that all the law required was that he should not charge anyone more than was reasonable.[10] The fact that the rate charged one who claims to have been unjustly discriminated against is not in itself unreasonable does not in any way affect the carrier's liability if in fact there has been an unreasonable discrimination.[11]

A carrier does not discriminate against a shipper who aids in the transportation, by refusing to give him lower rates, where the shipper benefits from his aid by receiving better service;[12] neither is a shipper discriminated against when the rate of which he complains is actually lower than that of his competitors.[13]

Under federal statutes. Under the express provisions of the Interstate Commerce Act, carriers subject to the act are bound to carry at an equal rate for all customers for substantially similar services and under substantially similar conditions.[14] Such provisions must be understood and enforced according to their evident purpose and in the light of the conditions which brought them forth.[15] Under these provisions carriers may not adjust

Falls Mfg. Co., 111 A. 691, 79 N H 467.

Utah.—Jeremy Fuel & Grain Co. v Denver & R. G R. Co, 207 P. 155, 60 Utah 153.

10 C.J. p 489 notes 66, 67.

The Corpus Juris text, has been quoted with approval, the court declaring that the great weight of American authority is in accord with the rule as there stated, in Jeremy Fuel & Grain Co v. Denver & R. G. R. Co, 207 P. 155, 60 Utah 153.

Creation of monopoly

Such discriminations have been declared to be particularly objectionable where they tend to create a monopoly in favor of one shipper to the exclusion of others—Louisville, etc, R Co v Wilson, 32 N. E. 311, 132 Ind 517, 18 L.R.A. 105—10 C J. p 490 note 69.

In Nebraska

(1) It has been said that there was nothing in the common law to prevent a carrier from giving individuals an unreasonably low rate or even carrying without charge—State v. Chicago, B & Q R. Co, 199 N W. 534, 112 Neb. 248.

(2) However, a later case quoted with approval the statement made in Sullivan v. Minneapolis & R R. Ry. Co, 142 N W 3, 121 Minn 488, 45 L R A,N S., 612, that "The modern common law imposes upon common carriers the duty of equality in freight rates to all shippers similarly circumstanced for the transportation of the same class of goods the same distance, and our statutes prohibiting such discrimination are declaratory of the common-law rule."—Central Bridge & Construction Co. v. Chicago & N W Ry Co., 262 N W 852, 854, 129 Neb. 726

10. S C—Ex p Benson, 18 S.C 38, 44 Am R 564.
10 C.J. p 489 notes 64, 65.

11. Tex.—Galveston Chamber of Commerce v. State A. Commn, Civ App., 137 S W. 737, reversed on other grounds 145 S.W. 573, 105 Tex. 101.

12. Wash.—Public Service Commission of Washington v. State, 204 P. 791, 118 Wash. 629, 25 A.L R 186, affirmed 207 P. 688, 118 Wash 629, 25 A.L R. 186.

13. Minn.—Hallett Const. Co. v. Foley Bros., 254 N.W. 435, 191 Minn 335

14. Ala.—Louisville & N. R. Co. v A. H. Cleaver & Co, 101 So. 597, 211 Ala 661.

Mich.—Pennsylvania R Co v. Marcelletti, 240 N W. 4, 256 Mich. 411, 73 A L R. 923.

Tex—Neubert v. Chicago, R I. & G. Ry Co, 296 S W. 1090, 116 Tex. 644, 53 A.L R 1234.

10 C J. p 489 note 68.

Storage charges

On shipment of flour from Western points in the United States and Canada to Boston, carrier could not, in view of Interstate Commerce Act Febr 4, 1887 § 1, and § 6 pars 1, 7, as amended, U S Comp St. §§ 8563, 8569, make any storage charge or charge for any service connected with transportation and delivery, other than those authorized by tariff schedules filed—Raymond Hadley Corporation v. Boston & M. R. R., 174 N Y S 342, 186 App Div 341, appeal dismissed on condition 123 N E 886, 226 N Y 711, and affirmed 126 N.E 921, 227 N Y. 648.

Switching charges

(1) Imposing charges for switching shipments of grain to industries located on tracks of a terminal company, no charge being made for switching like shipments on other industrial tracks owned by principal railroad companies, is unjust discrimination—Minneapolis Civic & Commerce Ass'n v. Chicago, M. & St. P Ry. Co., 158 N.W 817, 134 Minn. 169, affirmed Chicago, M & St. P. Ry. Co. v. Minneapolis Civic & Commerce Ass'n, 38 S Ct. 553, 247 U.S. 490, 62 L.Ed. 1229.

(2) Where, under the tariff provisions, charges for line haul made by railroads include charge for switching on industrial tracks, such railroads cannot remove discrimination against industries on tracks of subsidiary company by additional charge for switching over other industrial tracks, in violation of the tariff provisions—Minneapolis Civic & Commerce Ass'n v. Chicago, M. & St. P. Ry. Co., supra.

(3) The practice of three carriers as to traffic from points south of Richmond, whereby each absorbed, for shipments from competitive points only, switching charges to industries in Richmond on the lines of such carriers and similarly located with regard to the interchange tracks of the three carriers, but refused to absorb the switching charge on deliveries to similarly located industries on noncompetitive lines, was a violation of Interstate Commerce Act § 2, 49 U.S.C.A. § 2, not being a like and contemporaneous service of a like kind of traffic under similar circumstances and conditions—Seaboard Air Line Ry. Co. v. U S, Va, 41 S Ct 24, 254 U S 57 65 L.Ed 129, affirming, D.C., 249 F 368.

15. Mo.—Foster Lumber Co. v. Atchison, T & S F Ry. Co, 194 S W. 281, 270 Mo 629, L.R.A.1918A 768.

The purpose of congress in the enactment of Interstate Commerce Act § 6, as amended by the Hepburn Act § 2, is obviously to provide for a system of tariff schedules, rates, fares, and charges which would be uniform and consistent and apply without discrimination or favoritism to all shippers similarly situated. It is obviously intended thereby that the total charge to be paid by the shipper should be clearly ascertainable from the tariff

their rates with the motive of injuring or aiding a particular shipper, kind of traffic, or locality.[16] On the other hand, shippers who are accorded reasonable service at reasonable rates without unjust discrimination cannot complain of the rates enjoyed by their competitors,[17] and some shippers cannot escape the natural disadvantage of small capital and inadequate facilities of their own on the ground that a rate applicable to all shippers is discriminatory as to them.[18] Also, the act expressly exempts the carriage, storage, or handling of property free or at reduced rates for the United States, state, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat.[19]

The effect of maintaining a lower rate, intrastate, than the reasonable interstate rate is necessarily discriminatory whenever the two classes of traffic, inextricably intermingled are carried on,[20] and, under the amendment to the Interstate Commerce Act, 49 U.S.C.A. § 13 (4), unjust discriminations against interstate commerce caused by intra-state rates may be removed by minimum intrastate rates prescribed by the interstate commerce commission.[21]

Discriminatory rates violative of the Interstate Commerce Act may be imposed by a combination of connecting carriers as well as by an individual railroad,[22] and the commission has ample power to remove discrimination so practiced.[23] How-

schedules, so that one shipper should not have imposed on him auxiliary charges which might not be imposed on others.—Alton & S R. R. v. U. S., D C Cal, 49 F.2d 414.

16. U.S.—Texas & P. Ry. Co. v. U S., Tex., 53 S.Ct. 768, 289 U S. 627, 77 L.Ed. 1410, reversing, D.C., 42 F.2d 281.

Tariff unlawful

Tariff published by carrier for purpose of destroying or building up market or diverting traffic from particular place to injury thereof or in aid of another place is unlawful under Interstate Commerce Act § 3 (1), 49 U S C A. § 3 (1)—Texas & P. Ry. Co. v. U. S., Tex., 53 S.Ct. 768, 289 U S. 627, 77 L Ed. 1410, reversing, D C., 42 F.2d 281.

17. U.S—Alexander Sprunt & Son v. U. S., Tex., 50 S Ct. 315, 281 U. S. 249, 74 L Ed. 832, reversing, D. C., 23 F 2d 874.

18. U.S—Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & St. P. Ry. Co., D C Mo., 2 F 2d 291, affirmed 46 S.Ct. 530, 271 U.S. 259, 70 L Ed. 934.

19. U.S.—Nashville, C. & St. L. Ry. v. State of Tennessee, Tenn, 43 S. Ct 583, 262 U.S 318, 67 L.Ed 999, reversing, D C, State of Tennessee v. U S, 284 F. 371

La.—New Orleans & N. E. R. Co. v. City of New Orleans, 123 So. 323, 168 La. 781.

Scope of provision

"Congress did not intend, by this provision concerning reduced rates and free transportation, to create an instrument, by which the carrier was authorized, in its discretion, to subject interstate commerce to undue prejudice, or by which the state was empowered to compel the carriers so to do The object of the section was to settle, beyond doubt, that the preferential treatment of certain classes of shippers and travelers, in the matters therein recited is not necessarily prohibited. And in this respect its provisions are illustrative, not exclusive. It limits, or defines, the requirement of equality in treatment which is imposed in other sections of the act. By so doing, it preserves the right of the carrier theretofore enjoyed of granting, in its discretion, preferential treatment to particular classes in certain cases. Only in this sense can it be said that the section is permissive. It confers no right upon any shipper or traveler. Nor does it confer any new right upon the carrier."—Nashville, C. & St. L. Ry. v. State of Tennessee, Tenn., 43 S Ct. 583, 585, 262 U S. 318, 67 L Ed. 999, reversing, D C., State of Tennessee v. U. S, 284 F. 371.

20. U S.—Illinois Commerce Commission v. U. S., Ill., 54 S Ct. 783, 292 U.S. 474, 78 L Ed. 1371, motion denied 54 S Ct 861, rehearing denied 55 S.Ct. 66, 293 U.S. 628, 79 L.Ed. 714.

Switching rates

U.S—Illinois Commerce Commission v. U. S, Ill., 54 S.Ct. 783, 292 U.S. 474, 78 L Ed. 1371, motion denied 54 S.Ct. 861, rehearing denied 55 S.Ct. 66, 293 U.S. 628, 79 L Ed. 714.

21. U S.—U. S v. State of Louisiana, 54 S.Ct 28, 290 U S. 70, 78 L. Ed. 181, reversing, D C., State of Louisiana v. U. S, 2 F Supp. 545.

Ill.—Atchison, T & S. F Ry. Co. v. Illinois Commerce Commission, 166 N.E 466, 335 Ill. 70.

Pa.—Pennsylvania R Co v. Public Service Commission, 190 A. 372, 126 Pa.Super. L.

Increase proper

Where interstate commerce commission approved carrier's interstate rates, but ordered it not to discriminate against interstate traffic by charging it over one cent more than for certain intra-state shipments, the carrier might remove discrimination by advancing intra-state rates to within one cent of interstate rates, although state statute prescribed lower rates.—St Louis, I. M. & S. Ry. Co. v. State, 197 S W. 1, 130 Ark. 223.

22. U S—Texas & P. Ry. Co. v. U. S, Tex, 53 S Ct. 768, 289 U S 627, 77 L Ed. 1410, reversing, D.C., 42 F 2d 281—U S. v. Illinois Cent R. Co., Miss, 44 S Ct. 189, 263 U S 515, 68 L.Ed. 417—Central R. Co. of New Jersey v. U. S, N.J., 42 S.Ct. 80, 257 U S. 247, 66 L Ed 217.

Rate discriminatory

Where a railroad company established blanket rates on its main and branch lines within certain territory for transportation of lumber, but did not grant blanket rate to points on connecting lines, except where necessary to meet competition, the interstate commerce commission was warranted in finding that the refusal to grant the same through rate to point on independent short line wholly dependent on the railroad, where cost of transportation and other conditions were the same, constituted unfair discrimination, although the higher rate was reasonable, and the only motive of the railroad in making the discrimination was that of self-interest—U. S. v. Illinois Cent. R. Co., Miss., 44 S.Ct. 189, 263 U S 515, 68 L.Ed. 417.

23. U.S.—U. S. v. Illinois Cent. R. Co, supra—Central R Co. of New Jersey v. U. S, N J., 42 S Ct. 80, 257 U S. 247, 66 L Ed. 217.

Allowances by trunk lines to tap lines

Act Febr. 4, 1887 § 15, as amended by Act June 18, 1910 § 12, empowering the interstate commerce commission to prevent unlawful discrimination, authorizes the commission to prescribe the maximum allowance out of the joint rates which trunk line railways may make to tap lines owned by persons owning timber and mills which they principally

ever, participation in joint rates merely does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination, as where a lower rate is given one locality than to another similarly situated.[24]

Orders of the interstate commerce commission directing the removal of discriminatory rates must be reasonably definite; otherwise an application should be made to the commission for further specifications.[25]

Under state constitutions and statutes. The general rule as to the duty of carriers to maintain equality of charges, discussed in the first paragraph of this section, has been incorporated into the constitutional and statutory provisions of many of the states.[26] Under such legislation rates are

serve, although no joint rate was fixed either by the commission or by the carriers, and they had not been afforded an opportunity to agree with respect to the division.—O'Keefe v U. S., La., 36 S.Ct. 313, 240 U.S. 294, 60 L.Ed. 651.

Combination rates

Under Act to Regulate Commerce § 3, Comp.St. § 8565, prohibiting unfair discrimination, undue prejudice may be inflicted as effectively by a through rate which is a combination of locals, as by a joint through rate, and the interstate commerce commission has as much power to remove unjust discrimination in one case as in the other.—U. S. v. Illinois Cent. R. Co., Miss., 44 S.Ct. 189, 263 U.S. 515, 68 L.Ed. 417.

Cease and desist order proper

Where through rate charged by railroad from certain points within blanket territory was lower than rate charged from another point within such territory on an independent short line, the interstate commerce commission could require the railroad to desist from unjust discrimination, although the point from which the higher rate was charged was not on its own line, the railroad being in a position to remove the discrimination by increasing the lower rate.—U. S. v. Illinois Cent. R. Co., Miss., 44 S.Ct. 189, 263 U.S. 515, 68 L.Ed. 417.

24. U.S.—Texas & P. Ry. Co. v. U. S., Tex., 53 S.Ct. 768, 289 U.S. 627, 77 L.Ed. 1410, reversing, D.C., 42 F.2d 281—Central R. Co. of New Jersey v. U. S., N.J., 42 S.Ct. 80, 257 U.S. 247, 66 L.Ed. 217.

25. U.S.—American Exp. Co. v. State of South Dakota ex rel. Caldwell, S.D., 37 S.Ct. 656, 244 U.S. 617, 61 L.Ed. 1352.

Order sufficiently definite

(1) Order of the interstate commerce commission, directing express companies to remove an existing discrimination against interstate commerce, by ceasing to charge higher rates between certain points than for substantially equal distances between other points, was not invalid because leaving to express companies discretion to determine how discrimination shall be removed, whether by lowering the interstate rates which the commission found were not unreasonable, or by raising the intra-state rates, or by doing both.—American Exp. Co. v. State of South Dakota ex rel. Caldwell, S.D., 37 S.Ct. 656, 244 U.S. 617, 61 L.Ed. 1352.

(2) The intra-state rates involved in an order of the interstate commerce commission directing express companies to remove an existing discrimination against interstate commerce by ceasing to charge higher rates between Sioux City, Iowa, and South Dakota points than for substantially equal distances between such South Dakota points and five named South Dakota cities must be deemed to be those only between the five named cities and points in competitive territory, that is, those commercially tributary both to the five cities and to Sioux City, Iowa, in view of the qualification of the general words of such order by the clause, "which said relation of rates has been found by the Commission to be unjustly discriminatory," and of the report of the commission, made a part of the order, which makes it clear that the order applied only to competitive territory in the southeastern section of South Dakota.—American Exp. Co. v. State of South Dakota ex rel. Caldwell, supra

26. U.S.—Atlantic Coast Line R. Co. v. Trammell, D.C.Ga., 287 F. 741.

N.H.—Boston & M. R. R. v. Great Falls Mfg. Co., 111 A. 691, 79 N.H. 467

Tex.—Railroad Commission of Texas v. Houston Chamber of Commerce, 78 S.W.2d 591, 124 Tex. 375, affirming Houston Chamber of Commerce v. Railroad Commission of Texas, Civ.App., 19 S.W.2d 583.

10 C.J. p. 489 note 68.

Coal rates

Where a lower rate was established for coal shipped for manufacturers whose products outbound were transported over the railroads than for other manufacturers, a corporation, operating an electric railway and supplying electric current for lighting and power, is entitled to the lower rate on that portion of its coal used in producing power which is furnished to manufacturers who shipped their product over the railroad.—Vandalia R. Co. v. Public Service Commission, 114 N.E. 412, 185 Ind. 652.

Discrimination in rate

Any discrimination by a railroad in absorbing switching rates only to certain docks is one in rates as distinguished from a discrimination in regulations or practices.—National Dock & Storage Warehouse Co. v. Boston & M. R. R., 116 N.E. 544, 227 Mass. 197.

Demurrage

Pub.Acts 1909 No. 300, making discrimination by common carriers unlawful, is as applicable to discrimination through demurrage charges as it is to discrimination through a charge for line haul. Accordingly, a special contract, whereby railroad company gave lumber company free use of cars for unlimited time, when other shippers were required to pay one dollar per day for all time over two days, is unenforceable as unjustly discriminatory.—Grand Rapids & I. Ry. Co. v. Cobbs & Mitchell, 168 N.W. 961, 203 Mich. 133.

Greasing charges, imposed by carrier on shipper for delivering and receiving cars at private side tracks, not included in any tariff of rates filed with the public service commission, are illegal, in view of Porto Rico L.1917 No. 70 §§ 3, 4, 24, 95.—American R. Co. of Porto Rico v. South Porto Rico Sugar Co., C.C.A. Porto Rico, 293 F. 670.

Provisions construed

(1) Const. art. 10 § 7, providing that the legislature shall pass laws to prevent unjust discrimination and extortion in charges of express, telegraph, and railroad companies, is designed to take from the common carriers named therein the arbitrary selection of persons as the objects of their favor or disfavor.—State v. Chicago, B. & Q. R. Co., 199 N.W. 534, 112 Neb. 248.

(2) A constitutional provision to the effect that "the Legislature shall pass laws to regulate railroad freight and passenger tariffs, to correct abuses, and prevent unjust discrimination and extortion in the rates of freight and passenger tar-

illegally discriminatory where they compel a particular shipper to pay for services not rendered,[27] and it may be a carrier's duty, under statutes of this character, to make a special charge for ferry service, where this is necessary to enable it to treat all shippers substantially alike,[28] regardless of the fact that the carrier is permitted to carry poor persons and their property without charge.[29] Mere difference in rates to the same destination, however, does not constitute an unjust discrimination, since only undue or unreasonable preferences or disadvantages are prohibited;[30] and a contract by a carrier for the transportation of freight without charge is not illegal where under the circumstances there is no unjust discrimination.[31]

Under proper statutory authorization a special state commission such as a railroad commission, a public service commission, or a corporation commission may determine whether intra-state rates are unjustly discriminatory and fix proper rates, where the circumstances warrant;[32] but, if the

iffs on different railroads in this state, and enforce the same by adequate penalties," does not undertake to define or prohibit discrimination. It authorizes and directs the legislature to enact laws defining "unjust discrimination" in freight and passenger tariffs by railroad and imposing penalties for "unjust discrimination."—St. Louis Southwestern Ry. Co. of Texas v. State, 261 S.W. 996, 113 Tex. 570, 33 A.L.R. 367, reversing State v. St. Louis, S. W. Ry. Co. of Texas, Civ.App., 197 S. W. 1006.

Statute supersedes common law

The Public Utilities Act supersedes the common-law liability of the carrier so far as rates and unreasonable discrimination are concerned.—Terminal R. Ass'n of St. Louis v. Public Utilities Commission, 136 N.E. 797, 304 Ill. 312.

Switching charges

(1) Refusal of carrier to absorb switching charges on cars delivered it by electric railroads when it did so on those delivered by steam railroads, in absence of other difference in situation, was discrimination within Utilities Act § 38.—State Public Utilities Commission v. Illinois Cent. R. Co., 119 N.E. 294, 283 Ill. 425, 2 A.L.R. 582.

(2) Where unjust discrimination arises as between individuals or localities, because of absorbing of switching charges in certain instances and not in others under like circumstances, carrier may be required by the state railway commission to remove the discrimination by a change in tariff schedule eliminating the charges.—Lincoln Commercial Club v. Missouri Pac. Ry. Co., 172 N. W. 687, 103 Neb. 504.

27. Ill.—State Public Utilities Commission v. Chicago, M. & St. P. Ry. Co., 122 N.E. 803, 287 Ill. 412.

Capacity of cars

Freight charges based on rule fixing minimum weight of sixty thousand pounds per car at time when there was general rule that such minimum should be fifty thousand or car's marked capacity, if one of less capacity was furnished, was, under Public Utilities Act § 32, discriminatory and unreasonable.—State Public Utilities Commission v. Chicago, M. & St. P. Ry. Co., 122 N.E. 803, 287 Ill. 412.

28. N.H.—Boston & M. R. R. v. Great Falls Mfg. Co., 111 A. 691, 79 N.H. 467.

Order conclusive

Order of the interstate commerce commission and the state public service commission permitting a carrier to file a schedule of rates including a charge for ferrying service is a conclusive finding that an extra charge for such service was required of the carrier.—Boston & M. R. R. v. Great Falls Mfg. Co., 111 A. 691, 79 N.H. 467.

29. N.H.—Boston & M. R. R. v. Great Falls Mfg. Co., supra.

30. Ill.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 195 N.E. 32, 359 Ill. 563

31. Ga.—Sipple v. Seaboard Air Line Ry. Co., 114 S.E. 435, 154 Ga. 376, reversing 110 S.E. 39, 28 Ga. App. 16, conformed to 115 S.E. 47, 29 Ga.App. 328.

Damaged goods

Where there were no facilities for repairing damaged goods at destination, carrier's contract to transport them without compensation to the shipping point for repairs in order to lessen the damage was not invalid or unjustly discriminatory or in contravention of public policy.—Sipple v. Seaboard Air Line Ry. Co., 114 S.E. 435, 154 Ga. 376, reversing 110 S.E. 39, 28 Ga.App. 16, conformed to 115 S.E. 47, 29 Ga.App. 328.

32. Ind.—G. Ittenbach Co. v. Cleveland, C., C. & St. L. Ry. Co., 181 N.E. 382, 97 Ind.App. 332.
Wash.—Oregon-Washington R. & Nav. Co. v. Department of Public Works, 275 P. 87, 151 Wash. 142.

Duty to fix rate

Under a statute providing that, whenever the public service commission shall be of the opinion that the rates charged by any common carrier are unjustly discriminatory, the commission shall determine the just and reasonable rates to be charged for the service to be performed, it is the duty of the commission to determine the just and reasonable rates to be charged. An order directing a carrier to remove a discriminatory rate, when the only possible way in which that discriminatory rate can be removed is by making a substantial reduction in its rates, without at the same time determining what is a reasonable rate, is not an exercise of the jurisdiction conferred. — National Dock & Storage Warehouse Co. v. Boston & M. R. R., 116 N.E. 544, 227 Mass. 197.

Order proper

Under Burns St.Annot.1914 § 5537, commission may order railroad to cease charging consumer of coal, rate higher than charged to competing consumers in same locality without finding rate actually charged unreasonable, and fact that complex computation was necessary to determine portion of coal used to generate electricity furnished manufacturers entitled to lower rate does not make unreasonable order requiring that coal furnished to electric company be hauled at same rate as that furnished to consumers of electric power generated.—Vandalia R. Co. v. Public Service Commission, 114 N.E. 412, 185 Ind. 652.

Power of commission

In petition by consumer for relief against alleged unjust discrimination wherein it requests that it be charged the same rate as manufacturers, the power of the commission to establish different rates for the same commodity on the same carrier between the same points need not be decided.—Vandalia R. Co. v. Public Service Commission, 114 N.E. 412, 185 Ind. 652.

Prior contract

A contract for the shipment of logs at a specified rate, which bound the shipper to ship a specified minimum quantity was abrogated where the carrier subsequently, over the shipper's protest, obtained approval by the railroad commission of a tariff fixing the same rate, but conditioned upon the reshipment of the entire product manufactured from

rate is extortionate, its illegality commences at the time it is exacted rather than at the time such a commission finds it to be so and fixes a lower rate.[33] When reducing rates on the complaint of anyone that rates between certain points on a certain railroad are too high, such a commission may, for the purpose of preventing discrimination, by its own acts reduce the rates on the whole line or system.[34] However, in the exercise of the power conferred on it to correct abuses and prevent unjust discriminations, the commission cannot make rates which are unjustly discriminatory, and which permit a carrier to charge one person for a service a compensation greater or less than it charges any other person for a like service, or to give undue preference to any particular person or locality.[35] The question as to what constitutes an unjust discrimination is one of fact within the discretion of the commission to the extent of making any rate fixed by it a legal rate until otherwise determined by judicial action.[36]

Where a discrimination is effected by reason of a difference between interstate and intra-state rates it is the duty of such a commission to cooperate in the elimination of the discrimination.[37] Thus it is within the commission's province to order an increase in intra-state rates so as to prevent an unlawful discrimination against interstate commerce.[38] Similarly, if interstate freight rates put into effect by the interstate commerce commission are materially lower for the same length of haul on the same class of commodities than intra-state rates made under orders of a state commission, a discrimination is effected which it is the duty of the latter commission to remove by readjusting the rates.[39] Furthermore, reduction of interstate freight rates to conform to valid state made rates does not necessarily constitute an unlawful discrimination against interstate traffic.[40]

§ 377. Circumstances Justifying Discrimination in Rates

Discrimination in rates is justified when it is reasonably and fairly based on different transportation conditions, or when authorized by statute.

Although a common carrier is bound to carry at equal rates for all customers in like condition, as already discussed in the preceding section, under § 3 of the Interstate Commerce Act prohibiting discrimination, and under similar state legislation, mere discrimination does not render a rate illegal; only such rates as are unreasonably or unjustly discriminatory are inhibited.[41] In other words, mere inequality of charge does not neces-

the logs so shipped.—Alexandria & W. Ry. Co. v. Long Pine Lumber Co. of Louisiana, 93 So. 199, 152 La. 399.

33. Ky.—Louisville & N. R. Co. v. Greenbrier Distillery Co., 187 S.W. 296, 170 Ky. 775.

34. Minn.—Steenerson v. Great Northern R. Co., 72 N.W. 713, 69 Minn. 353, 372.
10 C.J. p 473 note 10.

35. U.S.—Atlantic Coast Line R. Co. v. Trammell, D.C.Ga., 287 F. 741.
Ala.—Southern Ry. Co. v. Alabama Public Service Commission, 97 So. 289, 210 Ala. 105.
Cal.—California Adjustment Co. v. Atchison, T. & S. F. Ry. Co., 175 P. 682, 179 Cal. 140, 13 A.L.R. 274.
Miss.—Mississippi Railroad Commission v. Mobile & O. R. Co., 123 So. 876, 154 Miss. 871.
Tex.—Railroad Commission of Texas v. Houston Chamber of Commerce, 78 S.W.2d 591, 124 Tex. 375, affirming, Civ.App., Houston Chamber of Commerce v. Railroad Commission of Texas, 19 S.W.2d 583.
10 C.J. p 473 note 11.

In the absence of special circumstances, railroad commission could not require railroad to continue to apply rate between certain points much lower than that declared reasonable and prescribed by commission for similar hauls.—Mississippi Railroad Commission v. Mobile & O. R. Co., 123 So. 876, 154 Miss. 871.

Orders held not to be discriminatory
Ky.—Louisville & N. R. Co. v. Greenbrier Distillery Co., 187 S.W. 296, 170 Ky. 775.
Tex.—Houston Chamber of Commerce v. Railroad Commission of Texas, Civ.App., 19 S.W.2d 583, affirmed Railroad Commission of Texas v. Houston Chamber of Commerce, 78 S.W.2d 591, 124 Tex. 375.

Rate discriminatory
An intra-state rate on fertilizer material originally granted by a railroad to establish a new industry, and continued in effect by an order of the state commission, and which was less than one half the rate prescribed by the commission for similar hauls of the same material in the same quantities in other places, some of which are competitors in the market, to the place to which the rate in controversy was granted, is discriminatory.—Atlantic Coast Line R. Co. v. Trammell, D.C.Ga., 287 F. 741.

36. Tex.—Galveston Chamber of Commerce v. State R. Commn., Civ.App., 137 S.W. 737, reversed on other grounds 145 S.W. 573, 105 Tex. 101—State R. Commn. v. Galveston Chamber of Commerce, 115 S.W. 94, 51 Tex.Civ.App. 476.

37. Pa.—Pennsylvania R. Co. v. Public Service Commission, 190 A. 372, 126 Pa.Super. 1.

38. Iowa.—Hawkeye Portland Cement Co. v. Chicago, R. I. & P. Ry. Co., 201 N.W. 16, 198 Iowa 1250.

39. Okl.—Atchison, T. & S. F. Ry. Co. v. State, 267 P. 253, 130 Okl. 263—Atchison, T. & S. F. Ry. Co. v. State, 206 P. 236, 85 Okl. 223.

40. U.S.—Southern Pac. R. Co. v. California R. Commn., D.C.Cal., 193 F. 699
10 C.J. p 501 note 80.

41. U.S.—U. S. v. Illinois Cent. R. Co., Miss., 44 S.Ct. 189, 263 U.S. 515, 68 L.Ed. 417—Nashville, C. & St. L. Ry. v. State of Tennessee, Tenn., 43 S.Ct. 583, 262 U.S. 318, 67 L.Ed. 999, reversing, D.C., State of Tennessee v. U. S., 284 F. 371.
Ill.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 173 N.E. 804, 342 Ill. 11—Atchison, T. & S. F. Ry. Co. v. Illinois Commerce Commission, 166 N.E. 466, 335 Ill. 70.
Wash.—State v. Public Service Commission, 192 P. 1075, 112 Wash. 520.

Connecting carriers
Statutory inhibition against discrimination in rates between connect-

sarily constitute undue or unreasonable preference or advantage,[42] and cannot be held illegal unless it is shown that it is not justified by the cost of the respective services, by their values, or other transportation conditions.[43] Further, any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge, since common carriers are only bound to give the same terms to all persons alike, under the same conditions and circumstances.[44] Accordingly, no claim of illegality can be sustained if, in view of all the circumstances, the discrimination is fair and reasonable, and not inconsistent with the public interests,[45] and, subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests on the same principles which are regarded as sound and adopted in other trades and pursuits.[46] The discrimination or preference must be reasonable, and the terms must not be unreasonably unequal.[47] Remote dissimilarities of conditions do not justify any discriminations which the carrier chooses to make,[48] and the similarity of circumstances and conditions which, under the Interstate Commerce Act, requires equality of rates, relates to the circumstances and conditions which affect the service only, and does not include matters affecting individual shippers.[49]

A carrier cannot, with the purpose of building up a port on its own line at the expense of an-

ing lines, requires only equality of charge for contemporaneous service of similar kind.—Pittsburgh & W. V. Ry. Co. v. U. S., D.C.Ohio, 41 F. 2d 806.

42. U.S.—Philadelphia & Reading Ry. Co. v. U. S., Pa., 36 S.Ct. 354, 240 U.S. 334, 60 L.Ed. 675, reversing, D.C., 219 F. 983—Western Paper Makers Chemical Co. v. U. S., D.C.Mich., 7 F.2d 164.

Ill.—See Baltimore & O. C. T. R. C. v. Illinois Brick Co., 198 Ill.App. 327.

R.I.—Public Utilities Commission v. Rhode Island Co., 110 A. 654, 43 R. I. 135.

Tex.—Panhandle & S. F. Ry. Co. v. Guthrie, Civ.App., 248 S.W. 106.

10 C.J. p 474 note 18, p 490 note 72.

A mere difference in percentage of increase or decrease of rate is not, of itself, evidence that any rate is unjustly discriminatory.—Chicago & E. I. Ry. Co. v. Illinois Commerce Commission, 173 N.E. 380, 341 Ill. 277.

43. U.S.—U. S. v. Illinois Cent. R. Co., Miss., 44 S.Ct. 189, 263 U.S. 515, 68 L.Ed. 417.

Ill.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 173 N.E. 804, 342 Ill. 11.

44. Wash.—State v. Public Service Commission, 192 P. 1075, 112 Wash. 520.

10 C.J. p 490 note 73

Additional demurrage charge

An additional demurrage or storage charge for detention of cars beyond a stated time was not invalid as discriminatory because limited to cars loaded with lumber held for reconsignment, where it appeared that it was a common practice to hold such cars for an unreasonable time awaiting reconsignment, thus keeping the cars out of normal use, to the detriment of the carrier and the public.—Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & St. P. Ry. Co., D.C.Mo., 2 F.2d 291, affirmed 46 S.Ct. 530, 271 U.S. 259, 70 L.Ed. 934.

Long term contract

An agreement whereby a railroad company agreed for thirty years to transport coal to a factory at the then existing rate was not an undue or unreasonable discrimination in violation of Const. art. 17 § 3, or Act June 4, 1883, P.L. 72, although a tariff was later filed calling for higher rates to other shippers.—Pittsburgh & L. E. R. Co. v. Colonial Steel Co., 96 A. 1037, 251 Pa. 460.

Shipper not estopped

A contract between a railroad and a lumber company, which was silent as to rates, was held not susceptible of being construed to estop the shipper from questioning the discriminatory rates applied to it.—U. S. v. Illinois Cent. R. Co., Miss., 44 S.Ct. 189, 263 U.S. 515, 68 L.Ed. 417.

45. Tenn.—Ragan v. Aiken, 9 Lea 609, 42 Am.R. 684.

Materials used by government

Where, at the request and recommendation of railroad companies, the Louisiana public service commission established rates for the transportation of road-building material to be used on state and parish public roads, substantially less than the ordinary rates for the transportation of such material, providing, however, that the state and parish received the benefit of such decreased rates, it was held that a railroad company or its receiver cannot complain that a later order of the public service commission, making applicable such decreased rate to such material used for paving municipal streets, was illegal or discriminatory, or arbitrary, the state having the right to fix rates for the transportation of materials for the building of public works lower than standard tariff rates for such material.—Bush v. Texas & P. Ry. Co., D.C.La., 290 F. 1008.

46. U.S.—Northern Pac. Ry. Co. v. St. Paul & Tacoma Lumber Co., C.C.A.Wash., 4 F.2d 359, reversing, St. Paul & Tacoma Lumber Co. v. Northern Pac. Ry. Co., D.C., 296 F. 749.

Ga.—M. A. Pharr Cotton Co. v. Davis, 118 S.E. 605, 30 Ga.App. 570—Draper v. Georgia, F. & A. Ry. Co., 95 S.E. 16, 21 Ga.App. 707, error dismissed 39 S.Ct. 132, 248 U.S. 539, 63 L.Ed. 410.

La.—Alexandria & W. Ry. Co. v. Long Pine Lumber Co. of Louisiana, 93 So. 199, 152 La. 399.

Wash.—State v. Public Service Commission, 192 P. 1075, 112 Wash. 520.

10 C.J. p 490 note 75.

47. Vt.—State v. Central Vermont R. Co., 71 A. 194, 81 Vt. 463, 130 Am.S.R. 1065.

48. U.S.—Bigbee & Warrior Rivers Packet Co. v. Mobile & O. R. Co., C.C.Ala., 60 F. 545—Interstate Commerce Commn. v. Texas & P. R. Co., N.Y., 57 F. 948, 955, 6 C.C.A. 653.

49. U.S.—Pennsylvania R. Co. v. International Coal Min. Co., Pa., 173 F. 1, 97 C.C.A. 383, reversed on other grounds 33 S.Ct. 843, 230 U.S. 184, 57 L.Ed. 1447.

10 C.J. p 491 notes 79, 80.

other on a rival road, adopt rates unreasonable in themselves, nor which are unduly preferential to its own port and unduly prejudicial to the other or to the public,[50] and there is no rule of law or practice which gives to a carrier the right to recapture traffic which it originated, by applying discriminatory rates thereto.[51]

In order to render an inequality of charge lawful, the goods must be carried under different circumstances, and the question whether the difference is material or essential arises on the facts in each particular case.[52]

In passing on the question of reasonableness of discrimination, it is proper to take into consideration, besides the mere differences in charges, the various elements, such as the convenience of the public, the fair interest of the carrier, the relative quantities of the traffic involved, the relative cost of the services and the profits to the company, and the situation and circumstances of the respective customers with reference to each other as competitive or otherwise.[53] It is not, however, proper to take into consideration the fact that the charge is reasonable in itself, since a charge may be perfectly reasonable and yet create an unjust discrimination;[54] neither is it proper to consider the length of time during which the rates have been in force nor the confusion which will result from a change.[55] Also, the proportion in which freight earned by two connecting railroads under a joint tariff schedule is divided between them is a matter for their consideration alone, and cannot be taken cognizance of by a court for the purpose of determining that the share received by one constitutes an unjust or discriminative rate, under the Interstate Commerce Law.[56]

Amount of freight shipped. According to a number of decisions, discriminations in freight rates, based solely on the amount of freight shipped without reference to any conditions tending to decrease the cost of transportation, are discriminations which are contrary to public policy[57] and which entitle the party against whom the discrimination is practiced to recover the amount of freight paid by him in excess of the rates accorded by the carrier to his more favored competitor.[58] However, on the principle of selling cheaper at wholesale than at retail, rates for large quantities may be relatively lower than for smaller quantities.[59] So it has been held that a carrier has a right to provide at times for a reduced rate on condition that one taking advantage of it shall, for a certain time, ship all his goods by such carrier's line, if it offers the same terms to all, and is prepared to transport goods for a reasonable sum to any person not willing to agree to such condition.[60]

Character of package or container. Difference in modes of packing or in the character of the

50. U.S.—Interstate Commerce Commn. v. Louisville & R. R. Co., C.C.Ga., 118 F. 613.

51. U.S—Atchison, T. & S. F. Ry. Co v. U. S, Ill, 49 S.Ct. 494, 279 U S 768, 73 L Ed. 947, affirming, D. C., 33 F.2d 345.

52. Kan.—Missouri, etc., R. Co. v. New Era Milling Co., 100 P. 273, 79 Kan. 435.
Pa—Borda v. Philadelphia, etc, R. Co, 21 A. 665, 141 Pa. 484.
10 C.J. p 490 note 76.

Location of plant
The advantage in rates which comes to a shipper merely as a result of the location of his plant does not constitute an illegal preference.
U.S.—U. S. v. Illinois Cent. R. Co., Miss, 44 S.Ct. 189, 263 U S. 515, 68 L.Ed 417.
Ill—Illinois Cent. R. Co. v. Illinois Commerce Commission, 173 N.E 804, 342 Ill. 11.

53. Okl—Atchison, T. & S. F. Ry Co v. State, 206 P. 236, 85 Okl 223
10 C J. p 491 note 81

This Corpus Juris text has been quoted with full approval in Atchison, T. & S. F. Ry. Co. v. State, 206 P. 236, 85 Okl. 223.

54. U S.—U. S. v. Illinois Cent. R Co, Miss, 44 S Ct. 189, 263 U S 515, 68 L Ed. 417.
Okl—Atchison, T. & S. F. Ry. Co v. State, 206 P. 236, 85 Okl. 223.
10 C.J. p 491 note 82.

55. Okl.—Atchison, T. & S. F. Ry. Co. v. State, supra.
10 C.J. p 491 note 83.

Corporation commission is not prevented from changing a rate which is manifestly discriminatory because such order impairs the general rate scheme, for, if a fixed rate is so discriminatory as to be abusive, it should be corrected.—Atchison, T. & S. F. Ry. Co. v. State, 206 P. 236, 85 Okl. 223.

No immunity
Where a forbidden discrimination is made, the mere fact that it has been long continued, and that the machinery for making it is in tariff form, cannot clothe it with immunity—Merchants' Warehouse Co. v. U S, Pa., 51 S Ct 505, 283 U S. 501, 75 L Ed. 1227, affirming, D.C., 44 F. 2d 379.

56. U.S.—Allen & Lewis v. Oregon R & Nav. Co, C C.Or., 98 F. 16.
10 C.J p 492 note 83½.

57. Wash.—Public Service Commission of Washington v. State, 204 P. 791, 118 Wash. 629, 25 A L R. 186, affirmed 207 P. 688, 118 Wash. 629, 25 A.L R 186.
10 C J. p 492 note 84.

In establishing rates for carriers, a state public service commission cannot consider the fact that a shipper ships in trainload lots, tending to make the cost of transportation less, since allowing lower rates on a condition which only a few shippers could meet would be an injustice to others.—Public Service Commission of Washington v State, 204 P. 791, 118 Wash. 629 25 A L R. 186, affirmed 207 P. 688, 118 Wash. 629, 25 A.L R. 186.

58. U S.—Hays v. Pennsylvania Co., C C.Ohio, 12 F. 309.

59. U.S. — Interstate Commerce Commn. v. Chicago Great Western R Co., C C Ill, 141 F. 1003, affirmed 28 S Ct. 493, 209 U.S. 108, 52 L.Ed. 705
N H.—Concord, etc., R. Co. v. Forsaith, 59 N H. 122, 47 Am R. 181.
10 C J. p 492 note 86.

60. N Y.—Lough v Outerbridge, 38 N.E. 292, 143 N.Y 271, 42 Am.S R. 712, 25 L R.A. 674, reversing 22 N.Y.S. 976, 68 Hun 486.
10 C J. p 492 note 87.

container in which goods are shipped may justify a discrimination in rates.[61]

Development of new industries. Under some statutes railroads may extend special rates to new industries.[62] However, since such a statute forms an exception to the general rule against discrimination, it can be availed of only in strict conformity with the letter and spirit of the statute.[63] Thus, if the statute so requires, the special rates must be for an agreed number of carloads,[64] or must be submitted to a railroad commission for approval or revision.[65] A new industry within the meaning of statutes of this character is one which is struggling for existence and which does not have an established business.[66]

Difference in cost of transportation. Proportionate difference in cost of transportation is a difference in circumstances warranting a preference in rates,[67] but slight differences in a single item of cost do not justify a difference in freight rates.[68]

Facilities furnished by shipper. Under some statutes a railroad may not apply lower rates to shippers who furnish part of the transportation services. Such statutes are designed to prevent discrimination in rates.[69]

Ownership of goods. A carrier cannot lawfully discriminate in rates for transportation on the mere circumstance that the shipper is or is not the real owner of the goods.[70] The fact that the shipper is merely a forwarding agent furnishes no excuse for discriminating against him in rates charged for transportation.[71]

Purpose or ultimate use. A discrimination in rates between shipments of the same commodity from and to the same points cannot be justified solely by a difference in the purpose of the respective shipments, or the ultimate use to be made of the commodity after completion of the transportation.[72] Under state statutes, however, substantially like the Interstate Commerce Act in this respect, it has been held that a special rate for the transportation of fuel to a manufactory less than the rate charged dealers is not undue or unreasonable discrimination;[73] but the principle involved in so holding has been disapproved and held not to justify a discriminating rate on raw materials shipped to a mill to be manufactured.[74]

§ 378. Charging More for Short than for Long Haul

Under the Interstate Commerce Act and similar state legislation, the charging of more for a short than a long haul is prohibited as unjust discrimination, at least in the absence of special circumstances and permission to make such a charge.

Interstate Commerce Act § 4, 49 U.S.C.A. § 4, makes it unlawful for any common carrier, subject to the provisions of the act, to charge or to receive any greater compensation in the aggregate for the transportation of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. When both the long and the short haul are made to or from a noncompetitive point, the effect of charging less for a long than for a short haul is to build up one place at the expense of the other,[75] and it is the object of the statute to

61. U.S.—Penn Refining Co. v. Western New York, etc., R. Co., Pa., 28 S.Ct. 268, 208 U.S. 208, 52 L.Ed. 456, affirming 137 F. 343, 70 C.C.A. 23.
10 C.J. p. 492 note 90.

62. Iowa.—Hawkeye Portland Cement Co. v. Chicago, R. I. & P. Ry. Co., 201 N.W. 16, 198 Iowa 1250.
Tenn.—New River Lumber Co. v. Tennessee Ry. Co., 238 S.W. 867, 145 Tenn. 266.

63. Iowa.—Hawkeye Portland Cement Co. v. Chicago, R. I. & P. Ry. Co., 201 N.W. 16, 198 Iowa 1250.

64. Iowa.—Hawkeye Portland Cement Co. v. Chicago, R. I. & P. Ry. Co., supra.

65. Iowa.—Hawkeye Portland Cement Co. v. Chicago, R. I. & P. Ry. Co., supra.
Tenn.—New River Lumber Co. v. Tennessee Ry. Co., 238 S.W. 867, 145 Tenn. 266.

66. Iowa.—Hawkeye Portland Cement Co. v. Chicago, R. I. & P. Ry. Co., 201 N.W. 16, 198 Iowa 1250.

67. Ill.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 173 N.E. 804, 342 Ill. 11.
10 C.J. p. 492 note 88.

68. Tex.—Galveston Chamber of Commerce v. Texas R. Commn., Civ.App., 137 S.W. 737.

69. Wis.—Nekoosa-Edwards Paper Co. v. Railroad Commission of Wisconsin, 213 N.W. 633, 193 Wis. 538.

70. U.S. — Interstate Commerce Commn. v. Delaware, etc., R. Co., N.Y., 31 S.Ct. 392, 220 U.S. 235, 55 L.Ed. 448.

71. U.S. — Interstate Commerce Commn. v. Delaware, etc., R. Co., N.Y., 31 S.Ct. 392, 220 U.S. 235, 55 L.Ed. 448, reversing 166 F. 499.
10 C.J. p. 492 note 92

72. U.S. — Interstate Commerce Commn. v. Baltimore, etc., R. Co., Com.Ct., 32 S.Ct. 742, 225 U.S. 326, 56 L.Ed. 1107, Ann.Cas.1914A 504 and note
10 C.J. p. 492 note 93.

73. Pa.—Hoover v. Pennsylvania R. Co., 27 A. 282, 156 Pa. 220, 36 Am.St.R. 43, 22 L.R.A. 263.
10 C.J. p. 493 note 95

74. N.C.—Hilton Lumber Co. v. Atlantic Coast Line R. Co., 53 S.E. 823, 141 N.C. 171, 6 L.R.A.,N.S., 225, disapproving Louisville, etc., R. Co. v. Commonwealth, 57 S.W. 508, 108 Ky. 628, 22 Ky.L. 328—Hilton Lumber Co. v. Atlantic Coast Line R. Co., 48 S.E. 813, 136 N.C. 479, 1 Ann.Cas. 52.
Discrimination as to particular commodities generally see supra § 361.

75. U.S. — Interstate Commerce Commn. v. Cincinnati, N. O. & T. P. Ry. Co., C.C.Ga., 56 F. 925—Ex p. Koehler, C.C.Or., 31 F. 315, 12 Sawy. 446.

prevent this.[76] Nevertheless the statute does not prohibit a railroad company from charging a less rate for a longer haul if it can justify that rate by showing that the circumstances and conditions are dissimilar.[77] Where it is difficult to point out clearly the circumstances or conditions which produce dissimilarity, the doubt should go in favor of the law, and the circumstances and conditions should be considered as being substantially similar.[78]

A through rate may be made less than the sum of the local rates between two points without violating any requirement of the Interstate Commerce Act.[79]

Competition is one of the most obvious and effective circumstances that make the conditions under which a long haul and a short haul are performed substantially dissimilar, and a competition which is real and substantial and exercises potential influence on rates to a particular point brings into play the dissimilarity of circumstances and conditions provided by the statute, justifying the lesser charge to the more distant and competitive point than to the nearer and noncompetitive point.[80] The legality of the rate is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the noncompetitive point may apparently engender a discrimination against it.[81] It is well settled that the character of competition which will justify a carrier in charging more for a short than for a long haul will also exempt it from liability under the section forbidding the giving of undue preferences or advantages to one shipper or locality over other shippers or other localities.[82]

In respect of the kind of competition to be considered, the meaning of the law is not that one kind of competition can be considered and not another kind, but that all competition can be considered, provided it possesses the attributes of producing a substantial and material effect on traffic and rate making.[83] The competition to be considered is not only that arising by water transportation, but also includes that from common carriers subject to the control of the act to regulate commerce.[84] The fact that the competition did not originate at the initial point of traffic is no reason why it should not be considered.[85] However, the mere fact of competition, irrespective of its character or extent, does not necessarily relieve the carrier from the restraint of the statute.[86] The right of the carrier to take competition into consideration in fixing rates is subject to the limitations fixed by the statute: (1) That all rates shall be just and reasonable and that no undue discrimination shall be brought about.[87] (2) That the competition relied on shall not be artificial or merely conjectural, but material and substantial, thereby operating on the question of traffic and rate making.[88] The right can be exercised only with due regard to the interest of the public, after giving full weight to the benefits to be conferred on the place from whence the traffic moved as well as the benefits to be derived from the locality to which it is to be delivered.[89]

Lines maintaining joint tariff. Where two railroad companies owning connecting lines of road

76. U.S.—Allen & Lewis v. Oregon R. & Nav. Co., C.C.Or., 98 F. 16.
Reasonableness of rates higher for short than for long haul see supra § 295.

77. U.S.—Western Paper Makers' Chemical Co. v. U. S., D.C.Mich., 7 F.2d 164.
10 C.J. p. 493 note 5.

Statute not violated

Rail rates established by interstate commerce commission on rosin from points south of the Ohio river to Kalamazoo and Grand Rapids, Mich., were not unjustly discriminatory as against such cities and did not violate the "long and short haul" clause of the Interstate Commerce Act.—Western Paper Makers' Chemical Co. v. U. S., D.C.Mich., 7 F.2d 164.

78. U.S.—Missouri Pac. R. Co. v. Texas & P. Ry. Co., C.C.La., 31 F. 862.

79. U.S.—Parsons v. Chicago & N. W. Ry. Co., Iowa, 17 S.Ct. 887, 167 U.S. 447, 42 L.Ed. 231, affirming, C.C.A., 63 F. 903—Chicago & N. W. Ry. Co. v. Osborne, Iowa, 52 F. 912, 3 C.C.A. 347.

80. U.S. — Interstate Commerce Commn. v. Louisville & N. R. Co. Ala., 23 S.Ct. 687, 190 U.S. 273, 47 L.Ed. 1047.
10 C.J. p. 493 note 7, p. 494 note 8.

81. U.S.—East Tennessee, V. & G. R. Co. v. Interstate Commerce Commn., Tenn., 21 S.Ct. 516, 181 U.S. 1, 45 L.Ed. 719.

82. U.S. — Interstate Commerce Commn. v. Alabama Midland R. Co., Ala., 18 S.Ct. 45, 168 U.S. 144, 42 L.Ed. 414, affirming 74 F. 715, 21 C.C.A. 51.
10 C.J. p. 494 note 10.

83. U.S.—Louisville & N. R. Co. v. Behlmer, S.C., 20 S.Ct. 209, 175 U.S. 648, 670, 44 L.Ed. 309.

84. U.S.—Louisville, etc., R. Co. v. Behlmer, S.C., 20 S.Ct. 209, 175 U.S. 648, 44 L.Ed. 309—Interstate Commerce Commn. v. Alabama Midland R. Co., Ala., 18 S.Ct. 45, 168 U.S. 144, 42 L.Ed. 414.
10 C.J. p. 494 note 12.

85. U.S.—Louisville, etc., R. Co. v. Behlmer, S.C., 20 S.Ct. 209, 175 U.S. 648, 44 L.Ed. 309, reversing 83 F. 898, 28 C.C.A. 229.

86. U.S. — Interstate Commerce Commn. v. Alabama Midland R. Co. Ala., 18 S.Ct. 45, 168 U.S. 144, 42 L.Ed. 414.

87. U.S.—Louisville, etc., R. Co. v. Behlmer, S.C., 20 S.Ct. 209, 175 U.S. 648, 44 L.Ed. 309, reversing 83 F. 898, 28 C.C.A. 229.

88. U.S. — Interstate Commerce Commn. v. Louisville & N. R. Co., Ala., 23 S.Ct. 687, 190 U.S. 273, 47 L.Ed. 1047.
10 C.J. p. 495 note 16.

89. U.S.—Louisville, etc., R. Co. v. Behlmer, S.C., 20 S.Ct. 209, 175 U.S. 648, 674, 44 L.Ed. 309, reversing 83 F. 898, 28 C.C.A. 229.

unite in a joint through tariff, they form for the connected roads a new and independent line, and the through tariff on the joint line is not the standard by which the separate tariff of either company is to be measured in determining whether such separate tariff violates the provision which forbids greater compensation for a short than for a long haul.[90] The portion of a through rate received by one of several railroad companies operating under the conditions mentioned for transporting goods as interstate commerce may be less than its local rate without a violation of this section.[91] It is not to be understood, however, that, when two companies by their joint tariff make a new and independent line, such line may not become subject to the long and short haul clause.[92] On the contrary, where a state railroad company whose road lies wholly within the limits of the state enters into the carriage of foreign freight by agreeing to receive the goods by virtue of foreign through bills of lading and to participate in through rates and charges, it thereby becomes a part of a continuous line, not made by a consolidation with the foreign companies, but by an arrangement for the continuous carriage or shipment from one state to another, and thus becomes amenable to the long and short haul clause of the Interstate Commerce Act.[93]

Permission from interstate commerce commission. Under Interstate Commerce Act § 4, 49 U.S.C.A. § 4, as amended, the prohibition against charging more for a short than a long haul is absolute unless application has been made to the commission to be relieved from the effect of the prohibition and such leave is granted.[94] Under this statute the right of carriers to seek and obtain under authorized circumstances the sanction of the commission to charge a lower rate for a long than for a short haul because of competition, or for other adequate reasons, is expressly preserved;[95] and as a correlative the authority of the commission to grant on request the right sought is made by the statute to depend on the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned, and in view of the preference and discrimination clauses of the act.[96]

Under state statutes. In several states there are statutes which in terms or effect are similar to the short and long haul clause of the Interstate Commerce Act. The purpose of these statutes, which have generally been upheld,[97] is to prevent unjust discrimination in the matter of rates,[98] and the exaction of a greater charge for a lesser service in violation thereof is a form of unjust discrimination or undue preference specifically prohibited.[99] Statutes of this character have been held to be applicable even though the

90. U.S.—Chicago & N. W. Ry. Co. v. Osborne, Iowa, 52 F. 912, 3 C.C.A. 347, reversing, C.C., 48 F. 49

91. U.S.—Parsons v. Chicago & N. W. Ry. Co., Iowa, 17 S.Ct. 887, 167 U.S. 447, 42 L.Ed. 231, affirming, C.C.A., 63 F. 903—Allen v. Oregon R. & Nav. Co., C.C.Or., 98 F. 16—Chicago & N. W. Ry. Co. v. Osborne, Iowa, 52 F. 912, 3 C.C.A. 347, reversing, C.C., 48 F. 49.
10 C.J. p. 495 note 26.

92. U.S.—Chicago & N. W. Ry. Co. v. Osborne, Iowa, 52 F. 912, 3 C.C.A. 347.

93. U.S.—Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commn., Ga., 16 S.Ct. 700, 162 U.S. 184, 40 L.Ed. 935, affirming 9 C.C.A. 689, reversing, C.C., 56 F. 925.
10 C.J. p. 495 note 28

94. Ohio—New York, C. & St. L. R. Co. v. Miller City Tile Co., 19 Ohio N.P.,N.S., 244
10 C.J. p. 495 note 22.

Prior to amendment

(1) Prior to the amendment of the Interstate Commerce Act by the act of June 18, 1910, it was well settled that, when the circumstances and the conditions were such as to justify it, the carrier could charge more for the short than for the long haul, without first obtaining leave from the commission.—East Tennessee, V. & G. Ry. Co. v. Interstate Commerce Commn., Tenn., 21 S.Ct. 516, 181 U.S. 1, 45 L.Ed. 719, reversing 99 F. 52, 39 C.C.A. 413, which affirmed, C.C., 85 F. 107—10 C.J. p. 495 note 18.

(2) The carrier could do so even though the commission had made an order forbidding the charge in the particular case.—Interstate Commerce Commn. v. Alabama Midland R. Co., Ala., 18 S.Ct. 45, 168 U.S. 144, 42 L.Ed. 414—Brewer v. Central of Georgia R. Co., C.C.Ga., 84 F. 258.

(3) In so doing the carrier judged for itself on peril of the consequences.—Interstate Commerce Commn. v. Alabama Midland R. Co., supra.

(4) When, however, its action was challenged in the courts, it could justify itself by showing a substantial dissimilarity of circumstances and conditions within the meaning of the act.—Detroit, G. H. & M. Ry. Co. v. Interstate Commerce Commn., Mich., 74 F. 803, 21 C.C.A. 103.

95. U.S.—U. S. v. Atchison, T. & S. F. Ry. Co., Com.Ct., 34 S.Ct. 986, 234 U.S. 476, 58 L.Ed. 1408.

96. U.S.—U. S. v. Atchison, T. & S. F. Ry. Co., supra.

97. U.S.—Missouri Pac. R. Co. v. McGrew Coal Co., Mo., 37 S.Ct. 518, 244 U.S. 191, 61 L.Ed. 1075.
10 C.J. p. 495 note 29.

Implied repeal

Statute which prohibits greater charge for short than for longer haul in any direction held impliedly repealed by Public Service Commission Act, Rev.St.1919 §§ 9974, 9986, 10456, which provides that where the commission shall be of opinion, after a hearing, that the rates are unjustly discriminatory, the commission shall determine the just and reasonable rates, fares, and charges to be thereafter observed and in force.—McGrew Coal Co. v. Mellon, 287 S.W. 450, 315 Mo. 798, certiorari denied 47 S.Ct. 456, 273 U.S. 752, 71 L.Ed. 874.

98. Ohio—Pittsburgh & L. E. R. Co. v. Public Utilities Commission of Ohio, 191 N.E. 467, 128 Ohio St. 388

99. Cal.—Atchison, T. & S. F. Ry. Co. v. Railroad Commission, 298 P. 991, 212 Cal. 370.
Ohio—Pittsburgh & L. E. R. Co. v. Public Utilities Commission of Ohio, 191 N.E. 467, 128 Ohio St. 388.

carrier does not actually carry any freight the greater distance.[1] In construing these provisions, it is generally held that honest and substantial competition of rival carriers will justify a charge of a less amount for a long than for a short haul,[2] at least where permission is obtained from the state commission.[3] As regards the character of the competition, water competition as well as that of rival railway companies may be considered.[4] These provisions apply where the transportation is over the same road, but not where the two hauls are over different lines operated by different corporations, although both have common offices;[5] and where the prohibition is limited to cases where the short is included in the long haul, it does not apply where the long haul is on the main line and the short haul is partly on a branch line.[6] However, the prohibition is not limited to cases where the freight is being transported between the same points.[7]

A through rate may be made less than the sum of the local rates between two points without violating any requirement of a state constitutional clause providing that all railroad companies shall transport freight of the same class for all persons from and to the same points and on the same conditions and in the same manner and for the same charges. Were it otherwise, all through freight would have to be hauled at the local rates.[8]

Where the statute so provides, a special commission has jurisdiction to deal with violations of a long and short haul provision in a state constitution.[9]

§ 379. Rebates

Generally rebates which effect an unreasonable discrimination are illegal, as are any rebates not provided for in the published tariff.

As already discussed in § 376, there are a limited number of decisions which take the view that a common carrier is not bound to treat all shippers equally in the matter of rates charged for transportation; that there is nothing in the common law to hinder a carrier from transporting freight for favored individuals at an unreasonable rate or even free of charge; and that all that the common law required was that the carrier should not charge other shippers more than was reasonable. However, as was also shown in that section, the weight of authority is decidedly against this doctrine, the view being taken that at common law the carrier is bound to carry at an equal rate for all customers for substantially similar services and under substantially similar conditions. In jurisdictions where the first of these views prevails, in the absence of statute providing otherwise, the giving of a rebate to a shipper by a carrier is not unlawful, as long as the charges against other shippers are not unreasonable and in no way increased by the rebate given to the favored shipper.[10] In jurisdictions where the majority view prevails, a rebate allowed by a carrier on the regular tariff of rates to one shipper is an unjust discrimination, at common law, against others shipping the same class of goods under the same conditions at the regular rate without rebate.[11] Even where this view prevails, the giving of a rebate to a shipper is not necessarily illegal, as the services may not be substantially similar or rendered under substantially similar conditions. In other words, the giving of a rebate, to be illegal, must be an unfair and unjust discrimination in favor of the shipper against the general public.[12]

Under Interstate Commerce Act. Rebates to one class of shippers over another, or to one shipper over another of the same class, are prohibited by the Interstate Commerce Act[13] Thus, under

1. Mo.—Cohn v. St. Louis, etc., R. Co., 79 S.W. 961, 181 Mo. 30—Seawell v. Kansas City, etc., R. Co., 24 S.W. 1002, 119 Mo. 222.

2. U.S.—Ex p. Koehler, C.C.Or., 23 F. 529, 533
Mo.—Cohn v. St. Louis, etc., R. Co., 133 S.W. 59, 151 Mo.App. 661.

3. Ky.—Hutchison v. Louisville, etc., R. Co., 57 S.W. 251, 103 Ky. 615, 22 Ky.L. 361.
10 C.J. p. 496 note 32.

4. Mo.—Cohn v. St. Louis, etc., R. Co., 133 S.W. 59, 151 Mo.App. 661
10 C.J. p. 496 note 33.

5. Mo.—Darlington Lumber Co. v. Missouri Pac. R. Co., 147 S.W. 1052, 243 Mo. 224.

6. Ky.—Louisville, etc., R. Co. v. Walker, 63 S.W. 30, 110 Ky. 961, 23 Ky.Law 453.

7. Tex.—Texas, etc., R. Co. v. Kuteman, 14 S.W. 693, 79 Tex. 465.

8. Ky.—Southern R. Co. v. Com., 77 S.W. 207, 116 Ky. 907, 25 Ky.Law 1078.
10 C.J. p. 493 note 98.

9. Wash.—Belcher v. Tacoma Eastern R. Co., 168 P. 782, 99 Wash. 34.

10. S.C.—Ex p. Benson, 18 S.C. 38, 44 Am.R. 564.
10 C.J. p. 496 note 43.

11. Iowa.—Cook v. Chicago, etc., R. Co., 46 N.W. 1080, 81 Iowa 551, 25 Am.S.R. 512, 9 L.R.A. 764.

12. N.Y.—Root v. Long Island R. Co., 21 N.E. 403, 114 N.Y. 300, 11 Am.S.R. 643, 4 L.R.A. 331.
10 C.J. p. 496 note 45.

Switching movements

In the absence of state statute prohibiting it, the parties may agree, so far as intra-state shipments are concerned, that the line freight rate shall include the service of moving the cars in and about the plant of the shipper as required, and that the carrier shall employ the shipper to use the latter's equipment for such service and pay or allow the latter a reasonable compensation therefor.—Pittsburgh & L. E. R. Co. v. South Shore R. Co., 107 A. 680, 264 Pa. 162.

13. Miss.—Pitman v. Yazoo & M. V. R. Co., 158 So. 547, 171 Miss. 799.

§ 2 of the Act, rebates are illegal as a device whereby one person is charged less than another for a like service,[14] and § 3 of the Act is violated if the rebate gives an undue preference to one person and subjects another similarly situated to an unreasonable prejudice.[15] Other provisions of the act are transgressed if the rebate constitutes a deviation from the published tariff,[16] in force at the time the charges were incurred.[17] Such rebates and the special privileges granted through them are violative of the act although they are disguised as other transactions,[18] and it is im-

Validity of contract

(1) Railroad's contract for construction of logging road to main line junction, and to transport goods at certain rate, if construed as giving logging company right to part of through rate allowed railroad for originating business would give it an undue and forbidden preference in violation of the federal laws, and should not be enforced.—Carolina Spruce Co. v. Black Mountain R. Co., 201 S.W. 154, 139 Tenn 137, error dismissed 39 S.Ct. 184, 248 U.S. 597, 63 L.Ed. 439.

(2) The fact that the original Interstate Commerce Act, which made rebates unlawful, did not prescribe any punishment for a shipper who accepted rebates, does not affect the application of the construction of that act as not invalidating the contract of carriage because of the rebate provision to contracts made under subsequent amendments which did impose punishment on the shipper.—Adams Express Co. v. Darden, C.C.A.Tenn., 286 F. 61, affirmed 44 S.Ct. 502, 265 U.S. 265, 68 L.Ed. 1010

14. U.S.—Merchants' Warehouse Co. v. U. S., Pa., 51 S.Ct. 505, 283 U.S. 501, 75 L.Ed. 1227, affirming, D.C., 44 F.2d 379.

Exclusive allowance to warehouse

A carrier's making of an exclusive allowance to a warehouse for the performance of terminal services in loading and unloading carload package freight has been held void as a rebate in violation of 49 U.S.C.A. § 2, where the warehouse and its patrons were thereby benefited and where it constituted a device by which the carrier indirectly received from them a less compensation for its services than received from other persons under substantially the same circumstances.—Terminal Warehouse Co. of Baltimore City v. U. S., D.C.Md., 31 F.2d 951.

15. U.S.—Merchants' Warehouse Co. v. U. S., D.C.Pa., 44 F.2d 379, affirmed 51 S.Ct. 505, 283 U.S. 501, 75 L.Ed. 1227.

16. U.S.—Lehigh Valley R. Co. v. U. S., N.Y., 37 S.Ct. 434, 243 U.S. 444, 61 L.Ed. 839, affirming, D.C., U. S. v. Lehigh Valley R. Co., 222 F. 685

N.Y.—Spencer, Kellogg & Sons v. Delaware, L. & W. R. Co., 195 N.Y.S. 69, 119 Misc. 174, affirmed 197 N.Y.S. 380, 204 App.Div. 243.

Pa.—Pittsburgh & L. E. R. Co. v. South Shore R. Co., 107 A. 680, 264 Pa. 162.

10 C.J. p 496 note 47 [a].

Borrowing from railroad

Fact that shipper sold ties to railway at market prices and borrowed money from railway at usual interest did not show violation of Elkins Act which prohibits rebates by which freight is transported at less than the rate specified in the published tariffs.—Southwestern Lumber Co. of New Jersey v. Kerr, D.C.Tex., 11 F.Supp. 253, affirmed, C.C.A., Kerr v. Southwestern Lumber Co. of New Jersey, 78 F.2d 348, certiorari denied 56 S.Ct. 130, 296 U.S. 611, 80 L.Ed. 433.

Corporations forwarding goods for importers from Europe to United States, charging for their transportation, etc., way not be allowed by railroad percentage on latter's published rates and a salary for shipping by its line without violating Act Febr. 4, 1887 § 6, as amended by Act June 29, 1906 § 2, and are not justified by § 15 of the earlier act as amended by § 4 of the later act.—Lehigh Valley R. Co. v. U. S., N.Y., 37 S.Ct. 434, 243 U.S. 444, 61 L.Ed. 839, affirming, D.C., U. S. v. Lehigh Valley R. Co., 222 F. 685

Switching charges

(1) Where no provision is made therefor in the tariff the carrier cannot under the Interstate Commerce Act contract to pay or give an allowance for switching services rendered by the shipper which the carrier had contracted to furnish as a part of the service covered by the line freight rate

U.S.—Pan American Petroleum Corporation v. U. S., D.C.La. & Tex., 18 F.Supp. 624.

Pa.—Pittsburgh & L. E. R. Co. v. South Shore R. Co., 107 A. 680, 681, 264 Pa. 162.

(2) The Chicago Joint Minimum Switching Tariff, which became effective Nov. 1, 1898, relating to absorption of switching charges and rebates, had no relevancy to switching charges on inbound shipments from the line of a Western road and did not authorize rebates with respect thereto.—Pennsylvania Co. v. U. S., Ill., 257 F. 261, 168 C.C.A. 345

17. U.S.—Pennsylvania Co. v. U. S., supra.

18. U.S.—Kerr v. Southwestern Lumber Co. of New Jersey, C.C.A.Tex., 78 F.2d 348, affirming, D.C., Southwestern Lumber Co. of New Jersey v. Kerr, 11 F.Supp. 253, and certiorari denied Kerr v. Southwestern Lumber Co. of New Jersey, 56 S.Ct. 130, 296 U.S. 611, 80 L.Ed. 433.—American Smelting & Refining Co. v. Union Pac. R. Co., Neb., 256 F. 737, 168 C.C.A. 83.

Pa.—State Line & S. R. Co. v. Lehigh Valley R. Co., 120 A. 829, 277 Pa. 227.

10 C.J. p 497 note 51.

Allowances to shipper's tap line

Where the interstate commerce commission, to prevent unjust discrimination in favor of shippers owning tap lines connecting their plants with main railroad lines, by means of an unfair division of the through rate over the two lines, fixed amounts receivable by the tap lines based on mileage, it did not act arbitrarily and unreasonably in refusing to include the back haul from the mill to a track scale, where it found that a greater allowance would result in unjust discrimination, that the evidence did not show that it was necessary that the shipments be weighed by the tap line, rather than by the trunk line, and that the allowing of a larger division of the through rate would place the owner of the tap line in a more advantageous position than other tap lines performing a similar service, and open the way for the relocation of other track scales, so as to require a long back haul and lay a basis for rebates.—Louisiana & P. B. Ry. Co. v. U. S., Ark., 42 S.Ct. 25, 257 U.S. 114, 66 L.Ed. 156, affirming, D.C., 274 F. 372.

Agreement to give bonus

Carrier's agreement to give a lumber company bonus equal to one half of amount of freight bills, in consideration of which lumber company constructed mills which would greatly increase freight business and result in building of town, violated Interstate Commerce Act §§ 2, 3, 6, as amended by Elkins and Hepburn Acts, prohibiting preferences, rebates, concessions, or discriminations in freight rates; and the carrier, by calling itself a promoter and the rebate a bonus, could not evade the statute.—Foster Lumber Co. v. Atchison, T. & S. F. Ry. Co., 194 S.W. 281, 270 Mo. 629, L.R.A.1918A 768.

Leases

(1) A lease of a factory site, given by a carrier to a shipper in consideration for the shipment of goods over its lines, is a bonus or benefit,

material whether the allowance takes the form of a deduction or a cross payment.[19] Rebates cannot be justified by the mere wording of the shipping documents,[20] nor can the doctrine of estoppel be invoked to require the carrier to comply with an agreement to pay an illegal rebate.[21]

On the other hand, the word "rebate," as found in the Interstate Commerce Act, is used in an offensive sense, and refers only to such discount, deduction, or drawback as is the basis of a discrimination in favor of a particular person and against other persons in a like situation, and destroys that equality of treatment in rates to which the public is entitled and which it is the purpose of the law to enforce; an undiscriminatory rebate is not a criminal offense, nor is it in any way prohibited.[22] In fact, in accordance with § 15 (13) of the Act, 49 U.S.C.A. § 15 (13),[23] a carrier may lawfully compensate a shipper or forwarder of goods for transportation services rendered to the carrier[24] and such an allowance when made

which is illegal under Interstate Commerce Act § 2 and the Elkins Act.—Central of Georgia Ry Co. v Blount, Ga., 238 F. 292, 151 C.C.A. 308

(2) Where a lease of a railroad for a stipulated rent provided that the lessee would transport coal mined by lessor for a sliding rate per ton, depending on the quantity transported, and that, if the quantity exceeded one hundred thousand tons in any year, the lessee would pay five cents per ton on all the coal transported, it was held that this was clearly a rebate, and not an additional rent, and the parties by their interpretation could not alter this fact, nor make that legal which was illegal by calling it by another name, for it is only where the meaning of a contract is uncertain or ambiguous that the parties' interpretation is followed.—State Line & S. R. Co. v. Lehigh Valley R. Co., 120 A. 829, 277 Pa. 227.

(3) A provision in a lease of land by an interstate railroad company for a smelter plant site, by which in consideration of the rental, etc., it agreed to do intraplant switching of cars, wholly disconnected from their transportation over its road, free of charge, was not invalid as a device to cover the giving of rebates—American Smelting & Refining Co. v. Union Pac. R. Co., Neb., 256 F. 737, 168 C.C.A. 83.

Settlement of disputed claim

(1) A carrier's agreement to pay a certain amount in settlement of a disputed claim for negligence, in consideration of future interstate shipments over its road, was violative of the law against rebating—St. Louis, I. M. & S. Ry. Co. v. Landa & Storey, Tex.Civ.App., 187 S.W. 358

(2) On the other hand, a shipper's claim for reasonable value of lumber provided by him for cooperage of cars furnished for intra-state shipment of grain, with approval of carrier's agent after its failure to provide such lumber, as required by its duly published tariff rule, being for amount which carrier would have had to expend, will not effect a discrimination or tend to destroy uniformity of rates—Gibbon Farmers' Elevator Co. v Minneapolis & St. L. R. Co., 170 N.W. 706, 142 Minn. 57

19. U.S.—Lehigh Valley R. Co. v U. S., N.Y., 37 S.Ct. 434, 243 U.S. 444, 61 L.Ed. 839, affirming, D.C., U. S. v. Lehigh Valley R. Co., 222 F. 685.

20. U.S.—Merchants' Warehouse Co. v. U. S., D.C.Pa., 44 F.2d 379, affirmed 51 S.Ct. 505, 283 U.S. 501, 75 L.Ed. 1227.

21. Tex.—St. Louis, I. M. & S. Ry Co. v Landa & Storey, Civ.App., 187 S.W. 358.

22. U.S.—American Sugar Refining Co. v Delaware, L. & W. R. Co., N.J., 207 F. 733, 125 C.C.A. 251.

Rebates to subcontractor

A contract providing for a refund by the carrier to a subcontractor working for it of freight charges and fares paid on laborers engaged in the work is not within either the letter or the spirit of the provisions prohibiting unfair discrimination or rebates.—Baker v. J. W. McMurry Contracting Co., 223 S.W. 45, 282 Mo. 685.

23. U.S.—O'Keefe v U. S., La., 36 S.Ct. 313, 240 U.S. 294, 60 L.Ed. 651—Louisville Cement Co. v. U. S., D.C.Ky., 19 F.Supp. 910.

After end of transportation

An allowance to a consignee for services rendered after delivery has been made and the transportation is at an end, constitutes an unlawful rebate.—New York Cent. & H. R. R. Co. v. General Electric Co., 114 N.E. 115, 219 N.Y. 227, 1 A.L.R. 1417, reversing 153 N.Y.S. 478, 167 App.Div. 726, which reversed 146 N.Y.S. 322, 83 Misc. 529, and certiorari denied General Electric Co. v. New York Cent. & H. R. R. Co., 37 S.Ct. 400, 243 U.S. 636, 61 L.Ed. 941.

"Connected with" defined

The phrase "connected with," as used in this provision, is a synonym of a "part of it," and does not mean something in addition to transportation that touches or is attached to transportation.—New York Cent., etc., R. Co. v General Electric Co., 146 N.Y.S. 322, 83 Misc. 529, reversed on other grounds 153 N.Y.S. 478, 167 App.Div. 726.

"Transportation" defined

Term "transportation" as used in statute permitting payment by carriers to shippers for performing transportation service includes delivery, but does not contemplate either loading or unloading.—Louisville Cement Co. v. U. S., D.C.Ky., 19 F. Supp. 910.

24. U.S.—Merchants' Warehouse Co. v U. S., Pa., 51 S.Ct. 505, 283 U.S. 501, 75 L.Ed. 1227, affirming, D.C., 44 F.2d 379—Terminal Warehouse Co. of Baltimore City v U. S., D.C.Md., 31 F.2d 951—American Trucking Ass'ns v U. S., D.C.D.C., 17 F.Supp. 655—American Sheet & Tin Plate Co. v. U. S., D.C.Pa., 15 F.Supp. 711

N.Y.—New York Cent. & H. R. R. Co v. General Electric Co., 114 N.E. 115, 219 N.Y. 227, 1 A.L.R. 1417, reversing 153 N.Y.S. 478, 167 App. Div. 726, which reversed 146 N.Y.S. 322, 83 Misc. 529, and certiorari denied General Electric Co. v. New York Cent. & H. R. R. Co., 37 S.Ct. 400, 243 U.S. 636, 61 L.Ed. 941.

N.D.—Knapp v. Minneapolis, St. P. & S. S. M. Ry. Co., 156 N.W. 1019, 33 N.D. 291.

The test of the right of a shipper to compensation for services rendered is whether there was a reasonable and proper basis for the performance of the services, and there was such basis when the shipper loaded goods which it was the carrier's duty to load under its published tariff, on the carrier's suggestion that, because of labor shortage due to the war, there would otherwise occur delay in loading.—U. S. ex rel. Members of Waste Merchants' Ass'n of New York, Voluntary Ass'n, v Interstate Commerce Commission, 277 F. 538, 51 App.D.C. 136, reversed on other grounds Interstate Commerce Commission, v. U. S. ex rel. Members of Waste Merchants' Ass'n of New York, 43 S.Ct. 6, 260 U.S. 32, 67 L.Ed. 112

Hauling wheat across frozen lake

Where a lake over which the railroad customarily furnishes barge service to haul goods to the point where its line commences has been frozen, the carrier may properly agree, under the Interstate Commerce

to all shippers alike, without discrimination, and in strict accordance with the published schedules, is not a rebate offensive either to the common law or to the statute.[25] The interstate commerce commission has authority to inquire into the reasonableness and propriety of such allowances for services,[26] but it may not allow compensation in one case and withhold it in another, where similar services have been performed, as, of course, this would constitute a discrimination in favor of one shipper and against another.[27] Of course, a common carrier which is not subject to the Interstate Commerce Act is not prevented by such act from giving rebates.[28]

Under State Legislation. Statutes exist in the several states under which the giving of a rebate to a shipper on the regular rate paid by other shippers for like services under similar circumstances is illegal,[29] and under such statutes rebates are illegal whether accomplished indirectly or directly.[30] The mere giving of a rebate is not necessarily illegal, however, since the services may not be substantially similar or rendered under substantially similar conditions.[31] A carrier, under such

Act, to pay the shipper the cost of the barge service for hauling the shipment across the ice. The general agent of the carrier has ostensible authority to agree to such an allowance.—Knapp v. Minneapolis, St. P. & S. S. M. Ry. Co., 156 N.W. 1019, 33 N.D. 291.

Pick-up and delivery service

Where the tariff provides for pick-up and delivery service as a part of the transportation service, the carrier may lawfully, where the tariff so provides, make an allowance to consignors and consignees who themselves perform the pick-up and delivery service without violating the provision of the Interstate Commerce Act against rebates.—American Trucking Ass'ns v. U. S., D.C.D.C., 17 F.Supp. 655.

Services rendered by warehouses in distributing and assembling package carload freight were not transportation services for which carriers could lawfully compensate.—Merchants' Warehouse Co. v. U. S., Pa., 51 S.Ct. 505, 283 U.S. 501, 75 L.Ed. 1227, affirming, D.C., 44 F.2d 379

Spotting service

Where the work in transporting, switching, and spotting cars within industrial plants is part of the transportation service a carrier is bound to perform, it may lawfully contract with the proprietors of the plants to perform such work and make them reasonable allowances therefor in the tariffs.—Pan American Petroleum Corporation v. U. S., D.C.La.& Tex., 18 F.Supp. 624—American Sheet & Tin Plate Co. v. U. S., D.C.Pa., 15 F.Supp. 711.

Switching services

An allowance by a railway company to a shipper of a switching charge for switching done by the shipper, which barely covered the cost of the service rendered, was legitimate and proper, and the fact that the shipper, in rendering such service, used the track of another railroad company, which he had acquired the right to use instead of building a spur track of his own, does not affect the legitimacy of the charge.—Texas & P. Ry. Co. v. Thompson, C.C.A.La., 288 F. 167.

25. U.S.—American Trucking Ass'ns v. U. S., D.C.D.C., 17 F.Supp. 655—American Sheet & Tin Plate Co. v. U.S., D.C.Pa., 15 F.Supp. 711.
10 C.J. p. 497 note 53

26. U.S.—O'Keefe v. U. S., La., 36 S.Ct. 313, 240 U.S. 294, 60 L.Ed. 651—Louisville Cement Co. v. U. S., D.C.Ky., 19 F.Supp. 910

Spotting service

(1) In determining whether shipper was entitled to allowance from carrier for performance of terminal services known as "spotting," interstate commerce commission had authority to determine where transportation by carrier under line haul charge ended.—Louisville Cement Co. v. U. S., D.C.Ky., 19 F.Supp. 910

(2) The commission was not required to determine whether shipper on changing method of receiving and delivering freight would be entitled to payment of allowance by carrier for spotting service until such changes had been made by shipper.—Louisville Cement Co. v. U. S., supra.

(3) A decision of the commission, however, ordering carrier to discontinue payment of allowance to shipper for spotting service would not preclude shipper from subsequently applying for an allowance under different facts.—Louisville Cement Co. v. U. S., supra.

27. D.C.—U. S. ex rel. Members of Waste Merchants' Ass'n of New York, Voluntary Ass'n, v. Interstate Commerce Commission, 277 F. 538, 51 App.D.C. 136, reversed on other grounds Interstate Commerce Commission v. U. S. ex rel. Members of Waste Merchants' Ass'n of New York, 43 S.Ct. 6, 260 U.S. 32, 67 L.Ed. 112.

28. N.Y.—Spencer, Kellogg & Sons v. Delaware, L. & W. R. Co., 197 N.Y.S. 380, 204 App.Div. 243, affirming 195 N.Y.S. 69, 119 Misc. 174, affirmed 199 N.Y.S. 951, 206 App.Div. 735.

Elevator company

(1) Although when elevator service is rendered by a railroad in connection with transportation such service is subject to the provisions of the Interstate Commerce Act against giving rebates, where such service is rendered by an independent contractor it is not rendered by the railroad within the meaning of the act. Accordingly, under a tariff schedule providing that the elevator company would retain the entire amount received from the railroad, a rebate by the elevator company will not constitute a violation of the act on the part of the railroad.—Spencer, Kellogg & Sons v. Delaware, L. & W. R. Co., 197 N.Y.S. 380, 204 App.Div. 243, affirming 195 N.Y.S. 69, 119 Misc. 174, affirmed 199 N.Y.S. 951, 206 App.Div. 735.

(2) Under such circumstances, where a railroad company's schedule of rates, as filed with the interstate commerce commission, included a charge for elevation and transfer of grain from vessels to cars, a promise by an elevator owner that such charge, when paid to such owner, would be retained, and that no part would be given to any one having an ownership interest in the grain, made with the reservation that such promise was subject to cancellation on written notice, was not violated by giving a special rate or rebate to a forwarding agent, after notice had been given withdrawing the promise.—Spencer, Kellogg & Sons v. Delaware, L. & W. R. Co., supra.

29. Ark.—Missouri Pac. R. Co. v. Whelen Springs Gravel Co., 49 S.W.2d 374, 185 Ark. 669, certiorari denied 53 S.Ct. 87, 287 U.S. 638, 77 L.Ed. 553.
N.J.—National Radiator Co. v. Pennsylvania R. Co., 143 A. 85, 6 N.J. Misc. 778
10 C.J. p. 498 note 54.

30. Mich.—Federal Gravel Co. v. Detroit & M. Ry. Co., 226 N.W. 677, 248 Mich. 49.

31. Ill.—Toledo, etc., R. Co. v. Elliott, 76 Ill. 67, distinguished in Indianapolis, etc., R. Co. v. Ervin, 8 N.E. 862, 118 Ill. 250, 59 Am.R. 369.

statutes, may also allow compensation to the shipper for services rendered to the carrier, provided such compensation fairly represents the cost of the service,[32] but an allowance to a consignee for services rendered after delivery has been made and the transportation has ended, constitutes an unlawful rebate.[33]

§ 380. Free Cartage or Storage, and Franks

The giving of free storage or franks constitutes unjust discrimination, but the giving of free cartage does not.

A railroad company does not violate Interstate Commerce Act §§ 4, 6, 49 U.S.C.A. §§ 4, 6, by furnishing cartage free of charge to merchants in one town on its line and not furnishing similar services to the merchants of another town in the vicinity.[34]

Free storage. Storage is an instrument of transportation,[35] and a railroad is bound to collect storage charges which are properly due.[36]

Franks. The giving of free transportation of personal packages to officers, employees, and members of their families, and to the officers of other transportation companies and members of their families, in exchange for passes issued by the latter to the officers of the express companies, is in violation of the Hepburn Law, which forbids all transportation of property at less than the published rates, and the giving or receiving of any concession, rebate, or discrimination with respect to the transmission of any property in interstate or foreign commerce.[37]

§ 381. Milling in Transit

In granting the privilege of milling in transit, carriers may not discriminate unreasonably between markets or individuals.

The right to stop the shipment of a commodity in transit for the purpose of treatment is in the nature of a special privilege which the carrier may concede,[38] but to which shippers are not entitled

Mo.—American Cent Ins Co. v. Chicago, etc., R. Co., 74 Mo.App. 89.
10 C.J. p 498 note 55.

32. Wis.—Nekoosa-Edwards Paper Co. v. Public Service Commission, 246 N.W. 428, 210 Wis. 644.

Submission to commission

(1) In the absence of statutory requirement, such a contract need not be filed with or passed on by a state public service commission.
U.S.—Texas & P. Ry. Co. v. Thompson, C.C.A.La., 288 F. 167.
Wis.—Nekoosa-Edwards Paper Co. v. Public Service Commission, 246 N.W. 428, 210 Wis. 644.

(2) Indeed, under some statutes it is not a matter over which the commission has jurisdiction, except as it may affect the through rate.—Nekoosa-Edwards Paper Co. v. Public Service Commission, supra.

(3) A carrier which has filed a tariff allowing the shipper a certain amount for terminal services is entitled to cancel the arrangement, in its discretion, since the arrangement is by law made an entirely voluntary one which the carrier could not be compelled to enter into.—Nekoosa-Edwards Paper Co. v. Public Service Commission, supra.

(4) In such a case it is the duty of the state commission to file and approve a canceling tariff although the carrier may thereby render itself liable to the shipper for breach of contract.—Nekoosa-Edwards Paper Co. v. Public Service Commission, supra.

Rental for facilities

Under a statute providing that a carrier shall not collect or receive less compensation for the transportation of any property or for any service in consideration of said shipper furnishing any part of the facilities incident thereto, "but that any railroad may rent any facilities incident to transportation and pay a reasonable rental therefor," a contract whereby a shipper agrees to furnish the necessary switch engines and crews to do terminal switching, and the carrier agrees to pay a specified rate for the switching, is a valid contract. The validity of such a contract, or the right to enter into the same, is not affected by a subsequent amendment to the statute providing, "but no payment shall be made by any carrier to an industry for performing any part of the service incident to the origination or determination of carload line haul shipments which the carriers have assumed to perform under the provisions of the bill of lading." The word "facilities," as used before the amendment, had a plain and unambiguous meaning. It included a switch engine and the service of a crew. This meaning still attaches, for, where a statute uses a word or phrase having a definite meaning, it will be presumed to be used in that sense and will be so construed unless it clearly appears that it was not so intended. Such an amendment does not change the right of rental of tangible things owned by the shipper and incident to transportation, things which may be readily measured, but does forbid the paying for services elusive in nature and capable of assisting in evasions or resulting in discrimination between shippers.—Nekoosa-Edwards Paper Co. v. Minneapolis, St. P. & S. S. M. R. Co., 259 N.W. 618, 620, 217 Wis. 426

33. N.Y.—New York Cent. & H. R. R. Co. v. General Electric Co., 114 N.E. 115, 219 N.Y. 227, 1 A.L.R. 1417, reversing 153 N.Y.S. 478, 167 App.Div. 726, which reversed 146 N.Y.S. 322, 83 Misc. 529, and certiorari denied General Electric Co. v. New York Cent. & H. R. R. Co., 37 S.Ct. 400, 243 U.S. 636, 61 L.Ed. 941.

34. U.S.—Interstate Commerce Commn. v. Detroit, G. H. & M. R. Co., Mich., 17 S.Ct. 986, 167 U.S. 633, 644, 42 L.Ed. 306, affirming 74 F. 803, 21 C.C.A. 103.
10 C.J. p 500 note 73.

35. Ala.—Central of Georgia R. Co. v. Patterson, 60 So. 465, 6 Ala.App. 494.

36. Mass.—Boston & M. R. R. v. Oceanic Steam Nav. Co., 116 N.E. 260, 226 Mass. 509

Where under the filed regulations the carrier is to make a reasonable charge for storage pending delivery to the consignee, he cannot agree with a particular shipper or consignee to hold the goods gratuitously pending delivery
U.S.—Southern R. Co. v. Prescott, S.C., 36 S.Ct. 469, 240 U.S. 632, 60 L.Ed. 836.
Ala.—Central of Georgia R. Co. v. Patterson, 60 So. 465, 6 Ala.App. 494

37. U.S.—American Express Co. v. U.S., Ill., 29 S.Ct. 315, 212 U.S. 522, 53 L.Ed. 635, affirming, C.C., U.S. v. Wells Fargo Express Co., 161 F. 606.

38. U.S.—Southern R. Co. v. St.

is a matter of right, as already fully discussed in § 314. In granting the privilege of milling in transit carriers may not discriminate between markets[39] or individual shippers,[40] and if a contract for milling in transit privileges is in material part violative of the Interstate Commerce Act or similar state legislation, the illegal part will vitiate the whole contract and prevent recovery of damages for its breach.[41] However, fair and reasonable discrimination in granting the privilege of milling in transit is not prohibited by the Interstate Commerce Act and similar state legislation,[42] and, so long as there is no unjust discrimination and no stipulation in the contract forbidding the carrier extending similar rates to all other shippers similarly situated, there is nothing unlawful in a milling in transit agreement by which a railroad company contracts to credit on the freight charges on manufactured goods any freight on raw material shipped to the factory.[43] The legality of the principle of milling in transit arrangements being generally recognized, the question whether a particular agreement will be upheld depends on the circumstances of each case.[44]

Under appropriate legislation a state board of railroad commissioners or public service commission is authorized to order the removal of discrimination in granting the privilege of milling in transit, as applied to intra-state commerce.[45]

§ 382. Stoppage in Transit to Test Market

The privilege of stoppage in transit to test the market can be granted only in accordance with tariffs properly filed.

Before a special privilege to stop cattle in transit to test the market en route can be granted by a railroad company it is necessary that the tariffs and schedules pertaining thereto should be filed with the proper authorities and be open to all shippers on equal terms, and where the tariffs filed with the public utilities commission specified the points at which live stock might be stopped in transit to test the market, any special contract enlarging on that privilege, which is not specified in the tariffs, is void.[46]

§ 383. Rebilling Rate

A rebilling rate to be legal must operate uniformly and fairly.

Louis Hay & Grain Co., Ill., 29 S. Ct. 678, 214 U.S. 297, 53 L.Ed. 1004.
Ala.—Priebe v. Southern R. Co., 66 So. 573, 189 Ala. 427.

39. U.S.—Southern R. Co. v. St. Louis Hay & Grain Co., Ill., 29 S. Ct. 678, 214 U.S 297, 53 L.Ed 1004.
Fla.—State v. Atlantic Coast Line R Co., 52 So. 4, 59 Fla. 612

40. Ala.—Louisville & N. R. Co. v. A. H. Cleaver & Co., 101 So. 597, 211 Ala. 661.
10 C.J. p 499 note 63.

41. Ala.—Louisville & N. R. Co. v. A. H Cleaver & Co., supra.
10 C.J. p 499 note 64.

Stipulation indorsed on bill of lading covering cotton shipment, in words "to be compressed in transit," was void as to intra-state shipment, in view of Code 1907 § 5531, and void as to interstate shipment, in view of U.S Comp.St. § 8597, as attempted discrimination in favor of particular shipper.—Louisville & N. R. Co v. A H. Cleaver & Co., 101 So 597, 211 Ala. 661.

42. Wash.—State v. Public Service Commission, 192 P. 1075, 112 Wash 520

Preference not unreasonable

Preference, granted by railway to flourmills in Seattle as to milling in transit wheat shipped from points on the railway's lines in Eastern Washington, the finished product to be delivered to points on the railway north and east of Seattle, such privileges being denied to a flourmill at Tacoma was held not to be unreasonable, or the discrimination between the points unjust, grant of the privilege to the Tacoma mill involving a much longer haul, and the conditions governing the two points being entirely different.—State v Public Service Commission, 192 P. 1075, 112 Wash. 520.

43. Miss.—Laurel Cotton Mills v. Gulf, etc, R Co, 37 So. 134, 84 Miss. 339, 66 L.R.A. 453.
10 C.J. p 499 note 66

44. Wash.—State v. Public Service Commission of Washington, 163 P 1143, 95 Wash. 376, affirmed State v. Public Service Commission, 166 P. 793, 95 Wash. 376.
10 C.J. p 499 note 65.

Refund arrangement

Under Pub Acts 1909 No 300 § 11, railroad company's rate on logs, providing for a specified refund on each thousand feet when equal amount of manufactured product was shipped out, was held valid, being proper milling in transit rate and not an illegal rebate or discrimination.—Fletcher Paper Co. v Detroit & M Ry Co, 164 N.W 528, 198 Mich 469, affirmed Detroit & M R Co v Fletcher Paper Co, 39 S.Ct. 13, 248 U.S 30, 63 L.Ed 107.

Option to compress cotton

Where carrier's tariff, published under Interstate Commerce Act § 6, 49 U.S.C.A. § 6, gave carrier option to compress cotton, indorsement on bill of lading of provision for shipment via compress at certain point was a valid and enforceable contract, it not constituting an unjust or undue preference.—M. A. Pharr Cotton Co. v. Davis, 118 S.E. 605, 30 Ga.App. 570.

Ore "to be stopped off . . . for sampling"

A special provision in a shipping bill to the effect that ore was "to be stopped off at Bergen Junction for sampling at Ledoux & Co. works" was in violation of Elkins Act § 1, 32 U.S.St. at L. p 846, as amended by Hepburn Act § 2, 34 U.S.St at L. p 587, Interstate Commerce Act § 3, 24 U.S.St at L. p 380 § 8565, and Elkins Act § 6, as amended by Hepburn Act § 2, where the ore was shipped at the standard rate and such provision did not appear in the bills of lading of other shippers paying the same rate, or in the filed tariffs.—Siebert v. Erie R Co., 179 N.Y.S 136, 189 App.Div. 586

45. S.D.—Chicago, M & St. P. Ry. Co. v Board of Railroad Com'rs, 199 N.W 453, 47 S.D. 395, error dismissed 46 S.Ct. 485, 271 U.S. 645, 70 L.Ed 1129.
Wash.—State v Public Service Commission of Washington, 163 P 1143, 95 Wash. 376, affirmed State v Public Service Commission, 166 P 793, 95 Wash 376.

46. Kan.—Mollohan v. Atchison, T. & S. F. Ry. Co., 154 P. 248, 97 Kan. 51.

A true rebilling rate has been defined as one in which goods received in unbroken carload lots can be rebilled over the same or another line completing one continuous trip simply by changing the consignee and altering the destination of the identical shipment without unloading. A rebilling rate to receive the sanction of law must operate uniformly and fairly and must be open to all alike. It cannot lawfully be restricted to shippers who live in a certain locality and who previously received freight over certain other favored associate carriers. While a local railroad's share of an interstate rate may not be a legitimate basis on which a state railroad commission can establish and enforce a low local rate, yet, whenever under the guise or pretense of a rebilling rate some merchants are given a low local rate, the commission is justified in making that rate the rate for all; nor is it bound to inquire whether it furnishes adequate return to the railroad company, for the state may insist on equality being enforced under the same conditions against all who perform a public or quasi public service.[47]

§ 384. - - Other Modes of Discrimination

Any device for charging prohibited discriminatory rates is illegal.

No device to defeat the enactments of congress relative to discriminatory rates can be upheld,[48] and a carrier is guilty of a discrimination within the provisions of the Interstate Commerce Act where it indirectly or by any device collects or receives a greater compensation from one person than another for hauling freight under like circumstances.[49] Accordingly a carrier may not work a discrimination by a contract or agreement which might require it to furnish free transportation;[50] it cannot estop itself from exacting the lawful freight charg-

47. U.S.—Alabama, etc., R. Co. v. Mississippi R. Commn., 27 S.Ct. 163, 203 U.S. 496, 51 L.Ed. 289, affirming 38 So. 356, 86 Miss. 667.
10 C.J. p. 500 note 69

48. Pa.—State Line & S. R. Co. v. Lehigh Valley R. Co., 120 A. 829, 277 Pa. 227.
10 C.J. p. 497 note 51 [a].

Contract not discriminatory

A provision in a contract between a carrier and a shipper which merely limits the rate to be imposed to the amount imposed on others engaged in a similar business is not a discrimination, it not being an effort to secure an undue advantage to himself on the part of the shipper, but a precaution to guard against future imposition by advancing rates.—Laurel Cotton Mills v. Gulf, etc., R. Co., 37 So. 134, 84 Miss. 339, 66 L.R.A. 453.

Settlement of claim

(1) A compromise of a bill of freight charges on an interstate shipment for less than the regularly published and lawful tariff rate was void as against public policy and in breach of the inhibitions of the Interstate Commerce Act.—Farrar v. Perkins, 251 P. 440, 122 Kan. 141

(2) On the other hand, where a railroad was required by city ordinance to elevate its tracks to avoid grade crossings, and where manufacturers and other shippers had built plants with reference to the old grade and made claims for damages because of the change, which on advice of competent counsel the carrier compromised, the settlements could not be considered a devise to indirectly grant concessions in violation of the Interstate Commerce Act as amended.—U. S. v. Northern Pac. Ry. Co., D.C.Wash., 18 F.2d 299.

Knowledge of loss

The rule permitting knowledge of loss or injury to supply the place of a written notice, see supra § 240, is not a discrimination between railroads, nor is it a preference in favor of a particular shipper at the expense of others, as it is a mode of proof, applicable alike to all railroads and in favor of all shippers.—Washington Horse Exch. v. Louisville, etc., R. Co., 87 S.E. 941, 171 N.C. 65.—Baldwin v. Atlantic Coast Line R. Co., 86 S.E. 776, 170 N.C. 12

49. U.S.—China Fire Ins. Co. v. Davis, C.C.A.N.Y., 50 F.2d 389, 76 A.L.R. 1259, certiorari denied Mellon v. China Fire Ins. Co., 52 S.Ct. 36, 284 U.S. 658, 76 L.Ed. 558.

Benefit of insurance

Clause in bill of lading giving carrier benefit of any insurance on shipment was invalid under § 2 of the Interstate Commerce Act, 49 U.S.C.A. § 2, as giving carrier greater compensation than collected for similar service.—China Fire Ins. Co. v. Davis, C.C.A.N.Y., 50 F.2d 389, 76 A.L.R. 1259, certiorari denied Mellon v. China Fire Ins. Co., 52 S.Ct. 36, 284 U.S. 658, 76 L.Ed. 558.

Carload lots

(1) An aggregation of shipments by various owners, in order to obtain the benefit of carload rates, does not constitute an undue discrimination within the meaning of the act.—Chicago, R. I. & G. Ry. Co. v. Manby, Tex.Civ.App., 207 S.W. 157

(2) On the other hand, where railroad issued two bills of lading for plaintiff's machinery and furniture, and goods were not shipped as one carload lot, agreement by the road and plaintiff that the shipments should be treated as carloaded was invalid.—Byrd v. Atlantic Coast Line R. Co., 90 S.E. 181, 106 S.C. 1.

Charge discriminatory

Additional charge for bringing merchandise into city, imposed only if merchandise is afterward shipped out over certain railroad, is discriminatory.—Atchison, T. & S. F. Ry. Co. v. U. S., Ill., 49 S.Ct. 494, 279 U.S. 768, 73 L.Ed. 947, affirming, D.C., 33 F.2d 345

Necessity of fraud

The provisions of the Interstate Commerce Act are not limited to fraudulent schemes and devices by which freight rates are reduced, but cover every case where there is undue discrimination.—Foster Lumber Co. v. Atchison T. & S. F. Ry. Co., 194 S.W. 281, 270 Mo. 629, L.R.A. 1918A 768.

Seller's assumption of carriage charges from coal mines to points on railroad connecting with buyer's railroad was legal limitation on price of coal and not illegal agreement for more than established through rate, where through rates from mines and from points on connecting railroad to point on buyer's railroad were identical, but buyer received $0.102 per ton less from distribution of rate from mines.—Murray v. Chicago, St. P., M. & O. Ry. Co., C.C.A.Ill., 65 F.2d 312

50. U.S.—Louisville & N. R. Co. v. U. S., Ky., 51 S.Ct. 297, 282 U.S. 740, 75 L.Ed. 672.
Md.—Pennsylvania Ry. Co. v. S. M. Hamilton Coal Co., 125 A. 405, 144 Md. 556, 35 A.L.R. 473.

Agreement to repay or collect prepaid freight

As to prepaid shipment of coal shipped to coal exchange for export, the carrier could not agree with original shipper to repay the freight, as

es,[51] it cannot agree to waive or release freight[52] or demurrage[53] charges; and it must collect the amount of an undercharge.[54]

In order to get or keep business a carrier cannot voluntarily perform for some shippers only commercial services in connection with its transportation services which, when added together, do not return to the carrier the published tariff rates plus the cost of the commercial services, notwithstanding such services are charged at their fair value if that happens for whatever reason to be less than the cost to the carrier.[55] Also, a carrier engaged in interstate commerce does not have the power to contract to sell and transport on the completion of the contract the commodity sold when the price stipulated in the contract does not pay the cost of purchase, the cost of delivery, and the published freight rates.[56]

A carrier in an intra-state shipment is not entitled to the benefit of a joint rate on its own line for carrying its own property in the absence of contract therefor, and an order of the railroad com-

in the event carrier could not collect freight from transshipper, it would have furnished free transportation in violation of Interstate Commerce Act—Pennsylvania Ry. Co. v. S. M Hamilton Coal Co., 125 A. 405, 144 Md. 556, 35 A.L.R. 478.

Erroneously marking goods prepaid

A shipment of goods marked prepaid when shipped, when in fact they are not, is a violation of regulations of interstate commerce commission—Howell v Seaboard Air Line R. Co., 119 S.E. 198, 186 N.C. 239.

Private passenger car

(1) Transportation of private passenger cars of one carrier subject to Interstate Commerce Act by another carrier free or at other than published tariff rates constitutes unjust discrimination—Louisville & N. R. Co. v. U. S., Ky., 51 S.Ct. 297, 282 U. S. 740, 75 L.Ed. 672.

(2) Transportation of private passenger cars of carriers is "shipment of property" as respects right to forbid free transportation over other lines—Louisville & N. R. Co. v. U. S., supra.

51. U.S.—Louisville & N. R. Co. v. Central Iron & Coal Co., Ala., 44 S.Ct. 441, 265 U.S. 59, 68 L.Ed. 900, affirming, C.C.A., 284 F. 250

The consignor is primarily liable for the carrier's charges, and under Interstate Commerce Act the carrier cannot bind itself to collect the charges from the consignee, and not from the consignor, to permit which would permit discrimination between shippers, which that act was intended to prevent—New York Cent. R. Co. v. Federal Sugar Refining Co., 194 N.Y.S. 467, 201 App.Div. 467.

Order notify bill

Where a carrier accepted a shipment of goods under an order notify bill of lading, it had no right to deliver the goods to the notify party without requiring the payment of its charges in accordance with the terms of the bill of lading, and thereafter to hold the consignor for such charges because of the insolvency of the notify party, since a rule permitting the carriers so to do would give them an opportunity to discriminate between shippers, contrary to the purpose of the Interstate Commerce Act.—New York Cent. R. Co. v. Federal Sugar Refining Co., 194 N.Y.S. 467, 201 App.Div. 467.

52. Ill.—New York Cent. R. Co. v Philadelphia & Reading Coal & Iron Co., 121 N.E. 581, 286 Ill. 267, affirming 210 Ill.App. 267—Doster & McKibben v. Michigan Cent. R. Co., 196 Ill.App. 49

Mich.—Wabash Ry. Co. v. Bloomgarden, 180 N.W. 443, 212 Mich. 410

N.J.—New York Cent. R. Co. v. Stanziale, 147 A. 457, 105 N.J.Law 593, reversing 143 A. 834, 6 N.J.Misc. 1116.

New agreement

While, in view of the federal statute, an agreement to release freight charges altogether would be invalid, where, under the bill of lading, the consignee is liable for freight charges, all the parties concerned may make a new agreement that the carrier should look to the shipper for payment of such charges.—Wabash Ry. Co. v. Bloomgarden, 180 N.W. 443, 212 Mich. 410.

53. **Additional exemptions**

Under the rule established by the interstate commerce commission, demurrage charges for the detention of cars must be exacted and collected by the carrier in accordance with the tariffs on file, and, where certain exceptions or exemptions are specified therein, no others can be permitted—Anthony Carlin Co. v. Hines, 140 N.E. 99, 107 Ohio St. 328.

Agreement immaterial

Whether demurrage covering "order notify" shipments was covered by an "average" agreement between the carrier and consignee was immaterial, as the carrier's duty to collect demurrage was imposed by law and could not be waived or limited either by contract or custom—Davis v. C. B. Gill & Co., 127 S.E. 532, 189 N.C. 542.

Duty to exact from all shippers

Where under the Interstate Commerce Act the charge for demurrage becomes a charge incidental to transportation, it is the duty of the carrier to exact it from all shippers without discrimination.—Pennsylvania R. Co. v. Whitney & Kemmerer, 73 Pa.Super. 588

54. Kan.—Case v. Union Pac. R. Co., 241 P. 693, 119 Kan. 706.

55. U.S.—Baltimore & O. R. Co. v. U. S., D.C.N.Y., 20 F.Supp. 917—Baltimore & O. R. Co. v. U. S., D.C.N.Y., 20 F.Supp. 273.

Minimize losses

An interstate carrier may lawfully minimize its losses from bad investments, but it may not give concessions to a favored shipper which in effect permit the carrier to cut its published tariff rates to that shipper—Baltimore & O. R. Co. v. U. S., D.C.N.Y., 20 F.Supp. 917—Baltimore & O. R. Co. v. U. S., D.C.N.Y., 20 F. Supp. 273.

Rental of warehouse

(1) The rental by an interstate carrier's wholly-owned subsidiary of warehouse at noncompensatory rentals based in part on annual earnings of lessee which was a shipper over the interstate carrier's lines was preferential treatment of lessee in violation of the Interstate Commerce Act, notwithstanding the warehouse property was losing property and rental was the fair rental value—Baltimore & O. R. Co. v. U. S., D.C.N.Y., 20 F.Supp. 917—Baltimore & O. R. Co. v. U. S., D.C.N.Y., 20 F. Supp. 273

(2) In determining whether the furnishing of warehousing, storage, and insurance to shippers at less than cost of such services plus transportation rates was discriminatory, rule that reasonable tariff rates need not be sufficient to give railroad a fair return on every transportation service rendered with respect to every part of its property so used was not applicable, since such services were distinguishable from transportation services.—Baltimore & O. R. Co. v. U. S., supra—Baltimore & O. R. Co. v. U. S., supra.

56. U.S.—New York, N. H. & H. R. Co. v. Interstate Commerce Commn., Va., 26 S.Ct. 272, 200 U.S. 361, 50 L.Ed. 515

10 C.J. p. 500 note 78.

mission which permits a carrier to charge freight rates for hauling its own property over its own road and to participate in a division of a through rate for so doing permits an unjust discrimination.[57]

§ 385. Waiver of Valid Contractual Limitation of Liability

A carrier cannot waive a valid contractual limitation of liability on the basis of which a particular rate has been granted.

Where the liability of the carrier is limited to a valuation fixed by agreement in consideration of the lower of the two rates, the limitation becomes a part of the rate, and the parties cannot by any compromise or agreement after loss change the limitation and arrange for the payment of a greater amount than the value as fixed in the shipping contract.[58] To do so would be giving the shipper an advantage over other shippers and would constitute an unlawful discrimination.[59]

3. Rights and Remedies Arising Out of Unjust Discrimination

§ 386. In General

If the statutory remedy for relief from unjust discrimination by a carrier is exclusive, the statutory procedure must be followed.

Under some statutes the remedies of a shipper arising from a carrier's discriminatory practices are limited to those provided by the statute, and the common-law remedies are superseded.[60] In the absence of such a statute, however, resort may be had to the common-law remedies.[61]

Ordinarily under the various statutes the courts will not reverse an order of a state commission as to discriminatory charges unless it is found to be clearly unreasonable.[62] Under some statutes, where there is an attempted discrimination between persons and associations by a common carrier, and service, facilities and accommodations are not allowed on reasonable and equal terms, prompt redress is afforded in the courts; but where the question is whether a community or locality is properly served by a railroad company, the matter is within the province of a railway commission.[63] Under some statutes an order of a state public service commission setting aside a regulation of a railroad company classifying shippers for the purpose of distribution of cars is reviewable on the question of the character of the discrimination it makes.[64]

§ 387. Recovery of Excess over Rate Charged Favored Shipper

At common law shippers who have been subjected to unjustly discriminatory rates may recover the difference between such rates and those charged favored shippers.

At common law a shipper who has been discriminated against unjustly in the matter of freight rates may recover the difference between the rate he was required to pay and that charged a favored shipper for similar services. Statutes regulating rates but providing no civil remedy do not abrogate the common-law remedy.[65]

§ 388. Recovery of Damages Resulting from Unjust Discrimination

a. In general
b. Amount of recovery

a. In General

In the absence of a statute to the contrary, a shipper may ordinarily maintain an action for the recovery of damages against a carrier resulting from unjust discrimination. Such actions, except as otherwise changed by statute, are subject to the usual rules governing civil actions.

Ordinarily under the statutes, state and federal, a shipper who has been discriminated against unjustly may recover damages sustained thereby.[66]

57. Tex.—Rio Grande, etc., R. Co. v. State R. Commn., Civ.App., 175 S.W. 1116—Rio Grande, etc., R. Co. v. Texas-Mexican R. Co., Civ.App., 173 S.W. 236.
10 C.J. p 500 note 79.

58. Iowa.—Tuller v. Chicago, R. I. & P. Ry. Co., 168 N.W. 301, 186 Iowa 1070.
10 C.J. p 501 note 81.
Waiver of provisions shipping contract as discrimination generally see supra § 364.

59. Kan.—Donohoo Horse, etc., Co. v. Missouri, etc., R. Co., 149 P. 436, 95 Kan. 681

60. Mont.—Doney v. Northern Pac. Ry. Co., 199 P. 432, 60 Mont. 209
Statutory remedies exclusive
Although Const. art. 15 § 7 provides that a shipper from one point to another cannot be subjected to any discrimination in freight charges or facilities in favor of a shipper from another point to the same destination, the provisions of the Railroad Commission Law, L.1907 c. 37, creating and prescribing the powers and duties of the railroad commission in the fixing of freight rates and the prevention of discrimination, are exclusive and the remedies therein prescribed must be followed.—Doney v. Northern Pac. Ry. Co., 199 P. 432, 60 Mont. 209.

61. Minn.—Sullivan v. Minneapolis, etc., R. Co., 142 N.W. 3, 121 Minn. 488, 45 L.R.A.,N.S., 612.

62. Neb.—Lincoln Commercial Club v. Missouri Pac. Ry. Co., 172 N.W. 687, 103 Neb. 504

63. Neb.—Rivett Lumber & Coal Co. of Benson v. Chicago & N.W. Ry. Co., 167 N.W. 570, 102 Neb. 492.

64. W.Va.—Baltimore & O. R. Co. v. Public Service Commission, 94 S.E. 545, 81 W.Va. 457, L.R.A.1918D 268.

65. Minn.—Sullivan v. Minneapolis, etc., R. Co., 142 N.W. 3, 121 Minn. 488, 45 L.R.A.,N.S., 612.
10 C.J. p 501 note 84.

66. Cal.—California Adjustment Co.

In the absence of a statute providing exclusive procedure therefor,[67] a shipper may resort to his common-law right to recover damages for unjust discrimination against him by a carrier, particularly where the state rate regulation statute furnishes no remedy for discrimination.[68] The mere fact that a state statute makes an unjust discrimination in rates by the carrier an indictable offense does not prevent a shipper aggrieved by such violation of the law from maintaining a suit against the carrier for the damages sustained thereby;[69] and the fact that the statute under which the action is brought requires any carrier guilty of discrimination to pay to the person injured a penalty in addition to the damages sustained does not prevent a recovery of such damages, although the shipper does not sue for the penalty.[70] To entitle a shipper to maintain an action under the Interstate Commerce Act to recover damages caused by unjust discrimination, it is not necessary that he should have paid the freight under protest;[71] it is necessary, however, that plaintiff show some specific injury from the acts of the carrier.[72]

Defenses. In actions to recover damages for discrimination by payment of rebates to competing shippers, the doctrine of voluntary payments has no application and will not preclude a recovery of damages for the tort measured by the rebates allowed to competitors;[73] and even if a shipper has knowl-

v. Atchison, T. & S. F. Ry. Co., 175 P. 682, 179 Cal. 140, 13 A.L.R. 274. 10 C.J. p 501 note 86.

In furnishing cars

A right of action for damages for unreasonable discrimination in furnishing cars exists under this act, not only against the offending carrier but against others inducing the discrimination.—Powers v. Cady, D C La., 9 F.2d 458.

Long and short haul clause

(1) Any person injured by discrimination through a violation of the long and short haul clauses of the federal or state legislation has a right of action therefor, whether or not such right existed at common law.

U.S.—Southern Pac. Co. v. California Adjustment Co., C.C.A.Cal., 237 F. 954, 150 C.C.A. 604, certiorari dismissed California Adjustment Co. v. Southern Pac. Co., 39 S.Ct. 182, 248 U.S. 595, 63 L.Ed. 438, and affirming, D.C., California Adjustment Co. v. Southern Pac. Co., 226 F. 349.

Cal.—California Adjustment Co. v. Atchison, T. & S. F. Ry. Co., 175 P. 682, 179 Cal. 140, 13 A.L.R. 274.

(2) A person bringing such an action need only show that his shipment from the intermediate point was charged for at a greater rate than that which would have been charged for the longer haul, and it is not necessary to prove actual discrimination by proving actual shipments from the longer distance.

Cal.—California Adjustment Co. v. Atchison, T. & S. F. Ry. Co., supra.

Minn.—McCaull-Dinsmore Co. v. Great Northern Ry. Co., 191 N.W. 42, 154 Minn. 28, certiorari granted Great Northern R. Co. v. McCaull-Dinsmore Co., 43 S.Ct. 361, 261 U. S. 610, 67 L.Ed. 825, and reversed on other grounds Davis v. Portland Seed Co., 44 S.Ct. 380, 264 U.S. 403, 68 L.Ed. 762

Ohio.—Beeghly v. Public Utilities Commission, 135 N.E. 641, 104 Ohio St. 158.

67. Mont.—Doney v. Northern Pac. Ry. Co., 199 P. 432, 60 Mont. 209

68. N.J.—National Radiator Co. v. Pennsylvania R. Co., 143 A. 85, 6 N.J.Misc. 778.

Form of action

Under some statutes triple damages provided for therein for unreasonable discrimination may be recovered in a common-law action on the case, but not in an action of debt, regardless of whether or not such damages are in the nature of a penalty.—Fishburn v. New York Cent. R. Co., 12 Pa.Dist. 665.

69. Ky.—Hutchison v. Louisville, etc., R. Co., 57 S.W. 251, 108 Ky. 615, 22 Ky.Law 361

Minn.—Sullivan v. Minneapolis, etc., R. Co., 142 N.W. 3, 121 Minn. 488, 45 L.R.A.,N.S., 612.

70. Tex.—Waugh v. Gulf, etc., R. Co., 131 S.W. 843, 62 Tex.Civ.App. 515.

71. U.S.—Pennsylvania R. Co. v. International Coal Min. Co., Pa., 173 F. 1, 97 C.C.A. 383, reversed on other grounds 33 S.Ct. 893, 230 U. S. 184, 57 L.Ed. 1447.
10 C.J. p 501 note 89.

72. U.S.—Interstate Commerce Commission v. U. S. ex rel. Campbell, 53 S.Ct. 607, 289 U.S. 385, 77 L.Ed. 1273, reversing U. S. ex rel. Campbell v. Interstate Commerce Commission, 63 F.2d 358, 61 App.D.C. 382, certiorari granted Interstate Commerce Commission v. U. S., ex rel. Campbell, 53 S.Ct. 524, 289 U.S. 714, 77 L.Ed. 1467.
10 C.J. p 501 note 90.

For charging more for short than for long haul

Where a railroad, under Interstate Commerce Act § 6, as amended by Act June 18, 1910, and Act Febr. 28, 1920, Comp.St.Suppl.Annot.1923 § 8569, filed and published a schedule of rates fixing a rate between two points lower than published rate for shorter haul on same line from intermediate point, without the permission of the interstate commerce commission, and thereafter imposed and collected the higher rate from the intermediate point, in violation of the long and short haul clause of § 4, Comp.St. § 8566, consignee, who paid such higher rate, could not recover the amount paid in excess of the lower rate without proof of actual damages sustained, in view of § 8, Comp. St. § 8572, making a carrier "liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any" violation of the act, and in view of amendment to § 4 by Transportation Act of 1920, since in such case the publication of the lower rate for the long haul did not wholly efface the higher intermediate one from the schedule, so as to make the lower rate the maximum rate which railroad could charge, even though railroad was liable to penalty under § 10 for publishing lower rate for longer haul.—Davis v. Portland Seed Co., 44 S.Ct. 380, 264 U.S. 403, 68 L.Ed. 762, reversing, C.C.A.Or., Davis v. Parrington, 281 F. 10, in which certiorari is granted Davis v. Portland Seed Co., 43 S.Ct. 95, 260 U.S. 717, 67 L. Ed. 479, reversing McCaull-Dinsmore Co. v. Great Northern Ry. Co., 191 N.W. 42, 154 Minn. 28.

73. Pa.—Mitchell Coal, etc., Co. v. Pennsylvania R. Co., 88 A. 743, 241 Pa. 536—Borda v. Philadelphia, etc., R. Co., 21 A. 665, 141 Pa. 484. 10 C.J. p 504 note 19.

Shipper, unaware of discrimination

by carrier in giving lower rates by drawback or refund to other shippers, obtaining knowledge thereof after last shipment, was held not to have made a voluntary payment, with full knowledge of all the facts, precluding recovery of damages.—National Radiator Co. v. Pennsylvania R. Co., 143 A. 85, 6 N.J.Misc. 778.

edge of rebates or refunds given to other shippers he will not be barred from recovering damages for the discrimination where he has made protest by demanding equality, on learning of the facts.[74] An order of the interstate commerce commission against defendant, forbidding discrimination in the distribution and awarding reparation to plaintiff, does not bar plaintiff's subsequent action under a state statute for damages from discrimination relating solely to intra-state commerce.[75] The provision of Interstate Commerce Act § 15(13), 49 U.S.C.A. § 15 (13), permitting a just and reasonable allowance by a carrier for services rendered or instrumentalities furnished in connection with the transportation is not available as a defense to a carrier in an action to recover for discriminations practiced by the making of a secret allowance to a favored shipper.[76] However, a shipper who with others was given rebates in violation of law cannot maintain an action against the carrier giving the rebates merely because other shippers were given larger rebates.[77]

It is no defense to a carrier, in an action by a shipper for damages from the exaction of discriminatory rates, that they were fixed by a state railroad commission in violation of a state constitutional provision,[78] and where a carrier discriminates against a shipper in the allotment of cars, contrary to its adopted system of transportation followed with respect to other shippers, it cannot set up as a defense that such system of transportation was subsequently declared unlawful by the interstate commerce commission which ordered its discontinuance.[79]

The personnel of the applicants for a siding to a coal mine, under a state statute, does not enter into the question of its grant or refusal, and a request by an agent for an undisclosed principal is sufficient.[80]

A custom or usage of a carrier to observe the following Monday when Sunday was a legal holiday and to stop running trains will not excuse the carrier from the damages imposed by law for delay in transporting goods on such day, when the custom is repugnant to the express provisions of a statutory regulation.[81]

As a defense to an action for damages for discrimination in favor of a separate corporation organized by it, the offending carrier cannot deny the separate existence thereof,[82] and an agreement by a shipper to pay a discriminative charge exacted by a railroad company in order to obtain service to which it was legally entitled without such charge, and with an express stipulation that it thereby waived none of its legal rights, does not estop it from maintaining a suit to recover back the sum so paid.[83]

Jurisdiction. Under the Interstate Commerce Act as amended, the federal courts have jurisdiction to the exclusion of any remedy in a state court in all that class of cases involving a determination of matters calling for the exercise of the administrative power and discretion vested in the interstate commerce commission, or which relate to a subject as to which the jurisdiction of the federal courts has otherwise been made exclusive.[84] However, the Interstate Commerce Act was not intended to deprive the state courts of their general and concurrent jurisdiction in respect of all existing rights not inconsistent with those created by the statute, including actions for damages caused by failure of the carrier to comply with its common-law duties, and the like,[85] and it has been said that the Elkins Act provides a remedy in court without going before the interstate commerce commission for any discriminations forbidden by law including discriminations or preferences prohibited by the Interstate Commerce Act.[86]

74. N.J.—National Radiator Co. v. Pennsylvania R. Co., supra.

75. Pa.—Clark Bros. Coal Min. Co. v. Pennsylvania R. Co., 88 A. 754, 241 Pa. 515.

76. U.S.—Langdon v. Pennsylvania R. Co., D.C.Pa., 194 F. 486, reversed on other grounds 208 F. 145, 125 C.C.A. 361.

77. U.S.—Pennsylvania R. Co. v. International Coal Min. Co., Pa., 173 F. 1, 97 C.C.A. 383, reversed on other grounds 33 S.Ct. 393, 230 U.S. 184, 57 L.Ed. 1447.
10 C.J. p 504 note 24.

78. Cal.—California Adjustment Co. v. Atchison, T. & S. F. Ry. Co., 175 P. 682, 179 Cal. 140, 13 A.L.R. 274.

79. Pa.—Stineman Coal Min. Co. v. Pennsylvania R. Co., 88 A. 761, 241 Pa. 509—Puritan Coal Min. Co. v. Pennsylvania R. Co., 85 A. 426, 237 Pa. 420, 458, Ann.Cas.1914B 37.
10 C.J. p 504 note 20.

80. Pa.—Minds v. Pennsylvania R. Co., 77 A. 909, 228 Pa. 575
10 C.J. p 504 note 26.

81. Tex.—Consumers' Lignite Co. v. Houston, etc., R. Co., Civ.App., 179 S.W. 306

82. Mich.—Federal Gravel Co. v. Detroit & M. Ry. Co., 248 N.W. 831, 263 Mich. 341

83. U.S.—Ohio Coal Co. v. Whitcomb, Wis., 123 F. 359, 59 C.C.A. 487, certiorari denied 24 S.Ct. 841, 191 U.S. 567, 48 L.Ed. 305.

84. U.S.—Pennsylvania R. Co. v. Puritan Coal Min. Co., Pa., 35 S.Ct. 484, 237 U.S. 121, 59 L.Ed. 867.
10 C.J. p 501 note 92.

85. U.S.—Eastern R. Co. of New Mexico v. Littlefield, 35 S.Ct. 489, 237 U.S. 140, 59 L.Ed. 878, dismissing appeal, Tex., 154 S.W. 543.
10 C.J. p 502 note 97.

86. U.S.—Interstate Commerce Comm. v. Chicago Great Western Ry. Co., C.C.Ill., 141 F. 1003, affirmed 28 S.Ct. 493, 209 U.S. 108, 52 L.Ed. 705.

In a suit to recover damages from a carrier for discrimination, where the carrier's rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the discretionary administrative power vested in the interstate commerce commission, and it is for that body to say whether such rule works an unjust discrimination, and until the commission has declared the rule of practice to be discriminatory and unjust plaintiff[87] cannot make out his case in a court. When the commission has declared such rule or practice to be unjust, redress must be sought either before the interstate commerce commission or in the federal courts of competent jurisdiction, as provided by the statute.[88] However, if the carrier's rule, fair on its face, has been unequally applied, and the suit is for damages occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage, and suits for such discrimination, although against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or federal courts.[89]

Under state statutes, the validity of which has been upheld, a special commission is sometimes given the power to order reparation by the carrier to a shipper who has been discriminated against.[90] Under some of such statutes a commission of this character has exclusive jurisdiction as to some classes of reparation matters and concurrent jurisdiction with the courts as to all others.[91] This power is purely statutory and cannot be extended beyond the legislative grant.[92] Thus, under some statutes the commission's power of reparation extends only to cases in which an examination or investigation of evidence as to some disputed matter of fact is necessary in order to determine whether the carrier has or has not charged an excessive or discriminatory amount,[93] while under other statutes the commission can authorize reparations only when there has been a discrimination under the established schedules and rates, or a departure therefrom.[94] Under still other provisions, before a

87. U.S.—Corona Coal Co. v. Southern Ry. Co., D.C.Ala., 266 F. 726, affirmed 43 S.Ct. 91, 260 U.S 698, 67 L.Ed. 470—Hillsdale Coal & Coke Co. v. Pennsylvania R. Co., D.C.Pa., 237 F. 272
Mont.—Doney v. Northern Pac. Ry. Co., 199 P. 432, 60 Mont. 209.
10 C.J. p 502 note 94.

The Corpus Juris text is cited with approval in Williston Coal & Ice Co. v. Davis, N.D., 190 N.W. 776.

Necessary to case

"A plaintiff, who brings his action at law for a cause of action arising under the provisions of the Interstate Commerce Law, must (as every plaintiff must) make out his case. If he has been damaged by a car distribution made in accordance with a system or rule of distribution adopted by a railroad carrier and filed with the Commission in accordance with the requirements of the statutes, he has not suffered a legal injury, unless the distribution be one of the character condemned by law. This he must prove, and he can prove it only by a finding of the Commission In consequence he is driven to go first to the Commission for all the administrative findings."—Hillsdale Coal & Coke Co v. Pennsylvania R. Co, D C.Pa, 237 F. 272, 273.

It is a matter of defense for a carrier sued for damages for discrimination to show, through pleading and proof, that the enforcement of the common-law duty and remedy presents an administrative question concerning interstate rates or federal regulations and control, subject to the jurisdiction either exclusive or preliminary, of the interstate commerce commission—Williston Coal & Ice Co. v. Davis, N.D, 190 N.W. 776.

88. U.S.—Terminal Warehouse Co. v. Pennsylvania R. Co, D C Pa., 7 F.Supp. 484, reversed on other grounds, C.C A., Pennsylvania R. Co. v. Terminal Warehouse Co, 78 F.2d 591, certiorari granted Terminal Warehouse Co. v. Pennsylvania R. Co, 56 S Ct 137, 296 U S 560, 80 L.Ed. 395, affirmed 56 S Ct. 546, 297 U.S 500, 80 L Ed 827.
10 C.J. p 502 note 95.

Commission may award reparation

The commission is given judicial or semijudicial power to find, when the power is invoked, the reparation to which a complainant has the right. The jurisdiction of the commission is restricted to common carriers and its awards are so limited. —Terminal Warehouse Co. v. Pennsylvania R. Co, D C Pa, 7 F Supp 484, reversed on other grounds, C.C. A., Pennsylvania R. Co v. Terminal Warehouse Co, 78 F.2d 591, certiorari granted Terminal Warehouse Co. v Pennsylvania R. Co, 56 S Ct 137, 296 U S. 560, 80 L Ed. 395, affirmed 56 S.Ct. 546, 297 U.S. 500, 80 L Ed. 827.

89. U.S —Hillsdale Coal & Coke Co v Pennsylvania R. Co., D C.Pa., 237 F 272
10 C J. p 502 note 96.

Recourse to commission unnecessary

"If the carrier has adopted and filed a fair and proper rule, or one has been found by the Commission, and the cause of action arises out of an unjust and discriminatory departure from it, causing damage, this fact may be established in an action at law, and no preliminary recourse to the Commission is necessary."—Hillsdale Coal & Coke Co. v. Pennsylvania R. Co., D C.Pa, 237 F. 272, 273

90. Ind—American Foundry Co. v. Chicago, I. & L. Ry. Co., 178 N.E. 295, 100 Ind App. 111.

91. Cal—Atchison, T. & S. F. Ry. Co. v Railroad Commission, 298 P. 991, 212 Cal. 370.

Reparation

Railroad Commission has jurisdiction to award damages by way of reparation on unauthorized departure from long and short haul provisions of statute.—Atchison, T. & S. F. Ry Co v Railroad Commission, 298 P. 991, 212 Cal 370.

92. Tex—Quanah, A. & P. Ry. Co. v. Warren, Civ App, 184 S.W 232. Utah—Denver & R G R Co. v. Public Utilities Commission of Utah, 272 P 939, 73 Utah 139

93. Cal.—California Adjustment Co. v. Atchison, T & S F Ry Co, 175 P 682, 179 Cal 140, 13 A L R. 274.

94. Utah—Denver & R G. R. Co. v. Public Utilities Commission of Utah, 272 P 939, 73 Utah 139.

In Texas, under Rev St 1911 art 6664, unless the railroad companies have done or omitted something,

shipper can recover damages in the courts for discrimination, the discrimination must first be passed on by a special commission;[95] but the fact that the commission is not authorized to order reparation, on determining that a rate is discriminatory, does not prevent a shipper from later maintaining an action in court to recover damages sustained by him as a result of such discrimination. In such case his action is based on the fact that the rate has been declared to be discriminatory by the proper tribunal, and the court merely determines the amount of damages, if any, sustained.[96]

A state public utilities commission cannot order reparations to shippers where a discrimination will result therefrom.[97]

Time to sue; limitations. If the statute prohibiting unjust discrimination by a carrier limits a time within which actions for damages resulting therefrom may be brought, such actions must be brought within the time so limited.[98] It has been held that an action for damages for discrimination in violation of the Interstate Commerce Act is controlled by the two year limitation period therein prescribed rather than the period specified in a state statute of limitations, whether suit is brought in a court of competent jurisdiction, or a complaint is filed with the interstate commerce commission,[99] and a suit to enforce an order of the interstate commerce commission awarding reparations for discrimination by a carrier must be brought within one year from the date of the order, under the Interstate Commerce Act.[1]

Parties. In the absence of a statute to the contrary, the person aggrieved is the proper party plaintiff in an action for discrimination,[2] and a party who, after the commencement of the action, becomes interested in the subject matter and the issues involved may be permitted to intervene as a party plaintiff.[3] A legal title is sufficient to maintain the action.[4]

Pleadings. In an action to recover damages for discrimination the declaration, petition, or complaint must show that the discrimination complained of was unjust.[5] One complaining of discrimina-

the doing or omission of which would be a violation of a law prescribing a penalty, the railroad commission is without power to act under the article. Accordingly, where there has been no such violation of law, the commission is not empowered to determine that rates made by it were discriminatory and the amount of damages to the shipper occasioned by such discrimination. —Clayton Oil & Refining Co. v. Railroad Commission of Texas, Civ.App., 3 S.W.2d 497—Missouri-Kansas & T. R. Co. of Texas v. Railroad Commission of Texas, Civ.App., 3 S.W.2d 489, affirmed Producers' Refining Co. v. Missouri, K. & T. R. Co. of Texas, Com.App., 13 S.W.2d 679, and 13 S.W.2d 680

95. **A voluntary reduction** of a rate by a carrier will not make the prior rate unlawful, unreasonable, or discriminatory and the basis for an action for damages.—Doney v. Northern Pac. Ry. Co., 199 P. 432, 60 Mont. 209.

96. Mont.—Doney v. Northern Pac. Ry. Co., supra.

97. Utah.—Gunnison Sugar Co. v. Public Utilities Commission of Utah, 256 P. 790, 69 Utah 521.

98. Colo.—Bonfils v. Public Utilities Commission of Colorado, 189 P. 775, 67 Colo. 563.
10 C.J. p 503 note 1.

99. U.S.—Powers v. Cady, D.C.La., 9 F.2d 458

1. Mass.—Westminster Nat. Bank v. Boston & M. R. R., 139 N.E. 345, 244 Mass. 578.

Assignee barred from recovery

Under Commerce Act § 16, as amended, 49 U.S.C.A. § 16 (3) (f), action by assignee of part of assignor's claim for reparations awarded by the interstate commerce commission against railroad, not brought within year and which was independent of prior action by assignor was barred, nor was assignee entitled to amount still in railroad's hands under compromise between it and assignor as money had and received.—Westminster Nat. Bank v. Boston & M. R. R., 139 N.E. 345, 244 Mass. 578.

2. Vt.—State v. Central Vermont R. Co., 71 A. 194, 81 Vt. 463, 130 Am. S.R. 1065
10 C.J. p 503 note 2.

A factor to whom goods were consigned for sale to others, and who had duty of collecting full amount that could possibly be realized, had a special property interest in cause of action against railroad for damages for unlawful discrimination against his principals with respect to acceptance of goods for shipment, had duty of prosecuting such action, and was accountable for proceeds thereof.—Hewitt v. New York, N.H. & H.R. Co., 1 N.Y.S.2d 292, 166 Misc. 186.

3. Mich.—Federal Gravel Co. v. Detroit & M. Ry. Co., 248 N.W. 831, 263 Mich. 341.

4. Pa.—Cox v. Pennsylvania R. Co., 85 A. 863.
10 C.J. p 503 note 3.

5. Tex.—White Rock Gravel & Sand Co. v. International & G. N. Ry. Co., Civ.App., 188 S.W. 280, error refused.
10 C.J. p 503 note 4.

Petition sufficient

A petition in an action against a railroad for failure and refusal to furnish cars, which alleged a willful and deliberate refusal, without semblance of justification, and which went into much detail, was sufficient although it did not, in the language of the statute charge that the discrimination was "undue" or "unreasonable."—Powers v. Cady, D.C.La., 9 F.2d 458.

Petitions insufficient

(1) In an action of the case brought under Gen.L.1923 § 3706, a declaration alleging the collection of a greater freight rate for shipments between certain points in the state than from another shipper of like merchandise a greater distance between the same point of shipment and another point in the state, does not state a cause of action for discrimination within § 3702.—U. S. Finishing Co. v. New York, N.H. & H.R. Co., 135 A. 49, 48 R.I. 11.

(2) A petition alleging that a carrier absorbed switching charges for two gravel pits without alleging that the amount so absorbed was more than that absorbed on switching charges for plaintiff, did not state a cause for damages for discrimination since it would not be presumed that defendant absorbed a greater amount of charges for competing gravel pits.—White Rock Gravel & Sand Co. v. International & G. N. Ry. Co., Tex.Civ.App., 188 S.W. 280, error refused.

tion and asking reparations therefor from a special commission must point out some specific thing done or omitted which constituted a violation of the statute[6] and that it operated to plaintiff's injury.[7] If damages are claimed on the basis of the charging of discriminatory rates, under some statutes it must be alleged that the rates were in violation of schedules established pursuant to statute;[8] and where the discrimination complained of is a violation of the long and short haul clause of the Interstate Commerce Act, the complaint will be insufficient if the entire through rate is not shown and if it is not alleged that any shipments were made at the lower rate, except such as were billed through under the joint rate.[9] On the other hand, where a complaint states a good cause of action for unjust discrimination under the Interstate Commerce Act, it is not rendered demurrable by the fact that it also insufficiently attempts to allege a combination or conspiracy on defendant's part with certain other railroads to restrain trade and seeks to recover triple damages under the Sherman Anti-Trust Act.[10] Also, where a recovery is sought for several acts of discrimination, it is not necessary to state each separate act of discrimination as a separate cause of action.[11]

If the conduct of the carrier amounts to a willful violation of the law against discrimination, exemplary damages are recoverable; hence allegations of the complaint which would throw light on the question as to whether the conduct of the carrier was willful will not be stricken out as irrelevant.[12]

Granting or denying leave to amend pleadings in actions of this character are matters largely within the discretion of the trial court.[13]

The loss alleged to have been sustained must be proved.[14] Allegations in the pleadings, however, on which counsel asserts that no reliance is placed, need not be considered[15]

Evidence. Generally speaking, evidence of the fact that there was a discrimination in rates of itself carries with it the presumption that the parties paying the higher rate were damaged.[16] In order to make out a case of unreasonable discrimination it is not necessary to show that the charges were more than the rates fixed by the carrier and approved by the railroad commissioners,[17] although a rate established by such commissioners will be presumed to be valid and reasonable until its unreasonable or discriminatory character is found by them.[18]

It is competent to show the rates charged others for shipments over other branches of the road where it appears that the conditions were substan-

6. Tex.—Clayton Oil & Refining Co v. Railroad Commission of Texas, Civ.App., 3 S.W.2d 497—Missouri-Kansas & T. R. Co. of Texas v. Railroad Commission of Texas, Civ.App., 3 S.W.2d 489, affirmed Producers' Refining Co. v. Missouri, K. & T. R. Co. of Texas, Com.App., 13 S.W.2d 679, and 13 S.W.2d 680.

7. Wash.—Chas. H. Lilly Co. v. Northern Pac. R. Co., 117 P. 401, 64 Wash. 589
10 C.J. p 503 note 5.

Damage
A petition for damages for violation of the provision of the Interstate Commerce Act forbidding the charging of a greater compensation as a through rate than the aggregate of the intermediate rates, is demurrable in the absence of some allegation of special damage to the shipper—Patterson v Louisville & N R. Co., C.C.A.Ga., 2 F.2d 592, affirmed 46 S.Ct. 8, 269 U.S. 1, 70 L.Ed. 131.

8. Mont.—Doney v. Northern Pac. Ry. Co., 199 P. 432, 60 Mont. 209.
Ohio—Warner v. Baltimore & O R. Co., 11 Ohio N.P.,N.S., 487.

Allegations held insufficient
In an action against a railroad company to recover discriminatory and unreasonable freight charges collected by it, allegations were held to be insufficient to show that the charges paid were not in accordance with tariffs adopted and in force between the points of shipment and destination at the time the shipments were made—Doney v. Northern Pac. Ry. Co., 199 P. 432, 60 Mont. 209.

9. U.S.—Parsons v. Chicago & N W. R. Co., Iowa, 17 S.Ct. 887, 167 U.S. 447, 42 L.Ed. 231, affirming 63 F. 903, 11 C.C.A. 489.

10. U.S.—American Union Coal Co. v. Pennsylvania R. Co., C.C.Pa., 159 F. 278.

11. Mo.—Cohn v. St. Louis, etc., R Co., 79 S.W. 961, 181 Mo. 30.
N.Y.—Langdon v New York, etc., R Co., 15 N.Y.S. 255, 27 Abb.N. Cas. 166.

12. Ga.—Augusta Brokerage Co. v Central of Georgia R. Co., 48 S.E. 714, 121 Ga. 48.

13. Mich.—Federal Gravel Co v. Detroit & M Ry Co., 248 N.W. 831, 263 Mich. 341.

Motion properly refused
In suit by shippers of gravel against railroad carrier for damages resulting from rebates and discrimination to competing gravel company, action of trial court in denying defendants' motion for leave to amend answer by alleging defense of statute of limitations, filed after commencement of trial, was not an abuse of its discretion in the matter.—Federal Gravel Co. v. Detroit & M. Ry. Co., 248 N.W. 831, 263 Mich. 341.

14. U.S.—Meeker v. Lehigh Valley R. Co., Pa., 35 S.Ct. 328, 236 U.S. 412, 59 L.Ed. 644

Failure to attack rates
Rates charged, not having been attacked, were binding, and their collection could not violate statute or provision for which penalty was authorized—Clayton Oil & Refining Co. v. Railroad Commission of Texas, Tex.Civ.App., 3 S.W.2d 497—Missouri-Kansas & T. R. Co. of Texas v. Railroad Commission of Texas, Tex.Civ.App., 3 S.W.2d 489, affirmed Producers' Refining Co v. Missouri, K. & T. R Co. of Texas, 13 S.W. 2d 679, and 13 S.W.2d 680.

15. Mont.—Doney v Northern Pac. Ry. Co., 199 P. 432, 60 Mont. 209.

16. U.S.—Chesapeake & O Ry Co. v U S., D.C.W.Va., 11 F.Supp. 588, affirmed 56 S.Ct. 164, 296 U.S. 187, 80 L.Ed. 147.

17. Mo.—Cohn v. St. Louis, etc, R. Co., 79 S.W. 961, 181 Mo. 30.

18. Mont.—Doney v Northern Pac. Ry. Co., 199 P. 432, 60 Mont. 209.

tially similar,[19] and in an action for refusal to grant facilities to an express company equal to those afforded another express company, contracts which the express company had offered to execute are properly admitted.[20] Under a statute declaring that every railroad company which shall fail or refuse under such regulations as may be prescribed by the railroad commission to transport freight destined for a connecting carrier shall be guilty of unjust discrimination, it is contemplated that the commission shall establish rules, hence in an action for unjust discrimination such rules are admissible.[21] On the other hand, in an action against a carrier for refusing a siding to coal property, evidence of the sale of cars by defendant to individual shippers and as to the loading of cars from wagons is irrelevant;[22] and, on an issue as to discrimination in car supply, evidence of defendant's equipment of foreign lines must be excluded as immaterial, where the evidence already introduced shows that defendant had an adequate number of cars on hand.[23]

The usual rules as to weight and sufficiency of evidence in civil actions generally apply in actions of this character.[24] The right of recovery given by the Interstate Commerce Act for violation of its provisions against unjust discrimination for the full amount of damages sustained by the violation of the act is in the nature of a penalty, and in order to recover plaintiff must make out a case showing a violation of the act clearly and directly and not by way of inference;[25] and, where the statute allows three times the actual damages, plaintiff is bound to produce very clear and definite proof as to the actual loss suffered.[26]

Trial. In actions of this character, disputed questions of fact are for determination of jury,[27]

19. N.C.—Hilton Lumber Co v. Atlantic Coast Line R. Co, 53 S.E. 823, 141 N.C. 171, 6 L.R.A.,N.S., 225.
10 C.J. p 503 note 14.

20. Tex.—Missouri, etc., R. Co. v. Empire Express Co., Civ.App., 173 S.W. 222.

21. Tex.—Consumers' Lignite Co v. Houston, etc., R. Co., Civ.App., 179 S.W. 306.

22. Pa.—Cox v. Pennsylvania R. Co., 85 A. 863

23. Pa.—Sonman Shaft Coal Co. v. Pennsylvania R. Co., 88 A. 746, 241 Pa. 487.

24. **Evidence held sufficient**
(1) To establish that railroad sued for damages because of rebates and discrimination in favor of gravel company owned by carrier and removing and selling gravel from railroad lands, was primarily interested in producing and selling commercial gravel that railroad might profit from traffic incident to transportation—Federal Gravel Co v Detroit & M. Ry. Co., 248 N.W. 831, 263 Mich. 341.

(2) To go to the jury, in an action for damages for discrimination in furnishing cars ordered by plaintiff, notwithstanding defendant's showing that it was unable to fill all the orders for cars, it appearing that it furnished a greater percentage of cars to others in the same line than it did plaintiff.—Dickinson v. Robertson, 223 S.W. 12, 144 Ark 515.

(3) To justify finding that a rule for the allotment of cars among shippers was adopted by the railroad—Anderson v. Chicago, M & St. P Ry. Co., 175 N.W. 246, 208 Mich. 424.

(4) To support finding that proximate cause of failure in business of gravel company and depreciation in its properties was unjust discrimination by railroad carrier arising when carrier organized and financed competing corporation to remove and sell gravel from carrier's lands—Federal Gravel Co. v. Detroit & M. Ry. Co, supra.

(5) To warrant a verdict for the shipper, in an action by a shipper against a railroad for discrimination and failure to furnish cars during a certain period, where local shippers and others at a main line point twenty-five miles distant received sufficient cars of the same class required by plaintiff for their needs during the same period.—Chicago, R. I. & P. Ry. Co. v. Sims, 256 S.W. 33, 161 Ark. 289.

(6) Where carriers had discriminated against a steel company by refusing to spot cars for it, or to make an allowance to it for the expense of spotting cars, as they did for its competitors in the same switching district, and the evidence showed that the steel company was unable to control the market price, so that it could not pass such charges on to its customers, it is manifest that the discrimination against that company had resulted in damage to it, by diminishing its profits to the extent of the cost of spotting its cars—Donner Steel Co v Interstate Commerce Commission, 285 F. 955, 52 App.D.C. 221.

Evidence held insufficient
(1) To show discrimination in furnishing freight cars—George H. Koepp, Inc., v. New Orleans Great Northern R. Co., 110 So. 729, 162 La. 487

(2) To support finding placing valuation on plaintiff's property.—Federal Gravel Co. v. Detroit & M. Ry. Co., 248 N.W. 831, 263 Mich. 341.

(3) An order of the interstate commerce commission, finding an unjust discrimination by the carrier in making a separate charge against a shipper for switching from the pier used by him, while absorbing such charge from piers used by his competitors, is not sufficient evidence to authorize recovery of damages by the shipper, since the measure of his damages is not the amount of the unjust discrimination, but the amount by which such discrimination had injured him—Hillsborough Mills v Boston & M. R. R., D.C.Mass., 269 F. 816.

25. U.S.—Parsons v. Chicago & N. W. R. Co, Iowa, 17 S.Ct. 887, 167 U.S. 447, 42 L.Ed. 231, affirming 63 F. 903, 11 C.C.A. 489—Knudsen-Ferguson Fruit Co. v Michigan Cent. R. Co, Minn., 148 F. 968 79 C.C.A. 46, certiorari denied 27 S. Ct. 786, 204 U.S. 671, 51 L.Ed. 672.
10 C.J. p 503 note 10.

26. Pa.—Roberts v Philadelphia, etc., R. Co., 22 Pa.Dist. 935.

27. Ark.—Missouri Pac. Ry Co. v. Kirten Gravel Co., 44 S.W.2d 674, 184 Ark. 1024.

Questions held for jury
(1) Whether plaintiff's and competitors' business was similarly situated.—Missouri Pac. Ry. Co v. Kirten Gravel Co., 44 S.W.2d 674, 184 Ark. 1024.

(2) Whether the demand for cars was so great that in the exercise of reasonable care it could not have been anticipated—Chicago, R. I. & P. Ry. Co. v. Sims, 256 S.W. 33, 161 Ark. 289.

and such determination by the jury must be made under proper instructions.[28]

b. Amount of Recovery

The actual loss suffered may be recovered as damages for unlawful discrimination in transportation facilities. For discrimination in rates some authorities apply the same rule while others allow recovery only of the difference between the discriminating rates. Double and triple damages as well as attorney's fees may be recovered under some statutes.

The measure of damages for unlawful discrimination in transportation facilities is compensation for the actual loss suffered,[29] ascertained according to the general rules governing compensatory damages, subject to any statutory minimum,[30] and to provisions for double or triple damages in certain cases, as will be hereinafter considered. All damages which ordinarily and in the natural course of things have resulted from the commission of the wrongful act are recoverable.[31] Loss of profits, if clearly shown and not merely speculative, is an element of damages.[32] However, plaintiff cannot recover more than his petition calls for.[33]

In actions based on § 2 of the Interstate Commerce Act, which prohibits and declares it unlawful for a carrier, by any special rate or rebate, or by any other device, to receive from one person for service rendered in transporting property a greater or less compensation than it receives from any other person for doing for him a like and contemporaneous service in the transportation of a like kind of traffic under similar conditions, and on § 8, which expressly declares that, wherever the carrier does an act prohibited or fails to do any act required it shall be "liable to the person injured thereby for the full amount of damages sustained in consequence of such violation . . . together with reasonable attorney's fee," the measure of damages in favor of a shipper compelled to pay the published tariff rate, while his favored competitors are given a less rate by means of rebates, or

(3) Whether unjust discrimination as against plaintiff resulted from nonenforcement of the road's rule governing the allotment of cars —Anderson v. Chicago, M. & St. P. Ry. Co., 175 N.W. 246, 208 Mich 424.

(4) Discrimination in furnishing cars in suit for triple damages— Stroud v. Missouri Pac. R. Co., 236 S.W. 891, 210 Mo.App. 311.

(5) Agency of firm from which plaintiff purchased coal for the collection of freight for defendant— Hall v. Pennsylvania R. Co., 100 A. 1035, 257 Pa. 54, L.R.A.1917F 414.

28. Mich.—Anderson v. Chicago, M & St. P Ry. Co., 175 N.W. 246, 208 Mich. 424.

Instructions held proper

(1) In an action for damages for failure to furnish cars ordered, where there was a showing of discrimination and testimony from which the jury might have found that plaintiff purchased and sold hay f. o. b. at point of shipment, so that he was not put to any expense in loading cars at such point, or in transportation to destination, an instruction that his measure of damages was the difference in the market value of the hay at the point of shipment where cars should have been furnished and at point of destination was correct.—Dickinson v. Robertson, 223 S.W. 12, 144 Ark. 515.

(2) Failure of an instruction in an action to recover triple damages for discrimination in furnishing cars to require a finding that such discrimination was undue or unreasonable does not render it erroneous, where plaintiff's evidence tends to show that the discrimination complained of was as a matter of law undue and unreasonable—Stroud v. Missouri Pac. R. Co, 254 S.W 111, 212 Mo App. 512, certiorari granted Missouri Pac R Co. v. Stroud, 44 S Ct. 37, 263 U S 694, 68 L Ed 510, and reversed on other grounds 45 S. Ct. 243, 267 U S. 404, 69 L.Ed. 683.

(3) In an action for triple damages for discrimination in furnishing cars to a shipper of lumber, an instruction on the measure of damages requiring the jury to take into consideration the reasonable value of plaintiff's lumber at the date the cars should have been delivered and the reasonable market value of the lumber at the time they were delivered, the verdict to be for the difference between these two amounts not to exceed the amount prayed for was proper.— Stroud v. Missouri Pac. R. Co., supra.

Instructions erroneous

In a suit for triple damages for discrimination in preferring shippers who ordered and were furnished cars after plaintiff ordered cars for shipping lumber wherein defendant endeavored to show cars furnished others on subsequent orders were for shipping mine material, preferred by an interstate commerce commission order, and the evidence showed some cars so furnished were for such material, and some of the preferred shippers shipped lumber and mine material, an instruction for plaintiff, based on a preference of other shippers, requiring the jury to find that after plaintiff's cars were ordered other shippers at the station in question "engaged in the business of shipping lumber," ordered cars, and were preferred, was erroneous in not requiring the jury to find that such cars were not loaded with mine material—Stroud v. Missouri Pac. R. Co., 236 S.W. 891, 210 Mo.App. 311.

29. Pa—Hillsdale Coal, etc, Co v. Pennsylvania R. Co., 78 A. 28, 229 Pa 61, 140 Am S R. 700.
10 C J. p 505 note 34.

Operation of gravel plant

Discriminatory acts of railroad carrier against gravel company in organizing, financing, and managing corporation to remove and sell gravel from land owned by carrier for nominal consideration, for primary purpose of securing freight revenue, rendered carrier liable for resulting damages—Federal Gravel Co. v. Detroit & M. Ry. Co., 248 N.W. 831, 263 Mich. 341.

30. Ohio—Toledo, etc., R. Co. v. Wren, 84 N.E. 137, 78 Ohio St. 137.

31. R I—Main Realty Co. v. Blackstone Gas & Elec. Co., 193 A. 879.
10 C.J. p 505 note 38.

32. R I—Main Realty Co. v. Blackstone Gas & Elec. Co., supra.
10 C J. p 505 note 39.

The Corpus Juris text has been quoted with full approval in Main Realty Co v. Blackstone Gas & Elec Co., R I., 193 A 879.

33. Mo—Stroud v. Missouri Pac. R Co, 254 S.W 111, 212 Mo.App. 512, certiorari granted Missouri Pac. R. Co. v. Stroud, 44 S.Ct. 37, 263 U.S. 694, 68 L.Ed. 510, and reversed on other grounds 45 S.Ct. 243, 267 U.S. 404, 69 L.Ed. 683.

other device, is the damage actually sustained and proved, and not the difference between the rate charged the injured party, and that charged favored shippers on like shipments during the same period; the statute does not provide any fixed measure of damages.[34] Under state statutes, more or less similar in terms to the provisions of the Interstate Commerce Act, the same rule has been applied in some states;[35] but in others it has been held that the difference between the discriminating rates may be recovered.[36]

While a charge prohibited by the long and short haul clause of the Interstate Commerce Act, 49 U.S.C.A. § 4, may subject the carrier to prosecution by the government, it does not afford adequate basis for reparation where there is no other proof of pecuniary damage.[37] However, it has been held that in actions based on § 4, the complaining shipper may recover the excess of the charge for a short haul over a charge for a long haul,[38] and a like rule prevails under similar state statutes.[39]

Double or triple damages. Under the statutes in

34. U.S. — Interstate Commerce Commission v U S. ex rel Campbell, 53 S Ct 607, 289 U.S. 385, 77 L Ed 1273, reversing U. S. ex rel. Campbell v. Interstate Commerce Commission, 63 F 2d 358, 61 App. D.C 382, certiorari granted Interstate Commerce Commission v. U. S ex rel. Campbell, 53 S Ct. 524, 289 U S 714, 77 L.Ed. 1467.
10 C.J. p 504 note 27.

"Full amount of damages"
Phrase "full amount of damages," within provision of Interstate Commerce Act making carrier liable for full amount of damages sustained in consequence of violation of act, includes damages for injury to business, including shrinkage of normal business profits.—Pennsylvania R. Co. v Terminal Warehouse Co, C. C.A.Pa, 78 F 2d 591, reversing, D.C, Terminal Warehouse Co. v. Pennsylvania R Co, 7 F Supp. 484, and certiorari granted 56 S Ct. 137, 296 U.S 560, 80 L Ed 395, affirmed 56 S.Ct 546, 297 U.S. 500, 80 L Ed. 827.

"The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less The answer to that question is not independent of time and place and circumstance. It calls for something more than the use of a mathematical formula"—Interstate Commerce Commission v U. S ex rel. Campbell, 53 S Ct. 607, 610, 289 U. S 385, 77 L Ed. 1273, reversing U S ex rel Campbell v Interstate Commerce Commission, 63 F 2d 358, 61 App D C. 382, certiorari granted Interstate Commerce Commission v U. S, ex rel. Campbell, 53 S Ct. 524, 289 U.S. 714, 77 L Ed. 1467.

Where party who has paid only reasonable rate sues because another has paid less, the party suing cannot recover as of course payment reasonable in amount for service given and accepted, but may recover damages actually proved, which may be more than preference or less — Interstate Commerce Commission v U. S ex rel. Campbell, 53 S Ct. 607, 289 U S. 385, 77 L Ed 1273, reversing U S ex rel. Campbell v Interstate Commerce Commission, 63 F. 2d 358, 61 App.D.C. 382, certiorari granted Interstate Commerce Commission v. U. S ex rel. Campbell, 53 S Ct. 524, 289 U S. 714, 77 L Ed. 1467.

35. Mich.—Federal Gravel Co v. Detroit & M Ry. Co., 248 N W. 831, 263 Mich. 341.
10 C J. p 505 note 28.

In Pennsylvania
(1) "The 'injury suffered' within the meaning of the term used in the act of 1883, may be either the difference in the rates charged under the provisions requiring the allowance of the same concessions and drawbacks to all persons 'upon like conditions, under similar circumstances, and during the same period of time' . . . or it may be the injury suffered by reason of 'undue or unreasonable discrimination,' though the conditions differ, in which case the injury would not necessarily be the difference in charges, but would be the damage suffered by reason of failure to furnish equal facilities or other requirements of shippers"—Hall v. Pennsylvania R Co, 100 A. 1035, 1041, 257 Pa. 54, L R A.1917F 414.

(2) Where a railroad allowed a retail coal dealer, a competitor of plaintiff, rebates, plaintiff was entitled to recover the difference between the amounts paid by him and the amount he would have paid at the lowest rate charged or received from any person for like services under similar circumstances —Hall v. Pennsylvania R. Co, supra.

36. Iowa.—Cook v. Chicago, R I. & P Ry. Co., 46 N W. 1080, 81 Iowa 551, 9 L R.A 764, 25 Am S R. 512
N J.—National Radiator Co. v Pennsylvania R. Co, 143 A 85, 6 N J.Misc 778.
Wash.—Tacoma Eastern R. Co v Public Service Commission of Washington, 202 P. 1, 117 Wash 609
10 C J. p 505 note 29.

Different views discussed
N J.—National Radiator Co. v. Pennsylvania R. Co, 143 A. 85, 6 N. J.Misc. 778.

Under a statute of Colorado, providing that, if the carrier made rebates or concessions to shippers, it must extend them to all shippers under the same circumstances and conditions, where it appeared that another shipper similarly circumstanced as to place and distance as plaintiffs had been receiving from the carrier a rebate which was not allowed to them, the damages sustained by plaintiffs should be measured by the amount of the rebate, and the question whether plaintiff lost profits on sales by reason of the nonallowance of the rebate is too remote to be held an element of damages.—Union Pac. R. Co. v. Goodridge, Colo., 13 S Ct. 970, 149 U.S 680, 37 L Ed 986.

37. U S.—Davis v Portland Seed Co., 44 S.Ct. 380, 264 U.S 403, 68 L Ed. 762, reversing, C C A Or, Davis v Parrington, 281 F. 10, in which certiorari is granted Davis v Portland Seed Co, 43 S.Ct. 95, 260 U.S 717, 67 L Ed 479, reversing McCaull-Dinsmore Co. v Great Northern Ry. Co., 191 N W. 42, 154 Minn. 28.

38. U.S —Osborne v. Chicago & N W. R. Co, C.C.Iowa, 48 F. 49, reversed on other grounds 52 F. 912, 3 C C A. 347—Junod v. Chicago & N W. R. Co, C.C.Iowa, 47 F 290, reversed on other grounds, C.C.A, 52 F. 912, certiorari denied 13 S Ct. 281, 146 U S. 354, 36 L.Ed 1002.

39. U S —Southern Pac. Co. v. California Adjustment Co., Cal., 237 F. 954, 150 C.C.A 604, certiorari dismissed California Adjustment Co. v Southern Pac Co., 39 S.Ct 182, 248 U S. 595, 63 L.Ed. 438, and affirming, D C., California Adjustment Co. v Southern Pac. Co., 226 F. 349.
Mo —McGrew Coal Co v Missouri Pac. Ry. Co., 217 S.W 984, 280 Mo. 466, 13 A.L.R 283, affirmed Missouri Pac R. Co. v McGrew Coal Co, 41 S Ct. 404, 256 U.S. 134, 65 L Ed. 864.
10 C J. p 505 note 33.

some jurisdictions a shipper may recover double or triple the damages sustained by an unjust discrimination,[40] and such statutes have been held to be valid.[41] Under some statutes double damages are allowed in case the carrier discriminates purposely; otherwise the shipper recovers only the actual damage sustained.[42] Under other statutes authorizing the recovery of damages treble the amount of injury suffered by unjust discrimination, where the verdict is for single damages, it is within the discretion of the court whether the damages should be tripled,[43] but, since such a statute is penal in character, it will not be construed to include other damages not designated therein.[44]

Exemplary damages, under some statutes, may be recovered, if it appears that the conduct of the carrier amounted to a willful violation of the law,[45] or if it appears that the carrier acted maliciously.[46]

Nominal damages. In order to sustain a recovery for substantial damages, the favored and disfavored shippers must have been competitors, but nominal damages are recoverable on a showing that the carrier violated its duty to charge all shippers the scheduled rate.[47]

Remote or speculative damages are not recoverable.[48]

Interest. Under the Interstate Commerce Act, interest on the recovery is in the discretion of the jury.[49] Also it has been held that the jury, in assessing damages, may consider as an element the lapse of time between the incurring of the damage and the rendering of the verdict, and allow for this in the assessment, but such element of damage cannot exceed the equivalent in amount of lawful interest.[50]

Attorney's fees. Under some statutes a successful plaintiff, in a suit under the statute, is entitled to a reasonable attorney's fee to be taxed as a part of the costs, and such statutes have been held to be valid.[51] Such a provision in the Interstate Commerce Act has been sustained as constitutional over the objection that it is purely arbitrary and imposes a penalty for merely failing to pay a debt.[52] The services for which an attorney's fee may be taxed are those incident to the action in which the recovery is had, and not those before the interstate commerce commission.[53]

§ 389. Injunctions

An interstate commerce commission cease and desist order may be enjoined.

An order of the interstate commerce commission that a carrier desist from subjecting a community to undue prejudice in respect of rates should be enjoined where there is in fact no undue discrimination.[54]

§ 390. Suits against Carriers

Carriers may be enjoined from unjustly discriminating by the individuals or localities affected, by the interstate commerce commission, and by the federal or a state government.

A shipper or a locality may invoke the remedy of injunction to restrain common carriers from granting discriminatory favors to other shippers to his or its prejudice and injury, where the remedy at law is not adequate or effectual;[55] and a corpora-

40. Mo.—Alexander v. Chicago, M. & St. P. R. Co., 221 S.W. 712, 282 Mo. 236, 11 A.L.R. 867.
Ohio.—Warner v. Baltimore & O. R. Co., 11 Ohio N.P.,N.S., 487.
10 C.J. p 505 note 40.

41. Mo.—Alexander v. Chicago, M. & St. P. R. Co., 221 S.W. 712, 282 Mo. 236, 11 A.L.R. 867.

42. Miss.—American Express Co. v. Crawley, 41 So. 261, 88 Miss. 525.

43. Pa.—Cox v. Pennsylvania R. Co., 85 A. 863.

44. Pa.—Hall v. Pennsylvania R. Co., 100 A. 1035, 257 Pa. 54, L.R.A.1917F 414.

Damages for delay in payment.
In an action for unlawful discrimination by railroad in freight rates, where plaintiff moved to have verdict trebled under Act June 4, 1883, P.L. 72, the court properly refused to permit recovery of damages for delay in payment.—Hall v. Pennsylvania R. Co., 100 A. 1035, 257 Pa. 54, L.R.A.1917F 414.

45. Ga.—Augusta Brokerage Co. v. Central of Georgia R. Co., 48 S.E. 714, 121 Ga. 48.
Ky.—Louisville, etc., R. Co. v. Ohio Valley Tie Co., 170 S.W. 633, 161 Ky. 212.
10 C.J. p 506 note 44.

46. Tex.—Missouri, etc., R. Co. v. Empire Express Co., Civ.App., 173 S.W. 222.
10 C.J. p 506 note 45.

47. Minn.—Seaman v. Minneapolis, etc., R. Co., 149 N.W. 134, 127 Minn. 180.

48. U.S.—Florida Cent. & P. R. Co. v. Bucki, Fla., 68 F. 864, 16 C.C.A. 42.
Ky.—Louisville, etc., R. Co. v. Ohio Valley Tie Co., 170 S.W. 633, 161 Ky. 212.
10 C.J. p 506 note 46.

49. U.S.—Osborne v. Chicago & N.W. R. Co., C.C.Iowa, 48 F. 49, reversed on other grounds 52 F. 912, 3 C.C.A. 347.

50. U.S.—Minds v. Pennsylvania R. Co., D.C.Pa., 237 F. 267, affirmed Pennsylvania R. Co. v. Minds, 244 F. 53, 156 C.C.A. 481, affirmed 39 S.Ct. 531, 250 U.S. 368, 63 L.Ed. 1039.

51. Mo.—Alexander v. Chicago, M. & St. P. R. Co., 221 S.W. 712, 282 Mo. 236, 11 A.L.R. 867.
10 C.J. p 506 note 49.

52. U.S.—Meeker v. Lehigh Valley R. Co., Pa., 35 S.Ct. 328, 236 U.S. 412, 59 L.Ed. 644.
10 C.J. p 506 note 50.

53. U.S.—Meeker v. Lehigh Valley R. Co., supra.

54. U.S.—Philadelphia & R. Ry. Co. v. U.S., Pa., 36 S.Ct. 354, 240 U.S. 334, reversing, D.C., 219 F. 988.

55. Mich.—Federal Gravel Co. v. Detroit & M. Ry. Co., 248 N.W. 831, 263 Mich. 341.—Federal Gravel

tion discriminated against is not necessarily barred from such relief because it has disposed of its physical properties pendente lite[56] A court of equity, however, cannot in the first instance enjoin an alleged discriminatory practice where an administrative question is presented which must first be determined by the interstate commerce commission.[57] It is only when a ruling has been made by the commission that the powers of a court of equity can be invoked for the enforcement of the ruling if the carrier refuses to comply with it[58]

Before a court of equity will grant an injunction, it must be fully satisfied that its orders will not likewise work a discrimination,[59] and an injunction will, of course, be denied where the evidence does not show that the rates complained of are discriminatory,[60] or that injunctive relief can alter or remedy the situation[61] It is not a prerequisite to injunctive relief that plaintiff should have first established his rights by an action at law;[62] and the fact that an action at law is given to recover triple damages does not prevent a court of equity from entertaining a bill to restrain the carrier from continuing illegal discrimination, and, when such a bill has been filed, it will assume jurisdiction over the whole matter and will award damages for the actual injuries shown to have been sustained through the illegal discrimination.[63]

Since the basis for injunctive relief must be an interference or threatened interference with a legal right of the petitioner, not a third person, it has been held that only shippers are real parties in interest, and that third persons, such as contract truck carriers, are not entitled to injunctive relief to restrain alleged discriminatory rates on the part of a railroad.[64]

By interstate commerce commission. Suit may be maintained in equity by the interstate commerce commission to compel obedience to an order made by it forbidding the carrier to continue unjust discrimination.[65] In an action of this character, if the

Co. v. Detroit & M. Ry. Co., 226 N.W. 677, 248 Mich. 49.
Ohio—Quinn Coal Co. v. Hocking Valley Ry., 20 Ohio Cir Ct,N.S., 420—Johnson Coal Mining Co. v. Hocking Valley R. R. Co., 1 Ohio N.P.,N.S., 385.
10 C J p 506 note 52.

Discrimination against gravel company

(1) Act of railroad in organizing subsidiary corporation for production and sale of commercial gravel in competition with others, in selling gravel at price below cost of production to secure business of shipping gravel, constituting unjust discrimination against other producers constituted violation of statute, entitling injured party to injunctive relief—Federal Gravel Co. v. Detroit & M Ry. Co., 248 N.W. 831, 263 Mich. 341.

(2) Gravel company's suit against railroad and a gravel company owned and operated by it, to enjoin unlawful discrimination, resulting from railroad's manipulation of freight rates in favor of gravel company and payment of its deficit, was held to be within the jurisdiction of a court of equity, under the adjudicated cases as well as under statutory provisions—Federal Gravel Co v. Detroit & M. Ry. Co., 226 N.W 677, 248 Mich 49.

56. Mich.—Federal Gravel Co. v Detroit & M Ry. Co., 248 N.W. 831, 263 Mich 341.

57. U.S.—Cleveland & Western Coal Co v. Baltimore & O R. Co., D C.Ohio, 283 F 995—Corona Coal Co. v. Southern Ry. Co., D.C.Ala., 266 F. 726, affirmed 43 S Ct. 91, 260 U S. 698, 67 L Ed 470.
Ohio—Socialist Co-Operative Publishing Co. v. American Express Co., 13 Ohio N P,N.S., 403.
10 C.J. p 507 note 53.

Distribution of assigned coal cars

A suit to enjoin a practice of a railroad company, in time of a shortage of coal cars, to deliver assigned cars, whether its own or those of other railroads or private owners, to mines with which the owners had contracts for coal, counting them against the quota of such mines under their respective ratings, under Interstate Commerce Act § 1 par 12, as amended by Transportation Act Febr. 28, 1920, and distributing commercial cars only to fill such quotas, presented an administrative question for determination by the interstate commerce commission, and not within the jurisdiction of the district court—Corona Coal Co v Southern Ry Co., D C.Ala., 266 F 726, affirmed 43 S.Ct. 91, 260 U S. 698, 67 L Ed. 470

58. U S.—Central Stock-Yards Co. v. Louisville & N. R. Co., C C Ky., 112 F. 823—Farmers' L. & T. Co v. Northern Pac. R. Co., C C.Wash., 83 F. 249.

59. Mo.—Chouteau v. Union R., etc., Co., 22 Mo App 286.
10 C J. p 507 note 55.

60. Pa.—Roberts v Philadelphia, etc., R. Co., 22 Pa Dist. 935.

Cease and desist order

Evidence held to sustain finding that a railroad 2.63 miles in length was but a terminal system for two railroad systems, thereby justifying a cease and desist order restraining such systems from unfair discrimination in making a charge for shipments delivered on such short line but making no charge for such switching done on their own lines.—Minneapolis Civic & Commerce Ass'n v. Chicago, M. & P. Ry. Co., 158 N.W. 817, 134 Minn. 169, affirmed Chicago, M. & St. P. Ry Co. v. Minneapolis Civic & Commerce Ass'n, 38 S Ct. 553, 247 U S. 490, 62 L Ed. 1229.

61. U S.—U. S. v. Northern Pac. Ry. Co., D.C.Wash., 18 F.2d 299.

Past violations

Where the discrimination alleged is the leasing of property by the railroad to certain persons and corporations at a rental below the actual value thereof, where such leases have expired at the time of the suit, an injunction against such leases will not be granted, as no injunctive decree can alter or remedy the situation, for the simple reason that past occurrences and events are not subject to preventive measures—U. S v Northern Pac. Ry. Co., D.C. Wash., 18 F 2d 299.

62. Ohio—Scofield v. Lake Shore, etc., R. Co., 5 N.E. 907, 43 Ohio St 571, 54 Am.R 846.

63. Pa.—Roberts v Philadelphia, etc., R. Co., 22 Pa.Dist 935

64. N.C.—Carolina Motors Service v Atlantic Coast Line R. Co., 185 S E 479, 210 N C. 36, 104 A.L R. 1165.

65. U.S. — Interstate Commerce Commn v. Western New York & P. R. Co., C.C Pa., 82 F. 192.
10 C.J. p 507 note 66.

carrier has been adjudged guilty of discrimination, it may be restrained from further violations of the act, but should not be enjoined in general terms from violating the act in the future in any particular.[66]

By federal government. Under the Elkins Act, 49 U.S.C.A. § 43, a proceeding against a common carrier to restrain it from discriminating in its rates may be maintained on behalf of the United States by one of its law officers at the request of the interstate commerce commission,[67] or by such law officer on his own motion; and, at least where the matter does not involve an administrative determination, he may institute a proceeding to restrain discrimination by carriers without prior investigation on the part of the interstate commerce commission.[68] The statute applies not only to violations of the Elkins Act subsequent to its enactment but also to every violation, whether previously or subsequently committed,[69] but only common carriers subject to the provisions of the act may be enjoined in such proceedings.[70]

By state government. Under appropriate statutory provision, a state attorney general has authority to maintain, in the name of the state, a suit to enjoin a carrier from putting a discriminatory and unlawful rate into effect.[71]

§ 391. Suits against State Railroad Commission

A state railroad commission may be enjoined from fixing discriminatory rates or from penalizing a railroad for conforming to the orders of the interstate commerce commission as to rates.

An order of a state railroad[72] or public service or utilities commission[73] fixing unreasonably discriminatory rates may be enjoined, unless, on equitable principles, such a remedy is unwarranted or unnecessary.[74] Also, where the interstate commerce commission has ordered a railroad to discontinue discriminatory rates contrary to the orders of a state railroad commission, the railroad may temporarily enjoin the state commission from suing it for damages or penalties or otherwise penalizing it for conforming to the orders of the interstate commerce commission;[75] but a railroad has no right to enjoin such a commission from enforc-

66. U.S.—New York, N. H. & H. R. Co. v. Interstate Commerce Commn., Va., 26 S.Ct. 272, 200 U. S. 361, 50 L.Ed. 515
10 C.J. p. 507 note 67.

67. U.S.—Missouri Pac. R. Co. v. U. S., Kan., 23 S.Ct. 507, 189 U. S. 274, 47 L.Ed. 811—U. S. v. Michigan Cent. R. Co., C.C.Ill., 122 F. 544
10 C.J. p. 507 note 61.

Prior to the passage of the Elkins Act the government was without power to commence a proceeding in equity against a common carrier to restrain it from discriminating in its rates, especially where there had been no antecedent order of the interstate commerce commission forbidding the alleged discrimination and a failure of defendant to comply with the order—U. S. v. Atchison, T. & S. F. Ry. Co., C.C.Mo., 142 F. 176—
10 C.J. p. 507 notes 59, 60.

68. U.S.—U. S. v. Milwaukee Refrigerator Transit Co., C.C.Wis., 145 F. 1007.

69. U.S.—U. S. v. Michigan Cent. R. Co., C.C.Ill., 122 F. 544.
10 C.J. p. 507 note 64.

70. U.S.—U. S. v. Union Stockyard, etc., Co., 192 F. 330, affirmed 33 S.Ct. 83, 226 U.S. 286, 57 L.Ed. 226.

71. Ala.—State v. Louisville & N. R. Co., 72 So. 494, 197 Ala. 203.

72. Miss. — Mississippi Railroad Commission v. Mobile & O. R. Co., 123 So. 876, 154 Miss. 871.

Order not negative in character
"Railroad Commission's order which affirmatively found that special discriminatory rate between certain points which railroads published inadvertently was, and had been since its publication, legally in effect between such points and intermediate points, and that rate was properly applicable between intermediate points, and which denied carriers right to cancel rate, was not a negative order which courts will refuse to enjoin, since railroad companies, being common carriers, were bound to transport freight offered to them, and effect of order was to require carriers to continue to apply discriminatory rate."—Mississippi Railroad Commission v. Mobile & O. R. Co., 123 So. 876, 154 Miss. 871.

An intra-state rate on fertilizer material originally granted by a railroad to establish a new industry and which was less than one half the rate prescribed by the state railroad commission for similar hauls of the same material in the same quantities in other places, some of which are competitors in the market, to the place to which the rate in controversy was granted, is discriminatory, and the order for its enforcement may be enjoined, regardless of whether it is unremunerative—Atlantic Coast Line R. Co. v. Trammell, D.C.Ga., 287 F. 741.

73. Kan.—Atchison, T. & S. F. Ry. Co. v. State Public Service Commission, 287 P. 608, 130 Kan. 478
—Missouri, K. & T. Ry. Co. v. Public Utilities Commission, 172 P. 1022, 103 Kan. 111.

74. U.S.—Atlantic Coast Line R. Co. v. Trammell, D.C.Ga., 287 F. 741.

Preliminary injunction
A carrier which had originally established a rate for transportation of two commodities between designated points which had existed for twenty years, except as affected by the horizontal increases and reductions during government control, and which had acquiesced for more than a year in an order of the state commission continuing that rate in effect, and made no showing that any considerable damage would be suffered by the refusal of a preliminary injunction, is not entitled to a preliminary injunction to restrain the enforcement of that rate by the state commission, where the answer of the commission averred it was about to formulate a general revision of this and other rates.—Atlantic Coast Line R. Co. v. Trammell, D.C.Ga., 287 F. 741.

75. U.S.—Eastern Texas R. Co. v. Railroad Commission of Texas, D.C.Tex., 242 F. 300, appeal dismissed Looney v. Eastern Texas R. Co., 38 S.Ct. 460, 247 U.S. 214, 62 L.Ed. 1084.

Injunction erroneously issued
Injunction setting aside Arkansas railroad commission's order suspending intra-state commodity tariff on theory that interstate commerce commission had declared existing tariff discriminatory, was held to

ing freight rates which it has established, on the ground that they unreasonably discriminate against shippers, nor is such a remedy available to a railroad on the ground that the rate discriminates against it, unless the discrimination amounts to a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment to the constitution of the United States.[76]

In a suit by a local chamber of commerce to enjoin the enforcement of an order of the railroad commission fixing rates between cities, the merchants doing business along the line of the road may properly be joined as plaintiffs.[77]

The burden of proof is in all cases on the complaining party to show that the rates are unjust and discriminatory,[78] and the general rules as to evidence[79] and trial[80] apply. Where there is no complaint as to the rates from the standpoint of revenue to the carriers, the court must assume that the rates are sufficiently high, if the same average is maintained, to furnish sufficient revenue.[81]

4. Status of Contracts in Violation of Statutes against Discrimination

§ 392. Contracts in Violation of Interstate Commerce Law

Contracts in violation of the Interstate Commerce Act are void.

Contracts which are in violation of the provisions of the Interstate Commerce Act prohibiting unjust discrimination are void and unenforceable,[82] at least to the extent that they are indivisible in the sense that the legal part may not be separated from the illegal.[83] Such contracts are sub-

have been erroneously issued.—Arkansas Railroad Commission v. Chicago, R I & P. R Co, 47 S.Ct 724, 274 U.S. 597, 71 L Ed 1224.

76. U.S.—Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co, Ark., 39 S Ct. 237, 249 U.S 134, 63 L Ed. 517, motion denied 39 S. Ct. 237, 249 U.S. 134, 63 L.Ed. 517.

Contract carrier

A suit by a contract carrier against a state department of public service to enjoin the enforcement of its order fixing rates to be charged by contract carriers on the ground that there was a discrimination in favor of special carriers was dismissed, it being considered that there was a difference in the two types of carrier justifying the apparent discrimination.—Prater v Department of Public Service of Washington, Wash, 60 P 2d 238.

77. Tex—State R. Commn. v Galveston Chamber of Commerce, 115 S W. 94, 51 Tex Civ.App. 476

78. Tex.—State R. Commn v Galveston Chamber of Commerce, supra

10 C.J. p 508 note 69.

79. Tex—Galveston Chamber of Commerce v. State R Commn, Civ. App, 137 S.W 737

10 C J. p 508 note 69 [b].

80. **Question of fact**

Whether town, granted exception by railroad commission to general rule compelling shippers of cotton for warehousing from or past bonded warehouses to pay more freight, offered better market for cotton than city wherein warehouse of company suing to enjoin enforcement of exception as discriminatory was located was matter of fact for trial court on conflicting evidence—Railroad Commission of Texas v. San Antonio Compress Co, Civ App, 264 S.W. 214, error denied 278 S W. 1115, 114 Tex. 582.

81. Tex.—Galveston Chamber of Commerce v. State R. Commn, Civ. App., 137 S.W. 737.

82. U S—Chesapeake & O. Ry Co. v. Westinghouse, Church, Kerr & Co, 46 S Ct 220, 270 U S. 260, 70 L.Ed 576, affirming 123 S.E. 352, 138 Va 647, certiorari granted 45 S Ct 98, 266 U S 598, 69 L Ed 460.

Kan—Parker Corn Co. v. Chicago, B & Q. R. Co., 244 P. 240, 120 Kan 484.

Mo.—Security Stove & Mfg. Co. v. American Ry Express Co, 51 S W.2d 572, 227 Mo.App 175—Cicardi Bros. Fruit & Produce Co. v. Pennsylvania Co, 213 S.W. 531, 201 Mo. App 609.

N J.—Lehigh Valley R. Co v. United Lead Co., 133 A. 290, 102 N J Law 545

N.C—McLemore v. Atlantic Coast Line R. Co, 154 S.E 390, 199 N.C. 264—Edenton Cotton Mills v. Norfolk Southern R Co, 100 S E 341, 178 N.C 212

Ohio.—Carollo v. Railway Express Agency, 3 N.E 2d 659, 52 Ohio App. 272.

Pa.—Pennsylvania R. Co. v. Cameron, 124 A. 638, 280 Pa. 458.

Tex—Texas & P. Ry. Co v West Bros, Com App., 207 S.W. 918, affirming in part and reversing in part St. Louis, I. M. & S Ry. Co v West Bros., Civ.App., 159 S.W. 142, rehearing denied Texas & P Ry. Co v. West Bros., Com App, 214 S W 808—Fort Worth & R. G Ry. Co v Burns, Civ.App., 242 S W 295.

Va—Norfolk Tidewater Terminals v Norfolk & P. Belt Line R. Co, 195 S E 684

Wis.—Holt Lumber Co. v. Duluth, S S & A. Ry. Co., 238 N.W. 839, 206 Wis 77

10 C J p 509 note 79.

Agreement to pay damages

An agreement by a carrier to pay damages, not occurring on its lines, to goods shipped in interstate commerce under a bill of lading providing that no carrier shall be liable for loss other than on its own lines, is unenforceable—Southern Ry Co. v. Lewis & Adcock Co., 201 S W. 131, 139 Tenn. 37, L R A 1918C 976.

In equity

Equity can decline to enforce shipper's notes and pledges to railway's subsidiary if constituting devices to effectuate rebates or special privileges—Kerr v. Southwestern Lumber Co of New Jersey, C.C.A.Tex., 78 F. 2d 348, affirming, D.C, Southwestern Lumber Co. of New Jersey v. Kerr, 11 F Supp 253, and certiorari denied Kerr v. Southwestern Lumber Co. of New Jersey, 56 S Ct 130, 296 U.S. 611, 80 L Ed. 433.

Supplemental agreement ineffectual

Original agreement for operation of private logging railroad, which was illegal because providing for a preference in violation of the Interstate Commerce Act, was not validated by a supplemental agreement requiring payment to carrier for future use of rails.—Holt Lumber Co v Duluth, S S & A Ry Co, 238 N W. 839, 206 Wis 77

83. U.S—Central R Co of New Jersey v. U. S. Pipe Line Co, C.C. A.Pa., 1 F.2d 866, affirming, D C., 290 F. 983.

10 C J p 509 note 79 [b].

Separable provision not invalidated

Provisions in an express company's receipt for a shipment which were invalid under the Cummins amendment, as amended by Act August 9, 1916, Comp St. § 8604a, such as limi-

ject to the general rule that a party to an illegal contract cannot set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim.[84]

One of the principal purposes of the Interstate Commerce Act was to enjoin on carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all, and which should not be departed from as long as the established schedule remains unaltered in the manner provided for by law,[85] and the effect of its enactment has been entirely to abrogate the right of private contract between the shipper and the carrier, as far as interstate transportation of freight is concerned.[86] Under the Act the published tariff may not be avoided, enlarged, or varied by the shipper and the carrier through express or implied contract,[87] or through the tort of the carrier,[88] and neither party is permitted, to release the other from any liability imposed

tation of the carrier's liability to transportation over its own lines, which were separable from the provision permitted by that amendment, limiting the liability to a stated value, unless greater value was declared, do not invalidate the latter provision.—American Ry. Express Co. v. Lindenburg, 43 S.Ct. 206, 260 U.S. 584, 67 L.Ed. 414, reversing Lindenburg v. American Ry. Express Co., 106 S.E. 884, 88 W.Va. 439.

84. U.S.—Oregon Short Line R. Co. v. American Smelting & Refining Co., C.C.A.Utah, 269 F. 898.

85. U.S.—Texas, etc., R. Co. v. Abilene Cotton Oil Co., Tex., 27 S.Ct. 350, 204 U.S. 426, 51 L.Ed. 553, 9 Ann.Cas. 1075.

10 C.J. p. 510 note 81.

Purpose of act to prevent unjust discrimination generally see supra § 350.

"Purpose of the act in requiring tariffs containing the rates of carriers to be filed was to secure uniformity, to secure the same treatment to all shippers alike by requiring them to pay one rate as established, published, and posted."—Central R. Co. of New Jersey v. U. S. Pipe Line Co., C.C.A.Pa., 1 F.2d 866, 868, affirming, D.C., 290 F. 983.

"Purpose of congress in the enactment of section 6 of the Interstate Commerce Act, as amended by Hepburn Act, § 2, is obviously to provide for a system of tariff schedules, rates, fares, and charges which would be uniform and consistent and apply without discrimination or favoritism to all shippers similarly situated."—Alton & S. R. R. v. U. S., D.C.Cal., 49 F.2d 414, 422.

86. U.S.—St. Louis-San Francisco Ry. Co. v. Lawrence, D.C.Okl., 30 F.2d 458, affirmed Lawrence v. St. Louis-San Francisco Ry. Co., 49 S.Ct. 106, 278 U.S. 228, 73 L.Ed. 282—Beaumont, S. L. & W. Ry. Co. v. Magnolia Provision Co., C.C.A.Tex., 26 F.2d 72, affirming, D.C., Magnolia Provision Co. v. Beaumont S. L. & W. Ry. Co., 20 F.2d 384, certiorari denied Beaumont, S. L. & W. Ry. Co. v. Magnolia Provision Co., 49 S.Ct. 23, 278 U.S. 620, 73 L.Ed. 542—Ingalls v. Maine Cent. R. Co., D.C.Me., 24 F.2d 113, supplemental opinion, 49 F.2d 631.

N.M.—Enderstein v. Atchison, T. & S. F. Ry. Co., 157 P. 670, 21 N.M. 548

Pa.—Kaplan v. Director General of Railroads, 78 Pa.Super. 195

Tenn.—Oman v. Tennessee Central Ry. Co., 7 Tenn.App. 141.

Wis.—Northern Wisconsin Produce Co. v. Chicago & N. W. Ry. Co., 234 N.W. 726, 203 Wis. 549—Wirch v. Chicago, M. & St. P. Ry. Co., 222 N.W. 232, 197 Wis. 316—Chicago & N. W. Ry. Co. v. J. I. Case Plow Works, 180 N.W. 846, 173 Wis. 237—Chicago, I. & L. Ry. Co. v. Peterson, 169 N.W. 558, 168 Wis. 193

10 C.J. p. 510 note 82

Special contracts prohibited

Under the Interstate Commerce Act, neither the carrier nor the shipper are permitted to engage in any contract different from that open to the general public, or which imposes any additional advantages to the shipper or more extended duties on the part of the carrier.—Adams Express Co. v. Burr Oak Jersey Farm, 206 S.W. 173, 182 Ky. 116.

87. U.S.—Keogh v. Chicago & N. W. Ry. Co., Ill., 43 S.Ct. 47, 260 U.S. 156, 67 L.Ed. 183, affirming, C.C.A., 271 F. 444, certiorari denied 41 S.Ct. 537, 256 U.S. 699, 65 L.Ed. 1177—American Ry. Express Co. v. American Trust Co., C.C.A.Ind., 47 F.2d 16, reversing, D.C., American Trust Co. v. American Ry. Express Co., 42 F.2d 272, and certiorari denied 52 S.Ct. 13, 284 U.S. 629, 76 L.Ed. 536—Ingalls v. Maine Cent. R. Co., D.C.Me., 24 F.2d 113, supplemental opinion, 49 F.2d 631—J. C. Famechon Co. v. Northern Pac. R. Co., C.C.A.Minn., 23 F.2d 307, affirming, D.C., 11 F.2d 312

Ala.—Louisville & N. R. Co. v. A. H. Cleaver & Co., 101 So. 597, 211 Ala. 661.

Ill.—Davis v. Keystone Steel & Wire Co., 148 N.E. 47, 317 Ill. 278—Chicago & E. I. Ry. Co. v. Chicago Heights Terminal Transfer R. Co., 147 N.E. 666, 317 Ill. 65, error dismissed 46 S.Ct. 207, 270 U.S. 626, 70 L.Ed. 767.

Kan.—Atchison, T. & S. F. Ry. Co. v. F. H. Stannard & Co., 162 P. 1176, 99 Kan. 720, L.R.A.1917C 1124

La.—Davis v. Ferguson, 132 So. 289, 17 La.App. 149.

Me.—Grant v. American Ry. Express Co., 139 A. 784, 126 Me. 489.

Minn.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Reeves Coal Co., 181 N.W. 335, 148 Minn. 196, 14 A.L.R. 405

Miss.—Mobile & O. R. Co. v. Jensen, 139 So. 840, 162 Miss. 741.

Mo.—Cicardi Bros. Fruit & Produce Co. v. Pennsylvania Co., 213 S.W. 531, 201 Mo.App. 609

N.Y.—Stevens v. Atchison, T. & S. F. Ry. Co., 202 N.Y.S. 195, 207 App.Div. 442, affirmed 147 N.E. 200, 239 N.Y. 572, certiorari denied 45 S.Ct. 463, 267 U.S. 603, 69 L.Ed. 809—Dickerson v. Erie R. Co., 169 N.Y.S. 5, 181 App.Div. 815

Tex.—City Nat. Bank of El Paso v. El Paso & N. E. Ry. Co., Civ.App., 225 S.W. 391, certiorari granted 42 S.Ct. 461, 258 U.S. 616, 66 L.Ed. 792, and affirmed 43 S.Ct. 640, 262 U.S. 695, 67 L.Ed. 1184

Va.—McGuire v. Atlantic Coast Line R. Co., 118 S.E. 225, 136 Va. 382.

Wash.—Pacific Fruit & Produce Co. v. Northern Pac. Ry. Co., 186 P. 852, 109 Wash. 481, 10 A.L.R. 337.

10 C.J. p. 510 note 83.

Reason for rule

This stringent rule prevails, because otherwise the paramount purpose of congress—prevention of unjust discrimination—might be defeated.—Keogh v. Chicago & N. W. Ry. Co., Ill., 43 S.Ct. 47, 260 U.S. 156, 67 L.Ed. 183, affirming, C.C.A., 271 F. 444, certiorari denied 41 S.Ct. 537, 256 U.S. 699, 65 L.Ed. 1177

Payment of a schedule freight rate binds both shipper and carrier to the observance of the conditions and limitations of such schedule as filed with the interstate commerce commission.—Tuller v. Chicago, R. I. & P. Ry. Co., 168 N.W. 301, 186 Iowa 1070.

88. U.S.—Keogh v. Chicago & N. W. Ry. Co., Ill., 43 S.Ct. 47, 260 U.S. 156, 67 L.Ed. 183, affirming, C.C.A., 271 F. 444, certiorari denied 41 S.Ct. 537, 256 U.S. 699, 65 L.Ed. 1177.

thereby.[89] Accordingly, it is unlawful for either party to depart from the duly filed and published tariff rates[90] in effect at the time the shipment is

89. Ill.—New York Cent. R. Co. v. Lehigh Stone Co., 220 Ill.App. 563
Minn.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Reeves Coal Co., 181 N. W. 335, 148 Minn. 196, 14 A.L.R. 405

Prepayment of freight

Carrier engaged in interstate commerce could not, in view of Interstate Commerce Act § 6 subs. 7, 49 U.S.C.A. § 6 (7), waive terms of published tariff requiring prepayment of freight and agree that terminal carrier, as its agent, appropriate and apply money collected by it in liquidation of freight charges due by other persons to payment of freight for which original consignee became initially liable and substitute undertaking of terminal carrier so to make collections and apply them to consignee's obligation.—Monongahela Ry. Co. v. Read, 127 A. 739, 147 Md. 144.

90. U.S.—Louisville N. R. Co. v. Central Iron & Coal Co., Ala., 44 S.Ct. 441, 265 U.S. 59, 68 L.Ed. 900, affirming, C.C.A., 284 F. 250—Pittsburgh, C., C. & St. L. Ry. Co. v. Fink, 40 S.Ct. 27, 250 U.S. 577, 63 L.Ed. 1151, reversing Fink v. Pittsburgh, C., C. & St. L. Ry. Co., 19 Ohio Cir.Ct.R.,N.S., 103—Eagle Cotton Oil Co. v. Southern Ry. Co., D.C.Miss., 46 F.2d 1006, reversed on other grounds, C.C.A., 51 F.2d 443, certiorari denied Southern R. Co. v. Eagle Cotton Oil Co., 52 S.Ct. 130, 284 U.S. 675, 76 L.Ed. 571—Pillsbury Flour Mills Co. v. Great Northern Ry. Co., C.C.A.Minn., 25 F.2d 66—Ingalls v. Maine Cent. R. Co., D.C.Me., 24 F.2d 113, supplemental opinion, 49 F.2d 631—Famechon Co. v. Northern Pac. R. Co., C.C.A.Minn., 23 F.2d 307, affirming, D.C., 11 F.2d 312—New York & Pennsylvania Co. v. Davis, D.C.N.Y., 8 F.2d 662—Central R. Co. of New Jersey v. U. S. Pipe Line Co., C.C.A.Pa., 1 F.2d 866, affirming, D.C., 290 F. 983—Davis v. Southern Pac. Co., D.C.Cal., 235 F. 731.
Ala.—Alabama Great Southern R. Co. v. Brown, 144 So. 124, 25 Ala. App. 243
Ark.—Missouri Pac. R. Co. v. Pfeiffer Stone Co., 266 S.W. 82, 166 Ark. 226
Del.—Windsor v. American Ry. Exp. Co., 143 A. 37, 4 W.W.Harr. 16.
Ill.—Davis v. Keystone Steel & Wire Co., 148 N.E. 47, 317 Ill. 278—Chicago & E. I. Ry. Co. v. Chicago Heights Terminal Transfer R. Co., 147 N.E. 666, 317 Ill. 65, error dismissed 46 S.Ct. 207, 270 U.S. 626, 70 L.Ed. 767
Iowa.—Sheldon v. Chicago, B. & Q. R. Co., 169 N.W. 189, 184 Iowa 865.
Kan.—Kanotex Refining Co. v. Atchison, T. & S. F. Ry. Co., 46 P.2d 16, 142 Kan. 139—Farrar v. Perkins, 251 P. 440, 122 Kan. 141.
Me.—Grant v. American Ry. Express Co., 139 A. 784, 126 Me. 489
Mass.—New York Cent. & H. R. R. Co. v. York & Whitney Co., 119 N.E. 855, 230 Mass. 206, affirmed in part and reversed in part on other grounds 41 S.Ct. 509, 256 U.S. 406, 65 L.Ed. 1016.
Mich.—Michigan Cent. R. Co. v. Claspy, 226 N.W. 216, 247 Mich. 549.
Minn.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Reeves Coal Co., 181 N.W. 335, 148 Minn. 196, 14 A.L.R. 405.
Miss.—Brookhaven Lumber & Mfg. Co. v. Mississippi Cent. R. Co., 122 So. 472, 154 Miss. 303—Lexington Compress & Oil Mill Co. v. Yazoo & M. V. R. Co., 95 So. 92, 131 Miss. 49—Southern Ry. Co. in Mississippi v. Buckeye Cotton Oil Co., 89 So. 228, 126 Miss. 562
Mo.—Mobile & O. R. Co. v. Southern Sawmill Co., 251 S.W. 434, 212 Mo. App. 117—Mobile & O. R. Co. v. Laclede Lumber Co., 216 S.W. 798, 202 Mo.App. 630—Cicardi Bros. Fruit & Produce Co. v. Pennsylvania Co., 213 S.W. 531, 201 Mo.App. 609—Sunderland Bros. Co. v. Baltimore & O. S. W. R. Co., 190 S.W. 650, 196 Mo.App. 154.
N.Y.—Stevens v. Atchison, T. & S. F. Ry. Co., 202 N.Y.S. 195, 207 App. Div. 442, affirmed 147 N.E. 200, 239 N.Y. 572, certiorari denied 45 S.Ct. 463, 297 U.S. 603, 69 L.Ed. 809—Lehigh Valley R. Co. v. Weyant, 165 N.Y.S. 391
N.C.—Edenton Cotton Mills v. Norfolk Southern R. Co., 100 S.E. 341, 178 N.C. 212.
Ohio.—New York, C. & St. L. R. Co. v. Miller City Tile Co., 19 Ohio N.P.,N.S., 244.
Okl.—St. Louis, I. M. & S. Ry. Co. v. McNabb, 162 P. 811, 63 Okl. 87.
Pa.—Pittsburgh & L. E. R. Co. v. South Shore R. Co., 107 A. 680, 264 Pa. 162—Erie R. Co. v. Kreitner Bros., Inc., 3 Pa.Dist. & Co. 251
Tenn.—Oman v. Tennessee Cent. Ry. Co., 7 Tenn.App. 141
Tex.—Houston & T. C. Ry. Co. v. Ahlers, Civ.App., 274 S.W. 333
W.Va.—Whitaker Glessner Co. v. Wheeling Terminal Ry. Co., 127 S.E. 639, 99 W.Va. 38.
10 C.J. p. 431 notes 9, 16, 17, p. 511 note 93.

Accomodations and facilities

(1) Agreements to furnish accommodations or facilities not contemplated by the published tariffs are void and unenforceable.
U.S.—Davis v. Cornwell, 44 S.Ct. 410, 264 U.S. 560, 68 L.Ed. 848, reversing Cornwell v. Davis, 213 P. 218, 66 Mont. 100.
Kan.—Parker Corn Co. v. Chicago, B. & Q. R. Co., 244 P. 240, 120 Kan. 484.
Md.—American Ry. Express Co. v. Peninsula Produce Exch., 130 A. 346, 148 Md. 465—Monongahela Ry. Co. v. Read, 127 A. 739, 147 Md. 144.
N.Y.—Siebert v. Erie R. Co., 179 N.Y.S. 136, 189 App.Div. 586—Emil Grossman Mfg. Co. v. New York Cent. R. Co., 169 N.Y.S. 213, 181 App.Div. 764.

(2) Accordingly, a discriminatory agreement of initial carrier to protect less than carload shipment of eggs from cold beyond initial line was void.—Northern Wisconsin Produce Co. v. Chicago & N. W. Ry. Co., 234 N.W. 726, 203 Wis. 549.

Agreement with consignee

(1) Freight charges must coincide with rate fixed by law, notwithstanding contrary agreements between consignee and carrier.—Dare v. New York Cent. R. Co., C.C.A.N.Y., 20 F.2d 379.

(2) An agreement by the consignee to pay more than the legal rate on interstate shipment does not render him liable for any amount in excess of such legal rate.—A. M. Lewin Lumber Co. v. Louisville & N. Ry. Co., 19 Ohio App. 152.

If carrier violates the Act § 6 49 U.S.C.A. § 6, requiring the establishing and posting of rates, this will not make valid a contract, which is in violation of §§ 2, 3 of the Act, 49 U.S.C.A. §§ 2, 3, prohibiting discrimination in rates.—Foster Lumber Co. v. Atchison, T. & S. F. Ry. Co., 194 S.W. 281, 270 Mo. 629, L.R.A.1918A 768.

Inclusion of article among commodities bearing lower rates, although desirable from transportation standpoint, cannot be accomplished by arbitrary departure from tariff.—Southern Ry. Co. v. Eichler, C.C.A. Mo., 56 F.2d 1010.

Specific performance denied

In view of Interstate Commerce Act §§ 2, 3, 12, 49 U.S.C.A. §§ 2, 3, 12, where railroad company filed with interstate commerce commission tariffs in proper form, published as required by such act, regulating charges for hauling slag, etc., from iron and steel mills located on railway, contract between iron millowner and railroad company, executed before passage of act, by which railroad agreed to haul away wastage without pay, as consideration for deed to right of way, cannot be specifically enforced.—Whitaker Gless-

made,[91] although they are unjust,[92] or are in violation of the long and short haul clause of the Act,[93] or were not published in the form and manner provided by rulings of the commission,[94] unless and until they are changed in the manner provided by law.[95] In fact the Act is violated although rates below those published are offered to shippers similarly situated and it is shown that in the particular case involved no harm has resulted,[96] and shippers, carriers, and consignees alike are presumed to know the law and understand that the rates charged or the services furnished can lawfully be only such as are prescribed by the tariff.[97] However, where freight is shipped solely for the use and benefit of the carrier itself, the rates may be below those published.[98] Also, it has been

ner Co v. Wheeling Terminal Ry Co., 127 S.E. 639, 99 W.Va. 38.

Strict compliance with statute

The provision of the Interstate Commerce Act to the effect that a carrier shall not charge or receive any different compensation, whether greater or less, than that shown by the filed and published schedule of rates must be strictly complied with because it is necessary to carry out the purpose of congress to prevent unjust discrimination.—Beaumont, S. L. & W. Ry. Co. v. Magnolia Provision Co., C.C.A.Tex., 26 F.2d 72, affirming, D.C., Magnolia Provision Co. v. Beaumont S. L. & W. Ry. Co., 20 F.2d 384, certiorari denied Beaumont, S. L. & W. Ry. Co. v. Magnolia Provision Co., 49 S.Ct. 23, 278 U.S. 620, 73 L.Ed. 542.

Switching and spotting charges

(1) Contract to pay additional amount for performing spotting service by special engine and crew, which service is covered by tariff, is both without consideration and illegal.—Chesapeake & O. Ry. Co. v. Westinghouse, Church, Kerr & Co., 46 S.Ct. 220, 270 U.S. 260, 70 L.Ed. 576, affirming 123 S.E. 352, 138 Va. 647, certiorari granted 45 S.Ct. 98, 266 U.S. 598, 69 L.Ed. 460.

(2) A railroad company owning a short line operated as a facility to a large steel plant, and engaged in switching and placing cars received from plaintiff, an interstate carrier, could not recover compensation from plaintiff, where no schedule of rates had been filed by plaintiff, as provided by Interstate Commerce Act.—Pittsburgh & L. E. R. Co. v. South Shore R. Co., 107 A. 680, 264 Pa. 162.

(3) Movement of cars from wharf track, where bananas were loaded, to team track, where most of them were sold, was not for railroad company's convenience, and it was required to collect the switching charge therefor, as per its tariffs and schedules on file with the interstate commerce commission.—U. S. v. Illinois Cent. R. Co., D.C.La., 230 F. 940.

91. Or.—Oregon-Washington R. & Nav. Co. v. Cascade Contract Co., 197 P. 1085, 101 Or. 582, petition denied 200 P. 1034, 101 Or. 582.

92. U.S.—Davis v. Prairie Pipe Line Co., C.C.A.Kan., 298 F. 393.

93. U.S.—Beaumont, S. L. & W. Ry. Co. v. Magnolia Provision Co., C.C.A.Tex., 26 F.2d 72, affirming, D.C., Magnolia Provision Co. v. Beaumont, S. L. & W. Ry. Co., 20 F.2d 384, certiorari denied Beaumont, S. L. & W. Ry. Co. v. Magnolia Provision Co., 49 S.Ct. 23, 278 U.S. 620, 73 L.Ed. 542.

94. U.S.—Magnolia Provision Co. v. Beaumont, S. L. & W. Ry. Co., D.C.Tex., 20 F.2d 384, affirmed, C.C.A., Beaumont, S. L. & W. Ry. Co. v. Magnolia Provision Co., 26 F.2d 72, certiorari denied 49 S.Ct. 23, 278 U.S. 620, 73 L.Ed. 542.

95. Mo.—Mobile & O. R. Co. v. Southern Sawmill Co., 251 S.W. 434, 212 Mo.App. 117.

Printing new schedules

If a tariff rate was unreasonable, the only way it could be changed so as to relieve the carrier from the obligation of applying that rate was to require the carrier, under Interstate Commerce Act § 6, 49 U.S.C.A. § 6, to print new schedules showing the changes, or by indicating them on schedules already enforced.—Mobile & O. R. Co. v. Southern Sawmill Co., 251 S.W. 434, 212 Mo.App. 117.

96. U.S.—Davis v. Southern Pac. Co., D.C.Cal., 235 F. 731, 738.

"It was competent for Congress to provide ways and means whereby uniformity and equality in the matter of railroad rates might be secured to those who were compelled to make use of public utilities. It was also competent for it, in its wisdom, to determine the means whereby discrimination, nonuniformity, and inequality, as among shippers, might be most advantageously perpetrated. In that spirit, as a means of putting it beyond the power of a carrier to do that which might give it the opportunity of indulging in discriminatory practices, it was likewise competent for that body absolutely to prohibit the doing of those things which might become the cloak of unbridled discrimination and favoritism. This Congress has done in saying that there shall be no departure from the published tariffs. So it will not do, in my judgment, to say merely that as long as no discrimination apparently results, a carrier may do any and all of the things prohibited by the act. Congress has said these prohibitions are necessary, presumably to attain the end desired. It is not open to this court, then, the end apparently having been attained, to hold the prohibitions unnecessary and their enactment a futility. If the Commerce Act is to be made an efficient instrumentality in the abolition of special privileges and the equalizing of rates, which, as demonstrated by repeated amendments, has been the aim, the practices which Congress in its wisdom and competency saw proper to prohibit must be regarded at all times as being under the ban of 'the law."—Davis v. Southern Pac. Co., supra.

97. U.S.—Pittsburgh, C., C. & St. L. Ry. Co. v. Fink, 40 S.Ct. 27, 250 U.S. 577, 63 L.Ed. 1151, reversing Fink v. Pittsburgh, C., C. & St. L. Ry. Co., 19 Ohio Cir.Ct.,N.S., 103.

Ala.—Northern Alabama Ry. Co. v. Phillips, 126 So. 846, 220 Ala. 541.—Hurt v. Atlanta, B. & A. Ry. Co., 84 So. 631, 17 Ala.App. 241.

Md.—American Ry. Express Co. v. Peninsula Produce Exch., 130 A. 346, 148 Md. 465.

Mass.—New York Cent. & H. R. R. Co. v. York & Whitney Co., 117 N.E. 855, 230 Mass. 206, affirmed in part and reversed in part on other grounds 41 S.Ct. 509, 256 U.S. 406, 65 L.Ed. 1016.

Miss.—Alabama Great Southern R. Co. v. F. A. Hulett & Son, 131 So. 814, 159 Miss. 333.

Mo.—Mobile & O. R. Co. v. Laclede Lumber Co., 216 S.W. 798, 202 Mo.App. 630.

N.Y.—Willson v. American Ry. Express Co., 197 N.Y.S. 600, 204 App.Div. 59, affirmed 147 N.E. 196, 239 N.Y. 562.

Vt.—Montpelier & W. R. R. R. v. Charles Bianchi & Sons, 113 A. 534, 95 Vt. 81.

Notice of change

Where, an agreement by interstate carrier to collect freight at pier, is void under Interstate Commerce Act as contravening terms of published tariff, carrier is not required to notify original consignee of discontinuance of practice of collecting freight in such manner, as the shipper is presumed to know that the contract is void.—Monongahela Ry. Co. v. Read, 127 A. 739, 147 Md. 144.

98. U.S.—Oklahoma Belt R. Co. v. Schaff, C.C.A.Okl., 282 F. 128.

Agreement valid

Where plaintiff, who contracted to construct and lease a line of rail-

held that § 6 of the Interstate Commerce Act, 49 U.S.C.A. § 6, does not forbid the collection of an unpublished rate,[99] and, in the absence of the establishment of a freight rate under the Interstate Commerce Act, the carrier and the shipper may fix the rate on an interstate shipment.[1] Further, if a contract with reference to rates is susceptible of two constructions, one of which would make it in violation of the Interstate Commerce Act and the other not, the latter construction will be adopted in preference to the former.[2]

Statute applicable to contracts existing at time of enactment. The Interstate Commerce Act and the amendments thereto apply, not only to contracts entered into after the enactment of the statute, but also to contracts existing at the time of their enactment.[3]

Effect of subsequent change in rate. Carriers may validly contract with shippers for a single transportation or successive transportations subject to a change of rates in the manner provided by the Interstate Commerce Act;[4] but a contract between a carrier and a shipper to transport the latter's goods in interstate commerce at the then established rates for a definite time is ineffective after a higher rate has been filed and published as required by the statute.[5] Where a contract for an interstate shipment is illegal because lower than the established schedule, a subsequent lowering of the rate to that specified in the contract does not validate the contract.[6]

§ 393. Effect on Carrier's Right to Recover Schedule Rates

Under the Interstate Commerce Act, a carrier has both a right and an absolute duty to recover the scheduled rates, regardless of its contract

An interstate carrier of freight has both a right and a duty to recover the rate fixed by the published tariff, although the shipping contract specifies a different rate or otherwise violates the terms of the Interstate Commerce Act,[7] and if it has collected less than the published rate it has both

way to the receiver of another road for the period of receivership, with an option to continue for ten years and with trackage rights after expiration of lease, was not required to ballast road, receiver's agreement, in consideration of fact that ballasting would reduce expense of maintenance and operation, to transport chats for ballasting for cost of transporting in work trains, instead of amount fixed by tariffs filed with the interstate commerce commission, was valid—Oklahoma Belt R. Co. v. Schaff, C.C.A.Okl., 282 F. 128.

Interstate Commerce Act not applicable

Interstate Commerce Act § 6 par 7, 49 U.S.C.A. § 6 (7), requiring uniform charges for interstate transportation, does not apply where the carrier is transporting material to be used by a contractor for the upkeep of the carrier's own road, in view of the provision prohibiting the transportation of any article produced by the carrier except such as may be intended for its own use.—Devine v. Meramec Portland Cement & Material Co., Mo.App., 253 S.W. 444

99. U.S.—Pennsylvania R. Co. v. M. McGirr's Sons Co., C.C.A.N.Y., 287 F. 334, certiorari denied M. McGirr's Sons Co. v. Pennsylvania R. Co., 43 S.Ct. 520, 262 U.S. 743, 67 L.Ed. 1210.

Charges for towing services

A railroad company engaged in interstate commerce can recover for its services in towing a shipper's car floats, which service was not a part of the interstate carriage, although it has not filed with the interstate commerce commission a tariff showing the charges for such services as required for charges for interstate carriage by Interstate Commerce Act § 6, as amended by Act June 29, 1906, § 2, Comp.St. § 8569.—Pennsylvania R. Co. v. M. McGirr's Sons Co., C.C.A.N.Y., 287 F. 334 certiorari denied M. McGirr's Sons Co. v. Pennsylvania R. Co., 43 S.Ct. 520, 262 U.S. 743, 67 L.Ed. 1210.

1. Mo.—Mott Store Co. v. St. Louis, etc., R. Co., 168 S.W. 322, 184 Mo.App. 50
10 C.J. p 511 note 90.

2. N.Y.—Stevens v. Atchison, T. & S.F. Ry. Co., 202 N.Y.S. 195, 207 App.Div. 442, affirmed 147 N.E. 200, 234 N.Y. 572, certiorari denied 45 S.Ct. 463, 267 U.S. 603, 69 L.Ed. 809.

Contract as to unpublished through rate

An export bill of lading providing for the carriage of goods to San Francisco and thence by steamship to Japan at a charge of one dollar and eighty-five cents per one hundred pounds, made up of the inland rate of ninety-five cents, and the ocean rate of ninety cents per hundredweight, should be given effect by construing the provision as contemplating two separate stages of transportation, rather than as providing for an indivisible contract, which would be invalid under Act Feb. 4, 1887, U.S.Comp.St. § 8563 et seq., because the through rate was not published and filed.—Stevens v. Atchison, T. & S.F. Ry. Co., 202 N.Y.S. 195, 207 App.Div. 442, affirmed 147 N.E. 200, 234 N.Y. 572, certiorari denied 45 S.Ct. 463, 267 U.S. 603, 69 L.Ed. 809.

3. U.S.—Chicago Great Western R. Co. v. Postal Telegraph-Cable Co., D.C.Ill., 245 F. 592, reversed on other grounds 249 F. 664, 161 C.C.A. 574, affirmed, N.Y., Postal Telegraph-Cable Co. v. Tonopah & Tidewater R. Co., 39 S.Ct. 162, 248 U.S. 471, 63 L.Ed. 365.
Miss.—W. M. Carter Planing Mill Co. v. New Orleans, M. & C. R. Co., 72 So. 884, 112 Miss. 148.
10 C.J. p 511 note 92.

Subsequent amendments applicable

Contract for maintenance and operation of railroad line to logging camp, giving the logging company privileges not granted to other shippers, was subject to amendments to the Interstate Commerce Act subsequently enacted while parties were operating under contract.—Holt Lumber Co. v. Duluth, S.S. & A. Ry. Co., 238 N.W. 839, 206 Wis. 77

4. U.S.—Interstate Commerce Commn. v. Chicago, etc., R. Co., Ill., 28 S.Ct. 493, 209 U.S. 108, 52 L.Ed. 705, affirming, C.C., 141 F. 1003.

5. U.S.—Armour Packing Co. v. U.S., Mo., 28 S.Ct. 428, 209 U.S. 56, 52 L.Ed. 681, affirming 153 F. 1, 82 C.C.A. 135, 14 L.R.A.,N.S., 400.
10 C.J. p 513 note 2.

6. Va.—Southern R. Co. v. Wilcox, 39 S.E. 144, 99 Va. 394.

7. U.S.—Great Northern Pac. S.S. Co. v. Rainier Brewing Co., Wash., 255 F. 762, 167 C.C.A. 106, error dismissed Rainier Brewing Co. v. Great Northern Pac. S.S. Co., 40 S.Ct. 54, 250 U.S. 652, 63 L.Ed. 1190.
Ala.—Hurt v. Atlanta, B. & A. Ry. Co., 84 So. 631, 17 Ala.App. 241.

a right and a duty to recover the remainder,[8] even though such rate be excessive, unreasonable, and unlawful.[9] These rights and duties, created by the Act, are for the protection of the public against secret rebates and discriminations rather than for the enrichment of the carrier.[10] So, the carrier cannot be estopped to assert the illegality of a contract made in violation of the statute,[11] and no act or omission of the carrier,[12] except allow-

Ga.—Williamson-Inman Co. v. Nashville, C. & St L Ry Co, 160 S.E. 687, 44 Ga App 129
Ill—Davis v. Keystone Steel & Wire Co, 148 N.E 47, 317 Ill 278.
Iowa—Sheldon v. Chicago, B & Q. R Co, 169 N.W 189, 184 Iowa 865.
Mass—American Ry Express Co v. Mohawk Dairy Co, 144 N.E. 721, 250 Mass. 1, 35 A L R 14
Miss—Lexington Compress & Oil Mill Co v Yazoo & M V R Co, 95 So. 93, 131 Miss 49
Mo.—Mobile & O R Co. v. Southern Sawmill Co, 251 S W. 434, 212 Mo. App 117
N Y.—Willson v. American Ry Express Co, 197 N.Y S 600, 204 App Div. 59, affirmed 147 N E. 196, 239 N Y. 562—Boston & M R. R v Standard Wall Paper Co, 181 N Y S. 129, 191 App Div. 307, affirmed 134 N E 593, 232 N.Y. 612
N.C—Edenton Cotton Mills v Norfolk Southern R Co., 100 S.E. 341, 178 N.C 212—Southern Ry. Co. v Latham, 97 S E 234, 176 N.C 417
Tenn—Oman v. Tennessee Cent. Ry. Co., 7 Tenn.App. 141.
10 C.J p 510 notes 84, 85.

Recovery from consignor

"The law imposes upon a railroad company the absolute duty to collect transportation charges, and, to relieve itself from the penalty imposed by law for failure or inability to exact the charges from the consignee, it must proceed against the consignor"—Central of Georgia Ry. Co. v Lovell, 180 N.Y.S 922, 924, 111 Misc. 735.

8. U.S.—Louisville & N R. Co. v. Williamson, C C.A.Ga., 87 F 2d 34—McFadden v Alabama Great Southern R Co, Pa, 241 F. 562, 154 C C. A 338, affirming, D C, Alabama Great Southern R Co. v. George H McFadden & Bros, 232 F 1000.
Ala.—Nashville, C & St L. Ry Co v. Gilliam, 101 So 889, 212 Ala 120
Ark—Missouri Pac R Co v. Pfeiffer Stone Co., 266 S W. 82, 166 Ark. 226
Del.—In re Arlington Hotel Co., 98 A 186, 11 Del Ch 137.
Ill—Davis v Naugle Pole & Tie Co., 238 Ill App. 214.
Ind.—American Ry. Express Co v. Johnson Butter Co., 187 N E. 405, 97 Ind App. 537—Cleveland, C., C. & St L R. Co v. Alexandria Paper Co, 124 N.E. 402, 71 Ind App 119
Iowa.—Sheldon v. Chicago, B. & Q. R Co., 169 N.W 189, 184 Iowa 865
Minn.—Chicago Great Western R. Co. v Schmit, 203 N W. 618, 163 Minn. 194
N H—Director General of Railroads v. McCormack, 136 A 253, 82 N.H 528.
Tex—Houston & T C. Ry. Co. v. Ahlers, Civ App, 274 S W. 333.
10 C J p 511 note 88

Proper parties

In interstate carrier's action against shipper to recover excess of tariff rate over freight charges actually paid on shipments of metal scrap, there was no question that carrier had not sued the proper party, where shipper was both consignor and consignee in bills of lading—Pennsylvania R Co. v. Fox & London, C C A N Y, 93 F.2d 669, certiorari denied Fox & London v Pennsylvania R Co., 58 S Ct. 949.

Under settlement

A settlement between carrier and shipper by the payment and acceptance of a charge different from the rate in the published tariff does not preclude either party from enforcing the lawful rate.—Galveston, H & S A Ry. Co. v. Lykes Bros., D C Tex, 294 F 968.

Consignee liable

A consignee of interstate shipments who received the shipments and paid all charges claimed, which were less than the lawful rates established under the Interstate Commerce Act as a matter of law assumed liability for the only lawful rate which it had a right to pay or the carrier a right to charge, and could not escape liability therefor through any contract with the carrier, and its liability was not a question of fact to be determined from circumstances tending to show an implied agreement—New York Cent. & H. R R. Co v. York & Whitney Co, 41 S.Ct. 509, 256 U.S. 406, 65 L Ed 1016, affirming in part and reversing in part 119 N E. 855, 230 Mass. 206.

9. U S.—Davis v Krauss Bros Lumber Co, D.C La., 25 F.2d 888—North American Co v St Louis & S F. R Co, D C Mo, 288 F. 612, reversed on other grounds, C C A, Spiller v. St. Louis & S. F R. Co, 14 F.2d 284, certiorari granted St Louis & S. F. R. Co v Spiller, 47 S.Ct. 111, 273 U S. 680, 71 L Ed. 837, affirmed in part and reversed in part on other grounds 47 S Ct. 635, 274 U S. 304, 71 L Ed. 1060
Mo.—Mobile & O. R Co. v. Southern Sawmill Co, 251 S.W. 434, 212 Mo App. 117

10. U.S.—Button v. Atchison, T. & S F. Ry. Co, C C A Okl, 1 F 2d 709, error dismissed Atchison, T & S F Ry Co v Button, 46 S Ct. 349, 270 U S 670, 70 L.Ed. 791.

11. U S—Pennsylvania R Co v Fox & London, C C A.N Y, 93 F 2d 669, certiorari denied Fox & London v Pennsylvania R Co, 58 S Ct 949—Northern Pac. Ry Co v Sommers Bros Mfg Co, D.C.Idaho, 34 F 2d 56
Ala—Nashville, C & St. L Ry Co v. Gilliam, 101 So 889, 212 Ala 120—Western Ry of Alabama v. Collins, 78 So 833, 201 Ala. 455.
Mo—Bush v Keystone Driller Co, 199 S W 597, 199 Mo App 152.
N H—Director General of Railroads v. McCormack, 136 A. 253, 82 N.H. 528
N Y—New York Cent. R Co v Sharp, 213 N Y S. 867, 215 App Div 794, affirming 206 N.Y.S. 755, 124 Misc. 265.
N.C.—Davis v. Gulley, 123 S E. 318, 188 N.C 80
Tenn—Oman v Tennessee Cent. Ry Co, 7 Tenn App. 141—Tennessee Cent Ry. Co. v. W. R. Tate Co, 5 Tenn App. 82.
Tex.—Houston & T. C. Ry. Co. v. Ahlers, Civ App, 274 S W. 333.
10 C J p 511 note 91.

Illegality of payments

The carrier is not estopped from asserting the legality of the Interstate Commerce Act and the illegality of payments by shippers which would be in contravention to the act—Pennsylvania R Co v. Cameron, 124 A 638, 280 Pa. 458.

12. U S.—Louisville & N. R Co v Central Iron & Coal Co, Ala, 44 S Ct 441, 265 U.S. 59, 68 L.Ed 900, affirming, C C A, 284 F 250—Northern Pac Ry Co v Van Dusen Harrington Co, C C A Minn, 60 F 2d 394
Ala—Nashville, C & St L Ry Co v Gilliam, 101 So. 889, 212 Ala 120—Western Ry. of Alabama v. Collins, 78 So 833, 201 Ala 455
Cal—New York Cent. R. Co. v Frank H. Buck Co, 41 P.2d 547, 2 Cal.2d 384
Ill.—New York Cent R. Co. v. Lehigh Stone Co, 220 Ill App 563.
Kan—Kanotex Refining Co v. Atchison, T & S F. Ry. Co., 46 P.2d 16, 142 Kan 139.
La—Davis v. Selig & Baughman Hardware Co., 2 La App 665
Minn—Chicago, M & St P. Ry. Co. v. Greenberg, 166 N W. 1073, 139 Minn. 428, L R.A 1918D 158, Ann. Cas 1918E 456.
Miss.—Southern Ry. Co. in Mississip-

ing the statute of limitations to run,[13] will estop or preclude it from enforcing the obligation of the shipper or consignee to pay the published freight rates. The circumstance that the rate was agreed on or paid and accepted through mistake of one or both parties does not affect the operation of the rule requiring the established rate to be charged and paid, since both are bound to take notice of the filed tariff rates.[14] In fact, even where the carrier's agent by mistake or otherwise quotes or collects a lower rate, it has both a right and duty to recover the published rate or the difference between that rate and a lower rate already collected in spite of any hardship accruing to the shipper or consignee,[15] and no error in failing to collect the legal transportation charges at the time of shipment or delivery will excuse the carrier from collecting the deficiency, or relieve the shipper from paying it,[16] nor is it material whether the mistaken rate is fixed in the bill of lading or

pi v. Buckeye Cotton Oil Co., 89 So. 228, 126 Miss. 562

Mo.—Mobile & O. R. Co. v. Southern Sawmill Co., 251 S.W. 434, 212 Mo. App. 117.

Tex.—Texarkana & Ft. S. Ry. Co. v. Brewer, Civ.App., 19 S.W.2d 334.

Agreement to file lower rate

Alleged fact that shipper bought oil with understanding with carrier that carrier would immediately file lower rate with interstate commerce commission did not preclude carrier from enforcing full rate in effect at time of shipment.—Kanotex Refining Co. v. Atchison, T. & S. F. Ry. Co., 46 P.2d 16, 142 Kan. 139.

13. U.S.—Louisville & N. R. Co. v. Central Iron & Coal Co., Ala., 44 S.Ct. 441, 265 U.S. 59, 68 L.Ed. 900, affirming, C.C.A., 284 F. 250—Button v. Atchison, T. & S. F. Ry. Co., C.C.A.Okl., 1 F.2d 709, error dismissed Atchison, T. & S. F. Ry. Co. v. Button, 46 S.Ct. 349, 270 U.S. 670, 70 L.Ed. 791.

Cal.—New York Cent. R. Co. v. Frank H. Buck Co., 41 P.2d 547, 2 Cal.2d 384.

14. U.S.—Western Grain Co. v. St. Louis-San Francisco Ry. Co., C.C.A.Ala., 56 F.2d 160—Central Warehouse Co. v. Chicago, R. I. & P. Ry. Co., C.C.A.Minn., 20 F.2d 828, affirming, D.C., Chicago, R. I. & P. Ry. Co. v. Central Warehouse Co., 14 F.2d 123.

Ala.—Emerson v. Central of Georgia Ry. Co., 72 So. 120, 196 Ala. 280, L.R.A.1916F 120—Robert S. Armstrong & Bros. Co. v. Rowland, 118 So. 502, 22 Ala.App. 613.

Ill.—Mellon v. Landeck, 248 Ill.App. 353.

La.—Swindler v. Texas & P. Ry. Co., 5 La.App. 641.

N.Y.—New York Cent. R. Co. v. Sharp, 213 N.Y.S. 867, 215 App.Div. 794, affirming 206 N.Y.S. 755, 124 Misc. 265.

Vt.—Montpelier & W. R. R. R. v. Charles Bianchi & Sons, 113 A. 534, 95 Vt. 81.

10 C.J. p. 511 note 94.

15. U.S.—Callaway v. Atchison, T. & S. F. Ry. Co., C.C.A.Mo., 35 F.2d 319—St. Louis-San Francisco Ry. Co. v. Republic Box Co., D.C.Tex., 12 F.2d 441—American Express Co. v. Sweeney, D.C.Mass., 283 F. 691—Great Northern Ry. Co. v. Hyder, D.C.Wash., 279 F. 783—Payne v. Clarke, D.C.Cal., 271 F. 525—Portland Cattle Loan Co. v. Oregon Short Line R. Co., Or., 251 F. 33, 163 C.C.A. 283, affirming, D.C., Oregon Short Line R. Co. v. Portland Cattle Loan Co., 245 F. 214—Alabama Great Southern Ry. Co. v. George H. McFadden & Bros., D.C.Pa., 232 F. 1000, affirmed McFadden v. Alabama Great Southern R. Co., 241 F. 562, 154 C.C.A. 338.

Ala.—Nashville, C. & St. L. Ry. Co. v. Gilliam, 101 So. 889, 212 Ala. 120—Western Ry. of Alabama v. Collins, 78 So. 833, 201 Ala. 455.

Ark.—Missouri Pac. R. Co. v. Pfeiffer Stone Co., 266 S.W. 82, 166 Ark. 226.

Del.—In re Arlington Hotel Co., 98 A. 186, 11 Del.Ch. 137.

Ga.—Central of Georgia Ry. v. O'Neill Mfg. Co., 91 S.E. 877, 19 Ga.App. 490.

Ill.—Elgin, J. & E. Ry. Co. v. Rockwell Lime Co., 213 Ill.App. 25. See Bush v. Carloading & Distributing Co., 210 Ill.App. 399.

La.—Davis v. Ferguson, 132 So. 289, 17 La.App. 149.

Miss.—Southern Ry. Co. in Mississippi v. Buckeye Cotton Oil Co., 89 So. 228, 126 Miss. 562.

Neb.—Fremont Milling Co. v. Chicago & N. W. Ry. Co., 163 N.W. 331, 101 Neb. 362.

N.H.—New York, N. H. & H. R. R. v. Tonella, 111 A. 341, 79 N.H. 464.

N.J.—West Jersey & S. S. R. Co. v. Lake & Risley Co., 145 A. 336, 105 N.J.Law 314.

N.C.—Davis v. Gulley, 123 S.E. 318, 188 N.C. 80—Edenton Cotton Mills v. Norfolk Southern R. Co., 100 S.E. 341, 178 N.C. 212—Southern Ry. Co. v. Latham, 97 S.E. 234, 176 N.C. 417.

Ohio.—New York Cent. R. Co. v. Peak, 6 Ohio App. 399—Louisville & N. R. Co. v. Magnus Co., 13 Ohio Cir.Ct.,N.S., 305.

Okl.—Garrison Coal Co. v. Hines, 247 P. 62, 118 Okl. 251, 46 A.L.R. 1151.

Tenn.—Cleveland, C., C. & St. L. Ry. Co. v. Southern Coal & Coke Co., 248 S.W. 297, 147 Tenn. 433—Nashville, C. & St. L. Ry. Co. v. Commercial Nursery Co., 8 Tenn.App. 16—Oman v. Tennessee Central Ry. Co., 7 Tenn.App. 141—Tennessee Central Ry. Co. v. W. R. Tate Co., 5 Tenn.App. 82.

Wis.—Mellon v. Johnson Co., 219 N.W. 352, 196 Wis. 64.

10 C.J. p. 447 note 36, p. 512 note 96.

Joint rate

Where, through mistake, a joint rate lower than that of the tariff rate is given, the carriers may recover the difference.—Sheldon v. Chicago, B. & Q. R. Co., 169 N.W. 189, 184 Iowa 865.

Error in construction of tariff

Errors of railroad agents in construction of tariffs do not make estoppel and cannot affect rights and duties to demand true rate.—Yazoo & M. V. R. Co. v. A. Marx & Sons, 135 So. 64, 17 La.App. 172, rehearing denied 135 So. 675, 17 La.App. 172.

Express company cannot estop itself from collecting the established tariff rate filed with the interstate commerce commission by any statement made by its local agent.—Willson v. American Ry. Express Co., 197 N.Y.S. 600, 204 App.Div. 59, affirmed 147 N.E. 196, 239 N.Y. 562.

Where consignees become bankrupt

The fact that the carrier delivered the goods to the consignee on payment of the freight demanded, which, by mistake, was less than the amount due, and that the consignee had since become bankrupt, so that the consignor could not recover the freight from him, does not estop the carrier from collecting the freight from the consignor.—New York, N. H. & H. R. R. v. Tonella, 111 A. 341, 79 N.H. 464.

Misrepresentation by agent of initial carrier

An interstate carrier is not estopped to demand the balance of the freight due even where the shipment has been induced by the misrepresentation and assurance of the agent of the initial carrier that the amount which the shipper prepaid was the full and correct charge.—Western & A. R. R. v. Aiken, 139 S.E. 914, 37 Ga.App. 271.

16. La.—Davis v. Ferguson, 132 So. 289, 17 La.App. 149, avoided 136 So. 293, 173 La. 132.

whether it was by parol agreement on a mistaken quotation of the rates made by the agent at the point of shipment.[17]

It has been said that the courts will not literally enforce the tariff rates so as to compel repayment of an alleged undercharge, where the individual circumstances of the particular case make it certain that the invocation of the principle is an absurdity.[18] Thus, a carrier will be denied the right to recover the scheduled rate for the route over which the shipment was made, where there were two routes over which the shipment could have been made and the shipper, although he designated the route followed, designated a lower rate applicable with respect to the other available route.[19] Similarly, since the purpose of the act to prevent discriminations does not permit its being used in the courts to enforce extortions, where the shipper has not given routing directions and the carrier has wrongfully routed the freight over an excessive route when a cheaper route was available, it cannot recover the higher rate applicable to the route actually used.[20] Further, a settlement of a controversy between a shipper and a carrier over freight charges, made in good faith on actual shipping weights, prevents the carrier from recovering the difference between the charge as settled and the rate based on car capacity.[21]

The carrier is entitled to hold the goods until payment of the legal charges.[22]

Failure to post or publish schedule. Although there is authority to the contrary,[23] generally, the fact that the rate has not been posted in accordance with statutory requirements does not affect the operation of the rule; the rate when made out and filed is notice, and its effect is not lost, although it is not actually posted in the station.[24] Accordingly, a carrier may recover the difference between the rate charged on an interstate shipment and the higher published rate filed with and approved by the interstate commerce commission, although the schedules have not been posted as required by the statute.[25] Similarly, although the rate schedule was not published as required by the act, the carrier may recover the difference between the tariff rate and the amount actually collected.[26]

Shipper's ignorance of violation of law. The fact that a shipper who is given a less rate than that fixed by the published schedule of rates was ignorant of the fact that he was receiving a preferential rate does not affect the operation of the rule, as otherwise the shipper whose duty it is to ascertain the published rate would in effect be empowered to secure a preference contrary to the statute.[27]

§ 394. Effect on Shipper's Right to Recover for Loss or Injury

A shipper is entitled to recover for loss or injury due to the carriers' negligence in the performance of its duties, although the shipping contract is violative of the Interstate Commerce Act, but is not entitled to recovery for breach of such a contract or for damages arising from the carrier's failure to perform.

The fact that a contract of shipment is invalid as violating the Interstate Commerce Law prohibiting discrimination does not operate as a bar to an action to recover for loss of, or injury to, the goods by negligence,[28] or for injury due to

17. U.S.—Wheeling & L. E. Ry. Co. v. Standard Envelope Mfg. Co., D.C. Ohio, 2 F. Supp. 637
10 C.J. p. 512 note 95.

18. U.S.—St. Louis-San Francisco Ry. Co. v. Republic Box Co., D.C. Tex., 12 F.2d 441.

19. U.S.—St. Louis-San Francisco Ry. Co. v. Republic Box Co., supra.

20. U.S.—Galveston, H. & S. A. Ry. Co. v. Lykes Bros., D.C. Tex., 294 F. 968.

21. U.S.—St. Louis Southwestern R. Co. v. Spring River Stone Co., Mo., 35 S.Ct. 456, 236 U.S. 718, 59 L.Ed. 805.

22. Kan.—Chicago, etc., R. Co. v. Hubbell, 38 P. 266, 54 Kan. 232.
Mo.—Sutton v. St. Louis, etc., R. Co., 140 S.W. 76, 159 Mo.App. 685.—Gerber v. Wabash R. Co., 63 Mo.App. 145.
S.D.—Church v. Minneapolis, etc., R. Co., 85 N.W. 1001, 14 S.D. 443.

23. Tenn.—Atlanta, etc., R. Co. v. Horne, 59 S.W. 134, 106 Tenn. 73.

24. Ohio.—Lyman Perin & Co. v. Pennsylvania R. Co., 194 N.E. 398, 48 Ohio App. 339.
10 C.J. p. 513 note 4.

25. Ohio.—Lyman Perin & Co. v. Pennsylvania R. Co., 194 N.E. 398, 48 Ohio App. 339
10 C.J. p. 513 note 5.

26. Wash.—Northern Pac. Ry. Co. v. Longmire, 176 P. 150, 104 Wash. 121.
Not printed
Carrier may collect difference between amount collected on interstate freight shipment and rate under tariffs filed, although rate schedules were not printed.—Northern Pac. Ry. Co. v. Longmire, 176 P. 150, 104 Wash. 121.

27. Miss.—Southern Ry. Co. in Mississippi v. Buckeye Cotton Oil Co., 89 So. 228, 126 Miss. 562.
N.C.—Edenton Cotton Mills v. Norfolk Southern R. Co., 100 S.E. 341, 178 N.C. 212.
Tenn.—Tennessee Central Ry. Co. v. W. R. Tate Co., 5 Tenn. App. 82.
10 C.J. p. 512 note 98

28. U.S.—Adams Express Co. v. Darden, C.C.A.Tenn., 286 F. 61, affirmed 44 S.Ct. 502, 265 U.S. 265, 68 L.Ed. 1010.
Ga.—Southern Express Co. v. Essig Bros., 87 S.E. 1090, 17 Ga.App. 657.
Tex.—Chicago, R. I. & G. Ry. Co. v. Manby, Civ.App., 207 S.W. 157.
10 C.J. p. 513 note 6.
Value of horses
Where tariff rate for shipping of carload of horses valued at one hundred dollars each was one hundred sixty-five dollars and contract recited that value and that rate was paid, although horses were known to carrier's agent to be race horses of a

delay in transportation,[29] or for damages caused by willfully misrouting the goods so that the shipper is compelled to pay a much higher rate of freight.[30] Even though the carrier is entitled to recover the rate fixed by the schedule, the rights of the shipper are not in other respects, not dependent on the special contract, different from what they would have been had the contract been free from illegality as to rates charged.[31]

On the other hand, no recovery can be had from a carrier for consequential damages resulting because of its failure to perform a contract violating the Interstate Commerce Act,[32] and one who has obtained from a common carrier transportation of goods at a rate specified in the bill of lading, which rate is less than the schedule rates in force at the time, is not entitled to recover the goods, or damages for their detention, on the tender of payment of the amount of charges named in the bill of lading, or of any sum less than the schedule charges.[33]

The carrier is not liable for damages resulting from a mistake in quoting a rate less than the full published rate[34] or for failure to post its freight tariff rates as fixed by the commission.[35]

§ 395. Power to Enjoin Carrier from Accepting Less than Scheduled Rates

A carrier may be enjoined from accepting less than the scheduled rates.

In a proper proceeding, where the contract is violative of the provisions of the Interstate Commerce Act against discrimination in rates, the carrier may be perpetually enjoined from taking less than the rates fixed in its published tariff of freight rates.[36]

much greater value, and shipper did not know of valuation until after loss, it was held that, under first Cummins amendment, Act March 4, 1915, § 1, Comp St § 8604a, carrier was liable for full actual loss resulting from the killing of five of the horses in transit.—Adams Express Co v Darden, Tenn., 44 S Ct. 502, 265 U.S 265, 68 L.Ed. 1010, affirming, C.C.A., 286 F. 61.

29. U S.—Pennsylvania R Co. v Olivit Bros., N J., 37 S Ct. 468, 243 U.S 574, 61 L Ed. 908.
Tex.—Chicago, R. I & G. Ry Co. v. Manby, Civ App., 207 S W 157.
10 C J. p 513 note 7.

Corpus Juris text, 10 C.J. p 513 notes 6–8 has been quoted with approval and the rule as there stated followed in Chicago, R. I. & G. Ry Co v. Manby, Tex.Civ.App., 207 S W. 157, 158.

Delay in furnishing cars

In action for damages to potatoes caused by defendant railway's delay in furnishing cars on application, it was no defense that the freight rate was discriminative.—Gallop & Fisher v. Norfolk Southern R Co, 91 S E 375, 173 N C. 21, error dismissed Norfolk Southern R. Co. v. Gallup, 39 S.Ct 184, 248 U.S 596, 63 L Ed. 438

30. Tex.—Chicago, R. I & G Ry Co. v. Manby, Civ.App., 207 S W. 157.
10 C J. p 513 note 8.

31. Ill.—Kirby v Chicago, etc., R Co, 90 N E 252, 242 Ill. 418, reversed on other grounds 32 S Ct. 648, 225 U S. 155, 56 L Ed. 1033, Ann.Cas.1914A 501.
10 C J. p 513 note 9.

32. W Va.—Whitaker Glessner Co v. Wheeling Terminal Ry Co, 127 S.E. 639, 99 W.Va. 38.

Mill waste

Millowner cannot recover consequential damages for breach of contract by railroad company to haul away wastage from mill as part consideration for right of way, since passage of Interstate Commerce Act, under which railroad filed schedule containing charges for hauling wastage from iron and steel mills.—Whitaker Glessner Co. v Wheeling Terminal Ry Co., 127 S.E. 639, 99 W.Va. 38.

33. Ala.—Southern R. Co. v. Harrison, 24 So. 552, 119 Ala 539, 72 Am.S.R 936, 43 L R.A. 385.
10 C.J p 511 note 86.

34. Alaska.—Harvey & Co. v. Copper River & N. W. Ry. Co., 5 Alaska 371.
Ark.—St. Louis, I. M. & S. Ry. Co v Wood, 207 S.W. 32, 136 Ark. 585.
N.C.—Edenton Cotton Mills v. Norfolk Southern R. Co., 100 S.E. 341, 178 N C. 212
Tenn.—Blow Stave Co. v. Hattendorf, 7 Tenn Civ.App. 415.
10 C J. p 512 note 97.

Conversion

Where a shipper ordered diversion of a car which had reached its destination, under advice of carrier's agent that it could be diverted to another point at the through rate from the place of shipment to the new destination, which was contrary to the carrier's rule, permitting such rate only if the original destination was an intermediate point on a direct route to the final destination, and otherwise fixing the rate as the sum of the local rates, the carrier was not guilty of converting the shipment by demanding the local rates, as required by the rules, and selling the goods when payment thereof was refused, although the diversion would not have been ordered, except for the statement of its local agent.—Willson v. American Ry. Express Co, 197 N.Y.S. 600, 204 App Div. 59, affirmed 147 N E 196, 239 N Y 562

Express company

Under the Interstate Commerce Act, and in view of the purpose thereof, to secure uniformity of rates an interstate shipper could not recover from an express company or its agent the damages sustained in shipping by express instead of by freight because of agent's misrepresentation as to the rates, since the rates had been published and shipper was presumed to have had knowledge thereof, and to allow recovery would permit evasion of the act by reducing the published rates by recoupment.—Williams v. American Ry Express Co., 110 S.E 125, 118 S C. 121.

Purchasers from consignee

A railroad company, having transported a car of goods from point without to point within the state to which it was consigned, is not liable to purchasers of goods from consignee for its agent's error in quoting tariff rate on connecting line for transporting the car to another point within state, or for erroneous statement that it would go forward on a through tariff rate.—W C Goodnow Coal Co v Northern Pac Ry. Co., 162 N.W. 519, 136 Minn 420.

35. Ark.—St. Louis, I M. & S Ry. Co. v. Wood, 207 S.W. 32, 136 Ark. 585.

36. U S.—New York, etc, R Co. v. Interstate Commerce Commn., Va., 26 S.Ct 272, 200 U.S 361, 50 L.Ed 515, modifying, C.C., Interstate Commerce Commn. v. Chesapeake & O Ry. Co., 128 F. 59.

§ 396. Contracts in Violation of State Legislation

Intrastate shipping contracts which are unduly discriminatory or which deviate from the duly established rates or tariffs are illegal, unenforceable, and void under the legislation in many states.

Under state statutes prohibiting discrimination in terms more or less similar to those of the Interstate Commerce Act, it is usually held that contracts in violation thereof are void and cannot be enforced.[37] Under some of such statutes, railroad freight rates have been taken from the domain of contract and have become matters to be regulated by law;[38] and the carrier, shipper, and consignee alike are required to abide by the rates legally established.[39] No mistake of fact, or special practice, engagement, or understanding of the parties, will suffice to change this requirement,[40] and the carrier cannot by contract,[41] or by estoppel or waiver,[42] directly or indirectly, increase or decrease the duly established rates. When the tariff rates are once legally established, the shipper and all parties, in legal contemplation, have notice thereof and of the law prohibiting discrimination in any form.[43] It has been held that a charge greater than that prescribed by the tariff is not legalized by a statute declaring that a carrier is guilty of extortion if it charges more than a reasonable rate for designated services,[44] and a statute prohibiting a carrier from charging more than the rate specified in the bill of lading, has no application where the rate charged and collected is on file with, and has been approved by, the state railroad commission.[45]

Under statutes of this character, a shipping contract is unenforceable and void where it provides for rates different from those fixed by an authorized state commission,[46] or specified in the filed

37. Ark.—Bryant Lumber Co. v. Fourche River Lumber Co., 187 S.W. 455, 124 Ark. 313.
Iowa.—Northern Gravel Co. v. Muscatine North & S. Ry. Co., 171 N.W. 787, 185 Iowa 1259.
Mo.—Mellon v. Stockton & Lampkin, 30 S.W.2d 974, 326 Mo. 129, transferred 35 S.W.2d 612, 225 Mo. App. 122—Mellon v. Burns, App., 35 S.W.2d 614.
N.J.—Lehigh Valley R. Co. v. United Lead Co., 133 A. 290, 102 N.J. Law 545—Lehigh Valley R. Co. v. Maas & Waldstein Co., 131 A. 884, 102 N.J. Law 332.
Tenn.—Louisville & N. Ry. Co. v. Hardman, 5 Tenn. App. 289.
10 C.J. p. 514 note 11.

38. Tenn.—Oman v. Tennessee Central Ry. Co., 7 Tenn. App. 141.

39. U.S.—Woodrich v. Northern Pac. Ry. Co., C.C.A.N.D., 71 F.2d 732, 97 A.L.R. 401—In re Independent Sewer Pipe Co., D.C.Cal., 248 F. 547.
Ala.—T. R. Miller Mill Co. v. Louis. & N. R. Co., 92 So. 797, 207 Ala. 253.
Ind.—American Ry. Express Co. v. Johnson Butter Co., 187 N.E. 405, 97 Ind. App. 537.
Ky.—Louisville & N. R. Co. v. Greenbrier Distillery Co., 187 S.W. 296, 170 Ky. 775.
Miss.—E. L. Young Heading Co. v. Payne, 89 So. 782, 127 Miss. 48—Southern Ry. Co. in Mississippi v. Buckeye Cotton Oil Co., 89 So. 228, 126 Miss. 562.
Mo.—Sonken-Galamba Corporation v. Missouri Pac. R. Co., 40 S.W.2d 524, 225 Mo. App. 1066.
N.Y.—Purcell v. New York Cent. R. Co., 275 N.Y.S. 70, 242 App. Div. 292, affirmed 197 N.E. 182, 268 N.Y. 164, certiorari denied 56 S.Ct. 73, 296 U.S. 545, 80 L.Ed. 387.
Ohio.—Erie R. Co. v. Steinberg, 113 N.E. 814, 94 Ohio St. 189, L.R.A. 1917B 787, Ann. Cas. 1917E 661.
Pa.—Pennsylvania R. Co. v. Silberman, 29 Pa. Dist. 605.
Tenn.—New River Lumber Co. v. Tennessee Ry. Co., 238 S.W. 867, 145 Tenn. 266.
W.Va.—Whitaker Glessner Co. v. Wheeling Terminal Ry. Co., 127 S.E. 639, 99 W.Va. 38.
10 C.J. p. 514 note 12.

There can be but one "lawful rate" in force at a given time, and that rate, by the terms of Code 1907 §§ 5525, 5527, 5553, 5554, 5651, is the rate which has been filed and approved by the railroad commission and published by the carrier and behind that rate, so long as it remains unchanged, and so far as its application to specific shipments is concerned, neither shipper nor carrier can go, and courts cannot inquire.—T. R. Miller Mill Co. v. Louisville & N. R. Co., 92 So. 797, 207 Ala. 253.

40. U.S.—Woodrich v. Northern Pac. Ry. Co., C.C.A.N.D., 71 F.2d 732, 97 A.L.R. 401—In re Independent Sewer Pipe Co., D.C.Cal., 248 F. 547.
Ala.—Louisville & N. R. Co. v. A. H. Cleaver & Co., 101 So. 597, 211 Ala. 661.
Ind.—American Ry. Express Co. v. Johnson Butter Co., 187 N.E. 405, 97 Ind. App. 537.

Improper classification immaterial
That army goods were styled and regarded as rags by the shipper, and received and billed as such by the carrier, was not controlling as to their proper classification for rate purposes, since the carrier was bound to collect the prescribed rate on a proper classification.—Louisville, H. & St. L. Ry. Co. v. Johns & Patterson, 258 S.W. 312, 201 Ky. 752.

41. Mo.—Mellon v. Burns, App., 35 S.W.2d 614—Mellon v. Stockton & Lampkin, 35 S.W.2d 612, 225 Mo. App. 122, transferred 30 S.W.2d 974, 326 Mo. 129.
Pa.—New York, P. & N. R. R. Co. v. Ambler-Davis Co., 3 Pa. Dist. & Co. 485.

42. Mo.—Mellon v. Burns, App., 35 S.W.2d 614—Mellon v. Stockton & Lampkin, 35 S.W.2d 612, 225 Mo. App. 122, transferred 30 S.W.2d 974, 326 Mo. 129.

Shipper not estopped to contest rates
A shipper's agreement to allow a carrier to charge rates conflicting with Const. art. 12 § 12, prohibiting charging more for short than long hauls, does not estop him from later contesting the legality of such rates.—Missouri Southern R. Co. v. Public Service Commission, 214 S.W. 379, 279 Mo. 484.

43. Mo.—Mellon v. Burns, App., 35 S.W.2d 614—Mellon v. Stockton & Lampkin, 35 S.W.2d 612, 225 Mo. App. 122, transferred 30 S.W.2d 974, 326 Mo. 129.

44. Ky.—Andrews Steel Co. v. Davis, 276 S.W. 148, 210 Ky. 473.

45. Miss.—E. L. Young Heading Co. v. Payne, 89 So. 782, 127 Miss. 48.

46. Miss.—Brookhaven Lumber & Mfg. Co. v. Mississippi Cent. R. Co., 122 So. 472, 154 Miss. 303.
Pa.—Leiper v. Baltimore & P. R. Co., 105 A. 551, 262 Pa. 328.
Tex.—Herrin Transp. Co. v. Marmion, Civ. App., 113 S.W.2d 291.
Va.—Norfolk Tidewater Terminals v. Norfolk & P. Belt Line R. Co., 195 S.E. 684.

tariffs,[47] or where it provides for services not open to all shippers alike, under the filed tariffs.[48] However, the mere fixing of a rate by a state railroad commission, when it is the same as stipulated in a prior contract by the shipper and carrier, does not of itself invalidate such an agreement.[49]

Statutes of this character render prior contracts for special rates unenforceable,[50] although it has also been held that a statute will not be given such a retroactive effect in the absence of some indication that the legislature so intended.[51] Such statutes are void as applied to interstate shipments,[52] but they may control shipping contracts made pursuant to an act of congress, unless it is shown that congress did not so intend.[53]

Effect on shipper's right to recover for loss or injury. No recovery can be had from a carrier for consequential damages resulting because of its failure to perform a contract in violation of a state statute regulating rates on particular services.[54]

§ 397. Effect on Carrier's Right to Recover Scheduled Rates

Under a number of state statutes, a carrier has both a right and an absolute duty to recover the scheduled rates regardless of its contract.

Although there is authority to the contrary,[55] under a number of state statutes governing intrastate carriers, the established intra-state rate may be recovered irrespective of any special contract and regardless of the fact that the carrier has, by mistake or otherwise, charged less than the established rate,[56] although it is unreasonable and extortionate,[57] and the doctrine of estoppel will not be applied to bar carrier from so recovering.[58]

Violation not shown

Where a railroad company inspected and classified as pitch material which was claimed to be asphaltum, and entered into a contract with a shipper to transport it for a given sum, it was held that the contract was binding, and the only way the carrier could avoid it was by showing that by mistake it agreed to transport the material for less than the tariff rate, this it did not show.—West Const Co v Seaboard Air Line Ry. Co, 210 S W. 633, 141 Tenn 342.

47. Mo—St. Louis Southwestern Ry. Co. v. Painton, App, 275 S.W 55

Specific performance denied

In view of Public Service Commission Act §§ 5, 6, and 7, where railroad company filed with state public service commission tariffs in proper form, published as required by such act, regulating charges for hauling slag, etc, from iron and steel mills located on railway, contract between iron mill and railroad company, executed before passage of act, by which railroad agreed to haul away wastage without pay, as consideration for deed to right of way, cannot be specifically enforced—Whitaker Glessner Co v. Wheeling Terminal Ry. Co, 127 S E. 639, 99 W Va. 38

48. Kan—Parker Corn Co. v Chicago, B. & Q. R. Co., 244 P 240, 120 Kan. 484

49. La.—Alexandria & W. Ry. Co. v Long Pine Lumber Co. of Louisiana, 93 So 199, 152 La. 399.

50. N.Y—Boston & M. R R. v Standard Wall Paper Co, 181 N Y S. 129, 191 App.Div 307, affirmed 134 N E 593, 232 N.Y. 612.
10 C J. p 514 note 14.

Contract rendered ineffectual

Although a contract for a fixed period is entered into between a carrier and shipper for a freight rate, which is the legal rate at the time, yet, if thereafter, the carrier establishes a higher rate in accordance with statutory provisions, the contract is ineffectual.—New River Lumber Co. v Tennessee Ry. Co, 238 S W. 867, 145 Tenn 266.

51. Wash.—Sultan R, etc, Co v Great Northern R Co, 109 P 320, 1020, 58 Wash. 604.

52. U S—Gulf, etc., R Co. v. Hefley, Tex, 15 S.Ct. 802, 158 U.S. 98, 39 L.Ed. 910.

53. U.S.—St Paul & Tacoma Lumber Co. v. Northern Pac. Ry. Co, D.C Wash., 296 F. 749, reversed on other grounds, C C.A., Northern Pac Ry. Co v. St. Paul & Tacoma Lumber Co., 4 F.2d 359

54. W Va.—Whitaker Glessner Co v. Wheeling Terminal Ry. Co., 127 S.E 639, 99 W Va. 38

Contract to haul mill wastage

Millowner cannot recover consequential damages for breach of contract by railroad company to haul away wastage from mill as part consideration for right of way, since passage of Public Service Commission Act, under which railroad filed schedule containing charges for hauling wastage from iron and steel mills.—Whitaker Glessner Co v. Wheeling Terminal Ry. Co, 127 S E. 639, 99 W.Va. 38

55. Ill.—Illinois Cent. R Co. v. Seitz, 73 N E 585, 214 Ill. 350, 105 Am S.R. 108, affirming 117 Ill.App. 154.
10 C.J p 514 note 13

56. U S.—In re Independent Sewer Pipe Co., D C.Cal., 248 F. 547.
Ind.—American Ry. Express Co. v. Johnson Butter Co., 187 N.E. 405, 97 Ind.App. 537
Iowa—Cummings Sand & Gravel Co v. Minneapolis & St. L. Ry Co., 166 N W 354, 182 Iowa 955, L.R.A. 1918C 797
Kan—Missouri Pac R. Co. v. Red Star Milling Co., 251 P. 417, 122 Kan 122.
Ky.—Louisville & N R Co. v. Perry Ice & Bottling Co., 10 S W.2d 1091, 226 Ky 286.
Miss.—Gulf, M & N R. Co. v. Riverside Brick & Mfg. Co, 107 So. 193, 141 Miss 505.
Mo—Mellon v. Burns, App, 35 S W. 2d 614—Mellon v. Stockton & Lampkin, 35 S.W 2d 612, 225 Mo App. 122, transferred 30 S.W 2d 974, 326 Mo. 129
N Y—Boston & M R. R. v. Standard Wall Paper Co, 181 N.Y S. 129, 191 App Div. 307, affirmed 134 N.E 593, 232 N Y. 612
Pa—New York, P. & N R. R Co. v. Ambler-Davis Co., 3 Pa Dist.& Co. 485.
Tenn—Oman v. Tennessee Central Ry. Co, 7 Tenn.App. 141
10 C J p 514 note 12

57. Miss—E L Young Heading Co. v. Payne, 89 So. 782, 127 Miss. 48.

58. U.S—Strawberry Growers' Selling Co. v American Ry. Exp. Co., C.C A La, 31 F.2d 947.
Iowa.—Cummings Sand & Gravel Co. v. Minneapolis & St. L Ry. Co, 166 N W 354, 182 Iowa 955, L R.A 1918C 797
Ky—Louisville & N. R. Co v. Perry Ice & Bottling Co, 10 S.W.2d 1091, 226 Ky. 286
Miss.—Southern Ry. Co. in Mississippi v. Buckeye Cotton Oil Co., 89 So. 228, 126 Miss 562
Mo.—Mellon v. Burns, App, 35 S.W 2d 614—Mellon v. Stockton & Lampkin, 35 S.W.2d 612, 225 Mo App. 122, transferred 30 S.W.2d 974, 326 Mo. 129.

This right of recovery is not defeated by the fact that the copies of the tariff were not posted in the local station as required by statute.[59]

U. BENEFIT OF INSURANCE

§ 398. In Absence of Special Contract

In the absence of special contract, a carrier is not entitled to the benefit of insurance effected by the shipper on the goods shipped.

As a corollary of the rule that a carrier cannot limit its liability by requiring the shipper to insure his goods, as already discussed in § 109, in the absence of special contract, the carrier is not entitled to the benefit of insurance effected by the shipper on the goods shipped,[60] and, in case of loss or injury, it is not entitled to call on insurer for contribution.[61] Payment of loss by insurer does not prevent a recovery against the carrier for the amount of the loss,[62] the carrier being primarily liable therefor, and the recovery being for the benefit of insurer, which is subrogated to the rights of the shipper.[63] The right to maintain the action is not affected by the fact that insurer was not legally bound to indemnify insured for the loss sustained.[64]

§ 399. Under Special Contract

Where the contract between the carrier and the shipper expressly so provides, the carrier may be entitled to the benefit of unconditional payments made to the shipper by an insurer of the goods shipped.

In view of the fact that the carrier has an insurable interest in the shipment,[65] and may in its own behalf take out insurance against its liability arising from negligence,[66] it may, therefore, enter into a valid contract, in the absence of fraud or a provision to the contrary in the contract with insurer,[67] with the shipper that in case he procures insurance on the shipment the insurance will inure to the benefit of the carrier,[68]

Director general of railroads was not estopped to sue for balance due on freight on coal billed by mistake at less than proper rate, although defendant sold the coal at a small profit under supervision of federal government, taking freight rate paid into account, so that payment of difference would result in loss, in view of Const. § 214, and Ky St. § 817, relative to preferences.—Davis v. Moody, 261 S.W. 1101, 203 Ky. 203.

59. Ky.—Louisville & N. R. Co. v. Perry Ice & Bottling Co., 10 S.W. 2d 1091, 226 Ky. 286.

60. U.S.—Luckenbach v. W. J. McCahan Sugar Refining Co., N.Y., 39 S.Ct. 53, 248 U.S. 139, 63 L.Ed. 170, 1 A.L.R. 1522, modifying The Julia Luckenbach, 235 F. 388, 148 C.C.A. 650.
10 C.J. p. 514 note 19.

Does not affect liability
Insurance on cotton burned through carrier's negligence does not affect the carrier's liability.—Texarkana & F. S. Ry. Co. v. Brass, Tex.Civ.App., 245 S.W. 457, affirmed, Com.App., 260 S.W. 828.

61. Pa.—Gales v. Hallman, 11 Pa. 515.
S.C.—Burnside v. Union Steamboat Co., 44 S.C.L. 113.
10 C.J. p. 514 note 20.

62. N.Y.—Levinson v. Morris Transfer Co., 186 N.Y.S. 563.

63. U.S.—Luckenbach v. W. J. McCahan Sugar Refining Co., N.Y., 39 S.Ct. 53, 248 U.S. 139, 63 L.Ed. 170, 1 A.L.R. 1522, modifying The Julia Luckenbach, 235 F. 388, 148 C.C.A. 650.
10 C.J. p. 514 note 21.

64. U.S.—Nord-Deutscher Lloyd v. Insurance Co. of North America, Md., 110 F. 420, 49 C.C.A. 1.—Commercial Ins. Co. v. The C. D. Jr., La., 13 F.Cas.No.7,051, 1 Woods 72.

65. Iowa.—Hartford Fire Ins. Co. v. Payne, 203 N.W. 4, 199 Iowa 1008, 39 A.L.R. 1109.

66. Miss.—Yazoo & M. V. R. Co. v. Blum, 86 So. 805, 124 Miss. 318.
10 C.J. p. 515 note 28.—13 C.J. p. 491 note 4.

May recover against insurer
A contract of insurance taken by the carrier on goods in its custody will be valid, and under it the carrier may recover against an insurance company for loss due to negligence.
U.S.—Phœnix Ins. Co. v. Erie & Western Transp. Co., Wis., 117 U.S. 312, 29 L.Ed. 873.—Waters v. Merchants' Louisville Ins. Co., Ky., 11 Pet. 213, 9 L.Ed. 691.
Mass.—Copeland v. New England Mar. Ins. Co., 2 Metc. 432.

67. U.S.—Luckenbach v. W. J. McCahan Sugar Refining Co., N.Y., 39 S.Ct. 53, 248 U.S. 139, 63 L.Ed. 170, 1 A.L.R. 1522, modifying 235 F. 388, 148 C.C.A. 650.—Pennsylvania R. Co. v. Burr, N.Y., 130 F. 847, 65 C.C.A. 331.
10 C.J. p. 515 note 24.

Incorporated in insurance contract
In shipper's action against truck carrier for loss of cargo, carrier could not defend on ground that shipper was fully reimbursed from its insurer, since advancement made by insurer to shipper under agreement whereby insurer was subrogated to shipper's rights against carrier did not constitute a "payment."—Nebraska Co-op. Creameries v. Des Moines Transp. Co., D.C.Iowa, 16 F. Supp. 853.

68. U.S.—Luckenbach v. W. J. McCahan Sugar Refining Co., N.Y., 39 S.Ct. 53, 248 U.S. 139, 63 L.Ed. 170, 1 A.L.R. 1522, modifying The Julia Luckenbach, 235 F. 388, 148 C.C.A. 650.—Pennsylvania R. Co. v. Burr, N.Y., 130 F. 847, 65 C.C.A. 331.—Nebraska Co-op. Creameries v. Des Moines Transp. Co., D.C.Iowa, 16 F. Supp. 853.
Iowa.—Hartford Fire Ins. Co. v. Payne, 203 N.W. 4, 199 Iowa 1008, 39 A.L.R. 1109.
Miss.—Yazoo & M. V. R. Co. v. Blum, 86 So. 805, 124 Miss. 318.
10 C.J. p. 515 note 23.

This Corpus Juris text has been approved and cited as authority in Yazoo & M. V. R. Co. v. Blum, 86 So. 805, 124 Miss. 318.

Breach of contract
Where shipper procured insurance giving insurer right to subrogation to shipper's cause of action against carrier in breach of oral promise to carrier to procure insurance without warranty and for benefit of shipper and carrier, carrier, in action against it for loss of cargo, was entitled to offset as damages for breach of promise full amount of loss.—Nebraska Co-op. Creameries v. Des Moines Transp. Co., D.C.Iowa, 16 F. Supp. 853.

No special consideration is necessary to sustain these contracts.—Missouri Pac. R. Co. v. International Mar. Ins. Co., 19 S.W. 459, 84 Tex. 149.

even though the loss or injury is due to the negligence of the carrier's servants or agents,[69] and although the carrier thereby shifts from itself to insurer the loss for which it is primarily responsible.[70] The rule that an insurer when he has indemnified an owner of property for a loss occasioned by a carrier is entitled to all the means of indemnity which the satisfied owner held against the carrier, and that the owner cannot after loss relinquish any rights to which insurer is entitled, does not prevent a valid agreement between the carrier and the shipper that the carrier shall have the benefit of any insurance to be effected by the owner.[71] Accordingly, contracts containing provisions of this nature are not in violation of statutes prohibiting carriers from limiting their common-law liability,[72] nor in contravention of any other rule based on public policy.[73] Where the policy covering the goods is limited to losses for which a common carrier would not be liable at common law, a provision that the carrier shall have the benefit of any insurance effected on the goods to be transported does not protect it from liability for loss due to negligence.[74] Also, the carrier is not entitled to the benefit of insurance covering items of loss which the carrier, through the bill of lading, refused to assume.[75]

If the owner has received from the insurance company the amount of damages caused by loss of or injury to the goods in shipment, he will of course be precluded by such stipulation from a recovery against the carrier for such loss or injury.[76] Nevertheless, to entitle a carrier to the benefit of a stipulation in the shipping contract, giving to it the benefit of any insurance effected on the goods shipped, it is essential that insurer should have made an unconditional payment of the damages to insured; otherwise the carrier has no standing to enforce any claim to the benefit of the insurance.[77] As between the carrier and insurer it is held that, in the absence of any misrepresentation or intentional concealment by the shipper in obtaining insurance on the goods, or of any express stipulation on the subject in the policy, the provision in the shipping contract that the carrier shall have the full benefit of any insurance effected on the goods limits the right by way of subrogation of insurer on paying to the shipper the amount of loss or damage. In other words, the contract between insured and the carrier being valid, the latter is protected from any action by insurer on payment by it for the loss or injury sustained.[78]

69. U S—Luckenbach v. W. J McCahan Sugar Refining Co, N.Y, 39 S Ct 53, 248 U.S. 139, 63 L Ed 170, 1 A.L R. 1522, modifying The Julia Luckenbach, 235 F. 388, 148 C C A. 650.
10 C J p 515 note 29.

70. U S—Nebraska Co-op. Creameries v. Des Moines Transp. Co, D.C Iowa, 16 F Supp 853.

71. U S—Rintoul v. New York Cent. & R R. Co, C C.N.Y., 20 F. 313.

72. Tex—British, etc, Mar. Ins. Co. v Gulf, etc, R. Co, 63 Tex. 475, 51 Am R 661.

73. Tex.—Insurance Co. of North America v Easton, 11 S.W. 180, 73 Tex 167, 3 L R A 424.

74. Tex—Gulf, etc, R. Co. v Zimmerman, 17 S.W. 239, 81 Tex. 605

75. U S.—Pennsylvania R. Co. v Burr, N Y., 130 F. 847, 65 C.C.A. 331.

Expected profit

Where a bill of lading limited the liability of the carrier, in case of loss or damage, to the value of the goods at the time and place of shipment, a further provision that he should have the benefit of any insurance effected by the owner is valid only as to such insurance, or so much of the insurance, as represents the goods, and the value for which, in case of loss, the carrier is liable; and he cannot claim the benefit of insurance covering the increased value of the goods at the port of destination, which the owner had the right to effect for his own protection.—Pennsylvania R Co. v. Burr, N.Y., 130 F. 847, 65 C C A. 331.

76. U S.—Rintoul v. New York Cent. & H R R. Co, C C.N.Y., 17 F 905, 21 Blatchf 439.
Tex—Gulf, etc, R Co. v. Zimmerman, 17 S W. 239, 81 Tex 605—British F. & M. Ins Co. v. Gulf, etc, R. Co, 63 Tex. 475, 51 Am R 661

Deduction by carrier

Such a contract entitled the carrier to a deduction for insurance paid the shipper—Yazoo & M V. R. Co v. Blum, 86 So. 805, 124 Miss. 318.

77. U.S.—Luckenbach v. W. J. McCahan Sugar Refining Co, N.Y, 39 S.Ct. 53, 248 U S 139, 63 L Ed 170, 1 A L R. 1522, modifying The Julia Luckenbach, 235 F. 388, 148 C C.A. 650—Pennsylvania R Co v Burr, N Y, 130 F. 847, 65 C C A. 331.
La—Dejean v. Louisiana Western R. Co, 118 So. 822, 167 La. 111.
10 C J. p 515 note 33

Loans or conditional payments by insurer to the shipper do not relieve the carrier from liability
U.S—Luckenbach v W. J. McCahan Sugar Refining Co., N.Y, 39 S.Ct. 53, 248 U S. 139, 63 L Ed. 170, 1 A L.R. 1522, modifying The Julia Luckenbach, 235 F 388, 148 C.C A. 650.
La.—Dejean v. Louisiana Western R. Co, 118 So 822, 167 La 111.

78. U.S.—Luckenbach v. W J McCahan Sugar Refining Co., N.Y, 39 S Ct. 53, 248 U.S 139, 63 L.Ed 170, 1 A.L R 1522, modifying The Julia Luckenbach, 235 F. 388, 148 C C.A. 650.
10 C J. p 181 note 4, p 516 note 34.

V. CONNECTING CARRIERS

§ 400. Who Are Connecting Carriers

A connecting carrier is one of several common carriers whose united lines constitute the route over which a shipment is to pass. Generally, however, the first carrier is not considered a connecting carrier.

In its broadest sense the term "connecting carrier" means one of several common carriers whose lines or parts thereof united constitute the route over which a shipment is to pass, and which participate in the transportation of such shipment,[79] a common carrier furnishing a necessary link in the transportation under a through bill of lading.[80] It has been defined, however, as one whose route, not being the first one, lies somewhere between the point of shipment and the point of destination; it becomes such by virtue of the agreement between the consignor or shipper and the first carrier, whereby the latter undertakes to deliver the shipment at its ultimate destination, and thus makes the carrier beyond its own route its agent for continuing the transportation, or else undertakes only to deliver the goods safely to the next carrier on the route, who thus becomes agent for the shipper for carrying them further.[81] That it is not named in the through bill of lading is unimportant.[82] The narrower definition given above perhaps more accurately expresses the common acceptation of what is meant by the term "connecting carrier," as appears from the decisions as to whether or not a local belt railroad,[83] a switching company,[84] a terminal company,[85] a wharf company,[86] or a transfer company,[87] is or is not a connecting carrier.

A railroad company which, after completion of a through contract of carriage, agrees to deliver the goods shipped on board a steamship within the state is not a connecting carrier within the Carmack amendment.[88]

§ 401. Rights, Duties and Liabilities of Initial Carrier

The initial carrier is the shipper's agent with certain duties and liabilities which end when the goods reach their destination.

The rights and liabilities of the initial carrier, when not affected by any partnership arrangement with connecting lines or by joint undertaking

79. Ala.—Veitch v. Illinois Cent. R. Co., 68 So. 575, 14 Ala.App 146.
10 C.J. p 516 note 37.

80. U.S.—Galveston Wharf Co v. Galveston, H. & S. A. Ry Co., 52 S. Ct. 342, 285 U.S. 127, 76 L.Ed. 659, affirming Galveston, H. & S. A. Ry. Co v. American Grocery Co., 36 S. W.2d 985, 122 Tex. 1, certiorari granted Galveston Wharf Co v. Galveston, H. & S. A. Ry Co., 52 S. Ct. 41, 285 U.S. 608, 76 L.Ed. 521, and affirming Galveston, H. & S. A. Ry. Co v. American Grocery Co., Tex.Com App., 25 S.W.2d 588, which reversed Galveston Wharf Co. v. American Grocery Co., Civ.App., 13 S.W.2d 983
Ill.—See Dunsworth v. Chicago & A. R. Co., 205 Ill.App. 51.

81. Mo.—Nanson v. Jacob, 12 Mo. App. 125, 127, reversed on other grounds 6 S.W. 246, 93 Mo. 331, 3 Am.S.R. 531
10 C.J. p 516 note 40 [a].

82. U.S.—Galveston Wharf Co. v. Galveston, H. & S. A. Ry. Co., 52 S.Ct. 342, 285 U.S. 127, 76 L.Ed. 659, affirming Galveston, H. & S. A. Ry. Co. v. American Grocery Co., 36 S.W.2d 985, 122 Tex. 1, certiorari granted Galveston Wharf Co. v. Galveston, H. & S. A. Ry. Co., 52 S. Ct. 41, 285 U.S. 608, 76 L.Ed. 521, and affirming Galveston, H. & S. A. Ry. Co. v. American Grocery Co., Tex.Com.App., 25 S.W.2d 588, which reversed Galveston Wharf Co. v. American Grocery Co., Civ.App., 13 S.W.2d 983.

83. Tex.—Chicago, etc., R. Co. v. Young, Civ.App., 107 S.W. 127.
10 C.J. p 516 note 41.

84. Kan.—Missouri Pac. R. Co. v. Wichita Wholesale Grocery Co., 40 P. 899, 55 Kan. 525.
Tex.—St. Louis, etc., R. Co. v. Jackson, 118 S.W. 853, 55 Tex.Civ.App. 407.
10 C.J. p 516 note 42

Company not connecting carrier

In an action for damages to a shipment of stock occasioned by unreasonable delay, it was held that a switching company, although it might be regarded as a transportation company, was not a connecting carrier for whose negligence defendant would not be liable.—Ft. Worth & R. G. Ry. Co. v. Hasse, Tex.Civ.App., 226 S.W. 448.

85. U.S.—U. S. v. Northern Pac. Terminal Co., C.C.Or., 181 F. 879, reversed on other grounds 184 F. 603, 106 C.C.A. 583
10 C.J. p 516 note 43.

86. U.S.—Galveston Wharf Co. v. Galveston, H. & S. A. Ry. Co., 52 S.Ct. 342, 285 U.S. 127, 76 L.Ed. 659, affirming Galveston, H. & S. A. Ry. Co. v. American Grocery Co., 36 S.W.2d 985, 122 Tex. 1, certiorari granted Galveston Wharf Co. v. Galveston, H. & S. A. Ry. Co., 52 S. Ct. 41, 285 U.S. 608, 76 L.Ed. 521, and affirming Galveston, H. & S. A. Ry. Co. v. American Grocery Co., Tex.Com.App., 25 S.W.2d 588, which reversed Galveston Wharf Co. v. American Grocery Co., Civ.App., 13 S.W.2d 983.

Company held connecting carrier

A wharf company to which goods covered by through bill of lading were delivered by steamship company for transfer to connection with railroad is a connecting carrier and liable as such.—Galveston Wharf Co. v. Galveston, H. & S. A. Ry. Co., 52 S.Ct. 342, 285 U.S. 127, 76 L.Ed. 659, affirming Galveston, H. & S. A. Ry. Co. v. American Grocery Co., 36 S.W. 2d 985, 122 Tex. 1, certiorari granted Galveston Wharf Co. v. Galveston, H. & S. A. Ry. Co., 52 S.Ct. 41, 284 U.S. 608, 76 L.Ed. 521, and affirming Galveston, H. & S. A. Ry. Co. v. American Grocery Co., Com.App., 25 S.W.2d 588, which reversed Galveston Wharf Co. v. American Grocery Co., Civ. App., 13 S.W.2d 983

87. Ga.—Western, etc., R. Co. v. Exposition Cotton Mills, 7 S.E. 916, 81 Ga. 522, 2 L.R.A. 102.
Mo.—Nanson v. Jacob, 6 S.W. 246, 93 Mo. 331, 3 Am.S.R. 531, affirming 12 Mo.App. 125.
Neb.—Missouri Pac. R. Co. v. Young, 41 N.W. 646, 25 Neb. 651
10 C.J. p 516 note 44.

88. Ill.—Charles D. Stone & Co. v. New York Cent. R. Co., 214 Ill.App. 483.

for transportation, are considered infra this section and §§ 403–417, while the liability of both the initial and the connecting carriers, where such an arrangement exists, is considered infra § 429. The liability of connecting carriers for unjust discrimination is treated supra § 357 et seq, and for penalties and statutory damages, infra § 451 et seq. Matters relating to changes as affected by transportation over several lines are dealt with supra § 315.

In general, the initial carrier is the shipper's agent in transporting the goods,[89] but is under no duty to inform the shipper of goods intended for export of the customs rules and regulations of the foreign port, and is not negligent in failing so to do.[90] The liability of the initial carrier ends when the goods reach the place of destination and are refused by the consignees in that place, and on the refusal of the consignees to accept the shipment, the initial carrier is under no obligation to return the goods to the shipper, and is entirely within its rights in merely advising the shipper of the fact, and in awaiting further instructions.[91]

The initial carrier of an interstate shipment has no authority to vary lawful regulations of the interstate commerce commission.[92]

§ 402. Who Is Initial Carrier

The initial carrier is one which receives property for transportation which subsequently it delivers to another carrier for further transportation, or one contracting with the shipper for transportation.

It has been broadly stated that a common carrier which receives property for transportation which it afterward delivers to another carrier for further carriage is the initial carrier,[93] and under the Carmack amendment this is said to be so even though no express contract is made between the shipper and such carrier and notwithstanding any subsequent contract of carriage made between the shipper and an intermediate connecting carrier,[94] but the view has been taken that the initial carrier is the one contracting with the shipper, and not necessarily the one whose line constitutes the first link in transportation.[95] Under the Car-

89. Ohio—Annin v. Cincinnati Northern R. Co., 153 N.E. 522, 22 Ohio App. 37.

90. Ga.—Central of Georgia Ry. Co. v. Evans, 157 S.E. 313, 172 Ga. 53, answers to certified questions conformed to 159 S.E. 877, 43 Ga.App. 683.

91. N.Y.—Schlitten v. Hines, 186 N.Y.S. 831, 196 App.Div. 254.

92. N.Y.—Greenwald v. New York Cent. & H. R. R. Co., 159 N.Y.S. 15, 95 Misc. 122.

Unloading cars

Initial carrier of interstate shipment, by noting in bill of lading, "Car to be opened by consignee," had no authority to vary regulation of interstate commerce commission that terminal carrier should unload all cars consigned to particular station.—Greenwald v. New York Cent. & H. R. R. Co., 159 N.Y.S. 15, 95 Misc. 122.

93. Idaho—Barrett v. Northern Pac. Ry. Co., 157 P. 1016, 29 Idaho 139.
Ill.—Golden Grain Milling Co. v. St. Louis, S. & P. R. Co., 226 Ill.App. 116.
31 C.J. p. 1200 note 34.

Switching to another carrier

A carrier which receives goods for interstate shipment is the initial carrier although it has only switched the car to another carrier's lines for transportation out of the state.—Barrett v. Northern Pac. Ry. Co., 157 P. 1016, 29 Idaho 139.

94. Va.—Chesapeake & O. Ry. Co. of Indiana v. National Bank of Commerce of Norfolk, 95 S.E. 454, 122 Va. 471, certiorari denied 38 S.Ct. 582, 247 U.S. 519, 62 L.Ed. 1246.

95. N.Y.—Schlitten v. Hines, 186 N.Y.S. 831, 196 App.Div. 254.
Tex.—Houston, E. & W. T. Ry. Co. v. Houston Packing Co., Civ.App., 221 S.W. 316, error refused.
10 C.J. p. 517 note 47.

Corpus Juris is cited with approval in Utz v. Chicago, B. & Q. Ry. Co., Mo.App., 208 S.W. 640, 641.

Switching services

(1) Where shipper loaded one of its refrigerator cars on tracks of "I." Railway Company, which switched the car to "H." Railway Company, the latter paying "I." Company for such switching services, and issuing a through bill of lading to the shipper, "H." Company was the initial carrier, within the Carmack Amendment to the Interstate Commerce Act.—Houston E. & W. T. Ry. Co. v. Houston Packing Co., Tex.Civ.App., 221 S.W. 316, error refused.

(2) Where a railroad company furnished the cars for an interstate shipment of stock and by its agent signed the bill of lading, it is deemed the initial carrier, even though the cars after being loaded were transported by a belt line to the track of such railroad company.—Utz v. Chicago, B. & Q. Ry. Co., Mo.App., 208 S.W. 640.

(3) Where carloads of goods shipped into Chicago over defendant's line were there sold on defendant's tracks and under diversion orders were forwarded to a point in Tennessee over another line to which defendant switched the cars and which issued bills of lading, in the absence of a showing that defendant received the cars at the original point of shipment in Canada, it is not the initial carrier whether the shipment be considered as a through shipment from Canada or as a shipment originating in Chicago.—Cardwell v. Payne, 226 Ill.App. 227.

Carrier without tracks at place of origin

The fact that a carrier did not own tracks at the place of origin of a shipment did not negative the assumption of its relation as carrier from such point, where the bill of lading acknowledged receipt of the goods at that point, and where such carrier issued export bills of lading, acknowledging receipt of cotton at the point of origin in place of local bills of lading, it was held that there was no ambiguity, but that the carrier's obligation was to transport from place of origin to the ship, and it was entitled to receive the goods at the point of origin or at any point along the route, and to transport the goods to the ship by any means it might provide.—Texarkana & Ft. S. Ry. Co. v. Brass, Tex.Com.App., 260 S.W. 828, affirming, Civ.App., 245 S.W. 457, rehearing overruled, Com.App., 262 S.W. 737.

Reshipment

On the refusal of consignees, purchasers of goods, to accept shipment, if the initial carrier entered into a new contract for reshipment of the goods, it would then be deemed the initial carrier in the reshipment.—

mack amendment, however, this rule is subject to the qualification, that, where the only act of the company issuing the bill of lading consists in the execution of the writing itself, such execution cannot convert the company into an initial carrier, where it receives no benefit, does not participate in the transportation, and by the bill of lading actually routes the goods from beginning to end over the lines of other and different companies.[96] A carrier which receives goods intended for interstate shipment and delivers them to another carrier within the same state is the initial carrier, even though the goods were billed by the first carrier only to the point at which the second carrier took them and a new bill of lading was issued by the latter for the balance of the journey.[97]

While it has been said that there can be, in contemplation of law, but one initial carrier,[98] and while, ordinarily, as shown infra § 406 a, the rights and liabilities of all the parties to an interstate shipment of freight are controlled solely by the original contract, which connecting carriers cannot change merely by delivering to the shipper new bills of lading controlling the shipment over their respective lines, where the old contract is abandoned and a new bill of lading is issued en route by another carrier to meet a change of conditions, the carrier issuing the new bill of lading becomes the initial carrier to destination.[99]

The initial carrier continues in that capacity, within the meaning of the Carmack amendment, although the shipment is diverted before the original destination has been reached,[1] or although by direction of the consignee at the destination named in the bill, the goods are shipped to another point on the same bill of lading;[2] and where the carrier first taking the goods, is unable, because of an embargo, to deliver them at their destination and diverts them to a different carrier, to be delivered at a different destination, the second carrier does not become the initial carrier.[3] A carrier that indorses a reconsignment on a bill of lading issued by it is the initial carrier within the Carmack amendment, although it had previously delivered the goods to the next carrier.[4] Where, however, all the obligations of a previous contract of shipment are terminated, and there has been a delivery to the consignee prior to a subsequent contract for shipment, the carrier receiving the property under the subsequent contract is the initial carrier.[5] Thus, where a carrier delivers the goods at their destination, having neither undertaken to cause the shipment to be carried beyond that point nor knowledge that it was to be, and the owner then delivers them to another carrier, which issues a through bill of lading for further transportation, the latter is the initial carrier within the purview of the Carmack amendment;[6] and,

Schlitten v. Hines, 186 N.Y.S. 831, 196 App.Div. 254.

96. Ga.—Georgia Southern & F. Ry. Co. v. Tifton Produce Co., 176 S.E. 89, 49 Ga.App. 530.

97. Ill.—Lino v. Northwestern Pac. R. Co., 163 N.E. 316, 332 Ill. 93, reversing 246 Ill.App. 451.

98. Va.—Chesapeake & O. Ry. Co. of Indiana v. National Bank of Commerce of Norfolk, 95 S.E. 454, 122 Va. 471, certiorari denied 38 S.Ct. 582, 247 U.S. 519, 62 L.Ed. 1246.

99. Ky.—Louisville & N. R. Co. v. Johnson, 206 S.W. 638, 182 Ky. 418.

Surrender of original bill

Where an interstate shipment of live stock from Nevada to Kentucky was stopped in Illinois, the original bill of lading surrendered, the stock transferred to other cars, mingled with other stock, and shipped to destination under new bill of lading, in the absence of showing of violation of Interstate Commerce Law, the carrier issuing the new bill of lading became the initial carrier to destination.—Louisville & N. R. Co. v. Johnson, 206 S.W. 638, 182 Ky. 418.

Invalidity of original contract

If initial contract covering interstate shipment was invalid as contract east of Chicago, then second contract might be made by connecting carrier, subjecting it to liability, under Interstate Commerce Act, as amended, of initial carrier. In determining the invalidity of the initial contract, Interstate Commerce Act, as amended in view of § 7, did not prohibit tariff regulation prohibiting movement of live stock on shipper's order contract east of Chicago, regulation applying to all carriage of live stock freight on lines of all common carriers east of Chicago.—Chesapeake & O. Ry. Co. of Indiana v. National Bank of Commerce of Norfolk, 95 S.E. 454, 122 Va. 471, certiorari denied 38 S.Ct. 582, 247 U.S. 519, 62 L.Ed. 1246.

1. Ark.—Chicago, R. I. & P. Ry. Co. v. S. L. Robinson & Co., 23 S.W.2d 976, 180 Ark. 911.
Ga.—Davis v. Southern Ry. Co., 185 S.E. 606, 53 Ga.App. 286.

Bill controlled by consignor

When the consignor controls the bill of lading, or has the right to change the destination or divert the goods to a new one, a reconsignment does not break the connection, but the new destination is regarded as the original one, to determine the liability of the initial carrier under the Carmack amendment to the Interstate Commerce Act.—Produce Trading Co. v. Norfolk Southern R. Co., 100 S.E. 316, 178 N.C. 175.

2. Ga.—Baltimore & O. R. Co. v. Montgomery & Co., 90 S.E. 740, 19 Ga.App. 29.
Ill.—Bruner v. Grand Trunk Western Ry. Co., 236 Ill.App. 541, affirmed 150 N.E. 266, 319 Ill. 421.—Sparr v. Southern Pac. Co., 220 Ill. App. 180.

3. Ill.—Gerard v. Davis, 225 Ill.App. 377.

4. N.C.—Myers v. Norfolk Southern R. Co., 88 S.E. 149, 171 N.C. 190.

5. Idaho.—Rice v. Oregon Short Line R. Co., 198 P. 161, 33 Idaho 565.

6. Ark.—Chicago, R. I. & P. Ry. Co. v. S. L. Robinson & Co., 23 S.W. 2d 976, 180 Ark. 911.
Minn.—Victor Produce Co. v. Western Transit Co., 160 N.W. 248, 135 Minn. 121.

Sale at first destination

Where wheat was shipped from Missouri point to shipper at St. Louis with no intention to ship beyond state line, but was sold and reshipped under new bill of lading to Illinois point, shipment to St. Louis

under similar circumstances, it has been held that the receiving carrier was not the initial carrier as to the extended transportation where it did not appear whether new bills of lading were issued therefor or whether the goods moved on the original bill.[7]

Although the operator of express cars fixed no through rate to points within its lines and rendered no bill for through charges, but charged a flat rate per one hundred pounds irrespective of the character of the goods or their value, or whether the charges of an express company to which it delivered shipments were prepaid or collected from the consignee, it advancing the express charges where they were prepaid and by its bill of lading undertaking to carry shipments to their destination on the line of the express company, the carrier is not a mere agent of the shipper but is the initial carrier within the meaning of the Interstate Commerce Act.[8] A railroad company which, after completion of a through contract of carriage, agrees to deliver the goods shipped on board a steamship within the state is not an initial carrier within the Carmack amendment.[9]

Where the initial carrier is owned and operated by the first connecting carrier both are deemed initial carriers.[10]

A forwarding carrier is a carrier who transports goods to the delivering carrier.[11]

§ 403. Loss or Injury on Connecting Lines in General

A receiving carrier acting as agent for another carrier is not liable for loss occurring after delivery to next carrier.

The question of whether a carrier which receives goods marked to a destination beyond its usual line of transportation is liable for loss or injury occurring on connecting lines depends for its solution on a variety of facts and circumstances which will be separately considered in subsequent sections of this Title. Thus, the effect on such liability of the absence of statute or special contract for through transportation is treated infra § 404; the existence of such a special contract, infra § 405; the existence of a contract limiting liability to the carrier's own line, infra § 407; and special statutory provisions such as the Carmack amendment relating to interstate commerce or, state legislation affecting intra-state shipments, infra § 406. The initial carrier's liability for injury on a connecting line due to defective cars is specifically discussed supra §§ 51, 56.

Where the receiving carrier takes as agent for another carrier, it is not liable for the loss of goods after it has turned over whatever control it had to the next carrier.[12]

§ 404. In Absence of Statute or Special Contract for Through Transportation

The authorities differ as to whether, in absence of statute or special contract, the initial carrier is liable for loss or injury occurring on a connecting line.

In a number of decisions, in accordance with what is called the English rule, it is held that a common carrier which receives goods consigned to a point beyond the terminus of its own line is liable for loss or injury occurring on a connecting line if it does not by contract limit its liability to loss or injury occurring on its own line;[13] and

was not part of continuous interstate shipment, and carrier by which shipment from St. Louis was made was initial carrier, within Carmack amendment, although sale was made at final mill weights.—Forest Green Farmers' Elevator Co. v. Davis, 270 S.W. 394, 216 Mo.App. 545.

7. S.C.—Beaufort Truck Growers' Ass'n v. Seaboard Air Line Ry. Co., 121 S.E. 357, 127 S.C. 496.

8. R.I.—Glenlyon Dye Works v. Interstate Express Co., 91 A. 5, 36 R.I. 558

9. Ill.—Charles D. Stone & Co. v. New York Cent. R. Co., 214 Ill.App. 483

10. Ky.—Makeever v. Georgia S. & F. Ry. Co., 294 S.W. 144, 219 Ky. 699

11. Ky.—Brunk v. Ohio, etc., R. Co., 105 S.W. 443, 444, 127 Ky. 304.

12. Mo.—Central Nat. Bank v. Pryor, App., 207 S.W. 298

13. Ill.—American Hide & Leather Co. v. Southern Ry. Co., 228 Ill. App. 305, affirmed 142 N.E. 200, 310 Ill. 524. See Dunsworth v. Chicago & A. R. Co., 205 Ill.App. 51 But see Pittsburgh, C., C. & St. L. Ry. Co. v. Hedrich, 202 Ill.App. 48 Contra dictum Wood & Co. v. Illinois Cent. R. Co., 240 Ill.App. 6

Tenn.—Sunshine Hosiery Mills v. Chambers Truck Co., 107 S.W.2d 515—Dixie Greyhound Lines v. Kaplan, 89 S.W.2d 342, 169 Tenn. 513.

10 C.J. p. 517 note 54

"In Tennessee we follow the English rule, which is supposed to have its origin in the case of Muschamp v. Lancaster & P. J. R. Co., 8 Mees & W., 421, and hold that in the absence of an express stipulation to the contrary, an undertaking to carry the shipment to its ultimate destination is implied from the mere act of acceptance, and the carrier is responsible for loss or injury occurring on the line of any succeeding carrier to which the shipment is entrusted to continue or complete the transportation. Transportation Co. v. Bloch Brothers, 6 S.W. 881, 86 Tenn. 393; 4 Elliott on Railroads, 3 Ed., sec. 2164. The other view, known as the so called 'American rule,' followed by the Federal courts and the courts of many other states, is that the duty of a railroad receiving a shipment marked for a destination beyond its own line is discharged, in the absence of a special agreement or course of business to the contrary, by safely carrying the goods over its own line and delivering them in good order to the next succeeding carrier to continue or complete the transportation."—Nashville, C. & St.

an agreement to deliver to a connecting carrier in no way limits the initial carrier's undertaking to carry the shipment to its destination in such case nor relieves it of liability.[14]

In most of the decisions, and in the federal courts, however, the English doctrine has been repudiated. Briefly stated, the rule formulated by the decisions of these courts is that, in the absence of any contract, usage, or statute to the contrary, or of any partnership agreement between connecting carriers or joint contract for transportation, the liability of the initial carrier, notwithstanding the fact that the goods are marked to a point beyond its line, terminates when it transports the goods to the end of its line and delivers them to a connecting carrier to be transported to their destination.[15] It has been held, however, that this rule, which was adopted in connection with railroad transportation should not, on the grounds of public policy, be applied to carriers of goods by motor truck, in view of the different conditions under which they operate; and, accordingly, the initial motor carrier is held liable for a loss occurring while the shipment was in possession of a connecting motor carrier.[16] In view of the rule stated infra § 449 c, that in the absence of special contract the initial carrier is under no duty to allow its cars to go over the connecting line, it is not liable for damages resulting from unloading the goods from its cars at the end of its line, if such unloading was accomplished without negligence.[17]

§ 405. Under Special Contract for Through Transportation

a. In general

b. What constitutes through transportation contract

a. In General

Contracts for through transportation are valid and subject the initial carrier to liability for breach of contract and for loss occurring while the property is in charge of other carriers.

As heretofore shown in § 32, a common carrier is not at common law bound to carry to points beyond its own line, and, as shown supra § 404, by the great weight of authority the common-law liability of a carrier for injury to, or loss of, goods is restricted to its own line, in the absence of contract or statute extending its liability. However, carriers may make valid contracts to transport property beyond their own line, and, when they do, they are bound to deliver the property at its place of destination according to their contract, and are liable for loss or injury occurring after the property has passed over their line and while in the charge of other carriers.[18] Under these

L. Ry. Co. v. Sparkman, Petty & Jameson, 8 Tenn.App. 683, 686.

Referring to Corpus Juris, the rule stated in the text has been declared the law of Tennessee.—Southeastern Express Co. v. Fry Produce Co, 2 Tenn.App. 37, 41.

Carrier by motortruck

A trucking company which by its receipt and bill of lading undertook to transport goods by motortruck to destination without limiting its liability was liable as initial carrier for shipment lost in transit by a connecting carrier notwithstanding the connecting carrier was suggested by the shipper, since by virtue of the receipt and bill of lading connecting carrier was agent of trucking company.—Sunshine Hosiery Mills v. Chambers Truck Co, Tenn, 107 S.W. 2d 515

14. Tenn.—Nashville, C. & St. L. Ry. Co. v. Sparkman, Petty & Jameson, 8 Tenn.App. 683.

15. U.S.—Oregon-Washington R. & Nav. Co. v. McGinn, Wash., 42 S.Ct. 332, 258 U.S. 409, 66 L.Ed. 689, reversing, C.C.A., McGinn v. Oregon-Washington R. & Nav. Co, 265 F. 81, certiorari granted 40 S.Ct. 148, 254 U.S. 628, 65 L.Ed. 446—Inland Waterways Corporation v. Standard Commercial Tobacco Co., C.C.A.La., 65 F.2d 715—Wiener v. Compagnie Generale Transatlantique, D.C.N.Y., 55 F.2d 252, reversed on other grounds, C.C.A., 61 F.2d 893—Vital v. Kerr, C.C.A.N.Y., 297 F. 959, certiorari denied Bigio v. Kerr, 44 S.Ct. 637, 265 U.S. 592, 68 L.Ed. 1196

Cal.—McCaslin v. Southern Pac. Co., 203 P. 742, 187 Cal. 716.

Ky.—Illinois Cent. R. Co. v. Stimson, 268 S.W. 835, 207 Ky. 78.

Mass.—Florida Cotton Oil Co. v. Clyde S. S. Co, 125 N.E. 855, 235 Mass. 10.

Mo.—Home Telephone Co. v. Granby & Neosho Telephone Co., 126 S.W. 773, 147 Mo.App. 216.

N.Y.—Noel v. Westcott Express Co., 158 N.Y.S. 702, 95 Misc. 154.

Tex.—Quanah, A. & P. Ry. Co. v. Warren, Civ.App., 184 S.W. 232.

10 C.J. p. 518 note 55.

Corpus Juris has been quoted or cited with approval in:

U.S.—Basila v. Western Union Telegraph Co., D.C.Fla., 24 F.2d 569, 572.

N.C.—M. V. Moore & Co. v. Southern Ry. Co, 111 S.E. 166, 169

16. U.S.—Tubize Chattilon Corporation v. White Transp. Co., D.C.Md., 6 F.Supp. 15

17. Tex.—Galveston, etc., R. Co. v. Jones, 134 S.W. 328.

18. U.S.—Wiener v. Compagnie Generale Transatlantique, C.C.A.N.Y., 61 F.2d 893, reversing, D.C., 55 F.2d 252—Tubize Chattilon Corporation v. White Transp. Co, D.C.Md., 6 F.Supp. 15.

Mo.—Randazzo Macaroni Mfg. Co. v. Minneapolis & St. L. R. Co., App., 251 S.W. 466—Wilson v. Chicago Great Western R. Co., App., 190 S.W. 22—Keithley & Quinn v. Lusk, 189 S.W. 621, 195 Mo.App. 143.

Mont.—Parham v. Chicago, M. & St. P. Ry. Co., 189 P. 227, 57 Mont. 492.

Okl.—St. Louis & S.F. R. Co. v. Wm. Bondies & Co, 166 P. 179, 64 Okl. 88—St. Louis & S.F. R. Co. v. Akard, 159 P. 344, 60 Okl. 4

S.C.—Barwick v. Northwestern R. Co. for South Carolina, 104 S.E. 545, 115 S.C. 123.

Tex.—Hines v. First Guaranty State Bank of Aubrey, Com.App., 243 S.W. 972, affirming, Civ.App., 228 S.W. 668—Wichita Valley Ry. Co. v. Brown, Civ.App., 270 S.W. 1112—St. Louis B. & M. Ry. Co. v. Lane, Civ.App., 248 S.W. 59.

10 C.J. p. 519 note 57—p. 533 note 47. "There is no doubt that a railroad company may contract for a move-

circumstances, the connecting carrier, receiving the goods for the purpose of transporting them to their destination and delivering them there, becomes the agent of the carrier receiving the goods from the consignor for shipment for the purposes of transportation and delivery.[19] Contracts of this nature are not ultra vires,[20] although it was at one time open to debate whether that was the case;[21] and such contracts are valid, although the agreement is to transport the goods beyond the limits of the state in which the carrier is chartered.[22] Where a carrier contracts to transport the goods over a particular connecting line and fails to do so, it is liable for such damages flowing from its breach as ought reasonably to have been foreseen at the time of entering into the contract.[23] Even though by statute the shipper has his option, after giving notice, to sue the initial or delivering carrier, the carrier must transport and deliver according to the terms of the bill of lading.[24]

b. What Constitutes Through Transportation Contract

Whether a particular contract of carriage provides for through transportation is determined in each case under general rules of construction.

A contract for through transportation may be either express or implied,[25] and it may be either absolute or conditional.[26] The law and courts favor the making and interpretation of contracts for shipments over connecting carriers as being for through shipment, and making the initial carrier with whom the contract is made liable for all damage whether caused by such initial carrier or the connecting carrier.[27] However, a contract whereby the liability of the carrier is sought to be extended beyond its own line will not be inferred from loose and doubtful expressions; the proof of such undertaking must be clear and explicit.[28] Where there is a conflict between the written and the printed parts of a contract of shipment or bill of lading, the one indicating a through contract and the other not, the written portion must prevail.[29] In a bill of lading, pro-

ment of freight over connecting carriers by land and a carrier by water for a shipment to or from a foreign country, and, if it does so, without reasonable limitation of its liability, it may be held for delay or damage to the goods occurring at any point, whether on its own line or that of a connecting carrier."—A Russo & Co v. U. S, C.C.A.La, 40 F.2d 39, 42.

Starting point

A carrier has the right to make a contract for the carriage of goods, notwithstanding the starting point is elsewhere than along the line of its own route—Schlitten v. Hines, 186 N.Y.S. 831, 196 App Div. 254.

Destination

In an action for breach of contract to transport corn into Mexico without reloading into other cars, it was held that the destination of shipment was not a point in Texas, as claimed by defendant, notwithstanding provision that the corn should not be taken into Mexico without surrender of bills of lading, which was for the shipper's protection; hence, where a connecting carrier refused to transport the corn into Mexico in accordance with the contract, defendant was liable.—Brunswig v. Bush, Mo App, 221 S.W. 759, certiorari dismissed Bush v Brunswig, 41 S Ct. 9, 254 U.S 660, 65 L Ed. 462.

Land and water carriage

Through bill of lading, providing for carriage of goods by connecting railroads to named port and from there to foreign port, required railroads to deliver goods in same good order as when received to on-carrying vessel lying in former port and bound for latter port—Rudy-Patrick Seed Co. v. Kokusai Kisen Kabushiki Kaisha, D C N.Y., 1 F.Supp 266

19. Ga.—Williamson-Inman Co v Nashville, C & St L Ry, 160 S E 687 44 Ga App. 129.
Mo.—Keithley & Quinn v. Lusk, 189 S.W. 621, 195 Mo.App. 143.
Okl.—St Louis & S. F R. Co. v Akard, 159 P 344, 60 Okl. 4.
10 C J. p 519 note 58.

20. N.Y.—Swift v Pacific Mail SS Co, 12 N E. 583, 106 N.Y. 206.
Pa.—Baltimore, etc, Steamboat Co. v. Brown, 54 Pa. 77
10 C J. p 520 note 59.

21. N J.—Saunders v. Adams Express Co, 74 A. 670, 78 N J Law 441.

22. N.C.—Lindley v Richmond, etc, R Co, 88 N C. 547.

23. Okl.—St Louis & S F. R. Co. v Wm. Bondies & Co, 166 P. 179, 64 Okl. 88

Loss of milling privilege

"Where a carrier contracted to transport a shipment of corn from D. to A over the line of a certain connecting carrier, upon whose line a milling in transit privilege was allowed at A., and breached its contract, delivering said shipment into A over the line of another carrier, thereby depriving consignee of the milling in transit privilege at A upon the line over which it agreed to transport same, said carrier will be liable for all damages proximately caused by its failure to deliver over the line designated in its contract."—St. Louis & S. F. R. Co. v. Wm. Bondies & Co, 166 P. 179, 64 Okl. 88

24. Fla.—Seaboard Air Line Ry. Co. v France, 111 So 248, 92 Fla. 1102

25. Cal.—Colfax Mountain Fruit Co. v. Southern Pac Co., 50 P. 775, 118 Cal 648, 40 L R A. 78.
10 C J p 520 note 62.

26. S.C.—Piedmont Mfg. Co v. Columbia, etc., R Co., 19 S C. 353.

27. Mo.—Keithley & Quinn v Lusk, 189 S W 621, 195 Mo App. 143

Reason for rule

"This is rightly so, as illustrated by the present case, since it is almost impossible for a shipper, who parts with his property in good condition and, having no control over or knowledge of it during transit, finds it damaged when delivered to him at the end of a long journey, to ascertain the exact time and place of the injury or by which carrier inflicted Moreover, to sue a connecting carrier often necessitates going to a foreign jurisdiction"—Keithley & Quinn v. Lusk, 189 S.W. 621, 622, 195 Mo.App. 143

28. U.S.—Wiener v. Compagnie Generale Transatlantique, D C.N.Y, 55 F 2d 252, reversed on other grounds, C C.A., 61 F 2d 893.
10 C.J. p 520 notes 64, 65.

Through contract shown see 10 C.J p 520 note 66 [a].

Through contract not shown

Ala.—Louisville & N. R Co v. Williams, 73 So. 548, 198 Ala 425
10 C J p 520 note 67 [a].

29. N Y.—Babcock v. Lake Shore, etc., R. Co., 49 N.Y. 491.

viding for the carrying of the goods beyond the line of the carrier issuing the bill, a provision in fine print, somewhat obscured by the use of stamps, that in case of injury to the goods only the carrier having custody of the goods at the time of the injury shall be liable cannot be regarded as part of the contract.[30] Where several bills of lading constitute the entire contract of carriage, they must be construed together.[31]

In jurisdictions where the English rule, stated supra § 404, prevails, and in some jurisdiction where the so-called American doctrine prevails, the giving of a through bill of lading or shipping receipt by the initial carrier will of course amount to a contract for through transportation and bind it for loss or injury occurring on the lines of the connecting carriers.[32] Other decisions, however, maintain the contrary doctrine;[33] and further it has been held that no contract of through shipment should be inferred from the giving of a through bill of lading or shipping receipt where the instrument limits the liability of the carrier to its own line.[34] Delivery of an interstate shipment of freight to an intra-state railroad, under a through bill of lading and a guaranty of a through rate, is a through shipment and is governed by the Carmack amendment making initial carriers liable for loss or injury caused by connecting carriers.[35]

According to the weight of authority the mere fact that the initial carrier gives a through rate on the goods to their point of destination on the line of another carrier does not of itself amount to a contract of carriage beyond its own line,[36] especially where the contract of shipment restricts the carrier's liability to its own line.[37] Other decisions, however, seem to take the contrary view.[38] A shipment is not a continuous one not completed until arrival at its ultimate destination where the freight rate thereon was not a through one to its destination, but was made up of separate charges to its original destination, reconsigning charges assessed on its reconsignment, and charges assessed by the last carrier, there being no indorsement on the original contract of shipment extending it.[39]

According to a considerable number of decisions, if the initial carrier charges and collects freight for the entire route in advance, it thereby assumes responsibility for safe carriage over every other part of the route; in other words, it has entered into a contract for through shipment.[40] A limitation placed on this rule by some cases is that it does not apply if the contract of carriage expressly limits the liability of the initial carrier to its own line;[41] but other decisions hold that, where the initial carrier has collected full freight for the entire route, it cannot limit its liability to its own route.[42] It has also been held that the rule does not apply where the initial carrier has no interest in, or connection with, the connecting carrier, except to collect and to pay over to it the freight charge from the end of the initial carrier's line to the point of destination;[43] and that merely requiring a guaranty of the payment of the entire through freight will not justify the conclusion that the initial carrier thereby undertook to be liable over the whole route.[44] On the other hand, it has been held by some decisions that the acceptance of full freight is but an incident to the transportation of the freight and does not imply any contract for through liability, in the absence of other circumstances showing clearly the carrier's intention to undertake for the safety of the goods over the entire route.[45]

Wis.—Peet v. Chicago, etc., R. Co., 19 Wis. 118.

30. Wash.—Allen v. Canadian Pac. R. Co., 84 P. 620, 42 Wash. 64, 7 Ann.Cas. 468.

31. U.S.—A. Russo & Co. v. U. S., C.C.A.La., 40 F.2d 39.

32. Ga.—Central, etc., R. Co. v. Hasselkus, 17 S.E. 838, 91 Ga. 382, 44 Am.S.R. 37.
Ky.—Ireland v. Mobile, etc., R. Co., 49 S.W. 188, 105 Ky. 400, 20 Ky. L. 1586.
10 C.J. p. 521 notes 69, 70.

33. N.C.—Reid v. Southern R. Co., 69 S.E. 618, 153 N.C. 490—Phillips v. North Carolina R. Co., 78 N.C. 294.
10 C.J. p. 521 note 71.

34. Mich.—Rickerson Roller Mill Co. v. Grand Rapids, etc., R. Co., 34 N.W. 269, 67 Mich. 110.
10 C.J. p. 521 note 72.

35. Tex.—Houston, etc., R. Co. v. Lewis, 129 S.W. 594.
10 C.J. p. 521 note 77.

36. Iowa.—Carter v. Chicago, etc., R. Co., 125 N.W. 94, 146 Iowa 201—Hill v. Burlington, etc., R. Co., 14 N.W. 249, 60 Iowa 196.
10 C.J. p. 521 note 78.

37. Wis.—Schneider v. Evans, 25 Wis. 241, 3 Am.R. 56.

38. U.S.—Smeltzer v. St. Louis, etc., R. Co., C.C.Ark., 158 F. 649.
10 C.J. p. 522 note 80.

39. Ill.—Wenatchee Valley Fruit Growers Ass'n v. Michigan Cent. R. Co., 215 Ill.App. 129.

40. Neb.—St. Joseph, etc., R. Co. v. Palmer, 56 N.W. 957, 38 Neb. 463, 22 L.R.A. 335.
10 C.J. p. 522 note 81.

41. Ohio.—Stevens v. Lake Shore, etc., R. Co., 20 Ohio Cir.Ct. 41, 11 Ohio Cir.Dec. 168.
10 C.J. p. 522 note 82.

42. Mo.—Marshall, etc., Grain Co. v. Kansas City, etc., R. Co., 75 S.W. 638, 176 Mo. 480, 98 Am.S.R. 508.
Neb.—St. Joseph, etc., R. Co. v. Palmer, 56 N.W. 957, 38 Neb. 463, 22 L.R.A. 335.
10 C.J. p. 522 note 83.

43. Mo.—Simmons Hardware Co. v. St. Louis, etc., R. Co., 120 S.W. 663, 140 Mo.App. 130.

44. Miss.—Illinois Cent. R. Co. v. Kerr, 8 So. 330, 68 Miss. 14.

45. W.Va.—Roy v. Chesapeake, etc.,

Where goods are received by a carrier "to be forwarded" to a certain destination not on its line of road, some cases hold that no through contract is thereby made, and that the initial carrier is liable only for such injuries as may occur on its own line through its own negligence,[46] at least in the absence of evidence of charging and collecting through freight, or other business connections or arrangements with connecting lines;[47] but there is authority to the contrary.[48] An agreement by an initial carrier "to forward" certain cars from a point on its line to a point on another line at a designated rate, in which agreement no other carrier is mentioned, nor any mention made of compensation, to any other party, or anything said of a change to the care of any other carrier on the way, is a through contract.[49]

The acceptance of goods under an agreement "to deliver" at a designated point on the line of another carrier has been held to amount to a contract of through shipment.[50]

Where a carrier by contract undertakes to deliver goods at a certain point, "with privilege of reshipping" reserved in the bill of lading to the carrier, the carrier's liability as such continues until the goods are safely delivered at destination.[51] So, in an action against a carrier for failure to deliver freight at a place beyond its own route, testimony by the shipper that he arranged for the transportation to such point, with the privilege of changing the destination of another place, will be deemed sufficient evidence of an express contract for through shipment.[52]

An undertaking on the part of a carrier to carry over the entire route cannot be implied from the fact of its entering into an arrangement with a dispatch company and with other carriers whose lines connect with its own, whereby it undertakes to carry at certain special rates all the goods for the transportation of which the dispatch company may contract; nor can an undertaking be implied from the carrier's giving a waybill on which it appears that the goods are for a point beyond its line, but which plainly purports to be a manifest of freight from one terminus of the road to the other.[53] A special check issued by a railroad as agent for a local express carrier for delivery of a passenger's baggage from the railroad station to his house is not a special contract for a through shipment.[54]

A contract of shipment is considered to be one entire contract of carriage from the point of shipment to that of destination, notwithstanding it provides that the "responsibility of each carrier" is "to extend hereunder only" to the line of the receiving carrier, where no provision is made by which any person other than the receiving carrier is to choose the connecting carrier, and the receiving carrier does, in fact, choose such connecting carrier.[55]

Waybills which contain several items of charges for the two lines over which goods are to be carried do not constitute a contract for through transportation, but indicate the opposite;[56] and the fact that a car is waybilled to a particular place has been held not to constitute evidence of a contract of through transportation, but merely to show the destination of the car.[57] Where a written contract issued by a carrier for the shipment of cattle to a point on its line limits its liability to damage accruing on its own line, a waybill issued by it for the guidance of its employees, which denominated plaintiff's shipment as a through live stock waybill to a point on a connecting line, via the point on defendant's line specified in the written contract, did not change or affect the terms of such written contract;[58] but a waybill in which the heading spoke of the goods as goods to be transported by the first road, from the place of departure to the place at the end of the whole line, and at which the owner wished to have them delivered, was held to be competent evidence of a through shipment.[59]

R Co, 57 S E 39, 61 W.Va. 616, 31 L R A.,N S, 1.
10 C J. p 522 note 86.

46. Ill.—Merchants' Dispatch, etc, Co v. Moore, 88 Ill. 136, 30 Am.R 541.
10 C.J. p 522 note 87.

47. Miss.—Crawford v. Southern R Assoc., 51 Miss 222, 24 Am R. 626

48. Kan—St. Louis, etc, R Co. v. Piper, 13 Kan. 505.
Mo—Davis v. Jacksonville Southeastern Line, 28 S.W. 965, 126 Mo. 69

49. U.S.—Ohio, etc., R. Co. v. McCarthy, C C Mo, 96 U S. 258, 24 L. Ed 693.

50. Ky.—Bryan v. Memphis, etc., R Co, 11 Bush 597
Me—Perkins v Portland, etc, R. Co, 47 Me 573, 74 Am D. 507.
10 C J. p 523 note 96.

51. La—Hirsch v Leathers, 23 La Ann 50.
Mo—Little v. Semple, 8 Mo 99, 40 Am D. 123.

52. Tex—Texas-Mexican R Co. v. Gallagher, Civ App, 64 S.W 809
10 C.J. p 523 note 92

53. U S—St. Louis Ins. Co v. St. Louis, etc, R Co, C.C.Mo, 104 U. S. 146, 26 L Ed. 679.

54. N Y.—Noel v. Westcott Express Co, 158 N Y.S 702, 95 Misc. 154.

55. Ill—Wabash R. Co. v. Curtis, 134 Ill App. 409.

56. Me—Taylor v. Maine Cent. R. Co, 32 A. 905, 87 Me 299

57. Va.—Herring v. Chesapeake, etc., R Co., 45 S E 322, 101 Va 778.
10 C J p 523 note 98.

58. Tex—San Antonio, etc., R. Co. v. Barnett, 66 S.W. 474, 27 Tex.Civ. App 498.

59. U.S.—Ogdensburg, etc, R Co v. Pratt, C.C Mass., 89 U S. 123, 22 L. Ed 827.

Where an initial carrier, on demand of the shipper, accepts and assumes the responsibility of tracing the shipment and of reporting delivery, if made, so that the shipper may enforce payment by the consignee, it cannot thereafter claim that its responsibility in that respect terminated on delivery to a connecting carrier.[60]

An agreement to carry the goods to its usual place of delivery at their destination if on its road, otherwise to deliver to another carrier on the route to the destination is not a contract for through shipment.[61]

Where the parties contemplate a through shipment, part over a connecting line, at a through rate, the initial carrier does not destroy the character of the shipment as a through one or relieve itself from the liability of a through carrier by issuing a bill of lading over its own line only, and itself reconsigning the goods to the connecting carrier;[62] nor is a through interstate bill issued by the initial carrier converted into a contract to carry to an intermediate point by a provision for transportation by another carrier from such intermediate point.[63]

§ 406. Under Special Statutory Provisions

a. Federal legislation
b. State legislation

a. Federal Legislation

Under the Carmack amendment, as amended, connecting carriers are treated as agents of the initial carrier, and the latter is accordingly liable for any actionable loss or injury occurring during the shipment whether on its own line or on that of the connecting carrier.

Under the Carmack amendment, as originally enacted and subsequently amended, 49 U.S.C.A. § 20 (11), whenever an initial carrier accepts goods for shipment to a point on another line in another state, it is conclusively treated as having made a through contract of shipment and will be liable for any loss or injury occurring on any connecting line over which the shipment may pass, as well as for loss or injury occurring on its own line,[64] and this rule

60. S.C.—Atlantic Coast Line R. Co. v. Schirmer, 69 S.E. 439, 87 S.C. 309.
10 C.J. p. 523 note 2.

61. Ill.—Canadian Pac. Ry. Co., 260 Ill.App. 482

62. Mo.—Keithley & Quinn v. Lusk, 189 S.W. 621, 195 Mo.App. 143.

63. Va.—Big Sandy & C. R. Co. v. Ball, 113 S.E. 722, 133 Va. 431.

64. U.S.—Oregon-Washington R. & Nav. Co. v. McGinn, Wash., 42 S.Ct. 332, 258 U.S. 409, 66 L.Ed. 689, reversing, C.C.A., McGinn v. Oregon-Washington R. & Nav. Co., 265 F. 81, certiorari granted 40 S.Ct. 148, 254 U.S. 628, 65 L.Ed. 446—Missouri, K. & T. Ry. Co. of Texas v. Ward, Tex., 37 S.Ct. 617, 244 U.S. 383, 63 L.Ed. 1213—Chicago & E. I. R. Co. v. Collins Produce Co., Ill., 235 F. 857, 149 C.C.A. 169, affirmed 39 S.Ct. 189, 249 U.S. 186, 63 L.Ed. 552

Ala.—Fred Henderson & Walters v. Atlantic Coast Line Ry. Co., 76 So. 309, 200 Ala. 393—Warley Fruit & Produce Co. v. Louisville & N. R. Co., 84 So. 311, 17 Ala.App. 263.

Ark.—Chicago, R. I. & P. Ry. Co. v. S. L. Robinson & Co., 23 S.W.2d 976, 180 Ark. 911—Missouri Pac. R. Co. v. Wellborn & Walls, 280 S.W. 18, 170 Ark. 469, certiorari denied Missouri Pac. R. Co. v. Wellborn, 47 S.Ct. 91, 273 U.S. 694, 71 L.Ed. 844—Missouri Pac. R. Co. v. Bell, 259 S.W. 745, 163 Ark. 284, certiorari denied 45 S.Ct. 125, 266 U.S. 625, 69 L.Ed. 474—Love v. Missouri Pac. R. Co., 242 S.W. 829, 158 Ark. 642—St. Louis, I. M. & S. Ry. Co. v. Cunningham Commission Co., 188 S.W. 1177, 125 Ark. 577.

Conn.—Alderman Bros. Co. v. New York, N. H. & H. R. Co., 129 A. 47, 102 Conn. 461.

Fla.—American Ry. Exp. Co. v. Fegenbush, 144 So. 320, 107 Fla. 145

Ga.—Central of Georgia Ry. Co. v. Council Bros., 136 S.E. 418, 163 Ga. 494, 61 A.L.R. 1304—Georgia Southern & F. Ry. Co. v. Tifton Produce Co., 127 S.E. 771, 160 Ga. 213, answers to certified questions conformed to 128 S.E. 592, 34 Ga.App. 13—Fleshnar & Adar v. Southern Ry. Co., 127 S.E. 768, 160 Ga. 205, answers to certified questions conformed to 128 S.E. 78, 33 Ga.App. 823—Georgia Southern & F. Ry. Co. v. Tifton Produce Co., 176 S.E. 89, 49 Ga.App. 530—Louisville & N. R. Co. v. Campbell Lumber Co., 166 S.E. 262, 45 Ga.App. 851—Atlantic Coast Line R. Co. v. Ousley, 139 S.E. 586, 37 Ga.App. 215—Central of Georgia Ry. Co. v. Council Bros., 137 S.E. 569, 36 Ga.App. 573.

Idaho.—Barrett v. Northern Pac. Ry. Co., 157 P. 1016, 29 Idaho 139

Ill.—Bruner v. Grand Trunk Western Ry. Co., 150 N.E. 266, 319 Ill. 421, affirming 236 Ill.App. 541—Sparr v. Southern Pac. Co., 220 Ill.App. 180.

Iowa.—Adams Steel Co. v. Chicago Great Western R. Co., 165 N.W. 367, 181 Iowa 1052, L.R.A. 1918B 622.

Kan.—Kirsch v. Postal Telegraph Cable Co., 164 P. 267, 100 Kan. 250

Ky.—Makeever v. Georgia S. & F. Ry. Co., 294 S.W. 144, 219 Ky. 699—Cleveland, C., C. & St. L. Ry. Co. v. Young, 195 S.W. 93, 175 Ky. 841—Southern Ry. Co. v. Avey, 191 S.W. 460, 173 Ky. 598

La.—American Trading Co. of New Orleans v. New Orleans & N. E. R. Co., 105 So. 82, 159 La. 9.

Me.—Lewis Poultry Co. v. New York Cent. R. Co., 105 A. 109, 117 Me. 482.

Mich.—Ithaca Roller Mills v. Ann Arbor R. Co., 186 N.W. 516, 217 Mich. 348—Winget v. Grand Trunk Western Ry. Co., 177 N.W. 273, 210 Mich. 100, certiorari denied Grand Trunk Western Ry. Co. v. Winget, 41 S.Ct. 6, 254 U.S. 629, 65 L.Ed. 447

Mo.—State ex rel. and to Use of St. Louis, B. & M. Ry. Co. v. Taylor, 251 S.W. 383, 298 Mo. 474, certiorari granted State of Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor, 44 S.Ct. 132, 263 U.S. 696, 68 L.Ed. 511, affirmed 45 S.Ct. 47, 266 U.S. 200, 69 L.Ed. 247, 42 A.L.R. 1232—Amber v. Davis, 232 S.W. 459, 221 Mo.App. 448—Mount Arbor Nurseries v. New York, C. & St. L. R. Co., 273 S.W. 410, 217 Mo.App. 31—Randazzo Macaroni Mfg. Co. v. Minneapolis & St. L. R. Co., App., 251 S.W. 466—O'Briant v. Pryor, App., 195 S.W. 759—Conley v. Chicago, B. & Q. R. Co., 183 S.W. 1111, 192 Mo.App. 534.

Mont.—Parham v. Chicago, M. & St. P. Ry. Co., 189 P. 227, 57 Mont. 492.

Neb.—McGinley v. Union Pac. R. Co., 263 N.W. 393, 129 Neb. 855.

N.Y.—Terranova v. Southern Pac. Co., 200 N.Y.S. 309, 206 App.Div. 64—Pacific Coast Borax Co. v.

applies, even though in violation of the statute no receipt or bill of lading was issued.[65] The purpose of the Carmack amendment, the validity of which has been upheld,[66] was to create in the initial carrier unity of responsibility for transportation to destination,[67] and to give the shipper a direct and ready remedy, and to enable him, in case of loss or damage to his goods, to have recourse to the initial carrier, and to leave the initial carrier to its recourse for whatever damage it may have to pay to the company doing the injury in case any such injury should be done by a connecting line.[68] Briefly

Shippers' Navigation Co., 178 N Y S 182, 108 Misc. 198.

N C—M V. Moore & Co v. Southern Ry Co, 111 S E. 166, 183 N. C. 213—Produce Trading Co v. Norfolk Southern R Co, 100 S.E 316, 178 N.C 175

N D—Knapp v. Minneapolis, St P. & S S M. Ry. Co., 159 N.W. 81, 34 N D 466.

Pa.—Moritz v. Florida East Coast Ry Co., 92 Pa Super 291—Sabarof v. Florida East Coast Ry. Co., 92 Pa Super 286.

S C—Sanders v. Charleston & W. C. Ry Co, 145 S E 400, 147 S.C. 487—Sanders v. Charleston & W C Ry. Co., 141 S E 607, 143 S. C 395

Tenn—Southeastern Express Co. v. Fry Produce Co, 2 Tenn App. 37.

Tex—Nation v San Antonio Southern Ry. Co, 283 S W 157, 115 Tex 431—St Louis Southwestern Ry Co. of Texas v. Seale & Jones, Com App., 267 S W. 676, modifying on other grounds, Civ App., 247 S W. 883—Burd v. San Antonio Southern Ry. Co., Com.App., 261 S W. 1021, modifying San Antonio Southern Ry. Co. v. Burd, Civ. App, 246 S W. 1060—Gulf, C. & S. F. Ry. Co. v. Morris, Com. App., 250 S W. 1017, affirming, Civ App, 241 S.W. 235—Gulf, C. & S. F. Ry. Co. v Hines, Com.App., 250 S.W. 1013, affirming, Civ App, 239 S W. 244—Ft. Worth & D. C. Ry Co v. Hill, Com App, 213 S.W. 952—Texas & P. Ry. Co. v West Bros, Com App, 207 S.W. 918 affirming in part and reversing in part St. Louis, I. M. & S R. Co. v. West Bros, Civ App, 159 S.W 142, rehearing denied Texas & P. R. Co. v. West Bros, Com App, 214 S.W 808—Rio Grande & E P. Ry. Co v. Roy Campbell & Co, Civ App., 288 S W. 539—Texas & N. O. R Co. v H. & C. Newman, Civ.App, 273 S W 335—Lancaster v. Norris, Civ App., 271 S W 401, reversed on other grounds Norris v. Lancaster, Com App., 280 S W. 574—Houston E & W. T. Ry Co. v. Houston Packing Co, Civ App, 221 S W. 316, error refused—Texarkana & F S. Ry. Co v. Twin City Products Co, Civ.App, 208 S W. 989—Baker v. Memphis, D. & G. Ry Co, Civ App., 208 S.W. 182—Andrews v. Roberts, Civ.App, 192 S W. 569.

Utah—Barry v Los Angeles & S. L. R. Co, 189 P. 70, 56 Utah 69

Vt.—Saliba v. New York Cent. R. Co, 144 A 194, 101 Vt. 427—Haglin-Stahr Co v. Montpelier & W R. R. Co, 102 A. 940, 92 Vt 258

Va—Norfolk & W. Ry. Co v Aylor, 150 S E 252, 153 Va. 575, certiorari denied 51 S Ct. 26, 282 U.S 847, 75 L Ed. 751—Chesapeake & O. Ry. Co. of Indiana v. National Bank of Commerce of Norfolk, 95 S.E. 454, 122 Va. 471, certiorari denied 38 S Ct. 582, 247 U S. 519, 62 L Ed. 1246

Wis—Vogel v. Delaware, L & W. R. Co, 171 N W. 198, 168 Wis. 567.

10 C.J p 524 notes 7, 8.

Terminal express carrier

Under Carmack amendment initial carrier by rail is liable for all intermediate carriers, including express carrier at end of transit, until goods are received at their destination.—Vogel v Delaware, L & W. R Co., 171 N.W. 198, 168 Wis. 567.

Switching at destination

Where a connecting carrier transporting a shipment of live stock delivers it to another road acting as its agent, and not as a connecting carrier, to be switched to stockyards for unloading at destination, the initial carrier is liable for injuries sustained during such switching operations, the destination of the shipment being the stockyards, and not the railroad yards.—Rio Grande, E P & S. F. R Co. v. Kraft & Madero, Tex.Civ.App., 212 S W. 981, dismissed for want of jurisdiction.

What constitutes contract

Bill of lading issued by initial carrier, and classification and schedules, including tariff circulars on file with interstate commerce commission, constituted contract of carriage within the federal law—American Cotton Products Co v New York Cent. R Co., 255 N.Y.S. 672, 142 Misc 821.

Referring to Corpus Juris, the rule of the text was applied in Louisville & N R. Co. v. B F. Roden Grocery Co., 96 So. 912, 915, 209 Ala 694.

65. Vt.—Dionne v. American Express Co., 101 A 209, 91 Vt. 521

Va—Jennings Automatic Dump Body v Virginian Ry. Co., 119 S. E. 147, 137 Va. 207—Chesapeake & O Ry. Co of Indiana v National Bank of Commerce of Norfolk, 95 S E. 454, 122 Va. 471, certiorari denied 38 S Ct. 582, 247 U.S. 519, 62 L.Ed. 1246.

10 C.J. p 526 note 35.

66. Ark—St. Louis & S F. R Co. v Heyser, 130 S.W. 562, 95 Ark. 412, Ann Cas.1912A 610.

Ga—Southern Ry. Co v. Baker, 124 S E 876, 158 Ga 830.

Ill—Fry v. Southern Pac. Co, 93 N E. 906, 247 Ill. 564.

Okl.—St Louis & S F. R Co. v. Akard, 159 P. 344, 60 Okl. 4

Tex—Galveston H & S. A. Ry. Co v. Johnson & Johnson, Civ.App., 133 S.W 725—Missouri, K. & T. Ry. Co. of Texas v Harriman Bros., Civ App, 128 S.W 932, reversed on other grounds 33 S.Ct. 397, 227 U S 657, 57 L Ed. 690.

Va—Norfolk & W. Ry. Co. v. Dixie Tobacco Co., 69 S E. 1106, 111 Va 813, affirmed 33 S.Ct. 609, 228 U.S. 593, 57 L Ed 980.

10 C J. p 524 note 9.

As not violative of due process of law clause of constitution see C. J S title Constitutional Law § 641, also 10 C J. p 524 note 9 [a].

As not denying equal protection of the laws see C J S. title Constitutional Law § 555, also 12 C J. p 1179 note 32.

67. U S.—Missouri, K. & T. Ry. Co. of Texas v Ward, Tex, 37 S.Ct. 617, 244 U.S 383, 63 L.Ed. 1213.

Ark—Chicago, R I. & P. Ry Co. v. S L Robinson & Co, 23 S.W 2d 976, 180 Ark. 911.

Fla—American Ry. Exp. Co. v. Fegenbush, 144 So 320, 107 Fla 145

Tenn—Southern Ry. Co. v. Lewis & Adcock Co., 201 S W 131, 139 Tenn. 37, L R A.1918C 976

Tex—Gulf, C. & S. F. Ry. Co. v. Hines, Com App, 250 S.W. 1013, affirming, Civ App, 239 S.W. 244

10 C J. p 524 note 11.

68. U S—Oregon-Washington R. & Nav Co. v McGinn, Wash 42 S. Ct 332, 258 U S. 409, 66 L Ed. 689, reversing, C.C A, McGinn v. Oregon-Washington R & Nav. Co., 265 F. 81, certiorari granted 40 S.Ct. 148, 254 U S. 628, 65 L.Ed 446—Missouri, K & T Ry Co. of Texas v. Ward, Tex., 37 S Ct. 617, 244 U S 383, 63 L Ed. 1213

N.Y—Western Electric Co. v. New York & B. Transp. Line, 180 N Y S 873.

10 C.J. p 524 note 12.

"The object of the Carmack Amendment was designed to aid the shipper in finding a liable corporation, where there were several carriers involved in the contract of carriage, and do away with the necessity of the shipper endeavoring to find upon which connecting line the

stated the reasons are: (1) The expense incurred in an effort to establish the shipper's claim in a distant court.[69] (2) The great hardship imposed by the rule which required a shipper sustaining loss to prove on which line it occurred, which resulted sometimes in failure to recover, simply because the shipper could not produce evidence to show where the loss occurred.[70] As to the question of expediency, it was said that, while in some instances it might be burdensome to the initial carrier to be held responsible for loss or injury to the property, caused by some other carrier over whose line the property passed, yet the initial carrier can generally protect itself better than a shipper can.[71] The legal effect of the provision is not to confer on the lawful holder of a bill of lading any new kind of contractual right, but to extend to him rather a new kind of remedy for the enforcement of his preëxisting contractual rights, by granting him a right of action against the initial carrier where the primary liability is on a connecting carrier.[72] The remedy thus given is additional to, and concurrent with, any other existing federal remedy,[73] and, as shown in C.J.S. title Commerce § 15, the provision in the Carmack amendment that nothing therein shall deprive the holder of a bill of lading of any remedy which he has under existing law is construed to mean existing federal law.

Carriers subject to act. The statute does not apply to interstate commerce by motor truck,[74] or interstate commerce wholly by water,[75] but interstate commerce wholly by railroad is subject to the act,[76] and so is interstate commerce partly by railroad and partly by water, under a common control, management, or arrangement for a continuous carriage or shipment.[77] The fact that the lines of a water carrier and a railway carrier connect and thus form a continuous line of transportation over which traffic moves between two or more states does not bring the water carrier within the control of the federal act, unless such carriers are under a "common control," or "common management," or there is between them a "common arrangement for a continuous carriage or shipment,"[78] and, where this is not the case, the water carrier, as initial carrier, is

culpable negligence occurred. The rule of law which required proof affirmatively that the damage occurred while the property was in the possession of the connecting carrier was intended to be obviated by this amendment, making the initial carrier responsible for all damage, no matter upon whose lines the negligence occurred"—Pacific Coast Borax Co. v. Shippers' Navigation Co., 178 N.Y.S. 182, 183, 108 Misc. 198

"The evident purpose of such amendment was to do away with the necessity of the holder of a bill of lading making an investigation to determine which carrier was at fault, if other than the receiving carrier moved the shipment, and to leave the question of ultimate liability to be settled among themselves by the interested carriers"—State ex rel. and to Use of St. Louis, B & M. Ry Co v. Taylor, 251 S.W. 383, 385, 298 Mo. 474, certiorari granted State of Missouri ex rel. St. Louis, B & M Ry. Co v Taylor, 44 S Ct 132, 263 U.S. 696, 68 L Ed. 511, affirmed 45 S Ct. 47, 266 U.S. 200, 69 L Ed 247, 42 A.L.R. 1232

"The purpose of the Carmack Amendment was to relieve the shipper of the trouble and expense of ascertaining what carriers have moved his goods in interstate commerce, and of determining upon which lines he has been damaged, and of locating and suing such carriers, oftentimes in jurisdictions remote from his domicile, and to transfer this burden to the initial carrier, which, because of the essentially close and reciprocal relations existing between transportation companies, is necessarily in a better position to ascertain, secure, and produce in court the facts upon which actions for damages must be based, and from which the liabilities of the carriers must be determined"—San Antonio Southern Ry. Co. v. Burd, Tex Civ App., 246 S.W. 1060, 1062, modified on other grounds Burd v. San Antonio Southern R. Co., Com.App., 261 S.W. 1021.

69. Md.—Baltimore, etc., R. Co. v. Sperber, 84 A. 72, 117 Md. 595.

70. Md—Baltimore, etc., R. Co. v. Sperber, supra
10 C.J. p 524 note 14.

71. Md—Baltimore, etc., R Co. v. Sperber, supra.

72. La.—W. H. Hodges & Co v Pennsylvania R Co., 132 So. 115, 171 La. 699, affirming 128 So. 52, 14 La.App 285

73. La—W H. Hodges & Co. v. Pennsylvania R Co., supra.
N.Y—Pacific Coast Borax Co v. Shippers' Navigation Co., 178 N.Y.S 182, 108 Misc 198
Ohio.—Norfolk & Western Ry Co v. Dresbach, 8 Ohio App. 333
Tex—Nation v San Antonio Southern Ry Co., 283 S.W. 157, 115 Tex 431—Fort Worth & Denver City Ry. Co v Motley, Civ.App., 87 S.W.2d 551, error dismissed
10 C.J p 524 note 10.

74. U.S.—Tubize Cattilon Corporation v. White Transp. Co., D.C. Md., 6 F.Supp. 15

Reason for rule

"The Carmack Amendment to the Interstate Commerce Act, shows it applies to any common carrier railroad or transportation company subject to the provisions of that act The Interstate Commerce Act, 49 U.S.C.A. § 1 et seq., applies to certain stated common carriers, and enumerates carriers by railroad and those carrying partly by railroad and partly by water, certain pipe lines, etc., but does not mention carriers by motortruck. Under the well-established rule that where matters included are enumerated, the effect is to exclude from the class those not enumerated, it would seem that the Carmack Amendment, making the initial carrier liable for loss on connecting lines on through interstate shipments does not apply"—Sunshine Hosiery Mills v Chambers Truck Co., Tenn., 107 S.W.2d 515, 516.

75. Mass—Florida Cotton Oil Co v. Clyde S. S. Co., 125 N.E. 855, 235 Mass 10
Tenn.—American Peanut Corporation v. St. Louis & Tennessee River Packet Co., 3 Tenn App. 552.

76. Tenn—American Peanut Corporation v. St. Louis & Tennessee River Packet Co., supra.

77. Tenn—American Peanut Corporation v. St Louis & Tennessee River Packet Co., supra.

78. Tenn.—American Peanut Corporation v. St Louis & Tennessee River Packet Co., supra.

not liable for loss or injury caused by a connecting carrier.[79]

Extent and limits of rule in general. Although the liability of an initial carrier as a common carrier for loss of goods on its own lines is not affected by the act,[80] and although an action ex delicto against an initial carrier as the actual tortfeasor, or against the lessor corporation whose line of railroad such a carrier operates is not thereby precluded,[81] the Carmack amendment is in derogation of the common-law doctrine by which a common carrier's liability is restricted to loss or damage on its own line,[82] and, so far as initial carriers in interstate shipments are concerned, abrogates that doctrine.[83] However, it was not the purpose of the amendment to extend the carriers' common-law liability, except to provide that, until the transportation ended, the liability of an initial carrier should continue exactly the same as if it owned one line of railroad from the point of shipment to the point of destination.[84] The legislation makes the initial carrier responsible for the safe delivery of goods accepted by it for transportation;[85] and to hold the initial carrier liable, it is unnecessary to establish negligence on its part.[86] The act, however, does not impose an absolute liability for loss or injury occurring on either line,[87] and the fact that the shipment was interstate does not ipso facto fix liability of the initial carrier under the Carmack amendment for damage caused by a connecting carrier, as the liability of the initial carrier depends on the extent of its obligation, evidenced by the bill of lading.[88] Obviously, under this statute, no special contract creating extra terminal liability for damages occurring on the line of a connecting carrier is necessary.[89] The liability of the initial carrier under the statute is the same as if it owned a continuous line from the point of shipment to the point of destination,[90] or, as otherwise expressed, its ef-

79. Tenn.—American Peanut Corporation v. St. Louis & Tenn. River Packet Co., supra.

80. Mo.—State ex rel. and to Use of St. Louis, B. & M. Ry. Co. v. Taylor, 251 S.W. 383, 298 Mo. 474, certiorari granted State of Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor, 44 S.Ct. 132, 263 U.S. 696, 68 L.Ed. 511, affirmed 45 S.Ct. 47, 266 U.S. 200, 69 L.Ed. 247, 42 A.L.R. 1232.

Tex.—Fort Worth & Denver City Ry. Co. v. Motley, Civ.App., 87 S.W.2d 551, error dismissed.

10 C.J. p. 525 note 19.

Furnishing defective car

Initial carrier, furnishing car with leaky roof and bad doors for shipment of sugar, moving sugar about considerably during repairs en route, and leaving it scattered over half of car, was held liable, either as carrier occupying position of insurer, or as warehouseman failing to use ordinary care and diligence to protect goods, for damage by rain after arrival at destination, before removal into warehouse, and loss of sugar spilled on floor of car.—American Trading Co. of New Orleans v. New Orleans & N. E. R. Co., 105 So. 82, 159 La. 9.

81. Ga.—Southwestern R. Co. v. Davies, 186 S.E. 899, 53 Ga.App. 712.

82. Ga.—Southern Pac. Co. v. Crenshaw, 63 S.E. 865, 5 Ga.App. 675.

83. N.Y.—Greenwald v. Weir, 111 N.Y.S. 235, 59 Misc. 431, reversed on other grounds 115 N.Y.S. 311, 130 App.Div. 696, and affirmed 92 N.E. 218, 199 N.Y. 170, 35 L.R.A., N.S., 971.

84. Mo.—Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co., 187 S.W. 149, 193 Mo.App. 572.

Or.—Stoddard Lumber Co. v. Oregon-Washington R. & Nav. Co., 165 P. 363, 84 Or. 399, 4 A.L.R. 1275.

Pa.—Keystone Pub. Co. v. Pennsylvania R. Co., 78 Pa.Super. 486.

10 C.J. p. 525 note 18.

Fault of consignee

Initial carrier is not liable for damage to strawberry shipment, where there was no showing of negligence on part of initial or connecting carrier in handling shipment in transit, shipment was in transit less than scheduled time, consignee was notified day after arrival, and shipment by consignee's orders was not placed on service track until three days later.—Marion T. Fannaly, Inc., v. Illinois Cent. R. Co., La.App., 160 So. 131.

85. N.H.—Ostroff v. Hustis, 114 A. 27, 80 N.H. 141.

86. Neb.—Mayhall & Neible v. Chicago, B. & Q. R. Co., 185 N.W. 326, 107 Neb. 58, error dismissed Union Stock Yards Co. of Omaha v. Mayhall & Neible, 43 S.Ct. 699, 262 U.S. 731, 67 L.Ed. 1205.

N.C.—Produce Trading Co. v. Norfolk Southern R. Co., 100 S.E. 316, 178 N.C. 175.

87. N.Y.—Burke v. Gulf, etc., R. Co., 147 N.Y.S. 794.

88. S.C.—Beaufort Truck Growers' Ass'n v. Seaboard Air Line Ry. Co., 121 S.E. 357, 127 S.C. 496.

89. Ind.—Wabash R. Co. v. Priddy, 101 N.E. 724, 179 Ind. 483.

90. U.S.—Chicago & E. I. R. Co. v. Collins Produce Co., Ill., 39 S.Ct. 189, 249 U.S. 186, 63 L.Ed. 552, affirming, C.C.A., 235 F. 857.

Ark.—Chicago, R. I. & P. Ry. Co. v. S. L. Robinson & Co., 23 S.W.2d 976, 180 Ark. 911.

Ga.—Fleshnar & Adar v. Southern Ry. Co., 127 S.E. 768, 160 Ga. 205, answers to certified questions conformed to 128 S.E. 78, 33 Ga.App. 823.

La.—American Trading Co. of New Orleans v. New Orleans & N. E. R. Co., 105 So. 82, 159 La. 9.

Me.—Lewis Poultry Co. v. New York Cent. R. Co., 105 A. 109, 117 Me. 482.

Miss.—Yazoo & M. V. R. Co. v. Craig, 79 So. 102, 118 Miss. 299, certiorari denied 39 S.Ct. 11, 248 U.S. 573, 63 L.Ed. 427.

Mo.—Randazzo Macaroni Mfg. Co. v. Minneapolis & St. L. R. Co., App., 251 S.W. 466.

Or.—Stoddard Lumber Co. v. Oregon-Washington R. & Nav. Co., 165 P. 363, 84 Or. 399, 4 A.L.R. 1275.

Pa.—Keystone Pub. Co. v. Pennsylvania R. Co., 78 Pa.Super. 486.

Vt.—Haglin-Stahr Co. v. Montpelier & W. R. R. Co., 102 A. 940, 92 Vt. 258.

10 C.J. p. 525 note 22.

Corpus Juris is quoted in Louisville & N. R. Co. v. B. F. Roden Grocery Co., 96 So. 912, 914, 209 Ala. 694.

Fault of connecting carrier

Seizure of shipment of poultry on connecting line, by military authorities in flood district under martial law, to relieve sufferers, if solely by reason of invitation of connecting line, when it could have delivered shipment by exercise of ordinary care, renders the initial carrier liable.—Chicago & E. I. R. Co. v. Collins Produce Co., Ill., 39 S.Ct. 189, 249 U.S. 186, 63 L.Ed. 552, affirming, C.C.A., 235 F. 857.

fect is to make the connecting carrier the agent of the initial carrier, the same as if it had contracted for through carriage to the point of destination;[91] but connecting carriers are agents of the initial carrier only because of the contract of the initial carrier which is the bill of lading as issued or modified by the original carrier.[92] As shown infra § 407 a (2) if shipments are received for through transportation and delivery beyond its line by the initial carrier, any stipulation for exemption from liability for loss or injury due to the default of its agents or connecting carriers is void and inoperative, but, in harmony with the rules stated supra § 97 et seq, the initial carrier may contract for exemption from liability where the shipment is damaged without the fault of the carrier or its agencies,[93] nothing in the federal law forbids the making of a contract limiting liability where there is no negligence either on the part of the initial or the connecting carrier.[94] Whether the initial carrier is liable under contracts limiting liability depends in each case on the provisions of the contract and the circumstances surrounding the loss or injury.[95]

91. U S—Missouri, K & T Ry Co of Texas v Ward, Tex, 37 S Ct 617, 244 U.S 383, 63 L Ed. 1213
Ala.—Louisville & N R Co. v. B. F Roden Grocery Co, 96 So. 912, 209 Ala. 694.
Ark.—Chicago, R I. & P. Ry. Co. v S. L. Robinson & Co., 23 S W. 2d 976, 180 Ark 911.
Ky—Cleveland, C, C. & St L Ry. Co. v. Young, 195 S W 93, 175 Ky. 841.
La.—American Trading Co of New Orleans v New Orleans & N E R. Co., 105 So 82, 159 La 9
Me—Lewis Poultry Co. v New York Cent R Co., 105 A. 109, 117 Me 482.
Mo—State ex rel and to Use of St Louis, B & M Ry Co v. Taylor, 251 S.W 383, 298 Mo. 474, certiorari granted State of Missouri ex rel. St. Louis, B. & M Ry. Co. v. Taylor, 44 S Ct. 132, 263 U S. 696, 68 L Ed. 511, affirmed 45 S Ct. 47, 266 U.S. 200, 69 L Ed. 247, 42 A L R. 1232 — Randazzo Macaroni Mfg. Co. v. Minneapolis & St. L. R. Co., App, 251 S.W. 466.
N C.—M. V. Moore & Co. v. Southern Ry. Co., 111 S.E. 166, 183 N C 213.
Tex.—Nation v San Antonio Southern Ry. Co, 283 S W. 157, 115 Tex. 431—Burd v San Antonio Southern Ry. Co., Com App, 261 S.W. 1021, modifying San Antonio Southern Ry. Co. v. Burd, Civ. App., 246 S W. 1060—Gulf, C. & S. F. Ry. Co. v Hines, Com.App., 250 S.W 1013, affirming, Civ App., 239 S W. 244
Vt.—Haglin-Stahr Co. v. Montpelier & W R. R Co, 102 A. 940, 92 Vt 258
Va.—Jennings Automatic Dump Body v Virginian Ry. Co., 119 S. E. 147, 137 Va. 207.
10 C J. p 525 note 23.

Disposition at destination

Disposition of decayed perishable merchandise by connecting carrier at point of destination, on consignee's rejection of shipment, is binding on initial carrier—American Fruit Growers of California v. Pacific Electric Ry. Co, 238 P. 105, 72 Cal App 682.

92. Va—Southern Produce Co. v Norfolk Southern R Co, 132 S. E. 360, 144 Va 422.

93. Cal—American Fruit Distributors of California v. Hines, 203 P. 821, 55 Cal.App. 377

94. Cal—American Fruit Distributors of California v. Hines, supra

Strikes

A carrier may by fair and reasonable agreement restrict its liability to losses which are the proximate result of strikes on a connecting carrier's road, where the loss is not occasioned by negligence of the carrier in the premises or it could not by reasonable diligence have prevented the loss—Jonesboro, L. C & E R Co v. Maddy, 248 S W. 911, 157 Ark 484, 28 A.L R. 498.

Nonagency station

A provision of a bill that property destined to, or taken from, a station, wharf, or landing at which there is no regularly appointed agent should be entirely at risk of owner after unloading from cars or vessels, or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharfs, or landings, should be at owner's risk until cars were attached to and after they were detached from trains, is valid—U S Feed Mills Co v Missouri Pac. R. Co., 36 S W 2d 136, 224 Mo App. 1134.

95. **Act of God**

Under the Carmack amendment, where a bill of lading exempted the carrier from loss by act of God, and was issued on the lower of two rates approved and published, and the goods were delayed through the negligence of a connecting carrier, so that, when they arrived at the destination, they could not be unloaded, due to a heavy rain, and were damaged by water at the time of the Dayton flood, the carrier was not liable, the proximate cause of the damage being the flood, and not the carrier's negligence—Continental Paper Bag Co. v Maine Cent. R. Co., 99 A 259, 115 Me. 449.

Strikes

In an action against an initial carrier, for loss to an interstate shipment of hogs, never delivered to consignees, but turned over by an intermediate carrier to another, it was error to limit defendant's right to exemption from liability by reason of strikes as provided for by contract to a finding that delay was occasioned solely by a strike of employees of a terminal carrier, as the Interstate Commerce Act extends to all terminal facilities and instrumentalities A strike on any of the connecting carriers singly or together would, under the contract release the initial carrier from liability except in case of negligence with regard to averting the loss—Jonesboro, L C. & E R. Co v Maddy, 248 S W 911, 157 Ark. 484, 28 A.L R. 498

"Unavoidable causes"

Bill of lading relieving, from liability for loss "by accidents or delays from unavoidable causes," unusual and unexpected congestion at place of destination due to teamsters at destination accustomed to handle shipments being occupied removing freight already there, was held not to exonerate initial carrier from liability for shipment destroyed by fire while sidetracked nine miles from destination on tracks of connecting carrier.—Yazoo & M. V R. Co. v Craig, 79 So. 102, 118 Miss 299, certiorari denied 39 S Ct. 11, 248 U S 573, 63 L Ed. 427

Limitation to liability of warehouseman

Duty as a carrier of an interstate shipment terminated forty-eight hours after arrival of the goods at destination and notice thereof given by the connecting carrier pursuant to the uniform "order notify" bill of lading, providing they might be kept subject to responsibility as warehousemen only if not removed within that time by the party entitled—Efland Hosiery Mills v. Hines, 114 S.E 472, 184 N.C. 356

Limitation as to value

(1) Provision of interstate through shipment contract limiting the car

The liability of the initial carrier is for every kind of positive misconduct of the connecting carrier affecting the property, and for its negligence and lack of care or effort,[96] but it is not limited to loss caused by some affirmative act of the connecting carrier, and, even though the latter is without fault if the loss is one for which it would be liable under the common-law principles discussed supra § 71, the initial carrier is liable.[97] The initial carrier is liable for the damages resulting from the wrongful act of the terminal carrier in delivering[98] or refusing to deliver[99] the goods shipped without taking up the bill of lading; but the amendment was not intended to forbid the delivery of a shipment by a terminal carrier under any and all circumstances to anyone except the holder of the bill of lading.[1] The statute has been held sufficiently comprehensive to include damages caused by delay in transportation, infra § 416; damages by reason of excessive freight charges caused by misrouting by a connecting carrier;[2] expense for assortment entailed where separate shipments were commingled in transit;[3] damages caused by negligence of the terminal carrier in unloading the shipment;[4] damages due to the final carrier's failure to notify the consignee of the arrival of the goods,[5] or its failure to notify the shipper of their arrival and nondelivery to the consignee[6] provided the final carrier was bound to notify the shipper;[7] damages caused by the failure, on the consignee's refusal to accept them, to store them for the account of the consignor;[8] damages due to the failure of the con-

rier's liability to one hundred dollars per animal is valid under Carmack amendment.—Jordan v. Chicago, B. & Q. R. Co., App., 196 S W. 417, transferred from 191 S.W. 70, 269 Mo 281.

(2) It has been said, however, that under the statute the initial carrier is liable for shipper's full actual loss or damage, notwithstanding limitations of liability or amount of recovery in receipt, bill of lading, contract, rule, regulation, or tariff. —American Trading Co. of New Orleans v. New Orleans & N. E. R Co., 105 So. 82, 159 La. 9.

(3) The validity of contractual limitations of liability as to value is treated generally supra § 102, and the construction, operation, and effect of such limitations, supra §§ 112, 113.

Private siding

That a railroad may put goods on a siding does not make it other than private within bill of lading that carrier shall incur no liability for goods received from, or delivered on, private sidings, where such place of delivery was fixed by the bill, with the making of which the terminal carrier had nothing to do— Charles Bianchi & Sons v. Montpelier & W. R. R. Co., 104 A. 144, 92 Vt. 319.

96. La.—American Trading Co. of New Orleans v. New Orleans & N E. R. Co., 105 So 82, 159 La. 9.
Me.—Lewis Poultry Co. v. New York Cent. R. Co., 105 A. 109, 117 Me. 482

97. Miss.—Yazoo & M. V. R Co. v Craig, 79 So 102, 118 Miss. 299, certiorari denied 39 S Ct. 11, 248 U.S. 573, 63 L.Ed. 427.

Loss by fire

Under Carmack amendment, liability of initial carrier for goods consumed by fire while sidetracked along line of connecting carrier before reaching destination is not limited to loss caused by some affirmative act of connecting carrier.—Yazoo & M. V. R. Co. v. Craig, 79 So. 102, 118 Miss 299, certiorari denied 39 S Ct. 11, 248 U.S. 573, 63 L Ed 427.

98. Conn.—Alderman Bros. Co. v New York, N. H. & H. R. Co., 129 A. 47, 102 Conn. 461.
Fla.—Atlantic Coast Line Ry. Co. v Roe, 118 So. 115, 96 Fla. 429.
Mich.—Winget v. Grand Trunk Western Ry. Co., 177 N.W. 273, 210 Mich. 100, certiorari denied Grand Trunk Western Ry. Co. v. Winget, 41 S.Ct. 6, 254 U.S. 629, 65 L.Ed. 447
Mo.—Peycke Bros. Commission Co. v. Sandstone Co-Op. Co., 191 S.W. 1088, 195 Mo.App. 417.
10 C.J. p 525 note 24.

Act of carrier or warehouseman

Under the Carmack amendment, the initial carrier is liable for the wrongful delivery by the terminal carrier without surrender of the original bill of lading, and it is immaterial whether its negligence was that of a warehouseman or a carrier, since it is not released from its delivery as a duty of transportation according to the terms of the shipping bill by which it received the goods and carried them to the terminal point, and this principle is particularly applicable in such case because the carrier would not have been liable for refusal to deliver goods shipped without surrender of original bill of lading and without reasonable identification and indemnity furnished to the carrier —Winget v. Grand Trunk Western Ry Co., 177 N W. 273, 210 Mich 100, certiorari denied Grand Trunk Western Ry Co v Winget, 41 S Ct. 6, 254 U.S 629, 65 L.Ed. 447.

99. N C. — McCotter v. Norfolk Southern R Co, 100 S E. 326, 178 N.C. 159.

1. Tex.—City Nat. Bank of El Paso v. El Paso & N. E. Ry. Co., Tex. Civ App, 225 S.W. 391, certiorari granted 42 S Ct. 461, 258 U S. 616, 66 L Ed. 792, and affirmed 43 S.Ct. 640, 262 U.S. 695, 67 L Ed. 1184.

2. Ohio—Chesapeake, etc., R Co. v. Ward Lumber Co., 21 Ohio Cir. Ct N.S. 337.

3. Ala.—Inland Waterways Corporation v. Sloss Sheffield Steel & Iron Co., 136 So 849, 223 Ala. 397.

4. Ark.—Missouri Pac. R. Co. v. Wellborn & Walls, 280 S W. 18, 170 Ark. 469, certiorari denied Missouri Pac. R. Co v. Wellborn, 47 S.Ct. 91, 273 U.S 694, 71 L.Ed. 844.

5. Ga.—Georgia Southern & F. Ry. Co. v. Tifton Produce Co, 127 S. E 771, 160 Ga. 213, answers to certified questions conformed to 128 S E 592, 34 Ga.App. 13

6. Ga.—Atlantic Coast Line R. Co. v Ousley, 139 S.E. 586, 37 Ga. App 215
Or.—Stoddard Lumber Co. v. Oregon-Washington R & Nav. Co, 165 P. 363, 84 Or. 399, 4 A.L.R 1275.
10 C.J. p 525 note 32.

Ignorance of shipper's residence

Where a carrier is unable to deliver goods which have been shipped through connecting carriers, under the Carmack amendment, the initial carrier is not relieved of its duty to notify the consignor because the terminal carrier did not know his residence.—Stoddard Lumber Co v. Oregon-Washington R. & Nav Co, 165 P. 363, 84 Or. 399, 4 A.L.R 1275.

7. N Y.—Markowitz v. New York Cent R Co., 172 N.Y S. 233.
Pa.—Keystone Pub. Co v. Pennsylvania R. Co, 78 Pa.Super 486.
Tex.—Texarkana & F. S Ry. Co v. Twin City Products Co., Civ.App., 208 S.W. 989.

8. Ala.—Louisville & N. R. Co. v.

necting carrier properly to feed and water live stock;[9] and damages due to a misdelivery by the terminal carrier.[10] It does not include damages for loss by a connecting carrier of equipment accompanying a shipment but forming no part of it.[11]

Only carriers as such are subject to the statute, and it applies only to shipments that are in the custody of carriers as such and before their duty as carriers is at an end;[12] and according to some authorities, the initial carrier is not liable for the act or omission of the delivering carrier resulting in injury to goods which it holds as a warehouseman,[13] and the same rule applies where the liability of the carrier has ceased under the provisions of the bill of lading by reason of storage of the goods in a public warehouse by the terminal carrier,[14] although the view has been taken that, if the goods are lost or injured, destroyed, or converted by a connecting carrier when acting as warehouseman under such facts as render the connecting carrier liable, the initial carrier is also liable under the statute, since whatever liability the terminal carrier

B. F. Roden Grocery Co., 96 So. 912, 209 Ala. 694.
10 C.J. p 525 note 32.

Forwarding on unauthorized order

Applying the rule of the text as stated in Corpus Juris, to which the court in its opinion referred, it has been held that, under the Carmack amendment initial carrier was liable for connecting carrier's breach of duty in forwarding shipment to strangers to the contract on order of unauthorized person on consignee's refusal to receive, instead of storing the goods—Louisville & N. R. Co v. B F Roden Grocery Co., 96 So. 912, 915, 209 Ala. 694.

9. Mo—Miller v. Quincy, O. & K C R Co., 225 S W. 116, 205 Mo App. 463.

Shipment detained by embargo

An initial carrier of interstate shipment of sheep is liable under the Carmack amendment for failure of the connecting carrier properly to feed and water at intermediate point, although, by reason of stockyards' embargo at destination, shipment could not be unloaded at destination, and for that reason was held at intermediate point.—Miller v. Quincy, O. & K. C. R. Co., 225 S W. 116, 205 Mo.App 463.

10. U S—King v. Barbarin, Mich., 249 F. 303, 161 C.C A. 311.
Ga—Southern Ry. Co. v. Hodgson Bros Co., 98 S E 541, 148 Ga. 851, reversing 95 S.E 263, 21 Ga.App 753, opinion of Sup Ct. conformed to 99 S E. 41, 25 Ga App 536.
Mich.—J F French & Co. v Pere Marquette Ry Co., 171 N.W. 491, 204 Mich 578, certiorari granted Pere Marquette R. Co. v. J. F French & Co., 39 S Ct. 494, 250 U.S 637, 63 L.Ed. 1183, reversed on other grounds 41 S.Ct. 195, 254 U.S. 538, 65 L.Ed 391.
Mo—Kemper Mill Co. v. Missouri Pac. Ry. Co, 186 S W. 8, 193 Mo App 466, transferred Kemper Mill & Elevator Co v. Missouri Pac. Ry. Co, 178 S.W 502
Va.—Norfolk & W Ry. Co v. Aylor, 150 S E 252, 153 Va 575, certiorari denied 51 S Ct. 26, 282 U.S 847, 75 L.Ed. 751.
10 C.J. p 525 note 33.

Corpus Juris is cited with approval in Louisville & N. R Co v B F Roden Grocery Co., 96 So. 912, 915, 209 Ala 694

After stoppage in transitu

Consignor could recover against initial carrier, where connecting carrier delivered to consignee in another state shipment under straight bill of lading sold for cash, which consignee failed to pay after notice from consignor not to deliver, notwithstanding consignor was then indebted to consignee—Louisville & N R. Co v. Campbell Lumber Co., 166 S E 252, 45 Ga App. 851.

Nondelivery

Under Carmack amendment shipper is entitled to damages resulting from payment of freight to destination and back to nearest accessible point for regaining possession, on failure of carrier to effect delivery—Texas & N. O. R. Co v. H. & C. Newman, Civ App., 273 S.W. 335

11. Me.—Mooers v Bangor & A. R. Co., 130 A. 241, 124 Me. 416.

Car lining and stove

A box car, previously lined and fitted with stove by shipper of potatoes, was furnished him by a railroad company for use subject to tariff regulations. He consigned car to Boston, from where it was reconsigned to other points, during which time lining and stove were lost It was held, under express provisions of the tariff rules, and since such equipment was not part of any shipment within Interstate Commerce Act, that the carrier was liable for loss of lining and stove only when occurring on its own lines—Mooers v Bangor & A. R. Co., 130 A. 241, 124 Me. 416.

12. Iowa.—Adams Seed Co. v Chicago Great Western R. Co., 165 N. W. 367, 181 Iowa 1052, L R A 1918B 622
Ky.—Illinois Cent R. Co. v Stimson, 268 S W. 835, 207 Ky. 78
10 C J. p 526 note 48

Corpus Juris is cited with approval in Texarkana & F S. Ry. Co v Twin City Products Co, Tex Civ. App, 208 S.W 989

13. Iowa—Adams Seed Co. v. Chicago Great Western R Co., 165 N. W. 367, 181 Iowa 1052, L R.A.1918B 622.
Ky—Illinois Cent R Co. v. Stimson, 268 S W. 835, 207 Ky. 78.
N.Y.—Dodge & Dent Mfg. Co v. Pennsylvania R Co., 162 N Y.S 549, 175 App Div. 823.
Tex—Texarkana & F S Ry. Co v. Twin City Products Co., Civ.App, 208 S W. 989.
Va.—New York, P. & N. R. Co. v Chandler, 106 S.E 684, 129 Va. 695
10 C J p 526 note 48 [a].

14. N.C—Efland Hosiery Mills v. Hines, 114 S E 472, 184 N C 356
Va — Jennings Automatic Dump Body v Virginian Ry. Co., 119 S E. 147, 137 Va 207.
"If an unlawful sale, or negligent storing, of the flour was made, at the instance of the delivering carrier, by the warehouseman, after the original contract of carriage was discharged, it is clear that the shipper, as owner of the flour, must look alone to the delivering carrier and the warehouseman as the responsible parties; the initial carrier cannot be held responsible because it had no part or lot in keeping or disposal of the flour after its delivery to the warehouseman."—Model Mill Co v Carolina, C & O. Ry. Co, 188 S W. 936, 939, 136 Tenn. 211.

Subsequent negligence

Where, pursuant to the uniform interstate bills of lading, refused goods were stored by the terminal carrier in a public warehouse, where, as provided in the bill of lading, they were to be held at the owner's risk and without further liability on the part of the carrier, the initial carrier's liability terminated, and it could not be held liable for their damage by fire claimed to be due to negligence of the terminal carrier or the warehouse in delaying to reship after the shipper ratified the delivery, and on his own responsibility assumed control of the goods, surrendered the original bills of lading, and instructed the reshipment—Efland Hosiery Mills v. Hines, 114 S.E. 472, 184 N.C 356.

incurred, under the facts of the case, that liability attaches to the initial carrier.[15]

The statute applies, although a route is selected by the shipper as to which the carrier has no established rate,[16] although the shipper accompanies the shipment,[17] or although the connecting carriers are insolvent.[18]

The statute has no application in an action against an initial and a connecting carrier based on their common-law liability[19] and will not be applied even though the connecting carrier is dismissed after the case has proceeded to trial.[20] It has been held, however, that the shipper is not required to sue the initial carrier alone to gain the benefit of the statute[21] and that he will not be deprived of his statutory remedy by averments that such carrier was acting jointly with, and as agent for, other carriers joined in the action as well as acting for itself.[22]

Bill of lading to intermediate point. An initial carrier is liable for loss or injury occurring on any line, although it issues a bill of lading only to some intermediate point.[23]

Intra-state shipments. While the statute applies to every carrier receiving property for transportation to a point in another state, although its own line may be wholly within the state of the place of shipment,[24] it is of course inoperative as to intra-state shipments.[25] Liability for damages as an initial carrier depends on the reception of the goods in one state for transportation to a point in another state or territory, rather than the intention which the shipper may have had at the time of loading the cars, but which does not find expression in some form of a contract.[26]

Where a carrier issued a bill of lading for transportation of goods to a point within the state on the line of another carrier without notice or reason to suppose that the shipment would pass beyond the destination specified, but the other carrier took up the bill of lading and issued a new one covering transportation to a point in another state, the provisions of the Interstate Commerce Act or the tariff schedules for interstate shipments permitting change of destination did not apply as a matter of federal law so as to make the first carrier liable for damage beyond the original point of destination.[27]

15. Ga.—Fleshnar & Adar v. Southern Ry. Co., 127 S.E. 768, 160 Ga. 205, answers to certified questions conformed to 128 S.E. 78, 33 Ga. App. 823.
Me.—Briggs Hardware Co. v. Aroostook Valley R. Co., 104 A. 8, 117 Me. 321.
Mich. — Winget v. Grand Trunk Western Ry. Co., 177 N.W. 273, 210 Mich. 100, certiorari denied Grand Trunk Western Ry. Co. v. Winget, 41 S.Ct. 6, 254 U.S. 629, 65 L.Ed. 447.

16. U.S.—Norfolk, etc., R. Co. v. Dixie-Tobacco Co., Va., 33 S.Ct. 609, 228 U.S. 593, 57 L.Ed. 980.
10 C.J. p 525 note 26

17. Tex.—Texas Mexican R. Co. v. King, Civ.App., 174 S.W. 336.

18. Tex.—Texas Mexican R. Co. v. King, supra.

19. Ohio.—Norfolk & Western Ry. Co. v. Dresbach, 8 Ohio App. 333.

Reason for rule
"When a statute gives a remedy where one already exists at common law, the statutory remedy is considered merely cumulative, and a party may sue at common law as well as upon the statute. . . . But both remedies may not be prosecuted together under one cause of action. . . . So in this case, as before observed, the defendant in error, Nelson Dresbach, having elected to pursue his common-law remedies against said defendant companies, must be held to the law applying to the cause of action so selected by him."—Norfolk & Western Ry. Co. v. Dresbach, 8 Ohio App. 333, 339

20. Ohio—Norfolk & Western Ry. Co. v. Dresbach, supra.

Reason for rule
"When the court dismissed The Big Four Company such dismissal did not thereby change the nature of the action. It still remained a suit to enforce the common-law liability of the Norfolk & Western Railway Company [the initial carrier]. The dismissal of The Big Four Company, under the circumstances, could not and did not change in any respect the character of the suit. The only effect of this dismissal was to relieve The Big Four Company from any liability, and to confine the plaintiff entirely to his right of action against the Norfolk & Western Railway Company under its common-law liability as fixed and determined by its contract with the plaintiff."—Norfolk & Western Ry. Co. v. Dresbach, 8 Ohio App. 333, 338.

21. Tenn — Southeastern Express Co. v. Fry Produce Co., 2 Tenn. App. 37.

22. Tex.—Burd v. San Antonio Southern Ry. Co., Com.App., 261 S.W. 1021, modifying San Antonio Southern Ry. Co. v. Burd, Civ. App., 246 S.W. 1060.

23. Ill. — Michelson v. Judson Freight Forwarding Co., 109 N.E. 281, 268 Ill. 546.

24. N.Y.—Shultz v. Skaneateles R. Co., 122 N.Y.S. 445, 66 Misc. 9, affirmed 129 N.Y.S. 1146, 145 App. Div. 906

25. Ga. — Taylor v. Central of Georgia Ry. Co., 121 S.E. 348, 31 Ga.App. 374.
Tex.—Gulf, C. & S. F. Ry. Co. v. Mars, Civ.App., 14 S.W.2d 877.
10 C.J. p 527 note 51.

Reconsignment
Where cattle shipped over defendant's road were originally consigned to point in state and there was no notation on bill of lading indicating purpose of shipper to have cars reconsigned at destination in state for point outside state, and evidence tended to show that shipment between points in state was complete transaction and that obligations of carrier were at an end on delivery of cars to destination in state, reconsignment of shipment after reaching destination in state to point outside state did not revive or continue obligations of original carrier under the Carmack amendment.—Gulf, C. & S. F. Ry. Co. v. Mars, Tex.Civ.App., 14 S.W.2d 877.

26. Idaho—Rice v. Oregon Short Line R. Co., 198 P. 161, 33 Idaho 565.

27. U.S.—Bracht v. San Antonio & A. P. Ry. Co., 41 S.Ct. 150, 254 U.S. 489, 65 L.Ed. 366, affirming 209 S.W. 579, 200 Mo.App. 655, certiorari granted 40 S.Ct. 16, 250 U.S. 658, 63 L.Ed. 1193.

Shipment through another state to a point in same state. While the Carmack amendment was held not to apply to a shipment through another state to a point in the same state as the point of origin, although the evil was the same in such a case as in the cases covered by the express terms of the amendment,[28] the amendment of August 29, 1916, 49 U.S.C.A. § 81, provides that bills of lading issued by any common carrier for transportation of goods from a place in one state to a place in the same state, through another state or foreign country, shall be governed by the Interstate Commerce Act.

Shipment to or from foreign country. While the Interstate Commerce Act formerly had no application to shipments to a foreign country,[29] since the Cummins amendment of March 4, 1915, which, however, had no application to a shipment before its enactment,[30] shipments "from any point in the United States to a point in an adjacent foreign country" are included within the operation of the statute, but the statute has no application where property is tendered for transportation from a point in one state to a point in a nonadjacent foreign country.[31] For a person to recover thereunder for goods lost in a shipment for export, he must show that the shipment was intended to be transported to an adjacent foreign country.[32] The Cummins amendment applies in such case notwithstanding the property may be carried partly on the high seas.[33] A foreign railroad which was the initial carrier of goods shipped to points within United States is not liable as an initial carrier under the amendment, where such railroad's lines lay wholly without the jurisdiction of the United States, and its acts in connection with the goods were performed outside of the United States,[34] and, under a contract for delivery to a connecting carrier made and fully performed in an adjacent foreign country, although the ultimate destination was a point in the United States, in an action against the initial carrier a provision limiting liability to value at place and time of shipment is controlling.[35]

When liability ceases. The liability of the initial carrier ceases when the goods reach their original destination in good condition.[36]

Shipper's contracts and arrangements with connecting carrier in general. No contract made by an intermediate carrier has any binding effect with reference to a shipment while in the course of transportation,[37] and the responsibility of the initial carrier cannot be extended so as to hold it liable for the defaults of the shipper's own agents under contracts to which it is not a party.[38] Thus, if the initial carrier is under no obligation under its general bill of lading to heat cars, it cannot be held

28. Tex.—Wichita Falls, etc., R. Co. v. Asher, Civ.App., 171 S.W. 1114. 10 C.J. p 527 note 53.

29. U.S.—Basila v. Western Union Telegraph Co., D.C.Fla., 24 F.2d 569.
Cal.—McCaslin v. Southern Pac. Co., 203 P. 742, 187 Cal. 716.
S.C.—Aldrich v. Atlantic Coast Line R. Co., 89 S.E. 315, 104 S.C. 364.
10 C.J. p 527 note 52.

30. Cal.—McCaslin v. Southern Pac. Co., 203 P. 742, 187 Cal. 716.

31. Ga.—Central of Georgia Ry. Co. v. Evans, 157 S.E. 313, 172 Ga. 53, answers conformed to 159 S.E. 877, 33 Ga.App. 683
Mo.—Lesser-Goldman Cotton Co. v. Missouri Pac. R. Co., 12 S.W.2d 485, 321 Mo. 714, certiorari denied 49 S.Ct. 351, 279 U.S. 855, 73 L.Ed. 997.
Va.—Southern Ry. Co. v. Southgate, 140 S.E. 661, 149 Va. 683.

Cuba is not an adjacent foreign country within the Cummins amendment
Ga.—Central of Georgia Ry. Co. v. Evans, 157 S.E. 313, 172 Ga. 53, answers conformed to 159 S.E. 877, 43 Ga.App. 683
Va.—Southern Ry. Co. v. Southgate, 140 S.E. 661, 149 Va. 683.

England
Bill of lading for transportation of cotton to England is a "through bill of lading," and shipment is not within statutes prohibiting exemptions from liability.—Lesser-Goldman Cotton Co. v. Missouri Pac. R. Co., 12 S.W.2d 485, 321 Mo. 714, certiorari denied 49 S.Ct. 351, 279 U.S. 855, 73 L.Ed. 997

32. Kan.—Barber v. Missouri Pac. R. Co., 236 P. 859, 118 Kan. 651.

33. Ohio.—Davis v. Krippendorf-Dittmann Co., 17 Ohio App. 76.

34. Ariz.—Southern Pac. R. Co. of Mexico v. Gonzalez, 61 P.2d 377, 48 Ariz. 260.

35. Ill.—Fox v. Canadian Pac. Ry. Co., 260 Ill.App. 482.

36. Ala.—Clark v. Louisville & N. R. Co., 114 So. 295, 216 Ala. 637—Atlantic Coast Line R. Co. v. Enterprise Oil Co., 101 So. 605, 211 Ala. 677—Fred Henderson & Walters v. Atlantic Coast Line Ry. Co., 76 So. 309, 200 Ala. 393
Idaho.—Rice v. Oregon Short Line R. Co., 198 P. 161, 33 Idaho 565—Barrett v. Northern Pac. Ry. Co., 157 P. 1016, 29 Idaho 139.
Ky.—Illinois Cent. R. Co. v. Stimson, 268 S.W. 835, 207 Ky. 78.
Va.—Southern Produce Co. v. Norfolk Southern R. Co., 132 S.E. 360, 144 Va. 422

Mistake of consignor
Liability as initial carrier of interstate carrier of freight, which, by mistake of consignor, carried shipment to Woodruff, S.C., instead of Woodford, S.C., ended with delivery at Woodruff where consignor corrected mistake.—Jeffcoat v. Atlantic Coast Line R. Co., 96 S.E. 616, 111 S.C. 19

Delivery to warehouse
Where the goods unclaimed by the consignee have been delivered to a public warehouse in accordance with a stipulation in the bill of lading after the lapse of two months from delivery at the station to which they were consigned, in the absence of federal regulations extending the time, the responsibility of the initial carrier terminated.—Keystone Pub. Co. v. Pennsylvania R. Co., 78 Pa.Super. 486.

37. Wash.—Parker-Bell Lumber Co. v. Great Northern R. Co., 124 P. 389, 69 Wash. 123, 41 L.R.A.,N.S., 1064.
10 C.J. p 526 note 43.

38. Va.—Southern Produce Co. v. Norfolk Southern R. Co., 132 S.E. 360, 144 Va. 422.

liable for the nonperformance of a special agreement to heat made by a connecting carrier, because, under these circumstances, the connecting carrier will, as to defaults in heating during transportation, be considered the initial carrier.[39] Since the first transaction has already settled the relation between the owner of the goods and the initial carrier and fixed the duties and liability of the carrier to such owner, the law is not defeated by the fact that the shipper subsequently obtains a bill of lading from another carrier[40] or makes a new shipping contract with a connecting carrier.[41] The fact that the shipper at the suggestion of the initial carrier and for their mutual convenience transacted part of the business of salvage of the goods lost with the connecting carrier whose negligence was responsible therefor does not in any way affect the liability of the initial carrier.[42]

Diversion and stoppage. The initial carrier is liable for loss caused by an unauthorized diversion of the shipment from the specified route of a connecting carrier as well as for loss or injury otherwise caused by it,[43] and the fact that the line of the connecting carrier was in another state makes no difference.[44] The fact that the shipment is diverted or stopped within the state of shipment by direction of the consignee does not change the shipment from an interstate to an intra-state one, nor affect the liability of the initial carrier under the statute.[45]

Under the amendment of July 3, 1926, providing that the liability imposed by the Carmack amendment shall also apply in the case of property reconsigned or diverted in accordance with applicable filed tariffs, the initial carrier remains liable as such for damages or injury to a shipment which has been diverted by a connecting carrier before it reached the destination specified in the original bill of lading.[46] This amendment was not applicable to shipments before its passage, however, and in cases arising prior thereto it was held that, where a diversion of freight shipped over a line of connecting carriers was not ordered until after it reached its original destination, the initial carrier was not liable for loss or injury to the consignment occurring after it had been started to its new destination,[47] since the reconsignment, after arrival of the freight at its original destination, was a new contract, and the connecting carrier had no implied authority to make a new contract on behalf of the initial carrier.[48] This rule was also applied in cases arising before the amendment last referred to where, with-

39. Me.—Ross v. Maine Cent. R. Co., 90 A. 711, 112 Me. 63.

40. U.S.—Missouri, K. & T. Ry. Co. of Texas v. Ward, Tex., 37 S.Ct. 617, 244 U.S. 383, 61 L.Ed. 1213
Tex.—Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero, Civ.App., 212 S.W. 981, dismissed for want of jurisdiction.
10 C.J. p. 526 note 46.

Acceptance within state

The acceptance by a shipper of live stock from a connecting carrier, to whom the shipment was delivered by the initial carrier while still within the state, of a new bill of lading did not discharge the original contract with the initial carrier for the through interstate shipment, where the initial bill of lading was for the entire journey, and the freight charges of both carriers were paid to the terminal carrier at destination, so that the initial carrier was liable for injury to the stock during transportation by the terminal carrier.—St. Louis Southwestern Ry. Co. of Texas v. Seale & Jones, Tex.Com.App., 267 S.W. 676, modifying on other grounds, Civ.App., 247 S.W. 883.—Gulf, C. & S. F. Ry. Co. v. Hines, Tex.Civ.App., 239 S.W. 244, affirmed, Com.App., 250 S.W. 1013.

Consideration

Where the initial carrier, in the bill of lading for an interstate shipment of cattle, attempted to limit its liability to its own lines, and the connecting carriers issued similar bills of lading, such bills of lading issued by the connecting carrier were without consideration and void, the initial carrier being required to issue a through bill of lading under the Cummins amendment to the Carmack Act.—Gulf, C. & S. F. Ry. Co. v. Hines, Tex.Com.App., 250 S.W. 1013, affirming, Civ.App., 239 S.W. 244.

41. Mont.—Parham v. Chicago, M. & St. P. Ry. Co., 189 P. 227, 57 Mont. 492.

42. N.Y.—Wien v. New York Cent., etc., R. Co., 146 N.Y.S. 1010, 85 Misc. 42.

43. Tenn.—Drake v. Nashville, etc., R. Co., 148 S.W. 214, 125 Tenn. 627.
Tex.—Kemendo v. Fruit Dispatch Co., Civ.App., 131 S.W. 73.

44. Tex.—Kemendo v. Fruit Dispatch Co., supra.

45. Ill.—Tanski v. Chicago, etc., R. Co., 181 Ill.App. 565.

46. Ga.—Davis v. Southern Ry. Co., 185 S.E. 606, 53 Ga.App. 286.

47. Ala.—Clark v. Louisville & N. R. Co., 114 So. 295, 216 Ala. 637.—Atlantic Coast Line R. Co. v. Enterprise Oil Co., 101 So. 605, 211 Ala. 676.—Fred Henderson & Walters v. Atlantic Coast Line Ry. Co., 76 So. 309, 200 Ala. 393.
Ark.—Chicago, R. I. & P. Ry. Co. v. S. L. Robinson & Co., 23 S.W.2d 976, 180 Ark. 911.
Fla.—Gentile Bros. Co. v. Atlantic Coast Line R. Co., 117 So. 890, 96 Fla. 228.—Chase & Co. v. Florida East Coast Ry. Co., 115 So. 825, 94 Fla. 1143.
Idaho.—Rice v. Oregon Short Line R. Co., 198 P. 161, 33 Idaho 565
Ill.—P. J. Claussen Co. v. Illinois Cent. R. Co., 259 Ill.App. 87. See Pittsburgh, C., C. & St. L. Ry. Co. v. Hedrich, 202 Ill.App. 48.
Miss.—Yazoo & M. V. R. Co. v. Norman, 88 So. 174, 125 Miss. 636.
Tex.—Gulf, C. & S. F. Ry. Co. v. Mars, Civ.App., 14 S.W.2d 877.—Houston & T. C. R. Co. v. Smith, Civ.App., 258 S.W. 542.
10 C.J. p. 526 note 39.

Customary carriage over local road

Initial carrier was not liable for damages to cattle while being transported over local road to the consignee's place of business after reaching destination, although there was a custom between consignee and connecting carrier allowing such extra transportation.—Fred Henderson & Walters v. Atlantic Coast Line Ry. Co., 76 So. 309, 200 Ala. 393.

48. Ala.—Atlantic Coast Line R. Co. v. Enterprise Oil Co., 101 So. 605, 211 Ala. 677.—Fred Henderson & Walters v. Atlantic Coast Line Ry. Co., 76 So. 309, 200 Ala. 393.
Ark.—Chicago, R. I. & P. Ry. Co. v.

out notice to the initial carrier prior to the arrival of the goods at their original destination, the connecting carrier made a new contract whereby they were to be transmitted from that point to another,[49] even though the initial carrier knew of the shipper's intention to divert the shipment to some other destination by instructing the connecting carrier to that effect in accordance with the regular course of dealing between the shipper and the connecting carrier;[50] and it was applied even where the order of reconsignment was transmitted to the terminal carrier through the original carrier, the latter not being at fault in transmitting the order or otherwise contributing to the injury sustained.[51] The receiving carrier's obligation, it was held, is defined by the through bill of lading issued by it, and, to charge it with liability for damage occurring on an extended transportation after it has fully complied with its undertaking, there must be a contractual basis, express or implied, therefor.[52] So it was determined that the right of the shipper to change and control the destination of the property either by diversion or reconsignment after it had been delivered to a connecting carrier in no degree increased the obligations imposed by the statute on the initial carrier, and the exercise of that right without the participation of the initial carrier could not affect the latter's liability.[53] On the other hand the initial carrier was, prior to the 1926 amendment, held liable where the goods before arriving at the billed destination were rerouted by the shipper and connecting carrier to minimize a loss anticipated as a result of an embargo at the original destination;[54] and the liability of the original carrier was also upheld as to the extended transportation in one case where notice to divert was given to the connecting carrier after arrival of the goods at their billed destination, apparently on the theory that, since the shipment moved under a transcontinental tariff filed with the interstate commerce commission which provided for a through rate with the right of diversion, and to which all carriers involved were parties, it was within the contemplation of all the parties that such a diversion might be made,[55] but the force of this decision was limited to its own peculiar facts in another case in the same jurisdiction.[56] So it was held that the issuing carrier remained liable where on arrival of the goods at the billed destination they were shipped by direction of the consignee to another point on the same bill of lading,[57] but the fact that no new bill of lading was issued on reconsignment was held not to continue the liability of the original carrier in another case in which the point was raised.[58] Where there was nothing in the bill of lading to indicate that the point of des-

S L. Robinson & Co., 23 S.W.2d 976, 180 Ark 911.

10 C.J. p 526 note 40.

"Reconsignment"

"The forwarding of goods after arrival at destination is what is usually termed a 'reconsignment,' and where the carrier over whose lines the property is to proceed from the original destination on the reconsignment is not the same as the initial carrier issuing the bill of lading, the new contract of carriage is made, not with the initial carrier as a party but with the carrier performing the additional transportation."—American Cotton Products Co. v. New York Cent. R Co., 255 N.Y.S. 672, 681, 142 Misc. 821.

49. Idaho—Barrett v. Northern Pac. Ry. Co, 157 P. 1016, 29 Idaho 139.
Va.—Southern Produce Co. v. Norfolk Southern R Co., 132 S.E 360, 144 Va 422.
Contra Chicago, R. I. & P. Ry Co. v. S. L Robinson & Co., 23 S.W 2d 976, 180 Ark 911.

50. Va—Southern Produce Co. v. Norfolk Southern R Co, 132 S E. 360, 144 Va 422.

51. Fla.—Gentile Bros. Co. v. Atlantic Coast Line R. Co, 117 So. 890, 96 Fla 228.

52. S.C.—Beaufort Truck Growers' Ass'n v. Seaboard Air Line Ry. Co, 121 S E. 357, 127 S C. 496.
Va—Southern Produce Co. v. Norfolk Southern R. Co, 132 S E. 360, 144 Va. 422.
"The liability of the initial carrier for loss, damage, or injury to property received for interstate transportation is regulated by the 'through bill of lading' that was issued or that should have been issued by the initial carrier."—Chase & Co. v. Florida East Coast Ry. Co, 115 So. 825, 94 Fla. 1143.

53. Va—Southern Produce Co v. Norfolk Southern R Co, 132 S E. 360, 144 Va. 422.

54. Mo.—Miller v. Quincy, O & K. C. R. Co., 225 S W. 116, 205 Mo.App. 463.

55. Ill—Sparr v. Southern Pacific Co., 220 Ill.App. 180.

56. Ill—P. J Claussen Co. v. Illinois Cent. R. Co, 259 Ill.App 87, 95.
"Appellant contends that the agreement [to an order of reconsignment] is shown by the tariff provision referred to, to which appellee, the initial line, was a party, and that this tariff provision makes the number of movements under diversion or reconsignment one continuous shipment The only case cited in support of this contention is Sparr Fruit Co. v. Southern Pac. Co., 220 Ill.App. 180. Some language in the opinion (p. 185) might warrant that construction, where the reconsignment is with the knowledge, or under the direction of the initial carrier or its agent. It would appear that that case was decided on certain stipulations to which the language in said opinion referred to may have been applicable. However, it was said by Mr. Justice McReynolds in Bracht v. San Antonio & A P. R Co, Mo, 41 S.Ct. 150, 254 U S. 489, 65 L Ed 366, where the interstate tariffs permitting reconsignment were offered in evidence by plaintiff and rejected, 'we are unable to say as a matter of federal law that tariff schedules for interstate shipments . . . constituted part of the agreement' In view of this holding and the tenor of the authorities . . . where the reconsignment was held to be a new transaction, we deem the contention untenable."—P. J Claussen Co. v. Illinois Cent R Co, supra.

57. Ga—Baltimore & O R. Co. v. Montgomery & Co., 90 S.E. 740, 19 Ga App 29.

58. Va—Southern Produce Co. v Norfolk Southern R. Co., 132 S E. 360, 144 Va. 422.

tination originally designated was to be the point of delivery, but the shipment was "for reconsignment," the initial carrier's liability continued until the goods were delivered at the point of destination indicated by a reconsignment made while the goods were in possession of a connecting carrier.[59] A provision in a bill of lading that a stop should be made on a connecting line to receive an additional shipment does not operate to defeat the initial carrier's liability for injury to the shipment occurring on a connecting line.[60]

Since the owner has the right, as an incident to the contract of carriage, before the shipment reaches the point of destination named in the bill of lading, to direct the terminal carrier to divert the shipment to another place on its lines, if such terminal carrier fails to divert the shipment as directed, in consequence of which it is damaged, the initial carrier, according to one view, is liable for such damages,[61] although no notice of the requested diversion was given to the initial carrier.[62] It has been held, however, that, where an initial carrier was under no obligation, by contract or otherwise, to notify a connecting carrier that the shipper desired a diversion of the shipment at a point on the connecting carrier's line, having delivered the shipment to the connecting carrier, it was not liable for failure of the connecting carrier to make the diversion, as no fault was attributable to the connecting carrier.[63]

Where the reconsignment is made while the goods are still in possession of the initial carrier, the latter is liable for failure to transport them safely to the destination indicated by the reconsignment.[64] So, where the consignee in an interstate shipment, on arrival of the goods at destination, refuses to receive them and the initial carrier agrees to transport them to another point in the same state, the new agreement is merely a modification of the original contract, and the shipment does not lose its character as an interstate one; hence, the Carmack amendment applies and the initial carrier is liable thereunder for the negligence of a connecting carrier after the agreement of reconsignment was entered into.[65]

The initial carrier is charged with knowledge of the fact that, after the original shipment was begun, the consignors surrendered their order bills of lading and had new ones issued, changing the point of destination of the goods and designating another party as the one to be notified on arrival of the shipment.[66]

Defenses available to initial carrier. The initial carrier may avail itself of any defenses or of any limitations of liability open to the carrier causing the loss,[67] even though, it is held, the shipment was lost at sea by a connecting carrier.[68]

b. State Legislation

Statutes applicable solely to intra-state shipments and varying in their effect, some being merely declaratory of the common law while others are in derogation thereof, which have been enacted in some states are given effect according to the legislative intent.

In regard to connecting carriers, statutes varying in their provisions have been enacted in some states. By virtue of the Carmack amendment, the

59. Ill.—L. Starks Co. v. Michigan Cent. R. Co., 207 Ill.App. 333.

60. N.Y.—De Winter v. Texas Cent. R. Co, 135 N.Y.S. 893, 150 App.Div. 612.

61. Va.—Jennings Automatic Dump Body v. Virginian Ry. Co., 119 S. E. 147, 137 Va. 207.
Contra dictum Houston & T. C. R. Co. v. Smith, Tex.Civ.App, 258 S. W. 542.

62. Ga.—Central of Georgia Ry. Co. v. Council Bros., 136 S.E. 418, 163 Ga. 494, 61 A.L.R. 1304—Central of Georgia Ry. Co. v. Council Bros., 137 S.E. 569, 36 Ga App. 573

63. Tex.—Patton v. Texas, etc, R. Co, Civ.App, 137 S.W. 721.

64. Ill.—L Starks Co. v. Michigan Cent. R Co, 207 Ill App. 333 See Chesney v. Union Pac Ry. Co, 209 Ill App 494.

65. Ala.—Warley Fruit & Produce Co. v. Louisville & N. R. Co, 84 So. 311, 17 Ala.App. 263.

66. U.S.—Russo v. Davis, C.C.A.Ill., 285 F. 231.

67. N.Y.—Dalziel v. Oregon-Washington R & Nav. Co, 219 N.Y.S 727, 219 App Div 394, appeal dismissed State Bank v. Oregon-Washington R. & Nav Co., 162 N. E. 528, 248 N Y. 569
N.C.—Price v. Southern Ry. Co., 92 S E. 182, 173 N.C. 394.
10 C J. p 527 note 55.

68. N.C.—Price v. Southern Ry. Co, 92 S E 182, 173 N C. 394
10 C.J. p 527 note 56.

Goods taken on execution

(1) In an action brought under the Carmack amendment for the value of goods taken on execution against the shipper in favor of his consignee, the liability of the initial carrier is to be tested by that of the terminal carrier—Hamilton Mill & Elevator Co. v. Stephenville, N. & S T. Ry. Co., Tex Civ.App., 189 S.W 774.

(2) So, where a shipment contract provided for delivery on the shipper's order and instructed the terminal carrier to notify the consignee of the arrival of the goods and the shipper deposited the bill of lading, with bank draft attached, in the bank which placed the amount of the draft to shipper's checking account credit, but the terminal carrier in another state had no knowledge of such transaction and the consignee refused the goods and protested the draft and the shipper repurchased the draft and bill and instructed the terminal carrier to deliver the goods to a broker, which the latter did forty-eight hours after arrival, and after such delivery the broker secured a default judgment against the shipper for a sum less than the value of the goods, the difference being adjusted by stipulation, the shipper cannot as a matter of law recover from the initial carrier the value of the goods—Hamilton Mill & Elevator Co. v. Stephenville, N. & S. T. Ry. Co., supra.

effect of which is considered supra § 406 a, the operation of state legislation is confined solely to intra-state shipments.[69]

The common-law doctrine is affirmed by a statute which provides that, if a common carrier accepts freight for a place beyond its line, unless it stipulates otherwise, it must deliver it at the end of its line to some other competent carrier, and that its liability shall cease on making such delivery.[70] Under such a statute, the liability of the initial carrier ceases on delivery of the goods shipped to the connecting carrier in the absence of a special contract otherwise providing;[71] and a provision in a freight contract that the carrier's responsibility shall cease at the connecting point is not rendered ineffective by a further stipulation for through transportation.[72]

The liability of the initial carrier will be enforced in cases brought within statutes making such carrier liable for any loss, damage, or injury caused by it or any connecting carrier,[73] or for any loss, damage, or injury caused by its negligence or the negligence of any connecting carrier;[74] but the initial carrier is not liable under such provisions for damages resulting from defective packing before receipt or inherent defects in the property,[75] or for negligence of another carrier to whom the shipment has been delivered under a new contract between the shipper and the latter carrier after the shipment has been carried to the destination fixed by the original contract.[76] A statute providing that whenever two or more railroads are connected together, the company owning either of them receiving freight to be transported to any place on the line of either shall be liable for the delivery of such freight to the consignee in the same order in which it was shipped, applies to the carriage of live stock and makes the initial carrier responsible in the first instance for any loss occurring on the line of a connecting carrier.[77]

Statutes providing that, in case of a contract for through shipment between points in the state, all connecting lines are liable for damages sustained anywhere in such through transportation, are not applicable to shipments to nonadjacent foreign countries;[78] but in the case of an intra-state carriage, where the initial carrier gives a through bill of lading, it obligates itself under the statute to deliver the shipment at destination and becomes liable for all damages that may accrue to the property while in transit over its lines or those of its connecting carriers.[79] A bill of lading which attempts to fix the rights of the shipper and all carriers transporting the goods as to the entire trans-

69. Tex.—Nation v. San Antonio Southern Ry. Co., 283 S.W. 157, 115 Tex. 431.
10 C.J. p 527 note 61.

70. S D.—Sutton v. Chicago, etc., R. Co., 84 N.W. 396, 14 S.D. 111.

71. Cal.—Schwartz v. Panama R Co., 103 P. 196, 155 Cal. 742.
Okl.—Chicago, etc., R. Co. v. Diggs, 140 P. 1160, 42 Okl. 183.
10 C.J p 527 note 63, p 528 note 75.

In Georgia

(1) In construing a statute providing that, where there are several connecting railroads under different companies and the goods are intended to be transported over more than one railroad, each company shall be responsible only to its own terminus and until delivery to the connecting road, it was held that, where no contract was entered into betwen the shipper and the initial carrier binding it to transport its goods beyond its line, it was not liable for injuries on the connecting line.—Felton v. Central of Georgia R. Co., 40 S.E. 746, 114 Ga. 609.

(2) Other decisions made since the enactment of this provision have apparently taken the opposite view.—East Tennessee, etc., R. Co. v Johnson, 11 S.E. 809, 85 Ga. 497.—Falvey v. Georgia R. Co., 76 Ga. 597, 2 Am S.R. 58.
10 C.J. p 528 note 67.

72. Cal.—Colfax Mountain Fruit Co v. Southern Pac. R. Co., 46 P. 668.

73. Ga.—Central of Georgia Ry. Co. v. Alford, 115 S.E. 771, 154 Ga. 863.
Ky.—Cumberland Transp. Co. v. E. J. O'Brien & Co., 2 S.W.2d 668, 222 Ky. 814.—E. J. O'Brien & Co. v. Davis, 288 S.W. 682, 216 Ky. 693.

Switching services

A statute which makes carriers receiving property for intra-state transportation liable for loss or injury on their own lines or the line of any carrier to which the property may be delivered, applies where the carrier receiving the entire freight charge delivered the car to a railroad performing switching services in placing the car on the consignee's siding at the instance and request of, and for special compensation paid by, the consignee, and the first carrier is liable for damages caused by the second.—Central of Georgia Ry. Co. v. Alford, 115 S.E. 771, 154 Ga. 863.

74. Mo.—Marshall Land & Mercantile Co v. Missouri Pac R. Co., App., 270 S.W. 422.

75. Ky.—E. J O'Brien & Co v. Davis, 288 S.W. 682, 216 Ky. 693.

76. Ga.—Taylor v. Central of Georgia Ry. Co., 121 S.E. 348, 31 Ga. App. 374.
10 C.J p 527 note 62.

Delivery as forwarder

A statute which makes carriers receiving property for intra-state transportation liable for loss or injury on their own lines or the line of any carrier to which the property may be delivered, has no application where defendant carrier's liability under a contract for intra-state shipment was ended when, as plaintiff's forwarder, it delivered the goods to another carrier at destination for transshipment, and it is not liable for damages occurring thereafter.—Taylor v Central of Georgia Ry. Co., 121 S.E. 348, 31 Ga.App. 374.

77. Neb.—Schneider v. Davis, 192 N. W. 230, 109 Neb. 638.—Nye-Schneider-Fowler Co v Chicago & N. W. Ry. Co., 179 N.W. 503, 105 Neb. 151.

78. Tex.—A L Wolff & Co. v Missouri, K. & T. Ry. Co of Texas, Civ.App., 283 S.W. 250, affirmed, Com.App., 289 S.W. 1000.

79. Tex.—Houston & T. C. R. Co. v. Clement Grain Co., Civ.App., 10 S. W.2d 400.—Houston E & W. T. Ry. Co. v. Southern Pine Lumber Co., Civ.App., 6 S.W.2d 418.—Kansas City, M & O Ry. Co. v. Cauble, Civ.App., 286 S.W. 478.

portation is a contract for through shipment within the statute, notwithstanding it specifically stipulates that it is not to be so treated,[80] and there is a through shipment when the connecting carrier receives the goods and transports them to destination without any new arrangement or contract,[81] but there is no through shipment within the statute where the initial carrier agreed to transport only to the end of its own line.[82] A verbal contract for through shipment is binding whether the route is chosen by shipper or carrier.[83] If a carrier issues a through bill of lading or receipt for transportation of goods to destination over a connecting line, such bill of lading or receipt constitutes a contract of through transportation, and the carrier will be liable for loss or injury occurring through the negligence of the connecting carrier, under a statute imposing liability on the carrier issuing the receipt or bill of lading.[84] What constitutes a through transportation contract generally is discussed supra § 405 b.

Other statutes provide that, where any freight that has been shipped to be conveyed by two or more common carriers to its destination, where under the contract of shipment or by law the responsibility of each or either shall cease on delivery to the next in good order, has been lost, damaged, or destroyed, it shall be the duty of the initial or any connecting carrier on application by the shipper, the consignee, or their assigns, within a stated time after application, to trace such freight and inform applicant in writing, when, where, how, and by which carrier said freight was lost, damaged, or destroyed, and the names of the parties and their official position, if any, by whom the truth of facts set out in said information can be established, and that, if the carrier to which application is made shall fail to trace the freight and give the required information in writing, within the time prescribed, then that carrier shall be liable for the value of the freight lost, damaged, or destroyed, in the same manner and to the same extent as if the loss, damage, or destruction occurred on its line. Statutes of this kind have no application to the initial carrier except where it is provided by law or contract that its responsibility shall cease on delivery to the next carrier.[85] Somewhat similar statutes which provide that, where freight addressed to a place beyond the route of the common carrier receiving it is lost or injured, the first carrier must within a reasonable time after demand give satisfactory proof to the consignor that the injury did not occur on its line, or it will itself be liable therefor, are not penal statutes to be construed strictly,[86] but are for the purpose of putting the shipper in possession of all the available information and to avoid the necessity of having a multiplicity of

80. Tex.—Ft. Worth & D. C. Ry. Co. v. Kemp, Civ.App., 207 S.W. 605.

Failure to fill blanks

A bill of lading in which the blanks left for stations named on the railroad company's line were not filled, and which contained stipulations expressly for the benefit of connecting carriers was a contract for through shipment between points within the state within the statute relating to shipment contracts, notwithstanding the bill provided it was not to be treated as a through shipment to a point off company's road —Missouri, K. & T Ry. Co. of Texas v. Baker Bros., Tex.Civ.App, 210 S W. 244.

81. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Hughston Grain Co, Civ.App, 186 S.W. 429.

82. Tex—Galveston, H. & S A. Ry. Co. v. Lock, Civ.App., 209 S.W. 181

83. Tex—St. Louis, B. & M. Ry. Co v. Lane, Civ.App., 248 S W. 59.

84. Mo—Miller v. Missouri, etc, R Co., 138 S W 902, 157 Mo App 638 10 C J. p 521 note 75.

85. Ga.—Payne v. Domestic Electric Co., 113 S.E 811, 154 Ga. 189, answers to certified questions conformed to 114 S.E. 716, 29 Ga.App 235.

Law making initial carrier liable

The statute requiring connecting carriers under contract providing that responsibility shall cease on delivery to the next carrier to trace any shipment and inform applicant where, when, how, and by whom the shipment was lost, damaged, or destroyed, is inoperative so far as the initial carrier is concerned, under a later enactment, making the initial carrier liable for the loss, damage, or injury, although providing that nothing therein shall deprive any holder of receipt or bill of lading of any remedy under existing law—Payne v. Domestic Electric Co., 113 S E 811, 154 Ga. 189, answers to certified questions conformed to 114 S. E. 716, 29 Ga.App. 235.

Statute requiring contract

A statute providing that, "when under contract for shipment of freight or express over two or more common carriers, the responsibility of each or any of them shall cease upon delivery to the connecting line 'in good order,' and if such freight or express has been lost, damaged, or destroyed, it shall be the duty of the initial delivering or terminal road, upon notice of such loss, damage, or destruction being given to it by the shippers, consignee, or their assigns, to adjust such loss or damage with the owners of said goods within forty days, and upon failure to discharge such duty within forty days after such notice, or to trace such freight or express and inform the said party so notifying when, where, and by which carrier the said freight or express was lost, damaged, or destroyed, within said forty days, then said carrier shall be liable for all such loss, damage, or destruction in the same manner and to the same extent as if such loss, damage, or destruction occurred on its lines: Provided, That if such initial, terminal, or delivering road can prove that, by the exercise of due diligence, it has been unable to trace the line upon which such loss, damage, or destruction occurred, it shall thereupon be excused from liability under this Section" has no application except where the shipment is under a bill of lading providing that the responsibility of each carrier ceases on delivery to connecting carriers in good condition.—Venning v. Atlantic Coast Line R. Co, 58 S.E 983, 78 S C. 42, 125 Am.S.R 768, 12 L R.A.,N.S, 1217—10 C.J. p 529 note 89.

86. N.D.—Assid v. Great Northern Ry. Co., 164 N.W. 949, 38 N.D. 270.

suits to determine the responsibility for damages.[87] Under provisions like these under consideration, if the carrier on application fails to trace the freight carried by a connecting carrier, it becomes liable for loss incurred by negligence of the connecting carrier;[88] and on this state of facts the law imputes the negligence of the connecting carrier to the initial carrier and in effect makes the same its negligence,[89] but the initial carrier cannot be held liable thereunder unless the injury or delay was caused by it or the shipper makes a demand on it for satisfactory proof as to when the injury or delay was caused, and the carrier fails to furnish such information.[90] Moreover, the demand for such proof must be direct and specific, and a simple request or demand for payment of the loss or damage does not bring the shipper within the requirements of the statute,[91] although a letter to the initial carrier setting forth the claim for damages and demanding proof of nonliability is sufficient.[92] The statute, however, does not prohibit a shipper in the first instance without such demand from bringing an action for damages for an alleged loss or injury.[93] There can be no recovery under the provisions of the statute where the goods were delivered to the consignee before the application to trace was made.[94] It has been held, however, that, where goods are delivered by the initial carrier to a carrier by water and transported to destination and placed in the warehouse of the latter subject to the order of the consignee, such goods were not "lost" so as to afford a right of action in favor of the consignor against the initial carrier for failure to trace the freight.[95]

Another type of statute provides that, in case of loss or damage to goods delivered to a railroad company for transportation over its own and connecting roads, the initial carrier shall be liable for the loss or damage, but may discharge itself of such liability by producing a written receipt from the carrier to whom it delivered the goods. The object of such a statute is to require the delivering company, in order to discharge itself, to produce such written evidence of the receipt of the property by a connecting company to whom it was delivered as will shift the liability to account for the property to the latter;[96] and it does nothing more than relieve persons interested in the property lost or damaged in transit of hardship by fixing the kind of evidence which a carrier shown to have been in actual possession of the property should take, preserve, and produce to prove that the property had properly been delivered to another carrier.[97] The production of a per diem receipt showing delivery to a connecting carrier each day of goods and cars containing goods, including the goods in question, signed by the agents of the connecting carrier, is a sufficient receipt in writing to satisfy the requirements of the statute.[98] The initial carrier may discharge itself from liability by producing a receipt in writing for the goods from a steamship company to whom it delivered the goods,[99] the words "connecting road" being held to include "connecting steamship lines."[1]

A statute which provides that every claim for loss or damage to property while in the possession of a common carrier shall be adjusted and paid within a designated time does not impose on one connecting carrier liability for the default of another, even where such carrier does not obtain and give information, or use due diligence to obtain it as provided by a tracing act in effect in the same state.[2]

87. Okl.—St. Louis & S. F. Ry. Co. v. Slade, 291 P. 107, 144 Okl. 216.
10 C.J. p 528 note 77 [a].

88. Okl.—St. Louis & S. F. Ry. Co. v. Slade, supra.
10 C.J. p 528 notes 70, 77.

89. Ga.—Central of Georgia R. Co. v. Murphey, 38 S.E. 970, 113 Ga. 514, 53 L.R.A. 720.

90. N.D.—Assid v. Great Northern Ry. Co., 164 N.W. 949, 38 N.D. 270.
Okl.—Lusk v. Durant Nursery Co., 232 P. 11, 73 Okl. 269

91. N.D.—Assid v. Great Northern Ry. Co., 164 N.W. 949, 38 N.D. 270.
10 C.J. p 528 note 78.

92. Okl.—St. Louis & S. F. Ry. Co. v. Slade, 291 P. 107, 144 Okl. 216.
Demand held sufficient
"A letter from the shipper to the initial carrier company setting forth his claim for damages to a shipment of cattle and hogs injured while in transit, which then provides 'If, upon investigation of this matter, you desire to take the position that the damage herein complained of did not occur while the shipment was being transported by your company, you will make due proof of same to the claimant,' is a sufficient demand to satisfy section 4937, Compiled Oklahoma Statutes 1921."—St. Louis & S. F. Ry. Co. v. Slade, 291 P. 107, 144 Okl. 216.

93. Okl.—St. Louis, etc., R. Co. v. McGivney, 91 P. 693, 19 Okl. 361.

94. Ga.—Savannah, etc., R. Co. v. Austin, 29 S.E. 11, 101 Ga. 629.

95. Ga.—McElveen v. Southern R. Co., 34 S.E. 281, 109 Ga. 249, 77 Am.S.R. 371.

96. S.C.—Miller v. South Carolina R. Co., 11 S.E. 1093, 33 S.C. 359, 9 L.R.A. 833.

97. S.C.—Venning v. Atlantic Coast Line R. Co., 58 S.E. 983, 78 S.C. 42, 125 Am.S.R. 768, 12 L.R.A.,N.S., 1217.

98. S.C.—Jonesville Mfg. Co. v. Southern R. Co., 58 S.E. 422, 77 S.C. 480.

99. S.C.—Chartrand v. Southern R. Co., 67 S.E. 741, 85 S.C. 479.

1. S.C.—Miller v. South Carolina R. Co., 11 S.E. 1093, 33 S.C. 359, 9 L.R.A. 833
10 C.J. p 529 note 87.

2. S.C.—Venning v. Atlantic Coast Line R. Co., 58 S.E. 983, 78 S.C. 42,

A statute providing that if the terminal carrier uses due diligence to notify the consignee of the arrival of the goods and the consignee does not take them, so that they have to be stored, the carriers shall thereafter be liable as warehousemen, limits the liability of the initial carrier under such circumstances to that of a warehouseman, although its issuance of a through bill of lading made it liable under other statutes "as common carrier" from the commencement of the trip until delivery of the goods to the consignee.[3]

§ 407. Contracts Limiting Liability to Carrier's Own Line

a. Right to make contract
b. How limitation of liability effected
c. Consideration
d. Operation and effect of limitation
e. Waiver of limitation

a. Right to Make Contract

(1) In absence of statute
(2) Under federal statutes
(3) Under state statutes

(1) In Absence of Statute

In the absence of prohibitory statutes, the initial carrier may limit its liability to loss or injury occurring on its own line.

The law is well settled, as stated in Corpus Juris, which has been quoted on this subject,[4] that, in the absence of statute providing otherwise, the initial carrier may by special contract limit its liability to loss or injury occurring on its own line.[5] This is necessarily so because the obligation of the carrier to transport goods beyond the terminus of its own line is purely a matter of contract and not of legal duty.[6] Contracts of this character are forbidden neither by public policy nor by constitutional or statutory provisions which prohibit a carrier from limiting its common-law liability, since at common law the initial carrier is not liable for loss or injury on a connecting line.[7] Such a limitation does not relieve the carrier from its common-law liability safely to carry and deliver to the connecting carrier.[8]

(2) Under Federal Statutes

Under the Carmack amendment as amended, the initial carrier in interstate shipments, or shipments to adjacent foreign countries, cannot limit its liability to injuries occurring on its own line.

Under the Carmack amendment, if interstate shipments are received for through transportation and delivery beyond its line by the carrier, any stipulation for exemption from liability for loss or injury due to the default of its agents, the connecting carriers, is void and inoperative.[9] Originally,

125 Am S R. 768, 12 L R.A.,N.S., 1217

3. Tex.—Hines v. First Guaranty State Bank of Aubrey, Civ.App., 228 S W. 668, affirmed Com.App., 243 S.W. 972.

Goods remaining in car

Under statutes of the kind under consideration, an initial carrier who contracts to transport the goods to destination and there deliver to consignee is liable as warehouseman for damages to goods while remaining in the car in which they were shipped, after their transportation by a connecting carrier who used due diligence to notify the consignee, and the goods were not taken by the latter.—Hines v. First Guaranty State Bank of Aubrey, Civ.App., 228 S W. 668, affirmed Com.App., 243 S W. 972

4. U S—Basila v Western Union Telegraph Co, D C Fla., 24 F 2d 569, 572.

5. Ariz.—Southern Pac Co. v Larrimore, 190 P. 564, 21 Ariz 509
Tex.—A. L. Wolff & Co v Missouri, K & T Ry Co, Com App, 289 S W 1000, affirming, Civ App., 283 S W. 250—Galveston, H & S A. Ry Co. v. Lock, Civ.App., 209 S.W. 181—St. Louis Southwestern Ry. Co of Texas v. Miller & White, Civ App., 190 S.W. 819.
Wis.—Chicago, M & St P. Ry Co. v. Jewett, 171 N.W. 757, 169 Wis. 102.
10 C.J. p 529 note 94.

6. U S—Basila v. Western Union Telegraph Co., D C.Fla., 24 F 2d 569.
Ariz.—Southern Pac. Co. v. Larrimore, 190 P. 564, 21 Ariz. 509.
10 C J p 530 note 95.

7. U S—Basila v. Western Union Telegraph Co., D C Fla., 24 F.2d 569.
10 C J. p 530 notes 96–98.

8. U.S—Basila v. Western Union Telegraph Co., supra
Ariz—Southern Pac. Co. v Larrimore, 190 P 564, 21 Ariz. 509.
10 C J. p 530 note 99

9. U.S—McGinn v. Oregon-Washington R. & Nav Co, Wash., 265 F 81, certiorari granted Oregon-Washington R & Nav. Co. v McGinn, 41 S.Ct. 148, 254 U S. 628, 65 L Ed 446, and reversed on other grounds 42 S.Ct. 332, 258 U.S 409, 66 L Ed 689
Ga.—Central of Georgia Ry Co v. Council Bros., 136 S E. 418, 163 Ga. 494, 61 A L R. 1304.
Ky—Cleveland, C, C. & St L Ry. Co. v. Young, 195 S.W. 93, 175 Ky. 841
Mo.—State ex rel. and to Use of St Louis, B. & M Ry Co. v. Taylor, 251 S.W. 383, 298 Mo 474, certiorari granted State of Missouri ex rel. St. Louis, B. & M. Ry. Co v. Taylor, 44 S Ct. 132, 263 U S. 696, 68 L Ed 511, affirmed 45 S Ct 47, 266 U S 200, 69 L.Ed. 247, 42 A. L R. 1232
N.Y—Western Electric Co. v. New York & B. Transp. Line, 180 N.Y S. 873.
N C—Reidsville Paper Box Co v. Southern Ry, 99 S.E. 23, 177 N C. 351.
Okl—St Louis & S F. R Co. v. Akard, 159 P. 344, 60 Okl. 4.
Pa.—Keystone Pub Co v Pennsylvania R Co, 78 Pa Super. 486.
Tex.—Gulf, C. & S F. Ry. Co. v Morris, Civ App, 241 S W 235, affirmed, Com App, 250 S W 1017—Panhandle & S F Ry Co. v Clarendon Grain Co., Civ App., 215 S.W 866.
10 C J p 531 note 9.

Rule of carrier

Even though approved by the interstate commerce commission, a rule relieving initial carrier from liability for failure of connecting carrier to divert shipment is void under the Carmack-Cummins Amendment. —Central of Georgia Ry. Co. v. Council Bros., 136 S E 418, 163 Ga. 494, 61 A.L.R 1304—Central of Georgia

the amendment had no application to foreign commerce and did not prohibit a carrier from issuing bills of lading limiting its liability to its own line in case of a foreign shipment,[10] but, as stated supra § 406 a, by subsequent amendment its operation was extended to transportation to points in an adjacent foreign country. Nevertheless, the prohibitory rule herein declared does not apply to shipments to nonadjacent foreign countries.[11]

(3) Under State Statutes

Whether the initial carrier may by contract limit its liability to loss or injury occurring on its own line under state legislation depends on the character of the statute as construed by the courts.

An attempt by the initial carrier in an intrastate shipment to limit its liability to loss or injury occurring on its own lines is ineffective where there is a state statute, patterned after the federal statute, making a carrier which has issued a receipt or bill of lading liable for damage or injury caused by any carrier to which the property may pass,[12] or where a statute defines connecting lines, and provides that each carrier shall be agent of the other and liable on the contract of shipment to the consignee for safe and speedy transportation, and that any connecting carrier held liable for injury to a shipment shall have a right of recovery against the offending carrier for the amount of any loss, damage, or injury which it has been compelled to pay, with costs of suit.[13]

Where the statute binds the shipper to all lawful terms of the bill of lading unless objected to in writing within a certain time and requires all bills to have blank forms attached for such objections, a contract limiting the carrier's liability to the time the goods were on its own line is valid and binding in the absence of objection thereto,[14] but a carrier is in no position to claim its liability was thus limited, although the bill so provides, where it contained no forms for objections.[15]

Notwithstanding a statute providing that, when a carrier issues a through bill of lading or a receipt for transportation of goods to destination over a connecting line, it shall be liable for any loss caused by the negligence of the connecting line, the carrier may by special contract restrict its liability for loss or injury caused by negligence of its own line,[16] but a special contract is necessary for this purpose.[17] When freight is received by the carrier for shipment to a destination beyond its own terminus, it is not necessary that it should contract to carry to the point of destination to render it liable for the negligence of the connecting carrier, but it will be liable unless it contracts to carry only on its own line.[18] Receiving freight for shipment to a point beyond its own line is prima facie an agreement to carry to that point, and it is necessary, in order to escape liability, that it should stipulate that it is only to carry on its own line.[19] This statute, however, has no application except in case of loss or injury due to negligence, and no special contract is necessary to exempt the initial carrier from loss or injury on a connecting line not due to the negligence of the connecting carrier.[20]

Ry. Co. v. Council Bros., 137 S.E. 569, 36 Ga.App. 573.

Contract as through bill

The Cummins amendment to the Carmack Act, requiring through bills of lading for interstate shipments, and making the initial carrier liable for negligence of connecting lines, does not, by the use of the words "when transported on a through bill of lading," authorize any other bill of lading for such a shipment, but is used to designate the kind of contract which the initial carrier is required to make; and a contract of shipment issued by an initial carrier for a shipment of cattle, reciting the name of the carrier, that of the shipper, the route of the shipment, the consignee, and that the charges were fixed by established and published tariffs and rules, is a through bill of lading, within the amendment, notwithstanding it attempted to limit liability of the initial carrier to its own lines.—Gulf, C & S. F. Ry. Co. v. Hines, Tex.Com.App., 250 S.W. 1013, affirming, Civ.App., 239 S.W. 244

10. U.S.—Hamlen & Sons Co. v. Illinois Cent. R. Co., D.C.Ark., 212 F. 324.

11. Tex.—A. L. Wolff & Co. v. Missouri, K. & T. Ry. Co. of Texas, Com.App., 289 S.W. 1000, affirming, Civ.App., 283 S.W. 250.

South Africa

Initial carrier could by contract limit its liability for shipment to South Africa to its own line, the Carmack amendment not being applicable to such shipment.—Chicago, M. & St. P. Ry. Co. v. Jewett, 171 N.W. 757, 169 Wis. 102

12. Ark.—Ft. Smith, S. & R. I. R. Co. v. Seroggins, 234 S.W. 999, 150 Ark. 571.
Ga.—Director General of Railroads v. Beard, 108 S.E. 310, 27 Ga.App. 365.—Heath v. Sandersville R. Co., 98 S.E. 92, 23 Ga.App. 255.

13. S.C.—Glenn v. Atlantic Coast Line R. Co., 80 S.E. 898, 96 S.C. 357.

14. Ill.—Bean v. Jackson, 207 Ill. App. 577.

15. Ill.—American Hide & Leather Co. v. Southern Ry. Co., 142 N.E. 200, 310 Ill. 524, affirming 228 Ill. App. 305.

16. Mo.—Crockett v. St. Louis, etc., R. Co., Mo.App., 126 S.W. 243.
10 C.J. p. 531 note 12, p. 532 notes 28, 29.

17. Mo.—Marshall v. Kansas City, etc., R. Co., 75 S.W. 638, 176 Mo. 480, 98 Am.S.R. 508.
10 C.J. p. 531 note 13.

18. Mo.—Western Sash, etc., Co. v. Chicago, etc., R. Co., 76 S.W. 998, 177 Mo. 641.—Popham v. Barnard, 77 Mo.App. 619.—Marshall v. Kansas City, etc., R. Co., 74 Mo.App. 81.

19. Mo.—Western Sash, etc., Co. v. Chicago, etc., R. Co., supra.

20. Mo.—Scott County Milling Co. v. St. Louis, etc., R. Co., 104 S.W. 924, 127 Mo.App. 80.

A statute which provides that all carriers over whose lines any freight received by either of such carriers for through shipment, on a contract for through carriage, recognized, acquiesced in, or acted on by such carriers, shall, with respect to the undertaking, be considered connecting lines and be deemed to be the agents of each other, that the contract shall be deemed to be the contract of each of the carriers, and that, for any loss or injury sustained in such through transportation over the connecting lines or over either of them, either of such carriers which the person sustaining damages may first elect to sue shall be held liable to such person, does not prevent either an initial or a connecting carrier from limiting its liability to its own line, particularly where the contract of the initial carrier was not a contract for through shipment,[21] although it has been held that such an attempted limitation is inoperative where the shipment was a through shipment in the purview of the statute.[22]

A statute which provides that, wherever any freight has been transported over two or more railroads operating and having an agent within the state, suit for damage arising out of such transportation may be brought against one or all of such railroad corporations in any county in which either of the roads extends or is operated, provided, if damages are recovered against one or more carriers, not partners, in the shipment, they shall be apportioned, does not affect the validity of a contract limiting a carrier's liability to its own lines, nor the rights of the parties thereunder.[23]

b. How Limitation of Liability Effected

Limitations of the initial carrier's liability to loss or injury occurring on its own lines are effected in the same manner as other limitations of liability.

Where such contracts are not invalid under the principles heretofore stated, the general rules governing the requisites and sufficiency of contracts limiting the carrier's common-law liability, considered supra §§ 89–91, are applicable to contracts limiting the carrier's liability for loss or negligence to its own line.[24] Thus, if a bill of lading limiting the liability of the initial carrier for loss or injury occurring on its own line is accepted by the shipper when the goods are delivered for transportation, the limitation will be binding and effective, although the shipper did not read it and did not know that the limiting clause was in the bill of lading;[25] but a provision in fine print, limiting the carrier's liability to its own line, which is somewhat obscured by the use of stamps, cannot, it is held, be regarded as a contract and is ineffective to limit the carrier's liability to its own line.[26] By accepting the bill of lading, the shipper, in the absence of fraud or mistake, will be conclusively presumed to know its terms and will not be permitted to plead ignorance of its contents.[27] However, any attempted limitation of liability contained in a bill of lading or a shipping receipt delivered to the carrier after acceptance of the goods for transportation is inoperative,[28] as such special contract, to be effective, must be made contemporaneously with the delivery of the goods;[29] yet it has been held that, where, at the time of a parol contract between a shipper of live stock and the carrier, the shipper expected to sign a written contract, and he subsequently did so, he was not in a position to avoid the force of provisions in the written contract limiting the liability of the carrier to damages occurring on its own line.[30]

21. Tex.—Crenwelge v. Ponder, Com.App., 228 S.W. 145, reversing Ponder v. Crenwelge, Civ.App., 203 S.W. 1125—Chicago, R. I. & G. Ry. Co. v. Hallam, Civ.App., 211 S.W. 809.
10 C.J. p 532 note 23.

Independent contracts

Where live stock was shipped over the lines of connecting carriers, but each carrier made an independent contract with the shipper, defendant, which was the initial carrier, limiting its liability to its own line, and the transportation being intra-state only, the statute, relating to contracts for through shipment recognized or acquiesced in by the carriers, had no application, and defendant was not liable for damages accruing on the lines of the connecting carriers.—Chicago, R. I. & G. Ry. Co. v. Hallam, Tex.Civ.App., 211 S.W. 809.

22. Tex.—Galveston, H. & S. A. Ry. Co. v. Zemurray, Civ.App., 215 S.W. 157—Texas, etc., R. Co. v. Townsend, Civ.App., 106 S.W. 760—Gulf, etc., R. Co. v. Terry, Civ.App., 89 S.W. 792.

23. Tex.—Missouri, etc., R. Co. v. Elliott, 89 S.W. 767, 99 Tex. 286.
10 C.J. p 532 note 26.

24. **Contracts held sufficient** to limit liability.
U.S.—Cincinnati, etc., R. Co. v. Fairbanks, 90 F. 467, 33 C.C.A. 611.
Mass.—Pendergast v. Adams Express Co., 101 Mass. 120.
Ohio.—Chesapeake, etc., R. Co. v. Ward Lumber Co., 21 Ohio Cir.Ct., N.S., 337—American Roofing Co. v. Memphis Packet Co., 8 Ohio S. & C.P. 490, 5 Ohio N.P. 146.
Wis.—Best v. Great Northern R. Co., 150 N.W. 484, 159 Wis. 429.
10 C.J. p 532 note 31 [a].

25. Ala.—Jones v. Cincinnati, etc., R. Co., 8 So. 61, 89 Ala. 376—Louisville, etc., R. Co. v. Meyer, 78 Ala. 597.
10 C.J. p 532 note 32.

26. Wash.—Allen v. Canadian Pac. R. Co., 84 P. 620, 42 Wash. 64, 7 Ann.Cas. 468.
10 C.J. p 533 note 33.

27. Iowa.—Mulligan v. Illinois Cent. R. Co., 36 Iowa 181, 14 Am.R. 514.

28. U.S.—Northern Pac. R. Co. v. American Trading Co., 25 S.Ct. 84, 195 U.S. 439, 49 L.Ed. 269.
Ala.—Louisville, etc., R. Co. v. Meyer, 78 Ala. 597.

29. Ala.—Southern R. Co. v. Levy, 39 So. 95, 144 Ala. 614.

30. Tex.—Chicago, etc., R. Co. v. Halsell, 81 S.W. 1243, 36 Tex.Civ.App. 522.

c. Consideration

No consideration is necessary for a contract limiting a carrier's liability to its own line.

No consideration need be shown to support an agreement for a limitation of this kind, for the reason that the carrier is under no obligation to assume liability for loss or injury on the line of a connecting carrier.[31] If a consideration were necessary, the shipment itself would suffice.[32] So, also, the increased facilities and lessened expense received by the shipper in the transmission of his goods to a distant destination requiring several lines to be traversed by means of such an arrangement among the carriers,[33] or a reduced rate of transportation,[34] would be a sufficient consideration.

d. Operation and Effect of Limitation

Although the rule is subject to some qualifications, generally a carrier validly limiting its liability to its own line is not chargeable with damages occurring on a connecting line.

If a common carrier, by valid stipulation in a bill of lading, limits its liability for the transportation of property to its own line, it will not be chargeable with damages occurring on a connecting line,[35] and this rule applies, although by virtue of its through traffic arrangements it received more than the local rates for the haul, and although it contracted for the through rate, and provided in its bill of lading that the connecting lines should have the benefit of all exceptions and conditions contained therein.[36] So, the fact that loss or injury occurring on a connecting line was due to its negligence does not affect the operation of the limitation.[37] The initial carrier is responsible only for the exercise of reasonable care and diligence in the selection of proper connecting carriers.[38] Nevertheless, although it has been held that, where the contract validly exempts the initial carrier from liability for loss not occurring on its own line or after the property is ready for delivery to the next carrier, such carrier is not liable for loss occurring on the line of the next carrier, even though caused by its own negligence,[39] the fact that the contract exempts the carrier from liability for loss or injury through negligence occurring on a connecting line will not exempt it from liability for loss occurring on another line due to its own negligence at the inception of the shipment;[40] and, if the damages proved are shown to have resulted from the joint negligence of the two carriers, each may properly be held responsible for the proportion of the damages accruing which its negligence bears to the entire negligence.[41] Where the initial carrier limited its liability to damage occurring on its own line and did not receive the goods on a through contract, a statute providing that in case of a contract for through shipment between points in the state all connecting lines are liable for damages sustained anywhere in such through transportation, is inapplicable and the carriers are not jointly liable thereunder, the case being governed by another statute which permits action to be brought against one or all connecting carriers and provides for apportionment of the damage recovered between carriers not partners in the carriage.[42]

The fact that the stipulation limiting the carrier's liability to its own line does not state the name of the station where the liability of the initial line is to end is immaterial.[43]

Where the connecting carrier acted merely as agent for the receiving carrier, the latter is liable for injuries occurring while the shipment was in the possession of the former, notwithstanding liability for damages was limited to those occurring on its own line;[44] and a contract limiting the liability of an initial carrier for loss or injury occurring on its own line is of no effect, where, by

31. Mo.—Hance v. Wabash Western R. Co., 56 Mo.App. 476.

32. Ala.—McNeill v. Atlantic Coast Line R. Co., 49 So. 797, 161 Ala. 319.

33. N.C.—Phifer v. Carolina Cent. R. Co, 89 N C 311, 45 Am.R. 687.

34. Ala.—Western R. Co v. Harwell, 11 So. 781, 97 Ala. 341.

35. Cal.—McCaslin v Southern Pac. Co., 203 P. 742, 187 Cal. 716.
Tenn.—American Peanut Corporation v. St Louis & Tennessee River Packet Co, 3 Tenn App. 552.
10 C.J. p 530 note 1.
Conversion
Where the bill of lading issued by an initial carrier expressly and validly limits liability to its own line, no recovery can be had against it for conversion by a connecting carrier.—McCaslin v Southern Pac. Co., 203 P 742, 187 Cal. 716

36. Kan.—Hoffman v. Union Pac. R. Co., 56 P. 331, 8 Kan.App. 379.

37. Pa.—American Express Co. v. Titusville Second Nat. Bank, 69 Pa. 394, 8 Am R. 268.
10 C.J. p 530 note 2.

38. Pa.—American Express Co. v. Titusville Second Nat. Bank, supra

39. Tex.—A. L. Wolff & Co v Missouri, K. & T. Ry. Co., Com.App, 289 S.W. 1000, affirming, Civ.App., 283 S.W. 250.

40. Mo.—Popham v. Barnard, 77 Mo.App. 619.
Tex.—Texas, etc., R. Co. v. McMillen, Civ.App., 183 S.W. 773—Galveston, etc., R. Co v. Herring, Civ App., 24 S.W. 939.

41. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Miller & White, Civ.App, 190 S.W. 819.

42. Tex. — Crenwelge v. Ponder, Com.App., 228 S.W. 145, reversing Ponder v. Crenwelge, Civ.App., 203 S W. 1125.

43. Mo.—Minter v. Southern Kansas R. Co, 56 Mo.App. 282

44. Tex.—Panhandle & S. F. Ry. Co. v. Wright-Herndon Co., Civ. App., 195 S.W. 216.

a partnership agreement between it and the connecting carrier over whose route the shipment is to be transported, each partner is liable in solido for all causes of actions against the partnership;[45] nor is such a contract by the initial carrier operative in its behalf, where it has leased the lines of a connecting carrier.[46]

Although the contract limits the liability of the initial carrier to damages on its own line, such carrier is liable for damages occurring on a connecting line where there has been a deviation.[47]

e. Waiver of Limitation

A connecting carrier cannot waive the limitation so as to affect another carrier.

One connecting carrier has no power to waive a stipulation limiting liability for loss or injury to the line on which it occurred so as to affect another connecting carrier;[48] nor has the station agent of a connecting line authority to waive such stipulation.[49]

§ 408. Right of Carrier to Make Through Contract of Carriage and Also to Limit Liability to Its Own Line

The authorities differ as to whether a carrier making a through contract of carriage can limit its liability to its own line.

Even where contracts limiting a carrier's liability are not prohibited by statute, there is some conflict of authority as to whether a carrier can make a through contract of transportation and also limit its liability to loss or injury on its own line. In some jurisdictions the rule is laid down, apparently without qualification, that an initial carrier may make a contract of through carriage to destination over connecting lines and at the same time limit its liability for loss or injury to such loss or injury as occurs on its own line;[50] but, as shown supra, § 405 a, in the absence of any stipulation to the contrary, the carrier making a contract of through carriage is responsible for loss or injury occurring on connecting lines. On the other hand, it has been held in a number of jurisdictions where the question seems to be unaffected by statute that, where a carrier contracts to carry goods to their destination over a connecting line, a clause in the contract of shipment which limits its liability to loss or injury occurring on its own line is invalid and inoperative as to loss or injury occurring on the connecting line, where the loss or injury is due to the negligence of the agents or servants of the connecting carrier.[51] Under a statute providing that, when a carrier issues a through bill of lading for the transportation of goods to destination over a connecting line, it shall be liable for any loss caused by the negligence of any connecting line, a carrier cannot contract for a through shipment and at the same time exempt itself from liability on account of loss or injury due to the negligence of connecting carriers,[52] and the same rule applies where the statute makes a carrier receiving freight to be transported to any place on the line of a connecting road liable for the delivery thereof to the consignee in the same order in which the freight was shipped.[53]

§ 409. Duty to Notify Connecting Carrier of Arrival of Goods

The initial carrier must notify the succeeding carrier of the arrival of the goods at the point of transfer to the latter's line.

It is the duty of the initial carrier to notify the succeeding carrier of the arrival of the goods at the point where the latter is to receive them,[54] and until such notice is given it remains liable for the safety of the goods.[55] There is no complete delivery to the succeeding line, and no liability on the part of the latter arises until after such notice.[56] This duty, it has been said, exists particularly in cases where live stock is being carried, it being always important in such cases that close

45. Tex.—Gulf, etc., R. Co. v. Wilson, 26 S.W. 131, 7 Tex.Civ.App. 128.
10 C.J. p 530 note 7.

46. Tex.—International, etc., R. Co. v. Anderson, 21 S.W. 691, 3 Tex.Civ.App. 8.

47. Ga.—Southern R. Co. v. Frank, 63 S.E. 656, 5 Ga.App. 574.
S.C.—Chartrand v. Southern R. Co., 67 S.E. 741, 85 S.C. 479.
Tex.—Galveston, etc., R. Co. v. Allison, 59 Tex. 193.
10 C.J. p 190 note 9.

48. Tex.—Gulf, etc., R. Co. v. Williams, 23 S.W. 626, 4 Tex.Civ.App. 294

49. Tex.—Gulf, etc., R. Co. v. Clarke, 24 S.W. 355, 5 Tex.Civ.App. 547.

50. Ariz.—Southern Pac. Co. v. Larrimore, 190 P. 564, 21 Ariz. 509.
10 C.J. p 533 note 46.
Reason for rule see 10 C.J. p 533 note 46 [a].

51. Okl.—St. Louis & S. F. R. Co. v. Akard, 159 P. 344, 60 Okl. 4
10 C.J. p 157 note 99 [b] (2), p 533 note 48.

52. Mo.—Western Sash, etc., Co. v. Chicago, etc., R. Co., 76 S.W. 998, 177 Mo. 641.
10 C.J. p 534 note 49

53. Neb.—Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry. Co., 179 N. W. 503, 105 Neb. 151.

54. Ala.—Louisville & N. R. Co. v. Williams, 73 So. 548, 198 Ala. 425.
10 C.J. p 534 note 50.

55. N.Y.—Sprague v. New York Cent. R. Co., 52 N.Y. 637.

56. Ala.—Louisville & N. R. Co. v. Williams, 73 So. 548, 198 Ala. 425.
10 C.J. p 534 note 52.

connections shall be made.[57] This notice must be given to some representative of the succeeding line authorized to receive it.[58] It is not necessary, however, that the first carrier notify the connecting carrier in advance when the goods will arrive.[59]

§ 410. Duty to Deliver Goods to Connecting Carrier

It is the duty of the initial carrier to deliver the goods to the connecting carrier within a reasonable time and in good condition.

Where goods are to be transported to a point beyond the terminus of the initial carrier, it is the duty of such carrier to deliver the goods to the connecting carrier to be forwarded on its line[60] within a reasonable time[61] and in good condition for transportation,[62] or at least to make a tender of delivery.[63] The duty of the carrier is not discharged until it has been imposed on the carrier next in order.[64] To relieve the initial carrier from liability and charge the connecting carrier for loss or injury, a complete delivery by the initial carrier is requisite,[65] or the failure to deliver must be justified by the circumstances of the case.[66] However, as shown infra § 449 c, in the absence of special contract, the initial carrier is under no obligation to allow its cars in which the goods are shipped to go over the connecting line, nor is it bound to load the goods on the connecting carrier's cars,[67] and, where authorized to do so by the bill of lading and filed tariffs, it may properly refuse to deliver to a connecting line performing only switching services until its charges are paid.[68] If the carrier assumes through transportation of live stock, however, it must deliver such stock at the terminus of its road to the connecting carrier in a car suitable to transport it to its final destination.[69] Where transportation is divided into two separate and independent stages, and the initial bill of lading imposes no duty to deliver the car to the connecting carrier for further transportation, the initial carrier's responsibility ends on its delivery, in good order to the consignor's agent at the connecting point.[70] A carrier who delivers to a connecting carrier other than the one designated in the contract for further transportation is liable for at least nominal damages, even though the goods arrive without delay or injury.[71] The duty to deliver to the connecting carrier does not arise where there is no such connection between the lines as to make delivery practicable.[72]

57. Mo.—Dunn v. Hannibal, etc., R. Co., 68 Mo. 268.

58. Ala.—Selma, etc., R. Co. v. Butts, 43 Ala. 385, 94 Am.D. 694.

59. Ky.—Louisville, etc., R. Co. v. Bourne, 15 Ky.L. 445.

60. U.S.—The No. 37, N.Y., 53 S. Ct. 328, 288 U.S. 239, 77 L.Ed. 721, reversing, C.C.A., The Car Float No. 37, 57 F.2d 144, reversing, D. C., The Talisman, 52 F.2d 691, and certiorari granted New York Cent. R. Co. v. The Talisman, 53 S.Ct. 85, 287 U.S. 587, 77 L.Ed. 513—Wiener v. Compagnie Generale Transatlantique, D.C.N.Y., 55 F.2d 262, reversed on other grounds, C. C.A., 61 F.2d 893.
N.C.—W. L. Hall & Co. v. Norfolk Southern R. Co., 91 S.E. 607, 173 N.C. 108.
Tex.—Quanah, A. & P. Ry. Co. v. Warren, Civ.App., 184 S.W. 232.
10 C.J. p. 534 note 57.

61. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Miller & White, Civ.App., 190 S.W. 819.
10 C.J. p. 534 note 58.

Concurring negligence

Where negligence of railroad in failing or refusing to accept shipment of live stock at connecting point concurred with negligence of connecting road in failing to deliver shipment in question, on transfer track, both companies were responsible for delays and consequent damages proximately resulting from such negligence.—St. Louis Southwestern Ry. Co. of Texas v. Miller & White, Tex.Civ.App., 190 S.W. 819.

62. U.S.—Buston v. Pennsylvania R. Co., C.C.Pa., 116 F. 235, affirmed 119 F. 808, 56 C.C.A. 320, and certiorari denied 23 S.Ct. 850, 189 U.S. 511, 47 L.Ed. 923.
Pa.—Eckert v. Pennsylvania R. Co., 60 A. 781, 211 Pa. 267, 117 Am.S.R. 571.
10 C.J. p. 535 note 59.

63. U.S.—Mallory S. S. Co. v. Garfield, C.C.A.N.Y., 10 F.2d 664, certiorari denied Garfield v. Mallory S. S. Co., 47 S.Ct. 97, 273 U.S. 703, 71 L.Ed. 848.

64. U.S.—Texas & Pac. R. Co. v. Reiss, N.Y., 22 S.Ct. 253, 183 U.S. 621, 46 L.Ed. 358—U. S. v. Union Pac. R. Co., Utah, 213 F. 332, 130 C.C.A. 34.
Mich.—Condon v. Marquette, etc., R. Co., 21 N.W. 321, 55 Mich. 218, 54 Am.R. 367.

65. Ala.—Mt. Vernon Co. v. Alabama Great Southern R. Co., 8 So. 687, 92 Ala. 296.
Tenn.—Farnsworth-Evans Co. v. Chicago, etc., R. Co., 157 S.W. 897, 128 Tenn. 50.
10 C.J. p. 535 note 61.

66. Va. — Merchants' & Miners' Transp. Co. v. L. J. Upton & Co., 103 S.E. 616, 127 Va. 406.

Fault of connecting carrier

Defendant carrier is not liable for failure to deliver a shipment of potatoes to a connecting carrier, where it was informed by plaintiff that connecting carrier would send its steamer for the shipment, and the connecting carrier, knowing that the shipment was ready, failed to do so. —Merchants' & Miners' Transp. Co. v. L. J. Upton & Co., 103 S.E. 616, 127 Va. 406.

67. Tex.—Galveston, H. & S. A. R. Co. v. Jones, 134 S.W. 328, 104 Tex. 92.

68. Va.—McGuire v. Atlantic Coast Line R. Co., 118 S.E. 225, 136 Va. 382.

69. Pa.—Eckert v. Pennsylvania R. Co., 60 A. 781, 211 Pa. 267, 107 Am. S.R. 571.

70. Mo.—Smith v. Gulf, C. & S. F., R. Co., 164 S.W. 132, 177 Mo.App. 269.

71. Mo.—Chandler Commn. Co. v. Nashville, etc., R. Co., 64 Mo.App. 144.

72. Ark.—St. Louis & S. F. R. Co. v. Marrs, 31 S.W. 42, 60 Ark. 637.

§ 411. Relation to Goods before Delivery

On refusal of the succeeding carrier to receive the goods, the initial carrier has the duty to notify the consignor or consignee and to take reasonable care of the property while awaiting instructions.

As stated infra § 414 b, the initial carrier does not become warehouseman while merely holding the goods at the end of its own line before delivery to the connecting carrier, but its liability as warehouseman attaches when it makes proper efforts to deliver them and the succeeding carrier refuses to receive them. Where goods are thus held after failure or refusal of the connecting carrier to receive them, it is the duty of the initial carrier to notify at once the shipper or consignee, as the case may be, and to take reasonable care of the goods while awaiting instructions,[73] unless the property is of such a perishable nature that the delay would be calculated to injure or destroy it;[74] and it will be liable for any loss or injury resulting from want of such notice,[75] although on failing to notify the owner its responsibility as common carrier does not continue.[76] In the absence of such notice it has been held that the first carrier must exercise ordinary care and prudence in instructing another carrier to transport the consignment.[77] The refusal of the connecting carrier to receive the goods will not render the retention of them by the first carrier a conversion;[78] but, under such circumstances, having received the goods for transportation involving their acceptance by the connecting carrier, the initial carrier is responsible as actual custodian, having by acceptance guaranteed that they will be forwarded.[79]

§ 412. What Constitutes Sufficient Delivery to Connecting Carrier

The rules governing delivery to a consignee are applicable in determining what constitutes sufficient delivery by the initial carrier to the connecting carrier, the manner thereof being generally left to the carriers themselves.

In the absence of a statute or regulation prescribing the manner in which transfer of freight from one carrier to a connecting carrier is to be made, the matter must be left to the connecting carriers themselves, subject to the qualification that no unreasonable method be adopted by them, and, hence, where an initial carrier has, at the point of connection, no facilities for transferring cattle, it may lawfully transfer them to the connecting road through union stockyards possessing such facilities.[80] As to what amounts to a sufficient delivery by the initial carrier, the rules governing delivery to a consignee, which are exhaustively treated supra § 161 et seq. are in the main applicable.[81] If anything remains to be done by the initial carrier, such as the giving of notice or shipping directions, or the separation and identification of the goods, the initial carrier remains liable.[82] Where the second carrier assumes control of the goods, the requirements as to delivery are satisfied.[83] However, a manual transfer of possession is not essential;[84] a constructive change of possession from the first to the second carrier may amount to a delivery.[85] If there is a common place of transfer at which the first carrier deposits the goods ready to be taken by the second

73. Ala.—Ocean S. S. Co. of Savannah v. People's Shoe Co, 81 So 241, 202 Ala. 594, conformed to 81 So. 245, 17 Ala App. 34
Ill.—Brennan Packing Co. v. Mellon, 252 Ill.App 522.
10 C.J. p 536 note 76.

74. Ala.—Southern R. Co. v. Wallace, 56 So. 714, 175 Ala. 72—Louisville & N. R. Co. v. Duncan, 34 So. 988, 137 Ala. 446.

75. Ill.—Brennan Packing Co. v. Mellon, 252 Ill.App. 522.
10 C.J. p 536 note 79.

76. Mo.—Cramer v. American Merchants' Union Express Co., 56 Mo. 524.

77. Ala.—Louisville, etc., R. Co. v. Duncan, 34 So. 988, 137 Ala. 446.
10 C.J. p 536 note 80.

78. Ark.—Little Rock, etc., R. Co. v. Odom, 38 S.W. 339, 63 Ark. 326.

79. Minn.—Southard v. Minneapolis, St. P. & S. S. M. R. Co., 62 N.W. 442, 619, 60 Minn 382.

80. Tex.—Texas & P. Ry. Co. v. Scott & Robertson, 90 S.W. 532, 41 Tex.Civ.App 163—Texas & P. Ry. Co. v. Felker, 90 S.W. 530, 40 Tex.Civ.App 604.

81. U.S.—Texas & P. R. Co. v. Clayton, N.Y., 84 F 305, 28 C.C.A. 142, affirmed 19 S.Ct. 421, 173 U.S. 348, 43 L.Ed. 725.
W.Va.—Lewis v. Chesapeake, etc., R. Co., 35 S.E. 908, 47 W.Va. 656, 81 Am.S.R. 816.
10 C.J. p 536 note 84

82. S.C.—Miller v. South Carolina R. Co, 11 S.E. 1093, 33 S.C. 359, 9 L.R.A. 833.
10 C.J. p 536 note 85.

83. Tex.—Texas, etc., R. Co v. Scoggin, 90 S.W. 521, 40 Tex.Civ. App. 526.

84. U.S.—Texas & P. R. Co. v. Clayton, N.Y., 84 F. 305, 28 C.C.A. 142, affirmed 19 S.Ct. 421, 173 U.S. 384, 43 L.Ed. 725.

85. U.S.—Texas & P. R. Co. v. Clayton, supra.
10 C.J. p 537 note 88.

Delivery on pier
Railroad contracting to carry cotton to port, and to deliver to ocean carrier, was not liable for ocean carrier's failure to transport, where road delivered it on pier where steamship was loading in ample time for loading.—Louisville & N. R. Co. v. Williams, 73 So. 548, 198 Ala. 425.

Placing cars on transfer track
Delivery of cars by initial carrier to connecting carrier is completed by placing cars on interchange or transfer track and delivering waybills according to prevailing custom at place of transfer—Jennings v. Missouri Pac. R. Co., 134 So. 694, 172 La. 522—10 C.J. p 537 note 88 [a].

connections shall be made.[57] This notice must be given to some representative of the succeeding line authorized to receive it.[58] It is not necessary, however, that the first carrier notify the connecting carrier in advance when the goods will arrive.[59]

§ 410. Duty to Deliver Goods to Connecting Carrier

It is the duty of the initial carrier to deliver the goods to the connecting carrier within a reasonable time and in good condition.

Where goods are to be transported to a point beyond the terminus of the initial carrier, it is the duty of such carrier to deliver the goods to the connecting carrier to be forwarded on its line[60] within a reasonable time[61] and in good condition for transportation,[62] or at least to make a tender of delivery.[63] The duty of the carrier is not discharged until it has been imposed on the carrier next in order.[64] To relieve the initial carrier from liability and charge the connecting carrier for loss or injury, a complete delivery by the initial carrier is requisite,[65] or the failure to deliver must be justified by the circumstances of the case.[66] However, as shown infra § 449 c, in the absence of special contract, the initial carrier is under no obligation to allow its cars in which the goods are shipped to go over the connecting line, nor is it bound to load the goods on the connecting carrier's cars;[67] and, where authorized to do so by the bill of lading and filed tariffs, it may properly refuse to deliver to a connecting line performing only switching services until its charges are paid.[68] If the carrier assumes through transportation of live stock, however, it must deliver such stock at the terminus of its road to the connecting carrier in a car suitable to transport it to its final destination.[69] Where transportation is divided into two separate and independent stages, and the initial bill of lading imposes no duty to deliver the car to the connecting carrier for further transportation, the initial carrier's responsibility ends on its delivery, in good order to the consignor's agent at the connecting point.[70] A carrier who delivers to a connecting carrier other than the one designated in the contract for further transportation is liable for at least nominal damages, even though the goods arrive without delay or injury.[71] The duty to deliver to the connecting carrier does not arise where there is no such connection between the lines as to make delivery practicable.[72]

57. Mo.—Dunn v. Hannibal, etc., R. Co., 68 Mo. 268.

58. Ala.—Selma, etc, R. Co. v. Butts, 43 Ala. 385, 94 Am.D. 694.

59. Ky.—Louisville, etc., R. Co. v. Bourne, 15 Ky.L. 445.

60. U.S.—The No 37, N.Y., 53 S. Ct. 328, 288 U.S. 239, 77 L.Ed. 721, reversing, C.C.A., The Car Float No. 37, 57 F.2d 144, reversing, D. C., The Talisman, 52 F.2d 691, and certiorari granted New York Cent. R. Co. v. The Talisman, 53 S.Ct. 85, 287 U.S. 587, 77 L.Ed. 513—Wiener v. Compagnie Generale Transatlantique, D.C.N.Y., 55 F.2d 262, reversed on other grounds, C.C.A., 61 F.2d 893.
N.C.—W. L. Hall & Co. v. Norfolk Southern R. Co., 91 S.E. 607, 173 N.C. 108.
Tex.—Quanah, A. & P. Ry. Co. v. Warren, Civ.App., 184 S.W. 232.
10 C.J. p 534 note 57.

61. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Miller & White, Civ.App., 190 S.W. 819.
10 C.J. p 534 note 58.

Concurring negligence
Where negligence of railroad in failing or refusing to accept shipment of live stock at connecting point concurred with negligence of connecting road in failing to deliver shipment in question, on transfer track, both companies were responsible for delays and consequent damages proximately resulting from such negligence.—St. Louis Southwestern Ry. Co. of Texas v. Miller & White, Tex.Civ.App., 190 S.W. 819.

62. U.S.—Buston v. Pennsylvania R. Co., C.C.Pa., 116 F. 235, affirmed 119 F. 808, 56 C.C.A. 320, and certiorari denied 23 S.Ct. 850, 189 U.S. 511, 47 L.Ed. 923.
Pa.—Eckert v. Pennsylvania R. Co., 60 A. 781, 211 Pa. 267, 117 Am.S.R. 571.
10 C.J. p 535 note 59.

63. U.S.—Mallory S. S. Co. v. Garfield, C.C.A.N.Y., 10 F.2d 664, certiorari denied Garfield v. Mallory S. S. Co., 47 S.Ct. 97, 273 U.S. 703, 71 L.Ed. 848.

64. U.S.—Texas & Pac. R. Co. v. Reiss, N.Y., 22 S.Ct. 253, 183 U.S. 621, 46 L.Ed. 358—U. S. v. Union Pac. R. Co., Utah, 213 F. 332, 130 C.C.A. 34.
Mich.—Condon v. Marquette, etc., R. Co., 21 N.W. 321, 55 Mich. 218, 54 Am.R. 367.

65. Ala.—Mt. Vernon Co. v. Alabama Great Southern R. Co., 8 So. 687, 92 Ala. 296
Tenn.—Farnsworth-Evans Co. v. Chicago, etc., R. Co., 157 S.W. 897, 128 Tenn. 50.
10 C.J. p 535 note 61.

66. Va. — Merchants' & Miners' Transp. Co. v. L. J. Upton & Co., 103 S.E. 616, 127 Va. 406.

Fault of connecting carrier
Defendant carrier is not liable for failure to deliver a shipment of potatoes to a connecting carrier, where it was informed by plaintiff that connecting carrier would send its steamer for the shipment, and the connecting carrier, knowing that the shipment was ready, failed to do so.—Merchants' & Miners' Transp. Co. v. L. J. Upton & Co., 103 S.E. 616, 127 Va. 406.

67. Tex.—Galveston, H. & S. A. R. Co. v. Jones, 134 S.W. 328, 104 Tex. 92.

68. Va.—McGuire v. Atlantic Coast Line R. Co., 118 S.E. 225, 136 Va. 382.

69. Pa.—Eckert v. Pennsylvania R. Co., 60 A. 781, 211 Pa. 267, 107 Am. S.R. 571.

70. Mo.—Smith v. Gulf, C. & S. F., R. Co., 164 S.W. 132, 177 Mo.App. 269.

71. Mo.—Chandler Commn. Co. v. Nashville, etc., R. Co., 64 Mo.App. 144.

72. Ark.—St. Louis & S. F. R. Co. v. Marrs, 31 S.W. 42, 60 Ark. 637.

§ 411. Relation to Goods before Delivery

On refusal of the succeeding carrier to receive the goods, the initial carrier has the duty to notify the consignor or consignee and to take reasonable care of the property while awaiting instructions.

As stated infra § 414 b, the initial carrier does not become warehouseman while merely holding the goods at the end of its own line before delivery to the connecting carrier, but its liability as warehouseman attaches when it makes proper efforts to deliver them and the succeeding carrier refuses to receive them. Where goods are thus held after failure or refusal of the connecting carrier to receive them, it is the duty of the initial carrier to notify at once the shipper or consignee, as the case may be, and to take reasonable care of the goods while awaiting instructions,[73] unless the property is of such a perishable nature that the delay would be calculated to injure or destroy it;[74] and it will be liable for any loss or injury resulting from want of such notice,[75] although on failing to notify the owner its responsibility as common carrier does not continue.[76] In the absence of such notice it has been held that the first carrier must exercise ordinary care and prudence in instructing another carrier to transport the consignment.[77] The refusal of the connecting carrier to receive the goods will not render the retention of them by the first carrier a conversion;[78] but, under such circumstances, having received the goods for transportation involving their acceptance by the connecting carrier, the initial carrier is responsible as actual custodian, having by acceptance guaranteed that they will be forwarded.[79]

§ 412. What Constitutes Sufficient Delivery to Connecting Carrier

The rules governing delivery to a consignee are applicable in determining what constitutes sufficient delivery by the initial carrier to the connecting carrier, the manner thereof being generally left to the carriers themselves.

In the absence of a statute or regulation prescribing the manner in which transfer of freight from one carrier to a connecting carrier is to be made, the matter must be left to the connecting carriers themselves, subject to the qualification that no unreasonable method be adopted by them, and, hence, where an initial carrier has, at the point of connection, no facilities for transferring cattle, it may lawfully transfer them to the connecting road through union stockyards possessing such facilities.[80] As to what amounts to a sufficient delivery by the initial carrier, the rules governing delivery to a consignee, which are exhaustively treated supra § 161 et seq. are in the main applicable.[81] If anything remains to be done by the initial carrier, such as the giving of notice or shipping directions, or the separation and identification of the goods, the initial carrier remains liable.[82] Where the second carrier assumes control of the goods, the requirements as to delivery are satisfied.[83] However, a manual transfer of possession is not essential;[84] a constructive change of possession from the first to the second carrier may amount to a delivery.[85] If there is a common place of transfer at which the first carrier deposits the goods ready to be taken by the second

73. Ala.—Ocean S. S. Co. of Savannah v. People's Shoe Co., 81 So. 241, 202 Ala. 594, conformed to 81 So. 245, 17 Ala App. 34.
Ill.—Brennan Packing Co. v. Mellon, 252 Ill.App. 522.
10 C.J. p 536 note 76.

74. Ala.—Southern R. Co. v. Wallace, 56 So. 714, 175 Ala. 72—Louisville & N. R. Co v. Duncan, 34 So. 988, 137 Ala. 446.

75. Ill.—Brennan Packing Co. v. Mellon, 252 Ill App. 522.
10 C J. p 536 note 79.

76. Mo.—Cramer v. American Merchants' Union Express Co., 56 Mo. 524.

77. Ala.—Louisville, etc., R. Co. v. Duncan, 34 So. 988, 137 Ala. 446.
10 C.J. p 536 note 80.

78. Ark.—Little Rock, etc., R. Co. v. Odom, 38 S.W. 339, 63 Ark. 326.

79. Minn.—Southard v. Minneapolis, St. P. & S. S. M. R. Co., 62 N.W. 442, 619, 60 Minn. 382.

80. Tex.—Texas & P. Ry. Co. v. Scott & Robertson, 90 S.W. 532, 41 Tex.Civ App. 163—Texas & P. Ry. Co. v. Felker, 90 S.W. 530, 40 Tex.Civ.App. 604.

81. U.S.—Texas & P. R. Co. v. Clayton, N.Y., 84 F. 305, 28 C.C.A. 142, affirmed 19 S.Ct 421, 173 U.S. 348, 43 L.Ed 725.
W.Va.—Lewis v. Chesapeake, etc. R. Co., 35 S.E. 908, 47 W.Va. 656, 81 Am.S.R. 816.
10 C.J. p 536 note 84.

82. S.C.—Miller v. South Carolina R. Co., 11 S.E. 1093, 33 S.C. 359, 9 L.R.A. 833.
10 C.J. p 536 note 85.

83. Tex.—Texas, etc., R. Co. v. Scoggin, 90 S.W. 521, 40 Tex.Civ App 526.

84. U.S.—Texas & P. R. Co. v. Clayton, N.Y., 84 F. 305, 28 C.C.A. 142, affirmed 19 S.Ct. 421, 173 U.S. 384, 43 L.Ed. 725.

85. U.S.—Texas & P. R. Co. v. Clayton, supra.
10 C.J. p 537 note 88.

Delivery on pier

Railroad contracting to carry cotton to port, and to deliver to ocean carrier, was not liable for ocean carrier's failure to transport, where road delivered it on pier where steamship was loading in ample time for loading.—Louisville & N. R. Co. v. Williams, 73 So. 548, 198 Ala. 425.

Placing cars on transfer track

Delivery of cars by initial carrier to connecting carrier is completed by placing cars on interchange or transfer track and delivering waybills according to prevailing custom at place of transfer.—Jennings v. Missouri Pac. R. Co., 134 So. 694, 172 La. 522—10 C.J. p 537 note 88 [a].

carrier, such deposit may constitute the necessary delivery and acceptance, although the agents of the connecting carrier have not exercised manual control over the goods.[86] It seems that, where the goods are delivered by the first carrier to a common depot, the liability of the second carrier does not attach until the lapse of a reasonable time for taking the goods away.[87]

Delivery of waybills covering a shipment to a connecting carrier is not conclusive of delivery of the shipment, where the cars containing it have yet to be removed to another track for inspection.[88]

§ 413. Duty to Give Shipping Directions to Connecting Carrier

The initial carrier must give essential shipping directions to the connecting carrier.

As stated in Corpus Juris, which has been quoted on this question,[89] it is the duty of the carrier to notify the connecting carrier of any facts with reference to the destination of the goods, the method of transportation, etc., which are essential to enable the connecting carrier properly to receive and transport the goods, and its liability for loss continues until it has given such shipping instructions, notwithstanding delivery to the connecting carrier.[90] Furthermore, exemption in the contract of carriage for loss or damage beyond the line of the initial carrier will not relieve it, where such damage is brought about by its own negligent misdirection.[91]

The mere fact that marks or labels on the packages consigned indicate the point to which they are to go will not excuse a failure to transmit instructions to the succeeding carrier.[92] If the instructions are omitted from the shipping bills, the initial carrier is responsible for the failure of the next line to know of them.[93] Where stock was carried over connecting railroads and there was no statute making it the duty of the first to notify the second carrier that the shipper wished to divert the shipment, and the contract expressly provided that the first carrier should be released of all liabilities after delivery of the stock to the connecting carrier, the initial carrier, after delivering the shipment to the second carrier, was held not liable, however, for its failure to notify the latter that the shipper wished the shipment diverted.[94]

§ 414. Initial Carrier as Forwarder or Warehouseman

a. As forwarder
b. As warehouseman

a. As Forwarder

A carrier acting as forwarder is bound to use reasonable care in selecting the proper connecting carrier and is liable for negligence therein.

Where goods are received by a carrier for transportation and delivery to a connecting carrier, it has been held that the first carrier is not a mere forwarding agent,[95] and that a carrier cannot make itself forwarder only of and liable merely as a bailee for a part of a shipment.[96] As shown supra § 10, however, one may be a mere forwarder, that is to say, an agent charged with the duty of transporting goods without becoming a common carrier; and some courts have chosen to speak of the duty of the initial carrier to the owner with reference to sending the goods on by a connecting carrier as that of forwarder only, involving therefore liability for negligence rather than full

86. U.S.—Pratt v. Grand Trunk R. Co., Mich., 95 U.S. 43, 24 L.Ed. 336.
10 C.J. p. 537 note 89.

87. Wis.—Wood v. Milwaukee, etc., R. Co., 27 Wis. 541, 9 Am.R. 465.

88. Tenn.—Farnsworth-Evans Co. v. Chicago, etc., R. Co., 157 S.W. 897, 128 Tenn. 50.

89. Wash.—Pacific Car & Foundry Co. v. Northern Pac. Ry. Co., 212 P. 159, 162, 123 Wash. 98.

90. Wash.—Pacific Car & Foundry Co. v. Northern Pac. Ry. Co., supra.
10 C.J. p. 537 notes 92–94.

Unessential instructions

Where the difference in the marking of the barrels was sufficient to have enabled the steamship company by consulting a duplicate of its own bill of lading to determine which were intended for refrigeration, a railroad company delivering a shipment of pears and apples to the steamer by lighter was held not liable for the steamer's failure to designate pears for refrigeration as it agreed to do in its bill of lading, although the lighter's captain failed to comply with instructions of the steamship company to designate which barrels were intended for refrigeration, and confused the shipment with another shipment.—Kimball Fruit Co. v. New York Cent. R. Co., 254 N.Y.S. 280, 142 Misc. 558

91. Wash.—Pacific Car & Foundry Co. v. Northern Pac. Ry. Co., 212 P. 159, 123 Wash. 98.
10 C.J. p. 537 note 95.

92. Ohio.—Little Miami R. Co. v. Washburn, 22 Ohio St. 334.

93. Ohio.—Little Miami R. Co. v. Washburn, supra.

94. Tex.—Patton v. Texas, etc., R. Co., Civ.App., 137 S.W. 721.

95. Mass.—Buckland v. Adams Express Co., 97 Mass. 124, 93 Am.D. 68.
10 C.J. p. 50 note 52.

Agreement "to forward"

An agreement in bill of lading "to forward" does not of itself show that the carrier receiving the goods takes them otherwise than as carrier with reference to its duty to deliver to a connecting carrier.
Minn.—Christenson v. American Express Co., 15 Minn. 270, 2 Am.R. 122.
Mo.—Fischer v. Merchants' Dispatch Transp. Co., 13 Mo.App. 133
N.Y.—Blossom v. Griffin, 13 N.Y. 569, 67 Am.D. 75—Krender v. Woolcott, 1 Hilt. 223

96. N.Y.—Simmons v. Law, 4 Abb. Dec. 241, 3 Keyes 217.

carrier liability; but regardless of this distinction, in the absence of statute, it is evident that with reference to securing transportation for the goods by the connecting carrier the first carrier is liable only for negligence.[97] As forwarder, so-called, it is the duty of the first carrier to use reasonable care in selecting the proper connecting carrier,[98] but this is the extent of its duty in this regard, and, having used this degree of care, it is held that the forwarder is absolved from further liability,[99] although a carrier, even though considered as forwarder, may be secondarily liable to the owner for goods damaged by the connecting carrier.[1] The fact that a connecting carrier to which the goods are to be transferred may be unprepared to continue the transportation with due promptness does not excuse a neglect by the first carrier to observe diligence in forwarding them.[2] If the initial carrier has transported goods over its own lines to a point of intersection with the connecting carrier, and is unable to deliver them to such carrier without fault on its part, it has the duty as a forwarder to exercise reasonable care to save loss of the goods or unnecessary costs to the owner; in other words, it should use the same degree of care that a prudent owner would exercise in the same situation.[3] However, where goods were carried for export by a railroad company and steamship company under one bill of lading, a clause therein that the railroad "in case of physical necessity shall have the right to forward such goods by any railway or route between the point of shipment and the point of destination" did not make it the duty of the railroad to forward the goods by another steamship company when it found that the steamship company by which the goods were billed could not take delivery, for such clause did not deal with transportation beyond the railroad terminus, that being the "point of destination" to be reached by the railroad.[4] The owner of the goods is bound by any contract between the forwarder and the connecting carrier.[5]

The foregoing rules have no application, of course, so far as interstate shipments are concerned, since, as shown supra § 406 a, by the provisions of the Carmack amendment the initial carrier is liable for loss or injury occurring on other lines to the same extent as if such loss or injury had occurred on its own line; nor do they apply to intra-state shipments under state legislation similar to the Carmack amendment, which is considered supra § 406 b.

b. As Warehouseman

The initial carrier does not become warehouseman while merely holding the goods at the end of its own line before delivery to the connecting carrier, but it is liable only as warehouseman where it makes proper efforts to deliver to the connecting carrier and the latter refuses to receive them.

Where a carrier receives goods for transportation to a destination beyond its own line, and involving a delivery to a connecting carrier, it does not become warehouseman of the goods while holding them at the end of its own line before delivery to the connecting carrier, but its liability remains that of carrier as long as such custody continues.[6] The recognized rule is that there must be actual or constructive delivery to such connecting carrier, so far as the shipper is concerned, before the initial carrier can relieve itself from responsibility under its contract.[7] The fact that, while the goods are being held for delivery to the connecting carrier, they have been stored in a warehouse does not affect the operation of the rule.[8] A provision that while a shipment awaits further conveyance the initial carrier's liability shall be that of a warehouseman is inapplicable where the goods had not arrived at their destination on the carrier's line prior to the injury,[9] and

97. S.C.—Maybin v South Carolina R. Co., 42 S.C.L. 240, 64 Am.D. 753.
10 C.J. p. 538 note 3.

98. Tenn.—Post v. Southern R. Co., 52 S.W. 301, 103 Tenn. 184, 55 L.R.A. 481
10 C.J. p. 538 note 4.

99. Mass.—Fowle v. Pitt, 67 N.E. 343, 183 Mass. 351.
Minn.—Christenson v. American Express Co., 15 Minn. 270, 2 Am.R. 122
10 C.J. p. 538 notes 5, 6.

1. U.S.—Reid v. Fargo, N.Y., 36 S. Ct. 712, 241 U.S. 544, 60 L.Ed. 1156, reversing 213 F. 771, 130 C.C.A. 285.

2. Pa.—Alexander v. Pennsylvania R. Co., 7 Pa.Super. 183, 42 Wkly. N.C. 181
10 C.J. p. 538 note 7.

3. Me.—Fisher v. Boston, etc., R. Co., 59 A. 532, 99 Me. 338, 105 Am.St.R. 283, 68 L.R.A. 390.

4. Mass.—Boston & M. R. R. v. Oceanic Steam Nav. Co., 116 N.E. 260, 226 Mass. 509.

5. Ill.—See Crane v. Tooker Storage & Forwarding Co., 204 Ill.App. 354.
N.Y.—Stoddard v. Long Island R. Co., 7 N.Y.Super. 180.

6. Ill.—Brennan Packing Co. v. Mellon, 252 Ill.App. 522.
10 C.J. p. 535 note 68.

7. Ky.—Louisville, etc., R. Co. v. Farmers', etc., Live-Stock Commn. Firm, 52 S.W. 972, 107 Ky. 53, 60, 21 Ky.L. 708

8. U.S.—Texas & P. R. Co. v. Clayton, N.Y., 84 F. 305, 28 C.C.A. 142, affirmed 19 S.Ct. 421, 173 U.S. 384, 43 L.Ed. 725
Ill.—Illinois Cent. R. Co. v. Mitchell, 68 Ill. 471, 18 Am.R. 564.
10 C.J. p. 535 note 70.

9. Ill.—Brennan Packing Co. v. Mellon, 252 Ill.App. 522

Sole custody of initial carrier

The rule of the text has been applied where ham intended for export and shipped from Chicago was loaded on the initial carrier's lighter in

it has been held that a stipulation in a contract of shipment that the liability of the initial carrier shall cease when the goods are ready to be delivered to a connecting carrier is void;[10] but the rule was held not to apply where the connecting carrier had no warehouse and the goods were destroyed by fire in the warehouse of the first carrier while awaiting transportation by the second carrier.[11]

Since the duty of the first carrier is to deliver to the second carrier, and its liability is to terminate when such delivery is made, it terminates its common-law liability as carrier by making proper efforts to deliver to the connecting carrier, and having done so it may, on the refusal of the connecting carrier to receive the goods, then store them, and in these circumstances it becomes liable as warehouseman only;[12] but the initial carrier must, by warehousing the goods, or by some unequivocal act, indicate its purpose to change its relation from that of carrier of transportation to that of mere custodian for safekeeping or forwarding.[13] If the carrier at the request of the consignor or consignee deposits the goods in the warehouse of a third party, its liability as a carrier or warehouseman is terminated, and it is not liable for subsequent loss, destruction, or injury to the goods.[14]

The liability of the initial carrier, under special statutory provisions, for loss or injury to goods while in possession of a connecting carrier acting as warehouseman, is considered supra § 406 a, b.

§ 415. Acts of Initial Carrier Resulting in Injury after Delivery to Connecting Carrier

Where the injury results from improper dealings of the initial carrier, it is liable, although the loss is not apparent until the goods are in possession of the connecting carrier.

The first carrier may, by improperly dealing with the goods, render itself liable to the shipper, even though the actual loss resulting is not apparent until the goods are in the second carrier's hands.[15] Thus, if by delay in the delivery to the connecting carrier of perishable goods their loss is caused in the hands of the second carrier, the first carrier will be liable;[16] and, if by delay of the initial carrier in giving shipping directions to the connecting carrier there is delay in the transportation, the first carrier will be responsible therefor;[17] but to render the first carrier liable it must appear that its delay, and not that of the second carrier, was the proximate cause of the loss.[18] If, however, there is concurring negligence of both carriers, either will be liable;[19] and the shipper must take notice of delays necessarily incident to transfers from one line to another.[20]

The first carrier will not be liable for conversion by second carrier, even though there has been negligence in properly advising the second carrier as to ownership of the property.[21]

New York for delivery to the next succeeding carrier, a steamship company, on July 28, but was directed by agents of the latter to be held aboard the lighter "awaiting receipt," and was thus held in the sole custody and control of the initial carrier without refrigeration until August 6, at which time, being rotten and unfit for human consumption, it was unloaded on the steamship company's pier and delivered to that carrier.—Brennan Packing Co. v. Mellon, 252 Ill.App. 522.

10. Ky.—Louisville, etc., R. Co. v. Farmers', etc., Live-Stock Commn Firm, 52 S.W. 972, 21 Ky.L. 708.

11. Wis. — Courteen v. Kanawha Dispatch, 86 N.W. 176, 110 Wis. 610, 55 L.R.A. 182.

12. Ill.—Illinois Cent. R. Co. v. Carter, 46 N.E. 374, 165 Ill. 570, 36 L.R.A. 527.
10 C.J. p 536 note 74.

13. N.Y.—Goold v. Chapin, 20 N.Y. 259, 75 Am.D 398.
10 C.J. p 536 note 75.

14. Ala.—Ocean S. S. Co. of Savannah v. People's Shoe Co., 81 So. 241, 202 Ala. 594, conformed to 81 So. 245, 17 Ala.App. 34.

15. Tex.—Fort Worth & Denver City Ry. Co. v. Motley, Civ.App., 87 S.W.2d 551, error dismissed—Levin v. International-Great Northern R. Co., Civ.App., 45 S.W. 2d 435, error dismissed—Texas Midland R. Co. v. Cummer Mfg. Co., Civ.App., 207 S.W. 617—Texas & P. Ry. Co. v. McMillen, Civ. App., 183 S.W. 773.
10 C.J. p 538 note 13.

Wrongful billing

Where an initial carrier was negligent in wrongfully billing a car of cattle to Fort Worth instead of San Antonio, and where the sole cause of damages to them was such negligent act, although the damages really occurred on the line of connecting carrier, the initial carrier was liable therefor—San Antonio Southern Ry. Co. v. Morgan, Tex.Civ. App., 257 S.W. 702.

16. Ark.—St. Louis, etc., R. Co. v. Coolidge, 83 S.W. 333, 73 Ark. 112, 108 Am.S.R. 21, 67 L.R.A. 555, 3 Ann.Cas 582.
10 C.J. p 539 note 14.

17. Tenn.—Illinois Cent. R. Co. v. Southern Seating, etc., Co., 58 S.W. 303, 104 Tenn. 568, 50 L.R.A. 729.
10 C.J. p 539 note 15.

18. Mich.—Detroit, etc., R. Co. v. McKenzie, 5 N.W. 1031, 43 Mich. 609—Michigan Cent. R. Co. v. Burrows, 33 Mich 6.

19. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Miller & White, Civ.App., 190 S.W. 819.
10 C.J. p 539 note 17.

Diversion

A carrier was held liable for negligence in diverting shipment, resulting in loss of the goods, although negligence of agent was not sole cause of loss, but concurred with that of connecting carrier—Texas Midland R. Co. v. Cummer Mfg. Co., Tex.Civ.App., 207 S.W. 617

20. Wis.—Burns v. Chicago, etc., R. Co., 80 N.W. 927, 104 Wis. 646.

21. Mass.—Northern R. Co. v. Fitchburg R. Co., 6 Allen 254.

§ 416. Delay in Transportation

Although the rule may be otherwise under special statute or contract for through transportation, in the absence thereof the initial carrier is not liable for delay on a connecting carrier's line.

While the initial carrier is liable for unreasonable delay resulting from its own default in failing to connect with another carrier,[22] in the absence of statute providing otherwise, the initial carrier is liable only for delay occurring on its own line both where the contract of transportation limits its liability to its own line and where it has not entered into a through contract of transportation,[23] unless, in accordance with the principles stated supra § 415, the delay occurring on the connecting line is due to the initial carrier's negligence;[24] and even though the initial carrier has notice of special damages which will result from any delay and fails to communicate such notice to the terminal carrier, it is not liable for damages from delay on the terminal line, unless such delay was the result of the failure to communicate the notice.[25] However, if the first carrier has undertaken to carry the goods to their destination over connecting lines, it will be liable for delay on such connecting lines to the same extent as on its own line, in which circumstances the connecting carrier must be regarded as the agent of the initial carrier;[26] but there is no liability in the absence of negligence where the delay is not unreasonable.[27] In an action based on the refusal to forward goods via a connecting line, an erroneous statement of route in the billing does not excuse defendant, who knew such statement was erroneous and refused to forward for other reasons;[28] and, under a statute requiring connecting carriers to forward goods within a reasonable time and authorizing the railroad commission to fix such time, a carrier transferring goods within the time fixed by the commission is not liable, although it might reasonably have done so sooner.[29]

Carmack amendment. While the initial carrier is not liable for delay under the Carmack amendment where the goods have been handled with reasonable dispatch,[30] independently of any contract for through transportation, such carrier is liable under that amendment for any unreasonable delay occurring on a connecting line in case of interstate shipments,[31] even though there is no

22. Neb.—Berliner v. Director General of Railroads, 184 N.W. 914, 106 Neb. 801.

Notice to shipper

Where live stock was received, accepted, and transportation begun, and carrier, through its default by failing to connect with another carrier, returned the cattle to pens at original point of shipment, to hold until the next day, a notice to the shipper that they would be forwarded the following day, if agreeable, was not alone a complete breach and termination of the original shipping agreement and redelivery, so as to give rise to a new agreement, but constituted a delay under the original agreement entitling the shipper to damages.—Berliner v. Director General of Railroads, 184 N.W. 914, 106 Neb. 801.

23. Iowa.—Quillen v. Minneapolis & St. L. R. Co., 164 N.W. 779, 181 Iowa 536.
10 C.J. p 539 note 20.

24. Tenn.—Illinois Cent. R. Co. v. Southern Seating, etc., Co., 58 S. W. 303, 104 Tenn 568, 78 Am.S. R. 933, 50 L.R.A. 729.
10 C.J. p 539 note 21.

25. Okl.—Atchison, T. & S. F. Ry. Co. v. Sun Drilling Co., 165 P. 1133, 65 Okl. 239.
10 C.J. p 546 note 4.

26. U.S.—A. Russo & Co. v. U. S., C.C.A.La., 40 F.2d 39.
Ind.—Erie R. Co. v. Hipskind, 113 N.E. 304, 185 Ind. 62.
Iowa.—Quillen v. Minneapolis & St. L. R. Co., 164 N.W. 779, 181 Iowa 536.
Neb.—Marsh & Marsh v. Chicago & N. W. Ry. Co., 173 N.W. 679, 103 Neb. 654.
Ohio.—Davis v. Oswald & Taube, 149 N.E. 861, 113 Ohio St. 499, certiorari denied Mellon v. Oswald & Taube, 46 S.Ct. 354, 270 U.S. 658, 70 L.Ed. 785.
10 C.J. p 284 note 3 [c], [d], p 539 notes 22, 23.

Notice

Where defendant railroad undertook to transport a car of sewer tile to plaintiff at a point beyond its own line, and the car was delayed in transit, causing plaintiff damage because its sewer caved in in a heavy rain for lack of the tile, defendant constituted the connecting carrier its agent, so that notice to the connecting carrier of the use intended to be made of the tile was notice to defendant.—Erie R. Co. v. Hipskind, 113 N.E. 304, 185 Ind. 62.

27. Okl.—Clinton & O. W. R. Co. v. Smith, 254 P. 702, 124 Okl. 75.

28. Tex.—Quanah, A. & P. Ry. Co. v. Bone, Civ.App., 199 S.W. 332

29. Tex.—Quanah, A. & P. Ry. Co. v. Bone, supra.

30. Va.—L. J. Upton & Co. v. Atlantic Coast Line R. Co., 131 S.E. 827, 146 Va. 475

31. U.S.—Pomona Products Co. v. Southern Ry. Co., D.C.Ga., 294 F. 982.
Ala.—Louisville & N. R. Co. v. Jones, 99 So. 919, 211 Ala. 158.
N.Y.—Wishnatzki v. Great Northern Ry. Co., 232 N.Y.S. 165, 225 App. Div. 62.
N.C.—Harrill v. Seaboard Air Line Ry. Co., 103 S.E. 21, 179 N.C. 540.
Tex.—Gulf, C. & S. F. Ry. Co. v. Nelson, 192 S.W. 1056, 108 Tex. 305, affirming, Civ.App., 139 S.W. 81, and certiorari denied 38 S.Ct. 13, 245 U.S. 657, 62 L.Ed. 534.
Vt.—Saliba v. New York Cent. R. Co., 144 A. 194, 101 Vt. 427.
Va.—L. J. Upton & Co. v. Atlantic Coast Line R. Co., 131 S.E. 827, 146 Va. 475—New York, P. & N. R. Co. v. Chandler, 106 S.E. 684, 129 Va. 695.
10 C.J. p 525 note 30.

Consequential damage

Loss and consequential damage which shipper suffered of the whole value of potatoes by reason of his loss of the sale of them which he had made at a stipulated price, caused by negligent delay in the transportation, followed by the subsequent conversion of the goods by the wrongful sale of them by the terminal carrier, was within the operation of the Carmack amendment.—New York, P. & N. R. Co. v. Chandler, 106 S.E. 684, 129 Va. 695

Diversion

Initial carrier of interstate ship-

physical damage to the goods carried.[32] There is a damage or injury to the goods themselves by delay in transportation, where it is shown that the delay in transportation has caused the goods to depreciate in value in the market of their destination.[33] Under this statute any contract by the initial carrier attempting to limit liability for unreasonable delay to its own line[34] or any tariff regulation impairing that liability[35] is void.

§ 417. Liability on Receipt of Goods for Return to Shipper

The initial carrier is liable for injuries occurring after it receives the goods for return to the shipper.

The initial carrier is liable for injuries to goods occurring on its line if they are received back from the connecting carrier on a return of the goods to the point of shipment.[36] Where, however, the consignor requested the carrier to return the goods after the consignee obtained an order of attachment against them, and the carrier required the consignor to sign an indemnity contract holding it harmless from liability in returning them, and constituting the carrier or connecting road the consignor's agent, the carrier was not liable for loss of goods while being returned due to the neglect of the connecting carrier.[37]

§ 418. Rights, Duties and Liabilities of Intermediate or Terminal Carrier

For certain purposes a connecting carrier is the shipper's agent, with the rights, duties, and liabilities incident to that relationship.

A "delivering carrier" is a carrier who actually delivers the goods at their destination in contradistinction to a forwarding carrier, who is one that transports goods to the former.[38] The term "connecting carriers" is defined supra § 400. The connecting carrier is the shipper's agent in transporting the goods[39] and in arranging the contract for further shipment when it is apparent that a new contract will be required at an intermediate point in the carriage.[40] So the consignee's refusal to accept shipment of perishable goods because of their damaged condition creates an implied agency or trust, charging the terminal carrier with the duty to use all reasonable efforts to protect the consignor from loss.[41] A connecting carrier is under no duty when it receives the goods to give notice of a strike at the destination of the shipment;[42] nor is an intermediate carrier under any

ment is liable under the Carmack amendment for delay in transit on other line of connecting carrier to a different destination, consented to by shipper on refusal of connecting carrier to proceed to original destination because of a nonlegal embargo issued by the stockyards at destination.—Miller v. Quincy, O. & K. C. R. Co, 225 S.W. 116, 205 Mo.App. 463.

Embargo

Where connecting carrier refused to deliver interstate shipment of sheep from Missouri at Chicago, because the stockyards there had issued an embargo against Missouri sheep on account of rumor of foot and mouth disease, which embargo was not a legal quarantine in sense of being ordered by the government, initial carrier was technically liable for the delay.—Miller v. Quincy, O. & K. C. R Co., 225 S.W. 116, 205 Mo App. 463.

Failure to reroute

Under the Carmack amendment an initial carrier is liable for delay resulting from failure of the connecting carrier to use reasonable diligence in forwarding a shipment over a different route when its own was not open.—Chicago, R. I. & P. R Co. v. Dawson, 248 S.W. 558, 157 Ark. 460.

Strike on connecting carriers' lines was held not to relieve initial carrier from liability for delay in interstate shipment of cattle.—Baker v. Nance Bros, Tex.Civ.App., 294 S.W. 290.

32. S.C.—Van Epps v. Atlantic Coast Line R. Co., 89 S.E. 1035, 105 S.C. 406.
10 C.J. p 525 note 30

33. Miss.—Southern Pac. R. Co. v. Lyon, 66 So. 209, 107 Miss. 777.

34. Ark.—Chicago, etc., R. Co. v. Miles, 123 S.W. 775, 124 S W 1043, 92 Ark. 573
Md.—Baltimore, etc., R. Co. v. Sperber, 84 A. 72, 117 Md. 595.
Miss.—Southern Pac. R. Co. v. Lyon, 66 So. 209, 107 Miss. 777.

35. N.Y. — Wishnatzki v. Great Northern Ry. Co., 232 N Y S. 165, 225 App.Div. 62.

36. Mich.—Reason v Detroit, etc., R. Co., 113 N W 596, 150 Mich. 50.

37. N.Y.—Peugeot Auto Import Co. v. New York Cent R. Co., 173 N. Y.S. 455.

38. Ky.—Brunk v. Ohio, etc., R. Co, 105 S W. 443, 127 Ky. 304, 308.

39. Ohio. — Annin v. Cincinnati Northern R. Co., 153 N.E. 522, 22 Ohio App. 37.

40. Ill.—Macomber & Whyte Rope Co v. United Fruit Co., 225 Ill. App. 286.

41. Cal.—American Fruit Growers of California v. Pacific Electric Ry. Co., 238 P. 105, 72 Cal App. 682.
Iowa—E. H. Emery & Co. v. Chicago, B & Q. R. Co, 170 N.W. 540, 186 Iowa 1156, rehearing denied 173 N.W. 12, 186 Iowa 1156.

Direction to make proper disposal

Where terminal carrier, on receiving consignee's letter directing it to "make proper disposal" of carload of lettuce, rejected because of damaged condition, immediately proceeded to do so, agency was created requiring it to use all reasonable efforts and its best judgment in disposing of shipment.—American Fruit Growers of California v. Pacific Electric Ry. Co., 238 P. 105, 72 Cal. App. 682.

42. Ill.—Sexton v. Grand Trunk Western R Co., 260 Ill.App. 448.

Effect of independent knowledge

One suing a connecting carrier for delay in delivery of shipment due to its failure to notify plaintiff of railway switchmen's strike when the initial carrier delivered the shipment to it would not have benefited from such notice if it already had knowledge of existence of strike.—Sexton v. Grand Trunk Western R. Co., 260 Ill.App. 448.

duty either to decline traffic tendered it or to turn that traffic over to a competitor having the rate designated by the shipper, notwithstanding it cannot transport it according to such rate.[43] The local agent of the terminal carrier at destination is under no duty to notify the agent of the initial carrier at the point of transfer of the purpose for which the shipment was desired and of the result of a failure promptly to forward.[44] A truckman contracting to haul building materials from the place of delivery by an interstate carrier to the site of the construction steps into the place of the consignee charged with the duty of unloading.[45] It is beyond the scope of a carrier's business to adjust controversies between consignees of property shipped over another carrier, and the holders of bills of lading purporting to be those of such other carrier.[46]

§ 419. Duty to Receive and Transport Goods

A connecting carrier's duty to receive and transport goods is like that of the initial carrier.

The duty of an intermediate or terminal carrier to receive goods tendered for transportation by the preceding carrier is the same as that of the initial carrier to receive from the shipper goods for transportation on its own line,[47] and, where goods are tendered to a carrier by another carrier in lawful possession, it has a duty to accept and carry them, even though a different route be named.[48] If goods are tendered in such manner that the carrier is under obligation to receive them, it will be liable as any other carrier for refusing so to do.[49] The duty to receive and transport property is extended in some jurisdictions, as shown infra § 449 b, to require the connecting carrier to receive and transport over its lines suitable loaded cars of other companies.

Reasonable regulations and conditions may be imposed with reference to the acceptance of goods from another carrier,[50] however, and it has been held that no connecting carrier is bound to receive goods tendered to it for transportation if at the time they are not in fit condition for shipment,[51] and that it may, as a condition of receiving damaged goods, require indemnity against damages which may result from their condition.[52] So a carrier may refuse to receive goods for transportation when the goods will be exposed to peculiar and unusual dangers, such as a snowstorm of such violence as to tie up traffic,[53] or floods of such a character as fall within the legal definition of an act of God and which threaten the carrier's railroad tracks with inundation;[54] and the mere fact that the car containing the goods had been placed on a connecting carrier's track by the initial carrier does not affect the operation of this rule.[55] Furthermore, the carrier may refuse to take a shipment unless the shipper agrees to make it subject to delay on account of a bridge on its line being out.[56] That a connecting carrier is entitled to demand prepayment of its charges before receiving or accepting the goods from the preceding carrier is shown supra § 315 b.

After the goods are received by the carrier, its liability is that of common carrier of goods.[57] It then becomes the duty of the carrier to transport the goods to the end of its route with reasonable diligence and to exercise reasonable care for the preservation of the goods;[58] but this is the extent

43. Kan.—Goffee & Carkener v. Missouri Pac. R. Co., 276 P. 834, 128 Kan. 245.

44. Tex.—Payne v. Reynolds, Civ. App., 239 S.W. 985.

45. Mich. — Rockwell v. Grand Trunk Western Ry. Co., 250 N. W. 515, 264 Mich. 626.

46. Ala.—National Park Bank of New York v. Louisville & N. R. Co., 74 So. 69, 199 Ala. 192.

47. U S —The No. 37, N.Y., 53 S.Ct. 328, 288 U.S. 239, 77 L.Ed. 721, reversing, C.C.A., The Car Float No 37, 57 F.2d 144, reversing, D C., The Talisman, 52 F.2d 691, and certiorari granted New York Cent R. Co v. The Talisman, 53 S.Ct. 85, 287 U S. 587, 77 L.Ed. 513.
10 C J. p 540 note 29.
Duty of a carrier to receive and transport goods generally see supra § 27.

Switching line railroad, organized for purpose of switching cars for other carriers, and maintaining spur for delivery of freight, was required to receive shipments of freight from all persons and to handle cars of all carriers under Interstate Commerce Act, although particular interstate railroad owned and operated the switching company through ownership of its stock.—Kansas City Southern Ry. Co. v. Ft Smith Suburban Ry. Co., 22 S.W.2d 21, 180 Ark. 492.

48. Ill.—Crane v. Taft, 203 Ill.App. 253.

49. Me.—Dunham v. Boston, etc., R. Co., 70 Me. 164, 35 Am.R. 314.
10 C.J. p 540 note 30.

50. N.C —Randall v. Richmond, etc., R. Co., 13 S.E. 137, 108 N.C. 612.
Tex.—Gulf, etc., R. Co. v. A. B Frank Co., Civ.App., 48 S.W. 210.

51. Ga.—Paramore v. Western R. Co., 53 Ga. 383.
10 C.J. p 68 note 78.

52. Tex.—Gulf, etc., R. Co. v. Frank, Civ.App., 48 S.W. 210—Missouri Pac. R. Co. v. Weisman, 21 S.W. 426, 2 Tex Civ.App. 486.

53. Mo.—Strother v. Atchison, T. & S. F. Ry. Co., App., 212 S.W. 404 —Gray v. Wabash R Co., 95 S.W. 983, 119 Mo.App. 144.

54. Mo.—Gray v. Wabash R. Co., supra.

55. Mo.—Strother v. Atchison, T. & S. F. Ry. Co., App., 212 S.W. 404.
10 C.J. p 67 note 72.

56. Mo.—Bowles v. Quincy, O. & K. C. R. Co., App., 187 S.W. 131.

57. N.Y.—Livingston v. New York Cent., etc., R. Co, 76 N.Y. 631.
10 C.J. p 540 note 31.

58. Pa.—Hinman Brothers v. Penn-

of its duty, and it is bound only to forward the shipment with reasonable diligence.[59] However, until the goods are accepted by the connecting carrier, it does not become liable to the owner as a common carrier;[60] and, if the second carrier has taken custody of the goods but something remains to be done before they are forwarded, it is liable only as warehouseman.[61] The connecting carrier is required to take notice of the authority of the forwarding carrier at the time the goods are tendered to it for transportation.[62] Where a statute requires a connecting carrier to receive and transport all freight delivered to it by any other line, receiving goods from the initial carrier for transportation is not a ratification of the initial carrier's contract, but merely a compliance with the statute.[63]

The owner may change the destination of the goods by arrangement with the second carrier.[64]

A connecting carrier notified of the time a shipment of cattle would arrive, if within the time limit prescribed by statute as the maximum allowed for confining cattle without food, water, or rest, must receive them in the absence of notice to the shipper or initial carrier of insufficient pens.[65]

§ 420. Duty to Furnish Suitable Cars and Other Facilities

A connecting carrier is liable for damages resulting from its failure to provide suitable cars and other facilities, and this rule applies notwithstanding it used the same cars in which it received the goods from a connecting line.

A connecting carrier is bound to provide suitable cars and facilities for the transportation of goods intrusted to it for carriage and is liable for loss or injury resulting from its failure to do so.[66] As shown infra § 449 b, the connecting carrier is not bound to receive and transport cars which are not in a suitable condition for further transportation; nevertheless, if it does accept defective cars for transportation, it will be liable for loss or injury to the shipment sustained by reason of such defective condition, and it cannot relieve itself from damages resulting from a breach of its duty to furnish satisfactory and suitable cars by showing that it carried the goods in the same cars in which it received them from a connecting line,[67] or that goods of the kind damaged were customarily shipped in the unsuitable type of cars employed;[68] and, although the contrary view has been taken,[69] it has been held that it cannot avoid liability on the theory that it was under no duty to break the seals on the cars and examine the shipment when it was delivered to its line for transportation.[70] Where a carrier receives a car from a preceding carrier and undertakes to transport the goods in it, it thereby makes the car a part of its own agency and means of transportation and is liable to the same extent as though the car were its own.[71]

sylvania R. Co., 5 Pa.Dist. & Co. 182.
10 C.J. p 540 note 32.

59. Tex.—Chicago, etc., R. Co. v. Kapp, 83 S.W. 233, 37 Tex.Civ. App. 203.

60. Mo.—Strother v. Atchison, T. & S. F. Ry. Co., App., 212 S.W. 404.
10 C.J. p 540 note 34.

61. Mass.—Judson v. Western R. Corp., 4 Allen 520, 81 Am.D. 718.

62. Ohio.—Maynard Coal Co. v. Chicago, K. & S. Ry. Co., 4 Ohio App. 459.

63. Tex.—Ponder v. Crenwelge, Civ. App., 203 S.W. 1125, reversed on other grounds Crenwelge v. Ponder, Com.App., 228 S.W. 145.

64. Ga.—Central of Georgia Ry. Co. v. Council Bros., 136 S.E. 418, 163 Ga. 494, 61 A.L.R. 1304—Central of Georgia Ry. Co. v. Council Bros., 137 S.E. 569, 36 Ga.App. 573.
10 C.J. p 540 note 37.

65. La.—Jennings v. Missouri Pac. R. Co., 134 So. 694, 172 La. 522.

66. Ga.—Sperry Flour Co. v. Atlantic Coast Line R. Co., 189 S.E. 278, 54 Ga.App. 725.
Iowa.—E. H. Emery & Co. v. Chicago, B. & Q. R. Co., 170 N.W. 540, 186 Iowa 1156, rehearing denied 173 N.W. 12, 186 Iowa 1156.
N.C.—Aydlett v. Norfolk-Southern R. Co., 89 S.E. 1000, 172 N.C. 47.
10 C.J. p 86 note 29-p 122 note 36 [b] (2).

67. Ga.—Sperry Flour Co. v. Atlantic Coast Line R. Co., 189 S.E. 278, 54 Ga.App. 725.
Mass.—Bonfiglio v. New York, N. H. & H. R. Co., 198 N.E. 236.
Mich.—H. Ginsberg & Sons v. Wabash R. Co., 189 N.W. 1018, 219 Mich. 665, 28 A.L.R. 518, affirmed Ginsberg v. Wabash R. Co., 193 N.W. 286, 222 Mich. 560.
Minn.—Geo. B. Higgins & Co. v. Chicago, B. & Q. R. Co., 161 N.W. 145, 135 Minn. 402, L.R.A.1917C 507.
10 C.J. p 90 note 70 [a], p 540 note 41.

Statutory joint liability

In view of a statute providing that, on proof made by shipper that property has been destroyed or damaged in transit between place of shipment and place of destination, the liability of the common carrier attaches to all defendants, and judgment shall be entered against all unless one or more prove that it was not liable, in an action for damages to a shipment of seed peas, notwithstanding a finding that the failure of the receiving carrier to furnish a proper car was the proximate cause of the damage, in the absence of proof to the contrary, the connecting carrier must be held jointly liable with the receiving carrier.—Feelyater v. Chicago, M. & St. P. Ry. Co., 190 N.W. 193, 178 Wis. 362.

68. Mass.—Bonfiglio v. New York, N. H. & H. R. Co., 198 N.E. 236.

69. Tex.—Davis v. Standard Rice Co., Civ.App., 293 S.W. 593.

Leak discoverable only from inside

A carrier is not liable for injury from a leak of a sealed car in which it received a shipment from another road, the leak being discoverable only by inspection from the inside, it not being required or authorized to break the seal for such purpose.—Davis v. Standard Rice Co., Tex.Civ. App., 293 S.W. 593.

70. Ga.—Sperry Flour Co. v. Atlantic Coast Line R. Co., 189 S.E. 278, 54 Ga.App. 725.

71. Iowa.—E. H. Emery & Co. v.

The liability of the carrier is not an absolute one, however, but results only in case of its failure to exercise due care, skill, or diligence. Such liability rests on negligence, some fault on its part, as its failure properly to inspect the vehicles before continuing the shipment,[72] and it is not liable for injuries resulting from a defect which was unknown to it and not discoverable on reasonable inspection.[73] Furthermore, apparent limitations of the rule have been announced in the case of cars of the initial carrier used for shipments under contracts for through transportation,[74] or for shipments of fruit,[75] especially where such cars are accompanied by messengers of the initial carrier.[76]

A carrier receiving from another carrier cattle for shipment is liable for injuries to the cattle caused by placing them in pens without shelter and too small to accommodate them properly, and allowing them to remain therein for a day in the sun without food or water, although it may not be liable for not holding a train for the cattle;[77] and, where the shipper informed the agent of a connecting carrier before delivery of the cattle to the connecting carrier that such carrier's stockyard was infected, the information was sufficient to put the carrier on inquiry as to the condition of its yard, rendering it negligence on its part to unload the shipment in such yard for feeding and watering, as required by the federal statute, without investigation.[78]

§ 421. Care of Goods in Transit

It is the duty of a connecting carrier to exercise reasonable care to protect a shipment from injury during transportation.

As heretofore shown, §§ 61–62, it is the duty of the carrier when goods of a perishable nature are accepted by it for shipment to see that its cars are properly ventilated in transit, and also to see that the cars are kept reasonably cool, if the goods are of a character which require it. This rule ordinarily applies to connecting carriers as well as to initial carriers, where they accept for transportation cars of another company whose contents require ventilation and refrigeration,[79] and

Chicago, B. & Q. R. Co., 170 N.W. 540, 186 Iowa 1156, rehearing denied 173 N.W. 12, 186 Iowa 1156.

Mich.—H. Ginsberg & Sons v. Wabash R. Co., 189 N.W. 1018, 219 Mich. 665, 28 A.L.R. 518, affirmed Ginsberg v. Wabash R. Co., 193 N.W. 286, 222 Mich. 560.

Minn.—Geo. B. Higgins & Co. v. Chicago, B. & Q. R. Co., 161 N.W. 145, 135 Minn. 402, L.R.A.1917C 507.

10 C.J. p 87 note 30, p 90 note 70 [a], p 541 note 46.

72. Minn.—Geo. B. Higgins & Co. v. Chicago, B. & Q. R. Co., supra.

73. Ill.—Golden Grain Milling Co. v. St. Louis, S. & P. R. Co., 226 Ill. App. 116.

Tex.—Davis v. Standard Rice Co., Civ.App., 293 S.W. 593.

Salty condition of car bottoms

Where potatoes in sacks were injured because bottoms of cars in which they were shipped were permeated with salt, connecting carrier was not liable where by reasonable inspection it could not discover unfitness of cars.—Geo. B. Higgins & Co. v. Chicago, B. & Q. R. Co., 161 N.W. 145, 135 Minn. 402, L.R.A.1917C 507.

74. N.Y.—Blount v. Pennsylvania R. Co., 119 N.Y.S. 65.

10 C.J. p 540 note 43.

75. Iowa.—E. H. Emery & Co. v. Chicago, B. & Q. R. Co., 170 N.W. 540, 543, 186 Iowa 1156, rehearing denied 173 N.W. 12, 186 Iowa 1156.

10 C.J. p 540 note 44.

"Counsel for appellant vigorously argues that the defendant is liable for such damages as may have resulted from the shipment of the peaches in meat cars over its lines, that it was bound to furnish suitable and properly equipped cars to insure reasonable protection to the fruit en route, and that by continuing the shipment in meat cars, it adapted the same as its own, and, therefore, [is] liable for any damages resulting from the use thereof. While the duty rests upon the carrier to provide cars and other means reasonably proper and fit for the transportation of perishable goods, no court, so far as we are aware, has ever held that it is incumbent upon the carrier to have on hand, at junction points, refrigerator fruit cars properly cooled, ready to receive the contents of meat cars improperly used by an initial carrier. To so hold would impose a duty manifestly impossible of performance."—E. H. Emery & Co. v. Chicago, B. & Q. R. Co., supra.

76. Tex.—Texas, etc., R. Co. v. Rackusin, Civ.App., 145 S.W. 734.

10 C.J. p 541 note 45.

77. Tex.—Andrews v. McGill, Civ. App., 179 S.W. 1087.

78. Ala.—Nashville, etc., R. Co. v. Farrell, 70 So. 986, 14 Ala.App. 380

79. Iowa.—E. H. Emery & Co. v. Chicago, B. & Q. R. Co., 170 N.W. 540, 186 Iowa 1156, rehearing denied 173 N.W. 12, 186 Iowa 1156.

N.Y.—Bobzein v. New York Cent. R. Co., 176 N.Y.S. 407, 187 App.Div. 767.

10 C.J. p 541 note 50.

Duty to re-ice

The delivering carrier's failure to re-ice a car of bananas, received by it with knowledge that there was no messenger in charge, on the second day after the last icing, constituted negligence, making it liable for resulting damages, unless relieved of the duty to re-ice by the terms of the bill of lading, such carrier being authorized by its tariff to re-ice the car in the usual way; and, hence, where the messenger, without notice to the consignor or consignee, had left the train without leaving directions for re-icing, the carrier was not relieved from liability for damage from its failure to do so, without having tried to procure instructions from the owner in accordance with ordinary procedure.—Chicago, R. I. & P. Ry. Co. v. George E. Shelton Produce Co., 291 S.W. 428, 172 Ark. 1017.

Extent of duty

(1) If goods in a refrigerator car are sound when a carrier takes them from an initial carrier, its whole duty is fulfilled if and when it thoroughly re-ices the car as reasonably necessary, and with fair diligence takes proper care of it over its line.—Daniels v. Northern Pac. Ry. Co., 171 P. 1178, 88 Or. 421.

(2) A connecting or terminal carrier, handling an interstate shipment of perishable fruit, under ordinary circumstances, need not examine it to see if the method of protection, whether by refrigeration or ventilation, chosen and contracted for by shipper, is proving effective, with a

the carrier must obey the contract set forth in the bill of lading unless some unusual occurrence not within the reasonable contemplation of the contract has made it impossible or unreasonable to attempt to do so;[80] but a connecting carrier that had received fruit cars which had been loaded by the consignor at the time of shipment over the initial carrier's line, and which were accompanied by messengers whose duty it was to attend to the heating of the cars, was held not liable for the failure to keep the cars at the proper temperature.[81] A terminal carrier, although having the right to unload a shipment at the place where it was unloaded, does not have the right to unload in a negligent manner.[82]

In harmony with the general rules stated supra §§ 63-66, it is the duty of a connecting carrier of live stock to handle the shipment with a reasonable degree of care and caution.[83] Under a statute prohibiting a carrier of stock from confining the same for longer than a specified time without food and water, the connecting carrier must take notice of the length of time the animals have been confined by the previous carrier,[84] and if the time limit expires while in the custody of the connecting carrier it must comply with the statute; otherwise it is guilty of negligence per se.[85] If an intermediate carrier's violation of the statute is continued by the terminal carrier, the latter is also liable.[86] Although the shipping contract requires the shipper to care for live stock shipped, his duty therein ceases when the connecting carrier prevents him from further accompanying the shipment;[87] and a connecting carrier may not urge as an excuse for its negligent failure to care for the stock that such duty was assumed by the shipper when the initial carrier refused to allow the shipper to accompany the stock and the connecting carrier knew it was unaccompanied;[88] nor will a contractual provision that any expense incurred by the carrier in caring for the animals should be collected from the consignee relieve the connecting carrier of liability for negligence.[89]

§ 422. Duty to Follow Routing Instructions

Connecting carriers are bound to follow routing instructions and are liable for losses resulting when they fail to do so.

As heretofore shown in § 45, it is the duty of the initial carrier to follow the routing instructions given by the shipper, and a failure to observe such instructions will render him liable for any loss directly resulting therefrom. Likewise, a connecting carrier, in receiving freight under a contract of shipment over several specified lines, owes a contract duty to the shipper not to divert the freight without the shipper's consent, and if there is a breach of duty in this respect such carrier will be liable for any loss which occurs during[90] or as a result of[91] the deviation. It is not

view to changing the methods contracted for, if it reasonably deemed that substituting another method would be more effective, and where grapes were shipped in a refrigerator car, using the ventilation process, and, on delivery to the terminal carrier, it inspected the car as to its external condition and likewise at destination, and there was nothing that would have justified it in failing to observe the requirements of the bill of lading, it was not liable for negligence—Cassone v. New York, N. H & H. R. Co., 123 A. 280, 100 Conn. 262

80. Conn.—Cassone v. New York, N H. & H. R. Co., supra.

81. Tex—Texas, etc., R. Co. v. Rackusin, Civ App., 145 S.W. 734.

82. Ark—Missouri Pac. R Co. v. Wellborn & Walls, 280 S.W. 18, 170 Ark. 469, certiorari denied Missouri Pac. R Co. v. Wellborn, 47 S Ct 91, 273 U.S. 694, 71 L.Ed. 844

83. Tex—Kansas City, M. & O. Ry Co. of Texas v. Corn, Civ.App., 186 S W. 807.

10 C J. p 89 note 54 [b].

Failure to follow instructions

In action against connecting carrier for damages to interstate shipment of mules, defendant would be liable for consequences of its negligent failure to observe directions given by plaintiff to unload in certain stockyards for feed, water and rest.—Chicago, R. I. & G. Ry Co. v. Jenkins, Tex.Civ App., 196 S.W. 679, error refused.

Duty to unload and reload

Under a statute making connecting lines the agents of each other, and making the contract of either with the shipper the contract of each, it was the duty of both connecting carriers to unload and reload a shipment of cattle at the connecting point, if they should have been unloaded there in order to rest, feed and water them. —Galveston, etc., R Co. v. Jones, Tex Civ App., 123 S W. 737.

84. Iowa—Heisel v. Minneapolis & St L. R. Co., 171 N W 1177, 185 Iowa 835

10 C J. p 100 note 98, p 540 note 38

Corpus Juris is cited and its statement of the rule of the text approved and followed in Lynn v. Mellon, 131 So 458, 460, 24 Ala.App. 144.

85. Ala.—Lynn v. Mellon, supra.

La.—Jennings v. Missouri Pac. R. Co, 134 So. 694, 172 La. 522.

86. Ala—Lynn v Mellon, 131 So. 458, 24 Ala.App. 144.

87. Ala—Lynn v. Mellon, supra.

88. Ind.—Chicago, I & L Ry. Co. v. Priddy, 115 N.E 266, 65 Ind.App. 552

89. Ind.—Chicago, I. & L Ry. Co. v. Priddy, supra.

90. Mass.—Saxon Mills v. New York, etc, R. Co, 101 N.E 1075, 214 Mass. 383

10 C J. p 129 note 82.

91. Mich.—Van Keulen & Winchester Lumber Co. v Manistee & N. E R. Co., 193 N.W. 289, 222 Mich. 682

Omission of intermediate stop

Failure to stop shipment of lumber at B, an intermediate point on the line of the connecting carrier for kiln-drying, as directed by instruction across the face of bill of lading and waybill, was held not the fault of the initial carrier, but of the connecting carrier, which deviated from the specified route; and the connecting carrier was accordingly held li-

material to a connecting carrier's liability for diverting goods from the route specified that the change involved no greater expense or delay, nor greater risk of loss, so far as could be seen in advance, nor can the connecting carrier justify its breach in diverting a shipment by setting up shipping directions received from the prior carrier;[92] a shipper not a party to a waybill made by and for the convenience of connecting carriers is not bound by it.[93] Furthermore, the connecting carrier's liability is not affected by the fact that other carriers forming a part of the line over which the goods were routed might also be liable under the bill of lading.[94] Where a shipment routed over specified connecting lines is diverted by the first two carriers without authority to a line not included in the contract, and that line received the shipment without sufficient shipping instructions, the three carriers are jointly and severally liable for loss resulting to the shipment.[95]

A terminal carrier, not being a party to the contract of routing, is ordinarily not liable for damages resulting from improper routing by the initial carrier.[96] Where a terminal carrier over whose line goods were billed as part of a dispatch route never received the goods by reason of a wrongful diversion thereof by a prior carrier, it is not liable for loss caused by such diversion.[97]

§ 423. Duty to Deliver to Succeeding Carrier

It is the duty of an intermediate carrier at the end of its route to deliver the goods to the next carrier or notify it of their arrival and if acceptance is refused to notify the consignor or consignee.

As between intermediate carriers, the duty of the one in possession at the end of his route is to deliver the goods to the succeeding carrier or to notify him of their arrival;[98] and the former is not relieved of responsibility by unloading the goods at the end of his route and storing them in his warehouse without delivery or notice to, or any attempt to deliver to, his successor.[99] The duty to make delivery to the succeeding carrier is not affected by the fact that no formal bill of lading or shipping contract had been executed.[1] If acceptance is refused, the carrier should notify the consignor or the consignee without unreasonable delay and should store, or otherwise take care of, the goods while awaiting instructions, and, having done this, the liability of the carrier, as such, will cease, and the liability of a warehouseman will be substituted.[2] Where, by the express terms of the contract the inland transportation of a shipment consigned to a foreign country is completed by storing the goods in a warehouse pending arrival of the vessel to complete the transportation, the liability of the last railroad carrier is that of a warehouseman.[3] Where the contract of carriage has been performed, and the terminal carrier's relationship to the goods becomes that of warehouseman, the obligation of the carrier, if any, to deliver to another carrier in obedience to instructions of the shipper, is that of a forwarder, and not of a carrier.[4]

Where a railroad company has, by building stockyards, or by contract with a stockyards company, made adequate provision for the discharge of its duty as a common carrier with respect to live stock shipped over its line to a city, it is not required by the common law to make delivery of

able notwithstanding its contention that instead of a through billing, there should have been a local billing to B, with a second billing, after drying, to point of destination.—Van Keulen & Winchester Lumber Co. v. Manistee & N. E. R. Co., 193 N.W. 289, 222 Mich. 682.

92. Mass.—Saxon Mills v. New York, etc., R Co., 101 N.E. 1075, 214 Mass. 383.

93. Tex.—Quanah, A & P. Ry. Co. v. Warren, Civ.App., 198 S.W. 814.

94. Mass.—Saxon Mills v. New York, etc., R Co, 101 N.E. 1075, 214 Mass. 383.

95. Tenn.—Drake v Nashville, etc., R. Co., 148 S.W. 214, 125 Tenn. 627.

96. Tex.—Houston, etc., R. Co. v. Buchanan, Civ.App., 84 S.W. 1073. 10 C.J. p 541 note 55.

97. Mass.—Saxon Mills v. New York, etc., R. Co., 101 N.E. 1075, 214 Mass. 383.

98. U.S.—The No. 37, N.Y., 53 S.Ct. 328, 288 U.S. 239, 77 L.Ed. 721, reversing, C.C.A., The Car Float No. 37, 57 F.2d 144, reversing, D.C., The Talisman, 52 F.2d 691, and certiorari granted New York Cent. R Co. v. The Talisman, 53 S.Ct. 85, 287 U.S. 587, 77 L.Ed. 513
Tex.—Quanah, A & P. Ry Co. v. Warren, Civ.App., 184 S.W. 232.
10 C.J. p 541 note 58

Delivery or tender of delivery

Each succeeding carrier must make delivery or at least tender of delivery to the next carrier to relieve itself from further obligation.—Mallory S. S. Co. v. Garfield, C.C.A.N.Y., 10 F.2d 664, certiorari denied Garfield v. Mallory S. S Co., 47 S.Ct. 97, 273 U.S. 703, 71 L.Ed. 848.

99. W.Va.—Lewis v. Chesapeake, etc., R. Co., 35 S.E. 908, 47 W.Va. 656, 81 Am.S.R. 816.
10 C.J. p 541 note 58.

1. Mass.—Saxon Mills v New York, etc., R. Co., 101 N.E. 1075, 214 Mass. 383.

2. U.S.—Buston v. Pennsylvania R Co., Pa., 119 F. 808, 56 C.C.A. 320, affirming, C.C., 116 F. 235, and certiorari denied 23 S.Ct. 850, 189 U. S. 511, 47 L.Ed. 923.

3. La.—Coate Bros. v New Orleans Terminal Co., 72 So. 678, 139 La. 958.

4. Va.—Jennings Automatic Dump Body v. Virginian Ry. Co., 119 S.E. 147, 137 Va. 207.

stock consigned to such city to connecting roads for delivery at other stockyards therein.[5]

§ 424. Liability for Loss or Injury

a. Carrier liable for loss or injury on its own line

b. Carrier liable only for loss or injury on its own line

a. Carrier Liable for Loss or Injury on Its Own Line

(1) In general

(2) Effect of through contract of initial carrier

(3) Effect of federal legislation

(1) In General

Each intermediate or terminal carrier is responsible for actionable damage occurring on its own line.

Subject to the defenses discussed generally supra § 75 et seq,[6] intermediate and terminal carriers are each responsible for loss or damage occurring on its own line[7] or while the goods are in possession of another carrier acting merely as

5. U.S.—Central Stock Yards Co. v. Louisville & N. R. Co., Ky., 118 F. 113, 55 C.C.A. 63, 63 L.R.A. 213, affirmed 24 S.Ct. 339, 192 U.S. 568, 48 L.Ed. 565.

6. **Fault of shipper or consignee**

(1) Negligence of shipper in loading goods to be carried in interstate commerce is a good defense in an action against terminal carrier for damages—M. C. Johnson Motor Co. v. Payne, 107 S.E. 252, 116 S.C. 171.

Contra Walter v. Alabama Great Southern R. Co., 39 So. 87, 142 Ala. 474—McCarthy v. Louisville, etc., R. Co., 14 So. 370, 102 Ala. 193, 48 Am.S.R. 29—10 C.J. p. 542 note 69.

(2) So the terminal carrier is not liable for value of potato shipment, sold when shipment was not called for and the consignor refused to give disposal orders.—McCarthy v. Pennsylvania R. Co., 97 Pa.Super. 570.

Fraud

Where connecting carrier, pursuant to single contract of shipment, placed car of silver ore on siding for sampling by shipper's agent, consented to removal of ore from car for sampling, left car to be reloaded when sampling process was finished, and knew upon reloading that there was a shortage in the number of bags, and where carrier under like conditions temporarily delivered considerable ore for sampling, the separation of silver metallics or nuggets from other ore and placing them in the car was not a fraud on the carrier, releasing it from liability for loss of the silver by theft, such carrier being chargeable with notice of process of sampling, and being bound by knowledge of its agent acquired in receipting for ore.—Siebert v. Erie R. Co., 179 N.Y.S. 136, 189 App.Div. 586.

Freezing

A connecting carrier is not liable for damage to perishable goods though it delayed the shipment where freezing was the proximate cause of the damage, and would have occurred had there been no delay.—Mount Arbor Nurseries v. New York, C. & St. L. R. Co., 273 S.W. 410, 217 Mo.App. 31.

Seizure of goods

(1) Seizure of goods by customs authorities in a foreign port excuses the connecting carrier for failure to deliver them to the consignee.—Central of Georgia Ry. Co. v. Evans, 157 S.E. 313, 172 Ga. 53, answers to certified questions conformed to 159 S.E. 877, 43 Ga.App. 633.

(2) Seizure of goods under legal process as excuse for nondelivery generally see supra §§ 187–189.

7. U.S.—Galveston Wharf Co. v. Galveston, H. & S. A. Ry. Co., 52 S.Ct. 342, 285 U.S. 127, 76 L.Ed. 659, affirming Galveston, H. & S. A. Ry. Co. v. American Grocery Co., 36 S.W.2d 985, 122 Tex. 1, certiorari granted Galveston Wharf Co. v. Galveston H. & S. A. Ry. Co., 52 S.Ct. 41, 285 U.S. 608, 76 L.Ed. 521, and affirming Galveston, H. & S. A. Ry. Co. v. American Grocery Co., Com.App., 25 S.W.2d 588, which reversed Galveston Wharf Co. v. American Grocery Co., Civ.App., 13 S.W.2d 983.

Ala.—Lynn v. Mellon, 114 So. 680, 217 Ala. 75—Southern Ry. Co. v. J. H. White Mercantile Co., 93 So. 395, 207 Ala. 520—James v. Alabama Great Southern R. Co., 81 So. 582, 202 Ala. 640—Louisville & N. R. Co. v. Johnson, 88 So. 925, 18 Ala.App. 691.

Ark.—Chicago, R. I. & P. Ry. Co. v. George E. Shelton Produce Co., 291 S.W. 428, 172 Ark. 1017.

Iowa.—Erisman v. Chicago, B. & Q. R. Co., 163 N.W. 627, 180 Iowa 759.

Ky.—Southern Ry. Co. v. Avey, 191 S.W. 460, 173 Ky. 598.

Minn.—Hansen-Peterson Co. v. Atchison, T. & S. F. Ry. Co., 205 N.W. 605, 165 Minn. 43.

Mo.—Conley v. Chicago, B. & Q. R. Co., 183 S.W. 1111, 192 Mo.App. 534.

N.Y.—Siebert v. Erie R. Co., 179 N.Y.S. 136, 189 App.Div. 586—Emil Grossman Mfg. Co. v. New York Cent. R. Co., 169 N.Y.S. 213, 181 App.Div. 764—American Cotton Products Co. v. New York Cent. R. Co., 255 N.Y.S. 672, 142 Misc. 821.

S.C.—Barwick v. Northwestern R. Co. for South Carolina, 104 S.E. 545, 115 S.C. 123.

Tex.—Beaumont, S. L. & W. R. Co. v. Farmers' Co-Op. Sweet Potato Curing Co. of Rosepine, La., Civ. App., 298 S.W. 454.

10 C.J. p. 541 note 62

Corpus Juris is quoted and cited with approval.

Ky.—Makeever v. Georgia Southern & F. Ry. Co., 294 S.W. 144, 149, 219 Ky. 699.

Wis.—Bassett v. Chicago & N. W. Ry. Co., 171 N.W. 749, 751, 168 Wis. 617, rehearing denied 171 N.W. 752, 168 Wis. 617.

Fault of initial carrier

Where steel rails were shipped under a nonnegotiable bill of lading in which the shipper was named both as consignor and consignee, the shipper attaching a draft against the purchaser of the rails to the bill of lading and forwarding it to a bank, and also sending to the purchaser a copy of a carrier's certificate of weights, and the carrier delivered the shipment to a connecting carrier without notifying it of the outstanding bill of lading, and the connecting carrier allowed the rails to be loaded on a steamer for export under orders of the initial carrier, the connecting carrier was liable to the shipper for conversion, notwithstanding it had acted as agent of the initial carrier, which itself was a wrongdoer and could not authorize delivery of the shipment to any one except the true owner, but the connecting carrier was, as between itself and the initial carrier secondarily liable, since the initial carrier, to perform its duty of carriage chose the connecting carrier as its agency, and the connecting carrier was bound only to deliver according to directions given it by the initial carrier. In such case the steamship company which received the property from the connecting carrier under the belief that it belonged to another than the true owner, because of the failure of the initial carrier to comply with its duty, was an innocent sufferer by the neglect of the initial carrier, and as between it and such carrier was not liable in an action by the shipper—Pacific Car & Foundry Co. v. North-

its agent;[8] and a connecting carrier in possession of the goods at the time of the loss is not entitled to escape liability upon the ground that it was acting as the agent of another carrier.[9] So the fact that each acts in the transportation as the agent of the contracting carrier furnishes no legal reason why it should not be held liable.[10] If all the damages occurred on the line of one of the connecting carriers, the whole amount is recoverable from it.[11] Where by reason of the neg-

ern Pac. Ry. Co., 212 P. 159, 123 Wash 98.

Liability as insurer

In the ordinary shipment of inanimate objects without an inherent vice, in absence of a contract to the contrary, the terminal carrier is an insurer, except as to injuries by the act of God or the public enemy, and responsible for injury to such objects occurring on its line without regard to negligence—Cassone v. New York, N H & H. R. Co., 123 A. 280, 100 Conn. 262.

Nondelivery

Consignee who proved delivery to connecting carrier was entitled to recover for nondelivery if connecting carrier failed to deliver—Louisiana & N. W. R Co. v. J. P. Machen & Co., 294 S.W. 714, 174 Ark. 122.

Wrongful detention

Where the shipper gave proper directions for the shipment of the goods, but the shipment miscarried as a result of the initial carrier's negligence, the initial carrier in that respect was the agent of the terminal carrier, and the shipper can recover from the terminal carrier in detinue for wrongful detention of the goods. —Louisville & N. R. Co. v. James, 86 So 906, 204 Ala. 604—Johnson v. Alabama Great Southern R. Co, 81 So 584, 202 Ala. 642—James v. Alabama Great Southern R. Co, 81 So. 582, 202 Ala. 640—Louisville & N. R. Co v. Johnson, 88 So. 925, 18 Ala.App. 691.

Acceptance of delayed delivery

Connecting carrier, by accepting delayed delivery of cattle from initial carrier, assumes all liability for the shipment.—Jennings v. Missouri Pac. R. Co., 134 So. 694, 172 La. 522.

8. U.S.—Missouri Pac. R. Co. v. Reynolds-Davis Grocery Co, 45 S. Ct. 516, 268 U.S. 366, 69 L.Ed. 1000, affirming 257 S W. 70, 161 Ark. 579.
Ga.—Southern Ry Co. v. Waxelbaum Produce Co, 90 S E 987, 19 Ga.App 64.
Tex.—Texarkana & Ft. S. Ry. Co. v. Brass, Com.App, 260 S.W. 828, affirming, Civ.App., 245 S W. 457, rehearing overruled, Com.App, 262 S. W. 737—Rio Grande, E P. & S. F. R. Co v. Kraft & Madero, Civ.App., 212 S W. 981, dismissed for want of juridiction.
Wash.—Leddy v. Great Northern Ry. Co, 210 P. 354, 122 Wash. 136.

Switching carrier

(1) Where defendant intermediate carrier undertook to deliver two carloads of mules to a certain point, and neither the shipping contract nor the waybills made any mention of a switching company employed to switch the cars from the end of defendant's line to the connecting carrier, defendant was liable for the negligence of the switching company in confining the mules too long without food and water, since, under the circumstances, the switching company was agent for the carrier.—Leddy v. Great Northern Ry. Co, 210 P. 354, 122 Wash. 136.

(2) The mere fact that after arrival of shipment at destination over line of defendant, it was delivered to consignee by another railroad, was held not to make the latter road the last carrier, in view of other facts in case—Southern Ry. Co. v. Waxelbaum Produce Co., 90 S.E. 987, 19 Ga. App. 64.

(3) So a railroad, designated in through bill of lading as the last of the connecting carriers, is liable, as delivering carrier, for loss of a portion of the goods sustained while car was in possession of switching carrier employed by last connecting carrier to switch car from point on its line within city designated in bill of lading, as point of destination, to consignee's warehouse within such city, since such switching carrier was not named in bill of lading, did not receive any part of joint through rate, and was simply agent of other carrier for purpose of delivery—Missouri Pac. R. Co. v. Reynolds-Davis Grocery Co., 45 S.Ct. 516, 268 U. S 366, 69 L.Ed. 1000, affirming 257 S.W. 70, 161 Ark. 579.

(4) Under these circumstances it was said that although the other railroad switched the car at its destination to the consignee's door, under a switching arrangement whereby it received payment according to interstate commerce commission tariff rules, the application of such rules did not make the switching carrier liable for goods lost, under the interstate liability rule—Missouri Pac. R. Co. v. Reynolds-Davis Grocery Co., 257 S W. 70, 161 Ark. 579, certiorari granted 44 S.Ct. 636, 265 U.S. 577, 68 L.Ed. 1188, and affirmed 45 S.Ct. 516, 268 U S. 366, 69 L.Ed 1000.

Truckman

In an action by an initial carrier against connecting carriers for property lost, where a connecting carrier employed a truckman to transport goods from the intermediate carrier to its piers, it is as responsible for the acts of the truckman and his employees in dealing with the property delivered to them as though such acts were those of its own officers.—Hill Steamboat Line v. New York Cent & H R R Co., 158 N.Y.S. 1084, 94 Misc. 118, modified on other grounds Hill Steamboat Line v. Panama R. Co., 160 N.Y.S. 1103, 97 Misc. 22.

9. U.S.—Galveston Wharf Co. v. Galveston, H & S. A. Ry Co, 52 S Ct. 342, 285 U S. 127, 76 L Ed. 659, affirming Galveston, H. & S A. Ry. Co. v. American Grocery Co. 36 S. W 2d 985, 122 Tex. 1, certiorari granted Galveston Wharf Co. v. Galveston, H. & S. A. Ry. Co, 52 S Ct. 41, 285 U.S. 608, 76 L Ed. 521, and affirming Galveston, H. & S A. Ry. Co. v. American Grocery Co, Com App., 25 S W.2d 588, which reversed Galveston Wharf Co. v. American Grocery Co, Civ.App., 13 S W 2d 983.

Cases distinguished

"The case of Missouri Pacific R. Co v. Reynolds-Davis Grocery Co., Ark., 45 S.Ct. 516, 268 U.S. 366, 69 L.Ed. 1000, upon which the petitioners rely, is not in point. There, the Missouri Pacific, the delivering carrier named in the bill of lading, had employed the St. Louis-San Francisco to perform a switching service in making the required delivery at the place of destination. The court held that the Missouri Pacific was the delivering carrier and was liable as such; it could not defeat that liability by the employment of an agent for service at the terminal. In the present case, the wharf company was the connecting carrier in possession of the goods at the time of the loss, and was responsible accordingly."—Galveston Wharf Co. v. Galveston, H. & S A. Ry. Co, 52 S.Ct 342, 344, 285 U.S. 127, 76 L.Ed. 659, affirming Galveston, H. & S. A. Ry. Co. v American Grocery Co., 36 S W.2d 985, 122 Tex. 1, certiorari granted Galveston Wharf Co v. Galveston, H. & S A. Ry Co., 52 S.Ct. 41, 285 U.S 608, 76 L Ed 521, and affirming Galveston, H. & S. A. Ry. Co. v. American Grocery Co, Com.App., 25 S.W.2d 588, which reversed Galveston Wharf Co v. American Grocery Co., Civ.App., 13 S W.2d 983.

10. Ky.—Makeever v. Georgia Southern & F. Ry. Co., 294 S.W. 144, 219 Ky. 699.
10 C.J. p 542 note 63.

11. Ky.—Makeever v. Georgia Southern & F Ry. Co., supra.
10 C.J. p 542 note 64.

ligence of each carrier damages occur on each line, the carriers are jointly and severally liable for the whole damage, and the whole damage suffered may be recovered from either,[12] although there is some authority to the contrary.[13] The fact that a shipment of goods has been injured by connecting carriers before being turned over to the terminal carrier does not relieve the latter from using ordinary care to avoid further injury to it; and if by the lack of ordinary care it does further injure the merchandise it will be liable for such further injury.[14] A connecting carrier, guilty of negligently handling cattle received from the initial carrier is liable for the injuries caused thereby, although the initial carrier was negligent in delaying the delivery of the cattle and thus prevented the connecting carrier from taking them out on its first train.[15] The connecting carrier is in no way affected, however, by an admission in the initial carrier's receipt showing delivery to the carrier in good order.[16]

In the absence of statutory provisions to the contrary, a carrier whose tracks were used by the delivering carrier and which had no other connection with the carriage is not liable for injuries to a shipment caused by the delivering carrier.[17]

(2) Effect of Through Contract of Initial Carrier

That the initial carrier makes a through contract of carriage does not ordinarily affect the liability of connecting carriers.

It is very generally held in the United States that the fact that the initial carrier makes a contract of through shipment with the shipper will not prevent the shipper from suing a connecting carrier for loss or injury sustained on its own line,[18] its liability being fixed by the applicable valid terms of the original bill;[19] and except in a few cases, most of which have been overruled or disapproved,[20] the rule laid down by the courts of England and Canada that, where the initial carrier has made such a contract there can be no recovery for loss or injury as against any but the initial carrier in the absence of a partnership agreement between the carriers[21] has never obtained any foothold in this country. While it is held in some decisions, as shown infra

12. Ky.—Makeever v. Georgia Southern & F. Ry. Co., supra.
Wis.—Bassett v. Chicago & N. W. Ry. Co., 171 N.W. 749, 168 Wis. 617, rehearing denied 171 N.W. 752, 168 Wis. 617.
10 C.J. p 542 note 65.

Citing Corpus Juris, the rule of the text has been approved and applied in Bassett v. Chicago & N. W. Ry. Co., 171 N.W. 749, 751, 168 Wis. 617, rehearing denied 171 N.W. 752, 168 Wis. 617.

Mistreatment of live stock

Where racing mare, shipped over two railroads, was deprived of proper feed and water, mistreatment being partly attributable to first as well as to second railroad which handled her, second railroad was nevertheless liable for whole damage; the two having been joint tort-feasors.—Bassett v. Chicago & N. W. Ry. Co., 171 N.W. 749, 168 Wis. 617, rehearing denied 171 N.W. 752, 168 Wis. 617—10 C.J. p 542 note 65 [a].

13. Ga.—Seaboard Air-Line R. Co. v. Friedman, 57 S.E. 778, 128 Ga. 316
10 C.J. p 542 note 66.

14. Ala.—Lynn v. Mellon, 114 So 630, 217 Ala. 75
Mass.—Northern Industrial Chemical Co. v. Davis, 144 N.E. 64, 249 Mass 246.
Tex.—Beaumont, S. L. & W. R Co v. Farmers' Co-op. Sweet Potato Curing Co. of Rosepine, Pa., Civ. App., 298 S.W. 454.
10 C.J. p 542 note 67.

Issuance of clean bill

Terminal carrier was free to refuse leaky shipment of castor oil, if not satisfied with condition of lading, and, having accepted it and issued clean bill of lading, it assumed usual obligations of carrier—Northern Industrial Chemical Co v. Davis, 144 N.E. 64, 249 Mass. 246.

15. Tex.—Andrews v. McGill, Civ. App., 179 S.W. 1087.

16. Tex.—Texas, etc., R. Co. v. Kelly, Civ App, 74 S W. 343.
10 C J. p 192 note 36.

17. Ohio.—Erie R. Co. v. Bender, Streibig & Co., 163 N.E. 50, 29 Ohio App. 262.

18. U.S.—Galveston Wharf Co. v. Galveston, H. & S. A. Ry. Co., 52 S. Ct. 342, 285 U.S. 127, 76 L.Ed. 659, affirming Galveston, H. & S. A Ry. Co. v. American Grocery Co, 36 S W.2d 985, 122 Tex. 1, certiorari granted Galveston Wharf Co. v. Galveston, H. & S. A. Ry Co., 52 S Ct. 41, 285 U.S. 608, 76 L.Ed. 521, and affirming Galveston, H & S. A. Ry. Co. v. American Grocery Co., Com.App., 25 S W.2d 588, which reversed Galveston Wharf Co. v. American Grocery Co, Civ.App, 13 S.W.2d 983.
N C.—Reidsville Paper Box Co. v. Southern Ry, 99 S E. 23, 177 N.C. 351
10 C.J. p 542 note 74, p 543 note 75.

19. U S.—Galveston Wharf Co. v. Galveston, H & S. A. Ry. Co, 52 S Ct 342, 285 U.S. 127, 76 L.Ed. 659, affirming Galveston, H. & S A. Ry Co v. American Grocery Co, 36 S.W 2d 985, 122 Tex. 1, certiorari granted Galveston Wharf Co. v. Galveston, H. & S. A. Ry. Co., 52 S Ct 41, 285 U S 608, 76 L Ed. 521, and affirming Galveston, H. & S A. Ry. Co. v. American Grocery Co., Com.App, 25 S.W.2d 588, which reversed Galveston Wharf Co. v. American Grocery Co., Civ.App., 13 S W.2d 983.

Tariff provision unavailing

Provision in tariff filed by the connecting carrier, that it should be liable only for negligence does not affect its liability to a shipper entitled to transportation of goods under the through bill of lading pursuant to which the carrier performed the service.—Galveston Wharf Co. v. Galveston, H & S A. Ry Co, 52 S. Ct 342, 285 U S 127, 76 L.Ed. 659, affirming Galveston, H. & S. A. Ry. Co. v American Grocery Co, 36 S W. 2d 985, 122 Tex. 1, certiorari granted Galveston Wharf Co. v. Galveston, H. & S A Ry Co., 52 S Ct. 41, 285 U.S. 608, 76 L.Ed 521, and affirming Galveston, H & S. A Ry. Co. v. American Grocery Co, Com App, 25 S W 2d 588, which reversed Galveston Wharf Co. v American Grocery Co., Civ App., 13 S W 2d 983.

20. Ala.—Alabama Great Southern R. Co. v. Mt. Vernon Co, 4 So 356, 84 Ala. 173
Ga.—Southern Express Co. v. Shea, 38 Ga. 519—Mosher v. Southern Express Co., 38 Ga 37
Ill.—Anchor Line v. Dater, 68 Ill. 369.
10 C.J. p 542 note 73.

21. See 10 C.J. p 542 notes 70–72.

§ 436, that an action on the contract will not lie, and that the remedy of the shipper is in tort, the weight of authority is to the effect that the through contract of shipment made with the initial carrier is binding on all connecting carriers who receive the goods.[22]

(3) Effect of Federal Legislation

The common-law liability of connecting carriers for damages occurring on their own lines continues under the Carmack amendment, such liability being measured by the valid applicable provisions of the original contract of carriage.

Although the Carmack amendment renders the initial carrier liable for loss or injury to an interstate shipment which it has accepted for transportation, regardless of whether the loss or injury occurred on its line or that of any connecting carrier over which shipment is transported, such statute does not have effect of abrogating the liability of an intermediate or terminal carrier to an action to recover for loss or injury occurring on its line[23]

22. N.C.—Reidsville Paper Box Co. v. Southern Ry., 99 S.E. 23, 177 N.C. 351.

10 C.J. p 543 note 77.

23. U.S.—Missouri, K. & T. Ry. Co. of Texas v. Ward, Tex., 37 S.Ct. 617, 244 U.S. 383, 61 L.Ed. 1213—John Lysaght, Limited, v. Lehigh Valley R. Co., D.C.N.Y., 254 F. 351, affirmed, C.C.A., Lehigh Valley R. Co. v. John Lysaght, Limited, 271 F. 906, certiorari denied 41 S.Ct. 625, 256 U.S. 704, 65 L.Ed. 1180, and error dismissed 42 S.Ct. 53, 257 U.S. 613, 66 L.Ed. 397.

Ala.—Southern Ry. Co. v. J. H. White Mercantile Co., 93 So. 395, 207 Ala. 520—Nashville, C. & St. L. Ry. v. Abramson-Boone Produce Co., 74 So. 350, 190 Ala. 271—Louisville & N. R. Co. v. Lynne, 71 So. 338, 196 Ala. 21—Central of Georgia Ry. Co. v. Gillis Mule Co., 103 So. 906, 20 Ala.App. 535, certiorari denied Ex parte Central of Georgia Ry. Co., 103 So. 909, 212 Ala. 635.

Ark.—Missouri Pac. R. Co. v. American Fruit Growers, 260 S.W. 39, 163 Ark. 318.

Ga.—Fleshnar & Adar v. Southern Ry. Co., 127 S.E. 768, 160 Ga. 205, answers to certified questions conformed to 128 S.E. 78, 33 Ga.App. 823—Southern Ry. Co. v. Morris, 95 S.E. 284, 147 Ga. 729, reversing on other grounds Morris v. Southern Ry. Co., 91 S.E. 878, 19 Ga.App. 495, conformed to 95 S.E. 741, 22 Ga.App. 154—Central of Georgia Ry. Co. v. Yesbik, 92 S.E. 527, 146 Ga. 769, affirming Yesbik v. Central of Georgia Ry. Co., 91 S.E. 274, 19 Ga.App. 252, certiorari granted Central of Georgia R. Co. v. Yesbik, 91 S.E. 873, 146 Ga. 620—Davis v. Peacock, 113 S.E. 697, 29 Ga.App. 122—Southern Express Co. v. Turner, 103 S.E. 802, 25 Ga.App. 625—Atlantic Coast Line R. Co. v. Stovall-Pace Co., 100 S.E. 657, 24 Ga.App. 248—Cincinnati, H. & D. Ry. Co. v. Quincey & Rogers, 91 S.E. 220, 19 Ga.App. 167—Southern Ry. Co. v. Waxelbaum Produce Co., 90 S.E. 987, 19 Ga.App. 64—Central of Georgia Ry. Co. v. Waxelbaum Produce Co., 89 S.E. 635, 18 Ga.App. 489, overruling Southern Ry. Co. v. Bennett, 86 S.E. 418, 17 Ga.App. 162, and Southern Ry. Co. v. Savage, 89 S.E. 634, 18 Ga.App. 489.

Ill.—Freedman v. Erie R. Co., 246 Ill.App. 479. See Gallagher v. Grand Trunk Western Ry. Co., 207 Ill.App. 316.

Iowa.—Erisman v. Chicago, B. & Q. R. Co., 163 N.W. 627, 180 Iowa 759.

Ky.—Makeever v. Georgia Southern & F. Ry. Co., 294 S.W. 144, 219 Ky. 699—Southern Ry. Co. v. Avey, 191 S.W. 460, 173 Ky. 598.

La.—Coate Bros. v. New Orleans Terminal Co., 72 So. 678, 139 La. 958.

Me.—Lewis Poultry Co. v. New York Cent. R. Co., 105 A. 109, 117 Me. 482.

Mich.—Ginsberg v. Wabash Ry. Co., 193 N.W. 286, 222 Mich. 560, affirming H. Ginsberg & Sons v. Wabash Ry. Co., 189 N.W. 1018, 219 Mich. 665, 28 A.L.R. 518.

Minn.—Hansen-Peterson Co. v. Atchison, T. & S. F. Ry. Co., 205 N.W. 605, 165 Minn. 43.

Miss.—Illinois Cent. R. Co. v. Mahon Live Stock Co., 71 So. 802, 111 Miss. 496.

Mo.—Amber v. Davis, 282 S.W. 459, 221 Mo.App. 448—American Fruit Growers v. Cleveland, C., C. & St. L. Ry. Co., App., 263 S.W. 488—Letner v. Missouri Pac. R. Co., App., 249 S.W. 155—Collier v. Wabash R. Co., App., 190 S.W. 969—Conley v. Chicago, B. & Q. R. Co., 183 S.W. 1111, 192 Mo.App. 534.

Neb.—McGinley v. Union Pac. R. Co., 263 N.W. 393, 129 Neb. 855—C. C. Whitnack Produce Co. v. Chicago & N. W. Ry. Co., 178 N.W. 177, 104 Neb. 587, certiorari granted Chicago & N. W. R. Co. v. C. C. Whitnack Produce Co., 41 S.Ct. 15, 254 U.S. 625, 65 L.Ed. 445.

N.Y.—Schlitten v. Hines, 186 N.Y.S. 831, 196 App.Div. 254—American Cotton Products Co. v. New York Cent. R. Co., 255 N.Y.S. 672, 142 Misc. 821—Pacific Coast Borax Co. v. Shippers' Navigation Co., 178 N.Y.S. 182, 108 Misc. 198.

N.C.—Riff v. Yadkin R. Co., 127 S.E. 588, 189 N.C. 585.

Ohio.—Oyler & Oyler v. Louisville & N. R. Co., 18 Ohio App. 481—Norfolk & Western Ry. Co. v. Dresbach, 8 Ohio App. 333.

S.C.—Faulk v. Seaboard Air Line Ry. Co., 101 S.E. 641, 115 S.C. 306.

Tenn.—Nashville, C. & St. L. Ry. Co. v. Southern Nursery Co., 3 Tenn.App. 148.

Tex.—Galveston, H. & S. R. Ry. Co. v. American Grocery Co., 36 S.W. 2d 985, 122 Tex. 1, affirming, Com.App., 25 S.W.2d 588, which reversed Galveston Wharf Co. v. American Grocery Co., Civ.App., 13 S.W. 2d 983, certiorari granted Galveston Wharf Co. v. Galveston, H. & S. A. Ry. Co., 52 S.Ct. 41, 284 U.S. 608, 76 L.Ed. 521, affirmed 52 S.Ct. 342, 285 U.S. 127, 76 L.Ed. 659—Nation v. San Antonio Southern Ry. Co., 283 S.W. 157, 115 Tex. 431—Burd v. San Antonio Southern Ry. Co., Com.App., 261 S.W. 1021, modifying San Antonio Southern Ry. Co. v. Burd, Civ.App., 246 S.W. 1060—Beaumont, S. L. & W. R. Co. v. Farmers' Co-Op Sweet Potato Curing Co. of Rosepine, La., Civ.App., 298 S.W. 454.

Utah.—Barry v. Los Angeles & S. L. R. Co., 189 P. 70, 56 Utah 69.

Va.—Southern Ry. Co. v. Finley & Seymour, 102 S.E. 559, 560, 127 Va. 132, disapproving "every expression used in" Chesapeake & O. Ry. Co. of Indiana v. National Bank of Commerce of Norfolk, 95 S.E. 454, 122 Va. 471, certiorari denied 38 S.Ct. 582, 247 U.S. 519, 62 L.Ed. 1246 "which can fairly be construed as indicating that connecting and delivering carriers of an interstate shipment cannot be sued for their own negligence."

Wis.—Bassett v. Chicago & N. W. Ry. Co., 171 N.W. 749, 168 Wis. 617, rehearing denied 171 N.W. 752, 168 Wis. 617.

10 C.J. p 543 note 79, p 544 note 83 [b].

Corpus Juris was cited with approval.

N.Y.—Remington v. Barrett, 188 N.Y.S. 174, 176, 196 App.Div. 838.

Va.—Southern Ry. Co. v. Finley & Seymour, 102 S.E. 559, 560, 127 Va. 132.

Carrier acting as warehouseman

Where delivering carrier holding goods as warehouseman for shipment to foreign port negligently stored them in a leaky warehouse, the Car-

or caused by its negligence;[24] and any damages occurring on a connecting carrier's line may, notwithstanding the Carmack amendment, be recovered in an action brought directly against the carrier causing the injury,[25] or against such carrier and the initial carrier jointly,[26] although the view has been taken that the statutory and common-law remedies may not be prosecuted under one cause of action.[27] The bill of lading required to be issued by the initial carrier on an interstate shipment governs the entire transportation and fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid;[28] the liability of any carrier in the

mack amendment is no defense to an action against such carrier for negligence—Coate Bros. v. New Orleans Terminal Co., 72 So. 673, 139 La. 958

Cases distinguished

"Appellee is mistaken in its contention that this court held in Looney v. Oregon Short Line R. Co., 111 N.E. 509, 271 Ill. 538, that no suit can be maintained against any carrier in an interstate shipment, other than the initial carrier, for loss or damage to the shipment caused by its own negligence. The holding in that case is that no suit under the Carmack Amendment can be maintained against any carrier of an interstate shipment other than the initial carrier, whose duty under that amendment is to issue the bill of lading. The facts stated in that case clearly show that the suit was brought directly under the Carmack Amendment against a connecting carrier, and this court merely held that the right of action given by that amendment was solely against the initial carrier. The decision in that case is entirely in harmony with the decision of the Supreme Court of the United States in the case of Georgia, F. & A. R. Co. v. Blish Milling Co., Ga., 36 S.Ct. 541, 241 U.S. 190, 60 L. Ed. 948. In this latter case the court held that the terminal carrier is not relieved from liability for misdelivering an interstate shipment by the provisions of the Carmack Amendment. . . . The effect of the holding is that, if in such a shipment a connecting carrier is sued, the rights and remedy of the shipper are to be determined under the federal laws existing prior to the enactment of the Carmack Amendment."—Pennington v. Grand Trunk Western Ry. Co., 115 N.E. 170, 172, 277 Ill. 39, reversing 119 Ill.App. 479.

24. Ga.—Sperry Flour Co. v. Atlantic Coast Line R. Co., 189 S.E. 278, 54 Ga.App. 725.
N.C.—Aydlett v. Norfolk-Southern R. Co., 89 S.E. 1000, 172 N.C. 47.

25. U.S.—Missouri, K. & T. Ry. Co. of Texas v. Ward, Tex., 37 S.Ct. 617, 244 U.S. 383, 61 L.Ed. 1213
Ind.—Pittsburgh, C., C. & St. L. R. Co. v. Larosa, 131 N.E. 22, 75 Ind. App. 475.
N.C.—Gillikin & Edwards v. Norfolk Southern R. Co., 93 S.E. 469, 174 N.C. 137.
Tex.—Galveston, H. & S. A. Ry. Co. v. American Grocery Co., 36 S.W.2d 985, 122 Tex. 1, affirming, Com.App., 25 S.W.2d 588, which reversed Galveston Wharf Co. v. American Grocery Co., Civ.App., 13 S.W.2d 983, certiorari granted Galveston Wharf Co. v. Galveston, H. & S. A. Ry. Co., 52 S.Ct. 41, 284 U.S. 608, 76 L.Ed. 521, affirmed 52 S.Ct. 342, 285 U.S. 127, 76 L.Ed. 659—Texas & P. Ry. Co. v. West Bros., Com.App., 207 S.W. 918, affirming in part and reversing in part St. Louis, I. M. & S. R. Co. v. Same, Civ.App., 159 S.W. 142, rehearing denied Texas & P. R. Co. v. West Bros., Com.App., 214 S.W. 808—Beaumont, S. L. & W. R. Co. v. Farmers' Co-Op. Sweet Potato Curing Co. of Rosepine, La., Civ. App., 298 S.W. 454.
Va.—Southern Ry. Co. v. Finley & Seymour, 102 S.E. 559, 127 Va. 132.
Wis.—Bassett v. Chicago & N. W. Ry. Co., 171 N.W. 749, 168 Wis. 617, rehearing denied 171 N.W. 752, 168 Wis. 617.
10 C.J. p. 543 note 80.

Cause arising after enactment

The proviso in the Carmack amendment that it should not deprive any holder of a bill of lading of any remedy or right of action which he has under the existing law reserves the right to the common-law action, and is not limited to causes of action in being when the amendment was passed—Remington v. Barrett, 188 N.Y.S. 174, 196 App. Div. 838.

26. Mo.—Otrich v. St. Louis, etc., R. Co., 134 S.W. 665, 154 Mo.App. 420.

Corpus Juris has been cited with approval in Dietz v. Southern Pac. Ry. Co., 28 S.W.2d 395, 398, 225 Mo.App. 39.

27. Ohio.—Norfolk & Western Ry. Co. v. Dresbach, 8 Ohio App. 333.

28. U.S.—Galveston Wharf Co. v. Galveston, H. & S. A. Ry. Co., 52 S.Ct. 342, 285 U.S. 127, 76 L.Ed. 659, affirming Galveston, H. & S. A. Ry. Co. v. American Grocery Co., 36 S.W.2d 985, 122 Tex. 1, certiorari granted Galveston Wharf Co. v. Galveston, H. & S. A. Ry. Co., 52 S.Ct. 41, 285 U.S. 608, 76 L.Ed. 521, and affirming Galveston, H. & S. A. Ry. Co. v. American Grocery Co., Com.App., 25 S.W.2d 588, which reversed Galveston Wharf Co. v. American Grocery Co., Civ.App., 13 S.W.2d 983—Texas & P. Ry. Co. v. Leatherwood, Tex., 39 S.Ct. 517, 250 U.S. 478, 63 L.Ed. 1096—Georgia F. & A. Ry. Co. v. Blish Milling Co., 36 S. Ct. 541, 241 U.S. 190, 60 L.Ed. 948, affirming 82 S.E. 784, 15 Ga.App. 142—Pomona Products Co. v. Southern Ry. Co., D.C.Ga., 294 F. 982.
Ala.—Inland Waterways Corporation v. Sloss Sheffield Steel & Iron Co., 136 So. 849, 223 Ala. 397—Southern Ry. Co. v. Northwestern Fruit Exch., 98 So. 382, 210 Ala. 519
Conn.—Cassone v. New York, N. H. & H. R. Co., 123 A. 280, 100 Conn. 262.
Fla.—American Ry. Exp. Co. v. Fegenbush, 144 So. 320, 107 Fla. 145
Ill.—Pennington v. Grand Trunk Western Ry. Co., 115 N.E. 170, 277 Ill. 39—Freedman v. Erie R. Co., 246 Ill.App. 479. See Gallagher v. Grand Trunk Western Ry. Co., 207 Ill.App. 316.
Ky.—McArthur v. Payne, 258 S.W. 684, 201 Ky. 793
Miss.—Illinois Cent. R. Co. v. Rogers & Hurdle, 76 So. 686, 116 Miss. 99.
N.Y.—Emil Grossman Mfg. Co. v. New York Cent. R. Co., 169 N.Y.S. 213, 181 App.Div. 764.
Tex.—Burd v. San Antonio Southern Ry. Co., Com.App., 261 S.W. 1021, modifying San Antonio Southern Ry. Co. v. Burd, Civ.App., 246 S.W. 1060.

"The only effect of the Carmack Amendment as applied to connecting or terminal carriers, is to give them the benefit of all lawful conditions or provisions in the contract made by the shipper with the initial carrier."—Erisman v. Chicago, B. & Q. R. Co., 163 N.W. 627, 630, 180 Iowa 759.

Authority of initial carrier

"To the extent of involving it, the delivering carrier, in the liability of a common carrier after the goods shall have come to its custody, the initial or receiving carrier of the goods, had such authority."—St. Louis & S. F. R. Co. v. Akard, 159 P. 344, 349, 60 Okl. 4.

Acquiescence in bill

Connecting carrier by acting on bill of lading for a through shipment issued by the initial carrier, receiving the goods, and not issuing

route over which the articles were routed, for loss or damage, is that imposed by the act as measured by the original contract of shipment so far as it is valid under the act.[29] Under this amendment the connecting carriers become the agents of the initial carrier and are charged with the duty of carrying out the contract of their principal with no right or power to engraft new conditions or stipulations on the contract already lawfully made and executed, binding them fully to perform their part of the contract of carriers under the terms of that contract,[30] whether or not receiving special instructions from the initial carrier.[31] Furthermore, under the Carmack amendment all connecting carriers are charged with knowledge that, after the original shipment was begun, the consignors surrendered their order bills of lading and had new ones issued, changing the point of destination of the goods and designating another party as the one to be notified on arrival of the shipment.[32]

b. Carrier Liable Only for Loss or Injury on Its Own Line

(1) In general
(2) Effect of federal legislation
(3) Effect of state legislation
(4) Effect of last carrier collecting entire charge

(1) In General

In the absence of special statute or joint undertaking, a connecting carrier is liable only for damage occurring on its own line or attributable to its own negligence.

The well settled rule stated in Corpus Juris, which has been cited with approval by the courts,[33] is that in the absence of some special statutory provision, or of a partnership agreement, or joint undertaking between several lines of carriers, an intermediate or terminal carrier is liable only for loss or injury occurring on its own line; and no recovery can be had against such carrier for damage caused wholly by another carrier.[34] This rule is

a bill of lading of its own, makes it its own.—International & Great Northern Ry. Co. v. Kansas City Produce Co., Tex.Civ.App., 200 S.W. 254, dismissed for want of jurisdiction.

Storage of goods

The provision in a bill of lading that the carrier's responsibility for goods shipped in an interstate shipment over connecting carriers will terminate on the storage of the goods by the terminal carrier in a public or licensed warehouse after the expiration of forty-eight hours from the time when the person entitled to receive the goods has been notified of their arrival and has failed to remove them, constitutes a contract binding on the shipper and the delivering carrier, by the terms of which the carrier is released from liability for any loss or damage to the goods after their storage in a warehouse in compliance with this provision in the bill of lading. Accordingly such carrier is not liable thereafter for conversion of the goods by the warehouseman. —Bibb Mfg. Co. v. Cleveland, C, C & St. L. Ry. Co., 132 S.E. 129, 35 Ga.App. 43.

Canadian bill of lading issued by Canadian initial carrier for carload shipment from Canada to United States is applicable to entire transportation.—Kaufherr & Co. v. Pennsylvania R. Co., 174 A. 27, 12 N.J. Misc. 542.

29. Ga.—Central of Georgia Ry. Co v Yesbik, 92 S.E. 527, 146 Ga. 769, affirming Yesbik v. Central of Georgia Ry. Co., 91 S.E. 274, 19 Ga.App. 252, certiorari granted Central of Georgia R. Co. v. Yesbik, 91 S.E. 873, 146 Ga. 620.
Ill.—Pennington v. Grand Trunk Western Ry. Co, 115 N.E. 170, 277 Ill. 39, reversing 119 Ill.App. 479—Freedman v. Erie R. Co., 246 Ill.App. 479.
Miss.—Illinois Cent. R. Co. v. Rogers & Hurdle, 76 So. 686, 116 Miss. 99.
N.Y.—American Cotton Products Co v. New York Cent. R. Co., 255 N.Y.S. 672, 142 Misc. 821.

Unauthorized notations

The initial carrier in an interstate shipment is the agent of the connecting carriers, and they are bound by its contract and by the original contract and not by unauthorized notations made on the bill of lading —McArthur v. Payne, 258 S.W. 684, 201 Ky. 793.

30. U.S.—Missouri, K & T. Ry. Co of Texas v. Ward, Tex., 37 S.Ct. 617, 244 U.S. 383, 61 L.Ed. 1213.
Ala.—Inland Waterways Corporation v. Sloss Sheffield Steel & Iron Co, 136 So. 849, 223 Ala. 397.
Ill.—Freedman v. Erie R. Co, 246 Ill.App. 479.
Tex.—Galveston, H. & S. A. Ry. Co v. American Grocery Co, 36 S.W. 2d 985, 122 Tex. 1, affirming, Com App, 25 S.W.2d 588, which reversed Galveston Wharf Co. v. American Grocery Co, Civ.App., 13 S.W.2d 983, certiorari granted Galveston Wharf Co. v. Galveston, H & S. A. Ry. Co., 52 S.Ct. 41, 284 U.S. 608, 76 L.Ed. 521, affirmed 52 S.Ct. 342, 285 U.S. 127, 76 L.Ed. 659.
10 C.J. p. 543 note 82.

Corpus Juris is cited with approval in Pabst Brewing Co. v. Chicago, M. & St. P. Ry. Co, 273 S.W. 424, 427, 221 Mo.App. 338.

Knowledge of appearance of shipment

As connecting carrier is initial carrier's agent in forwarding goods, and initial carrier is agent of terminal carrier in making contract of carriage, latter is bound by initial carrier's knowledge of appearance of shipment of beverage when received by initial carrier for transportation into dry state.—Pabst Brewing Co v. Chicago, M. & St. P. Ry. Co., 273 S.W. 424, 221 Mo.App. 338.

31. Ala.—Inland Waterways Corporation v. Sloss Sheffield Steel & Iron Co., 136 So. 849, 223 Ala. 397.

32. U.S.—Russo v. Davis, C.C.A.Ill., 285 F. 231.

33. La.—Hall v. Houston, E. & W. T. Ry. Co., 121 So. 769, 771, 9 La. App. 577.
Or.—Daniels v. Northern Pac. Ry. Co., 171 P. 1178, 1181, 88 Or. 421.
Tex.—St. Louis, S. F. & T. Ry. Co. v. J. G. Henderson Cut Stone Co., Civ.App., 275 S.W. 603, 605—Lancaster v. Smith, Civ.App., 226 S.W. 460, 461.

34. U.S.—Julius Klugman's Sons v. Oceanic Steam Nav. Co., D.C.N.Y., 42 F.2d 461—Loma Fruit Co. v. International Nav. Co., C.C.A.N.Y., 11 F.2d 124, certiorari denied Atchison, T. & S. F. R. Co. v. Loma Fruit Co., 46 S.Ct. 471, 270 U.S. 662, 663, 70 L.Ed. 787.
Ala.—Lynn v. Mellon, 114 So. 680, 217 Ala. 75—National Park Bank

especially applicable where the contract of carriage expressly negatives the liability of any connecting carrier for damage not caused by it,[35] or where there is no pro rata sharing of freight charges made under the initial contract, and where the terminal carrier refuses to receive a shipment under the initial contract, but receives it under a new contract whereby it makes its own rates and collects its own charges, and limits its liabilities to its own lines.[36] The initial carrier is not the agent of the connecting lines so as to make the latter liable for the former's negligence.[37] A connecting carrier is not an insurer of goods against damage resulting thereto while in its possession from causes occurring before the goods were delivered to it and for which it was not responsible, it being, under such circumstances, required to exercise only reasonable care to save the property from further damage after the condition which caused the damage has been discovered or should have been discovered by it in the exercise of such care.[38] An exception to the general rule is that if the connecting carrier itself furnished defective cars which were used in the entire transportation, it is liable for all the resulting damage, notwithstanding that some of it may have occurred while the cars were being hauled by other carriers.[39]

A shipper delivering merchandise to a carrier for delivery only on payment of the purchase price cannot maintain an action for conversion against a

of New York v. Louisville & N R. Co., 74 So. 69, 199 Ala. 192—Central of Georgia Ry. Co. v. Gillis Mule Co., 103 So. 906, 20 Ala.App. 535, certiorari denied Ex parte Central of Georgia Ry. Co., 103 So. 909, 212 Ala. 635.

Ark.—Missouri Pac. R. Co. v. Reynolds-Davis Grocery Co., 257 S.W. 70, 161 Ark. 579, certiorari granted 44 S.Ct. 636, 265 U.S. 577, 68 L.Ed. 1188, and affirmed 45 S.Ct. 516, 268 U.S. 366, 69 L.Ed. 1000—St. Louis, I. M. & S. Ry. Co. v. Davis, 185 S.W. 478, 123 Ark. 619.

Ga.—Central of Georgia Ry. Co. v. Scrivens, 100 S.E. 233, 24 Ga.App. 177.

Idaho.—Campbell v. Oregon Short Line R. Co., 275 P. 576, 47 Idaho 223.

Ill.—Lino v. Northwestern Pac. R. Co., 163 N.E. 316, 332 Ill. 93, reversing 246 Ill.App. 451—Denney & Co. v. Wabash Ry. Co., 250 Ill. App. 380—Freedman v. Erie R. Co., 246 Ill.App. 479—Golden Grain Milling Co. v. St. Louis, S. & P. R. Co., 226 Ill.App. 116—Gerard v. Davis, 225 Ill.App. 377. See Hamilton v. Cleveland, C., C. & St. L. Ry. Co., 206 Ill.App. 270.

Ind.—Michigan Cent. R. Co. v. S. J. Peabody Lumber Co., 131 N.E. 841, 76 Ind.App. 222.

Iowa—Adams Steel Co. v. Chicago Great Western R. Co., 165 N.W. 367, 181 Iowa 1052, L.R.A.1918B 622—Cedar Rapids Fuel Co. v. Illinois Cent. R. Co., 160 N.W. 353, 178 Iowa 878.

Ky.—Makeever v. Georgia Southern & F. Ry. Co., 294 S.W. 144, 219 Ky. 699—E. J. O'Brien & Co. v. Davis, 288 S.W. 682, 216 Ky. 693.

La.—Hall v. Houston, E. & W. T. Ry. Co., 121 So. 769, 9 La.App. 577, 582.

Md.—Pennsylvania R. Co. v. Walker, 128 A. 45, 147 Md. 323.

Mass.—Lyon v. Boston & M. R. R., 158 N.E. 663, 261 Mass. 251.

Miss.—Illinois Cent. R. Co. v. Walker, 77 So. 191, 116 Miss. 431.

Mo.—Johnson v. Missouri Pac. R. Co., 249 S.W. 658, 211 Mo.App. 564—Utz v. Chicago, B. & Q. Ry. Co., App., 208 S.W. 640

N.Y.—Lahn & Simons v. New York, N. H. & H. R. Co., 200 N.Y.S. 357—Grand Trunk Ry. Co. of Canada v. Satuloff, 182 N.Y.S. 81.

N.C.—M. V. Moore & Co. v. Southern Ry. Co., 111 S.E. 166, 183 N.C. 213.

Ohio—Oyler & Oyler v. Louisville & N. R. Co., 18 Ohio App. 481

Okl.—Oklahoma, N. M. & P. Ry. Co. v. H. M. S. Drilling Co., 229 P. 420, 100 Okl. 260.

Or.—Daniels v. Northern Pac. Ry. Co., 171 P. 1178, 88 Or. 421.

Pa.—Hinman Bros. v. Pennsylvania R. Co., 5 Pa.Dist. & Co. 182.

Tex.—St. Louis, S. F. & T. Ry. Co. v. J. G. Henderson Cut Stone Co., Civ.App., 275 S.W. 603—San Antonio Southern Ry. Co. v. Burd, Civ.App., 246 S.W. 1060, modified on other grounds Burd v. San Antonio Southern R. Co., Com. App., 261 S.W. 1021—Lancaster v. Smith, Civ.App., 226 S.W. 460—Ft. Worth & D. C. Ry. Co. v. Hill, Civ.App., 213 S.W. 952—Rio Grande & E. P. Ry. Co. v. J. H. Russell & Son, Civ.App., 212 S.W. 530—Quanah, A. & P. Ry. Co. v. Warren, Civ.App., 184 S.W. 232.

Wash.—Leddy v. Great Northern Ry. Co., 210 P. 354, 122 Wash. 136.

W.Va.—Copenhaver & Massey Milling Co. v. Kanawha & W. Va. R. Co., 93 S.E. 940, 81 W.Va. 73.

10 C.J. p 544 note 83.

35. U.S.—Oregon-Washington R. & Nav. Co. v. McGinn, Wash., 42 S.Ct. 332, 258 U.S. 409, 66 L.Ed. 689, reversing, C.C.A., McGinn v. Oregon-Washington R. & Nav. Co., 265 F. 81, certiorari granted 40 S.Ct. 148, 254 U.S. 628, 65 L.Ed. 446—A. Russo & Co. v. U. S., C.C.A. La., 40 F.2d 39.

Pa.—Karnofsky Bros. v. Delaware & Hudson Co., 117 A. 783, 274 Pa. 272

Tenn.—Southern Ry. Co. v. Lewis & Adcock Co., 201 S.W. 131, 139 Tenn. 37, L.R.A.1918C 976.

10 C.J. p 550 note 40 [b] (1).

Separate contracts

Under separate contracts for shipment of live stock, limiting the carriers' liability to injury to cattle on their respective lines, a terminal carrier could not be charged with negligence of a connecting carrier. —Ft. Worth & D. C. Ry. Co. v. Allen, Tex.Civ.App., 189 S.W. 765.

36. Okl.—Missouri, etc., R. Co. v. Peters, 131 P. 525, 37 Okl. 188.

37. N.C.—M. V. Moore & Co. v. Southern Ry. Co., 111 S.E. 166, 183 N.C. 213.

38. N.Y.—Bradley v. Lake Shore, etc., R. Co., 129 N.Y.S. 1045, 145 App.Div. 312.

Va.—Chesapeake & O. Ry. Co. v. W. C. Crenshaw & Co., 137 S.E. 515, 147 Va. 290.

10 C.J. p 544 note 86.

Continuing deterioration

Where an interstate shipment of peaches received by a connecting carrier from the initial carrier reached destination in poor condition because of insufficient refrigeration provided by the initial carrier, which caused deterioration to continue in the hands of the connecting carrier, the connecting carrier was liable only for damages resulting from its own negligence, and not for that of the initial carrier.—E. H. Emery & Co. v. Chicago, B. & Q. R. Co., 170 N.W. 540, 186 Iowa 1156, rehearing denied 173 N.W. 12, 186 Iowa 1156.

39. Ga.—Sperry Flour Co. v. Atlantic Coast Line R. Co., 189 S.E. 278, 54 Ga.App. 725.

N.C.—Aydlett v. Norfolk-Southern R. Co., 89 S.E. 1000, 172 N.C. 47.

connecting carrier which completed the transportation, made due delivery, collected the price, and credited the collection to the initial carrier's account.[40]

Where a partnership relation exists between connecting carriers, the rule, as stated infra § 429 a is that the intermediate or terminal carrier is liable for loss or injury, whether occurring on its own line or that of the other connecting carriers.

(2) Effect of Federal Legislation

Neither the original Carmack amendment nor the Bills of Lading Act abrogated the common-law rule limiting a connecting carrier's liability to its own line; but by subsequent amendment the delivering carrier was made liable regardless of where the damage occurred.

The general rule that an intermediate carrier is liable only for loss or injury occurring on its own line is not abrogated by the Carmack amendment,[41] and prior to the amendment hereinafter referred to, the terminal carrier as well was exempt from liability for damages not occurring on its own line;[42] and an express provision in the contract of carriage limiting the liability of intermediate and terminal carriers to loss, damage, or injury occurring on their own lines was not invalid under the act.[43] By the amendment of March 4, 1927, however, any common carrier delivering property

40. N Y—Polar Ware Co. v. Middlesex Transp. Co., 284 N.Y.S. 311, 157 Misc. 664.

Reason for rule

"It is conceded that if defendant had paid over the moneys collected by it to the initial carrier it would have been absolved from any liability. Indeed, it would have had no right to make any other disposition of them Its only duty or obligation was to the initial carrier. Upon collection of the moneys it became a debtor to the initial carrier, and it discharged its obligation by giving credit to that company against its indebtedness. No trust was created by the transaction, and plaintiff's only right of recourse was against the initial carrier with which it had contracted."—Polar Ware Co. v. Middlesex Transp. Co., 284 N.Y.S. 311, 312, 157 Misc. 664.

41. U S—Johnson-Brown Co. v. Delaware, L. & W. R. Co., D.C. Ga., 239 F. 590.

Ala.—Inland Waterways Corporation v. Sloss Sheffield Steel & Iron Co., 136 So. 849, 223 Ala. 397—Lynn v. Mellon, 114 So. 680, 217 Ala. 75.

Ill—Lino v. Northwestern Pac. R. Co., 163 N E 316, 332 Ill. 93, reversing 246 Ill.App. 451—Alton Iron & Metal Co. v. Wabash Ry. Co., 159 N E. 802, 328 Ill. 353, reversing 235 Ill.App. 151.

Ind—Mascari v New York, C. & St L. R. Co., 183 N.E 913, 97 Ind. App. 27.

Ky—Southern Ry. Co. v. Avey, 191 S W 460, 173 Ky. 598.

La—Hall v. Houston E. & W T. Ry. Co., 121 So. 769, 9 La.App. 577, 582.

N.Y.—Lahn & Simons v. New York, N H. & H. R Co., 200 N.Y.S. 357—Grand Trunk Ry. Co. of Canada v. Satuloff, 182 N.Y S. 81.

N.C—M. V. Moore & Co. v. Southern Ry. Co, 111 S.E. 166, 183 N C. 213

N.D—Knapp v. Minneapolis, St. P. & S. S. M Ry. Co., 159 N.W. 81, 34 N.D. 466.

Ohio—Oyler & Oyler v. Louisville & N. R. Co., 18 Ohio App. 481.

Tex.—Beaumont, S L & W R. Co. v. Farmers' Co-op Sweet Potato Curing Co. of Rosepine, La, Civ. App, 298 S W. 454—Atchison, T. & S. F. Ry. Co. v Ohlhausen, Civ. App., 272 S.W. 224—San Antonio Southern Ry. Co. v Burd, Civ. App., 246 S.W. 1060, modified on other grounds Burd v. San Antonio Southern R. Co, Com.App., 261 S W. 1021—Ft. Worth & D. C Ry. Co. v. Hill, Civ.App, 213 S.W. 952.

10 C J. p 544 note 83.

Commingling of shipments

If separate shipments of pig iron were not commingled when handled by connecting carrier, such carrier would not be liable for commingling of shipments.—Inland Waterways Corporation v. Sloss Sheffield Steel & Iron Co., 136 So. 849, 223 Ala. 397.

42. U.S.—Oregon-Washington R. & Nav. Co. v. McGinn, Wash., 42 S. Ct. 332, 258 U.S. 409, 66 L Ed. 689, reversing, C C.A., McGinn v. Oregon-Washington R. & Nav. Co, 265 F. 81, certiorari granted 41 S.Ct. 148, 254 U.S. 628, 65 L Ed. 446.

Ga.—Davis v. Peacock, 113 S.E. 697, 29 Ga App. 122.

Ill.—Alton Iron & Metal Co. v. Wabash Ry. Co., 159 N E. 802, 328 Ill. 353, reversing 235 Ill.App. 151.

Ind.—Baltimore & O. R. Co. v. Maurer, 127 N E 294, 73 Ind App. 296.

Iowa—Cedar Rapids Fuel Co. v. Illinois Cent. R. Co., 160 N.W 353, 178 Iowa 878.

Ky—McArthur v. Payne, 258 S.W. 684, 201 Ky. 793.

La—Hall v. Houston, E & W. T. Ry Co., 121 So. 769, 9 La.App. 577, 582.

Mass.—Lyon v Boston & M. R. R., 158 N.E. 663, 261 Mass 251

Mo—Utz v. Chicago, B. & Q. Ry. Co., App, 208 S.W. 640.

N C—M. V. Moore & Co. v. Southern Ry. Co., 111 S E. 166, 183 N C. 213.

Ohio—Oyler & Oyler v. Louisville & N. R. Co, 18 Ohio App. 481.

Pa.—Karnofsky Bros. v. Delaware & Hudson Co., 117 A. 783, 274 Pa. 272—Philadelphia & R. Ry. Co. v. Taylor, 156 A. 587, 102 Pa.Super. 31.

Tex.—Chapman v St. Louis Southwestern Ry. Co. of Texas, Civ. App., 295 S W. 262—San Antonio Southern Ry Co. v. Burd, Civ. App., 246 S.W. 1060, modified on other grounds Burd v San Antonio Southern R. Co, Com App., 261 S. W. 1021—Ft. Worth & D. C. Ry Co. v. Hill, Civ App., 213 S.W. 952 —Houston & T C. R. Co. v. Reichardt & Schulte Co., Civ App., 212 S.W. 208.

10 C.J. p 544 note 83.

Contractual exemption

The terminal carrier, transporting horses under a through interstate bill of lading which provided that no carrier should be liable, except as provided by statute, for any loss or damage not caused by it, is not liable for the death of horses during shipment because they had been given unwholesome food and water while being transported by an intermediate carrier.—Oregon-Washington R. & Nav. Co. v. McGinn, Wash., 42 S.Ct. 332, 258 U S. 409, 66 L Ed. 689, reversing, C C A., McGinn v. Oregon-Washington R. & Nav Co., 265 F. 81, certiorari granted 41 S.Ct. 148, 254 U.S. 628, 65 L.Ed. 446.

43. Ala.—Lynn v. Mellon, 114 So 680, 217 Ala. 75

N C—M. V. Moore & Co. v. Southern Ry. Co., 111 S E. 166, 183 N C 213.

Tenn—Southern Ry. Co v. Lewis & Adcock Co, 201 S W. 131, 139 Tenn. 37, L R A 1918C 976.

Common-law liability not limited

In an action against terminal carrier a provision in an interstate bill of lading, issued by the initial carrier, that no carrier should be liable for loss, damage, or injury not occurring on its own road, etc., except as liability might be imposed by law, was not a limitation of the defendant carrier's common-law liability,

received for transportation in interstate commerce, and transported, is liable to the owner thereof for any damage caused by such delivering carrier or by the carrier originally receiving it or by any intervening carrier over whose line the property has passed; and, accordingly, the delivering carrier will be held liable thereunder in an action by the shipper for damages caused by the other carriers.[44]

The Federal Bills of Lading Act § 22, 49 U.S.C.A. § 102, providing that the carrier issuing a bill of lading is liable for damages caused by loss of the goods in transit, does not apply to connecting or terminal carriers, and the liability of such carrier remains the same as prior to the passage of the statute.[45] Such carrier sued for a shortage is not, under the Act, estopped to deny that it received the quantity of goods specified in bills of lading issued by the initial carrier.[46]

(3) Effect of State Legislation

The common-law liability of connecting carriers in intra-state shipments is modified by some state legislation.

Statutes exist in a number of jurisdictions, some of which have materially modified the common-law liability of intermediate or terminal carriers so far as intra-state shipments are concerned,[47] as, for example, a statute which provides that the last of several connecting lines of railroad which receives goods as in good order will be liable for any damages done to the goods,[48] a statute requiring the terminal carrier on demand to trace the freight and making it liable for the loss in case of failure to do so,[49] or a statute making each of several connecting carriers agent of the other,[50] such as a statute which provides that all carriers over whose lines any freight received by either of such carriers for through shipment on a contract for through carriage recognized, acquiesced in, or acted on by such carriers, shall, with respect to the undertaking, be considered connecting lines and be deemed to be the agents of each other, and the contract shall be deemed to be the contract of each of the carriers, and that for any loss or injury sustained in such through transportation over the connecting lines, or either of them, either of such carriers which the person sustaining damages may first elect to sue shall be held liable to such person.[51] How-

as there was no common-law liability on a carrier for loss or damage not occurring on its own line and not caused by its own negligence—M. V. Moore & Co. v. Southern Ry. Co., 111 S.E. 166, 183 N.C. 213.

44. La.—Stinson v. Yazoo & M. V. R. Co., App., 159 So. 422.
Mass.—Bonfiglio v. New York, N. H. & H. R. Co., 198 N.E. 236.
N.Y.—Perkel v. Pennsylvania R. Co., 265 N.Y.S. 597, 148 Misc. 284.

Shipper's load and count

A railroad company delivering watermelons, which were in good condition and properly loaded when shipped by initial carrier, at auction market in damaged condition was held liable for damages, in absence of proof that damage was due to act of God, public enemy, or cause validly excepted in contract; and it was said that such carrier's full common-law liability would attach to the contracts for carriage under bills of lading indorsed "S. L. & C.," even if the melons, claimed to have been inspected by initial carrier's representatives at the points of origin, were improperly loaded—Perkel v. Pennsylvania R. Co., 265 N.Y.S. 597, 148 Misc. 284.

45. Ill.—Alton Iron & Metal Co. v. Wabash Ry. Co., 159 N.E. 802, 328 Ill. 353, reversing 235 Ill.App. 151.

46. Ill.—Alton Iron & Metal Co. v. Wabash Ry. Co., 159 N.E. 802, 328 Ill. 353, reversing 235 Ill.App. 151.

47. Ga.—Susong v. Florida Cent., etc., R. Co., 41 S.E. 112, 115 Ga. 361.
10 C.J. p 544 note 89, p 545 notes 90–93, p 546 notes 94–96.

48. Ga.—Susong v. Florida Cent., etc., R. Co., 41 S.E. 566, 115 Ga. 361.
10 C.J. p 544 note 89 [b].

49. S.C.—Burress v. Atlantic Coast Line R. Co., 60 S.E. 692, 79 S.C. 250.
10 C.J. p 544 note 89 [c], [d].

50. S.C.—Daughty v. Northwestern R. Co., 75 S.E. 553, 92 S.C. 361.
10 C.J. p 544 note 89 [d] (3)–(5).

51. Tex.—Conn v. Texas & N. O. Ry. Co., Com.App., 14 S.W.2d 1004, reversing, Civ.App., 4 S.W.2d 193—Gulf, C. & S. F. Ry. Co. v. Mitchell, Civ.App., 280 S.W. 335—Houston & T. C. Ry. Co. v. Roberts, Civ.App., 194 S.W. 218
10 C.J. p 545 notes 91–93, p 546 notes 94–96

Constitutionality

(1) A statute of the kind under consideration is constitutional.—Texas & P. Ry. Co. v. Randle, 44 S.W. 603, 18 Tex.Civ.App. 348.

(2) It is not made unconstitutional by a further provision prohibiting, except at plaintiff's request, apportionment of damages in an action thereunder.—St. Louis, B. & M. Ry. Co. v. Morris, Tex.Civ.App., 248 S.W. 57.

Carriage under through contract

(1) The statute has no application, except where there is a through contract of shipment and where the shipment is received and carried by the connecting carrier under that contract.—Kansas City, M. & O. Ry. Co. of Texas v. Odom, Tex.Civ.App., 185 S.W. 626—10 C.J. p 545 note 93.

(2) The shipment having been on a through bill of lading, each of the carriers is responsible for damages to the goods in transit under the statute.—Ft. Worth & D. C. Ry. Co. v. Kemp, Tex.Civ.App., 207 S.W. 605—Patterson & Roberts v. Quanah, A. & P. R. Co., Tex.Civ.App., 195 S.W. 1163

Joint liability

(1) Under these provisions where a shipment over connecting lines is on a through contract recognized and acted on by the carriers, each carrier is equally liable to the shipper for any loss or injury to the goods shipped—Kansas City, M. & O. Ry. Co. v. Cauble, Tex.Civ.App., 286 S.W. 478—St. Louis, B. & M. Ry. Co. v. Lane, Tex.Civ.App., 248 S.W. 59—Panhandle & S. F. Ry. Co. v. McCrummen, Tex.Civ.App., 240 S.W. 607—10 C.J. p 545 note 91.

(2) This is so whether the contract is oral or in writing.—St. Louis, B. & M. Ry. Co. v. Lane, supra—10 C.J. p 545 note 92.

(3) In order to bind the second or subsequent carriers jointly with the first, or with any of the other carriers, something more than receiving and transporting the goods or property was necessary thereunder, because the law requires a car-

ever, a statute which provides that all carriers receiving goods for intra-state shipment shall be liable for all damages thereto, and which authorizes the collection of damages from the agent at the point of destination on the consignee presenting an itemized statement, and further authorizes an action against a carrier failing to pay such claim, when considered in connection with another statute, making the initial carrier liable for all damages, merely makes each carrier liable for all damages occurring on its own line, and seeks to expedite speedy settlements of claims, recognizing the common-law presumption of liability of the delivering carrier, which may be overcome by proof; and a terminal carrier is not liable thereunder for damages caused by the initial carrier.[52]

(4) Effect of Last Carrier Collecting Entire Charge

The general rule making connecting carriers liable only for damages occurring on its own line is not affected by an arrangement between the carriers whereby the entire freight charge is collected by the delivering carrier.

As shown supra § 424 b (1), in the absence of a specific contract making each carrier liable for the default of any of the others, the general rule is that only the carrier on whose line the loss occurred will be liable; and where an arrangement is made between several connecting carriers by which goods to be carried over the entire route are to be delivered by each carrier to the next succeeding carrier, each carrier to pay the preceding carrier the amount of its charges, and the last one to collect the whole amount from the consignee, the receiving of the goods by the last carrier, the payment by it of all previous charges and its collection of the entire charge from the consignee will not render it liable for any injury done to the goods before they were received by it.[53]

rier so to receive and transport such freight when tendered to it.—Quanah, A. & P. Ry. Co. v. Warren, Tex.Civ.App., 184 S.W. 232—10 C.J. p 546 note 94.

(4) This was so notwithstanding the provisions of a statute to the effect that, whenever any freight or other property has been transported over two or more railroads operating any part of their roads in the state, suit for loss or damage thereto, or other cause of action connected therewith or arising out of such transportation or contract in relation thereto, may be brought against any one or all of such railroads in any county in which any of such railroads extends or is operated Such a statute does not authorize a suit against two railroads not acting under a joint contract for the distinctly separate wrong of one only, merely because property had been transported over the connecting lines of two—Texas, etc., R. Co v. Lynch, 75 S.W. 486, 97 Tex. 25.
10 C.J. p 546 note 96.

Original contract binding

(1) Under a provision that in any suit brought under the statute the rights, duties, and liabilities of the parties shall be determined by the contract of the initial carrier, unless there is an additional subsequent contract with a connecting carrier supported by valuable consideration, an initial carrier is authorized to issue a through bill of lading binding on it and the connecting carriers, and this is the only bill or receipt authorized for the entire shipment, and one issued by a connecting carrier is of no binding force or effect unless on a new or independent consideration moving to the shipper.—Panhandle & S. F. Ry Co. v. McCrummen, Tex.Civ.App., 240 S.W. 607.

(2) Accordingly, unless the consideration is proved, a stipulation in a subsequent bill of lading, limiting to its line of road the damages sustained by the negligence of the carrier guilty thereof, is void.—Panhandle & S. F. Ry. Co. v. McCrummen, supra.

(3) By taking a shipment, and transporting it without a new contract with the shipper, the connecting carrier recognizes and acquiesces in the original contract and liability, accordingly, attaches under the statute—Gulf, C & S. F. Ry. Co. v. Mitchell, Tex.Civ.App., 280 S.W. 335—St. Louis, B & M. Ry. Co. v. Lane, Tex.Civ.App., 248 S.W. 59—Panhandle & S F. Ry. Co. v. McCrummen, supra.

When liability attaches

(1) Under the statute, each connecting carrier is liable for damages occurring during transportation, and, where there was a contract to furnish cars for shipment of cattle at a specified time and place, the transportation began when the cattle were delivered under the contract—St. Louis, B. & M. Ry Co v. Lane, Tex.Civ.App., 248 S.W. 59.

(2) Where the contract between shipper and initial carrier was oral, the liability of both the initial and the connecting carriers began when the cattle were placed in the cattle pens at the point of origin, and the connecting carrier is subject to the initial carrier's liabilities and entitled to its legal exemptions. In such case, the ownership of cattle pens at the point of origin is immaterial, where the cattle were placed in such pens with the knowledge and consent of the initial carrier and were received by it in such pens—St. Louis, B. & M. Ry. Co. v. Lane, supra.

Mistaken recital in bill

The statutory provisions under consideration do not impress on the connecting carrier absolute responsibility for a mistaken recital in a bill of lading issued by the initial carrier, but relate to an externally imposed agency in reference to the goods actually shipped, the contract referring to the freight itself as received, even if "transportation" as used in the statute includes final delivery; and where a car, as loaded by the shipper, sealed at the point of shipment and thus received by the connecting carrier, had nothing about it or in its billing to show that bales of cotton therein were not marked as indicated in the bill of lading, or to arouse inquiry as to their markings, such carrier did not omit due care in failing promptly to discover the mistake, nor become a party to the initial carrier's original negligence.—Gulf, C & S. F. Ry. Co. v. Kempner, Tex.Com.App., 282 S.W. 795, reversing, Civ.App., 275 S.W. 459.

52. Ark.—Chicago, R. I. & P. Ry. Co. v. Ledbetter, 153 S.W. 801, 106 Ark. 512.
10 C.J. p 544 note 89 [a].

53. Mass.—Gass v. New York, etc., R. Co., 99 Mass. 220, 96 Am.D. 742.
Tex.—Miller v. Texas, etc., R. Co., 18 S.W. 954, 83 Tex. 518.
10 C.J. p 546 note 97.

§ 425. Liability for Delay

Connecting carriers are liable for negligent delays occurring on their own lines but not ordinarily for delays occurring on other lines.

In harmony with the rule stated supra § 191, applicable to carriers generally, a connecting carrier is bound to use reasonable diligence to transport within a reasonable time, and is liable for delay caused by it and occurring on its own line,[54] notwithstanding a stipulation in the bill of lading that no carrier is bound to transport the goods in time for any particular market or otherwise than with reasonable dispatch.[55] A connecting carrier cannot avoid liability for delay in forwarding a shipment because of an alleged excessive freight charge, as it is not bound to collect more than the legal charges, and is authorized to adjust the same after collection;[56] and a custom between the particular connecting carriers whereby one of them holds the goods in a warehouse, when a controversy arises over freight charges, until there is an adjustment or a correction of which the consignee has no knowledge constitutes no defense, in an action by the consignee for injuries arising from delay in shipment because of an observance of such custom, since the consignee is in no way bound by it.[57] In the absence of proof of partnership or other joint interest existing between several common carriers, or of some contract or statute otherwise providing, however, neither the intermediate nor the terminal carrier is liable for delay not occurring on its own line,[58] especially where the shipping contract so provides,[59] nor is it liable for failure to transport on a train which was authorized not to stop at the point of transfer.[60] Where the negligence of a railroad in failing or refusing to accept a shipment at a connecting point, concurred with the negligence of a connecting road in failing to deliver the shipment in question on the transfer track, both companies were responsible for delays and the consequent damages proximately resulting from such negligence;[61] but if delay occurs on each

54. Kan.—Stewart Poultry Co. v. Erie R. Co., 163 P. 448, 99 Kan. 540.
N.Y.—Caruso-Rinella-Battaglia Co. v New York Cent. R. Co., 226 N.Y.S 308, 222 App Div. 371.
N.C.—Gallop & Fisher v. Norfolk Southern R. Co., 91 S.E. 375, 173 N. C. 21, error dismissed, Norfolk Southern R. Co. v. Gallup, 39 S.Ct. 184, 248 U.S. 596, 63 L.Ed. 438.
10 C.J. p 295 note 33 [a], p 546 notes 99, 5.

Subsidiary lines

Jury's findings, sustained by evidence, that transportation was unreasonably delayed, was held sufficient basis for judgment against connecting carrier in shipper's action for damages, whether or not such carrier was party to shipper's understanding with initial carrier's agent as to routing of shipment from junction point, the initial carrier being a subsidiary of the connecting carrier.—Missouri-Pac. R. Co. v. Waugh, Tex.Civ.App., 74 S.W.2d 554, error dismissed.

Delay in furnishing cars

Where defendant steamship company issued a through bill of lading and defendant railway company, the final carrier, accepted goods, the latter is liable for damage resulting from delay in furnishing cars, and cannot object that former did not have authority to issue a through bill of lading—Gallop & Fisher v. Norfolk Southern R. Co., 91 S.E 375, 173 N.C 21, error dismissed Norfolk Southern R. Co. v Gallup, 39 S Ct. 184, 248 U.S. 596, 63 L Ed. 438.

Delay in giving notice

Delivering carrier, failing to notify consignee promptly according to local custom and oral promise, is liable for loss because of delay in giving notice.—Gulf, C. & S. F. Ry. Co. v. Galbraith, Tex.Civ.App., 39 S. W.2d 91.

Change of routing

A car of grain shipped from St. Joseph, Mo., to Sherman, Tex., was originally routed over defendant connecting carrier's line, but after bill of lading was issued the routing was changed on request of the shipper. The bill of lading with draft attached was forwarded to the purchaser, who paid the draft, and, receiving the bill of lading, presented the same to the agent of defendant with request that the car be forwarded to another point in Texas. The agent accepted it and issued a new bill of lading, although the car had not arrived. A month after, the car arrived in Sherman, and was forwarded by defendant to the new destination, where the grain was found to be in a damaged condition and sold at a loss. It was held, that defendant was liable notwithstanding the car was transported to Sherman by an agency other than defendant due to the change in the routing, for on notice to defendant that the car was in Sherman it was its duty to transport the same in a reasonable time.—Missouri, K. & T. Ry. Co. of Texas v Plano Milling Co., Tex.Com App., 231 S.W. 100, affirming Chicago & G. W. Ry. Co v. Plano Milling Co., Civ App., 214 S.W 833, certiorari denied 42 S Ct. 317, 258 U S. 624, 66 L Ed. 797.

55. Kan.—Stewart Poultry Co v. Erie R. Co., 163 P. 448, 99 Kan 540.

56. Okl.—St. Louis, etc., R Co v. Close, 140 P. 1176, 42 Okl 105.
10 C.J. p 295 note 36.

57. Tex.—Texas, etc., R Co. v. Hassell, 58 S.W. 54, 23 Tex Civ.App. 681.

58. Md.—Pennsylvania R Co. v. Walker, 128 A. 45, 147 Md. 323
N.Y.—Caruso-Rinella-Battaglia Co v. New York Cent. R Co., 226 N.Y.S. 308, 222 App Div 371.
10 C.J. p 546 note 2.

59. N.Y.—Harris v. Minneapolis, etc., R. Co., 73 N.Y S. 159, 36 Misc. 181.

60. Ala.—Louisville & N. R Co. v. Bishop, 85 So. 859, 17 Ala App. 320.

Corpse

Parent who had shipped corpse of deceased child under a through ticket requiring corpse to be transferred to connecting carrier at certain point could not recover for connecting carrier's failure to transfer corpse to train which did not stop or put off passengers or baggage at such point under its rules and regulations, promulgated by authority of the interstate commerce commission.—Louisville & N. R Co. v. Bishop, 85 So. 859, 17 Ala App. 320.

61. Tex.—St Louis Southwestern Ry. Co. of Texas v. Miller & White, Civ.App., 190 S W. 719.

Failure to receive no excuse

If failure of railroad to receive shipment of live stock when tendered it by connecting road was negligence, and such negligence prevented shipment of cattle that night to destina-

line of the connecting carriers, the terminal carrier is liable only for the proportion of loss occasioned by its negligent delay, and no more.[62]

Carmack amendment. Although the rule is otherwise where such carrier, having notice when it accepted the shipment that special damages would result from delay, makes a contract for through shipment,[63] under the Carmack amendment as it existed prior to the amendment of March 4, 1927, which makes the delivering carrier liable for the full damage to the property, neither an intermediate nor a terminal carrier is liable for delay in the transportation of an interstate shipment, where the delay was not caused on its line,[64] regardless of whether or not it had issued a bill of lading;[65] but the common-law right of one who has sustained damage by reason of the negligent delay of an intermediate or terminal carrier to proceed against the carrier causing the damage is not abrogated by the statute.[66] A shipper, who through mistake paid the initial carrier less than the lawful rate for transporting the property, cannot recover from the terminal carrier damages for delay in unloading, caused by his failure to pay to the terminal carrier the additional amount due.[67] Where a bill of lading on an interstate shipment routed a car over the line of a particular terminal carrier, and the shipment was not delivered to that carrier, but to defendant which had no facilities for delivering it into plaintiff's yard, and defendant, after being notified of the error, was informed of plaintiff's urgent need of the shipment, but nevertheless kept the car for an unreasonable length of time before it was returned to the place where defendant received it, to be transshipped over the designated terminal carrier into plaintiff's yard, plaintiff was entitled to recover the damages sustained independently of the Interstate Commerce Act, and regardless of whether defendant knew, in the first instance, that the car had been misrouted.[68]

§ 426. Liability for Misdelivery

The terminal carrier is liable for misdelivery of the goods.

In accordance with the general rule stated supra § 424 a (1), the terminal carrier is liable for the damages sustained if it delivers to the wrong person,[69] even if it does so by reason of negligent direction of a preceding carrier for whose acts the shipper is not responsible.[70] It has been held, however, that, since a connecting carrier does not see the bill of lading until it is surrendered on the arrival of the goods at their destination, the waybill is a complete defense to it for delivery at a wrong destination.[71] If the consignee has designated a carrier to receive the goods for him, delivery to such carrier is a good delivery and terminates the original transportation.[72]

§ 427. Proceedings to Compel Receipt of Freight from Connecting Carrier

As shown infra § 450, a carrier wrongfully refusing to receive freight from a connecting carrier may be compelled to do so in a suit for injunction brought by the offended carrier. Injunction to compel performance of a carrier's duty to receive and transport property generally is treated supra § 34.

§ 428. Liability of Main Line for Loss on Branch Line

The main line of a railroad is liable for losses occurring on branches controlled by it.

tion, railroad cannot excuse itself from liability on ground that it did not actually receive shipment until next day—St. Louis Southwestern Ry. Co of Texas v. Miller & White, Tex.Civ.App., 190 S.W. 819.

62. S.C.—Trakas v. Southern R. Co., 86 S.E. 492, 102 S.C. 211.
10 C.J. p 546 note 2 [b].

63. Tex.—Gulf, C & S. F. Ry. Co v. Nelson, 192 S.W. 1056, 108 Tex. 305, affirming, Civ.App., 139 S.W. 81, and certiorari denied 38 S.Ct. 13, 245 U.S. 657, 62 L.Ed. 534.

64. N.Y.—Caruso-Rinella-Battaglia Co. v. New York Cent. R. Co., 226 N.Y.S. 308, 222 App.Div. 371.
Tex.—Atchison, T & S. F Ry. Co v. Ohlhausen, Civ.App., 272 S.W. 224.
10 C.J. p 546 note 6.

65. U.S.—Hudson v. Chicago, etc., R. Co., D.C.Minn., 226 F. 38.

66. Kan.—Stewart Poultry Co. v. Erie R. Co., 163 P. 448, 99 Kan. 540.
N.Y.—Caruso-Rinella-Battaglia Co. v. New York Cent. R. Co., 226 N.Y.S. 308, 222 App.Div. 371.
N.D.—Richards v. Northern Pac. Ry. Co., 173 N.W. 778, 42 N.D. 472

67. Ky.—Blackford v. St. Louis, I. M. & S. Ry. Co., 203 S.W. 867, 181 Ky. 70.

68. S.C.—Mitchell v. Greenville, etc., R. Co., 83 S.E. 261, 98 S.C. 319.

69. Mo.—Kemper Mill & Elevator Co. v. Hines, 239 S.W. 803, 293 Mo. 88—Amber v. Davis, 282 S.W. 459, 221 Mo.App. 448
10 C.J. p 547 note 8.
Reconsignment
Where goods were shipped under a bill of lading containing an "order notify" clause and the terminal carrier at the request of the person to be notified, reconsigned the shipment by changing the waybills, although it did not issue any new bills of lading, such reconsignment constituted a delivery to the person to be notified, and, if unauthorized by consignor, the terminal carrier was liable for conversion.—Kemper Mill & Elevator Co. v. Hines, 239 S.W. 803, 293 Mo. 88

70. Minn.—Ratzer v. Burlington, etc., R. Co., 66 N.W. 988, 64 Minn. 245, 58 Am.S.R. 530—Foy v. Chicago, etc., R. Co., 65 N.W. 627, 63 Minn. 255.

71. N.Y.—Liberty Sales Co. v. Davis, 198 N.Y.S. 253.
10 C.J. p 547 note 10.

72. Ga.—Western, etc., R. Co. v. Exposition Cotton Mills, 7 S.E. 916, 81 Ga. 522, 2 L.R.A. 102.
Ill.—Illinois Cent. R. Co. v. Carter, 46 N.E. 374, 165 Ill. 570, 36 L.R.A. 527
N.Y.—Fenner v. Buffalo, etc., R. Co., 44 N.Y. 505, 4 Am.R. 709.

The main line of a railroad company is liable for all loss occurring on any of its branches over which it exercises a control,[73] but the mere fact that one company is a stockholder of the company owning and operating a connecting line does not render it liable for loss on such line, on the theory that it either has control of such line or is a part owner.[74]

§ 429. Joint Liability

a. Under partnership arrangements
b. Under joint contracts for transportation

a. Under Partnership Arrangements

Where partnership agreements, as distinguished from mere joint traffic arrangements or ownership of stock, exist between connecting carriers, each is liable for loss or injury caused by any one of them to property in course of transportation.

While connecting carriers cannot make arrangements with each other which will preclude either of them from serving the public generally with reference to transportation of goods as a common carrier,[75] and while some question has arisen as to the power of carriers under their charter to form a partnership or association for the purpose of through freight traffic,[76] partnership arrangements for through freights are very generally recognized and enforced in all jurisdictions. Where a partnership relation exists, each is liable for breach of the duty of carrier by any one of them in the course of the transportation, and suit for the loss may be brought against any one of them;[77] and this is so although the general management of each carrier is retained by the respective companies.[78] It has been held that, if an actual state of partnership exists between two connecting roads, the initial carrier cannot limit its liability to damage occurring on its own line, and that any contract to this effect is void;[79] but there is also authority for the opposite view.[80]

However, mere joint traffic arrangements and an agreement for division of freight will not in themselves constitute such a partnership;[81] nor will the fact that one of two connecting carriers owns a large amount of the stock of the other render such carrier liable for loss or injury caused by the negligence of the other.[82] Moreover, an agreement between several carriers to the effect that any injury to property should be paid for by the company on whose line it might occur, but that, if it could not be ascertained where the injury occurred, then each carrier should pay therefor in proportion to its interest in the through charge, does not constitute the carriers partners, and where damage occurs to freight shipped through, only the carrier in whose possession the goods were at the time of the injury can be held liable.[83]

b. Under Joint Contracts for Transportation

Connecting carriers which are parties to joint contracts for transportation are each liable for the others' defaults.

Carriers may enter into joint contracts for the transportation of goods from one place to another,[84] and thereby make themselves responsible for the bringing of goods to their road by other carriers, as long as they do not transcend whatever is reasonably incident to their business as carriers.[85] The effect of these contracts is to make each carrier

73. U.S.—Davis v. Alexander, Okl., 46 S.Ct. 34, 269 U.S. 114, 70 L.Ed. 186.
Ky.—Makeever v. Georgia S. & F. Ry. Co., 294 S.W. 144, 219 Ky. 699.
10 C.J. p 547 note 15.

Dominant and subsidiary lines

(1) "Where one railroad company actually controls another and operates both as a single system, the dominant company will be liable for injuries due to the negligence of the subsidiary company."—Davis v. Alexander, Okl., 46 S.Ct. 34, 35, 269 U.S. 114, 70 L.Ed. 186.

(2) Accordingly, where the first connecting carrier owns and operates the initial carrier it is equally liable for loss to particular shipment—Makeever v. Georgia Southern & F Ry. Co., 294 S.W. 144, 219 Ky. 699

74. Kan.—Atchison, etc, R. Co v. Cochrane, 23 P. 151, 43 Kan. 225, 19 Am S R. 129, 7 L R A. 414—Atchison, etc., R. Co. v. Davis, 8 P. 530, 34 Kan. 209, 211, allowing rehearing 8 P. 146, 34 Kan. 199.
10 C J. p 547 note 16.

75. Ga.—Seaboard Air-Line Belt R. Co. v. Western, etc., R. Co., 23 S. E. 848, 97 Ga. 289.
10 C.J. p 547 note 17.

76. N.H—Burke v. Concord R. Corp, 61 N H 160.
10 C J. p 547 note 18.

77. Neb.—Missouri Pac. R. Co v. Twiss, 53 N W. 76, 35 Neb 267, 37 Am.S R. 437.
S.C—Smith v. Southern R. Co, 71 S E. 989, 89 S C 415, 418.
10 C.J. p 547 note 20.

78. Ky.—Cincinnati, etc., R. Co v. Spratt, 2 Duv. 4.
N C—Rocky Mount Mills v. Wilmington, etc., R Co., 25 S E. 854, 119 N C 693, 56 Am S R. 682.
10 C J p 547 note 21.

79. Tex—Gulf, etc, R. Co. v. Wilson, 15 S.W 280, 26 S.W. 131, 79 Tex. 371, 23 Am.S R. 345, 11 L.R. A. 486.
10 C J p 548 note 22.

80. U S.—Milne v Douglass, C C. Mo, 13 F 37, 4 McCrary 368.
10 C J. p 548 note 23

81. U S—Pennsylvania R Co v. Jones, 15 S.Ct. 136, 155 U S 333, 39 L Ed 176.
Md—Shockley v. Pennsylvania R Co, 71 A. 437, 109 Md 123
10 C J. p 548 note 24.

82. Tex—Gulf, etc, R Co v. Lee, Civ.App, 65 S W. 54.

83. Mass—Aigen v. Boston, etc., R. Co., 132 Mass. 423
10 C.J. p 549 note 26

84. U S—Pennsylvania R. Co. v. Jones, D C, 15 S Ct. 136, 155 U.S 333, 39 L Ed. 176.
10 C J. p 549 note 27.

85. Mass—Saxon Mill v New York, etc, R Co., 101 N E. 1075, 214 Mass. 383.

liable for the default of the other;[86] and it has been held that their liability is not affected by provisions in bills of lading limiting the initial carrier's liability to delays occurring on its own line.[87] Where suit is brought on a joint contract made with several carriers, plaintiff must recover against all or none, in the absence of a statute providing otherwise.[88]

§ 430. One Carrier as Agent of Other Carriers

Where one carrier is empowered to contract in behalf of all, each connecting carrier is liable for the others' defaults.

Although several carriers are not copartners, one of them may be empowered to enter into a through contract with the shipper on behalf of all, and each will be responsible for the defaults of all.[89] The effect of state legislation making each carrier the agent of the others is considered supra § 424 b.

§ 431. Joint Employment of Common Agent by Carriers

Carriers jointly employing a common agent are jointly liable for damages arising from his negligence.

Where carriers jointly employ a common agent, and loss or injury occurs through his negligence, they will be jointly liable therefor.[90]

§ 432. Right of Connecting Carrier to Benefit of Limited Liability in Contract of Carriage

a. In general
b. Where contract expressly extends limitation to connecting carrier
c. Where contract expressly confines limitation to first carrier
d. Where contract does not expressly exclude connecting carrier

a. In General

A contract between the first and second carriers limiting liability is binding on the shipper provided the first carrier is the latter's agent in procuring the transportation, but a connecting carrier is not entitled to the benefit of limitations in a contract independent of the one under which he was acting.

The conflict in the authorities as to what are the relations between the shipper and the successive carriers makes it difficult to lay down general propositions as to whether succeeding carriers are entitled to the lawful exemptions from liability contracted for by the first carrier. If the first carrier is the agent of the shipper for the purpose of procuring transportation over connecting lines, then a contract for limitation of liability made between the first and second carriers, on delivery of the goods to the latter, will be binding on the shipper.[91]

A mere undertaking on part of first carrier to transport to the end of his route and deliver to a connecting carrier does not in itself constitute the first carrier an agent of the shipper in such sense as to authorize him to make such a contract.[92]

Even if there is no authority to contract with the succeeding carrier, the shipper, by suing the last carrier under such contract, may ratify it and thereby become bound to its terms.[93]

A common carrier transfer company carrying, under an independent contract, a trunk arriving on a train as a passenger's baggage and which lost the contents which were not all baggage as between the railway carrier and the passenger, is responsible for the loss, and cannot assert for itself the limitation of liability running in favor of a passenger carrier which, as an incident to the carriage of its passenger, carried his baggage.[94]

b. Where Contract Expressly Extends Limitation to Connecting Carrier

Valid limitations in the initial carrier's contract inure to the benefit of connecting carriers where the contract expressly so provides.

86. Tex.—Gulf, C & S. F. Ry. Co. v. Nelson, 192 S.W. 1056, 108 Tex 305, affirming, Civ.App., 139 S.W. 81, and certiorari denied 38 S.Ct. 13, 245 U.S. 657, 62 L.Ed. 534.
10 C.J. p 549 note 29.

Through shipment
Where shipment of goods is to pass through the hands of several carriers in order to reach destination, the various carriers on the through line over which the shipment is to pass make a joint contract whereby a bill of lading is given at the point of origin for the receiving company as well as others on which any company in such line of through traffic can be sued.—Reidsville Paper Box Co v. Southern Ry., 99 S.E. 23, 177 N.C. 351.

87. Tex.—Gulf, etc., R. Co. v. Nelson, Civ.App., 139 S.W. 81.

88. Ala.—Veitch v. Illinois Cent. R. Co., 68 So. 575, 14 Ala.App. 146.

89. Ill.—Illinois Cent. R. Co. v. Foulks, 92 Ill.App. 391, affirmed 60 N.E. 890, 191 Ill. 57.
Mo.—Crockett v. St. Louis, etc., R. Co., 126 S.W. 243, 147 Mo.App. 347.
Va.—Norfolk, etc., R. Co. v. Read, 12 S.E. 395, 87 Va. 185.
10 C.J. p 549 note 33.

90. Ark.—Kansas City Southern R. Co v. Embry, 90 S.W. 15, 76 Ark. 589.
Pa.—Dulaney v. Philadelphia, etc., R. Co., 77 A. 507, 228 Pa. 180.
10 C.J. p 549 note 34.

91. Ga.—Cranor v. Southern R. Co., 78 S.E. 1014, 13 Ga.App. 86.
10 C.J. p 549 note 37.

92. Ind.—Adams Express Co. v. Byers, 95 N.E. 513, 177 Ind. 33.
N.Y.—Babcock v. Lake Shore, etc., R. Co., 49 N.Y. 491.

93. Pa.—Sanderson v. Lamberton, 6 Binn. 129.

94. Minn.—McQuat v. Cook's Taxicab & Transfer Co., 176 N.W. 763, 145 Minn. 210.

Where the contract of carriage made by the initial carrier expressly provides that limitations of liability therein provided shall inure to the benefit of the connecting carriers, such limitations are, of course, operative in their favor, provided such limitations are valid.[95] If the limitation is one prohibited by law, it is inoperative, in favor either of the initial or of the connecting carriers.[96] In order for any connecting carrier to obtain the benefit of such stipulation, it is not necessary that it should be expressly named in the contract.[97]

c. Where Contract Expressly Confines Limitation to First Carrier

Connecting carriers are not entitled to the benefit of limitations of liability in a contract specifically limiting the benefit thereof to the initial carrier.

Where the original contract specifically provides, as it may do, that the limitations contained therein shall affect the initial carrier only, no subsequent carrier is entitled to the benefit of the limitations.[98] This rule has frequently been applied where it is stipulated that the liability of the initial carrier shall not extend beyond its own line,[99] even though the contract fixes a through rate,[1] but especially where there is no provision in the contract for a through rate.[2]

d. Where Contract Does Not Expressly Exclude Connecting Carrier

Valid limitations of liability not expressly restricted to the initial carrier ordinarily inure to the benefit of the connecting carriers.

Although the contrary view has been taken,[3] according to the weight of authority, where a contract for through transportation contains limited liability clauses which are not in express terms restricted to the initial carrier, the limitations so provided for will inure to the benefit of the connecting carrier, so far as they are valid.[4] Such a contract, it is said, has respect to, and provides for, the service of the carriers on connecting routes.[5] On the same theory it is said that, as the first carrier, by accepting the goods for through transportation without prepayment of charges, impliedly agrees that no demand for charges shall be made until the point of destination is reached, this agreement is binding on succeeding carriers, and they are likewise bound to see that no damage results to the shipper from demand for prepayment of charges by succeeding carriers.[6] However, if the limitation is invalid, the connecting carrier can, of course, claim no more under it than the initial carrier.[7]

§ 433. Under Hepburn Act and Carmack Amendment

In cases governed by federal law, valid limitations of liability in the bill of lading inure to the benefit of all connecting carriers.

Under the Carmack amendment a valid limitation of liability in a bill of lading subject to the act inures not only to the benefit of the initial carrier but also to every connecting carrier over whose line the shipment is forwarded,[8] and the rule is not affected by the fact that the connecting carrier re-

95. Mass.—Florida Cotton Oil Co. v. Clyde S. S. Co., 125 N.E. 855, 235 Mass. 10.
10 C.J. p 550 note 40.

Liability limited to own line
Where cattle were shipped over three lines under a contract that "the carrier shall not be held or deemed liable for anything in connection with said stock beyond its own line of road, and in no event shall one carrier be liable for the negligence of another," such contract "to inure to the benefit of all carriers," the liability of a connecting carrier was confined to such damages as might result from its own negligence, and there was no joint liability between the connecting carriers—Panhandle & S. F. Ry Co. v. Clarendon Grain Co., Tex.Civ.App., 215 S.W. 866.

96. U.S.—Woodburn v. Cincinnati, etc., R. Co., 40 F. 731.
Ark.—St. Louis, etc., R. Co. v. Spann, 20 S.W. 914, 57 Ark. 127.
10 C.J. p 550 note 41.

97. Conn.—Meras v New York, etc., R. Co., 52 A. 610, 75 Conn. 171, 96 Am.S.R. 192, 56 L.R.A. 884.

98. U.S.—Liverpool & G. W. Steam Co. v. Phenix Ins. Co., N.Y., 9 S. Ct. 469, 129 U.S. 397, 32 L.Ed. 788.
10 C.J. p 550 note 43.

99. N.Y.—Edsall v. Camden, etc., R., etc., Co., 50 N.Y. 661—Ætna Ins. Co. v. Wheeler, 49 N.Y. 616—Babcock v. Lake Shore, etc., R. Co., 49 N.Y. 491.

1. N.Y.—Ætna Ins. Co. v. Wheeler, 49 N.Y. 616.

2. Ark.—Taylor v. Little Rock, etc., R. Co., 39 Ark. 148.
Ga.—Central R., etc., Co. v. Bridger, 20 S.E. 349, 94 Ga. 471.
Pa.—Camden, etc., R. Co. v. Forsyth, 61 Pa. 81.

3. Wis.—Martin v. American Express Co., 19 Wis. 336.
10 C.J. p 551 note 51.

4. N.Y.—Burke v. Union Pac. R. Co., 166 N.Y.S. 100, 178 App.Div. 783, reversed on other grounds 124 N.E. 119, 226 N.Y. 534, and certiorari granted Union Pac. R. Co. v. Burke, 40 S.Ct. 56, 251 U.S. 548, 64 L.Ed. 409, affirmed 41 S.Ct. 283, 255 U.S. 317, 65 L.Ed. 656.
10 C.J. p 550 note 47.

5. N.Y.—Hachadoorian v. Louisville, etc., R. Co., 112 N.Y.S. 660, 128 App.Div. 171.

6. Tenn.—Bird v. Southern R. Co., 42 S.W. 451, 99 Tenn. 719, 63 Am. S.R. 856.

7. Ark.—St. Louis, etc., R. Co. v. Spann, 20 S.W. 914, 57 Ark. 127.

8. U.S.—Texas & P. Ry. Co. v. Leatherwood, Tex., 39 S.Ct. 517, 250 U.S. 478, 63 L.Ed. 1096.
Ind.—Chicago, I. & L. Ry. Co. v. Priddy, 115 N.E. 266, 65 Ind.App. 552.
Mass.—Lyon v. Canadian Pac. Ry. Co., 163 N.E. 180, 264 Mass. 596, 60 A.L.R. 1247—Florida Cotton Oil Co. v. Clyde S. S. Co., 125 N.E. 855, 235 Mass. 10.
N.Y.—Grand Trunk Ry. Co. of Canada v. Satuloff, 182 N.Y.S. 81.
Vt.—Piper v. Boston & M. R. R., 97 A. 508, 90 Vt. 176, affirmed Boston & M. R. R. v. Piper, 38 S.Ct. 354, 246 U.S. 439, 62 L.Ed. 820.
10 C.J. p 551 note 52.

Time to sue
A valid stipulation in the contract limiting the time for bringing suit for

fused to continue the shipment under the contract, with the initial carrier and required the shipper to execute a different contract which did not contain the limitation relied on.[9] On the other hand, any stipulation for limitation of liability, in so far as it is not authorized by the Carmack amendment, is invalid, whether intended for the benefit of the initial carrier or that of the succeeding carrier.[10] Under the Hepburn Act, enlarging the definition of the term "transportation" so as to include all services rendered in connection therewith, and a provision in the bill of lading that "every service to be performed hereunder" is subject to all the conditions therein contained, and that property not removed within forty-eight hours after notice of arrival may be kept "subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only," the liability of the terminal carrier for a loss due to its negligence while the goods were in its possession as warehouseman at the place of destination will be regarded as controlled by a limitation to the agreed valuation made to adjust the rate contained in the bill of lading issued by the initial carrier.[11]

§ 434. Right of Connecting Carrier to Benefit of Stipulation for Notice of Claim for Damages

Stipulations for notice of claim are generally held to inure to the benefit of connecting carriers.

While it has been held that a stipulation that a written notice of claim for damages must be given to the initial carrier within a specified time after delivery of the goods does not inure to the benefit of succeeding carriers,[12] it has also been held that a provision in a through bill of lading for an interstate shipment, requiring reasonable notice of claim for loss or injury, inures to the benefit of the terminal as well as the initial carrier, in case it is sought to make the terminal carrier liable for a misdelivery of the goods,[13] or for loss or injury thereto.[14] So also a provision of this character will inure to the benefit of connecting carriers which have accepted or acquiesced in a through bill of lading containing the provision under a state statute providing that a through bill of lading issued by the initial carrier and accepted or acquiesced in by the connecting carriers shall be regarded as the contract of each connecting carrier.[15]

§ 435. Actions

An action cannot be maintained against a connecting carrier after expiration of the time fixed by valid provision of the bill of lading.

In harmony with the general rules stated supra § 242, an action against a connecting carrier after expiration of a period of limitations validly prescribed by the bill of lading is barred[16] notwith-

loss, damage, injury or delay inures to the benefit of the connecting carrier.

U.S.—Texas & P. Ry. Co. v. Leatherwood, Tex., 39 S.Ct. 517, 250 U.S. 478, 63 L.Ed. 1096.

Mass.—Lyon v. Canadian Pac. Ry. Co., 163 N.E. 180, 264 Mass. 596, 60 A.L.R. 1247.

Limited liability as to value

The consignees of onion sets shipped in interstate commerce could recover from the terminal carrier for damage only on the basis of the bona fide invoice price of the property, including freight charges, if prepaid, as its value as stipulated by the standard form bill of lading, issued by the initial carrier in compliance with order No. 787 of the Interstate Commerce Commission, dated June 27, 1908, pursuant to the Carmack amendment to the Interstate Commerce Act, despite the consignees' allegation that the terminal and initial carriers were copartners, and despite the amendment of the Carmack amendment on March 4, 1915 subsequent to the contract of carriage.—Houston & T. C. R. Co. v. Reichardt & Schulte Co., Tex.Civ.App., 212 S.W. 208.

9. U.S.—Texas & P. Ry. Co. v. Leatherwood, Tex., 39 S.Ct. 517, 250 U.S. 478, 63 L.Ed. 1096.

Contra Chicago, R. I. & G. Ry. Co. v. Jenkins, Tex.Civ.App., 196 S.W. 679, error refused.

Carrier not estopped

Under the Carmack amendment, a bill of lading on an interstate shipment of live stock issued by the initial carrier is binding on the shipper and all connecting carriers, just as the rate properly filed by the initial carrier is binding on them; so connecting carriers, although they insisted as a condition of carrying the shipment further that the shipper accept and sign a new bill of lading, are not estopped to rely on a provision in the original bill of lading limiting the time for action, although the bills they issued contained no such limitation.—Texas & P. Ry. Co. v. Leatherwood, Tex., 39 S.Ct. 517, 250 U.S. 478, 63 L.Ed. 1096.

10. U.S.—Wabash Ry. Co. v. Helt, C.C.A.N.Y., 263 F. 72.

Ind.—Chicago, I. & L. Ry. Co. v. Priddy, 115 N.E. 266, 65 Ind.App. 552.

10 C.J. p 551 note 53.

Unsigned release

Where shipper did not sign release clauses on shipping order and bill of lading agreeing to limitation of carrier's liability, and where joint freight tariffs of carriers participating with initial carrier required signing of release clause for limitation of carrier's liability, a connecting carrier, whose freight tariff contained similar requirement, was not entitled to limited liability, notwithstanding it charged merely the reduced rate, the shipper not having signed release and not having been entitled to such reduced rate.—Siebert v. Erie R. Co., 179 N.Y.S. 136, 189 App.Div. 586.

11. U.S.—Cleveland, C. C. & St. L. R. Co. v. Dettlebach, Ohio, 36 S.Ct. 177, 239 U.S. 588, 593, 60 L.Ed. 453.

12. N.Y.—Jennings v. Grand Trunk R. Co., 5 N.Y.S. 140, 52 Hun 227, affirmed 28 N.E. 394, 127 N.Y. 438.

Tex.—Grayson County Nat. Bank v. Nashville, etc., R. Co., Civ.App., 79 S.W. 1094—Atchison, etc., R. Co. v. Grant, 26 S.W. 286, 6 Tex.Civ.App. 674.

13. U.S.—Georgia, F. & A. Ry. Co. v. Blish Milling Co., Ga., 36 S.Ct. 541, 241 U.S. 190, 60 L.Ed. 948.

10 C.J. p 551 note 57.

14. Iowa.—Erisman v. Chicago, B. & Q. R. Co., 163 N.W. 627, 180 Iowa 759.

10 C.J. p 551 note 58.

15. Tex.—Gulf, etc., R. Co. v. Boger, Civ.App., 169 S.W. 1093.

16. Mass.—Lyon v. Canadian Pac.

standing previous timely litigation against the initial carrier.[17] That such a stipulation inures to the benefit of the connecting carrier under the Carmack amendment is shown supra § 433.

§ 436. Nature and Form

In a proper case the action may be brought either in tort or on the contract.

While it has been held in a few decisions that, where damages result to a through shipment, intermediate or terminal carriers can be sued only in tort and that an action on the contract will not lie,[18] the weight of authority, as disclosed supra § 424 a (2), is to the effect that the through contract of shipment made with the initial carrier is binding on all connecting carriers who receive the goods. In case of a wrongful delivery by the terminal carrier the initial carrier is liable either in tort for the conversion of the goods or on contract for breach of the contract of carriage.[19] An action for damages caused by negligence of one of the connecting carriers can be treated as one for damages against the delivering carrier for failure to deliver in accordance with the terms of the contract.[20]

§ 437. Jurisdiction and Venue

Actions under the Carmack amendment are cognizable by state courts, the venue being governed by the local statutes.

Causes of action based on the Carmack amendment, are cognizable by the state courts,[21] and it has been held that, where the state practice permits, jurisdiction may be obtained in a state court over a nonresident initial carrier to enforce its liability under the Carmack amendment by attachment of the goods of such carrier without personal service,[22] although, on the other hand, it has been held that the remedy given against the initial carrier can be maintained only in a jurisdiction in which service can be had upon such carrier in a manner permissible in the courts of the United States.[23]

Venue in actions against one or more connecting carriers for loss of, or injury to, goods or delay in delivery is a matter of statutory regulation, and, since the Carmack amendment does not purport to deal with the venue of actions brought thereunder, it does not affect the question of venue, which is determined by state laws.[24] On this question different statutes have been applied in the various jurisdictions, such as statutes requiring suit to be brought in the county in which the cause of action originated or the contract was made or to be performed,[25] statutes requiring the action to be brought in the county in which any defendant re-

Ry. Co., 163 N.E. 180, 264 Mass. 596, 60 A.L.R. 1247.

N.Y.—Germini v. Southern Pac. Co., 204 N.Y.S. 603, 209 App.Div. 442.

Disallowance of claim

Under bill of lading providing that written claims for loss or damage must be made to originating or delivering carrier, and requiring suit to be brought within two years and one day after written notice is given by carrier that it has disallowed claim, failure to sue within such time after receiving delivering carrier's written notice disallowing claim is defense to action against connecting carrier, although claim was not disallowed by connecting carrier.—Germini v. Southern Pac. Co., 204 N.Y.S. 603, 209 App.Div. 442.

17. Mass.—Lyon v. Canadian Pac. Ry. Co., 163 N.E. 180, 264 Mass. 596, 60 A.L.R. 1247.

18. Ga.—Davis v. Peacock, 113 S.E. 697, 29 Ga.App. 122.

Ill.—Golden Grain Milling Co. v. St. Louis, S. & P. R. Co., 226 Ill.App. 116. But see Gallagher v. Grand Trunk Western Ry. Co., 207 Ill. App. 316.

10 C.J. p. 543 note 76.

19. Mo.—Peycke Bros. Commission Co. v. Sandstone Co-op. Co., 191 S.W. 1088, 195 Mo.App. 417.

20. U.S.—McGinn v. Oregon-Washington R. & Nav. Co., C.C.A.Wash., 265 F. 81, certiorari granted Oregon-Washington R. & Nav. Co. v. McGinn, 41 S.Ct. 148, 254 U.S. 628, 65 L.Ed. 446, and reversed on other grounds 42 S.Ct. 332, 258 U.S. 409, 66 L.Ed. 689.

21. Mo.—State ex rel. and to Use of St. Louis, B. & M. Ry. Co. v. Taylor, 251 S.W. 383, 298 Mo. 474, certiorari granted State of Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor, 44 S.Ct. 132, 263 U.S. 696, 68 L.Ed. 511, affirmed 45 S.Ct. 47, 266 U.S. 200, 69 L.Ed. 247, 42 A.L.R. 1232.

10 C.J. p. 551 note 62.

22. Mo.—State ex rel. and to Use of St. Louis, B. & M. Ry. Co. v. Taylor, supra.

23. U.S.—Pratt v. Denver & R. G. W. R. Co., D.C.Minn., 284 F. 1007.

24. Ga.—Central of Georgia Ry. Co. v. Touchstone & Wilbanks, 98 S.E. 485, 148 Ga. 861.

25. Ga.—Adair v. Atlantic Coast Line R. Co., 94 S.E. 840, 21 Ga.App. 564—Askew & Co. v. Southern Ry. Co., 58 S.E. 242, 1 Ga.App. 79.

10 C.J. p. 551 note 63 [a].

Issuance of bill of lading

In action by consignor against the initial carrier for damages resulting from failure to notify consignor of consignee's failure to accept the goods, court had jurisdiction where bill of lading was issued in county of suit although exchanged for another.—Atlantic Coast Line R. Co. v. Ousley, 139 S.E. 586, 37 Ga.App. 215.

Nonresident carrier

Where interstate shipment of goods was damaged by defendant initial carrier or its connecting carrier, superior court of county of destination has jurisdiction of suit for damages against initial, nonresident carrier.—Adair v. Atlantic Coast Line R. Co., 94 S.E. 840, 21 Ga.App. 564.

Contract limiting liability

Where defendant carrier, having no agent or line therein received live stock destined to Tift county, and its contract made its liability cease on delivery to connecting carrier, and stock was delayed by initial and connecting carriers, a petition, in suit for damages alleging such facts, did not make a case where contract was to be performed, or damages occurred in Tift county, so as to give jurisdiction over defendant in that county.—Central of Georgia Ry. Co. v. Touchstone & Wilbanks, 98 S.E. 485, 148 Ga. 861.

Refusal to issue through bill

(1) An action for the refusal by a railroad company to issue a through bill of lading over its road to a point on the line of a connecting carrier should be brought in the county of the point of shipment, or in the county of the defendant's residence.—

sides, or in which the contract is made, or in which the carrier agrees to deliver the property,[26] statutes authorizing suit in any county in which suit may be maintained against any of the connecting carriers,[27] and statutes providing that whenever property is transported by two or more railroad companies having an agent or representative in the state suit for damages arising out of such carriage may be brought against any one or all of such common carriers having an agent or representative in the state, in any court in any county in which either of such carriers operates or has an agent or representative.[28] A statute authorizing joint action against connecting carriers and providing that suit is to be instituted in the county of delivery but also providing that other existing remedies may be pursued by plaintiff, is cumulative and not restrictive or exclusive as to venue, and as regards venue the liability of the initial carrier and the connecting carrier under a statute similar to the Carmack amendment is joint and several, so that a statute authorizing a joint or joint and several action to be brought in any county having jurisdiction of any one of the defendants is applicable in an action against connecting carriers.[29] Under a statute permitting one who has contracted in writing to perform an obligation in a particular county to be sued therein or where he has his domicile, it was held that a carrier operating no line of road in the state but having agencies therein, which gives a bill of lading for the delivery of the goods in a county in which it has no agent, with a stipulation limiting its liability to injuries accruing on its own road, may be sued in the county where the goods are delivered for injuries thereto.[30]

§ 438. Parties

a. Plaintiff

b. Defendant

Coles v. Central Railroad & Banking Co., 9 S.E. 127, 82 Ga. 149.

(2) So, where the petition alleged that defendant agreed to carry goods to the terminus of its line, that after they had been shipped in car load lots plaintiffs requested defendant's agent at its terminus to have the goods transferred in the same cars to the road of the connecting carrier, to be by it carried to their destination, which request was refused, it was held that, as defendant had completed its contract, the petition showed no breach of a contract at the terminus of the road that would give the court of that county jurisdiction of an action.—Coles v. Central Railroad & Banking Co., supra.

26. Ky.—Cleveland, C. C. & St. L. Ry. Co. v. Young, 195 S.W. 93, 175 Ky. 841.
10 C.J. p 551 note 63 [b].

Destination of shipment

Under a statute of this character the venue of an action brought under the Carmack amendment against a nonresident initial carrier for damages to a shipment was in the county of the destination of the shipment, although the bill of lading stipulated that carrier should be responsible only for delivery of shipment to connecting carrier.—Cleveland, C., C. & St. L. Ry. Co. v. Young, 195 S.W. 93, 175 Ky. 841.

27. Mo.—Lay v. Chicago, etc., R. Co., 138 S.W. 884, 157 Mo.App. 467.
10 C.J. p 551 note 63 [c].

28. Tex.—Gulf, C. & S. F. Ry. Co. v. Hines, Civ.App., 18 S.W.2d 833, error refused.
10 C.J. p 552 note 65—p 553 note 73.

Transportation as requisite

Where shipment was made from a point on a certain railroad and a through bill of lading issued in the name of such line for transportation over several other lines, the last of which extended into the county where suit was brought, it was held that court erred in not sustaining a plea of privilege filed by the railroads not running through such county nor having agents or representatives therein, where the shipment in question had been taken by a sheriff before it had ever been delivered to the terminal carrier, the shipment not being "transported" by such last carrier within the meaning of the statute.—Payne v. Coleman, Tex.Civ.App., 232 S.W. 537.

Switching line

(1) That railroad with extensive system acted but for short distance in switching cars of live stock did not destroy its "common carrier" character, so as to prevent suit in any county where connecting carrier did business under the statute.—Gulf, C. & S. F. Ry. Co. v. Hines, Tex.Civ.App., 18 S.W.2d 833, error refused—Gulf, C. & S. F. Ry. Co. v. Hines, Tex.Civ.App., 4 S.W.2d 641.

(2) Furthermore, such carrier is a "connecting carrier" and, when impleaded in action against initial carrier, cannot plead privilege of suit in county of residence.—Gulf, C. & S. F. Ry. Co. v. Hines, supra.

Domicile of carriers

Under such statutes an action for loss or injury to goods or delay in transportation may be brought against several connecting carriers operating in the state and having an agent therein in a county in which one of the carriers has its domicile, and the others cannot object that they had no domicile in the county.—Texarkana, etc., R. Co. v. Shivel, Tex.Civ.App., 114 S.W. 196.
10 C.J. p 552 note 69.

Nonjoinder of defendant in county

Under this statute a suit may be brought against any one or all of the carriers in any county in which either is operating its road, without joining as a defendant a carrier whose line extends into the county where the suit is brought, or which has a local agent or its principal office in such county.—Nation v. San Antonio Southern Ry. Co., 283 S.W. 157, 115 Tex. 431—10 C.J. p 552 notes 65–68.

Common agent in county

Where several carriers joined as defendants in an action for damages to goods are shown to be partners and agents of each other, and to have a common agent in the county where the action is brought, they are all subject to the jurisdiction of the district court of that county.—New Mexico Eastern R. Co. v. Littlefield, Tex.Civ.App., 135 S.W. 1086.

29. Ala.—Louisville & N. R. Co. v. Strickland, 122 So. 693, 219 Ala. 581.

Doing business in county

Under Code 1923 § 9418, authorizing joint, or joint and several, action in county having jurisdiction of any one of defendants, and § 10045, authorizing joint actions against connecting carriers, it is immaterial whether all carriers sued for loss or damage to shipment are doing business in county where suit is brought, provided Const. 1901 § 232 is not violated by including in the suit a foreign corporation in a county in which it is not doing business and provided court has jurisdiction of one of them.—Louisville & N. R. Co. v. Strickland, 122 So. 693, 219 Ala. 581.

30. Tex.—Texas, etc., R. Co. v. Hornbeck, 39 S.W. 564, 90 Tex. 496.

a. Plaintiff

An action under the Carmack amendment is properly brought by the lawful holder of the bill of lading, and joint owners are properly joined.

The lawful holder of the bill of lading is the proper party to bring an action under the Carmack amendment,[31] notwithstanding he acquires title thereto after the damages sought to be recovered were inflicted;[32] and an action improperly brought by one who was not the lawful holder of a bill of lading cannot be amended to substitute the lawful holder.[33] A joint owner of the shipment is properly joined as plaintiff in a suit brought under the Carmack amendment.[34]

b. Defendant

The necessity or propriety of joining particular parties defendant is determined largely according to the controlling rules of substantive liability.

The rules as to proper parties defendant in actions for loss or injury where shipments are made over the lines of connecting carriers practically conform to the rules of substantive liability in such cases which have been fully developed in this Title supra §§ 401–431. Thus, where a connecting carrier is sued only for loss occurring on its own line, it cannot object on the ground of nonjoinder of the initial carrier.[35] Where the petition states a cause of action against the terminal carrier only, the initial and intermediate carriers are not necessary parties, but are proper parties in the beginning of the action in view of the possibility of the terminal carrier defending on the ground that it did not receive the shipment;[36] and if the defense is successfully interposed such carriers become necessary parties.[37] As heretofore shown in § 406 a, under the Carmack amendment, the initial carrier which accepts freight for transportation over the line of connecting carriers for interstate shipment is liable for loss or injury whether occurring on its own or on connecting lines and the connecting carrier causing the injury is not a necessary party in an action against the initial carrier under that amendment[38] or a similar state statute, particularly where the statute preserves to the initial carrier its right of action against the connecting line;[39] and, while it has been said that the connecting carrier is not a proper party in such case,[40] it is ordinarily held under the Carmack amendment that the shipper may sue the initial carrier and the carrier causing the loss jointly.[41] In

31. Ill.—Lino v. Northwestern Pac. R. Co., 246 Ill.App. 451, reversed on other grounds 163 N.E. 316, 332 Ill. 93.

Ind.—Bruner v. Chicago & E. I. Ry. Co., 161 N.E. 680, 87 Ind.App. 374.

Consignee

Where the findings are silent as to the ownership of the property after its delivery to the initial carrier, the presumption is that title is vested in the consignee who is therefore the lawful holder of the bill of lading.—Bruner v. Chicago & E. I. Ry. Co., 161 N.E. 680, 87 Ind.App. 374.

"Holder"

(1) The Carmack amendment does not mean that a suit may be maintained against the initial carrier by one whose mere physical possession of the bill is wrongful, or which amounts to nothing more than that of a fiduciary custodian for the actual owner.—Layton v. Central of Georgia Ry. Co., 149 S.E. 431, 40 Ga.App. 330.

(2) Under the Cummins amendment, 49 U.S.C.A. § 2, the "holder" of a bill of lading, such as is entitled to maintain an action thereon, means a person who has both actual possession of the bill and a right of property therein.—Layton v. Central of Georgia Ry. Co., supra.

Shipper

(1) Under the federal Bills of Lading Act, a shipper who delivered cotton to carriers for shipment to a foreign country on order bills of lading, which they attached to drafts and cashed at a bank, could not enjoin the carrier from transporting the cotton to its destination.—Frederick Leyland & Co. v. Webster Bros. & Co., Civ.App., 283 S.W. 332, error dismissed Webster Bros. & Co. v. Frederick Leyland & Co., 283 S.W. 1071, 115 Tex. 511.

(2) In action by one shipping goods to his own order against initial carrier for goods alleged to have been lost by delivering carrier, where plaintiff was not shown to be lawful holder of bill of lading, he could not recover.—Illinois Cent. R. Co. v. Stimson, 268 S.W. 835, 207 Ky. 78.

32. Ga.—Atlantic Coast Line R. Co. v. Murray, 134 S.E. 171, 162 Ga. 589, answers conformed to 134 S.E. 172, 35 Ga.App. 653.

33. Va.—Norfolk Southern R. Co. v. Greenwich Corp., 95 S.E. 389, 122 Va. 631.

Proper practice

"In these circumstances, the correct practice would have been for plaintiff to ask to be allowed to suffer a nonsuit before the jury retired, under section 3387 of the Code, and to have renewed the suit in the name of the proper plaintiff."—Norfolk Southern R. Co. v. Greenwich Corp., 95 S.E. 389, 390, 122 Va. 631.

34. Tex.—Kansas City, M. & O. Ry. Co. of Texas v. Corn, Civ.App., 186 S.W. 807.

35. Or.—Lacey v. Oregon R., etc., Co., 128 P. 999, 63 Or. 596.

Tex.—San Antonio, etc., R. Co. v. Moore, Civ.App., 39 S.W. 960.

10 C.J. p. 553 note 75.

36. Okl.—Oklahoma, N. M. & P. Ry. Co. v. H. M. S. Drilling Co., 229 P. 420, 100 Okl. 260.

37. Okl.—Oklahoma, N. M. & P. Ry. Co. v. H. M. S. Drilling Co., supra.

38. Ohio.—Norfolk & Western Ry. Co. v. Dresbach, 8 Ohio App. 333.

39. Ark.—Ft. Smith, S. & R. I. R. Co. v. Scroggins, 234 S.W. 999, 150 Ark. 571.

Discretion of court after judgment

Where initial carrier was sued for damages to shipment arising from negligent delay in delivery by subsequent carrier, and no effort was made by defendant to make that carrier party, refusal, after judgment, of motion to make it party defendant and confine execution to it was not abuse of discretion.—Lakeside Packing Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 203 N.W. 334, 187 Wis. 350.

40. Ohio.—Norfolk & Western Ry. Co. v. Dresbach, 8 Ohio App. 333.

41. Ala.—Southern Ry. Co. v. Northwestern Fruit Exch., 98 So. 382, 210 Ala. 519.

Mo.—Conley v. Chicago, R. & Q. R. Co., 183 S.W. 1111, 192 Mo.App. 534.

Tex.—Galveston, H. & S. A. Ry. Co. v. American Grocery Co., 36 S.W.2d 985, 122 Tex. 1, affirming, Com.App., 25 S.W.2d 533, which revers-

an action against the initial and connecting carriers for damages to a shipment of cattle for failure to furnish sufficient cars, failure to furnish proper and suitable pens and facilities for receiving and caring for the stock, and negligence in loading and rough handling while in the cars, there was no misjoinder, under a statute making all carriers liable for damage sustained anywhere during transportation, where plaintiff claimed no damage as the result of the initial carrier's delay in furnishing the cars as agreed.[42]

If damages to a shipment result from the negligence of each of several carriers over whose line the shipment passes, it has been held that they may be sued jointly[43] or severally.[44] It has been decided, however, that an initial carrier liable to the shipper only for misdelivery and the connecting carrier liable to the shipper only in trover or detinue for the goods could not be sued jointly in an action on the case;[45] and, where an initial carrier is not a party defendant, intermediate or connecting carriers cannot be joined in tort for delayed shipments.[46]

A receiver of a connecting carrier appointed more than two years after the delivery of freight to the initial carrier for transportation is not a proper party to the action for the loss of the freight, in the absence of any allegation that the goods or any part thereof came into his possession, or into the possession of the connecting carrier, after his appointment.[47]

In an action against carriers for delivering plaintiffs' shipment of live stock to another shipper's consignee, the other shipment being delivered to plaintiffs' consignee, the other shipper was not a necessary party defendant.[48]

Partnership or joint contract. Where a partnership relation exists between connecting carriers, or there is a joint contract for a shipment of goods over their respective lines, they may be joined as defendants in an action for loss or injury to the shipment,[49] or any one of them may be sued;[50] and under some statutes two or more carriers may be united as defendants in an action for loss or injury caused by negligence, although there is no partnership relation or joint undertaking by them to carry the particular freight.[51] Where a partnership relation exists between carriers, a connecting carrier which is sued for loss or injury to the shipment cannot object on the ground of the nonjoinder of the initial carrier by whose fault the loss or injury was caused.[52]

§ 439. Pleading

a. Declaration, petition, or complaint
b. Plea or answer
c. Demurrer
d. Issues, proof, and variance

a. Declaration, Petition, or Complaint

Plaintiff must allege facts sufficient to constitute a cause of action.

Following the rules of pleading in civil actions generally, plaintiff's declaration, petition, or complaint in an action for damages for loss, injury, or delay of goods transported by connecting carriers must state a cause of action, and if it does so, it is sufficient; otherwise it is not. This general rule has been applied in actions against the initial carrier,[53] or as well as in actions against the inter-

ed Galveston Wharf Co. v. American Grocery Co., Civ.App., 13 S.W. 2d 983, certiorari granted Galveston Wharf Co. v. Galveston, H. & S. A. Ry. Co., 52 S.Ct. 41, 284 U.S. 608, 76 L.Ed. 521, affirmed 52 S.Ct. 342, 285 U.S. 127, 76 L.Ed. 659.
Utah.—Barry v. Los Angeles & S. L. R. Co., 189 P. 70, 56 Utah 69.
10 C.J. p 553 note 78.

As stated in Corpus Juris, the rule of the text has been cited with approval in Dietz v. Southern Pac. Ry. Co., 28 S.W.2d 395, 398, 225 Mo.App. 39.

42. Tex.—St. Louis, B. & M. Ry. Co. v. Lane, Civ.App., 248 S.W. 59.

43. Ky.—Louisville & N. R. Co. v. Schaeffer, 280 S.W. 974, 213 Ky. 248.
10 C.J. p 553 note 79.

44. Ind.—Wabash R. Co. v. Priddy, 101 N.E. 724, 179 Ind. 483.

45. Ala.—James v. Alabama Great Southern R. Co., 81 So. 582, 202 Ala. 640

46. Ohio.—Oyler & Oyler v. Louisville & N. R. Co., 18 Ohio App. 481.

47. Tex.—Davies v. Texas Cent. R. Co., Civ.App., 133 S.W. 295.

48. Tex.—Southern Kansas R. Co. v. Lockhart, Civ.App., 141 S.W. 127
10 C.J. p 553 note 85.

49. Tex.—St. Louis, etc., R. Co. v. Dodson, Civ.App., 97 S.W. 523.

50. N.C.—Reidsville Paper Box Co. v. Southern Ry. Co., 99 S.E. 23, 177 N.C. 351.
10 C.J. p 547 note 20.

51. Mo.—Crockett v. St. Louis, etc., R. Co., 126 S.W. 243, 147 Mo.App. 347.

52. Mo.—Central American SS. Co. v. Mobile, etc., R. Co., 128 S.W. 822, 144 Mo.App. 43.
10 C.J. p 553 note 83.

53. Ill.—L. Starks Co. v. Michigan Cent. R. Co., 207 Ill.App. 333

Petition or complaint held sufficient

(1) Consignor's petition against initial carrier for damages resulting from failure to give notice of consignee's failure to accept goods stated cause of action.—Atlantic Coast Line R. Co. v. Ousley, 139 S.E. 586, 37 Ga.App. 215.

(2) Petition to recover for defendant's failure seasonably to deliver shipment to connecting carrier was held not open to exception on ground of vagueness of allegations as to shipments, in view of former trial.—Quanah, A. & P. Ry. Co. v. Bone, Tex.Civ.App., 208 S.W. 709, error refused.

(3) A complaint alleging that an initial carrier delivered freight in-

mediate or terminal carrier.[54] In an action based on the statutory liability of defendant carrier for damages caused by other carriers plaintiff must plead facts sufficient to bring the case within the statute,[55] but to fix the liability of the initial carrier under the Carmack and Cummins amendments it is unnecessary to allege issuance of a through bill of lading.[56] Prior to the amendment to the Carmack

trusted to it to a connecting carrier, not in the good condition in which it had been received, showed that damage was sustained on line of the initial carrier, and stated a cause of action against it under the Carmack Amendment—Pacific Coast Borax Co. v. Shippers' Navigation Co., 178 N.Y.S. 182, 103 Misc. 198.

(4) In parent's action against railroad for delay in transportation of the corpse of deceased child, allegation that by reason of defendant's negligence the corpse was not transferred to the next succeeding passenger train of the connecting carrier leaving the connecting point for the point of destination, as shown by the contract of carriage, was a sufficient allegation of a breach of duty.—Louisville & N. R. Co. v. Bishop, 85 So. 859, 17 Ala.App. 320.

Petition held insufficient

Where corporation canceled contract with railroad to make interstate transportation of stone for railroad's refusal to publish rate specified, corporation's petition to recover from railroad profits lost is demurrable, where transfer to connecting carrier would have been necessary, and corporation sought no publication of rate by connecting carrier or joint publication of rates.—Rowan County Freestone Co. v. Chesapeake & O. Ry. Co., 95 S.W.2d 575, 264 Ky. 785.

Damages claimed

While an averment of general notice to railroad company of damages that would result from refusal seasonably to deliver cars to connecting carrier was held sufficient averment as to notice to sustain recovery by consignee who was contractor for loss of his own time, this item of damage was held not fairly to come within any element of actual damages claimed in the petition.—Quanah, A. & P. Ry. Co. v. Bone, Tex.Civ.App., 208 S.W. 709, error refused.

54. Ga.—Georgia, F. & A. Ry. Co. v. Pippin, 127 S.E. 300, 33 Ga.App. 573.

Ill.—Pennington v. Grand Trunk Western Ry. Co., 115 N.E. 170, 277 Ill. 39.

10 C.J. p 553 notes 89, 90, p 554 notes 91–97.

Petition or complaint held sufficient

(1) Petition, alleging that notify consignee of interstate shipment paid draft attached to bill of lading, and that shipment was damaged by delivering carrier's negligence, was held to state cause of action by consignee against delivering carrier.—Atlantic Coast Line R. Co. v. Murray, 134 S.E. 172, 35 Ga.App. 653, conforming to answer to certified question, Sup., 134 S.E. 171, 162 Ga. 589.

(2) In shipper's suit against railroad as connecting carrier to recover for damage to interstate shipment of flour originally delivered by shipper to water carrier, failure of petition to state that railroad furnished cars to shipper was held not to render petition demurrable.—Sperry Flour Co. v. Atlantic Coast Line R. Co., 159 S.E. 278, 54 Ga.App. 725.

Complaint held insufficient

Complaint alleging that damage to freight was caused while in the possession of the initial carrier, and not setting forth what part of the damage, if any, was sustained on each of the two lines, did not state a separate cause of action against the connecting carrier, in view of the Carmack amendment.—Pacific Coast Borax Co. v. Shippers' Navigation Co., 178 N.Y.S. 182, 103 Misc. 198.

Waiver of limitation

An allegation in a petition in an action for injuries to live stock shipped under a contract requiring suit within a certain time, that the delay in suing was due to pending negotiations between plaintiff and connecting carriers, was held not to state an implied waiver of the contract limitation by the initial carrier.—Harrington v. Wichita Falls & N. W. Ry. Co., 156 P. 634, 56 Okl. 729.

Petition construed

(1) A petition against connecting carriers for damage resulting from delay in transportation which alleged that the shipper, at the request of the consignee, informed the carrier of the damage which would result from delay in transportation, that the shipper agreed in consideration of the carrier establishing a lower through rate to ship all the materials needed over that line, that thereafter the shipper, acting for the consignee, delivered to the carrier such material for transportation, and that shipments were delayed for an unreasonable length of time, declares on a breach of the original oral contract for shipment, not on the bills of lading subsequently issued.—Gulf, C. & S. F. Ry. Co. v. Nelson, 192 S.W. 1056, 108 Tex. 305, certiorari denied 38 S.Ct. 13, 245 U.S. 657, 62 L.Ed. 534.

(2) Where a petition against a connecting carrier does not allege that defendant received the goods in good order, the action will be construed as based on carrier's common-law liability, and not on a statute imposing liability on carriers receiving the goods in good order.—Southern Ry. Co. v. Waxelbaum Produce Co., 90 S.E. 987, 19 Ga.App. 64.

(3) So if the petition alleges a good common-law action, an averment that defendant received the goods "as in good order," does not necessarily render the action one brought solely under a statute providing that the last of several connecting carriers which has received the goods "in good order" shall be liable for any damage thereto.—Philadelphia & Reading Ry. Co. v. Venable, 43 S.E. 407, 117 Ga. 142.—Southern Express Co. v. Turner, 103 S.E. 802, 25 Ga.App. 625.

55. Tex.—St. Louis Southwestern Ry. Co. v. Cox, Civ.App., 221 S.W. 1043.

Contract for through carriage

To recover from a terminal carrier the damages to shipment caused by preceding carriers, plaintiff must plead that the shipment was on a contract for through carriage, recognized, acquiesced in, or acted upon by the carriers so as to bring the case within a statute imposing liability in such case; and there can be no recovery against the carrier for the loss, where a contract of this character was not pleaded, even though the evidence established such contract.—St. Louis Southwestern Ry. Co. v. Cox, Tex.Civ.App., 221 S.W. 1043.

Petition held sufficient

(1) Shipper's allegation that defendant railroads, their agents, and representatives undertook to transport cattle from certain point to another named point, and there to deliver them to commission company, was held sufficient to allege through shipment.—Kansas City, M. & O. Ry. Co. v. Cauble, Tex.Civ.App., 286 S.W. 478.

(2) So a petition by shipper of live stock alleging receipt by initial carrier and acceptance of shipment for safe carriage over its road and defendant's connecting line of road from and between designated stations sufficiently alleged through shipment.—St. Louis, B. & M. Ry. Co. v. Lane, Tex.Civ.App., 248 S.W. 59.

56. Mo.—State ex rel. and to Use of St. Louis, B. & M. Ry. Co. v. Taylor, 251 S.W. 383, 298 Mo. 474,

amendment making the liability thereunder apply in case of property reconsigned or diverted, however, it was necessary in an action against the initial carrier for delay to a diverted shipment to allege diversion before the shipment reached its destination or to show that it moved on a through bill of lading.[57]

As already shown supra § 424 b, in the absence of special contract or statute providing otherwise, or of a partnership relation, each of several connecting carriers is liable only for loss or injury occurring on its own line. Hence, if it is sought to charge one of several connecting carriers for loss or injury, it must ordinarily be alleged that the loss or injury occurred on its line,[58] or was caused by its negligence,[59] or that the carriers were joint contractors, or that some similar relation existed between them,[60] although if facts are stated which show that the carriers sustain a partnership relation to each other, it is not essential that the complaint should in terms designate them as partners, or use any particular words to describe the relation existing between them.[61] It is also necessary, if it is sought to charge one of a line of connecting carriers for loss or injury occurring on another line, to allege the acts of the other connecting carriers from which liability might arise.[62] However, in view of the presumption of law stated infra § 440 c (3) that the terminal carrier received the shipment in good condition if it was so received by the initial carrier, it has been held that in an action

certiorari granted State of Missouri ex rel. St. Louis, B & M. Ry Co v. Taylor, 44 S.Ct. 132, 263 U.S. 696, 68 L.Ed. 511, affirmed 45 S.Ct. 47, 266 U.S. 200, 69 L.Ed. 247, 42 A.L.R. 1232.

Tex.—Burd v. San Antonio Southern Ry Co., Com.App., 261 S.W. 1021, modifying San Antonio Southern Ry Co. v. Burd, Civ.App., 246 S.W. 1060.

Petition held sufficient

A petition against a railroad company, alleging that goods were delivered to the company, which operated lines only within the state of shipment, for transportation to points in other states, that plaintiff had become the owner of the goods, and that through defendant's negligence and violation of its common-law duty as a common carrier the goods were damaged, states a cause of action under Carmack amendment although it does not expressly allege that a bill of lading had been issued by the defendant carrier. In such case the allegation that the goods were delivered to a carrier in a named state outside of which it did not operate, for shipment to a destination in another state, is equivalent to an allegation that a through bill of lading was issued to that destination, since the carrier was required by the federal statute to issue a through bill of lading, and the presumption will be indulged that it did what the law required it to do.—State ex rel. and to Use of St. Louis, B. & M. Ry Co. v. Taylor, 251 S.W. 383, 298 Mo. 474, certiorari granted State of Missouri ex rel St Louis, B. & M. Ry. Co. v. Taylor, 44 S.Ct. 132, 263 U.S. 696, 68 L.Ed. 511, affirmed 45 S.Ct. 47, 266 U.S. 200, 69 L.Ed. 247, 42 A.L.R. 1232.

57. Ala.—Clark v. Louisville & N. R. Co., 114 So. 295, 216 Ala. 637.

Complaint held insufficient

Ala.—Clark v. Louisville & N. R. Co., 114 So. 295, 216 Ala. 637.

58. Ga.—Southern R. Co. v. Gardner, 56 S.E. 454, 127 Ga. 320.

N.D.—Ausk v. Great Northern R. Co., 86 N.W. 719, 10 N.D. 215.

S.C.—Felder v. Columbia, etc., R. Co., 21 S.C. 35, 53 Am.R. 656.

59. Ga.—Southern Ry. Co. v. Morris, 95 S.E. 284, 147 Ga. 729, reversing Morris v. Southern Ry. Co., 91 S.E. 878, 19 Ga.App. 495, conformed to 95 S.E. 741, 22 Ga. App. 154—Southern Express Co. v. Turner, 103 S.E. 802, 25 Ga.App. 625.

Allegation held sufficient

(1) A petition alleging that a defendant neglected to carry and deliver a hog safely, in that, before it arrived at a certain place, it died while in defendant's possession to plaintiff's *damage*, as against a general demurrer, sufficiently alleges injury was caused by defendant's negligence.—Southern Express Co. v. Turner, 103 S.E. 802, 25 Ga.App. 625.

(2) Allegations in suit against terminal carrier for loss of goods shipped from Massachusetts to Augusta, Ga., of its receipt thereof from connecting carrier in good order, and its failure to deliver them, not expressly declaring upon state or federal statute, were sufficient to show that loss was caused by defendant's negligence.—Atlantic Coast Line R. Co. v. Stovall-Pace Co., 100 S.E. 657, 24 Ga.App. 248.

60. N.C.—M. V. Moore & Co. v. Southern Ry Co., 111 S.E. 166, 183 N.C. 213

10 C.J. p. 553 note 90.

Complaint held sufficient

A complaint against a terminal carrier for delay in a shipment of live stock, which alleged that the initial and terminal carriers with another had associated themselves together into a system, and that each member was fully authorized to contract for the shipment of live stock freight over the system, sufficiently alleges that the contract entered into in the name of the initial carrier was also the contract of the terminal carrier, so that a breach of the contract, occurring on either line, created a joint obligation against both carriers.—Martin v. Union Pac. R. Co., 192 P. 506, 69 Colo. 174.

Under the Carmack amendment which makes the initial carrier liable for loss or injury to an interstate shipment occurring on any connecting line, the complaint in an action against the initial carrier for loss or injury to goods shipped need not give the names of the connecting lines. It is sufficient to allege the name of the initial carrier only.—Pecos, etc., R. Co. v. Meyer, Tex. Civ.App., 155 S.W. 309.

In Georgia, under a statute providing that, when freight to be conveyed by several carriers is lost, any connecting carrier, on application by shipper or consignee, shall trace such freight, and inform the applicant by which carrier it was lost, and making it liable, on failure to trace such freight, as if the loss had occurred on its line, a petition averring the loss of freight shipped by certain carriers, and the failure of the carrier at destination to trace it after verbal application of the shipper, states a cause of action against such carrier for the value of such loss of freight.—Savannah, etc., R. Co. v. Hardin, 35 S.E. 681, 110 Ga. 433.

61. Mo.—Wyman v. Chicago, etc., R. Co., 4 Mo.App. 35.

62. Tex.—International, etc., R. Co. v. Hatchell, 55 S.W. 186, 22 Tex. Civ.App. 498.

against the terminal carrier it is necessary to aver only that the initial carrier received the goods in good condition and that they were delivered to plaintiff in damaged condition;[63] and this has been said to be the rule in an action against the initial and terminal carriers where the statute makes the initial carrier liable for any damage caused by any carrier,[64] and in an action based on joint and several liability of defendant carriers.[65] So in an action against several connecting carriers jointly for injuries caused by negligence, it will be sufficient to allege the negligence generally and the damages resulting therefrom in transporting the goods,[66] and it is not necessary to allege what effect the negligence of each carrier had on the goods,[67] nor the particular amount of damages caused by each defendant on its own line,[68] it being sufficient to allege that the damages were caused by all the defendants.[69] Even if this were not so, where suit is brought against two railroads for injuries to a shipment due to negligence, where it is alleged that both defendants were really one and the same road, operated by the same management, which allegation is not specifically denied, defendants cannot object to the sufficiency of the allegations in regard to the times and places at which the alleged negligence occurred.[70]

In an action for damages to a shipment of live stock it is proper to plead anything which in the reasonable contemplation of the parties may affect the market value of the stock in determining whether there was a loss.[71]

In a proper case the petition may be amended to aver additional facts.[72]

b. Plea or Answer

Affirmative defensive matter must be specially pleaded.

In actions against one or more of several connecting carriers, answers and pleas are governed by the general rules as to such pleadings in civil actions generally and by such statutory provisions as may be in force relating to defenses in actions against such carriers. Thus defendant should specially plead affirmative defensive matter in avoidance of the damage,[73] such as diligence of the carrier in giving notice of arrival or negligence of the consignee in failing to ascertain the arrival,[74] and where, in a consignee's action for damages to a shipment, plaintiff averred receipt by the initial carrier in good condition and delivery to him in bad condition, the burden was on the connecting carrier

63. La.—Snowden v. Tremont & G. Ry. Co., App., 140 So. 122.

Petition held insufficient as not having alleged delivery to initial carrier in good condition.—Snowden v. Tremont & G. Ry. Co., La.App., 140 So. 122.

64. Ala.—Louisville & N. R. Co. v. Strickland, 122 So. 693, 219 Ala. 581.

Complaint held sufficient

Counts following substantially the statutory form for suit on bill of lading against common carrier, except that they alleged receipt of apples by director general during federal control and by connecting carriers when such control was relinquished March 1, 1920, to be delivered for a reward, are good as against demurrer.—Southern Ry. Co. v. Northwestern Fruit Exch., 98 So. 382, 210 Ala. 519.

Joining all carriers

It has been held that the joining of initial, intermediate, and delivering carriers by petition alleging delivery to first carrier and failure of terminal carrier to deliver portion of shipment constitutes statement of cause of action against latter carrier only.—Oklahoma, N. M. & P. Ry. Co. v. H. M. S. Drilling Co., 229 P. 420, 100 Okl. 260.

65. Ky. — Makeever v. Georgia Southern & F. Ry. Co., 294 S.W. 144, 219 Ky. 699.

66. Tex.—San Antonio, etc., R. Co. v. Martin, 108 S.W. 981, 49 Tex. Civ. App. 197.

67. Tex.—International, etc., R. Co. v. Jones, 91 S.W. 611, 41 Tex. Civ. App. 327.
10 C.J. p. 554 note 94.

68. Tex.—Gulf, etc., R. Co. v. Cunningham, 113 S.W. 767, 51 Tex. Civ. App. 368.—Atchison, etc., R. Co. v. Stribling, Civ.App., 94 S.W. 436.—Missouri, etc., R. Co. v. Phillips, Civ.App., 91 S.W. 242.

69. Tex.—Missouri, etc., R. Co. v. Phillips, Civ.App., 91 S.W. 242.

70. Tex.—Southern R. Co. v. Bennett, Civ.App., 103 S.W. 1115.
10 C.J. p. 554 note 97.

71. Tex.—Texas & P. Ry. Co. v. West Bros., Com.App., 207 S.W. 918, affirming in part and reversing in part St. Louis, I. M. & S. R. Co. v. West Bros., Civ.App., 159 S.W. 142, rehearing denied Texas & P. R. Co. v. West Bros., Com.App., 214 S.W. 808.

Loss of fill

In an action against connecting carriers for damage to a shipment of live stock by delay, if the shipment was delayed by defendant, and on account of such delay plaintiffs' cattle were damaged in appearance and lost in weight by reason of "loss of fill," reasonably in contemplation, such loss of fill may properly be shown as affecting market value.—Texas & P. Ry. Co. v. West Bros., Tex.Com.App., 214 S.W. 808, denying rehearing 207 S.W. 918, which affirmed in part and reversed in part St. Louis, I. M. & S. Ry. Co. v. West Bros., Civ.App., 159 S.W. 142.

72. **Amendments held proper**

(1) Where the original petition did not show that shipment was an interstate one over the lines of several carriers and that defendant was the last carrier, an amendment stating these facts does not set out a new cause of action.—Southern Ry. Co. v. Waxelbaum Produce Co., 90 S.E. 987, 19 Ga.App. 64.

(2) In action against carrier for damages to interstate shipment of hogs, that the original petition was on a written contract and the amendment to petition was on an implied contract was immaterial, being matter of procedure governed by state practice.—Bowles v. Quincy, O. & K. C. R. Co., Mo.App., 187 S.W. 131.

73. Tex.—Levin v. International-Great Northern R. Co., Civ.App., 45 S.W.2d 435, error dismissed.
10 C.J. p. 554 notes 98, 99

74. Tex.—Levin v. International-Great Northern R. Co., supra.

to plead that it had received them in the condition in which it had delivered them.[75]

c. Demurrer

Questions as to misjoinder of parties cannot be raised by demurrer.

It has been held that in an action against several connecting carriers for refusal to deliver goods transported, the question whether the initial and the intermediate carriers were proper parties cannot be raised by demurrer,[76] and that, in an action against the last connecting interstate carrier, a demurrer setting up that under the federal statute only the initial carrier could be sued was properly overruled.[77]

d. Issues, Proof, and Variance

The pleadings must be supported by appropriate proof without material variance.

Following the rules applicable to the proof and variance in civil actions generally, every essential allegation of plaintiff's pleading must be supported by appropriate proof,[78] which must be confined to the issues raised by the pleadings.[79] While there must be no material variance between the facts alleged and the facts proved,[80] immaterial variances may be disregarded.[81]

75. Ala.—Southern Ry. Co. v. Northwestern Fruit Exch., 98 So. 382, 210 Ala. 519

76. Ind.—Baltimore, etc., R. Co. v. McWhinney, 36 Ind. 436.

77. Ga.—Southern Ry. Co. v. Waxelbaum Produce Co., 90 S.E. 987, 19 Ga.App. 64.

78. Iowa.—Quillen v. Minneapolis & St. L. R. Co., 164 N.W. 779, 181 Iowa 536

Conversion

Under a complaint for a conversion by a carrier while goods were in defendant's possession as a carrier between the point of shipment and the point of destination, alleging that defendant was a common carrier, and that it unlawfully and wrongfully sold goods shipped by plaintiff, without his knowledge or consent, plaintiff cannot recover except on proof that defendant sustained the relation of a carrier of plaintiff's goods at the time of their conversion, or had so contracted with plaintiff as to be liable for loss by any other carrier or bailee.—McCaslin v. Southern Pac. Co., 203 P. 742, 187 Cal. 716.

Execution of contract

Where interstate live stock shipper alleged execution of contract with defendant connecting carrier, which failed specially to deny such allegation, a statute rendering proof of signature of written instrument unnecessary, unless denied, did not remove burden of proof of execution from shipper, where bill of lading on its face was made by initial carrier only.—Illinois Cent. R. Co. v. Walker, 77 So. 191, 116 Miss. 431

Negligence

Shipper suing for damage to interstate shipment, resulting from carrier's negligence, has burden of proving negligence.—Chicago, R. I. & P. Ry. Co. v. S. L. Robinson & Co., 298 S.W. 873, 175 Ark. 35.

79. N.C.—M. V. Moore & Co. v. Southern Ry. Co., 111 S.E. 166, 183 N.C. 213.

Assumption of liability for other's acts

Where plaintiff sued for the value of grain lost through defendant's negligence, asserting that it was lost while on board boats owned and operated by defendant, plaintiff cannot be permitted, the evidence showing that the boats belonged to a preceding carrier, to prove or recover on theory that defendant by special agreement had assumed liability for acts of such carrier.—Knapp v. Minneapolis, St. P. & S. S. M. Ry. Co., 159 N.W. 81, 34 N.D. 466.

Partnership or joint contract

Where the complaint did not allege a partnership between connecting carriers or special contract for joint transportation, but merely alleged delivery to the receiving carrier for transportation by it and connecting carriers under a bill of lading, proof of a partnership or special contract was incompetent and would not support a recovery, and liability depended on the legal import of the bill of lading itself.—M. V. Moore & Co. v. Southern Ry. Co., 111 S.E. 166, 183 N.C. 213.

80. Iowa.—Quillen v. Minneapolis & St. L. R. Co., 164 N.W. 779, 181 Iowa 536.

Contract of carriage

(1) A party who lays his case for damages for delay against a railroad company on a bill of lading on the theory of a breach of express interstate contract of afreightment does not establish his case as laid on proving that the carriage to the ultimate destination was effectuated by two separate contracts, one being express and intra-state and the other implied and interstate.—Taylor v. Central of Georgia Ry. Co., 121 S.E. 348, 31 Ga.App. 374.

(2) Where the petition in an action against the initial carrier for damages for delay in shipment of live stock, declared upon a written contract whereby defendant undertook to transport plaintiff's live stock to Chicago, and the allegation was denied, there was a fatal variance between pleading and proof when he failed to put the contract in evidence.—Quillen v. Minneapolis & St. L. R. Co., 164 N.W. 779, 181 Iowa 536

(3) Where petition alleged delivery of baggage to defendant railroads as successive carriers, but proof showed new and independent contract with appellant transfer company, there was variance between allegations and proof.—Ford v. Wabash Ry. Co., 300 S.W. 769, 318 Mo. 723, affirming, App., 266 S.W. 1032

Negligence

In action against initial carrier for negligent delay in delivery of live stock shipment, where petition did not allege negligence by connecting carrier, but predicated liability on negligence of initial carrier alone, plaintiff could not recover upon proof of connecting carrier's negligence, notwithstanding a state statute relating to joint liability for acts of all carriers.—Ft. Worth & R. G. Ry. Co. v. Jones, Tex.Civ.App., 212 S.W. 552.

Theory of recovery

In an action against an initial carrier for conversion by a connecting carrier in selling the shipment for transportation charges on refusal thereof by consignee, the shipper cannot recover for negligence in failing to notify the connecting carrier that it held, as alleged in the complaint, an indemnity bond for payment of the freight, and that plaintiff was arranging to sell the goods to others, the allegation as to the bond being necessary to show that the sale by the carrier was wrongful.—McCaslin v. Southern Pac. Co., 203 P. 742, 187 Cal. 716

81. Mo.—Johnson v. Missouri Pac. R. Co., 249 S.W. 658, 211 Mo.App. 564.

Delivery to carrier

Where an action against carrier

Under a general denial, it may be shown that the injury was not caused by defendant but by the negligence of the consignor in loading the shipment[82] or that the terminal carrier transported the goods with reasonable diligence to their destination.[83] So, in an action against a terminal carrier for a delay, it is entitled to prove under the general issue that the delay, if any, was that of the initial carrier.[84]

§ 440. Presumptions and Burden of Proof

a. In general
b. Delivery of goods
c. Loss or injury
d. Unreasonable delay
e. Instructions to connecting carrier
f. Issuance of bill of lading
g. Damages

a. In General

The burden is on the plaintiff to prove his cause of action and on the defendant to prove its defense.

In accordance with the general rules applicable to civil actions generally and the principles discussed in succeeding subdivisions of this section, in an action against initial or connecting carriers for loss or damage to goods transported the burden is on plaintiff to prove all the facts essential to his recovery,[85] including the contract[86] or negligence[87] upon which his cause of action is based. The burden is on defendant to establish its affirmative defenses,[88] such as the defense of contributory negligence[89] or a defense that its failure to forward a loaded car was excused by not receiving empty cars as provided by statute;[90] and, where defendant's liability is prima facie established, it has the burden of proving that the injuries resulted from some cause for which it is not liable.[91] Where defendant establishes a defense under the provisions of the contract, the burden is upon plaintiff to prove want

for damages to a shipment of potatoes was commenced in justice court in which there are no formal pleadings and great liberality is indulged in respect to the statement of a cause of action and the complaint alleged delivery to defendant, a connecting carrier, whereas the evidence showed delivery by plaintiff to another, the initial carrier, the variance is to be regarded as not material and hence not prejudicial where no affidavit of surprise was filed.—Johnson v. Missouri Pac. R. Co., 249 S.W. 653, 211 Mo.App. 564.

No variance

(1) There is no variance between proof that defendant carrier delayed shipments at junction point with another carrier at certain date, and allegations that goods were delivered to defendant a month previous to such date—Quanah, A. & P. Ry. Co. v. Bone, Tex.Civ.App., 199 S.W. 332.

(2) In view of a former trial of the case, admission of evidence as to shipments delayed was held to create no variance or surprise where the petition by the consignee sought to recover for the carrier's refusal seasonably to deliver to a connecting carrier—Quanah, A. & P. Ry. Co. v. Bone, Tex.Civ.App., 208 S.W. 709, error refused.

82. S.C.—M. C. Johnson Motor Co. v. Payne, 107 S.E. 252, 116 S.C. 171.

83. Tex.—Gulf, etc., R. Co. v. Brackett-Fielder Mill, etc., Co., Civ.App., 162 S.W. 1191.

84. Ala.—Central of Georgia R. Co. v. Strickland-Metcalf Grocery Co., 58 So. 678, 4 Ala.App. 372.

85. Me.—Hayden v. Maine Cent. R. R., 103 A. 1047, 117 Me. 560.
Miss.—Illinois Cent. R. Co. v. Walker, 77 So. 191, 116 Miss. 431.

Title to bill of lading

Person suing initial carrier for damages to interstate shipment must establish title to bill of lading—Bruner v. Chicago & E. I. Ry. Co., 161 N.E. 680, 87 Ind.App. 374.

86. Miss.—Illinois Cent. R. Co. v. Walker, 77 So. 191, 116 Miss. 431.

87. Ill.—Aurora Automatic Machinery Co. v. Chicago, B. & Q. R. Co., 217 Ill.App. 60.

Negligence of connecting carrier

A statute providing that any connecting carrier of a through shipment may be held liable for negligence of any other connecting line does not relieve party suing of the burden of alleging and proving the negligence of such other connecting line upon which the cause of action is based.—Ft. Worth & R. G. Ry. Co. v. Jones, Tex.Civ.App., 212 S.W. 552.

88. Tex.—Quanah, A. & P. Ry. Co. v. Bone, Civ.App., 199 S.W. 332.
10 C.J. p. 374 note 1 [a]

Special plea

Where delivering carrier, sued for damage to goods, specially pleaded that injury was brought about by causes beyond its control, it has burden of establishing such plea—Central of Georgia Ry. Co. v. Gillis Mule Co., 103 So. 906, 20 Ala.App. 535, certiorari denied Ex parte Central of Georgia Ry. Co., 103 So. 909, 212 Ala. 635.

89. Tex.—Galveston, H. & S. A. Ry. Co. v. Cromley, Civ.App., 214 S.W. 721.

90. Tex.—Quanah, A. & P. Ry. Co. v. Bone, Civ.App., 199 S.W. 332.

91. Ala.—Lynn v. Mellon, 131 So. 458, 24 Ala.App. 144.
Ga.—Central of Georgia Ry. Co. v. Council Bros., 137 S.E. 569, 36 Ga.App. 573.

Contract limiting liability

(1) In an action against an initial carrier wherein the carrier set up a contract different from that proved by plaintiff limiting its liability and that it had complied with the terms thereof, the carrier was bound to prove that the contract was known and assented to by plaintiff, and that defendant had fully performed it—Pittsburgh, etc., R. Co. v. Blakemore, 1 Ohio Cir.Ct. 42, 1 Ohio Cir. Dec. 26.

(2) Where bill of lading for interstate shipment of grapes provided that, "except in case of negligence of the carrier or party in possession (and the burden to prove freedom of such negligence shall be on the carrier or the party in possession), the carrier or party in possession shall not be liable for loss or damage . . . resulting from a defect or vice in the property," and shipper alleged that fruit was damaged in that it had decayed, and specified the defaults either ex contractu or ex delicto of the carrier which it claimed caused the decay, burden of proof was on the carrier to prove freedom from negligence alleged, the allegations raising a prima facie case against it—Cassone v. New York, N. H. & H. R. Co., 123 A. 280, 100 Conn. 262.

of consideration for the contractual stipulations which would defeat his recovery.[92] So, where the bill of lading contained a valid provision exempting the carrier from liability for loss by fire, on proof of destruction of the shipment by fire the burden of proving negligence was on the shipper, there being no presumption of negligence.[93] Negligence will not be presumed from the fact that the initial carrier by truck did not carry the goods in its own truck where nothing in the contract of carriage required it to do so.[94] There is a rebuttable presumption that goods loaded by the shipper in interstate commerce were as described and were properly loaded.[95]

Where an action is brought against defendant as "initial carrier" in an interstate shipment and there is no proof that the loss or injury occurred at any particular point on the route of transportation, it must be inferred that plaintiff bases his suit on the Carmack amendment, that is, on the obligation for through transportation, and therefore upon the contract expressed in the bill of lading.[96]

While a bill of lading does not necessarily determine the local or foreign character of the shipment, it is prima facie evidence on the subject; and, in the absence of proof, direct or circumstantial, that an interstate movement was in the contemplation of the parties when the goods were delivered for carriage, a bill of lading for a purported intra-state shipment will not be presumed, without further evidence, to have issued for an interstate shipment.[97] There is no presumption that a transportation, when commenced, is to be continued beyond the state limits.[98]

b. Delivery of Goods

The burden is on the plaintiff to show delivery of the goods to the carrier.

In an action against a terminal carrier for loss of goods, the burden is on plaintiff to prove the delivery of the goods to the initial carrier.[99] The same rule applies in an action for delay.[1] It has also been held that the burden of proof is on plaintiff to establish the receipt of the goods by defendant unless some relation of agency or partnership or some special contract affects the status.[2]

c. Loss or Injury

(1) In actions against initial carrier
(2) In actions against intermediate carrier
(3) In actions against terminal carrier

(1) In Actions against Initial Carrier

In actions against the initial carrier the burden is on the plaintiff, according to some authorities, to show that the loss occurred while the property was in its custody; but there is also authority holding otherwise.

According to many decisions, in order to hold the initial carrier liable for loss of, or injury to, goods, the burden rests on plaintiff to show that the loss or injury occurred while the property was in its custody; or in other words, to show a failure to deliver the goods to the connecting carrier, or a delivery thereof in bad condition.[3] There is no presumption that injury or loss occurred while the goods were in the hands of the initial carrier,[4] nor against the initial carrier as to the line on which the damage occurred.[5] The rule is not affected by a statute providing that in case of loss of, or injury to, a shipment over connecting lines, the initial carrier shall, on demand, give satisfactory proof to the consignor that the loss or injury did not occur on its line, and that, if it fails to furnish such proof, it will itself be liable therefor, in cases where the consignor sues the initial carrier without making the demand provided for by the statute;[6] nor is it affected by a statute which provides that, where a railroad company contracts to carry goods beyond the terminus of its own line and stipulates that there shall be no liability for damages to property beyond its own terminus, it shall be held for any damage occurring to property, unless it proves that it was not liable therefor, in cases where there

92. Miss.—Illinois Cent R. Co. v. Rogers & Hurdle, 76 So. 686, 116 Miss. 99.

93. Tex.—A. L. Wolff & Co. v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 283 S.W. 250, affirmed, Com.App., 289 S.W. 1000.

94. U.S.—Nebraska Co-op Creameries v. Des Moines Transp. Co., D.C.Iowa, 16 F.Supp. 853.

95. S.C.—M. C. Johnson Motor Co. v. Payne, 107 S.E. 252, 116 S.C. 171.

96. Ill.—Wood & Co. v. Illinois Cent. R. Co., 240 Ill.App. 6.

97. Ga.—Taylor v. Central of Georgia Ry. Co., 121 S.E. 348, 31 Ga. App. 374.

98. Ga.—Taylor v. Central of Georgia Ry. Co., supra.

99. Ala.—Central of Georgia Ry. Co. v. Gillis Mule Co., 103 So. 906, 20 Ala.App. 535, certiorari denied Ex parte Central of Georgia Ry. Co., 103 So. 909, 212 Ala. 635.
N.C.—Riff v. Yadkin R. Co., 127 S.E. 588, 189 N.C. 585.
10 C.J. p 555 note 6.

1. Ill.—Mexican Import Co. v. Pennsylvania R. Co., 193 Ill.App. 26.

2. Ala.—Southern Express Co. v. Saks, 49 So. 392, 160 Ala. 621.
10 C.J. p 555 note 8.

3. Mass.—Emery & Co. v. Boston & M. R. R., 120 N.E. 106, 230 Mass. 463.
10 C.J. p 555 note 9.

4. Okl.—Lusk v. Durant Nursery Co., 232 P. 11, 73 Okl. 269.
10 C.J. p 528 note 80, p 555 note 10.

5. Ark.—St. Louis, etc., R. Co. v. Pearce, 101 S.W. 760, 82 Ark. 353, 118 Am.S.R. 75, 12 Ann.Cas. 125.

6. Okl.—Atchison, etc., R. Co. v. Rutherford, 120 P. 266, 29 Okl. 850.
10 C.J. p 555 note 12.

is no evidence of a through contract.[7] However, where it is shown that a portion of the damage was done by the initial carrier, it will be presumed to have caused the whole damage unless it submits proof to the contrary.[8] Where plaintiff has rebutted the presumption that the injury occurred on the line of the terminal carrier, and the intermediate carrier has shown that it was not responsible for the injury, it then devolves on the initial carrier to rebut any presumption of negligence arising from the circumstances.[9]

Nevertheless, in a number of decisions the view has been taken that, where an initial carrier is sued for loss or injury, the burden rests on it to show that such loss or injury did not occur on its line[10] and that proper care was exercised to prevent the loss.[11] So the first carrier, on proof by the owner of damage of the goods, has the burden of showing delivery in good order to the connecting carrier.[12] The rule, it has been said, is in no way affected by the presumption, as against a connecting carrier, that the goods were received in the same order as when received by the initial carrier;[13] nor is it affected by a statute which raises a presumption that injury to freight in possession of a carrier was caused by its negligence.[14] The initial carrier, however, is not bound to prove when, where, or by whose negligence the goods were lost;[15] and the rule does not apply where a shipper of live stock agrees to care for the stock while in transit and accompanies them for that purpose, because he is in a situation to know the facts, equal, if not superior, to that of the carrier.[16]

Neither the Carmack amendment[17] nor a state statute[18] which makes the initial carrier liable for loss or injury occurring on connecting lines as well as on its own, imposes upon the shipper the burden of establishing in a suit against the initial carrier whether the loss was caused by it or the connecting carrier. Where holders of bills of lading in an interstate shipment prove nondelivery of the goods to consignee, it is presumed that they have been lost by negligence of the carrier or its agents, and the burden of showing that the loss resulted from some cause for which the initial carrier was not responsible is on it.[19] However, where goods were reconsigned after termination of the liability of the initial carrier as such, the burden is on plaintiff to establish that the damage occurred while defendant was the initial carrier,[20] and where it is held, as stated supra § 406 a, that the initial carrier is not liable for any loss occurring while the delivering carrier is holding the goods as warehouseman, in an action against the initial carrier for loss of goods alleged to have been removed from a car while in the hands of the delivering carrier, the burden is on plaintiff to prove that the loss occurred while the delivering carrier held the goods as

7. Iowa. — McManus v. Chicago Great Western R. Co., 115 N.W. 919, 138 Iowa 150, 128 Am.S.R. 180.

8. Ga.—Cincinnati, etc., R. Co. v. Pless, 60 S.E. 8, 3 Ga.App. 400.

9. Tex.—Ft. Worth, etc., R. Co. v. Shanley, 81 S.W. 1014, 36 Tex.Civ. App. 291.

Shipment over two lines

The rule of the text is applicable where the shipment is over only two lines and negligence on the part of the delivering carrier is expressly negatived.—Southeastern Express Co. v. Fry Produce Co., 2 Tenn.App. 37.

10. Ohio. — Pennsylvania Co. v. Quinby, 7 Ohio App. 197.
10 C.J. p. 555 note 16.

11. Ohio. — Pennsylvania Co. v. Quinby, 7 Ohio App. 197.

12. U.S.—Inland Waterways Corporation v. Standard Commercial Tobacco Co., C.C.A.La., 65 F.2d 715.

13. Ala.—Central of Georgia R. Co. v. Chicago Varnish Co., 53 So. 832, 169 Ala. 287.

14. N.C.—Meredith v. Seaboard Air Line R. Co., 50 S.E. 1, 137 N.C. 478.

15. Pa.—American Express Co. v. Titusville Second Nat. Bank, 69 Pa. 394, 8 Am.R. 268.

16. Tex.—St. Louis Southwestern R. Co. v. Vaughan, Civ.App., 41 S.W. 415.

17. U.S.—Chicago & E. I. R. Co. v. Collins Produce Co., Ill., 235 F. 857, 149 C.C.A. 169, affirmed 39 S. Ct. 189, 249 U.S. 186, 63 L.Ed. 552. "The first claim is that the court refused to rule, that by its terms, the Carmack Amendment (Act June 29, 1906, chap. 3591, sec. 7, pars. 11, 12, 34 Stat. 595 [Comp.St. §§ 8604a, 8604aa]) casts upon the shipper the burden of proving affirmatively that the loss which occurred on a connecting line was 'caused by' the connecting carrier. But, assuming that the question is presented by the record, which is doubtful, Galveston, Harrisburg & San Antonio Ry. Co. v. Wallace, 32 S.Ct. 205, 223 U.S. 481, 491, 56 L.Ed. 516, rules that, under the act as construed in Atlantic Coast Line R. R. Co. v. Riverside Mills, 31 S.Ct. 164, 219 U.S. 186, 205, 206, 55 L.Ed. 167, 31 L.R.A.,N.S., 7, in such a case as we have here the liability of the initial carrier is as if the shipment had been between stations in different states, but both upon its own line, and this renders the contention untenable."—Chicago & E. I. R. Co. v. Collins Produce Co., 39 S.Ct. 189, 190, 249 U.S. 186, 63 L.Ed. 552, affirming 235 F. 857, 149 C.C.A. 169.

18. Ga.—Atlanta & West Point R. Co. v. Fairburn Marble Co., 89 S.E. 817, 145 Ga. 708.

19. U.S.—Galveston, H. & S. A. Ry. Co. v. Wallace, Tex., 32 S.Ct. 205, 223 U.S. 481, 56 L.Ed. 516.
Ark.—Missouri Pac. R. Co. v. Bell, 259 S.W. 745, 163 Ark. 284, certiorari denied 45 S.Ct. 125, 266 U.S. 625, 69 L.Ed. 474.
Mo.—Randazzo Macaroni Mfg. Co. v. Minneapolis & St. L. R. Co., App., 251 S.W. 466.
N.H.—Ostroff v. Hustis, 114 A. 27, 80 N.H. 141.
Tex.—Texas & N. O. R. Co. v. Dingfelder & Balish, Civ.App., 114 S.W. 2d 666, error granted.
Va.—Chesapeake & O. Ry. Co. of Indiana v. National Bank of Commerce of Norfolk, 95 S.E. 454, 122 Va. 471, certiorari denied 38 S.Ct. 582, 247 U.S. 519, 62 L.Ed. 1246.

20. Ill.—Wenatchee Valley Fruit Growers Ass'n v. Michigan Cent. R. Co., 215 Ill.App. 129.

carrier.[21] In an action by the indorsee of a negotiable bill of lading covering an interstate shipment against the initial carrier for wrongful delivery, the indorsee must prove delivery by the shipper to the carrier, and his receipt of an order bill of lading, the indorsement and transfer thereof to plaintiff for value, the delivery of the car by defendant without requiring the production and surrender of the bill, and the consequent damage.[22]

(2) In Actions against Intermediate Carrier

The burden is on the plaintiff suing an intermediate carrier to establish prima facie the latter's responsibility for the loss, and when he does so the burden of going forward with the evidence shifts to the carrier.

In an action against an intermediate carrier, the burden is on plaintiff to show that such carrier received the goods in sound condition and that loss or injury happened to them while in its possession,[23] or at least to raise a presumption to that effect by showing that the loss was not suffered while the goods were in the possession of a subsequent carrier,[24] and this rule is applicable in an action against the last railroad carrier when the goods were not delivered directly to plaintiff but through a transfer company.[25] It has been held, however, that where there was evidence of the good condition of a shipment when loaded on the car of an intermediate carrier, the burden was on such carrier to prove that the shipment continued in the same good condition as when received until it had been delivered to the next carrier.[26] The rule stated infra subdivision (3) that where the goods were received by the initial carrier in good condition and delivered to the consignee in damaged condition the burden is on the terminal carrier to prove that they were not injured while in its possession does not apply to intermediate carriers;[27] but where live stock dies while in custody of the intermediate carrier a presumption sufficient to put that line to an explanation of the circumstances arises,[28] and, furthermore, where plaintiff has rebutted the presumption that the injury occurred on the line of the terminal carrier, the presumption then is that the damage occurred on the line of the next preceding carrier,[29] and it devolves on the latter, in order to escape liability, to show that it was not responsible for the injuries.[30] Where the intermediate carrier is shown to have delivered the goods to the terminal carrier in bad condition, it will be presumed that, on receipt of the goods by it from the initial carrier, they were in the same condition as when delivered to the initial carrier.[31]

(3) In Actions against Terminal Carrier

While the burden is on the plaintiff to show delivery in good condition to the initial carrier and arrival at destination in damaged condition, or loss, when these facts are shown a presumption arises against the terminal carrier and the burden is cast upon it to prove that it was not responsible for the loss.

In an action against the terminal carrier for loss or injury to goods, the burden is on plaintiff to show that the goods were in good condition when delivered to the initial carrier,[32] and that the goods were lost, diverted, or injured while in defendant's custody at or before their arrival at their destina-

21. Ky.—Illinois Cent. R. Co. v. Stimson, 268 S.W. 835, 207 Ky. 78.

22. Conn.—Alderman Bros. Co. v. New York, N. H. & H. R. Co., 129 A. 47, 102 Conn. 461.

23. Ky.—Southern Ry. Co. v. Avey, 191 S.W. 460, 173 Ky. 598.
N.Y.—Losecco v. Canadian Express Co., 199 N.Y.S. 80
10 C.J. p. 556 note 22
"Where the suit is against a connecting carrier, and not against the initial carrier, of an interstate shipment, it is incumbent upon the plaintiff to allege and prove that the loss and damage to his shipment were caused by the negligence of the defendant according to the law in existence prior to the enactment of the Carmack Amendment"—Pennington v. Grand Trunk Western Ry. Co., 115 N.E. 170, 171, 277 Ill. 39.

24. Ill.—Neuman v. Chicago & N. W. Ry. Co., 216 Ill.App. 387.

25. Ill.—Neuman v. Chicago & N. W. Ry. Co., supra
Reason for rule
'Where the last railroad carrier delivers a shipment of goods to a local drayman who receives the goods from the railroad and delivers them to the consignee, and especially where the drayman is the agent of the latter, as was the situation in the case at bar, the source of evidence, which may prove whether the blame for the shortage or damage complained of rests with the drayman, is quite as accessible to the consignee as to the railroad, if not more so"—Neuman v. Chicago & N. W. Ry. Co., 216 Ill.App. 387, 391.

26. N.C.—Produce Trading Co. v. Norfolk Southern R. Co., 100 S.E. 316, 178 N.C. 175.

27. Ala.—Lynn v. Mellon, 114 So. 680, 217 Ala. 75.
S.C.—Smith v. Southern Ry. Co., 113 S.E. 465, 121 S.C. 94.

28. S.C.—Smith v. Southern Ry. Co., supra.

29. Minn.—Hansen-Peterson Co. v. Atchison, T. & S. F. Ry. Co., 205 N.W. 605, 165 Minn. 43.

30. Tex.—Crenwelge v. Ponder, Com.App., 228 S.W. 145, reversing Ponder v. Crenwelge, Civ.App., 203 S.W. 1125.
10 C.J. p. 556 note 23.

31. Wis.—Stolze v. Ann Arbor R. Co., 134 N.W. 376, 148 Wis. 205.
10 C.J. p. 556 note 24

32. Ind.—Pittsburgh, C. C. & St. L. R. Co. v. Larosa, 131 N.E. 22, 75 Ind.App. 475
La.—Hall v. Houston E. & W. T. Ry. Co., 121 So. 769, 9 La.App. 577, 582.
N.J.—Kaufherr & Co. v. Pennsylvania R. Co., 174 A. 27, 12 N.J.Misc. 542
Ohio.—Cincinnati Machinery & Supply Co. v. Erie R. Co., 178 N.E. 26, 40 Ohio App. 99
S.C.—Copeland Co. v. Davis, 119 S.E. 19, 125 S.C. 449
Tex.—Lancaster v. Norris, Civ.App., 271 S.W. 401, judgment reversed on other grounds Norris v. Lancaster, Com.App., 280 S.W. 574.
10 C.J. p. 556 note 26.

tion.[33] However, except where the rule has been modified by statute,[34] it is generally held that on proof of delivery to the first carrier in good condition and receipt by the terminal carrier without objection it will be presumed in an action against the terminal carrier that the goods were still in the condition in which they were received by the initial carrier, and if they are injured or deficient in quantity, the burden is on the terminal carrier to show that such loss or injury did not result from any cause for which it was responsible.[35] Furthermore, although this extension of the doctrine has been

33. Ala.—Louisville & N. R. Co. v. Lynne, 71 So. 338, 196 Ala. 21.
Ind.—Pittsburgh, C. C. & St. L. R. Co. v. Larosa, 131 N.E. 22, 75 Ind. App. 475.
Ky.—Makeever v. Georgia Southern & F. Ry. Co., 291 S.W. 144, 219 Ky. 699.
Minn.—Hansen-Peterson Co. v. Atchison, T. & S. F. Ry. Co., 205 N. W. 605, 165 Minn. 43.
Mo.—Krallman v. Illinois Cent. R. Co., 235 S.W. 830, 209 Mo.App. 286.
N.Y.—Yatter v. Mathies, 246 N.Y.S. 548, 139 Misc. 26.
N.C.—Riff v. Yadkin R. Co., 127 S.E. 588, 189 N.C. 585.
S.D.—J. F. Anderson Lumber Co. v. Chicago & N. W. Ry. Co., 226 N. W. 273, 55 S.D. 305.
10 C.J. p. 556 note 26.

Corpus Juris is cited with approval in C. C. Whitnack Produce Co. v. Chicago & N. W. Ry. Co., 178 N.W. 177, 178, 104 Neb. 587, certiorari granted Chicago & N. W. Ry. Co. v. C. C. Whitnack Produce Co., 41 S.Ct. 15, 254 U.S. 625, 65 L.Ed. 445, affirmed 42 S.Ct. 328, 258 U.S. 369, 66 L.Ed. 665.

34. Mo.—Crockett v. St. Louis, etc., R. Co., 126 S.W. 243, 147 Mo.App. 347.
10 C.J. p. 556 note 28 [a].

35. U.S.—Chicago & N. W. Ry. Co. v. C. C. Whitnack Produce Co., Neb., 42 S.Ct. 328, 258 U.S. 369, 66 L.Ed. 665.
Ala.—Southern Ry. Co. v. J. H. White Mercantile Co., 93 So. 395, 207 Ala. 520—Louisville & N. R. Co. v. Lynne, 71 So. 338, 196 Ala. 21—Central of Georgia Ry. Co. v. Gillis Mule Co., 103 So. 906, 20 Ala. App. 535, certiorari denied Ex parte Central of Georgia Ry. Co., 103 So. 909, 212 Ala. 635.
Ark.—St. Louis, I. M. & S. Ry. Co. v. Davis, 185 S.W. 478, 123 Ark. 619.
Ga.—Central of Georgia Ry. Co. v. Clark Milling Co., 149 S.E. 77, 40 Ga.App. 113—Illinois Cent. R. Co. v. Banks, 122 S.E. 85, 31 Ga.App. 756—Barron Bros. v. New York, N. H. & H. R. Co., 122 S.E. 83, 31 Ga.App. 757—Lewis v. Joyner, 113 S.E. 329, 29 Ga.App. 92—Central of Georgia Ry. Co. v. Scrivens, 100 S.E. 233, 24 Ga.App. 177—Southern Ry. Co. v. Waxelbaum Produce Co., 90 S.E. 987, 19 Ga.App. 64.
Ill.—Freedman v. Erie R. Co., 246 Ill. App. 479.
Ind.—Mascari v. New York, C. & St. L. R. Co., 183 N.E. 913, 97 Ind. App. 27—Pittsburgh, C. C. & St. L. R. Co. v. Larosa, 131 N.E. 22, 75 Ind.App. 475.
Iowa.—Dye Produce Co. v. Davis, 209 N.W. 744, 202 Iowa 1003—E. H. Emery & Co. v. Wabash R. Co., 166 N.W. 600, 183 Iowa 687—Erisman v. Chicago, B. & Q. R. Co., 163 N.W. 627, 180 Iowa 759.
Ky.—E. J. O'Brien & Co. v. Davis, 288 S.W. 682, 216 Ky. 693—Louisville & N. R. Co. v. Schaeffer, 280 S.W. 974, 213 Ky. 248—McArthur v. Payne, 258 S.W. 684, 201 Ky. 793.
La.—Snowden v. Tremont & G. Ry. Co., App., 140 So. 122.
Me.—Goldberg v. New York, N. H. & H. R. Co., 153 A. 812, 130 Me. 96.
Md.—Pennsylvania R. Co. v. Walker, 128 A. 45, 147 Md. 323.
Mass.—Goodman v. New York, N. H. & H. R. Co., 3 N.E.2d 777—Lyon v. Boston & M. R. R., 158 N.E. 663, 261 Mass. 251.
Minn.—Hansen-Peterson Co. v. Atchison, T. & S. F. Ry. Co., 205 N. W. 605, 165 Minn. 43.
Miss.—Illinois Cent. R. Co. v. Mahon Live Stock Co., 71 So. 802, 111 Miss. 496.
Mo.—State ex rel. and to Use of St. Louis, B. & M. Ry. Co. v. Taylor, 251 S.W. 383, 298 Mo. 474, certiorari granted State of Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor, 44 S.Ct. 132, 263 U.S. 696, 68 L.Ed. 511, affirmed 45 S.Ct. 47, 266 U.S. 200, 69 L.Ed. 247, 42 A.L.R. 1232—Detmer, Bruner & Mason v. New York Cent. R. Co., 80 S.W. 2d 222, 229 Mo.App. 702, transferred, Sup., 72 S.W.2d 984—American Fruit Growers v. Cleveland, C. C. & St. L. Ry. Co., App., 263 S.W. 488—Block Bros. Clothing Co. v. Missouri Pac. R. Co., App., 253 S.W. 35—Johnson v. Missouri Pac. R. Co., 249 S.W. 658, 211 Mo.App. 564—Letner v. Missouri Pac. R. Co., App., 249 S.W. 155—Zerilli v. Ross, App., 198 S.W. 487—Equity Elevator Co. v. Union Pac. R. Co., App., 191 S.W. 1067.
N.Y.—Caruso-Rinella-Battaglia Co. v. New York Cent. R. Co., 226 N.Y.S. 308, 222 App.Div. 371—Remington v. Barrett, 188 N.Y.S. 174, 196 App. Div. 838—Yatter v. Mathies, 246 N.Y.S. 548, 139 Misc. 26.
N.C.—Reidsville Paper Box Co. v. Southern Ry., 99 S.E. 23, 177 N.C. 351.
Ohio.—Erie R. Co. v. Bender, Streibig & Co., 163 N.E. 50, 29 Ohio App. 262—Barron, Boyle & Co. v. Cleveland, C., C. & St. L. Ry. Co., 8 Ohio N.P.,N.S., 517, affirmed 80 Ohio St. 707, 11 Ohio Cir.Ct.R.,N.S., 602, 21 Ohio Cir.Dec. 142, 54 Wkly.L.Bul. 110.
Okl.—Lusk v. Durant Nursery Co., 232 P. 11, 73 Okl. 269—Oklahoma N. M. & P. Ry. Co. v. H. M. S. Drilling Co., 229 P. 420, 100 Okl. 260—Witchita Falls & N. W. Ry. Co. v. Benton, 167 P. 633, 66 Okl. 114—St. Louis & S. F. R. Co. v. Akard, 159 P. 344, 60 Okl. 4.
Or.—United Brokers' Co. v. Southern Pac. Co., 169 P. 114, 86 Or. 607, Ann.Cas.1918D 814.
Pa.—Harry E. Jackson Co. v. Pennsylvania R. Co., 172 A. 20, 113 Pa. Super. 535—Wray, Moore & Co. v. American Ry. Express Co., 75 Pa. Super. 425—Pottash v. Director General of Railroads, 3 Pa.Dist. & Co. 387.
S.C.—M. H. Felder & Co. v. Atlantic Coast Line R. Co., 165 S.E. 730, 167 S.C. 59—Copeland Co. v. Davis, 119 S.E. 19, 125 S.C. 449—Nimmer v. Northwestern R. Co., 107 S.E. 479, 116 S.C. 190—People's Hardware Co. v. Raleigh & C. R. Co., 107 S.E. 146, 116 S.C. 145.
S.D.—J. F. Anderson Lumber Co. v. Chicago & N. W. Ry. Co., 226 N. W. 273, 55 S.D. 305.
Tex.—Burd v. San Antonio Southern Ry. Co., Com.App., 261 S.W. 1021, modifying San Antonio Southern Ry. Co. v. Burd, Civ.App., 246 S.W. 1060—Crenwelge v. Ponder, Com. App., 228 S.W. 145, reversing Ponder v. Crenwelge, Civ.App., 203 S.W. 1125—Lancaster v. Norris, Civ. App., 271 S.W. 401, reversed on other grounds Norris v. Lancaster, Com.App., 280 S.W. 574—Davis v. Brooks Supply Co., Civ.App., 239 S.W. 628—Houston & T. C. R. Co. v. Reichardt & Schulte Co., Civ.App., 212 S.W. 208.
Va.—Chesapeake & O. Ry. Co. v. W. C. Crenshaw & Co., 137 S.E. 515, 147 Va. 290—Southern Ry. Co. v. Russell, 112 S.E. 700, 133 Va. 292.
10 C.J. p. 528 note 80, p. 556 note 29.

Corpus Juris has been cited with approval.
Neb.—C. C. Whitnack Produce Co. v. Chicago & N. W. Ry. Co., 178 N. W. 177, 178, 104 Neb. 587, certiorari granted Chicago & N. W. R. Co. v. C. C. Whitnack Produce Co., 41 S.Ct. 15, 254 U.S. 625, 65 L.Ed. 445, affirmed 42 S.Ct. 328, 258 U.S. 369, 66 L.Ed. 665.

declared to be unsound,[36] and although it has been held that the legal presumption does not arise in the absence of pleading or proof that the goods involved in the suit were in good condition when they were shipped,[37] many decisions have materially extended the rule and hold in effect that, if the goods are delivered by the terminal carrier in damaged condition or deficient in quantity, the presumption arises without further evidence that the loss or injury occurred while the goods were in the hands of the terminal carrier; in other words, the double presumption will be entertained that the goods were accepted in good condition by the initial carrier and that all the goods accepted were received by the terminal carrier in good condition, irrespective of the number of intermediate lines over which they were transported, thereby placing on it the burden of showing that the loss or injury was not the result of any cause for which it was responsible; but whichever of the two presumptions is entertained, the operation and effect will be the same.[38] The presumption is sufficient standing alone and in the absence of other testimony to sustain a verdict for plaintiff.[39] The presumption is not conclusive, however, and casts no absolute liability on the last carrier but simply imposes on it the burden of exonerating itself in order to escape liability,[40] it being sufficient for that purpose.[41] In the absence of statute providing otherwise, it is at most merely a presumption of fact which may be

Tenn.—M. Lewis & Sons v. Illinois Cent R. Co., 259 S.W. 903, 150 Tenn. 94.

In Michigan

(1) The general rule is disapproved, and the rule adopted that, where goods are transported by successive carriers and an action is brought against the terminal carrier for damage to the goods, it is not enough to show that the goods were delivered to the initial carrier in good condition, but it is incumbent on plaintiff to show that they were in good order when received by defendant.—Rolfe v. Lake Shore, etc, R. Co, 107 N.W. 899, 144 Mich. 169, 115 Am.S.R. 388—10 C.J. p 556 note 27 [a].

(2) However, the rule stated in the text was applied in this jurisdiction in a case controlled by the Carmack amendment—Ginsberg v. Wabash Ry. Co., 193 N.W. 286, 222 Mich. 560, affirming H. Ginsberg & Sons v. Wabash Ry Co, 189 N.W. 1018, 219 Mich. 665, 28 A.L.R. 518.

Carriers sued jointly

(1) Terminal carrier, sued jointly with initial carrier for damage to shipment not accompanied by shipper, has burden of showing where injury occurred.—Louisville & N R Co v Schaeffer, 280 S.W. 974, 213 Ky 248

(2) So, while the general burden is on the shipper to show damage to the shipment in transit, he is not under any obligation to allocate this damage or, in other words, to show how much was done by one defendant and how much by another. When he shows the receipt by the initial carrier of the goods in good condition, that no one accompanied them, and that they were delivered in bad order, he has met the burden imposed on him, and the burden is then on defendants to determine as among themselves, by evidence, just which one or ones of them may be responsible for the injury.—Makeever v. Georgia Southern & F. Ry. Co., 294 S.W. 144, 219 Ky 699.

Proof of carrier's negligence

Where evidence showed some negligence by terminal carrier resulting in damage to interstate potato shipment, carrier had burden of showing cause of part of loss for which it denied liability—Beaumont, S L. & W. R. Co. v. Farmers' Co-op. Sweet Potato Curing Co. of Rosepine, La., Tex.Civ.App., 298 S.W. 454.

38. Ind—Pittsburgh, C., C. & St L. R Co v Larosa, 131 N.E. 22, 75 Ind.App. 475.

37. La.—Snowden v. Tremont & G. Ry. Co., App., 140 So. 122—Hall v. Houston E. & W. T. Ry. Co., 121a So. 769, 9 La.App 577, 582.
Me.—Goldberg v. New York, N. H. & H. R. Co., 153 A. 812, 130 Me. 96.
Mo.—Krallman v Illinois Cent. R. Co, 235 S.W. 830, 209 Mo.App. 286.

Loss in transit

"Before a plaintiff is entitled to the benefit of the presumption or rule of law hereinbefore stated, the burden is upon him to show in the first place that the loss occurred while in transit, and without this proof he cannot recover."—Block Bros Clothing Co v. Missouri Pac. R. Co, Mo.App, 253 S.W. 35, 36 To same effect Detmer, Bruner & Mason v New York Cent. R. Co., 80 S.W. 2d 222, 227, 229 Mo.App. 702, transferred, Sup., 72 S.W 2d 984.

Presumption based on presumption

Proof of the contents of a trunk and their value at the time of delivery of trunk to hotel keeper without proof thereof at time of delivery by hotel keeper to initial carrier does not create presumption as to such contents and their value at time of delivery by initial carrier to final carrier, since such presumption would be based upon the presumption that trunk at time of delivery to initial carrier contained same articles as at time of delivery to hotel keeper.—Johnson v. Western Express Co., 181 P. 693, 107 Wash. 339.

38. U.S.—Julius Klugman's Sons v. Oceanic Steam Nav. Co., D.C.N.Y., 42 F.2d 461.
Ark.—Chicago R. I. & P. Ry. Co. v. George E. Shelton Produce Co., 291 S.W. 428, 172 Ark. 1017—Missouri Pac. R. Co. v. American Fruit Growers, 260 S.W. 39, 163 Ark 318—St. Louis, I. M. & S Ry. Co v. Cunningham Commission Co, 188 S.W. 1177, 125 Ark 577—St. Louis, I M. & S Ry. Co. v. Davis, 185 S.W. 478, 123 Ark. 619.
Conn.—Cassone v. New York, N H. & H R. Co., 123 A. 280, 100 Conn. 262.
Okl.—Clinton & O. W R Co. v. Smith, 254 P 702, 124 Okl 75.
10 C.J. p 557 note 30.

39. Ga.—Barron Bros v. New York, N H & H. R Co., 122 S.E 83, 31 Ga.App. 757.
Ill.—Freedman v. Erie R. Co., 246 Ill. App. 479
Ky.—E J O'Brien & Co. v. Davis, 288 S.W 682, 216 Ky. 693.
N.Y.—Remington v. Barrett, 188 N. Y.S. 174, 196 App.Div. 838.
Va.—Chesapeake & O. Ry. Co v. W. C Crenshaw & Co., 137 S.E. 515, 147 Va. 290
10 C.J. p 558 note 33

When other allegations supported

Presumption that goods delivered in good condition to initial carrier were in good condition when received by connecting carrier is not conclusive; but without competent proof rebutting the presumption, and showing that goods were not in good condition when so received, evidence is sufficient, on proof of other material allegations of petition, to support verdict against connecting carrier.—Central of Georgia Ry. Co v. Scrivens, 100 S.E. 233, 24 Ga.App. 177.

40. Wis.—Stolze v Ann Arbor R. Co., 134 N.W. 376, 148 Wis. 205.

41. Conn.—Cassone v New York, N. H. & H. R. Co., 123 A. 280, 100 Conn. 262.

rebutted,[12] and when it is shown that the act of the terminal carrier did not occasion the injury complained of, it is rebutted,[43] or, according to some decisions, which give the same net result, does not arise.[44] However the presumption cannot be overcome by proving a prevailing custom that the goods were not considered as delivered to the second carrier until a record showing the delivery was made on the books by the authorized agent.[45] Notwithstanding a statute which provides that the last company which received the goods as "in good order" shall be responsible to the consignee for any damage, open or concealed, done to the goods, the mere production of a receipt which is silent on the subject does not rebut the presumption that the goods were received in good order.[46] Furthermore, it has been held that, where goods were delivered in a damaged condition, proof that, before delivery to the last carrier, the car was in bad condition so that the goods were transferred to another is not sufficient to rebut the presumption of negligence which rests on the last carrier.[47]

Reasons for rule. Several reasons have been assigned for the rule. As stated in Corpus Juris, which has been quoted with judicial approval,[48] one reason is that the presumption is necessary to preserve the shipper's rights, since the carrier, and not he, has control of the goods and is in a much better position to prove their condition at the time it received them than is the owner.[49] Another reason assigned is that the law presumes a fact, continuous in its nature, to continue until the contrary appears.[50] Another reason is that it is within the power of the carrier to protect itself from responsibility for loss or injury occurring prior to its reception of the property by an inspection of its condition at the transfer point,[51] and that it will be presumed prima facie that if the shipment had not been in good order the carrier would have refused

42. Conn.—Cassone v. New York, N. H. & H R. Co., 123 A. 280, 100 Conn 262
La.—Snowden v. Tremont & G. Ry. Co, App, 140 So 122.
Mass.—Lyon v. Boston & M. R. R., 158 N.E. 663, 261 Mass. 251
Okl.—Wichita Falls & N. W. Ry. Co v. Benton, 167 P. 633, 66 Okl. 114.
Va.—Chesapeake & O. Ry. Co. v W. C. Crenshaw & Co., 137 S E. 515, 147 Va. 290.
10 C.J. p 558 notes 35, 36.

43. Mass—Lyon v Boston & M. R R. 158 N E. 663, 261 Mass. 251.
S C—Southern Textile Machinery Co v. Piedmont & N. Ry. Co., 103 S E 475, 114 S C. 141.
10 C.J p 558 note 37.

Evidence rebutting presumption

(1) The presumption that damage to interstate shipment was caused by last carrier may be rebutted by showing that damage occurred on connecting carrier's line, that the goods were received in a damaged condition, and that defendant was not at fault.—Lyon v. Boston & M. R. R., 158 N.E. 663, 261 Mass. 251.

(2) And the presumption that injury to live stock occurred on line of delivering carrier is rebutted by evidence showing that the stock when received by it was in bad condition—Wichita Falls & N. W Ry Co. v. Benton, 167 P. 633, 66 Okl 114

(3) So the presumption is rebutted by proof that nothing occurred likely to cause damage while shipment was in possession of the delivering carrier.—Snowden v Tremont & G Ry. Co, La App, 140 So. 122.

(4) The presumption is rebutted by proof of the delivering carrier that it did not receive the shipment from the intermediate carrier or that the loss occurred at the terminal after arrival of the goods—Oklahoma N M & P. Ry Co v. H M S Drilling Co, 229 P. 420, 100 Okl. 260

(5) Where grapes were shipped in a refrigerator car, using the ventilator process, evidence as to the condition of the car when received by defendant, long time of transportation before delivery to it, the few hours it was in transportation over defendant's line, and extent of decay of grapes when car was opened, was held to rebut the presumption that the terminal carrier received them in good order and that the injury occurred while in its control.—Cassone v. New York, N H & H. R. Co, 123 A. 280, 100 Conn. 262.

(6) Other illustrations see 10 C.J. p 558 note 37 [a].

44. Ark.—St. Louis, etc, R. Co. v. Renfroe, 100 S W. 889, 82 Ark 143, 118 Am S R. 58, 10 L R.A.,N S, 317.
10 C J. p 558 notes 38, 39.

45. Ark—Kansas City Southern R Co. v. Embry, 90 S.W. 15, 76 Ark. 589.

46. Ga.—Georgia R, etc, Co. v. Forrester, 23 S E. 416, 96 Ga. 428

47. Ill.—Ruddell v. Baltimore, etc, R. Co, 175 Ill.App. 456.

48. Neb.—C. C. Whitnack Produce Co v Chicago & N W. Ry. Co, 178 N.W. 177, 178, 104 Neb. 587, certiorari granted Chicago & N. W Ry Co. v C. C. Whitnack Produce Co, 41 S Ct. 15, 254 U S 625, 65 L Ed 445, affirmed 42 S.Ct. 328, 258 U.S 369, 66 L Ed 665.

49. Ark.—Missouri Pac. R. Co. v American Fruit Growers, 260 S.W. 39, 40, 163 Ark. 318

Ill—Neuman v Chicago & N W. Ry. Co, 216 Ill.App 387
Ind.—Pittsburgh, C C & St L R. Co. v Larosa, 131 N E 22, 75 Ind. App 475.
Okl.—Oklahoma N M. & P. Ry Co v. H M S. Drilling Co, 229 P. 420, 100 Okl. 260—St Louis & S. F R Co. v. Akard, 159 P. 344, 60 Okl 4
S D.—J F. Anderson Lumber Co. v. Chicago & N W Ry. Co, 226 N. W. 273, 55 S.D 305
10 C J p 559 note 43.

"The reason which the courts have given for raising the presumption which places the burden of proof on the carrier to clear itself of the charge of negligence is that the carrier has the best, and oftentimes the only, opportunity to determine when and how the injury occurred"—Missouri Pac R Co. v. American Fruit Growers, supra

50. Ala.—Southern Ry Co v. J. H. White Mercantile Co., 93 So. 395, 207 Ala. 520
Minn.—Hansen-Peterson Co v. Atchison, T & S F. Ry Co, 205 N W. 605, 165 Minn 43.
N Y—Caruso-Rinella-Battaglia Co v. New York Cent R Co, 226 N Y S. 308, 222 App Div 371
Tenn—M Lewis & Sons v. Illinois Cent. R Co., 259 S W. 903, 150 Tenn. 94.

51. Ill—Neuman v. Chicago & N W Ry. Co, 216 Ill.App. 387.
Neb—C C Whitnack Produce Co. v. Chicago & N. W Ry. Co., 178 N W. 177, 104 Neb 587, certiorari granted Chicago & N W Ry. Co. v. C C Whitnack Produce Co, 41 S Ct 15, 254 U.S 625, 65 L.Ed. 445, affirmed 42 S.Ct. 328, 258 U S. 369, 66 L Ed 665.
10 C J. p 559 note 44.

to receive it otherwise than as in bad order;[52] but, as is shown hereafter, the presumption applies, although the goods were shipped in sealed cars or in packages, or were shipped in bond, preventing inspection, and hence this latter reason is not entitled to much weight.[53]

Extent and limits of rule. The rule applies to transfer companies as well as to other common carriers,[54] and, although there is authority to the contrary,[55] to shipments of perishable goods[56] or live stock,[57] as well as to other shipments. The fact that the goods were concealed in boxes or packages will not affect the operation of the rule;[58] nor is its operation affected by the fact that the merchandise was shipped through in sealed cars without opportunity for the carrier to examine the goods;[59] and a fortiori the rule applies where the agent of the carrier has an opportunity, before sealing the car, to verify the waybill by ascertaining the contents of the car by an inspection.[60] So the rule applies whether the goods are passed over all the lines on the same car or at any terminal point are transferred from the car of one line to that of another,[61] and it makes no difference whether the goods go all the way on the same bill of lading or how often new ones are substituted on the way.[62] The presumption is not prevented from attaching by the fact that the goods could not be inspected when received by the terminal carrier because shipped in bond.[63] The operation of the rule is not affected by the fact that the shipment was made under a contract limiting the liability of the carrier to injuries occurring on its own line,[64] nor by the fact that the owner or consignee diverts the shipment while in transit,[65] although it has been held that the rule does not apply where the original contract ended before the goods were reconsigned over defendant's lines so that under the new contract defendant was the initial as well as the terminal carrier.[66] The application of the presumption is not prevented by the circumstance that the initial carrier was a steamship company and conducted its business on the water[67] or by the fact that the goods were transported from the wharf of the initial carrier to the freight station of the delivering carrier by a truckman.[68] So it has been held that the rule is not changed by a statute providing that, under a contract for shipment of freight between two or more common carriers the responsibility of

52. Neb.—C. C. Whitnack Produce Co. v. Chicago & N. W. Ry. Co., supra.
10 C.J. p. 559 note 45.

53. Wis.—Stolze v. Ann Arbor R. Co., 134 N.W. 376, 148 Wis. 205.
10 C.J. p. 559 note 55.

54. Tex.—Texas, etc., R. Co. v. Capper, 84 S.W. 694, 38 Tex.Civ.App. 61.

Effect on initial carrier

Carrier, under presumption that loss occurred during control of last custodian, is not liable for shortage in box of furs successively in custody of ocean carrier, truckman, and warehouseman.—Julius Klugman's Sons v. Oceanic Steam Nav. Co., D.C.N.Y., 42 F.2d 461.

55. Pa.—Harry E. Jackson Co. v. Pennsylvania R. Co., 172 A. 20, 21, 112 Pa.Super. 535.

"The rule is confined to ordinary merchandise, which does not deteriorate from a cause not within the control of the carrier. It has no application to perishable goods shipped under a contract which expressly relieves the carrier of the duty of examining or replenishing the bunkers with ice while in transit."—Harry E. Jackson Co. v. Pennsylvania R. Co., supra.

56. Conn.—Cassone v. New York, N. H. & H. R. Co., 123 A. 280, 100 Conn. 262.
10 C.J. p. 559 note 48.

57. S.C.—Walker v. Southern R. Co., 56 S.E. 952, 76 S.C. 308—Jones v. Southern R. Co., 56 S.E. 666, 76 S.C. 67

Tex.—Galveston, etc., R. Co. v. Jones, Civ.App., 123 S.W. 737.

58. Mass.—Bullock v. Haverhill, etc., Dispatch Co., 72 N.E. 256, 187 Mass. 91—Moore v. New York, etc., R. Co., 53 N.E. 816, 173 Mass. 335, 73 Am.S.R. 298.

N.C.—Morganton Mfg. Co. v. Ohio, etc., R. Co., 28 S.E. 474, 121 N.C. 514, 61 Am.S.R. 679.
10 C.J. p. 559 note 50.

59. Tex.—Houston & T. C. R. Co. v. Reichardt & Schulte Co., Civ.App., 212 S.W. 208.
10 C.J. p. 559 note 51.

60. R.I.—Podrat v. Narragansett Pier R. Co., 78 A. 1041, 32 R.I. 255.

61. Ga.—Central R. Co. v. Rogers, 66 Ga. 251.

62. Ga.—Central R. Co. v. Rogers, supra.

Issuance of new bill of lading by carrier delivering goods, which was not issued to either original consignor or original consignee, did not affect liability of carrier as delivering carrier under presumption that damage to goods carried over connecting lines was occasioned by last carrier.—Goodman v. New York, N. H. & H. R. Co., Mass., 3 N.E.2d 777.

63. Wis.—Stolze v. Ann Arbor R. Co., 134 N.W. 376, 148 Wis. 205.
10 C.J. p. 559 note 55

64. Ala.—Walter v. Alabama Great Southern R. Co., 39 So. 87, 142 Ala. 474.

65. Ill.—Ruddell v. Baltimore, etc., R. Co., 175 Ill.App. 456.

66. S.C.—M. H. Felder & Co. v. Atlantic Coast Line R. Co., 165 S.E. 730, 167 S.E. 59.

No through contract

Where evidence showed that shipment of potatoes over steamship from Boston to Savannah, Ga., and thence to Orangeburg, S. C., over railroad which delivered damaged potatoes, was not through shipment, plaintiff had burden of showing potatoes were sound when delivered to railroad.—M. H. Felder & Co. v. Atlantic Coast Line R. Co., S.C., 165 S.E. 730, 167 S.E. 59.

67. Mass.—Goodman v. New York, N. H. & H. R. Co., 3 N.E.2d 777.

68. Mass.—Goodman v. New York, N. H. & H. R. Co., supra.

Continuity of route

Transportation of goods by "truckman" from wharf of steamship company accepting initial carriage of goods to freight station of railroad which delivered them did not break continuity of route of "common carriers," so as to render presumption that damage to goods was occasioned by last carrier inapplicable, where bill of lading described railroad as delivering carrier from city of transshipment and railroad collected all transportation charges.—Goodman v. New York, N. H. & H. R. Co., Mass., 3 N.E.2d 777.

each shall cease on delivery to the connecting line in good order, on obtaining a receipt to that effect, and that the last carrier, on failure to inform the shipper, where the freight delivered was damaged, shall be liable therefor.[69]

On the other hand, the rule is not one of universal application; it does not apply where the line of the alleged terminal carrier did not extend to the point of delivery, and where such carrier did not undertake to transport freight beyond its own line,[70] nor where the agency of further transportation was not one over which the terminal carrier had control.[71] So it has been held that the presumption does not apply where the shipper accompanies the goods shipped, as here the reason on which the rule is based does not exist, and in consequence the rule itself has no application.[72] So the presumption that damage to freight shipped over several connecting lines occurred on the last connecting line is for the shipper's convenience, and cannot be invoked by an initial or an intermediate carrier for its own protection.[73]

Effect of Carmack amendment. The mere fact that the initial carrier is made liable does not, as between the shipper and the terminal carrier, affect the presumption as to the condition of the property when delivered to the latter;[74] but as between the initial and a connecting carrier, the Carmack

69. S.C.—Willett v. Southern R. Co., 45 S.E. 93, 66 S.C. 477.

70. Tex.—Missouri, etc., R. Co. v. Jarmon, Civ.App., 141 S.W. 155.

Delivery to switching carrier

(1) Where defendant carrier delivered sealed car to other carrier, to be switched a short distance to plaintiff's warehouse, and the other carrier received no part of the through freight, but charged defendant for switching, defendant was not the last carrier, and so was not chargeable with the presumption that it wrought the damage.—Southern Textile Machinery Co. v. Piedmont & N. Ry. Co., 103 S.E. 475, 114 S.C. 141.

(2) So, where railroad which transported carload of corn to city of destination, but which turned car over to switching railroad for transportation to plaintiff's warehouse, and where switching railroad was paid for services, the switching railroad, and not the first railroad, was the "terminal carrier," within rule as to liability of terminal carrier for loss of weight.—Fretwell v Southern Ry. Co, 126 S.E 132, 130 S.C. 379.

71. Tex.—Missouri, etc., R. Co. v. Jarmon, Civ.App., 141 S.W. 155.

72. Ky.—Makeever v. Georgia Southern & F. Ry. Co., 294 S.W. 144, 219 Ky. 699.

Tex.—Texas, etc, R. Co. v. Gray, 99 S.W. 1125, 90 S.W. 521, 45 Tex.Civ. App. 208.

10 C.J. p 560 notes 61, 62.

73. Tex.—Galveston, etc., R. Co. v. Jones, Civ.App., 123 S.W. 737.

74. U.S.—Chicago & N. W. Ry. Co. v. C. C. Whitnack Produce Co., Neb, 42 S.Ct. 328, 258 U.S. 369, 66 L.Ed 665.

Ark.—Missouri Pac R Co. v. American Fruit Growers, 260 S.W. 39, 163 Ark 318.

Ga.—Central of Georgia Ry. Co. v Clark Milling Co, 149 S.E. 77, 40 Ga.App. 113—Illinois Cent R. Co. v. Banks, 122 S.E. 85, 31 Ga.App. 756—Barron Bros. v. New York, N. H. & H R. Co, 122 S.E. 83, 31 Ga. App. 757—Lewis v. Joyner, 113 S. E. 829, 29 Ga.App. 92—Central of Georgia Ry. Co. v. Scrivens, 100 S.E. 233, 24 Ga.App. 177.

Ill.—Freedman v. Erie R. Co., 246 Ill App. 479.

Iowa.—E. H. Emery & Co. v. Wabash R. Co., 166 N.W. 600, 183 Iowa 687—Erisman v. Chicago, B. & Q. R. Co., 163 N.W. 627, 180 Iowa 759.

Ky.—McArthur v. Payne, 258 S.W. 684, 201 Ky. 793.

Mich.—Ginsberg v. Wabash Ry. Co., 193 N.W. 286, 222 Mich. 560, affirming H. Ginsberg & Sons v. Same, 189 N.W. 1018, 219 Mich. 665, 28 A.L.R. 518.

Mo.—American Fruit Growers v. Cleveland, C., C. & St. L. Ry. Co., App, 263 S.W. 488—Johnson v. Missouri Pac. R. Co., 249 S.W. 658, 211 Mo.App. 564—Letner v. Missouri Pac. R. Co., App, 249 S.W. 155.

Neb.—C. C. Whitnack Produce Co. v Chicago & N. W. Ry. Co, 178 N.W. 177, 104 Neb. 587, certiorari granted Chicago & N. W. Ry. Co. v. C. C. Whitnack Produce Co, 41 S.Ct. 15, 254 U.S. 625, 65 L.Ed. 445, affirmed 42 S.Ct. 328, 258 U.S. 369, 66 L.Ed 665.

S.C.—People's Hardware Co. v. Raleigh & C. R. Co, 107 S.E. 146, 116 S.C. 145

Tenn.—M. Lewis & Sons v. Illinois Cent. R Co, 259 S.W. 903, 150 Tenn. 94

Tex.—Davis v Brooks Supply Co., Civ App., 239 S.W. 628.

Va.—Chesapeake & O. Ry. Co. v. W. C. Crenshaw & Co, 137 S.E 515, 147 Va. 290—Southern Ry. Co v. Russell, 112 S.E 700, 133 Va. 292.

10 C.J. p 560 note 64

Corpus Juris is cited with approval in Pittsburgh, C. C. & St. L. R Co v. Larosa, 131 N.E 22, 23, 75 Ind.App. 475

In Louisiana

(1) The rule of the text apparently now applies—Snowden v. Tremont & G Ry Co, App, 140 So. 122—Hall v. Houston E. & W. T. Ry. Co., 121 So. 769, 9 La.App. 577, 582.

(2) At one time, however, the contrary rule was sustained—Henderson v. Kansas City Southern Ry. Co., 85 So. 625, 147 La. 647

(3) "The case of Duvall v. Louisiana Western Railway Co., 65 So. 104, 135 La. 189, recognized the rule that under the Carmack Amendment the intermediate or delivering carrier is liable for only such loss or damage as may have occurred on its or their lines; but it was there held that said amendment did not abrogate the rule of evidence 'that goods received in good order by the initial carrier are presumed to have been received in like good order by the succeeding carrier and that a delivery by the terminal carrier in bad order raises a presumption that the injury occurred on the delivering carrier's line.' But that decision was expressly overruled in Henderson v. K. C. S Ry. Co., 85 So 625, 147 La. 647, where the court held that the common-law rule above referred to had been abrogated by the Carmack Amendment adopted subsequent to the Duvall decision. The court, in support of its decision, cited Charleston & Western Carolina Ry Co. v. Varnville Furniture Co., 35 S.Ct 715, 237 U.S. 597, 59 L.Ed. 1137, Ann.Cas. 1916D 333. However, since the latter case was decided by the Supreme Court of the United States, that court has had occasion to deal further with the subject, and in the case of Chicago & Northwestern Ry. Co. v. C. C. Whitnack Produce Co, 42 S.Ct. 328, 258 U.S. 369, 66 L.Ed. 665, decided April 10, 1922, that court specifically held that said common-law rule was not abrogated by the Carmack Amendment . . . In holding that said common-law rule was not abrogated by the Carmack Amendment, the court held that there was no conflict between its holding and the ruling in the Charleston, etc, Ry Co. v Varnville Furniture Co. Case cited by our

amendment is inconsistent with any presumption that the loss or damage occurred on the line of the last carrier.[75]

d. Unreasonable Delay

Conflicting rules as to presumptions and burden of proof have been announced in actions for damages due to unreasonable delay.

It has been held that, in an action against an initial carrier to recover for injuries to a shipment caused by unreasonable delay, the burden is on it to show delivery without unreasonable delay to the connecting carrier;[76] but in an action against the initial carrier under the Carmack amendment the burden is on plaintiff to show failure of the connecting carrier to deliver the goods within a reasonable time.[77] Although there is authority directly to the contrary,[78] on the theory that the same reasons for establishing the principle of proof in the case of injury to the goods exist with equal force in the case of a wrongful delay,[79] it has been held that there is no presumption that the delay occurred on one line rather than the other,[80] and that, in an action for injuries caused by unreasonable delay, against an intermediate or terminal carrier, the burden of proof is on plaintiff to show that the delay complained of occurred on defendant's road,[81] particularly where plaintiff accompanied the shipment throughout its journey.[82] Where the goods were not shipped on the connecting carrier's next train leaving after receipt of a diversion order, the burden is on the shipper to prove that facilities were or should have been, available to divert the shipment by that train.[83] In an action for damage to live stock by reason of delays, where the initial carrier proved that a wreck occurred on the track ahead of the stock train it was held that it made a prima facie case of negligence under the doctrine of res ipsa loquitur against its connecting carrier which it was incumbent on it to meet by showing it was not due to the negligence of such carrier.[84]

Tender to connecting carrier. In an action against a terminal carrier for unreasonable delay in transporting a corpse, the burden of proof is on plaintiff to show a tender or a delivery by the receiving carrier to the terminal carrier in reasonable time for transportation on the train on which it had been agreed to be carried; the presumption, in the absence of opposing evidence, that damage or loss to goods shipped over connecting lines of railroad occurred on the line of the terminal carrier, based on the theory that a condition in its nature continuing, has in fact continued, has no application to delay in the shipment of a dead body over connecting lines where there was no showing that the body was actually delivered to the terminal carrier in time for a proper speedy shipment.[85]

e. Instructions to Connecting Carrier

The burden is on an initial carrier sued for loss of

court in the Henderson Case, supra. In the Henderson Case, supra, our court, referring to the Duvall Case, supra said: 'Since that decision was rendered, however, the Supreme Court of the United States has ruled otherwise.' And it cites the Charleston Case. Now that the Supreme Court of the United States has held in its latest expression on the point, that the common-law rule as to the presumption was not abrogated by the Carmack Amendment, and has stated that the Charleston Case, supra, does not support the contrary view, we take it that the question is settled, and accord to plaintiff the benefit of the presumption."—Hall v. Houston E. & W. T. Ry. Co., 121 So. 769, 771, 9 La App. 577, 582.

Notice of arrival

Where a railroad contracted to carry cotton to a port and deliver it to an ocean carrier for shipment to a foreign port, the burden was on the railroad, as against the shipper, to show that it gave notice to the ocean carrier of the arrival of the cotton at the pier in time for the ocean carrier to have taken the cotton aboard ship for the intended sailing.—Louisville & N. R. Co. v. Williams, 73 So. 548, 198 Ala. 425.

75. Tex.—Carlton Produce Co. v Velasco, etc., R. Co., Civ.App., 131 S.W. 1187.
10 C.J. p 560 note 65.

76. Cal.—Colfax Mountain Fruit Co v. Southern Pac Co., 46 P. 668, 5 Cal.Unrep.Cas. 527.
N.C.—Allen-Fleming Co v Southern R. Co., 58 S.E. 793, 145 N.C. 37—Meredith v. Seaboard Air Line R. Co., 50 S.E. 1, 137 N.C. 478.

77. Va.—L. J. Upton & Co v. Atlantic Coast Line R. Co., 131 S.E. 827, 146 Va. 475.

78. Ark.—Hudgins Produce Co. v. Missouri Pac. R. Co., 215 S.W. 606, 609, 139 Ark. 363.
10 C.J. p 560 note 69.
"It is conceded that, without the excluded testimony, there was nothing in the record to show when the carload of potatoes was delivered to defendant carrier, and the presumption arises that the delay occurred on its line as the delivering carrier. St Louis, I. M. & S Ry. Co. v. Coolidge, 83 S.W. 333, 73 Ark. 112, 108 Am.S.R. 21, 67 L.R.A. 555, 3 Ann Cas. 582."—Hudgins Produce Co. v. Missouri Pac. R. Co., supra.

79. N.C.—Harper Furniture Co v. Southern Express Co., 57 S.E. 458, 144 N.C. 639, 12 Ann Cas. 924.

80. N.Y.—Caruso-Rinella-Battaglia Co. v. New York Cent. R. Co., 226 N.Y.S. 308, 222 App.Div. 371.

Reason for rule

No condition is shown to exist which is presumed to continue.—Caruso-Rinella-Battaglia Co. v New York Cent. R. Co., 226 N.Y.S. 308, 222 App.Div. 371.

81. Ga.—Almand v. Georgia R., etc., Co., 22 S.E. 674, 95 Ga. 775—East Tennessee, etc., R. Co v Johnson, 11 S.E. 809, 85 Ga. 497.
Md.—Shockley v. Pennsylvania R. Co., 71 A. 437, 109 Md. 123

82. Tex.—Atchison, T. & S. F. Ry. Co. v Ohlhausen, Civ.App., 272 S.W. 224

83. Ark.—St. Louis-San Francisco Ry. Co v. Greig & Smith, 31 S.W. 2d 290, 182 Ark. 261.

84. Tex.—Kansas City, M. & O. Ry Co. v. Blackstone & Slaughter, Civ. App., 217 S.W. 208, rehearing overruled 218 S.W. 552, error granted.

85. Ala.—Southern R. Co. v. Renes, 68 So. 987, 192 Ala. 620.

goods to show that its failure properly to instruct the connecting carrier did not cause the loss.

In an action against an initial carrier for loss of goods, in which it produced a receipt from a connecting carrier differing from the original bill of lading as to the destination designated, the burden was on the initial carrier to show that its failure to extend to the connecting carrier proper instructions did not cause the loss.[86]

f. Issuance of Bill of Lading

Under the Carmack amendment it is conclusively presumed that the initial carrier issued a through bill of lading.

In an action under the Carmack amendment for loss or damage to property transported from a point in one state to a point in another, the presumption is that the law was obeyed and that a through bill of lading was issued,[87] and this presumption is a conclusive one.[88] Where an interstate shipment was diverted under the shipper's instructions, the presumption, in the absence of anything to the contrary, is that a new bill of lading was issued with the person to whom delivery was to be made as consignee.[89]

g. Damages

The plaintiff has the burden of proving the amount of the damage.

In an action for goods lost or damaged by connecting carriers, the burden is on plaintiff to establish the amount of the damage[90] and where no value of the lost goods is shown a verdict for plaintiff is without evidence to support it.[91] So, where plaintiff sues to recover the market value of the property lost, the burden is on him to show the market value.[92] In the absence of evidence to the contrary, it will be presumed that a sum derived from the sale of damaged goods by the terminal carrier on rejection by the consignee was the result of such carrier's reasonable efforts and exercise of judgment, and fairly establishes, for the purpose of computing the damage, the reasonable market value of the property.[93]

§ 441. Admissibility of Evidence

General rules as to admissibility of evidence apply in actions against connecting carriers.

The rules as to the admissibility of evidence in civil actions generally apply to actions against one or more of several connecting carriers for loss or injury, or for unreasonable delay in transportation,[94] including the general rules relating to admissibility of documentary evidence, such as bills of lading,[95] contracts of shipment,[96] waybills,[97] receipts from connecting carriers,[98] and notices to

86. S.C.—Chartrand v. Southern R. Co., 67 S.E. 741, 85 S.C. 479.

87. Tex.—Wichita Valley Ry. Co. v. Brown, Civ.App., 270 S.W. 1112.
10 C.J. p 560 note 74.

88. La.—Swift & Co. v. Texas & P. Ry. Co., 6 La.App. 7.
Mo.—Randazzo Macaroni Mfg. Co. v. Minneapolis & St. L. R. Co., App., 251 S.W. 466.
Tex.—Burd v. San Antonio Southern Ry. Co., Com.App., 261 S.W. 1021, modifying San Antonio Southern Ry. Co. v. Burd, Civ.App., 246 S.W. 1060—Wichita Valley Ry. Co. v. Brown, Civ.App., 270 S.W. 1112.

89. Ala.—Clark v. Louisville & N. R. Co., 114 So. 295, 216 Ala. 637.

90. Ind.—Pittsburgh, C. C. & St. L. R. Co. v. Larosa, 131 N.E. 22, 75 Ind.App. 475.

91. Ga.—Atlantic Coast Line R. Co. v. Stovall-Pace Co., 100 S.E. 657, 24 Ga.App. 248.

92. Tex.—Gulf, C. & S. F. Ry. Co. v. Hines, Civ.App., 4 S.W.2d 641.

93. Cal.—American Fruit Growers of California v. Pacific Electric Ry. Co., 238 P. 105, 72 Cal.App. 682.

94. S.C.—Charles v. Atlantic Coast Line R. Co., 58 S.E. 927, 78 S.C. 36, 125 Am.S.R. 762.
10 C.J. p 560 note 76.

Complaint of conductor

In an action against an initial carrier for delay in transit of interstate shipment, evidence that conductor fretted at engineer for lack of speed without apparent cause was admissible.—Miller v. Quincy, O. & K. C. R. Co., 225 S.W. 116, 205 Mo.App. 463.

Delay of corpse

In action against connecting carrier for failure to transfer corpse to next succeeding passenger train after arrival of corpse at connecting point, testimony that plaintiff boarded the train at the instance or direction of the flagman or conductor, and left the train upon discovery that the corpse was not on the train, was admissible.—Louisville & N. R. Co. v. Bishop, 85 So. 859, 17 Ala.App. 320.

95. Ga.—Southern Ry. Co. v. Waxelbaum Produce Co., 90 S.E. 987, 19 Ga.App. 64.
10 C.J. p 561 note 78 [a].

Receipted freight bill

In suit for damages to apples, where receipted freight bill bore stamp of delivery carriers affixed by joint agent of defendants, it was relevant evidence against each defendant and properly held for jury.—Southern Ry. Co. v. Northwestern Fruit Exch., 98 So. 382, 210 Ala. 519.

96. Tex.—St. Louis, etc., R. Co. v. Dodson, Civ.App., 97 S.W. 523.
10 C.J. p 561 note 79 [a].

Unsigned contract

In an action by cattle shipper against initial and connecting carriers for damages to shipment under an oral contract with initial carrier, where there was no evidence tending to show any written contract, the court properly refused to allow carrier to introduce in evidence a written contract prepared by the carrier but not signed nor, so far as the evidence discloses, ever known to plaintiff.—St. Louis, B. & M. Ry. Co. v. Lane, Tex.Civ.App., 248 S.W. 59.

97. Tex.—Quanah, A. & P. Ry. Co. v. Warren, Civ.App., 198 S.W. 814, 816.

Inadmissible against shipper

Since the shipper is not a party to the waybill made out for the convenience of connecting carrier he is not bound by it, and it is not admissible in evidence against him to show the destination of the goods.—Quanah, A. & P. Ry. Co. v. Warren, Tex.Civ.App., 198 S.W. 814, 816.

98. N.Y.—Hirsch v. New York Cent., etc., R. Co., 99 N.Y.S. 431, 50 Misc. 568.
Tex.—Texas Cent. R. Co. v. Miller, Civ.App., 88 S.W. 499.
10 C.J. p 561 note 80 [a].

trace shipments.[99] So proper evidence is admissible to prove or disprove authority to reconsign the shipment,[1] custom or usage,[2] the condition of the property on arrival at destination,[3] refusal to deliver the goods to a connecting carrier,[4] negligence,[5] that defendant was the last carrier,[6] that the loss or injury occurred on defendant's line,[7] that a through freight rate applied to the shipment,[8] and the measure and extent of the damages,[9] or to explain the shipper's failure to accompany live stock.[10] Evidence not material to the issues is inadmissible.[11]

99. Ga.—Atlantic Coast Line R. Co v. Hill, 77 S.E. 316, 12 Ga.App 392. 10 C.J. p 561 note 81 [a]

1. Mo.—Kemper Mill & Elevator Co v. Hines, 239 S.W. 803, 293 Mo. 88.

Other reconsignments

Where two cars of corn meal reconsigned by the terminal carrier on the alleged authority of consignor's agent were part of a larger order of ten thousand sacks of meal, testimony that other cars in such consignment were reconsigned with consignor's consent in the same manner as the two cars in question was admissible on the issue of authority to reconsign without surrender of the bills of lading.—Kemper Mill & Elevator Co. v. Hines, 239 S.W. 803, 293 Mo. 88.

2. Tex.—Gulf, etc., R. Co. v. Leatherwood, 69 S.W. 119, 29 Tex.Civ. App. 507.
10 C.J. p 561 note 82 [a].

3. Tex.—Texas & P. Ry. Co. v. McMillen, Civ.App., 183 S.W. 773.

Commingled live stock

In an action for injuries to a shipment of live stock in several cars, evidence of the condition of animals in a car as to which no notice of damage was filed was held admissible to show the condition of animals in other cars, all animals being commingled at destination.—Texas & P. Ry. Co. v. McMillen, Tex.Civ.App., 183 S.W. 773.

4. Tex.—Quanah, A. & P. Ry. Co v. Bone, Civ.App., 208 S.W. 709, error refused—Quanah, A. & P. Ry. Co. v. Bone, Civ.App., 199 S.W. 332.

Constant and systematic refusal

(1) In action against carrier for refusing seasonably to deliver goods to a connecting line, evidence that it constantly refused to make such deliveries is admissible, where evidence conflicted regarding defendant's refusal to deliver and its reasons therefor.—Quanah, A. & P. Ry. Co v. Bone, Tex.Civ.App., 199 S.W. 332.

(2) So evidence that carrier placed derail on tracks connecting with line of connecting carrier was held admissible as tending to show universal rule or system of action that contradicted defendant's claim where carrier denied refusal.—Quanah, A. & P. Ry. Co. v. Bone, Tex.Civ.App., 208 S.W. 709, error refused.

5. Tex.—Chicago, R. I. & G. Ry. Co. v. Jenkins, Civ.App., 196 S.W. 679, error refused.

Negligence of connecting carrier

In action for damages to interstate shipment of mules, under Interstate Commerce Act, making initial carrier liable for negligence on part of any carriers, evidence of negligence of connecting carrier is admissible as against initial carrier.—Chicago, R. I. & G. Ry. Co. v. Jenkins Tex. Civ.App., 196 S.W. 679, error refused.

Disregard of shipper's instructions

In action against connecting carrier for damages to interstate shipment of mules, objection to evidence that car of mules was unloaded at connecting point on line of subsequent carrier, and thereby probably damaged, was without merit where plaintiff's other evidence tended to show he instructed defendant's agent to unload at other stockyards.—Chicago, R. I. & G. Ry. Co. v. Jenkins, Tex.Civ.App., 196 S.W. 679, error refused.

Delay

In action against initial carrier for negligent delay in delivery of live stock shipment, where there was no allegation of negligence by connecting carrier, evidence tending to show that connecting carrier's failure to deliver shipment sooner was due to congestion of traffic, and not negligence on part of such carrier, was material to show that delay by initial carrier, if any, was no proximate cause of loss, and to controvert plaintiff's contention of negligent delay by connecting carrier after receiving shipment from initial carrier.—Ft. Worth & R. G. Ry. Co. v. Jones, Tex.Civ.App., 212 S.W. 552.

6. Ga.—Southern Ry. Co. v. Waxelbaum Produce Co., 90 S.E. 987, 19 Ga.App. 64

7. Tex.—Texas & P. Ry. Co. v. McMillen, Civ.App., 183 S.W. 773.
10 C.J. p 561 note 81 [a].

Open car

In an action against a carrier for goods taken from a car while in control of another railroad acting as agent under a switching arrangement, testimony of the chief yard clerk of the agent company and others that they saw a car with its door open, standing on the agent's track, at about the time in controversy, was relevant as a circumstance tending to throw light on whether the sugar was taken while the car was under control of defendant or his agent.—Missouri Pac. R. Co. v. Reynolds-Davis Grocery Co., 257 S.W. 70, 161 Ark. 579, certiorari granted 44 S.Ct. 636, 265 U.S. 577, 68 L.Ed. 1188, and affirmed 45 S.Ct. 516, 268 U.S. 366, 69 L.Ed. 1000

8. Ill.—Cardwell v. Payne, 226 Ill. App. 227.

9. Tex.—Texas & P. Ry. Co. v. McMillen Civ.App., 183 S.W. 773.

Actual value

In an action for injuries to a shipment of horses, evidence of their actual value at the point of destination is admissible, where they had no market value at such point.—Texas & P. Ry. Co. v. McMillen, Tex.Civ. App., 183 S.W. 773.

Condition at destination

In an action against a railroad company which carried horses only part of the way, and which limited its liability to its own line, it was held that evidence of their condition at the point of destination was admissible to determine measure and extent of damages.—Texas & P. Ry. Co. v. McMillen, Tex.Civ.App., 183 S.W. 773.

10. Ind.—Chicago, I. & L. Ry. Co. v. Priddy, 115 N.E. 266, 65 Ind.App. 552.

Refusal to permit

Evidence relative to initial carrier's refusal to permit shipper to accompany stock was admissible to explain shipper's failure to do so.—Chicago, I. & L. Ry. Co. v. Priddy, 115 N.E. 266, 65 Ind.App. 552.

11. Mass.—Northern Industrial Chemical Co. v. Davis, 144 N.E. 64, 249 Mass. 246.

Bad condition of other goods

Excluding testimony by witness who had not seen shipper's tobacco that tobacco sold at point of delivery to carrier was in bad condition was held proper.—Cumberland Transp. Co. v. E. J. O'Brien & Co., 2 S.W.2d 668, 222 Ky. 814.

Custom subsequent to loss

In action against terminal carrier for loss of castor oil shipped in 1918 in wooden barrels, court properly excluded evidence that in 1923 practice was to use metal containers, and that they were considered better than wood.—Northern Industrial Chemical Co. v. Davis, 144 N.E. 64, 249 Mass. 246.

Promise of "passenger run"

In action against initial carrier for delay in interstate shipment which had been rerouted to another destination, evidence of a promise of a "passenger run" over the new route was held inadmissible, the case not being

§ 442. Weight and Sufficiency of Evidence

General rules as to weight and sufficiency of evidence apply in actions against one or more connecting carriers.

The rules relating to weight and sufficiency of evidence in civil actions generally apply in actions against one or more of several connecting carriers for loss or injury or for delay in transportation, as, for example, to show delivery to the initial carrier,[12] delivery to the connecting or terminal carrier,[13] good condition of the property when delivered to the carrier,[14] delivery to the consignee,[15] loss,[16] cause of loss or damage,[17] market value of property lost or injured,[18] negligence of defendant[19] or the occurrence of injury on defendant's

based on promise of that kind and being dangerously near making new contract—Miller v. Quincy, O. & K. C. R. Co., 225 S.W. 116, 205 Mo.App. 463.

Subsidiary lines

Excluding testimony that certain intermediate carriers were part of another intermediate carrier's system was held not prejudicial to initial carrier sued for damage to goods in transit under statute making such carrier liable for all damage—Cumberland Transp. Co. v. E. J. O'Brien & Co., 2 S.W.2d 668, 222 Ky. 814.

Contributory negligence

In an action by a cattle shipper against initial and connecting carriers for damages to shipment, testimony in behalf of the carriers that plaintiff could have driven his cattle across country to a shipping point on the connecting carrier's line, thus not using the initial carrier's line at all, was properly excluded as utterly impertinent, the contributory negligence of shipper in using either of defendant's lines not being a defense to the action.—St. Louis, B. & M. Ry. Co. v. Lane, Tex.Civ.App., 248 S.W. 59.

Negligence of other carrier

In action against a connecting carrier for damage to goods, plaintiff's testimony showing that the damage occurred while they remained on lines or in custody of preceding carrier before delivery to defendant, should be excluded.—Copenhaver & Massey Milling Co. v. Kanawha & W. Va. R. Co., 93 S.E. 940, 81 W.Va. 73.

12. Tex.—Galveston, etc., R. Co. v. Keesey, 110 S.W. 170, 50 Tex.Civ. App. 463.
10 C.J. p 561 note 85.

13. Ga.—Southern Express Co. v. Cohen, 78 S.E. 1111, 13 Ga.App 174.
10 C.J. p 561 note 86.

Evidence held sufficient

(1) To show that initial carrier was subsidiary of connecting carrier and that connecting carrier received shipment—Missouri-Pac R. Co. v. Waugh, Tex.Civ.App., 74 S.W.2d 554, error dismissed

(2) To show that shipment was delivered by defendant and accepted by connecting carrier, and therefore defendant was relieved from liability for their subsequent destruction.—Arkansas Railroad v. Winters, 265 S.W. 967, 166 Ark. 213.

Evidence held insufficient to establish that merchandise in question was delivered to connecting carrier—Atlantic Coast Line R. Co. v. Seward, 142 So. 881, 106 Fla. 75, reversing 136 So. 620—10 C.J. p 544 note 83 [d]

14. Evidence held sufficient

(1) To show that goods, receipted for in bill of lading as being "in apparent good order (contents, inward condition, and value unknown)," were apparently in good condition as against the carrier who issued the bill of lading, but not against terminal carrier not a party to the bill. Ill.—See Gallagher v. Grand Trunk Western Ry. Co., 207 Ill.App. 316.
Mo.—Krallman v. Illinois Cent. R. Co., 235 S.W. 830, 209 Mo.App. 286.

(2) To sustain finding that shipment was delivered to initial carrier in good condition—Seymour Dry Goods Co. v. Missouri Pac. R. Co., 225 P. 113, 115 Kan. 858.

Evidence held insufficient

(1) To establish that carload of horses were in good condition when received by terminal carrier—Hall v. Houston E. & W. T. Ry. Co., 121 So. 769, 9 La.App. 577, 582.

(2) To prove delivery to initial carrier in good condition.—Snowden v. Tremont & G. Ry. Co., La.App., 140 So. 122.

15. Evidence held sufficient

(1) To show course of dealing and specific instructions by consignee, under which carrier was justified in delivering consignments to another without receiving nonnegotiable bills of lading.—Terracina v. Yazoo & M. V. R. Co., La.App., 152 So. 771.

(2) To show delivery to consignee by delivery to drayman who usually received consignee's freight.—Atlantic Coast Line R. Co. v. Seward, 142 So. 881, 106 Fla. 75, reversing 136 So. 620.

16. Evidence held sufficient

(1) To prove loss.—Bennett v. Missouri Pac. Ry. Co., 164 P. 1084, 100 Kan. 537, L.R.A.1918A 1061.

(2) To show that shipment was in bad condition when received at custom house at destination, and had been opened and some of the goods abstracted.—Vogel v. Delaware, L. & W. R. Co., 171 N.W. 198, 168 Wis. 567

Evidence held insufficient to show shortage in coal delivered.—J. F. Anderson Lumber Co. v. Chicago & N. W. Ry. Co., 226 N.W. 273, 55 S.D. 305.

17. Evidence held insufficient

(1) To show that damaged condition of grapes shipped was due to delay—Capella v. Southern Pac. Co., 218 N.Y.S. 366, 218 App.Div. 448

(2) To show that diversion of shipment of onions caused delay or damage thereto—Rio Grande & E. P. Ry. Co. v. Roy Campbell & Co., Tex.Civ.App., 288 S.W. 539.

18. Evidence held sufficient to warrant findings of no market value and fixing value of destroyed freight to plaintiff.—Texas & P. Ry. Co. v. Van Zandt, Tex.Civ.App., 30 S.W.2d 503, reversed on other grounds, Com.App., 44 S.W.2d 950.

Evidence held insufficient to sustain finding of market value of coal, not delivered—Lake Erie & W. R. Co. v. Fantz, 154 N.E. 875, 85 Ind. App. 569.

19. Evidence held sufficient

(1) To authorize inference that damage to shipment of watermelons was caused by defendant or connecting carrier.—Atlantic Coast Line R. Co. v. Varner, 137 S.E. 83, 36 Ga.App. 441

(2) To justify finding of a negligent refusal or failure of the terminal carrier to accept the shipment.—St. Louis South Western Ry. Co. of Texas v. Miller & White, Tex.Civ.App., 190 S.W. 819.

(3) To show negligence, making initial carrier liable for injury to hogs by pneumonia—Vaughn v. St. Louis-San Francisco Ry. Co., 15 S.W.2d 901, 223 Mo.App. 732.

(4) To show negligent delay in a shipment of stock—Miller v. Quincy, O. & K. C. R. Co., Mo.App., 240 S.W. 475.

(5) To show that fire damage to cotton was not due to negligence of railroad or connecting carrier and to go to jury on issue of negligence of United States Shipping Board Emergency Fleet Corporation, to whose agents it had been delivered—A. L. Wolff & Co. v. Missouri, K. & T. Ry. Co. of Texas, Tex.Civ.App., 283 S.W. 250, affirmed, Com.App., 289 S.W. 1000.

(6) To sustain finding that defendant connecting carrier's delay was the proximate cause of the injuries.

line,[20] injury by transportation in defective car,[21] | liability of initial carrier,[22] liability for negligent

—Heisel v. Minneapolis & St. L. R Co., 171 N W 177, 185 Iowa 885.

(7) To sustain findings that connecting carrier's delay in delivering live stock constituted negligence and caused injury to shipment —Gulf, C & S. F Ry. Co v. Hines, Tex.Civ. App., 4 S.W.2d 641.

(8) To warrant finding that terminal carrier's negligence was sole proximate cause of injury to animals —Gulf, C & S F. Ry Co. v. Hines, Tex.Civ.App., 18 S.W.2d 833, error refused.

(9) In an action for damages for delay in shipment of goods, to sustain a finding that defendant was negligent.—Schlitten v. Hines, 186 N. Y S. 831, 196 App.Div. 254.

Evidence held insufficient

(1) To establish liability of intermediate carrier who received goods in good condition and delivered them to next succeeding carrier in damaged condition, in absence of affirmative proof that damage was caused by something for which such carrier was responsible.—Southern Pac. R Co. of Mexico v. Gonzalez, Ariz., 61 P.2d 377.

(2) To establish negligence of connecting or terminal carriers.
La.—Hall v. Houston E. & W. T. Ry. Co., 121 So. 769, 9 La App. 577, 582.
Pa.—Harry E. Jackson Co. v. Pennsylvania R. Co., 172 A. 20, 112 Pa Super. 535.
Tex.—Lancaster v. Norris, Civ.App., 271 S.W. 401, reversed on other grounds, Com.App., Norris v. Lancaster, 280 S.W. 574.

(3) To prove negligence of carrier, which although receiving order at 5:30, failed to divert strawberries over connecting carrier's 6.50 train. —St. Louis-San Francisco Ry. Co. v. Greig & Smith, 31 S.W.2d 290, 182 Ark. 261.

(4) To show initial carrier's negligence.—St Louis, B. & M. Ry. Co. v. Moss, Tex Civ App., 203 S.W. 777.

(5) To show negligent delay by intermediate carrier of interstate stock shipment —Atchison, T. & S. F. Ry. Co. v. Ohlhausen, Tex.Civ. App, 272 S.W. 224.

(6) To support finding of period of delay which could have been avoided by exercise of ordinary care. —Kansas City, M. & O. Ry. Co. of Texas v. Odom, Tex.Civ.App., 185 S W 626.

20. Wis.—Best v Great Northern R. Co, 150 N.W 484, 159 Wis. 429.

Evidence held sufficient

(1) To establish prima facie case of liability on the part of the terminal carrier for damages in transit.— Lewis v Joyner, 113 S.E. 829, 29 Ga. App. 92.

(2) To establish that carload of horses was delivered in same condition as received by connecting and terminal carriers.—Hall v. Houston E. & W. T Ry. Co, 121 So. 769, 9 La. App 577.

(3) To show that an unusual and unnecessary delay in the transportation and delivery of the shipment occurred on defendant's line and that the damage was caused by this delay —Southern Ry. Co v. Waxelbaum Produce Co., 90 S.E. 987, 19 Ga.App. 64.

(4) To show that loss occurred on line of initial carrier.—Zorub v. Missouri Pac. R. Co, 31 S.W.2d 421, 182 Ark. 232.

(5) To show that, owing to defective icing, fish shipped were in damaged condition when car left initial carrier's yard.—Emery & Co. v. Boston & M. R. R, 120 N.E. 106, 230 Mass. 463.

(6) To support finding that damage to bananas in interstate shipment did not occur on line of connecting carrier.—Mascari v. New York, C. & St. L. R. Co., 183 N E. 913, 97 Ind.App. 27.

(7) To support finding that goods were lost or damaged while in defendant's custody.
Mo —Block Bros. Clothing Co. v. Missouri Pac. R. Co., App., 253 S. W. 35.
Tex.—Missouri Pac. R. Co. v. Guest, Civ.App., 280 S.W. 611—Ft. Worth & D. C. Ry. Co. v. Bone, Civ.App., 195 S W. 244.

(8) To sustain finding that bananas were frozen while in defendant connecting carrier's possession because of its negligent failure to regulate temperature of car.—Vandalia R. Co. v. La Rosa, 133 N.E. 152, 77 Ind.App. 58.

Evidence held insufficient

(1) To establish that live stock was injured while in possession of connecting or terminal carriers
La.—Hall v. Houston E. & W T. Ry Co., 121 So. 769, 9 La.App. 577, 582.
Tex —Missouri Pac. R. Co v. Heath, 18 S.W. 477.

(2) To rebut prima facie case against a terminal carrier, made by proof of delivery of goods to initial carrier in sound condition and delivery at destination in damaged condition, where the proof relied on shows that they were damaged before terminal carrier received them, but does not show extent of such damage with some degree of certainty and definiteness —Lewis v Joyner, 113 S.E. 829, 29 Ga.App 92

(3) To show delay on initial carrier's lines.—Chicago, R. I. & P. Ry Co v. S. L. Robinson & Co., 23 S W. 2d 976, 180 Ark. 911.

(4) To show injury to stock while in possession of carrier against whom verdict was rendered to extent of verdict.—Prelvitz v. Chicago Great Western R. Co., 157 N.W. 1079, 133 Minn. 131.

(5) To show that a shortage of goods did not take place while goods were in hands of terminal carrier, a transfer or drayage company.— Neuman v. Chicago & N. W. Ry. Co., 216 Ill.App 387.

(6) To support finding that shortage in shipment occurred while goods were in possession of defendant connecting carrier —Neuman v. Chicago & N. W. Ry. Co., supra.

21. Mo —Smith v. Gulf, etc., R. Co., 164 S W. 132, 177 Mo.App. 269. 10 C.J. p 561 note 87.

22. Tenn.—Nashville, C. & St. L. Ry. Co. v. Sparkman, Petty & Jameson, 8 Tenn.App. 683.

Evidence held sufficient

(1) To justify finding that the shipment was understood and intended to be a through shipment, so that the initial carrier was liable —Whiteside v. Chicago, M. & St. P. Ry. Co., Mo.App., 239 S W. 150.

(2) To make out a prima facie case of liability for injury to carload of watermelons —Marshall Land & Mercantile Co. v. Missouri Pac R. Co., Mo.App., 270 S.W. 422.

(3) To show initial carrier's liability as a warehouseman.—Savannah & S. Ry. Co. v. First Nat. Bank, 103 S.E. 887, 25 Ga.App. 529.

(4) To warrant conclusion that railroad company was liable as initial carrier for damages occurring while shipment was in charge of connecting carrier.—Bruner v. Grand Trunk Western Ry. Co., 150 N.E. 266, 319 Ill 421, affirming 236 Ill.App. 541.

(5) To warrant the finding that the damage was caused by negligent handling, irrespective of delay caused by embargo, and that therefore the initial carrier was liable.—Jakeway & Tyrrell v Lehigh Valley R. Co., 120 A. 820, 277 Pa. 236.

Evidence held insufficient

(1) To show conclusively that a shipment of goods over connecting lines was not under a contract of through shipment. — Keithley & Quinn v. Lusk, 189 S.W. 621, 195 Mo App. 143.

(2) To show, in action against initial carrier, that loss occurred during time delivering carrier was holding goods as carrier rather than as warehouseman.—Illinois Cent. R. Co. v. Stimson, 268 S.W. 835, 207 Ky. 78.

whether title to the goods was in plaintiff or a third party during transit;[47] whether the goods injured had been delivered to a connecting carrier;[48] and whether the goods had been delivered to the consignee.[49] So the question of the liability of an initial carrier for damages to cattle, caused by delay incident to feeding the cattle at the point of delivery to a connecting carrier, is one of fact for the jury, dependent on the time of delivery of the cattle to, and their acceptance by, the connecting carrier.[50] The question is one of law for the court and should not be submitted to the jury, however, where the fact is uncontroverted or where there is no substantial conflict in the evidence,[51] or where the issue is not sufficiently raised by the pleadings and evidence.[52] So, where the facts are undisputed, the question of whether the negligence complained of is that of a common carrier or a warehouseman is one of law for the court.[53]

Instructions. The rules governing instructions in civil actions generally apply in actions against one or more of a line of connecting carriers to recover for loss or injury to goods shipped, or for wrongful delay.[54] Accordingly the court should give, when requested, and does not err in giving, instructions that clearly and correctly state the law and that are pertinent to the issues and evidence,[55] such as instructions as to the effect of the contract

Intoxicating beverage

(1) In action against connecting carriers for damages for failure to deliver a carload of "Pablo," whether beverage which carrier refused to carry into dry state was beer, and whether it was properly iced and preserved by carrier from time of arrival at point outside such state until delivery to state chemist for examination, held for jury; and carriers receiving the shipment of beverage, with the same information subsequently possessed, cannot say, as defense to the action that they were deceived by the appearance of the shipment when it reached the point beyond which they refused to transport it.—Pabst Brewing Co. v. Chicago, M & St P. Ry. Co, 273 S. W. 424, 221 Mo App. 338.

(2) So whether it would have been unlawful to introduce beer into Arizona at time of carrier's refusal to ship beverage into such state is for jury, on evidence warranting inference of carrier's knowledge that it was not for consignee's personal use. —Pabst Brewing Co. v. Chicago, M. & St. P. Ry. Co., supra.

47. Tex.—Quanah, A. & P. Ry. Co. v. Bone, Civ.App., 199 S.W. 332.

48. Mich.—Reason v. Detroit, etc., R. Co., 113 N.W. 596, 150 Mich 50.

49. Ark.—Louisiana & N. W. R. Co. v. J. P. Machen & Co., 294 S.W. 714, 174 Ark. 122.

50. Tex.—Texas, etc., R Co. v Scoggin, 90 S W 521, 40 Tex.Civ. App 526

51. Ky.—E. J. O'Brien & Co. v. Davis, 288 S W. 682, 216 Ky. 693.

Bill of lading

Where an original bill of lading was put in evidence by defendant without objection, and a copy was put in evidence by plaintiff without objection, it was error to submit to the jury whether the paper in evidence was the bill of lading, since both parties may be said to have conceded that the bill of lading was in evidence.—Chartrand v. Southern Ry. Co., 67 S E. 741, 85 S.C. 479.

52. Tex.—Fort Worth & Denver City Ry Co v. Motley, Civ App., 87 S.W 2d 551, error dismissed

Evidence held insufficient to make issue for jury

(1) As to extent of damage to cans while in carrier's possession —Ohio Galvanizing & Mfg. Co v Southern Pac Co, C C.A Ky, 39 F 2d 840, certiorari denied 51 S.Ct. 83, 282 U S. 879, 75 L.Ed. 776

(2) As to unreasonable delay on part of intermediate carrier.—Georgia, S. & F Ry. Co. v Makeever, 15 S W.2d 293, 228 Ky. 492.

Contributory negligence

In shipper's action for damage to live stock allegedly caused by carrier's negligence in taking live stock out of two cars and reloading them in three cars, defense that shipper was contributorily negligent in overloading original cars not sufficiently raised by pleadings and evidence need not be submitted to jury.— Fort Worth & Denver City Ry. Co. v. Motley, Tex Civ.App, 87 S W.2d 551, error dismissed.

Twenty-eight hour law

Where an initial carrier accepted a shipment of horses and delivered them to a connecting carrier twenty-six hours and ten minutes later, it was error to submit to the jury the issue of its negligence in failing to unload the shipment for rest and feed as required by the twenty-eight-hour law.—Heisel v. Minneapolis & St. L R. Co., 171 N.W. 177, 185 Iowa 885.

Instruction as to evidence

In action against delivering carrier for damage to cabbage, in which the evidence showed that shipment was held up one whole day for icing, reclassification, and forwarding, but did not show that faster time could have been made, refusal of instruction that there was no legally sufficient evidence that damage was due to delay is reversible error.—Pennsylvania R Co v Walker, 128 A. 45, 147 Md 323.

53. Mich.—Winget v. Grand Trunk Western Ry Co, 177 N W. 273, 210 Mich 100, certiorari denied Grand Trunk Western Ry Co. v Winget, 41 S Ct. 6, 254 U S. 629, 65 L Ed. 447.

54. Mo.—Connelly v Illinois Cent. R Co, 113 S W 233, 133 Mo App. 310

Tex.—Texas, etc, R Co. v. Rankin, Civ App, 118 S W. 823

10 C J p 562 note 2.

55. Mo.—American Fruit Growers v. Cleveland, C., C & St. L. Ry. Co App, 263 S.W 488.

Instructions held not improper

(1) As telling jury that it was connecting carrier's duty to ice car from point of origin of shipment before arrival and acceptance for transportation at connecting point.— Galveston, H. & S. A Ry. Co v. Licata, Tex Civ App, 269 S W. 821, reversed on other grounds, Com App, 280 S W 540.

(2) In a suit against an initial carrier for specific acts of negligence occurring on its own line, as too general and permitting the jury to consider movements from the point of origin to final destination, and so to consider injuries which might have occurred on the line of the connecting carrier.—Lancaster v. Hollebeke, Tex Civ App., 235 S W. 1113.

Clerical error

Where, in shipper's action against three carriers, plaintiff, at close of his case, took an involuntary nonsuit as to two defendants, who no longer participated in the action, an instruction for plaintiff, unless "defendants" proved that "their" negligence did not produce the damage, etc, was not misleading, especially when a mere clerical error.—American Fruit Growers v. Cleveland, C., C & St. L. Ry. Co., Mo.App., 263 S. W. 488.

of carriage,[56] the facts necessary to be found to authorize a recovery,[57] the liability of the defendant or defendants,[58] and instructions on the burden of proof[59] and presumptions;[60] but it should not give and should refuse when requested misleading or incorrect instructions as to the law of the case,[61] confusing instructions,[62] or instructions which are not authorized by the issues and evidence.[63] So, in actions based on delay, instructions omitting the question of reasonable diligence in transporting the

56. Ark.—Farr v. St Louis Southwestern Ry. Co., 243 S.W. 880, 154 Ark. 585.

Instructions held proper

(1) As to effect of contractual limitation of time for bringing suit. —Farr v St Louis Southwestern Ry. Co., 243 S.W. 880, 154 Ark. 585

(2) As to effect of statute on validity of contracts limiting liability —Jackson v. Mauck, 126 N.E. 851, 189 Ind. 262.

57. Mo.—Bowles v. Quincy, O. & K. C. R. Co., App., 187 S.W. 131.

Delay

In action against succeeding carrier for damages to an interstate shipment of hogs, instruction which told jury that, before verdict for plaintiff could be returned, they must find that defendant failed to transport hogs in reasonable time, and that by reason of said failure hogs were injured so that some of them died, was not improper.—Bowles v Quincy, O. & K. C. R. Co., Mo.App., 187 S.W. 131.

58. N.C.—Groves Mills v. Carolina & N. W. Ry. Co., 148 S.E. 441, 197 N.C. 388.

Instruction construed

In action against two intermediate railroads for damage to fish, charge including statement that "that doesn't change what I have already said," in reply to counsel's suggestion that connecting carrier was bound only to carry safely over its own line, was held not to have instructed jury that intermediate railroad could be held liable for damage that did not occur on its own line but was recognition of the proposition as correct.—Columbia Fish & Ice Co. v. Atlantic Coast Line R. Co., 126 S.E. 645, 130 S.C. 549.

Separate verdicts

Prior to the Carmack amendment, in an action against several carriers for injuries to live stock, in the absence of a special contract extending the liability beyond the end of their respective lines, an instruction that the jury should find a separate verdict against each carrier for the damages that occurred on its line is proper.—Illinois Cent. R. Co. v. Curry, 106 S.W. 294, 127 Ky. 643, 32 Ky.L. 513.

59. N.C.—Groves Mills v. Carolina & N. W. Ry. Co., 148 S.E. 441, 197 N.C. 388.

Tenn.—Southeastern Express Co. v. Fry Produce Co., 2 Tenn.App. 37.

Instructions construed together

In an action against a railroad for loss of, and damage to, live stock in transit, instruction that plaintiff shipper to recover must show by a preponderance of testimony that the cattle after delivery to defendant railroad were negligently handled was not erroneous as giving plaintiff the right to recover if the proof showed the damage occurred after the cattle were received by defendant railroad, although inflicted by the delivering carrier where another instruction plainly told the jury that in order for plaintiff to recover he must show the loss resulted from defendant's negligence.—Missouri Pac R. Co. v. Hill, 215 S.W. 676, 144 Ark. 641.

60. Ga.—Lewis v. Joyner, 113 S.E. 829, 29 Ga.App. 92.

Relevancy

Charge that, where goods were delivered to initial carrier in good condition and received in bad condition at point of destination, rebuttable presumption of liability arose against terminal carrier, was not erroneous or prejudicial, as irrelevant or not adjusted to the evidence, although it appeared part of damage was sustained prior to terminal carrier's receipt of goods, there not being sufficient data as to the amount of such damage, and there being evidence that part of the damage occurred while goods were in hands of terminal carrier.—Lewis v. Joyner, 113 S.E. 829, 29 Ga. App. 92.

61. **Delay on connecting line**

In an action by a shipper for damages to shipment by delay in transportation, an instruction authorizing a verdict for plaintiff on the finding that there was negligent delay in the carriage of the property, without regard to whether the loss was due to the delay occurring on defendant's line, defendant not being the initial carrier, was error, as in order to render the defendant liable it was necessary that the jury find as a fact that the loss occurred through defendant's fault or breach of duty while the goods were in its possession.—Johnson v. Missouri Pac. R. Co., 249 S.W. 658, 211 Mo.App 564.

Joint liability

In an action against the initial carrier and the connecting carrier for failure to deliver cattle, an instruction that defendants are not jointly liable was correct, while others, implying that a verdict against all the defendants would be proper were inconsistent with it and misleading and constituted error prejudicial to the defendant whose liability was not established by proofs. —Mayhall & Neible v. Chicago, B. & Q. R. Co., 185 N.W. 326, 107 Neb. 58, error dismissed Union Stock Yards Co. of Omaha v. Mayhall & Neible, 43 S.Ct. 699, 262 U.S. 731, 67 L.Ed. 1205.

62. **Prediction on inconsistent facts**

In action against delivering carrier for damage to cabbage, rejection of prayer exonerating delivering carrier, if it iced car fully at only ice station along route, although car was without ice on arrival at destination, was proper, in that it assumed that carrier exercised due care by merely providing ice at such point, and was predicated on inconsistent facts and therefore confusing.—Pennsylvania R. Co. v. Walker, 128 A. 45, 147 Md. 323

63. Ill.—Parker v. Louisville & N. R. Co., 230 Ill.App. 259.

Duty to ice car

In an action against a connecting carrier for damages to three carloads of peaches caused by failure to properly ice the fruit, defendant was not entitled to an instruction specifically telling the jury that there was no duty resting on it to ice the cars before the shipment reached its first regular icing station, where the proof established that an icing plant was reached prior to the regular plant, and where there might have been an emergency which, in the exercise of ordinary care, called for re-icing the cars.—Missouri Pac. R. Co. v. American Fruit Growers, 260 S.W. 39, 163 Ark 318.

Acts of defendant's agent

In a shipper's action for injuries to live stock, it was not error to refuse to instruct that defendant was not liable for injuries occurring while the cattle were being switched by another road at destination, where such road was not acting as a connecting carrier, but as defendant's agent to do the switching.—Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero, Tex. Civ.App., 212 S.W. 981, dismissed for want of jurisdiction.

shipment should not be given.[64]

Directing verdict. The court should direct a verdict for the carrier where plaintiff has failed to prove its liability,[65] as where the evidence as to its liability is so vague and indefinite that any verdict for plaintiff would have been based on mere conjecture and surmise,[66] or when the carrier's rebutting evidence is so fair and conclusive that no reasonable man could fail to come to the conclusion that the carrier is not liable;[67] but a verdict should not ordinarily be directed where there is evidence tending to support the complaint.[68] Where, in an action against connecting carriers plaintiff admitted at the trial that no injury occurred on the line of one of such carriers, it was proper for the court to charge that, in case plaintiff was entitled to recover, no verdict should be rendered against such carrier.[69] Even though the correct measure of damages is not proved, if any damages are shown to have been sustained a motion for a peremptory instruction for defendant must be denied.[70]

Findings. In an action against the initial and connecting carriers for delay in transporting live stock, a finding of concurrent negligence on the part of both carriers, and a finding that the initial carrier tendered the stock to the connecting carrier while its train was on its track and about to leave, but that it refused then to accept the shipment, are inconsistent; the second finding controls the first, and a judgment against both carriers cannot be sustained,[71] but in an action against the initial carrier wherein defendant impleaded the connecting carrier, a special finding that the proximate cause of the injury was negligence on the part of the initial carrier, its agents and employees, is not inconsistent with a finding that the negligence of the connecting carrier was the proximate and sole cause of the loss.[72] Where plaintiff sued the initial carrier for the entire damages, submission of special issues which sought to apportion the damage to each connecting carrier does not destroy a specific finding as to the total damage which was supported by evidence.[73] In an action against connecting carriers, a finding that one of the defendants was guilty of actionable negligence in handling the property is sufficient to support a judgment against it without relation to the negligence of the other defendant.[74] A finding that defendant was not guilty of a specific act of negligence alleged does not demand a judgment for defendant, where the complaint was susceptible to the construction that plaintiff's cause of action was based on the breach of defendant's agreement to deliver safely, and the jury could have found that the carrier failed to perform its duty in other respects;[75] but a verdict for defendant initial

64. Ill.—Parker v. Louisville & N. R. Co., 230 Ill.App. 259.
Mont.—Phelps v. Great Northern Ry. Co., 213 P. 610, 66 Mont. 198, certiorari dismissed Great Northern Ry. Co. v. Galbreath Cattle Co., 44 S.Ct. 334, 264 U.S. 571, 68 L.Ed. 855, reversed on other grounds 46 S.Ct. 139, 271 U.S. 99, 70 L.Ed. 854.

65. Me.—Hayden v. Maine Central R. R., 103 A. 1047, 117 Me. 560.
Tex.—Rio Grande & E. P. Ry. Co. v. J. H. Russell & Son, Civ.App., 212 S.W. 530.
W.Va.—Copenhaver & Massey Milling Co. v. Kanawha & W. Va. R. Co., 93 S.E. 940, 81 W.Va. 73.

66. U.S.—Ohio Galvanizing & Mfg. Co. v. Southern Pac. Co., C.C.A.Ky., 39 F.2d 840, certiorari denied 51 S.Ct. 83, 282 U.S. 879, 75 L.Ed. 776.

Several defendants.

(1) Any one of several defendants, in suit for value of goods lost in transit, against whom there is nothing more than mere surmise as to liability, is entitled to directed verdict.—Julius Klugman's Sons v. Oceanic Steam Nav. Co., D.C.N.Y., 42 F.2d 461.

(2) So, where terminal carrier does not defend on ground of failure of intermediate carrier to deliver shipment, order sustaining demurrers to evidence by intermediate and initial carriers, and dismissing them from action, is not erroneous.—Oklahoma, N. M. & P. Ry. Co. v. H. M. S. Drilling Co., 229 P. 420, 100 Okl. 260.

67. S.C.—Parnell v. Atlantic Coast Line R. Co., 74 S.E. 491, 91 S.C. 270.

68. Ala.—Southern Ry. Co. v. Northwestern Fruit Exch., 98 So. 382, 210 Ala. 519.

Evidence held sufficient.

(1) To require submission to the jury.
Iowa.—Bolatti v. Wabash Ry. Co., 184 N.W. 641, 192 Iowa 306.—Heisel v. Minneapolis & St. L. R. Co., 171 N.W. 177, 185 Iowa 885.
Mo.—Vaughn v. St. Louis-San Francisco Ry. Co., 15 S.W.2d 901, 223 Mo.App. 732.
N.C.—Gallop & Fisher v. Norfolk Southern R. Co., 91 S.E. 375, 173 N.C. 21, error dismissed Norfolk Southern R. Co. v. Gallup, 39 S.Ct. 184, 248 U.S. 596, 63 L.Ed. 438.
Ohio.—Erie R. Co. v. Bender, Streibig & Co., 163 N.E. 50, 29 Ohio App. 262.
Tex.—Missouri Pac. R. Co. v. Guest, Civ.App., 280 S.W. 611.—Chicago, R. I. & G. Ry. Co. v. Hallam, Civ.App., 211 S.W. 809.

(2) To require submission of issue of negligence of railroads.—Groves Mills v. Carolina & N. W. Ry. Co., 148 S.E. 441, 197 N.C. 388.

(3) To require submission of issue of unreasonable delay in transporting hogs as to initial and delivering carriers.—Georgia, S. & F. Ry. Co. v. Makeever, 15 S.W.2d 293, 228 Ky. 492.

(4) To require submission of the question of whether tobacco, delivered by connecting carrier in damaged condition, was in good condition when delivered to initial carrier.—E. J. O'Brien & Co. v. Davis, 288 S.W. 682, 216 Ky. 693.

69. Tex.—Ft. Worth, etc., R. Co. v. Garlington, 92 S.W. 270, 41 Tex. Civ.App. 340.

70. Miss.—Illinois Cent. R. Co. v. Mahon Live Stock Co., 71 So. 802.

71. Tex.—St. Louis, etc., R. Co. v. Miller, Civ.App., 176 S.W. 830.

72. Tex.—Gulf, C. & S. F. Ry. Co. v. Hines, Civ.App., 18 S.W.2d 833, error refused.

73. Tex.—Texas-Mexican Ry. Co. v. Sutherland, Civ.App., 189 S.W. 983.

74. Tex.—Texas Mexican Ry. Co. v. Bell, Civ.App., 110 S.W.2d 199.

75. Ind.—New York, C. & St. L. Ry. Co. v. White, 192 N.E. 846, 99 Ind.App. 454.

carrier is justified by a finding that the goods were destroyed in a warehouse by a fire, as to the cause of which there is no evidence, a month after arrival at their destination and notice to the consignee.[76] A finding of negligence cannot be predicated on a failure to furnish a service which it would be illegal to furnish.[77]

Verdict. The usual rules as to verdicts, applicable in civil actions generally, apply in actions against connecting carriers.[78]

§ 444. Judgment

The judgment in a successful action by the plaintiff should be entered against the carrier or carriers liable in the amount found by the jury if not in excess of that sued for; and in a proper case, where several carriers are liable, there may be a judgment over against the carrier causing the damage.

Where an action is brought jointly against several connecting lines for joint negligence in transporting a shipment, a joint judgment may be rendered against all of them, they being joint tortfeasors, arising from a joint concurrent negligence in failing properly to transport the goods.[79] So, it has been held that, when two or more carriers participate in a shipment and fail to allocate the damage as among themselves, a joint judgment for the entire loss against all of them is proper.[80] In an action against all carriers of an interstate shipment, the court can render judgment against the carrier liable for the loss;[81] but the fact that the connecting lines are made parties does not prevent a recovery of the entire damages against the initial carrier.[82] Where a carrier, contracting to ship goods over its own and a connecting line, is sued for injury occurring on the connecting line, the latter cannot complain of a judgment over in favor of the contracting line against it, as it is primarily liable,[83] and where there was no evidence of negligence on the part of a railroad company, sued as a partner with its codefendants for damages to shipments of cattle, the bill of lading limiting liability of each road to negligence on its own line, it was entitled to a peremptory instruction on its plea for judgment over against its codefendants.[84] In an action against the initial carrier for the entire damage to an interstate shipment, where plaintiff proved his damages, and the jury found the damages caused by defendant and the connecting carrier in an amount in excess of that sued for, it is the court's duty to enter judgment for plaintiff for the amount sued for; and other special issues submitted seeking to apportion the amount of damage to connecting carriers not parties to the suit are immaterial to plaintiff's right to the judgment.[85] A judgment against connecting carriers, one of which was not served and did not enter an appearance, is, as to that one, improper.[86]

§ 445. Damages

In an action against the initial or connecting carrier, the assessment of damages will be governed by controlling statutory provisions and the rules applicable to the measure of damages in actions against carriers generally.

In an action against the initial or delivering carrier under the Carmack-Cummins amendment for loss or injuries caused by a connecting carrier, plaintiff is entitled to recover, as provided in the statute, his "full, actual loss."[87] What constitutes "full, actual loss" under the Interstate Commerce

76. Ill.—Aurora Automatic Machinery Co. v. Chicago, B & Q. R. Co., 217 Ill.App. 60

77. Wis.—Northern Wisconsin Produce Co. v. Chicago & N. W. Ry. Co., 234 N.W. 726, 203 Wis. 549.

78. **Separate verdicts**
It has been held that where an action was brought against connecting carriers for injuries to live stock shipped without any person accompanying them, and both carriers denied all negligence and offered evidence in support of the denial, in the face of conclusive evidence of serious delay in transportation, and that the animals when delivered were injured, so that it was impossible for the jury to determine which of the carriers was to blame for their condition, a verdict charging the entire damages against each was proper.—Cincinnati, etc., R. Co. v. Green, 100 S.W. 825, 30 Ky.L. 1180.

79. Va.—Norfolk, etc., R. Co. v. Crull, 70 S.E. 521, 112 Va. 151. 10 C.J. p. 562 note 7.

80. Ky. — Makeever v. Georgia Southern & F. Ry. Co., 294 S.W. 144, 219 Ky. 699.—Louisville & N. R. Co. v. Schaeffer, 280 S.W. 974, 213 Ky. 248.

81. Tex.—Galveston, H. & S. A. Ry. Co. v. American Grocery Co., 36 S.W.2d 985, 122 Tex. 1, affirming, Com.App., 25 S.W.2d 588, which reversed Galveston Wharf Co. v. American Grocery Co., 13 S.W.2d 983, certiorari granted Galveston Wharf Co. v. Galveston, H. & S. A. Ry. Co., 52 S.Ct. 41, 284 U.S. 608, 76 L.Ed. 521, affirmed 52 S.Ct. 342, 285 U.S. 127, 76 L.Ed. 659.

82. Tex.—Missouri, etc., R. Co. v. Demere, Civ.App., 145 S.W. 623.

83. Tex.—Texas, etc., R. Co. v. McCarty, 69 S.W. 229, 29 Tex.Civ.App. 616.

84. Tex.—Texas Cent. R. Co. v. Pool, 114 S.W. 685, 52 Tex.Civ.App. 307.—Texas, etc., R. Co. v. Childs, Civ.App., 40 S.W. 41.

85. Tex.—Texas-Mexican Ry. Co. v. Sutherland, Civ.App., 189 S.W. 983

86. Tex.—Chicago, etc., R. Co. v. Halsell, 80 S.W. 140, 35 Tex.Civ.App. 136.

87. Fla.—Atlantic Coast Line Ry. Co. v. Roe, 118 So. 115, 96 Fla. 429.

Partial loss
In action against initial carrier for loss of goods removed from car while in hands of delivering carrier, an instruction permitting plaintiffs to recover for entire value of shipment, where only portion thereof was removed, is erroneous, since initial carrier is liable only for portion that may have been lost in carriage. So, defendant is not liable for portion of goods properly delivered and which plaintiff permitted to be sold for charges, and where delivering carrier, permitting removal of part of goods from car, after

Act generally is treated supra §§ 262–274. Where a connecting carrier, on the strength of an embargo issued by the stockyards at destination, held an interstate shipment of live stock within the embargo at an intermediate point and there unloaded them, no substantial damages could be recovered against the initial carrier for refusal to go on to destination, whereby the cattle decreased in weight because of the delay, if there were no facilities for unloading at any other place than the stockyards, and the embargo forbade even unloading at the stockyards.[88]

To render the connecting carrier liable for special damages arising from delay which are not the ordinary, natural consequences of delay, the connecting carrier must have notice at or before receiving the shipment and undertaking the carriage.[89] Notice of special damages likely to result from delay, which might charge the initial carrier with liability, is not an element of the through contract, such as will affect the connecting carrier, unless noted on the waybill or otherwise brought home to it.[90] If the contract is a joint one, however, each of the parties to it is bound by the knowledge of the other of special damages likely to result from delay;[91] and under a statute making each connecting carrier in a through shipment the agent of the others, notice to one is notice to all as respects liability for special damages,[92] but the statute is inapplicable to a connecting carrier transporting the shipment under a separate contract.[93]

Apportionment. In an action against the terminal carrier, where it appears that some of the damage occurred before the shipment came on defendant's line, the damages must be apportioned;[94] and, accordingly, in an action against two or more connecting carriers for injuries sustained by an interstate shipment, where there are several separate issues of negligence arising during the handling of the shipment by each connecting carrier, each of such issues constituting a cause of action within itself, defendants have the right as between themselves to apportion between them the total damages according to the liability of each as found by the jury.[95] A statute providing that, where freight has been damaged in transit over two or more railroads, the damage shall be apportioned among them, does not require the apportionment of damage, however, where defendants have not filed pleadings asking apportionment.[96]

§ 446. Liability Over of Carrier Causing Loss or Injury

Under the Carmack amendment and similar state statutes, a carrier required to pay damages caused by a connecting carrier has a remedy over against such carrier.

As shown in the title Indemnity § 20, also 10 C.J. p 562 note 11, irrespective of any statutory provision, where one of a line of connecting carriers is compelled to pay for loss of, or injury to, a shipment occurring on the line of another, the latter is liable over to it for the amount so paid. Under the Carmack amendment, 49 U.S.C.A. § 20 (12), while a terminal carrier sued for its negligence in transporting property received from a connecting carrier can have no recovery over for any damages

retaining balance in warehouse for some time, sold it at public auction after proper advertising, initial carrier sued for loss of goods so removed was entitled to allowance for freight, storage, demurrage, and advertising, less sum for which goods sold.—Illinois Cent. R. Co. v. Stimson, 268 S.W. 835, 207 Ky. 78

88. Mo.—Miller v Quincy, O & K C. R. Co., 225 S.W. 116, 205 Mo. App. 463.

89. U.S.—Pomona Products Co. v. Southern Ry. Co., D.C.Ga., 294 F. 982.

Tex.—Kansas City, M & O. Ry. Co. v. Bell, Civ.App., 197 S.W. 322

"The connecting carrier cannot be held liable for special damages accruing to the owner by virtue of the nondelivery of a shipment, where the notice or special instructions given by the shipper to the initial carrier have not been communicated to the connecting carrier"—Atchison, T. & S. F Ry. Co v. Sun Drilling Co., 165 P 1133, 65 Okl. 239.

Damages for delay generally see supra §§ 221–230.

90. U.S.—Pomona Products Co. v. Southern Ry. Co., D.C.Ga., 294 F. 982.

91. Tex.—Kansas City, M. & O. Ry. Co. v. Bell, Civ.App., 197 S.W. 322.

92. Tex.—Conn v. Texas & N. O. Ry Co., Com.App., 14 S.W.2d 1004, reversing, Civ.App., 4 S.W.2d 193 —Kansas City, M. & O. Ry. Co. v. Bell, Civ.App., 197 S.W 322.

Notice to terminal carrier

Under a statute making each connecting carrier the agent of the others, information, acquired by the agent of the terminal carrier while acting within the scope of his authority, as to special damages likely to result from delay, became the knowledge of each connecting carrier, rendering the carriers causing such special damages thereafter liable for the damage. Thus, knowledge acquired by an agent of the terminal carrier immediately, in connection with the collection of freight charges, relative to the special circumstances consisting of the necessitous condition of the cattle for whose feeding the goods were designed, becomes by imputation of law the knowledge of connecting carriers.—Conn v. Texas & N. O. Ry. Co., Tex.Com.App., 14 S.W.2d 1004, reversing, Civ.App., 4 S.W.2d 193.

Notice to initial carrier

Under such statute, notice to initial carrier that hogs shipped on through bill of lading are to be exhibited binds connecting carrier.—Kansas City, M & O Ry. Co v. Bell, Tex.Civ.App., 197 S.W. 322.

93. Tex.—Kansas City, M & O. Ry. Co. v. Bell, supra.

94. Tex.—Houston & T C. R. Co. v. Reichardt & Schulte Co., Civ.App., 212 S.W. 208.

95. Tex.—International & G N. R. Co. v. Barnes Bros., Civ.App., 294 S.W. 349, affirmed Barnes Bros. v. International & G N. R. Co., Com. App., 1 S.W.2d 273.

96. Tex.—Ft Worth & D. C. R. Co. v. Kemp, Civ.App., 207 S.W. 605.

found against it,[97] an initial or terminal carrier required to pay to the owner of the property the damages or loss caused by a connecting carrier is entitled to recover such amount from the guilty carrier;[98] and the ultimate liability of the connecting carriers may, accordingly, be determined in an action brought against them by the initial carrier who has compensated the proper party for the loss,[99] or by cross-petition, by the initial carrier sued, over against the connecting carrier.[1] The same rule applies under similar state statutes relating to intrastate commerce.[2] It is not a condition precedent to the right of recovery over that a judgment against the initial carrier has been paid; the words, "required to pay," as used in the statute, mean asked to pay or asked of right and by authority of law to pay.[3] In the absence of fraud or gross negligence in settling with the shipper, the receipt relied on as evidence of the payment is sufficient to justify a recovery against the connecting carrier of the amount shown thereby;[4] and the burden is on the connecting carrier, sued by the initial carrier to recover the amount paid the shipper for failure to deliver freight, to prove alleged fraud by the initial carrier in procuring the receipt.[5] Since neither the consignor nor the initial carrier could have presented any claim in bankruptcy against a purchaser of goods, although the delivering carrier could have done so, in an action by the initial carrier against the delivering carrier for the amount paid to the consignor for failure to deliver the goods shipped to shipper's order and delivered without taking up the bill of lading, the delivering carrier could not set off an amount which it claims that the initial carrier could have received from the bankrupt estate of the consignee.[6]

§ 447. Rights, Duties, and Remedies Inter Se

Connecting carriers are bound by a local usage they have together established for transfer of freight, but a third carrier, not knowing of it, is not bound thereby.

Some of the rights, duties, and remedies of connecting carriers of goods inter se are considered in previous sections, this Title, such as those relating to establishment of joint through rates and division of rates, supra § 300, unjust discrimination, supra § 357 et seq, apportionment of damages in an action by the shipper, supra § 445, and recovery over by the carrier required to pay for damages caused by another, supra § 446. In subsequent sections are discussed traffic arrangements, infra § 448, the furnishing of facilities, infra § 449, and proceedings to compel the making of connections, infra § 450. In an action involving only the rights of two connecting carriers inter se, each carrier is necessarily bound by a local usage they, together, have established for the transfer of freight from the intermediate to the connecting carriers; thus, where two connecting carriers have established a usage in the delivery of goods, neither may be heard to reject the usage, or maintain that a loss sustained should not be borne by the carrier whose employee was responsible therefor.[7] As against the initial carrier suing such connecting carriers for recovery of the amount paid by it to the shipper for loss of the goods, however, a local custom between the connecting carriers not known to plaintiff is not binding on it.[8]

§ 448. Traffic Arrangements between Carriers

Connecting carriers may, but cannot be compelled to, enter into contracts relating to the interchange of traffic between them.

97. Tex.—Texas & P. R. Co v. West Bros., Com.App, 207 S W 918, affirming in part and reversing in part St. Louis, I. M. & S R. Co. v. West Bros, Civ.App., 159 S W. 142, rehearing denied Texas & P. Ry Co v West Bros., Com App., 214 S.W. 808.

98. Ky.—Southern Ry. Co. v. Avey, 191 S.W. 460, 173 Ky. 598.
Me.—Lewis Poultry Co. v. New York Cent R. Co., 105 A 109, 117 Me. 482.
Okl.—St. Louis & S F. R. Co. v. Akard, 159 P. 344, 60 Okl. 4
Tex.—Texas & P. R Co. v. West Bros, Com.App., 207 S W. 918, affirming in part and reversing in part St. Louis, I M & S R Co. v. West Bros., Civ.App, 159 S.W. 142, rehearing denied Texas & P. Ry Co. v. West Bros, Com.App., 214 S W 808.
10 C.J. p 563 note 13.

99. N.Y.—Hill Steamboat Line v. New York Cent. & H R. R. Co., 158 N.Y S. 1084, 94 Misc. 118, modified on other grounds Hill Steamboat Line v. Panama R Co, 160 N Y S 1103, 97 Misc 22.

1. Okl—St Louis & S F. R. Co. v. First Nat. Bank, 171 P. 467, 68 Okl. 68.

2. Ky.—Cumberland Transp. Co. v. E J O'Brien & Co, 2 S.W.2d 668, 222 Ky. 814.
Wis.—Lakeside Packing Co. v. Minneapolis, St. P. & S. S M Ry. Co., 203 N.W. 334, 187 Wis. 350.

3. Okl—St. Louis & S F R. Co. v. First Nat. Bank, 171 P. 467, 68 Okl. 68.

4. Ark—Kansas City, etc., R. Co. v. New York Cent., etc., R. Co., 163 S. W. 171, 110 Ark 612.

5. Ark.—Kansas City, etc., R. Co. v. New York Cent., etc., R Co., supra.

6. Ark—Kansas City, etc, R Co. v. New York Cent., etc., R. Co, supra.
Creditors entitled to prove claims against bankrupt estate in general see Bankruptcy § 385.

7. N.Y—Hill Steamboat Line v. New York Cent & H. R. R. Co, 158 N.Y S. 1084, 94 Misc. 118, modified on other grounds Hill Steamboat Line v. Panama R. Co., 160 N.Y.S. 1103, 97 Misc. 22.

8. N Y—Hill Steamboat Line v. Panama R Co., 160 N.Y S 1103, 97 Misc. 22, modifying Hill Steamboat Line v New York Cent. & H. R. R Co., 158 N.Y.S. 1084, 94 Misc. 118.

In the absence of statutory provision, the interchange of traffic between two connecting railroads is a matter for contract between them, and the courts have no power to compel such interchange, or to fix the terms on which it shall be made;[9] nor is such power conferred upon the courts by the Interstate Commerce Act.[10] Common carriers may enter into contracts establishing through routes for property transported over the lines of both companies,[11] and, as shown supra § 357, the mere fact that a railroad company has agreed to use a particular connecting carrier as its agency in a through shipment and refuses to issue through bills of lading for the shipment over another connecting line, of goods consigned to the same point of destination, will not be treated as an unjust discrimination against the latter. Traffic arrangements between carriers will be construed in the light of the circumstances and the purpose to be accomplished.[12] The legal effect of a through traffic agreement between two or more railroad companies owning and operating connecting lines of road is the creation of a new and independent continuous line.[13]

§ 449. Furnishing Facilities by Carrier to Connecting Lines

a. In general
b. Transportation of cars of connecting carrier
c. Delivery of its own cars by carrier to connecting carrier

a. In General

At common law carriers are not bound to furnish facilities to connecting lines.

The common-law obligations of a carrier to a connecting line as regards reception, transportation, and delivery of freight are the same as those existing between such companies and an individual shipper.[14] However, a carrier has no other rights or privileges against a connecting line than those belonging to a natural person, unless such rights and privileges are granted by the charters of the two carriers.[15] At common law, common carriers are not bound to give the use of their tracks, terminals, or other instrumentalities to competing lines,[16] nor is such a duty imposed by a constitutional requirement that all railroads whose lines connect shall transfer each other's freight, without delay or discrimination,[17] or such use given by a state railroad commission's order requiring the construction of a connection at a junction point between two railroads.[18] It has been held, however, that the legislature may, subject to constitutional limitations, prescribe reasonable regulations for the conduct of common carriers, and impose on railroad companies operating within the state duties in excess of their common-law obligations, and may exercise that power through a commission duly constituted for that purpose.[19] Moreover, as shown supra § 367 et seq, a common carrier cannot lawfully deny the use of its facilities to a connecting line, when such denial would constitute an unjust discrimination.

b. Transportation of Cars of Connecting Carrier

Carriers are ordinarily required to transport cars of other lines when tendered under proper conditions.

A railroad company must receive and transport over its line of road cars of other companies, where constitutional or statutory provisions make that one of its duties as a common carrier,[20] if the

9. U.S.—Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co., Colo., 4 S.Ct. 185, 110 U.S. 667, 28 L.Ed. 291.

10. U.S.—Central Stock Yards Co. v. Louisville & N. R. Co., Ky., 118 F. 113, 55 C.C.A. 63, affirmed 24 S. Ct. 339, 192 U.S. 568, 48 L.Ed. 565

11. U.S.—Illinois Cent. R. Co. v. Brooks-Scanlon Co., La., 241 F. 445, 154 C.C.A. 277.

12. Mass.—Eastern Massachusetts St. Ry. Co. v. Union St. Ry. Co., 168 N.E. 781, 269 Mass. 329.

Particular contracts construed

(1) To require plaintiff to carry on freight trolley business during its term.—Eastern Massachusetts St. Ry. Co. v. Union St. Ry. Co., 168 N.E. 781, 269 Mass. 329.

(2) To create a continuous through line under the control of defendant road between the points therein stated.—State v. Chicago, M. & St. P. Ry. Co., 165 N.W. 869, 139 Minn. 55.

13. Minn.—State v. Chicago, M. & St. P. Ry. Co., 165 N.W. 869, 139 Minn. 55.

14. U.S.—Atchison, etc., R. Co. v. Denver, etc., R. Co., Colo., 4 S.Ct. 185, 110 U.S. 667, 28 L.Ed. 291.
N.H.—Hedding v. Gallagher, 57 A. 225, 72 N.H. 377, 64 L.R.A. 811
10 C.J. p. 563 note 20

15. Ky.—Shelbyville R. Co. v. Louisville, etc., R. Co., 82 Ky. 541, 6 Ky.L. 611.

16. Mo.—Home Telephone Co. v. Granby & Neosho Telephone Co., 126 S.W. 773, 147 Mo.App. 216.
10 C.J. p. 563 note 22.

17. Va.—Commonwealth v. Norfolk & W. Ry. Co., 68 S.E. 351, 111 Va. 59.

18. Ind.—Pittsburgh, C., C. & St. L. R. Co. v. Hunt, 86 N.E. 328, 171 Ind. 189.

19. U.S.—Louisville, etc., R. Co. v. Central Stock Yards Co., Ky., 29 S. Ct. 246, 212 U.S. 132, 53 L.Ed. 441
10 C.J. p. 563 note 23

Power of commission

Whether the Maryland public service commission can require a carrier to receive, from another carrier at a connecting point, freight for delivery at its own terminals depends on whether there was enough distance between the point of reception and the point of delivery to constitute a bona fide further transportation.—State Public Service Commn. v. Baltimore, etc., R. Co., 90 A. 119, 122 Md. 393.—State Public Service Commn. v. Northern Cent. R. Co., 90 A. 105, 122 Md. 355

20. U.S.—Grand Trunk R. Co. of

gauge of the road is suitable, and the cars are not defective or out of repair, nor of such unusual and peculiar construction as to be unreasonably hazardous or dangerous to work with or to handle.[21] Furthermore, although there is authority to the contrary,[22] it has been held or said that, aside from any constitutional or statutory provision or special contract regulating the terms of receiving and drawing cars of another carrier, a railroad company is bound to receive and carry the cars of a connecting railroad company when tendered under proper conditions.[23] The fact that the carrier has an ample number of cars of its own in which to ship the freight, and that it would have to pay charges on the cars tendered while on its own line, will not justify a refusal to accept the cars.[24] However, a connecting carrier may, of course, refuse to receive and transport cars which are not in a suitable condition for further movement;[25] and in any event it is not incumbent on companies, in their duty as common carriers, to move such cars except in their own routine, as they are not obliged to accept and run them at all times and seasons, and not in the ordinary course of business.[26]

The duty of a carrier to accept goods at its station does not require it to accept cars offered by competing roads at arbitrary points near its terminals for the purpose of using its terminal station, and a law requiring it so to do is unconstitutional.[27] So, rules of a state railroad commission requiring common carriers to transport any proper article, and for a stipulated compensation to transport, switch, or transfer any loaded car tendered for the purpose by a connecting railroad, and further requiring all railroads to observe the right of a shipper to fix the route of the shipment, do not contemplate that a carrier having switching and terminal facilities for its own use at a particular point shall be forced, at least without adequate necessity, compensation, and protection, to collect and to distribute, within its own terminal and switching limits, for a competing line, carloads of freight destined to, or arriving from, points reached by its line, such carrier having no part of the line haul or compensation.[28] Notwithstanding these principles, however, a carrier may be required to receive cars from another carrier at a junction point with such carrier within the corporate limits of a city for transportation to team tracks of the receiving carrier which under the exceptional circumstances of the case are not merely instruments of terminal service and delivery but of railway transportation in the completest sense.[29]

On refusal of the carrier to receive and transport cars of a carrier intersecting it, the latter is not remitted to the railroad commissioners for redress, but the courts can determine the right of interchange, and, on failure of the roads to agree on the terms, these may be fixed by the commissioners.[30]

When a domestic railroad receives a cattle car from a foreign railroad in another state under custom, rules, and contract, by which the domestic road carries the car loaded to its destination in the state and unloads it, and must return the car promptly to the foreign road, but may load it on its return trip, paying a per diem for the use of the car, the right of the domestic road to the use of the car is superior to the right of an attaching creditor of the foreign road; and such right of the domestic road is not waived by its local agent requesting the

Canada v. Michigan Railroad Commission, Mich., 34 S.Ct. 152, 231 U.S. 457, 58 L.Ed. 310
Ill.—State Public Utilities Commission v. Cleveland, C., C. & St. L. Ry. Co., 120 N.E. 626, 285 Ill. 184
Mass.—Boston & L. R. Co. v. Nashua & L. R. Corp., 31 N.E. 1067, 157 Mass. 258
Tex.—St. Louis Southwestern Ry. Co. of Texas v. Morehead, Civ.App., 207 S.W. 336, error refused.
10 C.J. p. 563 note 26.

21. Neb.—Chicago, etc., R. Co. v. Curtis, 71 N.W. 42, 51 Neb. 442, 66 Am.S.R. 456.

22. U.S.—Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co., Or., 61 F. 158, 9 C.C.A. 409, affirming, C. C., 51 F. 465.
10 C.J. p. 564 note 29.

23. Mass.—Mackin v. Boston, etc., R. Co., 135 Mass. 201, 46 Am.R. 456—Vermont, etc., R. Co. v. Fitchburg R. Co., 14 Allen 462, 92 Am.D. 785
10 C.J. p. 564 note 30.

24. Tex.—Texas, etc., R. Co. v. Texas Short Line R. Co., 80 S.W. 567, 35 Tex.Civ.App. 387.

25. Ky.—Louisville, etc., R. Co. v. Williams, 24 S.W. 1, 95 Ky. 199, 15 Ky.L. 548, 44 Am.S.R. 214.
10 C.J. p. 564 note 32.

26. Mich.—Coup v. Wabash, etc., R. Co., 22 N.W. 215, 56 Mich. 111, 56 Am.S.R. 374

27. Ill.—State Public Utilities Commission v. Cleveland, C., C. & St. L. Ry. Co., 120 N.E. 626, 285 Ill. 184.
10 C.J. p. 564 note 35.

28. Fla.—State ex rel. Railroad Com'rs v. Louisville & N. R. Co., 67 So. 875, 69 Fla. 210.
Reason for rule
"Such a requirement would, for the purpose of originating and delivering at a point reached by competing lines, in effect give to a carrier for a mere switching charge the use for its own purposes of its competitor's terminal facilities, equipment, and motive power, thereby amounting to a taking of property in violation of organic rights."—State ex rel. Railroad Com'rs v. Louisville & N. R. Co., 67 So. 875, 876, 69 Fla. 210.

29. U.S.—Grand Trunk R. Co. of Canada v. Michigan Railroad Commission, Mich., 34 S.Ct. 152, 231 U.S. 457, 58 L.Ed. 310
Ill.—State Public Utilities Commission v. Cleveland, C., C. & St. L. Ry. Co., 120 N.E. 626, 285 Ill. 184.

30. N.Y.—Hudson Valley R. Co. v. Boston, etc., R. Co., 92 N.Y.S. 928, 45 Misc. 520, affirmed 94 N.Y.S. 545, 106 App.Div. 375.

sheriff to remove the car from the tracks of the domestic road when he levies the attachment, and by setting the car on stub tracks so as to be under the control and dominion of the sheriff under the orders of the court.[31]

c. Delivery of Its Own Cars by Carrier to Connecting Carrier

In absence of special contract, a carrier need not permit its cars to go over a connecting line.

While a common carrier has the privilege of furnishing its own cars beyond the end of its own line, particularly under a statute making it the duty of connecting carriers to receive and transport suitable loaded cars,[32] in the absence of special contract, a carrier is not required to permit its cars to go over a connecting line to continue the transportation by another carrier connecting with it,[33] since the carrier's obligation to provide equipments has always been held limited to service over its own road;[34] nor is it required to deliver its own cars for transportation over the line of a connecting carrier by a statute which provides that every railroad company which shall refuse to receive and transport the cars of any connecting railroad, or to transport and deliver the cars destined to any point on the line of any connecting carrier, shall be guilty of discrimination.[35] A state constitutional provision, that a carrier must deliver its cars to connecting carriers without providing for adequate protection for their return or compensation for their use, is repugnant to the federal constitution; and the want of adequate provisions for the carrier's protection and compensation in the state constitution itself cannot be cured by inserting them in judgments under the constitutional provision.[36]

§ 450. Proceedings to Compel Carriers to Make Connections

Carriers wrongfully refusing to make connections may be compelled to do so by injunction or appropriate statutory proceedings.

The duty imposed on railroad companies by the Interstate Commerce Act and by state legislation to receive freight from connecting roads,[37] or to exchange business with them,[38] is one which the courts will enforce by mandatory injunction, where the injury resulting from its nonperformance is continuing; and it is no defense to such relief that a strike of locomotive engineers and firemen has been ordered on plaintiff's road, and that if defendant's road should accept cars from the boycotted road its own men would be called out.[39] Furthermore, where a railroad company wrongfully refuses to exchange business with another company, it may be required, as shown in the C.J.S. title Mandamus § 231, also 38 C.J. p 813 note 37, to discharge its duties by mandamus.

In some jurisdictions, statutes provide a remedy whereby carriers may be compelled to make connections, and where this is the case, the proceedings are controlled by the statutory provisions. Thus, under a statute providing that, where the officials of two railroads which cross or connect cannot agree as to terms relating to the transfer and carriage of goods, delivery of cars, etc., either road may petition for appointment of commissioners to make an award, a petition will not be dismissed because no recognizance for costs is given by the petitioner, no such recognizance being required by the statute.[40] Under a statute which provides that railroad commissioners may commence proceedings against any carrier which has failed to make connections with other railroads after the commissioners have requested such roads to make such connections, where one of two railroads refuses to comply with the commissioner's request to make connections, the other railroad, although it has complied with the request, is a proper party to proceedings to compel the roads to make connections, since all the parties should be before the court in order that all matters in dispute may be determined and a judgment binding on both corporations be rendered.[41] A judgment in proceedings under a statute authorizing the court to order connecting railroad lines to make connections, which fixes a schedule for certain connecting trains, to be in effect if the companies fail to agree on the schedule making a desired connection, is erroneous, unless it provides that the connecting roads may afterward agree on a schedule not in conflict with the law.[42]

31. Kan.—Dye v. Denver, etc., R. Co., 153 P. 502, 96 Kan. 676.

32. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Morehead, Civ. App., 207 S.W. 336, error refused.

33. U.S.—Central Stock Yards Co. v. Louisville & N. R. Co., Ky., 24 S.Ct. 339, 192 U.S. 568, 48 L.Ed. 565.
10 C.J. p 564 note 38.

34. Tex.—Gulf, etc., R. Co. v. State, 120 S.W. 1028, 56 Tex.Civ.App. 353.

35. Tex.—Thompson v. Missouri, etc., R. Co., 126 S.W. 257, 128 S.W. 109, 103 Tex. 372.
10 C.J. p 565 note 40.

36. U.S.—Louisville, etc., R. Co. v. Central Stock Yards Co., 29 S.Ct. 246, 212 U.S. 132, 53 L.Ed. 441, reversing 97 S.W. 778, 133 Ky. 148, 30 Ky.L. 18
10 C.J. p 565 note 42.

37. U.S.—Chicago, etc., R. Co. v. Burlington, etc., R. Co., C.C.Iowa, 34 F. 481.

38. Tex.—Texas Mexican R. Co. v. State, Civ.App., 174 S.W. 298.

39. U.S.—Chicago, etc., R. Co. v. Burlington, etc., R. Co., C.C.Iowa, 34 F. 481.

40. Vt.—Rutland R. Co. v. Bellows Falls, etc., R. Co., 50 A. 636, 73 Vt. 20.

41. Va.—Southern R. Co. v. Commonwealth, 37 S.E. 294, 98 Va. 758.

42. Va.—Southern R. Co. v. Commonwealth, supra.

W. PENALTIES AND STATUTORY DAMAGES

1. In General

§ 451. General Statement

Reasonable statutory penalties may be imposed on common carriers for various acts and omissions in violation of specified public duties, in order to insure performance thereof.

Various statutes, the enactment of which is within the undoubted power of the states,[43] impose penalties on common carriers for various acts and omissions in violation of their duties and obligations as common carriers. These penalties are not given solely on the idea of making a pecuniary compensation to the person injured, but usually for the more important purpose of enforcing the performance of the duty required by public policy or positive statutory enactment.[44] Under some statutes, hereinafter discussed in § 513, penalties may also be imposed on shippers for a dereliction of duty which they owe the carrier.

Although the amount of the penalty is ordinarily within the discretion of the legislature,[45] and may be made sufficiently heavy to compel obedience to administrative orders of a state railroad commission,[46] it must not be unreasonably large,[47] so as to prevent the carrier from resorting to the courts to determine the validity of the statute imposing the penalty.[48]

Under a statute conferring power on the railroad commission to institute proceedings for the recovery of penalties provided by statute, the commission is without authority to act unless the carrier has done or omitted to do something in violation of a law prescribing a penalty.[49]

Penalties for violations of regulations relating to the carriage of passengers are hereinafter discussed in § 569.

§ 452. Construction of Statutes

Statutes imposing penalties on carriers for various acts and omissions are to be given a strict, although reasonable, construction.

Statutes imposing penalties on common carriers for various acts and omissions, in violation of specified public duties, like other penal statutes, must be given a strict,[50] although reasonable,[51] construction. They cannot be extended to cases not within the legislative intent or the evil intended to be remedied,[52] although the acts are in themselves wrongful.[53] If there is reasonable doubt arising as to whether the acts charged to have been done are within its meaning, the party of whom the penalty is demanded is entitled to the benefit of that doubt.[54] This rule, however, is never to be applied so strictly as to defeat the clear intention of the legislature, and, if the intention to impose the penalty clearly appears, that is sufficient, and must prevail.[55]

§ 453. Effect of Carmack Amendment on State Legislation Relating to Penalties

State legislation imposing penalties on common car-

43. N.C.—Tilley v. Southern Ry. Co., 90 S.E. 309, 172 N.C. 363.
10 C.J. p 565 note 48.

44. N.C.—Summers v. Southern Ry. Co., 50 S.E. 714, 138 N.C. 295.
Tex.—Quanah, A. & P. Ry. Co. v. Warren, Civ.App., 198 S.W. 814.

45. Ark.—Beckler Produce Co. v. American Ry. Express Co., 246 S.W. 1, 156 Ark. 296, 26 A.L.R. 1197

46. U.S.—Wadley Southern R. Co. v. Georgia, 35 S.Ct. 214, 235 U.S. 651, 59 L.Ed. 405, affirming 71 S.E. 740, 136 Ga. 440.

47. Ark.—Beckler Produce Co. v. American Ry. Express Co., 246 S.W. 1, 156 Ark. 296, 26 A.L.R. 1197.

48. N.C.—Garrison v. Southern R. Co., 64 S.E. 578, 150 N.C. 575.

49. Tex.—Clayton Oil & Refining Co. v. Railroad Commission of Texas, Civ.App., 3 S.W.2d 497—Missouri-Kansas & T. R. Co. of Texas v. Railroad Commission of Texas, Civ.App., 3 S.W.2d 489, affirmed Producers' Refining Co. v. Missouri, K. & T. R. Co. of Texas, Com.App., 13 S.W.2d 679, 680.

50. Ala.—Louisville & N. R. Co. v. Farmers' Produce Co., 85 So. 578, 17 Ala.App. 388.
Ark.—Simmons v. American Ry. Express Co., 227 S.W. 414, 147 Ark. 339.
La.—Daniel v. Louisiana Ry. & Nav. Co., 100 So. 684, 156 La. 467—State ex rel. Louisiana Public Service Commission v. Lancaster, 97 So. 347, 154 La. 151.
S.C.—Middleton & Co. v. Atlantic Coast Line R. Co., 110 S.E. 796, 118 S.C. 351.
10 C.J. p 565 note 54.

"The principle is well established that penal statutes are strictly construed . . . and one who seeks to recover a penalty for failure on the part of the defendant [carrier] to discharge some duty imposed by law must bring his case clearly within the language and meaning of the statute awarding the penalty."—Watkins v. American Ry. Express Co., 130 S.E. 305, 306, 190 N.C. 605.

51. S.C.—Middleton & Co. v. Atlantic Coast Line R. Co., 110 S.E. 796, 118 S.C. 351.

52. La.—State ex rel. Louisiana Public Service Commission v. Lancaster, 97 So. 347, 154 La. 151
10 C.J. p 565 note 55

53. Tex.—San Antonio, etc., R. Co. v. Stribling, 89 S.W. 963, 99 Tex. 319.

54. N.Y.—Chase v. New York Cent. R. Co., 26 N.Y. 523—Wysocki v. Erie R. Co., 140 N.Y.S. 950, 155 App.Div. 798.
N.C.—Hines v. Wilmington, etc., R. Co., 95 N.C. 434, 59 Am.R. 250.

55. Ark.—St. Louis, I. M. & S. R. Co. v. Freeman, 128 S.W. 1024, 95 Ark. 218—St. Louis, etc., R. Co. v. Waldrop, 123 S.W. 778, 93 Ark. 42.
N.C.—Hines v. Wilmington, etc., R. Co., 95 N.C. 434, 59 Am.R. 250.
10 C.J. p 566 note 58.

riers for various acts and omissions in breach of their duty as common carriers can have no application to interstate shipments, since as to such shipments, the Carmack amendment has exclusive dominion.

As heretofore shown, in § 17, the Carmack amendment covers the entire field of interstate shipments and supersedes all state legislation on the subject. It follows that state legislation imposing penalties on common carriers for acts of omission or commission constituting a breach of their duty as common carriers is void and inoperative so far as interstate shipments are concerned.[56] Inhibitive legislation of congress is not essential to exclude that of the state on incidental matters relating to interstate commerce with respect to which both had a concurrent power, it being sufficient so to do if the congressional legislation occupies the field of legislation.[57] The application of particular state statutes to interstate commerce, both as affected by the Carmack amendment and other federal legislation, and independent of such enactments, is treated below in §§ 454–513.

2. Acts or Omissions for Which Penalties Imposed

§ 454. Delay in Transportation

State statutes imposing penalties on a carrier for delay in transportation are valid, as applied to completely intra-state shipments, and render the carrier liable, if its default can be brought within their terms.

Statutes which impose a penalty on the carrier for delay in transportation have generally been held to be valid.[58] State statutes of this nature are, however, void as applied to interstate shipments, since they would then constitute a regulation of interstate commerce; they are not designed to, and do not, apply to interstate shipments,[59] even where the initial and the terminal point of shipment are within the same state and only a part of the transportation is out of the state.[60] These statutes are penal, and hence are to be strictly, although not unreasonably,[61] construed.

Statutes imposing penalties for delay have no reference to loss of, or injury to, goods.[62] In some cases, they have been held to apply to delay in making delivery to the consignee after arrival at destination.[63] Delay in delivering freight to connecting carriers as constituting unjust discrimination, under some statutes, is discussed infra § 511 b.

56. U S—Charleston, etc., R Co. v. Varnville Furniture Co, 35 S Ct. 715, 237 U S 597, 59 L Ed. 1137, reversing 79 S E. 700, 98 S.C. 63.
10 C.J. p 566 note 61.

57. U S—Southern R. Co v. Reid, N C, 32 S.Ct. 140, 222 U S. 424, 56 L Ed. 257.

58. U S.—Chicago, B. & Q. R Co. v. Kyle, 33 S Ct 440, 228 U.S. 85, 57 L.Ed 741, affirming Kyle v. Chicago, B. & Q. R Co., 122 N.W 37, 84 Neb. 621—Chicago, B. & Q R. Co. v. Cram, 33 S Ct. 437, 228 U S. 70, 57 L.Ed 734, affirming Cram v. Chicago, B. & Q. R Co., 122 N.W. 31, 84 Neb 607, 26 L R A.,N S., 1022, and 123 N W. 1045, 85 Neb. 586, 26 L R A.,N S., 1028, 19 Ann. Cas. 170
10 C.J. p 577 notes 46, 47.

Constitutional ban on usury inapplicable

A statute fixing special damages for delay at five per cent per month on the value of the property is not in violation of a constitutional provision to the effect that contracts for a greater rate of interest than ten per cent per annum shall be deemed usurious—Texas Cent. R Co. v Hannay-Frerichs & Co, Civ App., 130 S W. 250, modified on other grounds 142 S W. 1163, 104 Tex 603.

59. N C.—Hickory Marble, etc., Co v. Southern R Co., 60 S.E 719, 147 N.C 53.
10 C.J. p 577 notes 48, 50
What constitutes interstate commerce see C J.S. title Commerce § 23, also 12 C.J p 22 note 48–p 23 note 52.

A rule of state railroad commissioners relating to the time of forwarding freight applies only to intra-state shipments and a fine on account of an interstate shipment cannot be imposed on a carrier by virtue of such rule—Atchison, etc., R. Co. v. State, 124 P. 56, 33 Okl. 158.

60. N.C.—Davis v. Southern R Co., 60 S.E. 722, 147 N C. 68—Shelby Iee, etc., Co v. Southern R. Co., 60 S.E. 723, 147 N C. 61

61. S.C—Middleton & Co. v. Atlantic Coast Line R. Co, 110 S E 796, 118 S.C. 351.
10 C.J. p 577 note 52.

62. S C.—Cousar Mercantile Co v Southern R. Co, 64 S E. 391, 82 S C. 307—Macon v. Southern R. Co, 62 S.E. 6, 81 S C. 167.

63. **In North Carolina**

(1) Under Revisal 1905 § 2632, imposing a penalty for unreasonable delay in the transportation of goods, as amended by L 1907 c 461, Comp St § 3516, providing that it shall be construed to require delivery at destination within the time specified, the penalty extends to negligent default in making delivery to the consignee after arrival at destination.—Mitchell v. Atlantic Coast Line R Co., 110 S E. 859, 183 N C. 162.

(2) It was held, on the other hand, that the statute as amended did not impose a penalty for delay in delivery to the consignee after transportation ceased, and hence did not compel a carrier to deliver loaded cars off its own right of way onto the private track of the consignee—Brooks Mfg. Co. v Southern R Co, 68 S E 243, 152 N C. 665.

(3) It was held, under the statute prior to its amendment, that, to relieve the carrier from its operation, the transportation must have terminated, that is to say, the relation of carrier must have ended and that of warehouseman begun—Wall-Huske Co v. Southern R. Co, 61 S. E. 277, 147 N C 407—Alexander v. Atlantic Coast Line R. Co, 56 S E. 697, 144 N C. 93—10 C J. p 577 notes 53 [a] (2), 54.

(4) It was also held, prior to the amendment, that transportation of freight by a carrier was not terminated so as to relieve the carrier from liability for the statutory penalty for delay, on the train hauling the freight arriving within the yard limits of the point to which the freight was consigned—Wall-Huske Co. v. Southern R. Co., supra.

It is essential to the recovery of the penalty that the case be brought clearly within the terms of the statute, and hence it has been held that under a statute imposing penalties on failure to deliver goods within a fixed period, when notice is given that prompt shipment is required, no penalty can be recovered if such notice is not given [64]

The carrier is not liable to the penalty under the statute, for a delay occurring on the line of a connecting carrier, notwithstanding another statute makes it liable for ordinary damages resulting from delay on connecting lines, with a right of action over against the carrier at fault.[65]

§ 455. Effect on Common-Law Liability

As already noted in § 192, statutes providing penalties for delay in transportation apply simply to the penalties therein imposed and are not intended to affect the common-law liability of the carrier.

§ 456. Time Allowed Carriers for Transportation

A failure to transport goods within the time limited by statute may, where the statute so provides, subject the carrier to a penalty.

Under various statutes, a penalty may be imposed on a carrier for a failure to transport goods within a prescribed or reasonable time. Where the statute imposing a penalty for delay in transportation allows a carrier a designated number of days for commencing the transportation, full running days are intended, exclusive of the day of delivery and the day of shipment.[66]

Under a statute which imposes a penalty on a carrier for neglecting to transport within a reasonable time and provides that it shall be deemed to have transported the goods within a reasonable time if it is done within the ordinary time required by such transportation, except that two days at the initial point and forty-eight hours at one intermediate point for each one hundred miles of distance, shall not be charged against the carrier as unreasonable, a failure to transport within the ordinary time is prima facie unreasonable, and "ordinary time" within the meaning of this statute means the regular customary time within which, by the facilities in general use for the performance and duty of carrying goods, the carriage should be completed.[67] The "free" days allowed by the statute at the initial and intermediate points are not the standard by which reasonable time is to be measured, but the liability of the carrier is to be determined by deducting these days from the number of days in excess of the ordinary or reasonable time for transportation.[68] The purpose of the time allowance at intermediate points is for change of cars, if necessary, and for unloading and reloading.[69] The "free" days allowed the carrier must embrace within them the day of delivery when the goods were applied for, and for every day beyond that the carrier incurs the prescribed penalty.[70]

Where the statute provides that the time within which an act is to be done shall be computed by excluding the first and including the last day, unless that day shall be Sunday, when it also shall be excluded, what constitutes a reasonable time for transportation of freight must be determined by excluding the last day when it is Sunday,[71] and by including it if it is not Sunday.[72] In estimating what constitutes a reasonable time, intervening Sundays must be included,[73] even when freight trains are prohibited by law from running on Sundays;[74] but under a statute measuring the time by hours instead of days, it has been held that intervening Sundays should be excluded, as the statute contemplates working hours.[75]

64. S.C.—Middleton & Co. v. Atlantic Coast Line R. Co., 110 S.E. 796, 118 S.C. 351.

65. S.C.—Marion Cotton Oil Co. v. Atlantic Coast Line R. Co., 95 S.E. 336, 109 S.C. 150.

66. N.C.—Branch v. Wilmington, etc., R. Co., 88 N.C. 570—Keeter v. Wilmington, etc., R. Co., 86 N.C. 346—Branch v. Wilmington, etc., R. Co., 77 N.C. 347.

67. N.C.—Jenkins v. Southern R. Co., 59 S.E. 663, 146 N.C. 178—Stone v. Atlantic Coast Line R. Co., 56 S.E. 932, 144 N.C. 220.

68. N.C.—Davis v. Southern R. Co., 60 S.E. 722, 147 N.C. 68—Jenkins v. Southern R. Co., 59 S.E. 663, 146 N.C. 178.
10 C.J. p. 577 note 62 [a].

69. N.C.—Watson v. Atlantic Coast Line R. Co., 59 S.E. 55, 145 N.C. 236
10 C.J. p. 577 note 63.

Transfer of cars to another train
A statutory allowance of twenty-four hours extra for forwarding freight "at each point where transferring from one railroad to another or rehandling of freight is involved," applies as well to the changing of a car from one train to another at a division point as to the loading and unloading of less than carload shipments.—Chicago, R. I. & P. Ry. Co. v. Consumers' Coal Co., 193 S.W. 93, 127 Ark. 603

70. N.C.—Wall-Huske Co. v. Southern R. Co., 61 S.E. 277, 147 N.C. 407.

71. N.C.—Blue Ridge Collection Agency v. Southern R. Co., 61 S.E. 462, 147 N.C. 593.

72. N.C.—Davis v. Atlantic Coast Line R. Co., 59 S.E. 53, 145 N.C. 207—Branch v. Wilmington, etc., R. Co., 77 N.C. 347
Computation of time generally see C.J.S. title Time § 8, also 62 C.J. p. 962 note 47—p. 963 note 63.

73. N.C.—Wall-Huske Co. v. Southern R. Co., 61 S.E. 277, 147 N.C. 407

74. N.C.—Watson v. Atlantic Coast Line R. Co., 59 S.E. 55, 145 N.C. 236—Keeter v. Wilmington, etc., R. Co., 86 N.C. 346
10 C.J. p. 578 note 68

75. S.C.—Sanford v. Seaboard Air Line R. Co., 61 S.E. 74, 79 S.C. 519

Under a demurrage and delayage rule of a railroad commission, fixing a charge against carriers for each day's detention of a car in transit without allowance for free time, and allowing a day's free time at transfer points, a carrier is not deprived of such allowance by a delay in transit; under this provision time not used at one transfer point cannot be used at another.[76]

§ 457. Who May Sue

The person whose legal right is denied by the delay in transportation is the party to bring suit within a statute conferring the right of action on the "party aggrieved"

Under statutes in which the right to the penalty for the carrier's delay in transportation is given to the "party aggrieved," the right of action for the penalty is in the person whose legal right is denied;[77] such a statute does not require or even permit such action to be brought on relation of the state.[78] Ordinarily, when goods are delivered to a common carrier for transportation and the bill of lading issued, the title in the absence of any direction or agreement to the contrary vests in the consignee, and he alone is entitled to sue as the "party aggrieved" for the penalty.[79] Where, however, the facts show that some person other than the consignee is the one whose legal right is denied, and who alone is interested in having the transportation properly made, a different rule obtains, and he and not the consignee is entitled to sue for the penalty;[80] thus, where the consignor retains title to the goods, he is the party in whom the right to the penalty vests.[81]

Under a statute providing that the penalty be forfeited to the shipper, but that the demand therefor be made by the shipper or other party whose interest is affected by the delay, the purchaser or consignee may sue to enforce the penalty, inasmuch as the statute contemplates that the suit be brought by the party whose interest is affected.[82]

Under a statute providing that the penalty is to be recovered "by any consignee who may be injured in any way by such delay or by the owner or holder of the bill of lading," the consignee, not being shown to be either the owner or the holder of the bill of lading, cannot recover the penalty without proving that he was injured by the delay.[83] Under this statute the holder of the bill of lading can recover the statutory penalty without proving any injury from delay in shipping.[84]

Under particular demurrage and delayage rules of a railroad commission the consignee may recover the penalty.[85]

§ 458. Defenses

That the delay was caused by extraordinary and unforeseeable conditions not within its control may be set up as a defense, but the causal relationship must be established.

Extraordinary and unforeseen conditions over which the carrier has no control, disabling it from performing the duty imposed by the statute, present a good defense to an action to recover a penalty for delay.[86] The mere inability of the carrier to furnish cars, however, will not of itself excuse it for delay in transportation, since it is a part of its common-law duty to furnish sufficient facilities for transportation.[87] Also, the fact that trade conditions demand a larger number of cars than had ever been required at the time of the delay complained of constitutes no defense in the absence of a showing how the carrier's ability to move freight was affected thereby.[88] The fact that owing to unusual conditions it was difficult to secure help in railroad offices is no defense where it is not shown how that fact contributed to the delay.[89] If the carrier did not require prepayment of freight, failure of the shipper to prepay the freight presents no defense, since receiving the freight for transportation waives the prepayment.[90] Mismarking part of the

—Salley v. Seaboard Air Line R. Co., 56 S.E. 782, 76 S.C. 173.

76. Miss.—Keystone Lumber Yard v. Yazoo, etc., R. Co., 53 So. 8, 97 Miss. 433.

77. N.C.—Lexington Grocery Co. v. Southern R. Co., 48 S.E. 801, 136 N. C. 396
10 C.J. p 578 note 78.

78. N.C.—Robertson v. Atlantic Coast Line R. Co., 62 S.E. 413, 148 N.C. 323
10 C.J. p 578 note 79.

79. N.C.—Elliott v. Southern R. Co., 71 S.E. 339, 155 N.C. 235—Stone v. Atlantic Coast Line R. Co., 56 S.E. 932, 144 N.C. 220.
10 C.J. p 578 note 80.

80. N.C.—Summers v. Southern R. Co., 50 S.E. 714, 138 N.C. 295

81. N.C.—Davis v. Southern R. Co., 60 S.E. 722, 147 N.C. 68—Cardwell v. Southern R. Co., 59 S.E. 673, 146 N.C. 218
10 C.J. p 578 note 82, p 578 note 83

82. Ark.—Chicago, R. I. & P. Ry. Co. v. Consumers' Coal Co., 193 S.W. 93, 127 Ark. 603.

83. S.C.—Fullerton v. Atlantic Coast Line R. Co., 64 S.E. 142, 82 S.C. 333, 336.
10 C.J. p 579 note 84.

84. S.C.—Muckenfuss Mfg. Co. v. Charleston, etc., R. Co., 63 S.E. 747, 82 S.C. 177.

85. Miss.—Keystone Lumber Yard v. Yazoo, etc., R. Co., 47 So. 803, 94 Miss. 192—Yazoo, etc., R. Co. v. Keystone Lumber Co., 43 So. 605, 90 Miss. 391, 13 Ann.Cas. 960

86. N.C.—Jenkins v. Southern R. Co., 59 S.E. 663, 146 N.C. 178—Branch v. Wilmington, etc., R. Co., 77 N.C. 347
10 C.J. p 578 note 72

87. N.C.—Keeler v. Wilmington, etc., R. Co., 86 N.C. 346

88. Tex.—Texas Cent. R. Co. v. Hannay-Frerichs, 142 S.W. 1163, 104 Tex. 603.

89. Tex.—Texas Cent. R. Co. v. Hannay-Frerichs, supra.

90. Tex.—Texas Cent. R. Co. v. Hannay-Frerichs, supra.

goods shipped under a single bill of lading is no excuse for failure to transport those correctly marked, where the carrier in fact transported the incorrectly marked goods.[91]

§ 459. Conditions Precedent to Action

Where the statute holds the carrier responsible for delay only where it is given notice that prompt delivery is required, such notice is a condition precedent to recovery. It is not essential to recovery that a consignor suing as the "party aggrieved" shall have sustained injury by the delay.

Where the statute makes it a condition precedent to the right to recover for a delay in transportation that notice be given the carrier that prompt delivery is required, the notice provided for must be given to the shipping agent of the carrier.[92] While it is not necessary to give notice at the exact time of shipment, notice should be given within such time of shipment that the carrier's agent, notwithstanding his other duties, with reasonable diligence may remember the notice.[93] No particular method of notice being required, it may be given by the consignee or the holder of the bill of lading through another; direct notice is not essential.[94] It is not necessary that the carrier be required by the shipper to insert in the bill of lading "prompt notice required" where there is other evidence of such notice to the carrier.[95]

To authorize recovery by the consignor as the party aggrieved by the delay, it is not essential that he should have sustained injury by the delay.[96]

§ 460. Actions

The usual rules as to actions for penalties apply.

An action of this character to impose a penalty on a carrier for its acts or omissions is governed by the usual rules as to actions to enforce penalties, discussed in the C.J.S. title Penalties §§ 7–18, also 25 C.J. p 1181 note 46–p 1213 note 78.

Jurisdiction and venue. An action to recover the penalty under a statute providing that it shall be unlawful to allow freight to remain unshipped for more than five days unless otherwise agreed between the parties is an action ex contractu, and, when the sum does not exceed the jurisdictional amount, a justice of the peace has jurisdiction.[97] A statute providing that suit for penalty shall be brought in the proper court having jurisdiction thereof in a designated county, or in any county through or to which the carrier may run, has been held not to relate to jurisdiction, but to venue, and that a court in a county other than the one designated, and through which the carrier does not run, has jurisdiction of an action for a penalty if defendant does not file a plea of privilege to be sued in some other county.[98]

Limitations. A delayage charge fixed by rule of a railroad commission is in the nature of liquidated damages rather than a penalty, and therefore an action to recover it is not within a statute requiring suits for penalties to be brought within a year.[99]

Parties. In an action under a statute prescribing a stipulated penalty for the first day's delay and a lesser penalty for each succeeding day of delay, the shipper may properly join as parties defendant two railroads over which the goods were transported under a single contract of carriage, it being necessary to determine on which line the first day's delay occurred.[1]

Persons who may sue see supra § 457.

Pleading. In order to sustain a recovery of the penalty, the petition should allege the dates the shipments were delivered to the carrier.[2] If the statute prescribes a penalty for delaying shipments by sidetracking in transit, the declaration is demurrable if it fails to allege that the delay for which the penalty is asked was caused by sidetracking.[3]

An answer alleging, as a defense to an action to recover a penalty, that owing to unusual conditions it was difficult to secure help in railroad offices, or that there was great prosperity in the country at the time, and that freight conditions demanded a larger number of cars than had ever been required,[4]

91. N.C.—Lexington Grocery Co v. Southern R. Co., 48 S.E. 801, 136 N.C. 396

92. S.C.—Mills v. Southern R. Co., 64 S.E. 238, 82 S.C. 242
10 C.J. p 579 note 87.

93. S.C.—Mills v. Southern R. Co., supra.
10 C.J. p 579 note 88

94. S.C.—Mills v. Southern R. Co., supra.

95. S.C.—Jamison v. Southern R. Co., 57 S.E. 768, 77 S.C. 216.

96. N.C.—Reid v. Southern R. Co., 64 S.E. 874, 150 N.C. 753, 17 Ann. Cas. 247—Summers v. Southern R. Co., 50 S.E. 714, 138 N.C. 295, 298.
10 C.J. p 579 note 83.

97. N.C.—Katzenstein v. Raleigh, etc., R. Co., 84 N.C. 688.

98. Tex.—San Antonio, etc., R. Co. v. Stribling, Civ.App., 86 S.W. 374, modified on other grounds 89 S.W. 963, 99 Tex. 319.

99. Fla.—State v. Atlantic Coast Line R. Co., 47 So. 969, 56 Fla. 617, 32 L.R.A.,N.S., 639.

Miss.—Keystone Lumber Yard v. Yazoo, etc., R. Co., 53 So. 8, 97 Miss. 433.

1. N.C.—Sellars Hosiery Mills v. Southern Ry. Co., 93 S.E. 952, 174 N.C. 449.

2. Tex.—Dorrance v. International, etc., R. Co., Civ.App., 126 S.W. 694.
10 C.J. p 579 note 94

3. Miss.—Keystone Lumber Yard v. Yazoo, etc., R. Co., 47 So. 803, 94 Miss. 192.
10 C.J. p 579 note 95.

4. Tex.—Texas Cent. R. Co. v. Han-

is insufficient in the absence of any allegation of how these facts contributed to the delay.

Evidence. In an action to recover a penalty for failure of a carrier to transport goods within a reasonable time, the burden is on plaintiff to show that the time of the transportation was not reasonable.[5] The burden, however, is on the carrier to show that the delay was not negligent.[6] Whatever circumstance contributed to produce the delay in spite of ordinary diligence on the part of the carrier, and to which circumstance the carrier did not contribute, is admissible to disprove negligence.[7] Where two railroads are sued jointly as having unreasonably delayed the transportation, each carrier has the burden of rebutting the presumption of negligence as to itself.[8] It is not necessary to prove the value of the goods in order to recover.[9] If the statute requires that the claim be filed, the burden is on defendant to show that it was not filed,[10] and, if the statute provides that in order to recover the penalty it is necessary to recover the full amount of the claim filed, the burden is on defendant to show that the claim was excessive.[11] If the carrier sued sets up that the delay occurred on the line of a connecting carrier, the burden is on it to prove this fact.[12] Evidence of failure of the carrier to transport within the ordinary time makes out a prima facie case against defendant.[13] It is not relevant to the inquiry whether defendant knew the facts which gave plaintiff the right to sue.[14]

Questions for court and jury, and instructions. It is for the jury to determine whether there has been an unreasonable delay in transportation,[15] and an instruction which takes this question from the jury is erroneous.[16] So, if there is any question arising on the issue of ownership of the goods, for delay in shipment of which a penalty is sought, the issue should be submitted to the jury.[17]

Where, in an action against a carrier for penalties for delay in the transportation of goods, a written bill of lading acknowledging the receipt of a car was admitted in evidence, a charge that the carrier was presumed to know what it was doing when it accepted the car, and that it could not be heard to say that it did not have possession thereof at the time it issued the bill of lading, was proper.[18]

Allowance of attorney's fees. A statute providing that, in any action against a railroad for violation of a law regulating transportation, the successful plaintiff shall recover a reasonable attorney's fee, to be taxed as costs, applies to an action for a statutory penalty for failure to forward freight at a required speed.[19]

§ 461. Delivery of Goods without Surrender of Bill of Lading

Delivery to wrong person generally see supra §§ 173–175.

Examine Pocket Parts for later cases.

§ 462. Disobedience of Orders of Railroad Commission

Statutes imposing reasonable penalties for disobedience of orders of regulatory commissions are valid, and authorize recovery against the carrier for failure to observe a rule, rate, or regulation of the commission, except during a suit to test the validity of the order, or during the time the order has been stayed by a court.

Statutes which provide a penalty for disobedience, by carriers, of orders of the railroad commission or other regulatory body, relating to various matters of permissible regulation, are valid,[20] where the penalties are not so excessive as to prevent the carrier from testing the validity of the order in the courts.[21] The purpose of such statutes is to enforce the duties and obligations of carriers

nay-Frerichs, 142 S.W. 1163, 104 Tex. 603.

5. N.C.—Jenkins v. Southern R Co, 59 S.E. 663, 146 N.C. 178—Alexander v. Atlantic Coast Line R. Co., 56 S E 697, 144 N.C. 93—Walker v. Southern R. Co., 49 S.E 84, 137 N. C. 163.

6. Tex—Texas Cent. R. Co. v. Hannay-Frerichs, 142 S W. 1163, 104 Tex. 603.

7. Tex—Texas Cent R. Co. v. Hannay-Frerichs, supra

8. N C—Sellars Hosiery Mills v Southern Ry. Co., 93 S.E 952, 174 N.C 449.

9. S C.—Weinraub v Southern R Co., 87 S.E 1009, 103 S.C. 264—Muckenfuss Mfg. Co. v. Charleston, etc, R. Co., 63 S.E 747, 82 S.C 177.

10. N.C—Rabon v. Atlantic Coast Line R. Co, 62 S E. 743, 149 N.C 59.

11. N.C—Rabon v. Atlantic Coast Line R. Co supra.

12. N.C.—Watson v Atlantic Coast Line R. Co., 59 S E. 55, 145 N.C. 236
10 C J. p 580 note 5.

13. N C.—Jenkins v. Southern R. Co, 59 S E 663, 146 N C. 178.

14. N C.—Cardwell v Southern R Co, 59 S.E 673, 146 N C. 218.
10 C.J. p 580 note 7.

15. N C.—Wall-Huske Co. v Southern R. Co, 61 S.E. 277, 147 N.C 407
10 C J. p 580 note 8.

16. N C—Davis v. Southern R. Co, 60 S E. 722, 147 N.C. 68—Shelby Ice, etc, Co. v Southern R. Co., 60 S.E. 723, 147 N C 61

17. S C—Sanford v. Seaboard Air Line R Co, 61 S E 74, 79 S.C. 519

18. S C—Sanford v. Seaboard Air Line R. Co., supra.

19. Ark.—Chicago, R I & P Ry Co. v. Consumers' Coal Co., 193 S W. 93, 127 Ark 603.

20. U.S.—U S. v Clyde S S Co, C C A.N.Y., 36 F 2d 691, reversing, D C, 29 F 2d 742, and certiorari denied Clyde S. S Co. v U S., 50 S Ct. 350, 281 U S. 744, 74 L Ed 1157.

21. Ga.—Wadley Southern R. Co. v. State, 73 S E 741, 137 Ga 497.

when of a public nature or where penalties are incurred for their violation.[22] Being highly penal, they are to be strictly construed, and not to be extended beyond the scope of the authority expressly conferred.[23]

Where so provided, such statutes extend only to injuries inflicted on any person by a carrier in violation of a rule, rate, or regulation directly affecting its duties as carrier.[24] Rates and tariffs fixed by railroad commissioners come within the meaning of the words "rule or regulation" of the commissioners, as regards the carrier's liability for violation thereof.[25]

No penalty can be imposed for acts committed during the time that the commission's order has been stayed by a valid court order, where such acts are otherwise lawful.[26] Also, when so provided by the statute, penalties may be remitted where incurred during the carrier's prosecution in good faith of a judicial action to set aside the commission's order.[27] It has apparently been further held that the carrier is not subject to penalties until after the order complained of has been held valid, assuming, of course, that the carrier proceeds seasonably to test its validity and acts in good faith.[28]

Actions. If the statute so prescribes, the action to recover damages must be brought in the name of the state by the direction of the governor.[29] If the right of action is given to the shipper, one shipper cannot make the complaint for another shipper.[30]

A complaint by a shipper against a carrier alleging its violation of a demurrage rule of the corporation commission sufficiently confers jurisdiction on the commission to order that the railroad was in violation of its order and to impose a fine to be remitted on refund to complainant of the unlawful charges collected.[31] To entitle plaintiff to recover treble damages for violation of a commission order, the complaint must allege that the order was in force and effect at the time when the cause of action arose.[32] A complaint, or a declaration to recover a penalty imposed by a state railroad commission for violation of its rules by failing or refusing to transport freight, must allege the point of destination and must show that it was within the state.[33] Failure of the order of the commission attached to the declaration to show the point of destination is cured by proper allegation in the declaration;[34] but, unless required by statute or rule of court, such order need not be filed with the declaration.[35]

Where the evidence shows that defendant failed to file a tariff sheet within the time prescribed by the railroad commission, the presumption is that the act was willful.[36]

The authority of the railroad commission and the reasonableness of its order may be collaterally attacked in an action to recover penalties for a disobedience of such orders;[37] and the reasonableness of a rule of the railroad commission is a question of law for the court.[38]

Amount of penalty. A penalty of five hundred dollars per day for a carrier's refusal to submit records to examination by the interstate commerce commission is not excessive or confiscatory.[39]

Remission of penalty during suit

A penalty of not more than five thousand dollars per day for failure of a carrier to abide by the orders of the public service commission does not render the statute unconstitutional where a further provision exempts the carrier from liability for the penalty during prosecution of a suit to test the validity of the order.—Brooklyn Heights R. Co. v. Straus, D.C.N.Y., 245 F. 132.

22. Fla.—Railroad Comrs. v. Atlantic Coast Line R. Co., 47 So. 870, 56 Fla. 525.

23. La.—State ex rel. Louisiana Public Service Commission v. Lancaster, 97 So. 347, 154 La. 151.
10 C.J. p. 586 note 16.

24. Fla.—Railroad Comrs. v. Atlantic Coast Line R. Co., 47 So. 870, 56 Fla. 525.
10 C.J. p. 586 note 17.

25. Ga.—Atlantic Log & Export Co. v. Central of Georgia Ry. Co., 155 S.E. 525, 171 Ga. 175, answers to certified questions conformed to 155 S.E. 530, 42 Ga. App. 256.

26. Or.—Crown Mills v. Oregon Electric Ry. Co., 21 P.2d 214, 144 Or. 25.

27. U.S.—Brooklyn Heights R. Co. v. Straus, D.C.N.Y., 245 F. 132.

28. U.S.—Brooklyn Heights R. Co. v. Straus, supra.

29. Ga.—Wadley Southern R. Co. v. State, 73 S.E. 741, 137 Ga. 497.

30. Mo.—E. R. Darlington Lumber Co. v. Missouri Pac. R. Co., 147 S.W. 1052, 243 Mo. 224.

31. Okl.—Chicago, R. I. & P. Ry. Co. v. State, 186 P. 234, 77 Okl. 63.

Form of complaint for violation of statute requiring all contracts between any and all railroads, as to use and transportation of cars, to be submitted to railroad commissioners for inspection and correction.—State v. Warfield, 58 So. 367, 63 Fla. 298.

32. Or.—Crown Mills v. Oregon Electric Ry. Co., 21 P.2d 214, 144 Or. 25.

33. Fla.—State v. Atlantic Coast Line R. Co., 47 So. 387, 56 Fla. 601.

34. Fla.—State v. Seaboard Air Line R. Co., 47 So. 986, 56 Fla. 670.

35. Fla.—State v. Seaboard Air Line R. Co., supra.

36. Okl.—Atchison, etc., R. Co. v. State, 125 P. 721, 33 Okl. 371.

37. Ark.—St. Louis, etc., R. Co. v. State, 165 S.W. 251, 112 Ark. 147.
10 C.J. p. 586 note 24.

38. Ga.—Southern R. Co. v. Atlanta Sand, etc., Co., 68 S.E. 807, 135 Ga. 35.

39. U.S.—U. S. v. Clyde S. S. Co., C.C.A.N.Y., 36 F.2d 691, reversing, D.C., 29 F.2d 742, and certiorari denied Clyde S. S. Co. v. U. S., 50 S.Ct. 350, 281 U.S. 744, 74 L.Ed. 1157.

§ 463. Failure to Afford Facilities for Interchange of Traffic with Other Lines

Under a statute imposing a penalty on carriers for failure to afford facilities for interchange of traffic with other lines, the cause of action is based on the failure to furnish the requisite facilities and not merely the failure to make delivery to connecting carriers.

Under a statute requiring common carriers to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for receiving, forwarding, and delivering freight to and from their respective lines, and to and from other lines and places connected therewith, under a penalty for violation, the petition, to state a cause of action, must allege a failure to provide facilities for such purpose and it is not sufficient to allege negligence and breach of contract in failing to make delivery to the connecting carrier.[40] Under a statute to that effect, a domestic railroad company which wrongfully refuses to exchange business with a foreign company may be subject to the penalty therein provided.[41]

§ 464. Failure to Deliver Express Matter at Residence or Place of Business

A state statute imposing a penalty on the carrier for failure to deliver parcels at the consignee's residence or place of business is valid as to intra-state shipments; such statute is not complied with by personal delivery to the consignee at the local office.

A state statute reaffirming the duty of express carriers to deliver parcels at the residence or place of business of the consignee, and imposing a penalty for noncompliance, has been held valid,[42] except as applied to interstate shipments.[43] The provisions of the statute are not complied with by a personal delivery to the consignee at the local office.[44]

§ 465. Failure to File Annual Report

A carrier is liable for the penalty imposed by statute if it fails to file an annual report as required, in the prescribed form and within the time specified by the statute.

Under statutes requiring carriers to file annual reports with a specified public body or official, and imposing a penalty for noncompliance, a failure to file the required report in the prescribed form,[45] and within the time specified,[46] will render the carrier liable for the penalty. The fact that the state has shown no special damage resulting from the failure of the carrier to make its report within the required time affords no defense to the action for the penalty.[47]

Federal receivers may be sued in a state court to recover the penalty.[48]

Under a statute requiring the carrier to file the prescribed form, the complaint to recover the penalty must allege that the form was prescribed and furnished to defendant; but it need not allege that such form was as nearly as may be like that used by the interstate commerce commission, as required by the statute.[49]

§ 466. Failure to Furnish and Equip Cars

Statutes imposing penalties on carriers for failure to furnish cars are valid if reasonable; in the absence of express provision, they do not penalize the carrier for failure to furnish any particular kind of car, even where the shipper has contracted for a particular kind, or for failure to furnish a car for use on connecting lines.

Statutes which impose penalties on carriers for a failure to furnish cars to shippers who have complied with the provisions thereof have been upheld as being a proper regulation of common carriers,[50]

40. Iowa.—Clark v. American Express Co, 106 N.W. 642, 130 Iowa 254.
Delay in delivering shipment to connecting carrier see supra § 454.
Failure to deliver to connecting carrier because of inadequate facilities, as constituting unjust discrimination see infra § 511.

41. Tex.—Texas Mexican R. Co. v. State, Civ.App., 174 S.W. 298.

42. Ind.—U. S. Express Co. v. State, 73 N.E. 101, 164 Ind. 196.

43. Ind.—State v. Adams Express Co., 85 N.E. 337, 966, 171 Ind. 138, 19 L.R.A.,N.S., 93.

The Interstate Commerce Act, regulating the transportation and delivery of goods by express companies, supersedes the state statute relating to the same subject matter so far as interstate shipments are concerned.—State v. Adams Express Co, 85 N.E. 337, 966, 171 Ind 138, 19 L.R.A.,N.S, 93.

Prior to federal legislation on the subject the statute was not void as being a regulation of interstate commerce, even as applied to interstate shipments.—U. S. Express Co v. State, 73 N.E. 101, 164 Ind. 196—10 C.J. p 585 note 96.

44. Ind.—U. S Express Co. v. State, supra.

45. N.Y.—People v. Joline, 121 N. Y.S. 857, 65 Misc 394

Independent of other statutory requirement

A statute which provides that the public service commission shall prescribe an annual report to be made by carriers, the form of which report shall be designated by the commission, contemplates a report independently of the one required to be filed by another statute, or else such a report as may be indicated by the commission in the form which it prescribes.—People v Joline, 121 N.Y.S 857, 65 Misc. 394.

46. Tex.—Houston & T. C. R Co. v. State, 61 Tex. 342

47. Tex.—Houston & T. C. R Co. v. State, supra.

48. N.Y.—People v Joline, 121 N.Y. S 857, 65 Misc 394

49. N.Y.—People v. Joline, supra.

50. Tex.—Texas, etc, R. Co. v. Allen, 101 S.W 792, 100 Tex 525, reversing 98 S.W. 450, 42 Tex.Civ. App. 331—Wichita Valley Ry Co. v. Bevering, Civ.App., 272 S.W 250—Texas & P. Ry. Co v. Andrews, Reynolds & Co, 118 S.W. 1101, 55 Tex.Civ.App. 302, modified on other grounds 126 S.W. 562, 103 Tex. 271
10 C.J. p 574 note 2.
Duty to furnish cars see supra §§ 35–39.

if they are reasonable and either expressly or by construction exempt the carrier from liability for noncompliance caused by circumstances beyond its control[51] The validity of such statutes as affecting interstate shipments is treated in § 467 infra. They are to be strictly construed and no penalty other than that specifically provided by the statute can be imposed.[52]

Under these statutes it has been held that the carrier is not bound to furnish any particular kind of car, as long as the cars which it furnishes or tenders are suitable for the particular kind of freight offered for transportation;[53] and the fact that the shipper has made a binding contract with the carrier for a particular kind of cars does not affect the operation of this rule, the remedy of the shipper being for a breach of the contract and not an action to recover the penalty.[54] Under a statute requiring the carrier to furnish double-decked cars for certain kinds of live stock, the carrier may be subject to a penalty if it fails to comply therewith.[55]

The carrier is not liable to the penalty for refusing to furnish cars to be used on a connecting line.[56]

A statute providing that "every railroad corporation in the state shall start and run cars for the transportation of such property as shall, within a reasonable time previous thereto, be ready or offered for transportation" cannot be so extended as to include coal in the earth, to be dug and raised from the mines after cars are furnished, so that the carrier, for neglect in that regard, will be subject to the penalty provided in the statute.[57]

§ 467. To What Shipments Applicable

State statutes which impose penalties on carriers for a failure to furnish cars to shippers have no application to interstate shipments.

It has been definitely settled by the supreme court of the United States that state statutes which impose penalties on carriers for a failure to furnish cars to shippers cannot apply to interstate shipments, inasmuch as congress has exerted its paramount authority over the subject in the Hepburn Act making it the duty of carriers to furnish adequate facilities for transportation, thereby superseding any state legislation relating to the same matter.[58] It was held prior to this decision that, in the absence of federal legislation on the subject, such state statutes, not in terms restricted to intra-state transportation could validly apply to both interstate and intra-state shipments if they were reasonable,[59]

Duty to receive and transport property see supra § 27.

Failure to furnish cars as discrimination subjecting carrier to statutory penalty see infra § 511 a

Validity of statute as affected by amount of penalty see infra § 473.

51. Ga.—Southern R Co. v Atlantic Sand, etc, Co, 68 S E 807, 135 Ga 35.
Tex.—Texas & P. Ry. Co. v. Andrews, Reynolds & Co, 118 S.W. 1101, 55 Tex Civ.App. 302, modified on other grounds 126 S W 562, 103 Tex 271—Texas & P. Ry. Co. v. Taylor, 118 S W 1097, 54 Tex Civ.App. 419, affirmed 126 S.W 1117, 103 Tex. 367, modified on other grounds 126 S.W. 1200, 103 Tex. 367.
10 C.J. p 574 note 3.

52. Ill.—Atchison, etc, R. Co v. Peo., 81 N E 342, 227 Ill 270, reversing 128 Ill App 38.
Tex.—San Antonio, etc, R. Co. v Bailey, App, 15 S.W. 203.
10 C.J p 574 note 4.

53. Tex.—Austin, etc, R. Co. v. Slator, 26 S.W. 233, 7 Tex.Civ. App. 344.
10 C J. p 89 note 68 [a], p 574 note 5

54. Tex.—Texas, etc, R. Co v. Barrow, 77 S.W. 643, 33 Tex Civ App. 611.

55. Duty to furnish suitable cars see supra §§ 49–58.

Penalty dependent on rate charged

(1) A statute, providing that any railway company which fails or refuses to furnish double-decked cars for certain kinds of live stock shall be liable to the owner or shipper for a fixed sum as liquidated damages, except if it transports such animals in single-decked cars at half the price per carload charged for shipping other live stock, confers no actionable right to recover a penalty for failure to provide double-decked cars, unless the shipper has been charged, and required to pay, a greater amount for his shipment in single-decked cars than that specified.—Ft. Worth, etc, R Co. v Starr, Tex Civ.App, 141 S.W. 1084—10 C.J p 574 note 7 [a].

(2) A demand by the shipper for double-decked cars will be implied.—Ft. Worth, etc., R. Co v. Starr, supra.

(3) Where an initial carrier refused to provide double-decked cars for the shipment of plaintiff's sheep, and the terminal carrier collected full rates for the transportation of the sheep in single-decked cars, the initial carrier was liable for the penalty, unless it sustained the burden of proof that such terminal carrier had no authority to act for it in collecting such rate.—Ft. Worth, etc., R. Co. v Starr, supra

56. Tex.—Texas, etc., R. Co. v. Lov ing, Civ.App., 98 S.W. 451—Houston, etc., R Co v. Buchanan, 94 S W 199, 42 Tex.Civ App. 620.
10 C.J. p 574 note 8.

57. Ill.—People v. Illinois, etc., R. Co, 14 N E 261, 122 Ill 506.

58. U.S.—Chicago, etc, R. Co. v. Hardwick Farmers' El. Co, 33 S Ct. 174, 226 U.S. 426, 435, 57 L.Ed. 284, 46 L R A.,N.S, 203, reversing 124 N W. 819, 110 Minn. 25, 19 Ann Cas. 1038.
10 C J. p 574 note 13.

Intra-state or foreign shipments

Under a statute authorizing the recovery of a penalty for the failure to furnish cars for an intra-state shipment, that a shipper demanding cars had the intention and did actually ship them to a point in Mexico does not change the shipment to a foreign shipment, where the freight was shipped to a point within the state consigned to the shipper, and the freight was there paid, and the freight was thereafter shipped to a point in Mexico.—Texas, etc, R Co. v. Taylor, 126 S.W. 1117, 1200, 103 Tex. 367, affirmed 118 S W. 1097, 54 Tex.Civ.App. 419.

59. Ga.—Southern R Co. v Atlanta Sand, etc., Co., 68 S.E. 807, 135 Ga. 35.
10 C.J. p 574 notes 11, 12.

Regulations held reasonable

A rule of a railroad commission made in accordance with statutory

although no such application to interstate transportation would be permitted if they constituted an unreasonable burden thereon.[60]

§ 468. Application for Cars

It is essential to the recovery of the statutory penalty for failure to furnish cars that all the statutory requirements with respect to the application or demand for cars be complied with by the shipper, such as with respect to the time and place the cars are required.

To authorize a recovery of a penalty under the provisions of the statutes requiring carriers to furnish cars to shippers, all the statutory requirements in respect of application or demand for cars must be complied with by the shipper.[61] The application must be made to the agent designated by statute.[62] An oral application is insufficient where the statute requires the application to be in writing.[63] The application should state definitely the time when the cars shall be furnished, and noncompliance by the carrier with an application for cars which fixes no time,[64] or requests that cars shall be furnished "as soon as possible,"[65] imposes no liability on the carrier for failure to furnish cars. An application which requests the carrier to furnish cars within a shorter period than the minimum allowed by the statute to the carrier for furnishing cars is of no effect,[66] and the same conclusion has been reached in respect of an application which requests cars to be furnished at a date subsequent to the time allowed by the statute for furnishing cars.[67] Under a statute so providing, the application must designate as the place at which the cars are desired, some station or switch on the railroad of the company to which the application is made.[68] A failure to comply with an application to furnish cars to be used on another line imposes no liability on the carrier, where the statute does not require that cars to be used on another line shall be furnished.[69] An application for cars of a particular kind will not be sufficient as a basis for imposing a penalty on the carrier, where the statute does not impose on it the duty of supplying a particular kind of cars, but only such as are suitable for the kind of property which the shipper desires to transport.[70]

§ 469. Who May Sue

A part owner of property in control thereof who makes demand for the cars may sue to collect the penalty; but an agent whose status was undisclosed at the time of demand cannot sue, where it appeared at the time of shipment that the cars were intended for the use of another to whom the bill of lading was issued.

One who makes demand for the cars and has control of the property may sue for the penalty provided by the statute for failure to furnish cars, although he is only part owner of the property.[71] The remedy, however, is one in favor of the shipper, and a person who enters a demand for cars, without at that time disclosing his agency for another, cannot recover the penalty, where it appears that at the time of the shipment it was disclosed that the cars were intended solely for the use of

authority which provides that, when a shipper files a sufficient written application for cars, the railroad company shall furnish such cars within four days, Sundays and holidays excepted, etc., and for a violation of the rule shall, within thirty days after demand, pay the shipper one dollar per day per car after expiration of the free time, is a reasonable rule, it being construed to exempt the carrier from liability for noncompliance due to circumstances beyond its control.—Southern R. Co v. Atlanta Sand, etc, Co., 68 S.E 807, 135 Ga. 35.

60. U.S.—Houston, etc., R Co v Mayes 26 S Ct. 491, 201 U.S 321, 50 L Ed. 772, reversing 83 S W 53, 36 Tex Civ.App. 606

Regulations held unreasonable

"An absolute requirement that a railroad shall furnish a certain number of cars at a specified day regardless of every other consideration except strikes and other public calamities, transcends the police power of the State and amounts to a burden upon interstate commerce."—Houston, etc, R Co. v Mayes, 26 S.Ct. 491, 201 U S. 321, 329, 50 L.Ed. 772, reversing 83 S W. 53, 36 Tex. Civ.App. 606

10 C J. p 574 note 3 [b].

61. Tex.—Texas, etc., R. Co. v Hughes, 91 S W 567, 99 Tex. 533—Missouri, K. & T Ry Co of Texas v. Harrell Gin Co, Civ App., 187 S W. 376—Texas, etc, R. Co v. Barrow, 77 S.W. 643, 33 Tex. Civ App. 611—Austin, etc, R. Co v. Slator, 26 S.W. 233, 7 Tex Civ. App. 344.

62. Tex.—Austin & N. W. R Co. v Slator, 26 S.W. 233, 7 Tex.Civ.App. 344.

10 C J p 575 note 15.

63. Tex.—Texas, etc., R. Co v. Barrow, 77 S.W 643, 33 Tex Civ App 611.

10 C J p 575 note 16.

64. Kan.—Cox v. Missouri, etc., R. Co, 105 P 14, 81 Kan 186

10 C.J p 575 note 17.

65. Tex.—Texas, etc., R Co v. Hughes, 91 S W. 567, 99 Tex 533—Texas, etc., R Co. v. Shipman, Civ App, 98 S W. 449

66. N C.—McDuffie v. Seaboard Air Line R. Co., 59 S E. 122, 145 N.C. 397.

Tex.—Griffith v. Texas, etc., R. Co., 116 S.W 648, 53 Tex Civ.App. 510.

10 C J. p 575 note 19.

67. Tex.—Texas & P. R. Co v. Andrews, 126 S W. 562, 103 Tex. 271, reversing Civ App, 118 S W. 1101

10 C J. p 575 note 20

68. Tex.—Missouri, K & T Ry Co of Texas v Harrell Gin Co., Civ. App., 187 S.W. 376.

Spur track of another railroad

Application for cars to be placed on the spur track of another railroad imposes no liability on the carrier.—Missouri, K & T Ry Co. of Texas v. Harrell Gin Co., Tex Civ App, 187 S W. 376

69. Tex.—Texas, etc, R Co. v. Loving, Civ App, 98 S W 451—Houston, etc, R Co v Buchanan, 94 S W. 199, 42 Tex Civ App 620.

70. Tex.—Chicago, etc, R Co. v. Risley, 119 S W 897, 55 Tex Civ. App 66

10 C J. p 575 note 22.

71. Tex.—Texas, etc, R Co v Taylor, 126 S W. 1117, 1200, 103 Tex. 367, affirming 118 S.W. 1097, 54 Tex Civ.App. 419.

another, and the bill of lading was issued in the name of the true owner and shipper of the goods.[72]

§ 470. Defenses

In an action for a penalty for failure to furnish suitable cars, a strike or unforeseeable rush of business creating a shortage of cars is ordinarily a good defense, as is a special contract obligating the shipper to furnish equipment where the penalty is sought for improper equipment; but it is not a defense that the carrier did not have sufficient cars, or that it eventually furnished them, but after the required time.

When expressly so provided by statute, a strike on the carrier's line is a good defense to an action to recover penalties for failure to furnish cars,[73] and even in the absence of any statute so providing, a strike of such magnitude as to render the carrier unable by the use of proper effort to furnish cars on demand would constitute a good defense, although it would be otherwise if the strike was of an insignificant number of employees or in some department in no substantial way interfering with the furnishing of cars.[74]

The mere fact that the carrier did not have sufficient cars to comply with the demands made on its service, when cars were ordered from it, constitutes no defense;[75] but where there is a rush of business or congestion of traffic which could not reasonably have been anticipated, and the failure to furnish cars is due to this cause, the carrier is not liable for noncompliance with the statute,[76] especially under a further provision of the statute excusing it from furnishing cars because of unavoidable accident.[77] The fact that the cars were eventually furnished, although not within the required time, does not prevent the recovery of a penalty.[78]

Where the statute requires applicant to deposit with the agent of the carrier at the time of making his application a part of the freight charges, it is a good defense that at the point of shipment the carrier had no agent.[79] Under a similar statute providing for a deposit if required by the carrier, the shipper's failure to make the deposit is not a defense unless the carrier made a demand therefor and the shipper declined to comply.[80]

It is not a defense that a buyer from the shipper notified the carrier not to carry any more of the shipper's property consigned to the buyer;[81] nor is it a defense that a demand was made for cars to be shipped outside of the state, the statute not requiring the carrier so to do, where the carrier's right to limit the use of cars to shipments inside the state was not asserted at the time the cars were furnished.[82]

Where under the statute the carrier is excused from furnishing cars at any other place than its own elevators, it is essential that it should provide elevators sufficient for handling and storing all grain designed for transportation over its road, and if it fails so to do its refusal to furnish cars at the customers' elevators adjacent to its track will render it liable to a penalty.[83]

Special contract as to equipment of cars. In a shipper's action to recover a statutory penalty for the failure of the carrier properly to equip cars used for hauling lumber and timber, it is a defense that the cars were under a special contract allowed to go out on a private track to be loaded beyond the control of the carrier, and that the real shipper had contracted properly to equip the cars before loading them to be transferred to the carrier on its line.[84]

72. Ga.—Central of Georgia Ry. Co. v Rabun, 94 S.E. 598, 600, 21 Ga. App. 402.
"While it thus seems to be undoubtedly true that, had the bill of lading been issued in the name of the plaintiff, without disclosing the fact of his agency, the railway company could not then have been held to deny that the plaintiff in such case was the true shipper, by disputing the title of the person delivering the goods to it, yet where, by the terms of the shipping contract itself, it was in fact disclosed that the plaintiff was merely the agent of the true shipper, and as such he had made the demand for the car delivery, it would seem that the remedy granted to the shipper must be exercised by the one who occupied that relationship to defendant either actually or prospectively, notwithstanding the fact that he might have entered his demand for the cars through his agent, who did not at that time disclose his true status."—Central of Georgia Ry Co. v. Rabun, supra.

73. Tex.—Texas, etc., R. Co. v Andrews, 126 S.W. 562, 103 Tex. 271

74. Ga.—Southern R Co. v. Atlanta Sand, etc, Co, 68 S.E. 807, 135 Ga 35.

75. Ark.—St. Louis, etc, R Co. v. State, 107 S.W 1180, 85 Ark. 311, 122 Am.S.R. 33
Ga.—Southern R. Co v. Atlanta Sand, etc., Co, 68 S.E. 807, 135 Ga 35.
10 C.J. p 575 note 26

76. Ga.—Southern R Co. v. Atlanta Sand, etc., Co., supra.

77. Kan.—Udall Milling Co. v. Atchison, etc, R. Co., 108 P. 137, 82 Kan. 256.

78. Tex.—Texas, etc, R. Co v. Taylor, 118 S.W. 1097, 54 Tex Civ App. 419.

79. Tex.—Houston, etc, R Co. v Campbell, 45 S.W. 2, 91 Tex. 551, 43 L.R.A 225
10 C.J. p 575 note 28.

80. Kan.—Offerle Grain & Supply Co v Atchison, T & S. F. Ry. Co., 182 P. 405, 105 Kan. 272.

81. Tex.—Houston, etc., R. Co. v. Campbell, 45 S.W. 2, 91 Tex. 551, 43 L.R.A. 225, reversing, Civ.App., 40 S.W. 431.
10 C.J. p 575 note 30.

82. Tex.—Houston, etc., R Co. v. Buchanan, Civ.App., 84 S.W 1073.

83. Minn.—Rhodes v. Northern Pac. R. Co., 24 N.W. 347, 34 Minn. 87.

84. Fla.—Atlantic Coast Line R. Co. v. Lukens, 66 So. 566, 68 Fla. 116.

§ 471. Conditions Precedent to Action

Under a statute to that effect, it is a condition to an action for a penalty for failure to furnish cars that the shipper must have had freight under his control capable of being loaded within the required time for such after demand for the cars. If a statute so requires, it is a condition to the action that the carrier be permitted to defend a claim made by the shipper.

A statutory requirement that the shipper shall have "on hand at the time any demand for cars was made" necessary freight for loading them, taken in connection with the time allowed him of forty-eight hours for loading after delivery to the cars, has been held to mean that he must be the owner and manager of the freight and have such control over it that he can load the cars ordered within such time.[85] The statute does not mean that the shipper should have the property at the immediate point of shipment at the time of demand.[86]

If the statute so requires, the railroad commission must give the carrier opportunity to present a defense to a claim made by the shipper before it as a condition precedent to a suit by the shipper to recover a penalty for refusal to furnish cars.[87]

§ 472. Actions

The usual rules as to actions for penalties apply.

An action to impose a statutory penalty on a carrier for failure to furnish and equip cars is governed by the usual rules as to actions for penalties, discussed in the C.J.S. title Penalties §§ 7–18, also 25 C.J. p 1181 note 46–p 1213 note 78.

Jurisdiction and venue. Notwithstanding the unconstitutionality of a rule of the public service commission providing for determination by itself of disputes between carriers and shippers, a shipper may enforce his right to the statutory penalty for failure to furnish cars, in a court of law, on the theory that for every right there is a corresponding remedy by judicial action.[88]

Subject to the provisions of the statutes governing venue, the action may be brought in any county of the state in which the principal office or place of business of the carrier is located.[89]

Pleading. In an action by a shipper to collect the statutory penalty for failure to furnish cars, the complaint must allege with sufficient certainty facts constituting a violation of the statute by the carrier.[90] The petition need not allege that the point to which plaintiff's goods were shipped was a station on defendant's road, where it alleges that "defendant was conducting a general passenger and freight business over the line of its railroad" between the point of shipment and the point of destination.[91] The complaint is demurrable if it fails to designate as the place at which the cars were desired, some station or switch on the line of the carrier to which application was made.[92]

An answer which fails to allege facts to show that defendant had performed its duty by furnishing a sufficient number of cars to meet the ordinary needs of its business which it could reasonably anticipate, or that a scarcity of cars and existing demands for them were the results of circumstances not in its power reasonably to control and provide against is insufficient.[93] In a shipper's action to recover the statutory penalty for the failure of the carrier properly to equip cars used for hauling lumber and timber, a defense that the cars were loaded on a private track beyond the carrier's control could be made under the general issue.[94]

Evidence. Where the statute provides that "not to exceed six days" shall constitute a reasonable time in which to furnish cars, and no excuse for delay is offered except that traffic was unusually heavy, the court is justified in assuming that nine days was a reasonable time within which to furnish the cars.[95] The usual rules as to weight and sufficiency of evidence apply.[96]

85. Tex.—Texas, etc., R. Co. v. Taylor, 118 S.W. 1097, 54 Tex.Civ.App. 419.
10 C.J. p 576 note 34.

86. Tex.—Chicago, etc., R. Co. v. Risley, 119 S.W. 897, 55 Tex.Civ.App. 66—Texas, etc., R. Co. v. Taylor, 118 S.W. 1097, 54 Tex.Civ.App. 419.
10 C.J. p 576 note 35.

87. Ga.—Southern R. Co. v. Atlanta Sand, etc., Co., 68 S.E. 807, 135 Ga. 35
10 C.J. p 576 note 36.

88. Wash.—State v. Public Service Commission of Washington, 162 P. 523, 94 Wash. 274

89. Kan.—Star Grain, etc., Co. v. Atchison, etc., R. Co., 116 P. 906, 85 Kan. 281.

90. Tex.—Missouri, K. & T. Ry. Co. of Texas v. Harrell Gin Co., Civ.App., 187 S.W. 376.

91. Mo.—Emerson v. St. Louis, etc., R. Co., 19 S.W. 1113, 111 Mo. 161.

92. Tex.—Missouri, K. & T. Ry. Co. of Texas v. Harrell Gin Co., Civ.App., 187 S.W. 376.

Placement on spur track of another road

A complaint alleging application for car to be placed on a spur track of another railroad, not designating as the place where the car was desired one at some station or switch of defendant, is demurrable.—Missouri, K. & T. Ry. Co. of Texas v. Harrell Gin Co., Tex.Civ.App., 187 S.W. 376.

93. Tex.—Texas, etc., R. Co. v. Allen, 101 S.W. 792, 100 Tex. 525, reversing 98 S.W. 450, 42 Tex.Civ.App. 331.

94. Fla.—Atlantic Coast Line R. Co. v. Lukens, 66 So. 566, 68 Fla. 116.

95. Tex.—Texas, etc., R. Co. v. Smith, 79 S.W. 614, 34 Tex.Civ.App. 571.

96. Cattle pastured within short distance

Evidence that the shipper had his cattle in a pasture about eight or nine miles from the station from which the shipment was to be made,

Trial. Where the shipper makes a written application to the carrier for cars without tendering a deposit, without which the carrier under provisions of the statute is not liable for any penalty, and the carrier does not require the deposit to be made, it is for the jury to determine whether applicant elected to order the car without making such deposit.[97]

§ 473. Amount and Number of Penalties

Under a statute providing for exemplary damages for failure to furnish cars, damages are not restricted to actual damages. A specified penalty for each car not furnished is, in the absence of limit as to time of infliction, to be continued during the whole time of the carrier's delinquency.

Exemplary damages provided for by a statute penalizing carriers for delay in furnishing cars ordered, are not such damages as have been termed exemplary in cases holding that such damages cannot be recovered unless actual damages are proved.[98] Under a statute fixing the penalty at twenty-five dollars a day for each car not furnished, but not naming the time for which it is to be inflicted, the penalty is to be charged at the rate of twenty-five dollars a day for each car and to be continued during the whole time of the carrier's delinquency.[99]

§ 474. Failure to Pay for Loss of, or Injury to, Goods

Statutes which impose penalties on carriers for failure to adjust claims for loss of, or injury to, goods, within a designated time, are generally valid as applied to intra-state shipments, and entitle the aggrieved party, unless he has estopped himself, to enforce the penalty on proof of the existence of the necessary statutory conditions. Some courts hold that the carrier's good faith in refusing a claim precludes recovery of the penalty.

Statutes which impose penalties on carriers for failure, within a designated time, to adjust claims for loss of, or injury to, goods, have generally been held valid,[1] as merely providing a reasonable incentive for the prompt settlement, without suit, of just demands of a class admitting of special legislative treatment.[2] State statutes of this kind are not objectionable so far as intra-state shipments are concerned;[3] but, in accordance with the general rule stated in § 453 supra, if, and as far as, they assume to apply to interstate shipments, they are inoperative and void as being in conflict with the Carmack amendment, by which the special regulations and policies of particular states on the subject of the carrier's liability for loss of, or damage to, interstate shipments, and the contracts of carriers with respect thereto, have been superseded.[4] Such statutes, being of a penal nature, are to be construed strictly,[5] and the penalty, being purely a

that it would take four or five hours to drive the cattle from the pasture they were in to the station, and that he did in fact finally ship the cattle in a car furnished by the carrier is sufficient to show compliance with the requirements of the statute as to ability to deliver the cattle within the time demand was made for the car, where such car was requested in forty-eight hours.—Wichita Valley Ry. Co v Bevering, Tex.Civ.App., 272 S.W. 250

97. Kan.—Farmers' Grain & Mercantile Co. v. Union Pac. R. Co., 175 P. 599, 103 Kan. 527.

98. Kan.—Farmers' Grain & Mercantile Co. v. Union Pac R. Co., 175 P. 599, 103 Kan. 527.

99. Tex.—Texas, etc., R. Co. v. Taylor, 118 S.W. 1097, 54 Tex.Civ App. 419.

Validity of statute

This statute has been held not in violation of the constitution as authorizing the imposition of excessive fines and punishment.—Texas, etc., R. Co. v. Taylor, 118 S.W. 1097, 54 Tex.Civ App. 419.

1. U.S.—Chicago & N. W. Ry. Co v. Nye-Schneider-Fowler Co., 43 S. Ct 55, 260 U.S. 35, 67 L.Ed 115, modifying Nye-Schneider-Fowler Co v. Chicago & N. W. Ry. Co., 179 N.W. 503, 105 Neb. 151—Yazoo & Mississippi Val R Co. v. Jackson Vinegar Co., Miss., 33 S.Ct. 40, 226 U.S. 217, 57 L.Ed. 193

10 C.J. p 582 note 49.

Excessive and unreasonable penalty as rendering statute invalid see infra § 480.

Invalidity of statute as applied to case in which the claim is in excess of damage suffered see infra § 476.

Statutory provisions as not violating due process of law clause see C.J.S. title Constitutional Law § 640, also 10 C.J. p 582 note 49.

Statutory provisions as not violating equal protection of law clause see C.J.S. title Constitutional Law § 548, also 10 C.J. p 582 note 49, 12 C.J. p 1176 note 15.

Such a statute is invalid, however, if it is made applicable to railroads only and not to all common carriers.—Seaboard Air Line Ry. Co. v. Simon, 47 So. 1001, 56 Fla. 545, 20 L.R.A.,N.S., 126, 16 Ann.Cas. 1234

Purpose of statute

(1) "The object of statutes of this kind is not to penalize the carrier for refusing to pay claims within the time required, whether just or unjust, but the design is to bring about a prompt investigation and payment of all proper claims. The penalty is intended to make the carrier prompt in the discharge of its duties and to allow to the owner of the goods compensation for the trouble and expense of a suit which the unreasonable delay and refusal of the carrier to pay has made necessary. In such cases penalties may be made cumulative in order to make it to the interest of the carrier to perform its duty."—Beckler Produce Co. v American Ry Express Co., 246 S.W. 1, 2, 156 Ark. 296, 26 A.L.R. 1197.

(2) Other considerations involved see 10 C.J. p 582 note 48 [a].

2. Ark.—Beckler Produce Co v. American Ry. Express Co., supra. 10 C.J. p 582 note 50

3. Ark.—Beckler Produce Co. v. American Ry. Express Co., supra. 10 C.J. p 582 note 51

4. U.S.—Charleston, etc., R. Co. v. Varnville Furniture Co., 35 S.Ct. 715, 237 U.S. 597, 59 L.Ed. 1137, reversing 79 S.E. 700, 98 S.C. 63. 10 C.J. p 582 note 52.

5. La.—Daniel v. Louisiana Ry. & Nav. Co., 100 So. 684, 156 La. 467. 10 C.J. p 582 note 54.

To some extent remedial

It has been said, however, that such statutes although penal, are remedial to the extent that they were enacted to meet a hurtful policy of delaying payment.—Evans v.

creature of the statute, can be imposed only when all the statutory conditions exist.[6]

It is essential to recovery of the penalty that the shipper show a failure on the part of the carrier to adjust or pay the claim within the time prescribed by the statute.[7] The right to recovery, however, is not dependent on the value of the shipment,[8] nor is it of any importance in what particular manner the loss was caused, whether by conversion or otherwise.[9] Where the statute imposing the penalty does not designate the place of payment, the carrier, as debtor, must find claimant and tender the payment to him within the statutory period.[10]

A party otherwise entitled to the penalty may, by his own conduct, estop himself from any right thereto.[11]

Doubtful claim refused in good faith. Notwithstanding that a judgment is subsequently recovered for the full amount of the claim, it has been held that where the circumstances were such as to raise a fair doubt concerning the legality and justness of the claim, and payment was declined in good faith on that ground, the carrier is not liable for the penalty.[12]

§ 475. Requisites and Sufficiency of Claim

It is essential to the recovery of the penalty from the carrier for its failure to adjust a claim within the prescribed time, that there be strict compliance with the requirements of the statute in relation to the claim.

To authorize a recovery of the penalty imposed on carriers for failure to adjust claims for loss of, or injury to, goods, within a designated time, there should be a strict compliance with the requirements of the statute in relation to the claim.[13] Where the statute requires a filing of the claim, while the mail may be used as an agency for communication, it is essential that there be a delivery for filing and a receipt of the claim by the carrier's agent;[14] and a mere verbal claim will not be sufficient,[15] unless, as may be done, this requirement of the statute is waived.[16] The claim should show its nature and amount and the person to whom due.[17] Ordinarily a claim containing such matter will satisfy the requirements of the statute so far as the contents are concerned, without the attachment thereto of the freight bill, or the receipt and the bill of lading; and it is unnecessary that the claim be in any particular form, or attested to, or accompanied by proof of its validity,[18] although if the statute so requires, the claim must contain an itemized statement of the property injured and must be sworn to.[19]

Atlantic Coast Line R. Co., 95 S.E. 335, 109 S.C. 130.

6. Ala.—Louisville & N. R. Co. v. Farmers' Produce Co., 85 So. 578, 17 Ala. App. 388.
Ark.—Simmons v. American Ry. Express Co., 227 S.W. 414, 147 Ark. 339.
N.C.—Watkins v. American Ry. Express Co., 130 S.E. 305, 190 N.C. 605.
10 C.J. p. 582 note 55.

7. N.C.—Watkins v. American Ry. Express Co., supra.

8. Ark.—Simmons v. American Ry. Express Co., 227 S.W. 414, 147 Ark. 339.

9. S.C.—Wilson, etc. v. Atlantic Coast Line R. Co., 60 S.E. 663, 79 S.C. 198.

10. S.C.—Berley, etc. v. Columbia, etc., R. Co., 64 S.E. 397, 82 S.C. 232.
10 C.J. p. 582 note 57.

11. S.C.—Andrews v. Atlantic Coast Line R. Co., 82 S.E. 403, 98 S.C. 212
10 C.J. p. 582 note 58.

Acceptance of order in lieu of money
Where in an action for loss on freight and penalty for nonpayment within forty days, it appeared that plaintiffs had received and retained an order, in lieu of money, without objection until after the penalty had accrued, they were estopped to claim the penalty.—Andrews v. Atlantic Coast Line R. Co., 82 S.E. 403, 98 S.C. 212.

12. Fla.—Atlantic Coast Line R. Co. v. Farris & Co., 149 So. 561, 562, 111 Fla. 412
"In the case at bar, the record shows that the facts surrounding the occasioning of the loss and damage sued for were such as to raise a fair doubt concerning the legality and justness of the plaintiff's claim, and that the carrier declined the payment of the claims in good faith in reliance upon its contention that under the facts of the case, it was not liable at all. To apply the statutory penalty of 50 per centum per annum interest, under the circumstances shown here, would in effect deny to the carrier the right to litigate the validity of a claim, which under the law it was in duty bound not to pay, if the facts did not warrant payment. Such dispute of fact could only be settled by a trial of it in a judicial tribunal where the issues regarding it could be made up and settled. In the absence of any claim or showing of lack of good faith on the part of the carrier, in taking the course that it did in declining to pay without an adjudication of its liability, we cannot say that the application of the statutory penalty would be warranted"—Atlantic Coast Line R. Co. v. Farris & Co., supra.

13. Ala.—Louisville & N. R. Co. v. Farmers' Produce Co., 85 So. 578, 17 Ala. App. 388
La.—Daniel v. Louisiana Ry. & Nav. Co., 100 So. 684, 156 La. 467

14. N.C.—B. F. Eagles & Co. v. East Carolina Ry., 113 S.E. 512, 184 N.C. 66.

15. N.C.—Thompson v. Southern Express Co., 61 S.E. 182, 147 N.C. 343
S.C.—King v. Atlantic Coast Line R., 68 S.E. 769, 86 S.C. 510.
10 C.J. p. 582 note 60.

16. S.C.—Goldstein v. Southern R. Co., 61 S.E. 1007, 80 S.C. 522.
10 C.J. p. 582 note 61.

17. S.C.—King v. Atlantic Coast Line R. Co., 68 S.E. 769, 86 S.C. 510.

18. S.C.—Hawes v. Southern R. Co., 53 S.E. 285, 73 S.C. 274.
10 C.J. p. 583 note 63.

19. Ala.—Louisville & N. R. Co. v. Farmers' Produce Co., 85 So. 578, 17 Ala. App. 388.

The claim must be filed with the agent at the place designated by the statute, such as with the agent at destination,[20] unless there is a waiver of strict compliance with the statute[21] or facts excusing a literal compliance therewith.[22] So, where the consignor of a shipment fails to file his claim with the carrier at the place where the shipment originated, as required of the consignor by the statute, he cannot recover the penalty incurred by the carrier by its failure to settle the claim for loss of the shipment within the time prescribed by the statute.[23]

The claim must be delivered to the carrier within the time specified by the statute.[24] Under some statutes, a claim for the loss of goods may be filed after the lapse of a reasonable time for the arrival thereof.[25]

It is not essential that claimant should demand interest; and, where claimant sues for the actual amount of damages, without interest, on account of the amount claimed, he is entitled to recover the penalty.[26]

§ 476. Necessity of Recovering Judgment for Full Amount of Claim

Although there is some contrary authority, it is generally essential to the recovery of the penalty that the plaintiff recover judgment for the full amount of the claim filed; but it is not necessary that this be by independent action.

If the statute so requires, it is essential to the recovery of the penalty imposed on carriers for failure to adjust claims for loss of, or injury to, goods, within a designated time, that plaintiff recover judgment for the full amount of the claim filed.[27]

In other words, the penalty cannot be recovered until and unless the full amount claimed is recovered, either in a different action or in the same action.[28] Although there is some authority to the contrary,[29] this condition to the imposition of the penalty has been held applicable even independent of express statutory provision,[30] especially where the claim, as presented, was largely in excess of the amount subsequently recovered;[31] indeed, it has been held that a statute imposing a penalty for failure to pay a claim would be invalid as applied to the situation where the shipper's demand was in excess of the actual loss suffered.[32]

Some decisions have insisted on a literal compliance with the rule requiring the recovery to equal the amount of the claim, and have barred recovery of the penalty even though the claim exceeded by

20. N.C.—B. F. Eagles & Co. v. East Carolina Ry., 113 S.E. 512, 184 N.C. 66.
10 C.J. p. 583 note 65.

Agent at destination

(1) The filing of a claim with another officer of the carrier, and a forwarding of the same by such officer, in the discharge of his duties to the agent at the destination of the freight, is not a filing with the agent at point of destination.—Brown v. Southern R. Co., 51 S.E. 151, 71 S.C. 273.

(2) Failure of consignee to file claim for loss with the agent at the point of destination precluded recovery by him of the statutory penalty although claim was properly filed at place to which it would have been forwarded had it been filed in accordance with statute.—Daniel v. Louisiana Ry. & Nav. Co., 100 So. 684, 156 La. 467.

(3) Other applications of rule see 10 C.J. p. 583 note 65 [a].

21. S.C.—King v. Atlantic Coast Line R. Co., 68 S.E. 769, 86 S.C. 510.
10 C.J. p. 583 note 66.

22. S.C.—Sumter Pipe, etc., Co. v. Atlantic Coast Line R. Co., 73 S.E. 770, 90 S.C. 376.
10 C.J. p. 583 note 67.

23. N.C.—Hamlet Grocery Co. v. Southern R. Co., 87 S.E. 57, 170 N.C. 241.

24. Ala.—Louisville & N. R. Co. v. Farmers' Produce Co., 85 So. 578, 17 Ala. App. 388.

25. S.C.—Bullock v. Charleston, etc., R. Co., 64 S.E. 234, 82 S.C. 375.

26. S.C.—Abrams v. Columbia, etc., R. Co., 53 S.E. 819, 73 S.C. 542.

27. N.C.—Watkins v. American Ry. Express Co., 130 S.E. 305, 190 N.C. 605.
S.C.—Byrd v. Atlantic Coast Line R. Co., 90 S.E. 181, 106 S.C. 1.
10 C.J. p. 583 note 71.

Reason for statutory provision

(1) "The proviso . . . that the plaintiff cannot recover the penalty for a refusal to pay the amount of loss or damage to freight unless the full amount of the plaintiff's claim is recovered is based upon the ground that the plaintiff should know the amount of such loss and damage, and that if he demands more than a just amount, the defendant is not to be penalized for refusing to pay an unjust claim"—Tilley v. Southern Ry. Co., 90 S.E. 309, 310, 172 N.C. 363.

(2) Other statements see 10 C.J. p. 583 note 71 [a].

Claim for unpaid freight and feed charges

It has been held, without reference to the statutory requirement that the entire amount of the claim be recovered in order for the penalty to apply, that where the shipper filed a claim for the value of a horse lost in shipment plus the cost of the freight and feed bill to the point of destination, and he was not entitled to recover such freight and feed charges because he had not paid therefor, he could not recover the statutory penalty.—Southern Ry. Co. v. Kimball, 88 S.E. 14, 103 S.C. 365.

Where amount sued for is less than amount of claim filed, the penalty cannot be recovered.—Ray v. Southern R. Co., 77 S.E. 1012, 94 S.C. 303.

28. S.C.—Sauls-Baker Co. v. Atlantic Coast Line R. Co., 96 S.E. 118, 109 S.C. 285.

29. Miss.—Mobile, etc., R. Co. v. Brandon, 53 So. 957, 98 Miss. 461, 42 L.R.A.,N.S., 106.
10 C.J. p. 584 note 73.

30. Ark.—Simmons v. American Ry. Express Co., 227 S.W. 414, 147 Ark. 339.

31. U.S.—St. Louis, etc., R. Co. v. Wynne, Ark., 32 S.Ct. 493, 224 U.S. 354, 56 L.Ed. 799, 42 L.R.A.,N.S., 102.—Stupeck v. Union Pac. R. Co., D.C. Ohio, 200 F. 192.
10 C.J. p. 584 note 72.

32. U.S.—St. Louis, etc., R. Co. v. Wynne, Ark., 32 S.Ct. 493, 224 U.S. 354, 56 L.Ed. 799, 42 L.R.A.,N.S., 102.

only a few cents the amount subsequently recovered;[33] other cases, however, have applied the doctrine of "De minimis non curat lex" to excuse an excess of a small sum and have allowed a recovery of the penalty notwithstanding.[34] Where damages to the amount claimed are proved, the reduction of the amount by a valid counterclaim for charges is not in contemplation of law a failure to recover the full amount of the claim.[35] That the damage exceeded the sum claimed will not bar a recovery of the penalty.[36]

Although the statute makes a recovery of judgment for the amount claimed essential to the recovery of a penalty, the consignee may sue for the penalty, if the time has elapsed without adjustment of the claim, at the same time that he sues for loss or damage to the property, and is not required to institute an independent action for damages.[37]

§ 477. Effect of Settlement of Claim

There is a conflict of authority as to whether settlement of the claim prevents recovery of the penalty, in view of statutory provisions that no penalty is to be imposed unless the consignee "recover" the full amount claimed.

Under statutes which provide that no penalty for failure to pay a claim for loss of, or injury to, goods, within a specified time, is to be imposed, unless the consignee "recover" the full amount claimed, it has been held in some cases, that a settlement of the claim, even though after the time allowed therefor has expired, has the effect of preventing recovery of the penalty.[38] This view is expressly disapproved in other cases which hold that the penalty provided for by the statute may nevertheless be recovered.[39]

§ 478. Who May Sue and Who Liable

The purchaser of goods shipped, with sight draft against the bill of lading, may be entitled to sue for the penalty as the "consignee aggrieved" A carrier, on whose line the loss or injury did not occur, is not liable for the penalty, but liability rests with the carrier at fault.

The purchaser of goods shipped to the consignor's own order, with sight draft against the bill of lading which provided that the purchaser should be notified of their arrival, is the "consignee aggrieved" within the statute giving such person a right to recover a penalty for failure to adjust, within the statutory period, a claim for nondelivery of goods.[40]

Receivers of a railroad company, appointed by a federal court, are subject to the penalty when subjected by a statute to the duties, liabilities, and restrictions arising from the operation of the road.[41] Where the bill of lading under which the goods were shipped stipulates that no carrier shall be liable for loss or damage not occurring on its own line, no penalty can be recovered from a connecting carrier on whose line the loss or injury did not occur;[42] and independently of such provision in the bill of lading, if the statute penalizes a carrier for failure to adjust a claim for damages for loss of, or injury to, goods while in its possession, no penalty can be imposed on a carrier who has never received the goods.[43] The carrier liable for the penalty is the one originally at fault.[44]

33. Ark.—Simmons v. American Ry. Express Co., 227 S.W. 414, 147 Ark. 339.

Excess of five cents

Ark.—Simmons v. American Ry. Express Co., 227 S.W. 414, 147 Ark. 339.

34. S.C.—Evans v. Atlantic Coast Line R. Co., 95 S.E. 335, 109 S. C. 130.
10 C.J. p 583 note 71 [e].

Deviations excused

(1) Four cents.—Evans v. Atlantic Coast Line R. Co., 95 S.E 335, 109 S C. 130.

(2) Half a cent.—Weinberg v. Atlantic Coast Line R. Co., 65 S.E. 637, 83 S.C. 470—B & M. White Laundry Co v. Charleston, etc, R. Co., 65 S. E. 239, 83 S.C. 209, 212, 18 Ann.Cas. 690.

35. S.C.—Byrd v. Atlantic Coast Line R. Co, 90 S E. 181, 106 S.C 1

36. S C—Netherland v. Charleston, etc, R. Co, 60 S.E 927, 79 S.C. 368

Interest

Where addition of interest raises the recovery above the amount of the claim, the penalty may be recovered.—B. & M. White Laundry Co v. Charleston R. Co., 65 S E. 239, 83 S.C. 209.

37. S.C.—Sauls-Baker Co. v. Atlantic Coast Line R. Co., 96 S E 118, 119, 109 S C. 285.
10 C J. p 584 note 74.

Plaintiff "may sue for the penalty and for the amount claimed in separate actions (as they are separate causes of action) or in the same action. . . . The only dependence of the one action upon the other is that the penalty cannot be recovered until and unless the full amount claimed is recovered, either in a different action or in the same action, and therefore the trial of the cause of action for the penalty must either accompany or follow the trial of that for the claim"—Sauls-Baker Co v. Atlantic Coast Line R. Co., supra.

38. S C.—Best v. Seaboard Air Line R Co., 52 S.E 223, 72 S.C. 479.
10 C.J. p 584 note 75.

39. N C. — Albritton v. Atlantic Coast Line R Co, 62 S E. 597, 598, 148 N.C. 485, disapproving Best v. Seaboard Air Line R. Co., 52 S E 223, 72 S C 479.
10 C J. p 584 note 76

40. S.C—Brown v Atlantic Coast Line R. Co., 74 S.E. 754, 91 S.C. 377.

41. S.C.—Huguelet v. Warfield, 65 S.E. 985, 84 S.C. 87.

42. S.C—McMeekin v. Southern R. Co, 67 S E. 745, 85 S C 381—Moody v. Southern R. Co., 60 S. E 711, 79 S C. 297—Venning v. Atlantic Coast Line R. Co., 58 S. E 983, 78 S.C. 42, 125 Am.S.R. 768, 12 L R A,N.S, 1217.

43. La—Stothard v. Louisiana R., etc, Co., 53 So. 658, 127 La. 383. S C.—Smith v Southern R. Co., 71 S E 989, 89 S.C. 415—Burress v. Atlantic Coast Line R. Co, 60 S. E 692, 79 S.C 250.
10 C J. p 584 note 80.

44. La—Stothard v. Louisiana R., etc., Co., 53 So. 658, 127 La. 383.

§ 479. Actions

The usual rules as to actions for penalties apply.

An action to impose a statutory penalty on a carrier for failure to pay for loss of, or injury to, goods is governed by the usual rules as to actions for penalties, as discussed in the C.J.S. title Penalties §§ 7–18, also 25 C.J. p 1181 note 46–p 1213 note 78.

Jurisdiction and venue A cause of action against a railroad company for the statutory penalty, for failing to adjust a claim for loss of goods within the period prescribed by statute, arises at the point of destination, where the company fails to adjust the claim.[45]

Pleading. In a suit against a carrier for the collection of a penalty under a statute providing for the recovery of a penalty as well as damages, the shipper may be allowed to amend so as also to sue for the damages, the amount of which had been agreed on by the parties, inasmuch as such amendment does not affect the claim, the burden on plaintiff, or any defense which could be introduced by the carrier.[46]

Evidence. In an action by the shipper to recover the statutory penalty for failure of the carrier to adjust his claim within the required time, the burden is on plaintiff, on denial of liability by the carrier, to make out his case.[47] The shipper must prove the time when he filed his claim.[48]

In an action against a carrier for loss on freight and for a penalty for nonpayment within forty days, evidence of defendant's dealings with other claimants is properly excluded,[49] but it is error to exclude evidence of former dealings between the parties.[50]

Trial. Whether or not the freight claim agent of a carrier who passes on claims and either rejects them or orders them paid has authority to adjust a freight claim and communicate the decision to claimant, so as to make his statement binding on the carrier, is a question for the jury.[51] A verdict that the shipper was not entitled to the penalty may, as a matter of law, be set aside where the finding on another issue entitled him to such penalty.[52]

§ 480. Amount of Penalty

The reasonableness of the penalty is primarily for the determination of the legislature, but the courts may declare an excessive penalty invalid.

The reasonableness of a penalty for the failure to adjust a claim for loss of, or injury to, goods, within a specified time, is primarily for the judgment of the legislature, and courts will not interfere with its discretion as long as it keeps within the reasonable scope of its powers.[53] A statute imposing a penalty of fifty per cent per annum interest on the principal sum of a claim for freight lost or damaged by a carrier, on the carrier's failure to pay the claim within sixty days from its presentation, is not so exorbitant and unreasonable as to render the statute unconstitutional.[54] However, a statute providing for a continuing daily penalty of two dollars for refusal to settle a claim after a specified time is unconstitutional because exorbitant and unreasonable, for the reason that it leaves it to the discretion of the owner of the goods to increase the penalty by delaying his suit indefinitely within the period of the statute of limitations.[55] It has also been held that a statute allowing an attorney's fee for claimant on appeal, if plaintiff secures more than the amount tendered, is unfair and unreasonable where the carrier is successful on appeal in securing a reduction of the recovery, even though the recovery, when so reduced, exceeds the amount tendered in adjustment of the claim.[56]

45. S.C.—Smith v. Southern R. Co., 65 S.E. 1029, 84 S.C. 167.

46. N.C.—Jarrett Stationery Co. v. Southern Express Co., 67 S.E. 759, 152 N.C. 342.

47. N.C.—Watkins v. American Ry. Express Co., 130 S.E. 305, 190 N.C. 605.

48. N.C.—Watkins v. American Ry. Express Co., supra.

49. S.C.—Andrews v. Atlantic Coast Line R. Co., 82 S.E. 403, 98 S.C. 212.

50. S.C.—Andrews v. Atlantic Coast Line R. Co., supra.

51. S.C.—Tenhet v. Atlantic Coast Line R. Co., 64 S.E. 232, 82 S.C. 465.

52. **Penalty warranted without submission of issue**
In action for damage to shipment and for penalty for delay in payment of damage, the action of the court in setting aside a second special verdict that plaintiff was not entitled to penalty was proper, where, in answer to first issue, the jury found the full amount of the damage claimed had been sustained, since plaintiff's right to the penalty followed as a matter of law the finding that plaintiff had sustained the damage claimed, and the court would have been warranted in adding the penalty to the amount of such damage without submitting the issue.—Hussey v. Atlantic Coast Line R. Co., 110 S.E. 599, 183 N.C. 7.

53. Ark.—Beckler Produce Co. v. American Ry. Express Co., 246 S.W. 1, 156 Ark. 296, 26 A.L.R. 1197 10 C.J. p 584 note 86.

54. Fla.—Atlantic Coast Line R. Co. v. Coachman, 52 So. 377, 59 Fla. 130, 20 Ann.Cas. 1047.

55. Ark.—Southern Express Co. v. Couch, 249 S.W. 559, 157 Ark. 604—American Ry. Express Co. v. Bratton, 247 S.W. 379, 158 Ark. 639—Beckler Produce Co. v. American Ry. Express Co., 246 S.W. 1, 156 Ark. 296, 26 A.L.R. 1197.

56. U.S.—Chicago & N. W. Ry. Co. v. Nye-Schneider-Fowler Co., 43 S.Ct. 55, 260 U.S. 35, 67 L.Ed. 115, modifying Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry. Co., 179 N.W. 503, 105 Neb. 151.

Under a statute prescribing a fixed penalty for each day the carrier refuses to adjust a claim beyond a specified time, the amount recoverable as the penalty is not dependent on the value of the shipment.[57]

§ 481. Failure to Post Transportation Rates

There must be a compliance with statutory requirements in order for an aggrieved party to recover a statutory penalty for failure to post transportation rates.

A statute which imposes a penalty on railroad companies for failure to post rates of transportation at their stations, provided a notice of the violation and a demand for reparation be served on it, is intended to afford compensation for injuries and wrongs suffered as a result of the carrier's failure to post rates as required.[58] Under the provision of this statute as to the notice required to be given to the carrier, a notice which fails to state how claimant was injured by failure to post rates, the extent of his grievance, and the damage occasioned thereby is fatally defective.[59] Where it is made the duty of the railroad commission to fix the rates, there can be no violation of the statute by the carrier before the commission has complied with the statutory requirements which include a delivery of a copy of the schedule of rates to the carrier to be affected thereby.[60]

If the statute provides that the penalty shall be recovered "by the party aggrieved," only a person injuriously affected by the noncompliance with the statute may recover the penalty.[61]

In an action to recover the penalties provided for by this class of statutes, it is essential to allege all the facts necessary to show a case falling within the terms of the statute.[62]

§ 482. Refusal to Trace Freight and Give Information

It is within the power of a state, as to intra-state shipments, to require carriers to trace lost or damaged freight and to give information concerning the same, under a penalty for failure to do so

A state, under its power to regulate and control common carriers may, by statute, require carriers to trace freight which may have been lost or damaged, and to give information to the shipper concerning the same, under penalty of liability for the freight lost, damaged, or destroyed.[63] An action to enforce the carrier's liability under such a statute is in the nature of an action for a penalty,[64] and not one based on the contract of transportation.[65] Since the enactment of the Carmack amendment, state statutes authorizing the recovery of a penalty for defaults of such a character can have no application in case of an interstate shipment.[66] Even without regard to that enactment, they are invalid so far as they relate to interstate shipments, since they do not constitute a reasonable police regulation in aid of interstate commerce, but are a direct and immediate burden thereon.[67]

A statute prescribing a penalty for failure of the carrier to furnish information as to freight, including the name of the company responsible for the delay in shipment, although intended to embrace delay in shipments over connecting lines, is not limited to such lines so as to have no application to a shipment made over a single continuous line.[68]

Where recovery is limited by the statute to the value of the freight lost, damaged, or destroyed, and the right of action is confined to the shipper, the consignee, or an assignee, an action under the statute is not a qui tam action to recover a penalty, within the statute of limitations applicable to that class of actions.[69]

In an action to enforce the carrier's liability under statute for failure to trace freight and furnish the requisite information, evidence that defendant carrier delivered the freight in question to the next connecting line in good order is not admissible, because the act by its terms applies even where, under the contract of shipment or by law,

57. Ark.—Simmons v. American Ry Express Co., 227 S.W. 414, 147 Ark. 339.

58. Ark.—Arkansas & L. R. Co. v. Harris, 36 S.W. 186, 62 Ark. 452

59. Ark.—Arkansas & L. R. Co. v. Harris, supra.
10 C.J. p. 585 note 90.

60. S.C.—Johnson v. Seaboard Air Line R. Co., 52 S.E. 644, 73 S.C. 36
10 C.J. p. 585 note 91.

61. Ark.—Arkansas & L. R. Co. v. Harris, 36 S.W. 186, 62 Ark. 452

62. S.C.—Johnson v. Seaboard Air Line R. Co., 52 S.E. 644, 73 S.C. 36.
10 C.J. p. 585 note 92.

63. Ga.—Davis v. Seaboard Air-Line R. Co., 71 S.E. 428, 136 Ga. 278
—McCall v. Central of Georgia R. Co., 48 S.E. 157, 120 Ga. 602

64. Ga.—Seaboard Air Line R. Co. v. Davis, 77 S.E. 803, 139 Ga. 547

65. Ga.—McCall v. Central of Georgia R. Co., 48 S.E. 157, 120 Ga. 602
—Farkas v. Georgia Southwestern, etc., R. Co., 87 S.E. 160, 17 Ga. App. 403
10 C.J. p. 585 note 99 [a].

66. S.C.—Meetze v. Southern Express Co. 74 S.E. 833, 91 S.C. 379
Effect of Carmack amendment on state statutes relating to penalties generally see supra § 453.

67. U.S.—Central of Georgia R. Co. v. Murphey, 25 S.Ct. 218, 196 U.S. 194, 49 L.Ed. 444, 2 Ann.Cas. 514, reversing 43 S.E. 265, 116 Ga. 863, 60 L.R.A. 817.

68. S.C.—McCutchen v. Atlantic Coast Line R. Co., 61 S.E. 1108, 81 S.C. 71.

69. Ga.—Seaboard Air-Line R. Co. v. Davis, 77 S.E. 803, 139 Ga. 547.
10 C.J. p. 585 note 1.

the responsibility of each or either carrier shall cease on delivery to the next carrier, in good order;[70] and accordingly, it is unnecessary to allege such delivery in good order.[71] So it is not necessary to produce the contract of affreightment, and therefore not necessary to set it out as part of the petition asking for the recovery of the penalty.[72]

§ 483. Noncompliance with Statutes Enacted to Prevent Cruelty to Animals

A statutory penalty is recoverable from a carrier for failure to comply with statutes relating to the extent of confinement of, and the care to be provided for, live stock in transit, see infra §§ 484–491. The carrier's liability in damages to the shipper for loss or injury resulting from noncompliance with these statutes is treated in § 64 c, supra.

§ 484. Federal Legislation in General

a. General rules
b. Circumstances under which connecting carrier liable

a. General Rules

Under a federal statute, which, subject to certain qualifications, prohibits and penalizes the confinement of animals in cars for more than twenty-eight hours without their being unloaded for feed, water, and rest, the carrier is liable for the penalty, recoverable only by the United States, for a knowing and willful violation, regardless of any agreement with the shipper modifying the statutory duty. The carrier's responsibility under the statute continues until delivery is completed to the consignee or to the connecting carrier.

A federal statute, 45 U.S.C.A. §§ 71–74, generally known as the Twenty-Eight-Hour Law, which is remedial in its character,[73] and has for its primary purpose the prevention of cruelty to animals while being transported by railroad or other means of conveyance,[74] by making sure that animals confined in cars shall not go without feed, water, and rest for more than a specified time,[75] provides, subject to some limitations which will hereafter be considered, that no common carrier other than by water engaged in the interstate transportation of cattle, sheep, swine, or other animals shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading them into properly equipped pens for rest, water, and feed for a period of at least five consecutive hours; and that, where it knowingly and willfully fails to comply with the provisions of the statute, it shall be liable to a penalty recoverable in a civil action in the name of the United States. The penalty under this statute is recoverable only by the United States,[76] regardless of who may own the animals.[77]

Compliance with the statute cannot be waived except in the manner and on the contingencies provided in the act,[78] and, hence, it is no defense to the carrier that the owner of the animals consented to a longer period of confinement,[79] or a shorter period of rest,[80] than that prescribed, or contracted

70. Ga.—Davis v. Seaboard Air-Line R. Co., 71 S.E. 428, 136 Ga. 278—Savannah, etc., R. Co. v. Elder, 43 S.E. 379, 116 Ga. 942—Farkas v. Georgia Southwestern, etc., R. Co., 87 S.E. 160, 17 Ga.App 403.

71. Ga.—Davis v. Seaboard Air-Line R. Co., 71 S.E. 428, 136 Ga. 278—Farkas v. Georgia Southwestern, etc., R. Co., 87 S.E. 160, 17 Ga.App 403.

72. Ga.—Davis v. Seaboard Air-Line R. Co., 71 S.E. 428, 136 Ga. 278—Savannah, etc., R. Co. v. Elder, 43 S.E. 379, 116 Ga. 942—Farkas v. Georgia Southwestern, etc., R. Co., 87 S.E. 160, 17 Ga.App. 403

73. U.S.—U. S. v. Atlantic Coast Line R. Co., Va., 173 F. 764, 98 C.C.A. 110—Montana Cent. R. Co. v. U. S., Mont., 164 F. 400, 90 C.C.A. 388.
10 C.J. p 586 note 28.

The federal statute is quasi-penal in its nature—Hogg v. Louisville & N. R. Co., 127 S.E. 830, 33 Ga.App 773.

74. Ga.—Hogg v. Louisville & N. R. Co., supra.
10 C.J. p 586 note 29.

Construction

"The Act is to be construed to give effect to its humanitarian provisions, and as well to the exceptions in favor of the carriers"—U. S. v. Illinois Cent. R. Co., La., 58 S.Ct. 533, 534, reversing, C.C.A., 90 F.2d 213, certiorari granted 58 S.Ct. 49, 302 U.S. 671, 82 L.Ed ——.

Not for benefit of owners

The statute is not intended for the benefit of the owners but, on the contrary, is restrictive of their rights.—Baltimore, etc., R. Co. v. U. S., 31 S.Ct. 368, 220 U.S. 94, 55 L.Ed 384.

Ind.—Cleveland, etc., R. Co. v. Hayes, 104 N.E. 581, 181 Ind. 87, rehearing denied 103 N.E. 839, 181 Ind. 87.
10 C.J. p 586 note 31.

Protection of public health

The statute also has in view the protection of the public in preventing injury to the public health from the sale of cattle for food made ill and feverish by hunger, thirst, and exhaustion—Grand Trunk Western Ry. Co. v. U. S., Mich., 248 F. 905, 161 C.C.A. 23.

75. U.S.—U. S. v. Philadelphia, etc., R. Co., D.C.Pa., 223 F. 206.

Feeding of animals

Purpose of statute requiring carrier to feed animals at expiration of twenty-eight hours after they are received for consignment was to prevent express companies from starving animals while in their custody.—U. S. v. Railway Express Agency, D.C.N.Y., 10 F.Supp. 259.

76. Ga.—Hogg v. Louisville & N. R. Co., 127 S.E. 830, 33 Ga.App 773.
10 C.J. p 587 note 32

77. U.S.—Baltimore, etc., R. Co. v. U. S., Ohio, 31 S.Ct. 368, 220 U.S. 94, 55 L.Ed 384

78. Ind.—Cleveland, etc., R. Co. v. Hayes, 104 N.E. 581, 181 Ind. 87, rehearing denied 103 N.E. 839, 181 Ind. 87

79. U.S.—Baltimore, etc., R. Co. v. U. S., Ohio, 31 S.Ct. 368, 220 U.S. 94, 55 L.Ed. 384—U. S. v. Powell, C.C.A.Va., 65 F.2d 793.

80. U.S.—U. S. v. Delaware, etc., R. Co., D.C.N.Y., 220 F. 944.
10 C.J. p 587 note 33 [a].

to assume responsibility for the required care of the animals.[81]

While every confinement of animals by a carrier for greater than the time prescribed, unless clearly within the exceptions, is within the prohibition of the statute,[82] it is only where the carrier knowingly and willfully violates the statute that it becomes liable for the penalty therein specified.[83] The words of the statute, "knowingly" and "willfully," require that the carrier should have failed to obey the statute purposely and with a knowledge of the facts;[84] but it is not essential that there have been turpitude or moral wrong on its part.[85] The word "knowingly" means simply with knowledge of the facts which taken together constitute the failure to comply with the statute.[86] The word "willfully" is not used as implying a vicious or evil intent,[87] as with a design to injure the stock,[88] but as meaning "voluntarily" or "intentionally,"[89] with a deliberate and conscious purpose,[90] "purposely" or "obstinately;"[91] and it is calculated to describe the attitude of a carrier who having a free choice either intentionally disregards the statute or is indifferent to its requirements.[92] The fact that the detention

81. N.Y.—Walrath v. American Ry. Express Co., 216 N.Y.S. 545, 217 App.Div. 83.
10 C.J. p 587 note 34.

82. U.S.—U. S. v. Philadelphia & R. Ry. Co., D.C.Pa., 238 F. 428, affirmed Philadelphia & R. Ry. Co. v. U. S., 247 F. 466, 159 C.C.A. 520.

83. U.S.—U. S. v. Illinois Cent. R. Co., La., 58 S.Ct. 533, reversing, C.C.A., 90 F.2d 213, certiorari granted 58 S.Ct. 49, 302 U.S. 671, 82 L.Ed. ——. —U.S. v. Southern Ry. Co., D.C.Tenn., 1 F.2d 607—U. S. v. Boston & M. R. R., D.C. Mass., 21 F.Supp. 671—U. S. v. Baldwin, D.C.Neb., 17 F.Supp. 789—U. S. v. Chicago, St. P., M. & O. Ry. Co., D.C.Iowa, 245 F. 179—U. S. v. Philadelphia & R. Ry. Co., D.C.Pa., 238 F. 428, affirmed Philadelphia & R. Ry. Co. v. U. S., 247 F. 466, 159 C.C.A. 520.
10 C.J. p 587 note 35.
Connecting carrier's transportation beyond time limit to nearest unloading station as constituting an unintentional violation see infra § 486.

Delivery in accordance with car ticket

Where a carrier delivered a shipment of hogs at the proper place according to the car tickets before the time to unload under the Twenty-Eight Hour Law, which shipment the consignees refused to accept, because the car tickets made by a connecting carrier did not agree with the bills of lading, which called for delivery at another point, so that the time for unloading had expired before the shipment could be redelivered, and further delay was occasioned by the refusal of another connecting carrier to accept shipment after government inspector had ordered it unloaded for rest and feed, no liability could be imposed on it since there was no willful disobedience of the act, or even negligence—U. S. v. Allentown Terminal R. Co., D.C.Pa., 256 F. 855.

84. U.S.—U. S. v. Southern Ry. Co., D.C.Tenn., 1 F.2d 607.
10 C.J. p 587 note 37.

Act of employee of another company

In action against railroad company for penalty for violating Twenty-Eight Hour Law, train dispatcher of another railroad company, whose tracks were used by defendant, must be treated as defendant's agent, where movement of defendant's trains was governed by such dispatcher.—U. S. v. Chicago, St. P., M. & O. Ry. Co., D.C.Iowa, 245 F. 179.

Congestion in yards

A carrier is deemed knowingly and willfully to have violated the act where it has knowledge that delays are imminent because of yard congestion at the terminal point, and that the margin of safety is small, but nevertheless deliberately takes the risk of delivering the animals within the prescribed time.—U. S. v. Philadelphia & R. Ry. Co., Pa., 247 F. 469, 159 C.C.A. 523—Philadelphia & R. Ry. Co. v. U. S., Pa., 247 F. 466, 159 C.C.A. 520, affirmed, D.C., U. S. v. Philadelphia & R. Ry. Co., 238 F. 428.

Restricted terminal facilities

Where railroad company, knowing that margin of safety was small, elected to transport shipment of live stock without unloading for food, etc., and unloading of two of cars was delayed, because consignee's terminal facilities would only accommodate limited number of cars, and engine departed after placing on siding all cars it would hold, it has been held that company must, as to such cars delayed, be deemed to have knowingly and willfully violated the Twenty-Eight Hour Law—U. S. v. Philadelphia & R. Ry. Co., Pa., 247 F. 469, 159 C.C.A. 523.

Mere omission with knowledge of the facts is not enough. The penalty may not be recovered unless the carrier is also shown "willfully" to have failed—U. S. v. Illinois Cent. R. Co., La., 58 S.Ct. 533, reversing, C.C.A., 90 F.2d 213, certiorari granted 58 S.Ct. 49, 302 U.S. 671, 82 L.Ed. ——.

85. U.S.—U. S. v. Baldwin, D.C. Neb., 17 F.Supp. 789

86. U.S. — Oregon-Washington R., etc., Co. v. U. S., Idaho, 205 F. 337, 123 C.C.A. 471—St. Louis, etc., R. Co. v. U. S., Cal., 169 F. 69, 94 C.C.A. 437.
10 C.J. p 587 note 38.

Time of prior confinement

Knowledge by the carrier of the length of time the stock has been confined on prior lines will ordinarily be imputed to it, since it has the duty to make reasonable inquiry of such fact in order to avoid a violation of the statute—New York Cent., etc., R. Co. v. U. S., N.Y., 203 F. 953, 122 C.C.A. 255.
10 C.J. p 587 note 35 [a] (8).

87. U.S.—Chicago & N. W. Ry. Co. v. U. S., Ill., 234 F. 268, 148 C.C.A. 170, reversed on other grounds 38 S.Ct. 351, 246 U.S. 512, 62 L.Ed. 859.
10 C.J. p 587 note 39.

88. U.S.—Chicago & N. W. Ry. Co. v. U. S., Ill., 234 F. 272, 148 C.C.A. 174—Chicago & N. W. Ry. Co. v. U. S., Ill., 234 F. 268, 148 C.C.A. 170, reversed on other grounds 38 S.Ct. 351, 246 U.S. 512, 62 L.Ed. 859.
10 C.J. p 587 note 39.

89. **Determined from circumstances**
The question of willfulness is to be determined from the entire circumstances—Chicago & N. W. Ry. Co. v. U. S., Ill., 234 F. 272, 148 C.C.A. 174.

90. U.S.—U. S. v. Southern Ry. Co., D.C.Tenn., 1 F.2d 607.

91. U.S.—U. S. v. Illinois Cent. R. Co., La., 58 S.Ct. 533, reversing, C.C.A., 90 F.2d 213, certiorari granted 58 S.Ct. 49, 302 U.S. 671, 82 L.Ed. ——.
10 C.J. p 587 note 40.

92. U.S.—U. S. v. Illinois Cent. R. Co., La., 58 S.Ct. 533, reversing, C.C.A., 90 F.2d 213, certiorari granted 58 S.Ct. 49, 302 U.S. 671, 82 L.Ed. —— —Chicago & N. W. Ry. Co. v. U. S., Ill., 234 F. 268, 148

was caused by an oversight or negligence of the carrier's agents does not excuse the carrier,[93] as whether the carrier knowingly and willfully failed is to be determined by the acts and omissions which characterize its violation of the statute and not by any breach of duty owed to it by its employees.[94] It has been held, however, that the words "knowingly and willfully," as used in the statute, do not comprehend an unintentional oversight or simple negligence.[95]

To escape liability under the statute, the carrier is required to provide for the care of the stock until its duties as carrier are fulfilled by complete delivery.[96] So, where the carrier unloads animals prior to the expiration of twenty-eight hours, but fails to effect delivery or to feed and water the stock for a period of longer than twenty-eight hours, taking into account the time of the prior confinement on the cars, it will be liable.[97] If, however, the cars are delivered to the consignee within the time limit,[98] as where they are placed at his siding, and notice of delivery given to him,[99] the responsibility of the carrier under the statute ends, and it need not, to escape liability, provide further for the care of the stock.

In case of shipment over connecting lines, the initial carrier remains responsible for the stock and for the compliance with the statute regulating its confinement until it delivers the shipment to the next succeeding carrier,[1] but a carrier which delivers the cars containing stock to a connecting carrier within the prescribed time is relieved from further responsibility.[2]

The statute does not require the carrier to maintain any particular kind of equipment of its stock pens, permanent or otherwise, except in so far as to render them suitable for the humane purpose of properly feeding, watering, and resting the particular shipment of stock unloaded into them.[3]

It is not a defense to an action for the statutory penalty that the animals were not injured by the unlawful confinement.[4]

A carrier is liable for the violation of the statute by a terminal company which it had selected to discharge its duties to the shipper and under the statute.[5]

b. Circumstances under Which Connecting Carrier Liable

A connecting carrier which has knowledge of the period of confinement on prior lines is liable to the pen-

C.C.A. 170, reversed on other grounds 38 S.Ct. 351, 246 U.S. 512, 62 L.Ed. 859.
10 C.J. p 587 note 41.

Negligence of yardmaster

A railroad company, failing to take cattle from car, placed in yards for unloading, within time allowed by statute, until after such time, "willfully" violated its statutory duty and was liable for penalty, although such failure was due to its yardmaster's negligence or oversight, in failing to notify employee whose duty it was to unload cattle, regardless of whether such negligence or oversight was intentional or excusable.—U. S. v. Illinois Cent. R. Co., La., 58 S.Ct. 533, reversing, C.C.A., 90 F.2d 213, certiorari granted 58 S.Ct. 49, 302 U.S. 671, 82 L.Ed. ——.

93. U.S.—U. S. v. Illinois Cent. R. Co., La., 58 S.Ct. 533, reversing, C.C.A., 90 F.2d 213, certiorari granted 58 S.Ct. 49, 302 U.S. 671, 82 L.Ed. ——.
10 C.J. p 587 note 36.

94. U.S.—U. S. v. Illinois Cent. R. Co., La., 58 S.Ct. 533, reversing, C.C.A., 90 F.2d 213, certiorari granted 58 S.Ct. 49, 302 U.S. 671, 82 L.Ed. ——.

95. U.S.—U. S. v. Southern Ry. Co., D.C.Tenn., 1 F.2d 607.
10 C.J. p 587 note 36.

Error in reporting time of loading

(1) The carrier was not liable for the penalty where the unlawful confinement was not done intentionally but was due to a mistake or error in transmitting or receiving a message reporting the time of loading, which led the dispatcher, whose duty it was to set out the cars for the necessary attention, erroneously to believe that the shipment would arrive within the time limit of the statute.—U. S. v. Baldwin, D.C.Neb., 17 F.Supp. 789.

(2) Other examples see 10 C.J. p 587 note 35 [a] (1).

96. U.S.—U. S. v. Philadelphia, etc., R. Co., D.C.Pa., 223 F. 202
10 C.J. p 588 note 43.

Placement at unloading platform

Notwithstanding cars were transported to the siding of the consignee within the statutory period, the carrier is liable for the confinement of animals in some of the cars which could not for some time be accommodated because of the restricted facilities for unloading, since no delivery occurred until the cars were placed at the proper point where the animals could be released.—U. S. v. Philadelphia & R. Ry. Co., Pa., 247 F. 469, 159 C.C.A. 523.

97. U.S.—U. S. v. Railway Express Agency, D.C.N.Y., 10 F.Supp. 259.—U. S. v. Lehigh Valley R. Co., C.C.A.N.J., 204 F. 705.

Failure properly to care for animals after unloading as continuing the time of confinement see infra § 488

98. U.S.—Missouri, etc., R. Co. v. U. S., Kan., 178 F. 15, 101 C.C.A. 143.—U. S. v. Southern Pac. R. Co., D.C.Cal., 157 F. 459.

99. U.S.—U. S. v. Philadelphia, etc., R. Co., 223 F. 206, 207
"There is neither justice nor sound policy to be served in extending the period of the responsibility of the carrier beyond the time of delivery, where there is time left after delivery to unload, and the carrier has neither notice nor reasonable ground of expectation that the cattle will not be cared for as the act of Congress requires."—U. S. v. Philadelphia, etc., R. Co., supra.

1. U. S. v. Union Pac. R. Co., Utah, 213 F. 332, 130 C.C.A. 34.
Liability of connecting carrier see infra subdivision b of this section.

2. U.S.—Missouri, etc., R. Co. v. U. S., Kan., 178 F. 15, 101 C.C.A. 143.—U. S. v. Southern Pac. R. Co., D.C.Cal., 157 F. 459.

3. U.S.—U. S. v. St. Louis, etc., R. Co., Ark., 177 F. 205, 101 C.C.A. 375.

4. U.S.—U. S. v. Railway Express Agency, D.C.N.Y., 10 F.Supp. 259.

5. U.S.—U. S. v. Union Pac. R. Co., Utah, 213 F. 332, 130 C.C.A. 34.

alty if its transportation of the animals causes a total period of confinement in excess of the lawful limit, or continues a confinement already unlawful, except that it will not be liable if it merely transports the animals with all reasonable dispatch to the nearest available place for unloading.

If one carrier has held stock in transit for less than the time limit and delivers is to another carrier who continues the transportation so that the combined time of carriage would exceed such time limit, although the latter carrier may not have carried for the full time, it is liable if it had knowledge of the time consumed in carriage by the first carrier.[6] Where the initial carrier had kept the stock on hand without unloading for a period longer than that authorized by the statute when it was delivered to the connecting carrier, the latter need not confine the stock for another period equal to the statutory limit before it will be liable for violating the act,[7] and, if it receives and continues to transport such stock, it will ordinarily be liable for the penalty prescribed, notwithstanding the initial carrier has been prosecuted and has paid a fine for its own violation of the statute.[8] However, the mere receipt by a connecting carrier of live stock which has been continuously transported by previous carriers for more than twenty-eight hours in violation of the statute does not make it liable to the penalty.[9] If the connecting or terminal carrier merely transports the animals with all reasonable dispatch to the nearest available place for unloading, no penalty can be imposed notwithstanding such transportation causes the confinement of the stock beyond the lawful time,[10] or continues a confinement already unlawful.[11] In such case, however, it will be liable if it fails to exercise diligence, and to act with reasonable promptness in moving the car to its nearest unloading point and in commencing to unload;[12] and the failure of the carrier receiving a shipment already confined beyond the legal limit to unload the stock for several hours constitutes a prima facie violation of the statute.[13]

§ 485. Effect of Transportation Partly in Foreign Country

The Twenty-Eight-Hour Law is applicable even though part of the period of confinement in excess of the statutory limit has taken place during transit in a foreign country.

Although the Twenty-Eight-Hour Law in terms refers to shipments from one state or territory into or through another state or territory, it is not essential to the imposition of the penalty that the

6. U.S.—U. S. v. Northern Pac. Terminal Co., C.C.Or., 186 F. 947 —U. S. v. Oregon Short Line R. Co., C.C.Idaho, 160 F. 526.
Computation of time as including time animals confined by connecting lines see infra § 488

7. U.S.—U. S. v. Chicago, M. & St. P. Ry. Co., Iowa, 250 F. 442, 162 C.C.A. 512, reversing, D.C., 234 F. 386
10 C.J. p. 588 note 54.

8. U.S.—U. S. v. New York Cent., etc., R. Co., D.C.N.Y., 221 F. 1000
10 C.J. p. 588 note 55.

9. U.S.—Baker v. U. S., C.C.A.Tex., 284 F. 818
10 C.J. p. 588 note 56.

No participation

(1) A connecting carrier which continues the transportation of animals previously unloaded after an unlawful period of confinement by prior carriers, in which it did not participate and over which it had no control, is not liable for the penalty, since the statute does not undertake to make one carrier responsible for what, without its authorization, knowledge, or consent is done by another carrier while the latter is in exclusive control of the shipment.—Baker v. U. S., C.C.A. Tex., 284 F. 818.

(2) There is no illegality in an arrangement by which a railroad company, which owns stockyards and does the switching therein, retains control of shipments of live-stock until they are taken from the yards and delivered to a connecting carrier, and the law does not make the latter responsible for care of the stock until so delivered.—Baker v. U. S., supra.

10. U.S.—U. S. v. Terminal R. Ass'n of St. Louis, C.C.A.Ill., 296 F. 466.
10 C.J. p. 587 note 35 [a] (7).

11. U.S.—U. S. v. Cleveland, C., C. & St. L. Ry. Co., D.C.Ohio, 262 F. 775
10 C.J. p. 587 note 35 [a] (5), (6), p. 588 notes 57, 60, p. 590 note 87 [b].

Line involved in through transportation

"A terminal carrier, or any other carrier, may receive stock to be carried with due diligence to any reasonably convenient stockyard, for the purpose of being unloaded as required by law, without committing an offense; and this is true, even though the lines thus used may be part of a connecting line, which it is necessary to use in performing the original contract of interstate carriage."—U. S. v. Cleveland, C., C. & St. L. Ry. Co., D.C.Ohio, 262 F. 775, 777

Unloading at own yards

A connecting carrier is not liable where it unloads the stock at its own yards, the next and only place at which it could have been unloaded and watered with all reasonable dispatch, with the facilities it had for unloading it.—U. S. v. Sioux City Stock Yards Co., C.C.Iowa, 162 F. 556, affirmed 167 F. 126, 92 C.C.A. 578.

Delay of stockyards company

Where an interstate carrier of live stock has contracted with the owner of stockyards, near, but not on, its line, to unload, feed, water, and rest the stock in transit, a connecting carrier, which transports the stock from such through line to the yards, is not responsible for delay in unloading by the stockyards company, which in such case is agent of the through carrier.—U. S. v. Cleveland, C., C. & St. L. Ry. Co., D.C.Ohio, 262 F. 775.

12. U.S.—U. S. v. Delaware, etc., R. Co., D.C.N.Y., 220 F. 944.

Unloading time held unreasonable

Where terminal transfer carrier received the cars two and a half hours before the expiration of the lawful period of confinement, and failed to unload them for four hours, although two hours were a reasonable time for unloading, it was liable, although notations on bill of lading, showing that time was nearly up, were indistinct and unnoticed when the hogs were received.—U. S. v. Sioux City Terminal Ry. Co., D.C.Iowa, 234 F. 663.

13. U.S.—U. S. v. New York Cent., etc., R. Co., C.C.N.Y., 156 F. 249.

entire period of the prohibited confinement take place during transportation within the United States.[14] Also, the statute is applicable to a shipment originating in one state and ending in another, when the deprivation of food, water, and rest for the statutory period is shown, even though part of such period elapsed while the animals were in a foreign country.[15] The statute is likewise applicable to a shipment originating at a point outside of the United States and destined to a point within the United States, where the total period of time of confinement in transit exceeds that permitted by the statute.[16]

§ 486. Who Liable

A terminal railroad company or a stockyards company operating tracks into its yards may be a "railroad company" or "common carrier" within the statute as regards liability for noncompliance. All connecting carriers participating in an unlawful transportation beyond the time limit may be guilty of the offense alike, the liability being several.

A terminal railroad company which receives cars of live stock from other railroad companies for transportation and delivery to another railroad, or to stockyards, is subject to the provisions of the statute, and hence may become liable to a penalty for violation thereof.[17]

A stockyards company which constructs and maintains railroad tracks on land owned or leased by it, and operates engines and cars for hire for the transportation of live stock brought to the city in which it is situated by other interstate railroad companies between their terminals and the stockyards, and which also hauls such of the products or freight of the packing house from one to the other as required, and cars loaded with fuel or ice from such houses to the different railroads entering the city, is a railroad company or common carrier other than by water within the meaning of the statute.[18]

Receivers of a railroad appointed by a court to control and manage the road cannot be sued for violation of the statute.[19]

Connecting carriers. The liability imposed by the statute is a several one, and all connecting carriers that have had a hand in the carriage beyond the time limit are alike guilty of the offense.[20]

§ 487. Operation and Effect of Provisos Contained in Statute

a. In general
b. Request of shipper for extension of time
c. Accidental or unavoidable causes
d. Care of animals on cars obviating necessity of unloading
e. Time expiring at night

a. In General

The exceptions to, and provisions of, the Twenty-Eight-Hour Law, qualifying the liability of the carrier, are intended to provide for special exigencies and conditions.

The various exceptions and provisions in the Twenty-Eight-Hour Law, qualifying the liability of the carrier, are intended to give the statute the elasticity required to meet special exigencies and conditions,[21] and to protect the carrier from punishment for doing that which it cannot reasonably avoid,[22] there being no purpose or intention to impose on the carrier, unjust restrictions or duties impracticable of performance.

b. Request of Shipper for Extension of Time

The lawful period of confinement of animals under the Twenty-Eight-Hour Law may, under a provision to that effect, be extended from twenty-eight to thirty-six hours on written application therefor, for each particu-

14. U.S.—Grand Trunk Western Ry. Co. v. U. S., C.C.A.Mich., 248 F. 905, 907, 161 C.C.A. 23.
"The substantive offense is not the carrying of cattle in Canada, but their detention in the United States for such time as makes a total continuous confinement in excess of the statutory period. The act is thus violated in spite of the fact that a part of the confinement necessary to make up the statutory period had occurred in Canada."—Grand Trunk Western Ry. Co. v U. S., supra.

15. U.S.—Grand Trunk R. Co. of Canada v U. S., N.Y., 191 F. 803, 112 C.C.A. 317—U. S. v Lehigh Valley R Co., C.C.N.Y., 184 F. 971, affirmed 187 F. 1006, 109 C.C.A. 211.

16. U.S.—Grand Trunk Western Ry. Co. v. U. S., Mich., 248 F. 905, 161 C.C.A. 23.
10 C.J. p 588 note 49.

17. U.S.—U. S. v. Terminal R. Ass'n of St. Louis, C.C.A.Ill., 296 F. 466—U. S. v. Chicago, B. & Q. R. Co., C.C.A.Colo., 293 F. 185.
10 C.J. p 588 note 50.

No part of line of road
It has apparently been held, however, that a railroad, whose line connected with one over which the stock was being shipped, but formed no part of the through route, and was used merely to transport the cars from the through line to a stockyard for unloading, did not form "any part of a line of road" over which the cattle were to be conveyed from one state to another, within the terms of the statute.—U. S. v. Cleveland, C., C. & St. L. Ry Co., D.C.Ohio, 262 F. 775.

18. U.S.—U. S. v. Sioux City Stock Yards Co., C.C.Iowa, 162 F. 556, affirmed 167 F. 126, 92 C.C.A. 578.

19. U.S.—U. S. v Harris, D.C.Pa., 78 F. 290, affirmed 85 F. 533, 29 C.C.A. 327.

20. U.S.—U. S. v. Northern Pac Terminal Co., C.C.Or., 186 F. 947.
Circumstances under which connecting carrier is liable see supra § 484 b.

21. U.S.—U. S. v. Philadelphia & R. R. Co., D.C.Pa., 223 F. 207, 210.

22. U.S.—U. S. v. Oregon Short Line R. Co., C.C.Idaho, 160 F. 526.

lar shipment, by the shipper, his agent, or the person in custody of the shipment.

Under a provision contained in the statute that on the written request of the owner or person in custody of the particular shipment, which written request must be separate and apart from any printed bill of lading or other railroad form, the time of confinement may be extended to thirty-six hours, the carrier cannot be held liable to a penalty where such request is made, unless it has continuously transported the stock for a period exceeding thirty-six hours.[23] In the construction of this provision it has been held that a legal request under the statute may be made by the authorized agent of the owner of the particular shipment, or by the person in custody of the particular shipment.[24] There is a legal presumption that one to whom an owner of animals has intrusted their possession for delivery to a railroad company for shipment is authorized to make the request, and a railroad relying on this presumption cannot be held knowingly to have violated the law by confining animals for more than twenty-eight and less than thirty-six hours without knowledge of any defect in the agent's authority.[25]

The request may be printed, engraved, or stamped, or partly printed, engraved, or stamped and partly in handwriting, or it may be made on or in a railroad form separate and apart from a bill of lading or other railroad form than the one which contains the request alone;[26] nor is it necessary that it be written on a virgin sheet; it is effective if written at the bottom of a waybill and signed by the shipper.[27]

Such a request may be made, although it is not induced by any emergency or contingency that arises after the transportation commences and that was unforeseen at that time, and it may be made before the transportation commences.[28] To justify the confinement of cattle for more than twenty-eight hours without unloading, however, it is essential that the shipper should file a written request with each shipment; he may not file a single request applicable to all future shipments of his cattle.[29]

c. Accidental or Unavoidable Causes

Under a provision of the Twenty-Eight-Hour Law to that effect, liability for noncompliance is excused where caused by storm or other accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence.

Under an express provision of the statute to that effect, the carrier is excused from liability for a penalty for confinement of animals for more than twenty-eight hours, if it is prevented from complying with the statute by storm or other accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight.[30] An "accidental or unavoidable cause" within the meaning of the statute is one which cannot be avoided by that degree of prudence, foresight, care, and caution which the law requires of everyone under the circumstances of the particular case.[31] This does not include accidents to the train through the negligence of the carrier or its servants,[32] the negligence of servants in violation of the carrier's rules,[33] great and unusual stress of business,[34] breakdowns or wrecks which reasonable diligence and foresight could have avoided,[35] the sidetracking of the train to allow passage of other trains, the necessity of which could have been anticipated,[36] nor the failure of the carrier to provide unloading stations.[37] It does, however, include an accident to the train which could not reasonably have been anticipated and avoided,[38] such as the

23. U.S.—U. S. v Pere Marquette R. Co., C.C.N.Y., 171 F. 586.

24. U.S.—Missouri, etc., R. Co. v. U. S., Kan., 178 F. 15, 101 C.C.A. 143—Atchison, etc., R. Co. v. U. S., Kan., 178 F. 12, 101 C.C.A. 140—Wabash R. Co. v. U. S., Mo., 178 F. 5, 101 C.C.A. 133, 21 Ann.Cas. 819.
10 C.J. p. 589 note 63.

25. U.S.—Wabash R. Co. v. U. S., supra

26. U.S.—Missouri, etc., R. Co. v. U. S., Kan., 178 F. 15, 101 C.C.A. 143—Atchison, etc., R. Co. v. U. S., Mo., 178 F. 12, 101 C.C.A. 140—Wabash R. Co. v. U. S., Kan., 178 F. 5, 101 C.C.A. 133, 21 Ann.Cas. 819.
10 C.J. p. 589 note 66.

27. U.S.—Mobile, etc., R. Co. v. U. S., C.C.A.-Ill., 209 F. 605, 126 C.C.A. 427.

28. U.S.—Missouri, etc., R. Co. v. U. S., Kan., 178 F. 15, 101 C.C.A. 143—Atchison, etc. R. Co. v. U. S., Mo., 178 F. 12, 101 C.C.A. 140—Wabash R. Co. v. U. S., Kan., 178 F. 5, 101 C.C.A. 133, 21 Ann.Cas. 819.

29. U.S.—U. S. v. Pere Marquette R. Co., C.C.N.Y., 171 F. 586

30. U.S.—Chicago & N. W. Ry. Co. v. U. S., Ill., 38 S.Ct. 351, 246 U.S. 512, 62 L.Ed. 859, reversing 234 F. 268, 148 C.C.A. 170—U. S. v. Chicago, St. P., M. & O. Ry. Co., D.C.Iowa, 245 F. 179
10 C.J. p. 589 note 71

31. U.S.—Chicago & N. W. Ry. Co. v. U. S., Ill., 38 S.Ct. 351, 246 U.S. 512, 62 L.Ed. 859, reversing 234 F. 268, 148 C.C.A. 170.
10 C.J. p. 589 note 72

32. U.S.—U. S. v Southern Pac. Co., D.C.Cal., 157 F. 459

33. U.S.—U. S. v. Atlantic Coast Line R. Co., Va., 173 F. 764, 98 C.C.A. 110—Montana Cent. R. Co. v. U. S., Mont., 164 F. 400, 90 C.C.A. 388

34. U.S.—U. S. v. Union Pac. R. Co., Wyo., 169 F. 65, 68, 94 C.C.A. 433—U. S. v. Atchison, etc., R. Co., D.C.Ill., 166 F. 160—U. S. v. Southern Pac. Co., D.C.Cal., 157 F. 459.
10 C.J. p. 589 note 75.

35. U.S.—U. S. v. Atchison, etc., R. Co., D.C.Ill., 166 F. 160.

36. U.S.—U. S. v Southern Pac. Co., D.C.Cal., 157 F. 459.

37. U.S.—U. S. v. Atchison, etc., R. Co., D.C.Ill., 166 F. 160—U. S. v. Southern Pac. Co., D.C.Cal., 157 F. 459

38. U.S.—Chicago & N. W. Ry. Co. v. U. S., Ill., 38 S.Ct. 351, 352, 246 U.S. 512, 62 L.Ed. 859, reversing 234 F. 268, 148 C.C.A. 170.
10 C.J. p. 590 note 79.
"If in the exercise of ordinary

existence of a heavy snowstorm.[39] The carrier is warranted in putting animals in transit, if in the exercise of ordinary care it reasonably expects them to reach destination or a place to unload, within the prescribed time, and, it is sufficient thereafter if it exercises reasonable diligence and foresight to prevent delays which might unlawfully extend the period of transit.[40]

d. Care of Animals on Cars Obviating Necessity of Unloading

Under a provision of the statute to that effect, the carrier is not required to unload the animals within the specified time if facilities are available for, and the animals are in fact accorded, the necessary care and rest on the cars.

A provision in the statute, that, when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply, does not relieve the carrier from liability for failure to unload, unless the animals receive the specified care and opportunity for rest.[41] This provision deals with the structure of a car in which animals are transported, without taking into account the habits of animals.[42] Where a car is so constructed,[43] or so overloaded,[44] that the animals transported therein have no opportunity to rest by lying down, the carrier, to avoid liability, must unload them, for "opportunity to rest" means opportunity to lie down. To bring the case within the provision, the carrier must show not only that the animals can have the supplies specified but that they are in fact accorded them.[45]

e. Time Expiring at Night

Under a provision of the statute to that effect, if the twenty-eight hour limit expires at night, the carrier may without the consent of the owner or custodian continue the transit of sheep to a suitable place for unloading, without liability, except that in no case can it exceed the thirty-six hour limit.

The provision contained in the statute, that it shall not be required that sheep be unloaded in the nighttime, but that, where the time expires in the night, in case of sheep, the same may be kept in transit to a suitable place for unloading, subject to the thirty-six-hour limitation, is not void for uncertainty.[46] Its meaning is that, in case of sheep, if the twenty-eight-hour limit expires at night, the transit may be continued to a suitable place for unloading, without the consent of the owner or custodian, except that in no case shall the thirty-six-hour limit be exceeded.[47]

§ 488. Computation of Time

In estimating the time of confinement, the time consumed in loading and unloading is not to be considered; but the time during which the animals were confined on connecting lines is to be included. The time of confinement of the animals is deemed to continue until they are properly unloaded and cared for.

Under express provisions of the statute to that effect, in estimating the time of confinement, the time consumed in loading and unloading is not to be considered,[48] but the time during which the stock has been confined on connecting lines is to be included.[49] It is not essential to the application of the statutory penalty that the time of confinement on the cars by itself be in excess of the period prescribed by the statute; the period of confinement is deemed to continue, notwithstanding that the an-

care, prudence and foresight the carrier reasonably expects that following the determined schedule the containing car will reach destination or some unloading place within the prescribed time it properly may be put in transit. Thereafter the duty is on the carrier to exercise the diligence and foresight which prudent men, experienced in such matters, would adopt to prevent accidents and delays and to overcome the effect of any which may happen—with an honest purpose always to secure unloading within the lawful period. If, notwithstanding all this, unloading is actually prevented by storm or accident the reasonable delay must be excused"—Chicago & N. W. Ry. Co. v. U. S., supra.

39. U.S.—U. S. v. Philadelphia, etc., R. Co., D.C.Pa., 223 F. 202.

40. U.S.—Chicago & N. W. Ry. Co. v. U. S., Ill., 38 S.Ct. 351, 246 U.S. 512, 62 L.Ed. 859, reversing 234 F. 268, 148 C.C.A. 170.

41. U.S.—U. S. v. Powell, C.C.A.Va., 65 F.2d 793.

42. U.S.—Northern Pac. R. Co. v. Finch, D.C.N.D., 225 F. 676.

Habit of horses not to lie down.

Where cars were so constructed as not to permit horses to lie down, the provision is not complied with, and it is no defense that it is not the habit of horses to lie down while being transported in cars.—Northern Pac. R. Co. v. Finch, D.C.N.D., 225 F. 676.

43. U.S.—Northern Pac. R. Co. v. Finch, supra.

44. U.S.—U. S. v. Powell, C.C.A.Va., 65 F.2d 793.
10 C.J. p. 590 note 83 [b].

45. U.S.—Erie R. Co. v. U. S., N.Y., 200 F. 406, 118 C.C.A. 558, affirming U. S. v. Erie R. Co., C.C.N.Y., 191 F. 941.
10 C.J. p. 590 note 83.

46. U.S.—Southern Pac. Co. v. U. S., Cal., 171 F. 360, 96 C.C.A. 256, affirming, D.C., 162 F. 412.

47. U.S.—U. S. v. Atchison, etc., R. Co., Kan., 185 F. 105, 107 C.C.A. 323—Southern Pac. Co. v. U. S., Cal., 171 F. 360, 96 C.C.A. 256, affirming, D.C., 162 F. 412—U. S. v. Atchison, etc., R. Co., D.C.Ill., 166 F. 160.

48. U.S.—U. S. v. Northern Pac. Terminal Co., C.C.Or., 186 F. 947—U. S. v. Lehigh Valley R. Co., C.C.N.Y., 184 F. 971, affirmed 187 F. 1006, 109 C.C.A. 211.
10 C.J. p. 590 note 87.

49. U.S.—Grand Trunk Western Ry. Co. v. U. S., Mich., 248 F. 905, 161 C.C.A. 23
10 C.J. p. 590 note 88.
Liability of connecting carrier for confinement commenced by prior carriers see supra § 484 b.

imals are removed from the cars, until they are unloaded into suitable pens, and there fed, watered, and rested as required by the statute.[50]

§ 489. Actions

Proceedings to recover penalties for violation of the Twenty-Eight-Hour Law are civil and not criminal in nature, and are governed by the usual rules as to actions for penalties.

Proceedings to recover penalties for violation of the Twenty-Eight-Hour Law are civil and not criminal in their nature,[51] and the same strict rules of construction and of evidence which are applied in criminal prosecutions are not applicable.[52]

Jurisdiction and venue. In as much as the action is civil in its nature, the clause of the Twenty-Eight-Hour Law which authorizes the action to be brought in the federal court of the district where the violation may have been committed, or the person or the corporation resides or carries on business, is not in violation of the provision of the federal constitution declaring that in criminal cases the accused shall be entitled to a trial in the district where the crime has been committed.[53]

Pleading. The complaint must state the length of time live stock was confined without food, water, and rest,[54] and must allege that the act for which the penalty is sought to be imposed was done "knowingly and willfully,"[55] as otherwise it is fatally defective for failing to state an offense. It is not necessary, however, that the complaint should negative the matters of excuse designated by the statute,[56] as these are matters of defense to be alleged by the carrier,[57] and hence an allegation in the declaration negativing their existence is surplusage and need not be proved.[58] Where the complaint alleges that defendant carrier participated in the transportation of a shipment made in violation of the Twenty-Eight-Hour Law, and it does not appear on the face of it that the carrier could not have done so, it is not demurrable on that ground.[59] A complaint describing defendant as "lessee" of the road, and otherwise following the language of the statute is sufficient after verdict, although it does not expressly allege that defendant was at the time operating the road.[60] An allegation that a shipment of live stock was made to a consignee in a particular city, is to be construed as including the transportation to the point of final delivery to the consignee within the city, and not merely to the city limits.[61]

Evidence. Plaintiff in an action to recover the penalty prescribed by the statute must prove that the animals were knowingly and willfully confined beyond the period specified in the statute;[62] that is to say, he must show that the violation was purposely and obstinately done, and that the carrier had a free will or choice and intentionally disregarded the terms of the statute, or as plainly indifferent to its requirements.[63] Plaintiff, however, is not required to prove the nonexistence of accidental or unavoidable causes which might have prevented a compliance with the requirements of the statute and which could not have been anticipated by the exercise of diligence and foresight, as such causes are matters of defense to be proved by defendant carrier.[64] The burden is on a connecting carrier which has received stock already confined

50. U.S.—U. S. v. Railway Express Agency, D.C.N.Y., 10 F.Supp. 259—U. S. v. Oregon Short Line R. Co., D.C.Idaho, 218 F. 868—U. S. v. Lehigh Valley R. Co., C.C.A.N.J., 204 F. 705.

51. U.S.—New York Cent., etc., R., Co. v. U. S., Mass., 165 F. 833, 91 C.C.A. 519
10 C.J. p 590 note 89.

52. U.S.—Missouri, etc., R. Co. v. U. S., Kan., 178 F. 15, 101 C.C.A. 143
10 C.J. p 590 note 90.

53. U.S.—Southern Pac. Co. v. U. S., Cal., 171 F. 364, 96 C.C.A. 256, affirming, D.C., U. S. v. Southern Pac. Co., 162 F. 412

54. U.S.—U. S. v. Oregon Short Line R. Co., D.C.Idaho, 218 F. 868.

55. U.S.—U. S. v. Union Stockyards Co. of Omaha, C.C.A.Neb., 291 F. 366.
10 C.J. p 591 note 93.

56. U.S.—Chicago, etc., R. Co. v. U. S., Neb., 195 F. 241, 115 C.C.A. 193
10 C.J. p 591 note 94

57. U.S.—New York Cent., etc., R. Co. v. U. S., Mass., 165 F. 833, 91 C.C.A. 519.

58. U.S.—Grand Trunk R. Co. v. U. S., Ill., 229 F. 116, 143 C.C.A. 392.

59. U.S.—U. S. v. Chicago, B. & Q. R. Co., C.C.A.Colo., 293 F. 185

60. U.S.—New York Cent., etc., R. Co. v. U. S., Mass., 165 F. 833, 91 C.C.A. 519

61. U.S.—U. S. v. Chicago, B. & Q. R. Co., C.C.A.Colo., 293 F. 185.

62. U.S.—U. S. v. Chicago, St. P., M. & O. Ry. Co., D.C.Iowa, 245 F. 179.

Evidence held insufficient

Evidence not showing that defendant knew or could have known for what period of time the cattle had been held in the cars by connecting carriers before delivery to defendant without having been unloaded for food, water, and rest, and showing that defendant handled the shipments after they came into its hands with all possible diligence, was insufficient to show that defendant knowingly and willfully violated the act.—U. S. v. Union Stockyards Co. of Omaha, C.C.A.Neb., 291 F. 366

63. U.S.—U. S. v. Baldwin, D.C.Neb., 17 F.Supp. 789.

64. U.S.—U. S. v. Chicago, St. P., M. & O. Ry. Co., D.C.Iowa, 245 F. 179—U. S. v. Boston & M. R. R., D.C.Mass., 21 F.Supp. 673.
10 C.J. p 591 note 98.

Sufficiency of evidence

(1) Evidence that railroad received sheep at Mechanicville, N. Y., on December 10, with knowledge that sheep, which shipper had agreed might be confined thirty-six hours, had been confined by connecting carrier almost twenty-four hours, and, approximately three hours later and during snowstorm, started sheep on journey having scheduled running

for a period longer than that allowed by statute to show that it acted with reasonable promptness in removing the car to its nearest unloading point and in commencing to unload.[65] Plaintiff is required to establish its case only by a preponderance of the evidence as in other civil cases, and not beyond a reasonable doubt as in criminal cases.[66]

Trial. Instructions on a theory which there is no evidence to support are properly refused.[67] The legality of written requests for an extension of time of the confinement of cattle is a question of law for the court.[68] Whether facts amounting to a violation of the statute are shown to exist is a question for the jury.[69]

§ 490. Amount and Computation of Penalties

The court has the duty to fix the amount of the penalty within the limits specified by the statute.

Where there has been a verdict in favor of the government, the duty devolves on the court to fix the amount of the penalty by judgment, within the limits specified by the statute, at not less than one hundred dollars, and not more than five hundred dollars, for each violation of its provisions.[70] The unit of offense for which a separate penalty may be imposed is neither the individual animal, nor the carload,[71] nor the trainload, nor the individual shipment; it is the whole number of animals loaded at one time and as to which the time for unloading expires at the same time, every failure to unload any animals being a complete offense when the time for so doing has expired.[72] The time of confinement of live stock beyond the period fixed by the statute is not material in determining the number of the penalties or the amount thereof, unless it is for another period of the length designated by the statute.[73] The unloading of stock into improperly equipped pens after they have been confined in transit beyond the prescribed time does not constitute a new offense; it is merely a part of the prior unlawful confinement, which, as stated in § 488 supra, is deemed to continue until the stock is unloaded into suitable pens and properly cared for.[74] Although, as stated in § 484 supra, it is not a defense that a carrier has instructed its employees to comply strictly with the Twenty-Eight-Hour Law, such instructions have a bearing on the question of the amount of penalty which the court should impose.[75] Even though there is no intentional violation of the statute, the carrier may be guilty of such negligence as to call for the imposition of more than the minimum penalty for a second violation.[76]

§ 491. State Legislation

Under a statute imposing penalties on a carrier if it fails to feed and water stock in transit, unless this duty is shifted by contract to the shipper, the penalty cannot be enforced if the shipper contracts to care for the stock, notwithstanding that the carrier fails to furnish facilities therefor; nor is a carrier liable for the failure of its connecting carrier to care for the stock.

A statute, providing that a common carrier which conveys live stock shall feed and water the same during the time of conveyance and until delivery to

time of nine and one-half hours but actual running time ordinarily, of not more than eight and one-half hours, that sheep were cut from train before reaching destination, and that, because of inadequate facilities, only part of sheep were unloaded before expiration of thirty-six hours authorized recovery of penalty for violation of statute prohibiting willful confinement of sheep over thirty-six hours without unloading for rest, water, and feeding, unless prevented by storm or other accidental or unavoidable causes—U. S. v. Boston & M. R. R., D.C.Mass., 21 F.Supp. 671.

(2) Evidence established that breaking of train drawbars, which delayed shipment of sheep beyond thirty-six hour period agreed to by shipper for their confinement, was an "accidental and unavoidable cause" of delay, so as to excuse railroad from payment of statutory penalty for confinement of sheep over thirty-six hours.—U. S. v. Boston & M. R. R., D.C.Mass., 21 F.Supp. 673.

65. U.S.—U. S. v. Delaware, L. & W. R. Co., D.C.N.Y., 220 F. 944, motion for additional findings granted Delaware, L. & W. R. Co. v. U. S., 39 S.Ct. 67

66. U.S.—Missouri, etc., R. Co. v. U. S., Kan., 178 F. 15, 101 C.C.A. 143. 10 C.J. p 591 note 1.

67. U.S.—Oregon-Washington R., etc., Co. v. U. S., Idaho, 205 F. 341, 123 C.C.A. 475

68. U.S.—Missouri, etc., R. Co. v. U. S., Kan., 178 F. 15, 101 C.C.A. 143.

69. U.S.—Atchison, etc., R. Co. v. U. S., Kan., 178 F. 12, 101 C.C.A. 140.

Evidence held sufficient to go to jury

U.S.—Chicago & N. W. Ry. Co. v. U. S., Ill., 234 F. 268, 148 C.C.A. 170, reversed on other grounds 38 S.Ct. 351, 246 U.S. 512, 62 L.Ed. 859.

10 C.J. p 591 note 4 [a].

70. U.S.—U. S. v. Southern Pac. Co., D.C.Cal., 162 F. 412, affirmed Southern Pac. Co. v. U. S., 171 F. 360, 364, 96 C.C.A. 252, 256—U. S. v. Boston & A. R. Co., D.C.Mass., 15 F. 209.

71. U.S.—Baltimore, & O. S. W. R. Co. v. U. S., Ohio, 31 S.Ct. 368, 220 U.S. 94, 55 L.Ed. 384—Southern Pac. Co. v. U. S., Cal., 171 F. 360, 96 C.C.A. 252, affirming, D.C., U. S. v. Southern Pac. Co., 162 F. 412—U. S. v. St. Louis & S. F. R. Co., D.C.Mo., 107 F. 870

72. U.S.—Baltimore & O. S. W. R. Co. v. U. S., Ohio, 31 S.Ct. 368, 220 U.S. 94, 55 L.Ed. 384, modifying and affirming 159 F. 33, 86 C.C.A. 223.

10 C.J. p 591 notes 10–12.

73. U.S.—U. S. v. Sioux City Stock Yards Co., C.C.Iowa, 162 F. 556, affirmed 167 F. 126, 92 C.C.A. 578.

74. U.S.—U. S. v. Oregon Short Line R. Co., D.C.Idaho, 218 F. 868.

75. U.S.—U. S. v. Delaware, L. & W. R. Co., D.C.N.Y., 220 F. 944, motion granted for additional findings Delaware, L. & W. R. Co., 39 S.Ct. 67.

76. U.S.—U. S. v. Delaware, etc., R. Co., supra.

10 C.J. p 592 note 15.

the consignee, unless otherwise provided by special contract, and imposing a penalty on the carrier for violation of its provisions of not less than five dollars and not more than five hundred dollars, to be recovered by the owner of the live stock, does not authorize the recovery of the penalty for failure or refusal to feed and water the stock, where the shipper has contracted to do so, although it fails to furnish him with the facilities for so doing.[77] A carrier cannot be charged with the statutory penalty for its connecting carrier's failure to feed and water the stock, since the statute applies only to the carrier which fails to care for the stock in its possession in transit.[78] Under the statute, suit may be brought for less than the maximum penalty.[79]

Actions. In as much as the body of the act that creates the offense contains an exception relieving the carrier from liability to feed and water, if there is a special contract to that effect a petition in an action to recover the penalty must negative this exception.[80] It is not necessary to allege that a demand that the stock be watered was made on any particular agent.[81] In an action to recover the penalty, a written statement as to the condition of the stock, signed by the person who had charge of it on behalf of the owner, not being contractual in its nature, is important only as evidence and is not one to be considered by the court.[82] An instruction which authorizes a recovery without a finding negativing the existence of a special contract exempting the carrier from the duty to feed is affirmatively erroneous.[83]

§ 492. Overcharge

State statutes imposing penalties on carriers for overcharges are valid, as applied to intra-state shipments, and authorize recovery of the penalty if an overcharge is intentionally exacted, except where such charge is made in good faith under claim of right, or by accident or mistake.

Statutes which impose penalties on common carriers of goods for overcharges made for transportation, have generally been held to be valid.[84] State statutes of this nature can have no application to interstate transportation.[85] In accordance with the usual rule, already stated in § 452, these statutes are subject to strict construction.[86]

It is essential to the recovery of the penalty that plaintiff bring himself clearly within the terms of the statute.[87] Generally, the statutes are violated where an amount is demanded in excess of that fixed by statute or by a regulation of the railroad commission governing rates and is not innocently or unintentionally collected.[88] If the statute imposes a penalty for a "willful" violation, it is sufficient to render the carrier liable that there be an intentional failure to comply therewith.[89] However, there can be no recovery of a penalty under such a provision, on proof of an overcharge due merely to an accident or mistake.[90] It has also been held, under other statutes, that the carrier is not liable to a penalty for an overcharge made in good faith under the belief that it had the right to make the charge,[91] or for an overcharge made without malicious purpose or intentional miscon-

77. Tex.—Houston, etc., R. Co. v. Brown, 85 S.W. 44, 37 Tex.Civ.App 595.
10 C.J. p 592 note 19
Contract without consideration
Where a special contract is made, whereby the shipper undertakes to feed and water the stock, the fact that no reduction is made in the freight does not render the contract void for want of consideration and make the carrier liable for the penalty.—Texas, etc, R. Co. v. Peters, 71 S.W. 70, 31 Tex.Civ.App. 6

78. Tex.—Gulf, C & S. F. Ry. Co. v. Pearce, Civ.App, 105 S.W.2d 770, error refused.

79. Tex.—Houston, etc., R. Co v. Brown, 85 S.W. 44, 37 Tex.Civ.App. 595

80. Tex.—Houston, etc., R Co. v. Brown, supra
10 C.J. p 592 note 21.

81. Tex.—Houston, etc, R. Co. v. Brown, supra.
10 C.J p 592 note 22

82. Tex.—Texas, etc, R. Co. v. Peters, 71 S.W. 70, 31 Tex.Civ.App 6.

83. Tex.—Houston, etc, R Co. v Brown, 85 S.W. 44, 37 Tex.Civ.App 595.

84. Ala.—Mobile & M R Co. v. Steiner, McGehee & Co., 61 Ala. 559.
Fla.—Atlantic Coast Line R. R. v. Connell, 149 So. 596, 111 Fla. 572, supplemented 151 So. 381, 111 Fla. 572.
Minn.—State v. Winona & St. P. R Co, 19 Minn 434, Gil 377.
Mo.—Burkholder v. Union Trust Co, 82 Mo. 572.
10 C.J. p 569 note 9.
Actions to recover overcharge not involving recovery of penalty see supra §§ 319–323.
Refusal to adjust or to refund overcharge see infra § 509.
Validity as affected by amount of penalty see infra § 498.

85. Ala.—Mobile, etc, R. Co. v Dismukes, 10 So. 289, 94 Ala 131, 17 L.R.A. 113.
Okl.—Atchison, etc, R. Co. v State, 109 P. 218, 26 Okl. 166.
Prior to the Interstate Commerce Act, such statutes as applied to interstate shipments were valid as police regulations, and not void as being a regulation of interstate commerce—Fuller v. Chicago, etc., R. Co., 31 Iowa 187, affirmed 84 U.S. 560, 21 L.Ed. 710.

86. Miss.—Gilliland v Illinois Cent. R Co, 32 So 916, 81 Miss. 41.
10 C.J. p 569 note 12.

87. Tex.—Murray & Bros. v. Gulf, C. & S. F. R Co., 63 Tex. 407, 51 Am R 650

88. Ga.—Stewart v. Comer, 28 S.E 461, 100 Ga. 754, 62 Am S R. 353
10 C.J p 569 note 16

89. Iowa.—Fuller v. Chicago, etc., R. Co., 31 Iowa 187.
Word "willful" does not imply malice
Iowa.—Fuller v. Chicago, etc., R. Co, 31 Iowa 187.

90. U.S.—U S. v Texas, etc., R. Co., C.C La., 185 F 820.

91. Fla.—Atlantic Coast Line R R. v. Connell, 149 So. 596, 111 Fla 572, supplemented 151 So 381, 111 Fla. 572.
Shipment from established station
"We think the statute has refer-

duct, and exacted without protest or complaint at the time of payment.[92] Where the statute expressly exempts the carrier from liability for mistakes of fact, it thereby impliedly provides that for mistakes of law it shall not be exempt.[93]

A carrier is excepted from the operation of a statute imposing penalties for overcharges during the prosecution by it in good faith of a suit to determine whether the statute is confiscatory in its operation and effect as applied to such carrier.[94] Likewise, the penalty cannot be imposed for overcharges made by the carrier during the time the lawful rate fixed by the railroad commission was suspended by injunction of a court of competent jurisdiction.[95]

Rate fixed by statute or by commission. According to some authority the carrier is not relieved from liability for making an unreasonable charge by the fact that the rate charged was that fixed by the railroad commissioners under a statute providing that the commissioners shall make a schedule of "reasonable" maximum rates, which shall be prima facie evidence that the rates therein fixed are reasonable.[96] A different rule prevails in other jurisdictions having similarly phrased statutes, it being held that the penalty cannot be recovered from the carrier for exacting unreasonable charges where the charges made were within the limit prescribed by the railroad commission or by the statute;[97] and it has even been held that no liability can attach under a statute penalizing unreasonable charges where the reasonable rate was not as yet fixed by the railroad commission as required by the statute.[98] The approval of the railroad commission of a rate which is in violation of express statutory provision, however, does not preclude the application of the penalty.[99]

What constitutes an overcharge. The carrier may be guilty of an overcharge if it adopts a mode of transportation which involves the payment of a higher rate of freight than that provided for by the contract.[1] The carrier is not liable for an overcharge for exacting the regular transportation rate instead of a lower "switching" rate, where the service rendered is not "switching" within the statute.[2] A carrier obliged to pay a switching charge to a connecting carrier may require the shipper to pay such charge in addition to the regular rate

ence to overcharges made intentionally or arbitrarily for shipments from station to station and would have no application to charges imposed as in this case, under the impression that Connell, the shipping point, was regularly established as a station and that the railroad company had a right to make the charge. If the railroad commission had decided that Connell was a legally established shipping point and the rate legal, there would have been no basis for the action. This being true, and the right of recovery being dependent on this question, certainly no penalty accrued prior to the railroad commission's decision."—Atlantic Coast Line R. R. v. Connell, 149 So 596, 111 Fla 572, supplemented 151 So 381, 111 Fla. 572.

92. Mich.—Gorham Bros. Co. v. Ann Arbor R Co., 200 N.W. 287, 228 Mich. 273

93. Tex.—Texas, etc., R. Co. v. Sabine Tram Co., 121 S.W. 256, 61 Tex Civ App. 353.
10 C.J. p 570 note 32.

94. W.Va.—Coal, etc., R. Co. v. Conely, 67 S.E. 613, 67 W.Va 129.

95. Mich.—Fletcher Paper Co. v. Detroit & M. Ry. Co., 164 N.W. 528, 198 Mich. 469, affirmed Detroit & M. R. Co. v. Fletcher Paper Co., 39 S.Ct. 13, 248 U.S. 30, 63 L.Ed. 107.

96. In Iowa
(1) The rule stated in the text has been enunciated in an action to recover treble damages under a provision of the statute imposing such a penalty. The reason for this rule has been stated as follows: The statute "does not operate to the prejudice of the company, if the commissioners shall err in judgment, and fix a rate less than what is reasonable. It seems to us that the section has the same force and effect as to both parties. If the commissioners err in judgment, and fix a rate too high to be reasonable, why should the shipper be required to pay it, or the company, if it receive it, be permitted to keep it? It will be seen that § 17, when carefully read, does not attempt to deal with facts or conditions that are conclusive, but those that are prima facie only. Largely, its office is to fix a rule of evidence"—Barris v. Chicago, etc., R Co., 71 N.W. 339, 102 Iowa 375, 378, 63 Am.S R. 449

(2) It was said, however, in reference to enforcement of the penalty under another provision of the statute that "in prosecutions to recover penalties for the violation of the statute, the state is precluded from alleging that the commissioners' rates are unreasonable"—Burlington, etc., R. Co. v. Dey, 48 N.W. 98, 105, 82 Iowa 312, 31 Am.S.R 477, 12 L. R.A. 436.

97. U.S.—Winsor Coal Co. v. Chicago, etc., R Co., C.C.Mo., 52 F 716.

98. Ill.—Chicago, etc., R. Co. v. Peo., 77 Ill. 443.
Mo.—Scammon v Kansas City, etc., R. Co, 41 Mo App. 194.
10 C J p 569 note 15.

99. Mo.—McGrew v. Missouri Pac. R. Co, 94 S W. 719, 118 Mo App. 379.

Higher rate for shorter haul
Mo.—McGrew v. Missouri Pac. R. Co, 94 S.W. 719, 118 Mo App. 379.

1. Ga.—Stewart v. Comer, 28 S.E. 461, 100 Ga 754, 62 Am.S.R. 353.
What contitutes an overcharge generally see supra § 321.

2. Ohio.—Cincinnati, N. O. & T P. R. Co. v. J. B. Doppes' Sons Lumber Co., 21 Ohio Cir.Ct.,N.S., 49.

Complete shipment within terminal limit
In an action against a carrier for a penalty for an overcharge with respect to the moving of cars between points within the same city, on the ground that this was a switching service for which a lower rate was prescribed by statute, no penalty could be collected, where the lower rate was inapplicable; the word, "switching," as used in the statute, applies only to movements within the city terminal limits when incidental to the entire transportation, and it has no application to complete shipments from one railway to another within the terminal limits of the city.—Cincinnati, N. O & T. P. R. Co. v. J. B. Doppes' Sons Lumber Co., 21 Ohio Cir.Ct.,N.S., 49.

without liability to the penalty,[3] even where the switching charge is excessive.[4] A carrier having no siding where a patron desired to have goods hauled may demand extra compensation before undertaking the service and is not subject to a penalty for a rate in excess of its schedule for the station beyond.[5] Under a statute imposing a penalty for charging over a certain rate per hundred pounds of freight, the carrier is not obliged to apportion its charge for freight weighing less than a hundred pounds, and its charge of the statutory maximum for shipments of lesser weight does not subject it to the penalty.[6]

§ 493. Effect of Statutes on Right to Recover Damages

Some statutes imposing penalties therefor have been held to take away the common-law right to recover for overcharges, while other statutes are held not to have such an effect.

Some statutes authorizing shippers to recover for an overcharge, a penalty of a fixed specified sum,[7] or of a number of times the amount of the overcharge,[8] have been held not to take away the common-law right of action to recover the amount in excess of the lawful charge, treated in §§ 319–323 supra. Other statutes permitting the shipper to recover a number of times the amount of the overcharge, plus attorney's fees and costs, have been held to supersede the common-law remedy.[9]

§ 494. Defenses

It is not a defense to recovery of the penalty that the shipper has a remedy for breach of contract, or that the charges were paid at a point other than that of shipment; but the carrier may show that it might lawfully have charged more than it did. There is a conflict of authority as to whether the fact that payment by the shipper is made without protest precludes recovery of the penalty.

It is no defense to an action to recover penalties for overcharges that there was a special contract between the shipper and the carrier to fix rates, and that the shipper has a remedy by action for breach of contract;[10] nor is it a defense that the shipper did not pay the charges at the point of shipment, but at another station.[11] Defendant is not estopped from showing that it might lawfully have charged more than it actually did charge,[12] and a custom to make no additional charge for hauling to certain docks does not estop the carrier from asserting that the city and the docks are different places justifying an additional charge.[13]

Voluntary payment. There is some conflict of opinion as to the effect of payment without protest by the shipper. According to some decisions, if the payment is made without protest an action to recover the penalty will for that reason be barred.[14] Other authority holds that the right of action to recover the penalty is not affected by the fact that the excessive charges were paid without protest and with full knowledge of the facts.[15] Where an excess of freight charged over the rates specified in the bill of lading is paid under protest, such payment is not voluntary so as to preclude a recovery.[16]

§ 495. Conditions Precedent to Action

Statutory conditions precedent to an action for a penalty for an overcharge by a carrier of goods must be met.

Where the statutes require the shipper to file a written demand or notice of claim for overcharge with the carrier, there can be no recovery of a penalty for overcharge, unless there is a compliance with the requirements of the statutes.[17] The claim need not be accompanied by the bill of lading.[18] Several overcharges may be claimed in the same written demand.[19]

In the absence of any statute expressly or by implication requiring that complaint shall be made to the railroad commission before bringing suit, such action on the part of the shipper is not a condition precedent to an action for a penalty.[20]

3. Miss.—Gilliland v. Illinois Cent. R Co, 32 So. 916, 81 Miss 41

4. Okl.—Atchison, etc, R. Co. v. State, 109 P. 218, 26 Okl. 166.

5. Or—Schanen-Blair Co. v. Southern Pac. Co., 136 P. 886, 68 Or 106.

6. Tex.—Murray & Bro. v. Gulf, C. & S. F. R. R. Co., 63 Tex. 407, 51 Am.R. 650
10 C J. p 569 note 12 [a] (1).

7. Iowa—Fuller v Chicago, etc., R Co, 31 Iowa 187
10 C.J. p 569 note 22 [a]

8. Wis—Graham v Chicago, etc., R Co, 5 N W. 944, 49 Wis. 532—Smith v. Chicago, etc, R. Co., 5 N.W. 240, 49 Wis. 443.

9. U.S—Winsor Coal Co. v. Chicago & A. R. Co., C.C.Mo., 52 F. 716.
Kan—Beadle v. Kansas City, etc, R. Co., 32 P. 910, 51 Kan. 248.
10 C.J. p 569 note 23.

10. Mo.—Reynolds v. Chicago R. Co, 85 Mo. 90
10 C.J. p 570 note 27.

11. Tex.—San Antonio, etc., R. Co v. Bracht, Civ App, 163 S W 376

12. N J.—McGregor v. Erie R. Co, 35 N.J Law 115.

13. Tex.—Texarkana, etc., R Co. v. Sabine Tram Co., Civ App., 129 S W. 198.

14. S C—Stallings v. Southern R Co, 75 S E. 449, 92 S.C. 290—Hardaway v. Southern R. Co., 73 S.E. 1020, 90 S C. 475, 489, Ann.Cas 1913D 266.
10 C J p 570 note 35.

15. Wis.—Streeter v. Chicago, etc., R Co, 40 Wis 294.
10 C J p 570 note 36

16. Ala.—Southern R. Co. v. Anniston Fdy, etc., Co., 33 So 274, 135 Ala. 315

17. Tex.—Sabine, etc., R. Co. v. Cruse, 18 S W 755, 83 Tex. 460.
10 C J. p 570 note 39.

18. Tex.—Missouri Pac. R. Co. v. Rains, 3 Tex A.Civ.Cas § 66.
10 C J. p 570 note 40

19. N C.—Efland v. Southern R. Co., 59 S E 359, 355, 146 N.C. 129, 135.

20. Tex.—Texas, etc., R. Co. v. Sa-

§ 496. · Who Liable

A carrier is not liable for an overcharge made by a connecting carrier to which it transfers freight, even where such charge is collected by itself. Receivers of a carrier are not liable to the penalty.

Where the statute provides a penalty against any railroad company exacting higher rates than the maximum rates fixed by statute, a company which receives freight and delivers it to a connecting carrier is not liable for a penalty because of an overcharge by the latter company,[21] although the first company collects the amount from the shipper.[22] Receivers are not within the terms of the statute imposing a penalty on railroad companies for making excessive charges for freight.[23]

§ 497. · Actions

The usual rules as to actions for penalties apply.

An action to recover a penalty from a carrier of goods for an overcharge is governed by the usual rules as to actions to enforce penalties, as discussed in C.J.S. title Penalties §§ 7–18, also 25 C.J. p 1181 note 46–p 1213 note 78.

Jurisdiction and venue. Under a statute conferring a remedy by judicial action for an overcharge, a court has jurisdiction of an action for the recovery of the penalty therein provided for, and the shipper is not restricted to relief by application to the state railroad commission or to the interstate commerce commission.[24] Where it is provided by statute that an action for a penalty shall be brought in the county where the cause of action arose, and that an action against a railroad on a liability as carrier may be brought in any county through which the road passes, an action to recover a penalty for overcharge may be brought in a county through which the road runs, although the overcharge was not made there.[25]

Parties. Under a statute requiring an action for the penalty to be brought by the railroad commission in the name of the state, the state is the real party in interest.[26] Under a statute conferring the right of action on the "party aggrieved," the shipper who has been compelled to pay the overcharge may maintain the action for the recovery of the penalty.[27]

Time to sue. It has been held that actions based on statutes of the character under consideration are governed by the statutes of limitations applicable to penal actions.[28] No penalty can be recovered in an action brought after the expiration of the period of limitation provided for such actions.[29]

Pleading. To authorize a recovery of a penalty for overcharge the allegations of the complaint must bring the case clearly within the provisions of the statute.[30] Ordinarily, a complaint or declaration which follows the language of the statute will suffice,[31] although it fails to negative statutory exceptions to liability.[32] If the statutes provide a penalty for a charge in excess of a schedule of rates established as provided by law, the declaration must show that such rates had been established and that the freight charge was in excess of that rate,[33]

bine Tram Co., 121 S.W. 256, 61 Tex.Civ.App. 353.

21. Tex.—Gulf, etc., R. Co. v. Adair, App., 14 S.W. 1076.

22. Okl.—Atchison, etc., R. Co. v. State, 109 P. 218, 26 Okl. 166.

23. Tex.—Campbell v. Wiess, Civ. App., 25 S.W. 1076.

24. Ohio.—J. B. Doppes' Sons Lumber Co. v. Cleveland, C., C. & St. L. Ry. Co., 14 Ohio N.P.,N.S., 392.

25. Ark.—Chicago, etc., R. Co. v. Miller, 146 S.W. 485, 103 Ark. 151

26. Fla.—State v. Florida R. Co., 68 So. 667, 69 Fla. 564.
10 C.J. p 571 note 44

27. Ohio.—J. B. Doppes' Sons Lumber Co. v. Cleveland, C., C. & St. L. Ry. Co., 14 Ohio N.P.,N.S., 392

28. Iowa.—Baker Wire Co. v. Chicago, etc., R. Co., 76 N.W. 665, 106 Iowa 239.

29. Miss.—Gulf & S. I. R. Co. v. Laurel Oil & Fertilizer Co., 160 So. 564, 172 Miss. 630, correcting 159 So. 838, 172 Miss. 630, amending and overruling suggestion of error 158 So. 778, 172 Miss. 630.

30. U.S.—Winsor Coal Co. v. Chicago & A. R. Co., C.C.Mo., 52 F. 716.
Tex.—Sabine, etc., R. Co. v. Cruse, 18 S.W. 755, 83 Tex. 460.
10 C.J. p 571 note 46.

Connecting carriers

If suit is brought against connecting carriers jointly to recover a penalty for overcharge, an averment that defendants' business relations were wholly within their knowledge and that they had colluded to secrete the same to defeat plaintiff and other shippers is sufficiently full and specific.—International, etc., R. Co. v. Pichard, 1 Tex.A.Civ.Cas. §§ 427, 431.—10 C.J. p 571 note 53.

Weight of shipment

(1) A petition seeking recovery of a penalty under a statute construed as not applying to shipments of less than a certain weight, which alleges an overcharge on two packages each under the minimum statutory weight but together over that weight, is defective if it fails to allege that they were sent by one and the same shipment and the same bill of lading.—T. V. Murray & Bro. v. Gulf, C. & S. F. R. Co., 63 Tex. 407, 51 Am.R. 650.

(2) If the statute makes the carrier liable for a penalty for collecting greater freight charges than those stipulated in the bill of lading, and an action is brought for a penalty for overcharge on a bill of lading containing the clause "weight and transportation subject to correction," it must be alleged that the charges specified therein were based on the actual weight of the freight.—Gulf, etc., R. Co. v. Loonie, 19 S.W. 385, 84 Tex. 259, 261.—Sabine, etc., R. Co. v. Cruse, 18 S.W. 755, 83 Tex. 460

31. Va.—Norfolk, etc., R. Co. v. Pendleton, 11 S.E. 1062, 86 Va. 1004, affirmed 15 S.Ct. 413, 156 U.S. 667, 39 L.Ed. 574
W.Va.—Hart v. Baltimore, etc., R. Co., 6 W.Va. 336
10 C.J. p 571 note 47

32. Va.—Norfolk, etc., R. Co. v. Pendleton, 11 S.E. 1062, 86 Va. 1004, affirmed 15 S.Ct. 413, 156 U.S. 667, 39 L.Ed. 574.

33. Ill.—Chicago, etc., R. Co. v. Peo., 77 Ill. 443.
Mo.—McGrew v. Missouri Pac. R. Co., 21 S.W. 463, 114 Mo. 210.

or it will be subject to attack by special demurrer.[34] A mere allegation that the charges were unreasonable and extortionate will not suffice.[35]

The defense that an overcharge was unintentional and innocent is a matter which must be pleaded and proved by defendant.[36] A mistake in weight or classification cannot be proved under a general denial,[37] and if the answer shows on its face that the mistake pleaded was due to culpable negligence, it is insufficient.[38]

Evidence. The burden is on plaintiff to prove all the facts necessary to make out a case under the statute providing for the recovery of penalties for overcharges.[39] The burden of proving mistake as a defense is on the carrier.[40] The usual rules applicable generally in civil actions as regards admissibility[41] and weight and sufficiency[42] apply in actions to recover penalties for overcharge.

Trial. Whether or not a violation of the statute was intentional or was caused by inadvertence or mistake is a question for the jury.[43] Where the evidence is conflicting, a refusal to direct a verdict is proper.[44] Where the petition stated a cause of action and was supported by uncontradicted evidence, the court properly direct a verdict for plaintiff.[45]

§ 498. Amount and Number of Penalties

The amount and number of penalties depend on the terms of the statute.

Where the statute relating to penalties for overcharge provides that all penalties shall be cumulative, a shipper who is compelled to pay excessive freight charges on different shipments may recover a penalty for each separate act of extortion.[46] If the statute imposes two distinct penalties for the same act, and the penalties are not in the alternative, the enforcement of one does not prevent the enforcement of the other.[47]

The fact that the amount of the penalty recoverable is greatly in excess of the overcharge does not render it objectionable, since the penalty is imposed, not to facilitate the collection of claims, but to enforce the performance of the carrier's duties.[48]

Interest. Before judgment the penalty does not bear interest where the statute does not specifically allow it,[49] the liability not being of the character which entitles it to draw interest under the general statutes relating to interest.[50]

§ 499. Preventing Continuous Shipment of Freight

A petition to recover statutory damages for violation

34. Tex.—San Antonio, etc., R. Co. v Bracht, Civ.App., 163 S.W. 376.
10 C.J. p 571 note 50.

35. Ill.—Chicago, etc., R. Co. v. People, 77 Ill. 443.

36. Tex.—St. Louis Southwestern R. Co v. Rutherford, 96 S.W. 73, 43 Tex.Civ.App. 544.

37. Tex.—Ft. Worth, etc, R. Co. v. Lillard, App., 16 S.W. 654.

38. Ark.—Missouri Pac. R. Co. v. Smith, 29 S.W. 752, 60 Ark. 221.
10 C.J. p 571 note 56.

39. Ark.—Chicago, etc., R. Co. v. Young, 145 S.W. 203, 102 Ark. 599.
10 C.J. p 571 note 57.

Proof of established rate

Where a shipment is intended to be made under the regularly published and established rate, notwithstanding the rate specified in the bill of lading, the shipper in an action to recover a penalty for extortion on the part of the carrier in demanding additional charges, is required to show what the established rate is, and the statement of the rate in the bill of lading would not be evidence of such fact.—Panhandle & S. F. Ry. Co. v. Guthrie, Tex.Civ.App., 248 S.W. 106.

40. Tex.—San Antonio, etc., R. Co. v. Bracht, Civ.App., 163 S.W. 376.

41. Okl.—Atchison, etc., R. Co. v. State, 109 P. 218, 26 Okl. 166.
10 C.J. p 571 note 58.

Particular evidence held admissible

On information for overcharge, evidence is admissible to show that the order of the corporation commission violated was unjust and unreasonable, in view of Okl.Const. art. 9 § 22, providing that the delinquent or offending party have opportunity to introduce evidence of the validity, justness, or reasonableness of the order or requirement alleged to have been violated.—Atchison, etc., R. Co v. State, 109 P. 218, 26 Okl. 166.

42. Ark.—Missouri Pac. R. Co. v. Summers, 246 S.W. 859, 158 Ark. 643.
10 C.J. p 571 note 60.

Evidence held sufficient

(1) To sustain a verdict for plaintiff.—Missouri Pac. R. Co. v. Summers, 246 S.W. 859, 158 Ark. 643.

(2) To sustain a finding that a rate made by the railroad commission did not apply to the place to which the freight was shipped.—Sabine Tram Co. v. Texarkana, etc., R. Co., 143 S.W. 143, 105 Tex. 32, affirming, Civ.App., 129 S.W. 198.

Evidence held insufficient

(1) To show that defendant carrier operated either jointly or with others, the road which made the overcharge.—Missouri Pac. R. Co. v. Wright, 47 S.W. 557, 65 Ark. 631.

(2) The mere unsworn declaration of defendant's agent that there was an overcharge is insufficient to sustain a finding of an overcharge.—Latta Martin Pump Co. v. Southern Ry. Co., 50 S.E. 686, 138 N.C. 300.

43. Iowa.—Fuller v. Chicago, etc., R. Co., 31 Iowa 187.

44. Ark.—Chicago, R. I. & P. Ry. Co. v. McClanahan, 235 S.W. 380, 151 Ark. 77.

45. Ga.—Central of Georgia R. Co v. Stephens, 80 S.E. 1044, 141 Ga. 342.

46. Tex.—Texarkana, etc., R. Co. v. Sabine Tram Co., Civ.App., 129 S.W. 198.
10 C.J. p 572 note 63.

47. Iowa.—Herriman v. Burlington, etc., R. Co., 9 N.W. 378, 10 N.W. 340, 57 Iowa 187.
10 C.J. p 572 note 64.

48. Iowa.—Burlington, etc., R. Co. v. Dey, 48 N.W. 98, 82 Iowa 312, 31 Am.S.R. 477, 12 L.R.A. 436.
Kan.—Tucker v. Missouri Pac. R. Co., 108 P. 89, 82 Kan. 222.
N.C.—Efland v. Southern R. Co., 59 S.E. 359, 146 N.C. 129.
10 C.J. p 572 note 65.

49. Miss.—Gulf & S. I. R. Co. v. Laurel Oil & Fertilizer Co., 160 So. 564, 172 Miss. 630, correcting 159 So. 838, 172 Miss. 630, amending and overruling suggestion of error 158 So. 778, 172 Miss. 630.

50. Ohio.—Iron R. Co. v. Lawrence Furnace Co., 30 N.E. 616, 49 Ohio St. 102.

of a penal statute forbidding any contract, combination, or agreement to prevent a continuous carriage of freight to destination, must bring the case strictly within the statute.

Statutes forbidding any combination, contract, or agreement to prevent the carriage of freight from being continuous from the place of shipment to the point of destination, and authorizing the recovery of treble damages for violation of the provision, are penal.[51] Accordingly, a petition or a complaint in an action to recover the penalty must bring the case strictly within the letter of the statute, leaving nothing to inference or intendment.[52] A complaint which fails to allege any contract, combination, or agreement to prevent a continuous carriage from the point of shipment to the point of destination is fatally defective.[53]

§ 500. Refusal to Deliver Freight

Where a statute so provides, a carrier of goods may be subject to a penalty for refusing to deliver freight on tender of the legal charges. Actions to recover such penalties are governed by the usual rules.

Statutes which impose a penalty on carriers for refusing to deliver freight on tender of the legal charges, have generally been held to be valid.[54] Such state statutes do not apply to interstate shipments,[55] as to which, they have been superseded and rendered inoperative by the Carmack amendment.[56] Such statutes have no application to a carrier not a party to the bill of lading, which has not carried the goods under the bill of lading and has neither authorized nor accepted it;[57] nor do they ordinarily apply where no charges are due, the same having been prepaid.[58]

To authorize a recovery of the statutory penalty, the party seeking recovery must bring himself strictly within the terms of the statute.[59] Thus, where the statute so provides, it is essential, to fix the liability of the carrier, that the party seeking recovery tender[60] or pay[61] the entire amount of the charges shown to be due by the bill of lading. Under such a provision, the amount of the freight due must be shown by the bill of lading, and there can be no recovery where there are no figures nor data given in the bill of lading and none referred to, from which the amount of freight can be calculated;[62] but there is other authority holding that the penalty is recoverable, notwithstanding the failure of the bill of lading to specify the correct weight of the freight, without which the charges could not be computed, on the ground that the carrier had the duty in such case to weigh the goods within a reasonable time in order to ascertain the amount of the charges.[63] The fact that tender was made under protest does not invalidate it nor does it excuse the carrier's failure to deliver.[64] It is not necessary that the bill of lading be shown at the time of the tender to make the tender effectual, unless its production is demanded.[65] Where no depot was maintained at the point of destination of the goods, and it was customary to deliver freight for that place from a depot at another place, tender of freight charges at such depot, and refusal to deliver, will render the carrier liable for the penalty.[66]

On the ground that the statutory requirements cannot be avoided by making an unreasonable demand on the consignee as a condition precedent to obeying the law, it is not a defense to an action to recover a penalty under this statute that the owner refused to surrender the bill of lading,[67] or to give an indemnity bond in lieu of such surrender.[68] In this respect, it is not material that there is a custom among railroads of requiring surrender of the bill of lading.[69]

51. Iowa.—Clark v. American Express Co., 106 N.W. 642, 130 Iowa 254.

52. Iowa.—Clark v. American Express Co., supra.

53. Iowa.—Clark v. American Express Co., supra.

54. N.C.—Harrill v. Southern R. Co., 57 S.E. 382, 144 N.C. 532.
Tex.—Houston, etc., R. Co. v. Harry, 63 Tex. 256.
10 C.J. p 580 note 20.

55. Tex.—Gulf, C. & S. F. Ry. Co. v. Mathis, Civ.App., 194 S.W. 1135.

56. S.C.—Fennell Infirmary v. Southern R. Co, 85 S.E. 237, 101 S.C. 134.
10 C.J. p 580 note 21.

57. Tex.—Gulf, etc., R Co. v. Dwyer, 19 S.W. 470, 84 Tex. 194.
10 C.J. p 581 note 28.

58. Tex.—Alderson v. Gulf, etc., R Co., Civ.App., 23 S.W. 617.

59. Tex.—Fort Worth & D. C. Ry. Co. v. Brewer, Civ.App., 1 S.W.2d 686.
10 C.J. p 580 note 22.

60. Ark.—St. Louis, etc., R. Co. v Johnson, 13 S.W. 1096, 53 Ark. 282.
10 C.J. p 580 note 23, p 581 note 27.

61. Ark.—St. Louis, etc., R. Co. v. Johnson, supra.

62. Tex.—Texas, etc., R. Co. v. Wood, Civ.App., 23 S.W. 744.
10 C.J. p 580 note 24.

Expense account not part of bill of lading

A shipper who tenders the amount of freight shown by an expense account furnished by the carrier, which was no part of the bill of lading, cannot maintain an action for the penalty.—Schloss v. Atchison, etc., R Co., 22 S.W. 1014, 85 Tex. 601—Texas, etc., R. Co v Wood, Tex.Civ. App., 23 S.W. 744—10 C.J. p 581 note 26.

63. Ark.—Little Rock, etc, R. Co. v. Hanniford, 5 S.W. 294, 49 Ark. 291
10 C.J. p 581 note 25

64. Tex.—Atchison, etc., R. Co. v. Roberts, 22 S.W. 183, 3 Tex.Civ. App. 370.

65. Tex.—Gulf, etc., R. Co. v. Dwyer, 12 S.W. 1001, 75 Tex. 572, 16 Am. S.R. 926, 7 L.R.A. 478.

66. Tex.—St. Louis, etc, R. Co. v. McKee, App., 15 S.W. 45.

67. Tex.—Dwyer v. Gulf, etc., R. Co., 7 S.W. 504, 69 Tex. 707—Gulf, etc, R. Co v. McCown, Civ.App., 25 S.W. 435.

68. Tex.—Gulf, etc., R. Co. v. McCown, supra.

69. Tex.—Dwyer v. Gulf, etc., R. Co.,

It is no defense for the carrier to show that its agent did not know the correct charges, because of the carrier's failure to file its schedule of rates.[70]

The sealing of a car by the carrier's agent is not a refusal to deliver goods authorizing recovery of the penalty where the shipper was not seeking at that time to remove them.[71]

Actions. Where by statute a tender of the amount of freight shown by the bill of lading is a condition precedent to recover a penalty for refusal to deliver freight, the petition must allege a tender of the amount of freight charges as shown by the bill of lading,[72] and, if the bill of lading stipulates that the weights named therein are subject to correction, plaintiff must allege that the weights are correct.[73] Under a general denial defendant cannot prove a mistake in the weight or classification, although the bill of lading provides that the rate and classification were subject to correction; such a mistake must be specially pleaded.[74]

The burden is on the carrier to show that its failure to deliver was due to the consignee's failure on request to produce the bill of lading.[75] Where a shipment is intended to be made under the regularly published and established rate, notwithstanding the rate specified in the bill of lading, the shipper in an action to recover the penalty for refusal of the carrier to deliver the goods is required to show what the established rate is, and the statement of the rate in the bill of lading would not be evidence of such fact.[76] Where defendant claimed a higher rate than that fixed by the bill of lading, evidence offered by defendant to show that the shipper offered plaintiff to pay the difference between the amount specified in the bill of lading and that demanded by defendant, which offer plaintiff refused, was properly excluded[77]

An order dismissing a complaint charging a willful refusal to deliver freight, where there is failure merely to support the allegation of willfulness, is error.[78] Where it was admitted by both parties that the bill specified that the weight was subject to correction, and it was claimed by defendant carrier that more was due than tendered, an instruction that the jury could consider evidence as to the true weight only if they believed that such words were in the bill is erroneous, since the burden of proof was on plaintiff to show that he tendered the full amount.[79]

Amount and number of penalties. Under some statutes only one penalty is recoverable on one shipment, although there are several demands for delivery and refusals thereof;[80] by the provisions of other statutes, the penalties are cumulative.[81]

§ 501. Refusal to Give Bill of Lading

Under a statute requiring the carrier to furnish the shipper, on demand, a bill of lading stating the quantity and condition of the goods received, the carrier is not liable to the penalty, where the loading was done by the shipper and the necessary information was withheld from the carrier's agent.

Under a statute imposing a penalty on a common carrier for refusing to give a shipper, when demanded, a bill of lading stating the quantity, cargo, order, and condition of goods received for shipment, the railroad company is not liable because an agent refused to state in a bill of lading the weight or quantity of a car of goods loaded by the shipper, where the loading was done by plaintiff himself, and all the information necessary to make out the bill of lading was in his possession and by him withheld from the agent.[82]

§ 502. Refusal to Receive Freight for Transportation

State statutes imposing penalties on carriers for refusal under certain circumstances to receive freight for transportation, are valid, as applied to intra-state shipments, and entitle the shipper to recover the penalty where the carrier deliberately refuses to receive and transport freight tendered with the proper charges.

State statutes which impose a penalty on carriers under certain circumstances for refusal to receive freight for transportation are valid, at least so far as intra-state shipments are concerned;[83] but in view of federal legislation in this field, they can

7 S.W. 504, 69 Tex. 707—Gulf, etc., R. Co. v. McCown, Civ.App., 25 S.W. 435.
10 C.J. p 581 note 33.

70. N.C.—Harrill v. Southern R. Co., 57 S.E. 383, 144 N.C. 532.

71. Tex.—Fort Worth & D. C. Ry. Co. v. Brewer, Civ.App., 1 S.W.2d 686.

72. Tex.—St. Louis Southwestern R. Co. v. Carden, Civ.App., 26 S.W. 747

73. Tex.—Wichita Valley R. Co. v. Nance, 25 S.W. 47, 6 Tex.Civ.App. 34.

74. Tex.—Ft. Worth, etc., R. Co. v. Lillard, App., 16 S.W. 654.

75. N.C.—Jeans v. Seaboard Air Line R. Co., 80 S.E. 242, 164 N.C. 224

76. Tex.—Panhandle & S. F. Ry. Co. v. Guthrie, Civ.App., 248 S.W. 106

77. Tex.—Dillingham v. Fischl, 21 S.W. 554, 1 Tex.Civ.App. 546.

78. S.C.—Jefferson v. Southern Express Co., 87 S.E. 209, 103 S.C. 75.

79. Tex.—Gulf, etc., R. Co. v. Loonie, 19 S.W. 385, 84 Tex. 259—Gulf, etc., R. Co. v. Nelson, 23 S.W. 732, 4 Tex.Civ.App. 345

80. N.C.—Harrill v. Southern R. Co., 57 S.E. 383, 144 N.C. 532.
10 C.J. p 581 note 40.

81. Tex.—Atchison, etc., R. Co. v. Roberts, 22 S.W. 183, 3 Tex.Civ. App. 370

82. Tex.—Conley v. Sherman, etc., R. Co., 38 S.W. 519, 90 Tex. 295.
10 C.J. p 582 note 46.

83. N.C.—Corbett v. Atlantic Coast Line R. Co., 170 S.E. 129, 205 N.C. 85.
10 C.J. p 572 notes 67, 68.

have no application to interstate shipments.[84] Like other statutes imposing penalties, these statutes are subject to strict construction.[85]

The carrier's deliberate and peremptory refusal to accept a shipment tendered with the proper freight charge entitles the shipper to the penalty prescribed by the statute.[86] If the carrier elects to stand on its interpretation of the tariffs and wrongfully declines a shipment on the ground that insufficient freight charges are tendered, whereas it was in fact in error as to such interpretation, it is liable for the penalty.[87] There is a refusal to transport within the meaning of the statute when the carrier permits a shipper to load his cars with goods, but refuses to ship the car or to issue a bill of lading therefor.[88]

§ 503. Time Allowed for Shipment

If the statute allows the carrier two days at the initial point of shipment in which to ship freight, no penalty can be imposed for a refusal to receive goods for shipment by a train being loaded at the time of tender of the goods.

Where the statute imposing penalties on carriers for refusal to receive freight for transportation, allows the carrier two days at the initial point of shipment in which to ship freight, it incurs no penalty by a refusal to receive goods for shipment by a train being loaded when the goods were tendered for shipment.[89]

§ 504. Who May Sue

Under statutes so providing, only the "party aggrieved," as, for example, the shipper, may sue to recover the penalty.

Where the statutes imposing penalties on carriers for refusal to receive freight for transportation, provide that the penalty shall be recovered by "the party aggrieved," the shipper is entitled to sue for the penalty;[90] but a mere agent not the real party in interest,[91] or the attorney for attaching creditors,[92] or a connecting carrier over whose lines the freight is consigned,[93] is not so entitled.

§ 505. Defenses

The character of the shipment or the existence of conditions preventing performance of the duty, for which the carrier is not responsible, may be a defense to the imposition of a penalty for refusal to receive freight for transportation.

The character of a shipment may constitute a sufficient excuse for refusal to receive it, and hence preclude the application of the penalty for refusal to receive freight for transportation.[94] So, also, unforeseen conditions not to be anticipated,[95] or conditions for which the carrier is not responsible, preventing the discharge of its duty to receive goods for shipment,[96] may be successfully urged as a defense to an action to recover a penalty under the statutes.

It is not a defense to an action to recover a penalty for violation of the statutes that the party whose freight the carrier refused to ship sustained no injury thereby;[97] or that the carrier had failed to file and publish its schedule of rates;[98] or that the consignee of freight had failed to unload cars previously consigned to him, creating a congestion of traffic at the point to which the shipper desired to have the freight transported;[99] or that the agent to whom the goods were offered for shipment was ignorant of the location of the point to which they were destined;[1] or that the point to which the

Duty to receive and transport property generally see supra §§ 27–34.

84. U.S.—Southern Ry. Co. v. Reid, 32 S.Ct. 140, 222 U.S. 424, 56 L.Ed. 257, reversing Reid v. Southern Ry. Co., 69 S.E. 618, 153 N.C. 490.

Prior to Carmack amendment and decisions of the United States supreme court construing its provisions in regard to these regulations, such statutes were upheld, regardless of whether the shipment was intra-state or interstate in its character.—Bagg v. Wilmington, etc., R. Co., 14 S.E. 79, 109 N.C. 279, 26 Am.S.R. 567, 14 L.R.A. 596—10 C.J. p. 572 note 69.

85. N.C.—Cox v. Atlantic Coast Line R. Co., 62 S.E. 556, 148 N.C. 459.

86. N.C.—Corbett v. Atlantic Coast Line R. Co., 170 S.E. 129, 205 N.C. 85.

87. N.C.—Corbett v. Atlantic Coast Line R. Co., supra.

88. N.C.—Tilley v. Norfolk, etc., R. Co., 77 S.E. 994, 162 N.C. 37—Garrison v. Southern R. Co., 64 S.E. 578, 150 N.C. 575—Twitty v. Southern R. Co., 53 S.E. 957, 141 N.C. 355

89. N.C.—Cox v. Atlantic Coast Line R. Co., 62 S.E. 556, 148 N.C. 459.

90. Mich.—Crosby v. Pere Marquette R. Co., 91 N.W. 124, 131 Mich. 288
10 C.J. p. 573 note 83.

91. N.C.—McRackan v. Atlantic Coast Line R. Co., 63 S.E. 1042, 150 N.C. 331.

92. N.C.—McRackan v. Atlantic Coast Line R. Co., supra.

93. Mich.—Crosby v. Pere Marquette R. Co., 91 N.W. 124, 131 Mich. 288.
10 C.J. p. 573 note 86.

94. N.C.—Tilley v. Norfolk, etc., R. Co., 77 S.E. 994, 162 N.C. 37.
10 C.J. p. 572 note 73

95. N.C.—Garrison v. Southern R. Co., 64 S.E. 578, 150 N.C. 575.

96. N.C.—Murphy Hardware Co. v. Southern R. Co., 64 S.E. 873, 150 N.C. 703, 22 L.R.A.,N.S., 1200, 17 Ann.Cas. 481
10 C.J. p. 572 note 75.

97. N.C.—Reid v. Southern R. Co., 64 S.E. 874, 150 N.C. 753, 17 Ann.Cas. 247, reversed on other grounds Southern R. Co. v. Reid, 32 S.Ct. 145, 222 U.S. 444, 56 L.Ed. 263

98. N.C.—Burlington Lumber Co. v. Southern R. Co., 67 S.E. 167, 152 N.C. 70, reversed on other grounds Southern R. Co. v. Burlington Lumber Co., 32 S.Ct. 657, 225 U.S. 99, 56 L.Ed. 1001

99. N.C.—Garrison v. Southern R. Co., 64 S.E. 578, 150 N.C. 575.
10 C.J. p. 572 note 78.

1. N.C.—Reid v. Southern R. Co., 64 S.E. 874, 150 N.C. 753, 17 Ann.Cas. 247, reversed on other grounds Southern R. Co. v. Reid, 32 S.Ct. 145, 222 U.S. 444, 56 L.Ed. 263.
10 C.J. p. 573 note 79.

freight was to be consigned was not a regular station at which an agent of the carrier was kept.[2] Where the carrier fails to provide sufficient platform facilities for receiving cotton ordinarily awaiting transportation, it is not excused from receiving cotton for transportation, because the shipper refuses to place it on the platform which is covered with other cotton, necessitating unusual expense in putting the cotton on the platform.[3] The fact that a connecting carrier refuses to receive freight for a certain consignee will not relieve the initial carrier from liability for the penalty for refusing to receive freight.[4]

§ 506. Conditions Precedent to Action

Before liability for a penalty for refusal to receive freight for transportation can attach, there must be a proper tender of the freight for shipment.

Before the liability for a penalty for refusal to receive freight for transportation can attach, there must be an actual or constructive[5] tender of the freight for shipment; and the tender must be made during business hours[6] and at a regular station, when the statute so requires.[7] In making a tender, it is not essential that any particular language be used; it is sufficient that the language amounts in common understanding to a tender.[8]

§ 507. Actions

The usual rules as to actions for penalties apply.

An action to recover a penalty for refusal to receive freight for transportation is governed by the usual rules as to actions to enforce penalties, as discussed in C.J.S. title Penalties §§ 7–18, also 25 C.J. p 1181 note 46–p 1213 note 78.

Pleading. The declaration, petition, or complaint in an action for a penalty for refusal to receive freight for transportation, must allege all the statutory requisites, to establish defendant's liability for the penalty.[9] Where the penalty is a percentage of the value of the property at the time it should have been shipped, calculated for the time of the delay, the petition must show the date of shipment or tender, the value of the goods, and the period of delay.[10] Plaintiff need not show that defendant has filed and published its schedule of freight rates as required by law, as defendant will be presumed to have complied with the law.[11]

Evidence. The usual rules as to the weight and sufficiency of evidence apply.[12]

Instructions. An instruction that if cattle offered for shipment were at a nearby point ready for shipment, and this was known to the carrier's agent, there was a sufficient tender for shipment and the shipper would not be required to ask the carrier to ship each day, is erroneous in that it makes the tender depend only on the shipper's readiness to ship and knowledge of such readiness on the part of the carrier's agent.[13]

2. N.C.—Reid v. Southern R. Co., 63 S.E. 112, 149 N.C. 423, affirmed 64 S.E. 874, 150 N.C. 753, 17 Ann. Cas 247, reversed on other grounds Southern R. Co. v. Reid, 32 S.Ct. 145, 222 U.S. 444, 56 L.Ed. 263.

3. Ark.—St. Louis, etc., R. Co. v. State, 104 S.W. 1106, 84 Ark. 150.

4. N.C.—Wampum Cotton Mills v. Carolina, etc., R. Co., 64 S.E. 588, 150 N.C. 612.
10 C.J. p 573 note 82.

5. N.C.—Bane v. Atlantic Coast Line R. Co., 88 S.E. 477, 479, 171 N.C. 328.
10 C.J. p 573 note 87.
"The plaintiff may have been ready and willing to ship, and the defendant's agent may have known of this fact, and still no penalty would accrue unless there was an offer or tender of the shipment either actual or constructive If . . . the cattle were in a lot near by, it was not necessary that they should be driven from the lot to the station each day, but the plaintiff or his agent ought to have offered to do so in order to make good their tender."—Bane v. Atlantic Coast Line R. Co., supra.

6. N.C.—Wampum Cotton Mills v. Carolina, etc., R. Co., 64 S.E. 586, 150 N.C. 608.

7. N.C.—Garrison v. Southern R. Co., 64 S.E. 578, 150 N.C. 575—Alsop v. Southern Express Co., 10 S.E. 297, 104 N.C. 278, 6 L.R.A. 271.
10 C.J. p 573 note 89.

8. N.C.—Wampum Cotton Mills v. Carolina, etc., R. Co., 64 S.E. 586, 150 N.C. 608.
10 C.J. p 573 note 90.

9. Tex.—Kansas City, etc., R. Co. v. Cole, Civ.App., 149 S.W. 753—Dorrance v. International, etc., R. Co., 126 S.W. 694, 53 Tex.Civ.App. 460.

Complaint held to state cause of action

Under a statute requiring a carrier to receive at "a regular station" only all articles of the kind received for transportation, a complaint alleging that plaintiff tendered to a carrier at a particular station a quantity of loose lumber for shipment, etc., which defendant wrongfully and unlawfully refused to receive, states a cause of action for a penalty, since it would be inferred, to be shown by proof, that the station named was a regular station, and that loose lumber was an article usually received by the carrier—Olive v. Atlantic Coast Line R. Co., 67 S.E. 583, 152 N.C. 279.

Tender

The complaint, to be sufficient, must allege a proper tender.—Currie v. Raleigh, etc., R. Co., 47 S.E. 654, 135 N.C. 535—10 C.J. p 573 note 93.

10. Tex.—Kansas City, etc., R. Co. v. Cole, Civ.App., 149 S.W. 753—Dorrance v. International, etc., R. Co., 126 S.W. 694, 53 Tex.Civ.App. 460

11. N.C.—Burlington Lumber Co. v. Southern R. Co., 67 S.E. 167, 152 N.C. 70, reversed on other grounds Southern R. Co. v. Burlington Lumber Co., 32 S.Ct. 657, 225 U.S. 99, 56 L.Ed. 1001.

12. N.C.—Corbett v. Atlantic Coast Line R. Co., 170 S.E. 129, 205 N.C. 85.
10 C.J. p 573 note 94.

Evidence held to sustain finding of actual damage

N.C.—Corbett v. Atlantic Coast Line R. Co., 170 S.E. 129, 205 N.C. 85.

13. N.C.—Bane v. Atlantic Coast Line R. Co., 88 S.E. 477, 171 N.C. 328.

§ 508. Amount and Number of Penalties

The amount and number of penalties depend on the controlling statute and the facts of the particular case.

In view of the fact that a penalty of this character is purely a matter of statutory regulation, the amount and number of penalties depend on the terms of the statute as applied to the facts of the particular case. A statute imposing a penalty of fifty dollars for each day's failure to receive freight for shipment is intended to impose a penalty of such amount for each day on which the freight is at the depot ready for shipment;[14] such a provision is not invalid as imposing a penalty which would prevent the carrier from resorting to the courts to determine the validity of a statute imposing it.[15] To entitle a shipper daily to the statutory penalty for failure to receive freight for shipment, there must have been a tender, actual or constructive, and a refusal, each day.[16]

Where the statute provides that each article refused shall constitute a separate offense, on a refusal of a railroad company to transport a lot of cattle, a separate penalty is recoverable for each head.[17]

§ 509. Refusal to Refund Overcharge

State statutes imposing penalties on carriers for failure to refund overcharges within a specified time after the filing of claim therefor are valid, as applied to intrastate shipments, and entitle the "aggrieved party," who may be the consignee, to recover the penalty if the carrier fails to tender full settlement as required.

State statutes which require claims for overcharges to be adjusted and paid within a designated time after filing of the claim, and impose a penalty for failure so to do, are valid and enforceable, at least so far as intra-state shipments are concerned.[18] In as much as congress has taken entire control of the question of rates for interstate transportation, and especially of the matter of excessive charges, or those not corresponding with the rates authorized, filed, and published, these statutes are, as applied to interstate shipments, unconstitutional and void, as an interference with interstate commerce.[19]

The carrier incurs the statutory liability by its failure to settle, within a specified time, a claim for refund made in the manner designated by the statute, and its offer to refund an amount less than that actually owing to claimant is not a sufficient tender of settlement to defeat liability for the penalty.[20] If the statute imposing the penalty expressly so provides, it is a condition to the liability of the carrier that the plaintiff be entitled to recover the full amount of his claim for refund.[21] In the absence of such express statutory provision, however, the fact that the claim for refund,[22] or the complaint,[23] seeks recovery of an amount greater than that of the actual overcharge to which plaintiff is entitled, does not prevent the imposition of the penalty,

14. N.C.—Bane v. Atlantic Coast Line R. Co., 88 S.E. 477, 171 N.C. 328.

15. N.C.—Garrison v. Southern R. Co., 64 S.E. 578, 150 N.C. 575.
10 C.J. p 573 note 98.

16. N.C.—Bane v. Atlantic Coast Line R. Co., 88 S.E. 477, 479, 171 N.C. 328
10 C.J. p 574 note 99.
"Each day for which a penalty is demanded is treated as separate and distinct, upon the theory that when there has been a tender and refusal on one day the penalty of $50 is imposed, and that this closes the transaction, nothing else appearing, and that, if further penalties are demanded, the plaintiff must thereafter prove a tender and refusal."—Bane v. Atlantic Coast Line R. Co., supra

17. N.C.—Carter v. Wilmington, etc., R. Co., 36 S.E. 14, 126 N.C. 437.

18. N.C.—Tilley v. Southern Ry. Co., 90 S.E. 309, 172 N.C. 363.
10 C.J. p 592 note 26.
Penalties for overcharge see supra §§ 492–498.

Reason for enactment of statute

(1) "It is a matter of common knowledge that railroad companies are often neglectful in adjusting and settling claims for . . . overcharges. Considering the large number of agents that these companies must have, it is not to be wondered at that such . . . overcharges occur. But in the aggregate such claims are very large, and it is a matter of importance to the public that the carrier shall be impressed with the necesity of paying such claims, even when small severally, for the party aggrieved should not be debarred from recovery of his just dues because of the expense of counsel fees and the annoyance of litigation"—Tilley v. Southern Ry. Co., 90 S.E. 309, 310, 172 N.C. 363.

(2) Other statements see 10 C.J. p 592 note 26 [a].

19. N.C.—Blalock Hardware Co. v. Seaboard Air Line R. Co., 86 S.E. 1025, 170 N.C. 395.
S.C.—Pinkussohn Cigar Co. v. Clyde S.S. Co., 85 S.E. 1060, 101 S.C. 429.

20. N.C.—Tilley v. Southern Ry. Co., 90 S.E. 309, 172 N.C. 363.

21. Ga.—Atlanta & West Point R. Co. v. Fairburn Marble Co., 89 S.E. 817, 145 Ga. 708.

22. N.C.—Macon County Supply Co. v. Tallulah Falls R. Co., 82 S.E. 13, 166 N.C. 82, reversed on other grounds 36 S.Ct. 446, 241 U.S. 640, 60 L.Ed. 1216.

Rule as to claim for loss or injury to goods inapplicable

The requirement that the full amount of the claim be recovered as a condition to the liability for the penalty, which is applicable in the case of penalties imposed for failure to pay for a claim for loss of, or injury to, goods, see supra § 476, being based on the unreasonableness of not permitting the carrier to protect itself against unjust claims, does not apply to penalties imposed for failure to refund overcharges, since the carrier here knows the amount collected, has in its possession its tariff, fixing the legal rate, and can ascertain with exactness the amount of overcharge, and it can, therefore, protect itself against an unjust demand by tender of the amount due, which would preclude liability for the penalty.—Tilley v. Southern Ry. Co., 90 S.E. 309, 172 N.C. 363—Macon County Supply Co. v. Tallulah Falls R. Co., 82 S.E. 13, 166 N.C. 82, reversed on other grounds 36 S.Ct. 446, 241 U.S. 640, 60 L.Ed. 1216.

23. N.C.—Tilley v. Southern Ry. Co., 90 S.E. 309, 172 N.C. 363.

where the carrier does not offer to refund the amount actually owing; and the failure of the statute to require that the full amount of the claim be recoverable as a condition to the imposition of the penalty, does not render it invalid.[24] It is also not essential to the recovery of the penalty that the plaintiff's claim for refund specify the amount of the overcharge.[25]

What constitutes an overcharge. Statutes imposing a penalty for refusal to refund an overcharge have been held to apply to the consignee's claim for freight for goods taken beyond the point to which they were consigned, as this amounts to an overcharge of freight,[26] and also to a claim for an amount paid as freight on part of a shipment which was short and not delivered.[27] On the other hand, the mere fact that the carrier charges a higher rate for carrying freight in one direction than it does for carrying freight of the same class in the opposite direction does not necessarily constitute an overcharge.[28]

Who may sue. The consignee of freight who has paid the overcharge is the "party aggrieved," within a statute conferring the right to recover a penalty against the carrier for failure to refund such overcharge within a designated time.[29]

Amount of penalty. Under a statute imposing a penalty of twenty-five dollars for the first day's delay in payment of the claim after expiration of the period allowed therefor, and five dollars per day thereafter until the amount reaches one hundred dollars, plaintiff may recover the maximum sum if such time has elapsed as entitles him thereto.[30]

§ 510. Unjust Discrimination

The general nature of unlawful discrimination by a carrier, and the shipper's right to recover damages resulting therefrom, whether such right of action is conferred by the common-law or by statute, is considered in §§ 348–397 supra. The recovery of penalties provided by such statutes, such as double or treble damages, is discussed in § 511 infra.

§ 511. Against Shippers

a. In general
b. Failure or refusal to deliver to connecting lines without delay
c. To whom statutes applicable
d. Actions

a. In General

The carrier may be subject to a penalty under statutes prohibiting unjust discrimination against shippers, if it willfully violates the statute and unduly prefers one shipper as against others, under circumstances not justifying a difference in treatment, or where it unjustly discriminates between localities by exacting unequal charges for transportation over similar distances in the same direction.

State and federal statutes which prohibit unjust discrimination against shippers and impose penalties on carriers therefor, apart from the usual liability for damages considered in §§ 348–397 supra, have been generally held to be valid; but[31] state statutes of this character are void to the extent that they are made applicable to interstate shipments, for they are not intended to, and do not, apply to such shipments.[32] Like all penal statutes, statutes of this character are subject to strict construction.[33]

To authorize recovery of the penalty, the case must be brought clearly within the terms of the statute.[34] If the word "willful" is used in the

24. N.C.—Macon County Supply Co. v. Tallulah Falls R. Co., 82 S.E. 13, 166 N.C. 82, reversed on other grounds 36 S.Ct. 446, 241 U.S. 640, 60 L.Ed. 1216.

25. N.C.—Tilley v. Southern Ry. Co., 90 S.E. 309, 172 N.C. 363.

Reason for rule

The reason the statute does not require that the claim specify the amount of the overcharge is that the carrier "has full notice of the amount of freight, it should have charged according to its printed tariff, and the freight bill filed and its own books show what it did charge and collect."—Tilley v. Southern Ry. Co., 90 S.E. 309, 310, 172 N.C. 363.

26. S.C.—Wichman v. Atlantic Coast Line R. Co., 84 S.E. 420, 100 S.C. 138.

What constitutes an overcharge generally see supra § 321.

27. N.C.—Cottrell v. Carolina, etc., R. Co., 54 S.E. 288, 141 N.C. 383.

28. N.C.—Scull v. Atlantic Coast Line R. Co., 56 S.E. 876, 144 N.C. 180.

10 C.J. p. 593 note 29.

29. N.C.—Tilley v. Southern Ry. Co., 90 S.E. 309, 172 N.C. 363.

30. N.C.—Tilley v. Southern Ry. Co., supra.

31. Statute held valid

A statute which imposes a penalty for unjust discrimination if a carrier fails or refuses to transport freight without delay or discrimination to any point on a connecting line is constitutional.—Quanah, A. & P. Ry. Co. v. Warren, Tex.Civ.App., 184 S.W. 232.

Statute held invalid

A statute establishing a railroad commission to prevent the taking of unjust and unreasonable compensation, and the making of unjust and unreasonable discrimination, is unconstitutional, where its provisions were too indefinite and uncertain to sustain a suit for the penalties imposed, and did not sufficiently describe the offense therein described, but left to the jury to determine from the proof whether the difference in rates amounted to discrimination, or whether the charges were unjust and unreasonable, making the guilt or innocence of accused depend on the finding of a jury.—Louisville, etc., R. Co. v. Tennessee R. Commn., C.C.Tenn., 19 F. 679.

32. N.C.—McLean v. Charlotte, etc., R. Co., 4 S.E. 769, 96 N.C. 1.

33. Iowa.—Blair v. Sioux City, etc., R. Co., 80 N.W. 673, 109 Iowa 369.

10 C.J. p. 566 note 70.

34. Ark.—Choctaw, etc., R. Co. v.

statute as descriptive of the offense against which the penalty is denounced, the discrimination must be unjust and willful to render the carrier liable for the penalty.[35] So, a penalty of double the damage sustained will not be imposed where the discriminatory acts of the carrier were done by it in good faith in the belief that it was acting within its legal rights.[36]

In accordance with the rule stated in § 351 supra, no liability attaches under the statutes, unless there is some undue preference, some unjust or unreasonable discrimination; so long as those who are in substantially the same situation with reference to the carrier and the commodity to be shipped are treated with the same consideration and accorded the same privileges, there is no actual discrimination.[37] Further, there can be no actual discrimination between those whose situation and relations to the carrier with reference to the commodity to be shipped are so different as to justify or demand a difference in treatment.[38] Where a carrier raises the rate for transporting a certain commodity and agrees to carry for one shipper at the old rate under contracts already made by it, but refuses so to do for another shipper, it is guilty of unjust discrimination and becomes liable for the penalty imposed by the statute.[39] There may be unjust discrimination between shippers without charging more than the rate approved by the railroad commission.[40] If a discriminating charge is made against the shipper, the liability for the penalty attaches, although the charge was not actually paid.[41] The fact that the privileges allowed to the favored party may be withdrawn at any time constitutes no defense to an action to recover the penalty.[42]

Unequal charges for transportation of same distance. A statute imposing a penalty for unequal charges for transportation of freight for the same distance in the same direction, where directed at discrimination between localities, does not require for its violation that there be a personal discrimination and a personal injury as between individuals or classes.[43] Transportation "in the same direction," as to which discrimination is prohibited by such a statute, means transportation in the direction in which the freight is carried from the place where the shipment is made, embracing all branches of the road in that direction, if used in connection with, and as a part of, the same road.[44] A statute of this nature, however, has reference only to transportation over the road of the particular carrier and not to transportation over other railroads, for which it charges and receives nothing except as collection agent for the other railroads.[45] A statute which prohibits the charging of more for a short than for a long distance applies, although by the original contract of carriage the merchandise was to be carried to a station beyond that at which it was left.[46]

b. Failure or Refusal to Deliver to Connecting Lines without Delay

The carrier, under a statute so providing, may be subject to a penalty for unjust discrimination, without regard to any actual damage suffered by the shipper, if it fails or refuses to receive and transport freight without delay or discrimination to any point on the particular connecting line directed by the shipper.

A statute which provides that a carrier is guilty of unjust discrimination for which a penalty may be imposed, if it fails or refuses, under regulations prescribed by the railroad commission, to receive and transport freight without delay or discrimination to any point on a connecting line, is operative

State, 84 S.W. 502, 92 S.W. 26, 73 Ark 373.
Tex.—San Antonio, etc, R. Co. v. Stribling, 89 S.W. 963, 99 Tex. 319

Railroad company's ownership of stock of producing or manufacturing company whose articles or commodities railroad company transports does not of itself subject railroad company to penalties of statute forbidding railroads from transporting in interstate commerce commodities in which railroads are interested—U. S. v. Elgin, J. & E Ry. Co., D C Ill., 11 F Supp 435, affirmed 56 S Ct. 841, 298 U.S. 492, 80 L Ed 1300.

35. Tex.—Woodhouse v Rio Grande R. Co, 3 S W. 323, 67 Tex. 416—Texas, etc, R. Co v. Langsdale, Civ.App., 30 S W 681.
10 C J. p 566 note 71.

36. Mich.—Federal Gravel Co. v. Detroit & M. Ry. Co., 248 N.W. 831, 263 Mich. 341.

37. Ark.—Choctaw, etc., R. Co. v State, 84 S W. 502, 92 S.W. 26, 73 Ark. 373.

38. Ark.—Choctaw, etc., R. Co. v. State, supra.
10 C.J. p 567 note 73.

Release of carrier
The carrier cannot, however, set up in justification of the discriminatory lower rates a contract with the party in whose favor they were made, whereby, in consideration of the lower rates, such party released the carrier from an unexplainable, indefinite, and unadjusted claim for damages arising from a tort—Union Pac. R. Co v. Taggart, Colo, 13 S. Ct. 977, 149 U.S. 698, 37 L.Ed 905—Union Pac. R Co. v. Goodridge, Colo, 13 S Ct. 970, 149 U.S 680, 37 L.Ed. 986.

39. Ill.—Louisville, etc., R. Co. v. Crown Coal Co, 43 Ill.App. 228.

40. Ark.—Roberts v. St. Louis, etc., R Co., 130 S.W. 531.
Tex.—Houston, etc, R. Co. v. Lone Star Salt Co., 48 S.W. 619, 19 Tex. Civ App. 676.

41. N.C.—Hines v. Wilmington, etc., R. Co, 95 N C. 434, 445, 59 Am. R. 250

42. U.S. — Butchers', etc, Stock-Yards Co. v Louisville, etc, R. Co, Tenn, 67 F. 35, 14 C.C A. 290.

43. Ill.—Illinois Cent. R Co v. Peo, 12 N E. 670, 121 Ill. 304, 311.
10 C J. p 567 note 83.

44. N.C.—Hines v Wilmington, etc, R. Co., 95 N C 434, 59 Am.R. 250.
10 C J. p 567 note 77.

45. Mass.—Com. v. Worcester, etc. R. Co, 124 Mass 561.

46. N.H.—Osgood v. Concord R. Co., 63 N H. 255.

and authorizes enforcement of the penalty for noncompliance, notwithstanding that no applicable regulations have been prescribed by the commission.[47] This statute applies both to shipments in carload lots and to smaller shipments,[48] and without regard to whether the shipment is a through one.[49] The carrier may incur liability for the penalty thereunder, if it delays in delivering freight to the connecting carrier,[50] or if it misroutes the freight and delivers it to a connecting carrier other than the one designated by the bill of lading, even though as a result of an unintentional and innocent mistake.[51] The statute is also violated where the carrier wrongfully refuses to accept goods for shipment consigned or routed to a point on a connecting line, as to which transit the state commission has fixed the through rate,[52] or where it exacts from its connecting carrier as a condition on which it should receive freight, that the same should be transported over a different route from that selected by the shipper.[53] It is not essential to the recovery of the penalty that plaintiff show any actual damage suffered by him as a result of the delay in delivery to the connecting line, inasmuch as the statutory remedy is independent of the common-law right of action for refusal to deliver goods;[54] but even assuming that a showing of pecuniary damage is a necessary condition to recovery, such damage is shown in the interest on the value of the goods shipped and withheld.[55] It is no defense to the carrier's liability for refusal to transfer freight to a connecting carrier that there were no facilities for handling the goods at the junction point, since it is under a duty to furnish such facilities.[56] Where goods are carried beyond the connecting point in violation of the statute, it is no defense that this was done pending adjustment of a dispute between defendant carrier and the connecting carrier;[57] nor does the contention that the goods could not be delivered to the connecting carrier without first taking them beyond the connecting point for separation from other freight constitute a defense, unless such condition was made known to the shipper before delivery of the goods to defendant carrier.[58]

c. To Whom Statutes Applicable

State statutes imposing penalties for unlawful dis-

47. Tex.—Quanah, A. & P. Ry Co. v. Warren, Civ.App., 184 S.W. 232—Quanah, A. & P. Ry. Co. v. Jones Lumber Co., Civ.App., 178 S.W. 858—Inman v. Railway Co., 37 S. W. 37, 14 Tex.Civ.App. 39.

Breach of regulation

However, if the petition seeks recovery of the penalty on the ground of violation of the statute and of regulations of the commission, a failure to show the existence of the regulation and a breach thereof precludes recovery.—Quanah, A. & P. Ry Co. v. Warren, Tex.Civ.App., 184 S.W. 232.

Effect of statute relating to delay

Where a shipper has a cause of action for a penalty under the statute referred to in the text, he will be entitled to recover such penalty without reference to whether such statute operates as a repeal of another statute imposing a penalty for delay in transportation or whether the penalty fixed by the first mentioned statute is merely cumulative of the penalty fixed by the latter—Gulf, etc., R. Co. v. Lone Star Salt Co, 63 S.W. 1025, 26 Tex.Civ. App. 531

Penalty fixed by regulations

That the commission pursuant to authorization by another article of the statute enacted regulations pertaining to unloading cars at junction points, and fixed a penalty for delay, did not repeal or supersede the penalty prescribed by the statute stated in the text, since although the latter statute refers to regulations of the commission, the right conferred to regulate does not include the right to substitute a different penalty.—Quanah, A. & P. Ry Co. v. Moore, Tex.Civ.App., 189 S.W 322, dismissed for want of jurisdiction.

48. Tex.—Quanah, etc., R. Co. v. R. D. Jones Lumber Co., Civ App., 178 S W. 858.

Absence of regulation

Rev.St 1911 art 6670 subds 1, 2, and art 6671, as a whole, penalizes the refusal to deliver freight to a connecting carrier, and hence the fact that a shipment in less than carload lots is not embraced within the regulations of the railroad commission pertaining to carload shipments, under subd 2 dealing specifically with failure to make delivery under the regulations of the commission, does not preclude application of the penalty, where the petition seeks recovery for violation of the statute and not for violation of the commission rules—Quanah, A. & P. Ry. Co. v. Jones Lumber Co., Tex.Civ.App., 178 S.W. 858—Inman v. Railway Co., 37 S.W. 37, 14 Tex.Civ.App. 39.

49. Tex.—Quanah, A. & P. Ry. Co. v. Warren, Civ App., 184 S W. 232

50. Tex.—Quanah, A. & P. Ry. Co. v. Warren, supra

Penalty for delay in transportation see supra § 454.

51. Tex.—Gulf, C & S. F. Ry. Co. v. Temple Grain & Hay Co., 58 S. W.2d 47, 122 Tex. 288.

10 C.J. p 567 note 75.

Acceptance of bill of lading as waiver

Where in disregard of the shipper's instructions the carrier routes freight over a connecting line different from that requested and leaves the shipper bills of lading for such route, the shipper does not waive his right to insist that the change of routing is an unjust discrimination, by accepting the bills of lading as so left.—Thompson v. Missouri, etc., R. Co., 126 S.W. 257, 128 S.W. 109, 103 Tex. 372, reversing 118 S.W 618, 55 Tex.Civ.App. 12.

52. Tex.—Inman v. St. Louis Southwestern R. Co, 37 S.W. 37, 14 Tex. Civ.App. 39.

53. Tex.—Thompson v. Missouri, etc, R. Co, 126 S.W. 257, 128 S. W 109, 103 Tex. 372, reversing 118 S.W. 618, 55 Tex.Civ.App. 12.

10 C.J. p 567 note 76.

54. Tex.—Quanah, A. & P Ry Co. v. Warren, Civ.App., 198 S.W. 814, 816

55. Tex.—Quanah, A. & P. Ry. Co v. Warren, supra.

56. Tex.—Quanah, A. & P. Ry. Co. v. Warren, supra—Quanah, A. & P. Ry Co. v. Moore, Civ App., 189 S W. 322, dismissed for want of jurisdiction.

57. Tex.—Quanah, A. & P. Ry Co v. Moore, supra.

58. Tex.—Quanah, A. & P. Ry Co v. Moore, supra.

crimination embrace all carriers doing business in the state; but such statutes do not apply to receivers. Particular statutes relating to discrimination between specified types of shippers have been held not to apply to discrimination between other types.

State statutes imposing penalties for unlawful discrimination embrace all carriers doing business in the state, whether incorporated under the laws of the state or not,[59] but they have been held not to apply to receivers operating a railroad.[60] Particular statutes have been held not to include express companies so as to authorize a recovery against such carriers.[61]

Persons subject to discrimination. A statute imposing a penalty for discrimination by a carrier between commission merchants or other persons engaged in the transportation of freight and other individuals does not apply to discrimination between individuals not so specified, and hence does not authorize such an individual to recover the penalty.[62]

d. Actions

Actions of this character, which are held to be ex delicto, are governed by the usual rules.

The action for penalties imposed by statute for unjust discrimination is held to be ex delicto.[63]

Jurisdiction. An action based on a state statute to recover a penalty for unjust discrimination cannot be brought in the courts of another state.[64]

Conditions precedent. There being nothing in the statute requiring notice to be given in cases of unjust discrimination, the giving of such notice is not a condition precedent to a right of action to recover a penalty for unjust discrimination.[65]

Time to sue, limitations. Action to recover the penalty must be brought within the time required by law.[66] Where the original complaint alleged the conditions authorizing the recovery of double damages for unlawful discrimination and was filed within the period of limitation, the failure to file, within the period, an amended complaint praying for double damages, does not bar recovery of the penalty as outside the period of limitation[67] So, also, the statute does not toll a recovery of treble damages for which a motion was made after the period of limitation had expired, where the statement of claim for discrimination and an amendment alleging a violation of the statute imposing treble damages were made within the period[68]

Pleading. To authorize a recovery of a penalty for unjust discrimination it is sufficient for plaintiff to state the facts which bring his case clearly within the statute.[69] The declaration should show a discrimination and that such discrimination was unjust.[70] It is not necessary to allege what would have been a reasonable charge, since that is a mere matter of evidence;[71] and where a recovery is sought for several acts of discrimination, it is not necessary to state each act of discrimination as a separate cause of action.[72] It is not necessary to allege that the rate charged was in excess of that fixed by the commission, as there may be an unjust discrimination without charging more than the rate so fixed.[73] In an action under a state statute, the

59. N.C.—Hines v. Wilmington, etc., R. Co, 95 N.C. 434, 59 Am.R 250. Tex—Gulf, etc, R. Co. v. Barry, Civ.App, 45 S.W. 814.

60. Tex—Bonner v. Franklin Co-op. Assoc., 23 S W. 317, 4 Tex.Civ.App. 166.

61. **Inclusion by other statute**
Where a statute relating to express companies was intended, as to express companies, to cover the entire field covered by an act of the same legislature relating to railroads, and does not authorize the recovery of a penalty by private individuals, the penalty provision of the railroad act does not refer to express companies, notwithstanding a provision that all laws prescribed for railroads, in so far as applicable, shall apply to express companies; and hence an individual cannot recover from an express company for extortion and discrimination in rates the penalty prescribed by the railroad act—Helm v. Wells, Tex Civ. App., 177 S.W. 134.

62. Mo.—Tucker v. St. Louis-San Francisco Ry. Co., 250 S.W. 390, 298 Mo. 51, affirming, App, 233 S.W. 512.

Rule of ejusdem generis applied
Under a statute imposing a penalty for discrimination between "commission merchants or other persons engaged in the transportation of freight" and individuals, the rule of ejusdem generis prevents inclusion of all other shippers, such as lumber dealer or sand dealer, in phrase "or other persons engaged," etc, the intent to include discrimination between individuals not being clear—Tucker v. St. Louis-San Francisco Ry. Co., App., 233 S.W. 512, affirmed 250 S.W. 390, 298 Mo. 51.

63. Iowa.—Illinois Cent. Trust Co. v. Chicago, etc., R. Co., 135 N.W. 721, 156 Iowa 104.

64. N.Y.—Langdon v. New York, etc., R. Co, 11 N.Y S. 514, 58 Hun 122, affirming 9 N.Y.S. 245

65. Tex.—Woodhouse v. Rio Grande R. Co., 3 S W 323, 67 Tex. 416.

66. **Particular statutes applied**
(1) Where the federal statute so provides, the action must be brought within five years.—Carter v. New Orleans, etc., R Co., Miss., 143 F. 99, 74 C C.A. 293

(2) Under a Kansas statute, the action is barred in one year.—Beadle v. Kansas City, etc., R. Co., 29 P. 696, 48 Kan. 379.

67. Ark.—Missouri Pac. Ry. Co. v. Kirten Gravel Co., 44 S.W.2d 674, 184 Ark. 1024.

68. Pa.—Hall v. Pennsylvania R. Co, 100 A. 1035, 257 Pa. 54, L.R.A. 1917F 414.

69. Mo—Reynolds v. Chicago, etc., R. Co., 85 Mo. 90.

70. Ind—Adams Express Co v. State, 67 N.E. 1033, 161 Ind. 328. 10 C J. p 567 note 92.

71. U S.—Goodrich v Union Pac. R. Co., C.C Colo., 35 F. 35.

72. Mo.—Cohn v. St Louis, etc., R. Co, 79 S.W. 961, 181 Mo. 30. N.Y.—Langdon v. New York, etc., R. Co, 15 N Y S. 255. 10 C.J. p 568 note 94.

73. Ark.—Roberts v. St Louis, etc., R. Co., 130 S.W. 531, 95 Ark. 249.

petition need not allege that the shipment was an intra-state one, since, if the shipment was an interstate one, exclusively within the purview of the federal statutes, that would be a matter of defense.[74]

An answer in an action to recover a statutory penalty for unjust discrimination in another shipper's favor, which alleges a contract for a rebate if such shipper would furnish a certain amount of goods for shipment, but which does not allege that such amount was ever furnished or that the shipper ever became entitled to a rebate, is insufficient as presenting no defense.[75] It is a matter of defense, to be pleaded in the answer, that a shipment claimed to be discriminatory under state statute, was an interstate shipment, exclusively within the purview of the federal statutes.[76]

A material variance between the pleadings and proof, as with respect to the amount of charges as to which plaintiff was discriminated against, is fatal to a recovery.[77]

Evidence. One who seeks to recover a penalty for unjust discrimination has the burden of showing the facts which are charged to constitute discrimination by a preponderance of the evidence.[78] Where a prima facie case of unjust discrimination is made out, the burden is on defendant to show that the discrimination was in fact not unjust.[79] Where a carrier of goods discriminates in its rates, it will be presumed that the person injured was the shipper who actually paid the freight.[80]

Trial. A statement of claim of damages for discrimination, together with an amendment thereto before trial alleging violation of a statute making discrimination unlawful and imposing treble damages, is sufficient notice to the carrier that the action was brought to recover the penalty, to entitle plaintiff to recover treble damages on motion after verdict of the jury that he had been unlawfully discriminated against.[81]

Amount of penalty. Notwithstanding a statute permitting the recovery of a number of times the amount of damages sustained in consequence of a violation, it has been held that the court need not under all circumstances award such damages.[82] Under some statutes, interest is not recoverable on the treble damages imposed by the statute as a penalty for unjust discrimination in charges.[83]

§ 512. Against Other Carriers

Under some statutes a carrier is subject to a penalty if it unjustly discriminates against other carriers.

A statute prohibiting unjust discrimination by an express company against any other company or persons engaged in the same business and imposing a penalty for violation has been upheld as against various constitutional objections.[84] Like other penal statutes, this statute is subject to strict construction, and a carrier can be subjected to the penalties only under the express provisions of the statute and not by implication or construction.[85] To render an express company liable as for the violation of this statute, it is not essential that the company discriminated against should be incorporated.[86]

Under a statute imposing a penalty on any railroad company which shall refuse, under such regulations as may be prescribed by the railroad commission, to receive and transport without discrimination the tonnage in cars loaded or empty of any connecting line of railroad, it is not a defense to an action to recover a penalty for discrimination that the car or cars tendered to defendant carrier were not the original car or cars in which the goods were shipped; nor is it a defense that the car tendered was a refrigerator car not commonly used for the transportation of goods of the character with which it was loaded, where it appeared that the car was adapted to the use to which it was applied.[87]

74. Mo.—Alexander v. Chicago, M. & St P. R. Co, 221 S.W. 712, 282 Mo 236, 11 A.L.R. 867.

75. U.S.—Union Pac. R. Co. v. Taggart. Colo., 13 S.Ct. 977, 149 U. S. 698, 37 L.Ed 905—Union Pac. R Co. v. Goodridge, Colo, 13 S. Ct. 970, 149 U.S 680, 37 L.Ed 986.

76. Mo—Alexander v Chicago, M & St. P R Co., 221 S W. 712, 282 Mo 236, 11 A.L.R. 867.

77. Tex—Texas, etc., R. Co v. Langsdale, Civ.App., 30 S.W. 681 10 C.J. p 568 note 97.

78. N.C—Hilton Lumber Co. v Atlantic Coast Line R. Co., 53 S.E. 823, 141 N.C. 171, 6 L.R.A.,N.S., 225.
10 C.J. p 568 note 98.

79. Ill.—Peo v Baltimore, etc., R. Co., 92 N.E. 934, 246 Ill. 474.

80. Iowa—Illinois Cent. Trust Co v. Chicago, etc., R. Co, 135 N.W. 721, 156 Iowa 104.

81. Pa.—Hall v. Pennsylvania R. Co, 100 A 1035, 257 Pa. 54, L.R A.1917F 414.

82. Mich—Federal Gravel Co. v. Detroit & M. Ry. Co., 248 N.W. 831, 263 Mich. 341.
10 C.J. p 506 note 42.

83. Iowa—Blair v. Sioux City, etc, R Co., 80 N.W. 673, 109 Iowa 369

84. Ind—Adams Express Co. v. State, 67 N.E 1033, 161 Ind 328.
10 C J p 568 note 2.

85. Ind—State v. U S Express Co., 87 N.E 716, 172 Ind. 717.

86. Ind—Adams Express Co. v. State, 67 N.E 1033, 161 Ind 328
10 C J. p 568 note 3.

87. Tex—Gulf, etc, R. Co. v. Lone Star Salt Co, 63 S.W. 1025, 26 Tex. Civ.App. 531.

§ 513. Penalties Imposed on Shipper or Consignee

Under some statutes, in a proper case, a penalty may be imposed on the shipper or consignee.

Under a statute which provides that the party to whom cars are consigned shall unload the same within a specified time after delivery and notice, or forfeit to the railway company a certain sum per day for each car so left unloaded, the consignor is not liable for failure to see that the cars are unloaded at their destination; the remedy is against the consignee.[88] Under a similar statute imposing a penalty on applicant for cars who fails to load them within a specified time after they are furnished by the carrier, only one penalty can be collected for each car not loaded within the time limit after it is placed for loading.[89]

A statute imposing on a shipper a penalty for presenting a fraudulent claim for damages against the common carrier is not invalid.[90]

X. OFFENSES

§ 514. By Carriers or Their Agents

In addition to the imposition of penalties on carriers for violation of constitutional and statutory provisions enacted for the regulation of transportation, statutes have been enacted by the congress of the United States and by the legislatures of many states in regulation of transportation by carriers which provide that a violation of the provisions thereof shall constitute an indictable offense. Offenses against shipping and navigation laws are discussed in the C.J.S. title Shipping § 12, also 58 C.J. p 54 note 56–p 56 note 95. Offenses by common carriers as to illegal introduction, transportation or delivery of intoxicating liquor are considered in the C.J.S. title Intoxicating Liquors § 234, also 33 C.J. p 580 n 22–p 584 note 74.

§ 515. Failure to File Rates or Tariff

Where a statute so provides, interstate carriers must file a schedule of rates, fares, and charges, and a willful failure to do so, or transportation by one who has not filed his schedule, is a misdemeanor.

Under the provisions of the Interstate Commerce Act, 49 U.S.C.A. §§ 6, 41, the filing of schedules of interstate railroads with the interstate commerce commission is required and a willful failure to comply therewith is a misdemeanor punishable in any federal court having jurisdiction of crimes within the district within which the offense is committed. The rates which the carrier is required to file and publish are not alone those under which transportation has actually taken place, but those which the carrier has established as its present charges, as distinguished from those which are obsolete and tentative, or perhaps only to take effect in the future; they are the rates open to public inspection and on which shipments may be made, if offered.[91] An entirely intra-state railroad which is part of a joint through route over which interstate commerce is transported is subject to the provisions of the act.[92]

Transportation without filing tariff. By the provision of the Interstate Commerce Act, 49 U.S.C.A. §§ 6, 41, transportation of interstate commerce by a carrier which has not filed its rate for such service is a misdemeanor.[93]

§ 516. Charging Rates Different from Those Fixed by Schedule

Under a statute so providing, a carrier which charges rates different from those paid by schedule commits an indictable offense.

The offense by a carrier of charging rates different from those fixed by schedule has been made an indictable offense under several federal enactments hereinafter discussed.

Under the Interstate Commerce Act, 49 U.S.C.A. § 6, it was provided that, when a carrier shall have established and published its rates or fares it shall be unlawful for it to charge, or receive from, any person for the transportation of passengers or property, or for any services in connection therewith, a greater or a less compensation than that which is specified in such published schedule of rates or fares as may at the time be in force. This provision applies solely to transportation privileges and facilities, and not to such privileges as may be extended to a consignee after the shipment has reach-

88. Tex.—Houston, etc., R. Co. v Campbell, 45 S.W. 2, 91 Tex. 551, 43 L.R.A. 225, reversing, Civ.App., 40 S.W. 431.

89. Tex.—Gulf, etc., R Co v. Werner Stave Co, 131 S.W. 658, 62 Tex Civ.App. 284.

90. Minn.—Riskin v. Great Northern R. Co, 147 N.W. 960, 126 Minn. 138, Ann.Cas.1915D 823 and note.

91. U.S.—New York Cent. & H. R R Co. v. U. S, N.Y, 166 F. 267, 92 C.C.A. 331, reversing, D.C., 153 F 630.

92. U.S.—U. S. v. New York Cent. & H R R. Co., D.C.N.Y., 153 F. 630, reversed on other grounds 166 F. 267, 92 C.C.A. 331

93. U.S.—U. S. v. Illinois Terminal R Co., D.C.Ill, 168 F. 546.
10 C.J. p 593 note 42.

ed its destination.[94] This statute, is violated, however, where a railroad company, while ostensibly charging the rate fixed by the schedule, gives the shipper a rebate.[95] Subordinate agents who act in the illegal transaction are not criminally liable, in the absence of notice that the carrier is violating the statute.[96] A joint stock association organized under state laws to do an express business is subject to criminal prosecution under this section.[97] The statute by its terms applies to any common carrier who is a party to any joint tariff, and prohibits departures from the joint rates specified in the filed schedules. A receiver, however, not being bound to continue contracts made before his appointment, is not criminally liable for the violation of a joint tariff previously established by the railroad company of which he is receiver and another company, and which he has not ratified, adopted, or recognized in any way.[98]

The Elkins and Hepburn amendments of the Interstate Commerce Act, 49 U.S.C.A. § 41, both contain provisions that the willful failure on the part of any carrier subject to the Interstate Commerce Act strictly to observe the tariffs or rates filed and published as required by that act shall constitute a misdemeanor, and that, whenever any carrier files with the interstate commerce commission, or publishes a particular rate under the provisions of the Interstate Commerce Act or acts amendatory thereto, or participates in any rates so filed and published, that rate, as against such a carrier, its officers or agents, in any prosecution begun under the act, shall be conclusively deemed to be the legal rate, and any departure or offer to depart therefrom shall be deemed to be an offense. The purpose of these provisions is to require that all shippers be treated alike, and that the only rate charged for the same services, under the same conditions, shall be the one established, published, and posted as required by law.[99] The purpose is also to prohibit departure from the tariff rates irrespective of the actual discriminative effect of the departure.[1] While carrying at lower or different rates than the tariff rate is not in terms declared an offense or penalized, it is punishable as a failure to observe the statute strictly.[2] To make rates valid, so that a departure from them by the carrier will constitute an offense, it is necessary that they should be published.[3] The departure from the established and published rate must be willful;[4] but it has been held that the charging of a rate less than the filed rate constitutes a violation of the statute as matter of law,[5] and, where the tariff schedule is not open to two constructions, it cannot be said that the charging of less than the rate fixed was not knowingly done due to a misconstruction of the schedule.[6] Also, the sum of the knowledge of the railroad agents, within the scope of their respective functions, is sufficient to satisfy the statutory condition that an offense exists only when the forbidden act is done knowingly.[7] The willful demand of more than the tariff rates is of equal criminality with an actual collection thereof.[8] A willful failure strictly to observe the rates filed exists where the carrier accepts the shipper's note for a part of its freight charges,[9] or gives a particular shipper a discriminative credit,[10] or where the carrier fails to charge storage or demurrage when the goods have not been timely accepted,[11] or where the carrier attempts to charge storage before it has so placed the cars that the freight can be delivered.[12] It is no defense to a prosecution under these statutes that concessions from the published rate were

94. U.S.—U. S. v. Erie R. Co., D.C. N.Y., 209 F. 283

95. U.S.—U. S. v. Michigan Cent. R. Co., D.C.Ill., 43 F. 26.

96. U.S.—U. S. v. Michigan Cent R. Co., supra.
10 C.J. p 594 note 47.

97. U.S.—U. S. v. Adams Express Co., Ohio, 33 S.Ct. 878, 229 U.S. 381, 57 L.Ed. 1237.

98. U.S.—U. S. v. De Coursey, D.C. N.Y., 82 F. 302.

99. U.S.—New York Cent. & H. R R. Co. v. U. S., N.Y., 29 S.Ct. 304, 212 U.S. 481, 53 L.Ed. 613.
10 C.J. p 594 note 59.

1. U.S.—Vandalia R Co. v. U. S., Ill., 226 F. 713, 141 C.C.A. 469.

2. U.S.—Hocking Valley R. Co v. U. S., Ohio, 210 F. 735, 127 C.C.A. 285.

3. U.S.—U. S. v. Indiana Standard Oil Co., D.C.Ill., 170 F. 988

4. U.S.—Atchison, T. & S. F. R. Co. v. U. S., Cal., 170 F. 250, 95 C.C.A. 446

5. U.S.—U. S. v. Merchants' & Miners' Transp. Co., C.C.Ga., 187 F. 363.

6. U.S.—Michigan Cent. R. Co v. U. S., Mich., 246 F. 353, 158 C.C.A. 417, certiorari denied 38 S.Ct. 333, 246 U.S. 663, 62 L.Ed. 928.

7. U.S.—Michigan Cent. R. Co. v. U. S., supra.

8. U.S.—U. S. v. Texas & P. R. Co., C.C.La., 185 F. 820.

9. U.S.—U. S. v. Sunday Creek Co., D.C.Ohio, 194 F. 252.
10 C.J. p 594 note 66.

10. U.S.—Hocking Valley R. Co. v. U. S., Ohio, 210 F. 735, 127 C.C.A. 285
10 C.J. p 594 note 67.

11. U.S.—Michigan Cent R. Co v U. S., Mich., 246 F. 353, 158 C.C.A. 417, certiorari denied 38 S.Ct. 333, 246 U.S. 663, 62 L.Ed. 928.

Rate discriminatory

The fact that demurrage charges fixed by the rate schedule in a certain district were discriminatory as between a shipper located in such a district and competitors placed in other districts and governed by different rates constitutes no defense for granting a concession or a cancellation of such charges—Lehigh Valley R. Co. v. U. S., Pa., 188 F. 879, 110 C.C.A. 513, affirming 184 F. 543—10 C.J. p 595 note 71.

12. U.S.—U. S. v. Texas & P. R. Co., C.C.La., 185 F. 820.
10 C.J. p 595 note 68.

granted in compromise of claims for loss of property in transit;[13] nor can defendant be heard to say that it did not know of the filed rate established by it in accordance with the statute as a justification for its departure therefrom.[14]

The commodities clause of the Hepburn Act makes it unlawful for any railroad company to transport in interstate commerce any article it may own, or in which it may have any interest except such as may be necessary for its use in the conduct of its business as a common carrier. The purpose of such statute was to cure or prevent the evils that might result if, in hauling goods in and out, the company occupied the dual and inconsistent position of public carrier and private shipper,[15] and its constitutionality has been upheld.[16] The statute is general in its application, and not limited to cases of actual prejudice to shippers,[17] and it includes inbound as well as outbound shipments.[18] An intra-state shipment by an intra-state carrier of a commodity owned by it is not within the prohibition of this clause.[19]

§ 517. Unjust Discrimination

a. Under state statutes
b. Under federal statutes

a. Under State Statutes

Under some state statutes, carriers guilty of unjust discrimination are liable to indictment.

Constitutional and statutory provisions in a number of states, varying in terms, provide that common carriers guilty of unjust discrimination shall be liable to indictment.

In Georgia. Under a statute vesting in a public service commission the exclusive power to make rates and to determine what are just and reasonable rates, discrimination in freight rates in favor of any one is made a misdemeanor.[20]

In Kentucky there are several constitutional and statutory provisions relating to the subject of unjust discrimination by carriers.[21] Under a constitutional provision which declares that, for a violation of its provisions against unjust discrimination, the carrier shall "upon conviction by a court of competent jurisdiction" be fined a designated amount, it was held that the legislature has no power to enact a statute providing that prosecutions for violation of the constitutional provision can be instituted only on recommendation or request of the railroad commission.[22] On the other hand, it has been held that such power does exist under another constitutional provision forbidding carriers to charge any greater compensation for a short than for a long haul over the same line in the same direction where such provision further provides that, on application to the railroad commission, the common carrier may be authorized in special cases to charge less for long than for short distances, and authorizes the commissioners to prescribe the extent to which the common carrier may be relieved from its operation, and the question as to what penalties shall be imposed, or when, is left to the discretion of the legislature.[23] Whether or not the legislature has exercised its power in this regard has been the subject of some difference of opinion. In the earliest decision on the subject, it was held that a statute providing that on complaint that a carrier has discriminated between short and long haul shippers, it is the duty of the railroad commission to investigate the charge and to exonerate the carrier or furnish the grand jury with a statement of facts in order that the carrier may be indicted, does not prevent the indictment of a railroad company for charging more for a short than for a long haul in violation of the constitutional provision, without recommendation of the railroad commission.[24] However, in a case decided shortly afterward, the opposite conclusion was reached without any mention being made of the previous

13. U.S.—U. S. v. Atchison, T & S. F. R. Co., D.C.Cal., 163 F. 111, reversed on other grounds 170 F. 250, 95 C.C.A. 446.

14. U.S.—U. S. v. Merchants' & Miners' Transp Co., C.C.Ga., 187 F. 363—Atchison, T & S. F. R Co. v. U. S., Cal., 170 F. 250, 95 C.C.A. 446.

15. U.S.—Delaware, L. & W R. Co. v. U. S, N.Y., 34 S.Ct. 65, 231 U. S 363, 58 L.Ed. 269
10 C.J. p 595 note 76 [b].

16. U.S.—Delaware, L & W R. Co. v. U. S, supra—U. S. v Delaware & Hudson Co., C.C.Pa., 29 S.Ct. 527, 213 U.S. 366, 53 L.Ed. 836.

17. U.S.—Delaware, L & W. R. Co v. U S, N.Y., 34 S.Ct. 65, 231 U S 363, 58 L.Ed. 269.
10 C.J. p 595 notes 76 [b], 78.

18. U.S.—Delaware, L. & W R. Co v. U S, N.Y., 34 S.Ct. 65, 231 U. S 363, 369, 58 L.Ed. 269.
10 C.J. p 595 note 79

19. Ind.—Sisters of Providence v. Lower Vein Coal Co., 154 N.E. 659, 198 Ind. 645.

20. Ga.—Wight v. Pelham & H R. Co., 89 S.E. 176, 18 Ga.App 195.

21. **Extortion**
Extortion as used in St. § 816, relating to extortion by a carrier consisting of the charging of an unreasonable rate is extortion also under § 820 a, providing that, if a carrier is or has been guilty of extortion, on conviction it shall be fined, etc.—Illinois Cent. R. Co v. Paducah Brewery Co., 163 S.W. 239, 157 Ky. 357.

22. Ky.—Commonwealth v. Louisville, etc., R. Co., 65 S.W. 158, 112 Ky. 75, 84, 23 Ky.L. 1382.
10 C.J. p 595 note 82.

23. Ky.—Illinois Cent. R. Co. v. Commonwealth, 64 S.W. 975, 23 Ky.L. 1159.

24. Ky.—Illinois Cent. R. Co. v. Commonwealth, 63 S.W. 448, 23 Ky.L. 544.

decision,[25] and this is the result reached by a still later decision in which the court was nearly equally divided.[26] It has also been held that this statute is not inconsistent with the constitutional provision creating the offense, although it omits the proviso of the constitution authorizing the railroad commission, on application, to relieve carriers, in special cases, from its operation, since the proviso is self-executing, and this provision in the statute unnecessary.[27] A joint traffic arrangement by which connecting carriers haul from a point on one road to a point on another for less than the fixed carrying charges from the same point on one road to its terminus between such points does not violate the statute.[28] In construing the long and short haul clause of the constitution, it has been held that the fact that competition exists at one point which does not exist at the other does not of itself constitute such a dissimilarity of conditions as will justify the carrier in charging more for the short than for the long haul.[29] The phrase used in the constitution "substantially similar circumstances and conditions" relates to the actual cost of transportation.[30] Under a constitutional provision that all railroad companies shall transport, deliver, and haul "freight of the same class for all persons, associations or corporations from and to the same points and upon the same conditions in the same manner and for the same charges and for the same method of payment," there can be no offense committed, unless different charges be made for transporting freight of the same class from and to the same points and "upon the same conditions."[31] A railroad company commits no offense by charging a lower rate of freight for coal transported to a manufacturing establishment than to a coal dealer not in competition with the manufacturer.[32] A constitutional provision that the attorney general shall institute proceedings to enforce the provisions of another section of the constitution prohibiting common carriers from making a discrimination in rates where the conditions are the same does not exempt the carrier from indictment for violation of those provisions.[33]

In Oregon, a statute making it an offense for a railroad company to collect from one person for carrying more than it demands from another for a like contemporaneous service, and which omits the words, "under substantially similar circumstances and conditions," as used in the Interstate Commerce Law, after which it was patterned, has been held to apply to the different lines of an electric railroad company, although the conditions, such as cost, construction, etc., are not the same on the several lines.[34]

In Tennessee, under the statute making the granting of an unjust discrimination an offense, although a contract for a fixed period be entered into between a carrier and shipper for a freight rate, which is the legal rate at the time of the contract, yet, if thereafter the carrier establishes a higher rate in accordance with the provisions of the law, the contract is ineffectual, and the carrier will be indictable if it adheres to the contract.[35]

b. Under Federal Statutes

Under federal enactments relating to interstate commerce, numerous provisions against unjust discrimination on the part of the carrier are enumerated and declared to be indictable offenses.

The statutes of the United States relating to interstate commerce contain numerous provisions against unjust discrimination and declare that the acts of discrimination therein enumerated shall constitute indictable offenses. Every device that seeks to cover up a discrimination is denounced by the statute.[36] Where the offenses denounced can be committed only by the carrier, in so far as the statutes expressly include other persons, it is only as aiders, abettors, accomplices, or accessories of the carrier, while acting within the scope of their employment.[37]

25. Ky.—Illinois Cent. R Co. v. Commonwealth, 64 S.W. 975, 23 Ky.L. 1159.

26. Ky—Louisville, etc, R. Co. v. Commonwealth, 71 S W. 910, 114 Ky. 787, 24 Ky.L 1593.
10 C.J. p 596 note 87.

27. Ky—Louisville, etc., R. Co. v. Commonwealth, 46 S.W 707, 47 S W. 210, 593, 104 Ky 226, 20 Ky.L. 1380, 43 L.R.A. 541.

28. Ky—Commonwealth v Chesapeake, etc, R Co, 72 S.W 361, 24 Ky.L 1883.

29. Ky—Louisville, etc, R. Co. v. Commonwealth, 51 S W. 164, 1012, 106 Ky 633, 90 Am S R. 236, affirmed 22 S Ct. 95, 183 U.S. 503, 46 L Ed. 298.
10 C J. p 596 note 90.

30. Ky—Louisville, etc, R. Co v Commonwealth, 46 S.W 707, 47 S W. 210, 593, 104 Ky. 226, 20 Ky L. 1380, 43 L R A. 541.

31. Ky—Louisville, etc, R. Co. v Commonwealth, 48 S W. 416, 105 Ky 179, 183, 20 Ky.L. 1099, 43 L R A. 541.

32. Ky—Commonwealth v Louisville, etc, R. Co, 68 S W. 1103, 24 Ky L. 509—Louisville, etc., R. Co v. Commonwealth, 57 S W 508, 108 Ky. 628, 22 Ky L 328
10 C J p 596 note 93

33. Ky—Louisville, etc., R. Co. v. Commonwealth, supra.
10 C J. p 596 note 94

34. Or.—Portland R., etc, Co. v. State R. Commn, 105 P. 709, 109 P 273, 56 Or 468, 481.

35. Tenn—New River Lumber Co. v. Tennessee Ry Co., 238 S.W. 867, 145 Tenn 266

36. U.S—Vandalia R Co. v. U. S., Ill, 226 F. 713, 141 C C A 469.

37. U S—U. S v. Peterson, D C. Mont., 1 F.2d 1018.

Under the Interstate Commerce Act, 49 U.S.C.A. § 2, declaring that a common carrier shall be guilty of unjust discrimination which is unlawful, if by any special rate, rebate, or other device the charges it receives from any person are a greater or less compensation for any services rendered or to be rendered in the transportation of passengers or property than the charges it received from any other person for doing for him a like contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, the offense is not confined to discrimination by means of some device, as of special rate or drawback, but is committed by directly giving different rates to different persons.[38]

Under the Interstate Commerce Act, 49 U.S.C.A. § 3, it is unlawful for a carrier to make or to give any undue or unreasonable preference or advantage to any particular person, company, or locality in any respect whatever, or to subject any particular person, company, or locality to any undue or unreasonable prejudice or disadvantage.[39] Where two connecting lines agree on a joint through tariff, such joint tariff, or the share of it which either takes, is not the standard by which to determine whether either line has given an undue preference.[40]

The provision of the Interstate Commerce Act, 49 U.S.C.A. § 4, known as the long and short haul clause does not apply to a case where the short haul rate is a combination of the local rates of two connecting lines, and the lower long haul rate is a joint rate made by the two lines acting together.[41] An agent of a railroad company who merely collects freights or makes out bills of lading and has nothing to do with fixing the rate is not indictable for violation of this section of the statute,[42] except where guilty knowledge is brought home to him.[43] However, agents or employees of whatever rank who knowingly aid and abet in the execution of an unlawful contract are criminally liable.[44] A carrier asserting a right to charge discriminatory long and short haul rates without the consent of the interstate commerce commission is guilty of a willful violation of statute, since there is sufficient guilty knowledge or intent to justify a conviction.[45]

§ 518. Giving Rebates

One who knowingly offers or gives any rebate from the published and filed rates commits an offense which is indictable under the federal statutes.

The present statute relating to rebates, known as the Elkins Act as amended by the Hepburn Act, 49 U.S.C.A. § 41, provides that every person or corporation, whether carrier or shipper, who shall knowingly offer, or give, or solicit, or receive any rebates from the published and filed rates, shall be deemed guilty of a misdemeanor and, on conviction, shall be punishable by fine.[46] A shipment between two points in a state which passes over lines of road running through other states is an interstate shipment within the meaning of this statute.[47]

Elements of offense. An essential element of the offense under this statute is the offering or giving of rebates from the published and filed rates for transportation of property by a carrier engaged in interstate commerce,[48] and the offense of rebating consists in purposely doing the thing prohibited by statute;[49] but it is sufficient to constitute the offense if the act was done knowingly, although without any evil motive.[50] A carrier "knowingly" grants an unlawful concession contrary to the Hepburn amendment if it or its agents have willfully or intentionally remained in ignorance of the facts

38. U.S.—U. S. v. Tozer, D.C.Mo., 37 F. 635, 2 L.R.A. 444.
10 C.J. p 597 note 9.

Corpus Juris has been cited with approval in Illinois Cent. R. Co. v. Fontaine, 289 S.W. 263, 217 Ky. 211.

39. U.S.—Tozer v. U. S., C.C.Mo., 52 F. 917, distinguished in Waters Pierce Oil Co. v. Texas, 29 S.Ct. 220, 212 U.S. 86, 53 L.Ed. 417—U. S. v. Vacuum Oil Co., D.C.N.Y., 153 F. 598.
10 C.J. p 597 note 13.

40. U.S.—Tozer v. U. S., C.C.Mo., 52 F. 917, followed in Parsons v. Chicago, etc., R. Co., 63 F. 903, 11 C.C.A. 489, affirmed 17 S.Ct. 887, 167 U.S. 447, 42 L.Ed. 231.

41. U.S.—U. S. v. Mellen, D.C.Kan., 53 F. 229, following Chicago, etc., R. Co. v. Osborne, 52 F. 912, 3 C.C.A. 347.
10 C.J. p 598 note 19.

42. U.S.—U. S. v. Mellen, D.C.Kan., 53 F. 229.

43. U.S.—U. S. v. Michigan Cent. R. Co., D.C.Ill., 43 F. 26.

44. U.S.—U. S. v. Michigan Cent. R. Co., supra.

45. U.S.—U. S. v. Pennsylvania R. Co., D.C.Pa., 21 F.2d 579.

46. **Prior offenses**
The right to prosecute for any prior offense, under the Elkins Act, committed before the going into effect of the Hepburn Act was not lost by reason of its adoption—Great Northern R. Co. v. U. S., Minn., 28 S.Ct. 313, 208 U.S. 452, 52 L.Ed. 567—U. S. v. Chicago, St. P., M. & O. R. Co., D.C.Minn., 151 F. 84, affirmed 162 Fed. 835, 90 C.C.A. 211, certiorari denied 29 S.Ct. 689, 212 U.S. 579, 53 L.Ed. 659—10 C.J. p 598 note 27.

47. U.S.—U. S. v. Delaware, L. & W. R. Co., C.C.N.Y., 152 F. 269.
10 C.J. p 598 note 28.

48. U.S.—Pennsylvania Co. v. U. S., C.C.A.Ill., 257 F. 261, 168 C.C.A. 345
10 C.J. p 598 note 30.

49. U.S.—New York Cent., etc., R. Co. v. U. S., N.Y., 29 S.Ct. 304, 212 U.S. 481, 53 L.Ed. 613—Atchison, T. & S. F. R. Co. v. U. S., Cal., 170 F. 250, 95 C.C.A. 446.
10 C.J. p 598 note 31.

50. U.S.—Chicago, St. P., M. & O. R. Co. v. U. S., Minn., 162 F. 835, 90 C.C.A. 211, affirming, D.C., 151 F. 84, and certiorari denied 29 S.Ct. 689, 212 U.S. 579, 53 L.Ed. 659.

rendering the rate unlawful.[51] Any pecuniary inducement held out to a shipper to procure his business over a particular railroad is or may be a rebate or concession within the prohibition of this section.[52] Actual discrimination between shippers is not a necessary element,[53] nor is it necessary that fraud be alleged and proved.[54] The mere offer of a rebate, knowingly made by a carrier, is an offense, acceptance of such offer by the shipper being unnecessary.[55] In a prosecution for rebating by applying transit rates to certain outbound shipments, the fact that the agents who executed such outbound transactions did not know that the goods were not entitled to the transit rate does not show that defendant carrier did not knowingly make the rebates.[56] It is necessary only to prove that the favored shipper has had his property transported at a less rate than that published and filed.[57] Payment by the carrier of rebates stipulated in the contract of shipment or a refund of part of the legal rate completes the offense of giving rebates.[58] Every device that seeks to cover up a rebate is prohibited, provided the property is thereby transported at less than the tariff rate.[59] The fact that the full tariff rate is collected at the time of transportation does not negative the possibility of a rebate in respect thereto, as the rebate may be in a lump cash sum in advance, or by later or earlier indirect payments.[60] The payment of a rebate after the statute went into effect, but on shipments of property transported prior to its enactment, is comprehended by its provisions.[61]

Who liable. The Hepburn Act prohibiting "any person, persons, or corporation" from giving any rebate, concession, or discrimination with respect to the transportation of any property in interstate or foreign commerce, is not limited in its application to shippers and carriers, but includes any person or corporation whose intended acts result in a transportation of property at less than the tariff rates lawfully published.[62] Corporations engaged in interstate commerce as well as their agents are subject to the provisions of the act,[63] and a carrier can be prosecuted for the offense of rebating where it is a party to a published joint rate, although it has not filed or published the same.[64] It is not essential to the commission of the offense of giving a concession from a through rate over connecting lines of railroads that the rate should be a joint one as established by all the carriers and published and filed with the interstate commerce commission.[65]

Defenses. It is no defense to a prosecution for granting rebates that defendant treated all shippers of the same class of property for the same destination alike,[66] or that defendant acted in the honest belief that the rebate was lawful,[67] or that competing roads granted like concessions, and that defendant was compelled to do the same in order to receive its fair share of the business.[68] Accordingly, the fact that the rebate is paid to another than the shipper is immaterial, although a payment

51. U.S.—U. S. v. Erie R. Co., D.C. N.J., 222 F. 444.

52. U.S.—Northern Central Ry. Co v. U. S., N.Y., 241 F 25, 154 C.C. A. 25, certiorari denied 38 S.Ct. 9, 245 U.S. 645, 62 L.Ed. 529.

53. U.S.—Pennsylvania Co. v. U. S., Ill., 257 F. 261, 168 C.C.A. 345.

54. U.S.—U. S. v. Satuloff Bros., C. C.A.N.Y., 79 F.2d 846.

55. U.S.—U. S. v. Lehigh Valley Ry. Co., D.C.N.Y., 254 F. 332.

56. U.S.—Grand Rapids & I. R. Co v. U. S., Mich., 212 F. 577, 129 C. C.A. 113.

57. U.S.—Chicago & A. R. Co. v U. S., Ill., 156 F. 558, 84 C.C.A. 324, 26 L.R.A.,N.S., 551, affirming, D. C., 148 F. 646, and affirmed 29 S. Ct. 689, 212 U.S. 563, 53 L.Ed. 653.

58. U.S.—U. S. v. New York Cent., etc., R. Co., N.Y., 29 S.Ct. 304, 309, 212 U.S. 481, 500, 53 L.Ed. 613, 624, affirming 146 F. 298.
Ga.—Central of Georgia R. Co. v. Curtis, 82 S.E. 318, 15 Ga.App. 716.
10 C.J. p 598 note 36.

59. U.S.—Vandalia R. Co. v. U. S., Ill., 226 F. 713, 141 C.C.A. 469.
10 C.J. p 599 note 37.

Allowances to lessor

Allowances made by a lessee of a railroad from a coal mining company on shipments by the lessor have been held illegal as rebates, in violation of the Hepburn Act.—Central R. Co. of New Jersey v. U. S., N.J., 229 F. 501, 143 C.C.A. 569, certiorari denied 36 S.Ct. 446, 241 U.S. 658, 60 L.Ed. 1225.

60. U.S.—Vandalia R. Co. v. U. S., Ill., 226 F. 713, 141 C.C.A. 469.

61. U.S.—New York Cent., etc., R. Co. v. U. S., N.Y., 29 S.Ct. 309, 212 U.S. 500, 53 L.Ed. 624, affirming 146 F. 298.
10 C.J. p 599 note 40.

62. U.S.—Spencer Kellogg & Sons v. U. S., C.C.A.N.Y., 20 F.2d 459, affirming D.C., U. S. v. Spencer Kellogg & Sons, 12 F.2d 612, certiorari denied Spencer Kellogg & Sons v. U. S., 48 S.Ct. 122, 275 U. S. 566, 72 L.Ed. 429.

63. U.S.—Spencer Kellogg & Sons v. U. S., supra.
10 C.J. p 599 note 41.

64. U.S.—U. S. v. New York Cent., etc., R. Co., 29 S.Ct. 313, 212 U.S. 509, 53 L.Ed. 629, reversing 157 F. 393.
10 C.J. p 599 note 42.

65. U.S.—Chicago, B. & Q. R. Co. v. U. S., Mo., 157 F. 830, 833, 85 C.C.A. 194, affirmed 28 S.Ct. 439, 209 U.S. 90, 52 L.Ed. 698.
10 C.J. p 599 note 43.

66. U.S.—Chicago, St. P., M. & O. R. Co. v. U. S., 162 F. 835, 90 C.C. A. 211, certiorari denied 29 S.Ct. 689, 212 U.S. 579, 53 L.Ed. 659.
10 C.J. p 599 note 44.

67. U.S.—Central R. Co., of New Jersey v. U. S., N.J., 229 F. 501, 143 C.C.A. 569, certiorari denied 36 S.Ct. 446, 241 U.S. 658, 60 L. Ed. 1225.
10 C.J. p 599 note 45.

68. U.S.—U. S. v. Chicago, St. P., M. & O. R. Co., D.C.Minn., 151 F. 84, affirmed 162 F. 835, 90 C.C.A. 211, certiorari denied 29 S.Ct. 689, 212 U.S. 579, 53 L.Ed. 659.

which is but a commission for obtaining business for the carrier is not within the statute.[69]

Number of offenses. Each payment of a rebate constitutes only one offense, although it may cover more than one shipment.[70]

§ 519. Pooling

Agreements between carriers for the pooling of freights of competing carriers or to divide the proceeds of the earnings of such carriers are violations of the Interstate Commerce Act, for which the participating carriers stand subject to indictment.

Where a carrier is a corporation, not only the carrier itself, but the officers individually, are subject to indictment for violation of the Interstate Commerce Act, 49 U.S.C.A. § 5, which provides that it shall be unlawful for any common carrier, subject to a provision of the act, to enter into a contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof.[71]

§ 520. Delay in Transportation

Penalties and statutory damages for delay in transportation see supra §§ 454–460. Examine Pocket Parts for later cases.

§ 521. Other Offenses

Other offenses, which, if committed by a carrier or its agents, would serve as grounds for indictment, have been established by various state and federal statutes.

There are other acts committed by carriers which by special statute have been specifically denounced as criminal, such as embezzlement,[72] transportation of game in violation of law, see the C.J.S. title Game § 13, also 27 C.J. p 952 notes 35–50, and violation of the federal twenty-eight-hour law.[73]

Falsification or destruction of records. Under the provisions of the Interstate Commerce Act, 49 U.S.C.A. § 20 (7), any person who willfully falsifies or destroys the records or memoranda of an interstate carrier shall be deemed guilty of a misdemeanor. The general object of such statute is to require that carriers keep reliable records of the receipts and expenditures of and for each shipment. This regulation is intended as an ultimate protection, not to the carriers, but to the shippers, to secure a proper accounting of the expenditures that might be charged to each shipper on the basis of the tariff published in accordance with the law.[74] The provisions of the statute are applicable to express companies engaged in interstate commerce, and those who are its employees.[75] Memoranda kept by a car clerk of a railroad company, devised by him as a part of the system of his office, are records of the company within such statute.[76] The failure of a clerk of an interstate carrier to forward to another employee, as was his duty, certain cards covering c. o. d. shipments, in order that they might become part of a record, is not violative of this statute, since there is no showing that the cards were destroyed, altered, or mutilated.[77] An independent contractor, who falsifies his reports to a carrier respecting the goods furnished to such carrier, is not guilty of a violation under such statute.[78]

Violation of quarantine laws. A receiver operating a railroad is subject to the penal provisions of a statute prohibiting any common carrier from transporting live stock by rail from a quarantined district into another state.[79]

§ 522. Prosecution and Punishment

a. In general
b. Indictment or information
c. Evidence
d. Trial and punishment

a. In General

General rules of criminal procedure govern the prosecution of offenses by carriers, including jurisdiction and venue.

The offense of failing to file a schedule of rates with the interstate commerce commission, in compliance with statute, is committed in Washington, D. C., where the commission has its office, and must be prosecuted there.[80] However, a prosecution for

69. U.S.—U. S. v. Delaware, L. & W., R. Co., C.C.N.Y., 152 F. 269.

70. U.S.—U. S. v. Bunch, D.C.Ark., 165 F. 736—U. S. v. Stearns Salt & Lumber Co., D.C.Mich., 165 F. 735.
10 C.J. p 599 note 48.

71. U.S.—In re Pooling Freights, D.C.Tenn., 115 F. 588.

72. N.Y.—Larkin v. People, 61 Barb. 226.
10 C.J. p 601 note 69.

73. U.S.—Northern Pac. Terminal Co. v. U. S., Or., 184 F. 603, 106 C.C.A. 583.

74. U.S.—U. S. v. Fruit Growers' Express Co., Pa., 49 S.Ct. 374, 279 U.S. 363, 73 L.Ed. 739.

75. U.S.—U. S. v. Tippitt, D.C.Tex., 298 F. 495.

76. U.S.—Kennedy v. U. S., C.C.A. S.C., 275 F. 182.

77. U.S.—U. S. v. Trippitt, D.C.Tex., 298 F. 495.

78. U.S.—U. S. v. Fruit Growers' Express Co., Pa., 49 S.Ct. 374, 279 U.S. 363, 73 L.Ed. 739.

79. U.S.—U. S. v. Nixon Mo., 35 S. Ct. 49, 235 U.S. 231, 59 L.Ed. 207.

80. U.S.—New York Cent. & H. R. R. Co. v. U. S., N.Y., 166 F. 267, 92 C.C.A. 331, reversing, D.C., 153 F. 630.

transportation of interstate commerce by a carrier which has not filed its rate for such service in violation of the statute may be brought in any district through which the goods pass while in transit.[81] Also, under a statute regulating maximum freight rates and providing that the carrier shall, on conviction of charging higher rates than those fixed, be fined, it was held that the penalties could be enforced only in a criminal trial, and the supreme court has no original jurisdiction of a civil action to recover such penalties.[82]

b. Indictment or Information

An indictment or information against a carrier or its agent must charge accused's commission of the offense and must directly and positively allege every fact necessary to constitute the crime.

Indictments for offenses by carriers or their agents are governed by the usual rules of indictments and informations.[83] It must be positive with respect to the charge that the person accused committed the crime which renders him amenable to the charge,[84] and must directly and positively allege every fact necessary to constitute the crime.[85]

Charging rates different from those fixed. An indictment under the Interstate Commerce Act, 49 U.S.C.A. § 6, must show that a joint tariff has been established;[86] but a specific charge that all the connecting carriers concurred in the joint rate, or that it was filed with the interstate commerce commission by their joint action, is not essential to the validity of the indictment.[87] On the other hand, while the indictment must allege facts sufficient to show a commission of the offense charged,[88] if such facts appear in the indictment or information it is sufficient in that respect; accordingly, the indictment need not allege the day or days when the shipments were made,[89] nor allege that defendants, when the shipments were made, intended to charge less than the schedule rate.[90] An allegation that an established rate was in force on the day on which the unlawful charge was alleged to have been made obviates the necessity of alleging, in express terms, that no reduction in the established rates had taken place.[91] An indictment under the Elkins Act against a railroad company for failure to observe its published tariffs by extending credit to a shipper under joint rates for part of the freight is not insufficient because it does not preclude the possibility that it received in cash its own share of such freights.[92]

Unjust discrimination. An indictment against a carrier for unjust discrimination must charge the commission of the offense with precision and fullness, and clearly and fully set out all the elements of, or facts necessary to, the crime charged.[93]

81. U.S.—U. S. v. Illinois Terminal Co., D.C.Ill., 168 F. 546—New York Cent. & H. R. R. Co. v. U. S., N.Y., 166 F. 267, 92 C.C.A. 331.

82. Neb.—State v. Union Pac. R. Co., 93 N.W. 222, 67 Neb. 141—State v. Missouri Pac. R. Co., 90 N.W. 877, 64 Neb. 679.

83. U.S.—Atchison, T. & S. F. Ry. Co. v. U. S., Cal., 170 F. 250, 95 C.C.A. 446.

84. U.S.—U. S. v. New York Cent. & H. R. R. Co., C.C.N.Y., 146 F. 298, affirmed 29 S.Ct. 304, 212 U.S. 481, 53 L.Ed. 613, and affirmed 29 S.Ct. 309, 212 U.S. 500, 53 L.Ed. 624.

85. U.S.—U. S. v. Philadelphia & R. Ry. Co., D.C.Pa., 232 F. 946—U. S. v. New York Cent. & H. R. R. Co., C.C.N.Y., 146 F. 298, affirmed 29 S.Ct. 304, 212 U.S. 481, 53 L.Ed. 613, and affirmed 29 S.Ct. 309, 212 U.S. 500, 53 L.Ed. 324.

Certificate of convenience

Under a statute providing that a trucker for hire must obtain a certificate of convenience from a commission, an information charging operation of a truck without such permit is demurrable on a failure to show that defendant is a common carrier—State v. Smith, 252 P. 1011, 31 Ariz. 297.

86. U.S.—U. S. v. Pennsylvania R. Co., D.C.N.Y., 153 F. 625.
10 C.J. p 594 note 54.

87. U.S.—U. S. v. Pennsylvania R. Co., D.C.N.Y., 153 F. 625.
10 C.J. p 594 note 55.

Indictment held to show interstate shipment under joint tariff

An indictment of a carrier for failure to file its tariff of rates for petroleum, established under a common arrangement for interstate shipment, in violation of the Elkins Act, 49 U.S.C.A. § 41, which alleged the establishment of a rate for carrying petroleum between intra-state terminals under a common arrangement for a continuous interstate shipment, and that all of the shipments under such rate were under shipping orders, transfer slips, and waybills, showing that the commodity was to be transported from the point of shipment to destination by a continuous route without unloading or transshipment, sufficiently charged a common arrangement between the various carriers for a through interstate shipment under a joint tariff—U. S. v. New York Cent. & H. R. R. Co., D.C.N.Y., 153 F. 630, reversed on other grounds 166 F. 267, 92 C.C.A. 331.

88. **Intra-state shipment**

An indictment charging that a carrier participated in an interstate shipment of coal by rail and water, but failed to file with the interstate commerce commission tariffs showing the rates for water transportation, is insufficient where the shipment was intra-state.—U. S. v. Philadelphia & R. Ry. Co., D.C.Pa., 232 F. 946.

89. U.S.—U. S. v. Hanley, D.C.Ill., 71 F. 672.

90. U.S.—U. S. v. Hanley, supra.
10 C.J. p 594 note 50.

91. U.S.—U. S. v. Tozer, D.C.Mo., 37 F. 635, 2 L.R.A. 444.

92. U.S.—U. S. v. Hocking Valley Ry. Co., D.C.Ohio, 194 F. 234, affirmed 210 F. 735, 127 C.C.A. 285.

93. U.S.—U. S. v. Philadelphia & R. Ry. Co., D.C.Pa., 232 F. 946.

In Kentucky

(1) Under the constitutional provision against discrimination, an indictment for discrimination in charges must allege that the services to the different persons were on the same conditions—Com. v. Chesapeake, etc., R. Co., 72 S.W. 361, 24 Ky.L. 1888—10 C.J. p 596 note 95.

(2) The indictment must also allege that the freight in question was of the same class or kind and not of different classes or kinds.—Louisville, etc., R. Co. v. Com., 46 S.W.

An indictment in a federal prosecution under the Interstate Commerce Act, 49 U.S.C.A. § 2, need not allege by what particular device the discrimination alleged was accomplished.[94] If the indictment alleges all the details of time, place, distance, amount, and kind of freight transported for a designated person, and then charges that the service was for a less compensation than was received from another person named, "for doing for him a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions," there is a sufficient description of the services rendered for the person discriminated against.[95] An indictment which states that a carrier gave a rebate to one shipper, without stating any instance in which the carrier refused a like rebate to any other shipper, is defective as not showing discrimination.[96]

An indictment under the Interstate Commerce Act, 49 U.S.C.A. § 3, is sufficient if it shows with requisite certainty that defendant has committed an act giving one shipper or class of shippers an advantage, or subjecting others to a disadvantage, and need not allege that the discrimination was committed "under substantially similar circumstances and conditions" as required under the fourth section relating to long and short hauls.[97] The statute does not subject a railroad company to an indictment for failure or refusal to furnish switch connections to a shipper handling interstate traffic for transportation, although such connections are furnished to other shippers, where the indictment does not charge that those demanded are reasonably practicable and could be put in with safety, and that the shipper would furnish sufficient business to justify the expense of their construction and maintenance, nor that the person or company asking for the same offered to pay such portion of their cost as is usual and reasonable.[98] An indictment which charges generally that defendant practiced an unjust discrimination in respect of the transportation of property in interstate commerce by refusing to furnish to a particular company its proper and rightful share and quota of cars and motive power, and by furnishing to other companies more than their respective shares and quota of cars and motive power, does not allege a violation of that part of the section relating to the giving of an undue or unreasonable preference or advantage to any particular person, company, or locality, or to any particular description of traffic;[99] nor does it sufficiently charge that defendant subjected any particular company or any particular description of traffic to any undue or unreasonable prejudice or disadvantage, where it alleges no facts showing the rightful share or quota of cars and motive power to which the company charged to have been so prejudiced was entitled, or that such company at the time charged was prepared to make shipments and tendered the same and made demand for cars and motive power for their transportation in interstate commerce.[1]

Under the Interstate Commerce Act, 49 U.S.C.A. § 4, an indictment alleging that the share of the joint rate taken by one company is less than its local rate for a short haul is bad.[2]

702, 48 S.W. 416, 105 Ky. 179, 20 Ky. L. 1099, 43 L.R.A. 541.

(3) The points from and to which the goods were shipped must be stated.—Louisville, etc., R. Co. v. Com., 57 S.W. 508, 108 Ky. 628, 22 Ky.L. 328.

(4) It must also allege that the offense was willfully and knowingly committed, as the constitution makes that an essential element of the offense.—Louisville, etc., R. Co. v. Com., 46 S.W. 702, 48 S.W. 416, 105 Ky. 179, 20 Ky.L. 1099, 43 L.R.A. 541.

(5) If the indictment is based on the statute, it is not necessary that it should state the precise amount charged for the entire distance, nor that it should state the names of the persons in whose favor the discrimination was made, it being sufficient to state that the specified amount charged or received for the short distance was greater than that charged or received from persons generally for the long distance.—Louisville, etc., R. Co. v. Com., 46 S.W. 707, 47 S.W. 210, 598, 104 Ky. 226, 230, 20 Ky.L. 1380, 43 L.R.A. 541.

(6) Although it is a condition precedent to an indictment that the commission shall make an investigation followed by an order refusing to exonerate accused from the operation of the provisions of the constitution, an indictment stating the circumstances of the offense, and reciting that "defendant at said time not having been authorized by the railroad commission of this Commonwealth to charge less for a longer than for a shorter distance for transportation of coal" is sufficient.—Louisville, etc., R. Co. v. Com., 46 S.W. 707, 47 S.W. 210, 598, 104 Ky. 226, 230, 20 Ky.L. 1380, 43 L.R.A. 541.

In New Hampshire, under a statute providing that all persons shall have reasonable and equal terms, facilities, and accommodations for the transportation of themselves or their property, an indictment of a railroad company for not affording reasonable transportation facilities need not allege that the acts were unlawful, nor that the merchandise was the property of the person trying to transport it, where it not only uses the statutory description of the offense, but specifies the acts by which it is claimed that the law has been violated.—State v. Concord R. Co., 59 N.H. 85.

94. U.S.—Dye v. U. S., C.C.A.W.Va., 262 F. 6
10 C.J. p. 597 note 10.

95. U.S.—U. S. v. Decoursey, D.C.N.Y., 82 F. 302.

96. U.S.—U. S. v. Hanley, D.C.Ill., 71 F. 672

97. U.S.—U. S. v. Tozer, D.C.Mo., 37 F. 635, 2 L.R.A. 444.

98. U.S.—U. S. v. Baltimore & O. R. Co., D.C.W.Va., 153 F. 997.

99. U.S.—U. S. v. Baltimore & O. R. Co., supra.

1. U.S.—U. S. v. Baltimore & O. R. Co., supra.

2. U.S.—U. S. v. Mellen, D.C.Kan., 53 F. 229.

An indictment charging discrimination by an interstate carrier on the ground that it failed to collect demurrage charges on coal cars as authorized by schedules filed with the interstate commerce commission is insufficient where it does not contain averments of every fact necessary to constitute the crime.[3]

Giving rebates. Inasmuch as the object of the Elkins Act as amended by the Hepburn Act is to make the act of rebating one of the corporation as well as of the agent, and to include both within the provisions and restrictions of the statute, the corporation and its agents may be prosecuted for the same offense in one indictment.[4] An indictment charging a railroad company with the granting of a concession to a shipper must specifically set forth the nature, and, if possible, the amount of the concession, and point out what particular tariff charges the railroad company violated and failed to observe in making the concession.[5] The indictment need not allege the methods or devices resorted to to avoid the law, as the device constitutes no part of the offense;[6] nor is it necessary to allege a prior agreement for a rebate, it being sufficient to allege that defendant received the legal rate and paid the shipper a certain rebate.[7] The indictment need not allege the name of the agent by whom the concession was given.[8] A description of the act charged as having been done unlawfully and willfully is sufficient in charging intent,[9] and a charge that a certain rebate was knowingly made and received is sufficient to charge the offense.[10] An indictment charging violation of this statute due to grants of concessions in transporting goods is sufficient, and is not defective for a failure to charge defendant with felonious intent.[11] Where the offense charged is giving the shipper a through transportation of property between two points at less than the lawful rate, the indictment is not insufficient because it does not aver the through rate, if it states the amount of the concession and that it was given from the lawful rate over a certain part of the route, which rate is also given.[12] An indictment is not rendered insufficient in describing an alleged rebate by failure to use the word "concession."[13] The indictment need not negative exceptions to conditions or circumstances which might render the payment legal, this being a matter of defense.[14] A charge that a carrier's codefendant as its agent granted an unlawful concession does not amount to a charge that the carrier granted the concession through that agent so that it cannot be convicted if the agent is acquitted.[15] Under this statute, an indictment against a carrier charging that, while a certain embargo was in force, the carrier did unlawfully offer, grant, and give permits for transportation to certain shippers, while others similarly situated did not receive such permits, is insufficient to charge the offense of giving a rebate or concession, it not being alleged there was any transportation.[16]

Other offenses. Under the Interstate Commerce Act, 49 U.S.C.A. § 20(7), providing that willful falsification and destruction of records of an interstate carrier is an indictable offense, an information need not allege that the records falsified were records prescribed by the interstate commerce commission.[17] An indictment merely charging an employee with failure to forward cards which were to become part of the carrier's permanent records is insufficient.[18]

An indictment charging that a carrier violated § 10 of the Act, 49 U.S.C.A. § 10, which makes it to be an indictable offense for a carrier to assist a shipper in obtaining transportation at less than regular rates, is not required to set forth the steps provided by law to fix a lawful rate of transportation, such as publishing and posting,[19] and the

3. U.S—U. S. v. Philadelphia & R. Ry. Co., D.C.Pa., 232 F. 953.

4. U.S—New York Cent & H. R R Co. v. U. S, N.Y., 29 S.Ct. 304, 212 U.S. 481, 53 L.Ed. 613—U. S. v. New York Cent. & H. R. R. Co., C.C.N.Y., 146 F. 298, affirmed 29 S. Ct. 304, 212 U.S 481, 53 L.Ed 613 and affirmed 29 S.Ct. 309, 212 U S 500, 53 L Ed. 324.

5. U S—U. S v. Philadelphia & R. Ry Co, D.C Pa, 184 F 543, affirmed 188 F. 879, 110 C.C.A. 513

6. U S.—Dye v. U. S., C C A W.Va, 262 F. 6.
10 C J. p 600 note 52.

7. U S—U S. v. Chicago, St P., M. & O Ry. Co, D C Minn., 151 F. 84, affirmed 162 F. 835, 90 C C A. 211, certiorari denied 29 S.Ct. 689, 212 U S. 579, 53 L.Ed. 659.

8. U.S.—U S v. Erie R. Co., D C. N J., 222 F. 444.
10 C.J. p 600 note 54.

9. U.S—U. S. v Delaware, L & W. R. Co, C.C N.Y., 152 F. 269
10 C.J p 600 note 55.

10. U.S—U. S. v Cleveland, C., C. & St. L. Ry. Co, D.C Ill., 234 F. 178.

11. U.S—U. S. v Lehigh Valley R. Co., D.C.Pa, 43 F.2d 135.

12. U.S—Chicago, B. & Q. Ry. Co v. U. S., Mo, 157 F. 830, 85 C. C A. 194, affirmed 28 S Ct. 439, 209 U.S. 90, 52 L Ed. 698

13. U.S—Atchison, T & S. F. Ry. Co. v. U. S, Cal, 170 F. 250, 95 C C A. 446.

14. U.S.—U. S. v. Chicago, St. P, M & O. Ry Co, D C Minn, 151 F 84, affirmed 162 F. 835, 90 C C. A 211, and certiorari denied 29 S Ct. 689, 212 U S 579, 53 L.Ed. 659

15. U S.—U S. v. Erie R. Co, D. C.N J., 222 F. 444.

16. U.S.—U. S. v. Lehigh Valley Ry. Co, D C N.Y., 254 F 332

17. U S—U. S. v. Tippitt, D C.Tex, 298 F. 495—Kennedy v. U S, C C. A.S C., 275 F. 182

18. U S.—U. S. v. Tippitt, D C.Tex., 298 F. 495

19. U.S.—Elgin, J. & E. Ry Co. v U. S., Ill., 253 F. 907, 166 C C.A.

means or steps taken to adopt the rate need not be set forth.[20] Such indictment is not defective, although alleging that the rates departed from were on a certain type of goods, whereas the shipments charged did not specify that the goods were of that type, although it fails to set forth the manner or means whereby the shipper was assisted, or although it fails to allege that the shipper actually paid the freight.[21]

Pleading and proof. It is not necessary to prove the exact amount charged to have been given as rebates, under the Elkins Act as amended by the Hepburn Act, as the precise means alleged are not of the essence of the offense; it is sufficient if substantial amounts are proved.[22] Where a carrier is charged with rebating in applying transit rates to certain so-called outbound local shipments, evidence of the carrier's acts concerning inbound shipments disclosing a scheme calculated to conceal and carry out the offense charged in the indictment is admissible.[23] Where the indictment contains a number of counts, each charging the granting of a concession consisting in failure to collect the demurrage charge fixed by its published schedule of rates on a single carload shipment, it will be supported as to any one count by proof that at a single settlement between defendant and the shipper after all the shipments charged had been made defendant made a concession to the demurrage charges on all of the cars.[24]

c. Evidence

The evidence in prosecutions for offenses committed by carriers or their agents are governed by the rules of evidence applicable to criminal cases generally.

In a prosecution against an interstate carrier for charging a lower rate for the transportation of goods between two specified termini in different states than that scheduled in the filed joint tariff, the burden is on the prosecutor to show a common arrangement for a continuous carriage between the points mentioned in the filed joint tariff.[25]

On the trial of a prosecution against a railroad company for charging more for a short than for a long haul, in violation of a state regulation, the report of the railroad commission that defendant had been repeatedly guilty of the offense is admissible as evidence.[26] In a prosecution for granting a rebate or concession, evidence tending to show lack of intent to grant a concession to a shipper is admissible.[27]

As in other criminal prosecutions, in a prosecution against a carrier or its agents the state must prove accused's guilt beyond a reasonable doubt.[28]

d. Trial and Punishment

In prosecutions against carriers or their agents, the rules governing trial and punishment in criminal cases generally are applicable.

The rules applicable to trial and punishment in criminal cases generally govern the proceeding in prosecutions against carriers or their agents.

Questions of law and fact. Where failure to observe published tariff rates with regard to demurrage charges is alleged, the questions whether defendant had made a settlement with the shipper as to such demurrage, and whether, if so, the cancellation of the charges was a valid settlement of a disputed claim or for the purpose of making a concession in violation of the statute, are questions of fact for the jury.[29]

Instructions. In a prosecution for giving a rebate, the statement of the court, after setting out the language of the act and discussing the allegations as to a device and the intention of the parties, to the effect that the indictment concluded with a charge that defendant through the device named unlawfully gave a rebate to a named ship-

7, certiorari denied 39 S.Ct. 259, 249 U.S 601, 63 L.Ed. 797.

20. U.S.—Elgin, J. & E. Ry. Co. v. U. S., supra.

21. U.S.—Elgin, J. & E Ry. Co. v. U. S., supra.

22. U.S.—Grand Rapids & I Ry Co. v. U. S, Mich., 212 F. 577, 129 C.C.A. 113

23. U.S.—Grand Rapids & I. Ry. Co. v. U. S, supra.
10 C.J. p 600 note 61.

24. U.S.—U. S. v. Philadelphia & R. Ry. Co, D.C.Pa., 184 F 543, affirmed 188 F. 879, 110 C.C.A. 513.

25. U.S.—U. S. v. Pennsylvania R. Co., D.C.N.Y., 153 F. 626.

26. Ky.—Louisville, etc, R. Co. v. Com., 51 S.W. 167, 21 Ky.L 239

27. U.S.—Atchison, T & S. F. Ry. Co. v. U. S., Cal., 170 F. 250, 95 C.C.A. 446.
10 C.J p 600 note 63.

28. **Evidence held sufficient**

(1) To sustain a conviction for assisting a shipper to obtain transportation at less than regular rates. —Elgin, J. & E. Ry. Co. v. U. S., Ill., 253 F. 907, 166 C.C.A. 7, certiorari denied 39 S.Ct. 259, 249 U.S 601, 63 L.Ed. 797.

(2) To sustain a conviction of a carrier for granting any rebate, concession, or discrimination to a shipper in violation of the Elkins Act as amended.—Dye v. U. S., C.C.A.W.Va., 262 F. 6—Northern Central Ry. Co. v. U. S, N.Y., 241 F. 25, 154 C.C.A. 25, certiorari denied 38 S.Ct. 9, 245 U.S. 645, 62 L.Ed. 529.

(3) To sustain a charge against carrier's employee for willfully failing or neglecting to make full, true, and correct entries in the accounts and records of an interstate carrier of facts appertaining to the carrier's business.—Kennedy v. U. S., C.C.A.S.C., 275 F. 182.

29. U.S.—U. S. v Philadelphia & R. Ry. Co, D.C.Pa., 184 F 543, affirmed 188 F. 879, 110 C.C.A. 513.

per in the transportation of property in interstate commerce, was not objectionable as allowing the jury to find that the mere concoction of the device without transportation at a reduced rate would justify a conviction.[30]

Punishment. A trial court, in determining the penalty to impose for a carrier's failure to charge demurrage, may consider discrimination disclosed for which there could be no conviction.[31]

§ 523. By Persons Dealing with Carriers

Statutes have been enacted by congress and by many of the states making acts therein enumerated committed by shippers or other persons dealing with common carriers, as such, criminal offenses. The particular offenses of this character are discussed in detail in the sections immediately following.

§ 524. Violations of Elkins Act

a. In general
b. Accepting concessions
c. Accepting rebates
d. Receiving discrimination

a. In General

Under the provisions of the Elkins Act as amended, it is unlawful for a shipper or other person to solicit or accept concessions or rebates or receive discrimination of an interstate carrier; and the purpose of such enactment is to eliminate every form of discrimination, favoritism, or inequality in interstate transportation.

The Elkins Act, 49 U.S.C.A. § 41, provides that it shall be unlawful for any person or corporation to solicit, accept, or receive any rebate, concession, or discrimination with respect to the transportation of any property in interstate or foreign commerce, whereby such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by the carrier and declares that any person or corporation violating these provisions will be guilty of a misdemeanor punishable by fine. This statute provides for three separate and distinct offenses on the part of a shipper[32] or other person,[33] namely, accepting concessions, accepting rebates, and receiving discrimination, each of which is considered in the subsequent subsections of this section.

The act is a remedial statute and is intended to eliminate every form of discrimination, favoritism, or inequality.[34] This statute embraces the whole field of interstate commerce; and it does not exempt such foreign commerce as is carried on a through bill of lading, but in terms applies to transportation of property shipped from any point in the United States to a foreign country and carried from such place to a port of transhipment.[35] The commission of the crime is not dependent on whether the carrier consciously and knowingly participated therein.[36] The receiving of a rebate or concession is a continuous crime which may be prosecuted in any court of the United States having jurisdiction of crimes through whose district the transportation is conducted.[37] This act is not suspended by a governmental embargo on carriers, and hence a discrimination obtained by a shipper under the embargo regulations may be prosecuted under the Elkins Act.[38]

b. Accepting Concessions

A prosecution for accepting concessions from an interstate carrier will lie where a shipper or other person obtains transportation of property at less than the published rate. The rules of criminal law generally govern the proceedings in such prosecution.

30. U.S.—Vandalia R. Co. v U. S., Ill., 226 F. 713, 141 C.C.A. 469.

31. U.S.—Michigan Cent. R. Co v. U. S., Mich., 246 F. 353, 158 C.C.A. 417, certiorari denied 38 S.Ct. 333, 246 U.S. 663, 62 L.Ed. 928.

32. U.S.—U. S v. Bunch, D.C.Ark., 165 F. 736.

Shipper within meaning of act

One is a "shipper," within the meaning of Elkins Act, as amended, who, although a consignee, exercises such direct control over shipments of commodities consigned to him by another as enables him, by his own act, to procure for himself discriminations with respect to transportation service—U. S v. Metropolitan Lumber Co., D.C.N.J., 254 F. 335.

33. **Applicable to others**

The operation of the statute is not limited to shippers and carriers. Accordingly an indictment will lie against consignee's bookkeeper, livestock merchant, and weighing bureau's inspector for receiving rebate by placing false weight figures on freight bills—U. S. v. Miller, D.C. Neb., 18 F.Supp. 389.

34. U.S.—U. S v. P. Koenig Coal Co., Mich., 46 S.Ct. 392, 270 U.S. 512, 70 L.Ed. 709, reversing judgment, D.C., 1 F.2d 738—U. S. v. Union Stock Yard & Transit Co., Com.Ct., 33 S.Ct. 83, 226 U.S. 286, 57 L.Ed. 226—Louisville & N. R. R. Co v. Mottley, Ky., 31 S.Ct. 265, 219 U.S. 478, 55 L.Ed. 297—Spencer Kellogg & Sons v. U. S., C.C.A.N.Y., 20 F.2d 459, affirming, D.C., U. S v. Spencer Kellogg & Sons, 12 F.2d 612, certiorari denied Spencer Kellogg & Sons v. U. S., 48 S.Ct. 122, 275 U.S. 566, 72 L.Ed. 429—U. S v. Miller, D.C. Neb., 18 F.Supp. 389—U. S v. Altman, D.C.N.Y., 8 F.Supp. 880.
10 C.J. p 601 note 81.

Discrimination need not affect rates

Elkins Act as amended embraces the granting or receiving of discriminations or concessions, in transportation service, irrespective of whether they in any way affect transportation rates or charges.—U. S. v. Metropolitan Lumber Co., D.C.N.J., 254 F. 335.

35. U.S.—Chicago, B. & Q. Ry. Co. v. U. S., N.Y., 28 S.Ct. 439, 209 U.S. 90, 52 L.Ed. 698—Armour Packing Co. v. U. S., Mo., 28 S.Ct. 428, 209 U.S. 56, 52 L.Ed. 681.

36. U.S.—U. S. v. P. Koenig Coal Co., Mich., 46 S.Ct. 392, 270 U.S. 512, 70 L.Ed. 709, reversing, D.C., 1 F.2d 738—U. S v. Metropolitan Lumber Co., D.C.N.J., 254 F. 335.

37. U.S.—U. S. v. Lehigh Valley R. Co., D.C.Pa., 43 F.2d 135.
10 C.J. p. 602 note 83.

38. U.S.—U. S v. Metropolitan Lumber Co., D.C.N.J., 254 F. 335.

Ordinarily there is little substantial distinction between a concession and a rebate, the concession differing from the rebate only in that in the concession the shipper, instead of paying the full rate and receiving back part, merely settles for the difference. The result is the same; the property is transported for the same net amount less than the lawful rate.[39] The concession, however, need not necessarily involve a rebate, or be in effect a rebate, but may consist of anything whereby the shipper secures an unfair advantage. Accordingly, the offense may consist in a violation of an order of the interstate commerce commission providing for priorities in the distribution and movement of cars.[40] A mere agreement on the part of the shipper to accept the concession is not an offense under the statute.[41] It is not essential that the shipper should have solicited the concession which he obtains from the carrier,[42] nor is collusion between the carrier and shipper necessary.[43]

It is not essential to the offense of receiving a concession from a common carrier in violation of the Elkins Act as amended that the concession given violate a published tariff,[44] nor is it essential that the rates shall have been posted.[45] Where, however, the concession given is in effect a rebate, to make rates valid, so that the acceptance of a concession from them by the shipper shall constitute an offense, it is necessary that they shall have been "published,"[46] and the offense is not complete until the shipper has received a rate different from the established rate.[47] The shipper cannot be convicted of accepting a concession from the lawful published rate without proof of knowledge as to what was the published rate.[48] However, shippers who

39. U.S.—Standard Oil Co. of Indiana v. U. S., Ill., 164 F. 376, 386, 90 C.C.A. 364, certiorari denied 29 S.Ct. 689, 212 U.S. 579, 53 L.Ed. 659.

40. U.S.—U. S. v. Michigan Portland Cement Co., Mich., 46 S.Ct. 395, 270 U.S. 521, 70 L.Ed. 713.

The Elkins Act "makes it unlawful for any one to receive any concession in respect of transportation of any property in interstate commerce by a common carrier whereby any advantage is given or any discrimination is practiced. The facts charged bring what was done exactly within this description. It was priority or preference in securing the transportation of coal in an emergent congestion of the traffic. It was certainly a concession and one of value to one who under the law or the regulations having the force of law could not secure that priority. The words 'advantage,' 'concession,' and 'discrimination' in the statute must be construed to mean unlawful concession, unlawful advantage, unlawful discrimination. It certainly was not the intention of Congress to punish the granting or receiving of a lawful concession, a lawful advantage or a lawful discrimination. It is asked, if this was a concession, by whom was it conceded? The answer is by the carrier. He granted the priority and therefore he made the concession and gave the advantage and practiced the discrimination. But it was unlawful, and he did not know the facts which made it so. The shipper knew them because he had secured it by his deceit and received it. What is there in the statute that releases him from guilt, because the carrier who yielded to him the concession, and gave him the advantage and made the discrimination, thought it was lawful?"—U. S. v. P. Koenig Coal Co., Mich., 46 S.Ct. 392, 394, 270 U.S. 512, 70 L.Ed. 709.

41. U.S.—Standard Oil Co. of Indiana v. U. S., Ill., 164 F. 376, 386, 90 C.C.A. 364, certiorari denied 29 S. Ct. 689, 212 U.S. 579, 53 L.Ed. 659. 10 C.J. p. 602 note 87.

42. U.S.—U. S. v. Vacuum Oil Co., D.C.N.Y., 153 F. 598. 10 C.J. p. 602 note 90.

43. U.S.—U. S. v. P. Koenig Coal Co., Mich., 46 S.Ct. 392, 270 U.S. 512, 70 L.Ed. 709, reversing, D.C., 1 F.2d 738.

Act not limited to collusion cases

"Congress did not intend to limit the offense described in it to cases of collusion between the carrier and shipper. What was done by the plaintiff in error is not in dispute, and therefore the question is whether what was done constitutes an offense by this plaintiff in error, even though it were not established to have been done in collusion with a carrier or with its knowledge or consent. The law was intended to reach either individuals or corporate entities who contribute knowingly and understandingly to a rebate or concession by any manner or device, and the relation which the culprit bore to the carrier is not necessary as a foundation upon which to rest responsibility."—Spencer Kellogg & Sons v. U. S., C.C.A.N.Y., 20 F.2d 459, 461, affirming, D.C., U. S. v. Spencer Kellogg & Sons, 12 F.2d 612, certiorari denied Spencer Kellogg & Sons v. U. S., 48 S.Ct. 122, 275 U.S. 566, 72 L.Ed. 429.

44. U.S.—U. S. v. Michigan Portland Cement Co., Mich., 46 S.Ct. 395, 270 U.S. 521, 70 L.Ed. 713.

"The Elkins Act does not require such a tariff as to any other advantage or discrimination than a rebate. It declares to be an offense any device whereby transportation shall be given at any less rate than named in the published tariff 'or whereby any other advantage is given or discrimination is practiced.' Where the offense consists in a rebate, as that term is usually understood, to wit, transportation at a less rate in dollars and cents than the published rate which the shipping public are charged, a published tariff is, of course, necessary to constitute the standard, departure from which is the crime. Where there is no pecuniary reduction of the rates as published, and the tariff is complied with but the law against favoritism and discrimination is infringed by the making of a concession or the granting of an advantage not specifically measured in dollars and cents, reference to a published tariff is unnecessary."—U. S. v. Michigan Portland Cement Co., Mich., 46 S.Ct. 395, 270 U.S. 521, 70 L.Ed. 713.

45. U.S.—U. S. v. Miller, Ga., 32 S. Ct. 323, 223 U.S. 599, 56 L.Ed. 568, reversing, C.C., 187 F. 375. 10 C.J. p. 602 note 85½.

46. U.S.—U. S. v. Miller, C.C.Ga., 187 F. 375, reversed on other grounds 32 S.Ct. 323, 223 U.S. 599, 56 L.Ed. 568—U. S. v. Standard Oil Co. of Indiana, D.C.Ill., 170 F. 988.

47. U.S.—Standard Oil Co. of Indiana v. U. S., Ill., 164 F. 376, 90 C.C.A. 364, reversing, D.C., 155 F. 305, and certiorari denied 29 S.Ct. 689, 212 U.S. 579, 53 L.Ed. 659.

48. U.S.—Standard Oil Co. of Indiana v. U. S., supra. 10 C.J. p. 602 note 88.

pay a reduced rate with full knowledge of the published rate are guilty of the offense of accepting a concession, although, under a mistaken view of the law, they believed that they had the right to do so.[49] The statute is violated where, after the carrier has duly established a higher rate, the shipper secures such transportation at the rate agreed on in a prior contract with the carrier, which was the legal, published, and filed rate when the contract was made, since the statute, being then in force, is read into such contract and becomes a part of it.[50] The fact that a concession from the published and filed through rate on an interstate shipment over the lines of connecting carriers was given entirely by the initial carrier for transportation over its own line wholly within one state does not relieve the shipper receiving such concession from liability to prosecution therefor.[51]

Under a tariff rule approved by the interstate commerce commission that if the shipper orders a car of a certain length, which the carrier is unable to furnish but does provide a larger one, no higher rate shall be charged for the larger car provided it is not loaded over the maximum weight prescribed for the smaller car, a shipper who, knowing that the carrier cannot furnish the smaller cars, orders the smaller cars, but does not load the cars furnished over the maximum weight limited for the cars ordered, is not guilty of securing an unlawful concession.[52]

Number of offenses. Where accused made different shipments of goods in interstate commerce at concession rates, delivered throughout the year, the bills being marked prepaid, and settlements being made at a rate lower than that published, at various intervals, all shipments contained in one freight settlement between the parties did not constitute a single offense; but, notwithstanding a settlement was essential to make out the offense of receiving concession rates, on such settlement being consummated, there were as many offenses committed as there were distinct shipments, transportations, or transactions.[53]

Indictment. An indictment for the offense of accepting a concession, to be sufficient, must by its allegations positively and clearly show accused's commission of the crime charged,[54] including such matters as his criminal intent;[55] but matters which are not essential to the commission of the offense need not be alleged,[56] and mere matters of proof need not be alleged.[57] Since prima facie the offense is consummated when the property has been transported at the unlawful rate, the payment of

49. U.S.—Armour Packing Co. v. U. S., Mo., 28 S.Ct. 428, 209 U.S. 56, 52 L.Ed. 681, affirming 153 F. 1, 82 C.C.A. 135, 14 L.R.A.,N.S., 400.
10 C.J. p 602 note 89

50. U.S.—Armour Packing Co. v. U. S., supra.
10 C.J. p 602 note 91.

In Tennessee, under Act 1897 c 10, which has its prototype in the Interstate Commerce Act, the rule as stated in the text has been followed. —New River Lumber Co. v. Tennessee Ry. Co., 238 S.W. 867, 145 Tenn. 266.

51. U.S.—U. S. v. Vacuum Oil Co., D.C.N.Y., 158 F. 536.

52. U.S.—U. S. v. Olds Motor Works, D.C.Mich., 4 F.Supp. 65.

Employees' reference immaterial
In prosecution against interstate shipper for obtaining concessions by computing freight charges on minimum carload weight for 36' 6" cars, instead of 40' 6" cars furnished, where defense was that shipper, in writing, ordered unavailable 36' 6" cars and railroad furnished 40' 6" cars, fact that shipper's subordinate employees orally referred to 40' 6" cars was immaterial—U. S. v. Olds Motor Works, D.C.Mich., 4 F.Supp. 65.

53. U.S.—U. S. v. Standard Oil Co. of New York, D.C.N.Y., 192 F. 438, distinguishing U. S. v. Standard Oil Co., D.C.Ill., 170 F. 988.
10 C.J. p 603 note 99.

54. Change of rates
An indictment for this offense is sufficient where it charges each and all of the elements of the offense with the allegations of time, place, kind of goods, and name of carrier, averring the fixing of the published rate, the changing of the rate, and the new publication, the shipper's knowledge of this change, and the carriage of the goods over a described route at a concession of the difference between the two rates—Chicago, B. & Q. Ry. Co. v. U. S., N.Y., 28 S.Ct. 439, 209 U.S. 90, 52 L.Ed. 698, affirming 157 F. 830, 85 C.C.A. 194—Armour Packing Co. v. U. S., Mo., 28 S.Ct. 428, 209 U.S. 56, 52 L.Ed. 681, affirming 153 F. 1, 82 C.C.A. 135, 14 L.R.A.,N.S., 400.

Conditional rates
Where, under the published tariff, a two-cent pumping charge does not become effective unless tank barges are ordered by the shipper and such barges are available, an indictment charging the failure to pay the pumping charge as an unlawful concession is defective where it is silent on the subject of the condition in the tariff.—U. S. v. Durkee Famous Foods, D.C.N.J., 17 F.Supp. 846.

55. "Knowingly"
An indictment charging that a carrier had not collected demurrage, and that the shippers had not paid it, is insufficient to charge the offense of knowingly soliciting, accepting, and receiving a concession from a carrier.—U.S. v. Lehigh Valley Ry. Co., D.C.N.Y., 254 F. 332

56. Posting of rates
An indictment charging shippers with receiving a concession and accepting transportation of freight at a rate less than that filed is not fatally defective, if it fails to charge that the higher rate so filed had been "posted" as required by statute—U. S. v. Miller, Ga., 32 S.Ct. 323, 223 U.S. 599, 56 L.Ed. 568, reversing, C.C., 187 F. 375

Route of shipment
If it is averred that there was an established through rate between the terminal points of the shipment, to which rate the carriers concerned were parties, the indictment need not aver the route over which the shipment was actually made—U. S. v. Vacuum Oil Co., D.C.N.Y., 158 F. 536.

57. Actual payment
The indictment need not allege the actual payment of the unlawful lower rate, this being a matter of proof. —Standard Oil Co. of New York v. U. S., N.Y., 179 F. 614, 103 C.C.A. 172.

the rate, when, by whom, or under what circumstances, is not deemed an essential allegation.[58] As in other criminal prosecutions, a material variance between the pleading and proof is fatal to a conviction.[59]

Evidence. Otherwise proper evidence tending to show accused's guilt or innocence is admissible, such as evidence that accused honestly believed he was paying the lawfully established tariff.[60] In a prosecution of a refining company for receiving concessions in rates, based on the payment of the rate on unrefined naphtha instead of gasoline, the government has the burden of proving beyond a reasonable doubt that the property shipped was gasoline and not unrefined naphtha.[61]

Amount of fine. The imposition of a fine so large that its effect would be to bankrupt accused is an abuse of discretion and cannot be sustained.[62]

c. Accepting Rebates

The offense of accepting a rebate is committed when the shipper or other person obtains a rebate from the published rate. The rules governing the indictment and the trial in such prosecution conform to the rules of criminal prosecutions generally.

The purpose of the Elkins Act and its subsequent amendments punishing the receipt of rebates is to protect the carrier, as well as the shipper,[63] and to secure uniform freight rates to all shippers. Its provisions are violated by receiving any rebate or concession, whereby any property shall be transported at a lower rate by any interstate carrier than that named in the tariffs published and filed by the carrier whether by direct agreement between the shipper and the carrier or indirectly by any device whatever.[64] The essence of the offense is interference with interstate commerce, apart from the gain or loss occasioned thereby.[65] The offense is complete when the carrier to whom the shipper has paid the full rate returns to the shipper, on his de-

58. U.S.—U. S. v. Vacuum Oil Co., D.C.N.Y., 158 F. 536—U. S. v. Standard Oil Co. of Indiana, D.C.Ill., 155 F. 305, reversed on other grounds 164 F. 376, 90 C.C.A. 364, certiorari denied 29 S.Ct. 689, 212 U.S. 579, 53 L.Ed. 659

59. U.S.—U. S. v. Standard Oil Co. of Indiana, D.C.Tenn., 183 F. 223—U. S. v. Indiana Standard Oil Co., D.C.Ill., 170 F. 988.
10 C.J. p. 603 note 98.

60. U.S.—Lehigh Coal & Navigation Co. v. U. S., N.J., 40 S.Ct. 24, 250 U.S. 556, 63 L.Ed. 1138, answers to certified questions conformed to, C.C.A., 266 F. 457.

61. U.S.—U. S. v. Gulf Refining Co., Okl., 45 S.Ct. 597, 268 U.S. 542, 69 L.Ed. 1082, affirming, C.C.A., Gulf Refining Co. v. U. S., 284 F. 90, certiorari granted U. S. v. Gulf Refining Co., 43 S.Ct. 524, 262 U.S. 738, 67 L.Ed. 1208.

Proof insufficient

In prosecution of refining company under Elkins Act as amended for receiving concessions in rates on gasoline, in which was shown that the rate charged was that on unrefined naphtha, evidence, including evidence as to reduction of specific gravity and vapor tension under regulations of interstate commerce commission, was insufficient to prove that the product shipped was gasoline and not unrefined naphtha.—U.S. v. Gulf Refining Co., Okl., 45 S.Ct. 597, 268 U.S. 542, 69 L.Ed. 1082, affirming, C.C.A., Gulf Refining Co. v. U. S., 284 F. 90, certiorari granted U. S. v. Gulf Refining Co., 43 S.Ct. 524, 262 U.S. 738, 67 L.Ed. 1208.

62. U.S.—Indiana Standard Oil Co. v. U.S., Ill., 164 F. 376, 90 C.C.A. 364, reversing, D.C., 155 F. 305, and certiorari denied 29 S.Ct. 689, 212 U.S. 579, 53 L.Ed. 659.

63. U.S.—U. S. v. Miller, D.C.Neb., 18 F.Supp. 389

64. U.S.—U. S. v. Standard Oil Co., D.C.Ill., 148 F. 719.

Device unimportant

(1) The substance of the offense is not the device, but the receipt of the rebate and the transportation thereby effected.—Armour Packing Co. v. U. S., Mo., 153 F. 1, 82 C.C.A. 135, 14 L.R.A.,N.S., 400, affirmed 28 S.Ct. 428, 209 U.S. 56, 52 L.Ed. 681.

(2) To come within the prohibition of the statute, a device to obtain rebates need not necessarily be of a fraudulent character; the term "device" includes anything which is a plan or contrivance.—Armour Packing Co. v. U. S., Mo., 28 S.Ct. 428, 209 U.S. 56, 52 L.Ed. 681, affirming 153 F. 1, 82 C.C.A. 135, 14 L.R.A.,N.S., 400—10 C.J. p. 603 note 7.

Part of single rate

(1) A rebate or concession from a part of a single rate, whereby property is transported thereunder at a rate less than the established rate, is a concession from the entire rate and renders all transportation thereunder illegal.—Armour Packing Co. v. U. S., Mo., 153 F. 1, 82 C.C.A. 135, 14 L.R.A.,N.S., 400, affirmed 28 S.Ct. 428, 209 U.S. 56, 52 L.Ed. 681.

(2) Accordingly, where the filed and published tariffs of a railroad company specified a rate of $1.55 per ton for coal between two points, but contained a footnote stating that under the terms of a lease of a railroad line from a coal company "a lateral allowance is made out of the herein named rates" to such company on coal shipped by it, the amount of the allowance not being stated, and in practice the company was charged with the named rate against which the allowance was credited, the specified rate of $1.55 per ton was the duly established rate for coal, whether shipped by such company or others, a departure from which was unlawful, under the Elkins Act as amended by Hepburn Act.—Lehigh Coal & Navigation Co. v. U. S., C.C.A.N.J., 266 F. 457, conforming to answers to certified questions 40 S.Ct. 24, 250 U.S. 556, 63 L.Ed. 1138.

Refund by elevator company

Elevator company, collecting charges from railroad and refunding half thereof to consignees or shippers of grain, was guilty of violating Elkins and Hepburn Acts prohibiting giving of rebates.—Spencer Kellogg & Sons v. U. S., C.C.A.N.Y., 20 F.2d 459, affirming, D.C., U. S. v. Spencer Kellogg & Sons, 12 F.2d 612, certiorari denied Spencer Kellogg & Sons v. U. S., 48 S.Ct. 122, 275 U.S. 566, 72 L.Ed. 429.

Reshipment

Shipments in interstate commerce to a transit point where the goods were consumed, and in another instance reshipment from the transit point to another city in the same state, do not justify the application of lower transit rates, and hence the application thereof constituted rebating.—Nichols & Cox Lumber Co. v. U. S., Mich., 212 F. 588, 129 C.C.A. 124.

65. U.S.—U. S. v. Miller, D.C.Neb., 18 F.Supp. 389.

mand, the amount of rebate fixed in the shipping contract.[66] It is not a defense that one who contracted for and received a rebate personally received no benefit therefrom, but turned the rebate over without consideration to another;[67] that a contract existed between the carrier and the shipper to transport the latter's goods at the then established rates within a definite time;[68] that the rate filed was not intended to apply to shipments originating at certain points, when no other different rate was provided on shipments from such points;[69] that the transaction could not constitute a rebate under the act because there was not both a giver and a receiver, and because the carrier did not voluntarily collect less than its full compensation;[70] or that the shipment had ceased to be in interstate commerce, when the lawful freight rate had not been paid and received.[71]

To make rates valid, so that an acceptance of a rebate from them by a shipper shall constitute an offense, it is essential that the rates should be published.[72] Where, however, a railroad company has published and filed a schedule of rates on interstate shipments to points beyond its own line, the section applies to such rates equally with those between points on its own line;[73] and the failure to post rates by an interstate carrier will not relieve a shipper from the penalty for accepting rebates.[74]

All persons who participate in securing the unlawful rebate are guilty of the offense,[75] but the mere fact that accused was a stockholder in a corporation which accepted rebates in violation of law does not render him subject to the penalty imposed by the statute.[76]

Indictment. An indictment or information of this character must charge the commission of the crime by accused and positively and clearly allege every fact necessary to constitute the crime.[77] It need not, however, allege matters which are not essential elements of the offense.[78]

66. Ga.—Central of Georgia R. Co. v. Curtis, 82 S E 318, 14 Ga App. 716

67. U.S.—U. S. v. Wood, D C.Pa., 145 F. 405.

68. U S.—Armour Packing Co. v. U S., Mo., 153 F. 1, 82 C.C A 135, 14 L R A. N.S., 400, affirmed 28 S Ct. 428, 209 U S 56, 52 L.Ed. 681.

69. U.S. — Merchants' & Miners' Transp Co. v. U S, Ga., 199 F. 902, 118 C.C.A 232.

70. U.S—U S. v. Miller, D C Neb., 18 F Supp. 389.

71. U.S.—U. S. v. Miller, supra.

72. U.S—U. S v. Indiana Standard Oil Co., D.C.Ill., 170 F. 988.
10 C.J. p 603 note 4.

New rate

Where a special tariff promulgated by a railroad company making a rate to a point on the line of another road, although filed with the interstate commerce commission, was not a joint tariff fixing a joint rate, a joint rate subsequently made by the two roads and duly filed with the interstate commerce commission superseded the rate previously promulgated, the rule that a rate once lawfully published continues to be the lawful rate until it has been lawfully canceled, and that a subsequent tariff naming other rates, without canceling the previous rates, cannot carry the new rates into lawful effect, having no application; and the use and acceptance of the old rate by shippers after the filing of the new rate, and after the passage of the Elkins Act, was unlawful, as constituting a rebate.—Waters-Pierce Oil Co. v. U S., La., 222 F. 69, 137 C.C.A. 293.

73. U.S.—U. S v Standard Oil Co., D C.Ill., 148 F. 719

74. U.S—U. S v Miller, Ga., 32 S Ct 323, 223 U S. 599, 56 L Ed 568—Nichols & Cox Lumber Co. v. U S, Mich., 212 F 588, 129 C.C A 124
However, on a prosecution of the shipper for receiving a rebate, it has been held to be essential that the government prove that the tariffs were posted at least in the depot, station, or office of the railroad company where the shipments were received—U. S. v. Indiana Standard Oil Co, D.C.Ill., 170 F. 988.

75. **Refrigerator company**

Under the Elkins Act, which provides that it shall be lawful to include as parties, in addition to the carrier, all persons interested in, or affected by, the rate regulation or practice under consideration, a refrigerator company, organized for the purpose of conducting the interstate transportation of a brewing company, having entered into a contract for rebates with certain railroads, is "a party interested in the traffic," and as such subject to the provisions of the statute.—U. S. v. Milwaukee Refrigerator Transit Co, C C Wis, 145 F. 1007.

The consignee, as well as the consignor, is chargeable with a violation of the statute by receiving rebates or concessions from the published tariffs of an interstate carrier through the cancellation of terminal charges at the point of destination, which charges form a part of the tariffs as so published—U. S. v Standard Oil Co., D.C Ill., 148 F. 719

76. U.S—U. S. v. Wood, D.C.Pa., 145 F. 405.

77. **False claim for damages**

(1) An indictment charging solicitation of rebates and concessions from common carriers by means of a false claim for loss and damage to property is sufficient as alleging an offense under the Interstate Commerce Act, notwithstanding an indorsement on the indictment that such indictment was brought under the Elkins Act—U S. v. Altman, D.C.N.Y, 8 F Supp 880.

(2) Under evidence that corporate consignee, through its secretary-treasurer, surreptitiously removed merchandise from car, indictment charging them with soliciting rebate and concession from railroad by falsely claiming loss of merchandise during transportation sufficiently stated an offense under Elkins Act, as against contention that offense, if any, was against Interstate Commerce Act relating to fraud in obtaining transportation at rate less than established rate.—U S. v. Satuloff Bros., C C A.N.Y, 79 F.2d 846

(3) Indictments charging that defendants unlawfully and knowingly by means of false claims for loss and damage to property solicited rebates from common carriers are sustainable as charging crimes under Elkins Act prohibiting solicitation of rebates from common carries—U S. v. Altman, D C.N Y, 8 F Supp. 880.

Willfulness

An indictment under the Elkins Act is not insufficient because the word "willful" is omitted, since the charge amounts to an allegation of unlawful intent—U. S. v Altman, D. C N Y, 8 F Supp. 880

78. **Device**

(1) Since the device by which a re-

The material allegations of the indictment must be proved, such as the tender of payment of rebate, by or on behalf of the carrier, and its receipt by or on behalf of the shipper;[79] but immaterial allegations, such as fraud, need not be proved.[80]

In a prosecution for rebating in the application of transit rates to certain local shipments, evidence that one of the cars was sold to a railroad company and transported over its own line for a part of the outgoing distance, and that the charges for such portion of the distance were absorbed by it, did not constitute a fatal variance.[81]

Evidence. In accordance with the usual rules of evidence in criminal cases, otherwise proper evidence which tends to show the guilt or innocence of accused of the offense charged in the indictment is admissible,[82] and, to sustain a conviction, the state must prove accused's guilt beyond a reasonable doubt.[83] Where an interstate railroad company applied lower transit rates to shipments which were entitled only to local rates, the shipper's agents would be presumed to have knowledge of the rate applicable, which knowledge was imputable to the shipper.[84]

d. Receiving Discrimination

Any discrimination or advantage given to a shipper or other person, other than in the matter of rates, is condemned by the Elkins Act as amended and the receipt of such discrimination is an indictable offense.

The Elkins Act is not restricted in its provisions to departures from the established tariff rate, but is violated if any other advantage is given to a shipper, whereby discrimination is practiced.[85] Unjust

bate is brought about is not an essential element of the offense denounced by the Elkins Act, it is unnecessary to plead it in the indictment—Armour Packing Co v. U. S., Mo., 153 F. 1, 82 C.C.A. 135, 14 L.R.A., N.S., 400, affirmed 28 S.Ct. 428, 209 U.S. 56, 52 L.Ed. 681.

(2) Where such matter is included in the indictment it may be disregarded as surplusage—U. S. v. Altman, D.C.N.Y., 8 F.Supp. 880.

Posting of tariffs

An indictment is not insufficient for failing to allege that the schedules and tariffs alleged to have been violated were posted in the manner required by law.—U. S. v. Miller, Ga., 32 S.Ct. 323, 223 U.S. 599, 56 L.Ed. 568, reversing, C.C., 187 F. 375.

Rates

(1) The indictment need not allege that the carrier's published rate was a reasonable rate nor set out its tariffs in full, it is sufficient to aver that a certain named rate was in force between designated points as shown by the published tariffs—U. S. v. Standard Oil Co., D.C.Ill., 148 F. 719.

(2) Likewise it is not necessary to name any other shipper who was required to pay a different rate, as is the case where discrimination is charged—U. S. v. Vacuum Oil Co., D.C.N.Y., 153 F. 598

(3) An indictment charging the shipper with having received a rebate from the joint rate published and filed by a carrier need not specifically charge that such rate was required to be filed by the statute, where it alleges that it was published and filed as required by law.—U. S. v. Vacuum Oil Co., supra.

(4) On the other hand, an indictment which charges that there was an arrangement between several carriers having connecting lines for the continuous transportation of property over such lines between certain points, and that the lowest total rate, as shown by the published tariffs of such several carriers, was a certain sum on a particular product, but that such product was transported for accused at a lower rate, is bad, in that it does not negative the existence of a joint through rate lower than the total of the local rate.—U. S. v Standard Oil Co., supra.

79. U.S.—U. S. v. Bunch, D.C.Ark., 165 F. 736
10 C.J. p 604 note 13.

80. U.S.—U. S. v. Altman, D.C.N.Y., 8 F.Supp. 880.

81. U.S.—Nichols & Cox Lumber Co v. U. S., Mich., 212 F. 588, 129 C.C.A. 124.

82. **Carrier subject to act**

It may be shown that the carrier giving the alleged rebate was subject to the provisions of the statute.—U. S. v. Camden Iron Works, D.C.Pa., 150 F. 214, reversed on other grounds 158 F. 561, 85 C.C.A. 585—10 C.J. p 604 note 27.

Conversations

In prosecution against corporate consignee and its secretary-treasurer for soliciting rebate and concession from railroad by falsely claiming shortage, corporation's truck driver was properly permitted to testify regarding conversation with secretary-treasurer's uncle near car, whereby uncle directed driver to remove merchandise therefrom, since uncle's testimony indicated his presence and jury could have found that he had authority to give such direction.—U. S. v. Satuloff Bros., C.C.A.N.Y., 79 F.2d 846.

Judgment for consignee

In a prosecution against a corporate consignee and its secretary for soliciting a rebate by falsely claiming a shortage after surreptitiously removing merchandise from a car, a judgment for the consignee in an action against the carrier for the loss is inadmissible either on the theory of res judicata or as presumptive proof of what happened to the merchandise—U. S. v. Satuloff Bros., C.C.A.N.Y., 79 F.2d 846.

Shipment over several lines

Where the prosecution is for receiving rebates on a shipment over the lines of more than one carrier, any evidence tending to show that the shipment was made under a through bill of lading, or on a contract for continuous carriage by the several carriers, is admissible to prove that such carriers were used for the purpose of the shipment under a common control, management, or arrangement of continuous carriage, and the schedules of rates filed with the interstate commerce commission by the several carriers are admissible for the purpose of showing the lawful rate on such shipment.—U. S. v. Camden Iron Works, D.C.Pa., 150 F. 214, reversed on other grounds 158 F. 561, 85 C.C.A. 585.

83. **Evidence sufficient for jury**

In prosecution for soliciting rebate and concession, evidence was sufficient for jury on charge that corporate consignee, through its secretary-treasurer, surreptitiously removed certain merchandise from car in absence of railroad's checker, creating shortage later claimed.—U. S. v. Satuloff Bros., C.C.A.N.Y., 79 F.2d 846

84. U.S.—Nichols & Cox Lumber Co. v. U. S., Mich., 212 F. 588.

85. U.S.—U. S. v. Michigan Portland Cement Co., Mich., 46 S.Ct. 395, 270 U.S. 521, 70 L.Ed. 713.
10 C.J. p 605 note 31.

discrimination and favoritism of all kinds are condemned by the statute, and the question whether the existing conditions justify the difference in rates charged is one to be determined as one of fact on the trial.[86] Under the Hepburn amendment of the Elkins Act providing that a shipper who is permitted to settle his charges by paying a less or a different compensation to the carrier than is required of other shippers operating under the same or similar circumstances accepts or receives a discrimination, receiving payment by note is receiving "a different compensation" within the meaning of the statute, and the shipper from whom such note is received is guilty of a violation of the statute.[87] The use of a false claim for loss or damage to property as a device for soliciting rebates and concessions from common carriers is specifically prohibited by the Interstate Commerce Act, as discussed infra § 526, but that fact does not preclude indictment and trial under the Elkins Act for use of the same device, since the elements of the indictments are not identical nor is the proof necessary to support the one identical with that necessary to support the other.[88] Where accused by misrepresentations obtain transportation despite a railroad embargo, thus violating the Elkins Act, prosecution cannot be defeated because the embargo had not been submitted to the interstate commerce commission and its reasonableness ascertained and adjudicated,[89] nor may it be defeated on the theory that such commission should first determine whether the actions of the shippers constituted a violation of the Act.[90]

Indictment. Unlike an indictment charging a shipper with taking a rebate or concession which need not name any other shipper who is required to pay a different rate, such an averment is necessary where the indictment is based on unjust discrimination.[91] An indictment charging a violation of the Elkins Act, in that accused by misrepresentations obtained the transportation of goods on which a governmental embargo had been laid, sufficiently alleges a discrimination, where it shows that other persons were denied the same transportation services which defendants enjoyed, and is not defective on the theory that the president's assent to the embargo was not alleged, since it was obvious that he must act through agents.[92] An indictment for receiving discrimination from an interstate railroad does not show a violation of an order of the interstate commerce commission giving hospitals priority with respect to furnishing cars for coal, by ordering and obtaining coal ostensibly for a hospital and then diverting it, where it is not alleged that the coal for which the cars were so furnished was not required by the hospital.[93]

§ 525. Shipping Dangerous Goods without Giving Notice of Their Character

Under statutes so providing, it is an indictable offense to transport dangerous goods by any common carrier without giving notice of their character to such carrier.

In some jurisdictions statutes exist making the sending of dangerous goods by railroad without notice to the carrier of their dangerous character a criminal offense.[94]

The illegal transportation of explosives will be discussed in the C.J.S. title Explosives § 12, also 25 C.J. p 214 note 69–p 215 note 77.

§ 526. Other Offenses

Under provision of the Interstate Commerce Act, one who willfully by false billing or other fraudulent representation seeks to obtain transportation from a common carrier at less than regular rates is guilty of a misdemeanor. Under some statutes the tapping of a pipe line, conduit, or storage tank is an indictable offense.

The Interstate Commerce Act, 49 U.S.C.A. § 10, provides, among other things, that any person or corporation or any agent or officer thereof, who shall knowingly and willfully by false billing, false classification, false weight, false representations of the contents of a package or the substance of the property, false statement or any other device or means, without the consent or connivance of the carrier, obtain or attempt to obtain transportation of such property at less than the regular rates, shall be deemed guilty of fraud, which is declared to be a misdemeanor. The purpose of this provision is to protect the carrier against accusations for any of such acts where it could not observe the contents of the shipment, and against liability to innocent purchasers of bills of lading who may rely on the carrier's description in the bill of lading in purchas-

86. U.S.—U. S v Vacuum Oil Co., D C N.Y., 153 F. 598

87. U.S.—U. S v. Sunday Creek Co, D C.Ohio, 194 F. 252, affirming, C. C A., 210 F. 747.

88. U.S.—U S v. Altman, D.C.N.Y., 8 F.Supp 880.

89. U.S.—U S. v. Metropolitan Lumber Co, D C.N J., 254 F 335

90. U.S.—U S. v. Metropolitan Lumber Co, supra.

91. U.S.—U. S v. Vacuum Oil Co., D C N.Y, 153 F. 598

92. U.S.—U. S. v. Metropolitan Lumber Co., D C.N.J, 254 F. 335.

93. U.S.—U. S v. P. Koenig Coal Co., D C.Mich., 291 F. 385.

94. U S.—Horn v. Mitchell, Mass., 232 F 819, 147 C.C.A. 13, appeal dismissed 37 S Ct 293, 243 U S 247, 61 L Ed 700—Ryan v. U. S., Ind., 216 F 13, 132 C.C.A. 257.
10 C.J. p 605 note 47.

ing the property.[95] The gist of the offense under this section is the fraud of obtaining transportation at a rate less than the established rate by means of false billing or other fraudulent device.[96] An indictment will not lie under this section for giving or receiving rebates.[97] A shipper is guilty of false representation, rendering him subject to prosecution under the statute, where he describes the contents of a car so as intentionally to conceal its true character, and induces the carrier to charge him a less rate than is legally applicable.[98] On the other hand, the fixing of the value of property in a bill of lading at less than its actual value, for the purpose of limiting the amount of the carrier's liability in case of loss, is not a false billing in violation of the statute,[99] and the designation of a typewriter, dictionary, wearing apparel, trunk, and personal effects as emigrant movables is not a violation of the act.[1] The offense may be committed in securing an adjustment of the freight after delivery of the goods to the consignee.[2] The statute applies to consignees as well as to consignors of interstate shipments.[3]

In a prosecution under this statute, which also makes it an offense to obtain lower rates by filing a false claim for damages, the fact that the claim paid was no greater than the amount which the consignees were entitled to receive under a correct application of the law of damages is immaterial, where the payment of the claim reduced the compensation of the carrier below what it received at the regular rates.[4]

An indictment under this statute is usually sufficient if framed in the language of the statute.[5] It is not necessary that the different tariffs should be averred verbatim, the gravamen of the offense being the misrepresentation by which the rate was obtained.[6] Of course, there must be no material variance between the indictment and the proof.[7]

In prosecutions of this character, as in other criminal cases, the state must prove the guilt of accused beyond a reasonable doubt.[8] Otherwise proper evidence which tends to prove the guilt or innocence of accused is admissible.[9]

Tapping pipe line. Under a statute making it a criminal offense unlawfully to tap any pipe line, conduit, or storage tank constructed to transport or store petroleum products, the tapping of a pipe line with intent to appropriate any of the contents is a complete offense whether or not such appropriation or taking is in fact made.[10] This statute is not limited to common carrier pipe lines, but applies as well to private pipe lines.[11]

An indictment in the language of the statute for tapping a pipe line with intent to appropriate a por-

95. N.Y.—Schwalb v. Erie R. Co., 293 N.Y.S. 842, 161 Misc. 743.

96. U.S.—U. S. v. Satuloff Bros., C.C.A.N.Y., 79 F.2d 846.

97. U.S.—U. S. v. Hanley, D.C.Ill., 71 F. 672.

98. U.S.—U. S. v. Sterling Salt Co., D.C.N.Y., 200 F. 593.

99. U.S.—George N. Pierce Co. v. Wells Fargo & Co., N.Y., 189 F. 561, 110 C.C.A. 645, affirmed 35 S. Ct. 351, 236 U.S. 278, 59 L.Ed. 576.

1. Minn.—O'Connor v. Great Northern R. Co., 136 N.W. 743, 118 Minn. 223.

2. U.S.—U. S. v. Union Mfg. Co., Fla., 36 S.Ct. 420, 240 U.S. 605, 60 L.Ed. 822.
10 C.J. p 605 note 41.

3. U.S.—U. S. v. Wishnatzki, C.C.A.N.Y., 77 F.2d 357, reversing, D.C., 7 F.Supp. 313.
10 C.J. p 605 note 42.

4. U.S.—U. S. v. Wishnatzki, supra.

Amount of damage to goods carried by carload lot on an interstate bill of lading should, in a prosecution for filing false claims for damages, be determined from the weighted average of sales prices of sound goods in the particular car, in view of the settled practice between carriers and consignees.—U. S. v. Wishnatzki, D.C.N.Y., 7 F.Supp. 313, reversed on other grounds, C.C.A., 77 F.2d 357

5. U.S.—U. S. v. Sterling Salt Co., D.C.N.Y., 200 F. 593.

6. U.S.—U. S. v. Sterling Salt Co., supra.

7. U.S.—U. S. v. Howell, D.C.Mo., 56 F. 21.
10 C.J. p 605 note 44.

8. U.S.—U. S. v. Wishnatzki, C.C.A.N.Y., 77 F.2d 357, reversing, D.C., 7 F.Supp. 313.

Evidence held insufficient

(1) In prosecution under statute making it an offense to obtain lower railroad rates by false claim for damages, evidence showing that defendant certified claim and was unable some two years later to produce slips from which information was obtained or corresponding sales tickets was insufficient to support conviction.—U. S. v. Wishnatzki, C.C.A.N.Y., 77 F.2d 357, reversing, D.C., 7 F.Supp. 313.

(2) Evidence held insufficient to take question of filing of claim to jury.—Laser Grain Co. v. U. S., Mo., 250 F. 826, 163 C.C.A. 140.

Filing of claim

Where an indictment charged that accused filed a claim with a carrier in an attempt to obtain excessive damages in violation of this act, proof of filing, which is not complete until the document is delivered, is essential to conviction.—Laser Grain Co. v. U. S., Mo., 250 F. 826, 163 C.C.A. 140

9. **Acts and statements**

Where it is asserted that a claim against a carrier is fraudulent and that pressing such claim is a violation of this statute, the acts and sayings of one prosecuting or pressing the claim are generally admissible on the question of intent.—Laser Grain Co. v. U. S., Mo., 250 F. 826, 163 C.C.A. 140.

Establishment of rate

As evidence of the establishment of the rate, the jury may consider the testimony of those employees of the carrier having charge of that branch of its business, and also the fact that they posted a notice stating that schedules of rates could be inspected on application to its agent. —U. S. v. Howell, D.C.Mo., 56 F. 21.

10. Tex.—Williams v. State, Cr., 109 S.W.2d 489.

Evidence held sufficient to sustain a conviction against accused for tapping a pipe line and drawing gasoline therefrom.—Williams v. State, Tex.Cr., 109 S.W.2d 489.

11. Tex.—Williams v. State, supra.

tion of the contents to accused's use and benefit is sufficient, even though it does not allege an intent to deprive the owner of the value thereof.[12] Of course, a material variance between the indictment and proof in prosecutions of this character is fatal, but immaterial variances are not fatal.[13]

On a trial for tapping a pipe line with intent to appropriate a portion of the contents in violation of statute, it is not necessary to define the word "tapping" where there is no controverted issue as to the tapping, nor as to accused's act coming within the meaning of the term; nor is it necessary to define a "pipe line" as the term has a well-understood meaning; nor does the failure to define gas or casing-head gasoline as injurious to accused, since the taking of any property from the pipe line regardless of its value would constitute the offense.[14]

Y. LIABILITY OF SHIPPER OR CONSIGNEE TO CARRIER FOR TORTIOUS ACT

§ 527. In General

In the absence of an agreement to the contrary, a shipper or consignee is liable to the carrier for injury to the carrier's cars only when such damage was due to their negligence. The shipper may be liable to the carrier for goods in the possession of the carrier for shipment which were destroyed through the negligence of the shipper.

Where a carrier has placed cars on a siding for a shipper to load, and they escape and are injured, the doctrine of res ipsa loquitur has been held not to apply so as to raise a presumption of the shipper's negligence.[15] Also in an action by a carrier against a shipper for damages from loss by fire to a car during loading, where the carrier delivered the car to the shipper and the weather required a fire to preserve the goods from frost, the shipper does not have the burden of proving that his negligence did not cause the damage occasioned by a fire in the car before it was fully loaded and while under his control, the bailment of the car in such instance being for mutual benefit, and the shipper is not an insurer of the car while in his possession.[16]

The consignee is liable to the carrier for damages caused to its trains through his negligence in unloading freight which has been delivered to him in a car; it is his duty, in exercising his privilege of going on the carrier's right of way to procure his goods, to exercise it in such a way as not to inflict injury to the other's property.[17] Also, where the carrier had built a siding on defendant's property to receive and deliver freight to defendant, and where the contract between them provided that defendant should be liable for all loss or damage not caused by the carrier's negligence, where the carrier placed cars on the siding to be unloaded by defendant, if such cars are injured, even though not by the negligence of either party, defendant is liable therefor.[18]

Where the shipper, through his negligence in unloading goods at the carrier's station for shipment by it, injures or destroys other goods held by the carrier for shipment, the shipper will be liable therefor.[19] Under such circumstances, the amount paid by the carrier's claim department to the shippers who filed claims for goods claimed to have been destroyed by defendant's negligence is not the true measure of damage, as the carrier is liable to the shippers for the fair market value of their shipments.[20]

Goods of greater weight than represented by

12. Tex.—Williams v. State, supra.

13. Variances not fatal

(1) Where an indictment alleges that a pipe line was constructed to transport casing-head gas and was used for that purpose and that accused tapped the pipe line with intent to appropriate a part of the contents and the evidence showed that the line was constructed and used for such purpose, the state's case does not fail because it shows that accused took casing-head gasoline and not casing-head gas—Williams v. State, Tex.Cr., 109 S.W.2d 489.

(2) On a trial for tapping a pipe line constructed and used for transporting casing-head gas, where the evidence shows defendant took gasoline from the pipe line and that a compressor machine which converted the vapor gas into liquid gasoline was operated two or three times each week, the failure to prove that it was being operated the night the offense was committed does not constitute a failure to prove the averment that the line was used to transport casing-head gas.—Williams v State, supra.

14. Tex.—Williams v. State, Cr., 109 S.W.2d 489.

15. Utah.—Denver & R. G. R. Co. v Ashton-Whyte-Skillicorn Co., 162 P. 83, 49 Utah 82, L.R.A.1917C 768

16. Mich.—Pennsylvania R. Co v Dennis' Estate, 204 N.W. 89, 231 Mich. 367.

17. N.Y.—New York, etc., R. Co. v Atlantic Refining Co., 29 N.E. 829, 129 N.Y. 597, reversing 13 N.Y.S. 466.

10 C.J. p. 606 note 49.

18. N.J.—Central R. R. of New Jersey v Bayway Refining Co., 79 A. 292, 81 N.J.Law 456, Ann.Cas.1912D 77.

19. Spilling acid

Where a shipper unloads a barrel of formic acid on a freight platform of a railroad company in such a negligent manner that the barrel breaks, and its acid contents flow over a quantity of meat which had been deposited by another shipper on the same platform, and the meat is wholly or partially destroyed, the railroad company may maintain an action in its own name against the negligent wrongdoer to recover for the injury to the meat.—Pennsylvania R. Co. v. Farrell, 64 Pa.Super. 296.

20. U.S.—W. A. Hover & Co. v. Denver & R. G. W. R. Co., C.C.A.Colo., 17 F.2d 881.

shipper. It is not a part of the implied contract of shipment that a shipper should declare the true weight of an article shipped, and he will not be liable for negligence in understanding the weight of an article of this character which an injury occurs because the tackle used is insufficient, although adequate for the weight stated.[21]

§ 528. Shipment of Dangerous Articles

It is the duty of one shipping dangerous articles to notify the carrier of their character, and a failure to do so subjects the shipper to liability for resultant damages.

A shipper desiring to ship a dangerous article by a carrier has a right to do so if the carrier will accept it for transportation; but on delivering it, it is the duty of the shipper to inform the carrier fully of its dangerous character, in order that transportation may be declined, or if it accepted that suitable provision may be made against any danger from it, and a failure to give the carrier such notice will subject the shipper to liability for all damages caused by the articles shipped.[22] The duty does not arise from any contract, express or implied, but from the principle expressed in the maxim, Sic utere tuo ut alienum non lædas.[23] It has been said, however, that "in every shipment there is an implied contract on the part of the shipper that his goods are not of such a character as to cause injury to other goods, and that, no matter how innocent or how ignorant he may have been of their real character, the law will impute to him knowledge of the fact, inasmuch as he has had a better opportunity of acquiring it than any other person."[24] Where the goods are delivered to the carrier by the shipper's agent who has full knowledge of the dangerous character of the goods, the fact that such agent may be liable criminally will not affect his principal's liability to respond in damages to the carrier.[25] Where a consignee orders from different manufacturers two kinds of dangerous articles, and each manufacturer delivers to the carrier the articles ordered of him, without knowing of the shipment by the other of a similar article, and without informing the carrier of the dangerous nature of the goods, and an injury results, each of the shippers is liable in a joint action for the whole damages resulting, but there is no liability on the part of the consignee.[26]

In an action against a shipper for damages caused by his failure to comply with a regulation of the interstate commerce commission that certain substances must be shipped in metal cans or drums of a certain specification, the carrier has the burden of proving that the damages were caused by a failure to comply with the regulation.[27]

III. CARRIERS OF PASSENGERS

A. DEFINITION AND GENERAL NATURE

§ 529. In General

A carrier of passengers is one which undertakes to transport persons from place to place and is distinguishable from a carrier of goods.

A carrier of passengers is one that undertakes the transportation of persons,[28] a person or corporation who undertakes to transport or convey persons from one place to another, gratuitously or for hire.[29] Such a carrier may be either a special or private carrier, or a public or common carrier.[30]

A carrier of passengers is to be distinguished from a carrier of goods not only as to the extent of the liability, but also as to the nature of the contract. The carriage of goods is a bailment, and the liability arising therefrom for injuries to the goods is a liability arising out of the contract, whereas the carriage of passengers is not a contract of bailment,[31] and the liability of the carrier for injuries to passengers depends entirely on negligence, and is sometimes said, as regards common carriers, to

21. N.Y.—Hanna v Pitt, 106 N.Y.S 145, 121 App Div. 420.

22. U.S.—International Mercantile Mar. Co. v. Fels, N Y, 170 F. 275, 95 C.C A 471, 18 Ann Cas 18
Mass —Boston, etc, R. Co. v Shanly, 107 Mass. 568.
10 C.J. p 606 note 50.
Liability for transportation of explosives see C.J S. title Explosives § 9, also 25 C.J. p 198 note 85–p 199 note 97.

23. Mass —Boston, etc., R. Co. v. Shanly, supra.

24. U S.—Pierce v. Winsor, D.C. Mass., 19 F Cas No.11,151, 2 Sprague 35

25. N Y.—Barney v. Burstenbinder, 7 Trans 210, 64 Barb. 212.

26. Mass.—Boston, etc., R. Co. v Shanly, 107 Mass. 568

27. U S —W. A. Hover & Co. v. Denver & R. G. W. R. Co., C.C A.Colo., 17 F.2d 881.

28. Abbott L.D.

29. Wash.—Cushing v. White, 172 P. 229, 230, 101 Wash. 172, L.R.A. 1918F 463.
Operator for hire of school motorbus. who operates along a certain route every school day in taking all school children alike to and from a certain school, is a carrier of passengers in so far as such school children are concerned.—Sheffield v. Lovering, 180 S.E. 523, 51 Ga.App. 353.

30. Wash —Cushing v. White, 172 P 229, 101 Wash. 172, L R.A.1918F 463.

31. U.S —Boyce v. Anderson, Ky., 2 Pet. 150, 7 L Ed. 379.
S.C.—McDonald v. Clark, 15 S.C.L. 223.

arise out of a public duty to carry safely imposed by law.[32] The distinction between a carrier of passengers and a carrier of goods is aptly exemplified in the case of the transportation of passengers and the transportation of baggage by a common carrier; the carrier is at the same time a carrier of passengers and a carrier of goods, its liability as carrier in the former case depending on its negligence, whereas in the latter case the carrier is liable for all injuries not caused by an act of God or of the public enemy.[33]

§ 530. Public or Common Carrier in General

A public or common carrier of passengers is one which, as a regular business, undertakes for hire to carry all persons, within certain limitations, who may apply for passage, and holds itself out as engaged in such business.

The terms, "public" or "common" carrier, in the modern sense include carriers of passengers as well as of goods;[34] and as such, a public or common carrier of passengers is a quasi-public agency enjoying a public franchise or privilege,[35] although to constitute a public conveyance a common carrier, it is not necessary that it come within the definition of a public utility, so as to be subjected to the rules and regulations of a public utility commission.[36]

Public or common carriers of passengers, like common carriers of goods, are engaged in a public calling which imposes on them a duty to serve all without discrimination, as will be explained in § 538;[37] and they owe to their passengers a degree of care and protection different from that which may be exacted of persons who do not thus hold themselves out as serving the public in such capacity.[38] Therefore, the question whether or not one who furnishes transportation to individuals is a public carrier may be important for the purpose of determining his duty as to serving all who may apply, and also the care and prudence which he is required to exercise. For either purpose a public or common carrier of passengers may be defined as one who undertakes for hire to carry all persons, indifferently, who may apply for passage, as long as there is room and there is no legal excuse for refusing;[39] one who, by virtue of his calling and as a regular business, undertakes to transport persons from place to place, offering his services to such as may choose to employ him and pay his charges.[40]

32. N.Y.—Brewer v. New York, etc., R. Co., 26 N.E. 324, 124 N.Y. 59, 21 Am.S.R. 647, 11 L.R.A. 483.
Liability as dependent on negligence generally see infra § 676.

33. U.S.—Stokes v. Saltonstall, Md., 13 Pet. 181, 10 L.Ed. 115.
10 C.J. p 607 note 70.
Liability for baggage see infra §§ 867, 868.
Liability for injuries only in case of negligence see infra § 676.

34. Me.—Chaput v. Lussier, 165 A. 573, 574, 132 Me. 48.
N.Y.—Anderson v. Fidelity & Casualty Co. of New York, 127 N.E. 584, 228 N.Y. 475, 9 A.L.R. 1544, affirming 170 N.Y.S. 431, 183 App. Div. 170, which modifies 166 N.Y.S. 640, 100 Misc. 411.

At common law the term "common carrier" did not embrace a carrier of persons.
Ga.—Georgia Cent. R. Co. v. Lippman, 36 S.E. 202, 110 Ga. 665, 672, 50 L.R.A. 673.
N.H.—Elkins v. Boston, etc., R. Co., 23 N.H. 275, 284.

35. N.J.—Sheridan v. New Jersey & N. Y. R. Co., 141 A. 811, 104 N.J. 622

36. Wis.—Anderson v. Yellow Cab Co., 191 N.W. 748, 179 Wis. 300, 31 A.L.R. 1197.

37. **This statement in Corpus Juris** has been judicially approved.—North American Acc. Ins. Co. v. Pitts, 104 So. 21, 24, 213 Ala. 102, 40 A.L.R. 1171.

38. Conn.—Stanley v. Steele, 60 A. 640, 77 Conn. 688, 693, 2 Ann.Cas. 561.

Text of Corpus Juris is cited with approval in Sheffield v. Lovering, 180 S.E. 523, 524, 51 Ga.App. 353.
Degree of care required in general see infra § 678.

39. Ala.—Hood v. State, 162 So. 541, 542, 26 Ala.App. 507, reversed on other grounds 162 So. 543, 230 Ala. 343.
Ill.—Austin Bros. Transfer Co. v. Bloom, 147 N.E. 387, 388, 316 Ill. 435.
Mich.—Melcoman v. City of Grand Rapids, 188 N.W. 521, 523, 218 Mich. 397.
N.J.—Schott v. Weiss, 105 A. 192, 193, 92 N.J.Law 494.
Pa.—Lazor v. Ranas, 174 A. 817, 819, 114 Pa.Super. 425.
Tex.—Burnett v. Riter, Civ.App., 276 S.W. 347, 349.
Va.—Riggsby v. Tritton, 129 S.E. 493, 494, 143 Va. 903, 45 A.L.R. 280, motion denied 133 S.E. 580, 45 A.L.R. 280.
10 C.J. p 607 notes 62, 63.

This definition as given in Corpus Juris has received judicial approval.
Ala.—North American Acc. Ins. Co. v. Pitts, 104 So. 21, 24, 213 Ala. 102, 40 A.L.R. 1171.
Ill.—Rathbun v. Ocean Accident & Guarantee Corporation, 132 N.E. 754, 755, 299 Ill. 562, 19 A.L.R. 140, reversing 219 Ill.App. 514.

Similar definition
"One who professes to carry for all . . . who apply."—Utica-Clayville Bus Co. v. Waite, 252 N.Y.S. 673, 676, 233 App.Div. 297—10 C.J. p 607 note 62 [a]

"Public," which carrier must serve to constitute common carrier, does not mean everybody all the time—State ex rel. Anderson v. Witthaus, Mo., 102 S.W.2d 99.

40. U.S.—Sanger v. Lukens, D.C. Idaho, 24 F.2d 226, 228, reversed on other grounds C.C.A., 26 F.2d 855—McCoy v. Pacific Spruce Corporation, C.C.A.Or., 1 F.2d 853, 855, affirming Pacific Spruce Corporation v. McCoy, D.C. 294 F. 711.
Mont.—Stoner v. Underseth, 277 P. 437, 441, 85 Mont. 11.
Or.—Anderson v. Smith-Powers Logging Co., 139 P. 736, 739, 71 Or. 276, L.R.A.1916B 1089.

Similar definitions
(1) "One who holds himself out to the public, to carry persons . . . for hire."—Ace-High Dresses v. J. C. Trucking Co., 191 A. 536, 538, 122 Conn. 578.

(2) "One who undertakes for hire to transport from place to place such persons . . . as choose to employ it."—Chicago & E. I. Ry. Co. v. Chicago Heights Terminal Transfer R. Co., 147 N.E. 666, 668, 317 Ill. 65, error dismissed 46 S.Ct. 207, 270 U.S.

Holding out. To constitute a carrier a common carrier of passengers it is necessary that it hold itself out to the public as engaged in the business of carrying passengers,[41] the holding out being either by advertising or by actually engaging in the business and pursuing the occupation as an employment.[42] The real test, therefore, as to whether or not, in a particular case, a carrier is a common carrier of passengers, is whether it holds itself out to the public as engaged in the business of carrying passengers, and that it will, so long as it has room, carry persons coming to it for that purpose,[43] rather than the quantity or extent of the business actually transacted, or the number and character of the conveyances used in the employment.[44] A carrier does not become a public or common carrier of passengers merely because it is engaged in transporting persons, or because the person or persons served take all its facilities;[45] and although in a sense every person, firm, or corporation operating a motor vehicle for hire is a contract carrier, every such contract carrier is not a common carrier.[46] One is not a common carrier of passengers, who occasionally carries a passenger as a matter of special accommodation and agreement,[47] or who transports the employees of another over a regular route pursuant to a contract of carriage,[48] and the fact that the owner of a private automobile hires it to certain friends but not to everybody does not indicate that his automobile is devoted to the business of a common carrier.[49]

The destination of, or distance to be traveled by, the passenger is immaterial in determining whether

626, 70 L.Ed. 767—McCusker v. Curtiss Wright Flying Service, 269 Ill. App. 502, 521.

(3) "One whose occupation is the transportation of persons . . . from place to place for hire or reward, and who holds himself out to the world as ready and willing to serve the public indifferently in the particular line or department in which he is engaged."—Independent Truck Co. v. Wright, 275 P. 726, 151 Wash. 372—Cushing v. White, 172 P. 229, 230, 101 Wash. 172, L.R.A.1919F 463.

41. Ala.—Hood v. State, 162 So. 541, 26 Ala.App. 507, reversed on other grounds 162 So. 543, 230 Ala. 343.
Ill.—Rathbun v. Ocean Accident & Guarantee Corporation, 132 N.E. 754, 299 Ill. 562, 19 A.L.R. 140, reversing 219 Ill.App. 514.
N.J.—Schott v. Weiss, 105 A. 192, 92 N.J.Law 494
N.Y.—Utica-Clayville Bus Co. v. Waite, 252 N.Y.S. 673, 233 App.Div. 297.
10 C.J. p. 607 note 64.

42. Ill.—Rathbun v. Ocean Accident & Guarantee Corporation, 132 N.E. 754, 755, 299 Ill. 562, 19 A.L.R. 140, reversing 219 Ill.App. 514.
N.H.—Bernardi Greater Shows v. Boston & M. R. R., 165 A. 124, 86 N.H. 146.
Tenn.—Nashville, etc., R. Co. v. Messino, 1 Sneed 220, 225.

It "does not necessarily consist in public declarations or advertisement; the undertaking may be evidenced by the carrier's own notice, or, practically, by a series of acts, by his known habitual continuance in the line of business; one who follows carrying for a livelihood, or who gives out to the world in any intelligible way that he will take . . . persons for transportation for hire, is a common carrier . . . and this is so although the carrier has no fixed schedule of charges, does not operate over a definite route, does not always load his vehicle to capacity, and refuses, on occasion, to accept . . . passengers whether his vehicle is engaged or not"—Stoner v. Underseth, 277 P. 437, 441, 85 Mont. 11.

Use of his facilities must be so extensive as to imply an offer to serve entire public, or there must be other circumstances reasonably warranting inference that he was undertaking to serve all to the limit of his capacity.—State ex rel. Anderson v. Witthaus, Mo., 102 S.W.2d 99.

43. Pa.—Klawansky v. Public Service Commission of Pennsylvania, 187 A. 248, 123 Pa.Super. 375—City Transfer Co. v. Public Service Commission, 93 Pa.Super. 210.
Tex.—Burnett v. Riter, Civ.App., 276 S.W. 347.
Wash.—Independent Truck Co. v. Wright, 275 P. 726, 151 Wash. 372—Cushing v. White, 172 P. 229, 101 Wash. 172, L.R.A.1919F 463.

Question must be determined by character of business actually carried on by the carrier and not by any secret intention or mental reservation it may entertain or assert when charged with the duties and obligations which the law imposes.—Independent Truck Co. v. Wright, 275 P. 726, 151 Wash. 372—Cushing v. White, 172 P. 229, 101 Wash. 172, L.R.A.1919F 463.

44. Wash.—Independent Truck Co. v. Wright, 275 P. 726, 151 Wash. 372—Cushing v. White, 172 P. 229, 101 Wash. 172, L.R.A.1919F 463.

45. Mo.—State ex rel. Anderson v. Witthaus, 102 S.W.2d 99.
Pa.—Klawansky v. Public Service Commission of Pennsylvania, 187 A. 248, 123 Pa.Super. 375.

Contractor to carry mail between a railroad station and the post office in a town is not a common carrier with regard to the railway mail clerk, although required to carry him with the mail.—Davis v. Crisham, 99 N.E. 959, 213 Mass. 151.

46. Ala.—Hood v. State, 162 So. 541, 26 Ala.App. 507, reversed on other grounds 162 So. 543, 230 Ala. 343.

47. N.H.—Murch v. Concord R. Corp., 29 N.H. 9, 61 Am.D. 631.
Pa.—Harder v. Public Service Commission, 90 Pa.Super. 373.

Company which does not solicit business on the streets or other public places, and which is under no obligation and does not hold itself out as being ready and willing to furnish such services to the public at fixed charges, is not a common carrier of passengers because of the fact that it rents a car and chauffeur to persons, in the absence of a statute or ordinance requiring a license for such services.—Tracy v. Grand Concourse Service Co., 192 N.Y.S. 88, 199 App.Div. 348.

One occasionally renting motor trucks, used by him in his general transfer business for transferring freight, to carry passengers to and from picnic grounds on Sundays and holidays, is not a common carrier of passengers, but a private carrier for hire.—Gornstein v. Priver, 221 P. 396, 64 Cal.App. 249.

48. N.H.—Dover, S. & R. St. Ry. Co. v. Wentworth, 149 A. 505, 84 N.H. 258.

Person transporting certain persons to and from their place of employment at a specified weekly rate is not a common carrier.—Utica-Clayville Bus Co. v. Waite, 252 N.Y.S. 673, 233 App.Div. 297.

49. Ark.—Forbes v. Reinman, 166 S.W. 563, 112 Ark. 417, 51 L.R.A., N.S., 1164
Porto Rico.—Velez v. Llavina, 18 Porto Rico 634.

the carrier is or is not a common carrier.[50]

Public and private carrier distinguished. The distinction between a public or common carrier of passengers and a special or private carrier of the same is that it is the duty of the former to receive all who apply for passage, so long as there is room and no legal excuse for refusing, while such duty does not rest on the latter,[51] and this distinction, as stated in Corpus Juris, has received judicial approval.[52]

Transportation of baggage. A local carrier or transfer company engaged in the business of transferring baggage to and from railroad or steamship depots, or between different parts of a town or city, is a common carrier;[53] and it has been held that the proprietor of a line of taxicabs, omnibuses, and baggage wagons is a common carrier as to baggage received for transportation.[54]

§ 531. Private Carrier in General

A private carrier of passengers is one who, without being engaged in such business as a public employment, undertakes to deliver passengers for hire or reward, or even gratuitously.

A private carrier of passengers, is one who, without being engaged in such business as a public employment, undertakes to deliver passengers for hire or reward;[55] one who agrees, by special agreement or contract, to transport persons from one place to another, either gratuitously or for hire[56] The same person or corporation may be engaged in one line of business as a common carrier of passengers and in another line of business as a private carrier.[57]

§ 532. Railroads; Street Railroads

A railroad or street railroad is, generally, from the very nature of its business, a public or common carrier of passengers.

Railroad companies are generally by the nature of their business public carriers of passengers,[58] and bound to carry to the extent of the capacity of their passenger trains all suitable persons who apply for transportation in a proper way, as will be explained in §§ 538–540; and the duties and responsibilities of such a carrier apply to a receiver or trustee operating a railroad.[59] Where the transportation undertaken and the duties and responsibilities inci-

50. Ill.—Parmelee v. Lowitz, 74 Ill. 116, 24 Am R. 276
10 C.J. p 607 note 67.

51. Ala.—Hood v. State, 162 So. 541, 26 Ala App. 507, reversed on other grounds 162 So. 543, 230 Ala. 343.
10 C J. p 607 note 71.

Similar statement of distinction

"A public common carrier of passengers is distinguished from private carriers by the franchises conferred on it, and the obligations, restrictions, and liabilities with which it is charged, all flowing from considerations of public policy."—Lazor v Banas, 174 A. 817, 819, 114 Pa.Super 425.

52. Ala.—North American Acc. Ins. Co. v. Pitts, 104 So. 21, 24, 213 Ala. 102, 40 A.L.R. 1171
Mich.—Rogers v. Weber, 209 N.W. 165, 166, 235 Mich. 180.
N.Y.—Anderson v. Fidelity & Casualty Co. of New York, 166 N.Y.S. 640, 642, 100 Misc. 411.
Pa.—Aronimink Transp. Co v. Public Service Commission, 170 A. 375, 111 Pa.Super. 414.

53. Ill.—Morrison v. Parmelee Co., 222 Ill.App. 90
La.—Lawes v. New Orleans Transfer Co, 133 So 144, 11 La.App 170
10 C.J. p 50 note 43

54. W.Va.—Brown Shoe Co v. Hardin, 87 S.W. 1014, 77 W.Va. 611.
10 C J p 49 note 37.

55. Ill.—Austin Bros. Transfer Co. v. Bloom, 147 N.E. 387, 388, 316 Ill. 435.

One letting automobile and furnishing chauffeur for it is a private carrier for hire.
Ala.—Forbes v. Reinman, 166 S.W. 563, 112 Ark. 417, 51 L.R.A.,N.S., 1164.
Ill.—Dunne v. Boland, 199 Ill.App. 308.
Mass.—Haddad v. Griffin, 142 N.E. 74, 247 Mass. 369.

Contract to transport child to school

Where a mother contracted with a neighbor who transported his child to school for similar transportation for her son at rate of ten cents per day, neighbor was not "common carrier" but "private carrier" under special contract.—Lazor v. Banas, 174 A. 817, 114 Pa Super. 425.

If undertaking be single transaction, not part of the general business or occupation engaged in, as advertised and held out to the general public, then the individual or company furnishing such service is a private and not a common carrier
Mont.—Stoner v Underseth, 277 P. 437, 441, 85 Mont. 11.
Wash.—Independent Truck Co. v Wright, 275 P 726, 151 Wash 372
—Cushing v. White, 172 P. 229, 101 Wash. 172, L.R.A.1919F 463.

Transporter of workmen

An automobile owner daily transporting three workmen between their homes and place of work for a specified sum per day was not a "common carrier" but a "private" or "special" carrier—Lewis v. Bertero, Wash., 77 P.2d 786.

56. Mont.—Stoner v. Underseth, 277 P 437, 441, 85 Mont. 11.

General contractor, under a separate contract with his subcontractor to furnish automobile transportation to the latter's employee from the railroad station to his work, was a private carrier for hire, charged with all the duties pertaining to such person.—Duffy v. J W. Bishop Co, 122 A 121, 99 Conn. 573

57. U.S.—Chenery v Employers' Liability Assur. Corporation, C.C.A. Cal, 4 F.2d 826

58. Ill.—Chicago, etc, R. Co v Hamler, 74 N.E 705, 215 Ill 525, 106 Am.S.R 187, 1 L.R.A.,N.S, 674, 3 Ann Cas 42
10 C.J. p 608 note 81.

Attendants for animals

Where railroad and express company agree to transport animals and attendants, under uniform live stock contract providing that attendants will care for and feed animals, the companies are "common carriers," irrespective of statute authorizing "free passes" and of provision in attendants' contract limiting companies' liability for negligence, since attendants' services are consideration for transportation.—Crane v. Railway Exp Agency, 12 N.E.2d 672, 293 Ill.App 328.

59. N.J.—Klein v. Jewett, 26 N.J. Eq 474, affirmed 26 N.J.Eq. 550.
10 C J p 608 note 86.
Liability of receiver or trustee for injury to passenger see infra § 711.

dent thereto are such as are ordinarily incident to transportation by a common carrier, the mere fact that a railroad company makes some special arrangement for the transportation of persons over its lines in a particular way or under certain conditions does not deprive it of its character as common carrier.[60] A railroad company, however, may occasionally carry passengers on its freight trains without thereby making itself a common carrier of passengers on such trains;[61] and a company which operates only freight cars is not such a carrier.[62] So, also, a railroad company is not a carrier of passengers with reference to a person who is allowed to ride on a hand car.[63] If a railroad company is not in fact a common carrier of passengers, it cannot be made such by an order of a state public service commission.[64]

Except where it holds itself out to be such,[65] a railroad company does not act as a common carrier of passengers in hauling a show company or circus train, under a special agreement, not in the usual course of business of a common carrier by rail;[66] and the mere fact that the railroad company gives the circus company the option of having its cars transported by the railroad at the regular tariff rates as a common carrier, or for a greatly reduced consideration as a private carrier, does not establish the railroad company as a common carrier as affecting the carriage of the circus employees.[67]

A railroad company is not a common carrier of Pullman cars and employees performing duties therein, and is not bound to haul such cars when tendered to it by the Pullman company with its conductors, porters, or other employees,[68] unless its charter requires it so to do,[69] subject to such rules and regulations as may be prescribed;[70] and if, under such a charter, it contracts with a Pullman company to haul its cars, it necessarily contracts as a common carrier.[71]

As between different companies, where one railroad company is operating its train on the line of another road, the company operating the train is generally deemed the carrier as to passengers on such train;[72] and where one company operates the trains of another road over its track it is deemed the carrier,[73] except where it furnishes only the motive power.[74] The owner of a train or boat leased for an excursion, the crew being furnished with the train or boat, is the carrier as to passengers conveyed, although the means of conveyance may be under the general direction of the manager of the excursion.[75]

A street railroad company, irrespective of the motive power, is a common carrier of passengers,[76]

60. Ind.—Vandalia R. Co. v. Stevens, 114 N.E. 1001, 67 Ind.App. 238.
Ky.—Davis v. Chesapeake, etc., Railroad Co., 92 S.W. 339, 122 Ky. 528, 121 Am.S.R. 481, 5 L.R.A.,N.S., 458, 12 Ann.Cas. 723.
N.H.—Bernardi Greater Shows v. Boston & M. R. R., 165 A. 124, 86 N.H. 146.

Railroad company carrying miners over a branch line, and receiving as compensation a certain amount per month to be deducted from the miners' wages is a common carrier of passengers.—Vandalia R. Co. v. Stevens, 114 N.E. 1001, 67 Ind.App. 238.

61. N.H.—Murch v. Concord R. Corp., 29 N.H. 9, 61 Am.D. 631.
Persons riding on freight trains as passengers see infra § 552.

62. Ark.—Dodson v. Clark Lumber Co., 184 S.W. 417, 123 Ark. 50.
10 C.J. p. 608 note 84.

63. Me.—Hoar v. Maine Cent. R. Co., 70 Me. 65, 35 Am.R. 299.
Person riding on hand car as passenger see infra § 552.

64. U.S.—McCoy v. Pacific Spruce Corporation, C.C.A.Or., 1 F.2d 853, affirming Pacific Spruce Corporation v. McCoy, D.C., 294 F. 711.

65. N.H.—Bernardi Greater Shows v. Boston & M. R. R., 165 A. 124, 86 N.H. 146.

Giving option of rate

A railroad company, by giving a show company the option of transportation at a higher rate, according to tariffs, classifications, and rules, or at a reduced rate, admits willingness to transport the show company as common carrier, and that the show company is a proper subject for shipment according to such tariffs, classifications, and rules."—Bernardi Greater Shows v. Boston & M. R. R., 165 A. 124, 86 N.H. 146.

Publishing and filing tariffs, etc., with commission

A railroad company, by publishing and filing with the state public service commission and interstate commerce commission tariffs, classifications, and rules for transportation of show companies, holds itself out as a common carrier of such companies as to persons.—Bernardi Greater Shows v. Boston & M. R. R., 165 A. 124, 86 N.H. 146.

66. Ind.—Dierickx v. Davis, 137 N.E. 685, 80 Ind.App. 71, certiorari denied 44 S.Ct. 36, 263 U.S. 709, 68 L.Ed. 518.

67. U.S.—Sasinowski v. Boston & M. R. R., C.C.A.Mass., 74 F.2d 628.

68. Ill.—Chicago, etc., R. Co. v. Hamler, 74 N.E. 705, 215 Ill. 525, 106 Am.S.R. 187, 1 L.R.A.,N.S., 674, 3 Ann.Cas. 42.
Palace or sleeping car company as not common carrier see infra § 904.

69. Pa.—Coleman v. Pennsylvania R. Co., 89 A. 87, 242 Pa. 304, 50 L.R.A.,N.S., 432, Ann.Cas.1915B 529.

70. Pa.—Coleman v. Pennsylvania R. Co., supra.
10 C.J. p. 609 note 89.

71. Pa.—Coleman v. Pennsylvania R. Co., supra.

72. Ark.—Eureka Springs R. Co. v. Timmons, 11 S.W. 690, 51 Ark. 459.
10 C.J. p. 609 note 91.

73. Mass.—Schopman v. Boston, etc., R. Co. 9 Cush. 24, 55 Am.D. 41.
Mo.—Smith v. St. Louis, etc., R. Co., 85 Mo. 418, 55 Am.R. 380.
Vt.—Sprague v. Smith, 29 Vt. 421, 70 Am.D. 424.

74. U.S.—Keep v. Indianapolis & St. L. R. Co., C.C.Mo., 9 F. 625, 3 McCrary 208.

75. Mich.—Cuddy v. Horn, 10 N.W. 32, 46 Mich. 596, 41 Am.R. 178.
N.C.—White v. Norfolk, etc., R. Co., 20 S.E. 191, 115 N.C. 631, 44 Am.S.R. 489.
Tex.—Collins v. Texas, etc., R. Co., 39 S.W. 643, 15 Tex.Civ.App. 169.

76. Ala.—South & N. A. R. Co. v. Highland Ave. & B. R. Co., 24 So. 114, 119 Ala. 105.
Ill.—North Chicago Electric R. Co. v. Peuser, 60 N.E. 78, 190 Ill. 67.

in that one essential characteristic of its business is the carriage of the public generally,[77] and this is true although it may be constructed on private property.[78]

Scenic railway. The owner and operator of a scenic railway in an amusement park is subject, where he has accepted passengers on such railway for hire, to the liabilities of a carrier of passengers generally.[79]

Railroad built by government for war purposes. The fact that a railroad right of way is acquired by the federal government during a war, for a war purpose, under the war power or right of eminent domain, does not charge it and the road built thereon by the government with a public use, so as to give the public a right to demand a common carrier passenger service;[80] nor does the fact that the government conveys the right of way and road to a corporation organized, owned, and used by it for the same war purpose, charge the property with a public use, so as to make the corporation a common carrier of passengers,[81] and the same rule applies as to a temporary gratuitous permit to operate the road while the corporation organized by the government is winding up its affairs after the close of the war,[82] or as to a continuance of operation, under such temporary permit, consented to by a purchaser of the road.[83]

State as common carrier. Where a state owns and operates a railway system at a park, posts notices calling attention to the railway and the fare charged to ride thereon, has ticket offices, maintains the structure, provides the cars and machinery which runs them, and receives the revenue of its operation, it is a common carrier of passengers for hire, subject to liability as such.[84]

§ 533. Elevators

The owner or manager of a passenger elevator is, technically, not a common carrier of passengers, although in many cases he has been held to be such.

The owner or manager of a passenger elevator used in a building for the transportation of tenants and others, as stated in Corpus Juris, which statement has been followed in subsequent decisions,[85] is not in the full sense of the term a common carrier of passengers;[86] but with reference to the

Ind.—Citizens' St R. Co. v. Twiname, 13 N.E 55, 111 Ind. 587.
Neb.—In re Curtailment of Bus Service, 252 N.W. 407, 125 Neb. 825.
N.H.—Dover, S. & R. St. Ry. Co. v. Wentworth, 149 A. 505, 84 N.H. 258
N.D.—Peterson v. Fargo-Moorhead St. Ry. Co., 164 N.W. 42, 37 N D 440.
Or.—Thompson-Houston Electric Co. v. Simon, 25 P. 147, 20 Or. 60, 23 Am.S R. 86, 10 L.R.A. 251.
10 C J p 609 note 95

77. N H.—Dover, S. & R. St. Ry. Co. v. Wentworth, 149 A. 505, 84 N.H. 258.

78. Neb.—East Omaha St. R. Co. v. Godola, 70 N.W. 491, 50 Neb. 906

79. Ill.—O'Callaghan v. Dellwood Park Co, 149 Ill.App. 34, affirmed 89 N.E 1005, 242 Ill 336, 134 Am. S R. 331, 26 L.R.A ,N S., 1054 and note, 17 Ann Cas 407 and note.
Ohio—Sentker v. Martin, 19 Ohio N. P ,N.S., 445.
Tex.—Dallas Ry. & Terminal Co. v. Travis, 78 S.W.2d 941, 125 Tex. 11, affirming, Civ.App, 46 S.W.2d 743.
62 C J. p 867 note 30.

This rule as stated in Corpus Juris has been judicially approved as the general and accepted rule.
Cal.—Barr v. Venice Giant Dipper Co., 32 P 2d 980, 981, 138 Cal.App. 563.
Mo.—Cooper v Winnwood Amusement Co, App., 55 S.W.2d 737, 742

Operator of roller coaster owes duty of common carrier to passengers for hire riding thereon.—Barr v. Venice Giant Dipper Co, 32 P.2d 980, 138 Cal App. 563—62 C J. p 867 note 30.

80. U S.—McCoy v. Pacific Spruce Corporation, C.C.A Or., 1 F 2d 853, affirming, D.C., Pacific Spruce Corporation v. McCoy, 294 F. 711.

Reasons for rule

"The property was acquired for a particular purpose and the government had an unquestionable right to devote it to that purpose to the exclusion of every other. Its right and power to control and manage its own property in its own way rest upon the supremacy of its authority, and are neither limited nor controlled by the mode of acquisition. This would seem both elementary and fundamental."—McCoy v Pacific Spruce Corporation, C.C A Or, 1 F 2d 853, 855, affirming, D.C, Pacific Spruce Corporation v. McCoy, 294 F. 711.

United States as carrier of passengers during federal war-time control of railroads see C J S title Railroads § 31, also 51 C.J. p 448 note 20.

81. U S.—McCoy v. Pacific Spruce Corporation, supra.

82. U S.—McCoy v. Pacific Spruce Corporation, supra.

83. U S.—McCoy v. Pacific Spruce Corporation, supra

84. N Y.—Burke v. State, 119 N Y S. 1089, 64 Misc. 558.

85. Colo.—Davis v. Colorado Sav. Bank, 242 P. 985, 987, 78 Colo. 509.

86. D C.—Woodward & Lothrop v. Lineberry, 50 F 2d 314, 60 App D. C. 164, followed in 50 F 2d 317, 60 App D C 167, and certiorari denied Lineberry v. Woodward & Lothrop, 52 S Ct. 29, 284 U.S 648, 76 L Ed. 550.
10 C.J p 609 note 1.

As regards contracting against liability for negligence, an owner of a building in operating an elevator therein is not a common carrier.—Clarke v. Ames, 165 N.E. 696, 267 Mass. 44.

In hotel

The owner and operator of a passenger elevator in a hotel is not a common carrier of passengers.—McDowell v. Rockey, 167 N E 589, 32 Ohio App. 26.

In store or office building

The operator of an elevator in a store or office building is not a common carrier, because the elevator is merely an instrumentality furnished for the convenience of those occupying and using the building, and is at all times within the owner's control, without an obligation to carry any one except whom it pleases.
Conn.—Stratton v J. J Newberry Co, 169 A. 56, 117 Conn. 522.
D C.—Woodward & Lothrop v Lineberry, 50 F 2d 314, 60 App D C 164, followed in 50 F.2d 317, 60 App D. C. 167, certiorari denied Lineberry v. Woodward & Lothrop, 52 S Ct. 29, 284 U S 648, 76 L Ed. 550—Southern Ry Co. v. Taylor, 16 F. 2d 517, 57 App D C. 21, certiorari denied Taylor v. Southern Ry. Co.,

safety of the passengers on an elevator a similar degree of care is usually required of the owner or manager as is exacted of other passenger carriers, as stated infra § 687, and with this idea in view it has been held in many cases that such an owner or manager is a common carrier of passengers as to persons using the elevator;[87] and it has been held further that, where the landlord in consideration of the payment of the rent agrees to carry the tenant, his customers, and guests, in a passenger elevator, he is a carrier for hire.[88]

It has been held that an owner who permits a person to ride on a freight elevator occupies the relation of a common carrier of passengers toward such person,[89] as where an express delivery man or messenger in delivering packages to a tenant in a public office building is required, as is the custom, to use the freight elevator.[90]

Escalator. The rule that an elevator is deemed a common carrier applies equally to an escalator.[91]

§ 534. Other Passenger Carriers

A common carrier of passengers may be a carrier by stagecoach, omnibus, public hack or taxicab, jitney, steamboat, aeroplane, or even an ambulance.

Subject to the rules considered in §§ 530, 531 supra, public or common carriers of passengers are generally held to include all those who as a business carry passengers by means of stagecoach,[92] motorbus or other omnibus,[93] public hack or taxicab,[94]

47 S.Ct. 571, 273 U.S. 767, 71 L.Ed. 882.

87. Ala.—Ensley Holding Co. v. Kelley, 158 So. 896, 229 Ala. 650.
Colo.—Davis v. Colorado Sav. Bank, 242 P. 985, 78 Colo. 509.
Nev.—Smith v. Odd Fellows Bldg. Ass'n, 205 P. 796, 46 Nev. 48, 23 A.L.R. 38.
Wash.—Engstrand v. Hartnett, 180 P. 132, 106 Wash. 404.
Wis.—Dehmel v. Smith, 227 N.W. 274, 200 Wis. 292—Switzar v. Detroit Inv. Co., 206 N.W. 407, 188 Wis. 330.
10 C.J. p. 609 note 3.

"Prevailing doctrine with respect to the duty of one maintaining a passenger elevator in a hotel or other public building is that he is a common carrier and governed by the same rules applicable to other common carriers."—Murphy's Hotel v. Cuddy's Adm'r, 97 S.E. 794, 797, 124 Va. 207.

In apartment house

Plaintiff, who, on making call at room of business associate in apartment house, was injured by falling into elevator shaft, was an invitee with implied invitation to use elevator operated for convenience of guests and those having business with them, and relation of passenger and carrier arose between plaintiff and owner of apartment house.—Johnson v. Hopkins, 105 So. 663, 213 Ala. 492.

In retail store

Where elevator is operated for transporting customers in retail store, owner would be liable to customer, injured while entering it, for injuries proximately caused by the failure to exercise the highest degree of care, on the theory that relation of carrier and passenger exists.—Louis Pizitz Dry Goods Co. v. Yeldell, 104 So. 526, 213 Ala. 222, affirmed 47 S.Ct. 509, 274 U.S. 112, 71 L.Ed. 952, 51 A.L.R. 1376.

One who rides in elevator in public office building is not a mere licensee or trespasser, but is a passenger for hire.—Williams v. Short, 268 S.W. 706, 219 Mo.App. 99, transferred from 263 S.W. 200

"Comparing passenger elevators in office buildings with railroads as public conveyances, it may be said that ordinarily there is a more open and unrestricted invitation to the general public to become passengers in such elevators than in the case of railroads, where the possession of a ticket or pass is usually a requirement of admission, and we do not doubt that the daily use of such elevators by the traveling public as a whole, ascending and descending with short, quick trips, in many instances repeatedly on the same day, equals, if it does not greatly exceed, the number of passengers carried in railroad coaches and other means of public conveyance during the same time."—Davis v. Colorado Sav. Bank, 242 P. 985, 987, 78 Colo. 509

88. Or.—Kelly v. Lewis Inv. Co., 133 P. 826, 66 Or. 1, Ann.Cas.1915B 568
10 C.J. p. 610 note 4.

89. Ill.—Springer v. Ford, 59 N.E. 953, 189 Ill. 430, 82 Am.S.R. 464, 52 L.R.A. 930, affirming 88 Ill.App. 529.
10 C.J. p. 610 note 5.

90. Ala.—O'Rourke v. Woodward, 77 So. 679, 201 Ala. 265.

91. Pa.—Petrie v. Kaufmann & Baer Co., 139 A. 878, 291 Pa. 211.

Reason for rule

"As an escalator and an elevator perform the like service of conveying people from one elevation to another, they are subject to like duties and responsibilities. The passenger is at least as powerless to influence the action of the former as the latter."—Petrie v. Kaufmann & Baer Co., 139 A. 878, 879, 291 Pa. 211.

Retail store, which operates a continuously moving escalator between floors, may be regarded as a carrier within the rule requiring a high degree of care for passengers.
U.S.—S. S. Kresge Co. v. McCallion, C.C.A.Mo., 58 F.2d 931.
Ohio.—May Department Stores Co. v. McBride, 178 N.E. 12, 124 Ohio St. 264, affirming McBride v. May Department Stores Co., 177 N.E. 773, 39 Ohio App. 420.

92. Ill.—Austin Bros. Transfer Co. v. Bloom, 147 N.E. 387, 316 Ill. 435.
10 C.J. p. 607 note 73.
Auto stage defined see C.J.S. title Motor Vehicles § 3, also 42 C.J. p. 611, note 43.

93. Cal.—Simmons v. Pacific Electric Ry. Co., 212 P. 637, 60 Cal.App. 129.
Neb.—Giffen v. Lincoln Traction Co., 225 N.W. 232, 118 Neb. 459.
10 C.J. p. 607 note 74.

Motor bus

One who operates a motor vehicle over a fixed route along a city street, and to the capacity of the vehicle carries for hire any one who may hail him from the sidewalk and ask for passage, is a common carrier of passengers.—Frick v. City of Gary, 135 N.E. 346, 347, 192 Ind. 76.
Motor bus defined see C.J.S. title Motor Vehicles § 5, also 42 C.J. p. 611 note 47.

94. Cal.—Bezera v. Associated Oil Co., 3 P.2d 622, 117 Cal.App. 139
Ga.—Locke v. Ford, App., 187 S.E. 715.
Ind.—Hudnut v. Indiana De Luxe Cab Co., 182 N.E. 711, 98 Ind.App. 44.
Kan.—Cross v. Chicago, R. I. & P. R. Co., 242 P. 469, 120 Kan. 58.
Ky.—Dix v. Gross, 111 S.W.2d 673, 271 Ky. 231—Shelton Taxi Co. v. Bowling, 51 S.W.2d 468, 244 Ky. 817.
Me.—Chaput v. Lussier, 165 A. 573, 132 Me. 48.
Md.—Stewart Taxi-Service Co. v. Spencer, 132 A. 153, 149 Md. 635—Goldsworthy v. Maloy, 119 A. 693, 141 Md. 674.

jitney,[95] or steamboat, as explained in C.J.S title Shipping § 174; or also, as explained in § 41 of C.J.S. title Aerial Navigation, an airplane; and, under some statutes, include a terminal or union depot company.[96] A hackman, however, who has no established route, place of business, or time of employment, although a carrier in a restricted sense, is not a common carrier.[97]

A livery-stable keeper does not hold himself out to serve any and all persons, but operates only under a special contract, and deals with such persons only as he chooses, and is in no sense a common carrier;[98] and the fact that he rents his vehicles with drivers does not of itself make him a common carrier of passengers within the legal meaning of that term.[99]

An organization operating an ambulance gratuitously for members, although expecting contributions to the ambulance fund, is a public carrier.[1]

Carrying people for undertaker. A taxicab company is a common carrier of passengers in carrying people for an undertaker, although in so doing

Mass.—Dion v Drapeau, 150 N.E. 14, 254 Mass 186.
Mich.—Durfey v. Milligan, 251 N.W. 356, 265 Mich. 97—Melconian v. City of Grand Rapids, 188 N.W. 521, 218 Mich. 397.
Minn.—McKellar v. Yellow Cab Co., 181 N.W. 348, 148 Minn. 247.
N.Y.—Anderson v Fidelity & Casualty Co of New York, 127 N.E. 584, 228 N.Y. 475, 9 A.L.R. 1544, affirming 170 N.Y.S. 431, 183 App.Div 170, which modifies 166 N.Y.S. 640, 100 Misc. 411.
N.D.—Finlayson v Yellow Cab Co., 217 N.W. 662, 56 N.D. 407.
Okl.—A. & A. Taxicab Co. v. Bass, 58 P.2d 567.
Tex.—Burnett v. Riter, Civ.App., 276 S.W. 347.
Va.—Carlton v. Boudar, 88 S.E. 174, 118 Va. 521, 4 A.L.R. 1480
Wash.—Cushing v. White, 172 P. 229, 101 Wash. 172, L.R.A.1918F 463
Wis.—Scales v. Boynton Cab Co., 223 N.W. 836, 198 Wis. 293, 69 A.L.R. 978—Anderson v. Yellow Cab Co., 191 N.W. 748, 179 Wis. 300, 31 A.L.R. 1197
10 C.J. p 607 note 75.

This rule, as stated in Corpus Juris, has received judicial approval.
Ga.—Locke v. Ford, App., 187 S.E. 715, 716.
Kan.—Cross v. Chicago R. I. & P. R. Co., 242 P. 469, 470, 120 Kan. 58.
N.Y.—Anderson v. Fidelity & Casualty Co of New York, 170 N.Y.S. 430, 433, 183 App.Div. 170.

As matter of public policy

Where defendant owned twenty-eight taxicabs used for conveying passengers in a city, had a general office from which they were dispatched to convey passengers from one place to another, and were operated pursuant to a regular rate applied to the number of miles traveled, registered on a taximeter, and, responding to plaintiff's request to the general office, a taxicab was dispatched for her use from its stand at a railroad depot, public policy requires that it be classed as a common carrier.—Anderson v. Yellow Cab Co., 191 N.W. 748, 179 Wis. 300, 31 A.L.R. 1197.

Carrier engaged in automobile rent business, who owns and operates a motor vehicle for hire, either at a charge of so much per trip or so much per hour, who has a fixed stand or place where his car is available to prospective customers during many hours of the day and night, and who transports passengers from place to place, although he has no fixed schedule of charges, and does not operate over definite routes, and does not on all occasions load his car to full capacity, and reserves the right to refuse to transport passengers whether his vehicle is full or not, is a common carrier.
Tex.—Bower Auto Rent Co. v. Young, Civ.App., 274 S.W. 295.
Wash.—Cushing v. White, 172 P. 229, 101 Wash. 172, L.R.A.1918F 463.

"Auto transportation company or taxicab company, which holds itself out as ready to receive and transport all who apply for passage and are ready to pay for the service, is a common carrier."
N.D.—Finlayson v. Yellow Cab Co., 217 N.W. 662, 663, 56 N.D. 407.
Ohio.—Korner v. Cosgrove, 141 N.E. 267, 108 Ohio St. 484, 31 A.L.R. 1193.

May or may not be

A company which operates a taxicab at a given time or place, might or might not be a "common carrier of passengers."—Finnegan v Checker Taxi Co., Mass., 14 N.E.2d 127.

Taxicab company which has its cabs at various places and solicits the public to ride and has a meter guaranteeing that all who ride shall pay a uniform rate is a common carrier of passengers.—Yellow Cab Co. v. Teller, 9 Tenn.App 416

Not inherently common carrier

Corporation organized to transfer persons and property by cabs is not inherently a common carrier.—City Transfer Co. v. Public Service Commission, 93 Pa.Super. 210.
One letting automobile for hire as private carrier see supra § 531
Taxicab defined see C.J.S. title Motor Vehicles § 7, also 42 C.J. p 612 notes 62, 63.

Ind.—Denny v. City of Muncie, 149 N.E. 639, 197 Ind 28.
N.J.—Schott v. Weiss, 105 A. 192, 92 N.J.Law 494.
Tenn.—City of Memphis v State, 179 S.W. 631, 133 Tenn 83, L.R.A.1916B 1151, Ann.Cas.1917C 1056—Price-Bass Co. v. Dawson, 7 Tenn.Civ.App 192
Tex.—Burnett v. Riter, Civ.App., 276 S.W. 347.
Wash.—Cushing v. White, 172 P. 229, 101 Wash 172, L.R.A.1918F 463.
10 C.J. p 608 note 76.

Jitney driver operating between points in city over well-defined route for hire, who offers his services alike to all without discrimination and distinction is a common carrier.—Riggsby v. Tritton, 129 S.E. 493, 494, 143 Va 903, 45 A.L.R. 280, motion denied 133 S.E. 580, 45 A.L.R. 280.

Corpus Juris has been cited in support of this rule—Schott v. Weiss, 105 A. 192, 193, 92 N.J.Law 494.
"Jitney" defined see Jitney 33 C.J. p 834 note 5.

96. Fla.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla 721.

97. Minn.—Godbout v St Paul Union Depot Co., 81 N.W. 835, 79 Minn 188, 47 L.R.A. 532
N.Y.—Brown v New York Cent etc., R. Co., 27 N.Y.S. 69, 75 Hun 355.

This and the following text statements, as found in Corpus Juris, are cited with approval in North American Acc. Ins Co. v. Pitts, 104 So. 21, 213 Ala. 102.

98. N.Y.—Anderson v. Fidelity & Casualty Co of New York, 170 N.Y.S. 430, 183 App.Div. 170.
10 C.J. p 608 note 80

Corpus Juris has been cited in support of the rule that a livery-stable keeper is not ordinarily a common carrier—Anderson v. Fidelity & Casualty Co. of New York, 170 N.Y.S. 430, 433, 183 App.Div. 170

99. Tex.—Staacke v. Routledge, 241 S.W. 994, 111 Tex. 489, affirming, Civ.App., 175 S.W. 444.

1. Conn.—Leete v. Griswold Post No. 79, American Legion, 158 A. 919, 114 Conn. 400.

the taxicab is to some extent under the direction of the funeral director, if complete control is not surrendered, regardless of who pays for the service;[2] but the funeral director is not a carrier, either public or private, in superintending the formation of the procession of automobiles and assisting persons to enter.[3]

B. RELATION BETWEEN CARRIER AND PASSENGER GENERALLY

1. In General

§ 535. Nature of the Relation

The relation of carrier and passenger is contractual, and also personal, with reciprocal rights and duties.

The relation between a carrier and passenger is contractual in origin and nature,[4] and, as stated infra § 545, does not exist unless there is a contract either express or implied. The relation is also personal in nature, with reciprocal rights and duties, which neither party can disregard with impunity.[5]

§ 536. What Law Governs

The validity and effect of a contract between a carrier and passenger is generally governed by the law of the place where it is made.

The validity and effect of the contract between a carrier and passenger, in the absence of anything showing a contrary intent, is generally governed by the law of the place where the contract is made.[6] A contract for a continuous interstate carriage, to be partly performed in the state where the contract is executed, is regarded as entire and indivisible, and is governed by the law of the place where executed,[7] except in so far as it may be controlled by the federal law.[8]

§ 537. Applicability of Law of Bailments

A carrier of passengers is not, as to the person of the passenger, a bailee, as stated supra § 529, and in this respect the law of carriers of passengers is not a part of the subject of bailments; but inasmuch as those who hold themselves out as prosecuting the business of carrying passengers for hire are regarded as undertaking a public duty, they are properly classed in this respect with public carriers of goods, and it is proper to treat them under the general heading of "Carriers." Moreover, public carriers of passengers are deemed common carriers as to the baggage accepted by them for transportation as a part of the business of transporting passengers, as stated infra § 862.

§ 538. Duty to Receive and Transport Passengers

a. In general
b. What persons may be refused transportation

a. In General

A common carrier of passengers is, ordinarily, bound to receive for carriage, without discrimination, all proper persons who properly offer to become passengers.

As a general rule, a common carrier of passengers is bound to receive for carriage without discrimination all proper persons who desire and properly offer to become passengers,[9] if the accommoda-

2. Mo.—Burke v. Shaw Transfer Co., 243 S.W. 449, 211 Mo.App. 353, certiorari quashed State ex rel. Shaw Transfer Co. v. Trimble, 250 S.W. 384.

3. Mich.—Camp v. Spring, 217 N.W. 917, 241 Mich. 700.

4. U.S.—Austro-American S.S. Co. v. Thomas, N.Y., 248 F. 231, 160 C.C.A. 309, L.R.A.1918D 873.
Ga.—Matthews v. Central of Georgia Ry. Co., 169 S.E. 41, 46 Ga.App. 699.
Ky.—Chesapeake & O. Ry. Co. v. Mallett, 270 S.W. 26, 207 Ky. 745.
Mo.—Detchemendy v. Wells, App., 253 S.W. 150.
Okl.—Chicago, R. I. & P. Ry. Co. v. Warren, 269 P. 368, 132 Okl. 107.
Tex.—Lee v. Baker, Civ.App., 251 S.W. 580.
Va.—Virginia Ry. & Power Co. v. Arnold, 92 S.E. 925, 121 Va. 204.

5. W.Va.—Schuster v. Norfolk & W. Ry. Co., 102 S.E. 476, 85 W.Va. 658.

6. Ind.—Clark v. Southern Ry. Co., 119 N.E. 539, 69 Ind.App. 697.

Contract made in England

Where a certificate for a passage purchased in state of Massachusetts was exchanged in England for ticket, the contract of carriage was made there.—Secoulsky v. Oceanic Steam Nav. Co., 112 N.E. 151, 223 Mass. 465.

What law governs:
Carrier's liability for injuries in general see infra § 679.
Provision of contract limiting carrier's liability see infra § 639.

7. Ind.—Clark v. Southern Ry. Co., 119 N.E. 539, 69 Ind.App. 697.
Tex.—Nevill v. Gulf, C. & S. F. Ry. Co., Com.App., 244 S.W. 980, reversing, Civ.App., 187 S.W. 388, and reversed on other grounds Neville v. Gulf, C. & S. F. Ry. Co., Com.App., 252 S.W. 483.

8. Tex.—Nevill v. Gulf, C. & S. F. Ry. Co., supra.

News agent as passenger

Whether news agent entitled to transportation on defendant's road, under contract with his employer involving interstate commerce, was a passenger when injured through negligence of defendant's servants was to be determined by the federal law.—Nevill v. Gulf, C. & S. F. Ry. Co., Tex.Civ.App., 187 S.W. 388, reversed Com.App., 244 S.W. 980, which is reversed Neville v. Gulf, C. & S. F. Ry. Co., 252 S.W. 483.

9. Ala.—North American Acc. Ins. Co. v. Pitts, 104 So. 21, 213 Ala. 102, 40 A.L.R. 1171.
Ky.—Casteel v. American Airways, 88 S.W.2d 976, 261 Ky. 818.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.
Mass.—Haddad v. Griffin, 142 N.E. 74, 247 Mass. 369.
N.Y.—Anderson v. Fidelity & Casualty Co. of New York, 166 N.Y.S. 640, 100 Misc. 411, modified on

tions are sufficient,[10] unless some special reason or excuse exists for refusing them;[11] and in some jurisdictions this duty is expressly prescribed by constitutional or statutory provisions.[12] This duty, especially in the cases of railroads and street railroads, arises, independent of contract, from the public character of the carrier's business, and is regarded as a public duty.[13] A railroad company, therefore, has no right to discriminate by selling tickets to some persons and refusing them to others without a good excuse;[14] nor has it a right to refuse to sell a ticket to a point on its line which a railroad commission has ordered to be made a flag station,[15] except that it may refuse to sell a ticket for a train which does not stop at that point.[16]

Proper persons within the meaning of the general rule stated above, means persons whose status or condition apparently entitles them to be carried as passengers,[17] regardless of their character or conduct at other times,[18] unless the prior acts of

other grounds 170 N.Y.S 431, 183 App.Div 170 affirmed 127 N.E. 584, 228 N.Y. 475
10 C J. p 643 note 77.

Cannot receive and reject passengers at pleasure

Ky.—Brumfield v. Consolidated Coach Corporation, 40 S W 2d 356, 240 Ky. 1.

"From the beginning of our jurisprudence it has been recognized as the duty of a common carrier to accept and carry without discrimination those who offer themselves for transportation because of the dependence of the public and the demands of its welfare, presupposing, of course, the tender of the proper compensation by one to whom there could be no legal objection. It is, as well, the recognized duty of a carrier to transport its passengers safely to their destination. This extraordinary responsibility of private business, based upon considerations of public policy, has survived the great change in the conditions and circumstances under which they first arose where there was entire monopoly and extreme limitation of facilities. It has been adapted to the revoluntionary changes in the mode of transportation with some deviations required by the peculiar facilities. It is a long way from the sailing vessel to the palatial liner, from the ancient caravan to the modern railroad train, from the ox cart to the automobile, from the stage coach to the airplane. But after all, each is merely a form of transportation, is subject to the same general law controlling public service, and must be held, in general, to the same principles and responsibilities."—Casteel v. American Airways, 88 S.W. 2d 976, 979, 261 Ky. 818.

Historical development of rule

Ky.—Casteel v. American Airways, 88 S W.2d 976, 216 Ky. 818.

Private carrier is not bound to carry unless he makes a special agreement to do so.—Haddad v Griffin, 142 N.E 74, 247 Mass. 369.

Duty to receive and transport passengers in palace or sleeping cars see infra §§ 907, 908

Receiving and taking up passengers see infra § 644.

10. Ala.—Birmingham R, Light, etc., Co. v. Anderson, 57 So 103, 3 Ala App. 424.

Ky.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1

N.Y.—Anderson v. Fidelity & Casualty Co of New York, 166 N.Y.S. 640, 100 Misc. 411, modified on other grounds 170 N Y.S. 431, 183 App. Div. 170, affirmed 127 N.E. 584, 228 N.Y. 475.

At common law, inability of a carrier for want of room to carry a passenger in the vehicle used in the business of the carrier was a justification of the carrier in refusing to transport the proposed passenger and excused it from liability therefor.—Brumfield v. Consolidated Coach Corporation, 40 S W 2d 356, 240 Ky. 1.

Seats occupied or contracted for

A carrier, in case seats in a bus are occupied or contracted for by other passengers, in accordance with reasonable rules and regulations governing the business, is justified in refusing to accept a prospective passenger.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.

Accommodations and facilities during transit see infra § 645.

11. Ky.—Brumfield v. Consolidated Coach Corporation, supra.

N.Y.—Anderson v. Fidelity & Casualty Co. of New York, 166 N.Y.S. 640, 100 Misc. 411, modified on other grounds 170 N Y S. 431, 183 App Div. 170, affirmed 127 N E 584, 228 N.Y 475

10 C J. p 643 notes 78, 79.

Where train delayed by rain

A railroad, whose trains from station at which plaintiff purchased ticket were delayed by heavy rains, refusing to give plaintiff transportation in exchange for his ticket, such as was given through passengers, is not guilty of an unjust discrimination.—Ft. Worth & D. C. Ry Co. v. Frazier, Tex.Civ App, 191 S W 808.

12. Tex.—Ft. Worth & D C. Ry. Co. v Frazier, supra

10 C.J. p 644 note 80.

Construction of statute

A statute defining and prohibiting unjust discrimination by railroads with respect to services rendered, as affecting passengers is to be construed strictly and any doubt resolved in favor of the railroad.—Ft Worth & D. C. Ry. Co. v Frazier, Tex Civ.App, 191 S.W. 808.

Declaratory of common law

A statute denouncing unjust discrimination with respect to railroad's services, as respects passengers is declaratory of the common law, under which it is an unjust discrimination for a common carrier "to make or give any undue or unreasonable preference or advantage to any particular person," etc.—Ft. Worth & D. C Ry Co. v. Frazier, Tex Civ. App., 191 S.W. 808.

Negligent delay not discrimination

A statute declaring it an unjust discrimination for any railroad to give any unreasonable preference to any particular person, or to subject any traffic to an unreasonable delay, contemplates a delay caused by unjust discrimination, and not a merely negligent delay—Ft. Worth & D C. Ry. Co. v. Frazier, Tex Civ App., 191 S.W. 808.

13. N J.—Delaware, etc, R. Co v Trautwein, 19 A. 178, 52 N J Law 169, 19 Am.S.R. 442, 7 L R.A. 435.

N.C.—McNeill v. Durham, etc., R Co., 47 S.E. 765, 135 N C. 682, 67 L R.A 227, allowing rehearing 44 S.E. 34, 132 N.C. 510, 95 Am S R 641, 67 L.R.A. 227.

10 C.J. p 644 note 81.

14. Ind.—Indianapolis, etc., R Co v. Rinard, 46 Ind. 293.

N.J.—State v. Delaware, etc, R Co 2 A 803, 48 N.J.Law 55, 57 Am R 543.

15. Ga.—Georgia R., etc., Co. v Greer, 66 S E. 961, 7 Ga.App 292.

16. Ga.—Georgia R., etc., Co. v. Greer, supra

10 C J. p 644 note 84.

17. Ky.—Bogard v. Illinois Cent R Co, 139 S.W. 855, 144 Ky. 649, 36 L R A,N.S., 337.

Mass.—Gerber v New York Cent R R, 192 N.E. 837, 288 Mass 318

Mich.—Meisner v. Detroit, etc, Ferry Co, 118 N.W. 14, 154 Mich 545, 139 Am.S R. 493, 19 L.R.A,N S, 872.

18. Ky.—Reasor v. Paducah, etc., Ferry Co, 153 S W. 222, 152 Ky 220, 43 L.R.A.,N S., 820.

10 C J p 644 note 86.

misconduct have been such as to give rise to a fear of their repetition.[19]

Discrimination on account of race or color. The obligation imposed by law on carriers of passengers to receive for carriage all properly behaved and otherwise unobjectionable persons that may apply and that have complied with all reasonable precedent regulations precludes the carrier from refusing an intended passenger on account of race or color.[20]

Private carrier. The duty resting on a common carrier to receive all who apply for passage does not rest on a special or private carrier.[21]

b. What Persons May Be Refused Transportation

A carrier may refuse to carry as passengers persons who refuse to comply with its reasonable regulations, or who are likely to become obnoxious or dangerous to other passengers or interfere with the safe and convenient conduct of the carrier's business.

The duty to serve the public without discrimination does not require a carrier to accept as passengers any and every one,[22] and does not prevent it from making and enforcing reasonable regulations so as to exclude from trains or other vehicles of transportation persons who, by reason of bad character, or indecent conduct, or otherwise, are likely to render themselves obnoxious or dangerous to other passengers, or to interfere with the safe and convenient conduct of the carrier's business,[23] or persons who refuse or fail to comply with the carrier's reasonable rules and regulations.[24]

Intoxicated persons. A carrier of passengers is not bound to afford accommodations to persons, at least not without an attendant, who are so intoxicated as to affect their conduct or to render them unable to care for themselves.[25] Where, however, they are only slightly intoxicated, and show no signs that they will not conduct themselves properly or take care of themselves, they cannot be refused transportation.[26]

Persons infected with contagious diseases. A carrier of passengers is not under obligation to carry persons infected with contagious diseases whose presence would endanger the health of other passengers.[27]

Sick, feeble, infirm, and insane persons; necessity of attendant. While persons who are ill or afflicted have a right to enter and travel on the conveyances of a common carrier of passengers, nevertheless the carrier is not bound to accept as a passenger, without an attendant, one who, because of physical or mental disability, is unable to take care of himself, or is liable to require extra attention from the carrier or the passengers.[28] The rule, however, cannot be too rigorously enforced, and its application has been denied where the passenger has an attendant or has made provision for his own care;[29] and, where a person seemingly disabled is in fact able to travel alone without requiring extra care or attention, and this fact is known to the carrier, it is bound to carry him.[30] Thus, a carrier cannot absolutely refuse to transport an insane person, but may insist that he be properly attended and sufficiently restrained,[31] and may even refuse to receive an adjudged lunatic who is violent at the

19. Ky.—Louisville, etc., R. Co. v. McNally, 105 S.W. 124, 31 Ky.L. 1257.
10 C.J. p 644 note 87.

20. Ky.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.
10 C.J. p 646 note 5.
Separate accommodations for races see infra § 645

21. Wash.—Lewis v. Bertero, 77 P. 2d 786.

22. Ill.—Garlinski v. Chicago City Ry. Co., 257 Ill.App. 414

23. Ky.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.
10 C.J. p 644 note 89.
Ejection of persons objectionable as passengers see infra § 808.
Rules and regulations of carrier in general see infra §§ 570–577.

24. Tenn.—Southern R. Co. v. McNabb, 169 S.W. 757, 130 Tenn. 197, L.R.A.1915B 761.
10 C.J. p 645 note 90.
Ejection for failure or refusal to comply with regulations see infra § 819.

25. Mo.—Abernathy v. Missouri Pac. R. Co., App., 217 S.W. 568.
10 C.J. p 645 note 91.
Ejection of intoxicated passenger see infra § 808.

26. Mo.—Abernathy v. Missouri Pac. R. Co., App., 217 S.W. 568
10 C.J. p 645 note 92.

This entire paragraph, as stated in Corpus Juris, has received judicial approval in Abernathy v. Missouri Pac. R. Co., Mo.App., 217 S.W. 568, 570.

27. Ky.—Casteel v. American Airways, 88 S.W.2d 976, 261 Ky. 818.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.
10 C.J. p 645 note 93.

28. Ark.—Yazoo & M. V. R. Co. v. Littleton, 5 S.W.2d 930, 177 Ark. 199
Ky.—Casteel v. American Airways, 88 S.W.2d 976, 261 Ky. 818.
Miss.—Yazoo & M. V. R. Co. v. O'Keefe, 88 So. 1, 125 Miss. 536.
10 C.J. p 645 note 94.

Child of tender years
A carrier of passengers is not required to accept, unattended, a child of tender years needing special attention.—Yazoo & M. V. R. Co. v. O'Keefe, 88 So. 1, 125 Miss. 536.

Mental incompetent
A carrier is not required to accept as a passenger one without an attendant who is mentally incapable of caring for himself.—Chicago, R. I. & G. Ry. Co. v. Sears, Tex.Com.App., 210 S.W. 684, reversing, Civ.App., 155 S.W. 1003.

29. Ky.—Casteel v. American Airways, 88 S.W.2d 976, 261 Ky. 818.

30. Miss.—Illinois Cent. R. Co. v. Smith, 37 So. 643, 85 Miss. 349, 107 Am.S.R. 293, 70 L.R.A. 642.
Tenn.—Hogan v. Nashville Interurban R. Co., 174 S.W. 1118, 131 Tenn. 244, L.R.A.1915C 788, Ann. Cas.1916C 1162.
10 C.J. p 646 note 95.

31. Ala.—Hines v. Minard, 94 So. 302, 208 Ala. 176.
10 C.J. p 646 note 96.

Where insane person accompanied by attendant offered herself as a

time, although he is in the charge of attendants.[32] A blind person otherwise qualified cannot be refused passage on that ground alone,[33] but the carrier may insist that he be accompanied by a competent attendant,[34] unless it has reasonable grounds to believe that he can travel alone.[35]

Persons soliciting business in conflict or competition with carrier. The carrier may exclude a person who wishes to travel on its line for the purpose of soliciting business in conflict or competition with that in which the carrier is engaged, and may refuse transportation to such person, although he is willing to pay the usual fare charged to others.[36] A competitor, however, as part of the general public, is entitled to transportation where such competition is not conducted on the trains or stations of the carrier.[37]

Nonunion workingmen; danger of attack. A carrier may not exclude from its passenger cars nonunion workingmen, on the ground that a mob of strikers may board the train and injure other passengers.[38]

Waiver of grounds for refusal. Where at any time there is reasonable ground for refusing to receive and to carry passengers applying for transportation, the carrier should then insist on such ground, if desirous of avoiding responsibility; if it does not do so, and receives the passengers, their baggage, and other property, its liability will be the same as though no ground for refusal ever existed;[39] and, moreover, it may contract specially to carry such persons.[40]

§ 539. On Freight and Special Trains or Cars

A railroad, generally, is not required to carry passengers on its freight or special trains or cars, unless it is required to do so by statute or custom.

Except where a railroad company is required by statute to transport passengers on freight trains,[41] generally speaking, it has the right to refuse to carry passengers on its freight trains,[42] or, if it does receive them, to make such reasonable regulations as to the precedent purchase of tickets, or other conditions, as it may see fit.[43] Where, however, a company is accustomed to carry passengers on such trains, its duty, as a common carrier, to receive and to carry such persons as offer themselves is of the same character as in the case of its regular passenger trains.[44] Even if the company does not regularly carry passengers on its freight trains, the acceptance of fare by the conductor from one who has entered the train, or the sale of a ticket by an agent who assures the passenger that he can travel on such train, although there may be a regulation of the company prohibiting such travel, will impose on the company the customary liabilities of carriers of passengers.[45]

Special trains or cars. A carrier is not bound to receive or transport passengers on special trains or cars running for the particular purposes of the carrier, and not for the convenience of the traveling public.[46]

§ 540. Remedy for Refusal of Transportation

a. In general
b. Damages

passenger, and showed no evidence of doing violence, it is the carrier's duty to accept and carry her as a passenger, as long as she shows no evidence of becoming violent.—Hines v. Minard, 94 So. 302, 208 Ala. 176.

32. Ga.—Owens v. Macon, etc., R. Co., 46 S.E. 87, 119 Ga. 230, 63 L.R.A. 946.
10 C.J. p. 646 note 97.

33. Mich.—Wilson v. Detroit United R. Co., 132 N.W. 762, 167 Mich. 107, 118.
Miss.—Zackery v. Mobile, etc., R. Co., 21 So. 246, 74 Miss. 520, 60 Am.S.R. 529, 36 L.R.A. 546, 23 So. 434, 75 Miss. 746, 65 Am.S.R. 617, 41 L.R.A. 385.

34. Colo.—Denver, etc., R. Co. v. Derry, 108 P. 172, 47 Colo. 584, 27 L.R.A.,N.S., 761.
10 C.J. p. 646 note 99.

35. Miss.—Illinois Cent. R. Co. v. Smith, 37 So. 643, 85 Miss. 349, 107 Am.S.R. 293, 70 L.R.A. 642.
10 C.J. p. 646 note 1.

36. U.S.—Barney v. D. R. Martin, C.C.N.Y., 2 F.Cas.No.1,030, 11 Blatchf. 233.—Jencks v. Coleman, C.C.R.I., 13 F.Cas.No.7,258, 2 Sumn. 221.
N.Y.—Barney v. Oyster Bay, etc., Steamboat Co., 67 N.Y. 301, 23 Am.R. 115, affirming 2 Thomps. & C. 598.

37. La.—Ford v. East Louisiana R. Co., 34 So. 585, 110 La. 414.
10 C.J. p. 646 note 3.

38. Ill.—Chicago, etc., R. Co. v. Pillsbury, 8 N.E. 803.

39. U.S.—Hannibal & St. J. R. Co. v. Swift, Mo., 12 Wall. 262, 20 L.Ed. 423.
10 C.J. p. 646 note 6.
Acceptance by carrier generally see infra § 561.

40. Miss.—Yazoo & M. V. R. Co. v. O'Keefe, 88 So. 1, 125 Miss. 536.
Tex.—Chicago, R. I. & G. Ry. Co. v. Sears, Com.App., 210 S.W. 684, reversing, Civ.App., 155 S.W. 1003.
Special contracts in general see infra §§ 615–621.

41. Kan.—Jones v. Atchison, etc., R. Co., 157 P. 399, 98 Kan. 133.
10 C.J. p. 647 note 7.

42. Mo.—Whitehead v. St. Louis, etc., R. Co., 11 S.W. 751, 99 Mo. 263, 6 L.R.A. 409.
10 C.J. p. 647 note 8.
Status of persons riding on freight trains generally see infra § 552.

43. Mich.—Greenfield v. Detroit, etc., R. Co., 95 N.W. 546, 133 Mich. 557.
Requiring ticket or permit on freight train generally see infra § 606.

44. Mo.—Whitehead v. St. Louis, etc., R. Co., 11 S.W. 751, 99 Mo. 263, 6 L.R.A. 409.
10 C.J. p. 647 note 10.

45. Kan.—Kansas Pac. R. Co. v. Kessler, 18 Kan. 523.

46. Ind.—Cleveland, etc., R. Co. v. Wade, 48 N.E. 12, 18 Ind.App. 346.
10 C.J. p. 647 note 12.

a. In General

The remedy of a person wrongfully refused carriage on the vehicle of a public or common carrier of passengers is an action for damages.

The remedy of one who is wrongfully refused carriage on the vehicle of a public carrier of passengers is an action for damages,[47] and in some jurisdictions this remedy is expressly prescribed by statute.[48] An agent of an intending passenger cannot complain of a carrier's refusal to render service, as the right to such service is in the intending passenger.[49]

Jurisdiction and venue. Under a statute providing that in all cases where any person, firm, or corporation shall commit trespass, or do anything for which an action for damages lies, or where any corporation shall fail to do anything for which an action for damages lies, such person, firm, or corporation may be sued in the jurisdiction where such damage is done or trespass is committed, or at the domicile of such person, firm, or corporation, an action against a carrier for refusal to transport may be brought in the jurisdiction where such refusal occurred, and does not necessarily mean the jurisdiction in which the party injured actually was at the time he was injured.[50]

Pleading. In declaring against a carrier for refusing to carry, plaintiff must aver that he offered or was ready and willing to pay fare,[51] as well as other facts necessary to constitute his cause of action.[52]

Evidence. The burden is on the carrier to justify its refusal to accept as passengers those who properly apply by showing the existence of the special facts warranting such refusal.[53] The admissibility of evidence is governed by the ordinary rules regulating admissibility of evidence in civil actions.[54]

Trial. The reasonableness or unreasonableness of a refusal to carry a particular person is ordinarily a question for the jury;[55] and where there is evidence to support the allegations of the complaint it is proper to refuse a nonsuit.[56] The verdict and findings in such an action are governed by the rules applying to verdicts and findings in civil actions generally.[57]

b. Damages

The measure of damages is the actual loss or damage sustained by the intending passenger, including damages for mental suffering and humiliation, and exemplary or punitive damages where the carrier has acted willfully or with violence or bad faith.

General or special damages may be recovered for a carrier's refusal to carry a person as a passenger,[58] and such damages consist in compensation for the actual loss or damage sustained by the intending passenger; this may include, speaking generally, the expense of reaching his destination by

47. Ala.—Louisville & N. R. Co. v Frizzle, 108 So. 615, 21 Ala.App 354, certiorari denied 108 So. 616, 214 Ala. 688
10 C.J. p 647 note 13.

Law applicable
In absence of statute, common law must be looked to for applicable law, with respect to damages against carrier for refusing to accept passenger.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.

Person qualified to purchase ticket
A carrier refusing to receive, as passenger, a person qualified to purchase a ticket, without a sufficient excuse, is liable to an action for damages.—Brumfield v Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1

Right enforced by action and not by vi et armis
Out of the carrier's duty to carry springs a license to every person, having no notice to keep off, to go on the carrier's conveyance; but with such notice, the license is withdrawn, and, whether rightful or wrongful, such right cannot be enforced vi et armis; the remedy of a person so aggrieved is by action.—North Chicago St. R Co. v. Olds, 40 Ill.App 421.—10 C.J p 647 note 15.

48. Tex.—Paris, etc., R. Co v. Robinson, 114 S.W. 658, 53 Tex.Civ. App 12.
10 C.J p 647 note 14.

49. U.S.—Atchison, etc., R. Co. v Tiedt, Ill., 196 F. 348, 116 C.C.A. 168, 40 L.R.A.,N.S., 848.

50. La.—O'Brien v. Delta Air Corporation, 178 So. 489, 188 La. 911.

Where mother made contract in California for carriage of minor son from Shreveport, La., to California in one of corporation's regular passenger planes, and corporate agents in Shreveport refused to carry son as agreed, mother under statute could maintain action for damages in Shreveport instead of place of corporation's domicile, notwithstanding mother was residing in California at time of breach of duty, since place where corporation was to begin to carry out contract and where breach occurred was Shreveport, which fixed venue.—O'Brien v. Delta Air Corporation, 178 So. 489, 188 La. 911.

51. Mich.—Day v. Owen, 5 Mich. 520, 72 Am.D. 62.

52. S.C.—Kibler v. Southern R. Co., 41 S.E. 977, 64 S.C. 242.
10 C.J. p 648 note 18.

53. Ark.—St. Louis, etc., R. Co. v Laurence, 153 S.W. 799, 106 Ark. 544

54. Ky.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.
10 C.J. p 648 note 20.

Oral rule of bus company, with respect to the reservations of seats, is admissible in an action for damages for a refusal to accept a passenger.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1

55. Miss.—Illinois Cent. R. Co. v Smith, 37 So. 643, 85 Miss. 349, 107 Am.S.R. 293, 70 L.R.A. 642.
10 C.J. p 648 note 21.

56. S.C.—Kibler v. Southern R. Co., 41 S.E. 977, 64 S.C. 242.

57. Ark.—St. Louis, etc., R. Co. v. Dare, 138 S.W. 1009, 99 Ark. 486.
10 C.J. p 648 note 23.

58. Ga.—Georgia R., etc., Co. v. Greer, 66 S.E. 961, 7 Ga.App. 292.

another means, hotel expenses incurred by the delay, and any actual loss sustained in matters of business as the direct and necessary consequence of the carrier's failure to carry him,[59] and may also include the cost of the passenger's ticket,[60] on his offering to surrender it,[61] and something for the indignity, vexation, and disgrace to which the person has been subjected.[62]

Punitive or exemplary damages may be recovered in addition to actual damages, where the carrier's refusal is willful or accompanied by violence or bad faith;[63] but not where the element of willfulness, wantonness, or bad faith is lacking.[64] In some jurisdictions a railroad company can be held liable for exemplary damages only where it has ratified the malicious acts of its agents in failing or refusing to carry a passenger.[65]

§ 541. Stealing Ride as Criminal Offense

Stealing or attempting to steal a ride on a carrier's conveyance, under some statutes, constitutes a penal offense.

Statutes varying somewhat in their provisions have been enacted in some states, the effect of which is to make it an indictable offense to steal, or to attempt to steal, rides on the cars of a railroad company,[66] such as by knowingly and willfully proceeding on a train beyond the point to which he had paid his fare, with the intent to avoid the payment of the additional fare.[67] It is within the power of the legislature to enact statutes of this character as a measure conducive to the public safety, and this is so whether or not the ride so "stolen" is the subject matter of larceny.[68] One who openly enters and remains in a car with no intent to pay his fare is not guilty of attempting to steal a ride.[69] On the other hand, if one conceals himself on a train or in a car to avoid paying his fare, he is guilty of attempting to steal a ride if removed before the journey begins,[70] and of actually stealing a ride if he remains in the car until after the journey has commenced;[71] and it is no defense that he was un-

59. Ala.—Louisville & N. R. Co. v Frizzle, 108 So 615, 21 Ala.App 354, certiorari denied 108 So. 616, 214 Ala. 688.
Ind.—Pittsburgh, C., C & St. L. Ry Co. v. Friend, 143 N.E. 879, 194 Ind. 579, overruling rehearing 142 N.E. 709, 194 Ind. 579.
10 C.J. p 648 note 26

Additional cost and expense may be recovered by a wrongfully rejected passenger.—Louisville & N. R. Co. v. Frizzle, 108 So. 615, 21 Ala. App. 354, certiorari denied 108 So. 616, 214 Ala. 688.

Damages held not excessive for wrongful rejection of bridal couple in presence of bridal party from train, requiring them to take later train.—Louisville & N. R. Co. v. Frizzle, 108 So. 615, 21 Ala.App. 354, certiorari denied 108 So. 616, 214 Ala. 688.
Damages for:
Breach of contract of transportation see infra §§ 669-675
Wrongful ejection see infra §§ 846-854.

60. Ark.—St. Louis, etc., R. Co. v. Dare, 138 S.W. 1009, 99 Ark. 486.
Ky.—Chesapeake, etc., R. Co. v Gatewood, 159 S.W. 660, 155 Ky 102.
S.C.—Caldwell v Atlantic Coast Line R. Co., 55 S.E. 131, 75 S.C. 74.

61. Ark.—St. Louis, etc., R. Co. v. Dare, 138 S.W. 1009, 99 Ark. 486.

62. Ala.—Louisville & N R. Co v. Frizzle, 108 So. 615, 21 Ala.App. 354, certiorari denied 108 So. 616, 214 Ala. 688.
10 C.J. p 648 note 29.

63. S.C.—Vlasservitch v. Augusta, etc., R Co, 67 S.E 306, 85 S.C. 291
10 C.J. p 648 note 30
Exemplary damages for:
Breach of contract of transportation see infra § 674.
Wrongful ejection see infra § 853

64. Ky.—Chesapeake, etc., R. Co v. Gatewood, 159 S.W. 660, 155 Ky 102.
10 C.J. p 649 note 31.

65. Tex.—Townsend v. Texas, etc., R. Co., 88 S.W. 302, 40 Tex.Civ App. 71.

66. Tex.—Daugherty v. State, 56 S.W. 620, 41 Tex.Cr. 661.
10 C.J. p 642 note 66.

Indictment
The indictment should allege the name of the person in charge of the train or that his name could not by reasonable diligence be ascertained by the grand jury.—Daugherty v State, 56 S.W. 620, 41 Tex.Cr. 661—10 C.J. p 642 note 66 [a].

Proof
Under a statute making it an offense to trespass on railroad trains, it is necessary to prove a trespass contrary to the rules of the railroad company, and an intention to ride without paying a fare.—Burns v. Jagmetty, 90 A. 1050, 86 N.J.Law 23—10 C.J. p 642 note 66 [b].

67. N.J.—Mallery v. Erie R. Co., 92 A. 371, 86 N.J Law 210

68. Ga.—Pressley v. State, 45 S.E. 395, 118 Ga. 315.

69. Ga.—Mack v. State, 46 S.E. 437, 119 Ga. 352.

70. Ga.—Mack v. State, supra.

71. Ga.—Brazzell v. State, 46 S.E. 837, 119 Ga. 559.
10 C.J. p 643 note 70.

Gist of offense is the fraudulent concealing of one's self in the car of a railroad company for the purpose of stealing a ride and to escape payment of fare.—Dixon v. State, 107 S.E 777, 27 Ga.App. 228.

Sufficiency of pleading
An accusation charging that defendant fraudulently concealed himself in the car of a railroad company to avoid payment of fare, and stole a ride on such train while so concealed without paying fare therefor, sufficiently and substantially charged the substance and spirit of the offense, and was not subject to a demurrer on the ground that it failed to state that defendant concealed himself from the conductor or train authorities.—Dixon v. State, 107 S.E. 777, 27 Ga.App. 228.

Sufficiency of evidence
Evidence showing that defendant rode on a train in a box car without paying fare, but not showing that he was concealed, or was in the box car for the purpose of stealing a ride or to escape paying his fare, or that he concealed himself from the train authorities or was riding on the train without their knowledge or consent, or that they had anything to do with his arrest or prosecution, and not even showing with certainty that the car belonged to the railroad company rather than a circus, of which defendant was an employee, would not support a conviction.—Dixon v. State, 107 S.E. 777, 27 Ga.App. 228.

der the influence of liquor.[72] One who leaves a car without paying his fare before reaching the transfer point and boards a car on the continuing line where he pays his fare is guilty of an evasion of fare within a statute prohibiting persons from leaving cars without having paid the fare for the distance traveled.[73]

An ordinance fixing a rate for hire of hacks, etc., and imposing a fine or imprisonment for refusal to pay such rate, is within the legislative authority of a municipality authorized to regulate such conveyances.[74]

§ 542. Boarding Car While in Motion

Boarding a car while in motion, unauthorizedly or with the intent to obtain transportation surreptitiously, is an offense under some statutes.

One who steps on a car while in motion, in good faith intending to become a passenger, is not guilty of violating a statute making it a misdemeanor for a person to get on a train while in motion to obtain transportation thereon as a passenger, as such statute applies only to a person seeking to board a car or train unauthorizedly, or intending surreptitiously to obtain transportation as a passenger.[75]

§ 543. Other Offenses

Under some enactments it is an offense for a passenger to hang from the outside of a street car; or for a person to ride on a transfer or pass issued to another.

Under some enactments it is an offense for a passenger to hang from the outside of a street car;[76] or for a person to ride on a railroad pass issued to another.[77] Under an ordinance making the use of a street car transfer by a person other than the one to whom it was issued an offense, payment of a street car fare with a transfer issued to another constitutes a "use" in violation of such an ordinance.[78]

2. Who Are Passengers

§ 544. In General

A passenger, in a legal sense, generally, is one who travels in a public conveyance by virtue of a contract, express or implied, with the carrier, as to the payment of fare or that which is accepted as equivalent therefor.

As stated in Corpus Juris, which statement has been approved in subsequent decisions,[79] it is difficult to lay down a comprehensive definition of the word "passenger," or to exhaust in a single statement all the possible circumstances under which the relation of carrier and passenger may exist:[80] and, although a definition often given is that a passen-

72. Ga.—Brazzell v. State, 46 S.E 837, 119 Ga. 559.

73. Mass.—Com. v. Jones, 54 N.E. 869, 174 Mass. 401.
10 C.J p 643 note 72.
Fraud or evasion of fare generally see supra § 560

74. Ala.—Bray v. State, 37 So. 250, 140 Ala. 172.

75. N.Y.—East v. Brooklyn Heights R. Co., 88 N.E. 751, 195 N.Y. 409, 23 L.R.A.,N.S., 513

76. Ind.—Frank Bird Transfer Co v. Morrow, 72 N.E. 189, 36 Ind. App. 305.

Ordinance held inapplicable to summer cars

An ordinance making it unlawful for any person to hang from the outside of a street car, which ordinance was passed when the only cars in operation were drawn by horses, is inapplicable to summer cars subsequently operated by electricity, arranged with seats running crosswise, with a footboard running lengthwise of the car, used as a step or platform for the accommodation of passengers.—Frank Bird Transfer Co. v. Morrow, 72 N.E. 189, 36 Ind.App. 305.

77. Tex.—Leach v. State, 189 S.W 733, 80 Tex.Cr. 376.

Evidence

(1) In a prosecution for riding on the railroad pass of another, testimony of the railroad's auditor, that defendant had previously ridden on the pass, is admissible on the question of identity to show the number of times witness had been with defendant and his opportunity for recognition, and should be limited to the purpose for which it is introduced.—Leach v. State, 189 S.W. 733, 80 Tex.Cr. 376.

(2) The auditor may also testify that he had seen defendant previously to the offense, if defendant showed that the auditor did not know him.—Leach v. State, supra.

(3) Testimony of the auditor, that the pass was used on certain trips and certain dates other than that charged, is inadmissible, since if defendant did ride on the pass on such trips on such dates, it would not serve to identify him in relation to the offense charged.—Leach v. State, supra.

Using pass forbidden by law as offense see infra § 623.

78. Minn.—City of St. Paul v. Robinson, 152 N.W. 777, 129 Minn. 383.

Actual attempt to use transfer is necessary to constitute the offense, and hence the offense is not committed merely by the purchase of the transfer.—City of Chicago v. Taub, 150 Ill.App. 611.

Evidence held sufficient to sustain conviction

Minn.—City of St. Paul v. Robinson, 152 N.W. 777, 129 Minn. 383.

Penalty for unlawfully selling or buying transfer see infra § 650

79. Ky.—Chesapeake & O. Ry. Co. v. Mollett, 270 S.W. 26, 27, 207 Ky. 745.
Mo.—State v. Rector, 40 S.W.2d 639, 641, 328 Mo. 669.
N.J.—McCarron v. Erie R. Co., Sup., 159 A. 807.

80. Iowa.—Puckett v. Pailthorpe, 223 N.W. 254, 207 Iowa 613—Weber v. Chicago, etc., R. Co., 151 N.W. 852, 175 Iowa 358, L.R.A.1918A 626
Neb.—Woolsey v. Chicago, B. & Q R. Co., 58 N.W. 444, 39 Neb 798, 25 L.R.A. 79.
10 C.J. p 610 note 6.

"It is not easy to construct a definition of the term 'passenger,' which, on the one hand, will accurately include all persons entitled to the rights of passengers, and, on the other, exclude those who are not."—Rawlings v. Wabash R. Co., 71 S.W. 534, 97 Mo.App. 515.

"Just what constitutes the relationship of carrier and passenger

ger, in a legal sense, is one who travels in some public conveyance by virtue of a contract expressed or implied, with the carrier, as to the payment of fare or that which is accepted as equivalent therefor,[81] this definition, like some others which have been made, does not comprehend all possible situations for, ordinarily, every person not an employee, who is carried by the express or implied consent of the carrier on a conveyance usually employed in the carriage of passengers, is presumed to be lawfully on it as a passenger.[82]

One riding in a private car may be considered as a passenger of the railroad company to whose train the car is attached;[83] but this does not apply to one riding in a private car which is moved under a contract by which the employees of the railway company become special employees and act under the orders and directions of the person owning the car.[84]

Passenger in private vehicle. One riding in a private vehicle, such as a motor vehicle, driven by the owner or his chauffeur, is a passenger for hire where he renders compensation therefor, either by a pecuniary benefit to the motorist, or by a non-pecuniary benefit directly related to the transportation.[85]

has been a subject of much discussion by the courts in recent years, and the conclusions reached are not entirely harmonious."—Williams v Union Switch & Signal Co., 158 N.W. 901, 902, 37 S.D. 423.

81. Ala.—Continental Life Ins. Co v Newman, 123 So. 92, 23 Ala.App 203, reversed on other grounds 123 So. 93, 219 Ala. 311.
Iowa.—Puckett v. Pailthorpe, 223 N. W. 254, 207 Iowa 613—Fitzgibbon v. Chicago & N. W. Ry. Co., 79 N W. 477 108 Iowa 614
Pa.—Berkebile v. Johnstown Traction Co., 99 A. 371, 255 Pa. 310.
10 C.J. p 610 note 7.

Similar definitions

(1) "One who, for hire, has taken a place in a public conveyance for the purpose of being transported from one place to another."
Ill.—De La Vergne Refrigerating Mach. Co. v. McLeroth, 60 Ill.App 529, 534.
Ohio.—Hogans v. Columbus, 14 Ohio N.P.,N.S., 33, 38.

(2) "A person whom a railway, in the performance of its duty as a common carrier, has contracted to carry from one place to another place for a valuable consideration, or whom the railway, in the course of the performance of that contract, has received at its station, or in its car, or under its care."—Schepers v. Union Depot R. Co., 29 S.W. 712, 713, 126 Mo. 665—10 C.J. p 610 note 7 [a] (3)

(3) "A person who undertakes, with the consent of the carrier, to travel in a conveyance provided by the latter, otherwise than in the service of the carrier as such."
Colo.—Denver, S. P. & P. Ry. Co. v. Pickard, 6 P. 149, 152, 8 Colo. 163.
Mo.—Berry v Missouri Pac. Ry. Co., 25 S.W. 229, 233, 124 Mo. 223.
10 C.J. p 610 note 7 [a] (1).

(4) "One who enters the vehicle of a carrier with the intention of paying in money the usual fare for his transportation, or is supplied with a ticket or pass entitling him to ride to a given point."—Holt v Hannibal & St. J. R. Co., 74 S.W. 631, 633, 174 Mo. 524.
10 C.J. p 610 note 7 [a] (4).

In general terms

(1) "A passenger may be said - - - to be any person whom the carrier is, as carrier, transporting."—Norfolk & W. R. Co. v. Tanner, 41 S.E. 721, 722, 100 Va. 379.

(2) A passenger is "a person who travels in a public conveyance, as a railway car or steamship; one carried for fare by a common carrier."—State v. Rector, 40 S.W.2d 639, 641, 328 Mo. 669.

82. Ga.—Georgia, etc., R. Co. v. Tapley, 87 S.E. 473, 144 Ga. 453, L.R.A.1916C 1020.
Iowa.—Puckett v. Pailthorpe, 223 N. W. 254, 207 Iowa 613.
Tex.—International-Great Northern R. Co v Lucas, Civ.App., 70 S.W. 2d 226, reversed on other grounds 99 S.W.2d 297, 128 Tex. 480, opinion corrected 100 S.W.2d 97, 128 Tex. 480.

Transporting contractor

Where a railroad company, under a contract with a grading contractor, is required to furnish transportation, such contractor is a passenger, although riding on a motor car.—International-Great Northern R. Co. v Lucas, Civ.App., 70 S.W.2d 226, reversed on other grounds 99 S.W.2d 297, 128 Tex. 480, opinion corrected 100 S.W.2d 97, 128 Tex. 480
Presumption as to the relation of carrier and passenger generally see infra § 764.

83. Pa.—Lackawanna, etc., R. Co. v. Chenewith, 52 Pa. 382, 91 Am. D. 168.
10 C.J. p 611 note 9.

84. U.S.—Clough v. Grand Trunk Western R. Co., Mich., 155 F. 81, 85 C.C.A. 1, 11 L.R.A.,N.S., 446
Employees of others carried under contract with carrier as passenger generally see infra § 547.

85. Cal.—Haney v. Takakura, 37 P. 2d 170, 2 Cal.App.2d 1, amended 38 P.2d 160, 2 Cal.App.2d 1.
Mass.—Woods v. Woods, 3 N.E.2d 837.
Va.—Poole v. Kelley, 173 S.E. 537, 162 Va. 279—Garrett v. Hammack, 173 S.E. 535, 162 Va. 42.
Wash.—Lewis v. Bertero, 77 P.2d 786.

Motorist's promise to pick up another in response to request by the latter's son, who stated he would "fix it up" with the motorist, is a contract to receive pay for carriage, notwithstanding no definite amount is stated, since the fair value of his services would be recoverable.—Blanchette v. Sargent, 173 A. 383, 87 N.H. 15.

Contribution to expenses of operation of motor vehicle, such as for gasoline, oil, and garage charges, does not constitute payment for transportation, so as to constitute the contributor a passenger while riding in the vehicle.—Olefsky v. Ludwig, 272 N.Y.S. 158, 242 App. Div. 637.

Occupant not passenger

An occupant of an automobile driven by the owner is not "passenger for hire" where he had not paid or expected to pay for transportation, and the owner had not received or contracted with occupant or others to receive pay for occupant's carriage.—Walker v. Lloyd, Mass., 4 N.E.2d 306.

Services

(1) One riding in another's automobile, driven by the owner, to city for purpose of assisting him in marketing oranges at his request is not a "guest," but a passenger "rendering compensation."—Haney v. Takakura, 37 P.2d 170, 2 Cal.App.2d 1, amended 38 P.2d 160, 2 Cal.App.2d 1.

(2) Where truck driver who contracted to transport plaintiff's goods asked plaintiff to ride along in order to direct him as to route, which plaintiff did, services rendered by plaintiff were sufficient consideration for contract of carriage.—Lerma v. Flores, 60 P.2d 546, 16 Cal.App.2d 128.

§ 545. Necessity of Contract

The relation of carrier and passenger is dependent on the existence of a contract of carriage, express or implied, between the carrier and the passenger.

The relation of carrier and passenger is dependent on the existence of a contract of carriage, express or implied, between the carrier and the passenger, made either by themselves[86] or by their respective agents.[87] It is the existence of such a contract which distinguishes a passenger from a licensee, a trespasser, or an employee of the carrier,[88] an employee of a sleeping car company,[89] and other persons riding in the carrier's vehicles.[90] A mere contract for future transportation does not of itself create the relation of carrier and passenger, where the person so contracting has not placed himself under the care of the carrier as passenger.[91]

§ 546. Carrier's Employees

A carrier's employee, who is on the carrier's premises, or is being transported on the carrier's vehicle in connection with his services as employee, is generally regarded as not being a passenger; but generally he is regarded as a passenger where he is being transported on such vehicle for his own pleasure or convenience. A passenger rendering casual service on a train does not lose his status as passenger.

It is evident that the liability of the carrier for injuries to passengers is different from that of an employer with reference to injuries to employees in its service.[92] Therefore, the rules of a carrier's liability as to passengers do not apply to employees in the operation of the cars or other vehicles in which passengers are being transported,[93] or to others in the employ of the company.[94] Employees of the carrier who are being carried back and forth to and from their work, whether on construction trains or passenger trains, or in other vehicles of the carrier, and although they have no connection with the operation of the train and are carried outside of the hours of employment for which they are paid, without the payment of fare, are generally not to be considered as passengers;[95] and this is

Transaction held not gratuitous

If object of transporting plaintiffs in automobile driven by automobile salesman was pecuniary profit to defendant, transaction was not "gratuitous," although defendant actually received no pecuniary benefit—Foley v. McDonald, 185 N.E. 926, 283 Mass. 96.

Use of garage as consideration

Relation of passenger for hire arises where passenger for consideration agreed to give motorist use of her garage, rent free, and motorist agreed to take passenger and her husband to ride on certain days as might be reasonably agreed on during motorist's use of garage.—Chooljian v Nahigian, 173 N.E. 511, 273 Mass. 396.

Fellow employee's car

A person who pays for transportation to and from the place of his employment in a fellow employee's automobile is a "passenger for hire."—Lewis v. Bertero, Wash., 77 P.2d 786.

86. U.S.—Fels v. East St. Louis & S. Ry. Co., C.C.A.Mo., 275 F. 881—Purple v Union Pac. R. Co., Kan., 114 F. 123, 51 C.C.A. 564, 57 L.R.A. 700
Ala.—Birmingham Electric Co. v Maze, 166 So. 50, 231 Ala. 539—Broyles v. Central of Georgia Ry. Co., 52 So. 81, 166 Ala. 616, 139 Am.S.R. 50.
Ga.—Payne v. Allen, 116 S.E. 640, 155 Ga. 54, reversing 110 S.E. 345, 28 Ga.App. 8, conformed to 116 S.E. 642, 30 Ga.App. 80.
Ill.—Todd v. Louisville & N. R. Co., 113 N.E. 95, 274 Ill. 201, L.R.A. 1916F 543.
Ky.—Bales v Louisville & N. R. Co., 200 S.W. 471, 179 Ky. 207.
Minn.—Roberts v. Northwest Airlines, 275 N.W. 410
Mo.—Banks v Kansas City Rys Co., 217 S.W. 488, 280 Mo. 227—Thomas v. St. Louis-San Francisco Ry. Co., App., 293 S.W. 1051.
Ohio—Hogans v. City of Columbus, 14 Ohio N.P.,N.S., 33.
Tex.—Lee v. Baker, Civ.App., 251 S.W. 580.
10 C.J. p 611 note 11.

This rule, as stated in Corpus Juris (1) Has been judicially approved.—Birmingham Electric Co v. Maze, 166 So. 50, 51, 231 Ala. 539

(2) The entire section, as stated in Corpus Juris, has received judicial approval.—Chesapeake & O. Ry. Co v. Mollett, 270 S.W. 26, 27, 207 Ky. 645.

It differs from contract in ordinary relations of parties to each other, in that it is a contract which a common carrier is not at liberty to decline to make, where the would-be passenger has brought himself within the requirements entitling him to ask of it the service of carriage, and he does in fact ask it.—Virginia Ry. & Power Co. v. Arnold, 92 S.E. 925, 121 Va. 204.

87. Tex.—Gulf, etc., R. Co. v. Wilson, 15 S.W. 280, 79 Tex. 371, 23 Am.S.R. 345, 11 L.R.A. 486.
10 C.J. p 611 note 12.

88. Ky.—Chesapeake & O. Ry. Co. v. Mollett, 270 S.W. 26, 27, 207 Ky. 645.
10 C.J. p 611 notes 13–15.
Carrier's employee as passenger generally see infra § 546.

89. D.C.—Hughson v. Richmond, etc., R. Co., 2 App.D.C., 98.
Employee of sleeping car company as passenger see infra § 547.

90. Minn.—Gradin v. St. Paul, etc., R. Co., 14 N.W. 881, 30 Minn. 217.

91. Conn.—Donovan v. Hartford St. R. Co., 32 A. 350, 65 Conn. 201, 29 L.R.A. 297

92. N.C.—Gardner v. U. S. Railroad Administration, 118 S.E. 848, 186 N.C. 64.
10 C.J. p 633 note 79.

93. Mass.—Gillshannon v. Stony Brook R. Corp., 10 Cush. 228

94. Tex.—Schaff v. Bourland, Civ. App., 266 S.W. 843.

Railroad guard hired for strike duty

Where railroad guard was hired for strike duty, and on pay roll as such, and after arriving at point where strike was in progress, and while going to waiting room to get instructions, told strike mob his business and what he was there for, he was not entitled to that high degree of care for his protection from mob required of public carrier for protection of its passengers.—Schaff v. Bourland, Tex.Civ.App., 266 S.W. 843.

95. U.S.—Maryland Dredging & Contracting Co v. State of Maryland, C.C.A.Md., 262 F. 11, modifying, D.C., State of Maryland v. Baltimore & O. R. Co., 254 F. 720.
Ga.—Tharp v. Central of Georgia Ry. Co., 121 S.E. 592, 31 Ga.App. 598.
Pa.—Knorr v. Central Railroad of New Jersey, 110 A. 797, 268 Pa. 172, certiorari denied Central R. Co. of New Jersey v. Knorr, 41 S.Ct. 15, 254 U.S. 644, 65 L.Ed. 454.

also true of an employee who voluntarily rides on a train to his work, without payment of fare, and without any arrangement in regard thereto with the company,[96] or who uses a vehicle of the company, on his private business, with the company's permission,[97] or of employees who borrow a car and engine without the company's consent for their own purpose.[98]

However, as it is customary to give free transportation, as an ordinary passenger, to employees as a part of the consideration for their services, it has been held that an employee so riding, not for the purpose of rendering any service, and not rendering any service on the train, or connected with any such service, but for his own pleasure or advantage, even though continuing all the while in a popular sense in the employment of the company, is a passenger,[99] as where the employee is given, in addition to his wages, tickets or passes which entitle him to ride to and from his work, he is, while riding on such tickets, a passenger to whom the carrier owes the same duty as to other passengers,[1] un-

S.D.—Williams v. Union Switch & Signal Co., 158 N.W. 901, 37 S.D. 423.
10 C.J. p 633 note 81.

"Rule may be stated in another way, which is that railroad employees while being transported over the road as an incident of, or in immediate connection with, their employment or as a part of their contract of service are not to be regarded as passengers, but as employees merely."—Bernard v. Michigan United Traction Co., 178 N.W. 43, 45, 210 Mich. 333.

Stop for personal business

In accepting and using free transportation to and from his residence and work, a railroad employee was not a passenger, but an employee, although he stopped for a short period on his way home to attend to personal business.—Knorr v. Central Railroad of New Jersey, 110 A. 797, 268 Pa. 172, certiorari denied Central R. Co. of New Jersey v. Knorr, 41 S. Ct. 15, 254 U.S. 644, 65 L.Ed. 454

96. Iowa.—Dodge v. Chicago Great Western R. Co., 146 N.W. 14, 164 Iowa 627.
10 C.J. p 633 note 82.

97. Mont.—Glover v. Chicago, M. & St. P. Ry. Co., 171 P. 278, 54 Mont. 446.

Using gasoline speeder

Where attitude of railroad company toward employees riding on railroad's gasoline speeders on their private business was, at most, one of permission, they are mere licensees, and it was not liable to employee so riding, injured by defect in speeder, on theory of his being passenger.—Glover v. Chicago, M. & St. P. Ry. Co., 171 P. 278, 54 Mont. 446.

98. U.S.—Chicago, etc., R. Co. v. Bryant, Minn., 65 F. 969, 13 C.C.A. 249.
10 C.J. p 633 note 83.

Entire paragraph of text preceding, as stated in Corpus Juris, has been approved in subsequent decisions.
Mo.—State v. Rector, 40 S.W.2d 639, 641, 328 Mo. 669.

N.C.—Gardner v. U. S. Railroad Administration, 118 S.E. 848, 849, 186 N.C. 64.

99. S.D.—Williams v. Union Switch & Signal Co., 158 N.W. 901, 37 S.D. 423
Tenn.—Nashville Ry. & Light Co. v. Overby, 223 S.W. 997, 143 Tenn. 581.
10 C.J. p 633 note 84.

"Great weight of authority . . . is to the effect that when the employé, either by virtue of his contract of employment or under a rule or custom of his employer, is accorded the same means and privileges of transportation over the lines of his employer as an ordinary passenger for hire, then, while riding upon his employer's cars at a time when, under his contract of employment, he is neither under the control of his employer nor obliged to perform any service for him, he is to be regarded as a passenger, and that, under such circumstances, it is immaterial that the employé be either going to or coming from his place of work"—Klinck v. Chicago City Ry. Co., 104 N.E. 669, 671, 262 Ill. 280, 52 L.R.A.,N.S., 76, Ann. Cas.1915B 177.

Employee of switch and signal company

Where the employer, a switch and signal company, installing electric signals for a railway, was transporting its servant on a gasoline rail car, not as part of his employment of cleaning out battery wells, but was transporting him to and from a boarding house operated by it, when he was injured through his gang foreman throwing on the brakes too sharply, such servant was a "passenger."—Williams v. Union Switch & Signal Co., 158 N.W. 901, 37 S.D. 423

"L" guard staying on train after duty

Where an elevated railway guard stayed on train after duty and for his own purpose, he was a passenger.—Pierson v. Interborough Rapid Transit Co., 172 N.Y.S. 492, 184 App. Div. 678, affirming 168 N.Y.S. 425, 102 Misc. 130, and dismissal denied 123 N.E. 885, 226 N.Y. 689, and affirmed 126 N.E. 920, 227 N.Y. 666.

One employed by railroad company to work on bridge under a contract whereby, in addition to specified wages, he is to have daily transportation from his home to the bridge and return, is not an employee of the company while being transported from his home, but a passenger.—McNulty v. Pennsylvania R. Co., 38 A. 524, 182 Pa. 479.

Street railway employee

(1) If, when the employee of a street railway was riding on its car, his time did not belong to the railway, and if his contract of service did not contemplate that he should ride on its car as a means of furthering its business, he was a passenger.
Mich.—Bernard v. Michigan United Traction Co., 178 N.W. 43, 210 Mich. 333
W.Va.—Harris v. City, etc., R. Co., 70 S.E. 859, 69 W.Va. 65, 50 L.R.A.,N.S., 706, Ann.Cas.1912D 59.

(2) A track foreman injured while being transported free of charge to his home after finishing his day's work as an employee of the street railway company, is a passenger, and entitled to recover as such.—Elmer v. Pittsburgh Rys. Co., 96 A. 1054, 251 Pa. 505

Transportation to different locality

Where railroad laborer was engaged to work in different locality and furnished transportation by railroad to destination, he was "passenger," as regards degree of care required in crossing tracks.—Brown v. Union Pac. R. Co., 290 P. 759, 76 Utah 475.

1. N.C.—Campbell v. American Fidelity & Casualty Co., 192 S.E. 906, 212 N.C. 65.
Pa.—Borden v. Lehigh Valley R. Co., 76 Pa.Super. 517.
10 C.J. p 634 note 85

Employee of electric company

While an operator of motors and rotaries for an electric company, by engaging with a railroad company to make a daily reading of the amount of electricity furnished to it, and to deliver a report thereof

less his pass expressly waives his right to claim compensation for injuries while being carried;[2] but as to this rule there is authority to the contrary.[3] An employee on a pay train by invitation to receive his wages is in the position of a passenger.[4]

Elevators. Employees in a building, such as a hotel or store, are not passengers while being carried to and from their work on an elevator owned and operated in such building by their employer;[5] but it has been held that a person being carried to the place of her work in an elevator before the time for her to begin work is a passenger and not a servant of the owner of the building.[6]

Where a passenger renders service as an employee, at the request of the servants of the carrier, and is injured while so engaged, it has been held that he is, with reference to such injury, to be deemed an employee and not a passenger, having gone outside of his relation as passenger in performing the service and having incurred dangers other than those involved in that relation;[7] but a passenger will not, by the performance of a casual service on a train or car cease to be a passenger and become an employee of the railroad,[8] particularly after he has returned to his position as passenger.[9]

§ 547. Employees of Others Carried under Contract with Carrier

Employees, other than employees of the carrier, who are engaged in occupations which involve their transportation on passenger trains and who are so transported under special contracts between their employers and the carrier are generally entitled to the rights of passengers.

Persons who, as the employees of others, and not of the carrier, are engaged in occupations which involve their transportation on passenger trains, and who are so transported under special contracts between their employers and the carrier, are generally entitled to the rights of passengers.[10] One is not deprived of the protection due a passenger when carried on a passenger train by such an arrangement with the railroad company, by the fact that he is there for the purpose of transacting some business or of carrying on some occupation with the consent of the company;[11] but this does not apply to one who is allowed such a privilege by mere sufferance or permission;[12] and where an employee of another rides on a train in violation of an express rule of the railroad company forbidding him so to do, of which rule he has knowledge, he is a trespasser.[13]

Where a railroad company simply furnishes the motive power for a special train, having no control over the management of the train itself, the company is not so related to persons riding on the train as to be charged with the duty of their protection as passengers, particularly, where the contract stipulates that the railroad company is not acting in the matter as a common carrier, and exempts it from liability for injuries.[14]

to some conductor of a trolley car, at the end of the day, in consideration for which he was to have transportation between his home and his place of work for the electric company, thereby became also an employee of the railway company, the relation which he bore to it when he was injured, while riding home on one of its cars after furnishing such a report to the conductor thereof, was not that of employee, but of "passenger"—Strohl v. Eastern Pennsylvania Rys. Co., 113 A. 62, 270 Pa. 132.

"Passes issued for a valuable consideration, whether money or services, are in no sense gratuitous and an employee riding on such a pass is a passenger for hire."—Campbell v. American Fidelity & Casualty Co., 192 S.E. 906, 212 N.C. 65

2. Tenn.—Nashville Ry. & Light Co. v. Overby, 223 S.W. 997, 143 Tenn. 581.
Passes containing exemption from liability generally see infra §§ 634, 635.

3. Ga.—Tharp v. Central of Georgia Ry. Co., 121 S.E. 592, 31 Ga.App. 598.

Railroad employee, while being carried to and from his place of work as part of the contract of service, is a servant of the company, and not a passenger, and his status is not altered because his right to travel is evidenced by a free pass stipulating that it is given as a gratuity only and on condition of release of liability for injuries.—Tharp v. Central of Georgia Ry. Co., 121 S.E. 592, 31 Ga.App. 598.

4. Tenn.—Louisville, etc., R. Co. v. Stacker, 6 S.W. 737, 86 Tenn. 343, 6 Am.S.R. 840.

5. Ill.—Walsh v. Cullen, 85 N.E. 223, 235 Ill. 91, 18 L.R.A.,N.S., 911, reversing 138 Ill.App. 168.
10 C.J. p 634 note 89.
Passenger on elevator generally see supra § 533.

6. Or.—Putnam v. Pacific Monthly Co., 130 P. 986, 136 P. 835, 68 Or. 36, 45 L.R.A.,N.S., 338, L.R.A.1915F 782, Ann.Cas.1915C 256.

7. Kan.—Atchison, etc., R. Co. v. Lindley, 22 P. 703, 42 Kan. 714, 16 Am.S.R. 515, 6 L.R.A. 646
10 C.J. p 634 note 86.

8. Ark.—Tri-State Transit Co. of Louisiana v. Miller, 65 S.W.2d 9, 188 Ark. 149, 90 A.L.R. 1389.
10 C.J. p 634 note 87.

Bus passenger, injured when complying with driver's request to press down on accelerator, so that driver could make repairs, did not lose status of "passenger" and become "emergency employee" of carrier or "fellow servant" of driver.—Tri-State Transit Co. of Louisiana v. Miller, 65 S.W.2d 9, 90 A.L.R. 1389, 188 Ark. 149.

9. Pa.—Cumberland Valley R. Co. v. Myers, 55 Pa. 288

10. Tex.—International-Great Northern R. Co. v. Lucas, Civ.App., 70 S.W.2d 226, reversed on other grounds 99 S.W.2d 297, 128 Tex. 480, opinion corrected 100 S.W.2d 97, 128 Tex. 480.
10 C.J. p 630 note 62.

11. Cal.—Yeomans v. Contra Costa Steam Nav. Co., 44 Cal. 71.
Mass.—Commonwealth v. Vermont, etc., R. Co., 108 Mass. 7, 11 Am. R. 301.

12. Minn.—Gradin v. St. Paul, etc., R. Co., 14 N.W. 881, 30 Minn. 217.
10 C.J. p 630 note 64.

13. Ark.—Prescott, etc., R. Co. v. Hopkins, 182 S.W. 551, 122 Ark. 168.
10 C.J. p 631 note 67.

14. U.S.—Chicago, R. I. & P. Ry.

An employee of a news company, who is permitted by the carrier, under a contract between the carrier and the news company, to ride on its trains to sell magazines, fruit, and candy to passengers, is a passenger,[15] although the arrangement between the two companies does not appear.[16] However, in the absence of such a contract, a newspaper peddler on a train or a street car by sufferance or permission merely to ply his trade is not a passenger, but only a licensee.[17]

A servant of a sleeping car company who is given free transportation by a railroad company by the terms of an existing contract between the two companies has been held not to be a passenger of the railroad company on whose line he runs, in any such sense as to require of it the highest degree of care and skill in the operation of its road,[18] particularly where the contract between the two companies, which is ratified by the employee, so provides.[19] On the other hand, it has been held that such servant, although not a passenger in the ordinary meaning of the word, occupies the position of a passenger in regard to the careful running and management of the train.[20]

§ 548. Postal Clerks and Express Messengers

Railway postal clerks and express messengers are generally regarded as passengers while engaged in their duties on railroad trains.

Although it has been held that a postal clerk while on a train in the performance of his duties is not a passenger, so that the railroad company is liable to him for an injury only in case of negligence which would render it liable to its own employees,[21] by the weight of authority a postal clerk, employed in the service of the government and engaged in its service, traveling on a train, whom by contract with the government the company is bound to carry, must be considered a passenger,[22] at least in so far as

Co. v. Maucher, 39 S.Ct. 108, 248 U.S. 359, 63 L.Ed. 294, dismissing error Maucher v. Chicago, R. I. & P. Ry. Co., 159 N.W. 422, 100 Neb. 237.

10 C.J. p 631 note 66.

Circus employee

One riding on a train running over a railroad under right given the train owner by contract with the railway company, stipulating that the company was not acting therein as a common carrier, was not a passenger of the company; but his claim for injury from its negligence rests on the general right of an individual not to be injured by another's negligence.—Chicago, R. I. & P. Ry. Co. v. Maucher, 39 S.Ct. 108, 248 U.S. 359, 63 L.Ed. 294, dismissing error Maucher v. Chicago, R. I. & P. Ry. Co., 159 N.W. 422, 100 Neb. 237

10 C.J. p 631 note 66 [a].

15. Iowa.—Shadduck v. Chicago, M., St. P. & P. R. Co., 252 N.W. 772, 218 Iowa 281.

16. D.C. — Seymoure v. Director General of Railroads, 290 F. 291, 53 App.D.C. 316.

17. Md.—Rosenkokovitz v. United R., etc., Co., 70 A. 108, 108 Md. 306.

10 C.J. p 631 note 65.

18. Colo.—Denver, etc., R. Co. v. Whan, 89 P. 39, 39 Colo. 230, 11 L.R.A.,N.S., 432, 12 Ann.Cas. 732

D.C.—Hughson v. Richmond, etc., R. Co., 2 App.D.C. 98.

19. Ga.—Cato v. Southern Ry. Co., 106 S.E. 272, 151 Ga. 308, conformed to 107 S.E. 98, 26 Ga.App. 578.

Pullman conductor

One in the employ of the Pullman Company as conductor, under a contract whereby he ratified a contract between his employer and the railroad company and agreed that he should not have the rights of a passenger, and that it should not be liable for any injuries sustained by him, was not an "employee" or a "passenger" of the railroad company, but sustained a special contractual relation, the liability for injuries to the Pullman Company's employees, not pertaining to the public duty resting on the railroad company as a common carrier, but arising solely from the contract.—Cato v. Southern Ry. Co., 106 S.E. 272, 151 Ga. 308, conformed to 107 S.E. 98, 26 Ga.App. 578.

20. Mo.—Jones v. St. Louis Southwestern, etc., Ry. Co., 28 S.W. 883, 125 Mo. 666, 46 Am.S.R. 514, 26 L.R.A. 718.

10 C.J. p 631 note 69.

21. U.S.—Price v. Pennsylvania R. Co., 5 S.Ct. 427, 113 U.S. 221, 28 L.Ed. 981, dismissing error 96 Pa. 256.

10 C.J. p 631 note 70.

22. Ala.—Continental Life Ins. Co. v. Newman, 123 So. 93, 219 Ala. 311, reversing 123 So. 92, 23 Ala.App. 203.—Louisville & N.R. Co. v. Bowen, 103 So. 872, 212 Ala. 690.—Southern R. Co. v. Harrington, 52 So. 57, 166 Ala. 630, 139 Am.S.R. 59.

Ind.—Pittsburgh, C., C. & St. L. R. Co. v. Jones, 146 N.E. 864, 82 Ind.App. 569.

Ky.—Louisville & N. R. Co. v. Dougherty, 185 S.W. 114, 170 Ky. 10, L.R.A.1916E 464.

Mo.—Scheipers v. Missouri Pac. R. Co., 293 S.W. 51

Ohio.—Pittsburg, C., C. & St. L. R. Co. v. Pool, 17 Ohio Cir.Ct.,N.S., 404

Okl.—Missouri, K. & T. Ry. Co. v. Edmonds, 174 P. 1052, 73 Okl. 2

Va.—Carter v. Washington & O. D. Ry. Co., 95 S.E. 464, 122 Va. 458

10 C.J. p 631 note 71.

This rule, as stated in Corpus Juris, has been cited with approval in:

Ala.—Continental Life Ins. Co. v. Newman, 123 So. 93, 219 Ala. 311, reversing 123 So. 92, 23 Ala.App. 203.

Md.—Baltimore & O.R. Co. v. Davis, 137 A. 30, 33, 152 Md. 427.

Similar statement of rule

"It has been uniformly held, in the absence of a statutory provision to the contrary, that a mail clerk in the discharge of his duties as such, and in going to and returning from his work, while on the train is a passenger."—Louisville & N.R. Co. v. Dougherty, 185 S.W. 114, 115, 170 Ky. 10, L.R.A.1916E 464.

As passengers for reward

Postal clerks while on duty are passengers for reward. — Lusk v. Wilkes, 172 P. 929, 70 Okl. 44, L.R.A. 1918E 513

In car not switched into regular train

Where railway mail clerk was injured by violence with which locomotive struck car, his rights as passenger were not taken from him by fact that car which he entered to perform his regular duties had not yet been switched into regular train.—Pittsburgh, C., C. & St. L. R.

the company's liability for his personal injuries through negligence is concerned, as explained infra § 699. Since the relation is one of contract, it can arise only with the knowledge and acquiescence of both parties, and the carrier is under no duty to treat the clerk as a passenger, unless it knows of his presence in its car and acquiesces therein.[23]

A railway postal clerk, is not deprived of his status as passenger during the time he is merely superintending the loading of the car while it is standing at a station;[24] but a mail clerk whose duty it is to load cars and not to ride on them is not a passenger.[25]

Express messengers. An express messenger employed and paid solely by an express company and entitled under an arrangement between the express company and the railroad company to ride on the trains of the latter in the discharge of his duties is generally regarded as a passenger while on such train in the discharge of his duties,[26] and, as stated infra § 699, is entitled to the same degree of protection, although no charge is made for his transportation.[27] It has been held, however, that the relation of such messenger to the railroad company is analogous to that of one of its own employees;[28] and that, where the messenger agrees to hold the carrier harmless for personal injuries, he does not stand in the relation of a passenger.[29]

An employee of an express company employed to load and to unload express matter into and from cars at a station is not a passenger,[30] nor is he a passenger while riding on a freight elevator in a depot, engaged in loading or unloading goods.[31]

§ 549. Persons Riding Gratuitously in General

A person who is accepted or invited to ride as a passenger without the payment of fare and who does so in good faith has the status of a passenger. This rule applies to a child so accepted or invited, or who is in charge of another who does pay fare.

While it is no doubt true, as indicated in the definitions, given in §§ 530, 544, that public carriers of passengers are those which carry passengers for hire, there is not, in the case of carriers of passengers, a distinction as to liability between passengers carried for compensation and those carried gratuitously analogous to that recognized as to carriers of goods between cases where goods are carried for compensation and those where they are carried free, as explained supra § 3.

One who is accepted for transportation as a passenger without any compensation to be rendered is nevertheless entitled to all the care and protection which the carrier is under obligation to furnish to paying passengers, as announced infra § 680. Such acceptance must be by an officer or agent having the proper authority to do so;[32] and where one enters a train or car without any intention of paying fare, but under a collusive agreement with the conductor or some other employee to ride free in violation of the rules of the company, he does not become a passenger.[33] Where, however, the conductor of a train or other agent of the carrier, in violation of the rules of the carrier; invites a person to ride without payment of fare, the person riding in good faith on such invitation is a passenger and not a trespasser.[34]

Co. v. Jones, 146 N.E. 864, 82 Ind App 569.

23. Ky.—Louisville & N. R. Co. v. Dougherty, 185 S.W. 114, 170 Ky. 10 L.R.A 1916E 464.

24. Md—Baltimore & O. R. Co v. Davis, 137 A. 30, 152 Md 427.

25. Mass—Ward v. New York Cent. R Co., 142 N.E. 751, 248 Mass. 115.

26. Kan—Sewell v. Atchison, etc., R. Co, 96 P. 1007, 78 Kan. 1.
10 C J. p 632 note 73.

27. N Y—Blair v Erie R. Co., 66 N.Y. 313, 23 Am.R 55.

28. U S—Baltimore & O. S. W. R Co v. Voigt, 20 S.Ct 385, 176 U S. 498, 44 L Ed 560.
10 C J p 632 note 75.

29. U.S—Long v. Lehigh Valley R. Co, N Y, 130 F. 870, 65 C.C.A 354.
10 C J. p 632 note 76.
Limitation or exemption from liability for negligence generally see infra § 636.

30. N H.—Piper v Boston, etc., R. Co., 72 A. 1024, 75 N H. 238.

31. Tenn—Louisville & N. R. Co. v. Hensley, 7 Tenn Civ.App 610.

32. U.S.—Clark v. Colorado & N W. R. Co., Colo, 165 F. 408, 91 C.C.A 358, 19 L R.A ,N.S., 988.
10 C.J. p 635 note 94.

33. Ark.—St. Louis-San Francisco R Co. v. Bley, 271 S.W. 455, 168 Ark. 814.
Ky.—Morris v City Transfer & Yellow Taxi Co., 294 S.W. 1030, 220 Ky 219.
10 C.J. p 635 note 95.

Corpus Juris text is quoted with approval in Morris v. City Transfer and Yellow Taxi Co., 294 S.W 1030, 1031, 220 Ky. 219.

One taking joy ride in taxicab, without an intention to pay or to be charged therefor, as the driver's guest in return for hospitality he has received, is not a passenger—Morris v. City Transfer & Yellow Taxi Co., 294 S W. 1030, 220 Ky. 219.
Fraud or evasion of fare in general see infra § 560.
Payment of fare as condition to becoming passenger see infra § 559.

34. La.—Stevens v. Yellow Cab Co, App, 142 So. 807.
10 C.J. p 635 note 96.

In taxicab

Where after a cab is already engaged by others, the driver picks up acquaintances with the intention, not communicated to them, of charging them no fare, in violation of the rules of the taxicab company, such acquaintances are passengers.—Stevens v Yellow Cab Co., La.App., 142 So 807.

"Term 'deadhead' is applied to persons other than the president, directors, officers, agents, or employees of a Railroad Company, who are permitted by the company to travel on the road without paying any fare therefor."—Gardner v. Hall, 61 N.C. 21, 22.

These rules, as stated in Corpus Juris, have received judicial approv-

Children. While it seems a reasonable view that newsboys or children who are permitted to ride on a car gratuitously, with knowledge that the employee giving the permission has no authority to do so, are not passengers,[35] there are many cases holding that where a child accepts the invitation of a person in charge of a railroad or street car and having apparent authority to extend an invitation to ride thereon, without any payment of fare being intended, he becomes a passenger with reference to whose safety the carrier has the same liability as with reference to a paying passenger.[36]

Child in charge of another. A child going on a train or car with its mother, or in charge of another person who has a ticket or pays fare for herself or himself, is a passenger, although no fare is paid for such child;[37] but this rule does not apply where the child is unaccompanied by one having it in charge.[38]

Private carrier. A person riding on another's vehicle with his consent is entitled to the protection of a passenger, even though he has paid no fare;[39] but there is authority to the effect that a person being so carried as an accommodation is a mere licensee.[40]

§ 550. Persons Riding on Passes

A person riding on a pass, ordinarily, is a passenger, the same as if he were paying full fare.

As stated in Corpus Juris, which statement has been followed in subsequent decisions,[41] a person riding on a pass is as much a passenger as if he were paying full fare,[42] unless he refuses to comply with the conditions thereof,[43] and if the pass is given for a valuable consideration he is a passenger for hire.[44]

The fact that the carrier is prohibited by law from issuing free passes does not render a person a trespasser who travels on such a pass unlawfully issued to him; if the pass is unlawful, the conductor should demand the regular fare, and his failure to do so will not make the traveler a trespasser, nor destroy his rights as a passenger.[45]

§ 551. On Drover's Passes or under Similar Arrangements

A person riding on a freight train, on a drover's pass or a similar arrangement, to look after live stock being transported and as an incident to such transportation is, generally, regarded as a passenger for hire.

Persons are frequently transported on so-called passes who are not in fact gratuitous passengers, because the right to ride without payment of special compensation therefor is given in part consideration of payment which is principally for other services. Thus, persons who are carried on freight trains, on a drover's pass or a similar arrangement, to look after live stock which is being transported and as an incident to such transportation, are entitled to protection as passengers for hire,[46] provided they comply with the conditions of the

al in Morris v. City Transfer & Yellow Taxi Co., 294 S.W. 1030, 1031, 220 Ky. 219.

35. U.S.—Meloon v. Davis, C.C.A. N.H., 292 F. 82.
N.Y.—Marks v. Rochester R. Co., 58 N.Y.S. 210, 41 App.Div. 66.
10 C.J. p 635 note 97.
Newsboy riding as employee of another see supra § 547.

36. Ark.—Little Rock Tract., etc., Co. v. Nelson, 52 S.W. 7, 66 Ark. 494.
10 C.J. p 635 note 98.

37. Ala.—Ball v. Mobile Light, etc., Co., 39 So. 584, 146 Ala. 309, 119 Am.S.R. 32, 9 Ann.Cas. 962.
10 C.J. p 635 note 99.

38. Tex.—Gulf, etc., R. Co. v. Dawkins, 13 S.W. 982, 77 Tex. 228.
10 C.J. p 635 note 1.

39. W.Va.—Hodge v. Sycamore Coal Co., 95 S.E. 808, 82 W.Va. 106.

40. Ala.—Crider v. Yolande Coal & Coke Co., 89 So. 285, 206 Ala. 71

41. N.C.—Campbell v. American Fidelity & Casualty Co., 192 S.E. 906, 908, 212 N.C. 65.

42. N.H.—Wessman v. Boston & M. R. R., 152 A. 476, 84 N.H. 475.
10 C.J. p 635 note 3.
Passes generally see infra §§ 622–624.

43. N.C.—Campbell v. American Fidelity & Casualty Co., 192 S.E. 906, 212 N.C. 65.
10 C.J. p 635 note 4.

44. N.C.—Campbell v. American Fidelity & Casualty Co., supra.
10 C.J. p 636 note 5.

Member of employee's family
Free pass issued to member of railroad employee's family was not based on a legal consideration, where a statute forbids the issuance of transportation as consideration for services.—Wessman v. Boston & M. R. R., 152 A. 476, 84 N.H. 475.

45. N.C.—McNeill v. Durham, etc., R. Co., 47 S.E. 765, 135 N.C. 682, 67 L.R.A. 227, reversing 44 S.E. 34, 132 N.C. 510, 95 Am.S.R. 641, 67 L.R.A. 227.
10 C.J. p 636 note 6

46. U.S.—Norfolk Southern R. Co. v. Chatman, N.C., 37 S.Ct. 499, 244 U.S. 276, 61 L.Ed. 1131, L.R.A. 1917F 1128, affirming 222 F. 802, 138 C.C.A. 350—Gooch v. Oregon Short Line R. Co., C.C.A. Idaho, 264 F. 664, certiorari granted 41 S.Ct. 8, 254 U.S. 623, 65 L.Ed. 444, and affirmed 42 S.Ct. 192, 258 U.S. 22, 66 L.Ed. 443—Tripp v. Michigan Cent. R. Co., Mich., 238 F. 449, 151 C.C.A. 385, certiorari denied Michigan Cent. R. Co. v. Tripp, 37 S.Ct. 475, 243 U.S. 648, 61 L.Ed. 945.
Ill.—Crane v. Railway Exp. Agency, 12 N.E.2d 672, 293 Ill.App. 328
Kan.—Binder v. Union Pac. R. Co., 194 P. 314, 108 Kan. 47.
Me.—Miller v. Maine Cent. R. Co., 133 A. 907, 125 Me. 338, 47 A.L.R. 720.
Okl.—Lusk v. McBride, 175 P. 747, 73 Okl. 283.
Tex.—Roberts v. Ft. Worth & D.C. Ry. Co., Civ.App., 229 S.W. 954—Texas & N.O. R. Co. v. Tillman, Civ.App., 197 S.W. 1128, error refused.
10 C.J. p 636 note 8.

Person in charge of an interstate shipment of live stock, traveling on a freight train on a pass issued pursuant to the terms of the contract of shipment, as permitted by a statute, which excepts necessary

pass or similar arrangement,[47] such as a condition requiring them to ride in the caboose,[48] or on the same train with the stock.[49] On the same principle a shipper whom a truck operator agrees to carry with the load is a passenger.[50] It has been held that a person traveling on a drover's pass is a passenger only in a restricted sense,[51] and, in any event one accompanying a shipment without any agreement with the carrier is not a passenger.[52]

The relation, as passenger, of a person riding on such a pass or under such an arrangement, cannot be changed by any subterfuge in the contract for carriage,[53] nor by references to him in the carrier's classification or waybill as riding free,[54] or as "a man in charge";[55] nor is it affected by the failure of the published tariffs of the carrier to make a separate rate for the carriage of a caretaker of an interstate shipment, or to state separately how much of the published rate is to be treated as payment for the transportation of the stock and how much for the carriage of the caretaker.[56]

The relation continues until the car, in which the stock is being transported, arrives at the point where it is to be unloaded, and where the passenger is riding in the car, he has a right to remain therein until it reaches that point.[57] The relation also ex-

caretakers of live stock from the prohibition against the issuance of any interstate free pass, must be regarded as a passenger for hire.—Norfolk Southern R Co. v. Chatman, N C., 37 S.Ct. 499, 244 U.S. 276, 61 L.Ed. 1131, L.R.A 1917F 1128, affirming 222 F. 802, 138 C.C.A. 350—Gooch v. Oregon Short Line R Co., C.C.A.Idaho, 264 F. 664, certiorari granted 41 S Ct. 8, 254 U.S. 623, 65 L.Ed 444, and affirmed 42 S.Ct. 192, 258 U S. 22, 66 L.Ed. 443.

Statutory recognition

The judicial determination that "free pass" under which railroad transports attendants of live stock is not "free" in the popular sense, but constitutes transportation for hire, was adopted by congress in provision of Interstate Commerce Act authorizing railroads to issue such passes.—Crane v. Railway Exp Agency, 12 N E.2d 672, 293 Ill.App 328.

Person riding in caboose of a freight train as a caretaker of live stock carried on such train is a passenger.—Missouri, K. & T. Ry. Co. v Lynn, 161 P 1058, 62 Okl. 17.

Riding in stock car

Live stock shipper, permitted by carrier to ride with stock in stock car, is a passenger.—Beasley v. Hines, 219 S.W. 757, 143 Ark. 54, 15 A L R. 864.

Irrespective of statute

A person who is traveling with railroad's consent in charge of stock or goods carried by railroad for him, is a "passenger for hire," even when he is traveling on a drover's pass, and irrespective of statute authorizing issuance of free passes—Crane v. Railway Exp. Agency, 12 N. E 2d 672, 293 Ill.App. 328.

Care required as to persons accompanying stock see infra § 684.

47. Ill—Illinois Cent. R. Co. v. Jennings, 75 N.E. 457, 217 Ill. 140, reversing 119 Ill App 317.

48. Mo—Scrivner v Missouri Pac. R. Co, 169 S.W. 83, 260 Mo. 421. 10 C.J. p 637 note 10.

49. Vt.—Thorp v. Concord R. Co., 17 A. 791, 61 Vt. 378.
10 C.J. p 637 note 11.

50. Ky.—Jesse v. Dunn, 51 S.W 2d 918, 244 Ky. 613.

Shipper's relation to truck operator, in such a case, would be "similar to that of a shipper, who, under a special arrangement rides in a railroad stock car to look after the stock, with the result that he is a passenger."—Jesse v. Dunn, 51 S W 2d 918, 920, 244 Ky. 613

51. Neb.—Omaha, etc., R Co v. Crow, 74 N.W. 1066, 54 Neb 747, 69 Am S.R. 741.
10 C.J. p 637 note 12.

52. Ind.—Chicago, etc., R. Co. v. Hostetter, 84 N.E. 534, 171 Ind. 465, reversing, App, 82 N E 1134

53. Tex.—Missouri Pac. R. Co. v. Ivey, 9 S.W. 346, 71 Tex. 409, 10 Am.S.R. 758, 1 L R A. 500.
10 C.J. p 637 note 13

Stipulation as to assumption of risk

Under a contract for the shipment of live stock, which requires an attendant to accompany the shipment, and provides that, in consideration of the carriage of the attendant without charge other than the sum paid for the carriage of the live stock, the shipper agrees to indemnify the carrier against liability for injuries to the attendant, stating that, in consideration of his carriage without charge except the sum paid for the carriage of the stock, he assumes all risk of injury and releases the carrier from liability therefor, whether occasioned by its negligence or not, the attendant is a passenger for hire, payable in money—Tripp v. Michigan Cent. R. Co, Mich., 238 F. 449, 151 C.C A. 385, certiorari denied Michigan Cent. R. Co. v. Tripp, 37 S.Ct. 475, 243 U.S. 648, 61 L.Ed. 945—10 C.J. p 637 note 13 [a]

54. N.Y—Porter v. New York, etc., R. Co., 13 N.Y.S. 491, 59 Hun 177, affirming 29 N.E. 1029, 129 N.Y. 624.

Ohio.—Cleveland, etc., R. Co. v. Curran, 19 Ohio St. 1, 2 Am R 362.

Provisions in contract govern

Unless the contract between the carrier and shipper is legally forbidden, the provisions of that instrument, and not the classifications filed by the carrier, determine whether the attendant is carried free or as a passenger for hire.—Tripp v. Michigan Cent. R. Co, Mich., 238 F. 449, 151 C.C A. 385, certiorari denied Michigan Cent. R. Co. v. Tripp, 37 S.Ct. 475, 243 U S. 648, 61 L Ed 945

Provisions in classifications for free carriage

(1) A provision in a carrier's classification that, with one or more carloads of horses, the owner or agent will be carried free, does not militate against a contract for such shipment, providing that payment for the attendant's transportation is part of the charge for the transportation of the horses.—Tripp v. Michigan Cent. R. Co, Mich., 238 F. 449, 151 C.C A. 385, certiorari denied Michigan Cent. R. Co v. Tripp, 37 S.Ct. 475, 243 U.S. 648, 61 L.Ed. 945.

(2) A provision that an attendant with a shipment of horses will be carried free means only that he is not to be charged an additional fare, and not inconsistent with a contract providing that the freight charge includes the transportation of the attendant within the rule as to limitation of liability.—Tripp v. Michigan Cent R. Co, supra.

55. Ind.—Indianapolis, etc., R. Co. v. Beaver, 41 Ind. 493.

56. U.S.—Norfolk Southern R. Co. v. Chatman, N C, 37 S.Ct. 499, 244 U.S. 276, 61 L Ed. 1131, L R.A. 1917F 1128, affirming 222 F. 802, 138 C C.A. 350—Tripp v. Michigan Cent. R. Co., Mich, 238 F. 449, 151 C.C.A. 385, certiorari denied Michigan Cent. R. Co. v. Tripp, 37 S. Ct. 475, 243 U.S. 648, 61 L.Ed. 945.

57. Ind.—Chicago, T. H & S. E. R. Co. v. Meures, 119 N.E. 714, 187 Ind. 405.
10 C.J. p 636 note 8 [c].

ists while such a person is riding on a passenger train on a return ticket issued under the shipping contract.[58]

The consideration for the passage of such a person is the service he renders in taking care of the stock, or the charge made against him or his employer for shipping the stock.[59] If a pass to a caretaker, on an interstate shipment, is gratuitous in the ordinary sense of the term, it is in violation of the Interstate Commerce Act § 1, 49 U.S.C.A. § 1.[60]

Provision for only one person. Where the contract provides that only the shipper or one person may accompany the stock free of charge, another person who boards the train, claiming an interest in such stock, cannot claim the right of a passenger;[61] this also applies to a person who boards the train for the purpose of assisting in the care of such stock;[62] but in such a case the shipper who is riding with the stock cannot be held to be a trespasser by reason of the fact that his servant is also permitted to ride.[63]

§ 552. Persons Riding on Vehicles or in Places Not Proper for Passengers

a. In general
b. On freight trains

a. In General

A person who rides on a car or vehicle, or in a place thereon, not proper for the carriage of passengers is, ordinarily, not a passenger, unless he so rides, with the authority of the carrier, or on the invitation or with the permission of an employee of the carrier, having authority to extend such invitation or grant such permission.

Unless the company has expressly or impliedly authorized the use of such trains for the carrying of passengers, the rule is that persons entering and riding on pay trains,[64] construction trains,[65] gravel trains,[66] timber trains,[67] or trains prohibited from carrying passengers,[68] are not deemed passengers, unless they do so on the invitation or with the consent of the conductor or other employee having authority to grant such privilege,[69] and this is true also of one riding on a railroad velocipede.[70] A person riding on a construction train which customarily carries passengers, and having no notice of a rule to the contrary, has a right to assume that the conductor has authority to allow him to ride thereon, and should be considered a passenger.[71]

Although a person is lawfully on the carrier's premises, if he afterward intrudes himself on a car or vehicle on which he has no business, he becomes a trespasser, especially where such intrusion is forbidden by the carrier, as where he afterward attempts to ride on a freight elevator.[72]

Improper place. A person entering or riding in a place or on a portion of a vehicle not provided by the carrier for passengers is usually not regarded as a passenger,[73] unless the rule forbidding such rid-

Continuance and termination of relation generally see infra §§ 563–566.

58. Minn.—Gruhl v. Northern Pac. Ry. Co., 168 N.W. 127, 140 Minn. 353

59. U.S.—Tripp v. Michigan Cent. R. Co., Mich., 238 F. 449, 151 C.C.A. 385, certiorari denied Michigan Cent. R. Co. v. Tripp, 37 S.Ct. 475, 243 U.S. 648, 61 L.Ed. 945.
Me.—Miller v. Maine Cent. R. Co., 133 A. 907, 125 Me. 338, 47 A.L.R. 720.
Minn.—Gruhl v. Northern Pac. Ry. Co., 168 N.W. 127, 140 Minn. 353.
Okl.—Lusk v. McBride, 175 P. 747, 73 Okl. 283.
10 C.J. p. 637 note 17.
This rule, as stated in Corpus Juris, has been judicially approved in Campbell v. American Fidelity & Casualty Co., 192 S.E. 906, 908, 212 N.C. 65.

60. Me.—Miller v. Maine Cent. R. Co., 133 A. 907, 125 Me. 338, 47 A.L.R. 720.

61. Miss.—Richmond, etc., R. Co. v. Burnsed, 12 So. 958, 70 Miss. 437, 35 Am.S.R. 656.
Mo.—Brown v. Missouri, etc., R. Co., 64 Mo. 536

62. Conn.—Gardner v. New Haven, etc., Co., 51 Conn. 143, 50 Am.R. 12.
Tex.—Missouri Pac. R. Co. v. Aiken, 9 S.W. 437, 71 Tex. 373.

63. Tex.—Missouri Pac. R. Co. v. Aiken, supra.
10 C.J. p. 637 note 20.

64. Ga.—Southwestern R. Co. v. Singleton, 66 Ga. 252.
10 C.J. p. 637 note 22.

65. Minn.—Rosenbaum v. St. Paul, etc., R. Co., 36 N.W. 447, 38 Minn. 173, 8 Am.S.R. 653.
10 C.J. p. 637 note 23
Employees of carrier on such trains see supra § 546.

66. Mich.—Keating v. Michigan Cent. R. Co., 56 N.W. 346, 97 Mich. 154, 37 Am.S.R. 328.
10 C.J. p. 638 note 24

67. Tenn.—Illinois Cent. R. Co. v. Meacham, 19 S.W. 232, 91 Tenn. 428.
10 C.J. p. 638 note 25.

68. U.S.—Purple v. Union Pac. R. Co., Kan., 114 F. 123, 51 C.C.A. 564, 57 L.R.A. 700.
10 C.J. p. 638 note 26.

69. Kan.—Chicago, etc., R. Co. v. Frazer, 40 P. 923, 55 Kan. 582.
10 C.J. p. 638 note 27.

On chartered street car
Where a passenger enters a special street car chartered by a particular person, and tenders the amount of his passage, and keeps his seat with the knowledge and consent of the conductor who intends to transport him to his destination, the carrier thereupon waives the right to insist that he is not a passenger, and it is liable for his subsequent expulsion.—McCarter v. Greenville Tract Co., 51 S.E. 545, 72 S.C. 134, 5 Ann.Cas. 42.

70. U.S.—Craig v. Mt. Carbon Co., W.Va., 45 F. 448, appeal dismissed 14 S.Ct. 1144, 154 U.S. 499, 38 L.Ed. 1084.
10 C.J. p. 638 note 28.

71. Iowa.—Spence v. Chicago, etc., R. Co., 90 N.W. 346, 117 Iowa 1.
Kan.—St. Joseph, etc., R. Co. v. Wheeler, 10 P. 461, 35 Kan. 185

72. La.—Snyder v. Natchez, R. R. & T. R. Co., 7 So. 582, 42 La.Ann. 302.
Tenn.—Louisville & N. R. Co. v. Hensley, 7 Tenn.Civ.A. 610.

73. Ind.—Chicago, etc., R. Co. v. Field, 34 N.E. 406, 7 Ind.App. 172, 52 Am.S.R. 444
Kan.—Mendenhall v. Atchison, etc.,

ing has been habitually disregarded.[74] Other persons than express messengers, riding in express cars, are usually not to be considered as passengers.[75]

However, one does not lose his status as a passenger where with the express or implied permission of the conductor he is riding on the platform or the steps of a street car,[76] particularly where the car is crowded,[77] and he expects to and is able to pay the usual fare, and the street car company customarily receives and accepts fares from such passengers;[78] and this is true also in case of a crowded railroad train,[79] or where an invalid is received for transportation in the baggage car.[80] A passenger in an ordinary day coach who enters a sleeping car, with the consent of the conductor, merely for the purpose of using the lavatory is not a passenger on the sleeping car.[81]

Riding on engine. The relation of carrier and passenger generally does not exist by any agreement, express or implied, between a carrier and a person who furtively rides on the engine unknown to the company and contrary to its rules, which must have been known to him,[82] unless he rides thereon on the invitation or permission of an officer or employee of the carrier having apparent authority to extend him such invitation,[83] but the presumption is against his being there with such authority.[84] Thus, riding on an engine by the permission or invitation of the engineer does not constitute one so riding a passenger,[85] even though the conductor knows of his presence there and acquiesces.[86]

Riding on hand cars. One transported on a hand car which is used by the carrier for the convenience of its employees, and on which the carrying of passengers is forbidden, is not a passenger,[87] unless he is traveling thereon with the consent of the railroad company,[88] or is accepted as a passenger on such car by an officer or employee having authority to do so,[89] or unless the company is a common carrier of passengers by hand cars.[90]

R Co, 71 P. 846, 66 Kan 438, 97 Am S R. 330, 61 L.R.A. 120.
La.—Segrist v. Interurban Transp. Co., 5 La App. 404.
Tex.—Horwitz v Jefferson County Traction Co., Civ App, 188 S W 26.
Utah—Bergman v. Denver & R G. R. Co, 178 P 68, 53 Utah 213.
10 C J. p 638 note 30

Elevator shaft

A person who enters an elevator shaft when the elevator is absent from the floor is not a passenger
Iowa—Johnson v. Lincoln Hotel Co., 177 N.W. 550, 189 Iowa 291.
Wis—Switzer v. Detroit Inv. Co., 206 N.W 407, 188 Wis 330.

Getting onto rear of towing truck

Where a passenger of a public carrier by motor bus on his own initiative got out of the bus and onto the rear of the floor of a motor truck belonging to a third person employed by the carrier to tow its disabled bus to a nearby filling station, he thereby ceased to be a passenger of the public carrier by motor bus. — Segrist v Interurban Transp. Co, 5 La.App. 404.

74. Minn.—Schultz v. Minneapolis, etc., R Co, 143 N W. 1131, 123 Minn. 405

75. Cal—Pfister v. Central Pac R Co., 11 P 686, 70 Cal. 169, 59 Am R. 404.
10 C.J. p 638 note 32
Express messengers as passengers see supra § 548

76. Mass—Liversidge v. Berkshire St R. Co, 96 N E 665, 210 Mass 234, 36 L R A.,N S, 993.
10 C J. p 639 note 33.

77. Mass—Bilodeau v. Fitchburg & L. St. Ry. Co, 128 N.E. 872, 236 Mass. 526.
10 C.J p 639 note 34.

78. Ala—Mobile Light & R Co v Hughes, 67 So. 278, 190 Ala. 316

79. Mo.—Choate v. Missouri Pac. R. Co., 67 Mo.App. 105.
10 C.J. p 639 note 36.

80. Ky.—Arnett v. Chesapeake & O. Ry. Co, 248 S W. 1040, 198 Ky. 491.

Invalid on bed spring

An invalid, who was received by the conductor of a train for transportation in the baggage car while she was lying on a bed spring, was a passenger, entitled to all the privileges as such, although a rule of the company permitted such persons to be received only if they were lying on cots, and the conductor had received her as a passenger only on condition a cot be procured for her at the next station.—Arnett v Chesapeake & O. Ry. Co, 248 S W. 1040, 198 Ky. 491.

81. U S.—Payne v. Shearer, C.C.A. Miss., 270 F. 572.

82. Neb.—Woolsey v Chicago, B & Q R. Co., 58 N W. 444, 39 Neb 798, 25 L R A 79.
10 C J p 639 note 37.

Invitation of fireman

One riding on the engine of a freight train, in accordance with an arrangement with the fireman of the engine, to shovel coal in return for the privilege of riding, is not a passenger, where the conductor neither had knowledge of his presence nor consented thereto.—Woolsey v. Chicago, B & Q R. Co, 58 N.W 444, 39 Neb 798, 25 L R.A. 79—10 C J. p 639 note 37 [a].

83. Cal.—Berliner v. Travelers' Ins. Co, 53 P. 918, 121 Cal. 458, 66 Am. S.R. 49, 41 L R.A. 467.
10 C J p 639 note 38.

84. Tex—Wilcox v. San Antonio, etc., R Co, 33 S.W. 379, 11 Tex. Civ.App. 487.
10 C J. p 639 note 39.

85. Wash—Fischer v. Columbia, etc., R. Co., 100 P. 1005, 52 Wash. 462.
10 C.J. p 639 note 40.

86. Or.—Radley v. Columbia R. Co., 75 P. 212, 44 Or. 332, 1 Ann.Cas 447

87. Ark—Houston, etc., R. Co v. Bolling, 27 S.W. 492, 59 Ark. 395, 43 Am S R. 38, 27 L R A. 190.
10 C J. p 640 note 42.

88. Tex.—International, etc, R. Co v. Gray, 65 Tex. 32.

89. W Va.—Hodge v. Sycamore Coal Co, 95 S.E. 808, 82 W.Va. 106.
10 C J. p 640 note 43

General manager

A person riding gratuitously on a truck or hand car maintained and operated by a coal mining company to haul its express matter over a spur track of a railway company, leading from the main line to its coal mine, with the consent of its general manager having control of the operation of such car, is a passenger, and not a trespasser or mere licensee.—Hodge v. Sycamore Coal Co, 95 S E. 808, 82 W.Va 106.

90. Me—Hoar v. Maine Cent. R. Co., 70 Me. 65, 35 Am.R. 299.

b. On Freight Trains

A person is a passenger on a freight train only where he is carried thereon, as a passenger, in accordance with the general course of business, or rules and regulations, of the railroad company, or is accepted, by proper authority, for transportation as a passenger.

Where persons are, by proper authority, accepted for transportation on freight trains, the carrier is liable with reference to them as passengers,[91] particularly where fare or its equivalent is accepted;[92] and it is immaterial whether the company carries more or less passengers on its freight trains, or whether or not the passengers travel on a special permit or on a regular ticket.[93] The question of liability does not depend on the uses to which the train is usually devoted; and where there are no rules of the company prohibiting it, or even if there are such rules, and the officers making such rules relax or dispense with them in a particular case, and a passenger is taken on a train not generally used for passenger purposes, or with the expectation of paying fare when demanded, he is lawfully on the train.[94] This rule also applies to persons permitted by the carrier's employees to ride without paying fare, where the employee is expressly or impliedly authorized to grant such permission.[95] If it is customary for the carrier to allow passengers to ride on some freight trains, and if the person seeking transportation has no notice, express or implied, that passengers are not permitted to ride on the freight train in question, he may rely on the act of the conductor in authorizing him to go on such train, even though such act is without authority or contrary to the conductor's instructions.[96]

Where, however, a person goes on a freight train, charged with knowledge, by reason of the general course of business of the carrier, or by reason of rules or regulations known to him, that passengers are not allowed to ride on freight trains, and that conductors of freight trains have no authority to allow them so to do, he does not become a passenger, although he may have the assent of the conductor or some other agent to his act,[97] and even though the conductor accepts a ticket or payment of fare,[98] and this is particularly true where he so rides without the payment of fare[99] and in violation of a statute.[1]

Permission given by the engineer[2] or by a brakeman[3] on a freight train to a person to ride thereon, contrary to a rule of the company, does not make such person a passenger, particularly where such person has already been refused passage by the conductor.[4]

Special permits. Where persons are prohibited from riding on freight trains without special permits, one riding thereon without such a permit, and with knowledge of such regulation, does not become a passenger,[5] unless such rule of the company has been waived.[6] This rule applies to persons riding on such train by the invitation or permission of the carrier's agents who have no authority, implied

91. U.S.—Dysart v Missouri, etc., R. Co, Mo, 122 F. 228, 58 C.C.A. 592
10 C.J. p 640 note 47.
Mixed train carrying both freight and passengers is a passenger train within the meaning of the law when it accepts and carries passengers. —Tennessee R. Co. v. Kingsley, 10 Tenn.App 637.
One on freight train with the knowledge and consent of the agents in charge is not a trespasser, although there in violation of the rules of the company—Chicago, R I. & P. Ry. Co. v. Shadid, 159 P. 913, 60 Okl. 188.
Persons in charge of stock riding on freight trains see supra § 551.

92. Ind.—New York, etc., R. Co v. Doane, 17 N E 913, 115 Ind. 435, 7 Am S R. 451, 1 L R.A 157.
10 C J p 640 note 48
Payment of fare generally see infra § 559.

93. U.S.—Hazard v Chicago, B & Q. R Co., C C.Ill, 11 F.Cas No 6,-275, 1 Biss. 503

94. Tex.—Prince v International, etc., R. Co., 64 Tex. 144.

95. Or.—Gray v. Columbia Cent. R. Co., 88 P. 297, 49 Or 18
10 C.J. p 640 note 51.
Persons riding gratuitously as passengers generally see supra § 549.

96. Ill.—Illinois Cent R Co. v. Axley, 47 Ill.App. 307
Wis.—Boehm v. Duluth, etc., R. Co, 65 N.W 506, 91 Wis. 592.
10 C.J. p 641 note 52.

97. Ark.—St. Louis, etc., R. Co v Reed, 88 S W. 836, 76 Ark. 106, 113 Am S.R. 78.
Ky.—Louisville, etc., R. Co. v. Moss, 13 Ky L. 684
10 C.J. p 641 note 53.

98. Tex.—Texas, etc., R Co. v. Black, 27 S W 118, 87 Tex. 160—St. Louis Southwestern R Co. v. White, Civ App., 34 S W 1042.
10 C.J p 641 note 53.

99. Ky.—Taylor v Chesapeake, etc., R. Co., 163 S W. 1084, 157 Ky. 735
10 C.J. p 642 note 54.
Persons riding gratuitously generally see supra § 549

1. Mich.—Van Auken v Michigan Cent. R. Co., 148 N W. 819, 182 Mich. 331.

2. Minn.—Tuder v Oregon Short Line R. Co, 160 N.W 785, 135 Minn. 294, L R A 1917C 86
Accepting passenger left at stop
An engineer of a freight train is without authority to accept as a passenger one who had been riding on passenger train but was left at a stop, and such a person in riding on freight train without payment of fare was a trespasser and not a passenger.—Tuder v. Oregon Short Line R. Co, 160 N.W 785, 135 Minn. 294, L.R A 1917C 86.

3. Minn.—Janny v. Great Northern R. Co., 65 N.W. 450, 63 Minn 380.
10 C J p 642 note 56

4. Tex.—Gulf, etc, R Co v. Campbell 13 S W. 19, 76 Tex. 174

5. Tex.—Houston, etc., R. Co. v. Stell, 67 S W. 537, 28 Tex Civ.App. 280
Wash.—Olson v. Northern Pac R. Co., 96 P. 150, 49 Wash. 626, 18 L. R A,N S., 209.
Requiring ticket or permit on freight train generally see infra § 606.

6. Mich.—Greenfield v Detroit, etc, R Co., 95 N.W. 546, 133 Mich. 557.
10 C.J p 642 note 59.

or express, to extend such invitation or to grant such permission.[7]

§ 553. Persons Attending Passengers

A person who goes on the carrier's premises or train to attend an arriving or departing passenger is generally regarded as an invitee or licensee.

Persons going on a carrier's premises or entering a carrier's vehicle to assist a passenger, to greet an arriving passenger, or to take leave of a departing passenger, cannot be deemed passengers themselves; nor are they trespassers, properly speaking, they should be considered rather in the light of invitees or licensees to whom the carrier owes certain duties,[8] unless he goes on the carrier's premises an unreasonable length of time before the arrival or departure of a train;[9] and in the absence of any regulation to the contrary a person entering a train to assist a passenger does so under an implied permission.[10] It has been held, however, that one who goes on a train to assist or attend a sick or infirm passenger sustains the relation of passenger,[11] particularly where he does so at the request of the conductor.[12] On the other hand, a person who, not being a passenger, procures a passenger to transport his baggage for him, is a trespasser in going on the train to assist the passenger with such baggage.[13]

§ 554. Commencement of Relation

The relation of carrier and passenger, ordinarily, commences where a person, in good faith, offers to become a passenger and the carrier accepts the offer.

The relation of carrier and passenger generally commences where a person, in good faith, either expressly or impliedly offers to become a passenger, and the carrier, either expressly or impliedly, accepts such offer.[14] As will be further noted in the following §§ 555–561, it must appear that the carrier has held itself out, by express or implied invitation, as ready to receive the person who presents himself as passenger,[15] that the person present himself at a proper time and place, and in a proper manner, and that the carrier have actual or constructive notice of his intention to become a passenger, and accepts him as such, either expressly or impliedly[16] The facts may be such as to warrant a person in offering himself for carriage, and in acting on the assumption that his offer has been accepted, although the carrier did not intend to receive him as passenger[17]

7. Tex.—Houston, etc., R. Co. v. Moore, 49 Tex. 31, 30 Am.R. 98.
10 C.J. p 642 note 60.

8. Mo.—Lewis v. Illinois Cent. R. Co., 3 S.W.2d 371, 319 Mo. 233.
N.Y.—Barrett v. Brooklyn Heights R. Co., 176 N.Y.S. 590, 188 App.Div. 109.
Okl.—St. Louis, etc., R. Co. v. Isenberg, 150 P. 123, 48 Okl. 51.
10 C.J. p 642 note 61—52 C.J. p 547 note 8, p 548 note 9.

Husband who goes on train for the purpose of assisting his wife, who is a passenger, to find a seat, while in or on the car is an invitee, if not a passenger.—Lewis v. Illinois Central R. Co., 3 S.W.2d 371, 319 Mo. 233
Liability as to persons attending passengers see infra §§ 700, 722, 732.

9. Tenn.—O'Brien v. St. Louis, etc., R. Co., 5 Tenn.Civ.A. 588.
Going to or awaiting train or car for unreasonable period in general see infra § 556.

10. Okl.—St. Louis & S. F. R. Co. v. Isenberg, 150 P. 123, 48 Okl. 51.

11. Ind.—Evansville, etc., R. Co. v. Athon, 33 N.E. 469, 6 Ind.App. 295, 51 Am.S.R. 303
10 C.J. p 642 note 63.

12. Ind.—Vandalia R. Co. v. Darby, 108 N.E. 778, 60 Ind.App. 294.
10 C.J. p 642 note 64.

13. Tex.—Andrews v. Ft. Worth & D. C. R. Co., Civ.App., 25 S.W. 1040.

14. U.S.—U. S. Fidelity & Guaranty Co. v. Aschenbrenner, Cal., 65 F. 2d 976, certiorari granted Aschenbrenner v. U. S. Fidelity & Guaranty Co., 54 S.Ct. 229, 290 U.S. 622, 78 L.Ed. 543, reversed on other grounds 54 S.Ct. 590, 292 U.S. 80, 78 L.Ed. 1137, rehearing denied 54 S.Ct. 861, 292 U.S. 615, 78 L.Ed. 1474—Trapnell v. Hines, C.C.A.N.J., 268 F. 504
Ky.—Bales v. Louisville & N. R. Co., 200 S.W. 471, 179 Ky. 207.
Mo.—O'Mara v. St. Louis Transit Co., 76 S.W. 680, 102 Mo.App. 202.
Ohio.—Dowd v. Cleveland Ry., 22 Ohio N.P.,N.S., 236—Holzenkamp v. Cincinnati Traction Co., 2 Ohio N.P.,N.S., 157, affirmed 3 Ohio N.P., N.S., 537, 16 Ohio Dec. 673

There are two main elements in the legal definition of a passenger: First, an undertaking on the part of the person to travel in the conveyance provided by the carrier; and, second, an acceptance by the carrier of the person as a passenger, which acceptance may be either express or implied from attending circumstances.—Matthews v. Central of Georgia Ry. Co., 169 S.E. 41, 46 Ga.App. 699.
Acceptance by carrier in general see infra § 561.

15. Mass.—McPartland v. Boston, R. B. & L. R. R., 136 N.E. 168, 242 Mass. 346.

Where train is stationary at some place where it is the custom to take on passengers, there is an implied invitation to the general public to avail itself of the company's transportation facilities by boarding the train.—U. S. Fidelity & Guaranty Co. v. Aschenbrenner, Cal., 65 F.2d 976, certiorari granted Aschenbrenner v. U. S. Fidelity & Guaranty Co., 54 S.Ct. 229, 290 U.S. 622, 78 L.Ed. 543, reversed on other grounds 54 S.Ct. 590, 292 U.S. 80, 78 L.Ed. 1137, rehearing denied 54 S.Ct. 861, 292 U.S. 615, 78 L.Ed. 1474.

16. U.S.—Trapnell v. Hines, C.C.A. N.J., 268 F. 504.
Mass.—McPartland v. Boston, R. B. & L. R. R., 136 N.E. 168, 242 Mass. 346.
Mo.—Thomas v. St. Louis-San Francisco Ry. Co., App., 293 S.W. 1051.
Neb.—Woolsey v. Chicago, B. & Q. R. Co., 58 N.W. 444, 39 Neb. 798, 25 L.R.A. 79.

If carrier assumes responsibility of conducting buyer of passenger rights to point of departure, carrier passenger relationship exists.—Sanchez v. Pacific Auto Stages, 2 P.2d 845, 116 Cal.App. 392.

Person is not passenger, who has not offered to board a street car, is not at the loading place, and has not been invited or accepted as a passenger.—Hering v. City of Detroit, 221 N.W. 278, 244 Mich. 293.

17. Mass.—McPartland v. Boston, R. B. & L. R. R., 136 N.E. 168, 242 Mass. 346.

§ 555. Intent to Become Passenger in General

The relation of carrier and passenger commences when one puts himself in the care of the carrier, or directly within its control, with the bona fide intention of becoming a passenger, and is accepted as such by the carrier.

As stated in Corpus Juris, which statement has been followed in subsequent decisions,[18] the relation of carrier and passenger commences when one puts himself in the care of the carrier, or directly within its control, with the bona fide intention of becoming a passenger, and is accepted as such by the carrier,[19] as where he makes a contract for transportation and presents himself at the proper place and in a proper manner to be transported,[20] but not where he does not present himself in a proper way to become a passenger.[21]

Implied from circumstances. It is not required, however, that there be any formal act of delivery of the passenger's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation; but the existence of the relation is commonly to be implied from the attendant circumstances, and the rule is that these circumstances, either by the purchase of a ticket or otherwise, must be such as will warrant an implication that he intends to become a passenger and offers himself to be carried,[22] and that the offer is accepted by the carrier, as announced infra § 561. This rule as to the passenger relation being implied from the circumstances is especially applicable to a passenger on a street car.[23] The mere fact, however, of an intention to become a passenger, which intention has not been by acts or otherwise indicated to the servants of the carrier, does not render the person having such intention a passenger, although he may be entitled to transportation.[24] The rules of law in the preceding portion of this paragraph, as stated in Corpus Juris, have

18. Ky.—Chesapeake & O Ry. Co. v Mollett, 270 S.W. 26, 28, 207 Ky 645
Mo.—Thomas v. St Louis-San Francisco Ry. Co., App., 293 S.W. 1051, 1053
Pa.—Sweigart v. Shreiner, 14 Pa Dist. & Co., 435, 436.

19. U.S.—Pennsylvania R. Co. v. Rogers, N.J., 244 F 76, 156 C.C.A. 504.
Cal.—Hart v. Fresno Traction Co., 167 P. 885, 175 Cal 489—Riley v. Southern Pac. Co, 207 P. 699, 57 Cal App. 477.
Conn.—Vaughn v. Healy, 182 A. 166, 120 Conn 589.
Ga.—Matthews v. Central of Georgia Ry Co., 169 S.E. 41, 46 Ga App. 699.
Ill.—Todd v. Louisville & N. R Co, 113 N.E. 95, 274 Ill. 201, L.R.A. 1916F 543—Foote v. Chicago, N. S. & M R. Co., 256 Ill App. 581
Mass.—Gerber v. New York Cent. R. R, 192 N.E. 837, 288 Mass. 318
Ohio—Dowd v. Cleveland Ry, 22 Ohio N.P.,N.S., 236—Hogans v. City of Columbus, 14 Ohio N.P.,N.S, 33.
Okl.—Chicago, R. I & P. Ry. Co v. Warren, 269 P. 368, 132 Okl. 107—Schaff v. Samuels, 234 P. 195, 109 Okl. 133.
Pa.—Sweigart v. Shreiner, 14 Pa. Dist & Co. 435.
10 C.J p 611 note 19.

Similar statement of rule

The "relationship is held to begin when the prospective passenger puts himself in the care of the carrier, or directly within its control, at the proper place and in a proper manner to be transported, with the bona fide intention of availing himself of its facilities for transportation, and is accepted as such by the carrier."—Thomas v. St. Louis-San Francisco Ry Co., Mo.App. 293 S.W. 1051, 1053

Contract between a street railway and an intending passenger is created where he indicates his purpose to take passage on a car, and the operator indicates his acceptance of the proposed passenger in some manner, such as stopping the car—Maloney v. United Rys. Co of St. Louis, Mo, 237 S.W. 509

To complete relation there must be an intent on the part of the passenger to take passage, a communication of such intent to the carrier, and an express or implied acceptance by the latter.
Ga.—Matthews v. Central of Georgia Ry. Co, 169 S.E. 41, 46 Ga App. 699.
Mich.—Rice v Michigan Ry. Co., 175 N.W. 454, 208 Mich. 123.

"There may be a hiatus in the relationship in instances too numerous to mention, but, when the purchaser of the rights to be conveyed is in a position to be accepted as a passenger, the relationship is again in force."—Sanchez v Pacific Auto Stages, 2 P.2d 845, 847, 116 Cal App 392.
Necessity of acceptance by carrier generally see infra § 561.

20. Pa.—Sweigart v. Shreiner, 14 Pa Dist. & Co. 435
10 C.J p 612 note 20

21. U.S.—Southern R Co v. Smith, Ga., 86 F. 292, 30 C.C.A. 58, 40 L.R.A. 746.
10 C.J p 612 note 21.

22. U.S.—Pennsylvania R Co. v. Rogers, N.J, 244 F. 76, 156 C.C.A 504
Ga.—Matthews v Central of Georgia Ry. Co, 169 S.E. 41, 46 Ga App 699.
Ky.—Chesapeake & O. Ry. Co. v. Mollett, 270 S.W 26, 207 Ky. 745.
Mass.—McPartland v. Boston, R B. & L. R R, 136 N.E. 168, 242 Mass. 346
Mo.—Thomas v. St Louis-San Francisco Ry. Co., App., 293 S.W. 1051.
Va.—Virginia Ry. & Power Co. v. Arnold, 92 S.E. 925, 121 Va. 204
Wis.—Arneberg v. Chicago, M & St. P Ry. Co., 195 N.W. 844, 182 Wis. 85
10 C.J. p 612 note 22.

23. Pa.—Berkebile v. Johnstown Traction Co., 99 A. 871, 872, 255 Pa. 310
"Owing to the nature of the business, the contractual relation of a carrier and passenger on a street car is seldom created by express contract, but is usually implied from the surrounding circumstances and the acts of the parties"—Berkebile v Johnstown Traction Co, supra—10 C.J p 612 note 22 [b]

24. Conn.—Vaughn v. Healy, 182 A. 166, 120 Conn. 589
Ga.—Matthews v. Central of Georgia Ry. Co, 169 S.E. 41, 46 Ga App. 699.
Mo.—Banks v. Kansas City Rys. Co, 217 S.W. 488, 280 Mo. 227.
Ohio—Klovedale v. Ohio Public Service Co, 6 N.E.2d 995, 54 Ohio App. 244.
R.I.—Villa v United Electric Rys. Co, 155 A. 366, 367, 51 R.I. 384, 75 A.L.R 282
10 C.J p 612 note 24.

Relationship of bus passenger and carrier does not come into existence until prospective passenger does some physical act with respect to boarding bus or that intention is communicated to driver at time when bus may be safely boarded.—Klove-

received judicial approval.[25]

One is not a passenger while walking toward a station with the intention of buying a ticket and taking a train after he gets there before he reaches such station;[26] nor while attempting to cross in front of a street car for the purpose of entering it;[27] nor while waiting in a reservation space to board a street car;[28] and, ordinarily, not while crossing a street or otherwise approaching a street car with the intention of boarding it.[29] It has been held, however, that a person is a passenger in crossing a street and about to enter a waiting street car with open gates;[30] and that a person who has bought a ticket for carriage on an auto bus is a passenger while crossing the highway to reach the bus.[31]

§ 556. Going to or Awaiting Train or Car

A person who, with the bona fide intention of becoming a passenger and with the express or implied assent of the carrier, enters on the carrier's premises, at a proper place, in a proper manner, and at a proper time, ordinarily, has the status of a passenger, even before entering the carrier's vehicle.

Actual entry into the carrier's vehicle of carriage is not necessary to create the relation of carrier and passenger, and one may become a passenger before entering such vehicle[32] or before transportation has actually commenced.[33] As stated in Corpus Juris, which statement has been followed in subsequent decisions,[34] where one with the bona fide intention of becoming a passenger, and with the express or implied assent of the carrier, goes on the carrier's premises, into the station, ticket office, or waiting room,[35] at a time when such place is open for the

dale v. Ohio Public Service Co., 6 N.E.2d 995, 54 Ohio App. 244.

25. Ky.—Chesapeake & O. Ry. Co. v. Mollett, 270 S.W. 26, 28, 207 Ky. 645.

26. Ky.—Bales v. Louisville & N. R. Co., 200 S.W. 471 179 Ky. 207.
10 C.J. p. 612 note 25.

27. D.C.—Jaquette v. Capital Tract. Co., 34 App.D.C. 41, 25 L.R.A.,N.S., 407.

28. Mass.—Herman v. Boston Elevated Ry. Co., 176 N.E. 180, 275 Mass. 485.

29. Ill.—Lavander v. Chicago City Ry. Co., 129 N.E. 757, 296 Ill. 284.
Iowa.—Moss v. Mason City & C. L. R. Co., 251 N.W. 627, 217 Iowa 354.
Me.—Murray v. Cumberland County Power & Light Co., 103 A. 66, 117 Me. 165.
Mass.—La Belle v. Boston Elevated Ry. Co., 164 N.E. 478, 265 Mass. 482.
Mo.—Gunn v. United Rys. Co. of St. Louis, 193 S.W. 814, 270 Mo. 517, L.R.A.1917D 1131.
N.C.—Keiger v. Southern Public Utilities Co., 155 S.E. 875, 199 N.C. 786.
Ohio.—Hogans v. City of Columbus, 14 Ohio N.P.,N.S., 33.
R.I.—Villa v. United Electric Rys. Co., 155 A. 366, 51 R.I. 384, 75 A.L.R. 282.
10 C.J. p. 613 note 28.

Crossing subject to car stop

A pedestrian crossing from the curb to a designated car stop to wait for a car is not a passenger of the street railroad company as regards its liability for injuries inflicted by a negligent motorist or another street car.—Northrup v. Pacific Electric Ry. Co., 47 P.2d 365, 8 Cal.App.2d 189.

Crossing to bus

Person, who, while standing on untraveled portion of street by pole marked "Bus Stop," signaled bus, and was struck by oncoming automobile while crossing to bus which had stopped on her side of street, is not "passenger," but "mere traveler," to whom defendant owed duty only to exercise reasonable care.—Vaughn v. Healy, 182 A. 166, 120 Conn. 589.

30. Wis.—Zimmermann v. Mednikoff, 162 N.W. 349; 165 Wis. 333.

31. Cal.—Sanchez v. Pacific Auto Stages, 2 P.2d 845, 116 Cal.App. 392.

32. Cal.—Hart v. Fresno Traction Co., 167 P. 885, 175 Cal. 489.—Sanchez v. Pacific Auto Stages, 2 P.2d 845, 116 Cal.App. 392.
Fla.—Atlantic Coast Line R. Co. v. Webb, 150 So. 741, 112 Fla. 449.
Ga.—Matthews v. Central of Georgia Ry. Co., 169 S.E. 41, 46 Ga.App. 699.
Ind.—Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568, 585.
Minn.—Smith v. St. Paul City Ry. Co., 18 N.W. 827, 32 Minn. 1, 50 Am.R. 550.
Neb.—Woolsey v. Chicago, B. & Q. R. Co., 58 N.W. 444, 445, 39 Neb. 798, 25 L.R.A. 79.
N.J.—Fleming v. Connecticut General Ins. Co., 181 A. 185, 116 N.J.Law 6.
N.Y.—Allessi v. New York Rapid Transit Corporation, 297 N.Y.S. 1011, 163 Misc. 815.
10 C.J. p. 613 note 29.

33. Fla.—Atlantic Coast Line R. Co. v. Webb, 150 So. 741, 112 Fla. 449.
Me.—Rogers v. Kennebec Steamboat Co., 29 A. 1069, 86 Me. 261, 25 L.R.A. 491.

34. Fla.—Atlantic Coast Line R. Co. v. Webb, 150 So. 741, 744, 745, 112 Fla. 449.
Kan.—Middleton v. Missouri Pac. R. Co., 212 P. 909, 911, 112 Kan. 793.
N.D.—Weeks v. Great Northern Ry. Co., 175 N.W. 726, 727, 43 N.D. 426.

35. U.S.—Davis v. Olson, C.C.A. Minn., 293 F. 921.
Cal.—MacGregor v. Pacific Electric Ry. Co., 59 P.2d 123, 6 Cal.2d 596.—Sanchez v. Pacific Auto Stages, 2 P.2d 845, 116 Cal.App. 392.
Conn.—Vaughn v. Healy, 182 A. 166, 120 Conn. 589.
Ga.—Rome Ry. & Light Co. v. Jackson, 121 S.E. 875, 31 Ga.App. 730.
Iowa.—Vanderbeck v. Chicago, M., St. P. & P. Ry. Co., 230 N.W. 390, 210 Iowa 230.
Md.—Damico v. Washington, B. & A. Electric R. Co., 148 A. 821, 158 Md. 470.
N.C.—Clark v. Bland, 106 S.E. 491, 181 N.C. 110.—Thomas v. Southern R. Co., 92 S.E. 321, 173 N.C. 494.
Or.—Palmer v. Willamette Valley Southern Ry. Co., 171 P. 1169, 88 Or. 322, L.R.A.1918D 1114.
Tex.—Ft. Worth & D. C. Ry. Co. v. Brown, Civ.App., 205 S.W. 378.
Utah.—Hansen v. Oregon Short Line R. Co., 188 P. 852, 55 Utah 577.
10 C.J. p. 613 note 31.

Caretaker of cattle, who was to be transported free of charge in caboose, became passenger as soon as he arrived at depot ready to board train and before he started to go to caboose for that purpose.—Edmondson v. Missouri Pac. R. Co., Mo.App., 264 S.W. 470.

Employee of factory making use of private crossing, granted by the railroad company to his employer for use of the employees, on his way to the station to take a train, was a passenger as soon as he left the crossing and entered the station, whether or not he returned to the crossing after he left the station to go to his train.—Universal Portland Cement Co. v. Spirakis, 137 N.E. 276, 79 Ind.App. 17.

One who enters bus terminal and places his baggage in the hands of a porter to be put on the proper bus, acquires all the rights of a passenger

reception of passengers intending to take passage,[36] even though, without the passenger's knowledge, it has been opened without authority,[37] or goes on to the platform or other proper part of the premises to await the arrival of, or to take a seat in, a car,[38] he ordinarily places himself in the position of a passenger, although he has not purchased a ticket,[39] or the agent has refused to sell him a ticket.[40]

However, in order that one may become a passenger, he must come on the carrier's premises and await the arrival of his train or car at the proper place for passengers,[41] in a proper manner,[42] and at the proper time, that is, within a reasonable time before the arrival or departure of such train or car,[43] or within the period prescribed by statute or the railroad commission for the station to be kept open,[44] unless the station agent agrees to keep the station open for a longer period.[45] The rules of law in this paragraph, as stated in Corpus Juris,

from the moment he enters the place.—King Bros Transportation Co. v. Altherr, 29 Ohio N P ,N.S., 275.

On subway platform

N.Y.—Allessi v New York Rapid Transit Corporation, 297 N.Y.S. 1011, 163 Misc 815.

Where one is in a station or on a platform, intending to take passage, and a street car comes up and stops at that station, or its platform, there has been an acceptance of the passenger and an implied contract for carriage, thus creating the relation of passenger and carrier—Banks v Kansas City Rys. Co., 217 S.W. 483, 280 Mo 227.

36. Tenn.—Southern Ry. Co. v. Cantrell, 5 Tenn.App. 677.
10 C.J. p 613 note 32

When station closed

Where a railroad has regular hours during which its station is closed between trains, a person who, although intending to become a passenger, comes to the station during the time that it is closed does not acquire the status of a passenger.—Southern Ry. Co. v. Cantrell, 5 Tenn. App. 677.

37. Ill.—Chicago, etc., R. Co. v. Walker, 75 N.E. 520, 217 Ill. 605, affirming 118 Ill App. 397.

38. U.S—Aschenbrenner v. U. S. Fidelity & Guaranty Co., Cal., 54 S. Ct. 590, 292 U.S 80, 78 L.Ed. 1137, reversing, C C.A., U. S Fidelity & Guaranty Co v. Aschenbrenner, 65 F.2d 976, certiorari granted Aschenbrenner v. U. S. Fidelity & Guaranty Co., 54 S Ct. 229, 290 U S. 622, 78 L.Ed. 543, and rehearing denied 54 S Ct. 861, 292 U.S. 615, 78 L.Ed. 1474.
Ind.—Evansville Rys. Co v. Miller, 111 N.E. 1031, 64 Ind.App. 206.
Ky.—Louisville & N. R. Co v. Dixon, 195 S.W. 1099, 176 Ky. 569.
Me.—Verrill v. Androscoggin Electric Co, 102 A. 179, 116 Me. 519.
Mo—Thomas v St. Louis-San Francisco Ry Co., App., 293 S W 1051.
N.Y.—Allessi v. New York Rapid Transit Corporation, 297 N.Y.S 1011, 163 Misc. 815.
10 C J. p 614 note 34

39. N.C—Clark v. Bland, 106 S.E. 491, 181 N.C. 110.
Tex.—Ft Worth & D. C. Ry. Co. v. Brown, Civ App., 205 S W. 378
10 C.J p 614 note 35.
Purchase of ticket generally see infra § 558.

40. Va.—Norfolk, etc., R. Co. v. Gallihher, 16 S.E. 935, 89 Va. 639.
10 C.J p 614 note 36.

41. Ala.—McWilliams v. Louisville & N. R. Co., 115 So 246, 217 Ala. 192.
Cal.—Sanchez v Pacific Auto Stages. 2 P.2d 845, 116 Cal.App. 392.
Fla.—Atlantic Coast Line R. Co. v. Webb, 150 So. 741, 112 Fla. 449.
Mass—Gerber v New York Cent. R. Co, 192 N.E 837, 288 Mass. 318.
Or.—Palmer v. Willamette Valley Southern Ry. Co., 171 P. 1169, 88 Or. 322, L.R.A.1918D 1114.
10 C.J. p 614 note 37.

This rule, as stated in Corpus Juris, has been judicially approved.—Washington, B & A. R. Co. v. State, 116 A. 911, 912, 140 Md. 115.

Usual point of departure

A person holding a railroad ticket, who presents himself at the usual point of departure of trains, is a passenger.—Atlanta Terminal Co. v. Alexander, 143 S E. 905, 38 Ga.App. 280.

42. Fla.—Atlantic Coast Line R. Co v. Webb, 150 So 741, 112 Fla. 449.
Mass.—Gerber v. New York Cent. R. Co, 192 N.E 837, 288 Mass. 318.
Mo.—Thomas v. St. Louis-San Francisco Ry. Co, App., 293 S.W. 1051.
Or.—Palmer v Willamette Valley Southern Ry Co., 171 P. 1169, 88 Or. 322, L R A.1918D 1114.
10 C J. p 614 note 38.

43. Ala—McWilliams v. Louisville & N R Co, 115 So. 246, 217 Ala 192—Georgia R. Co. v Bell, 65 So 835, 187 Ala 541
Cal—Sanchez v Pacific Auto Stages, 2 P.2d 845, 116 Cal.App. 392.
Fla.—Atlantic Coast Line R. Co. v. Webb, 150 So 741, 112 Fla. 449.
Mo.—Thomas v. St. Louis-San Francisco Ry. Co, App., 293 S.W. 1051.
N.C.—Clark v. Bland, 106 S E 491, 181 N C 110—Thomas v Southern R Co, 92 S E 321, 173 N C 494
Or.—Palmer v. Willamette Valley Southern Ry Co, 171 P. 1169, 88 Or. 322, L.R.A.1918D 1114.
Utah—Hansen v. Oregon Short Line R Co, 188 P. 852, 55 Utah 577.
10 C.J p 614 note 39.

As passenger during interim

One who goes to railway depot a reasonable time before scheduled departure of train, with intention in good faith of paying his fare and boarding such train, is a passenger during interim between his arrival and that of the train, even prior to his actual purchase of the ticket—Ft Worth & D. C Ry. Co. v. Brown, Tex Civ App, 205 S W. 378.

Fifteen minutes before train time

Custom not to open ticket window until fifteen minutes before scheduled time for train, while evidential, was not controlling on question whether a person entering the station before such time and within a reasonable time before the departure of the train was a passenger, in an action against the railroad for assault and battery—Clark v Bland, 106 S.E. 491, 181 N C. 110.

Right to go to station

"Any one who intends in good faith to become a passenger upon a railroad train has the right to go to the station within a reasonable time before the train is expected to depart, and during such time he has the right to do whatever may be necessary or proper to facilitate the loading of his baggage upon the train." —Baker v. Williams, Tex.Civ.App., 198 S.W. 808, 809.

44. Ky.—Manatis v. Cumberland & M R Co., 300 S W. 593, 222 Ky. 190.
10 C J p 614 note 39 [c], [d].

Within thirty minutes

A person who enters a carrier's depot, intending to take passage on its train due to depart within thirty minutes, the statutory period, with the means on hand to pay his fare, and who either purchases a ticket or announces his intention to do so to the carrier's agent, acquires the status of a passenger.—Manatis v. Cumberland & M. R. Co., 300 S W. 593, 222 Ky. 190.

45. Ky.—Manatis v. Cumberland & M R Co., 300 S.W 593, 222 Ky. 190

Where depot agent agrees to keep waiting room open for a person who

have received judicial approval.[46]

Licensee or trespasser. A person is not a passenger who is at a station or about the carrier's premises by mere permission and sufferance, and not for the purpose of being transported in due course, or after the abandonment of such an intention,[47] as where he is there as a mere sightseer,[48] or out of mere curiosity, or for his own convenience, or for the transaction of business not connected with the company,[49] or where he is there more than a reasonable time, or more than the statutory period, before or after the arrival of his train;[50] or where he goes on a private right of way or other part of the premises not provided for passengers, and where there is no occasion for him to go as a passenger.[51] Where a person entering a depot does not purchase, or announce his intention to purchase, a ticket within the proper time before the departure of the train, nor obtain leave to wait if the train is not due within such time, the carrier is not charged with notice of his intention to become a passenger and is under no obligation to treat him as such.[52]

§ 557. Signaling Car, Train, or Elevator, and Boarding Same

A person who, with the bona fide intention of becoming a passenger, enters or attempts to enter or board a car, train, elevator, or other vehicle of a carrier, ordinarily becomes a passenger, particularly where it has slowed down or stopped in response to his signal. He may be a passenger even on a wrong train or car, but ordinarily does not become a passenger in boarding a moving train or car until he reaches a place of safety thereon.

As stated in Corpus Juris, which statement has been followed in subsequent decisions,[53] a person who, with the bona fide intention of becoming a passenger,[54] enters or attempts to enter or board a train or car, even before he has got entirely in the car or other vehicle, becomes a passenger,[55] even before he has come into physical contact with the

announces his intention to take a train, and who purchases a ticket or announces his intention to do so, the person acquires the status of a passenger, whether or not the train is due in thirty minutes, the statutory period.—Manatis v. Cumberland & M. R. Co., 300 S.W. 593, 222 Ky. 190

46. Fla.—Atlantic Coast Line R. Co. v Webb, 150 So. 741, 744, 745, 112 Fla. 449
Or.—Palmer v. Willamette Valley Southern Ry. Co., 171 P. 1169, 1171, 88 Or. 322, L.R.A.1918D 1114.

47. Md.—Washington, B. & A. R. Co v State, 116 A. 911, 140 Md. 115
10 C.J. p 615 note 40.

This rule, as stated in Corpus Juris, has received judicial approval.—Washington, B. & A. R. Co. v. State, 116 A. 911, 912, 140 Md. 115

48. Pa.—Gillis v. Pennsylvania R. Co., 59 Pa. 129, 98 Am.D. 317.

49. Ark.—St. Louis, etc., R. Co. v. Fairbairn, 4 S.W. 50, 48 Ark. 491.
10 C.J. p 615 note 42.

50. Mo.—Thomas v. Bush, App., 200 S.W. 301.
10 C.J. p 615 note 43.

11 a. m. to 6 p. m., unreasonable
One who purchases a ticket at 11 a. m. for a train leaving at 6 p. m., intending to stay in the station to keep warm, is not a passenger—Thomas v. Bush, Mo.App., 200 S.W. 301.

51. Md.—Washington, B. & A. R. Co. v State, 116 A. 911, 140 Md. 115.
Mass.—Evans v. Boston, R. B. & L. R. R., 189 N.E. 37, 285 Mass. 283.

Crossing between platforms
Person who, intending to go east on elevated railway, mounted stairway to station for use of west-going passengers, and was injured by westbound train while crossing between platforms to station for use of eastgoing passengers, for which there was a separate stairway, was not a passenger at time of injury, having been in no position to be accepted as a passenger at such time.—Banks v. Kansas City Rys. Co., 217 S.W. 488, 280 Mo. 227.

52. Ky.—Manatis v. Cumberland & M. R. Co., 300 S.W. 593, 222 Ky. 190

53. Ala.—Mobile Light & R. Co. v. Ellis, 96 So. 773, 776, 209 Ala. 580—Bradley v. Williams, 101 So. 808, 809, 20 Ala.App. 308.
Fla.—Atlantic Coast Line R. Co v Webb, 150 So. 741, 745, 112 Fla. 449

54. Ala.—Bradley v. Williams, 101 So. 808, 20 Ala.App. 308
Fla.—Atlantic Coast Line R. Co. v. Webb, 150 So. 741, 112 Fla. 449
Miss.—Gulf, M. & N. R. Co. v. Bradley, 142 So. 493, 167 Miss. 603.
10 C.J. p 615 note 44.

For convenience or to transact business
A person who boards a standing passenger train or car for purposes not connected with the carrier, such as to converse with a friend, to deliver a message, or to buy a newspaper, is not a passenger.—Gulf, M. & N. R. Co. v. Bradley, 142 So. 493, 167 Miss. 603—10 C.J. p 615 note 44 [b].

55. Ala.—Louisville, etc., R. Co. v. Robinson, 105 So. 874, 213 Ala. 522—Bradley v. Williams, 101 So. 808, 20 Ala.App. 308.
Conn.—Vaughn v. Healy, 182 A. 166, 120 Conn. 589.
Fla.—Atlantic Coast Line R. Co v. Webb, 150 So. 741, 112 Fla. 449.
Ill.—Lavander v. Chicago City Ry. Co., 129 N.E. 757, 296 Ill. 234.
Ky.—Louisville & N. Ry. Co. v. Copley, 197 S.W. 648, 177 Ky. 171
Mass.—Fitzgerald v. Boston Elevated Ry. Co., 174 N.E. 490, 274 Mass. 287.
Mo.—May v. Chicago, B. & Q. R. Co., 225 S.W. 660, 284 Mo. 508—Gunn v. United Rys. Co. of St. Louis, 193 S.W. 814, 270 Mo. 517, L.R.A.1917D 1131—Hayward v. People's Motor-bus Co. of St. Louis, App., 1 S.W. 2d 252.
N.Y.—Garricott v. New York State Rys., 119 N.E. 94, 223 N.Y. 9, L.R.A.1918D 929, reversing 151 N.Y.S. 1117, 167 App.Div. 953
Ohio.—Cincinnati Traction Co. v. Holzenkamp, 3 Ohio N.P.,N.S., 537, affirmed 74 Ohio St. 379, 30 Ohio L. 671, 17 Ohio Dec. 218.
Pa.—Berkebile v. Johnstown Traction Co., 99 A. 871, 872, 255 Pa. 310.
10 C.J. p 615 note 45.

Boarding jitney bus
Where one boarded a jitney bus with the implied knowledge of the operator of the bus, this was a sufficient indication of his intention to become a passenger.—Ivancich v. Davies, 199 P. 784, 186 Cal. 520.

Mounting steps of train
A person who, intending to board a train and become a passenger thereon, while in the act of mounting the steps of the train, is a "passenger".—Riley v. Southern Pac. Co., 207 P. 699, 57 Cal.App. 477.

On elevator
A person going to an office for business purposes is an "invitee" and on entering office building's elevator becomes a "passenger" due the same degree of care as in cases of common carriers of passengers by bus,

hand rail or step of the car,[56] and although he may not have purchased a ticket before making such attempt,[57] or was previously a trespasser on the carrier's property;[58] and whether or not, after he has boarded, the carrier actually knows of his presence on the car or vehicle.[59]

The entrance or attempt to enter or board, however, must be made at the proper time.[60] such as with reasonable promptness,[61] in a proper manner,[62] and at a proper place, such as a regular or proper stopping place.[63] If one attempts to board a car at a place which is not a regular stopping place, he ordinarily does not become a passenger unless he does so upon the express or implied invitation of the carrier,[64] as where passengers are permitted to enter and leave the car at that point;[65] but although, a person boards a carrier's train or vehicle at an unusual or unauthorized place, if he is entitled to transportation, he becomes a passenger from the time he gets on board.[66]

street car, or railroad—Ensley Holding Co v Kelley, 158 So. 896, 229 Ala. 650—10 C.J p 615 note 45 [c].

When a person presents himself at the entrance of a standing street car, with the purpose, disclosed to, and recognized by, its conductor or officer in charge, of entering it as a passenger, and, as the car stands to enable the purpose to be carried out, the act of entering is begun, the relation of passenger and carrier exists between them—Garricott v. New York State Rys., 119 N.E. 94, 223 N.Y. 9, L.R.A.1918D 929, reversing 151 N.Y.S. 1117, 167 App.Div. 953.

56. Mass—Fournier v. Holyoke St. Ry. Co., 154 N.E. 546, 258 Mass 257.
Ohio.—Holzenkamp v. Cincinnati Traction Co., 2 Ohio N.P.,N.S., 157, affirmed 3 Ohio N.P.,N.S., 537, 16 Ohio Dec. 673.
10 C.J p 615 note 45 [b].

It is not necessary that person should have hold of rail or have foot on step of car to be regarded as "passenger," but will be so regarded while carefully attempting to step upon platform.—Gunn v. United Rys Co. of St. Louis, 193 S.W. 814, 270 Mo. 517, L.R.A.1917D 1131

57. Ga—Matthews v. Central of Georgia Ry. Co., 169 S.E. 41, 46 Ga. App. 699.
N.C.—Snipes v. Norfolk, etc., R. Co., 56 S.E. 477, 144 N.C. 18.
10 C.J. p 616 note 46
Purchase of ticket generally see infra § 558

58. Ky—Louisville & N. Ry Co. v. Copley, 197 S.W. 648, 177 Ky. 171.

59. Cal—Ivancich v. Davies, 199 P. 784, 186 Cal. 520—Hellman v Los Angeles Ry. Corporation, 27 P.2d 946, 135 Cal.App. 627, rehearing denied 28 P.2d 384, 135 Cal.App. 627
Pa.—Berkebile v. Johnstown Traction Co., 99 A. 871, 255 Pa. 310.

In case of interurban cars, one does not have to announce his presence to the conductor before becoming a passenger—McKenzie v. Detroit, J. & C. Ry. Co., 161 N.W. 970, 195 Mich. 218

60. Ala—Bradley v. Williams, 101 So. 808, 20 Ala.App. 308.
10 C.J. p 616 note 48

This rule, as stated in Corpus Juris, has received judicial approval
Ala—Bradley v. Williams, 101 So. 808, 809, 20 Ala.App. 308.
Fla—Atlantic Coast Line R. Co. v Webb, 150 So. 741, 745, 112 Fla. 449

61. Ala—Birmingham Electric Co v Cleveland, 113 So. 403, 216 Ala. 455.
10 C.J p 617 note 49 [b].

Immediate boarding not required

Passenger does not lose his status as such by failing to board train immediately after purchasing ticket—Missouri-Kansas-Texas R. Co. of Texas v. Hail, Tex.Com.App., 48 S.W.2d 589, affirming Hail v. Missouri-Kansas-Texas R. Co. of Texas, Civ. App., 30 S.W.2d 1062.

62. Ala.—Bradley v. Williams, 101 So. 808, 20 Ala.App. 308.
Utah.—Bergman v. Denver & R. G. R. Co., 178 P. 68, 53 Utah 213.
10 C.J. p 617 note 49.

On opposite side from platform

A person boarding a train on the side opposite the platform, the platform being the proper and usual boarding place, without the knowledge of the train operators, is not a passenger—Bernadine v. Erie R. Co., 164 A. 265, 110 N.J.Law 338.

63. Ala.—Birmingham Electric Co v. Cleveland, 113 So. 403, 216 Ala. 455—Bradley v. Williams, 101 So. 808, 20 Ala.App. 308.
10 C.J. p 616 note 47.

At place provided

A person who claims the protection of the status of a passenger must board the train at the place then and there provided by the carrier for the acceptance of passengers, and at the particular place where the agents of the carrier are accustomed to be for that purpose—Gulf, M. & N. R. Co. v. Bradley, 142 So. 493, 167 Miss. 603

64. Mass—Nuttall v. Worcester Consol. St. Ry. Co., 114 N.E. 291, 225 Mass. 167—Jones v Boston, etc., R. Co., 39 N.E. 1019, 163 Mass 245
Mo.—Galloway v. Kansas City Rys. Co., 233 S.W. 385—McCarty v. St. Louis, etc., R. Co., 80 S.W. 7, 105 Mo.App. 596
10 C.J. p 616 note 47.

At crossing, not regular stopping place

A prospective interurban car passenger, waiting for car at crossing which was not a regular stopping place, and at which the car stopped only on signal, when struck by freight car which had not stopped after answering signal by blasts of whistle signifying that it would not stop, the deceased, as to such freight car, was not a passenger within the rule as to degree of care required of railroad toward passengers.—Van Sickle v. Grand Rapids, G. H. & M. Ry. Co., 182 N.W. 132, 213 Mich. 261

Boarding with other passengers

If plaintiff assumed position immediately in rear of other passengers boarding street car, in ample time to board it and give conductor an opportunity to see him with intention of becoming a passenger, the contractual relation was created, and he became entitled to all rights of passenger, although he was not at usual stopping place when car stopped.—Detchemendy v. Wells, Mo. App., 253 S.W. 150.

Toleration of practice as not invitation

The act of a railroad company in tolerating a practice on the part of the public of taking trains from a certain unsafe space or place is not an inducement or invitation to an intending passenger to use such space, and one doing so is not a passenger—Doherty v. New York, N. H. & H. R. Co., 118 N.E. 281, 229 Mass. 135—Hillman v. Boston Elevated Ry. Co., 93 N.E. 653, 207 Mass. 478, 32 L.R.A.,N.S., 198

65. Mass—Nuttall v. Worcester Consol. St. Ry. Co., 114 N.E. 291, 225 Mass. 167.

66. Mo—Hayward v. People's Motorbus Co. of St. Louis, App., 1 S.W.2d 252
10 C.J. p 617 note 50.

This rule, as stated in Corpus Juris, has received judicial approval.
Fla—Atlantic Coast Line R. Co. v. Webb, 150 So. 741, 745, 112 Fla. 449.
Mo—Hayward v. People's Motorbus Co. of St. Louis, App., 1 S.W.2d 252, 254

Boarding bus

Where a person sets his foot on

The rule that a person becomes a passenger on boarding or attempting to board, in good faith, a carrier's train or car is particularly applicable where the train or the car has slowed down or stopped apparently for the purpose of taking a person on, in response to his signal to it so to do;[67] or where it has stopped, although without signal, with the manifest purpose of discharging and receiving passengers.[68]

The mere signaling, however, of the car to stop and the driver's intention to stop do not give rise to the relation, until the driver, by checking the speed of the car or by some other act, in response to the signal, indicates an intention to accept such person as a passenger,[69] and this rule is particularly applicable at a flag station,[70] or at a place where cars do not usually stop.[71]

A person becomes a passenger on a street car, as stated in Corpus Juris and followed in subsequent decisions,[72] as soon as he has set his foot on the step, platform, or running board, in the act of getting into the car, after it has stopped, with the intention of becoming a passenger.[73]

Boarding moving train or car. When a train or car commences to move, the implied invitation to the general public to avail itself of the transportation facilities is withdrawn;[74] and ordinarily a per-

the rear platform of a motor bus, with the intention of securing passage therein, directly behind others who had boarded the bus with the knowledge and assistance of the conductor, the relationship of carrier and passenger is established, irrespective of where the regular or customary stopping place of the bus is.—Hayward v People's Motorbus Co. of St. Louis, Mo.App., 1 S.W.2d 252.

67. Fla.—Atlantic Coast Line R. Co. v. Webb, 150 So. 741, 112 Fla. 449.
Mo.—Vrooman v. Harvey, 197 S.W. 118.
Ohio—Holzenkamp v. Cincinnati Traction Co., 2 Ohio N.P.,N.S., 157, affirmed 3 Ohio N.P.,N.S., 537, 16 Ohio Dec. 673.
10 C.J. p. 617 note 51.

Presumption of invitation

If the signal is given, and the motorman sees it and stops, it is presumed, in the absence of evidence to show that the stop was for some other purpose, that the stopping is in answer to the signal, that the invitation is given, and the contract complete. It is not necessary for the car in such case to come to a full stop, but if the motorman sees the signal, and the car slows down so that it becomes perfectly safe to board it, the slowing down, if no other purpose be shown, may be inferred to be in response to the signal, and an invitation to board.—Vrooman v. Harvey, Mo., 197 S.W. 118.

68. Ala.—Mobile Light & R. Co. v. Ellis, 96 So. 773, 209 Ala. 580.
Md.—Damico v. Washington, B. & A. Electric R. Co., 148 A. 821, 158 Md. 470.
Mo.—Maxey v. Metropolitan St. R. Co., 68 S.W. 1063, 95 Mo.App. 303.
N.Y.—Garricott v. New York State Rys., 119 N.E. 94, 223 N.Y. 9, L.R.A.1918D 929, reversing 151 N.Y.S. 1117, 167 App.Div. 953

If a would-be passenger is at a regular stopping place, and the car stops or slows down, so that he safely may attempt, and does attempt, to board it, the contract of carriage is complete, although those operating the car do not see him.—Vrooman v. Harvey, Mo., 197 S.W. 118

Where a carrier stops its car and opens its doors, inviting passengers to enter, a person who boards or attempts to board the car is a passenger.
U.S.—Philadelphia Rapid Transit Co. v. Alcorn, C.C.A.Pa., 266 F. 50
Ala.—Bradley v. Williams, 101 So. 808, 20 Ala.App. 308.
Ga.—Payne v. Allen, 110 S.E. 345, 28 Ga.App. 8, reversed on other grounds 116 S.E. 640, 155 Ga. 54.
Mo.—Erny v. Wells, 293 S.W. 119, 316 Mo. 798.

One waiting on railway property at a flag station to board train stopping at that point, and attempting to board, is a passenger.—Davis v. Olson, C.C.A.Minn., 298 F. 921.

"Where a street car stops at a street corner in a city, where it is usual to take on and discharge passengers, and opens its door, such act is an invitation to all persons there present to become passengers, and, when such persons evidence such intention by proceeding to board such car, they become passengers within the meaning of the law fixing the status of the parties."—Bradley v. Williams, 101 So. 808, 809, 20 Ala. App. 308.

69. Mich.—Rice v. Michigan Ry. Co., 175 N.W. 454, 208 Mich. 123.
Ohio—Hogans v. City of Columbus, 14 Ohio N.P.,N.S., 33.
10 C.J. p. 617 note 52.

Discovery of intending passenger

Where street railway's servant in charge of car does not see intending passenger, and is not aware he wishes to become such, to give rise to relationship of carrier and passenger by implication, street railway by ordinary care should have seen intending passenger or have been aware he wished to become such.—Virginia Ry. & Power Co. v. Arnold, 92 S.E. 925, 131 Va. 204.

Presumption of response to signal

If signal is given, and motorman sees it and stops, it is presumed that stopping is in answer to signal, that invitation is given, and contract complete.—Vrooman v. Harvey, Mo., 197 S.W. 118.

Where a person takes a position on the platform of a street railroad company and flags an approaching car to express his purpose of boarding it, and the motorman responds in the customary manner to the signal, the relation of passenger and carrier is established.—Rice v. Michigan Ry. Co., 175 N.W. 454, 208 Mich. 123.

70. Ga.—Georgia, etc., R. Co. v. Tapley, 87 S.E. 473, 144 Ga. 453, 456, L.R.A.1916C 1020.
10 C.J. p. 617 note 53.

71. Mo.—Vrooman v. Harvey, 197 S.W. 118.
Or.—Palmer v. Willamette Valley Southern Ry. Co., 171 P. 1169, 88 Or. 322, L.R.A.1918D 1114.

72. Fla.—Atlantic Coast Line R. Co. v. Webb, 150 So. 741, 745, 112 Fla. 449.
Mo.—Hayward v. People's Motorbus Co. of St. Louis, App., 1 S.W.2d 252.
Wash.—Dahline v. City of Seattle, 5 P.2d 1010, 1012, 165 Wash. 683.—Heva v. City of Seattle, 272 P. 41, 150 Wash. 61.

73. Mass.—Franz v. Holyoke St. Ry. Co., 132 N.E. 270, 239 Mass. 565
Ohio.—Cincinnati Traction Co. v. Weber, 6 Ohio App. 17.—Cincinnati Traction Co. v. Holzenkamp, 3 Ohio N.P.,N.S., 537, affirmed 74 Ohio St. 379, 30 Ohio Law R. 671, 17 Ohio Dec. 218.—Holzenkamp v. Cincinnati Traction Co., 2 Ohio N.P.,N.S., 157, affirmed 3 Ohio N.P.,N.S., 537, 16 Ohio Dec. 673.
Wash.—Dahline v. City of Seattle, 5 P.2d 1010, 165 Wash. 683.—Heva v. City of Seattle, 272 P. 41, 150 Wash. 61.
10 C.J. p. 617 note 54.

74. U.S.—U. S. Fidelity & Guaranty Co. v. Aschenbrenner, C.C.A.Cal.,

son attempting to board a moving train or car does not become a passenger[75] although he may have a ticket for such train or car,[76] and this rule is especially applicable where he makes such attempt, without the knowledge of the carrier's employees, at an improper place or in an improper manner.[77] A person is also not a passenger in running to get on board a moving train or car.[78] A person boarding a moving train or car, however, becomes a passenger when he reaches a place of safety thereon,[79] although he is not seen, at the time he enters, by the motorman or conductor.[80]

A street car company may extend permission to become a passenger without bringing its car to a dead stop,[81] and where one, either on the invitation or with the knowledge of the motorman or conductor, attempts to board a car which is moving very slowly, such as at a speed of two miles per hour, he becomes a passenger,[82] although he sees

65 F.2d 976, certiorari granted Aschenbrenner v. U. S. Fidelity & Guaranty Co., 54 S.Ct. 229, 290 U.S. 622, 78 L.Ed. 543, reversed on other grounds 54 S.Ct. 590, 292 U.S. 80, 78 L.Ed. 1137, rehearing denied 54 S.Ct. 861, 292 U.S. 615, 78 L.Ed. 1474.

Ill.—Foote v. Chicago, N. S. & M. R. Co., 256 Ill.App. 581.

Md.—Damico v. Washington, B. & A. Electric R. Co., 148 A. 821, 158 Md. 470.

Or.—Palmer v. Willamette Valley Southern Ry. Co., 171 P. 1169, 88 Or. 322, L.R.A.1918D 1114—Tompkins v. Portland Ry., etc., Co., 150 P. 758, 77 Or. 174.

Signal to start as not withdrawal

A signal to start a street car given by the conductor before a person accepted as a passenger has had an opportunity to get fully on the car does not have the effect of a withdrawal of the invitation until such person hears or reasonably ought to hear the signal and understand its purport.—Fournier v. Holyoke St. Ry. Co., 154 N.E. 546, 258 Mass. 257.

75. U.S.—U. S. Fidelity & Guaranty Co. v. Aschenbrenner, C.C.A.Cal., 65 F.2d 976, certiorari granted Aschenbrenner v. U. S. Fidelity & Guaranty Co., 54 S.Ct. 229, 290 U.S. 622, 78 L.Ed. 543, reversed on other grounds 54 S.Ct. 590, 292 U.S. 80, 78 L.Ed. 1137, rehearing denied 54 S.Ct. 861, 292 U.S. 615, 78 L.Ed. 1474—Fels v. East St. Louis & S. Ry. Co., C.C.A.Mo., 275 F. 881.

Ga.—Matthews v. Central of Georgia Ry. Co., 169 S.E. 41, 46 Ga.App. 699.

Ill.—Foote v. Chicago, N. S. & M. R. Co., 256 Ill.App. 581.

Md.—Damico v. Washington, B. & A. Electric R. Co., 148 A. 821, 158 Md. 470.

Mass.—Gerber v. New York Cent. R. R., 192 N.E. 837, 288 Mass. 318.

Mo.—Vrooman v. Harvey, 197 S.W. 118.

N.J.—Fleming v. Connecticut General Ins. Co., 181 A. 185, 116 N.J.Law 6.

10 C.J. p 618 note 55.

Trespasser as matter of law

Where the undisputed evidence showed that plaintiff, a brakeman, attempted to board a through passenger train not scheduled to stop, but at the time moving at a speed of twelve to fifteen miles per hour, and that the engineer was without authority even to slow its speed on the signal of one desiring to board it, and there was no evidence to indicate any custom or practice giving the engineer apparent authority to receive passengers while the train was moving, as a matter of law the relation of carrier and passenger was not established, but plaintiff was a trespasser, and there was no liability on the part of the carrier by reason of the engineer slowing the train for plaintiff to board it, such action being without the scope of the engineer's authority.—Lee v. Baker, Tex.Civ.App., 251 S.W. 580.

76. Ky.—Kentucky Highlands R. Co. v. Creal, 179 S.W. 417, 166 Ky. 469, L.R.A.1916B 830—Illinois Cent. R. Co. v. Cotter, 103 S.W. 279, 31 Ky.L. 679.

77. U.S.—Trapnell v. Hines, C.C.A.N.J., 268 F. 504.

Tex.—Horwitz v. Jefferson County Traction Co., Civ.App., 188 S.W. 26, error refused.

From opposite side

A person attempting to board a moving train on the side opposite the platform, and without knowledge of defendant railroad's employees, was not a passenger, and defendant was not liable for injuries sustained by him in falling from the steps of the car.—Trapnell v. Hines, C.C.A.N.J., 268 F. 504.

Not stopping place

Where only slackening of street car's speed at stopping place was while rounding curve, and it had passed stopping place before plaintiff attempted to board it, he did not become a passenger.—Hildebrant v. City and County of San Francisco, 231 P. 1008, 69 Cal.App. 590.

78. U.S.—Fels v. East St. Louis & S. Ry. Co., C.C.A.Mo., 275 F. 881.

Ohio.—Hogans v. City of Columbus, 14 Ohio N.P.,N.S., 33.

10 C.J. p 618 note 58.

79. U.S.—U. S. Fidelity & Guaranty Co. v. Aschenbrenner, C.C.A.Cal., 65 F.2d 976, certiorari granted Aschenbrenner v. U. S. Fidelity & Guaranty Co., 54 S.Ct. 229, 290 U.S. 622, 78 L.Ed. 543, reversed on other grounds 54 S.Ct. 590, 292 U.S. 80, 78 L.Ed. 1137, rehearing denied 54 S.Ct. 861, 292 U.S. 615, 78 L.Ed. 1474.

Cal.—Ivancich v. Davies, 199 P. 784, 186 Cal. 520.

Mich.—McKenzie v. Detroit, J. & C. Ry. Co., 161 N.W. 970, 195 Mich. 218.

Pa.—Berkebile v. Johnstown Traction Co., 99 A. 871, 255 Pa. 310.

10 C.J. p 618 note 56.

One entering a moving caboose, used as a passenger coach, as it passed a stopping point at which there was no depot or other shelter, with the intent to take passage and comply with the reasonable regulations of the company, was a passenger.—Arneberg v. Chicago, M. & St. P. Ry. Co., 195 N.W. 844, 182 Wis. 85.

80. Pa.—Berkebile v. Johnstown Traction Co., 99 A. 871, 255 Pa. 310.

81. Mo.—Nolan v. Metropolitan St. R. Co., 157 S.W. 637, 250 Mo. 602.

Tex.—Lewis v. Houston Electric Co., 88 S.W. 489, 112 S.W. 593, 39 Tex.Civ.App. 625.

Mere nodding of head

Where plaintiff, intending to board train, went to station, and, desiring to speak to someone one hundred feet away, asked the conductor to wait a minute, which the conductor conditionally agreed to do, and the train started, and plaintiff signaled the motorman, the mere fact that the motorman nodded his head did not make plaintiff a passenger, so as to warrant recovery for injuries in attempting to board the moving cars.—Palmer v. Willamette Valley Southern Ry. Co., 171 P. 1169, 88 Or. 322, L.R.A.1918D 1114.

82. Mo.—Vrooman v. Harvey, 197 S.W. 118.

10 C.J. p 618 note 60.

If there is definite response by motorman to signal to stop at place where cars do not usually stop, and car is slowed down, so that attempt to board it may safely be made, and is made, one becomes passenger.—Vrooman v. Harvey, Mo., 197 S.W. 118.

no conductor or motorman on the car.[83]

Getting on wrong train or car. Where a person with the right to passage on the right train or car by mistake gets on a wrong train or car, he is nevertheless a passenger on the train or car which he is on,[84] particularly where he is accepted as a passenger by the conductor.[85] Unless a person has knowledge of or is notified of the facts,[86] he is a passenger, although he has boarded a train which does not stop at his station,[87] or although he has boarded a train or car not intended for passengers,[88] unless he has no right to believe that it is not so intended or is informed to the contrary.[89] One, however, who boards the car of one company under the impression that it is the car of another company, having at the time no purpose or intention of being carried as a passenger thereon, does not become a passenger.[90]

§ 558. Purchase of Ticket

The mere purchase of a ticket does not of itself create the relation of carrier and passenger; but it is an element in the inception of the relation, and, when taken with other facts indicating an intention to become a passenger, may be sufficient for such purpose.

The mere fact that a person has purchased a ticket entitling him to transportation does not of itself create the relation of carrier and passenger;[91] nor, in the absence of a rule or known usage of the company to the contrary, is the actual purchase of a ticket before entering the train essential to constitute the relation,[92] particularly where he has been given no opportunity to purchase a ticket.[93] This rule applies under a statute fixing the rate of fare to be charged one who in good faith boards a passenger train, without a ticket,[94] or which requires a carrier to transport passengers failing to procure tickets at the same price as is charged for tickets,[95] although such a statute does not prevent the carrier from enforcing a rule refusing to permit a person without a ticket to enter a passenger train.[96]

The fact, however, of the purchase of a ticket, or the holding of a transfer, is an element entering into the inception of the relation, and when taken together with other acts on the part of the purchaser indicating an intention to put himself under the control of the carrier it will be sufficient to create the relation,[97] although the ticket is not actually paid for at the time of purchase;[98] and

83. Mo.—Devoy v. St. Louis Transit Co., 91 S.W. 140, 192 Mo. 197.

84. Ind.—Cincinnati, H. & I. R. Co. v. Carper, 13 N.E. 122, 14 N.E. 352, 112 Ind. 26, 2 Am.S.R. 144.
10 C.J. p 618 note 62.

85. Wash.—Dahline v. City of Seattle, 5 P.2d 1010, 165 Wash. 683.
10 C.J. p 618 note 63.

86. Mich.—Baldwin v. Grand Trunk R. Co., 87 N.W. 380, 128 Mich. 417.
10 C.J. p 618 note 64.

87. Mich.—Baldwin v. Grand Trunk R. Co., supra.
10 C.J. p 618 note 65.

88. Mo.—Chapman v. Kansas City Rys. Co., 217 S.W. 290.
10 C.J. p 619 note 66.

Car not in service

Person attempting to board moving car without invitation, and which he knew or by exercising care could have known was not in service, is not a "passenger."—Damico v. Washington B. & A. Electric R. Co., 148 A. 821, 158 Md. 470—10 C.J. p 619 note 66 [a].

Persons riding on vehicles not proper for passengers in general see supra § 552.

89. Mass.—Robertson v. Boston & N. St. Ry. Co., 76 N.E. 513, 190 Mass. 108, 112 Am.S.R. 314, 3 L.R.A.,N.S., 588.
10 C.J. p 619 note 67.

Boarding car at usual stopping place

Where one, intending to become a passenger, boards a street car at its regular or usual stopping place and pays his fare he becomes and remains a passenger until he safely alights therefrom, although the car is not being used at that particular moment for the purpose of conveying passengers, but is on its way to a street car barn.—Dahline v. City of Seattle, 5 P.2d 1010, 165 Wash. 683.

90. Ga.—DeVane v. Atlanta, etc., R. Co., 60 S.E. 1079, 4 Ga.App. 136
Ill.—Metropolitan West Side El., R. Co. v. Sutherland, 139 Ill.App. 85.

91. Minn.—Barnett v. Minneapolis, etc., R. Co., 143 N.W. 263, 123 Minn. 153, 48 L.R.A.,N.S., 262.
10 C.J. p 619 note 69.

92. Mo.—Rawlings v. Wabash R. Co., 71 S.W. 534, 97 Mo.App. 515.
Okl.—Schaff v. Samuels, 234 P. 195, 109 Okl. 133.
Pa.—Simpson v. Southern Pennsylvania Traction Co., 103 A. 884, 260 Pa. 526—Berkebile v. Johnstown Traction Co., 99 A. 971, 255 Pa. 310.
10 C.J. p 619 note 70.

93. Ark.—St. Louis, etc., R. Co. v. Green, 161 S.W. 148, 110 Ark. 232.
Opportunity to purchase ticket see infra § 601.

94. Tex.—Houston, etc., R. Co. v. Washington, Civ.App., 30 S.W. 719.

95. Ark.—St. Louis, etc., R. Co. v. Kilpatrick, 54 S.W. 971, 67 Ark. 47.
10 C.J. p 619 note 73.

96. Ark.—St. Louis, etc., R. Co. v. Blythe, 126 S.W. 386, 94 Ark. 153, 29 L.R.A.,N.S., 299.

97. Ala.—Louisville & N. R. Co. v. Robinson, 105 So. 874, 213 Ala. 522.
Ga.—Atlantic Coast Line R. Co. v. Parker, 139 S.E. 581, 37 Ga.App. 218.
Ind.—Lake Erie & W. R. Co. v. McConkey, 113 N.E. 24, 62 Ind.App. 447
Mo.—Thomas v. St. Louis-San Francisco Ry. Co., App., 293 S.W. 1051.
Tex.—Texas & P. Ry. Co. v. Aiken, Civ.App., 202 S.W. 811.
10 C.J. p 619 note 75

A ticket from a station where passengers are not taken on, if sold through permission of the division superintendent, is sufficient to create the relation of carrier and passenger.—Fenlon v. Chicago, M. & St. P. Ry. Co., 169 P. 863, 99 Wash. 289.

Passenger from time of rejection of ticket

When party in good faith, with intention of becoming passenger, had purchased and presented ticket entitling him to ride, and was wrongfully denied entrance, relation of carrier and passenger existed at time of rejection.—Louisville & N. R. Co. v. Robinson, 105 So. 874, 213 Ala. 522.

Ticket holder waiting for train

One who has purchased a ticket and is waiting to take passage on an approaching train occupies the position of a passenger.
Ky.—Louisville & N. R. Co. v. Dixon, 195 S.W. 1099, 176 Ky. 569
Mo.—May v. Chicago, B. & Q. R. Co., 225 S.W. 660, 284 Mo. 508.

98. Iowa.—Ellsworth v. Chicago, etc., R. Co., 63 N.W. 584, 95 Iowa 98, 29 L.R.A. 173.
10 C.J. p 687 note 3.

although his ticket is invalid, if he boards a train or car in good faith believing that it is good, he is a passenger, and entitled to be treated as such,[99] until he is notified that his ticket is not good and he refuses to pay his fare.[1]

Accepting expired ticket. In the absence of bad faith, deceit, or fraud, if a person presents a ticket, redeemable at full price, which has expired, but which the conductor, after examining it, accepts, he is a passenger, or at least an invitee.[2] The conductor, in such a case, is chargeable with knowledge obtainable by his examination of the ticket, and his act of acceptance is a waiver of the defect in the ticket,[3] and, where there is nothing to indicate that the conductor, in accepting the expired ticket, did not knowingly waive the defect, the passenger is justified in concluding that the ticket had been knowingly accepted and that the carrier and passenger relation existed.[4]

§ 559. Payment of Fare

Actual payment of fare ordinarily is not essential to the existence of the relation of carrier and passenger where the passenger has the means and the intention of paying his fare.

Where a person enters a train or car, with the express or implied invitation or acceptance of the carrier's agent or conductor, as discussed infra §§ 561, 562, for the purpose of becoming a passenger, and with the means and intention of paying his fare, the actual payment of fare is not essential to the establishment of the relation of carrier and passenger;[5] and where a person boards a train with money sufficient to pay his fare, it will ordinarily be presumed that he intends to pay his fare on demand,[6] unless his conduct is such as to show that he is trying to evade a demand being made on him, as by hiding himself or otherwise,[7] and if he fails to pay after a demand and opportunity so to do the presumption ceases.[8] Nevertheless, the payment of fare to the proper person and the receipt of the same constitute unequivocal evidence of the existence of the relation,[9] and, although the acceptance of any compensation from the passenger creates the relation of carrier and passenger,[10] unless the payment is either made or waived the fare must some time be paid or tendered,[11] and if a person gets on or enters a vehicle of a carrier with no intention of paying fare,[12] or persistently refuses to pay his

99. U.S.—Chesapeake & O. Ry. Co v. Burton, C.C.A.W.Va., 62 F.2d 110, 88 A.L.R. 756, certiorari denied 53 S.Ct. 507, 288 U.S. 617, 77 L.Ed. 990
Ark.—Little Rock R., etc., Co. v Goerner, 95 S.W. 1007, 80 Ark. 158 7 L.R.A.,N.S., 97, 10 Ann.Cas. 273
10 C.J. p 620 note 76.

1. Tex.—Gulf, etc., R. Co. v. Bunn, 95 S.W. 640, 41 Tex.Civ.App. 503.

2. U.S.—Chesapeake & O. Ry. Co v. Burton, C.C.A.W.Va., 62 F.2d 110, 88 A.L.R. 756, certiorari denied 53 S.Ct. 507, 288 U.S. 617, 77 L.Ed. 990

3. U.S.—Chesapeake & O. Ry. Co. v. Burton, supra.

4. U.S.—Chesapeake & O. Ry. Co. v. Burton, supra.

5. Ala.—Louisville & N. R. Co. v. Harper, 83 So. 142, 203 Ala. 398.
Cal.—Sanchez v. Pacific Auto Stages, 2 P.2d 845, 116 Cal.App. 392.
Miss.—Gulf, M. & N. R. Co. v. Bradley, 142 So. 493, 167 Miss. 603
Mo.—Chapman v. Kansas City Rys. Co., 217 S.W. 290—Rawlings v. Wabash R. Co., 71 S.W. 534, 97 Mo. App. 515
N.Y.—Allessi v. New York Rapid Transit Corporation, 297 N.Y.S. 1011, 163 Misc. 815
Pa.—Simpson v. Southern Pennsylvania Traction Co., 103 A. 884, 260 Pa. 526—Berkebile v. Johnstown Traction Co., 99 A. 871, 255 Pa. 310
10 C.J. p 620 note 79.

One boarding street car intending to become a passenger, even though no fare has been collected before he sustains injury, is a passenger, and not a trespasser simply because he entered in violation of company's rule.—Berkebile v. Johnstown Traction Co., 99 A. 871, 255 Pa. 310.

On jitney bus

One boarding a jitney bus as it was leaving a stopping place was no less a passenger because he had not paid his fare, and rode on the running board, and the operator had no actual knowledge of his presence, where it was the custom to collect the fare at the end of the journey, and he had money for the fare, and was ready and willing to pay, knowledge of his presence being implied.—Ivancich v. Davies, 199 P. 784, 186 Cal. 520.

Statute not exhaustive

A statutory provision that an obligation to pay fare is implied on the part of a passenger, and reciprocal liability of carrier, is not exhaustive.—Payne v. Allen, 116 S.E. 640, 155 Ga. 54, reversing 110 S.E. 345, 28 Ga.App. 8, conformed to 116 S.E. 642, 30 Ga.App. 80.
Fares generally see infra §§ 578–596.
Payment of fare to avoid ejection see infra § 812.

6. Ohio.—Dowd v. Cleveland Ry., 22 Ohio N.P.,N.S., 236.
10 C.J. p 620 note 80.
Presumptions as to relation of carrier and passenger generally see infra § 764.

7. Ala.—Broyles v. Central of Georgia R. Co., 52 So. 81, 166 Ala. 616, 139 Am.S.R. 50.

8. Ala.—Broyles v. Central of Georgia R. Co., supra.

9. Cal.—Sanchez v. Pacific Auto Stages, 2 P.2d 845, 116 Cal.App. 392.
10 C.J. p 620 note 83.

10. Mo.—Alexander v. St. Louis-San Francisco Ry. Co., 2 S.W.2d 165, 221 Mo. 271.

11. Mont.—Higley v. Gilmer, 3 Mont. 90, 35 Am.R. 450.
10 C.J. p 620 note 84.

Permitted to ride on tender of improper fare

Where a street railway company instructed its conductors to refuse a tender of a three-cent fare, but to permit persons making such tender to ride, and plaintiff was permitted to enter the car and tendered to the conductor three cents, and the conductor allowed him to be transported, he was a passenger and entitled to protection as such.—Toledo Rys. & Light Co. v. Duggan, 7 Ohio App. 1.
Right to require fare see infra § 579.

12. Ind.—Union Traction Co. of Indiana v. Alstadt, 143 N.E. 879, 195 Ind. 389.
10 C.J. p 620 note 85.

The Corpus Juris text is cited with approval in Gulf, M. & N. R. Co. v. Bradley, Miss., 142 So. 493, 494.
Fraud or evasion of fare generally see infra § 560.

fare,[13] he cannot be considered a passenger, unless such refusal is justifiable.[14] A passenger who for a temporary purpose of his own enters a Pullman car forming part of the train without paying the extra fare demanded for the privilege of riding therein remains a passenger, and is entitled to protection as such.[15]

§ 560. Fraud or Evasion of Fare

A person conveyed on a carrier's vehicle by fraud or evasion of fare in violation of the rules or orders of the carrier is not a passenger.

One conveyed by fraud or against the express orders of the carrier is not a passenger,[16] as where by giving a tip or bribe he induces a conductor or other trainman to permit him to travel on a train, or in a place, not intended for the conveyance of passengers, contrary to the regulations of the company.[17] One who fraudulently attempts to secure transportation by attempting to pass himself off as one entitled to be carried without a ticket, or by like fraudulent acts, is not a passenger, although he is being transported, and it matters not whether he has actually perpetrated a fraud by deceiving the conductor of the train, or is on the train with intent to secure transportation by so doing;[18] but it is not to be presumed from the mere fact that a person has attempted to secure transportation which has been refused to him that he intends a fraud by remaining on the train,[19] since the presumption on the contrary is that he intends to pay his fare when it is demanded, as announced supra § 559. One who fraudulently attempts to ride on a nontransferable ticket or pass issued to another person is not a passenger,[20] but is entitled to the rights of a passenger where he presents such ticket or pass in good faith, and it is accepted by the conductor.[21] A former employee of the carrier, who accepts repayment of his fare from the conductor of the train on which he is riding, ceases to be a passenger and becomes a licensee or invitee.[22]

A trespasser stealing a ride or attempting so to do cannot be considered in any sense a passenger.[23]

Children or newsboys who climb on the platforms or sides of street cars without the consent of the conductor, for the purpose of securing a ride without payment of fare, are not entitled to protection as passengers,[24] but if the conductor consents that a child be carried, although he has no intention of paying fare, he is entitled to protection as a passenger.[25]

§ 561. Acceptance by Carrier in General

The relation of carrier and passenger does not exist until there has been an acceptance, express or implied, by the carrier, of the passenger, as such.

As has been noted supra §§ 554, 555, to give rise to the relation of passenger and carrier, there must be not only an intent on the part of the former to avail himself of the facilities of the latter for transportation, but also an express or implied acceptance by the latter of the former as a passenger. Al-

13. Ala.—Birmingham Electric Co v Maze, 166 So. 50, 231 Ala. 539.
10 C.J. p 620 note 86.

Refusal to pay child's fare
Relationship of carrier and passenger did not exist between street railroad company and grandmother who boarded car accompanied by grandchild upon grandmother's refusal to pay child's fare on demand, precluding grandmother's recovery, as passenger, for damages alleged to have been sustained when she was ejected.—Birmingham Electric Co. v. Maze, 166 So. 50, 231 Ala. 539.
Refusal to pay fare as terminating relation see infra § 563.

14. Minn.—Hardenbergh v. St. Paul, etc., R. Co., 38 N.W. 625, 39 Minn. 3 12 Am.S.R. 610.
10 C.J. p 621 note 87.

15. Mo.—Siegel v. Illinois Cent. R. Co., 172 S.W. 420, 186 Mo.App. 645.

16. Okl.—St. Louis, etc., R. Co v. Nichols, 136 P. 159, 39 Okl. 522.
10 C.J. p 621 note 90

17. Ark.—Williams v. Chicago, R. I. & P. Ry. Co., 215 S.W. 605, 139 Ark. 562.
Ind.—Chicago, etc., R. Co. v. Field, 34 N.E. 406, 7 Ind.App. 172, 52 Am.S.R. 444
Kan.—Mendenhall v. Atchison, etc., R. Co., 71 P. 846, 66 Kan. 438, 97 Am.S.R. 380, 61 L.R.A. 120.
Minn.—Brevig v. Chicago, etc., R. Co., 66 N.W. 401, 64 Minn. 168.
10 C.J. p 642 note 56.

A former employee who, by collusion with the conductor, gets permission to ride on a freight train, contrary to the rules of the railroad company, is a trespasser and not a passenger.—Youmans v. Wabash R. Co., 127 S.W. 595, 143 Mo.App. 393.

18. U.S.—Condran v. Chicago, M. & St. P. R. Co., Iowa, 67 F. 522, 14 C.C.A. 506, 28 L.R.A. 749
10 C.J. p 621 note 92.

19. U.S.—Robostelli v. New York, N. H. & H. R. Co., C.C.N.Y., 33 F. 796.
Fla.—Florida Southern R. Co. v. Hirst, 11 So. 506, 30 Fla. 1, 32 Am. S.R. 17, 16 L.R.A. 631.
Tex.—Galveston, etc., R. Co. v. Snead, 23 S.W. 277, 4 Tex.Civ.App. 31.

20. U.S.—Harmon v. Jensen, Mich., 176 F. 519, 100 C.C.A. 115, 20 Ann. Cas. 1224.
10 C.J. p 621 note 95.

21. U.S.—Robostelli v. New York, N. H. & H. R. Co., C.C.N.Y., 33 F. 796
10 C.J. p 621 note 95 [a].

22. Minn.—Hunter v. Chicago, St. P., M. & O. Ry. Co., 230 N.W. 793, 180 Minn. 305, affirmed 231 N.W. 920, 180 Minn. 305

23. Mass.—Cotter v. Boston, R. B. & L. R. Co., 154 N.E. 767, 258 Mass. 279.
Miss.—Gulf, M. & N. R. Co. v. Bradley, 142 So. 493, 167 Miss. 603.
10 C.J. p 622 note 96.

This rule, as stated in Corpus Juris, has received judicial approval.—Gulf, M. & N. R. Co. v. Bradley, 142 So. 493, 494, 167 Miss. 603.
Refusal to pay fare see supra § 559.
Stealing ride as offense see supra § 541.

24. Mo.—Padgitt v. Moll, 60 S.W. 121, 159 Mo. 143, 81 Am.S.R. 347, 52 L.R.A. 854.
10 C.J. p 622 note 97.

25. Ga.—Metropolitan St. R. Co. v. Moore, 10 S.E. 730, 83 Ga. 453.

though a formal acceptance of the prospective passenger by the carrier is not necessary,[26] until there is an acceptance, that is, until within the express or implied knowledge of the carrier or its employees the person seeking to become a passenger has indicated his intention to become a passenger, which intention has been in some way acquiesced in, at least to the extent of not refusing transportation, the relation does not arise, even though the purpose of the person attempting to become a passenger is to pay fare when required.[27]

Just as there may be sufficient intent to become a passenger before transportation actually commences, as stated supra §§ 555–557, so there may be an implied acceptance as to persons seeking transportation before they have entered into the train or other conveyance and it has started toward its destination. Those who by express or implied assent are waiting in the passenger room or in a standing car for the departure of a train, or are crossing the premises of the carrier for the purpose of going on a train, or are in the act of mounting the car steps, are passengers, provided their acts are such as are presumed to be known and assented to by the agents of the railroad company having authority in the matter, and regardless of whether or not a ticket has been purchased, if no rule or regulation of the company is being violated.[28]

§ 562. Invitation or Acquiescence of Carrier's Employees

A person on a carrier's vehicle at the invitation or by the acquiescence or consent of an authorized agent or employee is generally regarded as a passenger, or at least as a licensee.

One is ordinarily considered a passenger, in some respects at least, or a licensee, who in good faith enters the carrier's vehicle to ride therein to a certain point, at the invitation or by the acquiescence or consent of the carrier's employees, such as the conductor, in charge of the means of transportation,[29] even though such person has paid no fare, as explained supra §§ 549, 559, and although the train or vehicle is not intended and operated for the carriage of passengers, as explained supra § 552. The invitation or consent, however, must be given by one having the authority or right to give it;[30] and persons accepting invitations from employees

26. Va.—Virginia Ry. & Power Co v. Arnold, 92 S.E. 925, 121 Va. 204
Wash.—Dahline v City of Seattle, 5 P.2d 1010, 165 Wash. 683.
10 C.J. p 622 note 99 [b].

"The conscious acceptance by the motorman or conductor of the car of the offer of a would-be passenger to become a passenger—the actual meeting of minds of plaintiff and defendant in fact upon a contract of carriage—it is well settled, is not essential to the relationship of carrier and passenger."
Va.—Virginia Ry. & Power Co. v. Arnold, 92 S.E. 925, 927, 121 Va. 204.
Wash.—Dahline v. City of Seattle, 5 P.2d 1011, 1013, 165 Wash. 683.

27. Cal.—Hellman v. Los Angeles Ry. Corporation, 27 P.2d 946, 135 Cal.App. 627, rehearing denied 28 P.2d 384, 135 Cal.App. 627—Sanchez v. Pacific Auto Stages, 2 P.2d 845, 116 Cal.App. 392.
Ga.—Matthews v. Central of Georgia Ry. Co., 169 S.E. 41, 46 Ga.App. 699.
Ill.—Todd v. Louisville & N. R. Co., 113 N.E. 95, 274 Ill. 201, L.R.A. 1916F 543—Foote v. Chicago, N. S. & M. R. Co., 256 Ill.App 581.
Ky.—Chesapeake & O Ry. Co. v. Mollett, 270 S.W. 26, 207 Ky. 745.
Mo.—Banks v. Kansas City Rys. Co., 217 S.W. 488, 280 Mo. 227—Thomas v. St. Louis-San Francisco Ry. Co., App., 293 S.W. 1051.
Okl.—Schaff v Samuels, 234 P. 195, 109 Okl. 133
10 C.J. p 622 note 99.

Relation held not created

Where woman, intending to pay fare on train, which she entered after it had left station and was standing on siding, rode without having been seen by employees of carrier to next station, where she fell off while train was moving, there was no contract, express or implied, and she was not a passenger, there being nothing from which to imply acceptance of relationship by carrier.—Chesapeake & O Ry. Co. v. Mollett, 270 S.W. 26, 207 Ky. 745.

28. Ga.—Matthews v. Central of Georgia Ry. Co., 169 S.E. 41, 46 Ga. App. 699
10 C.J. p 622 note 2.

Relation held not created

The relation of carrier and passenger is not created where an intoxicated person applies to a station agent for a ticket, is refused, is ordered into the smoking room, and, on being found later on the platform, is again ordered into the smoking room.—Goodison v. Chicago, B. & Q. R. Co., 213 Ill.App. 56.

29. Ala.—Louisville & N. R. Co. v. Harper, 83 So. 142, 203 Ala. 398.
Ill.—Hayes v Sampsell, 113 N.E. 611, 274 Ill. 258, affirming 195 Ill.App 365.
Mo.—Chapman v. Kansas City Rys. Co., 217 S.W. 290
N.Y.—Barrett v. Brooklyn Heights R. Co., 176 N.Y.S. 590, 188 App.Div. 109.
Pa.—Wood v. Philadelphia Rapid Transit Co., 104 A. 69, 260 Pa. 481, L.R.A. 1918F 317
10 C.J. p 623 note 3.

Authority of motorman to receive passenger

Although a rule of a street railroad company provides that the conductor should be in charge of the car, and the motorman had no authority to accept or reject passengers, where passengers are discharged and received at the front as well as at the rear end of the car, it is within the motorman's apparent authority to receive passengers on the car, and therefore within the general scope of his employment.—Hayes v. Sampsell, 113 N.E. 611, 274 Ill. 258, affirming 195 Ill.App. 365.

Person attending passengers riding to next crossing

Where a man enters a street car with lady passengers, whose fares he pays, and requests the conductor to stop at the next crossing, and the conductor, learning for the first time that he is not a passenger, consents, and signals the motorman to stop, he recognizes that such man is not wrongfully on the car and permits his presence, so that he is a licensee and not a trespasser.—Barrett v Brooklyn Heights R. Co., 176 N.Y.S. 590, 188 App.Div. 109.

30. U.S.—Chicago, St. P., M & O. R. Co v. Bryant, Minn., 65 F. 969, 13 C.C.A. 249.
10 C.J. p 623 note 6.

not having the control of the train or vehicle or any apparent right to give permission to ride thereon are, of course, not entitled to be considered as passengers.[31]

It is sometimes proper to permit persons who are not passengers to enter public conveyances, as in the case of persons attending passengers, as explained supra § 553, and the authority to permit such persons to enter is impliedly conferred on the agent or employee in charge of the conveyance;[32] and, where such an agent or employee permits the presence on the conveyance of a person who has not paid his fare as a passenger, the permission relieves such person from the imputation of being a wrongful intruder or trespasser.[33]

§ 563. Continuance and Termination of Relation

The relation of carrier and passenger ordinarily continues until the journey, expressly or impliedly contracted for, has been concluded, and the passenger has left the carrier's premises, unless the passenger sooner terminates or relinquishes his rights as such.

The relation of carrier and passenger, as stated in Corpus Juris and approved in subsequent decisions,[34] having been constituted continues until the journey to the destination, expressly or impliedly contracted for, has been concluded[35] and the passenger has left the carrier's premises,[36] unless the relation is sooner terminated by the voluntary act of the passenger,[37] or unless the passenger has relinquished his rights as such by some act or misconduct of his own,[38] such as a refusal to pay fare,[39] refusal to produce a ticket,[40] failure to have his ticket stamped,[41] detaching coupons,[42] attempting to use an invalid ticket,[43] or refusing to comply

31. U.S.—Meloon v. Davis, C.C.A.N.H., 292 F. 82.
Ind.—Stalcup v. Louisville, N. A. & C. Ry. Co., 45 N.E. 802, 803, 16 Ind. App. 584.
Kan.—Mendenhall v. Atchison, etc., R. Co., 71 P. 846, 66 Kan. 438, 97 Am.S.R. 380, 61 L.R.A. 120.
Wash.—Gruber v. Cater Transfer Co., 165 P. 491, 96 Wash. 544, L.R.A.1917F 422.
10 C.J. p 623 note 7.

Woman, riding in motor express company's truck, without knowledge of company's manager, is not a "passenger."—Hoover Motor Express Co. v. Thomas, 65 S.W.2d 621, 16 Tenn. App. 664.

32. N.Y.—Barrett v. Brooklyn Heights R. Co., 176 N.Y.S. 590, 188 App. Div. 109.

33. N.Y.—Barrett v. Brooklyn Heights R. Co., supra.

34. Pa.—Sweigart v. Shreiner, 14 Pa.Dist. & Co., 435
Va.—Hines v. Garrett, 108 S.E. 690, 131 Va. 125.

35. Ga.—Metts v. Louisville & N. R. Co., 182 S.E. 531, 52 Ga.App. 115.
Iowa.—Vanderbeck v. Chicago, M. & St. P. & P. Ry. Co., 230 N.W. 390, 210 Iowa 230.
Tenn.—Buckner v. Southern Ry. Co., App., 96 S.W.2d 600.
Tex.—South Plains Coaches v. Box, Civ.App., 111 S.W.2d 1151, error dismissed.
Va.—Hines v. Garrett, 108 S.E. 690, 131 Va. 125.
10 C.J. p 623 note 8.

Evidence of intent to make continuous journey

An arrangement made by a passenger by telephone with an agent at an intervening point, before entering the car at the initial point, to secure a ticket at such intervening point, to his destination, indicates a determination to make a continuous journey on the same car, notwithstanding the passenger's statement that he intended to leave the car at such place to get the ticket ordered.—Arbuckle v. State, 124 N.E. 395, 188 Ind. 444.
Continuance of passenger relation of one riding on drover's pass or under similar arrangement see supra § 551.

36. Pa.—Sweigart v. Shreiner, 14 Pa. Dist. & Co. 435.
10 C.J. p 624 note 9

37. Pa.—Furby v. Pennsylvania R. Co., 132 A. 796, 286 Pa. 85
Tex.—Chicago, R. I. & G. Ry. Co. v. Sears, Comm.App., 210 S.W. 684, reversing, Civ.App., 155 S.W. 1003—South Plains Coaches v. Box, Civ. App., 111 S.W.2d 1151, error dismissed.
10 C.J. p 624 note 10.

Intoxicated passenger falling from car

Where voluntary intoxication was proximate cause of fall from street car vestibule, rights of passenger terminated leaving only rights of traveler on public highway while lying unconscious on track.—Bilodeau v. Fitchburg & L. St. Ry. Co., 128 N.E. 872, 236 Mass. 526.

Jumping from train

Where passenger jumped off train during afternoon of one day and was killed by train during following day while on track, he was not a passenger at the time of his injury, but merely a trespasser.—Chicago, R. I. & G. Ry. Co. v. Sears, Tex.Com.App., 210 S.W. 684, reversing, Civ.App., 155 S.W. 1003.

Leaving right of way

Where a nurse, who is a passenger on a train which is wrecked, after assisting in taking care of the injured, leaves the right of way and walks along a highway to a bridge over the track, she loses her status as passenger by leaving the right of way.—Furby v. Pennsylvania R. Co., 132 A. 796, 286 Pa. 85.

38. Iowa.—Vanderbeck v. Chicago, M., St. P. & P. Ry. Co., 230 N.W. 390, 210 Iowa 230.
10 C.J. p 624 note 11.

39. Miss.—Hart v. Southern R. Co., 40 Miss. 391.
10 C.J. p 624 note 12.
Payment of fare in general see supra § 559.

40. N.Y.—Hibbard v. New York, etc., R. Co., 15 N.Y. 455.
10 C.J. p 624 note 13.
Ejection for refusal to produce ticket see infra §§ 810–812.
Exhibition and surrender of ticket in general see infra §§ 609–613.

41. U.S.—Boylan v. Hot Springs R. Co., Ill., 10 S.Ct. 50, 132 U.S. 146, 33 L.Ed. 290.
Mo.—Cloud v. St. Louis, etc., R. Co., 14 Mo.App. 136.
Stamping and signing of ticket in general see infra § 620.

42. Mass.—Boston, etc., R. Co. v. Chipman, 14 N.E. 940, 146 Mass. 107, 4 Am.S.R. 293.
10 C.J. p 624 note 14.
Detachment of coupons in general see infra § 612.

43. Ind.—Godfrey v. Ohio, etc., R. Co., 18 N.E. 61, 116 Ind. 30
Minn.—Wyman v. Northern Pac. R. Co., 25 N.W. 349, 34 Minn. 210.

Ticket for different route

Where a ticket issued to a person does not entitle him to transportation over the route designated by him to the agent, and he, in ignorance of

with the reasonable rules of the carrier.[44]

Carried past destination. A passenger on a street car who is carried past the place for which passage was taken does not cease to be a passenger,[45] and if he is permitted to remain on the car until he reaches his destination on the return trip, he remains a passenger, although he pays but one fare.[46] A railroad passenger, however, who is carried past his destination is not a passenger while at a hotel until he can return.[47]

Reëntry after ejection. A passenger who is rightfully ejected from the train or car and who reënters the car for an improper purpose is a trespasser and not a passenger;[48] but if the ejection is illegal the passenger does not lose his status as such.[49]

Waiting passenger leaving premises. A passenger who, while waiting to take a train or car, leaves the carrier's premises, even temporarily, loses his status as such,[50] unless his leaving is due to the carrier's failure to comply with the law with regard to heating and lighting the station.[51]

A passenger in an elevator continues as such until he is safely placed outside the elevator, whether the gates are considered as a part of the elevator or as a part of the building.[52] One who alights from an elevator does not lose his identity as passenger while he is engaged in direct connection with or relation to the car.[53]

§ 564. Leaving Vehicle

A passenger ordinarily continues to be such while he is rightfully leaving the carrier's vehicle, until he has alighted in safety or has had a reasonable opportunity to do so.

A traveler is ordinarily, while in the act of rightfully leaving the vehicle of transportation at the station at which it has stopped, deemed to be a passenger,[54] and the relation continues until he has alighted in safety[55] or has had a reasonable opportunity so to do.[56]

this fact, proceeds with his journey on a train upon which he would be entitled to travel upon a ticket issued in accordance with his instructions, he is a passenger entitled to transportation to the destination and over the route designated by him to the agent, and he will not cease to be such a passenger upon afterward ascertaining that his ticket did not call for transportation over the route which he was traveling—Atlantic Coast Line R. Co. v. Parker, 139 S.E. 581, 37 Ga.App. 218.

44. Mass.—Renaud v. New York, etc., R. Co., 97 N.E. 98, 210 Mass. 553, 38 L.R.A.,N.S., 689.
10 C.J. p. 624 note 17.
Ejection for failure or refusal to comply with regulations see infra § 819.

45. Ind.—Terre Haute, I. & E. Traction Co. v. Hunter, App., 111 N.E. 344, 62 Ind.App. 399.
10 C.J. p. 624 note 18.

46. N.Y.—Rosenberg v. Third Ave. R. Co., 61 N.Y.S. 1052, 47 App.Div. 323, affirmed 61 N.E. 1151, 168 N.Y. 681.

47. Ga.—Central of Georgia R. Co. v. Price, 32 S.E. 77, 106 Ga. 176, 71 Am.St.R. 246, 43 L.R.A. 402
10 C.J. p. 625 note 20

48. U.S.—Harrison v. Fink, C.C.Ga., 42 F. 787
10 C.J. p. 624 note 11 [b]

49. Va.—Mangum v. Norfolk & W. Ry. Co., 99 S.E. 686, 125 Va. 244, 5 A.L.R. 346.

50. U.S.—Baird v. New York Cent. R. Co., C.C.A.N.J., 71 F.2d 970.
Or.—Palmer v. Willamette Valley Southern Ry. Co., 171 P. 1169, 88 Or. 322, L.R.A.1918D 1114.
10 C.J. p. 612 note 26

Suspension of status
Where an intending passenger, having reached the station, left it to talk to a person on a county road nearby, his status as an intending passenger was at least suspended.—Palmer v. Willamette Valley Southern Ry. Co., 171 P. 1169, 88 Or. 322, L.R.A.1918D 1114.

51. Miss.—Davis v. Day, 89 So. 814, 127 Miss. 140

Breach of statutory requirement
Under a statute making it the duty of railroads to heat and light their passenger waiting rooms for thirty minutes after the arrival of trains for the use of disembarking passengers, where a passenger intends using the room, but because it is not heated and lighted, goes away, but returns, the relation of passenger does not, for this reason, cease during the statutory thirty minutes—Davis v. Day, 89 So. 814, 127 Miss. 140.

52. Mo.—McDermed v. Baker, App., 20 S.W.2d 597.

53. Pa.—McKnight v. S. S. Kresge Co., 132 A. 575, 285 Pa. 489.

A person who rides on an elevator while moving a safe, and has alighted for the purpose of unloading the safe, has not lost his identity as passenger.—McKnight v. S. S. Kresge Co., 132 A. 575, 285 Pa. 489

54. Mich.—Serviss v. Ann Arbor R. Co., 135 N.W. 343, 169 Mich. 564
Pa.—Furby v. Pennsylvania R. Co., 132 A. 796, 286 Pa. 85.
10 C.J. p. 625 note 22

Alighting from escalator
Store, if classified as carrier with respect to care owed customer using escalator, continued in such relation during customer's alighting therefrom.—S. S. Kresge Co. v. McCallion, C.C.A.Mo., 58 F.2d 931

The phrase "passenger while being transported", as used in a statute providing that every railroad company shall be liable for damages "upon the person of passengers while being transported over its road", includes a passenger alighting from a train at his destination.—Maple v. Union Pac. R. Co., C.C.A.Neb., 264 F. 89.—Jones v. Chicago, R. I. & P. R. Co., C.C.A.Neb., 260 F. 929

55. Cal.—Fitzgerald v. Southern Pac. Co., 173 P. 91, 36 Cal.App. 660
Mo.—Lackey v. Missouri & K. I. Ry. Co., 264 S.W. 807, 305 Mo. 260
N.Y.—Fagan v. Atlantic Coast Line R. Co., 115 N.E. 704, 220 N.Y. 301, L.R.A.1917E 663, reversing 155 N.Y.S. 609, 170 App.Div. 47
Ohio.—Dowd v. Cleveland Ry., 22 Ohio N.P.N.S., 236.
10 C.J. p. 625 note 23

This rule, as stated in Corpus Juris, has received judicial approval
N.H.—Wilson v. Berlin St. Ry., 149 A. 602, 603, 84 N.H. 285.
Tex.—El Paso Electric Co. v. Ludlow, Civ.App., 291 S.W. 619, 621

56. Wash.—Duval v. Inland Nav. Co., 155 P. 768, 769, 90 Wash. 149
10 C.J. p. 625 note 24
"The relation of passenger and carrier ceases when the passenger is made aware of the arrival at the place of destination, and has had reasonable time to get off the boat or train".—Duval v. Inland Nav. Co., supra.

Remaining on board after reaching destination. However, remaining on the train or vehicle after reaching his destination does not necessarily terminate such passenger's relation, where he does so with the intention of paying the proper fare to continue his journey,[57] or for some other proper purpose,[58] or where his remaining thereon has been unintentional, such as by reason of his falling asleep.[59] Where he does not have such an intention or excuse and has had a reasonable time and opportunity to leave the car or vehicle and does not do so, he ceases to be a passenger.[60] A passenger who remains on the train, after passing his destination, to alight in switch yards nearer his home is a licensee only.[61]

One who leaves the train while in motion at a time and place when and where the company could not anticipate that he would leave it ceases to be a passenger;[62] but unless he has had a reasonable opportunity to alight an attempt to alight at his station while the train is in motion does not terminate the relation.[63]

§ 565. After Leaving Vehicle at Destination

A passenger's status as such ordinarily continues after he has alighted from the carrier's vehicle at his destination, until he has had a reasonable opportunity to leave the carrier's premises, or, in the case of a street car or auto stage, until he has safely stepped therefrom and had a reasonable opportunity to leave the place at which he alights.

The relation of carrier and passenger does not cease at the moment the passenger alights from the carrier's vehicle by its invitation at a place selected by the carrier at the point of destination, but continues until the passenger has had a reasonable opportunity to leave the carrier's station premises,[64] and what is a reasonable time or a reasonable delay within this rule is to be determined from all the circumstances,[65] and includes a reasonable time to see after his baggage and prepare for his departure.[66] If he remains beyond a reasonable time, with the station agent's permission, he is merely a licensee or invitee.[67]

The relation continues however, only while he is leaving in a proper manner and by the route usual and proper in such case, and if he fails to leave in such manner and by such route he ceases to be a passenger.[68] A railroad company has the right to determine the routes by which passengers shall enter and leave its trains and premises and, where it has made safe and suitable arrangements for the

57. Iowa.—Forbes v. Chicago, etc., R. Co., 113 N.W. 477, 135 Iowa 679.
10 C.J. p 625 note 25.
Person carried past destination see supra § 563.

58. Mo.—Turner v. Wabash R. Co., App., 211 S.W. 101.
10 C.J. p 625 note 26.

Infirm passenger waiting for assistance
That an aged and infirm passenger did not get off a railway coach with the other passengers, but waited five minutes for assistance before attempting to alight alone, did not deprive him of his status as a passenger.—Turner v. Wabash R. Co., Mo. App., 211 S.W. 101.

59. Iowa.—Vanderbeck v. Chicago, M. & St. P. & P. Ry. Co., 230 N.W. 390, 210 Iowa 230.
Kan.—Hanson v. Chicago, etc., R. Co., 112 P. 152, 83 Kan. 553, 31 L.R.A., N.S., 624.
10 C.J. p 625 note 24 [c].

60. Tenn.—Buckner v. Southern Ry. Co., App., 96 S.W.2d 600
Wash.—Duval v. Inland Nav. Co., 155 P. 768, 90 Wash. 149.
10 C.J. p 626 note 27.

A steamboat passenger who, after the boat had reached his destination, remained in the smoking room thirty minutes because his wife was elsewhere and "there was no use to go home," and also because he wished to talk to another passenger, thereby ceased to be a passenger.—Duval v. Inland Nav. Co., 155 P. 768, 90 Wash. 149.

61. N.J.—Keeney v. Delaware, etc., R. Co., 94 A. 604, 87 N.J.Law 505

62. Mass.—Com. v. Boston, etc., R. Co., 129 Mass. 500, 37 Am.R. 382

63. Ind.—Pittsburgh, etc., R. Co. v. Gray, 64 N.E. 39, 28 Ind.App. 588.—Pittsburgh, etc., R. Co. v. Gray, App., 59 N.E. 1000.

64. U.S.—Young v. Baldwin, C.C.A. Ark., 84 F.2d 841.
Cal.—MacGregor v. Pacific Electric Ry. Co., 59 P.2d 123, 6 Cal.2d 596.
Mich.—Sink v. Grand Trunk Western Ry. Co., 198 N.W. 238, 227 Mich. 21.—Boyle v. Waters, 166 N.W. 114, 199 Mich. 478.
N.H.—Wessman v. Boston & M. R. R., 152 A. 476, 84 N.H. 475.
N.J.—Spofford v. Central R. Co. of New Jersey, 98 A. 246, 89 N.J.Law 273.
N.Y.—Fagan v. Atlantic Coast Line R. Co., 115 N.E. 704, 220 N.Y. 301, L.R.A. 1917E 663, reversing 155 N.Y.S. 609, 170 App.Div. 47.
10 C.J. p 626 note 30.

The Corpus Juris text is cited with approval in Baker v. Hines, 213 P. 313, 314, 88 Okl. 266.

Leaving train and platform
A railroad passenger, arriving at the station of her destination, is entitled to the rights of a passenger while carefully leaving the train and platform, or until he has had a reasonable time to do so.
Mass.—Aldrich v. Boston & M. R. R., 130 N.E. 482, 238 Mass. 29
Pa.—Windle v. Davis, 118 A. 503, 275 Pa. 23.

65. U.S.—Pinson v. Kansas City Southern Ry. Co., C.C.A.Tex., 37 F.2d 652.
Mich.—Sink v. Grand Trunk Western Ry. Co., 198 N.W. 238, 227 Mich. 21
10 C.J. p 627 note 31.

66. U.S.—Pinson v. Kansas City Southern Ry. Co., C.C.A.Tex., 37 F.2d 652.
Okl.—Baker v. Hines, 213 P. 313, 88 Okl. 266.
Tex.—St. Louis Southwestern R. Co. v. Wallace, 74 S.W. 581, 32 Tex.Civ.App. 312.

67. Mich.—Sink v. Grand Trunk Western Ry. Co., 198 N.W. 238, 227 Mich. 21.

68. Mich.—Boyle v. Waters, 166 N.W. 114, 199 Mich. 478
Mo.—Shaffer v. St. Louis & S.F. Ry. Co., 208 S.W. 145, 201 Mo.App. 107.
W.Va.—Pierce's Ex'x v. Baltimore & O. R. Co., 128 S.E. 832, 99 W.Va. 313.
10 C.J. p 627 note 32.

Crossing track
Where, in order to leave railroad station, it is necessary to cross track, passenger leaving remains passenger until crossing track, if he

exit by passengers from its station grounds, a passenger must use the ways provided, and where he knowingly fails so to do and without invitation makes his exit in some other way, he ceases to be a passenger and becomes at most a mere licensee; and it makes no difference that he goes where others, with the knowledge of the carrier have gone before him, unless there is some invitation on the part of the carrier, and knowledge of such use does not of itself amount to such invitation.[69]

Street car or auto stage. The above rule as to the relation of passenger continuing until he has had a reasonable opportunity to leave the carrier's premises, is qualified in its application to passengers of ordinary surface street railroad companies or auto stages, it being a general rule, as stated in Corpus Juris, which statement has been approved by subsequent decisions,[70] that, in such cases, a person ceases to be a passenger as soon as he safely steps from the car or stage into a public street or highway,[71] and has had a reasonable opportunity to leave the place at which he alights,[72] provided he

uses means of egress which company has provided or which is customarily used with its knowledge and consent.—Pierce's Ex'x v. Baltimore & O. R. Co., 128 S.E. 832, 99 W.Va. 313.

69. Pa.—Tiers v. Pennsylvania R. Co., 141 A. 487, 490, 292 Pa. 522.
10 C.J. p 627 notes 33, 34.

This rule as stated in Corpus Juris has received judicial approval as being the rule generally recognized.—Tiers v. Pennsylvania R. Co., supra.

Duty of carrier to provide safe ways of ingress and egress see infra § 714.

70. N.C.—Loggins v. Southern Public Utilities Co., 106 S.E. 822, 823, 181 N.C. 221.
Okl.—Trail v. Tulsa St. Ry. Co., 222 P. 950, 951, 97 Okl. 19.
Tex.—Wittkower v. Dallas Ry. & Terminal Co., Civ.App., 73 S.W.2d 867, 869—El Paso Electric Co. v. Ludlow, Civ.App., 291 S.W. 619, 621.
Wis.—Will v. Milwaukee Electric Ry. & Light Co., 171 N.W. 658, 660, 169 Wis. 38.

71. Ala.—Willingham v. Birmingham Ry., Light & Power Co., 83 So. 95, 203 Ala. 351.
Cal.—Choquette v. Key System Transit Co., 5 P.2d 921, 118 Cal. App. 643.
Ill.—See Abt v. Chicago Rys. Co., 207 Ill.App. 314.
Iowa.—MacLearn v. Iowa Southern Utilities Co., 234 N.W. 851, 212 Iowa 555—Morris v. Omaha & C. B. St. Ry. Co., 187 N.W. 510, 193 Iowa 616.
Ky.—Trout's Adm'r v. Ohio Valley Electric Ry. Co., 43 S.W.2d 507, 241 Ky. 144.
Mass.—Mercier v. Union St. Ry. Co., 119 N.E. 764, 230 Mass. 397.
Minn.—Ruddy v. Ingebret, 204 N.W. 630, 164 Minn. 40, 44 A.L.R. 159.
Mo.—Gallagher v. St. Louis Public Service Co., 59 S.W.2d 619, 332 Mo. 944—Jacks v. Wells, 44 S.W.2d 154, 329 Mo. 327—Smuzynski v. East St. Louis Ry. Co., App., 93 S.W.2d 1058.
Ohio.—Cleveland Ry. Co. v. Karbole, 181 N.E. 889, 125 Ohio St. 467—Reining v. Northern Ohio Traction & Light Co., 140 N.E. 84, 107 Ohio St. 528—Rudin v. Cincinnati Traction Co., 18 Ohio N.P.,N.S., 260.
Okl.—Trail v. Tulsa St. Ry. Co., 222 P. 950, 97 Okl. 19.
Tenn.—Sims v. Knoxville Railway & Light Co., 208 S.W. 610, 141 Tenn. 238.
Tex.—El Paso Electric Co. v. Ludlow, Civ.App., 291 S.W. 619.
Wis.—Zalewski v. Milwaukee Electric Railway & Light Co., 263 N.W. 577, 219 Wis. 541—Will v. Milwaukee Electric Ry. & Light Co., 171 N.W. 658, 169 Wis. 38.
10 C.J. p 627 note 35.

The rule as stated in Corpus Juris is noted in Alabama Power Co. v. Hall, 103 So. 867, 869, 212 Ala. 638—Willingham v. Birmingham Ry. Light & Power Co., 83 So. 95, 96, 203 Ala. 351.

Similar statements of rule

(1) Carrier and passenger relationship does not cease until passenger alighting from street car is safely on the ground.
Colo.—Denver City Tramway Co. v. Hills, 116 P. 125, 50 Colo. 328, 36 L.R.A.,N.S., 213.
N.H.—Wilson v. Berlin St. Ry., 149 A. 602, 84 N.H. 285.

(2) Relation of carrier and passenger continues until latter has alighted from car and reached, or had a reasonable opportunity to reach, a place of safety.
Ky.—Trout's Adm'r v. Ohio Valley Electric Ry. Co., 43 S.W.2d 507, 241 Ky. 144.
Va.—Houston v. Lynchburg Traction & Light Co., 89 S.E. 114, 119 Va. 136.
Wis.—Zalewski v. Milwaukee Railway & Light Co., 263 N.W. 577, 219 Wis. 541.

(3) A passenger on alighting from a street car at the end of his journey loses his status as a passenger when he has stepped from the car to a place of safety on the street or on the highway, the question depending, not on number of steps he has taken, but on the circumstances and conditions under which he alights.—Loggins v. Southern Public Utilities Co., 106 S.E. 822, 181 N.C. 221.

"The object is a public place, over which the carrier has no control, and when a passenger safely alights there, his relation with the carrier determines, and he becomes merely a traveler on the highway."—Sims v. Knoxville Railway & Light Co., 208 S.W. 610, 141 Tenn. 238.

72. Iowa.—MacLearn v. Iowa Southern Utilities Co., 234 N.W. 851, 212 Iowa 555.
Neb.—Jacobson v. Omaha & Council Bluffs St. Ry. Co., 191 N.W. 327, 109 Neb. 356, 31 A.L.R. 563.
Okl.—Trail v. Tulsa St. Ry. Co., 222 P. 950, 97 Okl. 19.
Tex.—Wittkower v. Dallas Ry. & Terminal Co., Civ.App., 73 S.W.2d 867—El Paso Electric Co. v. Ludlow, Civ.App., 291 S.W. 619.
Va.—Houston v. Lynchburg Traction & Light Co., 89 S.E. 114, 119 Va. 136.
Wis.—Zalewski v. Milwaukee Electric Railway & Light Co., 263 N.W. 577, 219 Wis. 541—Will v. Milwaukee Electric Ry. & Light Co., 171 N.W. 658, 169 Wis. 38.
10 C.J. p 627 note 36.

Other statement of rule

Differing in degree, at least, from the rule prevailing in other jurisdictions with respect to the time when the relation between a street railway carrier and a passenger ceases, the relation is not terminated by the passenger's mere act of leaving the car, but continues until he has a reasonable opportunity to leave the car and the roadway of the company, after the car has reached the station or stopping place to which he is entitled to be carried.—Alabama Power Co. v. Hall, 103 So. 867, 869, 212 Ala. 638—Willingham v. Birmingham Ry., Light & Power Co., 83 So. 95, 97, 203 Ala. 351—Melton v. Birmingham Ry., Light & Power Co., 45 So. 151, 153 Ala. 95, 16 L.R.A.,N.S., 467.

Passing along car as not termination of relation

Stepping from the front platform of the car with the intention of passing alongside of the car to the rear platform to get the conductor's number for the purpose of making a complaint for mistreatment, does not terminate the relation of passenger.—Sims v. Knoxville Railway & Light Co., 208 S.W. 610, 141 Tenn. 238.

is set down at a place which is reasonably safe and proper for that purpose.[73]

In accordance with this rule it has been held that a passenger who, after alighting, starts to cross the street in front of or in the rear of the car, has ceased to be a passenger,[74] but there is also authority to the contrary.[75] Where a street car company is required by statute to keep certain portions of the street in repair and is made liable for injuries sustained by reason of any obstruction placed by it in the street, the relation of passenger and carrier is not terminated immediately on a passenger alighting from a street car.[76]

§ 566. After Leaving Vehicle at Point Other than Destination

a. In general
b. At intermediate station

a. In General

The relation of passenger ordinarily terminates if he abandons his journey before reaching his destination, but not on a merely temporary departure from the train or car.

As stated in Corpus Juris, which statement has been approved by subsequent decisions,[77] the relation ordinarily terminates when a passenger chooses to abandon his journey at a point before reaching the place to which he is entitled to ride.[78] A temporary departure, however, from the train or car for any good or reasonable cause, without an intention to abandon transportation, does not terminate the relation.[79]

b. At Intermediate Station

A passenger does not lose his status as such by temporarily alighting at an intermediate station, for any ordinary and usual purpose, but with the intent of resuming his journey on the same train or means of conveyance.

As a general rule, as stated in Corpus Juris, which statement has been approved by subsequent decisions,[80] a passenger does not lose his character as such by merely temporarily alighting at an intermediate station, with the express or implied consent of the carrier, for any reasonable and usual

73. Del.—Cooke v. Elk Coach Line, 180 A. 782.
Neb.—Jacobson v. Omaha & Council Bluffs St. Ry. Co., 191 N.W. 327, 109 Neb. 356, 31 A.L.R. 563.
N.C.—Loggins v. Southern Public Utilities Co., 106 S.E. 822, 181 N.C. 221.
Okl.—Trail v. Tulsa St. Ry. Co., 222 P. 950, 97 Okl. 19.
Or.—Corrigan v. Portland Traction Co., 73 P.2d 378—Lewis v. Pacific Greyhound Lines, 34 P.2d 616, 147 Or. 588, 96 A.L.R. 718.
Pa.—Duffy v. Philadelphia Rapid Transit Co., 140 A. 496, 291 Pa. 564.
Wis.—Will v. Milwaukee Electric Ry. & Light Co., 171 N.W. 658, 169 Wis. 38.
10 C.J. p. 628 note 37.

A stop on a corner curve of the track may not be reasonably safe or convenient within the meaning of the rule stated in the text.—Trail v. Tulsa St. Ry. Co., 222 P. 950, 97 Okl. 19.

Unusual place

The relation of carrier and passenger is terminated where a passenger alights from a motor bus or stage in a place of safety, although it is not the usual stopping place.
Ohio.—Waldron v. Southwestern Bus Co., 182 N.E. 596, 42 Ohio App. 549.
Or.—Lewis v. Pacific Greyhound Lines, 34 P.2d 616, 147 Or. 588, 96 A.L.R. 718.
Safety of place for getting on board or alighting see infra § 716.

74. Del.—Cooke v. Elk Coach Line, 180 A. 782.
Mo.—Gallagher v. St. Louis Public Service Co., 59 S.W.2d 619, 332 Mo. 944.
Or.—Corrigan v. Portland Traction Co., 73 P.2d 378—Lewis v. Pacific Greyhound Lines, 34 P.2d 616, 147 Or. 588, 96 A.L.R. 718.
10 C.J. p. 628 note 38.

75. Ala.—Birmingham R., etc., Co. v. O'Brien, 64 So. 343, 185 Ala. 617.
10 C.J. p. 628 note 39.

76. Me.—White v. Lewiston, etc., R. Co., 78 A. 473, 107 Me. 412.
10 C.J. p. 628 note 40.

77. N.C.—Wallace v. Norfolk Southern R. Co., 93 S.E. 731, 733, 174 N.C. 171.
Pa.—Furby v. Pennsylvania R. Co., 132 A. 796, 797, 286 Pa. 85.
Va.—Hines v. Garrett, 108 S.E. 690, 692, 131 Va. 125.

78. N.J.—Kelson v. Public Service R. Co., 110 A. 919, 94 N.J.Law 527
N.C.—Wallace v. Norfolk Southern R. Co., 93 S.E. 731, 174 N.C. 171.
10 C.J. p. 628 note 41.

A voluntary departure from the carrier's vehicle at some other point before reaching his destination may terminate the passenger's relation as such.—Hines v. Garrett, 108 S.E. 690, 131 Va. 125.

Leaving carrier's premises

Pa.—Furby v. Pennsylvania R. Co., 132 A. 796, 286 Pa. 85.

79. Ga.—Davis v. Jones, 129 S.E. 892, 34 Ga. App. 7.
Mich.—Moffit v. Grand Rapids Ry. Co., 200 N.W. 274, 228 Mich. 349.
N.C.—Wallace v. Norfolk Southern R. Co., 93 S.E. 731, 174 N.C. 171.
10 C.J. p. 628 note 42.

Going into baggage car

One, after becoming passenger on railway passenger train, does not cease to be such and become trespasser or licensee on leaving passenger coach and going into baggage car on matter personal to himself.—Davis v. Jones, 129 S.E. 892, 34 Ga. App. 7.

Continuing journey in truck

A bus passenger, who acted on request of bus driver in continuing part of her journey in truck driven by person not employed by bus company when bus broke down, did not abandon bus and cease to be passenger of bus company by so doing, as respects liability of bus company for injuries to passenger when she was mistreated by truck driver.—South Plains Coaches v. Box, Tex.Civ.App., 111 S.W.2d 1151, error dismissed.

To witness an accident

Passenger on street car, who left at request of conductor to witness an accident, and who was injured by negligence of third person while writing his name on pad which he held against side of car, retained his character as passenger to time of injury.—Moffit v. Grand Rapids Ry. Co., 200 N.W. 274, 228 Mich. 349.

80. Mich.—Moffit v. Grand Rapids Ry. Co., 200 N.W. 274, 275, 228 Mich. 349
N.C.—Goodman v. Queen City Lines, 180 S.E. 661, 208 N.C. 323—Wharton v. New York Life Ins. Co., 100 S.E. 266, 267, 178 N.C. 135—Wallace v. Norfolk Southern R. Co., 93 S.E. 731, 733, 174 N.C. 171.

purpose,[81] such as the procuring of refreshments,[82] the sending or the receiving of telegrams,[83] or for the purpose of exercising by walking up and down the platform,[84] or for relief from fatigue of travel,[85] or even from motives of curiosity.[86] This is an absolute right of the passenger, so long as his object in alighting is not inconsistent with his character as passenger; and it is not dependent on notice being given to the conductor of his desire to alight.[87]

However, it has been held that the passenger should not go out of sight, or out of hearing of the voice which gives the usual loud and distinct notice for all passengers to get aboard,[88] and one particularly ceases to be a passenger if he fails to return before his train or car departs.[89]

Where there is no intention to return; stop-over. By leaving the train before he has arrived at the point to which his ticket entitles him to ride, with no intention of resuming the journey on the same train at that time, a passenger voluntarily terminates his contract with the company to carry him to such point,[90] as by stopping over at an intermediate or way station, on a ticket for a continuous passage only between two points, unless the stop-over is caused without any fault on the part of the passenger,[91] or unless it is made under a contract permitting him so to do.[92]

Place other than regular stopping place. As stated in Corpus Juris, which statement has been approved by subsequent decisions,[93] where a passenger temporarily leaves the car at a place not a regular stopping place, he, for the time, sur-

81. Cal.—Sellars v. Southern Pac. Co., 166 P. 599, 33 Cal.App. 701.
N.C.—Goodman v. Queen City Lines, 180 S.E. 661, 208 N.C. 323.
Tex.—Texas & N. O. R. Co. v. Rooks, Civ.App., 283 S.W. 622, affirmed, Com.App., 292 S.W. 536, and rehearing denied 293 S.W. 554.
10 C.J. p 628 note 44.

Other statements of rule

A passenger may temporarily alight from the train or car at an intermediate station, without losing his status as passenger:

(1) For any lawful purpose.—Wallace v. Norfolk Southern R. Co., 93 S.E. 731, 174 N.C. 171.

(2) For matters of convenience or necessity.—St. Louis, etc., R. Co. v. Glossup, 114 S.W. 247, 88 Ark. 225.

(3) For any necessary purpose incident to his journey.—Jones v. Chicago, R. I. & P. Ry. Co., C.C.A.Neb., 260 F. 929.

(4) For a purpose not connected with his trip.—Missouri Pac. R. Co. v. Kennedy, 239 S.W. 376, 153 Ark. 77.

Using rest room and toilet

A passenger on a bus who temporarily alights at an intermediate station for the purpose of using the rest room and toilet of the station during a thirty-minute stop-over, with the express or implied consent of the carrier, does not lose his status as passenger on the bus line.—Goodman v. Queen City Lines, 180 S.E. 661, 208 N.C. 323.

82. Ala.—Louisville & N. R. Co. v. McCue, 114 So. 218, 216 Ala. 616, 61 A.L.R. 400.
Cal.—Sellars v. Southern Pac. Co., 166 P. 599, 33 Cal.App. 701.
10 C.J. p 629 note 45.

On announcement of allowance of time for meal

Where an announcement is made by those in charge of a passenger train, which had stopped at an intermediate station, that twenty minutes would be allowed for breakfast, a passenger's departure to get breakfast does not constitute a severance of the relation of passenger and carrier.—Louisville & N. R. Co. v. McCue, 114 So. 218, 216 Ala. 616, 61 A.L.R. 400.

83. U.S.—Alabama G. S. R. Co. v. Coggins, Tenn., 88 F. 455, 32 C.C.A. 1.

84. Cal.—Sellars v. Southern Pac. Co., 166 P. 599, 33 Cal.App. 701.
10 C.J. p 629 note 47.

85. Cal.—Sellars v. Southern Pac. Co., supra.

86. Neb.—Chicago, R. I. & P. R. Co. v. Sattler, 90 N.W. 649, 64 Neb. 636.
Tex.—Texas Midland R. Co. v. Ellison, 87 S.W. 213, 39 Tex.Civ.App. 172.
W.Va.—Layne v. Chesapeake, etc., R. Co., 67 S.E. 1103, 66 W.Va. 607.

Minor passenger does not lose his status as passenger by alighting at station on promise of conductor to show him four engines arriving from different points.—Chicago, M. & St. P. Ry. Co. v. Harrelson, C.C.A.Mo., 14 F.2d 893.

87. Tex.—Ft. Worth & D. C. Ry. Co. v. Hawley, Civ.App., 235 S.W. 659, dismissed for want of jurisdiction.—Texas & P. Ry. Co. v. Goodman, Civ.App., 51 S.W. 275.

88. Ga.—Southern Ry. Co. v. Stephens, 98 S.E. 176, 23 Ga.App. 200.
10 C.J. p 629 note 49

The Corpus Juris statement is cited with approval in Southern Ry. Co. v. Stephens, 98 S.E. 176, 23 Ga.App. 200.

Leaving vicinity

A passenger on a train, which was delayed on account of wreck elsewhere, on line, who voluntarily left train and its vicinity, ceased to be a passenger until he again entered train or came back to premises to board train.—Southern Ry. Co. v. Stephens, 98 S.E. 176, 23 Ga.App. 200.

Leaving right of way or premises

If a passenger at an intermediate station temporarily leaves the right of way or premises under the carrier's control, the relation of carrier and passenger is suspended.—Blackburn v. Williamson & P. C. Ry. Co., 202 S.W. 500, 180 Ky. 254.

89. Minn.—Tuder v. Oregon Short Line R. Co., 160 N.W. 785, 135 Minn. 294, L.R.A.1917C 86

Failure to return before train starts

Where a passenger left the train and went to a restaurant a block and a half away and failed to return to the station in time to resume his journey on the train his status as passenger ceased, and he had no right to continue his journey on another train without the further payment of fare.—Tuder v. Oregon Short Line R. Co., 160 N.W. 785, 135 Minn. 294, L.R.A.1917C 86.

90. U.S.—Roberts v. Koehler, C.C. Or., 30 F. 94.
Cal.—Drew v. Central Pac. R. Co., 51 Cal. 425.
10 C.J. p 629 notes 51, 52.
Stop-over privileges generally see infra § 647

91. Tex.—Gulf, etc., R. Co. v. Henry, 19 S.W. 870, 84 Tex. 678, 16 L.R.A. 318
10 C.J. p 629 note 53.

92. U.S.—New York, L. E. & W. R. Co. v. Winter, Mass., 12 S.Ct. 356, 143 U.S. 60, 36 L.Ed. 71.
10 C.J. p 629 note 54.
Stop-over privileges generally see infra § 647.

93. Pa.—Damm v. East Penn Transp. Co., 182 A. 720, 721, 120 Pa.Super. 381.

renders his relation as a passenger,[94] unless he so leaves the car on the express or implied invitation of the carrier for some necessary purpose incident to the journey,[95] such as for the purpose of going around a wreck, washout, or other obstruction, and taking another train or car[96] One who leaves a car for the purpose of avoiding a collision does not lose his right to protection as a passenger.[97]

At transfer station. While transferring from one train or car to another and while waiting at a transfer point for the purpose of continuing the journey, under a ticket entitling the passenger so to do, the relation of carrier and passenger continues,[98] as while transferring from one street car or motor bus to another.[99] The relation also does not cease where a passenger, on the invitation of the carrier, leaves the car or train, although not at a regular stopping place, to take another car or train to continue his journey.[1] Where, however, a person desires to travel to a certain point on a designated train which does not stop at such point, and at the suggestion of the agent buys a ticket to an intermediate point, and arrives there in the evening, and later takes the early morning train to his destination, he is not a through passenger.[2] A passenger has also been held to cease to be such while transferring from one car to another, where he is free to choose his own route in doing so, and goes onto the public highway in making the transfer.[3]

94. Pa.—Furby v. Pennsylvania R. Co., 132 A. 796, 286 Pa. 85.
10 C.J. p 629 note 55.

95. U.S.—Jones v. Chicago, R. I. & P. Ry. Co., C.C.A.Neb., 260 F. 929.
Md.—Davis v. Central Const. Corporation, 124 A. 396, 144 Md. 90.
Mass.—Poppel v. Boston Elevated Ry. Co., 155 N.E. 267, 258 Mass. 389.
Neb.—Chicago, etc., R. Co. v. Sattler, 90 N.W. 649, 64 Neb. 636, 97 Am.S.R. 666, 57 L.R.A. 890.
Pa.—Damm v. East Penn Transp. Co., 182 A. 720, 120 Pa.Super. 381.

96. Pa.—Damm v. East Penn Transp. Co., supra.
W.Va.—Holtman v. Norfolk & W. Ry. Co., 136 S.E. 855, 103 W.Va. 194.
10 C.J. p 629 note 57.

97. Iowa.—Gradert v. Chicago, etc., R. Co., 80 N.W. 559, 109 Iowa 547.
Ohio.—Toledo Consolidated St. R. Co. v. Fuller, 17 Ohio Cir.Ct. 562, 9 Ohio Cir.Dec. 123.
Pa.—Damm v. East Penn Transp. Co., 182 A. 720, 120 Pa.Super. 381.

98. Ga.—Mooneyham v. Nashville, C. & St. L. Ry. Co., 126 S.E. 736, 33 Ga.App. 406
10 C.J. p 630 note 59.

This rule, as stated in Corpus Juris, has been judicially approved.—Davis v. Central Const. Corporation, 124 A. 396, 144 Md. 90.

Waiting in waiting room

Passenger with point of destination on line of connecting carrier, traveling on through ticket calling for continuous passage to destination on next train of connecting carrier leaving junction point, preserves status as passenger when, after leaving train at junction point, he waits in waiting room of depot for purpose of continuing journey.—Mooneyham v. Nashville, C. & St. L. Ry. Co., 126 S.E. 736, 33 Ga.App. 406—10 C.J. p 630 note 59 [a].

99. Cal.—Boa v. San Francisco-Oakland Terminal Rys., 187 P. 2, 182 Cal. 93.
Conn.—Pins v. Connecticut Co., 102 A. 595, 92 Conn. 310
Ill.—Feldman v. Chicago Rys. Co., 124 N.E. 334, 289 Ill. 25, 6 A.L.R. 1291, reversing 212 Ill.App. 482
See Horst v. St. Louis Electric Terminal Ry. Co., 199 Ill.App. 169
Mich.—Moffit v. Grand Rapids Ry. Co., 200 N.W. 274, 228 Mich. 349
Pa.—Damm v. East Penn Transp. Co., 182 A. 720, 120 Pa.Super. 381
10 C.J. p 630 note 60.

This rule as stated in Corpus Juris has been cited with approval—Feldman v. Chicago Rys. Co., 124 N.E. 334, 289 Ill. 25, 6 A.L.R. 1291, reversing 212 Ill.App. 482.

Continuation of relation

One boarding street car, obtaining transfer, and leaving car at usual place of transfer, is "passenger" while on car, while making transfer, or while waiting to transfer, and after he is seated in car to which he has transferred—Moffit v. Grand Rapids Ry. Co., 200 N.W. 274, 228 Mich. 349.

Transferring to car in rear

A passenger of a street car upon being requested to transfer to a car in the rear remains a passenger while walking from car to car—Swink v. Philadelphia Rapid Transit Co., 120 A. 827, 277 Pa. 220.

1. Md.—Davis v. Central Const. Corporation, 124 A. 396, 144 Md. 90.

Transferring to train behind

Where passenger taking train directed was told by fare collector to get off when train stopped, and take a train behind, but stop was not a station, and, after going to station, he was told by policeman, who stated he was in charge, that train following stopped at place where first train stopped, and plaintiff returned there, his status as passenger continued.—Davis v. Central Const. Corporation, 124 A. 396, 144 Md. 90.

2. Minn.—Barnett v. Minneapolis, etc., R. Co., 143 N.W. 263, 123 Minn. 153, 48 L.R.A.,N.S., 262

3. Mass.—Niles v. Boston Elevated Ry. Co., 114 N.E. 730, 225 Mass. 570.
Mo.—Anton v. St. Louis Public Service Co., 71 S.W.2d 702, 335 Mo. 188
Va.—Virginia Ry. & Power Co. v. Dressler, 111 S.E. 243, 132 Va. 342, 22 A.L.R. 301.

"There seems to be good reason and also authority for holding that the relation of passenger is not sustained while a passenger with a transfer is outside of the direction and control of the carrier and walking along the public highway. . . . A transfer ticket imposes no liability on the carrier to make the transfer. The passenger himself makes the transfer, and generally without direction or suggestion from the carrier. . . . In the interim between leaving the car and offering himself as a passenger on another, the passenger is not under the care or custody of the carrier, nor subject to his direction or control, and may be far from the carrier's powers of observation. It would seem unreasonable, therefore, to hold the carrier liable to one as a passenger during such interval."—Virginia Ry. & Power Co. v. Dressler, 111 S.E. 243, 249, 132 Va. 342, 22 A.L.R. 301.

C. STATUTORY REGULATIONS IN GENERAL

§ 567. Power to Regulate

A common carrier of passengers is generally subject to legislative regulation by the state, or by a municipality, under legislative authority.

The general public has such an interest in the business of a common carrier of passengers, such as a railroad or a street railroad, that such business is properly the subject of legislative regulation under the police power of the state,[4] so far as such carrier is engaged in intra-state business,[5] including the right to license or tax such carrier,[6] or to prohibit or regulate the use of the public highways by such a carrier,[7] and including rapid transit in municipalities except in so far as the state has divested itself of such power.[8] The state may, by regulation, protect common carriers who provide their own roads from being impaired by competition from carriers who use the public roads of the state, further than the public convenience and necessity may require.[9]

The power of legislative regulation by the state, however, is subject to the right of the owner of the common carrier to control its business policy,[10] and to the power of congress to regulate interstate commerce, as explained in the C.J.S. title Commerce § 13, also 12 C.J. p 15 notes 80–87; and is subject also to the limitation that the regulation must not violate the state or federal constitution,[11] and must be reasonable,[12] which rea-

4. U.S.—Georgia R & Banking Co v. Smith, Ga., 9 S.Ct. 47, 128 U.S. 174, 32 L.Ed. 377.
Fla.—State v. Quigg, 114 So. 859, 94 Fla. 1056—State v. Atlantic Coast Line R. Co., 54 So. 900, 61 Fla. 799.
Wash.—State v. Howell, 147 P. 1159, 85 Wash. 294.
10 C.J. p 649 note 34.

Any contract usage, custom, or practice by common carrier is subject to lawful governmental rules and regulations.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.

Regulating connections of trains
A statute requiring connecting lines of common carriers to make as close connections as practicable for the convenience of the traveling public, does not mean a simple physical connection of tracks, but a connection of trains.—North Carolina Corp. Commission v. Atlantic Coast Line R. Co., 49 S.E. 191, 137 N.C. 1, 115 Am.S.R. 636, affirmed Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 27 S.Ct. 585, 206 U.S. 1, 51 L.Ed. 933.

Statute authorizing formation of passenger corporation
A statute authorizing the creation of corporations to establish and maintain stage lines, and permitting the formation of corporations for the transportation of goods, etc., is broad enough to permit the formation of a corporation for the transportation of passengers.—Staacke v. Routledge, 241 S.W. 994, 111 Tex. 489, affirming, Civ.App., 175 S.W. 444.

Regulation of:
Passenger service and accommodations of street railroads see C.J.S. title Street Railroads § 164, also 60 C.J. p 340 note 80–p 344 note 33.
Public service motor vehicles as common carriers are C.J.S. title Motor Vehicles § 45, also 42 C.J. p 641 notes 62, 63, 65.
Statutory regulation of:
Fares see infra § 582.
Passes see infra § 623.
Stop-over privileges see infra § 647.
Transfers see infra §§ 648–650

5. Fla.—State v. Atlantic Coast Line R. Co., 47 So. 969, 56 Fla. 617, 32 L.R.A.,N.S., 639.
Iowa.—Huston v. City of Des Moines, 156 N.W. 883, 176 Iowa 455.

6. Iowa.—Huston v. City of Des Moines, supra
N.Y.—Public Service Commn. Second Dist. v. Booth, 156 N.Y.S. 140, 170 App.Div. 590
10 C.J. p 649 note 36.
Licensing of vehicles carrying passengers generally see Licenses § 30.

7. Ky.—Reo Bus Lines Co. v. Southern Bus Line Co., 272 S.W. 18, 209 Ky. 40.

No vested right in highways
Common carriers engaged in transportation of persons for profit have no vested or inherent right in highways, and their unrestrained use is equivalent to appropriation of public property for private use, which may be prohibited or regulated by the legislature.—Reo Bus Lines Co. v. Southern Bus Line Co., 272 S.W. 18, 209 Ky. 40.

8. N.Y.—McCabe v. Voorhis, 153 N.E. 849, 243 N.Y. 401, reversing 218 N.Y.S. 807, 218 App.Div. 702.

In New York, under the City Home Rule Law, in the matter of rapid transit regulation, cities have not been fully emancipated from the power of the legislature.—McCabe v. Voorhis, 153 N.E. 849, 243 N.Y. 401, reversing 218 N.Y.S. 807, 218 App.Div. 702.

9. Fla.—Florida Motor Lines v. State Railroad Commission, 132 So. 851, 101 Fla. 1018

10. U.S.—Banton v. Belt Line Ry. Corporation, N.Y., 45 S.Ct. 534, 268 U.S. 413, 69 L.Ed. 1020.

Broad as is its power to regulate, the state does not enjoy the freedom of an owner, who, subject to reasonable regulation in the public interest, retains the management and right to control the business policy of the company.—Banton v. Belt Line Ry. Corporation, N.Y., 45 S.Ct. 534, 268 U.S. 413, 69 L.Ed. 1020.—Northern Pac. Railway v. North Dakota ex rel. McCue, N.D., 35 S.Ct. 429, 236 U.S. 585, 59 L.Ed. 735, L.R.A.1917F 1148, Ann.Cas.1916A 1.

Power to regulate and right of ownership as coexistent
The public power to regulate railroads and the private right of ownership of such property coexist, and the one does not destroy the other; and where the power to regulate is so arbitrarily exercised as to infringe the rights of ownership, it is void as being repugnant to the Fourteenth Amendment of the constitution of the United States, and also to the due process clause of the state constitution.—State R. Commn. v. Louisville, etc., R. Co., 80 S.E. 327, 140 Ga. 817, L.R.A.1915E 902, Ann.Cas.1915A 1018.

11. Tex.—Quanah, etc., R. Co. v. Warren, Civ.App., 184 S.W. 232.

12. Fla.—State v. Atlantic Coast Line R. Co., 47 So. 969, 56 Fla. 617, 32 L.R.A.,N.S., 639.
N.M.—Seward v. Denver, etc., R. Co., 131 P. 980, 17 N.M. 557, 46 L.R.A., N.S., 242.

Provision held reasonable
A statutory provision making the right of a railroad company to fix the time of running its trains subject to the power of the railroad commission to require connections to be made when public convenience requires it is reasonable and just.—North Carolina Corp. Commission v.

sonableness and lawfulness is to be determined by the judiciary.[13]

The power of regulation so far as it concerns carriers within the limits of a municipality may be conferred on the municipality,[14] as by requiring the consent of the municipal authorities to operation within the city.[15] A statute, however, authorizing municipalities to regulate certain enumerated carriers does not confer power on them to regulate all passenger carriers.[16]

Terminal facilities. The state may regulate a terminal company by requiring it to serve equally and fairly all railroad common carriers which the public welfare may require and to charge only reasonable rates therefor.[17] A statutory requirement that all common carriers shall afford all reasonable, proper, and equal facilities for receiving, forwarding, and delivering passengers to and from their several lines and connecting lines is violated by a railroad so changing its time card, by which a connection with a connecting road, which is of general convenience, is discontinued, in order to furnish better facilities to several towns.[18] A transportation company, however, operating a railroad and a line of steamboats connecting at the company's wharf, is not required, by the provision of the interstate commerce act prohibiting any undue or unreasonable preference, to permit the boats of a competitor to land boats at such wharf.[19]

Federal regulation. A provision of the Interstate Commerce Act § 3 (1), 49 U.S.C.A. § 3 (1), prohibiting common carriers from giving undue or unreasonable preferences or advantages applies to the transportation of passengers.[20]

§ 568. Power of Public Service Commissions

Power of regulating a common carrier of passengers may be vested, by statute, in a railroad or public service commission, the extent of the commission's powers depending on the terms of the statute.

The power of regulation of a common carrier of passengers, may be, and often is, vested in a railroad or public service commission provided for by statute, which statute also usually defines the extent of the commission's powers,[21] such as with

Atlantic Coast Line R. Co., 49 S.E. 191, 137 N.C. 1, 115 Am.S.R. 636, affirmed Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 27 S.Ct. 585, 206 U.S. 1, 51 L.Ed. 933.

Pecuniary disadvantage

State has power to require street railroads and like utilities to provide reasonably adequate facilities and services, although compliance may be attended by some pecuniary disadvantage, but may not, under guise of regulation, compel use and operation of company's property and public conveyance without just compensation.—Banton v. Belt Line Ry. Corporation, N.Y., 45 S.Ct. 534, 268 U.S. 413, 69 L.Ed. 1020.

Where mere convenience of the public is the sole consideration, unreasonable regulations that are clearly more burdensome to the carrier than they are correspondingly beneficial to the public are not contemplated by the law; and the property rights of the carrier are protected by organic law from burdens that are not necessary to personal safety and have no fair relation to, or are in excess of just requirements for, a reasonably efficient, nondiscriminating public service.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.

13. N.M.—Seward v. Denver, etc., R. Co., 131 P. 980, 17 N.M. 557, 46 L.R.A.,N.S., 242.

14. Mass.—Commonwealth v. White, 157 N.E. 597, 260 Mass. 300.
10 C.J. p 649 note 43.

An ordinance regulating the manner of boarding and alighting from street cars, and making it unlawful to board moving cars or to ride on street car steps, does not violate a constitutional provision vesting the regulation of public utilities in the railroad commission, where the constitutional provision itself provides that it shall not affect such powers of control over public utilities as relate to the making and enforcing of local police, sanitary, and other regulations, and the regulation, by such ordinance, being such as sought to control, supervise, and regulate the relations between a public utility and the general public in a matter concerning the convenience and safety of the public.—Schultheiss v. Los Angeles Ry. Corporation, 54 P.2d 49, 11 Cal.App.2d 525.

Municipal regulation of street railroad fares see infra § 583.

Regulation of public service motor vehicles by municipality see C.J.S. title Motor Vehicles § 45, also 42 C.J. p 642 note 67–p 643 note 79.

15. N.Y.—Public Service Commn. Second Dist. v. Hurtgan, 154 N.Y.S. 897, 91 Misc. 432.
10 C.J. p 649 note 44.

Consent of municipality to use of street by street railroad see C.J.S. title Street Railroads § 37, also 60 C.J. p 182 note 47–p 189 note 41.

16. Ill.—Metropolitan West Side Electric Ry. v. City of Chicago, 104 N.E. 165, 261 Ill. 624.

17. Fla.—State v. Jacksonville Terminal Co., 27 So. 225, 41 Fla. 377.

18. Va.—Southern Ry. Co. v. Commonwealth, 37 S.E. 294, 98 Va. 758.

19. U.S.—Ilwaco Ry. & Nav. Co. v. Oregon Short Line & U. N. Ry. Co., Wash., 57 F. 673, 6 C.C.A. 495.

20. Ala.—Alabama Great Southern R. Co. v. Conner, 151 So. 355, 227 Ala. 562, certiorari denied Connor v. Alabama Great Southern R. Co., 54 S.Ct. 531, 291 U.S. 675, 78 L.Ed. 1063.
Mo.—Ligon v. St. Louis & S. F. R. Co., 168 S.W. 647, 184 Mo.App. 187.

21. Fla.—State v. Atlantic Coast Line R. Co., 54 So. 900, 61 Fla. 799.
Ill.—Chicago Rys. Co. v. Commerce Commission, 167 N.E. 840, 336 Ill. 51, 67 A.L.R. 938.
Okl.—Tulsa St. Ry. Co. v. Oklahoma Union Ry. Co., 184 P. 71, 76 Okl. 102.
Vt.—City of Barre v. Barre & M. Traction & Power Co., 92 A. 237, 88 Vt. 304.
10 C.J. p 649 note 45.

Carriers within statute

A statute regulating "railroad, express, parlor and sleeping car companies" does not apply to street railroads; but a statute giving the railroad commissioners supervision of all railroads within the state, whether operated by steam, electricity, or any other power, includes street railroads within the commissioners' supervisory powers.—City of Barre v. Barre & M. Traction & Power Co., 92 A. 237, 88 Vt. 304.

regard to regulations of connections, so as to afford reasonable convenience and comfort to the public affected by the service;[22] and if the earnings of the carrier are sufficient it must be prepared to render proper service as required by the commission.[23] The commission, however, has no power to regulate matters of rapid transit covered by particular legislation;[24] and the order of such a commission must not be in violation of statute, and must be reasonable and just; and where it is so it supersedes and annuls any previous rules or regulations of the carrier in conflict therewith.[25] The fact that a minority of the members of a commission dissent does not invalidate an order passed by the majority of the members.[26] If a railroad company is not in fact a common carrier of passengers, an order of the commission regulating it as such is void.[27]

Under some provisions the carrier may appeal from the commission's order,[28] and obtain relief against such order if it is unreasonable;[29] but if the order has been made after a due hearing, on such appeal, the presumption obtains that the order is reasonable, just, and correct, and the burden is on the party complaining to establish its unreasonableness, unjustness, or incorrectness;[30] and where an order is made after hearing testimony sufficient to support the conclusion reached, the court, on appeal, will not substitute its judgment for that of the commission.[31] Where in an action to enjoin an order of such commission the evidence, although conflicting, does not show that the order was unreasonable or arbitrary, an injunction will be denied.[32] It is no objection to a

Regulation of terminal facilities

(1) A terminal or union depot company in rendering service as a common carrier is subject to supervision and regulation by the railroad commissioners, as provided by statute—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.

(2) Statutory power conferred on railroad commissioners to regulate, supervise, and control all passenger terminal or union depot companies, whether owned or operated by any railroad in connection with its main line, or by a separate company organized for that purpose, and with reference to requiring the admission into passenger terminals of railroad companies desiring or required by the commissioners to enter, and to fixing reasonable rates of compensation for the uses of such terminals, has no reference to a terminal station owned and used exclusively for its own traffic by any common carrier or railroad company, but applies to those passenger terminals owned or operated by a terminal company or individual, or by a railroad company in connection with its main line, when such terminal company, individual, or railroad company undertakes the public business of furnishing terminal facilities to railroad common carriers.—State v. Jacksonville Terminal Co., 27 So. 225, 41 Fla. 377.

Relieving street railroad from franchise provisions

Under a statute giving the public service commission power to regulate rates and service, where the income of a street railroad, operating under a franchise granted prior to the public service commission law, is not sufficient to pay a reasonable return and provide an adequate and sufficient service, the commission has no power to relieve a street railroad from its franchise provisions.—State v. Public Service Commission of Washington, 172 P. 890, 101 Wash. 601.

The policy of a public utilities act, in regulating an established carrier in a given field and protecting it from competition, is that the public will be more efficiently served and at a more reasonable rate than if other competing lines were authorized to render the same public service in the same territory.—Chicago Rys. Co. v. Commerce Commission, 167 N.E. 840, 336 Ill. 51, 67 A.L.R. 938.

Regulation of public service motor vehicle by public board or commission see C.J.S. title Motor Vehicles § 45, also 42 C.J. p. 643 notes 80–89, p. 644 notes 91–6.

22. Fla.—State v. Florida East Coast Ry. Co., 49 So. 43, 57 Fla. 522.

Regulating connections with other carriers

(1) Statutory provisions that the corporation commission shall have such general control and supervision of railroad companies as is necessary to carry into effect the provisions of the act, and that all common carriers shall afford all reasonable, proper, and equal facilities for the interchange of traffic and forwarding passengers, and shall make as close connections as practicable for the convenience of the traveling public, are within the power of the legislature.—North Carolina Corp. Commission v. Atlantic Coast Line R. Co., 49 S.E. 191, 137 N.C. 1, 115 Am.S.R. 636, affirmed Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 27 S.Ct. 585, 206 U.S. 1, 51 L.Ed. 933.

(2) Under such powers the corporation commission may require a railroad company to make connection with a train of another railroad, although it costs the railroad company fifteen dollars a day to do this; its net earnings in the state being nearly two million dollars per year, and several thousand passengers a year being thus saved several hours and the inconvenience of traveling at night.—North Carolina Corp. Commission v. Atlantic Coast Line R. Co., supra.

Regulation of connections between railroads generally see C.J.S. title Railroads § 56, also 51 C.J. p. 482 note 94–p. 484 note 23.

23. Neb.—In re Lincoln Traction Co., 171 N.W. 192, 103 Neb. 229.

24. N.Y.—City of New York v. Interborough Rapid Transit Co., 249 N.Y.S. 243, 232 App.Div. 233, affirming 240 N.Y.S. 316, 136 Misc. 569, and affirmed 177 N.E. 295, 257 N.Y. 20.

25. Okl.—St. Louis & S.F. R. Co. v. State Travelers' Corp., 148 P. 166, 47 Okl. 374.
10 C.J. p. 650 note 46.

26. Ga.—State R. Commn. v. Louisville, etc., R. Co., 80 S.E. 327, 140 Ga. 817, L.R.A.1915E 902, Ann.Cas. 1915A 1018.

27. U.S.—McCoy v. Pacific Spruce Corporation, C.C.A.Or., 1 F.2d 853, affirming, D.C., Pacific Spruce Corporation v. McCoy, 294 F. 711.

28. Okl.—St. Louis & S.F. R. Co. v. State Travelers' Corp., 148 P. 166, 47 Okl. 374.

29. Fla.—State v. Atlantic Coast Line R. Co., 54 So. 900, 61 Fla. 799.

30. Okl.—Tulsa St. Ry. Co. v. Oklahoma Union Ry. Co., 184 P. 71, 76 Okl. 102.
10 C.J. p. 650 note 51.

31. Mich.—Grand Rapids, etc., R. Co. v. State R. Commn., 154 N.W. 15, 188 Mich. 108.

32. Ga.—State R. Commn. v. Louisville, etc., R. Co., 80 S.E. 327, 140 Ga. 817, L.R.A.1915E 902, Ann.Cas. 1915A 1018.

general order of a public service commission applying to all railroads giving a certain service that complainant who was served with notice of the hearing claims that it does not afford such service, as complainant would have the right to try that question before it could be determined against complainant.[33] Under a statutory provision that no public utility shall urge grounds not set forth in its application for a rehearing before the commission, a railroad company waives the objection that its receiver was not joined in the proceedings before the commission by not raising the point on rehearing.[34]

§ 569. Penalties for Violation by Carrier of Regulations

Under some statutes, a carrier is subject to a penalty for a violation of the statutory regulations.

Under some statutes the carrier is subject to a penalty for a violation by it of the statutory regulations,[35] or of the orders of the public service commission,[36] and under some provisions an officer or agent of the company, through whose neglect or fault the company fails to obey the commission's order, is guilty of a misdemeanor.[37] Each failure of a railroad company to start its train from the point of origin on schedule time, as required by an order of the railroad commission, is a separate offense and subjects the company to the penalty for each offense.[38]

D. RULES AND REGULATIONS OF CARRIER IN GENERAL

§ 570. Power to Make Regulations

A common carrier of passengers may make such reasonable rules and regulations for the conduct of its business as will protect its interest and the interest of the traveling public.

Subject to statutory regulations, as announced supra §§ 567–569, the whole subject of the making of rules and regulations is left to the common carrier, subject only to control by the courts of their reasonableness, or discriminatory character;[39] and with this limitation a carrier of passengers has the right to make such reasonable rules and regulations as may seem fit and proper for the conduct of its business, in such manner as will protect

33. N.J.—Delaware, etc., R. Co. v. Board of Public Utility Comrs., 87 A. 801, 84 N.J. Law 619.

34. Mo.—State ex rel. Missouri Pac. R. Co. v. Atkinson, 192 S.W. 86, 269 Mo. 634, L.R.A.1918A 46, Ann.Cas. 1917E 987.

35. Ill.—City of Chicago v. Chicago City Ry. Co., 111 N.E. 983, 272 Ill. 245.

As to posting notice of transfer rights

Where an ordinance requiring transfers to be used within fifteen minutes is in force, failure of notices concerning transfers to follow a statutory provision giving an hour for their use will not subject a street railway company to a penalty fixed by another statute, requiring such notices to be posted.—City of Chicago v. Chicago City Ry. Co., 111 N.E. 983, 272 Ill. 245.

As to posting copies of anti-tipping statute

A statute making it an offense to fail to post copies of anti-tipping statute in passenger cars applies only to cars actually in use for the transportation of passengers.—State v. Southern Ry. Co. in Mississippi, 72 So. 837, 112 Miss. 23.

Penalty for failure to furnish separate accommodations for white and colored passengers

Tex.—State v. Galveston, etc., R. Co., Civ.App., 184 S.W. 227.

Penalty for:
- Excessive or unauthorized fare see infra §§ 587–589.
- Failure to:
  - Keep ticket office open see infra § 601.
  - Stop at station see infra § 658.
- Issuing free pass see infra § 623.
- Refusal to:
  - Check baggage see infra § 863
  - Issue or accept transfer see infra § 649.
  - Redeem unused ticket see infra § 614.
  - Sell:
    - Mileage book see infra § 582.
    - Ticket over connecting line see infra § 605.

Sections of statutes imposing penalty held not conflicting

Nev.—Ex parte Todd, 210 P. 131, 46 Nev. 214

36. Tex.—Missouri, etc., R. Co. v. State, Civ.App., 167 S.W. 822.

Amount of penalty

So long as corporation commission does not exceed its power under Rev.L.1910 §§ 1192, 1193, to punish for contempt a violation of its order, and where there has been no error in proceeding prejudicial to defendant, supreme court cannot disturb commission's judgment fixing amount of penalty.—Atchison, T. & S. F. Ry. Co. v. State, 165 P. 125, 47 Okl. 26.

Evidence held to sustain finding of corporation commission that its order to defendant railroad as to opening its waiting rooms, ticket windows, and baggagerooms an hour before scheduled arrival of trains had been violated.—Atchison, T. & S. F. Ry. Co. v. State, 165 P. 125, 47 Okl. 26.

37. U.S.—Brooklyn Heights R. Co. v. Straus, D.C.N.Y., 245 F. 132.

Personal and individual act contemplated

A statutory provision making any officer or agent of the company who procures, aids, or abets it in its failure to obey guilty of a misdemeanor contemplates a personal and individual act of the officer or agent, and not the mere failure of the company itself, unless such failure is due to the neglect or fault of the officer or agent.—Brooklyn Heights R. Co. v. Straus, D.C.N.Y., 245 F. 132.

38. Tex.—Missouri, etc., R. Co. v. State, Civ.App., 167 S.W. 822.

Obligation to conform to timetables generally see infra § 661.

39. Ga.—State R. Commn. v. Louisville, etc., R. Co., 80 S.E. 327, 140 Ga. 817, L.R.A.1915E 902, Ann.Cas. 1915A 1018.

Wash.—Davenport v. Chicago, M. & St. P. Ry. Co., 175 P. 298, 299, 103 Wash. 645.

This rule, as stated in Corpus Juris, has received judicial approval.—Davenport v. Chicago, M. & St. P. Ry. Co., supra.

its interest and the best interest of the traveling public.[40] It not only has the right, but it is its duty, to make reasonable rules and regulations necessary to the performance of its duties to the traveling public with the highest degree of efficiency, and to secure the safe, effective, and comfortable operation of its business.[41] It may delegate the power of adopting and enforcing such regulations to its employees engaged in the operation of its property in such business.[42]

In consonance with this right and duty, a common carrier of passengers may make reasonable rules and regulations for the management and operation of its trains and cars,[43] the government of its employees in the conduct of their business on trains,[44] the conduct of employees and of passengers,[45] the convenience, comfort, and safety of its passengers,[46] the transportation of invalid or disabled passengers,[47] and the payment of its charges.[48] It may prescribe the number of passengers

40. Ky.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1—Sturgill v. Chesapeake & O. R. Co., 11 S.W.2d 983, 227 Ky. 44.
N.Y.—Garricott v. New York State Rys., 119 N.E. 94, 223 N.Y. 9, L.R.A.1918D 929, reversing 151 N.Y.S. 1117, 167 App.Div. 953.
Or.—Baggage & Omnibus Transfer Co. v. City of Portland, 164 P. 570, 84 Or. 343, L.R.A.1917F 1080.
Tex.—Davis v. Kirklen, Civ.App., 253 S.W. 330.
Wash.—Davenport v. Chicago, M. & St. P. Ry. Co., 175 P. 298, 103 Wash. 645.
Wis.—Campbell v. Milwaukee Electric Ry. & Light Co., 170 N.W. 937, 169 Wis. 171, 6 A.L.R. 628.
10 C.J. p. 650 note 61.

The rule as stated in Corpus Juris is cited with approval in Davis v. Kirklen, Tex.Civ.App., 253 S.W. 330, 331.

Incidental authority

"The authority to adopt and enforce such regulations is incident to the ownership of property and to its employment in business of a common carrier. . . . And such regulations are such as an individual who happens to be the sole owner of like property, employed in like business, would have the right and power to make, in virtue of his ownership of his property and of his employment as a carrier of passengers for hire."—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 361, 240 Ky. 1.

Operator of bus line

A person or company operating a bus line may adopt rules, regulations, or customs for the benefit of the business, and the convenience, comfort, safety, or health of the passengers, not in conflict with the rules or regulations prescribed by the commissioner, under the power given him by statute.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.

Requiring wearing of coats in railroad dining room

A corporation operating railroad dining rooms and lunch counters may make and enforce a rule requiring all men to wear coats while eating in its dining rooms.—Fred Harvey v. Corporation Commission of Oklahoma, 229 P. 428, 102 Okl. 266, 36 A.L.R. 1445.

41. Ky.—Casteel v. American Airways, 88 S.W.2d 976, 261 Ky. 818—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.
N.Y.—Montgomery v. Buffalo R. Co., 58 N.E. 770, 165 N.Y. 139—Ketchum v. New York City R. Co., 103 N.Y.S. 486, 118 App.Div. 248.
Utah.—Kenyon Hotel Co. v. Oregon Short Line R. Co., 220 P. 382, 62 Utah 364, 33 A.L.R. 343.

Where the railroad depot adjoins a public street which the people in passing to and from the railroad trains must pass over, it is not only the right but it is the duty of the railroad company to promulgate reasonable rules for the safety and convenience of the public passing to and from the trains.—Kenyon Hotel Co. v. Oregon Short Line R. Co., 220 P. 382, 62 Utah 364, 33 A.L.R. 343.

42. Ky.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.
N.Y.—Garricott v. New York State Rys., 119 N.E. 94, 223 N.Y. 9, L.R.A.1918D 929, reversing 151 N.Y.S. 1117, 167 App.Div. 953.

"Where an agent has been appointed or employed with authority in him and his assistants to have the charge and management of such property and its use, in the business of transporting passengers, it is incident to his authority to adopt and enforce such reasonable regulations."—Brumfield v. Consolidated Coach Corporation, supra.

43. U.S.—Kyle v. Chicago, R. I. & P. Ry. Co., Ark., 182 F. 613, 105 C.C.A. 151.
Tex.—Gulf, C. & S. F. Ry. Co. v. Sanderson, Civ.App., 216 S.W. 286.
10 C.J. p. 651 note 62.

Entrance to cars

Street railroad company may make and enforce reasonable rules with regard to entrances by which passengers may enter car.—Birmingham Electric Co. v. Jones, Ala., 176 So. 303.

Reserving certain cars for certain traffic

Electric railway company had right, as a common carrier, to make a regulation that interurban cars should be reserved for interurban traffic only, and urban traffic excluded therefrom.—Campbell v. Milwaukee Electric Ry. & Light Co., 170 N.W. 937, 169 Wis. 171, 6 A.L.R. 628.

Schedule for operation

In the absence of statutory regulation a carrier may adopt a schedule for the operation of its trains according to which certain trains do not stop at all stations on its line.
Iowa.—Wilkes v. Chicago, R. I. & P. Ry. Co., 198 N.W. 44, 197 Iowa 832, 36 A.L.R. 1012.
Ky.—Sturgill v. Chesapeake & O. R. Co., 11 S.W.2d 983, 227 Ky. 44.

44. Ohio.—Crawford v. Cincinnati, etc., R. Co., 26 Ohio St. 580.

45. N.Y. — Rowe v. Brooklyn Heights R. Co., 75 N.Y.S. 893, 71 App.Div. 474.
10 C.J. p. 651 note 64.

46. D.C.—Capital Traction Co. v. Morgan, 44 App.D.C. 237.
Ky. — Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.
10 C.J. p. 651 note 65.

The accommodations of passengers while boarding the carrier's vehicle or being carried by it are subject to such reasonable rules and regulations as the carrier may deem proper to make.
Ky. — Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.
Mich.—Day v. Owen, 5 Mich. 520, 72 Am.D. 62.

Requiring stockmen to ride in caboose

A contract by a drover or caretaker of stock, riding on the same train in which the stock is carried, to ride and remain in the caboose while the train is in motion is valid, and not against sound public policy.—Hulet v. Payne, C.C.A.N.D., 282 F. 401—10 C.J. p. 651 note 65 [a].

47. Ky.—Arnett v. Chesapeake & O. Ry. Co., 248 S.W. 1040, 198 Ky. 491.

48. R.I.—Martin v. Rhode Island Co., 78 A. 548, 32 R.I. 162, 32 L.R.A.,N.S., 695, Ann.Cas.1912C 1283.
10 C.J. p. 651 note 67.
Regulations as to amount of fares see infra § 581.

that may ride at any one time on any of its cars or vehicles,[49] and may adopt and enforce rules providing that, when its coaches or vehicles contain the prescribed reasonable number of passengers, others desiring passage may be refused admittance.[50] It may also make reasonable rules and regulations as to the mode of performance of its duty as carrier,[51] but it may not thereby abridge its duty.[52] Where a railroad company has made such rules and regulations, it is its duty to run its trains according to them.[53]

Inconsistent with rules of commission. A carrier's rules and regulations are void when they are inconsistent with the rules prescribed by the public service commission.[54]

Rules and stipulations distinguished. Some of the regulations adopted by the carrier are sometimes printed on the ticket, and may then be said to constitute a stipulation in the contract rather than a rule governing the rights of the parties.[55]

§ 571. Reasonableness of Regulations

The rules and regulations of a carrier of passengers must be reasonable.

A carrier's rules and regulations must be reasonable or else they are not binding on passengers.[56] A rule or regulation which is in contravention of law, or whose enforcement would invalidate the provisions of a statute, cannot be enforced.[57]

Rules and regulations are reasonable which are suitable to enable the carrier to perform the duties it has undertaken, to secure to itself its just rights, and to conserve the safety, convenience, and comfort of its passengers,[58] particularly where they have been approved by the railroad or public service commission.[59] The following rules or regulations have been held reasonable: Forbidding passengers from boarding or leaving cars while in motion;[60] forbidding passengers from riding on the platform or steps of cars;[61] forbidding patrons

49. Ky.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.

50. Ky.—Brumfield v. Consolidated Coach Corporation, supra.

51. Ky.—Brumfield v. Consolidated Coach Corporation, supra.
N.H.—Johnson v. Concord R. Corp. 46 N.H. 213, 88 Am.D. 199.
10 C.J. p 651 note 66.

52. D.C.—Capital Traction Co. v. Morgan, 44 App.D.C. 237.

53. Ind.—Pittsburgh, etc., R. Co. v. Nuzum, 50 Ind. 141, 19 Am.R. 703—Pittsburgh, etc., R. Co. v. Lightcap, 34 N.E. 243, 7 Ind.App. 249—Chicago, etc., R. Co. v. Field, 34 N.E. 406, 7 Ind.App. 172, 52 Am.S.R. 444.

54. Ky.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.
Okl.—St. Louis & S. F. R. Co. v. State Travelers' Corp., 148 P. 166, 168, 47 Okl. 374
10 C.J. p 651 note 69.

55. Kan.—Freeman v. Atchison, etc., R. Co., 80 P. 592, 71 Kan. 327, 6 Ann.Cas. 118.
N.J.—State v. Campbell, 32 N.J.Law 309.

56. Ky.—Casteel v. American Airways, 88 S.W.2d 976, 261 Ky. 818—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.
10 C.J. p 652 note 71

The right of a passenger to be carried by a common carrier is generally superior to, and cannot be affected by, the carrier's rules and regulations, but his accommodation while being carried is subject to such reasonable rules and regulations as the carrier may deem proper to make.
Ky. — Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.
Mich.—Day v. Owen, 5 Mich. 520, 72 Am.D. 62.

57. Cal.—Robinson v. Southern Pac. Co., 38 P. 722, 105 Cal. 526, 28 L.R.A. 773.
10 C.J. p 652 note 72.

58. Ky.—Casteel v. American Airways, 88 S.W.2d 976, 261 Ky. 818—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.
N.Y.—Garricott v. New York State Rys., 119 N.E. 94, 223 N.Y. 9, L.R.A.1918D 929, reversing 151 N.Y.S. 1117, 167 App.Div. 953.

Allowing women to board car first
Where a street car is halted preparatory to taking on passengers, an order by the carrier's inspector that women should be allowed to board first is reasonable.—Garricott v. New York State Rys., 119 N.E. 94, 223 N.Y. 9, L.R.A.1918D 929, reversing 151 N.Y.S. 1117, 167 App.Div. 953.

Requiring invalid passenger to be transported on cot
The rule of a carrier requiring an invalid passenger to be transported on a cot, instead of on a bed spring, is reasonable, in view of the greater safety of the passenger while on a cot raised from the floor, and of the greater ease in taking her in and out of the car, so that the carrier could properly require such passenger to be removed from the train, if a cot was not procured for her.—Arnett v. Chesapeake & O. Ry. Co., 248 S.W. 1040, 198 Ky. 491.

Requiring doctor's certificate for invalid passenger
A rule requiring a person unable because of sickness to travel in a passenger car and desiring to travel in a baggage car to have a doctor's certificate that he has no contagious and infectious disease, and that travel in a baggage car will not endanger his life, is reasonable in view of a statutory provision prohibiting the transportation on trains of persons having contagious or infectious diseases.—Davis v. Kirklen, Tex.Civ.App., 253 S.W. 330.

Receiving or discharging bus passengers en route
A rule of a bus company permitting it to receive or discharge passengers while en route, at hotels, residences, post offices, or at other points between its fixed termini, which rule is generally known by the public, is not unreasonable.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.

59. Wis.—Campbell v. Milwaukee Electric Ry. & Light Co., 170 N.W. 937, 169 Wis. 171, 6 A.L.R. 628.

60. U.S.—Hulet v. Payne, C.C.A.N.D., 282 F. 401.
10 C.J. p 652 note 73.

This rule, as stated in Corpus Juris, has received judicial approval.—Hulet v. Payne, C.C.A.N.D., 282 F. 401, 404.

61. U.S.—Hulet v. Payne, supra.
10 C.J. p 652 note 74.

This rule, as stated in Corpus Juris, has received judicial approval.—Hulet v. Payne, supra.

going to sleep in waiting room or lying down on benches, in the absence of a duty to provide places where patrons may sleep while awaiting the arrival or departure of trains;[62] prohibiting the taking of dangerous articles into cars;[63] limiting the amount of personal effects which a passenger may carry with him in a car;[64] reserving interurban cars for interurban traffic only,[65] requiring the deposit of fare in a box on entering the car, as announced infra § 591; and requiring a passenger to have a ticket[66] or to pay cash fare.[67]

Rules dividing passengers into classes and setting apart particular cars, or portions thereof, for particular classes,[68] such as for the separation of white and colored races, as announced infra § 645, have also been held reasonable; but no rule, regulation, custom, or usage may be relied on by the carrier which will permit it to discriminate against or in favor of a passenger on account of race or color.[69]

Reasonableness a question of law and of fact. The reasonableness of a rule or regulation prescribed by a carrier has been held to be a mixed question of law and of fact,[70] on the other hand in many cases it has been held to be purely a question of law for the court,[71] particularly where the facts are uncontroverted.[72]

Interstate commerce commission. The reasonableness of a rule or regulation by a carrier, within the Interstate Commerce Act, is a question for the interstate commerce commission, where the only questions are whether the carrier's rule was applicable to the case and was properly applied.[73]

§ 572. Notice of Regulations

Notice of a carrier's rules or regulations affecting passengers is generally sufficient if it is given in such a manner that passengers may conveniently advise themselves thereof.

As the validity of a regulation does not depend on contract, express or implied, but on the general power of the carrier to control its business, there is not the necessity, which exists with reference to a special contract regulation, as explained infra §§ 616, 617, of bringing notice of the regulation home to the passenger so that his assent thereto shall appear; but the passenger is bound to take notice and to inform himself of all reasonable regulations governing the purchase of tickets and the transportation of passengers.[74] In the absence of a statute to the contrary, such a rule or regulation may be communicated and made known to the public in any manner sufficient to answer its purpose, and if it is so posted, or otherwise published, that passengers may conveniently advise themselves with reference thereto it is sufficient;[75]

62. Ga.—Central of Georgia R. Co. v. Motes, 43 S.E. 990, 117 Ga. 923, 97 Am.S.R. 223, 62 L.R.A. 507.

63. N.Y.—Dowd v. Albany R. Co., 62 N.Y.S. 179, 47 App.Div. 202.

64. N.J.—Runyan v. New Jersey Cent. R. Co., 47 A. 422, 65 N.J. Law 228
10 C.J. p 653 note 77.
Limitation of liability as to amount or value of hand baggage see infra § 875.

65. Wis.—Campbell v. Milwaukee Electric Ry. & Light Co., 170 N.W. 937, 169 Wis. 171, 6 A.L.R. 628.

66. Ark.—St. Louis, etc., R. Co. v. Blythe, 126 S.W. 386, 94 Ark. 153, 29 L.R.A.,N.S., 299.
10 C.J. p 653 note 79.
Exhibition and surrender of tickets generally see infra §§ 609–613.
Requiring ticket or permit on freight train see infra § 606.

67. Mo.—Bolles v. Kansas City Southern R. Co., 115 S.W. 459, 134 Mo.App. 696.
10 C.J. p 653 note 80.
Right to require fare generally see infra § 579.

68. Tenn.—Memphis, etc., R. Co. v. Benson, 4 S.W. 5, 85 Tenn. 627, 4 Am.S.R. 776.
10 C.J. p 653 note 81.

69. Ky.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.

70. Wis.—Bass v. Chicago, etc., R. Co., 36 Wis. 450, 17 Am.R. 495
10 C.J. p 653 note 83–p 654 note 86

71. Ky.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.
10 C.J. p 653 note 84.
"For the obvious reason that if this question should be left to the jury, on the trial, one jury might hold such rule was reasonable and another might hold the same rule or regulation was unreasonable. Thus, its uniformity and permanency, the essential qualities of every regulation, would be destroyed."—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 362, 240 Ky. 1

72. U.S.—Ohage v. Northern Pac. R. Co., Minn., 200 F. 128, 118 C.C.A. 302.
10 C.J. p 654 note 85.

73. U.S.—Southern R. Co. v. Campbell, 36 S.Ct. 33, 239 U.S. 99, 102, 60 L.Ed. 165, affirming 77 S.E. 745, 94 S.C. 95.
10 C.J. p 654 note 87.
Jurisdiction of interstate commerce commission in general see C.J.S. title Commerce § 142.

74. Ky.—Sturgill v. Chesapeake & O. R. Co., 11 S.W.2d 983, 227 Ky. 44—Chiles v. Chesapeake, etc., Ry. Co., 101 S.W. 386, 125 Ky. 299, 30 Ky. L. 1332, 11 L.R.A.,N.S., 268.
10 C.J. p 654 note 89.
Need not notify each passenger
Notice of existence and operation of reasonable rule or regulation of carrier need not be brought to actual knowledge of each person purchasing ticket.
Ky. — Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1
N.Y.—Barker v. Central Park, etc., R. Co., 45 N.E. 550, 151 N.Y. 237, 56 Am.S.R. 626, 35 L.R.A. 489.
10 C.J. p 654 note 89 [a].

75. Ind.—Union Traction Co. of Indiana v. Smith, 123 N.E. 4, 70 Ind. App. 40
Ky. — Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1
10 C.J. p 654 note 90
The test to be applied "is the fact they [regulations] are generally known to the public and are reasonable and permanent, not the manner in which they were adopted and made known to the public."—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 364, 240 Ky. 1.

and if it is generally well known, it is not necessary that it be formally adopted and published by writing or in print;[76] it may grow out of custom and usage.[77]

The distinction has been made that rules which cover special cases may properly be brought to the knowledge of the traveling public by notice of publication, but that a rule and notice which is intended to apply to all passengers and to affect all travel and every individual who applies for passage stands on a different basis and requires more direct notice,[78] and it has been held that a notice which is intended to apply to the entire public should be such as to leave no doubt but that it reaches all who are to be affected by it.[79]

Rules relating to the method in which employees shall conduct the business of the carrier, and regulating their authority, are not supposed to be known to the public, and a passenger is not charged with notice thereof, unless they are brought home to him;[80] and before such rules can be enforced against a passenger reasonable notice thereof must be given to him[81]

§ 573. Obedience to, and Enforcement of, Regulations

Passengers are bound to obey all reasonable rules and regulations of the carrier of which they have actual or constructive knowledge, and it is within the power of the carrier to enforce such rules and regulations.

Passengers are bound to obey all reasonable rules and regulations prescribed by the carrier, of which they have knowledge or are charged with knowledge,[82] provided the carrier has afforded them reasonable facilities for doing so.[83]

Enforcement. A person purchasing and receiving a ticket impliedly consents to the enforcement of all existing permanent, reasonable rules, customs and usages of the carrier known to the public, regulating the receiving, loading, transporting, and discharging of passengers;[84] and it is within the power, as well as the duty, of the carrier, through its proper employees, to enforce the observance, of such rules and regulations,[85] notwithstanding the previous existence of a contrary custom;[86] but such enforcement must be done in a reasonable manner, and so as not to inflict unnecessary injury or inconvenience on passengers[87]

§ 574. Waiver or Abrogation of Regulations

A carrier's rules and regulations may be waived or abrogated, as by their habitual violation with the carrier's knowledge

The rules and regulations of a carrier may be waived or abrogated, as by their habitual violation, with the consent or knowledge, actual or construc-

Bulletin announcing state law held not regulation

A bulletin issued by a carrier engaged in both intra-state and interstate carriage of passengers, announcing the enactment of a state statute requiring the segregation of races, declaring the statute applied only to intra-state passengers and requiring its enforcement on trains which carry passengers to which the law does apply, was not by its terms a valid regulation for the segregation of interstate passengers according to race—Washington, B & A. Electric R. Co. v. Waller, 289 F. 598, 53 App D C. 200, 30 A L R. 50.

76. Ky—Brumfield v. Consolidated Coach Corporation, 40 S W.2d 356, 240 Ky 1.

In absence of statute to contrary, rules and regulations of carrier may exist and bind both carrier and passengers, without being promulgated in writing or in print.—Brumfield v. Consolidated Coach Corporation, 40 S.W 2d 356, 240 Ky. 1.

77. Ky.—Brumfield v. Consolidated Coach Corporation, supra.

As to receiving and unloading passengers

A carrier may by custom establish a rule to receive and unload passengers at any convenient point between the termini of its route manifestly for the accommodation of its passengers, as well as to promote its business. So doing is a valuable privilege to the prospective passenger and an advantage of tremendous value to the carrier.—Brumfield v Consolidated Coach Corporation, 40 S W 2d 356, 240 Ky. 1.

78. Tenn—Louisville, etc, R. Co. v. Turner, 47 S.W. 223, 100 Tenn. 213, 43 L.R.A. 140.

79. Ind.—Union Traction Co. of Indiana v. Smith, 123 N.E. 4, 70 Ind. App. 40.
Tenn—Louisville, etc., R. Co. v. Turner, 47 S.W. 223, 100 Tenn. 213, 43 L.R.A. 140.

80. D C.—Washington, B. & A. Electric R. Co. v. Waller, 289 F. 598, 53 App D.C 200, 30 A L R. 50
Tex.—Chicago, R. I & G. Ry. Co. v. Carroll, 193 S.W. 1068, 108 Tex. 378
10 C.J. p 655 note 94.

Oral instructions by a carrier to its conductors to segregate interstate passengers by races is not a valid regulation, binding on the passengers, since knowledge of such regulation should be brought home to the passenger, at least constructively, before he enters the car.—Washington, B. & A. Electric R. Co. v Waller, 289 F. 598, 53 App D C. 200, 30 A.L.R. 50.

81. N.Y.—Hickman v. International Ry. Co., 160 N.Y.S. 994, 97 Misc. 53, reversed on other grounds 164 N.Y.S. 1095
10 C J p 655 note 95.

82. Ky—Casteel v. American Airways, 88 S W.2d 976, 261 Ky. 818.
10 C J. p 655 note 96
Disobedience of rules as:
Contributory negligence see infra § 779.
Grounds for ejection see infra § 819.

83. Mo—Cathey v. St Louis, etc, R. Co., 130 S W 130, 149 Mo App. 134.
10 C J. p 655 note 97.

84. Ky—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1

85. Ala.—Birmingham Electric Co. v. Jones, 176 So. 203
Wis.—Campbell v. Milwaukee Electric Ry. & Light Co., 170 N W. 937, 169 Wis. 171, 6 A.L R. 628.
10 C J. p 655 note 98.

86. Ark—Hobbs v. Texas, etc, R. Co., 5 S.W. 586, 49 Ark. 357.

87. Ala.—Birmingham, R. etc, Co. v. McDonough, 44 So. 960, 153 Ala. 122, 127 Am.S.R. 18, 13 L.R.A., N.S., 445.
10 C.J. p 655 note 99.

tive, of the carrier.[88] A railroad company, however, cannot waive a compliance with its regulations by way of discrimination; but, if the regulation is waived for one person, it is waived as to all under like conditions.[89]

§ 575. As to Use of Carrier's Premises

A common carrier of passengers may make reasonable rules and regulations for the use by others of its station grounds and other premises, consistent with the purposes for which they were created.

The station grounds or premises of a common carrier, such as a railroad company, must be devoted primarily to public use to the extent necessary for the public objects intended to be accomplished by the carrier,[90] and they cannot be used, without the carrier's consent, by taxicab men or others to solicit or carry on their business.[91] Accordingly, a common carrier of passengers, such as a railroad company, may make reasonable rules and regulations for the use of its stations and other premises, consistent with the purposes for which it was created and not inconsistent with legally established regulations;[92] and the power which the company has to regulate its station buildings it may delegate to suitable officers.[93] It may exclude from its station grounds those who go there not to transact business with the railroad company, but from curiosity or to transact their private business with passengers or third persons,[94] particularly when they are dishonest and troublesome,[95] and when such persons come on its station grounds in violation of such prohibition it may remove them, using no unnecessary force, as announced infra § 819 a common carrier may exclude from its vehicles and premises persons selling lunches to passengers,[96] and hotel runners soliciting patronage for their hotels.[97] It may also exclude from its station grounds hackmen soliciting the carriage of passengers to and from stations,[98] and for this purpose may obtain an injunction to prevent such persons from entering on its premises;[99] or it may allow all hack-

88. Pa.—Drake v. Pennsylvania R. Co., 20 A. 994, 137 Pa. 352, 21 Am.S.R. 883.
10 C.J. p. 655 note 1, p. 656 note 2.
In the absence of knowledge by the carrier there is no waiver.—Anderson v. Union Traction Co., 7 Pa. Dist. 41.

89. Pa.—Coleman v. Pennsylvania R. Co., 89 A. 87, 242 Pa. 304, 50 L.R.A.,N.S., 432.

90. Mo.—Canary Taxicab Co. v. Terminal Ry. Ass'n of St. Louis, 294 S.W. 88, 316 Mo. 709.

91. U.S.—Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., Ky., 48 S.Ct. 404, 276 U.S. 518, 72 L.Ed. 681, 57 A.L.R. 426, affirming, C.C.A., 15 F.2d 509, certiorari granted 47 S.Ct. 472, 273 U.S. 690, 71 L.Ed. 842.—Delaware, L. & W. R. Co. v. Town of Morristown, N.J., 48 S.Ct. 276, 276 U.S. 182, 72 L.Ed. 523, 56 A.L.R. 756, reversing, C.C.A., 14 F.2d 257, certiorari granted 47 S.Ct. 335, 273 U.S. 686, 71 L.Ed. 840.

92. Or. — Baggage & Omnibus Transfer Co. v. City of Portland, 164 P. 570, 84 Or. 343, L.R.A. 1917F 1080.
10 C.J. p. 656 note 4.
Baggage facilities
Since railroad companies are responsible for baggage, they may reasonably regulate use of stations and other matters concerning dispatch of business for that purpose.—Baggage & Omnibus Transfer Co. v. City of Portland, 164 P. 570, 84 Or. 343, L.R.A. 1917F 1080.
Municipal regulation of hackmen and hotel runners at depots see C.J.S. title Municipal Corporations § 266, also 43 C.J. p. 380 note 89–p. 381 note 10.

93. Mass.—Com. v. Power, 7 Metc. 596, 41 Am.D. 465.

94. U.S.—Jencks v. Coleman, C.C. R.I., 13 F.Cas.No.7,258, 2 Sumn. 221.
Ga.—Fluker v. Georgia R., etc., Co., 8 S.E. 529, 81 Ga. 461, 12 Am.S.R. 328, 2 L.R.A. 843.
Iowa.—Johnson v. Chicago, etc., R. Co., 50 N.W. 543, 51 Iowa 25.

95. Okl.—Chicago, etc., R. Co. v. Armstrong, 120 P. 952, 30 Okl. 134, 39 L.R.A.,N.S., 126, Ann.Cas.1913B 1343.
10 C.J. p. 656 note 7.

96. Ga.—Fluker v. Georgia R., etc., Co., 8 S.E. 529, 81 Ga. 461, 12 Am.S.R. 328, 2 L.R.A. 843.
10 C.J. p. 656 note 9.

97. Ark.—St. Louis, etc., R. Co. v. Osborn, 55 S.W. 142, 67 Ark. 399.—Landrigan v. State, 31 Ark. 50, 25 Am.R. 547.
Mass.—Commonwealth v. Power, 7 Metc. 596, 41 Am.D. 465.

98. U.S.—Delaware, L. & W. R. Co. v. Town of Morristown, N.J., 48 S.Ct. 276, 276 U.S. 182, 72 L.Ed. 523, 56 A.L.R. 756, reversing, C.C.A., 14 F.2d 257, certiorari granted 47 S.Ct. 335, 273 U.S. 686, 71 L.Ed. 840.
Mo.—Canary Taxicab Co. v. Terminal Ry. Ass'n of St. Louis, 294 S.W. 88, 316 Mo. 709.
10 C.J. p. 656 note 11.

99. Ark.—Missouri Pac. R. Co. v. Hobbs, 13 S.W.2d 610, 178 Ark. 1146.
Conn.—New York, etc., R. Co. v. Scovill, 41 A. 246, 71 Conn. 136, 71 Am.S.R. 159, 42 L.R.A. 157.
Mass.—Boston, etc., R. Co. v. Sullivan, 58 N.E. 689, 177 Mass. 230, 83 Am.S.R. 275.
Tex.—Clisbee v. Chicago, R. I. & G. Ry. Co., Civ.App., 230 S.W. 235.
10 C.J. p. 656 note 12.
Grounds for injunction held sufficient
Where hackmen, who had been permitted to enter station grounds to solicit passengers and baggage, continued to trespass on such grounds after notice to cease, for the reason that the company had sold the exclusive privilege to another, and such trespassing hackmen did not deny plaintiff's title to the property or claim any right of way over the same, the company was entitled to an injunction restraining the continuance of such trespasses, since resort to an action at law would occasion a multiplicity of suits, every trespass constituting a new cause of action.—Boston, etc., R. Co. v. Sullivan, 58 N.E. 689, 177 Mass. 230, 83 Am.S.R. 275.
Complaint held sufficient
(1) A complaint, alleging that defendant was trespassing daily on plaintiff railroad company's station, platform, and right of way to sell sandwiches and other foods to passengers on, or alighting from, its trains, in disregard of notices to keep off, thereby so annoying and harrassing plaintiff in the conduct of its business as to amount to a nuisance, that foods sold by him are wrapped in papers and thrown on the grounds, making it dangerous for passengers, and causing extra expense in keeping the grounds clean, that defendant is wholly insolvent, and that plaintiff has no

men the same privileges and facilities at its depot on their paying the company a certain compensation.[1] However, the company has no power to exclude from its station grounds persons desiring to transact business with it as a common carrier,[2] and cannot unreasonably prohibit a passenger from having his carriage, whether owned by him or hired for the purpose, enter the station grounds to deposit, or to take away, him or his baggage, as explained infra § 576.

Ferry grounds. Although public patronage of busses as a means of reaching a ferry causes overcongestion of the ferry terminal grounds, the ferry company cannot, consistently with its public duty, exclude all busses from such grounds while admitting all other conveyances, public or private, although not protected by any contractual rights.[3]

§ 576. Exclusive Privileges

A common carrier of passengers, such as a railroad company, by the weight of authority, may grant to a particular person or company the exclusive privilege of using its premises to solicit the patronage of passengers, for the carriage of themselves or their baggage, so long as reasonable accommodations are afforded to the general public for going on and leaving the station premises.

By the weight of authority, even where a statute expressly requires railroad companies to give all persons equal facilities for the use of their depots, such a company, as owner of its stations and station grounds, has power to grant to individuals exclusive privileges to transact business of a particular kind with persons resorting to its stations,[4] such as the exclusive privilege of selling lunches, or of soliciting orders for the sale of lunches, to passengers,[5] or of entering on the cars or other vehicles to solicit the carriage of passengers or baggage,[6] since such a statute applies only to persons having contractual relations with the carrier, and does not forbid the granting of exclusive privileges to persons to solicit patronage within the depot and on the trains of a common carrier,[7] nor require it to allow all hack drivers alike to use its premises as a standing ground to solicit business at its depot when they have no contract with a passenger.[8]

A common carrier of passengers, such as a railroad or terminal company, may, in the absence of constitutional or statutory provisions to the contrary, grant to one person the exclusive right of coming on its cars and station grounds to solicit from passengers the carriage of themselves and their baggage from the station, and may exclude others from coming on the grounds for such soliciting, so long as reasonable accommodations are afforded to the public in general for reaching and leaving the station,[9] and provided such an arrangement is not unnecessary, unreasonable, or arbi-

complete, adequate remedy at law, and brings the action to avoid a multiplicity of suits, is sufficient to authorize an injunction.—Missouri Pac. R. Co. v. Hobbs, 13 S.W.2d 610, 178 Ark. 1146.

(2) A complaint for an injunction by a railroad company against one who has violated its rules in coming on its grounds to solicit business is sufficient where it alleges that the company has been damaged thereby, without setting out the evidence to show the elements of such damages, if facts are set forth which show that the damage might be great, on account of the obstruction of the company's business.—New York, etc., R. Co. v. Scovill, 41 A. 246, 71 Conn. 136, 71 Am.S.R. 159, 42 L.R.A. 157.

1. N.Y.—New York Cent., etc., R. Co. v. Sheeley, 27 N.Y.S. 185.
10 C.J. p 657 note 13.

2. Mass.—Old Colony R. Co. v. Tripp, 17 N.E. 89, 147 Mass. 35, 9 Am.S.R. 661.
Tenn.—Summitt v. State, 8 Lea 413, 41 Am.R. 637.
Vt.—Harris v. Stevens, 31 Vt. 79, 73 Am.D. 337.

3. N.J.—Philadelphia & Camden Ferry Co. v. Johnson, 121 A. 900, 94 N.J.Eq. 296.

4. Mass.—Old Colony R. Co. v. Tripp, 17 N.E. 89, 147 Mass. 35, 9 Am.S.R. 661.
10 C.J. p 657 note 18.

A terminal company, in the management and control of its property in matters unconnected with, and beyond the scope of, its duties as a common carrier and not affecting its duties as such, may, as an incident to its ownership, grant to some concessions which it denies to others, provided it acts in good faith and its actions in that respect are consistent with the proper performance of its duties as a common carrier.—State ex rel. Postal Telegraph Cable Co. v. Wells, 118 So. 731, 96 Fla. 591, 60 A.L.R. 1072.

Selling newspapers

Railroad can forbid vending of newspapers in its subway trains and stations by others than those having concessions to do so.—People v. Goldstein, 268 N.Y.S. 50, 150 Misc. 101.

5. Ga.—Fluker v. Georgia R., etc., Co., 8 S.E. 529, 81 Ga. 461, 12 Am.S.R. 328, 2 L.R.A. 843.

6. Ga.—Hart v. Atlanta Terminal Co., 58 S.E. 452, 128 Ga. 754.
Kan.—Missouri Pac. R. Co. v. Kohler, 193 P. 323, 107 Kan. 673, rehearing denied 193 P. 899, 108 Kan. 6, 15 A.L.R. 333.
10 C.J. p 657 note 20.

7. Or.—Baggage & Omnibus Transfer Co. v. City of Portland, 164 P. 570, 84 Or. 343, L.R.A.1917F 1080.
10 C.J. p 657 note 21.

8. N.Y.—Brown v. New York Cent., etc., R. Co., 27 N.Y.S. 69, 75 Hun 355, appeal dismissed 46 N.E. 1145, 151 N.Y. 674.

9. U.S.—Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., Ky., 48 S.Ct. 404, 276 U.S. 518, 72 L.Ed. 681, 57 A.L.R. 426, affirming, C.C.A., 15 F.2d 509, certiorari granted 47 S.Ct. 472, 273 U.S. 690, 71 L.Ed. 842.—Delaware, L. & W. R. Co. v. Town of Morristown, N. J., 48 S.Ct. 276, 276 U.S. 182, 72 L.Ed. 523, 56 A.L.R. 756, reversing, C.C.A., 14 F.2d 257, certiorari granted 47 S.Ct. 335, 273 U.S. 686, 71 L.Ed. 840.—Skaggs v. Kansas City Terminal Ry. Co., D.C.Mo., 233 F. 827.
Ala.—Wright v. City of Anniston, 154 So. 597, 26 Ala.App. 109, certiorari denied 154 So. 599, 228 Ala. 554.
Iowa.—Red Top Cab Co. v. McGlashing, 213 N.W. 791, 204 Iowa 791.
Kan.—Missouri Pac. R. Co. v. Kohler, 193 P. 323, 107 Kan. 673, rehearing denied 193 P. 899, 108 Kan.

6, 15 A.L.R. 333—Mader v. City of Topeka, 189 P. 969, 106 Kan. 867, 15 A.L.R. 340.

Mo.—Red Top Taxicab Co. v. Terminal R. Ass'n of St. Louis, 15 S.W.2d 758, 322 Mo. 463—McFall v. Terminal R. Ass'n of St. Louis, Mo., 19 S.W.2d 1119—Columbia Cab Co. v. Terminal R. Ass'n of St. Louis, Mo., 19 S.W.2d 1118—Canary Taxicab Co. v. Terminal Ry. Ass'n of St. Louis, 294 S.W. 88, 316 Mo. 709.

N.J.—Thompson's Express & Storage Co. v. Mount, 111 A. 173, 91 N.J. Eq. 497, 15 A.L.R. 351.

Ohio.—Snyder v. Union Depot Co., 19 Ohio Cir.Ct. 368, 10 Ohio Cir. Dec. 645, reversing 9 Ohio S. & C. Pl.Dec. 63, 7 Ohio N.P. 64.

Or.—Baggage & Omnibus Transfer Co. v. City of Portland, 164 P. 570, 84 Or. 343, L.R.A.1917F 1080.

Pa.—Lehigh Valley R. Co. v. Graham, 64 Pa.Super. 437.

Utah.—Kenyon Hotel Co. v. Oregon Short Line R. Co., 220 P. 382, 62 Utah 364.

W.Va.—Rose v. Public Service Commission, 83 S.E. 85, 75 W.Va. 1, L.R.A.1915B 358, Ann.Cas.1918A 700.

10 C.J. p. 657 note 23.

This rule, stated in Corpus Juris

(1) Has received judicial approval as the majority rule.

Iowa.—Red Top Cab Co. v. McGlashing, 213 N.W. 791, 793, 204 Iowa 791.

Kan.—Missouri Pac. R. Co. v. Kohler, 193 P. 323, 326, 107 Kan. 673, rehearing denied 193 P. 899, 108 Kan. 6, 15 A.L.R. 333.

(2) Is cited generally in State v. Jacksonville Terminal Co., Fla., 106 So. 576, 586.

"The decided weight of authority particularly reflected in the more recent and seemingly better reasoned decisions, including those of the Supreme Court of the United States, is to the effect that a railroad company, as long as it thereby affords reasonable accommodation to the public and violates no constitutional or statutory provision, may grant such exclusive privilege to one company or person."—Canary Taxicab Co. v. Terminal Ry. Ass'n of St. Louis, 294 S.W. 88, 90, 316 Mo. 709.

Reason for rule

"For all purposes, except as inimical to its public duties, the property of a railroad company is its own as fully and absolutely as is the property of private owners. . . . There is no reason why a railroad company should be denied the right to contract with whomsoever it chooses for the private use of its premises when such use will not conflict with the performance of its public duties. The utilization by carriers of all legitimate sources of income from the use of their property is a matter in which the public has an interest. Without doubt, the companies might have excluded all cabs from their premises. There is no discrimination against passengers, for all are admitted to the premises on equal terms from the same points, save that access to the platform opposite the cab stand and access from the platform to other cabs may be wholly or partly obstructed by plaintiff's cabs."—Red Top Cab Co. v. McGlashing, Iowa, 213 N.W. 791, 792.

"In the courts of the United States . . . the rule is . . . well settled that, when not unnecessary, unreasonable, or arbitrary, a railroad may make arrangements, including the granting of special privileges to a single concern, to supply passengers arriving at its terminals with hacks and cabs, and it is not bound, at least in the absence of state legislation requiring it to do so, to accord similar privileges to other persons, even though they be licensed hackmen"—Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., C.C.A.Ky., 15 F.2d 509, 513, certiorari granted 47 S.Ct. 472, 273 U.S. 690, 71 L.Ed. 842, affirmed 48 S.Ct. 404, 276 U.S. 518, 72 L.Ed. 681, 57 A.L.R. 426

One of the leading, and one of the most instructive, cases respecting the duty of common carriers in this regard, is the case of Donovan v. Pennsylvania Co., Ill., 26 S.Ct. 91, 199 U.S. 279, 50 L.Ed. 192.—Kenyon Hotel Co. v. Oregon Short Line R. Co., 220 P. 382, 384, 62 Utah 364.

Injunction

(1) Where plaintiff transfer company had a contract with railway company not expiring until March 4, giving it exclusive right to solicit business on depot premises, a contract granting such right to defendant could not become effective until March 4, and on February 4 plaintiff was entitled to enjoin defendant temporarily from interfering with its business.—Kansas City S. & G. Terminal Co. v. Interurban Motor Transp. Co., 95 So. 258, 152 La. 1093.

(2) Where railroad company had granted taxicab company exclusive right to transport passengers' baggage, competitive company was properly enjoined from going within depot or on grounds for soliciting business.—Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., C.C.A.Ky., 15 F.2d 509, certiorari granted 47 S.Ct. 472, 273 U.S. 690, 71 L.Ed. 842, affirmed 48 S.Ct. 404, 276 U.S. 518, 72 L.Ed. 681, 57 A.L.R. 426.

(3) In a suit to determine the railroad's right to grant exclusive rights, it was held that plaintiff cab company was only entitled to have the city's petition for intervention dismissed.—Red Top Cab Co. v. McGlashing, 213 N.W. 791, 204 Iowa 791.

(4) Where a terminal company owning a union depot and a transfer company, engaged in the business of transporting passengers and baggage for hire, sued a second transfer company to restrain it from soliciting business on the depot premises, the question whether the terminal company has granted the other plaintiff the right to occupy any part of the depot premises does not concern defendant, as the terminal company has primarily the right to control the premises, and such right in either plaintiff is fatal to defendant.—Kansas City, S. & G. Terminal Co. v. Interurban Motor Transp. Co., 95 So. 258, 152 La. 1093.

Ordinances

(1) An ordinance attempting to establish hack stands and provide other regulations relating thereto does not affect the right of a railroad company to grant exclusive privilege to one company to solicit transfer of passengers and baggage upon its own grounds where the city's authority under the statute could extend no further than to its streets and public ways and to regulations, if any necessary, tending to afford travelers with sufficient accommodation, there being no claim of any insufficiency in this case.—Clisbee v. Chicago, R. I. & G. Ry. Co., Tex.Civ.App., 230 S.W. 235, error refused.

(2) An ordinance of a city prohibiting railroads from granting exclusive privileges of handling baggage is invalid where such power is not vested in the city by its charter.—Baggage & Omnibus Transfer Co. v. City of Portland, 164 P. 570, 84 Or. 343, L.R.A.1917F 1080.

Police officers cannot interfere

In the absence of statutory authority a city cannot authorize police officers to interfere with an exclusive privilege granted by a railway company to a firm of cab and baggagemen to stand its vehicles on a portion of the property owned by the railway company, when the space so granted is not required for the necessary and convenient use of the public having business with the railway company.—Missouri Pac. R. Co. v. Kohler, 193 F. 323, 107 Kan. 673, rehearing denied 193 P. 899, 108 Kan. 6, 15 A.L.R. 333.

Rental of portion of baggage room

A railroad company may rent a portion of its baggage room to another and concede to him the privileges necessarily incident to the use thereof, provided that by so doing it does not interfere with the exercise by any other person of any

trary;[10] and this rule applies although the person to whom the exclusive privilege has been granted is not a duly licensed hackman, in accordance with a municipal ordinance.[11] This rule, however, does not prevent others from entering to deliver or receive passengers or baggage on an order or contract,[12] nor does it apply to portions of streets over which the company has no private right of ownership or exclusive control.[13]

This rule, giving a railroad company the right to grant such exclusive privileges, is subject only to regulation by the state in the interest of the public as to the service to be furnished,[14] and is not a monopoly in the odious sense of the word, and does not involve an improper use by the railroad company of its property;[15] nor is it invalid as against public policy or as an illegal discrimination.[16]

Minority rule. According to some authorities, however, a railroad company has no right to grant to one hackman the exclusive privilege of entering

right which he may lawfully demand of the company as a common carrier.—Hart v. Atlanta Terminal Co, 58 S.E 452, 128 Ga. 754—10 C.J. p 657 note 23 [g]

Under charter powers

A railroad company may grant exclusive privileges at one of its stations to a transfer company where its charter empowers it to make all such regulations, rules, and by-laws as are necessary for the government of the corporation, or for effecting the object for which it was created, provided they are not repugnant to the laws and constitution of the United States—Black & White Taxicab & Transfer Co v Brown & Yellow Taxicab & Transfer Co, Ky., 48 S Ct. 404, 276 U.S 518, 72 L Ed 681, 57 A L.R. 426, affirming, C C A., 15 F.2d 509, certiorari granted 47 S. Ct 472, 273 U S. 690, 71 L Ed. 842

10. U.S.—Donovan v. Pennsylvania Co., Ill., 26 S.Ct 91, 199 U S. 279, 50 L.Ed. 192—Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co, C C.A Ky., 15 F.2d 509, certiorari granted 47 S Ct. 472, 273 U.S. 690, 71 L Ed. 842, affirmed 48 S.Ct. 404, 276 U.S. 518, 72 L Ed. 681, 57 A. L R. 426..

11. Mass.—Boston, etc, R Co. v Sullivan, 58 N.E 689, 177 Mass 230, 83 Am.S R. 275.
10 C.J p 658 note 24.

12. U.S.—Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co, Ky., 48 S Ct. 404, 276 U S. 518, 72 L Ed 681, 57 A L.R 426, affirming. C C A, 15 F 2d 509, certiorari granted 47 S Ct 472, 273 U.S. 690, 71 L Ed 842
Tex.—Clisbee v Chicago, R. I. & G Ry. Co, Civ.App., 230 S.W. 235, error refused.
10 C.J. p 658 note 25.

13. Ark.—Austeel v Bridges, 31 S. W.2d 958, 182 Ark. 518.

Under an ordinance providing for the closing of portions of certain streets and granting such portions to a railroad for a depot and other railroad purposes, the railroad company acquires no private right of ownership and no exclusive control over the streets which could be farmed out to taxicab companies even if permissible under the law to make an exclusive contract with respect thereto—Austeel v Bridges, 31 S W.2d 958, 182 Ark. 518.

Vacated alley

A taxi company and a city have no property rights in a cab stand located in a vacated alley, and leased by a railroad company to a rival company, where an ordinance conveyed the alley to the railroad and it has complied with the provisions of the conveyance—Red Top Cab Co. v McGlashing, 213 N W. 791, 204 Iowa 791.

14. Utah—Oregon Short Line R. Co. v Davidson, 94 P. 10, 33 Utah 370, 16 L R.A,N S., 777, 14 Ann Cas. 489

Constitutional restriction

(1) A constitutional provision that no railroad company shall make any exclusive or preferential arrangement for the conduct of any business as a common carrier does not prevent its granting exclusive privileges to a transfer company at its stations—Black & White Taxicab & Transfer Co v Brown & Yellow Taxicab & Transfer Co., Ky., 48 S Ct. 404, 276 U.S 518, 72 L.Ed 681, 57 A L.R. 426, affirming, C.C.A., 15 F 2d 509, certiorari granted 47 S Ct 472, 273 U.S 690, 71 L Ed. 842.

(2) A constitutional provision prohibiting passing of laws granting exclusive privileges does not prohibit carrier's power to grant exclusive rights to a transfer company, since it applies only to the enactment of laws.—Baggage & Omnibus Transfer Co. v. City of Portland, 164 P. 570, 84 Or. 343, L R.A.1917F 1080.

Police power

The advantage gained by granting exclusive privileges to a transfer company to solicit passenger's baggage is subordinate to a reasonable exercise of police power—Baggage & Omnibus Transfer Co. v. City of Portland, 164 P. 570, 84 Or. 343, L. R.A 1917F 1080.

15. U.S.—Donovan v. Pennsylvania Co., Ill, 26 S.Ct. 91, 199 U.S 279, 50 L Ed. 192—Black & White Taxicab & Transfer Co v. Brown & Yellow Taxicab & Transfer Co, C C A Ky, 15 F 2d 509, 513, certiorari granted 47 S Ct. 472, 273 U S 690, 71 L.Ed. 842, affirmed 48 S Ct. 404, 276 U.S 518, 72 L Ed 681, 57 A.L R. 426
N J.—Thompson's Express & Storage Co v. Whitemore, 102 A. 692, 88 N J Eq. 535
Tex.—Clisbee v Chicago, R. I & G. Ry. Co, Civ App., 230 S W 235.

16. U S.—Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co, Ky., 48 S. Ct. 404, 276 U.S 518, 72 L Ed 681, 57 A L R 426, affirming, C.C. A, 15 F 2d 509 certiorari granted 47 S.Ct. 472, 273 U S 690, 71 L.Ed. 842
Mo.—Canary Taxicab Co. v Terminal Ry Ass'n of St. Louis, 294 S W 88 316 Mo 709, distinguishing Kansas City Terminal Ry. Co v. James, 251 S W 53, 298 Mo 497, and Cravens v. Rodgers, 14 S.W. 106, 101 Mo. 247.

A railroad company leasing space in its station building and midway for the exclusive use of a taxicab company, and instructing its servants to escort passengers desiring taxicabs to the cab stand of such company, and permitting only such company to solicit business on the railroad property, is not guilty of unlawful discrimination—Red Top Taxicab Co. v. Terminal R. Ass'n of St Louis, 15 S W 2d 758, 322 Mo. 463—McFall v Terminal R. Ass'n of St Louis, Mo., 19 S W.2d 1119—Columbia Cab Co v. Terminal R. Ass'n of St Louis, Mo, 19 S W.2d 1118.

Under Public Utilities Act

Entering into a contract with a railroad company, whereby exclusive right to solicit orders for baggage delivery, hack, taxicab, and omnibus service is given to one engaged in such business, is not unjust discrimination within the prohibition of Public Utilities Act, which refers only to what a public utility is under a legal obligation to do, a railroad not being under any obligation to permit any man in such business to solicit on its platforms at stations—Thompson's Express & Storage Co. v Mount, 111 A. 173, 91 N. J Eq. 497, 15 A.L.R. 351.

its grounds to solicit the carriage of passengers or baggage to the exclusion of others,[17] on the ground that it would create a monopoly, prevent competition, and inconvenience the public,[18] and as being against a constitutional or statutory provision requiring all railroad companies to grant equal facilities for the transportation of passengers and freight to all persons.[19]

A railroad company owning or operating a dock or wharf in connection with its depot grounds cannot grant the exclusive privilege of receiving and discharging passengers thereat to one steamboat company to the exclusion of all others.[20]

§ 577. Designating Places for Hacks to Stand

A railroad company may designate the places on its premises where vehicles may stand to receive or discharge passengers and baggage.

Even though a carrier has no power to grant an exclusive privilege to one hack or omnibus line to occupy the depot grounds with its vehicles and solicit the patronage of incoming passengers, it has power to designate the place abutting on the platform where the owners of competing lines shall stand their respective vehicles, while awaiting the arrival and departure of trains, and where they shall receive and discharge passengers and baggage; and it may remove one who willfully disobeys such a regulation, using as much force as may be necessary.[21]

E. FARES, TICKETS, AND SPECIAL CONTRACTS

1. Fares

§ 578. Definitions

Fare is the price of passage or the sum paid or to be paid the carrier for transporting a passenger. A ticket becomes a fare when it is accepted by the conductor.

Fare is the price of passage or the sum paid or to be paid the carrier for transporting a passenger.[22] When a ticket is accepted by the conductor, it becomes a fare, but not before.[23]

"Rate of fare," when used in dealing with the question of transportation by a carrier, means the price or charge for the transportation of passengers.[24] In a transportation franchise, it is the measure of the consideration moving to the carrier for its service rendered.[25]

Rate. As used in a statute requiring railroads to carry passengers on its road "at a rate not ex-

17. Pa.—Commonwealth v. Grau, 16 Pa Dist. 806
10 C.J. p 659 note 26.

Under Kentucky law, railroad company cannot grant to one person, to exclusion of all others, right to come on depot ground with vehicles for receiving passengers.—Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., C.C.A.Ky., 15 F.2d 509, certiorari granted 47 S.Ct. 472, 273 U.S. 690, 71 L.Ed. 842, affirmed 48 S.Ct. 404, 276 U.S. 518, 72 L.Ed. 681, 57 A.L.R. 426.

18. Ill.—Pennsylvania Co. v. Chicago, 54 N.E. 825, 181 Ill. 289, 53 L.R.A. 223.
10 C.J. p 659 note 27.

19. Mich.—Kalamazoo Hack, etc., Co. v. Sootsma, 47 N.W. 667, 84 Mich. 194, 22 Am.S.R. 693, 10 L.R.A. 819.
Mont.—Montana Union R. Co. v. Langlois, 24 P. 209, 9 Mont. 419, 18 Am.S.R. 745, 8 L.R.A. 753

20. Fla.—Indian River Steamboat Co. v. East Coast Transp. Co., 10 So. 460, 28 Fla. 337, 29 Am.S.R. 258
Idaho.—Cœur d'Alene, etc., Transp. Co. v. Ferrell, 128 P. 565, 22 Idaho 752, 43 L.R.A.,N.S., 965.
10 C.J. p 659 note 29.

21. Mich.—Cole v. Rowen, 50 N.W. 138, 88 Mich. 219, 13 L.R.A. 848.
10 C.J. p 659 notes 30, 31.
Failure or refusal to comply with regulations as ground for ejection in general see infra § 819
Municipal regulation designating stands at railroad station see C.J.S. title Municipal Corporations § 266.

22. N.Y.—Chase v. New York Cent. R. Co., 26 N.Y. 523.
N.C.—McNeal Pipe, etc., Co. v. Howland, 16 S.E. 857, 111 N.C. 615, 20 L.R.A. 743
Pa.—Philadelphia v. Philadelphia Rapid Transit Co. 77 A. 501, 228 Pa. 325, 21 Ann.Cas. 87.
10 C.J. p 660 note 37.
Payment of fare as creating relation of carrier and passenger see supra § 559.

Commutation of fares
(1) The selling of a ticket for a term at a less price than the aggregate of daily fares for the term is a commutation of fares.—Abbott L.D.
(2) Commutation tickets see infra § 603.

Term relates to passengers
In common acceptance, when used in relation to common carriers, the term relates to passengers and not to freight.—De Grauw v. Long Island Electric R. Co., 60 N.Y.S. 163, 43 App.Div. 502, affirmed 57 N.E. 1108, 163 N.Y. 597

23. N.J.—Shelton v. Erie R. Co., 66 A. 403, 73 N.J.Law 558, 118 Am.S.R. 704, 9 L.R.A.,N.S., 727, 9 Ann.Cas. 883.
Tickets generally see infra §§ 597–621.

24. Pa.—Philadelphia v. Philadelphia Rapid Transit Co., 77 A. 501, 228 Pa. 325, 21 Ann.Cas. 87.
10 C.J. p 660 note 38.

Particular charge held not rate of fare
"A total charge of 25 cents for 6 rides is not a rate of fare either in the etymological or legal sense."—Philadelphia v. Philadelphia Rapid Transit Co., 77 A. 501, 502, 228 Pa. 325, 21 Ann.Cas. 87.

25. Ohio.—Parks v. Cleveland Ry. Co., 177 N.E. 28, 124 Ohio St. 79, affirming 176 N.E. 472, 38 Ohio App. 315.

ceeding two cents per mile," the word "rate" means price, amount.[26] A free pass, issued to an employee or a member of his family, is not included in the word "rates" as used in a statute requiring the filing of rate schedules and charges and regulations.[27]

A joint rate is a rate prescribed to be charged for the transportation of passengers over the connecting lines of two or more railroads, and to be divided among them for the service rendered by each respectively.[28]

§ 579. Right to Require Fare

Authority to carry passengers implies authority to charge a reasonable sum therefor, and on proper demand the passenger must make payment or produce a ticket showing payment, since the carrier cannot generally be required to carry passengers free.

Authority conferred upon a corporation to carry passengers implies authority to charge a reasonable sum for the service rendered,[29] and ordinarily it cannot be required to carry passengers without reward,[30] even though the railroad is regarded as a public highway.[31] Looking at the relation of carrier and passenger as arising out of contract, it is evident, as already pointed out in §§ 549-551, that a person may be a passenger without payment, if accepted as such by the carrier; nevertheless, to give rise to any contractual relation, consideration on the part of the passenger is essential;[32] and on demand of the conductor or other agent or servant properly empowered for the purpose, the passenger is under obligation to make payment, or to produce a ticket showing payment.[33] Where a passenger, shortly after boarding a car and paying his fare, leaves the car and boards another car attached thereto, he becomes a new passenger and liable for another fare.[34]

§ 580. Rate or Amount of Fare

a. In general
b. Factors involved in determination of reasonable rate

a. In General

A carrier is entitled to charge reasonable rates which will yield a compensatory return, but no more.

As already stated in § 579, a carrier has a right to be compensated for the transportation of passengers. It is entitled at all times to charge reasonable rates for the service furnished, that is, such rates as will produce a reasonable net income on the fair value of its property after deduction for depreciation and necessary expenses incident to operation.[35] A railroad is not prevented from seeking such compensatory rates by the fact that it has violated particular provisions of the franchise agreement under which it operates,[36] nor is it precluded from earning a fair rate of return by the fact that it also independently operates bus lines which are in partial competition with its railway lines.[37] On the other hand, regardless of its financial condition, a railroad company is not entitled to charge passenger fares yielding more than a fair return on the value of its property devoted to public use.[38]

b. Factors Involved in Determination of Reasonable Rate

(1) In general
(2) Value of property; rate base

26. N.Y.—Chase v. New York Cent. R. Co., 26 N.Y. 523.

27. Ind.—Clark v. Southern R. Co., 119 N.E. 539, 69 Ind.App. 697.

28. Ga.—Hill v. Wadley Southern Ry. Co., 57 S.E. 795, 128 Ga. 705.

29. U.S.—Stone v. Farmers' L. & T. Co., Miss., 6 S.Ct 334, 388, 1191, 116 U.S. 307, 29 L.Ed. 636.
10 C.J. p 677 note 56.
Part of franchise
The right to charge fares by a street railway company is a part of the franchise to use the streets. —Long v. City of Shreveport, 91 So. 825, 151 La. 423.

30. Ind.—Indianapolis v. Navin, 47 N.E. 525, 51 N.E. 80, 151 Ind 139, 41 L.R.A. 337.
Requiring certain officials to be carried free see infra § 582

31. Mo.—Farber v. Missouri Pac. R. Co., 22 S.W. 631, 116 Mo. 81, 20 L.R.A. 350.
10 C.J. p 677 note 58.

32. N.C.—Turner v. Richmond, etc., R. Co., 70 N.C. 1.
10 C.J. p 678 note 60.

33. Conn.—Norton v. Consolidated R. Co., 63 A. 1087, 79 Conn 109, 118 Am.S.R. 132, 6 Ann.Cas. 943.
N.J.—Jersey City, etc., R. Co. v. Morgan, 18 A. 904, 52 N.J.Law 60, affirmed 21 A. 783, 52 N.J.Law 558.
S.C.—Cave v. Seaboard Air Line R. Co., 77 S.E. 1017, 94 S.C. 282, L.R.A.1915B 915, Ann.Cas.1915A 1065.
Mistake of conductor as to right to transportation see infra § 818.
Refusal to produce ticket as terminating relation of passenger and carrier see supra § 563.

34. N.Y.—Tasker v. Third Ave. R. Co., 57 N.Y.S. 395, 27 Misc. 824.

35. Mass.—Donham v. Public Service Commission, 122 N.E. 397, 232 Mass. 309.
Pa.—City of Philadelphia v. Public Service Commission, 83 Pa.Super. 8.
Wis.—Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin, 172 N.W. 746, 169 Wis. 421.

36. Mo.—State ex rel. Kansas City Public Service Co. v. Latshaw, 30 S.W.2d 105, 325 Mo. 909, appeal dismissed Latshaw v. State of Missouri ex rel. Kansas City Public Service Co., 51 S.Ct. 101, 282 U.S. 806, 75 L.Ed. 723.

37. U.S.—International Ry. Co. v. Prendergast, D.C.N.Y., 1 F.Supp. 623.
Promotion of public convenience
Special master's finding in rate case that bus service established by street railway company through subsidiary promoted public convenience and that it did not seriously affect the competition of car lines was held sustained by evidence.—International Ry. Co. v. Prendergast, D.C.N.Y., 1 F.Supp. 623.

38. N.Y.—Yonkers R. Co. v. Maltbie, 296 N.Y.S. 411, 251 App.Div. 204.

(1) In General

A carrier is entitled to an adequate return on the fair value of its property, and in computing such return consideration must be given to the cost of maintenance, general expenses, and depreciation. Whether rates are reasonable should be generally determined by their effect on the net earnings of the company from passenger traffic throughout the entire system within the jurisdiction.

The factors involved in determination of a reasonable rate for the carrying of passengers are, in general, the same as those involved in fixing freight rates, and such general rules have already been considered in §§ 282–299. Cases involving passenger rates specifically will be hereinafter considered in this and the sections immediately following.

Passenger carriers, like other public service corporations, are entitled to an adequate return on the actual investment,[39] or, as it has been said, on the fair value of its property devoted to public use,[40] or, at least, a return sufficient to pay operating expenses.[41] What is an adequate rate of return depends greatly on the circumstances, the locality, the amount of risk involved, and the rate expected and realized in such locality on investments of a similar nature.[42] The company is not entitled to exact such rates as will enable it at all times not only to pay operating expenses, but also to meet the interest regularly accruing on all of its outstanding obligations and justify a dividend on all of its stock.[43] Further, if the rate established will yield a reasonable return to the carrier at present, it cannot be said to be confiscatory because it fails to yield in addition an amount for the purpose of recouping prior losses.[44]

In determining the reasonableness of rates, the cost of maintenance, upkeep, and general expenses must be considered as well as the actual cost of transportation.[45] The interest paid by a street railway company on its bonds may be included in computing the cost of carrying each passenger although the company has ceased to operate cars over a portion of the lines mortgaged to secure the bonds.[46] A railroad company may also properly charge its returns with an annual sum to provide for depreciation and replacement,[47] but it cannot

39. Mass.—Donham v. Public Service Commission, 122 N.E. 397, 232 Mass. 309.
10 C.J. p 665 note 17.

Reduced passenger rate which in a typical year, on experiment, yields a revenue equal to that produced by a former higher rate in a year of exceptional prosperity is not unreasonable.—Central of Georgia R. Co v. Alabama R. Commn., D.C.Ala., 209 F. 75.

40. U.S.—Los Angeles Ry. Corporation v. Railroad Commission of California, D.C.Cal., 29 F.2d 140, affirmed Railroad Commission of California v. Los Angeles Ry. Corporation, 50 S.Ct. 71, 280 U.S. 145, 74 L.Ed. 234
N.Y.—Yonkers R. Co. v. Maltbie, 274 N.Y.S. 535, 242 App.Div. 319, motion granted 195 N.E. 191, 266 N.Y. 542.
Wis.—Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin, 172 N.W. 746, 169 Wis. 421.
Determination of value of property see infra this section subdivision (2).

41. U.S.—Bellamy v. Missouri, etc., R. Co., Ark., 215 F. 18, 131 C.C.A. 326, L.R.A.1915A 1 and note
10 C.J. p 666 note 19.

42. N.Y.—Yonkers R. Co. v. Maltbie, 296 N.Y.S. 411, 251 App.Div. 204.
10 C.J. p 665 note 17 [b] (2)

Rate of seven and one-half per cent is a fair return.—Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin, 172 N.W. 746, 169 Wis. 421.

Return of over six per cent is not confiscatory, in the absence of evidence to the contray.—Yonkers R. Co. v. Maltbie, 296 N.Y.S. 411, 251 App.Div. 204

Return of four and nine-tenths per cent held confiscatory
U.S.—Los Angeles Ry. Corporation v. Railroad Commission of California, D.C.Cal., 29 F.2d 140, affirmed Railroad Commission of California v. Los Angeles Ry. Corporation, 50 S.Ct. 71, 280 U.S. 145, 74 L.Ed. 234

43. U.S.—Smyth v. Ames, Neb., 18 S.Ct. 418, 169 U.S. 466, 42 L.Ed. 819, modified on other grounds 18 S.Ct. 888, 171 U.S. 361, 43 L.Ed. 197.
Ill.—Chicago Union Tract. Co. v. Chicago, 65 N.E. 470, 199 Ill. 579.

44. U.S.—South, etc., Alabama R. Co. v. Alabama R. Commn., D.C. Ala., 210 F. 465.

45. N.Y.—Peo. v. Public Service Commn., 145 N.Y.S. 503, 159 App. Div. 531, affirmed 109 N.E. 1089, 215 N.Y. 689.
Wash.—Puget Sound Electric R. Co. v. State R. Commn., 117 P. 739, 65 Wash. 75, Ann.Cas.1913B 763

46. U.S.—Belt Line Ry. Corporation v. Newton, D.C.N.Y., 273 F. 272

47. U.S.—Chicago Rys. Co. v. Illinois Commerce Commission, D.C. Ill., 277 F. 970
N.Y.—Yonkers R. Co. v. Maltbie, 274 N.Y.S. 535, 242 App.Div. 319, motion granted 195 N.E. 191, 266 N.Y. 542.
10 C.J. p 666 note 23

Purpose of permitting depreciation charge in determining value of street railroad company's property as rate base is to compensate utility for property consumed in service, and duty of public service commission, guided by experience in rate making, is to spread such charge fairly over years of life of property.—Yonkers R. Co. v. Maltbie, 296 N.Y.S. 411, 251 App.Div. 204

"Straight line" method of computation
(1) The public service commission did not err in figuring accrued and annual depreciation of street railroad company's property by "straight line" method to fix value thereof for rate-making purposes.—Yonkers R. Co. v. Maltbie, 296 N.Y.S. 411, 251 App.Div. 204.

(2) "Straight line" method as based on accrual of depreciation at a uniform rate over the entire period of the probable life of the property, see C.J.S. title Public Utilities § 18, also 51 C.J. p. 19 notes 29–30, and Straight, 60 C.J. p 131 notes 73–78.

Straight percentage of value
Choosing by special master of some straight percentage of value of physical property was an incorrect method of assigning value to depreciation in street railway rate case, particularly where there was estimate of depreciation on the several units referred to in accounts in evidence.—International Ry. Co. v. Prendergast, D.C.N.Y., 1 F.Supp. 623.

Property right
Where ordinances authorize and require street railroad companies operating thereunder to set aside each year a certain percentage of gross receipts for renewals, and provide that at the end of the grant to the

charge to the income of one year the burdens of the deterioration of past years.[48] Depreciation should be based on the present value of the railroad's property and not the cost value.[49] The expense of bus operations may be properly considered in determining the rates of a street railroad company where the value of the property as a rate base included the property devoted to bus operations.[50]

Comparison with other rates. A rate voluntarily established by the company, in common with practically all other companies doing business in that part of the country, and maintained for many years, may be used as a basis for comparison in determining the reasonableness of a rate of passenger fare.[51] So, it has been said that there can be no better evidence of the reasonableness of a street railroad rate than its general adoption in franchises granted by other municipalities, over a long succession of years, with acquiescence by the public without question.[52] A commission, however, is not required to adopt the rate between two designated points, fixed by interurban franchise, as the basis for determination of the reasonableness of rates between other points;[53] nor will a rate established by it be held unreasonable on the ground that it exceeds the sum of fares between intermediate points fixed by independent franchise contracts.[54]

Earnings from other lines. Generally, whether or not particular rates are fair and reasonable must be determined by the effect on the net earnings throughout the whole line within the jurisdiction, and not on any particular division,[55] notwithstanding it was formerly an independent line.[56] It has been held, however, that subways and elevated roads operated by the same company under different leases and under distinct financial arrangements do not necessarily constitute a unified system for rate-making purposes,[57] and, where only the street

companies the city may purchase the properties at the valuation fixed by the ordinances, or, if it grants the right to other companies to operate the railways, such other companies should take over the properties at the same price, the state commerce commission, in proceedings to determine fares, has no power to prevent the setting aside of funds representing a depreciation sufficient to take care of necessary renewals, since, if such fund should not be on hand at the expiration of the grant, an abatement of the contract price could be secured, and the right to set aside the fund is a property right, which cannot be taken away by the state without the consent of the company—Chicago Rys. Co. v. Illinois Commerce Commission, D.C.Ill., 277 F. 970

48. Wash.—Puget Sound Electric R. Co. v. State R. Commn., 117 P. 739, 65 Wash. 75, Ann.Cas.1913B 763.

49. N.Y.—Yonkers R. Co. v. Maltbie 274 N.Y.S. 535, 242 App.Div. 319, motion granted 195 N.E. 191, 266 N.Y. 542.

50. U.S.—Los Angeles Ry. Corporation v. Railroad Commission of California, D.C.Cal., 29 F.2d 140, affirmed Railroad Commission of California v. Los Angeles Ry. Corporation, 50 S.Ct. 71, 280 U.S. 145, 74 L.Ed. 234.

51. U.S.—South, etc., Alabama R. Co. v. Alabama R. Commn., D.C.Ala., 210 F. 465.

52. N.J.—O'Brien v. Board of Public Utility Com'rs, 105 A. 132, 92 N.J.Law 44, affirmed 106 A. 414, 92 N.J.Law 587.

53. Ohio.—Stark County v. Public Utilities Commission, 131 N.E. 157, 102 Ohio St. 124.

54. Ohio.—Stark County v. Public Utilities Commission, supra.

Reason for rule

"Fares fixed by franchise between intermediate points may be either too high or too low to yield an adequate return and cannot of themselves be taken as a basis for determining the reasonableness of a through rate not so fixed"—Stark County v. Public Utilities Commission, 131 N.E. 157, 158, 102 Ohio St. 124.

55. U.S.—Groesbeck v. Duluth, S. S. & A. Ry Co., Mich., 40 S.Ct. 38, 250 U.S. 607, 63 L.Ed. 1167.
Mass.—City of Fall River v. Public Service Commission, 117 N.E. 915, 228 Mass. 575.
Wis.—City of Milwaukee v. Railroad Commission, 240 N.W. 165, 206 Wis. 339.
10 C.J. p 666 note 25.

Division for convenience of interstate traffic

In determining, at a railroad's suit, whether a state statute fixing rates for intra-state passenger traffic is confiscatory, a division of the railroad built, not in a desire to serve local needs, but to establish a through line traversing sparsely settled country between two points, for the convenience largely of interstate traffic, cannot be excluded from the calculation, where the state statute has clearly applied the doctrine of averages to the problem of rates.—Groesbeck v. Duluth, S. S. & A. Ry. Co., Mich., 40 S.Ct. 38, 250 U.S. 607, 63 L.Ed. 1167.

Operation of trains over another road

The results of operating through passenger trains over another railroad to an important point lying only fourteen miles from the lines of the first will not be excluded from the calculation of whether rates are reasonable—Groesbeck v. Duluth, S. S. & A. Ry. Co., Mich., 40 S.Ct. 38, 250 U.S. 607, 63 L.Ed. 1167.

Urban and suburban lines

Where railroad operated street railways and suburban railways as one system, the reasonableness of rates fixed by the railroad commission as to operation of suburban line is not affected by the fact that such line will be operated at a loss under the rates so fixed, the test of reasonableness being the effect on the system as a whole.—City of Milwaukee v. Railroad Commission, 240 N.W. 165, 206 Wis. 339—Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin, 177 N.W. 25, 171 Wis. 297.

56. U.S.—Groesbeck v. Duluth, S. S. & A. Ry. Co., Mich., 40 S.Ct. 38, 250 U.S. 607, 63 L.Ed. 1167.
10 C.J. p 666 note 26
Effect of consolidation of several roads in determining reasonableness see generally supra § 297.

Line purchased to avoid competition

A line of the railroad originally built by a competitor, paralleling the railroad's main line and purchased by the railroad's predecessor to avoid competition, now used mainly for heavy freight, the intra-state passenger travel over it being slight, is not to be excluded from the calculation of whether the rate fixed by the statute is confiscatory on any ground that its construction was not required by transportation needs.—Groesbeck v. Duluth, S. S. & A. Ry. Co., Mich., 40 S.Ct. 38, 250 U.S. 607, 63 L.Ed. 1167.

57. U.S.—Gilchrist v. Interborough Rapid Transit Co., N.Y., 49 S.Ct. 282, 278 U.S. 159, 73 L.Ed. 652, reversing D.C., Interborough Rapid

railroad fares to be charged within a certain city are in controversy, a city system of street railroads may be treated as a separate operating unit, apart from other suburban and interurban lines and international bridges also operated by the same company.[58]

Earnings from other business. According to some decisions, in determining the reasonableness of a particular passenger rate, the entire net revenue of the railroad must be looked to, from whatever source derived, whether from passengers, freight, express, or from investments held by the company.[59] By other authority although the reasonableness of a single rate or partial schedule as well as the sufficiency in the aggregate of the return on the carrier's intra-state business should be considered in determining whether the intra-state business will yield a fair return on the value of the property devoted to such business,[60] it is held, in determining whether the rate for specific passenger service is reasonable, that the entire net revenue of the road, from whatever character of service derived, is not to be looked to, since the specific service regulation must have its charges so fixed as to return to the road a normal profit on such specific branch of the service by itself;[61] the regulation of the specific service must be such as to bring a proper return to the railroad company for such service, independently of the return to it from other services,[62] and if the yield to the carrier from intra-state passenger earnings under a specific rate is sufficiently reasonable in amount to remunerate it for the service performed thereunder, confiscation cannot result from such a rate, even though the entire earnings derived from intra-state business, both freight and passenger, are unremunerative.[63] The remedy for such a situation is the adjustment of freight rates, and not the disturbance of the passenger rates.[64] However, in determining whether a passenger rate is confiscatory, the passenger service, including sleeping car, parlor car, and dining car facilities, must be treated as a whole, and not as separate operations to be charged with their proportion of specific and general expenses, and to be credited only with amounts received from charges for their specific service.[65]

Interstate and intra-state business. The reasonableness of an intra-state rate must be determined from the intra-state business alone, and the interstate business should not be considered,[66] except that the amount of interstate fares earned by that portion of the railroad lying within the state may be included in the computation.[67]

(2) Value of Property; Rate Base

Although no one factor involved in determining the value of property is conclusive, among the principal proper elements to be considered are original cost of construction, expenditures for permanent improvements, the amount and value of the company's bonds and stock, and reproduction cost.

All relevant factors must be taken into account in determining the fair value of the railroad company's property, for the purpose of rate-making.[68] Among the principal proper elements to be considered are original cost of construction, the amount expended in permanent improvements, the amount and market value of the company's bonds and stock, the present, as compared with the original, cost of construction, the probable earning capacity of the property under particular rates, and the sum required to meet operating expenses.[69] The estimat-

Transit Co. v. Gilchrist, 26 F.2d 912.

58. U.S.—International Ry. Co. v. Prendergast, D.C.N.Y., 1 F.Supp. 623.

Railway line, of relatively inconsequential value, serving industrial plants just outside corporate limits of Buffalo and connected with Buffalo system may, however, be properly included in such system where street railway fares to be charged in Buffalo were in controversy.—International Ry. Co. v. Prendergast, D.C.N.Y., 1 F.Supp. 623.

59. Ark.—Missouri Pac. R. Co. v. Smith, 29 S.W. 752, 60 Ark. 221.
Fla.—Pensacola, etc., R. Co. v. State, 5 So. 833, 25 Fla. 310, 3 L.R.A. 661.

60. U.S.—South, etc., Alabama R. Co. v. Alabama R. Commn., D.C. Ala., 210 F. 465—Central of Georgia R. Co. v. Alabama R. Commn., D.C.Ala., 209 F. 75.
10 C.J. p. 666 note 29.

61. U.S.—Norfolk, etc., R. Co. v. Conley, W.Va., 35 S.Ct. 437, 236 U.S. 605, 59 L.Ed. 745.
10 C.J. p. 666 note 30.

62. Md.—Pennsylvania R. Co. v. Towers, 94 A. 330, 126 Md. 59.

63. U.S.—South, etc., Alabama R. Co. v. Alabama R. Commn., D.C. Ala., 210 F. 465.
10 C.J. p. 666 note 30 [b].

64. U.S.—South, etc., Alabama R. Co. v. Alabama R. Commn., supra

Unreasonably low freight rates

A deficiency in intra-state earnings due to unreasonably low freight rates should be overcome by raising freight rates until they afford a reasonable return, and not by raising already reasonable passenger rates to accomplish that end.—South, etc., Alabama R. Commn. v. Alabama R. Commn., D.C.Ala., 210 F. 465.

65. U.S.—Groesbeck v. Duluth, S. S. & A. Ry. Co., Mich., 40 S.Ct. 38, 250 U.S. 607, 63 L.Ed. 1167.

Main use in interstate travel

The fact that these added facilities are used mainly by interstate travelers is immaterial.—Groesbeck v. Duluth, S. S. & A. Ry. Co., Mich., 40 S.Ct. 38, 250 U.S. 607, 63 L.Ed. 1167.

66. U.S.—Smyth v. Ames, Neb., 18 S.Ct. 418, 169 U.S. 466, 42 L.Ed. 819, modified on other grounds 18 S.Ct. 888, 171 U.S. 361, 43 L.Ed. 197.
10 C.J. p. 667 note 35.

67. U.S.—Central of Georgia R. Co. v. Alabama R. Commn., D.C.Ala., 209 F. 75
Mich.—State R. Commn. v. Wabash R. Co., 85 N.W. 466, 126 Mich. 113

68. Mo.—State ex rel. and to Use of City of St. Louis v. Public Service Commission, 34 S.W.2d 507, 326 Mo. 751.
N.Y.—Yonkers R. Co. v. Maltbie, 296 N.Y.S. 411, 251 App.Div. 204.

69. U.S.—Los Angeles Ry. Corporation v. Railroad Commission of

ed original cost or the assumed historical cost of the carrier's property cannot be made the sole basis for the determination of the rate base, where the greatest portion of the property was built or acquired before a general rise in prices.[70] It has been said that, ordinarily, the reproduction cost new, less depreciation, is the dominant factor in determining the value of the property, and that this of necessity must be the rule, where there are no other sufficient data on the subject.[71] A commission cannot ignore the item of reproduction cost in fixing the rate base, on the theory that if the property was not already in existence, it would not be reproduced, since the only question in issue is whether the company is receiving a fair return on property devoted to public use.[72] However, in an appraisal of property value, the application of the reproduction cost according to the general rules and principles of valuation is not a sole criterion and is not conclusive; due weight must be given to elements of valuation used generally in rate-making cases, to arrive at a fair and not excessive valuation.[73] A commission is not bound to allow as the base the amounts paid by the railroad in purchasing separate systems of which its system was composed, since such amounts do not necessarily represent fair or actual values.[74] The commission must allow a reasonable amount for going concern value, and it cannot exclude such item on the theory that street railways were generally losing ground and being replaced by busses;[75] but where the element of going value is inextricably interwoven with other elements of value in the rate base so that there is adequate allowance therefor, a separate specific item for such value need not be made.[76] It has been said, that the value of street railway franchises may not be properly included in rate base valuation;[77] nor can the value of a railway company's perpetual easements in the city streets be included.[78] A commission cannot eliminate working capital from the rate base on the theory that the company's money was all cash and that it would be on hand to meet obligations before they were incurred;[79] but an allowance for working cash capital to cover payments of accident claims need not be made if it is shown that the company's daily receipts are sufficient to cover such claims and that all accident expenses are charged to operating expenses.[80] Where the railway operates cars leased from another company, the value of such cars may properly be included in the rate base if the rental is excluded from the operating expenses.[81]

Interstate and intra-state property. Values cannot be apportioned as between interstate and intrastate business and freight and passenger business on a gross revenue basis, nor can a carrier be permitted to charge for more costly equipment, roadbed, track, and structures constituting a part of an interstate route than would be justified for the conduct of intra-state business.[82] It has been held,

California, D.C.Cal., 29 F.2d 140, affirmed Railroad Commission of California v. Los Angeles Ry. Corporation, 50 S.Ct. 71, 280 U.S. 145, 74 L.Ed. 234.

70. N.Y.—Yonkers R. Co. v. Maltbie, 274 N.Y.S. 535, 242 App.Div. 319, motion granted 195 N.E. 191, 266 N.Y. 542.

71. U.S.—Westinghouse Electric & Mfg. Co. v. Denver Tramway Co., D.C.Colo., 3 F.2d 285, appeal transferred City and County of Denver v. Stenger, 47 S.Ct. 343, 273 U.S. 657, 71 L.Ed. 826.

Depreciation must be considered

Appraisal of street railway property based on cost of reproduction without considering depreciation is erroneous.—City of Rochester v. New York State Rys., 217 N.Y.S. 452, 127 Misc. 766.

72. N.Y.—Yonkers R. Co. v. Maltbie, 274 N.Y.S. 535, 242 App.Div. 319, motion granted 195 N.E. 191, 266 N.Y. 542.

73. N.Y.—City of Rochester v. New York State Rys., 217 N.Y.S. 452, 127 Misc. 766.

74. Wis.—Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin, 172 N.W. 746, 169 Wis. 421.

75. N.Y.—Yonkers R. Co. v. Maltbie, 274 N.Y.S. 535, 242 App.Div. 319, motion granted 195 N.E. 191, 266 N.Y. 542.

Difficulty in determining going value will not justify disregarding of it in fixing rate base.—Yonkers R. Co. v. Maltbie, 274 N.Y.S. 535, 242 App. Div. 319, motion granted 195 N.E. 191, 266 N.Y. 542.

76. N.Y.—Yonkers R. Co. v. Maltbie, 296 N.Y.S. 411, 251 App.Div. 204

77. D.C.—Public Utilities Commission of District of Columbia v. Capital Traction Co., 17 F.2d 673, 57 App.D.C. 85.

78. U.S.—Westinghouse Electric & Mfg. Co. v. Denver Tramway Co., D.C.Colo., 3 F.2d 285, appeal transferred City and County of Denver v. Stenger, 47 S.Ct. 343, 273 U.S. 657, 71 L.Ed. 826.

Easements are property of value

Easements in streets, whatever their duration or terms may be, are property of value, indispensable to other property rights of street railway company, whether or not such value can be considered in fixing the base on which rates are to be established.—Westinghouse Electric & Mfg. Co. v. Denver Tramway Co., D.C.Colo., 3 F.2d 285, appeal transferred City and County of Denver v. Stenger, 47 S.Ct. 343, 273 U.S. 657, 71 L.Ed. 826.

79. N.Y.—Yonkers R. Co. v. Maltbie, 274 N.Y.S. 535, 242 App.Div. 319, motion granted 195 N.E. 191, 266 N.Y. 542.

80. N.Y.—Yonkers R. Co. v. Maltbie, 296 N.Y.S. 411, 251 App.Div. 204

81. N.Y.—Yonkers R. Co. v. Maltbie, 274 N.Y.S. 535, 242 App.Div. 319, motion granted 195 N.E. 191, 266 N.Y. 542

Relative efficiency of leased cars

Evidence of relative efficiency of street railroad company's service cars and passenger and service cars rented by it from another company, as compared with new and more efficient cars, was material and competent on question of valuation thereof for rate-making purposes.—Yonkers R. Co. v. Maltbie, 296 N.Y.S. 411, 251 App.Div. 204.

82. U.S.—Central of Georgia R. Co. v. Alabama R. Commn., D.C.Ala., 209 F. 75.

however, that this rule does not apply to a railroad built and operated essentially for interstate purposes, and where the intra-state business is merely incidental and too inconsiderable to make it feasible to fix rates on the basis of comparative values.[83] The values of a company's intra-state property, for the determination of the reasonableness of the intra-state rates, may be obtained by taking the tax values and raising them one hundred per cent.[84]

§ 581. Rate Fixed by Carrier

a. In general
b. Filed and published rates

a. In General

Within the limits set by legislative regulation, and subject thereto, a railroad company may fix and establish, increase, or reduce its rates, so long as they are reasonable and not unjustly discriminatory, and this may be done, under some statutes, by the filing of schedules with the regulatory commission.

Within the limits prescribed by federal or state regulation, a common carrier, such as a railroad or street railroad company, may fix or establish the rate of fare to be charged for the transportation of passengers,[85] subject to the requirement hereinafter discussed in this section that the rates fixed be reasonable and without unjust discrimination. Acting in accordance with statutory requirements, the carrier may also make a reasonable increase in its passenger rates, if the established rates are not compensatory, whether by reason of a change in conditions or otherwise,[86] and its right to do so is not affected by the fact that such increase is impolitic,[87] or that its patrons have acted in reliance on the existing rates.[88] Although a carrier acting under a constitutional provision may reduce its rate of fare from one point to another, for the purpose of competing with another carrier, in such case the rate cannot again be raised without the consent of the governmental authority in which is vested the power to regulate fares.[89]

Interstate carriers are authorized by the Interstate Commerce Act to fix and establish their own passenger rates by properly filing and publishing schedules therefor,[90] and, by following a similar procedure, the nature and effect of which is treated in subdivision b of this section, intra-state carriers, under some state statutes, may change their rates within the maximum fixed by law,[91] subject to the power of the railroad or public service commission to suspend temporarily the operation of the proposed rates and to annul them if found to be un-

83. Va.—Washington Southern R. Co. v. Com., 71 S.E. 539, 112 Va. 515.

84. U.S.—Central of Georgia R. Co. v. Alabama R. Commn., D.C.Ala., 209 F. 75.

85. U.S.—Henry L. Doherty & Co. v. Toledo Rys. & Light Co., D.C. Ohio, 254 F. 597.
N.Y.—In re Dry Dock, E. B. & B. R. Co., 172 N.E. 516, 254 N.Y. 305, affirming Dry Dock, E. B. & B. R. Co. v. Fullen, 239 N.Y.S. 501, 228 App.Div. 354.
10 C.J. p 660 notes 40, 41, p 663 note 88, p 664 notes 89, 90.

Who may regulate fares
The rates of fare need not be established by the board of directors and proved by a record of their action; agents other than the directors may be empowered to regulate such matters.—Jeffersonville R. Co. v. Rogers, 28 Ind. 1, 92 Am.D. 276.

86. Ill.—State Public Utilities Commission v. Chicago & W. T. Ry. Co., 114 N.E. 325, 275 Ill. 555, Ann. Cas 1917C 50.
N.Y.—Dry Dock, E. B. & B. R. Co. v. Fullen, 239 N.Y.S. 501, 228 App. Div. 354 affirmed In re Dry Dock, E. B. & B. R. Co., 172 N.E. 516, 254 N.Y. 305.
Utah.—Salt Lake City v. Utah Light & Traction Co., 173 P. 556, 52 Utah 210, 3 A.L.R. 715.
10 C.J. p 661 note 54.

Necessity of consent of commission
After passage of Public Utilities Act, but before it went into effect, street and interurban railway companies might, without consent of utilities commission, reasonably increase fares.—State Public Utilities Commission v. Chicago & W. T. Ry. Co., 114 N.E. 325, 275 Ill. 555, Ann. Cas 1917C 50.

87. N.Y.—Peo. v. Public Service Commn., 109 N.E. 252, 215 N.Y. 241, affirming 145 N.Y.S. 513, 159 App. Div. 546.

88. Utah.—Salt Lake City v. Utah Light & Traction Co., 173 P. 556, 52 Utah 210, 3 A.L.R. 715.

Street railroad is not estopped
from increasing rates, which have become inadequate, by the fact that many persons have built homes along the route of the road in reliance on the existing rates.—Salt Lake City v. Utah Light & Traction Co., 173 P. 556, 52 Utah 210, 3 A.L.R. 715

89. Cal.—Edson v. Southern Pac. R. Co., 77 P. 894, 144 Cal. 182.
10 C.J. p 661 note 53.

90. Tex.—Neubert v. Chicago, R. I. & G. Ry. Co., 296 S.W. 1090, 116 Tex. 644, 53 A.L.R. 1224.

Redemption of unused tickets
Carrier in preparing rate schedule under the Interstate Commerce Act, may declare intention to redeem unused, or partially unused, passenger tickets.—Neubert v. Chicago, R. I. & G. Ry. Co., 296 S.W. 1090, 116 Tex. 644, 53 A.L.R. 1224

91. N.J.—Gillen v. Public Service Ry. Co., 116 A. 621, 97 N.J. Law 333
N.Y.—Dry Dock, E. B. & B. R. Co. v. Fullen, 239 N.Y.S. 501, 228 App. Div. 354, affirmed In re Dry Dock, E. B. & B. R. Co., 172 N.E. 516, 254 N.Y. 305.

Mortgage effecting evasion
Where no schedule of rates was filed for a line organized before the creation of the public service commission, receivers operating such lines after foreclosure of a mortgage, who abolished one fare privileges and established certain fares, giving notice thereof only under a section of the statute dealing with the initial establishment of rates, were not subject to prosecution for a violation of a provision that a carrier shall not change its rates without compliance with the Public Service Commission Law, since the act of the receivers was in no sense a change of rates, and it was no answer that such construction of the law would permit a railroad company to sever its lines into parts by executing separate mortgages, and thus evade the Public Service Commission Law, as another section of that law requires approval of mortgages, thus obviating such a result.—People ex rel. Huff v. Warden and Keeper of Prison of City of New York, 194 N.Y.S. 862, 118 Misc. 681.

reasonable and discriminatory, as will hereinafter be discussed in § 582 b. Under some statutes distinguishing between rates initially established by the carrier and rates established by law or franchise agreement, a railroad cannot effectively increase its rates over the maximum permitted by statute by merely filing schedules therefor, since such rates can only be changed by action of the commission after proper complaint and hearing.[92]

Rates established by a carrier must be just and reasonable,[93] and without unjust discrimination.[94] In accordance with the general rule stated in § 376 supra, the mere fact that a railroad's passenger rates are discriminatory does not render them unlawful; only an arbitrary and unreasonable discrimination is prohibited.[95] If a difference in passenger rates is based on a reasonable and fair difference in conditions equitably and logically justifying a different rate, it is not invalid.[96] Accordingly, the carrier may discriminate in favor of those who purchase tickets before entering its car, see infra § 601, or who purchase "party rate" or commutation tickets;[97] and a party rate ticket is not an unjust discrimination within the meaning of the Interstate Commerce Act, when it is offered to the public generally.[98] Although it has been said to be the rule at common law that a carrier which charges the general public only reasonable fares is not precluded from charging particular customers still lower fares,[99] it has been held that a railroad's regulation by which more fare is required of one person than of another under similar conditions is unreasonable, and cannot be enforced.[1] In determining the reasonableness of a discrimination in rates between different localities or stations, the circumstances and relative conditions are to be taken into consideration, and a difference in mileage rate is not in itself the determinative test.[2] The

92. N.Y.—In re Dry Dock, E. B. & B. R. Co., 172 N.E. 516, 254 N.Y. 305, affirming Dry Dock, E. B. & B. R. Co. v. Fullen, 239 N.Y.S. 501, 228 App.Div. 354.

Duplication

Sections of the same statute providing methods for changing rate of fare by the filing of schedules and by order of the commission after hearing, are presumptively not obvious duplication, but relate to different classes of cases.—Dry Dock, E. B. & B. R. Co. v. Fullen, 239 N.Y.S. 501, 228 App.Div. 354, affirmed In re Dry Dock, E. B. & B. R. Co., 172 N.E. 516, 254 N.Y. 305.

93. Ill.—Ruggles v. People, 91 Ill. 256, affirmed 2 S.Ct. 832, 108 U.S. 526, 27 L.Ed. 812.

N.Y.—In re Dry Dock, E. B. & B. R. Co., 172 N.E. 516, 254 N.Y. 305, affirming Dry Dock, E. B. & B. R. Co. v. Fullen, 239 N.Y.S. 501, 228 App.Div. 354

Tex.—Neubert v. Chicago, R. I. & G. Ry. Co., 296 S.W. 1090, 116 Tex. 644, 53 A.L.R. 1224.

10 C.J. p. 660 note 40.

Determination of reasonableness see supra § 580 b

94. Ky.—Kentucky Traction & Terminal Co. v. Barrett, 195 S.W. 1124, 176 Ky. 605—Kentucky Traction & Terminal Co. v. Murray, 195 S.W. 1119, 176 Ky. 593, error dismissed Murray v. Kentucky Traction & Terminal Co., 39 S.Ct. 388, 249 U.S. 623, 63 L.Ed. 806.

Mo.—State ex rel. and to Use of Pugh v. Public Service Commission, 10 S.W.2d 946, 321 Mo. 297.

Ohio.—Hocking Valley Ry. Co. v. Railroad Commission of Ohio, 5 Ohio N.P.,N.S., 265, affirmed Railroad Commission of Ohio v. Hocking Valley Ry. Co., 91 N.E. 865, 82 Ohio St. 25.

Tex.—Neubert v. Chicago, R. I. & G. Ry. Co., 296 S.W. 1090, 116 Tex. 644, 53 A.L.R. 1224.

10 C.J. p. 660 note 41

Under Interstate Commerce Act, a passenger carrier is responsible for what it puts in its rates and regulations, and is punishable for unlawful discrimination therein.—Neubert v. Chicago, R. I. & G. Ry. Co., 296 S.W. 1090, 116 Tex. 644, 53 A.L.R. 1224.

Liability for misrepresentation as to schedule

Railroad could not be held liable to passenger for misrepresentations as to schedule approved by interstate commerce commission, since it would open door for special favors other than those provided for in the schedule.—Foley v. Chicago Great Western R. Co., 217 N.W. 563, 205 Iowa 72.

Acceptance of expired ticket

Conductor's accepting expired ticket redeemable at price paid was not unlawful under statutes forbidding special rates and preferences.—Chesapeake & O. Ry. Co. v. Burton, C.C.A.W.Va., 62 F.2d 110, 88 A.L.R. 756, certiorari denied 53 S.Ct. 507, 288 U.S. 617, 77 L.Ed. 990.

95. Ga.—Georgia Public Service Commission v. Atlanta & W. P. R. Co., 139 S.E. 725, 164 Ga. 822

Mo.—State ex rel. and to Use of Pugh v. Public Service Commission, 10 S.W.2d 946, 321 Mo. 297.

Ohio.—Hocking Valley Ry. v. Railroad Commission of Ohio, 5 Ohio N.P.,N.S., 265, affirmed Railroad Commission of Ohio v. Hocking Valley Ry. Co., 91 N.E. 865, 82 Ohio St. 25.

Pa.—Bradley v. Pennsylvania R. Co., 66 Pa.Super. 428.

96. Mo.—State ex rel. and to Use of Pugh v. Public Service Commission, 10 S.W.2d 946, 321 Mo. 297.

Ohio.—Hocking Valley Ry. v. Railroad Commission of Ohio, 5 Ohio N.P.,N.S., 265, affirmed Railroad Commission of Ohio v. Hocking Valley Ry. Co., 91 N.E. 865, 82 Ohio St. 25.

97. U.S.—Interstate Commerce Commn. v. Baltimore, etc., R. Co., Ohio, 12 S.Ct. 844, 145 U.S. 263, 36 L.Ed. 699, affirming, C.C., 43 F. 37

10 C.J. p. 660 note 44.

Ticket with greater number of rides

That fifty-ride bearer commutation tickets did not sell at a lower mileage rate than ten-ride tickets did not establish unjust discrimination.—State ex rel. and to Use of Pugh v. Public Service Commission, 10 S.W.2d 946, 321 Mo. 297.

98. U.S.—Interstate Commerce Commn. v. Baltimore, etc., R. Co., Ohio, 12 S.Ct. 844, 145 U.S. 263, 36 L.Ed. 699, affirming, C.C., 43 F. 37.

10 C.J. p. 660 note 45.

99. Mass.—Spafford v. Boston, etc., R. Co., 128 Mass. 326

Neb.—State v. Chicago, B. & Q. R. Co., 199 N.W. 534, 112 Neb. 248.

N.Y.—Onondaga Golf and Country Club v. Syracuse & S. R. Co., 160 N.Y.S. 693, 96 Misc. 213.

1. Ga.—Phillips v. Southern R. Co., 40 S.E. 268, 114 Ga. 284.

Iowa.—State v. Omaha, etc., R. Co., 84 N.W. 983, 113 Iowa 30, 86 Am.St.R. 357, 52 L.R.A. 315.

Mich.—Coy v. Detroit, etc., R. Co., 85 N.W. 6, 125 Mich. 616.

2. Mo.—State ex rel. and to Use of Pugh v. Public Service Commission, 10 S.W.2d 946, 321 Mo. 297.

voluntary establishment by a carrier of commutation rates between certain localities, less than the ordinary mileage rates, and the failure to offer such commutation rates for transit between other localities on the carrier's lines does not constitute unjust discrimination where circumstances differed and the carrier had not established any general policy of issuing such tickets.[3]

Local or through rate; journey by stages. Where a railroad establishes two legal schedules of fares, one through and one local, and passengers are given the right to contract for passage of either kind, although the destination may be the same under either contract, it has been guilty of no discrimination in exacting a greater rate for through passage.[4] It has been held that a passenger is entitled to make his journey by stages to obtain the benefit of local fares, when they are less than the through fare, notwithstanding the statute makes it unlawful for a carrier to charge or collect any rate different from that fixed in the schedules filed.[5] In such case, the passenger, when he pays his fare to a certain station and then remains on the train and demands transportation from that station to a still further station, stands in the same situation, so far as paying for his further passage is concerned, as if he had boarded the train at the intermediate station.[6] It has been held, however, that under a regulation of the carrier in an approved rate schedule specifically so providing, a passenger cannot choose a combination of local rates in order to avoid payment of the through rate from the point of boarding the train to the point of destination.[7]

Reduced rate. To constitute a reduced rate, the rate must be one which is lower than another rate which is offered to the public, and the sale of a return trip ticket at a price less than two single trip fares is not a sale at a reduced rate.[8] A custom of allowing a reduced rate on particular days or occasions or to particular persons imposes no obligation on the carrier to continue such custom,[9] and where such custom has been abandoned, one is not entitled to be carried, on tendering the reduced rate of fare;[10] but where, during the continuance of such custom or offer, a passenger is unable to procure a ticket through the fault of the carrier, he is entitled to be carried on a tender of the reduced fare.[11]

Special trains. Under a tariff sheet promulgated by a carrier and approved by the interstate commerce commission providing for a minimum charge for a special train, with certain exceptions for special trains in certain states, the minimum charge applies to such trains in other states.[12]

Credit for transportation. Under justifying circumstances, a reasonable extension of credit by a carrier pursuant to a contract for transportation is not in violation of the Interstate Commerce Act provision forbidding favoritism by carriers.[13] The acceptance by a carrier of transportation re-

Pa.—Bradley v. Pennsylvania R. Co., 66 Pa Super. 428.

Otherwise stated

Where neither the constitution or the legislation relating to the regulation of common carriers so requires, the cost of transportation need not in all cases be proportionate to the distance over which the service is rendered—Bradley v. Pennsylvania R. Co., 66 Pa.Super. 428.

Competition as factor involved

Different rates per mile between different points is not unreasonable where competition entered as factor—Hocking Valley Ry. v. Railroad Commission of Ohio, 5 Ohio N.P.,N. S., 265, affirmed Railroad Commission of Ohio v. Hocking Valley Ry. Co., 91 N.E. 865, 82 Ohio St. 25.

Relative cost of transportation

Where it appears that the company charged the same rates of fare to a station two and seven-tenths miles from its terminal as to a station four and one-tenth miles, and the commission finds from sufficient and competent evidence that the business between the terminal and first station was carried on at a considerable loss, and that there was a greater relative cost of transportation to the first station than to the second, such rate is not unjustly discriminatory.—Bradley v. Pennsylvania R. Co., 66 Pa.Super. 428.

Group arrangement of rates

Arrangement of suburban passenger rates into groups is not invalid solely because it results in preference in mileage rate.—State ex rel and to Use of Pugh v. Public Service Commission, 10 S.W.2d 946, 321 Mo. 297.

3. Ga.—Georgia Public Service Commission v. Atlanta & W. P. R. Co., 139 S.E. 725, 164 Ga. 822.

4. Ind.—Brown v. Terre Haute, I. & E. Traction Co., 113 N.E. 313, 63 Ind.App. 327, denying rehearing 110 N.E. 703, 63 Ind.App. 327.

5. Ind.—Brown v. Terre Haute, I. & E. Traction Co., supra.

6. Ga.—Perry v. Atlantic Coast Line R. Co., 70 S.E. 1122, 9 Ga.App. 260.
Okl.—Atchison, etc., R. Co. v. State, 150 P. 108, 47 Okl. 645.
10 C.J. p 661 note 59.

7. Ind.—Arbuckle v. State, 124 N.E. 395, 188 Ind. 444—Brown v. Terre Haute, I. & E. Traction Co., 110 N.E. 703, 63 Ind.App. 327, rehearing denied 113 N.E. 313, 63 Ind.App. 327.

8. Mo.—Robert v. Chicago, etc., R. Co., 127 S.W. 925, 148 Mo.App. 96.

9. Ga.—Johnson v. Georgia R., etc., Co., 34 S.E. 127, 108 Ga. 496, 46 L.R.A. 502.
Miss.—Illinois Cent. R. Co. v. Dunnigan, 50 So. 443, 95 Miss. 749, 24 L.R.A.,N.S., 503, Ann.Cas.1912A 159 and note.
10 C.J. p 661 note 50.

10. Ga.—Johnson v. Georgia R., etc., Co., 34 S.E. 127, 108 Ga. 496, 46 L.R.A. 502.
10 C.J. p 661 note 51.

11. Ind.—Chicago, etc., R. Co. v. Graham, 29 N.E. 170, 3 Ind.App. 28, 50 Am.S.R. 256.
10 C.J. p 661 note 52.

12. Ark.—Bush v. Cole, 194 S.W. 24, 128 Ark. 411.

13. Colo.—Atchison, T. & S. F. Ry. Co. v. Bowman, 158 P. 814, 61 Colo. 477.

quests calling for a given rate, the furnishing of the transportation, and the rendering of bills at that rate prevents it from claiming that such rate is only available when payment is made in cash.[14]

Length of trip on belt line. In the absence of legislative regulation, a street railroad company operating a belt line may by a reasonable regulation define the length of trip to which a passenger is entitled for his fare, and beyond which he cannot ride without paying an additional fare; and this is true even where a person, by taking a car on the same street going in an opposite direction, may reach his destination and have by that route a continuous one fare ride before reaching the end of the line.[15]

Transfers. The right of a street car company to establish rules and regulations to prevent fraud on it in the use of transfers does not confer any authority upon it to amend, change, or abrogate city ordinances respecting transfer points.[16]

Men in military service. In the absence of some arrangement for a reduced rate, a railroad is entitled to the established individual rates, less land grant deductions, for the transportation of men in military service.[17] The rate for through transportation of a party, composed of men in military service, where the carrier has no through party rate on file, is the individual through rate for each person, not the combination of a party rate, which had been filed, applying to part of the distance, and of the individual rates for the rest of it.[18] Where a carrier publishes its rates for performing a special service in transporting troops, and such rates are well known to the officials of the government who order such service and make no objection at the time it is rendered, the government is liable for the rates as published.[19]

b. Filed and Published Rates

A carrier may be required to file and publish its rates and a failure to do so will, unless the statute otherwise provides, render the rates void. A filed and published interstate rate is binding on both carrier and passenger.

Under the Interstate Commerce Act a carrier must file and publish its passenger rates,[20] and rates not so filed and published are apparently unlawful and void.[21] Although the Act also requires that a notice of a change in rates be posted, under its terms, such notice may be dispensed with by rule of the commission.[22] The published rates are binding on both the carrier and the passenger,[23] unless found to be unreasonable by the interstate commerce commission,[24] and they must be charged by the carrier and paid by the passenger without deviation therefrom.[25] In other words, a schedule of rates filed with, and approved by, the interstate commerce commission has the force of law and both the carrier and the passenger are bound to have knowledge thereof; neither the misquotation of rates nor ignorance is an excuse for charging or paying less or more than the filed rates.[26]

14. U.S.—Louisville & N. R. Co. v. United States, 52 Ct.Cl. 259.

15. Pa.—Com. v. Doe, 44 Pa.Super. 331.

16. Va.—Virginia Electric & Power Co. v. Wynne, 141 S.E. 829, 149 Va. 882.

17. U.S.—Atchison, T. & S. F. Ry. Co v. U. S., 41 S.Ct. 456, 256 U.S 205, 65 L.Ed. 891, reversing 55 Ct. Cl. 528.
10 C.J. p 661 note 46.

18. U.S.—Atchison, T. & S. F. Ry. Co. v. U. S., supra.

19. U.S.—Los Angeles & Salt Lake R. Co. v. U. S., 55 Ct.Cl. 305.

20. Ind.—Clark v. Southern Ry. Co., 119 N.E. 539, 69 Ind.App. 697.
Tex.—Neubert v. Chicago, R. I. & G. Ry. Co., 296 S.W 1090, 116 Tex. 644, 53 A.L.R. 1224.
10 C.J. p 662 note 63.

Filing of modifying regulations

"The rates, fares, and charges, as filed are indicative of the apparent consideration to be paid for transportation, but if there is any rule or regulation promulgated by the carrier that modifies such apparent rate, fare, or charge, it also must be filed with or as a part of the schedule, that the real rate, etc., or the real value of the service may be disclosed."—Clark v. Southern Ry. Co, 119 N.E. 539, 69 Ind.App. 697.

Schedules concerning free passes need not, however, be filed with the commission.—Clark v. Southern Ry. Co, 119 N.E. 539, 69 Ind.App. 697—52 C.J. p 1143 note 39 [c].

Concurrence in surcharge schedule

A railroad's concurrence in surcharge tariff schedule published for their benefit by Pullman Company may be inferred from circumstances if necessary to afford legal basis for collection—Waters v. Pullman Co, 10 F.2d 622, 56 App.D.C. 57, certiorari denied 46 S.Ct. 351, 270 U.S. 651, 70 L.Ed. 781.

21. Ind.—Clark v. Southern Ry. Co., 119 N.E. 539, 69 Ind.App. 697.

22. Miss.—Mississippi Cent. R. Co v Graham, 80 So. 66, 118 Miss. 761

Excursion fares

Interstate Commerce Rule adopted October 12, 1915, amending rule 52 as to posting of notice of change in passenger tariffs by dispensing with the necessity of posting notice, applies to excursion fares for which only a three-day posting of notice was necessary under the amendment of rule 52, adopted December 2, 1912, as well as to other rates and fares.—Mississippi Cent R. Co. v. Graham, 80 So. 66, 118 Miss 761.

23. Ind.—Clark v. Southern Ry. Co, 119 N.E. 539, 69 Ind.App. 697.

24. U.S.—Louisville, etc, R. Co. v. Maxwell, Tenn., 35 S.Ct. 494, 237 U.S. 94, 59 L.Ed. 853, L.R.A.1915E 665.

25. Pa.—Pennsylvania R. Co. v. Osborn, 161 A. 756, 106 Pa.Super. 45.
W.Va.—Dorr v Chesapeake & O Ry. Co, 88 S.E. 666, 78 W.Va 150, L.R.A 1916E 622.
10 C.J. p 662 note 64.

Interstate passenger is not entitled to be carried any portion of the journey for less than the interstate rate. He cannot travel part of the journey at intra-state fare.—Missouri, K. & T. Ry. Co. v. Ashinger, 162 P. 814, 63 Okl. 120, L.R.A.1917D 1180.

26. Iowa.—Foley v. Chicago Great Western R. Co, 217 N.W. 563, 564, 205 Iowa 72.
10 C.J. p 662 note 66.

Under a state statute making such procedure a condition precedent to the effectiveness of a change of rates, a carrier cannot validly put a change into operation unless it has complied with the statute as to the public posting and publishing of schedules containing the new rates;[27] other statutes requiring posting and publishing of a change in rates have, however, been construed as merely rendering the carrier liable in damages for noncompliance and not as invalidating the proposed change of rates.[28] The publishing and filing of rates may also be required by the order of a public service commission.[29]

§ 582. Legislative Regulation

a. In general
b. Power of commission
c. Particular regulations

a. In General

A state has the power, not subject to irrevocable delegation, to regulate intra-state passenger rates, regardless of effect on any contract existing between carriers and private parties, but any such regulation, whether imposed by itself or its authorized agency, must not interfere with the general level of interstate rates, and must be reasonable, nonconfiscatory and not unjustly discriminatory.

A state has the undoubted power to establish and regulate the rates to be charged by common carriers, such as railroads or street railroads, for the exclusively intra-state carriage of passengers.[30] This power exists even over a railroad corporation

"The rate fixed by the schedule is not simply a matter of contract, nor is the filing of the schedule merely a matter of notice. The schedule has the force of law. Both carrier and customer are bound to know the rate and its accompanying limitations and privileges. It makes no difference that the customer did not in fact see or know of the published schedule, nor is it material that the carrier knows of the agent's or the customer's ignorance." — Foley v. Chicago Great Western R. Co., supra.

Mistake as to rate for requested routing

Although a passenger might have gone and returned by a direct route to and from his point of destination, if he expresses a desire to go and come by a different route he must pay the filed tariff rates for the route taken notwithstanding a misquotation made by the carrier's agent and accepted by him in good faith, since such a mistake is not a mere misrouting by error of the carrier which will relieve the passenger from paying the tariff rate for the route he has taken.—Louisville, etc., R. Co. v. Maxwell, Tenn., 35 S.Ct. 494, 237 U.S. 94, 59 L.Ed. 863, L.R.A. 1915E 665.

27. Pa. — City of Pittsburgh v. Pittsburgh Rys. Co., 103 A. 372, 259 Pa. 558, affirming Pittsburgh Rys. Co. v. Public Service Commission, 66 Pa.Super. 243, 253.

Word "post" as used in a statute providing that no change in any tariff or schedule shall be made by a public service company except after thirty days posted and published notice to the commission and to the public, means the bringing to the notice or attention of the public by affixing to a post or wall, or putting up in some public place, to placard —City of Pittsburgh v. Pittsburgh Rys. Co., 103 A. 372, 259 Pa. 558, affirming Pittsburgh Rys. Co. v. Public Service Commission, 66 Pa. Super. 243, 253.

28. Nev.—Crumley v. Southern Pac. Co., 177 P. 17, 18, 42 Nev. 337.

"While it was the duty of the company to give the notice required . . . its failure to do so did not have the effect of invalidating the changes made . . . for such notice was intended merely to bring to the attention of the public that a change in the tariff schedule had in fact been made; and, as we view it, the only consequence which would follow a failure to give that notice would be that any persons damaged by reason of such failure might recover damages therefor"—Crumley v. Southern Pac. Co., supra.

29. N.J.—Delaware, etc., R. Co. v. Board of Public Utility Comrs., 87 A. 801, 84 N.J.Law 619.
10 C.J. p. 662 note 67.

30. U.S.—City of Covington, Ky. v. Cincinnati, N. & C. Ry. Co., C.C.A.Ky., 71 F.2d 117, certiorari denied Cincinnati, N. & C. Ry. Co. v. City of Covington, Ky., 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702, and City of Covington v. Cincinnati, N. & C. Ry. Co., 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702—O'Keefe v. City of New Orleans, D.C.La., 273 F. 560, affirmed, C.C.A., City of New Orleans v. O'Keefe, 280 F. 92—Westinghouse Electric & Mfg. Co. v. Binghamton Ry. Co., D.C.N.Y., 255 F. 378, appeal dismissed 257 F. 726, 169 C.C.A. 14.
Fla.—State v. Railroad Com'rs of Florida, 84 So. 444, 79 Fla. 526—State v. Burr, 84 So. 61, 79 Fla. 290
Ga.—Georgia Ry. & Power Co. v. Railroad Commission of Georgia, 98 S.E. 696, 149 Ga. 1, 5 A.L.R. 1.
Ill.—Hoyne v. Chicago & O. P. Elevated R. Co., 128 N.E. 587, 294 Ill. 413—State Public Utilities Commission v. City of Quincy, 125 N.E. 374, 290 Ill. 360—State Public Utilities Commission v. Chicago & W. T. Ry. Co., 114 N.E. 325, 275 Ill. 555, Ann.Cas.1917C 50
La.—State v. City of New Orleans, 91 So. 533, 151 La. 24.
Mich.—Groesbeck v. Detroit United Ry., 177 N.W. 726, 210 Mich. 227.
Mo.—State ex rel. Kansas City Public Service Co. v. Latshaw, 30 S.W.2d 105, 325 Mo. 909, appeal dismissed Latshaw v. State of Missouri ex rel. Kansas City Public Service Co., 51 S.Ct. 101, 282 U.S. 806, 75 L.Ed. 723—Kansas City v. Public Service Commission of Missouri, 210 S.W. 381, 276 Mo. 539, error dismissed 40 S.Ct. 54, 250 U.S. 652, 63 L.Ed. 1190—City of St. Louis v. Public Service Commission, 207 S.W. 805—City of St. Louis v. Public Service Commission of Missouri, 207 S.W. 799, 276 Mo. 509
N.Y.—In re Dry Dock, E. B. & B. R. Co., 172 N.E. 516, 254 N.Y. 305, affirming Dry Dock, E. B. & B. R. Co. v. Fullen, 239 N.Y.S. 501, 228 App.Div. 354—Dillon v. Erie R. Co., 43 N.Y.S. 320, 19 Misc. 116—Beardsley v. New York, L. E. & W. R. Co., 40 N.Y.S. 1077, 17 Misc. 256, affirmed 44 N.Y.S. 175, 15 App.Div. 251.
N.C.—In re Petition for Increase of Street Car Fares in City of Charlotte, 101 S.E. 619, 179 N.C. 151
Okl.—Swain v. Oklahoma Ry. Co., 32 P.2d 51, 168 Okl. 133.
Or.—City of Portland v. Public Service Commission of Oregon, 173 P. 1178, 89 Or. 325.
Pa.—City of Scranton v. Public Service Commission, 110 A. 775, 268 Pa. 192, affirming 73 Pa.Super. 192—Borough of Wilkinsburg v. Public Service Commission, 72 Pa.Super. 423.
Va.—City of Richmond v. Virginia Ry. & Power Co., 126 S.E. 353, 141 Va. 69.
10 C.J. p. 662 note 70.

created by an act of congress, in the absence of anything in the act indicating an intent by congress to remove such corporation from state control.[31] However, a state, in regulating intra-state rates, must be assumed to intend to act within the limits set by the federal constitution,[32] and it cannot so regulate intra-state fares as to interfere with the general level of interstate rates established by the interstate commerce commission.[33]

Although the state's power may by appropriate enactment be delegated to, and exercised by, a municipality, as will be considered in § 583, or by a railroad or public service commission, see subdivision b of this section, the state legislature cannot divest itself of the right to reassume and exercise its sovereign rights in this regard.[34] Although the state may at least qualifiedly delegate the power of rate fixing to a carrier, this can be done only by words of positive grant in the carrier's charter or by something which is in law equivalent thereto;[35] such power, it has been said, can be suspended in a given case only by a contract for a definite time by the supreme legislative body of the state or under authority clearly delegated by such body.[36]

The power of the state or its agencies to regulate rates cannot be withdrawn or limited by contracts or other obligations existing between a carrier and another party.[37] Accordingly, the power of legislative regulation is not restricted by the

Basis of power

(1) "The rate-making authority over public utilities is an attribute of sovereignty, inherent in the state, as an element of her police power" —State v. City of New Orleans, 91 So. 533, 535, 151 La. 24.

(2) "A continuance of adequate, efficient service by public utilities, particularly by street railroads in a growing city, vitally affects the public welfare. In granting to corporations franchises to engage in the business of common carriers, the law contemplates . . . an adequate and efficient service and that a reasonable compensation therefor shall be allowed, to comport with organic property rights. . . . Therefore it is clearly within the legislative power and duty to enact regulations by which a reasonable return for service rendered by common carriers may be effectuated as well as to enact regulations by which excessive charges and unjust discriminations by common carriers may be prevented and redressed"— State v. Burr, 84 So. 61, 72, 79 Fla. 290.

(3) Other statements of similar import see 10 C.J. p 662 note 70 [a]

Local or special legislation

A statute regulating street car fares in cities of the second class is not local or special legislation within the prohibition of the constitution —Ashworth v. Pittsburgh Ry. Co., 34 Pa.Co. 253.

Same fare as for interstate service

Statute forbidding railroad corporation having New York franchise, operating to and from stations within city of over a million, and owned, controlled, or operated by railroad corporation having franchise from another state, to charge rate per mile within such city in excess of rates charged for similar service from such city to stations in adjacent state, prohibits higher fares between stations in New York City on Long Island Railroad than are charged for similar mileage between New York City and stations in New Jersey on Pennsylvania Railroad — Transit Commission v. Long Island R. Co, 294 N.Y.S. 133, 250 App.Div. 448.

Mortgaging of road

A statutory provision for the mortgaging of a street railroad under a mortgage reserving to the railroad the right to operate twenty years after the date that its property might come into the possession of another as the result of foreclosure proceedings, and fixing the rate of fare to be charged for such twenty-year period, does not affect the legislature's right through the utilities commission to regulate fares while the railroad is in the hands of the mortgagor.—Humphrey Co. v. Cleveland Ry. Co, 9 Ohio N.P.,N.S., 609

Change of maximum rates

Legislature possesses power to change street railroad's maximum rates contained in earlier statutes when it appears rates are unjust and unreasonable —In re Dry Dock, E. B. & B. R. Co, 172 N.E. 516, 254 N.Y. 305, affirming Dry Dock, E. B. & B. R. Co. v. Fullen, 239 N.Y.S. 501, 228 App.Div. 354.

31. U.S.—Ames v. Union Pac. R. Co., C.C.Neb. 64 F. 165 affirmed 18 S.Ct. 418, 169 U.S. 466, 42 L.Ed. 819
10 C.J. p 663 note 73.

32. U.S.—Rowland v. Boyle, Ark., 37 S.Ct. 577, 244 U.S. 106, 61 L.Ed. 1022, affirming, D.C., Boyle v. St. Louis & S. F. R. Co., 222 F. 539.

33. Va.—Atlantic Coast Line R. Co. v. Commonwealth, 133 S.E. 883, 145 Va. 62.

Pullman surcharge

(1) In view of the rule stated in the text, the state corporation commission cannot order the removal of intra-state Pullman surcharges, where to do so would break down the interstate surcharges established by the interstate commerce commission —Atlantic Coast Line R. Co. v. Commonwealth, 133 S.E. 883, 145 Va. 62.

(2) Where the intra-state Pullman surcharge is worth one hundred thousand dollars annually to carriers in state, it is not removable on ground that loss would be de minimis.—Atlantic Coast Line R. Co. v. Commonwealth, supra.

(3) The removal of such surcharge is not authorized even though the Pullman Company is under contract to pay railroads for hauling Pullman cars —Atlantic Coast Line R. Co. v. Commonwealth, supra.

34. Mich.—Groesbeck v. Detroit United Ry., 177 N.W. 726, 210 Mich. 237.
Okl.—Swain v. Oklahoma Ry. Co., 32 P.2d 51, 168 Okl. 133.

35. Ind.—Indianapolis v. Navin, 47 N.E. 525, 51 N.E. 80, 151 Ind. 139, 41 L.R.A. 337.
10 C.J. p 664 note 91.

36. U.S.—Portland R., etc., Co. v. Portland, D.C.Or., 201 F. 119.

37. N.Y.—People ex rel. City of New York v. Nixon, 128 N.E. 245, 229 N.Y. 356, reversing 180 N.Y.S. 130, 190 App.Div. 612, affirming 179 N.Y.S. 82, 109 Misc. 7—Onondaga Golf & Country Club v. Syracuse & S. R. Co., 160 N.Y.S. 693, 96 Misc. 213.
Okl.—Little v. Oklahoma Ry. Co., 223 P. 692, 97 Okl. 286.
Effect of contract between carrier and municipality see infra § 583 b.

Statute authorizing increase in rates

A statute authorizing increase in maximum rates chargeable by street railroad when found inadequate to yield fair return, annulled existing contracts between carriers and private parties, in conflict therewith.— People ex rel. City of New York v. Nixon, 128 N.E. 245, 229 N.Y. 356,

fact that the income of the company has been pledged to the payment of obligations on the faith of its charter,[38] and a statute reducing rates is not invalid because of the fact that a contract existed between two companies for the interchange of traffic at the rates of fare which existed prior to its enactment.[39] Also, a contract between the carrier and a private party fixing the fares for the transporting of passengers between specified points is beyond the power of the parties and is unenforceable,[40] at least, after the particular service required by the contract is specifically rendered unlawful by statute.[41]

The action of the state, through the legislature or a public service commission, in establishing a single fare rate does not exhaust its power to regulate transportation charges; and after establishing such rate it may make a reasonable regulation affecting mileage or commutation rates.[42]

Rates must be reasonable. The state's power to regulate rates is subject to the limitations that the rates established by it or its authorized agency must be reasonable and fair, both to the carrier and to the public,[43] and that they must not be such as amount in law to the taking of private property for public use without just compensation or without due process of law.[44] It has apparently been held, however, that where a law fixing maximum rates existed at the time a railroad company was chartered and entered into and became a condition of its franchise, the company cannot secure judicial authorization to increase such rates notwithstanding that they have become unreasonable and confiscatory.[45]

reversing 180 N.Y.S. 130, 190 App. Div. 612, affirming 179 N.Y.S. 82, 109 Misc. 7.

38. U.S.—Chicago, B. & Q. R. Co v. Cutts, Iowa, 94 U.S. 155, 24 L.Ed. 94.

39. N.Y.—Buffalo East Side R. Co v. Buffalo St. R. Co., 19 N.E. 63, 111 N.Y. 132, 2 L.R.A. 284.

40. Okl.—Little v. Oklahoma Ry. Co, 223 P. 692, 97 Okl. 286.

41. N.Y.—Onondaga Golf and Country Club v. Syracuse & S. R. Co., 160 N.Y.S. 693, 96 Misc. 213.

Lower rate of fare

Under a statute providing that a carrier shall charge the same compensation for the same service, a contract, insuring club members a lower fare than the general public, is void after the law became effective, even though it was, in the absence of the statute, valid when made.—Onondaga Golf and Country Club v. Syracuse & S. R. Co., 160 N.Y.S. 693, 96 Misc. 213.

42. Md.—Pennsylvania R. Co. v. Towers, 94 A. 330, 126 Md. 59.

43. U.S.—Duluth St. Ry. Co. v. Railroad and Warehouse Commission of Minnesota, Minn., 4 F.2d 543, affirmed Railroad and Warehouse Commission of Minnesota v. Duluth Street Ry. Co., 47 S.Ct. 489, 273 U.S. 625, 71 L.Ed. 807—Public Service Ry. Co. v. Board of Public Utility Commissioners, D.C.N.J., 276 F. 979, 984, appeal dismissed Board of Public Utility Com'rs of State of New Jersey v Public Service Ry. Co., 45 S.Ct. 9, 266 U.S 636, 69 L.Ed. 481—Kansas City., C., C. & St J Ry. Co. v Barker, D.C.Mo., 242 F 310

Pa.—City of Philadelphia v Public Service Commission, 83 Pa.Super 8.

10 C.J p 664 note 99.

"The state . . . must consider both the rights of the public and the rights of the corporation. Out of this situation it must evolve what the law terms a just and reasonable rate, which when made by compulsion of public authority can never exceed the value of the service to the consumer and cannot be made so low as to confiscate the property devoted to that service. . . . The reasonable worth of the service rendered is the maximum of the permissible rate and a fair return on the value of the property employed for the public convenience is the minimum. It must fall between these two extremes."—Public Service Ry Co. v Board of Public Utility Commissioners, supra.

Determination of reasonableness of rate see supra § 580.

Commutation rates

A statute giving the commission power to fix maximum rates for commutation tickets does not authorize the commission to prescribe suburban commutation rates which would still further reduce to any extent earnings falling short of a fair return to any extent.—Kansas City, C., C & St. J. Ry. Co. v. Barker, D.C.Mo., 242 F. 310.

Former and prospective earnings

In fixing the rates at any particular time, the railroad's former earnings and probable prospective earnings should be considered with a view to so adjusting the rates as to permit a fair and reasonable return —Omaha & C. B St. Ry. Co. v. Nebraska State Railway Commission, 173 N.W. 690, 103 Neb. 695

Commission cannot annul rates which are not unjust and unreasonable.—Peo. v. Public Service Commn., 145 N.Y.S. 503, 159 App Div. 531, affirmed 109 N.E. 1089, 215 N.Y. 689.

44. U.S.—Duluth St Ry. Co v. Railroad and Warehouse Commission of Minnesota, D.C.Minn., 4 F. 2d 543, affirmed Railroad and Warehouse Commission of Minnesota v Duluth St Ry. Co., 47 S. Ct 489, 273 U.S. 625, 71 L.Ed. 807—Public Service Ry Co. v. Board of Public Utility Commissioners, D.C.N.J., 276 F. 979, appeal dismissed Board of Public Utility Com'rs of State of New Jersey v. Public Service R. Co., 45 S.Ct. 9, 266 U.S 636, 69 L.Ed. 481—Bellamy v. Missouri, etc, R Co, Ark., 215 F. 18, 131 C.C.A. 326, L.R.A 1915A 1 and note.

Ind.—Indianapolis v. Nevin, 47 N.E 525, 51 N.E. 80, 151 Ind. 139, 41 L. R.A. 337, 344.

Mass.—Commonwealth v. Interstate Consol St. R. Co., 73 N.E 530, 187 Mass. 436, 11 L.R.A.,N.S., 973, affirmed 28 S.Ct 26, 207 U.S. 79, 52 L.Ed. 111.

10 C.J p 664 note 1.

Joint rates

(1) State is without power to require transfer passengers, paying joint rate, to be carried at a loss or without substantial compensation over proper cost of such service, including not only expenditures incurred exclusively for that traffic, but also a just proportion of the expenses incurred for all traffic, of which transfer traffic forms a part'—Banton v Belt Line Ry. Corporation, N.Y., 45 S.Ct. 534, 268 U.S. 413, 69 L.Ed 1020.

(2) A joint rate fixed by the public service commission, which is in fact confiscatory, cannot be sustained on the ground that it is a reasonable service requirement.—Banton v. Belt Line Ry Corporation, supra.

45. U.S.—Charleston-Isle of Palms Traction Co. v. Shealy, D.C.S.C., 266 F. 406.

Although it has been said that rates can go no higher than the service is reasonably worth to the public requiring the service, even though charges so limited would fail to produce a fair return to the carrier on its investment,[46] other authority holds that if a reasonable and just rate will be prejudicial to a community it is unfortunate, but furnishes no reason why the company should be required to render the service at a loss.[47] Particular rates of fare and regulations in connection therewith, prescribed by statute or order of a commission, have been held, under the evidence presented, to be, on the one hand, valid, either as necessary to assure a reasonable return to the carrier,[48] or as sufficiently compensatory, against attack by the carrier as being confiscatory,[49] and on the other hand, invalid because unreasonable and inadequate to yield a sufficient return.[50] Where a carrier vol-

46. Wash.—Puget Sound Electric R. Co. v. State R. Commn., 117 P. 739, 65 Wash. 75, Ann.Cas.1913B 763.
10 C J p 664 note 2.

47. N Y.—Peo. v. Public Service Commn., 145 N.Y.S. 503, 159 App. Div. 531, affirmed 109 N.E. 1089, 215 N.Y. 689.

Advantage of lesser rate

A commission cannot annul rates fixed by a carrier merely because a lesser rate would be to the advantage of the public.—Peo. v. Public Service Commn., 145 N.Y.S. 503, 159 App.Div 531, affirmed 109 N.E. 1089, 215 N.Y 689.

48. Ill.—Chicago Rys Co. v. City of Chicago, 126 N E 585, 292 Ill 190, error dismissed City of Chicago v. Chicago Rys Co., 42 S Ct 95, 257 U.S. 617, 66 L Ed 399.
Mo.—State ex rel and to Use of Pugh v. Public Service Commission, 10 S.W.2d 946, 321 Mo. 297
Pa.—City of Philadelphia v. Public Service Commission, 83 Pa Super. 8.
R.I.—Public Utilities Commission v. Rhode Island Co., 110 A. 654, 43 R.I. 135.

Finding of service furnished at loss

Mo.—State ex rel. and to Use of Pugh v. Public Service Commission, 10 S W.2d 946, 321 Mo. 297.

Necessity for increase shown

U.S.—Westinghouse Electric & Mfg. Co. v. Binghamton Ry. Co., D C. N.Y., 255 F. 378, appeal dismissed 257 F 726, 169 C.C.A. 14.

Enlargement of single fare zone

(1) A finding of the commission in fixing rates, that a certain line did not extend farther than the single fare zones of other lines afforded a substantial basis for the action of the commission in including such line within the single fare zone.—West v. United Rys. & Electric Co. of Baltimore, 142 A 870, 155 Md 572, appeal dismissed United Rys. & Electric Co of Baltimore v. West, 49 S. Ct. 79, 278 U.S. 567, 73 L.Ed. 510.

(2) Commission's order, including in street railway's single fare zone suburban area served by urban system, thus necessitating an increase in the single fare required to be charged to yield a compensatory return, was, nevertheless, reasonable.—City of Milwaukee v. Railroad Commission, 240 N W. 165, 206 Wis 339.

(3) The enlargement of the single fare area and the increase in the rate of fare cannot be considered unreasonable solely because of the increase in rate, where, the rates charged in the single fare area formerly existing were in any case inadequate to yield a sufficient return to the carrier.—City of Milwaukee v. Railroad Commission, supra.

Temporary increase

Increase from five to seven cents of street car fares, after increase of employees' wages from forty-eight to sixty-five cents per hour, pending investigation as to what was adequate rate, was held to be reasonable.—Chicago Rys Co v. City of Chicago, 126 N E. 585, 292 Ill. 190, error dismissed City of Chicago v. Chicago Rys. Co., 42 S.Ct 95, 257 U S. 617, 66 L Ed. 399.

49. U.S.—Gilchrist v. Interborough Rapid Transit Co. N.Y., 49 S.Ct. 282, 279 U.S. 159, 73 L Ed. 652, reversing, D C, Interborough Rapid Transit Co. v. Gilchrist, 26 F.2d 912—Ann Arbor R. Co. v Fellows, D C.Mich., 236 F 387, appeal dismissed Ann Arbor R. Co. v. Glasgow, 39 S.Ct. 5, 248 U S. 588, 63 L.Ed. 434.
Pa.—Jones v. Delaware, L. & W. R. Co, 69 Pa Super 568.
Wis.—Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin, 172 N.W. 746, 169 Wis. 421.

Experimental rates

An order fixing fares of seven cents on sale of five tickets, otherwise ten cents to be in effect for experimental period of two to four months was not irrational or unconstitutional or unreasonable to extent of affording less revenue than rates proposed by receiver of company, nor was the experimental period of excessive duration.—Donham v. Public Service Commission, 122 N.E 397, 232 Mass. 309.

Five-cent fare

An order of the public service commission fixing a five-cent instead of a ten-cent rate between two towns will be sustained, where it appears the commission considered the surroundings, the size of the towns, and the rates charged by other roads, and from the substantial evidence offered determined that a five-cent rate was reasonable.—Jones v Delaware, L. & W. R Co., 69 Pa Super. 568.

50. U.S.—Los Angeles Ry Corporation v. Railroad Commission of California, D.C.Cal., 29 F 2d 140, affirmed Railroad Commission of California v. Los Angeles Ry. Corporation, 50 S.Ct 71, 280 U.S 145, 74 L.Ed. 234—Duluth St Ry Co. v. Railroad and Warehouse Commission of Minnesota, D.C Minn., 4 F 2d 543, affirmed Railroad and Warehouse Commission of Minnesota v Duluth Street Ry Co., 47 S.Ct. 489, 273 U S. 625, 71 L Ed. 807—Public Service Ry Co. v. Board of Public Utility Commissioners, D.C N J., 276 F. 979, appeal dismissed Board of Public Utility Com'rs of State of New Jersey v. Public Service R. Co., 45 S.Ct. 9, 266 U S 636, 69 L.Ed. 481—Belt Line Ry. Corporation v. Newton, D.C.N Y., 273 F. 272—Westinghouse Electric & Mfg. Co v. Binghamton Ry Co., D.C N.Y., 255 F. 378, appeal dismissed 257 F. 726, 169 C.C.A. 14.
Minn.—State v. St. Paul City Ry. Co, 265 N.W. 434, 196 Minn. 456.

Acceptance of transfers

Where the cost of carrying each passenger on a street railway exceeds four cents, and a majority of its passengers either travel on or receive transfers as required by an order of the state public service commission, which allows it only two cents for such passengers and its income is less than the operating expenses and interest on borrowed money, the order requiring the acceptance and issuing of transfers for the prescribed share in the fare is confiscatory, so that its enforcement should be restrained.—Belt Line Ry. Corporation v. Newton, D.C.N.Y., 273 F. 272.

Material reduction of revenue

Evidence sustained finding that order of state railroad and warehouse commission requiring street railways to sell two tokens for fifteen cents would materially reduce revenue obtained under former fare of ten cents cash or six tokens for forty-five cents, so as to require setting aside order under stipulation.—

untarily maintains a certain passenger rate for years, it is estopped to claim, in support of a contention that a reduced rate is confiscatory, that such rate was unremunerative.[51]

A rate established by statute is binding on the carrier until in the first instance, on application by the carrier or by some one injuriously affected thereby, or on the initiative of the public service commission, such rate has been investigated by the commission and judicially determined to be unreasonable or confiscatory as to a particular carrier.[52]

Unjust discrimination. The rates established by the legislature or its authorized agency must not amount to unjust discrimination.[53] Although unjust discrimination in railroad rates was forbidden by the common law, and it needs neither a statute nor a constitutional provision to make such discrimination in rates unlawful,[54] a state may, without violating the fourteenth amendment, prohibit any unjust discrimination by a domestic railroad company against any persons or localities on its lines,[55] and may leave it to the railroad commission to determine whether the rates are, or are not, discriminatory.[56]

The mere fact that a rate is discriminatory is not conclusive of its invalidity,[57] especially where the discrimination is produced by an unreasonable overcharge for one type of service,[58] only unjust and arbitrary discriminations are prohibited,[59] and if the difference in rates is based on a reasonable and fair difference in conditions which equitably and logically justify a different rate, it is not invalid as an unjust discrimination.[60] So, a constitutional provision prohibiting the charging of a greater sum for a through rate than for the aggregate of the intermediate rates, is not contravened by a commission order fixing a through interurban rate higher than the combined local street car service rates for the same distance, where the services are distinct and different, and different and reasonable methods for establishing the rates of each are followed.[61]

State v. St Paul City Ry. Co., 265 N.W. 434, 196 Minn. 456.

51. U.S.—Central of Georgia R. Co. v. Alabama R. Commn., D.C.Ala., 209 F. 75.

52. W.Va.—State v. Baltimore, etc., R. Co., 85 S.E. 714, 76 W.Va. 399.

53. Tex.—St. Louis Southwestern Ry. Co. of Texas v. State, 261 S.W. 996, 113 Tex. 570, 33 A.L.R. 367, reversing State v. St. Louis S. W. Ry. Co. of Texas, Civ.App., 197 S.W. 1006.

10 C.J. p 665 note 7.

Sale of mileage books as discrimination see infra subdivision c (1) of this section.

Special rates to soldiers as discrimination see infra subdivision c (4) of this section.

Evidence held not to show that public service commission's order approving increased suburban passenger rates was unjustly discriminatory.—State ex rel. and to Use of Pugh v. Public Service Commission, 10 S.W.2d 946, 321 Mo. 297.

54. Mo.—State v. Missouri, etc., R. Co., 172 S.W. 35, 262 Mo. 507, L.R.A.1915C 778, Ann.Cas.1916E 949.

55. U.S.—Portland R., etc., Co. v. Oregon R. Commn., 33 S.Ct. 820, 827, 229 U.S. 397, 414, 57 L.Ed. 1248, 1259, affirming 105 P. 709, 109 P. 273, 56 Or. 468.

Ga.—Phillips v. Southern R. Co., 40 S.E. 268, 114 Ga. 284.

10 C.J. p 665 note 9.

Railroads as public highways

A constitutional provision forbidding discrimination is binding on the state, notwithstanding that by the constitution railroads are declared to be public highways.—State v. Missouri, etc., R. Co., 172 S.W. 35, 262 Mo. 507, L.R.A.1915C 778, Ann.Cas.1916E 949.

Declaration of sovereign power

A constitutional provision authorizing the legislature to enact laws to prevent unjust discrimination is a declaration of the sovereign power over the carrier's duties to the public to demand only a reasonable rate without unjust discrimination, although the legislature has enacted no laws to carry out the constitutional provision.—Peo. v. Suburban R. Co., 53 N.E. 349, 178 Ill. 594, 49 L.R.A. 650.

56. U.S.—Portland R., etc., Co. v. Oregon R. Commn., 33 S.Ct. 820, 827, 229 U.S. 397, 414, 57 L.Ed. 1248, 1259, affirming 105 P. 709, 109 P. 273, 56 Or. 468.

57. Mo.—State ex rel. and to Use of Pugh v. Public Service Commission, 10 S.W.2d 946, 321 Mo. 297.

10 C.J. p 665 note 13.

Rate exceeding intermediate rates

A rate established by the commission will not be held unjustly discriminatory on the ground that it exceeds the sum of fares between intermediate points fixed by independent franchise contracts, since fares fixed by franchise may be either too high or too low to yield an adequate return and cannot of themselves be taken as a basis for determining the reasonableness of a through rate not so fixed.—Stark County v. Public Utilities Commission, 131 N.E. 157, 102 Ohio St. 124.

58. N.H.—State v. Maine Cent. R. Co., 92 A. 837, 77 N.H. 425.

10 C.J. p 665 note 14.

59. Mo.—State ex rel. and to Use of Pugh v. Public Service Commission, 10 S.W.2d 946, 321 Mo. 297.

Tex.—St. Louis Southwestern Ry. Co. of Texas v. State, 261 S.W. 996, 113 Tex. 570, 33 A.L.R. 367, reversing State v. St. Louis S. W. Ry. Co. of Texas, Civ.App., 197 S.W. 1006.

10 C.J. p 665 note 15.

Meaning of "unjust"

A constitutional provision that the legislature shall pass laws to prevent unjust discrimination, does not forbid all discrimination in fares, but only such as will operate unjustly, "unjust" being probably used in sense of that which is opposed to a law which is the test of right or wrong.—St. Louis Southwestern Ry. Co. of Texas v. State, 261 S.W. 996, 113 Tex. 570, 33 A.L.R. 367, reversing State v. St. Louis S. W. Ry. Co. of Texas, Civ.App., 197 S.W. 1006.

60. Mo.—State ex rel. and to Use of Pugh v. Public Service Commission, 10 S.W.2d 946, 321 Mo. 297.

10 C.J. p 665 note 15.

61. Cal.—City of Pasadena v. Railroad Commission of California, 218 P. 412, 192 Cal. 61.

Finding of difference sustained

Evidence that interurban cars were larger and more comfortable than local street cars, for a portion of the distance used tracks exclusively reserved for them, stopped only at designated places, and were

b. Power of Commission

Where the legislature has conferred such authority, a commission may have the power, in a proper case, to reduce or increase rates, to fix and adjust joint rates, to suspend or annul unjust or unreasonable rates established by a carrier, and to compel observance of lawfully established rates; but in exercising such powers, the commission must proceed in the manner prescribed by statute.

Within constitutional limitations, the power of the state to regulate the intra-state passenger rates of common carriers, including street railroads, may be properly delegated to a public service or railroad commission;[62] and such power may also be vested in a commission by virtue of a constitutional provision to that effect.[63] Although the commission has ordinarily only this delegated power,[64] and cannot act outside the authority conferred upon it by the legislature,[65] it may, within the limits prescribed by the legislature, regulate and fix the passenger rates of common carriers, including street railroads.[66] Accordingly, subject to compliance with statutory requisites as to its proceedings,

operated at a high speed on published time-tables, sustained a finding that a substantial difference existed between the character of local street car service and interurban service.—City of Pasadena v. Railroad Commission of California, 218 P. 412, 192 Cal. 61.

62. Del.—Robertson v. Wilmington & P. Traction Co., 104 A. 839, 7 Boyce 755.
Ill.—State Public Utilities Commission v. Chicago & W. T. Ry. Co., 114 N.E. 325, 275 Ill. 555, Ann. Cas.1917C 50.
Mo.—State ex rel Kansas City Public Service Co. v. Latshaw, 30 S.W. 2d 105, 325 Mo. 909, appeal dismissed Latshaw v. State of Missouri ex rel Kansas City Public Service Co., 51 S.Ct. 101, 282 U. S. 806, 75 L.Ed. 723.
N.Y.—United Traction Co. v. Public Service Commission, 219 N.Y.S. 421, 219 App.Div. 95.
Pa.—Foltz v. Public Service Commission, 73 Pa.Super. 24.
R.I.—Public Utilities Commission v. Rhode Island Co., 110 A. 654, 43 R.I. 135.
10 C.J. p 663 notes 72, 74.

63. Okl.—Swain v. Oklahoma Ry. Co., 32 P.2d 51, 168 Okl. 133—Tulsa St. Ry. Co. v. Oklahoma Union Ry. Co., 184 P. 71, 76 Okl. 102.

Power not exclusive

Neb.Const. art. 5 § 19a, did not give the state railway commission power to fix transportation rates to the exclusion of the state legislature.—State v. Clarke, 153 N.W. 623, 98 Neb. 566.

64. N.Y.—United Traction Co. v. Public Service Commission, 219 N.Y.S. 421, 219 App.Div. 95.

65. U.S.—Southern Pac. Co. v. Bartine, D.C.Nev., 1 F.2d 323.
10 C.J. p 663 note 74.

Subway fares

Transit commission has no greater authority respecting subway fares than statute gave its predecessor, the public service commission.—City of New York v. Interborough Rapid Transit Co., 177 N.E. 295, 257 N.Y. 20, affirming 249 N.Y.S. 243, 232 App.Div. 233, affirming 240 N.Y.S. 316, 136 Misc. 569.

66. U.S.—East St. Louis & S. Ry. Co. v. Brundage, D.C.Ill., 10 F.2d 830—Duluth St. Ry. Co. v. Railroad and Warehouse Commission of Minnesota, D.C.Minn., 4 F.2d 543, affirmed Railroad and Warehouse Commission of Minnesota v. Duluth Street Ry. Co., 47 S.Ct. 489, 273 U.S. 625, 71 L.Ed. 807.
Fla.—State v. Railroad Com'rs of Florida, 84 So. 444, 79 Fla. 526—State v. Burr, 84 So. 61, 79 Fla. 290.
Ga.—Georgia Public Service Commission v. Atlanta & W. P. R. Co., 139 S.E. 725, 164 Ga. 822—Georgia Ry. & Power Co. v. Railroad Commission of Georgia, 98 S.E. 696, 149 Ga. 1, 5 A.L.R. 1.
Minn.—City of St. Paul v. Railroad and Warehouse Commission, 203 N.W. 972, 163 Minn. 274.
Miss.—Illinois Cent. R. Co. v. Mississippi Railroad Commission, 77 So. 314, 116 Miss. 484.
N.Y.—Quinby v. Public Service Commission of State of New York for Second Dist., 119 N.E. 433, 223 N.Y. 244, 3 A.L.R. 685, reversing 169 N.Y.S. 1109, 183 App.Div. 914 affirming 169 N.Y.S. 976, 102 Misc. 337, reargument denied 124 N.E. 790, 227 N.Y. 601.
Ohio.—King Powder Co. v. Thrasher, 20 Ohio N.P.,N.S., 401.
Okl.—Swain v. Oklahoma Ry. Co., 32 P.2d 51, 168 Okl. 133.
R.I.—Public Utilities Commission v. Rhode Island Co., 110 A. 654, 43 R.I. 135.
Wis.—City of Milwaukee v. Railroad Commission, 240 N.W. 165, 206 Wis. 339.
10 C.J. p 663 notes 72, 74.
Power to regulate street railroad rates fixed by municipal ordinance or franchise see infra § 583 c.

Street railroads

(1) A statute conferring upon the railroad commissioners authority to regulate the tariff rates of "all railroads, railroad companies and common carriers," must be interpreted by its own terms, and must be considered as a whole in determining whether it applies to street railroads.—State v. Burr, 84 So. 61, 79 Fla. 290.

(2) As so interpreted authority to prescribe reasonable and just rates of street car fares is vested in the railroad commissioners.—State v. Railroad Com'rs of Florida, 84 So. 444, 79 Fla. 526—State v. Burr, supra.

Rates from "point to point"

The words "point to point," as used in a statute conferring upon railroad commissioners authority to regulate transportation rates from point to point within the state, do not necessarily mean from an established station to an established station, but may include transportation between the stops of a street car.—State v. Burr, 84 So. 61, 79 Fla. 290.

Ticket rate and train rate

A statute making it unlawful for railroads to collect more than the regular fare from passengers who board trains at places where tickets are not offered for sale, was not designed to control the railroad commission in fixing maximum rates and does not prevent the commission from fixing the maximum ticket rate and the maximum train rate at the same amount per mile.—Illinois Cent. R. Co. v. Mississippi Railroad Commission, 77 So. 314, 116 Miss. 484.

Absence of valid contract as to fares

(1) Under a statute conferring upon the railroad commission the right to regulate rates to be charged by street railways, except where a valid, subsisting contract with respect to the rate existed between a municipality and the carrier, the commission has the duty, on application of the carrier, to fix the fare, if no such valid contract was in effect.—Georgia Ry. & Power Co. v. Railroad Commission of Georgia, 98 S.E. 696, 149 Ga. 1, 5 A.L.R. 1.

(2) As to street railway franchises containing no limitation on fares public service commission has jurisdiction to regulate fares.—City of Yonkers v. Maltbie, 245 N.Y.S. 514, 138 Misc. 572, affirmed 248 N.Y.S. 75, 231 App.Div. 415.

the commission, under its authority to fix just and reasonable rates may, in a proper case, reduce,[67] increase,[68] or change,[69] the rates of fare to be charged. Moreover, in the absence of statutory limitation to the commission's authority, such reduction[70] or increase[71] may be granted where necessary to assure the establishment of a reasonable rate, notwithstanding that it is in contravention of an existing maximum rate fixed by statute, and this power to increase the statutory maximum will be found to exist especially where the statute authorizing the commission to fix just and reasonable rates specifically repeals inconsistent acts or parts thereof.[72] If, however, the legislature has not granted the necessary authority, or has forbidden the commission to disturb a statutory maximum fare limitation,[73] as by a provision restricting street railroad fares to five cents, in the same

Police power

Corporation commission's order, fixing street railroad fares as to lines outside municipal limits, was made under police power, not under contract, as affects the right of subsequent modification—Lynchburg Traction & Light Co. v. City of Lynchburg, C.C.A.Va., 16 F.2d 763.

67. Ill.—State Public Utilities Commission v. Chicago & W. T. Ry. Co., 114 N.E. 325, 275 Ill. 555, Ann.Cas.1917C 50.

N.Y.—People ex rel. City of New York v. Nixon, 128 N.E. 245, 229 N.Y. 356, reversing 180 N.Y.S. 130, 190 App.Div. 612, affirming 179 N.Y.S. 82, 109 Misc. 7—Quinby v. Public Service Commission of State of New York for Second Dist., 119 N.E. 433, 223 N.Y. 244, 3 A.L.R. 685, reversing 169 N.Y.S. 1109, 183 App.Div. 914, affirming 169 N.Y.S. 976, 102 Misc. 337, reargument denied 124 N.E. 790, 227 N.Y. 601.

10 C.J. p. 663 note 77.

68. U.S.—Westinghouse Electric & Mfg. Co. v. Binghamton Ry. Co., D.C.N.Y., 255 F. 378, appeal dismissed 257 F. 726, 169 C.C.A. 14.

Del.—Robertson v. Wilmington & P. Traction Co., 104 A. 839, 7 Boyce 155.

Md.—Chenoweth v. Maloy, 123 A. 77, 143 Md. 622.

Mass.—Donham v. Public Service Commission, 122 N.E. 397, 232 Mass. 309.

N.Y.—Quinby v. Public Service Commission of State of New York for Second Dist., 119 N.E. 433, 223 N.Y. 244, 3 A.L.R. 685, reversing 169 N.Y.S. 1109, 183 App.Div. 914, affirming 169 N.Y.S. 976, 102 Misc. 337, reargument denied 124 N.E. 790, 227 N.Y. 601—People ex rel. New York & N. S. Traction Co. v. Public Service Commission of State of New York for Second District, 162 N.Y.S. 405, 175 App.Div. 869.

N.C.—In re Petition for Increase of Street Car Fares in City of Charlotte, 101 S.E. 619, 179 N.C. 151.

Wis.—Smith v. Railroad Commission of Wisconsin, 173 N.W. 312, 169 Wis. 547.

Sale of tickets at lower rate than cash fare

(1) Order of public service commission requiring issuance by street railway lines of five tickets for thirty-five cents, ten-cent fare being required when paid in cash, is within the statutory authority of commission, to fix just and reasonable rates of fare, such authority not being restricted to orders involving only cash fares notwithstanding the failure of the carrier to propose the sale of tickets—City of Fall River v. Public Service Commission, 122 N.E. 406, 232 Mass. 329.

(2) Such a regulation is not in violation of the federal or state constitution.—Donham v. Public Service Commission, 122 N.E. 397, 232 Mass. 309.

69. U.S.—Westinghouse Electric & Mfg. Co. v. Binghamton Ry. Co., D.C.N.Y., 255 F. 378, appeal dismissed 255 F. 726, 169 C.C.A. 14

70. Ill.—State Public Utilities Commission v. Chicago & W. T. Ry. Co., 114 N.E. 325, 275 Ill. 555, Ann.Cas.1917C 50.

N.Y.—Quinby v. Public Service Commission of State of New York for Second Dist., 119 N.E. 433, 223 N.Y. 244, 3 A.L.R. 685, reversing 169 N.Y.S. 1109, 183 App.Div. 914, affirming 169 N.Y.S. 976, 102 Misc. 337, reargument denied 124 N.E. 790, 227 N.Y. 601.

Otherwise stated

A legislative enactment fixing a maximum rate per mile, pursuant to authorization by the state constitution, does not preclude the public utilities commission from reducing the rate chargeable by railroads within the statutory maximum.—State Public Utilities Commission v. Chicago & W. T. Ry. Co., 114 N.E. 325, 275 Ill. 555, Ann.Cas.1917C 50.

71. Del.—Robertson v. Wilmington & P. Traction Co., 104 A. 839, 7 Boyce 155.

N.Y.—In re Dry Dock, E. B. & B. R. Co., 172 N.E. 516, 254 N.Y. 305, affirming Dry Dock, E. B. & B. R. Co. v. Fullen, 239 N.Y.S. 501, 228 App.Div. 354—People ex rel. City of New York v. Nixon, 128 N.E. 245, 229 N.Y. 356, reversing 180 N.Y.S. 130, 190 App.Div. 612, affirming 179 N.Y.S. 82, 109 Misc. 7—Quinby v. Public Service Commission of State of New York for Second Dist., 119 N.E. 433, 223 N.Y. 244, 3 A.L.R. 685, reversing 169 N.Y.S. 1109, 183 App.Div. 914, affirming 169 N.Y.S. 976, 102 Misc. 337, reargument denied 124 N.E. 790, 227 N.Y. 601—Evens v. Phelps, 211 N.Y.S. 650, 214 App.Div. 122, affirmed 158 N.E. 310, 246 N.Y. 224.

10 C.J. p. 669 note 67 [f].

Power to fix maximum book mileage rates in excess of the maximum fixed by statute see infra subdivision c (1) of this section.

Authority held sufficient

A statute authorizing the commission "to hear and examine complaints concerning rates charged by any . . . public utility and to make such recommendations and orders as it may deem proper concerning such rates" is sufficient to empower the commission to increase a rate fixed by statute in the exercise of the regulatory power.—Robertson v. Wilmington & P. Traction Co., 104 A. 839, 7 Boyce, Del., 155.

72. Md.—Chenoweth v. Maloy, 123 A. 77, 143 Md. 622.

Maximum rates fixed by city charter granted by state are so subject to increase.—Chenoweth v. Maloy, 123 A. 77, 143 Md. 622.

73. U.S.—East St. Louis & S. Ry. Co. v. Brundage, D.C.Ill., 10 F.2d 830.

Neb.—State v. Clarke, 153 N.W. 623, 98 Neb. 566.

General authority insufficient

A grant of authority to the commission to regulate the rates of common carriers is not sufficient to authorize it to increase the rates beyond that provided for in a law fixing a maximum rate per mile, it being the intention of the legislature in specifically fixing a maximum fare and then conferring general powers of regulation upon the commission to permit the latter to regulate rates only within the prescribed limit.—State v. Clarke, 153 N.W. 623, 98 Neb. 566.

Electric railroad incorporated under Railroad Act is bound by two-cent fare law, and hence cannot secure an increase from the commission above such rate where the commission is prohibited by law from disturbing the statutory maximum.—East St. Louis & S. Ry. Co. v. Brundage, D.C.Ill., 10 F.2d 830.

act empowering the commission to regulate rates to assure railroads a reasonable return,[74] such maximum fare may not be increased by it, even though the company's income from such rate is not sufficient to yield it a reasonable return;[75] but the commission is not so restricted by a statutory provision requiring that carriers' charges be just and reasonable, and no more than allowed by law or by order of the commission "conformably with the law."[76]

A commission's authority to regulate rates is not limited by a statute authorizing municipalities to enter into "service-at-cost" agreements with utilities subject to approval by the commission, since the authority to approve such contracts implies an authority to investigate the facts, determine the value of the company's property, and determine the reasonableness of the rate.[77]

Under some statutes so providing, the commission has power to suspend or annul unjust and unreasonable rates established by the carrier;[78] but this can be done only after it has determined on satisfactory evidence that the rates are unjust and unreasonable, where the carrier has a statutory right to a hearing,[79] although it may be authorized to suspend an increase in rates by the carrier pending the hearing and determination of their reasonableness, without notice to the carrier.[80] The commission may also have the power to authorize a temporary increase of rates pending a determinate valuation of the railroad company's property devoted to public use,[81] and the fixing of a permanent rate on a full hearing;[82] to permit a street railway company to file a new schedule of rates within less than three years after the determination of the previous rate, under a statute providing that no rate be changed within such time except on application to, and approval by, the commission;[83] to compel observance, by the carrier, of a statute,[84] or of a valid contract between a municipality and a railroad company,[85] fixing rates; and to restrain a street railway company from putting a changed rate into effect where such company has not complied with the statutory requisites of publicly posting and publishing schedules of such changed rate.[86] Under its power to

74. Wash.—State v. Public Service Commission of Washington, 172 P. 890, 894, 101 Wash. 601.

"When the street railroads were first made subject to the jurisdiction of the Public Service Commission, there was an express provision in the same act which provided that no street railroad company should charge more than five cents. It cannot therefore be held that it was the intention of the Legislature by continuing in section 53 substantially the same provisions that had been embodied in the prior law [authorizing the commission to fix a just and reasonable rate where the existing rates are insufficient to yield a reasonable return] . . . to thereby grant to the Public Service Commission the right to fix a rate in excess of five cents and disregard the provision in section 25 limiting the rate to that sum."—State v. Public Service Commission of Washington, supra.

75. Wash.—State v. Public Service Commission of Washington, supra.

76. Md.—Chenoweth v. Maloy, 123 A. 77, 143 Md. 622.

Conformance with law as to exercise of powers

"Conformably with the law" means rates fixed by order of the commission, provided it conforms with the law in doing so, and does not prevent the commission from fixing a rate higher than one previously established by statute.—Chenoweth v. Maloy, 123 A. 77, 143 Md. 622.

77. Mo.—State ex rel. Kansas City Public Service Co. v. Latshaw, 30 S.W.2d 105, 325 Mo. 909, appeal dismissed Latshaw v. State of Missouri ex rel. Kansas City Public Service Co., 51 S.Ct. 101, 282 U.S. 806, 75 L.Ed. 723.

78. Ill.—State Public Utilities Commission v. Chicago & W. T. Ry. Co., 114 N.E. 325, 275 Ill. 555, Ann. Cas. 1917C 50.

N.J.—Gillen v. Public Service Ry. Co., 116 A. 621, 97 N.J.Law 333.

10 C.J. p. 663 note 77.

79. Ill.—State Public Utilities Commission v. Chicago & W. T. Ry. Co., 114 N.E. 325, 275 Ill. 555, Ann. Cas. 1917C 50.

10 C.J. p. 663 note 78.

Rates pending determination

Rates filed in original schedules of the carrier cannot be set aside by the commission except after full hearing and determination of their reasonableness, and the commission in the absence of statutory authority therefor may not prescribe other rates pending its determination.—State Public Utilities Commission v. Chicago & W. T. Ry. Co., 114 N.E. 325, 275 Ill. 555, Ann. Cas. 1917C 50.

80. U.S.—Trenton, etc., Tract. Corp. v. Trenton, D.C.N.J., 227 F. 502, affirmed 229 F. 140, 143 C.C.A. 416.

81. Pa.—City of Scranton v. Public Service Commission, 73 Pa. Super. 192, 197, affirmed 110 A. 775, 268 Pa. 192.

Emergency

A situation, due to an unexpected rise in prices and wages which makes it altogether probable that the past and present rate charged by street railway company is insufficient to yield a revenue which will pay a fair return on investment, although not constituting what would technically be denominated an emergency, may, when shown, be sufficient for the allowance by the state railway commission of a temporary increased rate.—Omaha & C. B. St. Ry. Co. v. Nebraska State Railway Commission, 173 N.W. 690, 103 Neb. 695.

82. Ill.—Chicago Rys. Co. v. City of Chicago, 126 N.E. 585, 292 Ill. 190, error dismissed City of Chicago v. Chicago Rys. Co., 42 S.Ct. 95, 257 U.S. 617, 66 L.Ed. 399.

83. Pa.—City of Philadelphia v. Public Service Commission, 84 Pa. Super. 135.

84. W.Va.—State v. Baltimore, etc., R. Co., 85 S.E. 714, 76 W.Va. 399.

Rate not determined unreasonable

Until a statutory rate has been investigated by the commission and determined to be unreasonable or confiscatory as to a particular carrier, or until such statute has been amended or otherwise nullified, the public service commission has jurisdiction to compel observance of such rate by the carrier.—State v. Baltimore, etc., R. Co., 85 S.E. 714, 76 W.Va. 399.

85. N.J.—Trenton & Mercer County Traction Corp. v. Inhabitants of City of Trenton, 101 A. 562, 90 N.J. Law 378, affirmed Trenton & Mercer County Traction Corp. v. Board of Public Utility Com'rs, 103 A. 1054, 91 N.J.Law 719.

86. Pa.—City of Pittsburgh v. Pitts-

regulate methods of operation, however, a commission cannot, as a means of forcing improved methods, penalize street railroad companies with a rate which will not return even operating expenses.[87]

A statute authorizing the commission to fix rates and services on its own motion has been held to apply only when the question is one of reasonableness of the fares and service, and not when the question is one of law as to the fares chargeable by a carrier under its franchise.[88]

An order of the commission raising rates under its power to take such action in the case of an emergency may be sustained as a general rate order authorized by statute, notwithstanding that the court finds that no emergency existed.[89]

A statutory provision authorizing investigations and inquiries by the commission on its own motion does not authorize the making of any order, and an order directing a railroad company to collect only a single fare between certain points is without jurisdiction and may be attacked collaterally in a prosecution for ejecting a passenger refusing to pay an additional fare.[90]

Coordination of fare zones. A commission has jurisdiction to determine an application for the coördination of fare zones of a street railroad and a bus corporation serving the same territory.[91]

Joint rates. Under a statute authorizing the commission to require physical connection of roads at junction points, the commission may make a valid order that a transfer system be installed by two street railroad companies, designating the point of transfer, fixing the rate for joint service, and providing for the division of such charges between the companies.[92] Where existing joint rates are confiscatory as to one railroad and excessive as to the other, the commission may adjust and apportion the joint rates so as to make them reasonably remunerative to both companies.[93]

Proceedings before commission. A commission in exercising its powers of regulation must act in the manner prescribed by the statute granting it power.[94] Thus, where the statute so provides, a new rate can be fixed and ordered by the commission only after a proper hearing and investigation as to the reasonableness of the old rate.[95] The fact that proceedings of the commission regulating rates of fare are not instituted by the state does not affect the validity of the regulation, where the statute authorizes the commission to act on its own motion, on the petition of the railroad company or on complaint of other specified persons and groups.[96] Even apart from specific statutory authorization, a railroad, as well as a citizen, has the right to be heard by the commission, and in a proper case, to obtain a change in its rates.[97] Under some statutes, however, the rates of a street railroad cannot be changed on an ex parte application of the company, without an opportunity accorded on public notice to citizens and taxpayers to be heard.[98] In an investigation of the necessity of increased rates to meet increased operating costs and wage demands, the commission may properly hear representatives of the railroad and its employees.[99]

burgh Rys. Co., 103 A. 372, 259 Pa. 558, affirming Pittsburgh Rys. Co. v. Public Service Commission, 66 Pa.Super. 243, 253.

87. U.S.—Chicago Rys. Co. v. Illinois Commerce Commission, D.C. Ill., 277 F. 970.

88. N.Y.—People v. Monarch, 185 N.Y.S. 5, 193 App.Div. 707.

89. Wis.—Smith v. Railroad Commission of Wisconsin, 173 N.W. 312, 169 Wis. 547.

90. N.Y.—People v. Monarch, 185 N.Y.S. 5, 193 App.Div. 707.

91. N.J.—Borough v. Roselle Park v. Board of Public Utility Com'rs, 144 A. 623, 7 N.J.Misc. 141, affirmed Town of Irvington v. Board of Public Utility Com'rs, 152 A. 921, 107 N.J.Law 191.

Offer of consolidation of street railroad and bus corporations during hearing on application for coördination of fare zones was immaterial to the issue.—Borough of Roselle Park v. Board of Public Utility Com'rs, 144 A. 623, 7 N.J.Misc. 141, affirmed Town of Irvington v. Board of Public Utility Com'rs, 152 A. 921, 107 N.J.Law 191.

Valuation

Board of public utility commissioners could coördinate as to fare zones in operation of street railroad and bus corporations serving same territory without valuation of property.—Borough of Roselle Park v. Board of Public Utility Com'rs, 144 A. 623, 7 N.J.Misc. 141, affirmed Town of Irvington v. Board of Public Utility Com'rs, 152 A. 921, 107 N.J.Law 191.

92. Okl.—Tulsa St. Ry. Co. v. Oklahoma Union Ry. Co., 184 P. 71, 76 Okl. 102.

93. Ill.—State Public Utilities Commission v. Chicago & W. T. Ry. Co., 114 N.E. 325, 275 Ill. 555, Ann.Cas. 1917C 50.

94. U.S.—Southern Pac. Co. v. Bartine, D.C.Nev., 1 F.2d 323.

95. U.S.—Southern Pac. Co. v. Bartine, supra.

96. Or.—City of Portland v. Public Service Commission of Oregon, 173 P. 1178, 89 Or. 325.

Navigation companies

Under a statutory provision that any person or corporation may file a written complaint with the commission, a railroad commission has jurisdiction to establish a through route and joint rate on a railroad to a city on petition of incorporated navigation companies, the fact that it has no jurisdiction over their business, or over water rates, being immaterial.—Grand Rapids, etc., R. Co. v. Michigan R. Commn., 154 N.W. 15, 188 Mich. 108.

97. Del.—Robertson v. Wilmington & P. Traction Co., 104 A. 839, 7 Boyce 155.

98. Del.—Robertson v. Wilmington & P. Traction Co., supra.

99. Ill.—Chicago Rys. Co. v. City of Chicago, 126 N.E. 585, 292 Ill. 190, error dismissed City of Chicago v. Chicago Rys. Co., 42 S.Ct. 95, 257 U.S. 617, 66 L.Ed. 399.

The commission, in a proceeding to fix rates, is required to weigh all competent evidence in determining the value of the railroad company's property,[1] and it cannot submit its own conclusions or judgments in place of the evidence presented as to reproduction cost;[2] but only such data as is introduced in evidence may be considered, and an order based on data not so introduced is invalid, notwithstanding that such data is otherwise clearly relevant and material.[3] Considerable latitude is permitted the commission in the investigation of relevant facts as to valuation and other aspects of the determination of the reasonableness of particular rates,[4] and it has been held that any evidence tending to establish the present value of the property is competent.[5] All items entering into the accounts presented by the company and the nature of all expenditures going to reduce the net earnings are subject to investigation;[6] but if the company stipulates that certain expenditures are not to be considered as affecting the value of its property or as having any bearing on the rates of fare it may charge, an investigation of such expenditures is no longer material and may not be required.[7] The commission is not bound, in its estimate of value, by the conclusion reached in an action previously brought in the federal court against a city, in which the street railroad company whose rates were involved was operated.[8]

A finding of the commission that the valuation of a street railroad's property is upward of a specified sum, not objected to by the company, may under certain circumstances, constitute a sufficiently definite valuation for the purpose of ascertaining a rate base.[9] It has been held, however, that in the absence of statutory requirement therefor, a definite appraisal of the value of the railroad company's property is not essential to the determination of the reasonableness of a proposed increase in rates,[10] at least, where the commission can determine such value from other evidence.[11]

In proceedings before a commission to annul increased rates, in the absence of a showing that the lower rates were reasonable and compensatory, the fact that such rates had been in force for some years raises no presumption that an increase therein is unreasonable;[12] the carrier is entitled to have the commission pass on the merits of the question whether the increased rates are unreasonable under the conditions then existing,[13] and where in such proceedings the commission does not find that the increased rates are unreasonable or unjust, it is erroneous for it to vacate them and to require the restoration of the preexisting lower rates merely on the ground that the carrier has failed to overcome the presumption that the increase was unreasonable.[14]

1. Mo.—State ex rel. and to Use of City of St. Louis v. Public Service Commission, 34 S.W.2d 507, 326 Mo. 751.

2. N.Y.—Yonkers R. Co. v. Maltbie, 274 N.Y.S. 535, 242 App.Div. 319, motion granted 195 N.E. 191, 266 N.Y. 542.

3. U.S.—Southern Pac. Co. v. Bartine, D.C.Nev., 1 F.2d 323.

4. Minn.—State v. Minneapolis Street Ry. Co., 191 N.W. 1004, 154 Minn. 401.

Inspection of stock books

The court properly directed a corporation holding the stock of a street railway company and the officers and directors of the holding company to permit the city to inspect the stock books of the holding company, since the railroad and warehouse commission and the city should have considerable latitude in the pursuit of such information.—State v. Minneapolis Street Ry. Co., 191 N.W. 1004, 154 Minn. 401.

5. N.Y.—Yonkers R. Co. v. Maltbie, 296 N.Y.S. 411, 251 App.Div. 204.

Appraisal not supported by inventories

That an appraisal of a railroad's properties, offered in evidence by such company in a proceeding before the commission, did not include the inventories on which it was based, did not make such proof inadmissible.—City of New York v. Nixon, 183 N.Y.S. 6, 111 Misc. 224.

6. Minn.—State v. Minneapolis Street Ry. Co., 191 N.W. 1004, 154 Minn. 401.

7. Minn.—State v. Minneapolis Street Ry. Co., supra.

8. Wis.—Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin, 172 N.W. 746, 169 Wis. 421.

9. Pa.—City of Philadelphia v. Public Service Commission, 84 Pa.Super. 135.

10. N.J.—O'Brien v. Board of Public Utilities Com'rs, 106 A. 414, 92 N.J.Law 587, affirming 105 A. 132, 92 N.J.Law 44.
Pa.—City of Philadelphia v. Public Service Commission, 84 Pa.Super. 135

Increase to meet changed conditions

Where increase in rate of trolley company over former reasonable charge is only sufficient to prevent deficit in operations because of new and extraordinary conditions, no useful purpose can be served by a valuation of all its property.—O'Brien v. Board of Public Utilities Com'rs, 106 A. 414, 92 N.J.Law 587, affirming 105 A. 132, 92 N.J.Law 44.

11. Pa.—City of Philadelphia v. Public Service Commission, 83 Pa.Super. 8

12. N.Y.—Peo. v. Public Service Commn., 109 N.E. 252, 215 N.Y. 241, affirming 145 N.Y.S. 513, 159 App.Div. 546.

13. N.Y.—Peo. v. Public Service Commn., 145 N.Y.S. 513, 159 App.Div. 546, affirmed 109 N.E. 252, 215 N.Y. 241.

14. N.Y.—Peo. v. Public Service Commn., 145 N.Y.S. 513, 159 App.Div. 546, affirmed 109 N.E. 242, 215 N.Y. 241

Reason for rule

In view of the regulations imposed on railroad companies and the public reports required of them, it is improper to assume that they have peculiar and hidden knowledge of their affairs, and so should have the burden of justifying an increase of rates, instead of those objecting having the burden of proving that the increase was not required.—Peo. v. Public Service Commn., 109 N.E. 252, 215 N.Y. 241, affirming 145 N.Y.S. 513, 159 App.Div. 546.

The order of the commission, to be valid, must be within the issues framed on the hearing before it.[15]

The commission's rejection of a requested tariff for street railway fares is a final determination.[16]

c. Particular Regulations

(1) Sale of mileage books
(2) Free transportation of specified officers
(3) Single fare for continuous trip; transfers
(4) Other regulations

(1) Sale of Mileage Books

Statutes requiring the sale of mileage books at less than the regular fare are invalid, except as to railroad companies organized subsequent to their enactment, but in so far as they are valid, the carrier may be subjected to a penalty for refusal to issue such books or to accept them for transportation.

A statute requiring a railroad company to issue mileage books at less than the regular fare has been held invalid as a discrimination in favor of those who purchase such tickets, and as depriving the company of its property without due process of law, and without equal protection of the laws,[17] particularly where such mileage books are required to be sold to one class of persons at a lower rate than to another class;[18] but such a statute has been held valid as applied to railroad companies organized subsequent to its enactment.[19] Where the statute so provides, the public service commission has the power to increase the maximum mileage book rates.[20]

In so far as the state may validly require the sale of mileage tickets, it may subject a railroad company to a penalty for a refusal to sell such a ticket, or to accept it for transportation when issued;[21] and any conditions as to the exercise of the right of issuance of the mileage book or of its acceptance for transportation not warranted by the terms of the statute are not enforceable by the carrier, and a noncompliance by the passenger therewith constitutes no defense to an action to recover a penalty for a violation of the statute.[22] Where, however, a demand is made for a mileage book, as provided for by a statute which has been superseded by a later statute, a railroad company may, without subjecting itself to a penalty, refuse to issue it.[23]

(2) Free Transportation of Specified Officers

A railroad may be required to transport specified public officers free of charge, but there is authority to the contrary.

Although there is some authority to the contrary,[24] it has been held that a statute requiring street railroads to transport firemen or police officers free of charge is a valid exercise of the police power of the state, since policemen are frequently required to be on street cars in the execution of their duties as such,[25] and that such a provision

15. U.S.—Southern Pac. Co. v. Bartine, D.C.Nev., 1 F.2d 323.

Rates on branch line

On hearing before railroad commission to determine reasonableness of passenger rates, where issue framed by commission itself involved only question of reducing rates over main line to three cents and over a particular branch to four cents, an order reducing rates on the main line and the branch lines to three cents was broader than the issue involved, and invalid.—Southern Pac. Co. v. Bartine, D.C.Nev., 1 F.2d 323.

16. U.S.—International Ry. Co. v. Prendergast, D.C.N.Y., 29 F.2d 296.

17. U.S.—Lake Shore, etc., R. Co. v. Smith, 19 S.Ct. 565, 173 U.S. 684, 43 L.Ed. 858, reversing 72 N.W. 328, 114 Mich. 460.
10 C.J. p 671 note 92.

18. U.S.—Lake Shore, etc., R. Co. v. Smith, supra.
10 C.J. p 671 note 94.

19. N.Y.—Parish v. Ulster, etc., R. Co., 85 N.E. 153, 192 N.Y. 353—Minor v. Erie R. Co., 64 N.E. 454, 171 N.Y. 566, affirming 76 N.Y.S. 513, 73 App.Div. 621, and appeal dismissed 26 S.Ct. 744, 199 U.S. 613, 50 L.Ed. 333.
10 C.J. p 671 note 93.

20. **In New York**

(1) The rule stated in the text has been enunciated—Peo v. Public Service Commn., 156 N.Y.S. 1065, 171 App.Div. 607—10 C.J. p 672 note 95.

(2) The commission's power to fix such maximum in excess of the maximum fixed by the Railroad Law is not affected by a provision in the Public Service Commission Law empowering the commission to fix maximum rates generally, notwithstanding a higher rate, fare, or charge was theretofore authorized by the statute.—Peo. v. Public Service Commn., supra.

(3) Power of commission to fix rates in excess of statutory maximum generally see supra this section subdivision b.

21. N.Y.—Watson v. New York, etc., R. Co., 54 N.Y.S. 201, 24 Misc. 628.
10 C.J. p 672 note 97.

Penalty cannot be imposed for refusal to sell a mileage ticket, as required by a statute, when applied to railroad companies organized prior to its enactment, since such statute can have no valid application thereto—Beardsley v. New York, etc., R. Co., 56 N.E. 488, 162 N.Y. 230, reversing 44 N.Y.S. 175, 15 App.Div. 251, affirming 40 N.Y.S. 1077, 17 Misc. 256.

22. N.Y.—Trolan v. New York Cent., etc., R. Co., 52 N.Y.S. 257, 31 App. Div. 320.
10 C.J. p 672 note 98.

23. N.Y.—Watson v. New York, etc., R. Co., 54 N.Y.S. 201, 24 Misc. 628.

24. N.Y.—Wilson v. United Tract. Co., 76 N.Y.S. 203, 72 App.Div. 233.

Reason for rule

A statute requiring firemen and policemen to be carried free is unconstitutional as depriving the company of property without due process of law, for, although it is conceded that public safety requires policemen and firemen to be carried on street railroad cars, such safety will not be promoted by their carriage free of charge—Wilson v. United Traction Co., 76 N.Y.S. 203, 72 App.Div. 233.

25. U.S.—Sutton v. State of New Jersey, N.J., 37 S.Ct. 508, 244 U.S. 258, 61 L.Ed. 1117.

is not the taking of property without just compensation.[26] An ordinance requiring the free transportation of mail carriers, which is effective as a contract between the municipality and the railway, is not affected in its operation by a subsequent state enactment forbidding railroads from carrying certain persons free.[27] A municipality has discretion to amend a franchise requiring such free transportation and eliminate from its operation the transportation of specified officers.[28] Under an ordinance requiring a street railroad company to furnish free transportation to specified officers of the city on the mayor's application, the mayor cannot exercise arbitrary power in requesting such transportation, nor can the company exercise arbitrary power in responding to such request.[29] A statute requiring a railroad company to transport public messengers free of charge does not include a county treasurer with state funds to be paid into the treasury of the state.[30] A statute requiring a state official to be carried free by a railroad includes the secretary to the governor whose duties are prescribed by statute.[31] An order of the public service commissioners that the members of the state water supply commission shall receive free transportation over all railroads operated in the state is not an exercise of the police power.[32]

(3) Single Fare for Continuous Trip; Transfers

Where the regulation so provides, a carrier may be required to furnish a continuous ride over particular lines for a single fare of a specified amount; but particular regulations of this nature have been held not to require transportation, for the single fare, beyond the specified terminus or to the terminus and back.

Where a statute, commission regulation, or ordinance so provides, a street railroad may be restricted to the collection of a single fare, of a stated amount, for a continuous ride over the street railroad company's lines within certain geographical limits,[33] and to a specified additional fare for

Ala.—Montgomery Light & Traction Co. v. Avant, 80 So. 497, 202 Ala 404, 3 A.L.R. 384.
10 C.J. p 668 note 45.

Reserved power to alter charter

A statute requiring that street railways grant free transportation to city detectives is a valid exercise of the state's power, especially under its reserved power to alter the charter of a railway company, in its discretion.—Sutton v. State of New Jersey, N.J., 37 S.Ct. 508, 244 U.S. 258, 61 L.Ed. 1117.

When in uniform

(1) An ordinance requiring the free transportation of members of the police force "when in uniform" includes a plain clothes man wearing only the badge prescribed by his superior.—Montgomery Light & Traction Co. v. Avant, 80 So. 497, 202 Ala. 404, 3 A.L.R. 384.

(2) Under ordinance requiring traction company to transport free members of police force and fire department "when in uniform," the rule of contemporaneous construction by company and city officers as to the badge of a plain clothes man being his uniform would have a bearing in construing the words "when in uniform."—Montgomery Light & Traction Co. v. Avant, supra.

(3) Construction of ordinance requiring traction company to furnish free transportation to police officers when in uniform, construed to entitle a plain clothes man wearing only the badge prescribed by his superior to free transportation, did not abrogate any contract right secured against impairment by the state or federal constitution; nor does it violate a state constitutional provision limiting the duration of street railroad franchises.—Montgomery Light & Traction Co. v. Avant, supra.

26. N.J.—State v. Sutton, 84 A. 1057, 83 N.J.Law 46, affirmed 94 A. 788, 87 N.J.Law 192, and affirmed Sutton v. State of New Jersey, 37 S.Ct. 508, 244 U.S. 258, 61 L.Ed. 1117

27. Ohio.—City of Steubenville v. Steubenville, East Liverpool & Beaver Valley Traction Co., 13 Ohio App. 493.

28. Ark.—Little Rock Ry. & Electric Co. v. Dowell, 142 S.W. 165, 101 Ark. 223, Ann.Cas.1913D 1086.

29. Ala.—Montgomery Light & Traction Co. v. Avant, 80 So. 497, 202 Ala 404, 3 A.L.R. 384.

30. Cal.—Pfister v. Central Pac. R. Co., 11 P. 686, 70 Cal. 169, 59 Am. R. 404.

31. N.J.—Pennsylvania R. Co. v. Herrmann, 96 A. 665, 88 N.J.Law 526.

32. N.J.—Delaware, etc., R. Co. v. Board of Public Utilities Comrs., 88 A. 849, 85 N.J.Law 28

33. U.S.—Puget Sound Traction, Light & Power Co. v. Reynolds, Wash., 37 S.Ct. 705, 244 U.S. 574, 61 L.Ed. 1325, affirming D.C., 233 F. 371.
N.Y.—People ex rel Brooklyn City R. Co. v. Nixon, 184 N.Y.S. 369, 193 App.Div. 746, affirmed 130 N.E. 915, 230 N.Y. 614.
10 C.J. p 669 note 69, p 670 notes 74–87.

Through service on lines within single system

Street railroad company, operating number of lines as part of single system, may be required by commission order to establish through service on payment of single fare.—Puget Sound Traction, Light & Power Co. v. Reynolds, Wash., 37 S.Ct. 705, 244 U.S. 574, 61 L.Ed. 1325, affirming, D.C., 233 F. 371

Limitation of fare for service as connecting carrier

(1) A prohibition against charging more than five cents for five miles or less, contained in one of the grants of a traction company which operates three different lines, is limited to its services as a connecting carrier, and does not apply to the carriage of passengers over its several lines.—Raynor v. New York, etc., Tract. Co., 151 N.Y.S. 417, 166 App.Div. 927, reversing 149 N.Y.S. 151, 86 Misc. 201.

(2) Where such company owns and operates several lines under several grants, it cannot be considered as a connecting carrier when transporting passengers from one of its lines to another.—Raynor v. New York, etc., Tract. Co., supra.

(3) Where such company can charge ten cents between two points, it may charge that amount for transportation originating on another of its own lines, although it is considered as operating connecting lines.—Raynor v. New York, etc., Tract. Co., supra.

Fare paid in paper

If a city railroad company secures a charter allowing it to receive a fare of five cents, at a time when specie is the lawful currency, and subsequently the government issues a paper currency, which enhances the value of the original fare, the company will be justified in advancing

distances beyond such limits;[34] or it may be required to sell a certain number of tickets for such transit for a specified sum.[35] A statute imposing a single fare limitation for transportation to points within a city does not apply where a city makes an extraordinary extension of its geographical limits.[36] Such single fare regulations apply only to the particular railroad corporations,[37] and lines of road,[38]

the fare to six cents, when paid in paper—Moneypenny v. Sixth Ave. R Co 30 N Y Super 328, 4 Abb Pr,N S, 357, 35 How Pr. 452.

Penalty for violation

Section 101 of the Railroad Law requiring a specified single fare to be charged for a continuous trip within city limits provides no penalty for a violation thereof but the right to recover such penalty must be sought under § 39 which provides for the forfeiture of fifty dollars to the aggrieved party in case of an overcharge—Bull v. New York City R Co., 85 N.E. 385, 192 N.Y. 361, 19 L.R.A.,N.S., 778, affirming 106 N Y S 378, 121 App.Div. 582—Baron v. New York City R. Co., 105 N Y S. 258, 120 App Div 134, reversing 102 N.Y.S 746, 52 Misc 581.

Contrary rule of carrier

Under a statute requiring street railroads to carry passengers for a single fare between any two points on roads operated under contract as a continuous line, a passenger is entitled to transfer privileges despite a rule of the street railroad company forbidding the issuing of transfers to points in the easterly parts of a city from any point west of a named street.—Ritter v. International Ry. Co., 159 N.Y S. 870.

34. N Y.—People ex rel Brooklyn City R. Co. v. Nixon, 184 N.Y S 369, 193 App Div. 746, affirmed 130 N.E 915, 230 N.Y. 614.
10 C J. p 669 note 70.

Annexation or consolidation

A street railroad extending through a city and a town, having under its franchises the right to collect a fare of a stated amount in each is not affected as to such right by the annexation of the town to the city, or by the subsequent consolidation of the city with another city.—People ex rel Brooklyn City R Co v. Nixon, 184 N.Y S 369, 193 App Div. 746, affirmed 130 N.E. 915, 230 N.Y 614

35. Mass—City of Fall River v Public Service Commission, 122 N E. 406, 232 Mass. 329.
Wis.—Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin, 172 N W. 746, 169 Wis. 421
10 C J. p 669 note 71, p 672 note 4 [b].

36. N.Y—Willis v. City of Rochester, 157 N Y.S 815, 93 Misc. 239, affirmed 159 N Y S 1150, 173 App. Div 957.

37. **Street surface railroads incorporated under statute**

(1) A statute imposing a single fare limitation on corporations operating street railroads which have been incorporated within its provisions applies only to street surface railroads and does not apply where a surface railroad leases the lines of an elevated railroad or steam surface railroad—Peo v Brooklyn Heights R Co, 79 N E 838, 187 N. Y. 48

(2) Such a statute does not apply to railroad companies which are not constructed and operated within its terms.—People ex rel Brooklyn City R Co. v Nixon, 184 N.Y S 369, 193 App Div. 746, affirmed 130 N E 915, 230 N Y. 614.
10 C.J. p 670 note 80.

38. **Fare beyond terminus**

(1) A municipality may require as a condition precedent that the purchaser of a street railroad franchise shall transport passengers for one fare to and from points beyond one of the termini of the proposed route over the line of other companies.—Peo. v. Barnard, 18 N.E 354, 110 N.Y. 548, reversing 48 Hun 57.

(2) But, where a traction company contracted with a city by acceptance of an ordinance granting permission to maintain its railroad, conditioned that specified rates of fare should be charged, and no words were used indicating that the parties were contracting for any other corporation, its obligation was to carry passengers for the stipulated fares only over its own lines.—Reed v. Trenton, 85 A. 270, 80 N.J.Eq 503.

Connecting and branch lines

(1) A statute imposing a single fare for a continuous ride over a carrier street railroad's line and any connecting branch or extension thereof, refers to transportation over a continuous and connected line of road composed of a main line and tributary lines.—Bull v New York City R. Co, 85 N E. 385, 192 N Y. 361, 19 L R.A.,N S, 778, affirming 106 N.Y S. 378, 121 App Div. 582—King v Nassau Electric R Co, 112 N Y S 589, 128 App Div. 130—10 C.J p 670 note 75

(2) Such statute also does not apply where two lines owned by the same company do not connect, that is, do not run into each other, but on the contrary cross at right angles—O Connor v. Brooklyn Heights R. Co., 108 N Y S 471, 123 App Div 784—Baron v. New York City R Co, 105 N Y S 258, 120 App Div. 134, reversing 102 N Y.S. 746, 52 Misc 581.

Leased lines

(1) A statutory provision requiring a single fare for passage over a main line and any branch or extension thereof does not apply to roads operated under a lease or contract, but only to the main line and branches thereof built by the carrying company itself—O'Connor v Brooklyn Heights R. Co, 108 N Y S. 471, 123 App Div 784—Baron v. New York City R. Co, 105 N Y S 258, 120 App. Div. 134, reversing 102 N Y S. 746, 52 Misc. 581.

(2) It has been held, however, under the same statute, that a street railroad company organized under the statute could not charge more than the specified fare within the city limits, whether it operated its own lines, or leased other lines whose owners had a right to charge a higher rate.—McNulty v. Brooklyn Heights R Co, 66 N Y S. 57, 31 Misc 674.

(3) The single fare limitation may be imposed over a leased line under another statutory provision that, where one street surface railroad company acquires by lease or otherwise the right to operate another street surface railroad, after the passage of such statutes, it is required to carry a passenger not only over its own road but also over the connecting leased road operated by it within the limits of a city or village for a single fare—Bull v. New York City R Co, 85 N E 385, 192 N. Y 361, 19 L R A,N S, 778, affirming 106 N Y S. 378, 121 App Div 582—People v Brooklyn Heights R Co, 79 N E 838, 187 N Y. 48.
10 C J. p 670 note 78.

Controlled road

Under a statute applying a single fare limitation to a ride over a railway's road or roads, or any connecting branch thereof, "operated by it or under its control," the control referred to means the control of the operation of the road and not merely the control of the corporation or individuals who operate it by reason of the ownership of a majority stock interest—Senior v. New York City R Co., 97 N Y S. 645, 111 App Div. 39, affirmed 80 N E 1120, 187 N.Y. 559—10 C J p 670 note 74

Subsequent extension of lines

(1) An ordinance fixing a maximum fare for street railroad companies has no application to connecting lines afterward constructed by such roads.—Ellis v. Milwaukee City R. Co, 30 N W. 218, 67 Wis. 135, 58 Am.R. 858.

(2) But under a statute so providing, the single fare may apply to an extension of the railroad's lines subsequent to the statute, if the

included within their terms, and do not restrict other railroads or lines from charging the rate of fare provided in their charters.[39] A regulation requiring a street railroad company to charge but a single fare for a continuous ride over its lines does not entitle a passenger to ride to a terminus and back again for a single fare.[40] A franchise given an interurban line, providing that a continuous ride from a town to a particular street in a city be furnished for a single fare of five cents, does not entitle passengers to go to any particular place of destination on such street or to be transported along the street after it has been reached.[41]

(4) Other Regulations

Various other regulations as to passenger rates have been held to be valid and have been construed.

A statute dividing railroad companies into classes according to the length of the roads operated or the amount of business done, and fixing a limit for passenger fares for each class, does not deny a corporation the equal protection of the laws.[42] Moreover, the legislature may, if it sees fit, establish rates for each railroad separately, and, as different roads may reasonably require different rates, certain roads may be exempted or excluded from a statute fixing rates.[43]

right to construct such branch or extension was acquired under its provisions.—Mendoza v. Metropolitan St. R. Co., 64 N.Y.S. 745, 51 App.Div. 430, reversing 62 N.Y.S. 580, 48 App.Div. 62.

"Existing railroads"

Under a contract between the city of New York and a railway company, providing for a five cent fare over a continuous line to be constructed but until completion of such line, allowing same fare for continuous ride over "existing railroads" to be charged that was charged at the end of the fiscal year prior to the contract, the railway company may charge the same amount, ten cents, as it formerly did to a particular point over existing railroads, although a portion of such line is furnished by itself to complete the continuous route, since such portion is an "existing" railway within the definition of the contract.—Merksamer v. Garrison, 181 N.Y.S. 197, 111 Misc. 195.

39. Leased lines not within statute

(1) Where the statute requires that only street surface railroads incorporated under its provisions maintain a single fare of five cents, such fare need not be maintained over a leased elevated road, and the lessee company may charge in addition to the single fare of five cents over its own road, the fare which by its charter the leased elevated road was entitled to charge.—Peo. v. Brooklyn Heights R. Co., 79 N.E. 838, 187 N.Y. 48.

(2) Likewise, the statute does not restrict to a single fare the charge over a street railroad and a connecting steam surface line, and the latter may additionally impose the fare provided for by its charter.—Peo. v. Brooklyn Heights R. Co., supra—Barnett v. Brooklyn Heights R. Co., 65 N.Y.S. 1068, 53 App.Div. 432.

(3) Further, the additional fare over the steam surface line may be exacted, notwithstanding that the street railroad company leasing such line changes the motive power and operates it as an electric surface railroad.—Peo. v. Brooklyn Heights R. Co., supra.

(4) A street railroad company which leases a road organized prior to the date specified in the statute requiring a single fare for any continuous line organized after such date, is not required to maintain a single fare over both its own and the leased line but may exact an additional charge for transportation over the latter line, notwithstanding the two are operated as a connected line.—Barnett v. Brooklyn Heights R. Co., supra.

Right unaffected by act of lessee

A street railroad company, not subject to a statute imposing a single fare limitation, on termination of its lease of a line on which it had right under its charters to charge two fares, resumes possession with such right unaffected by the fact that its lessee had voluntarily charged only one fare thereon.—People ex rel. Brooklyn City R. Co. v. Nixon, 184 N.Y.S. 369, 193 App.Div. 746, affirmed 130 N.E. 915, 230 N.Y. 614.

Effect of extensions

Right of a street railroad company, excepted from the operation of a statute imposing a single fare limitation, to charge on one line two fares as provided by its franchises, was not affected by extension of other lines under consents by the city providing for one five-cent fare over all its lines, "unless a rate . . . in excess . . . may be lawfully charged," in view of a statutory provision permitting a railroad not within the act, which builds extensions under the act, to charge its authorized rate prior to the extensions.—People ex rel. Brooklyn City R. Co. v. Nixon, 184 N.Y.S. 369, 193 App.Div. 746, affirmed 130 N.E. 915, 230 N.Y. 614.

40. Pa.—Wimmer v. Union Tract. Co., 12 Pa.Super. 467.

Intent of ordinance

An ordinance that provides that the rate of fare "shall not exceed the present fare" for a single continuous ride, shows no intention to diminish the amount of fare collectable, by requiring a ride to the terminus and back for a single fare, but only to prevent a subsequent increase.—Wimmer v. Union Tract. Co., 12 Pa. Super. 467.

41. Mich.—Zilwaukee Tp. v. Saginaw Bay City Ry. Co., 131 N.W. 37, 213 Mich. 61.

42. Ark.—St. Louis, etc., R. Co. v. Gill, 15 S.W. 18, 54 Ark. 101, 115, 11 L.R.A. 452, affirmed 15 S.Ct. 484, 156 U.S. 649, 39 L.Ed. 567.
10 C.J. p. 667 note 39.

43. Mich.—Groesbeck v. Detroit United Ry., 177 N.W. 726, 210 Mich. 227.
10 C.J. p. 667 note 40.

Statute not invalid as discriminatory

A provision of a statute, excepting from the rate thereby fixed passenger carriers earning over eight thousand dollars per mile, when construed with the next provision, that carriers earning more than ten thousand dollars per mile can charge only two cents per mile instead of two and one-half cents, as fixed by another section of the act, does not exclude a carrier theretofore earning eight thousand dollars per mile from all the provisions of the act, but only from the provision authorizing the two and one-half-cent rate, and as so construed is not void for unreasonable discrimination.—Groesbeck v. Detroit United Ry., 177 N.W. 726, 210 Mich. 227.

Earnings for preceding year

A statutory provision to the effect that in the future whenever passenger earnings of certain railways shall increase to equal ten thousand dollars per mile the carrier can charge only two cents per mile, applies to a carrier whose earnings for the year preceding the enactment exceeded ten thousand dollars per mile.—Groesbeck v. Detroit United Ry., 177 N.W. 726, 210 Mich. 227.

Hacks. An ordinance fixing the rate of fare for the hire of hacks is within the legislative authority of a municipality authorized to regulate such conveyances,[44] and it has been held that such rate of fare includes compensation for time and trouble in going for the passenger as well as in carrying him to his point of destination, and that the driver cannot make a special contract for a higher rate of fare after the passenger has entered or begun to enter the carriage.[45] An ordinance regulating public hackmen is not discriminatory because it applies only to those engaged in transporting passengers for hire who solicit business on the streets.[46]

Reduced fare to pupils. Where a statute or ordinance so provides, a street railroad company may be required to transport school children at a fare lower than the regular fare.[47] The words "pupils" and "schools" as used in such a statute or ordinance are of broad significance and may, by the connection in which they are used, be held to include students in higher institutions of learning;[48] but, ordinarily, and without something to indicate that a wider meaning was intended to be given to such words, they will not be taken to include students of higher institutions of learning, such as colleges, universities, or institutions for the teaching of trades, professions, or business.[49] The term, "public schools," as used in such a statute, has been held to include a parochial school maintained by private benevolence.[50]

Special rates to soldiers. According to some authority, a statute requiring railroads to give special rates to militiamen traveling on orders does not violate a constitutional provision forbidding discrimination in rates, and is not otherwise invalid under the state and federal constitutions.[51] By other authority, such a statute is void as denying to the railroad companies the equal protection of the laws guaranteed by the fourteenth amendment to the constitution of the United States.[52] Also, it has been held that such a statute violates a constitutional provision that the legislature shall pass laws to prevent unjust discrimination in passenger fares,[53] although it is not in contravention of a provision forbidding discrimination between, or in favor of, transportation companies and individuals.[54]

Charge for fraction of mile. Where a carrier is authorized to make certain charges per mile, the same fare may usually be charged for a part of a mile as is charged for a whole mile;[55] but it has been held that a charge cannot be made for a fraction of a mile unless it is so large a fraction as to make a charge of one cent or more not in excess of the rate per mile fixed by the statute.[56]

44. Ala.—Bray v. State, 37 So. 250, 140 Ala. 172
N.Y.—Yellow Taxicab Co. v Gaynor, 143 N.Y.S. 279, 82 Misc. 94, affirmed 144 N.Y.S. 299, 494, 159 App.Div. 893.
10 C.J. p 668 note 54.
Regulation of fares of motor-driven vehicles see C.J.S. title Motor Vehicles § 54, also 42 C.J. p 656 notes 8–20.

45. Mass.—Com. v. Duane, 98 Mass 1

46. N.Y.—Yellow Taxicab Co. v. Gaynor, 143 N.Y.S. 279, 82 Misc. 94, affirmed 144 N.Y.S. 299, 159 App.Div. 893.

47. Ohio—City of Cincinnati v. Cincinnati Traction Co., 23 Ohio N.P., N.S., 585.
10 C.J. p 670 note 88.

Statute held not violated

An ordinance increasing street car fares from five to six cents did not violate a statute providing that no franchise be modified or changed at the railroad's request unless it consents to the insertion in its franchise of a provision for the transportation of school children for not more than three-fifths of the fare charged adults, where the original franchise required school children to be transported for two and one-half cents, and the amending ordinance provided that this fare should remain unchanged.—Long v. City of Shreveport, 91 So. 825, 151 La. 423.

48. Mass.—Clinton v. Worcester Cons. St. R. Co., 85 N.E. 507, 199 Mass 279
Va.—Northrop v. Richmond, 53 S.E. 962, 105 Va. 335
10 C.J. p 671 note 89

49. La.—Long v. City of Shreveport, 91 So. 825, 151 La. 423.
10 C.J. p 671 note 90.

Students eighteen years of age or over, attending business colleges, or the junior and senior classes of other colleges, cannot be considered "school children" within a statute requiring any street railway requesting any modification of its franchise to agree to transport school children for three-fifths of the fare charged adults.—Long v. City of Shreveport, 91 So. 825, 151 La. 423.

50. Okl.—Oklahoma R. Co. v. St. Joseph's Parochial School, 127 P. 1087, 33 Okl. 755

Catholic convent schools

Under an ordinance requiring issuance of tickets on traction lines to children of specified ages attending "public or parochial" schools, the word "parochial" applies to convent schools and high schools maintained by the catholic church.—City of Cincinnati v. Cincinnati Traction Co., 23 Ohio N.P.,N.S., 585.

51. Minn.—State v. Chicago, etc., R. Co., 137 N.W. 2, 118 Minn. 380 41 L.R.A.,N.S., 524, Ann.Cas.1913E 494

52. Kan.—In re Gardner, 113 P. 1054, 84 Kan. 264, 33 L.R.A.,N.S., 956.

53. Mo.—State v. Missouri, etc., R. Co., 172 S.W. 35, 262 Mo. 507, L.R.A.1915C 778, Ann.Cas.1916E 949.
10 C.J. p 668 note 52

54. Mo.—State v. Missouri, etc., R. Co., supra.

55. Ark.—Jonesboro, etc., R. Co. v. Brookfield, 112 S.W. 977, 87 Ark. 409
N.J.—Hunter v. Erie R. Co., 56 A. 139, 70 N.J.Law 101.
Ohio—Cleveland, etc., R. Co. v. Wells, 62 N.E. 332, 65 Ohio St. 313, 58 L.R.A. 651.
10 C.J. p 667 note 41.

56. Mich.—Chamberlain v. Lake Shore, etc., R. Co., 81 N.W. 339, 122 Mich. 477—Zagelmeyer v. Cincinnati, etc., R. Co., 60 N.W. 436, 102 Mich. 214, 47 Am.S.R. 514.
10 C.J. p 668 note 42.

Fare nearest certain integer. Under a statute so providing, a carrier may charge that multiple of five which is nearest the product reached by multiplying the distance by the rate, whether it is above or below the actual fare;[57] and in case the fare is equally distant from the multiple next above and the one next below, either may be charged.[58]

Local and through rates. Under an act which requires transportation at "fair and reasonable rates," the carrier is not bound to transport local passengers at through rates, if the local rates are "fair and reasonable."[59]

Maximum rate. Subject to the limitation that the rate fixed must be reasonable and fair, as already discussed in subdivision a of this section, the legislature or the commission may fix a maximum rate beyond which the carrier cannot charge a passenger for transportation, and such maximum rate when fixed is binding on the courts in their adjudications as well as on the parties in their dealings;[60] and such power is not surrendered so as to leave it to be determined by the courts, free of all legislative control, by statutory authority to the company "from time to time to fix, regulate," etc., charges.[61] A commission order fixing the maximum ticket rate and the maximum train rate each at the same amount per mile is not, because of the failure to discriminate between the two, unreasonable and void.[62] The right granted a street railroad to operate a line on its agreement not to charge a fare in excess of a stated amount gives it the right to charge the maximum.[63]

Minimum rate. Under some statutes or regulations thereunder so providing, a minimum amount may be charged where the regular fare for the distance traveled is less than that amount;[64] but such minimum charge cannot be made for a fraction of a journey for which a passenger's mileage book falls short.[65]

Authorized or actual charges. A statute permitting a street railroad to charge the rates authorized by a prior franchise until such rates are changed by commission empowers the railroad to charge fares for which its franchise gave authority, notwithstanding that such fares were not collected by it before it became subject to the statute.[66]

§ 583. Municipal Regulation

a. In general
b. Validity and effect of franchise provision or agreement for fixed rate
c. Power of state or commission to change rates fixed by municipality

a. In General

A municipality may regulate the rates of fare of railroads within its limits only if the authority to do so has been clearly granted to it by the state, but, although the right conferred on it to grant franchises does not confer the power to prescribe rates, it may fix certain rates as a condition to its grant. Rates fixed by the municipality must be reasonable and not unjustly discriminatory.

As already stated in § 582, the power of regulation of street railroad rates is vested in the state, and a municipality has no power of regulation of such rates independent of that conferred on it by the sovereign power.[67] Consequently, in

57. Ohio—Cleveland, etc., R Co v. Wells, 55 N.E. 827, 61 Ohio St. 268, affirming 17 Ohio Cir Ct. 201, 9 Ohio Cir.Dec. 527—Heaton v. Cincinnati, etc., R. Co., 2 Ohio S. & C.P. 590, 1 Ohio N.P. 188, 433.

58. Ohio.—Cleveland, etc, R. Co. v. Wells, 55 N.E. 827, 61 Ohio St. 268, affirming 17 Ohio Cir.Ct. 201, 9 Ohio Cir.Dec, 527.

59. U S—Union Pac. R Co. v U. S, 20 Ct Cl. 70, affirmed 6 S.Ct. 772, 117 U.S. 355, 29 L.Ed. 920.
10 C.J. p 669 note 63.

60. Ga—Georgia Public Service Commission v. Atlanta & W. P. R. Co., 139 S.E. 725, 164 Ga. 822.
10 C.J. p 669 note 67.

Railroads within statute

(1) A railroad owned, controlled, or operated by another, but not connecting therewith, is not a part thereof, within statute fixing maximum rates for passenger transportation—Coal & Coke Ry Co. v. Conley, 67 S.E. 613, 67 W.Va. 129.

(2) Electric railroad incorporated under Railroad Act retains such character, and hence is subject to a statute fixing the maximum rate for companies within such act at two cents per mile.—East St. Louis & S. Ry. Co. v. Brundage, D.C.Ill., 10 F.2d 830.

61. U.S.—Stone v. New Orleans, etc., R. Co., Miss., 6 S.Ct. 349, 116 U.S. 352, 29 L.Ed 651—Stone v. Illinois Cent. R. Co., Miss., 6 S.Ct. 348, 388, 1191, 116 U.S. 347, 29 L Ed. 650—Stone v. Farmers' L. & T. Co., Miss., 6 S Ct. 334, 388, 1191, 116 U S 307, 29 L.Ed. 636.

62. Miss.—Illinois Cent. R. Co. v. Mississippi Railroad Commission, 77 So. 314, 116 Miss. 484.

63. N Y—People ex rel. Brooklyn City R Co v. Nixon, 184 N Y S. 369, 193 App Div. 746, affirmed 130 N.E 915, 230 N Y. 614.

64. Fla.—Louisville, etc., R. Co. v. Berry, 50 So. 579, 58 Fla. 300.
S C.—Kibler v. Southern R. Co., 40 S.E. 556, 62 S.C. 252.
10 C.J. p 669 note 64.

65. Fla.—Louisville, etc., R. Co. v. Berry, 50 So. 579, 58 Fla 300.
10 C J. p 669 note 65.

66. Minn—Anderson v. St. Paul City Ry. Co., 188 N.W. 286, 152 Minn. 213.

Interurban passengers

Under the rule stated in the text, a street railroad, given the right by its former franchise to collect a fare from any passenger over any part of its railway, could collect a fare from interurban passengers to or from a so-called midway district, although no such fare was collected before the street railroad became subject to the act.—Anderson v. St. Paul City Ry. Co., 188 N.W. 286, 152 Minn 213.

67. U.S—City of Covington, Ky., v. Cincinnati, N. & C. Ry. Co., C.C.A. Ky, 71 F.2d 117, certiorari denied Cincinnati, N. & C. Ry Co. v. City of Covington, Ky, 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702, and City of

the absence of a grant of authority from the state, a municipality cannot interfere with a street railroad company in the regulation of its rates of fare under express statutory authority.[68] However, where the legislature has not given exclusive authority over rates to a state regulatory body,[69] and has expressly or impliedly delegated this power to a municipality, it may regulate the rates of passenger fares to be charged by street railroad companies within its jurisdiction,[70] subject to the superior regulatory powers of the state or its authorized agency, as will hereinafter be considered in subdivision c of this section. Such power of the municipality is not subject to judicial control unless it is unlawfully or arbitrarily exercised,[71] and the question whether a provision in the franchise granted a street railroad company by a city, which fixes the maximum fares, is valid is one for the courts and not for the railroad or public service commission.[72]

As respects municipal regulation, the important question is whether in a given case power has in fact been granted to the municipality by the state; the authority must be contained in express terms or must arise by necessary implication from the language used in the legislative act, or it does not exist.[73] So, a grant of authority in a municipal charter to pass ordinances for municipal purposes generally, to control the streets, and to prescribe regulations, or to fix reasonable charges for enumerated vehicles, without specific mention of street railroads, is ordinarily insufficient to authorize an enactment fixing rates of fare to be charged by such railroads,[74] although a similar

Covington v. Cincinnati, N & C. R Co., 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702.

Ga.—Georgia Ry & Power Co v Railroad Commission of Georgia, 98 S.E. 696, 149 Ga. 1, 5 A.L.R. 1

Fla.—State v Railroad Com'rs of Florida, 84 So. 444, 79 Fla. 526—State v. Burr, 84 So. 61, 79 Fla. 290.

Ohio.—Village of Wyoming v Ohio Traction Co., 135 N.E. 675, 104 Ohio St. 325.

Okl.—Swain v. Oklahoma Ry. Co., 32 P.2d 51, 168 Okl. 133.

Pa.—City of Easton v. Easton Transit Co., 17 Pa.Dist. 711.

Ordinance without authority is void

Ga.—Georgia Ry. & Power Co v. Railroad Commission of Georgia, 98 S.E. 696, 149 Ga. 1, 5 A.L.R. 1.

10 C.J. p. 673 note 8 [b].

68. Mass.—Wellesley v. Boston, etc., St. R. Co., 74 N.E. 355, 188 Mass. 250—Keefe v. Lexington, etc., St. R. Co., 70 N.E. 37, 185 Mass. 183.

69. U.S.—Portland R., etc. Co. v. Portland, D.C.Or., 210 F. 667.

10 C.J. p. 672 note 3

70. La.—State v City of New Orleans, 91 So. 533, 151 La. 24

Ohio.—Rogers v. City of Cincinnati, 22 Ohio N.P.,N.S., 401.

10 C.J. p. 672 note 4.

Ordinances or municipal regulations requiring.

Free transportation of firemen, policemen, or other officers see supra § 582 c (2).

Reduced fare for school children see supra § 582 c (4).

Single fare for continuous trip see supra § 582 c (3).

Specified rate of fare for hacks see supra § 582 c (4)

Ordinance not vague or ambiguous

An amendment referring to ordinances granting franchises held by a street railway company, and increasing the fare fixed in them, was not vague and unambiguous because it did not amend and reordain each section of each ordinance fixing fares.—Long v City of Shreveport, 91 So. 825, 151 La. 423

Ordinance applicable to entire system

Municipal ordinance as to street car fares and transfers was held to apply to entire street railway system, consisting of several lines, franchises for some of which are still in force, while those for others had expired.—Detroit United Ry. Co. v City of Detroit, Mich., 39 S.Ct. 151, 248 U.S. 429, 63 L.Ed. 341.

71. U.S.—Houston Electric Co v. City of Houston D.C.Tex., 265 F. 360—Henry L. Doherty & Co v Toledo Rys. & Light Co., D.C. Ohio, 254 F. 597

10 C.J. p. 673 note 5.

72. Vt.—Barre v Barre, etc., Power, etc., Co., 92 A. 237, 88 Vt. 304.

73. Fla.—State v Railroad Com'rs of Florida, 84 So. 444, 79 Fla. 526—State v. Burr, 84 So. 61, 79 Fla. 290.

Ga.—Georgia Ry. & Power Co v Railroad Commission of Georgia, 98 S.E. 696, 149 Ga. 1, 5 A.L.R. 1

N.Y.—Koehn v. Public Service Commission, Second Dist., 176 N.Y.S. 147, 107 Misc. 151

10 C.J. p. 673 note 8

Doubt resolved against city

Any doubt as to whether a statute authorizes a municipality to fix rates must be resolved against the authority of the city.—State v. Railroad Com'rs of Florida, 84 So. 444, 79 Fla. 526

Delegation strictly construed

Any delegation of authority to a municipality to regulate rates must be strictly construed.—City of Richmond v. Virginia Ry. & Power Co., 126 S.E. 353, 141 Va. 69.

Rule applied to regulation of interurban rates

N.Y.—Koehn v. Public Service Commission, Second Dist., 176 N.Y.S. 147, 107 Misc. 151

Statutes held to confer authority

It has been held, under particular statutes, that authority to fix street railroad rates within a city was vested in the municipal council and not in the public service commission. —State v. City of New Orleans, 91 So. 533, 151 La. 24.

Special law prevails

If there is a general law conferring on municipalities authority to fix rates for street railroads, and also a special law conferring a similar power on a particular city which is inconsistent with the general law, the special or local law prevails as to the city to which it applies.—State v. Burr, 84 So. 61, 79 Fla. 290.

74. Ga.—Georgia Ry & Power Co. v. Railroad Commission of Georgia, 98 S.E. 696, 149 Ga. 1, 5 A.L.R. 1

10 C.J. p. 674 note 14

"We do not think that the sections of the charter of the city of Atlanta giving them control over the streets, nor that authorizing the municipality to prescribe 'reasonable charges to be collected by hacks, cabs, drays or other licensed vehicles for the transportation of persons,' etc., nor that part of the charter authorizing them to pass ordinances generally for a municipal purpose . . . nor similar provisions in the charter, grant to the city the power to fix the rates of fare upon lines of [a] street railroad; that power is not expressly given in any of these provisions of the charter, nor is it to be necessarily inferred from any of the powers actually granted."—Georgia Ry. &

statute has been held to evidence such an intention in view of a general clause including within such grant of authority, "like occupations."[75] A provision in the act incorporating a street railroad company that makes the rates of fare "subject to the approval of the mayor and city council" confers no power on the city to fix rates originally,[76] and even though power to fix rates could thus be conferred, it is exhausted by the passage of an ordinance under which the road is constructed and maximum rates prescribed.[77] It has also been held that the governmental power to prescribe rates is not in itself conferred on a city by power given to it to contract as to the rates to be charged,[78] or by a constitutional or statutory provision requiring the city's consent to the construction and operation of a street railroad within its environs.[79] It seems, however, that, where by statute or constitution the consent of the municipality affected is a requisite to the grant of any street railroad franchise, or where the city is itself empowered to grant franchises, it may impose a stipulated rate of fare as a condition to its consent,[80] or to its grant of a franchise,[81] and make the franchise defeasible on noncompliance with the prescribed rates.[82] As appears in subdivision b of this section, a municipality may also bargain with reference to rates for transportation to points outside the city limits, as a condition to granting the use of its streets.

Authority granted a municipality to fix rates at the end of a specified period continues until the power is exercised.[83]

In exercising authority to fix rates, the municipality need not designate a definite rate of fare, but may instead provide a fixed rule by which rates based on service at cost shall be determined, and, in such case, the ordinance is not objectionable as fixing an uncertain or variable rate.[84]

Method and procedure for setting rate. A municipality may properly provide in a franchise for the operation of a street railroad that in case of disagreement between it and the railroad as to the rate of fare to be charged, such rate shall be settled by arbitration.[85] This does not involve an invalid delegation of legislative authority of the

Power Co v. Railroad Commission of Georgia, 98 S.E. 696, 701, 149 Ga. 1, 5 A.L.R. 1.

75. Ill.—Chicago Union Tract. Co. v. Chicago, 65 N.E. 451, 199 Ill. 484, 59 L.R.A. 631.
10 C.J. p. 674 note 15.

76. U.S.—Old Colony Trust Co. v. Atlanta, C.C.Ga., 83 F. 39, 42, affirmed 88 F. 859, 32 C.C.A. 125.

77. Old Colony Trust Co. v. Atlanta, C.C.Ga., 83 F. 39, affirmed 88 F. 859, 32 C.C.A. 125.

78. Va.—City of Richmond v. Virginia Ry. & Power Co., 126 S.E. 353, 141 Va. 69.

79. N.Y.—In re Fleming, 191 N.Y.S. 586, 117 Misc. 373, appeal dismissed 192 N.Y.S. 925.
Va.—City of Richmond v. Virginia Ry. & Power Co., 126 S.E. 353, 141 Va. 69.

Condition imposed by subsequent ordinance

An ordinance imposing conditions on a street railway company, when the privilege is originally granted to occupy its streets, none of which fixes the fares to be charged nor bears any relation thereto, does not make it liable to such regulation by another ordinance enacted several years afterward, by virtue of a provision contained in it that the company shall be subject to "all lawful alterations or additions" to such conditions.—City of Easton v. Easton Transit Co., 17 Pa.Dist. 711.

80. Mo.—City of St. Louis v. Public Service Commission, 207 S.W. 805, 276 Mo. 509—City of St. Louis v. Public Service Commission of Missouri 207 S.W. 799, 276 Mo. 509.
N.Y.—Quinby v. Public Service Commission of State of New York for Second Dist., 119 N.E. 433, 223 N.Y. 244, 3 A.L.R. 685, reversing 169 N.Y.S. 1109, 183 App.Div. 914, affirming 169 N.Y.S. 976, 102 Misc. 337, reargument denied 124 N.E. 790, 227 N.Y. 601—People ex rel. Incorporated Village of Brownville v. Public Service Commission of New York, Second Dist., 191 N.Y.S. 293, 198 App.Div. 391—In re Fleming, 191 N.Y.S. 586, 117 Misc. 373, appeal dismissed 192 N.Y.S. 925.
Utah.—Salt Lake City v. Utah Light & Traction Co. 173 P. 556, 52 Utah 210, 3 A.L.R. 715.

81. U.S.—Portland R., etc., Co. v. Portland, D.C.Or., 201 F. 119.

Rate for special cars

Under a franchise reserving the right to fix rate of fares on special cars, municipality may authorize special rate on such special cars.—Stafford v. Cleveland R. Co., 20 Oh.Cir.Ct.,N.S., 129.

82. N.Y.—People ex rel. Incorporated Village of Brownville v. Public Service Commission of New York, Second Dist., 191 N.Y.S. 293, 198 App.Div. 391.

83. Ohio.—Rogers v. City of Cincinnati, 22 Ohio N.P.,N.S., 401.

Fixing of rate at specified intervals

A statute authorizing the city to fix rates at the end of twenty years from the passage of the act, and every fifteen years thereafter, empowers the city to fix rates at any time after the period named until a valid contract is entered into with the railroad for the balance of the period, and the city's power is continuous and cannot be exhausted either by lapse of time or by an ineffectual attempt to reach an agreement with the railroad.—Rogers v. City of Cincinnati, 22 Ohio N.P.,N.S., 401.

84. Ohio.—Rogers v. City of Cincinnati, supra.

85. Ohio.—Parks v. Cleveland Ry. Co., 176 N.E. 472, 38 Ohio App. 315, affirmed 177 N.E. 28, 124 Ohio St. 79.

Arbitration award binding on parties

Ohio.—Parks v. Cleveland Ry. Co., 176 N.E. 472, 38 Ohio App. 315, affirmed 177 N.E. 28, 124 Ohio St. 79.

Appraisement

(1) The power being admitted, the fact that rates not yet in dispute are submitted for determination does not render the determination unauthorized as a future arbitration since technically it is merely an appraisement of the value of the service provided by the carrier, and is not a technical arbitration designed to terminate all controversies between the parties.—Parks v. Cleveland Ry. Co., 177 N.E. 28, 124 Ohio St. 79, affirming 176 N.E. 472, 38 Ohio App. 315.

(2) A municipality by applying to a commission, pursuant to statute, for the approval of a contract for street car service, which contract

city where the city is authorized only to contract with street railroads as to rates and not to regulate them.[86] An ordinance which provides for the procedure to be followed for any change of rates by the council, whether such change is initiated by the council or proposed by the railway, is not objectionable as depriving the council of the legislative power to fix and determine rates where such power is specifically reserved.[87]

Enforcement by city of carrier's fare regulations. Although a municipality may have no authority to control the rates and charges of a street railroad, it can, because of the public interest in the maintenance of reasonable rates, require, under penalty, that the public shall observe the railroad's rules and regulations concerning rates.[88]

Regulation must be reasonable and nondiscriminatory. The power of municipal regulation of street railroad rates is subject to the limitations that there is reasonable need considering the nature and extent of the service, of lower rates and better terms than those existing, and that the rates and terms fixed by the ordinance are clearly not unreasonable, in view of all the conditions.[89] So, an ordinance fixing rates is ordinarily, on the one hand, subject to change by the city to protect the public from an excessive charge for service, and, on the other hand, subject to attack by the railroad company as unreasonable and confiscatory;[90] as indicated in subdivision b of this section, however, rates fixed by an ordinance operative as a binding contract may preclude alteration by the city, or attack by the railroad, except where a change of rate is agreed to by both parties. In order to enjoin the enforcement of an ordinance reducing fares, it is not incumbent for the railroad to show that the reduced rate is confiscatory within meaning of the federal constitution, but it is sufficient that the rate is unreasonable, unjust, and insufficient to maintain a fair return on the value of the property.[91] A rate which is reasonable when fixed, under the conditions then existing, may subsequently become unreasonable by reason of the company's building extensions and connecting lines, changing its motive power, and otherwise rendering increased services at an additional cost;[92] conversely, a rate unreasonable when fixed may become valid as a result of a subsequent lessening of operating costs and reproduction value.[93]

Rates fixed by municipal regulation must not unreasonably discriminate against any particular class of persons;[94] but, where all the residents of a municipality receive a reasonable service at a reasonable price, a discrimination in favor of the residents of a certain locality, resting on a sense of justice and fair play, is not reprehensible.[95]

b. Validity and Effect of Franchise Provision or Agreement for Fixed Rate

Although a municipality may not ordinarily contract

provides for appraisal of the street railroad's property and authorizes a review of the appraisal in the courts, does not thereby ratify the appraisal.—City of Rochester v New York State Rys., 217 N.Y.S. 452, 127 Misc. 766.

86. Ohio.—Parks v. Cleveland Ry. Co, 177 N.E. 28, 124 Ohio St. 79, affirming 176 N.E. 472, 38 Ohio App. 315.

87. Ky.—Poggel v. Louisville Ry. Co., 10 S.W.2d 305, 225 Ky. 784.

88. Mo.—Ex parte Packman, 296 S. W. 366, 317 Mo 732.

89. U.S.—Milwaukee Electric R., etc., Co. v. Milwaukee, C.C.Wis., 87 F. 577.
Wis.—Ellis v. Milwaukee City R Co., 30 N.W. 218, 67 Wis. 135, 58 Am.R. 858
10 C.J. p 675 note 24.

Neither of these conditions is independent of the other, and, although the public interest is of the first importance, the test is not what is desirable on the part of either, but what is reasonable in respect of both.

U.S.—Milwaukee Electric R, etc., Co. v. Milwaukee, C.C.Wis, 87 F. 577
Wis.—Ellis v. Milwaukee City R. Co., 30 N.W. 218, 67 Wis. 135, 58 Am.R. 858.

Presumption of reasonableness
Rates prescribed by municipal ordinances will be presumed to be reasonable until their unreasonableness is shown.
U.S.—Milwaukee Electric R., etc, Co. v. Milwaukee, C.C Wis., 87 F. 577.
Ill.—Chicago Union Tract Co v. Chicago 65 N.E. 470, 199 Ill. 579.
Wis.—Ellis v. Milwaukee City R. Co, 30 N.W. 218, 67 Wis. 135, 58 Am R. 858.

Reasonable return
Although, after the franchises for some of the lines of a street railway company have expired, the city can require the tracks of such lines to be removed, it cannot require continuance of service thereon on terms not allowing a reasonable return on investment, as this would amount to denial of due process of law.—Detroit United Ry. Co. v. City of Detroit, Mich., 39 S.Ct. 151, 248 U.S. 429, 63 L.Ed 341.

90. U.S.—Westinghouse Electric & Mfg Co. v. Denver Tramway Co., D.C Colo., 3 F.2d 285, appeal transferred City and County of Denver v. Stenger, 47 S.Ct. 343, 273 U.S. 657, 71 L.Ed 825—San Antonio Public Service Co. v. City of San Antonio, D.C.Tex., 257 F. 467, affirmed City of San Antonio v. San Antonio Public Service Co., 41 S. Ct. 428, 255 U.S. 547, 65 L.Ed. 777.

91. Tex.—Houston Electric Co. v. City of Houston, Civ.App, 212 S. W 198, error granted

92. U.S.—Galveston Electric Co. v. City of Galveston, Tex, 42 S.Ct. 351, 258 U.S. 388, 66 L.Ed 678, affirming, D.C, 272 F. 147.
10 C.J. p 675 note 26.

93. U.S.—Galveston Electric Co. v. City of Galveston, supra.

94. Pa.—City of Easton v Easton Transit Co., 17 Pa.Dist. 711.
10 C.J p 675 note 29.

95. La.—Forman v. New Orleans, etc, R. Co., 4 So. 246, 40 La.Ann. 446.

with a carrier for rates of fare in contravention of state regulation, it may, where authority has been clearly conferred on it by the state, and where the suspension of the regulatory power is not prohibited by the organic law, enter into a contract with a carrier for the maintenance of fixed fares for a definite term; such contract is binding on both parties, unless modified by mutual consent for a sufficient consideration, and precludes reduction of the rate by the city, or attack on the rate by the carrier as confiscatory.

Where the state legislature proceeds to exercise its power to fix rates for a street railroad company, such company and a municipality cannot contract as to the matter,[96] and by such means supersede or modify the rates fixed.[97] However, although as appears later in this section, the constitutions of some states have been held to prohibit the enforcement of such contracts in those jurisdictions where the suspension of the regulatory power is not expressly or impliedly prohibited by the organic law, and, where authority has been conferred on the municipality by appropriate state enactment, the municipality may enter into a contract with a street railroad to maintain a specified rate of fare, for a reasonable term of years.[98] Authority so to contract may also be derived from the city's right to impose conditions on a franchise grant, as long as the state has not exercised and is not seeking to exercise its police power as to street railroad fares.[99] In imposing the terms

96. U.S.—Westinghouse Electric & Mfg. Co. v. Binghamton Ry Co., D.C.N.Y., 255 F. 378, appeal dismissed 257 F. 726, 169 C.C.A. 14.

Power of state to alter rates fixed by existing contracts see infra subdivision e of this section.

Municipal consent to operation

Although a statute, relating to street railroads, provided for consent of municipal authorities to the construction and operation of such roads, yet as the act itself, by fixing the rate of fare, showed a legislative exercise of the rate-making power, the consent did not create any contract between the municipality and street railroad company, restricting the latter to the rate of fare prescribed in the act.—Westinghouse Electric & Mfg. Co. v. Binghamton Ry. Co., D.C.N.Y., 255 F. 378, appeal dismissed 257 F. 726, 169 C.C.A. 14.

Where authority to cross city streets is derived from the legislature, a statutory provision requiring the city's consent thereto, intended only to permit the city to regulate the construction and operation of the crossing, does not authorize the city, as a condition of granting its consent, to revise or change the fares prescribed by the legislature.—People ex rel New York, W. & B. Ry. Co. v. Public Service Commission, First Dist., 183 N.Y.S. 473, 193 App. Div. 445, affirmed 130 N.E. 911, 230 N.Y. 604.

97. N.Y.—In re Huff, 172 N.E. 520, 254 N.Y. 316, affirming 239 N.Y.S. 840, 228 App. Div. 763.

Schedules increasing fares beyond the statutory maximum on lines for which the legislature has granted franchises are unlawful, regardless of later contract franchises entered into with a municipality.—In re Huff, 172 N.E. 520, 254 N.Y. 316, affirming 239 N.Y.S. 840, 228 App. Div. 763.

98. U.S.—Railroad Commission of California v. Los Angeles Ry. Corporation, Cal., 50 S.Ct. 71, 280 U.S. 145, 74 L.Ed. 234, affirming, D.C., Los Angeles Ry. Corporation v. Railroad Commission of California, 29 F.2d 140—Columbus Ry., Power & Light Co. v. City of Columbus, Ohio, 39 S.Ct. 349, 249 U.S. 399, 63 L.Ed. 669, 6 A.L.R. 1648, affirming, D.C., 253 F. 499—Detroit v. Detroit Citizens' St. R. Co., Mich., 22 S.Ct. 410, 184 U.S. 368, 46 L.Ed. 592—Cincinnati, N. & C. Ry. Co. v. City of Cincinnati, Ohio, C.C.A. Ohio, 71 F.2d 124, certiorari denied 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702.

Ohio.—Interurban Ry. & Terminal Co. v. Public Utilities Commission, 120 N.E. 831, 98 Ohio St. 287, 3 A.L.R. 696—Interurban Ry. & Term. Co. v. City of Cincinnati, 112 N.E. 186, 93 Ohio St. 108—Rogers v. City of Cincinnati, 22 Ohio N.P.,N.S., 401.

10 C.J. p. 674 note 16.

Construction of particular agreements

(1) An agreement by a suburban railroad with a town to maintain the same rate of fare between the town and a certain city as that charged by it between such city and another city obligates it to charge only the rate charged by it between such other points, although on a line subsequently built or purchased by it.—West Bloomfield Tp. v. Detroit United R. Co., 109 N.W. 258, 146 Mich. 198, 117 Am.S.R. 628.

(2) A contract between a municipality and a railway specifying the fare chargeable for transportation to another city requires passengers to be carried in either direction at the stipulated rate, especially where this construction agrees with the practice followed for many years.—Georgia Ry. & Power Co. v. City of College Park, Ga., 43 S.Ct. 617, 262 U.S. 441, 67 L.Ed. 1074.

Provision held contractual and not regulatory

A section in a street railroad franchise providing that, in consideration of the rights conveyed to the grantee, he should not charge more than five cents for a single ride is a contractual obligation, and not merely a regulative provision.—Meridian Light & Ry. Co. v. City of Meridian, D.C.Miss., 265 F. 765.

Sufficiency of consideration

Where city was threatening to alter franchises of street railway company to its detriment, passage of ordinance which does not contain threatened changes is sufficient consideration for agreement of company to continue existing fares.—Trenton & Mercer County Traction Corp. v. Inhabitants of City of Trenton, 101 A. 562, 90 N.J.Law 378, affirmed Trenton & Mercer County Traction Corp. v. Board of Public Utility Com'rs, 103 A. 1054, 91 N.J.Law 719.

When contract complete

Where street railway company's directors had ordered its officers to execute agreement as to fares on passage of ordinance of same tenor and officers cannot vary its terms and directors do not intend to pass on matter again, agreement becomes binding on passage of ordinance.—Trenton & Mercer County Traction Corp. v. Inhabitants of City of Trenton, 101 A. 562, 90 N.J.Law 378, affirmed Trenton & Mercer County Traction Corp. v. Board of Public Utility Com'rs, 103 A. 1054, 91 N.J. Law 719.

Rescission for mistake

A street railroad company cannot rescind a contract with a city as to fares because of its own mistake, not induced by the city, as to the power reserved by the city to alter its franchise ordinance.—Trenton & Mercer County Traction Corp. v. Inhabitants of City of Trenton, 101 A. 562, 90 N.J.Law 378, affirmed Trenton & Mercer County Traction Corp. v. Board of Public Utility Com'rs, 103 A. 1054, 91 N.J.Law 719.

99. Ga.—Georgia Ry. & Power Co. v. Railroad Commission of Georgia, 98 S.E. 696, 149 Ga. 1, 5 A.L.R. 1.

and conditions on which a street railroad may operate within the municipal limits, the city may contract for a fixed rate of fare for transit to and from points outside the city limits,[1] as for transit to another city,[2] even though such other city may be a point located outside the state, and the contract, although involving interstate transportation, is valid so long as congress does not exercise its paramount authority with respect thereto.[3]

A surrender of the municipality's power of regulation by such a contract is a grave act and the courts will not construe an ordinance as having such an effect unless the authority to make the contract is plain and the intention to do so clearly and unmistakably appears;[4] and the rule of construction requiring a clear and explicit intent to suspend the regulatory power applies whether the company or the city is asserting the contract.[5] Particular ordinances fixing rates of fare have, accordingly, been held not to establish a contract obligating the maintenance of the specified rates, on the ground that the municipality had not been authorized by the legislature so to fix rates,[6] or

1. Ohio.—Village of Wyoming v Ohio Traction Co., 135 N.E 675, 104 Ohio St. 325.
10 C J. p 673 note 11.

In New York

(1) The rule stated in the text has been declared applicable to an interurban street railroad line using city streets by consent of the municipality.—People ex rel. Incorporated Village of Brownville v. Public Service Commission of New York, Second Dist., 191 N.Y.S. 293, 198 App Div. 391—10 C J. p 673 note 11 [b].

(2) It has been held, however, in a case involving an interurban high speed line, not a street railroad, that the fixing of interurban fares by franchise agreement is not germane to the public purpose of the existence of the city government, and is contrary to public policy, and infringes on the state legislative powers, and is not warranted by the constitutional provision requiring the city's consent to the use of its streets by a street railroad.—Koehn v. Public Service Commission, Second Dist., 176 N.Y.S. 147, 107 Misc. 151.

2. Ohio.—Interurban Ry. & Terminal Co v. City of Cincinnati, 112 N.E. 186, 93 Ohio St. 108.

Rate conditioned on annexation

A municipality may, in granting a franchise for the operation of a street railroad through its streets require as a condition thereof that the railroad maintain a specified fare for transit to another particular city if it should become annexed to such other city.—Interurban Ry. & Terminal Co v. City of Cincinnati, 112 N. E. 186, 93 Ohio St. 108.

Point within other city

Where a franchise under which an interurban railway was constructed through a township declared that the rate of fare should not exceed a certain rate per mile to any point within a named city, and the railway company, which had traffic arrangements with railways in the city, for a number of years, carried passengers beyond the city line to central points therein for the specified rate, a successor company which operated not only the interurban railway but also the railways within the city is bound by such practice and cannot insist that the contract rate is applicable only up to its interurban depot at the city line.—Sandstone Tp v. Michigan Ry Co., 164 N.W. 404, 198 Mich. 234.

3. U.S.—Cincinnati, N. & C. Ry. Co v. City of Cincinnati, Ohio, C.C.A. Ohio, 71 F.2d 124, certiorari denied 55 S.Ct. 142, 293 U.S. 612, 79 L Ed 702—City of Covington, Ky. v. Cincinnati, N. & C. Ry. Co., C.C.A Ky., 71 F.2d 117, certiorari denied Cincinnati, N. & C. Ry Co. v. City of Covington, Ky., 55 S Ct. 142, 293 U.S. 612, 79 L Ed 702, and City of Covington v. Cincinnati, N & C Ry. Co., 55 S.Ct. 142, 293 U.S. 612, 79 L Ed 702.

Possible abuse of power immaterial

City's power to contract with street railway company for interstate rates in consideration of grant of right to use city streets cannot be denied because of its possible abuse, contract resulting from exercise of such power being invalidated by fraud, but not by improvidence —City of Covington, Ky, v. Cincinnati, N. & C. Ry. Co., C.C.A.Ky., 71 F.2d 117, certiorari denied Cincinnati, N. & C Ry. Co. v. City of Covington, Ky, 55 S Ct. 142, 293 U.S. 612, 79 L Ed 702, and City of Covington v. Cincinnati, N. & C. Ry Co, 55 S.Ct. 142, 293 U.S. 612, 79 L Ed. 702.

Different rate for transit to city

Such a contract is not invalidated by the fact that the rate stipulated differs from the established rates for transportation from points outside the state to the city.—Cincinnati, N. & C Ry. Co v City of Cincinnati, Ohio, C C A Ohio, 71 F.2d 124, certiorari denied 55 S Ct. 142, 293 U S 612, 79 L.Ed 702

4. U.S.—Railroad Commission of California v. Los Angeles Ry. Corporation, Cal., 50 S Ct. 71, 280 U.S. 145, 74 L Ed. 234, affirming, D C, Los Angeles Ry. Corporation v. Railroad Commission of California, 29 F 2d 140—City of Paducah v. Paducah Ry. Co., Ky, 43 S Ct. 335, 261 U S 267, 67 L.Ed 647—San Antonio Public Service Co v. City of San Antonio, D C Tex, 257 F. 467, affirmed City of San Antonio v. San Antonio Public Service Co, 41 S Ct. 428, 255 U S. 547, 65 L Ed 777.

Ohio.—Village of Wyoming v. Ohio Traction Co, 135 N E. 675, 104 Ohio St 325.

5. U.S.—City of Louisville v. Louisville Ry. Co, C C A Ky, 281 F. 353.

6. U S.—Railroad Commission of California v. Los Angeles Ry Corporation, Cal., 50 S.Ct 71, 280 U S 145, 74 L Ed. 234, affirming, D.C., Los Angeles Ry. Corporation v Railroad Commission of California, 29 F.2d 140.

Mo.—State ex rel. Kansas City Public Service Co v. Latshaw, 30 S. W.2d 105, 325 Mo. 909, appeal dismissed Latshaw v. State of Missouri ex rel. Kansas City Public Service Co, 51 S Ct. 101, 282 U S. 806, 75 L Ed 723

10 C J p 673 note 10—p 674 note 21

Factors determining rates

City did not have authority to contract regarding valuation, income, and depreciation, which were factors determining street car company's rates.—State ex rel. Kansas City Public Service Co v. Latshaw, 30 S W 2d 105, 325 Mo. 909, appeal dismissed Latshaw v. State of Missouri ex rel. Kansas City Public Service Co, 51 S Ct 101, 282 U.S. 806, 75 L.Ed. 723

Powers conferred on commission

Provisions with respect to rates in franchises of street railroads granted since the adoption of constitutional provisions conferring all rate regulating powers on the railroad commission cannot be considered as binding contracts of inviolable nature.—Los Angeles Ry. Corporation v. Railroad Commission of California, D C Cal, 29 F 2d 140, affirmed Railroad Commission of California v. Los Angeles Ry Corporation, 50 S.Ct. 71, 280 U S 145, 74 L Ed. 234

Provisions of a city charter au-

that the ordinance was not intended to have such an effect.[7] So, also, a statute extending the charter of a street car company for a term of years will not be construed as extending existing rate contracts between a city and the company for such period of time, in the absence of clear and explicit language.[8] A statute amending a railway company's charter, authorizing it to enter into agreements with the city to change or extend contracts then in force, even if construed as ratifying an existing contract fixing the rate of fare, does not make that contract irrevocable, where a further provision reserves the power of amendment and regulation of rights and franchises to the legislature and the city.[9] Contracts between a municipality and a carrier as to rates will, if possible, not be construed as of indefinite duration.[10]

The validity of a contract fixing the rate of fare to be charged is not affected by the right given the railroad in its charter to receive a fair compensation to be fixed by its directors, or by the right reserved to the city in the contract to amend the ordinance, where such reservation is not intended to apply to the rate of fare The term of such a contract is not restricted by the subsequent adoption of constitutional provisions limiting the duration of franchises, notwithstanding the railroad failed to commence construction of tracks before the adoption of such provisions, or ordinances extending the franchises were enacted after the coming into effect of the constitutional limitation.[11]

The effect of the passage and acceptance of a contract ordinance granting a franchise to a street

thorizing the city to impose conditions on the grant of any franchise and to fix and determine rates are insufficient to empower the city to establish the rates to be charged by a street railroad company by contract—Railroad Commission of California v. Los Angeles Ry. Corporation, Cal., 50 S.Ct. 71, 280 U.S. 145, 74 L.Ed. 234, affirming, D.C., Los Angeles Ry. Corporation v. Railroad Commission of California, 29 F.2d 140.

7. U.S.—City of Paducah v. Paducah Ry. Co., Ky., 43 S.Ct. 335, 261 U.S. 267, 67 L.Ed. 647—City of San Antonio v. San Antonio Public Service Co., Tex., 41 S.Ct. 428, 255 U.S. 547, 65 L.Ed. 777, affirming, D.C., San Antonio Public Service Co. v. City of San Antonio, 257 F. 467

Ordinance providing for adjustment of fare

An ordinance granting a franchise for a term of years which fixes the maximum fare for the first year but provides for possible adjustments of such fare by the city each succeeding year does not show a contract binding on the carrier to accept the rate of fare prescribed for the first year as a maximum fare for the life of the franchise.—City of Paducah v. Paducah Ry. Co., Ky., 43 S.Ct. 335, 261 U.S. 267, 67 L.Ed. 647.

Prior treatment of ordinance as a regulation

An ordinance giving the city's consent to the consolidation of gas and electric companies with the street railroad company, which imposed on consolidated company all the limitations and duties imposed on either of the constituent companies, does not make the five-cent street railroad fare, fixed by the street railway ordinance, binding as a contract rate, although enacted prior to the adoption of a constitutional amendment prohibiting the irrevocable grant of a franchise, where it did not expressly evidence such an intention, and especially where it had theretofore been held that the rate was not a contract rate, but could be modified by the city—City of San Antonio v. San Antonio Public Service Co., Tex., 41 S.Ct. 428, 255 U.S. 547, 65 L.Ed. 777, affirming, D.C., San Antonio Public Service Co. v. City of San Antonio, 257 F. 467.

Failure to prescribe rate of fare

No contract regulating rates was effected by an ordinance granting a franchise for the operation of a street railroad to a consolidated company acquiring the properties of several public utilities, where such ordinance did not in direct terms prescribe the rate of fare but merely provided for the issuance of free transfers on the payment of a full fare, there being no statement as to what constituted a full fare.—Georgia Ry. & Power Co. v. Railroad Commission of Georgia, 98 S.E. 696, 149 Ga. 1, 5 A.L.R. 1

8. U.S.—City of Louisville v. Louisville Ry. Co., C.C.A.Ky., 281 F. 353.

Contract ingrafted on charter

Where a contract with a city, which fixed street car fares, had become ingrafted on the charter given the company by the legislature, the acceptance by the company of the extension of its charter and right to occupy the streets of the city would not bind the company to comply with the rate contract after its expiration, unless such was the intention of the legislature.—City of Louisville v. Louisville Ry. Co., C.C.A.Ky., 281 F. 353.

Operation after termination of contract

A contract provision giving the company the right to continue permanently to operate after the expiration of the contract until the city elected to purchase the lines did not require the company to operate at the contract rate after the expiration of the original contract, and before the city exercised its option to purchase the lines, where in the meantime an act of the legislature had extended the company's charter and its right to occupy the streets.—City of Louisville v. Louisville Ry. Co., C.C.A.Ky., 281 F. 353.

9. U.S.—City of Louisville v. Louisville Ry. Co., C.C.A.Ky., 281 F. 353.

10. N.C.—In re Petition for Increase of Street Car Fares in City of Charlotte, 101 S.E. 619, 179 N.C. 151.

Perpetual five cent fare

A contract between a city and a street railroad company, giving the company the right to operate on the streets for a term of thirty years, with the privilege of continuing to operate after expiration of the term until the city chose to purchase the lines of the company, will not be construed as intended to make perpetual the five-cent fare fixed by the original contract, subject only to the right of the city to purchase the lines, unless such intention is clearly expressed.—City of Louisville v. Louisville Ry. Co., C.C.A.Ky., 281 F. 353.

11. U.S.—City of Covington, Ky., v. Cincinnati, N. & C. Ry. Co., C.C.A. Ky., 71 F.2d 117, certiorari denied Cincinnati, N. & C. Ry Co. v. City of Covington, Ky., 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702, and City of Covington v. Cincinnati, N. & C. Ry. Co., 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702.

railroad company and authorizing it to charge a specified rate of fare for a given period is to make such provision for rates govern between the parties, as long as the railroad company retains the franchise and operates thereunder.[12] During such time the municipality's regulatory power to alter or interfere with the rate is suspended,[13] and it cannot require the company to reduce such rate,[14] notwithstanding the municipality has in such ordinance otherwise reserved to itself the right to prescribe from time to time the rules and regulations for the operation of the road.[15] Moreover, an ordinance consenting to a consolidation and extension of lines on condition that a specified fare be charged during the life of the grant may operate to prevent the municipality from changing the rate notwithstanding that a prior ordinance consenting to the renewal of one of the franchises in question reserved to the municipality the right to regulate fares.[16] The street railroad's right to charge the specified fare under such a contract is not abandoned or abrogated by its acceptance of a municipal ordinance which requires it to issue transfers,[17] or which authorizes it to change the motive power of its lines from horse power to electricity, even though the original franchise named only animal or pneumatic power.[18]

On its part, the railroad company has assumed a contractual obligation by its acceptance of the franchise with its conditions,[19] and it is bound to abide by the terms of the agreement and cannot increase the stipulated rate of fare during the continuance of the contract.[20] In this regard, the rail-

12. Ohio.—Interurban Ry. & Terminal Co. v. Public Utilities Commission, 120 N.E. 831, 98 Ohio St. 287, 3 A.L.R. 696—Interurban Ry. & Term Co. v. City of Cincinnati, 112 N.E. 186, 93 Ohio St. 108.

Transfers

Where a contract ordinance provides for the issuance of transfers at intersecting points therein designated and limits the time during which such transfers are valid, a street railway cannot be required, by subsequent ordinance not involving the exercise of the police power or the power to fix rates, to permit transfer at points other than intersections, or to increase the length of time during which transfers are valid.—City of Chicago v. Chicago City Ry. Co., 111 N.E. 983, 272 Ill. 245.

13. Ohio.—Rogers v. City of Cincinnati, 22 Ohio N.P.,N.S., 401.
10 C.J. p 674 note 16

Period of operation

The contract right of a street railway company to charge five-cent fares, secured against impairment "during the term of its charter" by a municipal ordinance ratified by statute, extends for fifty years, where the company undertook to organize for that period, under Minn. Gen.St.1866 c. 34 tits. 1, 2 §§ 1–53, and in its certificate of incorporation stated that its corporate life was to be for that term, and has continued to act as a corporation since the expiration of the thirty years which would have been its corporate life, if organized, as the municipality contends it should have been, under tit. 2 of such chapter.—City of Minneapolis v. Minneapolis St. Ry. Co., Minn., 30 S.Ct. 118, 215 U.S. 417, 54 L.Ed. 259, modifying, C.C., Minneapolis St. Ry. Co. v. City of Minneapolis, 155 F. 989.

Ordinance requiring increase of fare

An ordinance requiring a specified fare to be charged to certain points is inoperative in so far as it undertakes to compel the railway company to increase its fares to points as to which it has contracts, either with public bodies such as municipalities or with private parties.—Humphrey Co. v. R. Co., 9 Ohio N.P.,N.S., 609.

14. U.S.—Detroit United Ry. Co. v. City of Detroit, Mich., 39 S.Ct. 151, 248 U.S. 429, 63 L.Ed. 341.
10 C.J. p 674 note 18.

Single fare for continuous trip

(1) The obligation of the franchise contract for a line of a street railway company, fixing the fare on such line at five cents without transfer, is impaired, in the case of a continuous trip beginning on a nonfranchise line and extending over it and a franchise line, by an ordinance requiring all such service for five cents.—Detroit United Ry. Co. v. City of Detroit, Mich., 39 S.Ct. 151, 248 U.S. 429, 63 L.Ed. 341.

(2) The section of the ordinance requiring such continuous transit over both franchise and nonfranchise lines for a single fare, in violation of the railroad's franchise right, cannot be regarded as modified by another section providing that the ordinance should not be construed as impairing the obligation of any contract, and hence such other section does not prevent the ordinance from being declared invalid.—Detroit United Ry. Co. v. City of Detroit, supra.

15. U.S.—Detroit v. Detroit Citizens' St. R. Co., Mich., 22 S.Ct. 410, 184 U.S. 368, 46 L.Ed. 592.

16. U.S.—Cleveland v. Cleveland City R. Co., Ohio, 24 S.Ct. 756, 764, 194 U.S. 517, 538, 48 L.Ed. 1102, 1109, affirming, C.C., 94 F. 385.

17. U.S.—City of Minneapolis v. Minneapolis St. Ry. Co., Minn., 30 S.Ct. 118, 215 U.S. 417, 54 L.Ed. 259, modifying C.C., Minneapolis St. Ry. Co. v. City of Minneapolis, 155 F. 989.

18. U.S.—City of Minneapolis v. Minneapolis St. Ry. Co., supra.

19. N.Y.—Public Service Commission, Second Dist., v. International Ry. Co., 172 N.Y.S. 551, 185 App. Div. 220, reversed on other grounds 120 N.E. 727, 224 N.Y. 631.
10 C.J. p 674 note 20

Same as private individuals

In regard to the modification or abrogation of contract obligations voluntarily assumed, public service corporations stand on the same footing as individuals.—Public Service Commission, Second Dist. v. International Ry. Co., 172 N.Y.S. 551, 185 App.Div. 220, reversed on other grounds 120 N.E. 727, 224 N.Y. 631.

20. Mass.—Westwood v. Dedham, etc., St. R. Co., 95 N.E. 81, 209 Mass. 213.
Wash.—State v. Seattle Electric Co., 128 P. 220, 71 Wash. 213, 43 L.R.A.,N.S., 172.

Discontinuing sale of strip tickets

Where a street railroad company contracts with the city that the existing rates of fare might be changed from time to time, but only with the consent of both parties to the contract, and at the date of the contract the company charges five cents for a continuous ride and sells tickets in strips at the rate of six for twenty-five cents and gives free transfers at certain intersections on either cash fares or tickets, the company does not violate the contract by discontinuing the sale of strip tickets without the city's consent.—Philadelphia v. Philadelphia Rapid Transit Co., 77 A. 501, 228 Pa. 325, 21 Ann.Cas. 87.

road company cannot be heard to complain that the stipulated rate is inadequate and confiscatory, and a court will not undertake to grant relief from the fixed rate on such ground.[21] It has also been held that, even though a city is without legislative power to contract with reference to street railroad fares, the railroad cannot, while claiming benefits under the franchise, avoid a stipulation fixing the fare, which is not violative of any law or contrary to any public policy,[22] and that the court will not relieve the railroad from the obligation to maintain the stipulated fare, even though it is confiscatory, since this consideration is not one for the courts under the circumstances.[23]

Mergers or consolidations. The obligation to maintain the stipulated fare attaches not only to the grantee of the franchise but also to a successor company which has assumed the franchise and agreed with the municipality to abide by its terms,[24] and it continues in effect despite the expiration of the charter of the original grantee.[25] Such contract is binding also as to lines of other companies under long-term leases to the railroad which is the party to the agreement.[26] Likewise, the fact that the municipality contracting with the carrier becomes a part of another city during the period of the contract's operation does not affect its validity.[27]

The carrier's obligation to maintain the stipulated fare cannot however be imposed beyond the terms of the contract; hence, the stipulated fare cannot be extended to territory afterward annexed to the municipality,[28] unless the application of the stipulated rate to such territory is construed to be

21. U.S.—Georgia Power Co. v. City of Decatur, 50 S.Ct. 369, 281 U.S. 505, 74 L.Ed. 999, affirming 149 S.E. 32, 168 Ga. 705, certiorari granted 50 S.Ct. 38, 280 U.S. 544, 74 L.Ed. 604—Railroad Commission of California v. Los Angeles Ry. Corporation, Cal., 50 S.Ct. 71, 280 U.S. 145, 74 L.Ed. 234, affirming, D.C., Los Angeles Ry. Corporation v. Railroad Commission of California, 29 F.2d 140—Georgia Ry. & Power Co. v. Town of Decatur, Ga., 43 S.Ct. 613, 262 U.S. 432, 67 L.Ed. 1065—City of Paducah v. Paducah Ry. Co., Ky., 43 S.Ct. 335, 261 U.S. 267, 67 L.Ed. 647—Columbus Ry., Power & Light Co. v. City of Columbus, Ohio, 39 S.Ct. 349, 249 U.S. 399, 63 L.Ed. 669, 6 A.L.R. 1648, affirming, D.C., 253 F. 499—Cincinnati, N. & C. Ry. Co. v. City of Cincinnati, Ohio, C.C.A.Ohio, 71 F.2d 124, certiorari denied 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702—City of Covington, Ky. v. Cincinnati, N. & C. Ry. Co., C.C.A.Ky., 71 F.2d 117, certiorari denied Cincinnati, N. & C. Ry. Co. v. City of Covington, Ky., 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702, and City of Covington v. Cincinnati, N. & C. Ry. Co., 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702—Michigan Ry. Co. v. City of Lansing, D.C.Mich., 260 F. 322—North American Const. Co. v. Des Moines City Ry. Co., D.C.Iowa, 256 F. 107—Westinghouse Electric & Mfg. Co. v. Binghamton Ry. Co., D.C.N.Y., 255 F. 378, appeal dismissed 257 F. 726, 169 C.C.A. 14.

N.Y.—Public Service Commission, Second Dist., v. International Ry. Co., 172 N.Y.S. 551, 185 App.Div. 220, reversed on other grounds, 120 N.E. 727, 224 N.Y. 631.

Ohio.—City of Cincinnati v. Interurban Ry. & Terminal Co., 14 Ohio N.P.,N.S., 420.

Class of service must yield

The franchise of the railway company being definite as to rates for fares, without any provision as to change thereof, there can, in case of insufficient income, be no increase of fares, but class of service must yield.—North American Const. Co. v. Des Moines City Ry. Co., D.C.Iowa, 256 F. 107.

Excessive wage demands

That the employees of a public service corporation demand wages which the corporation regards as excessive does not relieve it from its contract obligations to the public.—Public Service Commission, Second Dist., v. International Ry. Co., 172 N.Y.S. 551, 185 App.Div. 220, reversed on other grounds 120 N.E. 727, 224 N.Y. 631.

Increased expenses

(1) The company cannot avoid the obligation to maintain the rate fixed in the franchise on the ground that the increased operating expenses, due to the war and the higher wages fixed by the war labor board, make it unprofitable, especially in the absence of a showing that further operation under the contract was impossible, or even that operation thereunder for the entire term of the franchise would be unremunerative.—Columbus Ry., Power & Light Co. v. City of Columbus, Ohio, Ohio, 39 S.Ct. 349, 249 U.S. 399, 63 L.Ed. 669, 6 A.L.R. 1648, affirming, D.C., 253 F. 499.

(2) The contract cannot be terminated by the company on the ground that the continuance of normal labor conditions was an implied term.—Burr v. City of Columbus, Ohio, D.C.Ohio, 256 F. 261, affirmed 39 S.Ct. 354, 249 U.S. 415, 63 L.Ed. 679.

(3) The fixing of wages to be paid by a street railroad company in arbitration by the war labor board, although at a rate which, under the charter contract between the company and the city, is confiscatory, is not such a direct interference with the contract by the government as to excuse the company from performance.—Burr v. City of Columbus, Ohio, supra.

22. U.S.—Meridian Light & Ry. Co. v. City of Meridian, D.C.Miss., 265 F. 765.
10 C.J. p 675 note 31.

23. U.S.—Meridian Light & Ry. Co. v. City of Meridian, supra.

24. U.S.—Georgia Power Co. v. City of Decatur, 50 S.Ct. 369, 281 U.S. 505, 74 L.Ed. 999, affirming 149 S.E. 32, 168 Ga. 705, certiorari granted 50 S.Ct. 38, 280 U.S. 544, 74 L.Ed. 604
10 C.J. p 674 note 19 [a].

25. U.S.—Georgia Power Co. v. City of Decatur, supra.

26. N.J.—Trenton & Mercer County Traction Corp. v. Inhabitants of City of Trenton, 101 A. 562, 90 N.J.Law 378, affirmed Trenton & Mercer County Traction Corp. v. Board of Public Utility Com'rs, 103 A. 1054, 91 N.J.Law 719.

27. U.S.—City of Covington, Ky., v. Cincinnati, N. & C. Ry. Co., C.C.A. Ky., 71 F.2d 117, certiorari denied Cincinnati, N. & C. Ry. Co. v. City of Covington, Ky., 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702, and City of Covington v. Cincinnati, N. & C. Ry. Co., 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702.
Ohio.—Village of Wyoming v. Ohio Traction Co., 135 N.E. 675, 104 Ohio St. 325.

28. U.S.—Georgia Ry. & Power Co. v. City of College Park, Ga., 43 S.Ct. 617, 262 U.S. 441, 67 L.Ed. 1074—Georgia Ry. & Power Co. v. Town of Decatur, Ga., 43 S.Ct. 613, 262 U.S. 432, 67 L.Ed. 1065—

intended by the parties to be within the terms of the contract.[29]

Modification or change of franchise rate. As stated above, a rate fixed by contract is inviolable by the municipality and the railroad during the term of the agreement, but a modification or change of such rate may be effected where it is consented to by both the parties for a sufficient consideration.[30] A charter provision requiring the grant of a franchise to be submitted to the voters does not apply to a change or an amendment of the rate fixed in a franchise.[31] Where the agreement provides that the rate of fare therein provided for shall not be increased without the consent of the corporate authorities, a consent by the city to a temporary increase, subject to revocation, does not preclude the city from later revoking the increase and compelling the railroad to abide by the contract rate;[32] and the carrier cannot insist on the maintenance of such temporary increase where the city council's consent thereto was in excess of its powers under a city charter requiring the city electors to approve any alteration of a franchise.[33]

Where contract invalid under organic law. Under the constitutional provisions of some states prohibiting the suspension of the police power or the irrevocable grant of any privilege or franchise, a municipality cannot make a binding contract with a street railroad as to the rate of fare to be charged.[34] In these jurisdictions, such a contract is at all times subject to the reserved legislative power of the state acting through the municipality, to fix rates, so long as they are not made confiscatory, and hence the municipality exercising the state's power by delegation may authorize a higher rate than the maximum fixed by the franchise without impairing the obligation of contract.[35] In such

Detroit United Ry. v. People of State of Michigan, Mich., 37 S.Ct. 87, 242 U.S. 238, 61 L.Ed 268, reversing People v. Detroit United Ry., 125 N.W. 700, 162 Mich. 460, 139 Am.S.R. 582, and City of Detroit v. Detroit United Ry., 139 N.W. 56, 173 Mich. 314.

Impairment of franchise right

Contract obligations of street railway which had acquired with all their franchises certain suburban lines were unconstitutionally impaired by effect given to Detroit annexation acts by decision requiring reduced rates in effect under the Detroit franchise to be in force in such annexed territory, notwithstanding the franchises for the lines in such territory provided for a higher rate of fare.—Detroit United Ry. v People of State of Michigan, 37 S.Ct. 87, 242 U.S. 238, 61 L.Ed. 268, reversing People v. Detroit United Ry., 125 N.W. 700, 162 Mich. 460, 139 Am.S.R. 582 and City of Detroit v. Detroit United Ry., 139 N.W. 56, 173 Mich. 314.

Interurban fare

Where contract between a municipality and an electric railway company fixed the fare chargeable between the municipality and another city, the application of such fare to territory afterward annexed to the municipality was invalid.—Georgia Ry. & Power Co. v. City of College Park, Ga., 43 S.Ct. 617, 262 U.S. 441, 67 L.Ed. 1074—Georgia Ry. & Power Co. v. Town of Decatur, Ga., 43 S.Ct. 613, 262 U.S. 432, 67 L.Ed 1065.

29. Ind.—Indiana R. Co. v. Hoffman, 69 N.E. 399, 161 Ind. 593.
10 C.J. p 672 note 4 [d] (1).
"It may be presumed that appellant [railroad company] under its contract whereby it agreed to issue the transfer tickets within the city limits must have contemplated that the city in the future might exercise the right of annexing territory, and thereby extend its limits. Upon no view of the case can the provision "within the limits of the city" be interpreted to have been intended under the agreement . . . to apply only to such limits as then fixed"—Indiana R. Co v. Hoffman, 69 N.E. 399, 401, 161 Ind. 593.

30. U.S.—Detroit v. Detroit Citizens' St. R. Co., Mich., 22 S.Ct. 410, 184 U.S. 368, 46 L.Ed. 592.
10 C.J. p 674 note 17.

Consideration for increase held sufficient

(1) Change of motive power by railroad—Clement v. Cincinnati, 9 Ohio Dec. (Reprint) 688, 16 Cinc.L. Bul. 355—Cincinnati v. Cincinnati St. R. Co., 2 Ohio S. & C.P. 466, 2 Ohio N.P. 298—10 C.J. p 674 note 17 [a].

(2) An ordinance granting an increase in the fare chargeable under a franchise agreement is not invalid for want of consideration, where, owing to the increased cost of operation, proper service cannot be maintained without an increase, as the public benefits to be derived supply whatever motive or consideration may be necessary.—Long v City of Shreveport, 91 So. 325, 151 La. 423.

Rights of city

A resolution of the city council agreeing to an increase in fare over that named in the franchise disposes of "rights of the city" within a charter provision suspending ordinances of such a character for thirty days before they can take effect—International Ry. Co. v. Rann, 171 N.Y.S. 193, 104 Misc. 46, affirmed 171 N.Y.S 1088, 185 App.Div. 906, which is affirmed 120 N.E. 153, 224 N.Y. 83.

31. N.Y.—International Ry. Co. v. Rann, supra

32. U.S.—Michigan Ry. Co. v. City of Lansing, D.C.Mich., 260 F. 322.

33. U.S.—Michigan Ry. Co. v. City of Lansing, supra.

Agreement not impaired by subsequent charter

A city charter provision requiring the electors to consent to any franchise alteration does not impair a franchise agreement requiring that any increase of fare be consented to by the corporate authorities since the charter merely changes the method of obtaining the city's consent to any change—Michigan Ry. Co. v. City of Lansing, D.C.Mich., 260 F. 322.

34. U.S.—City of San Antonio v. San Antonio Public Service Co., Tex., 41 S.Ct. 428, 255 U.S. 547, 65 L.Ed. 777, affirming, D.C., San Antonio Public Service Co. v. City of San Antonio, 257 F. 467—City of New Orleans v. O'Keefe, C.C.A. La., 280 F. 92, affirming, D.C., O'Keefe v City of New Orleans, 273 F. 560—City and County of Denver v. Stenger, C.C.A.Colo., 277 F. 865.

35. U.S.—O'Keefe v. City of New Orleans, D.C.La., 273 F. 560, affirmed, C.C.A., City of New Orleans v. O'Keefe, 280 F. 92.
La.—Black v. New Orleans Ry. & Light Co., 82 So. 81, 145 La. 180.
Tex.—Dallas Ry. Co. v. Geller, 271 S.W. 1106, 114 Tex. 484, reversing Geller v. Dallas Ry. Co., Civ.App., 245 S.W. 254.

states, an ordinance granting a street railroad franchise and imposing a maximum fare limitation must be taken as an exercise of the regulating power and not as imposing a unilateral contract or condition on the grantee to observe the limitation even though it becomes confiscatory;[36] and such a contract, if binding on the railroad and not on the city, would be void for want of mutuality.[37] A binding contract fixing the fares being absent, the railroad is not obliged to continue to operate at the stipulated rate where such rate is confiscatory, and it may seek relief from the enforcement thereof and secure the establishment of a reasonable rate;[38] and the city cannot enforce such confiscatory rate as a condition precedent to the right to continue to use its streets.[39]

c. Power of State or Commission to Change Rates Fixed by Municipality

(1) In general

(2) Where legislature has limited commission's authority

(1) In General

The legislature or its properly authorized agency may, without unlawfully impairing any obligation, exercise its supreme power of regulation and change rates fixed in a municipal ordinance, franchise provision, or contract, except, possibly, where it has expressly conferred authority on the municipality inviolably to contract with the railroad as to rates.

As already stated in § 582 a, the supreme power to regulate the rates charged by common carriers resides in the state, and, accordingly, such power may be exercised by it notwithstanding its regulation is in derogation of an existing municipal ordinance, franchise, or contract provision fixing the rate,[40] at least, in the absence of authority expressly conferred by the constitution or by statute to the municipality permitting it inviolably to reg-

Modification required by public welfare

A city's contract with a street railway to whom it has granted privilege of operating in its streets, etc., is subject to modification by an ordinance authorizing an increase in car fare, when required by public welfare, such as war conditions, increasing the cost of service and necessitating higher rates.—Black v. New Orleans Ry. & Light Co., 82 So. 81, 145 La. 180.

36. U.S.—City of San Antonio v. San Antonio Public Service Co., Tex., 41 S.Ct. 428, 255 U.S. 547, 65 L.Ed. 777, affirming, D.C., San Antonio Public Service Co. v. City of San Antonio, 257 F. 467—City and County of Denver v. Stenger, C.C.A.Colo., 277 F. 865.

37. U.S.—City and County of Denver v. Stenger, supra.

38. U.S.—Railroad Commission of California v. Los Angeles Ry. Corporation, Cal., 50 S.Ct. 71, 280 U.S. 145, 74 L.Ed. 234, affirming, D.C., Los Angeles Ry. Corporation v. Railroad Commission of California, 29 F.2d 140—City of San Antonio v. San Antonio Public Service Co., Tex., 41 S.Ct. 428, 255 U.S. 547, 65 L.Ed. 777, affirming, D.C., San Antonio Public Service Co. v. City of San Antonio, 257 F. 467—City of Louisville v. Louisville Ry. Co., C.C.A.Ky., 281 F. 353—City and County of Denver v. Stenger, C.C.A.Colo., 277 F. 865—O'Keefe v. City of New Orleans, D.C.La., 273 F. 560, affirmed City of New Orleans v. O'Keefe, C.C.A., 280 F. 92.

Rates fixed by noncontractual ordinance

Ordinances which were not contractual in form or in substance, and which declared in their preambles that the ordinances were for the purpose of "regulating and fixing the charges to be collected by" a street railroad, and which merely specified the rates to be charged by the railroad, were not contracts between the city and the street railroad, and did not preclude railroad from increasing rates, where rates so fixed were confiscatory.—City and County of Denver v. Stenger, C.C.A.Colo., 277 F. 865.

39. U.S.—City of New Orleans v. O'Keefe, C.C.A.La., 280 F. 92, affirming, D.C., O'Keefe v. City of New Orleans, 273 F. 560.

40. U.S.—Railroad Commission of California v. Los Angeles Ry. Corporation, Cal., 50 S.Ct. 71, 280 U.S. 145, 74 L.Ed. 234, affirming, D.C., Los Angeles Ry. Corporation v. Railroad Commission of California, 29 F.2d 140—City of Englewood v. Denver & S.P. Ry. Co., 39 S.Ct. 100, 248 U.S. 294, 63 L.Ed. 253, dismissing error Denver & S.P. Ry. Co. v. City of Englewood, 161 P. 151, 62 Colo. 229, 4 A.L.R. 956—Puget Sound Traction, Light & Power Co. v. Reynolds, Wash., 37 S.Ct. 705, 244 U.S. 574, 61 L.Ed. 1325, affirming, D.C., 233 F. 371—Milwaukee Electric Ry. & L. Co. v. Railroad Commission of Wisconsin, Wis., 35 S.Ct. 820, 238 U.S. 174, 59 L.Ed. 1254—International Ry. Co. v. Prendergast, D.C.N.Y., 52 F.2d 293—Public Service Ry. Co. v. Board of Public Utility Commissioners, D.C.N.J., 276 F. 979, 986, appeal dismissed Board of Public Utility Com'rs of State of New Jersey v. Public Service R. Co., 45 S.Ct. 9, 266 U.S. 636, 69 L.Ed. 481—O'Keefe v. City of New Orleans, D.C.La., 273 F. 560, affirmed, C.C.A., City of New Orleans v. O'Keefe, 280 F. 92.

Colo.—Denver & S.P. Ry. Co. v. City of Englewood, 161 P. 151, 62 Colo. 229, 4 A.L.R. 956, error dismissed City of Englewood v. Denver & S.P. Ry. Co., 39 S.Ct. 100, 248 U.S. 294, 63 L.Ed. 253.

Fla.—State v. Railroad Com'rs of Florida, 84 So. 444, 79 Fla. 526—State v. Burr, 84 So. 61, 79 Fla. 290

Ga.—Georgia Ry. & Power Co. v. Railroad Commission of Georgia, 98 S.E. 696, 149 Ga. 1, 5 A.L.R. 1.

Ill.—Hoyne v. Chicago & O.P. Elevated R. Co., 128 N.E. 587, 294 Ill. 413—Chicago Rys. Co. v. City of Chicago, 126 N.E. 585, 292 Ill. 190, error dismissed City of Chicago v. Chicago Rys. Co., 42 S.Ct. 95, 257 U.S. 617, 66 L.Ed. 399—State Public Utilities Commission v. City of Quincy, 125 N.E. 374, 290 Ill. 360.

Mo.—State ex rel. Kansas City Public Service Co. v. Latshaw, 30 S.W.2d 105, 325 Mo. 909, appeal dismissed Latshaw v. State of Missouri ex rel. Kansas City Public Service Co., 51 S.Ct. 101, 282 U.S. 806, 75 L.Ed. 723—Kansas City v. Public Service Commission of Missouri, 210 S.W. 381, 276 Mo. 539, error dismissed 40 S.Ct. 54, 250 U.S. 652, 63 L.Ed. 1190—City of St. Louis v. Public Service Commission, 207 S.W. 805, 276 Mo. 509—City of St. Louis v. Public Service Commission of Missouri, 207 S.W. 799, 276 Mo. 509.

N.J.—O'Brien v. Board of Public Utilities Com'rs, 106 A. 414, 92 N.J.Law 587, affirming 105 A. 132, 92 N.J.Law 44—O'Brien v. Board

ulate or contract for the rate to be charged by the carrier.[41] It has further been held that, even

of Public Utility Com'rs, 105 A. 132, 92 N.J Law 44, affirmed 106 A. 414, 92 N.J.Law 587—Atlantic Coast Electric Ry Co. v Board of Public Utility Com'rs, 104 A. 218, 92 N.J Law 168, 12 A.L.R. 737, reversing 99 A. 395, 89 N.J. Law 407, error dismissed 41 S Ct. 10, 254 U.S. 660, 65 L.Ed. 462.

N.C.—In re Petition for Increase of Street Car Fares in City of Charlotte, 101 S.E. 619, 179 N.C. 151.

Or.—City of Portland v Public Service Commission of Oregon, 173 P. 1178, 89 Or. 325

Pa.—City of Scranton v. Public Service Commission, 110 A. 775, 268 Pa. 192, affirming 73 Pa Super. 192—St Clair Borough v. Tamaqua & Pottsville Electric Ry. Co., 103 A. 287, 259 Pa. 462, 5 A.L.R 20—Borough of Edgewood, v Public Service Commission, 75 Pa Super 280—City of Scranton v. Public Service Commission, 73 Pa Super. 192, affirmed 110 A 775, 268 Pa 192—Foltz v Public Service Commission, 73 Pa Super. 24—Borough of Wilkinsburg v. Public Service Commission, 72 Pa Super. 423

Utah.—Salt Lake City v. Utah Light & Traction Co., 173 P. 556, 561, 52 Utah 210, 3 A.L.R. 715

Wis.—City of Milwaukee v. Railroad Commission, 240 N.W. 165, 206 Wis. 339.

10 C.J. p 675 notes 27, 28

"The Legislature . . . [has] the undoubted authority under the police power of the state to increase or decrease those fares as it deems proper, or to authorize the Public Service Commission to do the same. . . . And this is true whether the franchise ordinance mentioned is considered as a contract or a regulation enactment; it having been enacted and agreed to subject to the police power of the state, it must give way upon the exercise of that power by the Legislature or by its duly authorized agent, the Public Service Commission"—City of St. Louis v. Public Service Commission, 207 S.W. 805, 276 Mo. 509—City of St. Louis v. Public Service Commission of Missouri, 207 S.W. 799, 804, 276 Mo. 509.

"It is now settled law that so long as the state does not interfere the rates agreed upon between the cities and the street railway companies in the franchise ordinances are binding and enforceable. Neither party, without the consent of the other, may disregard any rate that is agreed upon between them. Either party may, however, make application to the Utilities Commission, if one is created by Legislative enactment, for the purpose of being relieved from the rates fixed in the franchise ordinance, and if it be made to appear that the rates under existing conditions have become unfair or unreasonable, in that they are either too high or too low, the commission may establish a rate which will again respond to the existing conditions. . . . In doing that the constitutional rights of the parties are neither invaded nor disregarded, for the simple reason that when the original rate was fixed by agreement it was still subject to modification at any time by the sovereign power of the state, providing the fare as fixed is found to be unfair and unreasonable"—Salt Lake City v. Utah Light & Traction Co., supra.

"The contract being subject to legislative control, the intervention of the state, either on behalf of the public utility to secure a reasonable return for the service rendered or of the city to cause a reduction of rates which have become excessive, does not abrogate a contract, of which the law is an integral part."—Chicago Rys. Co. v. City of Chicago, 126 N.E. 585, 590, 292 Ill. 190, error dismissed City of Chicago v. Chicago Rys. Co., 42 S.Ct. 95, 257 U.S. 617, 66 L.Ed. 399.

Nature of franchise immaterial

A general law, designed to regulate the rates of all carriers of the state, applies equally to companies operating under ordinances which regulate rates as a condition precedent to consent of the municipality, or under franchises in which the franchises are not so regulated—City of McKeesport v. Public Service Commission, 72 Pa.Super. 434—City of Pittsburg v. Public Service Commission, 72 Pa.Super. 433—Harbor Creek Township v. Public Service Commission, 72 Pa.Super. 433—Borough of North Braddock v. Public Service Commission, 72 Pa.Super. 432—City of Reading v. Public Service Commission, 72 Pa.Super. 432—Borough of Wilkinsburg v. Public Service Commission, 72 Pa.Super. 423.

Repealed ordinance

A city ordinance respecting the fares to be charged by a street railroad cannot be urged as a bar to the fixing of rates by the public service commission, where a subsequent state statute fixing the fare to be charged repealed the ordinance.—Chenoweth v. Maloy, 123 A. 77, 143 Md. 622.

Rights of city divested by statute

Under a statute regulating rates for the transportation of passengers but providing that it shall not apply to the rates of street or interurban railroads within cities or within five miles of their boundaries, the rights of municipalities under franchise contracts fixing passenger rates were divested except such as are retained by the proviso—Detroit United Ry. v. Oakland Circuit Judge, 183 N.W. 938, 215 Mich. 275.

Statute reserving power

The rule stated in the text follows at least where the contract between the municipality and the carrier was entered into at the time a statute existed reserving to the legislature the power to regulate rates, such reservation must be regarded as an implied term of the contract, and the rate fixed is only provisional, subject to the state's exercise of its power—In re Fleming, 191 N.Y.S. 586, 117 Misc. 373, appeal dismissed 192 N.Y.S. 925.

The state is not estopped from raising commutation rates fixed in a franchise by the fact that many persons have built homes along the route of the street railway in reliance on the existing rates.—Salt Lake City v Utah Light & Traction Co., 173 P. 556, 52 Utah 210, 3 A.L.R. 715.

Well considered case reviewing authorities

Fla.—State v. Burr, 84 So. 61, 79 Fla. 290.

41. U.S.—Puget Sound Traction, Light & Power Co. v Reynolds, Wash., 37 S.Ct. 705, 244 U.S. 574, 61 L.Ed 1325, affirming, D.C., 233 F. 371—Milwaukee Electric Ry & L. Co. v. Railroad Commission of Wisconsin, Wis., 35 S.Ct. 820, 238 U.S 174, 59 L.Ed. 1254.

Colo.—Denver & S. P. Ry. Co. v. City of Englewood, 161 P. 151, 62 Colo 229, 4 A.L.R. 956, error dismissed City of Englewood v. Denver & S. P. Ry. Co., 39 S.Ct. 100, 248 U.S. 294, 63 L.Ed. 253.

Fla.—State v. Burr, 84 So. 61, 79 Fla. 290.

Ill.—Hoyne v. Chicago & O P Elevated R. Co., 128 N.E. 587, 294 Ill. 413.

N.J.—Atlantic Coast Electric Ry. Co. v. Board of Public Utility Com'rs, 104 A 218, 92 N.J.Law 168, 12 A. L.R. 737, reversing 99 A. 395, 89 N.J.Law 407, error dismissed 41 S Ct. 10, 254 U.S. 660, 65 L.Ed 462

Authority not shown

The Charter Act of the City of Pensacola does not clearly and plainly give to it the power to prescribe rates for street car fares to the exclusion of state authority, if at all.—State v. Railroad Com'rs of Florida, 84 So. 444, 79 Fla. 526.

Ratification of existing franchises

An act of the territorial legislature confirming franchises made by municipalities prior to its assumption of sovereignty did not have the

where the state has expressly authorized a municipality to fix,[42] or contract as to,[43] rates, it may thereafter reassume and exercise these powers and change the rate specified in the franchise granted by the city, without securing the city's consent thereto.[44] This supreme power of the state to regulate rates is not abridged, denied, or irrevocably delegated to a municipality by a constitutional or statutory provision making the consent of the municipality affected a condition to the grant of any franchise for the operation of a street railroad;[45] nor is such power affected by

effect of irrevocably granting to the municipality the right or authority to fix the rate of fare to be charged and hence did not preclude the state from changing the rate fixed under such franchises—Swain v. Oklahoma Ry. Co., 32 P.2d 51, 168 Okl. 133.

Power to fix lower or higher fare

Where a city under its charter is without authority to contract with reference to a street railroad rate, which is an inherently legislative power, the state can fix a lower or higher fare than that fixed by street railroad franchise, if the facts justify and it is in the public interest to do so.—Meridian Light & Ry. Co. v. City of Meridian, D.C.Miss., 265 F. 765.

42. Mich.—Groesbeck v. Detroit United Ry., 177 N.W. 1023, 210 Mich 227.
Okl.—Swain v. Oklahoma Ry. Co., 32 P.2d 51, 168 Okl. 133.

Delegation and not contract

A statute providing that rates estabhshed by agreement shall not be increased without the consent of the municipal authorities is merely a delegation of state power, and not a contract between the state and the municipality, and the legislature may reassume and exercise such rate-making right without the consent of the municipality.—Groesbeck v. Detroit United Ry., 177 N.W. 1023, 210 Mich 227

Authority in abeyance during contract

Even if a provision of the city charter can be construed as giving the city the power to prescribe rates, the corporation commission is not divested of power to regulate such rates because of a constitutional provision saving to the municipality such right of regulation as is expressly conferred by statute, where the city enters into a binding contract with the street railroad as to the rate to be charged, since in such case its power of regulation is in abeyance during the term of the contract, and the commission's power of regulation remains unfettered.—City of Richmond v. Virginia Ry. & Power Co, 126 S.E. 353, 141 Va. 69.

43. Fla.—State v. Burr, 84 So. 61, 79 Fla. 290.
Va.—City of Richmond v. Virginia Ry. & Power Co., 126 S.E. 353, 141 Va. 69.

In Massachusetts

(1) Under a statute empowering the public service commission to regulate rates notwithstanding any agreement entered into by any board of officers acting under delegated authority, prior thereto, the commission has power to approve an increase in the rate of fare agreed to in the franchise granted by a town, although it was within the power of the town, as conferred by prior statute, to fix the fares by agreement as a condition to the grant of the franchise.—Board of Survey of Arlington v Bay State St. Ry. Co, 113 N.E. 273, 224 Mass 463, 5 A.L.R. 24

(2) It has been said, however, that "the right to exact fares of a specified amount for a term of years not grossly unreasonable in length, established by contract with a public service corporation pursuant to legislative authority, cannot thereafter be varied by statute without violating section 10 of article 1 of the Constitution of the United States, although power to fix just compensation for service furnished by public utilities in general is vested in the Legislature."—In re Opinions of the Justices, Mass., 199 N.E. 538, 543.

44. Mich.—Groesbeck v. Detroit United Ry., 177 N.W. 726, 1023, 210 Mich. 227.

45. U.S.—International Ry. Co v Prendergast, D.C.N.Y., 52 F.2d 293—Westinghouse Electric & Mfg Co. v. Binghamton Ry. Co, D.C. N.Y., 255 F. 378, appeal dismissed 257 F. 726, 169 C.C.A. 14.
Ill.—Hoyne v. Chicago & O. P. Elevated R. Co, 128 N.E. 587, 295 Ill. 413—State Public Utilities Commission v. Chicago & W. T. Ry. Co., 114 N.E. 325, 275 Ill. 555, Ann.Cas.1917C 50.
Mo.—Kansas City v. Public Service Commission of Missouri, 210 S.W. 381, 276 Mo. 539, error dismissed 40 S.Ct. 54, 250 U.S. 652, 63 L.Ed. 1190—City of St. Louis v. Public Service Commission, 207 S.W. 805, 276 Mo 509—City of St. Louis v Public Service Commission of Missouri, 207 S.W 799, 276 Mo. 509.
N.Y.—People ex rel. Village of Brownsville v. Public Service Commission, 205 N.Y.S. 525, 209 App.Div. 640, affirmed 148 N.E. 716, 240 N.Y. 586—Village of Mamaroneck v. Public Service Commission, 203 N.Y.S. 678, 208 App.Div 330, affirmed People ex rel. Village of Mamaroneck v. Public Service Commission of State of New York, 144 N.E. 903, 238 N.Y. 588—Koehn v. Public Service Commission, Second Dist., 176 N.Y.S. 147, 107 Misc. 151
Pa.—City of Scranton v. Public Service Commission, 110 A. 775, 268 Pa 192, affirming 73 Pa.Super 192—Foltz v. Public Service Commission, 73 Pa.Super. 24—Borough of Wilkinsburg v Public Service Commission, 72 Pa.Super. 423
Utah—Salt Lake City v. Utah Light & Traction Co., 173 P. 556, 52 Utah 210, 3 A.L.R. 715.

"We are also satisfied that the Legislature has the power to change rates, even though they were established as a condition for the consents given under the constitutional provision in question. There is nothing in the constitutional provision relating to consents by local authorities and abutting property owners which expressly or by implication takes away from the Legislature the power to regulate rates. If the local authorities and abutting property owners attach conditions to their consents which are proper subjects of legislative regulation, the fact that the result may operate to defeat that condition does not take away from the Legislature its rate-making power when it chooses to exercise that power, and the Legislature may exercise that power through the agency of the Public Service Commission."—People ex rel. Village of Brownsville v Public Service Commission, 205 N.Y.S. 525, 209 App.Div 640, affirmed 148 N.E. 716, 240 N.Y. 586.

Power of regulation neither granted nor prohibited

A constitutional provision, requiring a city's consent to construction and operation of a street railroad, neither grants nor prohibits the city from admitting on terms and conditions including fixed fares, which power is incidental to the power to withhold consent, and a city so contracting acts under its general reserved powers subject to the public policy of the state.—City of St. Louis v. Public Service Commission, 207 S.W. 805, 276 Mo. 509—City of St. Louis v. Public Service Commission of Missouri, 207 S.W. 799, 276 Mo. 509.

State not bound by estoppel of carrier

While a municipality, even if it

authority conferred on a municipality to grant franchises under appropriate conditions, for the operation of street railroads within its territory.[46] The fixing of a rate other than that provided for in the franchise or contract to which the municipality and the carrier are parties does not fall within the constitutional inhibition against impairment of obligations, since such agreements are deemed to be made subject to the supervening police power, of which the state cannot divest itself;[47] and the state, acting through its utilities commission, may authorize an increase in the rate fixed by the contract without requiring the railroad company to surrender its rights thereunder.[48]

The state's paramount authority over rates irrespective of any attempted establishment by municipal ordinance, franchise, or contract may be exercised on its behalf by a regulatory commission to which the power has been duly delegated,[49] and

has overstepped the purview of the constitutional provision requiring its consent to the construction of a street railroad, in assuming to fix interurban rates, may bind the railroad by estoppel after the latter has obtained the benefits of the consent, it cannot bind the state by a twenty-year provision in the consent, providing for modification of fares by public authority only after the expiration of that period—Koehn v. Public Service Commission, Second Dist., 176 N.Y.S. 147, 107 Misc. 151

46. U.S.—Milwaukee Electric Ry & L. Co. v. Railroad Commission of Wisconsin, Wis., 35 S.Ct. 820, 238 U.S. 174, 59 L.Ed. 1254—O'Keefe v. City of New Orleans, D.C.La., 273 F. 560, affirmed, C.C.A., City of New Orleans v. O'Keefe, 280 F. 92.

Ill.—Chicago Rys. Co. v. City of Chicago, 126 N.E. 585, 292 Ill. 190, error dismissed City of Chicago v. Chicago Rys. Co., 42 S.Ct. 95, 257 U.S. 617, 66 L.Ed. 399.

N.J.—Atlantic Coast Electric Ry. Co. v. Board of Public Utility Com'rs, 104 A. 218, 92 N.J.Law 168, 12 A.L.R. 737, reversing 99 A. 395, 89 N.J.Law 407, error dismissed 41 S.Ct. 10, 254 U.S. 660, 65 L.Ed. 462

Va.—City of Richmond v. Virginia Ry. & Power Co., 126 S.E. 353, 141 Va. 69.

Provision of city charter

Under a constitutional provision authorizing the corporation commission to regulate rates, and statutes enacted pursuant thereto, the commission can regulate rates of street railroad, although city and railroad subsequent to adoption of Constitution had entered into contracts fixing rates good as between city and railroad, notwithstanding another section of the constitution authorizing cities to grant franchises and a provision of the city charter empowering city to enter into contracts as to rates—City of Richmond & Virginia Ry. & Power Co., 126 S.E. 353, 141 Va. 69.

Authority to grant franchise for specified term

A statute authorizing city to consent to construction of street railroad for period not exceeding twenty years does not confer right to contract for rates for twenty-year period free from legislative control nor does contract under that law fixing rates and giving city fifty-five per cent of net proceeds preclude public utilities commission as agent of state from changing rates—Chicago Rys. Co. v. City of Chicago, 126 N.E. 585, 292 Ill. 190, error dismissed City of Chicago v. Chicago Rys. Co., 42 S.Ct. 95, 257 U.S. 617, 66 L.Ed. 399

47. U.S.—City of Englewood v. Denver & S. P. Ry. Co., 39 S.Ct. 100, 248 U.S. 294, 63 L.Ed. 253, dismissing error Denver & S. P. Ry. Co. v. City of Englewood, Colo., 161 P. 151.

Ill.—Hoyne v. Chicago & O. P. Elevated R. Co., 128 N.E. 587, 295 Ill. 413.

Mich.—Groesbeck v. Detroit United Ry., 177 N.W. 726, 210 Mich. 227.

Mo.—State ex rel. Kansas City Public Service Co. v. Latshaw, 30 S.W. 2d 105, 325 Mo. 909, appeal dismissed Latshaw v. State of Missouri ex rel. Kansas City Public Service Co., 51 S.Ct. 101, 282 U.S. 806, 75 L.Ed. 723.

Va.—City of Richmond v. Virginia Ry. & Power Co., 126 S.E. 353, 141 Va. 69.

Contracts are subject to police power

Under constitutional provisions conferring on the corporation commission the power to regulate rates, the commission could fix rates of street railroad, notwithstanding contracts, good as between city and railroad, entered into before adoption of constitution, pursuant to particular statutory authorizations, since such contracts were entered into subject to power of state, in exercise of police power, to regulate rates.—City of Richmond v. Virginia Ry. & Power Co., 126 S.E. 353, 141 Va. 69.

48. Ill.—Chicago Rys. Co. v. City of Chicago, 126 N.E. 585, 292 Ill. 190, error dismissed City of Chicago v. Chicago Rys. Co., 42 S.Ct. 95, 257 U.S. 617, 66 L.Ed. 399.

49. U.S.—Railroad Commission of California v. Los Angeles Ry. Corporation, Cal., 50 S.Ct. 71, 280 U.S. 145, 74 L.Ed. 231, affirming, D.C., Los Angeles Ry. Corporation v. Railroad Commission of California, 29 F.2d 140—City of Englewood v. Denver & S. P. Ry. Co., 39 S.Ct. 100, 248 U.S. 294, 63 L.Ed. 253, dismissing error Denver & S. P. Ry. Co. v. City of Englewood, 161 P. 151, 62 Colo. 229, 4 A.L.R. 956—Public Service Ry. Co. v. Board of Public Utility Commissioners, D.C.N.J., 276 F. 979, appeal dismissed Board of Public Utility Com'rs of State of New Jersey v. Public Service R. Co., 45 S.Ct. 9, 266 U.S. 636, 69 L.Ed. 481.

Fla.—State v. Burr, 84 So. 61, 79 Fla. 290.

Ill.—Hoyne v. Chicago & O. P. Elevated R. Co., 128 N.E. 587, 295 Ill. 413—State Public Utilities Commission v. City of Quincy, 125 N.E. 374, 290 Ill. 360—State Public Utilities Commission v. Chicago & W. T. Ry. Co., 114 N.E. 325, 275 Ill. 555, Ann.Cas.1917C 50.

Mass.—Board of Survey of Arlington v. Bay State St. Ry. Co., 113 N.E. 273, 224 Mass. 463, 5 A.L.R. 24.

Mo.—Kansas City v. Public Service Commission of Missouri, 210 S.W. 381, 276 Mo. 539, error dismissed 40 S.Ct. 54, 250 U.S. 652, 63 L.Ed. 1190—City of St. Louis v. Public Service Commission, 207 S.W. 805, 276 Mo. 509—City of St. Louis v. Public Service Commission of Missouri, 207 S.W. 799, 276 Mo. 509.

N.J.—O'Brien v. Board of Public Utility Com'rs, 105 A. 132, 92 N.J. Law 44, affirmed 106 A. 414, 92 N.J.Law 587.

N.Y.—People ex rel. Village of Brownsville v. Public Service Commission, 205 N.Y.S. 525, 209 App. Div. 640, affirmed 148 N.E. 716, 240 N.Y. 586—Village of Mamaroneck v. Public Service Commission, 203 N.Y.S. 678, 208 App.Div. 330, affirmed People ex rel. Village of Mamaroneck v. Public Service Commission of State of New York, 144 N.E. 903, 238 N.Y. 588—Koehn v. Public Service Commission, Second Dist., 176 N.Y.S. 147, 107 Misc. 151.

the fact that the rate affected by the order of the commission was agreed on by a franchise entered into prior to the enactment of the law creating the commission does not invalidate the regulation, where the commission has been given the power to deal with conditions as they arise;[50] but, as will be indicated in the following subdivision of this section, however, the commission may be unable to regulate rates fixed by contract ordinance where the state legislature has prohibited, or not given authority to, the commission to interfere therewith.

It has been said, on the other hand, that, unless restrained by its constitution, the state, acting through its legislature, may contract away its power to regulate the rates of fare, by delegating to the municipality the power to do so,[51] and that rates so fixed by the municipality may amount to an "irrepealable contract, binding future Legislatures,"[52] although it will not be presumed that the state has surrendered all of its power to reg-

N.C.—In re Petition for Increase of Street Car Fares in City of Charlotte, 101 S.E. 619, 179 N.C. 151.

Or.—City of Portland v. Public Service Commission of Oregon, 173 P. 1178, 89 Or. 325.

Pa.—City of Philadelphia v. Public Service Commission, 83 Pa.Super. 8.—Foltz v. Public Service Commission, 73 Pa.Super. 24.

Va.—City of Richmond v. Virginia Ry. & Power Co., 126 S.E. 353, 141 Va. 69.

Wis.—City of Milwaukee v. Railroad Commission, 240 N.W. 165, 206 Wis. 339.

Authority as to commutation rates

A provision of a statute creating the commission and empowering it to regulate rates that "nothing in this act contained shall be construed . . . to prevent carrying out of contracts for free or reduced rate passenger transportation or other public utility service heretofore made, founded upon adequate consideration and lawful when made," was not intended to apply to commutation rates fixed in a franchise ordinance and did not prevent the commission from regulating such rates.—Salt Lake City v. Utah Light & Traction Co., 173 P. 556, 52 Utah 210, 3 A.L.R. 715.

Annulment of city's authority

City's authority to represent the state in regard to the fares of a street railway, which had been given a franchise, was annulled by act creating public service commission, and such authority given to such commission, which as state's agent could agree to change in the franchise allowing company an increased rate of fare.—City of Portland v. Public Service Commission of Oregon, 173 P. 1178, 89 Or. 325.

Conditions warranting increase of rate

Where a street railway was being run at a loss, the public utility commissioners, under statutory provisions conferring authority to regulate rates, should have granted a request to raise the fare from five to six cents, although there were local contracts with municipalities through which it ran.—Northampton, Easton & Washington Traction Co. v. Board of Public Utility Com'rs, N.J., 102 A. 930.

Conditions of franchise as to increase of rate

Where city entered into service-at-cost agreement with street railway, public service commission, under statute, could hear application for increase in rates regardless of franchise agreement providing for increase only where additions were made to property.—State ex rel. Kansas City Public Service Co. v. Latshaw, 30 S.W.2d 105, 325 Mo. 909, appeal dismissed Latshaw v. State of Missouri ex rel. Kansas City Public Service Co., 51 S.Ct. 101, 282 U.S. 806, 75 L.Ed. 723.

Exclusive jurisdiction

Railway Commission Act gives exclusive original jurisdiction of cases involving the rates of common carriers, as street railway companies, to the state railway commission and such law is not affected by the charter provisions of the city of Omaha, in which the street railway applying for increased rates was located.—Omaha & C. B. St. Ry. Co. v. Nebraska State Railway Commission, 173 N.W. 690, 103 Neb. 695.

Expiration of period of contract

Order of public utilities commission for increase of fares to be charged by street railroad did not violate the rights of a city secured by contract with the railroad, such contract, expressly running only for twenty years, having expired before the commission's order. — Public Utilities Commission v. Rhode Island Co., 110 A. 654, 43 R.I. 135.

Res judicata

Decisions of corporation commission rendered in connection with franchise obligations to sell labor and student tickets at certain rates were not res judicata as to power of commission to fix street railroad rates different from those fixed by contracts between railroad and city, since such decisions were rendered in proceedings not involving exercise of police power of state to regulate rates of public service corporations.—City of Richmond v. Virginia Ry. & Power Co., 126 S.E. 353, 141 Va. 69.

Although a railroad company may be estopped by municipal consents from increasing intra-state interurban fares, the public service commission is not prevented thereby from exercising authority "upon its own motion," under a statute conferring such authority, where creditors, stock and bond holders, and the public generally are interested in avoiding the destruction of the public utility, since the police power of the state must have been reserved, there being no clear constitutional or statutory provisions to the contrary.—Koehn v. Public Service Commission, Second Dist., 176 N.Y.S. 147, 107 Misc. 151.

50. Or.—City of Portland v. Public Service Commission of Oregon, 173 P. 1178, 89 Or. 325.

51. U.S.—Columbus Ry., Power & Light Co. v. City of Columbus, Ohio, D.C.Ohio, 253 F. 499, affirmed 39 S.Ct. 349, 249 U.S. 399, 63 L.Ed. 669, 6 A.L.R. 1648.

Fla.—State v. Burr, 84 So. 61, 71, 79 Fla. 290.

"Unless the state by constitutional provision . . . or by other reservation duly made, retains the right to change rates for public service fairly and reasonably made by a duly authorized and valid contract between a public utility company and a municipality, the obligation of the contract cannot in general be lawfully impaired by subsequent legislation in so far as it injures contract rights of the company that have not been waived or in any way terminated."—State v. Burr, supra.

52. N.J.—Atlantic Coast Electric Ry. Co. v. Board of Public Utility Com'rs, 104 A. 218, 219, 92 N.J.Law 168, 12 A.L.R. 737, reversing 99 A. 395, 89 N.J.Law 407, error dismissed 41 S.Ct. 10, 254 U.S. 660, 65 L.Ed. 462.

Contract cannot be impaired

It has been said by way of dictum that a contract fixing rates, entered into by a municipality under authority of a statute permitting it to establish rates of fare by agreement and providing that such rate be not increased without its consent, cannot be impaired by the state or any of its agencies.—Michigan Ry. Co. v. Lansing, D.C.Mich., 260 F. 322.

ulate street railway rates, unless such intent clearly appears in the act delegating regulatory powers to the city.[53] Thus, it has been held that, where a state enactment clearly gives to a municipality the power to make a binding contract as to the rate of fare, a statute permitting the city to fix the terms and conditions for the operation of street railroads being so construed, the state, acting through its agency, the public utilities commission, cannot change the rate during the term of the contract, without the consent of the municipality affected.[54] Also, in some jurisdictions, it has been held that the state public service commission may interfere with municipal franchise provisions, only in respect of rates involving the rights of the general public, and not as to matters involving the proprietary rights of the city, where the state has vested in the municipality its police power in respect of the latter.[55]

(2) Where Legislature Has Limited Commission's Authority

A commission may be denied the right to interfere with rates fixed in a franchise agreement between a municipality and a railroad where the statute creating the commission and defining its powers prohibits the disturbance of rates so fixed or does not confer the necessary authority to do so.

In a number of jurisdictions, although the power of the state to regulate rates fixed by contract ordinances has been acknowledged, the state commission has been denied the right to interfere with rates so fixed, where the statute creating the commission and limiting the powers conferred on it either expressly or impliedly recognized valid existing utility contracts as enforceable obligations,[56] and prohibited the commission from disturbing rates fixed in them;[57] the commission may, however, temporarily increase the rates fixed by municipal franchise agreement where the statute

53. U.S.—Milwaukee Electric Ry. & L. Co. v. Railroad Commission of Wisconsin, Wis., 35 S.Ct. 820, 822, 238 U.S. 174, 59 L.Ed. 1254—City of Covington, Ky., v. Cincinnati, N. & C. Ry. Co., C.C.A.Ky., 71 F.2d 117, certiorari denied Cincinnati, N. & C. Ry. Co. v. City of Covington, Ky., 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702 and City of Covington v. Cincinnati, N. & C. R. Co., 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702.

"The fixing of rates which may be charged by public service corporations, of the character here involved, is a legislative function of the state, and while the right to make contracts which shall prevent the state during a given period from exercising this important power has been recognized and approved by judicial decisions, it has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction."—Milwaukee Electric Ry & L. Co. v. Railroad Commission of Wisconsin, supra.

54. Ohio.—Interurban Ry. & Terminal Co. v. Public Utilities Commission, 120 N.E. 831, 98 Ohio St. 287, 3 A.L.R. 696—Mahoning & Shenango Ry. & Light Co. v. Public Utilities Commission, 120 N.E. 835, 98 Ohio St. 303—Toledo, Bowling Green & Southern Traction Co. v. Public Utilities Commission, 120 N.E. 835, 98 Ohio St. 305.

The constitutional inhibition against impairment of obligation prevents the commission from changing the rate fixed by a binding contract entered into pursuant to legislative authority from the state.—Interurban Ry & Terminal Co. v. Public Utilities Commission, 120 N.E. 831, 98 Ohio St. 287, 3 A.L.R. 696

55. Wash.—State v. Seattle & R. V. Ry. Co., 194 P. 820, 113 Wash. 684, 15 A.L.R. 1194, distinguishing State v. Public Service Commission, 173 P. 737, 103 Wash. 72.

Free transit of policemen and firemen

The enactment of the Public Service Commission Law of 1911 did not supersede the right of a city of the first class to insist on the enforcement of its rights under the terms of franchise ordinance passed by the city and accepted by a street railway company prior to the going into effect of the law requiring grantees, their successors or assigns, to carry the city's policemen and firemen free when engaged in their official respective duties, since the state vested the city with all of its police power touching this subject matter.—State v. Seattle & R. V. Ry. Co., 194 P. 820, 113 Wash. 684, 15 A.L.R. 1194.

Sale of commutation tickets

(1) Under statute authorizing the public service commission to control and regulate rates, the commission could authorize a street railway to discontinue selling one dollar commutation tickets entitling the purchaser to twenty-five rides, although sale of such tickets was required by franchise from the city.—State v. Public Service Commission, 173 P. 737, 103 Wash. 72.

(2) In respect of the sale of such tickets, which involves the rights of the public generally, the state public service commission may abrogate municipal franchise provisions.—State v. Seattle & R. V. Ry. Co., 194 P. 820, 113 Wash. 684, 15 A.L.R. 1194.

56. Ind.—State v. Lewis, 120 N.E. 129, 187 Ind. 564.

Ohio.—Interurban Ry. & Terminal Co. v. Public Utilities Commission, 120 N.E. 831, 98 Ohio St. 287, 3 A.L.R. 696.

57. U.S.—Georgia Ry. & Power Co. v. Town of Decatur, Ga., 43 S.Ct. 613, 262 U.S. 432, 67 L.Ed. 1065

Ga.—Georgia Ry. & Power Co. v. Town of Decatur, 108 S.E. 615, 152 Ga. 143—Georgia Ry & Power Co. v. Railroad Commission of Georgia, 98 S.E. 696, 149 Ga. 1, 5 A.L.R. 1.

Valid subsisting contract held shown

Ga.—Georgia Ry & Power Co. v. Railroad Commission of Georgia, 98 S.E. 696, 149 Ga. 1, 5 A.L.R. 1

Transfers

Where a contract between a city and an electric railway company, fixing the fare chargeable between such city and another city, contained no provision on the subject of transfers, an order of the railroad commission requiring the issuance of free transfers was erroneous.—Georgia Ry. & Power Co. v. City of College Park, Ga., 43 S.Ct. 617, 262 U.S. 441, 67 L.Ed. 1074.

In Michigan

The filing of a proposed schedule of rates with the railroad commission by a road, prior to enactment of a statute delegating to it full powers of regulation, did not authorize an increase of rates in excess of those fixed in the franchise in view of a provision in the statute creating the commission, declaring that it does not authorize the commission to impair any existing franchise.—Humphrey v. Detroit, M. & T. S.L. Ry., 181 N.W. 975, 213 Mich. 113, denying rehearing 180 N.W. 373, 212 Mich. 91.

conferred such authority in the case of an emergency,[58] and it may, of course, make orders which do not go beyond the terms of the contract.[59]

In New York, rates fixed by a municipality as a condition to the grant of its consent to the construction of a street railroad, which is required by the state constitution, cannot be disturbed by the public service commission, since the state legislature has not specifically conferred on the commission authority to do so.[60] Notwithstanding the

58. Ind.—State v. Lewis, 120 N.E. 129, 187 Ind. 564.

Increased expenses due to war

Street railroad's petition for increased fares, due to expenses occasioned by war, was held to show emergency giving public service commission jurisdiction under Acts 1913 c 76 § 122 to consider the advisability of increasing the rate of fares.—State v. Lewis, 120 N.E. 129, 187 Ind. 564.

59. U.S.—Georgia Ry. & Power Co. v. Town of Decatur, Ga., 43 S.Ct. 613, 262 U.S. 432, 67 L.Ed. 1065.

Transfers

An order of a state railroad commission directing that no change be made in the matter of issuing free transfers on an electric railway on which rates were fixed by contract with municipality was not open to constitutional objection, when, so far as appeared, it did not go beyond the terms of the contract specifically providing for transfers.—Georgia Ry. & Power Co. v. Town of Decatur, Ga., 43 S.Ct. 613, 262 U.S. 432, 67 L.Ed. 1065.

60. U.S.—International Ry. Co. v. Prendergast, D.C.N.Y., 52 F.2d 293—Westinghouse Electric & Mfg. Co. v. Binghamton Ry. Co., D.C.N.Y., 255 F. 378, appeal dismissed 257 F. 726, 169 C.C.A. 14.

N.Y.—City of New York v. Interborough Rapid Transit Co., 177 N.E. 295, 257 N.Y. 20, affirming 249 N.Y.S. 243, 232 App.Div. 233, which affirmed 240 N.Y.S. 316, 136 Misc. 569—City of Niagara Falls v. Public Service Commission of New York for Second Dist., 128 N.E. 247, 229 N.Y. 333, reversing 178 N.Y.S. 882, 190 App.Div. 890, which reversed 177 N.Y.S. 861, 108 Misc. 567—Quinby v. Public Service Commission of State of New York for Second Dist., 119 N.E. 433, 437, 223 N.Y. 244, 3 A.L.R. 685, reversing 169 N.Y.S. 1109, 183 App.Div. 914, which affirmed 169 N.Y.S. 976, 102 Misc. 337, reargument denied 124 N.E. 790, 227 N.Y. 601, overruling People ex rel. New York & N. S. Traction Co. v. Public Service Commission of State of New York for Second District, 162 N.Y.S. 405, 175 App.Div. 869—People v. Monarch, 185 N.Y.S. 5, 193 App.Div. 707—City of New York v. Richmond Light & R. Co., 183 N.Y.S. 922—International Ry. Co. v. Rann, 171 N.Y.S. 193, 104 Misc. 46, affirmed 171 N.Y.S. 1088, 185 App.Div. 906, affirmed 120 N.E. 153, 224 N.Y. 83

"In the absence of clear and definite language conferring without ambiguity, jurisdiction upon the public service commission to increase rates of fare agreed upon by the street railroad and the local authorities, we should not unnecessarily hold that the Legislature has intended to delegate any of its powers in the matter, whatever its powers may be. The Public Service Commissions Law (sections 26, 49, subd. 1) and the Railroad Law (section 181) deal with maximum rates of fare established by statute, but make no reference in terms to rates established by agreement with local authorities."—Quinby v. Public Service Commission of State of New York for Second Dist., supra.

"The Quinby case [Quinby v. Public Service Commission, etc., supra] is intended by the Court of Appeals to hold that the Public Service Commission is without jurisdiction in any case to increase or decrease a rate of fare which has been agreed to by the enactment of a statute fixing the maximum rate of fare, and followed by the granting of a consent by the municipality to the construction and operation of the road, and which consent specifies the rate of fare to be charged, assuming, of course, that the contract made by such consent and the acceptance thereof, and by constructing and operating the road, has not been modified or abrogated by subsequent action or agreement, and also that it is immaterial to the question of jurisdiction whether or not such agreement or contract was subsequently ratified or approved by legislative action."—Westinghouse Electric & Mfg. Co. v. Binghamton Ry. Co., D.C.N.Y., 255 F. 378, 415, appeal dismissed 257 F. 726, 169 C.C.A. 14.

Regulation by transit commission

(1) The transit commission, as successor to the public service commission in regard to regulation of rates within the city of New York, is not authorized to alter a rate fixed by contract between the city of New York and a transit company.—City of New York v. Interborough Rapid Transit Co., 177 N.E. 295, 257 N.Y. 20, affirming 249 N.Y.S. 243, 232 App. Div. 233, which affirmed 240 N.Y.S. 316, 136 Misc. 569.

(2) Transit commission's power to increase elevated railway fares cannot be implied, but must be given by language admitting of no other reasonable construction.—City of New York v. Interborough Rapid Transit Co., supra.

(3) Transit commission was not authorized to increase elevated railway fares fixed by statute and extension certificate, especially in view of compact link between them and subways as to which contracts existed fixing the rate of fare, not within the control of the commission.—City of New York v. Interborough Rapid Transit Co., supra.

Interurban rates

(1) The rule stated in the text applies not only to urban rates but also to interurban rates so that, where a city consents to the use of its streets on condition that a certain rate be charged for transit to and from a neighboring city, the commission cannot interfere therewith.—Village of Mamaroneck v. Public Service Commission, 203 N.Y.S. 678, 208 App. Div. 330, affirmed People ex rel. Village of Mamaroneck v. Public Service Commission of State of New York, 144 N.E. 903, 238 N.Y. 588—People ex rel. Incorporated Village of Brownville v. Public Service Commission of New York, Second Dist., 191 N.Y.S. 293, 198 App.Div. 391.

(2) This is so notwithstanding the increase sought is not in the fares within the city litigating the change, but merely the fare for the portion of the transit in the neighboring city, which city has consented to the increase.—Village of Mamaroneck v. Public Service Commission, supra.

(3) It is not within the power of the public service commission to adopt a schedule filed by a street railway company, which eliminated a reduced return trip fare, for transit to and from a neighboring city, and thereby abrogate a condition attached to the franchise under which the company continues to operate where such franchise was granted prior to 1907.—People ex rel. Incorporated Village of Brownville v. Public Service Commission of New York, Second Dist., supra.

(4) It has been held, on the other hand, that interurban rates are not within the rule stated in the text and that, therefore, the commission may increase the rate fixed by the municipality as a condition to its grant of a franchise.—Koehn v. Public Service Commission, Second Dist., 176 N.Y.S. 147, 107 Misc. 151.

Rule under prior statute conferring authority

(1) It being conceded that the leg-

lack of such specific authority, however, the commission may, with the consent of the local authorities, evidenced as provided by law, increase rates of fare previously agreed on by the street railroad company and the municipality,[61] and it may regulate rates of railroads deriving their right to operate from the state, notwithstanding any attempted fixing of the rate by a municipality.[62] Further, the rule stated above, limiting the commission's authority, does not preclude the commission from regulating rates fixed by contract where the contract was entered into subsequent to the date of the enactment of legislation creating the commission and empowering it to regulate rates,[63] or, al-

islature has the power to regulate rates notwithstanding the constitutional provision requiring the consent of a municipality to the construction of a street railroad, and that its power to do so may be delegated to the public service commission, an amendment to the Public Service Commissions Law, L. 1921 c 134 § 29, and c 335 § 2, providing that the commission may regulate fares "notwithstanding that a higher . . . rate, fare, or charge has been heretofore prescribed by general or special statute, contract, grant, franchise, condition, consent, or other agreement" authorized the commission, before the repeal of such amendment, to increase a rate of fare fixed as a condition to the consent required by the constitutional provision.—People ex rel. Village of Brownsville v. Public Service Commission, 205 N.Y.S. 525, 209 App.Div. 640, affirmed 148 N.E. 716, 240 N.Y. 586—In re Fleming, 191 N.Y.S. 586, 117 Misc. 373, appeal dismissed 192 N.Y.S. 925.

(2) The authority delegated by this amendment to regulate rates, although established by franchise or contract, was taken away by L.1923 c 891, and the state of the law in regard to the commission's powers prior to the amendment was restored, so that the commission had not thereafter the authority to interfere with a rate fixed in a franchise as a condition to the municipality's consent.—Village of Mamaroneck v. Public Service Commission, 203 N.Y.S. 678, 208 App Div. 330, affirmed People ex rel. Village of Mamaroneck v. Public Service Commission of State of New York, 144 N.E. 903, 238 N.Y. 588.

(3) After the repeal of the amendment by L.1923 c 891 the authority of the commission did not continue even as respects petitions for new schedules filed prior to such repeal but not yet acted on at the time of the repeal. General Construction L. §§ 93, 94, relating to the prosecution of any "action or proceeding" to final effect notwithstanding the repeal of the statute involved, is not applicable, and the filing of petition for a new schedule is not an "action or proceeding" under sections 11-a and 46-a of such construction law.—Village of Mamaroneck v. Public Service Commission, supra.

Franchise rates are legislative in character

Franchise provisions as to rates of fares are in effect legislative rates when fixed and made by municipalities under sovereign power delegated to them and are binding, at least, until the legislature changes them by itself or by its properly authorized agency.—International Ry. Co v. Prendergast, D.C.N.Y., 52 F.2d 293.

Order reserving contract rights

An order of the public service commission, authorizing a railway company to charge two cents for transfers on its line, and excepting any contract rights of the city from its operation, does not, in view of the express exception violate previous franchises requiring free transfers; nor does it affect the city in its proprietary capacity as owner of the city streets.—City of New York v. Nixon, 183 N.Y.S. 6, 111 Misc. 224.

61. N.Y.—International Ry. Co. v. Rann, 120 N.E. 153, 224 N.Y. 83, affirming 171 N.Y.S. 1083, 185 App Div. 906, which affirms 171 N.Y.S. 193, 104 Misc. 46.

62. N.Y.—Evens v. Public Service Commission, Second Dist., 158 N.E. 310, 246 N.Y. 224, affirming Evens v. Phelps, 211 N.Y.S. 650, 214 App Div. 122—People ex rel. Garrison v. Nixon, 128 N.E. 255, 229 N.Y. 575, affirming 181 N.Y.S. 949, 191 App.Div. 945, reargument denied 129 N.E. 943, 229 N.Y. 645, motion to amend remittitur denied 129 N.E. 943, 229 N.Y. 647.

Road organized under General Railroad Law

Under Public Service Commissions L. §§ 29, 49, the public service commission had jurisdiction to authorize a railroad which was not a street railroad, within Const. art 3 § 18, but one organized under the General Railroad Law of 1850, using private right of way acquired under the present Railroad L. §§ 8, 9, 21, across streets in the city of New York, to charge a higher rate of fare within the city limits than that prescribed by an ordinance, under Greater New York Charter §§ 72–74, as amended by L.1901 c 466, giving city's consent to use of streets since the fixing of such rates was within police power of state, and since state had, under Railroad L. § 57, fixed the rate to be charged, precluding the city from making the charging of a specified rate a condition to its consent to use of streets by the railroad.—People ex rel. New York, W. & B. Ry Co v. Public Service Commission, First Dist., 183 N.Y.S. 473, 193 App Div 445, affirmed 130 N.E. 911, 230 N.Y. 604.

63. U.S.—International Ry. Co. v Prendergast, D.C.N.Y., 52 F.2d 293—Interborough Rapid Transit Co. v Gilchrist, D.C.N.Y., 26 F.2d 912, reversed on other grounds Gilchrist v. Interborough Rapid Transit Co., 49 S.Ct. 282, 279 U.S. 159, 73 L.Ed. 652.

N.Y.—City of New York v. Interborough Rapid Transit Co., 177 N.E. 295, 257 N.Y. 20, affirming 249 N.Y.S. 243, 232 App.Div. 233, which affirmed 240 N.Y.S. 316, 136 Misc. 569—People ex rel. Garrison v. Nixon, 128 N.E. 255, 229 N.Y. 575, affirming 181 N.Y.S. 949, 191 App.Div. 945, reargument denied 129 N.E. 943, 229 N.Y. 645, motion to amend remittitur denied 129 N.E. 943, 229 N.Y. 647—People ex rel. City of New York v Nixon, 128 N.E. 245, 247, 229 N.Y. 356, reversing 180 N.Y.S. 130, 190 App Div. 612, which affirmed 179 N.Y.S. 82, 109 Misc. 7—City of Yonkers v. Maltbie, 245 N.Y.S. 514, 138 Misc 572, affirmed 248 N.Y.S. 75, 231 App. Div. 415—Koehn v. Public Service Commission, Second Dist., 176 N.Y.S. 147, 107 Misc. 151.

"The statute which clothed the commission with jurisdiction to increase charges, if found to be inadequate, was notice to municipalities that franchises thereafter granted must be coupled with no conditions inconsistent with the jurisdiction thus conferred. The commission is now holding the city to terms which were accepted by implication when the conditions were imposed. . . . This is merely to give effect to the settled rule that contracts are made in submission to existing legislation."—People ex rel. City of New York v. Nixon, supra.

Earlier franchise superseded

A street railroad franchise granted in 1911 modified and superseded prior franchises and must be regarded as having been made subject to existing statutes conferring powers of regulation on the public service commission; hence the commission could entertain jurisdiction to change the rate of fare fixed in such franchise.—City of Yonkers v. Maltbie, 245 N.Y.S. 514, 138 Misc. 572, affirmed 248 N.Y.S. 75, 231 App.Div. 415.

though entered into prior to such time, was substantially modified or abrogated by contracts subsequent to such time, as by new contracts consenting to a change of motive power,[64] where the contract was entered into prior to the effective date of the constitutional provision requiring the municipality's consent to the construction of street railroads;[65] or where the contract expressly reserved to the legislature,[66] or to the public service commission,[67] the right to regulate the fares to be charged. The commission may also exercise authority where the contract,[68] or an agreement for a consolidation and extension of lines, modifying such contract,[69] is conditioned on compliance with a part of the railroad law which reserves to the legislature the right to regulate the rates of carriers subject to the law, and another provision gives the commission authority to act for the legislature under the law. If only a small portion of an entire system is beyond the control of the commission because of franchise agreements fixing rates, the commission may nevertheless regulate rates for the entire system.[70] Where the commission was given specific statutory authority to regulate rates even where fixed by franchise agreement, and proceeded to modify rates so fixed, a subsequent statute withdrawing such authority does not have the effect of reviving the franchise rates which had been superseded by the legal order of the commission, and the commission may thereafter regulate rates modified by it during the time it had authority to do so.[71] The statute repealing the prior statutory provision extending the commission's authority over rates fixed by franchise did not affect its established authority to regulate franchise rates specifically superseded by

Interurban rates

N.Y.—Koehn v. Public Service Commission, Second Dist., 176 N.Y.S. 147, 107 Misc. 151.

64. U.S.—Westinghouse Electric & Mfg. Co. v. Binghamton Ry. Co., D.C.N.Y., 255 F. 378, appeal dismissed 257 F. 726, 169 C.C.A. 14.

N.Y.—Evens v. Public Service Commission, Second Dist., 158 N.E. 310, 246 N.Y. 224, affirming Evens v. Phelps, 211 N.Y.S. 650, 214 App. Div. 122.

Prior contracts not superseded

Particular contracts entered into after the enactment of the Public Service Commissions Law have, however, been held not to supersede or modify prior contracts limiting fares so as to authorize an increase thereof by the commission.—City of New York v. Interborough Rapid Transit Co., 177 N.E. 295, 257 N.Y. 20, affirming 249 N.Y.S. 243, 232 App.Div. 233, which affirmed 240 N.Y.S. 316, 136 Misc. 569.

65. N.Y.—City of New York v. Interborough Rapid Transit Co., supra—Evens v. Public Service Commission, Second Dist., 158 N.E. 310, 246 N.Y. 224, affirming order Evens v. Phelps, 211 N.Y.S. 650, 214 App. Div. 122—People ex rel. Garrison v. Nixon, 128 N.E. 255, 229 N.Y. 575, affirming 181 N.Y.S. 949, 191 App.Div. 945, reargument denied 129 N.E. 943, 229 N.Y. 645, motion denied 129 N.E. 943, 229 N.Y. 647.

66. N.Y.—International Ry. Co. v. Public Service Commission, Second Dist., 124 N.E. 123, 226 N.Y. 474 affirming and answering certified questions 175 N.Y.S. 906, 188 App Div. 944, reargument denied 126 N.E. 911, 227 N.Y. 669.

Effect of "Milburn Agreement"

(1) Milburn Agreement, between city of Buffalo and street railways, abolishing transfers, was held not to preclude public service commission from authorizing increased fares in view of fact that it reserved the right of the legislature to regulate such fares; nor was such agreement, under Public Service Commission L. § 49 subd. 6, prohibiting commission from modifying it, a limitation on other subdivisions of same section giving commission power to regulate rates since the power to regulate transfers is distinct from that to regulate rate.—International Ry. Co. v. Public Service Commission, Second Dist., 124 N.E. 123, 226 N.Y. 474, affirming and answering certified questions 175 N.Y.S. 906, 188 App.Div. 944, reargument denied 126 N.E. 911, 227 N.Y. 669.

(2) Under Public Service Commission L. § 49, the commission has power to entertain a proceeding to increase rates where the rate of fare was fixed by the Milburn Agreement, since such agreement had effect only when ratified by the legislature by L.1892 c. 151, and became operative as a statutory rate subject to further regulation.—International Ry. Co. v. Public Service Commission, Second Dist., 174 N.Y.S. 403, 106 Misc. 293.

67. N.Y.—City of New York v. Richmond Light & R. Co., 183 N.Y.S. 922.

68. N.Y.—City of Yonkers v. Maltbie, 248 N.Y.S. 75, 231 App.Div. 415, affirming 245 N.Y.S. 514, 138 Misc. 572—Fagal v. Public Service Commission, 227 N.Y.S. 18, 131 Misc. 398—O'Connor v. Public Service Commission, Second Dist., 186 N.Y.S. 390, 114 Misc. 337.

Franchise superseding prior franchises

Street railroad franchise granted in 1911 modified and superseded all preceding franchises as to rates of fare and, where such franchise was made subject to the provisions of Railroad L. art. 5 which reserves to the legislature the right to regulate fares of railroads subject to that law, the commission has power to increase fares fixed by the franchise.—City of Yonkers v. Maltbie, 248 N.Y.S. 75, 231 App.Div. 415, affirming 245 N.Y.S. 514, 138 Misc. 572.

Entire system of lines

The commission may exercise authority over an entire system of lines, even though a portion is operated under franchises not within its control where a major portion of the franchises are conditioned on compliance with the provisions of the railroad law as set forth in the text.—Fagal v. Public Service Commission, 227 N.Y.S. 18, 131 Misc. 398.

69. U.S.—Westinghouse Electric & Mfg. Co. v. Binghamton Ry. Co., D.C.N.Y., 255 F. 378, appeal dismissed 257 F. 726, 169 C.C.A. 14.

N.Y.—Evens v. Public Service Commission, Second Dist., 158 N.E. 310, 246 N.Y. 224, affirming Evens v. Phelps, 211 N.Y.S. 650, 214 App. Div. 122—United Traction Co. v. Public Service Commission, 219 N.Y.S. 421, 219 App.Div. 95.

70. N.Y.—City of New York v. Interborough Rapid Transit Co., 177 N.E. 295, 257 N.Y. 20, affirming 249 N.Y.S. 243, 232 App.Div. 233, which affirmed 240 N.Y.S. 316, 136 Misc. 569—Evens v. Public Service Commission, Second Dist., 158 N.E. 310, 246 N.Y. 224, affirming Evens v. Phelps, 211 N.Y.S. 650, 214 App. Div. 122.

71. N.Y.—City of Yonkers v. Maltbie, 248 N.Y.S. 75, 231 App.Div. 415, affirming 245 N.Y.S. 514, 138 Misc. 572—United Traction Co. v. Public Service Commission, 219 N.Y.S. 421, 219 App.Div. 95.

statute, or rates fixed in various franchise agreements modified by other agreements made subject to provisions of the railroad law reserving authority to regulate to the legislature.[72]

§ 584. Proceedings to Enforce, or Obtain Relief from Rates

a. Judicial supervision in general
b. Injunction
c. Review of commission orders by appeal or action to set aside

a. Judicial Supervision in General

Courts generally may not interfere with the legislative regulation of rates except to afford protection against unreasonable and confiscatory rates.

As already stated in § 582, the primary duty of regulating and fixing the rates to be charged by a carrier is on the legislature or its authorized agency; the extent of judicial interference therewith is generally limited to protection against unreasonable or confiscatory rates.[73] So, the courts ordinarily may not review a commission's determination, in fixing rates, of questions of business or public policy;[74] and although they may in a given instance be called on to decide in the course of litigation whether a certain rate or regulation is reasonable or unreasonable, or to declare that a given statutory or commission regulation is confiscatory,[75] subject to some apparent qualifications treated in subdivision b (1) (b) of this section, they, in general, have no power to affirmatively determine and prescribe reasonable regulations and rates.[76]

If a railroad attempts to enforce improper and detrimental regulations, where the statute so provides, recourse must first be had to the state commission authorized to act thereon, and the courts must yield the prior right of determination to such tribunal.[77]

In a proceeding to review an appraisal made under a contract between a municipality and a street railroad, the municipality is not barred by laches or the statute of limitations where the contract directed no particular method of review and set no time limit therefor, and the action for review was brought within a reasonable time.[78]

b. Injunction

(1) To obtain relief from rates
(2) To enforce compliance with rates

(1) To Obtain Relief from Rates

(a) In general
(b) Preliminary injunction
(c) Jurisdiction

(a) In General

The enforcement of a rate clearly shown to be con-

72. N.Y.—United Traction Co. v. Public Service Commission, supra.

73. U.S.—Galveston Electric Co. v. City of Galveston, D.C.Tex., 272 F. 147, affirmed 42 S.Ct. 351, 258 U.S. 388, 66 L.Ed. 678—Houston Electric Co. v. City of Houston, D.C. Tex., 265 F. 360—Henry L. Doherty & Co. v. Toledo Rys. & Light Co., D.C.Ohio, 254 F. 597—Ann Arbor R. Co. v. Fellows, D.C.Mich., 236 F. 387, appeal dismissed Ann Arbor R. Co. v. Glasgow, 39 S.Ct. 5, 248 U.S. 588, 63 L.Ed. 434.
Wis.—City of Milwaukee v. Railroad Commission, 240 N.W. 165, 206 Wis. 339—Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin, 172 N.W. 746, 169 Wis. 421.
10 C.J. p. 675 note 33.
Modification of contracts between city and subway operating companies involving increase in fare is a matter involving municipal policy with which courts ordinarily will not interfere.—Halleran v. City of New York, 228 N.Y.S. 116, 132 Misc. 73.

74. U.S.—Central of Georgia R. Co. v. Alabama R. Commn., D.C.Ala., 209 F. 75.
10 C.J. p. 677 note 45.

75. U.S.—Duluth St. Ry. Co. v. Railroad and Warehouse Commission of Minnesota, D.C.Minn., 4 F.2d 543, affirmed Railroad and Warehouse Commission of Minnesota v. Duluth Street Ry. Co., 47 S.Ct. 489, 273 U.S. 625, 71 L.Ed. 807—Henry L. Doherty & Co. v. Toledo Rys. & Light Co., D.C.Ohio, 254 F. 597.
Wis.—City of Milwaukee v. Railroad Commission, 240 N.W. 165, 206 Wis. 339—Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin, 172 N.W. 746, 169 Wis. 421.
10 C.J. p. 675 note 34.

76. U.S.—Duluth St. Ry. Co. v. Railroad and Warehouse Commission of Minnesota, D.C.Minn., 4 F.2d 543, affirmed Railroad and Warehouse Commission of Minnesota v. Duluth Street Ry. Co., 47 S.Ct. 489, 273 U.S. 625, 71 L.Ed. 807—Houston Electric Co. v. City of Houston, D.C.Tex., 265 F. 360, 361—City of Toledo v. Toledo Rys. & Light Co., Ohio, 259 F. 450, 170 C.C.A. 426—Henry L. Doherty & Co. v. Toledo Rys. & Light Co., D.C.Ohio, 254 F. 597.
Wis.—City of Milwaukee v. Railroad Commission, 240 N.W. 165, 206 Wis. 339—Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin, 172 N.W. 746, 169 Wis. 421.
10 C.J. p. 675 note 35.
"The settled principle [is] that the fixing of rates, involving considerations of expediency, policy, and fairness under existing conditions as between the utility and the public, rests with the rate-making body . . . and that the right of judicial interference attaches only when it is established that the rate fixed denies to the utility a fair return . . . and, accordingly, that the scope of the inquiry is limited to the testing out of the rate of fare allowed, in order to determine whether or not it results in the prohibited taking of plaintiff's property, and does not embrace authority for binding the rate-making body to any particular plan for fixing fares other than, in the operation thereof, plaintiff shall be enabled to realize the fair return protected by the constitutional provision."—Houston Electric Co. v. City of Houston, supra.

77. Wis.—Campbell v. Milwaukee Electric Ry. & Light Co., 170 N.W. 937, 169 Wis. 171.

78. N.Y.—City of Rochester v. New York State Rys., 217 N.Y.S. 452, 127 Misc. 766.

fiscatory may be restrained by injunction, even before it has gone into operation, and the court may, as a condition thereof, fix a temporary maximum rate or order a temporary increase; and a carrier is not precluded from injunctive relief because it has previously acquiesced to the attacked rates. The court cannot restrain the commission from proceeding with its determination and its injunction as to enforcement of a certain rate does not prevent the commission from acting thereafter to fix a reasonable rate.

The enforcement of an unreasonable rate fixed by statute or commission regulation,[79] or of a rate fixed by an invalid ordinance,[80] may, in a proper case, be restrained by injunction, regardless of whether the rate attacked is unreasonable as initially fixed or afterward became so by reason of changed conditions,[81] although, the rule is imperative that such relief,[82] especially where sought

79. U.S.—Los Angeles Ry. Corporation v. Railroad Commission of California, D.C.Cal., 29 F.2d 140, affirmed Railroad Commission of California v Los Angeles Ry Corporation, 50 S.Ct 71, 280 U.S. 145, 74 L.Ed. 234—Augusta-Aiken Ry. & Electric Corporation v. Railroad Commission of South Carolina, C.C.A.S.C., 281 F. 977—Chicago Rys. Co. v. Illinois Commerce Commission, D.C Ill., 277 F. 970—Public Service Ry. Co. v. Board of Public Utility Commissioners, D.C.N.J., 276 F. 979, appeal dismissed Board of Public Utility Com'rs of State of New Jersey v. Public Service Ry Co., 45 S.Ct. 9, 266 U.S. 636, 69 L.Ed. 481.
10 C.J. p 676 note 38.

Injunction properly refused

Under particular circumstances, it was held that the court did not abuse its discretion in refusing an injunction to restrain city from enforcing an ordinance repealing an earlier ordinance increasing street railway fares.—Houston Electric Co. v. City of Houston, Tex.Civ.App., 212 S.W. 198, error granted.

Parties

(1) In a suit by a street railway alleging confiscation of its property through failure of the public service commission to prescribe fair and reasonable rates, various municipalities adverse to the railway company are proper parties to the determination of the questions involved.—International Ry. Co. v. Prendergast, D.C.N.Y., 29 F.2d 296.

(2) The public service commission was the sole necessary party, in so far as certain municipalities were concerned, in such a suit—International Ry. Co. v. Prendergast, supra

(3) Holders of mortgage bonds of a railroad company cannot maintain a suit to enjoin the enforcement of a state statute fixing rates unless it is shown that the mortgage trustee, representing all the bondholders, has refused to bring the suit—Winthrop v. Fellows, D.C.Mich., 230 F. 702, appeal dismissed 38 S.Ct. 189, 245 U.S. 679, 62 L.Ed. 544.

(4) Proceedings maintainable by bondholders for relief against unreasonable rates generally see supra § 310.

(5) The trustee under a railroad mortgage which is in process of foreclosure while the railroad is in the hands of receivers has no such interest in the future earnings of the road as to entitle it to question the validity of a rate statute, unless it is clearly shown that the mortgaged property is not of sufficient value to pay the mortgage debt after satisfying precedent liens.—Winthrop v. Fellows, supra

Pleadings generally held sufficient

U.S.—International Ry. Co v. Prendergast, D.C.N.Y., 29 F.2d 296.
10 C.J. p 676 note 38 [b].

Bill held insufficient to warrant relief

In a proceeding by a street railway to restrain a city from enforcing an ordinance reducing fares, pleadings did not show that reduced fare was unreasonable, unjust, or insufficient to maintain and pay a fair return on the value of the property—Houston Electric Co. v. City of Houston, Tex.Civ.App., 212 S.W. 198, error granted.

Supplemental bill

Street railway alleging confiscation of property through failure of commission to prescribe reasonable rates was held to be entitled to file supplemental bill alleging new facts.—International Ry. Co. v. Prendergast, D.C.N.Y., 29 F.2d 296.

Adoption of master's report

Where rate of return found by special master is based on an erroneous theory and the rate determined by the court on the evidence is high enough to avoid confiscation, master's conclusion that street car fares fixed by commission will result in confiscation cannot be adopted in a suit attacking the commission's determination.—International Ry. Co. v. Prendergast, D.C.N.Y., 1 F.Supp. 623.

Free passes

A case for injunctive relief against a statute requiring carriers to issue free passes to certain classes of persons as not made on mere averment that legislature violated constitution in authorizing free transportation to certain classes, nor by allegation that free transportation, issued under act, adds to carriers' operating expense.—St. Louis Southwestern Ry. Co. of Texas v. State, 261 S.W. 996, 113 Tex. 570, 33 A.L.R. 367, reversing State v. St. Louis S. W. Ry. Co. of Texas, Civ.App., 197 S.W. 1006.

80. **Suit by qualified elector**

(1) Where a city board of commissioners passed an ordinance as an emergency measure increasing street railway rates, an elector and citizen, and patron of the railway company was entitled to sue to restrain the operation of the ordinance, on the ground of invalidity, he having no adequate legal remedy by mandamus because of the declaration of the emergency, the provision that the ordinance should take immediate effect cutting off his right to file protest and to proceed thereunder.—Geller v. Dallas Ry. Co., Civ.App., 245 S.W. 254, reversed on other grounds Dallas R. Co. v. Geller, 271 S.W. 1106, 114 Tex. 484.

(2) Under a statute requiring ordinances granting franchises to be on file for one week before adoption, and notice thereof to be published, and requiring approval by the electors of street railway franchises, and publication of the ordinance itself before the submission to the voters, a qualified elector injured by an ordinance increasing the rate of fare may sue for an injunction, as the purpose of the first publication is to give those injuriously affected an opportunity to protect their rights in the courts.—Long v. City of Shreveport, 91 So. 325, 151 La. 423.

81. U.S.—Augusta-Aiken Ry. & Electric Corporation v. Railroad Commission of South Carolina, C.C.A.S.C., 281 F. 977, 980.
"It is not the fixing but the enforcement of a confiscatory rate that invades the constitutional rights of the carrier. To deny permission to raise an existing rate is in necessary effect to enforce that rate, and obviously confiscation may be as completely effected by refusing an increase as by requiring a reduction. It is therefore immaterial whether the rate be confiscatory when it is prescribed, or afterwards becomes so by reason of changed conditions. . . . It cannot be doubted that the power of the courts to enjoin confiscation effected by reduction is equally ample, and its exercise equally obligatory, to enjoin confiscation effected by refusal to permit an increase."—Augusta-Aiken Ry. & Electric Corporation v. Railroad Commission of South Carolina, supra.

82. U.S.—Galveston Electric Co. v. City of Galveston, D.C.Tex., 272 F.

before final hearing,[83] will not be granted, unless the confiscatory character of the rate is clear.

Since the courts cannot interfere with the commission's exercise of its regulatory powers, save only to protect against unreasonable rates, the commission cannot be enjoined from proceeding with its determination of the reasonableness of certain rates, for it will not be presumed that its orders will be arbitrary, oppressive, or unlawful;[84] so, a court, on behest of a carrier which has filed a schedule increasing its rates above the maximum provided for by statute, cannot enjoin the commission from interfering therewith, until the commission has investigated and determined that the increase in rate is unreasonable.[85] On the other hand, a commission order reducing fares, in force immediately after its passage, is a complete exercise of the legislative power, so as to support a suit for an injunction, in the absence of any provision for suspension by an application for rehearing, although under the statute, a motion to reconsider might have been made and entertained in the discretion of the commission.[86] Where after institution of a suit attacking rates as confiscatory, the commission fixes new increased rates, which are also claimed by the carrier to be confiscatory, such order does not remit matters to the legislative state but places the subject matter subject to review by the courts, justifying the filing of a supplemental bill,[87] and the railroad company's operation under the rates fixed by the order in question does not constitute a waiver or abandonment of the pending action.[88]

Where in a suit by a railroad to restrain the putting into effect of a statute or order of a commission fixing rates the evidence as to the unreasonableness of the proposed rates is unsatisfactory, the rates should be allowed to take effect experimentally, to await a demonstration of their reasonableness or unreasonableness by actual trial for a reasonable length of time, subject to a future application for a change.[89] A suit to enjoin the enforcement of a statute, ordinance, or order fixing rates is, however, not premature because no test period has intervened during which the effect of the rates can be determined,[90] as the proof of the inadequacy of the proposed rate may be so clear and convincing as to warrant the court in enjoining its imposition in advance of the time it is put into operation.[91] Further, the rule sometimes followed of permitting the enforcement of a reduced rate for a trial period does not require a trial period for an ordinance granting a partial increase in the rate, where the unchallenged computations show a larger increase to be necessary.[92]

It has been held, notwithstanding the rule stat-

147, affirmed 42 S.Ct. 351, 258 U.S. 388, 66 L.Ed. 678—Ann Arbor R. Co. v. Fellows, D.C.Mich., 336 F. 387, appeal dismissed Ann Arbor R. Co. v. Glasgow, 39 S.Ct. 5, 248 U.S. 588, 63 L.Ed. 434.
10 C.J. p. 677 note 42.

83. U.S.—International Ry. Co. v. Prendergast, D.C.N.Y., 52 F.2d 293.
10 C.J. p. 677 note 43

All doubts will be resolved against plaintiff, on application for a preliminary injunction restraining the enforcement of an order of the commission reducing street car fares.—Chicago Rys. Co. v. Illinois Commerce Commission, D.C.Ill., 277 F. 970.

Under conflicting evidence as to valuations, expenses, and earnings of railway, preliminary injunction to restrain enforcement of rates was denied, but issues were referred to master.—International Ry. Co. v. Prendergast, D.C.N.Y., 52 F.2d 293.

84. U.S.—Meridian Light & Ry. Co. v. City of Meridian, D.C.Miss., 265 F. 765.
Kan.—Kansas City v. Public Utilities Commission of Kansas, 176 P. 324, 325, 103 Kan. 473.
"Upon any issue which it has jurisdiction to consider the commission must decide for itself in the first instance. The presumption is that it will decide right; but, if not, the remedy lies in a subsequent action in the courts."—Kansas City v. Public Utilities Commission of Kansas, supra.

Power to allow application for increase

As public utilities commission's power to allow street railroad's application for increased rates depends on circumstances, it may determine for itself, in first instance, the facts in that regard, the remedy of anyone aggrieved being by subsequent action in the courts, and a proceeding to enjoin the commission from acting in the first instance does not lie—Kansas City v. Public Utilities Commission of Kansas, 176 P. 324, 103 Kan. 473.

85. W.Va.—State v. Baltimore, etc., R. Co., W.Va., 85 S.E. 714, 76 W.Va. 399.

86. U.S.—Chicago Rys. Co. v. Illinois Commerce Commission, D.C.Ill., 277 F. 970.

87. U.S.—International Ry. Co. v. Prendergast, D.C.N.Y., 52 F.2d 293.

88. U.S.—International Ry. Co. v. Prendergast, D.C.N.Y., 29 F.2d 296.

89. U.S.—St. Louis, etc., R. Co. v. Hadley, C.C.Mo., 155 F. 220.
Md.—Pennsylvania R. Co. v. Towers, 94 A. 330, 126 Md. 59.

90. U.S.—Duluth St. Ry. Co. v. Railroad and Warehouse Commission of Minnesota, D.C.Minn., 4 F.2d 543, affirmed Railroad and Warehouse Commission of Minnesota v. Duluth Street Ry. Co., 47 S.Ct. 489, 273 U.S. 625, 71 L.Ed. 807.

91. U.S.—Henry L. Doherty & Co. v. Toledo Rys. & Light Co., D.C.Ohio, 254 F. 597.

Injunction held justified

Where city authorities proposed to take action to compel a carrier which was operating without a franchise, to sell eleven tickets for fifty cents, it was held that such action, under the circumstances, would work a confiscation of the company's property, and so would be enjoined in advance, the company being entitled to charge for its service a sum which would give a fair return.—Henry L. Doherty & Co. v. Toledo Rys. & Light Co., D.C.Ohio, 254 F. 597.

92. U.S.—City of Toledo v. Toledo Rys. & Light Co., Ohio, 259 F. 450, 170 C.C.A. 426.

ed in subdivision a of this section, that the courts will not undertake to prescribe rates, that a court of equity, on granting an injunction restraining the enforcement of a rate as confiscatory, may name a rate as a condition of the injunction, beyond which the carrier may not charge, pending final adjudication and the determination of a just rate by the proper body.[93] It has also been held that the court may issue a temporary injunction increasing the rates fixed in a contract between a municipality and a carrier, where such rates have been found to be confiscatory,[94] and that such injunction is not objectionable as disturbing the existing state of affairs, where the contract in which the rate is fixed evidences a primary intent to establish reasonable rates as the status quo.[95]

In a suit by a taxpayer to enjoin as unreasonable and invalid an increase of rates effected by arbitration between a municipality and railroad, the validity of the franchise providing for such arbitration cannot be tested.[96]

Defenses. A carrier cannot be estopped from securing relief in equity from confiscatory rates by reason of its having acquiesced for a long period to such rates.[97] That a railroad company seeking to enjoin enforcement of an order fixing a joint rate was in fact incorporated and acquired the rights, privileges, and franchises of its predecessors while such order was in force, does not preclude it from attacking such order on its becoming unreasonable and confiscatory.[98] A railroad company is not bound to attack prescribed rates as to all its routes, and the fact that it does not seek an injunction against the operation of the order fixing confiscatory rates, as to lines of another company which owned all of complainant's stock, is not a ground for denial of an injunction.[99]

Effect of injunction. An injunction issued by a court of competent jurisdiction, restraining the enforcement of a rate law during the pendency of an action, will suspend the operation of such rates until final determination of their validity.[1] An injunction restraining the enforcement of a rate fixed by the commission does not prevent the commission from thereafter proceeding, under the law of its creation, to fix a reasonable rate.[2]

Decree. An injunction against the enforcement of an ordinance fixing fares, which are confiscatory under the prevailing conditions, should safeguard the right of the city under its charter and the franchise to exercise properly its power to prescribe just and reasonable fares, if conditions subsequently change.[3]

A petition to modify a decree enjoining enforcement of a statute fixing maximum rates on condition that the railroad does not exceed rates specified therein will be denied, where it is not shown that changed conditions have rendered the statutory rate no longer confiscatory or that the rates permitted by the decree have become more than sufficient to yield a reasonable return.[4]

(b) Preliminary Injunction

A preliminary injunction restraining the enforcement of the attacked rate pending final determination may be issued where it is shown that irreparable injury will otherwise occur and that passengers will be protected in case the rate is ultimately found valid.

A court may, in a proper case, issue a temporary injunction against the enforcement of the alleged confiscatory rate, pending final determination of the validity of such rate,[5] where the reasonableness of the rate is doubtful and the carrier will

93. U.S.—Augusta-Aiken Ry. & Electric Corporation v. Railroad Commission of South Carolina, C.C.A.S.C., 281 F. 977, 981—Public Service Ry. Co. v. Board of Public Utility Commissioners, D.C.N.J., 276 F. 979, appeal dismissed Board of Public Utility Com'rs of State of New Jersey v. Public Service R. Co., 45 S.Ct. 9, 266 U.S. 636, 69 L.Ed. 481—City of Toledo v. Toledo Rys. & Light Co., Ohio, 259 F. 450, 170 C.C.A. 426.

"When an injunction is asked to restrain the enforcement of an unreasonable rate, the court may make its granting conditional upon the doing of equity by plaintiff, and thus may require the plaintiff to consent to charge no more than what seems to the court to be reasonable—just as in tax injunction cases, the plaintiff is often required to pay what the court thinks a fair tax before it will give relief against the excessive part. In any of these instances, there is an indirect fixing or determination by the court, but each of these indirect results is fully within the judicial power."—Augusta-Aiken Ry. & Electric Corporation v. Railroad Commission of South Carolina, supra—City of Toledo v. Toledo Rys. & Light Co., Ohio, supra.

94. U.S.—City of Council Bluffs v. Omaha & C. B. St. Ry. Co., C.C.A. Iowa, 9 F.2d 246.

95. U.S.—City of Council Bluffs v. Omaha & C. B. St. Ry. Co., supra.

96. Ohio.—Parks v. Cleveland Ry. Co., 176 N.E. 472, 38 Ohio App. 315, affirmed 177 N.E. 28, 124 Ohio St. 79.

97. U.S.—City of Council Bluffs v. Omaha & C. B. St. Ry. Co., C.C.A. Iowa, 9 F.2d 246.

98. U.S.—Banton v. Belt Line Ry. Corporation, N.Y., 45 S.Ct. 534, 268 U.S. 413, 69 L.Ed. 1020.

99. U.S.—Banton v. Belt Line Ry. Corporation, supra.

1. Minn.—State v. Chicago, etc., R. Co., 153 N.W. 320, 130 Minn. 144, L.R.A.1916B 764.

2. U.S.—Augusta-Aiken Ry. & Electric Corporation v. Railroad Commission of South Carolina, C.C.A. S.C., 281 F. 977.

3. U.S.—City of Paducah v. Paducah Ry. Co., Ky., 43 S.Ct. 335, 261 U.S. 267, 67 L.Ed. 647.

4. U.S.—East St. Louis & S. Ry. Co. v. Brundage, D.C.Ill., 10 F.2d 830.

5. U.S.—Chicago Rys. Co. v. Illinois Commerce Commission, D.C.Ill.,

suffer irreparable injury by adhering thereto, and where the injunction can be so guarded that no material injury will result in the case that the attacked rate is ultimately found valid,[6] as by a provision requiring the carrier to post an indemnifying bond,[7] or to issue redeemable claim checks to its passengers.[8] It has been held, on the other hand, that a preliminary injunction will be denied where the circumstances do not indicate that the carrier will suffer irreparable injury by compliance, until the final hearing, with the statute or regulation being attacked,[9] notwithstanding that there is serious doubt of its constitutionality,[10] and that it is not sufficient reason for the granting of such an injunction that the carrier furnish a bond to return the excess fare in the event that the existing rate is found to be nonconfiscatory, since it is not practical to protect fully the rights of the public in such a manner.[11] A preliminary injunction suspending the enforcement of a state statute fixing railroad rates has also been refused where the statute in question had been in force for a number of years and it appeared that the case could be heard on its merits within a very short time.[12]

(c) Jurisdiction

A federal court may have jurisdiction to enjoin the enforcement of a confiscatory rate fixed by state statute or commission, regardless of the carrier's failure to follow the statutory procedure of reviewing the commission's orders in the state courts, but, ordinarily, where the statute provides for review, it must be followed and relief by way of a direct suit for an injunction cannot be obtained in the state courts.

A federal court may have jurisdiction to determine whether a rate prescribed by a state statute or a commission acting thereunder is reasonable or confiscatory, and it may enjoin the enforcement of such rate if it finds it to be confiscatory.[13] Such jurisdiction may be exercised notwithstanding that the state statute provides for review of commission orders by the state courts, and no such prior determination has been had.[14] Ordinarily, how-

277 F. 970—Joplin & P. Ry. Co v. Public Service Commission of Missouri D C Mo, 267 F 584.

Showing held to authorize injunction

(1) An uncontradicted showing that an interurban railway was losing money, although it was charging a higher rate in its interstate traffic and traffic in another state than was permitted by a state public service commission's order, is sufficient, in the absence of a satisfactory explanation why the business within that state should be more profitable than the other business, to authorize a temporary injunction against the enforcement of the order prescribing the rate—Joplin & P. Ry. Co. v. Public Service Commission of Missouri, D.C Mo, 267 F. 584.

(2) An order granting a preliminary injunction restraining a city from interference with the control, operation, or management of a street railway system by the company or with its collection of fares in accordance with a schedule adopted, but expressly recognizing the right of the city to act through appropriate legislation, was justified by threatened executive interference—City of Toledo v. Toledo Rys & Light Co, Ohio, 259 F. 450, 170 C.C.A. 426.

Conflicting affidavits

Where, on a motion for an injunction pendente lite to restrain the enforcing of a city ordinance prescribing rates of fare to be charged by hackmen, the affidavits present a sharp conflict of fact as to whether hacks could be operated at a profit at such rates, this fact will not be determined on affidavits on a preliminary hearing in advance of the trial—Yellow Taxicab Co. v. Gaynor, 143 N.Y.S 279, 82 Misc 94, affirmed 144 N.Y.S. 299, 159 App.Div. 893.

6. N.Y—Willis v City of Rochester, 157 N.Y.S. 815, 93 Misc. 239, affirmed 159 N.Y.S. 1150, 173 App. Div. 957.

7. U.S—City of Council Bluffs v. Omaha & C. B St. Ry. Co., C.C.A. Iowa, 9 F.2d 246

8. N.Y.—Willis v. City of Rochester, 157 N.Y.S. 815, 93 Misc 239, affirmed 159 N.Y.S. 1150, 173 App. Div. 957.

9. U.S.—Meridian Light & Ry. Co. v. City of Meridian, D.C Miss., 265 F. 765.

10 C.J. p 677 note 50.

No danger of injury shown

In a suit to enjoin the enforcement of a five cent street railroad fare as provided by the franchise, where it appeared that the franchise imposed no penalty for charging a higher fare, and that the city had attempted to pass no ordinance imposing such penalty, nor had taken any other action to enforce the provision, no danger of irreparable injury to the company was shown—Meridian Light & Ry. Co v. City of Meridian, D C Miss., 265 F. 765.

10. U.S—Ahern v. Newtown & B. St. R Co, C C Mass., 105 F. 702

11. U.S.—International Ry. Co. v. Prendergast, D C.N.Y., 52 F.2d 293.

12. U S.—Ann Arbor R. Co. v. Fellows, D.C.Mich, 236 F. 387, appeal dismissed Ann Arbor R Co. v Glasgow, 39 S Ct 5, 248 U S 588, 63 L.Ed 434.

13. U S.—Banton v. Belt Line Ry Corporation, N.Y, 45 S.Ct. 534, 268 U S 413, 69 L.Ed 1020—International Ry Co. v Prendergast, D C N Y., 29 F.2d 296—Los Angeles Ry. Corporation v Railroad Commission of California, D C Cal, 29 F 2d 140, affirmed Railroad Commission of California v. Los Angeles Ry Corporation, 50 S Ct. 71, 280 U S 145, 74 L Ed 234—Duluth St Ry. Co v Railroad and Warehouse Commission of Minnesota, D C Minn., 4 F.2d 543, affirmed Railroad and Warehouse Commission of Minnesota v. Duluth Street Ry. Co, 47 S Ct. 439, 273 U S. 625, 71 L Ed 807—Chicago Rys Co. v. Illinois Commerce Commission, D C Ill, 277 F. 970—Public Service Ry. Co v Board of Public Utility Commissioners, D C N.J, 276 F. 979, appeal dismissed Board of Public Utility Com'rs for State of New Jersey v Public Service Ry Co., 45 S Ct. 9, 266 U.S. 636, 69 L Ed. 481.

10 C.J. p 675 note 36

Federal court will be bound by decision of state court as to whether or not the rate prescribed applies to given individuals or given localities.—Portland, etc, R Co v Oregon R Commn, Or., 33 S.Ct. 820, 229 U S. 397, 57 L.Ed 1248—10 C.J. p 676 note 37.

14. U.S.—Railroad and Warehouse Commission of Minnesota v. Duluth St Ry. Co., Minn, 47 S Ct 489, 273 U.S. 625, 71 L.Ed. 807, affirming, D.C., Duluth St. Ry. Co. v.

ever, the established method for review of orders of the commission, such as by appeal to specified state courts, must be followed, and a party cannot disregard this procedure and directly bring suit in a state court to enjoin enforcement of the commission order,[15] if the commission had jurisdiction of the matter in question.[16] Accordingly, where the statute furnishes a direct and adequate remedy by appeal, a commission order increasing fares above those fixed in a municipal ordinance cannot be attacked by a municipality's suit in the state court to enjoin its enforcement,[17] or by a collateral proceeding by information in chancery brought by the state's attorney.[18]

Since, under some statutes, when complaint is made of a rate fixed in a carrier's tariff schedule, relief must be sought through the commission in the first instance, a court has no jurisdiction to entertain a suit to enjoin a carrier from enforcing a rule contained in its filed schedules, as in violation of a statute.[19]

(2) To Enforce Compliance with Rates

Injunction may issue, in a proper case, to enforce compliance by the carrier with rates established by law or by municipal or private contract, and to prevent it from collecting an excessive or unauthorized fare.

A court may, in a proper case, issue an injunction to enforce compliance by the carrier with rates fixed by statute,[20] ordinance,[21] or contract between a municipality and a railroad.[22] So, an

Railroad and Warehouse Commission of Minnesota, 4 F.2d 543—International Ry. Co. v. Prendergast, D.C.N.Y., 52 F.2d 293—International Ry. Co. v. Prendergast, D.C.N.Y., 29 F.2d 296—Los Angeles Ry. Corporation v. Railroad Commission of California, D.C.Cal., 29 F.2d 140, affirmed Railroad Commission of California v. Los Angeles Ry. Corporation, 50 S.Ct. 71, 280 U.S. 145, 74 L.Ed. 234

Completion of legislative process

An order of the railroad and warehouse commission fixing street railway fares ends the legislative function of rate making, and the judicial hearing provided by state statute is not a continuation of the legislative rate-making process, the completion of which is prerequisite to the obtaining of relief in the federal courts—Duluth St. Ry. Co. v. Railroad and Warehouse Commission of Minnesota, D.C.Minn., 4 F.2d 543, affirmed Railroad and Warehouse Commission of Minnesota v. Duluth Street Ry. Co., 47 S.Ct. 489, 273 U.S. 625, 71 L.Ed. 807.

Election to come under statute

Street railway's election to comply with and come under terms of statute, providing among other things for an appeal to the state district court from orders of the commission, was not a contract, requiring such an appeal before bringing suit in the federal courts to enjoin enforcement of order.—Railroad and Warehouse Commission of Minnesota v. Duluth St. Ry. Co., Minn., 47 S.Ct. 489, 273 U.S. 625, 71 L.Ed. 807, affirming, D.C., Duluth St. Ry. Co. v. Railroad and Warehouse Commission of Minnesota, 4 F.2d 543

Impairment of city's right of appeal

Street railway was not required to appeal to the state court as provided by statute, before suing in the federal court to enjoin enforcement of order, on the theory that such a suit would otherwise cut off the city's right of appeal under the statute.—Railroad & Warehouse Commission of Minnesota v. Duluth St. Ry. Co., Minn., 47 S.Ct. 489, 273 U.S. 625, 71 L.Ed. 807, affirming, D.C., Duluth St. Ry. Co. v. Railroad & Warehouse Commission of Minnesota, 4 F.2d 543.

15. Colo.—Denver & S. P. Ry. Co. v. City of Englewood, 161 P. 151, 62 Colo. 229, 4 A.L.R. 956.
Ill.—Hoyne v. Chicago & O. P. Elevated R. Co., 128 N.E. 587, 294 Ill. 413.
Okl.—Swain v. Oklahoma Ry. Co., 32 P.2d 51, 168 Okl. 133.

16. N.Y.—City of New York v. Richmond Light & R. Co., 183 N.Y.S. 922.

Review by certiorari

If a determination of the public service commission concerning the rates to be charged by city railway is not satisfactory to the city, the city must apply to the commission for a rehearing, and if the determination of the commission is not satisfactory, it may be reviewed by the court in a certiorari proceeding, and the city cannot, without following such procedure, come into a court of equity for correction and review of a determination of the commission, if the commission had jurisdiction to make an order in the matter.—City of New York v. Richmond Light & R. Co., 183 N.Y.S. 922.

17. Colo.—Denver & S. P. Ry. Co. v. City of Englewood, 161 P. 151, 62 Colo. 229, 4 A.L.R. 956.
N.Y.—City of New York v. Richmond Light & R. Co., 183 N.Y.S. 922.
Okl.—Swain v. Oklahoma Ry. Co., 32 P.2d 51, 168 Okl. 133

18. Ill.—Hoyne v. Chicago & O. P. Elevated R. Co., 128 N.E. 587, 294 Ill. 413.

19. Mich.—Detroit United Ry. v. Oakland Circuit Judge, 183 N.W. 938, 215 Mich. 275.

20. N.Y.—Transit Commission v. Long Island R. Co., 3 N.E.2d 622, 272 N.Y. 27, affirming 288 N.Y.S. 938, 248 App.Div. 749.
Proceedings to enforce rates generally see supra § 304.

Rate charged by subsidiary corporation

(1) Supreme court had jurisdiction in summary proceeding to grant temporary injunction in transit commission's proceeding against railroad under statute providing that subsidiary domestic railroad corporation shall not charge rate within city of specified population exceeding rate charged by parent foreign corporation for similar service to adjacent state.—Transit Commission v. Long Island R. Co., 3 N.E.2d 622, 272 N.Y. 27, affirming 288 N.Y.S. 938, 248 App. Div. 749.

(2) The presumption of constitutionality of the statute was sufficiently supported to enable the court to enforce it against the carrier, by injunction.—Transit Commission v. Long Island R. Co., 3 N.E.2d 622, 272 N.Y. 27, affirming 288 N.Y.S. 938, 248 App.Div. 749

21. La.—City of Lake Charles v. Lake Charles Ry., Light & Waterworks Co., 80 So. 260, 144 La. 217.

Municipal corporation may sue for injunction against violation of an ordinance limiting street car fares.—City of Lake Charles v. Lake Charles Ry., Light & Waterworks Co., 80 So. 260, 144 La. 217.

22. N.Y.—City of New York v. Interborough Rapid Transit Co., 240 N.Y.S. 316, 136 Misc. 569, affirmed 249 N.Y.S. 243, 232 App.Div. 233, affirmed 177 N.E. 295, 257 N.Y. 20.

Grounds for injunction

Threatened violation of provisions regulating fare in contract leasing transit system was sufficient ground for injunction.—City of New York v. Interborough Rapid Transit Co., 240 N.Y.S. 316, 136 Misc. 569, af-

injunction may issue to restrain a railroad or a street railroad company from collecting an excessive or unauthorized rate of fare.[23] It has also been held that injunction is a proper remedy to enforce the performance of a contract between a carrier and a private party limiting the rate of fare to be charged between specified points, in a suit by such private party to prevent an attempted increase in the rate.[24]

It has been said that where the carrier has charged a rate in excess of that fixed in its filed schedule, resort may be had to a court for relief, in the first instance, without application to the commission;[25] but it has also been held an increase of fare by a carrier above the rate specified in a contract with a municipality will not be restrained by a court at the suit of the municipality where the reasonableness of the increase, notwithstanding the contract, is a matter for prior determination by the public service commission.[26]

An application to restrain a railroad from violating a maximum rate statute will be denied where it is shown that the carrier has obeyed such statute for a long term of years and intends to continue to do so.[27]

c. Review of Commission Orders by Appeal or Action to Set Aside

Under statutes so providing, commission orders with respect to rates may be reviewed by the courts by an appeal thereto or by an action to set aside the order; but on such review, the commission order will not be disturbed unless clearly shown to be unreasonable and unsupported by the evidence, and the court, under its appellate jurisdiction, cannot amend or correct the order or substitute another one therefor.

Where the statute so provides, proceedings may be brought in the state courts to set aside an order of the commission regulating and fixing rates.[28] In such a proceeding, the commission order cannot be disturbed unless it is established by clear and satisfactory evidence that the order is unreasonable or otherwise unlawful,[29] and where the statute so provides, the burden is on complainant to show that the order sought to be set aside is unlawful or unreasonable.[30] Where the commission, after fixing street railroad fares, thereafter rescinded the same in a new proceeding on the ground that the rate was then unreasonable, the court, cannot, in a proceeding attacking the first rate first fixed, treat the rescission by the commission as having voided the rate ab initio.[31] A city is not entitled to be heard as a party to a proceeding instituted by a street railway company to review and annul orders of the commission respecting street car fares.[32]

Appeal from order of commission; certiorari. In some states, under statutes providing for such review, orders of the commission are appealable to specified state courts.[33] Also, a writ of certiorari

firmed 249 N.Y.S. 243, 232 App.Div. 233, affirmed 177 N.E. 295, 257 N.Y. 20.

23. Minn.—Anderson v. St. Paul City Ry. Co., 188 N.W. 286, 152 Minn. 213.
10 C.J. p 678 note 67.

Who may bring action

(1) While it is probably true that private users of transportation facilities furnished by a street railway company cannot maintain an action to fix the rate of fare, or to determine the reasonableness of the rate charged, yet, if the street railway company is exacting a higher rate than is permitted by existing law, such users may maintain an action to restrain the company from enforcing more than the lawful rate.—Anderson v. St. Paul City Ry. Co., 188 N.W. 286, 152 Minn. 213.

(2) It has been held, however, that owners of property abutting on the road, who have no contract with the company as to the rate of fare, are not proper parties plaintiff to a bill by the township authorities to restrain the company from collecting a greater rate of fare than that stipulated in a contract with the township, since such owners have no interest different from that of the general public.—Millcreek Tp. v. Erie Rapid Transit St. R. Co., 58 A. 613, 209 Pa. 300.

24. Ohio—Humphrey Co. v. Cleveland Ry Co., 9 Ohio N.P.,N.S., 609.

25. Mich.—Detroit United Ry v. Oakland Circuit Judge, 183 N.W. 938, 215 Mich. 275.

26. Pa.—St. Clair Borough v. Tamaqua & Pottsville Electric Ry. Co., 103 A. 237, 259 Pa. 462, 5 A.L.R. 20—Borough of Wilkinsburg v. Consolidated Traction Co., 72 Pa. Super. 437—McKeesport v. Pittsburgh Rys. Co., 72 Pa.Super. 435

27. Neb.—State v. Chicago, R. I. & P. R. Co., 159 N.W. 410, 100 Neb. 268.

28. Wis.—City of Milwaukee v. Railroad Commission, 240 N.W. 165, 206 Wis. 339—Smith v. Railroad Commission of Wisconsin, 173 N.W. 312, 169 Wis. 547—Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin, 172 N.W. 746, 169 Wis. 421.
10 C.J. p 676 note 39

Admissibility of evidence

Evidence that a rate established by the public service commission is not compensatory is admissible in proceedings to review a commission's order with respect to sale of mileage books, attacked as effecting an unlawful discrimination, since a rate not compensatory cannot be enforced.—Boston, etc., R. Co. v. State, 93 A. 306, 77 N.H. 437.

29. Wis.—City of Milwaukee v. Railroad Commission, 240 N.W. 165, 206 Wis. 339—Smith v. Railroad Commission of Wisconsin, 173 N.W. 312, 169 Wis. 547.

A statutory provision giving prima facie effect to determination of commissioners, applies to the determination of facts on evidence as to unreasonable rates, but does not countervail the well settled rule that in proceedings in error the presumption is that the court below applied the law correctly.—State R. Comm'n v. Hocking Valley R. Co., 91 N.E. 865, 82 Ohio St. 25, 33—10 C.J. p 676 note 39 [c]

30. Wis.—Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin, 172 N.W. 746, 169 Wis. 421.

31. Wis.—Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin, supra.

32. Mass.—Donham v. Public Service Commission, 122 N.E. 397, 232 Mass. 309.

33. Minn.—City of St. Paul v. Railroad and Warehouse Commission, 203 N.W. 972, 163 Minn. 274.

to review the commission's determination may be had in some jurisdictions.[34] Although an appeal from an order fixing rates brings before the court the question of valuation of the railroad's property, a finding of the commission as to value, without the fixing of any rate, is not appealable.[35]

In some jurisdictions, the court is limited on appeal to an affirmance or reversal of the order and it may not amend or correct the order of the commission, or substitute another order therefor.[36] Further, the findings of the commission should not be disturbed on review unless they bear evidence of having been reached arbitrarily and without a full consideration of the controlling facts;[37] but the courts may review the questions submitted in so far as requiring the application of legal principles.[38]

On a review by certiorari, the court may not disturb the order, if it is fair and reasonable within the grant of power constitutionally conferred by the legislature, and sufficiently supported by the evidence before the commission.[39]

Pa.—St. Clair Borough v. Tamaqua & Pottsville Electric Ry. Co., 103 A. 287, 259 Pa. 462, 5 A.L.R. 20. 10 C.J. p. 676 note 39.

Notice of appeal

(1) A notice of appeal by citizens and taxpayers from an order of the board of public utility commissioners for a city, stating that such order was made on a given date and granted to a traction company "the right to charge a seven-cent fare per passenger riding on cars of such company," is sufficient under a statutory provision requiring the notice of appeal to set forth the order appealed from.—Robertson v. Wilmington & P. Traction Co., Del.Super., 104 A. 839, 7 Boyce, 155.

(2) That a petition by citizens and taxpayers for the stay of the order was also signed by others than the parties signing the notice of appeal, does not invalidate the notice.—Robertson v. Wilmington & P. Traction Co., supra.

34. N.Y.—Yonkers R. Co. v. Maltbie, 296 N.Y.S. 411, 251 App.Div. 204—City of New York v. Richmond Light & R. Co., 183 N.Y.S. 922.

Pendency of action for injunction

Certiorari by transit company to review certain proceedings of transit commission denying a fare increase was held, however, to be improper where an action by the city was pending to enjoin the company from charging more than contract fare and various restraining orders prevented the commission from exercising jurisdiction.—City of New York v. Interborough Rapid Transit Co., 249 N.Y.S. 243, 232 App.Div. 233, affirming 240 N.Y.S. 316, 136 Misc. 569, and affirmed 177 N.E. 295, 257 N.Y. 20.

Allegations of petition held defective

(1) In a petition for certiorari by a city to review an order of the public service commission, authorizing the receiver of a railway company to charge two cents for transfers on its lines to a certain date, and an order denying city's application for a reversal or modification of the order, allegations that orders "were made without adequate or competent proof" and that "the receiver . . failed to submit proper competent or adequate proofs that the proposed increased rate was just or reasonable," were mere conclusions.—City of New York v. Nixon, 183 N.Y.S. 6, 111 Misc. 224.

(2) Allegations in the petition of the commission's violation of certain provisions of the public service commissions law, without allegations of fact showing wherein such provisions were violated, are conclusions of law not meriting further consideration.—City of New York v. Nixon, supra.

35. Minn.—City of St. Paul v. Railroad and Warehouse Commission, 203 N.W. 972, 163 Minn. 274.

36. U.S.—Wilmington City R. Co. v. Taylor, D.C.Del., 198 F. 159. 10 C.J. p. 677 note 46.

37. Wash.—Puget Sound Electric R. Co. v. State R. Commn., 117 P. 739, 65 Wash. 75, Ann.Cas.1913B 763. 10 C.J. p. 677 note 47.

Determination held not arbitrary

In a proceeding before the board of public utilities commissioners for permission to charge a higher railway fare, the evidence was held not to support a claim that the board acted arbitrarily in finding and determining the proposed ten-cent fare per zone would be unjust and unreasonable.—New Jersey Central Traction Co. v. Board of Public Utility Com'rs, 113 A. 692, 96 N.J.Law 90.

Forecast of probable future values

Record in street car fare proceeding did not show that public service commission failed to make proper forecast of probable future values as required.—State ex rel. and to Use of City of St. Louis v. Public Service Commission, 34 S.W.2d 507, 326 Mo. 751.

Allowance for going value

City conceding propriety of allowing something for going value in street car fare proceeding and presenting no evidence as to such value could not complain because public service commission finally allowed less than evidence presented by the railroad warranted.—State ex rel. and to Use of City of St. Louis v. Public Service Commission, 34 S.W.2d 507, 326 Mo. 751.

Allowance for promotion costs

City conceding propriety of public service commission's allowing two million dollars for promotion and consolidation in original cost estimate in street car fare proceeding could not contend on an appeal from such proceeding that no allowance therefor should be made.—State ex rel. and to Use of City of St. Louis v. Public Service Commission, 34 S.W.2d 507, 326 Mo. 751.

38. Wash.—Puget Sound Electric R. Co. v. State R. Commn., 117 P. 739, 65 Wash. 75, Ann.Cas.1913B 763.

39. N.Y.—Yonkers R. Co. v. Maltbie, 296 N.Y.S. 411, 251 App.Div. 204.

Burden of proof is on street railroad company applying for certiorari to review public service commission's determination denying its application for permission to increase its passengers fares, even in absence of statute imposing such burden, company being moving party having affirmative of issue.—Yonkers R. Co. v. Maltbie, 296 N.Y.S. 411, 251 App.Div. 204.

Determinations not to be disturbed because supported by evidence

(1) Determination as to value of street railroad company's property for rate-making purposes, on rehearing, after judicial annulment of its previous determination fixing higher valuation.—Yonkers R. Co. v. Maltbie, 296 N.Y.S. 411, 251 App.Div. 204.

(2) Whether witnesses were qualified to testify as experts on matters involved in valuation of street railway properties.—Yonkers R. Co. v. Maltbie, supra.

(3) The commission's finding that annual depreciation of street railroad company's property should be ascertained by dividing value thereof by number of years of its remaining service life.—Yonkers R. Co. v. Maltbie, supra.

(4) The commission's finding as to further depreciation of item in val-

An appeal by a municipality from an order granting a street railway an increased fare presents to the court not only the contention that the increase is unauthorized because in excess of the rate fixed in the franchise contract, but also the contention that the increased fare is unreasonable.[40] A proposition that the commission in fixing street car fares ignored the relation of value to earnings cannot be considered on appeal from the commission order by a municipality, where it was not raised before the commission either in the original proceeding or on the application for rehearing.[41]

A municipality may be a proper party to appeal from an order of the commission granting a street railway an increase in fares above the rate fixed in a franchise contract.[42] A city in such a position may also be permitted to intervene as a party in a certiorari proceeding by the carrier to review the determination of the commission prohibiting an increase of fare.[43]

Pending final disposition of its writ of certiorari to review a commission order with respect to fares, a carrier cannot secure a judicial order suspending and staying the enforcement of the commission order, where the granting of such a stay is not authorized by law.[44] Municipalities appealing from a commission order are entitled to notice of hearing on a petition by the carrier to a judge not to have the appeal operate as a stay of the order, which would otherwise be the effect of such an appeal under a statutory provision to that effect, but a failure to give such notice does not render a judge's order granting the petition of the carrier void, where such judge has jurisdiction to grant the petition, and it must be treated as valid until set aside.[45]

A court decision annulling the commission's determination denying an application for an increase of rates, because made without supporting evidence, does not preclude the commission from reopening the proceeding and receiving further evidence to justify its determination.[46]

§ 585. Actions for Fares or Charges

A carrier receiving less than its published rate for a ticket may recover the deficiency from the passenger.

Under some statutes, where a carrier receives for a ticket an amount less than the published rate, it may recover from the passenger using the ticket the difference between the amount paid and the amount which should have been collected,[47] irrespective of the liability of the purchaser of the ticket.[48] Where a carrier refunds fares under

uation of its property for engineering and superintendence.—Yonkers R. Co. v. Maltbie, supra.

(5) Commission's finding that return of over six per cent on its valuation of street railroad company's property for rate-making purposes was ample, in absence of evidence of facts relative to usual return on investments or what would be reasonable rate of return.—Yonkers R. Co. v. Maltbie, supra.

Appraisal not supported by inventory

That an appraisal of company's properties, offered in evidence by the company in a proceeding before the commission, did not include the inventories on which it was based, did not make it impossible for the court to find that there was competent proof of all the facts necessary to be proved, to authorize the making of the determination.—City of New York v. Nixon, 183 N.Y.S. 6, 111 Misc. 224.

40. N.C.—In re Petition for Increase of Street Car Fares in City of Charlotte, 101 S.E. 619, 179 N.C. 151.

41. Mo.—State ex rel. and to Use of City of St. Louis v. Public Service Commission, 34 S.W.2d 507, 326 Mo. 751.

42. Ill.—Chicago Rys. Co. v. City of Chicago, 126 N.E. 585, 292 Ill. 190, error dismissed City of Chicago v. Chicago Rys. Co., 42 S.Ct. 95, 257 U.S. 617, 66 L.Ed. 399.

N.C.—In re Petition for Increase of Street Car Fares in City of Charlotte, 101 S.E. 619, 179 N.C. 151.

43. N.Y.—Dry Dock, E. B. & B. R. Co. v. Fullen, 239 N.Y.S. 501, 228 App. Div. 354, affirmed In re Dry Dock, E. B. & B. R. Co., 172 N.E. 516, 254 N.Y. 305.

44. N.Y.—People ex rel. Brooklyn City R. Co. v. Public Service Commission of State of New York for First Dist., 181 N.Y.S. 790, 110 Misc. 509.

Conditions to granting of stay

A statutory provision with respect to the conditions on which a stay of a commission order may be granted, does not authorize a motion for a stay by a railroad company, pending the final disposition of its writ of certiorari allowed on an order of the public service commission, it being apparently intended only to prevent issuance of an ex parte stay and not to modify the general statutory rule that injunctive relief may only be granted in an action and not on a motion of this sort.—People ex rel. Brooklyn City R. Co. v. Public Service Commission of State of New York for First Dist., 181 N.Y.S. 790, 110 Misc. 509.

45. R.I.—Public Utilities Commission v. Rhode Island Co., 107 A. 871, 42 R.I. 379.

46. N.Y.—Yonkers R. Co. v. Maltbie, 296 N.Y.S. 411, 251 App. Div. 204.

47. Ill.—Chicago & A. R. Co. v. Bates, 223 Ill.App. 325.

Pa.—Pennsylvania R. Co. v. Osborn, 161 A. 756, 106 Pa.Super. 45.

10 C.J. p. 684 note 68

Husband and father

A man traveling with his wife and daughter is responsible for undercharges on the tickets of both.—Pennsylvania R. Co. v. Osborn, 161 A. 756, 106 Pa.Super. 45.

Special train

Acceptance by agent of fifty dollars in full settlement of tariff due for special train does not preclude railway company from suing for amount due according to its published tariff sheets, approved by interstate commerce commission.—Bush v. Cole, 194 S.W. 24, 128 Ark. 411.

48. Pa.—Pennsylvania R. Co. v. Osborn, 161 A. 756, 106 Pa.Super. 45.

Purchaser comparatively unimportant

"Beyond seeing that the law against the unlawful sale of railroad tickets is observed . . . it is comparatively unimportant who purchases railroad tickets. This is con-

protest on the unauthorized order of a government officer, it cannot in any event recover the sum refunded in the court of claims.[49]

§ 586. Recovery Back of Excessive or Unauthorized Charges

Overcharges in passenger fares may be recovered with interest, and, if the overcharge was willfully exacted, punitive damages may also be recovered.

If the agents of the carrier exact a larger amount by way of fare than the carrier is entitled to, the passenger may recover back the excess charge, with interest.[50] Where the overcharge is willful or wanton, exemplary damages may be recovered,[51] regardless of whether the overcharge is accompanied by some other breach of duty which, in itself, is sufficient to justify exemplary damages.[52]

A passenger on a street railroad cannot recover back a fare on the ground that the distance traversed was not sufficient for the amount paid, nor for the refusal to issue a transfer from one line to another to enable him to reach his destination, either on an implied contract or on any common-law right;[53] and a passenger who voluntarily pays an overcharge before the beginning of a long journey cannot recover for inconveniences resulting from a lack of sufficient funds while traveling.[54] Where a person riding on a drover's pass seeks to recover for return transportation under a contract of shipment, he must comply with the terms of the contract.[55]

§ 587. Criminal Responsibility and Penalties for Excessive or Unauthorized Charges

a. Overcharges
b. Discriminations

a. Overcharges

(1) In general
(2) Who may recover
(3) Defenses

(1) In General

Under some statutes a penalty is imposed on carriers for charging excessive fares, and any agent of the company charging an excessive fare is guilty of a misdemeanor. Such state statutes have no application to interstate commerce.

Under some statutes a penalty is imposed on carriers for charging fares in excess of those allowed by law,[56] the penalty usually including attorney's fees;[57] and under some of these statutes any agent of the company charging an excessive fare is guilty of a misdemeanor, although the company itself is not indictable for a violation of the act, but is subject to the penalty only.[58]

stantly done by porters and agents at hotels, by friends and relatives Whether such purchase will render the buyers liable to the railroad company, in case of an undercharge, is, in this case, not material. The passenger who uses the ticket is certainly liable"—Pennsylvania R. Co. v Osborn, 161 A. 756, 106 Pa.Super. 45.

49. U.S.—Norfolk Southern R. Co. v. U S, 59 Ct.Cl. 517.

50. Ark.—St. Louis, I. M & S. Ry. Co v. Williams, 199 S.W. 376, 131 Ark. 442, affirmed 40 S.Ct. 71, 251 U.S. 63, 64 L.Ed. 139.
10 C.J. p 678 note 63.

Person entitled to ride free

Where a carrier was under a contractual obligation to issue annual tickets entitling a certain passenger to ride without charge over its entire railway system, the passenger could recover fares which he had been obliged to pay as a result of the issuance of tickets entitling him to ride over only a limited portion of the system.—Thatcher v. West Chester St. Ry. Co., 35 Pa.Super. 615.

Evidence of overcharge

In action against a carrier, to recover amount of overcharge of a fare and penalty allowed, testimony that plaintiff had several times previously been charged a less fare will support a verdict that she had been overcharged.—St. Louis, I. M. & S. Ry. Co v. Williams, 199 S.W. 376, 131 Ark. 442, affirmed 40 S.Ct. 71, 251 U.S. 63, 64 L.Ed 139.

51. S.C.—Medlin v. Southern Ry Co., 141 S.E. 185, 143 S.C. 91, 56 A.L.R. 767.
10 C.J. p 678 note 65.

Liability for act of conductor

Where the rate of fare for the transportation of passengers was fixed by statute, the act of a railway conductor in willfully overcharging a passenger was not his independent act, but was an act within the scope of his agency for which the railroad company was liable.—Medlin v. Southern Ry. Co, 141 S.E. 185, 143 S.C. 91, 56 A.L.R. 767

52. S.C.—Medlin v. Southern Ry. Co, supra.

53. Pa.—Pittsburgh R. Co. v. Alexander, 20 Pa.Dist. 413.

54. N.C.—Parsons v. Norfolk & W. Ry. Co., 156 S.E. 137, 200 N.C. 54.

55. Idaho.—Campbell v. Oregon Short Line R. Co., 275 P. 576, 47 Idaho 223.

Demand for return ticket

Shipper was not entitled to recover return transportation without proof of demand for return ticket or offer to surrender contract.—Campbell v. Oregon Short Line R. Co., 275 P. 576, 47 Idaho 223.

56. U.S.—St. Louis, I M. & S. Ry. Co. v. Williams, 40 S.Ct. 71, 251 U.S. 63, 64 L.Ed. 139, affirming 199 S.W. 376, 131 Ark. 442.
10 C.J. p 678 note 68.

Statute held inapplicable

A statute prescribing a penalty for charging rates in excess of those prescribed by law does not apply to a railroad, where it is not shown that the special acts authorizing its formation were followed up by an actual and due formation of a corporation under and pursuant to the general railroad act.—Palm v. New York, N. H & H. R. Co., 12 N.Y.S. 554, 58 N.Y.Super. 502, 35 N.Y.St. 457.

57. Ark.—Dow v. Beidelman, 5 S.W. 718, 49 Ark. 455.

58. N.C.—State v. Southern R. Co., 59 S.E. 570, 145 N.C. 495, 13 L.R.A.,N.S., 966.
10 C.J. p 678 note 71.

Such statutes are essentially penal in nature,[59] the penalty being given not as a satisfaction for the injury received,[60] but to compensate the party injured for his expenses in the prosecution and to compel the payment of such a sum by the company violating the law, as effectually to stop the practice.[61] Although, like all other penal statutes, these statutes are subject to strict construction,[62] the words of the statute should not be so narrowed as to exclude cases which the words in their ordinary and common acceptation would comprehend.[63] It has been held, in accordance with these rules, that such statutes have no application in case of an overcharge, made in violation of the carrier's rates and rules, which the carrier is not shown to have ratified;[64] but, on the other hand, it has been held that the carrier is liable for the statutory penalty where the overcharge is made designedly and not through inadvertence or mistake,[65] even though it is made contrary to orders.[66] A carrier does not render itself liable by exacting the full amount of fare authorized by law, although it voluntarily accepted less at the commencement of the transportation.[67]

Interstate transportation. Where a passenger travels from a point within to a point without the state, not desiring or offering to break up the continuous passage by paying to the last station within the state, the transaction is one of interstate commerce and the state statute does not apply;[68] but where in such case he desires to break up the continuity of his journey and offers, but is refused permission, to pay his fare to the last station in the state, intending there to get a ticket for the rest of the trip, and a fare is collected of him greater than he would have to pay had he been permitted so to do, there is a matter of intrastate commerce involved to which the statute applies.[69]

Carriers liable. Street surface railroads as well as steam railroads are liable under the provisions of some statutes imposing penalties for charging excessive fares.[70] A railroad company which is running its trains over a piece of road without legal authority, and hence is not entitled to exact a fare, cannot be held liable for the penalty.[71]

Receivers are not subject to a penalty under a statute prohibiting excessive charges by railroad corporations.[72]

(2) Who May Recover

Where the statute so provides, the party aggrieved, who is the person intending to become a passenger, may recover the penalty.

Under some statutes the penalty for excessive charges may be recovered by the "party aggrieved,"[73] who is the person intending to become a passenger,[74] although his ticket was purchased by another for him.[75] Where children in charge of a parent or another having custody of them are

Prohibition and penalty in different sections

This rule applies notwithstanding the prohibition to charge in excess of the maximum rate and the penalty for a violation thereof are not found in the same but in different sections.—State v. Southern R. Co., 59 S.E. 570, 145 N.C. 495, 13 L.R.A., N.S., 966.

Doctrine of accessories inapplicable

N.C.—State v. Southern R. Co., 59 S.E. 570, 145 N.C. 495, 13 L.R.A., N.S., 966.

59. U.S.—St. Louis, I. M. & S. Ry. Co. v. Williams, 40 S.Ct. 71, 251 U.S. 63, 64 L.Ed. 139, affirming 199 S.W. 376, 131 Ark. 442.
N.Y.—Merksamer v. Garrison, 181 N.Y.S. 197, 111 Misc. 195.
10 C.J. p. 679 note 75.

60. Ark.—St. Louis R. Co. v. Gill, 15 S.W. 18, 54 Ark. 101, 11 L.R.A. 452.
N.Y.—Fisher v. New York Cent., etc., R. Co., 46 N.Y. 644.

61. Ark.—St. Louis, etc., R. Co. v. Frisby, 129 S.W. 291, 95 Ark. 281.
10 C.J. p. 678 note 74.

62. N.Y.—Merksamer v. Garrison, 181 N.Y.S. 197, 111 Misc. 195.
10 C.J. p. 679 note 75.

63. Ark.—St. Louis, etc., R. Co. v. Waldrop, 123 S.W. 778, 93 Ark. 42.

64. W.Va.—Hall v. Norfolk, etc., R. Co., 28 S.E. 754, 44 W.Va. 36, 67 Am.S.R. 757, 41 L.R.A. 669.

65. Ark.—St. Louis, etc., R. Co. v. Baker, 175 S.W. 397, 118 Ark. 69
N.Y.—Petze v. Coney Island, etc., R. Co., 111 N.Y.S. 532, 127 App.Div. 351
10 C.J. p. 679 note 78.

66. Ark.—St. Louis, etc., R. Co. v. Ryan, 19 S.W. 839, 56 Ark. 245.

67. N.Y.—King v. Nassau Electric R. Co., 112 N.Y.S. 589, 128 App. Div. 130.

68. Ark.—Kansas City Southern R. Co. v. Brooks, 105 S.W. 93, 84 Ark. 233.
Transportation from one state to another as interstate commerce see C.J.S. title Commerce § 23, also 12 C.J. p. 22 note 48-p. 23 note 52.

69. Ark.—Kansas City Southern R. Co. v. Brooks, 105 S.W. 93, 84 Ark. 233.

70. N.Y.—Petze v. Coney Island, etc., R. Co., 111 N.Y.S. 532, 127 App.Div. 351—King v. Syracuse, etc., R. Co., 131 N.Y.S. 878.

Horse cars

A statute prohibiting and penalizing railroad companies charging more than a stated sum for each mile "was not intended to apply to city railroads which are drawn by horses, but to those propelled by steam."—Hoyt v. Sixth Ave. R. Co., 1 Daly, N.Y., 528, 529.

Street railroad held not included

N.Y.—Moneypenny v. Sixth Ave. R. Co., 30 N.Y.Super. 328, 4 Abb.Pr. N.S. 357, 35 How.Pr. 452.

71. N.Y.—Enton v. Nassau Electric R. Co., 124 N.Y.S. 555, 68 Misc. 385.
10 C.J. p. 679 note 84.

72. N.Y.—Merksamer v. Garrison, 181 N.Y.S. 197, 111 Misc. 195.

73. Ark.—St. Louis Southwestern Ry. Co. v. Alverson, 271 S.W. 27, 168 Ark. 662.

74. Ark.—St. Louis, etc., R. Co. v. Frisby, 129 S.W. 291, 95 Ark. 281—St. Louis, etc., R. Co. v. Freeman, 128 S.W. 1024, 95 Ark. 218.

75. Ark.—St. Louis, etc., R. Co. v. Frisby, 129 S.W. 291, 95 Ark. 281

overcharged by a carrier, they are "persons aggrieved" and entitled to sue for the penalty, although the overcharge is not paid by them but by the persons in charge of them.[76]

(3) Defenses

Matters which justify the carrier's action may constitute a defense to an action to recover a penalty for excessive charges.

Matters which take the carrier's action in charging the fare out of the operation of the statute may be set up as a defense to an action to recover a statutory penalty from a carrier for charging excessive fares. Accordingly, where the penalty is sought for collecting a higher fare than that permitted by statute, and the carrier had no opportunity to resort to another remedy against the statutory fare, the fact that the rate fixed is unreasonable and confiscatory may constitute a good defense;[77] but to make this defense available it should clearly appear that the statutory rate is unreasonable, and the mere fact that the business and traffic is small and unremunerative does not of itself establish the unreasonableness of the rate.[78] An injunction restraining a railroad company from putting a rate in force is a complete defense in a prosecution for a violation of the statute establishing such rate.[79]

On the other hand, it is not a defense to an action to recover a penalty for extorting excessive fares that the passenger was riding in expectation of being overcharged and merely for the purpose of becoming entitled to sue for the penalty,[80] or that the fare was paid by the passenger under a champertous agreement with an attorney to induce the company to accept the overcharge and then to recover the penalty;[81] or that the payment of the overcharge was voluntarily made by the passenger,[82] nor is it a good defense that the excessive fare was in fact not actually paid, where the statute authorizes a recovery if the carrier should "demand or charge such excessive fare;"[83] or that the amount paid in excess of the legal rate of fare was repayable on presentation by the passenger of a slip given him on making the payment;[84] or that a greater fare was demanded because a speed greater than the ordinary speed was requested.[85]

Mistake. No penalty, of course, can be recovered for an overcharge due to inadvertence or mistake not amounting to gross negligence, where the statute expressly so provides.[86] Such a statute is intended to apply only to intentional wrong or reckless carelessness by the railroad company.[87] It has been held, under such a statute, that an honest mistake of law as well as of fact will excuse the carrier;[88] but the mistake which is to be relieved from must not have been the result of carelessness on the part of the carrier in being advised on the subject of its legal rights.[89]

Under statutes containing no express provision exempting the carrier from liability in case of mistake, the carrier is subject to a penalty only where it intentionally charges an excessive fare,[90]

—St. Louis, etc., R. Co. v. Freeman, 128 S.W. 1024, 95 Ark. 218.
Ohio.—Pennsylvania Co. v. O'Connell, 95 N.E. 773, 84 Ohio St. 218, Ann.Cas.1912C 540.
10 C.J. p 679 note 86.

76. Ark.—Chicago, etc., R. Co. v. Davis, 170 S.W. 245, 114 Ark. 519.
10 C.J. p 679 note 87.

77. U.S.—St. Louis & S. F. Ry. Co. v. Stevenson, Ark., 15 S.Ct. 484, 491, 156 U.S. 667, 39 L.Ed. 573—St. Louis & S. F. Ry. Co. v. Gill, Ark., 15 S.Ct. 484, 156 U.S. 649, 39 L.Ed. 567.
10 C.J. p 679 note 88.

78. Ark.—Missouri Pac. R. Co. v. Smith, 29 S.W. 752, 60 Ark. 221.

79. Minn.—State v. Chicago, etc., Co., 153 N.W. 320, 130 Minn. 144, L.R.A.1916B 764.

80. N.Y.—Fisher v. New York Cent., etc., R. Co., 46 N.Y. 644.
10 C.J. p 679 note 91.

81. Ark.—Missouri Pac. R. Co. v. Smith, 29 S.W. 752, 60 Ark. 221.
Reason for rule
"The 'champertous' agreement . . . if available for any purpose, can only be set up when the agreement is sought to be enforced. The right . . . [to sue for a penalty] does not grow out of it, but solely out of the fact that the railway company charged and received a greater compensation than that allowed by law. The company was not justified by the agreement in demanding and receiving excessive compensation. How, then, could it be a good defense? No effort was made in this suit to enforce it. The right of action in this case is not dependent on or controlled by it. It could not, then, affect the right to the penalty."—Missouri Pac. Ry. Co. v. Smith, 29 S.W. 752, 753, 60 Ark. 221.

82. Ark.—St. Louis, etc., R. Co. v. Gill, 15 S.W. 18, 54 Ark. 101, 11 L.R.A. 452, affirmed 15 S.Ct. 484, 156 U.S. 649, 39 L.Ed. 567.

83. Hawaii.—Ballou v. Hawaiian Tramways Co., 10 Hawaii 376.

84. N.Y.—Hogan v. Long Island R. Co., 126 N.Y.S. 449, 142 App.Div. 29.

85. Mass.—Commonwealth v. Loud, 3 Metc. 328, 37 Am.D. 139.

86. N.Y.—Wysocki v. Erie R. Co., 140 N.Y.S. 950, 155 App.Div. 798.
10 C.J. p 680 note 97.

87. N.Y.—McCarthy v. International R. Co., 110 N.Y.S. 936, 126 App.Div. 152.

88. N.Y.—Goodspeed v. Ithaca St. R. Co., 77 N.E. 392, 184 N.Y. 351, affirmed 84 N.Y.S. 383, 88 App.Div. 147.
10 C.J. p 680 note 99.

89. N.Y.—Goodspeed v. Ithaca St. R. Co., supra.
10 C.J. p 680 note 1.

90. Ark.—St. Louis, etc., R. Co. v. Baker, 175 S.W. 397, 118 Ark. 69—Little Rock & Ft. S. Ry. Co. v. Clark, 25 S.W. 504, 58 Ark. 490.
Ticket short of destination
(1) Where a ticket agent on receiving a fare for transportation to a designated point, by a mistake

and an honest mistake of a conductor in collecting fare, without the intention of taking an amount greater than was lawful, will not make the carrier liable.[91] However, if the carrier or its agent demands and receives for the fare an amount that is in excess of what is lawful, knowing that he is receiving that amount,[92] or if through its willfulness or culpable negligence it charges and receives a greater amount than the law allows,[93] the carrier will be liable for the penalty, and the mistake of making such overcharge will not constitute a defense.

b. Discriminations

Unjust discriminations as to passenger fares, under the statutes, generally subject the carrier to criminal responsibility or to a penalty.

Under the provisions of the Interstate Commerce Act as amended, 49 U.S.C.A. §§ 2, 10, 41, discrimination by common carriers in interstate rates is unlawful, and any corporation or person who sells or attempts to sell or furnish a service for other than the legal rate commits a misdemeanor.[94] While no collusion between the carrier and the person acting for it is required,[95] the carrier's employees or other persons are not guilty unless the carrier itself is guilty as principal.[96] Accordingly, where an employee, acting outside the scope of his employment, sells tickets at reduced rates, he is not guilty under the Act, since such acts attach no criminality to the carrier.[97] It has also been held that a contract whereby a carrier agrees to telegraph a ticket without exacting an extra charge, is not in violation of the Act, the additional expense necessary to telegraph being considered a mere incidental cost to be attributed to the carrier's promotion of its own business and service.[98]

Under state statutes prohibiting and penalizing unjust discriminations, and declaring it to be an unjust discrimination for any railroad to make or give any undue or unreasonable preference or advantage to any particular person, a discrimination between through passengers and persons purchasing tickets at intermediate stations is not an unjust discrimination.[99] So, where a carrier transports through passengers over a detoured route without the payment of additional fare, but refuses this privilege to persons purchasing tickets at intermediate stations, it is not subject to a penalty, especially where it subsequently accords the latter class the same privilege.[1] It is not a discrimination, within the meaning of some state statutory prohibitions, for a carrier to return the unconsumed portion of a passenger's fare on ejecting him.[2]

gives a ticket to a point at a less distance, and the conductor requires, in addition to the surrender of the ticket, the payment of the legal fare between the two points, the passenger is not entitled to recover the penalty, there being an honest mistake, and no intention to charge more than the legal rate.—Smith v. St. Louis, etc., R. Co., 176 S.W. 308, 118 Ark. 291—Chicago, etc., R. Co. v. McDermott, 152 S.W. 983, 106 Ark. 170, 44 L.R.A.,N.S., 281 and note.

(2) In such a case, however, the carrier would be liable in damages for violating the contract of carriage.—Smith v. St. Louis, etc., R. Co., supra.

91. Ark.—St. Louis, etc., R. Co. v. Baker, 175 S.W. 397, 118 Ark. 69—Little Rock & Ft. S. Ry. Co. v. Clark, 25 S.W. 504, 58 Ark. 490.

Mistake in making change

"An honest mistake by a conductor in making change, without the intention of taking an amount greater than was lawful, will not make defendant liable."—Little Rock & Ft. S. Ry. Co. v. Clark, 25 S.W. 504, 58 Ark. 490.

92. Ark.—St. Louis Southwestern Ry. Co. v. Alverson, 271 S.W. 27, 168 Ark. 662
10 C.J. p. 680 note 4.

Promise to return excess on ascertaining mistake

Where excess fare was collected from passenger by conductor deliberately and intentionally, fact that latter stated he would return money if fare had been paid, and did offer to return it after ascertaining mistake, did not prevent passenger, as a party aggrieved, from suing for statutory penalty.—St. Louis Southwestern Ry. Co. v. Alverson, 271 S.W. 27, 168 Ark. 662.

Overcharge resulting from joint action of conductors

Where the first conductor on a train failed to punch a passenger's ticket and return it, and a second conductor required the passenger to repay her fare, the railroad was responsible for acts of both conductors, and, as the result of their joint action was that she was required to pay excess fare, the passenger, as a party aggrieved, was entitled to recover the statutory penalty.—St. Louis Southwestern Ry. Co. v. Alverson, 271 S.W. 27, 168 Ark. 662.

93. Ark.—St. Louis, I. M. & S. Ry. Co. v. Waldrop, 123 S.W. 778, 93 Ark. 42.
10 C.J. p. 680 note 5.

94. U.S.—U. S. v. Estes, D.C.Ill., 6 F.2d 902

95. U.S.—U. S. v. Estes, supra.

96. U.S.—U. S. v. Peterson, D.C. Mont., 1 F.2d 1018.

Reason for rule

"Unless there is a common carrier guilty as principal, the carrier's employees or other persons cannot be guilty . . . because they are not of the class that alone can commit the offenses by the statutes denounced, viz., common carriers who willfully discriminate, and those persons who aid or abet them therein."—U. S. v. Peterson, D.C.Mont., 1 F.2d 1018, 1019.

97. U.S.—U. S. v. Peterson, supra

"Taking the statutes as a whole, it seems clear their intent is to include the employee only when 'acting within the scope of his employment' and thereby imposing equal guilt upon the carrier."—U. S. v. Peterson, supra.

98. Ala.—Southern Ry. Co. v. Rowe, 73 So. 634, 198 Ala. 353

99. Tex.—Ft. Worth & D. C. Ry. Co. v. Wells, Civ.App., 191 S.W. 815—Ft. Worth & D. C. Ry. Co. v. Frazier, Civ.App., 191 S.W. 808.

1. Tex.—Ft. Worth & D. C. Ry. Co. v. Wells, Civ.App., 191 S.W. 815—Ft. Worth & D. C. Ry. Co. v. Frazier, Civ.App., 191 S.W. 808.

2. Ky.—Louisville & N. R. Co. v. Watson, 255 S.W. 1056, 201 Ky. 108.

§ 588. Amount and Number of Penalties Recoverable

Subject to the limitation that the penalties must be reasonable, the amount and number of penalties recoverable depend on the language of the statute involved.

Where the statute provides that for a violation thereof the carrier shall forfeit a certain sum, which sum may be recovered, together with the excess so received, by the party paying the same, and omitting the words, "for each and every offense," only one penalty can be recovered for all overcharges exacted from one person prior to the commencement of the action.[3] It has been held, however, that under a provision that the carrier shall forfeit and pay to the party aggrieved a sum equal to double the amount of the overcharge, but in no case less than a certain sum, the party aggrieved may recover for each overcharge.[4] A carrier charging excessive fare on a single purchase of two tickets is subject to but one penalty, in the absence of anything to show that it intended to apportion its wrongful act between the two tickets.[5]

Amount; excessive penalties. Where the statute declares that the railroad company exacting excessive fares is liable in three times the excess, the company which charges excessive fares for transportation over its own line and a connecting road is liable only in three times the excess of its own fare; the penalty does not extend to an excess charge on the connecting road.[6]

A statute which, by imposing excessive penalties, operates to deter carriers from resorting to the courts to determine the reasonableness of the legislative regulation, and which compels submission, is unconstitutional.[7] However, statutes imposing penalties of not less than fifty or more than three hundred dollars,[8] or not less than two hundred and fifty dollars,[9] are not so unreasonable and excessive as to be rendered unconstitutional.

§ 589. Actions and Prosecutions

Actions and prosecutions of this character are governed by the usual rules.

In accordance with the general rules governing actions to recover penalties, as discussed in C.J.S. title Penalties §§ 7–18, also 25 C.J. p 1181 note 46–p 1213 note 78, an action to recover the penalty for charging excessive fares may be brought in the county where the ticket was sold.[10]

Parties. Where the statute so provides, the penalty may be recovered in a private and not a public suit.[11]

Pleading and indictment. Plaintiff's initial pleading, in an action of this character, to be sufficient must set forth facts sufficient to state a cause of action.[12] Under some statutes the title of the statute should be indorsed on the process.[13] The petition need not negative matters of defense, as for instance, that the ticket was purchased for the purpose of obtaining a penalty;[14] nor is it necessary to plead matters of evidence.[15] An answer attacking the statute under which the penalty is sought to be enforced as unconstitutional, because under its terms the carrier would be obliged to operate its railway at a loss is insufficient to raise the constitutional question, unless it appears that the rate fixed is unreasonable.[16]

Under the Interstate Commerce Act, 49 U.S.C.A. § 10, an indictment of an employee of a carrier for accepting less than the legal fare need not show specifically the exact relationship between defendant and the carrier.[17]

Evidence. The burden is on plaintiff to show facts sufficient to bring his case within the provisions of the statute.[18] The mere act of taking or

Return of fare or ticket on ejection of passenger see infra § 825.

3. N.Y.—Fisher v New York, Cent., etc., R. Co., 46 N.Y. 644, 658.
10 C.J. p 680 note 9.

4. Ohio.—Pittsburg, etc., R. Co. v. Moore, 33 Ohio St. 384, 385, 31 Am. R. 543, distinguishing Fisher v. New York Cent. R. Co., 46 N.Y. 644.

5. Ark.—Chicago, etc., R. Co. v. Young, 145 S.W. 203, 102 Ark. 599.

6. Wis.—Streeter v. Chicago, etc., R. Co., 40 Wis. 294.

7. Pa.—Central R. Co. of New Jersey v. Northampton County, 18 Pa. Dist. 143.

8. Ark.—St. Louis, I. M. & S. Ry. Co. v. Williams, 199 S.W. 376, 131 Ark. 442, affirmed 40 S.Ct. 71, 251 U.S. 63, 64 L.Ed. 139.
10 C.J. p 678 note 68 [a].

9. S.C.—Brown v. Seaboard Air Line Ry. Co., 115 S.E. 638, 122 S.C. 333.

10. Ohio.—Pennsylvania Co. v. O'Connell, 95 N.E. 773, 84 Ohio St. 218, Ann.Cas 1912C 540.

11. U.S.—St. Louis, I. M. & S. Ry. Co. v. Williams, 40 S.Ct. 71, 251 U.S. 63, 64 L.Ed. 139, affirming 199 S.W. 376, 131 Ark. 442.

12. A newspaper publisher, to recover damages and the statutory penalty for extortion and unjust discrimination, must show in his petition that he was treated in the contract or mileage coupons differently, to his injury, than other publishers or editors.—Russell v. St. Louis & S. W. Ry. Co. of Texas, Tex. Civ.App., 250 S.W. 1076

13. N.J.—Hunter v. Erie R. Co., 56 A. 139, 70 N.J.L. 101.
10 C.J. p 681 note 14.

14. Ohio.—Cincinnati, etc., R. Co. v. Cook, 37 Ohio St. 265.

15. N.Y.—Nellis v New York Cent. R. Co., 30 N.Y. 505.
10 C.J. p 681 note 16.

16. Ark.—Missouri Pac. R. Co. v. Smith, 29 S.W. 752, 60 Ark. 221.
10 C.J. p 681 note 17.

17. U.S.—U. S. v. Estes, D.C.Ill., 6 F.2d 902.

18. Mich.—Humphrey v. Detroit, M.

receiving more than the lawful fare raises a presumption against the carrier and is prima facie evidence of a violation of a statute forbidding excess fares.[19]

Questions of fact and law. Where the evidence on a question of fact is conflicting, it should be submitted to the jury for its determination under proper instructions,[20] but where the facts are undisputed and lead to but one conclusion, the question becomes one of law for the court.[21]

§ 590. Time, Place, and Mode of Tender or Payment

In the absence of a statute providing otherwise, a carrier may make and enforce reasonable regulations as to the time, place, and mode of payment of fare.

In the absence of a statute to the contrary, a carrier may make and enforce reasonable regulations as to the time, place, and mode of payment of fare.[22] As a general rule, the time of taking the fare, whether at the carrier's station or office, or in the car or other vehicle, is immaterial;[23] but the carrier may demand prepayment of fare, and, if it does not, it must be presumed to rely on its lien on the passenger's baggage or on his integrity.[24]

§ 591. Depositing Fare

Rules requiring passengers to deposit their fares in a box or other device are reasonable and must be met.

A rule of a street railroad company requiring passengers to deposit their fare in a box or other device on the car, on entering such car,[25] or within a given time or distance,[26] is reasonable, and must be complied with by the passengers. Exceptional circumstances may arise which will make the strict enforcement of the rule vexatious, but the carrier need not provide for all possible exceptions justifying a suspension of the rule.[27] Where a passenger has paid his fare he cannot be compelled to put another fare in the box.[28]

Correction of mistake. Where a passenger, by mistake, deposits in the box an amount greater than

& T. S. L. Ry., 180 N.W. 373, 212 Mich 91, rehearing denied 181 N. W. 975, 213 Mich. 113.
10 C J. p 681 note 18.

Evidence held insufficient

(1) A judgment against a carrier for the penalty for an overcharge between two stations is not supported by evidence merely that the mileposts between such stations showed the distance to be so many miles, where it does not appear that the company had any connection with such mileposts, or that they were located on its right of way.—Little Rock, etc., R. Co. v. Wells, 33 S.W. 208, 61 Ark. 354, 54 Am.S. R. 216, 30 L.R.A. 560.

(2) Evidence that a railroad company owned stock in another company, which in turn owned stock in a third company which had overcharged a passenger, and that the officers of the two former companies were the same persons, was insufficient to establish that the first company operated the third company at the time the passenger was overcharged.—Missouri Pac. R. Co. v. Bolling, 48 S.W. 806, 66 Ark. 646.

(3) Evidence that the interstate commerce commission had approved proposed rate increases was insufficient to establish that such approval affected the rates on the intrastate line of the carrier.—Humphrey v. Detroit, M. & T. S. L. Ry., 180 N.W. 373, 212 Mich. 91, rehearing denied 181 N.W. 975, 213 Mich. 113

(4) Where a traffic manager testified that a tariff schedule of increased rates, similar to one approved by the interstate commerce commission, had been filed with the state railroad commission, but was unable to swear that it had been filed, the evidence was insufficient to establish that such a schedule had been filed except as shown by the receipt of the commission which was not in the record.—Humphrey v. Detroit, M. & T. S. L. Ry., supra.

19. S C—Brown v. Seaboard Air Line Ry. Co., 115 S.E. 638, 122 S.C. 333.
10 C.J. p 680 note 3.

20. Tex.—Ft. Worth & D. C. Ry. Co. v. Frazier, Civ.App., 191 S.W. 808.

Questions held for jury

(1) Whether defendant charged an excessive fare, where the evidence as to the station to which the purchaser requested a ticket is conflicting.—Kinsey v. Southern Ry. Co., 177 S.E. 149, 174 S.C. 192.

(2) Whether an agent of the carrier did intentionally charge a greater sum than the regular fare.—Missouri Pac. R. Co. v. Summers, 246 S.W. 859, 158 Ark 643.

(3) Whether or not the carrier was guilty of gross negligence in allowing a conductor to take charge of its cars and collect fares without adopting some effectual method of notifying him of a change in the rate of fares.—King v. Syracuse, etc., R. Co, 131 N.Y.S. 878.

(4) Whether a railroad station was a regular station or a flag station within the meaning of a statute authorizing railroad companies to make special charges to passengers boarding a train or alighting at other than regular stations.—Clark v. Jonesboro, etc., R. Co., 112 S.W. 961, 87 Ark. 385.

21. Tex.—Ft. Worth & D. C. Ry. Co. v. Frazier, Civ.App., 191 S.W. 808.

22. Pa.—Robb v. Pittsburg, etc., R. Co., 14 Pa.Super. 282.
10 C.J. p 681 note 22.

23. Iowa.—Russ v. The War Eagle, 14 Iowa 363
N.Y.—Gordon v. Grand St., etc., R. Co., 40 Barb. 546.
Payment of fare as establishing relation of carrier and passenger see supra § 559.

24. Miss.—Hurt v. Southern R. Co., 40 Miss. 391.

25. Va.—Virginia Ry. & Power Co. v. O'Flaherty, 88 S.E. 312, 118 Va. 749, Ann Cas.1918D 471.
10 C J. p 681 note 26.

26. Ky.—Curtis v. Louisville City R. Co., 23 S.W. 363, 94 Ky. 573, 15 Ky.L. 351, 21 L.R.A. 649.

27. N.Y.—Elder v. International R. Co., 122 N.Y.S. 880, 68 Misc. 22, affirmed 128 N.Y.S. 1122, 143 App. Div. 960.

28. Ky.—Curtis v. Louisville City R. Co., 23 S.W. 363, 94 Ky. 573, 15 Ky.L. 351, 21 L.R.A. 649.

Facts held to constitute payment

Where an employee authorized to make change, by mistake, retained a nickel belonging to a passenger, the retention, under the circumstances, constituted a payment of the fare, which the employee could have put in the box had he desired.—Curtis v. Louisville City R. Co., 23 S.W. 363, 94 Ky. 573, 15 Ky.L. 351, 21 L.R.A. 649.

the fare, he is entitled to restitution of the excess, and if the employee in charge is not authorized to return it and in that manner correct the mistake, it is a reasonable course to adopt for the passenger to receive the fare of another passenger, and in that way reimburse himself. A regulation requiring a passenger who may be deprived of his money by inadvertently depositing in the box more than the amount of the fare to go to the office for his reimbursement and the correction of the mistake is unreasonable.[29]

§ 592. Medium of Payment

In the absence of a statute to the contrary, a passenger may tender payment in any lawful money and the carrier may not require a particular kind. Also, in the absence of a statute to the contrary, payment of fare in money is not necessary.

In the absence of a special statute requiring payment in some particular kind of money, a passenger may tender payment in any good and lawful money, and the carrier is not entitled to insist on a particular kind of money, as, for instance, coin instead of legal tender notes.[30] It must accept legal tender notes at their face value, in payment of fare when demanded in advance of transportation; and if it exacts payment in gold or silver coin, or the market value thereof in such notes, it is liable to the statutory penalty for charging a rate greater than that allowed by law.[31]

Unless a payment in money is expressly required, the fare need not be paid even in money, for any valuable consideration moving from the person to the carrier will render him a paying passenger.[32] However, under the Interstate Commerce Act as amended, 49 U.S.C.A. § 6 par (7), a carrier cannot accept any compensation other than cash for interstate transportation,[33] and hence the delivery of such transportation in exchange for advertising,[34] or for injuries received,[35] or for services or property,[36] is a violation of the act, although such a transaction is permitted by a state statute,[37] and although the contract between the carrier and the passenger for such transportation was entered into prior to passage of the act.[38] However, a contract for the carriage of a caretaker of live stock, whose transportation is included in the rate for the stock, is not violative of this provision.[39]

The acceptance of other than cash in payment of a passenger's fare is also prohibited under some state statutes.[40] Thus a statutory provision which prohibits a common carrier from charging one person a greater or a less compensation than another, and which also prohibits charging other than the rates fixed and established, which rates are expressed and measured by dollars and cents, prevents a carrier from collecting or receiving other than cash in payment of a passenger's fare.[41]

29. N.Y.—Corbett v. Twenty-third St. R. Co., 42 Hun 587.

30. Cal.—Tarbell v. Central Pac. R. Co., 34 Cal. 616.
Ga.—Atlanta Cons. St. R. Co. v. Keeny, 25 S.E. 629, 99 Ga. 266, 33 L.R.A. 824.
10 C.J. p. 682 note 32.

31. N.Y.—Lewis v. New York Cent. R. Co., 49 Barb. 330.
10 C.J. p. 682 note 33.
Penalty for excessive or unauthorized charges see generally supra §§ 587–589.

32. Tex.—Russell v. St. Louis & S.W. Ry. Co. of Texas, Civ.App., 250 S.W. 1076.
10 C.J. p. 682 note 35.

Advertising

(1) A contract whereby a railroad company in consideration of certain advertising issues a mileage book to be used for transportation only between points entirely within the state, but not in connection with or for any part of an interstate trip, is not invalid.—Illinois Cent. R. Co. v. Holman, 64 So. 7, 106 Miss. 449.

(2) Statutory provisions in some states authorize contracts, between railroads and newspaper publishers, for transportation in exchange for advertising. The form or terms of such contracts are not prescribed, and the only restrictions are that such contracts shall be upon the same basis of charge as is charged the public generally for a like service, and the exchange be on a basis of value received in all cases, and that the contracts be approved by the Railroad Commission and filed in its office.—Russell v. St. Louis & S.W. Ry. Co. of Texas, Tex.Civ.App., 250 S.W. 1076.

33. U.S.—Chicago, I. & L. R. Co. v. U. S., Ill., 31 S.Ct. 272, 219 U.S. 486, 55 L.Ed. 305, affirming, C.C., 163 F. 114—Louisville & N. R. Co. v. Mottley, 31 S.Ct. 265, 219 U.S. 467, 55 L.Ed. 297, 34 L.R.A., N.S., 671, reversing 118 S.W. 892, 133 Ky. 652.
10 C.J. p. 682 note 37.

34. U.S.—Chicago, I. & L. R. Co. v. U. S., Ill., 31 S.Ct. 272, 219 U.S. 486, 55 L.Ed. 305, affirming, C.C., 163 F. 114—Louisville & N. R. Co. v. Mottley, 31 S.Ct. 265, 219 U.S. 467, 55 L.Ed. 297, 34 L.R.A., N.S., 671, reversing 118 S.W. 982, 133 Ky. 652.
Miss.—Illinois Cent. R. Co. v. Holman, 64 So. 7, 106 Miss. 449.

35. U.S.—Louisville & N. R. Co. v. Mottley, 31 S.Ct. 265, 219 U.S. 467, 55 L.Ed. 297, 34 L.R.A.,N.S., 671, reversing 118 S.W. 982, 133 Ky. 652.

36. U.S.—Louisville & N. R. Co. v. Mottley, supra.

37. U.S.—Chicago, I. & L. R. Co. v. U. S., Ill., 31 S.Ct. 272, 219 U.S. 486, 55 L.Ed. 305, affirming, C.C., 163 F. 114.

38. U.S.—Louisville & N. R. Co. v. Mottley, 31 S.Ct. 265, 219 U.S. 467, 55 L.Ed. 297, 34 L.R.A.,N.S., 671, reversing 118 S.W. 982, 133 Ky. 652.

39. U.S.—Tripp v. Michigan Cent. R. Co., Mich., 238 F. 449, 151 C.C.A. 385, certiorari denied Michigan Cent. R. Co. v. Tripp, 37 S.Ct. 475, 243 U.S. 648, 61 L.Ed. 945.

40. Neb.—State v. Union Pac. R. Co., 126 N.W. 859, 87 Neb. 29, 31 L.R.A.,N.S., 657.

41. Ind.—Evansville, etc., R. Co. v. Vanada, 106 N.E. 388, 57 Ind.App. 415.
Neb.—State v. Union Pac. R. Co., 126 N.W. 859, 87 Neb. 29, 31 L.R.A.,N.S., 657.
10 C.J. p. 683 note 44.

Smooth or mutilated money. A silver coin, worn smooth by constant and long continued handling while being circulated as a part of the national currency, but distinguishable and not appreciably diminished in weight, is a good tender for car fare.[42] The conductor, however, has the right to demand an entire bill and is not bound to accept one from which a portion has been torn; if any part which may aid in determining whether it is a genuine bill is absent, he is under no duty to receive it.[43]

§ 593. Amount of Tender; Making Change

A passenger need not tender the exact fare, but must tender a reasonable sum which the carrier must accept and furnish change.

A passenger, particularly one on a street car, is not bound to tender the exact fare, but he must tender a reasonable sum, and the carrier must accept such tender and furnish change.[44] What is a reasonable sum within the meaning of these rules is usually a question for the court to determine,[45] and depends largely on whether the carrier is a steam railroad or a street railroad.[46] It has been held that a tender of a five-dollar bill in payment of a five-cent fare is unreasonable;[47] but, on the other hand, the contrary has also been held.[48] It has also been held, where a large bill is tendered to the conductor with the request that he return the change when they reach the terminal of the carrier in a large city, that the size of the bill is immaterial.[49]

A demand for change, as a condition precedent to giving up the money, defeats a tender which is otherwise good.[50]

Rules fixing the maximum amount for which change will be made. The carrier may make a reasonable rule fixing the maximum amount for which change will be made;[51] and, where such a rule exists, a tender of more than the maximum amount is not a good tender;[52] and in such a case the conductor is not bound to change a bill of a larger denomination than that fixed as the maximum, although he has sufficient change on hand so to do, as he is allowed considerable discretion in deciding whether he has sufficient change for the probable demands of the trip to allow him to change more than the maximum amount in a particular case.[53]

§ 594. By and to Whom Tender or Payment Made

Tender or payment may be made by anyone, but it is not sufficient unless it is made to an agent authorized to accept payment.

The fare need not be paid by the passenger himself.[54] If an actual tender of fare is made, the

42. Ala.—Mobile St. R. Co. v. Watters, 33 So. 42, 135 Ala. 227.
Ill.—Chicago Union Tract. Co. v. McClevey, 126 Ill.App. 21.
N.J.—Jersey City, etc., R. Co. v. Morgan, 18 A. 904, 52 N.J.Law 60, affirmed 21 A. 783, 52 N.J.Law 558, appeal dismissed 16 S.Ct. 276, 160 U.S. 288, 40 L.Ed. 430.

43. N.J.—North Hudson County R. Co. v. Anderson, 39 A. 905, 61 N.J. Law 248, 68 Am.S.R. 703, 40 L.R.A. 410.

44. N.Y.—Barker v. Central Park, etc., R. Co., 45 N.E. 550, 151 N.Y. 237, 56 Am.S.R. 626, 35 L.R.A. 489.
10 C.J. p. 683 notes 47, 48.

45. Tenn.—Knoxville Tract. Co. v. Wilkerson, 99 S.W. 992, 117 Tenn. 482, 9 L.R.A.,N.S., 579, 10 Ann.Cas. 641.
10 C.J. p. 683 note 52.

Mixed question of fact and law

It has been held that what constitutes reasonable tender "is a mixed question of fact and law to be determined in each case, taking into account always the size of the city, town, or village, where the passage is demanded, the volume of business done, and the facilities for making change"—Jones v. Louisville, etc., R. Co., 68 So. 924, 925, 926, 109 Miss. 655.

46. Miss.—Jones v. Louisville, etc., R. Co., supra.
"A distinction ought to be made, we think, between passengers traveling on steam railroads and those traveling on street railroads. Passengers of the former class are expected to prepare themselves with tickets procured at the regular office established at the station where the trains regularly stop. Horse cars and cable cars stop at all points along the road at the beck of those desiring to ride, and the conductors do not, as a general thing expect to receive tickets for passage"
Cal.—Barrett v. Market-St. Ry. Co., 22 P. 859, 860, 81 Cal. 296, 6 L.R.A. 336, 15 Am.S.R. 61.
Miss.—Jones v. Louisville & N. R. Co., 68 So. 924, 925, 109 Miss. 655.

47. N.Y.—Barker v. Central Park, etc., R. Co., 45 N.E. 550, 151 N.Y. 237, 56 Am.S.R. 626, 35 L.R.A. 489.
Pa.—Muldowney v. Pittsburg, etc., Tract. Co., 8 Pa.Super. 335.

48. Cal.—Barrett v. Market St. R. Co., 22 P. 859, 81 Cal. 296, 15 Am. S.R. 61, 6 L.R.A. 336.

49. Miss.—Jones v. Louisville, etc., R. Co., 68 So. 924, 109 Miss. 655.

50. Ky.—Louisville, etc., R. Co. v. Cottengim, 104 S.W. 280, 31 Ky.L. 871, 13 L.R.A.,N.S., 624.

51. Ga.—Burge v. Georgia R., etc., Co., 65 S.E. 879, 133 Ga. 423, 18 Ann.Cas. 42.
Tenn.—Knoxville Tract. Co. v. Wilkerson, 99 S.W. 992, 117 Tenn. 482, 9 L.R.A.,N.S., 579, 10 Ann.Cas. 641.

Rule fixing five dollars held reasonable

Tenn.—Knoxville Tract. Co. v. Wilkerson, 99 S.W. 992, 117 Tenn. 482, 9 L.R.A.,N.S., 579, 10 Ann.Cas. 641.

Rules fixing two dollars held reasonable

Ga.—Burge v. Georgia R., etc., Co., 65 S.E. 879, 133 Ga. 423, 18 Ann. Cas. 42—Wynn v. Georgia R., etc., Co., 64 S.E. 278, 6 Ga.App. 77.
N.Y.—Barker v. Central Park, etc., R. Co., 45 N.E. 550, 151 N.Y. 237, 56 Am.S.R. 626, 35 L.R.A. 489.
S.C.—Funderburg v. Augusta, etc., R. Co., 61 S.E. 1075, 81 S.C. 141, 21 L.R.A.,N.S., 868.

52. Ga.—Wynn v. Georgia R., etc., Co., 64 S.E. 278, 6 Ga.App. 77.
S.C.—Funderburg v. Augusta, etc., R. Co., 61 S.E. 1075, 81 S.C. 141, 21 L.R.A.,N.S., 868.
10 C.J. p. 683 note 50.

53. S.C.—Funderburg v. Augusta, etc., R. Co., supra.

54. Pa.—Rowdin v. Pennsylvania R. Co., 57 A. 1125, 208 Pa. 623.
S.C.—Mims v. Seaboard Air Line R. Co., 48 S.E. 269, 69 S.C. 338.

conductor cannot refuse it, no matter by whom the tender is made,[55] except that, where a stranger's offer to pay the passenger's fare is addressed to the passenger and not to the conductor, the latter is not bound to accept it in the face of the passenger's unqualified dissent.[56]

Payment or tender of fare may be made to any agent authorized to accept payment,[57] who is usually the conductor;[58] and a tender or payment to one not so authorized, such as to a brakeman, is not sufficient.[59] An offer to pay an employee who informs the passenger that he is not only unauthorized to receive it but also that he is prohibited from so doing is not an offer to the company.[60]

Tender or payment to avoid ejection will be hereinafter considered in § 812.

§ 595. Back Fare

If a passenger has failed to pay for the carriage already received, he cannot insist on further transportation without payment of the back fare.

If a passenger has failed to pay for the carriage already received on the train, he cannot insist on being allowed to continue his trip without payment of back fare.[61] Accordingly, if a conductor, through mistake, collects less than the regular train fare he may, on discovering the mistake within a reasonable time, require the passenger to pay the proper fare, unless his right so to do has been waived, as where the conductor receives and retains the amount paid without demanding more, for more than a reasonable length of time.[62]

§ 596. Passenger on Wrong Train

Where a passenger, through no fault of the carrier, takes the wrong train, he may be required to pay to the first station where the train stops.

If the passenger, by his own mistake and without fault of the servants of the carrier, takes the wrong train, he may be required to pay to the first station beyond, where the train stops;[63] but, as already pointed out in § 557, while on the train by mistake he is a passenger.

2. Tickets

§ 597. Purchase and Sale

The passenger must provide himself with the necessary evidence of his right to transportation, and where reasonable opportunities are afforded may be required to procure a ticket before entering the train.

Ordinarily it is the duty of the passenger to provide himself with the necessary evidence of his right to transportation, and, if he fails so to do through no fault of the carrier or its agents, the passenger will be entitled only to such transportation as he shows himself entitled to.[64] If the carrier sees fit, it may, by proper regulation, require the passenger to procure a ticket before entering the train for transportation, provided reasonable opportunities are afforded the passenger to secure a ticket,[65] and such a regulation is reasonable.[66]

The carrier must sell its tickets without discrimination and in the order of application;[67] and it may be held liable in damages where it negligently fails to give a passenger an opportunity to purchase a ticket,[68] or wrongfully or negligently refuses to sell him one,[69] or to furnish him one in exchange, under the provisions of a mileage book.[70] A carrier may also be liable in damages for its failure to furnish plaintiff a ticket that will carry him to the destination to which he has paid the fare charged.[71]

Tex.—Trinity Valley R. Co v. Stewart, Civ App, 62 S.W. 1085.
10 C J p 684 note 60.

55. Pa.—Ham v. Delaware, etc., Canal Co., 21 A. 1012, 142 Pa. 617

56. Pa—Muldowney v. Pittsburg, etc., Tract. Co, 8 Pa.Super 335.

57. N J.—Shelton v. Erie R. Co., 66 A. 403, 73 N.J Law 558, 118 Am.S. R. 704, 9 L R A ,N.S., 727, 9 Ann. Cas. 883.
Ohio.—Cleveland, etc, R. Co. v. Bartram, 11 Ohio St. 457

58. N.J.—Shelton v. Erie R. Co., 66 A. 403, 73 N.J.Law 558, 118 Am. S.R. 704, 9 L.R A ,N.S., 727, 9 Ann Cas 883.

59. Kan.—Mendenhall v. Atchison, etc., R. Co., 71 P. 846, 66 Kan. 438, 97 Am S R. 380, 61 L R.A. 120.
10 C.J. p 684 note 65.

60. Ohio.—Cleveland, etc., R. Co. v. Bartram, 11 Ohio St. 457.

61. Ga.—Coyle v. Southern R Co, 37 S E. 163, 112 Ga. 121.

62. Minn.—Wardwell v. Chicago, etc., R. Co, 49 N.W. 206, 46 Minn. 514, 24 Am S.R. 246, 13 L.R.A. 596.

63. Ky.—Illinois Cent R. Co v Billington, 30 S.W. 885, 17 Ky L 271
10 C J. p 684 note 71.

64. Ga.—Adams v. Louisville & N. R Co., 109 S E. 703, 27 Ga App 720.
10 C J. p 684 note 73, p 687 note 11 [b].

65. Ark.—Simmons v. Lusk, 194 S. W. 11, 128 Ark. 336.
10 C J. p 684 note 74.

66. Ark —St. Louis Southwestern R. Co. v. Branch, 153 S.W. 118, 106 Ark. 269.
10 C.J. p 684 note 75.

67. N.J —State v. Delaware, etc., R. Co, 48 N.J.Law 55, 2 A. 803, 57 Am. R. 543.

Tex.—Chicago, etc., R. Co. v. Howell, Civ App, 166 S.W. 81.
10 C J. p 685 note 77.

68. Ga.—Southern R. Co. v. Johnson, 70 S E. 69, 8 Ga.App 654.
10 C J p 685 notes 78, 79.

69. N.C —Coleman v Southern R. Co, 50 S.E. 690, 133 N C. 351.
10 C J p 685 note 80.

70. Ill.—Pittsburgh, etc., R. Co. v. Daniels, 90 Ill.App. 154
Ky.—Schmidt v. Cleveland, etc., R. Co., 74 S W. 674, 25 Ky.L. 11.
10 C J. p 685 note 81.

71. Ala.—Southern Ry. Co. v. Penny, 114 So. 15, 22 Ala.App. 199.
10 C J. p 685 note 82.

Half-fare ticket

A prospective passenger, applying for a full-fare ticket, and paying the full fare charged for such ticket, but receiving only a half-fare ticket, may recover of the carrier for damages

Sale of tickets on cars. Regulations have been made, and held reasonable, requiring street railroad companies to keep tickets for sale on their cars.[72]

§ 598. Authority to Sell; Brokers

The business of purchasing and selling nontransferable tickets without the authority of the carrier is an actionable wrong, and under some statutes constitutes a crime.

The carrying on of the business of purchasing and selling nontransferable tickets for profit to the injury of the carrier issuing such tickets is an actionable wrong,[73] and under statutory provisions in some jurisdictions the sale of such a ticket without the authority of the carrier constitutes a crime.[74]

Generally statutory provisions prohibiting persons from selling railroad tickets, unless they are specially authorized by the railroad company, and making it a penal offense for them so to do, have been upheld as a valid exercise of the police power,[75] although there is authority to the contrary.[76] Such statutes are not invalid as an interference with interstate commerce,[77] or as granting to anyone privileges or immunities denied to others, or as depriving any person of property without due process of law, or as impairing the obligation of contracts,[78] or as a delegation of the police power of the state to grant licenses to engage in a business[79]

A statute making it unlawful for any person other than a duly authorized agent of the company to "sell or deal in tickets" has no application to the sale of a single ticket by a person not a dealer therein.[80]

Ticket obtained in another state. A person who buys a ticket from a dealer who is not an authorized agent of the company, in a state where such sale is lawful, is entitled to transportation into another state over the railroad by which the ticket was issued, although a statute of the latter state makes the sale unlawful.[81]

§ 599. Sale on Credit

A mere delay in payment for a ticket does not invalidate it, at least where it is not a forbidden sale on credit.

The mere fact that the ticket is not actually paid for at the time of purchase does not invalidate

resulting from its failure to furnish the proper ticket.—Southern Ry. Co. v. Penny, 114 So. 15, 22 Ala.App. 199.

72. Mich.—West Bloomfield Tp. v. Detroit United R. Co., 109 N.W. 258, 146 Mich. 198, 117 Am.S.R. 628—Rice v. Detroit, etc., R. Co., 81 N.W. 927, 122 Mich. 677, 48 L.R.A. 84.
Neb.—Sternberg v. State, 54 N.W. 553, 36 Neb. 307, 19 L.R.A. 570.
10 C.J. p 685 note 83.

73. U.S.—Bitterman v. Louisville & N. R. Co., La., 28 S.Ct. 91, 207 U.S. 205, 52 L.Ed. 171, affirming 144 F. 34, 75 C.C.A. 192.

Actual malice not required

Actual malice, in the sense of personal ill will, is not required, since the wanton disregard of the rights of the carrier causing injury to it, which such business involves, constitutes legal malice.—Bitterman v. Louisville & N. R. Co., La., 28 S.Ct. 91, 207 U.S. 205, 52 L.Ed. 171, affirming 144 F. 34, 75 C.C.A. 192.

74. Ill.—People v. Lewis, 6 N.E.2d 175, 365 Ill. 156, affirming 1 N.E.2d 696, 285 Ill.App. 171.
10 C.J. p 686 note 86.

Sufficiency of information

(1) An information charging accused with unlawfully selling the return portion of a nontransferable railroad ticket without the authority of the railroad company need not negative exceptions in the statute creating the crime.—People v. Lewis, 6 N.E.2d 175, 365 Ill. 156, affirming 1 N.E.2d 696, 285 Ill.App. 171.

(2) "It is not necessary to set out in the information the name of the purchaser of the ticket"—People v. Lewis, 1 N.E.2d 696, 697, 285 Ill. App. 171, affirmed 6 N.E.2d 175, 365 Ill. 156.

75. Minn.—State v. Corbett, 59 N.W. 317, 57 Minn. 345, 24 L.R.A. 498.
10 C.J. p 686 note 88.

The object of such provisions is the prevention of ticket brokerage or ticket scalping.
Or.—State v. Thompson, 84 P. 476, 47 Or. 492, 4 L.R.A.,N.S., 480, 8 Ann. Cas. 646.
Tenn.—Samuelson v. State, 95 S.W. 1012, 116 Tenn. 470, 115 Am.S.R. 805.
10 C.J. p 686 note 89.

In Texas

(1) A municipal ordinance making it unlawful to sell, barter, or transfer in the city, for any consideration whatever, the whole or any part of any railroad ticket, unless duly authorized in writing so to do by the railroad issuing the same, is constitutional and in pursuance of a valid delegation of the police power of the state, in the absence of any statute on the subject.—Ex p. Hughes, 100 S.W. 160, 50 Tex.Cr. 614.

(2) But an act prohibiting anyone except a duly authorized agent from selling railroad tickets, and further providing that its provisions shall not apply to any person holding a ticket upon which is not plainly printed that "it is a penal offense for him or her to sell, barter, or transfer said ticket for a consideration," has no application to a ticket containing no such printed matter, and such a ticket is assignable.—International & G. N. R. Co. v. Ing, 68 S.W. 722, 29 Tex.Civ.App. 398.

(3) It has been held that an act of the latter character is unconstitutional and void because it gives to the railroad companies the power to determine whether the sale of its tickets shall constitute a criminal offense.—Texas, etc., R. Co. v. Mahaffey, 84 S.W. 646, 98 Tex. 392—Jannin v. State, Cr., 51 S.W. 1126.

76. N.Y.—Peo. v. City Prison Warden, 51 N.E. 1006, 157 N.Y. 116, 68 Am.S.R. 763, 43 L.R.A. 264, reversing 50 N.Y.S. 56, 26 App.Div. 228.
10 C.J. p 686 note 87.

77. Minn.—State v. Corbett, 59 N.W. 317, 57 Minn. 345, 24 L.R.A. 498.
10 C.J. p 686 note 90.

78. Ill.—Burdick v. Peo., 36 N.E. 948, 149 Ill. 600, 41 Am.S.R. 329, 24 L.R.A. 152.
10 C.J. p 686 notes 91, 92.

79. Minn.—State v. Corbett, 59 N.W. 317, 57 Minn. 345, 24 L.R.A. 498.

80. N.C.—State v. Clarke, 14 S.E. 84, 109 N.C. 739—State v. Ray, 14 S.E. 83, 109 N.C. 736, 14 L.R.A. 529.

81. Pa.—Sleeper v. Pennsylvania R. Co., 100 Pa. 259, 45 Am.R. 380.

it, at least where it could not be called a credit sale, but only a delay in payment and payment was expected and made the same day.[82] An agent authorized to sell tickets and to stamp and deliver the same, on receiving pay therefor, however, cannot bind his principal by turning over tickets to a third person, a ticket broker, to be in turn sold by him and to be paid for when so sold.[83]

§ 600. Delivery to Purchaser

It is the duty of the ticket agent to exercise reasonable care in delivering the ticket; where a wrong ticket is mistakenly furnished, the carrier will be liable, unless the passenger knew or had reason to believe that he was not given the correct ticket.

It is the duty of a ticket agent to exercise reasonable care in delivering the ticket so that the purchaser may get it, and if the purchaser is called away after applying for a ticket and putting down his money, it will be no delivery for the agent to put the ticket on the counter in his absence, if it does not come into his possession.[84] If a ticket agent by mistake gives a passenger the wrong ticket, the carrier is bound by the real contract between the parties;[85] but if the passenger knows or has reason to believe that the ticket handed him is not the ticket for which he called, he cannot thereafter complain that he received an improper ticket.[86]

§ 601. Extra Charge on Failure to Purchase Ticket

a. In general

b. Opportunity to purchase ticket

c. Waiver of right to demand extra fare

a. In General

Generally where a passenger violates a regulation requiring the purchase of a ticket before entering the train he may be subjected to a reasonable extra charge.

As already noted in § 597, the carrier may require the passenger to procure a ticket before entering the train, and, subject to some qualifications, where the passenger fails to comply with such a regulation, the carrier may properly exact a sum in addition to the amount which would have been charged for a ticket to the same destination, and such extra charge is generally recognized as a reasonable regulation and not unlawful as a discrimination,[87] particularly where the regulation provides for a refunding of the excess on the presentation by the passenger of a check at the ticket office.[88] Such a regulation is not unreasonable because it provides that as to passengers getting on the train at stations where there is no ticket office, or on trains where on account of the excessive rush of business it is impossible to issue the refunding check, the collection of the excess shall be omitted.[89]

Under some statutes such extra charge is expressly authorized,[90] except where the passage is wholly within the limits of an incorporated city.[91] Under other statutes, however, passengers who fail to procure tickets must be transported at the same rate and price charged for tickets for the same service.[92]

82. Iowa.—Ellsworth v. Chicago, etc., R. Co., 63 N.W. 584, 95 Iowa 98, 29 L.R.A. 173.
10 C.J. p 687 note 3.

83. Ohio.—Frank v. Ingalls, 41 Ohio St. 560.

84. U.S.—Quigley v. Central Pac. R. Co., C.C.Nev., 20 F.Cas.No.11,510, 5 Sawy. 107.

85. Ala.—Pullman Co. v. Riley, 59 So. 761, 5 Ala.App. 561.

Ticket for wrong station

A railroad company is liable for damages resulting to a passenger for furnishing a ticket to a different station from that called for, which would include the amount paid out by the passenger on account of the mistake.—Chicago, etc., R. Co. v. McDermott, 152 S.W. 983, 106 Ark. 170, 44 L.R.A.,N.S., 281—10 C.J. p 680 note 8.

Wrong date limit

A ticket agent authorized to sell two kinds of return trip tickets, with different date limits for the return trip, must issue a ticket for the time limit demanded by a passenger, and, where he inserts, without the fault of the passenger, an erroneous date limit for return, the passenger may recover the damages sustained.—Chicago, etc., R. Co. v. Howell, Tex.Civ.App., 166 S.W. 81.

86. Ala.—Pullman Co. v. Riley, 59 So. 761, 5 Ala.App. 561.

Duty to inspect ticket

A passenger may, in the absence of actual notice to the contrary, assume that the carrier has furnished him with a ticket correctly stating the terms of the contract actually made, and is not bound to inspect the ticket to see that the carrier has performed its duty.—Gulf, etc. R. Co. v. Copeland, 42 S.W. 239, 17 Tex.Civ.App. 55.

87. Ga.—Adams v. Louisville & N. R. Co., 109 S.E. 703, 27 Ga.App. 720
Miss.—Illinois Cent. R. Co. v. Mississippi Railroad Commission, 77 So. 314, 116 Miss. 484.
10 C.J. p 687 note 11.
Ejection of passenger for failure to pay extra charge see infra § 811.

Rule effected by discount

This rule may also be effected by the carrier's making a deduction from the regular or advertised fare in case of those buying tickets at the station.

Ga.—Coyle v. Southern R. Co., 37 S.E. 163, 112 Ga. 121.
Me.—State v. Goold, 53 Me. 279.
Mass.—Swan v. Manchester, etc., R. Co., 132 Mass. 116, 42 Am.R. 432.
10 C.J. p 688 note 15.

88. Minn.—Allen v. Chicago, etc., R. Co., 133 N.W. 462, 116 Minn. 119, Ann.Cas.1913A 1197.
10 C.J. p 688 note 12.

89. Pa.—Reese v. Pennsylvania R. Co., 19 A. 72, 131 Pa. 422, 17 Am.S.R. 818, 6 L.R.A. 529.

90. N.Y.—Hogan v. Long Island R. Co., 100 N.E. 47, 206 N.Y. 440, reversing 126 N.Y.S. 449, 142 App.Div. 29
10 C.J. p 688 note 16.

91. N.Y.—Hogan v. Long Island R. Co., supra.
S.C.—Weber v. Southern R. Co., 43 S.E. 888, 65 S.C. 356.
10 C.J. p 688 note 17.

92. Ark.—St. Louis Southwestern R. Co. v. Hammett, 136 S.W. 191, 98 Ark. 418.

It has been held that, if a passenger pays only from one station to another without a ticket, he may be compelled to pay an extra charge at each station, as a new contract between him and the company is thus made at each station,[93] and that, although he is on the train with a ticket, if he desires to go further than his ticket calls for, he may be required to pay the extra amount for the further transportation, notwithstanding he has no opportunity to procure another ticket.[94] On the other hand it has been held that, where the passenger has had no opportunity to procure another ticket, he is entitled to continue his journey by tendering or paying the regular fare.[95]

Limitation of amount of extra charge. In the absence of a statutory limitation the amount of such extra charge must be reasonable;[96] and it has been held, under some statutes, that the extra charge can in no case exceed the maximum rate allowed the carrier by law.[97] Where, however, the excess is to be refunded under reasonable conditions, the fact that the two sums might exceed the maximum rate authorized does not constitute an illegal charge, as such additional sum is in no sense a charge for transportation.[98]

Sufficiency of effort to procure ticket. Where the passenger makes no effort to procure a ticket,[99] or where he merely goes to the window of the ticket office, and not finding the agent there immediately enters the cars without making any effort to see if the agent is within the office, or to attract his notice,[1] he may be required to pay the train rate of fare; and this is also true where he reaches the station too late to buy a ticket before taking the train.[2] Where, however, the company fails to observe the statute relative to keeping open the ticket office, it cannot demand a higher rate, even though the passenger did not apply at the office for a ticket within the time specified, since the court regards the provision of the statute as an absolute rule, the operation of which is in no wise dependent on the attempt or intent of the purchaser to buy a ticket.[3]

b. Opportunity to Purchase Ticket

A condition precedent to the enforcement of a regulation exacting an extra charge is that the carrier afford the passenger a reasonable opportunity to purchase a ticket.

As a condition precedent to the enforcement of a regulation exacting an extra charge in case of a failure to purchase a ticket, the carrier must have afforded to the passenger a reasonable opportunity to procure a ticket.[4] The duty of the company in this respect may be stated thus: It must furnish a convenient and accessible place for the sale of tickets with a competent person in attendance ready to sell them,[5] which place should be open and accessible to all passengers for a reasonable time before the departure of each train, so that the passenger's failure to obtain a ticket shall really be a case of neglect on his part and not the fault of the company.[6] If a reasonable opportunity to purchase is not afforded, the passenger is entitled to have the regular fare accepted for his transportation,[7] al-

93. Ill.—Chicago, etc., R. Co. v. Parks, 18 Ill. 460, 68 Am.D. 562.

94. Ill.—Lake Erie, etc., R. Co. v. Quisenberry, 48 Ill.App. 338
Tex.—Easton v. Waters, App., 16 S.W. 540.

95. Ga.—Brown v. Central of Georgia R. Co., 58 S.E. 163, 128 Ga. 635.
Wis.—Phettiplace v. Northern Pac. R. Co., 54 N.W. 1092, 84 Wis. 412, 20 L.R.A. 483.

Order by corporation commission
In some jurisdictions an order to such effect may be made by the corporation commission as to travel within the state.—Atchison, T. & S. F. Ry Co. v. State, 150 P. 108, 47 Okl. 645—10 C.J. p 688 note 22.

96. W.Va.—White v. Chesapeake, etc., R. Co. 26 W.Va. 800

97. Miss.—Illinois Cent. R. Co v. Mississippi Railroad Commission, 77 So 314, 116 Miss. 484.
10 C.J. p 688 note 24.

98. Pa.—Reese v. Pennsylvania R. Co., 19 A. 72, 131 Pa 422, 17 Am. S.R. 818, 6 L.R.A. 529.

Particular charge held not illegal
A rule that passengers shall pay ten cents extra with a subsequent refundment when cash is tendered instead of a ticket, is a reasonable rule and is not in violation of a statute fixing the maximum rate for the transportation of passengers—Allen v. Chicago, etc., R. Co., 133 N.W. 462, 116 Minn. 119, Ann.Cas.1913A 1197.

99. Kan.—Union Pac. R. Co. v. Wolf, 38 P. 786, 54 Kan 592

1. Ind.—Indianapolis, etc., R. Co v. Kennedy, 77 Ind 507.

2. Ga.—Coyle v. Southern R Co., 37 S.E. 163, 112 Ga. 121.
Ind.—Lake Erie, etc., R. Co. v. Mayo, 30 N.E. 1106, 4 Ind.App 413.
Minn.—Allen v. Chicago, etc., R. Co., 133 N.W. 462, 116 Minn. 119, Ann. Cas 1913A 1197.

3. Tex.—Missouri Pac. R. Co. v. McClanahan, 1 S.W. 576, 66 Tex. 530—Gulf, etc., R. Co. v. Dyer, 95 S.W. 12, 43 Tex.Civ.App. 93.

4. Ala.—Southern Ry. Co v Blackwell, 100 So. 215, 211 Ala. 216—Louisville & N. R. Co v. Harper, 83 So 142, 203 Ala. 398
10 C.J. p 689 note 26

5. Ky.—Ponder v Lexington, etc., R Co., 174 S.W. 786, 164 Ky. 69.
10 C.J. p 689 note 26

6. Ga.—Adams v Louisville & N R Co., 109 S.E. 703, 27 Ga.App. 720.
10 C.J. p 689 note 26.

Purchase en route
A passenger cannot while en route be required to leave the train in order to purchase a ticket.—Central R., etc., Co v. Strickland, 16 S.E. 352, 90 Ga 562—Adams v Louisville & N. R. Co., 109 S.E. 703, 27 Ga.App. 720

7. Ala.—Louisville & N. R. Co. v. Harper, 83 So. 142, 203 Ala 398
Ga.—Adams v. Louisville & N. R Co., 109 S.E. 703, 27 Ga.App. 720.
10 C.J. p 689 note 26.

Journey over two lines
Where a passenger, having no ticket without his fault, paid the regular ticket rate to a junction point of the carrier's line, but showed no reason for not providing himself with a

though the contrary has also been held.[8] Accordingly, where there is no ticket office, or it is not kept open during a reasonable time before the departure of the train, so that a ticket may be bought, the regulation is not applicable.[9]

Time for keeping open office. Reasonable time for keeping open the office for the sale of tickets has been held to mean up to the time fixed by the published rules of the company for the departure of the train and not up to the time of actual departure;[10] and it is not necessary that the office be kept open until the very moment the train departs if the agent, in the usual course of the practicable discharge of his duties, has afforded opportunity for the purchase of tickets.[11] What is a reasonable time is usually a question of fact for the determination of the jury under the circumstances of the particular case,[12] with reference to the requirements, convenience, and demand of the public at the station in question.[13]

Under a statutory provision that the ticket office shall be kept open at least one hour prior to the departure of each passenger train,[14] or just prior to the departure of the train,[15] it has been held that the actual departure and not the advertised time of departure is meant. Where, however, the requirement is to keep the office open a specified time before the schedule time for the departure of the train, it is not necessary that an opportunity be afforded for the purchase of a ticket after the schedule time for departure, although the train is late.[16] If there is no one in attendance to sell tickets, the office is not "open" within the meaning of the statute.[17]

It is a good defense to a prosecution, under statutes making it an offense for a ticket agent to neglect to keep the ticket office open for the time prescribed by statute, that the railroad company did not sell tickets at such station for such train, but permitted the passengers to pay regular ticket fare on the train.[18]

c. Waiver of Right to Demand Extra Fare

In the absence of a mistake, the conductor by accepting and retaining the regular ticket fare waives the right to require payment of the extra charge, provided the passenger is justified in the belief that it was accepted as payment in full.

When a passenger in good faith tenders the regular ticket fare, and the conductor takes and retains it, he thereby waives the right to require the passenger to pay the difference between the ticket and train fare, provided the passenger is, from the attendant circumstances, justified in the belief that it was accepted as payment in full.[19] So, where the conductor receives and retains the ticket fare without demanding more until the train has passed the place at which he must exercise or abandon the right to eject the passenger for nonpayment, the latter has the right to assume that the amount paid

ticket for the remainder of his journey, the conductor of the train there taken was entitled to collect the train rate for the remainder of his journey.—Adams v. Louisville & N. R. Co., 109 S.E. 703, 27 Ga.App. 720.

8. Conn.—Crocker v. New London, etc., R. Co., 24 Conn. 249.
N.Y.—Bordeaux v. Erie R. Co., 8 Hun 579.
10 C.J. p 689 note 27

9. Ky.—Snellbaker v. Paducah, etc., R. Co., 23 S.W. 509, 94 Ky. 597, 15 Ky.L. 380.
10 C.J. p 689 note 28.

10. Ill.—St. Louis, etc., R. Co. v. South, 43 Ill. 176, 92 Am.D. 103—Illinois Cent. R. Co. v. Bauer, 66 Ill.App 124.
Mass.—Swan v. Manchester, etc., R. Co., 132 Mass. 116, 42 Am.R. 432.

11. S.C.—Talbert v. Charleston, etc., R. Co., 55 S.E. 138, 75 S.C. 138.
10 C.J. p 689 note 30.

12. Ga.—Central R., etc., Co. v. Strickland, 10 S.E. 352, 90 Ga. 562.
Iowa.—Everett v. Chicago, etc., R. Co., 28 N.W. 410, 69 Iowa 15, 58 Am.R. 207.
Minn.—Du Laurans v. St. Paul, etc., R. Co., 15 Minn. 49, 2 Am.R. 102.
10 C.J. p 689 note 31.

13. Iowa.—Everett v. Chicago, etc., R. Co., 28 N.W. 410, 69 Iowa 15, 58 Am.R. 207.

14. N.Y.—Nellis v. New York Cent. R. Co., 30 N.Y. 505—Chase v. New York Cent. R. Co., 26 N.Y. 523—Porter v. New York Cent. R. Co., 34 Barb. 353, 355.

In Texas

(1) Under a statute requiring ticket offices to be kept open for one-half hour prior to the departure of each train, an instruction that it was the duty of the carrier to keep its office open for a half hour before the arrival of the train and until the departure thereof imposed a greater duty upon the carrier than was imposed by law.—Missouri, etc., R. Co. v. Mills, 65 S.W. 74, 27 Tex.Civ.App. 245.

(2) A failure to keep the office open as required by such a statute constitutes negligence.—International & G. N. R. Co. v. Lister, Civ.App., 72 S.W. 107.

15. Kan.—Atchison, etc., R. Co. v. Hogue, 31 P. 698, 50 Kan. 40—Atchison, etc., R. Co. v. Dwelle, 24 P. 500, 44 Kan. 394.

16. Ill.—St. Louis, etc., R. Co. v. South, 43 Ill. 176, 92 Am.D. 103—Illinois Cent. R. Co. v. Bauer, 66 Ill.App 124—Chicago, etc., R. Co. v. Brisbane, 24 Ill.App. 463.
Mass.—Swan v. Manchester, etc., R. Co., 132 Mass. 116, 42 Am.R. 432.

In Kentucky, under a statute requiring railroad companies to keep their ticket offices open at least thirty minutes immediately preceding the schedule time of departure of passenger trains, and that, when any regular passenger train is delayed for thirty minutes in its arrival notice of the length of time of the delay shall be posted, a railroad company need not, where a train is seven minutes late, keep its office open up to the time of departure.—Ponder v. Lexington, etc., R. Co., 174 S.W. 786, 164 Ky. 69.

17. Tex.—Gulf, etc., R. Co. v. Dyer, 95 S.W. 12, 43 Tex.Civ.App. 93.
10 C.J. p 689 note 37.

18. Tenn.—Brady v. State, 15 Lea 628.

19. Minn.—Wardwell v. Chicago, etc., R. Co., 49 N.W. 206, 46 Minn. 514, 24 Am.S.R. 246, 13 L.R.A. 596, qualifying Du Laurans v. St. Paul, etc., R. Co., 15 Minn 29, 49, 2 Am.R. 102.

is satisfactory.[20] However, if the regular ticket fare is received through mistake, the conductor has a reasonable time to demand the extra fare.[21] The fact that the carrier has in other cases required only the regular fare is immaterial.[22]

§ 602. Representations and Acts of Agent or Employee

As a general rule representations within the apparent scope of a ticket agent's or conductor's authority bind the carrier.

Any agent allowed to exercise general authority to sell tickets over the line of a carrier thereby binds the carrier,[23] and any representation or promise within the apparent scope of his authority in making such contract for transportation will be binding,[24] particularly where the carrier has acted on the contract with knowledge of the facts.[25] If the terms of a ticket in effect are dependent on punches or marks not ordinarily intelligible to a purchaser, he may rely on the representations of the agent with regard to their effect.[26] A carrier, however, is not liable for agreements or special contracts made by an agent, not within the scope of his authority.[27] Thus the carrier has been held not liable for the representations of a ticket agent that a ticket may be used by one other than the original purchaser,[28] or that the conductor would transport without a ticket one who had lost his ticket.[29] Also, a carrier is not liable for the representations of its agent that coupons attached to a contract of carriage would entitle the purchaser to travel over a road not included in the contract and not authorized by the filed and published tariffs.[30] An agent authorized to sell cannot bind the carrier by delegating his authority to another, as by putting tickets already stamped and prepared for delivery into the hands of a third person, without the carrier's knowledge or consent.[31]

Representations subsequent to sale of ticket. A clear distinction appears to exist between an agent's representations at the time of the selling of the ticket and subsequent representations of an agent of the same company with regard thereto;[32] representations as to the effect of a ticket, not made in connection with its sale, are without authority,[33] and are not binding on the company.[34]

20. Minn.—Wardwell v. Chicago, etc., R. Co., 49 N.W. 206, 46 Minn. 514, 24 Am.S.R. 246, 13 L.R.A. 596

21. Ind.—Lake Erie, etc., R. Co. v. Mays, 30 N.E. 1106, 4 Ind.App. 413.
Minn.—Wardwell v. Chicago, etc., R. Co., 49 N.W. 206, 46 Minn. 514, 24 Am.S.R. 246, 13 L.R.A. 596, qualifying Du Laurans v. St. Paul, etc., R. Co., 15 Minn. 49, 2 Am.R. 102.

22. Ind.—Sage v. Evansville, etc., R. Co., 33 N.E. 771, 134 Ind. 100.

23. U.S.—Winters v. Cowen, C.C. Ohio, 90 F. 99, affirmed 96 F. 929, 37 C.C.A. 628
Ky.—Southern R. Co. v. Marshall, 64 S.W. 418, 111 Ky. 560, 23 Ky.L. 813.
Waiver of conditions by agent see infra § 621.

24. Ala.—Lamb v. Mitchell, 80 So. 151, 16 Ala.App. 577.
10 C.J. p. 690 note 49.

Scope of ticket agent's authority

(1) "The ticket agent generally has power to make contracts for the carrier for the carriage of passengers, and such contracts are within the scope of his apparent duties."—Yazoo & M. V. R. Co. v. O'Keefe, 88 So. 1, 2, 125 Miss. 536

(2) "The authorities agree that a ticket agent authorized to sell tickets has authority, and that it is his duty, upon application of a passenger or intended passenger, to give information as to the proper train upon which a ticket entitles the passenger to travel, and other like information regarding the use of the ticket."—Lamb v. Mitchell, 80 So. 151, 16 Ala.App. 577.

(3) Other statements see 10 C.J. p. 690 note 49 [a].

Agent authorized to sell tickets over connecting line

An agent of a carrier who has authority to sell a passenger ticket over its own line and that of a connecting carrier has authority to bind his principal by representations relating to the transportation over both lines.—Louisville, etc., R. Co. v. Spurling, 170 S.W. 192, 160 Ky. 819, Ann.Cas.1916A 487.

25. Ky.—Southern R. Co. v. Marshall, 64 S.W. 418, 111 Ky. 560, 23 Ky.L. 813.
10 C.J. p. 690 note 50.

26. Tenn.—O'Rourke v. Citizens' St. R. Co., 52 S.W. 872, 103 Tenn. 124, 76 Am.S.R. 639, 46 L.R.A. 614.
Tex.—Gulf, etc., R. Co. v. Copeland, 42 S.W. 239, 17 Tex.Civ.App. 55.
10 C.J. p. 690 note 51.

27. Me.—Cuozzo v. Maine Cent. R. Co., 91 A. 1006, 112 Me. 560.
10 C.J. p. 691 note 62.

28. Ga.—Coyle v. Southern R. Co., 37 S.E. 163, 112 Ga. 121.
Transferability of tickets see infra § 607.

Validation of nontransferable ticket

The fact that one other than the original purchaser of a nontransferable ticket had the return portion validated by one of the agents of the carrier gave him no right to use the ticket, since it was not within the scope of the agent's authority to extend the privileges afforded by the ticket to one other than the original purchaser.—Boston v. Southern Pac. Co., 194 S.W. 814, 175 Ky. 641.

29. Tex.—Texas, etc., R. Co. v. Smith, 84 S.W. 852, 38 Tex.Civ.App. 4.

30. Ala.—Alabama Great Southern R. Co. v. Vermillion, 77 So. 67, 69, 16 Ala.App. 229.
"The defendant [carrier] cannot be held liable for a statement by the defendant's agent that the coupons are good over a road not included in the contract, when the law charges plaintiff [purchaser] with a knowledge of the fact that they are not, and that it would be unlawful for defendant to so contract."—Alabama Great Southern R. Co. v. Vermillion, supra.

31. Ga.—Comer v. Foley, 25 S.E. 671, 98 Ga. 678.
Ohio.—Frank v. Ingalls, 41 Ohio St. 560.

32. Ga.—Shoenig v. Atlantic Coast Line R. Co., 86 S.E. 940, 17 Ga.App. 350.

33. U.S.—Atchison, T. & S. F. R. Co. v. Cameron, Ind.T., 66 F. 709, 14 C.C.A. 358.
Ga.—Shoenig v. Atlantic Coast Line R. Co., 86 S.E. 940, 17 Ga.App. 350.
Iowa.—Hanlon v. Illinois Cent. R. Co., 80 N.W. 223, 109 Iowa 136.
10 C.J. p. 690 note 53.

34. Iowa.—Hanlon v. Illinois Cent. R. Co., supra.

Limiting agent's authority. If the carrier seeks to limit the ticket agent's authority it must have its rules posted in its passenger depots or else it must otherwise bring the limitation to the attention of the passenger.[35]

Railroad conductors may make reasonable arrangements as to passengers transported under their direction,[36] but conductors have no authority to make special contracts of carriage.[37]

§ 603. Nature and Effect of Ticket

a. Particular types defined
b. Ticket as contract

a. Particular Types Defined

The various types of tickets have been defined.

A commutation ticket is a railroad ticket giving the holder the right to travel at a certain rate for a limited number of trips, or for an unlimited number within a certain period of time, for a less amount than would be paid in the aggregate for so many separate trips.[38] As otherwise defined it is a ticket for one passenger, good for more than one ride, or for more than one passenger for one ride, sold at a reduced rate;[39] a season ticket.[40]

Coupon tickets. Coupon tickets are complete tickets fastened together, and issued by carriers of passengers to be detached and given up in payment of fare.[41]

Excursion ticket. An excursion ticket is one of the varieties of special rate tickets coming within the designation or general description of "commutation tickets."[42]

Mileage book. A mileage book is a contract of carriage, having attached thereto coupons, one for every mile, each coupon being in two parts, one for the passenger's fare, the other for his baggage.[43]

Party-rate ticket. A party-rate ticket is a single ticket covering the transportation of ten or more persons from one place to another.[44] As otherwise

35. Miss.—Yazoo & M. V. R. Co. v. O'Keefe, 88 So. 1, 125 Miss. 536.

36. N.Y.—Wright v. Glens Falls, etc., R. Co., 48 N.Y.S. 1026, 24 App. Div. 617.
Tex.—Chicago, etc., R. Co. v. Burns, Civ. App., 104 S.W. 1081, affirmed 107 S.W. 49, 101 Tex. 329.
10 C.J. p. 691 note 65.

37. Pa.—Anderson v. Union Traction Co., 7 Pa.Dist. 41.
38. Black L. D.

Similar definitions

(1) The purchase of a right to go upon a certain route during a specified period for a less amount than would be paid in the aggregate for separate trips.
U.S.—Interstate Commerce Commission v. Baltimore & O. R. Co., C.C. Ohio, 43 F. 37, 56, affirmed 12 S.Ct. 844, 145 U.S. 263, 36 L.Ed. 699.
Ind.—Etter v. Cleveland, etc., R. Co., 86 N.E. 1020, 171 Ind. 581, 587, 588.

(2) A ticket issued at a reduced rate by a carrier of passengers, entitling the holder to be carried over a given route a limited number of times, or an unlimited number during a certain period
U.S.—Interstate Commerce Commission v. Baltimore & O. R. Co., supra.
Ind.—Etter v. Cleveland, etc., R. Co., supra.

(3) A railway or other ticket entitling the holder to repeated passage or other service, etc., at a reduced rate.—Etter v. Cleveland, etc., R. Co., supra.

(4) A ticket, as for transportation, which is the evidence of a contract for service at a reduced rate.
U.S.—Interstate Commerce Commission v. Baltimore & O. R. Co., Ohio, 12 S.Ct. 844, 145 U.S. 263, 277, 36 L.Ed. 699, affirming, C.C., 43 F. 37.
Ind.—Etter v. Cleveland, etc., R. Co., supra.

"Party-rate" ticket distinguished

(1) "The difference between commutation and party-rate tickets is that commutation tickets are issued to induce people to travel more frequently, and party-rate tickets are issued to induce more people to travel. There is, however, no difference in principle between them, the object in both cases being to increase travel without unjust discrimination, and to secure patronage that would not otherwise be secured."—Interstate Commerce Commission v. Baltimore & O. R. Co., C.C.Ohio, 43 F. 37, 56, affirmed 12 S.Ct. 844, 145 U.S. 263, 36 L.Ed. 699.

(2) "A one-way party ticket entitles the number of persons specified thereon to transportation of the quality indicated by the ticket, without stop-over, from and to the stations named on the ticket, within the limit specified. It is used for irregular travel between points varying with the applications of parties traveling one way. A commutation ticket entitles the holder (one person) to one first-class passage, without stop-over, for each number indicated on, or each coupon attached to, the ticket, between the stations named, in either direction, and is available to anyone under the conditions and within the limit specified in the contract. It is a kind of ticket largely used by suburban residents traveling between their homes and the larger cities, such as business men, school children, employees, etc. It has various forms, but is uniform in substance. It is a ticket generally on sale regularly by railroads, while party rates are commonly made to suit the particular conditions governing each party. We think the best expert railroad authority is to the above effect, and also that party-rate tickets are an entirely distinct class from commutation tickets, and are for a different class of travel"—Pittsburgh, etc., R. Co. v. Baltimore, etc., R. Co., 2 Int.Com.Rep. 729, 731.

(3) Other statements see 12 C.J. p. 216 note 48 [a].

39. U.S.—Interstate Commerce Commission v. Baltimore & O. R. Co., C.C.Ohio, 43 F. 37, 43, affirmed 12 S.Ct. 844, 145 U.S. 263, 36 L.Ed. 699.
Ind.—Etter v. Cleveland, etc., R. Co., 86 N.E. 1020, 171 Ind. 581, 587, 588.

40. Ind.—Etter v. Cleveland, etc., R. Co., supra.

41. English L. D.

42. U.S.—Interstate Commerce Commission v. Baltimore & O. R. Co., C.C.Ohio, 43 F. 37, 43, affirmed 12 S.Ct. 844, 145 U.S. 263, 36 L.Ed. 699.
23 C.J. p. 276 note 13

43. Ga.—Southern R. Co. v. Rosenheim, 58 S.E. 81, 1 Ga.App. 766, 770.
40 C.J. p. 658 note 52.

44. U.S.—Interstate Commerce Commission v. Baltimore & O. R. Co., Ohio, 12 S.Ct. 844, 145 U.S. 263,

defined, it is a ticket for the transportation of a number of persons from a place in one state or territory to a place situate in another state or territory at a rate less than that charged to a single individual for a like transportation on the same trip.[45]

Stop-over ticket. A stop-over ticket is one which gives a right to stop at a station beyond the time of the departure of the train on which one came with the purpose of continuing one's journey on a subsequent train.[46]

b. Ticket as Contract

Subject to some qualifications, the ordinary railroad ticket is not a contract, and is generally regarded as in the nature of a receipt or voucher showing that the passenger has paid his fare, and evidencing his right to transportation.

Subject to certain qualifications, the ordinary railroad ticket is not a contract in itself,[47] but merely a memorandum thereof,[48] and is generally regarded as in the nature of a receipt,[49] or as a token or voucher,[50] showing that the passenger has paid his fare. Such a ticket is evidence of the right to transportation furnished to the passenger in consequence of a contract to carry,[51] but is not evidence of the terms of passage, nor conclusive of the right to passage,[52] since the actual contract

278, 36 L Ed. 699, affirming, C C., 43 F. 37.
47 C.J. p 1320 note 25.

45. Ga.—Raleigh, etc, R. Co. v. Swanson, 28 S.E 601, 102 Ga. 754, 759, 39 L.R A. 275.

46. Cal.—Robinson v Southern Pac. R Co., 38 P. 94, 100, 105 Cal. 526, 556, 28 L.R A. 773.

Well known to general public

"A 'stop-over' ticket is a thing well known, not only in railroad circles, but to the general public,—so well known as to have gone into the common dictionaries of the language."—Robinson v. Southern Pac. R. Co., 38 P. 94, 100, 105 Cal. 526, 28 L.R.A 773.

47. Cal.—Ames v Southern Pac Co., 75 P. 310, 141 Cal. 728, 99 Am. S.R. 98.
Ill.—Lust v. Metropolitan West Side Elevated Ry Co., 222 Ill.App. 288.
Ky.—Guy v. Interstate Transit, 51 S. W.2d 455, 244 Ky. 479—Brumfield v. Consolidated Coach Corporation, 40 S.W 2d 356, 240 Ky 1—Louisville & N. R Co. v. Sandlin, 272 S. W 912, 209 Ky. 442.
Nev.—Summerfield v. Hines, 197 P. 690, 45 Nev. 60.
Okl —Dickinson v. Bryant, 172 P. 432, 69 Okl. 297, L.R A.1918E 978.
10 C.J. p 692 note 73.

48. Ky.—Guy v. Interstate Transit, 51 S.W.2d 455, 458, 244 Ky. 479—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 362, 240 Ky 1—Louisville & N. R. Co. v. Sandlin, 272 S.W. 912, 913, 209 Ky. 442.
10 C.J. p 692 note 73 [e].

"As between carrier and passenger the ticket is only a memorandum of the contract for carriage, the terms and details of which have been agreed upon before the delivery of the ticket."—Guy v. Interstate Transit, supra—Brumfield v. Consolidated Coach Corporation, supra—Louisville & N. R Co. v. Sandlin, supra.

As between passenger and conductor, ticket is evidence of passenger's rights.—Louisville & N. R. Co. v Sandlin, 272 S.W 912, 209 Ky. 442.

49. Cal.—Ames v Southern Pac. Co., 75 P. 310, 311, 141 Cal 728, 99 Am. S.R. 98.
Ill.—Lust v Metropolitan West Side Elevated Ry. Co, 222 Ill App 288
Nev.—Summerfield v. Hines, 197 P. 690, 692, 45 Nev. 60.
10 C.J. p 692 note 73 [d]

"It is more in the nature of a receipt given by the railroad company as evidence that the passenger has paid his fare for a certain kind of passage on the proper trains of the company, as limited and regulated by its rules"
Cal.—Ames v. Southern Pac. Co., supra
Nev.—Summerfield v. Hines, supra.

An elevated street railway ticket is merely a receipt and not a contract to carry, and a purchaser who presents such a ticket in payment of his fare, after the rate of fare has been raised by the public utilities commission, may be required to pay the difference between the price of the ticket and the new rate—Lust v. Metropolitan West Side Elevated Ry. Co., 222 Ill.App. 288.

As property

(1) An ordinary railroad ticket has more the character of personal property than of a negotiable instrument.—Frank v. Ingalls, 41 Ohio St 560, 564—51 C.J p 371 note 27.

(2) Yet it is not merchandise or a chattel.—State v. Corbett, 59 N W. 317, 57 Minn. 345, 350, 24 L.R A. 498—51 C.J. p 371 note 28.

50. Ind.—Pittsburgh, C., C. & St L. Ry. Co v. Higgs, 76 N.E. 299, 165 Ind. 694
47 C.J. p 1373 note 22 [b]—51 C.J. p 371 note 29.

It is a convenient symbol to represent the fact that the bearer has paid to the company the agreed price for his conveyance upon the road to the place designated.—Cleveland, etc. R. Co. v. Bartram, 11 Ohio St. 457, 462—Frank v. Ingalls, 41 Ohio St. 560, 563.

"Ordinary local tickets . . . are mere tokens to the passenger and vouchers for the conductor, adopted for convenience to show that the passenger has paid his fare from one place to another."—Watson v. Louisville, etc., R Co., 52 S.W. 1024, 104 Tenn 194, 200, 49 L R A 454—Louisville, etc., R Co. v. Turner, 47 S W 223, 100 Tenn. 213, 224, 43 L.R.A. 140.

Passage ticket for ocean voyage distinguished

"There is a distinction between the ordinary railroad ticket and a passage ticket for an ocean voyage, in that the former may be frequently treated as a token, while the latter partakes more of the character of a contract."—Murray v. Cunard S S. Co., 193 N.Y.S 220, 221, 200 App Div. 466

51. Okl.—Dickinson v. Bryant, 172 P. 432, 69 Okl. 297, L.R A.1918E 978.

Primary function of ticket

"Primarily, the function of a ticket is to serve as evidence, as between the conductor of the carrier's train and the passenger, of the latter's right to transportation"—Louisville & N. R. Co. v Rieley, 93 S.E. 574, 575, 121 Va. 469, L.R A 1918A 775.

Delivery of ticket as sufficient evidence

"Where a carrier sells a passenger a ticket, its delivery is sufficient evidence that it has contracted to carry him to the point named in the ticket within a reasonable time, not on a certain vehicle or coach of the passenger's own choosing, but subject to the rights of the carrier to assign the holder to the particular vehicle, and to the seat to be occupied by the holder while being transported."—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 363, 240 Ky. 1

52. Tenn.—Watson v. Louisville & N R Co, 56 S.W. 1024, 104 Tenn. 194, 49 L R.A. 454.

between the carrier and the passenger, made when the ticket is purchased, governs, notwithstanding recitals in the ticket.[53] While a passenger has a right to assume that a ticket delivered to him conforms to his contract,[54] either party may prove the rejection or waiver of any terms therein indorsed.[55]

On the other hand, it has been held that a ticket may be both a receipt and a contract.[56] Thus, where, in addition to its usual form, the ticket contains some reasonable stipulation or condition which the passenger has assented to, it may, to the extent of such stipulation, evidence[57] or constitute[58] the contract. Without regard to particular stipulations or to the assent of the passenger, it has been held that tickets are the contracts, or evidences of the contracts, of the carriers,[59] and that the face of the ticket is conclusive evidence to the conductor of the terms of the contract.[60]

Ticket purporting to be complete agreement; special contract. Generally where a ticket purports to be a complete agreement and sets out the terms of a special contract it is to be looked to as the evidence of the contract, and is conclusive as to its terms.[61]

A transfer ticket of a street railroad company is evidence of the contract as made out and punched by the carrier.[62]

A train check issued by a conductor in taking up a ticket is merely evidence of the right to transportation of the person to whom it is given.[63]

Devolution. A mileage book, at the death of the one to whom it is issued, goes to his personal representatives.[64]

§ 604. Construction: What Law Governs

Where a ticket is ambiguous, it should be construed most strongly against the carrier. In the absence of an intention of the parties to the contrary, the contract should be governed by the law of the place where the ticket is bought.

Where a ticket is of doubtful meaning, or ambiguous, it should be construed most strongly against the carrier by whom it is issued, and in favor of the purchaser.[65] In the absence of an express contract to the contrary, the passenger accepts his ticket subject to the custom and usages, and

53. Tex.—Texas, etc., R. Co. v. Wynn, 97 S.W. 506, 44 Tex.Civ. App. 29.
10 C.J. p 692 note 75.

54. U.S.—Harmon v. Jensen, C.C.A. Mich., 176 F. 519, 100 C.C.A. 115, 20 Ann.Cas. 1224.
10 C.J. p 692 note 76.

55. Me.—Burnham v. Grand Trunk R. Co., 63 Me. 298, 18 Am.R. 220.
10 C.J. p 692 note 77.

56. Va.—Louisville & N. R. Co. v. Rieley, 93 S.E. 574, 121 Va. 469, L.R.A.1918A 775.
10 C.J. p 692 note 79.

Custom and usage important

Custom and usage may have an important bearing in determining whether a ticket may, in particular cases, constitute a contract as well as serve as evidence of the passenger's right to transportation.—Louisville & N. R. Co. v. Rieley, 93 S.E. 574, 121 Va. 469, L.R.A.1918A 775.

57. Va.—Louisville & N. R. Co. v. Rieley, supra.

Implied assent from acceptance and use

"The very fact that the passenger knows the primary function . . . of the ticket and that he takes it to be used by him to serve such function, and so uses it, in the minds of some courts implies an assent on the part of the passenger to the stipulation on the ticket with respect to his rights of transportation (an implied meeting of the minds of the contracting parties being held to exist in such cases), and hence the ticket is held to evidence a contract between the passenger and carrier to the extent of such stipulations."—Louisville & N. R. Co. v. Rieley, 93 S.E. 574, 576, 121 Va. 469, L.R.A. 1918A 775.

A nontransferable ticket evidences a legal contract between the carrier and the purchaser, and limits the benefits of the contract to him.—Kirby v. Union Pac. R. Co., 119 P. 1042, 51 Colo. 509, Ann.Cas.1913B 461.

58. Ind.—Baltimore, etc., R. Co. v. Evans, 82 N.E. 773, 169 Ind. 410.—Pittsburg, C., C. & St. L. Ry. Co. v. Higgs, 76 N.E. 299, 165 Ind. 694.—Louisville, etc., R. Co. v. Wright, 47 N.E. 491, 18 Ind.App. 125.

Ticket containing limitations as to use

That part of a ticket providing that its use is limited to the purchaser and the dependent members of his family, and that a transfer will involve its forfeiture, constitutes a contract between the purchaser and the carrier, by the limitations of which he binds himself by accepting the ticket.—Baltimore, etc., R. Co. v. Evans, 82 N.E. 773, 169 Ind. 410.

59. Minn.—State v. Corbett, 59 N.W. 317, 57 Minn. 345, 350, 24 L.R.A. 498.

60. N.J.—Delaney v. Erie R. Co., 117 A. 395, 97 N.J.Law 434, affirmed 119 A. 924, 98 N.J.Law 558.

"Conclusive force is to be given to the intrinsic effect of a railroad ticket, as expressed on its face, when tendered by the passenger, so the face of the ticket is conclusive evidence to the conductor of the terms of the contract of carriage on which the conductor has a right to rely."—Delaney v. Erie R. Co., 117 A. 395, 97 N.J.Law 434, affirmed 119 A. 924, 98 N.J.Law, 558.

Conclusiveness of ticket as between conductor and passenger see infra § 816.

61. Ill.—See Martin v. Chicago, Duluth & Georgian Bay Transit Co., 194 Ill.App. 480.
Ind.—Calloway v. Mellett, 44 N.E. 198, 15 Ind.App. 366, 57 Am.S.R. 238.
10 C.J. p 692 note 78.
Special contracts generally see infra § 615.

62. Pa.—Golden v. Pittsburg R. Co., 28 Pa.Super. 313.
10 C.J. p 692 note 74.

63. U.S.—Cody v. Central Pac. R. Co., C.C.Nev., 5 F.Cas.No.2,940, 4 Sawy. 114.
10 C.J. p 695 note 14.

64. N.C.—Minnish v. Southern R. Co., 47 S.E. 432, 135 N.C. 342.

65. Ohio.—Ann Arbor R. Co. v. Amos, 97 N.E. 978, 85 Ohio St. 300, 43 L.R.A.,N.S., 587.
10 C.J. p 693 note 83.

rules and regulations of the carrier.[66] The ticket entitles him to transportation within a reasonable time, but not on any particular vehicle used by the carrier.[67] A ticket for a continuous passage is not necessarily a "through" ticket, but may merely indicate that there are no stop-over privileges.[68]

What law governs. In the absence of circumstances indicating that the parties contracted with intent that some other law should govern, a contract evidenced by a railroad ticket is generally governed by the law of the place where it is made, that is, where the ticket is bought;[69] but a special contract which affects only the remedy is governed by the law of the forum.[70]

§ 605. Tickets over Connecting Lines

In the absence of a statute to the contrary or an agreement between the carriers, one carrier does not have the power to bind a connecting carrier by issuing a through ticket over its lines.

In the absence of a statute to the contrary or any arrangement between carriers operating connecting lines, there is no right on the part of either to bind the other by the sale of a ticket for through transportation over the two lines.[71] Where, however, there is such an arrangement, the connecting carrier is bound to honor tickets or coupons sold by the initial carrier for transportation over the connecting line,[72] even after the arrangement has terminated, provided the purchaser had no notice thereof.[73] The initial carrier, in selling the ticket in such a case, acts as the agent of the connecting carrier, although there has been no direct appointment to that effect;[74] but a connecting carrier cannot legally make the initial carrier its agent to sell a ticket for interstate transportation over a route prohibited by tariffs filed with the interstate commerce commission.[75] Where the initial carrier has exceeded its authority, and the purchaser has notice of limitations on such authority, the connecting carrier is not bound to honor the ticket.[76]

Mileage tickets. Where by agreement between two companies each is constituted the agent of the other in the sale of mileage tickets good over both lines, neither may repudiate a ticket over its line sold by the other, on account of the subsequent abrogation of the agreement.[77] Where, however, the mileage ticket specifies the number of miles that may be traveled on each road, the portion of the ticket unused on one road is not available for transportation on the other.[78]

Penalty. Under some statutes, the validity of which has been upheld, a railroad company is required to sell tickets over the lines of a connecting carrier and is subject to a penalty for a violation of this requirement.[79] Such a statute is intended solely to prevent one railroad company from discriminating against a connecting company but it has been held that no liability attaches for the penalty imposed for a refusal to sell a ticket to a point on the line of the connecting company, unless such connecting company has tendered its tickets and requested their sale.[80] Where a connecting line having an office or agency has on sale tickets furnished by another connecting railroad and refuses to sell them to a prospective passenger, the connecting line is subject to the penalty.[81]

66. Ky.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 362, 240 Ky. 1.
"In the absence of an express contract to the contrary the passenger accepts the ticket subject to the custom and usages, rules and regulations of the carrier, which are uniform and permanent and are intended to protect and promote the comfort, convenience, safety, or health of all passengers alike, and at the same time secure the rights of the carrier."—Brumfield v. Consolidated Coach Corporation, supra.

67. Ky.—Brumfield v. Consolidated Coach Corporation, supra.
Performance of contract to transport on proper train or conveyance see infra § 641.

68. Md.—Stewart Taxi-Service Co. v. Spencer, 132 A. 153, 149 Md. 635.

69. Mo.—Robert v. Chicago, etc., R. Co., 127 S.W. 925, 148 Mo.App. 96.
10 C.J. p 693 note 84.

70. Tex.—St. Louis, etc., R. Co. v. Dysart, 130 S.W. 1047, 62 Tex.Civ. App. 7.
10 C.J. p 693 note 85.

71. U.S.—Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co., C.C.Or., 51 F. 465, affirmed 61 F. 158, 9 C.C.A. 409
10 C.J. p 693 note 87.
Nature and extent of liability of connecting carriers see infra § 653

72. Tex.—Mexican Cent. R. Co. v. Goodman, Civ.App., 43 S.W. 580.
10 C.J. p 693 note 88.

73. Ind.—Pittsburg, etc., R. Co. v. Berryman, 36 N.E. 728, 11 Ind.App. 640

74. U.S.—Cowen v. Winters, Ohio, 96 F. 929, 37 C.C.A. 628, affirming, C.C., 90 F. 99.
Ind.—Pittsburg, etc., R. Co. v. Berryman, 36 N.E. 728, 11 Ind.App. 640.
Mont.—Brian v. Oregon Short Line R. Co., 105 P. 489, 40 Mont. 109, 25 L.R.A., N.S., 459, 20 Ann.Cas. 311.

75. Ala.—Seaboard Air Line R. Co. v. Patrick, 65 So. 437, 10 Ala.App. 341.
10 C.J. p 693 note 91.

76. U.S.—Anderson v. New York & N. H. R. Co., C.C.Conn., 1 F.Cas. No.360, 6 Am.L.Rev. 754.
Tex.—Chicago, etc., R. Co. v. Carroll, Civ.App., 151 S.W. 1116.

77. U.S.—Cowen v. Winters, Ohio, 96 F. 929, 37 C.C.A. 628, affirming, C.C., 90 F. 99.

78. Ind.—Terre Haute, etc., R. Co. v. Fitzgerald, 47 Ind. 79.

79. Ga.—Stephens v. Central of Georgia R. Co., 75 S.E. 1041, 138 Ga. 625, 42 L.R.A.,N.S., 541, Ann. Cas.1913E 609.
10 C.J. p 694 note 96.

80. Ga.—Jones v. Louisville, etc., R. Co., 63 S.E. 627, 132 Ga. 11—Wimberly v. Georgia Southern, etc., R. Co., 63 S.E. 29, 5 Ga.App. 263.
10 C.J. p 694 note 97.

81. Ga.—Stephens v. Central Georgia R. Co., 75 S.E. 1041, 1044, 138

§ 606. Requiring Ticket or Permit on Freight Train

A regulation requiring persons wishing to ride on freight trains to pay fare or to procure a ticket or special permit in advance is reasonable, but the carrier must afford reasonable facilities therefor.

It is a reasonable regulation to require persons wishing to take passage on freight trains to pay fare or to procure a ticket[82] or a special permit[83] in advance. Of course, this right carries with it a corresponding duty on the part of the carrier to afford reasonable facilities for compliance.[84]

§ 607. Transferability of Tickets

a. In general
b. Restriction of use to original purchaser

a. In General

In the absence of a constitutional or statutory prohibition, or of a stipulation to the contrary on the face thereof, an ordinary ticket is transferable.

In the absence of a constitutional or a statutory prohibition, or of a stipulation to the contrary on the face thereof, an ordinary ticket, merely indicating a right to be transported by the carrier between two points named on its line, is transferable,[85] and the right to be transported between the points thus indicated passes by delivery of the ticket to the transferee,[86] although it is purchased from a ticket scalper.[87]

A ticket in coupon form, calling for transportation over connecting lines, with stop-over privileges under certain conditions, is transferable at the terminus of each division.[88]

A train check issued by a conductor in taking up a ticket is not assignable or transferable.[89]

b. Restriction of Use to Original Purchaser

Unless prohibited by statute, a carrier may make its tickets nontransferable, and one other than the original purchaser is not entitled to transportation on such a ticket. A ticket may also be limited to the use of several persons.

Unless prohibited by statute it is competent for a carrier of passengers to restrict the use of its tickets to the original purchaser, and where by a stipulation a ticket is made nontransferable, one other than the person to whom it is issued is not entitled to transportation thereon,[90] as, for example, where the words "not transferable," or words of like import, are printed on the ticket.[91] Thus a railroad company may make special reduced rate tickets nontransferable, and in such a case the original purchaser cannot assign or transfer them, or any rights

Ga. 625, 42 L.R.A.,N.S., 541, Ann. Cas.1913E 609.

"When one railroad places its tickets with another railroad, which has an office or agency and physical connection with the former, this is substantially a request to sell such tickets. And if the carrier having them for sale refuses to sell them at the rate fixed by the railroad commission of this state, this constitutes a discrimination within the purview of the statute, and the carrier so refusing . . . is liable for the penalty provided by . . . statute."—Stephens v. Central of Georgia R. Co., supra.

82. Ark.—McCook v. Northrup, 45 S.W. 547, 65 Ark. 225.
10 C.J. p 694 note 99.
Persons riding on freight trains as passengers see supra § 552.

83. Tex.—Ellis v. Houston East, etc., R. Co., 70 S.W. 114, 30 Tex. Civ.App 172.
10 C.J. p 694 note 1.

84. Ill.—Chicago, etc., R. Co. v. Flagg, 43 Ill. 364, 92 Am.D 133
Mo.—Cross v. Kansas City, etc., R. Co., 56 Mo.App. 664.
Tex.—Houston, etc., R. Co. v. Jackson, Civ.App., 61 S.W. 440.
Opportunity to purchase ticket as affecting right to exact extra fare see supra § 601 b.

85. Ohio.—Knecht v. Cleveland, C., C. & St. L. Ry. Co., 6 Ohio N.P., N.S., 13
10 C.J. p 694 note 3.

86. Ga.—Spencer v. Lovejoy, 23 S.E. 836, 96 Ga 657, 51 Am.S.R. 152.
10 C.J. p 694 note 3.

87. Ohio.—Knecht v. Cleveland, C., C & St. L. Ry. Co., 6 Ohio N.P., N.S., 13.
10 C.J. p 694 note 4.
Authority to sell tickets see supra § 598.

88. Or.—Nichols v. Southern Pac. Co., 31 P. 296, 23 Or. 123, 37 Am.S.R. 664, 18 L.R.A. 55.

89. U.S.—Cody v. Central Pac. R. Co., C.C.Nev., 5 F.Cas.No.2,940, 4 Sawy. 114.
Mo.—Walker v. Wabash, etc., R. Co., 15 Mo.App. 333

90. Ky.—Boston v. Southern Pac. Co., 194 S.W. 814, 175 Ky. 641.
10 C.J. p 694 note 7, p 695 note 8.
Use of nontransferable tickets or passes as affecting status of passenger see supra § 560.

Secret or undisclosed regulation

However, "a secret or undisclosed rule or regulation of the railroad company will not avail the company, if the ticket itself is unrestricted in form and the purchaser is without knowledge of such rule."—Knecht v. Cleveland, C., C & St. L. Ry. Co., 6 Ohio N.P.,N.S., 13, 15.

Special agent to dispose of ticket

Where a company delivers a ticket to a person, with power in the latter to sell and transfer the same, buts its validity has on its face been expressly limited to the first purchaser, the effect of the transaction is to constitute such person a special agent to dispose of the ticket on the terms named; and no authority being given such agent to vary the terms, it results that after a sale by the agent and the insertion of the purchaser's name, it becomes valueless in the hands of any other person.—Davis v. South Carolina, etc., R. Co., 33 S.E. 437, 107 Ga 420.

Statute held inapplicable

Under a statute providing that, "when by the terms of an instrument its assignment is prohibited, an assignment of it shall nevertheless be valid," the word "instrument" did not embrace mileage tickets issued at reduced rates, and the use of such a ticket could be restricted to the original purchaser.—Way v. Chicago, etc. R. Co., 19 N.W. 828, 64 Iowa 48, 52 Am.R. 431.

91. U.S.—Cody v. Central Pac. R. Co., C.C.Nev., 5 F.Cas.No.2,940, 4 Sawy. 114.
10 C.J. p 695 note 8.

whatever thereunder, to any third person.[92] Under the Interstate Commerce Act, 49 U.S.C.A. § 1 et seq, which recognizes the power of carriers to issue nontransferable tickets,[93] it is the duty of the railroad company to prevent the wrongful use of such tickets,[94] although under such act a railroad company cannot make a ticket nontransferable unless such limitation is shown in its schedule.[95]

The regular fare may be required of a person, other than the original purchaser, who attempts to travel on a ticket containing such a restriction, notwithstanding he bought it on the assurance of a pretended but unauthorized agent of the company that it would be accepted.[96]

Failure to affix signature. Where the conditions of a nontransferable ticket contemplate that it shall bear the signature of the original purchaser, the fact that it is unsigned will not confer on a third person who purchases it the right to ride on the ticket,[97] unless it is originally sold with the express understanding that it is to be used by such person.[98]

Ticket intended for several persons. A ticket may be limited to the use of several persons, such as the purchaser and the dependent members of his family.[99] It has been held that such a ticket authorizes a son who is residing with the father as a member of his family to travel thereon, notwithstanding he has attained his majority, unless at the time of purchase the purchaser is informed that a son over twenty-one years of age will not, under the regulations of the company, be allowed to ride on it.[1]

Ticket issued in wrong name. Where a ticket, on its face not transferable, is issued in the name of the wrong person, the conductor may refuse to receive it when tendered by the person for whom it was in fact purchased.[2]

Transferee cannot avoid transfer. The nontransferable clause is one which the carrier may insist on or waive at its election, and hence a transferee of the use of such a ticket cannot take advantage of the clause to avoid his liability to the owner of the ticket.[3]

Injunction. Persons may be enjoined from buying and selling tickets issued at reduced rates to persons who contract and bind themselves not to transfer them, the nontransferability being clearly apparent on the face of the tickets.[4]

§ 608. Forfeiture of Ticket

Nontransferable tickets may be forfeited and taken up by the carrier when presented by a person not entitled to ride thereon.

A carrier selling a ticket at a reduced rate, under an agreement that it shall not be transferred, may forfeit it when presented by one not entitled to ride thereunder,[5] particularly where there is a stipulation between the carrier and the purchaser which gives it the right to forfeit his ticket if presented by another person,[6] as where the filed tariffs of the carrier contain a provision to that effect.[7] The carrier may invoke the aid of equity to cancel the contract because of the fraud thus perpetrated,[8] or, if the ticket is used by another, it may sue for dam-

92. Ky.—Boston v. Southern Pac. Co., 194 S.W. 814, 175 Ky. 641.
10 C.J. p 695 note 9.

Return trip ticket
Where a private individual sold a return trip ticket at a price less than the single fare, the buyer had no right to use it when it contained a stipulation that it could be used only by the original purchaser, especially in view of the fact that his use would be a violation of the federal statute requiring uniform rates.—Boston v. Southern Pac. Co., 194 S.W. 814, 175 Ky. 641.

93. Ky—Boston v. Southern Pac. Co., supra.
10 C.J. p 695 note 11 [a].

94. U.S.—Bitterman v. Louisville & N. R. Co., La., 28 S.Ct. 91, 207 U.S. 205, 52 L.Ed. 171, 12 Ann.Cas. 693, affirming 144 F. 34, 75 C.C.A. 192.
10 C.J. p 695 note 11

95. U.S.—Baltimore & O. R. Co v. Hamburger, C.C.Va., 155 F. 849.
10 C.J. p 695 note 12.

96. Utah.—Drummond v. Southern Pac. Co., 25 P. 733, 7 Utah 118.

97. Minn.—Rahilly v. St Paul, etc., R. Co., 68 N.W. 853, 66 Minn. 153.
10 C.J. p 695 note 17.

98. Kan.—Jevons v Union Pac. R Co., 78 P. 817, 70 Kan. 491.
Tex.—Southern Pac R Co. v. Bailey, Civ.App., 91 S.W. 820.
10 C.J p 695 note 18.

99. Ind—Baltimore, etc., R. Co. v. Evans, 82 N.E. 773, 169 Ind. 410
10 C.J. p 696 note 21.

1. Ill.—Chicago, etc., R. Co. v. Chisholm, 79 Ill 584.

2. Ill.—Chicago, etc., R. Co. v. Bannerman, 15 Ill.App. 100.
10 C.J. p 695 note 19.

3. N.Y.—Bartlett v. Cook, 100 N.Y.S. 1036, 115 App.Div. 836—Cook v. Bartlett, 100 N.Y.S. 1032, 115 App. Div. 829
10 C.J. p 695 note 16.

4. Ohio—Kinner v. Lake Shore, etc., R. Co., 69 N.E. 614, 69 Ohio St. 339.
10 C.J. p 696 note 25.

5. N.Y.—Cantor v. Pennsylvania R. Co., 278 N.Y.S 448, 155 Misc. 805, reversing 270 N.Y.S. 346, 150 Misc 844.
10 C.J p 696 note 26.

6. N.J.—Harris v. Delaware, etc., R. Co., 72 A. 50, 77 N.J.Law 278.
10 C.J. p 696 note 27.

7. N.Y.—Weinstein v. Long Island R. Co., 282 N.Y.S. 865, 157 Misc. 117.

Construction
Tariff provisions are strictly construed where a penalty or forfeiture is invoked.—Weinstein v. Long Island R Co., 282 N.Y.S. 865, 157 Misc 117.

Filed tariffs as part of contract
The filed tariffs of the carrier are a part of the contract between it and the purchaser of a commutation ticket—Weinstein v. Long Island R Co, 282 N.Y.S. 865, 157 Misc. 117—Cantor v. Pennsylvania R Co., 278 N.Y.S. 448, 155 Misc. 805, reversing 270 N.Y.S. 346, 150 Misc. 844.

8. Mo.—Schubach v. McDonald, 73 S.W. 1020, 179 Mo. 163, 101 Am S R. 452, 65 L.R.A. 136, appeal dis-

ages for the breach of the contract.[9]

While there is authority that the right to forfeit can only arise out of a wrongful act on the part of the owner of the ticket,[10] and that no such right exists where the ticket is presented by a third person without the owner's authority,[11] it has also been held that the carrier may forfeit a ticket which the original owner has lost, and which has been subsequently presented to the carrier by a stranger.[12] The presentation of a mileage book by the original purchaser for the transportation of another accompanying him does not justify a forfeiture of the book under a rule providing for its forfeiture if presented by anyone other than the original purchaser.[13]

A ticket fraudulently obtained from the carrier is subject to forfeiture in the hands of a purchaser, although he had no knowledge of the fraud.[14]

Where the carrier wrongfully forfeits a ticket, it will be liable to the owner thereof for damages.[15]

Waiver. A carrier does not waive its right to forfeit a ticket because of a previous improper use, by subsequently honoring the ticket, unless in so doing it has knowledge or notice of the improper use.[16]

Right to take up ticket. Where a ticket, by its terms nontransferable, is presented by one other than the original purchaser, the conductor may, in accordance with the provisions of the ticket, take up the ticket and demand full fare,[17] and the holder is not entitled to demand the return of the dishonored ticket as a condition precedent to payment of fare, even though it is wrongfully taken up, if it is a ticket on which the passenger is not entitled to ride.[18] The right to take up a ticket is not limited to the occasion when presented by a third person, but it may be taken up when subsequently presented by the rightful holder.[19] It has been held, however, under a statute requiring railroads to issue mileage books, that a company cannot prescribe as a condition that, if presented by a person other than the one named therein, the book shall be taken up.[20] A condition that, if the purchaser fails to comply with the terms of the ticket, the company may "refuse to accept" it does not give the conductor the right to take it up when found in the hands of a third person, but merely the right to refuse to honor it.[21]

Ticket issued under assumed name. Where the ticket is limited to the original purchaser, and purports to contain his name and a description of his personal appearance, and is issued to another purchaser under an assumed name with the knowledge and assent of the agent, the conductor may not take up the ticket when presented by the purchaser for transportation.[22] It has also been held that the carrier cannot confiscate a mileage ticket purchased by a broker in a fictitious name without offering to return the money paid.[23]

§ 609. Exhibition and Surrender of Tickets

A carrier may make regulations requiring passengers to exhibit and surrender their tickets to the proper train officials at suitable and reasonable times.

A carrier may make regulations requiring passengers to exhibit and surrender their tickets to the proper train officials at suitable and reasonable times;[24] and such regulations will not be condemn-

missed 25 S.Ct. 797, 196 U.S. 644, 49 L.Ed. 632.

9. Mo.—Schubach v. McDonald, supra.

10. N.J.—Harris v. Delaware, etc., R. Co., 72 A. 50, 77 N.J.Law 278

Proof of permission or connivance important

"Where the company insists on a forfeiture, it . . . becomes important for it to prove not only that the ticket had been offered wrongfully, but that this had been done with the permission or connivance of the owner."—Harris v. Delaware, etc., R. Co, 72 A. 50, 77 N.J.Law 278, 282.

11. Minn.—Mueller v. Chicago, etc., R. Co, 77 N.W. 566, 75 Minn. 109.
N.J.—Harris v. Delaware, etc., R. Co., 72 A. 50, 77 N.J.Law 278.
10 C.J. p 696 note 28.

12. N.Y.—Cantor v. Pennsylvania R. Co., 278 N.Y.S. 448, 155 Misc. 805, reversing 270 N.Y.S. 346, 150 Misc. 844.

But it has been held that tariff provisions relating to the taking up and forfeiture of tickets apply "only to cases where the ticket has been wrongfully transferred, not where it has been lost by reason of the holder's negligence or stolen"—Weinstein v. Long Island R. Co, 282 N.Y.S. 865, 868, 157 Misc. 117.

13. U.S.—Southern R. Co. v. Campbell, 36 S.Ct. 33, 239 U.S. 99, 60 L.Ed. 165, affirming 77 S.E. 745, 94 S.C. 95.

14. Ohio.—Frank v. Ingalls, 41 Ohio St. 560.

15. S.C.—Smith v. Southern R. Co., 71 S.E. 47, 88 S.C. 541.
10 C.J. p 697 note 42.

16. Ind.—Baltimore, etc., R. Co. v. Evans, 82 N.E. 773, 169 Ind. 410

17. N.J.—Colton v. Delaware, etc., R. Co, 77 A. 1020, 80 N.J.Law 592.
10 C.J. p 696 note 35.

18. Minn.—Rahilly v. St. Paul, etc., R. Co., 68 N.W. 853, 66 Minn. 153.

19. N.J.—Trupin v. New Jersey Cent. R. Co, 93 A. 93, 87 N.J.Law 9—Harris v Delaware, etc., R. Co., 72 A. 50, 77 N.J.Law 278.

20. N.Y.—Watson v. New York, etc., R. Co, 54 N.Y.S. 201, 24 Misc. 628.

21. Neb.—Post v. Chicago, etc., R. Co., 15 N.W. 225, 14 Neb. 110, 45 Am.R. 100.

22. Ill.—Chicago, etc., R. Co. v. Pendergast, 75 Ill.App. 133.

23. Ohio.—Morton v. Lake Erie, etc., R. Co., 5 Ohio S. & C.P. 580, 7 Ohio N.P 605.

24. Miss.—Illinois Cent. R. Co. v. Cox, 96 So. 685, 132 Miss. 471.
10 C.J. p 697 note 44.
Ejection for refusal to exhibit or surrender ticket see infra § 810.

ed unless they are palpably unjust and oppressive.[25] Thus a passenger may lawfully be required to produce his ticket before entering the train,[26] and to this end the railroad company may require passengers to enter at certain doors, provided sufficient facilities are afforded, and may close other doors to prevent entrance therein of passengers.[27] A passenger may also be required to exhibit his ticket on passing through the carrier's gates for the purpose of taking a train,[28] and the gateman may, in the exercise of his judgment, refuse to allow a person to pass through the gate on a defective ticket.[29] The passenger may also be required to exhibit his ticket whenever reasonably requested by the conductor,[30] even two or more times.[31]

The conductor of a connecting carrier is not authorized to agree on behalf of another carrier that a passenger may be carried by the latter without exhibiting a ticket.[32]

Surrender of tickets A carrier may require a passenger to surrender his ticket after securing a seat in the car or other vehicle used for transportation.[33] Where a passenger with a ticket to a flag station has been overlooked by the conductor, it is his duty to call the conductor's attention to the fact, and surrender his ticket, in order that the conductor may know the passenger's destination, and have the train stopped for him to alight.[34]

§ 610. Right to Token in Exchange

Unless the passenger's destination is the next station, he should not be required to surrender his ticket without receiving a check or other token as evidence of payment of fare.

It is not unreasonable to require a passenger to render up his ticket at any time in the course of his journey, provided a conductor's check is given him in exchange.[35] He may in like manner be required to deliver it up without receiving such a check, provided the next station at which the train stops is his point of destination.[36] He should not, however, be required to part with his ticket without receiving a check or other adequate token of payment of fare, at a considerable distance from his point of destination, when there are intervening stations at which the train stops.[37] It is incumbent on the conductor to exercise care in seeing that, after he has taken the passenger's ticket, the latter is provided with a check or other evidence of his right of continuing his journey;[38] and where it is necessary for the passenger to change, for the performance of the road's contract, it is necessary that the conductor, after taking up the passenger's ticket, should return it to him before reaching the changing point, or in place thereof, should give him something that the new conductor will accept for passage to his destination.[39] Where a passenger's ticket has been taken from him, and not returned, he may buy another ticket and sue the carrier for its price.[40]

25. N.Y.—Vedder v. Fellows, 20 N.Y. 126.

26. Miss—Illinois Cent R. Co v. Cox, 96 So. 685, 132 Miss. 471.
10 C.J. p 697 note 46.

"Such rules are reasonable and tend to benefit the passenger and the carrier in preventing mistakes and disputes"—Illinois Cent. R. Co. v. Cox, 96 So. 685, 132 Miss. 471.

Damage

The fact that a servant of a carrier insists on the exhibition by the passengers of tickets or transportation before entering its trains, in a manner not insulting, does not afford an item or element of damage to a passenger, and where such a rule is adopted it is error to instruct the jury in a suit for damages that it was the duty of the carrier to admit the passenger on presenting himself if he had a ticket, when he refused to exhibit the ticket when requested to do so—Illinois Cent. R. Co. v. Cox, 96 So. 685, 132 Miss. 471.

27. Ark.—St. Louis, etc., R. Co. v. Dyer, 170 S.W. 1013, 115 Ark. 262.

28. D.C.—Watkins v. Pennsylvania R. Co., 21 D.C. 1.

Md.—Northern Cent. R. Co. v. O'Conner, 24 A. 449, 76 Md. 207, 35 Am.S.R. 422, 16 L.R.A. 449.

Minn.—Dickerman v. St. Paul Union Depot Co., 46 N.W. 907, 44 Minn 433.

29. Md.—Northern Cent. R. Co. v. O'Conner, 24 A 449, 76 Md. 207, 35 Am.S.R. 422, 16 L.R.A. 449.

30. N.Y.—Robinson v. New York, etc., R. Co., 150 N.Y.S. 925, 165 App.Div. 429.
10 C.J. p 697 note 50.

31. N.Y.—Hibbard v. New York, etc., R. Co., 15 N.Y. 455.
10 C.J. p 697 note 51.

32. N.Y.—Robinson v. New York, etc., R. Co., 150 N.Y.S. 925, 165 App.Div. 429.

33. Ill.—Illinois Cent. R. Co. v. Louthan, 80 Ill.App. 579.
Duty to furnish seat as condition to surrender of ticket see infra § 645.

34. Ga.—Georgia Cent. R. Co. v. Dorsey, 32 S.E. 873, 106 Ga. 826.
10 C.J. p 698 note 53.
Duty to stop at flag stations see infra § 655.

35. N.Y.—Northern R. Co. v. Page, 22 Barb. 130.

36. Ill.—Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420, 92 Am.D. 138.

37. N.H.—State v. Thompson, 20 N.H. 250.

38. Cal.—Sloane v. Southern California R. Co. 44 P. 320, 111 Cal. 668, 32 L.R.A. 193.

Reason for rule

"The passenger is not required to question the action of the conductor in taking up his ticket, but has to assume that his conduct in taking or withholding the ticket is in accordance with the rules of the company. It is therefore incumbent upon the conductor to exercise more than ordinary care in seeing that, after he has taken the ticket from the passenger, the latter shall be provided with the means of continuing the journey."—Sloane v. Southern California R. Co., 44 P. 320, 325, 111 Cal. 668, 32 L.R.A. 193.

39. N.C.—Sawyer v. Norfolk Southern R. Co., 86 S.E. 166, 171 N.C. 13.

40. N.Y.—Stewart v. Baltimore, etc., R. Co., 88 N.Y.S. 377.

§ 611. Holder of Commutation Ticket

A commutation ticket holder must produce such ticket on proper demand and on failure so to do may be required to pay the ordinary fare.

A person traveling on a commutation ticket must produce the same when required by the conductor, although known by the latter to be the holder of such a ticket,[41] and if he fails or refuses so to do, he may be required to pay the ordinary fare,[42] or, as will be hereinafter pointed out in § 810, he may be ejected.

A regulation that monthly commutation tickets shall be surrendered by the holders to the conductor on the last trip taken during the periods for which they are issued is reasonable.[43]

§ 612. Coupon Tickets; Detachment of Coupons

A rule that the carrier will not accept coupon tickets if detached is reasonable, although such a provision should not be enforced in case the detachment is not the fault of the passenger.

A carrier has the right to use coupon books, and, in consideration of the reduced rate at which they are sold, to provide that the coupons will not be accepted if detached.[44] Such a provision is reasonable and valid,[45] and in such a case tender of a detached coupon is ordinarily not sufficient to entitle the passenger to transportation.[46] Such a stipulation should not, however, be insisted on where the detachment is made without the fault of the passenger.[47] If, while the passenger is detaching a coupon, the conductor calls the passenger's attention to the fact that it is the conductor's duty to detach it, he should desist and hand the ticket and coupons to the conductor, and it will then be the duty of the latter, if he saw the coupons detached, or can readily ascertain that they have been detached from the ticket, to accept them, but the conductor will not be bound to receive the detached coupons without seeing the ticket.[48]

A practice of accepting detached coupons may constitute a waiver of the stipulation.[49]

§ 613. Where Ticket Is Lost

A passenger who has lost his ticket has no right to demand transportation.

The rule requiring the exhibition of a ticket applies, even though the passenger had a ticket but has lost it;[50] and there is no distinction in the rights of the passenger whether he loses or mislays his ticket before boarding the train or subsequently;[51] or whether he exhibited his ticket to an employee stationed at the door of the car for such purpose.[52] Where a commutation ticket is purchased at a price less than regular fare, and contains a condition requiring it to be presented by the holder to the conductor on each trip, presentation is a condition precedent to the right of the purchaser to be transported on it, and the rule is not changed by the fact of the loss of the ticket.[53]

§ 614. Redemption of Unused Ticket

At common law a carrier is under no obligation to redeem an unused ticket. Statutory provisions subjecting the carrier to a penalty for refusing to redeem unused tickets are strictly construed.

At common law, a carrier is under no obligation to redeem an unused ticket,[54] particularly where the ticket is sold at a special rate, with the condi-

41. N.J.—Ripley v. New Jersey, R. etc., Co., 31 N.J.Law 388.
Ohio.—Crawford v Cincinnati, etc., R. Co., 26 Ohio St. 580.

42. Conn.—Downs v. New York, etc., R. Co., 36 Conn. 287, 4 Am. R. 77.

43. N.J.—Rogers v. Atlantic City R. Co., 34 A. 11, 57 N.J Law 703.
Pa.—Bennett v. Railroad Co., 7 Phila. 11.

44. Ark.—Ft. Smith & Van Buren Dist. v. Kidd, 241 S.W. 374, 153 Ark. 489.
Detaching coupons as terminating relation of passenger and carrier see supra § 563.

45. Mass.—Boston, etc., R. Co. v Chipman, 14 N.E. 940, 146 Mass. 107, 4 Am.S.R. 293.
10 C.J. p 698 note 65.

46. Md.—United R., etc., Co. v. Hardesty, 51 A. 406, 94 Md. 661, 57 L.R.A. 275.
10 C.J. p 698 note 66.

47. Miss.—Fairfield v. Louisville, etc., R. Co., 48 So. 513, 94 Miss. 887, 136 Am.S.R. 611, 19 Ann.Cas. 456.
Wis.—Wightman v. Chicago, etc., R. Co, 73 Wis. 169, 40 N.W. 689, 9 Am.S.R. 778, 2 L.R.A. 185.
10 C.J. p 698 note 68.

48. Tenn.—Louisville, etc., R. Co. v. Harris, 9 Lea 180, 42 Am.R. 668.

49. Ind.—Pennsylvania Co. v. Bray, 25 N.E. 439, 125 Ind. 229.
Minn.—Thompson v. Truesdale, 63 N W. 259, 61 Minn. 129, 52 Am.S.R 579.

50. Ga.—Harp v. Southern R. Co., 47 S.E. 206, 119 Ga. 927, 100 Am. S.R. 212.
Ejection of passenger for failure to produce ticket see infra § 810.

Passenger's loss

A passenger who loses his ticket has no right to be carried on making or offering to make proof that the one paid for has been lost; the loss falls on him, and not on the carrier.—Harp v. Southern Ry. Co., 47 S.E. 206, 119 Ga. 927, 100 Am.S.R. 212.

51. Ga.—Harp v. Southern Ry. Co., supra.
Tenn.—Louisville, etc., R. Co. v. Fleming, 14 Lea 128.

52. Ga.—Harp v. Southern Ry. Co., 47 S.E 206, 119 Ga. 927, 100 Am. S.R 212.
Tenn.—Louisville, etc., R. Co. v. Fleming, 14 Lea 128.
10 C.J. p 699 note 72.

53. Ga.—Southern R. Co. v. De Sausure, 42 S.E. 479, 116 Ga. 53.
N.J.—Rogers v. Atlantic City R. Co., 34 A. 11, 57 N.J.Law 703
10 C.J. p 699 note 73.

54. Tex.—Neubert v. Chicago, R. I. & G. Ry. Co., Civ.App., 248 S.W. 141.
10 C.J. p 699 note 75.

Either contractual or statutory

A provision for the redemption of

tion that the company shall not be required to refund because of its nonuser.[55] Accordingly, a carrier, having sold a ticket, may, in the absence of a statute, treat the purchase price as having been irrevocably paid, as long as it stands ready to furnish the transportation.[56]

Where so required by statute, carriers of passengers are required to redeem unused tickets or parts of tickets issued by them, or be liable to a prescribed penalty.[57] Such a statute is reasonable,[58] and enters into the contract of carriage.[59] In so far as such a statute provides for a forfeiture, it is highly penal in nature and should be strictly construed.[60] It applies only to those purchasing tickets in good faith and for actual use;[61] and it has no application to tickets for interstate transportation,[62] or to tickets used by the original purchaser and thereafter sold by him, although the transferee is without notice of such fact.[63] A statutory requirement that provision shall be made for the redemption of tickets is not satisfied by the mere appointment of one person as the one through whom redemption must be made.[64]

Under statutes requiring the redemption of such tickets as the purchaser or owner has not used or received transportation for, it has been held that the carrier may reasonably require, as a condition of the redemption, that ticket holders surrender their tickets and submit a written statement as to why the ticket was not used.[65] On the other hand, it has been held under a statute containing no provision requiring, as a condition of redemption, that the purchaser of a ticket sign a receipt or statement of facts concerning it, that failure to sign such a statement is no defense to an action to recover the penalty, at least in the absence of a request so to do.[66] Where the statute limits the right of redemption to persons who shall have purchased the ticket from an authorized agent of the railroad company, an assignee of a nontransferable ticket may not require the railroad company to redeem it.[67]

Sufficiency of demand for redemption. Where the agent knows that the holder is at the ticket office with the tickets then in his possession, for the purpose of asking that they be redeemed, and the agent declines to redeem them, the necessity for a more formal offer and demand is thereby obviated.[68]

Place and time of redemption. Under some stat-

an unused, or partially unused, railroad ticket necessarily is either a part of the contract between the carrier and the passenger, or read into the contract because of the existence of a valid law to that effect. —Neubert v Chicago, R I. & G. Ry. Co., 296 S.W. 1090, 116 Tex. 644, 53 A.L.R. 1224.

55. Ga.—Southern R. Co. v. De Sausure, 42 S.E. 479, 116 Ga. 53.
10 C.J. p 699 note 76.

56. N.Y.—Salomon v. New York Cent. etc., R. Co., 150 N.Y.S. 282, 165 App Div. 35

57. Tex.—Neubert v. Chicago, R. I. & G. Ry. Co., Civ.App., 248 S.W. 141.
10 C.J. p 699 note 77, p 700 note 78,

Sufficiency of pleading in penalty action; rescission

In an action seeking judgment for the price of an unused ticket and for the statutory penalty for refusing to redeem such ticket, the pleading states no equitable grounds for rescission where it does not allege that the ticket was presented to the company when redemption was demanded, or that the holder is able and willing to return the ticket, or that the holder offers to do equity, or contains any excuse for these omissions.—Neubert v. Chicago, R. I. & G. Ry. Co., Tex.Civ.App., 248 S.W. 141.

58. Tex.—Neubert v. Chicago, R. I. & G. Ry. Co., 296 S.W. 1090, 116 Tex. 644, 53 A.L.R. 1224.

59. Ill.—Burn v. Chicago, etc., R. Co., 153 Ill.App. 319.

60. Iowa.—Prichard v. Chicago & N. W. Ry. Co., 166 N.W. 299, 182 Iowa 894.

61. Iowa.—Cook v. Chicago, etc., R. Co., 113 N.W. 1079, 136 Iowa 497—Jolley v. Chicago, etc., R. Co., 93 N.W. 555, 119 Iowa 491.

Good faith of purchaser

It has been held that such a statute was intended for the benefit of those purchasing tickets in good faith and for actual use, and may not be invoked by one who procures tickets with the sole object of bringing suit against the company in the event of its failure to redeem, and thereby recovering a penalty and seeking revenge for past difficulties. —Cook v. Chicago, etc., R. Co., 113 N.W. 1079, 136 Iowa 497—Jolley v. Chicago, etc., R. Co., 93 N.W. 555, 119 Iowa 491.

62. Tex.—Neubert v. Chicago, R. I. & G. Ry. Co., 296 S.W. 1090, 116 Tex. 644, 53 A.L.R. 1224—Neubert v. Chicago, R. I. & G. Ry. Co., Civ.App., 248 S.W. 141.

"We are of opinion . . . that the statutes . . have no application to interstate commerce, but that they were intended to apply, and do apply, only to intrastate commerce."—Neubert v. Chicago, R. I. & G. Ry. Co., 296 S.W. 1090, 1094, 116 Tex. 644, 53 A.L.R. 1224.

63. Tex.—Levinson v. Texas, etc., R. Co., 43 S.W. 901, 17 Tex.Civ. App. 617.

64. Iowa.—Rohrig v. Chicago, etc., R. Co., 106 N.W. 935, 130 Iowa 380.
10 C.J. p 700 note 85.

Telegraph operator's refusal to redeem

Where redemption is demanded of a telegraph operator who is relieving the station agent, his refusal to redeem will render the carrier liable for the penalty, and the mere fact that the regular ticket agent had been authorized to redeem the tickets is no excuse.—Rohrig v. Chicago, R. I & P. Ry. Co., 106 N.W. 935, 130 Iowa 380.

65. Iowa.—Prichard v. Chicago & N. W. Ry. Co., 166 N.W. 299, 182 Iowa 894.

Posting conditions as notice

Where a carrier has complied with statutory provisions in posting conditions for redemption of unused tickets, a ticket holder is charged with notice of such conditions.—Prichard v. Chicago & N. W. Ry. Co., 166 N.W. 299, 182 Iowa 894.

66. N.Y.—Thompson v. New York Cent. R. Co., 195 N.Y.S. 954, 119 Misc. 99.

67. N.Y.—Salomon v. New York Cent., etc., R. Co., 150 N.Y.S. 282, 165 App.Div. 35.

68. Iowa.—Jolley v. Chicago, etc., R. Co., 93 N.W. 555, 119 Iowa 491.

utes redemption is required to be made at the place of purchase, and it is no defense, in an action to recover a penalty for a refusal to redeem, that the ticket holder was directed to apply for redemption at a different place.[69]

Under statutes prescribing the time within which redemption must be made, the carrier's liability for the price of the ticket and for the prescribed penalty attaches, on the mere neglect of the company to redeem within the prescribed time after demand,[70] and the holder is not required to return to the company's office for his money within such time after demand.[71] However, immediate payment upon the date of demand is not required,[72] since the carrier may employ, for the purposes of redemption, processes of disbursement which are most orderly to it.[73] Where the carrier does not limit the period within which redemption shall be demanded, as authorized by such a statute, demand is timely if made within the period of the general statute of limitations.[74]

3. Conditions and Limitations; Special Contracts

§ 615. In General

A ticket may be issued containing special conditions and limitations, and, if reasonable, may be such as to constitute a special contract.

A ticket may be issued containing special conditions or limitations, that is, it may be such as to constitute a special contract.[75] Thus a carrier is under no general obligation to carry anyone for less than the regular rates, and if it does so for special accommodation, any reasonable condition imposed on the passenger should be performed, and in default of performance he may be required to pay the regular fare.[76] Where a ticket is such as to constitute a special contract, its terms will not be affected by any general representations of the carrier, by posted notices, advertisement, or otherwise, as to the effect of such tickets;[77] and the posting of notices in waiting rooms and ticket offices, and on the cars, putting conditions or limitations on ordinary tickets, is not sufficient to charge a passenger with notice thereof.[78]

The conditions attached even in the case of a special contract ticket must be reasonable.[79] A condition in a ticket that in case of error or dispute the passenger agrees to pay the regular fare and to apply at the carrier's office for correction and reimbursement is unreasonable and void.[80]

Time of making. Ordinarily the actual contract between the carrier and the prospective passenger arises when the ticket is purchased,[81] but arrangements may be made in advance for transportation for a special occasion or trip, and such arrangements may constitute a special contract,[82] although made prior to the purchase of a ticket.[83]

Mileage ticket. Limitations and restrictions on the use of a mileage ticket when properly made a

69. Iowa.—Shaw v. Chicago, R. I. & P. R. Co., 113 N.W. 478.

70. Iowa.—Jolley v. Chicago, etc., R. Co., 93 N.W. 555, 119 Iowa 491.

71. Iowa.—Prichard v. Chicago & N. W. Ry. Co., 166 N.W. 299, 300, 182 Iowa 894.
10 C.J. p. 700 note 87.
"The patron need not repeat his demand nor present himself a second time."—Prichard v. Chicago & N. W. Ry. Co., supra.

72. Iowa.—Prichard v. Chicago & N. W. Ry. Co., supra.
10 C.J. p. 699 note 77 [c] (2).

73. Tex.—Texas, etc., R. Co. v. Beaird, Civ.App., 169 S.W. 1050.

74. Iowa.—Jolley v. Chicago, etc., R. Co., 93 N.W. 555, 119 Iowa 491.

75. Mont.—Sanden v. Northern Pac. R. Co., 115 P. 408, 43 Mont. 209, 34 L.R.A.,N.S., 711.
10 C.J. p. 700 note 90.
Limitation of, or exemption from, liability see infra §§ 625–639.

76. Ind.—Baltimore, etc., R. Co. v. Evans, 82 N.E. 773, 169 Ind. 410.
10 C.J. p. 700 note 91.

77. Minn.—Dunlap v. Northern Pac. R. Co., 28 N.W. 240, 35 Minn. 203.
Miss.—Howard v. Chicago, etc., R. Co., 61 Miss. 194.

78. Tenn.—Louisville, etc., R. Co. v. Turner, 47 S.W. 223, 100 Tenn. 213, 43 L.R.A. 140.
10 C.J. p. 700 note 93.

79. Kan.—Freeman v. Atchison, etc., R. Co., 80 P. 592, 71 Kan. 327, 6 Ann.Cas. 118.
10 C.J. p. 701 note 94.

80. Ga.—Georgia R., etc., Co. v. Baker, 54 S.E. 639, 125 Ga. 562, 114 Am.S.R. 246, 7 L.R.A.,N.S., 103, 5 Ann.Cas. 484.
10 C.J. p. 701 note 96.

Mere advice
It has been held that a provision on a ticket, printed under the head "caution," that in cases of doubt the passenger should pay the rate which the conductor demands, take his receipt, and report to the general office is mere advice and not a part of the ticket.—Illinois Cent. R. Co. v. Gortikov, 45 So. 363, 90 Miss. 787, 122 Am.S.R. 324, 14 L.R.A.,N.S., 464.

81. Ohio.—Canadian Pac. Ry. Co. v. Meier, 156 N.E. 150, 23 Ohio App. 394.

82. Ky.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.
Ohio.—Canadian Pac. Ry. Co. v. Meier, 156 N.E. 150, 23 Ohio App. 394.

Arrangement by telephone from hotel with bus company for transportation of passengers constituted contract with carrier.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.

Not mere offer
Reservations for touring party were not mere offer by carrier but contract unaffected by advance in rates before deposit was due.—Canadian Pac. Ry. Co. v. Meier, 156 N.E. 150, 23 Ohio App. 394.

83. Ohio.—Canadian Pac. Ry. Co. v. Meier, supra.

Purchase of space for touring party, to be paid for by date certain or have space sold for purchaser's account, created special contract with carrier prior to purchase of ticket.—Canadian Pac. Ry. Co. v. Meier, 156 N.E. 150, 23 Ohio App. 394.

part of the contract are binding on the purchaser.[84] Thus a purchaser of an interchangeable mileage book is bound by a condition that undetached coupons shall be honored on trains only for transportation from a nonagency station, or from an agency station not open for the sale of tickets;[85] and, where offices are open for the sale of tickets and the holder of such a book has a reasonable opportunity so to do, he is required to present the book and procure an exchange mileage ticket, and if he fails so to do he cannot tender coupons from the book for his transportation;[86] but where the holder is prevented from exchanging coupons for a mileage ticket, as by reason of the company's failure to afford him reasonable facilities for making the exchange, the book becomes a complete contract for carriage entitling him to carriage without exchanging the coupons for a ticket.[87] Where the holder boards a train at a nonagency station he is entitled to ride to the end of his journey without getting off at any intermediate station to exchange his mileage coupons for a ticket.[88]

Mutilated ticket. To mutilate a ticket within the meaning of a stipulation on its face that it shall not be good for passage if mutilated in any way, it must be deprived of some essential part, and hence a ticket is valid, although torn in two pieces, where both pieces are presented to the conductor at the same time and it is apparent that they are parts of the same ticket, that together they form the entire ticket, and that no fraud has been perpetrated on the railroad company.[89] Although a street railroad company, pursuant to its rules, may refuse a transfer ticket which is mutilated after coming into possession of a passenger, it cannot refuse a ticket mutilated before it is given to him.[90]

Deficiency under special tariff. In the absence of a contract guaranteeing the number of passengers, persons who induce a carrier to publish with the interstate commerce commission a special tariff for a minimum number of passengers, and who deposit a sum of money as evidence of their good faith, are not liable for any deficiency arising under the tariff.[91]

84. Miss.—Illinois Cent. R. Co. v. Holman, 64 So. 7, 106 Miss. 449.
N.Y.—Horton v. Erie R. Co., 83 N.Y.S. 733, 86 App.Div. 379, appeal dismissed 72 N.E. 1152, 179 N.Y. 589.

Discrimination

(1) Conditions of mileage coupons exchanged with a newspaper publisher for advertising fixing a time limit, and naming the person entitled to use them, and withholding pro rata value of unused mileage, upon the holder's failure to redeem the same, are not extortion under the statute, nor unjust discrimination in the absence of allegation that timely demand was made for transportation, and that limitations complained of were not included in mileage coupons issued to other publishers.—Russell v. St. Louis & S. W. Ry. Co. of Texas, Tex.Civ.App., 250 S.W. 1076.

(2) There was no unjust discrimination by a railroad against a publisher where there was no showing that limitations in mileage coupons issued in payment of advertising were not similar to limitations contained in all mileage coupons issued to other publishers for like contemporaneous services.—Russell v. St. Louis & S. W. Ry. Co. of Texas, supra.

Good for intra-state journeys only

(1) A provision that the ticket shall be accepted for transportation only for journeys wholly within the state is enforceable.
Ga.—State R. Commn. v. Louisville, etc., R. Co., 80 S.E. 327, 140 Ga. 817, L.R.A.1915E 902, Ann.Cas. 1915A 1018.
Miss.—Illinois Cent. R. Co. v. Holman, 64 So. 7, 106 Miss. 449.
N.Y.—Horton v. Erie R. Co., 72 N.Y.S. 1018, 65 App.Div. 587, 10 N.Y.Ann.Cas. 321.

(2) However, it has been held that such a provision should be construed to mean that it will be accepted for only so much of a journey as lies within the state, and that, where one takes a trip from a point within to one without the state, he may pay for the part within the state with his mileage.—Horton v. Erie R. Co., 83 N.Y.S. 733, 86 App.Div. 379, appeal dismissed 72 N.E. 1152, 179 N.Y. 589.

(3) The latter construction, however, will not prevail where the ticket expressly provides otherwise.—Illinois Cent. R. Co. v. Holman, supra.

Limitations and restrictions not authorized by statute are not binding on the purchaser where there is no consideration for any agreement on his part to limit the use of the ticket further than prescribed by statute.
N.Y.—Parish v. Ulster, etc., R. Co., 85 N.E. 153, 192 N.Y. 353.—Horton v. Erie R. Co., 72 N.Y.S. 1018, 65 App.Div. 587, 10 N.Y.Ann.Cas. 321.—Watson v. New York, etc., R. Co., 54 N.Y.S. 201, 24 Misc. 628.
S.C.—Eberle v. Southern R. Co., 79 S.E. 793, 98 S.C. 89.
10 C.J. p 701 note 8.

85. Ga.—Perry v. Atlantic Coast Line R. Co., 70 S.E. 1122, 9 Ga.App. 260
S.C.—Des Portes v. Southern R. Co., 69 S.E. 148, 87 S.C. 160.
Tenn.—N., etc., R. Co. v. Read, 4 Tenn.Civ.A. 98.

86. Ga.—Perry v. Atlantic Coast Line R. Co., 70 S.E. 1122, 9 Ga.App. 260.
N.C.—Harvey v. Atlantic Coast Line R. Co., 69 S.E. 627, 153 N.C. 567.
S.C.—Des Portes v. Southern R. Co., 69 S.E. 148, 87 S.C. 160.
10 C.J. p 701 note 5.

87. N.C.—Harvey v. Atlantic Coast Line R. Co., 69 S.E. 627, 153 N.C. 567.
S.C.—Des Portes v. Southern R. Co., 69 S.E. 148, 87 S.C. 160.

Negligent attendance of ticket agent

A passenger unable to procure an exchange ticket because of the negligent attendance of the carrier's ticket agent is not entitled to transportation without such ticket.—Robb v. Pittsburg, etc., R. Co., 14 Pa.Super. 282.

88. Tenn.—N., etc., R. Co. v. Read, 4 Tenn.Civ.App. 98.

89. Ga.—Young v. Georgia Cent. R. Co., 47 S.E. 556, 120 Ga. 25, 102 Am.S.R. 68, 65 L.R.A. 436, 1 Ann.Cas. 24.

90. N.Y.—Koch v. New York City R. Co., 95 N.Y.S. 559.

91. Mo.—St. Louis Electric Terminal Ry. Co. v. Buechel, App., 213 S.W. 177.

§ 616. Knowledge and Assent of Passenger

Conditions printed on a ticket attempting to limit the purchaser's right to transportation are ineffective, unless his attention is called to them or they are known and assented to by him.

While there may be some uncertainty and even conflict in the authorities,[92] in accordance with the rule already discussed in § 603 that an ordinary ticket bought at the usual full fare and not for a special occasion is regarded as a mere receipt or voucher evidencing the purchaser's right to be carried, it is generally held that conditions printed on the ticket attempting to limit the purchaser's unlimited right of transportation are of no effect unless his attention is called to them or they are known and assented to by him, the mere acceptance of the ticket not being enough to make them a part of the contract.[93] This is particularly true where the system of figures and punches used to indicate the condition or limitation is not easily understood by a person of ordinary intelligence,[94] or where the words are printed in such fine type that they cannot be read without the aid of a powerful magnifying glass.[95]

§ 617. Special Tickets or Contracts

In the absence of fraud or mistake, a purchaser accepting or signing a special contract ticket containing reasonable conditions will be presumed to have assented thereto, although he did not in fact read them. Secret limitations on the authority of a general agent do not exempt the carrier from liability on contracts within the apparent scope of his authority.

As already noted in § 603 b, where a ticket purports to be a complete agreement and sets out the terms of a special contract, it is to be looked to as the evidence of the contract, and reasonable conditions inserted therein are binding on the purchaser, as they are presumed to be assented to by him in the acceptance of the ticket itself,[96] irrespective of whether or not he read it.[97] It has been held also that, where the words expressing the limitation are contained on the back of the ticket, in order to bind the holder it must appear that he read them or knew of them when he accepted the contract.[98]

Signing ticket. Where the purchaser signs the ticket it must be presumed, in the absence of fraud, misrepresentation, or mistake, that he read the conditions and assented to them, and he will be bound, although he did not in fact read them.[99] However, it is not indispensable that the ticket be signed by the purchaser if he has notice of its terms, or is put upon inquiry, and assents thereto.[1] Also, in case of tickets, such as mileage tickets or tickets over connecting lines, the very terms of which imply an assent which is required to be given by signature, the failure to sign does not relieve the purchaser who accepts and uses the ticket from the limitations or conditions contained therein.[2]

92. Tenn.—Louisville, etc., R. Co. v Turner, 47 S.W. 223, 100 Tenn. 213, 43 L.R.A. 140.

93. S.C.—Norman v. Southern R. Co., 44 S.E. 83, 65 S.C. 517, 95 Am.S.R. 809.
10 C.J. p 702 note 14.

94. Tenn.—O'Rourke v. Citizens' St. R. Co., 52 S.W. 872, 103 Tenn. 124, 76 Am.S.R. 639, 46 L.R.A. 614.
10 C.J. p 702 note 15.

95. Ill.—Princell v. Pickwick Greyhound Lines, 262 Ill.App. 398.

96. U.S.—Boylan v. Hot Springs R. Co., Ill., 10 S.Ct. 50, 132 U.S. 146, 33 L.Ed. 290
10 C.J. p 702 note 17.

97. Mass.—French v. Merchants', etc., Transp. Co., 85 N.E. 424, 199 Mass. 433, 127 Am.S.R. 506, 19 L.R.A.,N.S., 1006.
10 C.J. p 702 note 18.
"The usual rule is that a passenger who accepts a ticket on which the contract of transportation is stated is bound by its terms whether he reads it or not"—French v. Merchants', etc., Transp. Co., supra.

In the absence of fraud, imposition, or deceit the law presumes that the purchaser of a ticket, which contained contract stipulations plainly printed on its face, had knowledge of its contents and assented to its terms—Boling v. St. Louis, etc., R. Co., 88 S.W. 35, 189 Mo. 219.

Inability to read; ticket purchased by agent
The facts that the passenger's ticket is purchased for him by his agent in a wrong name, and that he cannot read, do not affect the validity of the condition contained in the ticket which the passenger accepts and uses, where there is no fraud on the part of anyone in the sale of the ticket.—Southern R. Co. v. White, 33 S.E. 952, 108 Ga. 201.

98. U.S.—The Majestic, D.C.N.Y., 56 F. 244, affirmed 17 S.Ct. 597, 166 U.S. 375, 41 L.Ed. 1039, reversing 60 F. 624, 9 C.C.A. 161, 23 L.R.A. 746.
Tex.—San Antonio, etc., R. Co. v. Newman, 43 S.W. 915, 17 Tex.Civ.App. 606.
10 C.J. p 703 note 20.

99. U.S.—Boylan v. Hot Springs R. Co., Ill., 10 S.Ct. 50, 132 U.S. 146, 33 L.Ed. 290.
10 C.J. p 703 note 21.

1. Tenn.—Watson v. Louisville, etc., R. Co., 56 S.W. 1024, 104 Tenn. 194, 49 L.R.A. 454.

Reduced rates putting purchaser on inquiry
Where a ticket is sold at a reduced rate on a special occasion, this is sufficient to put the purchaser on inquiry and affect him with notice to expect some special terms or conditions, although he may be unable to read, and it is immaterial that he does not sign the contract or have its contents explained to him—Watson v. Louisville, etc., R. Co., 56 S.W. 1024, 104 Tenn. 194, 49 L.R.A. 454—Louisville, etc., R. Co. v. Turner, 47 S.W. 223, 100 Tenn. 213, 43 L.R.A. 140—10 C.J. p 703 note 23.

2. Minn.—Rahilly v. St. Paul, etc., R. Co., 68 N.W. 853, 66 Minn. 153.
10 C.J. p 703 note 22.

Round trip ticket sold at reduced rate
Where a round trip ticket sold at a reduced rate contains in the body thereof a requirement as to identification and signing by the passenger, the assent of a passenger who accepts and uses it is conclusively presumed notwithstanding he does not sign the ticket—Abram v. Gulf, etc., R. Co., 18 S.W. 321, 83 Tex. 61—Ketcheson v. Southern Pac. R. Co., 46 S.W. 907, 19 Tex.Civ.App. 288.

Secret limitations on the authority of a general agent, not communicated to persons dealing with him as agent, do not exempt the carrier from liability on contracts made by the agent and within the scope of his apparent authority.[3]

§ 618. Limitations as to Time

a. In general
b. Effect of expiration of time limit

a. In General

Although in the absence of a binding limitation, a ticket is presumed to be unlimited as to time and may be used at any time within the period fixed by the statute of limitations, in the absence of a statute to the contrary a carrier may limit a reasonable time within which a ticket may be used.

In the absence of any binding stipulation or limitation, a ticket will be presumed to be unlimited as to time,[4] and it may be used at any time within the period fixed by the statute of limitations.[5] In the absence of a statute to the contrary, a carrier has power,[6] subject to the qualification that the limitation must be reasonable,[7] to limit the time within which tickets may be used. If the time limit is less than is sufficient to accomplish the trip, it is, of course, unreasonable and therefore of no effect.[8] On the other hand, limitations have been held to be reasonable which limit the use of the ticket to a continuous passage beginning on the date of sale,[9] or to one day from date of sale,[10] especially where there is also a provision for refunding the purchase price or any unused part thereof if the ticket is not used within that time.[11]

A statute making all railroad tickets available for a specified time from date has no force beyond the territorial limits of the state; and hence it will not apply to the case of a ticket calling for passage from a point within to a point without the state, while the ticket is being used beyond the limits of the state.[12]

Conflicting limitations. As between a time limitation appearing on a ticket covering an interstate trip, and a limitation appearing in the tariff sheets filed with the interstate commerce commission, the latter must govern.[13]

Limitation posted. A purchaser is not bound by a time limitation in a notice posted in the ticket office or in a circular, unless he has read it or has had notice of its contents.[14]

Particular limitations construed. In construing limitations as to time, it has been held that the stipulation "not good for passage after" a certain number of days from date, or "on and from date stamped on back," limits only the time of the commencement of the journey, so that, if the journey is commenced before midnight of the last day, the ticket remains good until its completion, if pursued continuously, although the time expires while en route.[15] Where, however, the stipulation is such

3. Ala.—Southern Ry. Co. v. Rowe, 73 So. 634, 198 Ala. 353.
Ky.—Shelton Taxi Co. v. Bowling, 51 S.W.2d 468, 244 Ky. 817.
Secret or private instructions to agent generally see C.J.S. title Agency § 95.

Contract to transport passenger on long trip held within apparent scope of taxicab driver's authority to carry passengers and contract for their carriage.—Shelton Taxi Co. v. Bowling, 51 S.W.2d 468, 244 Ky. 817.

Contract to telegraph transportation Secret limitations upon the authority of a railroad's general agent do not exempt the railroad from the obligations of engagements made by him within his ostensible authority as to telegraph transportation to a person on a connecting railway line. —Southern Ry. Co. v. Rowe, 73 So. 634, 198 Ala. 353.

4. Kan.—Freeman v. Atchison, etc., R. Co., 80 P. 592, 71 Kan. 327, 6 Ann.Cas. 118.
10 C.J. p 703 note 26.

A round trip ticket, not limited by its terms, is, after being used one way, good for the return trip at such time as the holder is disposed to present it, unless he is notified to the contrary at the time of purchase.—Pennsylvania R. Co. v. Spicker, 105 Pa. 142.

5. Kan.—Freeman v. Atchison, etc., R. Co., 80 P. 592, 71 Kan. 327, 6 Ann.Cas. 118.
10 C.J. p 703 note 27, p 704 note 35

A first-class railroad ticket, making no provision as to time of use, is subject to the statute of limitations, beginning to run from its date of issue.—Cassiano v. Galveston, etc., R. Co., Tex.Civ.App., 82 S.W. 806

6. Ill.—Pennington v. Illinois Cent. R. Co., 97 N.E. 289, 252 Ill. 584, 37 L.R.A.,N.S., 983, reversing 160 Ill. App. 128
10 C.J. p 703 note 30.

7. Va.—Louisville & N. R. Co. v. Rieley, 93 S.E. 574, 121 Va. 469, L.R.A.1918A 775
10 C.J. p 703 note 31.

8. Mont.—Brian v. Oregon Short Line R. Co., 105 P. 489, 40 Mont. 109, 25 L.R.A.,N.S., 459.
Tex.—Gulf, etc., R. Co. v. Wright, 30 S.W. 294, 10 Tex.Civ.App. 179.—Gulf, etc., R. Co. v. Wright, 21 S.W. 399, 2 Tex.Civ.App. 463.

9. Va.—Louisville & N. R. Co. v. Rieley, 93 S.E. 574, 121 Va. 469, L.R.A.1918A 775.

10. Ill.—Burn v. Chicago, etc., R. Co., 153 Ill.App. 319
La.—Coburn v. Morgan's Louisiana, etc., R. Co., 29 So. 882, 105 La. 398, 83 Am.S.R. 242.
Miss.—Illinois Cent. R. Co. v. Marlett, 23 So. 583, 75 Miss. 956.
10 C.J. p 704 note 33

11. Ga.—Southern R. Co. v. Watson, 36 S.E. 209, 110 Ga. 681
Miss.—Illinois Cent. R. Co. v. Marlett, 23 So. 583, 75 Miss. 956.

12. Me.—Carpenter v. Grand Trunk R. Co., 72 Me. 388, 39 Am.R. 340.
Mass.—Boston, etc., R. Co. v. Trafton, 23 N.E. 829, 151 Mass. 229

13. Ark.—Gordon v. Kansas City Southern Ry. Co., 2 S.W.2d 675, 176 Ark. 230.

14. Ga.—Georgia R. Co. v. Baldoni, 42 S.E. 364, 115 Ga. 1013
Pa.—Pennsylvania R. Co. v. Spicker, 105 Pa. 142.
Tenn.—Louisville, etc., R. Co. v. Turner, 47 S.W. 223, 100 Tenn. 213, 43 L.R.A. 140.

15. Mont.—Brian v. Oregon Short Line R. Co., 105 P. 489, 40 Mont.

that the ticket expires or is not to be good after a certain limit of time, the transportation must be completed by that time.[16] If a ticket bears date prior to the purchase from the agent, and is limited to one day from date of sale, the passenger is entitled to passage within one day from the time of purchase.[17]

The words "good this trip only" on a ticket will not have the effect of limiting the undertaking of the company to any particular day, as they do not relate to time but to a journey, and, if the ticket has not previously been used, it entitles the holder to a passage on a subsequent day, as well as on the day it bears date.[18] A ticket that bears on its face the words "good for this day only," with the date indorsed, is not good on a subsequent day,[19] especially where the rate of fare has lawfully been increased in the meantime.[20]

b. Effect of Expiration of Time Limit

It is generally held that the purchaser is bound by a limitation on the ticket as to the time within which it can be used and that he cannot use the ticket for transportation after the expiration of that time, provided the carrier is not the cause of the delay.

There is a seeming conflict of authority as to the effect of the expiration of the time limit on a ticket issued by a carrier. This conflict arises apparently from a difference in view as to whether a time limit stamped or printed on a ticket is a regulation of the carrier, or a matter of contract between the parties.[21] Where such a limitation is considered as a regulation, where a reasonable limitation as to the time within which a ticket may be used is printed or stamped on the face of the ticket, the purchaser is bound by it and must take notice thereof, and he is not entitled to use the ticket for transportation after the expiration of the time specified,[22] unless the ticket has been extended by a duly authorized agent of the carrier,[23] or unless the limitation has been waived, as will be noted in § 621. Also, according to some authorities, although the ticket is in ordinary ticket, the fact that it is limited as to time makes it more than a mere receipt or token, as it expresses at least a part of the contract between the parties, and by accepting it the passenger assents to the limit as expressed and is not entitled to use it after that limit has expired.[24] On the other hand, it has been held that such a limitation is a matter of contract and not a matter of regulation, and that the usual rule as to the knowledge and assent of the passenger to a limitation of an ordinary ticket, supra § 616, applies, and that the passenger is not bound by the limit of time expressed in such ticket unless he has notice thereof at the time of purchasing the ticket.[25]

A passenger is not entitled to transportation on an expired ticket, although he has on other occasions been permitted to ride on such ticket or even on the particular ticket in question,[26] or has checked baggage on the ticket,[27] or although an unauthorized agent of the company has made representations to him of his right to ride thereon.[28]

To carry a passenger after the date of expiration on a ticket, owing to a mistake in writing such

109, 25 L.R.A.,N.S., 459, 20 Ann.Cas. 311.
10 C.J. p 704 note 38.

Limitation to midnight

Where ticket provided that it should not be good for passage after midnight July 14, and passage was commenced before midnight on such date, passenger had right to complete journey after midnight—Woodard v Texas & P. Ry. Co., 86 S.W.2d 38, 126 Tex 30, reversing Texas & P Ry. Co. v Woodard, Civ App., 53 S.W.2d 82.

16. Miss.—Mitchell v. Southern R. Co., 27 So. 834, 77 Miss. 917.
10 C.J. p 704 note 39.

17. Iowa.—Ellsworth v. Chicago, etc., R. Co., 63 N.W. 584, 95 Iowa 98, 29 L.R.A. 173.
W.Va.—Trice v. Chesapeake, etc., R. Co., 21 S.E. 1022, 40 W.Va 271.

18. N.Y.—Pier v. Finch, 24 Barb. 514.

19. Me.—Burnham v. Grand Trunk R. Co., 63 Me. 298, 18 Am.R. 220.
N.Y.—Boice v. Hudson River R. Co., 61 Barb. 611.

20. N.Y.—Boice v. Hudson River R. Co., supra

21. Va.—Louisville & N. R. Co. v. Rieley, 93 S.E. 574, 575, 121 Va. 469, L.R.A 1918A 775.

22. Va.—Louisville & N. R. Co. v. Rieley, supra
10 C.J. p 704 note 45.
"Primarily, the function of a ticket is to serve as evidence, as between the conductor of the carrier's train and the passenger, of the latter's right to transportation. When a ticket is serving such function, the time limit contained on it (whether on its face, or back or within its folds, is immaterial) is a regulation of the carrier for the conduct of its business, the validity of which is to be determined upon the sole inquiry of its reasonableness as such regulation, and not upon any inquiry as to its validity as a contract between a passenger and carrier."—Louisville & N. R. Co. v. Rieley, supra.

23. Cal.—Elliott v. Southern Pac Co., 79 P 420, 145 Cal. 441, 68 L.R.A. 393.

La.—Randall v. New Orleans, etc., R. Co., 13 So. 166, 45 La.Ann. 778.
10 C.J. p 705 note 46.

24. Iowa.—Hanlon v. Illinois Cent. R. Co., 80 N.W. 223, 109 Iowa 136.
Kan.—Freeman v. Atchison, etc., R. Co., 80 P. 592, 71 Kan. 327, 6 Ann. Cas. 118.
La.—Coburn v Morgan's Louisiana, etc., R. Co., 29 So. 882, 105 La. 398, 83 Am.S.R. 242.

25. S.C.—Norman v. Southern Ry. Co., 44 S.E. 83, 65 S.C. 517, 95 Am. S.R. 809.
Tenn.—Louisville, etc., R. Co. v. Turner, 47 S.W. 223, 100 Tenn. 213, 43 L.R.A. 140.
10 C.J. p 705 note 49.

26. N.Y.—Hill v. Syracuse, etc., R. Co., 63 N.Y. 101.
10 C.J. p 705 note 50.

27. N.Y.—Wentz v. Erie R. Co., 3 Hun 241.

28. Md.—McClure v. Philadelphia, etc., R. Co., 34 Md. 532, 6 Am.R. 345.
N.Y.—Boice v. Hudson River R. Co., 61 Barb. 611.

date, is not a violation of the Interstate Commerce Act, since the erroneous issuance of a ticket in terms not conforming to the actual contract does not make an unlawful contract.[29]

Fault of carrier. It has been held that if, by fault of the carrier, the passenger is delayed, so that he cannot complete his journey within the limitation of the ticket, then he is entitled, notwithstanding such limitation, to continue his journey to his destination,[30] but this rule does not apply where the delay is caused by a third person.[31] It has been held, however, that the fact that the carrier fraudulently concealed the fact that it might not be able to carry the passenger on his return trip within the time prescribed in the ticket does not entitle the passenger to use an expired ticket.[32]

Mileage tickets. A mileage ticket limited as to time and good for a specified number of miles ceases to be valid at the expiration of that time, although the number of miles has not been traveled out.[33] However, a limitation of one day on the use of a mileage ticket for two thousand miles is void on its face,[34] and where such limitation is caused by a mistake of the agent the passenger is not bound by the contract until it is reformed in a court of equity.[35]

Tickets over connecting lines. Where a railroad company sells a limited ticket over its own and connecting roads, and such ticket is a joint contract of the several carriers, a passenger who is delayed by the fault of one of the roads is entitled to complete his journey on such ticket, although the time expires before he reaches the last of the connecting lines.[36] It is sufficient if the trip is begun on a particular line and the ticket is presented before midnight on the day named as the limit, although the journey is not completed on that line until after that time;[37] but where the ticket is in coupon form, and expressly provides that the carrier selling it is merely the agent of the connecting roads and is not responsible beyond its own line, the passenger is not entitled to be carried over the last road after the time has expired, although he is delayed by the fault of one of the other companies.[38] Where the last day of the limitation falls on Sunday, and the last line runs no train on that day, the passenger will be entitled to transportation if he presents himself for the first train of the next day.[39] Where the ticket is unlimited, and the passenger has used it over the first road, he is at liberty to begin his journey over the second road when he pleases.[40]

§ 619. Limitations as to Trains

Although an undisclosed rule of the carrier will not limit the use of a ticket to particular trains, the carrier may provide by a stipulation on the ticket that certain tickets shall be good only on particular trains.

Although an undisclosed rule of a carrier will not limit the use of a ticket to particular trains,[41] the carrier may provide by a regulation or condition on the ticket that certain tickets shall be good

29. Ky.—Illinois Cent. R. Co. v. Fleming, 146 S.W. 1110, 148 Ky. 473.
10 C.J. p 705 note 53.

30. Ala.—Morningstar v. Louisville, etc., R. Co., 33 So. 156, 135 Ala. 251.
10 C.J. p 705 note 54.

No Sunday trains

Where a passenger holds a limited ticket which expires on Sunday and he is prevented from riding on that date because the company runs no trains, he is entitled to a passage on the next day.—Little Rock, etc., R. Co. v. Dean, 43 Ark. 529, 51 Am. R. 584.

Reason for rule

The rule is more applicable to a contract for carriage than to ordinary contracts, for the reason that the time for performance is imposed by the company by way of limitation, and the contract should be so construed as to save the right and prevent a forfeiture, if it can be done.—Little Rock, etc., R. Co. v. Dean, 43 Ark. 529, 51 Am.R. 584.

Train late

Where the railroad company fails to run its trains on time, a ticket holder who boards the first passenger train stopping at his station after the purchase of his ticket is not to be ousted from the train on the ground that the limit of the ticket has expired.—Marx v. Louisiana Western R. Co., 36 So. 862, 112 La. 1085.

31. Cal.—Elliott v. Southern Pac. Co., 79 P. 420, 145 Cal. 441, 68 L.R.A. 393.
10 C.J. p 705 note 55.

32. Cal.—Elliott v. Southern Pac. Co., supra.

33. Iowa.—Sherman v. Chicago, etc., R. Co., 40 Iowa 45.
Mo.—Lillis v. St. Louis, etc., R. Co., 64 Mo. 464, 27 Am.R. 255.
Ohio.—Powell v. Pittsburg, etc., R. Co., 25 Ohio St. 70.

34. Minn.—Krueger v. Chicago, etc., R. Co., 71 N.W. 683, 68 Minn. 445, 64 Am.S.R. 487.

35. Minn.—Krueger v. Chicago, etc., R. Co., supra.

36. Tex.—Gulf, etc., R. Co. v. Looney, 19 S.W. 1039, 85 Tex. 158, 34 Am.S.R. 787, 16 L.R.A. 471.
10 C.J. p 705 note 62.

37. Mont.—Brian v. Oregon Short Line R. Co., 105 P. 489, 40 Mont. 109, 25 L.R.A.,N.S., 459, 20 Ann. Cas. 311.

38. Mont.—Brian v. Oregon Short Line R. Co., supra.
Ohio.—Pennsylvania Co. v. Hine, 41 Ohio St. 276.
10 C.J. p 706 note 64.

39. Ark.—Little Rock, etc., R. Co. v. Dean, 43 Ark. 529, 51 Am.R. 584.

40. Mich.—Brooke v. Grand Trunk R. Co., 15 Mich. 332.

41. Tex.—Chicago, R. I. & G. Ry. Co. v. Carroll, 193 S.W. 1068, 108 Tex. 378.
Duty to transport on proper train see infra § 641.

Ticket sold at reduced rate

Where a carrier authorized another carrier to sell tickets over its road, and such carrier sold a ticket at a reduced rate in accordance with published tariffs, an undisclosed rule of the first carrier that such ticket was invalid on a certain train did not relieve it of liability on the contract.—Chicago, R. I. & G. Ry. Co. v. Carroll, 193 S.W. 1068, 108 Tex. 378.

only on particular trains.[42] Thus the carrier may require that holders of excursion tickets shall travel on the trains provided for that special purpose, and not on regular trains;[43] and it may refuse to recognize as a passenger one who is riding on any train other than the one on which he is entitled to travel by his ticket,[44] as by refusing him passage on a second-class ticket on a train on which only first-class tickets are accepted.[45] Where the ticket calls for a "continuous trip only" between two points, it is not valid for passage to an intermediate point on a train which does not make the whole trip.[46]

§ 620. Stamping, Signing, and Identification

a. In general
b. Sufficiency of identification

a. In General

Reasonable provisions requiring the signing or stamping of reduced rate tickets and the identification of the holder thereof are valid, and a compliance therewith is essential to the passenger's right to transportation, unless such failure is due to the fault of the carrier or its servants or agents.

Usual conditions in an excursion ticket, sold for a round trip at a reduced rate, that before the returning portion of the ticket may be used it must be presented by the holder to an agent at the other end of the line to be signed or stamped by him, and that the holder must identify himself as the original purchaser by writing his signature on the ticket or, if this is not satisfactory to the validating agent, by producing other proofs of his identity, have been upheld as reasonable and valid.[47] Where there is an obvious mistake in the body of the contract indorsed on the ticket as to the place of identification, but which is inconsistent with the whole tenor of the contract and does not mislead the holder, the contract requiring a restamping of the ticket is not invalidated.[48] It is the duty of the passenger to present his ticket to the validating agent, and it is then the duty of the agent to see that the validating is properly done.[49] The passenger is not required to discover any mistake of the agent, nor need he use specific terms in requesting the agent to validate the ticket; but it is sufficient that the ticket comes into the agent's hands with information that the passenger is starting on his return journey.[50]

Signing by the purchaser at the time of issuance is also sometimes required as to other special tickets.[51]

Effect of noncompliance. The passenger's right to transportation is unaffected by the arbitrary refusal of the agent to stamp and sign the ticket,[52] or by his neglect so to do,[53] when the ticket is properly presented to him. It has been held that, where there was no one present at the station authorized to validate the ticket, and the passenger did everything that ordinary prudence and diligence would require to obtain a validation of the ticket, he is entitled to ride on the unvalidated ticket on explaining the circumstances to the conductor,[54] since it is incumbent on the carrier to have present, at a reasonable time before the arrival of trains on which the ticket would be good for passage, on any date on which the purchaser might see fit to use it, an agent authorized to sign and to stamp the ticket in the manner therein provided.[55]

Where the ticket is for carriage over several lines and contemplates that it shall be validated by the agent at the point of destination for the return trip, the company issuing the ticket is liable for the fault

42. Minn.—Dunlap v. Northern Pac. R Co., 28 N W 240, 35 Minn 203
Pa.—Robb v. Pittsburg, etc., R. Co., 14 Pa.Super. 282.
10 C J. p 706 note 69.

43. N.C.—McRae v. Wilmington, etc., R Co., 88 N C. 526, 43 Am.R. 745.
Tex.—England v. International, etc, R Co., 73 S.W. 24, 32 Tex.Civ.App 86
10 C.J. p 706 note 70.

44. Miss.—Howard v. Chicago, etc., R. Co., 61 Miss. 194.

45. U.S.—New York, L. E. & W. Ry. Co. v. Bennett, Tenn., 50 F. 496, 1 C.C.A. 544.

46. Md.—Johnson v. Philadelphia, etc., R. Co., 63 Md. 106.

47. Tenn.—Watson v. Louisville, etc, R Co., 56 S.W. 1024, 104 Tenn. 194, 49 L.R.A. 454.
10 C.J. p 706 note 74.
Failure to have ticket stamped as terminating relation of passenger and carrier see supra § 563.

48. S C.—Bethea v. Northeastern R Co., 1 S E. 372, 26 S C. 91.

49. Ky.—Illinois Cent. R. Co. v. Williams, 143 S W. 760, 147 Ky 52
Tex.—Houston, etc., R Co. v. Arey, 44 S.W. 894, 18 Tex.Civ.App. 457.
10 C.J p 706 note 76.

50. Ky.—Illinois Cent. R. Co. v. Williams, 143 S W. 760, 147 Ky. 52.
10 C.J p 707 note 78.

51. Okl.—Chicago, etc., R. Co. v. Newburn, 110 P. 1065, 27 Okl. 9, 30 L.R.A.,N.S., 432.
Tex.—Ketcheson v. Southern Pac. Co., 46 S.W. 907, 19 Tex.Civ.App. 288—Mexican Cent. R. Co. v. Goodman, Civ.App., 43 S.W. 580.
10 C.J. p 707 note 79.

52. Tex.—Texas, etc., R. Co. v. Payne, 87 S.W. 330, 99 Tex. 46, 122 Am S.R. 603, 70 L.R.A. 946.
10 C.J. p 707 note 86.
Failure to comply with conditions as to stamping, signing, and identification as grounds for ejection see infra § 813.

53. U S.—Northern Pac R. Co. v. Pauson, Cal., 70 F. 585, 17 C.C.A. 287.

54. Ga.—Southern R. Co. v. Wood, 39 S E. 894, 114 Ga. 140, 55 L.R.A. 536.
La.—Wilcox v. Louisville, etc., R. Co., 7 La.A., Orleans, 370.
10 C.J. p 707 note 88.

55. Ga.—Southern R. Co. v. Wood, 39 S.E. 894, 114 Ga. 140, 55 L.R.A. 536.

of such agent in failing properly to validate the ticket,[56] unless the initial company acts merely as agent for the connecting lines in issuing the ticket,[57] or unless the ticket provides that such company will not be responsible beyond its own line.[58]

It is incumbent on the purchaser to use reasonable means of complying with a condition as to identifying himself to the agent;[59] and where, after ample opportunity for complying with such stipulation has been afforded to him, he fails so to do, he is not entitled to transportation on his ticket,[60] unless in so doing he relies on the representations of an authorized agent of the company.[61]

b. Sufficiency of Identification

The burden of establishing identification is on the ticket holder. He is not required to identify himself to the satisfaction of the agent, in the absence of an express provision to that effect, but he must offer such proof as would satisfy a reasonable man.

It has been held that the purchaser merely writing his name, without more, is not necessarily a sufficient identification, but that he must offer to the agent such proof of his identity as would satisfy a reasonable man,[62] and that he is not bound to identify himself to the satisfaction of the train agent.[63] The validating agent is not required to accept the holder's verbal assurance of his identity or to institute other inquiries with a view of satisfying himself on such subject, as the burden is on the holder to produce sufficient evidence of his identification,[64] but the agent cannot refuse to hear facts on the subject of identification;[65] and, on the refusal of the conductor or agent to allow the passenger to identify himself by signature, he cannot be required to furnish other identification.[66] Where the ticket provides that the holder shall identify himself "to the satisfaction" of a designated agent, such agent is the party to determine the sufficiency of the identification, and it may not be referred to a jury to determine whether he was or was not "satisfied" with the proof of identity.[67]

§ 621. Waiver of Conditions

a. In general
b. Omission to enforce condition

a. In General

Except where there is a stipulation to the contrary in the ticket itself, an agent authorized to determine the passenger's right to transportation may waive conditions in the ticket; a ticket agent, however, cannot do so after the sale of the ticket.

Except where it is stipulated in the ticket itself that no agent or employee has authority to waive the conditions,[68] a general officer, or an agent authorized to determine whether or not a passenger is entitled to transportation, may waive the conditions in a ticket.[69] Such a waiver, however, cannot be made by an agent or servant having no authori-

56. Kan.—Chase v. Atchison, etc., R Co., 79 P. 153, 70 Kan. 546.
Tex.—Gulf, etc., R. Co v. St. John, 35 S.W 501, 13 Tex.Civ App. 257.
10 C J. p 707 note 90.
Nature and extent of connecting carrier's liability generally see infra § 653

57. S C.—Bethea v. Northeastern R Co., 1 S.E 372, 26 S.C 91.

58. U.S —Mosher v. St. Louis, I. M. & S. Ry. Co., Mo., 8 S Ct. 1324, 127 U.S. 390, 32 L.Ed. 249.
Mo.—Boling v. St. Louis, etc., R. Co., 88 S.W. 35, 189 Mo. 219.
Tex.—Clark v. Galveston etc., R Co., Civ.App., 137 S W. 716.
10 C.J. p 707 note 92.

59. Ga —Southern R. Co. v. Barlow, 30 S E. 732, 104 Ga. 213, 69 Am. S.R 166.
10 C J p 708 note 93.

60. Kan.—Dangerfield v. Atchison, etc., R Co., 61 P 405, 62 Kan. 85.
10 C.J. p 708 note 94.

61. Tex —Houston, etc., R. Co. v. Lee, Civ.App., 123 S.W. 154.
10 C.J. p 708 note 95.

62. Ga.—Southern Ry. Co. v. Barlow, 30 S E. 732, 104 Ga. 213, 69 Am.S.R. 166.
10 C.J. p 707 note 80.
"Printing" name
If the purchaser of a ticket, at the time of buying the same, intentionally adopted, as the method of signing his name, the making of the letters thereof in the form of printed characters, and thus rendered it impossible to identify himself as the original purchaser by reproducing his signature, the burden was on him to find other means of satisfactory identification. Merely proving by witnesses that his name was the same as that "printed" upon the ticket would not in every case, and under all circumstances, be sufficient or satisfactory proof that he was the original purchaser.—Central of Georgia Ry. Co. v. Cannon, 32 S.E 874, 106 Ga 828.

63. Ky.—Southern R. Co. v Cassell, 92 S W 281, 122 Ky. 317, 28 Ky.L. 1230.
10 C J. p 707 note 81.
Reason for rule
"The contract, properly construed, is not that the purchaser will satisfy the conductor of his identity as original purchaser. No quantity of evidence might have done that. For after all had been done that could have been, and all that any reasonable person would have required, still the conductor . . . might not have been satisfied, and would have had the right under . . . [this] view of the law to have refused the ticket and ejected the passenger under circumstances most unreasonable and unwarranted. Such could not have been the intention of both parties in entering into the contract of carriage."—Southern R. Co. v. Cassell, 92 S W. 281, 282, 122 Ky. 317, 28 Ky.L 1230.

64. Ky —Baltimore, etc., R Co. v. Hudson, 80 S W. 454, 117 Ky. 995, 25 Ky.L 2154.

65. Tex —Houston, etc, R Co. v. Lee, Civ.App., 123 S W 154.

66. Va.—Norfolk, etc., R. Co. v. Anderson, 17 S E. 757, 90 Va. 1, 44 Am.S R. 884.

67. S.C.—Bethea v. Northeastern R. Co., 1 S E 372, 26 S.C 91.

68. U S.—Boylan v. Hot Springs R. Co., Ill, 10 S Ct. 50, 132 U.S. 146, 33 L.Ed. 290.
10 C J. p 708 note 96.

69. U.S —Chesapeake & O Ry. Co v. Burton, C.C.A W.Va., 62 F.2d 110.
10 C J. p 708 note 97.
The Corpus Juris text has been cited with full approval in Chesapeake & O. R. Co. v. Burton, C.C.A. W Va., 62 F.2d 110.

ty to determine such a question, such as a baggagemaster, or an agent giving information not in connection with the sale of the ticket.[70] A waiver by one conductor as to his portion of the route will not, as a general rule, be binding on other conductors.[71] A purchaser of tickets with authority to resell them may waive a requirement as to signature.[72]

After sale of ticket. A ticket agent has not the implied power to bind the company, after the sale of the ticket is fully completed and his duties in regard to it are at an end, by representations which contradict the plain terms of the ticket sold.[73] An agent who has sold a ticket has no implied authority, after the ticket has expired by limitation, to waive such limitation and make a new contract as to its use.[74]

b. Omission to Enforce Condition

Ordinarily failure to require compliance with the conditions of a ticket in past instances does not amount to a waiver, unless such instances have been so numerous as to induce the passenger to believe that the conditions have been abandoned.

The fact that compliance with the conditions of a ticket has not been required in other instances will not amount to a waiver of such conditions,[75] unless on the occasion in question such instances were known to the passenger and were sufficiently numerous to induce him to believe that the requirement had been abandoned.[76] Thus the fact that the passenger has on other occasions been permitted to ride on an expired ticket, or even on the particular ticket in question, does not establish a custom to that effect, and so entitle the passenger to transportation.[77] It has been held, however, that, where a condition, such as that a ticket shall be signed by the purchaser, has been ignored by the selling agent or the conductor and the passenger has been allowed to ride thereon without signature, so that the omission to require signature is not to be deemed a mere oversight, the condition must be regarded as waived.[78] The act of a conductor in accepting an expired ticket has also been held to constitute a waiver of its defect.[79]

Where a ticket is not stamped as required, a waiver of the requirement cannot be predicated on the fact that the gatekeeper allows the passenger to pass without punching his ticket, or that the sleeping car conductor fails to remark the defect, where the regular conductor detects it at once and calls the passenger's attention to it.[80] Where one conductor fails to discover that the holder of a nontransferable ticket is not in fact the original purchaser, but the second conductor detects the fraud, there is no waiver of the condition in the ticket against its transfer.[81]

4. Passes

§ 622. In General

a. Definitions
b. Issuance; nature and effect

a. Definitions

A "pass" is a ticket, issued by a carrier, authorizing a designated person to travel free on its lines, between certain points or for a limited time.

The term "pass" has been defined as a ticket issued by a railroad or other transportation company, authorizing a designated person to travel free on its lines, between certain points or for a limited time.[82]

A gratuitous pass is an instruction to the carrier's conductors to receive and carry the passee upon its trains.[83]

70. Utah.—Drummond v. Southern Pac. Co., 25 P. 733, 7 Utah 118.
10 C.J. p 708 note 98.

71. Kan.—Dangerfield v. Atchison, etc., R. Co., 61 P. 405, 62 Kan. 85.
10 C.J. p 708 note 99

72. Cal.—Elser v. Southern Pac. Co., 94 P. 852, 7 Cal.App. 493.

73. Iowa.—Hanlon v. Illinois Cent. R. Co., 80 N.W. 223, 109 Iowa 136
10 C.J. p 708 note 2.

74. Ill.—Pennington v. Illinois Cent. R. Co., 97 N.E. 289, 252 Ill. 584, 37 L.R.A.,N.S., 983, reversing 160 Ill.App. 128.

75. Vt.—Thorp v. Concord R. Co., 17 A. 791, 61 Vt. 378.
10 C.J. p 708 note 4.

76. Tenn.—Watson v. Louisville, etc., R. Co., 56 S.W. 1024, 104 Tenn. 194, 49 L.R.A. 454.
10 C.J. p 708 note 4.

Accepting detached coupons

Where the company has been accustomed to honor coupons when detached, this constitutes evidence of a waiver by it of a condition in the ticket requiring them to be detached only by the conductor.—Thompson v. Truesdale, 63 N.W. 259, 61 Minn. 129, 52 Am.S.R. 579.

Unstamped tickets

The fact that other passengers, or indeed the passenger in question, on other occasions, have been allowed to travel without having tickets stamped will not abrogate the rule, unless such occurrences are so common or frequent as to amount to a custom or an abandonment of the rule, and to mislead the passenger.—Watson v. Louisville, etc., R. Co., 56 S.W. 1024, 104 Tenn. 194, 49 L.R.A. 454.

77. Mich.—Johnson v. Michigan United R. Co., 116 N.W. 529, 153 Mich. 65.
10 C.J. p 709 note 5.

78. Ohio.—Kent v. Baltimore, etc., R. Co., 12 N.E. 798, 45 Ohio St. 284, 4 Am.S.R. 539
Okl.—Chicago, etc., R. Co. v. Newburn, 110 P. 1065, 27 Okl. 9, 30 L.R.A.,N.S., 432.

79. U.S.—Chesapeake & O. Ry. Co. v. Burton, C.C.A.W.Va., 62 F.2d 110.

80. Pa.—Bowers v. Pittsburgh, etc., R. Co., 27 A. 893, 158 Pa. 302

81. Kan.—Dangerfield v. Atchison, etc., R. Co., 61 P. 405, 62 Kan. 85.

82. Black L.D.

83. Minn.—Bergerson v. Great

A drover's pass is a ticket given without charge to those who accompany consignments of cattle.[84] As otherwise defined, it is a railroad pass to one who goes along in charge of the cattle, to care for them, feed and water them, and unload them;[85] a contract for the carriage of a person in charge of cattle on a freight train, without charge.[86]

b. Issuance; Nature and Effect

A free pass is a mere license and not a contract, and in the absence of a statute requiring the issuance of passes, a person using a pass is deemed to have assented to the conditions thereon.

A free pass is not a contract,[87] but is a mere license to ride on the trains of the carrier;[88] and when given as a gratuity it is none the less a free pass because the carrier requires the person using it to sign an agreement exempting it from liability for injuries,[89] or because the giving of such pass is customary.[90] Conditions on the back of a pass which has expired, or which has had no legal existence, can have no legal effect.[91]

Contract to issue. A contract based on a good consideration, to grant a life pass, unless prohibited by statute, is valid and binding on the company, and for its refusal to perform the same the company may be held liable in damages,[92] and the fact that the contract expresses that transportation is to be furnished "free of charge" does not necessarily mean that it is a gratuity.[93] It has been held, however, that the receivers of a railroad cannot make an agreement for a free life pass which will bind subsequent owners of the road.[94] A pass given in consideration of rights granted does not entitle the holder thereof to travel free on a road subsequently leased and operated in connection with the original line;[95] and the fact that such a pass has been honored for use over a connecting line does not bind a consolidated company which buys both roads to recognize the pass beyond the limits of the original line granting it.[96]

Where a carrier engages that a person shall be "carried free of charge," he is under no duty to apply for a pass, and if none is furnished him he is entitled to be carried without one,[97] and it is the

Northern Ry. Co., 196 N.W. 670, 671, 158 Minn. 20.

Free pass

(1) A free pass means the privilege of riding over a railroad without payment of the customary fare.—Perkins v. New York Cent. R. Co., 24 N.Y. 196, 203, 82 Am.D. 281.

(2) Free pass within the meaning of statutory prohibitions see infra § 623.

84. Va.—Norfolk, etc., R. Co. v. Tanner, 41 S.E. 721, 100 Va. 379, 383, quoting Cooley Torts 2d ed., p 826.

85. Tex.—Missouri Pac. R. Co. v. Ivy, 9 S.W. 346, 349, 71 Tex. 409, 413, 10 Am.S.R. 758, 1 L.R.A. 500.

86. Vt.—Sprigg v. Rutland R. Co., 60 A. 143, 144, 77 Vt. 347.

87. U.S.—Smith v. Atchison, T. & S. F. Ry. Co., Okl., 194 F. 79, 114 C.C.A. 157.

Minn.—Bergerson v. Great Northern Ry. Co., 196 N.W. 670, 158 Minn. 20.

Mere gratuity

(1) A free pass authorized to be given to an employee's family is a mere gratuity.

U.S.—Charleston & W. C. R. Co. v. Thompson, Ga., 34 S.Ct. 964, 234 U.S. 576, 58 L.Ed. 1478.

Ind.—Payne v. Elliott, 133 N.E. 751, 77 Ind.App. 415.—Clark v. Southern Ry. Co., 119 N.E. 539, 69 Ind.App. 697.

Mo.—Pinnell v. St. Louis-San Francisco Ry. Co., 263 S.W. 182, certiorari denied 45 S.Ct. 123, 266 U.S. 623, 69 L.Ed. 473.

Tenn.—Southern Ry. Co. v. Linear, 198 S.W. 887, 138 Tenn. 543, L.R.A. 1918B 1114.

(2) A pass issued by defendant railroad to deceased, an officer of another railroad, in exchange for passes issued by his railroad to officers of defendant, is a free pass or gratuity.—Ft. Wayne & Wabash Valley Traction Co. v. Justus, 115 N.E. 585, 186 Ind. 464.

(3) Where a common carrier entered into a contract with a telegraph company, by which each was to render to the other certain services, and the carrier agreed to transport free of charge "all persons in the employ of the telegraph company when traveling on the business of said company," and under this contract the carrier issued to a telegraph lineman an annual pass, and the lineman used the pass on a trip for his individual pleasure or on business of his own, the pass when so used was gratuitous and not in consideration of services.—Brooks v. Bugg, 131 S.E. 365, 34 Ga.App. 761.

(4) Interstate pass issued by terminal railroad association to flagman of proprietary railroad was a free pass without consideration, notwithstanding flagman effected saving in using pass in going to and from his work, where his compensation would have been same whether or not he received pass.—Dunn v. Alton R. Co., Mo.App., 88 S.W.2d 224.

(5) Where plaintiff, tie inspector for company from which railroad bought ties, obtained railroad's permission to accompany its tie inspector on inspection trip, so that discrepancies in inspection might be adjusted on spot, pass was not issued for valuable consideration, arrangement being chiefly for benefit of the company and plaintiff.—Ellis v. Davis, C.C.A.Tex., 4 F.2d 323.

88. Minn.—Bergerson v. Great Northern Ry. Co., 196 N.W. 670, 158 Minn. 20.

10 C.J. p 678 note 60 [a].

89. Tex.—Stamp v. New Mexico Eastern R. Co., Civ.App., 161 S.W. 450.

Limitation of or exemption from liability see infra §§ 634–635.

Persons riding on passes as passengers see supra §§ 550–551.

90. Tex.—Stamp v. New Mexico Eastern R. Co., supra.

91. N.C.—McNeill v. Durham, etc., R. Co., 47 S.E. 765, 135 N.C. 682, 67 L.R.A. 227.

92. Pa.—Erie, etc., R. Co. v. Douthet, 88 Pa. 243, 32 Am.R. 451.

93. N.H.—Emerson v. Boston, etc., R. Co., 75 A. 529, 75 N.H. 427, 428, 27 L.R.A.,N.S., 331.

10 C.J. p 710 note 20.

94. N.J.—Martin v. New York, etc., R. Co., 36 N.J.Eq. 109.

95. Md.—Western Maryland R. Co. v. Lynch, 34 A. 40, 82 Md. 233.

10 C.J. p 709 note 12.

96. N.J.—Schmoele v. Atlantic City R. Co., 160 A. 524, 110 N.J.Eq. 597, affirming 155 A. 143, 108 N.J.Eq. 353.

10 C.J. p 709 note 13.

97. Minn.—Grimes v. Minneapolis, etc., R. Co., 33 N.W. 33, 37 Minn. 66.

duty of the carrier to inform the conductors of the right of such person to be carried free of charge.[98] Where, under a contract for an annual pass, on the expiration of the first pass application for a renewal is made, but a second renewal is not applied for thereafter, it has been held to be a question of fact for the jury as to whether an application is, under the circumstances, necessary or not.[99]

Assent to conditions. One who receives and uses a pass to procure free transportation must be deemed to have assented to the conditions indorsed thereon whether he reads and signs them or not,[1] except that, where the pass is, by statute, required to be issued on certain conditions, he is not bound by additional conditions thereon, to which he has not assented.[2]

Caretakers' passes. A pass issued under the exception in the Interstate Commerce Act as amended, permitting the issuing of free transportation to necessary caretakers, is not "free" in the popular sense of the word, but free in name only, and is a part of the consideration of the contract of shipment.[3] Such transportation is transportation for hire, with all the legal incidents of paid transportation.[4] Although there is sometimes a custom permitting an owner to accompany his stock, he is ordinarily not entitled, as a matter of right, to a pass on a freight train on which he has a shipment of stock,[5] unless such a pass is, by statute, required to be given.[6] A provision in the published tariffs of the carrier, that free or reduced transportation shall not be issued for shippers and caretakers and that they shall pay full fare returning, implies that passes will be issued to the destination of the shipment.[7]

§ 623. Passes Forbidden by Law

a. Under Interstate Commerce Act
b. Under state law

a. Under Interstate Commerce Act

The giving or use of a free pass, subject to certain exceptions, is prohibited by the Interstate Commerce Act, even though a valid contract has been entered into to issue such passes prior to the enactment of the prohibition.

Under the Interstate Commerce Act, 49 U.S.C.A. § 1, a common carrier is expressly prohibited, except in certain specified cases, from issuing or giving an interstate free ticket, free pass, or free transportation, and if it does so in violation of the act it is guilty of a misdemeanor and subject to a penalty;[8] and likewise any person other than those excepted, who uses such interstate free transportation, is subject to a like penalty.[9] The offense results ordinarily from a joint combination in which both the passenger and the carrier are participants, and the purpose and effect of the statute is to punish each of them.[10] It has been held that giving an undue preference or advantage to a particular person in violation of this act is not complete where a free pass had been delivered, unless there

98. Minn.—Grimes v. Minneapolis, etc., R. Co., supra.

99. Va.—Knopf v. Richmond, etc., R. Co., 8 S.E. 787, 85 Va. 769

1. Wash.—Muldoon v. Seattle City R. Co., 38 P. 995, 996, 10 Wash. 311, 45 Am.S.R. 787.
10 C.J. p. 709 note 17.
"We think it may be fairly held that a person receiving a ticket for free transportation is bound to see and know all of the conditions printed thereon which the carrier sees fit to lawfully impose."—Muldoon v. Seattle City R. Co., supra.

2. Mo.—Chorn v. Missouri, etc., R. Co., 153 S.W. 1060, 168 Mo.App. 518.
10 C.J. p. 710 note 18.

3. Me.—Miller v. Maine Cent. R. Co., 133 A. 907, 125 Me. 338, 47 A.L.R. 720.

4. U.S.—Norfolk Southern R. Co. v. Chatman, N.C., 37 S.Ct. 499, 244 U.S. 276, 61 L.Ed. 1131, L.R.A.1917F 1128, affirming 222 F. 802, 138 C.C.A. 350.

5. Ky.—Chesapeake, etc., R. Co. v. Collinsworth, 153 S.W. 241, 152 Ky. 197.

6. Mo.—Chorn v. Missouri, etc., R. Co., 153 S.W. 1060, 168 Mo.App. 518.

Statute inapplicable to interstate shipments

A statute providing that railroad companies shall furnish free transportation to shippers of live stock in certain cases, and authorizing actions to be brought to recover penalties for its violation, has no application to interstate shipments.—Missouri, etc., R. Co. v. Sinclair, 94 P. 123, 77 Kan. 228—State v. Otis, 56 P. 14, 60 Kan. 248.

False representations of ownership as crime

Under a statute providing for the free transportation of caretakers of live stock and watermelons, and providing that any person who falsely represents himself or another as the owner or shipper of such freight, for the purpose of procuring more transportation than is allowed by the statute, is guilty of a misdemeanor, the mere shipping of melons in the name of another person who accompanies the shipment does not constitute a violation of the statute, at least where it appears that the railroad agent had knowledge of the true ownership of the shipment.—Rooney v. St. Louis-San Francisco Ry. Co., 286 S.W. 153, 220 Mo.App. 273.

7. U.S.—Norfolk Southern R. Co. v. Chatman, N.C., 37 S.Ct. 499, 501, 244 U.S. 276, 61 L.Ed. 1131, L.R.A. 1917F 1128, affirming 222 F. 802, 138 C.C.A. 350.
"The language of the . . . [tariff] implies that . . . [caretakers'] passes will be issued . . . to destination of the shipment and was intended as notice to shippers that return passes would not be allowed"—Norfolk Southern R. Co. v. Chatman, supra.

8. U.S.—Illinois Cent. R. Co. v. Messina, 36 S.Ct. 368, 240 U.S. 395, 60 L.Ed. 709, reversing Yazoo & M. V. R. Co. v. Messina, 67 So. 963, 109 Miss. 143.
10 C.J. p. 711 note 35.

9. U.S.—Illinois Cent. R. Co. v. Messina, 36 S.Ct. 368, 240 U.S. 395, 60 L.Ed. 709, reversing 67 So. 963, 109 Miss. 143.
10 C.J. p. 711 note 36.

10. W.Va.—Comisky v. Norfolk & W. Ry. Co., 90 S.E. 385, 79 W.Va. 148, L.R.A.1917D 220.

was also an actual transportation on the pass.[11]

Since the issuance of passes to members of an employee's family is not prohibited, such passes are impliedly authorized.[12] The word "families," as used in the exception in the act prohibiting the issuance of any pass except to employees and their families, is used in the restrictive sense, and means a collective body of persons living in one house under one head.[13]

The provisions of the act do not extend to the postal service of the United States, nor prohibit the transportation by railroad companies free of charge of such officers or agents of the government as are employed in that service;[14] nor do they not prohibit the issuance of passes to officers, agents, and employees of carriers not subject to the act, such, for instance, as to officers and agents of transatlantic steamship companies and foreign railroad companies.[15]

Contract for issuance of pass. In view of the prohibition of the Interstate Commerce Act, 49 U.S.C.A. § 6, against demanding, collecting or receiving a greater or less or different compensation for the transportation of persons, than appears in the carrier's published tariffs, contracts for the issuance of passes, although based on a consideration, are unenforceable,[16] notwithstanding they were entered into prior to the passage of the act, and were valid when made,[17] or that the contract was to issue a pass to an employee of the carrier.[18]

b. Under State Law

Under statutory provisions in some jurisdictions the issuance of passes is prohibited except in certain specified instances; and any carrier issuing a pass, or any person accepting or using a pass, in violation of such a statute, is guilty of a misdemeanor.

Under constitutional or statutory provisions in some jurisdictions railroad companies are prohibited, except in certain specified cases, from granting free passes over their roads,[19] such as to public

11. U.S.—In re Huntington, D.C.N.Y., 68 F. 881.
10 C.J. p 711 note 37.

12. Ind.—Clark v. Southern Ry. Co., 119 N.E. 539, 69 Ind.App. 697

Prior to amendment
The exception allowed in § 22 of the Act prior to its amendment, in favor of officers and employees of the road, did not include the families of such persons—Ex parte Koehler, C.C.Or., 31 F. 315, 12 Sawy. 446.

13. Mo.—Wentz v. Chicago, etc., R. Co., 168 S.W. 1166, 259 Mo. 450, Ann.Cas.1916B 317.

Father of adult employee not within term
The term does not include the father of an adult employee not living with him nor dependent on him.—Wentz v. Chicago, etc., R. Co., 168 S.W. 1166, 259 Mo. 450, Ann.Cas 1916B 317.

14. 18 Op.Atty.-Gen. 587.
"As the act does not include the mail service in its provisions, none of the lawful, customary, and necessary instrumentalities by which that service is conducted is subjected to the law."—18 Op. Atty.-Gen. 587, 591.

15. U.S.—U. S. v. Erie R. Co., N.Y., 35 S.Ct. 396, 236 U.S. 259, 59 L.Ed. 567, affirming, D.C., 213 F. 391

16. Ind.—Payne v. Elliott, 133 N.E. 751, 77 Ind.App. 415.
Tenn.—Southern Ry. Co. v. Linear, 198 S.W. 887, 138 Tenn. 543, L.R.A. 1918B 1114.
W.Va.—Dorr v. Chesapeake & O. Ry. Co., 88 S.E. 666, 78 W.Va. 150, L.R.A.1916E 622

Prior to the Hepburn Act it was said that "the interstate commerce act of congress does not prohibit the issuance of railway passes upon a moneyed or other valuable consideration, but only prohibits free transportation."—Curry v. Kansas & C. P. Ry. Co., 48 P. 579, 58 Kan. 6.

17. U.S.—Louisville, etc., R. Co. v. Mottley, 31 S.Ct. 265, 219 U.S. 467, 55 L.Ed. 297, 34 L.R.A.,N.S., 671, reversing 118 S.W. 982, 133 Ky. 652.
10 C.J. p 711 note 39.
Medium of payment of fare see supra § 592.

Reason for rule
"The agreement . . . must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable. The framers of the constitution never intended any such state of things to exist."
U.S.—Louisville, etc., R. Co. v. Mottley, 31 S.Ct. 265, 271, 219 U.S. 467, 482, 55 L.Ed. 297, 34 L.R.A., N.S., 671, reversing 118 S.W. 982, 133 Ky. 652.
Wash.—Cowley v. Northern Pac. R. Co., 123 P. 998, 999, 68 Wash. 558, 41 L.R.A.,N.S., 559.

18. Ind.—Payne v. Elliot, 133 N.E. 751, 77 Ind.App. 415.
Tenn.—Southern Ry. Co. v. Linear, 198 S.W. 887, 138 Tenn. 543, L.R.A. 1918B 1114.

19. Ky.—Commonwealth v. Chesapeake & O. Ry. Co., 65 S.W.2d 95 251 Ky. 382—Kentucky Traction & Terminal Co. v. Barrett, 195 S.W. 1124, 176 Ky. 605—Kentucky Traction & Terminal Co. v. Murray, 195 S.W. 1119, 176 Ky. 593, error dismissed Murray v. Kentucky Traction & Terminal Co., 39 S.Ct. 388, 249 U.S. 623, 63 L.Ed. 806.
Neb.—State v. Chicago, B. & Q. R. Co., 199 N.W. 534, 112 Neb. 248
N.J.—Perkins v. Public Service Ry. Co., 99 A. 387, 87 N.J.Eq. 134.
10 C.J. p 710 notes 26, 27.

What constitutes free pass
As used in statutory prohibitions of free passes, the term "free pass" means a pass for which a full consideration is not given, and the transportation paid for in the usual way, at the usual time and at tariff rates, it means the privilege of riding over a railroad without payment of the customary fare.
La.—Coco v. Oden, 79 So. 287, 143 La. 718, 8 A.L.R. 679, error dismissed Odon v. Coco, 39 S.Ct. 386, 249 U.S. 587, 63 L.Ed. 790.
Tex.—Texas, etc., R. Co. v. Wells-Fargo Exp. Co., 110 S.W. 38, 101 Tex. 564.
Free pass defined generally see supra § 622.

In West Virginia that portion of the Public Service Commission Act which prohibits the issuance and use of passes is a general regulatory provision, sanctioned by, and not in violation of, the provision of the state constitution giving county courts administration of the estab-

officers;[20] and a pass issued in violation of such a statute is void and of no effect.[21] Also under some statutes, subject to certain exceptions, it is a penal offense for a person to accept free transportation on a railroad, or to use or ride on free passes thereon,[22] or for the carrier to issue such free transportation or pass,[23] although there is no intent to violate the statute.[24]

Such a statute is within the power of the legislature to regulate the business of common carriers by preventing unjust discrimination, and is a reasonable exercise of the police power of the state.[25] The mere fact that certain persons are exempted from the operation of the statute does not invalidate it,[26] although in such a case it will be strictly construed.[27] A railroad in issuing a pass to a person not within the operation of the statute acts as a common carrier.[28]

Contract to issue pass. Where the statutory prohibition is against the issuance of "free passes" to public officers, a pass for which a full consideration is rendered is not unlawful.[29] However, under statutes prohibiting free transportation or free passes generally, a contract for the issuance of a pass to a person not within the statutory exceptions is invalid.[30]

lishment and regulation of roads, ways, bridges, ferries and mills.—Shrader v. Steubenville, East Liverpool & Beaver Valley Traction Co., 99 S.E. 207, 84 W.Va. 1.

20. La.—Coco v. Oden, 79 So. 287, 143 La. 718, 8 A.L.R. 679, error dismissed Odon v. Coco, 39 S.Ct. 386, 249 U.S. 587, 63 L.Ed. 790.
10 C.J. p 710 note 28.

What officers within prohibition

(1) Notary public.—Peo. v. Rathbone, 40 N.E. 395, 145 N.Y. 434, 28 L.R.A. 384.

(2) Officers and agents of the state railroad commission.—Matter of Railroad Com'rs, 32 N.Y.S. 1115, 11 Misc. 103—10 C.J. p 711 note 44.

(3) Railroad policeman appointed by the governor, and required to take the constitutional oath, and by virtue of his appointment authorized to perform the duties of a peace officer.—Dempsey v. New York Cent., etc., R. Co., 40 N.E. 867, 146 N.Y. 290.

(4) Sheriff.—Coco v. Oden, 79 So. 287, 143 La. 718, 8 A.L.R. 679, error dismissed Odon v. Coco, 39 S.Ct. 386, 249 U.S. 587, 63 L.Ed. 790.

Private contractual relations between a public officer and a corporation may be such as to distinguish the case from that of an ordinary public officer, so as to make legal the issue of a pass.—Dempsey v. New York Cent., etc., R. Co., 40 N.E. 867, 146 N.Y. 290.

21. W.Va.—Bailey v. Bartlett, 163 S.E. 615, 112 W.Va. 27.

22. Neb.—State v. Chicago, B. & Q. R. Co., 199 N.W. 534, 112 Neb. 248.
W.Va.—State v. Ankrom, 103 S.E. 925, 86 W.Va. 570.
10 C.J. p 710 note 29.

Exchange of tickets not violation of statute

Where a shipper accompanied live stock over one road, and his assistant accompanied a shipment over another, and they received return tickets, to which they were entitled under shipping contracts, their exchange of such tickets, made with the ticket agent's consent, was not a violation of spirit or substance of a statute prohibiting the issuance of free passes but providing an exception in the case of caretakers accompanying live stock.—Gruhl v. Northern Pac. Ry. Co., 168 N.W. 127, 140 Minn. 353.

Riding free without pass

It has been held that it is not an offense under such statutes for a person to attempt to ride free without attempting to use the pass.—Carpenter v. Trinity & B. V. Ry. Co., 184 S.W. 186, 108 Tex. 52, 1 A.L.R. 1449, reversing, Civ.App., 146 S.W. 363.

Sufficiency of indictment

Indictment charging with reasonable certainty and precision the procurement and use of a pass entitling holder to free transportation or service by a public service corporation is sufficient on demurrer.—State v. Ankrom, 103 S.E. 925, 86 W.Va. 570.

Word "aid" construed

Although the word "aid" does not necessarily embrace or imply guilty knowledge or purpose, yet when supplemented by "abet," as both are used in a statute providing that every officer, agent, etc., of any public service corporation, or any patron, passenger, or other person, who procures, aids, or abets any violation of any provision of such statute by any public service corporation shall be guilty of a misdemeanor, both terms jointly indicate such knowledge and purpose and the intention to encourage the commission of the offense.—State v. Ankrom, 103 S.E. 925, 86 W.Va. 570.

23. Ky.—Commonwealth v. Chesapeake & O. Ry. Co., 65 S.W.2d 95, 251 Ky. 382.
Neb.—State v. Chicago, B. & Q. R. Co., 199 N.W. 534, 112 Neb. 248.
10 C.J. p 710 note 30.

Joint participation

Acts 1913 c 9 §§ 6, 7, Code 1913 §§ 6, 7 [secs. 641, 642], forbidding free transportation of passengers by carriers, except of employees, intend joint participation and punishment of carrier and passenger, either directly or indirectly, to constitute a violation thereof.—Comisky v. Norfolk & W. Ry. Co., 90 S.E. 385, 79 W.Va. 148, L.R.A.1917D 220.

24. Fla.—State v. Live Oak, etc., R. Co., 70 So. 550, 70 Fla. 564.

25. Ky.—Kentucky Traction & Terminal Co. v. Barrett, 195 S.W. 1124, 176 Ky. 605—Kentucky Traction & Terminal Co. v. Murray, 195 S.W. 1119, 176 Ky. 593, error dismissed Murray v. Kentucky Traction & Terminal Co., 39 S.Ct. 388, 249 U.S. 623, 63 L.Ed. 806.
10 C.J. p 711 note 33.

26. Neb.—State v. Chicago, B. & Q. R. Co., 199 N.W. 534, 112 Neb. 248.

Statute held valid

There being reasonable grounds for legislative classification of persons with respect to rates of fare paid, under Anti-Pass Law, Acts 1907 c 42 § 2, as amended by Acts 1911, c 83, Vernon Pen.Code Annot.1916 art 1533, and law affecting equally all persons similarly situated under similar circumstances, it is not invalid.—St. Louis Southwestern Ry. Co. of Texas v. State, 261 S.W. 996, 113 Tex. 570, 33 A.L.R. 367, reversing State v. St. Louis S. W. Ry. Co. of Texas, Civ. App., 197 S.W. 1006.

27. Neb.—State v. Chicago, B. & Q. R. Co., 199 N.W. 534, 112 Neb. 248.

28. N.H.—Wessman v. Boston & M. R. R., 152 A. 476, 84 N.H. 475.

29. N.Y.—Dempsey v. New York Cent., etc., R. Co., 40 N.E. 867, 146 N.Y. 290.

30. Ind.—Payne v. Elliott, 133 N.E. 751, 77 Ind.App. 415.
10 C.J. p 710 note 29 [a].

A contract whereby a railroad agrees to carry a person and the members of his family for life between two points in consideration of deeds to right of way is violative of a statute providing that no public utility shall make or give, directly or indirectly, any undue or unreasonable preference or advantage to any

While it has been held that such a statute is prospective in its operation, and does not operate to destroy or impair the obligation of contracts made prior to its passage,[31] there is authority to the contrary,[32] and it has been held that, where a public officer is prohibited from making use of a pass as well as from receiving one, he may not avail himself of a pass notwithstanding it was issued before the provision became operative.[33]

Interstate pass. The issuance of a pass limited to interstate transportation is not a violation of a statute prohibiting the issuance of passes for transportation within the state.[34]

Passenger carried past station. A statute prohibiting carriers from transporting passengers free does not prevent a railroad company, on carrying a passenger past his station by mistake, from carrying him free to the next station.[35]

§ 624. Revocability of Pass

A pass issued without consideration is revocable at any time.

As already pointed out in § 622 b, a pass issued without consideration is a mere license, which is revocable at any time,[36] even while the holder is a passenger on it.[37] This is especially true where the right is expressly reserved to cancel the pass at any time.[38] The leasing of a railroad works a revocation of prior passes issued without consideration.[39]

F. LIMITATION OF, OR EXEMPTION FROM, LIABILITY

1. In General

§ 625. Early Rule

Under the rule of some of the earlier cases, a common carrier could not by any means avoid its common-law liabilities.

According to some of the earlier cases, a common carrier could not by any means whatever avoid the liabilities imposed on it by the common law.[40]

§ 626. Present Rules

Under present rules, a common carrier cannot limit its liability for its willful misconduct; and the limitation of liability under the Carmack amendment does not apply to personal injuries to a passenger.

It may be broadly said that under the present rules a common carrier cannot limit its liability, or exempt itself from liability, to a passenger for injuries resulting from its willful misconduct;[41] so a carrier cannot exempt itself from responsibility for the fraudulent, willful, or reckless misconduct of

person, corporation, or locality.—Schmoele v. Atlantic City R. Co., 155 A. 143, 108 N.J.Eq. 353, affirmed 160 A. 524, 110 N.J.Eq. 597—Perkins v. Public Service Ry. Co., 99 A. 387, 87 N.J.Eq. 134.

An agreement in the nature of a free pass for life between a railroad company and a prospective shipper is invalid, where the consideration mentioned is one dollar, and the proof is to the effect that the pass was merely a gratuity in recognition of past kindnesses.—Pittsburg, etc., R. Co. v. Peterson, 58 Pa.Super. 44.

31. N.H.—Emerson v. Boston, etc., R. Co., 75 A. 529, 75 N.H. 427, 27 L.R.A.,N.S., 331.
Tex.—St. Louis Southwestern R. Co. v. Mitchell-Crittenden Tie Co., Civ.App., 148 S.W. 1191—Gulf, etc., R. Co. v. Wells, Civ.App., 108 S.W. 174, affirmed, Sup., 110 S.W. 41—Texas, etc., R. Co. v. Wells, Civ.App., 108 S.W. 172, affirmed 110 S.W. 38, 101 Tex. 564.
10 C.J. p 711 note 38.

32. N.J.—Schmoele v. Atlantic City R. Co., 155 A. 143, 108 N.J.Eq. 353, affirmed but the text point left undecided, 160 A. 524, 110 N.J.Eq. 597.

33. N.Y.—Peo. v. Rathbone, 40 N.E. 395, 145 N.Y. 434, 28 L.R.A. 384.

34. Ky.—Commonwealth v. Chesapeake & O. Ry. Co., 65 S.W.2d 95, 251 Ky. 382.

Words "within this state" construed
The words "within this state" must be construed to mean from one point in state to another point in state, in order to validate statute prohibiting common carriers from issuing free passes for transportation of passengers within this state.—Commonwealth v. Chesapeake & O. Ry. Co., 65 S.W.2d 95, 251 Ky. 382.

35. Gulf, etc., R. Co. v. Green, Tex.Civ.App., 141 S.W. 341.

36. Minn.—Bergerson v. Great Northern Ry. Co., 196 N.W. 670, 671, 153 Minn. 20.
N.C.—Turner v. Richmond, etc., R. Co., 70 N.C. 1.
10 C.J. p 712 note 48.

The rule as stated in Corpus Juris has been cited with approval by the court in Bergerson v. Great Northern Ry. Co., supra.

37. U.S.—Smith v. Atchison, T. & S.F. Ry. Co., Okl., 194 F. 79, 114 C.C.A. 157.
Minn.—Bergerson v. Great Northern Ry. Co., 196 N.W. 670, 671, 153 Minn. 20.
10 C.J. p 712 note 50.
"If . . . [a person] seeks to travel on a free pass, he does so at his peril."—Bergerson v. Great Northern Ry. Co., supra.

38. Minn.—Bergerson v. Great Northern Ry. Co., supra.
10 C.J. p 712 note 49.

Stipulation on back
"A free pass, having on its back that it 'may be revoked by the railroad company at any time,' to ride on trains . . . may be revoked . . . at any time."—Bergerson v. Great Northern Ry. Co., 196 N.W. 670, 158 Minn. 20.

39. N.C.—Turner v. Richmond, etc., R. Co., 70 N.C. 1.

40. Ga.—Fish v. Chapman, 2 Ga. 349, 46 Am.D. 393.
Ohio.—Jones v. Voorhees, 10 Ohio 145.

Historical summary
Ind.—Vandalia R. Co. v. Stevens, 114 N.E. 1001, 67 Ind.App. 238.

41. Ind.—Ft. Wayne & Wabash Valley Traction Co. v. Justus, 115 N.E. 585, 186 Ind. 464—Mitten v. Delano, 116 N.E. 744, 65 Ind.App. 701.
Miss.—Gulf & S.I.R. Co. v. Sullivan, 119 So. 501, 155 Miss. 1, 62 A.L.R. 191.
S.C.—Turman v. Seaboard Air Line Ry., 89 S.E. 655, 105 S.C. 287.

its agent or employee.[42] The situation with respect to injuries occasioned by the carrier's negligence is considered in §§ 629–639 infra.

The Carmack amendment under which a carrier may limit its liability by published tariff does not apply to the carrier's liability for personal injuries suffered by a passenger.[43]

§ 627. By Contract

By special contract, founded on valuable consideration, a carrier may limit its liability for injuries not arising from its willful misconduct or negligence, provided the limitation is just and reasonable.

In the absence of statutory restrictions, a common carrier may limit its liability by special contract for exemption from responsibility for injuries not arising from the negligence, see infra §§ 629–639, or willful misconduct, see supra § 626. of itself or its servants,[44] especially where the passenger is carried at a reduced fare;[45] but the exemption provided for in the contract must be such as is deemed just and reasonable in law,[46] and the contract must be founded on a valuable consideration, which may consist in a reduction of the passenger's fare or something equivalent.[47]

Where the terms of the special contract limiting the carrier's liability are set out in full in the ticket issued to the passenger, the limitation of liability contained therein has been held to be impliedly assented to by the acceptance and use of the ticket;[48] and it has also been held that the fact that the special contract when printed or written is not signed

Contracts limiting liability of sleeping car companies see infra § 905.

Limitation of contractual obligation for through transportation over connecting lines see infra § 652.

Limitation of liability as to passenger's baggage and effects see infra §§ 874–878.

Limitation of time for commencing action see infra § 758.

Written notice of injury as condition precedent to action see infra § 758.

Reason for rule

A contract exempting a carrier from "the intended wrongful acts of its servants . . . would militate against good order, and would be against public policy."—Turman v. Seaboard Air Line Ry., 89 S.E. 655, 105 S.C. 287, 291.

Rule applied to gratuitous passengers

Ind.—Ft. Wayne v. Wabash Valley Traction Co. v. Justus, 115 N.E. 585, 186 Ind. 464—Mitten v. Delano, 116 N.E. 744, 65 Ind.App. 701.

Miss.—Gulf & S. I. R. Co. v. Sullivan, 119 So. 501, 155 Miss. 1, 62 A.L.R. 191.

S.C.—Turman v. Seaboard Air Line Ry., 89 S.E. 655, 105 S.C. 287.

Rule applied to private carrier

A provision in a contract to haul a circus train that the carrier shall not be liable for injuries "arising from any cause whatsoever" is void in so far as the carrier is relieved from liability for injuries "willfully and intentionally inflicted," even though in making the contract the carrier is acting as a private, and not as a common, carrier.—Dierickx v. Davis, 137 N.E. 685, 689, 80 Ind.App. 71, certiorari denied 44 S.Ct. 36, 263 U.S. 709, 68 L.Ed. 518.

Not "liable under any circumstances"

A provision in a pass that the carrier shall not "be liable under any circumstances, whether of negligence of agent or otherwise," has been construed not to exempt the carrier from responsibility for the intended wrongful acts of its employees.—Turman v. Seaboard Air Line Ry., 89 S.E. 655, 656, 105 S.C. 287.

Abusive conduct of conductor

Miss.—Gulf & S. I. R. Co. v. Sullivan, 119 So. 501, 155 Miss. 1, 62 A.L.R. 191.

42. La.—Higgins v. New Orleans, etc., R. Co., 28 La.Ann. 133.

43. Dictum Galveston, H. & S. A. Ry. Co. v. Woodbury, 41 S.Ct. 114, 254 U.S. 357, 65 L.Ed. 301, reversing Woodbury v. Galveston, H. & S. A. Ry. Co., Tex.Civ.App., 209 S.W. 432.

As to drovers see infra § 635.

As to employees of others in general see infra § 633.

44. Pa.—Crary v. Lehigh Valley R. Co., 53 A. 363, 203 Pa. 525, 93 Am.St.R. 778, 59 L.R.A. 815.

10 C.J. p. 712 note 55.

Furnishing lights and stopping for drover

Although a person riding on a drover's pass is a passenger, the carrier can stipulate in such pass against liability for failure to set the passenger down at a station or to furnish lights for his accommodation, such a provision not being a contract relieving the carrier of liability for its negligence.—Roberts v. Ft. Worth & D. C. Ry. Co., Tex.Civ.App., 229 S.W. 954.

45. Mont.—Miley v. Northern Pac. R. Co., 108 P. 5, 41 Mont. 51.

Liability as insurer waived

"By the purchase and acceptance of the ticket at a reduced rate, with the condition indorsed on it that the . . . [passenger], in using it, would assume all risks of accident and damage to his person, there was an agreement between him and the railroad company that the common-law rule making the common carrier an insurer of his safety should be set aside, and that he would be bound by the agreement between them as the law defining the duty and liability of the . . . [railroad company] in carrying him. . . . That such an agreement may be made has long since been settled."—Crary v. Lehigh Valley R. Co., 53 A. 363, 203 Pa. 525, 93 Am.St.R. 778, 59 L.R.A. 815.

46. Ill.—Crane v. Railway Express Agency, 12 N.E.2d 672, 293 Ill.App. 328.

10 C.J. p. 713 note 66.

47. Ill.—Arnold v. Illinois Cent. R. Co., 83 Ill. 273, 25 Am.R. 383.—Illinois Cent. R. Co. v. Morrison, 19 Ill. 136.

10 C.J. p. 713 note 64.

Particular mode of conveyance

Where a passenger purchases a ticket for carriage on a freight train, which contains stipulations exempting the railroad from liability for injuries, the consideration which supports the limitation is the promise by the company to carry him by this particular mode of conveyance, to which but for the promise he would not be entitled.—Arnold v. Illinois Cent. R. Co., 83 Ill. 273, 25 Am.R. 386.

Performance of a duty already imposed

In holding that a stipulation for exemption from liability contained in a pass issued to a mail agent was without consideration, since the carrying of the agent was a duty already imposed on the carrier, the court said: "A promise by one party to do that which he is already under a legal obligation to perform has frequently been held to be insufficient as a consideration to support a contract."—Seybolt v. New York, etc., R. Co., 95 N.Y. 562, 575, 47 Am.R. 75.

48. Mass.—O'Regan v. Cunard SS. Co., 35 N.E. 1070, 160 Mass. 356, 39 Am.St.R. 484.

Knowledge and assent of passenger to conditions and limitations see generally supra § 616.

by the passenger is immaterial where the requisites to its validity in other respects exist.[49]

§ 628. By Notice

A common carrier cannot limit its liability to a passenger by any mere notice.

A common carrier cannot limit its liability to a passenger by any mere notice, even though the notice is expressly brought to his knowledge,[50] and constitutional or statutory provisions in several jurisdictions, prohibiting the limitation of liability by notice, have been construed or applied.[51]

2. For Negligence

§ 629. In General

The general rule, subject to qualifications and some dissent, is that a contract exempting a common carrier from liability for negligence to a passenger is void; but this rule does not apply to private carriers or to common carriers when acting outside their duties as such.

In analogy to the rule established in the case of carriers of goods, that any contract relieving the carrier from liability for negligence is invalid, supra § 99, it is widely held, in broad terms, that any contract purporting to exempt a common carrier of passengers from liability to a passenger for the negligence of itself or its employees is void, as being against public policy,[52] and that no contract, condition, or limitation will relieve the carrier from liability to a passenger carried for compensation or hire for the consequences of the negligence of the carrier or its employees, or modify that liability so as to restrict it within the limits fixed by the common law.[53] These broad rules, however, are subject to qualifications and exceptions, which will appear in succeeding sections.

Constitutional or statutory provisions. Particular constitutional or statutory provisions expressly providing that the carrier cannot by contract exempt itself from, or limit, its common-law liability for injury occasioned by its neglect or misconduct have been construed or applied in a number of cases;[54] and under such provisions a contract ex-

49. Mass.—Quimby v. Boston, etc., R. Co., 23 N.E. 205, 150 Mass. 365, 5 L.R.A. 846.

50. N.Y.—Bissell v. New York Cent. R. Co., 25 N.Y. 442, 82 Am.D. 369
10 C.J. p 714 note 69.
Notice of conditions and limitations generally see supra § 615.
Notice of regulations see supra § 572.

51. Ga.—Phillips v. Georgia R., etc., Co., 20 S.E. 247, 93 Ga. 356.
10 C.J. p 714 note 70.

52. U.S.—Curtiss-Wright Flying Service v. Glose, C.C.A.N.J., 66 F.2d 710, certiorari denied 54 S.Ct. 132, 290 U.S. 696, 78 L.Ed. 599—Oceanic Steam Nav. Co. v. Corcoran, C.C.A. N.Y., 9 F.2d 724, 57 A.L.R. 163.
Ind.—Vandalia R. Co. v. Stevens, 114 N.E. 1001, 67 Ind.App. 238.
Iowa.—Shadduck v. Chicago, M., St. P. & P. R. Co., 252 N.W. 772, 218 Iowa 281.
Neb.—Maucher v. Chicago, R. I. & P. Ry. Co., 159 N.W. 422, 100 Neb. 237, error dismissed Chicago, R. I. & P. R. Co. v. Maucher, 39 S.Ct. 108, 248 U.S. 359, 63 L.Ed. 294
N.H.—Wessman v. Boston & M. R. R., 152 A. 476, 84 N.H. 475.
Tex.—Nevill v. Gulf, C. & S. F. Ry. Co., Com.App., 244 S.W. 980, reversing, Civ.App., 187 S.W. 388, and reversed on other grounds, Com. App., 252 S.W. 483—International-Great Northern R. Co. v. Lucas, Civ.App., 70 S.W.2d 226, reversed on other grounds, Com.App., 99 S.W.2d 297, opinion corrected 100 S.W.2d 97.
10 C.J. p 714 note 75.
Dictum Broderson v. Rainier Nat. Park Co., Wash., 60 P.2d 234.
Corpus Juris quoted
Mo.—Alexander v. St. Louis-San Francisco Ry. Co., 2 S.W.2d 165, 166, 221 Mo.App. 271.
Corpus Juris cited
Colo.—Otis Elevator Co. v. Maryland Casualty Co., 33 P.2d 974, 977, 95 Colo. 99.
"It is against the policy of the law to permit any one, be he common carrier or not, to relieve himself by contract from the performance of his common-law duty to use ordinary care to avoid injuring those with whom he knew or should have known his business would bring him in contact."—Wessman v. Boston & M. R. R., 152 A. 476, 478, 84 N.H. 475.
"In England . . . it is . . . settled that a public carrier may exempt itself from liability for its own or its agent's negligence."—Oceanic Steam Nav. Co. v. Corcoran, C.C.A.N.Y., 9 F.2d 724, 728, 57 A.L.R. 163—10 C.J. p 717 notes 84–88, p 718 notes 89, 90

53. Me.—Miller v. Maine Cent. R. Co., 133 A. 907, 125 Me. 338, 47 A.L.R. 720.
Md.—Western Maryland Ry. Co. v. Shatzer, 120 A. 840, 142 Md. 274
Mass.—Palmer v. Boston & M. R. R., 116 N.E. 899, 227 Mass. 493.
Mo.—Alexander v. St. Louis-San Francisco Ry. Co., 2 S.W.2d 165, 221 Mo.App. 271.
N.H.—Wessman v. Boston & M. R. R., 152 A. 476, 84 N.H. 475.
N.J.—Sheridan v. New Jersey & N. Y. R. Co., 141 A. 811, 104 N.J.Law 622.
10 C.J. p 716 note 76.
Gratuitous passengers see infra § 634.
Corpus Juris quoted
Mo.—Alexander v. St. Louis-San Francisco Ry. Co., 2 S.W.2d 165, 166, 221 Mo.App. 271.
Reason for rule
"The reason . . . would seem to me to be that as a common carrier is a quasi public agency enjoying a franchise, and generally a monopoly, to serve the public for, and in consideration of, the carrier's own profit, the latter as a matter of public policy will not be permitted, while receiving the profit, to escape the service. One of the elements of that service in the case of a common carrier of passengers for hire is that it and its servants shall use a high degree of care for the safety of the passengers. The public which grants the profit-privilege is naturally interested in the performance of the reciprocal service. It is therefore a matter of true public policy which renders void any attempt to contract out of existence the right of the traveling public to have its safety properly conserved at the hands of those instrumentalities which, in consideration of such conservation, it has created and authorized to serve it and to take toll for so doing."—Sheridan v. New Jersey & N. Y. R. Co., 141 A. 811, 813, 104 N.J.Law 622.

54. Iowa.—Shadduck v. Chicago, M., St. P. & P. R. Co., 252 N.W. 772, 218 Iowa 281.

empting the carrier from liability will not be valid, even though it is attached as a condition to some special privilege which might have sustained it at common law.[55] Particular statutes applicable to employees of others, gratuitous passengers, and express messengers are considered in §§ 633, 634, 636, infra, respectively.

Carriers included in rule. The general rule above stated is applicable to all common carriers, whether by land or water,[56] or by air.[57]

A private carrier, however, is not included within the general rule, and may wholly absolve itself by contract from liability for its negligence,[58] even as to a passenger for hire;[59] nor is the general rule applicable to a common carrier acting outside its duties as a common carrier;[60] in such case the carrier may contract as a private carrier[61] and may, in the absence of statutes to the contrary, exempt itself from liability for negligence,[62] other than, it has been held, willful and wanton negligence.[63]

Neb.—Maucher v. Chicago, R. I & P. Ry. Co. 159 N.W. 422, 100 Neb. 237, error dismissed Chicago, R. I & P. R. Co. v. Maucher, 39 S.Ct. 108, 248 U.S. 359, 63 L.Ed. 294.

10 C.J. p. 717 note 78

55. Tex.—Ft. Worth, etc., R. Co. v. Rogers, 53 S.W. 366, 21 Tex.Civ. App. 605

10 C.J. p. 717 note 79.

56. U.S.—Curtiss-Wright Flying Service v. Glose, C.C.A.N.J., 66 F. 2d 710, certiorari denied 54 S.Ct. 132, 290 U.S. 696, 78 L.Ed. 599.

10 C.J. p. 717 note 81.

Limitation of liability of carriers by water see C.J.S. title Shipping § 195, also 58 C.J. p. 562 notes 35–38.

57. U.S.—Curtiss-Wright Flying Service v. Glose, C.C.A.N.J., 66 F. 2d 710, certiorari denied 54 S.Ct. 132, 290 U.S. 696, 78 L.Ed. 599.

Limitation of liability of common carrier by air see Aerial Navigation § 43.

Reason for rule

"What reason is there why the same principles applicable to land and water should not also be applied to air transportation? . . . All alike perform the same service, viz., transportation. They are competitors for the same class of business. Every passenger carrier by airplane means a passenger less for the railroad or the steamship. Transportation, as its derivation denotes, is a carrying across, and, whether the carrying be by rail, by water or by air, the purpose in view and the thing done are identical in result."—Curtiss-Wright Flying Service v. Glose, C.C.A.N.J., 66 F.2d 710, 712, certiorari denied 54 S.Ct. 132, 290 U.S. 696, 78 L.Ed. 599.

58. Ark.—Dodson v. Clark County Lumber Co., 184 S.W. 417, 123 Ark. 50.

10 C.J. p. 717 note 82.

A logging company which constructs a railroad to haul its materials to its sawmill and which is not engaged in the carriage of passengers may, in a contract with another to haul his material, exempt itself from all liability to him for injuries resulting from its negligence while carrying him to and from the place where he is getting out his material, since the logging company is "not a 'public carrier,' and, being engaged in performing purely a private service . . . [has] the right to prescribe the terms on which it . . . [will] perform the same."—Dodson v. Clark County Lumber Co., 184 S.W. 417, 418, 123 Ark. 50.

59. Ind.—Malott v. Weston, 98 N.E. 127, 51 Ind.App. 572

Tex.—Sullivan-Sanford Lumber Co. v. Watson, 155 S.W. 179, reversing, Civ.App., 135 S.W. 635

60. U.S.—Santa Fé P. & P. R. Co. v. Grant Bros. Const. Co., Ariz., 33 S. Ct. 474, 228 U.S. 177, 57 L.Ed. 787.

61. U.S.—McCree v. Davis, C.C.A. Ohio, 280 F. 959.

Ind.—Dierickx v. Davis, 137 N.E. 685, 80 Ind.App. 71, certiorari denied 44 S.Ct. 36, 263 U.S. 709, 68 L.Ed. 518.

Me.—Buckley v. Bangor, etc., R. Co., 93 A. 65, 113 Me. 164, L.R.A. 1916A 617

62. U.S.—McCree v. Davis, C.C.A. Ohio, 280 F. 959

Ill.—Chicago, etc. R. Co. v. Hamler, 74 N.E. 705, 215 Ill. 525, 106 Am.S.R. 187, 1 L.R.A.N.S., 674, 3 Ann. Cas. 42, reversing 114 Ill.App. 141.

Ind.—Russell v. Pittsburgh, etc., R. Co., 61 N.E. 678, 157 Ind. 305, 87 Am.S.R. 214, 55 L.R.A. 253—Dierickx v. Davis, 137 N.E. 685, 80 Ind.App. 71, certiorari denied 44 S.Ct. 36, 263 U.S. 709, 68 L.Ed. 518.

Mich.—Sabol v. Chicago & N. W. Ry. Co., 238 N.W. 281, 255 Mich. 548, certiorari denied Chicago & N. W. Ry. Co. v. Sabol, 52 S.Ct. 265, 284 U.S. 638, 76 L.Ed. 581.

10 C.J. p. 717 notes 80, 82, p. 719 note 5.

Rule applied to:

Circus employees see infra § 633.

Express messengers see infra § 636.

Sleeping car employees see infra § 633.

"The authorities are unanimous in holding that a railway company, although distinctively a common carrier when engaged in the performance of its legal duties, nevertheless, when acting in matters not within the scope of its legal duties, may contract as a private carrier and may lawfully provide in such a contract that it shall not be liable for injury to persons or property caused by its negligence."—Dierickx v. Davis 137 N.E. 685, 689, 80 Ind. App. 71, certiorari denied 44 S.Ct. 36, 263 U.S. 709, 68 L.Ed. 518.

Reason for rule

"Manifestly, this rule [that a common carrier cannot limit its liability] has no application when a railroad company is acting outside the performance of its duty as a common carrier. In such case, it is dealing with matters involving ordinary considerations of contractual relation; those who choose to enter into engagements with it are not at a disadvantage; and its stipulations even against liability for its own neglect are not repugnant to the requirements of its public service."

U.S.—Santa Fé P. & P. R. Co. v. Grant Bros. Const. Co., Ariz., 33 S. Ct. 474, 477, 228 U.S. 177, 57 L.Ed. 787

Tex.—Neville v. Gulf, C. & S. F. Ry. Co., Com.App., 252 S.W. 483, 485.

"General test" of validity

"If the service is one that is not imposed upon the carrier as a duty, it may undertake it upon such terms as it may see fit. According to many authorities, the general test, then to apply to contracts of common carriers, limiting their liability, is whether they relate to duties which they are bound to perform, or whether they relate to services which are optional for them to perform."—Denver, etc., R. Co. v. Whan, 89 P. 39, 39 Colo. 230, 236, 11 L.R.A.,N.S., 432, 12 Ann.Cas. 732.

Contract as determining liability

Where, under a special contract limiting its liability, a carrier undertakes duties which it is under no obligation to perform, the terms of the contract determine the extent to which the carrier is liable for injuries to a person carried under the contract.—Denver, etc., R. Co. v. Whan, 89 P. 39, 39 Colo. 230, 11 L.R.A.,N.S., 432, 12 Ann.Cas. 732.

63. U.S.—McCree v. Davis, C.C.A. Ohio, 280 F. 959

Mich.—Sabol v. Chicago & N. W. Ry. Co., 238 N.W. 281, 255 Mich. 548, certiorari denied Chicago & N. W. Ry. Co. v. Sabol, 52 S.Ct. 265, 284 U.S. 638, 76 L.Ed. 581.

However, it has been held that a common carrier undertaking to transport a person not its employee cannot by contract lawfully constitute itself a private carrier in the particular of being relieved of its common-law liability as a common carrier, the carriage of passengers for hire being within the scope of its business as a common carrier.[64]

In New York, contrary to the weight of authority as previously stated in this section, a carrier may, for a sufficient consideration passing to the passenger,[65] such as a reduction in rates,[66] stipulate for an exemption from liability for its negligence,[67] although as to a passenger for hire a contract limiting a carrier's liability for negligence is void unless the passenger is given the option of purchasing a ticket under which liability is unlimited.[68] To exempt a carrier from liability for negligence, the contract for exemption must be expressed in unequivocal terms,[69] or in such terms as to leave no doubt as to the meaning of the parties,[70] general words of limitation being insufficient in themselves to exempt the carrier from liability for negligence.[71]

The New York holdings to the effect that a carrier may limit its liability for negligence should, however, be compared with the holdings in that state as to degrees of negligence and grades of agents, considered in §§ 630, 631 infra, respectively.

§ 630. Degrees of Negligence

Under some authorities, a carrier may exempt itself from liability for ordinary, but not for gross, negligence; but others have rejected this distinction.

A distinction has been made between ordinary negligence and gross negligence, some cases holding that the carrier may exempt itself from liability for the former, but not for the latter.[72] In other cases,

Degrees of negligence generally see infra § 630.

64. Tex.—International-Great Northern R. Co. v. Lucas, Civ.App., 70 S.W.2d 226, 230, reversed on other grounds, Com.App., 99 S.W.2d 297, opinion corrected 100 S.W.2d 97.

65. N.Y.—Murray v. Cunard S. S. Co., 193 N.Y.S. 220, 200 App.Div. 466.

10 C.J. p. 718 note 97.

Consideration not shown

"The mere statement in the ticket that 'the price of passage hereunder has been fixed partly with reference to the liability assumed by the company as defined by this contract' is not of itself sufficient to show any consideration for an exemption from liability for the carrier's negligence."—Murray v. Cunard S. S. Co., 193 N.Y.S. 220, 222, 200 App.Div. 466

66. N.Y.—Anderson v. Erie R. Co., 119 N.E. 557, 223 N.Y. 277, affirming order 157 N.Y.S. 740, 171 App. Div. 687.

Limitation of liability as to passengers carried at reduced rates generally see infra § 632.

67. N.Y.—Anderson v. Erie R. Co., 119 N.E. 557, 223 N.Y. 277, affirming order 157 N.Y.S. 740, 171 App. Div. 687—Seybolt v. New York, etc., R. Co., 95 N.Y. 562, 47 Am.R. 75—Murray v. Cunard S. S. Co., 193 N.Y.S. 220, 200 App.Div. 466.

10 C.J. p. 718 notes 94, 97.

Authorities reviewed

N.Y.—Anderson v. Erie R. Co., 157 N.Y.S. 740, 171 App.Div. 687, affirmed 119 N.E. 557, 223 N.Y. 277.

68. N.Y.—Conklin v. Canadian-Colonial Airways, 194 N.E. 692, 266 N.Y. 244, affirming 271 N.Y.S. 1107, 242 App.Div. 625.

Refusal to carry without contract against liability

"Is it the law of this state that a common carrier of passengers for hire can refuse to carry them unless they stipulate or contract that the carrier shall not be liable for its own negligence or that of its employees? This state has never gone that far."—Conklin v. Canadian-Colonial Airways, 194 N.E. 692, 693, 266 N.Y. 244, affirming 271 N.Y.S. 1107, 242 App.Div. 625.

Reduced or alternative rates

The passenger will not be deemed to have assented to a stipulation in his ticket exempting the carrier from liability to him for the negligence of its employees, where it is not shown that the ticket was sold at a reduced rate, or that there was a higher rate which the passenger could have paid to secure full protection.—Murray v. Cunard S. S. Co., 193 N.Y.S. 220, 200 App.Div. 466.

69. N.Y.—Kenney v. New York Cent., etc., R. Co., 26 N.E. 626, 125 N.Y. 422

10 C.J. p. 718 note 94.

Reason for rule

"Every presumption is against an intention to contract for immunity for not exercising ordinary diligence in the transaction of any business, and hence the general rule is that contracts will not be so construed, unless expressed in unequivocal terms."—Mynard v. Syracuse, etc., R. Co., 71 N.Y. 180, 183, 27 Am.R. 28.

Release "from all claims" insufficient

A condition in a ticket issued by a railroad company releasing it "from all claims for damages for personal injuries from whatever cause" is not sufficiently plain and unequivocal in its terms to release the carrier from liability for injuries resulting to a passenger from its negligence.—Dow v. Syracuse, etc., R. Co., 80 N.Y.S. 941, 944, 81 App. Div. 362

70. N.Y.—Blair v. Erie R. Co., 66 N.Y. 313, 23 Am.R. 55—Magnin v. Dinsmore, 56 N.Y. 168—Perkins v. New York Cent. R. Co., 24 N.Y. 196, 82 Am.D. 281.

71. N.Y.—Elliott v. New York Cent., etc., R. Co., 11 N.Y.S. 691, 692.

10 C.J. p. 718 note 94

"When general words of release may be made operative, without including negligence of the carrier or servants, such construction as will exclude exemption for negligence must obtain."—Elliott v. New York Cent., etc., R. Co., supra.

72. Mont.—John v. Northern Pac. R. Co., 111 P. 632, 42 Mont. 18, 32 L.R.A.,N.S., 85

10 C.J. p. 718 note 91.

Rule not applied to passengers for hire

Ill.—Crane v. Railway Express Agency, 12 N.E.2d 672, 293 Ill. App. 328.

10 C.J. p. 718 note 92.

In New York

(1) The rule stated in the text is supported by some of the earlier New York cases—Smith v. New York Cent. R. Co., 29 Barb. 132, affirmed 24 N.Y. 222—Boswell v. Hudson River R. Co., 18 N.Y.Super. 699.

(2) To be effective, a contract for exemption was required to be clear and specific in its terms, general words of limitation being in themselves insufficient to exempt the carrier from liability for negligence.

however, this distinction has been rejected[73] as being too artificial and vague for clear definition or practical application.[74]

Degrees of negligence on the part of the carrier and its employees are considered in § 631 infra; degrees with respect to employees of others and gratuitous passengers are considered in §§ 633, 634, infra, respectively.

§ 631. Negligence of Carrier and That of Its Employees

Under some early New York cases, a carrier might exempt itself from liability for any degree of negligence of subordinate employees, but as to its own acts it could contract against liability only for negligence not constituting willful or wanton misconduct.

Under the distinction made in some of the earlier New York cases between the negligence of the carrier itself, as represented by its directors or managing officers, and that of its subordinate employees, a carrier might exempt itself from liability for any degree of negligence on the part of such employees, whereas, as to its own acts, it could contract against liability only for negligence not constituting willful and wanton misconduct,[75] however, with these holdings should be compared those in other New York cases as to exemption from liability generally, considered in § 629 supra, and as to degrees of negligence, considered in § 630 supra.

This distinction between the negligence of the carrier and that of its employees has, however, been repudiated in other jurisdictions.[76]

§ 632. Applications of Rule to Particular Classes of Passengers

It is generally held that a carrier cannot exempt itself from liability for negligence as to passengers carried at reduced rates or under so-called passes issued for consideration, passengers carried on freight trains, unless carriage on such trains is only by special permission, and passengers accompanying inanimate freight as caretakers thereof.

The general rule, stated in § 629 supra, that a common carrier of passengers cannot exempt itself from liability for negligence has been applied to passengers carried at reduced rates,[77] although

—Smith v. New York Cent. R. Co., supra.

(3) Other New York cases involving degrees of negligence are treated, where pertinent, in §§ 631, 634.

73. U.S.—New York Cent. R. Co. v. Lockwood, N.Y., 17 Wall. 357, 21 L.Ed. 627—Philadelphia & Reading R. Co. v. Derby, Pa., 14 How. 468, 14 L.Ed. 502.
Conn.—Griswold v. New York, etc., R. Co., 4 A. 261, 53 Conn. 371, 55 Am.R. 115

74. Conn.—Griswold v. New York, etc., R. Co., supra.

75. N.Y.—Perkins v. New York Cent. R. Co., 24 N.Y. 196, 82 Am.D. 281.
10 C.J. p. 718 note 97.
Distinction applied to gratuitous passengers see infra § 634.
"The principle therefore is, that parties cannot contract that they themselves may with impunity be guilty of willful misconduct. . . . But the rule has no application to contracts exempting them from liability for the acts of third persons. There is some difficulty in applying these principles to railroad companies on account of the artificial nature of corporations. As they can act only through agents, it may with about equal plausibility be said, on the one hand, that every act of their authorized agents, and on the other, that no such act is to be regarded as a direct act of the corporation. But a distinction is no doubt to be made, between the directors or managing officers of a corporation and its subordinate agents. As the former exercise all the powers of the corporation and are its only direct medium of communication with outside parties, they must, in respect to all its external relations, be considered as identical with the corporation itself. No contract, therefore, can exempt a railroad company from liability for the willful or wanton misconduct or gross recklessness of its directors; but the rule extends to no other officer or agent of the company."—Perkins v. New York Cent. R. Co., 24 N.Y. 196, 213, 82 Am.Dec. 281.

Defective rail

Even if a release by a passenger is invalid as to the negligence of the company or the directors, negligence in permitting a defective rail to be used, unknown to the company, is that of its servants, as to which the release is valid.—Anderson v. Erie R. Co., 157 N.Y.S. 740, 171 App.Div. 687, affirmed 119 N.E. 557, 223 N.Y. 277.

76. U.S.—New York Cent. R. Co. v. Lockwood, N.Y., 17 Wall. 357, 21 L.Ed. 627
N.H.—Wessman v. Boston & M. R. R., 152 A. 476, 84 N.H. 475.
10 C.J. p. 719 note 1.

Distinction criticized

(1) "The New York courts attempt a distinction between the negligence of the corporation, acting through its president and board of directors, and the negligence of their employees or servants and agents, a distinction which, we confess, we are unable to perceive. All corporations act by and through their agents, for whose acts, in the line of their business, the corporation appointing them is held liable."—Illinois Cent. R. Co. v. Read, 37 Ill. 484, 508, 27 Am.D. 260.

(2) With reference to this distinction, it has been said: "In the nature of things, every corporation must act solely through agents, and that their powers and duties may differ in degree, it seems to us, should make no difference, in so far as duties and liabilities to passengers, whether free or paying full fare, are concerned. The true inquiry, at last, is, did the injury result from the negligence of any agent of the corporation, while acting within the scope of his employment? . . . The negligence of the agent, of whatsoever grade, as to matters within the scope of his employment, with reference to passengers, is the negligence of the corporation itself, which, all the American cases agree, fixes a liability which the carrier cannot be permitted to avoid by contract"—Gulf, etc., R. Co. v. McGown, 65 Tex. 640, 644.

77. Mo.—Alexander v. St. Louis-San Francisco Ry. Co., 2 S.W.2d 165, 221 Mo.App. 271.
N.J.—Sheridan v. New Jersey & N. Y. R. Co., 141 A. 811, 104 N.J.Law 622.
10 C.J. p. 716 note 77.
"It is immaterial . . . that the attempted limitation on . . . liability is agreed to by the passenger in consideration of special concessions in the matter of rate of fare

there is authority to the contrary.[78] Likewise, the general rule is applicable to passengers carried on so-called passes in return for some benefit or advantage to the carrier,[79] as where the pass is given to the carrier's employee as part of his compensation.[80]

Passengers on freight trains. Apart from contracts with caretakers of inanimate freight and caretakers of live stock, who are considered later in this section and in § 635 infra, respectively, a contract with a passenger on a freight train, whereby the carrier is exempted from liability for injuries received by the passenger while riding on such train, is against public policy and void,[81] except where the train is one from which passengers are excluded except by special permission;[82] but at least one statute permitting a carrier to limit its liability to passengers carried on freight trains, except for willful negligence, has been construed or applied.[83]

Caretakers of inanimate freight. A contract between a carrier and a person accompanying inanimate freight as a caretaker thereof, exempting the carrier from liability to him for its negligence, is

or other departure from the rules applicable to passengers paying full fare It is enough that there is any consideration for the carriage."—Walther v. Southern Pac Co., 116 P. 51, 159 Cal. 769, 772, 37 L.R.A., N.S., 235.

Corpus Juris quoted

Mo.—Alexander v St. Louis-San Francisco Ry. Co., 2 S.W.2d 165, 166, 221 Mo App. 271.

Gratuitous carriage distinguished

(1) A common carrier granting gratuitous transportation may exempt itself from liability for negligence, since by such transportation it "puts off its character as a common carrier . . . and becomes a mere mandatary;" but "where the . . . [carrier] exacts any compensation for the carriage" it may not thus exempt itself from liability, since in such case "the relationship of common carrier and passenger, and the liability of the . . . [carrier] as a common carrier, persists."—Alexander v. St. Louis-San Francisco Ry. Co., 2 S.W.2d 165, 168, 221 Mo App 271.

(2) Exemption from liability to gratuitous passengers generally see infra § 634

78. N.Y.—Anderson v. Erie R. Co., 119 N.E. 557, 223 N.Y. 277, affirming 157 N.Y.S. 740, 171 App.Div. 687.

79. U.S.—Grand Trunk R. Co. v. Stevens, Me., 95 U.S. 655, 24 L.Ed 535
10 C.J. p 719 note 2
Drover's pass see infra § 635.

Conditions printed on pass

Where there is a valid consideration for a pass given by a railroad company, conditions printed on such pass, exempting the company from responsibility for the negligence of its servants, do not bind the passenger and should not be admitted in evidence in an action for damages for injuries caused by negligence—Williams v Oregon Short Line R. Co., 54 P. 991, 18 Utah 210, 72 Am.S.R. 777.

80. Mass.—Palmer v Boston & M. R. R., 116 N.E. 899, 227 Mass. 493.
Pa.—Borden v. Lehigh Valley R. Co., 76 Pa.Super 517
10 C.J. p 719 note 3.
Carrier's employees as passengers generally see supra § 546.

Rule not changed by statute

(1) A statute providing, in effect, that "no common carrier shall . . . issue . . . free transportation," but permitting "free or reduced rate service to its employes . . . does not prohibit the giving of a pass [to a carrier's employee] as part consideration for the service rendered by the employé," and, therefore, such statute does not change the rule stated in the text by making such a pass a gratuitous pass, so as to render applicable the rule with respect to gratuitous passes—Palmer v. Boston & M. R. R., 116 N.E. 899, 900, 227 Mass. 493

(2) Gratuitous pass see infra § 634.

81. Or.—Richmond v Southern Pac. Co., 67 P. 947, 41 Or. 54, 93 Am.S.R. 694, 57 L.R.A. 616.
10 C.J. p 719 note 7.
"The defendant, having voluntarily designated its freight train to carry passengers . . . thereby became . . . a common carrier of passengers by the means so adopted, and its special contract in respect to the attempted limitation did not devest it of that character; for, if it is the habit of a railroad company to carry passengers on a freight train, it becomes a common carrier of passengers by that means, and thereby assumes the liabilities of such carriers"—Richmond v Southern Pac. Co., 67 P. 947, 949, 41 Or. 54

82. Mich.—Van Auken v Michigan Cent. R. Co., 148 N.W. 819, 182 Mich 331
10 C.J. p 719 note 8.

Regulatory contract distinguished

(1) An agreement, by one holding a special permit, to assume the risks incident to boarding the caboose of a freight train at any place where it may be stopped for conducting the freight business of the carrier, is "not a limitation of the liability of the . . . [carrier] for its own negligence, but . . . a reasonable regulation which it might adopt for the purpose of carrying on its freight business."—Chicago, etc. R. Co v. Mann, 111 N.W 379, 381, 78 Neb. 541

(2) Power to make regulations see supra § 570.

Release construed; negligence included

(1) A contract executed by an inspector of locomotive appliances in consideration of permission to ride on the carrier's engines, releasing the carrier from "all damage" arising from his presence on the engines, releases the carrier from liability for negligence, "since, whatever his status, there would be no liability to him except for negligence."—Allen v. Erie R. Co., C.C.A. Ohio, 2 F.2d 712, 713

(2) A provision included in the contract above referred to that the inspector would "observe the railroad employés' rules does not affect the validity of the . . . contract" as a release.—Allen v. Erie R. Co., supra.

83. In Kansas

(1) A statute permitting railroad companies to limit their liability to passengers carried on freight trains to which a caboose is attached, except for willful negligence, has been held not to give such companies the right to demand a release of liability from a passenger on a mixed train consisting of freight cars, a passenger coach, and a combination car, regularly operated, carrying passengers and stopping at platforms as passenger trains usually do—Schwartz v. Missouri, etc., R. Co., 109 P. 767, 83 Kan 30

(2) Under the statute above referred to, the railroad company has no right to require a passenger riding on a freight train to give a release different from that designated by the statute, nor to refuse to accept a passenger because he declines to give such a different release—Davis v. Atchison, etc., R. Co., 106 P. 288, 81 Kan. 505.

void, since the caretaker is regarded as a passenger for hire, the consideration for his carriage being either the services rendered in caring for the freight or the charge made for the transportation thereof;[84] and it has been said that, if the caretaker is carried under an interstate pass which is gratuitous in the ordinary meaning of that term, any contract of release based thereon is void, since such a pass is in violation of the Interstate Commerce Act.[85]

§ 633. Employees of Others in General

If, in transporting the employees of another, a carrier acts as a common carrier, contracts between the carrier and employer and between the employer and employees exempting the carrier from liability to the employees for its negligence are void; but, if the employees, such as sleeping car and circus employees, are transported in a manner not imposed on the carrier as a common carrier's duty, as where the carrier moves the employer's own cars over its road, such contracts are generally held valid, except where statutory or constitutional provisions have a contrary effect.

If, in transporting the employees of another under a special contract with the employer, the carrier is acting as a common, and not as a private, carrier, a provision in such contract relieving the carrier from liability to such employees for its negligence, and a similar provision in a corresponding contract between the employee and his employer, are void under the general rule, stated in § 629 supra, that a common carrier cannot exempt itself from liability to a passenger for its negligence;[86] but, where the contract between the employer and the carrier merely provides for indemnifying the latter in case it should be held liable, such contract does not violate general rule above referred to,[87]

84. Me.—Buckley v. Bangor, etc., R. Co., 93 A. 65, 113 Me. 164, L.R.A. 1916A 617.
Drovers see infra § 635.

Caretaker of potatoes
Me.—Buckley v Bangor, etc., R. Co., 93 A. 65, 113 Me. 164, L.R.A 1916A 617.

Pass erroneously designated as "gratuitous"
If a pass under which a caretaker is carried, although it is designated as a "gratuitous free pass," is in fact a pass for a consideration, a stipulation contained therein releasing the carrier from liability for negligence is invalid.—Miller v. Maine Cent. R. Co., 133 A. 907, 125 Me. 338, 47 A.L.R. 720.

Carrier's failure to offer caretakers
A contract between a shipper of milk and a carrier, whereby the latter was indemnified against claims for personal injuries to the shipper's employees while carried free as caretakers of the milk shipped, is void where transportation of the milk under the care of men provided by the carrier was not offered as an alternative to the shipper and no reduction in rates was made as a consideration for the limitation; and a contract between the shipper and his employee indemnifying the shipper against claims for injuries to the employee while riding on the cars of the carrier, which contract was based on such void contract, cannot be availed of by the carrier as against the employee.—Baker v. Boston, etc., R. Co., 65 A. 386, 74 N.H. 100, 124 Am.S.R. 937, 12 Ann. Cas. 1072

85. Me.—Miller v. Maine Cent. R. Co., 133 A. 907, 125 Me. 338, 47 A.L.R. 720.

86. Ind.—Vandalia R. Co. v. Stevens, 114 N.E. 1001, 67 Ind.App. 238.
Employees of others as passengers generally see § 547 supra.

Rule applied to employees of mining company
Ind.—Vandalia R. Co. v Stevens, 114 N.E. 1001, 67 Ind.App. 238.

Express messengers and show employees distinguished
(1) "The express messenger cases and show employe cases . . . are cases where the shipper demanded and was given a carriage and transportation entirely different from that extended to the shipping public generally. The express company in those cases asked and obtained a combined carriage of property and the agent in charge thereof, and demanded and obtained space for such carriage in a particular car, and obtained privileges in connection with such transportation which are not demanded by, or given to, the ordinary shipper. . . . The express company . . . cannot demand or obtain from another common carrier transportation of its property different from that which the other carrier owes to the shipping public generally, except by special contract for the special carriage desired. Such carriage has always been by special contract, and has likewise been recognized as private carriage rather than common carriage. . . . So, also, with the show cases. . . . The transportation was a mixed transportation of property and persons, in cars owned by, and under the supervision, management, and control of, the show company. It is a kind of transportation which the railroad company does not owe to, and which is not given to, the public generally. In such respects, the express messenger cases and the show employe cases are wholly different from the instant case."—Vandalia R. Co. v. Stevens, 114 N.E. 1001, 1006, 67 Ind.App. 238.

(2) Express messengers see infra § 636.

(3) Circus employees see infra this section.

87. Tex.—San Antonio & A. P. Ry. Co. v. Tracy, 130 S.W. 639, 61 Tex.Civ.App. 574.
10 C.J. p. 722 note 30, p 723 note 42 [a].

Indemnity contract of partnership
(1) A provision in a construction contract entered into between a partnership and a railroad company, whereby the former agrees to assume all liability for injuries to, or deaths of the "agents and employees" of the partnership occurring during the transportation of such persons over the lines of the carrier, does not exempt the railroad company from liability for the death of a partner on the theory that such partner is an agent of the partnership, since the term "agents and employees" does not include the members, of a partnership.—International-Great Northern R. Co. v. Lucas, Tex.Com.App., 99 S.W.2d 297, 299, reversing, Civ.App., 70 S.W.2d 226, opinion corrected, Com.App., 100 S.W.2d 97.

(2) The indemnity features of the contract above referred to, if regarded as including injuries to, or death of, the partners while carried over the lines of the carrier, are void as against public policy, since in such a case the carrier would be relieved of its liability as a common carrier.—International-Great Northern R. Co. v Lucas, Tex.Civ.App., 70 S.W.2d 226, reversed on other grounds, Com.App., 99 S.W.2d 297, opinion corrected 100 S.W.2d 97.

since it is not a contract against the carrier's negligence.[88]

Transportation not within carrier's duty. While there is some authority to the contrary,[89] where a carrier transports, in a manner not imposed on it as a duty of a common carrier, the employees of another under a special contract with the employer, a condition in such contract exempting the carrier from liability to such employees for injuries caused by its negligence is generally considered valid,[90] except where statutory and constitutional provisions relating to employees of sleeping car companies and circus companies, considered in succeeding paragraphs of this section, have a different effect Likewise, except as such statutes otherwise provide, a corresponding contract between such an employee and his employer, whereby the former ratifies and assents to the contract between the carrier and his employer and releases the carrier from liability to him for its negligence, is considered valid and binding on the employee;[91] and such contract between the employee and his employer inures to the benefit of the carrier.[92] In the absence of such a contract on the part of the employee, however, it has been held that he is not bound by the contract between his employer and the carrier where he has no knowledge thereof;[93] but this holding should be contrasted with the holdings with reference to circus employees and express messengers, stated later in this section and in § 636 infra, respectively.

In some jurisdictions, however, such contracts as here considered, although valid in cases of ordinary negligence, are held to be ineffective to relieve the carrier from liability for injuries resulting from its willful and wanton negligence.[94]

88. Tex.—San Antonio & A. P. Ry Co. v. Tracy, 130 S.W. 639, 61 Tex. Civ.App. 574.

89. N.H.—Bernardi Greater Shows v. Boston & M. R. R., 165 A. 124, 86 N.H. 146.

90. U.S.—McCree v. Davis, C.C.A. Ohio, 280 F. 959.
Ind.—Dierickx v. Davis, 137 N.E. 685, 80 Ind.App. 71, certiorari denied 44 S.Ct. 36, 263 U.S. 709, 68 L.Ed. 518.
Mich.—Sabol v Chicago & N. W. Ry. Co., 238 N.W. 281, 255 Mich. 548, certiorari denied Chicago & N. W. Ry. Co v. Sabol, 52 S.Ct. 265, 284 U.S. 688, 76 L.Ed 581.
10 C.J. p 721 note 27.

Corpus Juris quoted
Md.—Western Maryland Ry. Co. v. Shatzer, 120 A. 840, 843, 142 Md. 274.

Reason for rule
(1) "The authorities are unanimous in holding that a railway company, although distinctively a common carrier when engaged in the performance of its legal duties, nevertheless, when acting in matters not within the scope of its legal duties, may contract as a private carrier and may lawfully provide in such a contract that it shall not be liable for injury to persons . . . caused by its negligence."—Dierickx v. Davis, 137 N.E. 685, 689, 80 Ind. App 71, certiorari denied 44 S.Ct. 36, 263 U.S. 709, 68 L.Ed. 518. To same effect McCree v. Davis, C.C.A.Ohio, 80 F 959, 963.

(2) "With respect to duties which . . . [the carrier] is under no obligation to perform, it may limit its liability by contract, and in such cases the liability of the carrier to one injured by its negligence will depend upon the terms of such contract. . . . In other words, if the service is one that is not imposed on the carrier as a duty, it may undertake it upon such terms as it may see fit."—Denver, etc., R. Co. v. Whan, 89 P. 39, 41, 39 Colo 230, 11 L.R.A.,N.S., 432, 12 Ann.Cas. 732.

"Carefully prepared opinion in the case of Denver, etc., R. Co. v Whan, 89 Pac. 39, 39 Colo. 230, 11 L.R.A.,N.S., 432, 12 Ann.Cas 732."—Neville v. Gulf, C. & S. F. Ry. Co., Tex.Com. App., 252 S.W. 483, 485, reversing 244 S.W. 980, which reversed, Civ App., 187 S.W. 388.

"General test"
"According to many authorities, the general test . . . to apply to contracts of common carriers, limiting their liability, is whether they relate to duties which they are bound to perform, or whether they relate to services which are optional for them to perform."—Denver, etc., R. Co. v. Whan, 89 P. 39, 41, 39 Colo 230, 11 L.R.A.,N.S., 432, 12 Ann. Cas. 732.

91. Tex.—Neville v. Gulf, C. & S. F. Ry Co., Com.App., 252 S.W. 483, reversing 244 S.W. 980, which reversed, Civ.App., 187 S.W. 388, applying federal rule.
10 C.J. p 722 note 28.

Corpus Juris quoted
Md.—Western Maryland Ry. Co. v. Shatzer, 120 A. 840, 843, 142 Md. 274.

Rule applied to employee of a news agency transported on the carrier's trains for the purpose of selling newspapers, periodicals, and other articles customarily sold by news agents.—Neville v. Gulf, C. & S. F. Ry. Co., Tex.Com.App., 252 S.W. 483, reversing 244 S.W. 980, which reversed, Civ.App., 187 S.W. 388, applying federal rule.

Fellow servant statute inapplicable
Where the employee is not also an employee of the carrier, such a contract as referred to in the text is not rendered invalid by a fellow servant statute providing that the carrier shall make no contract restricting its liability to an employee for negligence.—Robinson v. Baltimore & O. R. Co., 35 S.Ct. 491, 237 U.S. 84, 59 L.Ed. 849, affirming 40 App.D.C 169, L.R.A.1915D 510—Sager v. Northern Pac. R. Co., C.C. Minn., 166 F. 526—10 C.J. p 722 note 29.

92. Tex.—Neville v. Gulf, C. & S. F. Ry Co., Com.App., 252 S.W. 483, reversing 244 S.W. 980, which reversed, Civ.App., 187 S.W. 388, applying federal rule.

93. Md.—Western Maryland Ry. Co v. Shatzer, 120 A. 840, 142 Md 274.
10 C.J. p 722 note 31.
Extent to which drover bound see infra § 635.
Extent to which express messenger bound see infra § 636.

Corpus Juris quoted
Md.—Western Maryland Ry. Co. v. Shatzer, 120 A. 840, 843, 142 Md. 274.

"Better reasoned cases"
"It seems to us that the better reasoned cases for the most part decline to adopt the theory that an employé is bound . . . without having agreed upon the arrangement" between the carrier and his employer—Western Maryland Ry Co v. Shatzer, 120 A. 840, 845, 142 Md. 274.

94. U.S.—McCree v. Davis, C.C.A. Ohio, 280 F. 959.
Mich.—Sabol v Chicago & N. W Ry. Co., 238 N.W. 281, 255 Mich. 548, certiorari denied Chicago & N. W. Ry. Co v. Sabol, 52 S.Ct. 265, 284 U.S. 688, 76 L.Ed. 581.

Employees of sleeping car company. A contract between a railroad company and a sleeping car company by which the former relieves itself from liability for injuries to employees of the latter riding in a sleeping car attached to a train is valid.[95] So, also, a contract between a sleeping car company and its employee, whereby he assents to or ratifies the contract between the sleeping car company and the railroad company, releasing or limiting the latter's liability for personal injury to such employee while traveling over the railroad, is, in the absence of statute to the contrary, not void as against public policy,[96] since such employee is not a passenger of the railroad company;[97] and, in the absence of fraud or misrepresentation, it is binding on the employee, even though he fails to read it.[98]

Since such a contract between the sleeping car employee and his employer is prima facie for the benefit of the carrier, the carrier will be presumed to have accepted its provisions,[99] and may claim its advantages as one in whose interest the agreement is made,[1] and, in a jurisdiction not recognizing the doctrine of comparative negligence, it is a complete defense to the carrier even as to its gross negligence.[2]

Several statutory provisions have been held not to render invalid such contract between the sleeping car company and its employee, or inapplicable in determining its validity,[3] while other statutory and

Degrees of negligence generally see supra § 630

"It is a settled rule of law that a contract purporting to release the . . . [carrier] from all liability for negligence would be ineffective as a defense, where the injury to the . . . [employee] results from . . . willful and wanton negligence on the part of the servants of the . . . [carrier]."—McCree v. Davis, C.C.A.Ohio, 280 F. 959, 965.

A leading federal authority

U.S.—McCree v. Davis, C.C.A.Ohio, 280 F. 959

95. Colo.—Denver, etc., R. Co., v. Whan, 89 P. 39, 39 Colo. 230, 11 L.R.A.,N.S., 432, 12 Ann.Cas. 732.
Ind.—Russell v. Pittsburgh, etc., R. Co., 61 N.E. 678, 157 Ind. 305, 87 Am.S.R. 214, 55 L.R.A. 253.

Reason for rule

"Not being under any legal obligation to haul the cars of the Pullman Company for the purpose mentioned in its contract with that company, and not being under any obligation to transport the . . . [Pullman Company's employee] over its lines in the capacity [in which] he was riding, the . . . [carrier] had the legal right to dictate the terms upon which it would haul the cars of the Pullman Company . . . and the conditions under which its employés might ride therein when being so hauled."—Denver, etc., R. Co. v. Whan, 89 P. 39, 41, 39 Colo. 230, 11 L.R.A.,N.S., 432, 12 Ann.Cas. 732.

To same effect Russell v. Pittsburgh, etc., R. Co., 61 N.E. 678, 682, 157 Ind. 305, 87 Am.S.R. 214, 55 L.R.A. 253.

96. U.S.—Eubanks v. Southern Ry. Co., D.C.Fla., 244 F. 891.
Mass.—Kean v. New York Cent. & H. R. R. Co., 97 N.E. 64, 210 Mass. 449.
10 C.J. p 722 note 37.
Contra Carter v. Southern Ry.-Carolina Division, 84 S.E. 999, 100 S.C. 403.

Release as covering injuries from negligence

A contract by a sleeping car employee, releasing transportation companies from all claims for "liability of any nature or character whatsoever," includes a release of liability for personal injuries caused by the negligence of the carrier.—Russell v. Pittsburgh, etc., R. Co., 61 N.E. 678, 679, 157 Ind. 305, 87 Am.S.R. 214, 55 L.R.A. 253.

When exemption begins

Where a contract between a sleeping car porter and his employer bore date as of the date when he commenced the service, recited on its face that it was entered into in consideration of the employment, which was for no particular time, and provided for daily wages, payable monthly, a provision releasing railroads from liability for injuries to such porter was effective as to any occurrence after the contract was executed, although it was not in fact signed until seven months after his employment.—Chicago, etc., R. Co. v. Hamler, 74 N.E. 705, 215 Ill. 525, 106 Am.S.R. 187, 1 L.R.A.,N.S., 674, 3 Ann.Cas. 42, reversing 114 Ill.App. 141.

97. U.S.—Eubanks v. Southern Ry. Co., D.C.Fla., 244 F. 891.
10 C.J. p 722 note 37.
Sleeping car employees as passengers generally see § 547 supra.

98. U.S.—New York Cent., & H. R. R. Co. v. Difendaffer, Ill., 125 F. 893, 62 C.C.A. 1

99. Ind.—Russell v. Pittsburgh, etc., R. Co., 61 N.E. 678, 157 Ind. 305, 87 Am.S.R. 214, 55 L.R.A. 253.

1. Colo.—Denver, etc., R. Co. v. Whan, 89 P. 39, 39 Colo. 230, 11 L.R.A.,N.S., 432, 12 Ann.Cas. 732.
10 C.J. p 722 note 37 [a] (3).

2. Ill.—Chicago, etc. R. Co. v. Hamler, 74 N.E. 705, 215 Ill. 525, 106 Am.S.R. 187, 1 L.R.A.,N.S., 674, 3 Ann.Cas. 42, reversing 114 Ill.App. 141.
10 C.J. p 722 note 37 [a] (4).

Degrees of negligence generally see supra § 630.

3. **Employers' Liability Act**

(1) A Pullman porter may stipulate in his contract with the Pullman Company to exempt any carrier hauling the cars of the Pullman Company from liability for injuries notwithstanding the prohibition of the Employers' Liability Act prohibiting, in effect, a carrier from limiting its liability to its employees, he not being an employee of the carrier.—Robinson v. Baltimore, etc., R. Co., 35 S.Ct. 491, 237 U.S. 84, 59 L.Ed. 849, affirming 40 App.D.C. 169, L.R.A. 1915D 510.

(2) If, however, such a stipulation is made by an employee of the Pullman Company who is also an employee of the railroad company, it is invalid under the Employers' Liability Act.—Robinson v. Baltimore, etc., R. Co., supra.

In Missouri, a statute providing that no contract made between "any railroad corporation" and any of its "agents or servants," based on the contingency of his injury or death and limiting the liability of such railroad corporation for damages "under the provisions of this act" shall be valid, has no application to a contract made by a Pullman car porter with the Pullman Company, whereby he releases it from liability for negligent injury, agrees to indemnify it for any liability incurred on such account to a railroad company carrying its cars under contract of indemnity for negligent injury to Pullman employees, agrees that the contract may be assigned to such carrying company for purposes of defense, and also releases the carrying company.—McDermon v. Southern Pac. Co., C.C.Mo., 122 F. 669, 673.

"Railroad . . . liable for any damage done"

A statute in substance providing "that a railroad company shall be liable for any damage done to per-

constitutional provisions have been construed and applied so as to render such a contract void.[4]

Employees of circus company. Except as statutory or constitutional provisions have a contrary effect,[5] a provision in a carrier's special contract with a circus company to furnish motive power and move the circus over the carrier's road, exempting the carrier from liability to the circus employees for accident or injury occasioned by the carrier's negligence, is, under most authorities, valid and not contrary to public policy,[6] despite some authority to the contrary,[7] since in such a case the carrier acts as a private, and not as a common, carrier;[8]

sons" unless it shows that it has used "all reasonable care and diligence; the presumption in all cases being against the company," having been construed as "a declaration of the common-law liability, with the addition that the presumption of negligence is cast upon the . . . [carrier]," does not render invalid a contract between a sleeping car employee and his employer exempting the carrier over whose lines he is carried from liability on account of any injury to him—Eubank v Southern Ry. Co., D.C.Fla., 244 F. 891, 892, construing Florida statute

4. **In Pennsylvania,** under constitutional provisions providing, in effect, that "all railroad . . . companies shall be common carriers," that "no . . . unreasonable discrimination shall be made," and that no common carrier shall "engage . . . in any other business than that of common carriers," a contract between a sleeping car employee and his employer exempting the transporting carrier from responsibility for its negligence is void.—Coleman v. Pennsylvania R. Co, 89 A. 87, 92, 242 Pa 304, 50 L.R.A.,N.S., 432, Ann. Cas.1915B 529—Banks v. Pittsburg, etc., R Co., 55 Pa.Super. 301.

In Texas a contract between a Pullman employee and the Pullman Company whereby the former waives all damages for injuries that may be inflicted by the carrier is "condemned and rendered invalid by article 4560i, Sayles' Ann.Civ.Rev St. 1897"—San Antonio & A. P. Ry. Co., v. Tracy, 130 S.W. 639, 642, 61 Tex. Civ.App. 574.

5. "Liability . . . shall never be limited"

Under a constitutional provision that "the liability of railroad corporations as common carriers shall never be limited," and a statute under which "every railroad is bound to give transportation on equal terms," a contract between a carrier and a circus company providing, in effect, that the carrier shall not be liable for injuries to, among others, the employees of the circus company, is void—Maucher v. Chicago, R. I & P. Ry Co., 159 N.W. 422, 426, 100 Neb 237, error dismissed Chicago, R. I & P. R. Co. v. Maucher, 39 S Ct 108, 248 U S 359, 63 L Ed 294

6. U.S—Sasinowski v. Boston & M. R. R., C.C.A.Mass., 74 F.2d 628—McCree v. Davis, C.C.A.Ohio, 280 F 959.

Ind—Dierickx v. Davis, 137 N.E. 685, 80 Ind App 71, certiorari denied 44 S Ct. 36, 263 U.S 709, 68 L.Ed. 518.

Mich—Sabol v. Chicago & N. W. Ry. Co, 238 N.W. 281, 255 Mich 548, certiorari denied Chicago & N. W. Ry. Co v. Sabol, 52 S.Ct. 265, 284 U.S. 688, 76 L.Ed. 581

10 C.J. p 723 notes 42, 43.

The Hepburn Act and Carmack amendment do not prohibit a contract between a carrier and a circus company for hauling the circus train, in which contract the carrier is relieved from liability to the employees of the circus company for its negligence.—Dierickx v. Davis, 137 N.E. 685, 689, 80 Ind.App. 71, certiorari denied 44 S Ct. 36, 263 U.S 709, 68 L.Ed. 518.

Exemption limited to transportation

Where an employee of a show company was injured by the carrier's negligence while walking to his sleeping car, which was temporarily stored in the carrier's yards for use as living quarters by him and his fellow employees, a condition in the contract between the carrier and the show company exempting the carrier from liability during transportation did not relieve the carrier from liability to the employee, for such injuries, which did not arise "during the period of transportation."—Missouri Pac R. Co. v. Curcio, 261 S W. 896, 898, 164 Ark. 350.

Indemnity contract

Where the contract provided that the carrier should not be liable for any injury to any employee of the circus company to an amount greater than fifty dollars, and that, if it should be so held liable, the circus company would pay it the excess of such amount, whether the carrier was to be regarded as a common or as a private carrier, under the contract, the purpose of the contract was not to exempt it from liability for negligence, but to indemnify it in case it should be liable; and hence such contract did not violate either the rule of public policy or the common-law doctrine that a carrier cannot, by contract, secure exemption from liability for injuries to passengers caused by its own negligence.—Seaboard Air Line R Co v. Main, 43 S.E. 930, 132 N.C. 445.

7. N.H.—Bernardi Greater Shows v Boston & M. R. R., 165 A. 124, 86 N.H 146.

8. U.S.—Sasinowski v. Boston & M. R. R., C.C.A.Mass., 74 F 2d 628—McCree v. Davis, C C A Ohio, 280 F. 959

Ind—Dierickx v. Davis, 137 N.E. 685, 80 Ind App. 71, certiorari denied 44 S.Ct. 36, 263 U S. 709, 68 L Ed. 518.

Mich—Sabol v Chicago & N. W. Ry Co, 238 N.W. 281, 255 Mich 548, certiorari denied Chicago & N. W Ry. Co. v. Sabol, 52 S Ct. 265, 284 U.S 688, 76 L Ed. 581.

10 C J. p 723 note 44.

Contra Bernardi Greater Shows v. Boston & M. R. R., 165 A. 124, 86 N.H. 146.

"It is apparent, and the important fact is, that the show company was not seeking transportation for persons and property in the usual course of the business of a common carrier by rail. It sought to have its own train of cars moved from place to place on a time schedule suitable to its own peculiar purpose . . . From the very nature of the service desired, and from the situation of the parties, it is clear that the property and employés of the show company were not to be intrusted to the railway company in the manner in which freight and passengers are intrusted to a common carrier. The railway company might have refused absolutely to receive or to haul the cars of the show company; for the railway company did not hold itself out as engaging in the business of hauling or moving trains for others. It follows, then, that the railway company had the right to enter into the contract with the show company on the conditions therein stated. The contract is valid; and in the performance thereof the railway company was not acting as a common carrier."—Dierickx v. Davis, 137 N.E 685, 688, 80 Ind.App. 71, certiorari denied 44 S. Ct. 36, 263 U.S. 709, 68 L.Ed 518.

Contract of hiring of carrier's employees

(1) A carrier's agreement with a circus company stipulating in the first paragraph thereof that the carrier shall furnish the use of its line and employees and shall "transport the show," and also stipulating in subsequent paragraphs that the contract is a mere hiring by the carrier

but such a contract has been held ineffective to exempt the carrier from liability to the circus employee for injuries resulting from its willful and wanton negligence.[9]

In accepting transportation under the contract between the carrier and the circus company, the latter's employee has been held bound by the terms thereof;[10] but it has also been held that such a contract does not operate as a matter of law to defeat the employee's right to recover from the carrier for injuries caused by its negligence where he has no knowledge of the contract, and has not authorized the circus company to bind him thereby.[11]

In New York. In accordance with the general rule established in New York, as stated in § 629 supra, a carrier may stipulate with an employer for exemption from liability to the latter's employees for its own negligence or that of its servants;[12] but such a contract is to be strictly construed against the carrier,[13] and, where the employee has no knowledge of such contract, he is not bound thereby.[14]

Employees carried on elevators. It has been held that a provision in a lease that the landlord shall not be liable for any damages occasioned by a failure to repair an elevator in the leased premises will not preclude a recovery by the tenant's employee who is not a party to the lease, since the landlord, who occupies the relation of a common carrier of passengers to such employee, cannot limit his liability except by express contract with the employee.[15]

§ 634. Gratuitous Passengers; Free Passes

By the weight of authority, a stipulation in a free pass exempting a carrier from liability to the passenger for negligence is valid, and this rule applies to interstate free passes; but some authorities limit the rule to ordinary negligence, while others have applied it to the negligence of the carrier's employees, as distinguished from its own; still other authorities hold such a stipulation void.

While it has been said that there is a great contrariety of opinion as to the validity of a stipulation in a free pass exempting the carrier from liability for injury occasioned by negligence, or providing that the passenger assumes all risk of injury,[16] most of the authorities, with qualifications, later appearing, as to degrees of negligence, regard such a stipulation in a free pass as valid and binding on the passenger.[17] The majority rule has been

of its equipment and employees and that the carrier shall not be liable for its employees' negligence, has been construed not to be a contract to transport as a common carrier.—Sasinowski v. Boston & M R. R., C C A.Mass., 74 F.2d 628, 634.

(2) The provision in such agreement that the carrier shall "transport the show" is not so repugnant to the subsequent provision that it is a mere hiring as to prevent the operation of the agreement as a contract of hiring.—Sasinowski v. Boston & M. R R., supra.

(3) If such agreement is a valid contract of hiring of the railroad employees to operate the circus train, they became the servants of the circus company, and the carrier would be relieved from liability for their ordinary negligence—Sasinowski v. Boston & M. R. R., supra.

9. U.S.—McCree v. Davis, C.C.A Ohio, 280 F. 959.
Mich.—Sabol v. Chicago & N. W. Ry. Co, 238 N W 281, 255 Mich. 548, certiorari denied Chicago & N. W Ry Co. v. Sabol, 52 S.Ct. 265, 284 U S. 688, 76 L Ed. 581.
Degrees of negligence generally see supra § 630.

10. U.S.—Sasinowski v. Boston & M R. R, C.C.A.Mass, 74 F.2d 628—McCree v. Davis, C C.A.Ohio, 280 F. 959.
Ind.—Dierickx v. Davis, 137 N.E. 685, 80 Ind App. 71, certiorari denied 44 S Ct. 36, 263 U.S. 709, 68 L.Ed. 518.
Extent to which drover bound see infra § 635.
Extent to which express messenger bound see infra § 636.

11. U S.—Sager v. Northern Pac. R. Co, C C.Minn, 166 F. 526.

12. N.Y.—Elliott v. New York Cent., etc, R Co, 11 N.Y.S. 691.

13. N.Y.—Elliott v. New York Cent., etc, R Co., supra.
General release construed against exemption
"The exemption must be expressed in terms, and when general words of release may be made operative, without including negligence of the carrier or servants, such construction as will exclude exemption for negligence must obtain."—Elliott v. New York Cent., etc., R. Co., 11 N.Y.S. 691, 692.
Agreement to include release in pass
A contract between a railroad company and a telegraph company, containing the provision that the employees of the telegraph company shall, when carried under the contract, exhibit passes in which all responsibility of the railroad company "for any loss or damage or injury . . . shall be waived and released in a form usual in such cases," does not in itself constitute a release which will relieve the railroad company from liability for personal injuries to such an employee, but only provides for a release which should appear on the pass—Elliott v. New York Cent., etc., R. Co., 11 N.Y.S. 691, 692.

14. N.Y.—Coppock v. Lond Island R. Co., 34 N.Y.S 1039, 89 Hun 186.

15. Ill.—Springer v. Ford, 59 N.E. 953, 189 Ill. 430, 82 Am.S.R. 464, 52 L.R.A. 930, affirming 88 Ill. App. 529.

16. Ky.—Louisville & N. R. Co. v. Brown, 217 S.W. 686, 186 Ky. 435. 10 C.J. p 720 note 11.

17. U.S.—Kansas City Southern Ry. Co. v. Van Zant, 43 S Ct. 176, 260 U.S. 459, 67 L Ed 348, reversing Van Zant v. Kansas City Southern Ry. Co, 232 S.W. 696, 289 Mo 163—Bush v Bremner, C.C.A.Minn., 36 F 2d 189, affirming, D.C., 29 F. 2d 844—Ellis v. Davis, C C.A.Tex., 4 F.2d 323.
Fla.—O'Brien v. Atlantic Coast Line R. Co., 128 So. 9, 99 Fla. 843
Ga.—Devero v. Atlantic Coast Line R. Co., 181 S E. 421, 51 Ga.App. 699—Forster v. Southern Ry. Co., 146 S.E. 516, 39 Ga App 216—Brooks v Bugg, 131 S.E 365, 34 Ga App 761—Wright v. Central of Georgia Ry. Co., 89 S.E. 457, 18 Ga.App. 290.
Ind.—Ft. Wayne & Wabash Valley Traction Co. v. Justus, 115 N.E. 585, 186 Ind. 464—Clark v. Southern Ry Co., 119 N.E. 539, 69 Ind.

held to apply, even though notice of such stipulation may not have been brought home to the pas-

App 697—Mitten v Delano, 116 N.E 744, 65 Ind App 701.

Dictum, Vandalia R Co. v Stevens, 114 N E 1001, 67 Ind App. 238.

Mo—Pinnell v St. Louis-San Francisco Ry. Co, 263 S.W 182, certiorari denied 45 S Ct 123, 266 U S 623, 69 L Ed 473, applying federal law—Dunn v. Alton R Co, App, 88 S.W 2d 224, applying federal law.

N Y.—Wilder v. Pennsylvania R. Co., 156 N E 88, 245 N Y 36, 52 A.L R 188, affirming, 217 N.Y S. 56, 217 App.Div. 661, and answering certified questions 217 N.Y S 937, 218 App Div 714—Hester v. Manhattan Bridge Three-Cent Line, 212 N Y.S. 292, 214 App.Div. 534.

Okl.—Missouri, K. & T. Ry. Co. v. Zuber, 184 P. 452, 76 Okl. 146, 7 A.L.R. 840, appeal dismissed 41 S Ct 322, 255 U.S. 561, 65 L.Ed. 786, error dismissed 41 S.Ct. 449, 256 U S. 681, 65 L.Ed 1169.

Tenn.—Louisville & N. R. Co. v. Hadley, 11 Tenn App 642.

Va.—Williamson v. Seaboard Air Line Ry., 118 S.E. 255, 136 Va. 626, certiorari denied Williamson v Seaboard Air Line Ry. Co, 44 S Ct. 37, 263 U S 710, 68 L.Ed. 518, applying federal law.

10 C.J p 720 note 13.

Dictum Miller v. Maine Cent. R Co., 133 A 907, 125 Me. 338, 47 A L R. 720—Sheridan v. New Jersey & N. Y. R. Co., 141 A. 811, 104 N.J.Law 622.

Exemption in:

Caretaker's pass see supra § 632.

Drover's pass see infra § 635.

Pass issued for consideration see supra § 632.

Pass of express messenger see infra § 636.

Citing Corpus Juris

Ind.—Clark v. Southern Ry. Co., 119 N E. 539, 541, 69 Ind.App. 697.

Ky.—Louisville & N. R. Co. v. Brown, 217 S.W. 686, 687, 186 Ky. 435.

Weight of authority

The rule stated in the text "is supported by the weight of authority of the state courts of this country, as well as by . . . federal decisions."—O'Brien v. Atlantic Coast Line R. Co., 128 So. 9, 11, 99 Fla. 843

Reasons for rule

(1) "The rule . . . does not proceed upon the theory that in such case there is a consideration for the exemption contract, but proceeds upon the theory that there is a lack of consideration or compensation for the contract of carriage, so that the railway company, with the consent of the person to be carried, puts off its character as a common carrier as to him, and becomes a mere mandatary, and the relationship of common carrier and passenger does not exist, and it is on this theory that . . the contract is upheld"—Alexander v St. Louis-San Francisco Ry. Co, 2 S W.2d 165, 168, 221 Mo. App. 271.

(2) "Not only is no principle of public policy subverted by denying the holder of a free pass the right to repudiate his contract, but there is sound public policy in holding him to it. The expenses of operating railroads are borne by the general public,—that is, by the patrons who pay. In so far as persons stand aloof from the general public they increase the burden or at least postpone the day of lower rates. If the pass-takers, in addition, were allowed to recover judgments for personal injuries by disavowing their agreements, they would be making a positive increase of disbursements, to be borne ultimately by the general public."—Payne v. Terre Haute, etc., R Co, 62 N.E. 472, 157 Ind. 616, 620, 56 L R A. 472.

Particular classes of passengers held bound

(1) Carrier's employee.—Wright v. Central of Georgia Ry. Co, 89 S.E. 457, 18 Ga.App. 290.

(2) Members of family of carrier's employee.

U S.—Bush v. Bremner, C C A Minn, 36 F.2d 189, affirming, D C., 29 F 2d 844.

Fla.—O'Brien v. Atlantic Coast Line R. Co, 128 So. 9, 99 Fla. 843.

Ga.—Devero v Atlantic Coast Line R. Co., 181 S E 421, 51 Ga.App 699.

Ind.—Clark v. Southern Ry. Co, 119 N.E 539, 69 Ind App 697.

Mo—Pinnell v. St. Louis-San Francisco Ry. Co, 263 S.W., 182, certiorari denied 45 S Ct. 123, 266 U. S 623, 69 L.Ed. 473.

Okl—Missouri, K. & T. Ry Co. v. Zuber, 184 P. 452, 76 Okl. 146, 7 A L.R. 840, appeal dismissed 41 S Ct. 322, 255 U S. 561, 65 L.Ed 786, error dismissed 41 S Ct. 449, 256 U.S. 681, 65 L.Ed. 1169.

(3) Employee of another carrier.

Ind—Ft. Wayne & Wabash Valley Traction Co. v. Justus, 115 N.E. 585, 186 Ind. 464.

Mo.—Dunn v. Alton R. Co., App., 88 S.W.2d 224.

(4) Minors.

Conn—Griswold v. New York, etc., R. Co., 4 A. 261, 53 Conn. 371, 55 Am R. 115.

Mo—Pinnell v St Louis-San Francisco Ry. Co., supra.

10 C.J. p 724 note 51 [a].

Contra Pennsylvania Co. v. Purvis, 128 Ill.App. 367.

Size of type stipulated by statute

A penal statute declaring it to be unlawful for a carrier to issue any pass or ticket subject to any condition limiting the carrier's liability, "unless such condition shall be printed in nonpareil type, or in type or characters as large or larger than nonpareil type," renders invalid such a condition printed on a free pass in type smaller than that required by the statute, even though the passenger has accepted and used the pass and has signed his name as an acceptance of such condition—Clark v Southern Ry. Co., 119 N E. 539, 69 Ind.App. 697.

Injury at point where pass ineffective

Where a car in which a passenger was riding under a pass exempting the carrier from liability to him for personal injuries escaped from control and ran past the point up to which the pass was effective, after which he was injured, the exemption from liability was still effective to release the carrier, since its relations to the injured passenger had not been changed so as to make him a passenger from whom a fare was due.—Hester v. Manhattan Bridge Three-Cent Line, 212 N Y.S. 292, 214 App Div. 534.

Stipulation conditional on use of pass

Where a pass book containing a number of free passes requires the conductor to collect a pass each time the book is used, a failure to do so, the passenger being permitted to ride without the use of a pass, renders ineffective a stipulation in the pass book to the effect that it is to be used at the risk of the person presenting it, since in such case the stipulation is conditional on the use of the pass—Nashville Ry. & Light Co v. Overby, 223 S W. 997, 143 Tenn 581.

Pass for use of station and structures

Where a lineman was given a pass entitling him to free passage through the carrier's station and onto its structures, but not to free transit on its trains, a condition in such pass whereby he assumed all risks of accident while using the pass did not debar him from recovery against the carrier for injuries resulting from its negligence while he was repairing electric lines on its structures, since, there being no relation of passenger and carrier between the parties, the rule as to contracting against negligence when such relation exists was not applicable.—Wagner v Brooklyn Heights R Co, 74 N.Y.S 809, 69 App Div 349, affirmed in 66 N.E. 1117, 174 N.Y. 520.

senger,[18] although as to this there is some authority to the contrary,[19] and even though the passenger may have purchased a ticket for a drawing room car.[20]

The rule applies to all interstate free passes issued under the exemptions of the Interstate Commerce Act, prohibiting, with certain exceptions, the giving of passes,[21] but not to an interstate free pass not falling within the exemptions.[22] The rule has been broadly held to apply notwithstanding the giving of the pass is a breach of the federal statutes relating to interstate traffic.[23]

Such a stipulation in a pass, however, is of no effect as against a statute giving damages to the widow and next of kin of a passenger where death results from the negligence of the carrier and its employees;[24] and it has been held that such a stipulation does not bind the employee of another where the employee has no knowledge of the fact that he is carried under a pass in accordance with an arrangement between his employer and the carrier.[25]

Degrees of negligence. Some courts, while expressly or impliedly conceding the right of a carrier to exempt itself from liability to a passenger carried under a free pass in cases of ordinary negligence, refuse to apply the principle in cases of higher degrees of negligence variously referred to as willful, wanton, or gross negligence;[26] and in

18. U.S.—Boering v. Chesapeake Beach R. Co., 24 S.Ct. 515, 193 U.S. 442, 48 L.Ed. 742, affirming 20 App. D.C. 500.
Me.—Rogers v. Kennebec Steamboat Co., 29 A. 1069, 86 Me. 261, 25 L.R.A. 491.
Mass.—Quimby v. Boston, etc., R. Co., 23 N.E. 205, 150 Mass. 365, 5 L.R.A. 846.
10 C.J. p 720 note 14
Assent to conditions in pass generally see supra § 622.

The duty to ascertain the conditions in a pass rests on the one receiving the privileges of gratuitous carriage—Boering v. Chesapeake Beach R. Co., 24 S.Ct. 515, 193 U.S. 442, 48 L.Ed. 742, affirming 20 App. D.C. 500.

Condition accepted, although pass not read

One who takes transportation under a free pass containing a condition that he assumes all risk of personal injury is deemed to have accepted it on that condition, whether he has read it or not.—Rogers v. Kennebec Steamboat Co., 29 A. 1069, 86 Me. 261, 25 L.R.A. 491.

19. N.Y.—Pendergast v. Union R. Co., 41 N.Y.S. 927, 10 App.Div. 207.

Notice on prior occasion insufficient

The fact that a foreman of a street car company had at previous times notified an employee when giving him a pass that "he had to ride at his own risk, and that the company was entirely blameless," is not notice to the employee of a claim by the company of exemption from liability on all subsequent occasions on which he used the cars without pay—Pendergast v. Union R. Co., 41 N.Y.S. 927, 928, 10 App.Div. 207.

20. N.Y.—Ulrich v. New York Cent., etc., R. Co., 15 N.E. 60, 108 N.Y. 80, 2 Am.S.R. 369, reversing 13 Daly 129.

21. U.S.—Kansas City Southern Ry. Co. v. Van Zant, 43 S.Ct. 176, 260 U.S. 459, 67 L.Ed. 348, reversing Van Zant v. Kansas City Southern Ry. Co., 232 S.W. 696, 289 Mo. 163
Mo.—Pinnell v. St. Louis-San Francisco Ry. Co., 263 S.W. 182, certiorari denied 45 S.Ct. 123, 266 U.S. 623, 69 L.Ed. 473—Dunn v. Alton R. Co., App., 88 S.W.2d 224.
Contra McGrath v. Payne, Mo., 245 S.W. 1061.
Va.—Williamson v. Seaboard Air Line Ry., 118 S.E. 255, 136 Va. 626, certiorari denied Williamson v. Seaboard Air Line Ry. Co., 44 S.Ct. 37, 263 U.S. 710, 68 L.Ed. 518.
10 C.J. p 720 note 16.

Wife of employee

A carrier may validly stipulate in a pass for interstate transportation issued to the wife of an employee under the Interstate Commerce Act that it shall not be liable for negligent injury to her person—Charleston, etc., R. Co. v. Thompson, 34 S.Ct. 964, 234 U.S. 576, 58 L.Ed. 1476, reversing 79 S.E. 242, 13 Ga.App. 541.

Stop-over in state of destination

That a passenger on an interstate pass, from a point in South Carolina to a point in Virginia, stopped off at a point in Virginia, and was injured while boarding a train to resume her journey to the Virginia destination, did not change the character of her trip to render it intrastate, so as to make applicable a Virginia statute invalidating a stipulation in such pass exempting the carrier from liability for injuries—Williamson v. Seaboard Air Line Ry., 118 S.E. 255, 136 Va. 626, certiorari denied Williamson v. Seaboard Air Line Ry. Co., 44 S.Ct. 37, 263 U.S. 710, 68 L.Ed. 518.

Federal statute adopted by state

Where the provisions of the Interstate Commerce Act relating to the issuance of free passes are adopted by a state railroad commission as its own provisions for the issuance of intra-state free passes, a pass issued to a carrier's employee, being controlled by the decision of the federal supreme court, is a gratuitous pass, and not one for a consideration, and hence a stipulation in such pass exempting the carrier from liability is valid.—Wright v. Central of Georgia Ry. Co., 89 S.E. 457, 18 Ga.App. 290.

22. Me.—Miller v. Maine Cent. R. Co., 133 A. 907, 125 Me. 338, 47 A.L.R. 720.
Caretaker's pass see supra § 632.

23. U.S.—Duncan v. Maine Cent. R. Co., C.C.Me., 113 F. 508.

24. N.Y.—Tingley v. Long Island R. Co., 96 N.Y.S. 865, 109 App.Div. 793, 17 N.Y.Ann.Cas. 440.

25. Md.—Western Maryland Ry. Co. v. Shatzer, 120 A. 840, 142 Md. 274.
Employees of another generally see supra § 633.

Telegraph employees

Where a telegraph company had an arrangement with a carrier for the free transportation of its employees, and in accordance therewith individual passes were issued to the foreman of the former for the transportation of one "foreman and ten helpers," an employee of the telegraph company carried under such a pass is not bound by a stipulation therein exempting the carrier from liability where he does not know that his transportation is under a pass—Western Maryland Ry. Co. v. Shatzer, 120 A. 840, 842, 142 Md. 274.

26. U.S.—Virginia Beach Bus Line v. Campbell, C.C.A.N.C., 73 F.2d 97, certiorari denied 55 S.Ct. 637, 294 U.S. 727, 79 L.Ed. 1258.
Ga.—Devero v. Atlantic Coast Line R. Co., 181 S.E. 421, 51 Ga.App. 699—Forster v. Southern Ry. Co., 146 S.E. 516, 39 Ga.App. 216—Brooks v. Bugg, 131 S.E. 365, 34 Ga.App. 761—Wright v. Central of Georgia Ry. Co., 89 S.E. 457, 18 Ga.App. 290
Tenn.—Louisville & N. Ry. Co. v. Hadley, 11 Tenn.App. 642.
10 C.J. p 720 note 19.
Degrees of negligence generally see supra § 630.

some jurisdictions statutes prohibiting a carrier from exempting itself from liability for gross negligence have been applied.[27]

Carrier's and employees' negligence distinguished. On the theory that a principal may exempt himself from liability for the negligence of his agents or servants, it was held by some comparatively early authorities that a carrier might exempt itself from liability to a gratuitous passenger for the negligence of its employees, as distinguished from its own;[28] and, while this view was held to apply to any degree of negligence on the part of the employees,[29] it was also held limited in its application so as to include only negligence not constituting gross negligence.[30] Under early New York cases, a carrier might enter into a contract with a gratuitous passenger for exemption from liability for any degree of negligence on the part of its employees[31] other than its managing officers or directors, the latter being regarded as identical with the corporation itself,[32] while as to its own acts it could contract against liability only for negligence not constituting willful or wanton misconduct or gross recklessness.[33] The distinction between the negligence of the carrier and that of its employees, as affects the carrier's liability, is considered generally in § 631 supra.

Denying validity of exemption in toto. Some authorities, rejecting fine discriminations between de-

"By the great weight of authority . . . a contract of exemption from liability for negligence is upheld, at least so far as any except what is called in the opinions wanton, or willful, or gross negligence is concerned, in the case of a passenger who is carried solely as a matter of favor, and without any compensation or advantage whatever to the carrier."—Walther v Southern Pac. Co., 116 P 51, 159 Cal. 769, 773, 37 L.R.A.,N.S., 235 and note.

Willful intent to injure

To authorize a recovery against a carrier by a passenger injured "while being transported over the company's lines by virtue of a gratuitous pass, which exempted the company from liability for injuries caused by ordinary negligence . . . it must appear that the conduct of the . . . [carrier] was such as to evince a willful intention to inflict such an injury, or else was so reckless or so charged with indifference to the consequences . . . as to justify the jury in finding a wantonness equivalent in spirit to actual intent."—Devero v. Atlantic Coast Line R. Co., 181 S.E. 421, 422, 51 Ga.App. 699. To same effect Forster v. Southern Ry. Co., 146 S.E. 516, 517, 39 Ga.App. 216.

Liable only as mandatary

A carrier, carrying one gratuitously, occupies, as to him, "the position of a mandatary, and not that of a common carrier so far as its liability for negligence is concerned," and, therefore, is liable to him, under their agreement that he shall ride at his own risk, only where injury to him is caused by its willful, reckless, wanton, or gross negligence.—Marshall v Nashville R., etc., Co., 101 S.W. 419, 421, 118 Tenn. 254, 9 L.R.A.,N.S., 1246, 12 Ann.Cas. 675.

In Kentucky

(1) It has been held, without determining the effect as to ordinary negligence of a stipulation in a free pass exempting the carrier from liability, that as to gross negligence such a stipulation is void under a constitutional provision in effect prohibiting a common carrier from limiting its common-law liability.—Louisville & N. R. Co. v. Brown, 217 S.W. 686, 186 Ky. 435.

(2) However, without considering the matter of degrees of negligence, it has also been held that the constitutional provision above referred to renders invalid a stipulation in a free pass exempting the carrier from liability for its negligence—Clark v. Southern Ry. Co., 119 N.E. 539, 69 Ind.App. 697, construing and applying Kentucky constitutional provision

27. **In California** a statute providing that a common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for gross negligence, fraud, or willful wrong of itself or its servants, prevents a carrier from contracting against liability for the character of negligence referred to in the statute, as against one who is carried without any compensation whatever.—Walther v. Southern Pac. Co., 116 P. 51, 159 Cal. 769, 37 L.R.A.,N.S., 235.

In Oklahoma the same result as that stated in the preceding note, re California, has been reached under a statute containing the same language—Missouri, K. & T. Ry. Co. v. Zuber, 184 P. 452, 76 Okl. 146, 7 A.L.R. 840, appeal dismissed 41 S.Ct. 322, 255 U.S. 561, 65 L.Ed. 786, error dismissed 41 S.Ct. 449, 256 U.S. 681, 65 L.Ed. 1169.

28. N.J.—Kinney v. New Jersey Cent. R. Co., 32 N.J.Law 407, 90 Am.D. 675, affirmed 34 N.J.Law 513, 3 Am.R. 265.

10 C.J. p. 718 note 99.

"The present discussion does not . . . involve any consideration of the misconduct of the principal. . . . The transaction is virtually this: the carrier says to the passenger, I have employed careful and skillful men to manage my locomotive and cars; but they are human, and they may fail in their duty, to your danger. The passenger says, in consideration of a free passage, I will run that risk. The bargain is struck on these grounds, and I am clear that it would be a great refinement to impeach it as being prejudicial to public interests."—Kinney v. New Jersey Cent. R. Co., 32 N.J. Law 407, 412, 90 Am.D. 675, affirmed 34 N.J.Law 513, 3 Am.R. 265.

29. Conn.—Griswold v. New York, etc., R. Co., 4 A. 261, 53 Conn. 371, 55 Am.R. 115.

Degrees of negligence generally see supra § 630.

30. Wis.—Annas v. Milwaukee, etc., R. Co., 30 N.W. 282, 67 Wis. 46, 58 Am.R. 848.

31. N.Y.—Perkins v. New York Central R. Co., 24 N.Y. 196, 82 Am.D. 281—Wells v. New York Cent. R. Co., 24 N.Y. 181, affirming 26 Barb. 641.

32. N.Y.—Perkins v. New York Cent. R. Co., 24 N.Y. 196, 213, 82 Am.D. 281.

"A distinction is no doubt to be made, between the directors or managing officers of a corporation and its subordinate agents. As the former exercise all the powers of the corporation and are its only direct medium of communication with outside parties, they must, in respect to all its external relations, be considered as identical with the corporation itself. No contract, therefore, can exempt a railroad company from liability for the willful or wanton misconduct or gross recklessness of its directors; but the rule extends to no other officer or agent of the company."—Perkins v. New York Cent. R. Co., supra.

33. N.Y.—Perkins v. New York Cent. R. Co., supra.

grees of negligence[34] and between the negligence of the carrier itself and that of its employees,[35] hold all such stipulations exempting the carrier from liability to a gratuitous passenger for negligence to be contrary to public policy and void;[36] and in some jurisdictions this rule has been held to be, in effect, prescribed by constitution or statute.[37]

Illegal pass. Where a free pass is illegal under the provisions of an applicable state law or constitutional provision, a stipulation therein exempting the carrier from liability for injuries caused by its negligence is a nullity.[38]

§ 635. Drovers' Passes or Contracts

By the weight of authority, a carrier cannot by stipulation exempt itself from liability for negligence to one accompanying live stock on a drover's pass; and, even under the contrary rule, a drover without knowledge of such a stipulation entered into by his employer is not bound thereby. Particular stipulations in the pass or the contract of shipment have been held not to constitute provisions against the carrier's liability.

By the great weight of authority, where a caretaker of a shipment of livestock is carried under a drover's pass given to him by the carrier so that he may accompany the livestock to its destination, a stipulation in the pass or contract of shipment purporting to exempt the carrier from liability for its negligence to the drover is void as against public policy, since such drover is regarded as a passenger for hire, the pass and the contract being construed as a single contract, the consideration for which is the payment made for the transportation of the stock or the service rendered in caring for it;[39] and this rule has been held not to conflict with

34. U.S.—The New World v. King, Cal., 16 How. 469, 14 L.Ed. 1019.

35. N.H.—Wessman v. Boston & M. R. R., 152 A. 476, 84 N.H. 475.
10 C.J. p 721 note 23.

36. Mo.—McGrath v. Payne, 245 S. W. 1061.
N.H.—Wessman v. Boston & M. R. R., 152 A. 476, 84 N.H. 475.
Tex.—Galveston, H. & S. A. Ry. Co. v. Mullen, Civ.App., 198 S.W. 409, error refused.
10 C.J. p 721 note 24.

Reasons for rule

(1) "It is against the policy of the law to permit anyone, be he common carrier or not, to relieve himself by contract from the performance of his common-law duty to use ordinary care to avoid injurying those with whom he knew or should have known his business would bring him in contact."—Wessman v. Boston & M. R. R., 152 A. 476, 478, 84 N.H. 475.

(2) "The passenger cannot relinquish the rights which the law gives him in consideration of gratuitous passage. It is not a question of benevolence and hospitality on the part of the carrier in giving, nor the violation of moral obligation on the part of the passenger in receiving without being bound by the terms of the agreement upon which the gratuity was offered and accepted. The question is one of public duty which the State as parens patriae, having due regard for the lives and limbs of all her subjects, will not permit to be relegated to the domain of private contract. The interest which the commonwealth has in the comfort and safety of her citizens to see that they are protected from injuries resulting through the negligence of the public carrier or his servants is the same, whether such citizen be a gratuitous passenger or a passenger for hire."—St. Louis, etc., R. Co. v. Pitcock, 101 S.W. 725, 82 Ark. 441, 446, 118 Am.S.R. 84, 12 Ann.Cas. 582.

Duty to exercise care not waived

A stipulation in a pass that the passenger assumes "all risk of personal injury . . . from whatever causes arising, and . . . [releases] the railroad from liability therefor," does not "purport to relieve the . . . [carrier] from its duty to exercise ordinary care with reference to the . . . [passenger]," but merely grants to it "a release from liability in case this duty . . . [is] violated."—Wessman v. Boston & M. R. R., 152 A. 476, 478, 84 N.H. 475.

Relieving carrier from statutory duty

A contract between a railroad company and a news agent engaged in business on defendant's train, exempting the company from liability to him for negligence, is against public policy, and is void as respects negligence consisting of a violation of a statute requiring trains to be stopped before arriving at the crossing of an intersecting railroad, even though the company may not bear to the news agent the relation of common carrier.—Starr v. Great Northern R. Co., 69 N.W. 632, 67 Minn. 18.

37. **In Arkansas,** under a statute making railroads responsible for damages to persons caused by the running of trains, a stipulation in a free pass that the passenger accepting it assumes the risk of accidents is void as contrary to public policy.—St. Louis, etc., R. Co. v. Pitcock, 101 S.W. 725, 82 Ark. 441, 118 Am.S.R. 84, 12 Ann.Cas. 582.

In Nebraska, under a statute making every railroad company liable for all damages inflicted on the person of a passenger except in certain instances relating to the contributory negligence of the passenger, a stipulation in a free pass exempting the carrier from liability is void; and this rule is not changed by a statute providing that no notice shall limit the liability of a carrier unless brought to the knowledge of the opposite party and assented to by him, since such statute has been construed to relate to matters other than the carrier's liability to passengers and therefore not impliedly to give the carrier a right to limit its liability to the latter.—Chicago, etc. R. Co. v. Hambel, 89 N.W. 643, 2 Neb., Unoff., 607—Chicago, etc., R. Co. v. Collier, 95 N.W. 472, 1 Neb.,Unoff., 278.

In Virginia under a statute providing that no agreement by a common carrier for exemption from liability for injury caused by its own negligence or misconduct shall be valid, an agreement with a passenger traveling on a free pass, relieving the carrier from the consequences of its negligence or that of its servants, is invalid.—Norfolk, etc., R. Co. v. Tanner, 41 S.E. 721, 100 Va. 379.

38. Mont.—John v. Northern Pac. R. Co., 111 P. 632, 42 Mont. 18, 32 L.R.A.,N.S., 85
N.C.—McNeill v. Durham, etc., R. Co., 47 S.E. 765, 135 N.C. 682, 67 L.R.A. 227, allowing rehearing 44 S.E. 34, 132 N.C. 510, 95 Am.S.R. 641, 67 L.R.A. 227.

39. U.S.—Norfolk Southern R. Co. v. Chatman, N.C., 37 S.Ct. 499, 244 U.S. 276, 61 L.Ed. 1131, L.R.A. 1917F 1128, affirming 222 F. 802, 138 C.C.A. 350—Gooch v. Oregon Short Line R. Co., C.C.A.Idaho, 264 F. 664, certiorari granted 41 S.Ct. 8, 254 U.S. 623, 65 L.Ed. 444, and affirmed 42 S.Ct. 192, 258 U.S. 22, 66 L.Ed. 443—Tripp v. Michigan Cent. R. Co., Mich., 238 F. 449, 151

amendments to the Interstate Commerce Act,[40] or with particular provisions of that act.[41] Under this rule a carrier can neither exempt itself from liability for all but gross negligence[42] nor impose on the drover the risk of transportation not incidental to his taking care of his stock.[43]

On the other hand, some authorities regard a caretaker of livestock accompanying it on a drover's pass as a gratuitous passenger and, therefore, bound by a stipulation in the pass or contract of shipment releasing the carrier from liability to him for its negligence;[44] and in at least one jurisdiction statutes have been construed expressly to authorize such a provision against liability to the drover except in cases of gross negligence, willful wrong, or fraud.[45] Within this view, however, such a limi-

C.C.A. 385, certiorari denied Michigan Cent. R. Co. v. Tripp, 37 S. Ct. 475, 243 U.S. 648, 61 L.Ed. 945—Fitchburg R. Co. v. Nichols, Mass., 85 F. 945, 29 C.C.A. 500.

Ill.—Illinois Cent. R. Co. v. Beebe, 50 N.E. 1019, 174 Ill. 13, 66 Am.S.R. 253, 43 L.R.A. 210, affirming 69 Ill.App. 363—Crane v. Railway Express Agency, 12 N.E.2d 672, 293 Ill.App. 328.

Iowa.—Adams v. Chicago, R. I. & P. Ry. Co., 161 N.W. 295, 179 Iowa 1334.

Ky.—Louisville & N. R. Co. v. Bell, 38 S.W. 3, 100 Ky. 203.

Neb.—Missouri Pac. R. Co. v. Tietken, 68 N.W. 336, 49 Neb. 130, 59 Am.S.R. 526.

10 C.J. p. 724 note 49.

Dictum Miller v. Maine Cent. R. Co., 133 A. 907, 125 Me. 338, 47 A.L.R. 720.

"The agreement for . . . [the shipper's or caretaker's] carriage is a part of the agreement for the transportation of live stock. It is virtually all one contract. While the compensation paid is professedly for the transportation of the stock, it involves the condition that the shipper or a caretaker is to be allowed to ride along for the purpose of caring for it. And the consideration for the carriage of the shipper, or caretaker, is included in the charge made for transporting the stock. The transportation is not a matter of charity or gratuity, but one for a valuable consideration."—Buckley v. Bangor, etc., R. Co., 93 A. 65, 113 Me. 164, 169, L.R.A.1916A 617.

Status of persons riding on drover's passes as passengers generally see supra § 551.

Quoting Corpus Juris in Western Maryland Ry. Co. v. Shatzer, 120 A. 840, 844, 142 Md. 274.

Leading case

U.S.—New York Cent. R. Co. v. Lockwood, N.Y., 17 Wall. 357, 21 L.Ed. 627.

"Settled rule of policy"

U.S.—Norfolk Southern R. Co. v. Chatman, N.C., 37 S.Ct. 499, 500, 244 U.S. 276, 61 L.Ed. 1131, L.R.A. 1917F 1128, affirming 222 F. 802, 138 C.C.A. 350.

Limitation of liability to specified amount is void under the rule stated in the text.—Gerin v. Chicago, M. & St. P. Ry. Co., 158 N.W. 630, 133 Minn. 395.

Effect of declaring drover carrier's employee

Where a contract is made by the shipper of stock with the carrier, providing for a hand to accompany the stock and containing a stipulation that the hand so employed shall be the employee of the carrier, assuming all the risks of an employee, the recital in the contract does not alter the real relations of the parties involved, and as a carrier's liability cannot be limited by contract so as to excuse the negligence of the carrier or its servants, so "it cannot be done on false or counterfeited relations."—Missouri Pac. R. Co. v. Ivy, 9 S.W. 346, 71 Tex. 409, 413, 10 Am.S.R. 758, 1 L.R.A. 500.

40. U.S.—Gooch v. Oregon Short Line R. Co., C.C.A.Idaho, 264 F. 664, certiorari granted 41 S.Ct. 8, 254 U.S. 623, 65 L.Ed. 444, and affirmed 42 S.Ct. 192, 258 U.S. 22, 66 L.Ed. 443.

10 C.J. p. 724 note 50.

Carmack Act

With reference to a caretaker accompanying a shipment of cattle it has been held as follows: "Under the Carmack Act those engaged in interstate commerce . . . may make certain rules limiting liability, but not such as to relieve them from the consequences of their negligence. They may limit the amount of damage that may be recovered for loss or negligent injury to freight; they may limit the time in which actions may be brought under contracts, but the authorities do not hold that they can contract against any liability for negligence. They cannot contract against liability for the consequences that follow a violation of their common-law duty in transporting passengers."—Adams v. Chicago, R. I. & P. Ry. Co., 161 N.W. 295, 301, 179 Iowa 1334.

41. **Prohibiting free passes**

A provision in substance prohibiting carriers from issuing free passes or transportation except, among others, to necessary caretakers of livestock prohibits the carrier from issuing free transportation to a drover, since the phrase "free pass or free transportation," as used in the act with reference to caretakers, has the distinct legal meaning of transportation for hire; and as a consequence the statute does not change the rule stated in the text.

U.S.—Norfolk Southern R. Co. v. Chatman, N.C., 37 S.Ct. 499, 244 U.S. 276, 61 L.Ed. 1131, L.R.A.1917F 1128, affirming 222 F. 802, 138 C.C.A. 350.

Me.—Miller v. Maine Cent. R. Co., 133 A. 907, 125 Me. 338, 47 A.L.R. 720.

Prohibiting compensation other than scheduled rates

Under a provision in substance requiring the carrier to file schedules of rates and prohibiting it from receiving a different compensation, one riding on a drover's pass may recover for injuries caused by the carrier's negligence, although he was required to sign a release in accordance with the schedule filed by the carrier with the interstate commerce commission.—Willcox v. Erie R. Co., 147 N.Y.S. 360, 162 App.Div. 94.

42. Ill.—Illinois Cent. R. Co. v. Anderson, 56 N.E. 331, 184 Ill. 294, affirming 81 Ill.App. 137—Illinois Cent. R. Co. v. Beebe, 50 N.E. 1019, 174 Ill. 13, 66 Am.S.R. 253, 43 L.R.A. 210, affirming 69 Ill.App. 363.

10 C.J. p. 724 note 51.

43. U.S.—Fitchburg R. Co. v. Nichols, Mass., 85 F. 945, 29 C.C.A. 500.

Mo.—Bolton v. Missouri Pac. R. Co., 72 S.W. 530, 172 Mo. 92.

Neb.—Missouri Pac. R. Co. v. Tietken, 68 N.W. 336, 49 Neb. 130, 59 Am.S.R. 526.

10 C.J. p. 725 note 52.

44. N.Y.—Willcox v. Erie R. Co., 147 N.Y.S. 360, 162 App.Div. 94.

10 C.J. p. 724 note 47.

Limitation of liability as to gratuitous passengers generally see supra § 634.

Drover compelled to pay fare

Such a stipulation in the contract of shipment is of no effect where the drover is refused transportation under the contract and compelled to purchase a general ticket, even though he is injured while in the car with the livestock.—Jepsen v. Gallatin Valley Ry. Co., 195 P. 550, 59 Mont. 125.

45. S.D.—Kearnes v. Chicago, M. & St. P. Ry. Co., 171 N.W. 86, 41 S.D. 409.

10 C.J. p. 724 note 48.

tation of liability, agreed to between the shipper of the livestock and the carrier, is not binding on one who accompanies the livestock as the shipper's employee unless he has knowledge thereof.[46]

A stipulation limiting the carrier's liability for negligence as to a drover does not limit the recovery of his administratrix for damages sustained by his widow and children through his death, for which a right of action is given by statute.[47]

A stipulation that the carrier shall not be required to start or stop its trains or caboose at the depot or platform or to furnish lights for the drover's accommodation or safety has been held not a contract against the carrier's negligence,[48] and not to absolve the carrier from liability for its negligence in selecting an unsafe or remote place of ingress to, or egress from, the train;[49] and a stipulation requiring the drover to ride in the caboose while the train is in motion and to assume the risk of injury when not observing such requirement has been held not a limitation of the carrier's liability but a regulation for the conduct of its business,[50] the violation of which is discussed generally in § 779 infra. Likewise, the purpose of a provision requiring the drover to give notice to the carrier within a specified time as to any claim asserted by him has been said to be not to escape liability, but to facilitate investigation;[51] such requirement is considered in § 758 infra, as are stipulations limiting the time within which action may be commenced.

§ 636. Express Messengers

Except as statutes or constitutions provide otherwise, an express company's contract with a carrier exempting the latter from liability to the former's employees, and a second contract between an express company and a messenger whereby the latter assents to the foregoing contract or assumes all risk of injury from the carrier's negligence, are valid; but authorities differ as to whether the first contract binds the messenger without his knowledge and assent.

Except where the effect of constitutional or statutory provisions is otherwise,[52] a contract between an express company and a railroad company, by which the former assumes all risk of injury to its employees and agrees to hold the latter harmless

Provision operative during unloading

The drover is, while unloading the stock under such contract, within the exemption clause, although the car has arrived at its destination and he has left the car for a short time, prior to the injury, to obtain assistance in unloading.—Meuer v. Chicago, etc., R. Co., 59 N.W. 945, 5 S D 568, 49 Am.S.R. 898, 25 L.R.A. 81.

46. N.Y.—Coppock v. Long Island R. Co., 34 N.Y.S. 1039, 89 Hun 186 —Porter v. New York, etc., R. Co., 13 N.Y.S. 491, 59 Hun 177, affirmed 29 N.E. 1029, 129 N.Y. 624.

Employer's contract with carrier as binding employee generally see supra § 633.

Contract made by minor drover's father

"The stipulation in the contract that the person who receives free transportation under it agrees to assume all risk of personal injury from any cause whatever . . . is entitled to no consideration, because the . . . [drover] was a minor, and because this stipulation was not his contract, but the agreement of his [employer]."—Chicago, R. I. & P. R. Co. v. Lee, Kan., 92 F. 318, 321, 34 C.C.A. 365.

47. Kan.—Chicago, etc., R. Co. v. Martin, 53 P. 461, 59 Kan. 437, affirmed 20 S.Ct. 854, 178 U.S. 245, 44 L.Ed. 1055.

48. Tex.—Roberts v. Ft. Worth & D. C. Ry. Co., Civ.App., 229 S.W. 954.

49. Mo.—Edmondson v. Missouri Pac. R. Co., App., 8 S.W.2d 103.

Tex.—Roberts v. Ft. Worth & D. C. Ry. Co., Civ.App., 229 S.W. 954.

50. U.S.—Hulet v. Payne, C.C.A.N. D., 282 F. 401.

Release as to drover's negligence

"Such contracts do not stipulate against liability for the carrier's own negligence, but against liability for the passenger's reckless conduct."—Hulet v. Payne, C.C.A.N.D., 282 F. 401, 404.

51. Mo.—Edmondson v. Missouri Pac. R. Co., App., 264 S.W. 470.

52. Okl.—Missouri, etc., R. Co. v. West, 134 P. 655, 38 Okl. 581.

10 C.J. p. 725 note 60.

In Kansas under statutory provisions in substance making railroad companies liable for all damage to persons caused by their negligence, and for injuries to the employees through their negligence or that of other employees, which, as construed by the supreme court of the state, render void any contract limiting such liability, a contract between an express company and a railroad company that the former shall indemnify and save the latter harmless against any liability on account of the injury or death of any employee of the express company, and a second contract between the express company and an employee by which the employee assumes all risks of injuries while riding on the cars of any railroad, and expressly ratifies the contract between the express company and the railroad company, and agrees to save the express company harmless from any liability thereon, are not available as a defense to an action against the railroad company by the employee's widow to recover damages for his death occurring in Kansas through the alleged negligence of the railroad company.—Weir v. Rountree, Mo., 173 F. 776, 97 C.C.A. 500, 19 Ann.Cas. 1024, appeal dismissed 30 S.Ct. 418, 216 U.S. 607, 54 L.Ed. 635.

In Kentucky, under a constitutional provision prohibiting carriers from contracting away their common-law liability, a Virginia contract, whereby an express messenger at the time of his employment released all claims against the express company or against the carrier for injuries he might receive, whether through negligence or otherwise, was void, so as not to affect his right to recover for injuries received in Kentucky.—Davis v. Chesapeake, etc., R. Co., 92 S.W. 339, 122 Ky. 528, 29 Ky.L. 53, 121 Am.S.R. 481, 5 L.R.A.,N.S., 458, 12 Ann.Cas. 723.

In New Jersey an employment contract in which an express company employee assumed the risks of accidents resulting from the negligence of any person operating a railroad or vehicle and agreed, in the event that he should recover from any carrier, to repay to the express company any sum which the latter would be compelled to pay to such carrier by reason of its contract of indemnity with such carrier, is void under a statute providing, in substance, that "no . . . release of damages made before the happening of any accident . . . shall be valid."—Delaware, L. & W. R. Co. v. Smyth, 115 A. 65, 66; 93 N.J.Eq. 80.

from all loss arising therefrom, and a contract between the express company and a messenger, whereby the latter assents to the foregoing contract or assumes all risk of injury from the negligence of the railroad company, are valid, and preclude the messenger from recovering for injuries caused by the negligence of the employees of the railroad company;[53] but the railroad company is not entitled to the benefit of a contract, of which it had no knowledge, between an express company and its messenger, by which the latter assumes all risk of injury while in the discharge of his duties.[54]

To exempt a carrier from liability or to limit its liability for injury to an express messenger, the contract for release must expressly and plainly so provide;[55] and, while it has been said that ordinary rules of construction apply to such a contract,[56] it has also been held that such a contract should be strictly construed, and that a waiver by the employee of his rights should not be extended by implication or surmise.[57]

Knowledge and assent. It has been held that in order that such a contract between the railroad company and the express company may be binding on the messenger it must be made with his knowledge and assent;[58] but other authorities hold that a messenger is bound to know that his rights rest on the private contract between the two companies and that he is bound thereby, and, therefore, is chargeable with knowledge of limitations therein of the carrier's liability for injuries.[59]

A pass issued to an express messenger for a consideration moving from the express company is not a gratuity, and the railroad company is not exempted from liability to him by a provision in the pass to the effect that the person using it assumes all risks of accident and injury;[60] but a pass given an

53. U.S.—Wells Fargo & Co. v. Taylor, Miss., 41 S.Ct. 93, 254 U.S. 175 65 L.Ed. 205.
10 C.J. p. 725 note 55.
Express messengers as passengers see supra § 548.

Reasons for rule

(1) Where the contract with the carrier was in consideration of the express messenger's being allowed to ride in the latter's baggage car, it was held: "It was not a contract for carriage over the road, but for the use of a particular car. The consideration of the plaintiff's [express messenger's] agreement was not the performance of anything by the . . . [carrier] which it was under any obligation to do, or which the plaintiff had any right to have done. It was a privilege granted to the plaintiff. The plaintiff was not compelled to enter into the contract in order to obtain the rights of a passenger. Having these rights, he sought something more. The contract by which he obtained what he sought did not impair his rights as a passenger, and he was under no compulsion to enter into it."—Bates v. Old Colony R. Co., 17 N.E. 633, 639, 147 Mass. 255.

(2) A railroad company which undertakes, as a matter of accommodation or by special engagement, to carry an express messenger whom it is not bound to carry becomes a private carrier and may protect itself by contract from the result of its negligence.—Louisville, etc., R. Co. v. Keefer, 44 N.E. 796, 146 Ind. 21, 58 Am.S.R. 348, 38 L.R.A. 93.

(3) "A railroad is not a common carrier of common carriers . . . It is not required by usage, nor by common law, to transport the traffic of independent express companies over its lines in the manner in which the traffic is usually carried. . . . And, being under no duty, it may make special contracts limiting its liability. It contracts then as a private carrier. It may contract for nonliability to a messenger who is being carried for the purpose of handling and caring for the express company's goods, which are being carried under the terms of a special contract, and which it was not otherwise bound to carry at all."—Buckley v. Bangor & A. R. Co., 93 A. 65, 69, 113 Me. 164.

54. Ind.—Louisville, etc., R. Co. v. Keefer, 44 N.E. 796, 146 Ind. 21, 58 Am.S.R. 348, 38 L.R.A. 93.

55. Mich.—Cottrell v. Michigan United Tract. Co., 150 N.W. 857, 184 Mich. 221.
10 C.J. p. 726 note 61 [a].

Promotion terminating exemption

Where an express company's employee, while holding the office of driver at eighty-five dollars per month, but at the time acting as train guard for an extra compensation, was injured by the negligence of a railroad company transporting him, it is no defense, in an action by him against the railroad company, that by his original contract of employment with the express company as a helper at fifteen dollars per month he agreed to indemnify that company from liability for such injury or negligence, and by a contract between the two companies the express company indemnified the railroad company against loss for any such injury to any employee of the express company, as, when such employee was advanced to the new position of driver, the old contract was terminated.—Baltimore, etc., R. Co. v. Duke, 38 App.D.C. 164, Ann.Cas.1913C 832.

56. U.S.—Long v. Lehigh Valley R. Co., N.Y., 130 F. 870, 65 C.C.A. 354.

Release "from any or all claims"

An employment contract by which an express messenger, assumes all risk of personal injury while riding on any transportation line, and agrees to release any transportation company with which his employer may contract "from any or all claims" which may be made on account of any such injury, must be construed to apply to an injury resulting from negligence of a railroad company in whose car he is riding in the course of his employment, even though the contract does not in express terms include injuries due to negligence, since, he not being a passenger while so riding, no claim could be made against the company except on the ground of negligence.—Long v. Lehigh Valley R. Co., N.Y., 130 F. 870, 65 C.C.A. 354.

57. D.C.—Baltimore, etc., R. Co. v. Duke, 38 App.D.C. 164, Ann.Cas. 1913C 832.

58. U.S.—Chamberlain v. Pierson, S.C., 87 F. 420, 31 C.C.A. 157.
10 C.J. p. 726 note 61.

59. Ill.—Blank v. Illinois Cent. R. Co., 80 Ill.App. 475, affirmed 55 N.E. 332, 182 Ill. 332.
Ind.—Pittsburgh, etc., R. Co. v. Mahoney, 46 N.E. 917, 47 N.E. 464, 148 Ind. 196, 62 Am.S.R. 503, 40 L.R.A. 701.
Tenn.—McKay v. Louisville, etc., R. Co., 182 S.W. 874, 133 Tenn. 590
10 C.J. p. 726 note 62

60. D.C.—Baltimore, etc., R. Co. v. Duke, 38 App.D.C. 164, Ann.Cas. 1913C 832.

express messenger for the use of his family is a "free pass," within the Hepburn Act, so that a clause thereof, whereby the passenger assumes all risks, is binding on the person using it.[61]

§ 637. Mail Agents

A stipulation relieving a railroad company from liability for injury to mail agents transported on trains is invalid.

As to mail agents transported on trains, it has been held that a stipulation relieving the railroad company from liability for injury to them is not valid.[62]

§ 638. Transportation over Connecting Lines

A valid limitation of liability in a contract for transportation over connecting lines inures to the benefit of the connecting carriers. An initial carrier may provide in a ticket against responsibility beyond its own line, and such a provision may bind even a passenger failing to read it.

A contract for transportation over connecting lines, in which there is a valid limitation of liability, inures to the benefit of the carriers transporting the passenger under the contract.[63]

Liability limited to initial carrier's lines. A provision in a ticket issued by an initial carrier for transportation over connecting lines, to the effect that the initial carrier "acts only as agent" with respect to passage over such lines and "is not responsible beyond its own line," is valid,[64] and such a provision binds the passenger, even though he fails to read it,[65] although in the case of a full-fare ticket it has been held that a passenger is not bound

Pass issued for consideration generally see supra § 632.

Gratuitous passengers generally see supra § 634.

61. N.J.—Morris v. West Jersey, etc., R. Co., 94 A. 593, 87 N.J.Law 579.

62. Miss.—Illinois Cent. R. Co. v. Crudup, 63 Miss. 291.

N.Y.—Seybolt v. New York, etc., R. Co., 95 N.Y. 562, 47 Am.R. 75.

Postal clerks as passengers generally see supra § 548.

Reason for rule

Since federal statutes impose on every railroad company carrying the mail the duty of carrying the agent, the liabilities arising from this duty cannot be limited by contract.—Seybolt v. New York, etc., R. Co., 95 N.Y. 562, 47 Am.R. 75.

63. N.Y.—Wilder v. Pennsylvania R. Co., 156 N.E. 88, 89, 245 N.Y. 36, 52 A.L.R. 188, affirming 217 N.Y.S. 56, 217 App.Div. 661, and answering certified questions 217 N.Y.S. 937, 218 App.Div. 714.

10 C.J. p 726 note 66.

"The contract was a single contract to travel all the way, and afforded protection to all the lines contributing to that end"—Wilder v. Pennsylvania R. Co., supra.

Issuing carrier as agent of others

In making contract giving passenger free transportation, in consideration of which passenger assumed all risks of personal injury, railway company which issued pass was held agent of all other companies recognizing pass as to entire contract, including provision as to assumption of risk.—Wilder v. Pennsylvania R. Co., 156 N.E. 88, 245 N.Y. 36, 52 A.L.R. 188, affirming 217 N.Y.S. 56, 217 App.Div. 661, and answering certified questions 217 N.Y.S. 937, 218 App.Div. 714.

Rule applied to terminal company

A provision in a pass whereby the passenger assumed "all risks of . . . injuries" and released "the company from liability therefor" relieved the terminal company owning and operating the station used by the carrier from liability to the passenger for injuries sustained in falling on the slippery floor of the station.—Wilder v. Pennsylvania R. Co., 156 N.E. 88, 245 N.Y. 36, 52 A.L.R. 188, affirming 217 N.Y.S. 56, 217 App.Div. 661, and answering certified questions 217 N.Y.S. 937, 218 App.Div. 714

64. U.S.—Louisville & N. R. Co. v. Chatters, La., 49 S.Ct. 329, 279 U.S. 320, 73 L.Ed. 711, reversing, C.C.A., 26 F.2d 403, which affirmed, D.C., Chatters v. Louisville & N.R. Co., 17 F.2d 305, and certiorari granted 49 S.Ct. 26, 278 U.S. 590, 73 L.Ed. 523.

Reason for rule

Since the initial carrier is under no duty "as a common carrier . . . to transport or assume any responsibility for the transportation of . . . [a passenger] beyond its own line . . . [it] might, by stipulation on the through ticket, provide that it should not be so responsible."—Louisville & N. R. Co. v. Chatters, La., 49 S.Ct. 329, 332, 279 U.S. 320, 73 L.Ed. 711, reversing, C.C.A., 26 F.2d 403, which affirmed, D.C., Chatters v. Louisville & N. R. Co., 17 F.2d 305, and certiorari granted 49 S.Ct. 26, 278 U.S. 590, 73 L.Ed. 523

Inter-depot transportation

(1) Where a carrier sold a through ticket containing a coupon for transfer from its depot to that of a connecting carrier, but such coupon did not name the bus line to make the transfer, the initial carrier was responsible for injury to the passenger resulting from the negligence of the bus line actually making the transfer, in spite of a provision in the ticket that the carrier in selling it "for passage over other lines" acted "only as agent," and was "not responsible beyond its own lines," since, under the rule that an agent makes himself liable if he contracts in his own name without disclosing his principal's name, such bus line was not an "other line" within the meaning of the provisions of the ticket.—Boyles v. McClure, Tex.Com.App., 243 S.W. 1080, 1081, modifying McAdoo v. McClure, Civ.App., 232 S.W. 348

(2) A provision in a railroad ticket consisting of a coupon for transportation over the lines of the original carrier and another for transportation over those of the connecting carrier, that the carrier in selling the same "for passage over other lines . . . acts only as agent and is not responsible beyond its own line" does not apply to interstation transportation for which a separate ticket is issued by the initial carrier, even though such transportation is beyond the lines of the initial carrier.—Harmon v. Barber, Ohio, 247 F. 1, 159 C.C.A. 219, certiorari denied 38 S.Ct. 335, 246 U.S. 666, 62 L.Ed. 929.

65. U.S.—Missouri Pac. R. Co. v. Prude, 44 S.Ct. 450, 265 U.S. 99, 68 L.Ed. 919, reversing 247 S.W. 785, 156 Ark. 583.

Acceptance and use of ticket as assent

Acceptance and use of a ticket containing a provision limiting the carrier's liability for safe carriage to its own lines suffices to establish a valid prima facie agreement, and the mere failure of the passenger to read its provisions cannot overcome the presumption of assent.—Missouri Pac. R. Co. v. Prude, 44 S.Ct. 450, 265 U.S. 99, 68 L.Ed. 919, reversing 247 S.W. 785, 156 Ark. 583.

by such a provision in his ticket unless it is called to his attention and assented to by him;[66] but even where the initial carrier has contracted for exemption from liability for the negligence of a connecting carrier, it is liable for injuries caused by its negligence in furnishing a defective car to run over connecting lines, whether the injuries occur on its own line or on the line of a connecting carrier.[67]

§ 639. What Law Governs

Generally, unless the parties, intended otherwise, the validity and interpretation of a contract limiting a carrier's liability, including one for interstate transportation, depend on the law of the place where it is made; but by some authorities a contract valid where made will not be recognized as such in a state under whose law it would be void, and by others, if the action is in tort, the law of the place of the accident governs.

As a general rule, unless the parties at the time of making the contract have some other law in view,[68] the validity[69] and interpretation[70] of a contract limiting the carrier's liability are determined by the law of the place where it is made; and, in the absence of a federal law on the subject,[71] this rule applies to the validity[72] and interpretation[73] of a contract for interstate transportation. Thus, although a contract exempting the carrier from liability is invalid where it is sought to be enforced, if it is valid where made it may be enforced on principles of comity,[74] and, if it is invalid where made, it may be recognized as invalid in any other state, even one by the law of which the contract would have been valid.[75]

According to some decisions, however, a contract exempting a carrier from liability for negligence, valid at the place of its making, will not avail as a defense when the injury occurs, and recovery is sought, in a state by whose laws such contracts are held void;[76] and, by other authority, where the

66. Mich.—Thurston v. Northern Nav. Co., 171 N.W. 423, 205 Mich 278

67. Tex.—Missouri, etc., R. Co. v. Foster, 80 S.W 1197, 97 Tex. 618, reversing, Civ.App., 78 S.W. 1134—Missouri, etc., R. Co. v. Harrison, 80 S.W. 1139, 97 Tex 611, reversing, Civ.App., 77 S.W. 1036.
10 C.J. p 878 note 25.

Unsafe condition of car

Where an initial carrier contracted for through transportation over the lines of connecting carriers in a car furnished by such initial carrier, it was liable for injuries to passengers occasioned by its having furnished a car which was not capable of being made comfortably warm, even though the injuries occurred on the line of a connecting carrier, for the negligence of which the transportation contract exempted such initial carrier.—Missouri, etc., R. Co. v. Harrison, 80 S.W. 1139, 97 Tex. 611, reversing, Civ.App., 77 S.W. 1036.

68. U.S.—Wiley v. Grand Trunk R. Co., D.C.N.Y., 227 F. 127.

69. U.S.—Sasinowski v. Boston & M. R. R., C.C.A.Mass., 74 F.2d 628—Eubanks v. Southern Ry. Co., D.C.Fla., 244 F. 891.
N.Y.—Conklin v. Canadian-Colonial Airways, 194 N.E. 692, 266 N.Y 244, affirming 271 N.Y.S. 1107, 242 App Div. 625.
Ohio.—Knowlton v. Erie R. Co., 19 Ohio St. 260, 2 Am.R. 395.
10 C.J. p 726 note 70.

"The weight of authority, including the United States Supreme Court and the Circuit Court of Appeals for the Second Circuit, is that the invalidity of a release like this is to be determined by the law of the jurisdiction where the carriage was commenced—locus celebrationis—whether the basis of the carrier's liability be regarded as contractual or tortious"—Wiley v. Grand Trunk R. Co., D.C.N.Y., 227 F. 127, 130.

70. Cal.—Justis v. Atchison, etc., R. Co., 108 P. 328, 12 Cal.App. 639.
10 C.J. p 726 note 70.

71. Neb.—Maucher v. Chicago, R. I. & P. Ry. Co., 159 N.W. 422, 100 Neb. 237, error dismissed Chicago, R. I. & P. R. Co. v. Maucher, 39 S.Ct. 108, 248 U.S. 359, 63 L.Ed. 294.
10 C.J. p 727 note 71.

Carmack amendment inapplicable

"It is the contention of the appellant that the circus train constituted an interstate shipment, and therefore these contracts must be governed by the federal law. If governed by the federal statutes at all they must fall within what is commonly known as the Carmack Amendment to the Elkins Law (Act Feb. 19, 1903, c 708, 32 Stat. 847 [U.S.Comp St.1913, §§ 8597–8599]). Act June 29, 1906, 34 Stat. 3591, pp. 593–595 (U.S.Comp St. 1913, § 8592). . . . The act nowhere provides that a railway company may exempt itself from liability for negligently maiming or killing any person . . . If the contracts fell within the federal statute they are void because they undertake to exempt the carrier from all liability, but this was not a contract for the transportation of a mere piece of inanimate freight. It was a contract for the transportation of a person in whose life and safety the state has an interest, and a contract which would undertake to permit his wanton destruction would be against public policy and void. It does not appear . . . that the liability of the defendant is to be governed by the federal statute Congress has legislated on interstate shipments as applied to freight, but the act does not reach the questions herein involved, and in the absence of action by Congress the questions must be determined by the law of Nebraska. There is no federal legislation touching the liability of railroads growing out of interstate transportation of persons Such being the case, the law of Nebraska must be held to govern."—Maucher v. Chicago, R. I. & P. Ry Co., 159 N.W. 422, 425, 100 Neb. 237, error dismissed Chicago, R. I. & P. R. Co. v. Maucher, 39 S.Ct. 108, 248 U.S. 359, 63 L.Ed. 294.

72. N.Y.—Conklin v. Canadian-Colonial Airways, 194 N.E. 692, 266 N.Y 244, affirming 271 N.Y.S. 1107, 242 App Div. 625.
10 C.J. p 727 note 72

73. N.Y.—Fish v. Delaware, etc., R. Co., 105 N.E. 661, 211 N.Y. 374, reversing 143 N.Y.S 365, 158 App Div. 92, affirming 141 N.Y.S. 245, 79 Misc. 636.
10 C.J. p 727 note 72.

Presumption as to similarity of law

Although a special contract containing an exemption from liability, made in one state for transportation therein to a point in another state, is to be interpreted according to the law of the former state, in the absence of evidence as to what the law of such former state is it will be presumed to be the same as that of the latter state—Meuer v. Chicago, etc., R. Co., 59 N.W. 945, 5 S.D. 568, 49 Am.S.R. 898, 25 L.R.A. 81.

74. Ohio.—Knowlton v. Erie R. Co., 19 Ohio St 260, 2 Am.R. 395.
10 C.J. p 727 note 73.

75. Ill.—Illinois Cent. R. Co. v. Beebe, 50 N.E. 1019, 174 Ill. 13, 66 Am.S.R. 253, 43 L.R.A. 210.

76. Neb.—Maucher v. Chicago, R. I. & P. Ry. Co., 159 N.W. 422, 100 Neb 237, error dismissed Chicago, R. I. & P. R. Co. v. Maucher, 39

question arises in an action of tort, the law of the place where the accident happened governs.[77] It has also been held that such a contract, so far as the element of contract controls, must be construed by the laws of the place where it is principally to be performed, by whose laws it will be valid, rather than by the laws of another place where it would be invalid.[78]

G. PERFORMANCE OF CONTRACT OR DUTY TO TRANSPORT

§ 640. Duties as to Transportation in General

a. In general
b. Information to passengers
c. Rules or regulations as to stopping trains

a. In General

A carrier assumes the performance of all duties in accordance with its status, and likewise assumes the transportation of the passenger according to the terms of the contract of carriage. In its dealings with the public it must be honest and fair.

Where a person purchases a ticket for passage on a train or car, the carrier assumes the relation of common carrier toward him, and thereby assumes to perform all the duties of such carrier,[79] and, although it assumes the contract of safe carriage,[80] it is immaterial so far as its liability for injuries is concerned, whether these duties arise by express stipulation or by a contract which necessarily involves their observance.[81] Unless performance is waived, it is the duty of the carrier to transport a passenger according to the terms of his contract;[82] and if it fails so to transport him and is not prevented from so doing by an act of God, or of the public enemy, or by the passenger's own conduct, there is a breach of contract for which the carrier is liable in damages.[83] The act which breaks the contract may also constitute a tort.[84] The provisions of the contract by which a carrier undertakes a given service do not determine whether the service is one which as a common carrier it could be compelled to perform, but the character of the acts involved in its performance indicate the nature of the service, and in determining whether the service is part of the carrier's public duty, the test is whether the acts are such as the carrier must perform.[85]

S.Ct. 108, 248 U.S 359, 63 L.Ed 294.
10 C.J. p 727 notes 75, 77.

Reason for rule

"While it is the rule that any defense which is based upon the express terms of a contract is governed by the lex loci contractus, even though the action be ex delicto, yet the fact that the recognition of a provision for an exemption from liability for negligence would contravene the distinctive policy of the state in which the action arose and where the remedy is sought furnishes a sufficient reason for the refusal to recognize such provision. 2 Wharton, Conflict of Laws (3d ed.) § 471c. This State is concerned in the protection of the lives and limbs of all persons within its borders, whether interstate passengers or otherwise, and, as respects responsibility for torts committed within the jurisdiction of its laws, its courts will, where necessary, assume to determine the common law for themselves, and will not permit parties to contravene the domestic policy of the State by invidious contracts for exemptions from liability for negligence."—Lake Shore, etc., R. Co. v. Teeters, 77 N.E. 599, 166 Ind. 335, 342, 5 L.R.A.,N.S., 425.

77. U.S.—Smith v. Atchison, etc., R. Co., Okl., 194 F. 79, 114 C.C.A. 157.
N.Y.—Willcox v. Erie R. Co., 147 N.Y.S. 360, 162 App.Div. 94.

Rule limited; public policy

Although, in an action brought in one jurisdiction to recover for personal injuries inflicted by a tortious act in another jurisdiction, the validity of a contract exempting the carrier from liability is governed by the law of the place where the injury occurred, nevertheless, such contract will not be recognized in the jurisdiction where the action is brought if it is against the public policy of that jurisdiction.—Clark v. Southern Ry. Co., 119 N.E. 539, 69 Ind.App. 697.

78. Okl.—Atchison, etc., R. Co. v. Smith, 132 P. 494, 38 Okl. 157, Ann.Cas.1915C 620.

Round trip ticket

Where a ticket issued and delivered in Kansas to a railroad employee's wife for a round trip from a point in Kansas to a point in Oklahoma contains a provision releasing the carrier from liability, such provision must be construed according to the laws of Oklahoma, where it is valid, rather than by the laws of Kansas where it is invalid.—Atchison, etc., R. Co. v. Smith, 132 P. 494, 38 Okl. 157, Ann.Cas.1915C 620.

79. Tex.—El Paso, etc., R. Co. v. Landon, 124 S.W. 744, 58 Tex.Civ.App. 397.

80. La.—Brisolara v. Caddo Transfer & Warehouse Co., 127 So. 57, 13 La.App. 27.
N.Y.—Barad v. New York Rapid Transit Corporation, 295 N.Y.S. 901, 162 Misc. 458.

81. Tex.—El Paso, etc., R. Co. v. Landon, 124 S.W. 744, 58 Tex.Civ.App. 397.

82. Pa.—Sweigart v. Shreiner, 14 Pa.Dist.&Co. 435.
S.C.—Payne v. Atlantic Greyhound Bus Lines, 188 S.E. 426, 182 S.C. 58.
10 C.J. p 798 note 89.

Performance held not waived

Where defendant contracted to carry plaintiff and his companions in an automobile from one place to another, and the automobile broke down, and defendant failed within a reasonable time after being informed of the accident to carry plaintiff and his companions, the act of plaintiff in leaving the automobile and walking back was not a waiver of performance.—Taxicab Co. v. Grant, 57 So. 141, 3 Ala.App. 393.

83. Ark.—Smith v. St. Louis, etc., R. Co., 176 S.W. 308, 118 Ark. 291.
Pa.—Sweigart v. Shreiner, 14 Pa.Dist.&Co. 435.
10 C.J. p 799 note 90.

Injury by blow-out of tire

Where bus passenger was injured when tire blew out, bus company breached its contract with passenger for safe passage.—Brisolara v. Caddo Transfer & Warehouse Co., 127 So. 57, 13 La.App. 27.

84. U.S.—Austro-American S.S. Co. v. Thomas, N.Y., 248 F. 231, 160 C.C.A. 309, L.R.A.1918D 873.

85. N.H.—Wessman v. Boston & M.R.R., 152 A. 476, 84 N.H. 475.

In its dealings with the public, a common carrier must be honest and fair.[86] A passenger is entitled on his journey to civil treatment from the carrier's servants as part of the contract of carriage,[87] and, as shown infra § 692, the carrier is liable for abusive and insulting language or conduct of its servants. An infant passenger is not entitled to any special attention in the absence of an express contract to that end, or in the absence of facts from which it may be inferred that such a duty exists.[88]

Where a passenger presents an irregular ticket, it is the carrier's duty to heed any reasonable explanation made by the passenger and institute such an investigation as under the circumstances is reasonably available.[89] The holder of a ticket has no cause of action against the carrier for failing to carry him on his ticket, where he does not demand so to be carried, but from some cause voluntarily pays cash fare to the conductor.[90]

Generally, however, an arrangement as to transportation which is not within the authority of the carrier's agent does not impose a duty on the carrier to conform to it.[91]

b. Information to Passengers

A carrier must furnish passengers and intending passengers with such information as to its system and course of conduct as may be reasonably necessary to enable them to pursue their journey; but, generally, in the absence of a request therefor, a carrier is not bound to volunteer information. Information given by the carrier must be correct.

It is the duty of a carrier to furnish passengers, and those who in good faith intend to become passengers, with such information as to its system and course of conduct as may be reasonably necessary to enable them to pursue their journey.[92] In the absence of a request for information, however, it has been held that a carrier is not bound voluntarily to give information to a passenger,[93] and, unless the schedule has been changed after the ticket was sold or such change has been made without giving the ordinary notice to the public, it need not volunteer information as to what train a passenger should take to arrive at his destination.[94] So, in the absence of a request for information, the carrier is not bound to inform a passenger as to the time of departure of its earliest train to his destination,[95] or as to the track on which his train will arrive.[96] However, where a person purchases a ticket with the intention of using a certain train, and the agent of the company knows of his purpose so to do, it is the agent's duty to inform the passenger of the fact that the train will not stop at his station.[97]

On request to its ticket agent or other proper agent, the carrier is bound to give the correct information,[98] and a passenger has the right to rely on information given by such agent acting within

86. Ill.—Princell v. Pickwick Greyhound Lines, 262 Ill.App. 298.

87. Tenn.—Sims v. Knoxville Ry. & Light Co., 208 S.W. 610, 141 Tenn. 238—Knoxville Traction Co. v. Lane, 53 S.W. 557, 103 Tenn. 376, 46 L.R.A. 549.

88. Ky.—Strong v. Louisville & N. R. Co., 43 S.W.2d 11, 240 Ky 781

89. S.C.—Matthews v. Southern Ry. Co., 120 S.E. 369, 126 S.C. 454.

90. S.C.—Bethea v. Northwestern R. Co., 1 S.E. 372, 26 S.C. 91.

91. Me.—Cuzzo v. Maine Cent. R. Co., 91 A. 1006, 112 Me. 560.

92. Ala.—Lamb v. Mitchell, 80 So. 151, 16 Ala.App. 577.
S.C.—Shepherd v. Southern Ry. Co., 133 S.E. 231, 135 S.C. 75.

93. Ky.—Hundley v. Louisville & I. R. Co., 245 S.W. 149, 196 Ky. 604.
10 C.J. p 799 note 92.

Signs on car giving notice of destination

Where plaintiff boarded defendant's interurban electric car intending to go to S at nearly the scheduled time for the regular car for S without noticing signs on the car stating that its destination was E, and after discovering her mistake was allowed to alight at the next station and proceeded to walk back, doing which she sprained her ankle, the fact that the regular car for S had been temporarily withdrawn from service did not make it incumbent on defendant to inform her of that fact before allowing her to board the car, notice of the destination of the car being given to her by the signs thereon.—Hundley v. Louisville & I. R. Co., 245 S.W. 149, 196 Ky. 604.

Notification on entering interurban electric car

Where plaintiff boarded defendant's interurban electric car erroneously supposing that it would take her to her destination, but was allowed to alight at the next station and proceeded to walk back to the station at which she boarded the car, spraining her ankle on the way, negligence of defendant could not be predicated on its failure to notify plaintiff of the car's destination before allowing her to enter it, notwithstanding that it is the universal custom of steam railroads to give such notice to passengers.—Hundley v. Louisville & I. R. Co., 245 S.W. 149, 196 Ky. 604.

94. Ala.—Lamb v. Mitchell, 80 So. 151, 16 Ala.App. 577.

95. Tex.—Latimer v. St. Louis Southwestern R. Co., 90 S.W. 665, 40 Tex.Civ.App. 614.

96. Ga.—Dawson v. Southern Ry. Co., 89 S.E. 1051, 18 Ga.App. 534.
10 C.J. p 801 note 19.

When two trains are on track

Ticket agent having in response to inquiry correctly informed passenger as to time train left and that it was then on track did not mislead passenger, although in fact he boarded another train which was also on track at that time.—Shepherd v. Southern Ry. Co., 133 S.E. 231, 135 S.C. 75.

97. Ark.—St. Louis, etc., R. Co. v. Adcock, 12 S.W. 874, 52 Ark. 406.

98. Ala.—Pollard v. Jarrett, 169 So. 697.
Ark.—Crown Coach Co. v. Meadors, 53 S.W.2d 442, 186 Ark. 236.
10 C.J. p 799 notes 93, 94 [a].

Refusal of incidental information

A carrier is not liable because the agent at a depot at an intermediate station at which a passenger was waiting for a train refused to tell her the name of the town or where she could find a hotel, and on her asking for water merely pointed to a tank some distance away, or because men and boys around the station

the scope of his employment.[99] If such an agent wrongfully refuses information to a passenger on request, or negligently misinforms him, the carrier is liable for the damages caused thereby,[1] but where the misdirection of the agent does not cause a passenger to act differently than if the correct information was given, the passenger has no right of action.[2] Where the conductor and an ordinary employee make to a passenger conflicting statements as to the movement of the train, the passenger should act on the former's directions, and if he follows those of the other to his detriment he has no cause of action against the company.[3] A railroad is under no duty to furnish a clock in its waiting room for use of the passengers at the station, but where it undertakes to inform passengers of the time by means of a clock therein, it is required to exercise due care in the maintenance thereof so that passengers will not miss the train by reason of the clock being slow.[4]

c. Rules or Regulations as to Stopping Trains

In the absence of a statutory provision to the contrary, a carrier may make rules providing that particular trains shall stop only at certain stations if it furnishes reasonable means of reaching all stations on its route by some of its trains.

In accordance with the right of a carrier to make reasonable rules and regulations for the management and operation of its trains and cars, see supra § 570, it is a well established general rule that, in the absence of a statutory provision to the contrary, a carrier, where it furnishes reasonable means of reaching all stations on its route by some of its trains, may make rules providing that particular trains shall stop only at certain stations.[5] In following such reasonable regulations and train schedules the carrier need not stop its through or limited trains at all stations,[6] incurring no liability, in general, for failure to stop to receive a passenger, see infra § 644, or for failure to stop to discharge a passenger, see infra §§ 654–658.

§ 641. On Proper Train or Conveyance

Generally, the purchaser of a ticket may take passage on any train or car which will take him to his destination; but he has no right to take any particular train or one which does not stop at his destination or receive passengers at the station at which he desires to board it.

Unless there is a limitation as to the train or car which the purchaser of a ticket may take, see supra § 619, he may assume that he can take passage on any train or car which under the usual schedules of the road carries passengers and stops at his destination.[7] On the other hand, unless there is a

jeered and laughed at her.—Missouri, etc, R Co. v. Kendrick, Tex.Civ.App., 32 S W. 42

99. Ala.—Pollard v. Jarrett, 169 So. 697—Lamb v. Mitchell, 80 So. 151, 16 Ala App. 577.
Ark.—Crown Coach Co. v. Meadors, 53 S.W.2d 442, 186 Ark. 236.
S.C.—Shepherd v. Southern Ry. Co., 133 S.E. 231, 135 S.C. 75.
10 C.J. p 690 note 56 [a], p 799 note 94.

As to stop at destination

A passenger purchasing a ticket for a specified destination has the right to rely on a statement by the carrier's agent that the train will stop at that point.
Ala.—Pollard v. Jarrett, 169 So. 697.
N.C.—White v. Norfolk-Southern Ry. Co., 89 S E. 788, 172 N C 31, rehearing denied 91 S.E. 697, 173 N.C. 703.

1. N.C.—Coleman v. Southern R Co., 50 S.E. 690, 138 N.C. 351.
10 C.J. p 799 note 95.

Time of departure of trains

Where a passenger sustains damages by reason of misinformation as to the time of the departure of trains, given by a carrier's employees, the carrier is liable for the actual damages sustained by the passenger, proximately caused by reason of the misinformation—Weeks v. Great Northern Ry. Co., 175 N.W. 726, 43 N.D. 426, 8 A.L.R. 1173—10 C J. p 799 note 93 [b]

2. S.C.—Hutchison v. Southern Ry Co., 95 S.E 181, 109 S.C. 90.

Following of original plan

Misinformation given by defendant railroad's agent that plaintiffs' train would stop at their destination, resulting in failure of relative to meet them at nearby station where they alighted pursuant to their original plan, and then advised relative they would proceed to ultimate destination without his company, establishes no cause of action.—Hutchison v. Southern Ry. Co., 95 S E 181, 109 S.C. 90.

3. Mo.—Dillon v. Lindell R. Co, 71 Mo App 631.

4. Ala.—Louisville & N. R Co. v Clark, 87 So. 676, 205 Ala. 152, 14 A.L R. 695.

5. N C.—Meeder v. Seaboard Air Line Ry., 91 S.E. 527, 173 N.C 57.
Tex.—Gulf, C. & S. F. Ry. Co v. Sanderson, Civ.App., 216 S.W 286
10 C J p 800 note 7.

6. Ala.—Southern Ry. Co. v. Pruett, 77 So. 49 200 Ala. 675.
S C.—Shepherd v. Southern Ry. Co., 133 S.E 231, 135 S.C. 75.
10 C J. p 800 note 8.

7. Tenn.—Louisville, etc, R. Co. v Turner, 47 S W. 223, 100 Tenn 213, 43 L.R.A. 140.
10 C.J. p 799 note 2.

Excursion ticket

Under a statute providing that no railroad company shall limit the right of a ticket holder to a particular train, but that such holder may travel on any train, whether regular or express, and may stop at any of the stations along the line at which such train stops, and providing also that railroad companies may sell excursion, return, or special tickets at less than the regular rates, to be used as provided by the ticket, where defendant sold plaintiff an excursion ticket to M and return for a reduced rate, which ticket was to be good only on continuous trains, the only limitation as to the use of the ticket, "provided on the ticket," was that it should be good on continuous trains, and not good to stop off, it was held that plaintiff could ride on any regular train, provided he made a continuous passage.—Crabtree v. Washington County R. Co., 64 A. 842, 101 Me. 485.

First train stopping at destination

Under a statute providing that railroads shall run their passenger trains at regular times, to be fixed by public notice, shall furnish sufficient accommodations for passengers, and shall be liable to the party aggrieved, in an action for damages, for any neglect or refusal in the premises, the schedule of trains is an offer which, when accepted by a per-

special contract as to the train on which the passenger is to be transported, he is not entitled to take any particular train or conveyance, but has the right to be transported only in accordance with the reasonable regulations of the carrier;[8] and he must take a train which, under the regulations of the carrier, will take him to, and stop at, his destination, and he has no right to transportation on a train which is not scheduled to stop there,[9] or which under the regulations of the company does not receive passengers at the station at which the passenger desires to board it.[10]

§ 642. Duty of Passenger to Inquire; Taking Wrong Train or Car

An intending passenger must inform himself as to the train or car he must take to arrive at his destination, and where he takes the wrong train or car through his own fault or mistake he has no remedy for damages against the carrier.

It is the duty of a person about to take a train or car to inform himself as to what train or car he should take to arrive at his destination and as to when, where, and how he can go, or stop, according to the regulations and time-tables of the carrier; and before boarding a train or car, he is bound to inform himself as to whether, under the regulations of the carrier, it will stop at his destination.[11] Without an agreement or special contract providing therefor, he has no right to insist on the carrier changing the course of its business for his accommodation as to serve his convenience,[12] unless he has been misled by the servants of the carrier,[13] or where the carrier, by habitually stopping the train at that place, has induced the passenger to believe that its rule that the train should not stop there except under exceptional circumstances has been abrogated.[14]

Where a passenger takes a wrong train or car through his own fault or mistake, he has no remedy against the carrier for damages;[15] nor is the carrier bound to return him to the point where the mistake was made.[16] Where, however, a passenger takes a wrong train or car through the misdirection of the carrier's agent, the carrier is liable for the resulting damages,[17] and this rule applies whether or not the agent's act was negligent, inadvertent, willful, or malicious,[18] but willfulness, malice, or other aggravating circumstances may be shown, as bearing on the amount of recovery.[19] In such a case, it is the conductor's duty to use due care in regard to the passenger's condition and existing circumstances,[20] and it is the duty of the carrier to return him to the place where the mistake occurred, or to leave him at some point where he will not be subjected to any serious annoyance and to return him, by the first returning train, to the place where he took the wrong train.[21] Where the carrier's employees discover the fact that a passenger has

son by asking for a ticket, gives him a legal right to be transported by the first train stopping at his destination —Coleman v. Southern R. Co., 50 S E. 690, 138 N.C 351.

8. Ky.—Brumfield v. Consolidated Coach Corporation, 40 S.W 2d 356, 240 Ky. 1.
N.Y.—Paulitsch v. New York Cent., etc., R. Co, 6 N.E. 577, 102 N.Y. 280.
10 C.J. p 800 note 4.

9. Miss.—Illinois Cent. R Co. v. Harris, 32 So. 309, 81 Miss. 208, 95 Am S R. 466, 59 L.R.A. 742.
10 C.J. p 800 note 5.

10. U.S.—Ohage v. Northern Pac. R Co., Minn., 200 F. 128, 118 C.C.A. 302.
10 C.J. p 800 note 6.

11. Ala.—Pollard v. Jarrett, 169 So. 697—Southern Ry. Co. v Pruett, 77 So 49, 200 Ala. 675—Lamb v. Mitchell, 80 So. 151, 16 Ala.App. 577.
Ark.—Hines v. Smith, 224 S W. 612, 145 Ark. 218.
Ky.—Sturgill v. Chesapeake & O. R Co., 11 S W.2d 983, 227 Ky. 44.
Okl.—Hill v. New, 212 P. 422, 88 Okl. 208
S C—Shepherd v. Southern Ry. Co., 133 S.E. 231, 135 S.C. 75—May v. Seaboard Air Line Ry. Co, 96 S. E. 482, 110 S.C 84.
Tex.—Gulf, C. & S. F. Ry. Co. v Sanderson, Civ App., 216 S.W. 286.
10 C.J. p 801 notes 14, 15.

Regulations of connecting carrier
A purchaser of a through ticket is chargeable with knowledge of rules and regulations of the connecting carrier, promulgated under the authority of the interstate commerce commission—Louisville & N. R Co v. Bishop, 85 So 859, 17 Ala.App. 320

12. Okl.—Chicago, R. I. & P. R. Co v. Sheets, 154 P. 550, 54 Okl. 586

13. Ark.—Hines v. Smith, 224 S.W. 612, 145 Ark. 218.

14. Cal.—Wieland v. Southern Pac. R Co, 82 P. 226, 1 Cal.App. 343.
Tex.—Albin v. Gulf, etc, R. Co, 95 S W 589, 43 Tex.Civ.App. 170.
10 C.J. p 801 note 17.

15. Ky.—Hundley v. Louisville & I. R. Co., 245 S.W. 149, 196 Ky. 604.
Okl.—Hill v. New, 212 P. 422, 88 Okl 208.
S.C—Shepherd v. Southern Ry. Co., 133 S E. 231, 135 S.C. 75
10 C.J. p 801 note 20.

16. Ga.—Johnson v. Seaboard Air Line R Co., 79 S.E. 91, 13 Ga App 298.
N.Y.—Brown v. Interborough Rapid Transit Co., 107 N.Y.S 629, 56 Misc. 637

17. Ala.—Pollard v. Jarrett, 169 So. 697.
Ga.—Atlanta Terminal Co. v. Alexander, 143 S.E. 905, 38 Ga App. 280.
10 C J. p 801 note 22.

Remedy of passenger
Where a passenger, making proper inquiry, is misled by acts or statements of the railroad or its agents into taking the wrong train, his remedy is to leave the train and seek other transportation and recover of the railroad damages sustained.
Ala.—Southern Ry. Co. v. Pruett, 77 So 49, 200 Ala. 675.
Pa.—Weathers v. Pennsylvania R Co, 94 Pa.Super. 50.

18. Ga.—Atlanta Terminal Co. v. Alexander, 143 S.E. 905, 38 Ga.App 280
10 C J. p 801 note 23.

19. Ala.—Robertson v. Louisville, etc, R. Co., 37 So. 831, 142 Ala 216.

20. Tex.—Gulf, C. & S. F. Ry. Co. v. Hitt, Civ.App., 60 S.W.2d 864.

21. Tex.—St. Louis Southwestern R Co. v. Pruitt, Civ App., 79 S.W 598, error denied 80 S.W. 72, 97 Tex. 487.

boarded the wrong train or car, they are bound to inform him of his mistake and to afford him a reasonable opportunity to get off in view of all the facts;[22] if the train is on its way, they should inform him of his mistake, so that he may get off at a regular stop, if any, before reaching his destination, and continue his journey on another train;[23] but they may simply tell him what to do and ordinarily leave him to follow their directions.[24] Where a person boards a street car which does not run all the way to his destination without inquiring as to that fact, there is no contract to carry him beyond the point to which the car does run.[25]

§ 643. Route to Be Pursued

A passenger may be required to go by the most direct route or to pay extra fare. The carrier is not obliged to inform the passenger of the route unless such information is sought by the passenger.

Where a carrier operates direct and indirect or circuitous lines of road between two points, through passengers traveling on a simple contract to carry from one point to another may be required to go by the most direct route and to pay extra fare for transportation if they go by the longer route,[26] and neither the failure of the carrier to notify a passenger of such regulation, nor of its conductor as to the necessity of changing cars at a certain point en route, will affect the contractual rights of the parties.[27] Where a stock contract provides for the free passage, both ways, of the shipper, but does not name the route to be taken in returning, a general usage known to the shipper, permitting persons holding such contracts to take either of two routes, becomes a part of the contract.[28] A passenger is not entitled to recover for a failure to transport him over a certain route, where his injuries are caused by his own negligence in attempting to ride on a ticket not entitling him to passage over such route;[29] but where, through the fault of the carrier's agent, a passenger is given a wrong ticket, and the latter, on discovering the mistake, uses due care in selecting a route to his desired destination, the carrier is liable for damages, although he selects a route which causes him more discomfort than another which he might have selected would have caused.[30] A passenger is not bound by his signature to an interstate ticket, calling for transportation over a shorter route, where he has paid the fare for the longer route.[31] A street car passenger is entitled to be carried to his destination by the most direct route.[32]

A carrier is not obliged to inform the passenger of the route unless such information is sought by the passenger,[33] but where information as to the route to be taken is given, the carrier is bound by the statements of its agent.[34] Likewise, the carrier is liable, where on inquiry by an intending passenger it negligently fails to inform him as to the best and quicker route of travel.[35]

22. Ala.—Southern R. Co. v. Farquhar, 68 So. 289, 192 Ala. 415.

23. Miss.—Yazoo, etc., R. Co. v. Walls, 70 So. 349, 110 Miss. 256.

24. Ky.—Cincinnati, etc., R. Co. v. Raine, 113 S.W. 495, 130 Ky. 454, 132 Am.S.R. 400, 19 L.R.A.,N.S., 753.

Miss.—Illinois Cent. R. Co. v. Harper, 35 So. 764, 83 Miss. 560, 102 Am.S.R. 469, 64 L.R.A. 283.

25. Wash.—Braymer v. Seattle, etc., R. Co., 77 P. 495, 35 Wash. 346.

10 C.J. p. 802 note 26.

26. N.Y.—Kelly v. New York City R. Co., 84 N.E. 569, 192 N.Y. 97, affirming 104 N.Y.S. 561, 119 App. Div. 223, reversing 102 N.Y.S. 742, 52 Misc. 585.

10 C.J. p. 802 note 31.

27. S.D.—Church v. Chicago, etc., R. Co., 60 N.W. 854, 6 S.D. 235, 26 L.R.A. 616.

28. Iowa.—Milroy v. Chicago, etc., R. Co., 67 N.W. 276, 98 Iowa 188.

29. S.C.—Saunders v. Atlantic Coast Line R. Co., 85 S.E. 167, 101 S.C. 11.

30. Tex.—Texas, etc., R. Co. v. Armstrong, Civ.App., 41 S.W. 833.

31. S.C.—Jordan v. Southern R. Co., 84 S.E. 871, 100 S.C. 284.

32. N.Y.—Goodman v. New York R. Co., 150 N.Y.S. 702, 88 Misc. 95.

Ordinance prohibiting diverting from usual course

The Milwaukee ordinance, prohibiting a street car on which there were passengers from being diverted from the usual course on the line for which it was designated, unless it is disabled or an emergency renders it impossible to proceed in the usual course, was intended to prevent only arbitrary changes in the running of street cars, whereby passengers might be compelled to abandon them before reaching the scheduled destination thereof.—City of Milwaukee v. Becker, 180 N.W. 838, 173 Wis. 169.

33. Ga.—Williams v. East Coast Stages Co., 182 S.E. 415, 52 Ga. App. 77.

34. Miss.—Illinois Cent. R. Co. v. Harper, 35 So. 764, 83 Miss. 560, 102 Am.S.R. 469, 64 L.R.A. 283.

10 C.J. p. 691 note 57.

Bus transportation over smooth road on specific schedule

(1) Bus carrier was held liable for breach of contract, entered into by its ticket agent, to transport passenger over smooth road on specific schedule, notwithstanding that carrier had no bus leaving over smooth road on schedule specified, and that ticket agent made mistake in making contract, since ticket agent was acting within apparent scope of his authority.—Southwestern Greyhound Lines v. Wisdom, 95 S.W.2d 904, 192 Ark. 903.

(2) Fact that bus carrier reserved right in itinerary furnished passenger to change its schedule without notice was held not to preclude recovery by passenger from carrier for breach of contract to transport passenger over smooth road on specific schedule, where breach was occasioned by fact that there was no bus scheduled to leave over smooth road at time specified, rather than by change of schedule.—Southwestern Greyhound Lines v. Wisdom, supra.

35. Ala.—Southern R. Co. v. Nowlin, 47 So. 180, 156 Ala. 222, 130 Am.S.R. 91.

N.C.—Mace v. Southern R. Co., 66 S.E. 342, 151 N.C. 404, 24 L.R.A.,N.S., 1178 and note.

10 C.J. p. 802 note 34.

§ 644. Receiving and Taking Up Passengers

A passenger has the right to be admitted to the proper train or conveyance, and the carrier has the duty to stop, when required by its regulations and schedules or under a special contract, to receive him. Opportunities for taking the train or conveyance at the proper place must be afforded and convenient facilities must be provided, but ordinarily a carrier is not required to receive passengers at places other than those which are provided for the purpose. The carrier must keep the train or conveyance standing for such time as is reasonably necessary to enable intending passengers to board it.

A passenger has the right to be admitted to the proper train or conveyance for transportation under his contract, and he may recover damages if wrongfully refused admission to, or transportation on, such train.[36] Among the duties owing from the carrier to intending passengers, is the duty to stop all trains or conveyances, scheduled to stop, at the designated stations or places,[37] but in following its reasonable regulations and schedules, it need not stop to receive a passenger at a place at which the train or conveyance is not scheduled to stop.[38] However, even though a train is not scheduled to stop if the carrier contracts to stop the train, it is liable in tort if the train fails to stop.[39] Where by regulation or custom a train is to be stopped on signal, such as at a flag station, for the taking on of passengers, the carrier will be liable in damages for not stopping a train and taking on a passenger when the proper signal is given,[40] but there is no duty to stop a train other than a passenger train on the signal of one desiring to take passage.[41] Likewise, a street car must stop where the duty is to stop in accordance with the usual regulations, on signal.[42] Where the carrier negligently fails to stop, the intending passenger must exercise ordinary care and prudence to prevent injury to himself as the result of the carrier's negligence.[43] A carrier owning a train which, by reason of a wreck, is detoured over the line of another carrier, is under no legal duty to stop to receive passengers along the detoured route.[44]

Opportunities for taking the proper train at the proper place must be afforded under reasonable regulations,[45] and the carrier is required to exercise ordinary care in providing convenient facilities in order that its passengers may reach and board the trains or conveyances.[46] Ordinarily, however, a carrier is not bound to receive passengers other

36. Md.—Northern Central R. Co. v. O'Conner, 24 A. 449, 76 Md. 207, 35 Am.S.R. 422, 16 L.R.A. 449.
10 C.J. p 802 note 40.

Contract by telephone

Carrier's failure to transport passenger, in accordance with arrangement pursuant to telephone conversation, renders it liable for damages. —Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.

Closing doors of bus against ticket holder

Bus company was held not exonerated from liability for preventing woman from boarding bus on ground that its ticket agent's acts in so doing were not in course or within scope of his authority, especially where bus driver closed doors against her and drove away with knowledge of her possession of ticket and desire to board bus.—Southland Greyhound Lines v. Ashby, Tex. Civ.App., 80 S.W.2d 445, error dismissed

Refusal by gateman

Gateman at railway station used also by other roads than defendant, who was employed and paid by defendant, and under its direction, is servant of defendant sued for rejection of passenger.—Louisville & N. R. Co. v. Frizzle, 108 So. 615, 21 Ala.App. 354, certiorari denied 108 So. 616, 214 Ala. 688.

Detention by ticket chopper

Where a passenger deposited a valid ticket, she was entitled to proceed on her journey without molestation from the carrier, or being charged with depositing a bogus ticket by the ticket chopper, and the carrier is liable where the ticket chopper seized her and detained her, whether willfully or through error of judgment or otherwise.—Hahn v. Interborough Rapid Transit Co., 172 N.Y.S. 633, 184 App.Div. 861

37. Or.—Palmer v. Willamette Valley Southern Ry. Co., 171 P. 1169, 88 Or. 322, L.R.A.1918D 1114.
10 C.J. p 803 note 42.

38. U.S.—Ohage v. Northern Pac. R. Co., Minn., 200 F. 128, 118 C.C.A. 302

39. Wash.—Fenlon v. Chicago, M. & St. P. Ry. Co., 169 P. 863, 99 Wash. 289.

40. Ga.—Southern R. Co. v. Wallis, 66 S.E. 370, 133 Ga. 553, 30 L.R.A.,N.S., 401, 18 Ann.Cas. 67.
10 C.J. p 803 note 49.

Special excursion train

Where it was the annual custom of a railroad company to run an excursion train which always stopped on flag at a certain station to take on passengers, no notice being given to the public that the custom would be changed, by the course of business and established custom plaintiff was invited and had a right to take passage on the train at the station, and when this right was denied had a cause of action.—Gulf & S.I.R. Co. v. Dixon, 71 So. 906, 111 Miss. 637, reversing 70 So. 898, 110 Miss. 800.

41. N.C.—Brown v. Linville River Ry. Co., 94 S.E. 431, 174 N.C. 694.

42. Ill.—See Welch v. Chicago City Ry. Co., 208 Ill.App. 161.
Mo.—Haley v. St. Louis Transit Co., 77 S.W. 731, 179 Mo. 30, 64 L.R.A. 295.
10 C.J. p 803 note 50.

Standing on left hand side of car.

Street car motorman owed duty to stop for intending passenger who was standing at car stop on left-hand side of street car, notwithstanding that rule of company prohibited passengers from entering at left-hand entrance in absence of showing of facts justifying motorman in assuming that passenger would not enter by proper door when given opportunity. — Birmingham Electric Co. v. Jones, 176 So. 203, 234 Ala. 590.

43. Tex.—Nevill v. St. Louis Southwestern Ry. Co. of Texas, Civ. App., 211 S.W. 523, dismissed for want of jurisdiction.
W.Va.—Williams v. Baltimore & O. R. Co., 128 S.E. 96, 99 W.Va. 154.

44. Ky.—Payne v. Simmons, 255 S.W. 863, 201 Ky. 33, 33 A.L.R. 814.

45. Ky.—Chesapeake, etc., R. Co. v. Austin, 126 S.W. 144, 137 Ky. 611, 136 Am.S.R. 307.
N.C.—Phillips v. Southern R. Co., 32 S.E. 388, 124 N.C. 123, 45 L.R.A. 163.
10 C.J. p 802 note 41.

46. Ga.—Atlanta Terminal Co. v. Alexander, 143 S.E. 905, 38 Ga.App. 280.

than at the places provided for that purpose,[47] although it may by custom establish a policy of receiving passengers at other places.[48] A carrier may be liable for damages if its train leaves the station yards without coming to the depot where it is accustomed to receive passengers,[49] but as to freight trains carrying passengers, a custom to stop the car on which passengers are to be transported at some distance from the platform may be reasonable and proper, and the passenger cannot complain that, waiting on the regular passenger platform, he had no opportunity to enter the passenger car of the freight train.[50]

The carrier must keep the train or conveyance standing for such time as is reasonably necessary to enable intending passengers, in the exercise of reasonable diligence on their part, to board.[51] Where a carrier stops its train or car to receive passengers, it impliedly invites them to board the train, and the invitation continues as long as the train remains standing;[52] and where the train or car stops the usual length of time or long enough to allow passengers to get off or on, the carrier owes no duty to hold its train for a belated passenger,[53] although he is prevented from presenting himself at the train in time by reason of the crowd at the station.[54]

The duty to receive and transport without discrimination all proper persons who desire and properly offer to become passengers is treated in §§ 538–540 supra.

§ 645. Accommodations and Facilities during Transit

a. In general
b. Transportation facilities in general
c. Seats
d. Separate accommodation for races

a. In General

Generally, the carrier must provide reasonably fit, suitable, and sufficient accommodations and facilities for its passengers. A passenger with a ticket of a particular class is entitled to accommodations according to his ticket except in case of an unforeseen emergency.

It is, in general, the duty of a carrier of passengers to provide accommodations fit and suitable for their safe and comfortable transportation,[55] or, in other words, to furnish to passengers reasonably comfortable accommodations for their passage.[56] The carrier must use every reasonable means to care for the passenger's convenience, comfort, and safety while the relation of carrier and passenger continues,[57] but, although it has been broadly stat-

47. Or.—Palmer v. Willamette Valley Southern Ry. Co., 171 P. 1169, 88 Or. 322, L.R.A.1918D 1114.

Road crossing

The mere fact that the carrier had occassionally stopped its train at a road crossing one hundred thirty-five feet from the regular station did not make such crossing a stopping place.—Palmer v. Willamette Valley Southern Ry. Co., 171 P. 1169, 88 Or. 322, L.R.A.1918D 1114

48. Ky.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.

49. Ga.—Payton v. Gulf Line R. Co., 62 S.E. 469, 4 Ga.App. 762.

Departure from depot at connecting junctions

"Junction," as used in Crawford & Moses' Dig. § 960, requiring that passenger trains depart only from the station house or depot "at all junctions where two or more trains connect," means place where two or more tracks meet or cross, regardless of whether the tracks are owned by the same or different railroad companies.—Missouri Pac R. Co. v. Henry, 269 S.W. 51, 168 Ark. 146.

50. N.C.—Browne v. Raleigh, etc., R. Co., 12 S.E. 958, 108 N.C. 34.

51. Ga.—Poole v. Georgia R., etc., Co., 15 S.E. 321, 89 Ga. 320.
Or.—Palmer v. Willamette Valley Southern Ry. Co., 171 P. 1169, 88 Or. 322, L.R.A.1918D 1114.

52. Or.—Palmer v. Willamette Valley Southern Ry. Co., supra.
10 C.J. p 803 note 46.

53. Or.—Palmer v. Willamette Valley Southern Ry. Co., supra.
Tex.—Davis v. Kirklen, Civ.App., 253 S.W. 330.
10 C.J. p 803 note 47.

Delay for passenger to procure doctor's certificate

Under Rev.St. §§ 6552, 6554, 6591, relating to carriage of passengers by railroads, the right of any person to demand passage on a particular train must be tested by the requirement that he present himself for passage "within a reasonable time previous" to the scheduled starting time, and where one who was ill and desired to ride in the baggage car, which arrangement necessitated a doctor's certificate and special arrangements, reached the train only as it was ready to leave, it was held that no cause of action accrued to him because the train departed without him, notwithstanding his physician was to accompany him and could have furnished the necessary certificate promptly, this fact being not disclosed to the conductor at the time he was requested to wait.—Davis v. Kirklen, Tex.Civ.App., 253 S.W. 330.

54. Ky.—Chesapeake, etc., R. Co. v. Austin, 126 S.W. 144, 137 Ky. 611, 136 Am.S.R. 307.

55. S.C.—Payne v. Atlantic Greyhound Bus Lines, 188 S.E. 426, 182 S.C. 58.
10 C.J. p 803 note 53, p 804 notes 54–57.

Bus companies carrying passengers for reward must provide all usual and reasonable accommodations.—Missouri, Kansas & Oklahoma Coach Lines v. Burton, 72 P. 2d 385, 181 Okl. 45.

56. Ky.—Payne v. Combs, 249 S.W. 1031, 198 Ky. 749.

57. Utah.—Palmer v. Oregon Short Line R. Co., 98 P. 689, 34 Utah 466, 16 Ann.Cas. 229.
10 C.J. p 804 note 54.

Passengers from another line

Although the owner of a stage line made arrangements with the owner of a connecting stage line with reference to through transportation, he is bound, notwithstanding such arrangements, to give to passengers coming over another line not connecting, accommodations equal to those given to passengers transported on the connecting line.—Bennett v. Dutton, 10 N.H. 481.

ed that the carrier must exercise the highest degree of care in performing such duty,[58] as a rule, it is only required to use that high degree of care which a cautious and prudent person would use under similar circumstances,[59] and it is not required to use the utmost care, human skill, diligence, and foresight.[60] It is as much the duty of the common carrier to look after the comfort of its passengers as it is to protect them against assault or to provide for their safety while being transported,[61] and it must afford the same convenience, safety, and protection of health to all passengers without regard to race, creed, or color.[62]

The duties of a carrier require that it should furnish reasonable stational facilities for the accommodation of travellers on its lines,[63] and it is the duty of a railroad company to maintain a waiting room for the comfort of passengers at junctions or intermediate points, and to allow passengers the use of it for a reasonable length of time before and after the arrival and departure of trains.[64] An agreement to stop a train for a passenger to board it at a station where the train is not scheduled to stop has been held to include impliedly an agreement to keep open its waiting room for the accommodation of the passenger while waiting for the train.[65] The duty to keep stations heated in cold weather is considered in § 721 infra. The duty to heat cars is considered in § 744 infra.

Opportunity to procure food. The duty of a carrier when its train is on time to give opportunity to its passengers to procure food at regular eating stations is discharged when it exercises care to furnish an opportunity to those in ordinary physical condition to procure food for themselves, and it is not ordinarily its duty to convey food to infirm passengers.[66] Where, however, its train is delayed through its own fault, it must use due care to furnish an opportunity to passengers to procure food, and in doing this must take into consideration the sex, age, physical condition, and actual environments of each passenger, and in some cases it may be required to procure food for a passenger, although a passenger cannot recover for the carrier's failure to act where, by preferring a request either to the employees of the carrier or to fellow passengers, he could have procured the necessary food.[67]

Toilet facilities. It has been held that a toilet room should be provided in each passenger coach;[68] but the carrier's duties do not include the duty to provide dressing rooms for passengers.[69] A carrier need furnish only such toilet facilities as are sufficient if all passengers are in ordinary condition and state of health, in the absence of notice that some one of them is sick or suffering from an ailment which necessitates additional toilet facilities for his use.[70]

Water for drinking. A railroad company should also exercise a high degree of care to provide its passenger coaches with drinking water.[71]

Where there is delay in transit. Where a train is unavoidably delayed, the carrier performs its full duty when it provides suitable coaches, properly heated and open for the passengers' use pending the delay.[72]

58. S.C.—Payne v. Atlantic Greyhound Bus Lines, 188 S.E. 426, 182 S.C. 58.

59. Tex.—Texas & P. Ry. Co. v. Wallace, Civ.App., 2 S.W.2d 874, error dismissed.

60. W.Va.—Williams v. Baltimore & O. R. Co., 128 S.E. 96, 99 W.Va. 154.

61. Ky.—Louisville & I. Ry. Co. v. Jones, 250 S.W. 822, 199 Ky. 150, 33 A.L.R. 165.

62. Ky.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.

63. Tex.—Missouri, K. & T. Ry. Co of Texas v. Kendrick, Civ.App., 32 S.W. 42.

64. Tex.—St. Louis Southwestern R. Co. v. Foster, Civ.App., 112 S.W. 797.
10 C.J. p 804 note 55 [a].

65. Ind.—Draper v. Evansville & T. H. R. Co., 74 N.E. 889, 165 Ind. 117, 6 Ann.Cas 569.

66. Tex.—Texas, etc., R. Co. v. Harrington, 98 S.W. 653, 44 Tex.Civ. App. 386.

Duty to hold train

A passenger having made known to the conductor his desire to alight to get a lunch during the time the train stopped, and the conductor having informed him that he would have time to do so, and having consented to his alighting for that purpose, and the passenger having alighted, it was the duty of the conductor to hold the train in accordance with his answer, the passenger not having boarded the train sooner.—Missouri, etc., R. Co. v. Price, 106 S.W. 700, 48 Tex.Civ.App. 210.

If one crippled or infirm undertakes a journey which he knows will be of such length as to extend beyond the meal hours he must provide himself with food for he also knows that he can not walk or safely get on and off a train unassisted. —Texas, etc., R. Co. v Harrington, 98 S.W. 653, 44 Tex.Civ App. 386, 393.

67. Tex.—Texas, etc., R. Co. v. Harrington, supra

68. Ky.—Louisville & N. R. Co v. Grimes, 150 S.W. 346, 150 Ky. 219 10 C.J. p 962 note 90.

Corpus Juris is cited with approval in Hauser v. Chicago, R. I. & P. Ry Co., 219 N.W. 60, 61, 205 Iowa 940, 58 A.L.R. 687.

69. U.S.—Ozanne v Illinois Cent R Co., C.C.Ky., 151 F. 900, affirmed 157 F. 1004, 85 C.C.A. 678.

70. Tex.—Texas & P. Ry. Co. v. Wallace, Civ.App., 2 S.W.2d 874, error dismissed.

One toilet sufficient

It is enough for carriers to furnish one toilet for thirteen passengers, in absence of notice of passenger's abnormal condition.—Texas & P. Ry. Co. v. Wallace, Tex.Civ.App., 2 S.W.2d 874, error dismissed

71. Tex.—Arrington v. Texas, etc., R. Co., Civ.App., 70 S.W. 551.

72. Okl.—Lusk v. Wilkes, 172 P. 929, 70 Okl. 44, L.R.A.1918E 513.

b. Transportation Facilities in General

The carrier must use reasonable care to furnish transportation facilities, as far as practicable, to persons entitled to transportation. If a ticket is sold for a particular train the passenger must be accommodated thereon.

As the ordinary unlimited ticket is not a contract to transport on any particular train, see supra § 641, it does not constitute a breach of contract that the passenger having a ticket cannot be accommodated by reason of the limited capacity of the train.[73] The carrier's duty is to use reasonable care in furnishing accommodations, as far as practicable, to persons entitled to transportation,[74] and in the absence of a special contract, the passenger must content himself with such accommodations as the carrier can reasonably furnish.[75] However, if tickets are sold for a particular train, the contract is broken if accommodation is not furnished, even though the capacity of the train is already overtaxed,[76] as the carrier must provide its train with coaches reasonably sufficient to carry comfortably as many persons as in the exercise of ordinary care it should reasonably anticipate.[77] In determining what is reasonable diligence in affording adequate accommodations, it is proper to consider the notice given to the carrier of the probable requirement, the time in which it might act, and the means at hand, as well as other considerations involved.[78]

Riding in baggage car. A person voluntarily riding in a baggage car is not entitled to damages because of exposure to public gaze or because of failure of the carrier to furnish him a seat, or because a corpse is transported in the baggage car at the same time.[79] A refusal to permit a passenger to ride in a baggage car because he does not have an order of permission from the superintendent, as required by regulations of the railroad, does not render the carrier liable, although the passenger on previous trips has been permitted, as a matter of personal accommodation, to do so.[80]

Under particular-class tickets. One who has purchased a ticket of a particular class is entitled to accommodations according to his ticket,[81] although in case of an unforeseen emergency he may be compelled to accept other accommodations.[82] The holder of a second-class ticket is entitled to reasonable accommodations of the kind usually furnished to passengers of that class, and cannot be compelled to travel in a smoking car.[83]

Penalty. Under statutes expressly so providing, a failure or refusal to furnish a passenger with transportation facilities subjects the railroad company to a penalty to be collected by the party aggrieved.[84]

c. Seats

The carrier must furnish seats to passengers entitled to transportation, but it is released from this duty if it becomes impossible because of an unanticipated or unforeseeable influx of passengers. A passenger may not dictate where he shall sit, and the carrier may provide reasonable rules and regulations for the seating of passengers.

The carrier is bound to furnish seats to passengers entitled to transportation, if practicable,[85] and the passenger may refuse to give up his ticket or to pay fare unless a seat is furnished,[86] but this does not mean that he is entitled to ride free in such a case, as he cannot avail himself of the benefit of transportation without a seat and at the same

Car stalled in snowstorm

Where a suburban car becomes stalled in a snowstorm, there is no contract or legal obligation on the part of the conductor to find comfortable shelter, outside the car, for a female passenger, although there may be a moral obligation on him so to do—Prospert v. Rhode Island Suburban R. Co, 67 A. 522, 28 R.I. 367, 11 L.R.A.,N.S., 1142.

73. Ill.—Chicago, etc, R. Co. v. Fisher, 31 Ill App. 36.

74. Ala.—Birmingtón R. Light, etc., Co. v. Anderson, 57 So 103, 3 Ala. App. 424
Ill.—Chicago, etc., R. Co. v. Fisher, 31 Ill App. 36.
10 C.J. p 805 note 73.

75. Ky.—Chesapeake, etc., R. Co. v. Austin, 126 S.W. 144, 137 Ky. 611, 136 Am.S.R. 307.
10 C.J. p 805 note 74.

76. Ind.—Lafayette, etc., R. Co. v. Sims, 27 Ind. 59.

77. Ky.—Chesapeake, etc, R. Co. v. Austin, 126 S.W. 144, 137 Ky. 611, 136 Am.S.R. 307.

78. Ill.—Chicago, etc., R. Co. v. Fisher, 31 Ill.App. 36.

79. Tex.—Young v. Schaff, Civ.App., 283 S.W. 186.

Woman riding with sick husband

Railroad, being required by statute to accept corpse for transportation, was not liable for resulting illness and mental anguish of woman riding in baggage car with sick husband.—Young v. Schaff, Tex.Civ. App, 283 S.W. 186.

80. Tex.—Missouri, K. & T. Ry. Co. of Texas v. Nelson, Civ.App., 195 S.W. 1176

81. Ky.—Chesapeake, etc., R. Co. v. Austin, 126 S.W. 144, 137 Ky. 611, 136 Am.S.R. 307.
10 C.J. p 807 note 94.

82. U.S.—Louisville & N. R. Co v. Fisher, Tenn., 155 F. 68, 83 C.C.A. 584, 11 L.R.A.,N.S, 926.

Wreck

In case of a wreck a sleeping car passenger may be compelled to ride in a day coach—Louisville & N. R. Co. v. Fisher, Tenn, 155 F. 68, 83 C.C.A. 584, 11 L.R.A.,N.S., 926.

83. Ga.—Southern R. Co. v. Wood, 39 S.E. 922, 114 Ga. 159.
10 C.J. p 807 note 97.

84. Mich.—Freeman v. Detroit, etc., R Co., 32 N.W. 833, 65 Mich. 577.
10 C.J. p 805 note 81 [a], [b].

85. Ky.—Hollon v. Louisville & N. R. Co, 272 S.W. 740, 209 Ky. 287, 42 A.L.R. 155.
Okl.—Chapman v. Red Ball Bus & Baggage Co., 49 P.2d 685, 173 Okl. 599.
10 C.J p 806 note 82.

86. Ky.—Hollon v. Louisville & N. R. Co., 272 S.W. 740, 209 Ky. 287, 42 A.L.R. 155.
10 C.J. p 806 note 83.
Exhibition and surrender of tickets generally see supra § 609.

time withhold from the carrier his fare or ticket, but he should leave the train or car at the first opportunity,[87] or be subject to ejection, as shown infra § 810. A carrier, however, is not bound under all circumstances to furnish a sufficient number of cars to accommodate all with seats who may apply for transportation, as unforeseen emergencies may often arise where the performance of such duty would involve an impossibility; it is required to furnish only suitable seating accommodations for the ordinary amount of travel, or for an extraordinary number on reasonable notice,[88] although it must furnish a sufficient number of coaches for an influx of passengers which it should anticipate.[89] Under the rule, it has been held that the carrier is not liable to a colored passenger who is unable to get a seat because of the white passengers crowding over into the colored coach.[90] If a passenger with notice of the circumstances takes passage on a crowded car and surrenders his ticket or pays fare, he waives strict performance of his contract rights to a seat,[91] unless the conductor promises him that sufficient accommodations will be provided.[92] If the carrier receives a passenger without condition or notice of its inability to provide for his safety, it assumes all the obligations usually incumbent on a carrier.[93]

A passenger may not dictate where he shall sit or in what car he shall ride,[94] except that, where his ticket entitles him to ride in a particular seat or car, the carrier must, unless a sudden or unusual influx of passengers makes it impracticable, furnish him with a seat in such car, and to do this must, if necessary, limit passengers to single seats.[95] It is not a breach of duty on the part of the carrier to assign a passenger to the smoking car, but the passenger should be permitted to ride in another coach if room is available and he communicates his wish to do so to the conductor.[96] A carrier may properly provide reasonable rules and regulations for the seating of passengers;[97] and a rule restricting passengers to the use of one seat each if cars are not crowded, and to one half of a seat if they are crowded, and prohibiting backs of seats from being turned so as to make the seats face each other, and not allowing passengers to place baggage on seats in front of them is a reasonable one,[98] as is also a rule requiring conductors to permit a passenger who has failed to get the ticket really desired, on complaint made of the true condition, to ride in the coach in which he would have been entitled to ride if no mistake had been made, on payment of the difference in price of tickets.[99]

d. Separate Accommodation for Races

Independently of, or in accordance with, statutes a carrier may prescribe reasonable regulations for the separation of white and colored passengers if equal and like accommodations are afforded to both races.

A common carrier, independently of statute, has the right to prescribe reasonable regulations for the separation of white and colored passengers, giving equal and like accommodations to both;[1] if equal accommodations are provided it is not guilty of discrimination and it does not violate the civil rights of a passenger, see C.J.S. title Civil Rights § 10, also 11 C.J. p 809 note 90. Under a statute specifically providing for the separate accommodation of races, the carrier may make reasonable rules

87. Ga.—Rossman v. Georgia Ry. & Power Co., 91 S.E. 90, 146 Ga. 264, L.R.A.1917C 483
Ky.—Hollon v. Louisville & N. R. Co., 272 S.W. 740, 209 Ky. 287, 42 A.L.R. 155.
10 C.J. p 734 note 44 [a].

88. S.C.—Case v. Seaboard Air Line R. Co., 77 S.E. 1017, 92 S.C. 282, Ann.Cas.1915A 1065, L.R.A.1915B 915.
10 C.J. p 807 note 90.

Corpus Juris is cited with approval in:
Ky.—Hatfield v. Payne, 242 S.W. 32, 195 Ky. 310.
Miss.—Anderson v. Gulf & S. I. R. Co., 113 So. 188, 147 Miss. 164.

89. Ky.—Hatfield v. Payne, 242 S.W. 32, 195 Ky. 310.

90. Ark.—St. Louis, etc., R. Co. v. Petties, 138 S.W. 961, 99 Ark. 415.
10 C.J. p 807 note 92.

91. Ky.—Hollon v. Louisville & N. R. Co., 272 S.W. 740, 209 Ky. 287, 42 A.L.R. 155.
10 C.J. p 807 note 91.

92. N.Y.—Davis v. New York Cent. R. Co., 298 N.Y.S. 44, 163 Misc. 710.

93. Ind.—Evansville, etc., R. Co. v. Duncan, 92 Am.D. 322, 28 Ind. 441.
N.C.—Purcell v. Richmond, etc., R. Co., 12 S.E. 954, 956, 108 N.C. 414, 12 L.R.A. 113.

94. Ky.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.
10 C.J. p 806 note 85.

95. Miss.—Louisville, etc., R. Co. v. Patterson, 13 So. 697, 69 Miss. 421, 22 L.R.A. 259.

96. Ky.—Payne v. Combs, 249 S.W. 1031, 198 Ky. 749
10 C.J. p 806 note 85 [d], [e].

Female passenger
It is not, as a matter of law, a breach of duty to assign a female passenger to a seat in the smoking car. Such passenger should be permitted to enter a ladies' coach, if room is available therein, and should not be required to ride in the smoker, if smoking is offensive to her, and that fact is communicated to the agent in charge of the train; but if she voluntarily enters the smoker, and fails to request the agent to find her a seat elsewhere, she cannot complain of the smoke —Payne v. Combs, 249 S.W. 1031, 198 Ky. 749.

97. Mo.—McLain v. St. Louis, etc., R. Co., 111 S.W. 835, 131 Mo.App. 733.

98. Tex.—Gulf, etc., R. Co. v. Moody, Civ.App., 30 S.W. 574.

99. Miss.—Alabama, etc., R. Co. v. Drummond, 20 So. 7, 73 Miss. 813.

1. Ky.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.
N.C.—Huff v. Norfolk-Southern R. Co., 88 S.E. 344, 171 N.C. 203, L.R.A.1916E 278.
10 C.J. p 804 note 58—11 C.J. p 809 note 88.

or regulations as to the time and manner of designating the respective compartments of the races[2]

It is the duty of the conductor or other proper employee to exercise reasonable care in ascertaining the race to which the passenger belongs and in assigning passengers to the proper coaches;[3] if in arriving at his conclusion he makes an honest mistake as to the race to which the passenger belongs, the carrier is not responsible in damages,[4] but if he fails to exercise ordinary care, diligence, and judgment in this regard, whereby a passenger of one race is compelled to ride in a coach or compartment set apart for passengers of another race, the carrier may be held liable in damages.[5]

Where a white[6] or negro[7] passenger is compelled, in violation of the statute, to ride in a compartment with members of the other race he may recover damages, but the mere violation of the statute does not of itself confer a right of action in favor of a passenger if no damages are sustained.[8]

The carrier is not liable where a passenger of one race voluntarily rides in a coach intended for passengers of the other race,[9] and so it is not liable to a white passenger who, because of the unexpectedly large influx of passengers, can get a seat only in the compartment for colored passengers, where the passenger voluntarily takes a seat there.[10]

Such a statute does not require that separate dining cars shall be provided, and does not prohibit a railroad from adopting a rule by which it serves white persons at one hour and negroes at another, but the carrier may be liable for negligence in making a call to the dining car for white persons at a time when negroes are about to be served.[11] The carrier does not violate a duty to a white passenger by failing to provide separate accommodations in a caboose attached to a freight train, where the statute expressly contains an exception to that effect.[12]

Assignment of seats. Under a statute so providing, a conductor has the duty and is empowered not only to assign a seat at the time a passenger enters the car but to make such necessary reassignments as the exigencies of the traffic may require,[13] and he may use reasonably necessary force to compel the passenger to comply therewith.[14]

Furnishing step-boxes. In accordance with the necessity that the separate coaches or cars shall be equal in all points of comfort and convenience, the carrier must provide step-boxes at the entrance of coaches for negro passengers when such are provided at the entrances for white passengers.[15] Duty to furnish step-boxes generally see infra § 728.

Officer and prisoner. The carrier may require a white officer to keep his negro prisoner in the coach or compartment for colored passengers, and it is not liable for damages at the suit of the officer if the conductor or servant in charge does so without insult or undue violence, where the statute makes no provisions or exceptions in favor of officers having prisoners in their charge,[16] or even where the statute expressly excepts officers transporting prisoners from its provisions, the exception being created in favor of the officer only.[17]

2. Ark.—Bradford v. St. Louis, etc., R. Co., 124 S.W. 516, 93 Ark. 244.

3. Tenn.—Nashville, C. & St. L. R. Co. v. Cathey, 4 Tenn.Civ.A. 346.

4. Va.—Virginia Ry. & Power Co. v. Deaton, 137 S.E. 500, 147 Va. 576. 10 C.J. p 804 note 62.

5. Tenn.—Nashville, C. & St. L. R. Co. v. Cathey, 4 Tenn.Civ.A. 346. 10 C.J. p 804 note 63.

6. Ark.—Chicago, etc., R. Co. v. Allison, 178 S.W. 401, 120 Ark. 54.
Ky.—Chesapeake, etc., R. Co. v. Austin, 126 S.W. 144, 137 Ky. 611, 136 Am.S.R. 307.

Sign changed by outside agency
The rule in the text is true even though there were other coaches on the train for white persons and the sign designating the coach had been changed by some outside agency.—Payne v. Stevens, 88 So. 165, 125 Miss. 582, petition dismissed 43 S.Ct. 165, 260 U.S. 705, 67 L.Ed. 473.

7. Ky.—Conley v. Central Kentucky Tract. Co., 154 S.W. 41, 152 Ky. 764.

8. Ark.—Hines v. Meador, 224 S.W. 742, 145 Ark. 356.

9. Miss.—Anderson v. Gulf & S. I. R. Co., 113 So. 188, 147 Miss. 164. 10 C.J. p 805 note 64.

10. Miss.—Anderson v. Gulf & S. I. R. Co., supra.
10 C.J. p 805 note 64 [a].

11. Tenn.—Shelton v. Chicago, R. I. & P. R. Co., 201 S.W. 521, 139 Tenn. 378, L.R.A.1918D 707.

12. Okl.—St. Louis, I. M. & S. Ry. Co. v. Freeland, 134 P. 47, 39 Okl. 60.

13. Ark.—Little Rock Ry. & Electric Co. v. Hampton, 165 S.W. 289, 112 Ark. 194.—Bradford v. St. Louis, etc., R. Co., 124 S.W. 516, 93 Ark. 244.
Ga.—Savannah Electric Co. v. Lowe, 108 S.E. 313, 27 Ga.App. 350.

14. Ark.—Little Rock Ry. & Electric Co. v. Hampton, 165 S.W. 289, 112 Ark. 194.

Calling officers
Where colored passenger refused to exchange seat with white passenger as requested by bus driver in accordance with state segregation law, and driver called officers who arrested colored passenger for disorderly conduct when she used profane language and refused to move on officers' request, but bus driver did not assist in ejecting passenger from bus, bus company was not liable to passenger for breach of contract.—Kinchlow v. Peoples Rapid Transit Co., D.C., 88 F.2d 764.

15. Okl.—St. Louis-San Francisco Ry. Co. v. Loftus, 234 P. 607, 109 Okl. 141.

16. Ala.—Spenny v. Mobile & O. R. Co., 68 So. 870, 192 Ala. 483, denying certiorari 67 So. 740, 12 Ala. App. 375.
Ill.—Illinois Cent. R. Co. v. Cox, 96 So. 685, 132 Miss. 471.
Tex.—Gulf, C. & S. F. Ry. Co. v. Sharman, Civ.App., 158 S.W. 1045.

17. Ky.—Louisville, etc., R. Co. v.

§ 646. Continuous Trip According to Terms of Contract

A passenger is entitled to transportation from the point indicated by his ticket as the beginning of his journey, but he may begin his journey at an intermediate point. He is not entitled to leave the train on personal business or pleasure; and the carrier, unless the conductor has announced the time the train will remain standing and the passenger relies thereon, is not liable for departing before the return of a passenger who has absented himself. The words "continuous passage" on a ticket do not import that a passenger shall be carried without any stop or change.

The passenger is entitled to transportation from the point indicated by his ticket as the beginning of his journey to his destination, and not in the opposite direction;[18] and the facts that the holder has been permitted on former occasions to make a reverse trip on a ticket calling for passage in one direction, and that a conductor on another train at another time gave his opinion to the holder that the ticket would be good for passage either way, do not alter the rule.[19] Where the conditions of the ticket require a continuous journey, the passenger may, nevertheless, commence his journey at an intermediate point.[20] A passenger has no legal right unnecessarily to leave the train on personal business or pleasure at an intermediate station where the train is detained for an unusual length of time, and if he does so the carrier is not liable if the train departs before his return.[21] However, the carrier is liable if the conductor announces or states as a fact the period of time the train will remain standing and the passenger by relying on the statement is left behind,[22] but this rule is not applicable where the conductor, not knowing of the passenger's intention to leave, merely gives his opinion as to the time the train will start.[23]

The words "continuous passage" have been held to mean the continuous passage of the person to whom the ticket was issued, and not that of the train;[24] they do not import that he shall be carried without any stop or change of cars[25]

Requirements as to change or transfer are discussed in § 648 infra.

§ 647. Stop-Over Privileges

In the absence of statute or of an agreement, a passenger is not entitled on the original ticket to stop-over at an intermediate point. Under an agreement or a statute so providing, a passenger may be entitled to stop over at intermediate points if the conditions of the stop-over privilege are complied with. Generally, a passenger holding a coupon ticket may stop over at any connecting point.

In the absence of a contract to the contrary arising from special provisions, or implied from usage or regulation, a ticket entitles a passenger only to continuous transportation from the initial point to the end of his journey; and if, after commencing the journey, he stops off or abandons it before reaching his destination, he is not entitled to complete it on another train or at another time, under the original ticket or payment of fare,[26] particularly where the ticket expressly provides that the trip shall be continuous, although this simply expresses the general rule of law.[27] Likewise the passenger cannot, instead of himself resuming his journey on a subsequent train, introduce some

Catron, 43 S.W. 443, 102 Ky. 323, 19 Ky.L. 1346

N.C.—Huff v. Norfolk-Southern R. Co., 88 S.E. 344, 171 N.C. 203, L.R.A.1916E 278.

18. Cal.—Squires v. Southern Pac. Co., 183 P. 695, 42 Cal.App. 459. 10 C.J. p. 807 note 98.

19. Me.—Keeley v. Boston, etc., R. Co., 67 Me. 163, 24 Am.R. 19.

20. Ga.—Georgia R., etc., Co. v. Clarke, 25 S.E. 368, 97 Ga. 706.

N.Y.—Auerbach v. New York Cent., etc., R. Co., 89 N.Y. 281, 42 Am.R. 290.

21. Ga.—Southern Ry. Co. v. Stephens, 98 S.E. 176, 23 Ga.App. 200.

Tex.—Missouri, etc., R. Co. v. Price, 106 S.W. 700, 48 Tex.Civ.App. 210.

22. Ala.—Louisville & N. R. Co. v. McCue, 114 So. 218, 216 Ala. 616, 61 A.L.R. 400

Tex.—Missouri, etc., R. Co. v. Price, 106 S.W. 700, 48 Tex.Civ.App. 210.

Scope of conductor's authority

It is within the scope of the authority of the conductor to announce to a passenger, at his request, the name of the station at which the train is then stopped, to state to him the length of time the train will remain there, and to hold the train, in accordance with the answer, for the time so designated.—Missouri, etc., R. Co. v. Price, 106 S.W. 700, 48 Tex.Civ.App. 210.

23. Ga.—Southern Ry. Co. v. Stephens, 98 S.E. 176, 23 Ga.App. 200.

Presumption that passenger will absent himself

Where train was detained at a station and passenger asked conductor how long he expected to remain, conductor could not be presumed to know that passenger intended to absent himself from station grounds, and his answer in good faith neither increased nor diminished carrier's duty or liability.—Southern Ry. Co. v. Stephens, 98 S.E. 176, 23 Ga.App. 200.

Departure to inspect mill

A passenger who, after being told by the conductor that the train would remain about an hour, relied thereon, and left to inspect a mill a quarter of a mile away, and on returning in about three-quarters of an hour found that train had left, could not recover against the carrier.—Southern Ry. Co. v. Stephens, 98 S.E. 176, 23 Ga.App. 200.

24. Mo.—Walker v. Wabash, etc., R. Co., 15 Mo.App. 333.

Mont.—Brian v. Oregon Short Line R. Co., 105 P. 489, 40 Mont. 109, 25 L.R.A.,N.S., 459, 20 Ann.Cas. 311.

25. Ill.—Kirsch v. East St. Louis & Suburban Ry. Co., 210 Ill.App. 662. 10 C.J. p. 808 note 8.

26. N.J.—Pennsylvania R. Co. v. Parry, 27 A. 914, 55 N.J.Law 551, 39 Am.S.R. 654, 22 L.R.A. 251.

Tenn.—Louisville, etc., R. Co. v. Klyman, 67 S.W. 472, 108 Tenn. 304, 91 Am.S.R. 755, 56 L.R.A. 769. 10 C.J. p. 807 notes 2, 3.

27. N.Y.—Barker v. Coflin, 31 Barb. 556.

one else in his stead, and compel the carrier to complete the contract by carrying such other person on a subsequent train.[28] Should a passenger attempt to resume his journey by virtue of the same ticket, the conductor may demand the regular fare; but before doing this, or before ejecting him for refusing to pay the same, he must return to such passenger the ticket which he has declined to honor.[29] A ticket marked "good for one seat," etc., has been construed to mean one seat in the same train on which the holder takes passage, and that he is to be carried by that train only, and not by train after train, and by broken stages, day after day.[30]

Stop-over; when permitted in general. The carrier may by special agreement bind itself by the grant of the privilege of stopping over at an intermediate station; but in order to have this effect, the agreement must have been made by competent authority.[31] Time in these contracts is usually an important element, because, in as much as the carrier is required to furnish accommodation for all persons who apply for passage on any day, it is important to know how many are to be carried, and this cannot be known if there are persons holding tickets who have a right to apply for passage along the route in numbers entirely unknown.[32] It has been held that where a passenger is informed by the conductor that he may stop off en route, and then continue his journey on the same ticket, and when, in pursuance of such advice, he leaves that train and boards another, the company is bound to carry him to the end of his route;[33] but the contrary has been held, where the ticket expressly restricted the passenger to a continuous trip and provided that no agent had authority to modify the contract.[34]

Under a regulation giving the privilege of stopping over, a passenger has the right to rely on the assurances of the conductor with reference thereto.[35] Where a usage is relied on as giving a right to stop over, the subsequent change of the usage by a rule has been held binding on the passenger, although he had no notice thereof,[36] and the mere fact that a passenger has been allowed on some occasions to stop over does not entitle him to do so on other occasions.[37]

When expressly so provided by statute, a passenger is entitled to stop over at an intermediate point;[38] and a company may be required to sell tickets with stop-over privileges or be subject to a penalty for violation of the provisions of the statute.[39] A statute requiring the sale of stop-over tickets has no extraterritorial operation,[40] although it applies to a foreign corporation while acting as a carrier in the state.[41] Such a statute does not apply to one who demands a ticket with a desire that it shall be refused and for the sole purpose of laying a foundation to recover the penalty.[42]

Where the continuity of the journey is interrupted by misfortune or accident, without fault on the part of the passenger, he is entitled to continue his journey by another train.[43]

Compliance with conditions. Where the passenger's ticket, or a regulation of the company, attaches certain conditions to the stop-over privilege, the passenger is entitled to that privilege only on complying with such conditions,[44] such as a condition requiring the passenger to obtain from the conductor, or other train officer, his indorsement of the ticket or check[45] or a stop-over check.[46] Where a conductor's check is given, it must contain a clause expressly authorizing the stop-over priv-

28. Mo.—Walker v. Wabash, etc., R. Co., 15 Mo App. 333.

29. Pa.—Vankirk v. Pennsylvania R. Co., 76 Pa. 66, 18 Am R. 404.

30. Pa.—Dietrich v. Pennsylvania R. Co., 71 Pa. 432, 437, 10 Am R. 711.

31. U.S.—Scofield v. Pennsylvania Co., Ohio, 112 F. 855, 50 C.C.A. 553, 56 L.R.A. 224.
10 C.J. p 808 note 10.

32. N.Y.—Terry v. Flushing, etc., R. Co., 13 Hun 359.

33. N.Y.—Tarbell v. Northern Cent. R. Co., 24 Hun 51.
10 C.J. p 808 note 12.

34. Mont.—Sanden v. Northern Pac. R. Co., 115 P. 408, 43 Mont. 209, 34 L.R.A.,N.S., 711.
10 C.J. p 809 note 13.

35. U.S.—New York, etc., R. Co. v. Winter, 12 S.Ct. 356, 143 U.S. 60, 36 L.Ed. 71.
Ky.—Wilsey v. Louisville, etc., R. Co., 83 Ky. 511, 7 Ky.L. 498.
Mo.—Cherry v. Kansas City, etc., R. Co., 52 Mo App. 499.

36. N.H.—Johnson v. Concord R. Corp., 46 N.H. 213, 88 Am.D. 199.

37. Iowa.—Stone v. Chicago, etc., R. Co., 47 Iowa 82, 29 Am.R. 458.
N.Y.—Denny v. New York Cent., etc., R. Co., 5 Daly 50.

38. Cal.—Robinson v. Southern Pac. R. Co., 38 P. 94, 722, 105 Cal. 526, 28 L.R.A. 773.
Me.—Carpenter v. Grand Trunk R. Co., 72 Me. 388, 39 Am.R. 340.
10 C.J. p 809 note 18.

39. Cal.—Southern Pac. Co. v. Robinson, 64 P. 572, 132 Cal. 408, 12 L.R.A.,N.S., 497.

40. Me.—Carpenter v. Grand Trunk R. Co., 72 Me. 388, 39 Am.R. 340.
Mass.—Boston, etc., R. Co. v. Trafton, 33 N.E. 829, 151 Mass. 229.

41. Me.—Dryden v. Grand Trunk R. Co., 60 Me. 512.

42. Cal.—Southern Pac. Co. v. Robinson, 64 P. 572, 132 Cal. 408, 12 L.R.A.,N.S., 497.

43. Ky.—Wilsey v. Louisville, etc., R. Co., 83 Ky. 511.
Pa.—Dietrich v. Pennsylvania R. Co., 71 Pa. 432, 10 Am.R. 711.
10 C.J. p 809 note 23.

44. Wis.—Yorton v. Milwaukee, etc., R. Co., 11 N.W. 482, 54 Wis. 234, 41 Am.R. 23.
10 C.J. p 809 note 14.

45. N.Y.—Beebe v. Ayres, 28 Barb. 275.

46. Mass.—Dixon v. New England R. Co., 60 N.E. 581, 179 Mass. 242.
10 C.J. p 810 note 30.

ilege, as such check in the ordinary form is a mere certificate of payment of fare or surrender of the regular ticket and will not entitle the passenger to a stop-over.[47]

The stop-over privilege is exhausted by the expiration of the time for which it was granted,[48] or by one exercise thereof.[49]

Ticket in coupon form. An ordinary coupon ticket which amounts in effect to separate contracts of transportation over distinct lines, and with no special stipulations as to the journey being continuous, permits the passenger to stop off at any connecting point and subsequently avail himself of the coupons entitling him to transportation for the remainder of his journey.[50] This is true with reference to the several divisions of a system owned or operated by one management,[51] but a passenger has no right, under this rule, to stop over at a station between such connecting points.[52] The ticket may provide that the passage must be continuous to the point of destination, but provisions on this subject must be clear, and when they are of doubtful import they will be construed against the company, and the passenger will be held to have the right to stop over at terminal points.[53]

§ 648. Transferring from One Car or Train to Another; Street Car Transfers

a. In general
b. Statutory regulations
c. Duty of employee to give transfer; acceptance
d. Transfer tickets or tokens in general
e. Time of demanding transfer
f. Point of transfer
g. Time limit for use of transfer
h. Inspection of transfer

a. In General

A carrier may by reasonable regulation require that passengers for a certain point shall go through without change on some trains and on others that they shall change at an intervening station. In case of an accident or delay a passenger may be required to transfer to another train or car. The carrier must notify passengers of a regulation requiring a change, but special or individual notice or information is not necessary in the absence of a request therefor.

A carrier may by a reasonable regulation require that passengers for a certain point shall go through without change on some trains and on others that they shall change at an intervening station,[54] and a passenger is not entitled to damages for being required to change cars before reaching the destination to which he holds a ticket,[55] unless the regulation is under the circumstances unreasonable,[56] unless under the rules and schedules of the carrier such station is a stopping place for the train on which he takes passage,[57] or unless he was assured by the agent of the company, from whom he purchased his ticket, that a change of cars would not be necessary.[58] In the latter case the carrier is not relieved from liability by a rule that a passenger may expect to be accorded by the conductor only such rights as his ticket on its face entitles him to, although it has been held that the passenger must conform to the reasonable requirements of such rule so as not to increase his damages.[59] A passenger may be required, under the rules of the company, to take a through car to his destination and may be refused a transfer if he takes a car which he knows is going only part of the way,[60] or if he takes a car which will carry him to his destination in the same time and by practically as short a route without transferring.[61] On the other hand, he may be required, under the rules of the carrier, to transfer from a short service car, at the end of its run, to a through car,[62] and he may be entitled by stat-

47. Minn.—Wyman v. Northern Pac. R. Co., 25 N.W. 349, 34 Minn. 210.
10 C.J. p 810 note 31.

48. Ill.—Churchill v. Chicago, etc., R. Co., 67 Ill. 390.
Mo.—Cherry v. Chicago, etc., R. Co., 90 S.W. 381, 191 Mo. 489, 109 Am. S.R. 830, 2 L.R.A.,N.S., 695.
10 C.J. p 810 note 32.

49. N.Y.—Denny v. New York Cent., etc., R. Co., 5 Daly 50.

50. Mo.—Cherry v. Chicago, etc., R. Co., 90 S.W. 381, 191 Mo. 489, 109 Am.S.R. 830, 2 L.R.A.,N.S., 695.
Or.—Nichols v. Southern Pac. Co., 31 P. 296, 23 Or. 123, 37 Am.S.R. 664, 18 L.R.A. 55.
10 C.J. p 809 note 24.

51. Ga.—Spencer v. Lovejoy, 23 S.E. 836, 96 Ga. 657, 51 Am.S.R. 152.

52. Mont.—Brian v. Oregon Short Line R. Co., 105 P. 489, 40 Mont. 109, 25 L.R.A.,N.S., 459, 20 Ann.Cas. 311.
10 C.J. p 809 note 26.

53. N.Y.—Auerbach v. New York Cent., etc., R. Co., 89 N.Y. 281, 42 Am.R. 290.

54. Tex.—St. Louis Southwestern R. Co. v. McCullough, 45 S.W. 324, 18 Tex.Civ.App. 534.

55. Ill.—Kirsch v. East St. Louis & Suburban Ry. Co., 210 Ill.App. 662
S.C.—May v. Seaboard Air Line Ry. Co., 96 S.E. 482, 110 S.C. 84.
10 C.J. p 810 note 35

56. N.Y.—Goodman v. New York R. Co., 148 N.Y.S. 279, 86 Misc. 43.
10 C.J. p 810 note 36.

57. Ala.—Louisville, etc., R. Co. v. Thomason, 60 So. 506, 6 Ala.App. 365.

58. Ala.—Louisville, etc., R. Co. v. Thomason, supra.
D.C.—Dye v. Virginia Midland R. Co., 20 D.C. 63
Mo.—Dillon v. Lindell R. Co., 64 Mo. App. 418.

59. Ala.—Louisville, etc., R. Co. v. Thomason, 60 So. 506, 6 Ala.App. 365.

60. Wash.—Mills v. Seattle, etc., R. Co., 96 P. 520, 50 Wash. 20, 19 L.R.A.,N.S., 704
10 C.J. p 810 note 41.

61. Mo.—Curran v. United Rys. Co. of St. Louis, 196 S.W. 56, 197 Mo. App. 397.

62. N.Y.—Goodman v. New York R. Co., 148 N.Y.S. 279, 86 Misc. 43—

ute to such a transfer.[63] Where a company is bound under its franchise to issue transfers, the court will not make an order in anticipation of a breach by the company.[64] The passenger must comply with the conditions of the transfer and regulations of the carrier with respect thereto to be entitled to a transfer and transportation in accordance therewith on connecting lines.[65]

Accident or delay. In case of an accident or delay to the car on which a passenger is riding, he may be required to transfer to another car,[66] and it has been held that a passenger is entitled to make such transfer without paying a second fare, where the car on which he is riding is, through accident or otherwise, unreasonably delayed.[67] However, the fact that the car on which a passenger is being carried becomes disabled, and the carrier refuses to transfer him to another car for the original fare, does not entitle him to transfer himself to another car and continue his journey without paying a second fare; by so doing he does not subject the carrier to further liability and if he is ejected therefor, he can recover only for breach of the contract to carry within a reasonable time.[68] A carrier is not bound by a conductor's agreement to forward a passenger where his train has been delayed by unavoidable accident.[69]

Notice of change of cars. A primary duty rests on the carrier to notify passengers of a regulation requiring a change of cars,[70] but, in the absence of a request therefor, special notice or information need not be given,[71] and a reasonable notice is sufficient.[72] Where a passenger learns that he must change cars to reach his destination, it is his duty to ascertain where he must make such change, and if by his failure so to do he misses connection or is carried over a wrong line the company is not liable,[73] unless he was misled by the carrier's authorized agents or servants.[74] The carrier is liable where, on request, its agents negligently fail or refuse to inform a passenger as to the point where he will have to change.[75]

b. Statutory Regulations

Under statutes, municipal regulations, or orders of the public service commission, a street railroad may be required to issue transfers to a connecting line, leased or operated by the same company within the city limits.

Statutory or municipal regulations are sometimes made and held reasonable which require that a transfer shall be given on the change of a passenger from one street railroad line to a connecting line, leased or operated by the same company within the city's limits,[76] and under some regulations a system of transfers may be ordered by the corporation or public service commission.[77] This duty of

Goodman v. New York R. Co., 142 N.Y.S. 520, 81 Misc. 207.

63. N.Y.—Goodman v. New York R. Co., 150 N.Y.S. 702, 88 Misc. 95.

"Short service car" defined.—A car not running to the end of a street railway company's line, but only to a given street, is a "short service car."—Goodman v. New York R. Co., 150 N.Y.S. 702, 88 Misc. 95.

64. Wash.—McGilvra v. Seattle Electric Co., 111 P. 896, 61 Wash. 38, Ann.Cas 1912B 1020.

65. Mich.—Heffron v. Detroit City R. Co., 52 N.W. 802, 92 Mich. 406, 31 Am.S.R. 601, 16 L.R.A. 345.

66. Mo.—Dryden v. St. Louis Transit Co., 96 S.W. 1044, 120 Mo.App. 424. 10 C.J. p 810 note 44.

Cars following in close proximity

A passenger on an interurban car running over a river between two cities is not refused a continuous passage to the terminal city, where, owing to the "bunching" of three cars, because of an accident, in the city in which passage is taken, the conductor requests the passenger to take a transfer and get on the car following in close proximity, which he refuses to do, and remains on the car until it rounds a loop and starts on its return trip.—Kirsch v. East St. Louis & Suburban Ry. Co., 210 Ill.App. 662.

67. Ky.—Wilsey v. Louisville, etc., R. Co., 12 S.W. 275, 83 Ky. 51, 11 Ky.L. 419, 5 L.R.A. 855.

68. Ga.—Hornesby v. Georgia R., etc., Co., 48 S.E. 339, 120 Ga. 913, 1 Ann.Cas. 1396.

N.Y.—Taylor v. Nassau Electric R. Co., 53 N.Y.S. 5, 32 App.Div. 486.

69. Tex.—Houston, etc., R. Co. v. Rogers, 40 S.W. 201, 16 Tex.Civ. App. 19.

70. Ala.—Central of Georgia R. Co. v. Ashley, 48 So. 981, 159 Ala. 145.

71. Ark.—St. Louis, I. M. & S. Ry. Co. v. Needham, 184 S.W. 47, 122 Ark. 584.

Ga.—Williams v. East Coast Stages Co., 182 S.E. 415, 52 Ga.App. 77.

72. N.Y.—Barker v. New York Cent. R. Co., 24 N.Y. 599.

"If the defendant gave such published notice of the running of its trains, and such special notice in the cars, of the necessity of changing cars at any particular station, that every traveler of ordinary intelligence, by the use of reasonable care and caution, would obtain all the requisite information as to the route to be traveled, and the cars to be taken at any intermediate point of the voyage, it discharges its whole duty in this respect."—Page v. New York Cent. R. Co., 13 N.Y.Super. 523, 529.

73. Ark.—St. Louis, I. M. & S. Ry. Co. v. Needham, 184 S.W. 47, 122 Ark. 584.

10 C.J. p 811 notes 49, 50.

74. Ark.—Chicago, R. I. & P. R. Co. v. Floyd, 171 S.W. 913, 115 Ark. 607.

Tex.—St. Louis Southwestern R. Co. v. McCullough, 45 S.W. 324, 18 Tex. Civ.App. 534.

10 C.J. p 811 note 51.

75. Okl.—Lilly v. St. Louis, etc., R. Co., 122 P. 502, 31 Okl. 521, 39 L.R.A.,N.S., 663.

76. Ill.—Chicago Union Tract. Co. v. Chicago, 65 N.E. 451, 199 Ill. 484, 59 L.R.A. 631.

10 C.J. p 811 note 53.

Right, not privilege

Under a statute requiring the giving of transfers, a transfer to a passenger is not a privilege but a right. —City of Cincinnati v. Cincinnati St. Ry. Co., 3 Ohio N.P.,N.S., 489.

Urban and interburban passengers

Within city limits, urban and interurban passengers have precisely the same rights as to transportation on transfer.—City of Cincinnati v. Cincinnati St. Ry. Co., 3 Ohio N.P., N.S., 489.

77. N.Y.—Willcox v. Richmond Light, etc., Co., 128 N.Y.S. 266, 142 App.Div. 44, affirmed 95 N.E. 1141, 202 N.Y. 515.

giving transfers rests not only on the technical owner, but also on the real or beneficial owner, of the lines,[78] and not only on transportation companies existing at the time the statute is enacted, but also on those coming into existence thereafter;[79] and also, in the absence of a provision to the contrary, this duty has been held to apply to the limits of the city as subsequently extended.[80] Under some regulations transfers may be required even to the lines of other carriers,[81] although, in the absence of statute, transfers cannot be required from one line to another, owned and operated by an independent transportation company,[82] or from a line in one city to a line in an adjoining city, although owned by the same company.[83] In the absence of express statutory authority a municipality has no authority to require the giving of transfers,[84] but the power of a municipality to fix a maximum rate of fare has been held to carry as an incident thereto the power to require tickets transferring passengers from one line to another of the same transportation company.[85] A statute requiring a street railroad company to accept transfers from contiguous independent lines is not unconstitutional, although a provision in the company's charter fixes the maximum rate of fare, nor is it unconstitutional in that it compels the carriage of transferred passengers at a loss, where presumptively the loss will not be such as to render the company's business unremunerative as a whole;[86] such a statute does not take property without due process of law, in that it requires the gratuitous carriage of certain persons, where, reciprocally, the contiguous line is required to accept its transfers, and commissioners are, by the statute, given the power to adjust any inequalities between the two, and where the statute extends the transfer privileges to all persons in the same circumstances, it is not objectionable as creating a favored class.[87]

Under New York statutes so providing, every street railway company within the concept of the statute shall, on demand and without extra charge, give to each passenger paying one single fare a transfer entitling such passenger to one continuous trip[88] to any point or portion of any railroad embraced in such contract[89] within the limits of any one incorporated city or village.[90] The statute includes every street railroad company which enters into a contract with another company for the use or lease of its road,[91] and a company formed by the consolidation of several companies.[92] In order that a passenger may be entitled to a transfer from one line to another under these statutes, the two lines must be operated as intersecting lines in one railroad system.[93] Such a statute is a valid exercise of the police power of the legislature.[94]

c. Duty of Employee to Give Transfer; Acceptance

It is the duty of the conductor to issue a transfer in a proper case on demand by a passenger and the latter may recover damages from the carrier for an unlawful refusal to issue or the issuance of an improper transfer. Generally, a passenger who accepts a transfer must comply with the reasonable rules or conditions on which it is issued.

Okl.—Oklahoma R. Co. v. Powell, 127 P. 1080, 33 Okl. 737.
Or.—Portland R., etc., Co. v. State R. Commn., 105 P. 709, 109 P. 273, 56 Or. 468
10 C.J. p 811 note 54.

78. Ill.—Chicago Union Tract. Co v. Chicago, 65 N.E. 451, 199 Ill. 484, 59 L.R.A. 631.
10 C.J. p 811 note 55.

79. Ill.—Chicago Union Tract. Co. v. Chicago, supra.

80. Ind.—Indiana R. Co. v. Hoffman, 69 N.E. 399, 161 Ind. 593.
10 C.J. p 811 note 57.

81. Va.—Virginia Passenger, etc., Co. v. Com., 49 S.E. 995, 103 Va. 644.
10 C.J. p 811 note 58.

82. U.S.—Central Trust Co v. Third Ave. R. Co., C.C.N.Y., 165 F. 494.
Wash.—State v. Tacoma R., etc., Co., 112 P. 506, 61 Wash. 507, 32 L.R.A., N.S., 720.
10 C.J. p 812 note 59.

83. Vt.—Montpelier v. Barre, etc., Tract. etc., Co., 56 A. 278, 76 Vt. 66.
10 C.J. p 812 note 60.

84. U.S.—City of Atlanta v. Old Colony Trust Co., Ga., 88 F. 859, 32 C.C.A. 125, affirming, C.C., Old Colony Trust Co v. City of Atlanta, 83 F. 39
Pa.—Pittsburgh Ry. Co v. Alexander, 20 Pa.Dist. 413—City of Pittsburgh v. Pittsburgh Ry. Co., 20 Pa.Dist. 409

85. Ill.—Chicago Union Tract Co v. Chicago, 65 N.E. 451, 199 Ill. 484, 59 L.R.A. 631.
Pa.—City of Pittsburgh v. Pittsburgh Ry. Co., 20 Pa.Dist. 409.
10 C.J. p 812 note 61.

86. D.C.—District of Columbia v. Capital Tract. Co., 41 App.D.C. 115

87. D.C.—District of Columbia v. Capital Tract. Co., supra.

88. N.Y.—McLean v. Interurban St. R. Co., 92 N.Y.S. 77, 102 App.Div. 18, modifying 87 N.Y.S. 135.
10 C.J. p 812 note 69.

Statute pertaining to rate of fare

Under a New York statute providing that, subject to certain exceptions, not more than one fare shall be charged within the limits of any city or village for passage over the main line of road and any branch or extension thereof, Railroad Law § 181, a street railroad need not issue a transfer ticket to a passenger but is required only to transport the passenger to his destination without compelling payment of excess fare—King v Nassau Electric R. Co., 112 N.Y.S. 589, 128 App.Div. 130—10 C.J. p 812 note 66

89. N.Y.—Bull v New York City R. Co., 85 N.E. 385, 192 N.Y. 361, 19 L.R.A.,N.S., 778, affirming 106 N.Y.S. 378, 121 App.Div. 582.
10 C.J. p 813 note 70.

90. N.Y.—Blume v. Interurban St. R. Co., 83 N.Y.S. 989, 41 Misc. 171.
10 C.J. p 813 note 71.

91. N.Y.—Lux v. New York City R. Co., 92 N.Y.S. 109, 45 Misc. 222
10 C.J. p 812 note 67

92. N.Y.—Braffett v. Brooklyn, etc., R. Co., 97 N.E. 888, 204 N.Y. 440—Lowenstein v. International R. Co., 140 N.Y.S. 159

93. N.Y.—Oatman v. International Ry. Co., 163 N.Y.S. 495.
10 C.J. p 813 note 73.

94. N.Y.—Blume v. Interurban St. R. Co., 83 N.Y.S. 985, 41 Misc. 171.

On demand by a passenger, it is the duty of the conductor to give a proper transfer slip such as should be accepted by the conductor of the car to which the passenger is transferred.[95] If a street car passenger is unlawfully refused a transfer,[96] or if through fault of the agent or the conductor he is not furnished the proper transfer entitling him to ride on the connecting line, and is ejected therefrom,[97] he may recover damages therefor. It has been held that it is the duty of the passenger in such a case, on boarding a car on a connecting line, to pay the fare demanded by the conductor and to seek redress against the company for a violation of the passenger's right in refusing to transfer.[98]

Acceptance of transfer by passenger. Where a street railroad company holds out that it will issue a transfer when fare is paid, a request for a transfer is an acceptance of the offer, and the delivery of the transfer creates a contract to transport the passenger in both the original and the transfer car, the amount paid being a consideration for the right to ride on each car.[99] A passenger who accepts a transfer subject to reasonable rules or conditions must comply therewith,[1] except in case of an emergency,[2] provided reasonable notice of the existence of such rule is given to the public.[3]

d. Transfer Tickets or Tokens in General

A regulation requiring passengers to obtain and present transfer tickets is not unreasonable and passengers must comply therewith to be entitled to passage on succeeding cars. A custom to permit transfers without a token cannot be changed without notice.

Where street car lines are so operated that passengers are entitled to transfers from one line to another, a regulation of the carrier requiring passengers to obtain and present transfer tickets is not unreasonable, and passengers must comply therewith in order to be entitled to passage on succeeding cars.[4] Such a regulation cannot be waived either by the conductor of the car from which a passenger has come or by the conductor of the car to which he has changed.[5] Where it has been the custom of a street car company to permit passengers to transfer without a token of any kind, it cannot change such custom without giving notice of the change.[6] A street railroad company may, pursuant to its rules, refuse to take a transfer ticket which is mutilated after coming into the possession of the passenger, but cannot refuse to take one mutilated before it was given to him.[7]

e. Time of Demanding Transfer

A street railroad company may establish a rule that a passenger must demand a transfer at the time of payment of his fare or at a certain point on the line. The rule is to be reasonably construed in the light of surrounding circumstances.

The general rule which, as stated in Corpus Juris, has been quoted with approval,[8] is that in carrying out the system of transfers, it is a reasonable regulation for a street railroad company to establish a rule that a passenger must demand a transfer at the time of the payment of his fare,[9] or at a certain point on the line.[10] The rule must be reasonably construed, however, in the light of surrounding circumstances,[11] and the act of paying fare and the demand need not occur at the same second of time.[12] Such demand may be made by signs as well as orally.[13] A passenger may be excused from

95. Minn.—Morrill v. Minneapolis St R. Co., 115 N.W. 395, 103 Minn. 362, 123 Am.S.R. 341.
N.Y.—Rosenberg v. Brooklyn Heights R. Co., 86 N.Y.S. 871, 91 App.Div. 580.
10 C.J. p. 813 note 74.

96. Ky.—South Covington, etc., R. Co. v. Quinn, 110 S.W. 404, 33 Ky. L. 534.
N.Y.—Mannion v. International R. Co., 121 N.Y.S. 263, 66 Misc. 420.
10 C.J. p. 813 note 75.

97. Ala.—Birmingham R., etc., Co. v. Turner, 45 So. 671, 154 Ala. 542.
Ill.—Kiley v. Chicago City R. Co., 59 N.E. 794, 189 Ill. 384, 82 Am.S.R. 460, 52 L.R.A. 626.
Mo.—Green v. United Rys. of St. Louis, 206 S.W. 237, 200 Mo.App. 303.

98. Hawaii.—Rhodes v. Honolulu Rapid Transit, etc., Co., 16 Hawaii 319.

99. Ga.—Georgia R., etc., Co. v. Baker, 54 S.E. 639, 125 Ga. 562, 114 Am.S.R. 246, 7 L.R.A.,N.S., 103, 5 Ann.Cas. 484.

1. D.C.—Shortsleeves v. Capital Tract. Co., 28 App.D.C. 365, 8 L.R.A.,N.S., 287.
10 C.J. p. 813 note 79.

2. N.Y.—Bingemann v. International R. Co., 135 N.Y.S. 743, reversed on other grounds 138 N.Y.S. 1107, 153 App.Div. 935.

3. N.Y.—Goodman v. New York R. Co., 142 N.Y.S. 520, 81 Misc. 207—McGowan v. New York City R. Co., 99 N.Y.S. 835.

4. Ga.—Hornesby v. Georgia R., etc., Co., 48 S.E. 339, 120 Ga. 913, 1 Ann.Cas. 391.
10 C.J. p. 813 note 82.

5. Mass.—Crowley v. Fitchburg, etc., R. Co., 70 N.E. 56, 185 Mass. 279.

6. N.J.—Consolidated Tract. Co. v. Taborn, 32 A. 685, 58 N.J.Law 1, affirmed 36 A. 1128, 58 N.J.Law 408.

7. N.Y.—Koch v. New York City R. Co., 95 N.Y.S. 559.

8. Ala.—Birmingham Electric Co. v. Rylant, 174 So. 511, 234 Ala. 332, 590.

9. N.Y.—Crandall v. International R. Co., 117 N.Y.S. 1055, 133 App. Div. 857.
10 C.J. p. 814 note 90.

10. Ala.—Birmingham Electric Co. v. Rylant, 174 So. 511, 234 Ala. 332, 590.
10 C.J. p. 814 note 91.

11. Ala.—Birmingham Electric Co. v. Rylant, supra.

12. N.Y.—Wasserman v. New York City R. Co., 104 N.Y.S. 398.
10 C.J. p. 814 note 92.
Corpus Juris has been quoted in Birmingham Electric Co. v. Rylant, 174 So. 511, 512, 234 Ala. 332, 590.

13. N.Y.—Sullivan v. Brooklyn Heights R. Co., 106 N.Y.S. 378, 121 App.Div. 527.
10 C.J. p. 814 note 93.

demanding a transfer at the time of payment of his fare, where, under the circumstances existing at the time, he has reason to believe that the car which he has boarded will go to his destination, and has no notice either from the sign on the car or from the conductor that it will not do so.[14] Where a regulation requiring a passenger to demand a transfer at a particular time or place is posted conspicuously and advertised in such a manner as to bring it to the notice of the public generally, it is immaterial whether a particular passenger has knowledge thereof.[15]

f. Point of Transfer

A street railroad may require passengers having transfers to board cars at specified points, and it may refuse a transfer at a point which would enable a passenger to make a continuous round trip. The transfer must be made at the point where the roads intersect and in the same general direction as the initial trip.

A rule of a street railroad company requiring passengers having transfers to board cars at specified points is a reasonable regulation, and a transfer is not valid for passage when presented elsewhere.[16] Likewise, a rule of the company refusing a transfer at a point which would enable a passenger to make a continuous round trip is reasonable and within the company's right, but if the rule is not published or brought to the attention of the travelling public, it is not enforceable as against a passenger having no knowledge thereof.[17] A custom of giving transfers at a certain point cannot be discontinued without notice.[18] Where a transfer is to be made, and the transfer ticket indicates that it is to be presented at the intersection of the issuing line, a passenger is entitled to transfer at a point where a connecting line leaves the road on which he was first traveling and which affords him the nearest and most convenient route to his destination.[19] The transfer must, it has been held, be made at the point where the two roads intersect,[20] and in the same general direction as the initial trip,[21] but this does not mean that such route must be in the same longitudinal direction as that in which the passenger was first traveling.[22] It has been held that a street railroad company cannot be required to permit passengers to transfer at points other than the points of intersection, and that the right of passengers to transfer at other points cannot be upheld, under an ordinance, as an exercise of the rate-making power.[23] A passenger may rely on the representation of a conductor that a transfer is good at a particular point, where the transfer is punched in a blank space in the column of lines to which transfers are usually given, but contains nothing to indicate that it is not good as represented.[24] A street railway company may change transfer points although such changes may cause some inconvenience,[25] but it cannot alter a transfer point fixed by city ordinance in its discretion or even on solicitation of the police department.[26]

g. Time Limit for Use of Transfer

The use of a transfer may be subject to a time limit.

Where a street railroad company voluntarily permits passengers to transfer, where a statute requiring the company to give transfers contains no specific provision as to the length of time for which the transfers shall be good, or where a statute specifically so provides, the company may, by a reasonable regulation, require that a passenger shall use his transfer within the time limited thereon,[27] provided a car on which the passenger can be conveniently and comfortably transported passes the transfer point within the time so limited.[28] Such a

14. N.Y.—Goodman v. New York R. Co., 142 N.Y.S. 520, 81 Misc 207.

15. N.Y.—Ketchum v. New York City R. Co., 103 N.Y.S. 486, 118 App.Div. 248.

16. Cal.—Wasserman v. Los Angeles Ry. Corporation, 193 P. 130, 184 Cal 202.
10 C.J. p 814 note 96.

17. N.Y.—Hickman v. International Ry. Co., 160 N.Y.S. 994, 97 Misc. 53, reversed on other grounds 164 N.Y.S 1095, 177 App.Div 950.

18. Ala.—Birmingham R., etc., Co. v. Hatton, 65 So 934, 187 Ala 573.
N.Y.—Freeman v. New York City R. Co., 92 N.Y.S 47.
10 C.J. p 814 note 88

19. Mo.—Duke v. Metropolitan St. R. Co., 148 S.W. 166, 166 Mo.App. 121
N.Y.—Charbonneau v. Nassau Electric R. Co., 108 N.Y.S. 105, 123 App Div. 531.
10 C.J. p 814 note 97.

20. Mo.—Percy v. Metropolitan St. R. Co., 58 Mo.App. 75.
N.Y.—Hanley v. Brooklyn Heights R. Co., 96 N.Y.S. 249, 110 App.Div. 429.
10 C.J. p 814 note 98

21. N.Y.—Kelly v. New York City R Co., 84 N.E. 569, 192 N.Y 97, affirming 104 N.Y.S 561, 119 App. Div. 223, reversing 102 N.Y.S. 742, 52 Misc. 585
10 C.J. p 815 note 99
Reversing direction of trip
A transfer does not entitle a passenger to reverse the direction of his trip without paying another fare.—Kelly v. New York City R. Co., 84 N.E. 569, 192 N.Y. 97, affirming 104 N.Y.S 561, 119 N.Y App.Div. 223.

22. N.Y.—Wells v. New York City R Co., 107 N.Y.S. 430, 122 App.Div. 488.

23. Ill.—Chicago v. Chicago City R. Co., 111 N.E. 983, 272 Ill 245.

24. Hawaii.—Jeffs v. Honolulu Rapid Transit, etc., Co., 17 Hawaii 241.

25. Wash.—McGilvra v Seattle Electric Co., 111 P 896, 61 Wash. 38, Ann Cas 1912B 1020.

26. Va.—Virginia Electric & Power Co v Wynne, 141 S.E 829, 149 Va 882.

27. Ala.—Birmingham Electric Co v Putman, 109 So 890, 21 Ala.App. 431, petition dismissed 109 So. 891, 215 Ala. 107.
10 C.J p 815 note 6.

28. Ga.—Hornesby v. Georgia R., etc., Co., 48 S.E. 339, 120 Ga. 913, 1 Ann Cas. 391 and note.
10 C.J. p 815 note 7.

limitation on the use of a transfer may be prescribed by a statute or municipal ordinance.[29] A rule requiring a person holding a transfer to take the next succeeding car at the point designated on the transfer is a reasonable protection against fraud.[30] A rule of a street railroad company which puts an improper time limit on a transfer ticket does not relieve it from its obligation to carry for a single fare,[31] nor does the acceptance by a passenger of a transfer ticket so improperly limited modify the original contract of carriage or waive any rights acquired under it.[32]

h. Inspection of Transfer

No absolute duty rests on a passenger to examine his transfer ticket, and a condition on a transfer check that the passenger shall examine the check to see that it is correct is unreasonable where the time at the passenger's command is limited and the system complicated.

Ordinarily, no absolute duty rests on a passenger to examine his transfer ticket, but he may rely on the inference that the conductor has given him a proper one,[33] as the duty to see that a proper transfer ticket is given rests on the conductor, and not on the passenger.[34] A condition on a transfer check that the passenger shall "examine date, time, and direction," as indicated by the conductor's punch marks, and see "that the same are correct," is unreasonable where the time at his command is brief and the system complicated.[35] So, where the conductor of a street car delays complying with the request of a passenger for a transfer check until the latter is on the point of leaving the car, a stipulation on the check requiring the passenger to examine the latter and see that it is all right is, under the circumstances, unreasonable and not binding on him.[36]

§ 649. Penalty for Refusal to Issue or Accept Transfer

a. In general

b. Persons entitled
c. Defenses
d. Actions
e. Number of penalties recoverable

a. In General

When so provided by statute, a street railroad company may be subject to a penalty recoverable by the aggrieved passenger for refusal to issue a transfer. Refusal to accept a proper transfer subjects the carrier to the penalty, but a transfer incorrectly punched does not render it liable.

Under statutes so providing, a street railroad company operating its lines within the limits of a city under contract is subject to a penalty, which may be recovered by the aggrieved passenger, for its refusal to issue a transfer as required by the statute.[37] The object of such a statute is to promote public convenience by requiring the operation of the different lines as a single railroad with a single fare.[38] The purpose of the penalty clause is not to compensate passengers for any damage inflicted by a refusal to give a transfer, but rather to inflict a punishment for the violation of its terms and to break up the practice of so doing.[39] To authorize the recovery of a penalty under such statute, the passenger suing must bring his action strictly within its provisions,[40] and the penalty cannot be collected for failure to issue a transfer in violation of an agreement where the statute is not violated.[41] A proper demand for a transfer must be made, and if a demand is not made in compliance with a regulation of the carrier requiring the demand for transfers to be made at the time of paying the fare, a refusal to give a transfer will not render the carrier liable for the penalty.[42] Likewise, the demand for a transfer must show in which direction on the connecting line the passenger desires to go;[43] but if he asks for a transfer in a certain direction, and a transfer good only in the opposite direction is given him, by reason of which

29. Cal.—Ex parte Lorenzen, 61 P. 68, 128 Cal. 431, 79 Am.S.R. 47, 50 L.R.A. 55.
10 C.J. p 815 note 8.

30. S.C.—Taylor v. Spartanburg R., etc., Co., 82 S.E. 404, 98 S.C. 206, 52 L.R.A.,N.S., 908, Ann.Cas 1916D 585

31. N.Y.—Jenkins v. Brooklyn Heights R. Co., 51 N.Y.S. 216, 29 App.Div. 8, 5 N.Y.Ann.Cas. 315.
10 C.J. p 815 note 10.

32. N.Y.—Jenkins v. Brooklyn Heights R. Co., supra.

33. Ohio.—Diehl v. Cincinnati Traction Co., 6 Ohio App. 151.
Va.—Virginia Ry. & Power Co. v. Dressler, 111 S.E. 243, 132 Va. 342, 22 A.L.R. 301.
10 C.J. p 815 note 12.

34. Minn.—Morrill v. Minneapolis St. R. Co., 115 N.W. 395, 103 Minn. 362, 123 Am.S.R. 341.

35. Tenn.—O'Rourke v. Citizens' St. R. Co., 52 S.W. 872, 103 Tenn. 124, 76 Am.S.R. 639, 46 L.R.A. 614.

36. Pa.—Laird v. Pittsburg Tract. Co., 31 A. 51, 166 Pa. 4.

37. N.Y.—Wells v. New York City R. Co., 107 N.Y.S. 430, 122 App. Div. 488.

38. N.Y.—Myers v. Brooklyn Heights R. Co., 41 N.Y.S. 798, 10 App.Div. 335.

39. N.Y.—Fitzmartin v. New York City R. Co., 99 N.Y.S. 765, 51 Misc. 36.

40. N.Y.—Hunt v. Brooklyn Heights R. Co., 101 N.Y.S. 209, 115 App.Div. 673.
10 C.J. p 816 note 20.

41. N.Y.—Oatman v. International Ry. Co., 163 N.Y.S. 495.

42. N.Y.—Ketchum v. New York City R. Co., 103 N.Y.S. 486, 118 App.Div. 248—Fischer v. New York City R. Co., 104 N.Y.S. 400, 54 Misc. 267.

43. N.Y.—Thistle v. New York City R. Co., 104 N.Y.S. 401, 54 Misc. 268—Gasper v. New York City R. Co., 99 N.Y.S. 904, 51 Misc. 43.
10 C.J. p 816 note 22.

it is not accepted on the car to which he transfers, it is tantamount to a refusal, and the penalty may be recovered.[44] Refusal to accept a valid transfer tendered by a passenger is equivalent to a refusal to give one and renders the carrier liable to the penalty,[45] and this is so, even though the transfer was not presented in accordance with a reasonable regulation, in the absence of any proof of a reasonable endeavor by notice to apprise the public of its institution.[46] Where a conductor accepts a transfer which he might rightfully reject, he is bound to provide the passenger with a transfer good to the point of destination, and if he fails so to do the carrier is liable to the penalty.[47] That a conductor gives a transfer punched late by mistake, does not constitute a refusal to comply with the statute subjecting the company to liability for the penalty,[48] and, in like manner, a statute providing a penalty for overcharge does not apply where a conductor by mistake incorrectly punches a transfer which is rejected for passage,[49] or where a conductor mistakenly rejects a valid transfer but subsequently tenders back the extra fare before the passenger's journey is completed;[50] the latter statute has no application to a refusal by a street railroad company to give a transfer.[51]

In accordance with specific provisions therein, particular statutes have been held not limited to traffic contracts but to embrace leases also, so as to render the lessee operating the leased line liable to a penalty for refusing to issue transfers.[52] Where two street railroad companies, although separate corporate entities, have the same offices, officers, and directors, and use and equip cars interchangeably, pay operating expenses from the gross receipts of both, and are for all practical purposes one line, a passenger on one road may require a transfer to the other without extra charge, and may recover the statutory penalty for a refusal to issue such transfer, notwithstanding there is no written contract between the corporations for the lease of one of the lines, and although the arrangement between the companies is purely informal.[53] The penalty cannot be collected where the lines are not operated as one system, although owned by the same company.[54]

b. Persons Entitled

The passenger to whom a transfer is refused is entitled to the penalty, but he must be one who became a passenger in good faith with the actual desire of getting to some place.

"The party aggrieved," within the provisions of a statute which provides for a forfeiture to "the party aggrieved," is the passenger to whom a transfer is refused in violation of the statute,[55] and it is immaterial whether he has paid the fare himself or some one has paid it for him.[56] Since the statute has in contemplation a person who enters on a continuous trip, with the actual desire of getting to some place, and whose purpose is interfered with by an unjust refusal to give him a transfer, and who therefore is defeated of his aim, it has been held that one who becomes a passenger for the purpose of laying a foundation for an action to recover a penalty is not an "aggrieved party" within the meaning of the statute, or a "passenger desiring to make one continuous trip between" any two points within the meaning of the statute, and that one who becomes a passenger merely to seek information as to the custom of the carrier to issue or not to issue transfers at a certain point over a certain route, which information he desires to utilize for the benefit of suits commenced in behalf of his clients for penalties, is not an "aggrieved party" within the meaning of the statute.[57]

c. Defenses

It is no defense that the conductor did not have the usual transfer tickets, that the company had provided the conductor with transfers, etc.; but it is a perfect defense that plaintiff became a passenger for the purpose of laying a foundation for an action to recover a penalty.

44. N.Y.—Gasper v. New York City R. Co., 99 N.Y.S. 902, 51 Misc. 39.

45. N.Y.—Harris v. Interurban St. R. Co, 92 N.Y.S. 42, 46 Misc. 242—Lowenstein v. International R Co, 140 N.Y.S. 159.

46. N.Y.—Gasper v. New York City R. Co, 99 N.Y.S. 902, 51 Misc. 39.
10 C.J. p 816 note 25.

47. N.Y.—Bingemann v. International R Co., 135 N.Y.S. 743, reversed on other grounds 138 N.Y.S. 1107, 153 App.Div 935

48. N.Y.—Osborne v. International Ry Co., 123 N.E. 849, 226 N.Y. 421, reversing 164 N.Y.S. 226, 177 App.Div. 709, which reversed Osborn v International Ry. Co., 161 N.Y.S. 1042, 98 Misc. 7.

49. N.Y.—McCarthy v. International R. Co., 110 N.Y.S. 936, 126 App.Div. 182.

50. N.Y.—Tullis v. Brooklyn Heights R. Co., 75 N.Y.S. 863, 71 App.Div 494.

51. N.Y.—King v. Nassau Electric R. Co., 112 N.Y.S. 589, 128 App Div 130—Bingemann v. International R. Co, 131 N.Y.S. 4, 73 Misc 458
10 C.J. p 816 note 16 [a].

52. N.Y.—O'Reilly v. Brooklyn Heights R Co., 72 N.E. 517, 179 N.Y. 450—Griffin v. Interurban Street R. Co., 72 N.E. 513, 179 N.Y. 438.
10 C.J. p 816 note 27.

53. N.Y.—Catalano v. International R. Co., 145 N.Y.S. 1005

54. N.Y.—Oatman v. International Ry. Co, 163 N.Y.S. 495.

55. N.Y.—Fox v. Interurban St. R. Co, 86 N.Y.S. 64, 42 Misc. 538.
10 C.J. p 816 note 29.

56. N.Y.—Van Zandt v. New York City R. Co., 94 N.Y.S. 660, 106 App Div. 614—McLaughlin v. New York City R. Co, 94 N.Y.S. 653, 106 App. Div. 1.

57. N.Y.—Bull v. New York City R Co, 85 N.E. 385, 192 N.Y. 361, 19 L.R.A.,N.S., 778
10 C.J. p 817 note 32.

It is no defense to an action for a penalty under these statutes that the conductor did not have the usual transfer tickets,[58] or that the company had provided the conductor with transfers to give to passengers, his refusal being that of the company,[59] or that boys riding on a street car indulged in "skylarking."[60] So it is no excuse for refusal to give a transfer at a particular point that it might cause undue crowding in the street and at the street crossings.[61] Want of good faith of a passenger in that he became a passenger for the purpose of laying a foundation for an action to recover a penalty presents a perfect defense to an action.[62]

d. Actions

General rules governing actions to enforce or recover penalties apply in actions of the kind under consideration. If no period of limitations is specifically prescribed in the statute, the period of limitations is governed by general statutes providing for actions for a penalty.

Actions for penalties of the character under consideration are governed by the general rules obtaining in actions for penalties generally, see C.J.S. title Penalties §§ 7–15, also 25 C.J. p 1181 note 45–p 1213 note 78. An action for the penalty imposed by a statute requiring carriers to give tranfers, which does not prescribe a period of limitations, is not barred by the period of time prescribed for the commencement of actions against carriers asking or receiving more than the lawful rate of fare, but the period of limitations is governed by a general statute providing for actions for a penalty.[63]

Pleading. The complaint should state all the facts necessary to bring the case within the terms of the statute,[64] and the proof should conform to the pleading.[65] An answer alleging a possible alternative route, without alleging that a transfer was issued on such alternative route, is insufficient.[66]

Evidence. Plaintiff must establish every fact necessary for a recovery,[67] and the burden is on him to prove his case by a preponderance of the evidence, but not beyond a reasonable doubt.[68] Where there are two lines of cars running along a street, one of which is operated by defendant, it will not be presumed, in the absence of proof, that the car boarded by plaintiff, and on which a transfer tendered by him was refused, ran over the line operated by defendant.[69] Evidence as to whether plaintiff was a bona fide passenger is material and admissible.[70] Where it appears that a transfer was given plaintiff, but not honored by the conductor of the car which he subsequently took, and there was no evidence that he took the proper car, or that if he had taken it the transfer would have been refused, he is not entitled to recover.[71]

Trial. Whether the rule of a street railroad company as to transfers is reasonable is a question of law for the court and not for the jury.[72]

e. Number of Penalties Recoverable

Only one penalty may be recovered in a single action.

Only one penalty for the refusal of the carrier to transfer a passenger can be recovered in a single action, and the institution of such action constitutes a waiver of all penalties previously incurred.[73] However, such action does not prevent an action for a subsequently accruing penalty.[74]

§ 650. Penalty for Unlawfully Selling or Buying Transfer

Under statutes or ordinances so providing, it is an offense for a street car passenger to sell or to give away to be used a transfer issued to him, or for a person to purchase a transfer from anyone not an agent of the company and to attempt to use it.

58. N.Y.—Rosenberg v. Brooklyn Heights R Co., 86 N.Y.S. 871, 91 App.Div 580.
10 C.J. p 817 note 34.

59. N.Y.—Snee v. Brooklyn Heights R. Co, 104 N.Y.S. 907, 120 App Div 570, affirmed 87 N.E. 1127, 193 N.Y 659.
However, in an earlier case it was held that a company is not liable for the penalty, where it has established a system of transfers for its intersecting lines and furnishes its conductors with tickets for that purpose, and some individual passenger has not received transfers through the misjudgment, neglect, or mistake of the conductor.—Schwartzman v. Brooklyn Heights R Co, 98 N.Y.S. 941, 50 Misc. 116.

60. N.Y.—Rosenberg v. Brooklyn Heights R Co., 86 N.Y.S. 871, 91 App Div. 580.

61. N.Y.—Moskowitz v. Brooklyn Heights R. Co, 93 N.Y.S. 385, 47 Misc. 119, disapproving Topham v. Interurban R. Co., 89 N.Y.S. 298, 96 App.Div. 323.

62. N.Y.—Bull v. New York City R. Co., 85 N.E. 385, 192 N.Y. 361, 19 L.R.A.,N.S., 778.
10 C.J. p 817 note 32.

63. N.Y.—Munro v. Brooklyn Heights R. Co., 88 N.E. 567, 195 N.Y 254, affirming 105 N.Y.S. 325, 120 App. Div. 516.

64. N.Y.—Mendoza v. Metropolitan St. R. Co., 64 N.Y.S. 745, 51 App. Div. 430.
10 C.J. p 817 note 39.

65. N.Y.—Stevenson v. New York City R. Co, 104 N.Y.S. 866, 54 Misc. 641

66. N.Y.—Holmes v Interurban St. R Co., 92 N.Y.S. 57.

67. N.Y.—Oatman v. International Ry. Co., 163 N.Y.S. 495.

68. N.Y.—Kerin v. New York City R. Co., 103 N.Y.S. 769, 53 Misc 568.
10 C.J. p 818 note 41.

69. N.Y.—Harris v. Interurban St. R. Co., 92 N.Y.S. 42, 46 Misc. 242.

70. N.Y.—Carlin v. New York City R. Co., 108 N.Y.S 1020.

71. N.Y.—Weinstein v. Interurban St. R. Co., 86 N.Y.S. 731

72. N.Y.—Mannion v. International R. Co, 121 N.Y.S. 263, 66 Misc. 420.

73. N.Y.—Griffin v. Interurban St. R. Co., 72 N.E. 513, 179 N.Y. 438, reargument denied 72 N.E. 1142, 180 N.Y. 538.
10 C.J. p 818 note 46.

74. N.Y.—Transfer Penalty Cases, 92 N.Y.S. 322, 46 Misc. 579.

Under statutes or ordinances so providing, it is an offense, for which a penalty is prescribed, for a street car passenger to sell or to give away to be used a transfer issued to him,[75] or for a person to purchase a transfer from anyone not an agent of the street car company and to attempt to use the same.[76] The constitutionality of these ordinances has been assailed, but the courts have upheld their validity as against a contention that they constitute a deprivation of property without due process of law.[77] Unlawful use of a transfer as an offense is considered in § 543 supra.

§ 651. Transfers between Independent Lines

The nature, extent, and effect of transfers as between independent lines of passenger transportation are discussed in §§ 652 and 653, immediately following.

§ 652. Nature and Extent of Initial Carrier's Liability

a. In general
b. Special contract

a. In General

Although there is some authority to the contrary, it is the general rule that, in the absence of a special contract, the initial carrier is not liable for the failure of a connecting carrier to perform its contract or duty to transport unless a partnership arrangement exists between the carriers. Generally, a carrier is not liable if expressly exempted from liability.

There is some authority that a railroad company selling a passenger a ticket for through transportation to the point of destination over its own and connecting roads renders itself responsible for the entire journey,[78] this also being the English rule as stated in Corpus Juris,[79] but, by the weight of authority, in the absence of a special contract for through transportation, the sale by a carrier of an ordinary coupon ticket for transportation over its own and an independent connecting line does not give rise to a contract for through transportation,[80] and the initial carrier acts as principal merely with reference to its own line, and as agent of the connecting carrier in contracting for transportation over the connecting line;[81] the right of the purchaser and the responsibility of the different carriers are the same as though separate tickets had been purchased by him from each, and each is responsible only for the acts of its own agents and for injury suffered from its breach of duty on its own line.[82] In such a case the initial carrier discharges its duty when it delivers the passengers at the end of its own line ready to continue the transportation on the connecting line,[83] and it will not be liable for any failure of the connecting carrier to perform its independent contract.[84] It is not liable for a representation made by its agent, outside the scope of his authority, that a connecting carrier will wait for a certain train.[85]

Where, however, the arrangement existing between the associated lines of carriers amounts to a partnership, each will be liable to the passenger for losses or injuries occurring anywhere along the line of transportation; but the arrangement must be in reality a partnership, with the incident of community of profit and loss.[86] The mere fact that each

75. Cal.—Ex p. Lorenzen, 61 P. 68, 128 Cal. 431, 79 Am.S.R. 47, 50 L.R.A. 55.
10 C.J. p 818 note 49.

76. Ill.—Chicago v. Taub, 150 Ill. App. 611.

Purchase without attempt to use

A mere purchase of a transfer without an actual attempt to use it is not subject to a penalty under an ordinance rendering it unlawful to receive a transfer from one not an agent of the street car company with intent to use, or attempt to use, the same.—Chicago v. Taub, 150 Ill.App. 611.

77. Cal.—Ex p. Lorenzen, 61 P. 68, 128 Cal. 431, 79 Am.S.R. 47, 50 L.R.A. 55.
Ill.—Chicago v. Siegel, 82 N.E. 294, 229 Ill. 313.

78. Ark.—Missouri Pac. R. Co. v. Prude, 247 N.W. 785, 156 Ark. 583, reversed on other grounds 44 S.Ct. 450, 265 U.S. 99, 68 L.Ed. 919.

79. Md.—Pugh v. Washington Ry. & Electric Co., 106 A. 522, 134 Md. 196.

80. Ky.—Guy v. Interstate Transit, 51 S.W.2d 455, 244 Ky. 479.
10 C.J. p 818 note 56.

Duty to transport passenger beyond line

The law does not compel a carrier to transport its passengers over any line other than its own.—McAdoo v. McClure, Tex.Civ.App., 232 S.W. 348, modified on other grounds, Boyles v. McClure, Com.App., 243 S.W. 1080.

81. Ill.—See Schoenfeld v. Lake Shore & M. S. Ry. Co., 197 Ill.App. 419.
Md.—Mills v. Baltimore, etc., R. Co., 73 A. 885, 111 Md. 260, 134 Am.S.R. 599.
10 C.J. p 819 note 57.

However, in an early case in Georgia it was held that the initial carrier was liable for the safe and secure carriage and transportation of the passenger to his destination.—Central R. Co. v. Combs, 70 Ga. 533, 48 Am.R. 582.

82. Mont.—Brian v. Oregon Short Line R. Co., 105 P. 489, 40 Mont. 109, 25 L.R.A.,N.S., 459, 20 Ann. Cas. 311.
10 C.J. p 819 note 58.

83. N.J.—McDonald v. New Jersey Cent. R. Co., 62 A. 405, 72 N.J.Law 280, 111 Am.S.R. 672, 2 L.R.A.,N.S., 505.
10 C.J. p 819 note 60.

84. Ill.—See Schoenfeld v. Lake Shore & M. S. Ry. Co., 197 Ill.App. 419.
Tex.—St. Louis Southwestern R. Co. v. White, 89 S.W. 746, 99 Tex. 359, 122 Am.S.R. 631, 2 L.R.A.,N.S., 110, 13 Ann.Cas. 965, reversing, Civ.App., 86 S.W. 71—Gulf, etc., R. Co. v. Looney, 19 S.W. 1039, 85 Tex. 158, 34 Am.S.R. 787, 16 L.R.A. 471—Harris v. Howe, 12 S.W. 224, 74 Tex. 534, 15 Am.S.R. 862, 5 L.R.A. 777.
10 C.J. p 819 note 61.

85. Tex.—Texas, etc., R. Co. v. Conway, Civ.App., 180 S.W. 666.

86. U.S.—Lehigh Valley R. Co. v. Dupont, N.Y., 128 F. 840, 64 C.C.A. 478.
10 C.J. p 820 note 75.

sells through tickets, deducting its own share of the price paid for the same, and accounting to the other companies for their shares, the price being fixed according to a tariff established by each company as to its own road, may resemble, but does not constitute, a partnership;[87] nor will the mere appointment of a common agent at each end of the route to receive fares and to issue through tickets have such an effect.[88]

Where the ticket contains a provision exempting the company from liability beyond its own line or expressly negatives the idea that the company contracts for the entire journey, its liability will be confined to its own line,[89] unless the act complained of was committed by one of its own officers or employees acting within the general scope or course of his employment at the time,[90] or unless there is a partnership between the two lines;[91] but under the majority rule stated above such a provision is unnecessary, as it is never necessary to insert in a contract that which the law implies.[92]

Liability of the initial carrier for personal injuries generally is treated in § 702 infra.

b. Special Contract

Under an agreement or contract with the passenger, the initial carrier may be liable for any fault or breach of duty by the connecting carrier or its employees. The agreement to effect liability must be clear and explicit.

It has been urged that a contract by a carrier for the transportation of passengers beyond its own line is ultra vires; but this view has not been favorably received, the established doctrine being that a carrier may, under an arrangement with the connecting carrier, lawfully make such a contract,[93] and the validity of the contract is not affected by the fact that it is to be in part performed beyond the territorial limits of the state within which the carrier is incorporated.[94] Where the contract of the carrier selling the ticket is for through transportation, it is the principal, and the connecting carrier continuing the transportation of the passenger under such ticket is the agent of the carrier selling the ticket for the purpose of carrying out the contract of transportation, and in such case the carrier selling the ticket will be liable for any fault or breach of duty by the connecting carrier or its employees.[95] It has been held, however, that even where the contract is for through transportation, the initial carrier may limit its liability under the contract to its own line,[96] although a contrary doctrine has been upheld,[97] particularly where the connecting companies have entered into an arrangement by which practically a continuous system is formed under one management.[98]

An agreement on the part of the initial carrier to extend its liability beyond its own line will not be

87. U.S.—Pennsylvania R. Co. v. Jones, D.C., 15 S.Ct. 136, 155 U.S. 333, 39 L.Ed. 176
Ill.—Chicago, etc., R. Co. v. Mulford, 44 N.E. 861, 162 Ill. 522, 35 L.R.A. 599.
10 C.J. p. 821 note 76.

88. Ind.—Scott v. Cleveland, etc., R. Co., 43 N.E. 133, 144 Ind. 135, 32 L.R.A. 154.
10 C.J. p. 821 note 77.

89. U.S.—Missouri Pac. R. Co. v. Prude, 44 S.Ct. 450, 265 U.S. 99, 68 L.Ed. 919, reversing 247 S.W. 785, 156 Ark. 583.
Ky.—Guy v. Interstate Transit, 51 S.W.2d 455, 244 Ky. 479.
Tex.—McAdoo v. McClure, Civ.App., 232 S.W. 348, modified on other grounds Boyles v. McClure, Com.App., 243 S.W. 1080.
10 C.J. p. 819 note 62.
In an early case it was held that the initial carrier's liability was not limited by any statement written or printed on the check or ticket not signed by the passenger.—Central R. Co. v. Combs, 70 Ga. 533, 48 Am.R. 582

90. Pa.—Pennsylvania R. Co. v. Spicker, 105 Pa. 142.
S.C.—Oliver v. Columbia, etc., R. Co., 43 S.E. 307, 65 S.C. 1.

91. Miss.—St. Clair v. Kansas City, etc., R. Co., 28 So. 957, 77 Miss. 789.

92. Ill.—Chicago, etc., R. Co. v. Mulford, 44 N.E. 861, 162 Ill. 522, 35 L.R.A. 599, reversing 59 Ill. App. 479.

93. Ill.—Chicago, etc., R. Co. v. Dumser, 43 N.E. 698, 161 Ill. 190.
10 C.J. p. 820 note 67.

94. N.Y.—Cary v. Cleveland, etc., R. Co., 29 Barb. 35
Tenn.—Nashville, etc. R. Co. v. Sprayberry, 9 Heisk. 852.
Wis.—Candee v. Pennsylvania R. Co., 21 Wis. 582, 94 Am.D. 566.

95. Ky.—Guy v. Interstate Transit, 51 S.W.2d 455, 244 Ky. 479.
Neb.—Omaha, etc., R. Co. v. Crow, 74 N.W. 1066, 54 Neb. 747, 69 Am.S.R. 741—Chollette v. Omaha, etc., R. Co., 41 N.W. 1106, 26 Neb. 159, 4 L.R.A. 135.
Ohio.—Pennsylvania Co. v. Loftis, 74 N.E. 179, 72 Ohio St. 288, 106 Am.S.R. 597, 3 Ann.Cas. 3.
10 C.J. p. 820 note 69.

Corpus Juris is quoted in Pugh v. Washington Ry. & Electric Co., 106 A. 522, 134 Md. 196.

Agreement to engage accommodations
Where a carrier sells tickets over another line connecting with its own, and agrees to engage accommodations for the passenger over the latter, it is liable in damages for its failure so to do.—Bussman v. Western Transit Co., D.C.N.Y., 71 F. 654.

96. Tex.—Moore v. Missouri, etc., R. Co., 45 S.W. 609, 18 Tex.Civ.App. 561—International, etc., R. Co. v. Campbell, 20 S.W. 845, 1 Tex.Civ.App. 509.

97. Ga.—Central R. Co. v. Combs, 70 Ga. 533, 48 Am.R. 582.
Mo.—Jones v. St. Louis, etc., R. Co., 89 Mo.App. 653

98. D.C.—Howard v. Chesapeake, etc., R. Co., 11 App.D.C. 300.

Condition limited to separate lines
Where two railroad companies enter into an arrangement by which practically a continuous system is formed under one management, and one of them sells a ticket under a condition limiting its liability to its own line, it is nevertheless responsible for the safe carriage of passengers over the other line, and such condition must be limited in its operation to such other lines as have their own separate and independent management. — Howard v. Chesapeake, etc., R. Co., 11 App.D.C. 300.

implied from doubtful expressions or loose language, but only from clear and satisfactory evidence.[99]

Limitation of liability for negligence generally is discussed in § 638 supra.

§ 653. Nature and Extent of Connecting Carrier's Liability

Ordinarily the connecting carrier is liable only for the acts of its own employees or for injuries occurring on its own line of road.

Except in case of a partnership or a similar agreement,[1] the connecting carrier will ordinarily be liable only for the acts of its own employees or for injuries occurring on its own line of road,[2] and not for the acts of the initial carrier.[3] A connecting carrier will not be liable for refusing passage on a ticket which has expired, although the passenger was prevented from presenting his ticket within the time limit by the fault of the initial or an intermediate carrier.[4]

The duty imposed on railroad companies by the Interstate Commerce Act and by state legislation to receive passengers from connecting roads is one which the courts will enforce by mandatory injunction, where the injury resulting from its nonperformance is continuing; and it is no defense to such relief that a strike of locomotive engineers and firemen has been ordered on plaintiff's road, and that, if defendant's road should accept cars from the boycotted road, its own men would be called out.[5]

The liability of a connecting carrier for personal injuries is discussed in § 702 infra.

§ 654. Duty to Carry to, and to Stop at, Destination

a. In general
b. Duty to stop at destination

a. In General

Generally it is the duty of the carrier to exercise a high degree of care to carry a passenger safely to, and discharge him at, his destination.

Where a passenger has presented a proper ticket, or paid the proper fare, it is, as a general rule, the duty of the carrier to exercise a high degree of care to carry him safely to, and discharge him at, his destination; and a refusal or failure so to do will be a breach of contract for which the carrier will be liable in damages.[6] Generally, the carrier's duty is discharged by carrying the passenger safely to his destination and, after giving reasonable notice that it has reached such destination, by stopping at the fixed place for passengers to alight and remaining standing a sufficient length of time for them to alight safely.[7] In the absence of a sufficient excuse therefor, there is a breach of contract for which the carrier is liable, if it discharges a passenger from the train before his destination is reached,[8] or if it carries him to a place not called for by his ticket against his will.[9] Where the carrier wrongfully discharges a passenger at a place other than its destination and makes no effort to look after the safety and comfort of the passenger who cannot find safe and comfortable accommodations by the exercise of reasonable care it is liable in tort;[10] but where, although through mistake or inadvertence the passenger is discharged at the wrong station, there are safe and comfortable accommodations, there is no tortious breach of the carrier's contract.[11]

99. U.S.—Pennsylvania R. Co. v. Jones, D.C., 15 S.Ct. 136, 155 U.S. 333, 39 L.Ed. 176.
10 C.J. p 820 note 74.

1. N.Y.—Jacobs v. Third Ave. R. Co., 75 N.Y.S. 679, 71 App.Div. 199, 10 N.Y.Ann.Cas. 462, reversing 69 N.Y.S. 981, 34 Misc. 512, and affirming 68 N.Y.S. 623, 33 Misc. 802
10 C.J. p 821 note 78.

2. Ill.—Chicago, etc., R. Co. v. Fahey, 52 Ill. 81, 4 Am.R. 587.
Mass.—Schopman v. Boston, etc., R. Co., 9 Cush. 24, 55 Am.D. 41.
10 C.J. p 821 note 79

3. Ark.—Bresewitz v. St. Louis, etc., R. Co., 87 S.W. 127, 75 Ark. 242, 70 L.R.A. 212.
10 C.J. p 821 note 80.

4. Mont.—Brian v. Oregon Short Line R. Co., 105 P. 489, 40 Mont. 109, 25 L.R.A.,N.S., 459, 20 Ann. Cas. 311.

5. U.S.—Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co., C.C.Iowa, 34 F. 481.

6. N.H.—Ingerson v. Grand Trunk Ry., 106 A. 488, 79 N.H. 154
S.C.—Gilkerson v. Atlantic Coast Line R. Co., 89 S.E. 549, 105 S.C. 132.
10 C.J. p 821 note 84.
Corpus Juris is cited with approval in Faubion v. Minneapolis, St. P. & S. S. M. Ry. Co., 177 N.W. 371, 45 N.D. 269.

7. Ala.—Central of Georgia Ry. Co. v. Smith, 117 So. 74, 217 Ala. 501, 58 A.L.R. 1058.
S.C.—Gilkerson v. Atlantic Coast Line R. Co., 89 S.E. 549, 105 S.C. 132.

8. Iowa.—Gustafson v. Cedar Rapids, etc., R. Co., 126 N.W. 145, 148 Iowa 388.
10 C.J. p 822 note 86.

9. S.C.—Latour v. Southern R. Co., 51 S.E. 265, 71 S.C. 532.

10. Ky.—Louisville & N. R. Co. v. McPherson, 78 S.W.2d 919, 257 Ky. 662
Duty to know character of place
A carrier, in the discharge of the high duty which it owes to its passengers, is bound to know the character of the place at which it wrongfully discharges them.—Hines v. Garrett, 108 S.E. 690, 131 Va. 125

11. Ky.—Louisville & N. R. Co. v. Wells, 294 S.W. 143, 219 Ky. 718.
Depot in large city
Where the carrier through misinformation as to the proper station for meeting a connecting train caused a passenger to disembark at the

In the absence of an agreement therefor, the carrier is not bound to carry a passenger to a particular place, to which he has no ticket or has paid no fare,[12] and if the carrier does not know the passenger's destination except as stated in the ticket, it owes him no duty other than to carry him safely to the place called for by the ticket.[13]

Where by reason of a wreck a train is detoured over the line of another carrier, the carrier owning the train is under no legal duty to discharge at stations along the detoured route any passengers not destined therefor.[14]

b. Duty to Stop at Destination

A carrier must stop to discharge a passenger at his destination unless the train is not regularly scheduled to stop there and the carrier has entered into no agreement, or is guilty of no representation, that the train will stop.

It is the duty of the carrier to stop its train or car at the station to which the passenger has a ticket or has paid his fare,[15] if the station is one which the carrier has, by custom or regulations, noted as a place for the train to stop,[16] or is one at which the train is required to stop by a statutory regulation,[17] unless there is a sufficient excuse, under the particular circumstances, for its refusal or failure to stop at that point.[18] This rule, however, is subject to the reasonable customs and regulations of the carrier with regard to stopping particular trains only at particular stations,[19] and if, in the absence of a special contract or the assurance of an agent on which he has a right to rely, a passenger through his own fault or mistake boards a train which under the customs or regulations of the carrier does not regularly or ordinarily stop at his point of destination, he cannot require it to stop there or recover damages for its failure so to do,[20] particularly where it appears that there are other trains that do stop at the station and which give ample accommodations to that point.[21] However, it has been held that where a passenger is permitted without objection to board a train which does not stop at his destination and the passenger is unaware of that fact and the ticket contains no notice thereof, it is the carrier's duty to stop the train at that station and permit the passenger to alight,[22] at least where the agent of the carrier has been told the

wrong station, its action was held not to be tortious where the depot was in a large city in which the passenger would be safe, comfortable, and well taken care of.—Louisville & N. R. Co. v. Wells, 294 S. W. 143, 219 Ky. 718.

Discharge of passenger near home

Railroad passenger carried past destination was held not entitled to damages on theory of tort, where conductor invited her to remain on train until it returned to passenger's destination in about one hour, but, when passenger refused, stopped train and let passenger off, without discourtesy, within two hundred feet of commissary, near home of neighbor, within quarter of mile of place where her husband was working, and within one mile of her own home, between 9 and 10 A. M.—Louisville & N. R. Co. v. McPherson, 78 S.W.2d 919, 257 Ky. 662.

12. Mass.—Sullivan v. Old Colony St. R. Co., 86 N.E. 511, 200 Mass. 303.

Separate fare payable to each town

An interurban street railroad company is not absolutely bound to carry a passenger to a particular town where there is no agreement therefor, where he has procured no ticket and has paid no fare to that place, and a separate fare is payable in each town on the route, and he has been carried as far as he has paid or has offered to pay fare.—Sullivan v Old Colony St. R. Co., 86 N.E. 511, 200 Mass. 303.

13. Tex.—Walls v Kansas City, M. & O. Ry. Co. of Texas, Civ App., 195 S.W. 868.

14. Ky.—Payne v. Simmons, 255 S. W. 863, 201 Ky. 33, 33 A.L.R. 814.

15. La.—Cady v. New Orleans, T. & M. Ry. Co, 145 So. 680, 176 La. 341.
Va.—Hines v. Garrett, 108 S.E. 690, 131 Va. 125.
10 C.J. p 821 note 84.

Breach of duty per se

Generally a failure to stop train at point to which carrier has undertaken to carry and discharge passenger is per se a breach of duty for which an action technically lies.—Nashville, C. & St. L. Ry. v Campbell, 101 So. 615, 212 Ala 27.

16. S.C.—Martin v. Southern R. Co., 58 S.E. 3, 77 S C. 370, 122 Am.S.R 574.
10 C.J. p 822 note 90.

17. N.C.—Cable v. Southern R. Co., 29 S.E. 377, 122 N.C. 892.
10 C.J. p 822 note 91.

18. Ala.—Louisville, etc., R Co. v. Dancy, 11 So. 796, 97 Ala. 338.
Mich.—Reed v. Duluth, etc., R. Co., 59 N.W. 144, 100 Mich. 507.
10 C.J. p 822 note 92.

19. U.S.—Kyle v. Chicago, R. I. & P. Ry. Co., Ark., 182 F. 613, 105 C C.A. 151.
Ala.—Southern Ry Co. v. Pruett, 77 So 49, 200 Ala. 675.
Kan.—Atchison, etc., R. Co. v. Gants, 17 P. 54, 38 Kan. 608, 5 Am.S.R. 780.
S.C.—Shepherd v Southern Ry. Co., 133 S.E. 231, 135 S.C. 75.
10 C J. p 822 note 93.

20. N.C.—Meeder v. Seaboard Air Line Ry., 91 S E. 527, 173 N.C. 57
S.C.—Shepherd v. Southern Ry. Co., 133 S E. 231, 135 S.C. 75.
Tex.—Gulf, C. & S. F. Ry. Co. v. Sanderson, Civ App., 216 S.W. 286 —Texas & P. Ry Co. v. Lathrop, Civ.App., 192 S.W. 1080, error refused.
10 C.J p 822 note 94

Not specified in tariff

A passenger has no right to get off at a station not specified in the tariff, as a railroad is not allowed to extend to any person any privileges except such as are specified in its tariffs.—May v. Seaboard Air Line Ry. Co, 96 S.E. 482, 110 S.C. 84.

Permitting passenger to take through train

Conductor's conduct in permitting passenger to take through train cannot be regarded as willful, in absence of evidence showing that he willfully permitted passenger to take such train instead of local.—Shepherd v. Southern Ry. Co., 133 S.E. 231, 135 S.C. 75.

21. Ark.—St. Louis, etc., R. Co. v. Rosenberry, 45 Ark. 256.
Tex.—Texas, etc., R. Co. v. White, 17 S W. 419, 4 Tex A.Civ.Cas. § 259.

22. N.C.—Hutchinson v. Southern Ry. Co, 52 S.E 263, 140 N.C. 123, approved in Blaylock v. Southern Ry. Co., 100 S E. 599, 178 N.C. 353.

passenger's destination as he was about to board the train.[23]

Ordinarily, the carrier's duty is fully satisfied by notifying the passenger in due time that the train will not stop, and giving him an opportunity to alight at some other station on the road, from which he may take passage on the first train of the company which regularly stops at the station named in his ticket.[24] It has been held that this rule applies notwithstanding the conductor punches and takes up the passenger's ticket after having told him that the train does not stop at his place of destination,[25] although there is also authority to the contrary.[26] Where the train is scheduled to stop at stations before a passenger's destination, the conductor has no duty to volunteer information that the train does not stop at the passenger's destination since he may assume that the passenger intends to alight at an intermediate station and complete the journey by local train or otherwise.[27]

Where a passenger having the right to stop at a particular station is carried by without his consent and without giving him reasonable opportunity to leave the train, he may recover whatever damages he may have suffered by reason thereof,[28] and it is no defense that the conductor did not know of the passenger's presence on the train,[29] or that he offered to let the passenger off at an intermediate station and give him a pass by which he could take a later train, where such offer was not accepted.[30] Generally, it is the duty of the carrier in such a case to return the passenger to his destination,[31] but this rule does not apply where the passenger is carried beyond his destination by reason of his neglect to alight when he is offered a reasonable opportunity so to do;[32] and where a passenger is carried beyond his destination through no wrong or neglect of the carrier, and is safely landed at some other station, there is no duty on the carrier to get him back to his destination,[33] nor is it responsible for the gratuitous acts of its employees in advising or directing him as to his return.[34]

In street car cases, there is a duty on the carrier to stop the car on the signal of a passenger desiring to alight at any regular stopping place.[35]

Agreement or representation. Where the passenger has made a special contract, express or implied, to be carried on a particular train to a particular station, the carrier may be bound to stop at that station regardless of its custom or regulations,[36] particularly where no other train is run between the points in question on which the passenger might be transported.[37] This rule applies where the ticket agent has made an agreement with, or a promise to, the passenger that the train will stop.[38] Likewise, a statement or representation of the ticket agent or other proper agent that a ticket may be used on a particular train, or that the train will stop at his destination, may be relied on by the passenger as constituting an agreement that the train will stop at his destination, and the carrier will be bound, in the absence of knowledge on the part of the passenger that the information is incorrect,[39] although there is also authority to the con-

23. Ark.—Chicago, R. I. & P. Ry. Co. v. Sims, 292 S.W. 94, 173 Ark. 256.

24. N.C.—Meeder v. Seaboard Air Line Ry., 91 S.E. 527, 173 N.C. 57.
S.C.—May v. Seaboard Air Line Ry. Co., 96 S.E. 482, 110 S.C. 84.
10 C.J. p 823 note 96.

Purchase of ticket after notice

Where, when plaintiff requested the conductor to stop the train at a station at which it was not scheduled to stop, the conductor informed him that he was riding on a stock pass, and that he would not stop the train, and plaintiff, while the train was stopped at an intermediate station, procured a ticket to the station at which he desired to alight, it was held that, as the ticket notified him the train in question did not stop there, the conductor was justified in refusing to stop the train, although plaintiff had procured such ticket.—Gulf, C. & S. F. Ry. Co. v Sanderson, Tex.Civ.App., 216 S.W. 286.

25. Ark.—St. Louis, etc., R. Co. v. Atchison, 14 S.W. 468, 47 Ark. 74.
10 C.J. p 823 note 97.

26. Ga.—Caldwell v. Richmond, etc., R. Co., 15 S.E. 678, 89 Ga. 550

27. S.C.—Hutchison v. Southern Ry. Co., 95 S.E. 181, 109 S.C. 90.

28. W.Va.—White v. Ohio Valley Electric Ry. Co., 127 S.E. 65, 98 W.Va. 378.
10 C.J. p 824 note 14.

29. Mo.—Rawlings v. Wabash R. Co., 71 S.W. 535, 97 Mo.App. 511.

30. Ill.—Ohio, etc., R. Co. v. Peo., 29 Ill App 561.

31. Va.—Hines v. Garrett, 108 S.E. 690, 131 Va. 125.
10 C.J. p 825 note 17.

32. Ky.—Louisville, etc., R. Co. v. Gaddie, 172 S.W. 514, 162 Ky. 205, L.R.A.1915D 705.
10 C.J. p 825 note 18.

33. Ala.—Birmingham, R., etc., Co v. Seaborn, 53 So. 241, 168 Ala. 658.

34. Ala.—Birmingham R., etc., Co. v Seaborn, supra.
10 C.J. p 825 note 20.

35. Ky.—Louisville & I. R. Co. v Bullock, 250 S.W. 846, 199 Ky 193
10 C.J. p 823 note 99.

Use of push buttons

Since push buttons in street cars are ordinarily used for the purpose of giving notice of a passenger's desire to alight, a company using cars equipped with such buttons invites a passenger to use them for that purpose, and will not be heard to say that the use of the buttons was insufficient, and the passenger should have otherwise notified the conductor of a desire to alight.—Louisville & I R. Co. v. Bullock, 250 S.W. 846, 199 Ky. 193.

36. Ark.—Missouri Pac. R. Co. v. Coxwell, 30 S.W.2d 209, 182 Ark. 145.
10 C.J. p 823 note 4.

37. Ind.—Dillman v. Chicago, I. & L. Ry. Co., App., 88 N.E. 873.

38. Miss.—Louisville & N. R. Co. v. McArthur, 102 So. 842, 137 Miss. 780.
10 C.J. p 824 note 6.

39. Ark.—Simmons v. Lusk, 194 S.W. 11, 128 Ark. 336.

trary;[40] but this rule does not apply to the representations of an agent without authority, or in excess of such authority, to determine whether the train shall stop at a particular station.[41] It has been held that the passenger's remedy in such a case is not for the refusal of the conductor to stop at his station, but for the misinformation or misdirection given him.[42] By selling a ticket to a particular station the carrier contracts to carry the passenger to that station and to stop there to allow him to alight,[43] but in the absence of a special contract or representation the mere sale of a ticket by a carrier to a particular station creates no implied obligation that a particular train will stop at that station.[44] After the train conductor tells a passenger that the train does not stop at his station and directs him to change cars at an intermediate station, the passenger is not entitled to rely upon an incorrect statement of a railroad employee before he boarded the train that the train would stop at his destination.[45] A direction by a carrier's employee to a passenger to take a train which would carry him toward his destination to a station from which a local train could be taken is not a wrongful act.[46]

Since every one is bound to know that a conductor has no general power to run his train except in conformity to the schedule,[47] an arrangement or agreement with the conductor of the train to let the passenger off at a station where the train is not scheduled to stop has been held not to bind the carrier to stop the train at such station, or to render it liable in damages for its failure so to do,[48] although there is authority to the contrary.[49] An acceptance of a cash fare by the conductor for a certain station has been held an agreement binding on the carrier to stop the train at that station.[50] A passenger on a street car may rely on the promise of the conductor to let him off at a place where passengers are regularly received and discharged.[51]

§ 655. Stopping at Flag Stations

A carrier is bound to carry a passenger, holding a ticket to a flag station, to the station, and must stop to permit him to alight if the carrier knows or should know of the passenger's destination.

Where a passenger purchases a ticket to a flag station at which trains do not stop unless signaled or unless there are passengers on board for such station, the carrier undertakes to carry him to such destination and let him off there, and is bound to fulfill its obligation, and a failure to perform such duty is not only a breach of contract but also a tort for which an action is maintainable.[52] Ordinarily, it is the duty of the conductor before reaching the station to ascertain the destination of a passenger holding such a ticket and to stop the train there for the purpose of allowing the passenger to leave.[53] The exhibiting of the ticket to the carrier's agents or servants in charge of the train or car,[54] or the taking up of such ticket by the conductor,[55] is sufficient notice to the conductor of the passenger's desire to get off at a flag station. The

Ky.—Louisville, etc., R. Co. v. Gaddie, 172 S.W. 514, 162 Ky. 205, L.R.A.1915D 705.

Miss.—Louisville & N. R. Co. v. McArthur, 102 So. 842, 137 Miss. 780.

N.C.—Blaylock v. Southern Ry. Co., 100 S.E. 599, 178 N.C. 353.

10 C.J. p 690 note 56, p 691 note 59, p 738 note 68 [c], p 824 note 7.

Corpus Juris is cited with approval in Louisville & N. R. Co. v. McArthur, 102 So. 842, 137 Miss. 780.

40. Mo.—Sira v. Wabash R. Co., 21 S.W. 905, 115 Mo. 127, 37 Am.S.R. 386.

10 C.J. p 824 note 8.

41. Ala.—Alabama Great Southern R. Co. v. Carmichael, 8 So. 87, 90 Ala. 19, 9 L.R.A. 388.

10 C.J. p 824 note 9.

42. Ark.—St. Louis, etc., R. Co. v. Atchison, 14 S.W. 468, 47 Ark. 74.

Mo.—Marshall v. St. Louis, etc., R. Co., 78 Mo. 610.

43. Tex.—Texas, etc., R. Co. v. Cole, 1 S.W. 629, 66 Tex. 562—Renfro v. Texas Cent. R. Co., Civ.App., 141 S.W. 820—Missouri, etc., R. Co. v. Glass, 102 S.W. 447, 46 Tex. Civ.App. 126—San Antonio, etc., R. Co. v. Dykes, Civ.App., 45 S.W. 758.

44. U.S.—Atchison, T. & S. F. R. Co. v. Cameron, Ind.T., 66 F. 709, 14 C.C.A. 358.

45. Mich.—Lake Shore, etc., R. Co. v. Pierce, 11 N.W. 157, 47 Mich. 277.

Tex.—Texas & P. Ry. Co. v. Lathrop, Civ.App., 192 S.W. 1080, error refused.

46. Tex.—Texas & P. Ry. Co. v. Lathrop, supra.

47. Mich.—Lake Shore, etc., R. Co. v. Pierce, 11 N.W. 157, 47 Mich. 277.

48. Ala.—Alabama Great Southern R. Co. v. Carmichael, 8 So. 87, 90 Ala. 19, 9 L.R.A. 388.

10 C.J. p 691 note 67, p 824 note 11.

Refusal to stop for passenger with stock pass

The mere statement of the conductor in answer to a request by a passenger to stop the train at a station where it was not scheduled to stop, that the passenger was riding on a stock pass and had no ticket does not amount to a representation that if he purchased a ticket to that destination the train would stop there.—Gulf, C. & S. F. Ry. Co. v. Sanderson, Tex.Civ.App., 216 S.W. 286.

49. Tex.—Hull v. East Line, etc., R. Co., 2 S.W. 831, 66 Tex. 619.

10 C.J. p 824 note 12.

50. Ga.—Caldwell v. Richmond, etc., R. Co., 15 S.E. 678, 89 Ga. 550.

Tenn.—Tennessee R. Co. v. Kingsley, 10 Tenn.App. 637.

51. Mo.—Moeller v. United R. Co., 112 S.W. 714, 133 Mo.App. 68.

10 C.J. p 824 note 13.

52. Okl.—Ft. Smith, etc., R. Co. v. Ford, 126 P. 745, 34 Okl. 575, 41 L.R.A.,N.S., 745.

10 C.J. p 825 notes 22–24.

53. Ind.—Pittsburgh, C., C. & St. L. Ry. Co. v. Boys, 123 N.E. 482, 71 Ind.App. 102.

10 C.J. p 825 note 25.

54. Ark.—Chicago, R. I. & P. Ry. Co. v. Blundell, 191 S.W. 940, 127 Ark. 82.

55. Ind.—Pittsburgh, C. C. & St. L. Ry. Co. v. Boys, 123 N.E. 482, 71 Ind.App. 102.

10 C.J. p 825 note 26.

passenger has a right to act on the assumption that the conductor will call for his ticket before reaching the station specified and thus obtain such notice,[56] and failure of the conductor to do so will not excuse a failure to stop;[57] but where the carrier has no notice of the ticket and is not at fault for lack of notice, the carrier is not liable for its failure to stop.[58]

There is a divergence of judicial opinion as to the duty of a passenger to give notice and in some jurisdictions it has been held that the mere purchase of a ticket to a flag station is not sufficient notice to the carrier of the passenger's destination,[59] and it may become the duty of the passenger under the circumstances of the particular case to notify the conductor of his desire to get off at such a station,[60] as where the conditions, such as the train being crowded and the distance short, are such that the conductor cannot reasonably be expected to obtain notice by taking up the ticket or otherwise;[61] but there is other authority to the effect that the purchase of the ticket is conclusive notice,[62] and the fact that the train is so crowded that the conductor has no time to reach a passenger holding a ticket for a flag station before the station is passed does not excuse the carrier for failing to stop.[63]

A passenger cannot claim the right to be put off at a flag station short of the station named in his ticket.[64]

§ 656. Stopping at Places Other than Stations

In the absence of a special contract, a carrier owes no duty to discharge a passenger at a point where there is no regular station or stopping place.

In the absence of a special contract to that effect, a passenger on a railroad train has no right to demand that he be put off at a point where there is no regular station or stopping place,[65] and this rule applies even though such passenger has mistakenly embarked on the train and has paid his fare.[66] However, where a special contract to be put off at such a point is made with some agent of the company having the real or apparent power so to do, the company will be liable for failure to perform it.[67]

56. Ark.—Louisiana, etc., R. Co. v. Mason, 183 S.W. 977, 122 Ark. 477, distinguishing Rock Island, etc., R. Co. v. Stevens, 105 S.W. 1032, 108 S.W. 517, 84 Ark. 436, 16 L.R.A.,N.S., 1132.
10 C.J. p 825 note 27.

57. Ala.—Louisville, etc., R. Co. v. Fuqua, 65 So. 396, 187 Ala. 464, 52 L.R.A.,N.S., 668.
Ark.—Louisiana & A. Ry. Co. v. Mason, 183 S.W. 977, 122 Ark. 477.

58. Ark.—Chicago, R. I. & P. Ry. Co. v. Blundell, 191 S.W. 940, 127 Ark. 82.
Ky.—Pence v. Louisville, etc., R. Co., 64 S.W. 905, 23 Ky.L. 1207.

Duty to back train

Carrier, on being informed for the first time after passing a station that a passenger, although having ticket for another station, desired to get off at the station passed, was under no duty to back the train to the station.—New Orleans & N.E.R. Co. v. Martin, 105 So. 864, 140 Miss. 410.

Failure of passenger to proffer ticket

Where the passenger does not proffer his ticket or call it to the attention of the conductor when he collects the tickets of other passengers who boarded the train at the same station, the carrier is not liable for not stopping the train at the station for which such passenger holds a ticket.—Chicago, R. I. & P. Ry. Co. v. Blundell, 191 S.W. 940, 127 Ark. 82.

59. Ark.—Chicago, R. I. & P. Ry. Co. v. Blundell, 191 S.W. 940, 127 Ark. 82.—Rock Island, etc., R. Co. v. Stevens, 105 S.W. 1032, 108 S.W. 517, 84 Ark. 436, 16 L.R.A.,N.S., 1132.
10 C.J. p 826 note 31.

60. Ark.—Rock Island, etc., R. Co. v. Stevens, 105 S.W. 1032, 108 S.W. 517, 84 Ark. 436, 16 L.R.A.,N.S., 1132.
Ga.—Chattanooga, etc., R. Co. v. Lyon, 15 S.E. 24, 89 Ga. 16, 32 Am.S.R. 72, 15 L.R.A. 857.
10 C.J. p 825 note 28, p 826 note 30

61. Ark.—Chicago, R. I. & P. Ry. Co. v. Blundell, 191 S.W. 940, 127 Ark. 82.—Rock Island, etc., R. Co. v. Stevens, 105 S.W. 1032, 108 S.W. 517, 84 Ark. 436, 16 L.R.A.,N.S., 1132.

Need to collect only two tickets

Where a conductor had only two tickets to collect before reaching the flag station at which plaintiff desired to alight, he cannot excuse his failure to stop the train at that point on the ground that he supposed plaintiff was one of a party riding on a single ticket.—Louisiana & A. Ry. Co. v. Mason, 183 S.W. 977, 122 Ark. 477.

62. Ala.—Louisville, etc., R. Co. v. Fuqua, 65 So. 396, 187 Ala. 464, 52 L.R.A.,N.S., 668.
Tex.—Missouri, etc., R. Co. v. Glass, 102 S.W. 477, 46 Tex.Civ.App. 126.—San Antonio, etc., R. Co. v. Dykes, Civ.App., 45 S.W. 758
However, it has also been held in Texas that it is the duty of a passenger holding a ticket to a flag station to inform the conductor of his destination.—Gulf, etc., R. Co. v. Ryan, 18 S.W. 866, 4 Tex.A.Civ.Cas. § 305.

63. Tex.—Missouri, etc., R. Co. v. Glass, 102 S.W. 477, 46 Tex.Civ. App. 126.

64. S.C.—Matthews v. Charleston, etc., R. Co., 17 S.E. 225, 38 S.C. 429, 37 Am.S.R. 773.

Custom

A passenger cannot complain of a railroad company's refusal to put her off at a flag station short of the destination named in her ticket, although she had previously been permitted to get on and off at such station, where there is no allegation that it was ever the custom of the company so to accommodate the passengers.—Matthews v. Charleston, etc., R. Co., 17 S.E. 225, 38 S.C. 429, 37 Am.S.R. 773.

65. Pa.—Jagger v. People's St. R. Co., 36 A. 867, 180 Pa. 436, 38 L.R.A. 786.
10 C.J. p 826 note 33

66. Miss.—Wells v. Alabama Great Southern R. Co., 6 So. 737, 67 Miss. 24.

67. Ga.—Western R. Co. v. Young, 51 Ga. 489
Tex.—Hull v. East Line, etc., R. Co., 2 S.W. 331, 66 Tex. 619.
10 C.J. p 826 note 35.

Custom

A carrier may by custom establish policy of discharging passengers at places other than its depots

§ 657. Stopping at Platform or Suitable Place

The carrier must stop at the platform or other suitable place to enable passengers conveniently to alight.

The carrier must afford the passenger a reasonable opportunity to leave the car at a place safe and convenient for alighting.[68] The carrier should stop the train at the usual platform for discharging passengers at the place of destination, and cannot require the passenger to alight at an unusual or unsuitable place,[69] and it has been held that it is immaterial who owns the track on which the contracting carrier runs its cars into the station.[70] The carriers may, however, determine what part of its train shall be nearest the station when it stops.[71] If passengers are required to alight at any other point the carrier is liable for any injury to them resulting thereby,[72] unless by reason of a storm or other unavoidable accident the carrier is unable to stop its trains at the station.[73] Stopping the train merely a short distance past the usual place of debarkation is not a breach of the carrier's duty to stop at the destination if the train stops in the immediate vicinity,[74] but where the train carries a passenger beyond the immediate vicinity before it stops the carrier is liable for the injuries caused thereby,[75] and it cannot relieve itself from liability for the actual damages sustained by offering to take the passenger to the next station,[76] or by backing the train to the station.[77]

A street car must stop on the near side of the intersection when such is required by ordinance.[78]

A freight train carrying passengers should stop its caboose reasonably near the platform, regard being had to the surrounding situation and location.[79] In such cases a usage of stopping the car carrying passengers at some distance from the station platform, provided a reasonable opportunity to alight is afforded, is not improper,[80] but in the absence of any rule, regulation, or custom to that effect, it is the duty of the carrier to transport such a passenger to the place where its passengers are usually received and discharged from regular passenger trains.[81]

Duty to back or forward trains. Where a train is stopped near a station, or is so stopped that the passenger cars are not alongside the platform, it is ordinarily the duty of the conductor, if requested by any passenger, to move the train backward or forward, as desired, to enable the passengers to alight on the platform,[82] but where a passenger is carried past the station the carrier is not required in all cases to back the train to the station, the question of its duty so to do depending on the circumstances, including the distance the train has traveled before the mistake is discovered.[83] If a pas-

or stations.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.

68. Mo.—Gott v. Kansas City Rys Co., 222 S.W. 827.
10 C.J. p 826 note 36.
Care required in providing safe place for getting on board or alighting see infra § 716.

69. Mo.—Payne v. Davis, 252 S.W. 57, 298 Mo. 645.
10 C.J. p 826 note 37.

70. Ky.—Southern R. Co. v. Miller, 110 S.W. 351, 33 Ky.L. 505

71. N.C. — Anderson v. Atlantic Coast Line R. Co., 77 S.E. 402, 161 N.C. 462

72. S.C.—Martin v. Southern R. Co., 58 S.E. 3, 77 S.C. 370, 122 Am.S.R. 574.
10 C.J. p 826 note 38.

73. N.Y.—Cormack v. New York, etc., R. Co., 90 N.E. 56, 196 N.Y. 442, 24 L.R.A.,N.S., 1209, 17 Ann. Cas. 949.
10 C.J. p 827 note 39.

74. Ala.—Nashville, C. & St. L. Ry. v. Campbell, 101 So. 615, 212 Ala. 27.

Stopping automobile a few yards beyond gate

Driver of automobile truck, by which employees for small consideration were being driven to their homes, did not breach contract of carriage by stopping a few yards beyond employee's gate, instead of directly opposite it, where there were no impediments or inconveniences in the way of employee in reaching his home from where truck stopped.—Dantzler Shipbuilding & Dry Docks Co. v. Hurley, 81 So. 163, 119 Miss. 473, 4 A.L.R. 1487, suggestion of error denied 81 So. 406

75. Ga.—Payne v. Meadows, 109 S.E. 169, 27 Ga.App. 412.

Carrying sick passenger several hundred yards beyond station

Where a very sick and feeble passenger was carried several hundred yards past her station, resulting in her missing her husband, who was waiting at the station with a closed car, and also resulting in a relapse of influenza, the carrier was held liable.—Payne v. Meadows, 109 S.E. 169, 27 Ga.App. 412.

76. Ark.—Missouri Pac. R. Co. v. Coxwell, 30 S.W.2d 209, 182 Ark. 145

77. Miss.—New Orleans & N. E. R. Co. v. Myers, 106 So. 531, 140 Miss 789.

Missing conveyance at station

Where a passenger is negligently carried beyond and out of sight of the station, damages from missing a conveyance to meet the train at the station and having to walk home in a storm are recoverable.—New Orleans & N. E. R. Co. v. Myers, 106 So. 531, 140 Miss. 789.

78. Va.—Virginia Ry. & Power Co. v. Taylor, 132 S.E. 334, 144 Va. 496.

Authority to disregard ordinance

Director of public safety was held to exceed authority in authorizing street railroad to disregard ordinance requiring street cars to stop on near side of intersection.—Virginia Ry. & Power Co. v. Taylor, 132 S.E. 334, 144 Va. 496.

79. Ind.—New York, etc., R. Co. v. Doane, 17 N.E. 913, 115 Ind. 435, 7 Am.S.R. 451, 1 L.R.A. 157
10 C.J. p 827 note 42.

80. Wis.—Hemmingway v. Chicago, etc., R. Co., 31 N.W. 268, 67 Wis. 668.
10 C.J. p 827 note 42.

81. Mo.—Adams v. Missouri Pac. R. Co., 12 S.W. 637, 13 S.W. 509, 100 Mo. 555

82. Ind.—New York, etc., R. Co. v. Doane, 17 N.E. 913, 115 Ind. 435, 7 Am.S.R. 451, 1 L.R.A. 157.
10 C.J. p 827 note 44.

83. Miss.—Yazoo, etc., R. Co. v. Hardie, 55 So. 42, 967, 100 Miss.

senger who has been carried past his station has notice of the nature of the place where he is asked to get off, which, to his knowledge, is dangerous, his failure to object to alighting there will amount to a waiver of his right to be carried back,[84] but if he is not aware of the fact that he is carried beyond his station, his failure to demand that he be taken back is not a waiver of his right, and does not discharge the company's obligation to put him off at the proper place.[85] Where it is necessary to carry a passenger beyond his station, it is the duty of the carrier to notify him of its purpose as to returning to the station, and, if it fails so to do, it is negligent, and liable to the passenger for any damage caused thereby.[86]

§ 658. Penalty for Failure to Stop at Station

Under statutes so providing, railroad companies may be subject to penalties for failure to stop their trains at certain stations.

Statutes varying somewhat in phraseology which provide a penalty for the failure or refusal of railroad companies to stop their trains at certain stations have been held constitutional as a valid exercise of the police power of the state; and, where the federal government has not taken any affirmative action on the subject, under its power to regulate interstate commerce, such a statute applies to an interstate railroad.[87] These statutes are to be strictly construed, and, to warrant the imposition of the punishment provided, the proof must bring the company accused of its violation clearly within the provisions of the law; courts have no power to extend such enactments to cases not clearly within their terms,[88] nor can usage or custom be held to extend the terms of these statutes.[89] Hence it has been held that such a provision does not apply to flag stations, but only to regularly advertised stopping places.[90] Where the carrier has a just or legal excuse for refusing to stop, such as weather conditions making it dangerous so to do, it may constitute a good defense to an action for the penalty,[91] but this does not apply to causes for the refusal for which the carrier alone is responsible.[92] If the right to the penalty is given only to one who has paid the regular fare, one who has purchased a ticket at a reduced rate cannot recover the penalty for failure to discharge him at his destination.[93]

County seats. Statutes which provide that all regular passenger trains run by any common carrier operating a railroad shall stop a sufficient time at all county seats within the state to take on and discharge passengers from such trains with safety have been held to be a valid exercise of the police power of the state.[94]

Crossings or junctions. A statute which requires railroad companies to stop all trains carrying passengers at the junctions of other railroads to allow the transfer of passengers, personal baggage, etc., from the trains of the intersecting roads does not require such roads to stop all trains at each intersection, whether or not there are any persons, baggage, etc., from the intersecting road to be transferred; but, in order to establish a case under this statute, it is necessary to prove that, on a day specified, the railroad company failed to stop a train at a junction point when there was a passenger or baggage from the connecting railroad to be transferred and carried on the train not stopping.[95] Likewise, such a statute which requires passenger trains to be stopped when two trains are due at the crossing or junction at practically the same time, does not apply to a train not due at the junction near the same time as another where passengers arriving on one road have reasonable opportunity to take the next train at the depot.[96]

132, 34 L.R.A.,N.S., 740, 742, Ann. Cas.1914A 323

Va.—Hines v. Garrett, 108 S.E. 690, 131 Va. 125.

84. Tex.—Gulf, etc., R. Co. v. Head, 15 S.W. 504, 4 Tex.A.Civ Cas. § 209.

85. Mo.—Winkler v. St. Louis, etc., R. Co., 21 Mo.App. 99.

86. Miss.—Natchez, etc., R. Co. v. Lambert, 54 So. 836, 99 Miss. 310, 37 L.R.A.,N.S., 264.

87. U.S.—Lake Shore, etc., R. Co. v. Ohio, Ohio, 19 S.Ct. 465, 173 U.S 285, 43 L.Ed. 702.
10 C.J. p 827 note 49.

88. Ill.—Lake Erie, etc., R. Co. v. Peo., 42 Ill.App. 387.
S.C.—Rountree v. Atlantic Coast Line R. Co., 53 S.E. 424, 73 S.C. 268.
10 C.J. p 828 note 52.

89. Ill.—Lake Erie, etc., R. Co. v. Peo., 42 Ill.App. 387.

90. S.C.—Rountree v. Atlantic Coast Line R. Co., 53 S.E. 424, 73 S.C 268—Milhous v. Southern R. Co., 52 S.E 41, 72 S.C. 442, 110 Am S.R. 620
10 C.J. p 828 note 54.

91. Mich.—Reed v. Duluth, etc., R Co., 59 N.W. 144, 100 Mich. 507.

92. Mich.—Hoyt v. Cleveland, etc., R. Co., 71 N.W. 172, 112 Mich. 638
Crowded train and platform
It is no excuse that the train was so full, and that there were so many people at the station of plaintiff's destination waiting for the train, that the carrier determined it was unsafe to stop.—Hoyt v. Cleveland, etc., R. Co., 71 N.W. 172, 112 Mich. 638

93. Mont.—Miley v. Northern Pac. R. Co., 108 P. 5, 41 Mont. 51

94. U.S.—Gladson v. Minnesota, 17 S.Ct. 627, 166 U.S. 427, 41 L.Ed 1064, affirming 59 N.W. 487, 57 Minn. 385, 24 L.R.A. 502.
10 C.J. p 828 note 59.

95. Mo.—State v. St. Louis R. Co., 79 S.W. 714, 105 Mo.App. 207.
10 C.J. p 828 note 58.

96. Minn.—Brogger v. Chicago, St. P., M. & O. Ry. Co., 164 N.W. 368, 137 Minn 338, denying reargument 163 N.W. 662, 137 Minn. 338.

§ 659. Duty to Announce or Give Notice of Arrival at Station

a. In general
b. Sufficiency of notice

a. In General

The carrier must correctly announce or give notice of arrival of the train at the station.

A railroad company carrying passengers, in order to afford them opportunity to leave the train at their places of destination, is bound to give notice to such passengers by having the names of the different stations announced as the train approaches or arrives thereat,[97] particularly when so required by statute;[98] but a failure to comply with this duty is immaterial where the passenger is in no way misled thereby,[99] as where he knows that he has reached the station of his destination.[1] It has been held that, however, in the absence of a custom or statute requiring such announcement, the carrier is not negligent, as a matter of law, in failing to make it.[2]

A passenger, unless he knows that the station is some other than the one called, is warranted in relying on the announcement as being correct,[3] and misinformation, or failure to call the name of the station due to the fault of an employee within the scope of his authority, will render the carrier liable for injuries resulting therefrom,[4] as where the carrier negligently announces as the station to which the passenger is destined another and different station, and through no fault of the passenger he is thereby misled and induced to alight at a wrong station;[5] it is no excuse, in such a case, that the mistake in the announcement was made honestly.[6]

Flag station. A carrier has been held to be under no obligation to announce the arrival of the train at a flag station in the absence of notice that it has passengers for that station.[7]

Intermediate stations. As a general rule, where the conductor of a train knows the station at which a passenger intends to alight, it is not his duty as to such passenger to call out the names of intermediate stations.[8]

b. Sufficiency of Notice

A general announcement is usually sufficient, and personal notice to a passenger is unnecessary unless exceptional circumstances exist. Likewise there is no duty to awaken a passenger in the absence of special circumstances.

Generally, the duty to give the passenger notice of arrival at the station is discharged by announcing the arrival of the train in a distinct and audible manner in each car, so that it may be heard by all passengers of ordinary hearing and paying ordinary attention,[9] a reasonable time before the arrival of the train at the station.[10] A general announcement is all that is required, and personal notice to each passenger of the station where he is to alight is not necessary,[11] although extraordinary circumstances, such as the conditions of age, sex, or physical infirmity of the passenger, may bring it within the scope of the conductor's duty toward a passenger to give him personal notice that his particular station has been reached.[12] The carrier

97. Ark.—Edwards v. St. Louis Southwestern Ry. Co., 203 S.W. 588, 134 Ark. 265.
La.—Cady v. New Orleans, T. & M. Ry. Co., 145 So. 680, 176 La. 341.
Okl.—Hill v. New, 212 P. 422, 88 Okl. 208.
S.C.—Gilkerson v. Atlantic Coast Line R. Co., 89 S.E. 549, 105 S. C. 132.
10 C.J. p. 828 note 61.
Corpus Juris is cited with approval in Faubion v. Minneapolis, St. P. & S. S. M. Ry. Co., 177 N.W. 371, 372, 45 N.D. 269.

98. Ky.—Chesapeake, etc., R. Co. v. Robinson, 123 S.W. 308, 135 Ky. 850.

99. Ga.—Seaboard Air-Line R. Co. v. Rainey, 50 S.E. 88, 122 Ga. 307, 106 Am.S.R. 134, 2 Ann.Cas. 675.
10 C.J. p. 829 note 64.

1. La.—Cady v. New Orleans, T. & M. Ry. Co., 145 So. 680, 176 La. 341.
10 C.J. p. 829 note 65.

2. Ga.—Atlanta, etc., R. Co. v. Dickerson, 15 S.E. 534, 89 Ga. 455.
10 C.J. p. 829 note 66.

3. S.C.—Belcher v. Atlantic Coast Line R. Co., 177 S.E. 890, 175 S. C. 9.
Statement that train is stopping for water
A passenger had the right to rely on a statement of a train porter that a train was taking water, and is not guilty of contributory negligence in being carried past the station, although the train was in fact at the station at the time.—Houston E. & W. T. Ry. Co. v. Thorn, Tex.Civ. App., 197 S.W. 778.

4. S.C.—Wilson v. Southern R. Co., 75 S.E. 1014, 93 S.C. 17.
10 C.J. p. 829 note 67.

5. Ind.—Louisville, etc., R. Co. v. Cook, 38 N.E. 1104, 12 Ind.App. 109.
Okl.—St. Louis, etc., R. Co. v. Henry, 149 P. 132, 46 Okl. 526.
Tex.—Texas, etc., R. Co. v. Richardson, Civ.App., 143 S.W. 722.

6. Ky.—Tennessee Cent. R. Co. v. Brasher, 97 S.W. 349, 29 Ky.L. 1277.

7. Ky.—Louisville & N. R. Co. v. Whitaker, 300 S.W. 912, 222 Ky. 302.

8. Ala.—Louisville, etc., R. Co. v. Myers, 70 So. 186, 14 Ala.App. 310.
Ind.—Louisville, etc., R. Co. v. Cook, 38 N.E. 1104, 12 Ind.App. 109.

9. Ala.—Central of Georgia Ry. Co. v. Smith, 117 So. 74, 217 Ala. 501, 58 A.L.R. 1058.
Ark.—St. Louis, I. M. & S. Ry. Co. v. Needham, 184 S.W. 47, 122 Ark. 584.
10 C.J. p. 829 note 76.

10. Ala.—Central of Georgia Ry. Co. v. Barnitz, 84 So. 474, 17 Ala. App. 201.
10 C.J. p. 829 note 73.

11. Ala.—Central of Georgia Ry. Co. v. Smith, 117 So. 74, 217 Ala. 501, 58 A.L.R. 1058.
Ark.—Edwards v. St. Louis Southwestern Ry. Co., 203 S.W. 588, 134 Ark. 265.
Ky.—Strong v. Louisville & N. R. Co., 43 S.W.2d 11, 240 Ky. 781.
10 C.J. p. 829 note 73.

12. Ala.—Central of Georgia Ry. Co. v. Smith, 117 So. 74, 217 Ala. 501, 58 A.L.R. 1058.
10 C.J. p. 829 note 72.

need not insure that a passenger will hear such an announcement,[13] and in the absence of knowledge of a passenger's infirmity the carrier is not responsible if the announcement is not properly heard by a passenger who is deaf.[14]

The announcement of the station need not be made by the conductor personally, and it is sufficient if it is made by any employee of the carrier,[15] but an announcement by a person not an employee of the company is not binding on the carrier.[16] Any promise to give special notice will be deemed beyond the authority of the conductor or other agent, and not binding on the carrier,[17] unless exceptional circumstances exist.[18]

Awakening passenger. Generally, there is no duty to awaken a passenger in order to advise him that his destination is reached and to enable him to get off the train,[19] and a failure to comply with a promise made by the conductor to that effect whereby the passenger is carried beyond his station will impose no liability on the company.[20] This rule has been limited in its application, however, and it has been held that if the conductor sees a passenger asleep at his destination or if he has cause to expect that a passenger will be asleep at his destination he has the duty to awaken him or to see that he is awake.[21] Likewise, the carrier may be held liable for breach of the conductor's promise to awaken a passenger who becomes exhausted because the train is late,[22] or for the conductor's failure to comply with his promise to awaken and to assist a disabled passenger.[23]

It has been held that it is the duty of the railroad company to awaken seasonably a passenger who has a sleeping car ticket to an intermediate point on its line, so that he may safely and comfortably prepare to make the change and to continue his journey to the point on the line called for by his passenger ticket,[24] although there is also a corresponding duty on the part of the sleeping car company, as shown infra § 909.

§ 660. Duty in Connection with Alighting of Passenger

In the absence of special circumstances, the carrier owes no duty to see that a passenger does in fact leave the train at his proper station, but the train or conveyance must remain stopped for a reasonable length of time.

In the absence of special circumstances the carrier performs its whole duty after conveying the passenger to his destination and giving him notice, by affording him a reasonable opportunity to leave the train,[25] and it is then the duty of the passenger to exercise reasonable care with regard to alighting

13. Ky.—Chesapeake, etc., R. Co. v. Robinson, 123 S.W. 308, 135 Ky. 850.

14. Tex.—Texas Midland R. Co. v. Terry, 65 S.W. 697, 27 Tex.Civ. App. 341.

15. Ga.—Southern R. Co. v. O'Bryan, 42 S.E. 42, 115 Ga. 659.

16. Ind.—Columbus, etc., R. Co. v. Farrell, 31 Ind 408—Louisville, etc., R. Co. v. Cook, 38 N.E. 1104, 12 Ind.App. 109.
10 C.J. p 830 note 80.

17. Miss.—Gage v. Illinois Cent. R. Co., 21 So. 657, 75 Miss. 17.
Tex.—St Louis Southwestern R. Co. v. McCullough, 45 S.W. 324, 18 Tex.Civ.App. 534.

18. Ala.—Central of Georgia Ry. Co v. Smith, 117 So 74, 217 Ala. 501, 58 A.L.R. 1058—Louisville, etc., R. Co. v. Quick, 28 So. 14, 125 Ala. 553.

Old and infirm lady passenger

Where the conductor promised an old and infirm lady passenger, unaccustomed to riding on trains, that he would notify her of the arrival at her destination, it was held that she was under no duty to listen to, or depend upon, the call of the brakeman.—Louisville, etc., R. Co. v. Quick, 28 So. 14, 125 Ala. 553.

19. Okl.—Hill v. New, 212 P. 422, 88 Okl 208.
10 C.J. p 830 note 81.

Duty to arouse every passenger

There is no duty on the conductor to go through a day coach and arouse every passenger.—Gilkerson v. Atlantic Coast Line R. Co., 89 S.E. 549, 105 S.C. 132.

20. Ga.—Nunn v. Georgia R. Co., 71 Ga. 710, 51 Am.R. 284.
10 C.J. p 830 note 82.

21. S.C.—Gilkerson v Atlantic Coast Line R. Co., 89 S.E. 549, 105 S.C. 132.

Incidental to duty to assist passengers

The question is not whether it is the duty, ordinarily, of a conductor to awake a sleeping passenger, but whether it is his duty to render assistance to a passenger, in order that he may alight from the train at the proper time, when his physical condition renders such assistance necessary, and the conductor has knowledge of such fact. Under such circumstances, a promise on the part of the conductor is merely incidental to his duty to render assistance to passengers, in getting off the train when he has notice of the fact, that his aid is needed.—Gilkerson v. Atlantic Coast Line R. Co., 83 S.E. 592, 99 S.C. 426, L.R.A.1915C 664, Ann. Cas 1914B 248.

Promise to awaken very tired passenger

The carrier has been held liable for breach of the conductor's promise to awaken a passenger who announced that he was very tired and probably would not be awake when he reached his destination at an early hour in the morning.—Gilkerson v. Atlantic Coast Line R. Co., 83 S.E 592, 99 S.C. 426, L.R.A.1915C 664, Ann.Cas.1916B 248

22. Ala.—Central of Georgia Ry. Co. v. Smith, 117 So. 74, 217 Ala. 501, 58 A.L.R. 1058.

23. Miss.—Weightman v Louisville, etc., R Co., 12 So. 586, 70 Miss. 563, 35 Am.S.R 660, 19 L.R.A. 671.
Wis.—Nelson v Chicago, etc., R. Co., 109 N.W 933, 130 Wis. 214.
10 C.J. p 830 note 83.

24. Ala.—Pullman Co. v. Lutz, 45 So. 675, 154 Ala. 517, 129 Am.S.R 67, 14 L.R.A.,N.S., 907.
La.—Airey v. Pullman Palace Car Co., 23 So. 512, 50 La.Ann. 648

25. S.C.—Gilkerson v. Atlantic Coast Line R. Co., 89 S.E 549, 105 S.C. 132.
10 C.J. p 830 note 87.

Corpus Juris has been quoted with

at the proper place or station,[26] and without unnecessary delay.[27] There is no obligation on the carrier in an ordinary case to see that the passenger does in fact leave the train at his proper station,[28] or to furnish him assistance in doing so see infra § 727, unless the passenger becomes ill or is suffering from a disability to the knowledge of the carrier, making assistance necessary, or requiring a longer delay,[29] in which case notice of such fact should be given to the conductor.[30] The carrier ordinarily need not assist or care for a passenger after it has properly delivered him at his destination, as while he makes preparation further to continue his journey,[31] but where the carrier negligently permits a passenger to leave the train at a station, knowing that such station is not the passenger's destination, and knowing or having reason to know that the passenger believes such station to be his destination, without warning him of the mistake he is making, it will be liable to such passenger for such actual damages as proximately result to him from such negligence, and in such a case it is the duty of the trainman, at the passenger's request, to signal the train to stop and to give him opportunity to reboard the same.[32] There is no breach of duty in failing to open the door at a station which is not the passenger's ticket destination where the passenger has given no notice of his change of destination.[33]

Length of time of stopping. It is the duty of the carrier to stop for a reasonable length of time to enable the passenger in the exercise of due diligence safely to leave its train or car,[34] and it is not sufficient that the speed of the train or car is merely slackened,[35] unless there is an agreement to that effect, in which case the speed should be so checked that the passenger may get off safely.[36]

§ 661. Time of Transportation; Delay

The carrier must exercise ordinary care and skill to carry a passenger to his destination within a reasonable time and if it does so it is not liable, in the absence of a special contract, for an unavoidable delay. It must exercise due care to make advertised connections with connecting trains and to conform to published timetables.

It is the duty of the carrier to exercise ordinary care and skill to carry a passenger to his destination within a reasonable time,[37] and the carrier is liable for damages arising from an unreasonable delay occasioned by the fault or negligence of the employees in charge of the carrier's business,[38] even though the fault of such employees is willful.[39] Such a delay is not excused by a statutory prohibition against the carrier's employees remaining on duty more than a specified number of consecutive hours.[40] The carrier, however, is not an insurer

approval in McCarron v. Erie R. Co., 159 A. 807, 10 N.J Misc 498.

26. Tex.—St. Louis Southwestern R Co. v. Ricketts, 54 S.W. 1090, 22 Tex.Civ.App. 515

27. Tex.—Missouri, etc., R. Co. v. Kendrick, Civ.App., 32 S.W. 42.
10 C.J. p 830 note 89.

28. La.—Cady v. New Orleans, T. & M. Ry. Co., 145 So. 680, 176 La. 341.
10 C.J p 830 note 90.

29. Ga.—Central of Georgia R. Co. v. Madden, 69 S.E. 165, 135 Ga. 205, 31 L.R.A.,N.S., 813, 21 Ann.Cas. 1077.
S.C.—Gilkerson v. Atlantic Coast Line R. Co., 83 S.E. 592, 99 S.C. 426, L.R.A.1915C 664, Ann.Cas 1916B 248.
10 C.J. p 830 note 92.

30. Miss.—New Orleans, etc., R. Co. v. Statham, 42 Miss. 607, 97 Am. D. 478.
10 C.J. p 831 note 93.

Liability for death of passenger

A railroad is not liable for the death of a sick passenger carried, helpless and unconscious past his destination, because of its failure to discharge or to assist the passenger from the train when it stopped, where it has had no knowledge of the passenger's condition and no circumstances existed from which it should have learned of it.—Bullington v. Texas & N. O. R. Co., Tex.Civ. App., 300 S.W. 948.

31. Ala.—Waldrop v. Nashville, etc., R. Co., 62 So. 769, 183 Ala. 226.
Tex.—International, etc., R. Co. v. Doolan, 120 S.W. 1118, 56 Tex.Civ. App. 503
10 C.J. p 831 note 94.

32. S.C.—Campbell v. Seaboard Air Line R. Co., 65 S.E. 628, 83 S.C. 448, 23 L.R.A.,N.S., 1056, 137 Am. S.R. 824
10 C.J. p 831 notes 96, 97.

33. Miss.—New Orleans & N. E. R. Co. v. Martin, 105 So. 864, 140 Miss. 410.

34. La.—Cady v. New Orleans, T. & M. Ry. Co., 145 So. 680, 176 La. 341.
Okl.—Hill v. New, 212 P. 422, 88 Okl. 208.
S.C.—Gilkerson v. Atlantic Coast Line R. Co., 89 S.E. 549, 105 S.C. 132.
10 C.J. p 823 note 1.

Stopping at flag station

The carrier must stop the train at a flag station for a reasonable length of time to allow a passenger to alight.—Ft. Smith, etc., R. Co. v. Ford, 126 P. 745, 34 Okl. 575, 41 L.R.A.,N.S., 745—10 C.J. p 825 note 23.

35. Ala.—Montgomery, etc., R. Co. v. Stewart, 8 So. 708, 91 Ala. 421.
10 C.J. p 823 note 2.

36. Ga.—Western R. Co. v. Young, 51 Ga. 489.

37. Ala.—Alabama Great Southern R. Co. v. Conner, 151 So. 355, 227 Ala. 562, certiorari denied Conner v. Alabama Great Southern R. Co., 54 S.Ct. 531, 291 U.S. 675, 78 L.Ed. 1063
Ky.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.—Paducah Traction Co. v. Weitlauf, 195 S.W. 99, 176 Ky. 82, L.R.A.1917F 353.
10 C.J. p 831 note 98.

38. N.Y.—Cormack v. New York, etc., R. Co., 90 N.E. 56, 196 N.Y. 442, 25 L.R.A.,N.S., 1209, 17 Ann. Cas. 949.
S.C.—Woodward v. Southern R. Co., 83 S.E. 591, 99 S.C. 251, L.R.A. 1915C 477.
10 C.J. p 831 note 1.

39. N.Y.—Weed v. Panama R. Co., 17 N.Y. 362, 72 Am.D. 474.
Wis.—Milwaukee, etc., R. Co. v. Finney, 10 Wis. 388.

40. S.C.—Black v. Charleston, etc., R. Co., 69 S.E. 230, 87 S.C. 241, 31 L.R.A.,N.S., 1184.

as to the time when a passenger will reach his destination, unless it makes a special contract to that effect.[41] Neither the ticket agent selling a ticket nor the conductor taking it has authority to make such a contract,[42] although the passenger may rely on the statements of the ticket agent, made at the time of the purchase of his ticket, with regard to the time of arrival of the train at his destination, rendering the carrier liable for misinformation,[43] and where in case of a delay the passenger, on the conductor's advice, takes the train of another line, on which he is also delayed, the first carrier has been held liable for such second delay.[44] In the absence of a special contract the carrier is not liable for a delay which is not due to negligence on its part,[45] as where it is caused by an act of God or inevitable accident,[46] or where the train is delayed by the wreck of another train, caused without negligence;[47] and in such a case the carrier is not bound by the conductor's promise to furnish the passenger other transportation.[48]

It has been held that, where the carrier has notice of the special engagements or business of its passengers, requiring that they be transported promptly, it will be liable for a failure to transport them in time to meet their engagements, if it is reasonably within its power so to do, in compliance with its contract,[49] but that where no such notice is given it is not responsible for a delay which might have been avoided if the notice had been given in time.[50]

One who boards as passenger a mixed freight and passenger train takes passage subject to the delays incident to that mode of conveyance,[51] but for any unreasonable delay considering that mode of conveyance, the passenger has redress for the actual damages occasioned thereby.[52]

Delay in starting. The failure of the carrier to start its train on time does not render the company liable to a passenger who is injured thereby, unless such failure constitutes a breach either of an express contract or of a legal obligation created by its published time-tables and notices,[53] or is due to a willful neglect of duty.[54]

Duty to make connections. The carrier owes the duty of due care to make advertised connections with connecting trains,[55] and in the absence of statute may guarantee a through connection with another train,[56] but a special contract by a common carrier with a passenger for a guaranteed connection with a certain train in an interstate journey is an "undue or unreasonable preference or advantage" prohibited by the federal statute, Interstate Commerce Act, 49 U.S.C.A. § 3 (1), and therefore unenforceable.[57] An agent having authority to

41. N.Y.—Cormack v. New York, etc., R. Co., 90 N.E. 56, 196 N.Y. 442, 24 L.R.A.,N.S., 1209, 17 Ann. Cas. 949.

42. N.Y.—Gerardy v. Louisville, etc., R. Co., 102 N.Y.S. 548, 52 Misc. 466.

Statement that late train will make up time

A statement by a ticket agent, on selling a ticket to a passenger, that the train was late, but that it would make up for lost time and arrive at its destination on time, and a similar statement by the conductor on taking up the ticket, do not establish a special contract binding the carrier to carry the passenger on schedule time.—Gerardy v. Louisville, etc., R. Co., 102 N.Y.S. 548, 52 Misc. 466.

43. Wash.—Turner v. Great Northern R. Co., 46 P. 243, 15 Wash. 213, 55 Am.S.R. 883.

10 C.J. p. 691 note 58.

'It is generally the fact that there is no other person than the ticket agent at a railroad station who can give travelers the necessary information as to the arrival, departure and running time of trains, and the rule, as formulated by a learned text writer, is, that passengers have a right, until otherwise informed, to rely on information received by them from ticket agents, in answer to inquiries concerning those matters, provided they do not disregard other reasonable means of information."—Turner v. Great Northern R. Co., 46 P. 243, 15 Wash. 213, 218, 55 Am.S.R. 883.

44. Wash.—Turner v. Great Northern R. Co., supra.

45. S.C.—Mulligan v. Southern R. Co., 65 S.E. 1040, 84 S.C. 171.

10 C.J. p. 831 note 9.

46. Ky.—Paducah Traction Co. v. Weitlauf, 195 S.W. 99, 176 Ky. 82, L.R.A.1917F 353.

10 C.J. p. 832 note 10.

47. Ky.—Southern R. Co. v. Miller, 110 S.W. 351, 129 Ky. 98, 102, 33 Ky.L. 505.

N.Y.—Cormack v. New York, etc., R. Co., 90 N.E. 56, 196 N.Y. 442, 24 L.R.A.,N.S., 1209, 17 Ann.Cas. 949.

48. Tex.—Houston, etc., R. Co. v. Rogers, 40 S.W. 201, 16 Tex.Civ.App. 19.

49. Ga.—Chappell v. Alabama Western R. Co., 70 S.E. 208, 8 Ga.App. 787.

10 C.J. p. 832 note 20.

50. Ga.—Georgia R. Co. v. Hayden, 71 Ga. 518, 51 Am.R. 274.

51. S.C.—Fort v. Southern R. Co., 42 S.E. 196, 64 S.C. 423.

52. Mo.—Green v. Missouri, etc., R. Co., 97 S.W. 646, 121 Mo.App. 720.
S.C.—Fort v. Southern R. Co., 42 S.E. 196, 64 S.C. 423.

53. N.Y.—Gerardy v. Louisville, etc., R. Co., 102 N.Y.S. 548, 52 Misc. 446.

10 C.J. p. 832 note 13.

54. Miss.—Illinois Cent. R. Co. v. Hawkins, 74 So. 775, 114 Miss. 110, L.R.A.1917D 977.

Delay to accommodate other intending passengers

Railroad company, which delays passenger train two and one-half hours to accommodate other persons intending to become passengers, in violation of rights of another passenger, is guilty of "willful neglect of duty."—Illinois Cent. R. Co. v. Hawkins, 74 So. 775, 114 Miss. 110, L.R.A.1917D 977.

55. Ala.—Alabama Great Southern R. Co. v. Conner, 151 So. 355, 227 Ala. 562, certiorari denied Connor v. Alabama Great Southern R. Co., 54 S.Ct. 531, 291 U.S. 675, 78 L.Ed. 1063.

10 C.J. p. 832 note 24.

56. U.S.—Harmon v. Barber, Ohio, 247 F. 1, 159 C.C.A. 219, certiorari denied 38 S.Ct. 335, 246 U.S. 666, 62 L.Ed. 929.

57. Ala.—Alabama Great Southern R. Co. v. Conner, 151 So. 355, 227

make all usual and ordinary contracts of carriage may guarantee connection at an intermediate station,[58] and failure to make a connection after the passenger was induced to buy his ticket by information that it would be made entitles the passenger to recover.[59] A statement by the agent that the train would make close connections at a certain point is not a guaranty that connection will be made.[60]

Obligation to conform to time tables. The publication of a time-table imposes on the railroad company the obligation to exercise all reasonable care and diligence to make the movements of its train correspond thereto,[61] but this obligation is not absolute and unconditional,[62] particularly where the time-table contains a condition that the carrier does not guarantee the punctuality of its trains, of which condition the passenger has, or is chargeable with, knowledge,[63] and therefore in the absence of a special contract the carrier will be liable for not running on schedule time only where the delay is caused by its negligence.[64] The fact that schedules of trains are still in circulation, although they have in fact been abrogated, does not bind the company to run its trains in accordance with such schedules,[65] nor is the company bound to run a train according to a working time-table which is issued only for the information of employees, and not for the information of the public.[66]

Penalty for failure to start the train from the point of origin on schedule time as required by the railroad commission is considered in § 569 supra.

§ 662. Actions

An action may be maintained for a breach in the performance of a carrier's contract or duty to transport.

An action may be maintained against the carrier for a breach in the performance of its contract or duty to transport.[67]

§ 663. Nature and Form

In case of a breach by the carrier of its duty or contract to transport a passenger, the latter, as stated and discussed in the C.J.S. title Actions § 49 e (5), ordinarily has a choice of remedies, and may sue either on the contract of transportation, or in tort for the breach of duty imposed by law, although under some circumstances the action must be in contract, and under others in tort.

§ 664. Jurisdiction and Venue

In the absence of a special statute, a passenger may bring suit in the county where the breach of the carrier's duty originated.

A passenger may bring suit in the county where the failure on the part of the carrier to discharge its duty originated, and use transactions occurring in other counties as mere matters of aggravation.[68] Under statutes so providing, an action for breach of contract of transportation should be brought in the county where the contract was made,[69] and an action for injuries to a passenger due to his being carried past his destination may be brought either in the county where the injury occurred, or where plaintiff resided at the time of the injury.[70]

§ 665. Pleading

a. Declaration, petition, or complaint
b. Plea, answer, or replication
c. Issues, proof, and variance

Ala. 562, certiorari denied Connor v. Alabama Great Southern R. Co., 54 S.Ct. 531, 291 U.S. 675, 78 L.Ed. 1063.

58. U.S.—Harmon v. Barber, Ohio, 247 F. 1, 159 C.C.A. 219, certiorari denied 38 S.Ct. 335, 246 U.S. 666, 62 L.Ed. 929.
10 C.J. p 691 note 60.

59. S.C.—Cleckley v. Atlantic Coast Line R. Co., 90 S.E. 32, 105 S.C. 423.

Customary connection

In spite of a schedule misconnection of fifteen minutes, if it was customary to hold a train to make a connection, and a passenger, relying on the conductor's statement that he could make it, took his ticket by such route, and although the ticket agent told him he could not make it, the passenger could recover on failure to connect.—Cleckley v. Atlantic Coast Line R. Co., 90 S.E. 32, 105 S.C. 423.

Willfulness negatived

Willfulness in failing to make connections is negatived where the schedule shows a misconnection, and when a passenger took his ticket by such connecting point, the carrier took him on a limited train to a nonstop station, to avoid delay.—Cleckley v. Atlantic Coast Line R. Co., 90 S.E. 32, 105 S.C. 423.

60. S.C.—Latour v. Southern R. Co., 51 S.E. 265, 71 S.C. 532.

61. N.Y.—Cormack v. New York, etc., R. Co., 90 N.E. 56, 196 N.Y. 442, 24 L.R.A.,N.S., 1209, 17 Ann. Cas. 949.
10 C.J. p 832 note 23.

62. N.Y.—Cormack v. New York, etc., R. Co., supra—Slater v. Jewett, 85 N.Y. 61, 39 Am.R. 627
10 C.J. p 832 note 25.

63. S.C.—Mulligan v. Southern R. Co., 65 S.E. 1040, 84 S.C. 171.

64. Tex.—St Louis Southwestern R. Co. v. White, 89 S.W. 746, 99 Tex. 359, 122 Am.S.R. 631, 2 L.R.A.,N.S., 110, 13 Ann.Cas. 965.
10 C.J. p 832 note 27.

65. U.S.—Ohage v. Northern Pac. R. Co., Minn., 200 F. 128, 118 C.C.A. 302.
10 C.J. p 801 note 11.

66. Mich.—Geer v. Michigan Cent. R. Co., 106 N.W. 72, 142 Mich. 511.

67. Ala.—Louisville & N. R. Co. v. Robinson, 105 So. 874, 213 Ala. 522—Birmingham Ry. Light & Power Co. v. Elmit, 60 So. 982, 6 Ala. App. 657.
Ky.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1.

68. Ga.—Southern Ry. Co. v. O'Bryan, 37 S.E. 161, 112 Ga. 127.

69. Ky.—Southern R. Co. v. Cassell, 92 S.W. 281, 28 Ky.L. 1230.
10 C.J. p 843 note 97.

70. Tex.—Gulf, etc., R. Co. v. Ward, 124 S.W. 130, 58 Tex.Civ.App. 210.

a. Declaration, Petition, or Complaint

As in other civil actions, the declaration, petition, or complaint must allege all matters essential for recovery.

In accordance with the rules regulating pleadings in civil actions generally, in an action against a carrier arising out of a breach of contract to transport a passenger, the declaration, petition, or complaint must allege facts constituting plaintiff's cause of action, such as his right to transportation,[71] a breach of the contract or duty on the part of defendant,[72] and other particular facts which plaintiff relies on as constituting his cause of action.[73] A petition which discloses the relationship of carrier and passenger, the duty arising therefrom, and the breach thereof is sufficient.[74]

In an action for a failure to stop or refusal to transport, plaintiff must allege that he was ready and willing to pay the legal or reasonable fare for such transportation,[75] that defendant failed or refused to transport him,[76] and that it was the duty of the carrier to stop the train or car at that particular station or place.[77] Where by a special agree-

71. Ala.—Southern R. Co. v. Melton, 47 So 1008, 158 Ala. 404.
10 C.J. p 844 note 2.

Refusal of admission to limited train

In an action by plaintiff who held ticket from Reno to San Francisco, but who was denied admission to a limited train, the complaint, setting forth the rules of the carrier and the circumstances and seeking recovery on the ground of breach of contract, was held not to state cause of action, the rules of the company pleaded declaring a ticket for such transportation to be a local ticket, notwithstanding "local ticket" is ordinarily defined with relation to railroads as traffic confined to a single road, and such rules further requiring a local passenger to hold either a sleeping car ticket or a permit showing that a through passenger would share such accommodations, and the complaint not alleging plaintiff had the required ticket or such a permit.—Summerfield v. Hines, 197 P. 690, 45 Nev. 60.

Payment of fare

Passenger's allegation that common carrier subway railroad, in consideration of fare paid by passenger, agreed safely to carry passenger and to take appropriate precautions for his care and safety during course of his passage, was proper statement of contractual engagement arising by operation of law, and would be deemed a nontraversable allegation on proof that passenger in usual course paid fare prescribed by railroad for passage.—Barad v. New York Rapid Transit Corporation, 295 N.Y.S. 901, 162 Misc. 458.

72. Ala.—Southern R. Co. v. Melton, 47 So. 1008, 158 Ala. 404.
Ga.—Brown v. Georgia, etc., R. Co., 46 S.E. 71, 119 Ga. 88.

Construction with view to substantial justice

Construing the pleading with a view to substantial justice, as required by Civ.Prac.Act § 123, an allegation that a particular rule of a carrier was in force in April will not, in an action for breach of contract in July for transportation as a passenger, be disregarded, but will be accepted as an allegation that the rule was in force at the time the contract was made.—Summerfield v. Hines, 197 P. 690, 45 Nev. 60.

Allegation in alternative

A passenger being entitled to complain of the simple negligence of the carrier's conductor, the complaint was not insufficient because it alleged in the alternative that he recklessly, willfully, or wantonly failed to put plaintiff off at his destination.—Birmingham Ry., Light & Power Co. v. Elmit, 60 So. 982, 6 Ala.App. 657.

73. Ala.—Conner v. Central of Georgia Ry. Co., 128 So. 789, 221 Ala. 358.—Southern Ry. Co. v. Penny, 114 So 15, 22 Ala.App. 199.
Ga.—Southern R. Co v. Wallis, 66 S.E. 370, 133 Ga. 553, 30 L.R.A.,N.S., 401, 18 Ann.Cas. 67.
10 C.J. p 844 note 4.

Description of place where passenger alighted

Where passenger was carried beyond her station, it was permissible to describe the place in the petition where she was caused to alight and surroundings contributing to her fright.—Pullman Co v. Strang, 132 S.E. 399, 35 Ga.App. 59.

Items of damage

In an action against a carrier for refusing to transport a passenger, a petition alleging that she suffered actual damages in a specified sum, including among other items one for medicine and doctors, but not alleging that she paid the sum claimed, or assumed to pay it, or that it was a reasonable charge, did not support a recovery for such item.—Gulf, C. & S. F Ry. Co. v. Gordon, Tex. Civ.App., 218 S.W. 74.

Petitions held insufficient

Ala.—Conner v. Central of Georgia Ry. Co., 128 So. 789, 221 Ala. 358.
10 C.J. p 844 note 4 [b].

74. Ala.—Louisville & N. R. Co v. McCue, 114 So. 218, 216 Ala. 616, 61 A.L.R. 400
10 C.J. p 843 note 1 [a] [b], p 844 note 4 [a].

Complaint held sufficient

(1) A count alleging that plaintiff was a passenger for hire on a train which stopped at an intermediate station, that an announcement was made by the persons in charge that twenty minutes would be allowed for breakfast, that plaintiff left her infant child in charge of a porter, and that before the announced time elapsed the train departed without her, was held to disclose the relationship of carrier and passenger, the duty arising therefrom, and the negligent breach.—Louisville & N. R. Co. v. McCue, 114 So. 218, 216 Ala. 616, 61 A.L.R. 400

(2) A complaint in an action for carrying woman passenger beyond destination, which was merely a flag station, in consequence of which person waiting for her there left before train brought her back.—Nashville, C. & St. L. Ry. v. Campbell, 101 So. 615, 212 Ala. 27.

(3) A complaint alleging that plaintiff was a passenger on a train, that defendant failed to announce her station, whereupon she was carried beyond the same, etc., to her injury.—Alabama Great Southern Ry. Co. v. Lawrence, 77 So. 432, 16 Ala.App. 382

(4) Petition alleging trainmen carried passenger and family beyond station, that passenger and family were put off in rain, and had to walk back to station, resulting in illness.—Cady v. New Orleans, T. & M. Ry. Co., 145 So. 680, 176 La. 341.

75. Ind.—Sage v. Evansville, etc., R. Co., 33 N.E. 771, 134 Ind. 100.
10 C.J. p 844 note 5.

76. Ga.—Brown v. Georgia, etc., R. Co., 46 S.E. 71, 119 Ga. 88.
10 C.J. p 844 note 6.

Negligence vel non

No question of negligence vel non need be averred if plaintiff was unlawfully rejected when relation of carrier and passenger existed.—Louisville & N. R. Co. v. Robinson, 105 So. 874, 213 Ala. 522.

77. Ga.—Battle v. Georgia R., etc., Co., 48 S.E. 338, 120 Ga. 994.

Failure of street car to stop

In an action against a street railroad company for its failure to stop a car in response to a signal by an intending passenger, plaintiff must

ment a railroad company obligates itself to stop a train at a particular station on a certain day to take on a passenger, in an action for a failure to perform this duty it need not be alleged that the train was scheduled to stop at such station.[78] If the action is for a failure or refusal to let the passenger off at his destination, and for carrying him beyond, or putting him down short of, his destination, plaintiff must allege that the place at which he desired to stop was one at which by law, or by the carrier's regulations, it was the duty of the carrier to stop the train,[79] or that by a special contract he was entitled to be discharged at that station,[80] and that it negligently failed or refused to stop the train a reasonably sufficient time for him to alight;[81] but where the action is based on the misinformation of the station agent in directing a passenger to a through train which did not stop at his destination, it is not necessary for the petition to aver that the train was scheduled to stop there.[82] An allegation that the carrier failed to put a passenger off at his destination is insufficient in the absence of further allegations showing circumstances which imposed that duty on the carrier.[83]

In an action for the breach of a contract of carriage under a ticket to a point beyond the line of the road selling it, there should be an allegation that defendant and the road which sold the ticket were joint contractors, or that the latter had authority to bind defendant by the issuance of the ticket.[84]

b. Plea, Answer, or Replication

The plea or answer should set out all facts establishing a defense to the action. A replication that a rule claimed to have been violated by plaintiff is unreasonable is improperly addressed to the plea of general issue.

In accordance with the rules of pleading generally, the plea or answer should set out facts establishing a defense to the action, such as that the injury to plaintiff was caused by his own negligence and not by negligence on the part of defendant.[85] An affirmative defense must be specially pleaded.[86]

In a suit for refusal to issue a transfer, a replication that a rule which defendant claimed was violated by plaintiff is unreasonable is improperly addressed to the plea of general issue.[87]

c. Issues, Proof, and Variance

General rules governing issues, proof, and variance apply in actions of this character. Proof must be confined to the pleadings.

Such matters only as are properly put in issue by the pleadings and proof and are material need be considered.[88] Plaintiff can introduce evidence and recover only on such cause of action as is properly alleged by him[89] and on proof of all material matters alleged.[90] Likewise, defendant can introduce evidence and rely only on such matters of defense as are properly put in issue by its pleadings.[91]

allege facts which show that it was the duty of the company to stop the particular car in question for the purpose of taking on plaintiff as a passenger.—Battle v. Georgia R., etc., Co., 48 S.E. 338, 120 Ga. 994—Battle v. Georgia R., etc., Co., 48 S.E. 337, 120 Ga. 992.

78. Ind.—Evansville, etc., R. Co. v. Wilson, 50 N.E. 90, 20 Ind.App. 5.

79. Ala.—Lamb v. Mitchell, 80 So. 151, 16 Ala.App. 577.
10 C.J. p. 845 note 7.

80. Ind.—Ohio, etc., R. Co. v. Hatton, 60 Ind. 12—Evansville, etc., R. Co. v. Wilson, 50 N.E. 90, 20 Ind.App. 5.

81. Ala.—Birmingham R., etc., Co. v. Elmit, 60 So. 982, 6 Ala.App. 657.
10 C.J. p. 845 note 9.

82. Ala.—Pollard v. Jarrett, 169 So. 697.

83. Ky.—Strong v. Louisville & N. R. Co., 43 S.W.2d 11, 240 Ky. 781.

Infant passenger

Petition alleging carrier, in violation of contract, failed to put infant passenger off train and negligently carried him beyond destination, was held insufficient, against demurrer.—Strong v. Louisville & N. R. Co., 43 S.W.2d 11, 240 Ky. 781.

84. S.C.—Matthews v. Charleston, etc., R. Co., 17 S.E. 225, 38 S.C. 429, 37 Am.S.R. 773

85. Ala.—Taxicab Co. v. Grant, 57 So. 141, 3 Ala.App. 393.

Automobile breaking down

A plea in an action for breach of contract to carry plaintiff and companions in an automobile from one place to another and return, which alleges that, after the breaking down of the automobile, plaintiff left the disabled car, and could not be found when defendant reached the car with another automobile, but which fails to aver that plaintiff was at fault in leaving the broken down car before another car came, or that defendant exercised proper care in sending relief after notice, or which fails to show that any negligence of plaintiff proximately contributed to the breaking down of the car, and which shows that the results were attributable to the act of defendant, is bad on demurrer.—Taxicab Co. v. Grant, 57 So. 141, 3 Ala.App. 393.

86. Miss.—Illinois Cent. R. Co. v. Redmond, 81 So. 115, 119 Miss. 765.

Failure to furnish seat to plaintiff

In action for damages in that carrier did not furnish plaintiff a seat, a defense that carrier could not furnish a seat because of a sudden and unusual influx of passengers is an affirmative one, and must be specially pleaded.—Illinois Cent. R. Co. v. Redmond, 81 So. 115, 119 Miss. 765.

87. Ala.—Birmingham Electric Co. v. Rylant, 174 So. 511, 234 Ala. 332.

88. Ala.—Anniston Electric, etc., Co. v. Anderson, 66 So. 924, 11 Ala.App. 554.
10 C.J. p. 845 note 15.

Negligence

Where a carrier admits a technical breach of a contractual duty and consequent liability for nominal damages, and no actual damages are alleged, there is no issue as to its negligence.—Western & A. R. Co. v. Carlock, 92 S.E. 1006, 20 Ga.App. 249.

89. Ga.—Southern R. Co. v. Hobbs, 45 S.E. 23, 118 Ga. 227, 63 L.R.A. 68.
10 C.J. p. 845 note 16.

90. S.C.—Martin v. Southern R. Co., 71 S.E. 236, 89 S.C. 32.
10 C.J. p. 846 note 17

91. S.C.—Cave v. Seaboard Air Line

Special damages, not the necessary result of a breach of a contract to carry, must be specially pleaded in order to be recoverable.[92]

Such competent evidence is admissible on behalf of plaintiff as tends to prove matters put in issue by his pleadings,[93] or which is in rebuttal of matters of defense set up by defendant.[94]

Any material variance between plaintiff's pleadings and proof is fatal to a recovery,[95] but an immaterial variance which in no wise prejudices defendant's case will not affect plaintiff's rights.[96]

§ 666. Evidence

a. Presumptions and burden of proof
b. Admissibility
c. Weight and sufficiency

a. Presumptions and Burden of Proof

The plaintiff has the burden of proving matters relied on for recovery, and the defendant must prove matters of affirmative defense or matters to rebut a prima facie case made by the plaintiff.

Plaintiff has the burden of proving matters and allegations of fact relied on for recovery,[97] and that his injuries were sustained by reason of the carrier's negligence or violation of its duty.[98] Matters of affirmative defense or matters to rebut a prima facie case made by plaintiff must be proved by defendant.[99] The burden is on the carrier to prove any rule or regulation which relieves it of its prima facie obligation to transport one who has purchased a ticket on a train going in the direction called for by the ticket, and which stopped at the station where the ticket holder was,[1] but if a rule is proved the burden is on plaintiff to prove that it is unreasonable.[2] Where there has been an unreasonable delay of the carrier's train, a presumption of negligence arises,[3] and the burden is on the carrier to show that the delay was not due to its negligence.[4] To raise a statutory presumption of the carrier's negligence when a person is injured by the running of its trains or cars, plaintiff must show that he sustained actual damage.[5] The destruction of a ticket by a conductor who refuses to honor it, instead of turning it in to the auditor of the road when such is his duty, raises the presumption that the ticket was good.[6]

R. Co., 77 S.E. 1017, 94 S.C. 282, L.R.A.1915B 915, Ann.Cas.1915A 1065.

92. Ala.—Louisville, etc., R. Co. v. Sanders, 61 So. 482, 7 Ala.App. 543.

93. S.C.—Martin v. Southern R. Co., 71 S.E. 236, 89 S.C. 32—Milhous v. Southern R. Co., 57 S.E. 474, 76 S.C. 492—Ford v. Southern R. Co., 55 S.E. 448, 75 S.C. 286.
10 C.J. p 846 note 20.

Actions or utterances of flagman

What flagman did or said as train which failed to stop on signal at flag station passed plaintiff was held admissible, where complaint contained wanton count.—Central of Georgia Ry. Co. v Purifoy, 145 So 323, 25 Ala. App. 252, certiorari denied 145 So. 321, 226 Ala. 58.

94. S.C.—Bussey v. Charleston, etc., R. Co., 55 S.E. 163, 75 S.C. 116.

95. W.Va.—Jenkins v. Chesapeake, etc., R. Co., 57 S.E. 48, 61 W.Va. 597, 49 L.R.A.,N.S., 1166, 11 Ann. Cas. 967.
10 C.J. p 846 note 22.

96. Ala.—Southern R. Co. v. Melton, 47 So. 1008, 158 Ala. 404.
10 C.J. p 846 note 23.

97. Ga.—Georgia Ry & Electric Co. v. McAllister, 54 S.E. 957, 126 Ga. 447, 7 L.R.A.,N.S., 1177.
10 C.J. p 846 note 25 [a], [b], [d], [e].

98. Ark.—Edwards v. St. Louis Southwestern Ry. Co., 203 S.W. 588, 134 Ark. 265.

Injuries from walking back

In action against railroad for injuries sustained by passenger carried by destination and forced to walk back in nighttime, burden was on plaintiff to show that his injuries were sustained by reason of railroad's negligence.—Edwards v. St. Louis Southwestern Ry. Co., 203 S.W. 588, 134 Ark. 265.

Negative testimony

The burden to prove railroad's negligence in a suit for injuries caused by carrying plaintiff past his station, cannot be discharged by negative testimony that plaintiff took first chair in car to hear station called, and that the conductor did not take up his ticket until after the train passed his station.—Edwards v. St Louis Southwestern Ry. Co, 203 S.W. 588, 134 Ark. 265.

99. Ala.—Louisville & N. R. Co. v Clark, 87 So. 676, 205 Ala. 152, 14 A.L.R. 695.
Tex.—Gulf, C. & S. F. Ry. Co. v. Gentry, Civ.App., 197 S.W. 482.
10 C.J. p 846 note 25 [c].

Contributory negligence

Where passenger's destination was called before train reached that point and passenger alighted and suffered injuries in riding on horseback to her destination, burden of proving that she was guilty of contributory negligence was on the railroad company.—Gulf, C. & S. F. Ry. Co. v. Gentry, Tex.Civ.App., 197 S.W. 482.

Station clock slow

In action for damages by a passenger who missed train because of inaccurate clock in station waiting room, passenger's testimony that the clock was from seven to ten minutes slow at the time she missed her train was held to establish a prima facie case of negligence on the part of the railroad, shifting the burden of proof on railroad.—Louisville & N. R. Co. v. Clark, 87 So. 676, 205 Ala. 152, 14 A.L.R. 695.

1. Tex.—Trinity, etc., R. Co. v. Voss, Civ.App., 160 S.W. 663.

2. Wash.—Davenport v. Chicago, M. & St. P. Ry. Co., 175 P. 298, 103 Wash. 645.

Rule as to closing of station

Where there is no allegation or proof that the public service commission has adopted any rule under Remington Code 1915 § 8626—85, covering the time when a certain station should be kept open, it will be presumed that the carrier's rules and customary practice with reference thereto were reasonable, casting the burden upon a passenger to allege and prove that the closing of the station at the time in question was unreasonable.—Davenport v. Chicago, M. & St. P. Ry Co., 175 P. 298, 103 Wash 645.

3. S.C.—Taber v. Seaboard Air Line R Co., 66 S.E. 292, 84 S.C. 291, 19 Ann Cas 1132
10 C.J. p 847 note 26.

4. S.C.—Taber v. Seaboard Air Line R Co, supra.
10 C.J. p 847 note 27.

5. Ga.—Western & A. R. Co. v. Carlock, 92 S.E. 1006, 20 Ga.App. 249.

6. Ky.—Louisville, etc., R. Co v. Donaldson, 43 S.W. 439, 19 Ky.L. 1384.

For rules of law pertaining to presumptions and burden of proof generally see the C.J.S. title Evidence §§ 103–157, also 22 C.J. pp 67–157.

b. Admissibility

General rules pertaining to the admissibility of evidence in civil cases apply in actions to recover damages for the carrier's breach of contract or duty to transport.

In accordance with the general rules pertaining to the admissibility of evidence in civil cases, in order that particular evidence in an action against a carrier for breach of its contract or duty of carriage may be admissible, it must be competent, relevant, and material, and evidence which is incompetent, irrelevant, or immaterial under the particular issues is not admissible.[7] Circumstances which show the duty of the carrier,[8] or facts which show that the carrier was not guilty of a breach of duty,[9] are admissible. Evidence as to the carrier's acts on other occasions is ordinarily inadmissible,[10] unless they were such as to amount to a custom or usage.[11] The purpose of plaintiff's journey cannot be shown in an action for putting him off at the wrong station where the carrier had no notice of the purpose.[12]

Declarations or statements of the carrier's agents, constituting a part of the res gestæ of the transaction, are admissible;[13] but declaration or statements made after the alleged transaction, and not a part of the res gestæ, are inadmissible,[14] and this rule has been held to apply to a time-table given by an agent after the transaction.[15]

Proper evidence as to the damages sustained is admissible,[16] but evidence as to damages not the proximate result of the carrier's negligence or breach of duty is not admissible.[17]

c. Weight and Sufficiency

General rules governing the weight and sufficiency of evidence in civil cases generally apply in actions to recover damages for the carrier's breach of contract or duty to transport.

7. Mich.—Johnson v. Michigan United R. Co., 116 N.W. 529, 153 Mich. 65.
Miss.—Yazoo, etc., R. Co. v. Hardie, 55 So. 42, 967, 100 Miss. 132, 34 L.R.A.,N.S., 740, Ann.Cas.1914A 323.
10 C.J. p 847 notes 30, 31.

Evidence held inadmissible

Ala.—Southern Ry. Co. v. Rowe, 73 So. 634, 198 Ala. 353.
10 C.J. p 848 note 31 [a].

8. Ala.—Central of Georgia Ry. Co. v. Smith, 117 So. 74, 217 Ala. 501, 58 A.L.R. 1058.

Duty to notify passenger

In action by passenger for negligently carrying her beyond destination, court properly refused to exclude evidence that she told conductor she was exhausted and conductor said he would look after her.—Central of Georgia Ry. Co. v. Smith, 117 So. 74, 217 Ala. 501, 58 A.L.R. 1058.

9. Wash.—Davenport v. Chicago, M. & St. P. Ry. Co., 175 P. 298, 103 Wash. 645.

Compliance with regulation

Where complaint charged that railroad was negligent in closing a station at a certain time, the railroad should have been permitted to prove that the closing of the waiting room at the time in question was in accordance with its regularly established rule, that the rule was reasonable, and that the public service commission had adopted no rule governing the subject under Remington Code 1915 § 8626—85.—Davenport v. Chicago, M. & St. P. Ry. Co., 175 P. 298, 103 Wash. 645.

10. Ga.—Southern R. Co. v. O'Bryan, 37 S.E. 161, 112 Ga. 127.
10 C.J. p 848 note 32.

Previous controversy

In a suit for damages for willful failure of a motorman of a street car to stop for intending passenger, it was error to admit testimony showing details of a previous controversy between the motorman and passenger, or the son of the passenger, about a different matter.—Meridian Light & Ry. Co. v. Williams, 91 So. 863, 129 Miss. 73.

11. N.J.—Runyan v. Central R. Co., 41 A. 367, 61 N.J.Law 537, 68 Am.S.R. 711, 43 L.R.A. 284.
10 C.J. p 848 note 33.

12. Ky.—Louisville & N. R. Co. v. Wells, 294 S.W. 143, 219 Ky. 718.

13. S.C.—Holcomb v. Spartanburg R., etc., Co., 78 S.E. 231, 94 S.C. 435.
10 C.J. p 848 note 34.

14. Ala.—Louisville, etc., R. Co. v. Thomason, 60 So. 506, 6 Ala.App. 365.

15. Ala.—Louisville, etc., R. Co. v. Thomason, supra.

16. **Condition of health**

In a woman's action against a railroad for failure to transport her to the destination for which she bought tickets, and for having put her off at an intermediate point, plaintiff's evidence as to the condition of her health at the time of the injury complained of, and subsequently, was competent on the issue of damages.—Blaylock v. Southern Ry. Co., 100 S.E. 599, 178 N.C. 353.

Excitement and nervousness of plaintiff

In action based on negligence of defendant railroad's station agent in selling plaintiff ticket fixing her destination as Irondale and directing her to board through train that did not stop at Irondale, plaintiff's testimony that she was excited and made nervous by announcement of train conductor that train would not be stopped at Irondale was held competent and material.—Pollard v. Jarrett, Ala., 169 So. 697.

Heatstroke

Where passenger three months advanced in pregnancy was put down by bus driver near noon on a hot day in August nearly three miles beyond her station at which there had been a conveyance to meet her, and passenger, being without money to employ a conveyance, undertook to walk with three small children and baggage to parents' home about four miles away, in passenger's action for damages, permitting jury to consider testimony that passenger suffered a heatstroke, over objection that such eventuality was not reasonably foreseeable by carrier, was not error.—Tri-State Transit Co. v. Martin, Miss., 179 So. 349.

Arrangements to meet plaintiff

Passenger's testimony as to arrangements to meet her at train, which failed to stop, was held admissible.—Chicago, R. I. & P. Ry. Co. v. Sims, 292 S.W. 94, 173 Ark. 256.

17. Miss.—Louisville & N. R. Co. v. Blair, 123 So. 859, 154 Miss. 680.

Happenings after passenger reached destination

Evidence as to what occurred after passenger, who was carried beyond her destination, reached destination, was held incompetent.—Louisville & N. R. Co. v. Maness, 9 S.W.2d 1011, 225 Ky. 625.

Subject to the rules governing the weight and sufficiency of the evidence in civil cases generally, to warrant a recovery for a carrier's breach of contract of carriage, the evidence on plaintiff's behalf must be of such weight and sufficiency as will reasonably justify the jury in finding the existence of all facts necessary to constitute his cause of action.[18] Thus the evidence should be sufficient to establish plaintiff's right to transportation, defendant's duty in the matter and its breach thereof,[19] and the damages plaintiff has sustained as a proximate result of the breach.[20]

In accordance with these rules evidence has been held sufficient for particular purposes or to show specific facts,[21] such as sufficient to show that defendant owned and operated the car which carried plaintiff beyond his destination;[22] to sustain a finding that the carrier entered into a specific contract with a passenger;[23] to establish that plaintiff exchanged his ticket with another passenger with no intent to defraud the carrier;[24] to show that the carrier knew the imperative necessity for plaintiff, for whom the train did not stop, to board the train;[25] to sustain plaintiff's testimony as to injury received;[26] to sustain a recovery of actual[27] or punitive[28] damages; to show or to sustain a verdict of negligence;[29] or to show that the carrier's negligence caused plaintiff's injuries.[30]

Likewise, evidence has been held insufficient for particular purposes or to show specific facts,[31] such as insufficient to show that a passenger took the wrong train by reason of the ticket agent's misdirection;[32] to establish that a trainman did not announce the station of the passenger's destination;[33] to establish that the train's stop was not of sufficient duration to permit plaintiff to alight;[34] to show humiliation or injury to feelings;[35] to show contributory negligence;[36] to authorize recovery

18. Minn.—Lamson v. Great Northern R. Co., 130 N.W. 945, 114 Minn. 182, Ann.Cas.1914A 15.
10 C.J. p 849 note 38.

19. N.C.—Reeves v. Seaboard Air Line R. Co., 62 S.E. 1078, 149 N.C. 244.
S.C.—Christian v. Augusta, etc., R. Co., 69 S.E. 17, 87 S.C. 123, Ann.Cas. 1912B 995

20. Tex.—International, etc., R. Co. v. Addison, Civ.App., 93 S.W. 1081, reversed on the facts 97 S.W. 1037, 100 Tex. 241, 8 L.R.A.,N.S., 880.
10 C.J. p 849 note 40.

Mental suffering

Mental suffering need not be positively proved, but may be inferred from the circumstances, including the relation of the parties, as where there has been failure to promptly deliver a telegraphed railroad ticket to plaintiff's dying husband.—Southern Ry. Co. v. Rowe, 73 So. 634, 198 Ala. 353.

21. Mich.—Johnson v. Michigan United R. Co., 116 N.W. 529, 153 Mich. 65.
N.C.—Reeves v. Seaboard Air Line R. Co., 62 S.E. 1078, 149 N.C. 244.
Tex.—Gulf, etc., R. Co. v. Ward, 124 S.W. 130, 58 Tex.Civ.App. 210.
10 C.J. p 849 note 38 [b].

22. Tex.—Texas Electric Ry. v. Shelton, Civ.App., 286 S.W. 526.

Slight evidence of ownership sufficient

Where action for injuries to passenger on interurban car carried beyond her station was tried on theory that defendant owned car, without objection by defendant, slight evidence of defendant's ownership was sufficient.—Texas Electric Ry. v. Shelton, Tex.Civ.App., 286 S.W. 526.

23. Ark.—Southwestern Greyhound Lines v. Wisdom, 95 S.W.2d 904, 192 Ark. 903

24. Minn.—Gruhl v. Northern Pac. Ry. Co., 168 N.W. 127, 140 Minn. 353.

25. Wash.—Fenlon v. Chicago, M. & St. P. Ry. Co., 169 P. 863, 99 Wash. 289.

26. Va.—Hines v. Garrett, 108 S.E. 690, 131 Va. 125.

27. Okl.—Chicago, R. I. & P. Ry. Co. v. Wells, 156 P. 314, 56 Okl. 599.
Tex.—Houston, E. & W. T. Ry. Co. v. Thorn, Civ.App., 197 S.W. 778.

Promise to assist plaintiff to alight

Evidence that the porter promised plaintiff to assist her to alight at the proper place is sufficient to sustain a verdict awarding actual damages against the carrier for carrying the passenger beyond her destination.—Murrell v. Charleston & W. C. R. Co., 105 S.E. 350, 115 S.C. 228.

Taking up child's health certificate

Evidence that conductor of defendant railroad knew an eleven year old plaintiff intended to go to a point on a connecting road, but told the station agent to give her a ticket to the junction, and took up her health certificate issued relative to quarantine measures to prevent infantile paralysis, and without which she was unable to purchase another ticket to her destination, etc., was held to sustain a verdict for actual damages.—Halford v. Southern Ry. Co., 99 S.E. 339, 112 S.C. 266.

28. Ga.—Southeastern Greyhound Lines v. Suits, 190 S.E. 417, 55 Ga.App. 371.

Intentionally malicious conduct

In suit based on refusal of bus driver to give passage to ticket holder, accompanied by statement in presence of others in public bus station that ticket holder was drunk, evidence that bus driver's conduct was intentionally oppressive or malicious was held sufficient to authorize recovery of punitive damages.—Southeastern Greyhound Lines v. Suits, 190 S.E. 417, 55 Ga.App. 371.

29. Ark.—Crown Coach Co. v. Meadors, 53 S.W.2d 442, 186 Ark. 236—Chicago, R. I. & P. Ry. Co. v. Sims, 292 S.W. 94, 173 Ark. 256.
Tex.—Gulf, C. & S. F. Ry. Co. v. Hitt, Civ.App., 60 S.W.2d 864—Houston E. & W. T. Ry. Co. v. Thorn, Civ.App., 197 S.W. 778.

30. Ark.—Missouri Pac. R. Co. v. Coxwell, 30 S.W.2d 209, 182 Ark. 145
Tex.—Gulf, C. & S. F. Ry. Co. v. Hitt, Civ.App., 60 S.W.2d 864.

Proximate cause of death

Evidence was held to authorize finding that negligent carriage beyond his destination, with consequent exposure, of a passenger having pneumonia was proximate cause of his death.—Southern Traction Co. v. Glenn, Tex.Civ.App., 220 S.W. 798, dismissed for want of jurisdiction.

31. Mo.—Smith v. St. Louis, etc., R. Co., 106 S.W. 108, 127 Mo.App. 53.
10 C.J. p 849 note 38 [c].

32. Ga.—Dawson v. Southern Ry. Co., 89 S.E. 1051, 18 Ga.App. 534.

33. La.—Cady v. New Orleans, T. & M. Ry. Co., 145 So. 680, 176 La. 341

34. La.—Cady v. New Orleans, T. & M. Ry. Co., supra.

35. Mo.—Oller v. Dixie Greyhound Lines, App., 51 S.W.2d 557.

36. W.Va.—White v. Ohio Valley Electric Ry. Co., 127 S.E. 65, 98 W.Va. 378.

for doctor bills:[37] or to sustain recovery of exemplary damages.[38]

Evidence of custom. Custom, in derogation of a rule regulating train movements, requires proof of continued conduct, raising an inference that the acts were approved or assented to by railroad officers; evidence that a train occasionally stopped at a destination not on the schedule does not establish a custom of stopping at such station.[39] It has been held that the testimony of a witness who has traveled on a train about once a month for more than a year is not sufficient to prove a custom as to calling stations or announcing change of cars,[40] and that the testimony even of witnesses who have traveled considerably as to conductors and porters assisting ladies off and on trains is insufficient to establish such a custom as will bind the railroad company.[41]

§ 667. Trial

a. Questions of law and fact

b. Instructions

c. Verdict and findings

a. Questions of Law and Fact

In accordance with the general rule, questions of law are to be determined by the court and questions of fact are to be determined by the jury.

In accordance with the general rule in the trial of civil cases, in an action for breach of a carrier's contract or duty to transport, questions of law are ordinarily to be determined by the court, and it is error to submit them to the jury,[42] but questions of fact or of mixed law and fact are ordinarily to be determined by the jury under proper instructions from the court.[43] If there is any evidence from which the jury might justifiably find the existence or nonexistence of a fact in issue, but the evidence is conflicting, or is such that reasonable minds might arrive at different conclusions therefrom, the issue should be submitted to the jury,[44] and in such a case it is improper for the court to take the ques-

37. Tex.—Gulf, C. & S. F. Ry. Co. v. Gordon, Civ.App., 218 S.W. 74.

Doctor's denial that he attended plaintiff

In an action against a carrier for refusing to transport a passenger, the evidence did not warrant a recovery for doctor's bills where the doctor to whom plaintiff said she owed the bill denied attending her on account of any sickness contracted at the time in question, or any knowledge of such sickness, or any charge for such service.—Gulf, C. & S. F. Ry. Co. v. Gordon, Tex.Civ.App., 218 S.W. 74.

38. Okl.—Chicago, R. I. & P. Ry. Co. v. Wells, 156 P. 314, 56 Okl. 599.

Brusque manner of conductor

Testimony of the brusque manner of a conductor is not sufficient to make a case for punitive damages.—New Orleans & N. E. R. Co. v. Martin, 105 So. 864, 140 Miss. 410.

39. Ky.—Sturgill v. Chesapeake & O. R. Co., 11 S.W.2d 983, 227 Ky. 44.

40. Ala.—Southern R. Co. v. Wooley, 48 So. 369, 158 Ala. 447.

41. Tex.—St. Louis, etc., R. Co. v. McCullough, 45 S.W. 324, 18 Tex. Civ.App. 534.

42. N.C.—Huff v. Norfolk-Southern R. Co., 88 S.E. 344, 171 N.C. 203, L.R.A. 1916E 278.
10 C.J. p. 849 note 44.

43. Ala.—Central of Georgia Ry. Co. v. Smith, 117 So. 74, 217 Ala. 501, 58 A.L.R. 1058.
Ark.—Crown Coach Co. v. Meadors, 53 S.W.2d 442, 186 Ark. 236.
Ga.—Berry v. Seaboard Air Line Ry., 89 S.E. 591, 18 Ga.App. 492.
Ky.—Louisville & L. R. Co. v. Baker, 283 S.W. 1003, 214 Ky. 668.
N.C.—White v. Norfolk-Southern Ry. Co., 89 S.E. 788, 172 N.C. 31, rehearing denied 91 S.E. 697, 173 N.C. 705.—Huff v. Norfolk-Southern R. Co., 88 S.E. 344, 171 N.C. 203, L.R.A. 1916E 278.
Pa.—Fitzgerald v. Pennsylvania Co., 72 Pa.Super. 276.—Cleaver v. Pennsylvania Co., 72 Pa.Super. 271.
S.C.—Payne v. Atlantic Greyhound Bus Lines, 188 S.E. 426, 182 S.C. 58.—Spigener v. Seaboard Air Line Ry., 98 S.E. 330, 111 S.C. 405.
10 C.J. p. 850 note 45.

Questions held for jury

(1) Whether passenger on street railroad, in asking for transfer two or three minutes after paying her fare and after street car had gone about three blocks, reasonably complied with rule requiring that transfer be requested at time of payment of fare, so as to entitle her to recover damages for refusal to issue transfer.—Birmingham Electric Co. v. Rylant, 174 So. 511, 234 Ala. 332.

(2) Whether the train left before schedule time.—Louisville & N. R. Co. v. Clark, 87 So. 676, 205 Ala. 152, 14 A.L.R. 695.

(3) Whether passenger made inquiries as to whether the train she took was the right train to her destination, and was misinformed by railroad's agents.—Southern Ry. Co. v. Pruett, 77 So. 49, 200 Ala. 675.

(4) Whether a maid at the station assisting female passengers on and off trains was an agent of the railroad for directing passengers to trains.—Southern Ry. Co. v. Pruett, supra.

(5) Whether an attack of asthma, suffered by plaintiff after being carried past her destination, was caused by the nervous excitement incident to the failure of the car to stop when signaled and by the additional walk to her home.—Louisville & L. R. Co. v. Bullock, 250 S.W. 846, 199 Ky. 193.

(6) Whether passenger put off train at wrong station was not sufficiently sure of station to impose on her duty not to accept porter's statement.—Gulf, M. & N. R. Co. v. Jones, 125 So. 114, 155 Miss. 689.

(7) Whether passenger was furnished with as reasonable and adequate accommodation as was required under the circumstances.—Davis v. New York Cent. R. Co., 298 N.Y.S. 44, 163 Misc. 710.

(8) Whether passenger in enfeebled condition, carried past destination, was given sufficient opportunity to alight at station.—Brewer v. Atlantic Coast Line R. Co., 147 S.E. 596, 149 S.C. 454.

(9) Whether sufficient notice was given the ticket agent of the sickness of plaintiff so as to require his assistance.—Spigener v. Seaboard Air Line Ry., 98 S.E. 330, 111 S.C. 405.

(10) Whether plaintiff voluntarily left the train and terminated the relationship of carrier and passenger.—Hines v. Garrett, 108 S.E. 690, 131 Va. 125.

44. Ala.—Wilkey v. Central of Georgia Ry. Co., 118 So. 922, 218 Ala. 708.—Purifoy v. Central of Georgia Ry. Co., 117 So. 466, 218 Ala. 11.—Louisville & N. R. Co. v. Robinson, 105 So. 874, 213 Ala. 522.

tion from the jury by nonsuit, dismissal, affirmative charge, or direction of a verdict.[45] It is ordinarily a question for the jury whether the carrier owed a specific duty,[46] whether the injury was proximately caused by the carrier's breach of duty,[47] whether the carrier was guilty of negligence,[48] whether the carrier's employees were guilty of such willfulness, wantonness, or gross negligence as to justify a recovery of exemplary damages,[49] and whether the passenger was guilty of contributory negligence.[50] Likewise, the amount of actual damages to which plaintiff is entitled is usually a question for the jury.[51]

If there is no evidence on an issue of fact, or if

Ark.—St Louis-San Francisco Ry Co v. Talley, 34 S.W.2d 463, 182 Ark. 1155—St. Louis, I. M. & S. Ry. Co. v Needham, 184 S.W. 47, 122 Ark. 584.

Ky.—Louisville & N. R. Co. v. Maness, 9 S.W.2d 1011, 225 Ky. 625

10 C.J. p 850 note 46.

Whether button was pushed in interurban car

Testimony by plaintiff that she pushed the button in an interurban car before it reached her street and heard the bell ring, with testimony by another passenger that he heard the bell ring but did not know whether or not it was before she reached her street, was held sufficient to take to the jury the issue of whether the bell was rung before reaching the street, notwithstanding the conductor's denial.—Louisville & I. R. Co. v. Bullock, 250 S.W. 846, 199 Ky. 193

45. Ala.—Louisville & N. R. Co. v. McCue, 114 So. 218, 216 Ala. 616, 61 A.L.R. 400.

Ark.—Davis v. Stone, 251 S.W. 371, 159 Ark. 156.

10 C.J. p 850 note 47.

Nonsuit on whole case

In a passenger's action against a railroad company for actual and punitive damages, where there is evidence of negligence in the routing of the ticket but none of the conductor's willfulness in refusing to carry the passenger, the court should so direct the jury, and a nonsuit on the whole case would be improper.—Penn v. Atlantic Coast Line R. Co., 98 S.E. 793, 111 S.C. 499.

46. Duty to stop train shortly after starting

Whether railroad owed duty to stop train and allow passenger placed on wrong train to get off, where request was made when train was not more than three or four blocks from station and moving slowly, was held for jury.—Pullman Co. v. Dudley, Tex.Civ.App., 77 S.W.2d 592

Duty to back train

In action for being carried beyond destination, whether the train should have been backed to place of destination, on discovery of mistake less than a mile beyond the station, notwithstanding a railroad rule prohibiting movement against current of traffic without orders from superintendent of transportation, was held for the jury.—Hines v. Garrett, 108 S.E. 690, 131 Va. 125.

47. S.C.—Spaugh v. Atlantic Coast Line R. Co., 155 S.E. 145, 158 S.C. 25.

Illness

In action for damages by female passenger compelled, by misdirection of railroad as to trains, to remain all night in a town not her home, whether her illness resulted from her sitting up all night in the depot after she refused railroad's offer to take her to a hotel or send her home in an automobile was for the jury.—Southern Ry. Co. v. Pruett, 77 So. 49, 200 Ala. 675.

Rape

In action against railroad by eighteen year old passenger wrongfully discharged beyond her station, requiring her to walk back a distance of one mile along unprotected route known to have been infested by tramps, hoboes, and other disreputable characters, whether rape committed on her while walking back was proximately caused by the wrongful ejection from train was held for the jury.—Hines v. Garrett, 108 S.E. 690, 131 Va. 125.

48. Miss.—Yazoo & M. V. R. Co. v. Hearn, 71 So. 561, 111 Miss. 294.

S.C.—Spaugh v. Atlantic Coast Line R. Co., 155 S.E. 145, 158 S.C. 25—Mishoe v. Atlantic Coast Line R. Co., 133 S.E. 704, 135 S.C. 316.

Tex.—Nevill v. St. Louis Southwestern Ry. Co. of Texas, Civ.App., 211 S.W. 523, dismissed for want of jurisdiction.

49. Miss.—Illinois Cent. R. Co. v. Ramsay, 127 So. 725, 157 Miss. 83.

S.C.—Belcher v. Atlantic Coast Line R. Co., 177 S.E. 890, 175 S.C. 9—Matthews v. Southern Ry. Co., 120 S.E. 369, 126 S.C. 454—Edwards v. Seaboard Air Line Ry. Co., 113 S.E. 134, 120 S.C. 294.

10 C.J. p 850 note 48.

50. Pa.—Fitzgerald v. Pennsylvania Co., 72 Pa.Super. 276—Cleaver v. Pennsylvania Co., 72 Pa.Super. 271.

Tex.—Texas Electric Ry. v. Shelton, Civ.App., 286 S.W. 526—Gulf, C. & S. F. Ry. Co. v. Gentry, Civ.App., 197 S.W. 482.

10 C.J. p 851 note 49.

Failure to examine ticket

Whether a passenger was negligent in not examining commuter's ticket, and discovering the error in making it out to some other name than hers, or if she knew or should have known that the ticket showed on its face it was not made out in her name by the ticket seller, were held jury questions.—Delaney v. Erie R. Co., 117 A. 395, 97 N.J.Law 434, affirmed 119 A. 924, 98 N.J.Law 558.

Passenger held not negligent as matter of law

Passenger who missed train while seated in station waiting room relying on the time as shown by the clock therein was held not contributorily negligent as a matter of law—Louisville & N. R. Co. v. Clark, 87 So. 676, 205 Ala. 152, 14 A.L.R. 695

Riding horseback to destination

In action by passenger whom railroad company wrongfully put off at station some miles from her destination, question whether passenger who suffered injuries in riding horseback to her destination was guilty of contributory negligence which was proximate cause of injury was held for the jury.—Gulf, C. & S. F. Ry. Co. v. Gentry, Tex. Civ.App., 197 S.W. 482.

Walking through snow

Where train failed to stop, whether illness of husband was sufficiently imperative necessity to render it prudent for wife to reach another town by walking through a mountain pass through six feet of snow to get money to take him to hospital, was question for jury.—Fenlon v. Chicago, M. & St. P. Ry. Co., 169 P. 863, 99 Wash. 289.

Walking to next town

Whether passenger, who had been deprived of passage upon train by negligence of train employees in failing to stop train upon signal, was negligent in not securing lodging in town and in walking to next station along the railroad tracks, instead of traveling the dirt or wagon road, was held for the jury.—Nevill v. St. Louis Southwestern Ry. Co. of Texas, Tex.Civ.App., 211 S.W. 523, dismissed for want of jurisdiction.

51. Ark.—Missouri Pacific Transp. Co. v. Williams, 109 S.W.2d 924, 194 Ark. 852.

N.J.—Delaney v. Erie R. Co., 117 A. 395, 97 N.J.Law 434, affirmed 119 A. 924, 98 N.J.Law 558.

N.Y.—Davis v. New York Cent. R. Co., 298 N.Y.S. 44, 163 Misc. 710.

the evidence is so slight that a finding of its existence or nonexistence would not be sustained, or if the evidence is conclusive of its existence or nonexistence, the question becomes one of law for the court and should not be submitted to the jury,[52] and the court may dispose of the case by a dismissal or nonsuit.[53]

b. Instructions

General rules applicable to instructions in civil cases apply in an action for damages based on the carrier's breach of contract or duty to transport.

In accordance with general rules applicable to instructions in civil cases, in an action against a carrier for a breach of a contract of carriage the court, in charging the jury, should correctly state the law[54] applicable to the facts which the evidence tends to prove.[55] The instructions must be pertinent and must conform and be confined to the issues made by the pleadings and evidence,[56] and must charge on all material matters in issue.[57] They should not be confusing or misleading,[58] or

S.C.—Belcher v. Atlantic Coast Line R. Co., 177 S.E. 890, 175 S.C. 9.

52. Miss.—Louisville & N. R. Co. v. Blair, 123 So. 859, 154 Miss. 680
S.C.—Laird v. Atlantic Coast Line R. Co., 134 S.E. 220, 136 S.C. 34.
10 C.J. p 851 note 50.

Punitive damages

Where there is no evidence of willfulness, wantonness, or gross negligence, it is improper to submit the question of punitive damages to the jury.
Miss.—Louisville & N. R. Co. v. Blair, 123 So. 859, 154 Miss. 680
S.C.—Laird v. Atlantic Coast Line R. Co., 134 S.E. 220, 136 S.C. 34.
10 C.J. p 851 note 50 [a].

53. S.C.—Ussery v. Augusta-Aiken R. Co., 60 S.E. 527, 79 S.C. 209.
10 C.J. p 851 note 51.

Proof of contract

Where a tortious breach of contract is the gravamen of the action, a failure to prove the contract will justify a nonsuit.—Magee v. Oregon R., etc., Co., C.C.Wash., 46 F. 734.

54. Ala.—Southern Ry. Co. v. Penny, 114 So. 15, 22 Ala.App. 199.
Miss.—Jackson Light & Traction Co. v. Taylor, 72 So. 856, 112 Miss. 60.
Mo.—Oller v. Dixie Greyhound Lines, App., 51 S.W.2d 557.
10 C.J. p 851 note 53.

Instructions properly refused

(1) Instructions that conductor's promise to awaken passenger at destination was not binding on carrier, that carrier was not under duty to awaken passenger when train arrived at destination if proper notice of station was given, that if passenger's destination was called in customary manner and passengers had reasonable opportunity to alight, passenger carried beyond destination could not recover, and that under evidence conductor had no authority to bind carrier by promise to awaken passenger at destination were held properly refused.—Central of Georgia Ry. Co. v. Smith, 117 So. 74, 217 Ala. 501, 58 A.L.R. 1058.

(2) In action for damages against railroad company for refusing to transport passenger, requested charge that plaintiff could not recover for mental suffering and humiliation, and that plaintiff was not entitled to recover if he did not suffer in person, reputation, or estate, and was entitled to recover nominal damages only, if any, was held properly refused where it was a question for the jury whether the act of the carrier was willful.—Louisville & N. R. Co. v. Robinson, 105 So. 874, 213 Ala. 522.

55. Ga.—Pullman Co. v. Strang, 132 S.E. 399, 35 Ga.App. 59.—Western & A. R. Co. v. Carlock, 92 S.E. 1006, 20 Ga.App. 249.
Miss.—Illinois Cent. R. Co. v. Cox, 96 So. 685, 132 Miss. 471.
Mo.—Oller v. Dixie Greyhound Lines, App., 51 S.W.2d 557.
10 C.J. p 851 note 54.

Instructions held warranted by evidence

(1) Instructions on duty to notify passenger that train did not stop at her station.—Chicago, R. I. & P. Ry. Co. v. Sims, 292 S.W. 94, 173 Ark. 256.

(2) In suit based on refusal of defendant's bus driver to give passage to ticket holder, accompanied by statement in presence of others that ticket holder was drunk, charge authorizing recovery of additional damages if jury found there were aggravating circumstances either in act of bus driver or in his intention.—Southeastern Greyhound Lines v. Suits, 190 S.E. 417, 55 Ga.App. 371.

(3) Charge requiring railroad agent to exercise extraordinary care in conducting plaintiff's wife to right train.—Atlanta Terminal Co. v. Alexander, 143 S.E. 905, 38 Ga.App. 280.

(4) In a suit for failure to put a child off at its destination under a special contract by a carrier's agent, an instruction that, if the jury believe the ticket agent agreed that the conductor would put the child off at its destination, and that the conductor promised to do so, and if it was within the scope of the authority of these employees to bind the company, defendant would be liable for failure of the conductor to put the child off.—Yazoo & M. V. R. Co. v. O'Keefe, 88 So. 1, 125 Miss. 536.

(5) Instruction that carrier, knowing of passenger's enfeebled condition, was bound to render reasonable assistance.—Brewer v. Atlantic Coast Line R. Co., 147 S.E. 596, 149 S.C. 451.

(6) Instruction on presumption of negligence where passenger injured on train.—Brewer v. Atlantic Coast Line R. Co., supra.

(7) Where railroad servants called passenger's station before she reached it and induced her to alight, charge that railroad company must have its stations properly announced which required a finding that miscalling of station was negligence before verdict for plaintiff could be authorized.—Gulf, C. & S. F. Ry. Co. v. Gentry, Tex.Civ.App., 197 S.W. 482.

(8) In action against carrier for agent's mistake in selling ticket whereby passenger was carried to wrong station, submission of theory of contributory negligence.—Walls v. Kansas City, M. & O. Ry. Co. of Texas, Tex.Civ.App., 195 S.W. 868.

56. S.C.—Milhous v. Southern R. Co., 52 S.E. 41, 72 S.C. 442, 110 Am.S.R. 620.
10 C.J. p 853 notes 64, 65.

57. W.Va.—Jenkins v. Chesapeake, etc., R. Co., 57 S.E. 48, 61 W.Va. 597, 49 L.R.A.,N.S., 1166, 11 Ann. Cas. 967.
10 C.J. p 853 note 66.

58. Ala.—Central of Georgia Ry. Co. v. Barnitz, 84 So. 474, 17 Ala. App. 201.
Miss.—Louisville & N. R. Co. v. Blair, 123 So. 859, 154 Miss. 680.
Tex.—Gulf, C. & S. F. Ry. Co. v. Gentry, Civ.App., 197 S.W. 482.
10 C.J. p 852 note 55.

Instructions slightly misleading

Instructions which tend only in a slight degree to confuse or mislead have been held not to constitute fatal error.—Birmingham Ry., Light & Power Co. v. Cohill, 72 So. 126, 196 Ala. 278.

too general.[59] An instruction should be complete in itself, but instructions are to be considered as a whole, and the fact that one portion considered separately may be open to objection does not constitute error if the charge is correct in its entirety.[60] It is error for the court to refuse a proper request not sufficiently covered by other charges as given,[61] but such request need not be given in its exact language and the court may modify the requested instruction to conform to the law applicable to the case.[62] It is not error to refuse a requested instruction on matters already sufficiently covered by the charge as given,[63] or on immaterial or unessential matters.[64] An instruction is erroneous which invades the province of the jury,[65] as where it withdraws or excludes an issue of fact on which there is disputed evidence from the determination of the jury.[66]

c. Verdict and Findings

Findings should be construed in the light of the evidence and issues presented to the jury.

Findings should be construed in the light of the evidence[67] and issues presented to the jury.[68]

§ 668. Costs

Attorney's fees may be recovered as an incident to costs when authorized by statute.

Under a statute authorizing plaintiff to recover reasonable attorney's fees as an incident to costs in a recovery against a carrier for violation of any law regulating the transportation of passengers, a passenger entitled to recover in an action for failure to carry him to his station may recover attorney's fees.[69] However, attorney's fees cannot be recovered under such a statute if no statute regulating railroads has been violated.[70]

§ 669. Damages

Damages for breach of contract or for tort may be recovered in actions of this nature.

It has been held that an action for being refused transportation in accordance with contract, or for refusal to put the passenger off at his destination, is for breach of contract, and the damages recoverable are those recoverable in such an action.[71] Nevertheless, the breach of the contract may also involve a tort, that is, a breach of the carrier's common-law duty, and in such case other damages than those incident to breach of contract may be recovered.[72] The technical form of the action is, in general, immaterial, recovery being allowed in accordance with the wrong indicated by the facts as alleged.[73]

§ 670. Elements and Measure in General

As a general rule, the passenger's measure of damages is compensation for the actual damages he has

Instruction held not misleading
In passengers' action for failure of train to stop at destination, instruction was held not misleading as against contention that it required conductor to give passengers special notice of arrival of train at their destination—Laird v. Atlantic Coast Line R. Co., 126 S.E. 135, 130 S.C. 368.

59. N.Y.—Miller v. King, 59 N.E. 1114, 166 N.Y. 394.

60. Ark.—Davis v. Stone, 251 S.W. 371, 159 Ark. 156.
10 C.J. p 852 note 57.

61. Ala.—Central of Georgia Ry. Co. v. Lanier, 73 So. 821, 198 Ala. 497.
Miss.—New Orleans & N. E. R. Co. v. Myers, 106 So. 531, 140 Miss. 789—Illinois Cent. R. Co. v. Cox, 96 So. 685, 132 Miss. 471.
Mo.—Evans v. Wabash Ry. Co., 12 S.W.2d 767, 223 Mo.App. 439.
10 C.J. p 852 note 58.

62. Ark.—Chicago, R. I. & P. Ry. Co. v. Sims, 292 S.W. 94, 173 Ark. 256.
S.C.—Gilkerson v. Atlantic Coast Line R. Co., 89 S.E. 549, 105 S.C. 162.

Improper modification
In an action against a carrier for requiring a white passenger to ride in a coach set apart for negroes, it was improper to modify instructions which precluded recovery if the conductor honestly believed that the passenger was a negro, by the clause unless plaintiff "made known to the said conductor that she was a white woman"—Norfolk, etc., R. Co. v. Stone, 69 S.E. 927, 111 Va. 730.

63. Ga.—Central of Georgia R. Co. v. Almand, 43 S.E. 67, 116 Ga. 780

64. Ala.—North Alabama Tract Co. v. Daniel, 57 So. 120, 3 Ala.App. 428.

65. Tex.—Davis v. Houston, etc., R. Co., 59 S.W. 814, 25 Tex.Civ.App. 8.

66. N.C.—Story v. Norfolk, etc., R. Co., 45 S.E. 349, 133 N.C. 59.
10 C.J. p 852 note 63.

67. Tex.—Texas & P. Ry. Co. v. Lathrop, Civ.App., 192 S.W. 1080, error refused.

68. Tex.—Houston E. & W. T. Ry. Co. v. Thorn, Civ.App., 197 S.W. 778.

69. Ark.—St. Louis, etc., R. Co. v. Neal, 51 S.W. 1060, 66 Ark. 543

70. Ark.—Missouri Pac. R. Co. v. Coxwell, 30 S.W.2d 209, 182 Ark. 145.
10 C.J. p 853 note 68.

Violation of agreement
Passenger with appendicitis suing railroad for carrying him beyond destination, not regular stop but a place where the carrier had agreed to stop, cannot recover attorney's fee—Missouri Pac. R. Co. v. Coxwell, 30 S.W.2d 209, 182 Ark. 145.

71. Mass.—Murdock v. Boston, etc., R. Co., 133 Mass. 15, 43 Am.R. 480
10 C.J. p 835 note 44.

72. N.C.—Purcell v. Richmond, etc., R. Co., 12 S.E. 954, 108 N.C. 414, 12 L.R.A. 113
10 C.J. p 835 note 45.

73. N.C.—Williams v. Carolina, etc., R. Co., 57 S.E. 216, 144 N.C. 498, 12 L.R.A.,N.S., 191, 12 Ann.Cas. 1000
10 C.J. p 835 note 46.

Act considered tort or breach of contract
Where, under the facts of the case, punitive damages would not be allowed, it is immaterial whether the failure of a carrier to stop and take on a passenger be considered a tort or breach of contract, because the damages are the same—Fenlon v. Chicago, M. & St. P. Ry. Co., 169 P. 863, 99 Wash. 289.

sustained as a natural and proximate result of the breach or which the carrier could reasonably have anticipated might result from the breach.

Where a carrier breaks its contract by failing or refusing to transport the passenger in accordance with the terms thereof, such as by negligently failing to take him up, or by putting him down at a point other than his destination, or by unreasonably delaying his transportation, or otherwise, the passenger's measure of damages is, as a general rule, compensation for the actual damages he has sustained as a natural and proximate result of the breach,[74] or, as otherwise expressed, such damages as the carrier should reasonably have anticipated might result from the breach.[75] A carrier is not liable for remote or contingent damages or such as are not the proximate result of its breach of duty,[76] which could not reasonably have been anticipated or foreseen,[77] or which are due to the passenger's own want of ordinary care.[78] If there has been no tortious breach of contract, it has been held that the damages are to be measured by the passenger's loss of time and money expended by reason of the delay,[79] but if the contract is tortiously broken damages are to be assessed not only for lost time and money but for such damages as follow directly from its acts.[80]

Under the circumstances of the particular case a passenger may be entitled to recover the expenses reasonably incurred by him in getting to his destination,[81] including his living expenses at an intermediate point,[82] and compensation for time lost beyond the reasonable length of time it would have taken the carrier to transport him to his destination,[83] the value of which is to be computed by the reasonable value of the passenger's services in his usual occupation at the place of destination.[84] A

74. U.S.—Lee Line Steamers v Page, Tenn., 237 F. 57, 150 C.C.A. 259.
Ala.—Louisville & N. R. Co. v. Clark, 87 So. 676, 205 Ala. 152, 14 A.L.R. 695—Louisville & N. R. Co. v. Frizzle, 108 So. 615, 21 Ala.App. 354, certiorari denied 108 So. 616, 214 Ala. 688.
Ark.—Chicago, R. I. & P. Ry. Co. v. Blundell, 191 S.W. 940, 127 Ark. 82.
N.C.—Causey v. Davis, 116 S.E. 401, 185 N.C. 155.
Tex.—Nevill v. St. Louis Southwestern Ry. Co. of Texas, Civ.App., 211 S.W. 523, dismissed for want of jurisdiction—Gulf, C. & S. F. Ry. Co. v. Nichols, Civ.App., 198 S.W. 338, error refused.
10 C.J. p. 833 note 29, p. 834 note 34.

Damages not merely nominal

Damage suffered by interstate passenger placed on wrong train other than mental suffering by being compelled to take circuitous route was not merely nominal, so as to preclude judgment against railroad, where substantial right of passenger was violated.—Pullman Co. v. Dudley, Tex.Civ.App., 77 S.W.2d 592.

75. Ky.—Paducah Traction Co. v. Weitlauf, 195 S.W. 99, 176 Ky. 82, L.R.A.1917F.353.
N.C.—Causey v. Davis, 116 S.E. 401, 185 N.C. 155.
10 C.J. p. 833 note 30.

Consequences reasonably anticipated by prudent man

Passenger who missed train by reason of railroad's negligence in permitting waiting room clock to be slow could recover damages for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would at the time of the negligence have thought reasonably possible to follow if they had occurred to his mind.—Louisville & N. R. Co. v. Clark, 87 So. 676, 205 Ala. 152, 14 A.L.R. 695.

76. N.C.—Causey v. Davis, 116 S.E. 401, 185 N.C. 155—Brown v. Linville River Ry. Co., 94 S.E. 431, 174 N.C. 694—Garland v. Carolina, C. & O. Ry., 90 S.E. 779, 172 N.C. 638, L.R.A.1917B 706.
Tex.—Schaff v. Boatright, Civ.App., 243 S.W. 1116—Gulf, C. & S. F. Ry. Co. v. Nichols, Civ.App., 198 S.W. 338, error refused.
10 C.J. p. 833 note 31.

Fall while sleeping in waiting room

Passenger's injuries from fall while sleeping in waiting room waiting for train back were held not proximate result of being carried beyond destination.—Strong v. Louisville & N. R. Co., 43 S.W.2d 11, 240 Ky. 781.

77. Tex.—Eastern Texas Electric Co. v. Reagan, Civ.App., 228 S.W. 366—Gulf, C. & S. F. Ry. Co. v. Nichols, Civ.App., 198 S.W. 338, error refused.
10 C.J. p. 833 note 32.

78. Tex.—Eastern Texas Electric Co. v. Reagan, Civ.App., 228 S.W. 366.
10 C.J. p. 834 note 33.

Waiting in cold room although another is heated

Female passenger discharged at wrong station could not recover damages resulting from waiting in cold room in station, where main room was heated.—Louisville & N. R. Co. v. Wells, 294 S.W. 143, 219 Ky. 718.

79. Ky.—Brumfield v. Consolidated Coach Corporation, 40 S.W.2d 356, 240 Ky. 1—Louisville & N. R. Co. v. Wells, 294 S.W. 143, 219 Ky. 718—Louisville & N. R. Co. v. Pigg, 267 S.W. 549, 206 Ky. 470—Paducah Traction Co. v. Weitlauf, 195 S.W. 99, 176 Ky. 82, L.R.A. 1917F 353.

80. Ky.—Louisville & N. R. Co. v. Maness, 9 S.W.2d 1011, 225 Ky. 625—Louisville & N. R. Co. v. Pigg, 267 S.W. 549, 206 Ky. 470.

81. Ala.—Central of Georgia Ry. Co. v. Barnitz, 73 So. 471, 198 Ala. 156, reversing on other grounds 70 So. 945, 14 Ala.App. 354.
10 C.J. p. 834 notes 34, 36.

Excess over ticket price

In action for failure to deliver promptly ticket telegraphed to plaintiff's dying husband, an element of damages was the excess over the ticket price of the expenses of the transportation of such husband's remains.—Southern Ry. Co. v. Rowe, 73 So. 634, 198 Ala. 353.

82. Tex.—International, etc., R. Co. v. Doolan, 120 S.W. 1118, 56 Tex. Civ.App. 503.
Wash.—Bullock v. White Star S.S. Co., 70 P. 1106, 30 Wash. 448.

83. Mo.—Oller v. Dixie Greyhound Lines, App., 51 S.W.2d 557.
10 C.J. p. 834 note 34, p. 835 note 39.

Necessity for pecuniary damage

Where a train is delayed a passenger is not entitled to actual damages for loss of time unless he has suffered pecuniary damages or personal loss.—Miller v. Southern R. Co., 48 S.E. 99, 69 S.C. 116.

84. N.Y.—Cooley v. Pennsylvania R. Co., 81 N.Y.S. 692, 40 Misc. 239.
10 C.J. p. 835 note 40.

Delay in starting ginneries

Where plaintiff was delayed four days in starting two ginneries because railroad employee barred him from train, the measure of damages, if ginneries were established plants was rental value, but, if ginneries were not going concerns, was the in-

passenger cannot recover what he would have earned but for the delay, where no definite occupation or employment was within his contemplation at the time,[85] although the question whether the passenger would have procured employment had he been at his destination during the time he was delayed may be considered in estimating his damages.[86] A passenger may be entitled to recover, inter alia, the price of his ticket,[87] but not if the journey is actually completed on the ticket.[88] Where a passenger, who is wrongfully excluded from a train, voluntarily keeps his ticket as evidence and purchases another, he is not entitled to recover the price of the first ticket.[89]

§ 671. Physical and Mental Suffering; Inconvenience

a. In general
b. Walking or taking another conveyance
c. Injuries after reaching destination

a. In General

Generally, damages for physical or mental suffering and inconvenience which are the proximate result of the carrier's breach of duty may be recovered; but, as a rule, in the absence of aggravating circumstances, mental suffering or inconvenience, to be compensable, must be accompanied by physical injury.

Damages for physical or mental suffering may generally be recovered where they are incident to, or consequent on, the passenger being wrongfully carried to or put down at a point away from his destination,[90] or on his not being given a proper opportunity to board the train,[91] but not where such physical or mental suffering is a remote result of the carrier's breach of duty.[92] Such damages may also be recovered for an unreasonable delay in transportation,[93] unless they are merely a remote result of the delay.[94] Damages for mental pain and humiliation may also be recovered where the passenger is transported in an improper manner, or under aggravated circumstances,[95] as where a white passenger is wrongfully compelled to ride in a coach intended for colored persons,[96] or they may

terest on the money invested, and the wages of the laborers employed, reduced by earnings which plaintiff either received, or by reasonable diligence could have received, from employment of laborers in other work, and not the gross earnings or profits per day after start of operations.—Currie v. Davis, 126 S E 119, 130 S.C. 408, petition dismissed Davis v. Currie, 45 S.Ct. 88, 266 U.S. 182, 69 L.Ed. 234.

85. U.S.—North American Transp. & Trading Co. v Morrison, Wash., 20 S Ct. 869, 178 U.S. 262, 44 L Ed. 1061, reversing, C C., Morrison v. North American Transp. & Trading Co., 85 F. 802.

86. Wash—Ransberry v. North American Transp., etc., Co., 61 P. 154, 22 Wash. 476.

87. Ky.—Louisville, etc., R. Co. v. Spurling, 170 S.W 192, 160 Ky. 819, Ann Cas.1916A 487.
10 C.J p 834 note 35.

Limited to price of ticket

In the absence of proof of humiliation in taking up commutation ticket by the agents of defendant company, the measure of damages is the value of the unexpired portion of the ticket—Delaney v. Erie R. Co., 117 A. 395, 97 N J.Law 434, affirmed 119 A. 924, 98 N.J Law 558—Gerety v. New York & N. J. R Co, 98 A 400, 89 N J Law 175, reversing 95 A. 733, 88 N J Law 16

Cash fare

In a suit against a railroad for damages for negligence of its agent informing plaintiff that his ticket entitled him to transportation over a certain route, which was wrong, thereby causing plaintiff to spend the sum of two dollars and eight cents, the actual damages recoverable is the amount of the cash fare.—Gulf & S. I. R. Co. v. Beard, 93 So. 357, 129 Miss. 827.

88. Ala.—Nashville C. & St. L. Ry. v. Campbell, 101 So. 615, 212 Ala. 27.

89. Kan.—Williams v. Chicago, etc., R. Co, 135 P 67, 90 Kan 478

90. Wis.—Stutz v. Chicago, etc., R. Co., 40 N W. 653, 73 Wis. 147, 9 Am S.R. 769—Brown v. Chicago, etc., R. Co, 11 N.W. 356, 911, 54 Wis 342, 41 Am R 41.
10 C J. p 835 note 47.

Injuries sustained by waiting

Injuries from dampness or exposure sustained by being compelled to wait after a breach of duty by the carrier are compensable.—Weed v. Panama R. Co, 17 N.Y. 362, 72 Am. D. 474—10 C J. p 838 note 65.

Insults

Railroad, furnishing half-fare ticket to minor paying full fare, is liable for insults offered passenger, using ticket, by conductor of connecting carrier.—Southern Ry Co. v. Penny, 114 So 15, 22 Ala App 199.

91. Ga.—Brown v. Georgia, etc., R. Co., 46 S E 71, 119 Ga 88.
10 C.J. p 836 note 48.

92. Ky.—Louisville, etc., R. Co v. Spurling, 170 S W. 192, 160 Ky 819, Ann Cas 1916A 487—Cincinnati, etc., R Co. v. Raine, 113 S W. 495, 130 Ky. 454, 132 Am.S R. 400, 19 L R A.,N S., 753.
10 C.J. p 836 note 49.

Improper proposals to female passenger

Injury to feelings of female passenger by improper proposals by driver engaged by conductor and telegraph operator to take her home was held not a proximate result of carrier's breach of contract of carriage by carrying her past her station.—Western & A. R. Co. v. Jackson, 93 S.E. 547, 21 Ga App. 50

93. Ky.—Southern R Co v Miller, 110 S W. 351, 129 Ky. 98, 33 Ky.L 505.
10 C.J. p 836 note 50.

94. Ark.—Hot Springs R. Co. v. Deloney, 45 S.W. 351, 65 Ark 177, 67 Am S.R. 913
10 C J. p 836 note 51.

95. Ky.—Illinois Cent. R. Co. v Fleming, 146 S.W. 1110, 148 Ky. 473
10 C.J. p 836 note 52.

Wrongfully taking up commutation ticket

Where railroad ticket seller made out a commuter's ticket in the name of Mr L L. instead of Miss L. M. D., and the ticket was taken up by conductor when presented for passage by Miss D. on the 29th ride, it was held that damages could be recovered for the indignity and humiliation, if any.—Delaney v. Erie R. Co., 117 A. 395, 97 N.J.Law 434, affirmed 119 A. 924, 98 N.J Law 558.

96. Ky—Louisville, etc, R. Co v. Ritchel, 147 S.W. 411, 148 Ky 701, 41 L R.A.,N S, 958, Ann.Cas.1913E 517
10 C J p 836 note 53.

be recovered where the carrier improperly fails or refuses to transport him as a passenger,[97] or by misdirection causes him to take the wrong train.[98] A passenger may likewise, in a proper case, recover for trouble, inconvenience, and annoyance caused by the carrier's breach of duty.[99]

It is generally held, however, that for mere negligent omission of duty, not accompanied with, or resulting in, physical injury, or without circumstances of aggravation, the carrier is not liable for damages by way of compensation for mental suffering,[1] or for inconvenience and annoyance,[2] unless special circumstances known to the carrier exist, as shown infra § 672. If the carrier's act or conduct is wanton or where the infliction of punitive damages is proper, damages for mental pain and suffering may be recovered.[3]

Special damages from illness or mental suffering dependent on knowledge by the carrier of the peculiar circumstances is considered in § 672 infra.

b. Walking or Taking Another Conveyance

Injuries caused by plaintiff's walking or going to his destination by another conveyance are compensable if proximate or foreseeable and not caused by the passenger's own negligence or imprudence.

It is the duty of a passenger refused transportation or discharged at the wrong station to use ordi-

97. Ind.—Cleveland, etc., R. Co. v. Kinsley, 60 N.E. 169, 27 Ind.App 135, 87 Am.S.R. 245.
10 C.J. p 837 note 55.

98. Ark.—Hines v. Witherspoon, 219 S.W. 1014, 143 Ark. 131.
Tex.—Texas, etc., R. Co. v. Armstrong, 51 S.W. 835, 93 Tex. 31.

99. Ala.—Louisville & N. R. Co. v. Clark, 87 So. 676, 205 Ala. 152, 14 A.L.R. 695.
10 C.J. p 834 note 34, p 837 notes 58–60.

1. Ark.—St. Louis, I. M. & S. R. Co. v. Bragg, 64 S.W. 226, 69 Ark. 402, 86 Am.S.R. 206.
Miss.—Gulf & S. I. R. Co. v. Beard, 93 So. 357, 129 Miss. 827.
Mo.—Oller v. Dixie Greyhound Lines, App., 51 S.W.2d 557.
Tex.—Texas Electric Railway Co. v. Price, Civ.App., 218 S.W. 1092—Jones v. Texas & N. O. R. Co., 55 S.W. 371, 23 Tex.Civ.App. 65—Texas & P. R. Co. v. Armstrong, Civ.App., 41 S.W. 833.
Wash.—Davenport v. Chicago, M. & St. P. Ry. Co., 175 P. 298, 103 Wash. 645.
10 C.J. p 837 note 56.

Delay in reaching sick relative

(1) In an action against a railroad company for breach of contract for special train, damages cannot be recovered merely for disappointment and mental suffering resulting from delay in departing to reach the bedside of a sick parent.—Wilcox v. Richmond & D. R. Co., S.C., 52 F. 264, 3 C.C.A. 73, 17 L.R.A. 804.

(2) Where plaintiff was delayed eight or ten hours in his journey which he was making to see a sick brother, it was held that mental suffering caused by delay in seeing his brother was too remote to be considered as an element of damage.—Hot Springs R. Co. v. Deloney, 45 S.W. 351, 65 Ark. 177, 67 Am.S.R. 913.

Discomfort in being aroused from sleep

Where a passenger on a railroad train was told that he would have to pay a bridge toll some time during the night, and the conductor offered to receive it and pay it for him, and on a previous occasion he had been told the same thing, had refused to pay, and was not disturbed on passing over the bridge, or compelled to pay such toll, in an action for damages in collecting such toll, it was not error to refuse to instruct that he could not recover for discomfort or injury to his feelings by being aroused in the night by an employee of the bridge company and compelled to pay the toll.—Galveston, etc., R. Co. v. Patterson, Tex.Civ.App., 46 S.W. 848.

Inconvenience or fatigue

It has been held that, where a train is delayed, a passenger is not entitled to actual damages for inconvenience or fatigue, unless he has suffered pecuniary damages or personal loss, or unless the carrier's conduct was willful.—Miller v. Southern R. Co., 48 S.E. 99, 69 S.C. 116.

Misinformation

Carrier was held not liable to prospective passenger for mental anguish caused by misinformation given by carrier's agent, regarding quickest means of transportation to prospective passenger's dying mother.—Bowers v. Colonial Stages Interstate Transit, 43 S.W.2d 497, 163 Tenn. 502.

Under federal rule

In a Texas case, it has been held that damages recoverable from railroad under federal decisions for mental anguish and suffering of passenger caused by delay as result of being placed on wrong train must have grown out of bodily injury sustained by passenger, and recovery cannot be had for physical injury which follows as mere sequel to mental anguish. There must be some causal connection, and recovery may be had against railroad under federal rule for that mental suffering of passenger only which is caused by, or which flows from, physical injury. Thus, a widow, accompanying husband's body to funeral, who was placed on wrong train during interstate passage, was held not entitled to damages from railroad for mental suffering caused by consequential delay, nor for physical suffering growing out of such mental suffering. Whether interstate passenger's action against railroad and Pullman Company for delay caused by being placed on wrong train was on contract or for tort was immaterial, as regards applicability of federal rule disallowing damages for mental suffering or for physical suffering growing out of mental suffering.—Pullman Co. v. Dudley, Tex.Civ.App., 77 S.W.2d 592.

2. N.Y.—Miller v. Baltimore, etc., R. Co., 85 N.Y.S. 883, 89 App.Div. 457.

3. Miss.—Illinois Cent. R. Co. v. Hawkins, 74 So. 775, 114 Miss. 110, L.R.A.1917D 977.
Mo.—Oller v. Dixie Greyhound Lines, App., 51 S.W.2d 557.
S.C.—Currie v. Davis, 126 S.E. 119, 130 S.C. 408, petition dismissed Davis v. Currie, 45 S.Ct. 88, 266 U.S. 182, 69 L.Ed. 234.

Violence and insulting language by gatekeeper

Passenger suing agent appointed by president under Transportation Act 1920 § 206, U.S.Comp.St. Suppl. Annot.1923 § 10071¼cc, for refusal of gatekeeper to permit him to pass through gate to train, accompanied by violence and insulting and threatening language, could recover compensatory damages for injuries to feelings, humiliation, and mental sufferings.—Currie v. Davis, 126 S.E. 119, 130 S.C. 408, petition dismissed Davis v. Currie, 45 S.Ct. 88, 266 U.S. 182, 69 L.Ed. 234.

Aggravating circumstances not shown

A statement by a railroad station agent, when closing a station: "You fellows will have to get out of here.

nary care in going to his destination.[4] Injuries which are caused by plaintiff's going to his destination by another conveyance are recoverable if proximate or foreseeable,[5] but they are not recoverable if not proximate or reasonably to be anticipated,[6] or if the injuries are caused by the passenger's own negligence or imprudence.[7] Where a passenger in the exercise of a deliberate judgment needlessly walks to his destination, the carrier is not liable for the injuries sustained thereby,[8] nor, it has been held, is it liable in the absence of a tortious breach of its duty;[9] but if the passenger, because of the carrier's negligence, apparently had good cause or reason to walk, the carrier may be liable,[10] even though the carrier had no notice of the passenger's physical condition,[11] and unless the injuries were not proximate or foreseeable.[12] Where a passenger is wrongfully put down at a place other than his destination, and he uses ordinary care to avoid walking, without success, he is entitled to compensation for the trouble, inconvenience, and annoyance of having to walk,[13] or in getting to his destination through other means of transportation.[14]

I am going to lock up"—did not show any violence, or insulting or abusive language such as would warrant damages for mental anguish.—Davenport v Chicago M. & St. P. Ry. Co., 175 P. 298, 103 Wash. 645

4. Ark—Crown Coach Co. v. Meadors, 53 S.W.2d 442, 186 Ark. 236.

5. Ark—Crown Coach Co. v. Meadors, supra
Ga.—Georgia R, etc, Co. v McAllister, 54 S.E. 957, 126 Ga. 447, 7 L.R.R.N.S., 1177
10 C.J. p 838 note 64.

Exposure in riding horseback

Where a passenger alighted before reaching her destination, wrong station being called, and suffered injuries from exposure in riding horseback to her destination, fact that the railroad company did not foresee particular injury suffered is no defense on the theory that its negligence was not the proximate cause. However, recovery for injury sustained from exposure in riding horseback to destination can be sustained only where it was reasonable under circumstances for passenger to voluntarily undergo exposure—Gulf, C & S. F. Ry Co v. Gentry, Tex Civ.App, 197 S W. 482.

Ride in inclement weather

If a carrier was negligent in permitting a clock in its station to run slow, so that plaintiff missed her train and was compelled to ride a long distance in inclement weather, as a result of which she suffered injury to her health, it was chargeable with knowledge of what might result, and it must respond in damages for the natural and probable proximate result of such negligence.—Davis v. Clark, 98 So. 37, 19 Ala.App. 468.

Sickness from drive across country

Damages for sickness resulting from plaintiff's leaving train to drive across country, on being informed that he would be unable to make connections, was held not too remote to afford basis of recovery—Mishoe v Atlantic Coast Line R. Co, 133 S E. 704, 135 S.C 316.

6. Tex—Gulf, C. & S. F Ry Co. v Gentry, Civ App, 197 S.W. 482.

Continuing journey by automobile or street car

(1) Where conductor of railroad train wrongfully causes passenger to disembark before reaching destination, at a station from which he can shortly thereafter continue journey on another train, but instead of waiting therefor passenger continues journey by automobile, railroad company is not responsible for damage sustained because of automobile trip.—Louisville & N R Co. v. McArthur, 102 So. 842, 137 Miss. 780.

(2) Where a passenger, who missed his train as a result of incorrect information, procured an automobile and made a trip across country in the cold, he cannot recover damages for inconvenience and discomfort suffered, etc., the misinformation, althought the carrier was responsible therefor, not being the proximate cause—Weeks v. Great Northern Ry Co., 175 N.W. 726, 43 N D 426, 8 A L R 1178.

(3) A woman who purchased a railroad ticket and boarded a train which would not stop at her destination, so that she was compelled to get off at an intermediate station, where she might have changed trains and have been carried to destination, although having a cause of action for the railroad's failure to transport her, could not recover for injuries she received by reason of going to destination on a street car from the intermediate point—Blaylock v Southern Ry. Co., 100 S E 599, 178 N.C 353.

7. Tex.—International, etc., R. Co v. Addison, 97 S.W. 1037, 100 Tex 241, 8 L.R A,N.S., 880, reversing, Civ.App, 93 S W. 1081.
10 C.J. p 838 note 68.

8. Va—Hines v. Garrett, 108 S E. 690, 131 Va. 125.
Wis—Le Beau v. Minneapolis, St P. & S S M. Ry. Co, 159 N W 577, 164 Wis. 30, L R.A 1917A 1017
10 C.J. p 838 note 67.

Injury from fall into cattle guard

Failure to stop train at flag station on signal of a woman wishing to take passage is not proximate cause of her injury from falling into cattle guard, she needlessly attempting to walk to her destination on the track—Brown v. Linville River Ry. Co, 94 S E 431, 174 N.C 694.

9. Ga—Louisville, etc., R Co v Spinks, 30 S.E. 968, 104 Ga 692.
Ky—Louisville & N R. Co. v. Pigg, 267 S W. 549, 206 Ky 470.

10. Ark—Missouri Pac R. Co. v. Coxwell, 30 S W.2d 209, 182 Ark. 145.
Wash—Fenlon v. Chicago, M & St. P. Ry. Co., 169 P. 863, 99 Wash 289.
W Va—White v. Ohio Valley Electric Ry Co, 127 S.E. 65, 98 W. Va 378
10 C J p 837 note 62.

Required to act hastily

Eighteen year old girl carried beyond her station, who was, in effect, ejected from train, having been required to act hastily and without reasonable opportunity for deliberation, and who was raped while walking back to station, did not assume the risk of walking back—Hines v. Garrett, 108 S E. 690, 131 Va 125

11. Ky—Louisville, etc, R Co. v. Roney, 127 S W. 158.
Tex—Pecos, etc, R. Co. v Williams, 78 S W 5, 34 Tex.Civ App 100.

12. Tex—Eastern Texas Electric Co v. Reagan, Civ App, 228 S W. 366.

Sudden storm

Where plaintiff was carried beyond her station to another and compelled to walk back, a sudden storm that caused her to get wet, was held an independent cause which negligence of defendant did not set in motion, and for which it was not liable.—Garland v. Carolina, C. & O Ry, 90 S E. 779, 172 N.C. 638, L R A.1917B 706.

13. Ala—Alabama Great Southern R Co v. Sellers, 9 So. 375, 93 Ala. 9, 30 Am S R 17.
10 C.J p 837 note 58

14. Ark—St Louis, etc, R. Co v. Evans, 126 S W. 1058, 94 Ark. 324.
10 C.J p 837 note 59.

c. Injuries after Reaching Destination

Injuries sustained by a passenger after reaching his destination are not ordinarily compensable.

A passenger who is discharged at a place other than his destination cannot ordinarily recover for injuries sustained after reaching his destination,[15] in the absence of the carrier's notice of the peculiar circumstances, as shown infra § 672.

§ 672. Special Damages Dependent on Knowledge of Circumstances

Special damages dependent on certain peculiar circumstances of which the carrier had no knowledge or notice are not recoverable.

Special damages sustained because of peculiar circumstances not within the contemplation of the parties when the contract was made, and of which circumstances the carrier had no knowledge, cannot be recovered.[16] This rule applies to increased illness for failure of the train to stop to receive a passenger, where the carrier had no notice of the illness,[17] mental anguish where the carrier has no notice of the reason therefor,[18] injuries sustained by the passenger after reaching his destination in the absence of the carrier's notice of the peculiar circumstances,[19] loss of profits in an enterprise which is interfered with by delay of the passenger in reaching his destination, the danger of such loss not having been known to the carrier,[20] and a loss sustained by a passenger in being prevented from procuring employment by failure of the train to stop at his destination, in the absence of knowledge by the carrier that the purpose of the trip was to procure employment.[21]

Where the carrier has knowledge or is notified of the peculiar circumstances, special damages sustained may be recovered,[22] such as those resulting from a failure to keep a professional or business engagement,[23] or from illness;[24] and, under this rule,

15. Ala.—Central of Georgia Ry. Co v. Barnitz, 73 So. 471, 198 Ala 156, reversing 70 So. 945, 14 Ala App. 354

Going from depot to home

A passenger wrongfully carried past her destination to which she returned cannot recover for injuries received while going from the depot at destination to her mother's home, although she paid her own passage back to destination—Central of Georgia Ry. Co v. Barnitz, 73 So. 471, 198 Ala. 156, reversing 70 So. 945, 14 Ala App. 354.

Premature departure of person to meet plaintiff

Where defendant carrier's train passed plaintiff passenger's destination, which was a flag station, and then shortly returned thereto to let her off, but in meantime her kinsman who was at station to meet her, left the station on seeing the train go by, inconvenience, discomfort, and hardship resulting from the premature departure of plaintiff's kinsman was held not compensable—Nashville, C. & St. L. Ry. v. Campbell, 101 So. 615, 212 Ala. 27.

Cold contracted after reaching home

A cold, contracted by a passenger a few days after reaching home, cannot be held attributable to the inconvenience of being carried a short distance past his destination and back again, after an all-night ride and other conditions over which the carrier had no control—Schaff v. Boatright, Tex Civ.App., 243 S.W 1116.

16. Ala.—Nashville, C. & St. L Ry. v. Campbell, 101 So. 615, 212 Ala. 27—Louisville & N. R. Co v. Clark, 87 So. 676, 205 Ala. 152, 14 A.L.R. 695.

N.C.—Causey v. Davis, 116 S.E. 401, 185 N.C. 155.

10 C.J. p 838 note 69.

Disembarkment at wrong station

Railroad having no knowledge that passenger's destination was not the station at which she left train, and that she was required to drive twenty-five miles from such station to reach her home, was not liable for damages sustained by her from exposure and from cold and rain during such ride, which she would not have sustained if railroad had not negligently caused her to miss another train for which she had a ticket—Louisville & N. R. Co. v. Clark, 87 So. 676, 205 Ala. 152, 14 A.L.R. 695

17. S.C.—Berley v. Seaboard Air Line R. Co., 65 S.E. 456, 83 S.C. 411.

18. N.C.—Causey v. Davis, 116 S.E. 401, 185 N.C. 155.

10 C.J. p 838 note 69 [b].

Failure to arrive in time for funeral

In an action for breach of a contract to transport plaintiff, where it was shown that because of delay plaintiff failed to make proper connections, and was obliged to spend two dollars and thirty cents for automobile hire, and then failed to arrive in time to attend her stepmother's funeral, it was held that, in the absence of any showing of knowledge of the special circumstances on the part of the railroad, recovery was properly restricted to the amount of actual damages.—Causey v. Davis, 116 S.E. 401, 185 N.C. 155.

Fright

Where a female passenger on a railroad was carried beyond her station, and the train stopped near the next station, and the passenger walked at night and without escort through the town to the house of a friend, she could not show that she was frightened by hearing loud voices of negro men who were walking behind her, unless it also appeared that the locality was one in which such occasion for fright was likely to occur, and that the railroad company had notice of this—Central of Georgia R Co. v. Dorsey, 42 S.E. 1024, 116 Ga. 719.

Humiliation

Damages for the humiliation caused by profane language used by negroes in the presence of plaintiff's wife cannot be recovered, where it is not shown that the misconduct of the negroes was known to the carrier's conductor.—Missouri, etc., R. Co. v. Ball, 61 S.W. 327, 25 Tex.Civ. App. 500.

19. Ala.—Central of Georgia Ry. Co. v. Barnitz, 73 So. 471, 198 Ala. 156, reversing 70 So. 945, 14 Ala.App. 354.

20. Ga.—Georgia R. Co. v Hayden, 71 Ga. 518, 51 Am.R. 274.

10 C.J. p 839 note 70.

21. S.C.—Laird v. Atlantic Coast Line R. Co, 126 S.E 135, 130 S.C. 368.

22. Tex.—International, etc., R. Co. v. Anchonda, Civ.App, 68 S.W. 743—Missouri, etc., R. Co. v. Hennesey, 49 S.W. 917, 20 Tex.Civ.App. 316.

10 C.J. p 839 note 74.

23. Ga.—Chappell v. Alabama Western R Co., 70 S.E. 208, 8 Ga.App. 787.

10 C.J. p 839 note 73.

24. Ark.—Southwestern Greyhound Lines v. Wisdom, 95 S.W.2d 904, 192 Ark. 903.

S.C.—Spigener v. Seaboard Air Line Ry., 98 S.E. 330, 111 S.C. 405.

damages from mental suffering or anguish may be allowed although no physical injury is sustained.[25]

§ 673. Nominal Damages

In an action for breach of the carrier's contract or duty to transport, at least nominal damages ordinarily may be recovered; but a passenger cannot recover even nominal damages for violation of the separate coach law unless he has suffered actual injury.

Where there has been a breach of the contract or duty to transport on the part of the carrier, but no actual damages have been sustained by the passenger, at least nominal damages may be recovered by him.[26] However, it has been held that a passenger cannot recover even nominal damages against a carrier for an infraction of the separate coach law unless he has suffered actual injury.[27]

§ 674. Exemplary Damages

Exemplary or punitive damages may be recovered where the carrier's breach of duty is attended with willfulness, gross negligence, insult, indignity, or other aggravating circumstances.

Where the breach of duty as to transporting the passenger, or delivering him at his destination within a reasonable time, is attended with circumstances of willfulness, gross negligence, insult, or indignity, exemplary or punitive damages may be recovered,[28] as where the carrier willfully delays the train,[29] or willfully leaves a passenger at the station,[30] or where the passenger is recklessly, wantonly, or willfully carried beyond his destination,[31] or wantonly set down and left at a wrong station.[32] In general, where there is a breach of contract only, or negligence not accompanied with circumstances of aggravation, no exemplary damages will be allowed,[33]

Contract to transport over smooth road

Bus passenger's recovery for carrier's breach of contract to transport passenger over smooth road on specific schedule effected by rerouting over rough road on different schedule, was held not limited to price of ticket for distance over which passenger was rerouted, where passenger had insufficient funds to purchase another ticket and ticket agent had been informed of passenger's illness when he sold ticket, since notice given carrier's agent entitled passenger to any special damages to which breach subjected passenger—Southwestern Greyhound Lines v. Wisdom, 95 S.W.2d 904, 192 Ark. 903.

Notification while train could have returned

In an action against a carrier for leaving an intending passenger at the station, a verdict for plaintiff was not improper because no notice that the passenger was ill was given the carrier before the train left the station, when it appeared that it had sufficient notice after the train left and while the train might still have gone back.—Spigener v. Seaboard Air Line Ry., 98 S.E. 330, 111 S.C. 405.

25. Ala.—Nashville, C. & St. L. Ry. v. Campbell, 101 So. 615, 212 Ala. 27.
Tex.—Jones v. Texas & N. O. R. Co., 55 S.W. 37, 23 Tex.Civ.App. 65—Pullman Palace-Car Co. v. McDonald, 21 S.W. 945, 2 Tex.Civ.App. 322.
10 C.J. p. 839 note 74 [b].

Knowledge of husband seriously ill

Damages for mental anguish are recoverable for failure promptly to deliver telegraphed ticket, where the railway agent knew it was sent to husband seriously ill that wife might have him with her when he died.—Southern Ry. Co. v. Rowe, 73 So. 634, 198 Ala. 353.

26. Ala.—Nashville, C. & St. L. Ry. v. Campbell, 101 So. 615, 212 Ala. 27.
N.C.—Blaylock v. Southern Ry. Co., 100 S.E. 599, 178 N.C. 353.
10 C.J. p. 839 note 76.

Inconvenience in walking short distance

Where the act of the carrier is a mere negligent omission of duty, and the passenger's injury consists wholly of the inconvenience occasioned by having to walk a short distance back to the station, the carrier is liable for nominal damages only.
Ga.—Southern R. Co. v. Cartledge, 73 S.E. 703, 10 Ga.App. 523.
Miss.—Kansas City, etc., R. Co. v. Fite, 7 So. 223, 67 Miss. 373.

Carrying beyond flag station

Passenger, carried two miles beyond flag station, may recover nominal damages—Western & A. R. Co. v. Jackson, 93 S.E. 547, 21 Ga.App. 50.

Colored passenger seated beside white passenger

White passenger was held entitled to only nominal damages from motorbus company, where he made no objection and did not move to another available seat when driver directed colored person to sit beside such passenger in white compartment—City Bus Co. v. Thomas, 160 So. 582, 172 Miss. 424.

27. Tex.—Connally v. Missouri, K. & T. Ry. Co., Civ.App., 187 S.W. 376—Weller v. Missouri, K. & T. Ry. Co., Civ.App., 187 S.W. 374—Norwood v. Galveston, etc., R. Co., 34 S.W. 180, 12 Tex.Civ.App. 560.

28. Ala.—Wilkey v. Central of Georgia Ry. Co., 118 So. 922, 218 Ala. 708—Purifoy v. Central of Georgia Ry. Co., 117 So. 466, 218 Ala. 11.
Ga.—Southeastern Greyhound Lines v. Suits, 190 S.E. 417, 55 Ga.App. 871.
Miss.—Illinois Cent. R. Co. v. Hawkins, 74 So. 775, 114 Miss. 110, L.R.A.1917D 977.
10 C.J. p. 840 note 79.

29. S.C.—Fort v. Southern R. Co., 42 S.E. 196, 64 S.C. 423.

Delay of two and a half hours

Where a carrier delays train for two and one-half hours to accommodate fifty schoolgirls, attending concert, passenger, who because of such delay fails to make connections with train for her destination, being forced to spend night in depot hotel, is entitled to punitive damages.—Illinois Cent. R. Co. v. Hawkins, 74 So. 775, 114 Miss. 110, L.R.A.1917D 977.

30. Ga.—Southeastern Greyhound Lines v. Suits, 190 S.E. 417, 55 Ga.App. 871.
S.C.—Spigener v. Seaboard Air Line Ry., 98 S.E. 330, 111 S.C. 405.

31. Miss.—Mobile, etc., R. Co. v. Moreland, 61 So. 424, 104 Miss. 312, 46 L.R.A.,N.S., 52.
10 C.J. p. 840 note 80.

32. S.C.—Campbell v. Seaboard Air Line R. Co., 65 S.E. 628, 83 S.C. 448, 23 L.R.A.,N.S., 1056, 137 Am.St.R. 824.
10 C.J. p. 840 note 81.

33. Ark.—Missouri Pacific Transp. Co. v. Williams, 109 S.W.2d 924, 194 Ark. 852.
N.C.—Picklesimer v. Louisville & N. R. Co., 138 S.E. 340, 194 N.C. 40, 52 A.L.R. 1330—White v. Norfolk-Southern Ry. Co., 89 S.E. 788, 172 N.C. 31, rehearing denied 91 S.E. 697, 173 N.C. 705.
S.C.—Penn v. Atlantic Coast Line R. Co., 98 S.E. 793, 111 S.C. 499—Schirmer v. Charleston & W. C. Ry. Co., 98 S.E. 134, 111 S.C. 389.
10 C.J. p. 840 note 82.

as where the wrongful act is the result of a mistake made in good faith by an employee of the company,[34] such as in calling out a wrong station.[35]

Failure to stop at flag station. A willful failure to stop a train at a flag station, on a proper signal so to do, is ground for exemplary damages,[36] provided the signal is seen;[37] but such damages cannot be recovered, even though the signal is seen, if the failure to stop is not accompanied with willfulness or malice.[38]

§ 675. Inadequate or Excessive Damages

Ordinarily, the amount of damages is within the discretion of the jury or the court trying the case; but where the amount allowed is excessive the verdict may be set aside or the amount of damages may be reduced.

As a general rule the amount of damages to which a passenger is entitled for a wrongful breach of a contract of transportation is within the discretion of the jury, or the court trying the case, and the decision of the jury in this regard is generally conclusive, if the damages allowed are not of such an amount as to induce the belief that the jury were influenced by passion, partiality, corruption, or prejudice, or were misled by a mistaken view of the case.[39] If the amount allowed is so excessive as to

Adding acts of simple negligence

In an action against a street railroad, it was held that simple negligence in carrying plaintiff by her destination could not be added to simple negligence in depositing plaintiff in an unsafe place, so as to constitute refusal to back the car gross negligence, justifying punitive damages.—Jackson Light & Traction Co. v. Taylor, 72 So. 856, 112 Miss. 60

Brusque remarks of conductor

In an action against a street railroad for negligence in carrying plaintiff beyond her destination, remarks of defendant's conductor were held to amount at most to brusqueness, and not sufficient to constitute an insult justifying punitive damages—Jackson Light & Traction Co v. Taylor, 72 So. 856, 112 Miss. 60.

34. S.C.—Penn v. Atlantic Coast Line R. Co., 98 S.E. 793, 111 S.C. 499.
10 C.J. p 841 note 83

Refusal to accept mileage book coupon

Where conductor refused to accept mileage book coupon and required passenger to pay cash fare, but thereafter discovered mistake and on following day tendered passenger difference between cash fare and coupon, passenger, refusing such difference and suing railroad for refusal to accept coupon, was not entitled to punitive damages.—Schirmer v. Charleston & W C. Ry. Co., 98 S E 134, 111 S C. 389.

Abandonment after passenger alighted temporarily

In passenger's action against bus company for injuries sustained when he was compelled to walk part of way to his destination when bus drove off without him after passenger had alighted temporarily, punitive damages were not recoverable where evidence did not show any intentional act by bus driver to abandon passenger nor that driver's conduct was malicious or wrongful.—Missouri Pacific Transp. Co. v. Williams, 109 S.W.2d 924, 194 Ark. 852.

35. Okl—St. Louis, etc., R Co. v. Freeland, 134 P. 47, 39 Okl. 60.
10 C J. p 841 note 84.

36. Ala—Wilkey v. Central of Georgia Ry. Co, 118 So. 922, 218 Ala. 708—Purifoy v. Central of Georgia Ry. Co., 117 So. 466, 218 Ala. 11.
N C—Williams v. Carolina, etc, R. Co, 57 S.E. 216, 144 N.C. 498, 12 L.R.A.,N.S, 191, 12 Ann.Cas 1000.
10 C J. p 841 note 85.

37. N C—Brown v. Linville River Ry. Co., 94 S.E. 431, 174 N C. 694.
10 C J. p 841 note 86.

38. Miss.—Yazoo, etc., R. Co. v. Mitchell, 35 So. 339, 83 Miss. 179—Yazoo, etc., R. Co. v. Faust, 32 So. 9.

Carrying beyond flag station

In the absence of malice, insult, or willful wrong, where a passenger train has failed to stop at a flag station where passengers get on and off, and a passenger for such station jumps off and walks back without sustaining actual damage or injury, exemplary damages are not recoverable.—Kansas City, etc., R. Co. v. Fite, 7 So 223, 67 Miss. 373—Dorrah v. Illinois Cent. R. Co., 3 So. 36, 65 Miss. 14, 7 Am S.R. 629—Chicago, etc., R. Co. v. Scurr, 59 Miss. 456, 42 Am.R. 373.

39. Ga—Southern R. Co. v. Wallis, 66 S.E. 370, 133 Ga 553, 30 L.R.A., N S., 401, 18 Ann.Cas. 67.
10 C J p 841 note 90.

Damages held not excessive

(1) $8,660, as compensatory damages for injuries to feelings, humiliation, and mental suffering of passenger who was denied passage through gate to train, and was thrown down, cursed, and threatened, in presence of crowd, as clearly to indicate a punitive purpose, or primarily to entail a penal consequence.—Currie v. Davis, 126 S.E. 119, 130 S.C. 408, petition dismissed Davis v. Currie, 45 S. Ct. 88, 266 U.S. 182, 69 L.Ed. 234.

(2) $7,500, to enfeebled passenger put off train three-fourths mile from town, suffering from exposure and overexertion—Brewer v. Atlantic Coast Line R. Co., 147 S E 596, 149 S C. 454.

(3) $2,000, for damages passenger sustained from breach of bus carrier's contract, entered into after carrier's ticket agent was informed that passenger was ill and that rough road would bring about recurrence of her trouble, to transport passenger over smooth road on specific schedule, where passenger was rerouted on more trying schedule over rough road, causing recurrence of hemorrhage and displacement of uterus, and passenger's physician testified that condition would remain and perhaps grow worse—Southwestern Greyhound Lines v Wisdom, 95 S.W. 2d 904, 192 Ark. 903.

(4) $1,925, to passenger who suffered heatstroke after being put down by bus carrier near noon on hot day in August nearly three miles beyond her station, where passenger was three months advanced in pregnancy and was required to remain in bed three or four weeks—Tri-State Transit Co. v. Martin, Miss, 179 So. 349.

(5) $1,000, for railroad's furnishing half-fare ticket to one applying and paying for full-fare ticket.—Southern Ry. Co. v. Penny, 114 So. 15, 22 Ala.App. 199.

(6) $1,000, for increased suffering from walking three-fourths mile back, after train carried passenger with appendicitis beyond destination.—Missouri Pac. R. Co. v. Coxwell, 30 S W.2d 209, 182 Ark. 145.

(7) $450, where a female passenger was negligently carried beyond her station, being forced to walk back in the cold and mud so that her sore eyes were aggravated.—Yazoo & M. V. R. Co. v. Hearn, 71 So. 561, 111 Miss. 294.

(8) $200, in an action for damages for carrying a passenger beyond the point where she should have changed cars, where plaintiff was shown to have been highly annoyed and suf-

induce such a belief, it may be set aside,[40] or the amount of damages may be reduced.[41] The above rules apply where the verdict includes exemplary damages.[42]

fered mental distress, and to have been incumbered with a suitcase and the care of two small children, one of whom she was forced to carry along the railroad track for a quarter of a mile or more—Davis v. Stone, 251 S.W. 371, 159 Ark 156.

(9) $150, where a conductor failed, as requested, to notify a passenger when she reached her destination, Elizabeth, Ga., and refused to stop the train after it had passed through the station, and she paid fare to Marietta, Ga., where she left the train and secured conveyance back on a truck—Payne v. Prince, 108 S E 825, 27 Ga.App. 523.

(10) $79, in an action against a carrier for being carried past a station about a mile.—Houston E & W. T. Ry. Co. v. Thorn, Tex.Civ.App., 197 S W. 778.

Damages held adequate

$100, for inconvenience in being detained twenty-four hours in making connections on return railroad trip, caused by round trip ticket being deficiently made out.—Southern Ry Co v. Alspaugh, 140 So. 771, 25 Ala App. 72.

40. Ga.—Chattanooga, etc, R. Co. v Lyon, 15 S E. 24, 89 Ga. 16, 32 Am S.R. 72, 15 L R.A.,N.S, 857.
Wash.—Bartolini v. Grays Harbor R., etc., Co, 153 P. 4, 88 Wash. 341.
10 C.J. p 842 note 91.

Damages held excessive

(1) $750, where female passenger was set down at wrong place and forced to walk quarter to half mile to station in rain.—Case v. Yazoo & M. V R. Co, 74 So. 773, 114 Miss. 21.

(2) $400 for interruption of his journey, where, after plaintiff, a traveling salesman, missed his train because, as alleged, it failed to stop at the station, he drove to another town for his own pleasure and on the next day went to his originally intended destination on the same ticket he had purchased the day before, and he could have remained in comfort in a hotel in the place where he was left.—St. Louis, I. M & S. Ry. Co. v. Hix, 141 S.W. 492, 101 Ark. 90.

(3) $100 actual and punitive damages to a passenger who failed to protest when compelled to ride, together with her friends, in a baggage coach for a distance of eight miles.—Illinois Cent. R. Co., v. Shackleford, 71 So. 298, 111 Miss 121.

Excessive nominal damages

$1000, awarded to a passenger carried two miles beyond his station, cannot be sustained as nominal damages.—Western & A. R Co v. Jackson, 93 S E 547, 21 Ga App. 50.

41. Nev.—Burrus v. Nevada-California-Oregon R. Co, 145 P. 926, 38 Nev 156.
10 C.J p 843 note 92.

Excessive damages reduced

(1) $1,500 reduced to $1200, to girl put off at wrong station, with result that she contracted cold—Gulf, M & N. R. Co v. Jones, 125 So 114, 155 Miss 689.

(2) $1,500, reduced to $750, for train's departing ahead of announced schedule—Louisville & N. R Co v McCue, 114 So 218, 216 Ala. 616, 61 A.L.R. 400.

(3) $1500 reduced to $300, in an action against a carrier for carrying a child of tender years beyond its destination in violation of a special contract, where the child merely was frightened and caught a cold.—Yazoo & M V. R Co v. O'Keefe, 88 So. 1, 125 Miss 536.

(4) $1,250 reduced to $500, for carrying train passenger beyond her destination.—Central of Georgia Ry. Co. v. Smith, 117 So. 74, 217 Ala. 501, 58 A.L.R. 1058.

(5) $800 reduced to $550, in an action by a person negligently directed to the wrong train, necessitating a debarkation, a walk of a mile and a half and a cold night ride on a hand car, resulting in a cold and exposure, but no permanent impairment of health.—Hines v. Witherspoon, 219 S W. 1014, 143 Ark. 131.

(6) $750 reduced to $250, where a railroad permitted negroes to be served while white passengers were in the dining car, on perceiving which plaintiff arose and left the car, and the steward insisted in the hearing of others that she pay for the meal ordered—Shelton v. Chicago, R. I & P R Co, 201 S W. 521, 139 Tenn 378, L R A 1918D 707.

(7) $500 reduced to $400, in favor of a female passenger, who was carried beyond her station, it appearing she suffered no ill effects save fatigue and the loss of a meal—Yazoo & M V. R. Co. v. Smithart, 71 So. 562, 111 Miss. 299.

(8) $500 reduced to $200, to passenger set down at wrong station, who spent night with station agent's family and proceeded on the next day.—Yazoo & M. V. R. Co. v. Duke, 74 So. 693, 113 Miss 881.

(9) $500 reduced to $200, to passenger by reason of conductor waking him and ordering him to vacate berth unless he paid additional fare, conductor intimating that plaintiff had altered his tourist sleeper ticket to standard sleeping car ticket.—Galveston, H & S. A. Ry. Co. v Wurzbach, Tex Civ.App, 219 S W 252

(10) $400 reduced to $200, for injuries to passenger, walking over wet road at night because of earlier train's failure to stop.—Chicago, R. I. & P Ry Co. v. Sims, 292 S W 94, 173 Ark. 256.

(11) $250 reduced to $100, to negro passenger carried beyond destination by train, for ill effects occasioned by walking in wet and cold and for loss of time—St. Louis-San Francisco Ry. Co. v. Talley, 34 S.W.2d 463, 182 Ark. 1155.

(12) $250 reduced to $50, to passenger for street railroad's refusal to issue transfer, where passenger was not ejected but left street car at the transfer point and borrowed money sufficient to pay extra fare, and passenger was not afraid to go about streets at night.—Birmingham Electric Co v. Rylant, 174 So 511, 234 Ala. 332.

(13) $250 to each of two women for requiring them to ride in negro coach reduced to $50 each, where they rode only three or four miles, their escorts were near by, conductor's wife was in seat across aisle from them, and they were invited into negro compartment because other compartment of car was crowded with men, many of whom were smoking—Chicago, R. I. & P Ry Co v. Allison, 191 S W. 15, 126 Ark. 495.

(14) $200 for wife reduced to $100, where husband and wife were carried beyond their station and walked several miles, but were not subjected to indignities and suffered no mental anguish.—Chicago, R. I. & P Ry Co v Blundell, 191 S.W. 940, 127 Ark 82.

(15) $50 reduced to $10, in favor of plaintiff who was negligently carried beyond her station, but who was only delayed about an hour and three-quarters.—Louisiana & A. Ry Co. v. Mason, 183 S.W. 977, 122 Ark 477.

42. Ky.—Louisville, etc, R Co. v. Ritchel, 147 S W 411, 148 Ky. 701, 41 L R A.,N.S, 958, Ann.Cas.1913E 517.
10 C.J. p 843 note 93.

Punitive damages not excessive

In an action against a carrier for leaving a passenger at the station knowing that she was sick and intended to board the train, a verdict of $5,000 punitive damages was not excessive.—Spigener v. Seaboard Air Line Ry., 98 S.E 330, 111 S.C. 405.

H. PERSONAL INJURIES IN GENERAL

1. CARE REQUIRED AND LIABILITY OF CARRIER GENERALLY

§ 676. Carrier as Insurer

A carrier of passengers is liable only for injuries to them caused by its negligence, and is not an insurer of the safety of passengers.

The general rule, as stated in Corpus Juris, which has been approved,[43] is that a carrier of passengers is not as absolutely liable for the safety of the passengers as a carrier of goods is for the safety of the goods; but it is liable only for injuries to passengers which are caused by its negligence[44] in failing to exercise the proper degree of care, skill, and diligence for such passengers' safety, as explained infra §§ 677, 678, and, therefore, although it has been said that the line of demarcation between the highest degree of care, as explained infra § 678, and insurance is not easy of description,[45] the carrier is not an insurer of the safety of passengers,[46] in the sense in which a carrier of goods

43. La.—Martin v. Interurban Transp Co., 131 So. 514, 518, 15 La. App. 256
N.Y.—McKinney v. New York, W. & B. Ry. Co., 179 N.Y.S. 535, 537.

44. U.S.—Austro-American S. S. Co. v. Thomas, N.Y., 248 F. 231, 160 C.C.A. 309, L.R.A.1918D 873.
Ala.—Alabama Great Southern R. Co. v. Johnson, 71 So. 620, 14 Ala.App. 558.
Ark.—Arkansas Power & Light Co. v. Boyd, 65 S.W.2d 919, 188 Ark. 254
Ky.—McDermott v. Louisville & N. R. Co., 206 S.W. 6, 182 Ky. 22.
La.—Matteson v. Teche Greyhound Lines, App., 178 So. 272—Peterson v. Louisiana Power & Light Co., App., 174 So. 644.
Me.—Chaput v. Lussier, 165 A. 573, 132 Me. 48.
Md.—Steinberg v. Pullman Co., 144 A. 363, 156 Md. 329.
Mass.—Intriligator v. Goldberg, 12 N.E.2d 730.
Mich.—Selman v. City of Detroit, 278 N.W. 112, 283 Mich. 413.
Miss.—Louisville & N. R. Co. v. Compiretto, 102 So. 837, 137 Miss. 766.
Mo.—Bond v. St. Louis-San Francisco Ry. Co., 288 S.W. 777, 315 Mo. 987—Stofer v. Kansas City Public Service Co., 41 S.W.2d 614, 226 Mo. App. 376—Bennett v. St. Louis-San Francisco Ry. Co., 7 S.W.2d 1028, 223 Mo.App. 28
Tenn.—Nashville, C. & St. L. Ry. v. Hopper, 217 S.W. 661, 142 Tenn. 200—Wishone v. Yellow Cab Co., App., 97 S.W.2d 452.
Va.—Chesapeake & O. Ry. Co. v. Baker, 143 S.E. 299, 150 Va. 647, addendum to opinion denying rehearing 141 S.E. 753, 149 Va. 549, denying rehearing 140 S.E. 648, 149 Va. 549—Chesapeake & O. Ry. Co. v. Hobbs, 128 S.E. 538, 142 Va. 96, 41 A.L.R. 1083.
10 C.J. p. 863 note 19.

Death of passenger

A common carrier of passengers, other than a railroad, street railway, or electric railroad, is liable for the death of a passenger only when the death is caused by the negligence of the carrier itself, or the unfitness or gross negligence of its agents or servants.—Finnegan v. Checker Taxi Co., Mass., 14 N.E.2d 127.

Rule regarding liability of carrier of goods is inapplicable to carrier of passengers.—Martin v. Interurban Transp. Co., 131 So. 514, 15 La.App. 256.

45. Iowa.—Hauser v. Chicago, R. I. & P. Ry. Co., 219 N.W. 60, 61, 205 Iowa 940, 58 A.L.R. 687.

"Carrier's duty stops just short of insuring the safety of the passenger."—Kliebenstein v. Iowa Ry. & Light Co., 188 N.W. 129, 130, 193 Iowa 892.

46. U.S.—Kitsap County Transp. Co. v. Harvey, C.C.A.Wash., 15 F.2d 166, 48 A.L.R. 1420—Lehigh Valley R. Co. v. Ciechowski, C.C.A.N.Y., 10 F.2d 82, certiorari denied 46 S.Ct. 352, 270 U.S. 654, 70 L.Ed. 783—The Korea Maru, Hawaii, 254 F. 397, 165 C.C.A. 617—Austro-American S. S. Co. v. Thomas, N.Y., 248 F. 231, 160 C.C.A. 309, L.R.A.1918D 873
Ala.—Mosley v. Teche Lines, 166 So. 800, 232 Ala. 110—Alabama Great Southern R. Co. v. Johnson, 71 So. 620, 14 Ala.App. 558.
Ark.—Arkansas Power & Light Co. v. Boyd, 65 S.W.2d 919, 188 Ark. 254—Arkansas Power & Light Co. v. Mart, 65 S.W.2d 39, 188 Ark. 202.
Cal.—Nicholson v. Porter, 5 P.2d 659, 118 Cal.App. 555—Sinan v. Atchison, T. & S. F. Ry. Co., 284 P. 1041, 103 Cal.App. 703.
Ill.—Lundquist v. Chicago Rys. Co., 137 N.E. 92, 305 Ill. 106, affirming 221 Ill.App. 654—Letush v. New York Cent. R. Co., 267 Ill.App. 526.
Iowa.—Crozier v. Hawkeye Stages, 228 N.W. 320, 209 Iowa 313—Hauser v. Chicago, R. I. & P. Ry. Co., 219 N.W. 60, 205 Iowa 940, 58 A.L.R. 687.
Kan.—Cloud v. Kansas-Oklahoma Traction Co., 173 P. 338, 103 Kan. 249.
Ky.—Schooler v. Louisville & I. R. Co., 82 S.W.2d 221, 259 Ky. 80—Peak v. Louisville & N. R. Co., 297 S.W. 1107, 221 Ky. 97—Payne v. Moore, 244 S.W. 869, 196 Ky. 454—McDermott v. Louisville & N. R. Co., 206 S.W. 6, 182 Ky. 22.
La.—Peyerson v. Louisiana Power & Light Co., App., 174 So. 644—Baptiste v. New Orleans Public Service, App., 161 So. 783—Martin v. Interurban Transp Co., 131 So. 514, 15 La.App. 256—Nee v. New Orleans Public Service, 123 So. 135, 11 La.App. 1.
Me.—Chaput v. Lussier, 165 A. 573, 132 Me. 48.
Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720—Steinberg v. Pullman Co., 144 A. 363, 156 Md. 329—Pugh v. Washington Ry. & Electric Co., 113 A. 732, 138 Md. 226—Hagerstown & F. Ry. Co. v. State, 99 A. 376, 129 Md. 318.
Mass.—Carlson v. Boston & M. R. R., 168 N.E. 171, 269 Mass. 60—Fitzmaurice v. Boston, R. B. & L. R. Co., 152 N.E. 239, 256 Mass. 217.
Miss.—Teche Lines v. Britt, 170 So. 294
Mo.—Sakowski v. Baird, 69 S.W.2d 649, 334 Mo. 951—Lacks v. Wells, 44 S.W.2d 154, 329 Mo. 327—Bond v. St. Louis-San Francisco Ry. Co., 288 S.W. 777, 315 Mo. 987—Stofer v. Kansas City Public Service Co., 41 S.W.2d 614, 226 Mo.App. 376.
N.J.—Spalt v. Eaton, 192 A. 576, 118 N.J.Law 327.
N.Y.—Scott v. New York Cent. R. Co., 216 N.Y.S. 163, 216 App.Div. 623—O'Brien v. New York Rys. Co., 174 N.Y.S. 116, 185 App.Div. 867—Morgan v. Oceanic Steam Nav. Co., 224 N.Y.S. 420, 130 Misc. 570—McKinney v. New York, W. & B. Ry. Co., 179 N.Y.S. 535.
N.C.—Mills v. Atlantic Coast Line R. R., 90 S.E. 221, 172 N.C. 266.
Pa.—Burns v. Pennsylvania R. Co., 144 A. 103, 294 Pa. 277—Petrie v. Kaufmann & Baer Co., 139 A. 878, 291 Pa. 211—Swink v. Philadelphia Rapid Transit Co., 120 A. 827, 277 Pa. 220.
Tenn.—Wishone v. Yellow Cab Co., App., 97 S.W.2d 452—Nashville Ry. & Light Co. v. Owen, 11 Tenn.App.

is said to be an insurer of the safety of the goods, as stated supra § 71, and hence is not liable for injuries caused by an accident which an exercise of the proper degree of care, skill, and diligence could not anticipate or prevent, as stated infra §§ 678, 697.

The carrier, however, is said to be an insurer against all risks caused or increased by its negligence, without any fault on the part of the passenger;[47] and under some statutes, a railroad company is liable for injuries sustained by a passenger while being transported, unless they arise from the passenger's own criminal negligence or from his violation of some express regulation of the company brought to the passenger's notice,[48] but such a statute has been held not to apply to street railroads, as announced infra § 686, to a drover riding on a freight train in charge of stock,[49] or to an intending passenger.[50]

§ 677. General Rule as to Care Required

A carrier must exercise as high a degree of care, skill, and diligence in receiving a passenger, conveying him to his destination, and setting him down safely as the means of conveyance and the circumstances will permit.

Although there is much conflict in the statements by the various courts and authorities as to the care required of a carrier in transporting passengers and its consequent liability, as explained infra § 678, and although the carrier does not insure that the passenger will be carried safely, as stated supra § 676, the general rule, as stated in Corpus Juris, which has received approval,[51] when reduced to its simplest form may be stated to be that the carrier is bound to exercise as high a degree of care, skill, and diligence in receiving a passenger, conveying him to his destination, and setting him down safely as the means of conveyance employed and the circumstances of the case will permit;[52] and that

19—Cecil v. Jernigan, 4 Tenn App 80—Price-Bass Co. v. Dawson, 7 Tenn.Civ.App. 192

Tex.—Fort Worth & D. C. Ry Co. v. Kidwell, 245 S.W. 667, 112 Tex. 89, answering certified questions, Civ. App., 249 S.W. 303—Trinity & B. V. Ry Co. v. McDonald, Com App., 208 S.W. 912, reversing, Civ.App., 160 S.W. 984—Schaff v. Gordon, Civ.App., 214 S.W. 638.

Utah.—Taylor v Bamberger Electric R Co., 220 P. 695, 62 Utah 552.

Va.—City of Portsmouth v. Madrey, 191 S.E. 595—Virginia Electric & Power Co. v. Lenz, 164 S.E 572, 158 Va. 732—Chesapeake & O. Ry. Co. v. Baker, 143 S.E. 299, 150 Va. 647, addendum to opinion denying rehearing 141 S.E. 753, 149 Va. 549, denying rehearing 140 S.E. 648, 149 Va. 549—Chesapeake & O. Ry. Co. v. Hibbs, 138 S.E 538, 142 Va 96, 41 A.L.R. 1083—Derring's Adm'r v. Virginia Ry: & Power Co., 95 S.E. 405, 122 Va. 517.

Wis.—Ormond v. Wisconsin Power & Light Co., 216 N.W. 489, 194 Wis 305.

10 C.J. p 863 note 21.

Corpus Juris statement has received judicial approval in Payne v. Cohlmeyer, C.C.A.Ill., 275 F. 803, 805.

Rule well recognized

"The rule that a carrier of passengers is not an insurer of the safety of its passengers is so universally recognized that it does not require the citation of authorities to support it."—Louisville & N R Co. v. Compiretto, 102 So. 837, 137 Miss. 766.

Statute imposing highest degree of care on the carrier for a passenger for hire does not constitute the carrier an insurer of the passenger's safety—Heck v. Northern Pac. Ry. Co., 196 P. 521, 59 Mont 106.

Owner or operator of elevator as not insurer of safety of passengers see infra § 687.

47. Ind.—Grand Rapids, etc., R. Co. v Boyd, 65 Ind. 526.

As insurer against injury by negligent or willful acts of employees see infra § 689.

48. U.S.—Clark v. Zarniko, Neb., 106 F. 607, 45 C.C.A. 494.

10 C.J. p 864 note 25.

Merely presumption of negligence

Such a statutory provision merely establishes a presumption that damages inflicted on a passenger are entirely attributable to the negligence of the railroad company, and does not make it an insurer of the safety of passengers—Clark v. Zarniko, Neb., 106 F. 607, 45 C.C.A. 494.

"Railroad company"

Corporation organized under general railroad statute with authority to construct and operate a railway between two cities for carrying passengers is a "railroad company," within such a statute.—Webb v. Omaha & S. I. Ry. Co., 164 N.W. 564, 101 Neb. 596.

49. Neb.—Omaha, etc., R. Co. v. Crow, 74 N.W. 1066, 54 Neb. 747, 69 Am.S.R. 741.

50. Neb.—Scott v. Union Pac. R. Co., 155 N.W. 217, 99 Neb. 97—Chicago, etc., R. Co. v Mann, 111 N.W. 379, 78 Neb. 541.

51. U.S.—The Korea Maru, Hawaii, 254 F 397, 399, 165 C.C.A. 617

La.—Shally v. New Orleans Public Service, Sewerage & Water Board, 1 La.App. 770, 773, affirmed 105 So 606, 159 La. 519.

N.Y.—Anderson v. Fidelity & Casualty Co of New York, 166 N.Y.S. 640, 100 Misc 411, modified on other grounds 170 N.Y.S. 431, 183 App.Div. 170, which is affirmed 127 N.E. 584, 228 N.Y. 475.

52. U.S.—Trapnell v. Hines, C.C.A. N.J., 268 F 504, 505, 506—Philadelphia Rapid Transit Co. v. Alcorn, C.C.A.Pa., 266 F 50.

N.Y.—Morgan v Oceanic Steam Nav. Co., 224 N.Y.S. 420, 130 Misc 570.

N.D.—Faubion v Minneapolis, St. P. & S. S Ry. Co., 177 N.W. 371, 45 N.D. 269.

Ohio—Canton Motor Coach v. Hall, 189 N.E 505, 46 Ohio App. 516.

10 C.J. p 854 note 72

All reasonable means and measures to secure the safety and comfort of passengers must be employed.

Cal.—Little v. Los Angeles Ry. Corporation, 271 P. 134, 94 Cal.App. 303

N.Y.—Hershey v New York, O. & W. Ry Co., 179 N.Y.S. 396, 398, 189 App.Div. 270.

Implied condition

There is an implied condition on part of the carrier with each passenger that the latter shall not be put in jeopardy of life or limb by any fault, even the slightest, of the servants of the carriers, and defendant owed to a minor child of plaintiff, a passenger, the duty to conduct him in safety to his destination—Scarborough v. Louisiana Ry. & Nav. Co., 82 So 286, 145 La. 323.

Incidental duty

The duty to safely transport passengers is a duty incident to the business for which the carrier was incorporated.—Abbott v Johnstown, G. & K. Horse R. Co., 80 N.Y. 27, 36 Am.R. 572.

should any injury happen to the passenger not contributed to by his own negligence, but due to negligence on the part of the carrier or its servants, damages may be recovered;[53] and in some jurisdictions the carrier is made liable for such negligence, by statute,[54] even though the acts complained of were not within the scope of the agent's or servant's employment, as stated infra § 689.

This duty of care is the same whether the liability of the carrier is claimed as a breach of contract or as a failure to perform the duty of a carrier.[55] A statute regulating the carrier's duty as to care, in force at the time of an accident, is a part of a passenger's contract of carriage, so that a subsequent repeal of the statute cannot operate retrospectively to relieve the carrier.[56]

Applicability of rule of common carrier, as to degree of care required as to passengers, to patrons of theaters and other places of public amusement see C.J.S. title Theaters and Shows § 41, also 62 C.J. p 867 notes 26-32.

Alternative duties. It may be that the duties of are carrier, in regard to the safety of a passenger, are in the alternative, so that, while no one duty is specific they may not all be neglected.[57]

Private carrier compared. A higher degree of care is imposed on a common carrier of passengers than may be imposed on a private carrier.[58]

§ 678. Statements of Degree of Care Required

a. In general
b. Limitations of rules
c. Continuance of care; varying according to time and place
d. Private carrier

a. In General

A common carrier of passengers should exercise such a degree of care, skill, and diligence for the safety of its passengers as is required by the nature and risk of the undertaking, in view of the mode of conveyance and other circumstances involved. This has been held to require "a high degree of care," "the highest degree of care, skill, and diligence," "the highest practicable care," or "extraordinary care and caution."

Although the classification of negligence by degrees has been condemned,[59] various forms of expression have been used to indicate the degree of care, skill, and diligence which a carrier of passengers must exercise in transporting a passenger, such as that it must exercise "a high degree of care,"[60] "the highest degree of care, prudence and fore-

Care required as to:
Licensees and trespassers on trains see Railroads § 925.
Passengers in palace or sleeping cars see infra §§ 909-912.
Passengers on vessels see Shipping §§ 192-195.
Premises, machinery, and appliances see infra §§ 713-722, 735-742.

53. N.J.—Spalt v. Eaton, 192 A. 576, 118 N.J Law 327.
N.Y.—Morgan v. Oceanic Steam Nav. Co., 224 N Y S. 420, 130 Misc. 570.
10 C.J. p 854 note 73.

54. Mont.—Taillon v. Mears, 74 P. 421, 29 Mont. 161, 1 Ann.Cas. 613.
10 C.J. p 854 note 74.
Proximate cause of injury generally see infra §§ 755, 756.

55. U.S.—The Korea Maru, Hawaii, 254 F. 397, 165 C.C.A. 617.

56. Wash.—Singer v. Martin, 164 P. 1105, 96 Wash. 231.

57. N.J.—Kinder v. Erie R. Co, 162 A. 387, 109 N.J.Law 469, reversing 146 A. 923, 7 N.J.Misc 637, followed in 137 A. 88, 103 N J Law 316—Gore v. Delaware, L. & W. R. Co., 98 A. 389, 89 N.J.Law 224.

58. Wash.—Garrow v. Seattle Taxicab Co., 238 P 623, 135 Wash. 630, 45 A.L.R 293.
See also infra § 678 d.

59. Minn.—Campbell v. Duluth, etc., R. Co., 120 N W. 375, 107 Minn 378, 22 L.R.A.,N.S., 190.
10 C.J. p 854 note 76.

60. U S—Bellocchio v. Italia Flotte Riunite Cosulich Line Lloyd Sabaudo Navigazione Generale, C.C.A.N.Y., 84 F.2d 975—Kitsap County Transp. Co. v. Harvey, C.C.A. Wash., 15 F.2d 166, 48 A.L.R 1420.
Ala.—Capital Motor Lines v. Gillette, 177 So. 881, 235 Ala 157
Fla.—Louisville & N. R. Co. v Norton, 78 So. 982, 75 Fla. 597.
Ky.—Dix v. Gross, 111 S.W.2d 673, 271 Ky. 231—Adams v. Hilton, 110 S.W.2d 1088, 270 Ky. 818—Trout's Adm'r v. Ohio Valley Electric Ry. Co., 43 S.W.2d 507, 241 Ky. 144.
Md.—Owners' Realty Co. of Baltimore City v. Richardson, 148 A. 543, 158 Md. 367.
Minn.—Lentz v. Minneapolis & St. Paul Suburban R. Co, 160 N.W 794, 135 Minn. 310.
N J.—Wall v. G. R. Wood, Inc., 197 A. 41, 119 N J.Law 442—Buckalew v Eaton, 191 A. 773, 118 N.J.Law 188—Seckler v. Pennsylvania R. Co., 174 A. 501, 113 N.J.Law 299—Jackson v. Delaware, L. & W. R. Co., 170 A. 22, 111 N.J.Law 487—Rogers v. New York Cent. R. Co., 150 A. 357, 106 N.J.Law 394—Barney v Hudson & M. R. Co., 145 A. 5, 105 N J.Law 274, affirmed 148 A. 917, 106 N.J.Law 230, 231—Sheridan v. New Jersey & N. Y R. Co., 141 A. 811, 104 N.J.Law 622—McBride v. Pennsylvania R. Co., 123 A. 765, 99 N J.Law 464—Maldonato v. Ironbound Transp. Co., 156 A. 275, 9 N.J.Misc. 985.
N.Y.—Hoffman v. Lehigh Valley R. Co., 177 N.Y.S. 140, 183 App.Div. 414.
N.C.—Lindsey v. Atlantic Coast Line R. Co, 92 S E. 166, 173 N C. 390—Mills v. Atlantic Coast Line R. R., 90 S E. 221, 172 N C. 266.
Tex.—St. Louis, S. F & T. Ry. Co. v. Gore, Civ.App., 69 S.W.2d 186, error dismissed.
Utah—Taylor v. Bamberger Electric R. Co., 220 P. 695, 62 Utah 552.
"This term does not lend itself to precise legal definition, absolutely resolving every case. It is relative in the sense that the thing to be done to avert injury depends upon the special circumstances; and this ordinarily involves a factual inquiry. It is such degree of care as is commensurate with the risk of harm—such as one exercising a high degree of care, skill, and diligence, directed to the passengers' safety, and consistent with the nature of the carrier's undertaking and the practical operation of the vehicle or mode of conveyance, would under all the circumstances deem prudent to obviate the danger, known or reasonably to be anticipated."—Spalt v. Eaton, 192 A. 576, 578, 118 N.J.Law 327
Synonymous terms
"'A high degree of care' is prac-

sight," as explained infra in this section, "the greatest possible care and diligence,"[61] and as explained infra in this section, "the utmost care and diligence," or "extraordinary care and caution."

In the proper use of the term, however, "negligence" is simply the failure to use the amount of care, skill, and diligence required by the nature of the undertaking and the circumstances of the case, and speaking in this sense of the degree of care required of the carrier of passengers who has intrusted to it the personal safety of the passenger, it is evident that, whatever form of expression is used, the skill, care, and diligence should be proportioned to the nature and risk of the undertaking, in view of the nature of the means of conveyance employed,[62] and sometimes involves custom and knowledge actual or attributable to one or the other of the parties,[63] although it has been held that the degree of care required under particular circumstances and conditions cannot be lessened by the carrier's custom in regard to particular acts.[64]

The highest degree of care means only reasonable care in the superlative degree,[65] and ordinary care imports all the care which the peculiar circumstances of the place or occasion reasonably require, and this will be increased or diminished as danger of accident or injury is increased or diminished.[66] Therefore, while it might be proper in one sense to say that the care required is that which an ordinarily careful and prudent person would exercise in such business, yet, on the other hand, the nature of the business requires the use of a very high degree of care, prudence, and foresight, and it would be inaccurate and misleading to say that ordinary and reasonable care is sufficient to relieve the carrier from the charge of negligence,[67] although it has been held that, in view of the modern tendency to refuse to recognize degrees of negligence, the care required of the carrier may be expressed by the terms "due care," "reasonable care," or "ordinary care,"[68] particularly in regard to dangers which are not usually incident to the mode of conveyance used.[69]

tically synonymous to 'highest care.'"—Taddeo v. Tilton, 289 N.Y.S. 427, 431, 248 App.Div. 490.

61. U.S.—Philadelphia, etc., R. Co. v. Derby, Pa., 14 How. 468, 14 L.Ed. 502.
10 C.J. p 855 note 78.

62. Md.—Pugh v. Washington Ry. & Electric Co. 113 A. 732, 735, 138 Md. 226—Tall v. Baltimore Steam Packet Co., 44 A. 1007, 1008, 90 Md. 253, 47 L.R.A. 120
N.H.—Wright v. Boston & M. R. R., 139 A. 370, 83 N.H. 136, 56 A.L.R. 975
N.J.—Jones v. People's Rapid Transit Co., 153 A. 373, 9 N.J.Misc. 315
N.Y.—Taddeo v. Tilton, 289 N.Y.S. 427, 248 App.Div. 290—Allessi v. New York Rapid Transit Corporation, 297 N.Y.S. 1011, 163 Misc. 815—Morgan v. Oceanic Steam Nav. Co., 224 N.Y.S. 420, 130 Misc. 570
Tex.—St. John v. Gulf, C. & S. F. Ry. Co., 80 S.W. 235, 236—International & G. N. Ry. Co. v. Williams, Civ.App., 183 S.W. 1185.
10 C.J. p 855 note 81.

Corpus Juris statement has received judicial approval in De Jager v. Andringa, 217 N.W. 332, 333, 241 Mich. 474.

63. Ill.—Sorenson v. Illinois Cent. R. Co., 155 Ill.App. 606.

64. Tex.—International, etc., R. Co. v. Cruseturner, 98 S.W. 423, 44 Tex.Civ.App. 181.
10 C.J. p 855 note 83.

65. D.C.—Pistorio v. Washington R. & E. Co., 46 App.D.C. 479, 484.

66. U.S.—Pennsylvania R. Co. v. Rogers, N.J., 244 F. 76, 156 C.C.A. 504.
Ill.—Bartz v. Chicago City Ry. Co., 116 Ill.App. 554
10 C.J. p 855 note 84

"Protection required is obviously greater with respect to matters wherein the passenger is helpless or of which he may be expected to be ignorant."—Wright v. Boston & M. R. R., 139 A. 370, 372, 83 N.H. 136, 56 A.L.R. 975.

More dangerous the character of machine used by a common carrier of passengers, the greater the degree of care and caution required in its use and occupation.—Cates v. Hall, 88 S.E. 524, 171 N.C. 360.

Where passenger has full knowledge of danger and can avoid it, carrier need not exercise high standard of care for protection.—Wright v. Boston & M. R. R., 139 A. 370, 83 N.H. 136, 56 A.L.R. 975.

67. U.S.—Giger v. New York, N. H. & H. R. Co., C.C.A.N.Y., 60 F.2d 63.
Iowa.—Kliebenstein v. Iowa Ry. & Light Co., 188 N.W. 129, 193 Iowa 892.
Ohio.—Cleveland Elec. Ry. Co. v. Pifer, 20 Ohio Cir.Ct.,N.S., 435.
10 C.J. p 855 note 85

68. Ind.—Terre Haute Indianapolis & Eastern Traction Co. v. Scott, 150 N.E. 777, 197 Ind. 587, 43 A.L.R. 1029—Terre Haute, etc., Traction Co. v. Phillips, 132 N.E. 740, 191 Ind. 374—Pittsburgh, C., C. & St. L. Ry. Co. v. Stephens, 157 N.E. 58, 86 Ind.App. 251
Md.—Pugh v. Washington Ry. & Electric Co., 113 A. 732, 138 Md. 226.
N.J.—Sandler v. Hudson & M. R. Co., 151 A. 99, 8 N.J.Misc. 537, affirmed 156 A. 459, 108 N.J.Law 203.
Wis.—Ormond v. Wisconsin Power & Light Co., 216 N.W. 489, 194 Wis. 305
10 C.J. p 856 note 86.

"It cannot be said that the duty to use care which arises out of the relation of carrier and passenger differs in kind, character, or degree from the duty which arises out of the relation of master and servant, or out of any other relation which imposes the legal duty to use care."—Union Traction Co. of Indiana v. Berry, 121 N.E. 655, 657, 188 Ind. 514, rehearing denied 124 N.E. 737, 188 Ind. 514.

Exposure of passenger to danger, which the exercise of reasonable foresight would have anticipated and due care avoided, is negligence on the part of a carrier.—Allessi v. New York Rapid Transit Corporation, 297 N.Y.S. 1011, 163 Misc. 815

Under law of Costa Rica, it is railroad's duty to passenger to exercise care of good father or of reasonably prudent man, breach of which is not barred by limitation.—Page v. United Fruit Co., C.C.A. Mass., 3 F.2d 747, certiorari granted Northern Ry. Co. v. Page, 46 S.Ct. 19, 269 U.S. 542, 70 L.Ed. 402, and reversed on other grounds Northern Ry. Co. v. Page, 47 S.Ct. 491, 274 U.S. 65, 71 L.Ed. 929

69. Ill.—Chicago, etc., R. Co. v. Pillsbury, 14 N.E. 22, 123 Ill. 9, 5 Am.S.R. 483.
10 C.J. p 856 note 87.

A carrier, such as a railroad company, owes to a passenger a different and a higher degree of care than to mere trespassers or strangers,[70] or to travelers at highway crossings,[71] or using the streets or highways as crossings,[72] or to one of its servants,[73] or than when complying with requirements of the public service commission.[74]

Highest degree of care, skill, and diligence. In a great majority of the cases it is stated that the carrier, particularly in case of a railroad company, must exercise the utmost care, skill, and diligence, or the highest degree of care, prudence, and foresight for the passenger's safety,[75] and is responsi-

70. Fla.—Atlantic Coast Line R. Co. v. Webb, 150 So. 741.
10 C.J. p 856 note 88.

71. Va.—Washington, etc., R. Co. v. Vaughan, 69 S.E. 1035, 111 Va. 785.

72. Wash.—Switzer v. City of Seattle, 294 P. 225, 159 Wash. 540, opinion modified on rehearing on other grounds 298 P. 347.

73. Mass.—Silva v. Boston, etc., R. Co., 90 N.E. 547, 204 Mass. 63.

74. U.S.—Lehigh Valley R. Co. v. Ciechowski, C.C.A.N.Y., 10 F.2d 82, certiorari denied 46 S.Ct. 352, 270 U.S. 654, 70 L.Ed. 783.

75. U.S.—Oceanic Steam Nav. Co. v. Corcoran, C.C.A.N.Y., 9 F.2d 724, 57 A.L.R. 163.
Ala.—Mosley v. Teche Lines, 166 So. 800, 232 Ala. 110—Franklin v. Southern Ry. Co., 72 So. 11, 196 Ala. 118—Alabama Great Southern R. Co. v. Johnson, 71 So. 620, 14 Ala. App. 558.
Cal.—Smith v. O'Donnell, 12 P.2d 933, 215 Cal. 714—Leonard v. Pickwick Stage System, 7 P.2d 1059, 120 Cal.App. 512—Jianou v. Pickwick Stages System, 296 P. 108, 111 Cal.App. 754—Simmons v. Pacific Electric Ry. Co., 212 P. 637, 60 Cal.App. 129—Jones v. United Railroads of San Francisco, 202 P. 919, 54 Cal.App. 744—Fitzgerald v. Southern Pac. Co., 173 P. 91, 36 Cal.App. 660.
Fla.—Hall v. Seaboard Air Line Ry. Co., 93 So. 151, 84 Fla. 9.
Ill.—Lundquist v. Chicago Rys. Co., 137 N.E. 92, 305 Ill. 106, affirming 221 Ill.App. 654.
Ind.—Chicago, L. S. & S. B. Ry. Co. v. Brown, 115 N.E. 368, 66 Ind.App. 126.
Ky.—Schooler v. Louisville & L. R. Co., 82 S.W.2d 221, 259 Ky. 80—Consolidated Coach Corporation v. Hopkins, 14 S.W.2d 768, 228 Ky. 184—Louisville & N. R. Co. v. Scarbrough, 270 S.W. 494, 208 Ky. 79—Louisville & N. R. Co. v. Bennett, 209 S.W. 358, 183 Ky. 445—McDermott v. Louisville & N. R. Co., 206 S.W. 6, 182 Ky. 22—Louisville & N. Ry. Co. v. Copley, 197 S.W. 648, 177 Ky. 171.
La.—Hopkins v. New Orleans Ry. & Light Co., 90 So. 512, 150 La. 61, 19 A.L.R. 1362—Matteson v. Teche Greyhound Lines, App., 178 So. 272—Wallace v. Shreveport Rys. Co., App., 175 So. 86—Hart v. Gulf, M. & N. R. Co., App., 167 So. 166—Baptiste v. New Orleans Public Service, App., 161 So. 783—Shally v. New Orleans Public Service, Sewerage & Water Board, 1 La.App. 770, affirmed 105 So. 606, 159 La. 519.
Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720—Damico v. Washington, B. & A. Electric R. Co., 148 A. 821, 158 Md. 470—Hagerstown & F. Ry. Co. v. State, 99 A. 376, 129 Md. 318—United Rys. & Electric Co. of Baltimore v. Phillips, 99 A. 355, 129 Md. 328, L.R.A.1917C 384.
Minn.—Mardorf v. Duluth-Superior Transit Co., 271 N.W. 588.
Miss.—Yazoo & M. V. R. Co. v. Hawkins, 140 So. 873, 163 Miss. 505—Louisville & N. R. Co. v. Compiretto, 102 So. 837, 137 Miss. 766.
Mo.—Brindley v. Wells, 271 S.W. 48, 308 Mo. 1—May v. Chicago B. & Q. R. Co., 225 S.W. 660, 284 Mo. 508—Hurley v. Missouri Pac. Transp. Co., App., 56 S.W.2d 620, certiorari quashed State ex rel. and to Use of Hurley v. Becker, 66 S.W.2d 524, 334 Mo. 537—Cecil v. Wells, 259 S.W. 844, 214 Mo.App. 193—Burkett v. Missouri Pac. R. Co., App., 208 S.W. 104.
Mont.—Garvin v. Butte Electric Ry. Co., 169 P. 40, 54 Mont. 196.
Neb.—Fielding v. Publix Cars, 277 N.W. 331.
N.Y.—Palsgraf v. Long Island R. Co., 225 N.Y.S. 412, 222 App.Div. 166, reversed on other grounds 162 N.E. 99, 248 N.Y. 339, 59 A.L.R. 1253, reargument denied 164 N.E. 564, 249 N.Y. 511—McKinney v. New York, W. & B. Ry. Co., 179 N.Y.S. 535.
Ohio.—Jones v. Youngstown Municipal Ry. Co., 12 N.E.2d 279, 133 Ohio St. 118—Cleveland Elec. Ry. Co. v. Pifer, 20 Ohio Cir.Ct.,N.S., 435—Dowd v. Cleveland Ry., 22 Ohio N.P.,N.S., 236.
Okl.—Missouri, Kansas & Oklahoma Coach Lines v. Burton, 72 P.2d 385—Muskogee Electric Traction Co. v. Bolin, 232 P. 105, 105 Okl. 142—Baker v. Hines, 213 P. 313, 88 Okl. 266.
Pa.—O'Malley v. Laurel Line Bus Co., 166 A. 868, 311 Pa. 251—Johnston v. Director General of Railroads, 133 A. 158, 286 Pa. 166—Cody v. Venzie, 107 A. 383, 263 Pa. 541—Wood v. Philadelphia Rapid Transit Co., 104 A. 69, 260 Pa. 481, L.R.A.1918F 317—Bickley v. Philadelphia & R. Ry. Co., 101 A. 654, 257 Pa. 369—Lazor v. Banas, 174 A. 817, 114 Pa.Super. 425—Wood v. Pennsylvania R. Co., 170 A. 367, 111 Pa.Super. 430—Deady v. Philadelphia Rapid Transit Co., 100 Pa.Super. 208—Snow v. Philadelphia Rapid Transit Co., 84 Pa.Super. 236.
S.C.—Belcher v. Atlantic Coast Line R. Co., 177 S.E. 890, 175 S.C. 9—Gladden v. Southern Ry. Co., 141 S.E. 90, 142 S.C. 492—Hewitt v. Atlantic Coast Line R. Co., 127 S.E. 718, 131 S.C. 426.
Tenn.—Nashville, C. & St. L. Ry. v. Hopper, 217 S.W. 661, 142 Tenn. 200—Louisville & N. R. Co. v. Marlin, 186 S.W. 595, 135 Tenn. 435, L.R.A.1917A 417—Louisville & N. Ry. Co. v. Powell, 11 Tenn.App. 253—Price-Bass Co. v. Dawson, 7 Tenn.Civ.App. 192—Memphis St. Ry. v. Felts, 6 Tenn.Civ.App. 303.
Tex.—St. Louis Southwestern Ry. Co. v. Varnell, Civ.App., 97 S.W.2d 320—San Antonio & A. P. Ry. Co. v. Wiuvar, Civ.App., 257 S.W. 667.
Va.—Virginia Ry. & Power Co. v. Cherry, 105 S.E. 657, 129 Va. 262—Derring's Adm'r v. Virginia Ry. & Power Co., 95 S.E. 405, 122 Va. 517.
10 C.J. p 856 note 91.

Corpus Juris statement has received judicial approval in Zoccolillo v. Oregon Short Line R. Co., 177 P. 201, 213, 53 Utah 39.

Reason for rule

"The rule whereby carriers are onerated with the duty of exerting the highest degree of care had and has its foundation in the fact that the carrier assumes almost absolute control of the body and the movements of the passenger, and in the further fact that the passenger commits himself to the watchfulness of the carrier's servants."—Louisville & N. R. Co. v. Hensley, 7 Tenn.Civ.App. 610, 614.

Carrier owes passenger nondelegable duty of exercising the highest degree of care.—Southern Ry. Co. v. Hussey, C.C.A.Mo., 42 F.2d 70, 74 A.L.R. 1172, certiorari granted 282 U.S. 826, 75 L.Ed. 736, affirmed 51 S.Ct. 367, 283 U.S. 136, 75 L.Ed. 908.

"Utmost care, skill, and diligence

ble for even slight negligence;[76] and this duty of care applies to all things affecting the safe transportation of passengers.[77] In some states this rule of care, at least in effect, is prescribed by statute, which has been held merely declaratory of the common law.[78]

By another form of expression, the carrier is required to exercise the highest degree of care and skill which would be used by a person of great prudence in view of the nature and the risks of the business under the same or similar circumstances;[79] and again the rule has been stated that the carrier is required to do all that human sagacity and foresight can do under the circumstances, in view of the character and mode of conveyance adopted, to prevent injury to passengers, the carrier being held liable for the slightest negligence with reference to the exercise of such care,[80] although the precautions to be taken are to be measured by those in general use.[81]

Highest practicable care. As stated in Corpus Juris, quoted as being the proper rule,[82] in view of the limitations stated hereafter in subdivision b of this section, the rule is probably more accurately stated as the highest degree of care, prudence, and foresight that a prudent man engaged in the busi-

is what a cautious man in similar employment would use"—Link v. Atlantic Coast Line R. Co., Mo.App., 233 S.W. 834.

76. Ala.—Mosley v. Teche Lines, 166 So. 800, 232 Ala. 110.
Cal.—Leonard v. Pickwick Stage System, 7 P.2d 1059, 120 Cal.App. 512—Fitzgerald v. Southern Pac. Co., 173 P. 91, 36 Cal.App. 660.
Ill.—Crane v. Railway Express Agency, 12 N.E.2d 672, 293 Ill.App. 328—Chicago Union Tract. Co. v. Mee, 136 Ill.App. 98.
Iowa—Kliebenstein v. Iowa Ry. & Light Co., 188 N.W. 129, 193 Iowa 892.
La.—Wallace v. Shreveport Rys. Co., App., 175 So. 86.
Mo.—Stofer v. Kansas City Public Service Co., 41 S.W.2d 614, 226 Mo.App. 376.

Injuries avoidable by ordinary care

A carrier of passengers is responsible for injuries received by them while in the course of transportation which might have been avoided by ordinary care.—Jones v. United Railroads of San Francisco, 202 P. 919, 54 Cal.App. 744.

77. U.S.—Southern Ry. Co. v. Hussey, C.C.A.Mo., 42 F.2d 970, 74 A.L.R. 1172, certiorari granted 51 S.Ct. 75, 282 U.S. 826, 75 L.Ed. 736, affirmed 51 S.Ct. 367, 283 U.S. 136, 75 L.Ed. 908.
Tex.—Bragg v. Houston Electric Co., Civ.App., 264 S.W. 245, affirmed Houston Electric Co. v. Bragg, Com.App., 276 S.W. 641, motion overruled 280 S.W. 188.
10 C.J. p. 861 note 5 [b].

78. **Statutory expression of rule**

When provided by statute, a carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.
Mont.—Taillon v. Mears, 74 P. 421, 29 Mont. 161, 1 Ann.Cas. 613.
Okl.—Missouri, Kansas & Oklahoma Coach Lines v. Benton, 10 P.2d 451, 157 Okl. 10—Chicago, R. I. & P. Ry. Co. v. Shelton, 273 P. 988, 135 Okl. 53—Lusk v. Wilkes, 172 P. 929, 70 Okl. 44, L.R.A.1918E 513—Chicago, R. I. & P. Ry. Co. v. Dizney, 160 P. 880, 61 Okl. 176.
10 C.J. p. 854 note 74 [a].

79. U.S.—Henson v. Fidelity & Columbia Trust Co., C.C.A.Ky., 68 F.2d 144, affirming, D.C., 3 F.Supp. 950, and rehearing denied, C.C.A., 69 F.2d 778.
Ky.—Louisville & N. R. Co. v. Campbell, 35 S.W.2d 26, 28, 237 Ky. 182.
Mo.—Gott v. Kansas City Rys. Co., 222 S.W. 827.
Tex.—Fort Worth & D. C. Ry. Co. v. Kidwell, 245 S.W. 667, 112 Tex. 89, answering certified questions, Civ.App., 249 S.W. 303—Trinity & B. V. Ry. Co. v. McDonald, Com.App., 208 S.W. 912, reversing, Civ.App., 160 S.W. 984—Gulf, C. & S. F. Ry. Co. v. Baldwin, Civ.App., 2 S.W.2d 520—Waters v. Texas Electric Ry., Civ.App., 267 S.W. 1005.
10 C.J. p. 857 note 92.

Similar expressions of the degree of care

(1) "The highest degree of care and prudence in the management and operation of its cars and the instrumentalities employed by it that prudent men in like circumstances employ, and commensurate with the hazards ordinarily to be encountered." — Rickabaugh v. Toungstown Municipal Ry. Co., 9 N.E.2d 900, 907, 55 Ohio App. 431.

(2) "That degree of care, caution, and foresight which a person of great prudence, and average intelligence, experienced in the business of common carrier and appreciating responsibilities arising from nature of risk, would exercise to secure safety of passengers."—Lehigh Valley R. Co. v. Ciechowski, C.C.A.N.Y., 10 F.2d 82, 85, certiorari denied 46 S.Ct. 352, 270 U.S. 654, 70 L.Ed. 783.

(3) "The highest degree of care and diligence which is known to careful, diligent, and skillful persons engaged in such business."—Central of Georgia R. Co. v. Robertson, 83 So. 102, 103, 203 Ala. 358.

(4) "The highest degree of care which ordinarily careful and skillful persons would use under like circumstances."—Cincinnati Traction Co. v. Burkhardt, 4 Ohio App. 103, 106.

"Very high degree"

Carrier must exercise "very high degree of care" for safety of passengers—such care as persons of very high prudence would use under similar circumstances—Louisiana Ry. & Nav. Co. of Texas v. Smith, Tex.Civ.App., 285 S.W. 1104.

80. Cal.—Scarborough v. Urgo, 216 P. 584, 191 Cal. 341.
Iowa—Kliebenstein v. Iowa Ry. & Light Co., 188 N.W. 129, 193 Iowa 892.
La.—Scarborough v. Louisiana Ry. & Nav. Co., 82 So. 286, 145 La. 323.
Va.—Chesapeake & O. Ry. Co. v. Hibbs, 128 S.E. 538, 142 Va. 96, 41 A.L.R. 1083.
W.Va.—Bartley v. Western Maryland Ry. Co., 95 S.E. 443, 81 W.Va. 795—Perkins v. Monongahela Valley Traction Co., 95 S.E. 797, 81 W.Va. 781.
10 C.J. p. 858 note 93.

81. Wis.—Ormond v. Wisconsin Power & Light Co., 216 N.W. 489, 490, 194 Wis. 305.
10 C.J. p. 858 note 94.
"Whether the conduct of the common carrier in a given particular accords with its legal duty in the premises is to be tested by comparing its conduct with that generally exercised by those engaged in the same business under similar circumstances." — Ormond v. Wisconsin Power & Light Co., supra.

"Best precautions in known practical use" should be used by a carrier to secure the safety of its passengers—Little v. Los Angeles Ry. Corporation, 271 P. 134, 94 Cal.App. 303.

82. Ariz.—Wilkinson v. Phoenix Ry. Co., 236 P. 704, 705, 706.

ness, as usually conducted, would employ, that is, such care as is reasonably practicable; or in other words, such care, prudence, and foresight as can reasonably be exercised consistent with the practical operation of the road or mode of conveyance used, and the exercise of its business as a carrier, taking into consideration the circumstances and conditions existing at the time and place in question;[83] and in some cases this degree of care has been expressed as the highest practicable care, caution, and diligence which capable and faithful railroad men would exercise under similar circumstances.[84]

Extraordinary care and caution. In some cases it is said that extraordinary care, caution, and diligence are required,[85] and that slight negligence will

83. U.S.—S. S. Kresge Co. v. McCallion, C.C.A.Mo., 58 F.2d 931—Memphis St. Ry. Co. v. Bobo, Tenn., 232 F. 708, 146 C.C.A. 634, affirmed Memphis St. Ry. Co. v. Moore, 37 S.Ct. 273, 243 U.S. 299, 61 L.Ed. 733.
Ala.—Mosley v. Teche Lines, 166 So. 800, 232 Ala. 110—Continental Life Ins. Co. v. Newman, 123 So. 92, 23 Ala.App. 203, reversed 123 So. 93, 219 Ala. 311.
Ark.—Wade v. Brocato, 95 S.W.2d 94—Arkansas Power & Light Co. v. Mart, 65 S.W.2d 39, 188 Ark. 202—Pittman v. Hines, 221 S.W. 474, 144 Ark. 133.
Conn.—Robinson v. Connecticut Co., 189 A. 452, 122 Conn. 300—Di Rossi v. Connecticut Co., 188 A. 926, 122 Conn. 372—Briganti v. Connecticut Co., 175 A. 679, 119 Conn. 316.
D.C.—Pistorio v. Washington R. & E. Co., 46 App.D.C. 479.
Ill.—Thomason v. Chicago Motor Coach Co., 10 N.E.2d 714, 292 Ill. App. 104—Arndt v. Riverview Park Co., 259 Ill.App. 210—Sczuck v. Chicago Rys. Co., 229 Ill.App. 325—Kanter v. St. Louis, S. & P. R. R., 218 Ill.App. 565—Gilberts v. Rockford & I. Ry. Co., 215 Ill. App. 324. See Appel v. Alton, G. & St. L. Traction Co., 207 Ill.App. 562—Bourland v. Louisville & N. R. Co., 199 Ill.App. 126—Aur v. East St. Louis Ry. Co., 194 Ill.App. 193.
Ind.—Ft. Wayne & Northern Indiana Traction Co. v. Parish, 119 N.E. 488, 67 Ind.App. 597.
Kan.—Cloud v. Kansas-Oklahoma Traction Co., 173 P. 338, 103 Kan. 249.
Ky.—Peak v. Louisville & N. R. Co., 297 S.W. 1107, 221 Ky. 57—Payne v. Moore, 244 S.W. 869, 196 Ky. 454.
La.—Martin v. Interurban Transp. Co., 131 So. 514, 15 La.App. 256—Brisolara v. Caddo Transfer & Warehouse Co., 127 So. 57, 13 La. App. 27.
Md.—Smith v. Blue Ridge Transp. Co., 191 A. 66.
Minn.—Fewings v. Mendenhall, 93 N.W. 127, 88 Minn. 336, 97 Am.S.R. 519, 60 L.R.A. 601.
Mo.—Lige v. Chicago, B. & Q. R. Co., 204 S.W. 508, 275 Mo. 249, L.R.A. 1918F 548—Whitlow v. St. Louis-San Francisco Ry. Co., App., 282 S.W. 525, certiorari quashed State ex rel. St. Louis & San Francisco Ry. Co. v. Danes, 290 S.W. 425, 316 Mo. 474—Liljegren v. United Rys. of St. Louis, App., 227 S.W. 925.
Neb.—Daly v. Publix Cars, 259 N.W. 163, 128 Neb. 403—Griffen v. Lincoln Traction Co., 225 N.W. 232, 234, 118 Neb. 459.
N.J.—Spalt v. Eaton, 192 A. 576, 118 N.J.Law 327.
Ohio.—Cincinnati Traction Co. v. Keil, 26 Ohio Cir.Ct.N.S., 445—Sentker v. Martin, 19 Ohio N.P.,N.S., 445
Pa.—Burns v. Pennsylvania R. Co., 144 A. 103, 294 Pa. 277—Petrie v. Kaufmann & Baer Co., 139 A. 878, 291 Pa. 211—Furby v. Pennsylvania R. Co., 132 A. 796, 286 Pa. 85.
R.I.—Roy v. United Electric Rys. Co., 164 A. 513, 53 R.I. 122—Adams v. United Electric Rys. Co., 128 A. 197, 46 R.I. 312.
Tenn.—Nashville Ry. & Light Co. v. Owen, 11 Tenn.App. 19—Cecil v. Jernigan, 4 Tenn.App. 80.
Tex.—St. John v. Gulf, C. & S. F. Ry. Co., 80 S.W. 235, 236—Waters v. Texas Electric Ry., Civ.App., 267 S.W. 1005—Bragg v. Houston Electric Co., Civ.App., 264 S.W. 245, affirmed Houston Electric Co. v. Bragg, Com.App., 276 S.W. 641.
Va.—City of Portsmouth v. Madrey, 191 S.E. 595.
Wash.—Washington v. City of Seattle, 16 P.2d 597, 170 Wash. 371, 86 A.L.R. 113.
W.Va.—Venable v. Gulf Taxi Line, 141 S.E. 622, 105 W.Va. 156.
10 C.J. p. 858 note 96.

Similar expressions of rule

(1) "Every precaution for the safety of its passengers that is reasonable and practicable, at all times and under all circumstances"—Whitlow v. St. Louis-San Francisco Ry. Co., Mo.App., 282 S.W. 525, 533, certiorari quashed State ex rel. St. Louis & San Francisco Ry. Co. v. Danes, 290 S.W. 425, 316 Mo. 474.

(2) "The highest degree of care required by the law in any case where human safety is at stake, and the highest degree of care and prudence known to the usage and practice of very careful, skillful, and diligent persons engaged in the business of carrying passengers by similar means and agencies."—Mosley v. Teche Lines, 166 So. 800, 801, 232 Ala. 110—Alabama Power Co. v. Maddox, 151 So. 575, 576, 227 Ala. 628—Continental Life Ins. Co. v. Newman, 123 So. 92, 23 Ala.App. 203, reversed on other grounds 123 So. 93, 219 Ala. 311.

(3) "The highest degree of care reasonably to be expected from human vigilance and foresight, in view of the mode and character of the conveyance adopted and consistent with the practical prosecution of their business."
N.D.—Finlayson v. Yellow Cab Co., 217 N.W. 662, 664, 56 N.D. 407.
Wis.—Dauplaise v. Yellow Taxicab Co., 235 N.W. 771, 204 Wis. 419—Ormond v. Wisconsin Power & Light Co., 216 N.W. 489, 194 Wis. 305—Carson v. Green Cab Co., 203 N.W. 394, 395, 186 Wis. 566—Ferguson v. Truax, 118 N.W. 251, 253, 136 Wis. 637.

Character of conveyance, etc.

"This so-called highest degree of care imposed upon the carrier is said to be affected by the character of the conveyance, its mode of propulsion, the usual course of its business, and the hazards of the particular situation."—Matteson v. Teche Greyhound Lines, La.App., 178 So. 272, 273.

"Utmost care" required of carrier for protection of passenger "means no more than every care which is practicable by carriers engaged in the transportation of their passengers."—Richmond-Ashland Ry. Co. v. Jackson, 162 S.E. 18, 22, 157 Va. 628.

84. Mo.—Kirkpatrick v. Metropolitan St. R. Co., 109 S.W. 682, 211 Mo. 68, reversing 107 S.W. 1025, 129 Mo.App. 524.
10 C.J. p. 860 note 97.

85. Cal.—Anderson v. San Francisco-Oakland Terminal Rys., 214 P. 289, 61 Cal.App. 21.
D.C.—Capital Traction Co. v. Copland, 47 App.D.C. 152.
Ga.—Locke v. Ford, App., 187 S.E. 715—Atlanta Terminal Co. v. Alexander, 143 S.E. 905, 38 Ga.App. 280—Rome Ry. & Light Co. v. Gaddis, 111 S.E. 67, 28 Ga.App. 213—Seaboard Air Line Ry. v. Brewton, 99 S.E. 226, 23 Ga.App. 621, reversed on other grounds 102 S.E. 439, and vacated 102 S.E. 920, 25 Ga.App. 168.
10 C.J. p. 860 note 98.

render the carrier liable in such cases;[86] and in some jurisdictions this rule is prescribed by statute.[87] What may amount to extraordinary diligence with respect to one class of trains may not amount to it with respect to another class.[88]

b. Limitations of Rules

The rules requiring the highest degree of care, etc., do not require the exercise of every possible care or precaution, and apply only in regard to dangers which, reasonably and naturally, may be anticipated or apprehended.

The rules requiring the highest or utmost care, etc., do not mean that the carrier must take every possible or conceivable care or precaution which might increase or even insure safety,[89] for that would prevent the practical performance of the duty to transport with expedition, in accordance with the usual requirements of the business, and would prevent the use of means of locomotion which, while necessary to speed and the carrying capacity of the vehicles used, are well known to be to some extent hazardous,[90] nor do the rules go to the extent of requiring the carrier to exercise a guardianship over passengers who are adults and mentally competent, or to undertake to coerce them into the exercise of ordinary care for their own safety.[91]

Moreover, the rule requiring the highest degree of care, etc., applies only with respect to dangers which may reasonably and naturally be anticipated or apprehended from unsafe roadbeds, defective machinery, imperfect cars, and other conditions endangering the success of the undertaking,[92] and as to dangers which are not usually incident to the operation of the mode of conveyance used, and which are not naturally to be apprehended, a less strict rule applies, and the carrier is required to exercise only ordinary care;[93] and it is not responsible for injury occasioned by inevitable casualty or some other cause which human foresight could not reasonably anticipate or prevent.[94] It is not essen-

Application to coach on siding for night

A common carrier's duty to exercise extraordinary diligence in receiving, carrying, and discharging passengers is applicable where coach in which a passenger is riding is detached from train and placed for night on railway siding.—Central of Georgia Ry. Co. v. Deas, 96 S.E. 267, 22 Ga.App. 425.

86. Ga.—Central R. Co. v. Thompson, 76 Ga. 770.
10 C.J. p. 860 note 99.

87. Ga.—Douthitt v. Louisville, etc., R. Co., 71 S.E. 470, 136 Ga. 351.
10 C.J. p. 860 note 1.

88. Ga.—Ball v. Mabry, 18 S.E. 64, 91 Ga. 781.

89. Ala.—Mosley v. Teche Lines, 166 So. 800, 232 Ala. 110.
Ill.—Letush v. New York Cent. R. Co., 267 Ill.App. 526.
Iowa.—Hauser v. Chicago, R. I. & P. Ry. Co., 219 N.W. 60, 205 Iowa 940, 58 A.L.R. 687.
Md.—Smith v. Blue Ridge Transp. Co., 191 A. 66—Damico v. Washington, B. & A. Electric R. Co., 148 A. 821, 158 Md. 470—Philadelphia, W. & B. R. Co. v. Anderson, 20 A. 2, 72 Md. 519, 20 Am.S.R. 483, 8 L.R.A. 673.
Mo.—Liljegren v. United Rys. of St. Louis, App., 227 S.W. 925.
Tex.—St. Louis Southwestern Ry. Co. of Texas v. Woodall, Com.App., 207 S.W. 84.
10 C.J. p. 860 note 3.

Absolute guaranty that the passenger will be transported safely to his destination, is not effected by the duty to exercise the utmost care.—Liljegren v. United Rys. of St. Louis, Mo.App., 227 S.W. 925.

"Every possible preventive which the highest scientific skill might suggest" need not be used.—Little v. Los Angeles Ry. Corporation, 271 P. 134, 94 Cal.App. 303.

90. Iowa.—Pershing v. Chicago, etc., R. Co., 32 N.W. 488, 71 Iowa 561.
10 C.J. p. 861 note 4.

91. Va.—Davidson v. Washington & O. D. Ry., 105 S.E. 669, 129 Va. 99.
W.Va.—Trippett v. Monongahela West Penn Public Service Co., 130 S.E. 483, 100 W.Va. 319.

92. Cal.—Sanchez v. Pacific Auto Stages, 2 P.2d 845, 116 Cal.App. 392.
Conn.—Robinson v. Connecticut Co., 189 A. 453, 122 Conn. 300—Briganti v. Connecticut Co., 175 A. 679, 119 Conn. 316.
Fla.—Hall v. Seaboard Air Line Ry. Co., 93 So. 151, 84 Fla. 9.
Iowa.—Hauser v. Chicago, R. I. & P. Ry. Co., 219 N.W. 60, 205 Iowa 940, 58 A.L.R. 687.
Ky.—Riley v. Louisville & N. R. Co., 21 S.W.2d 990, 231 Ky. 564—Payne v. Moore, 244 S.W. 869, 196 Ky. 454.
N.J.—Spalt v. Eaton, 192 A. 576, 118 N.J.Law 327—Rogers v. New York Cent. R. Co., 150 A. 357, 106 N.J. Law 394.
N.Y.—Taddeo v. Tilton, 289 N.Y.S. 427, 248 App.Div. 290—Hershey v. New York, O. & W. Ry. Co., 179 N.Y.S. 396, 189 App.Div. 270—O'Brien v. New York Rys. Co., 174 N.Y.S. 116, 119, 185 App.Div. 867.
Tex.—Bragg v. Houston Electric Co., Civ.App., 264 S.W. 245, affirmed Houston Electric Co. v. Bragg, Com.App., 276 S.W. 641, motion overruled 280 S.W. 188.
10 C.J. p. 861 note 5.

"Foresight," as used in rule that common carrier must exercise highest degree of care to protect its passengers from danger that foresight could anticipate, means, not foreknowledge absolute, but rather that characteristics of accident are such that it can be classified among events that without due care are likely to occur, and that due care would prevent.—Davis v. Public Service Co-ordinated Transport, 174 A. 540, 113 N.J.Law 427—Barney v. Hudson & M. R. Co., 145 A. 5, 105 N.J.Law 274, affirmed 148 A. 917, 106 N.J.Law 230, 231—McBride v. Pennsylvania R. Co., 123 A. 765, 99 N.J. Law 464—Rivers v. Pennsylvania R. Co., 83 A. 883, 83 N.J.Law 513.

Impossibility of injury

The carrier is not required to render it impossible for a passenger to injure himself.—Doss v. Southwestern Transp. Co., Tex.Civ.App., 89 S.W.2d 1092.

That passengers will act with reasonable regard for their own safety is to be assumed in determining the degree of care which a carrier must use in protecting them from danger.—Wright v. Boston & M. R. R., 139 A. 370, 83 N.H. 136, 56 A.L.R. 975.

93. Fla.—Hall v. Seaboard Air Line Ry. Co., 93 So. 151, 84 Fla. 9.
N.J.—McBride v. Pennsylvania R. Co., 123 A. 765, 99 N.J.Law 464.
10 C.J. p. 861 note 6.

Passenger outside of undertaking

Carrier is not bound to exercise highest degree of care with respect to passengers putting themselves outside carrier's undertaking.—Damico v. Washington, B. & A. Electric R. Co., 148 A. 821, 158 Md. 470.

94. Del.—Clayton v. Philadelphia, B. & W. R. Co., 106 A. 577, 7 Boyce 343.

tial, however, to the carrier's liability that it must have anticipated the precise injury or precise person injured; it is sufficient that it should have anticipated a similar injury to some one similarly situated.[95]

Furthermore, in exercising care for the safety of passengers the carrier must not violate its duty to other people to use ordinary care not to injure them.[96]

c. Continuance of Care; Varying According to Time and Place

The duty to exercise care for a passenger's safety continues during the existence of the relation, and the degree of care required may vary according to the time and place and circumstances.

The duty of the carrier to protect its passengers is not confined to the carrier's vehicle, but extends during the entire continuance of the relation.[97]

The degree of care required, however, may vary according to the time and place and circumstances;[98] and, according to some decisions, the highest degree of care is required while the passenger is in the course of transportation on the carrier's vehicle, or boarding or alighting therefrom, and only reasonable or ordinary care is required while he is waiting in the carrier's station or on its platforms, or leaving its premises,[99] or where he has temporarily left the train at a stop,[1] or in regard to comparatively trifling dangers which a passenger meets on a car, only in the same way and to the same extent as he meets them daily in other places and from which he habitually and easily protects himself.[2] According to other decisions, however, the carrier is bound to exercise the highest degree of care to protect a passenger during the entire continuance of the relation, from the time he becomes a passenger until he ceases to be such by the completion of his journey and has left the carrier's premises.[3]

La.—Nee v. New Orleans Public Service, 123 So. 135, 11 La.App. 1.
Mass.—Carlson v. Boston & M. R. R., 168 N.E. 171, 269 Mass. 60.
Mo.—Bennett v. St. Louis-San Francisco Ry. Co., 7 S.W.2d 1028, 223 Mo.App. 28—Liljegren v. United Rys. Co. of St. Louis, App., 227 S.W. 925.
N.C.—Mills v. Atlantic Coast Line R. R., 90 S.E. 221, 172 N.C. 266.
Tenn.—Price-Bass Co. v. Dawson, 7 Tenn.Civ.App. 192.
Tex.—Doss v. Southwestern Transp. Co., Civ.App., 89 S.W.2d 1092, error refused.
Va.—Chesapeake & O. Ry. Co. v. Hibbs, 128 S.E. 538, 142 Va. 96, 41 A.L.R. 1083.
W.Va.—Trippett v. Monongahela West Penn Public Service Co., 130 S.E. 483, 100 W.Va. 319—Thompson v. Monongahela Ry. Co., 128 S.E. 110, 99 W.Va. 207, 42 A.L.R. 159.
10 C.J. p 861 note 7.
"Passengers on railroad trains necessarily incur the risks and perils incident to travel over which the carrier has absolutely no control, and which are wholly without its agency, such as unforeseen accidents against which human care and foresight could not guard, and acts of strangers which could not reasonably be expected"—Riley v. Louisville & N. R. Co., 21 S.W.2d 990, 992, 231 Ky. 564.

Carrier is not responsible for

(1) Accident occasioned by instrumentality outside conveyance.—Orms v. Traction Bus Co., 150 A. 897, 300 Pa. 474.

(2) Accident which had never before occurred, and which could not be said to be within reasonable contemplation.—McKinney v. New York, W. & B. Ry. Co., 179 N.Y.S. 535.

(3) Injuries caused by independent agency over which it has no control.—Burns v. Pennsylvania R. Co., 144 A. 103, 294 Pa. 277.

95. Tex.—Trinity & B. V. Ry. Co. v. McCune, Civ.App., 154 S.W. 237.
10 C.J. p 861 note 8.
"The carrier is required to guard against only those things which in the exercise of the highest degree of care it should anticipate would probably be dangerous to some passengers"—Doss v. Southwestern Transp. Co., Tex.Civ.App., 89 S.W.2d 1092, 1093.

96. Ohio.—Canton Motor Coach v. Hall, 189 N.E. 505, 46 Ohio App. 516.

97. Ky.—Trout's Adm'r v. Ohio Valley Electric Ry. Co., 43 S.W.2d 507, 241 Ky. 144.
N.H.—Wright v. Boston & M. R. R., 139 A. 370, 83 N.H. 136, 56 A.L.R. 975.
10 C.J. p 861 note 9.
Care as to receiving, conveying, and setting down safely in general see supra § 677.

98. Ark.—Arkansas Power & Light Co. v. Mart, 65 S.W.2d 39, 188 Ark. 202.
Cal.—Wilkinson v. United Railroads of San Francisco, 232 P. 131, 195 Cal. 185.

Safety and convenience

A ticket holder, presenting himself at the usual point of departure of trains, is entitled to extraordinary care for safety and ordinary diligence in matters involving convenience.—Atlanta Terminal Co. v. Alexander, 143 S.E. 905, 38 Ga.App. 280.

99. Ky.—Louisville & N. R. Co. v. Scarbrough, 270 S.W. 494, 208 Ky. 79
N.Y.—Hoffman v. Lehigh Valley R. Co., 177 N.Y.S. 140, 188 App.Div. 414.
Tex.—Baker v. Williams, Civ.App., 198 S.W. 808.
10 C.J. p 862 notes 10, 11.
Corpus Juris statement has received judicial approval in Payne v. Simmons, 255 S.W. 863, 867, 201 Ky. 33.

Railroad owes no greater duty to one intending to become passenger than it owes to one with whom relation has been established.—Bales v. Louisville & N. R. Co., 200 S.W. 471, 179 Ky. 207.
Care required as to:
Condition and use of premises generally see infra §§ 713–722.
Passengers boarding or alighting generally see infra §§ 723–734.
Limitations of rules as to care generally see supra subdivision b of this section.

1. Cal.—Sellars v. Southern Pac. Co., 166 P. 599, 33 Cal.App. 701.

Reason for rule

There is a difference in the danger involved and the opportunity and capacity to protect himself between the situation of the passenger while traveling on the train and where he has temporarily left it at a stop, and the authorities generally recognize the rule in cases like this to be that the carrier is held to ordinary care and ordinary prudence.—Sellars v. Southern Pac. Co., 166 P. 599, 33 Cal.App. 701.

2. U.S.—Bassell v. Hines, C.C.A.Ohio, 269 F. 231, 12 A.L.R. 1361

3. Okl.—Muskogee Electric Traction Co. v. Bolin, 232 P. 105, 105 Okl.

d. Private Carrier

A private carrier of passengers for hire, such as by private motor vehicle, generally is required to exercise only ordinary care and diligence for his passenger's safety, although some authorities require the same degree of care as is required of a common carrier.

A private carrier of passengers for hire, such as by a private motor vehicle, generally is not bound to exercise the highest degree of care for the safety of his passengers, as in the case of a common carrier, but is bound to exercise only ordinary care and diligence to carry his passengers safely,[4] except as specially provided by the contract of carriage, as where the carrier undertakes to insure the safe delivery of his passengers; but such an extended liability is not readily to be presumed, and a mere undertaking to carry safely imposes no higher duty than is imposed as a matter of law on the carrier.[5] A passenger for hire in such a vehicle may recover for the carrier's negligence in failing to exercise ordinary care and diligence,[6] and is not within a statute barring a nonpaying guest, in a motor vehicle, from maintaining an action against the motorist for injuries suffered by ordinary negligence.[7]

According to some authorities, however, a private carrier of passengers by motor vehicle is under the same duty with respect to passengers as a common carrier, and owes to a passenger for hire the duty of exercising the highest degree of care and skill for his safety,[8] or at least is bound to use reasonable and ordinary care for the protection of his passengers;[9] and in driving through the streets of a city he is required to anticipate that he may meet

142—Baker v. Hines, 213 P. 313, 88 Okl. 266.
10 C.J. p 862 note 12.

Carrier's duty to passenger crossing tracks on way to station is that of care in a high degree.—Pennsylvania R. Co. v. Rogers, N.J., 244 F. 76, 156 C.C.A. 504.

4. Ariz.—McClure v. Johnson, 69 P. 2d 573.
Ark.—Forbes v. Reinman, 166 S.W. 563, 112 Ark. 417, 51 L.R.A.,N.S., 1164.
Cal.—Lerma v. Flores, 60 P.2d 546, 16 Cal.App.2d 128—Gornstein v. Priver, 221 P. 396, 64 Cal.App. 249.
Mass.—Woods v. Woods, 3 N.E.2d 837—Foley v. McDonald, 185 N.E. 926, 283 Mass. 96.
Pa.—Lazor v. Banas, 174 A. 817, 114 Pa.Super. 425, overruling Cody v. Venzie, 107 A. 383, 263 Pa. 541.
Care due permissive guests in motor vehicle see Motor Vehicles § 399.
Care required of common carrier by motor vehicle see infra § 685.
Private carrier defined see supra § 531.

"There is a vast difference as to some duties and liabilities, when the relation of common carrier and passenger exists, and when that of private carrier and passenger exists, whether the carriage is for hire or is gratuitous"—Galloway v. Perkins, 73 So. 956, 198 Ala. 658.

Transportation to school
Where mother contracted for transportation of her son to school in neighbor's truck at rate of ten cents per day, neighbor owed son duty of operating truck at such rate of speed and in such manner as under ordinary circumstances no injury could befall son—Lazor v. Banas, 174 A. 817, 114 Pa.Super. 425

5. Ariz.—McClure v. Johnson, 69 P. 2d 573.

6. Kan.—Rogers v. Price, 230 P. 1047, 117 Kan. 181.
Va.—Garrett v. Hammack, 173 S.E. 535, 162 Va. 42

7. Cal.—Lerma v. Flores, 60 P.2d 546, 16 Cal.App.2d 128
Conn.—Latham v. Hankey, 166 A. 400, 117 Conn. 5.
Mass.—Walker v. Lloyd, 4 N.E.2d 306.
N.H.—Blanchette v. Sargent, 173 A. 383, 87 N.H. 15.

Consideration sufficient to support contract for carriage and to exclude operation of statute barring guest action against motorist in case of ordinary negligence is any benefit conferred, or detriment suffered, into the adequacy of which the law will not inquire.
Cal.—Lerma v. Flores, 60 P.2d 546, 16 Cal.App.2d 128.
Conn.—Latham v. Hankey, 166 A. 400, 117 Conn. 5.

Broker's hope of commission is not "payment" by a client for transportation in the broker's automobile, within the meaning of such a statute.—Smith v. Taylor, 2 P.2d 18, 137 Or. 230.

Waiver of inadequacy of consideration
Where agreed consideration for carriage has been accepted, although consideration was valueless service, acceptance by motorist constitutes waiver of any claim of inadequacy and prevents motorist setting up statute as bar to action.—Lerma v. Flores, 60 P.2d 546, 16 Cal.App.2d 128.

8. Mo.—Mahany v. Kansas City R. Co., Mo., 254 S.W. 16, 286 Mo. 601, 228 S.W. 821.
Care required of common carrier by motor vehicle see infra § 685.

Undertaker who contracts to transport persons to and from a funeral in an automobile, although a private carrier, is under the same duty as a common carrier to exercise the highest degree of care with respect to passengers—Mahany v. Kansas City R. Co., 254 S.W. 16, 286 Mo. 601, 228 S.W. 821.

Sight-seeing automobile
(1) This business much more resembles a public than a private carriage of passengers, and, whether or not, in a strictly technical sense it can be regarded as a common carrier of passengers, such a carrier is bound to use reasonable care according to the nature of the contract, and in view of the nature of the business and the peril to life and limb of the passengers likely to arise from an accident, this reasonable care should be defined as the highest degree of care consistent with the proper transaction of the business—Hinds v. Steere, 95 N.E. 844, 209 Mass. 442, 35 L.R.A.,N.S., 658.

(2) Chauffeur of a sight-seeing automobile which carries passengers owes them the highest degree of care—McFadden v. Metropolitan St. R. Co., 143 S.W. 884, 161 Mo.App. 652.

9. Ala.—Perkins v. Galloway, 69 So. 875.
"The driver of the automobile was bound to use at least reasonable and ordinary care. He was bound to anticipate care that he might meet persons or vehicles and to keep a proper lookout for them and use care to have his machine under such control as to enable him to avoid collisions."—Johnson v. Coey, 86 N.E. 678, 237 Ill. 88, 91, 21 L.R.A.,N.S., 81.

Compared with liveryman
Private carriers for hire by automobile owe duty to use due care toward passengers equal to those defined for a liveryman.—Duffy v. J. W. Bishop Co., 122 A. 121, 99 Conn. 573.

persons or vehicles, to keep a proper lookout for them, and to use care to have his machine under such control as to enable him to avoid collisions.[10]

§ 679. What Law Governs

The law of the place where the injury occurred generally governs as to the liability of a carrier for negligence in causing injury to a passenger, but the law of the forum as to matters of procedure. The common law governs where no statute is involved.

Where an action against a carrier for personal injuries is regarded as an action in tort, the law which governs the degree of care required and the liability of a carrier for its negligence in injuring a passenger is the law of the place where the injury occurred, and not that of the place where the contract of carriage was made.[11] Under this rule, rights given by the lex loci delicti can be defeated only by defenses permitted by that law;[12] and, where no special law of the lex loci delicti jurisdiction is pleaded and proved, the presumption is that it is the same as the law of the forum.[13] Where, however, the action is regarded as based on the contract of carriage, the lex loci contractus governs.[14] The remedy, pleading, and procedure are governed by the law of the forum.[15]

Common or statute law. The right of a caretaker accompanying an interstate shipment of live stock, to recover for a personal injury and his duty to give written notice of such injury must be determined under the common law, and not under a federal statute, 49 U.S.C.A. § 20, relating to claims arising from interstate shipments of property.[16] An action for injuries to a circus employee, whether on an interstate or intra-state journey, is a common-law action for tort and is governed by the law of the state where no federal statute is involved.[17]

§ 680. Care as to Passengers Who Do Not Pay Fare

One accepted as a passenger, without the payment of fare, is generally entitled to the same care, skill, and diligence for his safety as is a paying passenger.

One who is accepted for transportation as a passenger without compensation to be rendered is, nevertheless, entitled to the same degree of care, skill, and diligence for his safety and protection as the carrier owes to paying passengers,[18] unless there is a statutory provision to the contrary,[19] or unless he is riding under a special agreement by which he assumes the risk of injury from negligence of the carrier or its employees.[20] This rule applies to a

10. Ill.—Johnson v. Coey, 86 N.E. 678, 237 Ill. 88, 21 L.R.A.,N.S., 81
Mo.—McFadden v. Metropolitan St R. Co., 143 S.W. 884, 161 Mo.App 652.

11. U.S.—Wells v. Missouri Pac. R. Co., C.C.A.Ark., 87 F.2d 579.
Ark.—Yazoo & M. V. R. Co v. Littleton, 5 S.W.2d 930, 177 Ark. 199, 59 A.L.R. 936—Kansas City Southern Ry. Co. v. Phillips, 298 S.W. 325, 174 Ark. 1019—Hines v. Rice, 218 S.W. 851, 142 Ark. 159.
Miss.—Turner v. Southern Ry. Co., 73 So. 62, 112 Miss. 359
N.C.—Hipps v. Southern Ry., 99 S.E. 335, 177 N.C. 472.
10 C.J. p 863 note 14.

Failure to provide heat in station
Cause of action for injuries sustained by plaintiff, who had purchased a ticket at a station in South Carolina for transportation to a station in North Carolina, because of defendant's negligence in failing to provide heat in its South Carolina station where plaintiff had to wait for the train on which she was to take passage, arose in South Carolina and must be tried under the laws prevailing in that jurisdiction. —Hipps v. Southern Ry., 99 S.E. 335, 177 N.C. 472.

12. Ky.—Pittsburg, etc., R. Co. v. Grom, 133 S.W. 977, 142 Ky. 51.

13. Ga.—Seaboard Air Line R. Co. v. Andrews, 78 S.E. 925, 140 Ga. 254, Ann.Cas 1914D 165.
10 C.J. p 863 note 16.
Presumption as to law of sister state being same as law of forum generally see C.J.S. title Evidence § 133, also 22 C.J. p 152 note 97.

14. Tex.—El Paso, etc., R. Co. v. Landon, 124 S.W. 744, 58 Tex.Civ. App. 397.

15. Ark.—St Louis, etc., R. Co. v. Coy, 168 S.W. 1106, 113 Ark. 265.
10 C.J. p 863 note 18.

Negligent speed
Where statutory law of place of accident different from statutory law of forum as to prima facie unreasonable speed, law of forum controlled. —Davis Cabs v. Evans, 182 N.E. 327, 42 Ohio App. 493.

16. Mo.—Edmondson v. Missouri Pac. R. Co., App., 8 S.W.2d 103—Edmondson v. Missouri Pac. R. Co., App., 264 S.W. 470.

17. Ind.—Dierickx v. Davis, 137 N.E. 685, 80 Ind.App. 71, certiorari denied 44 S.Ct. 36, 263 U.S. 709, 68 L.Ed. 518.

18. Tenn.—Baskin & Cole v. Whitson, 8 Tenn.App 578.
Utah.—Hansen v. Oregon Short Line R. Co., 138 P. 852, 55 Utah 577.
W.Va.—Bailey v. Bartlett, 162 S.E. 615, 112 W.Va. 27.
10 C.J. p 873 note 82.
"Liability of a common carrier does not depend on the fact that compensation for the passage is paid to the carrier, nor does its duty to carry safely result alone from the consideration paid."—Wessman v. Boston & M. R. R., 152 A. 476, 483, 84 N.H. 475.

Doctrine of respondeat superior applies to the performance of the duties of care, skill, and diligence for the safety of such a passenger.—Wessman v. Boston & M. R. R., 152 A. 476, 84 N.H. 475.
Care required as to:
Passengers generally see supra §§ 677, 678.
Persons accompanying live stock on freight or mixed trains see infra § 683.
Persons riding gratuitously as passengers see supra § 549.

19. Ga.—Carter v. Seaboard Air Line Ry., 94 S.E. 280, 21 Ga.App. 251.
Mont.—John v. Northern Pac. R. Co., 111 P. 632, 42 Mont. 18, 32 L.R.A., N.S., 85.
10 C.J. p 874 note 83.

Reciprocal obligations
Under a statute making the passenger's duty to pay fare and the carrier's liability reciprocal obligations, a passenger, paying no fare, injured by a sudden jerk of shuttle train operated by railway company to carry its employees to and from work, is not entitled to recover because persons were occasionally carried on train without payment of fare and none was demanded.—Carter v. Seaboard Air Line Ry., 94 S.E. 280, 21 Ga.App. 251.

20. Ind.—Clark v. Southern Ry. Co., 119 N.E. 539, 69 Ind.App. 697.
Me.—Miller v. Maine Cent. R. Co.,

person riding on a free pass,[21] although the pass, without his fault, is issued in violation of law,[22] or his use of the pass is a violation of law;[23] and even though the pass contains a release from liability for injuries, the carrier is liable for injuries caused by willful or wanton negligence.[24] This rule also applies to one who in good faith rides without the payment of fare on the invitation of the conductor or other agent of the carrier, within the apparent scope of his employment, notwithstanding his presence on the train or car is illegal under the act to regulate commerce.[25]

§ 681. Care as to Passengers Riding in Places Not Designed for Them

A passenger riding, with the carrier's knowledge, in a place not designed for passengers to ride, is entitled to the exercise, by the carrier, of care, skill, and diligence for his safety.

The degree of care, skill, and diligence required for the safety of passengers generally, as explained supra §§ 677, 678, must be exercised for the safety of a passenger who, with the knowledge of the carrier, is riding in a place not designed for passengers to ride,[26] such as in regard to the management and operation of the train or car when the passenger is riding in a dangerous place, as explained infra § 752.

§ 682. Duty to Warn Passenger as to Danger

It is the duty of the carrier to warn a passenger of any danger to him, which, in the exercise of a proper degree of care, it may apprehend or foresee, and which is not observable by the passenger and of which he is unaware.

The carrier owes to the passenger the duty of protection during transportation in order that, while on the carrier's premises and in its vehicles, he

133 A. 907, 125 Me 338, 47 A.L.R 720.
10 C.J. p 874 note 84.

One riding on pass providing that rider assumes all risk is not entitled as of legal right to any degree of diligence at hands of carrier, and carrier is not liable for mere negligence, although gross, and such rule applies to employee riding on such pass where travel is in no way connected with his employment.—Lanier v. Bugg, 123 S.E. 145, 32 Ga.App. 294

Exemption from liability to gratuitous passenger for negligence generally see supra § 634.

21. Ga.—Lanier v. Bugg, 123 S.E. 145, 32 Ga.App. 294.
Me.—Miller v. Maine Cent. R. Co., 133 A. 907, 125 Me 338, 47 A.L.R 720.
N.C.—Campbell v. American Fidelity & Casualty Co., 192 S.E. 906, 212 N.C. 65.
Utah.—Hansen v. Oregon Short Line R. Co., 188 P. 852, 55 Utah 577.
10 C.J. p 874 note 85.

Corpus Juris has received judicial approval in Wessman v. Boston & M. R. R., 152 A. 476, 478, 84 N.H. 475.

Due care

Carrier, carrying passenger on free pass, owes duty of exercising due care, although, in absence of prohibitive statute, it may contract to relieve itself from liability.—Clark v. Southern Ry. Co., 119 N.E. 539, 69 Ind.App. 697.

Employee's wife

That railroad employee's wife traveled on free pass did not affect character of carrier's service, nor legal duty of railroad as common carrier to transport passenger safely.—Wessman v. Boston & M. R. R., 152 A. 476, 84 N.H. 475.—10 C.J. p 874 note 85 [a].

Person riding on pass as passenger see supra § 550.

22. W.Va.—Bailey v. Bartlett, 163 S.E. 615, 112 W.Va. 27.
10 C.J. p 874 note 86.

Intra-state bus line which honors pass, void because issued to person not included within statutory classification, owes same degree of care as it owes to regular passenger.—Bailey v. Bartlett, 163 S.E. 615, 112 W.Va 27.

23. Mo.—McGrath v. Payne, 245 S.W. 1061.

Not authorized to receive or use pass

That a passenger, while riding on defendant's railroad, was not an employee and not authorized to receive or use the free pass on which he was riding, did not relieve the carrier who had accepted him as a passenger from using the same degree of care toward him as toward other passengers.—McGrath v. Payne, Mo., 245 S.W. 1061.

24. U.S.—New York Cent. R. Co. v. Mohney, Ohio, 40 S.Ct 287, 252 U.S. 152, 64 L.Ed 502, 9 A.L.R 496—Virginia Beach Bus Line v. Campbell, C.C.A.N.C., 73 F.2d 97, certiorari denied 55 S.Ct. 637, 294 U.S. 727, 79 L.Ed. 1258.

25. Miss.—Illinois Cent. R. Co. v. Messina, 72 So. 779, 111 Miss 884, certiorari denied 37 S.Ct. 246, 242 U.S. 653, 61 L.Ed 546.
10 C.J. p 874 note 87.

Discharged employee being transported home

Where assistant supervisor having charge of movements of work train directed discharged railroad employee to ride on such train after railroad had promised employee passage home, the railroad owed the employee the duty of operating the work train with reasonable care.—Mitchell v. Southern Ry. Co., 97 S.E. 628, 176 N.C 645

26. Ill.—Wennmacher v. Choate, 224 Ill.App. 42.
Mo.—Cooley v. Dunham, 195 S.W. 1058, 196 Mo.App 399.

On platform

If a street car conductor knew that plaintiff was riding outside of the railing on the back platform of the car, and accepted plaintiff's transfer with such knowledge, plaintiff was a passenger, and the company owed the duty of exercising the highest degree of care to transport him safely.—Louisville Ry. Co. v. Rice, 250 S.W 863, 199 Ky. 196.

On running board

As to passengers riding on the running board of a street car, with the knowledge and consent of its employees, the carrier and its servants owed to them the highest degree of care consistent with the mode of conveyance adopted and with the practical operation of the road.—Wennmacher v. Choate, 224 Ill.App. 42.

On steps

(1) Where a man standing on the step outside the line of street car is accepted as a passenger, carrier has the duty of exercising the high degree of care required by their relations, and commensurate with the circumstances.—Smith v. Kansas City Rys. Co., Mo.App., 204 S.W. 575

(2) Where the conductor of a street car sees a child less than seven years old riding on the step, he must endeavor reasonably to protect him against his own indiscretion.—Smorawski v. Chicago City Ry. Co., 211 Ill.App. 557

Person riding in improper place as passenger see supra § 552.

may enjoy comfort, peace, and safety. This duty of care involves warning of danger so far as such warning may enable the passenger to protect himself against an injury which might be anticipated in the exercise of a high degree of care and foresight, and the carrier will be liable for an injury which might have been avoided if due warning had been given.[27] The employees in charge of the train or car should notify passengers of any danger which may be apprehended or foreseen with reference to the place of riding, or of any other peril to which they are subjected.[28] There is no duty, however, to warn a passenger of his danger where the conditions which constitute the danger are as observable by him and apparently as obvious to him as to the employees of the carrier,[29] and where a passenger remains on the running board without any necessity for doing so, there is no duty to warn him of the danger from jolts or lurches incident to the ordinary motion of the car when passing over switches or around curves.[30]

It may also be negligence unduly to alarm a passenger by unnecessary signals or warnings as to danger, whereby he is induced to act in such a way as to be injured;[31] but the usual signals or warnings required in the operation of the train or car with reference to those not passengers will not render the carrier liable for injury resulting to a passenger who is alarmed thereby.[32] The statutory signals required where a train approaches a station have no reference to the safety of the passenger in connection with the operation of the train.[33]

§ 683. Liability as Affected by Means of Conveyance

The means of conveyance used by a common carrier of passengers generally does not affect the degree of care required of it for the safety of passengers; but the means used should be considered in determining whether the proper degree of care has been exercised.

The law with reference to the duty of care of common carriers to passengers is the same as to all common carriers,[34] and as a general rule the degree of care required of a carrier of passengers is not affected by the means of conveyance or motive power used,[35] but the mode of conveyance used is an important element in determining whether

27. N.Y.—Morgan v. Oceanic Steam Nav. Co, 224 N.Y.S. 420, 130 Misc. 570.
10 C.J. p 910 note 1.

This duty rests on the theory "that the danger may not be apparent by reason of circumstances which lie wholly within the knowledge of the carrier."—Morgan v. Oceanic Steam Nav. Co, 224 N.Y.S. 420, 425, 130 Misc. 570.
Duty to warn boarding or alighting passengers see infra § 724.

28. Conn.—Rosenthal v. New York, etc., R. Co, 89 A. 888, 88 Conn. 65, 51 L.R.A.,N.S., 775.
10 C.J. p 910 note 2.

Danger from car on adjacent track
Where a passenger is in a position rendering him liable to be injured by a car on an adjacent track, it is the duty of the conductor or other employee who has knowledge of the passenger's dangerous position, and that he is oblivious of such danger, to warn him thereof.—Gage v. St. Louis Transit Co, 109 S.W. 13, 211 Mo. 139.

29. Ind.—Pere Marquette R. Co. v. Strange, 84 N.E. 819, 85 N.E. 1026, 171 Ind. 160, 20 L.R.A.,N.S., 1041
10 C.J. p 910 note 4.

Going on platform
Where a passenger, in violation of the rules of defendant company, was smoking in a coach, and, upon being asked to stop, asked where he could go, and was told by the porter that if he wanted to smoke, he could go out on the platform, and, on doing so, slipped and fell off train and was injured, the porter was not negligent in failing to warn passenger of the dangers of going on the platform.—Rhodes v. Houston E. & W. T. R. Co., Tex.Civ.App., 242 S.W. 263.

30. Mass.—Olund v. Worcester Cons. St. R. Co., 92 N.E. 720, 206 Mass. 544

31. Mo.—Ephland v. Missouri Pac. R. Co., 37 S.W. 820, 38 S.W. 926, 137 Mo. 137, 59 Am.S.R. 498, 35 L.R.A. 107.
10 C.J. p 910 note 6.

32. Ill.—Chicago, etc., R. Co. v. Felton, 17 N.E. 765, 125 Ill. 458, reversing 24 Ill.App. 376
Mo.—Kleiber v. People's R. Co, 17 S.W. 946, 107 Mo. 240, 14 L.R.A. 613.

33. Ala.—Alabama Great Southern R. Co v. Hawk, 72 Ala. 112.
Tenn.—Louisville, etc., R. Co. v. McKenna, 7 Lea 313.

34. Ark.—Missouri Pac. Transp. Co v. Robinson, 86 S.W.2d 913, 191 Ark. 428.

35. Ark.—Missouri Pac. Transp. Co. v. Robinson, supra—Arkansas Cent. R. Co v. Janson, 119 S.W. 648, 90 Ark. 494.
Mo.—Burkett v. Missouri Pac. R. Co, App., 208 S.W. 104
Tex.—Paris & G. N. Ry. Co. v. Atkins, Civ.App., 185 S.W. 306, affirmed 234 S.W. 66, 111 Tex. 306.
10 C.J. p 865 note 26.

Bus company is not insurer of its passengers.—Mahfouz v. Interurban Transp. Co., 135 So. 740, 17 La.App. 241.

Chauffeur of a sight-seeing automobile which carries passengers owes them the highest degree of care.—McFadden v. Metropolitan St. R. Co, 143 S.W. 884, 161 Mo.App. 652.

Owner and operator of scenic railway is bound to exercise the highest degree of care for the safety of its passengers, and to do all that human foresight and vigilance can do consistent with the mode of conveyance and the practical operation of the business to prevent accidents to such passengers.—Sentker v. Martin, 19 Ohio N.P., N.S., 445.

Taxicab drivers
(1) A taxicab driver is bound to exercise in the management of his taxicab the highest degree of care required by the circumstances to protect a passenger from injury during transportation, but is not bound to anticipate every possible peril, and is not an insurer nor obliged to foresee the impossible or highly improbable.—Intriligator v. Goldberg, Mass., 12 N.E.2d 730.

(2) A jitney driver as a common carrier owed to his passenger the duty of exercising the highest degree of care compatible with the practical operation of the car. That duty would not be met as a matter of law by a mere observance of the law of the road. His negligence, if any, as between him and his passenger is to be measured by his duty as a common carrier, not by his duty to other users of the highway.—Singer

the proper degree of care has been exercised,[36] and as compared with other modes of conveyance the more dangerous the character of the machine used by the carrier the greater the care and caution required in its use.[37]

§ 684. Freight or Mixed Trains

A carrier must generally exercise the highest degree of practicable care, skill, and diligence for the safety of a passenger received for transportation on a freight or mixed train.

In the operation of freight or mixed trains, somewhat greater peril is involved to passengers riding thereon than is involved in the operation of passenger trains,[38] and, as explained infra §§ 750, 774, 794, a passenger on such a train assumes the inconveniences and additional risks that are usually and reasonably incident to transportation on such trains. However, as in the case of passengers generally, as stated supra § 677, it is the duty of the carrier to carry a passenger on such a train safely to his destination,[39] and in doing so to exercise the same high degree of care that it owes to passengers on ordinary passenger trains, and this generally means the highest practical degree of care consistent with the operation of a freight or mixed train,[40] taking into consideration the different facts and circumstances that attend transportation on such a train,[41] such as the fact that, in the absence of statute, a carrier is not required to equip its cabooses like passenger cars, and that inconvenience and danger necessarily attend such mode of conveyance;[42] and in some states this rule of liability is expressly enforced by statute.[43] Such a passenger does not as-

v Martin, 164 P. 1105, 1107, 96 Wash. 231.

(3) A taxicab operator owes to passenger for hire the duty to exercise the utmost care and diligence to provide safe transportation.—Larson v. Blue & White Cab Co., Cal. App., 75 P.2d 612.

(4) A taxicab owner, engaged in business of transporting passengers for hire, was under duty of exercising highest degree of care to transport passenger in safety.—Dix v. Gross, 111 S.W.2d 673, 271 Ky. 231—Adams v. Hilton, 110 S.W.2d 1028, 270 Ky. 818

(5) Operators of taxicabs are required to use utmost skill, diligence, and foresight consistent with their business for safety of passengers, and are liable for slightest negligence.—Fielding v. Publix Cars, Neb., 277 N.W. 331.

Care required of carrier operating vessel see C.J.S. title Shipping § 193, also 58 C.J. p 548 note 32—p 551 note 74.

36. Ga.—Southern R. Co. v. Cunningham, 50 S.E. 979, 123 Ga. 90.
10 C.J. p 865 note 27.

37. N.C.—Cates v. Hall, 88 S.E. 524, 171 N.C. 360.

38. La.—Johnson v. Missouri Pac. Ry. Co., 2 La. App. 244.
10 C.J. p 865 note 31.

Injury resulting from jerks and jars of freight train see infra § 750.

Who are passengers on freight or mixed trains see supra § 552.

39. N.D.—Faubion v. Minneapolis, St. P. & S. S. M. Ry. Co., 177 N.W. 371, 45 N.D. 269.

40. Ark.—Meeks v. Graysonia, N. & A. R. Co., 272 S.W. 360, 168 Ark. 966

Ky.—Millers Creek R. Co. v. Blevins, 205 S.W. 911, 181 Ky. 800—Kentucky & T. Ry. Co. v. Ball, 194 S.W. 785, 175 Ky. 630.

La.—Johnson v. Missouri Pac. Ry. Co., 2 La. App. 244

Mo.—Rissmiller v. St. Louis & H. Ry. Co., App., 187 S.W. 573.

Tex.—Fort Worth & D. C. Ry. Co. v. Hawley, Civ. App., 235 S.W. 659—Yoes v. Texas & P. Ry. Co., Civ. App., 211 S.W. 311.
10 C.J. p 865 note 33.

Reason for rule

"Conditions of operation and management, of course, are different from those of a passenger train, but the human element is the same, and the same rule is justly applicable to both. As to the matter of application, it is to be administered in each case according to the circumstances of that case."—Paris & G. N. R. Co. v. Atkins, 234 S.W. 66, 67, 111 Tex. 306, affirming, Civ. App., 185 S.W. 306.

Irrespective of ownership of car

A railroad company's liability for injury to persons properly in freight car during course of transportation, for injuries sustained because of defects therein which might have been discovered by reasonable inspection, does not depend on such company's ownership of car which it adopts as part of its own equipment, irrespective of source from which received.—Dominices v. Monongahela Connecting R. Co., 195 A. 747, 328 Pa. 203.

Lack of accommodations

A carpenter at work under government contractors at an army camp site who knew that a cattle car was the only accommodation furnished by a railroad to transport workers to and from a city to the camp site, and chose to avail himself of it, cannot recover for injuries received when he slipped and fell as he was disembarking at the usual stopping place, on the ground that the railroad failed to furnish proper accommodations.—Gilliam v. Atlantic Coast Line R. Co., 103 S.E. 10, 179 N.C. 508

41. Tex.—Paris & G. N. R. Co. v. Atkins, 234 S.W. 66, 111 Tex. 306, affirming, Civ. App., 185 S.W. 306.

"As to what facts will raise an inference of negligence is quite different in the case of passenger trains and freight trains."—Burkett v. Missouri Pac. R. Co., Mo. App., 208 S.W. 104, 105

Distinction between degree of care on passenger and freight trains

It has been held that the degree of care required of carriers and their servants on passenger trains is greater than that required on freight trains, where certain accommodations have been provided for passengers.

U.S.—Reber v. Bond, C.C. Miss., 38 F. 822.

Ky.—Kentucky & T. Ry. Co. v. Ball, 194 S.W. 785, 175 Ky. 630.

Every reasonable care and precaution

It is no less the duty of the carrier to exercise every reasonable care and take every reasonable precaution against injury to passengers which appliances for that mode of transportation will admit of.—Riggs v. Norfolk-Southern R. Co., 124 S.E. 749, 188 N.C. 366

42. Kan.—Jones v. Atchison, etc., R. Co., 157 P. 399, 98 Kan. 133.
10 C.J. p 866 note 34.

The test of due care toward a passenger riding in caboose of freight train is what prudent and cautious men would do under the same or similar circumstances, and not what railway employees usually or ordinarily do.—Paris & G. N. Ry. Co. v. Atkins, Civ. App., 185 S.W. 306, affirmed 234 S.W. 66, 111 Tex. 306.

43. Cal.—Roberts v. Sierra R. Co., 111 P. 519, 14 Cal. App. 180.
10 C.J. p 866 note 35.

sume any risks from the lack of proper care on the part of the carrier, as stated infra §§ 774, 794, and if such care is not exercised by the carrier, and a passenger is injured thereby, the carrier is negligent and liable.[44] A person riding on a pass in a camp car attached to a freight train has been held not entitled to the same degree of care for his safety as is a passenger on a regular passenger train.[45]

Persons accompanying stock. Under these rules drovers or persons accompanying stock on freight trains under a contract for transporting such stock, are entitled, as passengers, to the highest degree of care, diligence, and skill for their safety, consistent with the operation of the train.[46]

§ 685. Stagecoaches

A common carrier of passengers by stagecoach or motor vehicle is generally bound to exercise the highest degree of care, skill, and diligence for the safety of its passengers.

The principles governing the liability of passenger carriers seem first to have been laid down in stagecoach cases, and it was early settled that the owner of a stagecoach is not an insurer of the safety of his passengers, and is liable only in case of negligence.[47] However, a carrier by stagecoach or cab is bound to exercise the greatest care and diligence, and is liable for the slightest negligence of himself or his servants.[48] Such a carrier is required to exercise great care with reference to the vehicle used, the horses and harness, and the prudence, skill, and sobriety of the driver, and is liable if, through the slightest negligence in these respects, or in the conduct of the driver, a passenger is injured.[49]

Motor vehicle carriers. The rules considered heretofore, in §§ 677 and 678, as to the degree of care required of common carriers of passengers apply to common carriers operating by motor vehicle,[50] and, in accordance with those rules, it is generally held that the highest degree of care, skill, and diligence, or, as otherwise expressed, the highest degree of care consistent with the mode of conveyance and the nature of the business, must be exercised for the safety of its passengers by a common carrier operating by motor vehicle,[51] such as

Liability for gross negligence

(1) Under a statutory provision that a railroad company shall be liable to a passenger on a freight train only for gross negligence, the company is not required to take the same precautions for the safety and comfort of such a passenger as it must for a passenger on a passenger train—Binder v. Union Pac. R. Co., 194 P. 314, 108 Kan. 47—10 C.J. p 866 note 35 [b].

(2) This rule, under some statutes, applies only to a freight train not intended for both passengers and freight—Illinois Cent. R. Co. v. White, 52 So. 449, 55 So. 593, 97 Miss 91—10 C.J. p 866 note 35 [c].

44. Fla.—Atlantic Coast Line R. Co. v. Hamlett, 89 So. 337, 81 Fla. 872. 10 C J p 866 note 37.

45. Md.—Western Maryland Ry. Co v. Shatzer, 120 A. 840, 142 Md. 274.

46. Okl.—Lusk v. McBride, 175 P. 747, 73 Okl. 283—Missouri, K. & T. Ry. Co. v. Lynn, 161 P. 1058, 62 Okl. 17.
Tex.—Yoes v. Texas & P. Ry. Co., Civ App., 211 S.W. 311, error refused—Texas & N. O R. Co. v. Tillman, Civ.App., 197 S.W. 1128.
10 C.J p. 867 note 38.

Need not take caboose to unloading chute

A statute requiring the carrier to furnish a caboose for the transportation of an attendant of live stock "to the actual place of unloading such shipment," does not require the carrier to take the caboose along with the live stock car to the unloading chute—Vulgamott v. Hines, Mo.App., 229 S.W. 394.

Riding in car with stock

A live stock shipper who is permitted by the carrier to ride with the stock in a stock car is entitled to the degree of care due a passenger, but not to the protection which could and should have been afforded him if a passenger on a passenger train, or if he had traveled in the caboose, as he had a right to do.—Beasley v. Hines, 219 S.W. 757, 143 Ark. 54, 15 A.L.R. 864.

Safe place to alight

A carrier must exercise the high degree of care which it owes to a passenger not to set a person riding on a drover's pass down at an unsafe place, or a place so remote from the depot platform used for passengers as would expose him to manifest danger.—Roberts v. Ft Worth & D C. Ry. Co., Tex.Civ.App., 229 S.W. 954.

47. Mont.—Taillon v. Mears, 74 P. 421, 29 Mont. 161, 1 Ann.Cas. 613
10 C.J. p 867 note 39.
Carrier not insurer generally see supra § 676.

48. Cal.—Wright v. Yosemite Transp. Co., 175 P. 906, 38 Cal.App. 782—Wright v. Yosemite Transp. Co., 175 P 905, 38 Cal.App. 277.
Iowa.—Bonce v. Dubuque St. R. Co., 5 N.W. 177, 53 Iowa 278, 36 Am.R. 221
Wash.—Nicktovich v. Olympic Motor Transit Co., 272 P. 736, 150 Wash. 278.
10 C.J. p 867 note 40.

49. Kan.—Lewark v Parkinson, 85 P. 601, 73 Kan. 553, 5 L.R.A.,N.S., 1069
10 C.J. p 867 note 41.
Care required in hiring employees generally see infra § 688.

50. Ark.—Missouri Pac Transp. Co. v. Robinson, 86 S.W.2d 913, 191 Ark. 428.

51. Cal.—McKinley v. Dalton, 17 P. 2d 160, 128 Cal.App 298.
Ky.—Jesse v. Dunn, 51 S.W.2d 918, 244 Ky. 613.

Ambulance

An organization operating an ambulance gratuitously for members of the public, but expecting contributions to the ambulance fund, is liable as a "public carrier" to an occupant for ordinary negligence by the ambulance driver.—Leete v. American Post No. 79, American Legion, 158 A. 919, 114 Conn. 400.

Passenger having intoxicating liquor no excuse

Where plaintiff at time of injury was passenger in automobile of defendant common carrier driven by its employee, defendants were legally bound to exercise high degree of care, and fact that another passenger had intoxicating liquor in his possession does not absolve defendants, on theory that automobile was hired for purpose of transporting intoxicating liquor, in violation of law.—Bower Auto Rent Co. v. Young, Tex.Civ.App., 274 S.W. 295.
Care required of private carrier by motor vehicle see supra § 678 d.

by auto stage or motor bus,[52] or jitney bus.[53] If the operator of such a vehicle, by his negligence, creates or helps to create an emergency the exercise of ordinary care thereafter will not relieve him from liability to an injured passenger;[54] but the carrier is not liable for injury to a passenger if it has been entirely free from negligence.[55]

Taxicab. The owner or operator of a taxicab, as has generally been held, must exercise the highest degree of care, skill, and diligence, compatible with the practical operation of the cab, for the safety of its passengers.[56] The exercise of such care is

52. Ark.—Wade v. Brocato, 95 S.W.2d 94—Missouri Pac. Transp Co. v. Robinson, 86 S.W.2d 913, 191 Ark. 428.
Cal.—Simmons v. Pacific Electric Ry. Co., 212 P. 637, 60 Cal.App. 129.
Conn.—Robinson v. Connecticut Co., 189 A. 453, 122 Conn. 300.
Ill.—Rowan v. Bartonville Bus Line, 242 Ill.App. 451.
Ky.—McGraw v. Ayers, 58 S.W.2d 378, 248 Ky. 166.
La.—Baptiste v. New Orleans Public Service, App., 161 So. 783.
Mass.—Turner v. Berkshire St. Ry. Co., 193 N.E. 178.
Miss.—Oliver Bus Lines v. Skaggs, 164 So. 9, 174 Miss. 201.
Neb.—Giffen v. Lincoln Traction Co., 225 N.W. 232, 118 Neb. 459.
Okl.—Missouri, Kansas & Oklahoma Coach Lines v. Burton, 72 P.2d 385.
Or.—Richardson v. Portland Trackless Car Co., 233 P. 540, 113 Or. 544.
Tenn.—Tennessee Coach Co. v. Young, 80 S.W.2d 107, 18 Tenn. App. 592—Greyhound Lines, Inc. v. Patterson, 14 Tenn.App. 652—Blount County v. Perry, 7 Tenn. App. 340.
Wash.—Washington v. City of Seattle, 16 P.2d 597, 170 Wash. 371, 86 A.L.R. 113—Duggins v. International Motor Transit Co., 280 P. 50, 153 Wash. 549—Nicktovich v. Olympic Motor Transit Co., 272 P. 736, 150 Wash. 278.
W.Va.—Bennett v. Bartlett, 158 S.E. 712, 110 W.Va. 478.

A driver in sole charge of a bus is obligated to give highest degree of care for safety of his passengers compatible with reasonable movements of bus in performing his duties of assisting passengers in disposing of their baggage and removing it when passengers reach their destination.—Interurban Transp. Co. v. Reeves, Ark., 108 S.W.2d 594.

As distinguished from carriers by railroad "it must be borne in mind that a railroad company is generally responsible for the condition of the tracks over which it runs its trains, while automobile carriers have no control of the public highways over which they transport their passengers"—Karp v. Powers, 124 So. 781, 782, 12 La.App. 518.

City carrying passenger in its bus for hire owes utmost precaution to passenger to see that passenger is safely carried to her destination, and city, to escape liability for passenger's injuries while in bus, has to be free from any negligence contributing to the injury.—Johnson v. City of Monroe, La.App., 164 So. 456.

Defects in highway

Carrier of passengers by motor bus is not liable for accident caused by unknown defects in road which appears safe and solid, where defects could not be detected by exercise of highest degree of care consistent with practical conduct of its business.—Oliver v. Union Transfer Co., 71 S.W.2d 478, 17 Tenn.App. 694.

High degree of care

(1) A motor bus company must use a high degree of care to transport its passengers safely.—Schreiber v. Public Service Co-ordinated Transport, 169 A. 629, 112 N.J.Law 199—Holda v. Public Service Co-ordinated Transport, 168 A. 753, 11 N.J.Misc. 879.

(2) The distinction has been made that the owner of the utility owes a high degree of care, but that the operator owes a duty of reasonable care only.—Maldonato v. Ironbound Transp. Co., 156 A. 275, 9 N.J.Misc. 985.

Proper car in the inspection, maintenance, and operation of the bus must be exercised by a motor bus owner, and his failure to do so is the only negligence for which he is liable to a passenger.—Sakowski v. Baird, 69 S.W.2d 649, 334 Mo. 951.

Safe transportation to the end of his journey is a duty owed by a motor bus company to a passenger.—Martin v. Interurban Transp. Co., 131 So. 514, 15 La.App. 256.

53. N.J.—Schott v. Weiss, 105 A. 192, 92 N.J.Law 494.
Wash.—Singer v. Martin, 164 P. 1105, 96 Wash. 231.
Wis.—McCaffrey v. Automobile Liability Co., Limited, Mutual, 186 N.W. 585, 176 Wis. 230.

Statement of rule

Jitney driver, as common carrier, owes passenger utmost care, diligence, and foresight in operation and management of his vehicle and is liable if guilty of negligence in slightest degree, whereby passenger, not himself negligent, is injured.—Riggsby v. Tritton, 129 S.E. 493, 143 Va. 903, 45 A.L.R. 280, motion denied 133 S.E. 580, 45 A.L.R. 280.

As to a passenger riding on the running board, with the driver's permission, the driver is bound to use ordinary care not to increase the hazard.—Cecil v. Jernigan, 4 Tenn. App. 80.

Mere observance of the law of the road by a jitney bus driver is not a sufficient discharge of his duty to a passenger to exercise the highest degree of care compatible with the practical operation of the car, his negligence, if any, as between him and his passenger, being measurable only by his duty as a common carrier, and not by his duty to other users of the highway.—Singer v. Martin, 164 P. 1105, 96 Wash. 231.

54. Ky.—McGraw v. Ayers, 58 S.W.2d 378, 248 Ky. 166.

55. La.—Baptiste v. New Orleans Public Service, App., 161 So. 783.
Mo.—Sakowski v. Baird, 69 S.W.2d 649, 334 Mo. 951.

56. Cal.—Bezera v. Associated Oil Co., 3 P.2d 622, 117 Cal.App. 139.
Ill.—Reitz v. Yellow Cab Co., 248 Ill. App. 287.
Ky.—Hensley v. Braden, 91 S.W.2d 34, 262 Ky. 672—Shelton Taxi Co. v. Bowling, 51 S.W.2d 468, 244 Ky. 817.
La.—Upton v. Bell Cabs, App., 154 So. 359—Thibodeaux v. Star Checker Cab Co., App., 143 So. 101.
Me.—Chaput v. Lussier, 165 A. 573, 132 Me. 48.
Mass.—Guinevan v. Checker Taxi Co., 194 N.E. 100, 289 Mass. 295.
Minn.—McKellar v. Yellow Cab Co., 181 N.W. 348, 148 Minn. 247.
Or.—Ramsdell v. Frederick, 285 P. 219, 132 Or. 161.
Pa.—Hughes v. Pittsburgh Transp. Co., 150 A. 153, 300 Pa. 55.
Tenn.—Wishone v. Yellow Cab Co., App., 97 S.W.2d 452.
Va.—Hogan v. Miller, 157 S.E. 540, 156 Va. 166.
Wash.—Rich v. Campbell, 2 P.2d 886, 164 Wash. 393—Fleming v. Red Top Cab Co., 233 P. 639, 133 Wash. 338.
Wis.—Scales v. Boynton Cab Co., 223 N.W. 836, 198 Wis. 293, 69 A.L.R. 978—Anderson v. Yellow Cab Co., 191 N.W. 748, 179 Wis. 300, 31 A.L.R. 1197.

Extraordinary diligence

Operators of taxicab business of transporting general public for hire are carriers and must exercise extraordinary diligence for protection of passengers.—Locke v. Ford, Ga.App., 187 S.E. 715.

a primary duty of the driver of the taxicab,[57] and he must exercise a higher degree of care for the safety of his passenger than for the safety of a pedestrian,[58] and a higher degree of care than is imposed on an automobile owner who carries a person as his guest or as an accommodation.[59]

§ 686. Street Cars of Various Kinds

A street railroad company, as a common carrier of passengers, generally is required to exercise the highest degree of care, prudence, and foresight for the safety of its passengers.

A carrier by street car is not an insurer of the safety of its passengers, but is liable only for negligence, in failing to exercise a proper degree of care,[60] and hence is not liable for an injury to a passenger which the exercise of reasonable foresight would not have anticipated or due care have avoided.[61] In some cases language has been used with reference to transportation of passengers in this manner, indicating that reasonable care and diligence is all that is necessary to relieve the carrier from liability for injuries happening to the passenger in the course of transportation;[62] but in most of the cases the general rule of liability is laid down, as in other cases discussed in §§ 677 and 678, to the effect that a street railroad company is required to exercise the same degree of care and diligence for the safety of its passengers as is any other common carrier of passengers, such as an ordinary railroad company,[63] that is, the highest degree of care, prudence, and foresight, or, as it is otherwise expressed, the highest degree of care and skill which prudent men would use and exercise in like business and under like circumstances, or the highest degree of care, skill, and diligence, consistent with the practical operation of the road;[64] and particularly is a street railroad governed by the rules

High degree of care required

Mich.—Durfey v. Milligan, 251 N.W. 356, 265 Mich. 97.

N.J.—King v. Steglitz, 166 A. 146, 111 N.J. Law 11.

Ordinary or reasonable care required

Ind.—Hudnut v. Indiana De Luxe Cab Co., 182 N.E. 711, 98 Ind.App. 44.

Mass.—Dion v. Drapeau, 150 N.E. 14, 254 Mass. 186

Taxicab constitutes "hackney coach" as regards taxi owner's liability for passengers' injuries.—Chaput v. Lussier, 165 A. 573, 132 Me. 48.

The driver must be alert and watchful at all times, and exercise the necessary care to carry his passengers safely.—McKellar v. Yellow Cab Co., 181 N.W. 348, 148 Minn. 247.

57. Cal.—Bezera v. Associated Oil Co., 3 P.2d 622, 117 Cal.App. 139.

Wash.—Garrow v. Seattle Taxicab Co., 238 P. 623, 135 Wash. 630, 45 A.L.R. 293.

58. Md.—Sun Cab Co. v. Reustle, 192 A. 292.

59. Wash.—Garrow v. Seattle Taxicab Co., 238 P. 623, 135 Wash. 630, 45 A.L.R. 293.

60. Ala.—O'Brien v. Birmingham Ry., Light & Power Co., 72 So. 343, 197 Ala. 97.

Ark.—Arkansas Power & Light Co. v. Boyd, 65 S.W.2d 919, 188 Ark. 254—Arkansas Power & Light Co. v. Mart, 65 S.W.2d 39, 188 Ark. 202

Ill.—Grubczak v. Chicago Rys. Co., 242 Ill.App. 384.

La.—Bynum v. City of Monroe, App., 171 So. 116—Mahfouz v. Interurban Transp. Co., 135 So. 740, 17 La.App. 241—Martin v. Interurban Transp. Co., 131 So. 514, 15 La.App. 256—Schuh v. N.O. Public Service, Inc., 5 La.App. 57.

Mo.—Jordan v. St. Louis Public Service Co., App., 103 S.W.2d 552

R.I.—Bines v. United Electric Rys. Co., 148 A. 417, 50 R.I. 438.

Tex.—Dallas Ry. & Terminal Co. v. Travis, Civ.App., 46 S.W.2d 743, affirmed 78 S.W.2d 941, 125 Tex. 11.

10 C.J. p. 867 note 44.

Slight negligence of street railroad proximately causing passenger's injury may render railroad liable, providing passenger could not himself have avoided injury by exercising ordinary care.—Leslie v. Georgia Power Co., 171 S.E. 395, 47 Ga.App. 723.

Carrier as not insurer generally see supra § 676

61. Ill.—See Holler v. Chicago City Ry. Co., 209 Ill.App. 140.

D.C.—Kight v. Metropolitan R. Co., 21 App.D.C. 494.

Minn.—Winchell v. St. Paul City R. Co., 90 N.W. 1050, 86 Minn. 445.

Wash.—Tobin v. City of Seattle, 221 P. 583, 127 Wash. 664.

Injury by wire accidentally attached to car

If the wire which caught deceased was accidentally attached to the street car while in operation, and operators had no knowledge of it, and were not negligent in failing to discover it, verdict could not be for plaintiff on account of the operators' negligently allowing the wire to become attached to the car.—O'Brien v. Birmingham Ry., Light & Power Co., 72 So. 343, 197 Ala. 97

Injuries by accident generally see infra § 697.

62. Mass.—Fiske v. Boston Elevated Ry. Co., 194 N.E. 835, 289 Mass. 598—Fitzgerald v. Boston Elevated Ry. Co., 174 N.E. 490, 274 Mass. 287.

10 C.J. p. 868 note 46.

"The rule of the highest degree of care is usually applied in cases where the accident results from defective roadbeds, machinery, or cars, and rarely in cases where the result follows negligent operation by the motorman."—Taddeo v. Tilton, 289 N.Y.S. 427, 433, 248 App.Div. 290

If carrier has selected an efficient motorman, prescribed proper rules for operation, etc., it should be held liable for the exercise of that care by its motorman in any situation that may arise that would be exercised by the average individual of ordinary prudence under like circumstances.—O'Brien v. New York Rys. Co., 174 N.Y.S. 116, 185 App.Div. 867—10 C.J. p. 868 note 46 [b].

63. S.C.—Derrick v. Columbia Ry., Gas & Electric Co., 137 S.E. 682, 139 S.C. 200.

Tex.—Dallas Ry. & Terminal Co. v. Travis, Civ.App., 46 S.W.2d 743, affirmed 78 S.W.2d 941, 125 Tex. 11.

10 C.J. p. 868 note 48.

64. Ala.—Birmingham Electric Co. v. Shelton, 163 So. 633, 231 Ala. 110—Birmingham Electric Co. v. Shephard, 110 So. 604, 215 Ala. 316—Birmingham Ry., Light & Power Co. v. Gray, 71 So. 689, 196 Ala. 42.

Ark.—Arkansas Power & Light Co. v. Boyd, 65 S.W.2d 919, 188 Ark. 254

Cal.—Drury v. Los Angeles Ry. Corporation, 282 P. 525, 102 Cal.App. 58

Colo.—Colorado Springs & Interurban Ry. Co. v. Reese, 169 P. 572, 69 Colo. 1.

Conn.—Cavanaugh v. Connecticut Co., 149 A. 131, 110 Conn. 698—Belle-

regulating steam railroads, where it operates its cars beyond the limits of the city through open country.[65] These rules of liability are applicable to carriers operating horse cars,[66] cable cars,[67] electric cars,[68] and elevated railways.[69]

A statute providing that a railroad company shall be liable for damages inflicted on passengers while being transported over its road has no application to street railroads;[70] and an ordinance as to the degree of care required of a street railroad for the safety of pedestrians and vehicles does not affect the degree of care required of it for the safety of passengers.[71]

§ 687. Elevators

The owner or operator of a passenger elevator is generally required to exercise the highest degree of care and diligence for the safety of passengers using the elevator.

deau v. Connecticut Co., 149 A. 127, 110 Conn. 625.

Ill.—Walsh v. Chicago Rys Co., 128 N.E. 647, 649, 294 Ill. 586, reversing 216 Ill.App. 409—Kaldunski v. Chicago City Ry. Co., 250 Ill.App. 475—Grubczak v. Chicago Rys. Co., 242 Ill.App. 384.

Ind.—Ft Wayne & Northern Indiana Traction Co. v. Parish, 119 N.E. 488, 67 Ind.App. 597.

Iowa—Kliebenstein v. Iowa Ry. & Light Co., 183 N.W. 129, 193 Iowa 892.

La.—Bacon v. New Orleans Public Service, 137 So. 213, 18 La.App. 96, rehearing denied 137 So. 866, 18 La.App. 96—Thomas v. Shreveport Rys. Co., 127 So. 119, 13 La. App. 212.

Mass.—Bilodeau v. Fitchburg & L. St. Ry. Co., 128 N.E. 872, 236 Mass. 526—MacGilvray v. Boston Elevated Ry. Co., 118 N.E. 166, 229 Mass. 65, 4 A.L.R. 283.

Mich.—Selman v. City of Detroit, 278 N.W. 112, 283 Mich. 413—Larskowski v. Detroit United Ry., 159 N.W. 530, 193 Mich. 409.

Mo.—Toomey v. Wells, 276 S.W. 64, 310 Mo 696—Walquist v. Kansas City Rys Co., 237 S.W. 493, 292 Mo. 34—Jordan v. St. Louis Public Service Co., App., 103 S.W.2d 552—Cooley v. Dunham, 195 S.W. 1058, 196 Mo.App. 399.

Ohio—Cincinnati Street Ry. Co. v. Mueller, 200 N.E. 770, 51 Ohio App. 314—Cincinnati Street Ry. Co. v. Henkel, 176 N.E. 101, 38 Ohio App. 243—Morris v. Cincinnati Traction Co., 20 Ohio N.P.,N.S., 607.

Or.—Stamos v. Portland Electric Power Co., 274 P. 915, 128 Or. 310.

Pa.—Zaltouski v. Scranton Ry. Co., 165 A. 847, 310 Pa. 531—Riff v. Pittsburgh Rys. Co., 148 A. 102, 298 Pa. 256—Appenzeller v. Philadelphia Rapid Transit Co., 163 A. 387, 107 Pa.Super. 319—Deady v. Philadelphia Rapid Transit Co., 100 Pa. Super. 208.

S.C.—Derrick v. Columbia Ry., Gas & Electric Co., 137 S.E. 682, 139 S.C. 200.

Tenn.—Memphis St. Ry. Co. v. Cavell, 187 S.W. 179, 135 Tenn. 462—Memphis St. Ry. v. Felts, 6 Tenn.Civ.App. 303

Wash.—Tobin v. City of Seattle, 221 P. 583, 127 Wash. 664.

W.Va.—Cain v. Kanawha Traction & Electric Co., 95 S.E. 88, 81 W.Va. 631.

10 C.J. p. 868 note 49.

Basis of duty

A street railroad company must exercise the highest degree of care consistent with the practical operation of its business for the safety of passengers, because it is a common carrier, and not because it has the right to take property by eminent domain.—London v. Bay State St. Ry. Co., 121 N.E. 394, 231 Mass. 480.

Care required of motorman

(1) A motorman must use "the highest reasonable degree of care, vigilance, and forethought consistent with the mode of conveyance and the practical operation of the road"—Maher v. Connecticut Co., 155 A. 854, 855, 113 Conn. 556, 77 A.L.R. 426

(2) A motorman operating a one-man car is bound to exercise the utmost care for the safety of his passengers.—McNeil v. East Bay St. Rys., 32 P.2d 598, 220 Cal. 591.

(3) Whether street car motorman negligently operated car, as regards passenger's injuries, depends upon whether he acted with care required of a man under similar circumstances.—Cavanaugh v. Connecticut Co., 149 A. 131, 110 Conn. 698—Belledeau v. Connecticut Co., 149 A. 127, 110 Conn. 625.

City, as a carrier of passengers on municipally owned street railway, is bound by the same degree of care as other such carriers.—Bradley v. City of Seattle, 294 P. 554, 160 Wash. 100—Tobin v. City of Seattle, 221 P. 583, 127 Wash. 664.

Extraordinary diligence

It is the duty of a street railway company to use extraordinary care and diligence to protect passengers from any injury which might reasonably be anticipated as arising from outside sources.—Leslie v. Georgia Power Co., 171 S.E. 395, 47 Ga.App. 723—Georgia Ry. & Power Co. v. Murphy, 110 S.E. 680, 28 Ga. App. 173.

High degree of care

N.Y.—Rosenbaum v. Union Ry. Co., 169 N.Y.S. 456.

Tex.—Dallas Ry & Terminal Co. v. Travis, Com.App., 78 S.W.2d 941, 125 Tex. 11, affirming, Civ.App., 46 S.W.2d 743—Dallas Ry & Terminal Co. v. Garner, Civ.App., 42 S.W.2d 665, reversed on other grounds, Com.App., 63 S.W.2d 542.

Passengers of different sexes, ages, health, and physical ability require exercise of appropriate care by street railway employees, and what would be proper exercise of appropriate degree of care in one case may be gross negligence in another.—Cincinnati Street Ry. Co. v. Mueller, 200 N.E. 770, 51 Ohio App. 314

65. D.C.—Dixon v. Great Falls, etc., R. Co., 38 App.D.C. 591, 598, Ann. Cas.1913C 571

10 C.J. p. 869 note 50.

An interurban electric railway is bound to exercise the highest degree of care and diligence for the convenience and safety of its passengers.—Lewis v. Cedar Rapids & I. C. R. & Light Co., 167 N.W. 588, 183 Iowa 725, L.R.A.1918E 826

66. Kan.—Topeka City R. Co. v. Higgs, 16 P. 667, 38 Kan. 375, 5 Am.S.R. 754.

10 C.J. p. 869 note 51.

67. Mo.—Sweeney v. Kansas City Cable R. Co., 51 S.W. 682, 150 Mo. 385.

10 C.J. p. 869 note 52.

68. Del.—McAllister v. Peoples' R. Co., 54 A. 743, 20 Del. 272.

10 C.J. p. 869 note 53.

Railroad operating electric tube train owes high degree of care to passengers.—Benedetto v. Hudson & M. R. Co., 156 A. 37, 9 N.J.Misc. 758

69. Mass.—Fiske v. Boston Elevated Ry. Co., 194 N.E. 835, 289 Mass. 598

An elevated railway, as a common carrier of passengers, owes to passengers the duty of exercising reasonable care under the circumstances, and this means a high degree of care—the utmost caution compatible with the conduct of its business.—Fitzgerald v. Boston Elevated Ry. Co., 174 N.E. 490, 274 Mass. 287—Mucci v. Boston Elevated Ry. Co., 159 N.E. 513, 262 Mass. 308.

70. Neb.—Lincoln St. R. Co. v. McClellan, 74 N.W. 1074, 54 Neb. 672, 69 Am.S.R. 736.

10 C.J. p. 869 note 54.

71. Mo.—Toomey v. Wells, 276 S.W. 64, 310 Mo. 696.

While, as stated supra § 533, the owner of a passenger elevator operated in a building for carrying persons up and down may not be a carrier of passengers in the sense that he is bound to serve the public, yet his duty as to protecting the passengers in his elevator from danger is the same as that applicable to common carriers of passengers by other means, and he is bound to do all that human care, vigilance, and foresight can reasonably suggest under the circumstances, and, in view of the character of the mode of conveyance adopted, to guard against accidents and injuries resulting therefrom, and a failure in this respect will constitute negligence rendering him liable,[72] although he is not an insurer of the safety of the passenger,[73] and therefore cannot be held responsible for an accident which he could not reasonably have anticipated or provided against;[74] nor can he be held responsible, except for willful or wanton injury, to a person who goes on an elevator without right, or contrary to reasonable regulations.[75]

The owner or operator of a passenger elevator or escalator, on the grounds of public policy,[76] is generally required to exercise, for the safety of passengers as variously expressed, extraordinary care,[77] the highest degree of care and diligence usually exercised by prudent and cautious persons under the same or similar circumstances,[78] or the highest degree of care and diligence which is practically consistent with the efficient use and operation of such mode of transportation.[79] These rules have also been held to apply to the owner of a freight elevator who permits persons to ride thereon.[80] According to some authorities, however, the rule requiring the highest degree of care of a carrier of passengers does not apply in case of an elevator, or escalator, but the owner or operator is required to exercise only ordinary or reasonable care for the safety of passengers using the same.[81]

72. Ala.—Ensley Holding Co. v. Kelley, 158 So. 896, 229 Ala. 650.
La.—Ross v. Sisters of Charity of Incarnate Word, 75 So. 425, 141 La. 601, L.R.A.1917F 260.
Md.—O'Neill & Co. v. Crummitt, 190 A. 763.
Mo.—McDermed v. Baker, App., 20 S.W.2d 597.
Neb.—Dailey v. Sovereign Camp, W. O. W., 184 N.W. 920, 106 Neb. 767.
Nev.—Smith v. Odd Fellows Bldg. Ass'n, 205 P. 796, 46 Nev. 48, 23 A.L.R. 38.
Ohio.—McDowell v. Rockey, 167 N.E. 589, 32 Ohio App. 26.
Pa.—Strobel v. Park, 140 A. 877, 292 Pa. 200, 57 A.L.R. 253—McKnight v. S. S. Kresge Co., 132 A. 575, 285 Pa. 489.
Tex.—City Nat. Bank v. Pigott, Civ. App., 270 S.W. 234.
Wash.—Kranzusch v. Trustee Co., 161 P. 492, 494, 93 Wash. 629.
10 C.J. p. 869 note 56.

Corpus Juris statement has received judicial approval in Jenkins v. Missouri State Life Ins. Co., 69 S.W. 2d 666, 670, 334 Mo. 941.

Acts of omission and of commission

"One who is charged with negligence in failing to remedy some existing condition of his premises is not under the same duty of watchfulness to discover and prevent danger as one who is actively engaged in transporting persons from one level to another by means of an elevator operating in a shaft, every movement of which creates a new situation."—Jenkins v. Missouri State Life Ins. Co., 69 S.W.2d 666, 670, 334 Mo. 941.

Duty to tenant as measuring duty to customer

The duty owed by the owner of an office building to a tenant of the building, with regard to elevators, measures the duty which the owner owes to a customer of the tenant.—Draper v. Cotting, 120 N.E. 365, 231 Mass. 51.

Care as to:
- Competency and efficiency of operatives see infra § 688
- Machinery and appliances see infra § 742.
- Passengers boarding or alighting from elevator see infra § 734.

73. Ala.—Ensley Holding Co. v. Kelley, 158 So. 896, 229 Ala. 650.
Ohio.—Ohio Traction Co. v. Flynn, 26 Ohio Cir.Ct.,N.S., 250.
Pa.—Petrie v. Kaufmann & Baer Co., 139 A. 878, 291 Pa. 211—McKnight v. S. S. Kresge Co., 132 A. 575, 285 Pa. 489.
Va.—Murphy's Hotel v. Cuddy's Adm'r, 97 S.E. 794, 124 Va. 207.
10 C.J. p. 870 note 57.
Carrier as not insurer generally see supra § 676

74. Mass.—Shattuck v. Rand, 7 N.E. 43, 142 Mass. 83
10 C.J. p. 871 note 65.

75. Ind.—Springer v. Byram, 36 N.E. 361, 137 Ind. 15, 45 Am.S.R. 159, 23 L.R.A. 244.

Using freight elevator when passenger elevator available

Mass.—Billows v. Moors, 37 N.E. 750, 162 Mass. 42.
Mich.—Amerine v. Porteous, 63 N.W. 300, 105 Mich. 347.

76. Ill.—Winheim v. Field, 107 Ill. App. 145.

77. Ga.—Grant v. Allen, 80 S.E. 279, 141 Ga. 106.
10 C.J. p. 870 note 59.

78. U.S.—S. S. Kresge Co. v. McCallion, C.C.A.Mo., 58 F.2d 931, 933.
D.C.—Southern Ry. Co. v. Taylor, 16 F.2d 517, 57 App.D.C. 21, certiorari denied Taylor v. Southern Ry. Co., 47 S.Ct. 571, 273 U.S. 767, 71 L.Ed. 882.
Ala.—Ensley Holding Co. v. Kelley, 158 So. 896, 229 Ala. 650.
Mo.—Roberts v. Schaper Stores Co., 3 S.W.2d 241, 318 Mo. 1190—McCardle v. George B. Peck Dry Goods Co., 195 S.W. 1034, 271 Mo. 111—Williams v. Short, 268 S.W. 706, 219 Mo.App. 99, transferred, Sup., 263 S.W. 200.
Okl.—Lander v. Hornbeck, 179 P. 21, 74 Okl. 239
10 C.J. p. 870 note 60.

79. La.—Ross v. Sisters of Charity of Incarnate Word, 75 So. 425, 141 La. 601, L.R.A.1917F 260.
Mont.—Gohn v. Butte Hotel Co., 295 P. 262, 88 Mont. 599.
Ohio.—May Department Stores Co. v. McBride, 178 N.E. 12, 124 Ohio St. 264, affirming McBride v. May Department Stores Co., 177 N.E. 773, 39 Ohio App. 420—Ohio Traction Co. v. Flynn, 26 Ohio Cir.Ct.,N.S., 250.
Pa.—Petrie v. Kaufmann & Baer Co., 139 A. 878, 291 Pa. 211.
Va.—Murphy's Hotel v. Cuddy's Adm'r, 97 S.E. 794, 124 Va. 207.
Wash.—Getty v. Hutton, 188 P. 10, 110 Wash. 124—Engstrand v. Hartnett, 180 P. 132, 106 Wash. 404.
Wis.—Dehmel v. Smith, 227 N.W. 274, 200 Wis. 292—Dibbert v. Metropolitan Inv. Co., 147 N.W. 3, 158 Wis. 69, L.R.A.1915D 305, Ann.Cas. 1916E 924.
10 C.J. p. 870 note 61.

80. Mo.—McDermed v. Baker, App., 20 S.W.2d 597.
10 C.J. p. 871 note 62.

81. Conn.—Stratton v. J. J. New-

The degree of care required of the owner and operator is not affected by a statute forbidding the operation of elevators without a license, and providing for the inspection and approval thereof.[82]

§ 688. Care Required in Employment of Employees

The carrier must exercise reasonable diligence in selecting and employing a sufficient number of competent and careful employees.

The carrier is bound to use reasonable diligence in selecting and employing competent and careful employees, and for injuries resulting from incompetence and inefficiency which was known, or might by the exercise of reasonable diligence have been known, to the carrier, the latter is liable;[83] and this rule applies with reference to the selection of drivers for stagecoaches, motor vehicles, hacks, and similar vehicles,[84] to the employment of motormen and conductors for electric cars,[85] or drivers for street cars,[86] and to the employment of competent and skillful operatives for passenger elevators.[87]

A carrier of passengers should employ only sober men as its employees.[88]

Degree of competency. A carrier is not expected or required to employ only persons of extraordinary skill and prudence,[89] but its duty in this respect is discharged if it engages employees who are possessed of such a degree of skill and competency as will fit them to meet the exigencies ordinarily arising in the line of their employment, or such as might reasonably be anticipated.[90]

Number of employees. It must employ a sufficient number of employees to insure the proper management of its trains or other vehicles used in the transportation of passengers,[91] that is, it must employ enough employees to meet the ordinary and usual exigencies of its business, or such as might reasonably be anticipated,[92] and especially must it employ the number of employees required by statute or ordinance to be on a train or car.[93] However, unless required by statute, a railroad company is required to provide a sufficient number of men to act as a police force in protecting its passengers only where disturbance or violence may reasonably be expected.[94]

berry Co., 169 A. 56, 117 Conn. 522.
10 C.J. p 871 note 63.

82. Cal.—McKeon v. Lissner, 223 P. 965, 193 Cal. 297—McKeon v. Lissner, 262 P. 459, 87 Cal.App. 371.

83. Conn.—Briganti v. Connecticut Co., 175 A. 679, 119 Conn. 316.
10 C.J. p 871 note 67.

Corpus Juris has been cited with approval in Wishone v. Yellow Cab Co., Tenn.App., 97 S.W.2d 452, 453.

A private carrier of passengers for hire must exercise the usual skill, care, and diligence ordinarily engaged in the same pursuit to furnish a proper driver.—Duffy v. J. W. Bishop Co., 122 A. 121, 99 Conn. 573.

84. Tenn.—Wishone v. Yellow Cab Co., App., 97 S.W.2d 452.
10 C.J. p 872 note 68
Care required of carrier by stagecoach or like vehicle generally see supra § 685.

85. N.Y.—Bergman v. Brooklyn & Queens Transit Corporation, 297 N.Y.S. 727, 163 Misc. 762.
Tex.—Bragg v. Houston Electric Co., Civ.App., 264 S.W. 245, affirmed Houston Electric Co. v. Bragg, Com.App., 276 S.W. 641, motion overruled 280 S.W. 188.
10 C.J. p 872 note 69.

Common carriers assume a definite responsibility to man their cars with skilled and trained motormen, the measure of their competency being their ability to properly operate and control the car.—Bergman v. Brooklyn & Queens Transit Corporation, 297 N.Y.S. 727, 163 Misc. 762.

86. Mont.—Wall v. Helena St. R. Co., 29 P. 721, 12 Mont. 44.
10 C.J. p 872 note 70.

A single act of carelessness on the part of the driver of a car at a time other than that when the accident happened does not establish the unfitness of the driver, although uncontradicted.—Dallas City R. Co. v. Beeman, 11 S.W. 1102, 74 Tex. 291.

87. Me.—Jones v. Co-operative Assoc. of America, 84 A. 985, 109 Me. 448, L.R.A.1915E 745.
10 C.J. p 872 note 71.

Unskilled and inexperienced operator
Where personal injuries are inflicted on another without his fault by reason of elevator operator's inexperience and lack of skill, the owner will be held liable.—Dailey v. Sovereign Camp, W. O. W., 184 N.W. 920, 106 Neb. 767.

88. U.S.—Gallena v. Hot Springs R. Co., C.C.Ark., 13 F. 116, 4 McCrary 371.
10 C.J. p 872 note 72.

89. Ala.—Gadsden, etc., R. Co. v. Causler, 12 So. 439, 97 Ala. 235
Ohio.—Cincinnati Traction Co. v. Burkhardt, 4 Ohio App. 103.

90. N.Y.—Bergman v. Brooklyn & Queens Transit Corporation, 297 N.Y.S. 727, 163 Misc. 762.
10 C.J. p 872 note 74.

Careful and prudent servants
A carrier of passengers must employ careful and prudent servants, who are required to exercise that degree of diligence which very careful and prudent persons exercise in their own affairs.—Central of Georgia R. Co. v. Robertson, 83 So. 102, 203 Ala. 358.

91. Minn.—Koeller v. Wisconsin, R. etc., Co., 153 N.W. 519, 130 Minn. 265.
10 C.J. p 873 note 76.

92. Tex.—Bragg v. Houston Electric Co., Civ.App., 264 S.W. 245, affirmed Houston Electric Co. v. Bragg, Com.App., 276 S.W. 641, motion overruled 280 S.W. 188.
10 C.J. p 873 note 77.

Removal of obstructions in car
Carrier cannot relieve itself of duty to keep aisles of car free from obstructions by failing to employ conductor or other capable servant to discover and remove them, it being necessary that motorman or some other servant discharge conductor's duties in such case.—Bragg v. Houston Electric Co., Tex.Civ.App., 264 S.W. 245, affirmed Houston Electric Co. v. Bragg, Com.App., 276 S.W. 641, motion overruled 280 S.W. 188.

93. Neb.—Lincoln Traction Co. v. Heller, 100 N.W. 197, 102 N.W. 262, 72 Neb. 127.
10 C.J. p 873 note 78.

94. N.C.—Britton v. Atlanta, etc., Air Line R. Co., 88 N.C. 536, 43 Am.R. 749.
10 C.J. p 873 notes 79, 80.

Physicians and surgeons. If, either by requirement of law or through choice, a carrier provides a physician or surgeon to care for its passengers, the carrier is liable for injuries to passengers resulting from his negligence or incompetence only where it knew or should have known of his unfitness.[95]

§ 689. Negligence and Wrongs of Carrier's Employees or Agents

A carrier is under a duty to protect a passenger from injury by the carrier's employees; in general, a carrier is liable for an injury to a passenger caused by the negligence or wrongful act of an employee of the carrier occurring when the employee is acting within the scope of his employment or duties, and, under the rule recognized in some jurisdictions at least, may be liable, under some circumstances, for acts of an employee not strictly within the scope of his employment.

The rule stated in Corpus Juris, which has been quoted with approval,[96] is that the duty of the carrier to protect the passenger must usually be discharged by means of its employees engaged in carrying out the transportation contracted for,[97] who are, in general, required to exercise the high degree of care toward passengers that is imposed on the carrier,[98] and the duty or obligation of the carrier to a passenger includes the protection of the passenger from injury by the carrier's employees.[99]

While in some cases it has been stated broadly that a carrier is not liable for the willful and malicious acts of its employees,[1] generally speaking, since such a carrier usually must act through employees for whose acts the carrier is responsible,[2] as a general rule a carrier, like any other master or principal carrying on a business by means of the employment of servants or agents, is liable for injuries resulting from the incompetency, supra § 688, negligence,[3] of such servants or agents, or wrong-

95. Colo.—Denver & R. G. R. Co. v. Ptolemy, 169 P. 541, 69 Colo. 69.
10 C.J. p 872 note 75.

96. S.D.—Blankenbaker v Chicago, M. & St. P. Ry Co., 168 N.W. 744, 745, 40 S.D. 588, 10 A.L.R. 720.

97. Pa.—Mittleman v. Philadelphia Rapid Transit Co., 70 A. 828, 221 Pa. 485, 18 L.R.A.,N.S., 503.
10 C.J. p 884 note 17.

98. Ark.—Interurban Transp. Co. v. Reeves, 108 S.W. 2d 594.
Md.—Baltimore, etc., R. Co. v. Leapley, 4 A. 891, 65 Md. 571.
10 C.J. p 886 note 32, p 888 note 48.

99. U.S.—Austro-American S. S. Co. v. Thomas, N.Y., 248 F. 231, 160 C.C.A. 309, L.R.A.1918D 873.
Ky.—Payne v. Moore, 244 S.W. 869, 196 Ky. 454—Louisville & N. R. Co. v. Bennett, 209 S.W. 358, 183 Ky. 445.
Mass.—Langley v. Boston Elevated Ry. Co., 112 N.E. 79, 223 Mass. 492.
N.C.—Harrison v. Norfolk-Southern R. Co., 113 S.E. 678, 184 N.C. 86.
Tex.—Wright v. Schaff, Civ.App., 228 S.W. 333.
10 C.J. p 886 note 32, p 888 notes 47, 48.

Statutory obligation

The obligation of a carrier, under Civ.Code 1910 § 2714, to exercise extraordinary diligence on the part of himself and his agents to protect the lives and persons of his passengers includes an obligation of diligence to protect passengers from injury by the carrier's employees.—Georgia Ry. & Power Co. v. Turner, 125 S.E. 598, 33 Ga.App. 101.

1. Mo.—McKeon v. Citizens' R. Co., 42 Mo. 79, 43 Mo. 405.
10 C.J. p 886 note 29.

2. La.—Schmidt v New Orleans R. Co., 40 So. 714, 116 La. 311, 7 L.R.A.,N.S., 162.
10 C.J. p 884 note 17, p 885 note 18 [b].

Conductor

With respect to the care and control of passengers on a railroad passenger train, the conductor, acting within the real or apparent scope of his authority, has been regarded as the alter ego of the carrier, and the company is responsible for his acts.
Ga.—Davis v. Jones, 129 S.E. 892, 34 Ga.App. 7.
Ohio.—Toledo Rys. & Light Co. v. Duggan, 7 Ohio App. 1.

Driver of bus

Acts of driver in sole charge of bus in discharging his duties of assisting passengers in disposing of their baggage and removing it when the passengers reached their destination were acts of bus company, since driver was clothed with all bus company's authority with respect to such duties.—Interurban Transp. Co. v. Reeves, Ark., 108 S.W. 2d 594.

Taxicab driver selecting substitute driver

Taxicab driver selecting substitute driver and riding in rear seat was cab owner's servant in performing transportation contract, and neither driver nor his substitute was the servant of passengers.—Chaput v. Lussier, 165 A. 573, 132 Me. 48.

3. Ala.—St. Louis & S. F. Ry. Co. v. Trice, 80 So. 434, 202 Ala. 352.
Cal.—Little v. Los Angeles Ry. Corporation, 271 P. 134, 94 Cal.App. 303.
La.—Gaines v. Teche Lines, App., 176 So. 134.
Mich.—Sabol v. Chicago & N. W. Ry. Co., 238 N.W. 281, 255 Mich. 548, certiorari denied Chicago & N. W. Ry. Co. v. Sabol, 52 S.Ct. 265, 284 U.S. 688, 76 L.Ed. 581.
Neb.—Daly v. Publix Cars, 259 N.W. 163.
10 C.J. p 886 note 32, p 888 note 48 [b] (2).

Bus driver, who was in charge of bus in a capacity analogous to that of a train conductor when bus broke down, had such authority as position of train conductor implied, as respects whether bus driver was acting within his authority by having passenger continue journey on truck of a third person not employed by bus company.—South Plains Coaches v. Box, Tex.Civ.App., 111 S.W.2d 1151, error dismissed.

Conductor boarding street car

In respect of the liability of a street car company for an injury to a person waiting to board a car as a passenger caused by the negligence of a conductor while boarding the car, it was held that, if the conductor was boarding the car for the purpose of taking immediate charge of it, he was acting within the scope of his employment.—Cromwell v. Los Angeles Ry. Corporation, 283 P. 375, 102 Cal.App. 499.

Direction to leave car

The conductor of a street car, in warning passengers that they should leave the car in a case where an emergency had arisen, was acting within the sphere or scope of his duties.—Little v. Los Angeles Ry. Corporation, 271 P. 134, 94 Cal.App. 303.

Negligent act in handling suitcase

The negligent act of bus porter in letting a suitcase fall on passenger's head and neck was act of driver for which bus company was lia-

ful acts,[4] even though willful and malicious,[5] or willful and wanton,[6] of its agents or servants within the scope or course of their employment or duties, in the absence of any limitation in the contract of carriage,[7] or by implication from the situation of the parties,[8] even though such acts are in violation of rules of the carrier,[9] or contrary to its orders,[10] nor can the carrier escape this liability by failing to give its employees full instructions or by restricting their authority so as to disable them from properly performing their duties.[11] In view of a statutory provision requiring a common carrier to exercise extraordinary diligence to prevent insult, injury, or harm to a passenger, such carrier is in general liable to a passenger who suffers insult, mortification, or embarrassment resulting directly from the failure of the carrier's servants to perform their legal duty to such passenger or from such servants' negligent and wrongful acts; but, in general, there is no liability where such servants had no knowledge of the conditions subsequently complained of and the passenger took no measures to avoid or remedy such conditions,[12]

In respect of certain acts or torts of employees or servants of a carrier which are outside the scope or course of the employment[13] or the duties[14] of the employees or servants, it has been held or recognized that the carrier is not liable, even though the act in question is performed while the employee or servant is engaged in performing his duties. There has been a distinct tendency, however, to impose a broad liability on carriers in respect of the acts of their employees; and according to some cases, the general rule that a principal or master is not liable for injuries resulting from the willful and malicious acts of his agent or servant, not done within the

ble, where porter acted as such in driver's presence and with driver's apparent consent. — Interurban Transp Co. v. Reeves, Ark., 108 S W.2d 594.

Passenger assisting in placing trunk on vehicle

Bus company was liable for injuries to passenger through negligence of driver while helping such driver lift onto bus trunk being transported by virtue of tickets of passenger and his daughter, whether or not help was volunteered or requested by driver, since the driver accepted the passenger's aid in discharging bus company's duty.—Gaines v. Teche Lines, La.App., 176 So. 134.

Private carrier for hire

A private carrier for hire was liable for an injury to a passenger in an automobile of such carrier caused by the negligence of the driver.—Dunne v. Boland, 199 Ill.App. 308.

4. N.Y.—Palmeri v. Manhattan R. Co., 30 N.E. 1001, 133 N.Y. 261, 28 Am.S.R. 632, 16 L.R.A. 136, affirming 14 N.Y.S. 468, 60 Hun 579.
10 C.J. p 886 note 32.

Taxicab driver.

The owner of a taxicab is responsible for the acts of the driver when acting as a servant of the owner in the course of the employment.—Solomone v. Yellow Taxi Corporation, 151 N.E. 442, 242 N.Y. 251, reversing 213 N.Y.S. 899, 215 App.Div. 790, and reargument denied 152 N.E. 445, 242 N.Y. 602.

Tort committed in performance of duties

Carrier of passengers is liable for torts of agents selected, when committed in performance of their duty, and a tort of conductor need not be authorized or ratified by railroad to render it liable.—Lipman v. Atlantic Coast Line R. Co., 93 S.E. 714, 108 S.C. 151, L.R.A.1918A 596.

5. Ill.—Chicago, etc., R. Co. v. Bryan, 90 Ill. 126.
10 C.J. p 886 note 32.

6. S.C.—Medlin v. Southern Ry. Co., 141 S.E. 185, 143 S.C. 91, 56 A.L.R. 767.
10 C.J. p 886 note 32.

7. Ala.—Orr v. Boockholdt, 65 So. 430, 10 Ala.App. 331.

8. Ala.—Orr v. Boockholdt, supra.

9. Mass.—Foley v. Boston, etc., St. R. Co., 84 N.E. 846, 198 Mass. 532.
10 C.J. p 886 note 32, p 887 note 35.

Opening vestibule door in violation of instructions and rules

If it was railroad porter's duty to open doors of car vestibule at station, it was not outside scope of employment as to passenger to open door on particular side, notwithstanding that in opening it he may have violated railroad's instructions and rules. That railroad passenger induced porter to violate instructions in regard to opening car vestibule doors, did not relieve porter of duty as such to use care to avoid injuring passenger, as by pushing against him box carried by the porter for the passenger.—St. Louis Southwestern Ry. Co. of Texas v. Preston, Tex.Civ.App., 194 S.W. 1128, affirmed, Com.App., 228 S.W. 928.

10. La.—Schmidt v. New Orleans R. Co., 40 So. 714, 116 La. 311, 7 L.R.A.,N.S., 162.
10 C.J. p 887 note 36.

11. La.—Schmidt v. New Orleans R. Co., supra.

12. Ga.—Hames v. Old South Lines, 183 S.E. 503, 52 Ga.App. 420.

13. Wash.—Cunningham v. Seattle R., etc., Co., 28 P. 745, 3 Wash. 471.
Wis.—Youngquist v. L. J. Droese Co., 167 N.W. 736, 167 Wis. 458
10 C.J. p 887 note 38, p 885 note 19 [a]

Deviating from bus route

Where jitney bus company, licensed to run on certain avenue, directed driver to follow that route only, and did not know or have reason to believe he departed therefrom, it was not liable for injuries suffered by passenger whom the driver was taking to his home outside the route.—Youngquist v. L. J. Droese Co., 167 N.W. 736, 167 Wis. 458

14. Cal.—Little v. Los Angeles Ry. Corporation, 271 P. 134, 94 Cal.App. 303.
10 C.J. p 887 note 38

Respondeat superior

In respect of an injury sustained by a passenger while attempting to alight from a street car in an emergency, it was stated that the street car company could be held liable only under the doctrine of respondeat superior.—Little v. Los Angeles Ry. Corporation, 271 P. 134, 94 Cal.App. 303

Employee not intrusted with any duty to passenger

Neither a carrier nor one who furnishes to a carrier terminal facilities for taking on passengers, owing a duty to one who is a passenger, violates that duty where the servant committing the act complained of has not been intrusted with the performance of any duty owing by the employer to the passenger and where the master is not negligent in failing to anticipate or to prevent the tortious act of the servant.—Massengale v. Atlanta, B. & C. R. Co., 168 S.E. 111, 46 Ga.App. 484.

course of the employment, considered in C.J.S. titles Agency § 258, and Master and Servant § 572, also 39 C.J. page 1293 note 80, and page 1294 note 81, is not applicable to the fullest extent, at least where the injury is inflicted on a passenger by a carrier's agent or servant.[15] Many cases recognize a distinct doctrine as applicable to carriers of passengers, holding or recognizing that carriers are liable for the wrongful acts of their agents or servants which result in injuries to passengers, whether or not willful and malicious[16] or willful and wanton,[17] and whether or not done in the line of their employment or service, or within the scope of their employment or authority,[18] if done during the course of the discharge of the duty which their employers owe to passengers, or in the course of carrying out the contract of carriage, unless, according to some cases, the act of the carrier's employee is caused by the wrongful act of the injured passenger.[19] This rule or principle of liability applies, according to some cases, to the wrongful acts of any agent or servant employed in the general business of transportation, even though the offending servant is not at the time of the commission of the wrongful act directly employed in the carriage of the injured passenger.[20] The ground on which most cases which recognize this doctrine proceed is that the carrier as a part of its contract of carriage is bound to protect the passenger from all tortious acts of its employees, and that for a breach of this contract, however occasioned, a passenger may recover.[21] According to some cases, however, the rule or doctrine of respondeat superior is the rule which determines the liability of the carrier for acts of an employee or servant intrusted with the performance of the contract of carriage, which the carrier has in no way authorized.[22] Notwithstanding this broad rule of liability, in order to hold a carrier liable for acts or defaults of an employee or a servant, as employee or servant, it must appear that the person acting or failing to act was, in a legal, as distinguished from a popular, sense, in the employment of the carrier at the time of the acts or defaults complained of.[23]

15. N.Y.—Barad v New York Rapid Transit Corporation, 295 N.Y.S. 901, 162 Misc 458.
10 C.J. p 888 notes 47, 48.

16. Ala.—Ex parte Alabama Great Southern R Co., 86 So. 100, 204 Ala. 504, granting certiorari on other grounds Alabama Great Southern R. Co. v. Hunt, 86 So. 97, 17 Ala.App. 566.
Mass.—Langley v. Boston Elevated Ry. Co., 112 N.E. 79, 223 Mass. 492
N.Y.—Barad v. New York Rapid Transit Corporation, 295 N.Y.S. 901, 162 Misc. 458.
10 C.J. p 888 note 48.

17. Ga.—Yellow Cab Co. of Atlanta v. Carmichael, 126 S.E. 269, 33 Ga App 364
10 C J. p 888 note 48.

Want of purpose to serve carrier
Carrier is liable in damages for injuries to passenger caused by willful and wanton acts of its employees, even though purpose of employees was not to serve carrier by such acts.—Yellow Cab Co of Atlanta v. Carmichael, 126 S E. 269, 33 Ga App. 364.

Willful exposure to danger
In view of Civ Code 1910 § 4395, petition alleging that plaintiff made express contract with taxi driver to transport him safely to railroad shops by turning in at designated entrance, that driver was warned if he did not turn in at entrance but drove past, probability was that passenger would be injured by strikers, that driver knowingly and willfully refused to turn in at entrance and drove on past it until he came in contact with strikers who inflicted injuries on plaintiff set out a cause of action.—Yellow Cab Co. of Atlanta v. Carmichael, 126 S.E. 269, 33 Ga. App. 364.

18. Ala.—Birmingham R., etc., Co. v. Baird, 30 So. 456, 130 Ala. 334, 89 Am.S.R. 43, 54 L.R.A. 752
Mass.—Langley v. Boston Elevated Ry. Co., 112 N E 79, 223 Mass. 492.
10 C.J. p 888 note 48.

Want of authority and ratification
Passenger may recover actual damages resulting from wrongful act of servant of carrier, although such act was outside scope of employment and was neither authorized nor ratified by the carrier.—Pullman Co. v. Hall, C.C.A.W.Va., 46 F.2d 399.

Want of authority for specific act
A carrier is responsible for any conduct of its servants intrusted with the carriage of a passenger resulting either in wanton or negligent injury at their hands, regardless of the authority for the special act or of the fact that the infliction of the wrong was by the servant while acting in his own interest and in violation of his own duty as the carrier's representative.—Texas Midland R. R v. Monroe, 216 S.W. 388, 110 Tex. 97, reversing, Civ App., 155 S.W. 973.—St Louis Southwestern Ry. Co. of Texas v. Preston, Tex Com App., 228 S.W. 928, affirming, Civ.App., 194 S.W. 1128.—Fort Worth & D. C Ry. Co. v. Lovett, Tex.Civ.App., 243 S.W. 519.

Explosion of bottle of coffee owned by employee
Where a passenger on a street car was injured by the explosion of a bottle of coffee placed by the motorman on a radiator under a seat occupied by such passenger, the street car company could not avoid liability on the ground that the motorman's act was not done within the scope of his agency and authority on the company's business.—Snow v. Philadelphia Rapid Transit Co., 84 Pa Super. 236.

19. N.Y.—Barad v. New York Rapid Transit Corporation, 295 N.Y.S. 901, 162 Misc. 458.

20. Mass.—Hayne v. Union St. R. Co, 76 N.E 219, 189 Mass. 551, 109 Am S.R. 655, 3 L.R.A.,N S, 605.
10 C.J. p 888 note 49.

21. N.Y.—Barad v. New York Rapid Transit Corporation, 295 N.Y.S. 901, 162 Misc 458
10 C.J. p 889 note 50.

22. Tex.—Texas Midland R. R v. Monroe, 216 S.W. 388, 110 Tex. 97, reversing, Civ.App., 155 S.W. 973.

23. Mass.—Langley v. Boston Elevated Ry. Co., 112 N.E. 79, 223 Mass. 492

Truck driver
A bus company would not be liable for injuries to passenger, who was mistreated by truck driver, not employed by bus company, with whom passenger had continued journey on request of bus driver when bus broke down, on theory that truck driver was a subagent, unless bus driver had express or implied

The carrier is not liable under any of the rules herein considered where the injuries sustained are not caused by any negligent or wrongful act on the part of its employees,[24] and the carrier is not liable for an act of its employee which does not invade a legally protected interest of, nor constitute the violation of a right of, the injured passenger,[25] even though the act of the employee may constitute a wrong toward another passenger.[26]

Wantonness of an act of an employee of a carrier which is relied on as a ground for recovery must be based on actual knowledge.[27]

It has been stated broadly that the same rule and measure of responsibility apply to the owner and operator of a public taxicab for the acts of agents and servants as apply to other common carriers.[28] Under some statutes, however, it has been held that a taxicab company is liable for the death of a passenger only when the death is caused by its negligence, or the unfitness or gross negligence of its agents or servants.[29]

Extent or degree of care; liability as insurer. While the carrier cannot be regarded as an insurer of the safety of the passenger in all events, as shown above in § 676, and the duty of the carrier to protect a passenger from injury by the carrier's employees has been characterized or described as a duty or obligation to exercise the highest degree of care,[30] the highest degree of care and diligence,[31] or the utmost care and diligence consistent with the management of the business of the carrier,[32] it has been held or recognized that the carrier may be regarded as an insurer that a passenger will not be injured by the negligent[33] or willful[34] acts of its employees while engaged in performing a duty which the carrier owes to the passenger. It has been held, however, that the liability of the carrier as insurer is confined to liability for torts committed by employees engaged in the general business of transportation,[35] and that it is not liable for a tort against a passenger committed by an employee who is not connected with the operation of the train or with the care and safety of passengers, where such employee is riding on the train in connection with other business of the employee and the carrier has not failed to exercise due care to protect the passenger.[36]

Employee not on duty, or acting exclusively for himself. The carrier is not liable for acts of its servant occurring while the latter is at liberty from service and is pursuing his own ends exclusively,[37]

authority to engage truck driver to carry passenger forward—South Plains Coaches v. Box, Tex.Civ.App., 111 S.W.2d 1151, error dismissed

24. Mich.—Goodfellow v. Detroit United R. Co., 119 N.W. 900, 155 Mich. 578, 20 L.R.A.,N.S., 1123.
Mo.—Jones v. St. Louis, etc., R. Co., 116 S.W. 4, 135 Mo.App. 468.
10 C.J. p. 887 note 39.

Failure to discover presence of passenger

Where woman boarded train after it had left station and was waiting on siding for another to pass, conductor already having collected tickets and being in coach ahead, employees of carrier were not negligent in failing to discover her before reaching next station.—Chesapeake & O. Ry. Co. v. Mollett, 270 S.W. 26, 207 Ky. 745.

Failure to forbid passenger to assist trainman

Where passenger on platform was requested by brakeman to help in unloading a barrel from train, conductor was not required to forbid passenger to give such help where there was no inherent danger in the work and no reason to anticipate danger, as affecting the liability of the carrier.—Shaffer v. St. Louis & S. F. Ry. Co., 208 S.W. 145, 201 Mo.App. 107.

Illness of driver

Owner of taxicab in which passenger was injured when epileptic attack of driver, coming without warning, caused accident, was liable only for negligent selection or retention of driver, since there was no negligence immediately connected with accident.—Wishone v. Yellow Cab Co., Tenn.App., 97 S.W.2d 452.

25. N.Y.—Palsgraf v. Long Island R. Co., 162 N.E. 99, 248 N.Y. 339, 59 L.R.A. 1253, reversing 225 N.Y.S. 412, 222 App.Div. 166, and reargument denied 164 N.E. 564, 249 N.Y. 511.

26. N.Y.—Palsgraf v. Long Island R. Co., supra.

Negligence or wrong toward injured passenger not shown

Where railway company's guard pushed passenger in assisting the latter to board car, and package covered by newspaper and containing fireworks fell on rails and exploded, and shock of explosion threw down scales at the other end of platform many feet away, and scale struck plaintiff, plaintiff could not recover for injury sustained, since no negligence was shown in relation to plaintiff, and to recover plaintiff was required to show wrong to herself and not merely a wrong to some one else.—Palsgraf v. Long Island R. Co., 162 N.E. 99, 248 N.Y. 339, 59 A.L.R. 1253, reversing 225 N.Y.S. 412, 222 App.Div. 166, and reargument denied 164 N.E. 564, 249 N.Y. 511.

27. Ala.—Birmingham Electric Co. v. Guess, 131 So. 883, 222 Ala. 280.

28. Ohio.—Korner v. Cosgrove, 141 N.E. 267, 108 Ohio St. 484, 31 A.L.R. 1193

29. Mass.—Finnegan v. Checker Taxi Co., 14 N.E.2d 127.

30. W.Va.—Thompson v. Monongahela Ry. Co., 128 S.E. 110, 99 W.Va. 207, 42 A.L.R. 159.

31. Ky.—Louisville & N. R. Co. v. Bennett, 209 S.W. 358, 183 Ky. 445.

32. Mass.—Langley v. Boston Elevated Ry. Co., 112 N.E. 79, 223 Mass. 492.

33. U.S.—Pennsylvania R. Co. v. McCaffrey, N.J., 149 F. 404, 79 C.C.A. 224
10 C.J. p. 889 note 52.

34. Fla.—Hall v. Seaboard Air Line Ry. Co., 93 So. 151, 84 Fla. 9.
10 C.J. p. 889 note 52.

35. Fla.—Hall v. Seaboard Air Line Ry. Co., supra.

36. Fla.—Hall v. Seaboard Air Line Ry. Co., supra.

37. Mass.—Langley v. Boston Elevated Ry. Co., 112 N.E. 79, 223 Mass. 492.

Independent contract between driver of taxicab and passenger

Owners of taxicab were not liable to passenger for driver's negligence,

at least in the absence of any showing that the injured person relied on, or had knowledge of, the fact that the vehicle of carriage in which such person was injured was owned by the carrier.[38] Where, however, in accordance with a custom of the carrier's employees, known and assented to by the carrier, employees on duty call for, and receive assistance from, an employee not at the time on duty, the carrier may be liable for an injury to a passenger caused by the negligence of the employee so assisting.[39]

It has been held that the owner of a taxicab is not liable for an injury to a person other than a passenger for hire whom the driver has invited or permitted to ride as an accommodation to such person.[40] The driver of a taxicab is, however, in the service of the owner, notwithstanding he drives the cab at a time other than during the regular hours of service without being specially requested to do so, where he collects the usual and customary fee for the service and turns it over to the owner,[41] and the same measure of responsibility attaches to the owner for the acts of the driver as would attach if the service were rendered during the regular hours of service.[42]

After termination of relation of master and servant. If the relation of carrier and passenger has terminated, there can be no recovery for the acts of an employee thereafter,[43] including willful or malicious acts.[44]

Passenger elevator. The owner of a passenger elevator is liable for injuries to a passenger which result from the negligent or wrongful act of an employee while acting as such and within the scope of his employment;[45] but not in general where the employee is acting outside the scope of his employment,[46] or where the negligent or wrongful act is done by one who has no duty to perform in operating the elevator.[47]

Contagious disease. It has been held that a passenger who contracts a contagious disease from a ticket agent of a carrier while purchasing his ticket cannot recover damages if the carrier did not know or have any reason to know that the agent had such disease;[48] but the contrary has been held where the agent knew that he was infected with such a disease.[49]

§ 690. Who Are Employees

a. In general
b. Employees of others

a. In General

A carrier may be liable for the acts of a person who is not regularly employed where such person is acting as its employee by the authority or request of a regular employee and such regular employee is acting within the scope of his authority in engaging such person.

The duty of a carrier to protect passengers must

whether driver was their servant or not, where driver accepted credit on board bill as part of fare, since driver as servant would have had no authority to carry passengers for other than a cash fare—Johnson v. Brewer, 98 S.W.2d 889, 266 Ky. 314.

38. Cal.—Slater v. Friedman, 217 P. 795, 62 Cal.App. 668.

Taxicab

In an action by a passenger against a taxicab owner for personal injuries, sustained while defendant's agent was driving his machine, where the driver was shown to have been employed to work from 10 A. M. to 10 P. M., and unauthorized to work after that hour, and where the accident occurred after 10 P. M., while the driver was engaged on his own enterprise, defendant was not liable, at least where there was no showing that plaintiff relied on, or had knowledge of, the fact that defendant owned the taxicab—Slater v. Friedman, 217 P. 795, 62 Cal.App. 668.

39. Kan.—Leavenworth Electric R. Co. v. Cusick, 57 P. 519, 60 Kan. 590, 72 Am.S.R. 374.
10 C.J. p 885 note 18 [a].

40. N.Y.—Salomone v. Yellow Taxi Corporation, 151 N.E. 442, 242 N.Y. 251, reversing 213 N.Y.S. 899, 215 App.Div. 790, and reargument denied 152 N.E. 445, 242 N.Y. 602.

41. Ohio.—Korner v. Cosgrove, 141 N.E. 267, 108 Ohio St. 484, 31 A.L.R. 1193.

42. Ohio.—Korner v. Cosgrove, supra.

43. Del.—Cooke v. Elk Coach Line, Super., 180 A. 782.

44. N.C.—Palmer v. Winston-Salem R., etc., Co., 42 S.E. 604, 131 N.C. 250.
Tex.—Missouri, etc., R. Co. v. Pope, Civ.App., 149 S.W. 1185.

45. Ark.—Sweeden v. Atkinson Impr. Co., 125 S.W. 439, 93 Ark. 397, 27 L.R.A.,N.S., 124.
Ky.—H. B. Phillips Co. v. Pruitt, 82 S.W. 628, 25 Ky.L. 831, 83 S.W. 114, 26 Ky.L. 1105.
Wis.—Zieman v. Kieckhefer El. Mfg. Co., 63 N.W. 1021, 90 Wis. 497.
10 C.J. p 887 note 42.

46. Ark.—Sweeden v. Atkinson Impr. Co., 125 S.W. 439, 93 Ark. 397, 27 L.R.A.,N.S., 124.
Tex.—Mills v. Robinson, Civ.App., 208 S.W. 351.
10 C.J. p 887 note 43.

Idle talk as to danger of falling of elevator

The master, owner of an elevator, could not have contemplated that employees engaged in operating and repairing an elevator would go outside of their prescribed duties and unnecessarily frighten and injure a passenger therein by idle talk of the danger that the elevator might fall, and the owner was not liable for such talk on the part of the employee engaged in repairing the elevator where there was no evidence that the operator of the car heard such talk which was not within the scope of the authority of the employee engaged in making the repairs.—Mills v. Robinson, Tex.Civ.App., 208 S.W. 351, error refused.

47. Mass.—Gibson v. International Trust Co., 58 N.E. 278, 177 Mass. 100, 52 L.R.A. 928.
Va.—Norfolk Bd. of Trade Bldg. Corp. v. Cralle, 63 S.E. 995, 109 Va. 246, 132 Am.S.R. 917, 22 L.R.A., N.S., 297
10 C.J. p 887 note 44.

48. Kan.—Long v. Chicago, etc., R. Co., 28 P. 977, 48 Kan. 28, 30 Am.S.R. 271, 15 L.R.A. 319.

49. Tex.—Missouri, etc., R. Co. v. Raney, 99 S.W. 589, 44 Tex.Civ.App. 517

usually be discharged by means of its employees engaged in carrying out the transportation contracted for, and, in determining whether or not a carrier is liable for an injury to a passenger under the general rule that the carrier is liable for the acts or defaults of its agents or servants, the question which has usually arisen is whether or not the act or default of a person who is admitted to be an agent or servant, or to be in the employ generally, of the carrier which causes the injury, is one for which the carrier may be held liable, as considered above in § 689 and below in §§ 691–694, but it sometimes becomes necessary to determine also whether or not the person whose act or default causes the injury is the agent or servant of the carrier.[50] It has been held that a carrier is liable if a passenger is injured in an accident occasioned by the want of skill of a person who, although not regularly employed by the carrier, is at the time acting as its employee by the authority or request of one of its regular employees;[51] but the carrier is not liable for the negligent acts of a volunteer or intermeddler who attempts to render services without authority,[52] unless the carrier or some employee charged with such a duty could reasonably have anticipated that a passenger would be subject to an injury from such a person, or was at fault in some respect in failing to prevent it.[53] In order to render the carrier liable for the acts of a person who is not regularly employed by the carrier, on the theory that an agent or employee of the carrier employed such person to perform the service in connection with which the acts complained of occurred, it must appear that such agent or employee was specially authorized to employ, or was acting within the scope of his authority in employing, a subagent.[54] A carrier may be estopped to deny the employment and authority of a person for whose act it is sought to hold the carrier liable, where the latter, without objection, permits such person to occupy a place of responsibility in its service.[55]

Independent contractor. In general, an independent contractor who enters into an agreement with a carrier to transport passengers of such carrier from a point on the latter's line to a specified place for a fare to be fixed by such contractor is not a servant of the carrier so as to render the carrier liable for the negligence of the independent contractor.[56] A person who rents a taxicab from the owner and who, in operating it, prosecutes his own business uncontrolled by the owner is not an employee of the owner, and the latter is not, in general, liable for the acts of such person which cause an injury to a passenger in the taxicab; and, where in such case the passenger has knowledge of the relationship between the driver and the owner or makes an independent contract of carriage with the driver with knowledge that such contract is not authorized by the owner, the owner is not prevented from denying that the driver is the employee of the owner.[57]

b. Employees of Others

The employee of one other than the carrier may be regarded as the employee of the carrier in respect of the performance of a duty which the carrier owes to its passengers where the carrier has delegated the performance of such duty to such other.

The rule stated in Corpus Juris, which has been

50. Trainmaster assigned to duty with circus train

In a case in which a trainmaster in the employ of a railroad company was sent with a circus train, which was being hauled over the line of such company under a special contract, it was said that the railroad company was not liable for the trainmaster's negligence unless he was, at the time of the accident, its servant acting within the scope of his employment. It was held, however, that, in view of the terms of the special contract, the trainmaster was actually the servant of the railroad company, and that the latter was liable for the trainmaster's negligence.—Sabol v. Chicago & N. W. Ry. Co., 238 N.W. 281, 255 Mich. 548, certiorari denied Chicago & N. W. Ry. Co. v. Sabol, 52 S.Ct. 265, 284 U.S. 688, 76 L.Ed. 581.

51. Kan.—Leavenworth Electric R. Co. v. Cusick, 57 P. 519, 60 Kan. 590, 72 Am.S.R. 374.
10 C.J. p. 885 note 18.

52. Va.—Norfolk Bd. of Trade Bldg. Corp. v. Cralle, 63 S.E. 995, 109 Va. 246, 132 Am.S.R. 917, 22 L.R.A., N.S., 297.
10 C.J. p. 885 note 19.

53. Tex.—Houston, etc., R. Co. v. Bush, 133 S.W. 245, 104 Tex. 26, 32 L.R.A.,N.S., 1201, reversing, Civ.App., 123 S.W. 201.
10 C.J. p. 885 note 20.

54. Ga.—Western & A. R. Co. v. Jackson, 93 S.E. 547, 21 Ga.App. 50.

Driver procured to take home passenger carried past station

Where female passenger was carried past her station, driver engaged to take her home, and who made improper proposals, could not be held to be carrier's agent, without a showing that its conductor or telegraph operator who procured such driver was specially authorized to employ him or acted within scope of their authority.—Western & A. R. Co. v. Jackson, 93 S.E. 547, 21 Ga.App. 50.

55. Ill.—Harris v. Atlantic-Pacific Stages, Inc., 260 Ill.App. 308.

56. Okl.—City of Muskogee v. McMurry, 8 P.2d 670, 155 Okl. 203.

Jitney service

The rule stated in the text was applied in holding that the operator of a jitney or bus service who had entered into a contract with a street car company to transport passengers who should leave such company's cars at a certain point was not, under the contract and evidence, a servant of the street car company, and that the latter was not liable for injuries to a person who had been a passenger on a street car but who sustained an injury while on a bus of the independent contractor as a result of the negligence of the latter.—City of Muskogee v. McMurry, 8 P.2d 670, 155 Okl. 203.

57. Ky.—Johnson v. Brewer, 98 S.W.2d 889, 266 Ky. 314.

quoted with approval,[58] is that, where a duty which the carrier owes to its passengers is involved, it cannot shift the obligation by delegating the performance of such duty to another, and, as respects the liability of the carrier for the proper performance of such duty, the employees of such other may be regarded as the employees of the carrier;[59] and the carrier, therefore, may be held liable as regards such duties for the negligent or wrongful acts of the employees of an independent contractor.[60] So, where railroad companies are in the joint use and occupation of stations or tracks, a passenger of one company may recover against that company for injuries due to the negligence or fault of the employees of another company using the same station or tracks.[61]

It has been held that, where a street railroad company has the sole right and duty to operate street cars within the limits of a municipality, the employees of another company are, while operating a car of such other company within such limits pursuant to a valid agreement between the two companies, the employees of the company which has the sole right and duty to operate within such limits.[62]

The driver of a bus may in law be regarded as the agent of the owner of the bus and of the franchise for its operation, and such owner may be held liable for the acts of the driver, even though another than the owner pays the driver his wages and is his immediate employer.[63] The driver of a taxicab may be regarded as the ostensible agent of a person who permits such driver to hold himself out to passengers as the agent of such person, notwithstanding such person is in fact the employee of another and is acting for such other in operating the cab.[64]

Employees of connecting carrier. With reference to the liability of a carrier who contracts for through transportation over connecting lines, it is held that the contracting carrier is liable for the negligence or wrongful acts of the employees of the connecting carrier in carrying out the transportation contracted for.[65]

Employees of owner of sleeping cars and the like. The question as to whether the person whose wrong caused the injury was the employee of the carrier has arisen in determining the liability of railroad companies for the negligence or wrongful acts of porters on sleeping cars owned and controlled by an independent company, but used by the railroad company as a part of its train, and it has been held that, in as much as the employees of the railroad company have entire control of the trains and are engaged in the transportation of the passenger under contract with him, although he may be availing himself of the conveniences and additional accommodations of the sleeping car, such porters are to be deemed for certain purposes at least employees of the railroad company so far as the passenger is concerned.[66]

58. S.D.—Blankenbaker v. Chicago, M. & St. P. Ry. Co., 168 N.W. 744, 745, 40 S.D. 588, 10 A.L.R. 720.

59. U.S.—Barrow SS. Co. v. Kane, N.Y., 88 F. 197, 31 C.C.A. 452.
Ind.—Louisville, etc., Ferry Co. v. Nolan, 34 N.E. 710, 135 Ind. 60.
10 C.J. p 885 note 21.

Flagman at crossing

Where a flagman at a place where a street railroad crossed railroad tracks was hired by the railroad company which owned such tracks, but was maintained at the equal charge of the street railroad company and the railroad companies which used such tracks, the flagman was the agent of the street railroad company in signaling a motorman on a street car to cross, in respect of the liability of the street car company for a resultant injury to a passenger on the street car.—Augustus v. Chicago, etc., R. Co., 134 S.W. 22, 153 Mo.App. 572.

60. U.S.—Barrow SS. Co. v. Kane, N.Y., 88 F. 197, 31 C.C.A. 452.
S.D.—Blankenbaker v. Chicago, M. & St. P. Ry. Co., 168 N.W. 744, 40 S.D. 588, 10 A.L.R. 720.

News agent

A news boy or news agent who was in the immediate employment of a company which had a contract with a railroad company giving the former company the right to place news agents on trains to make sales of newspapers and merchandise was also the agent of the railroad company so far as concerned the transportation of passengers on its trains and its liability to passengers for the acts of the news agent.—Blankenbaker v. Chicago, M. & St. P. Ry. Co., 168 N.W. 744, 40 S.D. 588, 10 A.L.R. 720.

61. Ark.—Kansas City Southern R. Co. v. Watson, 144 S.W. 922, 102 Ark. 499.
10 C.J. p 885 note 23.

62. Mo.—Wilcox v. Kansas City Western R. Co., 213 S.W. 156, 201 Mo.App. 510

63. Cal.—Irwin v. Pickwick Stages System, 25 P.2d 998, 134 Cal.App. 443.

Constitutional provision as to leasing or alienating franchise

In support of the conclusion set forth in the text, the court cited the provision of Const. art 12, § 10, that the legislature shall not pass any laws permitting the leasing or alienation of any franchise so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise or any of its privileges—Irwin v. Pickwick Stages System, 25 P.2d 998, 134 Cal.App. 443.

64. Ky.—Middleton v. Frances, 77 S.W.2d 425, 257 Ky. 42.

65. Minn.—McLean v. Burbank, 11 Minn. 277, 12 Minn. 530.
Pa.—Ryland v. Peters, 1 Phila. 264

66. N.Y.—Dwinelle v. New York Central R. Co., 24 N.E. 319, 120 N.Y. 117, 17 Am.S.R. 611, 8 L.R.A. 224.
S.D.—Blankenbaker v. Chicago, M. & St. P. Ry. Co., 168 N.W. 744, 40 S.D. 588, 10 A.L.R. 720.
10 C.J. p 886 note 25.

Assisting passenger to alight from car

(1) Pullman porter is servant of railroad when assisting alighting passengers with hand baggage.—

Postal or mail clerks. Postal clerks engaged in the mail service on railroads are not to be deemed employees of the railroad company so as to render the company liable for their negligence, which caused injury to a passenger,[67] but it may be held liable for the conduct of such clerks in rendering the passenger platforms dangerous at stations, as shown below in § 717.

§ 691. Assaults or Personal Violence

a. In general
b. Justification and provocation

a. In General

A carrier owes a duty to its passengers to protect them from the violence and assaults of its servants or employees, and subject to certain limitations is liable for assaults on passengers committed by such servants or employees.

Under the rule stated in Corpus Juris, which has been quoted and cited with approval,[68] the duty of a carrier to a passenger includes the protection of the passenger from assaults of the carrier's employees, and it is generally held that where any servant or agent of the carrier while engaged in carrying out the carrier's duty or business of transportation assaults a passenger, or otherwise infringes the right of protection to which he is entitled, the carrier is liable,[69] irrespective, according to some cases, of whether the servant, in performing the act complained of, was acting for the carrier or for his own purposes,[70] or of whether the act of the employee pertained to the service for which he was employed or was within the scope of his employment,[71] unless the assault was justified by some act of the passenger, as considered in subdivision b immediately following. The liability of carriers for assaults on passengers by servants of carriers has been recognized under a general statute impos-

White v. New York Cent. R. Co., 239 N.Y.S. 90, 228 App.Div. 50.

(2) A carrier is liable for injury from negligence of a Pullman porter in not placing a step for passenger to alight on platform, although porter was not in its employ in absence of passenger's knowledge that Pullman car was not under carrier's management, it being immaterial that it was managed by Pullman Company under independent contract with carrier, as passenger might assume that whole train was under carrier's management.—Rogers v Philadelphia & R. Ry. Co., 103 A 873, 260 Pa. 430, 106 A. 734, 263 Pa. 429.

Obstruction on station platform

If the exercise of care in the use of a movable step in connection with a Pullman car was left by the railroad company to the servants of the Pullman Company, then the railroad company is responsible to its passenger for the negligence of such servants resulting in injury to such passenger through the negligence of such servants in leaving such step unguarded on a station platform.—Regan v. Boston & M. R. Co., 113 N.E. 200, 224 Mass. 418.

Liability of railroad company to passenger riding in palace or sleeping cars see infra § 918.

67. N.Y.—Carpenter v. Boston, etc., R Co., 97 N.Y. 494, 49 Am.R. 540. 10 C.J. p 886 note 26

68. Kan.—Higgins v. Southern Kansas Stage Lines Co., 42 P.2d 599, 602—Middleton v. Missouri Pac. R. Co., 212 P. 909, 112 Kan. 793.
N.Y.—Barad v. New York Rapid Transit Corporation, 295 N.Y.S. 901, 908, 162 Misc. 458.

69. Ala.—Tomme v. Pullman Co., 93 So. 462, 207 Ala 511.
Fla.—Hall v. Seaboard Air Line Ry. Co., 93 So. 151, 84 Fla. 9.
Iowa.—Fagg v. Minneapolis & St. L. R. Co., 157 N.W. 148, 175 Iowa 459.
Ky.—Payne v. Moore, 244 S.W. 869, 196 Ky. 454—Louisville & N. R. Co. v. Bennett, 209 S.W. 358, 183 Ky. 445.
Mass.—Langley v. Boston Elevated Ry. Co., 112 N.E. 79, 223 Mass 492—Spade v. Lynn & B. R. Co., 52 N.E. 747, 172 Mass. 488, 70 Am.S.R. 298, 43 L.R.A. 832.
N.C.—Harrison v. Norfolk-Southern R. Co., 113 S.E. 678, 184 N.C. 86
Ohio.—Korner v. Cosgrove, 141 N.E. 267, 108 Ohio St. 484, 31 A.L.R. 1193.
S.D.—Blankenbaker v. Chicago, M. & St. P. Ry. Co., 168 N.W. 744, 40 S.D. 588, 10 A.L.R. 720.
Tex.—Wright v. Schaff, Civ.App., 228 S.W. 333.
W.Va.—Clark v. Norfolk & W. Ry. Co., 100 S.E. 480, 84 W.Va. 526, 7 A.L.R. 117.
10 C.J. p 889 note 56, p 890 note 58.

Carrier as perpetrator of assault

A street car company was in law the perpetrator and was responsible for an unauthorized and willful, aggravated assault on a passenger by its employee.—Eastern Texas Electric Co. v. Baker, Tex.Civ.App., 238 S.W. 335, reversed on other grounds, Com.App., 254 S.W. 933.

Negligent shooting

A carrier is liable for damages sustained by an intending passenger, who went to the station at an appropriate time to take a train, and was negligently shot by the station agent, who about two hours before had been assaulted and shot at by persons attempting to rob the station, and who at the time he shot the intending passenger thought the latter was one of those who had attempted to rob the station, and was intending to shoot again at the agent.—Middleton v. Missouri Pac. R. Co., 212 P. 909, 112 Kan 793.

70. Fla.—Hall v. Seaboard Air Line Ry. Co., 93 So. 151, 84 Fla. 9
Iowa.—Fagg v. Minneapolis & S.L. R. Co., 157 N.W. 148, 175 Iowa 459
N.Y.—Barad v. New York Rapid Transit Corporation, 295 N.Y.S. 901, 162 Misc. 458
N.C.—Clark v. Bland, 106 S.E. 491, 181 N.C. 110
Ohio.—Korner v. Cosgrove, 141 N.E. 267, 108 Ohio St. 484, 31 A.L.R. 1193.
10 C.J. p 889 note 56.
Indecent assaults on female passengers see infra § 692.

Shooting

The rule stated in the text was recognized as applicable where a passenger was accidentally shot when an employee of the carrier was demonstrating the method of using such employee's automatic pistol.—Texas Midland R. R. v. Monroe, 216 S.W. 388, 110 Tex. 97, reversing, Civ.App., 155 S.W. 973.

71. Mo.—Shelby v. Metropolitan St. R. Co., 125 S.W. 1189, 141 Mo.App. 514
10 C.J. p 889 note 56.

Basis of liability

According to some cases the liability of the carrier for an assault on a passenger by an employee rests on the duty which the carrier owes through its servants to the passenger and not on the fact that the act is incident to a duty within the scope of the servant's employment.—Hall v. Seaboard Air Line Ry. Co., 93 So. 151, 84 Fla. 9.

ing liability on a master, under certain circumstances, for both the negligent and voluntary torts of his servant.[72] It is not necessary, in order to render the carrier liable, that the passenger should remain continuously in a vehicle of the carrier or on its premises.[73]

The duty or obligation of a carrier to protect passengers from assaults by the carrier's employee has been characterized or described generally as a duty or obligation to exercise the highest degree of care and diligence,[74] or the utmost care and diligence consistent with the management of its business.[75] It has been held that a carrier is not liable for a willful assault committed by an employee who is acting for his own purposes and not within the scope or course of his employment, where the assault could not have been anticipated and prevented by the exercise of due care,[76] where such employee has no duties in connection with the contract of carriage.[77] As to an assault committed on a passenger waiting at a station for a train, by an employee of the carrier who is not in charge of the station, the view has been taken that the carrier is under a duty to exercise only ordinary care to protect the passenger.[78]

According to some cases, a carrier is absolutely liable as an insurer for failure to protect a passenger from assaults by its servants unless the passenger has himself caused the difficulty.[79] It has been held that liability as an insurer includes, and is confined to, liability for assaults committed by employees engaged in the general business of transportation, and that the carrier is not liable as an insurer for an assault by an employee who is not connected with the operation of the train or with the care and safety of passengers, where such employee is riding on the train as a passenger in connection with other business of the employee, and in such case the carrier is liable only if it fails to exercise due care to protect the passenger.[80]

Particular employees. Under and subject to the rules above considered, the carrier is in general liable for assault on a passenger by the conductor in charge of the train or car in which the passenger is riding,[81] whether the assault is in the supposed interest and discharge of a supposed duty to the carrier, or is made as the result of personal malice or desire for revenge for an affront,[82] or in general for a purpose of the conductor while engaged in an act outside his regular duties.[83] It has been held, however, that, in an action in trespass vi et armis against a carrier, a passenger is not entitled to recover for an assault and battery committed by a conductor on the theory that the conductor was the alter ego of the carrier and that the latter was, therefore, corporately present and was participating in the assault and battery.[84] A brakeman on a train, in connection with his employment, is bound to discharge the duty of protecting the passenger, and if he makes an assault on the passenger, the carrier will in general be liable, even though the assault is not connected with the discharge of any particular duty as brakeman, but

72. Ga.—East Tennessee, etc., R Co v. Fleetwood, 15 S.E. 778, 90 Ga 23.
10 C.J. p 890 note 58.

73. N.C.—Clark v Bland, 106 S.E 491, 181 N.C 110.

Passenger called off premises by employee

If one is waiting for a train and is called off of the carrier's premises by an employee of the railroad to a point a short distance away and for the purpose of a personal difficulty, and is there assaulted and beaten, the same rules apply as would apply if the assault takes place on the premises of the railroad, the passenger having no knowledge or warning of the employee's wrongful purpose —Clark v. Bland, 106 S.E. 491, 181 N. C. 110.

74. Ky.—Louisville & N. R Co. v. Bennett, 209 S W. 358, 183 Ky. 445.

75. Mass.—Langley v. Boston Elevated Ry Co., 112 N.E. 79, 223 Mass 492
N J.—Haver v. Central R Co, 41 A 916, 62 N.J.Law 282, 72 Am S.R 647, 43 L.R A. 84.

76. Pa.—Rohrback v Pennsylvania R Co, 90 A. 557, 244 Pa. 132.
10 C J. p 892 note 73.

77. Tex.—Houston, etc., R Co. v. Bush, 133 S W. 245, 104 Tex 26, 32 L R A,N.S, 1201, reversing, Civ. App, 123 S.W. 201.

78. Ky.—Tate v Illinois Cent. R. Co, 81 S W. 256, 26 Ky.L. 309.

79. U S.—Rohrback v. Pullman's Palace Car Co, C.C.Pa, 166 F 797.
N.Y.—Barad v. New York Rapid Transit Corporation, 295 N.Y S 901, 162 Misc. 458
N C.—Harrison v. Norfolk-Southern R. Co, 113 S.E. 678, 184 N C. 86.
10 C J. p 889 note 56 [b]

80. Fla.—Hall v. Seaboard Air Line Ry Co., 93 So. 151, 84 Fla. 9.

Stenographer

The rule stated in the text was applied where the employee who committed the assault was a stenographer who was employed in the office of a division superintendent, had no duties other than clerical, and had no power to exercise authority as to, or to provide any arrangement for, the comfort, protection, and assistance of passengers.—Hall v. Seaboard Air Line Ry. Co, 93 So 151, 84 Fla. 9.

81. Mo.—Briggs v. Lusk, App, 190 S W. 380.
N C.—Harrison v. Norfolk-Southern R. Co., 113 S.E 678 184 N.C. 86.
Ohio.—Toledo Rys. & Light Co. v. Duggan, 7 Ohio App. 1.
Tex.—Eastern Texas Electric Co. v. Baker, Civ.App, 238 S.W 335, reversed on other grounds, Com App., 254 S.W. 933.
10 C J. p 891 note 59, 10 C J 889 note 56 [h].

82. Ala.—Birmingham R, etc., Co. v. Baird, 30 So. 456, 130 Ala. 334, 54 L.R.A. 752.
10 C J. p 891 note 59.

83. Tex.—Texas Midland R. R v. Monroe, 216 S.W. 388, 110 Tex. 97, reversing, Civ App., 155 S W. 937.
10 C J. p 891 note 59.

84. Ala.—Ex parte Louisville & N. R. Co., 83 So. 52, 203 Ala. 328, granting certiorari Louisville & N. R. Co. v. Lacey, 82 So. 636, 17 Ala. App. 146.

is made for his own purposes.[85] The liability of the carrier for a willful and malicious assault by a brakeman has been denied, however, where there was no showing that it had been committed in the line or discharge of any duty of the brakeman to the carrier.[86]

Further, it has been held or recognized that this rule of a carrier's liability extends to the conduct of other employees who have, in the discharge of their duties, any connection with the passenger, such as a porter,[87] any member of the train crew,[88] a flagman,[89] a gateman,[90] a railroad telegraph operator,[91] a railroad watchman or guard,[92] a guard on a subway train,[93] the motorman or driver of a street car,[94] or the operator of a taxicab.[95]

A railroad company may also be liable for an assault or personal violence on a passenger by a station agent[96] or by a baggage-master.[97] According to some cases a carrier may be liable even where an assault by a station agent is committed in connection with a matter which is personal to such agent.[98] It has been held, however, that the carrier is not liable for an assault by an employee charged with the duty of checking the baggage of passengers where the assault is not calculated or intended to promote or facilitate the business of the carrier and is not within the scope of the employee's authority.[99]

It has been held that a railroad company is liable to a passenger on its train for an assault committed by a news agent in connection with a sale made by such agent to the passenger.[1]

Relationship of carrier and passenger and period of liability. While it has been broadly stated that, if a person was assaulted and wantonly injured, while on the carrier's car by the conductor, it is immaterial whether or not such person was a passenger,[2] it is generally held that whether or not a carrier is liable, under the rules above considered, usually depends on whether or not the relationship of carrier and passenger exists between it and the injured person when the assault occurs.[3] The carrier's liability for such assaults exists or continues as long as the passenger is being transported,[4] or is

85. Iowa—Fagg v. Minneapolis & S. L. Co, 157 N.W. 148, 175 Iowa 459
10 C.J. p 891 note 60

86. Pa.—Win v. Atlantic City R. Co., 93 A. 876, 248 Pa. 134.

87. Ark.—St Louis, etc., R. Co. v Jackson, 177 S.W. 33, 118 Ark. 391, L.R.A.1915E 668.
10 C.J. p 891 note 61

88. Ky.—Illinois Cent. R. Co. v. Gunterman, 122 S.W. 514, 135 Ky. 438.
N.C.—White v. Norfolk, etc., R. Co., 20 S.E. 191, 115 N.C. 631, 44 Am. S.R. 489.
10 C.J. p 891 note 62

89. Ky.—Louisville & N. R. Co. v. Bennett, 209 S.W. 358, 183 Ky. 445.
La.—Vinot v Louisville & N. R. Co, 134 So. 761, 17 La.App. 197.
10 C.J. p 891 note 62 [a].

90. D.C.—Watkins v. Pennsylvania R. Co., 21 D.C. 1.
Ind.—Indianapolis Union R. Co. v. Cooper, 33 N.E. 219, 6 Ind.App. 202.

91. Mo.—Roberts v. Wabash R. Co., 134 S.W. 89, 153 Mo.App. 638.

Incidental employment by another

The rule stated in the text may apply even though the operator incidentally works as operator for an independent company.—Roberts v. Wabash R. Co., 134 S.W. 89, 153 Mo. App. 638.

92. Mo.—Hedge v. St. Louis, etc., R. Co, 145 S.W. 115, 164 Mo.App. 291
Tex.—Texas, etc, R. Co. v. Bowlin, Civ.App., 32 S.W. 918.

93. N.Y.—Barad v. New York Rapid Transit Corporation, 295 N.Y.S. 901, 162 Misc. 458.

94. Mo.—Shelby v. Metropolitan St. R. Co., 125 S.W. 1189, 141 Mo.App. 514.
N.Y.—Supple v. International Ry. Co, 203 N.Y.S. 749, 208 App.Div. 547.
10 C.J. p 891 note 67.

95. Mo.—Van Hoeffen v. Columbia Taxicab Co, 162 S.W. 694 179 Mo App. 591
Ohio.—Korner v. Cosgrove, 141 N.E. 267, 108 Ohio St. 434, 31 A.L.R 1193.
10 C.J. p 891 note 68

96. Tenn.—Neville v. Southern R Co, 146 S.W. 846, 126 Tenn. 96, 40 L.R.A.,N.S., 995.
10 C.J. p 892 note 69

97. Ga.—Savannah, etc, R. Co. v Quo, 29 S.E. 607, 103 Ga. 125, 68 Am.S.R. 85, 40 L.R.A. 483.
10 C.J. p 892 note 70

98. N.C.—Clark v. Bland, 106 S.E 491, 181 N.C. 110

Alleged defamation of station agent by passenger

A railroad company was liable for an assault by a station agent on a passenger at a railroad station, notwithstanding the assault was made because such agent believed that the passenger had told certain persons that the agent had been peddling whisky on the streets—Clark v. Bland, 106 S.E. 491, 181 N.C. 110

99. Ohio.—Little Miami R. Co v. Wetmore, 19 Ohio St. 110, 2 Am. R. 373.

Assault growing out of earlier controversy

If a person who had had a controversy with a station agent as to the checking of baggage returned to the station, not for the purpose of transacting any legitimate business with the agent but merely to upbraid or reproach the latter because of the earlier, real or supposed grievance, and a difficulty arose between them, the railroad company was not liable for an assault committed by the agent in connection with such difficulty.—Georgia R., etc, Co. v. Richmond, 25 S.E. 565, 98 Ga. 495

1. S.D.—Blankenbaker v. Chicago, M & St P Ry Co, 168 N.W 744, 40 S.D 588, 10 A.L.R 720

2. Mo.—State ex rel. United Rys. Co of St. Louis v. Allen, 240 S.W 117.

3. Ky.—Manatis v Cumberland & M R Co., 300 S.W. 593, 222 Ky. 190.
N.Y.—Supple v. International Ry Co, 203 N.Y.S. 749, 208 App.Div 547.
10 C.J. p 892 notes 72, 73.

Leaving car at front and passing to rear

Where a passenger on a street railroad car felt that he had been mistreated by the conductor and, after alighting from the front of the car according to a rule of the company, necessarily passed to the rear to get the number of the conductor to make his complaint, and while doing so, was assaulted by the conductor and injured, the company was liable—Sims v. Knoxville Railway & Light Co, 208 S.W. 610, 141 Tenn. 238.

4. Ala.—Alabama City, etc., R. Co. v. Sampley, 53 So. 142, 169 Ala. 372.
10 C.J. p 892 note 72.

on the carrier's premises legitimately in connection with such transportation.[5] On the other hand, where the passenger has ceased to be a passenger by the termination of his journey and his departure from the train or car,[6] or where the employee has ceased to be an employee for the time being by reason of having no further duty to discharge to his employer in the premises,[7] so that the duty of the carrier to the injured person as a passenger has been terminated, or that, according to some cases, the assault may be regarded as a matter outside the scope or course of the employment, the carrier is not in general liable; but, where an assault commenced in the carrier's vehicle is kept up after the passenger has alighted therefrom, the carrier is liable, not only for the initial assault, but also for the consequences following therefrom in natural sequence and as a part of one continuous transaction.[8]

There is authority for the view that the rules governing the liability of railroad companies for assaults by employees do not in their entirety apply to street railroad companies, in view of the general rule that a person leaving a street car ceases to be a passenger as soon as he safely steps from the car into a public street and has had a reasonable time to leave the place where he alights, provided he is set down at a place which is reasonably safe and proper for that purpose.[9]

Violation of law by employee. The fact that the employee was violating the law does not necessarily constitute a defense to the carrier for such employee's assault on a passenger.[10]

b. Justification and Provocation

A carrier is not liable for an alleged assault on a passenger by an employee of the carrier where the circumstances are such as to justify the use of force by the employee and he does not use more force than is necessary.

It is not every assault by an employee that gives to the passenger a right of action against the carrier.[11] The passenger has in general no cause of action when he has rendered the assault justifiable, as where by his own wrongful acts or misconduct he has broken the contract of carriage and has cast on the employee both the right and duty of using force,[12] as, for example, in protecting other passengers,[13] or in rightfully ejecting a passenger who has forfeited his right to carriage, as considered infra § 824. The fact that the employee honestly, but mistakenly, supposed that he was justified in making the assault will not, however, exempt the

5. Ga.—Casway v. Atlantic, etc., R Co., 58 Ga. 216.
10 C J p 892 note 72.

6. Ala.—Willingham v. Birmingham Ry., Light & Power Co., 83 So. 95, 203 Ala. 351.
Ill.—See Abt v Chicago Rys Co., 207 Ill App. 314—Hedger v. Chicago City Ry. Co., 207 Ill.App. 26
Pa.—Berryman v. Pennsylvania R Co., 77 A. 1011, 228 Pa. 621, 30 L. R A.,N.S., 1049
Wis.—Will v. Milwaukee Electric Ry. & Light Co., 171 N.W. 658, 169 Wis. 38.
10 C J. p 892 note 73.

Person leaving street car

(1) Where passenger, who had been rebuked by motorman for smoking on car, on alighting applied insulting epithet to motorman, the carrier was not liable for death of passenger from blow during altercation after motorman had left car and followed passenger to place near the sidewalk, such altercation being independent from rebuke for smoking, and the relation of carrier and passenger having terminated.—Will v Milwaukee Electric Ry. & Light Co., 171 N.W 658, 169 Wis 38.

(2) One who was assaulted by a motorman after he had voluntarily left a street car in a public thoroughfare and had taken several steps was not a passenger when assaulted, even though the motorman had started using offensive language toward him while he was yet a passenger.—Willingham v. Birmingham Ry, Light & Power Co, 83 So. 95, 203 Ala. 351.

7. Ark.—St. Louis & S. F. R. Co. v. Wyatt, 105 S.W. 72, 84 Ark. 193.
10 C J. p 892 note 73.

Assault on person not passenger by employee not on duty

Where a person had gone to a railroad station for the purpose of putting his wife and child on board a train of defendant company, had had an altercation with a gateman in respect of the necessity of purchasing a ticket for the child, and subsequently was assaulted by such gateman in the station waiting room after the train had left and while the gateman was off duty during his luncheon period, the railroad company was not liable.—Horecker v Pere Marquette R. Co, 233 Ill.App 278

8. Mo.—O'Brien v. St. Louis Transit Co., 84 S.W. 939, 185 Mo. 263, 105 Am.S R. 592.
10 C.J. p 893 note 74.

Corpus Juris has been cited with approval in Birmingham Electric Co v. Driver, 166 So. 701, 704, 232 Ala. 36.

9. Wis.—Will v Milwaukee Electric Ry. & Light Co., 171 N.W. 658, 169 Wis. 38.

10. Ind.—Southern R Co. v. Crone, 99 N.E. 762, 51 Ind.App 300.

Failure to comply with statutory provision as to identification as employee

In an action by a passenger for personal injuries resulting from being assaulted by defendant's agent, defendant could not escape liability because the agent failed to comply with Burns St.Annot.1908 § 5177, requiring trainmen to wear on their hats or caps a badge of their office, etc.—Southern R. Co v. Crone, 99 N.E. 762, 51 Ind App. 300.

11. U.S.—New Orleans, etc., R. Co. v. Jopes, Miss., 12 S.Ct. 109, 142 U.S. 18, 35 L.Ed. 919.

12. N.Y.—Monnier v New York Cent., etc., R. Co., 67 N.E 569, 175 N.Y. 281, 96 Am.S R 619, 62 L R A. 357, reversing 75 N.Y.S. 521, 70 App Div. 405
10 C.J. p 893 note 77.

13. U.S.—New Orleans, etc., R Co. v. Jopes, Miss., 12 S.Ct. 109, 142 U. S. 18, 35 L.Ed. 919.
10 C.J. p 893 note 78.

Assault by one passenger on another

In protecting a passenger from assault and injury by another passenger, it is the right and duty of the carrier's employees to use such force as is necessary to protect the assaulted passenger.—Parris v. Deering Southwestern Ry. Co., 208 S.W. 97, 203 Mo.App. 182.

carrier from liability, where such was not the case.[14]

The employees in charge may use such force and compulsion as is necessary to secure compliance with a reasonable regulation or direction of the carrier.[15] The fact that the passenger is refusing to comply with a regulation or direction of the carrier will not, however, justify the carrier's employee in using violence not proper nor necessary for the enforcement of the regulation or direction;[16] nor will the fact that the passenger is negligent justify such force.[17] Furthermore, it has been held that, where the disorder occasioned by a passenger consists merely of loud and boisterous language and conduct, the carrier's employees do not have the right to use force merely to quiet such passenger and prevent him from being disorderly and boisterous, and to allow him to continue his journey.[18]

The fault of a passenger short of producing the necessity to act in self-defense will not justify an assault on the part of a passenger.[19] A servant of a carrier may not assault a passenger merely in retaliation for an assault committed on himself or on another passenger[20] or in revenge or punishment under any circumstances.[21]

Previous illicit relations between a railroad employee and a passenger does not relieve the railroad company of liability for the employee's malicious act in assaulting her.[22]

Self-defense. Where, in the course of a difficulty with a passenger who is the aggressor, an employee of the carrier, in self-defense or to protect himself from bodily harm, injures the passenger, in general no liability will thereby be incurred by the carrier, since the fact that the employee is engaged in the service of another does not deprive him of his right of self-defense;[23] and the rule applies where the employee acts under the honest and reasonable be-

14. Ala.—Birmingham R., etc., Co. v. Mullen, 35 So. 701, 138 Ala. 614.
10 C.J. p. 893 note 80

15. N.Y.—Garricott v. New York State Rys., 119 N.E. 94, 223 N.Y. 9, L.R.A.1918D 929, reversing 151 N.Y.S. 1117, 167 App.Div. 953.

Entering car

Inspector ordering men to stand back so that women could board car first could exercise force necessary to compel compliance.—Garricott v. New York State Rys., 119 N.E. 94, 223 N.Y. 9, L.R.A.1918D 929, reversing 151 N.Y.S. 1117, 167 App.Div. 953.

16. Mo.—Parris v. Deering Southwestern Ry. Co., 208 S.W. 97, 203 Mo.App. 182.
N.C.—Harrison v. Norfolk-Southern R. Co., 113 S.E. 678, 184 N.C. 86
10 C.J. p. 893 note 81

Enforcement of law as to separation of white and colored races

Where the law authorizes or requires a carrier to provide separate but equal accommodations for the white and colored races, and a servant of the carrier uses undue violence in enforcing the regulation, the carrier is liable in damages to the injured passenger.—Illinois Cent. R. Co. v. Cox, 96 So. 685, 132 Miss. 471.

Entering car

If, in enforcing a regulation or direction as to passengers entering a car that women shall be allowed to enter first, the employee of the carrier uses more force and compulsion than is necessary, without willfulness, malice, or a purpose of the employee, such employee does not act beyond the scope of his employment, and the carrier may be liable.—Garricott v. New York State Rys., 119 N.E. 94, 223 N.Y. 9, L.R.A.1918D 929, reversing 151 N.Y.S. 1117, 167 App.Div. 953.

Persistent violation of regulation

A passenger who displays a persistent determination to disregard a regulation forbidding passengers from going to sleep in the waiting rooms or lying down on the benches, and by his unlawful conduct exasperates an employee of the company, so as to unfit him from properly performing the duty which he owes his master with respect to his treatment of its patrons, cannot complain that such employee lost his temper and resorted to unnecessary force in compelling observance of the regulations of the company.—Central of Georgia R. Co. v. Motes, 43 S.E. 990, 117 Ga. 923, 9 Am.S.R. 223, 62 L.R.A. 507.

Unlimited corrective methods

While it is the duty of a passenger to observe reasonable regulations and to deport himself in a decent and orderly manner, if he fails to do so, the carrier may not apply unlimited corrective methods.—Louisville & N. R. Co. v. Bennett, 209 S.W. 358, 183 Ky. 445

17. Ill.—Wabash, etc., R. Co. v. Rector, 104 Ill. 296.

18. Mo.—Parris v. Deering Southwestern Ry. Co., 208 S.W. 97, 203 Mo.App. 182.

Want of violence or assault by disorderly passenger

In view of the right, under Rev. St.1909 § 3093, and Mo. St. Annot. § 4708, of servants of a carrier to eject passengers, such servants were not justified in assaulting and whipping into submission a drunken and boisterous passenger merely for the purpose of quieting him and preventing him from being disorderly and boisterous, and to continue to carry him, where there was no showing that such passenger was assaulting and injuring other passengers.—Parris v. Deering Southwestern Ry. Co., 208 S.W. 97, 203 Mo.App. 182.

19. Ala.—Southern R. Co. v. Hanby, 62 So. 871, 183 Ala. 255

20. Ala.—Birmingham R., etc., Co. v. Baird, 30 So. 456, 130 Ala. 334, 89 Am.S.R. 43, 54 L.R.A. 752.

21. Ala.—Birmingham R., etc., Co. v. Baird, supra.

Punishment for actions affecting another passenger

Where boy, train passenger, was teasing girl passenger, and flagman inflicted on boy a severe beating, railroad company was liable.—Vinot v. Louisville & N. R. Co., 134 So. 761, 17 La.App. 197.

22. Ark.—Pine Bluff, etc., R. Co. v. Washington, 172 S.W. 872, 116 Ark. 179
10 C.J. p. 891 note 60 [c].

23. Ky.—Louisville & N. R. Co. v. Bennett, 209 S.W. 358, 183 Ky. 445
La.—Smith v. New Orleans Public Service, 127 So. 16, 12 La.App. 692
Mo.—Wiard v. Dunham, 210 S.W. 873.—Hunter v. Kansas City Rys. Co., 248 S.W. 998, 213 Mo.App. 233.—Parris v. Deering Southwestern R. Co., App., 227 S.W. 1071.
N.C.—Harrison v. Norfolk-Southern R. Co., 113 S.E. 678, 184 N.C. 86.
10 C.J. p. 893 note 84, p. 894 note 85.

Passenger is not justified in assaulting conductor, although the passenger was provoked by the conductor's insulting language.—Louisville & N. R. Co. v. Bennett, 209 S.W. 358, 183 Ky. 445.—Louisville Co. v. Frick, 165 S.W. 649, 158 Ky. 450

Prior altercation

The rule stated in the text ap-

lief that he is in imminent danger,[24] and further, there is some authority to the effect that the stringent rule generally applicable as to the liability of carriers with respect to the high degree of care required of them does not apply in self-defense situations.[25] The carrier may be liable, however, where its employee uses more force than is necessary for his defense and protection and the orderly conduct of the carrier's business,[26] or, as sometimes stated, where the employee uses more force than is necessary or, in the exercise of a sound discretion, appears to be necessary.[27]

A prior assault on the employee by the passenger, which has terminated, will not justify a subsequent assault on the passenger by such employee;[28] and it has been held that, even though the passenger struck the first blow, the carrier cannot avail itself of the right of self-defense, where the passenger's assault was provoked by the carrier's employee, without any provocation on the part of the passenger.[29] Furthermore, the carrier may not relieve itself of liability on the theory that its employee acted in self-defense where the employee neither had any reasonable ground to apprehend danger from the passenger who was assaulted nor actually believed that such danger existed.[30]

Provocation. In general an assault on a passenger by an employee of the carrier is excused entirely only when the provocative conduct is such as in law amounts to a justification of the assault on the ground of self-defense.[31] Mere abusive language or conduct, or opprobrious epithets alone, are not sufficient to justify the commission of an assault by an employee on a passenger,[32] particularly where such language or conduct was provoked by the employee;[37] and this rule applies even though the passenger's language or conduct is in violation of the law.[34] Insulting or opprobrious language used by a passenger after he has unjustifiably been assaulted by an employee of the carrier does not cure nor excuse such prior breach of the contract of carriage.[35] The fact that a passenger threatens to report an employee to the carrier for some supposed or actual improper action on the part of the employee does not justify an assault by the latter.[36]

Where the language or conduct of the passenger is exasperating to the employee and provocative of an assault, it may be shown in mitigation of damages;[37] and, according to some cases, the carrier is not liable where the passenger by his provoking language or conduct intended to bring about a difficulty with the employee who committed the assault,[38] or where such language or conduct is such as to exasperate the employee and unfit him to act toward the passenger in the manner usually required of such employee.[39]

Intoxicated passenger. A carrier is liable if one of its employees assaults and beats a passenger, al-

plied regardless of who may have been the aggressor in a prior, unimportant altercation which had been terminated before the passenger indicated his intention to assault the carrier's employee—Smith v. New Orleans Public Service, 127 So. 16, 12 La.App. 692.

24. U.S.—New Orleans, etc., R. Co. v. Jopes, Miss., 12 S.Ct. 109, 142 U.S. 18, 35 L.Ed. 919
10 C.J. p 893 note 84.

25. U.S.—New Orleans, etc., R. Co. v. Jopes, supra.
Tex.—International, etc., R. Co. v. Washington, 117 S.W. 992, 54 Tex. Civ.App. 166.
10 C.J. p 894 note 86

26. Mo.—Parris v. Deering Southwestern R. Co., App., 227 S.W. 1071.
10 C.J. p 893 note 84, p 894 note 89 [a].

27. Ky.—Louisville & N. R. Co. v. Bennett, 209 S.W. 358, 183 Ky. 445.
10 C.J. p 893 note 84.

28. Mo.—O'Brien v. St. Louis Transit Co., 110 S.W. 705, 212 Mo. 59, 15 Ann.Cas. 86, 84 S.W. 939, 185 Mo. 263, 105 Am.S.R. 592.
Tex.—Galveston, etc., R. Co. v. La Prelle, 65 S.W. 488, 27 Tex.Civ.App. 496

29. Tex.—St. Louis, etc., R. Co. v. Huddleston, Civ.App., 178 S.W. 704.
10 C.J. p 894 note 88.

30. U.S.—Memphis St. R. Co. v. Townes, C.C.A.Tenn., 281 F. 127.
10 C.J. p 894 note 89 [c] (2).

31. Mo.—Hunter v. Kansas City Rys. Co., 248 S.W. 998, 213 Mo.App. 233.

32. Iowa.—Fagg v. Minneapolis & St. L. R. Co., 157 N.W. 148, 175 Iowa 459
Ky.—Louisville & N. R. Co. v. Bennett, 209 S.W. 358, 183 Ky. 445
Mo.—Hunter v. Kansas City Rys. Co., 248 S.W. 998, 213 Mo.App. 233
N.C.—Harrison v. Norfolk-Southern R. Co., 113 S.E. 673, 184 N.C. 86.
10 C.J. p 894 note 89.

Language with intent to insult, or to provoke an assault

The refusal of an instruction, to the effect that the use by the passenger of abusive or insulting language to an employee of the carrier with intent to insult such employee or to provoke an assault by him would estop the passenger from asserting a claim for damages for an assault, was proper.—Louisville & N. R. Co. v. Bennett, 209 S.W. 358, 183 Ky. 445.

33. U.S.—Texas, etc., R. Co. v. Williams, Tex., 62 F. 440, 10 C.C.A. 463.
10 C.J. p 895 note 90.

34. Iowa.—Heggen v. Ft. Dodge etc., R. Co., 130 N.W. 148, 150 Iowa 313.
10 C.J. p 895 note 91.

35. Ky.—Louisville & N. R. Co. v. Bennett, 209 S.W. 358, 183 Ky. 445.

36. Mo.—Sterneman v. Spring Tract. Co., 163 S.W. 358, 178 Mo.App. 64.

37. Iowa.—Fagg v. Minneapolis & St. L. R. Co., 157 N.W. 148, 175 Iowa 459.
Mo.—Hunter v. Kansas City Rys. Co., 248 S.W. 998, 213 Mo.App. 233.
10 C.J. p 895 note 92

38. N.Y.—Baker v. Brooklyn, etc., R. Co., 130 N.Y.S. 690, 146 App.Div. 304.
Tex.—Missouri, etc., R. Co. v. Gerren, 121 S.W. 905, 57 Tex.Civ.App. 34.
10 C.J. p 895 note 93.

39. Ga.—Central of Georgia R. Co. v. Motes, 43 S.E. 990, 117 Ga. 923, 97 Am.S.R. 223, 62 L.R.A. 507.
10 C.J. p 895 note 93.

though the passenger is intoxicated and has treated the employee rudely.[40]

§ 692. Abusive and Insulting Language or Conduct

A carrier is under a duty to protect a passenger from insults and indignities on the part of its employees and in general is liable for indecent, abusive, and insulting language or conduct of its employees toward passengers.

A carrier is under a duty to protect passengers from insults and indignities on the part of the carrier's employees or servants, and indecent, abusive, and insulting language, or rude and insulting conduct,[41] on the part of the employee of a carrier, tending to cause a breach of the peace, or to humiliate or mortify a passenger, will entitle the passenger to recover damages, whether the insult is offered from malice or as the result of negligence by the employee;[42] and, even though the carrier did not authorize or ratify the objectionable language or conduct,[43] or was not negligent in selecting the employee,[44] the passenger is not deprived of the transportation for which he has contracted,[45] or, according to some cases, the passenger does not suffer physical injury,[46] unless, according to some

40. Tex.—Friar v. Orange, etc., R. Co., 101 S.W. 274, 45 Tex.Civ.App. 564.
10 C.J. p 895 note 94.

41. U.S.—Austro-American S. S. Co v. Thomas, N.Y., 248 F. 231, 160 C.C.A. 309, L.R.A.1918D 873.
Ala.—Tomme v. Pullman Co., 93 So. 462, 207 Ala. 511.
Ky.—Payne v. Moore, 244 S.W. 869, 196 Ky. 454—Louisville & N. R. Co. v. Bennett, 209 S.W. 358, 183 Ky. 445.
Mass.—Langley v. Boston Elevated Ry. Co., 112 N.E. 79, 223 Mass. 492.
Mo.—Hendrix v. United Rys. Co. of St. Louis, 193 S.W. 812.
N.D.—Barbknecht v. Great Northern Ry. Co., 212 N.W. 776, 55 N.D. 104.
Ohio—Korner v. Cosgrove, 141 N.E. 267, 108 Ohio St. 484, 31 A.L.R. 1193.
Tex.—Wright v. Schaff, Civ.App., 228 S.W. 333—Texas & N. O. R. Co. v. Tillman, Civ.App., 197 S.W. 1128.
10 C.J. p 895 note 97.

Statutory obligation

The obligation of a carrier under Civ.Code 1910 § 2714 to exercise extraordinary diligence on the part of himself and his agents to protect the lives and persons of his passengers includes an obligation of diligence to protect passengers from insult by the carrier's employees.—Georgia Ry. & Power Co. v. Turner, 125 S.E. 598, 33 Ga.App. 101.

Rights of passengers stated

Passengers on railway trains have by virtue of their contract for transportation the right to be treated by the servants and employees of the carrier with kindness, respect, courtesy, and due consideration, and to be protected against insult, indignity, and abuse from such servants and agents.—Hall v. Seaboard Air Line Ry. Co., 93 So. 151, 84 Fla. 9.

Accusation of attempt to defraud

A railroad company was liable to a passenger where its conductor, after the passenger had given him a ticket, continued to demand a ticked and, in a loud voice and in the presence of other passengers, accused the passenger of attempting to defraud the railroad company.—Stewart v. Pennsylvania R. Co., 6 Pa.Dist. & Co. 125.

Enforcement of law as to separation of white and colored races

Where the law authorizes or requires a carrier to provide separate but equal accommodations for the white and colored races, and a servant of the carrier, in enforcing such regulation, uses insulting and offensive language to a passenger, the carrier is liable in damages to the passenger.—Illinois Cent. R. Co. v. Cox, 96 So. 685, 132 Miss. 471.

Male passenger

The rule stated in the text is not limited to female passengers, but applies to male passengers as well.—Southern Ry. Co. v. Carroll, 70 So. 984, 14 Ala.App. 374.

Honest mistake of employee

Conceding that ticket agent made honest mistake, it would not relieve railroad company if agent was rude and insulting in insinuating that plaintiff was attempting to obtain ticket without paying therefor.—Knoell v. Kansas City, C., C. & St. J. Ry. Co., Mo.App., 198 S.W. 79.

Justification or provocation

Conduct of passenger on train in tendering conductor cash value to point where train did not stop did not justify conductor in using insulting language to him, as by calling him a lunatic. If railroad passenger tendered conductor cash fare to point where train did not stop merely to provoke altercation in order to make case against road, it was matter of defense in mitigation of damages, even if passenger's technical rights as passenger were violated by conductor.—Lipman v. Atlantic Coast Line R. Co., 93 S.E. 714, 108 S.C. 151, L.R.A.1918A 596.

42. Ga.—Wolfe v. Georgia R., etc., Co., 58 S.E. 899, 2 Ga.App. 499.
Tex.—Gulf, etc., R. Co. v. Luther, 90 S.W. 44, 40 Tex.Civ.App. 517.
10 C.J. p 896 note 99.

43. Colo.—Bleecker v. Colorado, etc., R. Co., 114 P. 481, 50 Colo. 140, 33 L.R.A.,N.S., 386.
N.C.—Harrison v. Norfolk-Southern R. Co., 113 S.E. 678, 184 N.C. 86.
S.C.—Lipman v. Atlantic Coast Line R. Co., 93 S.E. 714, 108 S.C. 151, L.R.A.1918A 596.
Tenn.—Knoxville Tract. Co. v. Lane, 53 S.W. 557, 103 Tenn. 376, 46 L.R.A. 549.
10 C.J. p 895 note 97.

44. N.C.—Harrison v. Norfolk-Southern R. Co., 113 S.E. 678, 184 N.C. 86.
10 C.J. p 896 note 99 [a] (1).

45. W.Va.—John v. Baltimore & O. R. Co., 95 S.E. 589, 82 W.Va. 149.

46. Ala.—Louisville & N. R. Co. v. Robinson, 105 So. 874, 213 Ala. 522.
Pa.—Stewart v. Pennsylvania R. Co., 6 Pa.Dist. & Co. 125.
S.C.—Medlin v. Southern Ry. Co., 141 S.E. 185, 143 S.C. 91, 56 A.L.R. 767—Lipman v. Atlantic Coast Line R. Co., 93 S.E. 714, 108 S.C. 151, L.R.A.1918A 596.
10 C.J. p 895 note 97.

Breach of duty growing out of contract

The fact that the cause of action stated in the complaint is for breach of duty growing out of the contract of carriage does not prevent the application of the rule stated in the text.—Southern Ry. Co. v. Carroll, 70 So. 984, 14 Ala.App. 374.

Reason for rule

A breach of the obligation of a common carrier to its passenger, working injury to him, is a cause of action standing on a higher plane than that of one arising from an injury by mere negligence, because the relation subsisting between them is founded on a direct, special, and personal obligation, peculiar in its nature, and not on general law constituting the basis of the relation subsisting between many other persons, such as neighbors or strangers, who stand on an equal footing and deal with each other at arm's length, wherefore conduct on the part of a carrier working grievous injury only to the feelings and sensibilities of a

cases, the employee's language is provoked or justified by the passenger's conduct or language.[47]

According to some cases, the carrier is absolutely liable as insurer for the protection of a passenger from insults by its employees unless the passenger alone is the cause of the trouble.[48] It has been held, however, that the liability of a carrier as insurer against indignities offered to a passenger by its employees rests on the relation which such employees bear to the carrier as persons whom the carrier has employed in the general transportation of passengers.[49] In some cases the duty or obligation to protect a passenger from insults and indignities on the part of the carrier's employees has been characterized or described generally as a duty or obligation to exercise the highest degree of care and diligence,[50] or the utmost diligence and care consistent with the proper management of its business.[51] According to some cases, the carrier owes only the duty to exercise ordinary care to protect a passenger waiting at a station from insults, abuse, and threats of its employee who is not acting in discharge of any duty owing to the carrier and who is not in charge of the station,[52] particularly where the offending employee has no connection with the passenger service,[53] and there is no liability in such case where responsible employees of the carrier have no notice of the misconduct of the offending employee nor opportunity to prevent such misconduct.[54]

In order that a passenger may recover for an alleged insult, it must appear not only that the facts and circumstances were such that the passenger was insulted and humiliated, but also that they were such as would reasonably tend to humiliate any person in similar circumstances.[55]

Female passenger. To a female passenger a carrier owes an especial duty to protect her from insulting remarks,[56] gross carelessness amounting to rudeness,[57] indecent assaults, or improper liberties[58] on the part of its employees, and the carrier is in general liable for language or conduct of an employee which constitutes a breach of the carrier's duties in this regard. It has been said that such duty should not be frittered away by nice questions as to whether the employee was acting within the scope of his employment.[59]

The carrier is not liable as an insurer, however, for an assault on a female passenger made by an

passenger is actionable.—John v. Baltimore & O. R. Co., 95 S.E. 589, 82 W.Va. 149.

Damages for mental suffering in the absence of physical injury see infra § 771.

47. Ga.—Binder v. Georgia R., etc., Co., 79 S.E. 216, 13 Ga.App. 381.
10 C.J. p. 895 note 96.

48. N.C. — Harrison v. Norfolk-Southern R. Co., 113 S.E. 678, 184 N.C. 86.
10 C.J. p. 889 note 56 [b].

49. Fla.—Hall v. Seaboard Air Line Ry. Co., 93 So. 151, 84 Fla. 9.

50. Ky.—Louisville & N. R. Co. v. Bennett, 209 S.W. 358, 183 Ky. 445.

51. Mass.—Langley v. Boston Elevated Ry. Co., 112 N.E. 79, 223 Mass. 492.

52. Ky.—Tate v. Illinois Cent. R. Co., 81 S.W. 256, 26 Ky.L. 309.

53. Ky.—Louisville & N. R. Co. v. Lindsay, 279 S.W. 965, 212 Ky. 516.

54. Ky.—Louisville & N. R. Co. v. Lindsay, supra.

Freight yard clerk

Carrier was not liable for conduct of freight yard clerk having no connection with passenger service, who, acting wholly on his own personal responsibility and in relation to a personal matter, used abusive and insulting language and threats against prospective passenger standing on depot platform at a time when no employee in authority was present to restrain him or had notice of his purpose.—Louisville & N. R. Co. v. Lindsay, 279 S.W. 965, 212 Ky. 516.

Porter employed to handle mail

Carrier and terminal operator were not liable for insulting language directed to passenger through train window, while train was standing in station, by porter whose duties were connected with mail, in absence of evidence that either carrier or terminal company knew of occurrence in time to prevent it or had reason to anticipate it.—Massengale v. Atlanta, B. & C. R. Co., 168 S.E. 111, 46 Ga.App. 484.

55. Ga.—Georgia R., etc., Co. v. Baker, 58 S.E. 88, 1 Ga.App. 832.

56. N.D.—Barbknecht v. Great Northern Ry. Co., 212 N.W. 776, 55 N.D. 104.
10 C.J. p. 896 note 1.

Insulting, indecent, or opprobrious language

(1) Where the porter on a train, while on duty as porter, used opprobrious epithets and insulting language to a female passenger, the carrier was liable in damages for such misconduct — Barbknecht v. Great Northern Ry. Co., 212 N.W. 776, 55 N.D. 104.

(2) The fact that a passenger's immodest remarks encourage the conductor to make an improper proposal does not relieve the carrier of liability for the insult, but it may be considered in mitigation of damages.—Strother v. Aberdeen, etc., R. Co., 31 S.E. 386, 123 N.C. 197.

57. La.—Spearman v. Toye Bros. Auto & Taxi-Cab Co., 114 So. 591, 164 La. 677.
10 C.J. p. 896 note 1.

58. Fla.—Hall v. Seaboard Air Line Ry. Co., 93 So. 151, 84 Fla. 9.
10 C.J. p. 896 note 1.

Assault or ravishment

(1) A railroad company was liable for an assault on a passenger with intent to commit rape by one employed as a baggage-master on the train.—Savannah, etc., R. Co. v. Quo, 29 S.E. 607, 103 Ga. 125, 68 Am.S.R. 85, 40 L.R.A. 433.

(2) A railroad company has been held liable where a rape on a passenger was committed by a brakeman.—Garvik v. Burlington, etc., R. Co., 108 N.W. 327, 131 Iowa 415, 117 Am.S.R. 432.

(3) The carrier was liable where the driver of his taxicab committed rape on a female passenger.—Korner v. Cosgrove, 141 N.E. 267, 108 Ohio St. 484, 31 A.L.R. 1193.

(4) If plaintiff consented to a carrier's employee ravishing her because of fear, there was not only an actionable wrong, but an actual rape.—Dickinson v. Scruggs, Tenn., 242 F. 900, 155 C.C.A. 488.

59. Ala.—Birmingham R., etc., Co. v. Parker, 50 So. 55, 161 Ala. 248.

employee who is not connected with the operation of the train or with the care and safety of passengers, where such employee is riding on a train as a passenger in connection with other business of the carrier; in such case the carrier is liable only if it fails to exercise due care to protect the passenger.[60] A carrier is not ordinarily liable where the relationship of carrier and passenger does not exist between it and the female on whom an indecent assault is committed by employees of such carrier.[61]

Lascivious proposals of an employee if later voluntarily accepted do not create liability on the part of the carrier.[62]

Mere rudeness of language or brusqueness of behavior on the part of the employee may not be such an injury to the passenger as to entitle him to recover damages.[63]

§ 693. Acts of Employee as Police Officer; Special Officer

The fact that employees of a carrier are clothed with powers of police officers does not necessarily relieve the carrier of liability to passengers for acts of such officers. The carrier is not in general liable for the acts of police officers, as such, where such officers are appointed or commissioned by the public authorities, notwithstanding the appointment of such officers is procured, and their compensation is paid, by the carrier.

The conductor of a train, in looking after and protecting his passengers, is to some extent clothed with the powers of a police officer.[64] The fact, however, that a conductor or other employee is clothed by law with police authority affords no immunity to the carrier for damages resulting from his wrongful discharge of his duty, either as employee of the carrier or under color of his police authority;[65] hence the carrier is liable for such employee's wrongful acts in carrying out the law requiring the separation of white and colored passengers,[66] or in committing an assault or other wrong on a passenger.[67] It has been held, however, that, where such employee is not liable to one for assault and battery, the carrier is not liable.[68]

The carrier may be held responsible for the act of its employee in voluntarily assisting a police officer in making an illegal search of a passenger,[69] and it cannot be excused on the theory that an officer may require assistance even in making an illegal search where it does not appear that the officer requested assistance.[70] On the other hand, where a special agent acting in the scope of his employment causes the arrest of a person, the carrier is not liable if such agent exercised ordinary care, and there was probable cause for having such person arrested.[71]

Officer appointed by public authorities; special officer. An officer duly appointed by public authorities for police duty in connection with a railroad, whose compensation is paid by the railroad company, is prima facie at least a public officer for whose acts, as such officer, the company which procures the appointment is not liable.[72] Nevertheless, if such officer is engaged in some sort of service for the company and does a wrongful act in the course of such service, and within the scope of his employment, or by express direction of the company, the latter is liable therefor;[73] hence, if such an offi-

60. Fla.—Hall v. Seaboard Air Line Ry. Co., 93 So. 151, 84 Fla. 9.

61. Ky.—Manatis v. Cumberland & M. R. Co, 300 S.W. 593, 222 Ky. 190.

Assault in station

Railroad company was not liable for indecent assault by its employees on plaintiff waiting in depot for train of different railroad, since such conduct was an independent wrong committed by the employees as individuals and out of the line of their duty, for which the doctrine of respondeat superior could not be invoked—Manatis v. Cumberland & M. R. Co, 300 S.W. 593, 222 Ky. 190.

62. U.S. — Dickinson v. Scruggs, Tenn, 242 F. 900, 155 C.C.A. 488.

63. Mass.—McCumber v. Boston El R Co, 93 N.E. 698, 207 Mass 559, 32 L.R.A.,N.S., 475.
10 C.J. p 896 note 3.

64. N.C.—Brown v Atlantic Coast Line R Co, 71 S.E. 777, 161 N.C. 573.
Right to arrest or detain passenger generally see infra § 827.

65. Va.—Southern R. Co. v. Grubbs, 80 S.E. 749, 115 Va. 876
10 C.J. p 896 note 6.

66. Ga.—Wolfe v. Georgia, etc., Co, 58 S.E. 899, 2 Ga.App. 499—Georgia R, etc, Co. v. Baker, 58 S.E. 88, 1 Ga.App. 832.

67. Mont.—Rand v. Butte Electric R Co., 107 P. 87, 40 Mont. 398.
10 C.J. p 896 note 8.

68. Mass.—Horgan v. Boston El R. Co, 94 N.E. 386, 208 Mass. 287.

69. Ala.—Nashville, etc, R. Co. v. Crosby, 62 So. 889, 183 Ala. 237.

70. Ala.—Nashville, etc, R. Co. v. Crosby, supra.

71. Ark.—St. Louis & S.F. Ry. Co v. Wyatt, 105 S.W. 72, 84 Ark. 193.

72. N.J.—Goldberg v. Central R. Co of New Jersey, 117 A. 479, 97 N.J.Law 374.
10 C.J. p 897 note 10.

Officer appointed by governor under statute

The duty of a railway policeman appointed by the governor, under Comp.St.Suppl 1911–1915 p 113, to preserve peace is superior to his duty as an employee of a railway company performing its duty as a carrier to preserve a passenger's personal safety. As such statute enacts that such police officers shall have all the powers of policemen and constables in criminal cases, they have the paramount duty of preserving the public peace free from interference by a railway company in its effort to exercise the care required for its passengers. A railway policeman commissioned by the governor under such statute, being a state officer charged with public duties and responsible to the state, not the railway company by whom he was employed, unless his action was instigated by the company or its officers or employees, the railway company was not liable as for an assault for his act done in pursuance of his duty to preserve order.—Goldberg v. Central R. Co of New Jersey, 117 A. 479, 97 N.J. Law 374.

73. W.Va.—McKain v. Baltimore, etc., R. Co., 64 S.E. 18, 65 W.Va

cer in the performance of such services wrongfully inflicts injury on a passenger, the carrier may be liable therefor, even though the injurious act so done was willful and malicious, and prompted by motives and purposes personal to the employee.[74] Under some statutes which authorize railroad companies to appoint and employ policeman at the expense of such companies, a railroad company is liable for the wrongful acts toward a passenger of an officer so appointed and employed, as, for example, for an assault.[75]

A railroad company responsible for the appointment of a special police officer cannot regard him as a de facto officer after his office is vacated by failure to qualify, since it is bound to know that he is an officer de jure before he is given employment on its trains.[76]

§ 694. Passengers under Disability

a. In general
b. Becoming ill or incapacitated during transit

a. In General

The circumstances may be such as to impose on a carrier the duty to give, through its employees, special care and attention to passengers who are under physical or mental disability.

The general rule as to the duty to care for the safety of a passenger is applicable in case of passengers who are suffering from some infirmity or disability,[77] particularly where the employees of the carrier have no knowledge or reason to believe that the passenger is laboring under a disability.[78] A carrier is presumed to know, however, that feeble or infirm persons may be passengers;[79] such a contingency should be taken into consideration, and, if such persons are injured by negligence in operating the train, they are entitled to recover even though the injury would not have happened to a person in sound health.[80]

The care which should be exercised may vary with the age, sex, or bodily infirmity of the passenger,[81] and, if a passenger's sickness or disability is known to some employee in charge of the train or premises, it is knowledge of the carrier,[82] and there is a duty to assist such passenger;[83] the care given to him should be commensurate with his infirmities or condition,[84] or, as sometimes stated.

233, 131 Am.S.R. 964, 23 L.R.A., N.S., 289, 17 Ann.Cas. 634.
10 C.J. p. 897 note 11, p. 896 note 6 [a].

74. W.Va.—Moss v. Campbells Creek R. Co., 83 S.E. 721, 75 W.Va. 62, L.R.A.1915C 1183.
10 C.J. p. 897 note 12.

75. Okl.—Baker v. Hines, 213 P. 313, 88 Okl. 266.

76. Ky.—Cincinnati, etc., R. Co. v. Cundiff, 179 S.W. 615, 166 Ky. 594, Ann.Cas.1916C 513.

77. Ark.—Price v. St. Louis, etc., R. Co., 88 S.W. 575, 75 Ark. 479, 492, 112 Am.S.R. 79.
10 C.J. p. 897 note 19.

78. Del.—Clayton v. Philadelphia, B. & W. R. Co., 106 A. 577, 7 Boyce 343.
Tex.—Chicago, R. I. & G. Ry. Co. v. Sears, Com.App., 210 S.W. 684, reversing, Civ.App., 155 S.W. 1003.
10 C.J. p. 897 note 20.

Notice not brought home to carrier

Negligence predicated on the extraordinary duty owing by carriers and their employees to sick, aged, or infirm passengers is not established where notice of the condition of the passenger is not brought home to the carrier.—Louisville & N. R. Co. v. Turner, 292 S.W. 758, 219 Ky. 92.

Passenger apparently able to care for himself

The contract of a common carrier of passengers has reference in general to passengers in normal health, and, in the absence of special agreement, it is under no duty to proffer special care or treatment to a passenger in ill health, who appears to be able to look after himself and to procure any extra care or service required.—Churchill v. United Fruit Co., D.C.Mass., 294 F. 400.

79. Tex.—East Line, etc., R. Co. v. Rushing, 6 S.W. 334, 69 Tex. 306.
10 C.J. p. 897 note 21.

Pregnant women

Knowledge that pregnant women may be passengers on busses is chargeable to operators thereof.—Consolidated Coach Corporation v. Garmon, 26 S.W.2d 20, 233 Ky. 464.

80. Mass.—Yancey v. Boston El. R. Co., 91 N.E. 202, 205 Mass. 162, 137 Am.S.R. 431, 26 L.R.A.,N.S., 1217—Spade v. Lynn, etc., R. Co., 52 N.E. 747, 172 Mass. 488, 70 Am.S.R. 298, 43 L.R.A. 832.
10 C.J. p. 897 note 21.

Corpus Juris has been cited with approval in Carroll v. St. Paul Union Depot Co., 204 N.W. 470, 164 Minn. 28.

81. N.J.—Staines v. Central R. Co., 61 A. 385, 72 N.J.Law 268.
10 C.J. p. 898 note 22.

Degree and sufficiency of care

It has been said that the degree of care required is the same as to all passengers, that is to say, the greatest care, but that the care sufficient to insure the safety of one person may not be sufficient for others, physically less able to take care of themselves; therefore, it is not true that a carrier owes to every passenger precisely the same care, without regard to age, sex, or bodily infirmity.—St. Louis, etc., R. Co. v. Finley, 15 S.W. 266, 79 Tex. 266.

82. N.H.—Foss v. Boston, etc., R. Co., 21 A. 222, 66 N.H. 256, 49 Am.S.R. 607, 11 L.R.A. 367.
10 C.J. p. 898 note 24.

Termination of relation of carrier and passenger

After a person who was mentally deranged had ceased to be a passenger by leaving a train voluntarily, negligence of the railroad company for failure to care for such person could not be predicated on failure of station agent, telegraph operator, and section hands, who had knowledge of such condition, to protect passenger from injury or report his condition to the company, the knowledge of such employees not being imputable to company, inasmuch as it was not their duty to make such report to the company.—Chicago, R. I. & G. Ry. Co. v. Sears, Tex.Com.App., 210 S.W. 684, reversing, Civ.App., 155 S.W. 1003.

83. Ala.—Southern Ry. Co. v. Hayne, 95 So. 879, 209 Ala. 186.

84. U.S.—Chicago, B. & Q. R. Co. v. Schrimpf, Minn., 236 F. 200, 149 C.C.A. 390.

with the responsibility assumed by the carrier,[85] and may be greater than that required as to ordinary passengers.[86]

While, under certain circumstances, it may be the duty of the carrier's employees to observe a passenger's condition,[87] according to some cases, there is no obligation to anticipate disabilities nor to be on the lookout for them,[88] as, for example, in determining the necessity for assisting a passenger to board or alight from the vehicle of carriage, considered below in § 727. Notwithstanding the employees of the carrier have no knowledge or reason to believe that a passenger is incapacitated at the time he is received as a passenger, the carrier owes such passenger a duty to exercise such care as may reasonably be necessary for the passenger's safety where knowledge of his condition is acquired after he becomes a passenger.[89]

While a railroad company is not bound to accept for transportation without an attendant one who because of physical or mental disability is unable to take care of himself, as shown above in § 538, yet, if its employees voluntarily accept such a person, unattended, they should render to him such special care and assistance as his condition requires in order that he may safely be transported,[90] especially where the employee in charge of the train agrees to take care of such person,[91] or, at least, where a duly authorized employee of the carrier contracts specially to carry such a person.[92] Notwithstanding the employees of the carrier have no knowledge or reason to believe that a passenger is under mental disability when he is received as a passenger without an attendant, the carrier owes to such passenger a duty to exercise due care for his safety after his condition is discovered.[93] The carrier must bestow on a passenger who is mentally deranged and who has no attendant any special care and attention, in addition to that given to an ordinary passenger, which reasonable prudence and foresight demand for such passenger's safety, considering the conduct and disposition of mind manifested by the passenger or any conduct or disposition which might reasonably be anticipated from one in his mental condition; the additional care in such case is, however, measured by the knowledge of the passenger's condition which the carrier has or should obtain by observation, and no added duty is imposed where the carrier has no notice of such condition and it is not observable.[94]

Del.—Clayton v. Philadelphia, B. & W. R. Co, 106 A. 577, 7 Boyce 343.
Pa.—Schmuck v. Heilman, 14 Pa. Dist & Co. 449.
Tex.—Gulf, C. & S. F. Ry. Co. v. Hitt, Civ.App., 60 S.W.2d 864.
10 C.J. p 898 note 24.

Reasonable care in view of condition
Duty of carrier to disabled passenger, who has to be assisted upon train, and of whose disability carrier has knowledge, is that of care reasonably necessary for passenger's safety, in view of his condition.—Carroll v. St. Paul Union Depot Co., 204 N.W. 470, 164 Minn. 28.

85. Mich.—Tozer v. Michigan Cent. R. Co, 162 N.W. 280, 195 Mich. 662

Condition of passenger
Care commensurate with the responsibility assumed as to a sick, aged, or otherwise infirm passenger is such care as is reasonably necessary to protect him in view of his condition.—Steketee v. Waters, 159 N.W. 368, 193 Mich. 177.

86. Del.—Clayton v. Philadelphia, B. & W. R. Co, 106 A. 577, 7 Boyce 343.
Ky.—Casteel v. American Airways, 88 S.W.2d 976, 261 Ky. 818.
N.C.—Harrison v. Norfolk-Southern R. Co, 113 S.E. 678, 181 N.C. 86.
Okl.—Dickinson v. Bryant, 172 P. 432, 69 Okl. 297, L.R.A.1918E 978—St. Louis & S. F. Ry. Co. v. Dobyns, 157 P. 735, 57 Okl. 643.
Pa.—Jameitis v. Wilkes-Barre Ry. Co., 121 A. 317, 277 Pa. 437—Kradel v. Pittsburgh, H. B. & N. C. Ry. Co., 100 A. 128, 255 Pa. 427.
10 C.J. p 898 notes 24, 27 [a] (2).

87. S.C.—Brackett v. Southern R. Co., 70 S.E. 1026, 88 S.C. 447, Ann. Cas.1912C 1212.
10 C.J. p 898 notes 25, 22 [a].

88. Ala.—Southern Ry. Co. v. Hayne, 95 So. 879, 209 Ala. 186.
10 C.J. p 898 note 24 [a] (2).

89. Tex.—Stewart v. Houston & T. C. Ry. Co., Civ.App., 229 S.W. 577

Mental incapacity
The rule stated in the text has been applied or recognized in respect of a passenger whose mind was deranged.—Chicago, R. I. & G. Ry. Co. v. Sears, Tex.Com.App., 210 S.W. 684, reversing, Civ.App., 155 S.W. 1003—Stewart v. Houston & T. C. R. Co., Tex.Civ.App., 229 S.W. 577.

90. Tex.—Chicago, R. I. & G. Ry. Co. v. Sears, Com.App., 210 S.W. 684, reversing, Civ.App., 155 S.W. 1003.
10 C.J. p 898 note 27.

91. Ark.—Yazoo & M. V. R. Co. v. Littleton, 5 S.W.2d 930, 177 Ark. 199, 59 A.L.R. 936.

92. Miss.—Yazoo & M. V. R. Co. v. O'Keefe, 88 So. 1, 125 Miss. 536.

Care required under circumstances
A railroad company has power to contract specially to carry sick or incompetent persons who are unattended, and, if it makes such contract through a duly authorized employee and carries such persons, it owes them such reasonable care and attention as the circumstances call for.—Yazoo & M. V. R. Co. v. O'Keefe, 88 So. 1, 125 Miss. 536.

93. Tex.—Chicago, R. I. & G. Ry. Co. v. Sears, Com.App., 210 S.W. 684, reversing, Civ.App., 155 S.W. 1003—Stewart v. Houston & T. C. R. Co, Civ.App., 229 S.W. 577.

94. Tex.—Chicago, R. I. & G. Ry. Co. v. Sears, Com.App., 210 S.W. 684, reversing, Civ.App., 155 S.W. 1003.

Leaving train while in motion and subsequent injury
Where the only information possessed by trainmen of passenger's abnormal mental condition was that he was laboring under a delusion that some one wanted to kill or rob him, and passenger was otherwise apparently sane, there being nothing in his manner to indicate that he was dangerous to other passengers or that he was likely to injure himself, trainmen could not anticipate that he would leave train while it was in motion or that he would thereafter voluntarily injure himself.—Chicago, R. I. & G. Ry. Co v. Sears, Tex.Com.App., 210 S.W. 684, reversing, Civ.App., 155 S.W. 1003.

According to some cases, where a passenger who is physically or mentally disabled is attended by another person who is apparently capable of rendering the necessary assistance, the carrier is not under the duty to pay special attention to such passenger,[95] and, where an insane person has his own attendant and the carrier does not contract to carry such person unattended, the carrier is not liable for an injury to such person resulting from his acts which are not anticipated by the carrier's employees.[96] It has been held, however, that, even where an insane passenger is accompanied by an attendant, the carrier, through its employees, is not entitled to rely entirely on such attendant to protect such passenger from injury where such employees have notice of the passenger's condition and have promised to render assistance;[97] in such case it is the duty of such employees to use the highest degree of diligence which a reasonably prudent man would use, consistent with the proper operation of the train, to prevent such passenger from jumping from the train.[98]

Children. In respect of a passenger who is a minor, the carrier is bound to exercise a high degree of care,[99] and, as to a young child, it has been asserted that the carrier owes the highest practical degree of care on the part of its employees in carrying out the contract of carriage,[1] and that the age of such child is a factor which must be considered in the measurement of such care.[2] A high degree of care in view of the circumstances is required in respect of a child of tender years,[3] and it has been held or recognized that greater care is required as to such a child than is necessary as to adults.[4]

The care to be exercised toward a young child who is traveling alone must be proportioned to the degree of danger inherent in his youth and inexperience.[5] and a carrier that specially contracts, through a duly authorized employee, to carry a child of tender years who is unattended owes the duty to such child of such reasonable care and attention as the circumstances call for, and is liable for its neglect of such duty.[6]

In respect of a child of tender years, it has been held or recognized that the primary duty of caring for such child is on the parents or their representative who has the immediate custody of such child,[7] and that, where such child is in the care of his parent, the carrier, through its employees, has the right to rely on the presumption that the parent will take such care of the child as the natural love of the parent would prompt him or her to exercise under the circumstances.[8] Where, however, the carrier's employees who are engaged in the operation of its train know, or, in the exercise of reasonable care and diligence, should know, that such child is or will be exposed to danger or injuries by acts or negligence of the carrier's employees, the carrier is not entitled to act on such presumption and is under the duty to use all reasonable and practicable care and diligence to avoid the danger and avert the injury.[9]

While a carrier is not required to construct or operate its cars for the purpose of carrying unruly children, where it elects to take such a child as a passenger on its car, it is bound to use reasonably adequate care for his protection or else to eject him, notwithstanding such child is in charge of a nurse or attendant.[10]

95. La.—Gates v. Bisso Ferry Co., App., 172 So. 829.

96. Miss.—Boyd v. Alabama & V. Ry. Co., 71 So. 164, 111 Miss. 12, suggestion of error denied 71 So. 655.
10 C.J. p. 898 note 27 [e] (2).

97. Ark.—Pittman v. Hines, 221 S.W. 474, 144 Ark. 133.

98. Ark.—Pittman v. Hines, supra.

99. N.J.—Heinige v. Little Ferry Bus Line, 171 A. 135, 12 N.J.Misc. 213.

1. U.S.—Chicago, M. & St. P. Ry. Co. v. Harrelson, C.C.A.Mo., 14 F.2d 893.

2. U.S.—Chicago, M. & St. P. Ry. Co. v. Harrelson, supra.

3. Ohio.—Morris v. Cincinnati Traction Co., 20 Ohio N.P.,N.S., 607.

Infant in arms

High decree of care due passengers inures to baby carried by woman passenger.—Southern Ry. Co. v. Lawson, 114 So. 290, 217 Ala. 1, 55 A.L.R. 385, reversing 114 So. 288, 22 Ala.App. 180.

4. Neb.—Kruger v. Omaha St. R. Co., 114 N.W. 571, 80 Neb. 490, 127 Am.S.R. 786, 17 L.R.A.,N.S., 101.
10 C.J. p. 898 note 23.

Corpus Juris has been cited with approval in Brizzolari v. Market St. Ry. Co., 46 P.2d 783, 784, 7 Cal.App.2d 246.

5. Conn.—Roden v. Connecticut Co., 155 A. 721, 113 Conn. 408.

6. Miss.—Yazoo & M.V.R. Co. v. O'Keefe, 88 So. 1, 125 Miss. 536.

7. N.Y.—Longacre v. Yonkers R. Co., 182 N.Y.S. 373, 191 App.Div. 770.

8. Ark.—St. Louis, etc., R. Co. v. Rexroad, 26 S.W. 1037, 59 Ark. 180.

9. Ark.—St. Louis, etc., R. Co. v. Rexroad, supra.
10 C.J. p. 898 note 23 [b].

10. N.Y.—Longacre v. Yonkers R. Co., 140 N.E. 215, 236 N.Y. 119, 38 A.L.R. 1030, modifying 194 N.Y.S. 952, 202 App.Div. 345.

Methods of protection

(1) It has been held that, in view of the fact that the primary duty of care for children is on parents or nurse, motorman and conductor were not under absolute obligation to close and latch doors of car to prevent children who were accompanied by a nurse from running onto platform.—Longacre v. Yonkers R. Co., 182 N.Y.S. 373, 191 App.Div. 770.

(2) On a subsequent appeal in the same case it was held that, in view of the mischievous disposition which the children had displayed in running onto the platform, it might have been foreseen that they would fall or jump from the platform, and that, while the carrier, through its employees, was not bound to take

Intoxicated passenger. The mere fact that a passenger is drinking, or is under the influence of liquor, is not necessarily enough to require the carrier's employees to give him any more care than they give to other passengers.[11] The test in determining liability in such case is whether or not the carrier's employees were wanting in prudence, and liability depends on the facts of the particular case.[12] The fact that the passenger is intoxicated does not relieve the carrier of the performance of its duties to the passenger as such,[13] and, where a carrier receives as a passenger a person who is known to its employees to be partially or entirely helpless on account of intoxication, it is bound to exercise such care and assistance as his condition reasonably requires for his safety[14] and to bestow on him such special care and attention beyond that given to an ordinary passenger as are reasonably required,[15] even though the passenger's intoxication is in violation of a statute.[16] In general the care which must be exercised depends on the known condition of the passenger and the situation as a whole,[17] and the rule requiring special care as to an intoxicated passenger applies only where the passenger's intoxicated condition is known, or by proper diligence could have been known, to the carrier's employees,[18] if the fact of such a state of intoxication is unknown to the employees, or they are not chargeable with knowledge thereof, it will not cast any burden of care on them additional to that due to ordinary, sober passengers.[19] According to some cases, in order to impose on the carrier the duty to exercise greater care than that required as to an ordinary passenger, it must appear that the carrier had knowledge of the condition of an intoxicated passenger, not merely that the carrier should have known, or could by care have learned, of such condition.[20] In any event the employees of the carrier need not exercise more than ordinary care to discover whether or not a passenger is in-

the particular step of closing the vestibule doors, nor the doors leading to platform, nor of forcing the children back into the car, nor of ejecting them, the carrier failed to exercise due care in not taking any of such steps—Longacre v. Yonkers R. Co., 140 N.E. 215, 236 N.Y. 119, 28 A.L.R. 1030, modifying 194 N.Y.S. 952, 202 App.Div. 845

11. Ky.—Louisville & N. R. Co. v. Mudd's Adm'x, 191 S.W. 102, 173 Ky. 330.
La.—Gates v. Bisso Ferry Co., App., 172 So. 829.
Tenn.—Bowers v. Nashville, C. & St. L. Ry., 7 Tenn.Civ.A. 473.
10 C.J. p. 899 note 28

12. La.—Gates v. Bisso Ferry Co., App., 172 So. 829.

13. Ill.—Burke v. Chicago, etc., R. Co., 108 Ill.App. 565.
Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Francis, 220 S.W. 739, 187 Ky. 703
N.Y.—Fagan v. Atlantic Coast Line R. Co., 115 N.E. 704, 220 N.Y. 301, L.R.A.1917E 663, reversing 155 N.Y.S. 609, 170 App.Div. 47.
10 C.J. p. 899 note 29.

14. Ill.—Burke v. Chicago, etc., R. Co., 108 Ill.App. 565.
Md.—Veenstra v. United Rys. & Electric Co. of Baltimore, 129 A. 678, 148 Md. 512
N.Y.—Fardette v. New York & S. Ry. Co., 180 N.Y.S. 179, 190 App.Div. 543.
Pa.—Schmuck v. Heilman, 14 Pa.Dist. & Co. 449.
10 C.J. p. 899 note 29.

Position of danger

The carrier may be liable where, after a passenger is received with knowledge on the part of an employee of the carrier that the passenger is intoxicated, the latter is permitted to remain in a position where it may be foreseen that he may be injured.—Gates v. Bisso Ferry Co., La.App., 172 So. 829

Removal from one coach to another

Where an intoxicated passenger is disorderly, insulting, and offensive to other passengers, the conductor, instead of stopping the train and ejecting the offending passenger, may, in the exercise of ordinary care for the latter's safety, require him to remove to another coach where his conduct may not be offensive or objectionable to the passengers riding therein.—Louisville & N. R. Co. v. Phelps' Adm'r, 205 S.W. 793, 181 Ky. 689.

15. N.Y.—Fagan v. Atlantic Coast Line R. Co., 115 N.E. 704, 220 N.Y. 301, L.R.A.1917E 663, reversing 155 N.Y.S. 609, 170 App.Div. 47
Pa.—Kradel v. Pittsburgh, H., B. & N. C. Ry. Co., 100 A. 128, 255 Pa. 427.
10 C.J. p. 899 note 29.

Riding on platform

The conductor of a street railroad company may fail in the exercise of due care where he permits an intoxicated passenger to ride on the platform and the conductor has knowledge of, or should have, observed, the condition of the passenger.—Jameitis v. Wilkes-Barre Ry. Co., 121 A. 317, 277 Pa. 437.

16. N.H.—Wheeler v. Grand Trunk R. Co., 50 A. 103, 70 N.H. 607, 54 L.R.A. 955.

17. Ky.—Louisville & N. R. Co. v. Phelps' Adm'r, 205 S.W. 793, 181 Ky. 689.
N.Y.—Fagan v. Atlantic Coast Line R. Co., 115 N.E. 704, 220 N.Y. 301, L.R.A.1917E 663, reversing 155 N.Y.S. 609, 170 App.Div. 47—Fardette v. New York & S. R. Co., 180 N.Y.S. 179, 190 App.Div. 543.

Care commensurate with condition

A carrier owes to an intoxicated passenger a duty commensurate with the passenger's condition.—Fagerdahl v. North Coast Transp. Co., 35 P.2d 46, 178 Wash. 482, modifying 28 P.2d 107, 175 Wash. 690.

Incapacity as element in determining care required

Where an intoxicated person is accepted as a passenger with knowledge that he is incapable of taking care of himself, that fact is an element in determining the care which is required.—Ingerson v. Grand Trunk Ry., 106 A. 488, 79 N.H. 154

18. Ky.—Louisville & N. R. Co. v. Mudd's Adm'x, 191 S.W. 102, 173 Ky. 330.
10 C.J. p. 899 note 29, p. 900 note 31

Imputed knowledge

That an employee of a railroad company, who was not a member of the crew of the passenger train from which decedent got off, and was not then on duty, and did not know that decedent got off the train, saw him walking on the company's tracks in a drunken condition would not make the company liable for running over decedent.—Pinson v. Southern R. Co., 67 S.E. 464, 85 S.C. 355.

19. Wash.—Welsh v. Spokane, etc., R. Co., 157 P. 679, 91 Wash. 260.
10 C.J. p. 900 note 32.

20. N.H.—Ingerson v. Grand Trunk Ry., 106 A. 488, 79 N.H. 154.

toxicated [21]

It has been held that the employees of a carrier are not chargeable with negligence merely because they permit a helplessly intoxicated passenger to depart on reaching his destination by train, in the absence of knowledge on their part of his ultimate destination and means of reaching it,[22] but, according to some cases, a carrier may be liable where its employees permit an intoxicated passenger to leave its vehicle of carriage, or put him off, at a place which is dangerous in view of his condition, without taking due care for his safety;[23] and it has been held that in such case a carrier owes to its passenger the highest degree of care consistent with the practical operation of its railroad [24]

b. Becoming Ill or Incapacitated during Transit

A carrier, through its employees, owes to a passenger who becomes ill or incapacitated during transit the duty to give him such care and attention as are reasonably practicable under the circumstances and consistent with other duties of the carrier, where it has knowledge of the passenger's condition or is chargeable with such knowledge.

Where a passenger becomes ill or incapacitated during transit, and such fact is known to the employees of the carrier, or it is so apparent that they are charged with knowledge of it, it is their duty to give him such care and protection, beyond that demanded under ordinary circumstances, as are reasonably practicable with the facilities at hand and consistent with the safe and proper conduct of the business and the carrier's duties to other passengers,[25] or, as sometimes stated, it is the carrier's duty to exercise a high degree of care to protect the passenger from the dangers incident to the surroundings and mode of travel.[26] Where an unat-

21. Ky.—Louisville & N R Co v Mudd's Adm'x, 191 S.W. 102 173 Ky. 330—Louisville, etc., R Co. v Gregory, 133 S.W. 805, 141 Ky. 747, 35 L.R.A.,N.S., 317

22. N H—Ingerson v Grand Trunk Ry., 106 A. 488, 79 N H 154.

Authority to place passenger in custody of officer

The fact that trainmen were authorized, but not required, by statute to place an intoxicated passenger in the custody of an officer did not prevent the application of the rule stated in the text.—Ingerson v Grand Trunk Ry., 106 A. 488, 79 N H. 154.

Injury after leaving train

Where an intoxicated passenger so demeaned himself as to justify his ejection, and on reaching his destination in the nighttime left the train, and his body was found on the track under such circumstances as to show injury by another train which passed during the night, the railroad company, being under no obligation to guard the passenger through the night, was not liable.—Nash v. Southern Ry. Co., 33 So. 932, 136 Ala. 177, 96 Am.S.R. 19.

23. Ill—Panor v. Northwestern Elevated R. Co., 228 Ill.App. 162
Wash—Sullivan v Seattle Electric Co., 86 P. 786, 44 Wash 53
10 C.J. p 898 note 27 [c].

Abandonment in known place of danger

Where a passenger is, through intoxication, so bereft of reason that he is incapable of caring for himself, and, while in that condition, the carrier, through its employees, permits him to leave its train and abandons him in a known place of danger where injury is likely to result, there is negligence for which the carrier may be liable.—O'Rourke v. Louisville & N. R Co, 197 Ill.App 45, 183 Ill.App 593

Protection in departing from train and leaving premises

Where a railroad company did not exercise its right to eject, but accepted and undertook to transport to the destination shown by his ticket an intoxicated passenger who had a ticket to a station at which the train was not scheduled to stop, it was under a general duty to stop at such station for a time reasonably sufficient to enable such passenger to alight at a place where he could, using reasonable care, alight safely and pass by a way reasonably apparent, accessible, and safe to the depot, or at a designated and proper place, and thence from the property of the company, or, in the absence of such a way, to take reasonable and proper precautions to protect him and make safe his passing from the place of alighting to the depot or an appointed exit from its property—Fagan v Atlantic Coast Line R. Co, 115 N.E. 704, 220 N.Y. 301, L.R.A.1917E 663, reversing 155 N.Y.S. 609, 170 App.Div. 47.

24. Ill—Panor v. Northwestern Elevated R. Co, 228 Ill.App 162.

25. Ga.—Central of Georgia R. Co., 69 S.E. 165, 135 Ga. 205, 31 L.R.A., N.S., 813, 21 Ann.Cas. 1077.
Ky—Casteel v. American Airways, 88 S.W.2d 976, 261 Ky. 818
La—Searcy v Interurban Transp. Co., 179 So. 75, 189 La. 183, reversing, App., 179 So 93, reversing 171 So. 468.
10 C.J. p 900 note 34.

Consideration and care

Where a passenger becomes ill while en route, no matter how free the carrier may be of any fault, the carrier owes the passenger the consideration and care suggested by the dictates of common humanity—Hughes v Gregory Bus Lines, 128 So 96, 157 Miss 374.

Mistake as to cause of passenger's condition

(1) Where the death of a person who had been a passenger on a street car followed a cerebral hemorrhage which he had suffered while he was a passenger, and it was shown that the employees of the street railroad company had permitted such person to continue to ride for several hours without obtaining medical assistance, it was held that the company's duty to such person was not excused nor lessened because its servants assumed honestly, but without investigation, that such person was drunk, and that the case turned, not on what the employees assumed or thought, but on what they should, in the exercise of reasonable prudence, have done in the light of the facts brought to their notice.—Middleton v. Whitridge, 108 N.E. 192, 213 N.Y. 499, Ann.Cas 1916C 856, reversing 141 N.Y.S 104, 156 App.Div. 154—Middleton v. Third Ave. Ry Co., 182 N.Y.S. 598, 192 App.Div. 172.

(2) A bus company, whose employees carried a passenger who had suffered an apoplectic stroke while riding on bus into station without summoning medical aid, was liable for passenger's pain and suffering, notwithstanding employees' good faith but erroneous assumption that passenger was intoxicated.—Searcy v. Interurban Transp Co., 179 So. 75, 189 La. 183, reversing, App., 179 So. 93, reversing 171 So. 468.

26. Tex.—Stewart v. Houston & T. C. Ry. Co., Civ.App., 229 S.W. 577, error refused.

Mental incapacity

Where a passenger, after being

tended passenger, after starting on a journey, becomes sick, and unconscious or insane, it may become the duty of the carrier to remove him and leave him in competent hands so that he may receive proper care and attention[27] until he is in a fit condition to resume his journey, or until he shall obtain the assistance necessary to take care of him to the end of his journey.[28]

§ 695. Protection against Injuries from Fellow Passengers

a. In general
b. Particular acts, and acts of particular types, of fellow passengers

a. In General

A carrier is under the duty to use due care to protect its passengers from the torts or misconduct of fellow passengers and is liable for failure to comply with such duty.

The rule stated in Corpus Juris, quoted and cited with approval,[29] is that while a carrier is perhaps not bound to protect its passengers from injuries by third persons to the same extent and degree as from like injuries by its own, or its agents' or employees', acts or omissions,[30] yet it is the duty of a carrier, through its employees, to exercise great care and vigilance in preserving order and in guarding passengers from annoyance, violence, insult, or other misconduct threatened by fellow passengers,[31] at least where the passenger is on a vehicle of carriage and the misconduct of a fellow passenger is actually foreseen;[32] and where the carrier, through its agents or employees, knows, or has opportunity to know, of a threatened injury by a fellow passenger, or might reasonably anticipate the happening of such an injury, and fails or neglects to take the proper precautions or to use proper means to prevent or mitigate such injury, it is liable therefor.[33]

received as such, to the knowledge of the carrier becomes unable to care for himself by reason of mental incapacity, it is the carrier's duty to exercise a high degree of care to protect the passenger from dangers incident to his surroundings and mode of travel.—Stewart v. Houston & T. C. Ry. Co., Tex.Civ.App., 229 S.W. 577, error refused.

27. N.Y.—Middleton v. Whitridge, 108 N.E. 192, 213 N.Y. 499, Ann.Cas.1916C 856, reversing 141 N.Y.S. 104, 156 App.Div. 154—Middleton v. Third Ave. Ry. Co., 182 N.Y.S. 598, 192 App.Div. 172.
10 C.J. p. 900 note 35.

28. Ky.—Casteel v. American Airways, 88 S.W.2d 976, 261 Ky. 818
10 C.J. p. 900 note 35.

29. Cal.—Schwerin v. H. C. Capwell Co., 34 P.2d 1050, 1051, 140 Cal.App. 1.
D.C.—Washington Ry. & Electric Co. v. Perry, 47 App.D.C. 90, 97
Ky.—Louisville & I. R. Co. v. Garr, 273 S.W. 540, 542, 209 Ky. 841—Hatfield v. Payne, 242 S.W. 32, 34, 195 Ky. 310.
N.J.—Frazier v. Public Service Ry. Co., 116 A. 769, 770, 97 N.J.Law 37.
N.Y.—King v. Interborough Rapid Transit Co., 188 N.Y.S. 700, 708, 197 App.Div. 15, dissenting opinion, modified 135 N.E. 519, 233 N.Y. 330.
N.C.—Pride v. Piedmont & N. Ry. Co., 97 S.E. 418, 176 N.C. 694.
Pa.—Wood v. Philadelphia Rapid Transit Co., 104 A. 69, 71, 260 Pa. 481, L.R.A.1918F 817.
W.Va.—Thompson v. Monongahela Ry. Co., 128 S.E. 110, 113, 99 W.Va. 207, 42 A.L.R. 159.

30. Mich.—Takacs v. Detroit United Ry., 207 N.W. 907, 234 Mich. 42.
10 C.J. p. 900 note 37.

31. Ark.—Arkansas Power & Light Co. v. Steinheil, 80 S.W.2d 921, 190 Ark. 470.
Mass.—Savickas v. Boston Elevated Ry. Co. 132 N.E. 29, 239 Mass. 226—Langley v. Boston Elevated Ry. Co., 112 N.E. 79, 223 Mass. 492.
Mo.—Abernathy v. Missouri Pac. Ry. Co., App., 217 S.W. 568.
N.J.—Spalt v. Eaton, 192 A. 576, 118 N.J.Law 327.
Tex.—Texas & P. Ry. Co. v. Baker, Com.App., 215 S.W. 556, reversing, Civ.App., 184 S.W. 664.
Va.—Virginia Ry. & Power Co. v. Hubbard, 91 S.E. 618, 120 Va. 664
10 C.J. p. 900 note 38.

Violation of rules by passenger

An inference of a carrier's negligence may be drawn from disobedience to rules of conduct by a passenger resulting in an injury to another passenger if the carrier is negligent in enforcing such rules. The mere fact that a carrier had promulgated rules as to carrying newspapers on its trains did not show the exercise of sufficient care as to a passenger on a station platform who was injured by being struck by a bundle of newspapers thrown from a train by another passenger, even in the absence of evidence showing habitual disregard of the rules. The carrier was bound to exercise reasonable care to prevent the violation of such rules.—King v. Interborough Rapid Transit Co., 135 N.E. 519, 233 N.Y. 330, modifying 188 N.Y.S. 700, 197 App.Div. 15

Duty to exercise authority

The employees in charge of a train have authority to exercise a reasonable control over passengers and should properly exercise such authority in order to protect passengers.—Gerlach v. Pittsburgh Rys. Co., 94 Pa.Super. 121

32. Ala.—Tomme v. Pullman Co., 93 So. 462, 207 Ala. 511.

33. Ala.—Ex parte Alabama Great Southern R. Co., 86 So. 100, 204 Ala. 504, granting certiorari on other grounds Alabama Great Southern R. Co. v. Hunt, 86 So. 97, 17 Ala.App. 566.
Ark.—Arkansas Power & Light Co. v. Steinheil, 80 S.W.2d 921, 190 Ark. 470
D.C.—Washington Ry. & Electric Co. v. Perry, 47 App.D.C. 90.
Ga.—Yellow Cab Co. of Atlanta v. Carmichael, 126 S.E. 269, 33 Ga.App. 364
Ky.—Louisville & I. R. Co. v. Garr, 273 S.W. 540, 209 Ky. 84—Payne v. Combs, 249 S.W. 1031, 198 Ky. 749—Payne v. Moore, 244 S.W. 869, 196 Ky. 454—Louisville & N. R. Co. v. Bennett, 209 S.W. 358, 183 Ky. 445
Mo.—Lige v. Chicago, B. & Q. R. Co., 204 S.W. 508, 275 Mo. 249, L.R.A. 1918F 548.
N.J.—Falzarano v. Delaware, L. & W. R. Co., 194 A. 75, 19 N.J.Law 76—Frazier v. Public Service Ry. Co., 116 A. 769, 97 N.J.Law 37—Skillen v. West Jersey & S. R. Co., 115 A. 372, 96 N.J.Law 492.
N.C.—Pride v. Piedmont & N. Ry. Co., 97 S.E. 418, 176 N.C. 594—Mills v. Atlantic Coast Line R. R., 90 S.E. 221, 172 N.C. 266.
10 C.J. p. 901 note 39.

Want of formal request for protection

The mere fact that the injured passenger did not make a formal request for protection did not relieve the carrier of liability where its conductor participated in the oc-

This duty may involve the coöperation of the employees of the carrier and the invoking of the assistance of other passengers in removing a disorderly passenger from the train.[34]

The liability of a carrier for injury to a passenger by the tort or misconduct of a fellow passenger is based on the failure of the carrier, through its employees, to prevent such tort or misconduct, and not imposed on the ground that the carrier is liable for the tort of the fellow passenger under the principle of respondeat superior.[35] It follows that the liability of the carrier arises not alone from the fact that the passenger has been injured, but from the failure of its agents or servants to afford him proper protection, and hence unless such agents or servants know or ought to know that danger from fellow passengers exists or is reasonably to be apprehended, and can, by the use of proper care, prevent the injury, the carrier is not liable.[36] Thus the carrier is not liable where the injury is caused by acts of a fellow passenger, which its agents or employees had no reason to apprehend, and which they could not, by the exercise of proper care, prevent.[37] It has been stated broadly that a carrier is required to interfere with the voluntary acts of passengers only where such acts constitute a breach of the peace or are such as to suggest a reasonable probability that injury will result to others.[38]

In accordance with the general rule as to a carrier's obligation, stated above in § 676, a carrier is

currence in which the injury was sustained, and assumed a hostile attitude toward such passenger—Alabama Great Southern R. Co. v. Hunt, 86 So. 97, 17 Ala.App. 566, certiorari granted on other grounds Ex parte Alabama Great Southern R. Co., 86 So. 100, 204 Ala. 504.

34. N.J.—Spalt v. Eaton, 192 A. 576, 118 N.J.Law 327—Frazier v. Public Service Ry. Co., 116 A. 769, 97 N.J.Law 37.
Pa.—Gerlach v. Pittsburgh Rys. Co., 94 Pa.Super. 121.
10 C.J. p. 901 note 40.

35. Ark.—Arkansas Power & Light Co. v. Steinheil, 80 S.W.2d 921, 190 Ark. 470.
Ky.—Hatfield v. Payne, 242 S.W. 32, 195 Ky. 310.
Me.—Chaput v. Lussier, 165 A. 573, 132 Me. 48.
Md.—Pugh v. Washington Ry. & Electric Co., 113 A. 732, 138 Md. 226.
Mich.—Takacs v. Detroit United Ry. Co., 207 N.W. 907, 234 Mich. 42.
N.J.—Hoff v. Public Service Ry. Co., 101 A. 404, 90 N.J.Law 336, reversed on others grounds 103 A. 209, 91 N.J.Law 641, 15 A.L.R. 860.
Pa.—Pittsburg, etc., R. Co. v. Hinds, 53 Pa. 512, 91 Am.D. 224.
W.Va.—Thompson v. Monongahela Ry. Co., 128 S.E. 110, 99 W.Va. 207, 42 A.L.R. 159.
10 C.J. p. 901 note 41.

36. Ala.—Tomme v. Pullman Co., 93 So. 462, 207 Ala. 511.
Ark.—Arkansas Power & Light Co. v. Steinheil, 80 S.W.2d 921, 190 Ark. 470.
Cal.—Schwerin v. H. C. Capwell Co., 34 P.2d 1050, 140 Cal.App. 1.
Fla.—Hall v. Seaboard Air Line Ry. Co., 93 So. 151, 84 Fla. 9.
Ky.—Hatfield v. Payne, 242 S.W. 32, 195 Ky. 310.
Md.—Pugh v. Washington Ry. & Electric Co., 113 A. 732, 138 Md. 226.
Mass.—Pearson v. Payne, 139 N.E. 488, 245 Mass. 158.
Mich.—Takacs v. Detroit United Ry., 207 N.W. 907, 234 Mich. 42.
N.J.—Hoff v. Public Service Ry. Co., 101 A. 404, 90 N.J.Law 336, reversed on other grounds 103 A. 209, 91 N.J.Law 641, 15 A.L.R. 860.
Pa.—Wood v. Philadelphia Rapid Transit Co., 104 A. 69, 260 Pa. 481, L.R.A.1918F 817.
Tex.—Texas & P. Ry. Co. v. Baker, Com.App., 215 S.W. 556, reversing, Civ.App., 184 S.W. 664.
W.Va.—Thompson v. Monongahela Ry. Co., 128 S.E. 110, 99 W.Va. 207, 42 A.L.R. 159.
10 C.J. p. 901 note 41, p. 902 note 42.

Opportunity to prevent injury

Knowledge or opportunity for knowledge must have been acquired or have existed for a period of time sufficient to permit the taking of steps for the protection of passengers.—River Excursion Co. v. Kuntz, 51 S.W.2d 911, 244 Ky. 587.

37. Ark.—Arkansas Power & Light Co. v. Steinheil, 80 S.W.2d 921, 190 Ark. 470.
Fla.—Hall v. Seaboard Air Line Ry. Co., 93 So. 151, 84 Fla. 9.
Ky.—River Excursion Co. v. Kuntz, 51 S.W.2d 911, 244 Ky. 587.
Mass.—Eaton v. New York, N. H. & H. R. R., 116 N.E. 815, 227 Mass. 113.
Mich.—Takacs v. Detroit United Ry., 207 N.W. 907, 234 Mich. 42.
Mo.—Lige v. Chicago, B. & Q. R. Co., 204 S.W. 508, 275 Mo. 249, L.R.A. 1918F 548—Liljegren v. United Rys. Co. of St. Louis, App., 227 S.W. 925.
N.C.—Pride v. Piedmont & N. Ry. Co., 97 S.E. 418, 176 N.C. 594—Mills v. Atlantic Coast Line R. R. Co., 90 S.E. 221, 172 N.C. 266.
W.Va.—Slaven v. Baltimore & O. R. Co., 171 S.E. 818, 114 W.Va. 315.
10 C.J. p. 902 note 43.

Careless or wanton act in railroad station

Carrier is not in general liable for passenger's injuries sustained in railroad station through careless or wanton act of fellow passenger, unless such act should have been reasonably anticipated—Seckler v. Pennsylvania R. Co., 174 A. 501, 113 N.J.Law 299.

Slamming door of taxicab

(1) A taxicab passenger who had put her hand on metal upright post between front and rear doors in alighting could not recover from taxicab owner in negligence action for injuries to her fingers sustained when another passenger who had alighted before her slammed door, since the law imposes no duty on driver to anticipate such an unusual happening.—Vogel v. Laiso, 300 N.Y.S. 180.

(2) Where a passenger, who put her hand in the door jamb of a taxicab to assist herself in rising to alight, sustained injuries when passenger who alighted ahead of her slammed the door, taxicab driver was not liable for injuries where passenger who had slammed door was not driver's agent and accident was an event which driver could not anticipate.—Intriligator v. Goldberg, Mass., 12 N.E.2d 730.

38. Pa.—Wood v. Philadelphia Rapid Transit Co., 104 A. 69, 260 Pa. 481, L.R.A.1918F 817.

Passenger carrying bulky objects

(1) Street cars being for the use of people with or without their luggage, negligence cannot be inferred because a workman is permitted to enter or leave carrying tools, or implements of his trade, such as an iron pipe.—Wood v. Philadelphia Rapid Transit Co., 104 A. 69, 260 Pa. 481, L.R.A.1918F 817.

(2) In action for personal injury to passenger while entering trolley car from being struck by an iron pipe which a passenger leaving the car was carrying, it was held that there was no negligence on the part of the carrier.—Wood v. Philadelphia Rapid Transit Co., supra.

not an insurer or guarantor of the entire immunity of a passenger from injury resulting from the acts or misconduct of fellow passengers.[39] The extent or degree of the obligation or duty in this regard imposed on the carrier has variously been characterized or described as the obligation or duty to use or exercise the utmost care,[40] the utmost vigilance,[41] the utmost vigilance and care,[42] the utmost vigilance and foresight,[43] the highest degree of care,[44] the highest practical degree of care,[45] the utmost practicable care,[46] the highest degree of care and diligence,[47] the highest practicable degree of care and diligence,[48] the highest degree of care consistent with the business,[49] and the utmost care and diligence consistent with the proper management of the carrier's business.[50] According to some cases, however, the degree of care required varies with time and place, a high degree of care being required while the passenger is on the vehicle of carriage and only ordinary care while the passenger is waiting at the carrier's station.[51] While the view has been expressed that the responsible employees of the carrier must use the highest degree of care, consistent with the business, to ascertain the danger,[52] it has been held or recognized that only ordinary care and prudence are in general required in foreseeing or anticipating the torts or misconduct of fellow passengers,[53] and that the rule that it is the duty of a carrier to use the highest degree of care to protect a passenger from wrong or injury by a fellow passenger applies only when the carrier has knowledge of the existence of the danger or of facts or circumstances from which the danger may reasonably be anticipated.[54] It has been held that the general rule that a carrier must exercise the highest degree of care for the personal safety of passengers consistent with the nature of the contract of carriage, with relation to the carrier's or its servants' acts or omissions, does not necessarily measure the duty and liability of the carrier in respect of torts or misconduct of fellow passengers.[55]

b. Particular Acts, and Acts of Particular Types, of Fellow Passengers

As a general rule a carrier is not liable to a passenger resulting from the wrongful and unauthorized interference by a fellow passenger with the appliances on the vehicle of carriage. Whether or not a carrier is liable for injuries to a passenger resulting from assaults, improper language, and the like, on the part of a fellow passenger, or from the acts or conduct of an intoxicated or insane passenger depends in general on whether or not the employees of the carrier had knowledge of, or could reasonably have anticipated, the acts or conduct of the fellow passenger, and could, with the exercise of due care, have prevented the resultant injury.

In general a carrier is not liable for injuries caused by a fellow passenger's unanticipated act in set-

39. Ky.—Peak v. Louisville & N. R. Co., 297 S.W. 1107, 221 Ky. 97—Payne v. Moore, 244 S.W. 869, 196 Ky 454
Md—Pugh v. Washington Ry & Electric Co., 113 A. 732, 138 Md. 226.
Mich—Takacs v. Detroit United Ry., 207 N.W. 907, 234 Mich. 42.
Mo.—Lige v. Chicago, B. & Q R. Co., 204 S.W. 508, 275 Mo. 249, L. R.A.1918F 548—Liljegren v. United Rys. Co of St. Louis, App., 227 S. W 295.
N J.—Hoff v. Public Ry. Co, 103 A. 209, 91 N J.Law 641, 15 A.L R 860, reversing 101 A. 404, 90 N J Law 386
N C.—Mills v. Atlantic Coast Line R. R, 90 S.E 221, 172 N C. 266.
W Va—Thompson v Monongahela Ry Co., 128 S E. 110, 99 W.Va. 207, 42 A.L.R 159.

Use of every reasonable means
The duty of the carrier is discharged by using every reasonable means to conserve the passenger's convenience. comfort, and safety—Ex parte Alabama Great Southern R. Co, 86 So 100, 204 Ala. 504, granting certiorari Alabama Great Southern R. Co. v. Hunt, 86 So. 97, 17 Ala. App. 566.

40. Mo.—Liljegren v. United Rys. Co. of St Louis, App., 227 S W. 925.
N J—Falzarano v. Delaware, L & W. R Co, 194 A 75, 19 N J Law 76.

41. Mo—Williams v. East St Louis & S Ry Co, 232 S W. 759, 207 Mo App. 233.

42. U S.—Flint v. Norwich, etc, Transp Co, 9 F Cas.No.4,873, 34 Conn 554, 557.

43. N C.—Mills v. Atlantic Coast Line R. R, 90 S.E 221, 172 N. C 266.

44. Tex—Nevill v. Gulf, C & S. F. Ry Co., Civ App, 187 S.W. 388, reversed on other grounds, Com. App. 244 S.W 980, which is reversed on rehearing 252 S W. 483.
W.Va.—Thompson v. Monongahela Ry. Co, 128 S E. 110, 99 W Va. 207, 42 A L R 159.

45. Mo—Grubb v Kansas City Ry Co, 230 S W. 675, 207 Mo App 16—Abernathy v. Missouri Pac. Ry Co., App, 217 S W 568.

Ordinary care is not sufficient.—Grubb v. Kansas City Rys Co, 230 S.W 675, 207 Mo.App. 16.

46. Mo.—Lige v Chicago, B. & Q R Co., 204 S.W. 508, 275 Mo. 249, L.R.A.1918F 548—Spohn v. Missouri Pac R Co, 14 S W 880, 101 Mo. 417, 87 Mo 74

47. Ky—Louisville & N. R Co v Bennett, 209 S W. 358, 183 Ky 445

48. Ky—Peak v Louisville & N R Co, 297 S W 1107, 221 Ky 97—Payne v. Moore, 244 S W. 869, 196 Ky 454

49. Mo.—Lige v Chicago, B. & Q R Co, 204 S W 508, 275 Mo. 249 L.R.A 1918F 548—Liljegren v United Rys Co. of St. Louis, App, 227 S W 925

50. Mass—Langley v. Boston Elevated Ry Co, 112 N E 79, 223 Mass. 492

51. Ala.—Tomme v. Pullman Co, 93 So. 462, 207 Ala 511

52. Mo.—Lige v. Chicago, B & Q R Co, 204 S W. 508, 275 Mo 249, L.R A 1918F 548—Liljegren v. United Rys Co. of St Louis, App, 227 S W 925

53. Ala.—Tomme v Pullman Co., 93 So 462, 207 Ala. 511.
Ky—River Excursion Co. v. Kuntz, 51 S W 2d 911, 244 Ky. 587.

54. S C.—Norris v. Southern R Co Carolina Div, 65 S E. 956, 84 S.C 15.

55. Mich—Takacs v. Detroit United Ry, 207 N.W. 907, 234 Mich. 42.

ting[56] or releasing[57] brakes, or in improperly giving a signal for the car or train to start,[58] unless the employee in charge ratifies or adopts the unauthorized signal by allowing the car or train to proceed without seeing that passengers have alighted from or boarded the car in safety,[59] or unless such employee by the exercise of due care and diligence could have prevented the moving of the car or train.[60]

Injury to a passenger from the negligent handling of a firearm by a fellow passenger has been held not to impose a liability where the carrier's employees had no reason to anticipate the accident,[61] or used all available means to prevent it;[62] but the carrier is liable where its employees are careless or negligent in allowing the passenger so to handle a firearm.[63] The carrier is not liable for injuries to a passenger resulting from the ignition or explosion of inflammable or explosive material carried by a passenger, if, in the exercise of a high degree of prudence and foresight, such as would be exercised by a very cautious, prudent, and competent person under similar circumstances, the danger could not have been avoided.[64]

Assaults generally. Ordinarily it is the duty of the carrier, acting through its employees, to protect a passenger from an assault by a fellow passenger,[65] and, according to some cases, the carrier is under the duty to exercise the highest practicable degree of care and diligence in this regard,[66] the highest degree of care,[67] the utmost care,[68] or the utmost vigilance and foresight.[69] In general the carrier is liable where a passenger is assaulted by a fellow passenger and such assault could have been prevented by the carrier or its employees by the exercise of due care.[70] The carrier is not, however,

56. N.Y.—McDonnell v New York Cent., etc., R Co., 54 N.Y.S 747, 35 App Div. 147, appeal dismissed 53 N E 1127, 159 N.Y. 524.
Wash.—Anderson v. Northern Pac R Co., 152 P. 1001, 88 Wash. 139

57. Wis.—Sure v Milwaukee Electric R., etc., Co., 133 N.W. 1098, 148 Wis 1, 37 L.R.A.,N.S., 724, Ann. Cas 1913A 1074.
10 C J p 902 note 47.

58. N.C.—Pride v. Piedmont & N. Ry. Co., 97 S.E. 418, 176 N C. 594
10 C J p 903 note 48.

59. Kan.—Leavenworth Electric R. Co v. Cusick 57 P. 519, 60 Kan. 590, 72 Am S.R. 374

60. Ill.—North Chicago St. R Co. v. Cook, 33 N E. 958, 145 Ill 551
10 C.J p 903 note 50.

61. Ky.—Louisville, etc., R Co. v. McEwan, 31 S.W. 465, 17 Ky L. 406.
Tex.—Galveston, etc., R. Co. v. Long, 36 S W. 485, 13 Tex.Civ.App. 664

62. Md.—Tall v. Baltimore Steam Packet Co., 44 A. 1007, 30 Md. 248, 47 L.R.A. 120
10 C.J p 903 note 52.

63. Tenn.—Nashville, etc., R. Co. v Flake, 88 S.W. 326, 114 Tenn. 671, 108 Am S R. 925.
10 C J. p 903 note 53.

64. Ky.—Clarke v Louisville, etc., R Co., 39 S W. 840, 101 Ky. 34, 49 S.W. 1120, 18 Ky.L 1082, 36 L R A 123.
10 C J. p 903 note 54.

65. Ky.—Chesapeake & O. R. Co. v. Pack, 232 S.W. 36, 192 Ky. 74.
Md.—Washington Ry. & Electric Co., 106 A. 522, 134 Md. 196
Mo.—Parris v. Deering Southwestern Ry. Co., 208 S.W. 97, 203 Mo.App. 182.
N.J.—Spalt v. Eaton, 192 A 576, 118 N.J.Law 327—Hoff v. Public Service Ry Co., 103 A. 209, 91 N J Law 641, 15 A L R. 860, reversing 101 A. 404, 90 N J Law 386
W Va.—Clark v Norfolk & W. Ry Co., 100 S E. 480, 84 W.Va 526, 7 A L.R. 117.
10 C J p 900 note 38, p 904 note 58

Ordinary care

The employees of the carrier must use at least ordinary care to protect a passenger from an assault by another passenger which could reasonably have been anticipated.—El Paso Electric Co. v. Cannon, Tex Civ. App., 69 S.W.2d 532, reversed on other grounds, Com.App., 99 S W 2d 907

66. Ky.—Peak v. Louisville & N R Co., 297 S.W. 1107, 221 Ky 97—Payne v. Moore, 244 S W. 869, 196 Ky. 454

67. Ky.—Louisville R. Co v. Dott, 171 S.W. 438, 161 Ky. 759, L.R.A. 1915C 681.
Tex.—Nevill v. Gulf C & S F. Ry Co., Civ App., 187 S W. 388, reversed on other grounds, Com.App., 244 S.W. 980, which is reversed 252 S.W 483.
Wash.—Kelly v Navy Yard Route, 137 P. 444, 77 Wash 148.

68. N.J.—Falzarano v. Delaware, L & W. R Co., 194 A. 75, 119 N.J. Law 76

69. N C.—Mills v. Atlantic Coast Line R. R., 90 S E. 221, 172 N C 266

70. Ala.—Birmingham Electric Co v Driver, 166 So. 701, 232 Ala. 36.
Ark.—Hines v. Rice, 218 S W. 851, 142 Ark 159.
Ky.—Payne v Moore, 244 S W. 869, 196 Ky. 454.
Mo.—Lige v. Chicago, B. & Q. R. Co., 204 S.W. 508, 275 Mo. 249, L. R.A.1918F 548—Koenig v. St. Louis Public Service Co., App., 45 S W.2d 896—Liljegren v United Rys Co of St Louis, App., 227 S.W 925
N.J.—Falzarano v Delaware, L. & W R Co., 194 A. 75, 119 N J Law 76.
N.Y.—Crawford v Brooklyn & Queens Transit Corporation, 3 N Y S.2d 105
Ohio.—Paal v. Cleveland Ry. Co., 11 Ohio App. 462
Pa.—Gerlach v. Pittsburgh Rys Co., 94 Pa.Super. 121
Tex.—El Paso Electric Co v. Cannon Civ App., 69 S.W.2d 532, reversed on other grounds, Com.App., 99 S.W.2d 907.
10 C.J. p 904 note 58.

Desertion of passenger by carrier's employees

A passenger, responding to the lawful call of carrier's servants to aid in ejecting an offensive or disorderly fellow passenger, does not cease thereby to be entitled to the protection against violence owing to all passengers, and if, after he has responded to the call of carrier's servants, he is injured because the latter desert him, or fail to give him all assistance reasonably in their power, the carrier is liable.—Frazier v. Public Service Ry. Co., 116 A. 769, 97 N.J Law 37.

Failure of employee in charge of train to protect passenger

A conductor or person in charge of a railway train is invested with the powers of a peace officer to protect passengers from assault by fellow passengers, and he must exercise such powers faithfully, or the carrier will be deemed guilty of negligence, and must answer for any injury inflicted by such passengers.—Hall v. Seaboard Air Line Ry. Co., 93 So. 151, 84 Fla. 9.

er, an insurer of the entire immunity of a passenger from assaults by fellow passengers.[71] The theory or basis of liability is not that the carrier is liable for the assault of the fellow passenger under the principle of respondeat superior, but that the carrier is liable for its employees' failure to prevent the assault.[72] So the carrier is not liable where its employees have exercised due care to protect the passengers from such assault,[73] or where the assault is one which could not reasonably have been anticipated by them[74] in time to prevent it;[75] in other words, the carrier is not liable unless it or its employees knew in advance of the intended assault, or should have apprehended from the surrounding circumstances and known facts, that an assault was threatened or imminent,[76] in time to prevent it.[77] A carrier is not bound under ordinary circumstances to anticipate that one passenger will

Application of statute

A statute which makes a railroad company liable for any damages done by the running of cars, or by any person in its employment or service, unless the company shows due care on the part of its agents, does not apply where a passenger injured in an affray with a fellow passenger on a train sues the railroad company for damages—Davis v. Georgia R., etc., Co., 34 S.E. 1001, 110 Ga. 305.

71. Ky.—Peak v. Louisville & N. R. Co., 297 S.W. 1107, 221 Ky. 97—Payne v. Moore, 244 S.W. 869, 196 Ky. 454—Louisville R. Co. v. Dott, 171 S.W. 438, 161 Ky. 759, L.R.A. 1915C 681.
Md.—Pugh v. Washington Ry. & Electric Co., 113 A. 732, 138 Md. 226.
N.J.—Hoff v. Public Service Ry. Co., 103 A. 209, 91 N.J.Law 641, 15 A.L.R. 860, reversing 101 A. 404, 90 N.J.Law 386.
N.C.—Mills v. Atlantic Coast Line R. R., 90 S.E. 221, 172 N.C. 266.
W.Va.—Thompson v. Monongahela Ry. Co., 128 S.E. 110, 99 W.Va. 207, 42 A.L.R. 159.

72. Ark.—Arkansas Power & Light Co. v. Steinheil, 80 S.W.2d 921, 190 Ark. 470.
Fla.—Hall v. Seaboard Air Line Ry. Co., 93 So. 151, 84 Fla. 9.
Md.—Pugh v. Washington Ry. & Electric Co., 113 A. 732, 138 Md. 226.
N.J.—Hoff v. Public Service Ry. Co., 101 A. 404, 90 N.J.Law 386, reversed on other grounds 103 A. 209, 91 N.J.Law 641, 15 A.L.R. 860.
W.Va.—Thompson v. Monongahela Ry. Co., 128 S.E. 110, 99 W.Va. 207, 42 A.L.R. 159.

73. Ky.—Kinney v. Louisville, etc., R. Co., 34 S.W. 1066, 99 Ky. 59.

74. Ky.—Peak v. Louisville & N. R. Co., 297 S.W. 1107, 221 Ky. 97.
Mo.—Lige v. Chicago, B. & Q. R. Co., 204 S.W. 508, 275 Mo. 249, L.R.A. 1918F 548.
Ohio—Paal v. Cleveland Ry. Co., 11 Ohio App. 462.
10 C.J. p. 904 note 60.

Circumstances not warranting anticipation of assault

(1) Defendant carrier was not responsible to passenger assaulted on train by another passenger in absence of conductor, where there was nothing in the conduct of the other passenger when in the presence of the conductor before the assault sufficient to indicate that passenger was quarrelsome or unruly—Mills v. Atlantic Coast Line R. R., 90 S.E. 221, 172 N.C. 266.

(2) That a passenger who subsequently assaulted another was laughing, talking, and having a good time was not such misconduct as would justify the inference of probable danger to other passengers so as to require the trainmen to anticipate such assault—Payne v. Moore, 244 S.W. 869, 196 Ky. 454.

(3) Fact that passengers have been observed by trainmen throwing paper wads at one another, and warned to abstain therefrom, does not render carrier liable for injury inflicted by one passenger on another by tin cup unintentionally and accidentally thrown, which trainmen had no knowledge or reason to believe would be so used.—Thompson v. Monongahela Ry. Co., 128 S.E. 110, 99 W.Va. 207, 42 A.L.R. 159.

(4) It may not be assumed that the mere presence of a woman and a man in a sleeping car in which there are no other passengers is a situation fraught with danger to her, in the absence of any external indication of the man's character, and the carrier may not be held liable where the man committed an assault on the woman and there is no showing that the employees knew, nor could, by the exercise of reasonable diligence, have known, that the man intended to commit the assault.—Hall v. Seaboard Air Line Ry. Co., 93 So. 151, 84 Fla. 9.

Sudden and unexpected assault

Where a passenger was the victim of a sudden and unexpected assault by another passenger, which could not have been foreseen and prevented by the utmost care, the carrier was not liable.—Payne v. Moore, 244 S.W. 869, 196 Ky. 454.

Ordinance requiring conductor on car

Where the assault was not one which could reasonably have been anticipated by the conductor who was on the car when such assault occurred, so that there was no liability under the rule stated in the text, the situation was not affected by the existence of a city ordinance requiring that there shall be a conductor on each car for the purpose of collecting fares and for the better accommodation of passengers and the public and by a rule of law that the violation of a city traffic ordinance is negligence per se.—Paal v. Cleveland Ry. Co., 11 Ohio App. 462.

Ordinary care in anticipating assault

It has been held that the employees of the carrier are required to exercise only ordinary care and prudence in foreseeing, or anticipating, violence against a passenger, on a vehicle of carriage, on the part of a fellow passenger.—Tomme v. Pullman Co., 93 So. 462, 207 Ala. 511.

75. Ark.—Arkansas Power & Light Co. v. Steinheil, 80 S.W.2d 921, 190 Ark. 470.
Ky.—Payne v. Moore, 244 S.W. 869, 196 Ky. 454.
10 C.J. p. 904 note 60.

Want of knowledge or notice

Street railroad company was not liable for injuries sustained by passenger who was assaulted by fellow passenger on crowded street car where motorman, who also performed duties of conductor, was not informed of disturbance until passenger came forward, and evidence failed to show that motorman could have prevented assault even if he had observed disturbance by means of a mirror—Arkansas Power & Light Co. v. Steinheil, 80 S.W.2d 921, 190 Ark. 470.

76. Ky.—Hatfield v. Payne, 242 S.W. 32, 195 Ky. 310.
Ohio—Paal v. Cleveland Ry. Co., 11 Ohio App. 462.
Tex.—Texas & P. Ry. Co. v. Baker, Com. App., 215 S.W. 556, reversing, Civ. App., 184 S.W. 664.
W.Va.—Thompson v. Monongahela Ry. Co., 128 S.E. 110, 99 W.Va. 207, 42 A.L.R. 159.
10 C.J. p. 904 note 58 [b].

77. Md.—Pugh v. Washington Ry. & Electric Co., 113 A. 732, 138 Md. 226.
N.J.—Hoff v. Public Service Ry. Co., 101 A. 404, 90 N.J.Law 386, reversed on other grounds 103 A. 209, 91 N.J.Law 641, 15 A.L.R. 860.

assault another,[78] or that, because one passenger is engaged in frolic or sport with another, such conduct will result in injury to one of them.[79] Liability is not, however, confined to a case in which the peril of the particular passenger who is assaulted is known to, or discoverable by, the carrier's employees; the carrier is under a duty to protect all its passengers from an assault from a fellow passenger when its employees have knowledge or the means of knowledge that an assault on some one is imminent.[80]

Crowding, jostling or colliding. As a general rule a carrier is not liable for an injury to a passenger caused by crowding and jostling by another passenger.[81] Thus it is not liable as a general rule for injury to a passenger caused by his being pushed or jostled by other passengers when getting on or off its vehicles,[82] unless the conduct of such other passenger is unusual and disorderly and could be prevented by the employees in charge,[83] or unless the carrier has reason to expect a large number of passengers, and fails to use due care to provide sufficient guards or otherwise to protect passengers from injury by crowding.[84] A carrier is not in general liable for an injury to a passenger resulting from jostling or collision in connection with the proper and lawful ejectment of an obnoxious passenger by the employees of the carrier.[85] The carrier may be liable, however, where its employees are negligent in ejecting the offending passenger.[86]

A carrier is not liable for an injury to a passenger caused by a collision with another passenger in the carrier's station where the conduct of such other could not reasonably have been anticipated and guarded against.[87]

A carrier is under the duty to use due care to avoid overcrowding at its stations and in its trains

Reprehensible conduct of conductor

Where a passenger in the seat in front of plaintiff attempted to caress her, but was forced to desist by a deputy sheriff on the car to keep order, the act of the conductor in laughing, while reprehensible, did not render the carrier liable, where the conductor was some distance away and it did not appear that he knew of the impending assault, or could have prevented the assault and did not do so.—Pugh v. Washington Ry. & Electric Co., 113 A. 732, 138 Md. 226.

78. Mass.—Isenberg v. New York, etc., R. Co., 108 N.E. 1046, 221 Mass. 182.

79. Mass.—Isenberg v. New York, etc., R. Co., supra.

80. Ky.—Hatfield v. Payne, 242 S.W. 32, 195 Ky. 310.

81. Pa.—Spagnol v. Pennsylvania R. Co., 123 A. 781, 279 Pa. 205, 32 A.L.R. 1313—Moore v. Philadelphia Rapid Transit Co., 87 Pa.Super. 393.

On station platform

Railway company was not guilty of negligence proximately causing injuries to woman passenger waiting to board train by fall from station platform onto track as result of unknown passenger's pushing another passenger against her in passing between him and news stand six feet from edge of platform; company could not fairly and reasonably anticipate unknown person's awkwardness.—Williams v. New York Rapid Transit Corporation, 6 N.E.2d 58, 272 N.Y. 366, reversing 288 N.Y.S. 778, 248 App.Div. 765.

82. Pa.—Wood v. Philadelphia Rapid Transit Co., 104 A. 69, 260 Pa. 481, L.R.A.1918F 817.

10 C.J. p. 903 note 55.

Street car

A street railroad company was not negligent in failing to restrain a crowd waiting for a car at a stopping place in a public street, over which such company had neither control nor authority, where there was no station or platform, and was not liable for injury to a child who was pushed under a car by the crowd, even assuming that such child was a passenger.—Savickas v. Boston Elevated Ry. Co., 132 N.E. 29, 239 Mass. 226.

Injury on platform of car

Carrier was not liable for injuries to passenger thrown against brake wheel while entering car by man emerging from car, not being responsible for misconduct of another passenger which it could not have foreseen and guarded against.—Eaton v. New York, N.H. & H.R.R., 116 N.E. 815, 227 Mass. 113.

Reasonable care

The view has been expressed that the carrier is bound to use only reasonable care to prevent injury to a passenger seeking to leave the vehicle of carriage, by being pushed by passengers seeking to enter.—Buck v. Manhattan R. Co., 15 Daly 550, affirmed 31 N.E. 628, 134 N.Y. 589.

83. Mass.—Kelley v. Boston El. R. Co., 96 N.E. 1031, 210 Mass. 454.

10 C.J. p. 903 note 56.

84. Mich.—Cousineau v. Muskegon Tract., etc., Co., 115 N.W. 987, 152 Mich. 48.

10 C.J. p. 904 note 57.

Street car

Where overcrowding and pushing by persons seeking to board street cars was reasonably to be anticipated by a street car company, failure of the company to adopt reasonable expedients to obviate the danger to a passenger resulting from such conditions rendered it liable for an injury to a passenger proximately caused by such conditions. The company's claim that the method of protecting passengers observed on the occasion in question had been followed for a long time with no untoward results, and hence that there was no negligence, could not be upheld, since a mere negligent method for a long period of time, free from injuries, does not establish a correct standard of care and safety.—Grubb v. Kansas City Rys. Co., 230 S.W. 675, 207 Mo.App. 16.

85. Mass.—Cobb v. Boston El. R. Co., 60 N.E. 476, 179 Mass. 212.—Spade v. Lynn & B.R. Co., 52 N.E. 747, 172 Mass. 488, 70 Am.S.R. 298, 43 L.R.A. 832.

Pa.—Moore v. Philadelphia Rapid Transit Co., 87 Pa.Super. 393.

10 C.J. p. 903 note 55 [b].

Carrier liable only for negligence of employee

By his contract of carriage a passenger invokes protection of rule that carrier may enforce order on conveyance and, if necessary, expel offender, and carrier is liable to another passenger injured while offender was being expelled only for servant's negligence while so acting.—Spalt v. Eaton, 192 A. 576, 118 N.J.Law 327.

86. Mass.—Thayer v. Old Colony St. R. Co., 101 N.E. 368, 214 Mass. 234, 44 L.R.A.,N.S., 1125, Ann.Cas.1914B 865.

N.J.—Spalt v. Eaton, 192 A. 576, 118 N.J.Law 327.

87. Mass.—Pearson v. Payne, 135 N.E. 488, 245 Mass. 158.

or cars, which will endanger passengers, as shown below in §§ 720 and 745.

Indecency, rudeness, and the like. It is the duty of the carrier, through its employees, to prevent, as far as is reasonably possible, indecent, profane, insulting, or abusive language[88] and conduct[89] on the part of passengers in the presence of others, particularly female passengers,[90] where it has notice of, or reason to anticipate, the same, and a passenger who is obliged to hear such language[91] or to witness, or be subjected to, such conduct,[92] may in general recover damages, even though, according to some cases, suffering no actual bodily injury.[93] The rule is otherwise, however, where the employees of the carrier have no knowledge of, and have no reason to have knowledge of nor to anticipate, such improper language or conduct[94] in time to prevent it,[95] or where there is no opportunity to prevent it.[96] According to some cases a carrier is not bound to protect its passengers from rudeness or bad manners on the part of other passengers, unless such conduct amounts to a breach of the peace.[97]

Insane passenger. A carrier is under the duty to exercise a high degree of care and to take every reasonable precaution to prevent annoyance or injury to passengers by a fellow passenger who is insane,[98] dependent on the circumstances of the particular case,[99] and this duty may include the duty to provide another place on the train for the insane person if such other place is reasonably available,[1] the duty, under certain circumstances to exercise proper restraint even though, at the time, the insane passenger is quiet and apparently harmless,[2] or even the duty to remove the insane passenger from the train at a place where he can be cared for if that course appears to be necessary.[3] This duty of the carrier arises not merely from the probability but from the reasonable possibility known to the carrier's employees that such injury will result, and the carrier is liable for an injury to a passenger resulting from a failure to comply with its duty in this regard.[4] The carrier has neither the right nor duty, however, to remove the insane passenger from one place in the train in order to protect passengers there, to another place and thereby impose the burden of annoyance and prospective danger on other passengers equally entitled to protection.[5]

88. Ark.—Arkansas Power & Light Co v. Steinheil, 80 S.W 2d 921, 190 Ark 470.
Ky.—Payne v. Moore, 244 S W. 869, 196 Ky. 454—Chesapeake & O R Co. v. Pack, 232 S.W 36, 192 Ky. 74—Louisville & N. R. Co. v. Bennett, 209 S.W. 358, 183 Ky. 445.
Md.—Pugh v. Washington Ry. & Electric Co., 106 A. 522, 134 Md. 196
Mo.—Abernathy v. Missouri Pac. Ry. Co, App, 217 S.W 568
N J.—Falzarano v. Delaware, L & W. R. Co., 194 A 75, 119 N.J Law 76—Spalt v Eaton, 192 A. 576, 118 N.J Law 327—Frazier v. Public Service Ry. Co, 116 A. 769, 97 N. J Law 37—Hoff v. Public Service Ry. Co, 103 A. 209, 91 N.J Law 641, 15 A L.R. 860, reversing on other grounds 101 A. 404, 90 N J. Law 386.
10 C J. p 904 note 63.

89. Ky.—Payne v. Combs, 249 S.W. 1031, 198 Ky. 749.
Mo.—Abernathy v. Missouri Pac R. Co, App., 217 S W. 568
Tex.—St. Louis, etc, R Co. v. Mackie, 9 S.W. 451, 71 Tex. 491, 10 Am S.R 766, 1 L R A. 667.
10 C J p 904 notes 63, 58 [c].

90. Ala.—Seaboard Air Line R Co. v Mobley, 69 So. 614, 194 Ala. 211.
10 C J p 904 note 63

91. Ky.—Payne v. Combs, 249 S W 1031, 198 Ky 749
Tex.—St Louis, etc., R. Co. v. Mackie, 9 S.W. 451, 71 Tex. 491, 499, 10 Am S R. 766, 1 L R A. 667.
10 C J. p 904 note 63, p 905 note 65

92. Ky.—Payne v. Combs, 249 S W. 1031, 198 Ky. 749
Tex.—St. Louis, etc., R Co v Mackie, 9 S W. 451, 71 Tex. 491, 10 Am.S R 766, 1 L.R A. 667.
10 C J p 904 note 63, p 905 note 65.

93. Ala.—Seaboard Air Line R Co v Mobley, 69 So. 914, 194 Ala 211
10 C J p 905 note 65.
Damages for mental suffering in absence of physical injury see infra § 771.

94. Tex.—International, etc, R Co v. Duncan, 121 S W. 362, 55 Tex. Civ App 440.

Rudeness of fellow passenger
Carriers of passengers are not liable for rude acts of a passenger, which they could not fairly anticipate—Hershey v New York, O. & W. Ry Co., 179 N.Y S. 396, 189 App Div 270.

Ordinary care in anticipating insults
It has been held that the employees of the carrier are required to exercise only ordinary care and prudence in foreseeing or anticipating insults to a passenger on a vehicle of carriage by a fellow passenger—Tomme v Pullman Co., 93 So 462, 207 Ala. 511.

95. Ark.—Arkansas Power & Light Co. v. Steinheil, 80 S W.2d 921, 190 Ark. 470.

96. Pa.—Wood v. Philadelphia Rapid Transit Co, 104 A 69, 260 Pa 481, L R A 1918F 817—Moore v Philadelphia Rapid Transit Co, 87 Pa Super. 393

97. Pa.—Graeff v. Philadelphia, etc, R Co, 28 A. 1107, 161 Pa 230, 41 Am S.R. 885, 23 L R A. 606.
10 C J p 905 note 66.

98. Ala.—Hines v Miniard, 86 So 23, 204 Ala. 514, 12 A L R. 238
10 C J. p 906 note 73

99. U S.—Meyer v St. Louis, I M & S Ry Co, Ark, 54 F. 116, 4 C C A 221, affirmed, C C A, St Louis, I. M. & S. Ry. Co. v. Greenthal, 77 F 150.

1. Ala.—Hines v Miniard, 86 So. 23, 204 Ala 514, 12 A L.R 238

2. U S.—Meyer v. St Louis, I M & S Ry. Co, Ark, 54 F. 116, 4 C C A 221, affirmed, C C.A, St Louis, I M & S Ry Co. v. Greenthal, 77 F 150

3. U S.—Meyer v. St. Louis, I. M. & S. Ry. Co, supra.
Ala.—Hines v Miniard, 86 So. 23, 204 Ala 514, 12 A L R 238

4. U S.—Meyer v. St. Louis, I. M. & S Ry Co., Ark, 54 F. 116, 4 C C A 221, affirmed, C C A, St. Louis, I M & S Ry Co. v. Greenthal, 77 F 150
10 C J. p 906 note 73.

5. Ala.—Hines v Miniard, 86 So 23, 204 Ala. 514, 12 A.L R 238.

The carrier is not liable, for injuries due to the unnatural appearance and conduct of a lunatic, where its employees did not know, or with proper care could not have known, that such injuries were likely to be caused,[6] and, where a passenger seeks to charge the carrier with liability on the theory that the carrier's employee wantonly failed to protect such passenger from the acts or conduct of an insane fellow passenger, there can be no recovery if such employee, acting in good faith, did his best to give such protection as was within his power to give.[7]

Intoxicated passenger. As stated in Corpus Juris quoted with approval,[8] it is the duty of the carrier's employees to protect passengers from the acts or conduct of an intoxicated fellow passenger, and, where there is reason to apprehend injury or annoyance from him to other passengers, the employees should take action, commensurate with the probable danger, to protect such other passengers,[9] as, for example, by ejecting him from the train or other vehicle, as shown infra § 808, or require him to remain seated and conduct himself properly,[10] or at least to take a position in the car where danger to other passengers would be lessened;[11] and, where by reason of the employees' negligent failure to afford due protection a passenger is injured by an intoxicated fellow passenger, the carrier is liable.[12] According to some cases, where a fellow passenger is intoxicated, the duty of a carrier to protect its passengers from misconduct of fellow passengers is greater in degree than that imposed under ordinary circumstances, in view of the well-known tendency of intoxicated persons to misconduct themselves.[13] The carrier is not, however, an insurer of the immunity of passengers from the misconduct of an intoxicated fellow passenger; it is under a duty, according to some cases, only to guard against that which a very careful person would anticipate as likely to happen, or to use the highest practicable degree of care and diligence to protect other passengers, and is not liable merely because a passenger is injured by an intoxicated fellow passenger.[14] Thus the carrier is not liable where there has been no reasonable opportunity to discover such passenger's condition and intent,[15] or where the employees of the carrier could not reasonably foresee and prevent the wrongful acts or misconduct of such passenger;[16] and failure to

6. Ky.—Louisville, etc., R. Co. v. Brewer, 143 S.W. 1014, 147 Ky. 166, 39 L.R.A.,N.S., 647, Ann.Cas.1913D 151.

7. Ala.—Hines v. Minard, 86 So. 23, 204 Ala. 514, 12 A.L.R. 238.

8. Ark.—Hines v. Rice, 218 S.W. 851, 853, 142 Ark. 159
Mo.—Lige v. Chicago, B. & Q. R. Co., 204 S.W. 508, 512, 275 Mo. 249, L.R.A.1918F 548.

9. Va.—Virginia Ry. & Power Co. v. Hubbard, 91 S.E. 618, 120 Va. 664

Duty to act before disturbance occurs

A conductor in charge of a street car should not wait until a drunken passenger has committed some disturbing act before taking action, but should take proper precautions as soon as such passenger gives reasonable cause to believe that he may injure others.—Virginia Ry. & Power Co. v. Hubbard, 91 S.E. 618, 120 Va. 664.

Excluding from train or arresting

(1) In view of the power to arrest drunken persons given to conductors by statute, it was the duty of a conductor to arrest passengers who were intoxicated, in order to protect fellow passengers.—Butler County R. Co. v. Exum, 187 S.W. 329, 124 Ark. 229

(2) In order to protect other passengers, the circumstances may be such as to require the carrier, through its employees, to prevent intoxicated persons from boarding trains, or, in view of a statutory provision constituting conductors peace officers for the purpose of arresting any person found to be drunk, the duty of arresting an intoxicated passenger on a train may arise in affording due protection to other passengers.—Memphis, D. & G. R. Co. v. Trussell, 183 S.W. 981, 122 Ark. 516

10. Ark.—Hines v. Rice, 218 S.W. 851, 853, 142 Ark. 159
Mo.—Lige v. Chicago, B. & Q. R. Co., 204 S.W. 508, 512, 275 Mo. 249, L.R.A.1918F 548
10 C.J. p. 905 note 69.

11. Va.—Virginia Ry. & Power Co. v. Hubbard, 91 S.E. 618, 120 Va. 664.

12. Ala.—Tomme v. Pullman Co., 93 So. 462, 207 Ala. 511.
Ark.—Butler County R. Co. v. Exum, 187 S.W. 329, 124 Ark. 229—Memphis, D. & G. R. Co. v. Trussell, 183 S.W. 981, 122 Ark. 516
Mo.—Koenig v. St. Louis Public Service Co., App., 45 S.W.2d 896—Liljegren v. United Rys. Co. of St. Louis, App., 227 S.W. 925
Pa.—Gerlach v. Pittsburgh Rys. Co., 94 Pa.Super. 121.
Va.—Virginia Ry. & Power Co. v. Hubbard, 91 S.E. 618, 120 Va. 664.
10 C.J. p. 905 notes 67–70.

13. Mo.—Abernathy v. Missouri Pac. R. Co., App., 217 S.W. 568.

Reason for rule

The degree of care increases with the degree of danger.—Abernathy v. Missouri Pac. R. Co., Mo.App., 217 S.W. 568.

14. Ky.—Peak v. Louisville & N. R. Co., 297 S.W. 1107, 221 Ky. 97
Mo.—Lige v. Chicago, B. & Q. R. Co., 204 S.W. 508, 275 Mo. 249, L.R.A. 1918F 548—Abernathy v. Missouri Pac. R. Co., App., 217 S.W. 568.

15. Mo.—Lige v. Chicago, B. & Q. R. Co., 204 S.W. 508, 275 Mo. 249 L.R.A.1915F 548.
10 C.J. p. 905 note 71.

16. Ala.—Tomme v. Pullman Co., 93 So. 462, 207 Ala. 511.
Ky.—Peak v. Louisville & N. R. Co., 297 S.W. 1107, 221 Ky. 97
Mo.—Lige v. Chicago, B. & Q. R. Co., 204 S.W. 508, 275 Mo. 249, L.R.A. 1918F 548
N.C.—Pride v. Piedmont & N. Ry. Co., 97 S.E. 418, 176 N.C. 594—Mills v. Atlantic Coast Line R. R., 90 S.E. 221, 172 N.C. 266.
10 C.J. p. 905 note 72.

Mere intoxication not sufficient warning

Where there is nothing in the conduct or known disposition of the passenger, other than mere intoxication, to warn the trainmen that he is likely to become violent or insulting towards another passenger, then the carrier is not liable for sudden acts of such character.—Abernathy v. Missouri Pac. R. Co., Mo.App., 217 S.W. 568.

eject a passenger merely because he is drunk, if otherwise well behaved, will not alone subject a carrier to liability for an injury caused by his acts or conduct.[17] In order to render the carrier liable, however, it is not necessary that its employees have knowledge of, or anticipate, danger to the particular passenger who is injured, where such employees know, or, in the exercise of due care, should know, that injury to some passenger is likely to occur if due steps to restrain the intoxicated passenger are not taken.[18]

The facts that the employee in charge of a car saw or should have seen an intoxicated person board the car and that injury to another passenger subsequently resulted do not of themselves show negligent failure of the carrier to prevent such injury.[19]

Separation of white and colored passengers. A carrier may be liable for injuries to passengers by fellow passengers, through the negligence of its agents or servants in failing to remove passengers whose conduct, by reason of race antipathy, indicated danger,[20] or for injuries resulting from the failure of the carrier's agents or servants to comply with, or enforce, a statute as to the separation of the white and colored races.[21] It has been held that in such case it is not an essential element of liability that the servants of the carrier must have had reason to believe that injury would result from contact in the same car between passengers of different races,[22] and that a violation of the statute is itself tantamount to a warning that injury may result.[23] According to some cases, the duty of the carrier's employee, on whom the duty of enforcement is imposed by such a statute, to require separation, or to make a reasonable effort to that end, arises when such employee knows, or has such opportunity for knowledge as should advise a reasonably prudent person, that a passenger is in the wrong place in the vehicle of carriage, and the carrier is liable for the resultant injury where such employee fails to comply with his duty in this regard.[24] Furthermore there is authority for the view that, even though the duty of enforcement is imposed by the statute on the employee who is in charge of the train, other and subordinate employees may have the duty to communicate to the employee in charge their knowledge that a passenger is in a part of the train from which he should be excluded, and that the carrier may be liable for an injury resulting from such subordinate employees' failure to comply with their duty in this regard.[25] It has been held under some statutes, however, that the carrier is not liable unless the employee on whom the duty of enforcement is imposed has actual knowledge of the presence of a passenger in the wrong place.[26] In any event, the carrier is not liable where there is no breach of duty on the part of the employees of the carrier.[27] So, in order to render the carrier liable, knowledge of the responsible employee that a passenger is in a place from which he should be excluded,[28] or opportunity of other employees to communicate

17. Mo.—Lige v. Chicago, B. & Q. R Co., 204 S W. 508, 275 Mo. 249, L R.A.1918F 548.
10 C.J. p 905 note 72.

18. Mo.—Abernathy v. Missouri Pac. R. Co., App., 217 S.W. 568

19. Mass—Topping v. Eastern Massachusetts St. Ry. Co., 147 N.E. 382, 252 Mass. 270.

20. Ky.—Louisville, etc., R. Co. v. McEwan, 51 S.W. 619, 21 Ky.L. 487.
10 C.J. p 902 note 44.

21. Ky.—Louisville & I. R. Co. v. Garr, 273 S.W. 540, 209 Ky. 841—Quinn v. Louisville & N. R Co, 32 S.W. 742, 98 Ky. 231, 17 Ky.L.R. 811.

Basis of liability

The carrier is liable for an injury to a passenger by another passenger, not on the theory that there is a cause of action based on the provisions of Kirby Dig. § 6622 et seq., requiring the separation of white and colored passengers, but because of the duty of the carrier to protect its passengers from harm and inconvenience—Hines v. Meador, 224 S.W. 742, 145 Ark. 356.

22. Ky—Quinn v. Louisville & W R. Co, 32 S.W. 742, 98 Ky. 231, 17 Ky L R 811.

23. Ark.—Hines v. Meador, 224 S W 742, 145 Ark 356.

24. Ky—Louisville & I. R. Co. v Garr, 273 S.W 540, 209 Ky. 841.

Assault on white passenger while in place set apart for colored passengers

If conductor of interurban railway knew, or had opportunity for knowledge, that white passenger was in car set apart for colored passengers, it was his duty to require white passenger to go into white coach, or make reasonable effort to that end, and, if he failed to do so, railway company is liable for assault on white passenger by colored passenger—Louisville & I. R Co. v. Garr, 273 S W. 540, 209 Ky. 841.

25. Ky.—Louisville, etc., R Co. v. Renfro, 135 S W. 266, 142 Ky. 590, 33 L.R A.,N.S., 133
10 C.J p 902 note 45 [b].

26. Tex.—Texas & P. Ry. Co. v. Baker, Com App, 215 S W 556, reversing, Civ App, 184 S.W. 664.
10 C.J. p 902 note 45

Knowledge of conductor necessary

There can be no violation of the Separate Coach L § 9, as amended by Acts 30th Leg. c 36 § 9, in the absence of actual knowledge that a white or colored person was in the wrong compartment, and the knowledge must be that of the conductor of the train, and not of the porter, brakeman, or any other employee.—Texas & P. Ry. Co v. Baker, Tex. Com App., 215 S.W. 556, reversing, Civ.App, 184 S.W 664.

27. Ky.—Hale v Chesapeake & O. R Co, 135 S W. 398, 142 Ky 835—Bailey v. Louisville & N. R Co, 44 S W. 105, 19 Ky.L. 1617.

28. Tex—Texas & P. Ry Co. v Baker, Com.App., 215 S W. 556, reversing, Civ.App, 184 S W. 664

Assault by white passenger on colored passenger

Under Separate Coach L. § 9, as amended by Acts 30th Leg. c 36 § 9, a negro cannot recover damages from a carrier by reason of an assault by a white person riding in the coach set aside for negroes, unless it is shown that the conductor of the train had actual knowledge of the

such knowledge to the responsible employee,[29] must have been acquired or existed in time to have prevented the injury complained of, and it seems that the carrier is not liable where a passenger, while riding in a part of a train from which he should have been excluded, acts in self-defense in inflicting an injury on another passenger.[30]

§ 696. Protection against Injuries from Other Third Persons

The carrier owes a duty to protect passengers from wrongs inflicted by strangers or intruders, if the danger is, or in the exercise of due care may be, known to the carrier's employees and can be prevented by them, and the carrier may be liable for injuries due to a neglect of such duty.

As stated in Corpus Juris, which has been quoted with approval,[31] the carrier owes to a passenger the duty of exercising a high degree of care to protect him from insult and injury or violence[32] by strangers or intruders on its cars or premises, if the danger is, or in the exercise of due care can be, known to the employees of the carrier and prevented by them, and if it fails in its duty in this respect it is liable for the resulting injury; thus, the carrier may be liable for the robbery of a passenger by strangers, if by due diligence it could have been prevented by those in charge of the conveyance.[33] and the carrier's agent owes a duty to exercise a high degree of care to protect a passenger waiting at a station for a train from assault and robbery.[34] This general duty, however, arises only when the danger is actually foreseen in time to prevent it, or is of such a nature and under such circumstances that it might be anticipated,[35] and ordinarily the carrier is not liable for the independent wrongs of third persons which it could not reasonably anticipate or apprehend,[36] including the acts of third persons intruding into the waiting rooms or on the depot grounds, or within the cars, and causing injury to passengers, where the disorderly conduct which caused the injury could not have been anticipated against casualties, caused by strangers, which cannot reasonably be anticipated, even if charged with highest degree of care as common carrier. Whether or not such company was chargeable with negligence, rendering it liable for injuries to customer struck by children who were ascending escalator which was moving downward, depends on what reasonable person in its position would have been done under circumstances. —Schwerin v. H. C. Capwell Co., 34 P.2d 1050, 140 Cal.App. 1.

presence of the white passenger in the negro coach in time to have avoided the assault resulting in the injury.—Texas & P. Ry. Co. v. Baker, Tex.Com.App., 215 S.W. 556, reversing, Civ.App., 184 S.W. 664.

29. Ky.—Louisville, etc., R. Co. v. Renfro, 135 S.W. 266, 142 Ky. 590, 33 L.R.A.,N.S., 133.

30. Ky.—Louisville, etc., R. Co. v. Renfro, supra.
10 C.J. p 902 note 45 [a].

31. La.—Miles v. New Orleans Public Service, Inc., 3 La.App. 496, 498

32. Ark.—Arkansas Power & Light Co. v. Steinheil, 80 S.W.2d 921, 190 Ark. 470.
Fla.—Hall v. Seaboard Air Line Ry. Co., 93 So. 151, 84 Fla. 9.
Ga.—Yellow Cab Co. of Atlanta v. Carmichael, 126 S.E. 269, 33 Ga. App. 364.
Ky.—Payne v. Moore, 244 S.W. 869, 186 Ky. 454—Louisville & N. R. Co. v. Bennett, 209 S.W. 358, 183 Ky. 445.
Mass.—Langley v. Boston Elevated Ry. Co., 112 N.E. 79, 223 Mass. 492.
N.J.—Falzarano v. Delaware, L. & W. R. Co., 194 A. 75, 119 N.J.Law 76—Spalt v. Eaton, 192 A. 576, 118 N.J. Law 327—Hoff v. Public Service Ry. Co., 103 A. 209, 91 N.J.Law 641, 15 A.L.R. 860, reversing on other grounds 101 A. 404, 90 N.J. Law 386.
N.C.—Mills v. Atlantic Coast Line R. R., 90 S.E. 221, 172 N.C. 266.
Tex.—South Plains Coaches v. Box, Civ.App., 111 S.W.2d 1151, error dismissed—Gulf, C. & S. F. R. Co. v. Baldwin, Civ.App., 2 S.W.2d 520—Wichita Falls Traction Co. v. Berry, Civ.App., 187 S.W. 415, error dismissed—Nevill v. Gulf, C. & S. F. Ry. Co., Civ.App., 187 S.W. 388, affirmed, Com.App., 252 S.W. 483, setting aside on rehearing 244 S.W. 980.
Va.—Hines v. Garrett, 108 S.E. 690, 131 Va. 125.
W.Va.—Clark v. Norfolk & W. Ry. Co., 100 S.E. 480, 84 W.Va. 526, 7 A.L.R. 117.
10 C.J. p 906 note 75.

Concurrent negligence
Common carrier of passengers is liable for personal injuries to passenger caused by concurrent negligence of carrier's servant and third persons.—Daly v. Publix Cars, 259 N.W. 163, 128 Neb. 403—Giffen v. Lincoln Traction Co., 225 N.W. 232, 118 Neb. 459.

Aggressor in altercation
Where the facts are otherwise sufficient to require the carrier's servants or agents to interfere in an altercation in order to protect a passenger, the duty exists regardless of who was the aggressor.—Birmingham Ry., Light & Power Co. v. Lipscomb, 73 So. 962, 198 Ala. 653.

33. La.—Miles v. New Orleans Public Service, Inc., 3 La.App. 496.
Va.—Connell v. Chesapeake, etc., R. Co., 24 S.E. 467, 93 Va. 44, 57 Am. S.R. 786, 32 L.R.A. 792.
10 C.J. p 907 note 76.

34. Tex.—Missouri, K. & T. Ry. Co. of Texas v. Silber, Civ.App., 209 S.W. 188

35. La.—Miles v. New Orleans Public Service, Inc., 3 La.App. 496.
10 C.J. p 907 note 77.

Escalator in department store
Department store company in operating escalator need not provide

36. U.S.—Northern Ry. Co. v. Page, Mass., 47 S.Ct. 491, 274 U.S. 65, 71 L.Ed. 929, reversing, C.C.A., Page v. United Fruit Co., 3 F.2d 747, certiorari granted Northern Ry. Co. v. Page, 46 S.Ct. 19, 269 U.S. 542, 70 L.Ed. 402.
Iowa.—Wheeler v. Des Moines City Ry. Co., 215 N.W. 950, 205 Iowa 439, 55 A.L.R. 473.
Ky.—Riley v. Louisville & N. R. Co., 21 S.W.2d 990, 231 Ky. 564.
Pa.—Orms v. Traction Bus Co., 150 A. 397, 300 Pa. 474.
Tenn.—Price-Bass Co. v. Dawson, 7 Tenn.Civ.App. 192.
Tex.—Threatt v. Houston, etc., R. Co., 71 S.W. 976, 31 Tex.Civ.App. 227.
10 C.J. p 907 note 78.

Care of female passenger
Carrier taking female passenger past her station, whose conductor and telegraph operator engaged driver to take her home, was not liable for his improper proposals, where neither conductor nor operator had reason to suspect his unfitness for such employment.—Western & A. R. Co. v. Jackson, 93 S.E. 547, 21 Ga. App. 50.

pated,[37] or where the carrier's employees, although knowing of the threatened danger, could not in the exercise of due care prevent it.[38] As otherwise stated, in order to charge the carrier with liability, its servants must have knowledge, or in the exercise of due care could have acquired knowledge, of the danger in time to have prevented the injury.[39]

The carrier is not liable for the tort of the third person under the principle of respondeat superior; the theory or basis of liability is the negligent failure of the carrier and its employees to afford the passenger that protection which, in the exercise of such care as the law requires them to use and by the means available, they could and should have given to the passenger.[40]

The carrier is not an insurer of the safety of a passenger against the consequences of the wrongful acts of third persons.[41] According to some cases, the care required of the carrier is reasonable and ordinary care, such as a person of ordinary prudence would regard as reasonably necessary and proper under the circumstances;[42] and it has been held or recognized that the general rule that the carrier is under the duty not to expose its passengers to any danger which human foresight and care can apprehend or provide against,[43] or the general rule that the carrier must exercise the highest degree of care for the personal safety of passengers consistent with the nature of the contract of carriage, in relation to the carrier's or its servants' acts or omissions,[44] does not necessarily measure the carrier's duty and liability in respect of independent torts of strangers, and that the carrier is not held to the highest degree of care to provide against malicious or criminal interference with its apparatus by strangers.[45] According to other cases, however, on the theory that the carrier is bound to exercise the same care to discover and guard against danger to the safety of its passengers from acts committed by a third person as it must exercise in reference to avoiding such acts on its own part, the care required as to acts of a third person is such a high degree of prudence in guarding against such acts as would be used by a very cautious, prudent, and competent person under similar circumstances.[46] So, the view has been expressed that a common carrier for hire is bound to use extraordinary care and diligence to protect its passengers in transit from the violence or injury of third persons.[47] In some cases the duty of the carrier has been characterized as one to exercise the highest degree of care,[48] the highest degree of care and diligence,[49] the utmost vigilance and foresight,[50] or

37. La.—Miles v. New Orleans Public Service, Inc., 3 La.App. 496
10 C.J. p. 907 note 78.

Careless or wanton act in railroad station

Carrier is not in general liable for an injury to a passenger sustained in a railroad station through the careless or wanton act of a stranger, unless such act should have reasonably been anticipated.—Seckler v Pennsylvania R. Co., 174 A. 501, 113 N.J.Law 299.

38. Ind.—Lake Erie, etc., R. Co. v Arnold, 59 N.E. 394, 26 Ind.App. 190
La.—Miles v. New Orleans Public Service, Inc., 3 La.App. 496.

39. Ark.—Arkansas Power & Light Co. v. Steinheil, 80 S.W.2d 921, 190 Ark. 470.

40. Ark.—Arkansas Power & Light Co. v. Steinheil, supra.
Fla.—Hall v. Seaboard Air Line Ry. Co., 93 So. 151, 84 Fla. 9.
Ind.—Terre Haute, Indianapolis & Eastern Traction Co. v. Scott, 150 N.E. 777, 197 Ind. 587, 43 A.L.R. 1029
Ky.—Riley v Louisville & N. R. Co., 21 S.W.2d 990, 231 Ky. 564.

41. Ky.—Riley v Louisville & N. R. Co., supra—Louisville R. Co. v Dott, 171 S.W. 438, 161 Ky. 759, L.R.A.1915C 681 and note.

42. Ind.—Terre Haute, Indianapolis & Eastern Traction Co. v Scott, 150 N.E. 777, 197 Ind. 587, 43 A.L.R. 1029

Persons beyond control of carrier

As to third persons beyond the control of the carrier, the latter is required to exercise only ordinary care and vigilance to discover danger of, and prevent, injury to passengers—Williams v. East St. Louis & S. Ry. Co., 232 S.W. 759, 207 Mo.App. 233—10 C.J. p. 906 note 75 [a].

Conductor

Railroad conductor has duty to use reasonable care to protect passengers from injuries by third persons, where there is reason for suspecting danger.—Terre Haute, Indianapolis & Eastern Traction Co. v Scott, 170 N.E. 341, 91 Ind.App. 690, rehearing denied 172 N.E. 659, 91 Ind.App. 690

43. Iowa.—Wheeler v Des Moines City Ry. Co., 215 N.W. 950, 205 Iowa 439, 55 A.L.R. 473

44. Mich.—Takacs v. Detroit United Ry., 207 N.W. 907, 234 Mich. 42

45. U.S.—Delaware, L. & W. R. Co. v. Donahue, N.Y., 238 F. 770, 151 C.C.A. 620

46. Tex.—Gulf, C. & S. F. Ry. Co. v. Baldwin, Civ.App., 2 S.W.2d 520.

Misplaced switch

The rule stated in the text was applied in respect of a misplaced switch.—Gulf, C. & S. F. R. Co. v Baldwin, Tex.Civ.App., 2 S.W.2d 520

Stoning train

It was the duty of a railroad company as a carrier of passengers to use the high degree of care that would be exercised by a very cautious and prudent person under the same circumstances to protect its passengers on a train from stoning—Gulf, C. & S. F. Ry. Co. v. Besser, Tex.Civ.App., 200 S.W. 263, dismissed for want of jurisdiction.

Strangers under control of carrier

A carrier of passengers is charged with the highest degree of care and foresight consistent with the orderly conduct of its business in respect of the protection of its passengers from injuries resulting from the act of strangers under its control or direction—Fewings v Mendenhall, 93 N.W. 127, 88 Minn. 336, 97 Am.S.R. 519, 60 L.R.A. 601.

47. Ga.—Yellow Cab Co. of Atlanta v. Carmichael, 126 S.E. 269, 33 Ga.App. 364.

48. Ky.—Louisville R. Co. v. Dott, 171 S.W. 438, 161 Ky. 759, L.R.A. 1915C 681 and note.

49. Ky.—Louisville & N. R. Co. v Bennett, 209 S.W. 358, 183 Ky. 445

50. N.C.—Mills v. Atlantic Coast Line R. R., 90 S.E. 221, 172 N.C. 266.

the utmost care and diligence consistent with the proper management of its business.[51]

A street railroad company is not necessarily liable for the conduct of a third person who negligently injures an intending passenger standing on a highway.[52] Where a passenger leaves a street car of his own volition for the purpose of inspecting the damage resulting from a collision between such car and a motor car, the carrier is not liable for an injury sustained by the passenger, while in the street, through the negligence of a third person.[53] The rule is otherwise, however, where the passenger leaves the car at the invitation of the conductor in order to assist the conductor in connection with the collision and the injury results from the conductor's neglect of his duty to warn the passenger of danger.[54] Where a street car passenger's peril from outside is seen, or notice thereof is given, carmen must avert it if possible, but any suggestions from passengers as to what the conductor shall or shall not do merely carries knowledge to the conductor of the danger, and does not affect the company's liability.[55]

Operation of taxicab by third person. The owner of a taxicab may be liable to a passenger where the regular driver permits a third person to drive, the regular driver remains in the cab, and the passenger sustains injury through the negligent driving of the substitute driver, even though the regular driver exceeds his authority as an employee in selecting a substitute driver.[56] Where the substitute driver is selected by the regular driver, without authority, there is no such privity between the owner and the substitute driver as to base liability on the principle of respondeat superior; in such case the only ground of liability is a negligent violation of the contract of carriage.[57] The owner is not relieved of liability in such case on the theory of common enterprise where the injured persons were merely passengers without the right to control the substitute driver.[58]

Protection from mob; strikers. A carrier may be liable for injuries to a passenger by a mob allowed to go on its train, car, or premises with the purpose of injuring passengers, the intention of the mob being reasonably apparent, and it being within the power of its employees to prevent it.[59] The carrier is not liable, however, where it is not within the power of its employees to prevent the injury;[60] nor, it seems, merely because the employees fail to leave the vehicle of carriage in order to summon assistance to prevent an occurrence that may not reasonably be anticipated;[61] and it is not the duty of a railroad company to carry on its trains a police force sufficient to quell or oppose the entrance of unexpected mobs seeking to injure persons on the train, as shown above in § 688

A street railroad is not negligent as to its passengers in attempting to operate its cars during a strike of its employees, unless the conditions are such that it ought to know, or ought reasonably to anticipate, that it cannot do so and at the same time guard its passengers from violence.[62]

Protection from police officers. A carrier is not ordinarily liable to a passenger for injuries caused by an unforeseeable unlawful act of a police officer.[63] Where a known officer of the law in the apparent exercise of his official authority disturbs

51. Mass.—Langley v. Boston Elevated R Co., 112 N.E. 79, 223 Mass 492.

52. Pa.—Klingensmith v. West Penn. Rys. Co., 123 A. 787, 279 Pa. 336.

53. Mich.—Moffit v. Grand Rapids Ry. Co, 200 N.W. 274, 228 Mich. 349

54. Mich.—Moffit v. Grand Rapids Ry Co., supra

55. Ky.—Louisville R. Co. v. Dott, 171 S.W. 438, 161 Ky. 759, L.R.A. 1915C 681.
10 C.J. p 908 note 84.

56. Me.—Chaput v. Lussier, 165 A. 573, 132 Me. 48.

Passenger not guest

In reaching the conclusion that the owner of the taxicab was liable, it was pointed out that plaintiffs were passengers and not guests.—Chaput v. Lussier, 165 A. 573, 132 Me 48.

Instruction not to permit anyone else to drive

Taxicab owner's instructions to driver not to permit anyone else to drive cab did not affect owner's liability for passenger's injuries when driver permitted another to drive cab —Chaput v. Lussier, 165 A. 573, 132 Me 48.

57. Me.—Chaput v. Lussier, supra.

58. Me.—Chaput v. Lussier, supra.

59. Mo.—Williams v. East St. Louis & S. Ry. Co., 232 S.W. 759, 207 Mo. App. 233.
10 C.J. p 907 note 80.

Attacks on colored persons

Where a reasonably prudent person would have anticipated that a colored passenger would have been attacked by a mob if brought into a certain place, such passenger had no knowledge of the actual conditions, the carrier did have such knowledge and failed to warn the passenger of the danger, and the passenger was attacked by a mob, the carrier was liable if all other elements of liability existed.—Williams v. East St. Louis & S. Ry. Co., 232 S.W. 759, 207 Mo. App 233—10 C.J. p 907 note 80 [a].

60. Pa.—Pittsburgh, etc., R. Co v. Hinds, 53 Pa. 512, 91 Am.D. 224.

61. La.—Miles v. New Orleans Public Service, Inc., 3 La.App. 496.

62. Ill.—Chicago, etc., R. Co. v. Pillsbury, 14 N.E. 22, 123 Ill. 9, 5 Am.S.R 483.
Minn.—Fewings v. Mendenhall, 93 N.W. 127, 88 Minn. 336, 97 Am.S.R 519 and note 60 L.R.A. 601.
R.I.—Bosworth v. Union R. Co., 58 A. 982, 26 R.I. 309, 3 Ann.Cas. 1080
10 C.J. p 907 note 83.

63. **Shooting into cab**

Where taxicab driver, who knew that officers were searching automobiles for a murderer, continued on his way notwithstanding an officer had stepped into road with flashlight and ordered driver to stop, and officer shot into cab wounding passenger, driver was not liable to passenger for negligence in failing to stop, since it was not reasonably foresee-

the peace and personal security of a passenger, the carrier's employees are not bound to inquire whether he is acting officially and with lawful authority;[64] and it is not their duty to intervene unless the officer's conduct is known to be unlawful.[65] The servants or employees of the carrier are under no duty to resist or interfere with such an officer in arresting a passenger unless they know or, by reasonable diligence, should know that the arrest is unlawful,[66] or, as sometimes stated, to justify interference by the carrier's employees, the case must be a plain and unmistakable case of unlawful arrest.[67] It is not the duty of an employee of the carrier to assume from the fact that the officer has no warrant that the arrest of a passenger is unlawful so as to require such employee to prevent, or protest against, the arrest or detention.[68] According to some cases, however, the rule is otherwise where the carrier's employees know, or, by the exercise of due diligence, should know, that the arrest is unlawful,[69] and where it is plain to the agent or employee of the carrier that the officer is not acting in the exercise of his authority, it is the duty of such agent or servant to interfere for the protection of the passenger.[70]

While the view has been expressed that the duty to interfere for the protection of the passenger exists where it is plain that the officer is abusing his official authority, that is, is exceeding the limits of his customary functions in disturbing the peace and personal security of the passenger,[71] according to other cases, where a passenger is arrested while on a train, the carrier is under no duty to see that the officer uses only such force as is necessary to make the arrest.[72]

The carrier may be liable to a passenger for the acts of an officer whom its agents have requested to assist in ejecting undesirable persons, as shown below in § 824.

§ 697. Act of God, Vis Major or Inevitable Accident

In the absence of negligence on the part of the carrier, it is not liable to a passenger where the injury is due to a natural cause, overwhelming force, or other cause beyond the control of the carrier.

Since carriers of passengers are liable only for negligence, as shown above in § 676, it matters not whether the injury is due to a natural cause or overwhelming force, or to the wrongs or faults of third persons, unless the carrier is in some way guilty of negligence with respect thereto. If the accident resulting in injuries is due to such causes, and is inevitable, that is, could not have been avoided in the exercise of that high degree of care which the carrier is bound to exercise for the safety of the passenger, the carrier will not be liable;[73] nor will it be liable if there is no negligence on its part, but the accident is caused by the interference of a third person with its appliances,[74] nor if the in-

able that the officer would, without right, shoot on a mere suspicion that some one in the taxicab had committed a felony—England v. Kinney, 113 S.W.2d 838, 272 Ky. 32

64. Ark.—Mayfield v. St. Louis, etc., R. Co., 133 S.W. 168, 97 Ark. 24, 32 L.R.A.,N.S., 525.
10 C.J. p 908 note 85.

Corpus Juris is cited with approval in Clark v. Norfolk & N. Ry. Co., 100 S.E. 480, 481, 84 W.Va. 526, 7 A.L.R. 117.

65. Ala.—Birmingham Ry., Light & Power Co. v. Lipscomb, 73 So. 962, 198 Ala. 653
Kan.—Fennell v. Atchison, T. & S. F. Ry. Co., 158 P. 14, 98 Kan. 210, L.R.A.1916E 1107.
Ky.—Chesapeake & O. R. Co. v. Pack, 232 S.W. 36, 192 Ky. 74.
10 C.J. p 908 note 86.

Entry into colored compartment

White Pen Code Annot. 1911 arts. 1010—5 and 1010—9, punishing any person riding in a coach not designated for his race, and punishing any conductor omitting to remove from a coach any person not entitled to ride therein, do not prohibit a white peace officer from entering a negro coach in the performance of his duties, so as to make the carrier liable therefor. Accordingly, under White's Code Cr.Proc.Annot. arts. 3, 44, requiring peace officers to interfere without warrant to suppress crime, a white city marshal may enter a negro coach within the limits of the city to investigate a prior disturbance therein and to ascertain whether it is necessary to take any steps to prevent its recurrence.—Missouri, K. & T. R. Co. v. Brown, Tex.Civ.App., 158 S.W. 259.

66. W.Va.—Clark v. Norfolk & W. Ry. Co., 100 S.E. 480, 84 W.Va. 526, 7 A.L.R. 117.
10 C.J. p 908 note 86.
Liability of carrier for illegal arrest made by police officer see C.J.S. title False Imprisonment § 40, also 25 C.J. page 508 note 60-page 509 note 62.

67. Ky.—Chesapeake & O. R. Co. v. Pack, 232 S.W. 36, 192 Ky. 74.

68. Ky.—Chesapeake & O. R. Co. v. Pack, supra.

69. W.Va.—Clark v. Norfolk & W. Ry. Co., 100 S.E. 480, 84 W.Va. 526, 7 A.L.R. 117.

70. Ala.—Birmingham Ry., Light & Power Co. v. Lipscomb, 73 So. 962, 198 Ala. 653.

71. Ala.—Birmingham Ry., Light & Power Co. v. Lipscomb, supra.

72. Ark.—Mayfield v. St. Louis, etc., R. Co., 133 S.W. 168, 97 Ark. 24, 32 L.R.A.,N.S., 525.
Ga.—Brunswick, etc., R. Co. v. Ponder, 43 S.E. 430, 117 Ga. 63, 97 Am.S.R. 152, 60 L.R.A. 713.
N.C.—Carver v. Carolina, etc., R. Co., 85 S.E. 293, 169 N.C. 204.

73. Ala.—Irwin v. Louisville, etc., R. Co., 50 So. 62, 161 Ala. 489, 135 Am.S.R. 153, 18 Ann.Cas. 772
La.—Holden v. Toye Bros. Auto & Taxicab Co., 1 La.App. 521
Mass.—Davis v. Boston Elevated Ry. Co., 126 N.E. 841, 235 Mass. 482
10 C.J. p 908 note 90.

Dog jumping from coach

Passenger lawfully approaching train and injured by dog jumping from coach cannot recover where human foresight could not have prevented accident.—Burns v. Pennsylvania R. Co., 144 A. 103, 294 Pa. 277.

74. N.C.—Pruett v. Southern R. Co., 80 S.E. 65, 164 N.C. 3, 49 L.R.A.,

jury is the result of a pure accident.[75] On the other hand, if, in the exercise of the high degree of care and foresight required of carriers of passengers, the cause of the accident could have been foreseen and the result thereof avoided, the carrier will be liable.[76] The negligence of the carrier in such case, however, must be proximate and not remote as connected with the accident,[77] but it has been held that the carrier is liable, although the immediate cause of the accident is an act of God, if the negligence of the carrier concurs in any degree in causing the injuries.[78]

Extreme weather conditions. A carrier is not guilty of such culpable negligence as will make it liable in damages, if it fails to provide against extraordinary and unprecedented storms, floods, or other extreme weather conditions which cannot be reasonably anticipated by that degree of skill and experience required in the prudent construction or operation of the road; in such cases, the injury cannot be held to be attributable to any fault or negligence of the company; it results from inevitable accident—vis major—the act of God.[79] A railroad company is bound, however, so to construct its road that it will be capable of resisting all extremes of weather which, in the territory through which the line runs, might reasonably be expected, although perhaps rarely, to occur, and is liable for an accident caused by its failure so to do;[80] and it will also be liable if its negligence in operating its road concurs with the weather conditions in causing the accident.[81]

§ 698. To Whom Liable

The duty of a carrier which it owes to a passenger does not extend to a person between whom and the passenger no relations have been established. The carrier owes the duty of reasonable care to an invitee on a vehicle or the premises of the carrier.

It may be stated, as a general rule, that the carrier owes the requisite care to every passenger, without regard to age, sex, or bodily infirmity.[82]

The carrier's duty to exercise the care, skill, and diligence which it must exercise toward a passenger does not extend to one who has no relation with the carrier,[83] as where one who was a passenger has ceased to be such;[84] hence, the carrier is not

N.S., 810 and note, Ann.Cas.1915D 54 and note.
10 C.J. p. 908 note 91.

75. Mass.—Nichols v. Boston Elevated Ry. Co., 120 N.E. 847, 231 Mass. 299.

76. S.C.—Black v. Charleston, etc., R. Co., 69 S.E. 230, 87 S.C. 241, 31 L.R.A.,N.S., 1184
10 C.J. p. 909 note 92.

Alleged insanity of locomotive engineer

A railroad company may not avoid liability for the death of a passenger on one of its trains caused by a collision due to the disregard of orders by the engineer of the locomotive attached to such train, on the alleged ground that such engineer was temporarily insane, where the only evidence of insanity is that the engineer jumped to save his life—Powe v. Morgan's L. & T. R. R. & S. S. Co., 7 La.App. 51.

Overturning of automobile stage, which was driven on a gravel road by one who had not slept for thirty-six hours, was held not to be an unavoidable accident or ordinary risk of the road assumed by the passenger, where the stage would not have left the road except for the driver's negligence.—Seney v. Pickwick Stages Northern Division, 255 P. 279, 82 Cal.App. 226.

77. Tenn.—Illinois Cent. R. Co. v. Kuhn, 64 S.W. 202, 107 Tenn. 106.
10 C.J. p. 909 note 93

78. Wash.—Topping v. Great Northern R. Co., 142 P. 425, 81 Wash. 166, L.R.A.1915F 1174.
10 C.J. p. 909 note 94

79. Me.—Libby v. Maine Cent. R. Co., 26 A. 943, 85 Me. 34, 20 L.R.A. 812.
10 C.J. p. 909 notes 95, 96.

80. Ky.—Louisville, etc., R. Co. v. Peck, 153 S.W. 39, 152 Ky. 6, 49 L.R.A.,N.S., 198.
10 C.J. p. 909 note 97.

81. Tenn.—Illinois Cent. R. Co. v. Kuhn, 64 S.W. 202, 107 Tenn. 106.
10 C.J. p. 910 note 98.

82. Tex.—International & G. N. Ry. Co. v. Williams, Civ.App., 183 S.W. 1185, error refused.

83. Mo.—Frye v. St. Louis, etc., R. Co., 98 S.W. 566, 200 Mo. 377, 8 L.R.A.,N.S., 1069.
10 C.J. p. 875 note 97.

Person unloaded at station

A bus company which operated a station at which a passenger who was suffering from an apoplectic stroke was unloaded by another bus company without the knowledge of the first company was not liable for breach of duty as carrier for treatment or mistreatment of passenger as a drunk, in absence of a contractual relationship with first company.—Searcy v. Interurban Transp. Co., 179 So. 75, 189 La. 183, reversing, App., 179 So. 93, reversing 171 So. 468

84. Ill.—See Horst v. St. Louis Electric Terminal Ry. Co., 199 Ill.App. 169.

Iowa.—Morris v. Omaha & C. B. St. Ry. Co., 187 N.W. 510, 193 Iowa 615.
Mich.—Sink v. Grand Trunk Western Ry. Co., 198 N.W. 238, 227 Mich. 21.
Mo.—Neuer v. Metropolitan St. R. Co., 127 S.W. 669, 143 Mo.App. 402
N.J.—Higgins v. Del Monte, 194 A. 256, 119 N.J.Law 3.
Who are passengers generally, continuance and termination of relation see supra §§ 563–566.

After safely alighting

Elderly woman who was struck by passing motorist while attempting to cross street immediately after safely alighting from bus could not maintain action against bus company on theory of relation of carrier and passenger, since on alighting she assumed status of pedestrian.—Cooke v. Elk Coach Line, 180 A. 782, 7 Harr., Del., 120.

Assisting brakeman in unloading freight

Where passenger, after leaving train and while on platform, was requested by brakeman to help in unloading of heavy barrel from car, railroad was not liable, by reason of the relation of carrier and passenger, for injuries sustained while giving such assistance.—Shaffer v. St. Louis & S. F. Ry. Co., 208 S.W. 145, 201 Mo.App. 107.

Bailee of person

Carrier's duty to passengers applies only to period in which carrier in a certain sense, is bailee of passenger's person.—El Paso Electric

liable for the acts of its employees toward one who has no such relation, unless they acted by its authority or direction.[85]

A person who has purchased a ticket and is crossing the tracks of the carrier in order to enter a vehicle of carriage is entitled to the same high degree of care that is required of a carrier in respect of a passenger actually riding in such a vehicle.[86]

Where a person, although not a passenger, is on a car or the carrier's premises by its express or implied invitation, it is bound to exercise ordinary care for his protection.[87] Notwithstanding a carrier has ground for refusing to receive a particular person as a passenger, if such person is received and his fare is paid or duly tendered, he is entitled to the same rights as other passengers.[88]

The carrier is liable for injuries sustained by a person on its car as the result of a sudden, unprovoked, willful, and malicious assault by the conductor, regardless of the capacity in which such person was on the car.[89]

Where a railroad company permits the use of its tracks by another company, and an employee of such other company actually engaged at the time in the operation of a train of such other company is injured while the train is moving over the track of the railroad company, the latter company, being under no legal obligation to him except to furnish him a track on which the train might safely be run, is not liable for his death unless he is killed by reason of a defect in its tracks.[90]

A carrier owes at least the duty of reasonable care to one who is being transported in a private car.[91]

§ 699. Persons Riding under Special Contracts

In general a carrier owes to all persons, other than its own employees, whom it has received and agreed to transport the duty to exercise the same or similar care, skill, and diligence which it is required to exercise as to passengers, and, for a breach of such duty which is the cause of injury to a person so received and transported, the carrier is liable.

Co. v. Ludlow, Tex Civ App., 291 S W. 619.

Only while relation exists

The duty of a carrier to exercise due care for the safety of its passengers continues only while the relation of passenger and carrier exists. —Kelson v. Public Service R. Co., 110 A. 919, 94 N J.Law 527.

Leaving train temporarily

Passenger may leave train temporarily at station not her destination without losing status as passenger and is entitled to same high degree of care as at destination.—Texas & N. O R Co. v Rooks, Tex.Civ App, 283 S W. 632, affirmed, Com App, 292 S W. 536, and rehearing denied 293 S. W. 554.

Transfers

Where passenger making continuous journey alights from carrier for purpose of making transfer, relation of carrier and passenger continues while he is in necessary act of making transfer, during which time carrier owes him same high degree of care which it owes to all passengers Accordingly, where bus company operating bus on public highway temporarily closed to public use deposited passenger on closed highway on dark night with instructions to walk ahead and transfer to another bus, duty of carrier to passenger continued while passenger was walking on road to effect transfer—Damm v. East Penn Transp Co, 182 A. 720, 120 Pa Super. 381.

85. Ala—Birmingham R., etc, Co. v. Mason, 34 So. 207, 137 Ala 342.

86. Pa—Lynn v. Pittsburgh & L. E R. Co., 110 A. 271, 267 Pa 41.

87. Mich—Sink v. Grand Trunk Western Ry. Co, 198 N W. 238, 227 Mich. 21.

Okl.—St Louis & S F R Co v. Stacy, 171 P. 870, 77 Okl 165 10 C J. p 876 note 5.

Persons properly on cars

A railroad company owes persons properly in its freight cars during course of transportation, duty to inspect such cars with sufficient thoroughness to ascertain any fairly obvious defect constituting likely source of danger in their construction or state of repair before hauling them over its lines—Dominices v Monongahela Connecting R. Co., 195 A 747, 328 Pa. 203.

Person transporting passengers and baggage between stations

One engaged in transporting passengers and their baggage between two depots situated on two different lines of railway in the same village, and who had been so engaged for some time with the carrier's knowledge and acquiescence, was an invitee on the station premises, and the carrier owed him reasonable care for his safety. In such case, the implied invitation extended not only to the particular premises where the invitee's bus was generally placed near the depot platform, but also to the waiting rooms and station platform.—Dougherty v. Davis, 187 N. W 616, 48 N.D. 883

Police officer boarding train to make arrest

Where railroad employee, assisting passengers to board and alight from trains, permitted constable to go into train to make an arrest, carrier was bound to hold train a reasonable time to permit him to make such arrest and alight, and was liable for injury to him due to its failure to exercise ordinary care for his safety—St. Louis, I M & S Ry Co v. Cantrell, 164 P. 110, 63 Okl. 187, L R.A.1917D 980.

88. U S.—Pearson v. Duane, Cal., 4 Wall. 605, 18 L Ed 447.

89. Mo—Lampe v United Rys Co. of St Louis, 232 S W 249, 209 Mo App. 357.

90. Ga—Killian v. Augusta, etc, R. Co, 4 S E 165, 79 Ga. 234, 11 Am. S R. 410

Train of lumber company

In a case in which the rule stated in the text was applied and in which the question as to liability of a railroad company for the death of an employee of a lumber company while a train of the latter company was being operated over the tracks of the railroad company was involved, the view was expressed that the rule as to the liability of the railroad company for injury to an employee of the lumber company temporarily occupying with its own cars and engine the track of the railroad company, by permission of the latter, is quite different from that as to the liability of railroad companies to passengers or to the public generally—Central of Georgia Ry Co v. Bessinger, 87 S E 920, 17 Ga App. 617.

91. Ind.—Cleveland, C., C & St. L. R Co. v. Henry, App, 80 N E 636, rehearing denied 81 N E 593, superseded 83 N E. 710, 170 Ind. 94.

The carrier's duty to exercise the care, skill, and diligence which it must exercise toward a passenger extends in general to every case in which a carrier receives and agrees to transport a person not in its employment, whether by contract with the person to be carried, or with some other person,[92] as where the contract is made with another person by whom the person to be carried is employed, for the purpose of transacting the employer's business on the cars or other conveyances of the carrier,[93] and the carrier may be liable for injuries resulting from a failure to comply with such duty.[94]

Employee of carrier. The liability of a railroad company for personal injury to its employee who travels to and from his work on a free pass has been recognized where at the time of the accident he was not acting in the capacity of an employee.[95]

Express messenger. An express messenger whom a railroad company is carrying under a contract with an express company does not, it has been held, assume the risks resulting from the negligence of the railroad company in the management of its trains.[96] It has been held that a railroad company owes an express messenger at least as high degree of care for his protection as it owes to its own employees.[97]

Mail clerk. The foregoing rules apply in the case of a postal or mail clerk[98] Regardless of whether or not the relation between a railroad mail clerk and a railroad company is that of passenger and carrier, it has been held that it is the duty of the railroad company to exercise such care as a person of ordinary prudence would exercise under like conditions and like circumstances for the safety of such clerk.[99]

While a postal or mail clerk or agent may not rely on the contract between the railroad carrier and the government as a basis of recovery, he may rely on the breach of duty which the law imposes on every person who undertakes to perform even a gratuitous service for another to exercise the care and skill which the nature of the undertaking requires.[1] The railroad company in carrying the mails is not an agent or public officer engaged in a governmental function, so as to be exempt from liability for the negligence of its employees which results in injury to a mail clerk.[2]

Persons accompanying live stock. Subject to certain limitations and qualifications due to the mode of travel, the contract of carriage, and the duties of the person who is traveling, the carrier's duty to a person traveling on a drover's pass or under a similar contract, to accompany live stock is substantially the same as that which the carrier owes to an ordinary passenger, and a breach of such duty may constitute negligence for which the carrier is liable.[3] The carrier must exercise reasonable care for the safety of a caretaker while engaged in car-

92. Ill.—Barker v. Chicago, etc., R. Co., 90 N.E. 1057, 243 Ill. 482, 134 Am.S.R. 382, 26 L.R.A.,N.S., 1058.
10 C.J. p. 874 note 90, p. 875 note 92.
Who are passengers see supra §§ 544–566.

93. Me.—Miller v. Maine Cent. R. Co., 133 A. 907, 125 Me. 338, 47 A.L.R. 720.
10 C.J. p. 875 note 93.

Pass issued pursuant to contract
Where plaintiff was not a trespasser, but rode with the consent of the carrier under an agreement between her employer and the carrier, plaintiff was entitled to due care unless she was precluded from recovering by reason of her knowledge of the pass limiting the carrier's liability.—Western Maryland Ry. Co. v. Shaizer, 120 A. 840, 142 Md. 274.
Employees of other as passengers in general see supra § 547.

94. Me.—Miller v. Maine Cent. R. Co., 133 A. 907, 125 Me. 338, 47 A.L.R. 720.
10 C.J. p. 874 note 90, p. 875 notes 91–93.

95. Mass.—Palmer v. Boston & M. R. R., 116 N.E. 899, 227 Mass. 493.
Employee of carrier as passenger in general see supra § 546.

96. Ohio. — Pennsylvania Co. v. Woodworth, 26 Ohio St. 585
Express messenger as passenger in general see supra § 547.

97. Va.—Shannon v. Chesapeake, etc., R. Co., 52 S.E. 376, 104 Va. 645.

98. Ala.—Louisville & N. R. Co. v. Bowen, 103 So. 872, 212 Ala. 690
Ky.—Louisville & N. R. Co. v. Dougherty, 185 S.W. 114, 170 Ky. 10, L.R.A.1916E 464.
Ohio.—Pittsburg, C., C. & St. L. R. Co. v. Pool, 17 Ohio Cir.Ct.,N.S., 404.
Mo.—Scheipers v. Missouri Pac. R. Co., 298 S.W. 51.
10 C.J. p. 875 note 94.

Written contract unnecessary
To establish a liability of a railroad company for injuries to a United States mail clerk, it is not necessary to show a written contract between the company and the United States to carry mail.—International, etc., R. Co. v. Davis, 43 S.W. 540, 17 Tex.Civ.App. 340

Highest degree of care
A railway mail clerk is entitled to the highest degree of care.—Carter v. Washington & O. D. Ry., 95 S.E. 464, 122 Va. 458.
Postal or mail clerk as passenger in general see supra § 548.

99. Ind.—Pittsburgh, C., C. & St. L. Ry. Co. v. Arnott, 126 N.E. 13, 189 Ind. 350.

1. Ala.—Southern R. Co. v. Harrington, 52 So. 57, 166 Ala. 630, 139 Am.S.R. 59

2. Ill.—Barker v. Chicago, etc., R. Co., 90 N.E. 1057, 243 Ill. 482, 134 Am.S.R. 382, 26 L.R.A.,N.S., 1058
10 C.J. p. 875 note 94 [c] (2).

3. Ark.—Beasley v. Hines, 219 S.W. 757, 143 Ark. 54, 15 A.L.R. 864.
Tex.—Yoes v. Texas & R. Ry. Co. Civ.App., 211 S.W. 311, error refused.
10 C.J. p. 875 note 96.
Person riding on drover's pass or under like arrangement as passenger in general see supra § 551.

High degree of care
Aside from stipulations in drover's pass which relieve the carrier of certain specified obligations, the carrier owes a person riding on such pass that high degree of care which a very cautious and prudent person would exercise, under the same or similar circumstances, to protect such person from injuries, and a failure to use such care is

ing for stock in the yards of the carrier,[4] and whether the person accompanying stock pursuant to contract is regarded as a passenger or as a licensee, it is the duty of the carrier to exercise reasonable care to provide and keep in a reasonably safe condition instrumentalities provided for use in transportation and handling of stock.[5] The duty of a carrier to a caretaker accompanying live stock is modified by the fact that the duties of a caretaker expose him to certain perils not incident to ordinary travel.[6]

In respect of the return passage of a caretaker on the carrier's passenger train pursuant to a contract for the shipment of livestock, the caretaker is entitled to the high degree of care required of a carrier in respect of a passenger, and the carrier is liable for a breach of duty in this regard.[7]

§ 700. Licensees and Trespassers

With respect to trespassers and licensees on its cars or premises, a carrier must avoid wanton or willful injury to such persons, and must also exercise ordinary care to avoid injury to them after their presence has been discovered.

A mere licensee[8] or trespasser,[9] or other person

negligence for which the carrier may be liable.—Roberts v. Ft. Worth & D. C. Ry. Co., Tex.Civ.App., 229 S.W. 954—Texas & N. O. R. Co. v. Tillman, Tex.Civ.App., 197 S.W. 1128, error refused.

Degree of care as affected by carriage on freight or mixed train see supra § 684.

4. Okl.—Chicago, R. I. & P. Ry. Co. v. Steinberger, 171 P. 716, 68 Okl. 57.

10 C.J. p. 875 note 96 [a].

Crossing tracks

Owner accompanying shipment of live stock under contract with carrier had carrier's implied consent to cross tracks in its yard to look after stock, and in such case carrier must exercise reasonable care for his safety.—Chicago, R. I. & P. Ry. Co. v. Steinberger, 171 P. 716, 68 Okl. 57.

5. N.D.—Wall v. Great Northern Ry. Co., 175 N.W. 705, 43 N.D. 422.

6. Tenn.—Nashville, C. & St. L. Ry. v. Hopper, 217 S.W. 661, 142 Tenn. 200.

Person riding in stock car

In measuring the degree of care to which a passenger is entitled, the circumstances of the particular case should be considered, a passenger riding in a stock car not being entitled to the same protection as one riding in a passenger train or in a caboose.—Beasley v. Hines, 219 S.W. 757, 143 Ark. 54, 15 A.L.R. 864.

7. Minn.—Gruhl v. Northern Pac. Ry. Co., 168 N.W. 127, 140 Minn. 353.

8. Ark.—St. Louis-San Francisco R. Co. v. Bley, 271 S.W. 455, 168 Ark. 814.

La.—Bonner v. Louisiana Central Lumber Co., App., 160 So. 325.

Okl.—St. Louis & S. F. R. Co. v. Stacy, 171 P. 870, 77 Okl. 165.

10 C.J. p. 875 note 1

To whom carrier liable for unsafe premises see infra § 722

Intention to become passenger

As respects railroad's liability to purchaser of passenger train ticket, who was allegedly struck by swinging timber on box car of passing freight train, purchaser who was approaching place where he would embark on train, two or three hours later, was at most a mere "licensee."—Reed v. Baldwin, 92 S.W.2d 392, 192 Ark. 491

General public visiting waiting room

Carrier owes no duty to general public visiting depot waiting rooms except to abstain from willful, wanton injury.—Manatis v. Cumberland & M. R. Co., 300 S.W. 593, 222 Ky. 190.

No contract

Where plaintiff contracted with defendant, a carrier, to carry goods for him in a baggage truck, and defendant sent his servant with such truck, and plaintiff without defendant's authority rode in truck and was thrown out, as defendant had not contracted to carry plaintiff, carrier is not liable for his injury.—Gruber v. Cater Transfer Co., 165 P. 491, 96 Wash. 544, L.R.A.1917F 422.

Tenant riding elevator

Tenant attempting to move furniture into building closed to reception of freight was "licensee," precluding recovery for injuries sustained while riding elevator.—Barton v. Republican Co., 178 N.E. 605, 277 Mass. 299.

Person using car as passageway

Elevated railroad's passenger, passing through car to get on other side of platform, was at most a licensee, to whom carrier owed no duty except to refrain from wanton misconduct.—Rhoades v. Boston Elevated Ry. Co., 122 N.E. 194, 232 Mass. 361.

Entering car on private business

A person has no right as a matter of law to enter a public conveyance operated by a common carrier of passengers, for his private purposes alone. Demurrer to complaint was properly sustained in an action for the death of a person who had entered a passenger coach for the purpose of procuring one already therein to transact an errand for him, but did not intend to become a passenger himself, and was killed when attempting to alight.—Rowell v. Hines, 103 S.E. 545, 114 S.C. 339.

9. U.S.—Trapnell v. Hines, C.C.A.N.J., 268 F. 504.

Ga.—Madden v. S. L. Mitchell Automobile Co., 94 S.E. 92, 21 Ga.App. 108

Ill.—See Abt v. Chicago Rys. Co., 207 Ill.App. 314.

Ky.—See Louisville & N. R. Co. v. Moss, 13 Ky.L. 684

Tenn.—Louisville & N. R. Co. v. Martin, 186 S.W. 595, 135 Tenn. 435, L.R.A.1917A 417.

Utah.—Bergman v. Denver & R. G. R. Co., 178 P. 68, 53 Utah 213.

10 C.J. p. 876 note 2.

Extraordinary diligence not required

Railroad company does not owe trespasser duty of extraordinary diligence, owing to passengers under Civ.Code 1910 § 2714, but trespasser is entitled to protection against willful, wanton, and unnecessary violence by employees.—Payne v. Allen, 116 S.E. 640, 155 Ga. 54, reversing 116 S.E. 345, 28 Ga.App. 8, conformed to 116 S.E. 642, 30 Ga.App. 80

Duty to discover trespasser

Railroad is under no duty to discover presence of trespassers on train.—Bergman v. Denver & R. G. R. Co., 178 P. 68, 53 Utah 213

Elevator

Hotel owner was not negligent as to injuries sustained by trespassing child riding on elevator, from contact with wall of elevator shaft.—Crawford v. Rice, C.C.A.Tex., 36 F.2d 199.

Person assisting passenger

Where a person enters the carrier's car for the purpose of assisting a passenger, the carrier is not required to exercise toward him the degree of care required of it toward passengers, but it owes him the duty of ordinary care after it is aware of his presence within the car.—Mahoning Valley Ry. Co. v. Gorz, 6 Ohio App. 474.

Person accompanying live stock not trespasser

Where the contract between a car-

not occupying the status of a passenger,[10] on the carrier's cars or premises is entitled to no protection from the carrier except that it should not wantonly or willfully injure him, or in other words, that it should exercise ordinary care to avoid injuring him after discovering his presence; and this rule applies to one who enters a train or car for the purpose of stealing a ride,[11] or without any intention of paying fare under a collusive agreement with the conductor or some other agent,[12] in violation of the rules of the carrier; and it applies also to one who, although a passenger, puts himself in the position of a trespasser by violating some rule or regulation of the carrier.[13] According to some cases, however, although there is authority to the contrary,[14] a child of tender years who is invited to ride by the motorman of a street car is lawfully on such car and the carrier owes the same duty to such child that it owes to a passenger, notwithstanding such child has not paid any fare.[15]

Whether a person riding on a conveyance belonging to a carrier is a licensee or trespasser, the carrier has the duty not to injure such person wantonly or willfully,[16] and, according to some cases, must protect him from willful and wanton misconduct of the agents of the carrier;[17] and for a breach by a servant of the carrier of the duty to use ordinary care to avoid injuring a licensee[18] or trespasser[19] after discovering his peril, the carrier may be liable, as, for example, where an injury is caused by the wanton or willful act of such servant.[20] Also, where an employee of a carrier,

rier and an owner of live stock permitted the owner to accompany the car containing the stock but contemplated that he should ride in the caboose, he was not a trespasser, within the meaning of the rule here under consideration, at a time when he was caring for the stock as authorized by the contract, notwithstanding he was traveling in the car containing the stock, accompanied by his sons who were not entitled to free transportation.—Lincoln v. St. Louis-San Francisco Ry. Co., 7 S.W.2d 460, 223 Mo.App. 46.

10. Mass.—Nuttall v. Worcester Consol. St. Ry. Co., 114 N.E. 291, 225 Mass. 167.
Who are passengers see supra §§ 544–566.

Improper boarding place

A person boarding train on side opposite platform, platform being proper and usual boarding place, without knowledge of train operators, was not "passenger" to whom railroad owed high degree of care, and could not recover for injuries sustained when train allegedly started with unusual jerk.—Bernardine v. Erie R. Co., 164 A. 265, 110 N.J. Law 338.

11. Utah.—Bergman v. Denver & R. G. R. Co., 178 P. 68, 53 Utah 213.
10 C.J. p 876 note 3.

Care as to equipment of train

Railroad owed trespasser stealing ride no duty to equip its train in such a way that the rear engine would have control over the automatic air brakes, nor so to equip train that stop signals given by train air whistles could be passed directly to lead engine.—Bergman v. Denver & R. G. R. Co., 178 P. 68, 53 Utah 213.

Carrier liable

The rule stated in the text was apparently recognized in a case in which the right of a person who was injured while riding on a street car to recover was upheld.—Union Traction Co. of Indiana v. Alstadt, 143 N.E. 879, 195 Ind. 389.

12. U.S.—Purple v. Union Pac. R. Co., Kan., 114 F. 123, 51 C.C.A. 564, 57 L.R.A. 700.
10 C.J. p 876 note 3.

Trainmen's permission to ride

Although young men beating their way on a freight train paid the trainmen a trifling sum for permission to ride, the railway was not liable for injuries to them when their legs, hanging out the door of an extra wide car, struck an obstacle, they having been mere trespassers, to warn whom the trainmen were under no legal duty, but only to refrain from negligently injuring them after discovery of peril.—Williams v. Chicago, R. I. & P. Ry. Co., 215 S.W. 605, 139 Ark. 562.

13. Mass.—Renaud v. New York, etc., R. Co., 97 N.E. 98, 210 Mass. 553, 38 L.R.A.,N.S., 689—Yancey v. Boston El. R. Co., 91 N.E. 202, 205 Mass. 162, 137 Am.S.R. 431, 26 L.R.A.,N.S., 1217.
10 C.J. p 876 note 4.

Carrier's failure to object

Mere fact that, when prospective passenger on freight train trespassed on part of right of way not intended for his use, he was not ejected, did not make him invitee to go into same place second time, especially where dangerous condition was obvious.—Hamilton v. Pryor, Mo., 201 S.W. 550, L.R.A.1918D 212.

14. Child a trespasser

If a motorman in the state of Maine did not have apparent or implied authority to invite an eleven year old child to become a passenger without the payment of a fare, then such child was a trespasser, to whom the carrier only owed the negative duty of not injuring by willful or wanton conduct, in view of Me. Rev.St. c 55 § 34.—Meloon v. Davis, C.C.A.N.H., 292 F. 82.

15. Ill.—Hayes v. Sampsell, 113 N.E. 611, 274 Ill. 258, affirming 195 Ill.App. 365.
N.J.—Solomon v. Public Service Ry. Co., 92 A. 942, 87 N.J.Law 284.

Motorman's violation of orders

The fact that the motorman violated orders in receiving a child of tender years on the car did not affect the status of such child.—Hayes v. Sampsell, 195 Ill.App. 365, affirmed 113 N.E. 611, 274 Ill. 258.

16. Tenn.—Hoover Motor Express Co. v. Thomas, 65 S.W.2d 621, 16 Tenn.App. 664.

17. Tenn.—Louisville & N. Ry. Co. v. Hadley, 11 Tenn.App. 642.

18. Md.—Carr v. United Rys. & Electric Co. of Baltimore, 108 A. 872, 135 Md. 307.

19. Ga.—Madden v. S. L. Mitchell Automobile Co., 94 S.E. 92, 21 Ga.App. 108.

Passenger failing to leave train in time

A railroad's negro porter, running along beside a train, after it left a station, endeavoring to board, owed the duty to a person thereon, who had neglected to leave the train at the stop, to use care not to injure such person while the latter was trying to alight, even assuming that such person was a trespasser because of his failure to leave the train sooner, and the carrier was liable where there was a failure to comply with such duty.—Paris & G. N. R. Co. v. Campbell, Tex.Civ.App., 185 S.W. 346.

20. Ga.—Madden v. S. L. Mitchell Automobile Co., 94 S.E. 92, 21 Ga.App. 108.
Tenn.—Louisville & N. R. Co. v. Marlin, 186 S.W. 595, 135 Tenn. 435, L.R.A.1917A 417.

knowing that a child of tender years is trespassing on a vehicle under his care, negligently acts in such a manner as to injure the trespasser, his conduct is viewed in law as intentional, or willful and wanton.[21]

§ 701. Companies or Persons Liable

The fact that a carrier does not own the vehicle or track used for the transportation of passengers does not relieve the carrier of liability where it is in control of operation.

A carrier operating a car or train is liable for negligent or wrongful injuries to passengers thereon, whether or not it owns the car or train or track.[22] So, where a carrier of passengers by railroad uses cars which belong to another company, it will, by reason of its obligation to provide adequate and sufficient vehicles for safe conveyance, be liable for accidents arising from such defects in the cars as are discoverable on a careful and thorough examination.[23] So, also, a bus company is liable for an injury to one of a group of people whom it has agreed to transport notwithstanding the injured person, at the time of the accident, is riding in a bus which such company has obtained from another company by independent contract, in order to perform the contract to transport.[24] A carrier operating its trains over a bridge and having charge of a platform thereon is not absolved from liability for injuries to passengers from the dangerous condition thereof, by reason of the fact that the city is in general possession of the bridge and attends to necessary repairs.[25] A person or corporation that holds himself or itself out as the operator of a vehicle of carriage may not, under certain circumstances at least, be entitled to deny liability for an injury to a passenger by showing that the driver is an independent contractor[26] or that he is not the agent of such person or corporation.[27] So the fact that another corporation actually manages a railroad station does not relieve the carrier, whom it is sought to charge, of responsibility to passengers who are using the station facilities at such carrier's invitation.[28]

A carrier using a platform or station constructed or controlled by another owes the duty to its passengers of keeping and maintaining it in a reasonably safe condition, and becomes liable for failure to perform this duty.[29]

A carrier is not liable for injuries to a passenger from a cause which is not under its control and in respect to which it owes no duty to the passenger;[30] hence in general it is not liable where it does not own or control the track or car at the time a passenger thereon is injured,[31] although the passenger is not bound by a secret arrangement between the carrier with which he contracts and another carrier, under which the other carrier has exclusive control of the car in which the passenger is riding, and of which arrangement he has no notice.[32]

One railroad company does not become liable for the negligence of another merely by reason of being a stockholder in the corporation guilty of the negligent act.[33] Where, however, one company actually controls another, and operates its line of road

21. Pa—Petrowski v. Philadelphia, etc, R. Co., 107 A. 381, 263 Pa. 531.

22. Ind—Winona Interurban R. Co. v. Williard, 101 N.E 1022, 54 Ind. App. 472
Mass—Fletcher v. Boston, etc., R. Co, 1 Allen 9, 79 Am.D. 695.
10 C.J. p 876 note 8.

Where one railroad company depends on another for motive power, negligence of the second in the operation of the train will be chargeable to the first.—Keep v. Indianapolis & St. L. R. Co., C.C Mo., 10 F. 454, 3 McCrary 302.

23. U.S—Pennsylvania Co v. Roy, Ill, 102 U.S 451, 26 L Ed. 141.

24. Ala—Dixie Stage Lines v. Anderson, 134 So. 23, 222 Ala. 673.

25. N Y—Waldman v. Brooklyn Union El R Co, 120 N.Y S. 1017, 136 App.Div 376

26. D C—Rhone v Try Me Cab Co, 65 F.2d 834 62 App D.C. 201.

Taxicab
Taxicab corporation and registered owner of taxicab could not avoid liability to a passenger by showing that the driver was an independent contractor—Rhone v. Try Me Cab Co, 65 F 2d 834, 62 App.D C 201.

27. Tex.—McCarthy v. Valdez, Civ. App., 10 S.W.2d 1051, error dismissed.

Driver's own car
Defendant motorbus firm employing driver to operate his own car along defendants' route under defendants' permit and to solicit business in defendants' name, was estopped to deny his agency as to injured passenger.—McCarthy v Valdez, Tex Civ App., 10 S W.2d 1051, error dismissed

28. Md—Pennsylvania R. Co. v. Hoover, 120 A. 526, 142 Md. 251.

29. La—Leveret v. Shreveport Belt R. Co., 34 So 579, 110 La 399
Tex—Houston, etc., R Co. v. McCarty, 89 S W. 805, 40 Tex Civ. App. 364
10 C J. p 878 note 29

30. Mo.—Reynolds v. St. Louis Southwestern R. Co, 142 S.W 1097, 162 Mo App 618.
10 C J. p 877 note 10.

31. Ill—Pell v. Joliet, etc., R Co., 87 N E 542, 238 Ill. 510, affirming 142 Ill App. 362.
10 C J. p 877 note 11.

32. **This Corpus Juris statement** has been quoted with approval in Pugh v. Washington Ry & Electric Co, 106 A. 522, 134 Md. 196

33. Kan.—Mathews v. Atchison, etc, R. Co, 55 P. 282, 60 Kan. 11

Majority stockholder
The mere fact that a railroad company owned seventy per cent of the common stock of another railroad company which was responsible for the operation of a train when a railway mail clerk was exposed to cold and sustained an alleged impairment of health did not make the former company liable for the latter company's acts on the theory of agency.—Casey v Northern Pac Ry. Co, 213 N.W. 57, 171 Minn. 34.

as a single system, and sells tickets at the stations of the subordinate line over its system, the dominant company will be liable for injuries suffered by a passenger due to the negligence of the subordinate, although the subordinate company keeps up its corporate organization.[34] So it has been held that a street railroad company which actually controls the operations of a bus company is liable for an injury to a passenger of the bus company caused by the negligence of an employee of the latter company.[35]

A corporation which purchases the property, assets, and franchises of another corporation which is a carrier of passengers does not, merely by reason of such purchase, become liable for an injury to a passenger sustained prior to the purchase while riding in a vehicle of the seller, even though such assets in the hands of the transferee remain subject to the debts of the transferor;[36] in such case no agreement on the part of the transferee to assume liability may be implied from the mere fact of the transfer.[37]

A street railroad company may not evade its duty to passengers, nor avoid liability for negligence resulting in personal injuries to them, by its operating contracts with other corporations.[38]

The receivers of a railroad or street railroad who are vested with the power to manage and operate it are liable as receivers for injuries to a passenger from negligence in its operation, as shown below in § 711, and the company is not in general liable for such negligence.[39] Liability for injuries sustained while the receivers were operating the road is sometimes imposed on the purchaser at foreclosure by the decree of sale.[40]

A railroad company which constructs a line into a military reservation with knowledge that it is to be used to transport soldiers may be liable for injuries to soldiers sustained while they are being transported over such line where such injuries are caused by the dangerous condition of such road due to faulty construction by such company and the railroad company, before turning over the line to the military authorities had knowledge of such condition and of the use which was to be made of the line, and the fact that the military authorities have accepted the line and are operating the train when the accident occurred does not relieve the railroad company of liability.[41] The railroad company that constructed the line is not liable, however, where the accident which caused the injuries is not due to defects in the original construction but to changes made by the military authorities after the line had been turned over to them and while they were in absolute control.[42] For injuries to soldiers due solely to the negligence of the military authorities in respect of the speed or make up of the train, neither the railroad company that constructed the line nor the director general of railroads was liable where the military authorities had absolute control in respect of operation.[43]

Liability of company selling ticket or permitting others to sell tickets; recovery over. A company selling a ticket to a passenger is liable for an injury resulting to him through the negligence of those operating the train, although such train is owned and operated by a different company, the ticket being receivable for passage thereon through

34. Okl.—St. Louis & S. F. R. Co. v. Sanford, 153 P. 650, 54 Okl. 185.

35. Md.—Baltimore Transit Co. v. Swindell, 103 A. 566, 132 Md. 274.

36. Cal.—Duran v. Pickwick Stages System, 35 P.2d 148, 140 Cal.App. 103.

N.C.—Begnell v. Safety Coach Line, 153 S.E. 264, 198 N.C. 688.

Statutory provisions

Even though the provisions of Comp.St. § 1138 applied to the sale of the assets, franchises, etc., of one bus corporation to another, at most such provisions would render the conveyance void, with the result that the property conveyed would be subject to levy and sale in an action by the passenger against the transferor notwithstanding the transferee was in possession, but would not render the transferee liable. Comp.St. § 1013 which applies only to a sale in bulk of a large part or the whole of a stock of merchandise did not apply to the above sale by the bus company, and did not render the transferee liable. —Begnell v. Safety Coach Line, 153 S.E. 264, 198 N.C. 688.

37. Cal.—Duran v. Pickwick Stages System, 35 P.2d 148, 140 Cal.App. 103.

38. Neb.—Tankersley v. Lincoln Traction Co., 175 N.W. 602, 104 Neb. 24, 10 A.L.R. 1510.

39. Ill.—Glover v. Insull, 213 Ill.App. 268.

Mo.—Moore v. Metropolitan St. R. Co., 176 S.W. 1120, 189 Mo.App. 555.

After discharge of receiver

Railroad company to which its property was returned after discharge of receiver was not liable to passenger, injured by trainmen when road was in hands of receiver, where receiver made no earnings while operating road's properties, and there was no showing that there were any betterments during the period of the receiver's control, that the railroad corporation had assumed liability, or that the court which had jurisdiction of the receivership had imposed liability on such company.—Beaumont, S. L. & W. Ry. Co. v. Daniel, Tex.Civ.App., 195 S.W. 625.

40. Ill.—White v. Chicago, P. & St. L. R. Co., 196 Ill.App. 459.

41. U.S.—Bryson v. Hines, C.C.A.N.C., 268 F. 290, 11 A.L.R. 1438.

Exemption of government

The fact that the government was exempt from suit in respect of the injuries referred to in the text does not affect the liability of the railroad company.—Bryson v. Hines, C.C.A.N.C., 268 F. 290, 11 A.L.R. 1438.

42. U.S.—Heise v. Davis, C.C.A.S.C., 275 F. 326.

43. U.S.—Heise v. Davis, supra—Bryson v. Hines, C.C.A.N.C., 268 F. 290, 11 A.L.R. 1438.

an arrangement between the two companies,[44] and this has also been held to be true as to a carrier issuing tickets in its own name and supplying them to another carrier which sells them.[45]

The fact that a carrier whose employee has negligently caused an injury to a passenger holding a ticket of such carrier has an agreement with another carrier under which the latter transports passengers holding tickets of the former does not affect the liability of the carrier whose employee caused the injury.[46]

A carrier whose negligence causes an injury to a passenger who was transported under an agreement between such carrier and the carrier who sold the ticket to the passenger is liable over to the carrier who sold the ticket where the latter has been compelled to pay damages to the passenger.[47]

Ownership and control of taxicab. According to some cases a corporation which furnishes a taxicab on request may not avoid liability for injuries to a passenger on the ground that the taxicab, notwithstanding it bears the name of the corporation, is owned and operated by another;[48] it must actually appear, however, that the corporation which it is sought to charge actually undertook to provide the taxicab.[49] Where the theory on which liability of a corporation which is not the owner of a cab, and of the owner of the cab is asserted is that they are engaged in a joint venture and that the driver is the agent and employee of the corporation and under its control, a passenger who is injured while in the cab may not recover from such corporation if the owner is an independent contractor since the corporation would not be liable for the negligence of the owner or of his employee;[50] on the other hand the corporation is liable if the owner turned over the cab and the driver to the corporation and made them subject to its control.[51]

Elevators. The owner of a building at the time an elevator therein breaks, and injures a passenger, because of the negligence of the manufacturer in not making a proper test, is liable for the injuries, although the building was owned by another at the time the elevator was installed.[52] The determination of the question as to who is liable for an injury to a passenger depends in general on who has actual possession and control of the premises in which the elevator is located, and the person who is in actual possession and control is liable notwithstanding another is legally entitled to possession and control of the building.[53] The mere fact that a trespasser who has attempted to operate an elevator is still on the elevator when a passenger is injured does not permit the owner and the owner's servant to avoid liability for their negligence in connection with the operation of the elevator.[54]

44. U.S.—Barkman v. Pennsylvania R. Co., C.C.N.J., 89 F. 453.
10 C.J. p 877 note 16.

Commutation ticket

Plaintiff, having commutation ticket of defendant railroad company, riding on train of another company furnished for plaintiff's transportation, was passenger of defendant company, making latter liable for plaintiff's injuries.—McCarron v Erie R. Co., 159 A. 807, 10 N.J.Misc. 498.

45. Pa.—Mullen v. Chester Tract. Co., 84 A. 429, 235 Pa. 516, 42 L.R.A.,N.S., 76 and note.
10 C.J. p 877 note 17.

46. Cal.—Sanchez v. Pacific Auto Stages, 2 P.2d 845, 116 Cal.App. 392.

47. Ill.—Purple Swan Safety Coach Lines v. Egyptian Transp. Co., 256 Ill.App. 442.

48. D.C.—Rhone v. Try Me Cab Co., 65 F.2d 834, 62 App.D.C. 201
Fla.—Economy Cabs v. Kirkland, 174 So. 222, 127 Fla. 867, affirmed 176 So. 151, 129 Fla. 309.

Corporations having same office and telephone number

Where two corporations have the same office and telephone number and one of the corporations owns and operates taxicabs and the other furnished limousines and touring cars but is not engaged in the cab business, it seems that, if the latter corporation, in answer to a telephone request, undertakes to provide a taxicab, it is its duty to provide a safe taxicab and a careful driver.—Bergenthal v. State Garage & Trucking Co., 190 N.W. 901, 179 Wis. 42.

49. Wis.—Bergenthal v. State Garage & Trucking Co., supra.

Corporations having same office and telephone number

Where an automobile livery company and a cab company were made up of the same stockholders and officers, and occupied the same offices, with joint office employees and used a common telephone, and a telephone call for a cab was received from an unknown person, who did not ask which company he was talking to, but merely ordered a cab, which was furnished by the cab company, the auto livery company could not be held liable for injuries resulting from the negligence of the cab driver.—Bergenthal v. State Garage & Trucking Co., 190 N.W. 901, 179 Wis. 42.

50. Ind.—United Transp. Co. v. Jeffries, App., 200 N.E. 424, superseded 5 N.E.2d 524, 211 Ind. 226.

51. United Transp. Co. v. Jeffries, supra.

52. Wis.—Dibbert v. Metropolitan Inv. Co., 147 N.W. 3, 148 N.W. 1095, 158 Wis. 69, L.R.A.1915D 305, 312, Ann.Cas.1916E 924.

53. Cal.—Benussi v. Hannah, 199 P. 1063, 53 Cal.App. 243.

Purchaser on foreclosure

In an action for negligent death of tenant of apartment in elevator, facts warranted a finding that the actual possession and actual control of the apartment building had been taken over by defendant before the accident, and that a receiver in mortgage foreclosure proceedings was not in possession and control thereof, although the receiver's account was not settled and he was not discharged until after the accident occurred, defendant being the purchaser at the sale under the mortgage.—Benussi v. Hannah, 199 P. 1063, 53 Cal.App. 243.

54. Mo.—Williams v. Short, 268 S.

§ 702. Connecting Carriers

A carrier who sells a ticket for transportation of a passenger over its own and connecting lines is in general liable only for injuries due to the torts of its own employees. A carrier other than the initial carrier is in general liable only for injuries occurring on its own line through the torts of its own employees.

While there have been some decisions to the effect that a ticket for transportation over connecting lines is presumed to be the through contract of the carrier who sells the ticket, as shown above in § 652, in accordance with the rule usually recognized that the sale by a carrier of an ordinary coupon ticket for transportation over its own and an independent connecting line does not of itself create a contract for through transportation, as shown above in § 652, a carrier selling a ticket to a passenger over its own and connecting lines is ordinarily liable only for injuries to such passenger caused by the negligence of its own employees.[55] Its liability extends to their negligence while operating its car on the connecting line,[56] but not for injuries occurring on the line of the connecting carrier through the negligence of the latter's employees,[57] and the fact that the initial carrier is a stockholder in the connecting line does not render it liable for the negligence of the latter's employees.[58] The initial carrier may, however, by a contract for through transportation render itself liable for injuries caused by the negligence or other torts of the connecting carrier.[59] So, where the relation between the initial and the connecting carriers is in the nature of a partnership and they are in a sense joint operators of cars over the through route, the initial carrier may be liable for an injury sustained by a passenger as a result of the failure of the employee in charge of the car properly to protect the passenger.[60] It has been held that, even though the initial carrier purports to act only as agent in contracting for transportation beyond its line, it may be liable for an injury sustained by the passenger beyond its line if it contracts in its own name without disclosing the name of the principal, notwithstanding the passenger knew at the time of the contract that the agent was acting as principal.[61] Even though the ticket creates separate

W. 706, 219 Mo.App. 99, transferred, Sup., 263 S.W. 200.

Duty to carry

Where one offered himself as elevator passenger on first floor of a public building and was carried to fourth floor by regular operator, there was an implied obligation to take him down, and hence, in action for death of such passenger, based on bad condition of elevator and negligence of regular operator in operating elevator from outside, fact that alleged trespasser who had attempted to operate elevator was on elevator at time of passenger's death did not relieve defendant from liability.—Williams v. Short, 268 S.W. 706, 219 Mo App. 99, transferred, Sup., 263 S.W. 200.

55. U.S.—Pennsylvania R. Co. v. Jones, D.C., 15 S.Ct. 136, 155 U.S. 333, 39 L.Ed. 176.
N.Y.—Brook v. Brooklyn Union El. R. Co., 133 N.Y.S. 253, 148 App. Div. 668.
But the view has been expressed that the initial carrier was liable for an injury sustained at an intermediate point in the journey after the passenger had left the line of the initial carrier.—Gray v. Colorado Southern Ry. Co., Tex.Civ.App., 204 S.W. 347.
Nature and extent of connecting carrier's liability see supra § 653.

56. Pa.—Moss v. Lancaster, etc., R. Co., 33 Pa.Super. 1, affirmed 67 A. 869, 218 Pa. 601.
S.C.—Oliver v. Columbia, etc., R. Co., 43 S.E. 307, 65 S.C. 1.
10 C.J. p 877 note 20.

Collection of fare by zones

Where plaintiffs took passage on defendant suburban electric railway's car for continuous passage on the same car to a point in another state, knowing no other carrier than defendant, defendant was liable for collision damages, although fare was collected in six installments of nickel each, and collision occurred in fifth fare zone, over state line, on tracks belonging to another company on which defendant operated under operating agreement, and although defendant had no charter to operate outside state.—Simpson v. Southern Pennsylvania Traction Co., 103 A. 884, 260 Pa. 526.

57. U.S.—Pennsylvania R. Co. v. Jones, D.C., 15 S.Ct. 136, 155 U.S. 333, 39 L.Ed. 176.
S.C.—Seibels v. Northern Cent. R. Co., 61 S.E. 435, 80 S.C. 133, 16 L.R.A.,N.S., 1026.
10 C.J. p 877 note 21.

58. Kan.—Mathews v. Atchison etc., R. Co., 55 P. 282, 60 Kan 11.

59. Md.—Pugh v. Washington Ry. & Electric Co., 106 A. 522, 134 Md 196.
Pa.—Beamer v. Philadelphia, etc., R. Co., 50 Pa.Super. 211.
Tex.—Missouri, etc., R. Co. v. Ryon, Civ.App., 177 S.W. 525.

60. Md.—Pugh v. Washington Ry. & Electric Co., 106 A. 522, 134 Md. 196.

Protection from acts of third person

Where street car was operated to certain point by one company and beyond such point and to end of trip by another company, with same car employees, without charge of additional fare and without notice to passenger that when car reached such point latter company acquired control, and where both companies had same officers, directors, and employees and were parts of one street car system referred to as "the company," the initial carrier was equally liable with the connecting carrier for conductor's failure to protect passenger during that part of trip when car was operated over lines of the connecting carrier.—Pugh v. Washington Ry. & Electric Co., 106 A. 522, 134 Md 196.

61. Tex.—Boyles v. McClure, Com. App., 243 S.W. 1080, modifying McAdoo v. McClure, Civ.App., 232 S.W. 348.

Sufficiency of disclosure

It seems that the fact that the conductor of the train of the initial carrier pointed out to the passenger, when the latter left such train, the bus which the latter was to take for transfer to the station of another railroad would not be such a disclosure of the carrier by bus as would relieve the initial carrier of liability for an injury sustained by the passenger while on the bus, on the theory that disclosure of the carrier by bus should have been made when the contract was made. In any event the disclosure was not sufficient where neither the conductor nor anyone else informed the passenger of the name of the carrier by bus and of the alleged fact

contracts for carriage over two railroads, the initial carrier is obligated to some extent to furnish accommodations in connection with an opportunity for the passenger to make the transfer, and where, by its contract, the initial carrier assumes the obligation of providing transportation between its station and the station of the other railroad on which the passenger's journey is to continue, the initial carrier is liable for any injury sustained through the negligence of the driver of the vehicle furnished for the interstation transfer.[62]

Where the initial carrier furnishes the car in which the passenger is transported over the connecting line, it is liable for injuries caused by its negligently furnishing a defective car, irrespective of whether the injuries occur on its own line or on the line of the connecting carrier,[63] and notwithstanding its contract with the passenger purports to exempt it from liability for the connecting carrier's negligence, as shown above in § 638. A carrier, by lending its car and the service of an employee to a connecting carrier, is not, however, rendered liable for injuries to a passenger carried over the connecting line, caused by the connecting carrier's negligence, because the compensation for such loan is reckoned on the number of fares collected by the connecting carrier on that car.[64]

A connecting carrier ordinarily is liable only for injuries occurring over its own road through the negligence of its own employees,[65] and this rule applies where the contract is for transportation of a passenger in interstate commerce.[66] Notwithstanding a contract for through transportation is made by the initial carrier, a connecting or intermediate carrier is usually liable for a tort occurring on its line,[67] at least for the tort of its own servant or employee.[68] It has been held that, where a carrier selling a through ticket over several roads which are being operated under the name of a designated system acts as agent for the others, all of them are liable for injuries caused by the negligence of any one of them.[69]

§ 703. Carrier or Contractor

Whether or not a carrier is liable for the negligence or misconduct of a contractor whom the carrier has engaged for the construction of its road depends largely on whether or not the carrier has the right to control the activities of the contractor.

Where a carrier such as a railroad company contracts for the construction of its road by another person, in case of injuries occurring from the negligence or misconduct of the contractor or his employees the liability of the carrier depends primarily on whether or not it had the right to control the manner of doing the work.[70] If the contractor is an independent contractor, the carrier will not be liable for his negligence or wrongful acts,[71] unless the act is one concerning which the carrier owes a duty to its passengers to see properly done.[72] The railroad company is not liable for injuries to passengers caused by the negligence of the employees of a contractor, acting under the direction of an independent board appointed by the state over whom the railroad company has no control, unless its own employees fail to exercise proper care to

that such carrier though not named in the ticket was a party to the contract of transportation.—Boyles v McClure, Tex.Com.App., 243 S.W. 1080, modifying McAdoo v. McClure, Civ.App., 232 S.W. 348.

62. U.S.—Harmon v. Barber, Ohio, 247 F. 1, 159 C.C.A. 219, certiorari denied 38 S.Ct. 335, 246 U.S. 666, 62 L.Ed. 929.

63. D.C.—Blatcher v. Philadelphia, etc., R. Co., 31 App.D.C. 385, 16 L.R.A.,N.S., 991.
10 C.J. p 878 note 24.

64. Conn.—Wheeler v. Hartford, etc., R. Tramway Co., 69 A. 535, 80 Conn. 561.
10 C.J. p 878 note 26.

65. Tex.—International, etc., R. Co. v. Duncan, 121 S.W. 362, 55 Tex. Civ.App. 440.

66. Tex.—Gray v. Colorado Southern Ry. Co., Civ.App., 204 S.W. 347.

The Carmack amendment did not affect the rule stated in the text.—Gray v. Colorado Southern Ry. Co., Tex.Civ.App., 204 S.W. 347.

67. Ill.—Purple Swan Safety Coach Lines v. Egyptian Transp. Co., 256 Ill.App. 442.

68. Tex.—Gray v. Colorado Southern Ry. Co., Civ.App., 204 S.W. 347.

Bus connection

Where an intermediate carrier employed the owner of a bus to transfer the passenger from the railroad station of such intermediate carrier to the railroad station of the next carrier and the bus owner was the employee and servant of the intermediate carrier which so employed him, such intermediate carrier was liable for an injury to the passenger caused by the negligence of such bus owner.—Gray v. Colorado Southern Ry. Co., Tex.Civ.App., 204 S.W. 347.

69. Tex.—El Paso, etc., R. Co. v. Landon, 124 S.W. 744, 58 Tex.Civ.App. 397.

70. Tex.—Cunningham v. International R. Co., 51 Tex. 503, 32 Am. R. 632.

71. Pa.—Beckman v. Meadville, etc., St. R. Co., 67 A. 983, 219 Pa. 26.
10 C.J. p 878 note 33.

72. Ala.—Western Ry. of Alabama v. Turrentine, 73 So. 40, 197 Ala. 603.
W.Va.—Carrico v. West Virginia Central, etc., R. Co., 19 S.E. 571, 33 W.Va. 86, 24 L.R.A. 50.
10 C.J. p 878 note 34.

Condition of station platform

In a case in which the alleged injury resulted from the condition of the platform at a station, the view was expressed that the carrier could not avoid its duty of caring for the safety of its passengers by delegating such duty to a contractor.—Western Ry. of Alabama v. Turrentine, 73 So. 40, 197 Ala. 603.

anticipate and avoid the danger.[73]

It has been held that a principal contractor may be held liable for negligent injury to an employee of a subcontractor while such employee is being transported, in connection with the work involved, in a vehicle of the principal contractor, notwithstanding the contract between the principal contractor and the subcontractor places on the latter liability for injury to his employees.[74]

Operation of trains or cars. In case of injuries to passengers due to the negligence or improper operation of a train on a road, or parts thereof, which is being built by construction contractors, the railroad company will not be liable if the train is exclusively controlled and operated by the contractor and his employees, without the company's knowledge and against its prohibition, although the train belongs to the railroad company and was furnished to the contractor as a part of the consideration for the work done, and although the employees in charge of it were employed primarily by the railroad company.[75] The carrier's obligation to transport its passengers safely cannot, however, be shifted from itself by delegation to an independent contractor;[76] and, if it permits a contractor to exercise its franchises by running trains for general traffic on the road which he is constructing or repairing, it will be liable for injuries to passengers caused by the negligence of the contractor's employees in operating such trains.[77]

Elevators. Under certain circumstances a contractor who installs or repairs an elevator may be liable directly to a passenger who sustains injury as the result of negligence of such contractor in connection with such installation or repairs,[78] or may be liable by way of indemnity to the owner or operator of the building in which the elevator is installed.[79] Such contractor is not liable, however, in the absence of some actionable wrong or violation of duty on his part.[80]

§ 704. Carrier or Charterer

A carrier that charters its vehicles of carriage to private persons is liable for injuries to passengers due to the negligence of its employees in operating such vehicles if operation is under the control of such employees.

Where a carrier charters its train, cars, or other vehicles to private persons, it is liable for injuries to passengers caused by the negligence of its employees in operating the same if under their control;[81] and it is also liable for the negligence of such private persons if it permits them to operate the train or car.[82] The charterer may also be liable to its passengers for the negligence of the carrier.[83]

§ 705. Carrier Permitting Use of Road or Train by Another

The owner of a railroad or street railroad which permits another carrier to use the road may be liable for injuries to passengers which occur in connection with such use.

The company to which the franchises for the operation of a railroad or street railroad are granted by the state or municipality cannot, without legislative or municipal authority, farm out its franchises, or permit by lease, license, or otherwise, another company or person to use them, so as to avoid liability to passengers for injuries sustained through the negligent exercise of such franchises.[84]

73. U.S.—New York, etc., R. Co. v. Baker, N.Y., 98 F. 694, 39 C.C.A. 237, 50 L.R.A. 201.
10 C.J. p. 878 note 35.

74. Conn.—Duffy v. J. W. Bishop Co., 122 A. 121, 99 Conn. 573.

75. Tex.—Cunningham v. International R. Co., 51 Tex. 503, 32 Am. R. 632.

76. U.S.—Barrow SS. Co. v. Kane, N.Y., 88 F. 197, 31 C.C.A. 452

77. Ga.—Chattanooga, etc., R. Co. v. Liddell, 11 S.E. 853, 85 Ga. 482, 21 Am.S.R. 169.
10 C.J. p. 879 note 40.

Furnishing motorcar

Where railroad furnished rail-laying contractor with motorcar for transporting materials and crews, and furnished contractor with information regarding movements of other cars and trains, railroad was liable for contractor's negligent operation resulting in collision with another motorcar.—International-Great Northern R. Co. v. Lucas, Civ.App., 70 S.W.2d 226, reversed on other grounds 99 S.W.2d 297, 128 Tex. 480, opinion corrected 100 S.W.2d 97, 128 Tex. 480.

78. Iowa.—Hoskins v. Hotel Randolph Co., 211 N.W. 423, 203 Iowa 1152, 65 A.L.R. 1125, certiorari denied Otis Elevator Co. v. Hoskins, 48 S.Ct. 122, 275 U.S. 566, 72 L.Ed. 429.
Utah.—Berg v. Otis Elevator Co., 231 P. 832, 64 Utah 518.

79. Iowa.—Hoskins v. Hotel Randolph Co., 211 N.W. 423, 203 Iowa 1152, 65 A.L.R. 1125, certiorari denied Otis Elevator Co. v. Hoskins, 48 S.Ct. 122, 275 U.S. 566, 72 L.Ed. 429

80. U.S.—Hoskins v. Otis Elevator Co., C.C.A.Iowa, 16 F.2d 220.

81. N.C.—White v. Norfolk, etc., R. Co., 20 S.E. 191, 115 N.C. 631, 44 Am.S.R. 489.
10 C.J. p. 879 note 41.

82. S.C.—Kirkland v. Charleston, etc., R. Co., 60 S.E. 668, 79 S.C. 273, 128 Am.S.R. 848, 15 L.R.A.,N.S., 425.
10 C.J. p. 879 note 42

83. Tex.—American Express Co. v. Ogles, 81 S.W. 1023, 36 Tex.Civ. App. 407
10 C.J. p. 879 note 43.

84. Ky.—Louisville, etc., R. Co. v. Johnson, 182 S.W. 214, 168 Ky. 351, L.R.A. 1916D 514.
La.—Muntz v. Algiers, etc., R. Co., 35 So. 624, 111 La. 423, 100 Am.S.R. 495, 64 L.R.A. 222.
10 C.J. p. 879 note 45.

Existence of license or right to use railroad

Long continued silence by the owner of a railroad as to its use by another carrier and acquiescence which lead the public to believe, and to act on the belief, that such other carrier has the consent of the owner may be a sufficient basis of liability. As bearing on the ques-

Where such a company owning a road permits another carrier to use the same, the latter must be deemed to do so as the agent of the owner,[85] hence the owner will be liable for injuries to passengers due to the actionable negligence of such other carrier while using the road,[86] regardless of the contract arrangement between the two carriers.[87] Thus, where a railroad company allows the trains of another company to run over its tracks, the former is responsible to the passengers on its own trains in the same manner as if all the trains belonged to itself,[88] and it is liable for injuries to such passengers, even though they result wholly from the negligence of the other company.[89] It has been held that a passenger on a car of a street car company which is using the tracks of another company as part of a through route, with due consent of such other company, is also a passenger of such other and entitled to receive from each the same degree of care and the company which owns the track is liable for a breach of its duty in this regard which causes injury to such passenger.[90]

According to some cases the owner of the road may be liable to a passenger on a car or train operated over such road by another carrier where the injury is due to negligent operation by such other carrier;[91] but it has been held that the owner is not so liable for injuries to passengers on the trains of the other carrier,[92] unless such injuries result from negligence in not properly maintaining the tracks.[93]

§ 706. Carrier Using Other Road

A carrier which uses the railroad of another carrier may, under certain circumstances, be liable for injuries to passengers of either company.

A railroad or a street railroad company using the road of another company is held to the same degree of care in its use as if it owned the road[94] and is liable for any negligence or misconduct on the part of its own employees while under its control and in the conduct of its business,[95] even though such company does not own the train which its employees are operating,[96] and even though the agreement or arrangement under which it uses the other road is illegal.[97] So a company using

tion as to whether a license existed, with resultant liability of the owner of the railroad to a passenger on a vehicle of the alleged licensee driving of a spike in switch connected with track used by implied licensee in operation of motor car carrying passengers, preventing use of track for a few days without notice to licensee or public, where the motor car was operated over the track continuously thereafter, did not of itself revoke license.—Midland Valley R Co. v. Toomer, 162 P. 1127, 62 Okl. 272, L.R.A.1917D 344.

85. U.S.—Chicago Rys. Co. v Kramer, Ill., 234 F. 245, 148 C.C.A. 147.
Conn.—Murray v. Lehigh Valley R. Co., 34 A. 506, 66 Conn. 512, 32 L.R.A. 539.
10 C.J. p 880 note 46

86. Okl.—Midland Valley R. Co. v. Toomer, 162 P. 1127, 62 Okl. 272, L.R.A.1917D 344.
10 C.J. p 880 note 47.

Acquiescence in use of road

Long continued silence and acquiescence on the part of the company which owns the road, in respect of the operation of vehicles over such road by another carrier, go to the question of negligence as well as of agency—Midland Valley R. Co. v. Toomer R Co., 162 P. 1127, 62 Okl. 272, L.R.A.1917D 344.

87. Ill.—Chicago, etc., R. Co v Newell, 113 Ill.App. 263, affirmed 72 N.E. 416, 212 Ill. 332.

88. Ark.—Biddle v. Riley, 176 S.W. 134, 118 Ark. 206, L.R.A.1915F 992.
10 C.J. p 880 note 49.

Misplacement of switch

Railroad which retained control of section of track used by connecting carrier owed duty of care to passengers, as regards misplacement of switch due to defective signal, although men immediately in contact with switch were employed by other road. Under such circumstances, a statute requiring intersected railroad line to "unite" with new railroad does not require contract for use of another railroad's tracks for connections.—Southern Ry. Co. v. Hussey, Mo., 51 S.Ct. 367, 283 U.S. 136, 75 L.Ed. 908, affirming, C.C.A., 42 F. 2d 70, 74 A.L.R. 1172, certiorari granted 51 S.Ct. 75, 282 U.S. 826, 75 L.Ed. 736.

89. Ohio—Maumee Valley R., etc., Co. v. Montgomery, 91 N.E. 181, 81 Ohio St. 426, 135 Am.S.R. 802, 26 L.R.A.,N.S., 987.
10 C.J. p 880 note 50.

90. U.S.—Chicago Rys. Co. v. Kramer, Ill., 234 F. 245, 148 C.C.A. 147.

91. Okl.—Midland Valley R Co v. Toomer, 162 P. 1127, 62 Okl. 272, L.R.A.1917D 344.
10 C.J. p 880 note 47.

Measure of passenger's rights

The rights of a passenger on a railroad company by license are not measured by the same rules that would measure the rights between the licensee and the railroad company. Railroad company cannot stand by and receive benefits of operation of motor car over its tracks, and in case of negligent injury to passenger in such car charge the negligence of the operator to the passenger—Midland Valley R Co v Toomer, 162 P. 1127, 62 Okl. 272, L.R.A.1917D 344.

92. N.Y.—Sias v. Rochester R Co., 62 N.E. 132, 169 N.Y. 118, 56 L.R.A. 850.
10 C.J. p 880 note 51.

93. Ga.—Gregory v. Georgia Granite R Co., 64 S.E. 686, 132 Ga. 587
10 C.J. p 880 note 52

94. Conn.—Murray v. Lehigh Valley R Co., 34 A. 506, 66 Conn. 512, 519, 32 L.R.A. 539
10 C.J. p 880 note 53.

Corpus Juris statement of this rule was cited with approval in Scott v Cincinnati, N. O. & T. P. Ry. Co., 203 S.W. 1064, 181 Ky. 128, reversing 200 S.W. 6, 178 Ky. 800.

95. Ind.—Louisville, etc., R. Co v Linton, 88 N.E. 532, 43 Ind.App. 709.
10 C.J. p 880 note 54.

96. Mass.—Eaton v. Boston, etc., R. Co., 11 Allen 500, 87 Am.D. 730.

97. U.S.—Chesapeake, etc., R Co v. Howard, 20 S.Ct. 880, 178 U.S. 153, 44 L.Ed. 1015, affirming 14 App.D.C. 262
N.Y.—Berkey v. Third Ave Ry. Co., 155 N.E. 58, 244 N.Y. 84, 50 A.L.R.

the road of another company is liable for the negligence of its own employees in the operation of its trains over the road, thereby injuring passengers on the trains of such other company, notwithstanding its trains are operated under, and subject to, the rules and orders of such other company, if its employees are guilty of acts of negligence independent of, and not attributable to, the orders under which the trains are run;[98] but a company using the tracks of another company will not be liable if its employees and trains, and all their movements, are at the time under the absolute and exclusive control of the company owning the road.[99] It has been held or recognized that a railroad company operating its trains over the road of another company is liable to its own passengers for the negligence of the other company or its employees;[1] and is also liable for damages to its passengers by reason of defects in the road of such other company so used by it which might have been discovered by the exercise of due care.[2] It has been held, however, that a company using the road of another company is not liable to its own passengers for injuries due solely to the negligence of the servants of such other company in the operation of a train of the latter,[3] and that, where a street railroad company has the sole right and duty to operate street cars within the limits of a municipality, another company whose car is being operated within such limits, pursuant to a valid agreement between the two companies, is not liable to a passenger on such car for an injury caused by the fault of persons in the general service of such other company in operating the car.[4]

A railroad company which, in an emergency, routes one of its trains over the line of another company is not liable for injuries to a passenger caused by improper facilities at a station on such line where such passenger voluntarily left the train at such station which was not his destination.[5]

A provision of a contract for the use of a railroad by a carrier other than the owner that such other carrier shall assume, without indemnity, full responsibility for damages on account of carrying passengers as though the road was owned and exclusively maintained and operated by it has been construed to refer to damages caused by the defective condition of the track or by the negligence of its own servants in operating the trains of such other carriers, in so far as liability between the two carriers is concerned.[6]

§ 707. Lessor or Lessee

a. Lessor
b. Lessee

a. Lessor

In general a railroad company or a street railroad company may not without due authorization divest itself of liability to passengers incident to maintenance and operation of its road by leasing it to another.

The question whether a railroad or a street railroad company leasing its road to another company is liable for injuries to passengers resulting from the negligence of the lessee is one on which there is some diversity of judicial opinion. As a general rule a railroad company or a street railroad company cannot, without legislative or municipal authority, divest itself of any of its duties or liabilities to passengers incident to the maintenance and operation of its road, by leasing the road to another;[7] hence if the lease is not given under such authority, the lessor usually remains liable to passengers for the negligence or misconduct of the lessee in the operation of the road.[8]

599, reversing 217 N.Y.S. 156, 217 App.Div. 504, motion denied 155 N.E. 914, 244 N.Y. 602, 50 A.L.R 599.

98. Kan.—Chicago, etc., R. Co. v. Posten, 53 P. 465, 59 Kan. 449.

99. Mo.—Smith v. St. Louis, etc., R Co., 85 Mo. 418, 55 Am.R. 380.

1. U.S.—Brady v. Chicago & G. W. R. Co, Iowa, 114 F. 100, 52 C.C.A. 48, 57 L.R.A. 712.
Mass.—Chaffe v. Consolidated R. Co., 82 N.E. 497, 196 Mass. 484.
10 C.J. p 880 note 60.

2. Mass.—Littlejohn v. Fitchburg R. Co, 20 N.E. 103, 148 Mass 478, 2 L.R.A. 502.

Dangerous condition

Where a street railroad knowingly permitted a dangerous condition to exist, such as wires stretched over a cinder path onto which it discharged passengers, it cannot avoid liability by the fact that the wires and path were maintained by a railroad, as it cannot evade its duty to passengers by its operating contracts with other corporations, or thus avoid liability for negligence resulting in personal injury to passengers.—Tankersley v. Lincoln Traction Co., 175 N.W. 602, 104 Neb. 24.

3. Vt.—Sprague v. Smith, 29 Vt. 421, 70 Am.D. 424.

4. Mo.—Wilson v. Kansas City Western R. Co., 213 S.W 156, 201 Mo.App. 510.

5. Ky.—Payne v. Simmons, 255 S.W. 863, 201 Ky. 33, 33 A.L.R. 814.

Extent of duty

Conceding that a passenger may have been justified in leaving the train before starting on a detoured route over the line of another carrier, due to a wreck, and resuming a subsequent train over the carrier's line on the same ticket, he could not abandon the train at any point he saw proper on the detour, and be entitled to all the duties owing a disembarking passenger at his destination.—Payne v Simmons, 255 S.W. 863, 201 Ky. 33, 33 A.L.R. 814.

6. Ark.—Kansas City Southern Ry. Co. v. Wade, 201 S.W. 787, 132 Ark. 551.

7. Ky.—Payne v. Simmons, 255 S.W. 863, 201 Ky 33, 33 A.L.R. 814.
10 C.J p. 881 note 64.

8. Ky.—Louisville, etc., R. Co. v.

In a few cases it has been held or recognized, without express reference to whether or not the lease was authorized, that the lessor is liable for injuries caused by negligence of the lessee.[9] In any event, if the lessor carrier owes a clear legal duty to the person injured, that duty cannot be avoided or lessened by any arrangement which such carrier may make with any other person; if any part of the duty is delegated to another, such other becomes the agent of the lessor carrier in that regard and the carrier is responsible for the acts of such other.[10]

The lessor is liable for injuries occurring in the operation of its road by the lessee, where the road is being operated in the name of the lessor;[11] and, regardless of the effect of a lease in ordinary cases, if the lessor retains control over the operation of the road it will be liable for injuries resulting through such operation.[12]

Where the lease is authorized by statute, the lessor of course remains liable for the acts of the lessee, if the statute provides that it shall.[13] According to some cases, where the lease is authorized, it implies an exemption from liability on the part of the lessor for the torts of the lessee, to some extent at least,[14] unless such liability is expressly reserved in the statute or ordinance, unless the lease is to an irresponsible company, or unless the control of the road is reserved by the lessor in the lease.[15] Other cases, however, hold that, although there is legislative or municipal authority for the lease, the lessor is not absolved from such liability, unless in addition to such authority there is a provision expressly exempting the lessor from liability,[16] notwithstanding the lessee agrees to assume all liability.[17] Some of the cases make a distinction between injuries growing out of negligence in the operation of trains or the general management of the road over which the lessor company exercises no control and injuries due to the omission of duties owing to the public which are imposed primarily upon the lessor, holding that an authorized lease relieves the lessor from liability as to the negligence of the lessee in the operation of its trains,[18] but not for injuries due to defects in the tracks, the roadbed, or other real property.[19]

A statute which authorizes the lease and provides that the lessor shall remain liable as if it operated the road itself does not impose liability on the lessor for the torts of a stranger who seizes and operates the road without the consent either of the lessor or of the lessee.[20]

Authorization by interstate commerce commission. Where the lease of the railroad of a corporation chartered by the state, which is being operated in interstate commerce, is duly authorized by the interstate commerce commission, the lessor is not in general liable for injuries to passengers of the lessee, even though neither the order granting authority to make the lease nor the lease contains an express provision exempting the lessor from liability.[21]

b. Lessee

A lessee of a railroad is in general liable for injuries to passengers resulting from its negligence.

A lessee is not relieved of its legal duties as a carrier of passengers because it is not the owner of the track and the facilities, and is liable for its own negligence or that of its employees in the

Johnson, 182 S.W. 214, 168 Ky. 351, L.R.A.1916D 514—Big Sandy, etc., R. Co. v. Blankenship, 118 S.W. 316, 133 Ky. 438, 23 L.R.A.,N.S., 345, 19 Ann.Cas. 264.
10 C.J. p 881 note 65.

9. S.C.—Bouknight v. Charlotte, C. & A. R. Co., 19 S.E. 915, 41 S.C. 415.
10 C.J. p 881 note 66.
Failure to stop at a station and afford a passenger an opportunity to alight is a breach of a public duty which renders the lessor liable where the road is being operated by a lessee—Pickens v. Georgia R. & Banking Co., 55 S.E. 171, 126 Ga. 517.

10. U.S.—Southern Ry. Co. v. Hussey, C.C.A.Mo., 42 F.2d 70, 74 A.L.R. 1172, certiorari granted 51 S.Ct. 75, 282 U.S. 826, 75 L.Ed. 736, affirmed 51 S.Ct. 367, 283 U.S. 136, 75 L.Ed. 908.

11. Ga.—Singleton v. Southwestern R. Co., 70 Ga. 464, 48 Am.R. 574.

12. U.S.—Chesapeake, etc., R. Co. v. Howard, 20 S.Ct. 880, 178 U.S. 153, 44 L.Ed. 1015, affirming 14 App. D.C. 262.

13. Mass.—Quested v. Newburyport, etc., R. Co., 127 Mass. 204.
10 C.J. p 882 note 70.

14. Mo.—Graefe v. St. Louis Transit Co., 123 S.W. 835, 224 Mo. 232.
10 C.J. p 882 note 71.

15. Mo.—Moorshead v. United R. Co., 96 S.W. 261, 100 S.W. 611, 203 Mo. 121, affirming 96 S.W. 261, 119 Mo. App. 541.

16. Ga.—Singleton v. Southwestern R. Co., 70 Ga. 464, 48 Am.R. 574.
10 C.J. p 882 note 75

17. Mass.—Braslin v. Somerville Horse R. Co., 13 N.E. 65, 145 Mass. 64.

18. U.S.—Arrowsmith v. Nashville & D. R. Co., C.C.Tenn., 57 F. 165.
10 C.J. p 882 note 77

19. Mo.—Moorshead v. United R. Co., 96 S.W. 261, 119 Mo.App. 541, affirmed 96 S.W. 261, 100 S.W. 611, 203 Mo. 121.

20. Mo.—Hulen v. Wheelock, 300 S.W. 479, 318 Mo. 502
Receiver of lessee
The lessor was not liable for injuries to a passenger on a train operated by the receivers of the lessee in the absence of any showing of an express or implied consent by the lessor to continued possession by such receivers—Hulen v. Wheelock, 300 S.W. 479, 318 Mo. 502.

21. Tex.—Houston, E. & W. T. Ry. Co. v. Anderson, 36 S.W.2d 983, 120 Tex. 200, reversing, Civ.App., 10 S.W.2d 767.

operation of the leased road,[22] even though the lease executed is in excess of its powers,[23] nor will this liability be affected by a subsequent confirmatory statute.[24] The lessee is also liable for any injury to its passengers in the operation of its trains, although the specific act of negligence is committed by the company over whose tracks it operates its trains,[25] and also for injuries due to the defective conditions of the track or the roadbed, although such defects were in the original construction, or existed at the time of the lease;[26] and this has been held to be true, although the road is owned by the state which also furnishes the motive power and controls the road through its agents, and the accident happens through the negligence of the state's agents.[27]

The operating lessee of a railroad must exercise care to protect passengers and others having the right on its depot premises in keeping such premises and the approaches thereto in a reasonably safe condition, and some statutes have imposed this duty.[28]

Where a transit system is leased from a public transit commission, the negligence, if any, in adopting equipment installed and controlled by the commission, by which a passenger is injured, is not the negligence of the lessee,[29] and a like rule applies to matters of design and construction.[30]

A person who makes a contract for the carriage of another may not avoid liability for injury to such other merely because such person leased from a third person the vehicle and operator used to perform the contract of carriage.[31]

§ 708. Carriers Using Same Station Facilities; Union Depot Company

In general each of several companies which use the same station facilities is under the duty of keeping the premises in a safe condition. A union depot company that undertakes to provide common station facilities for several carriers has the duty of keeping the station and its facilities in proper condition for the safety of passengers and their attendants.

The Corpus Juris statement of the rule, which has been quoted and cited with approval,[32] is that where two or more companies are using the same station facilities all are under the duty of keeping the premises in a safe condition and free from obstructions or dangerous instrumentalities.[33] One of such companies is under the same duty as to passengers using the premises in connection with the other roads that it owes to its own passengers, and is bound to operate its trains with the same due regard for their safety;[34] and such a company is liable to its own passengers for injuries caused by the negligence of the other company.[35]

22. Ky.—Payne v. Simmons, 255 S.W. 863, 201 Ky. 33, 33 A.L.R. 814
Mass.—Kuhlen v. Boston, etc., St. R. Co., 79 N.E. 815, 193 Mass. 341, 118 Am.S.R. 516, 7 L.R.A.,N.S., 729.
10 C.J. p. 882 note 79, p. 881 note 65 [c].

23. D.C.—Chesapeake, etc., R. Co. v. Howard, 14 App.D.C. 262, affirmed 20 S.Ct. 880, 178 U.S. 153, 44 L.Ed. 1015

24. D.C.—Chesapeake, etc., R. Co. v. Howard, supra.

25. Ill.—Smith v. Chicago, etc., R. Co., 163 Ill.App. 476.
10 C.J. p. 882 note 82.

26. Mass.—Littlejohn v. Fitchburg R. Co., 20 N.E. 103, 148 Mass. 478, 2 L.R.A. 502.
10 C.J. p. 882 note 83.

27. Mass.—Littlejohn v. Fitchburg R. Co., 20 N.E. 103, 148 Mass. 478, 2 L.R.A. 502.
Pa.—Peters v. Rylands, 20 Pa. 497, 59 Am.D. 746.
10 C.J. p. 882 note 84.

28. Ark.—St. Louis, etc., Co. v. Caldwell, 124 S.W. 1034, 93 Ark. 286.

29. Mass.—Du Bois v. Boston Elevated Ry. Co., 176 N.E. 920, 276 Mass. 98—Theall v. Boston El. R. Co., 100 N.E. 543, 213 Mass. 327
10 C.J. p. 882 note 87.

30. Mass.—Bartol v. Boston, 156 N.E. 844, 259 Mass. 323.

31. Mo.—Mahany v. Kansas City Rys. Co., 254 S.W. 16, 29 A.L.R. 817.

Automobile owned, and chauffeur paid, by third person

Undertaker who leased an automobile and a chauffeur was liable for injuries to passenger caused by negligence of chauffeur in driving passengers from funeral under a contract of carriage, even though the undertaker did not own the automobile and did not pay the chauffeur's salary.—Mahany v. Kansas City Rys. Co., Mo., 254 S.W. 16, 29 A.L.R. 817

32. Ala.—Louisville & N. R. Co. v. Clark, 87 So. 676, 205 Ala. 152, 14 A.L.R. 695.
Ky.—Scott v. Cincinnati, N. O. & T. P. Ry. Co., 203 S.W. 1064, 181 Ky. 128, reversing 200 S.W. 6, 178 Ky. 800

33. Kan.—Atchison, T. & S. F. R. Co. v. Cochran, 23 P. 151, 43 Kan. 225, 19 Am.S.R. 129, 7 L.R.A. 414.
10 C.J. p. 883 note 89.
Safety of stations, etc., generally see infra §§ 717–721.

34. Mass.—Kuhlen v. Boston, etc., St. R. Co., 79 N.E. 815, 193 Mass. 341, 118 Am.S.R. 516, 7 L.R.A.,N.S., 729.
10 C.J. p. 883 note 90.

Control of train

The fact that the train of a carrier which was using the tracks and station premises of other carriers was being run under the direction of the train dispatchers of one of such other carriers when such train struck a passenger of the carrier whose dispatchers were controlling such train did not relieve of liability the carrier that owned and operated the train.—Chicago, R. I. & P. Ry. Co. v. Stepp, Mo., 164 F. 735, 90 C.C.A. 431, 22 L.R.A.,N.S., 350, affirming, C.C., 151 F. 908

35. Mass.—Frazier v. New York, etc., R. Co., 62 N.E. 731, 180 Mass. 427.

Moving train of another company

The facts that the dangerous instrumentality which caused an injury was the moving train of another company and that defendant company did not control the movements of such train did not relieve defendant company of its duty to its own passengers.—Scott v. Cincinnati, N. O. & T. P. Ry. Co., 203 S.W. 1064,

A carrier using a union depot may be liable for a negligent failure to keep it or the approaches thereto in a safe condition,[36] although the premises are under the control of a receiver of the depot company.[37] It has been held, however, that a railroad company which uses a union station is not liable to persons who are injured while waiting for a train of such company at such station as a result of the negligent handling of a crowd by the employees of the company which has control of such station where such railroad company has no rights or duty in respect of such control.[38] It has also been held that a passenger of a bus line which uses a station together with other lines is a permissive licensee of other lines which are the lessees of such station and that such lessees are not liable for an injury to such passenger in the absence of willfulness or wantonness on the part of the lessees, and that other lines which are neither the carrier of the injured passenger nor the lessee of the station are not liable.[39]

A union depot company which undertakes to provide common terminal facilities for passenger carriers owes to passengers and their attendants the duty of keeping the station and its facilities in a proper condition for their safety;[40] and, where it undertakes to direct passengers to their proper trains, it is bound to see that this duty is performed in a proper manner, and, if it relies on train employees so to direct passengers, it is liable for injury caused to a passenger or his attendant in following the directions of such employee.[41] It has been held, however, that a railroad company which owns a union station owes no active duty, in respect of the premises, to a passenger of another company which has acquired the right to use such station, the reason being that, as to the owner, such passenger was a mere stranger or intruder.[42]

A contract between a depot company and the railroad company using the depot which in terms imposes on the depot company liability for damages or losses caused by the negligence or other fault of itself or its officers or employees in the management, maintenance, repair, betterment, extension, and renewal of the depot facilities has been so construed as not to charge the depot company with liability for the negligence of a telegraph operator at the union depot in failing to transmit to a conductor a message covering train movements wholly beyond the yard limits of the depot.[43]

§ 709. Joint and Several Liability

In general a carrier and a third person, including another carrier, whose joint or concurrent negligence causes injury to a passenger may be held jointly or severally liable.

Where the injury sustained by a passenger is caused by the joint or concurrent negligence of the carrier and a third person,[44] or two or more car-

181 Ky. 128, reversing 200 S.W. 6, 178 Ky. 800.

36. Ky.—Scott v. Cincinnati, N. O. & T. P. Ry. Co., supra
10 C.J. p. 883 note 92.

37. Wash.—Herrman v. Great Northern R. Co., 68 P. 82, 27 Wash. 472, 57 L.R.A. 390.

Neglect of receiver

Where the receiver of a union depot company neglects to maintain safe premises, his negligence is that of the carrier whose duty it is to maintain them.—Herrman v. Great Northern R. Co., 68 P. 82, 27 Wash. 472, 57 L.R.A. 390.

38. Pa.—Bright v. Pennsylvania R. Co., 69 Pa. Super. 188, 195

Crowd waiting for train

The rule stated in the text was applied where the alleged injuries resulted from failure of the employees of the Washington Terminal Company properly to advise persons who were waiting for an excursion train at the union station in Washington, D. C., as to the track on which the train would be. When it was apparent that defendant railroad company had no control or right of control over an unruly crowd that was not on its property, or any property over which it had a contract right of control, such company was not liable since it could not reasonably have anticipated or guarded against an unexpected movement of an unruly assemblance of excursionists on the property of another company.—Bright v. Pennsylvania R. Co., 69 Pa. Super. 188, 195.

39. N.C.—Goodman v. Queen City Lines, 180 S.E. 661, 208 N.C. 323.

40. Minn.—Dean v. St. Paul Union Depot Co., 43 N.W. 54, 41 Minn. 360, 16 Am.S.R. 703, 5 L.R.A. 442
10 C.J. p. 883 note 94

41. Colo.—Union Depot, etc., Co. v. Londoner, 114 P. 316, 50 Colo. 22, 33 L.R.A.,N.S., 433.

42. Ala.—Montgomery & E. R. Co. v. Thompson, 77 Ala. 448, 54 Am. R. 72

43. Ark.—Kansas City Southern Ry. Co. v. Wade, 201 S.W. 787, 132 Ark. 551

Liability confined to performance of duties within yard limits

The view was taken that, under the contract referred to in the text, the depot company was liable only for the acts of its servants in the performance of the duties required of it within the yard limits.—Kansas City Southern Ry. Co. v. Wade, 201 S.W. 787, 132 Ark. 551.

44. Ky.—Dix v. Gross, 111 S.W.2d 673, 271 Ky. 231.—Denker v. Lowe, 234 S.W. 294, 192 Ky. 660.
La.—Marcus v. Checker Cab Co., 120 So. 408, 10 La. App. 297
N.J.—O'Neill v. Allied Freight Distributors, 172 A. 543, 12 N.J. Misc. 464.
Pa.—Moraski v. Philadelphia Rapid Transit Co., 142 A. 276, 293 Pa. 224.—Klingensmith v. West Penn Rys. Co., 123 A. 787, 279 Pa. 336
Tex.—Galveston, H. & S. A. Ry. Co. v. Packard, Civ. App., 193 S.W. 397, error refused
10 C.J. p. 982 note 11

Where water board negligently placed pipes in dangerous proximity to car track, as a result of which passenger preparing to alight was injured, such negligence, concurring with that of street car company, was proximate cause of injury, since but for presence of pipe passage of street car would have been clear and safe; hence there was no reason for finding that negligence of street car company was sole and proximate

riers or companies,[45] they may be held jointly or severally liable. It has been held, however, that there can be no joint liability where the alleged negligence consists of separate and independent acts of both companies or defendants, over which neither has entire control.[46] An initial carrier that sells a ticket for travel over its line and the lines of other railroad carriers cannot be held jointly liable with one of such other carriers for an injury which occurred on the line of such other without any fault on the part of the initial carrier where the ticket and the through tariff filed with the interstate commerce commission contain a provision that the initial carrier is not responsible beyond its own line.[47]

Where two carriers jointly operate a road or particular train, they are jointly and severally liable for injuries caused by the negligence of either.[48] Where two carriers use the same station, they may, under certain circumstances, be jointly and severally liable for injuries to a passenger of one of the carriers, by reason of the negligence of either in respect of the safe condition of the premises.[49] Where two carriers maintain a crosswalk between their stations for convenience in the transfer of passengers, the duty rests on both to see that the way is properly lighted and both are liable to a passenger who is injured as a result of a breach of such duty.[50] A like rule has been applied in respect of the duty and liability of a street railroad company and a county which operates a ferry boat as to defects in an approach or connecting way between the street car line and the ferry boats, which causes an injury to a passenger in transferring from one to the other.[51]

The view has been taken that, where one carrier controls the operations of another carrier, each may be held liable in the same action for the negligence of such other carrier which is the cause of injury to one of its passengers.[52]

The right of a passenger to hold the carrier and the carrier's employee whose negligence caused the injury liable in the same action has been upheld.[53]

Where several persons, each of whom owns a bus, obtain a certificate from the public authorities to operate a line over certain streets, the receipts being pooled and distributed under an agreed plan, such persons other than the owner of the bus on which a passenger sustained an injury as a result of the negligence of the driver are liable on the theory that the relation of agency exists among such owners and each is liable for the negligent acts of another in carrying out the undertaking.[54]

Carrier and municipality or public body Where a passenger is injured by the concurrent negligence of the carrier, a street railroad company, and the city, they are jointly liable,[55] and a like rule applies where the injury is caused by the negligence of the carrier and of a public board.[56] It has been held, however, that a city and a street railroad company are not joint tort-feasors in respect of a hole in a street which causes injury to a passenger alighting from a street car,[57] and that the torts are concurrent and related but not joint.[58]

cause of injury or vice versa.—Shalley v. New Orleans Public Service, 105 So. 606, 159 La. 519, affirming 1 La App. 770.

45. Ga.—Riley v. Wrightsville, etc., R. Co, 65 S.E. 890, 133 Ga 413, 24 L.R.A.,N.S, 379, 18 Ann Cas. 208.
Iowa—Parker v. Des Moines City R. Co., 133 N.W. 373, 153 Iowa 254, Ann Cas 1913E 174.
10 C J. p 883 note 97.
Liability for collisions caused by concurrent negligence of two carriers see infra § 747.

46. R.I.—Besharian v. Rhode Island Co, 102 A. 807, 41 R.I. 94.
10 C J p 883 note 98

Misrouting by certain carriers and rude treatment by another

Railroad company and Pullman company, which negligently permitted passenger to remain in Pullman coach when diverted from route to her destination to the line of another carrier, and such other carrier who did not know and should not have known that plaintiff was being misrouted, but whose conductor treated her in a rude and ugly manner in connection with her leaving the train, could not be sued jointly—Armstrong v. Southern Ry. Co., 116 S.E 31, 29 Ga.App. 418.

47. U.S.—Louisville & N. R. Co. v. Chatters, La., 49 S.Ct. 329, 279 U. S. 320, 73 L.Ed. 711, reversing, C C A, 26 F.2d 403, affirming, D.C., Chatters v. Louisville & N. R. Co., 17 F.2d 305, and certiorari granted 49 S.Ct 26, 278 U.S. 590, 73 L Ed. 523.

48. U.S.—Jenkins v. Atlantic Coast Line R. Co., C.C.S C., 179 F 535.
10 C J. p 883 note 99.

49. Miss.—Williams v. Southern R. Co., 59 So. 850, 102 Miss. 617.
10 C.J. p 883 note 1.

50. Mich.—Boyle v. Waters, 166 N. W. 114, 199 Mich. 478

51. Wash.—Hart v. King County, 177 P. 344, 104 Wash. 485.

52. Md.—Baltimore Transit Co. v. Swindell, 103 A. 566, 132 Md. 274.

53. La.—Johnson v City of Monroe, App., 164 So 456
N.J.—Dickson v. Ackerman, 168 A. 269, 111 N.J.Law 583

54. Ohio.—Beierla v. Hockenedel, 157 N.E. 573, 25 Ohio App. 186.

Partnership or joint enterprise

It was immaterial whether the arrangement described in the text was a partnership or merely a joint enterprise, as affecting the question as to liability.—Beierla v. Hockenedel, 157 N.E. 573, 25 Ohio App. 186.

55. Mo.—Reynolds v. Metropolitan St. R. Co., 168 S.W. 221, 180 Mo. App. 138.

56. La.—Shally v. New Orleans Public Service Sewerage & Water Board, 1 La.App. 770, affirmed 105 So. 606, 159 La. 519.

57. Ohio.—Poehl v. Cincinnati Traction Co, 151 N.E. 806, 20 Ohio App. 148.

58. Ohio.—Poehl v. Cincinnati Traction Co., supra.

Contract as to liability. The determination as to who are joint employees within the meaning of the provision of a contract between railroad companies using the same tracks and terminal facilities that loss from injuries caused by the negligence of a joint employee shall be borne equally depends on the terms of the contract.[59]

§ 710. Liability of Agents and Servants

According to some cases the employees of a carrier who are in charge of the vehicle of carriage are personally liable to a passenger on such vehicle only where the injury is due to the misfeasance or positive wrongs of such employees. In some cases the liability of employees whose negligent operation causes the injury has been recognized.

The view has been taken that the employees of a carrier in charge of a train or other vehicle on which the passenger is injured are not personally liable to such passenger for the injury, unless it results from the misfeasance and positive wrongs of such employees.[60] In so far as the personal liability of an employee in charge of a train is concerned, it has been held that he has the duty to exercise ordinary care to avoid injury to a passenger and is not under the duty to exercise the high degree of care that is required of the carrier, and that, if nonfeasance or negligence of the employee is in respect of a precaution required of him only by his contract of employment, such breach of the contract of employment is not necessarily a breach of the employee's duty to the passenger which would impose liability on the employee.[61] So it has been held that a railroad station agent who is under no duty to notify those in charge of a train that another train is ahead on the same track is not liable for injuries to a passenger in a rear-end collision.[62] On the other hand, the right to recover from an employee of the carrier, whose negligent operation of the vehicle of carriage caused an injury to a passenger, has been recognized.[63]

§ 711. Liability of Trustees and Receivers

A trustee or receiver who is exercising the franchise of the carrier or is in control of the operation of the line or road may be liable for injuries to passengers.

A trustee in possession and control, and exercising for the time being the franchises of the carrier, is responsible to passengers for the negligence of the employees of the carrier, even though he has agreed to manage it according to the order of the beneficiary.[64]

The receivers of a railroad or street railroad who are vested with the power to manage and operate it are liable as receivers for injuries to a passenger resulting from negligence in its operation,[65] and the company may not in general be held liable for such negligence, as shown above in § 701. So it is proper to render judgment against a receiver who was operating the road when the injury complained of occurred and the action therefor was instituted notwithstanding the receivership was discharged before the trial, where the discharge was conditional and recognized the existence of causes of action which accrued during the receivership.[66]

§ 712. Defenses in General

The fact that the injured person had not paid his fare or that a person other than the carrier was also

59. Ark.—Kansas City Southern Ry. Co. v. Wade, 201 S.W. 787, 132 Ark. 551.

Telegraph operator

Under a contract with plaintiff for joint use of defendant's track, providing that each railway company shall be liable for one half of the injury to persons caused by negligence of a joint employee, and who shall be considered such, it was held that a telegraph operator of a union depot company, receiving and transmitting train orders, for both, was such a joint employee.—Kansas City Southern Ry. Co. v. Wade, 201 S.W. 787, 132 Ark. 551.

60. U.S.—Bryce v. Southern R. Co., C.C.S.C., 125 F. 958, denying rehearing 122 F. 709.

Liability of servant to third person in general see C.J.S. title Master and Servant § 576, also 39 C.J. p. 1311 note 48-p. 1312 note 57.

61. Mo.—May v. Chicago, B. & Q. R. Co., 225 S.W. 660, 284 Mo. 508.

Effect of liability to employer

The rule stated in the text applies to the conductor of a train notwithstanding he would be answerable over to the employer company for failure to use a high degree of care.—May v. Chicago, B. & Q. R. Co., 225 S.W. 660, 284 Mo. 508.

62. S.C.—Sutton v. Southern R. Co., 64 S.E. 401, 82 S.C. 345.

63. La.—Johnson v. City of Monroe, App., 164 So. 456.

N.J.—Dickson v. Ackerman, 168 A. 269, 111 N.J.Law 583.

Concurrent negligence

(1) The fact that another's negligence concurred with that of an employee who was the driver of a bus in causing the injury did not permit the latter to avoid liability.—Johnson v. City of Monroe, La.App., 164 So. 456.

(2) A like rule applies where the negligence of the driver of a taxicab concurred with that of another person in causing injury to a passenger.—Dickson v. Ackerman, 168 A. 269, 111 N.J.Law 583.

64. Wash.—O'Toole v. Faulkner, 70 P. 58, 29 Wash. 544.

65. Mo.—Moore v. Metropolitan St. R. Co., 176 S.W. 1120, 189 Mo. App. 555.

Operating train over line of different railroad company

Receiver carrying live stock in own train was not relieved from liability for death of caretaker from injuries received in wreck by fact that another company owned roadbed or by fact that he was bound by contract with such owner to account for earnings of its part of road.—Heed v. Gummere, 136 N.E. 5, 192 Ind. 227.

66. Ark.—St. Louis Southwestern Ry. Co. v. Owings, 204 S.W. 1146, 135 Ark. 56.

negligent does not necessarily prevent a recovery. Facts showing that the carrier had not failed to perform any duty owing to the injured person or that such person was himself responsible for the injury may constitute a defense.

It has been held or recognized that it is no defense to a carrier, such as a railroad or street railroad, in an action for injuries to a passenger, that the passenger had not paid his fare at the time of the injury, where the fare had not yet been demanded,[67] that he was guilty of forgery in using the ticket of another,[68] that the carrier did as other carriers have customarily done,[69] or that another carrier or person was also negligent in connection with the accident.[70]

In an action to recover damages for an injury to a passenger sustained in alighting from a street car, the carrier may interpose the defense that its agents have exercised due care and diligence to avoid the injury, that the damage was caused by the negligence of the passenger, that the passenger consented, or that the passenger could have avoided the injury notwithstanding the carrier's negligence.[71] Contributory negligence of passenger as a defense is considered infra § 774 et seq.

A carrier is not entitled to the defense of assumption of risk in an action in tort to recover for an injury sustained by plaintiff while entering defendant's street car, because of the defective condition of the car platform.[72]

Where the cause of the accident in which a passenger in an automobile stage of defendant is admitted by the pleadings to have been a defective or broken rim of a wheel, the matter of due inspection is one of defense.[73]

Where a person seeks to recover for a personal injury on the theory of the relation of passenger and carrier between the parties, defendant may plead and prove that the relation of master and servant existed.[74]

Traveling illegally; free pass. Where a passenger on a train is traveling for an illegal purpose, and the railroad is a participator in such purpose, the rule in pari delicto, etc., will apply in a suit against the company for negligence and consequent injury to the passenger.[75]

It has been held that a passenger traveling on a pass forbidden by law is not in pari delicto with the railroad company in violating the law, so as to prohibit him from recovering for injuries, although the pass contains a provision exempting it from liability for injuries caused by the negligence of itself or its employees.[76] So it has been held that a person riding on an interstate train without paying fare, in violation of the provisions of the Hepburn Act against free transportation, is not necessarily prevented from recovering for an injury sustained while so riding.[77] It has also been held that a person who in good faith and with the consent of the carrier accepts a free passage in interstate commerce does not forfeit his right to the benefit of a rule of the local law which charges the carrier with the duty to exercise care for the safety of a gratuitous passenger merely because of such provision of the Hepburn Act.[78] However, it has been held,

67. U.S.—Chicago, R. I. & P. R Co. v Lee, Kan., 92 F. 318, 34 C. C.A. 365.

68. Mo.—Mirrielees v. Wabash R Co., 63 S.W. 718, 163 Mo. 470.
10 C.J. p 884 note 9.

69. Wash.—Williams v. Spokane Falls, etc., R. Co., 80 P. 1100, 39 Wash. 77, 84 P. 1129, 42 Wash. 597

70. La.—Johnson v. City of Monroe, App., 164 So. 456.
Neb.—Daly v. Publix Cars, 259 N.W. 163, 128 Neb. 403.
N.J.—Dickson v. Ackerman, 168 A. 269, 111 N.J. Law 583.
10 C.J. p 884 note 11.

Injury to prospective passenger

If a motorman of street car was guilty of negligence or willful wrong, concurring with negligence of driver of automobile knocked against prospective passenger waiting for car, proximately causing injury, such passenger was entitled to recover from street car company —Alabama Power Co. v. Bass, 119 So. 625, 218 Ala. 586, 63 A.L.R. 1.

71. Ga.—Georgia Ry. & Power Co. v. Gilbert, 146 S.E. 34, 39 Ga.App. 58—Georgia Ry. & Power Co. v. Gilbert, 146 S.E. 33, 39 Ga.App. 56.

72. Ark.—Arkansas Power & Light Co. v. Hughes, 76 S.W.2d 53, 189 Ark. 1015.

Contractual relation

In reaching the conclusion set forth in the text in a case in which plaintiff had slipped on a steel plate which had been placed across the platform of the car near the door for the purpose of having passengers step on it as they entered the car, it was said that no contractual relation existed between plaintiff and defendant company.—Arkansas Power & Light Co. v. Hughes, 76 S.W.2d 53, 189 Ark. 1015.

73. Cal.—Jianou v. Pickwick Stages System, 296 P. 108, 111 Cal.App. 754.

74. Or.—Susznik v. Alger Logging Co., 147 P. 922, 76 Or. 189

75. Ga.—Redd v. Muscogee R. Co., 48 Ga. 102.
N.C.—Turner v. North Carolina R. Co., 63 N.C. 522.
10 C.J. p 884 note 13.

76. Mont.—John v. Northern Pac. R. Co., 111 P. 632, 42 Mont. 18, 32 L.R.A.,N.S., 85
N.C.—McNeill v. Durham, etc., R. Co., 47 S.E. 765, 135 N.C. 682, 67 L.R.A. 227.

77. Miss.—Illinois Cent. R. Co. v. Cole, 74 So. 766, 113 Miss. 896.

Trespasser or licensee

The rule stated in the text was applied where the injured person was a trespasser or licensee riding on the tender of the engine with the consent of the engineer when the injury was sustained.—Illinois Cent. R. Co. v. Cole, 74 So. 766, 113 Miss. 896—Illinois Cent. R. Co. v. Messina, 72 So. 779, 111 Miss. 884.

78. U.S.—Southern Pac. Co. v. Schuyler, Utah, 33 S.Ct. 277, 227 U.S. 601, 57 L.Ed. 662.

that a person who rides on an interstate train, without paying fare and in violation of state and federal statutes, is not in general entitled to recover for damages sustained while so riding, even though he is on the train with the consent of the carrier's employees who are in charge of the train.[79]

The fact that the right of an employee of a railroad company to travel between certain points within a state, as part of the contract of service, is represented by a so-called free pass reciting that it is a gratuity and that the employee releases the company from any injury he may sustain while using the pass is not a defense to an action for an injury sustained by the employee while riding to his work between points within the state.[80]

2. Care Required and Liability as to Condition and Use of Premises

§ 713. In General

The care required of a carrier in keeping its premises safe for passengers is commonly held to be only reasonable or ordinary care. Its duty to keep premises safe extends only to those parts thereof to which the public and passengers naturally resort or have been invited, and to which they necessarily or ordinarily go in boarding or leaving trains, and not to places to which they have no occasion to go, or beyond the station grounds.

It has been said that the carrier's liability to passengers, with respect to the condition of its premises, is the same as that of any owner or occupant of premises to persons who by invitation or inducement come there to transact business.[81]

While a carrier of passengers is chargeable with a high or the highest degree of care with respect to passengers in the course of transportation, see § 678, this degree of care is not, except under a few authorities,[82] required as to passengers on the premises of the carrier, the care required for the protection of such passengers being, as regards the safe condition of the premises, only reasonable or ordinary care.[83] In other words, the carrier is

Railway mail clerk off duty

The rule stated in the text was applied where a railway mail clerk was killed by the derailment of a mail train on which he was riding for his own purposes, having taken the train in question with the knowledge of the train agent and conductor in charge, using his commission from the post office department as evidence of his right to transportation.—Southern Pac. Co. v. Schuyler, Utah, 33 S.Ct. 277, 227 U.S. 601, 57 L.Ed. 662.

79. S.C.—Hinnant v. Southern Ry. Co., 100 S.E. 709, 113 S.C. 19.

Riding in cab of engine

One riding in the cab of an interstate freight train by permission of the conductor and engineer, without payment of fare, violated state and federal statutes and could not recover for personal injury.—Hinnant v. Southern Ry. Co., 100 S.E. 709, 113 S.C. 19.

Applicability of provision of Hepburn Act

In reversing a judgment of the state court which had allowed a recovery by a trespasser or licensee on an interstate train for an injury sustained while riding on the tender of the engine with the consent of the engineer, it was held that the provision of the Hepburn Act against free transportation applied to the case of a person so riding.—Illinois Central R. Co. v. Messina, 36 S.Ct. 368, 70 L.Ed. 709, 240 U.S. 395, reversing Yazoo & M. V. R. Co. v. Messina, 67 So. 963, 108 Miss. 143.

80. Ga.—Tharp v. Central of Georgia Ry. Co., 121 S.E. 592, 31 Ga. App. 598.

81. Colo.—Union Depot, etc., Co. v. Londoner, 114 P. 316, 50 Colo. 22, 33 L.R.A.,N.S., 433.

Ill.—Davis v. Southside Elevated R. Co., 127 N.E. 66, 292 Ill. 378, 10 A.L.R. 254.

Ky.—Bales v. Louisville & N. R. Co., 200 S.W. 471, 179 Ky. 207.

Mo.—Thomas v. St. Louis-San Francisco Ry. Co., App., 293 S.W. 1051, 1054.—Williams v. Kansas City Terminal Ry. Co., 231 S.W. 954, 956, 288 Mo. 11, transferred, App., 223 S.W. 132.

10 C.J. p. 917 note 57.

"The carrier should not be held to a higher degree of care in maintaining its premises than that to which the owner of buildings used for ordinary business purposes is held."—Thomas v. St. Louis-San Francisco Ry. Co., supra.—Williams v. Kansas City Terminal Ry. Co., supra.

82. S.C.—Johns v. Charlotte, etc., R. Co., 17 S.E. 698, 39 S.C. 162, 39 Am.S.R. 709, 20 L.R.A. 520.

10 C.J. p. 911 note 12.

In Texas

(1) "It seems to be settled by the decisions of this state that the rule of high degree of care is applicable alike in both situations stated" as to a passenger in transit and a passenger on the premises.—Fort Worth & D. C. Ry. Co. v. Brown, Tex.Civ.App., 205 S.W. 378, 379.

(2) That a passenger was on the platform, and not in the cars, did not alter the degree of care due him by the carrier, which was the highest degree of care.—Fort Worth & D. C. Ry. Co. v. Kidwell, 245 S.W. 667, 112 Tex. 89, answering certified questions, Civ.App., 249 S.W. 303.

(3) Ordinarily, railroad must keep grounds in reasonably safe condition, and use more than ordinary care in maintaining depot grounds designated for passengers' use.—Fort Worth & D. C. Ry. Co. v. Armitage, Tex.Civ.App., 39 S.W.2d 108, error refused.

(4) However, it has also been stated that the carrier owes the duty "to exercise ordinary care to keep its passenger station buildings and other depot premises set apart for use of its passengers in a reasonably safe condition for such use."—Chicago, R. I. & G. Ry. Co. v. Taylor, Tex.Civ.App., 225 S.W. 822, 825.

Alighting passenger as in transit

(1) It has been held that a passenger while alighting from the train is still a passenger in transit, with respect to whom it is the carrier's duty to use the highest degree of care to keep the premises safe.—South Covington & C. St. Ry. v. Vanice, 278 S.W. 116, 211 Ky. 774.—Louisville & N. R. Co. v. Scarbrough, 270 S.W. 494, 208 Ky. 79.—Louisville & N. R. Co. v. Baker, 164 S.W. 799, 158 Ky. 224.

(2) Highest care to protect passenger during continuance of relation see supra § 678.

83. U.S.—Young v. Baldwin, C.C.A. Ark., 84 F.2d 841.—Chesapeake & O. Ry. Co. v. Burton, C.C.A.W. Va., 50 F.2d 730.

Ark.—Chicago, R. I. & P. Ry. Co.

required to use such care as would be used by persons of ordinary prudence under like circumstances to see that the construction adopted will render the premises as safe as the exigencies of its business will permit,[84] and is required to use ordinary care to maintain its premises in such a reasonable and suitable condition that passengers and others authorized to use them may, in the exercise of ordinary care, use them in safety.[85] It is not required to furnish absolutely safe premises,[86] or premises as safe as possible.[87] The degree of care required of the carrier with respect to particular portions of the premises or particular duties therein is considered in §§ 714–721 infra.

v. Amedon, 256 S.W. 52, 161 Ark. 310

Ill.—Dean v. Yelloway Pioneer System, 259 Ill.App. 180.

Ky.—Cincinnati, N. & C. Ry. Co. v. Trenkamp, 295 S.W. 866, 220 Ky. 552—Louisville & N. R. Co. v. Scarbrough, 270 S.W. 494, 208 Ky. 79—Louisville & N. R. Co. v. Minnix, 260 S.W. 15, 202 Ky. 472—Payne v. Simmons, 255 S.W. 863, 201 Ky. 33, 33 A.L.R. 814—Louisville & N. R. Co. v. Dixon, 195 S.W. 1099, 176 Ky. 569—Louisville & N. R. Co. v. Baker, 164 S.W. 799, 158 Ky. 224.

Md.—Jackson v. Hines, 113 A. 129, 137 Md. 621.

Mich.—Anda v. Chicago, D. & G. B. Transit Co., 204 N.W. 761, 231 Mich. 567.

Minn.—McDonnell v. St. Paul Union Depot Co., 195 N.W. 538, 157 Minn. 66.

Mo.—Thomas v. St. Louis-San Francisco Ry. Co., App., 293 S.W. 1051—Martin v. Missouri Pac. R. Co., App., 253 S.W. 1083—Williams v. Kansas City Terminal Ry. Co., 231 S.W. 954, 288 Mo. 11, transferred, App., 223 S.W. 132.

N.J.—Seckler v. Pennsylvania R. Co., 174 A. 501, 113 N.J.Law 299—Bradley v. Erie R. Co., 143 A. 743, 105 N.J.Law 1, reversed on other grounds 147 A. 572, 106 N.J.Law 51—Holtzman v. Hudson & M. R. Co., 138 A. 623, 101 N.J.Law 255.

N.Y.—White v. New York Cent. R. Co., 239 N.Y.S. 90, 228 App.Div. 50—Hoffman v. Lehigh Valley R. Co., 177 N.Y.S. 140, 188 App.Div. 414—Allessi v. New York Rapid Transit Corporation, 297 N.Y.S. 1011, 163 Misc. 815.

Utah.—Stonebreaker v. Bamberger, 54 P.2d 418, 88 Utah 310.

10 C.J. p. 862 note 11—p. 911 notes 11, 13.

Care varying according to time and place generally see supra § 678.

The Corpus Juris statement is cited with approval in Chesapeake & O. Ry. Co. v. Burton, C.C.A.W.Va., 50 F.2d 730, 731.

"The authorities are well nigh unanimous that as to stairways, floors, and conveniences in and about a railway depot, or station, provided by a common carrier, its duty towards passengers and other invitees or licensees thereon is discharged when reasonable or ordinary care to make them safe for the purposes intended has been exercised in their construction and maintenance" — McDonnell v. St. Paul Union Depot Co., 195 N.W. 538, 539, 157 Minn. 66.

"The great weight of authority, and, indeed every case, except perhaps a few sporadic ones, require of carriers only the exercise of reasonable or ordinary care" to keep their premises in reasonably safe condition.—Payne v. Simmons, 255 S.W. 863, 867, 201 Ky. 33, 33 A.L.R. 814.

Reasons for distinction as to care

(1) That the carrier's duty in handling passengers on platforms and ways to incoming trains "does not require generally even the highest degree of practicable care, as in the actual transportation of passengers, is evident, as the passenger is not deprived in such case of his power of self-protection, which to a large degree is preserved to him."—Allessi v. New York Rapid Transit Corporation, 297 N.Y.S. 1011, 1015, 163 Misc. 815.

(2) "This [rule] is upon the theory that station buildings in themselves neither require the employment of dangerous agencies nor do they possess unusual elements of danger."—Thomas v. St. Louis-San Francisco Ry. Co., Mo.App., 293 S.W. 1051, 1054—10 C.J. p. 862 note 11 [a] (1).

Dependent on surrounding circumstances

"While ordinary care is the test, the content of ordinary care is dictated by the circumstances. Some circumstances might require very little inspection or watchfulness or circumspection, as the case may be, in order to satisfy that degree of care; others might require great diligence and watchfulness or, in comparison to the first situation, great and extraordinary care."—Stonebreaker v. Bamberger, 54 P.2d 418, 422, 88 Utah 310.

Necessity of successful care

In determining whether a carrier was negligent, the degree of care exercised, rather than the degree of success resulting therefrom, is controlling.—Seckler v. Pennsylvania R. Co., 174 A. 501, 113 N.J.Law 299.

84. N.J.—Bradley v. Erie R. Co., 143 A. 743, 105 N.J.Law 1, reversed on other grounds 147 A. 572, 106 N.J.Law 51.

10 C.J. p. 911 note 15.

"Good and diligent businessman"

"The . . . [carrier] is bound to use the skill and care such as would be exercised by a good and diligent businessman in his particular vocation."—Allessi v. New York Rapid Transit Corporation, 297 N.Y.S. 1011, 1015, 163 Misc. 815.

Standard method of construction

(1) If a method of construction of a standard character is adopted, such as is generally adopted by other well regulated carriers, the carrier cannot be charged with negligence in the construction.

La.—Mills v. Illinois Cent. R. Co., 86 So. 750, 148 La. 217.

N.J.—Seckler v. Pennsylvania R. Co., 174 A. 501, 113 N.J.Law 299—Bradley v. Erie R. Co., 143 A. 743, 105 N.J.Law 1, reversed on other grounds 147 A. 572, 106 N.J.Law 51.

10 C.J. p. 911 note 16.

(2) Where a railroad track on which plaintiff was injured in stepping from the adjacent platform was built according to standard methods, with the cross-ties exposed for purposes of drainage and to show defects in the ties, and its location with reference to the curbing and platform was according to standards in general use, the railroad could not be charged with negligence.—Mills v. Illinois Cent. R. Co., supra.

Nonavailability of less dangerous equipment is no excuse for installing equipment dangerous to passengers and not essential to the operation of a subway.—Chakofsky v. Interborough Rapid Transit Co., 203 N.Y.S. 357, 208 App.Div. 407, reversing 195 N.Y.S. 79.

85. Md.—Jackson v. Hines, 113 A. 129, 137 Md. 621.

10 C.J. p. 911 note 14.

86. Ky.—Illinois Cent. R. Co. v. Sanderson, 192 S.W. 869, 175 Ky. 11, L.R.A.1917D 890.

Minn.—McDonnell v. St. Paul Union Depot Co., 195 N.W. 538, 157 Minn. 66.

Utah.—Stonebreaker v. Bamberger, 54 P.2d 418, 88 Utah 310.

10 C.J. p. 911 note 18.

87. Or.—Finseth v. Suburban R. Co., 51 P. 84, 32 Or. 1, 39 L.R.A. 517.

To what premises duty extends. The carrier's duty of keeping its premises in a reasonably safe condition extends to all parts of the premises and approaches thereto to which the public or passengers naturally resort,[88] or which they occupy at the express or implied invitation of the carrier,[89] and, at least in the absence of warning, to all parts of the station grounds reasonably near to the platforms where passengers will necessarily or ordinarily go in approaching and boarding, or in alighting from and leaving, the trains.[90] On the other hand, the duty does not extend to a portion of the grounds where passengers properly have no occasion to go,[91] such as a portion of the carrier's right of way some distance from the station premises,[92] or to premises used for the servicing of trains[93] or, to the passenger's knowledge, exclusively for the handling of freight,[94] nor does it extend beyond the limits of the carrier's premises[95] or station grounds.[96]

§ 714. Safe Approaches; Ingress and Egress

a. In general

b. Approaches not designated or established by carrier; streets

88. Ky.—Bales v. Louisville & N R Co, 200 S.W. 471, 179 Ky. 207—Louisville & N R. Co. v Dixon, 195 S.W. 1099, 176 Ky. 569.
Md.—Jackson v. Hines, 113 A. 129, 137 Md 621.
Mo.—Thomas v. St Louis-San Francisco Ry Co, App., 293 S.W. 1051.
Wis.—Banderob v. Wisconsin Cent R. Co., 113 N.W. 738, 133 Wis. 249.
10 C.J. p 911 note 20.
The carrier owes "the duty of making and keeping the station, the approaches thereto, and the surroundings thereof, where persons lawfully in the station would be likely to go, in a safe condition."—Jackson v. Hines, supra.
Premises to be kept lighted see infra § 718.

89. U.S.—Maryland Dredging & Contracting Co. v. Hines, C.C.A. Md., 269 F. 781.
Ky.—Cincinnati, N. & C. Ry. Co. v Trenkamp, 295 S.W. 866, 220 Ky. 552—Bales v Louisville & N R. Co, 200 S.W 471, 179 Ky. 207—Louisville & N. R. Co. v. Dixon, 195 S.W 1099, 176 Ky. 569.

Absence of fence

Where a prospective passenger, taking a short cut diagonally over the tracks, was injured on cattle guards, it was held that the absence of a fence between the street and the guards, if not an invitation, made the passenger no worse than an unintentional trespasser without criminal intent, to whom the carrier may be liable—Kovarik v. Long Island R Co, 178 N.Y.S. 705, 189 App Div. 534.

"An open gate [between a station platform and a porch adjacent thereto] is an implied invitation to enter"—Louisville & N. R. Co. v. Dixon, 195 S.W. 1099, 1101, 176 Ky. 569

"Premises set apart for . . . passengers"

Tex.—Chicago, R. I. & G Ry. Co v. Taylor, Civ.App., 225 S.W. 822, 825

90. Ky.—Bales v. Louisville & N. R. Co., 200 S.W. 471, 473, 179 Ky. 207—Louisville & N R. Co. v Dixon, 195 S.W. 1099, 176 Ky. 569.
Md.—Jackson v. Hines, 113 A. 129, 137 Md 621
N.Y.—Kovarik v. Long Island R Co., 178 N.Y.S. 705, 189 App.Div. 534
Pa.—Calhoon v. Pittsburgh Coal Co, 194 A 768, 771, 128 Pa Super 582
Wis.—Banderab v. Wisconsin Cent. R Co, 113 N.W. 738, 133 Wis. 249.
10 C.J. p 911 note 21.
"Such portions of the depot premises as are necessarily or customarily used by the passengers, and the approaches to them."—Bales v. Louisville & N. R. Co., supra.
"From the time a passenger leaves the public highway and enters the premises, occupied by a carrier, until he leaves the carrier's premises, for the public highway, the carrier is bound to provide safe means of passage between the public highway and the carrier's means of transportation."—Calhoon v. Pittsburgh Coal Co., supra.

Cattle guards near station

(1) Where a carrier placed dangerous cattle guards very near a station, and between the station and the highway, it was held to endanger the safety of passengers, and in the absence of warning the carrier may be liable to one injured thereby—Kovarik v Long Island R Co, 178 N.Y.S. 705, 189 App Div. 534.

(2) Nor is the carrier justified in so exposing passengers to injury by the fact that a statute requires that cattle guards be provided if liability for injury to animals is to be avoided.—Kovarik v. Long Island R. Co., supra.

Pitfalls near platform

"The railroad company is not only under obligation to passengers and those whom it invites onto its depot premises to have and keep the depot, waiting rooms, and platforms reasonably safe, but it will not be permitted or allowed to maintain dangerous pitfalls so near to its platform as to endanger the safety of those having a right to be upon such platform, and escape responsibility for consequences."—Louisville & N. R. Co v. Dixon, 195 S.W. 1099, 1100, 176 Ky 569.

Way to carrier's park

A woman who had purchased a ticket and was waiting to take passage on an approaching train, and who left the station platform with her child and fell into an open trapdoor, was not a trespasser so as to bar recovery, where the carrier maintained a park to reach which it was necessary to go the way which she took.—Louisville & N R Co. v. Dixon, 195 S.W. 1099, 176 Ky 569

91. Ky.—Bales v. Louisville & N R Co, 200 S.W 471, 179 Ky. 207
N.C.—Brown v. Linville River Ry. Co, 94 S.E 431, 174 N.C 694
Tex.—Fort Worth & D C. Ry Co. v Armitage, Civ.App., 39 S.W.2d 108, error refused.
10 C.J. p 911 note 22

92. Ky.—Bales v. Louisville & N R Co., 200 S.W 471, 179 Ky 207.
N.C.—Brown v. Linville River Ry Co, 94 S.E 431, 174 N.C. 694.
10 C.J. p 912 note 23.

Acquiescence in use

"It is well settled that acquiescence on the part of a railroad company in the use of its right of way, set apart and exclusively used by it for the operation of its trains, does not confer any authority or right upon the persons so using it"—Bales v. Louisville & N. R Co, 200 S.W. 471, 475, 179 Ky 207.

93. Tex.—Fort Worth & D. C. Ry Co. v. Armitage, Civ.App., 39 S.W 2d 108, error refused.

94. Tex.—Houston, etc., R. Co v Grubbs 67 S.W. 519, 28 Tex.Civ App 367.

95. Pa.—Calhoon v. Pittsburgh Coal Co, 194 A 768, 128 Pa Super 582
Approaches not owned or controlled by carrier see infra § 714 b

96. Pa.—Seltzer v. Philadelphia & R. Ry. Co, 69 Pa Super. 309, 314
The carrier's "obligation to protect passengers does not extend beyond the limits of what may properly be considered station facilities or grounds."—Seltzer v. Philadelphia & R. Ry. Co., supra.

a. In General

The carrier must provide and maintain safe and adequate approaches to its station, platforms, or vehicles, or exercise reasonable or ordinary care as to such approaches; thus, it must keep approaches free of dangerous conditions, or warn or guard passengers against dangers in approaches.

The carrier is required to provide and maintain reasonably safe and adequate approaches to the station, platforms, and vehicles for passengers going aboard or leaving the vehicles, or to exercise reasonable or ordinary care with respect to such approaches,[97] in view of dangers reasonably to be apprehended;[98] in this respect the highest degree of care is generally not required.[99] Thus, it is the

97. Ark.—Yazoo & M. V. R. Co. v. Hill, 216 S.W. 1054, 141 Ark. 378.
Ill.—Davis v. South Side Elevated R. Co., 127 N.E. 66, 292 Ill. 378, 10 A.L.R. 254.
Ind.—Terre Haute, Indianapolis & Eastern Traction Co. v. Auler, 188 N.E. 572, 206 Ind. 423.
Ky.—Payne v. Simmons, 255 S.W. 863, 201 Ky. 33, 33 A.L.R. 814—Bales v. Louisville & N. R. Co., 200 S.W. 471, 179 Ky. 207—Cumberland R. Co. v. Hemphill, 184 S.W. 883, 169 Ky. 519.
Mass.—McCarthy v. Boston, R. B. & L. R. Co., 159 N.E. 507, 262 Mass. 56.
Mich.—Anda v. Chicago, D. & G. B. Transit Co., 204 N.W. 761, 231 Mich. 567.
Mo.—Payne v. Davis, 252 S.W. 57, 298 Mo. 645—Evans v. Chicago, B. & Q. Ry. Co., 109 S.W. 79, 130 Mo.App. 509.
N.J.—Seckler v. Pennsylvania R. Co., 174 A. 501, 113 N.J.Law 299—Bradley v. Erie R. Co., 147 A. 572, 106 N.J.Law 51, reversing 143 A. 743, 105 N.J.Law 1—Bradley v. Erie R. Co., 143 A. 743, 105 N.J. Law 1, reversed on other grounds 147 A. 572, 106 N.J.Law 51—Holtzman v. Hudson & M. R. Co., 128 A. 623, 101 N.J.Law 255.
N.Y.—Heffron v. New York Cent. & H. R. R. Co., 119 N.E. 1024, 223 N.Y. 473, reversing 161 N.Y.S. 1128, 175 App.Div. 962.
N.C.—Fulghum v. Atlantic Coast Line R. Co., 74 S.E. 584, 158 N.C. 555, 39 L.R.A.,N.S., 558.
Pa.—Norris v. Pennsylvania R. Co., 177 A. 785, 317 Pa. 586—Greenfield v. Pittsburgh & Lake Erie R. Co., 157 A. 587, 305 Pa. 456—Coyle v. Philadelphia & R. Ry. Co., 100 A. 1005, 256 Pa. 496—Muhlhouse v. Monongahela St. Ry. Co., 50 A. 937, 201 Pa. 237—Calhoon v. Pittsburgh Coal Co., 194 A. 768, 128 Pa.Super. 582—Prettyman v. Trenton Transportation Co., 73 Pa. Super. 353—Seltzer v. Philadelphia & R. Ry. Co., 69 Pa.Super. 309.
Tenn.—Clinton v. Tennessee Electric Power Co., 10 Tenn.App. 311.
Tex.—Texas & N. O. R. Co. v. Ewing, Civ.App., 46 S.W.2d 398, error dismissed—Stiles v. Union Terminal Co., Civ.App., 1 S.W.2d 947, error refused.
Utah.—Barlow v. Salt Lake & U. R. Co., 194 P. 665, 57 Utah 312.
Wash.—Hart v. King County, 177 P. 314, 104 Wash. 485.
W.Va.—Pierce's Ex'x v. Baltimore & O. R. Co., 128 S.E. 832, 99 W.Va. 313.
Wis.—Pieva v. Milwaukee Electric Ry. & Light Co., 246 N.W. 691, 210 Wis. 568—Zilles v. Milwaukee Electric Ry. & Light Co., 246 N.W. 693, 210 Wis. 531.
10 C.J. p. 912 note 27—p. 916 note 54.

The rule as stated in Corpus Juris is cited and approved in Pierce's Ex'x v. Baltimore & O. R. Co., 128 S.E. 832, 834, 99 W.Va. 313.

Analogy to care required of municipality as to sidewalks

A railroad company is bound to exercise the same degree of care in keeping sidewalks provided for passengers in safe condition as a municipal corporation with respect to public sidewalks.—Weldon v. New York, etc., R. Co., 144 N.Y.S. 868, 159 App.Div. 649—Bateman v. New York Cent., etc., R. Co., 47 Hun, N.Y., 429.

Carriers within rule

"The rule that a carrier must provide safe means of passage between public streets and carrier's means of transportation applies not only to ferries, but to railroads, street railways, taxicabs, motor busses, and airplanes as well.—Calhoon v. Pittsburgh Coal Co., 194 A. 768, 772, 128 Pa.Super. 582.

Degree of care exercised, not degree of success resulting therefrom, is what controls in determining whether carrier was negligent in construction or maintenance of its station and approaches thereto.—Seckler v. Pennsylvania R. Co., 174 A. 501, 113 N.J.Law 299.

Extent of use

"What may be considered a reasonably safe exit under conditions existing at . . . [a flag station] would not be so regarded in populous towns and cities."—Fulghum v. Atlantic Coast Line R. Co., 74 S.E. 584, 585, 158 N.C. 555, 39 L.R.A., N.S., 558.

Locked turnstile

Carrier has right to maintain turnstiles, and to require all persons intending to board its cars to pass through them, and to keep them locked until operator is reasonably satisfied required fare has been paid.—South Covington & C. St. Ry. Co. v. Elder, 266 S.W. 1055, 206 Ky. 178, 40 A.L.R. 82.

Mode of construction

(1) Railroad has duty of constructing station platform and approaches as safe as exigencies of its business will permit.—Bradley v. Erie R. Co., 143 A. 743, 105 N.J.Law 1, reversed on other grounds 147 A. 572, 106 N.J.Law 51.

(2) Railroad's adoption of method of construction for station platform and approaches according with that in general use is due performance of duty to passengers.—Bradley v. Erie R. Co., supra.

Path on steep incline

Where carrier provided a passageway down a steep incline, from its train to its boat, by cutting steps into soft sand, it was held to be an unsafe path; the carrier should have had ropes or guard rails along the path, and steps should have been made of wood.—Yazoo & M. V. R. Co. v. Hill, 216 S.W. 1054, 141 Ark. 378.

Way on one side of track

"When a railroad has provided safe and convenient means of ingress and egress to and from its trains, upon one side of its track, it has in this particular discharged its whole duty to passengers, and it is not bound to anticipate that, in disregard of its reasonable and known regulations, they will alight upon the opposite side."—Seltzer v. Philadelphia & R. Ry. Co., 69 Pa.Super. 309, 315.

98. Mich.—Anda v. Chicago, D. & G. B. Transit Co., 204 N.W. 761, 231 Mich. 567.

99. Ill.—Davis v. South Side Elevated R. Co., 127 N.E. 66, 292 Ill. 378, 10 A.L.R. 254.
Ky.—Payne v. Simmons, 255 S.W. 863, 201 Ky. 33, 33 A.L.R. 814.
N.J.—Holtzman v. Hudson & M. R. Co., 128 A. 623, 101 N.J.Law 255.
Contra Dieckmann v. Chicago, etc., Ry. Co., 121 N.W. 676, 145 Iowa 250, 139 Am.S.R. 420, 31 L.R.A. N.S., 338.
"The high degree of care exacted of carriers in conveying passengers does not extend to stational facilities and approaches."
Mich.—Anda v. Chicago, D. & G. B. Transit Co., 204 N.W. 761, 762, 231 Mich. 567.
N.J.—Seckler v. Pennsylvania R. Co., 174 A. 501, 502, 113 N.J.Law 299.

carrier's duty to keep its approaches free of defects, obstructions or other dangerous conditions,[1] and it is, therefore, liable for injuries suffered by intending passengers going to the station or cars, or by alighting passengers departing therefrom, where it permits the approach to be blocked by a train,[2] or to be obscured or indiscernible.[3] In this connection should be noted the discussion, in § 717 b, of the safety of stations, platforms, walks, and landing places generally.

Where a carrier knows an approach to be unsafe, it is under the duty of warning passengers of the danger,[4] or of guarding passengers against injury from such danger, by erecting barricades or otherwise,[5] particularly where the source of danger has been caused by the carrier itself.[6]

Approaches crossing tracks. Where it is necessary to cross the tracks in order to reach or to depart from the station, platform, or vehicle, the carrier must provide and maintain a safe way for that purpose,[7] and there is authority to the effect that in such circumstances the highest degree of care must be exercised to protect passengers from injury in making the passage.[8]

Where several ways of ingress or egress are maintained, each must be kept in a reasonably safe condition.[9]

Weight of authority

In contrast with an instruction requiring the carrier "to observe the highest degree of care which prudent persons engaged in the same business are accustomed to observe," it was held that "the great weight of authority, and, indeed, every case, except perhaps a few sporadic ones, require of carriers only the exercise of reasonable or ordinary care" with respect to the duty as to approaches—Payne v. Simmons, 255 S. W. 863, 867, 201 Ky. 33, 33 A.L.R. 814.

1. Ill—Davis v South Side Elevated R. Co., 127 N.E. 66, 292 Ill. 378, 10 A.L.R. 254.
Mich.—Anda v. Chicago, D. & G. B Transit Co, 204 N.W. 761, 231 Mich 567.
N.Y.—Chakofsky v. Interborough Rapid Transit Co., 203 N.Y.S. 357, 208 App.Div. 407, reversing 195 N. Y.S. 79
N.C—Fulghum v. Atlantic Coast Line R. Co., 74 S.E. 584, 158 N.C. 555, 39 L.R.A.,N.S., 553.
Pa—Norris v. Pennsylvania R. Co., 177 A. 785, 317 Pa. 586—Greenfield v. Pittsburgh & Lake Erie R. Co., 157 A. 587, 305 Pa. 456
Obstruction of approach as failure to keep station open see infra § 721 a.

2. Ky.—Louisville, etc., R. Co. v. Keller, 47 S.W. 1072, 104 Ky. 768, 20 Ky.Law 957.
Okl—Mayne v. Chicago, etc., R. Co., 69 P. 933, 12 Okl. 10.

Injury from exposure

Where the way to the waiting room is obstructed by a freight train, an alighting passenger can recover from the carrier for injuries suffered because of exposure—Louisville, etc., R. Co. v. Keller, 47 S. W. 1072, 104 Ky. 768, 20 Ky.L. 957

3. N.J—Bradley v Erie R. Co., 147 A. 572, 106 N.J.Law 51, reversing 143 A. 743, 105 N.J. Law 1.
Tex—Cato v. Texas & P. Ry. Co., Com.App., 39 S.W.2d 843, reversing Texas & P. Ry. Co. v. Cato, Civ. App., 19 S.W.2d 858.

Dust and dirt on plankway

Where the carrier provided a wooden plankway, but permitted it to become covered with dust and dirt, it was held to be negligence not to keep the passage discernible to persons of ordinary observation—Bradley v. Erie R. Co., 147 A. 572, 106 N.J.Law 51, reversing 143 A. 743, 105 N.J. Law 1.

Opening in intervening train

Where carrier provided an opening in an intervening train so that passengers could go through it to the train on the next track, but the opening was hidden from view, and a passenger was injured by an obstacle while walking around the intervening train, the carrier was held liable.—Cato v. Texas & P. Ry. Co., Tex.Com.App., 39 S.W.2d 843, reversing Texas & P. Ry. Co. v. Cato, Civ. App., 19 S.W.2d 858

4. Mass.—Cook v. Boston Elevated Ry. Co, 142 N.E. 824, 248 Mass. 142.
Tex—Cato v. Texas & P. Ry. Co., Com.App., 39 S.W.2d 843, reversing Texas & P. Ry. Co. v. Cato, Civ. App., 19 S.W.2d 858
10 C.J. p 912 note 29 [b]
Duty to warn boarding or alighting passenger of danger see infra § 724.

5. N.Y—Schlessinger v. Manhattan R. Co., 98 N.Y.S. 840, 49 Misc 504.
10 C.J. p 913 note 37.

6. Ala—Montgomery St. R. Co. v. Mason, 32 So. 261, 133 Ala. 508.
N.Y.—Wolf v. Third Ave. R. Co., 74 N.Y.S. 336, 67 App.Div. 605—Wells v. Steinway R. Co., 45 N.Y.S. 864, 18 App.Div 180.

7. Cal—Aydlott v. Key System Transit Co, 286 P. 456, 104 Cal App. 621.
Iowa.—Dieckmann v. Chicago, etc, R. Co., 121 N.W. 676, 145 Iowa 250, 139 Am.S.R. 420, 31 L.R.A.,N.S., 338.
Kan.—Tipton v. Topeka R. Co., 132 P. 189, 89 Kan. 451.
N.J—Bradley v Erie R. Co, 147 A. 572, 106 N.J.Law 51, reversing 143 A. 743, 105 N.J.Law 1.
Pa—Seltzer v. Philadelphia & R. Ry. Co, 69 Pa.Super. 309.
Vt—Wiley v. Rutland R. Co, 86 A. 868, 86 Vt. 504.
W.Va.—Pierce's Ex'x v. Baltimore & O. R. Co., 128 S.E. 832, 99 W.Va. 313.
10 C.J. p 913 note 30 [c].
Operation of cars or trains while boarding or alighting passenger is crossing tracks see infra § 726

Rule applied to interurban railway

Cal—Aydlott v. Key System Transit Co., 286 P. 456, 104 Cal.App. 621.

8. Iowa.—Dieckmann v. Chicago, etc, R. Co., 121 N.W. 676, 145 Iowa 250, 139 Am.S.R. 420, 31 L.R.A.,N.S. 338.

9. Mass.—Cook v. Boston Elevated Ry. Co, 142 N.E. 824, 248 Mass. 142.
Mo.—Gurtman v. Lusk, 208 S.W. 61.
Tex—Stiles v. Union Terminal Co, Civ.App., 1 S.W.2d 947, error refused.
10 C.J. p 912 note 29

The Corpus Juris text is quoted with approval in Gurtman v. Lusk, Mo., 208 S.W. 61, 65.

Escalators

Where there were two escalators, one of which was in motion, the other not, if the carrier knew, or ought to have known, that the use of the nonmoving escalator at station was likely to result in harm to passengers invited by the carrier to use the escalator, it owed the duty to the passengers to warn them in some efficient manner that use of the nonmoving escalator was forbidden as dangerous—Cook v. Boston Elevated Ry. Co., 142 N.E. 824, 248 Mass. 142.

b. Approaches Not Designated or Established by Carrier; Streets

The carrier's duty to keep approaches safe extends generally to ways on its premises commonly used as approaches with its knowledge or consent, although not designated as such by it, and to approaches on the property or in the control of others. However, this duty is generally held not to extend to public streets; thus, carriers operating street cars on public streets are not responsible for defects in streets used as approaches, except so far as required to keep in repair the portion between, or adjacent to, the rails.

If by custom a way on the carrier's premises is commonly used as an approach, with the carrier's knowledge or consent, or at its express or implied invitation, it is the carrier's duty, under most authorities, to keep such way reasonably safe, even though the way was not intended or designated for such use by the carrier, and even though the carrier provides a safe approach in compliance with the duty stated in § 714 a supra;[10] however, by other authority persons using an approach not established as such by the carrier have been regarded as licensees, to whom the carrier does not owe this duty.[11]

Approaches on property or in control of others; public streets. The carrier's duty to keep approaches safe is applicable to approaches on the property, or in the control, of others, but in general made use of by passengers, with the express or implied approval of the carrier,[12] since such duty is not delegable.[13] However, this rule has been held not to apply to public streets used as approaches, so that the carrier is not liable for injuries suffered by prospective or departing passengers by reason of the unsafe condition of the street,[14] although there

10. Mo.—Gurtman v. Lusk, 208 S.W. 61.
N.Y.—Heffron v. New York Cent. & H. R. R. Co., 119 N.E. 1024, 223 N. Y. 473, reversing 161 N.Y.S. 1128, 175 App. Div. 962.
Tex.—Cato v. Texas & P. Ry. Co., Com.App., 39 S.W.2d 843, reversing Texas & P. Ry. Co. v. Cato, Civ. App., 19 S.W.2d 858.
10 C.J. p. 912 note 29—p. 913 note 39—p. 914 note 40.

But where there was a usually traveled way from the depot to the highway, it was held that another path was not "the only practical way," and that the carrier need not keep it safe, despite the fact that it was used by those going to and from trains, and that the carrier knew of such use.—Chicago, R. I. & G. Ry. Co. v. Taylor, Tex.Civ.App., 225 S.W. 822, 825, dismissed for want of jurisdiction.

In New Jersey

(1) Where a carrier provided two wooden plankways, but permitted passengers to walk across a third way, the carrier was liable to one injured because of a defect in the latter way.—Bradley v. Erie R. Co., 147 A. 572, 106 N.J.Law 51, reversing 143 A. 743, 105 N.J.Law 1.

(2) But a passenger leaving by another way than that provided after alighting from train, was held not invitee, but trespasser or licensee, not entitled to recover for injury from striking foot against signal box even though the way was commonly used.—Lawrence v. Delaware, L. & W. R. Co., 134 A. 893, 4 N.J.Misc. 916.

Notice of safe way

"In the absence of knowledge that only one safe path has been provided by a railroad corporation for leaving a passenger station, and of any notice or direction to take a particular path, a passenger may use any path which appears to be designed and used as a way to the street, and as to him the corporation is bound to see that all such paths are reasonably safe."—Gurtman v. Lusk, Mo., 208 S.W. 61, 65—10 C.J. p. 912 note 29 [a].

11. Ky.—Bales v. Louisville & N. R. Co., 200 S.W. 471, 179 Ky. 207.

Path not on depot premises

Where an intending passenger was injured while walking on a commonly used path on the carrier's right of way about six hundred feet from the station, the court, conceding the carrier's duty to keep approaches safe, said: "A way, which has not been set apart or established for the use of persons having business with the company, and which is not upon nor a part of the depot premises, and which, in its inception, was created by mere trespassing without authority or invitation, is not such an approach as is contemplated" in the statement of the carrier's duty to keep approaches safe.—Bales v. Louisville & N. R. Co., 200 S.W. 471, 475, 179 Ky. 207.

12. Mich.—Boyle v. Waters, 166 N. W. 114, 199 Mich. 478.
Wash.—Hart v. Kings County, 177 P. 344, 104 Wash. 485.
10 C.J. p. 913 notes 30, 31.

Walk joining stations of carriers

(1) Even though one carrier owns the property on which a roadway is built, connecting its train with another carrier's ferry, and the latter agrees to keep the road in repair, both are answerable to a person injured, because of a defect therein, while walking from the train to the ferry.—Hart v. Kings County, 177 P. 344, 104 Wash. 485.

(2) Where each of two connecting carriers constructs half of a walk connecting their stations, both are liable to a passenger of either who is injured on the walk because of failure to keep it safe.—Boyle v. Waters, 166 N.W. 114, 199 Mich. 478.

13. Mich.—Boyle v. Waters, supra.
Wash.—Hart v. Kings County, 177 P. 344, 346, 104 Wash. 485.
10 C.J. p. 913 note 33.

"The duty of protection to passengers is, as between the carriers [jointly maintaining a roadway], neither individual nor delegable, nor can it be evaded by contract inter sese, or by a denial of an ownership of the fee."—Hart v. Kings County, supra.

14. U.S.—Jackson v. Pennsylvania R. Co., N.J., 245 F. 551, 158 C.C.A. 17.
Ind.—Terre Haute, Indianapolis & Eastern Traction Co. v. Auler, 188 N.E. 572, 206 Ind. 423.
Pa.—Calhoon v. Pittsburgh Coal Co., 194 A. 768, 128 Pa.Super. 582.

Reason for rule

"To hold the railroad in effect responsible for the condition of the abutting street is to breed confusion and invite carelessness. On the other hand, if the railroad is held rigidly to its duty in regard to territory it controls, and the city likewise to its duty in the territory it controls, the public will be better protected than where we have divided, dual duty. In the present case it would seem the . . . [passenger] could have sued the city for its alleged neglect, and to subject the railroad to an alternative and original liability for such alleged negligence is to encourage carelessness on the part of the municipality."—Jackson v. Pennsylvania R. Co., N.J., 245 F. 551, 552, 158 C.C.A. 17.

Street abutting ferry house

Carrier held not liable for injury to prospective passenger from defect in street within a few feet of the entrance to its ferry house since there were other entrances, and since the carrier was not obligated, nor did

is also authority to the contrary.[15]

Thus carriers by street car, taking up and discharging passengers on a public street, are generally not responsible for defects or obstructions in streets used as approaches,[16] except in so far as they are required to keep the portion of street between, or adjacent to, their rails in repair.[17]

Transferring from one vehicle to another. Where, as a regular incident of travel, a carrier operating on the public streets permits transfers to be made from conveyances on one route to conveyances on other routes, it is only bound to provide safe places for alighting and reëmbarking, and is not liable for the condition of the streets used by passengers in making the transfer.[18]

The carrier's duty where a transfer must be made at an unusual place because of an emergency is considered in § 715 infra.

§ 715. Safety of Ingress and Egress at Unusual Place

Where, because of emergency, passengers must be transferred to complete their trip, the carrier has been required to provide a safe place for the transfer, and to exercise the highest care; some authorities do not, however, require such provision.

The carrier's duty to provide safe means of ingress and egress has been held to extend to a place at which, because of an emergency, a passenger is required to transfer from one car or train to another in order to complete what would otherwise be a continuous trip,[19] and the carrier has been held

it have the right, to repair the street.—Jackson v. Pennsylvania R. Co., N. J., 245 F. 551, 158 C.C.A. 17

15. W.Va.—Pierce's Ex'x v. Baltimore & O. R. Co., 128 S.E. 832, 834, 99 W.Va. 313
10 C.J. p. 913 notes 30, 32, 37 [a].
'The fact that the way across railroad tracks used by an alighting passenger in going to the station is a public highway does not affect the degree of care due him by the carrier"—Pierce's Ex'x v. Baltimore & O. R. Co., supra—10 C.J. p. 913 note 30 [c].

16. Ind.—Terre Haute, Indianapolis & Eastern Traction Co. v. Auler, 188 N.E. 572, 573, 206 Ind. 423
Mo.—Anton v. St. Louis Public Service Co., 71 S.W.2d 702, 335 Mo. 188.
Tenn.—Clinton v. Tennessee Electric Power Co., 10 Tenn.App. 311.
10 C.J. p. 913 note 34.
"It is obvious that the rule as stated has reference to what are ordinarily known as steam railroads maintaining station houses and like structures in cities, and it is readily seen that there would be great difficulty in applying it to street car companies operating on city streets which they do not control, and stopping at frequent intervals in the public way for the purpose of receiving and discharging passengers"—Terre Haute, Indianapolis & Eastern Traction Co. v. Auler, supra.

Corpus Juris is cited for a collection of the authorities in Maryland Dredging & Contracting Co. v. Hines, C.C.A.Md., 269 F. 781, 783.

Access to private right of way
Interurban electric railroad operating on private right of way outside of city and regularly stopping on signal to accept or discharge passengers at suburb without station, held not bound to provide safe means of access and egress to and from right of way.—Terre Haute, Indianapolis & Eastern Traction Co. v. Auler, 188 N.E. 572, 206 Ind. 423.

Bridge to car line
Where a street railway did not build or maintain a bridge which persons used in going to and from its car line, it is not liable to one injured because of a defect in the bridge.—Clinton v. Tennessee Electric Power Co., 10 Tenn.App. 311.

A public street is not to be regarded as a passenger station for the safety of which a street railroad company is responsible, when used by passengers as a place to alight
Mass.—Thompson v. Gardner, etc., R. Co., 78 N.E. 854, 193 Mass. 133, 118 Am.S.R. 459
Mich.—Spangler v. Saginaw Valley Tract Co., 116 N.W. 373, 152 Mich. 405

The failure of a street railway to repair a pavement in accordance with the requirements of a city ordinance has been held not to give a right of action to one who has alighted from one of the carrier's cars and is injured in consequence of a defect in the pavement.—Fielders v. North Jersey St. R. Co., 53 A. 404, 54 A. 822, 68 N.J.Law 343, 96 Am.S.R. 552, 59 L.R.A. 455, reversing 50 A. 533, 67 N.J.Law 76

17. Cal.—Aydlott v. Key System Transit Co., 286 P. 456, 104 Cal.App. 621
10 C.J. p. 913 note 35.

Requirement by franchise or ordinance
"Manifestly . . . it would be unreasonable to . . . require . . . [a street railway] to provide safe means of access to its cars at every stopping place. It is obliged usually, to stop its cars at all street crossings; and unless some provision of its franchise or an ordinance of the city requires it to pave the street between its tracks, or to maintain platforms and approaches to its cars, it is not to be held responsible for the condition of public streets, and ordinarily will not be liable for injuries to passengers caused by defects therein"—Tipton v. Topeka R. Co., 132 P. 189, 191, 89 Kan. 451.

As to the portion of its tracks ordinarily traversed by intending passengers, an interurban railway company operating on a public street owed duty, as required by its franchise, to keep it in safe condition, so that where an intending passenger while crossing the tracks caught her foot in a hole and was struck by a train, the carrier was liable for the injuries suffered.—Aydlott v. Key System Transit Co., 286 P. 456, 104 Cal.App. 621

18. Mo.—Anton v. St. Louis Public Service Co., 71 S.W.2d 702, 335 Mo. 188.
10 C.J. p. 916 note 53.

Reason for rule
"The transfer ticket is simply an undertaking on the part of the carrier to continue the carriage further without additional charge . . . In the interim between leaving the car and offering himself as a passenger on another, the passenger is not under the care or custody of the carrier, nor subject to his direction or control, and may be far from the carrier's powers of observation. It would seem unreasonable, therefore, to hold the carrier liable to one as a passenger during such interval"—Anton v. St. Louis Public Service Co., 71 S.W.2d 702, 706, 335 Mo. 188

19. Conn.—Pins v. Connecticut Co., 102 A. 595, 92 Conn. 310
Ohio.—Lake Shore Electric Ry. Co. v. Shepherd, 192 N.E. 740, 48 Ohio App. 167.
10 C.J. p. 916 note 53
Where transfer is regular incident of travel see supra § 714 b

Municipal sidewalk
Where carrier, but not passenger,

bound at such times to exercise the highest degree of care.[20] Some authorities do not require the carrier to furnish a way to make such a transfer, but if the carrier voluntarily provides a way it then becomes its duty to keep it safe.[21]

§ 716. Safety of Place for Getting on Board or Alighting

In general, a carrier must provide and maintain a convenient and safe place for passengers boarding or alighting; but this duty does not ordinarily apply to a carrier operating street cars on the public streets.

In general, it is the duty of the carrier to provide and maintain a convenient and reasonably safe place at which its vehicles can stop for passengers to get on board or alight.[22] However, carriers operating street cars on the public streets are not subject to this duty, since they neither own nor control the streets;[23] but if the street car company has provided any portion of its roadbed as a place for passengers to alight, it must exercise reasonable care to keep that particular place safe for the purpose.[24]

The duty owed by carriers to boarding or alighting passengers to stop their conveyances at safe places is considered, with reference to carriers generally, in § 723 infra, with reference to carriers by street car in § 733 infra, and as an element in the performance of the carrier's contract or duty to transport the passenger, in § 657 supra; and the duty which the carrier owes to such passengers where the conveyance stops at a place other than a regular stopping place is considered in § 731 infra.

§ 717. Safety of Stations, Platforms, Walks, and Landing Places

a. Duty to provide safe and adequate stational facilities

b. Duty to keep stational facilities safe

a. Duty to Provide Safe and Adequate Stational Facilities

The carrier is generally required to provide safe and adequate stational facilities and to use reasonable or ordinary care in their construction. Where a platform is furnished it must be so constructed that passengers, using ordinary care, may occupy it, and step from the car to it, and vice versa, in safety; and the existence of space between the cars and the platform is not ordinarily, sufficient of itself to constitute negligence.

It is commonly held the duty of the carrier to

knew at time passenger boarded car that, because of high water, passengers would have to transfer to another car, municipal sidewalk used by passengers in transferring temporarily became part of railway's equipment, and carrier was required to exercise toward passengers the same degree of care in respect thereto as if sidewalk were its property — Lake Shore Electric Ry Co. v. Shepherd, 192 N E 740, 48 Ohio App. 167

Transfer through woods

Where a suburban trolley, on account of a public improvement in the road, had to transfer the passengers through the woods, it owed at least ordinary care in leading them through the wood and in seeing that the path was reasonably safe.—Pins v. Connecticut Co., 102 A. 595, 92 Conn 310.

20. W.Va —Killmyer v. Wheeling Tract. Co, 77 S E 908, 72 W.Va. 148, 48 L R A.,N S., 683, Ann.Cas 1915C 1220

10 C J. p 916 note 53 [a].

21. Or —Finseth v Suburban R Co, 51 P. 84, 32 Or. 1, 39 L R A. 517.

10 C.J p 916 note 53 [c].

22. U S.—Chesapeake & O. Ry. Co. v. Burton, C.C A W.Va., 50 F.2d 730 —Davis v. Olson, C C A.Minn., 298 F 921.

Ill —Feeney v. Chicago City Ry. Co., 220 Ill App 400

Iowa —Vanderbeck v. Chicago, M, St P. & P. Ry. Co., 230 N.W. 390, 210 Iowa 310.

Mo —Le Duc v. St. Louis, etc., R Co., 140 S W. 758, 159 Mo.App. 136

N.C.—Lane v. Southern Ry. Co, 134 S.E 855, 192 N.C. 287, 51 A L R 1114.

N.D.—Faubion v. Minneapolis, St. P. & S. S M. Ry. Co., 177 N.W. 371, 45 N D 269.

10 C J p 914 note 44.

The Corpus Juris text is cited with approval

U S —Chesapeake & O. Ry. Co. v. Burton, C.C A W.Va., 50 F.2d 730, 731

Ala —Alabama Power Co. v. Hall, 103 So 867, 212 Ala. 638

Mo.—Jenkins v Missouri State Life Ins. Co, 69 S.W 2d 666, 334 Mo. 941.

"Unusual" place

The place where a passenger alights from a train need not be "unusual" as well as unsafe, to make the carrier liable for his injury.—Louisville, etc, R. Co v. Davis, 162 S W. 1124, 1125, 157 Ky. 239.

"High degree of care" required

N C —Lane v. Southern Ry. Co., 134 S.E. 855, 859, 192 N.C. 287, 51 A.L R 1114.

Duty to provide platforms see infra § 717 a.

23. Ill.—Feeney v. Chicago City Ry. Co, 220 Ill.App. 400.

Ky —Mayhew v. Ohio Valley Electric Ry. Co, 254 S.W. 202, 203, 200 Ky. 105.

Minn —Lentz v. Minneapolis & St. Paul Suburban R. Co., 160 N.W. 794, 135 Minn. 310.

Pa —Perret v. George, 133 A. 228, 229, 286 Pa 221—Scanlon v Philadelphia Rapid Transit Co, 57 A. 521, 208 Pa. 195.

10 C J p 913 note 35 [b].

"The law recognizes a distinction between the duties of a street railway company, operating its lines upon the streets of a city, toward an alighting passenger, as to the condition of the place, and the duties of a steam or interurban railway in the country, where the latter have regular and supposedly equipped places for the purpose and have under their control a right of way which they can and must prepare for that purpose."—Mayhew v Ohio Valley Electric Ry. Co., supra

"However broadly and strictly we may have held street railways to care in receiving and discharging passengers, where the company owns or controls the right of way, with the approaches thereto, the rule is different where such right of way and approaches are not so owned. . . . It is only in exceptional cases, arising under contract, that a street railway company is responsible for accidents occurring in the cartway of a street through lack of repair"—Perret v. George, supra.

Duty of carrier by street car as to streets used as approaches see supra § 714 b.

24. N.Y.—Flack v. Nassau Electric R. Co., 58 N Y.S. 839, 41 App.Div. 399.

provide safe and adequate stational facilities for the protection and accommodation of passengers waiting for, approaching, and leaving the trains or other means of conveyance,[25] although there is authority to the effect that depots and waiting rooms need not be established unless a statute so requires.[26] In the construction of such facilities, the carrier is required to exercise only reasonable or ordinary care, so that they may be used in safety.[27]

Platforms. It may be necessary for a railroad company to furnish a platform suitable and adequate for taking up and setting down passengers;[28] but it has been held not required to do so at a place other than a regular or usual stopping place.[29] Where the carrier does provide a platform, it must exercise ordinary care to construct it in such a way that passengers may, in the exercise of due care, occupy it in safety,[30] and where a platform is so constructed that part of the train projects over it passengers injured thereby have been permitted to recover from the carrier,[31] although some authorities consider the danger to be obvious, so that the carrier is relieved of liability.[32]

25. U.S.—Chesapeake & O. Ry. Co. v. Burton, C.C.A.W.Va., 50 F.2d 730
Cal.—Wilkinson v. United Railroads of San Francisco, 232 P. 131, 195 Cal. 185.
Kan.—Higgins v. Southern Kansas Stage Lines Co., 42 P.2d 599, 141 Kan. 641.
Md.—Jackson v. Hines, 113 A. 129, 137 Md. 621.
N.C.—Lane v. Southern Ry. Co., 134 S.E. 855, 192 N.C. 287, 51 A.L.R. 1114.
Okl.—Missouri, Kansas & Oklahoma Coach Lines v. Burton, 72 P.2d 385, 181 Okl. 45.
Pa.—Spagnol v. Pennsylvania R. Co., 123 A. 781, 279 Pa. 205, 32 A.L.R. 1313.
Tex.—Ft. Worth & D. C. Ry. Co. v. Brown, Civ.App., 205 S.W. 378.
W.Va.—Pierce's Ex'x v. Baltimore & O. R. Co., 128 S.E. 832, 99 W.Va. 313
10 C.J. p. 916 note 54.

"It is generally recognized that a common carrier of passengers, because of the nature and character of its business, must provide such stational facilities and conveniences as are reasonably necessary for the accommodation of its passengers, actual and prospective."—Jackson v. Hines, 113 A. 129, 131, 137 Md. 621.

Corpus Juris is cited with approval.
U.S.—Chesapeake & O. Ry. Co. v. Burton, C.C.A.W.Va., 50 F.2d 730, 731.
W.Va.—Pierce's Ex'x v. Baltimore & O. R. Co., 128 S.E. 832, 833, 99 W.Va. 313.

Accommodations for colored people

Motorbus carrier held bound by statute to provide reasonable station facilities for accommodation and comfort of prospective passengers while waiting for arrival of bus so that a colored woman could recover damages for injury resulting from exclusion from the station on a cold night.—Higgins v. Southern Kansas Stage Lines Co., 42 P.2d 599, 141 Kan. 641

Hotel used as bus station

A bus company held to have duty under statute to provide safe conditions for its passengers at hotel used as bus station under arrangement with hotel.—Missouri, Kansas & Oklahoma Coach Lines v. Burton, 72 P.2d 385, 181 Okl. 45

26. Ala.—Waldrop v. Nashville, etc., R. Co., 62 So. 769, 183 Ala. 226—Page v. Louisville & N. R. Co., 29 So. 676, 129 Ala. 232.

Less than required population

Where a statute provides that depots be built in towns with a population of more than one thousand, it is not the carrier's duty to build them in towns having a smaller population.—Page v. Louisville & N. R. Co., 29 So. 676, 129 Ala. 232.

27. Ill.—Davis v. Southside Elevated R. Co., 127 N.E. 66, 292 Ill. 378, 10 A.L.R. 254.
Minn.—McDonnell v. St. Paul Union Depot Co., 195 N.W. 538, 157 Minn. 66.
N.J.—Seckler v. Pennsylvania R. Co., 174 A. 501, 113 N.J.Law 299—Holtzman v. Hudson & M. R. Co., 128 A. 623, 101 N.J.Law 255.
Ohio.—Majoros v. Cleveland Interurban R. Co., 187 N.E. 857, 127 Ohio St. 255

This rule as stated in Corpus Juris is cited or referred to.
Ill.—Davis v. Southside Elevated R. Co., 127 N.E. 66, 67, 292 Ill. 378, 10 A.L.R. 254.
Minn.—McDonnell v. St. Paul Union Depot Co., 195 N.W. 538, 539, 157 Minn. 66.

Authorities "well nigh unanimous"
Minn.—McDonnell v. St. Paul Union Depot Co., 195 N.W. 538, 539, 157 Minn. 66

Care, not success, controlling

The degree of care exercised, rather than the degree of success achieved, is the controlling factor in determining negligence in construction or maintenance.—Seckler v. Pennsylvania R. Co., 174 A. 501, 113 N.J.Law 299.

Floors at different levels

Construction of floor in bus station with difference in elevation of three inches between floor of dressing room and floor of station has been held not negligence, so as to render bus company liable for injuries sustained by passenger.—Van v. Teche Lines, La.App., 164 So. 267.

Turnstile

Installation at a subway station of a turnstile on which was a sharp piece of exposed metal on which a passenger injured himself has been held negligence on carrier's part, since the injury should have been anticipated in the exercise of reasonable forethought and prudence.—Chakofsky v. Interborough Rapid Transit Co., 203 N.Y.S. 357, 208 App.Div. 407, reversing 195 N.Y.S. 79.

28. Mass.—McCarthy v. Boston, R. B. & L. R. Co., 159 N.E. 507, 262 Mass. 56.
Tex.—Wells Fargo & Co. v. Lowery, Civ.App., 197 S.W. 605, error refused.
10 C.J. p. 917 note 61.

29. Ind.—Sellers v. Cleveland,' etc., R. Co., 81 N.E. 1087, 40 Ind.App. 319.

30. N.J.—Holtzman v. Hudson & M. R. Co., 128 A. 623, 101 N.J.Law 255—Dotson v. Erie R. Co., 54 A. 827, 68 N.J.Law 679.
N.Y.—Hoffman v. Lehigh Valley R. Co., 177 N.Y.S. 140, 188 App.Div. 414.
Pa.—Twersky v. Pennsylvania R. Co., 104 A. 63, 261 Pa. 6.
10 C.J. p. 917 note 61

Platform of type generally used

"The adoption of a method of construction of its platforms and approaches which accords with that in general use by well-regulated railroad companies, and which is approved by experience, is a due performance of the duty which it owes to its passengers in that regard."—Bradley v. Erie R. Co., 143 A. 743, 744, 105 N.J.Law 1, reversed on other grounds 147 A. 572, 106 N.J.Law 51—Feil v. West Jersey, etc., R. Co., 72 A. 362, 363, 77 N.J.Law 502.

31. Ind.—Evansville Rys. Co. v. Miller, 111 N.E. 1031, 64 Ind.App. 206.
N.Y.—Hoffman v. Lehigh Valley R. Co., 177 N.Y.S. 140, 188 App.Div. 414.
10 C.J. p. 917 note 61.

32. Ala.—Williford v. Atlantic Coast Line R. Co., 113 So. 44, 216 Ala. 307.

Further, passengers exercising due care must be able to step from the steps of a car to the platform, or vice versa, in safety.[33] However, there must be some space between the cars and the platform to provide for the swaying of the cars, or for the curvature of the platform,[34] and the existence of such a space is not of itself sufficient to constitute negligence,[35] at least if the space is such that the carrier is not bound to anticipate injury to passengers therefrom,[36] or if its existence is obvious to passengers using ordinary care,[37] or if passengers are warned of the danger.[38]

N.J.—Dotson v. Erie R. Co., 54 A. 827, 68 N.J.Law 679.

"It is a matter of common knowledge that . . . the platforms along the best regulated railroads are built so near the rails that the projections from the engines and the cars will overlap, to some extent, the edge of the platform. While the extreme edge of the platform is perfectly safe for passengers when occupying it for the purpose to which it is manifestly adapted, it is a matter of common knowledge that it is a place of danger when occupied while trains are passing or are likely to pass. It is the plain duty of the passenger when not getting on or off a train, but while he may be waiting upon the platform, or engaged in walking upon it, to keep such a distance from the edge of it next to the rail that he would be beyond the reach of the projections of ordinary trains. And the company is not liable for injury to a passenger who suffers himself to go beyond such a limit, and is injured by a passing train"—Dotson v. Erie R. Co., 54 A. 827, 829, 68 N.J.Law 679.

Warning device

Railroad held not under duty to place guard rail or other warning device at track before station platform, where danger of being hit by trains was obvious.—Williford v. Atlantic Coast Line R. Co., 113 So. 44, 216 Ala. 309.

33. N.J.—Dotson v. Erie R. Co., 54 A. 827, 829, 68 N.J.Law 679.
10 C.J. p 917 note 66

"A railroad company is only required to build platforms of sufficient dimensions to accommodate passengers getting on and off at their stations. . . . This duty requires the railroad company to construct its platform sufficiently near to the rails that it will afford to passengers, including the aged and infirm, a safe exit to and from the trains."—Dotson v. Erie R. Co., supra.

34. Mass.—Hilborn v. Boston & N. St. R. Co., 77 N.E. 646, 191 Mass. 14.
N.Y.—McKinney v. New York Consol. R. Co., 129 N.E. 652, 230 N.Y. 194, reversing 172 N.Y.S. 906, 186 App. Div. 959—Gibson v. New York Consol. R. Co., 159 N.Y.S. 514, 173 App.Div. 125.
10 C.J. p 917 note 66.

"The cars must not scrape the platform of the station, and must be far enough away to allow for the oscillation and swaying of the train. On a perfectly straight track three or four inches of separation would be all that necessity required, and as much as should be usually maintained. But a perfectly straight line cannot everywhere be constructed. . . . The body of a car forms an unbending straight line, and wherever there is a curve becomes the chord of an arc. If the outer line of the platform, following the curve of the track, as it should to bring all points as near as possible to the train, shows a convexity to the cars, any one of them in passing will have its center nearer to the station than one or both ends. If the car stops, and the center is within four inches of the platform, one or both ends will be further away, depending upon the character or degree of the curve. It follows, therefore, that where a station is located upon a curve, and is convex towards the train, which becomes a tangent, the closest approach reasonably possible of the center of the car will leave the ends further away; and in such case that distance and the consequent opening is inevitable,—a necessary result of the practical operation of the road,—and its presence, the bare fact of its existence, is not and cannot be deemed negligence."—Ryan v. Manhattan R. Co., 23 N.E. 1131, 121 N.Y. 126—Woolsey v. Brooklyn Heights R. Co., 108 N.Y.S. 16, 19, 123 App.Div. 631, opinion of Hooker, J.

35. N.Y.—McKinney v. New York Consol. R. Co., 129 N.E. 652, 230 N.Y. 194, reversing 172 N.Y.S. 906, 186 App.Div. 959—Trudnowski v. New York Cent. R. Co., 221 N.Y.S. 686, 220 App.Div. 503—Lang v. Interborough Rapid Transit Co., 183 N.Y.S. 270, 193 App.Div. 56—Gibson v. New York Consol. R. Co., 159 N.Y.S. 514, 173 App.Div. 125.
10 C.J. p 917 note 66.

Particular spaces held not to show negligence

(1) Three and one-half inches.—McKinney v. New York Consol. R. Co., 129 N.E. 652, 230 N.Y. 194, reversing 172 N.Y.S. 906, 186 App.Div. 959.

(2) Five inches, with "a drop from the step to the platform of not more than an inch greater than the height of the individual step."—Trudnowski v. New York Cent. R. Co., 221 N.Y.S. 686, 688, 220 App.Div. 503.

(3) Seven and one-half inches.—Gibson v. New York Consol. R. Co., 159 N.Y.S. 514, 173 App.Div. 125.

(4) Eight inches.—Lang v. Interborough Rapid Transit Co., 183 N.Y.S. 270, 193 App.Div. 56.

(5) Nine inches.—Anshen v. Boston Elevated Ry. Co., 91 N.E. 157, 205 Mass. 32.

(6) Ten inches.—Woolsey v. Brooklyn Heights R. Co., 108 N.Y.S. 16, 123 App.Div. 631.

36. Mass.—Anshen v. Boston Elevated Ry. Co., 91 N.E. 157, 205 Mass. 32.
N.Y.—McKinney v. New York Consol. R. Co., 129 N.E. 652, 230 N.Y. 194, reversing 172 N.Y.S. 906, 186 App.Div. 959.
10 C.J. p 917 note 66.

Less than ordinary adult's step

Space much less in distance than an ordinary adult's step is not so great as to charge a carrier with negligence for failure to guard against passengers' falling into the space.—Anshen v. Boston Elevated Ry. Co., 91 N.E. 157, 205 Mass. 32.

37. N.Y.—Lang v. Interborough Rapid Transit Co., 183 N.Y.S. 270, 193 App.Div. 56—Gabriel v. Long Island R. Co., 66 N.Y.S. 301, 54 App.Div. 41.
Pa.—Twersky v. Pennsylvania R. Co., 104 A. 63, 261 Pa. 6.
10 C.J. p 917 note 66.

Care by passenger assumed

(1) "It may be assumed generally that where passengers are alighting they will watch their steps"—Gibson v. New York Consol. R. Co., 159 N.Y.S. 514, 515, 173 App.Div. 125.

(2) "A carrier of passengers in the management of its business has the right to assume that passengers will take some care of themselves"—Gabriel v. Long Island R. Co., 66 N.Y.S. 301, 303, 54 App.Div. 41.

(3) A subsurface railroad was not negligent in failing to warn a passenger of an open space between station platform and car, which she in fact saw, as it could act on the assumption she would use ordinary care to avoid any obvious danger.—Lang v. Interborough Rapid Transit Co., 183 N.Y.S. 270, 193 App.Div. 56.

38. N.Y.—Woolsey v. Brooklyn Heights R. Co., 108 N.Y.S. 16, 123 App.Div. 631—Coogan v. Interborough Rapid Transit Co., 99 N.Y.S. 382, 50 Misc. 562.
10 C.J. p 917 note 66.
Carrier's duty to warn passengers of

Subway leased from transit commission. A carrier leasing a subway from a transit commission, which designed and constructed the stations and platforms, is not responsible for the negligence of the commission in that work.[39]

b. Duty to Keep Stational Facilities Safe

(1) General rules
(2) Application of rules
(3) Conditions on liability; knowledge of defect and time to remedy

(1) General Rules

The carrier is generally required to exercise ordinary or reasonable care to keep its stations, stational facilities, and platforms in safe condition, although some authorities require a high, or the highest, degree of care. It is not relieved of this duty by the fact that another attempts to perform it, or that it does not own or did not construct the facilities used.

The authorities are well-nigh unanimous, it has been said,[40] that it is the carrier's duty to exercise ordinary or reasonable care to keep its stations, stational facilities, and platforms in safe condition,[41]

dangers generally while boarding or alighting see supra § 724

Warning held necessary

Where the space is nine inches wide, the carrier should give passengers warning, and if it does so, it is not liable to one injured by reason of that opening.—Coogan v. Interborough Rapid Transit Co., 99 N.Y.S. 382, 50 Misc. 562.

39. Mass.—Bryant v. Boston Elevated Ry. Co. 122 N.E. 744, 232 Mass. 549—Collins v. Boston Elevated Ry. Co., 105 N.E. 353, 217 Mass. 420—Theall v. Boston El. R. Co., 100 N.E. 543, 213 Mass. 327—Hilborn v. Boston & N. St. R. Co., 77 N.E. 646, 191 Mass. 14

Open space between platform and car

Where a subway and platform were designed and constructed by a transit commission and were leased to the carrier, the carrier, having had no control over the plan or size of the platform, is not responsible for the existence of spaces between the cars and the platform.—Bryant v. Boston Elevated Ry. Co., 122 N.E. 744, 232 Mass. 549—Collins v. Boston Elevated Ry. Co., 105 N.E. 353, 217 Mass. 420—Hilborn v. Boston & N. St. R. Co., 77 N.E. 646, 191 Mass. 14

Escalator defectively constructed

(1) The carrier must accept and operate the subway or street car line as constructed, and if, due to the manner in which an escalator was constructed, there was a defect in it, the carrier would not be liable to one injured thereby.—Du Bois v. Boston Elevated Ry. Co., 176 N.E. 920, 276 Mass. 98—Theall v. Boston El. R. Co., 100 N.E. 543, 213 Mass. 327.

(2) A street railroad company is not negligent in not asking the commission to change escalators before the first accident resulting from their mechanism.—Theall v. Boston El. R. Co., 100 N.E. 543, 213 Mass. 327.

40. Minn.—McDonnell v. St. Paul Union Depot Co., 195 N.W. 538, 157 Minn. 66.

41. U.S.—Chesapeake & O. Ry. Co. v. Burton, C.C.A.W.Va., 50 F.2d 730—Kansas City Southern Ry. Co. v. Pinson, C.C.A.Tex., 23 F.2d 247, applying Louisiana law.

Ark.—Kansas City Southern R. Co. v. Cobb, 178 S.W. 383, 118 Ark. 569—St. Louis, etc., R. Co. v. Grimsley, 117 S.W. 1064, 90 Ark. 64—St. Louis, etc., R. Co. v. Wilson, 66 S.W. 661, 70 Ark. 136, 91 Am.S.R. 74.

Cal.—Sanchez v. Pacific Auto Stages, 3 P.2d 845, 116 Cal.App. 392

Iowa.—McNaughton v. Illinois Cent. R. Co., 113 N.W. 844, 136 Iowa 177.

Ky.—Cincinnati, N. & C. Ry. Co. v. Trenkamp, 295 S.W. 866, 220 Ky. 552—Louisville & N. R. Co. v. Scarbrough, 270 S.W. 494, 208 Ky. 79—Louisville & N. R. Co. v. Minix, 260 S.W. 15, 202 Ky. 472—Payne v. Simmons, 255 S.W. 863, 201 Ky. 33, 33 A.L.R. 814—Illinois Cent. R. Co. v. Sanderson, 192 S.W. 869, 175 Ky. 11, L.R.A.1917D 890—Cumberland R. Co. v. Hemphill, 184 S.W. 883, 169 Ky. 519—Louisville & N. R. Co. v. Baker, 164 S.W. 799, 158 Ky. 224.

Mass.—Klein v. Boston Elevated Ry. Co., 200 N.E. 6—Pearson v. Payne, 139 N.E. 488, 245 Mass. 158.

Mich.—Anda v. Chicago, D. & G. B. Transit Co., 204 N.W. 761, 231 Mich. 567.

Minn.—McDonnell v. St. Paul Union Depot Co., 195 N.W. 538, 157 Minn. 66.

Mo.—Williams v. Kansas City Terminal Ry. Co., 231 S.W. 954, 288 Mo. 11, transferred, App., 223 S.W. 132—Thomas v. St. Louis-San Francisco Ry. Co., App., 293 S.W. 1051—Lowther v. St. Louis-San Francisco Ry. Co., 261 S.W. 702, 214 Mo.App. 293—Martin v. Missouri Pac. R. Co., App., 253 S.W. 1083—Munro v. St. Louis, etc., R. Co., 135 S.W. 1016, 155 Mo.App. 710

N.H.—Wessman v. Boston & M. R. R., 152 A. 476, 84 N.H. 475.

N.J.—Seckler v. Pennsylvania R. Co., 174 A. 501, 113 N.J.Law 299—Holtzman v. Hudson & M. R. Co., 128 A. 623, 101 N.J.Law 255—Feil v. West Jersey, etc., R. Co., 72 A. 362, 77 N.J.Law 502—Cooney v. Hudson & M. R. Co., 138 A. 512, 5 N.J.Misc. 842

N.Y.—Beltz v. Buffalo, R. & P. Ry. Co., 119 N.E. 81, 222 N.Y. 433, reversing 160 N.Y.S. 1124, 171 App.Div. 976—Kelly v. Manhattan Ry. Co., 20 N.E. 383, 112 N.Y. 443, 3 L.R.A. 74—Boettcher v. Dowling, 277 N.Y.S. 228, 243 App.Div. 397, affirmed 200 N.E. 316, 270 N.Y. 557—Hoffman v. Lehigh Valley R. Co., 177 N.Y.S. 140, 188 App.Div. 414—Murphy v. Hudson & M. R. Co., 167 N.Y.S. 895, 180 App.Div. 585

Ohio.—Majoros v. Cleveland Interurban R. Co., 187 N.E. 857, 127 Ohio St. 255

Utah.—Stonebreaker v. Bamberger, 54 P.2d 418, 88 Utah 310—Barlow v. Salt Lake & U. R. Co., 194 P. 665, 57 Utah 312

W.Va.—Pierce's Ex'x v. Baltimore & O. R. Co., 128 S.E. 832, 99 W.Va. 313.

Wis.—Pleva v. Milwaukee Electric Ry. & Light Co., 246 N.W. 694, 210 Wis. 568—Zilles v. Milwaukee Electric Ry. & Light Co., 246 N.W. 693, 210 Wis. 564

10 C.J. p. 916 note 54—p. 917 note 62

The Corpus Juris statement has been adopted or referred to.

U.S.—Chesapeake & O. Ry. Co. v. Burton, C.C.A.W.Va., 50 F.2d 730, 731.

Ill.—Davis v. Southside Elevated R. Co., 127 N.E. 66, 67, 292 Ill. 378, 10 A.L.R. 254.

Ky.—Hendricks v. Covington & Cincinnati Bridge Co., 6 S.W.2d 1050, 1053, 224 Ky. 592.

Minn.—McDonnell v. St. Paul Union Depot Co., 195 N.W. 538, 539, 157 Minn. 66

W.Va.—Pierce's Ex'x v. Baltimore & O. R. Co., 128 S.E. 832, 833, 99 W. Va. 313

In Illinois

(1) As between the highest degree of care and ordinary care, only ordinary care is required of the carrier to keep its stations, depots, and appurtenances safe, and "anything that has been said in any former decision of this court which might be thought to support the contrary conclusion is hereby overruled."—Davis v. South Side Elevated R. Co., 127 N.E. 66, 68, 292 Ill. 378, 10 A.L.R. 254

(2) The carrier "was not bound to use the highest degree of care in maintaining said depot and platform, but was bound to use only ordinary

in view of the dangers to be apprehended,[42] although some authorities require a "high"[43] or "the highest"[44] degree of care, and still others state the duty without reference to the degree of care to be used in its performance.[45]

The duty above stated as to stational facilities is not limited, in its application, to carriers by steam or electric railroad, but applies also to carriers by street car with respect to stations and platforms which they may maintain.[46]

The carrier will not be relieved of this duty by the fact that another attempts to perform it,[47] nor is it material, it has been declared, that the carrier did not build and does not own the station or platform it uses.[48]

care"—Dean v Yelloway Pioneer System, 259 Ill App 180, 189

(3) But it has been held that the carrier must exercise the "highest degree of care, skill and diligence for the safety of the . . . [passenger] consistent with the mode of conveyance employed."—Lapin v. Northwestern El R. Co., 162 Ill App 296, 298

"Reasonably safe"

It is the company's duty to exercise "ordinary care" to keep its waiting room in a safe condition, so that it is inaccurate to instruct merely that a carrier must keep its waiting room in a "reasonably safe condition"—St. Louis, etc., R. Co. v Grimsley, 117 S.W. 1064, 1066, 90 Ark. 64

"Very high precautions"

In action by passenger slipping on grease on station platform, railroad knowing that motor vehicles frequently traversed platform and left grease, held required, in the exercise of ordinary care, to take "very high precautions" to discover and remove grease.—Stonebreaker v. Bamberger, 54 P 2d 418, 422, 88 Utah 310.

Abandoned station

A railroad company cannot defeat a recovery for injuries sustained at a station by the claim that such station was abandoned, where, although it kept no agent and sold no tickets there, it sold tickets to, and permitted passengers to get off and on at, such place—Gulf, etc., R. Co. v. Williams, 51 S.W. 653, 21 Tex Civ. App. 469.

Escalator

A railway company, obliged to accept and operate a subway as constructed, was under the "duty to maintain the escalator in as safe a condition as it was in when it came under . . [its] control"—Du Bois v Boston Elevated Ry Co., 176 N.E. 920, 921, 276 Mass. 98.

Flag station

N C.—Pincus v. Atlantic Coast Line R. Co., 53 S E. 297, 140 N.C. 450, 111 Am S.R 856.

Safety tread on steps

Where a defendant equipped steps in a station giving access to trains with safety tread, which was supposed to afford a firm footing even though wet, a passenger, who slipped on a step which had become wet presumably from the wet or muddy shoes and dripping umbrellas of the preceding passengers, cannot recover from defendant, it having exercised ordinary care—Williams v. Kansas City Terminal Ry Co., 231 S W. 954, 288 Mo. 11, transferred, App., 223 S. W. 132.

Statutes requiring station to be open

A statute requiring waiting rooms to be kept open for thirty minutes before the scheduled departure of trains does not affect the carrier's duty to keep its waiting room safe for all entering it at the carrier's invitation, and a carrier permitting unguarded hole to exist in floor of waiting room in course of repair was liable to an intending passenger who went to the waiting room two hours before her train was due, unless she was guilty of contributory negligence.—Louisville & N. R. Co. v. Minnix, 260 S.W. 15, 202 Ky. 472.

42. N Y.—Beltz v. Buffalo, R & P. Ry. Co., 119 N E. 81, 222 N.Y. 433, reversing 160 N.Y.S. 1124, 171 App. Div. 976—Kelly v. Manhattan Ry. Co., 20 N.E. 383, 112 N.Y. 443, 3 L.R A. 74.

43. N C.—Lane v. Southern Ry. Co., 134 S.E. 855, 859, 192 N.C. 287, 51 A.L.R. 1114.

In Texas

(1) "It seems to be settled by the decisions of this state that the rule of high degree of care is applicable" to "the condition of . . . [a carrier's] station and premises occupied by its passengers preliminary to or upon termination of the actual transportation," as well as to "the actual transportation of the passenger"—Fort Worth & D C. Ry. Co. v Kidwell, 245 S.W. 667, 670, 112 Tex. 89, answering certified questions, Civ.App., 249 S W. 303—Ft. Worth & D. C. Ry. Co. v. Brown, Civ. App., 205 S.W. 378, 379.

(2) But it has been held that the carrier owes the duty of exercising only "ordinary care" to keep its station buildings safe.—Chicago, R. I. & G. Ry Co. v. Taylor, Tex.Civ.App., 225 S.W. 822, 825, dismissed for want of jurisdiction.

(3) And such care as "persons of ordinary prudence would employ under the same circumstances" has been required.—Trinity, etc., R. Co. v. O'Brien, 46 S.W. 389, 391, 18 Tex. Civ.A. 690.

44. S C.—Dilleshaw v. Charleston, etc., R Co., 67 S E 304, 305, 85 S. C. 334

Alighting passenger

A carrier owes an alighting passenger the "highest degree of care" to keep its platforms in reasonably safe condition, since such passenger is still in transit—Louisville & N R Co v. Scarbrough, 270 S.W. 494, 496, 208 Ky. 79—Louisville & N R Co. v. Baker, 164 S.W. 799, 801, 158 Ky 224.

45. Miss.—Meridian Terminal Co v Stewart, 108 So 496, 143 Miss 523 Pa.—Twersky v. Pennsylvania R Co., 104 A. 63, 261 Pa. 6.

Safe for persons exercising ordinary care

The duty of a carrier rises no higher than to construct and maintain its platforms so as to make them safe for persons exercising ordinary care—Twersky v. Pennsylvania R. Co., 104 A. 63, 261 Pa. 6.

Use in safety

Terminal company maintaining union passenger station and railroad using terminal have duty of maintaining landing place "in such condition that it could be used with safety" by persons going to and coming from trains—Meridian Terminal Co. v Stewart, 108 So 496, 143 Miss. 523.

46. Ky.—South Covington & C St. Ry. v. Vance, 278 S.W. 116, 211 Ky. 774—Mayhew v. Ohio Valley Electric Ry. Co., 254 S.W. 202, 203, 200 Ky. 105.

Mass.—Klein v. Boston Elevated Ry Co., 200 N E. 6.

10 C.J p 917 note 62

"If . . . a street railway has provided a regular depot at a stopping place, the same duties are imposed upon it with reference to its safety for the discharge of passengers as are imposed upon other carriers of passengers."—Mayhew v. Ohio Valley Electric Ry. Co., supra.

47. Colo.—Union Depot, etc., Co. v. Londoner, 114 P 316, 50 Colo. 22, 33 L.R.A.,N.S., 433.

10 C J. p 911 note 20 [a].

Liability generally where station used by more than one carrier or operated by union depot company see supra § 708.

48. N H.—Haselton v. Portsmouth,

The fact that a passenger is pushed into a dangerous place does not shift the responsibility for the injury, as the carrier is bound to know that crowds will congregate on its platform.[49]

(2) Application of Rules

In accordance with its general duty to keep its stational facilities safe, it is the carrier's duty, subject to qualifications as to notice and opportunity to eliminate the danger, to keep the station and platform in good repair and free of defects, obstructions, and other dangerous conditions, and to prevent, and guard passengers against, any customary use of the platform which renders it dangerous.

The particular duties involved in the carrier's general duty to keep its stations and platforms safe for the protection and accommodation of its passengers, and discussed in this subdivision, are in addition to those specifically considered in §§ 718–721 infra.

Subject to qualifications as to notice and opportunity to eliminate the danger, it is the carrier's duty to keep the station and platform in good repair[50] and free of dangerous depressions[51] or other defects;[52] to keep the platform free from, or to remove, trucks, baggage, and other obstacles on which passengers are liable to be injured,[53] even though the dangerous obstacles were placed there by another, such as an express company permitted to use the platform for its own purpose,[54] to pre-

etc., St. R Co., 53 A. 1016, 71 N. H. 589.
10 C.J. p 917 note 62

A street railroad company adopting a platform and inviting the public to use it in getting on and off the cars, has the duty of keeping the platform in a reasonably safe condition for that purpose; and it is immaterial whether or not the platform was built by the company, or is in a public street—Haselton v. Portsmouth, etc., St. R. Co, 53 A. 1016, 71 N.H. 589.

Part of platform

(1) However, it has been held that a carrier authorized to use only a certain part of a platform which it did not construct or maintain is not responsible for the condition of any other part, even though it did in fact use the entire platform—Eastern Texas Electric Co. v. Tucker, Tex Civ.App, 287 S.W. 71.

(2) So, where street railway was authorized to use platform to extent of twenty-four inches outside of rails, mere use of entire platform was held not to render carrier liable for injuries to boarding passenger who fell through hole thirty-three inches from rail—Eastern Texas Electric Co. v. Tucker, supra.

49. Ind—Indianapolis St. R. Co. v. Robinson, 61 N.E. 936, 157 Ind 414.
Carrier's duty to protect passengers against crowds see infra § 720.

50. Ohio.—Majoros v. Cleveland Interurban R. Co., 187 N.E. 857, 127 Ohio St. 255.
10 C.J. p 918 note 67.

Against storms

Ohio—Majoros v. Cleveland Interurban R Co, 187 N E. 857, 127 Ohio St. 255.

51. S C.—Dilleshaw v. Charleston, etc., R. Co, 67 S E. 304, 85 S.C. 334.
10 C.J. p 917 note 55–p 918 note 67.

Absence of negligence

Subway operating company has been held not liable for injuries sustained by plaintiff who stepped into a pool of water and fell as she was entering a turnstile on platform of subway station, where there was no showing of negligence for which company was liable.—Brand v. Interborough Rapid Transit Co, 291 N.Y. S. 260—10 C J. p 917 note 56.

Depression not dangerous

A carrier has been held not liable to a passenger who accidentally fell from platform of its depot at a point of depression caused by a descent of ground, but not causing a sufficient elevation to render it dangerous.—Hueston v. Quincy, O. & K. C. Ry. Co., Mo, 189 S.W 1170.

52. Mo.—Martin v. Missouri Pac R Co., App., 253 S.W. 1083—Munro v. St. Louis, etc., R. Co, 135 S.W. 1016, 155 Mo.App. 710.
10 C J. p 917 note 55–p 918 note 67.

Defective door spring

Mo—Martin v. Missouri Pac. R. Co., App, 253 S W. 1083.

53. U.S.—Chesapeake & O. Ry. Co v. Burton, C.C.A W.Va., 50 F.2d 730.
Tex.—Wells Fargo & Co. v. Lowery, Civ.App, 197 S W. 605, error refused.
10 C J. p 918 note 68.

"This duty not only requires the railroad company as a carrier of passengers to exercise ordinary care to see that the station platform itself is in safe condition and free from any defect from which a consequent injury might be reasonably expected to result, but also to keep such station platform free from obstructions and dangerous instrumentalities, especially at the time when passengers are expected to go to and from its cars."—Kansas City Southern R. Co. v. Watson, 144 S W. 922, 102 Ark. 499, 503.

News stand

Railway company has been held not guilty of negligence proximately causing injuries to women waiting to board train by fall from crowded station platform onto track as result of unknown person pushing man against her in passing between him and news stand six feet from edge of platform, such stand not constituting unlawful obstruction of platform—Williams v New York Rapid Transit Corporation, 6 N.E.2d 58, 272 N.Y. 366, affirming 288 N.Y.S. 778, 248 App Div 765.

Steel wire barrel hoop

U S—Chesapeake & O. Ry. Co. v. Burton, C C.A.W.Va, 50 F.2d 730.

Baggage on platform

A carrier is not negligent in placing baggage on a station platform, where a sufficient passageway is left. —White v. New York Cent. R Co, 239 N.Y.S. 90, 228 App.Div. 50—10 C J. p 918 note 68 [c] (1).

Passageway of six feet

Where a carrier's employee placed a few cross-ties near the tracks at a flag station, leaving six feet of space between the ties and the train, there was held to be sufficient passageway at the station—Fulghum v. Atlantic Coast Line R. Co, 74 S. E. 584, 158 N.C. 555, 39 L R A.,N S, 558.

Passenger helping to remove obstruction

Where passenger, after leaving train and while on platform helped a brakeman to lift a heavy barrel, railroad was not liable for injuries received while so doing, on ground that passageway on platform was obstructed, where another brakeman and conductor were near by to render help if needed, and it would have been but a short time until obstructions were removed.—Shaffer v St Louis & S. F Ry. Co., 208 S W. 145, 201 Mo App 107.

54. Tex—Wells Fargo & Co v. Lowery, Civ.App., 197 S W. 605, error refused.
10 C J. p 906 note 75 [e]–p 918 notes 68, 69.

Contract with third person

Where a carrier, by contract with an express company, granted to it the right to use its platform, it was

vent, and to guard passengers against, another's customary use of the platform which renders it dangerous,[55] such as the acts of postal clerks in throwing mail pouches on the platform from passing trains;[56] and to prevent the creation of, or to remedy, other dangerous conditions.[57]

(3) Conditions on Liability; Knowledge of Defect and Time to Remedy

A carrier, to be liable for failure to remedy a dangerous condition in stational facilities, must know of it, or be chargeable with knowledge of it because of its long existence, or the condition must be one that should have been anticipated: and the carrier must have had reasonable time to make the premises safe. However, the carrier need not anticipate injury from dangers obvious to persons using ordinary care.

Before the carrier's liability arises for its failure to remedy a dangerous condition in its stational facilities, it must know of the condition, or the condition must have been so long existent, that the carrier is chargeable with knowledge of it,[58] or it must

held that "such contract did not absolve the railroad company from its duty of using care to prevent injury to persons lawfully on said premises," so that a passenger injured by tripping over a truck negligently placed on platform by an employee of the express company can recover from the carrier.—Wells Fargo & Co v Lowery, Tex.Civ App., 197 S W. 605, 609, error refused.

55. N C—Thomas v. Southern R. Co, 92 S E 321, 173 N.C. 494.
10 C J. p 918 note 69.

Duty to keep platform free of "dangerous instrumentalities"

N C—Thomas v Southern R. Co, 92 S.E. 321, 173 N.C. 494—Mangum v. North Carolina R. Co, 58 S.E. 913, 914, 145 N C. 152, 122 Am S R. 437, 13 L.R.A.,N.S., 589.

56. N.C.—Thomas v. Southern R Co., 92 S E. 321, 173 N.C. 494.
10 C J. p 919 note 71.

Precautions

(1) It is the carrier's duty to protect passengers and others lawfully on its platform against injuries from the mail sacks, by requiring them to be thrown at a particular place, by posting warning notices, or by other available means.—Huddleston v. St Louis, etc., R. Co., 119 S.W. 280, 90 Ark. 378.

(2) "It was negligence in the . . . [carrier] not to have reported [this practice] to the post office authorities, which would doubtless have required the mail clerk to use the crane."—Thomas v. Southern R. Co., 92 S.E. 321, 173 N.C. 494.

57. U.S—Kansas City Southern Ry Co v Pinson, C C A Tex., 61 F.2d 1001—Pinson v. Kansas City Southern Ry. Co, C.C.A.Tex., 37 F.2d 652.
Mass.—Pearson v Payne, 139 N.E. 488, 245 Mass 158.
Mo.—Lowther v. St. Louis-San Francisco Ry. Co., 261 S.W. 702, 214 Mo.App. 293.
N.Y.—Kaplowitz v. Interborough Rapid Transit Co., 103 N.Y.S. 721, 53 Misc. 646.
Pa.—Norris v. Pennsylvania R. Co., 177 A. 785, 317 Pa. 586—Deegan v. Pennsylvania R. Co., 160 A. 858, 307 Pa 207.
Utah.—Stonebreaker v. Bamberger, 54 P 2d 418, 88 Utah 310.

Banana peel

Pa.—Deegan v. Pennsylvania R. Co., 160 A. 858, 307 Pa. 207.
10 C J. p 919 note 72 [a].

Piece of tobacco

N Y.—Kaplowitz v. Interborough Rapid Transit Co, 103 N.Y.S. 721, 53 Misc. 646.

Pile of dirt on step

Where one of the carrier's employees had swept dirt into a pile on one of the steps from the street to the station, and a passenger was injured, the carrier was liable.—Norris v. Pennsylvania R. Co, 177 A. 785, 317 Pa. 586.

Pool of grease at bus station

Utah.—Stonebreaker v. Bamberger, 54 P.2d 418, 88 Utah 310.

Rusty nails scattered on platform

Mo.—Lowther v. St. Louis-San Francisco Ry. Co., 261 S.W. 702, 214 Mo.App. 293.

Vicious dog

U S—Kansas City Southern Ry. Co v. Pinson, C.C.A.Tex., 61 F.2d 1001—Pinson v. Kansas City Southern Ry. Co., C.C.A Tex, 37 F.2d 652—10 C J. p 916 note 54 [h].

Stick on stairway

N.Y—Kessler v. New York Rapid Transit Corporation, 286 N.Y.S 897, 247 App Div. 898.

Wet floor

Mass.—Pearson v. Payne, 139 N.E. 488, 245 Mass. 158.

58. U.S.—Chesapeake & O. Ry. Co v. Burton, C.C.A W.Va., 50 F.2d 730.
Ill.—Davis v. South Side Elevated R. Co, 127 N E. 66, 292 Ill. 378, 10 A.L.R. 254.
Mass—Pearson v. Payne, 139 N E. 488, 245 Mass 158—Theall v. Boston El. R. Co, 100 N.E. 543, 213 Mass. 327—Brooks v. Old Colony R. Co, 46 N.E. 566, 168 Mass. 164.
Miss—Meridian Terminal Co v. Stewart, 108 So. 496, 143 Miss. 523.
N J.—Broderick v. Hudson & M. R. Co., 197 A. 663, 119 N.J Law 532.
N.Y.—White v. New York Cent. R. Co, 239 N.Y.S. 90, 228 App.Div. 50.
Pa.—Deegan v. Pennsylvania R. Co., 160 A. 858, 307 Pa 207.
Tex—Wells Fargo & Co. v Lowery, Civ.App., 197 S W. 605, error refused.
Utah—Stonebreaker v. Bamberger, 54 P 2d 418, 88 Utah 310.
10 C J. p 916 note 54, p 917 notes 55 [a], 56 [a], p 919 notes 72, 73.

"Actual or constructive knowledge" or "notice"

(1) "The presence of the banana skin on the platform, without actual or constructive knowledge of that fact, would not impose liability" on railroad for injury to person slipping thereon.—Deegan v. Pennsylvania R Co, 160 A 858, 859 307 Pa. 207.

(2) In the absence of 'actual or constructive notice" that a stairway in a subway station is wet, muddy, and slippery, the carrier is not liable to one injured thereby—Boettcher v. Dowling, 277 N Y S. 228, 230, 243 App.Div. 397, affirmed 200 N E. 316, 270 N.Y 557.

Absence of inspection

Failure, if any, of railroad company to inspect stairway in station to discover defects did not impose liability on company for injuries caused by defects, in absence of showing that there was an existent dangerous condition which inspection would or should have disclosed.—Broderick v. Hudson & M. R. Co, 197 A. 663, 119 N.J Law 532

Negligent handling of express trucks

If a railroad company which permitted an express company to use its depot and platform when large numbers of persons were going to and from trains along the platform "knew or should have known of the negligent manner of the express company in doing business and made no effort to abate it, it cannot escape liability for such."—Wells Fargo & Co v. Lowery, Tex Civ.App., 197 S. W. 605, 609, error refused—10 C.J. p 906 note 75 [e].

Duration of condition

(1) That a banana skin had been on the station platform for at least one hour and a half is sufficient to charge the carrier with constructive notice of the condition.—Deegan v. Pennsylvania R. Co., 160 A. 858, 307 Pa. 207.

be such as the carrier should have anticipated;[59] and the carrier must have had a reasonable time within which to make the premises safe.[60]

The character of the dangerous condition is an element in determining how long a time must elapse before the carrier will be charged with knowledge of the danger[61] or with negligence for failure to remedy it.[62]

Obvious dangers. Since passengers are expected to exercise ordinary care on their own behalf,[63] the carrier need not anticipate injury from dangers that are obvious to persons using such care.[64]

§ 718. Duty to Keep Premises Lighted

A carrier is obligated properly to light its premises, if necessary, so as to enable passengers to use them safely; and reasonable or ordinary care is commonly required in so doing. Street railway companies are subject to this duty only if they maintain platforms for passengers.

A carrier owes passengers the duty of properly lighting stations, platforms, walks, and other approaches, if necessary,[65] during a reasonable or suf-

(2) Presence of baby bottle on heavily traveled stairway of railroad terminal for ninety minutes before injury to passenger has been held constructive notice of such presence —Greenfield v Pittsburgh & Lake Erie R Co, 157 A 587, 305 Pa. 456.

Vicious dog

(1) Railroad allowing dog in station waiting room for railroad's benefit was liable to passenger bitten by dog where railroad knew or should have known dog's disposition to bite —Pinson v. Kansas City Southern Ry. Co, C.C.A Tex, 37 F 2d 652—10 C J. p 916 note 54 [h]

(2) But railroad was held not liable for injury to passenger by being bitten by dog in its waiting room where the dog was not vicious, was not known to have previously been in the waiting room, and was not known to be there at the time of injury.—Kansas City Southern Ry. Co v. Pinson, C C A.Tex, 23 F.2d 247.

59. Mich —Anda v. Chicago, D. & G. B. Transit Co, 204 N W. 761, 231 Mich 567.
N Y.—White v. New York Cent. R Co., 239 N.Y S. 90, 228 App.Div 50
Ohio.—Majoros v Cleveland Interurban R. Co., 187 N E. 857, 127 Ohio St. 255
10 C.J. p 916 note 54 [i].

Customary incidents of travel

Railroad was held not liable for injuries to prospective passenger who stumbled over hand baggage of alighting passengers left on platform, since that is a customary incident of travel and the danger could not have been anticipated.—White v. New York Cent. R. Co., 239 N.Y.S. 90, 228 App.Div 50.

Storms

Interurban car company must exercise ordinary care in keeping shelter house, maintained for prospective passengers, in reasonably safe condition against reasonably anticipatable storms —Majoros v. Cleveland Interurban R. Co, 187 N.E. 857, 127 Ohio St. 255.

Where a motor truck, out of control, left the road and struck a passenger on a path to the street from the carrier's dock, the carrier was not held liable, since such an event could not be anticipated.—Anda v Chicago, D. & G B Transit Co., 204 N.W. 761, 231 Mich 567.

60. U.S —Chesapeake & O Ry. Co. v. Burton, C.C A W Va., 50 F.2d 730.
Miss —Meridian Terminal Co v. Stewart, 108 So. 496, 143 Miss. 523.
10 C J. p 918 note 67 [a] (3), p 919 notes 72, 73.
"The . . . [carrier's] duty was to use reasonable care not to permit the station to become dangerous through the presence of an obstruction, after a reasonable opportunity to discover and remove it, and the failure to remove something, which was not in fact seen, would necessarily take its character as a negligent act only from the duration of the opportunity to make the removal."—Scholtz v Interborough Rapid Transit Co., 95 N Y S. 557, 558, 48 Misc. 619.

61. Mo.—Munro v. St. Louis, etc, R Co., 135 S W. 1016, 1022, 155 Mo App 710
Utah —Stonebreaker v. Bamberger, 54 P 2d 418, 88 Utah 310.
"A failure for a very short time to discover and repair a yawning chasm in the floor of a crowded railroad depot would be gross negligence, while it may be seriously doubted whether a failure to discover and repair a very slight decayed spot in the comparatively new platform of a flag station, used mostly for freight, is negligence at all."—Munro v. St. Louis, etc., R Co., supra.

Infrequent danger distinguished from continual

"The so-called 'banana peel' case . . is an occasional and comparatively infrequent occurrence," and the carrier is liable only if it negligently fails to discover the peel, or knowing of it, fails to remove it; but where a carrier permits motor cars frequently to traverse "a rather small area" and "knows of the likelihood of the frequent dropping of grease . . . it does not have to be put on notice of each individual deposit," and it need not be shown that a particular deposit was on the platform "for such length of time as to make it incumbent on the company to take notice"—Stonebreaker v. Bamberger, 54 P 2d 418, 421, 422, 423, 88 Utah 310.

62. Mo —Munro v St Louis, etc, R. Co, 135 S W. 1016, 155 Mo App 710.

63. U.S.—Pennsylvania R. Co. v O'Neil, N Y., 204 F 584, 123 C.C A 52
Iowa —McNaughton v Illinois Cent. R Co, 113 N W 844, 136 Iowa 177
Ky —Illinois Cent R Co. v. Sanderson, 192 S W 869, 175 Ky. 11, L R A 1917D 890.
N J.—Cooney v. Hudson & M. R. Co., 138 A 512, 5 N J Misc. 842
Pa —Twersky v. Pennsylvania R. Co., 104 A 63, 261 Pa. 6

64. U.S —Pennsylvania R. Co. v O'Neil, N Y., 204 F 584, 585, 123 C C A 52.
Iowa —McNaughton v. Illinois Cent R Co, 113 N.W 844, 136 Iowa 177.
Ky —Illinois Cent. R Co v. Sanderson, 192 S W. 869, 175 Ky 11, L R. A 1917D 890.
"The law expects every one entering . . . [railroad stations, etc] to keep his eyes open and not to stumble over a perfectly obvious obstruction."—Pennsylvania R Co v. O'Neil, supra

Recklessness need not be anticipated —Illinois Cent R Co v. Sanderson, 192 S.W 869, 175 Ky. 11, L.R A 1917D 890.

65. U S —Young v. Baldwin, C.C.A Ark., 84 F 2d 841
Iowa —Stout v. Chicago, R. I. & P Ry. Co., 200 N.W. 596, 198 Iowa 1017
Ky —Louisville & N. R. Co. v. Scarbrough, 270 S W 494, 208 Ky. 79—Payne v. Simmons, 255 S W. 863, 201 Ky. 33, 33 A L R 814
Md —Jackson v. Hines, 113 A. 129, 137 Md. 621.
Mass.—McCarthy v. Boston, R. B. &

ficient time before and after the arrival and departure of trains to enable passengers to alight from and board trains, and to enter and leave the premises, with safety;[66] and failure to perform this duty constitutes negligence.[67] It has been held that the carrier must have actual or constructive notice

L R Co, 159 N.E 507, 262 Mass. 56.
Miss —Illinois Cent. R. Co v Small, 74 So 681, 113 Miss. 857
Mo —Payne v. Davis, 252 S W. 57, 61 298 Mo. 645
N Y —O'Brien v. Rutland R Co., 278 N Y S 8, 243 App Div. 833.
N C —Lane v Southern Ry Co., 134 S E 855, 192 N C. 287, 51 A L R. 1114.
Tex —Fort Worth & D C Ry. Co v Kidwell, Civ App, 249 S.W. 303, 306, certified questions answered, Com.App, 245 S W. 667, 112 Tex. 89—Chicago, R. I & G. Ry. Co. v Taylor, Civ App, 225 S W 822, dismissed for want of jurisdiction.
Wis —Pleva v. Milwaukee Electric Ry. & Light Co., 246 N W. 694, 210 Wis 568—Zilles v. Milwaukee Electric Ry & Light Co, 246 N.W. 693, 210 Wis 564
10 C J p 919 note 74.

"It is the duty of a railway company to properly light its station platforms during the arrival and departure of trains, taking on or discharging passengers . . . and to so light the platforms of stations that passengers discharged from cars can proceed with safety, in the exercise of care, along the usual course taken by passengers to where they would leave the platform (Gerhart v. Wabash Railway, 84 S W. 100, 110 Mo App. 105; Sargent v St. Louis, S F. R. R Co., 21 S W 823, 114 Mo. 348, 19 L.R A. 460)."—Payne v. Davis, supra.

Corpus Juris statement quoted

N.C.—Lane v. Southern Ry Co., 134 S.E. 855, 859, 192 N.C 287, 51 A L R. 1114.

"The rule with reference to the lighting of depots is analogous to that with reference to the physical maintenance of both depots and platforms, and both of them rest upon the same reasoning"—Payne v Simmons, 255 S W. 863, 866, 201 Ky. 33, 33 A.L R. 814.

City failing to furnish light

(1) The performance of this duty is not excused by the fact that there is no system of public lighting in the city in which the carrier's station is located.—Toledo, etc, R. Co. v. Stevenson, 122 Ill.App. 654.

(2) That the city fails to furnish lights for the carrier's premises is likewise no excuse —Harris v. Seattle, etc, R. Co, 117 P 601, 65 Wash. 27—Owen v. Washington, etc., R. Co., 69 P. 757, 29 Wash. 207.

(3) Where a railroad company had made diligent effort to have the city furnish a light for its premises where passengers alighted from trains, and the city had undertaken so to do, the company in good faith, relying thereon, if the city was negligent in this respect, such negligence was imputed to the company. —Owen v Washington, etc., R. Co., supra

Depot used in common

Where intersecting railroads use a common depot, and an intending passenger of one is injured because the platform was insufficiently lighted, the other railroad is not liable for the injuries —Louisville, etc., R. Co. v. Treadway, 40 N E 807, 41 N.E. 794, 143 Ind 689—Louisville, etc, R. Co v. Treadway, 40 N.E. 807, 41 N. E 794, 142 Ind 475.

Walk joining stations of carriers

Where each of two connecting carriers constructs half of a walk connecting their stations, both have the duty to see that it is properly lighted —Boyle v Waters, 166 N.W. 114, 199 Mich 478

66. U S —Young v. Baldwin, C C A. Ark, 84 F 2d 841.
Ind.—Cleveland, etc, R Co. v Harvey, 90 N.E. 318, 45 Ind.App 153
Ky —Payne v. Simmons, 255 S W. 863, 201 Ky. 33, 33 A L.R 814
Mo —Payne v. Davis, 252 S.W. 57, 298 Mo. 645
N.C —Lane v. Southern Ry. Co., 134 S E 855, 192 N C 287, 51 A L R. 1114
10 C.J p 919 note 74, p 920 note 83 [c].

Corpus Juris statment quoted

N.C —Lane v Southern Ry Co, 134 S E. 855, 859, 192 N.C. 287, 51 A. L.R 1114.

"What constitutes a reasonable time during which such premises must be kept lighted is determined by the circumstances of each particular case, and depends upon the size and importance of the station and the number of persons who lawfully visit it at night for the purpose of transacting business with the railroad company."
Ind.—Cleveland, etc, R. Co. v. Harvey, 90 N.E. 318, 320, 45 Ind.App. 153.
Or.—Abbot v Oregon R. Co., 80 P. 1012, 1014, 46 Or. 549, 114 Am.S R. 885, 1 L.R A.,N.S., 851, 7 Ann Cas 961.

A statute imposing a duty to keep the premises lighted during at least a specified period does not relieve the carrier of its common-law duty to provide light during a reasonable time; "while the statute might be taken into account in determining the reasonableness of the time, it was not controlling in that respect"—Drummy v. Minneapolis, etc, R Co, 133 N W 655, 657, 153 Iowa 479, construing Minnesota statute.

Reasonable time after arrival

The relation of carrier and passenger continues until the passenger has had a reasonable time to leave the station, and until then the carrier has the duty of providing reasonably safe and sufficiently lighted station grounds —Young v. Baldwin, C C.A Ark, 84 F 2d 841

Special trains are within rule
Mo —Gerhart v. Wabash R Co, 84 S.W 100, 110 Mo App. 105
Or —Abbot v Oregon R Co, 80 P 1012, 46 Or 549, 114 Am.S.R. 885, 1 L R A,N S, 851, 7 Ann Cas. 961.
10 C J p 919 note 74 [d]

Unreasonable times or hours

(1) The carrier's duty does not apply to a passenger who goes to the station or attempts to board a train an unreasonable length of time before its departure.
Mo —Sweany v Missouri, etc, R. Co. 151 S W 198, 167 Mo App 137.
N.C.—Hodges v. New Hanover Transit Co, 12 S E 597, 107 N C 576.

(2) Two hours before the train is due is not a reasonable time.—Sweany v. Missouri, etc., R. Co., supra.

(3) It is not the duty of a carrier "to keep its waiting room and platform lighted in the nighttime at unreasonable hours, depending upon the size and importance of this station" —Louisville, etc, R Co. v. Treadway, 40 N E. 807, 809, 41 N.E. 794, 143 Ind. 689.

67. U S.—Young v. Baldwin, C.C.A. Ark, 84 F.2d 841.
Cal.—Teale v. Southern Pac. Co., 129 P 949 20 Cal.App. 570.
Miss.—Illinois Cent. R. Co v. Small, 74 So 681, 113 Miss. 857.
N C.—Lane v. Southern Ry. Co, 134 S E. 855, 192 N.C. 287, 51 A L.R. 1114.
10 C.J p 919 note 74 [a]

Permitting obstruction of light

(1) Negligence is not excused by the fact that light is shut off from the alighting place by a row of box cars, and failure to have sufficient light is culpable negligence.—Teale v. Southern Pac. Co., 129 P. 949, 20 Cal.App. 570

(2) "If the . . . [carrier] depended on the street lights for the lighting of its platform, and permitted transfer rigs or 'busses' to intercept the lights . . . it could not excuse itself from the due care required of it to keep its platform lighted because of such interference." —Fort Worth & D. C. Ry. Co. v.

that the lighting has become insufficient before it can be held liable [68]

A statute requiring a carrier, under penalty, to keep its depots or passenger houses lighted should be strictly construed.[69]

Degree of care required. The carrier, according to what has been declared the great weight of authority,[70] is under a duty to exercise only reasonable or ordinary care with respect to the lighting of the premises,[71] although other authorities appear to require a "high"[72] or "the highest"[73] degree of care.

To whom duty extends. The carrier's duty to keep its premises lighted extends not only to actual passengers, but also to prospective passengers[74] and to persons accompanying or meeting passengers,[75] and, as to passengers, it continues as long as the relation of carrier and passenger exists.[76]

Premises to which duty extends. The carrier's duty to keep its premises lighted extends to stations or those parts of the premises in and around stations which it should anticipate might reasonably be used by passengers;[77] under other authority, the duty extends only to those parts of the premises which the carrier expressly or impliedly invites passengers to use.[78] Without reference to the two preceding principles, the duty to light has been held[79] or held not[80] to extend to particular places,

Kidwell, Tex.Civ.App., 249 S.W. 303, 306, certified questions answered 245 S.W. 667, 112 Tex. 89.

68. N.Y.—Emanuel v. Long Island R. Co, 299 N.Y.S. 393.

69. Tex.—Gulf, etc, R. Co. v. Barnett, 47 S.W. 1039, 19 Tex.Civ.App 626.

Platforms not included

Tex.—Gulf etc, R Co v. Barnett, 47 S.W. 1039, 19 Tex.Civ.App. 626

70. Ky.—Payne v Simmons, 255 S.W. 863, 201 Ky. 33, 33 A.L.R. 814.

71. Iowa.—Stout v. Chicago, R I. & P. Ry. Co., 200 N.W. 596, 198 Iowa 1017.

Ky.—Payne v. Simmons, 255 S.W. 863, 201 Ky. 33, 33 A.L.R. 814

Md.—Jackson v. Hines, 113 A. 129, 137 Md 621.

Tex.—Chicago, R I. & G Ry. Co. v. Taylor, 225 S.W. 822, dismissed for want of jurisdiction.

10 C.J. p 919 note 74.

72. N.C.—Lane v Southern Ry. Co., 134 S.E. 855, 859, 192 N.C. 287, 51 A.L.R. 1114.

73. Miss.—Illinois Cent. R. Co. v. Small, 74 So 681, 682, 113 Miss. 857.

As to alighting passenger

A carrier owes an alighting passenger the highest degree of care to keep the premises reasonably well lighted, since such passenger is still in transit.—Louisville & N R. Co. v. Scarbrough, 270 S.W. 494, 208 Ky 79.

74. Md.—Jackson v. Hines, 113 A. 129, 137 Md. 621.

N.Y.—O'Brien v. Rutland R. Co, 278 N.Y.S. 8, 243 App.Div. 833.

To whom carrier liable for unsafe premises generally see infra § 722

75. Md.—Jackson v. Hines, 113 A. 129, 137 Md. 621.

76. U.S.—Young v. Baldwin, C.C.A. Ark, 84 F.2d 841.

10 C.J. p 920 note 78.

Commencement and continuance of relation generally see supra §§ 554–566.

Incidental acts as passengers

The duty exists while passengers "are performing acts reasonably and fairly attributable to that relation, such as leaving the train for refreshment, for the sending of telegrams, for the taking of exercise and the like."—Texas, etc, R Co v Stewart, Tex, 33 S.Ct 548, 228 U.S. 357, 362, 57 L.Ed 875, affirming 183 F. 575, 105 C.C.A. 646

77. Md.—Jackson v. Hines, 113 A. 129, 137 Md 621.

Miss.—Illinois Cent. R Co. v. Small, 74 So. 681, 113 Miss 857.

Va.—Mitchell v. Southern Ry. Co, 88 S.E. 56, 118 Va. 642.

10 C.J. p 920 note 82

What premises carrier is bound to keep safe generally see supra § 713.

Flag stations

(1) Where a carrier was charged with knowledge that there would be passengers for a train leaving a flag station at night, it was bound to have the station platform lighted for a reasonable time before the arrival of the train.—Cleveland, etc., R. Co. v. Harvey, 90 N.E. 318, 45 Ind. App 153.

(2) However, a railroad company is not obligated to furnish a light at a flag station at a time when no train is expected.—Mitchell v. Southern Ry. Co., 88 S.E. 56, 118 Va 642.

Platform for employees only

Where a platform was for the use of employees only, but there was nothing to indicate that fact, it must be regarded as a part of the station which the carrier should have anticipated might be used by passengers, and the carrier was bound to use ordinary care so to guard and light it that persons using reasonable care could pass over it in safety.—Jackson v. Hines, 113 A. 129, 137 Md 621.

Tracks used to reach train

Where plaintiff at night proceeded from defendant's station to wrong side of waiting passenger train without knowledge of customary method of boarding train at the station, and while running on the tracks to other side tripped over a sidewalk projection, defendant was negligent in not lighting the premises or indicating a safe way to the train.—Illinois Cent. R. Co v. Small, 74 So 681, 113 Miss. 857.

78. Tex.—Chicago, R I. & G. Ry. Co v. Taylor, Civ.App, 225 S.W. 822, dismissed for want of jurisdiction

Wis.—Hempton v. Green Bay, etc, R Co., 155 N.W. 927, 162 Wis 62.

Back way to station

Where the carrier had extended no express or implied invitation to passengers or others to use a back way to reach its station or trains, it was not required to maintain lights or to guard the way.—Hempton v Green Bay, etc., R Co, 155 N.W. 927, 162 Wis. 62.

Other practical ways of approach

Where there is a usually traveled and apparently safe way between the depot and the public road, it cannot be said that a pathway, also frequently used, was "the only practical way" for a passenger to reach the road; the carrier therefore did not owe a duty to keep it in suitable condition or to provide lights.—Chicago, R I. & G. Ry. Co v. Taylor, Tex.Civ. App., 225 S.W. 822, 825, dismissed for want of jurisdiction.

79. **Cinder pathway from platform to train**

N.Y.—O'Brien v. Rutland R. Co, 278 N.Y.S. 8, 243 App.Div. 833.

80. **Point eight hundred feet from station**

Ill.—Wood v. Illinois Cent R. Co., 201 Ill.App. 439.

Where a detour was necessary because of a wreck, a carrier detouring a passenger train over the tracks of another carrier was not liable for injuries to a passenger occasioned by improper lighting at a station on the

including "quasi depots or stopping places."[81]

What constitutes proper lighting at any particular station depends upon the character and extent of business transacted there and the character, situation, and surroundings of the station with reference to physical conditions affecting the security of persons in the proper use of the premises,[82] so that lighting which would be insufficient at one station might be adequate at a station with different conditions.[83]

Street railways. The general rule as first above stated has been said to refer to what are ordinarily known as steam railroads maintaining station houses and like structures in cities, and not to apply to street car companies operating on city streets which they do not control and stopping at frequent intervals in the public way to receive and discharge passengers;[84] but a street railway company which provides platforms for its passengers is within the rule.[85]

§ 719. Accumulations of Snow and Ice

A carrier must use ordinary or reasonable care to keep its platforms and approaches free of dangerous accumulations of snow and ice, but is liable for failure in this duty only if it had notice of the condition and a reasonable time to remedy it.

It is the carrier's duty to keep, by the exercise of ordinary[86] or reasonable[87] care, its platforms and approaches free of dangerous accumulations of snow and ice,[88] even though the accumulations do not amount to obstructions to travel.[89]

Notice of condition; opportunity to remedy. However, before the carrier will be held liable for failure to perform this duty, it must have had notice of the dangerous condition,[90] which notice

detour at which the passenger alighted.—Payne v. Simmons, 255 S.W. 863, 201 Ky. 33, 33 A.L.R. 814.

81. N.C.—Wagner v. Atlantic Coast Line R. Co., 61 S.E. 171, 176, 147 N.C. 315, 19 L.R.A.,N.S., 1028.

82. Cal.—Teale v. Southern Pac. Co., 129 P. 949, 952, 20 Cal.App. 570.
10 C.J. p. 920 note 83.
"The proper character of the lights furnished at any particular station will depend upon the character and extent of business transacted at the station. If many passengers are to be taken on the trains, and many others are to be discharged, if much baggage, mail, and express is to be handled by many employes, if the station grounds must be used at the time of the arrival of the trains by many persons having business there with the company, or with incoming or outgoing passengers, confusion and accident at night can be prevented only by the aid of a lighting system much more extensive than would be required under other circumstances."
Cal.—Teale v. Southern Pac. Co., supra.
Kan.—St. Louis & S. F. R. Co. v. Marshall, 81 P. 169, 71 Kan. 866.

83. Cal.—Teale v. Southern Pac. Co., 129 P. 949, 20 Cal.App. 570.

84. Ind.—Terre Haute, Indianapolis & Eastern Traction Co. v. Auler, 188 N.E. 572, 206 Ind. 423.
An interurban railroad company operating cars on city streets and a private right of way outside the city limits is not obligated to light the places where it stops on signal to accept or discharge passengers.—Terre Haute, Indianapolis & Eastern Traction Co. v. Auler, 188 N.E. 572, 206 Ind. 423.

85. Wash.—Harris v. Seattle, etc., R. Co., 117 P. 601, 603, 65 Wash. 27.
"There is no difference either in reason or in law between such a situation and that of a railroad company maintaining a depot or station."—Harris v. Seattle, etc., R. Co., supra.

86. N.Y.—Hannon v. New York Cent. R. Co., 169 N.Y.S. 436.—Murphy v. Hudson & M. R. Co., 167 N.Y.S. 895, 180 App.Div. 585.

87. Minn.—Hull v. Minneapolis, etc., R. Co., 133 N.W. 852, 116 Minn. 349.
10 C.J. p. 921 note 84.

88. N.J.—Costello v. Director General of Railroads, 112 A. 861, 95 N.J.Law 538.
N.Y.—Rosenthal v. New York Rapid Transit Corporation, 208 N.Y.S. 427, 124 Misc. 513.—Hannon v. New York Cent. R. Co., 169 N.Y.S. 436.
Pa.—Wilson v. Reading Co., 95 Pa. Super. 570.
10 C.J. p. 921 note 84.
"A duty rested upon the . . . [carrier] towards . . . persons lawfully entering said station for the purpose of boarding its trains or transacting other business, to use ordinary care to keep the approach from the street thereto in a reasonably safe condition; and if it knowingly suffered snow and ice to accumulate upon the approach from the street to its station in such quantity as to make the approach slippery, and by reason thereof rendered its use dangerous, we think it clear that the . . . [carrier] would be liable to a person injured by slipping and falling upon such approach while upon his way to a train."—Illinois Cent. R. Co. v. Keegan, 71 N.E. 321, 210 Ill. 150, affirming 112 Ill.App. 28.
Accumulations of snow and ice on steps and platforms of cars see infra § 744 c.

The text statement in Corpus Juris is cited with approval in Taylor v. Missouri Pac. R. Co., Mo., 279 S.W. 115, 118.

Duty a relative one
While the duty exists for a street railroad company to keep each stopping place where there are no street intersections free of ice, and the snow leveled down, it "must be a relative one, taking into consideration the weather conditions on the one hand and the safety of the passengers on the other. Each case must be dependent upon its own peculiar facts."—Speck v. International R. Co., 118 N.Y.S. 71, 73, 133 App.Div. 802.

Sand or other precautions
(1) It is the carrier's duty "to protect the platform by the application of some substance to reduce its slipperiness."—Rosenthal v. New York Rapid Transit Corporation, 208 N.Y.S. 427, 428, 124 Misc. 513.

(2) Where a carrier allows ice to remain at places on and outside a walk, without sanding it, it is liable to a passenger for injuries resulting from a fall on the ice.—Rodick v. Maine Cent. R. Co., 85 A. 41, 109 Me. 530.

89. Ill.—Illinois Cent. R. Co. v. Keegan, 71 N.E. 321, 210 Ill. 150, affirming 112 Ill.App. 28.

90. Ill.—Illinois Cent. R. Co. v. Keegan, supra.
N.J.—Costello v. Director General of Railroads, 112 A. 861, 95 N.J.Law 538.
N.Y.—Rusk v. Manhattan R. Co., 61 N.Y.S. 384, 46 App.Div. 100.—Lieberman v. New York Rapid Transit Corporation, 238 N.Y.S. 400, 135 Misc. 834.—Hannon v. New York Cent. R. Co., 169 N.Y.S. 436.

may be presumed after a reasonable time.[91] Further, it must have had a reasonable time after the snow fell to remedy the condition,[92] accordingly, carriers have not been required to keep their premises clear of such accumulations during the continuance of a storm,[93] although the continuance of the snowfall has been held not to relieve the carrier as a matter of law.[94]

Employees' neglect of duty. A carrier's failure to have its approaches free of slush, snow, and ice is not excused by the fact that the men it had employed to remove the accumulations had failed to do so.[95]

§ 720. Protection from Crowds

It is the carrier's duty, in the performance of which reasonable or ordinary care is commonly required, to protect passengers from dangerous crowds at premises which it controls; however, it will be liable only for failure to guard against dangers which it should have anticipated. The carrier should avoid excessive crowding, and should control unruly crowds by providing proper facilities, or a sufficient number of guards, or both.

It is the carrier's duty to protect passengers on its premises from crowds imperiling their safety,[96]

Obvious danger required

A carrier was not liable for failure to sprinkle sand, ashes, or something of that character upon the ice and snow, where the condition "was not so obviously dangerous to travelers that it was bound to anticipate that injury might be sustained by reason of it"—Rusk v. Manhattan R Co., 61 N.Y.S. 384, 386, 46 App Div 100.

91. N J—Costello v. Director General of Railroads, 112 A. 861, 95 N J Law 538

N.Y.—Lieberman v. New York Rapid Transit Corporation, 238 N.Y.S 400, 135 Misc. 834—Hannon v. New York Cent. R Co., 169 N.Y.S. 436

If time is insufficient notice will not be presumed.—Hannon v. New York Cent. R Co., 169 N Y.S 436.

Thirty-four hours ample time

N.Y.—Lieberman v. New York Rapid Transit Corporation, 238 N.Y S. 400, 135 Misc. 834.

92. N.Y—Kelley v. Manhattan R. Co, 20 N.E 383, 112 N Y. 443, 3 L. R.A. 74—Meginn v. Ramsdell, 148 N.Y.S. 415, 163 App Div. 232—Rusk v. Manhattan R. Co., 61 N Y S. 384, 46 App Div. 100—Rosenthal v. New York Rapid Transit Corporation, 208 N Y S. 427, 124 Misc 513.

Pa.—Wilson v. Reading Co., 95 Pa. Super. 570.

One hour not reasonable time

N.Y.—Meginn v. Ramsdell, 148 N Y. S. 415, 163 App.Div. 232.

Snow on previous day

Where weather was cold and misty and it had snowed on previous day, it was held that elevated railroad had duty and ample opportunity of reducing slippery conditions of platform by applying ashes or other substance thereto—Rosenthal v. New York Rapid Transit Corporation, 208 N.Y S 427, 124 Misc 513.

Early morning hours

"Culpable negligence cannot be predicated upon the failure to clean off the steps between the time the storm ceased, which was between 3 and 4 o'clock in the morning, and the time [5 30 A. M.] when the accident happened. So brief a period as that, at such a time in the night, cannot, we think, be regarded as any evidence of a lack of that reasonable care which the . . . [carrier] was bound to exercise."—Kelley v. Manhattan R. Co., 20 N E. 383, 386, 112 N Y 443 3 L R A. 74

93. N.Y.—Kelley v. Manhattan R. Co, supra—Murphy v Hudson & M R Co., 167 N Y S 895, 180 App Div. 585—Rusk v Manhattan R Co, 61 N Y.S 384, 46 App Div. 100.

Pa.—Wilson v Reading Co, 95 Pa. Super. 570.

Reason for rule

"The failure to throw ashes or sawdust, or something of that character, upon the steps during the storm, cannot be regarded as negligence, because the continuance of the storm would render the steps as slippery as before."—Kelley v Manhattan R. Co., 20 N.E 383, 386, 112 N Y 443, 3 L.R A. 74—Rusk v. Manhattan R. Co., 61 N.Y S. 384, 386, 46 App Div 100.

94. Mass—Klein v. Boston Elevated Ry. Co., 200 N.E 6.

95. Ill.—Illinois Cent. R Co. v Keegan, 71 N E 321, 210 Ill. 150, affirming 112 Ill App. 28

96. U S.—Maryland Dredging & Contracting Co. v Hines, C C.A.Md, 269 F. 781.

Ky.—South Covington & C St. Ry v. Vanice, 278 S.W 116, 211 Ky. 774.

Md.—Pennsylvania R. Co v. Hoover, 120 A. 526, 142 Md. 251.

Mass—Bryant v. Boston Elevated Ry. Co., 122 N E. 744, 232 Mass 549—Jackson v Boston Elevated Ry. Co., 105 N E 379, 217 Mass. 515—Kuhlen v Boston & N. St. Ry. Co., 79 N.E 815, 193 Mass. 341, 7 L R A.,N.S., 729, 118 Am S.R. 516.

Mo—Oesch v St. Louis Public Service Co, 59 S.W.2d 758, 228 Mo App 1055—Grubb v. Kansas City Rys Co., 230 S W. 675, 207 Mo.App. 16.

N.Y.—McGearty v. Manhattan Ry. Co, 43 N.Y.S. 1086, 15 App.Div. 2—Allessi v. New York Rapid Transit Corporation, 297 N.Y S. 1011, 163 Misc. 815

Pa.—Coyle v. Philadelphia & R Ry Co, 100 A 1005, 256 Pa. 496—Muhlhause v Monongahela St. Ry Co, 50 A. 937, 201 Pa 237—Prettyman v. Trenton Transportation Co, 73 Pa Super. 353—Bright v. Penna. R R Co, 69 Pa Super 188.

10 C J. p 903 note 56—p 904 note 57—p 921 note 87.

Protection against injuries from fellow passengers generally see supra § 695

Overcrowding in vehicles see infra § 745.

The text as stated in Corpus Juris is quoted with approval in Oesch v St. Louis Public Service Co, 59 S. W 2d 758, 760, 228 Mo App. 1055.

"There is an admirable statement of the rule in Coyle v Philadelphia R R. Co., 100 A. 1005, [1006] 256 Pa. 496 . . : 'Although a carrier is not liable for mere rudeness and bad manners on the part of their passengers, or intending passengers, and therefore, not bound to anticipate and guard against such conduct, yet when it invites the public to use its facilities to visit parks, or places of amusement, it has notice that large crowds are likely to assemble, and that proper care must be used in protecting them from injuries arising from such conduct as may reasonably be expected to occur, such as a sudden rush on the part of the crowd to obtain entrance to cars immediately upon arrival of trains at the station. Such acts on the part of a large assemblage of people, congregated for the common purpose of securing passage on a public conveyance, are not within the reasoning of the line of cases which hold the carrier is relieved from liability for damages resulting from unexpected acts of rudeness or improper conduct on the part of other passengers, or intending passengers, but are such as occur so frequently that they may be properly considered as such a natural and probable result that the carrier must recognize and guard against them.'"

at least where such premises are within its control,[97] direct or implied.[98] If the danger from crowds was such that the carrier should have anticipated it, it will be liable for its failure to guard against, or to adopt expedients to obviate, the danger;[99] but, if the circumstances are such that the carrier was not bound to anticipate the danger, it will not be liable for injuries resulting therefrom.[1]

This duty requires the carrier to avoid exces-

Ky.—South Covington & C. St. Ry. v. Vanice, 278 S.W. 116, 118, 211 Ky. 774.

Pa.—Muhlhause v. Monongahela St. Ry. Co., 50 A. 937, 938, 201 Pa. 237—Prettyman v. Trenton Transportation Co., 73 Pa.Super. 353, 357.

97. U.S.—Maryland Dredging & Contracting Co. v. Hines, C.C.A.Md., 269 F. 781.

Ky.—South Covington & C. St. Ry. v. Vanice, 278 S.W. 116, 211 Ky. 774.

N.Y.—Allessi v. New York Rapid Transit Corporation, 297 N.Y.S. 1011, 163 Misc. 815—Dashew v. Interborough Rapid Transit Co., 175 N.Y.S. 875.

Pa.—Prettyman v. Trenton Transportation Co., 73 Pa.Super. 353—Bright v. Penna. R.R. Co., 69 Pa. Super. 188.

"These duties and obligations depend . . . on the authority and power of the carrier to control and police the place where passengers take the train."—Maryland Dredging & Contracting Co. v. Hines, C.C.A. Md., 269 F. 781, 782.

Carrier not strictly in control

"In view of the fact . . . that the . . . [carrier] held this out as the proper place for its passengers to come to for the purpose of taking its cars, so that its passengers had a right to regard themselves as having come thither by its invitation," it may be liable, even though it lacks complete control, since "the general principle has been established that one who, though not strictly in control of a defective thing or dangerous place, yet uses it for his own benefit and for his own purposes invites another to enter it, may, if the other elements of liability concur, be held responsible to the latter for an injury caused by the defect or danger."—Kuhlen v. Boston & N. St. Ry. Co., 79 N.E. 815, 817, 193 Mass. 341, 7 L.R.A.,N.S., 729, 118 Am.S.R. 516.

Street railway

The duty applies to a carrier by street railway at inclosed stations which it controls, but does not apply at street corners or crossings where the premises are not under its control.—South Covington & C. St. Ry. v. Vanice, 278 S.W. 116, 211 Ky. 774.

Union depots

Where an intending passenger was injured in a union depot by the rush of the crowd as a result of the shifting of the signal sign from one gate to another by an employee of the company operating the depot, it was held that, since the carrier had no control over the station or the facilities or employees thereof, it was not liable.—Bright v. Penna. R.R. Co., 69 Pa.Super. 188.

98. Pa.—Prettyman v. Trenton Transportation Co., 73 Pa.Super. 353.

99. U.S.—Maryland Dredging & Contracting Co. v. Hines, C.C.A.Md., 269 F. 781.

Ky.—South Covington & C. St. Ry. v. Vanice, 278 S.W. 116, 211 Ky. 774.

Mass.—Sack v. Davis, 139 N.E. 819, 245 Mass. 114—Bryant v. Boston Elevated Ry. Co., 122 N.E. 744, 232 Mass. 549—Kuhlen v. Boston & N. St. Ry. Co., 79 N.E. 815, 193 Mass. 341, 7 L.R.A.N.S., 729, 118 Am.S.R. 516.

Mo.—Oesch v. St. Louis Public Service Co., 59 S.W.2d 758, 228 Mo.App. 1055—Grubb v. Kansas City Rys. Co., 230 S.W. 675, 207 Mo.App. 16.

N.J.—Sandler v. Hudson & M. R. Co., 151 A. 99, 8 N.J.Misc. 537, affirmed 156 A. 459, 108 N.J.Law 203.

N.Y.—Williams v. New York Rapid Transit Corporation, 6 N.E.2d 58, 272 N.Y. 366, reversing 288 N.Y.S. 778, 248 App.Div. 765—McGearty v. Manhattan Ry. Co., 43 N.Y.S. 1086, 15 App.Div. 2—Allessi v. New York Rapid Transit Corporation, 297 N.Y.S. 1011, 163 Misc. 815.

Pa.—Coyle v. Philadelphia & R. Ry. Co., 100 A. 1005, 256 Pa. 496—Muhlhause v. Monongahela St. Ry. Co., 50 A. 937, 201 Pa. 237—Prettyman v. Trenton Transportation Co., 73 Pa.Super. 353.

10 C.J. p. 903 notes 55, 56—p. 904 note 57.

Absence of mishaps in past

(1) In a passenger's action for injuries received as a result of being pushed under a moving car by a crowd of intending passengers, the claim that carrier had used the same negligent means to protect passengers in the past with no untoward results cannot be upheld, since a mere negligent method for a long period of time, without injuries, does not establish a correct standard of care and safety.—Grubb v. Kansas City Rys. Co., 230 S.W. 675, 207 Mo. App. 16.

(2) That a passenger who was injured had used railroad platform for five years, and had never before been crowded off during "rush" period, was not measure of railroad's liability or duty.—Sandler v. Hudson & M. R. Co., 151 A. 99, 8 N.J.Misc. 537, affirmed 156 A. 459, 108 N.J.Law 203.

Excursion trains

A carrier, inviting public to use its excursion trains, has notice that large crowds are likely to assemble, and must use proper care to protect them from injury from a sudden rush by the crowd to enter cars immediately on arrival of its trains.—Coyle v. Philadelphia & R. Ry. Co., 100 A. 1005, 256 Pa. 496—10 C.J. p. 921 note 87 [b].

Tendency to push toward cars

"Whenever from past experience it may be reasonably anticipated by the carrier that at a given time in its terminal there will be an unusual crowd, it must take notice of the fact that under such conditions such crowds in attempting to board its cars will indulge the naturally selfish propensity of pushing, shoving, and jostling, even to boisterousness, to the end that they may promptly board the cars, and that in such circumstances its passengers may be injured."—South Covington & C. St. Ry. v. Vanice, 278 S.W. 116, 117, 211 Ky. 774.

1. Ala.—Alabama Great Southern R. Co. v. Bell, 76 So. 920, 200 Ala. 562.

Mass.—Martin v. Boston Elevated Ry. Co., 160 N.E. 300, 262 Mass. 542—Sack v. Davis, 139 N.E. 819, 245 Mass. 114.

N.J.—Janderup v. Raritan River R. Co., 102 A. 1053, 91 N.J.Law 327—Kalleberg v. Raritan River R. Co., 102 A. 350, 91 N.J.Law 222.

N.Y.—McKinney v. New York Consol. R. Co., 129 N.E. 652, 230 N.Y. 194, reversing 172 N.Y.S. 906, 186 App. Div. 959.

Pa.—Spagnol v. Pennsylvania R. Co., 123 A. 781, 279 Pa. 205, 32 A.L.R. 1313—Prettyman v. Trenton Transportation Co., 73 Pa.Super. 353.

Absence of previous boisterous conduct

Carrier was not liable to entraining passenger whose injury was occasioned by jostling and pushing of crowd on platform, where there was no evidence of boisterous conduct on previous occasions, and the carrier had no notice that there would be such conduct.—Martin v. Boston Elevated Ry. Co., 160 N.E. 300, 262 Mass. 542.

Acts of carrier causing crowding

(1) Street railway was held not negligent in moving car forward from one berth in the station to another, so that an intending passenger was thrown to platform by crowd,

sive crowding,[2] and to control boisterous or unruly crowds by providing proper facilities, such as gates or guard rails, to safeguard passengers,[3] or by providing a sufficient number of employees to police the unruly crowd.[4] Further, this duty may require

where unruliness had not occurred in the past—Alward v. Boston Elevated Ry Co, 145 N E 332, 250 Mass. 244.

(2) Woman thrown to platform, on which she was waiting to board train at closed front end door of car, when crowd rushed toward rear door immediately after railroad company's employee passed front door without opening it, was held not entitled to recover damages from company for resulting injuries.—Hanshew v. Lehigh Valley R Co, 286 N.Y.S. 589, 247 App.Div. 784.

No indication of crowd

A subway carrier was not bound to anticipate that a large number of people would congregate at a station in one minute's time, where there was nothing to indicate that such a thing might happen—McKinney v. New York Consol. R. Co., 129 N.E. 652, 230 N.Y. 194, reversing 172 N.Y.S. 906, 186 App.Div. 959.

Surge toward cars

(1) "The company is not bound to anticipate the crowd will, in disregard of the rights of others, surge toward the entrances, injuring persons about to board the cars."—Spagnol v. Pennsylvania R. Co, 123 A. 781, 782, 279 Pa. 205, 32 A.L.R. 1313.

(2) Where a passageway provided for passengers' use in boarding trains was ordinarily safe, but because of the crowd a passenger was pushed into the path of a train, the carrier was not liable, since there were no abnormal conditions and the rush of the crowd could not have been anticipated.

Ala.—Alabama Great Southern R. Co. v. Bell, 76 So. 920, 200 Ala. 562.

Pa.—Prettyman v. Trenton Transportation Co., 73 Pa.Super. 353.

(3) Carrier was not liable for injuries to prospective passenger pushed under train by crowd in absence of likelihood of lawlessness or riotousness—Sack v. Davis, 139 N.E. 819, 245 Mass. 114.

2. Mo.—Grubb v. Kansas City Rys. Co., 230 S.W 675, 207 Mo.App. 16.

N.Y.—McGearty v. Manhattan Ry. Co., 43 N.Y.S. 1086, 1087, 15 App. Div. 2—Allessi v. New York Rapid Transit Corporation, 297 N.Y.S. 1011, 1017, 163 Misc. 815—Dashew v. Interborough Rapid Transit Co., 175 N.Y.S. 875

Pa.—Muhlhause v. Monongahela St. Ry Co, 50 A. 937, 201 Pa. 237.

10 C.J. p 921 note 87 [d].

"The . . . [carrier] must be assumed to have known the capacity of its platform and when it had admitted passengers to the extent of such capacity. If, when having done this, the passengers were not removed by its trains, it became its duty to permit no more to enter."—McGearty v. Manhattan Ry. Co., supra—Allessi v. New York Rapid Transit Corporation, supra.

Crowd exceeding car's capacity

"To permit . . . 150 or 200 persons anxious to return home to go into the inclosure used as a station platform for entering a car with a seating capacity of 45 people, at 9 o'clock at night . . . would necessarily result in danger;" the carrier should have admitted only a sufficient number of persons to fill the car.—Muhlhause v. Monongahela St Ry. Co., 50 A. 937, 939, 201 Pa. 237.

Room back of platform

Where the platform adjoined a public highway so that there was ample room for the crowd behind the platform, it cannot be said that the platform accommodations were insufficient.—Janderup v. Raritan River R Co, 102 A. 1053, 91 N.J Law 327—Kalleberg v. Raritan River R Co., 102 A. 350, 91 N.J.Law 222.

What constitutes excessive crowding

(1) A crowd on a subway station platform must prevent free action.—Commerford v. Interborough Rapid Transit Co., 192 N.Y.S. 349, 199 App. Div 852

(2) "Permitting the platform to be crowded to repletion does not of itself constitute negligence."—Bryant v. Boston Elevated Ry Co, 122 N. E. 744, 746, 232 Mass 549.

(3) "That a subway station is crowded with people pushing and hurrying to enter cars and similar conditions had obtained at other times is not sufficient to establish negligence."—Martin v. Boston Elevated Ry. Co., 160 N.E. 300, 301, 262 Mass. 542.

(4) The overcrowding of a station which exposes passengers to danger is sufficient basis for a finding by a jury of the carrier's negligence—Allessi v. New York Rapid Transit Corporation, 297 N.Y.S. 1011, 163 Misc. 815.

3. N.Y.—McGearty v Manhattan Ry Co., 43 N.Y.S. 1086, 15 App.Div. 2—Allessi v. New York Rapid Transit Corporation, 297 N.Y.S. 1011, 163 Misc. 815.

Pa—Muhlhause v. Monongahela St. Ry. Co, 50 A. 937, 201 Pa 237—Prettyman v. Trenton Transportation Co., 73 Pa.Super. 353.

Difficulty of control

"It is no sufficient reason for not using the gate for this purpose [control of large crowds] that . . . it would be difficult to keep the crowd outside, and that there would be serious danger of injury to women and children in doing so"—Muhlhause v Monongahela St. Ry. Co, 50 A. 937, 939, 201 Pa. 237.

Absence of a guard rail has a direct relation to the number of persons who may safely be admitted to the platform.—McGearty v. Manhattan Ry. Co., 43 N.Y.S. 1086, 15 App. Div. 2.

4. U.S—Maryland Dredging & Contracting Co. v. Hines, C C.A.Md., 269 F. 781.

Ky.—South Covington & C. St. Ry v Vance, 278 S.W 116, 211 Ky 774.

Mass.—Bryant v. Boston Elevated Ry. Co, 122 N.E. 744, 232 Mass 549—Kuhlen v. Boston & N. St Ry. Co, 79 N.E. 815, 193 Mass. 341, 7 L.R.A.,N.S, 729, 118 Am.S.R 516.

Mo.—Grubb v Kansas City Rys. Co, 230 S.W 675, 207 Mo.App. 16.

N.Y—Commerford v. Interborough Rapid Transit Co, 192 N.Y.S. 349, 199 App Div. 852—Allessi v New York Rapid Transit Corporation, 297 N.Y.S. 1011, 163 Misc. 815—Farmer v Interborough Rapid Transit Co, 205 N.Y.S. 479, 123 Misc 383

Pa.—Coyle v Philadelphia & R. Ry Co, 100 A. 1005, 256 Pa. 496—Muhlhause v. Monongahela St. Ry Co., 50 A. 937, 201 Pa. 237.

10 C.J. p 904 note 57—p 921 note 87

Disturbance of peace as prerequisite

"It was not necessary before the . . [carrier] could properly act that the crowd should be so violent, riotous and disorderly as to endanger and disturb the public peace"—Bryant v. Boston Elevated Ry. Co., 122 N.E. 744, 746, 232 Mass. 549.

No guards necessary where no overcrowding

Unless a subway platform is overcrowded, and crowding caused injury to passenger boarding car, there was no duty or need for carrier to have guards there, and absence of guards was not negligence—Commerford v Interborough Rapid Transit Co, 192 N.Y.S. 349, 199 App.Div. 852—Farmer v Interborough Rapid Transit Co, 205 N.Y.S. 479, 123 Misc. 383.

Sufficiency of guards

(1) The carrier is required to furnish a sufficient police force to protect its passengers against assaults or violence and crowds which might reasonably be expected, but not one sufficient to overcome all violence to passengers from strangers when such violence is not to be reasonably

the carrier to provide both.[5]

Degree of care required. In the performance of its duty to protect passengers from dangerous crowds, the carrier is commonly required to exercise reasonable or ordinary care,[6] although the highest degree of care has been required by a few authorities.[7]

§ 721. Duty to Keep Station Open, Heated, and Comfortable

a. Duty to keep station open

b. Duty to keep station heated and comfortable

a. Duty to Keep Station Open

It is the carrier's duty to keep its stations or waiting rooms open for a reasonable time, or for such period as a statute or rule of the railroad commission prescribes, before and after the arrival and departure of trains. The prescription of a certain time does not relieve the carrier of the duty to keep stations open for a longer time if circumstances require.

It is not only the duty of a carrier to provide and maintain safe and adequate stational facilities, supra § 717, but it is also its duty to keep its stations or waiting rooms open, for the accommodation of passengers, for a reasonable time,[8]

expected.—Maryland Dredging & Contracting Co. v. Hines, C.C.A.Md., 269 F. 781.

(2) Carrier must furnish sufficient guards to control crowd in pushing and jostling in boarding cars, so as to prevent injury to passengers—South Covington & C. St. Ry. v. Vanice, 278 S.W. 116, 211 Ky. 774.

(3) "It would be unreasonable to require . . [the carrier] to maintain a force of men large enough to suppress a riotous demonstration."—Spagnol v. Pennsylvania R Co, 123 A 781, 782, 279 Pa. 205, 32 A.L.R. 1313

Driving from shelter

Where a news stand was six feet from the edge of the platform, and some passengers were gathered at that point for protection from the wind, the carrier's guard had no duty to drive them from this shelter—Williams v. New York Rapid Transit Corporation, 6 N.E.2d 58, 272 N.Y. 366, reversing 288 N.Y.S 778, 248 App Div. 765.

Duty in absence of adequate facilities

"There is a distinction as to a carrier's duty in handling a crowd at a station like this [having a platform 480 feet by 18 feet] and that where they gather at resorts and popular places of amusement where no adequate station facilities are offered. Coyle v. P. & R. Ry. Co., 100 A. 1005, 256 Pa 496. At the latter places the company must employ assistance to keep the crowd away from the trains as much as possible."—Spagnol v. Pennsylvania R Co., 123 A. 781, 782, 279 Pa. 205.

Restraint by warning and force

Transit corporation has a duty, with respect to the surging forward of passengers at busy subway terminal at time of arrival of train, to "watch the conditions and by warning and by physical opposition if necessary, restrain aggressive persons and make the entrance orderly so far as reasonable use of abilities permits."—Allessi v. New York Rapid Transit Corporation, 297 N.Y.S. 1011, 1015, 163 Misc. 815.

5. N.Y.—McGearty v. Manhattan Ry. Co, 43 N.Y.S 1086, 15 App Div. 2—Allessi v. New York Rapid Transit Corporation, 297 N.Y.S. 1011, 163 Misc. 815.
Pa.—Muhlhause v. Monongahela St. Ry Co, 50 A. 937, 201 Pa. 237

6. Mo.—Oesch v. St Louis Public Service Co., 59 S.W.2d 758, 228 Mo. App. 1055
N.J.—Sandler v Hudson & M. R Co, 151 A. 99, 8 N.J Misc. 537, affirmed 156 A 459, 108 N.J.Law 203
N.Y.—McGearty v Manhattan Ry. Co., 43 N.Y.S. 1086, 15 App.Div. 2—Allessi v New York Rapid Transit Corporation, 297 N.Y.S. 1011, 163 Misc. 815.
Pa.—Coyle v. Philadelphia & R Ry. Co., 100 A. 1005, 256 Pa. 496—Muhlhause v. Monongahela St. Ry. Co, 50 A. 937, 201 Pa 237—Prettyman v. Trenton Transportation Co., 73 Pa.Super. 353.
10 C.J. p 921 note 87

"The . . . [carrier] is bound to use the skill and care such as would be exercised by a good and diligent businessman in his particular vocation, and such degree of reasonable skill and care should be exercised in handling passengers on platforms and ways to incoming trains."—Allessi v. New York Rapid Transit Corporation, 297 N.Y.S. 1011, 1015, 163 Misc 815

Corpus Juris quoted

Mo.—Oesch v. St. Louis Public Service Co, 59 S.W.2d 758, 760, 228 Mo.App. 1055.

"Such rule is firmly established"

N.J.—Sandler v. Hudson & M. R. Co., 151 A 99, 100, 8 N.J.Misc. 537, affirmed 156 A. 459, 108 N.J.Law 203.

Care required in transportation distinguished

"That . . . [the duty] does not require generally even the highest degree of practicable care, as in the actual transportation of passengers, is evident, as the passenger is not deprived in such case of his power of self-protection, which to a large degree is preserved to him."—Allessi v. New York Rapid Transit Corporation, 297 N.Y.S 1011, 1015, 163 Misc. S15.

Factors affecting care required

"In considering the degree of care required by the carrier . . . consideration must be had of the following elements· (a) Width and length of the station platform; (b) location of the entrances and exits; (c) number of exits and entrances; (d) normal traffic; (e) 'rush hour' traffic; (f) presence and necessity for guard rails; (g) necessity and number of guards; (h) obstruction on platform by pillars, news stands; (i) space between platform and train; (j) whether the station platform is straight or curved and respective distances of train to straight and curved platform; (k) visibility of station platform, entrances to subway cars, (l) warnings of danger by signs or guards, etc."—Allessi v. New York Rapid Transit Corporation, 297 N.Y.S. 1011, 1016, 163 Misc. 815.

7. U.S.—Maryland Dredging & Contracting Co. v. Hines, C.C.A.Md., 269 F. 781
Mass.—Kuhlen v Boston & N. St. Ry. Co., 79 N.E. 815, 193 Mass. 341, 7 L.R.A., N.S., 729, 118 Am.S.R. 516

As to boarding passenger

Carrier held to owe highest degree of care to protect passenger about to board car at terminal station from a boisterous crowd.—South Covington & C St. Ry. v. Vanice, 278 S.W. 116 211 Ky. 774.

Mode of conveyance and operation as factors

"Persons waiting to board a train . . . are entitled to receive from the carrier the highest degree of care for their safety consistent with the mode of conveyance and its practical operation."—Maryland Dredging & Contracting Co v. Hines, C.C.A. Md, 269 F 781, 782.

8. Miss.—Williams v. Southern R. Co., 59 So. 850, 851, 102 Miss. 617.
10 C.J. p 804 note 57, p 921 note 89.

"It is unnecessary to cite authorities for the statement that the com-

or for such time as a statute[9] or a rule of the railroad commission[10] may prescribe, before and after the arrival and departure of trains; and the duty to keep waiting rooms open for reasonable periods exists also where a statute provides that waiting rooms shall be kept open at such hours as to accommodate passengers traveling over the carrier's road on any of its trains, and naming no specific time.[11] The fact that a statute or rule prescribes a certain time does not relieve the carrier of the duty of keeping its stations open for a longer time if the circumstances of a particular case require it.[12] The carrier is liable to one suffering injury as a result of its failure to perform this duty.[13]

Statutes as affecting departing passengers. A

mon law, in the absence of any statute, requires all common carriers of passengers to keep their waiting rooms open and comfortably heated for a reasonable time before and after the arrival and departure of all trains."—Williams v. Southern R Co., supra.

The rule as stated in Corpus Juris is cited in Hansen v. Oregon Short Line R. Co., 188 P. 852, 856, 55 Utah 577.

Determination of reasonable time

'For the courts to determine what is a reasonable time, it is important to know all of the facts and circumstances going to make up the case to be decided"—Williams v. Southern R. Co., 59 So. 850, 851, 102 Miss. 617

Gratuitous passenger

One who has a pass from the carrier and who goes to the station to await the train is deemed a passenger, and is entitled to recover for injury from exposure caused by station agent's failure to keep the waiting room open.—Hansen v. Oregon Short Line R. Co., 188 P. 852, 55 Utah 577.

Station customarily open

A passenger who went to the station two hours before the train was due, and three hours before it actually arrived, and who was refused admission to the locked waiting room which was customarily kept open all night when it was cold, was allowed to recover for injuries caused by exposure.—Hansen v. Oregon Short Line R. Co., 188 P. 852, 55 Utah 577.

Where no duty to provide station

A railroad company which builds the station house and waiting room at a certain station cannot arbitrarily deny the use thereof to a particular passenger, even though it is not under a duty either at common law or under statute to maintain a waiting room at that particular station—Waldrop v. Nashville, etc, R. Co., 62 So. 769, 183 Ala. 226.

9. Miss.—Adams v. Yazoo & M. V. R. Co, 76 So. 733, 115 Miss. 865
Tex.—Gulf, C & S. F. Ry. Co. v. Williams, Com App, 268 S.W. 149, reversing, Civ App., 251 S.W. 553—International, etc., R. Co v. Pevey, 70 S.W 778, 30 Tex.Civ App. 460.
10 C.J. p 921 note 90.

Statute as fixing reasonable time

The time prescribed in the statute during which stations must be kept open is the legislative construction of a reasonable time for that purpose, and, where a railroad in compliance with the statute opened its station one hour before the departure of a train, it was not liable to a prospective passenger for injuries resulting from exposure before the station was opened—Texas Midland R Co. v. Griggs, Tex Civ App., 106 S. W. 411.

Unscheduled stop at passenger's request

Where a train stops, at a passenger's request, at a station at which it was not scheduled to stop, there is no liability on the part of the carrier for failure to have the depot open for the time prescribed in the statute—St. Louis Southwestern R Co. v. Wallace, 74 S.W. 581, 32 Tex. Civ.App. 312.

Flag station

(1) The rule stated in the text has been applied to flag stations.—Adams v Yazoo & M. V R. Co, 76 So 733, 115 Miss. 865—10 C J. p 921 note 89 [a] (2)

(2) However, a statute requiring railroads to keep their ticket offices at regular passenger depots open for at least thirty minutes before the time of departure of trains, and to open waiting rooms for the same time as ticket offices, has been held not to require railroads to keep depots open at flag stations during the nighttime—Sandifer v Louisville, etc., R. Co., 89 S.W. 528, 28 Ky.L. 464.

10. S C.—Neal v. Southern R. Co, 75 S.E. 405, 92 S.C. 197.

11. S.C—Ginn v. U. S. Railroad Administration, 103 S.E. 548, 114 S C 236—Neal v Southern R. Co, 75 S E. 405, 92 S C. 197.

Intending passenger protected

S C.—Ginn v. U. S. Railroad Administration, 103 S.E. 548, 114 S.C. 236.

Passenger changing trains, who had to wait seven hours, and was kept out of the waiting room for two hours, was held entitled to recover for injuries suffered as a result of the exposure.—Neal v. Southern R Co., 75 S E 405, 92 S.C. 197.

Notice of desire for special care

"Reasonable notice should be give to the railroad if special care and attention is desired, otherwise, a sick passenger would bear the same relation to the railroad company as a well passenger, and would have, in the absence of notice, no higher right."—Ginn v. U S. Railroad Administration, 103 S.E. 548, 549, 114 S C. 236.

12. Miss—Williams v. Southern R Co, 59 So. 850, 102 Miss. 617.
10 C.J p 922 note 92.

Commission's rule merely minimum time

Where a statute required waiting rooms to be "kept open at such hours as to accommodate passengers traveling over such road on any of its passenger trains," and a rule of the railroad commission stated that they must be kept open for at least thirty minutes before the scheduled arrival of a train, it was held that the statute established the carrier s duty to keep open for a reasonable time, and that the rule merely established a minimum time—Neal v Southern R. Co, 75 S E. 405, 407, 92 S C. 197.

13. Ala.—Waldrop v. Nashville, etc, R Co, 62 So. 769, 183 Ala. 226
Ark—St Louis, etc., R. Co. v Wilson, 66 S.W. 661, 70 Ark. 136, 91 Am.S R 74.
Kan—Higgins v Southern Kansas Stage Lines Co, 42 P.2d 599, 141 Kan 641.
S C.—Ginn v. U. S Railroad Administration, 103 S E. 548, 114 S C 236—Neal v. Southern R Co., 75 S.E 405, 92 S C. 197.
Utah.—Hansen v. Oregon Short Line R Co, 188 P. 852, 55 Utah 577.

Exclusion from shelter

(1) A carrier is liable to a passenger for sickness resulting from her ejection from the waiting room—Waldrop v. Nashville, etc, R. Co, 62 So. 769, 183 Ala. 226

(2) Where a motor bus carrier was bound to provide station accommodations, a colored woman excluded from the only station on a cold and stormy night can recover from the carrier for injury suffered as a result of the exposure.—Higgins v Southern Kansas Stage Lines Co., 42 P.2d 599, 141 Kan. 641.

statute requiring railroad companies to provide waiting rooms "for passengers waiting for trains" does not absolve such a company from its duty to provide shelter for a departing passenger who needs to remain in order to save himself from grievous bodily harm.[14] Similarly, where a statute requires waiting rooms to be kept open "until the train departs," the carrier is not liable, for failure to keep its waiting room open, to a passenger who reached it after the train had departed.[15]

b. Duty to Keep Station Heated and Comfortable

It is the carrier's duty, under or apart from statutes, to keep its stations and waiting rooms reasonably comfortable and decent, as by heating them when necessary; but mere violation of such statute does not justify recovery by a passenger in the absence of proof of injury. A statutory duty to heat stations when necessary is not absolute, but depends on weather conditions.

Concomitantly with its duty to keep its stations open for a reasonable time before and after the arrival and departure of trains, as considered in subdivision a of this section, it is the duty of the carrier to keep the station or waiting room reasonably comfortable and decent.[16] Thus the carrier must use reasonable care to have its waiting rooms and stations, when necessary, comfortably heated[17] and ventilated.[18]

Where a statute requires waiting rooms and sta-

Passenger locked in

A railroad company is liable for its agent's knowingly permitting its waiting room at a station to be and to remain locked, against the protest of a prospective passenger in the room, when, by the exercise of ordinary care, such agent could have prevented its being locked, or could have opened it.—St. Louis, etc., R. Co. v. Wilson, 66 S.W. 661, 70 Ark. 136, 91 Am.S.R. 74.

Entrance to depot obstructed

(1) Where a train blocked the approach to the depot for an unreasonable time, compelling a passenger to remain in the cold, there was held to be negligence, and the carrier was liable for the injury resulting from the exposure.—Louisville, etc., R. Co. v. Daugherty, 108 S.W. 336, 32 Ky.L. 1392, 15 L.R.A., N.S., 740.

(2) Carrier's duty to keep approaches unobstructed see supra § 714 a.

14. Ala.—Waldrop v. Nashville, etc., R. Co., 62 So. 769, 771, 183 Ala. 226.

15. Ky.—Ward v. Louisville, etc., R. Co., 183 S.W. 211, 168 Ky. 826.

Time to make arrangements

However, a passenger who reaches an open waiting room after the departure of the train cannot be ejected until he has had a reasonable time to make arrangements to continue his journey, or to protect himself against the weather.—Ward v. Louisville, etc., R. Co., 183 S.W. 211, 168 Ky. 826.

16. Ark.—Kansas City Southern R. Co. v. Cobb, 178 S.W. 383, 118 Ark. 569.—St. Louis, etc., R. Co. v. Wilson, 66 S.W. 661, 70 Ark. 136, 91 Am.S.R. 74.
Ga.—Nashville, C. & St. L. Ry. v. Mooneyham, 139 S.E. 589, 37 Ga. App. 236.
N.C.—Hipps v. Southern Ry., 99 S.E. 335, 177 N.C. 472.
10 C.J. p. 922 note 93.

This rule as stated in Corpus Juris is quoted with approval in Hipps v. Southern Ry., 99 S.E. 335, 336, 177 N.C. 472.

Carrier must exercise ordinary diligence toward passenger as respects comfort at station while waiting for train.—Nashville, C. & St. L. Ry. v. Mooneyham, 139 S.E. 589, 37 Ga. App. 236.

Accumulation of smoke

Permitting the accumulation of smoke to the discomfort of a woman passenger is neglect of this duty.—Texas, etc., R. Co. v. Cornelius, 30 S.W. 720, 10 Tex.Civ.App. 125.

Cancellation of trains without notice

Where an intending passenger suffered injury because the night was cold and the waiting room filthy, unheated, and uncomfortable, the carrier was not relieved of its duty by the fact that it had been compelled, by high water, to withdraw its regular train, where it had failed to notify prospective passengers on a connecting carrier's line of the cancellation.—Chicago, etc., R. Co. v. Stephens, Tenn., 218 F. 535, 134 C.C.A. 263.

Permission to use office

The custom of the agent in charge of a depot to invite passengers, when the weather is disagreeable, to come into the office in the depot, does not relieve the carrier of liability for failure to maintain a proper waiting room.—Missouri, etc., R. Co. v. McCutcheon, 77 S.W. 232, 33 Tex.Civ.App. 557.

17. U.S.—Chicago, etc., R. Co. v. Stephens, Tenn., 218 F. 535, 134 C.C.A. 263.
Ark.—Kansas City Southern R. Co. v. Cobb, 178 S.W. 383, 118 Ark. 569.
Ky.—Davis v. Allen, 251 S.W. 194, 199 Ky. 442.
Minn.—Barnett v. Minneapolis, etc., R. Co., 143 N.W. 263, 123 Minn. 153, 48 L.R.A.,N.S., 262.
Miss.—Williams v. Southern R. Co., 59 So. 850, 102 Miss. 617.—Adams v. Yazoo & M. V. R. Co., 76 So. 733, 115 Miss. 865.
Tex.—Gulf, C. & S. F. Ry. Co. v. Williams, Civ.App., 290 S.W. 846.
10 C.J. p. 922 note 94.

Necessity of proper ventilation of public conveyances and stations during the influenza epidemic of 1918 did not lessen the duty of a carrier to keep its waiting rooms comfortably heated for its passengers.—Davis v. Allen, 251 S.W. 194, 199 Ky. 442.

Person waiting between trains

(1) One waiting at a station, after arriving on one train, to make connection with another train, is a passenger and entitled to a comfortable and heated depot.—Chicago, etc., R. Co. v. Stephens, Tenn., 218 F. 535, 134 C.C.A. 263.

(2) However, where a person intending to take an early morning train arrived at the depot on another train at 11:30 P.M. the evening before, defendant carrier was under no obligation to furnish him a warm waiting room before he purchased his ticket the next morning, he being a mere licensee prior thereto.—Barnett v. Minneapolis, etc., R. Co., 143 N.W. 263, 123 Minn. 153, 48 L.R.A.,N.S., 262.

Failure of railroad commission to require

However, where a statute confers authority on the railroad commission to require railroads to heat waiting rooms, but the railroad commission has made no such requirement, there is no duty on the carrier to do so.—Page v. Louisville & N.R. Co., 29 So. 676, 129 Ala. 232.

Violation of duty as negligence

A failure to provide warmth in midwinter is "at least prima facie evidence of negligence."—St. Louis, etc., R. Co. v. Wilson, 66 S.W. 661, 662, 70 Ark. 136, 91 Am.S.R. 74.

18. Iowa.—Drummy v. Minneapolis, etc., R. Co., 133 N.W. 655, 153 Iowa 479.

tions to be heated, or open and heated, during certain prescribed times before or after the arrival or departure of trains, the carrier must perform the duty so imposed,[19] and its failure to do so constitutes negligence;[20] but the existence of such a statute does not relieve the carrier of its common-law duty to provide heat.[21] The mere violation of such a statute, in the absence of proof of injury to a passenger entitled to use the station, does not render the carrier liable.[22]

Duty dependent on weather conditions. Where one statutory provision requires that stations be kept open and warmed at certain times, and another provision that stations while in use shall be heated "if necessary," the duty so imposed is not absolute, but depends on the condition of the weather;[23] and, in determining whether artificial heat is necessary, the carrier has been required to use that high degree of care that a very cautious and prudent person would use in similar circumstances.[24]

Carriers using union stations. Carriers using union stations have the joint duty of keeping the station warm for passengers;[25] but the minimum time prescribed in a statute is not applicable to such stations, and carriers must perform the duty as established by the common law, since the time passengers may have to wait varies so widely.[26]

§ 722. To Whom Carrier Liable for Unsafe Premises

The carrier is liable for unsafe premises not only to passengers, but to all on the premises at its express or implied invitation or to transact legitimate business with its agent. Thus the carrier may be liable to prospective or departing passengers and to those accompanying or meeting them; to passengers alighting temporarily at intermediate stations, at its express or implied invitation or for a reasonable and usual purpose; or to persons riding on free passes.

The carrier's duty of using reasonable care to make the premises safe, and the corresponding liability for injuries resulting from negligence in doing so, as considered in §§ 713-721 supra, is not limited to passengers in the act of boarding or alighting from the vehicles, but applies to all persons who are on the premises at the express or implied invitation of the carrier, or for the purpose of attending to legitimate business with its agent.[27] Thus persons awaiting trains which they intend to board may recover from the carrier for injuries caused by the unsafe condition of the premises,[28] simi-

19. N.C.—Hipps v. Southern Ry., 99 S.E. 335, 177 N.C. 472
Tex.—Gulf, C. & S. F. Ry. Co. v. Hitt, Civ.App., 60 S.W.2d 864—Chicago, R. I. & G. Ry. Co. v. Faulkner, Civ.App., 194 S.W. 651—Texas Midland R. Co. v. Griggs, Civ.App., 106 S.W. 411—St. Louis Southwestern R. Co. v. Lowe, Civ.App., 97 S.W. 1087.
10 C.J. p 922 note 96.

Passenger carried past destination
Where a passenger was carried past her destination, and the station at which she alighted was cold and unheated, she could recover for injury suffered as a result of the carrier's failure to use ordinary care in the performance of its statutory duty.—Kansas City Southern R. Co. v. Cobb, 178 S.W. 383, 118 Ark. 569.

Station open at times not prescribed
If waiting rooms are kept open for accommodation of public at times other than as prescribed by statute, the railway company must use care to keep them heated when necessary to prevent injury to those lawfully occupying them—Gulf, C. & S. F. Ry. Co. v. Williams, Tex.Com.App., 268 S.W. 149, reversing, Civ.App., 251 S.W. 553—Gulf, C. & S. F. Ry. Co. v. Williams, Tex.Civ.App., 290 S.W. 846.

20. Tex.—Gulf, C. & S. F. Ry. Co. v. Hitt, Civ.App., 60 S.W.2d 864—Chicago, R. I. & G. Ry. Co. v. Faulkner, Civ.App., 194 S.W. 651.

Negligence per se
Tex.—Gulf, C. & S. F. Ry. Co. v. Hitt, Civ.App., 60 S.W.2d 864—Chicago, R. I. & G. Ry. Co. v. Faulkner, Civ.App., 194 S.W. 651.

21. Miss.—Williams v. Southern R. Co., 59 So. 850, 851, 102 Miss. 617.
N.C.—Hipps v. Southern Ry., 99 S.E. 335, 177 N.C. 472
Tex.—Southern Kansas R. Co. v. Caylor, Civ.App., 135 S.W. 1087
10 C.J. p 922 note 97
"The minimum time fixed in this statute can never be used to bar a recovery in any case . . . where the facts show that the company should have kept the rooms open and comfortable for a longer period of time"—Williams v. Southern R. Co., supra.

Waiting between trains
A passenger who takes passage at a station of a railroad company, destined to a distant point on its line, and who, because of schedule arrangements, occupies a waiting room at an intervening station for several hours, may maintain suit against the company for neglecting its duty to keep its waiting room comfortably heated; and the statutory provision that companies shall open their waiting rooms and keep them heated for one hour before the arrival and departure of trains has no application.—Tully v. Yazoo, etc., R. Co., 4 Tenn.Civ.A. 184.

22. Miss.—Davis v. Day, 89 So. 814, 127 Miss. 140.

23. Tex.—Gulf, C. & S. F. Ry. Co. v. Williams, Com.App., 268 S.W. 149, reversing, Civ.App., 251 S.W. 553.

24. Tex.—Gulf, C. & S. F. Ry. Co. v. Williams, supra.
10 C.J. p 922 note 94 [c].

25. Miss.—Williams v. Southern R. Co., 59 So. 850, 102 Miss. 617.
10 C.J. p 922 note 94 [a].

26. Miss.—Williams v. Southern R. Co., supra.

27. Ark.—Chicago, R. I. & P. Ry. Co. v. Amedon, 256 S.W. 52, 161 Ark. 310.
Ky.—Louisville & N. R. Co. v. Minnix, 260 S.W. 15, 202 Ky. 472
Md.—Jackson v. Hines, 113 A. 129, 137 Md. 621.
N.C.—Pineus v. Atlantic Coast Line R. Co., 53 S.E. 297, 140 N.C. 450, 111 Am.S.R. 856
10 C.J. p 923 note 8
Commencement and continuance of relation of passenger and carrier generally see supra §§ 554-566
To whom carrier liable for negligence generally see supra §§ 698-700.
To whom carrier owes duty to light premises, and liability for failure to perform that duty, see supra § 718.

28. Ky.—Louisville & N. R. Co. v. Dixon, 195 S.W. 1099, 176 Ky. 569.

larly, persons leaving the station after alighting from a train are entitled, in regard to the condition of the premises, to the protection of passengers, until they have had a reasonable opportunity to leave the premises;[29] and the same liability exists as to persons on the premises to obtain information about trains[30] or to look after baggage.[31]

The care which the carrier is required to exercise with reference to a person who has ceased to be a passenger is that owed to any other member of the general public;[32] so this liability of the carrier ceases on a passenger's reaching the street on alighting from a street car.[33]

Persons meeting or accompanying passengers. The carrier's liability applies also to persons who are on the premises for the purpose of accompanying passengers to the trains or other conveyances, or meeting them when they arrive,[34] but not if the person met is traveling otherwise than as part of the regular passenger traffic.[35]

Md.—Jackson v. Hines, 113 A. 129, 137 Md. 621.
N.Y.—White v. New York Cent. R. Co., 239 N.Y.S. 90, 228 App.Div. 50.
Ohio.—Majoros v. Cleveland Interurban R. Co., 187 N.E. 857, 127 Ohio St. 255.
Utah.—Hansen v. Oregon Short Line R. Co., 188 P. 852, 55 Utah 577.
10 C.J. p. 923 note 8.

Person in lee of shelter house

Interurban car company's duty to maintain shelter house in reasonably safe condition inured to prospective passenger's benefit, notwithstanding he sought protection in lee of shelter house.—Majoros v. Cleveland Interurban R. Co., 187 N.E. 857, 127 Ohio St. 255.

Shipper of live stock who accompanies it, and is advised that it will be necessary to pass over railroad yards to board the caboose at the distant point at which it is placed, is not a trespasser in going from the station to board the caboose, and it is the duty of the carrier to use reasonable care to make the premises reasonably safe.—Chorn v. Missouri, etc., R. Co., 153 S.W. 1060, 168 Mo.App. 518.

29. U.S.—Young v. Baldwin, C.C.A. Ark., 84 F.2d 841.
Mich.—Sink v. Grand Trunk Western Ry. Co., 198 N.W. 238, 227 Mich. 21.
N.H.—Wessman v. Boston & M. R. R., 152 A. 476.
10 C.J. p. 923 note 1.
Continuance and termination of relation with respect to passenger leaving vehicle see supra §§ 564–566.

Remaining by express permission

Passenger who left one train to continue journey on that of connecting railroad, and who, because of inclement weather, was given express permission to remain in the station where he had alighted by agent in charge thereof until it was time to go to station of connecting railroad to take other train, was, during the three hours he remained on the premises of the first station, at least an invitee of the railroad as to whom the railroad was required to keep the premises in a reasonably safe condition, and was not merely a licensee.—Sink v. Grand Trunk Western Ry. Co., 198 N.W. 238, 227 Mich. 21.

30. Tex.—Baker v. Gohman, Civ.App., 226 S.W. 691, dismissed for want of jurisdiction.
10 C.J. p. 923 note 8 [d].

31. Ind.—Cleveland, etc., R. Co. v. Jones, 99 N.E. 503, 51 Ind.App. 245.
N.J.—Exton v. New Jersey Cent. R. Co., 46 A. 1099, 63 N.J.Law 356, 56 L.R.A. 508, affirming 42 A. 486, 62 N.J.Law 7, 56 L.R.A. 508.

32. Pa.—Fisher v. Paxson, 38 A. 407, 182 Pa. 457.
Wis.—Imhoff v. Chicago, etc., R. Co., 22 Wis. 681.

33. Minn.—Lentz v. Minneapolis & St. Paul Suburban R. Co., 160 N.W. 794, 795, 135 Minn. 310.
Pa.—Perret v. George, 133 A. 228, 229, 286 Pa. 221.
10 C.J. p. 923 note 3.
"A passenger having alighted, with no accompanying negligence of the carrier in affording him an opportunity and a place, takes the street as he finds it."—Lentz v. Minneapolis & St. Paul Suburban R. Co., supra.
"The passenger had, in legal contemplation, ceased to be a passenger when she stepped to the street."—Perret v. George, supra.
Duty and liability of carriers by a street car as to safety of place for boarding and alighting see supra § 716.
Termination of relation of passenger and carrier when passenger alights from street car see supra § 565.

34. Ark.—Chicago, R. I. & P. Ry. Co. v. Amedon, 256 S.W. 52, 161 Ark. 310—St. Louis, etc., R. Co. v. Grimsley, 117 S.W. 1064, 90 Ark. 64.
Iowa.—McNaughton v. Illinois Cent. R. Co., 113 N.W. 844, 136 Iowa 177.
Md.—Jackson v. Hines, 113 A. 129, 137 Md. 621.
Mo.—Evans v. Chicago, B. & Q. Ry. Co., 109 S.W. 79, 130 Mo.App. 509.
N.Y.—Godfrey v. New York Cent. & H. R. R. Co., 56 N.E. 77, 161 N.Y. 565.
10 C.J. p. 924 note 9.

Reason for rule

"The custom of friends and relatives to accompany to the station persons leaving by train, for the purpose of assisting or of comforting them, or merely as a mark of friendly interest and affection, as well as the custom of friends and relations going to the station for like reasons to meet persons coming in, is so uniform, universal, and long-standing, and is so much a part and parcel of the business of carrying passengers, and has been so uniformly acquiesced in for so long by the carrier, that it would be absurd to regard a person coming to a railroad station to meet an incoming friend or relation either as a trespasser or a bare licensee to whom the carrier owes no duty but that of refraining from wanton or willful negligence."—Jackson v. Hines, 113 A. 129, 131, 137 Md. 621.

Such person not trespasser or bare licensee

Ark.—Chicago, R. I. & P. Ry. Co. v. Amedon, 256 S.W. 52, 161 Ark. 310.
Md.—Jackson v. Hines, 113 A. 129, 137 Md. 621.
N.Y.—Godfrey v. New York Cent. & H. R. Co., 56 N.E. 77, 161 N.Y. 565.

Taking leave of passenger

The carrier's liability has been held to extend to one going upon the platform or depot grounds for the purpose of taking leave of a friend who is a passenger.—Banderob v. Wisconsin Cent. R. Co., 113 N.W. 738, 133 Wis. 249.
Contra Galveston, etc., R. Co. Matzdorf, 112 S.W. 1036, 102 Tex. 42, 132 Am.S.R. 849, 20 L.R.A.,N.S., 833, reversing, Civ.App., 107 S.W. 882.
Status of persons attending passengers generally see supra § 553.

35. Wis.—Dowd v. Chicago, etc., R. Co., 54 N.W. 24, 84 Wis. 105, 36 Am.S.R. 917, 20 L.R.A. 527.

Caretaker of live stock on freight train

The duty does not extend to one at the station at an unusual hour for the purpose of bidding farewell to a person who is about to leave on a freight train in charge of live stock, and who is a passenger only in a limited and restricted sense.—Dowd v. Chicago, etc., R. Co., 54 N.W. 24,

Passenger alighting at intermediate station. It has been held that the duty of furnishing reasonably safe platforms and the like does not apply to a passenger who leaves the train at an intermediate station;[36] but the rule is otherwise where he does so on the express or implied invitation of the carrier,[37] or where he alights, without its objection, for a reasonable and usual purpose.[38]

Person riding on free pass. A carrier owes to a person riding on a free pass, as to other passengers, the duty to keep the premises safe.[39]

3. Care Required and Liability as to Passengers Boarding or Alighting from Vehicle

§ 723. In General

A carrier is usually required to exercise the highest degree of care to avoid injury to passengers boarding or alighting from the carrier's vehicle.

The carrier is bound to exercise care in securing the safety of the passenger while boarding and alighting from its cars or other conveyances,[40] and the degree of care required in the discharge of this duty is ordinarily held to be the highest care, or the care which a very prudent person would use under the circumstances,[41] that is, that high degree of care which is required with reference to the transportation of passengers.[42] There is, however, authority to the effect that the care owed by a carrier to passengers boarding, or alighting from, its vehicles is reasonable[43] or ordinary[44] care,

84 Wis. 105, 36 Am.S.R. 917, 20 L.R.A. 527

36. N.C.—Goodman v. Queen City Lines, 180 S.E. 661, 208 N.C. 323.
10 C.J. p. 923 note 5
Citing Corpus Juris
N.C.—Goodman v. Queen City Lines, 180 S.E. 661, 208 N.C. 323.
Continuance and termination of relation of passenger and carrier at intermediate stations and transfer points see supra § 566.

37. N.C.—Goodman v. Queen City Lines, supra.
10 C.J. p. 923 note 6.
Citing Corpus Juris
N.C.—Goodman v. Queen City Lines, 180 S.E. 661, 208 N.C. 323.
Stop as invitation
"When a train is stopped in daylight for any reasonable length of time to receive or discharge passengers, an invitation is thereby tacitly extended by the railroad company to the passengers in the coaches to alight for a few minutes' rest and invigoration. . . . This same invitation, it would seem, must also be offered at night where a train is stopped for a reasonable time to receive or discharge passengers at a station, the platform of which is well lighted. . . . When the platform of a depot at which a train stops at night is not illuminated, the darkness is a notice to passengers in the cars who are not obliged to depart at that station to remain in the coaches."—Abbott v. Oregon R. Co., 80 P. 1012, 1019, 46 Or. 549, 114 Am.S.R. 835, 1 L.R.A.,N.S., 851, 7 Ann.Cas. 961.
Stop at meal and rest station
N.C.—Goodman v. Queen City Lines, 180 S.E. 661, 208 N.C. 323.
10 C.J. p. 923 note 7.

38. U.S.—Alabama, etc., Ry. Co. v. Coggins, Tenn., 88 F. 455, 458, 32 C.C.A. 1
"The weight of authority, reason, and custom all require us to hold that where a passenger, without objection by the company or its agents, alights at an intermediate station, which is a station for the discharge and reception of passengers, for any reasonable and usual purpose, like that of refreshment, of the sending or receipt of telegrams, or of exercise by walking up and down the platform, or the like, he does not cease to be a passenger, and is justified in the belief that the company is exercising due care for his safety."—Alabama, etc., Ry. Co. v. Coggins, supra.

39. N.H.—Wessman v. Boston & M. R.R., 152 A. 476
Status of person riding on pass as passenger see supra § 550.
Reasonable opportunity to leave
The carrier is bound to keep the station safe until one riding on such a pass has had a reasonable opportunity to leave the station after alighting.—Wessman v. Boston & M. R.R., N.H., 152 A. 476.

40. Ala.—Alabama Great Southern R. Co. v. Bell, 76 So. 920, 200 Ala. 562—Alabama City G. & A. Ry. Co. v. Bessiere, 72 So. 325, 197 Ala. 5
Miss.—Illinois Cent. R. Co. v. Small, 74 So. 681, 113 Miss. 857.
N.J.—Bradley v. Erie R. Co., 147 A. 572, 106 N.J.Law 51, reversing 143 A. 743, 105 N.J.Law 1—Rhodehouse v. Director General of Railroads, 111 A. 662, 95 N.J.Law 355—McCarron v. Erie R. Co., 159 A. 807, 10 N.J.Misc. 498.
N.Y.—Anderson v. Fidelity & Casualty Co. of New York, 166 N.Y.S. 640, 100 Misc. 411, modified on other grounds 170 N.Y.S. 431, 183 App.Div. 170, which is affirmed 127 N.E. 584, 228 N.Y. 475
Tex.—Texas & N. O. R. Co. v. McNeill, Civ.App., 270 S.W. 1038
10 C.J. p. 924 note 13.

41. Md.—Grinath v. Baltimore & Belair Electric Ry. Co., 125 A. 604, 145 Md. 290.
N.J.—McCarron v. Erie R. Co., 159 A. 807, 10 N.J.Misc. 498
N.C.—Lane v. Southern Ry. Co., 134 S.E. 855, 192 N.C. 287, 51 A.L.R. 1114.
Pa.—O'Malley v. Laurel Line Bus Co., 166 A. 868, 311 Pa. 251—Hassan v. Reading Co., 89 Pa.Super. 592.
Tex.—Wisdom v. Chicago, R. I. & G. Ry. Co., Com.App., 231 S.W. 344, reversing Chicago, R. I. & G. Ry. Co. v. Wisdom, Civ.App., 216 S.W. 241—Texas & N. O. Ry. Co. v. Owens, Civ.App., 299 S.W. 933—Texas & N. O. R. Co. v. Tillman, Civ.App., 197 S.W. 1128, error refused.
10 C.J. p. 924 note 14
The Corpus Juris text is quoted with approval in Alabama Power Co. v. Hall, 103 So. 867, 869, 212 Ala. 638
Other expressions used in designating the degree of care to be exercised by the carrier are:
(1) "Extraordinary care"—Georgia R. & Banking Co. v. Brooks, 119 S.E. 424, 30 Ga.App. 692
(2) "Extraordinary diligence"—Metts v. Louisville & N.R. Co., 182 S.E. 531, 52 Ga.App. 115.
(3) "Strictest vigilance"—Ensor v. Pennsylvania R. Co., 159 A. 872, 306 Pa. 451.

42. Md.—Grinath v. Baltimore & Belair Electric Ry. Co., 125 A. 604, 145 Md. 290.
Mo.—Payne v. Davis, 252 S.W. 57, 298 Mo. 645.
N.J.—McCarron v. Erie R. Co., 159 A. 807, 10 N.J.Misc. 498.
10 C.J. p. 924 note 15

43. Mass.—Poulos v. Labbe, 195 N.E. 893.
Mich.—Serviss v. Ann Arbor R. Co., 135 N.W. 343, 169 Mich. 564.
Tenn.—Southern R. Co. v. Mitchell, 40 S.W. 72, 98 Tenn. 27.
"Every reasonable precaution"
Cal.—Sellars v. Southern Pac. Co., 166 P. 599, 33 Cal.App. 701.
In setting passengers down at stations reasonable care under the circumstances is required.
Mich.—Serviss v. Ann Arbor R. Co., 135 N.W. 343, 169 Mich. 564
Tenn.—Southern R. Co. v. Mitchell, 40 S.W. 72, 98 Tenn. 27

44. Del.—Clayton v. Philadelphia, B.

that is, such care as an ordinarily prudent and careful person would use under similar circumstances,[45] with reference to existing conditions including the carrier's knowledge, if any it has, of the physical and mental condition of the passenger.[46] In a case laying down the rule that the carrier is bound to use a "high degree of care" with respect to passengers boarding or alighting from its vehicles, the quoted words have been held to denote no more than care commensurate with the risk of danger.[47]

The carrier is not, however, an insurer of the passenger's safety in boarding or alighting,[48] is not bound to anticipate that a passenger alighting in a street will place himself in danger by violating a statute regulating the movement of traffic,[49] and if the carrier, through its agents and employees, uses proper care for the safety and protection of a boarding or an alighting passenger it is not liable for injuries that he may sustain while getting on or leaving the vehicle of the carrier,[50] particularly where he does so by an unusual mode of ingress or egress.[51]

Extent and duration of care. The high degree of care required of carriers with respect to boarding or alighting passengers is not required until such time as they place themselves under the carrier's care as passengers.[52] The carrier's duty of extraordinary care toward an alighting passenger has been held, on the other hand, to continue until he reaches a place where he has some freedom of locomotion and can in a measure look out for his own safety.[53] It has also been held that a railroad company as a carrier owes to an alighting passenger a duty to do what is reasonably necessary to insure his safety in leaving its premises.[54] Of course, the carrier is not absolved from liability nor from a high degree of care merely because the passenger is not injured while in the very act of alighting nor at the very spot where and when he alights,[55] the carrier being charged with knowledge of the conditions at, and immediately adjacent to, the spot where it discharges passengers from its conveyances.[56] A carrier may not ordinarily, however, be liable as for a passenger for injuries received by an alighting passenger after it has performed its duty, and he has safely left the vehicle.[57]

Misleading passenger. A carrier owes to a pas-

& W. R. Co., 106 A. 577, 7 Boyce 343.
Ind.—Stradling v. Hahn, 163 N.E. 527, 88 Ind.App. 117.

45. Del.—Clayton v. Philadelphia, B. & W. R. Co., 106 A. 577, 7 Boyce 343.

46. Del.—Clayton v. Philadelphia, B. & W. R. Co., supra.

47. N.J.—Rhodehouse v. Director General of Railroads, 111 A. 662, 95 N.J.Law 355.

48. Ark.—Reed v. Baldwin, 92 S.W. 2d 392.
La.—Smith v. New Orleans Ry. & Light Co., 91 So. 514, 150 La. 1070.
Mass.—Carlson v. Boston & M. R. R., 168 N.E. 171, 269 Mass. 60.
Or.—Lewis v. Pacific Greyhound Lines, 34 P.2d 616, 147 Or. 588, 96 A.L.R. 718—Nelson v. United Rys. Co., 166 P. 763, 85 Or. 427.
Pa.—Stuckwish v. Hagan Corporation, 175 A. 381, 316 Pa. 513.
W.Va.—Slaven v. Baltimore & O. R. Co., 171 S.E. 818, 114 W.Va. 315.
10 C.J. p. 925 note 17.

49. Cal.—Williams v. East Bay Motor Coach Lines, App., 60 P.2d 320.

Walking on wrong side of street

Where motorbus stopped several feet from curb because of water flowing in gutter, and passengers who alighted were struck by automobile while walking toward destination in street, bus operator was not negligent in failing to anticipate that passengers would violate Vehicle Act by walking on right-hand side of street.—Williams v. East Bay Motor Coach Lines, Cal.App., 60 P.2d 320.

50. La.—Deblanc v. Texas & P. R. Co., 6 La.App. 433.
Or.—Lewis v. Pacific Greyhound Lines, 34 P.2d 616, 147 Or. 588, 96 A.L.R. 718.
Pa.—Seltzer v. Philadelphia & R. Ry. Co., 69 Pa.Super. 309.
Va.—Davidson v. Washington & O. D. Ry., 105 S.E. 669, 129 Va. 99.
10 C.J. p. 925 note 18.

51. Pa.—Seltzer v. Philadelphia & R. Co., 69 Pa.Super. 309.
Va.—Davidson v. Washington & O. D. Ry., 105 S.E. 669, 129 Va. 99.
10 C.J. p. 925 note 19.

52. Conn.—Vaughn v. Healy, 182 A. 166, 120 Conn. 589.

Signaling the carrier's vehicle to stop may not render one a passenger within the rule stated in the text.
Conn.—Vaughn v. Healy, 182 A. 166, 120 Conn. 589.
Ga.—Atlanta Northern Ry. Co. v. Brown, 125 S.E. 465, 159 Ga. 212, reversing Brown v. Atlanta Northern Ry. Co., 120 S.E. 677, 31 Ga.App. 429, and former judgment vacated Brown v. Atlanta N. Ry. Co., 125 S.E. 795, 33 Ga.App. 194.

At regular stopping place

Steam or interurban railroad must use greater care for safety of intending passengers at regular stopping places than elsewhere.—Aydlott v. Key System Transit Co., 286 P. 456, 104 Cal.App. 621.

53. Ga.—Georgia R. & Banking Co. v. Brooks, 119 S.E. 424, 30 Ga.App. 692.

54. W.Va.—Ballard v. Charleston Interurban R. Co., 169 S.E. 524, 113 W.Va. 660.

55. Mo.—Gatt v. Kansas City Rys. Co., 222 S.W. 827.

56. Mo.—Gatt v. Kansas City Rys. Co., supra.

57. U.S.—Chesapeake & O. Ry. Co. v. Burton, C.C.A.W.Va., 50 F.2d 730.
Ala.—Hammett v. Birmingham Ry., Light & Power Co., 81 So. 22, 202 Ala. 520.
Conn.—Roden v. Connecticut Co., 155 A. 721, 113 Conn. 408.
Or.—Lewis v. Pacific Greyhound Lines, 34 P.2d 616, 147 Or. 588, 96 A.L.R. 718.
Pa.—Tiers v. Pennsylvania R. Co., 141 A. 487, 292 Pa. 522.
Wash.—Welsh v. Spokane & I. E. R. Co., 157 P. 679, 91 Wash. 260, L.R.A.1916F 484.
10 C.J. p. 925 note 20.

Another statement of rule

"When . . . the duty of the carrier to provide a safe place to alight has been fulfilled and the passenger has left the vehicle, it ceases to owe to him any duty other than that which it owes to any person coming within the range of its activities, not to do him injury by failure to exercise reasonable care."—Roden v. Connecticut Co., 155 A. 721, 722, 113 Conn. 408.

senger while reboarding a train, after alighting in reliance on misinformation by a trainman as to the name of the station, the same duty as to other passengers about to board the train;[58] and generally where a carrier misleads a passenger with reference to the time, the place, and the safety of boarding or alighting, it is liable for the injuries sustained.[59]

Duty to select safe place for boarding and alighting. A carrier is required not only to set apart, construct, and maintain, on its own premises, a safe place for boarding or alighting from its vehicles, see supra § 716, but is also under a duty in other respects to see that the place at which passengers are invited to board or alight from vehicles of the carrier is safe for that purpose.[60] For example, as respects passengers boarding or alighting from its vehicles, a carrier has the duty of selecting a safe place to stop its vehicles whether it is the usual place or not, if it is one at which the passenger is expressly or impliedly invited to board or alight.[61] In furtherance of this duty the carrier should stop its vehicles at the station platform,[62] or at another reasonably safe and convenient place.[63] However, where a railroad as carrier has no control over conditions existing at a station where such carrier is required to pick

Intoxicated passenger

Where a passenger in an interurban train was injured after safely leaving train in an intoxicated condition, the carrier's servants having no knowledge of his incapacity, it was held that the carrier was not liable.—Welsh v. Spokane & I. E. R. Co., 157 P. 679, 91 Wash. 260, L.R.A. 1916F 484.

After safely alighting on station platform

Pa.—Tiers v. Pennsylvania R. Co., 141 A 487, 292 Pa. 522.

58. Mich.—Foley v. Detroit, etc., R. Co., 146 N.W. 186, 179 Mich. 586.

59. N.J.—McCarron v Erie R. Co., 159 A. 807, 10 N.J.Misc. 498.
10 C.J p 925 note 16.

Place to alight

Misdirections by a railroad's servants in charge of a train as to the proper place for passengers to get off may render the road liable to one who, acting in reasonable reliance on the directions, is injured.—Clayton v. Philadelphia, B. & W. R. Co., 106 A. 577, 7 Boyce, Del., 343.

60. Ark.—Davis v. Kelly, 237 S.W. 698, 152 Ark. 151.
Conn.—Roden v. Connecticut Co., 155 A. 721, 113 Conn. 408.
Ga.—Locke v. Ford, App., 187 S.E 715.
La.—Hamilton v. Louisiana Ry & Nav. Co., 85 So 611, 147 La. 616.
Minn.—Lentz v Minneapolis & St. Paul Suburban R. Co., 160 N.W. 794, 135 Minn. 310
Mo.—Gatt v. Kansas City Rys. Co., 222 S.W. 827.
N.J.—Malzer v. Koll Transp. Co., 156 A. 639, 108 N.J.Law 296—Kinder v. Erie R. Co., 137 A. 88, 103 N.J. Law 316—Gore v. Delaware, L & W. R. Co., 98 A. 389, 89 N.J.Law 224—Spofford v. Central R. Co. of New Jersey, 98 A. 246, 89 N.J.Law 273—Kinder v. Erie R. Co., 146 A 923, 7 N.J.Misc. 637, reversed on other grounds 162 A. 387, 109 N.J. Law 469.
Or.—Lewis v. Pacific Greyhound Lines, 34 P.2d 616, 147 Or. 588, 96 A.L.R. 718.
Pa.—O'Malley v. Laurel Line Bus Co., 166 A. 868, 311 Pa. 251—Chamberlain v. Director General of Railroads, 118 A. 550, 275 Pa. 47.
Tex.—Texas & N. O Ry Co. v. Rooks, Com.App., 292 S.W 536, affirming, Civ.App., 283 S.W. 622, and rehearing denied, Com App., 293 S. W. 554—St. Louis Southwestern Ry. Co. of Texas v. Woodall, Com. App., 207 S.W. 84, reversing, Civ. App., 159 S.W 1012—San Antonio & A. P. Ry. Co. v. Wiuvar, Civ. App., 257 S W. 667.
10 C.J. p 914 note 40, p 924 note 15 [a].

"**In other words,** it must exercise . . . care in ascertaining whether or not the place it discharges its passengers is reasonably safe."—Caley v. Kansas City, 48 S W.2d 25, 26, 226 Mo.App. 934.

Matters to be considered

Among the circumstances which may be considered in determining whether a carrier has furnished a reasonably safe place to alight are the age, weight, and condition of the passenger as well as the bundles which he may be carrying.—Barlow v. Salt Lake & U R. Co, 194 P. 665, 57 Utah 312.

61. U.S.—Davis v. Olson, C C.A Minn., 298 F. 921.
Ark.—Davis v. Kelly, 237 S.W. 698, 152 Ark. 151.
Ga.—Locke v. Ford, App, 187 S.E 715.
La.—Hamilton v. Louisiana Ry. & Nav. Co., 85 So. 611, 147 La. 616
Mo.—Gatt v. Kansas City Rys. Co, 222 S W. 827.
N.J.—Malzer v. Koll Transp. Co, 156 A. 639, 108 N.J Law 296.
Okl.—Muskogee Electric Traction Co v. Latty, 187 P. 491, 77 Okl. 156.
Or.—Lewis v. Pacific Greyhound Lines, 34 P.2d 616, 147 Or. 588, 96 A.L R. 718.
Pa.—O'Malley v. Laurel Line Bus Co., 166 A 868, 311 Pa. 251.
10 C.J p 914 notes 41 [a], 44.

Not an absolutely safe place but the safest practicable place under the circumstances must be selected —Davis v. Kelly, 237 S.W. 698, 152 Ark 151.

62. Ark.—Davis v Kelly, supra.
Ga.—Georgia R & Banking Co. v Brooks, 119 S E. 424, 30 Ga App 692.
La.—Hamilton v. Louisiana Ry. & Nav. Co., 85 So. 611, 147 La. 616.
Mo.—Payne v. Davis, 252 S W. 57, 298 Mo 645
Pa.—Miller v Lehigh Valley R Co, 138 A. 89, 290 Pa 130.
Tex.—St. Louis Southwestern Ry Co of Texas v. Woodall, Com App., 207 S W. 84, reversing, Civ App., 159 S.W. 1012.
10 C J. p 915 note 45.

Lateness of train no excuse

The fact that a train is late affords a carrier no excuse for failing to discharge its duty to stop at a station platform, so that passengers may safely alight.—Davis v. Kelly, 237 S W. 698, 152 Ark. 151.

Part of train nearest station

A carrier may determine the part of the train to be nearest the station at stops, having due regard for the convenience of the traveling public, providing reasonably safe walk ways are provided from the place of egress to the station.—Anderson v. Atlantic Coast Line R. Co., 77 S.E 402, 161 N C 462

63. Ark.—Davis v. Kelly, 237 S.W. 698, 152 Ark. 151.
La.—Hamilton v. Louisiana Ry & Nav Co, 85 So. 611, 147 La. 616.
10 C.J. p 915 note 46.

Highway crossing

Where it was the custom of a carrier to stop interurban cars at a highway crossing for the accommodation of passengers, it was required to exercise reasonable care to enable passengers to enter or alight with as little danger as practicable.—Muskogee Electric Traction Co. v. Latty, 187 P. 491, 77 Okl. 156.

up passengers, it is not liable for injuries resulting to one about to board a train at such station,[64] and the liability of a carrier which has stopped its vehicle at a place which is safe as regards the carrier's right of way does not extend to injuries resulting from conditions in an adjacent area outside the control of the carrier;[65] nor may a failure to stop a train coach opposite a station platform, without more, constitute negligence as regards a passenger who is injured while in the act of alighting from such coach.[66] Where the conditions under which particular classes of carriers must operate their vehicles require that passengers boarding or alighting therefrom be picked up from, or discharged on, the traveled portions of public streets or highways outside the control of such carriers, they are not usually liable for injuries sustained by such passengers by reason of dangerous conditions existing in such areas;[67] nor in such cases is the carrier ordinarily required to exercise the high degree of care which is required of carriers who control the place of boarding or alighting,[68] it being usually sufficient that the carrier use reasonable care to see that the place selected for picking up or discharging passengers is safe for that purpose,[69] and that while the vehicle is stopped the carrier exercise ordinary care or care in proportion to the danger likely to be encountered by the passenger in the particular situation.[70] However, where the passenger is a child of tender years it has been held that the carrier must exercise the highest degree of care for his safety as regards the place selected for his alighting.[71] Of course, a carrier who deposits a passenger in the street at a place which the carrier knows will reasonably expose him to unusual and unnecessary peril may be liable for injuries resulting therefrom.[72] Stopping on a curve may not, without more, constitute negligence as to a passenger injured in boarding, or alighting from, the vehicle of a carrier.[73] The care required of carriers as respects passengers boarding or alighting at places other than regular stopping places is considered infra § 731. The duty of a street railroad as a carrier of passengers to select a safe place for them to board or alight is discussed infra § 733.

Operation of vehicle generally. In addition to the duties of a carrier in starting or stopping its

64. U.S.—Maryland Dredging & Contracting Co. v. Hines, C C A.Md., 269 F. 781.

Control by military authorities

A carrier, which furnished to the United States government under contract a train to transport its workmen to a city from a station on the reservation, which was subject to exclusive control of military authorities and policed by them, is not liable for injuries to a passenger by reason of insufficient policing.—Maryland Dredging & Contracting Co. v. Hines, C.C.A.Md., 269 F. 781.

65. Ind.—Terre Haute, Indianapolis & Eastern Traction Co v. Auler, 188 N E 572, 206 Ind. 423.

Toleration not amounting to control

That the carrier tolerated the end of a plank to rest on its property was not sufficient to charge the carrier with liability for injury to a passenger, by reason of defects in the plank, on alighting from a car.—Terre Haute, Indianapolis & Eastern Traction Co. v. Auler, 188 N.E. 572, 206 Ind. 423.

66. Mass.—Carlson v. Boston & M. R. R., 168 N E. 171, 269 Mass 60

Reason for rule

"It is common knowledge that all cars in a long train ordinarily cannot be stopped opposite a station platform."—Carlson v. Boston & M. R. R., 168 N E 171, 173, 269 Mass 60.

Several hundred feet

That coach stopped several hundred feet before reaching station platform was held not to show negligence as regards liability for passenger's death.—Carlson v. Boston & M. R R, 168 N.E. 171, 269 Mass. 60

Alighting as train leaves station

A carrier which is not otherwise negligent in starting its train is not liable for injuries sustained by a passenger who alights from the train as it leaves a station notwithstanding the coach on which such passenger was riding had not stopped opposite the station platform.—Carlson v. Boston & M. R. R., 168 N.E 171, 269 Mass. 60.

67. Ind.—Hudnut v. Indiana De Luxe Cab Co., 182 N.E. 711, 98 Ind App 44.
Ky.—Hensley v. Braden, 91 S.W.2d 34, 262 Ky. 672.
N.J.—Garvey v Public Service Coordinated Transport, 179 A. 33, 115 N.J Law 280.

Stop in compliance with ordinance

The rule stated in the text is particularly applicable where the vehicle is stopped at the particular point in compliance with a municipal ordinance rather than by "selection" of the carrier itself.—Garvey v. Public Service Co-ordinated Transport, 179 A. 33, 115 N.J.Law 280.

68. Ind.—Hudnut v. Indiana De Luxe Cab Co., 182 N.E. 711, 98 Ind. App. 44.
Ky.—Hensley v. Braden, 91 S.W.2d 34, 262 Ky. 672.

69. Del.—Cooke v. Elk Coach Line, 180 A. 782.
Ind.—Hudnut v. Indiana De Luxe Cab Co., 182 N.E. 711, 98 Ind App. 44.
Ky.—Hensley v. Braden, 91 S.W.2d 34, 262 Ky. 672.
La.—Durieu v New Orleans Public Service, 7 La App. 276
N.J.—Garvey v. Public Service Coordinated Transport, 179 A. 33, 115 N.J.Law 280—Malzer v. Koll Transp. Co., 156 A. 639, 108 N.J. Law 296.

Uneven and cracked pavement

That surface of pavement is uneven and cracked does not establish carrier's negligence in providing unsafe landing place for passengers.—Durieu v. New Orleans Public Service, 7 La.App. 276.

70. Ind.—Hudnut v. Indiana De Luxe Cab Co., 182 N.E. 711, 98 Ind. App. 44.
Ky.—Hensley v. Braden, 91 S W.2d 34, 262 Ky. 672.

71. Ky.—Taylor v. Patterson's Adm'r, 114 S.W.2d 488, 272 Ky. 415.

Child less than seven years of age

Ky.—Taylor v. Patterson's Adm'r, 114 S W.2d 488, 272 Ky. 415.

72. Conn.—Roden v. Connecticut Co., 155 A. 721, 113 Conn. 408.
Ga.—Locke v. Ford, App., 187 S.E. 715

73. Mass.—Stanley v. Boston Elevated Ry. Co, 143 N E. 338, 248 Mass. 494.
Minn.—Lentz v. Minneapolis & St. Paul Suburban R. Co., 160 N.W. 794, 135 Minn. 310.

vehicles, in particular situations, as regards passengers who may be boarding or alighting, see infra §§ 729–731; and to avoid injuries to such passengers by the operation of other trains and cars, see infra § 726. A carrier must generally so manage and operate the vehicle which such passengers are boarding or alighting from as to avoid injuring them.[74] For example, a carrier is under a duty to operate its vehicles in such manner as to avoid injury to passengers waiting to board such vehicles at a station.[75] In operating a train as it approaches a station to pick up passengers the carrier may, however, properly assume that passengers about to board the train will remain out of its path,[76] so that the failure to maintain a constant lookout in order to discover whether such persons shall heedlessly walk too close to the approaching train does not constitute negligence;[77] nor is a carrier required to assume that a passenger waiting to board an approaching vehicle will, in signaling it to stop, lean over the track.[78]

A carrier may be liable for injuries sustained by an alighting passenger as a result of the slamming of the door of the vehicle as he alights.[79] On the other hand, in the absence of negligence on the part of a carrier, it is not liable for injuries to a passenger by the closing of a car door as he was alighting.[80]

§ 724. Duty to Warn as to Danger

A carrier may have the duty to warn boarding and alighting passengers of dangers when they are known to the carrier and not to such passengers.

It is the carrier's duty to warn a boarding or an alighting passenger of dangers of which it knows or ought to knew, and of which the passenger is ignorant,[81] especially as to dangers which exist at a place other than a regular stopping place.[82] Accordingly it has been held that the carrier may be required to warn boarding or alighting passengers of the presence of ice on the steps of the vehicle,[83] danger from passing vehicles,[84] the ap-

74. Ala.—Alabama Great Southern R. Co. v. Bell, 76 So 920, 200 Ala. 562.

75. Ala.—Alabama City, G. & A. Ry. Co. v. Bessiere, 72 So. 325, 197 Ala. 5.
Cal.—Wilkinson v. United Railroads of San Francisco, 232 P. 131 195 Cal. 185—Aydlott v. Key System Transit Co., 286 P. 456, 104 Cal. App. 621.
Me.—Verrill v. Androscoggin Electric Co., 102 A. 179, 116 Me. 519.
Tex.—Texas Electric Ry. v. Stewart, Civ.App., 217 S.W. 1081, error refused.

Failure to maintain lookout
Where engineer, proceeding through populous city and approaching populous station, kept no lookout to see whether passengers might be crowded so near tracks as to be injured, negligence may be inferred from such failure.—Alabama Great Southern R. Co. v. Bell, 76 So 920, 200 Ala. 562.

Approaching station at excessive speed
That engineer approached densely crowded station at speed of from fifteen to twenty miles per hour was held to warrant finding of negligence. —Alabama Great Southern R. Co. v. Bell, 76 So. 920, 200 Ala. 562.

Statute or ordinance regulating speed
Where defendant's employee, having transportation, was killed by one of defendant's interurban cars while crossing the track to board the same, the absence of statute or ordinance regulating the speed of defendant's cars while passing the station was immaterial, the operatives of the car owing the duty of using ordinary care to discover and avoid injuring persons who might be expected to be at the station.—Texas Electric Ry. v. Stewart, Tex.Civ.App., 217 S.W. 1081, error refused.

76. Ala.—Williford v. Atlantic Coast Line R. Co., 113 So. 44, 216 Ala 309.
Kan.—Turner v. Laying, 294 P. 665, 132 Kan. 127

77. Ala.—Williford v. Atlantic Coast Line R. Co., 113 So. 44, 216 Ala. 309.

78. Kan.—Turner v. Laying, 294 P. 665, 132 Kan. 127.

79. N.Y.—Allegeier v. Nerrie, 291 N.Y.S. 195.

80. Mass.—MacGill-Allen v. New York, N. H. & H. R. Co., 118 N.E. 248, 229 Mass 162.

Grade of three per cent does not show negligence with relation to passenger when door closed on hand, nor require brakeman at door of each car where passengers are alighting. —MacGill-Allen v. New York, N. H. & H. R. Co., 118 N.E. 248, 229 Mass. 162.

81. La.—Gates v. New Orleans Ry. & Light Co., 75 So. 1002, 141 La. 946.
Mo.—Payne v. Davis, 252 S.W. 57, 298 Mo. 645
N.J.—Alexander v. Matteucci, 135 A. 820, 5 N.J.Misc. 183.
Ohio.—Cleveland-Akron-Canton Bus Co. v Walker, 165 N.E. 373, 30 Ohio App 411
10 C.J. p 925 note 25.

The Corpus Juris text is quoted with approval in Alabama Power Co. v. Hall, 103 So. 867, 869, 212 Ala. 638.

82. Mich.—Chalker v. Detroit, G. H. & M. Ry Co., 173 N.W. 532, 207 Mich 138
Mo.—Payne v Davis, 252 S.W. 57, 298 Mo 645
10 C.J. p 926 note 26.

Danger by reason of darkness
Where disembarking place during repairs to bridge over railroad cut was made dangerous by darkness, carrier had duty of warning alighting passengers, and in this connection it was immaterial whether passenger, who fell into cut and was killed, was invited to alight in darkness, or whether place was thereafter made dark by turning out lights of street car before passenger had reasonable opportunity to pass beyond zone of danger.—Alabama Power Co. v. Hall, 103 So. 867, 212 Ala 638.

Passenger continuing journey
Street railway company allowing passengers, alighting at bridge, to continue passage in cars at opposite end must warn passengers of danger at such stopping place.—McManus v. Boston Elevated Ry. Co., 160 N.E. 529, 262 Mass. 519.

83. Conn.—Dunne v. Connecticut Co., 195 A. 183
Mich.—Chalker v. Detroit, G. H. & M Ry Co., 173 N.W. 532, 207 Mich 138

84. Miss.—Gulfport & Mississippi Coast Traction Co v Raymond, 128 So. 327, 157 Miss. 439.

At unusual place
Miss.—Gulfport & Mississippi Coast Traction Co. v. Raymond, 128 So. 327, 157 Miss. 439.

proach of a particular vehicle,[85] the slippery condition of the ground at the point where the passenger is about to alight,[86] and the presence of a dangerous crowd at that place.[87] So, where a street car company stops its car at a place where there are obstructions or defects in the street of which it knows or should know, but of which an alighting passenger is ignorant, it may be its duty to warn him thereof;[88] and there may exist circumstances under which a street railroad company shall be required to warn an alighting passenger of the icy condition of a street.[89] Where a carrier desires passengers to leave a car by a particular door or exit, it should notify them of that fact and warn them against leaving by another door or exit.[90] It is ordinarily the duty of a railroad company to give notice by signal or otherwise that its train, which has been stopped to pick up or discharge passengers, is about to start, particularly where there are special circumstances rendering a signal or warning reasonably necessary,[91] and especially where such warning is required by statute.[92]

On the other hand, where dangers confronting boarding or alighting passengers are as obvious to them as to the carrier, it has no duty to issue a warning as to such dangers.[93] For example, a carrier is not under any duty to warn passengers of the danger involved in attempting to board or alight from a moving train or car.[94] So carriers, such as those operating street cars, buses, or taxicabs, picking up and discharging passengers in public streets and highways, are not ordinarily under any duty to warn boarding or alighting passengers of obvious street dangers,[95] such as those which arise from the operation of other vehicles in the street or highway,[96] or from the ordinary

85. N.J.—Alexander v. Matteucci, 135 A. 820, 5 N.J.Misc. 183
Ohio—Cleveland-Akron-Canton Bus Co. v. Walker, 165 N.E. 373, 30 Ohio App. 411.
Warning by other trains or cars see infra § 726.

86. Mich.—Chalker v. Detroit, G. H. & M. Ry. Co., 173 N.W. 532, 207 Mich. 138.
Where step is high
Mich.—Chalker v. Detroit, G. H. & M. Ry. Co., 173 N.W. 532, 207 Mich. 138.

87. Ga.—Georgia Ry. & Power Co. v. Murphy, 110 S.E. 680, 28 Ga. App. 173.
Turbulent crowd
Ga.—Georgia Ry. & Power Co. v. Murphy, 110 S.E. 680, 28 Ga.App. 173.
Care in protection from crowds at stations and the like generally see supra § 720

88. Ala.—Alabama Power Co. v. Hall, 103 So. 867, 212 Ala. 638—Mobile Light & R. Co. v. Therrell, 88 So. 677, 205 Ala. 553.
Ky.—Mayhew v. Ohio Valley Electric Ry. Co., 254 S.W. 202, 200 Ky. 105
La.—Gates v. New Orleans Ry. & Light Co., 75 So. 1002, 141 La. 946
Mass.—Williamson v. Boston Elevated Ry. Co., 156 N.E. 22, 259 Mass. 229.
10 C.J. p 926 note 27.
Iron stake near track
La.—Gates v. New Orleans Ry. & Light Co., 75 So. 1002, 141 La. 946.

Unless glaringly obvious, street railroad company must warn alighting passengers of dangerous defects in the street at the place where the car is stopped.—Caley v. Kansas City, 48 S.W.2d 25, 226 Mo.App. 934.

89. N.H.—Wilson v. Berlin St. Ry., 149 A. 602, 84 N.H. 285
Where company required to remove ice
Under an ordinance requiring a street railroad company to remove ice and snow from its "tracks," including that part of the street where a passenger would step in alighting from a car, the company may be required to warn an alighting passenger of the existence of icy ruts of which the passenger has no knowledge.—Wilson v. Berlin St. Ry., 149 A. 602, 84 N.H. 285.

90. N.C.—Kearney v. Seaboard Air Line R. Co., 74 S.E. 593, 158 N.C. 521.
10 C.J. p 926 note 28.

91. Tenn.—Louisville & N. R. R. Co. v. Powell, 11 Tenn.App. 253
10 C.J. p 939 note 24.

92. Ala.—Southern R. Co. v. Norwood, 64 So. 604, 186 Ala. 49.
10 C.J. p 939 note 25.

93. Cal.—Williams v. East Bay Motor Coach Lines, App., 60 P.2d 320—Choquette v. Key System Transit Co., 5 P.2d 921, 118 Cal.App. 643
Ind.—Terre Haute, I. & E. Traction Co. v. Evans, 161 N.E. 671, 87 Ind. App. 324
Ky.—Hensley v. Braden, 91 S.W.2d 34, 262 Ky. 672.
Wash.—Lindgren v. Puget Sound International Ry. & Power Co., 253 P. 791, 142 Wash. 546.
Wis.—Downs v. Northern State Power Co., 228 N.W. 471, 200 Wis. 401.

94. Mass.—Elger v. Boston Elevated Ry. Co., 115 N.E. 242, 226 Mass. 84
Neb.—McCoy v. Omaha & C. B. St. Ry. Co., 177 N.W. 791, 104 Neb. 468.
N.H.—Wright v. Boston & M. R. R., 139 A. 370, 83 N.H. 136, 56 A.L.R. 975
N.Y.—Mearns v. Central Railroad of New Jersey, 57 N.E. 292, 163 N.Y. 108, reargument denied 58 N.E. 1089, 164 N.Y. 598.
10 C.J. p 927 note 33

Practice of warning passengers seen to undertake to leave moving vehicle does not establish duty to warn.—Wright v. Boston & M. R. R., 139 A. 370, 83 N.H. 136, 56 A.L.R. 975.

95. Minn.—Ruddy v. Ingebret, 204 N.W. 630, 164 Minn. 40, 44 A.L.R. 159.
Tex.—Wittkower v. Dallas Ry. & Terminal Co., Civ.App., 73 S.W.2d 867, error refused.

96. Cal.—Williams v. East Bay Motor Coach Lines, App., 60 P.2d 320.
Conn.—St. John v. Connecticut Co., 131 A. 396, 103 Conn. 641.
Ind.—Terre Haute, I. & E. Traction Co. v. Evans, 161 N.E. 671, 87 Ind. App. 324.
Ky.—Hensley v. Braden, 91 S.W.2d 34, 262 Ky. 672
Minn.—Ruddy v. Ingebret, 204 N.W. 630, 164 Minn. 40, 44 A.L.R. 159
Mo.—Smuzynski v. East St. Louis Ry. Co., App., 93 S.W.2d 1058.
Neb.—Jacobson v. Omaha & Council Bluffs St. Ry. Co., 191 N.W. 327, 109 Neb. 356, 31 A.L.R. 563.
N.J.—Trimboli v. Public Service Coordinated Transport, 168 A. 572, 111 N.J.Law 481.
Ohio—Cleveland Ry. Co. v. Karbole, 181 N.E. 889, 125 Ohio St. 467—Reining v. Northern Ohio Traction & Light Co., 140 N.E. 84, 107 Ohio St. 538, affirming Northern Ohio Traction & Light Co. v. Reining, 16 Ohio App. 406.
Tex.—Wittkower v. Dallas Ry. &

condition of the street.[97] A carrier may not be required to warn alighting passengers that the vehicle on which they are riding has not yet come to a stop;[98] nor may negligence be predicated on a bus driver's failure to give a passenger warning of ice on the step where the passenger saw the ice before she stepped on it.[99] A street railway company is not under any duty to warn passengers boarding or alighting from its cars of the danger from the overhang swing of the rear of a car as it rounds a curve.[1] Of course, the carrier may not be held liable for failure to warn an alighting passenger of small objects which may temporarily happen to be on the street when the carrier does not know, and has no reason to know, of the presence of such objects.[2] In general there is no duty to instruct or warn passengers of the proper or safe mode of entering or leaving cars, it being the duty of the passenger to comply with the usual reasonable and known regulations of the carrier with reference to safe entrance and exit.[3] Where the construction of a vehicle is such as to indicate to the passenger the particular exit from which he is expected to alight, the carrier is not under a duty to warn him not to use another exit.[4] There is no general rule requiring a warning to be given a passenger before starting a street car,[5] and in the absence of knowledge that passengers are boarding or alighting, if the train has been stopped a sufficient time for them to get aboard or alight, the train may be started without further notice or warning.[6] Where there was no reason to suppose that a passenger would attempt to alight from a vehicle temporarily halted at a place other than a regular stopping place, the carrier was not under a duty to warn such passenger of his danger from the sudden starting of the vehicle.[7]

Sufficiency of warning. Where a warning to

Terminal Co., Civ.App., 73 S.W.2d 867, error refused

Wash.—Lindgren v. Puget Sound International Ry. & Power Co., 253 P. 791, 142 Wash 546.

Wis.—Downs v. Northern States Power Co., 228 N.W. 471, 200 Wis. 401.

10 C.J. p 925 note 23.

Stop other than regular stopping place does not alter the text rule.—Lindgren v. Puget Sound International Ry. & Power Co., 253 P. 791, 142 Wash. 546.

Probability of violation of rules of road

Street car operators owe no duty to notify passengers in alighting that automobile is likely to violate the rules of the road by passing on wrong side of street.—Cleveland Ry. Co. v. Arrison, 159 N.E. 580, 26 Ohio App. 359.

Reasons for rule

"Such a warning would, in most instances, be utterly superfluous. A rule requiring the company to watch for and warn its passengers as to all such dangers would be impracticable and extremely burdensome. The danger from moving vehicles and from other independent agencies operating upon the street is an ever-present one, intermittent in character, varying in degree with each occasion, and is of such kind that previous warning by the company of each specific danger as it arises would become practically impossible. The danger is not constant, but often arises suddenly, and is only momentary. The person encountering danger, having alone the control over his own movements, must rely upon himself and upon his own precaution and judgment. The responsibility of the company should be coextensive with its practical control. It is impracticable for another to take the responsibility of attempting to control and guard, as to such dangers, the person able to take care of himself. The passenger is in a much better position to guard against those dangers than is the company. The passenger standing upon the step or at the door, in readiness to alight, has a full view of the street in all directions. If there are approaching vehicles, it is solely within his power to fix the exact moment when he shall alight from the car."—Jacobson v. Omaha & Council Bluffs St Ry Co., 191 N.W. 327, 331, 109 Neb. 356.

97. Mass.—Thompson v. Gardner, etc., R. Co., 78 N.E. 854, 193 Mass. 133, 118 Am.S.R. 459.
10 C.J. p 925 note 24.

98. N.Y.—Mearns v. Central Railroad of New Jersey, 57 N.E. 292, 163 N.Y. 108, reargument denied 58 N.E. 1089, 164 N.Y. 598.

"Ordinarily, passengers have no difficulty in determining whether a train has stopped. They are usually as sensitive to a moving car as any guard or conductor could be, and heretofore it has never been understood to be the duty of a railroad company to expressly warn its passengers of the starting or of the stopping of the train"—Mearns v. Central Railroad of New Jersey, 57 N.E. 292, 293, 163 N.Y. 108, reargument denied 58 N.E. 1089, 164 N.Y. 598

99. Conn.—Byrne v Connecticut Co., 195 A. 184, 123 Conn 304.

1. Cal.—Dwyer v. Los Angeles Ry Corporation, 2 P.2d 468, 115 Cal. App. 709.

Mass.—Fairbanks v Boston Elevated Ry. Co., 129 N.E. 367, 237 Mass 127.

Pa.—Duffy v. Philadelphia Rapid Transit Co., 140 A. 496, 291 Pa. 564.

Warning by loader unnecessary

Cal.—Dwyer v. Los Angeles Ry. Corporation, 2 P.2d 468, 115 Cal.App 709

2. Ky.—Kentucky Traction & Terminal Co. v. Soper, 286 S.W. 776, 215 Ky. 536.

Small stone or pebble

Ky.—Kentucky Traction & Terminal Co. v. Soper, 286 S.W. 776, 215 Ky. 536.

3. Ind.—Pere Marquette R. Co. v Strange, 84 N.E. 819, 85 N.E 1026, 171 Ind. 160, 20 L.R.A.,N.S., 1041.
10 C.J. p 925 note 22.

4. Va.—Davidson v. Washington & O. D Ry., 105 S.E. 669, 129 Va. 99.

Mail and baggage compartment

Va.—Davidson v. Washington & O D Ry., 105 S.E 669, 129 Va 99.

Unusually high step

Where an electric railway company was not responsible for the use of the motorman's stool by passengers alighting at a door not intended for the use of passengers, it was under no duty to warn a passenger of the unusually long step from the top of the stool to the ground.—Davidson v. Washington & O D. Ry., 105 S.E. 669, 129 Va 99

5. Mass.—Davey v. Greenfield, etc., R. Co., 58 N.E. 172, 177 Mass. 106
10 C.J. p 939 note 27.

6. Mo.—May v. Chicago, R. & Q R. Co., 225 S.W. 660, 284 Mo. 508.
10 C.J. p 939 note 26.

7. Mass.—Bush v. Boston Elevated

passengers is necessary, a general warning, such as will be likely to reach all the passengers on their way in or out, is ordinarily regarded as sufficient.[8] Where an opening in a train at a station has been made for the passage of persons, the duty to give warning before closing the space is not, on the other hand, satisfied by merely ringing the engine bell or sounding the whistle.[9] A warning to an alighting passenger of the approach of other vehicles of the carrier coming from a particular direction was no assurance of safety as regards another vehicle coming from another direction.[10]

§ 725. Boarding or Alighting from Moving Train or Car

Generally a carrier is not liable for injuries sustained by persons while attempting to board or alight from a moving train or car in the absence of some direction, invitation, permission, or compulsion by the carrier.

As a general rule a carrier's employees have a right to assume that a passenger will not attempt to board or alight from a moving train or car,[11] and are not negligent in failing to warn him against doing so, see supra § 724, or in failing to use other means to restrain him from doing so,[12] or to stop the vehicle,[13] especially where it does not know, or have reason to know, of his peril or intention to board or alight from the moving train or car,[14] and where the passenger attempts to get off or on at a place other than a regular stopping place,[15] or from the wrong side of the vehicle.[16] The carrier is not liable, even when its employees have knowledge of the injured person's intent, if they use proper care to prevent him from boarding or alighting while the train or car is in motion,[17] or to assist him to escape from a dangerous position in which he has placed himself.[18]

On the other hand, a carrier may be liable for injuries sustained by passengers in boarding or alighting from moving trains or cars, and sometimes, under applicable statute or ordinance, where the carrier's employees know, or have reason to know, of the passenger's intention and that he is ignorant of his peril in attempting to board or alight,[19] and to manage a train or car in such manner as to create an appearance of imminent danger of a collision, thereby inducing passengers to jump from the train or car, may constitute negligence for which the carrier is liable.[20]

Direction, invitation, permission, or compulsion. Generally, in order that a carrier may be liable for injuries sustained by a passenger in attempting to board a moving vehicle, there must be some order, request, or direction by the carrier's employees to board the vehicle.[21] Hence, in the ab-

Ry. Co., 123 N.E. 613, 232 Mass. 593.

8. N.Y.—Wertheimer v. Interborough Rapid Transit Co., 102 N.Y.S. 706, 52 Misc. 540.
10 C.J. p 926 note 29.

9. Ky.—Louisville, etc., R. Co. v. Smith, 122 S.W. 806, 135 Ky. 462.

10. Mass.—Mercier v. Union St. Ry. Co., 119 N.E. 764, 230 Mass. 397.

11. U.S.—Palen v. Wheelock, C.C.A. Mo., 13 F.2d 34.
La.—Smith v. New Orleans Ry. & Light Co., 91 So. 514, 150 La. 1070.
Mo.—Gunn v. United Rys. Co. of St. Louis, 193 S.W. 814, 270 Mo. 517, L.R.A.1917D 1131.
N.Y.—Mearns v. Central Railroad of New Jersey, 57 N.E. 292, 163 N.Y. 108, reargument denied 58 N.E. 1089, 164 N.Y. 598.
10 C.J. p 926 note 32.

Trespasser

The only duty which a carrier owes a trespasser attempting to become a passenger by boarding a rapidly moving train is not willfully or wantonly to injure him.—Lee v. Baker, Tex.Civ.App., 251 S.W. 580.

12. Mo.—Kirby v. United Rys. Co. of St. Louis, 242 S.W. 79.
Tex.—Vivian v. San Antonio, U. & G. R. Co., Civ.App., 196 S.W. 267, error refused.
10 C.J. p 927 note 34.

Partial blindness of a passenger does not require the carrier to provide special means to keep him from leaving the moving train.—Vivian v. San Antonio, U. & G. R. Co., Tex.Civ.App., 196 S.W. 267, error refused.

13. Mo.—Gunn v. United Rys. Co. of St. Louis, 193 S.W. 814, 270 Mo. 517, L.R.A.1917D 1131.
Neb.—O'Connor v. Omaha & C. B. St. Ry. Co., 177 N.W. 838, 104 Neb. 534.

14. U.S.—Palen v. Wheelock, C.C.A. Mo., 13 F.2d 34.
Neb.—O'Connor v. Omaha & C. B. St. Ry. Co., 177 N.W. 838, 104 Neb. 534.
Tex.—Vivian v. San Antonio, U. & G. R. Co., Civ.App., 196 S.W. 267, error refused.
10 C.J. p 927 note 35

Duty to discover intent to board

After boarding, and having given ample opportunity for passengers to do so, employees of a carrier are not required to lean forward out of the vestibule door to discover whether anyone is going to undertake to board the vehicle while it is in motion.—Palen v. Wheelock, C.C.A.Mo., 13 F.2d 34.

15. Ind.—Mishler v. Chicago, S. B. & N. I. Ry. Co., 122 N.E. 657, 188 Ind. 189.
10 C.J. p 927 note 36.

16. Pa.—Chitwood v. Philadelphia & R. Ry. Co., 109 A. 645, 266 Pa. 435.
Tex.—Armitage v. Fort Worth & D. C. Ry. Co., Civ.App., 65 S.W.2d 376, error refused.

Boarding moving train from wrong side

Pa.—Chitwood v. Philadelphia & R. Ry. Co., 109 A. 645, 266 Pa. 435.

Lighting yards

Tex.—Armitage v. Fort Worth & D. C. Ry. Co., Civ.App., 65 S.W.2d 376, error refused.

17. Mass.—Sullivan v. Boston, El. R. Co., 84 N.E. 844, 199 Mass. 73, 21 L.R.A.,N.S., 36.
10 C.J. p 928 note 39.

18. Mo.—Mathews v. Metropolitan St. R. Co., 137 S.W. 1003, 156 Mo. App. 715.
10 C.J. p 928 note 40.

19. Ill.—Little v. Peoria Ry. Co., 215 Ill.App. 385.
10 C.J. p 927 note 37, p 928 note 38.

20. Ala.—Birmingham R., etc., Co. v. Butler, 33 So. 33, 135 Ala. 388.
10 C.J. p 928 note 41.

21. Mo.—Gunn v. United Rys. Co. of St. Louis, 193 S.W. 814, 270 Mo. 517, L.R.A.1917D 1131.

sence of any invitation by a carrier to board its vehicle at a particular place, the carrier has been held not to be liable for injuries, by reason of conditions there existing, to a passenger in attempting to board a moving vehicle at such place.[22] The carrier is, however, liable for the resulting injuries where a passenger attempts to board or alight from a moving train or car, under the direction or invitation of the conductor or other employee in charge thereof,[23] or where he does so under force or apprehension of force,[24] although it is not under all circumstances negligence per se to suggest to a passenger that he alight from the train or car while it is slowly moving,[25] or to permit him to do so.[26] The fact that the next station is announced does not constitute an assurance to passengers that the car has stopped, or an invitation to alight before it has in fact stopped,[27] nor may an open door in a moving vehicle necessarily constitute an invitation to alight while the vehicle is in motion.[28] Whether the opening of a door is an invitation to alight is to be determined by the circumstances of the particular case.[29] That a motorman turns and looks at a passenger who desires to alight from a street car does not constitute an implied invitation to alight while the car is in motion.[30]

§ 726. Operating Other Cars or Trains

In order to avoid injury to passengers boarding or alighting from its trains or cars, a carrier must exercise due care in operating other cars or trains.

Where, on the express or implied invitation of a railroad or street railroad company, passengers go on or near to the tracks in waiting for, getting on, or alighting from, a train or car, it is the duty of the company to operate its trains or cars at such places with such care as not to imperil the safety of such passengers; and if it fails so to do it is liable for injuries caused thereby,[31] and the meas-

Neb.—O'Connor v Omaha & C B. St. Ry Co, 177 N.W. 838, 104 Neb. 534.

22. La.—Smith v. New Orleans Ry & Light Co, 91 So. 514, 150 La 1070

Walk as invitation

A walk adjoining street car tracks on the neutral ground of a street and obviously intended to be used only by employees in opening or closing a switch, was not an invitation to the public to walk there in boarding cars, so as to impose liability on the carrier for injuries sustained by a passenger attempting to board a moving train.—Smith v New Orleans Ry. & Light Co., 91 So. 514, 150 La. 1070.

Space in street between ends of ties

An open space between the ends of the crossties of an electric railroad on neutral ground in a street not maintained as a way for pedestrians was held not dangerous or violative of a municipal ordinance requiring the space occupied by the tracks to be kept in repair, so as to impose liability for injury to a boy stepping therein while attempting to board a moving train.—Smith v. New Orleans Ry. & Light Co, 91 So. 514, 150 La. 1070.

23. Ill.—Little v. Peoria Ry. Co., 215 Ill App. 385.
Iowa—Bersie v. Chicago, M. & St. P. Ry Co., 211 N.W. 250, 202 Iowa 1090.
10 C.J. p 928 note 42.

Compulsion, duress, or coercion need not exist in order to impose on the carrier liability for injuries to a passenger resulting from his alighting from a moving vehicle under the counsel or advice of the carrier's employee—Bersie v. Chicago, M. & St. P. Ry. Co, 211 N.W. 250, 202 Iowa 1090.

Invitation may be tacit as manifested by the conduct of the carrier's employees—Little v. Peoria Ry. Co., 215 Ill.App. 385.

24. Ind.—Louisville, etc., R Co v Wood, 14 N.E. 572, 16 N E 197, 113 Ind 544.
Ky.—Louisville, etc., R. Co. v. Richerson, 14 Ky.L 925.
10 C.J. p 928 note 43.

25. Ill.—Chicago, etc., R. Co. v. Hazzard, 26 Ill 373
Mo.—Wilburn v. St Louis, etc, R. Co, 48 Mo App 224.
Pa.—Rothstein v. Pennsylvania R. Co., 33 A 379, 171 Pa 620
S C—Crosby v. Seaboard Air Line R. Co., 61 S E. 1064, 81 S C. 24.
10 C J. p 928 note 44

26. La.—Gipson v. Shreveport Traction Co., 77 So 129, 142 La 497, L. R.A.1918B 1130.

27. N.Y.—Mearns v. Central R Co. of New Jersey, 57 N.E. 292, 163 N.Y. 108, reargument denied 58 N. E. 1089, 164 N Y 598.
10 C J. p 928 note 45

"Well, we are here"

Where an infirm aged passenger had disclosed his destination to the trainmen, statement of one of them, "Well, we are here," was not an invitation for the passenger to alight, while the train was moving —Vivian v. San Antonio, U. & G. R. Co, Tex.Civ.App, 196 S W. 267, error refused.

28. Iowa—Fitzgerald v. Des Moines City Ry. Co, 207 N.W. 602, 201 Iowa 1302.

Mass.—Elger v Boston Elevated Ry. Co, 115 N E 242, 226 Mass. 84
Mo—Kirby v. United Rys. Co. of St. Louis, 242 S W. 79.

29. Iowa—Fitzgerald v. Des Moines City Ry. Co., 207 N.W. 602, 201 Iowa 1302.

30. Ill.—Busack v. Chicago City Ry Co, 118 N.E. 1041, 283 Ill. 117, L R.A 1918D 416.

31. U.S—Southern Ry. Co. v. Hobson, C C A Ga., 43 F.2d 715
Ala—Montgomery Light & Traction Co v. O'Connor, 85 So. 384, 204 Ala 24
Cal—MacGregor v. Pacific Electric Ry. Co, 59 P 2d 123, 6 Cal.2d 596
Ill—Bernier v. Illinois Cent. R Co, 215 Ill.App. 454, affirmed 129 N. E 747, 296 Ill 464 See Cannon v. Chicago Rys. Co., 205 Ill App. 423
Ind—Indiana Union Traction Co. v Hiatt, 114 N E 478, 65 Ind App 233, rehearing denied 115 N E 101, 65 Ind. 233.
La—Willis v. Vicksburg, S & P. R Co, 38 So. 892, 115 La. 53
Mass.—Poppel v. Boston Elevated Ry. Co, 155 N.E. 267, 258 Mass. 389
Mich—Terrill v. Michigan United Traction Co, 183 N.W. 46, 214 Mich 478—Terrill v. Michigan United Traction Co, 171 N.W 340, 204 Mich 652
N Y—Campbell v. Richmond Light & R Co., 127 N E 271, 228 N Y. 383, reversing 168 N.Y.S. 813, 181 App Div. 320.
Pa—Lasater v. Conestoga Traction Co., 160 A 447, 306 Pa. 500.
10 C J. p 929 note 46.

Care required where headlight out of order

Where headlight of suburban car

ure of care and protection owed to such persons is not affected by the fact that other ways are provided, not requiring the going on or crossing of the track on the company's premises.[32] Thus, where it is necessary or proper for passengers in boarding, or alighting from, a train or car to go on or near to another track on which another train or car is approaching, it is the duty of the carrier's employees to keep a proper lookout,[33] to keep the speed of the approaching train or car under such control as is proper and reasonable under the circumstances and, if necessary, to stop it,[34] and to give such warning by bell, whistle, or otherwise, of its approach, as will reasonably protect the boarding or alighting passengers from injury,[35] particularly where a statute or ordinance requires that such precautions shall be taken.[36] Where a street car is standing discharging passengers, it is the duty of the motorman in charge of an approaching car on a parallel track to have his car under such control that it may be stopped on a moment's notice;[37] and, irrespective of an ordinance requiring such action, the motorman may be required to slacken the speed of his car and give a signal of its approach;[38] but it is not the duty of a carrier to stop its car, or slow up, or give a signal, on every occasion of meeting another car.[39] The duty of servants operating trains or cars to look out for passengers who are boarding, or alighting from, another train or car does not involve absolute liability, as they have the right, in the absence of notice to the contrary, to assume that persons on or near tracks will not be negligent,[40] and if the carrier's servants exercise proper care under the circumstances, the company will not be liable for the resulting injuries;[41] nor does the duty apply after the passenger has left the place of alighting,[42] nor where he is on a part of the premises where he is not authorized to be.[43] An ordinance requiring that street cars approaching cars stopped on another track to pick up or discharge passengers shall stop in order to permit alighting passengers to pass in front of the approaching car does not apply so as to require that it shall be stopped to permit a person to cross in front of it to board a car on the other track.[44]

was out of order, it was car employees' duty, in operating car during the night, to exercise great care in approaching station grounds, where persons would likely be for the purpose of becoming passengers.—Willi v. United Rys. Co. of St Louis, 224 S.W 86, 205 Mo App. 272.

32. U.S.—Delaware, etc., R. Co. v. Price, N.J., 221 F. 848, 137 C.C.A. 406, certiorari denied 35 S.Ct. 939, 238 U.S. 636, 59 L.Ed 1500.

33. La.—Willis v Vicksburg, S. & P. R. Co., 38 So 892, 115 La. 53.
10 C.J. p 930 note 50.

34. N.C.—Dunn v. Atlantic Coast Line R. Co., 93 S.E. 784, 174 N.C. 254.
10 C.J. p 930 note 51.

35. Ark.—St. Louis, etc, R. Co. v. Tomlinson, 64 S.W. 347, 69 Ark. 489.

36. N.C.—Dunn v. Atlantic Coast Line R. Co., 93 S.E. 784, 174 N.C. 254.
10 C.J. p 930 note 53.

37. Ohio—Mahoning Valley Ry. Co. v Kazanecka, 7 Ohio App. 289.
10 C.J. p 930 note 54.

38. N.Y.—Wall v. International Ry. Co., 135 N.E. 512, 233 N.Y. 309, reversing 188 N.Y.S. 550, 195 App. Div. 685.

39. La.—Blanco v. New Orleans Ry. & Light Co., 73 So. 774, 140 La. 693.
10 C.J. p 930 note 55.

At other than regular stopping place

Street car passing another in opposite direction is not required to sound gong at a place other than a regular stopping place.—Laws v. Hammond, W. & E. C Ry. Co., 128 N.E. 52, 79 Ind.App 650.

40. Ill.—Foreman Trust & Savings Bank v. Chicago Rapid Transit Co., 252 Ill.App 151.—Bernier v. Illinois Cent. R. Co., 213 Ill.App 530. See Loudon v Terminal R. Ass'n of St. Louis, 206 Ill.App. 87.
Kan.—Turner v Laying, 294 P. 665, 132 Kan. 127.
La.—Blanco v New Orleans Ry & Light Co., 73 So. 774, 140 La. 693.
Mich.—Brown v Detroit United Ry., 185 N.W. 707, 216 Mich 582.—Van Sickle v. Grand Rapids, G. H. & M Ry Co, 182 N.W. 132, 213 Mich. 261.
Mo.—State ex rel. St. Louis-San Francisco Ry. Co. v. Reynolds, 233 S.W. 219, 289 Mo. 479, quashing Martin v. St. Louis-San Francisco Ry. Co., App., 227 S.W. 129.
10 C.J. p 930 note 56.

Doctrine of last clear chance inapplicable

Where until a moment before he was struck a passenger waiting to board another train was in no danger, the doctrine of last clear chance did not apply so as to require the operator of the train which struck him to slacken its speed or sound a warning.—Foreman Trust & Savings Bank v Chicago Rapid Transit Co., 252 Ill.App. 151.

Train running behind schedule

The engineer of a through train running late on the time of an accommodation train at great speed, when he saw persons at a suburban station attempting to cross the track, could assume that they saw his train and the speed of such train, and that, if waiting passengers, they knew the local train had not arrived on time, and that they would stop and look before entering on the track, which was the real danger zone.—State ex rel. St. Louis-San Francisco Ry. Co. v. Reynolds, 233 S.W. 219, 289 Mo 479, quashing Martin v St. Louis-San Francisco Ry. Co., App., 227 S.W. 129.

41. Ill.—Foreman Trust & Savings Bank v. Chicago Rapid Transit Co., 252 Ill.App. 151.
Kan.—Turner v. Laying, 294 P. 665, 132 Kan. 127.
La.—Serio v. New Orleans Ry & Light Co., 91 So. 70, 150 La. 632.—Blanco v. New Orleans Ry & Light Co., 73 So 774, 140 La. 693.
Mich.—Brown v Detroit United Ry., 185 N.W. 707, 216 Mich. 582.—Van Sickle v. Grand Rapids, G. H. & M. Ry. Co., 182 N.W. 132, 213 Mich. 261.
10 C.J. p 931 note 57.

42. W.Va.—Ballard v. Charleston Interurban R Co., 169 S.E. 524, 113 W.Va. 660.
10 C.J. p 931 note 58.

43. W.Va.—Ballard v. Charleston Interurban R Co., supra.
10 C.J. p 931 note 59.

44. La.—Blanco v. New Orleans Ry. & Light Co., 73 So. 774, 140 La. 693.

The violation of a statute or ordinance respecting the rate of speed of a car or train may of itself constitute negligence as to a passenger injured while boarding or alighting from a vehicle on another track.[45]

§ 727. Assistance of Passengers

a. In general
b. Duty dependent on circumstances

a. In General

In the absence of any apparent necessity for personal assistance to passengers boarding or alighting, the carrier is not required to furnish it.

In the absence of circumstances showing that a passenger about to board, or alight from, the vehicle of a carrier requires assistance, there is as a general rule no duty personally to assist him,[46] particularly in the absence of any request for assistance;[47] nor is it necessarily incumbent on the carrier's employees to direct a passenger how he shall get on or off,[48] or how he shall go after he has alighted.[49]

Custom or rule of carrier. A custom of assisting passengers is not binding on the carrier unless it has knowledge thereof, or unless the custom is so well known that it may reasonably be presumed to be a part of the contract of carriage.[50] Nonconformity with a rule of the carrier requiring conductors to assist female passengers in alighting will not impose liability on the carrier unless the rule was known to, and relied on by, the passenger.[51]

Third persons. The carrier is not liable for the incompetency or negligence of a third person who is not its employee or authorized to act for it in assisting a passenger;[52] but where the contract of a carrier with a society to run a special train provides for members thereof to assist passengers to alight, it is liable for incompetency or negligence of members in so assisting a passenger.[53]

A voluntary promise by the conductor or other employee to assist a passenger in alighting at a certain station does not impose any liability on the carrier for a failure of the conductor or employee to keep such promise,[54] unless he has notice of the conditions or circumstances of the passenger that will render such assistance necessary.[55]

Assisting from one car to another. It is not negligence for a conductor after inviting and assisting a boarding passenger from one car to another to enable her to get a seat to fail to assist her down the aisle to a seat, where she is not weak or sick or the speed of the train is not excessive or unusual, and a curve in the road which is reached while she is walking is not a sharp one; and in the absence of anything shown as to his manner, the offer of a conductor to assist a passenger from the baggage car to a car in the rear on her hesitating to move while the car is in motion, after he has announced that there are seats there, is not an order for her to go there.[56]

Care and negligence in rendering; extent of assistance. Where a carrier's employees render assistance, even where it is not necessary, it will be liable for any negligence connected with the rendering of such assistance[57] within the scope of the

45. N.C.—Dunn v. Atlantic Coast Line R. Co., 93 S.E. 784, 174 N.C. 254.
10 C.J. p. 931 note 60.

46. Ala.—Smith v. Southern Ry. Co., 164 So. 903, 231 Ala. 381—Southern Ry. Co. v. Hayne, 95 So. 879, 209 Ala. 186—Atlantic Coast Line R. Co. v. Farmer, 79 So. 35, 201 Ala. 603—Louisville & N. R. Co. v. King, 73 So. 456, 198 Ala. 168.
Ga.—Metts v. Louisville & N. R. Co., 182 S.E. 531, 52 Ga.App. 115.
Ind.—Hudnut v. Indiana De Luxe Cab Co., 182 N.E. 711, 98 Ind.App. 44.
Md.—Hagerstown & F. Ry. Co. v. Wingert, 105 A. 537, 133 Md. 455.
Mass.—Tefft v. Boston Elevated Ry. Co., 188 N.E. 507, 285 Mass. 121.
Pa.—Low v. Harrisburg Rys. Co., 138 A. 852, 290 Pa. 365—Baron v. Wilkes-Barre Ry. Co., 71 Pa.Super. 103.
R.I.—Di Nora v. Rhode Island Co., 109 A. 706, 43 R.I. 7.
Tex.—Lattimer v. Texas & Pac. Ry. Co., Civ.App., 106 S.W.2d 727—San Antonio & A. P. Ry. Co. v. Wiuvar, Civ.App., 257 S.W. 667—Ft. Worth & D. C. Ry. Co. v. Yantis, Civ.App., 185 S.W. 969, error refused.
Wis.—Dorcey v. Milwaukee Electric Ry. & Light Co., 203 N.W. 327, 186 Wis. 590—Gardner v. Chicago & M. Electric Ry. Co., 159 N.W. 1066, 164 Wis. 541.
10 C.J. p. 931 note 61.

47. Ala.—Louisville & N. R. Co. v. King, 73 So. 456, 198 Ala. 168.
Mass.—Tefft v. Boston Elevated Ry. Co., 188 N.E. 507, 285 Mass. 121.
Pa.—Low v. Harrisburg Rys. Co., 138 A. 852, 290 Pa. 365—Baron v. Wilkes-Barre Ry. Co., 71 Pa.Super. 103.

48. Ky.—Illinois Cent. R. Co. v. Cruse, 96 S.W. 821, 123 Ky. 463, 29 Ky.L. 914, 8 L.R.A.,N.S., 299, 13 Ann.Cas. 593.
Mich.—Nichols v. Chicago, etc., R. Co., 51 N.W. 364, 90 Mich. 203.
10 C.J. p. 931 note 62.

49. Mass.—Lee v. Boston El. R. Co., 65 N.E. 822, 182 Mass. 454.

50. Tex.—St. Louis Southwestern R. Co. v. McCullough, 45 S.W. 324, 18 Tex.Civ.App. 534.

51. Ala.—Central of Georgia R. Co. v. Carlisle, 56 So. 737, 2 Ala.App. 514.

52. Tex.—Missouri, etc., R. Co. v. Kemp, Civ.App., 173 S.W. 532.

53. Tex.—Missouri, etc., R. Co. v. Kemp, supra.

54. Ala.—Louisville & N. R. Co. v. King, 73 So. 456, 198 Ala. 168.
10 C.J. p. 931 note 64.

55. Ga.—Southern R. Co. v. Hobbs, 45 S.E. 23, 118 Ga. 227, 63 L.R.A. 68.
10 C.J. p. 932 note 65.

56. Md.—Plummer v. Washington, etc., R. Co., 92 A. 536, 124 Md. 200.

57. Mo.—Lackey v. Missouri & K. I. Ry. Co., 264 S.W. 807, 305 Mo. 260.
Pa.—Hager v. Philadelphia & R. Ry. Co., 104 A. 599, 261 Pa. 359.

employee's employment,[58] reasonable care being required in such cases,[59] or a degree of care commensurate with the passenger's condition as it appears to them,[60] although it has been held that the carrier may be liable for injuries sustained by a passenger while being assisted to alight by an employee, notwithstanding he was acting outside the scope of his employment,[61] and that, where assistance is necessary, the same high degree of care is required in such cases as during actual transportation.[62] In the absence of negligence on the part of a carrier's employee who voluntarily undertakes to assist a passenger to board a car, the carrier is not liable for injuries resulting from the withdrawal of such assistance.[63] The extent of assistance to be rendered to a passenger in boarding or alighting is to be determined by the reasonable necessities of the particular case.[64]

The absence of express authority from a carrier to its agent to assist or escort passengers across a highway in order to board the carrier's vehicle, may not relieve the carrier from liability for injuries sustained by a passenger while being so assisted or escorted.[65]

b. Duty Dependent on Circumstances

The circumstances of the particular case determine whether the employees of a carrier are under a duty to assist passengers in boarding or alighting

The duty of rendering personal assistance to a passenger in boarding or alighting depends on the circumstances and conditions surrounding the passenger in the particular case,[66] and it may become the duty of the carrier's employees to assist a passenger in boarding or alighting, where the circumstances are such as to indicate that he requires such assistance,[67] as where there is some unusual danger or difficulty arising from the place or means afforded for alighting,[68] or where the passenger is

Tex.—St. Louis Southwestern Ry. Co. of Texas v. Preston, Civ.App., 194 S.W. 1128, affirmed, Com.App., 228 S.W. 928.
10 C.J. p. 932 note 67.

58. Ga.—Western, etc., R. Co. v. Voils, 26 S.E. 483, 98 Ga. 446, 35 L.R.A. 655.
10 C.J. p. 932 note 68.

59. Tenn.—Nashville, C. & St. L. Ry. Co. v. Newsome, 206 S.W. 33, 141 Tenn. 8.
10 C.J. p. 932 note 69.

60. Wash.—Fagerdahl v. North Coast Transp. Co., 35 P.2d 46, 178 Wash. 482, modifying 28 P.2d 107, 175 Wash. 600.

Apparently intoxicated person

Duty of conductor assisting apparently intoxicated passenger from interurban car was measured by that owed to intoxicated man, where conductor did not know or have actual notice that passenger had cerebral hemorrhage.—Fagerdahl v. North Coast Transp. Co., 35 P.2d 46, 178 Wash. 482, modifying 28 P.2d 107, 175 Wash. 600.

61. Iowa.—Ray v. Chicago, etc., R. Co., 144 N.W. 1018, 163 Iowa 430.

62. Tenn.—Nashville, C. & St. L. Ry. Co. v. Newsome, 206 S.W. 33, 141 Tenn. 8.
Tex.—Southern Traction Co. v. Reagor, Civ.App., 186 S.W. 272, error refused.
10 C.J. p. 932 note 70.

63. N.Y.—Kelly v. Nassau Electric R. Co., 124 N.E. 147, 227 N.Y. 39, reversing 159 N.Y.S. 1121, 173 App.Div. 983.

64. Tex.—St. Louis, S. F. & T. Ry. Co. v. Gore, Civ.App., 69 S.W.2d 186, error dismissed.
10 C.J. p. 932 note 65 [a].

Ascending steps

In the absence of any apparent necessity for so doing, the employee of a carrier is not under any duty to ascend the steps of a train car to assist a passenger to alight.—St. Louis, S. F. & T. Ry. Co. v. Gore, Tex.Civ.App., 69 S.W.2d 186, error dismissed.

65. Cal.—Sanchez v. Pacific Auto Stages, 2 P.2d 845, 116 Cal.App. 392.

66. Ala.—Mobile Light & R. Co. v. Therrell, 88 So. 677, 205 Ala. 553.
Ark.—Payne v. Thurston, 230 S.W. 561, 148 Ark. 456.
Ga.—Metts v. Louisville & N. R. Co., 182 S.E. 531, 52 Ga.App. 115.
Mich.—Chalker v. Detroit, G. H. & M. Ry. Co., 173 N.W. 532, 207 Mich. 138.
Tenn.—Nashville, C. & St. L. Ry. Co. v. Newsome, 206 S.W. 33, 141 Tenn. 8.
Tex.—Wisdom v. Chicago, R. I. & G. Ry. Co., Com.App., 231 S.W. 344, reversing Chicago, R. I. & G. Ry. Co. v. Wisdom, Civ.App., 216 S.W. 241—Lattimer v. Texas & Pac. Ry. Co., Civ.App., 106 S.W.2d 727—Texas & P. Ry. Co. v. Whittington, Civ.App., 292 S.W. 966—Ft. Worth & D. C. Ry. Co. v. Yantis, Civ.App., 185 S.W. 969, error refused.
10 C.J. p. 932 note 75.

67. Ala.—Mobile Light & R. Co. v. Therrell, 88 So. 677, 205 Ala. 553.
Ga.—Metts v. Louisville & N. R. Co., 182 S.E. 531, 52 Ga.App. 115.
Iowa.—Vanderbeck v. Chicago, M., St. P. & P. Ry. Co., 230 N.W. 390, 210 Iowa 230.
Ky.—Louisville & N. R. Co. v. Bowman, 270 S.W. 471, 208 Ky. 39.
Mich.—Chalker v. Detroit, G. H. & M. Ry. Co., 173 N.W. 532, 207 Mich. 138.
Tex.—Texas & P. Ry. Co. v. Whittington, Civ.App., 292 S.W. 966.
10 C.J. p. 932 note 76.

68. Ala.—Mobile Light & R. Co. v. Therrell, 88 So. 677, 205 Ala. 553.
Ga.—Metts v. Louisville & N. R. Co., 182 S.E. 531, 52 Ga.App. 115.
Ky.—Louisville & N. R. Co. v. Scarbrough, 270 S.W. 494, 208 Ky. 79.
Mich.—Chalker v. Detroit, G. H. & M. Ry. Co., 173 N.W. 532, 207 Mich. 138.
N.J.—Gore v. Delaware, L. & W. R. Co., 98 A. 389, 89 N.J.Law 224.
Or.—Adams v. Portland Ry., Light & Power Co., 171 P. 219, 87 Or. 602, L.R.A.1918D 526.
Tex.—Wisdom v. Chicago, R. I. & G. Ry. Co., Com.App., 231 S.W. 344, reversing Chicago, R. I. & G. Ry. Co. v. Wisdom, Civ.App., 216 S.W. 241.
10 C.J. p. 933 note 77.

High step

A step two and a half or three feet high may impose a duty to assist a passenger to board a train.—Louisville & N. R. Co. v. Bowman, 270 S.W. 471, 208 Ky. 39.

Ice and snow

(1) Carrier must assist passenger in alighting where accumulations of ice and snow have made coach steps dangerous.—Chalker v. Detroit, G. H. & M. Ry. Co., 173 N.W. 532, 207 Mich. 138.

(2) Due care may require that the operator of a one-man street car assist a passenger to alight at a place where there is ice in the street, notwithstanding the carrier had no right to remove such ice.—Wilson v. Berlin St. Ry., 149 A. 602, 84 N.H. 285.

to the knowledge of the employees of the carrier so infirm or disabled as to require assistance,[69] particularly where a request for assistance is made[70] That a female passenger has in charge a small child and is encumbered with baggage, may present a situation calling for assistance.[71]

On the other hand, the employees of a carrier are not required to use diligence to discover the feeble condition of a passenger and his inability to help himself;[72] nor are they required to offer personal assistance to apparently normal passengers boarding or alighting from a step which is not unusually high.[73] In the absence of any request, or any apparent need, for assistance, a carrier's servants are not under any duty to assist a passenger to alight merely because he is a cripple.[74] That a female passenger is carrying a small child in her arms as she alights may not impose a duty on the carrier's employees to assist her, in the absence of a custom so requiring or a request for such assistance.[75]

Female passengers accompanied by men. Where a female passenger is attended by a husband or friend, apparently capable of giving any needed assistance in boarding or alighting from a car, the carrier is under no duty to render such assistance.[76] The rule is otherwise, however, as regards a female passenger accompanied by a man, who is not acting as her escort, and to whom she is apparently not looking for protection and assistance.[77] This is particularly true where the man is encumbered with baggage and is apparently looking out for himself alone.[78]

§ 728. Appliances and Means for Boarding or Alighting

A carrier may under appropriate circumstances be required to furnish appliances and means for its passengers to board and alight from its vehicles, and must use due care to see that such appliances and means are safe for that purpose.

A carrier must exercise care in providing safe appliances and means for the assistance and protection of passengers in getting on and off its cars,[79] and in operating the same.[80] In some cases it has been held that the means and appliances furnished must be the safest known and tested;[81] but in other cases it has been held that the carrier is not absolutely liable in this regard, and that this duty is performed if it provides reasonably safe

69. Ala.—Southern Ry. Co. v. Laxson, 114 So. 290, 217 Ala. 1, 55 A.L.R. 385, reversing 114 So. 288, 22 Ala.App. 180—Mobile Light & R. Co. v. Therrell, 88 So. 677, 205 Ala. 553.
Ark.—Payne v. Thurston, 230 S.W. 561, 148 Ark. 456
Or.—Watts v Spokane, P. & S. Ry. Co., 171 P. 901, 88 Or. 192.
10 C.J. p 933 note 78.

Disability from physical or mental infirmity

Passenger's disability imposing on carrier duty to assist in alighting need not arise from physical or mental infirmity alone.—Southern Ry. Co. v. Laxson, 114 So. 290, 217 Ala. 1, 55 A.L.R. 385, reversing 114 So. 288, 22 Ala.App. 180.

Cripple with crutches

Ala.—Mobile Light & R. Co. v. Therrell, 88 So. 677, 205 Ala. 553

70. Mo.—Layne v. Chicago, etc., R. Co., 157 S.W. 850, 175 Mo.App. 34

71. Ala.—Southern Ry. Co. v. Laxson, 114 So. 290, 217 Ala. 1, 55 A.L.R. 385, reversing 114 So. 288, 22 Ala.App. 180.
Tex.—International & G. N. Ry Co. v. Williams, Civ.App., 183 S.W. 1185, error refused.

72. Ky.—Illinois Cent. R. Co. v. Cruse, 96 S.W. 821, 123 Ky. 463, 29 Ky.L. 914, 8 L.R.A.,N.S., 299, 13 Ann.Cas. 593.
Tex.—Gulf, etc., R. Co. v. Garner, 115 S.W. 273, 52 Tex.Civ.App. 387.

73. Ala.—Southern Ry. Co. v. Hayne, 95 So. 879, 209 Ala. 186.
Tex.—Ft. Worth & D. C. Ry Co. v. Yantis, Civ.App., 185 S.W. 969, error refused.

Five- or six-inch step

That a car step is five or six inches above the platform from which a passenger boards a train does not, without more, present a situation requiring that he be assisted in boarding.—Southern Ry. Co. v. Hayne, 95 So. 879, 209 Ala. 186.

Eighteen inch step

A step eighteen inches high does not impose any duty on the carrier to assist an apparently normal adult to alight.—Ft. Worth & D. C. Ry. Co. v. Yantis, Tex.Civ.App., 185 S.W. 969, error refused.

74. N.C.—Graham v. Norfolk-Southern R. Co., 93 S.E. 428, 174 N.C. 1.

75. Mass.—Gatchell v. Boston Elevated Ry. Co., 130 N.E. 94, 238 Mass. 185.

76. Ala.—Southern Ry. Co. v. Hayne, 95 So. 879, 209 Ala. 186.
R.I.—Di Nora v. Rhode Island Co., 109 A. 706, 43 R.I. 7.
10 C.J. p 931 note 61 [e].

Invalid passenger

Ky.—Arnett v. Chesapeake & O. Ry. Co., 248 S.W. 1040, 198 Ky. 491.
Va.—Walters v. Norfolk & W. Ry. Co., 94 S.E. 182, 122 Va. 149.

77. Ky.—Louisville & N. R. Co. v. Bowman, 270 S.W. 471, 208 Ky. 39.

78. Ky.—Louisville & N. R. Co. v. Bowman, supra.

79. Ala.—Atlantic Coast Line R. Co. v. Farmer, 79 So. 35, 201 Ala. 603.
Cal.—Sellars v. Southern Pac. Co., 166 P. 599, 33 Cal.App. 701.
Ga.—Metts v. Louisville & N. R. Co., 182 S.E. 531, 52 Ga.App. 115
Ky.—Chesapeake & O. Ry Co. v. Clarke, 189 S.W. 882, 172 Ky. 811.
10 C.J. p 933 note 82

Station other than destination

Carrier opening doors and providing means for passenger to alight at station other than her destination should exercise due care to provide safe means.—Texas & N. O. R. Co. v. Rooks, Tex.Civ.App., 283 S.W. 622, affirmed, Com.App., 292 S.W. 536, rehearing denied 293 S.W. 554.

Preventing obstruction of car platform

A street car company owes to its passengers the duty to prevent the obstruction of the platforms of the cars by baskets or other objects which would endanger passengers when alighting.—Hopkins v. New Orleans Ry. & Light Co., 90 So. 512, 150 La. 61, 19 A.L.R. 1362.

80. Mass.—Plummer v. Boston El. R. Co., 84 N.E. 349, 198 Mass. 499.
10 C.J. p 933 note 83.

81. Tex.—Missouri Pac. R. Co. v. Wortham, 10 S.W. 741, 73 Tex. 25, 3 L.R.A. 368.
10 C.J. p 934 note 84.

means and appliances.[82] Where the carrier has provided a safe means of exit from its vehicle, it is not liable for injuries resulting to an alighting passenger who uses another means of exit.[83] The mere fact that on former occasions a carrier has provided a particular appliance for boarding or alighting, does not impose any duty to continue to furnish the particular kind of appliance.[84]

Box or footstool. In the absence of circumstances rendering such assistance necessary, a carrier is not required to furnish a boarding or an alighting passenger with a portable box or footstool;[85] but where the car step is unreasonably high, the carrier should furnish a box or footstool to facilitate the boarding or alighting of a passenger,[86] and should exercise due care to see that such box or stool is in a safe condition,[87] and is placed or used by its employees in a safe manner.[88] The carrier is not, however, an insurer of a passenger against injuries sustained by him in using a step box or footstool to board a train.[89]

§ 729. Opportunity and Time for Getting on Board or Alighting

a. Opportunity and time for getting on board

82. Pa.—Keller v. Hestonville, M. & F Pass. R. Co., 1 Pa.Dist. 197, affirmed 24 A. 159, 149 Pa. 65.
Va.—Davidson v Washington & O D. Ry, 105 S E. 669, 129 Va. 99.
10 C J. p 934 note 85.

83. Va.—Davidson v. Washington & O. D. Ry, supra.

Assuming passengers would not use wrong exit

Where steps for passengers were provided at the rear of an electric railway car, the front end of which was occupied as a baggage and mail compartment, and there were no steps in front, and a sign warned passengers to stay out of the baggage and mail compartment, the carrier had a right to assume that passengers would not use the door to such compartment as a means of exit.—Davidson v. Washington & O. D. Ry, 105 S.E. 669, 129 Va. 99.

Exit from one side of vehicle

(1) Generally, a requirement by a street railway that passengers enter and leave a car from a particular side is reasonable, and the mere fact that in a particular instance the danger from passing vehicles would be less on the opposite side of the car will not in all cases render the railway chargeable with negligence.—Klingensmith v. West Penn Rys. Co., 123 A. 787, 279 Pa. 336.

(2) An occasional alighting and discharge of passengers on the wrong side of a train will not establish a custom, binding on the carrier, of permitting its passengers to so alight, as regards a passenger who is injured while alighting from the wrong side.—Seltzer v. Philadelphia & R Ry Co., 69 Pa.Super. 309.

Duty to provide steps

A railroad company was under no obligation to provide steps for passengers at the door of a baggage compartment, which was plainly not intended for their use.—Davidson v. Washington & O. D. Ry., 105 S.E 669, 129 Va. 99.

Stationing brakeman at door

Where a railroad company has completed the transfer of passengers at a junction and is in the act of making up a train before leaving, it is not required in the shifting, or making up of the train, to keep a brakeman at the door of the train continuously to keep passengers from alighting on the wrong side.—Seltzer v. Philadelphia & R. Ry. Co., 69 Pa Super. 309.

Open doors

Negligence on the part of an electric railway company toward an alighting passenger could not be predicated on the fact that a door leading from the passenger section of a combination car to the baggage and mail compartment, which was used by the passenger as an exit, and a door leading from such compartment to the ground were open, where it did not appear that they were opened by any employee, and the conductor and motorman attempted to deter passengers from taking that route in alighting.—Davidson v. Washington & O. D. Ry., 105 S E 669, 129 Va. 99.

Permitting others to use exit

Negligence on the part of an electric railway company toward passenger using the door of a baggage and mail compartment as an exit could not be predicated on the fact that it permitted a large number of passengers to pass out through the baggage and mail compartment, the door of which had no steps, where the conductor warned passengers to keep out of such compartment, and the motorman turned one of them back and closed the door to the passenger section.—Davidson v. Washington & O. D. Ry, 105 S.E. 669, 129 Va. 99.

Use of stool as negligence

Negligence could not be predicated on the fact that the motorman's stool was used at the exit of the baggage compartment, where it was not shown that such stool was used by any employee of the company or with the company's authority.—Davidson v. Washington & O. D. Ry., 105 S.E. 669, 129 Va. 99.

84. Ala.—Atlantic Coast Line R Co. v. Farmer, 79 So. 35, 201 Ala 603.

Movable planks

Ala.—Atlantic Coast Line R. Co. v. Farmer, 79 So. 35, 201 Ala. 603.

85. Ala.—Roberts v. Kurn, 165 So. 77, 231 Ala. 381—Southern Ry Co. v Hayne, 95 So 879, 209 Ala. 186—Atlantic Coast Line R. Co. v. Farmer, 79 So. 35, 201 Ala. 603
Md.—Hagerstown & F Ry. Co v Wingert, 105 A 537, 133 Md. 455
N.Y.—Trudnowski v New York Cent. R. Co., 221 N.Y.S. 686 220 App.Div. 503.
Or.—Nelson v United Rys. Co., 166 P. 763, 85 Or 427
10 C J. p 934 note 86

86. Cal.—Sellars v Southern Pac. Co, 166 P. 599, 33 Cal App 701.
10 C J. p 934 note 87.

87. La.—Scott v. Vicksburg S. & P. Ry. Co., 90 So 840, 150 La. 537, 20 A.L.R. 908.
10 C.J. p 934 note 88.

88. Ark.—Davis v. Kelly, 237 S.W. 698, 152 Ark 151.
La.—Scott v. Vicksburg, S. & P. Ry Co., 90 So. 840, 150 La. 537, 20 A.L R 908.
10 C J. p 934 note 89.

Footstool placed on slanting ground

Where a train was late, and overran the station platform, and a woman passenger of forty-nine, weighing over two hundred pounds, protested against alighting at such place, but the brakeman assured her she could alight safely, and that he would assist her and, relying thereon, she stepped on the footstool, which was placed on slanting ground, and known by the brakeman not to be on a level, and tilted, so as to cause her to fall, the carrier was liable.—Davis v. Kelly, 237 S. W. 698, 152 Ark. 151

89. La.—Scott v. Vicksburg, S. & P. Ry. Co., 90 So. 840, 150 La. 537, 20 A.L.R. 908.
Miss.—Yazoo & M. V. R. Co. v. Skaggs, 179 So. 274.

b. Opportunity and time for alighting
c. Reasonable time dependent on circumstances

a. Opportunity and Time for Getting on Board

A carrier has the duty to give passengers boarding its vehicles, a sufficient opportunity and time to do so.

A carrier owes a duty to boarding passengers to allow them time to get on board with reasonable care and expedition.[90] Hence, it is held, and sometimes under applicable statutes, that if without allowing such reasonable time the vehicle is started or otherwise moved while a passenger is attempting to board it, whereby he is injured, the carrier is liable.[91]

Holding train for passenger to procure ticket. Where a passenger attempts to board a train without a ticket and is sent back by the conductor to procure one, the train must be held a reasonable time for such passenger, and if it starts off without being so held, and the passenger is injured in attempting to board it, the company is liable.[92]

Starting vehicle before passenger seated. Ordinarily, it is not negligence to start a vehicle after a passenger has got on board the vehicle but before he has reached a seat,[93] unless there is some reason to apprehend danger in so doing, or the movement is made in a negligent manner,[94] or unless it is required by statute that the passenger shall be given a reasonable time to reach a seat.[95] It has been held that the driver of a stagecoach should, before commencing his journey, ascertain that the passengers are seated; but in his journey over ordinary streets and highways, where frequent or occasional necessary stoppages are made because of crowds, parades, or the like, or because of the use of the street or highway by others of the public, he is not bound, before he starts again, to give notice to the passengers that he is about to do so, or to ascertain whether the passengers remained seated as before the stoppage was made.[96]

b. Opportunity and Time for Alighting

A carrier must give passengers alighting from its vehicles an opportunity and time to do so.

A carrier owes a duty to an alighting passenger, sometimes under applicable statutes, to stop its vehicle a sufficient length of time to enable him, acting with ordinary diligence and promptness, to alight with safety before the vehicle is again moved, and a failure in this respect will render the carrier liable for any injury resulting to the passenger,[97] whether the movement of the vehicle is performed

90. Ala.—Louisville & N. R. Co. v Banks, 76 So. 472, 16 Ala.App. 188
Ind.—Pittsburgh, C., C. & St. L. Ry. Co v Friend, 118 N.E. 598, 70 Ind.App. 366.
Ky.—Louisville & N. R. Co. v. Quinn, 219 S.W. 789, 187 Ky. 607.
N.J.—Ploeser v. Central R. Co. of New Jersey, 105 A. 228, 92 N.J. Law 490—Sullivan v. La Frade, 185 A. 665, 14 N.J.Misc. 482.
Pa.—Chitwood v. Philadelphia & R. Ry. Co., 109 A. 645, 266 Pa. 435.
S.C.—Anderson v. Hampton & Branchville R. & Lumber Co., 132 S.E. 47, 134 S.C. 185
Tex.—Texas & N. O. R. Co. v. Tillman, Civ.App., 197 S.W. 1128, error refused.
10 C.J. p 934 note 91.

Mixed trains
A railroad company is required to stop its mixed trains carrying passengers at stations a sufficient length of time to permit passengers to enter and leave, and a failure to do so is negligence.—Witham v. Lusk, Mo.App., 190 S.W. 403.
Time for boarding street cars see infra § 733.

91. Ala.—Louisville & N. R. Co. v. Banks, 76 So. 472, 16 Ala.App. 188.
Ind.—Stradling v. Hahn, 163 N.E. 527, 88 Ind.App. 117—Pittsburgh, C., C. & St. L. Ry. Co. v. Friend, 118 N.E. 598, 70 Ind.App. 366.
Ky.—Louisville & N. R. Co. v. Quinn, 219 S.W. 789, 187 Ky. 607.
Mo.—May v. Chicago, B. & Q. R. Co., 225 S.W. 660, 284 Mo. 508—Witham v. Lusk, App., 190 S.W. 403.
S.C.—Anderson v. Hampton & Branchville R. & Lumber Co., 132 S.E. 47, 134 S.C. 185.
Tex.—Texas & N. O. R. Co. v. Tillman, Civ.App., 197 S.W. 1128, error refused.
10 C.J. p 934 note 92, p 935 note 93.

Conclusion as to care not warranted
That bus driver did not know that a person approaching the bus intended to become passenger would not warrant conclusion driver exercised ordinary care in starting bus while such person was boarding same.—Stradling v. Hahn, 163 N.E. 527, 88 Ind.App. 117.

92. Mo.—Missouri, etc., R. Co. v. Gist, 73 S.W. 857, 31 Tex.Civ.App. 662.
10 C.J. p 935 note 94.

93. La.—Murphy v. New Orleans Public Service, App., 169 So. 890.
Mass.—McRae v. Boston Elevated Ry. Co., 176 N.E. 773, 276 Mass. 82.
Pa.—Wood v. Pennsylvania R. Co., 170 A. 367, 111 Pa.Super. 430.
Va.—Scott v. Cunningham, 171 S.E. 104, 161 Va. 367.
10 C.J. p 939 note 21
Starting street car before passenger seated see infra § 733.

94. Mo.—Rhodes v. Missouri Pac. R. Co., 255 S.W. 1084, 213 Mo.App. 515.
10 C.J. p 939 note 22.

95. Ga.—Gainesville Midland R. Co. v. Jackson, 57 S.E. 1007, 1 Ga.App. 632.

96. N.J.—Haile v. Clayton, etc., Co., 38 A. 805, 61 N.J.Law 197.

97. Ala.—Smith v. Southern Ry. Co., 164 So. 903, 231 Ala. 381.
Ark.—Texarkana & Ft. Smith Ry. Co. v. Adcock, 231 S.W. 866, 149 Ark. 110—Payne v. Thurston, 230 S.W. 561, 148 Ark. 456—St. Louis Southwestern Ry. Co. v. Aydelott, 194 S.W. 873, 128 Ark. 479
Cal.—Vietti v. Hines, 192 P. 80, 48 Cal.App. 266
Fla.—Atlanta & St. A. B. Ry. Co. v. Kelly, 82 So. 57, 77 Fla. 479.
Ky.—Louisville & N. R. Co. v. Chadwell's Adm'r, 280 S.W. 89, 212 Ky. 723—Cincinnati, N. O. & T. P. Ry. Co. v. Francis, 220 S.W. 739, 187 Ky. 703.
La.—Guidry v. Morgan's Louisiana & T. R. & S. S. Co., 74 So. 534, 140 La. 1007, L.R.A.1917D 962.
Mich.—Tuttle v. Detroit J. & C. Ry. Co., 159 N.W. 498, 193 Mich. 390
Okl.—St. Louis-San Francisco Ry. Co. v. Bell, 273 P. 243, 134 Okl. 251.
Or.—Watts v. Spokane, P. & S. Ry. Co., 171 P. 901, 88 Or. 192.
Pa.—Montalini v. Pennsylvania Co., 100 A. 806, 256 Pa. 249.

with ordinary care or negligently,[98] as where the train is merely slowed down and then started up again, with knowledge that a passenger is alighting.[99] Where, however, a reasonable time has been allowed for passengers to alight and the carrier is without knowledge or reason to know of the perilous position of a passenger attempting to alight, it may act on the assumption that he will exercise due care to avoid perilous positions,[1] or that all passengers whose destination is reached have left the cars;[2] and it is not incumbent on it to see that all the passengers have alighted.[3] The fact that a passenger has stepped from a train on to the platform does not terminate the carrier's liability, for it is its duty to prevent any injury to the passenger by the car, although it is not necessary that the train shall be held without moving until the passenger has had time to leave the platform; it is enough if he has had a reasonable opportunity to get beyond danger from the movement of the cars.[4]

Ignorance of passenger's intention to alight. The mere absence of knowledge on the part of a carrier's employee that a passenger intends to alight at a particular place will not excuse the carrier in case a reasonable time is not allowed the passenger so to do.[5]

c. Reasonable Time Dependent on Circumstances

What constitutes a reasonable time to be allowed passengers to board or alight depends on the circumstances surrounding particular cases.

What constitutes a reasonable time for a passenger to board or to alight from a train depends very largely on the circumstances existing at the time, such as the physical ability of the passenger, his encumbrance with luggage, the existence of a crowd on the car or the platform, the darkness of the night with the landing place badly lighted, the difficulties of the place, and the like. It is the duty of the carrier to give a reasonable time under the circumstances as they exist and are known to, or should be known to, the employees in charge of the train.[6] Thus, a longer time than is allowed ordinary passengers may be necessary in the case of children,[7] adults accompanied by small children,[8] persons apparently suffering from a wasting disease, such as tuberculosis,[9] or those who are lame or otherwise infirm.[10] Where a passenger uses ordinary diligence to alight and is injured by the starting of the train, it may be inferred that the time of stoppage was insufficient;[11] but on the other hand, where passengers similarly situated safely leave the car without any accident, it may legitimately be inferred that sufficient time was granted to alight in safety.[12]

§ 730. Moving Train While Passenger Is Boarding or Alighting

Moving a train while a passenger is in the act of boarding or alighting therefrom to the knowledge of the carrier constitutes negligence.

Where a train has been stopped for a reasonable time, the carrier is required to use only ordinary care in thereafter moving it,[13] and if it is not ap-

Tenn.—Louisville & N. Ry. Co. v. Powell, 11 Tenn.App. 253—Nashville, C & St. L Ry. v. Buchanan, 7 Tenn Civ A, 56.
Va.—Johnson v. Atlantic Coast Line R Co., 99 S.E. 558, 125 Va. 136.
W.Va.—Bartlett v. Baltimore & O. R Co., 99 S.E. 322, 84 W.Va. 120.
10 C.J. p 935 note 97, p 936 note 1.

98. U.S.—Midland Valley R. Co. v. Page, C.C.Okl., 182 F 125.

99. Cal.—Vietti v. Hines, 192 P. 80, 48 Cal.App 266
10 C.J. p 936 note 99.

1. Ky.—Chesapeake & O. Ry Co. v. Thompson, 270 S.W. 464, 208 Ky. 32.
Mo.—Payne v. St. Louis-San Francisco Ry. Co., App., 256 S.W. 538.
10 C.J. p 936 note 2.

2. Mo.—Payne v. St. Louis-San Francisco Ry. Co., supra.
10 C.J. p 936 note 3.

3. Mo.—Payne v. St. Louis-San Francisco Ry. Co., supra
10 C.J. p 936 note 4.

4. Ky.—Louisville, etc., R. Co. v. Ricketts, 37 S.W 952, 18 Ky.L. 687, 52 S.W. 939, 21 Ky.L. 662—Smith v. Louisville City R., 10 Ky. Op. 174.

5. Wis.—Walters v. Chicago, etc., R. Co, 89 N.W. 140, 113 Wis. 367.
10 C.J. p 936 note 6.

6. Ark.—Texarkana & Ft. Smith Ry. Co. v. Adcock, 231 S.W. 866, 149 Ark. 110—Payne v. Thurston, 230 S.W. 561, 148 Ark. 456—St. Louis Southwestern Ry. Co. v. Aydelott, 194 S.W. 873, 128 Ark. 479.
Ind.—Pittsburgh, C, C & St. L Ry. Co v. Friend, 118 N.E. 598, 70 Ind. App 366.
10 C.J. p 937 note 7.

What constitutes reasonable time

A reasonable time within the rule stated in the text is such time as a person of ordinary care and prudence should be allowed to take.—Texarkana & Ft. Smith Ry. Co. v. Adcock, 231 S.W. 866, 149 Ark 110—10 C.J. p 937 note 7 [a].

7. Minn.—Keller v. Sioux City, etc., R. Co., 6 N.W. 486, 27 Minn 178.
Mo.—Ridenhour v. Kansas City Cable R. Co., 13 S.W. 889, 14 S.W. 760, 102 Mo. 270.

8. Ark.—Payne v. Thurston, 230 S. W. 561, 148 Ark. 456.
N.C.—Riggs v. Norfolk-Southern R. Co., 124 S.E. 749, 188 N.C. 366

Family as unit

Where a man becomes a passenger with his wife and little children, he has the supervision of their safety, and they are to be regarded as a unit in so far as affording sufficient time to leave the car is concerned.—Hurt v. St. Louis, etc., R. Co., 7 S.W 1, 94 Mo. 255, 4 Am.S.R. 374, 7 S.W. 5.

9. Ark.—Payne v. Thurston, 230 S. W. 561, 148 Ark. 456.

10. Iowa.—Mitchell v Des Moines City R. Co, 141 N.W. 43, 161 Iowa 100.
10 C.J. p 937 note 9.

11. Mo.—Cullar v. Missouri, etc., R Co., 84 Mo.App. 340.

12. Mo.—Hurt v. St. Louis, etc., R. Co., 7 S.W. 1, 94 Mo. 255, 4 Am.S. R. 374, 7 S.W. 5.

13. Tex.—St. Louis Southwestern R. Co v. Turner, 77 S.W. 255, 33 Tex. Civ.App. 604.

parent to the carrier's employees that a passenger is either boarding or alighting from the train, the carrier will not ordinarily be liable for an injury resulting from its being started or otherwise moved;[14] but whether or not the train has stopped for a reasonable time, it is negligence to start or otherwise to move it while a passenger, within the actual or constructive knowledge of the employees of the carrier, is in a position of peril in the act of getting on the train or of alighting therefrom,[15] as where they know, or have reason to know, of the infirmity or disability of a passenger, which will require him to take a longer time to board or to alight.[16] This rule applies, although the motion is an ordinary one incident to the operation of the train;[17] it also applies where the passenger's delay in alighting is caused by the carrier's failure to call the station.[18] Any sudden or unnecessary starting or jerking of the train while a passenger is in the act of alighting, which fact the carrier knows, or ought to know, whereby the passenger is injured, renders the carrier liable therefor;[19] this rule also applies to a sudden stopping of the train or car while a passenger is alighting.[20]

§ 731. Care at Places Other than Regular Stopping Places

a. In general

b. Stop after call of station

a. In General

Carriers may be required to exercise due care to protect from injury passengers boarding or alighting from vehicles at places other than regular stopping places.

Where the passenger is attempting to get on board or alight at a place other than a regular stopping place, in pursuance of an express or implied invitation, it is the duty of the carrier to bring the train to a full stop in order to enable him to do so in safety;[21] and if by increasing the speed of the train before it has come to a full stop,[22] or by starting the train or car, when the employees know, or have reason to know, that a passenger is boarding or alighting,[23] the passenger is injured, he may recover for the injuries caused thereby. The duty of a carrier to see that the place at which its vehicle is stopped to pick up or discharge passengers is safe for that purpose, see supra § 723 and infra § 733, is applicable with regard to boarding or alighting passengers at stops other than regular stopping places,[24] the carrier being charged with the duty of knowing whether the place actually selected is of such character;[25] and the carrier is liable for injuries to boarding or alighting passengers as a result of conditions which are more dangerous at the place where the vehicle is stopped than at the regular stopping place.[26] Moreover, where a passenger has been put down at a place other than a regular stopping place, the duty of the

14. Ky.—Louisville & N. R. Co. v. Quinn, 219 S.W. 789, 187 Ky. 607.
Md.—Lambert v. Philadelphia, B & W. R. Co., 125 A. 765, 145 Md. 662.
Pa.—Chitwood v. Philadelphia & R. Ry. Co., 109 A. 645, 266 Pa. 435.
10 C.J. p 937 note 14.

15. Ala.—Louisville & N. R. Co. v. Banks, 76 So. 472, 16 Ala. App. 188.
Ark.—Texarkana & Ft. Smith Ry. Co. v. Adcock, 231 S.W. 866, 149 Ark. 110—Payne v. Thurston, 230 S.W. 561, 148 Ark. 456.
Fla.—Atlanta & St. A. B Ry. Co. v. Kelly, 82 So. 57, 77 Fla. 479.
Ky.—Chesapeake & O. Ry. Co. v. Smith, 83 S.W.2d 488, 259 Ky. 821.
La.—Nelson v. Vicksburg, S. & P. Ry. Co., 75 So. 212, 141 La. 475
Mo.—May v. Chicago, B. & Q. R. Co., 225 S.W. 660, 284 Mo. 508.
Pa.—Hawkins v. Director General of Railroads, 121 A. 46, 277 Pa. 213—Stankowcz v. Baltimore & O. R. Co., 62 Pa.Super. 125.
S.C.—Comer v. Atlantic Coast Line R. Co., 90 S.E. 188, 105 S.C. 480.
Tenn.—Louisville & N. Ry. Co. v. Powell, 11 Tenn.App. 253
Va.—Johnson v. Atlantic Coast Line R. Co., 99 S.E. 558, 125 Va. 136.
W.Va.—Bartlett v. Baltimore & O. R. Co., 99 S.E. 322, 84 W.Va. 120.
10 C.J. p 938 note 15.

Passenger warned before signal to start

Trainmen causing train to start when they knew, or should have known, that a passenger is in the act of boarding the train, are negligent even though they have warned passenger before giving the engineer the signal to start the train.—May v. Chicago, B. & Q. R. Co., 225 S.W. 660, 284 Mo. 508

16. Ark.—Payne v. Thurston, 230 S.W. 561, 148 Ark. 456.
10 C.J. p 938 note 16.

Tubercular person
Ark.—Payne v. Thurston, 230 S.W. 561, 148 Ark. 456.

17. Tenn.—Louisville & N. R. Co. v. Powell, 11 Tenn.App. 253.
10 C.J. p 938 note 17.

18. Ky.—Chesapeake, etc., R. Co. v. Robinson, 123 S.W. 308, 135 Ky. 850.

19. Mo.—Patterson v. Lusk, App., 196 S.W. 65.
10 C.J. p 938 note 19, p 973 note 66.

20. Mass.—Comerford v. New York, etc., R. Co., 63 N.E. 936, 181 Mass. 528.

21. Ark.—St. Louis, etc., R. Co. v. Cantrell, 37 Ark. 519.
10 C.J. p 940 note 34

22. Ind.—Union Traction Co. of Indiana v. McVey, 114 N.E. 438, 185 Ind. 693.
10 C.J. p 940 note 35.

23. Ill.—See Aur v. East St. Louis Ry. Co., 194 Ill.App. 193
Mich.—Stahl v. Southern Michigan Ry. Co., 178 N.W. 710, 211 Mich. 350
10 C.J. p 940 note 36.

24. Ala.—Alabama Power Co. v. Hall, 103 So. 867, 212 Ala. 638—Mobile Light & R. Co. v. Therrell, 88 So. 677, 205 Ala. 533
Mo.—Watts v. Fleming, 298 S.W. 107, 221 Mo.App. 1123.
Ohio—Cincinnati Street Ry. Co. v. Mueller, 200 N.E. 770, 51 Ohio App. 314.
Va.—Virginia Ry. & Power Co. v. Taylor, 132 S.E. 334, 144 Va. 496
10 C.J. p 913 note 39.

25. Ala.—Alabama Power Co. v. Hall, 103 So. 867, 212 Ala. 638—Mobile Light & R. Co. v. Therrell, 88 So. 677, 205 Ala. 533.

Corpus Juris text is cited with approval in Alabama Power Co. v. Hall, 103 So. 867, 869, 212 Ala. 638

26. Ark.—Davis v. Kelly, 237 S.W. 698, 152 Ark. 151.
Ga.—Georgia R. & Banking Co. v.

carrier to provide for his safety has been held to continue until he has proceeded to a point where he has some freedom of locomotion and can in a measure look out for his own safety.[27] Where a passenger is put down in a place short of or beyond his station, he may be entitled to recover for injuries received while attempting, with due care, to reach his destination,[28] unless his being so put down is caused by his own fault,[29] or unless he is put off at a proper place, and the carrier is not guilty of negligence.[30] A carrier stopping short of or beyond the point at which it knows that a passenger desires to alight should, at least, give him notice of that fact before he attempts to leave the vehicle.[31] Rules as to opportunity and time to be allowed passengers for boarding or alighting from trains or cars, see supra §§ 729, 730, infra § 733, and as to the signal for starting the train or car are, likewise, applicable where the train or car is stopped for taking on or discharging passengers at other than its regular or usual stopping place,[32] even though the conductor exceeds his authority and vio-

Brooks, 119 S.E. 424, 30 Ga.App. 692.

La.—Hamilton v. Louisiana Ry. & Nav. Co., 85 So. 611, 147 La. 616—Johnston v. City of Monroe, App., 147 So. 519.

Mo.—Payne v. Davis, 252 S.W. 57, 298 Mo. 645—Watts v. Fleming, 298 S.W. 107, 221 Mo.App. 1123.

Pa.—Miller v. Lehigh Valley R. Co., 138 A. 89, 290 Pa. 130.

Tex.—St. Louis Southwestern Ry. Co. of Texas v. Woodall, Com.App., 207 S.W. 84, reversing, Civ.App., 159 S.W. 1012.

Va.—Virginia Ry. & Power Co. v. Taylor, 132 S.E. 334, 144 Va. 496.

10 C.J. p. 915 note 46 [a].

Place poorly lighted

Where a carrier might have selected a less dangerous and better lighted place to stop its car in order to permit a passenger to alight and transfer to another car at the other end of an incompleted piece of track, the company was held to be liable for injuries sustained by an alighting passenger as a result of being struck by an automobile being driven recklessly and without lights near the place where the car was stopped.—Watts v. Fleming, 298 S.W. 107, 221 Mo.App. 1123.

Cattle guard covered with snow

Where street car passes regular stopping place and stops on private right of way so that entrance gates open on cattle guards covered with snow, the company owes those invited to enter the high degree of care required for protection of passengers.—Richey v. Minneapolis St. Ry. Co., 160 N.W. 188, 135 Minn. 54.

High step or rough ground

(1) When a railroad company fails to provide such facilities, or, because of heavy increase in business or a desire to operate their trains more economically, passengers are forced to alight away from regular receiving platforms, the company will be held liable for accidents occurring, if the place to alight is unsafe, either from a step too high or because the ground is covered with cobblestones or from other defects.—Miller v. Lehigh Valley R. Co., 138 A. 89, 290 Pa. 130.

(2) Accordingly the company was held to be liable for injuries sustained by a female passenger as a result of being forced to alight at a place where the step was thirty inches high and the ground was covered with cobblestones and rock ballast.—Miller v. Lehigh Valley R. Co., supra.

(3) The decisions as to the duty of street railway companies in relation to the height of steps do not control since railroads own their right of way and can make their own landing places while street railways are only allowed the use of public highways in common with other vehicles.—Miller v. Lehigh Valley R. Co., supra.

(4) 'The ground on which they alight should be such as to fairly permit safe walking'"—Miller v. Lehigh Valley R. Co., supra.

Stopping over bridge

Where a train was brought to a stop at a station in such manner that a platform of the car in which an alighting passenger was riding extended over a bridge, through which the passenger fell on alighting, the carrier was held to be liable for the injuries sustained.—Hamilton v. Louisiana Ry. & Nav. Co., 85 So. 611, 147 La. 616.

Assuming car stopped at regular place

Where a passenger, who was injured in stepping on a curb while alighting at a place other than the regular stopping place, thought that the car was stopped at the regular stopping place, which was a smooth pavement, and where he had previously boarded the car, and he was not informed or warned otherwise by the motorman, the carrier was held to be liable.—Johnston v. City of Monroe, La.App., 147 So. 519.

Contractual obligation immaterial

Whether carrier was under contractual obligation to allow passenger to alight where he did is immaterial, as regards liability for injury, where he was rightfully on the train, and alighted from it, where it had stopped at a point other than the station platform, at conductor's invitation.—St. Louis Southwestern Ry. Co. of Texas v. Woodall, Tex.Com.App., 207 S.W. 84, reversing, Civ.App., 159 S.W. 1012.

Stopping distance from crossing

Where trains were customarily stopped at a highway crossing which was comparatively level and safe, stopping several car lengths from the crossing, requiring a passenger to walk over rough uneven ground, slippery with ice, whereby she slipped and fell into a ditch in attempting to board a train, was held to be negligence rendering the carrier liable.—Davis v. Olson, C.C.A.Minn., 298 F. 921.

27. Ga.—Georgia R. & Banking Co. v. Brooks, 119 S.E. 424, 30 Ga.App. 692.

Stepping into steam pit

Where by reason of the limited space in the passageway which he was required to use in making his way from the train to the station, an alighting passenger was injured when he stepped into a steam pit, the carrier was held to be liable, under the rule stated in the text.—Georgia R. & Banking Co. v. Brooks, 119 S.E. 424, 30 Ga.App. 692.

28. Mo.—Gatt v. Kansas City Rys. Co., 222 S.W. 827—Irby v. St. Louis Public Service Co., App., 82 S.W. 2d 118.

10 C.J. 941 note 38.

Falling on trestle

Where passenger, after alighting from street car in nighttime on motorman's assurance that she was at destination which in fact was one stop distant, continued along track toward destination and was injured when she fell on trestle, the company was held liable.—Irby v. St. Louis Public Service Co., Mo.App., 82 S.W. 2d 118.

29. Miss.—Wilson v. New Orleans, etc., R. Co., 8 So. 330, 68 Miss. 9.

Pa.—Fisher v. Paxson, 38 A. 407, 182 Pa. 457.

10 C.J. p. 941 note 39.

30. Tex.—Missouri, etc., R. Co. v. Maxwell, Civ.App., 130 S.W. 722.

31. Pa.—O'Malley v. Laurel Line Bus Co., 166 A. 868, 311 Pa. 251.

32. Ala.—Alabama Great Southern

lates the rules of the carrier in so stopping the train or car.[33] Where a passenger, unknown to the carrier, alights or falls from a train at a point other than a regular stopping place, the carrier may be under a duty to see that he is not injured.[34] If the train or other vehicle is stopped, not for the purpose of allowing passengers to get on board or alight, care must be taken to avoid injury to passengers who may be misled as to the place of stoppage being the proper one for those purposes.[35] With reference to this matter it is important to know whether there has been an express or an implied invitation to the passenger to get on board or alight at such place, and if such invitation has been given, the duty is involved of using care with reference to passengers who attempt to comply with the invitation,[36] and this rule applies, although the train stops at a station for a reasonable length of time to enable the passenger to get off, but he neglects to do so, and it again stops at another place for him to alight;[37] and the fact that a passenger in such a case fails to demand a return of the car or train to the platform does not cast on him the danger incident to getting off, if he does not know that the alighting place is dangerous.[38]

If a passenger enters or leaves a train or car at a place not intended for getting on board or alighting, without any invitation or direction so to do, he cannot recover for injuries resulting from the unsafe character of the place,[39] and the mere failure to stop a train at the usual stopping place may not be sufficient to indicate negligence on the part of the carrier.[40] A fortiori the mere fact of stopping a street car at a place other than a regular stopping place may not constitute negligence of the carrier as regards a passenger who is injured as he alights therefrom,[41] notwithstanding the conditions at the place where the car is stopped are not precisely similar to those at the regular stopping place,[42] particularly in the absence of any showing that the place where passengers are required to alight is inherently dangerous,[43] or where there

R. Co. v. Siniard, 26 So. 689, 123 Ala. 557.
10 C.J. p 939 note 28.

33. Tex.—Texas, etc., R. Co. v. Elliott, 61 S.W. 726, 26 Tex.Civ.App 106.

34. Me.—Mahan v. Hines, 115 A. 132, 120 Me. 371.

Brakeman's report sufficient compliance

Where an intoxicated passenger negligently gets off or falls off at a semaphore stop, the brakeman's reporting at the station stop practically at the time notice was first brought to him is a sufficient compliance with the carrier's duty to look out for his safety.—Mahan v. Hines, 115 A. 132, 120 Me. 371.

35. Pa.—O'Malley v. Laurel Line Bus Co., 166 A. 858, 311 Pa. 251.
Wis.—Larson v. Green Bay & W. R. Co., 192 N.W. 63, 179 Wis. 510.
10 C.J. p 940 note 30.

36. Minn.—Kral v. Burlington, etc., R. Co., 74 N.W. 166, 71 Minn. 422.
Tex.—St. Louis Southwestern R. Co. v. Missildine, Civ.App., 157 S.W. 245.
10 C.J. p 940 note 31.

37. Minn.—Kral v. Burlington, etc., R. Co., 74 N.W. 166, 71 Minn. 422.

38. Mo.—Fillingham v. St. Louis Transit Co., 77 S.W. 314, 102 Mo. App. 573.

39. Iowa.—Chesley v. Waterloo, C. F. & N. R. Co., 176 N.W. 961, 188 Iowa 1004, 12 A.L.R. 1366.
Mass.—Bush v. Boston Elevated Ry. Co., 123 N.E. 613, 232 Mass. 593.
10 C.J. p 914 note 42, p 915 note 47, p 945 note 67.

40. Mich.—Porter v. Chicago, etc., R. Co., 44 N.W. 1054, 80 Mich. 156, 20 Am.S.R. 511.
10 C.J. p 940 note 30 [a].

41. La.—Clogher v. New Orleans Ry. & Light Co., 78 So. 247, 143 La. 85—Freeman v. New Orleans Public Service, Inc., 1 La.App. 600.
N.Y.—Krupnick v. Branikowski, 284 N.Y.S. 407, 246 App.Div. 782, reversed on other grounds 3 N.E.2d 210, 271 N.Y. 612.
Pa.—Scherer v. Philadelphia Rapid Transit Co., 145 A. 76, 295 Pa. 199—Low v. Harrisburg Rys. Co., 138 A. 852, 290 Pa. 365.
Wash.—Carter v. Spokane United Rys., 288 P. 247, 157 Wash. 166.

Reasons for rule; railroad case distinguished

(1) "Street railway companies do not have fixed stopping places, and cannot be expected to come to a stand with exactness each time at the same point where passengers are discharged . . . differing in this respect from railroad companies which provide regular platforms for stoppage."—Low v. Harrisburg Rys. Co., 138 A. 852, 855, 290 Pa. 365.

(2) The practical operation of any other rule would be to necessitate the marking of the space constituting the regular stopping place, and to preclude the stopping elsewhere, unless the car company choose voluntarily to incur the risk of a lawsuit. A tardy signal for stopping would have to pass unheeded, with the consequence that many a passenger would be carried beyond his station. On days of rain and slippery tracks the car would have to approach a stopping place gingerly, with bated breath, as it were, lest it be not precise in making the stop. Perhaps such a rule would suit the car company, but certainly not the traveling public.—Clogher v. New Orleans Ry. & Light Co., 78 So. 247, 143 La. 85—Freeman v. New Orleans Public Service, Inc., 1 La.App. 600.

42. La.—Clogher v. New Orleans Ry. & Light Co., 78 So. 247, 143 La. 85—Freeman v. New Orleans Public Service, Inc., 1 La.App. 600.

Darkness of night and rain

Where there is sufficient artificial light to enable the passenger to see the conditions, and in the absence of any contention that the landing place was wet or slippery or otherwise affected by rain falling at the time the injury is sustained, the mere fact that it was at night and raining is immaterial.—Freeman v. New Orleans Public Service, Inc., 1 La.App. 600.

Higher step

That the step from the car step to the ground is slightly higher at the place where the car is stopped than at the regular stopping place does not, without more, constitute negligence.—Clogher v. New Orleans Ry. & Light Co., 78 So. 247, 143 La. 85—Freeman v. New Orleans Public Service, Inc., 1 La.App. 600.

43. Ky.—Tinnell v. Louisville Ry. Co., 62 S.W.2d 467, 65 S.W.2d 469, 250 Ky. 245—Louisville Ry. Co. v. Saxton, 298 S.W. 1105, 221 Ky. 427.

Injury by automobile

Where because of some trouble with a street car's motor, the conductor directed the passengers to alight at a place other than a regular stopping place, the company is not liable for injuries sustained by

is no reason to anticipate harm to the passenger by reason of his alighting at the place where the car is stopped;[44] nor does the opening of the door of a car stopped at a place other than a regular stopping place constitute negligence as regards a passenger who is injured as he alights from the car.[45] A carrier's custom of stopping at a particular point will not, without more, indicate negligence for failure to stop at such precise point on the occasion when an alighting passenger is injured.[46] The general rule that a street railway company is not ordinarily liable for injuries to passengers boarding, or alighting from, its cars when such injuries are caused by obvious street dangers, see infra § 733, applies to injuries sustained by passengers while boarding or alighting from street cars stopped at places other than regular stopping places.[47] Therefore, a street railway carrier is not ordinarily liable for injuries to such passengers arising from the operation of other vehicles in the street.[48] Where the carrier does not know, or have reason to know, that a passenger is in a dangerous position in boarding or alighting, it is not negligence to move the train or car while he is in such position,[49] or suddenly to start a street car as a passenger is in the act of alighting at a place where the car happens to be stopped other than a regular stopping place.[50] This is particularly true where it does not appear that the cars of the company ever stopped for the purpose of permitting passengers to alight at such place.[51] Neither may a carrier be liable for injuries sustained by a passenger in alighting, without notice to the carrier, from a moving train at a point other than a regular stopping place,[52] nor for injuries sustained by a boarding passenger as a result of ordinary jerks or jars, where the person injured enters the train without notice or invitation at a point where the carrier is not accustomed to receive passengers.[53]

Degree of care. The high degree of care which

an alighting passenger when struck by a passing automobile—Louisville Ry. Co. v. Saxton, 298 S.W. 1105, 221 Ky. 427.

44. Pa.—Scherer v. Philadelphia Rapid Transit Co., 145 A. 76, 295 Pa. 199—Low v. Harrisburg Rys. Co., 138 A. 852, 290 Pa. 365.
Wash.—Carter v. Spokane United Rys, 288 P. 247, 157 Wash. 166.

"Obviously dangerous place"

"The controversy hinges on the question as to whether the car stopped at an obviously dangerous place" —Scherer v. Philadelphia Rapid Transit Co., 145 A. 76, 295 Pa. 199

45. Kan.—Miller v. Kansas City Public Service Co., 15 P.2d 453, 136 Kan. 288.
Wash.—Carter v. Spokane United Rys., 288 P. 247, 157 Wash. 166.

Car stopped by traffic

Where a street car was stopped within a block because of other cars ahead and as a passenger rose and stepped forward to alight, the motorman opened the door for her to do so, the opening of the door was not negligence as regards injuries sustained by the passenger as she alighted.—Miller v. Kansas City Public Service Co., 15 P.2d 453, 136 Kan. 288.

Opening door of moving car

The opening of the door of a moving street car by the motorman at a place not designated as a stopping point is not negligence proximately contributing to cause the injuries received by a passenger on alighting from the moving car, and the street railway company is not liable for such injuries.—Kahlfeldt v. Busby, 272 Ill.App. 469.

46. Miss.—Dantzler Shipbuilding & Dry Docks Co. v. Hurley, 81 So. 163, 119 Miss. 473, 4 A.L.R. 1487, suggestion of error denied 81 So. 406.

47. Iowa.—Chesley v. Waterloo, C., F. & N. R. Co., 176 N.W. 961, 188 Iowa 1004, 12 A.L.R. 1366.
Minn.—Fox v. Minneapolis St. Ry. Co., 251 N.W. 916, 190 Minn. 343.

48. Ill.—Kahlfeldt v. Busby, 272 Ill. App. 469.
Iowa.—Chesley v. Waterloo, C., F. & N. R. Co., 176 N.W. 961, 188 Iowa 1004, 12 A.L.R. 1366.
Kan.—Miller v. Kansas City Public Service Co., 15 P.2d 453, 136 Kan. 288.
Minn.—Fox v. Minneapolis St. Ry. Co., 251 N.W. 916, 190 Minn. 343.
Wash.—Carter v. Spokane United Rys., 288 P. 247, 157 Wash. 166.

Passenger struck by automobile

Ill.—Kahlfeldt v. Busby, 272 Ill.App. 469.
Kan.—Miller v. Kansas City Public Service Co., 15 P.2d 453, 136 Kan. 288.
Wash.—Carter v. Spokane United Rys., 288 P. 247, 157 Wash. 166.

49. Md.—Lambert v. Philadelphia, B. & W. R. Co., 125 A. 765, 145 Md. 662.
10 C.J. p. 941 note 37.

Backing up to water tank

Where it does not appear that the employees of a railroad knew that anyone was attempting to board its train, the railroad company did not fail to perform any duty owed a passenger by running its train a few feet by a water tank and then backing up, although he was accustomed to board the mail car at the tank, and was injured while boarding it when the train backed.—Lambert v. Philadelphia, B. & W. R. Co., 125 A. 765, 145 Md. 662.

50. Mass.—Bush v. Boston Elevated Ry. Co., 123 N.E. 613, 232 Mass. 593.

Starting without bell

Motorman stopping car at other than regular stopping place was not negligent in starting without bell from conductor, in the absence of notice or knowledge that anyone was alighting.—Bush v. Boston Elevated Ry. Co., 123 N.E. 613, 232 Mass. 593.

No invitation to alight

That other passengers alighted from the car in front of one who was injured while attempting to do so was not, without more, sufficient to show an invitation to alight at the place in question.—Bush v. Boston Elevated Ry. Co., 123 N.E. 613, 232 Mass. 593.

51. Mass.—Bush v. Boston Elevated Ry. Co., supra.

52. Ky.—Louisville & N. R. Co. v. Whitaker, 300 S.W. 912, 222 Ky. 302.

Sale of ticket as notice

Sale of ticket to the place where the injury occurred was not notice that passenger, injured in alighting from moving train thereat, would take such train.—Louisville & N. R. Co. v. Whitaker, 300 S.W. 912, 222 Ky. 302.

That many trains stop at the place where the injury occurred was immaterial in action for injuries in alighting from moving train thereat.—Louisville & N. R. Co. v. Whitaker, 300 S.W. 912, 222 Ky. 302.

Flag station

Ky.—Louisville & N. R. Co. v. Whitaker, 300 S.W. 912, 222 Ky. 302.

53. W.Va.—Raines v. Chesapeake,

is usually required of carriers as regards passengers boarding or alighting from its vehicles, see supra § 723, has been held to be required of carriers with respect to passengers alighting at places other than regular stopping places;[54] and it has been held that, notwithstanding a stop is made at the particular place at a passenger's request, the carrier is bound to exercise the highest degree of care for his safety in alighting,[55] and this especially where the carrier has been in the custom of stopping its cars there to receive or discharge passengers, although it is not a regular stopping place.[56] It has also been held that, if for some proper reason the passenger is required or allowed to leave or to take the train at a place not the customary stopping place, what is required of the carrier is care with respect to his doing so, and the question of approaches is not involved.[57]

b. Stop after Call of Station

A carrier may be liable where a passenger is injured while alighting from a vehicle which is stopped at a place other than a regular stopping place after the announcement of the passenger's station.

The announcement of the name of a station or other regular stopping place being usually intended to inform passengers that the train or car is approaching their destination, so that they may prepare to get off when the train or car stops, is not of itself an invitation to alight;[58] nor does such announcement of itself constitute an act of negligence toward a passenger who is injured in thereupon attempting to alight.[59] If the train or car is soon thereafter brought to a full stop, a passenger may safely conclude that it has arrived at the station or other regular stopping place, and, particularly under statutes requiring that stations be announced, he is justified in attempting to get off, unless he is warned or unless the surroundings and circumstances are such as would show to a reasonably careful and prudent man that the train or car has not reached the proper stopping place; and if by alighting he is injured without any fault on his part the carrier will be liable.[60] There is no duty, however, of warning passengers not to get off when the train is stopped for other purposes, where no station has been called and there are no attendant circumstances calculated to induce a passenger to conclude that the stop is at the usual and proper stopping place.[61]

§ 732. Care as to Persons Not Passengers

Usually a carrier is required to exercise ordinary care to avoid injury to persons other than passengers who go to meet them or to see them off.

One who according to custom goes on a train or a street car to assist a passenger in entering or leaving such train is an invitee or a licensee,[62] and, although the carrier does not owe him the same degree of care that it owes to a passenger,[63] it does owe him ordinary care for his safety and protection while he is entering the car, while he is in it, and while he is leaving it;[64] and especially is there such a duty where a passenger requires assistance which

etc., R. Co., 70 S.E. 711, 68 W.Va 694, 33 L.R.A.,N.S., 583.

54. Mo.—Gott v. Kansas City Rys. Co., 222 S.W. 827.

55. Ill.—West Chicago St. R. Co. v. Buckley, 102 Ill.App. 314, affirmed 65 N.E. 708, 200 Ill. 260.

56. Ill.—Chicago City R. Co. v. Lowitz, 119 Ill.App. 360, affirmed 75 N.E. 755, 218 Ill. 24
Or.—Devroe v. Portland R., etc., Co., 131 P. 304, 64 Or. 547.

57. Ga.—Central R. Co. v. Thompson, 76 Ga. 770.
10 C.J. p 914 note 43.

Safe return to platform and egress therefrom

If a passenger is carried beyond a station and required to alight at an unusual place and in darkness, the carrier may be required to exercise such a degree of care as is reasonably necessary to secure his safe return to the platform, and egress therefrom in the usual way.—Payne v. Davis, 252 S.W. 57, 293 Mo. 645.

58. N.Y.—Mearns v. Central R. Co., 57 N.E. 292, 163 N.Y. 108, reversing 48 N.Y.S. 366, 23 App.Div. 298.
10 C.J. p 941 note 41.

59. Ga.—Blitch v. Central R. Co., 76 Ga. 333.
Ky.—Gayle v. Louisville, etc., R. Co., 173 S.W. 1113, 163 Ky. 459

60. Ala.—Franklin v. Southern Ry. Co., 72 So. 11, 196 Ala. 118.
La.—Nelson v. Vicksburg, S. & P. Ry. Co., 75 So. 212, 141 La. 475
Wis.—Larson v. Green Bay & W. R. Co., 192 N.W. 63, 179 Wis. 510.
10 C.J. p 941 note 42.

Informing passenger of situation

Where a train was stopped at a switch, a flagman who was present under circumstances leading him to believe that a female passenger who was about to alight was not aware that the train was not at its regular stopping place, should inform her of the situation, especially where the ground at the place where the train was stopped was rough and unsafe —Franklin v. Southern Ry. Co., 72 So. 11, 196 Ala. 118

61. Me.—Ouellette v. Grand Trunk R. Co., 76 A. 280, 106 Me. 153, 138 Am.S.R. 340.
10 C.J. p 942 note 44.

62. U.S.—Lowden v. McClung, C.C.A. Ark., 80 F.2d 694
Ala.—Mobile & O. R. Co. v. Davis, 137 So. 525, 223 Ala. 600
Kan.—Cannon v. Atchison, T. & S.F. Ry. Co., 167 P. 1050, 101 Kan. 363, L.R.A.1918A 559
Md.—Jackson v. Hines, 113 A. 129, 137 Md. 621.
N.Y.—Barrett v. Brooklyn Heights R. Co., 176 N.Y.S. 590, 188 App.Div. 109.
Okl.—Chicago, R. I. & P. Ry. Co. v. Brooks, 179 P. 924, 72 Okl. 208.
10 C.J. p 942 note 45.

63. Ala.—Mobile & O. R. Co. v. Davis, 137 So. 525, 223 Ala. 600
Okl.—Chicago, R. I. & P. Ry. Co. v. Brooks, 179 P. 924, 72 Okl. 208.
10 C.J. p 942 note 46.

64. Ala.—Mobile & O. R. Co. v. Davis, 137 So. 525, 223 Ala. 600
Kan.—Cannon v. Atchison, T. & S.F. Ry. Co., 167 P. 1050, 101 Kan. 363, L.R.A.1918A 559.
Mo.—Lewis v. Illinois Cent. R. Co., 50 S.W.2d 122—Lewis v. Illinois Cent. R. Co., 3 S.W.2d 371, 319 Mo. 233.
N.Y.—Barrett v. Brooklyn Heights R. Co., 176 N.Y.S. 590, 188 App.Div. 109.

the employees of the carrier do not undertake to render,[65] or where the conductor of the train requests a third person to assist a passenger.[66] One who goes to meet incoming trains for the purpose of performing services for the mutual benefit of such person on one side, and the carrier and arriving passengers on the other, is also held to be an invitee of the carrier, which owes to him a duty of ordinary care not to injure him.[67]

Persons not rendering assistance. Persons other than passengers who are at stations for the purpose of greeting incoming friends or relatives are held to be invitees or licensees[68] for whose safety the carrier is required to exercise ordinary care.[69] It has likewise been held that persons who go to a train to see their friends off are invitees or licensees[70] and the carrier must exercise ordinary care to protect them from injury;[71] but it has also been held that the rule which requires that carriers use due care to avoid injury to persons other than passengers, who come to assist boarding or alighting passengers, does not apply to one who goes on a carrier's cars merely on private business, or for the purpose of meeting and greeting friends or relatives, and with no idea or purpose of rendering any assistance to passengers,[72] and that a custom on the part of the carrier, however long continued, to permit such practice does not entitle such persons to any higher protection than that due to naked licensees.[73] Similarly it has been held that ordinary negligence is not sufficient to impose liability on a carrier for injuries to one who goes to a station to see friends off.[74]

Opportunity and time for alighting. Where the purpose of a person, not a passenger, in entering a train or street car to assist a passenger is known to the conductor or other employee in charge of the train, it is the duty of the carrier to give him a reasonable opportunity and time to render such assistance and leave the vehicle.[75] The carrier may also be required to give persons who board a train to see their friends off a reasonable opportunity to fulfill that purpose and to alight from the train;[76] but if the purpose of a person, who boards a train to as-

Okl.—Chicago, R. I. & P. Ry. Co. v. Brooks, 179 P. 924, 72 Okl. 208.
Tex.—St. Louis Southwestern Ry. Co. of Texas v. Watts, 216 S.W. 391, 110 Tex. 106, reversing, Civ.App., 173 S.W. 909.
10 C.J. p. 942 note 47.

65. Ark.—Little Rock, etc., R. Co. v. Lawton, 18 S.W. 543, 55 Ark. 428, 29 Am.S.R. 48, 15 L.R.A. 434.
10 C.J. p. 943 note 48.

66. Ky.—Bishop v. Illinois, etc., R. Co., 77 S.W. 1099, 25 Ky.L. 1363.
10 C.J. p. 943 note 49.

67. Mass.—Fournier v. New York, N. H. & H. R. Co., 189 N.E. 574, 286 Mass. 7, 92 A.L.R. 610.
N.D.—Daugherty v. Davis, 187 N.W. 616, 48 N.D. 883.

68. Md.—Jackson v. Hines, 113 A. 129, 137 Md. 621.
Va.—Norfolk & W. Ry. Co. v. Parrish, 89 S.E. 923, 119 Va. 670.

Not trespasser or bare licensee

"The custom of friends and relatives to accompany to the station persons leaving by train, for the purpose of assisting or of comforting them, or merely as a mark of friendly interest and affection, as well as the custom of friends and relations going to the station for like reasons to meet persons coming in, is so uniform, universal, and long-standing, and is so much a part and parcel of the business of carrying passengers, and has been so uniformly acquiesced in for so long by the carrier, that it would be absurd to regard a person coming to a railroad station to meet an incoming friend or relation either as a trespasser or a bare licensee to whom the carrier owes no duty but that of refraining from wanton or willful negligence"—Jackson v. Hines, 113 A. 129, 131, 137 Md. 621

69. Md.—Jackson v. Hines, supra.
Va.—Norfolk & W. Ry. Co. v. Parrish, 89 S.E. 923, 119 Va. 670.

70. Neb.—Leon v. Chicago, B. & Q. R. Co., 167 N.W. 787, 102 Neb. 537, L.R.A.1918F 313.
Okl.—St. Louis & S. F. R. Co. v. Stacy, 171 P. 870, 77 Okl. 165
S.C.—Richardson v. Atlantic Coast Line R. Co., 98 S.E. 132, 111 S.C. 359.
Tex.—Missouri, K. & T. Ry. Co. of Texas v. Bailey, Civ.App., 186 S.W. 230, error dismissed.

Attending shipment of corpse

Person going upon railway station platform to accompany others to a train and to attend to shipment of remains of relative of passengers and friend of such person is upon premises by implied invitation of railroad.—St. Louis & S. F. R. Co. v. Stacy, 171 P. 870, 77 Okl. 165

71. Neb.—Leon v. Chicago, B. & Q. R. Co., 167 N.W. 787, 102 Neb. 537, L.R.A.1918F 313.
Okl.—St. Louis & S. F. R. Co. v. Stacy, 171 P. 870, 77 Okl. 165.
S.C.—Richardson v. Atlantic Coast Line R. Co., 98 S.E. 132, 111 S.C. 359.

72. Ark.—Arkansas, etc., R. Co. v. Sain, 119 S.W. 659, 90 Ark. 278, 22 L.R.A.,N.S., 910.
10 C.J. p. 943 note 50.

73. Ark.—Arkansas, etc., R. Co. v. Sain, supra.

74. Kan.—Senning v. Arkansas Valley Interurban Ry. Co., 165 P. 863, 101 Kan. 78.

Warning that car was to start

Where it did not appear that a carrier's employees should have anticipated that a moving car would have struck one who, while at a station to see friends off, had gone into a space between the platform and the car to recover a lost coin, the carrier was not liable for failing to give a warning that the car was to start.—Senning v. Arkansas Valley Interurban Ry. Co., 165 P. 863, 101 Kan. 78.

75. U.S.—Lowden v. McClung, C.C.A. Ark., 80 F.2d 694
Ala.—Mobile & O. R. Co. v. Davis, 137 So. 525, 223 Ala. 600.
Kan.—Cannon v. Atchison, T. & S. F. Ry. Co., 167 P. 1050, 101 Kan. 363, L.R.A.1918A. 559.
Mo.—Lewis v. Illinois Cent. R. Co., 50 S.W.2d 122.—Lewis v. Illinois Cent. R. Co., 3 S.W.2d 371, 319 Mo. 233.
N.Y.—Barrett v. Brooklyn Heights R. Co., 176 N.Y.S. 590, 188 App.Div. 109.
Okl.—Chicago, R. I. & P. Ry. Co. v. Brooks, 179 P. 924, 72 Okl. 208.
Tex.—Houston E. & W. T. Ry. Co. v. Lynch, 208 S.W. 714.
10 C.J. p. 943 note 51.

Statutory signal

Duty was owing party assisting passengers with conductor's knowledge to give statutory signal for departure and opportunity thereafter to leave train.—Mobile & O. R. Co. v. Davis, 137 So. 525, 223 Ala. 600.

76. Neb.—Leon v. Chicago, B. & Q.

sist or see a passenger off, is not known, and there are no circumstances to put the carrier on notice, the carrier is not bound to hold the train until he has had time to alight, or to notify him before the train starts,[77] and it has been held that the carrier is not bound to use ordinary diligence to ascertain the purpose of such person.[78] If in such a case the train starts before such person can get off, he must either remain on the train until he can make known his wish to get off[79] or take the risk of alighting while the train is in motion,[80] unless the carrier has misled him by a false appearance of safety or put him under compulsion with respect to leaving the train.[81] It has been held, however, that, if the train has not stopped long enough to allow such person a reasonable opportunity to alight, it should be again stopped for that purpose,[82] although a carrier is not liable for injuries sustained in jumping from the train as it was moving in the absence of a request that it be stopped.[83] It has been held, however, that even though the carrier does not know of such person's intention to get off, he is entitled to the protection of having the train remain at the station for the customary length of time,[84] or for the length of time prescribed by statute.[85] There is, nevertheless, authority to the effect that, as regards such person, it is not necessary that the train be held for the full length of time usually required for passengers to alight, but only long enough to enable him to alight on notice to the trainmen of his desire so to do.[86]

§ 733. Street Car Cases

a. In general
b. Operation of vehicle and appliances generally
c. Duty to select safe place for boarding and alighting
d. Time for boarding or alighting in general
e. Starting car before passenger seated
f. Starting car while passenger boarding or alighting
g. Starting up car before stopping
h. Seeing that passengers have reached place of safety

a. In General

The carrier is required to exercise a high degree of care to avoid injury to passengers boarding or alighting from street cars.

As may be observed from preceding sections of this title, see supra §§ 723–732, general rules applicable to taking up and setting down passengers are applicable to street cars. However, since the peculiar conditions under which street cars are operated often call for the application of these rules under circumstances which do not exist as to other types of vehicles, rules relating to the carrier's care and liability for injuries to passengers boarding or alighting from street cars, not specifically treated in such preceding sections, are discussed in this section.

In accordance with the ordinary rule that carriers must exercise the highest degree of care to avoid injury to passengers boarding or alighting from the vehicles of such carriers, see supra § 723, it is held to be the duty of the employees in charge of street cars to exercise toward every passenger boarding or alighting from a car that high degree of care which prudent persons engaged in the operation of cars exercise for the safety of passengers under like circumstances;[87] but this degree of care is not in

R. Co., 167 N.W. 787, 102 Neb. 537, L.R.A.1918F 313.

77. Ala.—Atlantic Coast Line R. Co. v. Watson, 110 So. 316, 215 Ala. 254.
Pa.—Kohler v. Pennsylvania R. Co., 157 A. 618, 305 Pa. 249.
10 C.J. p 944 note 52.

Attendant to ascertain purpose
Railroad is not obliged to have attendant near to receive notice of person's intention to board train to assist passenger and alight at same station—Kohler v Pennsylvania R Co., 157 A. 618, 305 Pa. 249.

78. Pa.—Kohler v. Pennsylvania R. Co., supra.
10 C.J. p 944 note 53.

79. Ga.—Coleman v. Georgia, R., etc., Co., 10 S.E. 498, 84 Ga. 1
Ky.—Parks v Kentucky Cent. R. Co., 3 Ky.L. 691, 11 Ky.Op. 552.

80. Ky.—Berry v. Louisville, etc., R. Co., 60 S.W. 699, 109 Ky. 727, 22 Ky.L. 1410
10 C.J. p 944 note 55.

81. Ohio—Lake Shore, etc., R. Co v. Dallet, 35 Ohio Cir.Ct. 606, affirmed 89 N.E. 1118, 80 Ohio St. 735.

82. S.C.—Johnson v. Southern R. Co., 31 S.E. 212, 53 S.C. 203, 69 Am. S.R. 849.
Tex.—Missouri, etc., R. Co. v Churchill, Civ.App., 171 S.W. 517

83. Tex.—Ft. Worth & D.C.R. Co. v. Allen, Civ.App., 179 S.W. 62.

84. Tex.—Ft. Worth, etc., R. Co. v Abbott, Civ.App., 170 S.W. 117—Texas Cent. R. Co. v Hutchingson, 132 S.W. 509, 62 Tex.Civ.App. 536

85. Minn.—Street v. Chicago, etc., R. Co., 145 N.W. 746, 124 Minn. 517.

86. Ark.—Little Rock, etc., R. Co. v. Lawton, 18 S.W. 543, 55 Ark. 428, 29 Am.S.R. 48, 15 L.R.A. 434

87. Ark.—Beach v. Eureka Traction Co., 203 S.W. 834, 135 Ark. 542.
See Ill.—Appel v Alton, G. & St. L. Traction Co., 207 Ill.App. 562
Iowa.—Fitzgerald v. Des Moines City Ry. Co., 207 N.W. 602, 201 Iowa 1302.
N.C.—Woods v. North Carolina Public Service Co., 94 S.E. 459, 174 N.C. 697, 1 A.L.R. 942.
Ohio.—Mahoning & S. Ry. & Light Co. v. Leedy, 136 N.E. 198, 104 Ohio St. 487.
Wash.—Gilson v Washington Water Power Co., 161 P. 352, 93 Wash. 480.
10 C.J. p 945 note 64.

Duty absolute
Duty of street railroad to persons promptly boarding car at regular

its application to all persons always the same, as what would be sufficient care as to one person might not be sufficient as to another.[88] Street railway companies are not, however, as regards passengers boarding or alighting from street cars, insurers of safety;[89] nor is a street railway company, as regards such passengers, required to guard against what cannot be reasonably expected,[90] but may assume that they will exercise ordinary precautions for their own safety,[91] and may assume that third persons will not endanger an alighting passenger by violating an applicable statute.[92]

In the absence of actual notice of the incapacity of a passenger to look out for his own safety when alighting from a street car, the carrier owes to him no higher degree of care than to other passengers.[93]

Extent and duration of care. In accordance with the rule that one becomes a passenger on a street car at the moment that he puts his foot on the step of the car in boarding the same with the intention of becoming a passenger, see supra § 557, a street railway company as carrier has from that moment the duty of exercising due care in protecting such boarding passenger from injury;[94] but on a passenger's reaching a place of apparent safety after alighting from a street car the carrier's duty of due care toward him as a passenger is at an end.[95] Of course, where the elements of danger from which injury results to a passenger alighting from a street car are within the control of the carrier, its duty toward such passenger does not end until he has reasonable opportunity to pass beyond the zone of danger created by these conditions.[96]

When rules as to steam railroads apply. Where a street railroad operates its tracks beyond the limits of the city through uneven, open country, it is governed by the rules regulating steam railroads as to the receipt and discharge of passengers.[97]

Prospective passengers waiting to board cars. In accordance with the duty owed by a street railroad company toward pedestrians on or near its tracks, see C.J.S. title Street Railroads § 245, also 60 C.J. p 441 note 30–p 442 note 39, in approaching a place where the presence of prospective passengers waiting to board the car may be expected, the

stops is absolute. — Birmingham Electric Co. v. Cleveland, 113 So. 403, 216 Ala. 455.

Holder of a transfer boarding a street car is not entitled to any higher degree of care on the part of the carrier than is due to other boarding passengers.—Carey v. New Orleans Public Service, Inc., 3 La. App. 217.

88. Ky.—Louisville R. Co. v. Wilder, 136 S.W. 892, 143 Ky. 436.
10 C.J. p 945 note 65.

89. La.—Smith v. New Orleans Ry. & Light Co., 91 So. 514, 150 La. 1070.
N.Y.—Weiser v. Dry Dock E B & B. R. Co., 188 N.Y.S 856

90. Cal.—Northrup v. Pacific Electric Ry. Co., 47 P.2d 365, 8 Cal. App 2d 189.
10 C.J. p 945 note 66.

91. La.—Smith v. New Orleans Ry. & Light Co., 91 So 514, 150 La. 1070—Gaisser v New Orleans Public Service, 6 La.App. 139.
Pa.—Tomey v. West Penn Rys. Co., 150 A. 612, 300 Pa. 189.

92. Ind.—Terre Haute, I. & E. Traction Co. v. Evans, 161 N.E. 671, 87 Ind.App. 324.

Automobile passing car

Where a street car is stopped to discharge passengers at a point which would not permit an automobile to pass such car in compliance with a statute prohibiting automobiles from passing cars stopped for such purpose within a lateral distance of a prescribed number of feet, the motorman might properly assume that an automobile which had been going in the same direction would not so pass in violation of the statute and to the injury of an alighting passenger. — Terre Haute, I. & E Traction Co. v. Evans, 161 N.E. 671, 87 Ind.App. 324.

93. Wash.—Welsh v. Spokane & I. E. R. Co., 157 P. 679, 91 Wash. 260, L.R.A.1916F 484.

Intoxicated passenger

Wash.—Welsh v. Spokane & I. E. R. Co., 157 P. 679, 91 Wash. 260, L.R.A.1916F 484.

94. Mass.—Franz v. Holyoke St. Ry. Co., 132 N.E. 270, 239 Mass 565.

95. Ala.—Hammett v. Birmingham Ry., Light & Power Co., 81 So. 22, 202 Ala. 520.
Ga.—Martin v. Georgia Power Co., 165 S.E. 880, 45 Ga.App. 799—Jernigan v. Georgia Ry. & Power Co., 120 S.E. 439, 31 Ga.App. 273.
Iowa.—Fitzgerald v. Des Moines City Ry. Co., 207 N.W. 602, 201 Iowa 1302—Morris v. Omaha & C. B. St. Ry. Co., 187 N.W. 510, 193 Iowa 616—Chesley v. Waterloo, C., F. & N. R. Co., 176 N.W. 961, 188 Iowa 1004, 12 A.L.R. 1366.
Minn.—Ruddy v. Ingebret, 204 N.W. 630, 164 Minn. 40, 44 A.L.R. 159.
Mo.—Smuzynski v. East St. Louis Ry. Co., App., 93 S.W.2d 1058.
Neb.—Jacobson v. Omaha & Council Bluffs St. Ry. Co., 191 N.W. 327, 109 Neb. 356, 31 A.L.R. 563.
Ohio.—Northern Ohio Traction & Light Co. v. Reining, 16 Ohio App. 406, affirmed Reining v. Northern Ohio Traction & Light Co., 140 N.E. 34, 107 Ohio St. 528—Mahoning & S. Ry. & Light Co. v. Leedy, 136 N.E. 198, 104 Ohio St. 487.
Pa.—Martin v. Steen, 167 A. 609, 109 Pa.Super 263.
Wis.—Zalewski v. Milwaukee Electric Railway & Light Co., 263 N.W. 577, 219 Wis. 541.

96. Ala.—Alabama Power Co. v. Hall, 103 So. 867, 212 Ala. 638.

Darkness at time of alighting or thereafter

Where disembarking place during repairs to bridge over railroad cut was made dangerous by darkness, carrier had duty of warning passengers or maintaining lights, and it was immaterial whether passenger, who fell into cut and was killed, was invited to alight in darkness, or whether place was thereafter made dark by turning out lights of street car before passenger had reasonable opportunity to pass beyond zone of danger.—Alabama Power Co. v. Hall, 103 So. 867, 212 Ala. 638.

Issuance of transfer immaterial

That a transfer has been issued to a passenger who is injured on alighting from a street car with intent to board another car of the carrier does not alter the text rule. —Alabama Power Co. v. Hall, 103 So. 867, 212 Ala. 638.

97. Mont.—Robinson v. Helena, etc., R. Co., 99 P. 837, 38 Mont. 222.

The Corpus Juris text is cited with approval in Palmer v. Willamette Valley Southern Ry. Co., 171 P. 1169, 1171, 88 Or. 322.

street car should be operated in such manner as to avoid injury to them,[98] the usual rule being that, as regards prospective passengers waiting at regular stopping places, the car must be operated with ordinary and reasonable care,[99] or care commensurate with the danger involved.[1] In a particular case, however, it was held that a motorman's miscalculation of the distance between a parked vehicle and the track, resulting in injuries to a prospective passenger when such vehicle was thrown against him by the street car which he was waiting to board, constituted negligence as a matter of law.[2] It has also been held that the running of a street car at a rate of speed in excess of that prescribed by ordinance is negligence per se as regards injuries sustained by a prospective passenger when struck by such car, and this irrespective of the prospective passenger's knowledge of such ordinance.[3]

In consonance with the rule that a street railway company as a carrier is not required to guard against what cannot be reasonably expected, see infra § 733, a motorman is not negligent in failing to keep a lookout for passengers who may seek to board the car at a place other than a regular stopping place[4] or in failing to stop his car at a place other than a regular stopping place to permit one seeking to board the car to do so;[5] nor is a motorman, on observing one signaling an intention to board the approaching car at a nonstopping place, required to indicate that the car cannot be boarded at such place.[6] Also, a motorman is not required to have his car under such control at night as to permit it to be stopped within the limits of vision.[7]

b. Operation of Vehicle and Appliances Generally

Street cars must be so operated as to avoid injury to passengers boarding or alighting therefrom, and due care must be exercised to see that such passengers are not injured by the operation of such cars' appliances.

Aside from its duties as to stopping or starting its cars in particular situations with respect to passengers boarding or alighting therefrom, as indicated in subsequent paragraphs of this section, a street railway company, as a carrier, has a positive duty so to operate its cars generally as to avoid injury to passengers boarding or alighting therefrom.[8]

A carrier by street car must also exercise due

98. Ala.—Alabama Power Co v Bass, 119 So. 625, 218 Ala. 586, 63 A.L.R. 1.
Conn.—Moyles v. Connecticut Co., 160 A. 307, 115 Conn. 80.
Me.—Verrill v. Androscoggin Electric Co., 102 A. 179, 116 Me. 519.
Wash.—Switzer v. City of Seattle, 294 P. 225, 159 Wash. 540, modified on other grounds 298 P. 347.

99. Conn.—Vaughn v. Healy, 182 A. 166, 120 Conn. 589—DeCicco v. Connecticut Co., 168 A. 879, 117 Conn. 677—Sacks v. Connecticut Co., 146 A. 494, 109 Conn. 221.
Ky.—Louisville Taxicab & Transfer Co. v. Reno, 35 S.W.2d 902, 237 Ky. 452.
Neb.—O'Connor v. Omaha & C. B. St. Ry. Co., 177 N.W. 838, 104 Neb. 534.
N.J.—Courtney v. Public Service Ry. Co., 115 A. 740, 96 N.J.Law 308, affirmed 117 A. 925, 97 N.J.Law 564.
R.I.—Villa v. United Electric Rys. Co., 155 A. 366, 51 R.I. 384.

Time when duty arises

Motorman's duty toward intending passenger begins when motorman saw, or should have seen, such person in place of danger of which he may not be cognizant.—Switzer v. City of Seattle, 294 P. 225, 159 Wash. 540, opinion modified on other grounds 298 P. 347.

Care of reasonably prudent man

Motorman is required to use such care to avoid injuries to prospective passengers as reasonably prudent man under same circumstances would exercise.—Sacks v. Connecticut Co., 146 A. 494, 109 Conn. 221.

1. Conn.—Sacks v. Connecticut Co., supra.

High degree of care owed passenger is not required as regards prospective passengers.
Neb.—O'Connor v. Omaha & C. B. St. Ry. Co., 177 N.W. 838, 104 Neb. 534.
R.I.—Villa v. United Electric Rys. Co., 155 A. 366, 51 R.I. 384, 75 A.L.R. 282.

Where danger is great

(1) Where the danger to the prospective passenger is great, the care required of the motorman is correspondingly great.—Moyles v. Connecticut Co., 160 A. 307, 115 Conn. 80—Sacks v. Connecticut Co., 146 A. 494, 109 Conn. 221.

(2) Thus a motorman's duty, when signaled by intending passenger who had to cross tracks to board car, was to exercise great care.—Moyles v. Connecticut Co., supra.

More specifically, in the exercise of due care toward prospective passengers, the motorman of an approaching street car may be required to:

(1) Have his car under control.
Conn.—Sacks v. Connecticut Co., 146 A. 494, 109 Conn. 221—Pond v. Connecticut Co., 111 A. 621, 96 Conn. 437.
Tenn.—Tennessee Electric Power Co. v. Bainbridge, App., 95 S.W.2d 1261.

(2) Maintain a lookout.—Sacks v. Connecticut Co., supra.

(3) Sound a warning.—Sacks v. Connecticut Co., supra.

(4) Stop on signal.—Pond v. Connecticut Co., supra.

2. Ky.—Louisville Taxicab & Transfer Co. v. Reno, 35 S.W.2d 902, 237 Ky. 452.

3. Mo.—Unterlachner v. Wells, 296 S.W. 755, 317 Mo. 181.

4. Va.—Veale v. Virginia Ry. & Power Co., 131 S.E. 200, 144 Va. 210.

Waving hand by person seeking to board car at nonstopping place did not impute knowledge of intent to board car to motorman.—Veale v. Virginia Ry. & Power Co., 131 S.E. 200, 144 Va. 210.

5. Va.—Hendricks v. Virginia Electric & Power Co., 172 S.E. 160, 161 Va. 793.

6. Va.—Veale v. Virginia Ry. & Power Co., 131 S.E. 200, 144 Va. 210.

7. Conn.—Sacks v. Connecticut Co., 146 A. 494, 109 Conn. 221.

8. Ala.—Alabama Power Co v Bass, 119 So. 625, 218 Ala. 586, 63 A.L.R. 1.
Conn.—Moyles v. Connecticut Co., 160 A. 307, 115 Conn. 80.
Me.—Verrill v. Androscoggin Electric Co., 102 A. 179, 116 Me. 519.

care to see that passengers boarding or alighting from its cars are not injured by the operation of their appliances.[9]

c. Duty to Select Safe Place for Boarding and Alighting

Street railway carriers have the duty of seeing that the place selected for passengers to board or alight from street cars is safe for that purpose.

The rule that a carrier has the duty of seeing that the place where it invites its passengers to board or alight from its vehicles is safe for this purpose, see supra § 723, applies to street cars.[10] It is also the duty of the persons operating a street car to know that the place at which the car is stopped to allow passengers to alight is reasonably safe.[11] It is not essential to the carrier's liability that the situation be bristling with glaring and obvious possibilities of harm,[12] it being sufficient that the situation is one that is likely to result in injury to the passenger in the particular situation.[13] A street railway company is not, however, an insurer of the safety of the place at which cars are stopped to permit passengers to alight.[14] In view of the conditions under which street cars are normally operated, requiring that passengers be picked up from, or discharged on, the traveled portions of public streets which are outside the control of the carrier, the law applicable to other types of carriers, as regards the safety of the place selected for this purpose, is not usually applied as strictly in the case of street cars,[15] the duty of the street railway

9. Ala.—Mobile Light & R. Co. v. Ellis, 96 So. 773, 209 Ala. 580.
Mo.—Vogts v. Kansas City Rys. Co., App., 228 S.W. 526.
N.C.—Brown v. Asheville Power & Light Co., 88 S.E. 858, 171 N.C. 555.
Ohio.—Hess v. Cincinnati Street R. Co., 29 Ohio N.P.,N.S., 67.
10 C.J. p. 945 note 64 [d], [g].

Closing door

(1) Under particular circumstances it has been held that closing the entrance door of a street car as a passenger was boarding the same constituted negligence for which the carrier was liable.
Ala.—Mobile Light & R. Co. v. Ellis, 96 So. 773, 209 Ala. 580—Bradley v. Williams, 101 So. 808, 20 Ala. App. 308.
Mo.—Vogts v. Kansas City Rys. Co., App., 228 S.W. 526.

(2) Where a passenger was injured in falling to the street by reason of the closing of the exit door as she was in the act of alighting, the company was held to be liable, notwithstanding the door was automatic in operation.—Hess v. Cincinnati Street R. Co., 29 Ohio N.P.,N.S., 67.

10. Ala.—Alabama Power Co. v. Hall, 103 So. 867, 212 Ala. 638—Mobile Light & R. Co. v. Therrell, 88 So. 677, 205 Ala. 533—Hammett v. Birmingham Ry., Light & Power Co., 81 So. 22, 202 Ala. 520.
Ark.—Beach v. Eureka Traction Co., 203 S.W. 834, 135 Ark. 542.
Conn.—St. John v. Connecticut Co., 131 A. 396, 103 Conn. 641.
Ga.—Martin v. Georgia Power Co., 165 S.E. 880, 45 Ga.App. 799—Jernigan v. Georgia Ry. & Power Co., 120 S.E. 439, 31 Ga.App. 273—Graham v. Savannah Electric Co., 91 S.E. 912, 19 Ga.App. 509.
Ill.—Griswold v. Chicago Rys. Co., 170 N.E. 845, 339 Ill. 94, affirming 253 Ill.App. 498.
Iowa.—Fitzgerald v. Des Moines City Ry. Co., 207 N.W. 602, 210 Iowa 1302.
Kan.—Kennedy v. Fleming, 221 P. 349, 114 Kan. 853.
La.—Campbell v. N. O. Public Service, 133 So. 542, 16 La.App. 210—Wagner v. New Orleans Public Service, 120 So. 72, 9 La.App. 699.
Mass.—McManus v. Boston Elevated Ry. Co., 160 N.E. 529, 262 Mass. 519.
Minn.—Reid v. Minneapolis St. Ry. Co., 213 N.W. 43, 171 Minn. 31—Lentz v. Minneapolis & St. Paul Suburban R. Co., 160 N.W. 794, 135 Minn. 310.
Miss.—Gulfport & Mississippi Coast Traction Co. v. Raymond, 128 So. 327, 157 Miss. 439.
Mo.—Caley v. Kansas City, 48 S.W. 2d 25, 226 Mo.App. 934—Watts v. Fleming, 298 S.W. 107, 221 Mo.App. 1123.
Neb.—Jacobson v. Omaha & Council Bluffs St. Ry. Co., 191 N.W. 327, 109 Neb. 356, 31 A.L.R. 563.
N.H.—Wilson v. Berlin St. Ry., 149 A. 602, 84 N.H. 285.
N.J.—Pabst v. Public Service Ry. Co., 141 A. 773, 104 N.J.Law 537.
N.C.—Loggins v. Southern Public Utilities Co., 106 S.E. 822, 181 N.C. 221.
Ohio.—Mahoning & S. Ry. & Light Co. v. Leedy, 136 N.E. 198, 104 Ohio St. 487—Cincinnati Street Ry. Co. v. Mueller, 200 N.E. 770, 51 Ohio App. 314—Cleveland Ry. Co. v. Arrison, 159 N.E. 580, 26 Ohio App. 359—Cleveland Ry. Co. v. Rauft, 12 Ohio App. 397.
Okl.—Muskogee Electric Traction Co. v. Latty, 187 P. 491, 77 Okl. 156.
Pa.—McCarty v. Gochnauer, 167 A. 590, 312 Pa. 258—Gerlach v. City of Philadelphia, 157 A. 212, 103 Pa.Super. 401.
Tenn.—Clinton v. Tennessee Electric Power Co., 10 Tenn.App. 311.
Wash.—Tobin v. City of Seattle, 221 P. 583, 127 Wash. 664.
10 C.J. p. 914 note 41.

11. Ala.—Mobile, etc., R. Co. v. Walsh, 40 So. 560, 146 Ala. 295.
R.I.—Tilden v. Rhode Island Co., 63 A. 675, 27 R.I. 482.
10 C.J. p. 916 note 51.

12. Mo.—Caley v. Kansas City, 48 S.W.2d 25, 226 Mo.App. 934.

13. Mo.—Caley v. Kansas City, supra.

14. Minn.—Reid v. Minneapolis St. Ry. Co., 213 N.W. 43, 171 Minn. 31—Ruddy v. Ingebret, 204 N.W. 630, 164 Minn. 40, 44 A.L.R. 159.
Neb.—Jacobson v. Omaha & Council Bluffs St. Ry. Co., 191 N.W. 327, 109 Neb. 356, 31 A.L.R. 563.
Pa.—Perret v. George, 133 A. 228, 286 Pa. 221.

15. Ga.—Martin v. Georgia Power Co., 165 S.E. 880, 45 Ga.App. 799—Graham v. Savannah Electric Co., 91 S.E. 912, 19 Ga.App. 509.
Ind.—Terre Haute, I. & E. Traction Co. v. Evans, 161 N.E. 671, 87 Ind.App. 324.
Iowa.—Morris v. Omaha & C. B. St. Ry. Co., 187 N.W. 510, 193 Iowa 616—Chesley v. Waterloo, C., F. & N. R. Co., 176 N.W. 961, 188 Iowa 1004, 12 A.L.R. 1366.
Ky.—Kentucky Traction & Terminal Co. v. Soper, 286 S.W. 776, 215 Ky. 536.
Minn.—Reid v. Minneapolis St. Ry. Co., 213 N.W. 43, 171 Minn. 31.
Neb.—Jacobson v. Omaha & Council Bluffs St. Ry. Co., 191 N.W. 327, 109 Neb. 356, 31 A.L.R. 563.
Pa.—Klingensmith v. West Penn. Rys. Co., 123 A. 787, 279 Pa. 336.
S.C.—Thompson v. Greenville Traction Co., 107 S.E. 911, 116 S.C. 444.
Wash.—Tobin v. City of Seattle, 221 P. 583, 127 Wash. 664.

Other statements of rule

(1) "It is generally held that the law applicable to steam railroads which have particular places to stop to take on and let off passengers, which places are generally prepared in advance by having station build-

company in such cases being merely to select a reasonably safe place for its passengers to board or alight,[16] and this duty is met when it stops its car so that the passenger in alighting will step on a part of the street properly marked for public travel.[17] The duty to select a safe place for passengers to board or alight from street cars does not require the carrier to protect such passengers from obvious street dangers,[18] such as those which arise from the operation of other vehicles on the street[19] or

ings or platforms, cannot in fairness be applied—at least too strictly—to the operation of street railways, which stop upon signal at innumerable places and usually have not regular stations and platforms."—Tobin v City of Seattle, 221 P. 583, 587, 127 Wash 664.

(2) "A public street in a city is not to be regarded as a passenger station, for the safety of which a railway company may be responsible, when used by passengers to alight."—Thompson v. Greenville Traction Co., 107 S.E. 911, 116 S.C. 444.

16. Ala.—Alabama Power Co v. Hall, 103 So 867, 212 Ala. 638—Mobile Light & R Co v. Therrell, 88 So 677, 205 Ala. 533.
Ga.—Martin v. Georgia Power Co, 165 S.E. 880, 45 Ga App. 799—Georgia Ry. & Power Co v. C C. Gilbert, 146 S.E. 34, 39 Ga App. 58—Georgia Ry. & Power Co v. Gilbert, 146 S E 33, 39 Ga.App. 56—Jernigan v Georgia Ry. & Power Co., 120 S E. 439, 31 Ga.App 273—Graham v. Savannah Electric Co., 91 S E 912, 19 Ga App 509.
Iowa.—Morris v. Omaha & C B St. Ry. Co, 187 N.W. 510, 193 Iowa 616
La.—Campbell v. N. O Public Service, 133 So. 542, 16 La.App. 210—Wagner v. New Orleans Public Service, 120 So 72, 9 La App 699.
Minn.—Reid v. Minneapolis St. Ry Co., 213 N.W. 43, 171 Minn. 31.
Mo.—Caley v. Kansas City, 48 S.W. 2d 25, 226 Mo.App 934
Neb.—Jacobson v Omaha & Council Bluffs St. Ry. Co., 191 N.W. 327, 109 Neb. 356, 31 A.L.R. 563
N.H.—Wilson v. Berlin St. Ry, 149 A 602, 84 N.H. 285.
N.J.—Pabst v. Public Service Ry. Co., 141 A 773, 104 N.J.Law 537.
Ohio.—Mahoning & S Ry. & Light Co. v. Leedy, 136 N.E 198 104 Ohio St. 487—Cleveland Ry. Co. v. Rauft, 12 Ohio App 397
Pa.—McCarty v. Gochnauer, 167 A. 590, 312 Pa. 258
Tenn.—Clinton v. Tennessee Electric Power Co., 10 Tenn App. 311.
10 C.J. p 915 notes 46, 48.

17. Conn.—St. John v. Connecticut Co, 131 A 396, 103 Conn 641.
Ga.—Martin v. Georgia Power Co., 165 S.E 880, 45 Ga.App. 799.
Iowa.—Morris v Omaha & C. B St. Ry Co, 187 N W 510, 193 Iowa 616—Chesley v Waterloo, C., F. & N R Co., 176 N.W. 961, 188 Iowa 1004, 12 A.L.R. 1366.
Wis.—Zalewski v. Milwaukee Electric Railway & Light Co, 263 N W. 577, 219 Wis 541.
10 C.J. p 915 note 49.

18. Cal.—Northrup v Pacific Electric Ry. Co, 47 P.2d 365, 8 Cal App.2d 189
Minn.—Fox v. Minneapolis St Ry. Co, 251 N.W 916, 190 Minn. 343—Reid v. Minneapolis St. Ry. Co, 213 N.W 43, 171 Minn. 31—Ruddy v Ingebret, 204 N.W. 630, 164 Minn 40, 44 A.L.R. 159.
Neb.—Jacobson v Omaha & Council Bluffs St Ry Co, 191 N.W. 327, 109 Neb. 356, 31 A.L.R 563.
Ohio.—Mahoning & S. Ry. & Light Co v. Leedy, 136 N.E 198, 104 Ohio St. 487—Cleveland Ry. Co. v. Arrison, 159 N.E. 580, 26 Ohio App. 359.
Pa.—Klingensmith v. West Penn. Rys Co., 123 A 787, 279 Pa. 336—Murtha v. City of Philadelphia, Super., 197 A 513.
Tex.—Wittkower v Dallas Ry. & Terminal Co., Civ.App, 73 S.W.2d 867, error refused.

Other statements of rule; reasons for rule

(1) "The rule adhered to by this and the majority of courts is that a street railway company under ordinary circumstances is not responsible for injuries to a passenger that are caused by obvious street dangers. The risks incident thereto are known to all passengers; they have as good or better opportunity to observe and protect themselves from those risks as have the conductor or motorman."—Fox v. Minneapolis St. Ry Co, 251 N.W. 916, 919, 190 Minn 343.

(2) "It would, under the circumstances, be impracticable to require the company to take the responsibility of protection against these obvious dangers of the street. The motorman . . . could have but little judgment as to these dangers when he is attending his usual duties The company is not the creator of these conditions or street dangers and they are beyond its control"—Ruddy v. Ingebret, 204 N.W 630, 631, 164 Minn. 40, 44 A.L.R. 159

(3) "The very nature of these obvious dangers, which are necessarily within the knowledge of all, and which do not include defective equipment or manipulation of the company's instrumentalities make it impracticable for the company to cope with them, while on the other hand, they may be successfully avoided by ordinary diligence on the part of the passenger in stepping from the street car into the street.'—Ruddy v. Ingebret, supra.

19. Ala.—Hammett v Birmingham Ry, Light & Power Co, 81 So. 22, 202 Ala. 520
Cal.—Northrup v Pacific Electric Ry. Co., 47 P 2d 365, 8 Cal.App 2d 189.
Conn.—St. John v. Connecticut Co, 131 A 396, 103 Conn 641.
Ga.—Martin v. Georgia Power Co, 165 S.E. 880, 45 Ga App 799—Jernigan v. Georgia Ry & Power Co, 120 S E 439, 31 Ga App. 273
Iowa.—Moss v Mason City & C L. R. Co, 251 N.W. 627, 217 Iowa 354—Fitzgerald v. Des Moines City Ry. Co, 207 N.W. 602, 210 Iowa 1302—Chesley v. Waterloo, C., F & N. R Co. 176 N.W 961, 188 Iowa 1004, 12 A.L.R. 1366.
Ky.—Trout's Adm'r v. Ohio Valley Electric Ry Co., 43 S.W.2d 507, 241 Ky. 144.
La.—Cazeaux v. New Orleans Public Service, 134 So. 121, 16 La App. 541.
Md.—Hevell v. Baltimore Transit Co, 196 A 103
Minn.—Ruddy v Ingebret, 204 N.W. 630, 164 Minn. 40, 44 A.L.R 159
Mo.—Smuzynski v. East St Louis Ry. Co, App., 93 S.W 2d 1058.
Neb.—Jacobson v Omaha & Council Bluffs St. Ry Co, 191 N.W 327, 109 Neb. 356, 31 A.L.R 563.
Ohio.—Cleveland Ry. Co. v. Karbole, 181 N.E 889, 125 Ohio St. 467—Mahoning & S Ry & Light Co v Leedy, 136 N.E 198, 104 Ohio St. 487—Cleveland Ry Co v. Arrison, 159 N.E 580, 26 Ohio App 359.
Pa.—McCarty v. Gochnauer, 167 A. 590, 312 Pa. 258—Klingensmith v. West Penn. Rys. Co, 123 A. 787, 279 Pa 336.
Tex.—Wittkower v. Dallas Ry & Terminal Co., Civ.App., 73 S.W 2d 867, error refused.

Reason for rule

"The motorman has no way of knowing when a driver will instantaneously become a wrongdoer"—Ruddy v. Ingebret, 204 N.W. 630, 631, 164 Minn 40, 44 A.L.R 159.

Anticipating violation of statute

The company is not bound to anticipate that the operator of a passing automobile will disregard a statute forbidding automobiles from passing a standing street car on the side on which passengers are being received or from which they are being discharged.—Klingensmith v.

from ordinary obstructions, defects, or unevenness of the surface of the street, at the place where the car is stopped.[20] A fortiori, the carrier is not required to exercise a high, or the highest, degree of care to prevent injury to an alighting passenger by reason of conditions existing on the surface of the street at the point where he alights;[21] nor is the carrier liable for injuries resulting from a defective bridge adjacent to the right of way of the street car tracks and outside the control of the carrier.[22]

Degree of care in selecting place to stop. The degree of care required to be exercised by a street railroad in selecting a safe place for passengers boarding or alighting from its cars has been variously stated to be ordinary care,[23] reasonable care,[24] extraordinary care,[25] a high degree of care,[26] and the highest degree of care.[27] It has been held, moreover, that a street railroad which discharges its passengers on its private right of way is bound to the utmost degree of care in procuring a safe place for them to alight.[28]

Usual or designated stopping place. In furtherance of the duty of street railway carriers to select a safe place for their passengers to board or alight, it is usually held to be the duty of a street railroad company, in taking on or letting off passengers, to stop its cars at the usual stopping places,[29] particularly where signaled in time to permit it so to do,[30] although it has also been held that mere failure to

West Penn. Rys. Co., 123 A. 787, 279 Pa. 336.

Requiring entry from particular side

Generally a requirement by a street railway that passengers enter a car from a particular side is reasonable, and the mere fact that in a particular instance the danger from passing vehicles would be less in boarding the car on the opposite side will not in all cases render the railway chargeable with negligence—Klingensmith v. West Penn. Rys. Co., 123 A. 787, 279 Pa. 336.

Requiring exit from particular side

(1) That alighting passenger struck by automobile had been directed to leave street car from its left side could not without more be accounted negligence on the part of the company.—Jernigan v. Georgia Ry. & Power Co., 120 S.E. 439, 31 Ga.App. 273.

(2) Nor may the fact that a passenger is discharged from that side of the street car where traffic is moving, rather than from the opposite side where there is no traffic, constitute negligence on the part of the carrier.—Anderson v. Grandy, 283 P. 186, 154 Wash. 547.

20. U.S.—Shepard v. Denver Tramway Corporation, C.C.A.Colo., 62 F.2d 339.
Ga.—Graham v. Savannah Electric Co., 91 S.E. 912, 19 Ga.App. 509.
Ky.—Kentucky Traction & Terminal Co. v. Soper, 286 S.W. 776, 215 Ky. 536.
Mass.—Lenoue v. Worcester Consol. St. Ry. Co., 153 N.E. 533, 257 Mass. 285.
Minn.—Reid v. Minneapolis St. Ry. Co., 213 N.W. 43, 171 Minn. 31.
Pa.—Perret v. George, 133 A. 228, 286 Pa. 221—Murtha v. City of Philadelphia, Super., 197 A. 513—Martin v. Steen, 167 A. 609, 109 Pa.Super. 263.
R.I.—Villa v. United Electric Rys. Co., 155 A. 366, 51 R.I. 384, 75 A.L.R. 282.
S.C.—Thompson v. Greenville Traction Co., 107 S.E. 911, 116 S.C. 444.

Another statement of rule

"Street car companies are not required to observe the condition of streets over which their cars travel, so as to stop their cars with exactness at places where passengers may avoid ordinary defects in the highway while alighting."—Perret v. George, 133 A. 228, 229, 286 Pa. 221.

Small pebble

Ky.—Kentucky Traction & Terminal Co. v. Soper, 286 S.W. 776, 215 Ky. 536.

21. U.S.—Shepard v. Denver Tramway Corporation, C.C.A.Colo., 62 F.2d 339.
Minn.—Reid v. Minneapolis St. Ry. Co., 213 N.W. 43, 171 Minn. 31.

It would be impracticable to require a street railway company to exercise a high degree of care in protecting a passenger against small obstructions on the surface of the street or defects thereon in view of the motorman's exacting duties of guarding against ordinary street risks of traffic, and passengers' ability to look after themselves.—Reid v. Minneapolis St. Ry. Co., 213 N.W. 43, 171 Minn. 31.

22. Tenn.—Clinton v. Tennessee Electric Power Co., 10 Tenn.App. 311.

23. Minn.—Reid v. Minneapolis St. Ry. Co., 213 N.W. 43, 171 Minn. 31.

24. N.J.—Pabst v. Public Service Ry. Co., 141 A. 773, 104 N.J.Law 537.

25. Ga.—Georgia Ry. & Power Co. v. C. C. Gilbert, 146 S.E. 34, 39 Ga.App. 58—Georgia Ry. & Power Co. v. Gilbert, 146 S.E. 33, 39 Ga.App. 56.

26. Iowa.—Fitzgerald v. Des Moines City Ry. Co., 207 N.W. 602, 210 Iowa 1302.
Minn.—Lentz v. Minneapolis & St. Paul Suburban R. Co., 160 N.W. 794, 135 Minn. 310.

27. Ala.—Alabama Power Co. v. Hall, 103 So. 867, 212 Ala. 633—Mobile Light & R. Co. v. Therrell, 88 So. 677, 205 Ala. 533.
Mo.—Caley v. Kansas City, 48 S.W.2d 25, 226 Mo.App. 934.
Ohio—Cincinnati Street Ry. Co. v. Mueller, 200 N.E. 770, 51 Ohio App. 314—Cleveland Ry. Co. v. Arrison, 159 N.E. 580, 26 Ohio App. 359.

28. Md.—Topp v. United R., etc., Co., 59 A. 52, 99 Md. 630, 1 Ann.Cas. 912.

29. Me.—Verrill v. Androscoggin Electric Co., 102 A. 179, 116 Me. 519.
La.—Johnston v. City of Monroe, App., 147 So. 519.
Miss.—Gulfport & Mississippi Coast Traction Co. v. Raymond, 128 So. 327, 157 Miss. 439.
Ohio.—Cincinnati Street Ry. Co. v. Mueller, 200 N.E. 770, 51 Ohio App. 314.
Okl.—Muskogee Electric Traction Co. v. Latty, 187 P. 491, 77 Okl. 156.
10 C.J. p. 945 note 70.

Stopping on curve

Street railroad was not liable for injury to passenger alighting at usual landing place partly over curve in track.—Harang v. N. O. Public Service, 119 So. 86, 9 La.App. 91.

Stopping over ditch or depression

Stopping a car over a ditch or depression which brought the step two or three feet from the ground was held to indicate negligence on the part of the company as respects a passenger injured in boarding the car, where it appeared that the car might have been conveniently stopped at the usual stopping place on the graded roadway. — Muskogee Electric Traction Co. v. Latty, 187 P. 491, 77 Okl. 156.

30. Ohio.—Cincinnati Street Ry. Co.

stop at a place indicated as a stopping place may not constitute negligence with respect to a passenger, injured while alighting, provided the place at which the stop is made is reasonably safe for the purpose of alighting.[31] Where conditions in a neighborhood require that street cars be rerouted and that a regular stopping place be relocated, the company may not be liable for injuries sustained by an alighting passenger caused by a failure to stop at the old stopping place.[32]

Place or conditions controlled by carrier. The duty of a street railway, as carrier, to select a safe place for stopping its cars to permit passengers to board or alight is particularly applicable to cases where the place selected, or the conditions constituting the danger, are within the control of the carrier.[33] This is especially true where an ordinance requires that the carrier shall eliminate the conditions constituting the dangerous situation.[34] On the other hand, the duty to provide a safe place for boarding cars does not require that a city operating a street car system shall mark out safety zones on the street at places where cars are boarded[35] or maintain watchmen at such places;[36] nor does the mere fact that a city, operating a street railway system, permits two-way traffic on the paved side of the street adjacent to a track constitute a dangerous situation within the rule requiring that passengers be provided with a safe place to alight.[37]

Excavation or construction work in street. Stopping a street car for a passenger to alight at a place where the street is being excavated may constitute negligence for which the carrier shall be liable,[38] although it is not necessarily negligence on the part of the carrier to pick up passengers at a

v. Mueller, 200 N.E 770, 51 Ohio App 314.
10 C.J. p 946 note 71.

31. Conn.—St. John v. Connecticut Co., 131 A. 396, 103 Conn. 641.

White marked pole

Street railroad need not stop car at white-marked pole, which was usual place for discharge of passengers, and might stop at any convenient place in vicinity, provided exit was afforded on a highway not defective or dangerous—St. John v. Connecticut Co., 131 A. 396, 103 Conn. 641.

32. Mass—Bigelow v. Boston Elevated Ry. Co., 115 N.E. 250, 226 Mass. 116.

Passenger thrown from running board

Street railway was not liable to passenger thrown from running board, where he stood preparatory to alighting, having passed abandoned stop, on ground that company was negligent in changing stopping places, line being rerouted owing to tunnel construction. — Bigelow v. Boston Elevated Ry. Co., 115 N.E. 250, 226 Mass. 116.

33. Ky—Mayhew v. Ohio Valley Electric Ry. Co, 254 S.W. 202, 200 Ky. 105.
La.—Gates v. New Orleans Ry. & Light Co, 75 So. 1002, 141 La. 946—Shally v. New Orleans Public Service, Sewerage & Water Board, 1 La.App. 770, affirmed 105 So. 606, 159 La. 519.
N.H.—Wilson v. Berlin St. Ry., 149 A. 602, 84 N.H 285.
Wash—Tobin v. City of Seattle, 221 P. 583, 127 Wash. 664.

At regular depot, duties same as other carriers

A street railway which has provided a regular depot at a stopping place is charged with the same duties with reference to its safety for the discharge of passengers as are imposed on other carriers of passengers.—Mayhew v Ohio Valley Electric Ry. Co, 254 S.W. 202, 200 Ky 105.

Constructing landing place; establishing lights

A street railroad which constructs a landing place for patrons and establishes lights to guide them in crossing the tracks thereby invites them to use the crossing and must, as regards alighting passengers, keep it reasonably safe.—Brooks v Union Depot Bridge & Terminal R Co, 258 S.W. 724, 215 Mo.App. 643

Duty to furnish light

A city owning and operating street car system owes a duty to its patrons to see that sufficient light is furnished at places where it stops its cars for taking on passengers to make the place reasonably safe.—Tobin v. City of Seattle, 221 P. 583, 127 Wash 664.

34. N.H.—Wilson v. Berlin St. Ry., 149 A. 602, 84 N.H. 285.

Snow and ice ruts

Where an ordinance required a street railway company to remove snow and ice from its tracks and the street adjacent thereto, the company may be liable for injuries resulting to an alighting passenger by reason of snow and ice ruts which have been permitted to remain on the street.—Wilson v Berlin St. Ry, 149 A. 602, 84 N.H 285.

35. Wash—Tobin v. City of Seattle, 221 P 583, 127 Wash. 664.

No reason for applying different rule to city

"If the street railway system were being operated by a private owner, it would not only have no duty to mark out safety zones, but it would have no right to do so, and we cannot see that any greater duty in this regard should devolve upon the city than upon a private owner under the same circumstances"—Tobin v. City of Seattle, 221 P 583, 587, 127 Wash 664.

36. Wash.—Tobin v. City of Seattle, supra.

Reason for rule

"It is perfectly plain that it would be impossible for the respondent or any privately owned street railway system to station watchmen at the almost innumerable stopping places that street cars have. To impose that obligation upon it would be to so burden it as to make it impossible for it to continue operations"—Tobin v. City of Seattle, 221 P. 583, 587, 127 Wash 664.

37. Wash—Jones v City of Seattle, 257 P. 393, 144 Wash 188

38. Kan—Kennedy v. Fleming, 221 P 249, 114 Kan 853
Mo.—Caley v. Kansas City, 48 S.W. 2d 25 226 Mo App 934
N.J—Pabst v Public Service Ry Co., 141 A 773, 104 N.J Law 537
Ohio—Cleveland Ry. Co v. Ranft, 12 Ohio App 397.
Pa—Gerlach v City of Philadelphia, 157 A. 212, 103 Pa Super. 401.

View of trench obstructed

Where an alighting passenger's view of an open trench was obstructed by the car itself because of the proximity of the trench to the track at the place where the car was stopped, the company was held to be liable for injuries sustained by such passenger in stepping into such trench while in the very act of alighting—Gerlach v. City of Philadelphia, 157 A. 212, 103 Pa.Super. 401.

point where the streets are under construction or being improved.[39]

Crowd. The mere fact that an alighting passenger is injured as a result of the boisterous and violent conduct of a crowd attempting to board the car may not impose liability on the carrier, particularly in the absence of any showing that the carrier or its servants had previous information or experience that the crowd would attempt to board the car at the time and place in question.[40] Reason to anticipate the presence of a dangerous crowd at the time and place in question may, on the other hand, render the carrier liable for failure to protect an alighting passenger from injury from such crowd.[41]

d. Time for Boarding or Alighting in General

A street car must be stopped long enough to permit person boarding or alighting therefrom to do so in safety.

While receiving or discharging passengers, the car should be held stationary for a reasonable length of time, due regard being had to the circumstances and conditions surrounding the particular passengers,[42] to allow them, in the exercise of reasonable care and diligence on their part, to board or to alight in safety, and, if the carrier fails to hold the car a sufficient length of time to allow them such an opportunity, it is liable for the resulting injuries,[43] although the passenger so injured is not seen by those in charge of the car.[44] The rule also applies, although the car has stopped for purposes other than taking on or setting down passengers, if it is stopped under circumstances which amount to an invitation to passengers to board or alight,[45] as where a car is stopped at a place where it is customary for passengers to board it.[46] On the other hand, a street railway carrier may not be liable for injuries to a boarding passenger in starting the car after he has had a reasonable time to enter, particularly where the car is started in a careful manner[47] or at least without any unusual violence or jerk.[48] It has also been held that the carrier may not be liable for injuries sustained by a passenger from the starting of the car after he has safely entered the car, notwithstanding the start is made with a jolt or jerk.[49] Starting a street car while a passenger is in the body of the car and moving toward the exit to alight does not without more constitute negligence;[50] nor, in the absence of knowl-

39. Pa.—Martin v. Steen, 167 A. 609, 109 Pa.Super. 263.

Reason for rule

"To hold the carrier liable in all such cases would require the street car company either to become an insurer of those who passed over a space where improvements were being carried on or to refuse to accept passengers at such places. The latter would be a great inconvenience to the traveling public and is not required."—Martin v. Steen, 167 A. 609, 109 Pa.Super. 263.

40. Mass.—Dullea v. Boston Elevated Ry. Co., 146 N.E. 237, 251 Mass. 56.

41. Ga.—Georgia Ry. & Power Co. v. Murphy, 110 S.E. 680, 28 Ga.App. 173.

Knowledge of crowd's custom

A street car company, knowing that at a certain time each day a crowd boards the cars at a certain point and struggles and pushes against one another, has reason to anticipate that a female passenger without knowledge thereof, and who has gone on the platform for the purpose of alighting, will be injured, and fails in its legal duty if it fails to use the required diligence to protect her from injury by the crowd. —Georgia Ry. & Power Co. v. Murphy, 110 S.E. 680, 28 Ga.App. 173.

42. Ill.—Garlinski v. Chicago City Ry. Co., 257 Ill.App. 414—Little v. Peoria Ry. Co., 215 Ill.App. 385.
10 C.J. p. 946 note 72.

43. Ala.—Van Tinder v. Birmingham Ry., Light & Power Co., 80 So. 858, 202 Ala. 474.
Cal.—Poak v. Pacific Electric Ry. Co., 170 P. 159, 177 Cal. 190—Jones v. United Railroads of San Francisco, 202 P. 919, 54 Cal.App. 744.
Ill.—Garlinski v. Chicago City Ry. Co., 257 Ill.App. 414—Little v. Peoria Ry. Co., 215 Ill.App. 385. See Devine v. Chicago City Ry. Co., 195 Ill.App. 304.
Iowa.—Walters v. Des Moines City Ry., 179 N.W. 865, 191 Iowa 196.
Ky.—Kentucky Traction & Terminal Co. v. Peel, 214 S.W. 874, 185 Ky. 207.
La.—Schernbeck v. New Orleans Ry. & Light Co., 73 So. 771, 140 La. 682—Latmore v. New Orleans Public Service Co., 2 La.App. 349.
Mo.—Baldwin v. Kansas City Rys. Co., App., 231 S.W. 280—Hartweg v. Kansas City Rys. Co., App., 231 S.W. 269—Vogts v. Kansas City Rys. Co., App., 228 S.W. 526—Elliot v. United Rys. Co. of St. Louis, 214 S.W. 234, 201 Mo.App. 662.
Okl.—Oklahoma Union Ry. Co. v. Mitchell, 231 P. 1062, 105 Okl. 152.
Pa.—Morris v. Pittsburgh Rys. Co., 100 A. 971, 256 Pa. 390—Laub v. Philadelphia Rapid Transit Co., 97 Pa.Super. 323.
W.Va.—Cain v. Kanawha Traction & Electric Co., 102 S.E. 119, 85 W.Va. 434.
Wis.—Kausch v. Chicago, Milwaukee Electric Ry. Co., 186 N.W. 257, 176 Wis. 21.
10 C.J. p. 946 note 73.

44. Ill.—Garlinski v. Chicago City Ry. Co., 257 Ill.App. 414.
Mo.—Elliot v. United Rys. Co. of St. Louis, 214 S.W. 234, 201 Mo.App. 662.
W.Va.—Cain v. Kanawha Traction & Electric Co., 95 S.E. 88, 81 W.Va. 631.

45. Mo.—Elliot v. United Rys. Co. of St. Louis, 214 S.W. 234, 201 Mo. App. 662.
10 C.J. p. 947 note 75.

46. Ind.—Citizens' St. R. Co. v. Jolly, 67 N.E. 935, 161 Ind. 80.
N.C.—Brown v. Asheville Power, etc., Co., 88 S.E. 858, 171 N.C. 555.

47. Iowa.—Worez v. Des Moines City Ry. Co., 156 N.W. 867, 175 Iowa 1.

48. Ala.—Alabama Power Co. v. Carroll, 94 So. 743, 208 Ala. 426.

49. R.I.—Straight v. United Electric Rys. Co., 128 A. 571, 46 R.I. 383.

Jolt or jerk expected

"Passengers in the present day of traffic congestion expect . . . there may be some jolt or jerk in starting; they govern themselves accordingly"—Straight v. United Electric Rys. Co., 128 A. 571, 572, 46 R.I. 383.

50. Mass.—Gollis v. Eastern Massachusetts St. Ry., 149 N.E. 607, 254 Mass. 157.

edge by those in charge of a street car that a passenger has not alighted and is in the act of alighting when the car is started, injuring him, is the carrier liable where it appears that the car has been stopped for a reasonably sufficient time to enable passengers to alight.[51] That an employee of a carrier urges passengers alighting from a street car to "step lively" has been held not to amount to negligence toward an alighting passenger who was injured in being crowded by other passengers in their haste to alight.[52] The mere fact that the employees of the carrier do not know of the presence near the track of an object against which a boarding passenger is brought by the premature starting of the car will not relieve the carrier of liability for injuries sustained by such passenger.[53] It is only at such places where it may be reasonably anticipated that a passenger may attempt to leave the car that the duty rests on the carrier to use care in allowing time for passengers to alight therefrom.[54]

The length of time for which the car must be held stationary must in general be such as to enable passengers attempting to get on or off to reach a place of safety either on the street or in the car before it is started.[55]

Where invitation withdrawn or admission denied. Where a passenger is not in a position to avail himself of the invitation to board a street car, manifested by its stopping, the conductor may recall the invitation at any time before it is accepted,[56] and, where a car is stopped only to discharge passengers, the carrier is not liable for injuries resulting, from the starting of the car, to a passenger attempting to board the same after the conductor has warned him not to do so in a tone of voice sufficiently loud to be heard by an ordinary person.[57] However, where admission to a street car is denied to one who is left standing in a place of danger by reason of the carrier's invitation to board such car, due regard for the danger of such person's position and due care for his safety must be observed in starting the car forward.[58]

e. Starting Car before Passenger Seated

Ordinarily the carrier is not liable for injuries sustained by a boarding passenger from the starting of a street car before he is seated.

It is generally held that it is not necessary to hold a car until a passenger is seated, and that the carrier is not liable for injuries sustained by a passenger while in the act of taking a seat, in consequence of the starting of the car,[59] unless it is started in a violent, unusual, or reckless manner,[60] or unless the unusual conditions and circumstances surrounding a particular passenger, as in case of an enfeebled or infirm passenger, require that the car be held until he is seated.[61] There are cases, however, which hold, without reference to the manner or circumstances of starting, that the carrier may be liable for injuries sustained by a boarding passenger before he has reached a seat.[62]

f. Starting Car While Passenger Boarding or Alighting

Starting a street car while a passenger is boarding

Signal

That the passenger has given a signal to stop does not alter the text rule—Gollis v. Eastern Massachusetts St. Ry., 149 N.E. 607, 254 Mass. 157.

51. Tex.—San Antonio Traction Co. v. Cox, Civ.App., 184 S.W. 722.

52. Mass.—Ritchie v. Boston Elevated Ry. Co., 131 N.E. 67, 238 Mass. 473.

53. Wis.—Kausch v. Chicago, Milwaukee Electric Ry. Co., 186 N.W. 257, 176 Wis. 21.

54. Tex.—Galveston Electric Co. v. Marangola, Com.App., 283 S.W. 777, reversing, Civ.App., 273 S.W. 311.

55. Mass.—Binder v. Boston Elevated Ry. Co., 164 N.E. 441, 265 Mass. 589

Mo.—Baldwin v. Kansas City Rys. Co., App., 231 S.W. 280—Baldwin v. Kansas City Rys. Co., App., 214 S.W. 274—Elliot v. United Rys Co. of St. Louis, 214 S.W. 234, 201 Mo.App. 662

10 C.J. p 947 note 76.

56. Mass.—Buckley v. Boston El. R. Co., 102 N.E. 75, 215 Mass. 50.

57. Mo.—Maxey v. Metropolitan St. R. Co., 68 S.W. 1063, 95 Mo.App. 303.

58. U.S.—Philadelphia Rapid Transit Co. v. Alcorn, C.C.A.Pa., 266 F. 50.

59. Conn.—Cavanaugh v. Connecticut Co., 149 A. 131, 110 Conn. 698—Belledeau v. Connecticut Co., 149 A. 127, 110 Conn. 625.

Ga.—Georgia Power Co. v. Watts, App., 192 S.E. 493.

Iowa.—Worez v. Des Moines City Ry. Co., 156 N.W. 867, 175 Iowa 1.

Md.—Brocato v. United Rys & Electric Co. of Baltimore, 99 A. 792, 129 Md. 572.

Mass.—Phinney v. Eastern Massachusetts St. Ry. Co., 189 N.E. 52, 285 Mass. 207—Hallinan v. Worcester Consol. St. Ry. Co., 172 N.E. 862, 273 Mass. 27—Seidenberg v. Eastern Massachusetts St. Ry. Co., 165 N.E. 658, 266 Mass. 540—Binder v. Boston Elevated Ry. Co., 164 N.E. 441, 265 Mass. 589.

Ohio—Cincinnati Traction Co. v. Burkhardt, 4 Ohio App. 103.

R.I.—Straight v. United Electric Rys. Co., 128 A. 571, 46 R.I. 383.

10 C.J. p 947 note 79.

Starting without signal or gong

Starting a car without a signal or gong in violation of a company rule does not constitute negligence as regards a passenger who is not yet seated, since the rule in question is not for the benefit of passengers who are fully within the car—Binder v. Boston Elevated Ry. Co., 164 N.E. 441, 265 Mass. 589.

60. Md.—Grinath v. Baltimore & Belair Electric Ry. Co., 125 A. 604, 145 Md. 290.

R.I.—Adams v. United Electric Rys. Co., 128 A. 197, 46 R.I. 312.

10 C.J. p 947 note 80

61. N.J.—Herbich v. North Jersey St. R. Co., 52 A. 357, 67 N.J.Law 574, reversing 47 A. 427, 65 N.J. Law 381.

62. Pa.—Walters v. Pennsylvania Tract. Co., 28 A. 941, 161 Pa. 36—Austrian v. United Tract. Co., 19 Pa.Super. 329.

or alighting may constitute negligence for which the carrier shall be liable.

Regardless of the length of time for which a car is stopped, and although it is stopped for a length of time which would be reasonable under ordinary conditions, if the conductor or the motorman in charge of the car knows or has reason to know that a passenger is in the act of boarding or alighting, it is negligence suddenly or recklessly to start or otherwise to move the car, whereby the passenger is injured;[63] and this may be so whether or not the starting of the car is by an unusual and unnecessary jerk or lurch of the car.[64] The rule also applies, although the car has been stopped in violation of the carrier's rules[65] or of a city ordinance.[66] Moreover, the rule applies, although the car has stopped at a place which is not a regular stopping place,[67] and for a purpose other than for receiving or discharging passengers,[68] particularly where the stop at such unusual place is under circumstances which import an invitation to board or alight.[69] The fact that a stop was necessitated for the purpose of turning a switch does not excuse the carrier from its duty not to start the car while a passenger entitled to alight at such place was in the act of doing so.[70]

Where, however, the employees in charge of a car do not know, or have reason to know, that a

63. Ala.—Mobile Light & R. Co. v. Gallasch, 97 So. 733, 210 Ala. 219—Van Tinder v. Birmingham Ry., Light & Power Co., 80 So. 858, 202 Ala. 474.
Ariz.—Phœnix Ry. Co. of Arizona v. Beals, 181 P. 379, 20 Ariz. 386.
Cal.—Poak v. Pacific Electric Ry. Co., 170 P. 159, 177 Cal. 190—Hoffman v. Pacific Electric Co., 188 P. 597, 45 Cal. App. 751.
Ill.—Lundquist v. Chicago Rys. Co., 137 N.E. 92, 305 Ill. 106, affirming 221 Ill. App. 654—Little v. Peoria Ry. Co., 215 Ill. App. 385. See McConnell v. Chicago Rys. Co., 199 Ill. App. 490.
Ind.—Ohio Electric Ry. Co. v. Lease, 121 N.E. 1, 187 Ind. 668.
Iowa.—Walters v. Des Moines City Ry., 179 N.W. 865, 191 Iowa 196.
Ky.—Stover v. Cincinnati, N. & C. Ry. Co., 67 S.W.2d 484, 252 Ky. 425—Louisville & I. R. Co. v. Whitesides, 270 S.W. 19, 207 Ky. 733—Kentucky Traction & Terminal Co. v. Peel, 214 S.W. 874, 185 Ky. 207—South Covington & C. St. Ry. Co. v. Heinrich, 186 S.W. 187, 170 Ky. 499.
La.—Schernbeck v. New Orleans Ry. & Light Co., 73 So. 771, 140 La. 682—Latmore v. New Orleans Public Service Co., 2 La. App. 349.
Md.—Grinath v. Baltimore & Belair Electric Ry. Co., 125 A. 604, 145 Md. 290.
Mass.—McAvoy v. Boston Elevated Ry. Co., 175 N.E. 103, 275 Mass. 9—Davey v. Greenfield, etc., R. Co., 58 N.E. 172, 177 Mass. 106.
Mich.—Morris v. Detroit United Ry., 193 N.W. 871, 223 Mich. 264.
Mo.—Detchemendy v. Wells, App., 253 S.W. 150—Leonard v. United Rys. Co. of St. Louis, App., 239 S.W. 892—McCormack v. United Rys. Co. of St. Louis, App., 238 S.W. 579—Baldwin v. Kansas City Rys. Co., App., 231 S.W. 280—Vogts v. Kansas City Rys. Co., App., 228 S.W. 526—Morris v. Kansas City Rys. Co., App., 223 S.W. 784—Baldwin v. Kansas City Rys. Co., App., 214 S.W. 274—Elliot v. United Rys. Co. of St. Louis, 214 S.W. 234, 201 Mo.App. 662—Lynch v. United Rys. Co. of St. Louis, 193 S.W. 890, 197 Mo. App. 238.
Ohio.—Northern Ohio Traction & Light Co. v. Schrock, 7 Ohio App. 229—Cincinnati Traction Co. v. Frank, 6 Ohio App. 112—Dowd v. Cleveland Ry., 22 Ohio N.P.,N.S., 236.
Okl.—Oklahoma Union Ry. Co. v. Mitchell, 231 P. 1062, 105 Okl. 152.
Pa.—Morris v. Pittsburgh Rys. Co., 100 A. 971, 256 Pa. 390—Laub v. Philadelphia Rapid Transit Co., 97 Pa. Super. 323.
W.Va.—Malone v. Monongahela Valley Traction Co., 141 S.E. 440, 105 W.Va. 60—Cain v. Kanawha Traction & Electric Co., 102 S.E. 119, 85 W.Va. 434.
Wis.—Kausch v. Chicago, Milwaukee Electric Ry. Co., 186 N.W. 257, 176 Wis. 21.
10 C.J. p. 948 note 84.

Employee's duty to know or see

(1) It is no defense that conductor did not see passenger in act of alighting before signaling motorman to go ahead, as it was his duty to see or know that passenger had reached place of safety before starting car.—Cain v. Kanawha Traction & Electric Co., 95 S.E. 88, 81 W.Va. 631.

(2) The motorman in a pay-as-you-enter car has a duty to see to it that, when he is about to start his car with the door open, no passengers are in the act of boarding.—Lynch v. United Rys. Co. of St. Louis, 193 S.W. 890, 197 Mo.App. 238.

(3) It is the duty of a street car conductor, after stopping the car to enable a passenger to alight, to know before starting the car again, not only that the passenger on whose signal the car was stopped is not in the act of alighting, but also to know that no other passenger who may rely on the signal to stop is in the act of alighting.—Jones v. United Railroads of San Francisco, 202 P. 919, 54 Cal. App. 744.

64. Ky.—Louisville & I. R. Co. v. Whitesides, 270 S.W. 19, 207 Ky. 733—Kentucky Traction & Terminal Co. v. Peel, 214 S.W. 874, 185 Ky. 207—South Covington & C. St. Ry. Co. v. Heinrich, 186 S.W. 187, 170 Ky. 499.

65. Mo.—Leonard v. United Rys. Co. of St. Louis, App., 239 S.W. 892.
10 C.J. p. 949 note 88.

66. Mo.—Parks v. St. Louis Transit Co., 96 S.W. 426, 119 Mo.App. 445—Gilroy v. St. Louis Transit Co., 92 S.W. 1152, 117 Mo.App. 663.

67. Mich.—Morris v. Detroit United Ry., 193 N.W. 871, 223 Mich. 264.
Mo.—Morris v. Kansas City Rys. Co., App., 223 S.W. 784—Elliot v. United Rys. Co. of St. Louis, 214 S.W. 234, 201 Mo.App. 662.
10 C.J. p. 948 note 85.

Knowledge essential

Where a street car passenger attempts to alight when the car stops at an unusual place, knowledge of the conductor, or proof of facts charging him with knowledge, that the passenger is attempting to get off at such place is essential to a recovery for personal injuries caused by the starting of the car while he is doing so.—Lang v. Omaha, etc., St. R. Co., 148 N.W. 964, 96 Neb. 740.

68. Cal.—Hoffman v. Pacific Electric Co., 188 P. 597, 45 Cal. App. 751.
Mich.—Morris v. Detroit United Ry., 193 N.W. 871, 223 Mich. 264.
10 C.J. p. 949 note 86.

Stop to replace trolley

Mich.—Morris v. Detroit United Ry., 193 N.W. 871, 223 Mich. 264.

69. Del.—Coyle v. People's R. Co., 80 A. 638, 23 Del. 454.
10 C.J. p. 949 note 87.

70. Ill.—Lundquist v. Chicago Rys. Co., 137 N.E. 92, 305 Ill. 106, affirming 221 Ill. App. 654.

passenger is attempting to board or alight, it is not negligence to start the car,[71] unless it is started in an unusual and violent manner;[72] and this is particularly true where the car has stopped at a point other than a regular stopping place for some reason other than for receiving or discharging passengers.[73]

A sudden or unusual movement of a street car while a passenger is boarding or alighting is not negligence per se, but its culpability depends on the circumstances of time and place, or of knowledge that such movement may injure a passenger.[74] For example, it has been held that the sudden acceleration or starting of the car may not without more constitute negligence as regards a passenger within the body of the car, notwithstanding he has indicated by signal that he intends to alight at a certain place.[75] On the other hand, it has been held that a jerk or movement may constitute negligence for which the carrier is liable, where it is made at a regular stopping place or at a place where it is customary for the company to take on or discharge passengers,[76] or where the employees in charge of the car know, or have reason to know, that such person is boarding or alighting.[77] Moreover, a sudden starting of a street car may constitute negligence as regards a passenger who is known to the motorman to be in such position that he could not protect himself against even an ordinary jerk or lurch of the car by gripping some part of the car or its equipment.[78] Where a street car is stopped to discharge passengers, a sudden starting of the car or a sudden stopping of such movement resulting in injury to a passenger who is about to alight may also constitute negligence.[79]

g. Starting Up Car before Stopping

Where, after slowing down, as if to stop, at a place where a passenger seeks to board or alight, a street car suddenly starts up without stopping, thereby causing injury to such passenger, the carrier may be liable.

Where a street car slows down and then suddenly starts up again before it has fully stopped, the carrier will be liable for injury to a passenger resulting therefrom, if the passenger while in the exercise of due care has reason to think that the slowing down is for the purpose of enabling him to get on board or to alight,[80] provided those in charge of the car know, or have reason to know, of the passenger's attempt to board or alight,[81] or the place is one where passengers should naturally be expected to get aboard or alight.[82] The mere slackening of the speed of a street car, under circumstances not amounting to an invitation to board, followed by a speeding up of the car without stopping, does not, however, constitute negligence as regards one injured while attempting to board the car,[83] and it is not negligence to increase the speed of the car where the employees in charge thereof

71. Mo.—Husbands v. St. Louis Electric Terminal Ry. Co., App., 196 S.W. 78
10 C.J. p. 937 note 14, p. 949 note 90.

72. Ky.—Samuels v. Louisville R. Co., 151 S.W. 37, 151 Ky. 90.
Tex.—San Antonio Tract. Co. v. Badgett, Civ.App., 158 S.W. 803.

73. Mo.—Husbands v. St. Louis Electric Terminal Ry. Co., App., 196 S.W. 78
10 C.J. p. 949 note 92.

74. Conn.—Cavanaugh v. Connecticut Co., 149 A. 131, 110 Conn. 698—Belledeau v. Connecticut Co., 149 A. 127, 110 Conn. 625.
10 C.J. p. 949 note 94.

75. Mass.—Desautels v. Massachusetts Northeastern St. Ry. Co., 177 N.E. 578, 276 Mass. 381—Gollis v. Eastern Massachusetts St. Ry., 149 N.E. 607, 254 Mass. 157.

76. U.S.—Virginia Public Service Co. v. Silver, C.C.A.Va., 68 F.2d 230
Ala.—Van Tinder v. Birmingham Ry., Light & Power Co., 80 So. 858, 202 Ala. 474
10 C.J. p. 949 note 95

77. U.S.—Virginia Public Service Co. v. Silver, C.C.A.Va., 68 F.2d 230.
10 C.J. p. 950 note 96.

78. Conn.—Cavanaugh v. Connecticut Co., 149 A. 131, 110 Conn. 698—Belledeau v. Connecticut Co., 149 A. 127, 110 Conn. 625.

79. U.S.—Virginia Public Service Co. v. Silver, C.C.A.Va., 68 F.2d 230.
Pa.—Laub v. Philadelphia Rapid Transit Co., 97 Pa.Super. 323.

Distinguished from starting before passenger seated

"There is a difference . . . between the case in which the passenger is fully and fairly upon the car, which he has just boarded, and the case in which the car has stopped to discharge passengers and they are in the act of leaving it. Our common experience teaches us that in the former case the passenger must anticipate that the car may start before he is seated, and that the movement may be abrupt. In the latter case the passenger has a right to assume that it will remain stationary until those who are being discharged have an opportunity to alight, and its sudden movement is unexpected"—Laub v. Philadelphia Rapid Transit Co., 97 Pa.Super. 323, 327.

80. U.S.—Virginia Public Service Co. v. Silver, C.C.A.Va., 68 F.2d 230
Mo.—Chapman v. Kansas City Rys. Co., 233 S.W. 177—Kern v. United Rys. Co. of St. Louis, 259 S.W. 821, 214 Mo.App. 232—Harriman v. Dunham, App., 196 S.W. 443
Wash.—Switzer v. City of Seattle, 294 P. 225, 159 Wash. 540, modified on other grounds 298 P. 347.
10 C.J. p. 950 note 97.

81. Mo.—Harriman v. Dunham, App., 196 S.W. 443.
Wash.—Switzer v. City of Seattle, 294 P. 225, 159 Wash. 540, modified on other grounds 298 P. 347
10 C.J. p. 950 note 98.

82. Mo.—Kern v. United Rys. Co. of St. Louis, 259 S.W. 821, 214 Mo.App. 232
10 C.J. p. 950 note 99.

83. Cal.—Hildebrant v. City and County of San Francisco, 231 P. 1008, 69 Cal.App. 590.

On curve and approaching stopping place

Mere slacking of speed of street car when rounding curve and approaching stopping place was not in itself an invitation for one to be-

do not know, and have no reason to know, of a passenger's attempt to board or alight;[84] and, where the car merely slackens its speed for the purpose of letting an intending passenger get on, the conductor is not bound to ascertain whether any person might be alighting while the car is in motion.[85]

h. Seeing That Passengers Have Reached Place of Safety

A street railway has the duty to see that passengers boarding or alighting from street cars have reached a place of safety before starting such cars.

Where a car has stopped for the purpose of letting one or more passengers on or off, even though it has stopped for a reasonable length of time, and although it is not a regular stopping place, it is the duty of the employees in charge of the car to see, before starting it, that all passengers attempting to get on or off have reached a place of safety,[86] and this duty is not dispensed with by a company rule requiring conductors of cars, stopped before crossing railroad tracks, to go forward and look for approaching trains before signaling the motorman to proceed;[87] nor may a mere lack of knowledge that a passenger is in a position of danger in boarding or alighting relieve the carrier from liability,[88] unless such lack of knowledge is caused by an act of the passenger, as by his boarding or alighting by an unusual mode of ingress or egress.[89] The rule requiring the carrier to see, before starting its car, that passengers boarding or alighting therefrom have reached a place of safety has been held to apply even where the car has been stopped for some other purpose than for receiving or discharging passengers;[90] but it has been held that this rule does not apply to one who, although on the car, has not become a passenger.[91] Under the general rule, stated previously in this paragraph, where a passenger boarding a street car has reached a place of safety within the car, the carrier is not liable for injuries sustained by the starting of the car,[92] unless it is moved in a violent, unusual, or reckless manner;[93] nor may the carrier be liable for injuries resulting to an alighting passenger from the operation of the car in starting on its way after the passenger has been given an opportunity to reach a place of safety,[94] particularly where there is nothing to show that the motorman or conductor

come a passenger, and it was not in itself negligence to reduce speed under such circumstances or to increase it afterward.—Hildebrant v. City and County of San Francisco, 231 P. 1008, 69 Cal.App. 590.

84. Mich.—Schultz v. Michigan United R. Co., 123 N.W. 594, 158 Mich. 665, 27 L.R.A.,N.S., 503.
10 C.J. p 950 note 1.

85. Ohio—Ashtabula Rapid Transit Co. v. Holmes, 65 N.E. 877, 67 Ohio St 153.

86. Ill.—Griswold v. Chicago Rys. Co., 253 Ill.App. 498, affirmed 170 N.E. 845, 339 Ill. 94
Pa.—Jamieson v. Pittsburgh Rys Co., 163 A. 292, 309 Pa. 197—Lyons v. Pittsburgh Rys. Co., 152 A. 687, 301 Pa. 499.
10 C.J. p 951 note 3.

87. W.Va.—Cain v. Kanawha Traction & Electric Co., 95 S.E. 88, 81 W.Va. 631.

Duty to boarding or alighting passengers first

"Neither the rule of the company nor the rule of reason required the conductor to leave his car to perform that duty before he discharged his duty to passengers getting off and on the car."—Cain v. Kanawha Traction & Electric Co., 95 S.E. 88, 81 W.Va. 631.

88. N.Y.—Smith v. Kingston City R. Co., 67 N.Y.S. 135, 55 App.Div. 143, affirmed 62 N.E. 1100, 169 N.Y. 616
10 C.J. p 952 note 6.

89. Ky.—Central Kentucky Tract. Co. v. Chapman, 124 S.W. 830.
Mo.—Cramer v. Springfield Tract. Co., 87 S.W. 24, 112 Mo.App. 350
10 C.J. p 952 note 7.

90. Ill.—West Chicago St. R. Co. v. Manning, 48 N.E. 958, 170 Ill. 417.
10 C.J. p 952 note 4.

91. Mass.—Wheeler v. Boston El. R. Co., 107 N.E. 938, 220 Mass. 298.

92. Ala.—Alabama Power Co. v. Carroll, 94 So. 743, 208 Ala. 426
Iowa—Worez v. Des Moines City Ry Co., 156 N.W. 867, 175 Iowa 1.
R.I.—Straight v. United Electric Rys. Co., 128 A. 571, 46 R.I. 383.

Reason for rule

"The adoption of any other rule would involve intolerable delays in traffic."—Straight v. United Electric Rys. Co., 128 A. 571, 572, 46 R.I. 383

Vestibule

Boarding passenger, who has solidly placed both feet on vestibule floor, has reached a place of safety within the text rule, and this notwithstanding passenger is known to be on way to body of car and required to take upward step to reach it.—Straight v. United Electric Rys. Co., 128 A. 571, 46 R.I. 383.

93. Ill.—Sczuck v. Chicago Rys. Co., 229 Ill.App. 325.
Mass.—Gollis v. Eastern Massachusetts Street Ry., 149 N.E. 607, 254 Mass. 157.
10 C.J. p 949 note 93.

94. Mass.—Noonan v. Boston Elevated Ry. Co., 160 N.E. 811, 263 Mass. 305.
Wis.—Steinburg v. Milwaukee Electric Railway & Light Co., 266 N.W. 793—Zalewski v. Milwaukee Electric Railway & Light Co., 263 N.W. 577, 219 Wis. 541.

Reasonable opportunity

In absence of evidence tending to show that a one-man street car motorman knew or ought in exercise of due care to have known that passenger was in a place of danger, only duty owed to passenger after passenger had safely alighted from car was to give passenger a reasonable opportunity to get beyond danger zone.—Steinburg v. Milwaukee Electric Railway & Light Co., Wis., 266 N.W. 793.

Assuming withdrawal by passenger

After passenger was safely off street car and afforded a reasonable opportunity to walk to a place of safety, motorman who was in sole charge of car had right to assume that passenger would withdraw far enough to avoid being struck by rear end of car as it swung around curve in usual manner.—Steinburg v. Milwaukee Electric Railway & Light Co., Wis., 266 N.W. 793.

Duty to look to rear

After passenger had safely stepped from a one-man street car and car was started, motorman was not under duty to look to rear to ascertain whether passenger was in a position so close to car as to be in danger of being hit by the overhang

knew or should have known that at the time the car was started the alighting passenger was in a position of danger.[95] On the other hand, where a passenger who has alighted from a street car stopped at a curve is injured by the overhang of the car as it starts up before the passenger has had an opportunity to reach a place of safety, the company may be liable.[96] It cannot be said as a matter of law, however, that it is culpable negligence to start a street car before a passenger has reached what is termed a "place of safety."[97] Particular care is required, before starting a car, which has been stopped on an abrupt curve, to see that boarding passengers are safely aboard the car.[98]

Crowded car. The rule requiring carriers to see that passengers boarding or alighting have reached a place of safety applies, although the car is crowded, making it difficult to see from within it whether passengers are boarding or alighting,[99] and in such a case the conductor is not justified in relying on information given him by one standing on the rear platform of the car;[1] but, if this duty may be performed equally as well from inside the car as at any other point, the conductor need not be on the platform at the time.[2]

§ 734. Elevator Cases

A carrier of passengers by elevator is under a duty to exercise the highest degree of care to avoid injury to passengers entering or leaving its elevators.

As in the case of other types of carriers, see supra § 723, a carrier of passengers by elevator is required to exercise the highest degree of care to avoid injury to passengers entering or leaving the elevator[3] and has the duty of seeing that the place which they are invited to use in entering or leaving is safe for that purpose.[4] It is the duty of a carrier by elevator to allow a reasonable time for passengers, in the exercise of ordinary care, to enter its car with safety,[5] and, where the person in charge of an elevator starts it suddenly, before a person who has entered it has had an opportunity to obtain his balance and stability, it is negligence rendering the operator of the elevator liable to a passenger for injuries thereby sustained;[6] and it is

thereof as car swung around curve in usual manner.—Steinburg v Milwaukee Electric Railway & Light Co., Wis, 266 N W. 793

Overhang

(1) Where passenger had alighted from street car and walked fifty feet alongside of car to crosswalk at which she turned to go to curb and was struck by rear end of car after it had moved forward and rear end swung outward while rounding curve, evidence was held insufficient to establish negligence on part of street car operator in respect of allowing passenger to reach place of safety, in respect of starting car forward on curve or in respect of keeping proper lookout.—Zalewski v. Milwaukee Electric Railway & Light Co, 263 N.W. 577, 219 Wis. 541.

(2) Where seven to nine seconds elapsed between the time that a passenger alighted and the time that he was struck by the overhang of the car, and it appeared that he could have reached a place of safety in two or three short steps, it was held that the company was not liable for his injuries.—Steinburg v Milwaukee Electric Railway & Light Co., Wis., 266 N W. 793

(3) Duty to warn of danger see supra § 724.

95. Mass.—Noonan v. Boston Elevated Ry. Co., 160 N.E. 811, 263 Mass. 305.

96. Conn.—St. John v. Connecticut Co., 131 A. 396, 103 Conn 641.
Ill.—Griswold v Chicago Rys. Co., 253 Ill App. 498, affirmed 170 N.E. 845, 339 Ill. 94.
Mo.—Took v. Wells, 53 S.W.2d 389, 331 Mo 249
N.Y.—Wilson v International Ry. Co, 199 N.Y.S. 562, 205 App.Div. 275.
Pa.—Jamieson v. Pittsburgh Rys Co, 163 A. 292, 309 Pa 197—Lyons v. Pittsburgh Rys. Co., 152 A. 687, 301 Pa 499.
Wash.—Holm v City of Seattle, 294 P. 261, 159 Wash. 618
10 C J p 951 note 3 [j].

97. Kan.—Hopson v. Union Traction Co, 167 P. 1059, 101 Kan. 499.

Reason for rule

"The rule governing such instances must of practical necessity be dependent on the facts of each given case."—Hopson v. Union Traction Co., 167 P 1059, 1061, 101 Kan. 499.

98. Cal.—Drury v. Los Angeles Ry. Corporation, 282 P. 525, 102 Cal. App. 58

Reason for rule

"It should be observed that, when a street car regularly stops for passengers at a safety zone which is located at the beginning of an abrupt turn in the course of the track, greater care should be exercised to see that the passengers are safely aboard and that the car is carefully started and operated around the curve, for the reason that the sudden change in the direction in which the car is traveling is likely to increase the danger to those who may remain on the steps or platform of the car."—Drury v. Los Angeles Ry. Corporation, 282 P. 525, 527, 102 Cal. App. 58.

99. D.C.—Guenther v. Metropolitan R. Co, 23 App D C. 493
Ill.—Hamilton v. Kankakee Electric R. Co., 158 Ill.App. 422.
10 C J p 952 note 8

1. La.—Grant v New Orleans R, etc., Co, 56 So 897, 129 La 811
Pa.—McCurdy v. United Tract. Co, 15 Pa Super 29.

2. Va.—Fanshaw v. Norfolk, etc, Tract. Co., 61 S E 790, 108 Va 300

3. Mo.—McDermed v. Baker, App., 20 S.W 2d 597
Tex.—City Nat. Bank v. Pigott, Civ App., 270 S.W. 234.

4. Mo.—Jenkins v. Missouri State Life Ins Co, 69 S.W.2d 666, 334 Mo 941—McDermed v. Baker, App., 20 S W 2d 597.

Corpus Juris is cited with approval in Jenkins v. Missouri State Life Ins Co, 69 S W 2d 666, 670, 334 Mo 941

Projecting door

Where the lower door of the elevator at the floor where a passenger was invited to alight projected above the floor of the elevator causing a passenger to trip as she attempted to alight, the carrier was held to be negligent for failure to furnish a reasonably safe place to alight.—McDermed v. Baker, Mo.App, 20 S. W.2d 597

5. Ohio.—Ohio Traction Co. v. Flynn, 26 Ohio Cir.Ct., N S, 250.
10 C.J. p 952 note 12

6. Ohio.—Ohio Traction Co. v. Flynn, supra.
10 C.J. p 952 note 13.

particularly necessary that a child passenger shall be granted this opportunity, as in his case there is greater danger of serious consequences from the sudden and rapid motion of the car.[7] An elevator must also be held a reasonable time for passengers to alight;[8] and it has been held that, where the car stops to permit a passenger to alight, the operator must before starting use reasonable care to ascertain if others are about to leave the car, and that it is not necessary that every passenger who wishes to leave at that place should repeat the direction to the operator to stop there.[9] A carrier by elevator is not, however, liable for injuries sustained by a passenger in attempting to alight while the elevator is in motion.[10] Failure to warn a passenger who is invited to alight at a particular floor that the floor of the elevator is not level with the floor of the building may constitute negligence.[11]

4. Care Required and Liability as to Machinery, Tracks and Appliances

§ 735. Sufficiency and Maintenance in General

The carrier must exercise the highest degree of care with reference to the sufficiency and maintenance of its roadbed, machinery, and other appliances used in the transportation of passengers.

The rule requiring a carrier to exercise the highest degree of practicable care and skill in performance of the transportation, stated supra § 678, is applicable in its full extent with reference to the sufficiency and maintenance of the roadbed, bridges, tracks, machinery, and other running appliances of a railroad, street railroad, bus, or taxi company engaged in the transportation of passengers,[12] the degree of care required depending largely on the probable seriousness of accidents that may result from defects.[13] If injuries result to a passenger from defects which could have been avoided by the exercise of the highest care and diligence on the part of the persons employed in the construction and maintenance of the carrier's road and the manufacture and repair of its rolling stock and machinery, the carrier is liable.[14] However, the carrier is not liable for an accident where it exercises such care, prudence, and foresight as is required under the circumstances.[15]

7. N.Y.—McGrell v. Buffalo Office Bldg. Co, 35 N.Y.S 599, 90 Hun 30, reversed on other grounds 47 N.E. 305, 153 N.Y. 265

8. R.I.—Bullock v. Butler Exch. Co., 46 A. 273, 22 R.I. 105.
Tex.—City Nat. Bank v. Pigott, Civ. App., 270 S.W. 234
10 C.J. p 953 note 15

Opening door as invitation to alight
Act of operator in opening door of passenger elevator, stopped at a floor level, constitutes an implied invitation for passengers to leave.—City Nat. Bank v. Pigott, Tex.Civ. App, 270 S.W 234.

9. Mo.—Luckel v. Century Bldg Co, 76 S.W. 1035, 177 Mo. 608—Becker v. Lincoln Real Est, etc., Co., 73 S.W. 581, 174 Mo 246.

10. R.I.—Bullock v. Butler Exch. Co., 46 A 273, 22 R.I. 105.

Opening door before reaching floor
The fact that defendant's servant in charge of an elevator opened the door before reaching the floor at which plaintiff was to alight and before the elevator had stopped did not constitute an invitation to plaintiff to alight before the elevator had stopped.—Bullock v. Butler Exch. Co., 46 A. 273, 22 R.I. 105.

11. Conn.—Bemis v. Plant, 106 A. 764, 93 Conn. 554.

12. Conn.—Dunne v. Connecticut Co., 195 A. 183
Ill.—Roberts v. Economy Cabs, 2 N.E.2d 128, 285 Ill.App. 424.
Mich.—Trent v. Pontiac Transp. Co., 275 S.W. 501, 281 Mich. 586.
Mo.—Thomas v. St. Louis-San Francisco Ry. Co, App., 293 S.W 1051
Tenn.—Bowers v. N. C. & St. L Ry, 7 Tenn.Civ.App. 473—Perry v Knoxville Ry. & Light Co., 6 Tenn Civ.App. 243.
Tex.—Hines v. Parry, Civ.App, 227 S.W. 339, reversed on other grounds Com.App, 238 S.W. 886.
10 C.J. p 953 note 19

Trolley wires
Street railroad, as regards duty to passengers, had duty of exercising utmost care and skill in construction, management, and maintenance of electric wire—Kentucky Traction & Terminal Co v Roman's Guardian, 23 S.W.2d 272, 232 Ky. 285.

13. N.Y.—Kelly v. Manhattan R Co., 20 N.E. 383, 112 N.Y. 443, 3 L.R.A 74
10 C.J. p 953 note 20.

Degree of care
(1) The degree of care required in keeping the company's appliances in reasonably good repair is that high degree of care which would be exercised by very cautious, competent, and prudent persons under the same or similar circumstances.—St. Louis Southwestern R. Co v. Parks, 90 S.W. 343, 40 Tex.Civ.App. 480.

(2) It is the duty of a carrier to exercise that high degree of care which a very competent and prudent person would exercise in furnishing reasonably safe appliances and attachments necessary for the accommodation of its passengers, and it is also incumbent on it to use the same care to see that such appliances and attachments are kept in a reasonably safe condition.—Houston, etc., R Co. v. Swancey, Tex.Civ.App., 128 S.W. 677.

14. La.—Haynes v. Louisiana Ry. & Nav. Co 74 So 538, 140 La 1019
10 C.J. p 953 note 21.

Independent contractor
The exercise of this care on the part of the carrier itself cannot be avoided by turning over the construction or maintenance of roadbed or track to an independent contractor—Virginia Cent. R. Co. v. Sanger, 15 Gratt 230, 56 Va. 230.

Where snowsheds are constructed over a railroad track, but not high enough to enable a person to walk over the highest cars of a freight train with safety, and a person in charge of stock, properly passing along the top of the train, is injured by a collision with such snowsheds, he may recover.—Nelson v. Southern Pac. Co., 55 P. 364, 18 Utah 244—Saunders v. Southern Pac. Co., 44 P. 932, 13 Utah 275

15. Iowa.—Hauser v. Chicago, R. I. & P. Ry. Co., 219 N.W. 60, 205 Iowa 940, 58 A.L.R. 687.
La.—Martin v Interurban Transp. Co, 131 So. 514, 15 La.App. 256.
10 C.J. p 953 note 22.

§ 736. Inspection

The care required of a carrier as to its equipment requires such inspection thereof as the highest degree of care and foresight would suggest, so far as practicable with the carrying on of its business.

The care required as to roadbed, track, machinery, and appliances is not fully exercised by an originally safe construction, but involves such constant inspection for the purpose of discovering defects or dangers which may be developed in the operation of the road, and in remedying the same, as the highest degree of care and foresight would suggest, so far as practicable, consistently with the carrying on of the carrier's business, and a neglect of this duty renders the carrier liable to passengers who may be injured by reason of any defect which might have been discovered by such inspection.[16] This inspection with respect to both its mode[17] and frequency[18] must be such as can be done consistently with the conduct of the carrier's business. The frequency of inspection is dependent on the liability to impairment, the consequences of which may be apprehended as a result of defective conditions;[19] but the carrier is not required to keep up a continuous inspection,[20] or to know at each moment the condition of every part of a train.[21]

Under circumstances involving peculiar peril, such as a freshet, endangering the safety of the track, the carrier should inspect its tracks with more than ordinary promptitude to discover whether danger has developed;[22] and it has been held that inspection should be made both during and after extraordinary storms in order to prevent accidents.[23]

§ 737. Latent Defects

Generally the duty of a carrier as to furnishing safe machinery and appliances is discharged by a purchase thereof from a competent and reputable manufacturer and an inspection thereof to discover defects by tests which the highest degree of care and prudence suggest.

While it has been held that a carrier is liable for injuries sustained by passengers in consequence of accidents resulting from defects in its machinery, notwithstanding the defects were latent and could not have been discovered by the carrier's ordinary inspection, if the manufacturer could have ascertained them by application of a reasonable test,[24]

16. Ky.—Kentucky Traction & Terminal Co. v. Roman's Guardian, 23 S.W.2d 272, 232 Ky. 285.
La.—Haynes v. Louisiana Ry. & Nav. Co., 74 So. 538, 140 La. 1019—Martin v. Interurban Transp. Co., 131 So. 514, 15 La.App. 256
Mont.—Batch v. Helena Light & Ry. Co., 159 P. 411, 52 Mont 517.
Ohio—Jones v. Youngstown Municipal Ry. Co., 12 N.E.2d 279, 133 Ohio St. 118.
Tex.—Hines v. Parry, Civ.App., 227 S.W. 339, reversed on other grounds, Com.App., 238 S.W. 886.
10 C.J. p 953 note 23.

Mode of inspection insufficient

Where straps in a street car used for registering fares were inspected by looking at them, but were not tested by ringing fares, the company was liable where a strap broke, causing the conductor to fall upon plaintiff.—Batch v. Helena Light & Ry Co., 159 P. 411, 52 Mont. 517.

17. Ga.—Leslie v. Georgia Power Co., 171 S.E. 395, 47 Ga.App. 723
10 C.J. p 954 note 24.

Thoroughness of inspection

The inspection must be as thorough as the dangers incident to the business make necessary.—Rouston v. Detroit United R. Co., 115 N.W. 62, 151 Mich. 237.

Brakes of car from another road

A carrier receiving a car from another road is not required to make a scientific inspection of the brakes of such car to ascertain whether they are safe, but only a practical inspection, or an inspection consistent with the reasonable dispatch of its business.—Western Maryland R. Co. v State, 53 A. 969, 95 Md. 637.

Method used by carriers generally

(1) A carrier is responsible for a lack of exercise of such diligence as would ordinarily be used by a common carrier in the inspection of its equipment for defects.—Trent v. Pontiac Transp. Co., 275 N.W. 501, 281 Mich. 586

(2) Bus company's method of inspecting tie rod and steering device, being same as used by carriers generally was held sufficient and to relieve carrier from liability for break from latent defect.—Martin v. Interurban Transp. Co., 131 So. 514, 15 La. App. 256.

(3) A bus company inspecting its tires in accordance with the customary inspection of tires made generally by bus companies throughout the country has been held to discharge its duty sufficiently in this respect —Ormond v. Wisconsin Power & Light Co., 216 N.W. 489, 194 Wis 305.

Removing part to test strength

As regards liability for injuries to passengers, it was not carrier's duty to have tie rod of recent acquisition and standard manufacture taken loose from bus and its strength tested.—Martin v. Interurban Transp Co., 131 So 514, 15 La App. 256.

18. Ga.—Leslie v. Georgia Power Co., 171 S E 395, 47 Ga.App 723
N.J.—Griffin v Hohorst, Inc., 185 A. 535, 14 N.J Misc. 421.
10 C J. p 954 note 25.

19. Ga.—Leslie v. Georgia Power Co., 171 S E. 395, 47 Ga.App. 723.
10 C.J. p 954 note 26.

20. Ga.—Leslie v. Georgia Power Co, supra
Mo.—Taylor v. Missouri Pac R. Co., 279 S W. 115, 311 Mo 604.
Neb.—Belder v. Omaha & Council Bluffs St. Ry. Co., 272 N W. 220
N J.—Hunter v. Public Service Ry Co, 144 A. 305, 105 N J.Law 300—Griffin v. Hohorst, Inc, 185 A 535, 14 N J Misc. 421—Casale v. Public Service Co-ordinated Transport, 160 A. 326, 10 N J.Misc. 611.
R I.—Bines v. United Electric Rys Co, 148 A. 417, 50 R I. 438.
10 C.J. p 954 note 27.

21. Ga.—Leslie v. Georgia Power Co, 171 S E. 395, 47 Ga.App. 723.
10 C J. p 954 note 27.

22. Me.—Libby v. Maine Cent R. Co, 26 A. 943, 85 Me. 34, 20 L.R.A. 812.
Mo.—Cobb v. St. Louis, etc., R. Co, 50 S W. 894, 149 Mo. 609.
Act of God, vis major, or inevitable accident see supra § 697.

23. N C.—Hardy v Carolina Cent. R Co., 74 N C 734, 76 N.C. 5
Tex.—International, etc., R Co v. Halloren, 53 Tex. 46, 37 Am R 744.

24. Cal.—Morgan v. Southern Pac Co., 187 P. 74, 45 Cal App. 229.
La.—Haynes v. Louisiana Ry. & Nav. Co, 74 So. 538, 140 La. 1019.
10 C.J. p 955 note 34.

Manufacturer as carrier's agent

A railroad was not excused from exercising the utmost care and diligence for the safety of passengers to

there is authority to the contrary,[25] and it may be stated as a general rule, as laid down in Corpus Juris, quoted and cited with approval,[26] that the duty of the carrier as to furnishing machinery and appliances originally safe, suitable, and adequate is discharged by a purchase thereof from a competent and reputable manufacturer[27] and an inspection to detect defects discoverable by any tests which the highest degree of care and prudence can suggest, and hence it will not be liable for injuries resulting from hidden defects which could not be discovered and provided against in the exercise of such care and prudence.[28] However, while a mere lack of knowledge of a latent defect will not excuse a carrier who has not exercised the proper degree of care to discover such defects,[29] a carrier is not liable for latent defects which could not be discovered by the most careful and thorough examination,[30] and certainly is not liable for latent defects of such a character that no degree of skill, care, and foresight could detect their existence.[31]

§ 738. Well Known and Approved Machinery and Appliances

While a carrier is not required to adopt and use every new and untried machine or appliance, it has a duty to provide and make use of the best and most approved machinery and appliances for the safety of passengers then known and in general practical use.

Under the rule stated in Corpus Juris and approved,[32] a carrier of passengers must keep pace with science and art and modern improvement in its appliances,[33] and its duty to its passengers requires that it shall exercise the highest degree of care which is reasonably consistent with the carrying on of its business[34] in providing and making use of the best and most approved machinery and appliances for the safety of passengers then known and in general practical use.[35] Such machinery and appliances as have been in general use and have been found to be safe and efficient may be used;[36] but the mere fact that those used are such as are in common use, irrespective of their safety and sufficiency, is not enough,[37] and the fact that an appliance is constructed in the way that such appliances are usually constructed does not relieve the carrier of negligence, if the method of construction is inherently negligent[38] or dangerous.[39]

A carrier, however, is not required to adopt and use every new and untried machine or appliance, or

discover defects in a rail by the fact that the rail was constructed by a competent and skilled manufacturer, from whom it was purchased, the manufacturer having been the road's agent or servant in rolling the rail, for whose want of care it was responsible—Morgan v. Southern Pac. Co., 187 P. 74, 45 Cal.App. 229.

25. Mich—Grand Rapids, etc., R. Co. v. Huntley, 38 Mich. 537, 31 Am.R. 321.

26. U.S.—Henson v. Fidelity & Columbia Trust Co., D.C.Ky., 3 F.Supp. 950, 953, affirmed, C.C.A., 68 F.2d 144, rehearing denied 69 F.2d 778.
La.—Martin v. Interurban Transp. Co., 131 So. 514, 517, 15 La.App. 256.

27. Va.—Chesapeake & O. Ry. Co. v. Baker, 141 S.E. 753, 149 Va. 549, denying rehearing 140 S.E. 648, 149 Va. 549, addendum opinion 143 S.E. 299, 150 Va. 647.

Assuming absence of latent defects
It has been held that a railway may assume that a rail furnished and tested by a standard maker, which did not have apparent defects, is a good rail.—Chesapeake & O. Ry. Co. v. Baker, 141 S.E. 753, 149 Va. 549, denying rehearing 140 S.E. 648, 149 Va. 549, addendum opinion 143 S.E. 299, 150 Va. 647

28. U.S.—Holland v. Director General of Railroads, C.C.A.N.J., 273 F. 928.
Ala.—Central of Georgia R. Co. v. Robertson, 83 So. 102, 203 Ala. 358.
Mo.—Galloway v. Kansas City Rys. Co., 233 S.W. 385.
N.J.—Glassmeyer v. Pennsylvania R. Co., 167 A. 750, 11 N.J.Misc. 675.
10 C.J. p. 954 note 30.

29. Ala.—Central of Georgia R. Co. v. Robertson, 83 So. 102, 203 Ala. 358.

30. U.S.—Holland v. Director General of Railroads, C.C.A.N.J., 273 F. 928
10 C.J. p. 955 note 31.

31. U.S.—Holland v. Director General of Railroads, supra.
10 C.J. p. 955 note 32.

Wheels
It has been held that a carrier is not liable for defects in a car wheel not discoverable by the usual and proper tests.—Toledo, etc., R. Co. v. Beggs, 85 Ill. 80, 28 Am.R. 613—10 C.J. p. 955 note 33.

32. Pa.—Strobel v. Park, 140 A. 877, 878, 292 Pa. 200, 57 A.L.R. 253.

33. Ala.—Central of Georgia R. Co. v. Robertson, 83 So. 102, 203 Ala. 358.
10 C.J. p. 955 note 35.

34. Ky.—Riley v. Louisville & N. R. Co., 21 S.W.2d 990, 231 Ky. 564.
10 C.J. p. 955 note 36.

Passengers carried on freight trains
A railroad company operating freight trains on which passengers are allowed to ride is not required to equip them with safety devices such as are usual only to passenger trains and are not practicable in connection with freight trains.—Olds v. New York, etc., R. Co., 51 N.E. 450, 172 Mass. 73—Heyward v. Boston, etc., R. Co., 48 N.E. 773, 169 Mass. 466.

35. Ala.—Central of Georgia R. Co. v. Robertson, 83 So. 102, 203 Ala. 358.
Ill.—Grubczak v. Chicago Rys. Co., 242 Ill.App. 384.
10 C.J. p. 955 note 37.

Window is an appliance
Window in passenger car or bus is "appliance of transportation" as to which carrier should adopt every reasonable known safeguard to protect traveling public.—Orms v. Traction Bus Co., 150 A. 897, 300 Pa. 474

36. Ohio.—Cincinnati Traction Co. v. Keil, 26 Ohio Cir.Ct.,N.S., 445.
10 C.J. p. 956 note 38.

37. U.S.—Kitsap County Transp. Co. v. Harvey, C.C.A.Wash., 15 F.2d 166, 48 A.L.R. 1420.
10 C.J. p. 956 note 39.

Must be "suitable"
Although the appliance be the last achievement of mechanical and scientific skill, if it is not a suitable appliance to be used in the transportation of passengers, it is negligence to employ it for that purpose, at least without adequate warning and protection against the perils attending such employment.—Jacobi v. Builders' Realty Co., 164 P. 394, 174 Cal. 708, L.R.A.1917E 696

38. Tex.—Houston & T. C. R. Co. v. Werline, Civ.App., 84 S.W.2d 288, error dismissed.
10 C.J. p. 956 note 40.

39. U.S.—Kitsap County Transp. Co.

the best in use, but which is not in general use;[40] nor to provide its vehicles with all known and approved appliances necessary to protect its passengers from injury;[41] nor, under the approved statement of the rule in Corpus Juris,[42] is it required to adopt machinery and appliances which are so expensive as to make such adoption impractical for the carrying on of its business,[43] although the mere fact that the adoption entails additional cost will not relieve the carrier from the duty of adopting it.[44]

§ 739. Care as to Track

A railroad or street railroad company owes a duty to its passengers of exercising the highest degree of care to construct and maintain in an adequate and safe condition its roadbed, track, bridges, and culverts.

A railroad or street railroad company owes a duty to its passengers of exercising the highest degree of care and foresight to construct and maintain in a safe and adequate condition its roadbed and track,[45] including the provision of sound and adequate rails,[46] properly fastened.[47] The carrier must exercise the highest degree of care to construct and maintain safe and adequate trestles, and bridges.[48] Likewise the carrier must exercise

v Harvey, C.C.A.Wash., 15 F.2d 166, 48 A.L.R. 1420.
10 C.J. p 956 note 41.

40. Ala.—Central of Georgia R. Co. v. Robertson, 83 So. 102, 203 Ala. 358.
Ky.—Riley v. Louisville & N. R. Co., 21 S.W.2d 990, 231 Ky. 564.
10 C.J. p 956 note 42.

Door check

A carrier is not negligent because a door of a toilet room on a car, which closes on the hand of a passenger, where he has thrust it to prevent falling after losing his balance, is not supplied with a door check, so that it will close automatically, since carriers do not ordinarily equip such doors with such checks, and the door is a customary appliance in good repair and not obviously dangerous and is being used in a usual and customary manner.—Merton v. Michigan Cent. R. Co., 137 N.W. 767, 150 Wis. 540.

41. La.—Murphy v. New Orleans Public Service, App., 169 So. 890

Upright supports

Carrier was held not liable for failure to have upright supports installed in trolley bus at time of fall sustained by passenger when walking to his seat through starting of bus, even though stanchions afforded additional means of support for passengers, where sufficient protection was afforded without uprights.—Murphy v. New Orleans Public Service, La. App., 169 So. 890.

42. Ky.—Riley v. Louisville & N. R. Co., 21 S.W.2d 990, 993, 231 Ky. 564.

43. Ark.—Arkansas Midland R. Co. v. Canman, 13 S.W. 280, 52 Ark. 517.
10 C.J. p 956 note 43.

Block signals on branch line

Failure of railroad to equip branch line with automatic block signals was held not negligence as to passenger injured in train wrecked by robbers.—Riley v. Louisville & N. R. Co., 21 S.W.2d 990, 231 Ky. 564.

44. Ill.—Pittsburg, etc., R. Co. v. Thompson, 56 Ill. 138.
Me.—Cameron v. Lewiston, etc., St. R. Co., 70 A. 534, 103 Me. 482, 125 Am.S.R. 315, 18 L.R.A.,N.S., 497.

45. Ala.—Central of Georgia R. Co. v. Robertson, 83 So. 102, 203 Ala. 358.
Ark.—Fourche River Valley & I. T. Ry. Co. v. Camp, 214 S.W. 35, 139 Ark. 406.
Mo.—Thomas v. St. Louis-San Francisco Ry. Co., App., 293 S.W. 1051.
10 C.J. p 956 note 46.

Duty as to ties

(1) Railroad has duty to provide ties that appear to be in condition to carry load under stress of good rails in ordinary way.—Chesapeake & O. Ry. Co. v. Baker, 141 S.E. 753, 149 Va. 549, denying rehearing 140 S.E. 648, 149 Va. 549, addendum opinion 143 S.E. 299, 150 Va. 647.

(2) A railroad company will be liable for injuries to a passenger, which result from a derailment of the car in consequence of the giving way of rotten and unsafe ties in the roadway, if such defect in the roadway could have been discovered by a proper discharge of defendant's duties of inspection in time to avert the calamity.—Furnish v. Missouri Pac. R. Co., 13 S.W. 1044, 102 Mo. 438, 22 Am.S.R. 781.

Extraordinary and unprecedented storms

In the construction of the roadbed and track the company is not bound absolutely to provide against extraordinary and unprecedented storms, floods, or other inevitable casualties caused by the hidden forces of nature, unknown to common experience, and which cannot be reasonably anticipated by that degree of engineering skill and experience required in the prudent construction of a railroad.—Libby v. Maine Cent. R. Co., 26 A. 943, 85 Me. 34, 20 L.R.A. 812.

Act of God, vis major, or inevitable accident generally see supra § 697.
Duty of railroad generally as to construction and maintenance of tracks and roadbed see C.J.S. title Railroads § 694, also 52 C.J. p. 160 n. 42–50

46. Ala.—Central of Georgia R. Co. v. Robertson, 83 So. 102, 203 Ala. 358.
Mo.—Thomas v. St. Louis-San Francisco Ry. Co., App., 293 S.W. 1051.
10 C.J. p 956 note 47.

Liability dependent on negligence

Street railroad must be guilty of negligence to be liable for improper construction of its appliances.—Low v. Harrisburg Rys. Co., 138 A. 852, 290 Pa. 365.

Remote dangers

Street railway company in construction of appliances was not bound to guard against dangers which were remote.—Low v. Harrisburg Rys. Co., 138 A. 852, 290 Pa. 365.

47. Ala.—Central of Georgia R. Co. v. Robertson, 83 So. 102, 203 Ala. 358
10 C.J. p 957 note 48.

48. Ala.—Central of Georgia R. Co. v. Robertson, supra.
10 C.J. p 957 note 49.

Where state or municipal bridge used

(1) A state bridge, the plans of which are approved and its construction thereunder supervised by state officers, which forms part of a highway and is used by a street railroad company with the consent or license of the state, but over which it has no control, is not such an appliance of the company by adoption as will render it liable for an injury to one of its passengers caused by a defect in a device for raising and lowering the bridge, which, although discoverable in the manufacture, is not apparent on ordinary observation.—Birmingham v. Rochester City, etc., R. Co., 32 N.E. 995, 137 N.Y. 13, 18 L.R.A. 764, overruling 59 Hun 583.

(2) A traction company which undertakes to pass over a bridge owned by a municipality without seeing to its safety is liable to its passengers for injuries resulting to them through the insufficiency of the bridge used to sustain the weight of

highest degree of care to construct and maintain safe and adequate culverts,[49] and proper and efficient switches.[50]

Landslides. If the track is so constructed as to subject trains passing thereon to danger from landslides which might have been provided against, the company will be liable for injuries resulting from such dangerous condition.[51]

Number of tracks required. While it would be safer for all railroads to have two tracks and run all trains going in the same direction over the same track, this does not necessarily make it the duty of all railroads to have double tracks. The business of a road may, however, render it unsafe to use a single track, and necessary to the safety of the passengers to use a double one.[52]

§ 740. Obstruction on or near Track; Dangers from Animals

While a railroad must exercise a high degree of care to so construct and maintain its track that there will be no obstructions on or near the track which may imperil the safety of passengers in its cars, it has been held required to exercise only reasonable and ordinary care to discover objects on adjacent lands which may possibly obstruct its track.

A railroad or street railroad company must exercise a high degree of care so to construct and maintain its track that there will be no obstructions on or near the track which may imperil the safety of passengers on its cars,[53] and the carrier will be liable for injuries resulting from temporary obstructions on or near the track, which are there by the negligence of the carrier.[54] However, it has been held that the carrier is required to exercise only reasonable and ordinary care to discover objects off of its right of way, on lands adjacent thereto, which may possibly obstruct its track.[55]

Proximity of parallel tracks. To construct parallel tracks so close together that a passenger on a car on one track may be injured by a passing car on the other track may constitute negligence;[56] and it has been held that the carrier may be held responsible, although the tracks are so located under municipal direction, if the narrow clearance is caused by the company's putting on wider cars after the tracks are located.[57]

Danger from animals. The duty to provide against obstructions involves care to keep animals off the track,[58] and although a railroad company is under no obligation at common law to owners or

the cars of such company.—Elgin, etc, Tract Co. v. Hench, 132 Ill.App. 535

49. Ala.—Central of Georgia R. Co v. Robertson, 83 So 102, 203 Ala. 358.
10 C.J. p 957 note 50.

50. Mo.—Thomas v. St. Louis-San Francisco Ry. Co, App., 293 S.W. 1051.
10 C.J. p 957 note 51.

Locating switch on curve

Railroad violated no duty owing to passenger by having switch located on curve, so that engineer could not see it in time to avert danger from derailment by train robbers.—Riley v. Louisville & N R. Co, 21 S.W. 2d 990, 231 Ky. 564.

51. U.S.—Gleeson v. Virginia Midland R. Co, D.C., 11 S.Ct 859, 140 U.S. 435, 35 L.Ed. 458.
10 C.J. p 957 note 52.

52. Ark.—Arkansas Midland R. Co. v. Canman, 13 S.W. 280, 52 Ark. 517

53. Tex.—Texas & P. Ry Co. v. Hughes, Civ.App., 192 S.W. 1091, error refused.
10 C.J. p 957 note 54.

Trolley poles

(1) That poles were placed under municipal approval has been held not to exonerate the carrier from liability where the question was also present as to what care the carrier took to protect its passengers from injury by reason of the juxtaposition of the poles to the cars.—Capital Traction Co. v. Copland, 47 App.D.C 152.

(2) A street railroad company is not compelled so to construct and locate its tracks and poles that it will be physically impossible for a passenger, riding on running board of car, to bring himself in contact with poles.—Milliken v. Rhode Island Co., 99 A. 1023, 40 R.I. 82.

Warehouse doors over siding

It was the duty of a person who maintained double doors over a railroad's switch track leading into his warehouse safely to control his doors to prevent injury to a passenger on defendant railroad's car, removal by the railroad of a post set up to prevent the doors opening so far as to collide with passing cars not making out a prima facie case of negligence against it.—Kelly v. Philadelphia, B. & W. R. Co., 113 A. 194 270 Pa. 149.

54. Mo.—Hoffman v. Western Union Telegraph Co App., 43 S.W.2d 902.
10 C.J. p 958 note 55.

Carrier not negligent

Where undisputed proof showed that timber, covering telegraph company's excavating hole between street car rails, wedged against street car axle bringing car to abrupt stop injuring passenger, street car company was held not negligent.—Hoffman v. Western Union Telegraph Co, Mo App., 43 S.W.2d 902.

Leaves on track

In determining whether it was negligent for a street railroad company not to remove leaves on the track, the jury should consider the nature of the obstruction, whether it was necessary to remove it, and the character and extent of the labor required so to do, keeping in view the degree of care required by the company in maintaining its tracks. —Eaton v. Wilmington City R. Co., 75 A. 369, 24 Del. 435.

55. W.Va.—Thomas v. Monongahela Valley Traction Co., 112 S.E. 228, 90 W.Va. 681.

Entry on adjacent land authorized by statute

A statute authorizing railroads to enter on the lands of any person and cut down standing trees that may be in danger of falling on the tracks, making compensation therefor, imposes a duty on a railroad, subject to the statute as a part of its charter, and the railroad must look out for and remove menacing trees standing adjacent to the right of way, and, for its failure so to do, it must respond in damages for breach of duty.—Rice v. Chicago, etc., R. Co., 131 S.W. 374, 153 Mo. App. 35.

56. La.—Caillier v. New Orleans Ry. & Light Co., 120 So. 76, 11 La. App. 93.
10 C.J. p 958 note 56.

57. Fla.—Jacksonville Electric Co. v. Dillon, 64 So. 669, 67 Fla 114.

58. Pa.—Lackawanna, etc, R Co. v. Chenewith, 52 Pa. 382, 91 Am.D. 168.

occupants of the adjacent land to maintain fences sufficient to keep animals off its track as stated in the C.J.S. title Railroads § 177, also 51 C.J. p 707 note 47 et seq, yet it is bound to use all reasonable care to prevent their straying on it, and thereby endangering passengers; and, if the want of a proper fence makes the road unsafe, and an accident happens to a passenger in consequence, the company will be liable;[59] and this is particularly true where the company is required by law to fence its track.[60] However, a statute relating to the liability of a railroad for injuries to stock on its failure to fence its track has been held inapplicable where the collision and injury to a passenger was caused by an object like an automobile on the track.[61]

§ 741 Safe Cars or Other Vehicles

a. In general
b Applications of rule

a. In General

Generally the duty of a carrier involves the exercise of the highest degree of care in furnishing cars and appliances which are safe.

While, by virtue of statutory provisions in at least one jurisdiction, a carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put, and is not excused for default in this respect by any degree of care,[62] as a general rule the duty of a carrier, such as a railroad or street railroad company, involves the exercise of the highest care in furnishing cars which are safe and provided with proper appliances, and in keeping them in repair, and, if through a failure to exercise such care a passenger suffers an injury in consequence of any defect or unsafe condition of the vehicles or cars, or of the appliances thereof, the carrier is liable therefor,[63] and the carrier cannot delegate the performance of this

59. Ind.—Louisville, etc., R. Co. v. Hendricks, 28 N.E. 58, 128 Ind 462.
10 C.J. p 958 note 60.

60. Tex.—Gulf, etc., R. Co. v Wilson, 15 S.W 280, 79 Tex. 371, 23 Am.S R 345, 11 L.R.A 486
10 C J. p 958 note 61.

61. Wis.—Smith v. Chicago, N. S. & M. R. R., 193 N.W. 64, 180 Wis. 259.

62. Okl.—Jacobsen v. Howard, 23 P. 2d 185, 164 Okl. 88—Sand Springs Ry. Co. v. Westhafer, 218 P. 525, 92 Okl. 89.

63. U.S.—Henson v. Fidelity & Columbia Trust Co, D.C.Ky., 3 F. Supp. 950, affirmed, C.C.A., 68 F.2d 144, rehearing denied 69 F.2d 778
Ark.—Arkansas Power & Light Co. v. Hughes, 76 S.W.2d 53, 189 Ark 1015—Chicago, R. I & P. Ry. Co v. McCrary, 16 S W.2d 466, 179 Ark 444.
Conn.—Briganti v. Connecticut Co., 175 A. 679, 119 Conn 316—Duffy v. J. W. Bishop Co, 122 A. 121, 99 Conn. 573.
La.—Haynes v Louisiana Ry. & Nav. Co., 74 So. 538, 140 La. 1019—Martin v. Interurban Transp. Co, 131 So. 514, 15 La App. 256—Pinchera v. Shreveport Rys. Co, 124 So. 538, 12 La.App. 91.
Md.—Baltimore & O R. Co. v. Davis, 137 A 30, 152 Md 427.
Mass.—Casey v. Boston Elevated Ry. Co., 150 N.E. 850, 255 Mass. 33—Coleman v. Boston Elevated Ry. Co., 148 N.E. 819, 249 Mass. 155.
N.Y.—Fabian v. Schenectady Rapid Transit, 278 N.Y.S. 160, 243 App. Div. 834.
N.C.—Brown v. Asheville Power & Light Co, 88 S.E 858, 171 N.C. 555
S.C.—Hall v. Southern Ry. Co, 160 S.E. 584, 162 S.C. 260.
Tenn.—Cecil v. Jernigan, 4 Tenn App. 80.
Tex.—Rhodes v Houston, E. & W. T R. Co, Civ.App., 242 S W. 263—St Louis Southwestern Ry. Co. of Texas v. Rutherford, Civ.App., 184 S W. 700, error refused
10 C.J. p 959 note 63.

Corpus Juris is cited with approval in Grubczak v. Chicago Rys. Co., 242 Ill.App. 384, 388.

Liability dependent on duty

The liability of a carrier to a soldier falling from the box car in which he was riding depends on the duty of the carrier to furnish a guard for the door of the car, which might have prevented the accident —Gainer v. Hines, 184 N Y S. 768 194 App.Div. 21.

Foresight

A carrier, transporting soldiers in a box car, was not bound to foresee that one of the soldiers would stand within two feet of the open door for the purpose of pointing out the scenery to his companions—Gainer v. Hines, 184 N.Y S. 768, 194 App.Div 21.

Mail cars

The rule stated in the text is applicable to mail cars
Md.—Baltimore & O. R Co. v. Davis, 137 A. 30, 152 Md. 427.
Va.—Carter v. Washington & O. D Ry., 95 S E. 464, 122 Va. 458.

Poultry car

Where a produce company, shipping poultry, ordered an L. P. T. poultry car for a shipment, and defendant railway furnished a new car of the type, without defect, except the alleged defect of design or construction, that the grain bin underneath had too large a hole, the railway is not liable for injuries to the produce company's employee, riding with the car, when his leg passed through the hole in the bin when the train was moving, such defect being a latent defect as to the railroad company.—Nashville, C. & St. L. Ry. v Hopper, 217 S W. 661, 142 Tenn. 200.

What is not negligence

(1) Injury to a passenger when a severe jerk threw him against the glass covering of a tool box hanging perpendicularly near the door facing could not reasonably have been foreseen, and so placing the box was not negligence.—Coon v. Southern Ry. Co, 88 S.E. 510, 171 N C 759.

(2) In the absence of any statute requiring a barrier across the door of a box car in which soldiers were transported, or proof that a barrier was part of the equipment of the car, its absence in itself affords no proof of negligence—Gainer v Hines, 184 N.Y.S 768, 194 App Div. 21.

(3) Other illustrations see 10 C J. p 959 note 63 [d].

No prior accidents

That defendant street railway company's claim agent had received no report of prior accident due to skirt of passenger catching on knob which served as a bumper to intercept street car gate would not be a complete defense to charge of negligence. —Sander v. Los Angeles Ry. Corporation, 175 P. 901, 38 Cal App. 222.

As to improvements not involving the safety of passengers, a carrier is not required to exercise the highest degree of care in the construction of its cars—Leyh v. Newburgh Electric R Co., 58 N Y.S. 479, 41 App. Div. 218, affirmed 61 N.E. 1131, 168 N.Y. 667.

duty and escape liability for its nonperformance.[61] The carrier is not, however, charged with the duty of providing or maintaining vehicles or appliances in such condition as will absolutely prevent injury to passengers;[65] and, generally, if the cars and appliances adopted by it are of the most approved type in general use by others engaged in a similar occupation, its duty in this respect is sufficiently performed.[66]

Foreign objects. The care required of a carrier with respect to foreign objects or substances in cars or on the platforms or steps thereof, such as snow and ice, baggage, parcels, banana peelings, etc., is considered infra § 744.

b. Applications of Rule

The rule requiring a carrier to exercise the highest degree of care in providing and keeping in safe condition its cars and appliances has been applied to handholds, seats, platforms, doors, brakes, window guards, etc.

A carrier is required to exercise the highest care in providing and keeping in a safe condition such appliances as handrails or handholds,[67] steps,[68] axles,[69] wheels,[70] seats,[71] footrests,[72] coupling arrangements,[73] headlights,[74] platform gates or doors on a street car,[75] overhead racks for packages,[76] and brakes,[77] and in providing bell ropes, where that is practicable in view of the nature of the business.[78]

Window guards or screens. While, under some circumstances, the carrier has a duty to effectually guard openings in its cars and to warn its passenger of the danger,[79] it is generally not regarded as negligence for a carrier to fail to put bars, screens, or other guards on the windows of its cars to prevent passengers from being injured.[80]

Passageway between cars; vestibules. A carrier is bound to keep the passageway between cars which passengers are expressly or impliedly invited to use in a safe condition.[81] While a railroad company is

Failure to equip a train with the tools usually carried by trains for emergency use in case of a wreck is negligence, and, where for want of such tools a passenger is not rescued as promptly as would have otherwise been practicable, the carrier will be responsible for damages for such additional suffering, regardless of whether the wreck itself was or was not caused by its negligence.—Jackson v. Natchez, etc., R. Co., 38 So. 701, 114 La. 981, 108 Am.S.R. 366, 70 L.R.A. 294.

64. U.S.—Henson v. Fidelity & Columbia Trust Co., D.C.Ky., 3 F. Supp. 950, affirmed, C.C.A., 68 F. 144, rehearing denied 69 F.2d 778.

65. Ill.—Grubczak v. Chicago Rys. Co., 242 Ill.App. 384.
10 C.J. p. 959 note 64.

Corpus Juris is cited with approval in Hauser v. Chicago, R. I. & P. Ry. Co., 219 N.W. 60, 61, 205 Iowa 940, 58 A.L.R. 687.

66. La.—Murphy v. New Orleans Public Service, App., 169 So. 890.
Ohio.—Gorman v. City of Cleveland, 159 N.E. 136, 26 Ohio App. 109.—Cincinnati Traction Co. v. Keil, 26 Ohio Cir.Ct.,N.S., 445
Tex.—Houston & T. C. R. Co. v. Werline, Civ.App., 84 S.W.2d 288, error dismissed
10 C.J. p. 960 note 65.

Corpus Juris is cited and approved in Grubczak v. Chicago Rys. Co., 242 Ill.App. 384, 388.
Appliance inherently negligent or dangerous see supra § 738.

67. Mo.—Galloway v. Kansas City Rys. Co., 233 S.W. 385.
10 C.J. p. 960 note 66.

68. Ky.—Louisville & N. R. Co. v. Rowland's Adm'r, 14 S.W.2d 174, 227 Ky. 841.

Unreasonably high steps
Unreasonably high steps on vehicles, where dangerous to passengers, constitute negligent breach of carrier's duty.—Louisville & N. R. Co. v. Rowland's Adm'r, 14 S.W.2d 174, 227 Ky. 841.—Louisville & N. R. Co. v. Bowman, 270 S.W. 471, 208 Ky. 39.

69. La.—Haynes v. Louisiana Ry. & Nav. Co., 74 So. 538, 140 La. 1019.
10 C.J. p. 960 note 67.

70. Pa.—Meier v. Pennsylvania R. Co., 64 Pa. 225, 3 Am.R. 581.
10 C.J. p. 960 note 68.

71. Md.—Smith v. Blue Ridge Transp. Co., 191 A. 66.
Okl.—Chapman v. Red Ball Bus & Baggage Co., 49 P.2d 685, 173 Okl. 599
10 C.J. p. 960 note 69.

Duty not absolute
A carrier is not absolutely bound to furnish passengers safe seats, but is only chargeable with the exercise of a very high degree of care to provide reasonably safe seats.—Boyles v. Texas, etc., R. Co., Tex.Civ.App., 86 S.W. 936.

72. Ark.—Chicago, R. I. & P. Ry. Co. v. McCrary, 16 S.W.2d 466, 179 Ark. 444.

73. N.Y.—Gottlieb v. New York, etc., R. Co., 3 N.E. 344, 100 N.Y. 462.
10 C.J. p. 960 note 70.

74. Ala.—Alabama Great Southern R. Co. v. Jones, 71 Ala. 487
N.C.—Briggs v. Durham Tract. Co., 61 S.E. 373, 147 N.C. 389.

75. Mo.—Anderson v. Kansas City Rys. Co., 233 S.W. 203, 290 Mo. 1.
Or.—Adams v. Portland Ry., Light & Power Co., 171 P. 219, 87 Or. 602, L.R.A.1918D 526.
10 C.J. p. 960 note 72.

The use of a street car without gates on the platforms is not negligence, in the absence of a statute forbidding such use, which will make the company liable for injuries received by a person thrown from the car.—Byron v. Lynn, etc., R. Co., 58 N.E. 1015, 177 Mass. 303.

76. Ky.—Louisville, etc., R. Co. v. Roemmele, 162 S.W. 547, 157 Ky. 84.

77. Va.—Richmond-Ashland Ry. Co. v. Jackson, 162 S.E. 18, 157 Va. 628
10 C.J. p. 960 note 74

78. Ala.—Mobile, etc., R. Co. v. Ashcraft, 48 Ala. 15.
Minn.—Oviatt v. Dakota Cent. R. Co., 45 N.W. 436, 43 Minn. 300

79. Ill.—Gilberts v. Rockford & I. Ry. Co., 215 Ill.App. 324.
10 C.J. p. 961 note 76.

Two to four inches clearance
Where proximity of a carrier's tracks is such as to leave a clearance of only two to four inches between passing cars and such condition has existed a considerable time it is the carrier's duty effectually to guard openings in its cars and to warn its passengers of the danger.—Gilberts v. Rockford & I. Ry. Co., 215 Ill.App. 324.

80. Ark.—Batte v. St. Louis Southwestern Ry. Co., 199 S.W. 907, 131 Ark. 568.
Mo.—Malone v. St. Louis-San Francisco Ry. Co., 213 S.W. 864, 201 Mo.App. 489.
10 C.J. p. 961 note 77.

81. N.Y.—Scott v. New York Cent.

under no legal obligation to provide vestibules between its cars for its passengers, and a failure to do so is not of itself negligence,[82] where it provides such vestibules, it is its duty to use a high degree of care to maintain them in a safe condition.[83]

Heating cars. A railroad or street railroad company must also provide for the comfort of its passengers by furnishing suitable and safe means for heating its cars and keeping them warm in cold weather.[84]

Toilet rooms. Where toilet rooms are provided the carrier must use care to furnish and keep them in proper condition.[85]

Locomotives. A railroad company owes the duty to its passengers of using a high degree of care to have its locomotives in proper condition;[86] and this duty may extend to the providing of a safe spark arrester.[87]

§ 742. Elevator Cases

Owners of elevators must exercise the highest degree of care with respect to the safety of the car and appliances and make use of the most approved machinery and devices in general practical use for the safety of passengers.

Owners of passenger elevators, although not strictly common carriers of passengers, owe the same duty to those who by invitation, express or implied, are transported in the cars of such elevators, to exercise the highest degree of care, in view of the character of the mode of conveyance adopted, as to the safety of the car and appliances, and, where a passenger on an elevator is injured through some defect in the machinery or appliances, of which defect the proprietor knew, or by the exercise of the highest degree of care could have known and remedied, he is liable to the passenger for the injury thereby sustained.[88] While the own-

R. Co., 216 N.Y.S. 163, 216 App. Div. 623.
10 C.J p 961 note 78.

82. Tenn.—Louisville & N. R Co. v. Hutcherson, 8 Tenn App 235—Bowers v. N., C & St. L. Ry., 7 Tenn Civ.App. 473.
10 C J. p 961 note 79.

Passenger wrongfully on platform
Even where a carrier may be negligent in not having the platform of a car protected by vestibule doors, it is not negligent as to a passenger who stands on the platform, after being directed by the trainmen to go inside the car where he belongs, while the train is stopped on a trestle.—Louisville, etc., R. Co. v. Gregory, 133 S W. 805, 141 Ky. 747, 35 L.R A.,N S., 317.

83. U.S.—Minneapolis, St. P. & S. S. M. Ry. Co v Galvin, C.C A.Mich, 54 F.2d 202, certiorari denied 52 S. Ct. 407, 285 U S. 551, 76 L.Ed. 941.
N.J —Potter v. Pennsylvania R. Co., 174 A 734, 113 N J.Law 441.
N Y.—Scott v. New York Cent. R. Co., 216 N.Y.S. 163, 216 App.Div. 623.
Tenn.—Louisville & N. R. Co. v. Hutcherson, 8 Tenn.App. 235.
10 C.J. p 961 note 80.

84. Ga.—Atlantic Coast Line R. Co. v. Powell, 56 S.E 1006, 127 Ga. 805, 810, 9 L R.A.,N.S., 769, 9 Ann.Cas 553.
10 C J p 961 note 84.

This rule in Corpus Juris is cited with approval.
Iowa —Hauser v Chicago, R I & P. Ry Co, 219 N W. 60, 61, 205 Iowa 940, 58 A.L R. 687
Ky.—Louisville & I Ry Co v Jones, 250 S.W 822, 823, 199 Ky. 150, 33 A.L.R. 165.

Degree of care
(1) Railroad, in selecting and maintaining coach heating system, had duty to exercise highest degree of care imposed on passenger carriers —Houston & T. C R. Co. v. Werline, Tex Civ App., 84 S.W 2d 288, error dismissed.

(2) A carrier of passengers is bound only to exercise that degree of care in endeavoring to keep its vehicles sufficiently warm which a very cautious and prudent person would exercise under the same or similar circumstances.—Zoccolillo v. Oregon Short Line R Co, 177 P. 201, 53 Utah 39
Providing for comfort and safety of passengers see infra § 744.

85. Tex.—Trinity & B. V. Ry. Co. v. McDonald, Com.App, 208 S W. 912, reversing, Civ.App, 160 S.W. 984.

Open toilets
Railroad's failure to furnish train with toilet having bowl or pan at the bottom of stool did not render it liable for injury to passenger's eye from small hard substance blown through opening in stool, such injury not having been foreseen by railroad as result of the use of open toilets.—Trinity & B. V. Ry. Co v. McDonald, Tex Com.App, 208 S W. 912, reversing, Civ.App, 160 S W. 984.

Door check
Failure of carrier to provide door check held not negligence rendering it liable to passenger losing finger, when on sudden lurch of train, car door which he was compelled to unfasten in order to enter toilet, slammed and caught his finger, it appearing that by exercise of ordinary care injury could have been averted, notwithstanding lurch.—Chesapeake & O Ry. Co. v. Hibbs, 128 S E 538, 142 Va 96, 41 A L R 1083.
Duty to provide toilet rooms see supra § 645

86. Ohio —Scrabic v. Cincinnati, N O. & T. P Ry. Co., 182 N E 528, 42 Ohio App. 473.
10 C J. p 962 note 91.

Federal Boiler Inspection Act protects passengers, as well as employees, of carriers subject thereto —Scrabic v. Cincinnati, N O & T. P. Ry. Co, 182 N E. 528, 42 Ohio App. 473.

87. Ark.—Batte v. St Louis Southwestern Ry. Co., 199 S.W. 907, 131 Ark. 568
10 C J p 962 note 92.

Best known
Railroad company must keep its engines in good repair, supplied with best known appliances to prevent escape of cinders.—Batte v. St. Louis Southwestern Ry Co, 199 S.W 907, 131 Ark. 568—10 C.J p 962 note 92 [a].

88. Mass —Draper v. Cotting, 120 N E. 365, 231 Mass 51
Mont.—Gohn v. Butte Hotel Co., 295 P. 262, 88 Mont. 599
Nev.—Smith v Odd Fellows Bldg. Ass'n, 205 P. 796, 46 Nev 48, 23 A.L.R 38.
Pa —Strobel v. Park, 140 A 877, 292 Pa 200, 57 A L R. 253—McKnight v S S Kresge Co., 132 A. 575, 285 Pa 489.
Va.—Murphy's Hotel v. Cuddy's Adm'r, 97 S.E. 794, 124 Va 207
Wash —Getty v. Hutton, 188 P. 10, 110 Wash. 124.
10 C.J p 963 note 94.

Escalator
Department store owner operating escalator for customers' convenience

er is not bound to furnish an appliance which will make accidents impossible, and is only bound to furnish those actually used by men of judgment and common prudence, he must keep pace with science, art, and modern improvements in appliances and make use of the best and most approved machinery and devices in general practical use for the safety of passengers.[89]

Municipal ordinances relating to the use of safety devices and the operation of elevators have been held not applicable to elevators in the course of construction and installation,[90] nor to elevators constructed or installed prior to passage of the ordinance.[91]

Inspection and tests. It is the proprietor's duty, sometimes by virtue of statutory provisions, to employ persons of skill and experience to inspect his passenger elevators;[92] and, for the failure of the persons employed by him to make a proper inspection and to ascertain a defect that is open and visible to a person of reasonable skill and experience, the proprietor is liable,[93] and the owner of an elevator has been held liable for injury to a passenger caused by a latent defect therein where a proper test by the manufacturer would have disclosed such defect.[94]

Foreign objects. The care and liability of a carrier by elevator with respect to the presence of foreign objects and injuries therefrom is considered infra § 744.

owed duty to use reasonable care to keep escalator reasonably safe for customers' use.—Stratton v. J. J. Newberry Co., 169 A. 56, 117 Conn. 522

Negligence necessary

Operators of apartment house were not liable for injuries to prospective tenant caused by an inherent structural defect in an automatic elevator or lack of repair thereof, unless negligent with respect thereto.—McKeon v. Lissner, 223 P. 965, 193 Cal. 297

Freight elevator

Owner of building, maintaining freight elevator, which it notified furniture van helper to use, was under duty to keep it in reasonably safe condition.—Courtney v. Gainsborough Studios, 174 N.Y.S. 855, 186 App.Div. 820.

Particular facts constituting negligence

(1) Owners of elevator with open front, which permitted person riding who fell to be caught and killed, held negligent.—Strobel v. Park, 140 A. 877, 292 Pa. 200, 57 A.L.R 253.

(2) To leave projecting floors in an elevator well, construct indicators so that they project into well, and operate an elevator cage with an open door under such conditions, has been held to constitute negligence.—Kranzusch v Trustee Co., 161 P. 492, 93 Wash. 629.

Electricity cut off

As the electricity for propelling an elevator will at times be cut off, the mere stopping of an elevator thereby was not in any sense a wrongful act toward a passenger, where there was no physical injury caused by it.—Mills v. Robinson, Tex Civ.App., 208 S.W. 351, error refused

Care required and liability in general see supra § 687.

89. Nev.—Smith v. Odd Fellows Bldg. Ass'n, 205 P. 796, 46 Nev. 48, 23 A.L.R 38.
Pa.—Strobel v. Park, 140 A. 877, 292 Pa. 200, 57 A.L.R 253.
10 C.J. p 963 note 97.

Use of experimental appliance not suitable

The use of an appliance not suitable for the purpose has been held to constitute negligence although it is the latest achievement of mechanical and scientific skill.—Jacobi v. Builders' Realty Co., 164 P. 394, 174 Cal. 708, L.R.A.1917E 696.

Appliances not compatible

The installation and use of appliances which are not compatible with its operation, taken in connection with the class and character of the building in which it is used, is not required.—Getty v. Hutton, 188 P. 10, 110 Wash. 124.

Riding on freight elevator

One who accepts an express or implied invitation to ride in a freight elevator is entitled only to such appliances as are proper for freight elevators.—O'Rourke v. Woodward, 77 So. 679, 201 Ala. 265.—10 C.J. p 963 note 99

90. Ind.—Bedford Stone & Construction Co. v Hennigar, 121 N.E. 277, 187 Ind. 716.

91. Cal.—Kauffman v Machin Shirt Co., 140 P. 15, 167 Cal. 506.

92. Cal.—McKeon v Lissner, 262 P. 459, 87 Cal.App. 371.
10 C.J. p 963 note 95

Statute as not diminishing duty

A statute providing for a periodical inspection of elevators by the state has been held not to take from owners the power to provide competent safety devices.—McKeon v. Lissner, 262 P. 459, 87 Cal.App. 371.

Inspection does not relieve from consequences of negligence

If defendants were negligent in the maintenance of an elevator, the mere fact that they employed an inspector and that he made inspections would not relieve them from the consequences of such negligence.—McKeon v. Lissner, 223 P. 965, 193 Cal. 297.

Reasonable care

According to some authorities, the owner of an elevator is required to exercise only reasonable care in this regard, which would require an inspection with such frequency and by persons with such knowledge and experience as should be reasonably required in view of the danger and risk involved in running an elevator.—Rumetsch v. Wanamaker, 110 N.E. 760, 216 N.Y. 379, L.R.A.1916C 1245, reversing 139 N.Y.S. 385 154 App.Div. 800.—10 C.J. p 963 note 98.

93. Cal.—McKeon v. Lissner, 262 P. 459, 87 Cal.App. 371.
10 C.J. p 963 note 96.

94. Wis.—Dibbert v Metropolitan Inv. Co., 147 N.W. 3, 148 N.W. 1095, 158 Wis. 69, L.R.A.1915D 305, 312, Ann.Cas.1916E 924.

5. CARE REQUIRED AND LIABILITY IN MANAGEMENT AND OPERATION

§ 743. In General

A carrier of passengers owes the duty of exercising a high degree of care in managing and operating its vehicles, and a violation of statutory or municipal provisions may constitute negligence per se.

A carrier of passengers, such as a railroad or street railroad company, owes the duty to its passengers of exercising a high degree of care, diligence, and foresight in managing and operating its cars and other machinery and appliances by which the transportation is carried out; and if it fails so to do, it is liable for injuries to passengers caused thereby;[95] but the carrier will not be liable for injuries caused, without any negligence on its part,

95. U.S.—Gray v. Baltimore & O. R. Co., C.C.A.Ill., 24 F.2d 671, 59 A.L.R. 461.
Ark.—Arkansas Power & Light Co. v. Mart, 65 S.W.2d 39, 188 Ark. 202
La.—Dixon v. Teche Transfer Co., 1 La.App. 227—Guidry v. Teche Transfer Co., 1 La.App. 225
N.Y.—Agry v. Pennsylvania R. Co., 150 A. 401, 106 N.J.Law 476, reversing 146 A. 587, 7 N.J.Misc. 579.
Pa.—Thompson v. City of Philadelphia, 195 A. 174, 129 Pa.Super. 174
Tenn.—Bowers v. N., C. & St. L. Ry., 7 Tenn.Civ.App. 473
Utah—Brown v. Union Pac. R. Co., 290 P. 759, 76 Utah 475
Va.—Chesapeake & O. Ry. Co. v. Baker, 140 S.E. 648, 149 Va. 549, rehearing denied 141 S.E. 753, 149 Va. 549, addendum opinion 143 S.E. 299, 150 Va. 647
Wash.—Poropat v. Olympic Peninsula Motor Coach Co., 299 P. 979, 163 Wash. 78.
10 C.J. p. 963 note 2.

Ordinary care as relative term

The term "ordinary care," when applied to the management of railroad engines and cars in motion, imports all care which the peculiar circumstances of the place or occasion reasonably require, and this will be increased or diminished according as ordinary liability to danger and accident and to do injury to others is increased or diminished in the movement and management of such engines and cars.—MacFeat v. Philadelphia, etc., R. Co., 62 A. 898, 21 Del. 52, 66.

Abandoning post

(1) It was not negligence for conductor and motorman to leave street car on slight incline, provided they first properly secured car.—Delfosse v. United Rys. Co. of St. Louis, Mo., 201 S.W. 860

(2) Other illustrations see 10 C.J. p. 963 note 2 [d].

Assuming others will proceed in accordance with the law

(1) One operating vehicle on highway may assume that another will proceed in accordance with law and cannot be charged with negligence because of such assumption, unless he continues on after he has knowledge that other is not acting within law.—Gritsch v. Pickwick Stages System, 22 P.2d 554, 131 Cal.App. 774.

(2) It is true that, ordinarily, an automobile driver need not anticipate negligence on the part of another driver on the highway and may assume that other drivers will obey the law, but he cannot assume that the highway is clear and he must be vigilant and anticipate and expect the presence of others, and particularly so when he is driving a heavy and extremely wide bus containing passengers who have entrusted their safety to him, along a narrow road on which he knows that other heavy, wide trucks are being operated.—Blount County v. Perry, 7 Tenn.App. 340.

Competent employees sometimes negligent

It is common knowledge that competent motormen are negligent at times, and, fact that motorman was going at full headway does not show there could not have been sudden overfeeding of controller by him.—Colorado Springs & Interurban Ry. Co. v. Reese, 169 P. 572, 69 Colo. 1.

Conductor blocking aisle

A conductor must use the care a very cautious, prudent, and competent person would use for the safety of a woman passenger walking toward him in aisle of a moving car. Such conductor was not negligent in temporarily obstructing the aisle by standing therein, bending over to speak to some one, as a woman passenger approached, walking to the rear, and lost her balance before she reached him as she halted to wait for him to let her pass.—Steed v. Gulf, C. & S. F. Ry. Co., Tex.Com.App., 231 S.W. 714, affirming, Civ.App., Gulf, C. & S. F. Ry. Co. v. Steed, 209 S.W. 772.

Dripping chemicals

Unless motorman and inspector of elevated knew that chemical dripping from scene of fire would cause harm they were not negligent in running open surface car under it.—Flaherty v. Boston Elevated Ry. Co., 126 N.E. 798, 235 Mass. 422.

Floor of car

"The carrier does not insure the safety of the passenger, nor is it to be held responsible for unforeseen happenings over which it has no control, but in respect to the floor of the conveyance the defendant company did owe to the passenger, as the trial court stated, 'the highest degree of skill and practicable care in the operation of its busses that may be reasonably expected of intelligent and prudent persons engaged in that business in view of the instrumentalities employed and the dangers naturally to be apprehended and that is reasonably consistent with the practical operation of the company's busses.'"—Jones v. Youngstown Municipal Ry. Co., 12 N.E.2d 279, 282, 133 Ohio St. 118.

Formation of train

The carrier must exercise such care in the formation of a passenger train.
Colo.—Denver, etc., R. Co. v. Pilgrim, 47 P. 657, 9 Colo.App. 86
Ind.—Cleveland, etc., R. Co. v. Wade, 48 N.E. 12, 18 Ind.App. 346
10 C.J. p. 964 note 4.

Making passenger move to another coach

A carrier is liable for injuries to passenger required to move from one coach to another if its servants knew or could have known by ordinary care that from the circumstances injury might result.—Louisville & N. R. Co. v. Ashley, 183 S.W. 921, 169 Ky. 330, L.R.A.1916E 763

Reckless driving causing shock to nervous system

Evidence that bus passenger sustained severe shock to nervous system and severe heart strain, and that his physical condition was permanently impaired and his capacity to work diminished, as result of drunken driver's reckless operation of bus in manner which caused passenger to fear that bus would be wrecked, sustained passenger's recovery against bus company.—Tennessee Coach Co. v. Snelling, 186 S.E. 588, 53 Ga.App. 570.

Stop between stations

As regards liability for injuries to passenger, mere stopping of train elsewhere than at station is not negligence.—Holland v. Boston & M. R. R., 181 N.E. 217, 279 Mass. 342.

Inviting passengers to walk on trestle

Where a bridge over a canal was open because mechanism was out of order, and a street car conductor issued transfers to passengers and

by a casualty which could not have been reasonably anticipated or foreseen.[96] Where the negligence of the carrier's employees contributes directly to bring about the dangerous situation, the fact that they are reasonably prudent after they discover the impending danger does not relieve the carrier from liability.[97]

Derailment of car. Where a carrier operates its road, car, or train so negligently that a car is derailed, it is liable for the resulting injuries to a passenger,[98] although the mere fact of a derailment does not render the carrier liable, if it occurs without any negligence on its part.[99]

Statutes and ordinances pertaining to road regulations, as between the passenger and the carrier, have been held to be for the benefit and protection of the passengers,[1] and the violation of such provisions has been held to be negligence per se.[2]

Elevators. A carrier by elevator must exercise the highest degree of care and diligence in the operation and management of the elevator for the passenger's safety.[3] The operation of the doors in the

suggested and invited them to cross on a nearby railroad bridge, without suggestion or warning of the fact that a train was likely to arrive momentarily, and without providing some means of flagging and preventing it from running down the passengers who might be on the bridge, it was held that the conductor was negligent.—Thompson v. New Orleans Ry. & Light Co., 87 So. 716, 148 La 698.

Duty of trolley car motorman

(1) Trolley car motorman must pay attention to mechanical operations of the car, to pedestrians on the street, to vehicular traffic, to signals of passengers, lights, and various other matters which are necessary to give efficient public service—Thompson v. City of Philadelphia, 195 A 174, 129 Pa Super. 174.

(2) The operator of a trolley car must be vigilant and alert, as regards a passenger's safety, and must keep looking constantly ahead and have his car under sufficient control to avoid even unusual and unexpected dangers—Deady v. Philadelphia Transit Co, 100 Pa Super. 208—10 C J p 963 note 2 [c].

(3) As shown supra § 733, motorman must stop his car so that passengers may alight only at places that are not manifestly dangerous.

96. U S—Mendelson v. Davis, C C A. Neb, 281 F. 18.
Mass—DeDonati v. Boston Elevated Ry. Co, 9 N E.2d 381.
10 C J p 964 note 3

Brake as support in climbing

Railroad was not negligent in failing to set brake, resulting in injury to shipper accompanying stock and using brake as support in climbing at end of car.—Eiler v. Atchison, T. & S. F Ry Co., 157 P. 261, 98 Kan. 150.

Act of God, vis major, or inevitable accident generally see supra § 697.

97. Ind—Grand Rapids, etc, R. Co. v. Ellison, 20 N E. 135, 117 Ind. 234.

98. Miss—Columbus & G Ry. Co v. Phillips, 133 So. 123, 160 Miss. 390.
Va—Chesapeake & O. Ry. Co. v Baker, 140 S.E 648, 149 Va. 549, rehearing denied 141 S.E. 753, 149 Va 549, addendum opinion 143 S.E 299, 150 Va 647.
10 C J p 965 note 7.

Open switch as gross negligence

The leaving open of a switch leading to a side track when a passenger train may be expected momentarily, without ascertaining its location, is "gross negligence," within Rev L 1910 §§ 2916, 2917, 2918, defining such negligence to be the want of slight care and diligence—Missouri, K. & T. Ry Co. v. Zuber, 184 P 452, 76 Okl. 146, 7 A L R 840, appeal dismissed 41 S.Ct 322, 255 U S 561, 65 L.Ed 786, and error dismissed 41 S. Ct 449, 256 U S 681, 65 L Ed 1169

99. U S.—Gray v. Baltimore & O R. Co., C.C A Ill, 24 F.2d 671, 59 A L R. 461.
Miss—Columbus & G. Ry Co. v. Phillips, 133 So. 123, 160 Miss. 390
10 C J p 965 note 8.

Lookout by fireman

Failure of fireman, who had been engaged in firing engine, to keep lookout, was not violation of duty owing to passenger, injured in train wrecked by robbers.—Riley v Louisville & N R. Co., 21 S W.2d 990, 231 Ky 564

1. Me—Chaput v. Lussier, 165 A 573, 132 Me. 48.
Mass—Rea v Checker Taxi Co., 172 N E 612, 272 Mass. 510

Control of car

Municipal ordinance requiring that street car approaching curve should do so with greatest care and should be under complete control of motorman did not require motorman to have car under such control that it could be stopped instantly, since that would be dangerous to passengers—Youngstown Municipal Ry Co. v. Chismar, 8 N E 2d 156, 54 Ohio App 481.

Statute too vague

As respects liability to passenger on street car, municipal ordinance, providing that on first appearance of danger to vehicles moving toward street car such car should be stopped within shortest time and shortest distance possible, was too vague to constitute rule of conduct in operation of street cars—Youngstown Municipal Ry. Co. v. Chismar, 8 N.E. 2d 156, 54 Ohio App 481.

Violation of statute or ordinance pertaining to speed see infra § 749

2. Tenn—Greyhound Lines, Inc. v Patterson, 14 Tenn App. 652.
10 C.J p 965 note 5

Keeping door closed

Violation of ordinance to keep bus door closed would be negligence per se in action by passenger thrown through open door—Beierla v Hockenedel, 157 N E 573, 25 Ohio App 186.

Bus wheels off pavement

Since in turning at intersection left wheels of bus necessarily moved from paved to graveled portion of street, there was no violation of statute prohibiting operation of vehicles with wheels off pavement—Wade v. North Coast Transp. Co., 5 P 2d 985, 165 Wash 418

3. Ala—O'Rourke v. Woodward, 77 So. 679, 201 Ala. 265.
La.—Ross v Sisters of Charity of Incarnate Word, 75 So 425, 141 La. 601, L R A 1917F 260.
Pa—McKnight v S S. Kresge Co., 132 A. 575, 285 Pa 489.
Wash—Davis v Burke, 156 P. 525, 90 Wash 495

Starting as passenger enters

It is negligence for the operator of an elevator to attempt to close the door and start the car while a passenger is about to enter.—Davis v Burke, 156 P. 525, 90 Wash 495

Operator for automatic elevator

Failure to employ an operator for automatic push button elevator in a hospital is not actionable by any passenger except a child of tender years who cannot appreciate the risk.—Ross v. Sisters of Charity of Incarnate Word, 75 So. 425, 141 La. 601, L R A 1917F 260.

Operator is owner's agent

Employee running elevator operated by defendant company was defendant's agent in conserving passengers' safety against hazards caus-

usual and customary manner that such doors are operated on similar elevators does not necessarily relieve defendant from liability,[4] and the operation of an elevator with the doors opening into it open while passing a floor is negligence.[5] Leaving the door of an elevator shaft open and unguarded while the elevator is not opposite that floor is negligence for which the proprietor is liable in case a person without any contributory negligence on his part steps or falls into the open shaft and is injured.[6]

§ 744. Providing for Safety and Comfort of Passengers on Trains

a. In general
b. Gates, doors, and windows
c. Foreign objects

a. In General

A carrier has a duty to provide for the safety and comfort of passengers and must protect them from disorder, provide sufficient heat, etc.

A carrier has the duty to protect the passengers from disorder;[7] and they should be furnished the usual comfort in the way of heat, but in order to make the carrier liable for injuries due to insufficient heating of the car, it must appear that the condition was negligently permitted to exist, in addition to the fact that a dangerous condition existed, as there is no liability unless the carrier has reason to foresee injury to a healthy person by reason of the atmospheric condition of the car.[8]

Bite by dog. A carrier is not liable for injuries sustained by a passenger being bitten by a dog, where there was no proof that the presence of the dog was a probable source of harm to passengers or that the carrier was negligent in not excluding the dog from the car, or that the carrier's employees knew that the dog was in the car.[9]

b. Gates, Doors, and Windows

It may constitute negligence if the carrier leaves the doors open while the vehicle is moving; and where a passenger is injured by the opening or closing of a door or window the carrier is liable if its employees have been negligent.

A carrier must maintain gates and doors in proper condition, as shown supra § 741, and in addition thereto such appliances must be so used that they will afford the protection intended,[10] and if the doors of the vestibule are left open between sta-

ed by banana peel on elevator floor.—Ensley Holding Co. v. Kelley, 158 So. 896, 229 Ala. 650.

Freight elevator

Owner of office building was entitled to carry warehouse trucks on freight elevator on which plaintiff was riding, but if they fell and injured plaintiff because car was negligently operated, plaintiff could recover.—O'Rourke v. Woodward, 77 So 679, 201 Ala 265.

4. Mo—Howard v. Scarritt Estate Co, 184 S W. 1144, 267 Mo 398.

5. Cal—Parsons v. Easton, 195 P 419, 184 Cal 764

6. Tenn.—Southern Bldg Assoc v. Lawson, 37 S W 86, 97 Tenn 367, 56 Am.S.R. 804
10 C.J. p 871 note 66.

7. Ark.—Beasley v Hines, 219 S W. 757, 143 Ark 54, 15 A L R 864.
10 C J p 965 note 14

Tramp boarding train

Knowledge of the impossibility of preventing tramps from boarding trains, which a train crew must be presumed to have had, did not impose on the train crew the continuous duty of so patrolling cars as to make it impossible for tramps to enter them without being discovered.—Beasley v Hines, 219 S.W. 757, 143 Ark. 54, 15 A L.R. 864.

Protection from injuries from third persons generally see supra §§ 695, 696.

8. Utah.—Zoccolillo v. Oregon Short Line R. Co, 177 P. 201, 53 Utah 39

Wis—Marcott v Minneapolis, etc, R. Co, 133 N.W. 37, 147 Wis. 216
10 C J. p 962 notes 84, 85.

Degree of heat

A carrier is only required to heat its cars so as to provide a reasonable degree of comfort for passengers in an ordinary and normal state of health—Zoccolillo v. Oregon Short Line R Co, 177 P 201, 53 Utah 39—10 C J p 961 note 84 [b].

Negligence as matter of law

To permit a car to become so cold as to cause a passenger's feet to freeze constitutes negligence as a matter of law.—Zoccolillo v Oregon Short Line R. Co., 177 P. 201, 53 Utah 39.

Informing as to condition

That plaintiff did not inform the carrier or its servants of the delicate condition of his wife will not preclude recovery for injuries resulting to her from cold contracted through an insufficiently heated car.—St Louis Southwestern Ry. Co. of Texas v. Rutherford, Tex.Civ App., 184 S W. 700, error refused.

Necessary ventilation during epidemic does not lessen duty

The necessity of proper ventilation of public conveyances and stations during the influenza epidemic of 1918 did not lessen the duty of a carrier to keep its passenger coaches comfortably heated for its passengers.—Davis v. Allen, 251 S W 194, 199 Ky. 442

Mail cars

(1) Railroad should furnish proper heat for a postal car in which a mail clerk is employed at such times as the cars are being used for that purpose with knowledge of the carrier—Louisville & N R Co v. Dougherty, 185 S.W. 114, 170 Ky. 10, L R A 1916E 464—10 C J p 961 note 84 [a].

(2) That employment of postal clerk prevented him from occupying heated coaches furnished by carrier after the wreck, so that he remained in charge of mail and contracted illness, carrier's failure to provide warmth and shelter other than such coaches was not actionable negligence.—Lusk v. Wilkes, 172 P. 929, 70 Okl. 44, L R A 1918E 513.

Extended quotation of Corpus Juris has been made in a case in which the writer of the opinion stated that so far as he has been able to trace the cases, practically all are cited in the footnotes.—Zoccolillo v Oregon Short Line R Co, 177 P 201, 53 Utah 39.

9. Mass—Fiske v. Boston Elevated Ry. Co., 194 N.E. 835, 289 Mass. 598.

10. Tex—St. Louis Southwestern Ry Co of Texas v. Christian, Civ. App., 191 S.W. 175, error refused.
10 C J. p 965 note 10.

Reasonable care

It is the duty of a railway to use

tions, while the train is moving, it may constitute negligence for which the company will be liable,[11] although under some circumstances, as in the case of interurban cars making frequent stops, it has been held not to constitute negligence in the absence of a special reason appearing for shutting such doors.[12] In the absence of special circumstances, it is not negligence to have the doors of the vestibule, or the drop doors over the steps, open while the vehicle is not in motion or is standing at a station,[13] or when it is just arriving or leaving the station.[14]

Opening or closing. An injury caused to a passenger, such as that of having his hand or foot crushed by the opening or closing of a car window or door, as where it is due to the usual lurching or swinging of the car, is an accident for which the carrier is not liable, unless it is attributable to negligence on the part of the carrier.[15] Thus, where the carrier's employee does not know or have reason to know of a passenger's dangerous position near a door, and he opens or closes the door, whereby the passenger is injured, the carrier is not liable,[16] nor is it liable for injuries to a passenger by the opening or closing of a door or window by another passenger;[17] but the carrier is liable, where its employee, knowing, or having reason to know, of a passenger's dangerous position near a door, opens or closes such door, without warning the passenger of his danger, whereby he is injured.[18]

It is the duty of the carrier to have the windows, doors, and ventilators of a passenger car closed while passing through a long tunnel to prevent the

reasonable care to keep the traps and doors of vestibuled cars closed.—St. Louis Southwestern Ry Co. of Texas v. Christian Tex Civ App., 191 S W. 175, error refused.

11. U S—Minneapolis, St. P. & S. S. M. Ry. Co. v Galvin, C C A Mich., 54 F.2d 202, certiorari denied 52 S Ct. 407, 285 U S 551, 76 L Ed 941.
Ill.—Dunn v. Chicago, R. I. & P Ry. Co, 248 Ill.App 26.
N.J—McBride v. Pennsylvania R. Co, 123 A 765, 99 N J Law 464
N Y—Scott v. New York Cent R Co, 216 N.Y.S. 163, 216 App Div 623.
Tenn—Louisville & N R Co. v. Hutcherson, 8 Tenn.App 235.
10 C J. p 961 note 81.

Passenger opening door

A carrier is not responsible for the consequences of a passenger's negligent act in opening a vestibule door a short time before the injury occurred.
U S—Mendelson v. Davis, C C.A. Neb, 281 F 18
W Va—Slaven v. Baltimore & O R. Co., 171 S E 818, 114 W Va 315.

Gate and door

A carrier is not bound, where he keeps the gate on the rear coach fastened, to keep the door also fastened—Daly v Pryor, 198 S.W. 91, 197 Mo App. 583

12. Ill.—Blair v. Chicago, O. & P. Ry. Co, 205 Ill App. 160

13. Tex—Doss v. Southwestern Transp Co, Civ App., 89 S.W.2d 1092, error refused
10 C J p 961 note 82.

14. Ky—Louisville & N R. Co. v. Spears' Adm'r, 232 S.W. 60, 192 Ky. 64.
Mass.—McKay v Boston & M. R. R., 188 N.E. 390, 284 Mass. 606—Carlson v Boston & M R. R., 168 N E 171, 269 Mass 60.
10 C J. p 961 note 83.

15. Ky—York v. Cincinnati, N. O. & T. P Ry. Co, 288 S.W 750, 216 Ky 825.
Mo—Crabtree v. St Louis & S. F R. Co, 273 S W 1104, 218 Mo.App. 306.
10 C J. p 965 note 16.

Rule stated in Corpus Juris is cited and applied in Chadwick v Louisville & N. R. Co., 281 S.W. 1018, 1020, 213 Ky. 831, 45 A L R. 1537.

Conduct indicating or not indicating negligence

(1) Conductor's failure to keep hand on wheel regulating street car door, causing passenger's injury, was held not negligence—Gorman v. City of Cleveland, 159 N.E 136, 26 Ohio App. 109.

(2) That train slowing down caused vestibule door, opened by brakeman, to close on passenger's hand, indicated railroad's negligence—Agry v. Pennsylvania R Co, 150 A. 401, 106 N J.Law 476, reversing 146 A. 587, 7 N J Misc. 579.

(3) In case of a passenger injured by the car door closing on his hand when the car was going round a curve, it was held that the carrier could be found negligent in not having the door open far enough to lock—Colletto v. Hudson & M. R. Co., 100 A. 200, 90 N J.Law 315.

(4) Other illustrations see 10 C J. p 965 note 16 [b], [c].

Inspecting open window

Carriers need not inspect window of passenger coach when raised to see that it is at proper height, or to see that windows are not raised by passengers when ventilation of car is required—Chadwick v. Louisville & N. R. Co., 281 S.W. 1018, 213 Ky. 831, 45 A.L R 1537.

16. Mich—Camp v. Spring, 217 N. W. 917, 241 Mich. 700.
N.Y.—Siegel v. Interborough Rapid Transit Co., 214 N.Y S. 71, 126 Misc. 452
10 C.J. p 966 note 17.

17. N Y—Smith v Union Ry. Co. of New York City, 247 N.Y.S 804, 139 Misc 69.
10 C J. p 966 note 18.

18. N.Y—Grafstein v Interborough R. Co, 189 N Y.S 68.
Tex—Schaff v. Gordon, Civ.App, 214 S W. 638
10 C J p 966 note 19

Degree of care

(1) Carrier owed highest degree of care to passenger whose fall was caused by premature closing of car door—Williams v. Hudson & M R Co, 141 A. 168, 6 N J Misc 337, affirmed Williams v. Pennsylvania R Co., 143 A. 921, 9 N.J Misc. 218, and Williams v. Hudson & M. R. Co, 151 A. 486, 105 N.J.Law 259.

(2) Train employee, in closing door, is charged with the duty of exercising that high degree of care and vigilance to prevent injury to passenger that a very prudent, cautious, and competent person would have exercised, failure to exercise such care constituting negligence imputable to the carrier.—Schaff v. Gordon, Tex.Civ.App, 214 S W. 638.

Duty to see passenger's position

No duty rests on the conductor of discovering that a passenger on the platform of a car and about to alight has a hand on the jamb of the door and seeing that the door is not allowed to close while her hand is there.—Polis v. Philadelphia & R. Ry. Co, 117 A. 415 273 Pa 591—L'Hommedieu v. Delaware, L. & W. R. Co., 101 A. 933, 258 Pa. 115.

otherwise inevitable discomfort from smoke, cinders, and gas;[19] but it does not follow that an officer should be provided for every car, or that the omission to shut out the gas and smoke would of itself give a passenger a right to sue for the discomfort and annoyance.[20]

c. Foreign Objects

A carrier is not liable for injuries sustained by a passenger slipping on snow or ice on the platforms or steps, or on a banana peeling, or tripping over objects such as baggage in the aisle unless charged with notice of such objects and an opportunity to remove them; and a carrier is not liable where injury is sustained by reason of objects thrown or blown into the cars unless it was negligent.

While a carrier must exercise the highest degree of care in furnishing safe cars and appliances therein as stated supra § 741 a, a different measure of duty has been held to prevail as to the condition of the vehicle with respect to foreign objects[21]

Snow and ice. Accumulations of snow and ice on car steps and platforms which cannot be prevented in the prosecution of the carrier's business will not be imputed to it as negligence,[22] but the carrier is liable for injuries to passengers caused by such accumulations, if there has been a sufficient opportunity to remove such source of danger,[23] and this duty is not performed by merely appointing employees to keep the steps or platforms in a safe condition[24]

Banana peels or parcels, etc. While the carrier's employees have a duty to remove objects from the aisles and platforms of the vehicles when they have

19. Ky—Louisville & N R. Co. v. Roberts, 218 S.W. 713, 187 Ky 192, 9 A L R 94.
10 C J p 966 note 20.

20. Md—Western Maryland R. Co. v. Stanley, 61 Md. 266, 48 Am R. 96

21. U S—Livingston v. Atlantic Coast Line R. Co, C C A S.C, 28 F 2d 563.
Neb.—Belder v. Omaha & Council Bluffs St Ry. Co, 272 N.W. 220.

Ordinary care
A railroad company was held to the exercise of only ordinary care to see that hassocks provided in a chair car, and which are moved about by passengers at their pleasure, are not allowed to project into the aisle.—Bassell v. Hines, C C A Ohio, 269 F. 231, 12 A L R. 1361.

Statute requiring utmost care
Railway must use utmost care to keep passageways in passenger cars unobstructed by objects likely to injure passengers.—Chicago, R. I. & P Ry Co. v. Shelton, 273 P. 988, 135 Okl. 53.

22. U S.—Akin v. Chicago & N. W. Ry. Co, C.C A.Minn, 21 F.2d 1000.
Ark.—Turner v. Hot Springs St. Ry. Co, 75 S W.2d 675, 189 Ark 894
Me.—Davis v. Waterville, F & O St. Ry. Co., 102 A. 374, 117 Me. 32
Md—Washington, B. & A. Electric R. Co. v. Fitch, 136 A. 529, 152 Md 137
Mass.—Hartford v. Boston Elevated Ry. Co, 182 N.E 476, 280 Mass 288—Seidenberg v. Eastern Massachusetts St Ry. Co., 165 N.E 658, 266 Mass. 540.
N J—Griffin v Hohorst, Inc, 185 A. 535, 14 N J.Misc 421.
R.I—Bines v United Electric Rys Co., 148 A. 417, 50 R I. 438.
10 C.J. p 962 note 87.
Duty as to accumulations of snow and ice at stations, platforms, etc, see supra § 719.

This rule stated in Corpus Juris
is cited and applied in Hunter v Public Service Ry. Co, 144 A 305, 105 N J Law 300.

Condition dangerous to person exercising reasonable care
If it is apparent to a reasonably prudent person that passengers cannot get off or on the cars, exercising reasonable care, without danger of falling, the steps and platform should be put in such condition as to enable them to do so, ever though the train or car must be delayed for that purpose.—Garvin v. Butte Electric Ry. Co, 169 P. 40, 54 Mont. 196.

23. U S—Akin v. Chicago & N. W. Ry. Co, C.C A.Minn, 21 F.2d 1000
Me.—Celucci v. Cumberland County Power & Light Co., 183 A. 754.
Md—Washington, B. & A Electric R. Co. v. Fitch, 136 A. 529, 152 Md. 137.
Mo—Taylor v. Missouri Pac. R. Co, 279 S.W. 115, 311 Mo. 604.
N Y.—Altberger v. New York Consol. R. Co, 162 N Y.S. 739.
10 C J. p 962 note 88.

Degree of care
(1) The carrier should exercise the highest degree of care to protect its passengers from perils incident to slippery steps.
Conn—Dunne v. Connecticut Co., 195 A. 183.
Minn—Gegere v. Chicago & N W. Ry Co., 220 N.W. 429, 175 Minn. 36.
Mo.—Taylor v. Missouri Pac. R Co, 279 S W. 115, 311 Mo 604—Smith v. Kansas City Public Service Co, 56 S.W 2d 838, 227 Mo App. 675.
Ohio.—Olszowy v. Cleveland Ry. Co, 192 N E. 366, 47 Ohio App. 529.
Pa—Saunders v. Altoona & Logan Valley Electric Ry. Co., 84 Pa. Super. 385.
10 C.J. p 962 note 88 [a].

(2) The degree of care required is not the highest, but is such a degree of care as is commensurate with the risk.—Altberger v. New York Consol. R. Co, 162 N.Y S. 739

(3) A railroad company's duty toward its passengers requires it to use due care to keep entrances to its coaches free from accumulations of ice and snow—Young v. Grand Trunk Ry, 100 A. 603, 78 N.H. 605.

Different rule as to railroads and street railroads
The same rule that would apply to the removal of snow and ice on cars of a through railroad train stopping at stations long distances apart does not necessarily obtain in the case of an elevated railroad train or street car operated within a city under conditions so radically different
Mo.—Bate v. Harvey, App., 195 S W. 571.
N Y—Altberger v. New York Consol R Co., 162 N.Y S. 739.

Examining steps
A carrier's employee is not under a duty to examine the step at every stop, and failure to examine the step just before the passenger alighted to see if there was ice on it has been held not to constitute negligence—Byrne v. Connecticut Co., 195 A. 184, 123 Conn. 304.

Anticipating falls
In freezing weather, and when deposits of snow and ice are known to be, or are likely to be, on the step, those in charge of a street car are required to anticipate that a passenger might slip on the step—Bate v. Harvey, Mo App, 195 S.W 571.

24. N J—Murphy v North Jersey St. R. Co, 80 A. 331, 81 N.J Law 706, 35 L.R A.,N.S., 592, reversing 73 A. 1119 mem.

notice thereof,[25] the carrier is not liable for injuries occurring where a passenger slips on a foreign object, such as a banana peeling, etc.,[26] or trips over an object in the aisle of the car, such as a hassock or piece of baggage, etc.,[27] unless its employees placed it there or had an opportunity to notice the presence of such object and remove it.

A carrier also has a duty to protect passengers from articles falling[28] from an overhead rack.[29]

Objects thrown or blown into car, etc. A carrier is not liable for injuries sustained by a passenger by reason of objects which are thrown or blown in-

25. Iowa—Costello v. Chicago, R. I & P Ry. Co., 217 N.W. 434, 205 Iowa 1077.
Pa—Wood v. Philadelphia Rapid Transit Co, 104 A. 69, 260 Pa. 481, L R A 1918F 817.
Tex—Houston Electric Co. v. Bragg, Com App., 276 S W. 641, affirming, Civ.App, Bragg v Houston Electric Co., 264 S.W 245, motion overruled 280 S W. 188.

26. U S—Livingston v. Atlantic Coast Line R Co., C.C A S C, 28 F.2d 563.
Mo—Vortriede v St Louis Public Service Co, App, 58 S W 2d 492—Jones v. St Louis-San Francisco Ry. Co, 5 S W 2d 101, 222 Mo App. 1220—Tevis v. United Rys. Co of St. Louis, App, 185 S.W. 738.
Neb.—Belder v. Omaha & Council Bluffs St. Ry. Co., 272 N W 220.
N.J.—Casale v. Public Service Coordinated Transport, 160 A. 326, 10 N.J.Misc. 611.
N.Y.—Moll v. Niagara Gorge R. Co, 264 N Y S. 761, 238 App Div. 528
Tex—Rhodes v. Houston, E. & W T. R. Co, Civ App, 242 S W. 263
10 C.J. p 959 note 63 [d] (6).

27. Ala.—Atkinson v. Dean, 73 So. 479, 198 Ala. 262.
Ill—Heineke v. Chicago Rys. Co, 116 N E 761, 279 Ill. 210, affirming 199 Ill.App. 399—Garner v. East St Louis Ry. Co., 211 Ill App. 201.
Iowa—Costello v. Chicago, R. I. & P Ry. Co., 217 N W. 434, 205 Iowa 1077.
Ky—Hawkins v. Louisville & N R. Co, 202 S W. 632, 180 Ky. 295, 3 A.L.R. 637.
Mass—Phinney v. Eastern Massachusetts St. Ry. Co, 189 N E. 52, 285 Mass. 207.
Mich.—Selman v. City of Detroit, 278 N W 112, 283 Mich. 413.
Ohio.—Cincinnati Traction Co. v. Hamburger, 13 Ohio Cir.Ct ,N S., 273, affirmed 84 Ohio St. 456, 9 Ohio L.Rep 7, 56 Cinc L Bul. 123.
Tex—Gulf, C. & S. F. Ry. Co. v. Blackmon, Civ.App., 56 S.W 2d 199, error refused—Bragg v Houston Electric Co., Civ App, 264 S.W 245, affirmed Houston Electric Co. v Bragg, Com App, 276 S W. 641, overruled 280 S W 188.
10 C.J. p 902 note 43 [b], p 965 note 11, 12

Not negligence per se

It is not negligence as a matter of law for the conductor of a street car, with a seat running lengthwise on each side of car, to permit the bag of a passenger to remain in the aisle, where it is not so placed as to obstruct free exit and entrance into the car, since street railroad is not bound to exercise toward passenger the utmost diligence in such case. Under such circumstances, the carrier will not be liable for injuries, unless it omitted to exercise reasonable care in keeping the aisle clear—Selman v. City of Detroit, 278 N W. 112, 283 Mich. 413.

Right to bring baggage

(1) Street car passenger may carry personal baggage to his seat and control its disposition, except as restricted by reasonable regulation promulgated by carrier or by legislation, so long as he does not endanger safety of fellow passengers.—Bragg v. Houston Electric Co, Tex.Civ.App., 264 S W 245, affirmed Houston Electric Co v. Bragg, Com. App., 276 S.W. 641, overruled 280 S. W. 188.

(2) Where street railroad rule forbade bringing certain articles into street car, presence of suitcase in aisle of car did not warrant finding that operator violated rule, where suitcase was not within forbidden class of articles—Phinney v. Eastern Massachusetts St. Ry. Co., 189 N E. 52, 285 Mass. 207.

Anticipating injury

In action for injuries sustained by falling over suitcase in aisle of street car, it was held that, in view of the circumstances, it might reasonably have been anticipated that baggage would be placed in aisle of street car, and that others, without knowledge of it being so placed, might stumble over it and fall.—Houston Electric Co v. Bragg, Tex. Com App., 276 S W. 641, affirming Bragg v Houston Electric Co., Civ. App, 264 S.W. 245, overruled, Com. App., 280 S W. 188

Furnishing employee to keep aisle clear

Whether exercise of high degree of care required of street car company to prevent injury to passenger required it to furnish person to see that aisle was free of obstructions would depend on conclusions which reasonable minds would reach from the facts, and if reasonable minds might differ, failure to furnish such person would be predicate on which negligence could be based, and holding of trial court that negligence could not be predicated on allegation that some person should have been furnished by street car company to see that aisle was not obstructed when passengers were alighting was error—Houston Electric Co. v. Bragg, Tex Com.App, 276 S W. 641, affirming Bragg v. Houston Electric Co., Civ App., 264 S.W. 245, overruled, Com App., 280 S.W. 188.

Insufficient to charge carrier

Where passenger first testified that she did not see another passenger's suitcase, over which she tripped when preparing to get off street car, until she was nearing home, and later claimed that she saw suitcase protruding into aisle when she boarded car and that suitcase was not moved throughout trip, and there was no evidence that conductor knew of presence of suitcase in aisle before passenger tripped thereon, passenger could not recover, since her version established that suitcase was not in aisle long enough to charge carrier with notice—Selman v. City of Detroit, 278 N.W 112, 283 Mich. 413.

28. Pa—Neves v. Pennsylvania R. Co., 145 A 602, 295 Pa. 551—Bickley v. Philadelphia & R. Ry Co., 101 A. 654, 257 Pa. 369.

29. Pa—Creahan v Pennsylvania R. Co, 187 A. 51, 123 Pa.Super 268.
10 C.J. p 965 note 13.

Degree of care

A carrier is only bound to use reasonable care and diligence to prevent passengers from being injured by articles falling from racks in the cars, intended to hold the same.—Morris v. New York Cent, etc., R Co., 13 N.E. 455, 106 N.Y 678 1 Silv.A. 513—Whiting v. New York Cent, etc., R. Co., 89 N.Y.S. 584, 97 App.Div. 11.

Duty to inspect

Where proper equipment for accommodation of hand luggage was provided by railroad, responsibility of railroad with relation to location of luggage, for injuries sustained by passenger when struck by satchel which fell from rack over passenger's head, extended only to duty of making proper inspection.—Creahan v. Pennsylvania R. Co, 187 A. 51, 123 Pa.Super. 268.

to the car unless it is negligent.[30]

Elevators. The operator of an elevator is bound to exercise a general oversight of the premises to assure passengers' safety, but he need not anticipate foreign objects, such as banana peels, on the floor due to third persons' carelessness, nor maintain a special watchfulness therefor.[31]

§ 745. Overcrowding

Although it is not negligence per se to receive a passenger on a crowded car, the carrier has a duty to exercise care proportionate to the increased danger caused by the overcrowding.

It is the carrier's duty to exercise a high degree of care to provide its passengers with seats and with a safe place to ride, so as to prevent overcrowding,[32] particularly where it has notice in advance that an unusual number of passengers will ride on its trains;[33] and, while it is not negligence per se to receive a passenger on a crowded car or train,[34] and the carrier is not liable for a passenger's injuries if it exercises a proper degree of care for his safety in such cases,[35] yet it is its duty to exercise a degree of care for the passenger's safety proportionate to the increased danger caused by the overcrowding;[36] and if it fails so to do it is liable for injuries received by the passenger by reason of the overcrowding of the conveyance increasing the danger to him by his being compelled to stand or ride in an unsafe position, or by being put in peril while getting on or off the conveyance.[37] Thus, where a street car passenger is compelled by the

30. Ky.—Schooler v. Louisville & I. R. Co., 82 S.W.2d 221, 259 Ky. 80.

Carrier held not liable

(1) Interurban railroad company was not liable for injury to passenger, struck in eye by small stone thrown into its traction car at or near station, company being unable to deviate from its fixed route or guard its entire line and having no control or means of acquiring control of persons throwing stones into its cars—Schooler v. Louisville & I. R. Co, 82 S W 2d 221, 259 Ky. 80.

(2) Where stone, probably thrown by trailer of truck, struck bus windshield causing injury to passenger's eyes, carrier was not liable to passenger.—Stephenson v. Smith Motor Coach Co., 47 S W.2d 932, 243 Ky. 153.

(3) In action for injuries to passenger struck by stone thrown through open bus window, bus carrier was not negligent, if stone was thrown by passing truck, it not being dangerous to have windows open unless injury therefrom might have been reasonably anticipated under circumstances.—Bowling Green-Hopkinsville Bus Co. v. Edwards, 59 S. W.2d 584, 248 Ky 684.

(4) Other illustrations see 10 C J. p 964 note 3 [h].

31. Ala.—Ensley Holding Co. v Kelley, 158 So. 896, 229 Ala. 650.

Inspection

(1) Failure to inspect floor of elevator at each floor so as to discover banana peel on which passenger slipped, not negligence, although owner's rules so required.—Thomas v. J. Samuels & Bro., 132 A 8, 47 R I 206, reargument denied 132 A. 386.

(2) Passenger elevator operator in department store was under no duty to inspect elevator at top floor in order to discover banana peel on which subsequently passenger slipped—Thomas v. J. Samuels & Bro., supra.

32. N Y—Allessi v. New York Rapid Transit Corporation, 297 N.Y. S 1011, 163 Misc. 815.

Utah.—Taylor v. Bamberger Electric R. Co., 220 P. 695, 62 Utah 552.

10 C.J. p 966 note 22

Care required as to protection from crowds on stations, platforms, etc, see supra § 720.

Extended quotation of Corpus Juris as to overcrowding the vehicles of carriers and the liability for injuries resulting therefrom has been made in Jordan v. St. Louis Public Service Co., Mo App, 105 S.W.2d 552, 557.

33. Mo—Jordan v. St. Louis Public Service Co., supra.

10 C.J. p 966 note 23.

34. Ill.—Walsh v. Chicago Rys Co., 128 N.E 647, 294 Ill. 586, reversing 216 Ill.App 409.

La.—Schuh v N. O. Public Service, Inc., 5 La App. 57.

Mass.—Moulton v. Boston Elevated Ry. Co., 127 N E 886, 236 Mass. 234—Knowles v Boston Elevated Ry. Co., 123 N E. 681, 233 Mass. 347, 5 A L R. 1255.

Pa—Miller v Pittsburgh, H., B & N C. Rys. Co, 157 A. 330, 102 Pa Super 547.

Tenn.—Perry v. Knoxville Ry. & Light Co, 6 Tenn Civ.App. 243.

Wash—Carton v. Eyres & Seattle Drayage Co, 201 P. 737, 117 Wash. 536.

10 C.J. p 966 note 24.

35. Mass.—Power v. Boston Elevated R. Co, 161 N E 623, 263 Mass. 553—Moulton v. Boston Elevated Ry. Co., 127 N E. 886, 236 Mass 234.

Mo—Carlson v Wells, 276 S.W. 26, 42 A.L.R. 1319.

Tenn—Perry v. Knoxville Ry. & Light Co, 6 Tenn Civ.App. 243

10 C.J. p 966 note 25

36. Ill—Walsh v. Chicago Rys Co, 128 N E 647, 294 Ill. 586, reversing 216 Ill App 409.

N J—Egner v Hudson & M R Co, 162 A. 554, 109 N J Law 367—Barney v. Hudson & M R Co, 145 A. 5, 105 N J.Law 274 affirmed 148 A. 917, 106 N J Law 230, 231.

Okl—Sand Springs Ry. Co. v. Smith, 203 P. 207, 84 Okl 211.

Pa—Miller v. Pittsburgh, H, B & N. C Rys. Co., 157 A. 330, 102 Pa. Super. 547.

Wash—Carton v. Eyres & Seattle Drayage Co, 201 P. 737, 117 Wash. 536.

10 C.J. p 967 note 26

37. Conn—Walker v. Connecticut Co., 100 A. 1063, 91 Conn. 606.

N.Y—Allessi v. New York Rapid Transit Corporation, 297 N.Y S. 1011, 163 Misc 815—Broder v. New York Consol R. Co, 162 N. Y.S 1002, 98 Misc 256.

10 C J. p 967 note 27.

Evidence of negligence

An overcrowding of cars exposing a passenger to danger is a sufficient basis for a finding of negligence.—Allessi v. New York Rapid Transit Corporation, 297 N Y S. 1011, 163 Misc. 815—10 C.J. p 967 note 27 [a].

Elevators

(1) An owner of a building for whom passenger elevators are being operated may be liable for injuries sustained in the fall of an elevator, although the operator was powerless to prevent the overloading of the elevator.—Campbell v Bradbury, 176 P. 685, 179 Cal. 364.

(2) The operator of an elevator has been held negligent in opening a door back of plaintiff so that she was thrown out backward and then thrown over by the crowd—Chase v. Boston Elevated Ry. Co., 122 N.E. 174, 232 Mass. 133.

overcrowded condition of the car to ride on the step or platform, and is injured by reason of his being pushed from the car by virtue of its overcrowded condition, the company may be held liable for his injuries.[38]

§ 746. Liability for Collisions

A carrier must generally exercise the highest degree of care to avoid collisions with other cars on the same track or highway, or at crossings and street intersections, but it is not liable to a passenger injured in a collision occurring without fault on its part.

Collisions between trains or cars being one of the most common forms of danger to which passengers are subjected in transportation, the carrier must exercise the highest degree of care and foresight in avoiding them, and, where an injury is inflicted on a passenger by reason of a collision caused by the negligence of the carrier, he is entitled to compensation in damages;[39] but where the carrier exercises proper care under the circumstances, it will not be liable for a collision which occurs without any fault on its part.[40]

Slippery condition of track. The fact that the collision occurs through a car sliding, owing to the rails being slippery from rain or otherwise, does not absolve the carrier from liability as it is bound to anticipate such conditions, and to act accordingly.[41]

At intersecting lines. The duty of exercising proper care to prevent collisions is especially imperative at a railroad or street car crossing. Where trains or cars move on intersecting lines of railroad, the persons in control of each must exercise a proper lookout for the approach of another train or car, and must also have their own train or car under proper control so that it can be stopped promptly;[42] and this rule applies notwithstanding there is a flagman[43] or interlocking device[44] at the

38. Mass.—Moulton v. Boston Elevated Ry. Co., 127 N.E. 886, 236 Mass. 234.
Okl.—Sand Springs Ry. Co. v. Smith, 203 P. 207, 84 Okl. 211.
10 C.J. p. 967 note 28
Protection from injuries from fellow passengers generally see supra § 695.

39. U.S.—Memphis St. Ry. Co. v. Bobo, Tenn., 232 F. 708, 146 C.C.A. 634, affirmed Memphis St. Ry. Co. v. Moore, 37 S.Ct. 273, 243 U.S. 299, 61 L.Ed. 733.
La.—Powe v. Morgan's L. & T. R. R. & S. S. Co., 7 La.App. 51.
Mich.—Bury v. Detroit United Ry., 164 N.W. 460, 198 Mich. 447.
Mo.—Walquist v. Kansas City Rys. Co., 237 S.W. 493, 292 Mo. 34.
N.J.—King v. Steglitz, 166 A. 146, 111 N.J.Law 11.
Tenn.—Memphis St. Ry. Co. v. Cavell, 187 S.W. 179, 135 Tenn. 462
Tex.—Fort Worth & R. G. Ry. Co. v. Woodward, Civ.App., 254 S.W. 227.
Wis.—Arneberg v. Chicago, M. & St. P. Ry. Co., 195 N.W. 844, 182 Wis. 85.
10 C.J. p. 967 note 29.

Care governed by situation and circumstances

Trainmen operating freight and passenger trains, colliding during snow storm, owed passenger duty to use care required by situation and circumstances — Sanucci v. New York Cent. R. Co., 228 N.Y.S. 505, 223 App.Div. 517.

Proper lookout

Motorman of railroad's motor coach was under duty toward passenger to keep proper lookout while backing into station, and failure to look or to see another coach which was plainly visible was negligence.—St. Louis Southwestern Ry. Co. v. Varnell, Tex.Civ.App., 97 S.W.2d 320.

40. La.—Benedict v. New Orleans Public Service, 120 So. 521, 9 La.App. 322.
10 C.J. p. 968 note 32.

41. Ill.—Chicago City R. Co. v. Schmidt, 75 N.E. 383, 217 Ill. 396, affirming 117 Ill.App. 213.
10 C.J. p. 968 note 33.

Caterpillars on track

Presence of caterpillars on street car track, causing car to skid, was held not sudden and unforeseeable overwhelming natural force required to sustain defense of vis major.—Bradley v. City of Seattle, 294 P. 554, 160 Wash. 100.

42. Mo.—Bergfeld v. Dunham, App., 228 S.W. 891
Tenn.—Memphis St. R. Co. v. Felts, 6 Tenn.Civ.A. 303.
10 C.J. p. 968 note 34.

Highest degree of care

It is the duty of the operatives of a street car approaching a railroad crossing to use the highest degree of care to ascertain if there is any train closely approaching the crossing, to prevent injury to passengers on the street car.—Bergfeld v. Dunham, Mo.App., 228 S.W. 891.

Motorman fainting

Where a street car motorman fainted in his cab and caused a collision, injuring plaintiff, the responsibility of the street car company for the motorman's failure to exercise reasonable care, where the motorman had warnings of the fainting spell, must be determined in the same manner as any other question arising in the course of the motorman's employment — Goldman v. New York Rys. Co., 173 N.Y.S. 737, 185 App.Div. 739.

Railroads and street railroads distinguished

"In the absence of statutory regulations, there is an element of difference between the duties required of the servants of a steam railroad, and those of an electric street railroad in approaching a crossing where the view is obstructed, such as the one we are considering. For instance, the street railroad employé may be required, if the place of crossing is more than ordinarily dangerous, to stop the car before going on the crossing, and if necessary go forward to a point where he can see whether it is safe to proceed, and look and listen for an approaching train."—Vincennes Tract. Co. v. Curry, 109 N.E. 62, 65, 59 Ind.App. 683.

Freight train

The same degree of care is required in the operation of a freight train at an intersection of tracks as that required of a passenger train, since in either case human life is at stake.—Van Orman v. Lake Shore, etc., R. Co., 115 N.W. 968, 152 Mich. 185.

A contract between carriers as to the stopping of trains at an intersection of their roads cannot affect the care which a carrier owes to its passengers to avoid collisions.—Washington, etc., R. Co. v. Trimyer, 67 S.E. 531, 110 Va. 856.

43. Iowa.—Parker v. Des Moines City R. Co., 133 N.W. 373, 153 Iowa 254, Ann.Cas.1913E 174
Mo.—Augustus v. Chicago, etc., R. Co., 134 S.W. 22, 153 Mo.App. 572.

44. Mich.—Van Orman v. Lake Shore, etc., R. Co., 115 N.W. 968, 152 Mich. 185.

crossing, or the company whose passenger is injured has the right of way.[45] Thus the driver or conductor of a street car, when approaching a railroad crossing, should go forward to see that there is no danger in running his car over the crossing,[46] notwithstanding there are crossing gates and they are open,[47] particularly when the view of the railroad is obstructed,[48] and, even though the conductor has gone forward, it is negligence on the part of the driver of the car to follow so closely with his car as not to be able to avail himself of a warning, if given.[49]

Busses, etc., crossing tracks. The driver of a bus or other vehicle carrying passengers for reward must exercise a high degree of care when crossing railroad or street railroad tracks, and the carrier is liable where a collision occurs through its negligence.[50]

Statute or ordinance. The violation of a statute or ordinance requiring street cars to stop before going on to railroad crossings is such negligence as will render the street car company liable for injuries sustained by its passengers in a collision caused by such negligence;[51] and the violation, by a bus driver, of a statute requiring all automobiles to stop before crossing railroad tracks has been held to render the bus company liable as a matter of law for injuries sustained in a collision.[52]

At grade crossings generally. A carrier, carrying passengers over crossings frequently traveled, must exercise the highest degree of care to avoid collisions at such crossings,[53] but in order for the car-

N Y —Gorman v. New York, etc., R. Co., 87 N E. 682, 194 N.Y. 488, reversing 106 N.Y S. 1127, 122 App. Div. 896.

The failure to use at a grade crossing interlocking signals and switches, so arranged that the signal, when set against a train, opens a switch and either derails or sidetracks the train before it can reach the crossing, is not negligence with respect to a collision which occurs at the time when the crossing signal is set at safety for the train on which the injured person is a passenger.—Gorman v. New York, etc., R. Co., 87 N.E 682, 194 N.Y. 488, reversing 106 N.Y S. 1127, 122 App.Div. 896.

45. N.Y.—Zimmer v. Third Ave R. Co., 55 N.Y.S 308, 36 App Div. 265.

No superior right of way

Where the cars of one company have no superior right of way to the cars of another company at crossings, such company having no superior right of way is guilty of negligence if its motorman, when approaching such crossing, sees the car of the other company at a stop and proceeds forward without keeping his car in such control as to enable him to avoid a collision with such other car if it is suddenly started.—Schmidt v. Chicago City R Co., 144 Ill App. 512, affirmed 88 N E 275, 239 Ill. 494

Statutory right of way

That one train has the right to cross first by statute does not excuse those in charge of each train from the exercise of extraordinary care to avoid a collision and consequential injuries to passengers.—Atlantic Coast Line R. Co. v. Adeeb, 84 S E. 316, 15 Ga.App 842

46. Ky.—Central Passenger R Co v. Kuhn, 6 S.W 441, 86 Ky. 578, 9 Ky.L. 725, 9 Am S R 309.
10 C.J. p 969 note 38.

Signaling while view obstructed

(1) The conductor of a street car, who signaled the motorman to cross the tracks of a railroad although his view was obstructed by the smoke, steam, and noise of a passing train has been held guilty of negligence.—Memphis St. Ry Co. v. Cavell, 187 S W. 179, 135 Tenn. 462.

(2) Such conduct constitutes negligence as a matter of law.—Memphis St Ry. Co. v. Bobo, Tenn, 232 F. 708, 146 C C A. 634, affirmed Memphis St Ry. Co. v. Moore, 37 S.Ct. 273, 243 U S. 299, 61 L Ed. 733.

47. Ill —Chicago, etc, R. Co. v. Smith, 124 Ill App 627, affirmed 80 N.E 716, 226 Ill. 178
Mo —Mulderig v St Louis, etc, R Co., 94 S.W. 801, 116 Mo App. 655

48. Ky.—Central Pass. R. Co. v. Kuhn, 6 S W. 441, 86 Ky. 578, 9 Ky L 725, 9 Am S R. 309
Mo.—Mulderig v. St. Louis, etc, R. Co., 94 S.W. 801, 116 Mo App. 655.

49. Ill —Chicago, etc, R Co. v. Smith, 124 Ill App 627, affirmed 80 N E. 716, 226 Ill. 178.

50. Mich —De Jager v. Andringa, 217 N.W. 332, 241 Mich 474.

Negligence as matter of law

Where driver stopped bus at railroad crossing and after proceeding was struck by passenger train approaching in plain view, bus owners were held negligent as matter of law.—De Jager v. Andringa, 217 N. W. 332, 241 Mich. 474.

Gross negligence

Bus driver who tried to cross track with knowledge of approaching train or who could have seen train if he had looked or listened was held guilty of gross negligence.—Gulf & S I R Co v. Carlson, 102 So. 168, 137 Miss 613.

Care of autobus driver

(1) Autobus driver approaching railway crossing coincidently with railway car must presume car motorman would continue over crossing without slowing —McCarthy v. Pacific Electric Ry. Co., 255 P. 868, 82 Cal App. 503.

(2) Autobus driver approaching railway crossing coincidently with railway car has continuing duty to use caution in protecting passengers from collision —McCarthy v. Pacific Electric Ry Co, supra.

(3) The rule that a person driving across a street railroad track need exercise only ordinary care has no application in an action by a passenger in an omnibus against its owner for injuries received in a collision at such crossing, as the carrier should exercise a greater degree of vigilance.—Frank Parmelee Co. v. Wheelock, 79 N E 652, 224 Ill. 194, affirming 127 Ill App. 500.

51. Ohio —Cincinnati, D & T. Traction Co v. Holbrock, 32 Ohio Cir. Ct 724
10 C J p 969 note 42.

Where view unobstructed

A statute requiring street car companies to bring their cars to a stop before crossing a railroad track, and to send an employee forward to look out for trains, makes no exception of tracks where the view is unobstructed —Mulderig v. St Louis, etc, R. Co, 94 S W. 801, 116 Mo App. 655.

Violation of statute or ordinance generally see supra, § 743.

52. Miss —Teche Lines v Pope, 166 So 539, 175 Miss. 393.

53. U S —Lehigh Valley R Co. v. Ciechowski, C C A N Y, 10 F 2d 82, certiorari denied 46 S.Ct 352, 270 U.S 654, 70 L Ed. 783

Higher degree of care than required by public service commission

(1) A carrier may be held to a higher degree of care than that exercised in complying with the requirements of the public service

rier to be liable it must be guilty of some negligent act or omission.[54]

At street intersections. The duty to exercise care to prevent collisions is particularly applicable at street intersections and a passenger injured in a collision at a street intersection by reason of the carrier's negligence may recover,[55] but the carrier is not liable where the collision occurred without fault

commission.—Lehigh Valley R. Co v Ciechowski, C.C.A.N.Y., 10 F.2d 82, certiorari denied 46 S.Ct. 352, 270 U.S. 654, 70 L.Ed. 783.

(2) Carrier may be required to maintain flagman and gates at crossing of much-traveled highway in addition to maintaining safety signal prescribed by public service commission.—Lehigh Valley R. Co. v. Ciechowski, supra.

Timely signal

Timely crossing signal by engineer was held necessary, where he saw automobile approaching crossing under circumstances which might drown warning of his on-coming passenger train.—Lehigh Valley R. Co v. Ciechowski, C.C.A.N.Y., 10 F.2d 82, certiorari denied 46 S.Ct. 352, 270 U.S. 654. 70 L.Ed. 783.

Duty of bus drivers, etc., crossing railroad tracks see supra this section.

54. Cal.—Jackson v. Pacific Electric Ry Co., 46 P.2d 281, 7 Cal.App.2d 287.

Motorist disregarding crossing signals

Where motorist, disregarding danger signals, drove directly in front of interurban train and was struck by train, and particles of glass from automobile allegedly were blown into eyes of passenger of train who was sitting by open window, railroad was held not liable to passenger, where motorman was not negligent.—Jackson v. Pacific Electric Ry Co., 46 P.2d 281, 7 Cal.App.2d 287.

55. Ill.—Schluraff v Shore Line Motor Coach Co., 269 Ill.App. 569.

La.—Wilkins v. Featherstone Transfer Co., 100 So. 732, 156 La. 601.—Thorgrimson v Shreveport Yellow Cabs, App., 161 So. 49

Mass.—Froio v. Eastern Massachusetts St. Ry. Co., 142 N.E. 255, 247 Mass. 474.

R.I.—Zmuda v McFarland, 165 A. 446, 53 R.I. 210.

Tex.—Valee v Joiner, Com.App., 44 S.W.2d 983, reversing Eastern Texas Electric Co. v. Joiner, Civ.App., 27 S.W.2d 917.

Care required

(1) A bus driver must exercise the highest degree of care to prevent collisions at street intersections.—Di Rossi v. Connecticut Co., 188 A. 926, 122 Conn. 372.

(2) Holding motorman to "high degree of care" to avoid collision with vehicle using intersecting street was held proper, although vehicle was negligently and unlawfully operated.—Dallas Ry. & Terminal Co. v. Garner, Tex.Civ.App., 42 S.W.2d 665, reversed on other grounds, Com.App., 63 S.W.2d 542.

(3) Street car conductor, as well as motorman, has duty to passenger to exercise highest degree of care to avoid collision with automobile.—Kappico v. St. Louis Public Service Co., Mo.App., 41 S.W.2d 826.

(4) Where street car and automobile truck collided at street intersection, injuring street car passenger, duty of both motorman and truck driver was to use care of an ordinarily prudent person under the circumstances.—Kelly v International Ry Co., 212 N.Y.S. 309, 214 App.Div. 652.

(5) Truck driver and taxicab driver whose vehicles collided both owed taxicab passenger duty to use care commensurate with all circumstances.—Nelson v. Haege, 248 N.Y.S. 647, 232 App.Div. 56.

(6) Drivers, gripmen, and motormen of street cars are obliged to exercise à more exacting attention when they approach street crossings in a crowded city where vehicles and pedestrians may always be expected in front of them.—Lazer v Chicago City R. Co., 152 Ill.App. 319

Right of way; through streets

(1) Where an autobus was traveling at a high rate of speed on reaching a street on which an automobile was approaching from his right, the automobile had the right of way, and failure to have the bus under such control as to let the automobile pass in front of it was negligence, rendering defendant bus owner liable to a passenger for injury from the collision.—Baker v. Western Auto Stage Co., 192 P. 73, 48 Cal.App. 283.

(2) That driver of taxicab had right of way at street intersection did not alone relieve it from liability to passenger for negligence in intersection collision.—Hogan v. Miller, 157 S.E. 540, 156 Va. 166.

(3) Taxicab driver, who had right of way, still had duty to keep lookout and exercise highest degree of care for safety of his passenger, could not continue through intersection oblivious to other traffic, and would not be excused, merely because he had right of way, by negligence of another motorist, unless negligence of other motorist was sole cause of accident.—B-Line Cab Co v Lake, 110 S.W.2d 1083, 270 Ky. 763.

(4) Motorman has no right to presume that, by sounding warning at street intersection, vehicles having right of way will yield it.—Louisville & Interurban R. Co v. Kerr, 287 S.W. 926, 216 Ky. 407

(5) Stage driver on through street having right of way could assume automobile approaching on cross street would obey law and stop before entering through street.

Cal.—Gritsch v Pickwick Stages System, 22 P.2d 554, 131 Cal.App. 774

La.—Upton v Bell Cabs, App., 154 So. 359.

(6) However, the motorman or driver cannot assume that a person is not going to violate the law when every indication is to the contrary

Ark.—Arkansas Power & Light Co v Boyd, 65 S.W.2d 919, 188 Ark. 254.

La.—Upton v Bell Cabs, supra.

(7) In such circumstances, the driver was required to use such care to avoid accident as ordinarily prudent driver would have done under similar circumstances by immediately placing taxicab under proper control, slowing down, or stopping if necessary.—Upton v. Bell Cabs, supra.

Lookout

(1) Failure of driver of taxicab to observe automobile approaching from his right at street intersection notwithstanding automobile was in plain sight justified finding of negligence in action for personal injuries sustained by passenger in taxicab.—Rosenberg v. Matulis, 166 A. 397, 116 Conn. 675

(2) Street car motorman observing motortruck three hundred feet away, and failing to keep it under surveillance, although knowing it must cross his path, held negligent, as regards liability to injured passenger.—Bacon v. New Orleans Public Service, 137 So. 213, 18 La.App. 96, rehearing denied 137 So. 866, 18 La.App. 96

Stopping or slowing down at intersection

(1) Street railway is not obligated to stop cars at all intersections, or to slacken speed so as to permit practically immediate stop.—Benedict v. New Orleans Public Service, 120 So. 521, 9 La.App. 322

(2) Driver of taxicab involved in collision with truck should have stopped before entering from narrow intersecting street into wide thoroughfare with two street car tracks.—Dawson v. Toye Bros. Yellow Cab Co., 131 So. 716, 15 La.App. 326

(3) Taxicab driver, who approach-

on its part.[56]

On highway between intersections. A carrier, such as a bus company or taxicab company, etc., must exercise care to avoid collisions with other vehicles on the highway and is liable to its passenger where he sustains injury in a collision caused by its negligence.[57] However, the carrier is not liable where it was not negligent.[58]

§ 747. Concurrent Negligence of Two Carriers

Generally each carrier is liable to a passenger injured in a collision caused by the concurrent negligence of such carriers.

Where a passenger is injured in a collision caused by the concurrent negligence of two carriers, the general rule is that each carrier is liable,[59] and the

ed blind intersection at forty miles per hour without slowing down and rammed into automobile traveling at twenty miles per hour and which had slowed down before reaching intersection and was then in intersection, having right of preemption, was held negligent.—Holland v. Owners' Automobile Ins. Co. of New Orleans, La.App., 155 So. 780.

(4) Bus driver approaching intersection at thirty-five miles per hour, and colliding with motorist slowly crossing intersection, injuring bus passenger was held negligent.—Sloan v. Original Stage Line, 12 P.2d 465, 124 Cal.App. 317.

(5) Driver of taxicab entering through traffic street was not required to stop, as regards liability to passenger, where no stop sign had been erected.—Ramsdell v Frederick, 285 P. 219, 132 Or 161

Proceeding on officer's signal

As regards bus company's liability for injuries to passenger resulting from intersectional collision, traffic officer's signal for bus driver to proceed and signal for on-coming automobile to stop did not authorize bus driver to proceed in negligent manner or to proceed at all if to do so necessarily, exposed passengers to harm.—Di Rossi v. Connecticut Co., 188 A. 926, 122 Conn. 372.

Superior rights of street railroad

(1) While street car companies do not have exclusive use of tracks, their rights are superior to traveling public's, and street cars have right of way.—Ruthberg v. Philadelphia Rapid Transit Co., 151 A. 19, 300 Pa. 536.

(2) Street car motorman, although believing he had superior rights on highway, had duty of using due care to prevent impending collision with truck.—Moraski v. Philadelphia Rapid Transit Co., 142 A. 276, 293 Pa. 224.

(3) Motorman of trolley car, although having superior right of way, has duty of controlling car, so as to avoid collision.—Caplan v Philadelphia Rapid Transit Co, 92 Pa.Super. 251.

(4) In an action for personal injuries against a street railway company and the driver of an automobile which collided with a car of the company, by a passenger of the company who at the time was in its car, it is not error for the trial court to grant a prayer for instruction asked by the railway company that the car of the company had a preferential right of way which its codefendant was required to respect.—Pistorio v. Washington R & E Co., 46 App.D.C. 479.

56. La.—Benedict v. New Orleans Public Service, 120 So. 521, 9 La. App. 322.
Pa.—Ruthberg v. Philadelphia Rapid Transit Co., 151 A. 19, 300 Pa. 536—Rosen v. Philadelphia Rapid Transit Co, 100 Pa Super. 242.

57. Ill.—Lavin v. Yellow Cab Co., App., 4 N.E.2d 50.
Pa.—Brown v. Cunningham Cab Co., 92 Pa.Super. 356.

Driving in center of highway

Bus driver's action, in driving within few feet of center of highway when there was unoccupied space the width of the bus to the right on the highway, constituted negligence as regards bus company's liability for passenger's injuries when bus was sideswiped by automobile.—Ross v. Bay City Transit Co., 56 P.2d 247, 12 Cal.App.2d 639.

Lookout

(1) Operator of stage owed passenger duty to keep proper lookout ahead, together with observation of condition of road to avoid obstructions.—Poropat v. Olympic Peninsula Motor Coach Co., 299 P. 979, 163 Wash. 78.

(2) Bus driver was required to be on lookout for animals in highway, regardless of stock law making it unlawful for animals to run at large in county.—Tennessee Coach Co. v Young, 80 S.W.2d 107, 18 Tenn.App. 592.

Bus on car tracks

A bus driver is a common carrier required to exercise the utmost care and diligence for the safety of his passengers, and the jury may find that he is thereby required while driving along a street car track to look behind at intervals to ascertain whether a street car is approaching. The utmost care and vigilance which the driver of a bus owes to his passengers under Civ.Code § 2100 requires him when driving along an interurban track to exercise the utmost care to hear the warning signal of a car approaching from behind, and to turn off from the tracks as soon as he safely can do so, and it is negligence for him to remain upon the tracks after hearing such signal merely because it was more comfortable for the passengers.—Simmons v. Pacific Electric Ry. Co, 212 P. 637, 60 Cal.App. 129

Avoidance of obstructions or vehicles by railroad or street railroad company see infra § 748.

58. Ky.—Dix v. Gross, 111 S.W.2d 673, 273 Ky. 231
N.J.—De Stefano v. Yellow Cab Co, 126 A. 429, 2 N.J.Misc. 1006
N.Y.—Gehm v. Yellow Taxi Corporation, 281 N.Y.S. 320, 245 App.Div. 816
Ohio—Cleveland Ry. Co v. Orwig, 177 N.E. 201, 124 Ohio St. 134.

Sounding horn

Bus driver's failure to sound horn when about to meet and pass truck was held not negligence under statute which requires sounding of horn only when about to pass another vehicle going in same direction.—Gager v Teche Transfer Co, La.App., 153 So. 69.

Slowing down not negligence

Slowing down by a carrier where he could not see in front of him has been held not an act of negligence as respects the crashing into the rear of the car by another car, on the contrary, it was the duty of the carrier to slow down or to stop in such circumstances.—Wilford v Cooper, 98 S.W.2d 39, 266 Ky. 64.

Ordinance inapplicable

Where an automobile backed across the sidewalk into a bus standing in the street parallel to the sidewalk at a time when the street was lighted, but the interior of the bus was not lighted, whereby plaintiff was injured as he was in the act of boarding the bus, the carrier was not liable for negligence as the New York City ordinance requiring bus companies to light the interior of their busses is for the accommodation and convenience of its passengers, and not to warn users of highway.—Kerner v Surface Transp. Corporation, 2 N.Y.S.2d 356, 166 Misc. 742.

59. U.S.—Little v. Hackett, N.J., 6 S.Ct. 391, 116 U.S. 366, 375, 29 L.Ed. 652.

passenger may sue either of them, or he may join them in one action, as shown infra § 760, and the fact that those operating the train or car on the crossing track are negligent will not relieve the carrier of the passenger from liability for injury to him if its employees might, in the exercise of the highest degree of care and precaution, have avoided the collision.[60] This rule applies where a collision is caused by the concurrent negligence of a street railroad company and a sight-seeing automobile,[61] or of a railroad company and a hackman,[62] or of a bus company and a taxicab company,[63] or of two taxicab companies.[64]

The liability of a carrier to an injured passenger where an injury occurs through the concurrent negligence of the carrier and a third person generally is treated supra § 709.

§ 748. Avoidance of Collisions with Animals, Vehicles, or Other Obstacles on or near Track

A railroad or street railroad company is generally held to the highest degree of care in avoiding collision with obstacles or vehicles on or near the track

The highest degree of care is required in avoiding collision with obstacles on or near the track from which danger may be anticipated,[65] although the obstruction is caused by an agency over which the carrier has no control;[66] and this is the rule as to animals on, or which may be about to come on, the track,[67] and also applies to a vehicle,[68] not-

Cal.—Simmons v. Pacific Electric Ry. Co., 212 P. 641, 60 Cal.App 140.

Ga.—Central of Georgia Ry Co. v. Wheat, 122 S.E 794, 32 Ga.App 151.

Ind.—Union Traction Co. of Indiana v Alstadt 143 N.E. 879, 195 Ind 389

N.J.—Matthews v. Delaware, L. & W. R. Co., 27 A. 919, 56 N.J.Law 34, 22 L.R.A 261

10 C.J. p 970 note 45.

The rule as laid down in Corpus Juris is cited and applied in Simmons v. Pacific Electric Ry. Co., 212 P 637, 641, 60 Cal.App 129.

In Pennsylvania

(1) It has been held that a taxicab company, whose driver stopped cab with rear wheel between trolley rails, and street railway company, whose motorman should have seen wheel there and had ample time to stop car before collision were concurrently negligent and jointly and severally liable.—Hughes v Pittsburgh Transp. Co., 150 A. 153, 300 Pa. 55.

(2) However, in an earlier case it was held that only the carrier with whom the passenger had contracted for carriage is liable.—Lockhart v. Lichtenthaler, 46 Pa. 151.

60. U.S.—Memphis St. Ry. Co. v. Bobo, Tenn., 232 F. 708, 146 C.C.A. 634, affirmed Memphis St. Ry. Co. v. Moore, 37 S.Ct. 273, 243 U.S. 299, 61 L.Ed. 733.

Tenn.—Memphis St. Ry Co. v. Cavell, 187 S.W 179, 135 Tenn. 462.

10 C.J. p 970 note 46.

61. Mo.—McFadden v. Metropolitan St. R Co., 143 S.W. 884, 161 Mo. App. 652.

62. N.Y.—Jerome v. New York Rys. Co., 179 N.Y.S. 777, 190 App.Div. 311

10 C.J. p 971 note 49.

63. N.J.—Koplow v. Hiczwa, 134 A. 891, 4 N.J.Misc. 904.

64. N.J.—Dickson v Ackerman, 168 A 269, 111 N.J.Law 583

65. Pa. — Hughes v. Pittsburgh Transp. Co., 150 A 153, 300 Pa. 55.

10 C.J. p 971 note 50

Elevated railroad pillars

A street car conductor is bound to take notice of the distance between his car and the pillars of an elevated railroad in the street, and of the size of a passenger standing on the running board, in determining whether it is safe to permit the car to pass a pillar before the passenger has had time to enter the car, but it is not necessarily negligence in every case to allow the car to pass the pillar while a passenger is standing on the running board, as a street railroad company is not bound to anticipate that a passenger standing on the running board of an open car will swing back so as to come in contact with a pillar of an elevated railroad sufficiently distant to permit the passenger standing in the position first assumed by him to pass it in safety, although the passenger found such movement convenient in order to swing himself more easily up into the car.—Canavan v. Interurban St. R. Co., 87 N.Y.S. 491.

Passing car on other track

A street car company is liable for the death of a passenger who, while standing on the inside running board of an open car, was struck by a car from the opposite direction on the other track, if the bell on such car was not sounded.—Kalis v. Detroit United R Co., 119 N.W. 906, 155 Mich. 485.

Warning of danger

(1) It was not motorman's absolute duty to warn open trolley car passenger of possible danger as car approached parked vehicles.—Maher v. Connecticut Co., 155 A. 854, 113 Conn 556, 77 A.L.R. 426

(2) Street railroad company is not bound to warn passenger of proximity of pole to its tracks, where danger was known to passenger and was obvious.—Milliken v. Rhode Island Co., 99 A. 1023, 40 R.I. 82

66. La.—Larose v New Orleans Public Service, 119 So. 908, 10 La. App. 91.

10 C.J. p 971 note 51.

67. Tex.—Scott v. Texas Electric Ry Co., Com.App., 32 S.W.2d 641, reversing Texas Electric Ry. Co. v Scott, Civ.App., 21 S.W.2d 24.

10 C.J. p 971 note 52.

68. La.—Larose v. New Orleans Public Service, 119 So. 908, 10 La. App. 91.

Pa.—Petri v. Pittsburgh Rys Co., 195 A. 107.

Wis.—Moen v Madison Rys. Co., 243 N.W. 505, 208 Wis. 388.—Moen v Madison Rys. Co., 243 N.W. 503, 208 Wis 381.

10 C.J. p 971 note 53.

Duty in passing animal drawn vehicle

Motorman of street car, passing unattended animal-drawn vehicle, need only ascertain sufficiency of margin and proceed at reasonably slow speed, unless animals appear restive.—Larose v. New Orleans Public Service, 119 So. 908, 10 La. App. 91.

Liability dependent on negligence

A street railway company was not liable for injuries to a passenger who was knocked from the running board of a car by a truck standing in the street, if the motorman could not have stopped the car after he saw or had an opportunity to see the truck.—Virginia Ry. & Power Co. v. Cherry, 105 S.E. 657, 129 Va. 262.

Collisions at street intersections or railroad crossings see supra § 746.

withstanding the carrier has a paramount right of way,[69] and notwithstanding the driver of the vehicle is negligent.[70] However, the carrier will not be liable if it exercises due care and the collision could not have been reasonably anticipated,[71] as where a collision with a wagon is caused by a sudden movement of the horses attached thereto.[72]

§ 749. Dangerous Rate of Speed

A carrier may run its train or cars, without being guilty of negligence per se, at any rate of speed consistent with the safety of its passengers in the absence of a statute or ordinance limiting such speed.

In the absence of a statute or ordinance to the contrary, it is not negligence per se for a carrier to run its train or car at any rate of speed consistent with the safety of its passengers,[73] even though the rate of speed is in excess of the scheduled rate,[74] particularly where the excessive speed results from defective machinery, which defects are not known and could not be known by the exercise of the highest degree of care, and which prevent the engineer or motorman from controlling it.[75] However, the rate of speed at which a train or car is run may be dangerous in view of the circumstances or conditions under which it is operated, or because the particular place is such as to require precautions in that respect, and under such circumstances and conditions may constitute negli-

69. Pa. — Hughes v. Pittsburgh Transp. Co., 150 A. 153, 300 Pa. 55.
10 C.J. p. 968 note 30, p. 971 note 53.

Sharp lookout

While it is not the carrier's duty to anticipate and provide against every exigency or possible contingency which may suddenly arise in the operation of the lines, it is carrier's duty and that of its employees to keep a sharp lookout and be able to stop the car in the face of danger. It is duty of motorman of street car to keep a constant lookout ahead and to have such control of his car as to avoid dangers ordinarily incident to its operation and also to avoid such unusual and unexpected dangers as he sees in time to avoid.—Petri v. Pittsburgh Rys. Co., Pa., 195 A. 107.

Absence of negligence not necessarily shown

Fact that headlight on motor truck on side near track was not lighted did not show that motorman was not negligent in colliding therewith but was only circumstance.—Tuttle v. Connecticut Valley St. Ry. Co., 132 N.E. 360, 239 Mass. 553.

70. Pa. — Hughes v. Pittsburgh Transp. Co., 150 A. 153, 300 Pa. 55.
10 C.J. p. 968 note 31

Vehicle following car

If a street car conductor knew that an automobile was following a street car at such a rate of speed and in such close proximity thereto as to make it dangerous to a passenger on the rear platform to stop the car at a place not an ordinary stopping place, it would be negligence for him to do so under the last clear chance doctrine, independent of the duties of the company to a passenger.—Louisville Ry. Co. v. Rice, 250 S.W. 863, 199 Ky. 196.

71. Cal.—Souza v. Market St. Ry. Co., 289 P. 665, 106 Cal. App. 347.
Ky.—Louisville Ry. Co. v. Himbaugh, 82 S.W.2d 776, 259 Ky. 604.—Louisville Ry. Co. v. Rice, 250 S.W. 863, 199 Ky. 196.
Ohio.—Youngstown Municipal Ry. Co. v. Chismar, 8 N.E.2d 156, 54 Ohio App. 481.
R.I.—Rohl v. United Electric Rys. Co., 149 A. 375, 50 R.I. 478.
10 C.J. p. 968 note 30 [b], p. 971 note 54.

Overswing

Street railway owes no duty to keep lookout to prevent collision from overswing or to warn of danger until actually known. Street railway employees could assume that automobile driver would not attempt to pass between parked truck and turning street car.—Wheeler v. Des Moines City Ry. Co., 215 N.W. 950, 205 Iowa 439, 55 A.L.R. 473.

Sounding gong

(1) Street car motorman was held not negligent in failing to sound gong, where car was lighted and visible to driver of bus which collided with car.—Rohl v. United Electric Rys. Co., 149 A. 375, 50 R.I. 478.

(2) Municipal ordinance providing that gong on street cars should be sounded at least one hundred feet distant from all street intersections and while passing such intersections held inapplicable in suit against company by passenger on car for injuries sustained in collision between street car and automobile which did not occur at intersection.—Youngstown Municipal Ry. Co. v. Chismar, 8 N.E.2d 156, 54 Ohio App. 481.

Vehicle following car

A street car conductor may assume, in the absence of indication to the contrary, that an automobile following the car will be driven with such care that it can stop before colliding with the street car, even if the street car stops at an unexpected place, since the automobile driver is charged with knowledge that street cars frequently do stop at other than the regular stopping places.—Louisville Ry. Co. v. Rice, 250 S.W. 863, 199 Ky. 196.

Assuming vehicle would clear track

As long as driver of truck rounding curve with left front wheel on space between inside rails of tracks was apparently able to give street car approaching curve from opposite direction, a clear track, motorman was entitled to assume that he would do so.—Wilkerson v. Pittsburgh Rys. Co., 163 A. 909, 309 Pa. 381.

72. La.—Larose v. New Orleans Public Service, 119 So. 908, 10 La. App. 91.
10 C.J. p. 971 note 55.

73. Ala.—Central of Georgia R. Co. v. Robertson, 83 So. 102, 203 Ala. 358.
Ill.—Letush v. New York Cent. R. Co., 267 Ill. App. 526.
Wis.—Smith v. Chicago, N. S. & M. R. R., 193 N.W. 64, 180 Wis. 259.
10 C.J. p. 972 note 57.

Derailment not foreseeable

Conduct of motorman of interurban car to have been negligent in actionable sense, must have been such that derailment because of speed ought reasonably to have been foreseen by him. Alleged excessive speed of interurban car was held not to entitle passenger injured by overturning of car to recover, where overturning of car was caused by collision with automobile, driver of which had unobstructed view of two thousand feet toward approaching car for last five hundred feet of his approach to intersection, since motorman could not have foreseen that driver of automobile would not stop.—Bleul v. Milwaukee Electric Railway & Light Co., Wis., 271 N.W. 1.

74. Tenn.—East Tennessee, etc., R. Co. v. Winters, 1 S.W. 790, 85 Tenn. 240.
10 C.J. p. 972 note 58.

75. Ky.—South Covington, etc., St. R. Co. v. Barr, 144 S.W. 755, 147 Ky. 549.

gence as to passengers thereon,[76] even though it is less than the rate allowed by statute or ordinance;[77] and in accordance with this rule it is the duty of the employee in charge of the motive power of a train or car so to regulate its speed as to have it under control, and to slow up, and, if necessary, to stop, when danger is imminent.[78]

Violation of statute or ordinance. Where statutes or ordinances limiting the rate of speed are held to be for the benefit and protection of passengers, it is generally held to be negligence per se to run at a greater rate of speed;[79] but where a

76. Ala.—Alabama Power Co. v Edwards, 121 So 543, 219 Ala 162
La.—Haynes v. Louisiana Ry. & Nav Co., 74 So 538, 140 La. 1019
—Matteson v Teche Greyhound Lines, App., 178 So 272
Mich.—Bury v Detroit United Ry., 164 N.W 460, 198 Mich. 447
Pa.—Deady v Philadelphia Rapid Transit Co., 100 Pa.Super. 208.
Tenn. — Tennessee Coach Co. v. Young, 80 S.W.2d 107, 18 Tenn App 592.
10 C.J. p 972 note 60.

May constitute negligence

The fact that an electric street car was going at the rate of twelve or fifteen miles an hour in passing over a frog at a curve where the carrier's rules required that cars should not run faster than four miles an hour has been held to be evidence of negligence on the part of the motorman in running the car.—Sweetland v Lynn, etc., R. Co., 59 N.E. 443, 177 Mass. 574, 51 L.R.A. 783

It is negligence toward passengers

(1) To run a street car at great speed when approaching a switch.—Alabama Power Co. v. Edwards, 121 So 543, 219 Ala 162.

(2) Knowingly to drive through loose rock at rapid speed under circumstances where rocks may be thrown and injure some one.—Bowling Green-Hopkinsville Bus Co. v Edwards, 59 S.W.2d 584, 248 Ky. 684.

(3) It was gross and wanton negligence on part of locomotive engineer to run train at high speed with notice that there was water over track ahead.—Illinois Cent. R. Co. v. Cole, 74 So 766, 113 Miss 896.

(4) Violation of rule to regulate car when headlights are turned off so as to be able to stop within range of vision was held evidence of negligence.—Tuttle v. Connecticut Valley St. Ry. Co., 132 N.E. 360, 239 Mass 553

(5) Taxicab driver's attempt to cross highly-traveled, sleety street at twenty-five miles an hour at night while snow was falling was held negligence — Barrows v. Checker Taxi Co., 195 N.E. 112, 290 Mass 231

(6) Other illustrations see 10 C.J. p 972 note 60 [a].

It is not negligence toward passengers to run a trolley car at a speed of about ten miles per hour where the street was free of traffic, the road and rails were dry, and the car was lighted.—Rohl v United Electric Rys. Co., 149 A. 375, 50 R.I. 478

Crowded car or train

(1) Where the seats, aisles, and platform of a street car are crowded, the carrier should so regulate the speed as to use the highest degree of care for the safety of passengers consistent with the practical operation of the car.—Alton Light, etc., Co. v. Oller, 75 N.E. 419, 217 Ill. 15, 4 L.R.A.,N.S., 399, affirming 119 Ill.App. 181.

(2) Where a person is accepted as a passenger on a street car which is so crowded that he is compelled to stand on the rear platform and hold on by the handrail, and while in this position, and without notice to him, the car is driven around a curve in the track without slackening speed, in violation of a rule of the company requiring the speed to be reduced one half in rounding curves, and he is violently thrown from the car and injured, such facts are sufficient to establish negligence on the part of the carrier entitling the passenger to recover for his injuries.—Gatens v. Metropolitan St. R. Co., 85 N.Y.S. 967, 89 App.Div. 311, affirmed 73 N.E. 1124, 191 N.Y. 515.—Lucas v. Metropolitan St. R. Co., 67 N.Y.S. 833, 56 App.Div. 405.

(3) Where in such a case a passenger is thrown from the platform as the train rounds a curve at a speed of from twenty-five to thirty miles an hour, the carrier is liable for his injuries, although an ordinance permits trains to run thirty-five miles an hour at the place of the accident.—Chicago, etc., R. Co. v. Newell, 72 N.E. 416, 212 Ill. 332, appeal dismissed 25 S.Ct. 801, 198 U.S. 579, 49 L.Ed. 1171.

The conductor of a street car, being in control of the movements of the vehicle, is negligent if he allows the motorman to proceed at so excessive a rate of speed as to endanger passengers.—Mobile Light, etc., Co. v. Hughes, 67 So. 278, 190 Ala 216.

Knowledge of conditions

The employees of a carrier are charged with knowledge of the condition of the carrier's railroad track at a point where excessive speed would be likely to cause derailment.—Houston, etc., R. Co. v. Cheatham, 113 S.W. 777, 52 Tex.Civ.App. 1.

77. Ill.—Chicago, etc., R. Co. v. Newell, 72 N.E. 416, 212 Ill. 332, appeal dismissed 25 S.Ct. 801, 198 U.S. 579, 49 L.Ed 1171.

78. La.—McMahon v New Orleans R., etc., Co., 53 So 857, 127 La. 544, 32 L.R.A.,N.S., 346.
10 C.J. p 973 note 62.

Another vehicle in road

Driver of bus must keep machine under such control after discovering another vehicle ahead, to avoid accident. In passenger's action for injuries, bus driver seeing truck enter road one hundred twenty-five feet away and failing to get bus sufficiently under control to avoid collision, but depending on truck getting out of way, held negligent.—Mahfouz v. Interurban Transp. Co. 135 So. 740, 17 La.App. 241.

79. U.S.—Harmon v. Barber, Ohio, 247 F. 1, 159 C.C.A. 219, certiorari denied 38 S.Ct. 335, 246 U.S. 666, 62 L.Ed 929.
Tenn.—Blount County v. Perry, 7 Tenn.App. 340.
Wash.—Singer v. Martin, 164 P. 1105, 96 Wash. 231.
10 C.J. p 973 note 63.

Through streets

Statutory duty of driver of stage on through street was to drive at careful and prudent speed, having due regard to traffic, surface, and width of highway. Statute limiting speed to fifteen miles an hour at intersection held controlled by subsequently enacted provisions respecting through highways. One driving vehicle on established through highway appropriately marked with stop-signs at intersections need not reduce speed at intersections to fifteen miles an hour, but rate of speed, unless governed by local regulation, is controlled by statute requiring speed not greater than is reasonable and proper.—Gritsch v. Pickwick Stages System, 22 P.2d 554, 131 Cal. App. 774.

Controlling statute as to street railroad

Motor Vehicle Act, limiting speed to twenty miles per hour, has no application to vehicles operated on stationary rails or tracks, and hence does not repeal an ordinance limiting the speed of street cars to ten miles, and so render erroneous an instruction predicating liability for injury to a passenger on a violation of such ordinance.—McKinnon v. United Railroads of San Francisco, 203 P. 122, 55 Cal.App. 96.

regulation of speed is intended for the benefit of persons crossing the track, a violation of such regulation does not raise an imputation of negligence per se in favor of an injured passenger.[80]

§ 750. Sudden Jerks and Jolts

A carrier is not liable for jerks or jolts which are necessarily incident to the use of the conveyance, but the rule is otherwise where the jerk or jolt is unnecessary, or sudden and violent.

It may constitute negligence that the train or car is so operated that, by jerking or jarring, passengers are imperiled who are properly conducting themselves with reference to their transportation, and the conveyance must be operated with regard to the situation of the passengers as known to, or as it should be known to, the employees in charge.[81] Thus it may constitute negligence to stop a train or car with such suddenness and violence as to cause injury to a passenger,[82] where there is no justification or excuse therefor.[83] However, in order that the above rule may apply, the jerk or jolt must be unnecessary or unusually sudden or violent,[84] such jerks and jars as are necessarily incident to the use

Repeal of a statute limiting the speed of cars is ineffective to deprive a person injured by a violation of such statute prior to its repeal of his right to rely thereon.—Singer v Martin, 164 P 1105, 96 Wash. 231—10 C.J. p 973 note 63 [c].

Violation of statutes or ordinances relating to operation and management generally see supra § 743.

80. Tex.—Walker v. Metropolitan St. R Co., Civ.App., 151 S.W. 1142

81. Ark.—Arkansas Power & Light Co. v. Mart, 65 S.W.2d 39, 188 Ark. 202.
Cal.—McIntosh v. Los Angeles Ry. Corporation, 59 P.2d 959.
Fla.—Atlantic Coast Line R Co. v. Hamlett, 89 So 337, 81 Fla. 872.
Mo.—Modrell v. Dunham, App, 187 S.W. 561, 564.
10 C.J. p 973 note 66.

Utmost care

A carrier must use the utmost care in operating its cars so as not to jar or upset passengers.—Bales v. Kansas City Public Service Co., 40 S.W.2d 665, 328 Mo. 171—Laible v. Wells, 296 S.W. 428, 317 Mo. 141

Negligence dependent on circumstances

Whether sudden starting is necessary and consistent with prudent and proper operation of street car depends on circumstances.—Arkansas Power & Light Co. v. Mart, 65 S.W.2d 39, 188 Ark. 202.

Making up train after receiving passenger

(1) Where a carrier receives a passenger in one of its cars for passage before making up the train of which such car is to be a part, the law requires the company to make up its train, couple, manage, and control its cars and engines in such a careful, skillful, and prudent manner as to carry the passenger with reasonable safety; and it will be liable for an injury to the passenger resulting from its neglect of this duty, when such passenger is not wanting in ordinary care.—Hannibal, etc., R. Co. v. Martin, 111 Ill. 219, affirming 11 Ill App. 386.

(2) It is the duty of those coupling passenger cars to use the highest degree of care usually exercised by ordinarily prudent persons under like circumstances.—Southern R Co v. Neal, 175 S.W. 14, 164 Ky. 121

82. U.S.—Southern Pac. Co. v Hanlon C.C.A.Cal., 9 F.2d 294.
Mass.—Warren v. Boston Elevated Ry. Co., 155 N.E. 871, 259 Mass 226
Minn.—McMurray v. Twin City Motor Bus Co., 228 N.W. 154, 178 Minn. 561
N.Y. — Bergman v. Brooklyn & Queens Transit Corporation, 297 N.Y.S. 727, 163 Misc. 762.
Va.—Richmond-Ashland Ry. Co. v Jackson, 162 S.E. 18, 157 Va. 628.
10 C.J. p 974 note 67.

Corpus Juris statement of this rule is cited with approval in Selman v. City of Detroit, 278 N.W. 112, 283 Mich. 413.

Conduct held to constitute negligence

(1) Cab driver following close behind automobile ahead, and bringing cab to sudden stop, throwing passenger against partition window, fracturing nose was held negligent.—Stevens v. Yellow Cab Co., La. App., 142 So 807

(2) Sudden stopping of street car and throwing passenger holding on iron railing onto floor held negligence, authorizing recovery of damages.—Warren v. Boston Elevated Ry. Co., 155 N.E. 871, 259 Mass 226.

(3) Where a female passenger, sixty-nine years old and weighing one hundred seventy pounds, had not alighted when the car started and was carried nearly to the next street where cars customarily stopped without signal, the act of the conductor in unnecessarily signaling for an emergency stop causing a bounce that threw the passenger from the car was negligence.—Funk v New Orleans Ry & Light Co., 91 So. 506, 150 La. 1046.

The term "violent stop," as applied to the stopping of a street car, must be given a relative meaning in keeping with the circumstances of the particular case, since a stop which might be inconsequential to a standing passenger in the prime of life may be violent and highly injurious to an aged and infirm person.—Allen v Dunham, 175 S.W 135, 188 Mo App 193

83. U.S.—Southern Pac Co. v. Hanlon, C.C.A.Cal., 9 F.2d 294
Mich.—Selman v. City of Detroit, 278 N.W 112, 283 Mich 413

Stopping at railroad crossing

The right of action of a railroad's passenger for being thrown from a car platform to the ground when the car lurched forward with a jerk is unaffected by the fact that the jerk was caused by the stopping of the train at a crossing to wait for signals before pulling into a station, a fact of which the passenger was not apprised.—Johnson v. Atlantic Coast Line R. Co., 99 S.E 558, 125 Va 136

84. Fla.—Atlantic Coast Line R. Co. v. Hamlett, 89 So 337, 81 Fla. 872
Ga.—Southern Ry. Co. v Whitehead, 120 S.E. 700, 31 Ga.App. 398.
Iowa.—Wheeler v Des Moines City Ry. Co., 215 N.W. 950, 205 Iowa 439, 55 A.L.R 473.
Ky.—Shafer v. Chesapeake & O. Ry. Co., 14 S.W 2d 780, 228 Ky. 219—Kentucky Traction & Terminal Co v Peel, 214 S.W. 874, 185 Ky 207—McDermott v. Louisville & N R Co., 206 S.W. 6, 182 Ky. 22—Millers Creek R Co. v Blevins, 205 S.W. 911, 181 Ky. 800—Louisville Ry Co. v. Osborne, 188 S.W 419, 171 Ky. 348.
La.—Murphy v. New Orleans Public Service, App., 169 So. 890
Mass.—Holland v Boston & M. R R., 181 N.E. 217, 279 Mass. 342—Revsbech v. Boston Elevated Ry Co., 175 N.E. 734, 275 Mass. 317.
Mich.—Selman v. City of Detroit, 278 N.W. 112, 283 Mich 413.
Mo.—Laible v. Wells, 296 S.W. 428, 317 Mo. 141 — Mendenhall v Springfield Traction Co., App., 26 S.W.2d 50—Katon v. Kansas City Rys. Co., App., 241 S.W. 983—Laycock v. United Rys. Co. of St. Louis, App., 227 S.W. 883, certified questions answered, Sup., 235 S.W. 91.

of the conveyance, and are not the result of negligence, will not render the carrier liable for resulting injuries.[85] In accordance with this rule the carrier is not liable where the sudden jerk or jar

N.J.—Raeuber v. Public Service Ry. Co., 98 A. 192, 89 N.J.Law 366.
N.Y.—Smith v. Union Ry. Co. of New York City, 247 N.Y.S. 804, 139 Misc. 69.
Ohio—Yager v. Marshall, 196 N.E. 375, 129 Ohio St. 584.
Pa.—Harkins v. Philadelphia Rapid Transit Co., 134 A. 376, 286 Pa. 465 — Fornwalt v. Philadelphia Rapid Transit Co., 65 Pa.Super. 559.
Tenn.—N., C. & St. L. Ry. Co. v. Buchanan, 7 Tenn.Civ.A. 56.
Utah.—Morrissey v. Union Pac. R. Co., 249 P. 1064, 68 Utah 323.
10 C.J. p. 974 note 68.

Sudden acceleration or stopping

(1) Sudden acceleration of moving car, or sudden stopping, without more, is not evidence of negligence.—Gollis v. Eastern Massachusetts St. Ry., 149 N.E. 607, 254 Mass. 157—O'Neill v. Boston Elevated Ry. Co., 142 N.E. 904, 248 Mass. 362.

(2) This is true irrespective of whether the passenger is seated or standing—Selman v. City of Detroit, 278 N.W. 112, 283 Mich. 413.

(3) It is not negligent for a train to accelerate speed suddenly while approaching a station.—Vivian v. San Antonio, U. & G. R. Co., Tex.Civ.App., 196 S.W. 267, error refused.

(4) A street railway cannot be held liable for resulting injuries to passengers due to sudden jerks in starting, stopping, or operating such conveyances if they are maintained in a serviceable condition and operated in the customary manner.—Selman v. City of Detroit, supra.

Whether jerk violent or unusual dependent on circumstances

(1) Whether a car is started or stopped with an unusual or unnecessary jerk or jolt depends upon the facts in each particular case.
Mass.—Revsbech v. Boston Elevated Ry. Co., 175 N.E. 734, 275 Mass. 317.
R.I.—Roy v. United Electric Rys. Co., 164 A. 513, 53 R.I. 122.

(2) Care required of street railroad for safety of passengers, and what constitutes violent or unusual jerk of car, depends on existing conditions.—Meyers v. Wells, Mo., 273 S.W. 110.

Beyond passenger's reasonable anticipation

Sudden or violent jerk of moving trolley car is not of itself sufficient to establish motorman's negligence unless it otherwise clearly appears that movement of car was so extraordinary as to be beyond passenger's reasonable anticipation.—Waldov v. Philadelphia Rapid Transit Co., 182 A. 129, 120 Pa.Super. 304.

Jerk prima facie unnecessary

When street car on which passengers were standing on steps was proceeding at moderate speed and suddenly jerked forward, sudden movement was prima facie unnecessary and negligent—Cooley v. Dunham, 195 S.W. 1058, 196 Mo.App. 399.

Violent jerk necessarily incident to starting

A carrier has been held liable where the car starts with an unusual or violent jerk, injuring a passenger, although it may be thought that such jerk was necessary to the starting of the car—Bales v. Kansas City Public Service Co., 40 S.W.2d 665, 328 Mo. 171—Laible v. Wells, 296 S.W. 428, 317 Mo. 141.

Sufficient violence to indicate negligence necessary

To entitle a passenger on a street car to recover for injuries received from a jerk or lurch of the car, throwing the passenger from the step of the car, assuming that the passenger had a right to be on the step, it must not only be unnecessary and unusual, but it must be of sufficient violence to indicate negligence in the operation of the car.—Louisville & I. R. Co. v. Roberts, 228 S.W. 681, 190 Ky. 744.

85. U.S.—Griggs v. Erie R. Co., C.C.A.N.J., 71 F.2d 966—Mareniss v. Sheeran, C.C.A.N.Y., 31 F.2d 976—Chesapeake & O. Ry. Co. v. Needham, W.Va., 244 F. 146, 156 C.C.A. 574.
Ark.—Harris v. Bush, 196 S.W. 471, 129 Ark. 369.
Cal.—McIntosh v. Los Angeles Ry. Corporation, 59 P.2d 959.
Ky.—Louisville & N. R. Co. v. Phelps' Adm'r, 205 S.W. 793, 181 Ky. 689.
La.—Masicot v. New Orleans Ry. & Light Co., 75 So. 490, 141 La. 622—Murphy v. New Orleans Public Service, App., 169 So. 890—Ritchie v. New Orleans Public Service, 132 So. 793, 15 La.App. 640—Nee v. New Orleans Public Service, 123 So. 135, 11 La.App. 1—Matthews v. New Orleans Public Service, Inc., 8 La.App. 463.
Mass.—Phinney v. Eastern Massachusetts St. Ry. Co., 189 N.E. 52, 285 Mass. 207—Desautels v. Massachusetts Northeastern St. Ry. Co., 177 N.E. 578, 276 Mass. 381—Revsbech v. Boston Elevated Ry. Co., 175 N.E. 734, 275 Mass. 317—Seidenberg v. Eastern Massachusetts St. Ry. Co., 165 N.E. 658, 266 Mass. 540—Chandler v. Boston Elevated Ry. Co., 158 N.E. 669, 261 Mass. 230—Warren v. Boston Elevated Ry. Co., 155 N.E. 871, 259 Mass. 226—Walsh v. Boston Elevated Ry. Co., 152 N.E. 64, 256 Mass. 17.
Mich.—Selman v. City of Detroit, 278 N.W. 112, 283 Mich. 413—Clifford v. Detroit United Ry., 185 N.W. 741, 216 Mich. 377.
Mo.—Laycock v. United Rys. Co. of St. Louis, 235 S.W. 91, 290 Mo. 344, answering certified questions, App., 227 S.W. 883.
N.J.—Hewitt v. Atlantic & S. Ry. Co., 132 A. 500, 4 N.J.Misc. 339.
N.Y.—Cull v. Union Ry. Co. of New York City, 183 N.Y.S. 275, 192 App.Div. 649.
Pa.—Delaney v. Buffalo, R. & P. Ry. Co., 109 A. 605, 266 Pa. 122—McClusky v. Shenango Valley Traction Co., 161 A. 424, 105 Pa.Super. 275.
R.I.—Roy v. United Electric Rys. Co., 164 A. 513, 53 R.I. 122.
Tenn.—Perry v. Knoxville Ry. & Light Co., 6 Tenn.Civ.App. 243.
Va.—Richmond-Ashland Ry. Co. v. Jackson, 162 S.E. 18, 157 Va. 628—Chesapeake & O. Ry. Co. v. Hibbs, 128 S.E. 538, 142 Va. 96, 41 A.L.R. 1083.
Wash.—Wade v. North Coast Transp. Co., 5 P.2d 985, 165 Wash. 418.
10 C.J. p. 974 note 69.

The rule as stated in Corpus Juris is cited in Caillier v. New Orleans Ry. & Light Co., 120 So. 76, 78, 11 La.App. 93.

Mere fact passenger was thrown off balance, when car started, did not warrant conclusion that starting was unusual, so as to impose liability for injuries sustained.—Phinney v. Eastern Massachusetts St. Ry. Co., 189 N.E. 52, 285 Mass. 207.

Not insurer

As respects railroad's liability for injuries sustained by passenger who was thrown from step of car by sudden jerk of train, railroad, although bound to exercise highest degree of care for safety of passenger, was not an insurer.—Savell v. Southern Ry. Co., C.C.A.Ga., 93 F.2d 377, 114 A.L.R. 1261.

Starting car while passenger standing

(1) It is not negligent to start a car while a passenger is standing up, unless the start is with an extraordinary jerk due to some defect in the track or machinery, or want of skill in the person operating the car or train.—Pryor v. Metropolitan St. R. Co., 85 Mo.App. 367.

(2) Where a passenger in a street car stands up in the aisle as the car stops between stations, and, although notified that it will soon start, remains standing until it starts with a jerk which injures her, the carrier is not negligent.—Normington v. Interborough Rapid Transit Co., 96 N.Y.S. 261, 48 Misc. 526.

is caused by its efforts to avoid a collision,[86] or to avoid injury to a person or animal unless this will result in serious injury to passengers,[87] or unless there was some prior negligence on the part of the carrier,[88] as, for example, where the carrier is guilty of negligence in permitting such person or animal to be on the track,[89] or in failing seasonably to discover such presence.[90]

Passengers on freight or mixed trains assume the risk of such additional jerking and jarring as is incident to the operation of such trains, as distinguished from passenger trains, and such jerks or jars will not constitute negligence;[91] but this does not relieve the carrier from using the highest degree of care to prevent unusual and unnecessary jolts and jars by such trains.[92]

While boarding or alighting. The moving of a train or car while a passenger is boarding or alighting is treated supra §§ 730 and 733.

§ 751. Acts in Emergencies

Where confronted with an emergency, the carrier's employees must exercise only such care as an ordinarily prudent person would exercise under like circumstances and conditions.

Where a carrier's employee is confronted with a sudden emergency, the fact that he is obliged to act quickly and without a chance for deliberation must be taken into account, and he is not held to the same degree of care that he would otherwise be required to exercise in the absence of such emergency, but must exercise only such care as an ordinarily prudent person would exercise under like circumstances and conditions,[93] and the failure on his part to exercise the best judgment the case renders possible

86. Mo.—Graber v. Wells, App., 7 S.W.2d 719.
W.Va.—Tochek v. Monongahela Transport Co., 152 S.E. 776, 109 W.Va. 20.
10 C.J. p. 975 note 71.

Assuming car will stay on right side of road

Bus driver may assume that overtaken vehicle will remain on right side of road to which it has drawn after warnings.—Tochek v. Monongahela Transport Co., 152 S.E. 776, 109 W.Va. 20.

Duty to stop quickly

Bus driver's duty to passengers required him to stop bus quickly enough to avoid collision with automobile, if reasonably possible.—Robinson v. Connecticut Co., 189 A. 453, 123 Conn. 300.

87. U.S.—Southern Pac. Co. v. Hanlon, C.C.A.Cal., 9 F.2d 294.
Mass.—Conley v. Town Taxi, 10 N.E.2d 74.
N.Y.—Mintz v. International Ry. Co., 124 N.E. 893, 227 N.Y. 197, reversing 165 N.Y.S. 563, 177 App.Div. 942.
10 C.J. p. 975 note 72.

88. Mintz v. International Ry. Co., 165 N.Y.S. 563, 177 App.Div. 942, reversed with directions 124 N.E. 893, 227 N.Y. 197.

Control of bus

Driver of motor bus must have car under such control that he can stop in emergency without injuring passengers.—Featherstone v. Cleveland Ry. Co., 167 N.E. 606, 32 Ohio App. 93.

Discovering position of switch

Railroad must use same care to discover throwing of cut-over switch as to refrain from throwing switch necessitating emergency stop causing injury.—Gulf, C. & S. F. Ry. Co. v. Baldwin, Tex.Civ.App., 2 S.W.2d 520.

89. N.Y.—Dorr v. Lehigh Valley R. Co., 136 N.Y.S. 872, 152 App.Div. 342, affirmed 105 N.E. 652, 211 N.Y. 369, L.R.A.1915D 368, Ann.Cas. 1915C 763.

90. Va.—Safety Motor Transit Corporation v. Cunningham, 171 S.E. 432, 161 Va. 356.
10 C.J. p. 975 note 74.

All circumstances must be considered

In passenger's action for injuries sustained from falling to floor by sudden stop of bus, in considering whether emergency was created by driver's negligence in failure to keep proper lookout, all circumstances must be given due weight.—Safety Motor Transit Corporation v. Cunningham, 171 S.E. 432, 161 Va. 356.

91. Fla.—Atlantic Coast Line R. Co. v. Hamlett, 89 So. 337, 81 Fla. 872.
Ga.—Hines v. Hendricks, 104 S.E. 520, 25 Ga.App. 682.
La.—Johnson v. Missouri Pac. Ry. Co., 2 La.App. 244.
Mo.—Provance v. Missouri Southern R. Co., App., 186 S.W. 955.
Okl.—Missouri, K. & T. Ry. Co. v. Lynn, 161 P. 1058, 62 Okl. 17.
10 C.J. p. 975 note 75.

Knowledge of equipment

The equipment of mixed freight and passenger trains "is adapted to such business, and those of the traveling public electing to ride on mixed trains are chargeable with knowledge of such facts."—Meeks v. Graysonia, N. & A. R. Co., 272 S.W. 360, 362, 168 Ark. 966.

92. Fla.—Atlantic Coast Line R. Co. v. Hamlett, 89 So. 337, 81 Fla. 872.
Ga.—Hines v. Hendricks, 104 S.E. 520, 25 Ga.App. 682.
La.—Johnson v. Missouri Pac. Ry. Co., 2 La.App. 244.
Mo.—Rissmiller v. St. Louis & H. Ry. Co., App., 187 S.W. 573.
Okl.—Missouri, K. & T. Ry. Co. v. Lynn, 161 P. 1058, 62 Okl. 17.
10 C.J. p. 976 note 76.

Rule well stated in Corpus Juris

The rule as laid down in the text of Corpus Juris has been said to be well stated and is quoted and applied in Millers Creek R. Co. v. Blevins, 205 S.W. 911, 912, 181 Ky. 800.

Extraordinary diligence, as applied to a mixed train, and the jolts and jerks occurring in connection therewith, is that extreme care which very prudent and thoughtful persons would use on a like train under like circumstances.—Southern R. Co. v. Cunningham, 50 S.E. 979, 123 Ga. 90.

Passengers thrown out of seats

Railroad contracting to provide seats in caboose is negligent in handling trains so as to throw passengers out of them.—Johnson v. Missouri Pac. Ry. Co., 2 La.App. 244.

Injury within statute

An injury to a passenger in the caboose of a freight train, resulting from his being thrown from his seat by a violent jerk of the train, is an injury caused by the running of a train within Kirby Dig. § 6773, making railroads responsible, where injury is done to persons or property by the running of trains.—Scullin v. Vining, 191 S.W. 924, 127 Ark. 124.

Notice of passenger's presence

Waybill reciting owner of property would accompany box car held notice to trainmen of owner's position in box car.—St. Louis-San Francisco Ry. Co. v. Britton, 31 S.W.2d 756, 182 Ark. 437.

93. Ind.—Ft. Wayne & Northern Indiana Traction Co. v. Parish, 119 N.E. 488, 67 Ind.App. 597.
Mass.—Tozier v. Haverhill, etc., R. Co., 72 N.E. 953, 187 Mass. 179.

does not establish lack of care and skill on his part which renders the company liable,[94] although it is not necessarily a defense in such a case that the employee lost his usual ability to control the car, as a reasonable degree of presence of mind is an essential to his competency.[95]

§ 752. Passengers Riding in Dangerous Places

Where a passenger is permitted to ride in a position of danger, the carrier has a duty to exercise a degree of care for him with reference to the danger to which he is exposed.

While passengers should not be encouraged or required, by reason of failure to furnish them other accommodations, to ride in dangerous places, such as on the platforms or steps of railroad or street cars,[96] a carrier is not bound so to restrain the liberty of its passengers that latter can by no act of their own put themselves in unnecessary danger,[97] hence it is not negligence per se to permit passengers to ride on platform or footboard of an open car,[98] except as to passengers under disability,[99]

Miss.—Teche Lines v. Britt, 170 So. 294.

Care commensurate with danger

If emergency was created by sudden entrance of truck on track immediately in front of street car, street railroad was not liable for injuries sustained by street car passenger because motorman failed to use very high degree of care, as the degree of care is commensurate with the danger to be avoided.—Roach v. Yonkers R Co., 271 N.Y.S. 289, 242 App Div 195

Not charged with superhuman powers

Operator of jitney bus is not charged with the necessity of either possessing superhuman powers of anticipation or exercising such powers in a threatened emergency.—McCaffrey v. Automobile Liability Co, Limited, Mutual, 186 N.W 585, 176 Wis 230.

Car out of control on hill

Where the motorman lost control of a street car while going down a hill, and jumped off, and the conductor advised plaintiff passenger to jump off, and she did so, and was injured, plaintiff could plead and submit to the jury two acts of negligence, or either of them: First, the negligence of defendant in suddenly confronting plaintiff with a real or apparent danger of imminent injury on account of permitting the car to get beyond control, thereby terrifying plaintiff into yielding to the impulse or instinct of self-preservation; second, negligence of conductor in negligently giving the alarm to alight from the car, and in advising and assisting plaintiff to alight, causing plaintiff to believe there was imminent danger in remaining on the car. To support a charge of negligence as to passenger injured while jumping from street car of which motorman lost control on a hill, the peril must have been caused by negligence of the street railway, apprehension of peril from the standpoint of the passenger must have been reasonable, and the appearance of danger must have been imminent, leaving no time for deliberation, and, on the other hand, the danger must be judged by the circumstances as they appeared at the time, and not by the result Where motorman lost control of street car on a hill, and conductor negligently advised and assisted woman passenger to alight, in order to recover for negligence in giving the advice, the passenger must prove that a false alarm was given, causing her to believe there was imminent danger in remaining on the car, and this belief must have been such as an ordinarily prudent person would have entertained under the same circumstances, and the passenger's action must have been such as would probably have been taken by an ordinarily prudent person, and must have been unaccompanied with any contributory negligence —Hellar v Kansas City Rys Co., Mo App, 237 S W. 811.

94. Iowa.—Graham v Chicago, etc, R Co, 119 N.W. 708, 122 N.W. 573, 143 Iowa 604.
10 C J. p 976 note 79.
Sudden stops to avoid collisions with persons or vehicles see supra § 750.

95. Mich.—Howell v Lansing City Electric R Co, 99 N.W 406, 136 Mich 432.

96. Tenn.—Louisville & N. R R Co. v Hutcherson, 8 Tenn.App. 235.

Conduct not an invitation to remain in dangerous place

Conductor's request to passengers on running board to wait until car stopped was not invitation to remain in such dangerous place.—Bigelow v. Boston Elevated Ry. Co, 115 N.E. 250, 226 Mass 116.

No duty to discover position

Motorman was not required to look to see if any one was on step outside closed door after trolley car had started —Tardieu v. Connecticut Co., 154 A. 173, 113 Conn. 94.

Apparent authority of conductor

Conductor of passenger train held not, as matter of law, to act without apparent authority in permitting passenger to ride temporarily in baggage car immediately ahead of coach in which he was originally riding.—Davis v. Jones, 129 S.E 892, 34 Ga. App. 7.

97. Mass.—Bigelow v. Boston Elevated Ry Co., 115 N.E. 250, 226 Mass. 116
10 C J. p 977 note 83.

Signal for emergency stop

Conductor need not give signal for emergency stop because passenger advanced in years rises from seat in open car and steps on running board and stands there for a moment with hold upon car.—Bigelow v. Boston Elevated Ry. Co, 115 N.E. 250, 226 Mass. 116.

98. Ill —Ervin v. Peoria R Co, 179 Ill App 409.
Or.—Anderson v City, etc., R Co., 71 P. 659, 42 Or. 505.

Evidence of negligence

For a street railway to carry passengers greatly in excess of the seating capacity of its cars and to permit them to stand on the platform and steps is evidence of negligence —Larskowski v. Detroit United Ry., 159 N.W 530, 193 Mich. 409

99. Wis —Griebenow v. Chicago & M E Ry Co., 171 N.W. 664, 169 Wis. 12.
10 C J. p 898 note 23 [c]

Appearance not indicating disability

That a street car passenger injured by falling from the platform while the car was in motion was sixty-nine years old and had one useless eye did not make it negligence for the conductor to allow him to go upon the platform while the car was in motion preparatory to alighting, there being nothing in his appearance to make it incumbent on the conductor to exercise special care in his behalf.—Griebenow v. Chicago & M. E. Ry. Co., 171 N.W. 664, 169 Wis. 12.

Degree of intoxication

Whether a conductor was negligent in compelling an intoxicated person, carrying a sack of clams and fish poles, to ride on the rear platform of the car, depended in part on the degree of intoxication as it appeared to the conductor —Fardette v. New York & S. Ry. Co., 180 N.Y.S. 179, 190 App.Div. 543.

or persons of immature years.[1] If fare is collected from a passenger and he is allowed to ride in a position of danger, it is the duty of the carrier to exercise the proper degree of care for him with reference to the danger to which he is exposed,[2] although the carrier has a rule prohibiting passengers from riding in such positions.[3]

A carrier's duty to exercise the highest degree of care to passengers in the maintenance of its track and the operation of the train extends to a passenger attempting to pass from one car to another of a moving train;[4] but it is not negligence for an elevated railroad company to permit passengers to pass from one car to another while the train is at a standstill, nor in such circumstances is it its duty to warn passengers of the existence of a space between the cars.[5]

§ 753. Duty to Avoid Misleading Passengers as to Movements of Trains

A carrier has a duty to avoid misleading passengers as to movements of the train or car.

Passengers have a right to rely on information or directions given by the conductor or other employee in charge of the train or car as to its movements, and if by such information or directions a passenger is misled into a position of danger whereby he is injured, the carrier is liable therefor.[6] Thus the carrier is liable where by reason of such announcements or directions a passenger is misled into going on the steps or platform of a car from which he is thrown by a sudden movement of the car.[7]

§ 754. Duty to Injured Passenger

A carrier has the duty to render such care and attention to an injured passenger as common humanity dictates, and it is liable for resulting injuries from such neglect even though not negligent in causing the original injury.

It is the duty of a carrier to render such care and attention as common humanity would dictate to a passenger who is injured in an accident.[8] Thus where a passenger falls or is thrown from a train or car, it is the carrier's duty to stop the train or car and to rescue him, if this can be done without endangering the safety of other passengers,[9] and to

Extra precaution

The fact that a passenger has by intoxication voluntarily deprived himself of the ability to exercise ordinary care does not furnish any excuse for the conductor to force him from a place of safety in the train to one where it will require extraordinary care to avoid injury, and when the intoxication is apparent to the conductor it calls for extra precaution on his part.—Central of Georgia R. Co. v. Carleton, 51 So. 27, 163 Ala. 62.

1. Minn.—Jackson v. St. Paul City R Co., 76 N.W. 956, 74 Minn 48
10 C.J. p 977 note 85.

Boy understanding danger

If a boy passenger on a railroad train had intelligence enough to understand that it was more dangerous to ride on a car platform or on the step than inside the car, no duty devolved on the company to prevent him from so riding—Walling v. Trinity, etc., Valley R. Co., 106 S.W. 417, 48 Tex Civ.App. 35.

2. Mich.—Larskowski v. Detroit United Ry., 159 N.W. 530, 193 Mich. 409.
Mo—Cooley v. Dunham, 195 S.W. 1058, 196 Mo.App. 399.
Pa.—Little v. West Penn Railways Co., 29 Pa Dist. 826
R.I.—Capuono v. Rhode Island Co., 102 A. 721.
10 C.J. p 977 note 86.

Knowledge of particular person on step not necessary

To make out negligence it is not essential that conductor should have known that deceased was particular person upon step—Cooley v. Dunham, 195 S.W. 1058, 196 Mo App. 399.

Care as to passengers riding in places not designed for them see supra § 681

3. Ark.—St. Louis, etc., R Co v. Loyd, 160 S.W. 851, 109 Ark. 579
Ga.—Augusta R., etc., Co. v Smith, 48 S.E. 681, 121 Ga 29.

Waiver

A rule prohibiting passengers from standing on platforms while the train or car is in motion is waived by a failure to provide sufficient accommodations for passengers inside the car.—Graham v. McNeill, 55 P. 631, 20 Wash. 466, 72 Am.S.R. 121, 43 L.R.A. 300

4. Tex.—Galveston, etc., R. Co. v Patillo, 101 S.W. 492, 45 Tex.Civ.App 572.

Mail clerk going on engine

Where plaintiff, a railway mail clerk, required to notify the engineer of his omission to blow a whistle for a station at which mail was put off, went on an engine after it was disconnected to give such notice, and there was evidence from which the jury might find that he was placed in a position of danger, to the knowledge of the fireman, by the act of the engineer in setting the engine in motion in ignorance of plaintiff's presence and before he had time to complete giving the notice and alight from the engine, it was held, that plaintiff may recover damages for an injury sustained while getting off, if ordinary care on the part of the fireman required him to call the engineer's attention to his danger.—Rauscher v. Payne, 188 N.W. 1017, 152 Minn. 368

5. Mass.—Hogan v. Boston El. R. Co., 81 N.E. 198, 195 Mass. 313.

6. Mo—Laub v Chicago, etc., R. Co., 94 S.W. 550, 118 Mo.App 488.
10 C.J. p 977 note 91.

7. Ala.—Southern R Co v. Roebuck, 31 So 611, 132 Ala. 412.
Ark.—Midland Valley R Co. v. Hamilton, 104 S.W 540, 84 Ark 81
Kan.—James v. Chicago, etc., R Co, 105 P. 40, 81 Kan 23

8. Miss.—Hughes v. Gregory Bus Lines, 128 So 96, 157 Miss. 374.
10 C.J. p 978 note 93.

9. Miss.—Boyd v. Alabama & V. Ry. Co., 71 So. 164, 111 Miss 12, suggestion of error denied 71 So. 655.
10 C.J. p 978 note 94.

Where return would endanger other passengers

(1) Where an intoxicated passenger falls off a train and his absence is not noticed until the train has traveled several miles, it is not negligence to refuse to back the train, if it appears that other trains are notified to watch for him, and that to back the train would endanger all on board.—Yazoo & M V. R. Co. v. Smith, Miss., 64 So 158, 106 Miss. 455, 49 L.R.A.,N.S., 917.

(2) Where the railroad company does not know that an insane person in jumping from the train is seriously hurt or injured, and could not

take him with reasonable promptness to a place where he can receive proper treatment,[10] or to procure others to render the necessary assistance.[11] If the carrier fails to render such care and attention as is required under the circumstances, it is liable for the damages resulting from such neglect,[12] notwithstanding the original injury was not caused by its negligence,[13] or notwithstanding the negligence of the passenger contributed to his injury.[14]

6. Proximate Cause of Injury

§ 755. General Rule

While the carrier's negligent act or omission must have been the direct or proximate cause of the injury complained of in order to render the carrier liable, it is not necessary that it shall be the sole cause.

As in other cases of actionable negligence, in order to hold the carrier liable, its wrongful act or omission constituting negligence must have been the direct or proximate cause of the injury complained of,[15] and the particular act of negligence relied on as constituting the grounds of recovery must have been the proximate cause of the injury.[16] If there were other possible causes, the question is whether the negligent construction, maintenance, or operation of the premises, roadbed, machinery, or appliances was the efficient and dominant cause producing the injury.[17]

Intervening act. If the carrier or its employees

safely back down to the place where he fell, and permits the relatives of the injured passenger to leave the train to go back to his assistance, and could not prevent his death or relieve his suffering by going back and picking him up, it is under no duty to back its train for the purpose of taking him up—Boyd v. Alabama, etc., R. Co., 71 So 164, 111 Miss. 12, suggestion of error denied 71 So 655.

10. Miss.—Yazoo, etc., R. Co. v. Byrd, 42 So. 286, 89 Miss. 308.

11. Ky—Reed v Louisville, etc., R. Co., 47 S W 591, 48 S W. 416, 104 Ky. 603, 20 Ky L 815, 990, 44 L R A 823.

12. Miss.—Hughes v. Gregory Bus Lines, 128 So 96, 157 Miss 374
Tex—San Antonio Public Service Co v. Wellman, Civ App., 288 S W 582
10 C.J. p 978 note 97.

13. Tex.—San Antonio Public Service Co v. Wellman, supra.

14. Miss.—Yazoo, etc., R. Co. v. Byrd, 42 So. 286, 89 Miss. 308.
Ohio.—Knepfle v Cleveland, etc., R. Co., 32 Ohio Cir.Ct. 660.
10 C.J. p 978 note 98.

15. U.S—Northern Ry. Co. v Page, Mass., 47 S Ct. 491, 274 U S. 65, 71 L Ed. 929, reversing, C.C A., Page v United Fruit Co., 3 F.2d 747, certiorari granted Northern Ry Co v. Page, 46 S.Ct. 19, 269 U.S. 542, 70 L Ed 402.
Del—Clayton v. Philadelphia, B & W R. Co., 106 A. 577, 7 Boyce 343.
Ill.—Walsh v Chicago Rys. Co., 128 N E 647, 294 Ill. 586, reversing 216 Ill App 409.
Iowa—Wheeler v Des Moines City Ry Co., 215 N W. 950, 205 Iowa 439, 55 A L R. 473
La.—Matteson v. Teche Greyhound Lines, App., 178 So. 272.
Md—City Cab Co. v. Becker, 166 A. 434, 165 Md. 32.
Minn.—Draves v. Minneapolis & St P Suburban R Co., 172 N.W. 128, 142 Minn 321.
Mont—Fisher v. Butte Electric Ry. Co., 235 P. 330, 72 Mont. 594.
N J—Kelson v. Public Service R Co., 110 A 919, 94 N.J Law 527.
Pa—Lazor v. Banas, 174 A 817, 114 Pa Super 425
Tex—Texas Electric Ry. v. Scott, Civ App., 21 S W.2d 24, reversed on other grounds Scott v. Texas Electric Ry. Co., Com.App., 32 S.W 2d 641
Va.—Virginia Electric & Power Co v. Lenz, 164 S.E. 572, 158 Va. 732—Chesapeake & O. Ry. Co. v. Baker, 143 S E 299, 150 Va 647, addendum to opinion denying rehearing 141 S.E. 753, 149 Va. 549, denying rehearing 140 S E. 648, 149 Va 549—Chesapeake & O. Ry. Co v. Hibbs, 128 S.E 538, 142 Va 96, 41 A.L R. 1083.
10 C J. p 978 note 2.

An extended quotation of the rules stated in Corpus Juris as to the necessity of the carrier's negligence being the proximate cause of the injury is made in Paducah Traction Co v. Weitlauf, 195 S W. 99, 102, 176 Ky. 82, L R.A 1917F 353.

Negligence must be causa sine qua non

In order for the carrier to be liable, its negligence must be "causa sine qua non, a cause which, if it had not existed, the injury would not have occurred."—Fisher v. Butte Electric Ry. Co., Mont., 235 P. 330, 332.

Reasonable, natural, and probable result

(1) A carrier is not liable for an injury to a passenger from an accident, which is not the reasonable, natural, and probable result of the situation, and which could not have been foreseen by the carrier, in the exercise of that high degree of care which the law demands of him.—Kelson v. Public Service R. Co., 110 A. 919, 94 N.J Law 527

(2) In order to warrant finding that negligence of carrier, or its act, not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances.—Chesapeake & O Ry. Co. v Hibbs, 128 S.E 538, 142 Va 96, 41 A.L.R. 1083.

Reasonable anticipation

Whether casting of stone through bus window was actionable negligence depended upon whether throwing of stone and resultant injury to bus passenger could have been reasonably anticipated as probable consequence.—Bowling Green-Hopkinsville Bus Co v. Edwards, 59 S.W.2d 534, 248 Ky. 684.

Each of two acts as proximate cause

Each of two negligent acts of the carrier which combine to produce an injury may be a proximate cause thereof.—Van House v. Canadian Northern Ry. Co., 192 N.W. 493, 155 Minn 57, 28 A.L.R. 357.

"If a carrier is negligent in two particulars, and neither negligent act alone is sufficient to cause an injury, but both, acting concurrently, are the proximate cause of a wreck and subsequent injury, the carrier is liable."—Sproule v. St. Louis, etc., R. Co., Tex.Civ.App., 91 S W. 657, 658.

16. Ky.—Paducah Traction Co. v. Weitlauf, 195 S W. 99, 176 Ky. 82, L R.A.1917F 353
Va.—Virginia Electric & Power Co. v. Lenz, 164 S E. 572, 158 Va. 732.
10 C J. p 979 note 4.

17. Miss—Yazoo & M. V. R. Co. v. Hawkins, 132 So. 742, 159 Miss. 775.
N.Y.—Santolo v. Interborough Rapid Transit Co., 187 N.Y.S. 390, 196 App.Div. 34.
10 C.J. p 979 note 3.

were negligent, and the injury resulted mediately or immediately from such negligence, then the carrier is liable, although there may have been an intervening cause not chargeable to the carrier's fault,[18] but in cases where, although the carrier is negligent, there is an intervening independent cause for the injury, not the result of the carrier's negligence or other wrong, the carrier is not liable.[19]

Negligence need not be sole cause. It is not necessary, however, that the negligence of the carrier shall be the sole cause of the resulting injury; even though there is an accompanying cause not chargeable to the carrier, yet if the carrier's negligence contributes to the injury it is liable therefor.[20] Therefore it is immaterial that in connection with the accident causing injury to the passenger there is negligence or wrongful act of a third person, such as the negligence of those managing a train, car, or vehicle with which the train or car in which the passenger is riding collides, or the like, it is enough that the negligence of the carrier contributes in some way or concurs with the negligence of third persons in causing the accident complained of.[21]

The question of joint and several liability where the negligence of two carriers concurs in causing a collision and resulting injuries to passengers is treated supra § 747; and the same question where

18. Ala.—Alabama Power Co v. Bass, 119 So. 625, 218 Ala. 586, 63 A.L.R. 1.
Ill.—Walsh v. Chicago Rys. Co., 128 N.E. 647, 294 Ill. 586, reversing 216 Ill.App. 409
Mich.—Larskowski v. Detroit United Ry., 159 N.W. 530, 193 Mich. 409
Miss.—Oliver Bus Lines v. Skaggs, 164 So. 9, 174 Miss. 201.
Mo.—Watts v. Fleming, 298 S.W. 107, 221 Mo.App. 1123.
10 C.J. p. 979 note 5.

Intervening act not sole proximate cause

That railroad's negligence might not have caused passenger's death without intervening act held not to render intervening act sole proximate cause.—Gulf, C. & S. F. Ry. Co. v. Ballew, Tex.Civ.App. 39 S.W.2d 180, reversed on other grounds, Com.App., 66 S.W.2d 659.

Negligent direction to passenger

Where a passenger is induced to leave the train by the negligent direction of the carrier, and he observes ordinary care in attempting to regain it, the carrier is liable for an injury received by the passenger, regardless of what other negligent cause cooperated in producing the injury.—Laub v. Chicago, etc., R. Co., 94 S.W. 550, 118 Mo.App. 488.

19. U.S.—New York Cent. R. Co. v. Johnson, Mo., 49 S.Ct. 300, 279 U.S. 310, 73 L.Ed. 706, reversing, C.C.A., 27 F.2d 699, certiorari granted 49 S.Ct. 27, 278 U.S. 590, 73 L.Ed. 523, and opinion amended 49 S.Ct. 417
Ala.—Louisville & N. R. Co. v. Courson, 174 So. 474, 234 Ala. 273
Ga.—Rome Ry. & Light Co. v. King, 117 S.E. 464, 30 Ga.App. 231.
Ky.—Riley v. Louisville & N. R. Co., 21 S.W.2d 990, 231 Ky. 564.
Md.—United Rys. & Electric Co. of Baltimore v. Perkins, 136 A. 50, 152 Md. 105.
Mich.—Takacs v. Detroit United Ry., 207 N.W. 907, 234 Mich. 42.
Mo.—Francis v. St. Louis Transfer Co., 5 Mo.App. 7.
N.J.—Kelson v. Public Service R. Co., 110 A. 919, 94 N.J.Law 527.
N.Y.—King v. Interborough Rapid Transit Co., 188 N.Y.S. 700, 197 App.Div. 15, modified on other grounds 135 N.E. 519, 233 N.Y. 330.
N.C.—Garland v. Carolina, C. & O. Ry. Co., 90 S.E. 779, 172 N.C. 638
Pa.—Martin v. Philadelphia Rapid Transit Co., 127 A. 765, 282 Pa. 358.
10 C.J. p. 980 note 6.

Negligence of third person

Injury to elderly woman who possessed her senses of sight and hearing and was struck by automobile while crossing street after having alighted from bus and having been directed by bus driver to cross street held proximately caused by negligence of operator of automobile rather than by any negligence of bus company or driver.—Cooke v. Elk Coach Line, Del., 180 A. 782.

Concurring cause

Presence near the street railroad track of a truck, against which plaintiff was carried by the starting of a car while he was boarding it, was not an intervening cause of the injury but a concurring cause.—Kausch v. Chicago, Milwaukee Electric Ry. Co., 186 N.W. 257, 176 Wis. 21.

20. Ariz.—Phoenix Ry. Co. of Arizona v. Beals, 181 P. 379, 20 Ariz. 386.
Ill.—Walsh v. Chicago Rys. Co., 128 N.E. 647, 294 Ill. 586, reversing 216 Ill.App. 409—Kanter v. St. Louis, S. & P. R. R., 218 Ill.App. 565.
La.—Marcus v. Checker Cab Co., 120 So. 408, 10 La.App. 297.
N.C.—Woods v. North Carolina Public Service Co., 94 S.E. 459, 174 N.C. 697, 1 A.L.R. 942
Ohio.—Community Traction Co. v. Freeman, 156 N.E. 598, 116 Ohio St. 448.
Pa.—Lyons v. Pittsburgh Rys. Co., 152 A. 687, 301 Pa. 499—Litwinavage v. Schuylkill Ry. Co., 124 A. 293, 280 Pa. 53.
Tex.—McAdoo v. McClure, Civ.App., 232 S.W. 348, modified on other grounds Boyles v. McClure, Com.App., 243 S.W. 1080—Galveston, H. & S. A. Ry. Co. v. Packard, Civ.App., 193 S.W. 397, error refused
10 C.J. p. 981 note 9.

Two proximate causes

There may be two proximate causes of an injury, and where this condition exists the negligence of one will not exonerate the other.—Woods v. North Carolina Public Service Co., 94 S.E. 459, 174 N.C. 697, 1 A.L.R. 942.

Act of interloper

Where a motorman left a street car on a sloping track near a railroad and an interloper released the brakes and let the car run toward a railroad track, causing a passenger to be injured in alighting, it does not necessarily follow that the motorman's act in leaving the car where he did under the circumstances was not negligence and the proximate cause of the injury.—Kliebenstein v. Iowa Ry. & Light Co., 188 N.W. 129, 193 Iowa 892

21. Ark.—Arkansas Power & Light Co. v. Boyd, 65 S.W.2d 919, 188 Ark. 254.
Ill.—Panor v. Northwestern Elevated R. Co., 228 Ill.App. 162—Wennmacher v. Choate, 224 Ill.App. 42.
Ky.—McGraw v. Ayers, 58 S.W.2d 378, 248 Ky. 166—Denker v. Lowe, 234 S.W. 294, 192 Ky. 660
La.—Johnson v. City of Monroe, App., 164 So. 456.
Mass.—Turner v. Berkshire St. Ry. Co., 198 N.E. 178—Cohen v. Eastern Massachusetts St. Ry. Co., 165 N.E. 113, 266 Mass. 283
N.J.—Gash v. Khan, 160 A. 367, 10 N.J.Misc. 708.
Or.—Stamos v. Portland Electric Power Co., 274 P. 915, 128 Or. 310
R.I.—Zmuda v. McFarland, 165 A. 446, 53 R.I. 210.
Tex.—Commercial Standard Ins. Co. v. Shudde, Civ.App., 76 S.W.2d 561, error granted
Va.—Hogan v. Miller, 157 S.E. 540, 156 Va. 166.
10 C.J. p. 971 note 48, p. 982 note 10.

the negligence of a carrier and a third person concurs in causing the injuries is treated supra § 709.

§ 756. Applications of Rule

a. Operation of trains or cars
b. Equipment
c. Condition of premises

a. Operation of Trains or Cars

The general rules as to proximate cause apply where the alleged negligent act or omission of the carrier occurs in the operation and management of its trains or cars.

The general rules as to proximate cause apply where the alleged negligent act or omission of the carrier occurs in the operation of its cars,[22] as

22. Cal.—Nicholson v. Porter, 5 P 2d 659, 118 Cal.App. 555.
La.—Cazeaux v New Orleans Public Service, 134 So 121, 16 La App 541—Grennon v. New Orleans Public Service, 120 So. 801, 10 La App 641.
Md.—United Rys. & Electric Co. of Baltimore v. Perkins, 136 A 50, 152 Md. 105.
Mich.—Tozer v. Michigan Cent R Co., 162 N W 280, 195 Mich. 662.
Mo.—Madden v. Red Line Service, App., 76 S W.2d 435—Lincoln v St Louis-San Francisco Ry. Co., 7 S W 2d 460, 223 Mo App. 46
Ohio—Cleveland Ry. Co. v Arrison, 159 N E 580, 26 Ohio App. 359
R I.—Rohl v. United Electric Rys Co., 149 A. 375, 50 R I. 478.
Va.—Virginia Electric & Power Co v. Lenz, 164 S E 572, 158 Va 732

Foreseeing exact time or manner not necessary

Doctrine of foreseeableness did not require that railroad foresee exact time, manner, or occasion of emergency application of brakes.—Gulf, C & S. F. Ry Co. v. Ballew, Tex Civ App., 39 S W.2d 180, reversed on other grounds, Com App., 66 S W 2d 659

Failure to warn of danger

Woman's negligence in failing to look to right for approaching automobiles before she stepped onto concrete portion of street from cinder strip in center thereof after alighting safely from street car or such negligence combined with that of driver of automobile which struck her, not motorman's failure to warn her of dangers from approaching automobiles in crossing street, held proximate cause of her resulting injury, as to preclude recovery of damages from street railway company—Smuzynski v. East St Louis Ry. Co., Mo App., 93 S.W.2d 1058.

Conductor obstructing aisle

The act of a conductor of a passenger train in temporarily obstructing the aisle as he stood therein, bending over to speak to some one, as a woman passenger approached walking to the rear, was held not the proximate cause of her falling before she reached him as she halted to wait for him to let her pass—Steed v. Gulf, C. & S. F. Ry Co., Tex Com App., 231 S W. 714, affirming Gulf, C. & S. F. Ry. Co. v. Steed, Civ.App., 209 S.W. 772.

Intoxicated passenger

If intoxicants did not contribute to plaintiff's fall from vestibule of street car, negligence in operation and management of car from which thrown was efficient cause of injuries when subsequently run over—Bilodeau v. Fitchburg & L. St. Ry. Co., 128 N E. 872, 236 Mass. 526.

Passengers transferring over railroad trestle

Where a bridge over a canal was open because mechanism was out of order, and a street car conductor issued transfers to passengers and suggested and invited them to cross on a nearby railroad bridge, without suggestion or warning of the fact that a train was likely to arrive momentarily, and without providing some means of flagging and preventing it from running down the passengers who might be on the bridge, the conductor was negligent, and such negligence was the proximate cause of death of a passenger caught on the bridge by a train—Thompson v. New Orleans Ry. & Light Co., 87 So. 716, 148 La. 698.

Negligence or tort of third person causing injury

(1) Commuter who had gone to rear door of coach knowing coach sometimes did not clear trestle, and who was injured while attempting to pull himself around in order to return to front end of coach on discovering rear end of coach was not clear, by passenger allowing door to close upon commuter's hand, held not entitled to recover for injuries from railroad, even if railroad was negligent in stopping coach where it did, since such act did not contribute to commuter's injury.—Overbeck v. Erie R. Co., 187 A. 648, 14 N J.Misc. 816

(2) Negligence, on part of one assisting a furniture van helper, in starting a freight elevator of a building, which was the proximate cause of injury to the helper, precluded his recovery against defendant as though he himself had been guilty of contributory negligence—Courtney v Gainsborough Studios, 174 N.Y.S. 855, 186 App.Div. 820.

(3) Where an intending passenger while standing on the station platform, was struck by the body of a boy who boarded an approaching train before it came to a stop and was thrown under the wheels, it was held that the proximate cause of her injuries was the conduct of the boy, for whose acts the railroad was not liable, and not the absence of the conductor or brakeman, or the fact that the doors were or were not open.—Spagnol v. Pennsylvania R. Co., 123 A 781, 279 Pa. 205, 32 A.L.R. 1313.

(4) Where passenger held child's hand while alighting, child's suddenly jumping from steps jerking passenger forward held proximate cause of passenger's injury, and as matter of law was not reasonably foreseeable by railroad, precluding recovery—St Louis, S F & T. Ry. Co v. Gore, Tex Civ.App., 69 S W 2d 186, error dismissed

(5) A passenger's injury from the tort of a fellow passenger has been held not the proximate consequence of negligence in operating the doors of the car and passing the passenger's destination—Takacs v Detroit United Ry., 207 N.W. 907, 234 Mich 42.

(6) The absence of light on front and rear of bus, which was standing at night at side of highway opposite a vacant lot used for parking purposes, was not the contributing or proximate cause of accident in which passenger was injured when automobile backed out of lot as passenger was in act of boarding the bus, so as to render bus company liable for passenger's injuries.—Kerner v. Surface Transp. Corporation, 2 N.Y.S 2d 356, 166 Misc 742.

Acts held proximate cause

(1) Backward movement of street car held proximate cause of injury to passenger jumping aside and being struck by automobile, notwithstanding passenger was not touched by street car.—Ft. Smith Traction Co. v. Oliver, 46 S.W.2d 647, 185 Ark. 227.

(2) Attempt of cab driver to overtake two automobiles ahead near intersection on busy street held proximate cause of injuries to passenger resulting from collision with truck making left turn from intersecting street—Thorgrimson v. Shreveport Yellow Cabs, La.App., 161 So. 49.

(3) The proximate cause of injury to a passenger injured while stepping over a bag in the aisle when the train gave a lurch was the lurch of the train, and not the placing of the bag in the aisle.—Friedberger v.

where it did not give required signals,[23] or failed to keep a proper lookout,[24] or ran its trains or cars at an excessive speed,[25] or moved the train or car

Baltimore & O. S. W R. Co., 9 Ohio App. 173

Acts held not proximate cause

(1) Collision with cars on switch was not proximate consequence of negligence of trainmen in striking automobile on crossing, which turned switch when thrown against switch stand—Engle v. Director General of Railroads, 133 N.E. 138, 78 Ind.App 547.

(2) A street car conductor owes no duty to a passenger to guard against danger from collision by a following automobile, where it was not reasonably to be anticipated that the driver of the automobile would run his machine into the street car, and, since there can be no negligence unless there is a breach of duty, the conductor's act in stopping the car was not the proximate cause of injuries to a passenger inflicted by the colliding automobile—Louisville Ry. Co v Rice, 250 S.W. 863, 199 Ky. 196

(3) That a door was left unlocked and no attendant provided to assist passengers alighting from a car did not contribute or cause the fall of a passenger, who stepped on a banana peeling, for such result from leaving the door unlocked could not have been reasonably contemplated and was not, in a legal sense, the proximate cause.—Ft Worth & D. C Ry. Co. v. Yantis, Tex.Civ.App., 185 S.W. 969, error refused

(4) Street railway was not responsible for injuries to girl passenger who jumped from car which began to move unattended down slight incline on which it had been stopped where railway was not responsible for car so moving.—Delfosse v. United Rys Co. of St. Louis, Mo., 201 S.W 860.

(5) Failure to have required number of brakemen held not to warrant finding of negligence proximately causing death of passenger who stepped or fell from moving train at station.—Carlson v. Boston & M. R R., 168 N.E. 171, 269 Mass. 60.

(6) Mere failure to announce plaintiff's station was not proximate cause of injury to plaintiff, thrown from step after train had started and was three hundred twenty-five feet away from station, while he was seeking trainman to have train stopped.—Louisville & N. R Co. v. Burk, 268 S.W. 844, 207 Ky. 1

23. Ohio.—Steinman v. Cleveland Ry. Co., 155 N.E. 149, 23 Ohio App. 448.

Failure to call station

The failure of conductor to call station at which eight year old passenger wished to get off train did not render railroad liable for injuries sustained when boy jumped from train after it failed to stop at his station, where passenger and his companions knew that train was nearing station—Nashville, C. & St L Ry. v. Harrell, Tenn.App., 110 S W 2d 1032

Acts held not proximate cause

(1) The failure to sound the gong at a crossing as required by an ordinance was not the proximate cause of the injuries where the collision was with an automobile approaching from the opposite direction on the same street—Alabama Power Co v Bass, 119 So. 625, 218 Ala. 586, 63 A.L.R. 1.

(2) The failure to ring the gong has been held not an act of negligence contributing to the injury where the prospective passenger observed the car approaching.

N J—Courtney v. Public Service Ry. Co., 115 A. 740, 96 N.J.Law 308, affirmed 117 A. 925, 97 N J Law 564

Ohio.—Steinman v. Cleveland Ry Co, 155 N.E. 149, 23 Ohio App 448.

Pa.—Sang v. Pittsburgh, H, B & N C. Ry Co, 80 Pa.Super 524.

24. Mont.—Fisher v. Butte Electric Ry Co, 235 P. 330

Independent intervening cause

Presence of ditched car on right-hand side of road and of another automobile which had backed near it to render aid was held not independent intervening cause of passenger's injury when bus, claimed to have been operated at excessive speed and without proper lookout on approaching curve, ran into ditch to avoid collision—Oliver Bus Lines v. Skaggs, 164 So 9, 174 Miss 201.

Not proximate cause

In an action for injuries to plaintiff's son intending to board defendant's street car which ran over him when he fell or slipped under the side after the front had passed, negligence of the motorman in failing to keep a lookout was held not to have contributed to the injury, so as to make defendant liable.—Vosbein v New Orleans Ry & Light Co, 90 So. 579, 150 La. 230.

25. Ga.—Atlanta & W. P. R. Co. v Reese, 110 S.E. 750, 28 Ga.App 275.

La.—Matteson v Teche Greyhound Lines, App., 178 So 272.

Mo.—Varley v Columbia Taxicab Co, 240 S.W. 218—Grubb v Dunham, 214 S.W. 256, 201 Mo App. 504.

Wash.—Singer v. Martin, 164 P. 1105, 96 Wash. 231.

Acts of carrier held proximate cause

(1) Proprietor of jitney bus, passenger in which was injured in collision, was liable to passenger if excessive speed of bus would, without more, have brought it to place of the collision at the time when it took place—Singer v Martin, 164 P. 1105, 96 Wash. 231.

(2) In passenger's action against taxicab company, taxicab driver's attempt to cross highly-traveled, sleety street at twenty-five miles an hour at night, while snow was falling was held negligence and proximate cause of collision with automobile which had entered intersection first in exercise of due care—Barrows v. Checker Taxi Co, 195 N.E. 112, 290 Mass. 231.

(3) Failure of the driver of a passenger carrying truck colliding with a truck ahead to exercise such reasonable care in regulating the speed of his vehicle and its proximity to the other as was necessary to protect a passenger seated on the latter with her legs hanging over the end was held the sole proximate cause of her injury, her perilous position being only the condition or remote cause—Gornstein v. Priver, 221 P 396, 64 Cal.App. 249.

Held not proximate cause

(1) The speed of the car is not the proximate cause of an injury where it would have happened even if the car had proceeded slowly—Fairbanks v. Boston Elevated Ry Co, 129 N.E. 367, 237 Mass. 127.

(2) Where an electric car at an excessive rate of speed approached a station where several hundred persons were waiting, and several men jumped on the front platform of the car, and the negligent rate of speed naturally resulted in the knocking down of persons standing near the track, and plaintiff was knocked down by one rushing through the crowd to board the car, stumbling as she fell over those who were knocked down by persons on the front platform in such a manner as to slide under the car between the front and rear trucks, the negligent rate of speed was not the proximate cause of the injuries—Grubb v. Dunham, 214 S.W. 256, 201 Mo App. 504.

(3) Negligent speed of bus was held not proximate cause of injuries to passenger, where bus, traveling on through street, was struck by taxicab when half way over intersection and out of course which would normally be followed by taxicab traveling on intersecting street and which failed to stop at stop sign—City Cab Co. v. Becker, 166 A. 434, 165 Md. 32.

while passengers were boarding or alighting,[26] or permitted overcrowding.[27] Also such rules apply with reference to an alleged negligent act or omission, such as a failure to separate white and colored passengers,[28] or the failure to stop to pick up or discharge a passenger[29] at the proper or usual place.[30]

b. Equipment

The general rules as to proximate cause apply where the alleged negligent act or omission of the carrier consists in the failure to furnish and maintain its equipment in proper condition.

The general rules as to proximate cause apply in cases where the alleged negligence consists in the

(4) Motorman's failure to slacken speed was not negligence, causing injury to prospective passenger knocked against car by automobile driving beside it.—United Rys & Electric Co. of Baltimore v. Perkins, 136 A. 50, 152 Md. 105.

26. Cal.—Little v. Los Angeles Ry. Corporation, 271 P. 134, 94 Cal.App. 303.

Acts proximately causing injury

(1) Where an electric car came to a stop or nearly so before reaching the platform on which plaintiff was awaiting the car and then started forward with a severe jerk and threw plaintiff's fellow passengers against other intending passengers, thereby pushing plaintiff off the platform, the sudden jerk was the proximate cause of the accident, and those pushed back were not an independent intervening cause, and lack of guard rail at the rear of the platform at most was but a concurring cause.—Litwinavage v. Schuylkill Ry. Co., 124 A. 293, 280 Pa. 53.

(2) In action for injury to passenger pushed off platform used for entrance and exit of passengers to electric car, where real cause of injury was not the scramble to get aboard, but the sudden jerk of the car forward and for which fellow passengers were not responsible, it was held that the accident could not be said to have resulted from their rudeness or misconduct.—Litwinavage v. Schuylkill Ry. Co., supra.

Not proximate cause

Street car company was held not liable where passenger stumbled over companion's foot while descending from car, and not because of premature starting thereof.—Handy v. New Orleans Public Service, 127 So. 753, 13 La.App. 257.

Concurring cause

If a street car passenger was injured from the concurrence of the catching of her skirt on something on the car and the starting of the car before she had time to alight, that defendant was not responsible for her skirt catching does not relieve it from responsibility for the accident if it negligently started its car while plaintiff was thus embarrassed.—Phœnix Ry. Co. of Arizona v. Beals, 181 P. 379, 20 Ariz. 386.

27. N.C.—Chancey v. Norfolk & W. Ry. Co., 93 S.E. 834, 174 N.C. 351, L.R.A.1918A 1070, Ann.Cas.1918E 580.

As proximate cause

(1) The negligence of a carrier in permitting its car to be overcrowded is the proximate cause of injury to a passenger who is pushed off the car by another passenger who is pushing his way through the crowd to get into a position to alight.—Knaisch v. Joline, 123 N.Y.S. 412, 138 App.Div. 854, distinguishing McVay v. Brooklyn, etc., R. Co., 99 N.Y.S. 266, 113 App.Div. 724.

(2) Other illustrations see 10 C.J. p. 979 note 5 [e].

Not proximate cause

Railroad is not liable to passenger assaulted and robbed on its train, cars being without light and badly overcrowded, there being no causal connection between road's supposed negligent act in overcrowding and failing to light its cars, and injury charged to have resulted.—Chancey v. Norfolk & W. Ry. Co., 93 S.E. 834, 174 N.C. 351, L.R.A.1918A 1070, Ann.Cas.1918E 580.

28. Miss.—Mississippi Power & Light Co. v. Garner, 176 So. 280.

Held proximate cause

(1) Knowingly permitting a violation of a statute requiring the separation of white and colored passengers has been held the proximate cause of an injury resulting from an assault by one of another race in the same car.—Hines v. Meador, 224 S.W. 742, 145 Ark. 356.

(2) Colored passenger could recover against bus carrier for injuries sustained when assaulted by a white passenger, because she refused to give up her seat in a bus which, instead of having partitions to separate the white and colored races, contained a small sign with the word "white" on one side and the word "colored" on the other, on ground that carrier failed to comply with statute requiring separate compartments for the white and colored races, as against contention that failure to have separate compartments was not the proximate cause of the passenger's injury.—Mississippi Power & Light Co. v. Garner, Miss., 176 So. 280.

29. N.C.—Brown v. Linville River Ry. Co., 94 S.E. 431, 174 N.C. 694.

Falling into cattle guard

Failure to stop train and take up passenger was not proximate cause of injury from falling into cattle guard while walking to destination.—Brown v. Linville River Ry. Co., 94 S.E. 431, 174 N.C. 694.

Collision

Failure to stop at a passenger's destination has been held not the proximate cause of injuries received when the car collided with another vehicle.—Fulton v. Kalbach, 179 N.Y.S. 604.

30. N.Y.—Fulton v. Kalbach, supra. N.C.—Garland v. Carolina, C. & O. Ry. Co., 90 S.E. 779, 172 N.C. 638. 10 C.J. p. 981 notes 7, 8.

Held proximate cause

If carrier discharged a passenger at a place beyond her station, whereby she was compelled to walk the track back to destination, the act of discharging was the proximate cause of her injury from being struck by another car.—Gott v. Kansas City Rys. Co., Mo., 222 S.W. 827.

Acts held not proximate cause

(1) Carrying a street car passenger a few feet beyond the street intersection was not the proximate cause of injuries caused by depression in street after the passenger had voluntarily and safely alighted.—Morris v. Omaha & C. B. St. Ry. Co., 187 N.W. 510, 193 Iowa 616.

(2) Street car company was held not liable to passenger who in alighting from car which stopped sixty steps past intersection, stepped on small rolling object on concrete pavement and fell, as it was not bound to warn of such objects and carrying beyond intersection was not proximate cause.—Kentucky Traction & Terminal Co. v. Soper, 286 S.W. 776, 215 Ky. 536.

(3) Where a trolley car passenger, carried past his station, was given a ticket by the conductor to enable him to ride back, but, instead of doing so, started to walk back on the private right of way of a railroad company and stumbled and fell, sustaining the injuries sued for, the railroad company was not liable, there being no causal connection between the injuries and defendant's act in not letting the passenger off at the right station.—Kelson v. Public Service R. Co., 110 A. 919, 94 N.J.Law 527.

failure of the carrier to furnish and keep in proper condition its machinery, cars, tracks, and appliances.[31]

c. Condition of Premises

The general requirements as to proximate cause apply to an alleged negligent act or omission of the carrier resulting in an alleged defect or dangerous condition of its premises.

The general requirements as to proximate cause apply to an alleged negligent act or omission of the carrier resulting in an alleged defect or dangerous condition of its premises,[32] such as a failure to light its premises properly.[33]

(4) Bus company's act in discharging passenger at other than usual stopping place was held not proximate cause of passenger's injuries when struck by another automobile while crossing road—Waldron v Southwestern Bus Co, 182 N E 596, 42 Ohio App 549.

(5) Alleged negligence of stage in discharging passenger across highway from restaurant where it usually stopped was held not proximate cause of passenger's injuries when struck by automobile while crossing highway to restaurant.—Lewis v Pacific Greyhound Lines, 34 P.2d 616, 147 Or. 588, 96 A.L.R. 718.

(6) Alleged negligence of bus driver in discharging passenger on rainy night at unsafe place on highway was held not proximate cause of injuries sustained by passenger who was struck by automobile traveling on wrong side of highway—Madden v. Red Line Service, Mo.App, 76 S. W 2d 435.

(7) Other illustrations see 10 C J. p 981 note 7 [a], [b].

31. Or.—Benvie v. Portland Ry., Light & Power Co., 156 P. 266, 79 Or. 639
Tex—Texas & N. O Ry. Co. v Rooks, Com.App, 293 S.W. 554, denying rehearing 292 S.W. 536, which affirmed, Civ App, 283 S W 622.

Defective equipment held proximate cause

(1) Railroad's furnishing of mail car with defective door held proximate cause of injury to postal clerk in trying to close it—Baltimore & O. R Co. v. Davis, 137 A. 30, 152 Md. 427.

(2) Proximate cause of death of decedent, who collapsed in elevator and was killed because of dangerous situation, held to be negligence creating dangerous situation.—Strobel v. Park, 140 A. 877, 292 Pa. 200, 57 A L R. 253

Defective equipment held not proximate cause

In a passenger's action for personal injury when an alleged defective gate of the car swung out and he fell from the steps and was injured as he attempted to board a moving train was held not the proximate cause of injury.—Wichita Falls & N W. Ry. Co. v. Cover, 164 P. 660, 63 Okl. 260

Intervening act

Railway mail clerk injured while making unauthorized attempt to repair defective catcher bar on mail car, defect being due to defendant railway's negligence, cannot recover, since his intervening act broke the sequence from the railway's negligence to the accident, and its negligence was therefore not the proximate cause of the injury—Lancaster v. Hall, Tex Civ App., 277 S.W. 776

Negligence of third person

(1) Injuries sustained by prospective railroad passenger when glass from train window fell upon her as as result of companion of another passenger putting hand through window which he was attempting to raise held caused by such party's negligence, for which railroad was not liable, where window, although difficult to raise, was not defective—Hart v Gulf, M. & N R Co, La App, 167 So. 166.

(2) Where the act of employees of the owner of a warehouse in opening a door over defendant railroad's switch track into the warehouse was the direct, voluntary, intelligent, and intervening cause of accident to plaintiff, a passenger on defendant railroad's car struck by the door, such act of the warehouse owner's employees was the proximate cause of the accident, and defendant railroad was not liable, having no control over such employees, the removal by the railroad of a post to prevent opening of the door to the point of collision with cars not being the proximate cause—Kelly v Philadelphia, B & W. R. Co, 113 A. 194, 270 Pa 149.

32. Ky.—Cumberland R Co. v Hemphill, 184 S W. 883, 169 Ky 519.
Tex—Fort Worth & D C. Ry. Co. v Armitage, Civ App., 39 S.W 2d 108, error refused.

Inadequate luggage rack

Defendant railroad's negligence in providing an inadequate luggage rack between seats in its station held the proximate cause of plaintiff's injury notwithstanding the suitcase may have been pushed therefrom by the negligence of a third person—Wright v Kansas City Terminal Ry Co., 193 S.W. 963, 195 Mo.App. 480.

Door stop

Railroad's negligent maintenance of defective automatic door stop in depot held the proximate cause of injuries to passenger struck by door in passing out of depot upon way to train, although the passage of little girls through the door at the same time may have contributed to the cause of the accident—Martin v. Missouri Pac. R. Co, Mo App, 253 S W. 1083.

Failure to provide proper place for alighting

The fact that a passenger while standing on the space between two tracks provided by a carrier as the place for passengers to leave the train is struck and injured by a train on the other track belonging to another carrier does not relieve the first carrier from liability, the failure to provide a proper place for alighting being a proximate cause of the accident.—Chicago Terminal Transfer R Co v Schmelling, 64 N E. 714, 197 Ill. 619, affirming 99 Ill.App 577.

33. Va.—Washington-Virginia Ry Co v Struder, 111 S.E 239, 132 Va 368.

Unlighted station

(1) Negligent failure of an interurban railroad company to have its station lighted does not impose liability for the death of a passenger who was killed in attempting to cross the track to the platform on the opposite side from the station, where there was no showing that the absence of station lights in any way contributed to the accident.—Washington-Virginia Ry. Co. v. Struder, 111 S E 239, 132 Va. 368.

(2) An assault by a negro on a female passenger in an unlighted waiting room after dark is not such a proximate consequence of the carrier's failure to light the room as to charge it with having foreseen the danger and render it liable therefor.—Prokop v. Gulf, etc, R. Co., 79 S. W 101, 34 Tex.Civ App 520.

Insufficient lighting held proximate cause

Any dangerous obstruction or failure to light a walk is proximate cause of injury to passenger occurring before she has a reasonable opportunity to leave the carrier's premises, in the direction ordinarily taken, by means of such walk.—Boyle

7. ACTIONS FOR PERSONAL INJURIES

§ 757. Nature and Form

While an action against a carrier for wrong resulting in personal injury is usually brought in tort, the action may be in assumpsit for breach of the express or implied contract to carry safely, see C.J.S. title Actions § 49 e (5).

§ 758. Right of Action and Conditions Precedent

a. Right of action
b. Conditions precedent

a. Right of Action

A passenger, who by reason of the carrier's failure to perform its duty toward him sustains personal injuries, ordinarily has a right of action therefor against the carrier.

A right of action against a carrier for injury resulting from a defective piece of equipment is not affected by failure of the public authorities to see that the dangerous condition was detected and eliminated.[34] Where plaintiff's cause of action is based solely on the absence of lights on a car, which plaintiff was attempting to board and in so doing fell over a fender on the car, that a statute requires fenders on such cars is immaterial.[35]

If it could be said that a person invited to ride gratuitously is a passenger, such person could have no right of action for injuries resulting from the carrier's negligence during performance of the contract, whether based on the contract or on the imposed duty due to the relationship of the parties, where a statute makes it unlawful to accept free service from a utility, and where statutes making contracts illegal are held to bar all actions arising therefrom whether in contract or in tort.[36]

The repeal, without a saving clause, of a statute giving the passenger a right of action against the carrier for a violation of the statute resulting in personal injury to the passenger terminates his right of action thereunder.[37]

b. Conditions Precedent

Conditions precedent, including the giving of notice required by statute or agreement before bringing suit, or the bringing of the suit within a certain time, must be complied with

The requisite written notice of the personal injury sustained by a passenger as a condition precedent to the maintenance of an action against the carrier therefor, whether required by statute[38] or by the agreement between the parties,[39] must be

v. Waters, 166 N.W. 114, 199 Mich. 478

34. N.Y.—Chakofsky v. Interborough Rapid Transit Co., 203 N.Y.S. 357, 208 App.Div. 407, reversing 195 N.Y.S. 79

35. La.—Constance v. Louisiana Power & Light Co., 132 So. 525, 15 La.App. 615

36. U.S.—Meloon v. Davis, C.C.A.N.H., 292 F. 82

37. Mass.—Finnegan v. Checker Taxi Co., 14 N.E.2d 127.

38. Tex.—Sawyer v. El Paso, etc., R. Co., 108 S.W. 718, 49 Tex.Civ.App. 106
10 C.J. p. 995 note 77.

39. U.S.—Gooch v. Oregon Short Line R. Co., Idaho, 42 S.Ct. 192, 258 U.S. 22, 66 L.Ed. 443, affirming, C.C.A., 264 F. 664, certiorari granted 41 S.Ct. 8, 254 U.S. 623, 65 L.Ed. 444
Okl.—Missouri, K. & T. Ry. Co. v. Lynn, 161 P. 1058, 62 Okl. 17.
S.D.—Kearnes v. Chicago, M. & St. P. Ry. Co., 171 N.W. 86, 41 S.D. 409.
10 C.J. p. 995 note 78

Agreement valid

Agreement requiring injured party or his representative to give carrier notice in writing of claim within a specified reasonable period is valid.—Oceanic Steam Nav. Co. v. Corcoran, C.C.A.N.Y., 9 F.2d 724, 57 A.L.R. 163.

Purpose of agreement requirement of written notice of injury to cattle caretaker within stated period is to give carrier opportunity to investigate while facts are easily obtainable.—Edmondson v. Missouri Pac. R. Co., 286 S.W. 439, 220 Mo.App. 294.

Compliance with requirement

In view of actual knowledge by carrier's agents of injury to plaintiff passenger and of action taken by carrier on that knowledge, letters written by plaintiff to carrier's claim agent within thirty days after injury that he intended to assert claim for damages, and was willing to make settlement, is substantial compliance with his contract to give written notice within thirty days after injury.—Edmondson v. Missouri Pac. R. Co., Mo.App., 264 S.W. 470

Length of time for giving notice

(1) Less time reasonably may be allowed for a notice of a claim for personal injuries to a passenger than is deemed proper for goods, although an exception might be implied if the accident made notice within the time impracticable.—Gooch v. Oregon Short Line R. Co., Idaho, 42 S.Ct. 192, 258 U.S. 22, 66 L.Ed. 443, affirming, C.C.A., 264 F. 664, certiorari granted 41 S.Ct. 8, 254 U.S. 623, 65 L.Ed. 444

(2) In an action by a caretaker of an interstate shipment of live stock, a provision in the written contract, requiring notice of injury within thirty days of the date thereof is reasonable and valid.—Missouri, K. & T. Ry. Co. v. Lynn, 161 P. 1058, 62 Okl. 17.

(3) Provision in shipping contract, that no claim for injury to person of shipper should be valid unless presented in writing to carrier within four months, was void.—Gerin v. Chicago, M. & St. P. Ry. Co., 158 N.W. 630, 133 Minn. 395

To whom notice to be given

A requirement of notice of injury to a passenger riding on a drover's pass is not invalid because it specifies the notice is to be given to the general manager of the carrier.—Gooch v. Oregon Short Line R. Co., Idaho, 42 S.Ct. 192, 258 U.S. 22, 66 L.Ed. 443, affirming, C.C.A., 264 F. 664, certiorari granted 41 S.Ct. 8, 254 U.S. 623, 65 L.Ed. 444.

Shipping contract provisions not applicable to passenger

Where a railroad company's agent refused to permit the shipper of a horse to ride on the shipping contract, and compelled him to purchase

given; and the fact that the carrier had actual notice is no excuse for failure to give the notice required,[40] nor can plaintiff claim he was relieved from the necessity of giving notice because the accident prevented defendant from transporting him, the rule as to failure to perform in case of dependent provisions not applying.[41] Under the common law, such a provision may be waived by the carrier.[42]

A statute requiring notice of injuries from ice or snow on "premises" or "adjoining ways" as a condition precedent to an action therefor does not require notice as a condition precedent to an action for injuries to a passenger slipping on ice or snow on the steps of a carrier's car.[43] Service of a summons and complaint has been held sufficient notice under a statute requiring notice of injury within a specified period of time as a condition precedent.[44]

The agreement of the parties sometimes provides that suit for the injury must be brought within a specified time after the cause of action accrues,[45] and under such agreement the time within which suit must be brought does not accrue until notice is given;[46] but the carrier may waive the provision as to the time for suit.[47] It has been held that, in a passenger's action sounding in tort, any stipulation in the transportation contract limiting the time within which suit must be brought is inapplicable;[48] and it has been held that a limitation to a time less than provided by statute cannot be imposed on a shipper in intra-state shipment.[49]

§ 759. Jurisdiction and Venue

The action being transitory, it may be brought in the state where the cause of action arose, or where defendant is served, subject always to such statutory provisions as may regulate the place of bringing the action.

An action by a passenger for personal injuries due to the negligence of the carrier is transitory in its nature and may be brought in the state where the cause of action arose, that is, where the injuries were incurred,[50] although the contract for carriage was made in another state;[51] or in the absence of statutes to the contrary, it may be brought

a general ticket, such shipper, although he was injured while on freight train and in car with the animal, has the rights of an ordinary passenger, and the railroad company cannot rely on the limitations in the shipping contract relating to recovery and notice of injury.—Jepsen v. Gallatin Valley Ry. Co, 195 P. 550, 59 Mont. 125.

Effect of statute on agreement

(1) Carmack amendment to the Interstate Commerce Act, U S Comp St. § 8604a, did not relieve a caretaker of carloads of hogs from giving notice to railroad of his injury, as required by contract between them, since amendment deals only with shipments of property, and not with transportation of persons.—Keairnes v. Chicago, M. & St. P. Ry. Co, 171 N W. 86, 41 S D. 409.

(2) Act March 4, 1915 § 1, Comp. St. § 8604a, prohibiting any provision by a carrier fixing the time for notice of loss or injury to goods at less than ninety days, did not establish a new public policy with reference to similar notices, so as to invalidate a stipulation in a drover's pass requiring notice of claim for personal injuries to be given within thirty days.—Gooch v Oregon Short Line R Co., Idaho, 42 S Ct. 192, 258 U.S. 22, 66 L.Ed. 443, affirming, C C.A., 264 F 664, certiorari granted 41 S.Ct. 8, 254 U.S. 623, 65 L.Ed. 444.

(3) Right of cattle caretaker accompanying interstate shipment to recover from carrier, and duty to give notice of such injury, is governed by the common law, notwithstanding that an agreement that written notice should be made within thirty days was required under a regulation that was part of the carrier's tariff filed with the interstate commerce commission, the Interstate Commerce Act being inapplicable to personal injury cases.—Edmondson v. Missouri Pac. R. Co., 286 S.W. 439, 220 Mo App 294.

Provision for notice of injury to property

Where plaintiff, caretaker of stock, was injured while in caboose, by violent starting of train, failure to give notice of injury within sixty days, as required by bill of lading in case of "injury to property," was immaterial.—Davis v. Adkins, Tex.Civ App, 251 S W. 285.

40. U.S.—Gooch v. Oregon Short Line R. Co., Idaho, 42 S.Ct. 192, 258 U S. 22, 66 L Ed 443, affirming, C.C.A., 264 F. 664, certiorari granted 41 S.Ct. 8, 254 U.S. 623, 65 L Ed. 444.

41. Mo—Edmondson v. Missouri Pac. R Co, App., 264 S.W. 470.

42. Mo—Edmondson v. Missouri Pac R. Co., App, 8 S.W 2d 103—Edmondson v. Missouri Pac R. Co, 286 S.W. 439, 220 Mo App 294—Edmondson v Missouri Pac. R. Co, App., 264 S.W. 470.

Immediate investigation of injury and offer to settle is a waiver of written notice of injury under caretaker's contract executed by cattle shipper.—Edmondson v. Missouri Pac. R. Co, 286 S.W. 439, 220 Mo. App. 294—Edmondson v. Missouri Pac R Co., Mo.App., 264 S.W. 470.

43. Mass—Casey v. Boston Elevated Ry. Co, 150 N E. 850, 255 Mass. 33.

44. Wis—Maxwell v. Johnson, 161 N.W. 736, 165 Wis. 462.

45. Kan—Koster v. Atchison, T & S. F. R Co., 147 P. 798, 95 Kan. 109.
10 C J p 995 note 79.

Provision of live-stock contract, whereby the shipper traveled as caretaker, that no action should be maintained by him for any damage unless brought within six months, applies to actions for injuries to the shipper, as well as for injuries to the stock.—Achen v. Atchison, T & S F. Ry. Co., 175 P. 980, 103 Kan 668.

46. Kan—James v Chicago, etc, R. Co, 105 P. 40, 81 Kan 23, 27.

47. Tex—St. Louis, etc, R. Co v. Dysart, 130 S.W. 1047, 62 Tex Civ App. 7.
10 C J. p 996 note 81.

48. Okl.—Martin v. Chicago, R I. & P. R Co., 143 P. 711, 46 Okl 169.

49. Tex—Davis v Adkins, Civ App, 251 S.W 285.

50. U S.—Baltimore, etc, R. Co. v. Reed, Ohio, 223 F. 689, 139 C.C A. 192
10 C.J p 996 note 84.

51. Ind—Indiana, etc, R. Co. v. Masterson, 44 N E. 1004, 16 Ind. App. 323.

in the state where defendant is served, although the injury arose in another state.[52]

As between different counties, the action may be brought in any county in which process is served on defendant, unless there is a statutory provision localizing the action.[53] The action may be brought, under various statutes, in the county where the injury occurred or the cause of action arose,[54] or where defendant resides or has its principal office or place of business,[55] or through or into which the line passes,[56] or where plaintiff resides,[57] provided, under some statutes, it is a county through which the road runs.[58] Courts of a county other than those designated by the statutory provisions have no jurisdiction of an action against a carrier.[59]

Convenience of witnesses. It has been held that

52. U S —Hireen v. Interstate Transit Lines, D.C Cal, 52 F 2d 182.
10 C J. p 996 note 86.

53. Ky.—Chesapeake, etc., R. Co. v. Cowherd, 15 Ky L. 160.
10 C J. p 996 note 88.

54. Ga.—Tennessee Coach Co. v. Snelling, 180 S.E. 741, 51 Ga.App. 432.
10 C J. p 996 note 89.

Selection of county

Foreign corporation operating within state as motor common carrier could be sued in county where cause of action originated and service on person designated by corporation to receive service could be had by second original, although it was not necessary that action be brought in county where cause of action originated, if corporation had agent and place of business within state. —Tennessee Coach Co. v Snelling, 180 S E. 741, 51 Ga.App. 432.

Prior to statute

It was no objection to an action for injuries to a passenger, brought prior to Acts 1903 p 182, requiring suits for personal injuries to be brought in the county where the injury occurred, that it was brought in a county other than that in which the injury occurred or plaintiff resided.—Kansas City, M. & B R Co v. Butler, 38 So. 1024, 143 Ala. 262.

55. Ga —Harrison v. Neel Gap Bus Line, 179 S E. 871, 51 Ga App 120
10 C J p 996 note 90.

As affected by statutory provisions

(1) A statute providing that action against motor common carriers "may" be brought in any county where action could be brought if defendant were railroad being sued on like cause of action is permissive and cumulative, and does not require bringing of action against motor common carrier in county where cause of action originated —Harrison v. Neel Gap Bus Line, 179 S.E 871, 51 Ga App 120.

(2) Where the statute necessitates bringing suit in the county where the carrier is doing business, a passenger is not entitled to maintain venue in county where accident occurred without proof that bus owner was operating as common carrier in such county at time of suit. —Amberson v. Anderson, Tex Civ. App, 43 S.W.2d 120.

Doing business by agent

Where suit may be brought in a county where the carrier does business by agent, a railroad which had formerly maintained a depot in the county, although at the time of the suit it no longer had an agent there, but still maintained the depot for the storage of freight and the convenience of passengers, was "doing business by agent" in that county so as to be subject to suit there in an action by a passenger for personal injuries —Louisville & N. R Co. v Dawson, 68 So. 674, 14 Ala App 272.

56. Okl.—Jacobsen v. Howard, 23 P. 2d 185, 164 Okl. 88.

Carrier operating on lines of another

Where a contract between two railroad companies allowed the second company to operate its trains, in charge of its own servants and conductors, over the tracks of the first, with the added provision that the first company should be liable to the second for any sums which might be recovered against the second because of injuries received by passengers or others while the second was operating its trains over the line of the first, the lessee company was carrying on its business within the counties in which the line of the lessor company ran, and might be sued therein —In re Columbia, N. & L R Co, 71 S E 1013, 89 S.C 407 —Jenkins v Atlantic Coast Line R Co, 71 S E. 1010, 89 S C. 408.

Motor carriers

A motor carrier operating busses under jurisdiction of corporation commission is a "transportation company" within statute authorizing suit in any county through which line passes.—Jacobsen v. Howard, 23 P 2d 185, 164 Okl. 88.

57. Ky —Louisville & N. R Co. v. Spears' Adm'r, 232 S.W. 60, 192 Ky. 64
Mich —Amyot v. Lamb, 190 N.W. 741, 221 Mich 256.
10 C J. p 996 note 91.

Residence of personal representative

Within a provision of Code Civ. Pract § 73, authorizing an action against a common carrier to be brought in the county in which the plaintiff resides, if that is a county through which the carrier passes, plaintiff's residence in an action to recover for the death of a passenger is the residence of the personal representative, by whom the suit is prosecuted, under Ky.St. § 6, not the residence of the deceased passenger, and the administrator can prosecute such action in the county of his residence, whether it is controlled by the state statute or by the order of the director general, requiring suits against carriers while under federal control to be brought in the county or district where the plaintiff resided.—Louisville & N R Co v Spears' Adm'r, 232 S W. 60, 192 Ky. 64, overruling Illinois Cent R Co. v. Willis, 97 S.W. 21, 123 Ky 636, 29 Ky.L. 1187—10 C J. p 996 note 91 [a].

Provision for suit where principal office located

Comp.L 1915 § 12340 par 3, providing that "suits may be commenced" against a railroad in any county where its principal office is situated, etc., does not prohibit passengers to bring action for personal injuries in their home counties pursuant to par 2, the permissive provisions indicating a legislative intent to amplify or define the specified corporate residence of such defendant in which an action may be commenced at plaintiff's option.—Amyot v. Lamb, 190 N.W. 741, 221 Mich. 256.

58. Ohio —Johnson v. Toledo & O. Cent. Ry Co, 5 Ohio N.P.,N.S, 347.
10 C J p 996 note 92

Mandatory provision

The word, "may," in the Ohio statute, Rev St. § 5204, providing that suit may be brought in any county through which the road passes has been held to mean "must" Under such a provision the action cannot properly be brought in the county where the carrier's principal offices are located unless the line of the road passes through such county — Johnson v. Toledo & O. Cent Ry. Co., 5 Ohio N.P ,N.S , 347.

59. Ky.—Sherrell v. Chesapeake, O. & S W R. Co., 12 S.W. 465, 89 Ky 302.
10 C.J. p 996 note 88 [a], [b].

the court may consider the convenience of employee witnesses in determining where the trial shall be held, although their convenience will be given less consideration than the convenience of witnesses who are not connected with the parties.[60]

§ 760. Parties

In an action against a carrier for personal injuries, the carrier may be proceeded against alone, but plaintiff may join other proper parties as defendants, including other carriers, purchasers of offending carriers, and sureties or insurers of carriers.

Where a passenger is injured by the joint or concurrent acts of several joint tort-feasors, he may sue either of them, or he may join them in one action and recover against such as are shown by the evidence to be liable.[61] A nonjoinder of all persons liable therefor cannot be taken advantage of in such an action, but a recovery may be had against such as are shown to be liable,[62] provided the action is brought in tort and not in contract.[63] Carriers having a joint duty toward a passenger may be joined in an action for injuries,[64] but not where the injury results from concurrent, rather than joint, negligence.[65] A purchaser of railroad property, under a decree of foreclosure providing that the purchaser shall take the property subject to all liabilities, may be joined as defendant in an action for personal injuries to, or death of, a passenger, occurring while the road is being operated by a receiver.[66] Companies jointly operating their roads through a lessee may be joined in one action for injuries to a passenger over their lines, where the negligent acts are continuous and chargeable to the common agent of the lessee.[67]

Receivers appointed in a federal court for a defendant railroad company, after a suit is brought against the latter in a state court, need not be made parties to the suit.[68] A shipper of live stock contracting to hold a carrier harmless for any damages it might be required to pay for injuries to a caretaker accompanying the stock is not a necessary party to an action by the caretaker against the carrier for personal injuries.[69]

Sureties and insurers. The surety on a bond, given by the owner of an automobile stage line as a condition precedent to obtaining a certificate of convenience and necessity required for operation of such a line, is a proper party to an action for injuries brought against the owner by a passenger,[70] but an indemnity insurance company contracting to indemnify an automobile transportation company against damages to passengers, cannot be joined in an action for injuries to a passenger against the company, unless the policy expressly or by necessary implication so provides;[71] and a provision in the policy for direct liability to any person as provided for in the policy, whether an action is brought against the assured alone or jointly with the insurer, does not warrant joinder of the insurer in an action in tort against the carrier.[72]

60. N.Y.—Neeley v. Erie R. Co., 119 N.Y.S. 953, 134 App.Div. 781.
10 C.J. p. 997 note 93.

61. Ga.—Central of Georgia Ry. Co. v. Wheat, 122 S.E. 794, 32 Ga.App. 151.
Iowa.—Wabash Ry. Co. v. Peterson, 175 N.W. 523, 187 Iowa 1331.
Mont.—Knuckey v. Butte Electric Ry. Co., 109 P. 979, 41 Mont. 314.
N.Y.—Jerome v. New York Rys. Co., 179 N.Y.S. 777, 190 App.Div. 311.
Va.—Carlton v. Boudar, 88 S.E. 174, 118 Va. 521, 4 A.L.R. 1480.
10 C.J. p. 997 note 95.

Trucking and street car companies.
Owner of truck colliding with street car is properly made defendant with street railroad in action for injury to street car passenger.—Moraski v. Philadelphia Rapid Transit Co., 142 A. 276, 293 Pa. 224.

62. N.Y.—Jerome v. New York Rys. Co., 179 N.Y.S. 777, 190 App.Div. 311.
10 C.J. p. 997 note 96.

63. Pa.—M'Call v. Forsyth, 4 Watts & S. 179.
10 C.J. p. 997 note 97.

64. Mich.—Boyle v. Waters, 166 N.W. 114, 199 Mich. 478.

65. Ohio.—Hudson v. Ohio Bus Line Co., 11 N.E.2d 113, 56 Ohio App. 483.

Bus and taxicab.
Where bus and taxicab were being driven in opposite directions on a street and collided injuring bus passenger, the negligence, if any, was merely concurrent and not joint, precluding joinder of bus company and taxicab company in passenger's action for injuries.—Hudson v. Ohio Bus Line Co., 11 N.E.2d 113, 56 Ohio App. 483.

66. Colo.—Denver, etc., R. Co. v. Gunning, 80 P. 727, 33 Colo. 280.
10 C.J. p. 997 note 98.

67. N.C.—Carleton v. Yadkin R. Co., 55 S.E. 429, 143 N.C. 43, 10 Ann.Cas. 348.

68. Ark.—St. Louis, etc., R. Co. v. Coy, 168 S.W. 1106, 113 Ark. 265.

69. Okl.—Missouri, K. & T. Ry. Co. v. Lynn, 161 P. 1058, 62 Okl. 17.

70. Wash.—Hayes v. Staples, 225 P. 417, 129 Wash. 436.
W.Va.—O'Neal v. Pocahontas Transp. Co., 129 S.E. 478, 99 W.Va. 456.

71. W.Va.—Shepherd v. Pocahontas Transp. Co., 131 S.E. 548, 100 W.Va. 703—O'Neal v. Pocahontas Transp. Co., 129 S.E. 478, 99 W.Va. 456.

Statutes not authorizing joinder.
Acts 1923 c. 6 § 82, subs. class H, requiring applicant, as condition precedent to receiving certificate of convenience for operating automobile transportation line, to file with state road commission a bond with surety approved by the commission, or liability insurance policy satisfactory to commission to protect public, does not authorize joinder of indemnity company with its assured as party defendant in action by passenger for injuries while being transported, such statute not creating new remedy, nor is such joinder authorized by Code 1923 c. 71 § 2, on theory that promises of policy were for sole benefit of plaintiff or for sole benefit of class of which she was member.—Shepherd v. Pocahontas Transp. Co., 131 S.E. 548, 100 W.Va. 703—O'Neal v. Pocahontas Transp. Co., 129 S.E. 478, 99 W.Va. 456.

72. W.Va.—Conwell v. Hays, 136 S.E. 604, 103 W.Va. 69.

§ 761. Declaration, Complaint, or Petition

a. In general
b. Relation of carrier and passenger
c. Negligence or wrong generally
d. Acts of employees, fellow passengers, and other third persons
e. Place and time
f. Passengers boarding or alighting
g. Matters of defense; contributory negligence
h. Proximate cause
i. Amendment

a. In General

The declaration, petition, or complaint must definitely and consistently allege all facts necessary to the statement of the cause of action against the carrier.

The declaration, complaint, or petition, in an action by a passenger against a common carrier for personal injuries sustained by reason of the carrier's negligence or wrong, is governed by the rules relating to such pleadings in civil actions generally.[73] Thus, the allegations must be definite[74] and consistent,[75] and must sufficiently state all the facts that are necessary to state the cause of action on which plaintiff relies.[76]

73. S C—Stuckey v Atlantic Coast Line R Co, 38 S E 416, 60 S C 237, 85 Am S R. 842.
10 C J. p 997 note 3

74. Ala—Birmingham Ry, Light & Power Co. v. Hunt, 76 So. 918, 200 Ala 560
10 C J p 997 note 4.

Allegations held definite

(1) Allegation of injury to passenger from negligence of street railroad or its agents or employees. —Alabama Power Co v Edwards, 121 So 543, 219 Ala. 162

(2) Declaration by passenger based on insulting and humiliating treatment inflicted by conductor, stating such conduct in general terms, without specifying evidential facts or averring exact words used —John v Baltimore & O R Co, 95 S E 589, 82 W Va 149

75. Mo—Shanahan v St Louis Transit Co, 83 S.W. 783, 109 Mo. App. 228
10 C J p 997 note 5.

Effect of verdict on inconsistencies

A petition which alleges that the receivers exercise exclusive control of the road, and that plaintiff's injuries resulted from negligence in the operation of the car on the road, is sufficient, after verdict, to sustain judgment against the receivers, although it also contains allegations as to the management by the company, inconsistent with the operation of the car by the receivers, since those defects are waived by answer on the merits—Moore v. Metropolitan St. R Co, 176 S.W. 1120, 189 Mo App. 555.

76. Mo—Rosenzweig v Wells, 273 S. W 1071, 308 Mo. 617.
N.Y.—Bressler v. New York Rapid Transit Corporation, 13 N E 2d 772, 277 N.Y 200, reversing 297 N Y. S. 336, 251 App.Div 890.
10 C J p 998 note 6.

Declaration, complaint, or petition held sufficient to state a cause of action for personal injuries:

(1) Against two railroad companies for injury to passenger on train of one when derailed by obstructions on connecting track, as to use of which companies were in litigation and violent dispute—Brown v Mississippi Cent. R Co., 109 So. 796, 144 Miss. 326.

(2) At crossing between station platforms.—Banks v. Kansas City Rys Co, 217 S W 488, 280 Mo 227.

(3) By allowing car to be and remain cold—Zoccolillo v Oregon Short Line R. Co, 177 P. 201, 53 Utah 39.

(4) By assault of employee.—Dorton v. Kansas City Rys. Co, 224 S.W. 30, 204 Mo.App 262.

(5) By being thrown from seat when fire truck hit car.—Moen v. Madison Rys. Co, 243 N.W 505, 208 Wis 388—Moen v. Madison Rys Co., 243 N W. 503, 208 Wis 381

(6) By being thrown from conveyance
Cal—Gumpel v. San Diego Electric Ry Co., 172 P. 605, 178 Cal. 166 —Rystinki v. Central California Traction Co., 165 P. 952, 175 Cal 336
Mo—Goodwin v. Wells, 285 S W. 112, 220 Mo App 1.
10 C J p 998 note 6 [a] (7).

(7) By carrier's concurrent negligence.
Ind—Ft. Wayne & Northern Indiana Traction Co. v Parish, 119 N.E. 488, 67 Ind App. 597
Minn—Kloss v. Minneapolis St Ry. Co., 219 N.W 179, 174 Minn. 294.

(8) By collision.—Hoover v St Louis Electric Terminal Ry Co., Mo., 227 S.W. 77, reversing, App, 216 S W 984.

(9) By discharging passenger at dangerous place.
Ga—Locke v Ford, 187 S E. 715, 54 Ga App 322.
Tex—Fuchs v. Dallas Ry. & Terminal Co, Civ App, 18 S W.2d 854, error refused.

(10) By falling from train—Kordick v. Chicago R. Co, 187 Ill.App 74.

(11) By falling over obstructions. —Bragg v. Houston Electric Co., Tex Civ.App, 264 S W. 245, affirmed Houston Electric Co. v Bragg, Com. App, 276 S W 641, motion overruled 280 S W 188—10 C J. p 998 note 6 [a] (6)

(12) By operation of bus in violation of statute.—South Plains Coaches v. Behringer, Tex Civ App, 4 S. W.2d 1003, affirmed Behringer v. South Plains Coaches, Com App, 13 S W 2d 334

(13) By operation of elevator known to be defective—Reel v Consolidated Inv Co., Mo, 236 S W. 43.

(14) In alighting from conveyance
Ga—Hall v. Georgia R & Banking Co, 103 S.E 849, 25 Ga App 459 —Savannah Electric Co v Johnson, 103 S.E. 798, 25 Ga App. 517
Mo—Rosenzweig v Wells, 273 S.W 1071, 308 Mo. 617—McDermott v United Rys. Co. of St. Louis, App, 236 S W 1080.
Neb—Leon v. Chicago, B. & Q R Co, 167 N.W. 787, 102 Neb. 537, L R.A.1918F 313.
Tex—Wichita Falls Traction Co v Berry, Civ.App, 187 S W. 415, error dismissed.
Va—Houston v. Lynchburg Traction & Light Co., 89 S E 114, 119 Va 136.

(15) In attempting to board conveyance—Haynie v. Central of Georgia Ry. Co., 93 S E. 258, 20 Ga.App 599—Southern Ry Co. v. Sewell, 90 S.E. 94, 18 Ga App. 544.

(16) Sustained by slipping on apple core on aisle of defendant's street car.—Leslie v. Georgia Power Co, 171 S.E. 395, 47 Ga App. 723

(17) Under doctrine of last clear chance—Cazeaux v. New Orleans Public Service, 124 So 685, 14 La. App. 320—10 C J. p 998 note 6 [a]

(18) Under theory of sudden peril rule.—Cazeaux v. New Orleans Public Service, supra.

Declaration, complaint, or petition held insufficient to state a cause of action for personal injuries:

(1) By being struck by automobile

The declaration, petition, or complaint must allege a duty owing from the carrier to the passenger,[77] or facts showing the existence of a duty to protect plaintiff from the injury of which he complains, defendant's failure to perform such duty, and the injury to plaintiff resulting from such failure;[78] and it is, in general, sufficient to allege ultimate facts showing that the relation of passenger and carrier existed, and that defendant negligently did, or omitted to do, the act or acts that proximately caused, or contributed to causing, the injury as stated,[79] the specific fact that actually caused the injury being duly alleged so that a definite issue may be presented for trial.[80] It is not sufficient to allege

while intending to become passenger.—Franklin v. Houston Electric Co., Tex.Civ.App., 286 S.W. 578.

(2) When leaving or alighting from a conveyance—Butler v. Central of Georgia Ry. Co., 94 S.E. 279, 21 Ga.App. 318—10 C.J. p 998 note 6 [b] (3), [d] (1).

(3) Under last clear chance rule
Ind.—Doyle v. Union Traction Co., 152 N.E. 877, 85 Ind.App. 62.
Mo.—Wilson v. Wells, 13 S.W.2d 541, 321 Mo. 929.

After purchase of offending carrier's property

Injured passenger's complaint against negligent bus company is demurrable as against a nonnegligent bus company subsequently buying part of negligent company's property.—Begnell v. Safety Coach Line, 153 S.E. 264, 198 N.C. 688

Negligence in alternative

In street car passenger's action for injuries, a count charging negligence in the alternative was not objectionable where each alternative sufficiently charged good cause of action and was based on the same injury.—Alabama Power Co. v. Edwards, 121 So. 543, 219 Ala. 162.

Recovery of nominal damages

(1) When nominal damages are recoverable, a declaration in action for personal injuries, stating case authorizing any recovery whatever, is not demurrable.—Tampa Electric Co. v. Ferguson, 118 So. 211, 96 Fla. 375.

(2) A petition by white girl passenger against bus carrier, based on fact that colored girl seated herself beside plaintiff, is not generally demurrable because not showing that plaintiff was actually damaged, since plaintiff might recover nominal, vindictive, or punitive damages, even though she did not recover actual, compensatory, or general damages—Hames v. Old South Lines, 183 S.E. 503, 52 Ga.App. 420.

77. Ala.—Atkinson v. Dean, 73 So. 479, 198 Ala. 262

Alleging too high a duty

Allegation that defendant street railway owed plaintiff, injured while getting off car, highest degree of care of which human foresight was capable, does not vitiate declaration in personal injury action.—Malone v. Monongahela Valley Traction Co., 140 S.E. 340, 104 W.Va. 417.

78. Ala.—Atkinson v. Dean, 73 So. 479, 198 Ala. 262
N.Y.—Dymott v. City of New York, 1 N.Y.S.2d 939, 253 App.Div. 894
10 C.J. p 998 note 7.

Allegations held sufficient to show duty

(1) Complaint for injury to passenger, thrown in alighting from street car, was held certain, and sufficiently to aver defendant's duty to conserve plaintiff's safety as a passenger.—Birmingham Ry., Light & Power Co. v. Hunt, 76 So. 918, 200 Ala. 560.

(2) A count alleging that car was signaled to stop, that it overran the regular stopping place about two car lengths, where it stopped to take on passengers, and that, while plaintiff was in the act of boarding, the conductor suddenly closed the entrance door, thereby injuring plaintiff's hand, sufficiently alleges facts which entitle plaintiff to the care owing by the carrier to one in the act of becoming a passenger by carrier's invitation, so that a demurrer on the ground that it did not appear that the plaintiff owed the defendant any duty was properly overruled—Mobile Light & R. Co. v. Ellis, 96 So. 773, 209 Ala. 580.

(3) A petition alleging that plaintiff, a woman, was directed by the agent of a carrier to ride in a smoking car, and that the conductor paid no attention to her objection thereto, and that while in the car other passengers therein used obscene and boisterous language, and two of them became involved in a quarrel while standing by her seat, as a result of which she was badly frightened and humiliated, received a nervous shock that resulted in confinement to her bed for a period, and from which she suffered for some time, is sufficient against a demurrer—Payne v. Combs, 249 S.W. 1031, 198 Ky. 749.

Allegations held sufficient to show breach of duty

(1) Allegation that door indicated by bus driver as location of toilet was opening to basement and that plaintiff, a passenger, fell downstairs.—Watts v. Colonial Stages Co., 163 S.E. 523, 45 Ga.App. 115.

(2) As to elevator.—State Realty Co. v. Ligon, 119 So. 672, 218 Ala. 541.

(3) In an action for injury from falling over a suitcase in the aisle of a street car—Alabama Great Southern R. Co. v. Johnson, 71 So. 620, 14 Ala.App. 558.

Allegations subject to special exception

In action against railroad for injury to passenger's eye from spark or cinder from locomotive, the terms "first-class coach" and "first-class manner," in allegations of petition that the railroad failed to transport the passenger in a "first-class manner" while he was a passenger on a "first-class coach," are subject to exception, such terms being improper in pleading railroad's duty to use the highest degree of care and foresight safely to transport the passenger.—Schaff v. Sanders, Tex.Civ.App., 257 S.W. 670, affirmed, Com.App., 269 S.W. 1034.

Joint duty

If two carriers maintain a crosswalk between stations at junction, and their neglecting to light the way concurred to injure a passenger, she could sue both, although she alleged no joint duty.—Boyle v. Waters, 166 N.W. 114, 199 Mich. 478.

79. Ala.—State Realty Co. v. Ligon, 119 So. 672, 218 Ala. 541.
Fla.—Barnwell v. Seaboard Air Line Ry., 74 So. 497, 73 Fla. 482.
10 C.J. p 999 note 8.

Allegations held sufficient

(1) Counts which allege that defendant was a common carrier of passengers, that plaintiff was a passenger, and that defendant so negligently conducted itself in transit that at a certain time and place plaintiff was thrown or caused to fall from car, are sufficient—Birmingham Ry., Light & Power Co. v. Gray, 71 So. 689, 196 Ala. 42.

(2) Allegations that plaintiff boarded defendant's street car bound for center of city, while stopped at regular stopping place for passengers, took seat therein, and remained thereon as passenger until it was wrecked, sufficiently disclosed relation of carrier and passenger, even if statement that he was a passenger were conclusion and there was no averment that he paid or offered to pay fare.—Union Traction Co. of Indiana v. Alstadt, 143 N.E. 879, 195 Ind. 389.

80. Fla.—Atlantic Coast Line R. Co. v. Hamlett, 89 So. 337, 81 Fla. 872.

a duty on the part of defendant to do certain things and the breach of that duty as a conclusion of law, but the facts should be stated from which the law will raise the duty.[81]

There should be a definite statement of the injuries received.[82]

The giving of the notice required by statute as a condition precedent to an action for injuries must be pleaded.[83]

Matters which go merely in aggravation or extenuation, and whose effect is to enhance or diminish the damages, need not be pleaded by plaintiff.[84]

In an action for damages for injuries alleged to have been the result of a carrier's negligence, an allegation disclaiming responsibility for the negligence of a third person is surplusage.[85]

b. Relation of Carrier and Passenger

The declaration, complaint, or petition must properly allege the relationship of passenger and carrier.

It is essential, in an action against a carrier for a breach of its duty as a carrier of passengers, that the declaration, petition, or complaint show by proper allegations that the relation of carrier and passenger existed between the person injured and defendant at the time the injury was received,[86] and, therefore, there should be allegations which indicate that defendant was a carrier of passengers,[87] although, if defendant is a railroad company, the fact that it is a carrier of passengers will be presumed.[88] There must also be an allegation of facts showing that plaintiff was a passenger;[89] and, although it is usual to charge that the undertaking to carry plaintiff was for hire,[90] it is not necessary to allege that plaintiff had paid for his transportation, as the obligation to pay is inferred.[91]

81. Ill.—Chicago, etc., R. Co. v. Clausen, 50 N.E. 680, 173 Ill. 100.
10 C.J. p 999 note 9.

82. Ga.—Douglas, etc., R. Co. v. Swindle, 59 S.E. 690, 2 Ga.App. 550.
10 C.J. p 999 note 10.

Petition held sufficient

In action by passenger against bus company for breach of contract in failing to summon medical assistance for passenger while passenger was suffering from an apoplectic stroke, a petition alleging that passenger was conscious during the stroke and that his pain was intense, that suffering could have been mitigated by medical attention, and that passenger had been damaged by failure to procure medical aid to alleviate the suffering, coupled with testimony admitted without objection that passenger suffered intensely and that suffering was augmented by the neglect of the bus company's employees, stated a cause of action for pain and suffering.—Searcy v. Interurban Transp. Co., 179 So. 75, 189 La. 183, reversing, App., 179 So. 93, reversing 171 So. 468.

83. Mass.—Klein v. Boston Elevated Ry. Co., 200 N.E. 6.

84. Tex.—Houston, etc., R. Co. v. Batchler, 83 S.W. 902, 37 Tex.Civ.App. 116.
10 C.J. p 1000 note 12.

85. Ga.—Rome Ry. & Light Co. v. King, 117 S.E. 464, 30 Ga.App. 231

86. La.—Owens v. South New Orleans Light & Traction Co., 1 La.App. 601.
N.Y.—Dymott v. City of New York, 1 N.Y.S.2d 939, 253 App.Div. 894.
10 C.J. p 1000 note 13

Allegations held sufficient

(1) Allegations that plaintiff bought ticket entitling him to passage and went on platform to wait arrival of train, with intent to become passenger, show at least qualified relation of passenger and carrier.—Pittsburgh, C., C. & St. L. Ry. Co. v. Friend, 118 N.E. 598, 70 Ind.App. 366.

(2) A complaint alleging that plaintiff was injured while boarding one of defendant's street cars which had stopped to take on passengers, as a result of defendant's negligence in starting the car, without directly alleging plaintiff was a passenger and defendant a common carrier, has been held sufficient, on motion for nonsuit, to show the relationship of passenger and carrier.—Rostad v. Portland Ry., Light & Power Co., 201 P. 184, 101 Or. 569.
10 C.J. p 1000 note 13 [a] (1),.(2).

Allegations held insufficient

(1) In an action for personal injuries to one boarding a car.—Mobile Light & R. Co. v. Ellis, 92 So. 106, 207 Ala. 109.

(2) In an action for injuries received in an elevator.—Downs v. Seeley, 56 A. 502, 76 Conn. 317.

(3) In action for death of plaintiff's testator struck by train while on tracks and attempting to flag train at small station.—Atlantic Coast Line R. Co. v. Webb, 150 So. 741, 112 Fla. 449.

Evidence of relationship not to be alleged

In action for death of railway mail clerk caused by not heating car, it was not necessary to plead contract between railroad and United States further than to show that it conferred upon decedent right to be in car, and court properly refused to require plaintiff to make complaint more specific.—Pittsburgh, C., C. & St. L. Ry. Co. v. Arnott, 126 N.E. 13, 189 Ind. 350.

87. Ala.—Birmingham R., etc., Co. v. Selhorst, 51 So. 568, 165 Ala. 475.
10 C.J. p 1000 note 14.

88. Ala.—Birmingham R., etc., Co. v. Adams, 40 So. 385, 146 Ala. 267, 119 Am.S.R. 27.
10 C.J. p 1000 note 15.

89. Ga.—Payne v. Allen, 116 S.E. 640, 155 Ga. 54, reversing 110 S.E. 345, 28 Ga.App. 8.
10 C.J. p 1000 note 16.

Form of allegation

While question on demurrer as to whether relation of carrier and passenger exists as matter of law is always determined from pleaded facts and circumstances, facts shown by conclusions and participial expressions will be given same force and effect as those directly stated.—Union Traction Co. of Indiana v. Alstadt, 143 N.E. 879, 195 Ind. 389.—10 C.J. p 1000 note 16 [a].

Allegation held sufficient

Allegation that "plaintiff took passage on one of defendant's passenger trains to be carried," etc.—Vandalia R. Co. v. Stevens, 114 N.E. 1001, 67 Ind.App. 238.

90. N.Y.—Roberts v. Johnson, 58 N.Y. 613

91. Ind.—Union Traction Co. of Indiana v. Alstadt, 143 N.E. 879, 195 Ind. 389.
La.—Spearman v. Toye Bros. Auto & Taxi-Cab Co., 114 So. 591, 164 La. 677.
10 C.J. p 1001 note 18.

Taxicab passenger

A petition for injuries sustained by passenger when taxicab overturned is not demurrable for failure to

Presence on cars with permission. Where the passenger sues for personal injuries received while on the cars with the knowledge and permission of the carrier, it is sufficient to allege that he was on the cars with the permission of the carrier and with the knowledge of its employees in charge.[92]

c. Negligence or Wrong Generally

The carrier's negligence must be properly alleged, it being generally regarded as sufficient to allege it in general terms without specifying particulars or details.

It is not sufficient to allege the carrier's negligence merely as a conclusion of law; but the essential facts constituting the negligence or wrong, or from which it may be presumed, must be stated with reasonable certainty and definiteness in order that defendant may be informed of what it is called on to meet at the trial.[93] Although there are some

allege payment of fare.—Shelton Taxi Co. v. Bowling, 51 S.W.2d 468, 244 Ky. 817.

92. Ark.—St. Louis, etc., R. Co. v Coy, 168 S.W. 1106, 113 Ark. 265
10 C.J. p 1001 note 19.

93. U.S.—Lehigh Valley R. Co v Stevenson, C.C.A.N.J., 17 F.2d 748.
Fla.—Atlantic Coast Line R. Co. v. Allen, 117 So. 333, 96 Fla. 419.
Pa.—Scharf v. Pennsylvania R. Co., 10 Pa.Dist. & Co. 207—Hippy v Conestoga Traction Co., 2 Pa.Dist & Co. 246
10 C.J. p 1001 note 21.

Allegations held sufficient

(1) In carelessly applying brakes of interurban car—Richmond-Ashland Ry. Co. v. Jackson, 162 S.E. 18, 157 Va. 628.

(2) In both use of mechanically deficient latch and failure of stage driver properly to close and latch door—McCormick v. Index Stages, 242 P. 1090, 137 Wash. 507.

(3) In failing to give customary warning that train was about to leave.—Hail v. Missouri-Kansas-Texas R. Co. of Texas, Tex.Civ.App., 30 S.W.2d 1062, affirmed Missouri-Kansas-Texas R. Co. of Texas v. Hail, Com.App., 48 S.W.2d 589

(4) In failure to operate bus at reasonable and safe rate of speed, and failure to control motion of bus so as to avoid injury to passengers—Buckalew v. Eaton, 191 A. 773, 118 N.J.Law 188.

(5) In failure properly to light tracks at station and to maintain headlights on car, resulting in passenger being struck while signaling car to stop.—Union Traction Co. of Indiana v Smith, 127 N.E. 308, 74 Ind.App. 345.

(6) In leaving a helplessly intoxicated passenger off its train on a narrow platform between two much-used tracks in a place of danger without any care for his safety—Panor v. Northwestern Elevated R. Co., 228 Ill.App. 162.

(7) In stopping without warning in middle of highway, although in view of averments as to third party's negligence in running into bus with a truck, the bus driver's negligence probably could not have been proximate cause of accident.—Peterson v. Louisiana Power & Light Co., La.App., 174 So. 644.

(8) That defendants were common carriers of passengers for hire, that plaintiff was passenger in one of defendants' automobiles at time of injury and received her injuries because of gross negligence of driver in permitting automobile to run off road and be overturned.—Bower Auto Rent Co. v. Young, Tex.Civ.App., 274 S.W. 295.

(9) That injuries were caused by negligence in not stopping as scheduled and agreed and on account of brakeman leading plaintiff to believe that train had come to full stop—Pittsburgh, C., C. & St. L. Ry. Co. v Boys, 123 N.E. 482, 71 Ind.App. 102.

(10) That on a dark night when the platform was unlighted plaintiff, waiting for a train, stepped on an attached porch, the gate to which was open, and fell through a trap-door opening but a few feet from the station platform.—Louisville & N. R. Co. v. Dixon, 195 S.W. 1099, 176 Ky. 569

(11) That passenger in baggage car when train was derailed, was in the baggage car with knowledge and consent of conductor, and that train was derailed because of negligent condition of track and equipment and excessive speed, and further allegation that injuries were due also to negligence in having certain objects in baggage car so placed that they fell on plaintiff as train was derailed—Davis v. Jones, 129 S.E. 892, 34 Ga.App. 7.

(12) That plaintiff was passenger on wrecked train, and that his injuries were directly caused by carrier's negligence—Curry v. St. Louis-San Francisco Ry. Co., 296 S.W. 473, 221 Mo.App. 1.
10 C.J. p 1001 note 21 [b].

Allegations held insufficient

(1) In absence of more precise allegations as to curve in railroad track and facts connected therewith which made it "dangerous" as alleged, petition in action for death of passenger should have been dismissed.—Central of Georgia Ry. Co. v. Stacer, 92 S.E. 962, 20 Ga.App. 195.

(2) Mere allegations that the relation of carrier and passenger existed and that, while it existed, the passenger was injured in connection with the carriage, without the further averment, in general terms at least, that the injury resulted from the carrier's negligence do not state a cause of action.—Reel v. Consolidated Inv. Co., Mo., 236 S.W. 43.

(3) A petition alleging that two railroad companies were negligent in that one sold plaintiff a ticket over its road, and negligently placed her on train of other defendant, and that plaintiff, through negligence of other defendant, was injured in boarding another train for purpose of returning to point from which she started, and as result of negligence of both defendants was delayed in reaching her destination, and thereby suffered certain injuries, did not allege joint acts of negligence, or show that defendants were joint tort-feasors, so as to confer jurisdiction over second defendant—Ryle v Central of Georgia Ry. Co., 119 S.E. 342, 30 Ga.App. 737.

(4) Petition for injuries by glass in street car door falling out when tapped by prospective passenger to attract conductor's attention containing no averments to indicate glass was defective, or not suitable for the purpose for which it was intended, or that defendant should have anticipated it would be used as plaintiff used it, is insufficient—Hudgins v. Georgia Power Co., 159 S.E. 723, 43 Ga.App. 627.

(5) To a petition alleging that defendant maintained a "sharp and dangerous curve," so that coach striking it at a dangerous rate of speed lurched and threw passenger from train, special demurrer on ground that description of curve was indefinite should have been sustained—Central of Georgia Ry. Co. v Stacer, supra.

Where prima facie case is alleged, it is not necessary to allege in terms that the carrier was negligent—Lake Shore Electric R. Co. v Hobart, 13 Ohio Cir.Ct.,N.S., 592.

Two acts as concurrent causes

Petition for injury to passenger falling in alighting from street car was held to charge two acts of negligence, concurrent causes of injury, sudden starting, and stopping op-

decisions to the contrary,[94] as a general rule, where plaintiff alleges the relation of carrier and passenger, it is sufficient to allege the negligence in general terms; that is, it is not necessary to state the details or particulars of the acts causing the injury, but it is sufficient to state in a general way that defendant was negligent as to the machinery or appliances used, or in failing to construct or maintain the track in a safe condition, or in the operation of the train, conveyance, or the like.[95] Such allegations are sufficient at least as against a general demurrer for want of sufficient facts,[96]

posite hole.—Hoffman v. Dunham, Mo.App., 202 S.W. 429.

94. Del.—Riedel v. Wilmington City R. Co., 64 A. 257, 21 Del. 573.
10 C.J. p. 1002 note 22.

Necessity and sufficiency of allegations

(1) In personal injury action by street car passenger, thrown from seat when fire truck hit car, complaint generally alleging negligence, without allegations that motorman discovered, or should have discovered, approach of truck, did not state cause of action.—Moen v. Madison Rys. Co., 225 N.W. 821, 199 Wis. 168, followed in 225 N.W. 822, 199 Wis. 171.

(2) In action by street car passenger thrown from seat when fire truck hit car, complaint alleging on information and belief that motorman heard gong, since numerous occupants of car heard gong, charged motorman with knowledge of truck's approach.—Moen v. Madison Rys. Co., 243 N.W. 505, 208 Wis. 388—Moen v. Madison Rys. Co., 243 N.W. 503, 208 Wis. 381.

95. Ala.—Birmingham Electric Co. v. Jones, 176 So. 203, 234 Ala. 590—Louisville & N. R. Co. v. Courson, 174 So. 474, 234 Ala. 273—Birmingham Electric Co. v. Shelton, 163 So. 633, 231 Ala. 110—Alabama Power Co. v. Carroll, 94 So. 743, 208 Ala. 426—Atkinson v. Dean, 73 So. 479, 198 Ala. 262—Tennessee, A. & G. Ry. Co. v. Rossell, 88 So. 362, 18 Ala.App. 17—Alabama Great Southern R. Co. v. Johnson, 71 So. 620, 14 Ala.App. 553.
Ill.—Jensen v. East St. Louis Ry. Co., 202 Ill.App. 583.
Ind.—Curtis v. Mauger, 114 N.E. 408, 186 Ind. 118—Ft. Wayne & Northern Indiana Traction Co. v. Parish, 119 N.E. 488, 67 Ind.App. 597.
Mo.—Malone v. St. Louis-San Francisco Ry. Co., 213 S.W. 864, 202 Mo.App. 489.
Ohio.—Wehrenberg v. Cincinnati Traction Co., 2 Ohio N.P.,N.S., 271.
Or.—Coblentz v. Jaloff, 239 P. 825, 115 Or. 656.
R.I.—De Nicola v. United Electric Rys. Co., 182 A. 1, 55 R.I. 402.
10 C.J. p. 1002 note 23.

In collision cases

(1) A petition, alleging relation of passenger and carrier and injury of plaintiff in collision caused by negligence of defendant, in general terms, sufficiently alleges defendant's negligence, in view of presumption arising from fact of collision.—Hoover v. St. Louis Electric Terminal Ry. Co., Mo.App., 216 S.W. 984, reversed on other grounds, Sup., 227 S.W. 77.

(2) A petition in an action by passenger for injuries alleging that "plaintiff further says that said collision and the injuries she received hereinafter set out were caused by carelessness and negligence of the defendants . . their servants, agents, and employees operating said street car," contains a general charge of negligence, and not a specific charge.—Bergfeld v. Dunham, Mo.App., 228 S.W. 891.

(3) Allegation in passenger's action for injuries, sustained when street car collided with automobile, that defendant negligently, carelessly, and recklessly operated its street car so as to cause street car to strike automobile, is sufficient to raise issue of negligence as against contention that declaration was defective in failing to allege in what respect defendant was negligent.—De Nicola v. United Electric Rys. Co., 182 A. 1, 55 R.I. 402.

Matters peculiarly within defendant's knowledge

(1) The facts constituting the negligence resulting in collision being peculiarly within the knowledge of defendant railway company, plaintiff passenger was not bound to prove the particular acts of commission or omission on the part of the employees of defendant which caused the accident, and was not therefore required to allege the same in his petition.—Arnett v. Illinois Cent. R. Co., 176 N.W. 322, 188 Iowa 540.

(2) In action by street car passenger for injuries from collision, general allegations of negligence are permitted, where plaintiff, not being familiar with instrumentalities employed by defendant, has no knowledge of specific character of negligent act causing injury, and doctrine of presumption of negligence will be applied.—Porter v. St. Joseph Ry., Light, Heat & Power Co., 277 S.W. 913, 311 Mo. 66.
10 C.J. p. 1002 note 23 [a].

As against demurrer

(1) In action against street railroad company by intending passenger for injuries received when struck by overhang of street car at curve, count of amended complaint alleging negligence in operation of street car as proximate cause of injuries to intending passenger while standing at customary and regular stopping place waiting to take passage on street car was not demurrable.—Birmingham Electric Co. v. Jones, 176 So. 203, 234 Ala. 590.

(2) Whether extraordinary care for a passenger's safety required a street car motorman to get off and see that his car would not collide with a train before crossing railroad tracks was a question for the jury, and a petition alleging a failure to do so was not demurrable.—Rome Ry. & Light Co. v. Gaddis, 111 S.E. 67, 28 Ga.App. 213.

As against objection after judgment

A complaint in an action for personal injuries sustained when the motor stage in which deceased was riding collided with another automobile in the midst of a pool of oil on the highway, occasioned by the breaking of a nearby pipe line, which alleged that the driver "negligently and carelessly caused said stage to collide with the automobile," sufficiently alleges negligence as against an objection, after judgment, that no cause of action was stated.—Carnahan v. Motor Transit Co., 224 P. 143, 65 Cal.App. 402.

96. Ala.—Louisville & N.R. Co. v. Bowen, 103 So. 872, 212 Ala. 690.
Ohio.—Wehrenberg v. Cincinnati Traction Co., 2 Ohio N.P.,N.S., 271.
10 C.J. p. 1003 note 24.

Allegations as to safeguarding of passengers

(1) In an action for injuries against city operating street railroad, complaint alleging that city failed to adopt any other method of making stopping place reasonably safe or any safeguard for the protection of intending passengers, and failed to operate any system whereby intending passengers could signal street cars for the purpose of allowing them to board them, while perhaps subject to motion to make more specific and certain, was not bad as against demurrer.—Tobin v. City of Seattle, 221 P. 583, 127 Wash. 664.

(2) Allegation in action for injuries against street railway company, charging negligence in failing to provide any means whatsoever for safeguarding prospective passengers, while doubtless subject to motion to make more specific and certain, was not bad as against demurrer.—Tobin v. City of Seattle, supra.

but not as against a motion to make more specific;[97] and it has been held that such general language as amounts to hardly more than a statement of a mere conclusion is good as against a general demurrer.[98] The general rule applies, although plaintiff has knowledge of the particular act of negligence which caused the injury.[99] However, a count consisting of general allegation, omitting the word "negligence," and not alleging any facts to show negligence is demurrable.[1] Although by statute plaintiff, in the case of railroads, need not show more than that the injury was caused by a running train, as to other carriers plaintiff must allege facts constituting negligence.[2] Even though an allegation of negligence in general terms would be insufficient, if the passenger's declaration alleges facts showing that the accident was not one which would ordinarily have occurred had reasonable care been exercised, the declaration will be regarded as sufficient.[3]

Where the complaint avers negligence generally and then charges particular acts as constituting negligence, the latter allegation supersedes the general allegation of negligence,[4] and, unless the facts so alleged in themselves constitute actionable negligence, the complaint is subject to a demurrer.[5] When the action is brought against a carrier and another, it is not improper for plaintiff to allege general negligence against the carrier and specific acts of negligence against codefendant.[6]

It has been held that a declaration for the wrongful death of a passenger which properly pleads the facts showing the relationship of passenger and carrier is not bad on demurrer because it may charge a higher degree of care than is owed by carrier to passenger in executing its contract of carriage, as all such matter is treated as surplusage.[7]

An allegation of negligence is not objectionable because the negligence did not occur at the time of the accident causing the passenger's injury, as it is the result of the negligence which is complained of.[8]

97. Wash.—Tobin v. City of Seattle, supra.
10 C.J. p 1003 note 25.

98. Ala.—Birmingham R., etc., Co v. McCurdy, 55 So 616, 172 Ala. 488.

99. Tex.—San Antonio Tract Co. v. Williams, 78 S.W. 977, 34 Tex Civ. App. 372.

1. Ala.—Birmingham Ry, Light & Power Co. v. Garrett, 73 So. 818, 198 Ala. 445.

2. Ark.—Wade v. Brocato, 95 S.W. 2d 94, 192 Ark 826.

Bus passenger's complaint alleging that while riding in defendant's bus in seat back of driver a small stone was thrown through open window near driver's seat and struck passenger in eye as bus passed automobile traveling at high rate of speed on gravel road and alleging negligence only in bus driver's leaving particular window open is demurrable as not stating facts constituting negligence—Wade v. Brocato, 95 S.W 2d 94, 192 Ark. 826.

3. Va. — Houston v. Lynchburg Traction & Light Co., 89 S.E 114, 119 Va. 136.

4. Ala.—Birmingham R., etc., Co. v. Wilcox, 61 So. 908, 181 Ala 512.
10 C.J p 1003 note 28

Allegations held general

(1) Allegation of failure to warn passenger of opening of car door at time of collision is no part of a general charge that door was negligently opened—Morris v. Union Depot Bridge & Terminal R. Co., 8 S. W.2d 11, 320 Mo. 371.

(2) Allegations that plaintiff passenger was injured by a cinder from a passing locomotive hitting his eye, due to defendant's negligence, etc., plead negligence generally, and not specifically—Malone v. St. Louis-San Francisco Ry. Co, 213 S.W. 864, 202 Mo App. 489.

(3) In action for injuries sustained by passenger falling on pavement when street car moved as she was boarding it, an allegation regarding negligence, stating generally the act complained of and alleging that which of defendant's servants was negligent is a fact peculiarly within defendant's knowledge, is general—Zimmerman v. Kansas City Public Service Co, 41 S.W.2d 579, 226 Mo. App 369.

(4) In a passenger's action for injuries sustained in a derailment caused by a cow on the track, allegations that the derailment would not have happened except for the negligence of defendant and that such negligence was the proximate cause of the injury, but that the reason for the derailment and the particular acts of negligence were peculiarly within defendant's knowledge, and not within plaintiff's knowledge, is a general, rather than a particular, plea of negligence—Eastern Texas Electric Co. v. Kappe, Tex Civ App, 235 S.W. 253, error refused.

Allegations held specific

(1) Allegation of negligence in failing to provide a safe and suitable conveyance for plaintiff, in a complaint in action against street railroad for injuries to passenger alleging that injuries resulted from act of carrier's servants.—Derrick v Columbia Ry., Gas & Electric Co, 137 S E 682, 139 S C 200.

(2) Petition alleging motorman negligently started street car with violent jerk, causing plaintiff to be thrown to floor, charges specific negligence, as it alleges the particular person who did the particular act—Dieterman v. Springfield Traction Co, Mo App, 26 S.W 2d 866.

As limiting negligence charged

Where it is alleged that plaintiff "was caused to slip and fall on the snow and slush lying on" defendant's station platform, the negligence charged by the complaint is only with respect to existence of snow and slush, and no defect in the platform was charged—Murphy v Hudson & M R. Co., 167 N Y S 895, 180 App Div. 585.

5. Fla.—Barnwell v. Seaboard Air Line Ry., 74 So. 497, 73 Fla. 482
10 C J. p 1003 note 29.

Where facts show no duty

While general allegations as to duty and negligence, standing alone, may with other allegations state cause of action, yet, if other allegations of count state specific material facts showing no duty or negligence within meaning of general allegations, declaration may be had on demurrer—Barnwell v. Seaboard Air Line Ry., 74 So. 497, 73 Fla. 482

6. Mo.—Story v. People's Motorbus Co of St. Louis, 37 S.W 2d 898, 327 Mo. 719—Hulen v Wheelock, 300 S.W 479, 318 Mo 502.

7. W Va.—Brogan v Union Tract Co, 86 S.E. 753, 76 W Va. 698.

8. Ala.—Alabama Power Co v Edwards, 121 So. 543, 219 Ala. 162.

Derailment; running off road. In case of injury to a passenger by reason of the derailment or wreck of a train or car, it is sufficient to allege that the derailment was caused by the negligence of defendant without specifying in what particular act the negligence consisted;[9] and the same rule has been applied in cases of a motor carrier whose automobile or bus leaves the highway and runs into a ditch, the situations being regarded as analogous,[10] although there is authority to the contrary in the case of a street railroad.[11] Since the fact of derailment raises a presumption of negligence, an allegation of the fact of derailment has been held sufficient without further allegation of negligence on defendant's part.[12]

Willfulness and wantonness. Where the action is for a willful and wanton injury, an allegation of simple negligence only is not sufficient, but facts showing willfulness, wantonness, or gross negligence on the part of defendant or its employees must be alleged,[13] and if the circumstances averred do not justify an inference of intentional wrong the pleading is insufficient as one for wantonness.[14]

d. Acts of Employees, Fellow Passengers, and Other Third Persons

One seeking to recover for the acts of employees of the carrier, or of copassengers, or other third persons, must allege all matters necessary to his particular cause of action.

An allegation of negligence of an employee is sufficient to charge the carrier with negligence,[15] and it is not necessary to allege that the employee was acting by the authority, and with the knowledge, of the carrier,[16] nor specifically to charge that the acts of the employee were within the scope of his employment, if that fact appears in a general way from the allegation that the employee was acting for the carrier in the matter of which negligence is alleged;[17] nor is it necessary to allege the names of the employees whose negligence caused the injury.[18] Thus, where the injury is caused by the operation of a train or car, it is usually sufficient to allege, in general terms, that the injury complained of was occasioned by the negligence of the servants or agents of the carrier in charge of the train or car;[19] but where the negligent act is apparently not one within the scope of the employee's employment, it must be alleged that he acted within the scope of his employment.[20] A complaint seeking recovery for injuries from defendant as a carrier need not allege that the injuries were not caused by an independent contractor operating defendant's vehicle.[21]

Agency may be sufficiently alleged by allegations of the particular acts and conduct of the alleged agent.[22]

In actions for injuries received by a passenger by reason of assaults, or other wrongful acts on the part of an employee or fellow passenger, or other person, which the employees of the carrier should have prevented, the allegation may properly be of negligence and misconduct on the part of the carrier with respect thereto;[23] and in case of an assault, or other acts, by a person other than an

9. Va.—Hines v. Beard, 107 S.E. 717, 130 Va. 286.
10 C.J. p. 1003 note 31.

10. Cal.—Leitert v. Pickwick Stages, Northern Division, 229 P. 889, 68 Cal. App. 504—Lawrence v. Pickwick Stages, Northern Division, 229 P. 885, 68 Cal. App. 494.

11. Del.—Redding v. Wilmington & Philadelphia Traction Co., 108 A. 739, 7 Boyce 518.

12. Ariz.—Southern Pac. Co. v. Hogan, 108 P. 240, 13 Ariz. 34, 29 L.R.A.,N.S., 813.
10 C.J. p. 1004 note 32.

13. Ala.—Central of Georgia R. Co. v. Mathis, 71 So. 674, 196 Ala. 32.
10 C.J. p. 1004 note 33.

14. Ala.—Western Ry. of Alabama v. Turrentine, 73 So. 40, 197 Ala. 603.

15. Ind.—Illinois Cent. R. Co. v. Hawkins, 115 N.E. 613, 66 Ind.App. 312.

16. Ky.—Shelton Taxi Co. v. Bowling, 51 S.W.2d 468, 244 Ky. 817.

17. Ala.—Mobile & O. R. Co. v. Davis, 137 So. 525, 223 Ala. 600.
10 C.J. p. 1004 note 34.

18. Ga.—Haynie v. Central of Georgia Ry. Co., 93 S.E. 258, 20 Ga. App. 599.
10 C.J. p. 1004 note 35

Where train is identified

A petition of passenger injured when boarding train is not subject to special demurrer because failing to name company's agents in charge of train, train itself being identified by number and further description—Haynie v. Central of Georgia Ry. Co., 93 S.E. 258, 20 Ga.App. 599.

19. Tex.—Texas, etc., R. Co. v. Boyd, Civ.App., 141 S.W. 1076.
10 C.J. p. 1004 note 36.

In order to allege specific negligence, as to a street car passenger, there must not only be an averment as to the particular servants whose negligence is complained of, but it must also be pointed out wherein they or either of them have been negligent.—Bergfeld v. Kansas City Rys. Co., 227 S.W. 106, 285 Mo. 654.

20. Ala.—Alabama Great Western R. Co. v. Pouncey, 61 So. 601, 7 Ala.App. 548
10 C.J. p. 1005 note 37.

21. Ala.—Dixie Stage Lines v. Anderson, 134 So. 23, 222 Ala. 673.

22. Ga.—Ryle v. Central of Georgia Ry. Co., 119 S.E. 342, 30 Ga.App. 737.

23. Ala.—Birmingham R., etc., Co. v. Moore, 42 So. 1024, 148 Ala. 115.
10 C.J. p. 1005 note 38.

Complaints held sufficient

(1) A complaint alleging brakeman could have prevented third person from assaulting plaintiff stated cause of action.—Pittsburgh, C., C. & St. L. R. Co. v. Retz, 125 N.E. 424, 71 Ind.App. 581.

(2) Complaint alleging railroad conductor saw passenger wrestling with robber for possession of revolver, but negligently failed to prevent robber from injuring passenger, having power to do so, is not demurrable.—Terre Haute, Indianapolis & Eastern Traction Co., 170 N.

employee, it should be alleged that the carrier knew, or from the attendant circumstances should have known, of the threatened injury in time to prevent it,[24] and a complaint which fails to show that the injury might have been prevented by the exercise of reasonable care, and that defendant and its servants failed to exercise such care, is insufficient.[25] In such an action, an allegation that the carrier owed plaintiff a high degree of care is not bad as requiring too high a degree of duty.[26] In a passenger's action for assault by one permitted on a train under contract between the carrier and another while acting in the course of, and within the scope of, his business, no allegation of negligence is necessary, the question being liability for the tort of an agent.[27] A petition which clearly states an action against a carrier for assault and battery by its employees in beating, ejecting, and imprisoning a passenger, is not subject to demurrer, because it is insufficient to state a cause of action for malicious prosecution or false imprisonment.[28] Where a petition alleging indecent assault shows that plaintiff was in fact a passenger of a carrier other than the one the acts of whose servants are complained of, it is bad on demurrer.[29] In a petition for assault by a servant of the carrier, an allegation that plaintiff intended to pay his fare is surplusage.[30] One seeking damages because of mortification resulting from the acts of a fellow passenger must allege that the mortification complained of came about through the acts or omissions of the carrier's servants.[31]

Willful or wanton acts. Under the doctrine that a carrier is liable for the willful acts or torts of its agents committed within the general scope of their employment as well as for acts of negligence, in a complaint which shows that plaintiff was a passenger on a train, it is sufficient to charge such willful acts or torts by averring generally that they were committed by the employees of defendant within the scope of their employment, or the line of their duty;[32] and it has been held that it is not necessary to allege the authority of the employee, or that he was acting within the scope of his employment.[33] It is sufficient if the allegations of the petition, if true, would authorize a jury to find willful injury,[34] but if wantonness or willfulness is alleged generally, and the facts on which such charge is predicated are then set out, such facts must in themselves show wantonness or willfulness[35] An allegation which, if true, shows conduct which amounts to a wanton disregard of the right and duty owed to a passenger and which was so gross

E 341, 91 Ind App. 690, rehearing denied 172 N E 659, 91 Ind App. 690.

Complaint held insufficient

Complaint, which alleged that passenger on train was struck without provocation by intoxicated person aboard train—Craig v. New York Cent. R. Co., 287 N Y S. 407, 248 App Div. 557, affirmed 5 N E 2d 356, 272 N Y 610.

24. Ga.—Powell v. Beasley, 194 S E 926, 57 Ga App. 231.
10 C J. p 1005 note 39.

Assault by passenger

A complaint charging that, while plaintiff was a passenger on defendant's train, a negro woman cursed and abused her, to her injury, and averring the injury was proximately caused by gross and wanton negligence of defendant's servants, acting within the scope of their duty as such, was subject to demurrer for failure to aver knowledge.—Hines v. Miniard, 94 So. 302, 208 Ala. 176

Robbery

A petition alleging that a passenger was robbed while standing in the crowded aisle of a passenger coach, but not charging that any employees of the company or anyone connected with it aided or participated in the robbery, nor showing the facts under which it occurred, is not sufficient to authorize recovery against the carrier for the property lost by the robbery.—Hatfield v. Payne, 242 S W. 32, 195 Ky 310.

25. Ind.—Terre Haute, Indianapolis & Eastern Traction Co v. Scott, 150 N E 777, 197 Ind. 587, 43 A. L.R 1029.

26. Ala.—Birmingham Electric Co. v. Driver, 166 So. 701, 232 Ala. 36

27. S D.—Blankenbaker v Chicago, M & St. P. Ry Co, 168 N W. 744, 40 S D. 588, 10 A L.R. 720.

28. Ky.—Louisville & N. R. Co v Mason, 251 S W 184, 199 Ky 337

29. Ky.—Manatis v. Cumberland & M R. Co, 300 S.W. 593, 222 Ky 190.

30. Mo.—State ex rel. United Rys Co of St. Louis v. Allen, 240 S W. 117.

31. Ga.—Hames v. Old South Lines, 183 S E 503, 52 Ga.App. 420.

32. Ala.—Birmingham Electric Co v. Mann, 147 So 165, 226 Ala 379
Ohio.—Siegel v. Cleveland Electric Ry. Co, 17 Ohio Cir Ct ,N.S, 18.
10 C.J. p 1005 note 40.

Sufficient allegation of willfulness

(1) A complaint, charging conductor with "gross and wanton negligence," imputes to him a willingness to inflict injury, or a willfulness in pursuing a course of conduct which would naturally or probably result in injury, or an attempt to perpetrate wrong.—Hines v Miniard, 86 So. 23, 204 Ala. 514, 12 A.L.R. 238.

(2) A count, alleging that the carrier's "servants, agents or employees, acting within the line and scope of their employment as such agents, servants or employees at said time and place, wantonly injured plaintiff on said date and occasion by wantonly causing the plaintiff to be caught in the doors and wantonly injuring and damaging her, etc," is good as against demurrer, on the ground that the facts did not constitute wantonness as matter of law; that it purports to set out quo modo of wantonness, whereas facts did not constitute wantonness, that it does not appear with sufficient certainty that defendant's servants, acting within employment, wantonly injured passenger, and that it does not appear that defendant's employees acting within employment, wantonly caused passenger to fall with knowledge that passenger would likely sustain injuries, or with reckless disregard of consequences.—Birmingham Electric Co. v. Mann, 147 So. 165, 226 Ala 379.

33. Ala.—Birmingham R., etc., Co v Mason, 34 So. 207, 137 Ala. 342
10 C J p 1005 note 41.

34. Ga.—Forster v. Southern Ry Co, 146 S E 516, 39 Ga App 216.

35. Ala.—Birmingham Electric Co y. Guess, 131 So. 883, 222 Ala 280

as to show a wanton disregard of the consequences on the part of the employee is sufficient as against a general demurrer [36]

In some jurisdictions, in order that punitive damages may be recovered for such acts, it must be alleged that such acts were either participated in, authorized, or ratified by defendant.[37]

e. Place and Time

The place and time of the accident or injury should be properly alleged.

The complaint, declaration, or petition should state as definitely as possible the place where,[38] and the time when,[39] the injury occurred, although it has been held that it is not necessary to specify the time of the injury.[40] However, it is not necessary to allege specifically that the place at which the injury occurred was between the points of plaintiff's departure and destination.[41]

f. Passengers Boarding or Alighting

All matters necessary and proper to show the negligence and liability of a carrier for injuries received when attempting to board or alight from a car or train must be alleged.

In an action for injuries received while attempting to board or alight from a train or car, it should be alleged that the train or car was at a station provided for passengers, or at a place where it was usual or customary to receive or discharge passengers,[42] or that plaintiff was invited or knowingly permitted, by an authorized employee of the company, to make the attempt at the place where it was made,[43] and matters sufficient to charge the carrier with notice of plaintiff's intention to board the car or train should be alleged.[44]

At unsafe place. A complaint for injuries received while alighting at an unsafe place should allege the facts which show defendant's duty to provide a safe place and means for alighting, and its failure so to do, and the resulting injury,[45] although it need not allege what constitutes a safe place,[46] or give a minute description of the place where the stop was made and the injuries occurred.[47] It should charge in terms that the stop was at a place not reasonably safe or convenient, or state facts from which such a conclusion follows as a matter of law.[48] As a carrier having provided proper facilities for boarding or leaving a con-

38. Ga.—Tennessee Coach Co. v Snelling, 180 S.E. 741, 51 Ga App 432.

37. U S—Norfolk & P. Tract Co. v. Miller, Va., 174 F 607, 98 C.C.A. 453.

38. Ark—St Louis, etc., R. Co v Wright, 150 S.W. 706, 105 Ark 269
10 C J. p 1006 note 43

39. Ark—St. Louis, etc., R. Co. v. Wright, supra
10 C J. p 1006 note 44.

40. Ind—Wabash R Co. v. Savage, 9 N.E. 85, 110 Ind 156.

41. Tex—International, etc., R Co v. Underwood, 4 S W. 216, 67 Tex. 589

42. Ind—Terre Haute Tract., etc., Co. v. Payne, 89 N E. 413, 45 Ind. App. 132
10 C.J p 1006 note 47.

43. Ind—Louisville, etc., R. Co. v Wood, 14 N.E 572, 16 N E 197, 113 Ind. 544
10 C.J p 1006 note 48.

Allegations held sufficient

In an action for injuries sustained by a passenger when alighting from a train, where acts were sufficiently alleged to show that the brakeman was on the train as such, that as brakeman and as the employee and servant of the railroad he invited and permitted the passenger to alight at a dangerous place for discharging passengers not provided by the railroad for the discharge thereof, states a cause of action as against the contention that there was no allegation that the brakeman was acting within the scope of his authority—Fort Worth & D. C Ry. Co. v. Lovett, Tex. Civ.App., 243 S W. 519.

44. Conn—Tardieu v. Connecticut Co., 154 A. 173, 113 Conn. 94
Ga—Norton v. Georgia Ry. & Power Co., 110 S E. 459, 28 Ga App. 167.

45. Ala—Mobile Light & R. Co v. Therrell, 88 So 677, 679, 205 Ala. 553, citing **Corpus Juris** with approval.
10 C J p 1006 note 49.

Allegations held sufficient

(1) Petition in an action for injury to a passenger while alighting from a train at destination, alleged to have been due to the stopping of the train in an unsafe position, states a cause of action under Neb Rev.St 1913 § 6052, making railroads liable for all injuries to passengers, except where arising from criminal negligence of the passenger or violation of express rules—Jones v. Chicago, R. I. & P Ry. Co., C C A.Neb., 260 F. 929.

(2) Counts charging negligence in not maintaining a suitable means for plaintiff to alight with safety at station, and alleging its duty to do so and its negligence, are sufficient against demurrer.—Atlantic Coast Line R Co. v. Farmer, 79 So. 35, 201 Ala 603.
10 C J. p 1006 note 49 [a].

Allegations held insufficient

(1) In a passenger's action for injuries, an allegation that the place where defendant's car stopped to permit plaintiff to alight was dangerous for a person walking on crutches was not a sufficient allegation of lack of safety or inconvenience, where it did not allege that plaintiff was walking on crutches—Mobile Light & R. Co v. Therrell, 88 So 677, 205 Ala. 553

(2) In a passenger's action for injuries, an allegation that the place where defendant stopped its car for plaintiff to alight was dangerous for a person walking on crutches was a negation of danger for persons normally conditioned and not walking on crutches.—Mobile Light & R. Co. v Therrell, supra.

Complaint showing violation of statute regulating construction

Complaint alleging place where car stopped for passengers to alight was unsafe, which alleges facts showing a violation of Burns St Annot 1914 § 5634, requiring street railway tracks to be laid at the same grade as the streets, as against contention that complaint did not show existence of duty on defendant's part to protect passenger from danger.—Union Traction Co. of Indiana v Haney, 132 N. E. 260, 78 Ind App. 624.

46. Ala—Montgomery St. R. Co v. Mason, 32 So. 261, 133 Ala. 508.

47. Va—Richmond City R Co. v. Scott, 11 S E 404, 86 Va. 902
10 C J. p 1007 note 51.

48. Ala.—Mobile Light & R Co. v. Therrell, 88 So 677, 205 Ala 553.

veyance is ordinarily under no duty to render manual assistance, a count based on an employee's failure or refusal to render such assistance must allege facts showing that the duty to do so was present.[49]

Sudden starting or jerking. A complaint for injuries from a sudden starting or jerking of a train or car is generally sufficient where, after alleging that the train or car had stopped, or slowed down to a rate of speed safe for plaintiff to board or alight, at a proper stopping place,[50] it alleges in general terms that while plaintiff was in the act of boarding or alighting from the car or train it was suddenly caused to start or jerk, or increase its speed, through the negligence of defendant or its employees in the operation of the car or train, thereby causing plaintiff's injury,[51] although it does not allege that the car had come to a stop when he made the attempt to board or alight, where the facts alleged imply notice to the carmen of his position,[52] nor that it had not been stopped for a reasonable time.[53] Since every jerk or jar of a train or car does not amount to negligence, allegations that, as plaintiff was boarding or alighting, the car was started or jerked, or the speed suddenly increased, as a proximate consequence of which plaintiff was injured, are insufficient as allegations of negligence,[54] unless they also allege that the jerk was extraordinary, or more than a usual and inevitable accident,[55] especially where the passenger was safely on the car and was not injured while attempting to board or leave it,[56] or unless they conclude with the averment that plaintiff's injuries were proximately caused by the negligent manner in which defendant operated the car.[57] However, where nothing more than that the carrier was guilty of negligence need be alleged and proved, it is not required of plaintiff that he allege the jerk was unnecessary.[58] It has been held necessary to allege

49. Ala.—Atlantic Coast Line R Co. v. Farmer, 79 So. 35, 201 Ala 603.

Allegation sufficient

A count of the complaint, alleging that defendant's servants knew of the irregularity, etc., of the ground at the place where passenger was required to alight, that he was crippled and walked with crutches, and that although it was dangerous for him to leave the car without assistance, they did not assist him, sufficiently charges wanton negligence—Mobile Light & R. Co. v. Therrell, 88 So. 677, 205 Ala. 553

Allegations held insufficient

Counts based on conductor's failure or refusal to assist passenger in alighting when, on account of conditions at car step, she could not alight without peril, not alleging any want of facilities for leaving the car in some other way.—Atlantic Coast Line R. Co v. Farmer, 79 So. 35, 201 Ala. 603.

50. Colo.—Fox v. Denver City Tramway Co., 143 P. 278, 57 Colo. 511.
10 C.J. p 1007 note 52.

51. Cal.—Murray v. United Railroads of San Francisco, 193 P. 596, 49 Cal App. 462.
Fla.—Atlanta & St. A. B. Ry. Co. v. Kelly, 82 So. 57, 77 Fla. 479.
Ind.—Doyle v. Union Traction Co., 152 N.E. 877, 85 Ind App. 62—Pittsburgh, C., C. & St. L. Ry. Co. v. Friend, 118 N.E 598, 70 Ind. App. 366.
Mo.—Lammert v. Wells, App., 282 S. W. 487.
Okl.—Oklahoma Union Ry. Co. v. Mitchell, 231 P 1062, 105 Okl. 152
Or.—Rostad v. Portland Ry., Light & Power Co., 201 P. 184, 101 Or 569.
10 C J. p 1007 note 53.

Allegations showing cause for attempt to board moving train

In action for injuries to passenger while boarding a moving train, petition showing injury through act of railroad in starting train without warning prior to time told passenger on alighting, thereby knowingly creating a situation which would naturally induce passenger to attempt to board train, and suddenly jerking train while passenger was so doing, states a cause of action—Redfield v. New York Cent. R. Co., C.C.A.Mo, 83 F.2d 62

Sufficiency after judgment

Complaint, alleging that plaintiff's wife was a passenger on one of defendant railroad's trains, and that while the train was standing at a station to allow passengers to leave it, and while the wife was doing so, the train was suddenly started to her injury, was sufficient to sustain judgment for plaintiff when liberally construed on appeal, in the absence of appropriate and specific grounds of demurrer.—Central of Georgia Ry. Co. v. Williams, 84 So. 633, 17 Ala. App. 259.

52. Ind.—Indianapolis, etc., Rapid Transit Co. v. Walsh, 90 N.E 138, 45 Ind App. 42.
10 C.J. p 1007 note 54.

53. Ind.—Public Utilities Co. v. Whitehead, 134 N.E. 894, 78 Ind. App. 85.
Ky.—Louisville & N. R Co. v. Campbell, 35 S.W.2d 26, 237 Ky. 182.

54. Ga.—Rome R., etc., Co. v. Keel, 60 S.E. 468, 3 Ga App. 769.
10 C J. p 1008 note 56.

55. Mo.—Saxton v Missouri Pac. R Co., 72 S.W. 717, 98 Mo.App. 494.

56. Mo.—Laycock v. United Rys Co of St. Louis, 235 S.W. 91, 290 Mo. 344, answering certified questions, App., 227 S.W 883.

Allegations held sufficient

In a street car passenger's action for injuries, a petition alleging that the car moved with a sudden and unexpected jerk, pulling the car forward with such force as to throw some one in the inside of the car against the door, breaking the glass, and causing it to strike plaintiff in the eyes and face, sufficiently alleged that the jerk was an extraordinary and unusual movement of the car—Laycock v. United Rys. Co. of St. Louis, 235 S.W. 91, 290 Mo. 344, answering certified questions, App., 227 S.W. 883.

57. Ala.—Birmingham R., etc., Co. v. Gonzalez, 61 So 80, 183 Ala. 273, Ann Cas 1916A 543.

Cause of action held stated

A petition, alleging that plaintiff boarded defendant's pay-as-you-enter car at a transfer station, where it stopped to take on passengers, and that, while on the platform looking in her purse for her fare, the car started with a sudden jerk, throwing another passenger against her and throwing her against an iron bar, setting out the particulars of her injuries, denying her own negligence, and alleging the injury to have been the proximate result of defendant's negligence in starting the car without warning, set out a cause of action—Columbus R. Co v. Joyce, 104 S.E. 21, 25 Ga App. 652.

58. Ark.—Arkansas Power & Light Co. v. Mart, 65 S.W.2d 39, 188 Ark. 202.

that it was the duty of the employee of the carrier to look out for the safety of plaintiff injured by an unexpected movement of the car while alighting therefrom.[59]

An allegation that the train started before plaintiff had a reasonable time to board or alight safely is a sufficient averment that the train was not stopped for a sufficient length of time to enable plaintiff, using due diligence, to board or alight in safety.[60]

It is not necessary to allege that plaintiff was in danger, and that this fact was known to defendant, if the circumstances under which the injuries were received, and from which this conclusion might be drawn, are alleged in detail.[61]

A complaint alleging wanton negligence against defendant's employees or some of them in suddenly starting a street car, knowing that plaintiff was disembarking, is insufficient in not averring that all of the employees knew of plaintiff's position, or that those who started the car knew of it.[62]

Crowded car. An allegation that defendant, a street car company, carelessly and negligently permitted its cars, exits, and running board to be greatly crowded with passengers, whereby plaintiff while attempting to alight was thrown and injured, states a cause of action.[63]

g. Matters of Defense; Contributory Negligence

Defenses need not be negatived. In general, freedom from contributory negligence need not be pleaded by the passenger.

Matters of defense ordinarily need not be anticipated and denied in the declaration, complaint, or petition.[64]

Contributory negligence. In some states it is necessary in the petition or complaint expressly to negative any fault or contributory negligence on the part of plaintiff.[65] In most of the states, however, it is held sufficient so to allege the facts as to indicate that the injury was the result of the fault or negligence of defendant, without expressly averring plaintiff's freedom from contribution thereto, which is regarded as a matter of defense,[66] unless the other averments necessary to state a cause of action suggest the inference that plaintiff may have been guilty of contributory negligence;[67] but even in jurisdictions in which contributory negligence need not be negatived, the complaint, declaration, or petition is insufficient on demurrer if the allegations thereof show that plaintiff was guilty of contributory negligence proximately causing his injury,[68] although it has been held that the complaint is not demurrable if the facts stated do not conclusively show contributory negligence.[69]

h. Proximate Cause

The facts alleged must show that the negligence

59. La.—Mills v. St. Tammany & New Orleans Ry. & Ferry Co., 71 So. 511, 139 La. 285.

60. Ala.—Birmingham R., etc., Co. v. Jung, 49 So. 434, 161 Ala. 461, 18 Ann Cas. 557
10 C.J. p 1008 note 59.

61. Ga.—Coleman v. Georgia R., etc., Co., 10 S.E. 498, 84 Ga. 1.
10 C.J. p 1008 note 60.

62. Ala.—Birmingham R., etc., Co. v. Bennett, 39 So. 565, 144 Ala. 369.
10 C.J. p 1008 note 61.

63. Ga.—Worthington v. Georgia R., etc., Co., 62 S.E. 525, 131 Ga. 450.
N.J.—Dunham v. Public Service Corp., 69 A. 1012, 76 N.J.Law 452

64. Ala.—Culberson v. Empire Coal Co., 47 So. 237, 156 Ala. 416.
10 C.J. p 1008 note 63.

65. Iowa.—Burger v. Omaha, etc., St. R. Co., 117 N.W. 35, 139 Iowa 645, 130 Am.S.R. 343.
10 C.J. p 1008 note 64.
Pleading of contributory negligence of person injured generally see infra § 799.

66. Ill.—Panor v. Northwestern Elevated R. Co., 228 Ill.App. 162.
Ind.—Pittsburgh, C., C. & St. L. Ry. Co. v. Friend, 118 N.E. 598, 70 Ind. App. 366.
10 C.J. p 1008 note 65, p 1009 note 67.

67. Ky.—Louisville & N. R. Co. v. Whitaker, 300 S.W. 912, 222 Ky. 302.
10 C.J. p 1009 note 66.

Petition held sufficient

Petition, in action for personal injuries, averring that plaintiff stepped partly on the track to signal defendant's interurban car to stop, and, on receiving what she understood was the usual response that it would stop, was struck and injured while getting away from the track by the car passing by at a great speed, does not show on its face that plaintiff was guilty of contributory negligence.—Texas Electric Ry. v. Hooks, Tex.Civ.App., 211 S.W. 654, dismissed for want of jurisdiction.

Petition held demurrable

Where plaintiff was injured in attempting to get off a moving train, his petition not alleging that train was not traveling so fast as to make danger of alighting therefrom apparent, and that plaintiff believed he could alight safely, is demurrable.—Louisville & N. R. Co. v. Whitaker, 300 S.W. 912, 222 Ky. 302.

68. Ind.—Pittsburgh, C., C. & St. L. Ry. Co. v. Boys, 123 N.E. 482, 71 Ind.App. 102.
Ohio.—Wehrenberg v. Cincinnati Traction Co., 2 Ohio N.P.,N.S., 271.
10 C.J. p 1009 note 68

69. Ga.—Leslie v. Georgia Power Co., 171 S.E. 395, 47 Ga.App. 723.—Watts v. Colonial Stages Co., 163 S.E. 523, 45 Ga.App. 115.
Ind.—Pittsburgh, C., C. & St. L. Ry. Co. v. Friend, 118 N.E. 598, 70 Ind.App. 366.—Ft. Wayne & N. I. Traction Co. v. Kumb, 116 N.E. 309, 64 Ind.App. 529.
10 C.J. p 1009 note 69.

Complaint not demurrable

A declaration alleging that defendant carrier, on a dark night, after announcing that the next stop of the train would be at plaintiff's destination, stopped the train on a trestle before reaching such destination, with the car doors open, thus misleading plaintiff into believing that his station had been reached, as a result of which plaintiff alighted and fell from the trestle, was not demurrable as showing contributory neg-

or wrongful act of the carrier or its employees was the proximate cause of the injury.

The declaration, complaint, or petition must allege facts which make it appear that the injury complained of was the proximate result of the alleged negligence or wrongful act on the part of the carrier or its employees.[70] It is not necessary formally to charge that such was the fact,[71] it is sufficient that the facts alleged lead, with reasonable certainty, to the conclusion that the injury proximately resulted from the negligence charged.[72]

Where the petition shows that the proximate cause of the injury to a passenger having safely alighted from a conveyance was the negligence of some third person, the petition is bad on demurrer.[73]

Where several acts of negligence are charged, it need not be alleged which act was the direct or sole cause of the injury, and, where all of them together might have caused it, it may be alleged that each of them contributed to the injury.[74]

Mental suffering. In those jurisdictions in which there can be no recovery for mental suffering unaccompanied by physical injury, a complaint which fails to show that plaintiff's mental suffering was connected with physical injury to him proximately resulting from defendant's negligence does not state a cause of action, where mental suffering is the only damage claimed.[75]

i. Amendment

As in other civil actions the passenger may, in a proper case, amend his declaration, complaint, or petition so long as no new cause of action is introduced.

In actions by passengers against carriers, as in other cases, amendments of the declaration, complaint, or petition may be made which do not introduce new causes of action,[76] and in a proper case

ligence.—Louisville & N. R. Co. v. Norton, 78 So. 982, 75 Fla. 597.

70. Ill.—See McConnell v. Chicago Rys. Co., 199 Ill.App. 490
Mo.—Crone v. United Rys Co. of St Louis, 236 S.W. 654—Curry v. St Louis-San Francisco Ry. Co, 296 S.W. 473, 221 Mo App. 1.
Pa.—Scharf v. Pennsylvania R. Co, 10 Pa Dist. & Co. 207.
10 C J. p 1010 note 70.

Allegations held sufficient

Complaint in action by passenger struck by automobile while alighting was sufficient to show proximate cause of injury was combined negligence of railroad and automobilist.—Ft. Wayne & N. I. Traction Co. v. Kumb, 116 N.E. 309, 64 Ind.App. 529.

Complaint held insufficient

Count alleging street railroad failed to sound gong at crossing as required by ordinance was defective in not averring that automobile which was knocked against the prospective passenger was struck by car at street crossing.—Alabama Power Co. v. Bass, 119 So. 625, 218 Ala. 586, 63 A.L.R. 1.

71. Ind.—Hammond, etc, Electric R. Co. v. Antonia, 83 N E. 766, 41 Ind. App. 335.

72. Cal—Rystinki v. Central California Traction Co., 165 P. 952, 175 Cal. 336.
10 C.J. p 1010 note 72.

Allegations held sufficient to allege proximate cause.

U.S.—Pennsylvania Co. v. Clark, C. C.A Ohio, 266 F. 182.
Ala.—Alabama Power Co. v. Bass, 119 So. 625, 218 Ala. 586, 63 A.L R. 1.
Cal—Lawrence v. Pickwick Stages, Northern Division, 229 P. 885, 68 Cal.App. 494.
Ga—Rome Ry. & Light Co v. King, 117 S.E. 464, 30 Ga App. 231.
Ill—Paris v. East St. Louis Ry. Co, 275 Ill App 241.
Ind—Pittsburgh, C, C. & St. L. Ry Co v. Friend, 118 N E. 598, 70 Ind App. 366
N Y.—Broder v New York Consol R. Co, 162 N Y.S. 1002, 98 Misc. 256.
Okl—St. Louis-San Francisco Ry. Co. v. Bell, 273 P. 243, 134 Okl. 251.
Tex—Interstate Casualty Co. of Birmingham v. Hogan, Civ.App, 232 S.W. 354.

73. Ga—Martin v. Georgia Power Co, 165 S E. 880, 45 Ga App. 799.

74. Mo.—Parker v. United R. Co, 133 S.W. 137, 154 Mo.App. 126.

Allegation showing concurrent negligence

Allegation that motorman saw express wagon in time to have avoided collision did not show street railroad's negligence was sole proximate cause of collision, rendering verdict for passenger against express company error.—Kloss v. Minneapolis St Ry. Co, 219 N.W. 179, 174 Minn. 294.

75. Ind.—Cleveland, etc., R Co. v Stewart, 56 N E. 917, 24 Ind App. 374.

76. Ala—Gaines v. Birmingham Ry, Light & Power Co, 51 So. 238, 164 Ala. 6—Birmingham Ry., Light & Power Co. v. Jung, 49 So. 434, 161 Ala 461, 18 Ann Cas. 557.
Ga.—Southern Ry. Co. v. Clay, 61 S E 226, 130 Ga. 563.
Mo—Hayward v. People's Motorbus Co. of St. Louis, App., 1 S.W.2d 252.
10 C J. p 1011 note 82.

Amendments held permissible

(1) In an action by a passenger against a street railway company for personal injuries sustained while alighting from a car, plaintiff may at the trial two years after the accident amend his statement by changing averment that there was no stop of the car at all to an averment that there was an insufficient stop, such amendment not being a change of the cause of action but only a restatement in a different form which did the appellant no injury—Schmelzer v. Chester Traction Co, 66 A. 1005, 218 Pa. 29.

(2) Where a petition alleged that on approaching the station the train slowed up, and plaintiff prepared to step off, and on alighting the speed was increased and he was injured thereby, an amendment that defendant was negligent in that the train did not stop a sufficient length of time was improperly refused, where such amendment merely amplified the allegations of the petition, did not affect the substance of the case as originally alleged, nor alter its nature in any respect, and was timely—Evans v. Southern Ry. Co., 77 S E. 197, 12 Ga App. 319.

(3) An amendment of the petition by adding the quoted part so as to make it allege that, while plaintiff was on defendant's street car as a passenger the car jumped the track "by reason of the carelessness and negligence of the defendant, its agents, servants and employés," and plaintiff was thereupon thrown violently from her seat and seriously injured, did not constitute a departure.—Patterson v. Springfield Traction Co, 163 S.W. 955, 178 Mo.App. 250.

(4) Where the petition suggests a breach of the obligation which the carrier owes a passenger, it may be amended to conform to the proof, showing that the servants of defend-

amendments are necessary and should be made where allegations material to the cause of action have been omitted.[77] A declaration in tort, however, cannot be so amended as to convert it into an action on the contract of carriage.[78]

§ 762. Plea or Answer

General rules of pleading apply with respect to pleas and answers in actions against carriers of passengers for personal injuries.

The plea or answer in an action against a carrier by a passenger for personal injuries is governed by the general rules relating to such pleadings in civil cases generally, and it must allege everything necessary to a proper statement of the defense.[79] Thus, the plea or answer should allege facts setting up a complete defense to the allegations in the declaration or complaint.[80] Matters of defense, as to which there is no allegation in the complaint, must be set up by special plea, such as an agreement of the passenger to assume the risk,[81] and in order to entitle the carrier to make the defense that it has adopted and promulgated rules and regulations which the passenger has violated, it must plead such rules and allege the facts which constitute the defense.[82] An answer alleging that the injury was due solely and alone to the negligence of a third party presents an affirmative defense in so far as it brings into the case new matter not raised by the complaint.[83] Where defendant pleads specially matters which are covered by the general issue, its plea is bad as amounting to the general issue.[84] In actions ex delicto against the carrier for injury to a passenger, the general issue is "not guilty."[85]

Waiver of defenses. Defenses not made in the plea or answer are generally regarded as waived.[86]

Admissions. An answer admitting that defendant is a railroad or a street railroad corporation admits its character as a common carrier of passengers.[87] A plea of the general issue admits possession and control of the car and appliances described in the declaration,[88] and the capacity in which defendant is sued,[89] and also admits the character in which plaintiff brings his action as set out in the complaint.[90]

§ 763. Issues, Proof, and Variance

a. Issues
b. Matters to be proved
c. Evidence admissible under pleadings
d. Variance

a. Issues

As in civil actions generally, only such matters as are properly put in issue by the pleadings and proof will be considered in actions against carriers for personal injuries.

In an action by a passenger against a carrier for personal injuries, as in other civil actions, such matters, and such only, will be considered on the trial as are properly put in issue by the pleadings and proof in the case.[91] Thus, only such theory of

ant wrongfully assaulted plaintiff who was not a passenger.—McDonald v. St. Louis & S. F. R Co, 146 S W. 83, 165 Mo App 75.

Charging negligence generally

A count, added by way of amendment to a complaint for personal injuries, which alleges negligence of defendant generally in the transportation of plaintiff as a passenger, referring to the same accident and injuries as set forth in an original count, but without setting out the particulars of the accident, does not constitute a new cause of action—Gaines v. Birmingham Ry., Light & Power Co, 51 So. 238 164 Ala. 6—10 C.J p 1011 note 82 [b].

77. Ala.—Montgomery Tract. Co v. Fitzpatrick, 43 So. 136, 149 Ala. 511 9 L R A,N S., 851.
10 C.J. p 1011 note 83

78. Ga.—Cox v. Richmond, etc, R. Co, 13 S E. 827, 87 Ga. 747.

79. Ala.—Western R Co. v. McGraw, 62 So 772, 183 Ala. 220
10 C J p 1011 note 86

80. Ala.—Lawrence v Kaul Lumber Co, 55 So 111, 171 Ala 300.
10 C J. p 1011 note 87.

Allegation of unnecessary matters

Where a complaint charged that child had been injured while attempting to board street car on August 25, 1929, and answer denied child had attempted to board car on that date, further allegation in answer that she had attempted to board car on May 27, 1929, and at that time had caught hand in door, although perhaps unnecessary, constituted no error, since defendant was entitled to prove occurrence.—Curtis v. Dallas Ry & Terminal Co., Tex.Civ.App, 73 S W 2d 964, error dismissed.

81. Ind.—Pittsburgh, etc, R Co v Higgs, 76 N E 299, 165 Ind 694, 4 L.R A.,N.S., 1081.
10 C J p 1011 notes 88, 89.

82. Okl.—Lane v. Choctaw, etc., R Co, 91 P. 883, 19 Okl 324.

83. Cal.—Crosby v. Pickwick Stages, Northern Division, 264 P. 346, 88 Cal App 799—Schropshire v. Pickwick Stages, Northern Division, 258 P 1107, 85 Cal.App 216.

84. Fla.—Atlantic Coast Line R Co. v Crosby, 43 So. 318, 53 Fla. 400
10 C.J p 1012 note 91.

85. Pa.—McCall v. Forsyth, 4 Watts & S. 179.

86. Tex.—St Louis Southwestern R. Co v Parks, 90 S W. 343, 40 Tex. Civ.App 480.
10 C.J. p 1012 note 92.

87. Mo.—Burbridge v Kansas City Cable R. Co., 36 Mo App. 669.

88. Ill.—Kloepher v. Osborne, 177 Ill.App 384.

89. Ill.—Kloepher v Osborne, supra.

90. Ala.—Birmingham R, etc, Co v. Moore, 43 So. 841, 151 Ala. 327.

91. D C.—Mellon v. Seymoure, 12 F. 2d 836, 56 App D C 301.
Iowa.—Kelly v Muscatine B. & S R Co., 191 N W. 525, 195 Iowa 17
Mass.—Latus v Boston Elevated Ry Co, 158 N.E 668, 261 Mass. 233—Bilodeau v Fitchburg & L. St Ry. Co, 128 N.E 872, 236 Mass 526
10 C J. p 1012 note 99.

Excessive speed

An allegation that motorman negligently used power, mechanism, and controls, so that instead of street car gradually coming to stop before collision, it continued on with great force and speed, does not charge negligence in operating car at excessive speed.—Dallas Ry & Terminal Co. v. Wells, Tex.Civ.App, 60 S W.2d 485, error refused.

the case or such matters of negligence as are properly put in issue by the pleadings and proof can be relied on by plaintiff as grounds for a recovery; he cannot charge one kind of negligence or wrong and recover for negligence or wrong of a different character;[92] and the same rule applies to matters which can be relied on by defendant as grounds of defense.[93] The theory on which a complaint against a carrier proceeds must be gathered from the general scope of the pleading and not from detached allegations,[94] or from facts subsequently disclosed by the evidence;[95] and statements of facts merely as inducement or as steps leading up to the injury counted on will not, for the purpose of restricting plaintiff's measure of damages, be construed as the statement of the cause of action on which a recovery is sought.[96] The gist of such an action for personal injuries received by a passenger is generally simple negligence,[97] and recovery cannot be had on a count for negligence on proof of

Issue of failure to discover danger

Railroad must use same care to discover throwing of cut-over switch as to refrain from throwing switch necessitating emergency stop causing injury, and charge that sudden stopping was negligence comprehended both matters.—Gulf, C & S. F. Ry. Co. v. Baldwin, Tex.Civ.App., 2 S.W. 2d 520.

Where two acts alleged

Where petition for damages for injuries received while boarding a street car alleged that the car was suddenly started "and" the vestibule door was negligently closed, the two acts of negligence were separate and distinct, and the use of "and" between them did not make them a single and undivided or indivisible act; hence, plaintiff could submit his case and recover on both or either of them.—Vogts v. Kansas City Rys. Co., Mo.App., 228 S.W. 526.

92. Fla.—Williams v. Hines, 86 So. 695, 80 Fla. 690.
Ga.—Hines v. Hendricks, 104 S.E. 520, 25 Ga.App. 682.
Ind.—Hines v. Rollins, 179 N.E. 183, 97 Ind.App. 251—Engle v. Director General of Railroads, 133 N.E. 138, 78 Ind.App. 547.
Iowa.—Monaghan v. Equitable Life Ins. Co. of Iowa, 168 N.W. 892, 184 Iowa 352, superseding Monahan v. Equitable Life Ins. Co. of Iowa, 156 N.W. 994.
Mo.—Crabtree v. St. Louis & S. F. R. Co., 273 S.W. 1104, 218 Mo.App. 306.
S.C.—Durst v. Southern Ry. Co., 125 S.E. 651, 130 S.C. 165.
Tenn.—Nashville, C. & St. L. Ry. v. Harrell, App., 110 S.W.2d 1032.
Tex.—Brown v. Houston E. & W. T. Ry. Co., Civ.App., 198 S.W. 986, dismissed for want of jurisdiction.
10 C.J. p 1012 note 1.

Recovery as limited by pleadings

(1) Where plaintiff's pleadings sought recovery for injuries sustained after boarding standing street car, she could not recover or introduce evidence showing injury occurred while boarding moving street car.—Hellman v. Los Angeles Ry. Corporation, 27 P.2d 946, 135 Cal.App. 627, rehearing denied, 28 P.2d 384, 135 Cal.App. 627.

(2) In action against street railway for injuries to passenger, where plaintiff pleaded negligence both generally and specifically, he established cause of action by proving either general or specific negligence.—Colorado Springs & Interurban Ry. Co. v. Reese, 169 P. 572, 69 Colo. 1.

(3) A declaration alleging that defendant was a carrier of passengers, and so grossly and negligently managed and operated a brake on the car in which plaintiff was a passenger that the brake was released, and the handle flew back and struck plaintiff, does not authorize recovery for injuries caused solely by defective appliances.—Washington & O. D. Ry Co. v. Smith, 289 F. 582, 53 App.D.C. 184.

(4) In action by one whose foot caught in crossing while signaling for car to stop, where one count of complaint relies on operation of car at negligent rate of speed, and another count on negligent construction of crossing, either count would support verdict.—Union Traction Co. of Indiana v. Barnett, 127 N.E. 287, 75 Ind.App. 19.

(5) In passenger's action against railroad and employee, in which the right to recover was based solely on the negligence of such employee, and in which there was no general allegation of negligence on part of railroad, passenger could not recover against railroad alone.—Durst v. Southern Ry. Co., 125 S.E. 651, 130 S.C. 165.

Reliance on res ipsa loquitur doctrine

(1) Where plaintiff, in action against a carrier, has pleaded general negligence, he may rely on presumptive negligence
Colo.—Colorado Springs & Interurban Ry. Co. v. Reese, 169 P. 572, 69 Colo. 1.
Mo.—Lammert v. Wells, Mo.App., 282 S.W. 487.

(2) However, if he has pleaded specific acts of negligence, he could not then invoke the doctrine of res ipsa loquitur to make out his case, and a directed verdict in his favor, based on presumptive negligence under such rule, was error.
Mo.—Mayfield v. St. Louis-San Francisco Ry. Co., App., 272 S.W. 1051
Tex.—Dowdy v. Southern Traction Co., Civ.App., 184 S.W. 687, reversed on other grounds, Com.App., 219 S.W. 1092.

(3) In action for injuries, alleged to have been caused by negligent operation of street car past station building, by which operatives knew or should have known that passengers on footboard were likely to be struck, admission of testimony as to speed and swaying of car as it passed building, to show manner in which injury occurred, is not error as tending to raise assignment of negligence not pleaded.—Van Leer v. Wells, Mo.App., 263 S.W. 493.

(4) In passenger's action for injuries in collision between electric car and a steam locomotive, allegations that car was being run at a rapid rate of speed through darkness with defective headlight on track used by defendant for other traffic do not restrict plaintiff to recovery on proof of defective headlight as only act of negligence relied on, but the doctrine of res ipsa loquitur may apply.—Sand Springs Ry. Co. v. Westhafer, 218 P. 525, 92 Okl. 89.

93. Mo.—Mirrielees v. Wabash R. Co., 63 S.W. 718, 163 Mo. 470
10 C.J. p 1013 note 2.

94. Ind.—Citizens' St. R. Co. v. Willoeby, 33 N.E. 627, 134 Ind. 563.

95. Tex.—International, etc., R. Co. v. Williams, 183 S.W. 1185.
10 C.J. p 1013 note 4.

96. Mo.—Forrester v. Metropolitan St. R. Co., 91 S.W. 401, 116 Mo.App. 37.
10 C.J. p 1013 note 5.

Allegations in actions for assault

Where a petition, alleging the relation of passenger and carrier, alleged also that plaintiff was assaulted by defendant's servant while a passenger on defendant's car, the fact that it also alleged that the servant was acting within the scope of his employment could not deprive the passenger of the right to recover as for a breach of defendant's duty as a common carrier.—Buttler v. Wells, Mo.App., 241 S.W. 664.

97. Tex.—Gulf, etc., R. Co. v. Redeker, 100 S.W. 362, 45 Tex.Civ.App. 312.
10 C.J. p 1013 note 6.

willful and wanton injury.[98] Likewise, where gross and wanton negligence is charged, proof of simple negligence will not support a recovery;[99] and where the gist of the action is an injury occasioned by the willful acts of an employee, recovery can be had only by showing a willful injury.[1]

General denial or general issue puts in issue the facts essential to plaintiff's recovery,[2] but it does not put in issue the ownership of the track or the control of the cars.[3]

b. Matters to Be Proved

All matters material to the cause of action or defense must be proved as alleged.

Negligence or other matters material to sustain the action[4] or defense[5] must be proved in the manner alleged in the declaration or other pleading. Matters not in issue need not be proved,[6] nor is it necessary to prove averments which are not material,[7] such as averments of mere matters of inducement.[8]

Where several independent acts of negligence or wrongs are alleged by plaintiff, he need not prove every act of negligence or wrong; it is sufficient to prove any one of them as the proximate cause of the injury,[9] although they are alleged conjunctively.[10] Especially is this true where the allegation may be treated either as an additional ground of negligence or as surplusage.[11] However, if the several acts of negligence are alleged as being jointly the proximate cause of the injury, proof of the several acts is required.[12]

98. Iowa—Fitzgibbon v. Chicago, etc., R. Co., 79 N.W. 477, 108 Iowa 614.
10 C J. p 1013 note 7.

99. Ala.—Hines v. Minard, 86 So 23, 204 Ala. 514, 12 A L R 238.

1. Iowa.—Way v. Chicago, etc., R. Co, 35 N W. 525, 73 Iowa 463.
10 C J. p 1013 note 8.

2. S C—Smith v. Chamberlain, 17 S E 371, 38 S C. 529, 19 L R A. 710.
10 C J. p 1013 note 9.

3. Ill—Pell v. Joliet, etc, R. Co., 87 N E 542, 238 Ill. 510, affirming 142 Ill.App. 362
10 C J. p 1013 note 10.

4. Ala.—Willingham v. Birmingham Ry., Light & Power Co., 83 So. 95, 203 Ala. 351
Ark—St. Louis-San Francisco Ry. Co. v. Cox, 283 S.W. 31, 171 Ark. 103
Ind.—Hines v. Rollins, 179 N.E. 183, 97 Ind App 251
Md—Hagerstown & F. Ry. Co. v. State, 99 A. 376, 129 Md 318
Mo—Walser v. Missouri Pac. R Co, App, 6 S.W.2d 632—Jones v. St. Louis-San Francisco Ry. Co., 5 S W.2d 101, 222 Mo App. 1220—Taylor v. Kansas City Terminal Ry. Co, App, 240 S.W. 512—Malone v St. Louis-San Francisco Ry Co., 213 S W. 864, 202 Mo.App. 489—Rooker v. Deering Southwestern Ry. Co, App, 204 S.W. 556.
N J—Bradley v. Erie R Co, 143 A. 743, 105 N.J.Law 1, reversed on other grounds 147 A. 572, 106 N.J. Law 51.
Wash.—Calhoun v. Portland Ry., Light & Power Co., 178 P. 805, 105 Wash. 592.
10 C J. p 1013 note 12.

Essential elements

Passenger suing for injuries caused by train jerk or stop must allege and prove that it was sudden, unusual, unnecessary, and so violent as to indicate negligence.—Chesapeake & O. R. Co. v. Hay, 58 S.W.2d 228, 248 Ky. 69.

Result of negligence must be alleged and proved, even where res ipsa loquitur maxim applies.—Kilgore v Brown, 266 P. 297, 90 Cal. App. 555

Specific acts of negligence

A petition alleging that deceased was killed by the negligence of defendant's servant in suddenly starting or permitting a freight elevator to start up, while deceased was placing machinery on it, without warning, when the operator knew or by exercising ordinary care could have known deceased was in a dangerous position, charged specific negligence, which must be proved, thus preventing the application of the doctrine of res ipsa loquitur—Grimm v. Globe Printing Co., Mo., 232 S.W. 676.

Time of assault

In action for assault made by railroad conductor, where plaintiff's evidence did not identify any particular conductor, but showed an assault on February 3, which was denied by defendant's train crew, plaintiff, after such refutation, could not recover for assault at different time—Lacy v Louisville & N. R Co., 73 So. 81, 197 Ala. 539.

Untrue allegations

Where plaintiff was not passenger, she cannot recover in action wherein she pleads that she was passenger Where car was not derailed, passenger cannot recover on allegation that car was derailed to her injury.—Porter v. Boston Elevated Ry., 122 N.E. 314, 232 Mass. 299.

Where presumption of negligence arises from mere injury

(1) Where an inference of negligence has arisen, as in the case of a collision, a passenger injured by collision between street cars, alleging negligence generally, need not prove specific act of negligence causing collision—Dallas Ry. Co v. Skorodynski, Tex Civ.App, 292 S W. 638.

(2) Street car passenger injured by passing car, need not prove defendant's negligence.—Rizzo v. New Orleans Ry. & Light Co., 7 La.App. 686

5. Mo—Hulen v. Wheelock, 300 S W. 479, 318 Mo. 502
10 C.J p 1014 note 13.

6. Mass—Barry v Boston, etc., R. Co, 61 N E 518, 172 Mass. 109.
10 C.J. p 1014 note 14

7. Utah—Stonebreaker v. Bamberger, 54 P 2d 418, 88 Utah 310.
10 C J p 1014 note 15.

Allegations held immaterial

(1) Where plaintiff was injured while crossing defendant's street car track in front of a car, which had stopped and was suddenly started, that it was not shown that the car had stopped for the purpose of permitting passengers to board the same, is immaterial, where the car had stopped to discharge passengers, so that plaintiff and others might approach expecting to board it.—Rucker v. San Diego Electric Ry. Co., 183 P. 578, 41 Cal App 787.

(2) Allegations as to speed, stopping, and signaling are immaterial in suit by one in safety zone, struck by rear end of car.—Steinman v. Cleveland Ry. Co., 155 N.E. 149, 23 Ohio App. 448.

8. Tex—St. Louis Southwestern R. Co. v. Parks, Civ App, 73 S.W. 439.

9. Ill.—Little v. Peoria Ry Co., 215 Ill App 385. See Leiberich v. East St. Louis & Suburban Ry. Co., 199 Ill App 1.
Mo.—Kaenter v. Missouri Pac. Ry. Co, App, 218 S.W 349—Rogers v. Kansas City Rys. Co., App., 204 S. W. 595
N.Y.—Ulrich v. Interborough Rapid Transit Co., 159 N.Y.S. 868, 95 Misc. 588.
10 C.J. p 1014 note 17.

10. Tex.—Galveston, etc, R. Co. v. Watts, Civ.App., 182 S W. 412.
10 C.J. p 1015 note 18

11. Mo.—Kaenter v. Missouri Pac. Ry Co, App., 218 S W. 349.

12. Tex.—Ratteree v. Galveston,

c. Evidence Admissible under Pleadings

(1) In general

(2) Under specific and general allegations of negligence

(3) Under general denial or general issue

(1) In general

Only competent evidence of matters properly in issue is admissible.

Competent evidence which substantially corresponds with the allegations, and which is restricted to the issues, is admissible,[13] but evidence which does not conform to the issues, or which relates only to a matter not in issue, is inadmissible.[14]

etc., R. Co., 81 S.W. 566, 36 Tex. Civ. App. 197—Williams v. Galveston, etc., R. Co., 78 S.W. 45, 34 Tex. Civ. App. 145.

Proof of concurrent acts required

Where the petition of a passenger on defendant's train averred that a vestibule door was negligently left open, and that as a result of a sudden jar or jolt he was thrown from the car platform onto the tracks, proof of the concurring acts of negligence is essential to recovery.—Giles v. Michigan Cent. R. Co., 212 S.W. 873, 278 Mo. 350.

13. Colo.—Colorado Springs & Interurban Ry. Co. v. Reese, 169 P. 572, 69 Colo. 1.
Mo.—Story v. People's Motorbus Co. of St. Louis, 37 S.W.2d 898, 327 Mo. 719—Rosenzweig v. Wells, 273 S.W. 1071, 308 Mo. 617—Abernathy v. Missouri Pac. R. Co., App., 217 S.W. 568—Hamilton v. Metropolitan St. R. Co., 89 S.W. 893, 114 Mo. App. 504.
Neb.—Lieb v. Omaha & C. B. St. Ry. Co., 228 N.W. 364, 119 Neb. 222.
N.J.—Poulton v. Merz, 154 A. 190, 9 N.J.Misc. 402.
Va.—Barnard Bus Lines v. Weeks, 158 S.E. 870, 156 Va. 465.
10 C.J. p. 1015 note 21

Evidence held admissible

(1) In an action by a passenger for an assault committed by the motorman in dragging him to the front of the car from a position in the aisle where he was standing, where defendant files a plea alleging that when the motorman laid hands on plaintiff, and removed him from his position in the aisle of the car, plaintiff was blocking the passage of other passengers forward, and plaintiff joins issue on the plea, the evidence by plaintiff will not be confined to the single question of justification, but he may show the facts and circumstances surrounding the alleged assault.—Capital Traction Co. v. Morgan, 44 App. D.C. 237.

(2) In an action for death of a passenger who was thrown from one of defendant's cars while it was being run at an unusual speed while rounding a curve of defendant's track, it is not error to admit evidence for plaintiff that the track was uneven on the curve, for the purpose of showing whether in view of that fact the car could not have been run around the curve slower than the usual rate of speed around an ordinary curve.—Washington Ry. & Electric Co. v. Dittman, 44 App. D.C. 89.

(3) In a street car passenger's action for injuries sustained while alighting, it was not error to permit the conductor to testify that he was not in charge of the particular car on which the plaintiff rode, where the petition alleged and the answer admitted his employment and agency.—Hunter v. Joplin & P. Ry. Co., 197 P. 1092, 109 Kan. 169.

(4) Evidence that street car door was open when plaintiff attempted to board car and that company's rules required conductor to close it before starting was admissible on issue whether car was standing or moving, although negligence in starting without closing door was not pleaded, and such rule was for guidance of company's employees.—Detchemendy v. Wells, Mo.App., 253 S.W. 150.

(5) Under an averment that it was the custom of the motorman not to accelerate speed until receiving a go ahead signal from the conductor, the character of the signal as two bells may be shown.—Chapman v. Kansas City Rys. Co., Mo., 233 S.W. 177.

(6) In an action for negligence in causing a street car to start while a passenger was alighting, in which it was claimed by defendant that the way plaintiff said she fell was contrary to physical laws, testimony that the car started with a jerk was admissible, although the starting of the car with a jerk was not pleaded, such testimony being material as evidential matter.—Hartweg v. Kansas City Rys. Co., Mo.App., 231 S.W. 269.

(7) In an action for personal injuries to a seven-year-old boy when alighting from defendant's moving street car, based on the humanitarian doctrine, evidence that the motorman ordered the boy off the car was admissible to prove the motorman's knowledge of the boy's presence.—State ex rel. Metropolitan St. R. Co. v. Ellilison, Mo., 224 S.W. 820, quashing certiorari Quirk v. Metropolitan St. Ry. Co., App., 210 S.W. 106.

(8) Petition alleging that while deceased was in the act of alighting the street car was negligently started was sufficiently broad to warrant submission of the issue as to whether the conductor allowed deceased a reasonable time safely to alight.—Teske v. Kansas City Rys. Co., Mo. App., 204 S.W. 577.

(9) Where a complaint in an action for slipping on platform charges only negligence in presence of snow and slush, depression in platform may be considered in respect thereto, but not as independent ground of negligence.—Murphy v. Hudson & M. R. Co., 167 N.Y.S. 895, 180 App. Div. 585.

(10) Under an allegation that injuries to passenger's eye were caused by a cinder or spark from spark arrester on engine used by railroad, evidence as to spark escaping from other engines than that hauling plaintiff, operated at the time and in the immediate vicinity where the injury occurred, was admissible.—Schaff v. Sanders, Tex.Civ.App., 257 S.W. 670, affirmed, Com.App., 269 S.W. 1034.

(11) In action by passenger for injuries in which defendants denied existence of insurance policy, required on behalf of carrier, on date of injury as alleged, plaintiff could offer proof of allegations.—Nicktovich v. Olympic Motor Transit Co., 272 P. 736, 150 Wash. 278.

(12) In an action for injuries against city operating street railway, complaint, alleging that city stopped its cars at a place where the street was paved only on one side and knowingly permitted all vehicular traffic to travel both ways on one side of the street, making a dangerous situation, presented a question for the jury, whether having such knowledge, it was negligent in selecting such a place for the taking on and letting off passengers, and presented a charge which plaintiff was entitled to prove.—Tobin v. City of Seattle, 221 P. 583, 127 Wash. 664.
10 C.J. p. 1015 note 21 [a]

14. U.S.—Hulet v. Payne, C.C.A.N.D., 282 F. 401.
Ill.—Sinopoli v. Chicago Rys. Co., 147 N.E. 487, 316 Ill. 609—Toledo W. & W. R. Co. v. Beggs, 85 Ill. 80, 28 Am.R. 613.
Tex.—Galveston, H. & S. A. Ry. Co. v. Henry, Civ.App., 252 S.W. 210.

(2) Under Specific and General Allegations of Negligence

Evidence, to be admissible under specific allegations of negligence or wrong, must be specific and conform to the facts alleged; but under a general allegation evidence of any fact tending to show the negligence or wrong alleged is admissible.

Where the allegations as to defendant's negligence are specific, the proof also must be specific and must conform to the facts alleged[15] This rule has been held to apply notwithstanding such specific allegations are unnecessary;[16] and according to some decisions, where a general allegation of negligence is followed by allegations of specific acts of negligence, the specific allegations must be proved,[17] although specific allegations, where negligence has been alleged generally, have been held not to deprive the passenger of the benefit of the presumption arising from the accident unless his complaint clearly indicates his intention to limit the negligence to the acts specified.[18]

Where the negligence on the part of defendant is alleged in general terms, plaintiff is not confined in his evidence to any particular acts of negligence;[19] and evidence of any fact which is a circumstance tending to show the actionable negligence or wrong covered by the pleadings is admissible, although no mention of such fact is made in the pleading.[20] Thus, evidence is admissible that a passageway between cars was not sufficiently lighted, under an allegation that the station was not sufficiently lighted,[21] and that the brake rod was broken under an allegation that the braking apparatus was in bad repair and useless for the purpose of controlling the car.[22] However, an allegation that a designated

Va.—Murphy's Hotel v. Cuddy's Adm'r, 97 S.E. 794, 124 Va. 207.
10 C.J. p. 1015 note 22.

Evidence held inadmissible

(1) A passenger, not alleging that it was safe to alight from moving train at flag station, could not testify that he thought it safe.—Louisville & N. R. Co. v. Whitaker, 300 S.W. 912, 222 Ky. 302.

(2) A contract whereby a street railroad company operated interurban cars within the city and the ordinance authorizing such contract are not admissible, where the petition against both interurban and street railroad company simply pleaded that plaintiff was a passenger in an interurban car, and was injured by the negligence of the servants of defendants then operating the car.—Huntington v. Kansas City Rys. Co., Mo.App., 220 S.W. 1011.

(3) In an action for the death of one falling through an open vestibule door of a train on which he was a passenger, where it was not contended by plea or otherwise that defendant was negligent in not using proper equipment, the court did not err in excluding defendant's testimony as to the character of equipment in use on the train.—Galveston, H. & S. A. Ry. Co. v. Henry, Tex.Civ.App., 252 S.W. 210.

(4) Evidence of safe places on highway is properly excluded, where automobile stage passenger's complaint for injuries failed to allege as negligence driving in storm.—Osborne v. Galusha, 254 P. 1086, 143 Wash. 127.

15. Mo.—Maloney v. United Rys. Co. of St. Louis, 237 S.W. 509.
10 C.J. p. 1016 note 23.

Evidence held inadmissible

In prospective tenant's action against operators of apartment house for injuries caused by defective automatic elevator, in which the only specification of negligence in the complaint was the failure to keep the elevator in repair, plaintiff could not recover on proof of negligent failure to keep the hallway leading to elevator lighted.—McKeon v. Lissner, 223 P. 965, 193 Cal. 297.—10 C.J. p. 1016 note 23 [b].

16. Mo.—Hamilton v. Metropolitan St. R. Co., 89 S.W. 893, 114 Mo.App. 504.
10 C.J. p. 1016 note 24.

17. Mo.—Roscoe v. Metropolitan St. R. Co., 101 S.W. 32, 202 Mo. 576.
10 C.J. p. 1016 note 25.

18. N.Y.—De Roire v. Lehigh Valley R. Co., 199 N.Y.S. 652, 205 App.Div. 549.

19. Ind.—Evansville Rys. Co. v. Miller, 111 N.E. 1031, 64 Ind.App. 206.
Tex.—Dowdy v. Southern Traction Co., Com.App., 219 S.W. 1092, reversing, Civ.App., 184 S.W. 687.
10 C.J. p. 1016 note 26.

20. Okl.—St. Louis & S. F. R. Co. v. McClain, 162 P. 751, 63 Okl. 75.
Pa.—McKnight v. S. S. Kresge Co., 132 A. 575, 285 Pa. 489.
10 C.J. p. 1017 note 27.

Evidence admissible under general allegations of negligence

(1) Under a general allegation of negligence, in that the driver of a motor stage caused it to collide with another automobile, evidence that the car was equipped with defective lights is admissible as tending to prove the charge of negligent driving.—Carnahan v. Motor Transit Co., 224 P. 143, 65 Cal.App. 402.

(2) A motor transportation company being sued for personal injuries sustained by a passenger in a collision may not complain that it was surprised and unprepared to meet the issue of defective lights, since on the making of a prima facie case by plaintiff the burden was on it to establish its freedom from negligence, including proof of proper lighting equipment.—Carnahan v. Motor Transit Co., supra.

(3) Any fact indicating that railroad permitted grease to remain on station platform after railroad knew, or should have known, of presence thereof, is admissible under injured passenger's allegation that railroad negligently failed to remove grease.—Stonebreaker v. Bamberger, 54 P. 2d 418, 88 Utah 310.

Under allegation of negligent operation

(1) Proof under doctrine of last clear chance is admissible under a general allegation of negligent operation.—Lehigh Valley R. Co. v. Stevenson, C.C.A.N.J., 17 F.2d 748.

(2) In an action to recover for an injury to a passenger in a street car, an allegation that the car was negligently operated was sufficient, in the absence of motion for more specific statement, to permit the introduction of evidence of excessive speed.—Omaha & C. B. St. Ry. Co. v. McKeeman, Neb., 250 F. 386, 162 C.C.A. 456.

Evidence held inadmissible

In action against receiver of street railway company, wherein passenger pleaded general negligence in collision between street car and automobile, resulting in injury, evidence of negligence in sudden and abrupt stopping of street car is inadmissible, as it does not support the cause of action alleged.—Hughes v. Kiel, Mo.App., 100 S.W.2d 48.

21. Tex.—Galveston, etc. R. Co. v. Thornsberry, 17 S.W. 521.

22. Neb.—St. Joseph, etc. R. Co. v. Hedge, 62 N.W. 887, 44 Neb. 448.

servant of the carrier was negligent, although a general allegation, confines the proof to negligence of the particular servant referred to.[23]

(3) Under General Denial or General Issue

In general, any evidence which goes to controvert the facts which plaintiff must establish may be introduced by defendant under the general issue or general denial.

Under the general issue or general denial defendant may introduce any evidence which goes to controvert the facts which plaintiff is bound to establish to sustain his cause of action,[24] although, under some statutes, defendant cannot prove affirmative matter in avoidance under the general issue, unless it gives notice thereof in writing.[25] Where the gravamen of the complaint is defendant's neglect to discharge a public duty in protecting its passengers from the insults or wrongs of its employees, defendant may prove, under the general issue, that the employee's conduct was fully warranted and justifiable; but where the suit is based, not on defendant's failure to protect the passenger, but on the employee's wrong in insulting the passenger, such justification can be proved only where it has been set up affirmatively by a special plea.[26] It has been held that evidence that plaintiff was drunk is not admissible as justification under the general issue.[27]

d. Variance

The proof must correspond to and support the allegations; a material variance is generally fatal to recovery, but an immaterial variance is not.

The proof must correspond to and support the allegations;[28] and hence, where there is a material

23. Mo.—Perkins v. United Rys. Co. of St. Louis, App., 243 S.W. 224.

24. U.S.—Robinson v. Baltimore & O. R. Co., 35 S.Ct. 491, 237 U.S. 84, 59 L.Ed. 849, affirming 40 App. D.C. 169, L.R.A.1915D 510.
10 C.J. p. 1017 note 31

Evidence held admissible

(1) That passenger's condition was attributable to disease was matter of defense, which railroad company could establish under general denial.—New York Cent. R. Co. v. Johnson, Mo., 49 S.Ct. 300, 279 U.S. 310, 73 L.Ed. 706, reversing, C.C.A., 27 F.2d 699, certiorari granted 49 S.Ct. 27, 278 U.S. 590, 73 L.Ed. 523, and amended 49 S.Ct. 417.

(2) Evidence that husband of plaintiff suing street railroad for injuries alleged to have been sustained while passenger on street car attempted to hire witness to testify in plaintiff's behalf, and statements made by husband in plaintiff's presence concerning hiring of witnesses for such purpose is admissible under general denial as tending to show conspiracy and fraud.—Smith v. St. Louis Public Service Co., Mo. App., 84 S.W.2d 161.

25. Miss.—Yazoo, etc., R. Co. v. Grant, 38 So. 502, 86 Miss. 565, 109 Am.St.R. 723, 4 Ann.Cas. 556.
10 C.J. p. 1017 note 32.

26. Ga.—Binder v. Georgia R., etc., Co., 79 S.E. 216, 13 Ga.App. 381.

27. N.C.—Raynor v. Wilmington, etc., R. Co., 39 S.E. 821, 129 N.C. 195.

28. Mo.—Beurskens v. Dunham, App., 193 S.W. 855.
S.C.—Durst v. Southern Ry. Co., 125 S.E. 651, 130 S.C. 165.
10 C.J. p. 1018 note 37.

Variance held not to exist

(1) Evidence establishing assault by railroad employee on passenger, and cause of action for intentional and malicious assault.—Morton v. St. Louis-San Francisco Ry. Co., 20 S.W.2d 34, 323 Mo. 929.

(2) Allegations that defendant so carelessly placed a step box and the box was so insecure that, when plaintiff stepped on it, the box slipped and turned, and caused plaintiff to fall, and evidence showing that the unevenness of the pavement caused the box to turn.—Tanner v. Chicago, R. I. & P. Ry. Co., Mo.App., 258 S.W. 730.

(3) Evidence that the car jerked or moved suddenly or abruptly as plaintiff was alighting and allegations that while she was alighting the car started up.—Clymer v. Kansas City Rys. Co., Mo.App., 214 S.W. 423.

(4) Allegations that plaintiff, a passenger, was injured because defendant railway company took the forward part of the train some distance from plaintiff's coach and negligently backed it into said coach, and proof of a sudden jerk, by the collision alleged.—Johnson v. St. Louis & S. F. R. Co., Mo.App., 190 S.W. 352

(5) Averment that driver drove bus off highway, and proof that bus skidded off road.—Tennessee Coach Co. v. Young, 80 S.W.2d 107, 18 Tenn.App. 592.

(6) Complaint alleging nosing on a step was insufficiently secured, and proof that it had been suffered to become loose.—Henry v. Navy Yard Route, 162 P. 584, 94 Wash. 526

(7) Charge that while passenger was alighting car was negligently started without warning, and evidence that he was not given reasonable time to alight, and that the conductor negligently signaled to go ahead.—Cain v. Kanawha Traction & Electric Co., 95 S.E. 88, 81 W.Va. 631

(8) Evidence that plaintiff fell from train, where plaintiff's complaint alleged that she was injured by being thrown from train, and defendant's answer denied that she was injured by any fall or by being thrown.—Fitzgerald v. Southern Pac. Co., 173 P. 91, 36 Cal.App. 660.

(9) In taxicab passenger's action for injuries sustained because of driver's alleged negligence, wherein taxicab corporation denied that cab was driven by any of corporation's agents, and corporation might be liable if it appeared that cab was in its custody and on its business, notwithstanding name of driver or number of cab was not correctly stated in declaration nor by plaintiff when testifying.—Gale v. Independent Taxi Owners' Ass'n, 84 F.2d 249, 65 App.D.C. 396.

Variance or failure of proof

(1) Petition alleging plaintiff fell by descent of elevator and proof showing fall by its ascent did not show failure of proof but variance.—Roberts v. Schaper Stores Co., 3 S.W.2d 241, 318 Mo. 1190

(2) In a street car passenger's action for injuries, there is, at most, an immaterial variance between an allegation of sudden jerk at street intersection and proof that jerk occurred twelve or fifteen feet from intersection, and not a total failure to prove the cause of action alleged.—Harriman v. Dunham Mo.App., 196 S.W. 443

(3) Where a petition was based on railroad's negligence in maintaining an inadequate luggage rack in its station, failure to prove its allegations that the suitcase which injured plaintiff was knocked off the

variance between the proof and the allegations, it is fatal to a recovery,[29] as where there is a substantial variance as to the time, place, and cause of the injury,[30] unless such variance is waived by a failure to call the attention of the court thereto,[31] or is cured by an amendment of the pleading.[32]

The variance between an allegation of negligence in suddenly starting a car after it had stopped, while the passenger was attempting to board or alight, and proof that it was moving when he made such attempt, has been held material[33]

On the other hand, where the proof substantially supports the pleading, the fact that it varies therefrom on some immaterial matter is not a fatal variance.[34] Thus, it has been held that the variance between an allegation that plaintiff was thrown or

rack by some one constitutes only a variance and not a failure of proof —Wright v. Kansas City Terminal R Co, 193 S.W. 963, 195 Mo.App 480

(4) Where petition alleged defendant railroad negligently failed to provide a luggage rack in its station with a retaining rail to prevent baggage from falling off and the evidence showed an inch molding, there was a variance only.—Wright v. Kansas City Terminal R. Co, supra

(5) Where petition in passenger's personal injury action alleged negligence of defendant in that conductor negligently directed plaintiff to alight from moving train, and defendant was not called on to defend against negligence of any other servant, there was failure of proof and not a mere variance when inference from evidence was that alleged negligent direction was given by brakeman—Bogrees v. Wabash Ry Co, Mo App., 266 S.W. 333

(6) Where petition charged that plaintiff was riding on a ticket purchased of defendant, and that while thus traveling for hire on defendant's car he was assaulted, and the proof was that at the time of the assault plaintiff was traveling on a cash fare paid to another company, a street railway company, and on a portion of the line of travel of the car owned by the street railway, on which defendant's car was operated, under an operating agreement complying with a city ordinance as to such operation, by defendant's crew acting as the crew and employees of the street railway, there was more than a variance, but it amounted to a failure of proof.—Wilcox v. Kansas City Western Ry Co., 213 S. W 156, 201 Mo App 510.

29. Colo—Denver Tramway Co v. Johnson, 179 P. 143, 66 Colo 50.
Ill—See Guthorle v Chicago Rys Co, 211 Ill App 390.
Ky—South Covington & C. S. Ry Co. v. Schied, 217 S.W. 124, 186 Ky. 452
N.Y—Wiener v Fifth Avenue Coach Co, 164 N Y S 667.
10 C.J. p 1018 note 38.

Variances held material

(1) A count against a carrier, alleging plaintiff's injuries were caused by reason of the fact that "the defendant then and there, through its agents, servants, or employés in charge of said train, wantonly and intentionally" caused the train to move and jerk, etc., resulting in injuries to plaintiff, charging wantonness as the direct act of the carrier, and evidence tending to show wantonness on part of employees while acting within the line and scope of their employment.—Atlantic Coast Line R Co v. Thomas, 95 So. 53, 19 Ala.App. 76

(2) In actions for assault and battery on plaintiff passenger by conductor, between a complaint charging direct authorization by the corporation and proof of an unauthorized act by an agent for which the corporation is liable on principle only of "respondeat superior."—Ex parte Louisville & N R Co, 83 So. 52, 203 Ala 328, reversing Louisville & N R. Co v. Lacey, 82 So. 636, 17 Ala App 146.

(3) Proof that plaintiff was led to step off the car by the conductor's negligence in opening a door and allegation that plaintiff was led to take a position on the platform or step from which he fell or was thrown to the ground—Fitzpatrick v Capital Traction Co, 46 App D.C. 13.

(4) Declaration, alleging deceased was killed while passenger, and proof of wrongful refusal to accept him as passenger—Todd v. Louisville & N R Co, 113 N.E 95, 274 Ill 201, L R A 1916F 543

(5) Allegation that plaintiff was a passenger and proof that he refused to pay his fare when lawfully demanded—Willett v. King, 168 N.W. 986, 203 Mich 295.

(6) Evidence that step was thrown up, causing street car passenger to fall in alighting and pleading that door was closed on passenger's heel while alighting.—McConnell v Philadelphia Rapid Transit Co., 89 Pa Super. 316.

30. Mo—Gardner v. Metropolitan St. R. Co, 122 S W. 1063, 223 Mo. 389, 18 Ann Cas. 1166.
10 C J. p 1018 note 39.

31. U.S.—Atchison, T. & S F. Ry. Co. v. Tiefel, C C A.Cal., 28 F.2d 977.
10 C.J. p 1019 note 40.

32. N Y.—Scheu v. Union R Co., 98 N.Y.S 278, 112 App Div 239.
10 C J. p 1019 note 41.

33. Ga.—Gosnell v. Central of Georgia R. Co., 86 S.E 90, 17 Ga.App. 67.
10 C.J p 1019 note 42.

34. Ill—Kaldunski v. Chicago City Ry. Co., 250 Ill App. 475—Hoffman v. Yellow Cab Co, 238 Ill App. 269. See Leiberich v. East St. Louis & Suburban Ry. Co., 199 Ill App 1.
Mo.—Took v. Wells, 53 S.W.2d 389, 331 Mo. 249.
Ohio.—Cleveland Ry. Co. v. Hill, 12 Ohio App. 125
Tenn—Louisville & N. Ry. Co v. Powell, 11 Tenn.App 253
Tex—Galveston, H. & S A. Ry. Co v. Williams, Civ App., 217 S W. 420.
10 C.J p 1019 note 44.

Variances held immaterial

(1) Allegation that injury was caused by defendant's negligent operation of two street cars, and proof showing that injury was caused by negligent operation of one street car, where defendant was responsible for operation of both street cars.—Jacksonville Traction Co. v. Seelbach, 157 So. 509, 117 Fla. 233

(2) An allegation that he was thrown from the train by an unusual jerk or jar when it stopped at the station, and proof that the train had stopped four hundred and fifty feet from the station when plaintiff was thrown therefrom.—Louisville & N. R. Co v. Spears' Adm'r, 232 S W. 60, 192 Ky. 64.

(3) Charge of negligence of defendant street railway company in starting the car suddenly after it had stopped at its usual place, and "while plaintiff was in the act of boarding the car at a time when she was in a position of danger," and plaintiff's statement that the car started with a jerk—Baldwin v. Kansas City Rys. Co., Mo App, 214 S.W. 274.

(4) Petition alleging that deceased was a street car passenger "until he reached a point at or near an intersection at a point within a few feet, about 30 feet, of where the car was required to stop and discharge passengers," and evidence that the car stopped about thirty feet before reaching the regular stopping place.

pushed from the car, and proof that he stepped or jumped from the car to avoid danger, is immaterial.[35] There is no material variance between allegations of negligence in suddenly starting a car and proof that the car was moving so slowly as not to enhance the danger of the passenger's act;[36] nor is there a material variance between allegations that a car was barely moving and proof that it was standing,[37] nor between allegations that a car was suddenly started while plaintiff was on the step and proof that plaintiff stepped from a moving car, thinking it stationary.[38] Where the gist of the action is the starting of the train while plaintiff was in the act of boarding or leaving it, proof of matters of inducement will not create a variance.[39]

Adverse party misled. It has been held that a variance to be material must be such as to mislead the adverse party,[40] and where it is provided by statute that no variance between pleading and proof shall be deemed material unless it actually misleads the adverse party to his prejudice, the variance must have such effect to be regarded as material.[41]

§ 764. Presumptions and Burden of Proof

a. In general
b. As to existence of relation of carrier and passenger
c. As to negligence or wrong in general
d. Res ipsa loquitur in general
e. Res ipsa loquitur; inapplicability of rule; waiver
f. Res ipsa loquitur; applicability of rule to particular accidents
g. Res ipsa loquitur; rebutting presumption
h. Elevators and escalators

a. In General

The plaintiff has the burden of proving every fact essential to his cause of action; and this burden does not shift even where a presumption of negligence exists.

The burden of proof is on plaintiff to show by a preponderance of evidence all the essential elements of his cause of action.[42] The burden of proving a defense of accident or uncontrollable

—Teske v. Kansas City Rys. Co., Mo. App., 204 S.W. 577.

(5) Allegation that the brakeman was negligent in permitting and inviting the passenger to alight at the place and time of the accident, variance between petition alleging that the passenger in attempting to alight "lost her balance or slipped from said steps," and proof that she jumped off—Fort Worth & D. C. Ry. Co. v. Lovett, Tex.Civ.App., 243 S.W. 519

35. U.S.—Washington, etc., R. Co. v. Hickey, D.C., 17 S.Ct. 661, 166 U.S. 521, 41 L.Ed. 1101.
10 C.J. p. 1020 note 45.

36. Mo.—Gunn v. St. Louis United R. Co., 160 S.W. 540, 177 Mo.App. 512
10 C.J. p. 1019 note 43.

37. Colo.—Denver Tramway Co. v. Johnson, 179 P. 143, 66 Colo. 50.

38. Cal.—Poak v. Pacific Electric Ry. Co., 170 P. 159, 177 Cal. 190.

39. Mo.—Ridenhour v. Kansas City Cable R. Co., 13 S.W. 889, 102 Mo. 270
10 C.J. p. 1020 note 46.

40. Colo.—Colorado Springs, etc., R. Co. v. Marr, 141 P. 142, 26 Colo.App. 48
10 C.J. p. 1020 note 47.

41. Ky.—Kentucky Tract., etc., Co. v. Waits, 180 S.W. 356, 167 Ky. 236
10 C.J. p. 1020 note 48.

42. Mass.—Finnegan v. Checker Taxi Co., 14 N.E.2d 127.
N.Y.—Bressler v. New York Rapid Transit Corporation, 13 N.E.2d 772, 277 N.Y. 200, reversing 297 N.Y.S. 336, 251 App.Div. 890.
Pa.—Shade v. The Union Traction Co., 7 Pa.Dist. 34, 20 Pa.Co. 292.
10 C.J. p. 1020 note 51.

Actionable conduct

Plaintiff passenger has burden of proving that language and conduct of defendant railroad's conductor were actionable—Hutchison v. Southern Ry. Co., 95 S.E. 181, 109 S.C. 90.

Due care

Where accident to passenger happened prior to enactment of St.1914 c. 553, burden was on plaintiff to show his intestate was in exercise of due care, that her carelessness did not contribute to accident, and that defendant was negligent—Hurley v. New York, N.H. & H.R. Co., 146 N.E. 235, 251 Mass. 53.

Identification of instrument of accident

To warrant a recovery in an action for injury to one who, just after alighting from a street car, was thrown down by reason of her foot being caught in a rope hanging from the rear of the car, it is not essential to prove the character or purpose of the rope—Landis v. Wichita R. & Light Co., 203 P. 1109, 110 Kan. 205.

Obstructions in aisles

Passenger, suing railroad for injuries caused by obstruction in aisle of car, had the burden of proving the existence of such obstruction—Killeen v. Delaware, L. & W.R. Co., 112 A. 911, 270 Pa. 123.

Ownership, operation, or control

(1) To establish liability in a passenger's action for injury from negligent operation of a street car, there must be some proof of ownership, operation, or control, to cast a duty on defendant—Lester v. Wells, Mo.App., 253 S.W. 387.

(2) In action against taxi owners for negligence of driver, passenger was required to show driver was acting for owners at time of injuries or that owners were estopped to deny such fact—Johnson v. Brewer, 98 S.W.2d 889, 266 Ky. 314.

(3) Proof that at time of accident corporation owned bus raised rebuttable presumption that bus was being operated for purposes of corporation—Irwin v. Pickwick Stages System, 25 P.2d 998, 134 Cal.App. 443.

(4) Conclusive presumption is created by words "shall be deemed" in Motor Vehicle Act providing that title to vehicle shall be deemed not to have passed from legal owner to another until new certificates of registration and ownership are issued.—Irwin v. Pickwick Stages System, supra.

Liability of initial carrier

A passenger, injured while in a car after it has been turned over to a connecting carrier, has the burden of proving the initial carrier's liability for injuries caused by negligence after the car was so delivered.—Cisco & N.E. Ry. Co. v. Proctor, Tex.Civ.App., 272 S.W. 308, affirmed Proctor v. Cisco & N.E. Ry. Co., Com.App., 277 S.W. 1047.

event is on the carrier.[43]

Where the circumstances of the case warrant, certain presumptions may be indulged in, such as that the driver of a motor vehicle is presumed to have seen whatever he would have seen if properly performing his duties,[44] or what was visible to his passenger,[45] or, in a proper case, that an employee was acting within the scope of his authority,[46] and a conductor may be charged with knowledge that his train carries a mail car and baggage car and that persons are employed therein.[47] A street car company having constructed and maintained a safety zone in such fashion that one standing therein could be struck by its cars will be presumed to know that a person occupying such zone is in danger of injury by being struck by a car.[48]

A person dressed in the uniform adopted by the carrier for its employees and acting as an employee will be presumed, in the absence of other evidence, to be in the employ of the carrier,[49] but such presumption does not arise from the mere presence of a person wearing a cap and uniform, and not in any way identified as an employee.[50]

Shifting of burden. Although it has sometimes been stated that the burden of proof will shift to defendant on plaintiff making out a prima facie case,[51] this statement is inaccurate, and, where defendant sets up a plea or answer denying its liability, the main burden of proof does not shift, but is on plaintiff throughout the case,[52] even where a presumption of negligence exists,[53] or defendant has pleaded an affirmative defense,[54] although, where plaintiff introduces evidence sufficient to make out a prima facie case, it is then incumbent on defendant in order to prevent a recovery to introduce evidence sufficient to overcome such showing by plaintiff;[55] but the carrier is not called on to of-

43. La.—Dixon v. Teche Transfer Co., 1 La.App. 227—Guidry v. Teche Transfer Co., 1 La.App. 225

44. Wash.—Duggins v. International Motor Transit Co., 280 P. 50, 153 Wash. 549

45. Ill.—Hoffman v. Yellow Cab Co., 238 Ill.App. 269

46. **Authority of bus driver**

In action against bus company for injuries to passenger who was mistreated by truck driver, not employed by bus company, with whom passenger had continued journey on being requested to do so by bus driver when bus broke down, a presumption arose that bus driver acted within his authority in requesting passenger to continue journey with truck driver when bus driver's agency was established by showing he occupied the position of a train conductor and was only agent present, and a finding for plaintiff would be authorized if presumption was not rebutted.—South Plains Coaches v. Box, Tex.Civ.App., 111 S.W.2d 1151, error dismissed

47. Ind.—Pittsburgh, C., C. & St. L. Ry. Co. v. Arnott, 126 N.E. 13, 189 Ind. 350

48. Iowa.—Mangan v. Des Moines City Ry. Co., 203 N.W. 705, 200 Iowa 597, 41 A.L.R. 368.

49. Md.—Baltimore, etc., R. Co. v. Kane, 13 A. 387, 69 Md. 11, 9 Am.S.R. 387.
10 C.J. p. 1022 note 63.

50. Va.—Davidson v. Washington & O. D. Ry., 105 S.E. 669, 129 Va. 99

51. U.S.—Irvine v. Delaware, L. & W. R. Co., N.J., 184 F. 664, 106 C.C.A. 600.
10 C.J. p. 1021 note 58.

52. R.I.—Chappell v. United Electric Rys. Co., 152 A. 738, 51 R.I. 148
10 C.J. p. 1021 note 59.

53. Cal.—Seney v. Pickwick Stages, Northern Division, 255 P. 279, 82 Cal.App. 226
Mass.—Gilchrist v. Boston Elevated Ry., 172 N.E. 349, 272 Mass. 346—Fitzmaurice v. Boston, R. B. & L. R. Co., 152 N.E. 239, 256 Mass. 217.
N.J.—McKittrick v. Public Service Ry. Co., 128 A. 226, 101 N.J.Law 262.
N.Y.—McKinney v. New York, W. & B. Ry. Co., 179 N.Y.S. 535
Va.—Virginia Electric & Power Co. v. Lowry, 184 S.E. 177—Richmond-Ashland Ry. Co. v. Jackson, 162 S.E. 18, 157 Va. 628.
10 C.J. p. 1021 note 60

Burden not shifted by res ipsa loquitur rule

(1) A passenger has the burden of showing the carrier's negligence in order to recover, and while the doctrine of res ipsa loquitur will relieve the passenger of the burden of introducing evidence, on showing that the injury was the result of derailment, yet the burden is not shifted, and if the carrier introduces evidence the passenger is not entitled to recover on mere equipoise.—Hines v. Beard, 107 S.E. 717, 130 Va. 286.

(2) The burden on passenger to recover for injuries in res ipsa loquitur case was to show that she was passenger on bus, and that it skidded or left road in unusual manner, and that she was injured without negligence on her part.—Carlson v. Kansas City, Clay County & St. Joseph Auto Transit Co., 282 S.W. 1037, 221 Mo.App. 537.

54. Cal.—Schropshire v. Pickwick Stages, Northern Division, 258 P. 1107, 85 Cal.App. 216, followed in Crosby v. Pickwick Stages, Northern Division, 264 P. 346, 88 Cal.App. 799.

55. Colo.—Denver Tramway Corporation v. Kuttner, 35 P.2d 852, 95 Colo. 312.
Wallace v. Shreveport Rys. Co., La.App., 175 So. 86, quoting this rule stated in **Corpus Juris.**
La.—Johnson v. City of Monroe, App., 164 So. 456—Cusimano v. New Orleans Public Service, 122 So. 903, 12 La.App. 586 reversed on other grounds 127 So. 376, 170 La. 95.
Mo.—Heidt v. People's Motorbus Co. of St. Louis, App., 9 S.W.2d 650
N.Y.—King v. Interborough Rapid Transit Co., 135 N.E. 519, 233 N.Y. 330, modifying 188 N.Y.S. 700, 197 App.Div. 15—McKinney v. New York, W. & B. Ry. Co., 179 N.Y.S. 535
N.C.—Lindsey v. Atlantic Coast Line R. Co., 92 S.E. 166, 173 N.C. 390
Okl.—Sand Springs Ry. Co. v. Westhafer, 218 P. 525, 92 Okl. 89.
Pa.—Doud v. Hines, 112 A. 528, 269 Pa. 182—Bickley v. Philadelphia & R. Ry. Co., 101 A. 654, 257 Pa. 369
10 C.J. p. 1022 note 61.

Unsafe railroad accepted by government

In an action against a railroad company for negligence in constructing an unsafe railroad, accepted and operated by the government for carrying troops on a military reservation, where there was no proof that the government required the construction in such haste as to excuse the negligence, the railroad cannot be relieved from liability on that ground, as it cannot be assumed

fer evidence until facts showing a prima facie liability on its part have been proved.[56]

b. As to Existence of Relation of Carrier and Passenger

The plaintiff has the burden of proving he was a passenger at the time of the accident, aided by the presumption that one who is traveling on a public conveyance used for passenger carriage, and who is not an employee of the carrier, is lawfully on such conveyance as a passenger.

The burden is on plaintiff to prove that he was a passenger, and as such was being rightfully transported at the time of the accident,[57] although during the trial there is no suggestion of a denial of that fact.[58] This burden, however, is aided by the presumption that a person traveling in a railroad car, or other public conveyance used for passenger carriage, and who is not connected with the carrier as employee, is there lawfully as a passenger;[59] but such presumption does not arise where there is evidence that the person was riding on the train as a trespasser,[60] as where he was riding on a car, or part of the train, not intended for the accommodation or use of passengers;[61] nor is there any presumption that one riding in the private vehicle of another is being carried as a passenger for hire.[62]

Evidence that plaintiff was riding on a ticket purchased at defendant's ticket office and at the time of the accident was a passenger on defendant's train which was being operated over its railroad is prima facie proof that the train was being operated by, and in charge of, defendant's employees.[63] The burden is on the carrier to prove that plaintiff, injured in attempting to board a car, was a trespasser unable to pay his fare.[64]

A person on a freight train carrying passengers is presumed to be thereon as a passenger,[65] particularly where it is required by statute that local freight trains shall carry passengers.[66] However, ordinarily one riding on a train used for conveying freight exclusively,[67] or on a freight car of a mixed train, is presumed not to be a passenger, and he has the burden of showing special circumstances to rebut this presumption.[68] Where defendant carrier is a carrier only of goods by truck, there is a presumption that a driver of the truck had no authority to invite or permit persons to ride thereon.[69]

As between connecting carriers, where a passenger buys what purports to be a through ticket from the first carrier, he will be presumed to be under such carrier's care during the whole trip, and the burden is on such carrier to show otherwise.[70]

as a matter of law that the government required the construction of a dangerous track—Bryson v. Hines, C.C.A.N.C., 268 F. 290, 11 A.L.R. 1438

56. Tex.—Paris, etc., R. Co. v. Robinson, 114 S.W. 658, 53 Tex.Civ. App. 12.

57. Conn.—Petrillo v. Kolbay, 165 A. 346, 116 Conn. 389.
10 C.J. p. 1040 note 76.

58. Ala.—Birmingham R., etc., Co. v. McCurdy, 55 So. 616, 172 Ala. 488

59. Pa.—Berkebile v. Johnstown Traction Co., 99 A. 871, 255 Pa. 310.
10 C.J. p. 1040 note 78.

Automobile passenger

A person traveling in an autobus used for carrying passengers, in the absence of countervailing circumstances, is presumed to be a passenger for hire.

Cal.—Meier v. Golden State Auto Tour Corporation, 195 P. 290, 50 Cal.App. 277.

Tenn.—Baskin & Cole v. Whitson, 8 Tenn.App. 578.

Entering train at usual station

When a train stops at the usual station for receiving and discharging passengers, and a person enters the coaches, he is presumed to be a passenger—Rowell v. Hines, 103 S.E. 545, 114 S.C. 339.

Payment of fare

(1) Where conductor testified plaintiff was a passenger, the fact that there was no evidence she had ticket, nor paid fare, nor was able and willing to pay, was immaterial as affecting a contention that there was no proof that she was a passenger, it being presumed from her riding between stations that she paid fare—Wichita Valley Ry. Co. v. Helms, Tex.Civ.App., 261 S.W. 225.

(2) One intending to become a passenger, who was injured in the depot while waiting for his train, and who subsequently boarded the train, must be presumed to have paid the regular fare—Ft. Worth & D.C. Ry. Co. v. Brown, Tex.Civ.App., 205 S.W. 378.

60. Tex.—Southerland v. Texas, etc., R. Co., Civ.App., 40 S.W. 193.

61. Ark.—Prescott, etc., R. Co. v. Hopkins, 182 S.W. 551, 122 Ark. 168.
10 C.J. p. 1040 note 80.

Presumption is that one riding out of place provided by a railroad company for passengers is not a passenger, or, if such, that he has assumed the increased risk from riding there.—Chicago, R.I. & P. Ry. Co. v. Thurlow, Kan., 178 F. 894, 102 C.C.A. 128, 30 L.R.A.,N.S., 571.

Work trains

The presumption that one who is permitted by an employee of a company to ride on a construction train is not lawfully thereon may be overcome by special circumstances implying the authority of such employee to grant such privilege—Rosenbaum v. St. Paul, etc., R. Co., 36 N.W. 447, 38 Minn. 173, 8 Am.S.R. 653.

62. U.S.—Lydon v. Robert Smith Ale Brewing Co., C.C.Pa., 133 F. 830.

63. Ill.—Lake Erie, etc., R. Co. v. Delong, 109 Ill.App. 241.

64. Ind.—Chicago, L.S. & S.B. Ry. Co. v. Brown, 115 N.E. 368, 66 Ind. App. 126.

65. Va.—Southern R. Co. v. Dawson, 36 S.E. 996, 98 Va. 577.
10 C.J. p. 1040 note 83

66. Ark.—Kruse v. St. Louis, etc., R. Co., 133 S.W. 841, 97 Ark. 137.

67. U.S.—Dysart v. Missouri, K. & T.R. Co., Mo., 122 F. 228, 58 C.C.A. 592.
10 C.J. p. 1040 note 85.

68. Tex.—Missouri, etc., R. Co. v. Huff, 81 S.W. 525, 98 Tex. 110, reversing, Civ.App., 78 S.W. 249.
10 C.J. p. 1041 note 86.

69. Wash.—Gruber v. Cater Transfer Co., 165 P. 491, 96 Wash. 544, L.R.A. 1917F 422.

70. Pa.—Prethrow v. West Jersey, etc., R. Co., 63 A. 415, 214 Pa. 112, 112 Am.S.R. 736.
10 C.J. p. 1041 note 87.

Rebutting presumption. The presumptions as to the relation of passenger and carrier, arising from the manner in which a person is traveling, are merely presumptions of fact, and may of course be rebutted by the carrier or the passenger.[71]

c. As to Negligence or Wrong in General

The burden of proving the negligence or wrong of the carrier is on plaintiff, who must also show such negligence or wrong was the proximate cause of his injury.

As in other civil cases in which damages are sought to be recovered for injuries caused by the negligence of another, the burden is on plaintiff who seeks to recover for the negligence or wrong of the carrier to show by a preponderance of the evidence the negligence or wrong as alleged,[72] and that such negligence or wrong was the proximate cause of the injury complained of,[73] and this obligation may sufficiently be performed by showing circumstances attending the injury from which a presumption of negligence on the part of the carrier arises, thereby putting on the carrier the onus of showing due care on its part, as shown infra § 764 d. The passenger does not have the burden of showing the exact breach of duty committed by the carrier.[74] Where the evidence raises the issue of unavoidable

71. U.S.—Bryant v. Chicago, St. P., M. & O. etc., R. Co., Minn., 53 F. 997, 4 C.C.A. 146.
10 C.J. p. 1041 note 88.

72. U.S.—Old South Lines v. McCuiston, C.C.A.Ga., 92 F.2d 441—Windham v. Atlantic Coast Line R. Co., C.C.A.Ala., 71 F.2d 115.
Ala.—Mosley v. Teche Lines, 166 So. 800, 232 Ala. 110.
Ark.—St. Louis-San Francisco Ry. Co. v. Evans, 109 S.W.2d 918.
Del.—Clayton v. Philadelphia, B. & W. R. Co., Super., 106 A. 577, 7 Boyce 343.
Ga.—Holmes v. Georgia Power Co., 162 S.E. 403, 44 Ga.App. 588, reversed on other grounds Georgia Power Co. v. Holmes, 165 S.E. 284, 175 Ga. 487, conformed to Holmes v. Georgia Power Co., 165 S.E. 918, 45 Ga.App. 826.
Ill.—See Van Zandt v. Metropolitan West Side Elevated Ry. Co., 205 Ill.App. 453.
Ky.—Cincinnati, N. & C. Ry. Co. v. Trenkamp, 295 S.W. 866, 220 Ky. 552—McDermott v. Louisville & N. R. Co., 206 S.W. 6, 182 Ky. 22.
La.—King v. New Orleans Ry. & Light Co., 74 So. 168, 140 La. 843.
Mass.—Shine v. New York, N. H. & H. R. R., 128 N.E. 713, 236 Mass. 419, 11 A.L.R. 1075.
Mo.—Schulz v. St. Louis-San Francisco Ry. Co., 4 S.W.2d 762, 319 Mo. 8—Tevis v. United Rys. Co. of St. Louis, App., 185 S.W. 738.
Mont.—Fisher v. Butte Electric Ry. Co., 235 P. 330, 72 Mont. 594.
Neb.—Haight v. Omaha & C., B. St. Ry. Co., 166 N.W. 248, 101 Neb. 841.
N.H.—Lewis v. Boston & M. R. R., 106 A. 605, 79 N.H. 165.
N.Y.—Farmer v. Interborough Rapid Transit Co., 205 N.Y.S. 479, 123 Misc. 383—Meyers v. Hines, 191 N.Y.S. 773, 199 App.Div. 594—Slomka v. Nassau Electric R. Co., 182 N.Y.S. 156, 191 App.Div. 727—McKinney v. New York, W. & B. Ry. Co., 179 N.Y.S. 535.
Okl.—Muskogee Electric Traction Co. v. Latty, 187 P. 491, 77 Okl. 156.
Pa.—Martin v. Steen, 167 A. 609, 109 Pa.Super. 263—Bowman v. Pennsylvania R. Co., 149 A. 877, 299 Pa. 558, certiorari denied 51 S.Ct. 27, 282 U.S. 849, 75 L.Ed. 752—Kelly v. Philadelphia, B. & W. R. Co., 113 A. 194, 270 Pa. 149.
S.C.—Hutchison v. Southern Ry. Co., 95 S.E. 181, 109 S.C. 90.
Va.—Chesapeake & O. Ry. Co. v. Baker, 140 S.E. 648, 149 Va. 549, rehearing denied 141 S.E. 753, 149 Va. 549, rehearing denied 141 S.E. 753, 149 Va. 549, addendum opinion, 143 S.E. 299, 150 Va. 647—Davidson v. Washington & O. D. Ry., 105 S.E. 669, 129 Va. 99.
10 C.J. p. 1021 note 53, p. 1022 note 65.

Prima facie case

In action for death of passenger, plaintiff has burden of establishing prima facie case, and carrier is not bound where whole case rests on circumstantial evidence to advance a more plausible theory than that advanced by plaintiff.—Daly v. Pryor, 198 S.W. 91, 197 Mo.App. 583.

Notice of conditions

(1) In action for injury sustained by slipping on banana skin on station platform, plaintiff had burden of proving skin was there long enough to charge railroad with constructive notice of its presence.—Deegan v. Pennsylvania R. Co., 160 A. 858, 307 Pa. 207.

(2) Trolley passenger, suing for injuries from fall in underground passage, need not prove direct notice to trolley company of dangerous character of structure.—Palmer v. Philadelphia Rapid Transit Co., 100 Pa.Super. 380.

(3) Burden was on one suing for injuries, caused by taxicab driver's refusal to help remove plaintiff from floor to seat of cab, to prove that driver knew or should have known that heater in floor was so hot as to burn plaintiff.—Schmuck v. Heilman, 161 A. 420, 106 Pa.Super. 12.

(4) Passenger suing for injuries received when stumbling over brick on walk leading from train must show that brick was placed by person for whose conduct defendants were responsible, or had remained so long that it should have been discovered and removed.—Meridian Terminal Co. v. Stewart, 108 So. 496, 143 Miss. 523.

73. U.S.—New York Cent. R. Co. v. Johnson, Mo., 49 S.Ct. 300, 279 U.S. 310, 73 L.Ed. 706, reversing, C.C.A., 27 F.2d 699, certiorari granted 49 S.Ct. 27, 278 U.S. 590, 73 L.Ed. 523, and opinion amended 49 S.Ct. 417—Northern Ry. Co. v. Page, Mass., 47 S.Ct. 491, 274 U.S. 65, 71 L.Ed. 929, reversing, C.C.A., Page v. United Fruit Co., 3 F.2d 747, certiorari granted Northern Ry. Co. v. Page, 46 S.Ct. 19, 269 U.S. 542, 70 L.Ed. 402—Old South Lines v. McCuiston, C.C.A.Ga., 92 F.2d 441.
Iowa.—Moss v. Mason City & C. L. R. Co., 251 N.W. 627, 217 Iowa 354.
Ky.—Johnson v. Brewer, 98 S.W.2d 889, 266 Ky. 314.
La.—Lakios v. New Orleans, T. & M. Ry. Co., App., 147 So. 525.
Mo.—Madden v. Red Line Service, App., 76 S.W.2d 435—Willi v. United Rys. Co. of St. Louis, 224 S.W. 86, 205 Mo.App. 272.
Mont.—Fisher v. Butte Electric Ry. Co., 235 P. 330, 72 Mont. 594.
Neb.—Haight v. Omaha & C., B. St. Ry. Co., 166 N.W. 248, 101 Neb. 841.
N.H.—Vaughan v. Boston & M. R. R., 103 A. 129, 78 N.H. 615.
Tex.—Lancaster v. Hall, Civ.App., 277 S.W. 776.
10 C.J. p. 1022 note 66.

Negativing inference of other cause

Plaintiffs, suing for wrongful death from starting train without warning, had burden of negativing inference of death from cause for which railroad was not responsible.—Betcher v. Southern Pac. Co., C.C.A.Tex., 29 F.2d 735.

74. Mich.—Trent v. Pontiac Transp. Co., 275 N.W. 501, 281 Mich. 586.

accident, the burden is on plaintiff to show such was not the cause of the injuries.[75] Where the carrier is negligent, the burden is on it to prove that the act of a fellow passenger, which it claims was the sole proximate cause of the injury, entirely superseded its negligence and was in itself responsible for the injury and not foreseeable.[76]

Where the degree of negligence is not shown, ordinary negligence, and not gross negligence or willfulness or wantonness will be presumed.[77]

Assault. In an action for an assault by an employee of the carrier, the burden is on plaintiff to prove that the injury was caused by the wrongful act of such employee, while acting within the line of his duty.[78] Where an assault is shown it is presumed that it was unlawful, and the burden is on the carrier to prove justification, and if the carrier puts in evidence to show justification, the burden is on plaintiff to rebut it.[79] Where it appears that plaintiff was the aggressor in provoking the assault, it is incumbent on defendant to show that the employee used no more force than was reasonably necessary to repel plaintiff's assault.[80] Where the assault is committed by a fellow passenger, who previously thereto was quiet and orderly, no presumption of prior misconduct from which the trainmen could have anticipated the assault can be indulged, merely because it subsequently appeared that the passenger was drunk or crazy.[81]

d. Res Ipsa Loquitur in General

The res ipsa loquitur doctrine applies in actions for simple negligence against carriers, and a prima facie case is made out when it is shown that the injury was caused by something in the care, custody, or control of the carrier or connected with its business, and the circumstances were such that the accident could not well have happened without defendant being negligent.

The maxim, Res ipsa loquitur, which is recognized to some extent in the proof of negligence in general, applies to common carriers, and is of peculiar application in actions for simple negligence against carriers of passengers, such as railroad or street railroad companies, and in a number of cases the rule has been broadly stated that the happening of an accident to the passenger, at least where it appears to have occurred without fault on his part, gives rise to a presumption of negligence on the part of the carrier, so that the passenger makes out a prima facie right to recover for personal injuries received during transportation, by proof that he was at the time of receiving the injury a passenger, that an accident occurred, and that his injury resulted therefrom, and thereby casts on defendant the burden of rebutting such presumption.[82] This, however, is too broad a state-

75. Tex.—Dallas Ry. Co. v. Alexander, Civ.App., 23 S.W.2d 512.

76. Tex.—Gulf, C. & S. F. Ry. Co. v. Ballew, Civ.App., 39 S.W.2d 180, reversed on other grounds, Com.App., 66 S.W.2d 659.

77. Ky.—Southern R. Co. v. Lee, 101 S.W. 307, 30 Ky.L. 1360, 10 L.R.A.,N.S., 837.
10 C.J. p. 1023 note 68.

78. Ky.—White v. South Covington, etc., R. Co., 150 S.W. 837, 150 Ky. 681.
Md.—Rosenkovitz v. United R., etc., Co., 70 A. 108, 108 Md. 306.
10 C.J. p. 1021 notes 55, 56.

79. Mo.—Parris v. Deering Southwestern Ry. Co., App., 227 S.W. 1071.

No more force than necessary

Where the carrier seeks to justify the assault by an employee, it is incumbent on it to show that no more force was used than was necessary under the circumstances.—Parris v. Deering Southwestern R. Co., Mo.App., 227 S.W. 1071.

80. Ark.—St. Louis Southwestern R. Co. v. Berger, 44 S.W. 809, 64 Ark. 613, 39 L.R.A. 784.

81. Ky.—Payne v. Moore, 244 S.W. 869, 196 Ky. 454.

82. U.S.—Pennsylvania Co. v. Clark, C.C.A.Ohio, 266 F. 182.
Ala.—Birmingham Electric Co. v. Mealing, 108 So. 511, 214 Ala. 537.—Tennessee, A. & G. Ry. Co. v. Rossell, 88 So. 362, 18 Ala.App. 17.
Cal.—Leonard v. Pickwick Stage System, 7 P.2d 1059, 120 Cal.App. 512.
Ill.—Field v. Winheim, 123 Ill.App. 227.
Iowa.—Preston v. Des Moines Ry. Co., 241 N.W. 648, 214 Iowa 156.
Ky.—Warren v. Cumberland R. Co., 193 S.W. 1037, 175 Ky. 92.
La.—Cusimano v. New Orleans Public Service, 127 So. 376, 170 La. 95, reversing 122 So. 903, 12 La.App. 586.—Hopkins v. New Orleans Ry. & Light Co., 90 So. 512, 150 La. 61, 19 A.L.R. 1362.—Gaines v. Teche Lines, App., 176 So. 134.—Wallace v. Shreveport Rys. Co., App., 175 So. 86.—Gager v. Teche Transfer Co., App., 153 So. 69.—Bacon v. New Orleans Public Service, 137 So. 213, 18 La.App. 96, rehearing denied 137 So. 866, 18 La.App. 96.—Baptiste v. New Orleans Public Service, 127 So. 655, 13 La.App. 625.—Nee v. New Orleans Public Service, 123 So. 135, 11 La.App. 1.—Larose v. New Orleans Public Service, 119 So. 908, 10 La.App. 91.—Poncet v. South New Orleans Light & Traction Co., 3 La.App. 64.
Mo.—Powell v. St. Joseph Ry., Light, Heat & Power Co., 81 S.W.2d 957, 336 Mo. 1016.—Malone v. St. Louis-San Francisco Ry. Co., 213 S.W. 864, 202 Mo.App. 489.
N.Y.—De Roire v. Lehigh Valley R. Co., 199 N.Y.S. 652, 205 App.Div. 549.
Pa.—Orms v. Traction Bus Co., 150 A. 897, 300 Pa. 474.
S.C.—Thompson v. Atlantic Coast Line R. Co., 102 S.E. 11, 113 S.C. 261.
10 C.J. p. 1023 note 71.

It is an "inference," and not a "presumption," from the showing of the overturning of a taxicab injuring a passenger that it occurred through the negligence of the driver.—Dowd v. Atlas Taxicab & Auto Service Co., 202 P. 870, 187 Cal. 523.

Permissible inference only

Under the rule established by the supreme court of the United States, which is binding on the courts of the District of Columbia, the doctrine of res ipsa loquitur does not require an inference of negligence to be drawn from proof of injury to a street car passenger happening without her fault, but merely permits such inference to be drawn.—Robertson v. Washington Ry. & Electric Co., 279 F. 180, 51 App.D.C. 311.

ment. As stated in § 676 supra, the carrier is not an insurer against injuries to the passenger, but plaintiff's right of action for injuries is based on negligence, the burden of proof of which is on him; and the circumstances of many, if not all, of the cases in which the rule is so broadly stated have been such that the presumption would have arisen from the circumstances of the accident Therefore, the mere proof of an injury to the passenger in course of transportation, which, so far as it is shown, might have occurred by reason of other cause than the carrier's negligence, such as the act of the passenger himself, or without fault of anyone, will not make out a prima facie case,[83] particularly where the circumstances connected with the accident were of such a character as to withdraw as against defendant any presumption of negligence.[84] Thus, the presumption of negligence does not arise from the mere happening of an accident,[85] even though the carrier cannot explain

Extent of burden

(1) The carrier has the burden only of showing freedom from negligence —Gager v. Teche Transfer Co, La App, 153 So. 69.

(2) In suit by passenger for personal injuries, burden is on common carrier by motorbus to show that it was free from negligence, but it is not necessary for carrier to show how or why injury occurred —Baptiste v. New Orleans Public Service, La App, 161 So. 783.

(3) Street railway company, sued for injuries to passenger alleging only defective operation of exit step, was not required to show how and why plaintiff was injured —Wylie v Shreveport Rys. Co, App., 140 So. 715, affirmed 145 So. 513, 176 La. 193.

83. U.S —Old South Lines v. McCuiston, C C A Ga, 92 F 2d 439.
Ala —Central of Georgia R. Co. v. Robertson, 83 So. 102, 203 Ala 358
Md —Tittlebaum v. Pennsylvania R. Co, 174 A. 89, 92, 167 Md. 397.
Mont.—Heck v Northern Pac. Ry. Co, 196 P. 521, 59 Mont. 106.
Or —Richardson v. Portland Trackless Car Co, 233 P. 540, 113 Or. 544.
Pa —Mink v. Philadelphia Rapid Transit Co, 93 Pa Super. 63.
Wash.—Morrissey v Union Pac. R. Co, 249 P 1064, 68 Utah 323, referring to collection of authorities in **Corpus Juris.**
10 C J. p 1024 note 74.

"If, by the evidence . . . it was disclosed that the injury complained of might have been caused either by the defendant's negligence or by the act of another for which the defendant was not responsible, then the doctrine would not apply." —Tittlebaum v. Pennsylvania R. Co, supra

No presumption of negligence arises from injuries received by:

(1) Catching of plaintiff's heel while alighting from street car —Coleman v. Boston Elevated Ry Co., 143 N.E 819, 249 Mass 155.

(2) Falling of window glass from street car —Cleveland Ry Co. v. Sutherland, 152 N.E. 726, 115 Ohio St. 262.

(3) Falling over a suitcase projected in the aisle of a street car. —Alabama Great Southern R. Co. v Johnson, 71 So 620, 14 Ala App 558

(4) Falling window in railroad car.
Ky —Chadwick v. Louisville & N R. Co, 281 S W. 1018, 213 Ky. 831, 45 A.L.R 1537
Mass —Murphy v. Boston Elevated Ry Co., 118 N E. 191, 229 Mass. 38

(5) Mere skidding of motor vehicle.
Mass —Bartlett v Town Taxi, 160 N E 797, 263 Mass. 215.
R I.—Peters v. United Electric Rys Co, 165 A 773, 53 R I 251, modified on other grounds 167 A. 122

(6) Slipping on banana peel in aisle of coach —Windham v. Atlantic Coast Line R. Co., C C A. Ala, 71 F.2d 115.

(7) Slipping on fresh plum on vestibule floor, and passenger had burden to prove that motorman-conductor knew or should have known of presence of plum in time to remove it —Morrison v. Pacific Northwest Public Service Co., 30 P 2d 344, 146 Or 225.

(8) Slipping of stepping box —Beltz v. Buffalo, R & P. Ry Co, 119 N E 81, 222 N Y 433 reversing 160 N.Y.S. 1124, 171 App Div. 976.

(9) Sudden breaking of window, where no showing was made that accident was caused by mechanical defect in window, or by passing train, and where window a short time before had been examined and nothing had been found wrong, and where evidence was offered to show accident was caused by third person over whom railway had no control —Tittlebaum v Pennsylvania R Co, 174 A. 89, 167 Md 397.

(10) Tripping over baggage in aisle.—Heineke v. Chicago Rys Co., 116 N E. 761, 279 Ill. 210, affirming 199 Ill App 399.

(11) Taxicab passenger, from sudden turning of car —Bartlett v Town Taxi, 160 N.E. 797, 263 Mass. 215.

(12) Stumbling over suitcase in aisle of a car —Dusenbury v Delaware, L. & W R. Co., 158 N.Y.S 681, 95 Misc. 241.

84. Miss —Gulf & S I R. Co v. Odum, 98 So. 60, 133 Miss 543. 10 C.J p 1024 note 75.

Standing train

Generally, the doctrine of the maxim res ipsa loquitur cannot have any application to injuries received by a passenger while alighting from a standing train.—Heck v. Northern Pac Ry. Co, 196 P. 521, 59 Mont. 106

Passenger safely alighting from car

(1) Where passenger is injured after safely alighting, carrier is not liable, presumption of its negligence when passenger is injured being inapplicable —Stewart v. New Orleans Public Service, 4 La App 543

(2) Where passenger after alighting was struck by bus turning corner, happening of accident created no presumption of negligence.—Fitzpaldi v. Philadelphia Rural Transit Co, 163 A. 397, 107 Pa Super. 385

Where testimony was conflicting as to whether plaintiff's injuries were sustained while a passenger and about to alight, or whether they were sustained at a distance of six or eight feet from the car after she had safely alighted, the rule of res ipsa loquitur has no application.—Livingston v Omaha & C. B St Ry. Co, 175 N W 662, 104 Neb 118

Injury by fellow passenger

Where a passenger was not hurt by any instrumentality connected with the means of transportation, but from a piece of pipe carried by an alighting passenger there was no presumption against the carrier, and the burden of proof was on the passenger.—Wood v Philadelphia Rapid Transit Co., 104 A 69, 260 Pa. 481, L R.A.1918F 817.

85. Mich.—Trent v. Pontiac Transp Co., 275 N.W 501, 281 Mich. 586
N Y —Morgan v. Oceanic Steam Nav. Co, 224 N Y.S. 420, 130 Misc 570.
Ohio —Canton Motor Coach v Hall, 189 N E. 505, 46 Ohio App 516.
Pa —Zaltouski v. Scranton Ry. Co, 165 A 847, 310 Pa 531—Creahan v Pennsylvania R. Co., 187 A. 51, 123 Pa.Super. 263 — Baron v. Wilkes-Barre Ry. Co., 71 Pa.Super. 103
S C —Nelson v. Charleston & W. C. Ry. Co., 121 S.E. 198, 92 S.C. 151.

it,[86] as from the mere fact that the passenger is injured while boarding, riding on, or alighting from a street car,[87] or from the mere fact of his falling from a train or car,[88] or on steps at a station;[89] nor does such presumption arise merely from the fact that defendant owned and operated, through its employee, the car by which plaintiff was injured,[90] nor from the mere relation of passenger and carrier.[91] The applicability of the res ipsa loquitur doctrine does not depend on the degree of care imposed by law on the carrier of passengers.[92]

The doctrine of res ipsa loquitur is applicable only where the thing shown speaks of the negligence of defendant,[93] and, where it is further made to appear that the injury was caused by something which, at the time it occurred, was in the care, custody, or under the control of the carrier, or in some way connected with, or related to, its business in the transportation of passengers, and the circumstances attending the injury were so unusual and of such a nature that the accident could not well have happened without defendant being negligent, as where the happening of the accident appears to have been due to defective roadbed, track, machinery, or appliances, or fault in the operation of the conveyance, it makes out a prima facie case in favor of plaintiff and throws on the carrier the burden of adducing evidence to show its freedom from negligence, that is, from any want of the exercise of the high degree of care, skill, and foresight required of carriers of passengers in the prosecution of their business with respect to the defect or fault which caused the accident.[94]

Negligence held not to be presumed

(1) That intending passenger was struck by "rear overhang" of street car rounding curve did not raise presumption of railroad's negligence.—Dwyer v. Los Angeles Ry. Corporation, 2 P.2d 468, 115 Cal.App. 709.

(2) Where a carrier permitted a negro passenger to ride on its cars into a city where a mob attacked the car and injured the passenger, negligence of carrier will not be presumed from the mere happening of the accident.—Williams v. East St. Louis & S. Ry. Co., 232 S.W. 759, 207 Mo.App. 233.

(3) The skidding of an automobile or motorbus while traveling along wet street at eight or ten miles an hour cannot be presumed to be negligent.—Heidt v. People's Motorbus Co. of St. Louis, 284 S.W. 840, 219 Mo.App. 683.

(4) Where the thumb of a passenger on an elevated train was injured through a sliding door closing on it, no negligence could be inferred from the mere happening of the accident.—Kinbec v. Interborough Rapid Transit Co., 191 N.Y.S. 313.

(5) Court could not infer that, because railroad cars are usually provided with catch to hold door open while passengers are passing in or out, and door closed, catch was defective, or that railroad was negligent in not having door placed back sufficiently to interlock with catch.—Wood v. Pennsylvania R. Co., 170 A. 367, 111 Pa.Super. 430.

(6) Negligence could not be predicated on closing of door of railroad car on passenger's finger, in absence of evidence that door was closed in unusual manner or that there was anything defective in operation or construction of door or catch, or that railroad employee was responsible for door's movement.—Wood v. Pennsylvania R. Co., supra.

86. N.Y.—Salomone v. Yellow Taxi Corporation, 151 N.E. 442, 242 N.Y. 251, reversing 213 N.Y.S. 899, 215 App.Div. 790, and reargument denied 152 N.E. 445, 242 N.Y. 602.—Brown v. Klein, 245 N.Y.S. 654, 230 App.Div. 681.

87. Cal.—Rystinki v. Central California Traction Co., 165 P. 952, 175 Cal. 336.—Duffield v. Payne, 227 P. 217, 66 Cal.App. 767.
Ill.—Piper v. Green, 216 Ill.App. 590.
Md.—State v. United Railways & Electric Co. of Baltimore, 159 A. 916, 162 Md. 404, 83 A.L.R. 1307.—Callis v. United Rys. & Electric Co., 97 A. 715, 128 Md. 406.
Pa.—Wood v. Pennsylvania R. Co., 170 A. 367, 111 Pa.Super. 430.—Keller v. H., M. & F. Pass. R. Co., 1 Pa.Dist. 197, affirmed 149 Pa. 65.
Va.—Virginia Electric & Power Co. v. Lenz, 164 S.E. 572, 158 Va. 732.
10 C.J. p. 1024 note 76.

88. La.—Betts v. Shreveport Rys. Co., 137 So. 615, 18 La.App. 282.
N.Y.—Scott v. New York Cent. R. Co., 216 N.Y.S. 163, 216 App.Div. 623.
10 C.J. p. 1025 note 77.

89. Ga.—Flanders v. Atlanta Terminal Co., 95 S.E. 307, 21 Ga.App. 812.

90. Mont.—Fisher v. Butte Electric Ry. Co., 235 P. 330, 72 Mont. 594.

91. Tex. — Southland Greyhound Lines v. Frausto, Civ.App., 69 S.W. 2d 497, error dismissed.

92. Ind.—Union Traction Co. of Indiana v. Berry, 124 N.E. 737, 188 Ind. 514, denying rehearing 121 N.E. 655, 188 Ind. 514.

93. Ala.—Central of Georgia R. Co. v. Robertson, 83 So. 102, 203 Ala. 358.
10 C.J. p. 1025 note 78.

94. U.S.—May Department Stores Co. v. Bell, C.C.A.Mo., 61 F.2d 830.—New York Cent. R. Co. v. Johnson, C.C.A.Mo., 27 F.2d 699, certiorari granted 49 S.Ct. 27, 278 U.S. 590, 73 L.Ed. 523, reversed on other grounds 49 S.Ct. 300, 279 U.S. 310, 73 L.Ed. 706, opinion amended 49 S.Ct. 417.—Mendelson v. Davis, C.C.A.Neb., 281 F. 18.
Ala.—Central of Georgia R. Co. v. Robertson, 83 So. 102, 203 Ala. 358.—Bradley v. Williams, 101 So. 808, 20 Ala.App. 308.
Cal.—McIntosh v. Los Angeles Ry. Corporation, 59 P.2d 959.—Robinson v. McAlister, 13 P.2d 926.—St. Clair v. McAlister, 13 P.2d 924, 216 Cal. 95.—Smith v. O'Donnell, 12 P.2d 933, 215 Cal. 714.—Graff v. United Railroads of San Francisco, 172 P. 603, 178 Cal. 171.—Rystinki v. Central California Traction Co., 165 P. 952, 175 Cal. 336.—Snyder v. Tanner Motor Livery, App., 50 P.2d 1051.—Jones v. United Railroads of San Francisco, 202 P. 919, 54 Cal.App. 744.
Colo.—Denver Tramway Corporation v. Kuttner, 35 P.2d 852, 95 Colo. 312.—Yellow Cab Co. v. Hodgson, 14 P.2d 1081, 91 Colo. 365, 83 A.L.R. 1156, quoting **Corpus Juris** at length.
Ill.—Roberts v. Economy Cabs, 2 N.E.2d 128, 285 Ill.App. 424.
Ind.—Indianapolis Traction & Terminal Co. v. Thornburg, 125 N.E. 57, 74 Ind.App. 642.
Ky.—Kentucky Traction & Terminal Co. v. Roman's Guardian, 23 S.W. 2d 272, 232 Ky. 285.—Chadwick v. Louisville & N. R. Co., 281 S.W. 1018, 213 Ky. 331, 45 A.L.R. 1537.
La.—Wallace v. Shreveport Rys. Co., App., 175 So. 86.—Stevens v. Yellow Cab Co., App., 142 So. 807.—Rizzo v. New Orleans Ry. & Light Co., 7 La.App. 686.
Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158

It has been held that this presumption continues throughout the trial of the case;[95] and it has also been held that the doctrine of res ipsa loquitur is not restricted in its application to carriers to injuries to persons who assume the character of passengers,[96] but applies to prospective as well as actual passengers,[97] and to a passenger injured on a freight train the same as to one injured on a passenger train.[98]

The doctrine applies to carriers jointly operating the conveyance at the time of the passenger's injury.[99]

Reasons for rule. The reasons for the doctrine as to the presumption of negligence arising from the circumstances of the injury inflicted on a passenger are, by some courts, said to be based on the fact that the evidence as to the cause of the accident lies peculiarly within the knowledge of the carrier.[1] By other courts it is said to rest on the fact that, where an accident happens which in the ordinary course of business would not happen if the required degree of care was observed, the presumption is that such care was wanting;[2] and still other courts base the doctrine in this class of cases on the ground that, as the carrier has failed in the duty to carry safely, undertaken by contract, the burden is on it to show an excuse for such failure.[3]

Md. 424, reargument denied 149 A 565, 158 Md. 424, and appeal dismissed American Oil Co. v. Metz, 51 S Ct. 40, 282 U.S 801, 75 L Ed. 720—Hagerstown & F. Ry. Co. v. State, 99 A. 376, 129 Md. 318.

Mass.—Fitzmaurice v. Boston, R. B. & L. R. Co., 152 N E 239, 256 Mass. 217.

Mich.—Durfey v. Milligan, 251 N.W. 356, 265 Mich. 97.

Mo—Powell v. St Joseph Ry., Light, Heat & Power Co., 81 S.W.2d 957, 336 Mo. 1016—Elliott v. Chicago, M. & St. P. Ry. Co., 236 S.W. 17—Anderson v. Kansas City Rys. Co., 233 S.W. 203, 290 Mo. 1—Malone v. St. Louis-San Francisco Ry. Co., 213 S.W. 864, 202 Mo App. 489.

Mont.—Heck v. Northern Pac. Ry. Co, 196 P. 521, 59 Mont. 106.

N.J.—Egner v. Hudson & M. R Co, 162 A. 554, 109 N J Law 367—Barney v Hudson & M. R. Co., 145 A 5, 105 N J.Law 274, affirmed 148 A. 917, 106 N.J Law 230, 231—Rapp v. Butler-Newark Bus Line, 138 A. 377, 103 N.J.Law 512, affirmed 140 A. 921, 104 N.J.Law 444.

N Y.—Salomone v. Yellow Taxi Corporation, 151 N.E. 442, 242 N Y 251, reversing 213 N.Y.S. 899, 215 App.Div. 790, and reargument denied 152 N.E. 445, 242 N Y. 602—Smith v. Interborough Rapid Transit Co., 201 N Y S. 676, 121 Misc. 673—Dusenbury v. Delaware, L. & W. R. Co., 158 N Y S. 681, 95 Misc. 241.

Ohio—Sentker v. Martin, 19 Ohio N. P.,N S, 445.

Or.—Richardson v. Portland Trackless Car Co, 233 P. 540, 113 Or. 544.

Pa—Petri v. Pittsburgh Rys Co., 195 A. 107—Miller v. Pennsylvania R. Co., 154 A. 924, 303 Pa. 524—Petrie v Kaufmann & Baer Co, 139 A. 878, 291 Pa. 211—Johnston v. Director General of Railroads, 133 A. 158, 286 Pa. 166—Furby v. Pennsylvania R. Co., 132 A. 796, 286 Pa 85—Mink v. Philadelphia Rapid Transit Co., 93 Pa.Super. 63—Heim v. Philadelphia & Reading R. Co., 29 Pa.Dist. 453

S C—Hall v. Southern Ry Co, 160 S.E. 584, 162 S.C. 260—Porter v. Davis, 110 S.E. 121, 118 S C. 153.

Tenn.—Nashville Ry. & Light Co v. Owen, 11 Tenn App. 19.

Tex—Bower Auto Rent Co. v. Young, Civ App, 274 S.W. 295.

Va—Chesapeake & O. Ry. Co. v. Baker, 140 S E. 648, 149 Va 549, rehearing denied 141 S.E 753, 149 Va. 549, addendum opinion 143 S. E 299, 150 Va. 647—Walters v Norfolk & W Ry. Co., 94 S.E. 182, 122 Va. 149.

Wash — Wade v. North Coast Transp. Co., 5 P 2d 985, 165 Wash 418—Bradley v. City of Seattle, 294 P. 554, 160 Wash. 100.

10 C J. p 1025 note 79.

Cause of accident unknown to plaintiff

In actions for injuries to passengers, carrier has burden of showing freedom from negligence if facts indicate that passenger had no knowledge of cause of accident.—Peterson v. Louisiana Power & Light Co, La. App, 174 So. 644.

"Split switch"

In a suit for injury to intending passenger, it appeared that a street car took an unexpected course, the back wheels going as they were intended and the front ones veering off by reason of a split switch and causing an unusual and dangerous movement of the car which could not have happened except for some defect in the track or car or some negligence in its management, defendant had burden of explaining the casualty, the machinery and appliances being peculiarly within defendant's knowledge. — Mayne v Kansas City Rys. Co, 229 S.W. 386, 287 Mo 235.

Knowledge of defendant of conditions

(1) Res ipsa loquitur doctrine would apply against railroad if conditions showed that grease on which passenger slipped must have been on station platform for considerable time.—Stonebreaker v Bamberger, 54 P.2d 418, 88 Utah 310.

(2) In such a case, a passenger slipping on grease on station platform is not bound to prove that railroad, knowing that motor vehicles frequently traversed platform and left grease, had, or was chargeable with, knowledge of particular grease involved—Stonebreaker v. Bamberger, supra.

Taxicab companies

(1) Taxicab company is "common carrier" within the application of the res ipsa loquitur doctrine which applies in action by passenger.—Bezera v. Associated Oil Co, 3 P.2d 622, 117 Cal App. 139.

(2) Driver's violation of rule by driving in prohibited direction on one-way street was evidence of negligence with respect to passenger.—Rea v. Checker Taxi Co., 172 N.E. 612, 272 Mass. 510.

Bus carrier

Rule of res ipsa loquitur applies to negligent injury by bus carrier, where accident could not ordinarily have happened without carrier's negligence, requiring carrier to show freedom from negligence—Crozier v. Hawkeye Stages, 228 N.W. 320, 209 Iowa 313

95. S.C—McKittrick v. Greenville Tract. Co., 70 S E. 414, 88 S.C 91.

96. N.Y.—Bartnik v. Erie R Co., 55 N.Y S 266, 36 App.Div. 246.

10 C.J. p 1026 note 82

97. Colo—Denver Tramway Corporation v. Kuttner, 35 P.2d 852, 95 Colo. 312.

98. Ind.—Vandalia R. Co. v. Darby, App., 108 N E. 778.

99. Kan—Woods v. Kansas City, K. V. & W. R Co., 8 P.2d 404, 134 Kan. 755

1. Cal.—Steele v. Pacific Electric R. Co, 143 P. 718, 168 Cal. 375.

10 C J. p 1027 note 84.

2. Iowa—Monahan v. Equitable L. Ins. Co, 156 N.W. 994.

10 C J. p 1027 note 85

3. La.—Hopkins v. New Orleans Ry.

Statutory provisions. In some jurisdictions this rule of res ipsa loquitur has been made the subject of statutory enactments,[4] under some of which enactments the presumption of negligence arises where the injury is shown to have been caused by the running of a locomotive or car, or other machinery,[5] or on proof of defendant's failure to use the utmost care and diligence for the safe carriage

& Light Co., 90 So. 512, 150 La. 61, 19 A.L.R. 1362—Johnson v. City of Monroe, App., 164 So. 456—Johnson v. Missouri Pac. Ry. Co., 2 La.App. 244

10 C.J. p. 1027 note 86.

Extent of burden under rule

Although the carrier has the burden of proving its freedom from negligence where the passenger was not carried to his destination safely, the carrier is not required to show how and why passenger was injured to bar recovery.—Cusimano v. New Orleans Public Service, 127 So. 376, 170 La. 95, reversing 122 So. 903, 12 La.App. 586—Bynum v. City of Monroe, La.App., 171 So. 116—Dillon v. New Orleans Public Service, La.App., 170 So. 406.

4. **In Arkansas**, under Crawford & Moses' Dig. § 8562, injury of passenger by moving train is prima facie evidence of railroad's negligence.—Missouri Pac. R. Co. v. Henry, 269 S.W. 51, 168 Ark. 146—10 C.J. p. 1027 note 87 [a].

In Florida

(1) The provision of Rev. Gen. St. 1920 § 4964, making a railroad company liable for damage to persons, stock, or other property by the "running" of locomotives, or cars, or other machinery, unless the company shall make it appear that its agents have exercised all ordinary and reasonable care and diligence, and providing that in all cases the presumption shall be against the company, applies only where injury is caused by an act of the railroad or its agents in running its locomotives or cars or other machinery.—Tampa Electric Co. v. Soule, 94 So. 692, 84 Fla. 557.

(2) Where the statutory presumption of negligence is applicable to put on defendant railroad company the burden of proving due care and diligence, the presumption does not outweigh proofs that employees of defendant company did in fact use due care in the premises, but the question of liability is to be determined by a proper consideration of all the evidence adduced under appropriate charges as to the law.—Atlantic Coast Line R. Co. v. Hamlett, 89 So. 337, 81 Fla. 872.

10 C.J. p. 1027 note 87 [b].

In Georgia

(1) Proof of injury to person by servant of railroad raises presumption that railroad's negligence was proximate cause.—Western & A. R. R. v. Dobbs, 137 S.E. 407, 36 Ga.App. 516.

(2) The presumption of negligence as to a passenger raised by Civ. Code 1910 § 2780, is a rule of evidence and not a presumption of law, and may be rebutted either by the testimony of plaintiff or by that of defendant.—Southern Ry. Co. v. Winn, 103 S.E. 733, 25 Ga.App. 438.

(3) The presumption extends only to the acts of negligence charged in the petition.—Hines v. Hendricks, 104 S.E. 520, 25 Ga.App. 682—Southern Ry. Co. v. Winn, supra.

(4) In an action by a passenger to recover damages for personal injuries statute making proof of injury inflicted by train prima facie evidence of railroad's negligence is not void as arbitrary or unreasonable.—Seaboard Air Line Ry. Co. v. Fountain, 160 S.E. 789, 173 Ga. 593.

10 C.J. p. 1027 note 87 [c].

In Louisiana Civ.Code § 2754, throwing the burden of proof on a carrier to show want of negligence, refers to "things" intrusted to the care of the carrier and not to a person.—McGinn v. New Orleans R., etc., Co., 43 So. 450, 118 La. 811, 13 L.R.A.,N.S., 601 and note.

In Mississippi code 1906 § 1985, as amended by L.1912 c. 215, declaring that proof of injury inflicted by running of engines, etc., shall be prima facie evidence of want of skill and care, applies to shock received by passenger leaning against controller on platform of electric car not then in motion.—Gulfport & Mississippi Coast Traction Co. v. Hicks, 76 So. 873, 116 Miss. 164.

In Nebraska, under the Railroad Incorporation Act of 1867, § 3, Consol.St., 1891 c. 9 § 572, where it is established that a person is injured while a passenger of the railroad company, a conclusive presumption of negligence arises, except where it is disclosed that the injury was caused by his own criminal negligence, or by his violation of some rule of the company brought to his actual notice.—Lincoln Tract. Co. v. Heller, 100 N.W. 197, 102 N.W. 262, 72 Neb. 127.—10 C.J. p. 1027 note 87 [e].

5. Ga.—Seaboard Air Line Ry. Co. v. Fountain, 160 S.E. 789, 173 Ga. 593

10 C.J. p. 1027 note 88.

Running of train essential

(1) Where injury is shown to have been caused by running of train, presumption arises that injury was caused by railroad's negligence, but before presumption can be indulged, there must be some evidence that injury was caused by operation of train.—Lowden v. Scott, Ark., 95 S.W.2d 630.

(2) Where a passenger on a street car, in attempting to leave the car at a place where the car usually stops for the purpose of allowing passengers to descend from it after the car has come to a full stop, falls and injures herself, the mere fact of the injury does not cast on the company the presumption that it either caused the injury or that the injury was the result of any negligence on the part of the company or its agents, under Rev.Gen.St.1920 § 4964, since the presumption under such statute exists only where the injury was the result of an act of the railroad or its agents in running its locomotives, or cars, or other machinery.—Tampa Electric Co. v. Soule, 94 So. 692, 84 Fla. 557.

(3) The word "running," as used in the statute conveys the idea of action, the doing of something by the railroad company or its agents, and the presumption of negligence does not exist where, by no act of the company or its agents in running the locomotives, cars, or other machinery, a person or stock or other property is injured on railroad premises.—Tampa Electric Co. v. Soule, supra.

(4) Where a passenger was knocked from the platform of a street car and run over by the car, the presumption applies, although the alleged negligence was disassociated from the operation of the car, such as the negligent failure to protect the passenger from the danger to be anticipated from a crowd boarding the car.—Georgia Ry. & Power Co. v. Murphy, 110 S.E. 680, 28 Ga.App. 173.

(5) Where sole contention of passenger was that injury resulted from railroad's failure to have fire in its waiting room, and it affirmatively appeared that the damage was not caused by running of locomotive or cars or other machinery, or by persons in its employment and service, there was no presumption of negligence.—Louisville & N. R. Co. v. Newsome, 118 S.E. 566, 30 Ga.App. 621.

(6) In action for death of plaintiff's husband, who was stealing a ride on passenger train, where it appeared that he was discovered beside the track shot and bruised, the presumption of negligence against railroad did not arise.—Gray v. Georgia Southern & F. Ry. Co., 92 S.E. 961, 20 Ga.App. 201.

10 C.J. p. 1027 note 88 [b].

of passengers.[6] This presumption disappears on introduction of rebuttal testimony by the carrier.[7]

Gratuitous passenger. In case of injury to a gratuitous passenger, he must offer proof to supplement the presumption of negligence, in order to show gross negligence by the carrier,[8] and in the case of an employee riding on a free pass stipulating that the rider assumes all risk, the burden is on plaintiff to prove that the acts or omissions of the company were willful or wanton, as no presumption of willfulness or wantonness arises under a statute providing for a presumption of negligence where injuries result from running of trains.[9]

What law governs. It has been held that, as such presumption relates to the burden of proof, it is governed by the law of the forum, although the injury occurred in another state, where no such rule obtains.[10]

e. Res Ipsa Loquitur; Inapplicability of Rule; Waiver

The res ipsa loquitur doctrine does not apply when the injury was not the result of the carrier's negligence; nor does it apply where specific acts causing the injury are pleaded; nor if waived by plaintiff.

When the accident is such that negligence of the carrier cannot be inferred therefrom, the doctrine of res ipsa loquitur does not apply;[11] nor does it apply where the evidence shows that the injury resulted probably from some unavoidable cause, that is, some cause outside the ordinary supervision and control of the carrier, and not connected with the construction or operation of the railroad,[12] or was not the result of any defect in the means of transportation or operation,[13] or that the accident might have been the result of the wrongful acts or negligence of third persons,[14] or of causes not due to human agency,[15] or where the accident causing the injury is to the passenger and not to the vehicle on which he is riding at the time;[16] nor does this doctrine apply where a definite cause is clear on the evidence.[17]

Act of passenger contributing to injury. The presumption of negligence does not arise where the injury is caused by some defect in the means of transportation combined with some deliberate and voluntary act on the part of the passenger[18] or a

6. Okl.—Sand Springs Ry. Co. v. Westhafer, 218 P. 525, 92 Okl. 89.

7. Ga.—Holmes v. Georgia Power Co., App., 162 S.E. 403, 44 Ga.App. 588, reversed on other grounds Georgia Power Co. v. Holmes, 165 S.E. 284, 175 Ga. 487, conformed to Holmes v. Georgia Power Co., 165 S.E. 918, 45 Ga.App. 826.

8. Pa.—Bowman v. Pennsylvania R. Co., 149 A. 877, 299 Pa. 558, certiorari denied 51 S.Ct. 27, 282 U.S. 849, 75 L.Ed. 752.
10 C.J. p. 1028 note 89.

9. Ga.—Lanier v. Bugg, 123 S.E. 145, 32 Ga.App. 294.

10. Ark.—Huckaby v. St. Louis, etc., R. Co., 177 S.W. 923, 119 Ark. 179.

11. Mass.—Coleman v. Boston Elevated Ry. Co., 143 N.E. 819, 249 Mass. 155.

12. U.S.—Louisville & N. R. Co. v. Chatters, La., 49 S.Ct. 329, 279 U.S. 320, 73 L.Ed. 711, reversing, C.C.A., 26 F.2d 403, which affirmed, D.C., Chatters v. Louisville & N. R. Co., 17 F.2d 305, and certiorari granted 49 S.Ct. 26, 278 U.S. 590, 73 L.Ed. 523.
Pa.—Zolden v. Shenango Valley Traction Co., 94 Pa.Super. 191.
10 C.J. p. 1028 note 91.

Monoxide gas affecting bus passenger
The doctrine of res ipsa loquitur has been held inapplicable in passenger's action against bus company for ill effects resulting from inhalation of carbon monoxide gas while passing through tunnel.—Warshawsky v. Nevins Bus Co., 153 A. 114, 9 N.J.Misc. 227.

13. Pa.—Burns v. Pennsylvania R. Co., 144 A. 103, 294 Pa. 277—Duffy v. Philadelphia Rapid Transit Co., 140 A. 496, 291 Pa. 564—Swink v. Philadelphia Rapid Transit Co., 120 A. 827, 277 Pa. 220—Deady v. Philadelphia Rapid Transit Co., 100 Pa.Super. 208.
Va.—Walters v. Norfolk & W. Ry. Co., 94 S.E. 182, 122 Va. 149.

Doctrine held inapplicable
(1) That passenger, standing on steps of street car, stooped over, extending body beyond side of car and was struck by milk platform, raised no presumption of negligence of carrier.—Miller v. Pittsburgh, H., B & N. C. Rys. Co., 157 A. 330, 102 Pa.Super. 547.

(2) An injury to a passenger by the ordinary opening or closing of a street car door, although done by an employee of carrier, is not sufficient to charge the latter with negligence, since the presumption is such employee was acting within the proper line of his duty.—Swink v. Philadelphia Rapid Transit Co., 120 A. 827, 277 Pa. 220.

(3) Doctrine of res ipsa loquitur is inapplicable in action for death of passenger where the sole course was the fact that the passenger fell or stepped off moving train.—Kercher's Adm'r v. Richmond, F. & P. R. Co., 142 S.E. 393, 150 Va. 108.

(4) In suit by plaintiff, injured by falling out of invalid chair while being lowered from defendant's baggage car by plaintiff's husband and friends, assisted by baggage master, doctrine of res ipsa loquitur was inapplicable.—Walters v. Norfolk & W. Ry. Co., 94 S.E. 182, 122 Va. 149.

14. Colo.—Yellow Cab Co. v. Hodgson, 14 P.2d 1081, 91 Colo. 365, 83 A.L.R. 1156, quoting **Corpus Juris** text.
Minn.—Sullivan v. Minneapolis St. Ry. Co., 200 N.W. 922, 161 Minn. 45.
10 C.J. p. 1028 note 92.

Negligence of party to collision
Injured taxicab passenger, offering evidence that automobile driver's act was one cause of collision with taxicab, could not recover from taxicab company without proving its driver's negligence.—Klan v. Security Motors, 164 A. 235, 164 Md. 198.

15. Pa.—Fleming v. Pittsburgh, etc., R. Co., 27 A. 858, 158 Pa. 130, 38 Am.S.R. 835, 22 L.R.A. 351.
10 C.J. p. 1028 note 93.

16. Ark.—Price v. St. Louis, etc., R. Co., 88 S.W. 575, 75 Ark. 479, 112 Am.S.R. 79.
10 C.J. p. 1028 note 94.

17. Ill.—Letush v. New York Cent. R. Co., 267 Ill.App. 526.
Ind.—Engle v. Director General of Railroads, 133 N.E. 138, 78 Ind.App. 547.
Pa.—Low v. Harrisburg Rys. Co., 138 A. 852, 290 Pa. 365.
10 C.J. p. 1028 note 95.

18. Mass.—Shaughnessy v. Boston, etc., R. Co., 110 N.E. 962, 222 Mass. 334.
10 C.J. p. 1028 note 96.

fellow passenger.[19]

As dependent on pleading. The doctrine of res ipsa loquitur applies only where defendant's negligence is charged generally, and not where the specific acts which caused the injury are alleged, as in such a case plaintiff has the burden of proving the specific acts relied on;[20] but it has been held that plaintiff is not deprived of the benefit of such rule merely because he alleges his cause of action with unnecessary particularity,[21] and that, where a passenger pleads general and specific acts of negligence and the cause is tried on the theory that both specific and general negligence are alleged, the presumption of the carrier's negligence arises on proof of plaintiff's injury while a passenger.[22]

Injuries while at depot. Owing to the fact that the carrier is not required to use the highest degree of care to keep in repair the depot appointments, see supra § 713 et seq, the presumption of negligence has been held not to arise where injuries are received at a depot before taking passage on the carrier's train or vehicle,[23] unless they are received through the operation of a train.[24]

Waiver of presumption. When his petition has properly invoked the doctrine of res ipsa loquitur the passenger, by undertaking to prove some specific cause of the accident, does not waive the presumption of negligence arising from the injury to him,[25]

19. Okl.—Chicago, R. I. & G. Ry. Co. v. Jones, 187 P. 233, 77 Okl. 140

20. Ariz—Pickwick Stages Corporation v. Messinger, 36 P.2d 168, 44 Ariz 174.
Cal—Starkey v Market St. Ry. Co., 265 P 839, 90 Cal App. 249—Seney v. Pickwick Stages, Northern Division, 255 P. 279, 82 Cal.App. 226.
Fla—Williams v. Hines, 86 So. 695, 80 Fla 690.
Mo—Stolovey v. Fleming, 8 S.W 2d 832, 328 Mo. 623—Duggan v. St. Louis Public Service Co, App, 56 S.W 2d 626—Mendenhall v. Springfield Traction Co, App., 26 S.W.2d 50—Heidt v. People's Motorbus Co. of St. Louis, 284 S.W. 840, 219 Mo. App 683
Tex—International & G. N. Ry. Co. v. Bartek, Com.App., 213 S.W. 602, affirming, Civ.App., 177 S.W. 137.
10 C J. p 1028 note 97.

Application of doctrine to specific acts

In action for death of passenger when street car in which he was riding struck a truck, plaintiff who pleaded specific acts of negligence of street railroad must rely for recovery on such acts alone, but is entitled to application of rule of res ipsa loquitur in so far as such specific acts of negligence alleged in complaint were concerned—Atkinson v. United Railroads of San Francisco, 234 P. 863, 71 Cal.App. 82.

Notice of intention not to rely on specific allegations

In passenger's action against street railroad for injuries sustained when trolley wire end swung through window and struck passenger, res ipsa loquitur rule could not be invoked unless passenger's pleading put railroad on notice that passenger did not intend to be restricted to specific allegation of defectiveness, and that passenger was relying upon more general allegation of defectiveness in wire. Passenger's petition against street railroad, for injuries sustained when trolley wire end swung through window and struck passenger, alleging specific acts of negligence and use of defective wire which was old and worn out "or defective in some manner unknown to this plaintiff," entitled passenger to invoke res ipsa loquitur rule.—Wichita Falls Traction Co v. Elliott, Tex. Com App., 81 S W.2d 659, answering certified questions, Civ.App., 85 S.W. 2d 1093, error dismissed.

Pleading held general, permitting application of doctrine

(1) In an action for damages for injuries sustained by a passenger, when the train on which he was riding was derailed.—Central of Georgia R. Co. v. Robertson, 83 So. 102, 203 Ala. 358.

(2) In action for injuries allegedly caused when defendant so negligently operated the train as to cause it to suddenly jerk with unusual and unnecessary force—Rhodes v. Missouri Pac R. Co., 255 S.W. 1084, 213 Mo.App. 515.

(3) In actions for injuries sustained in a collision.
Cal.—Sloan v. Original Stage Line, 12 P 2d 465, 124 Cal.App. 317.
Mo.—Powell v. St. Joseph Ry., Light, Heat & Power Co, 81 S W.2d 957, 336 Mo 1016—Stofer v. Harvey, App., 204 S.W. 587

(4) In action for injuries to passenger in auto stage.—Jianou v. Pickwick Stages System, 296 P. 108, 111 Cal App. 754

(5) In action for injuries to passenger when bus broke down.—Clarke v Cardinal Stage Lines, 31 P.2d 1, 139 Kan. 280.

(6) In passenger's action for injuries when falling from street car—Carlson v. Wells, Mo, 276 S.W. 26, 42 A L R. 1319.

(7) In action for injuries received when employees negligently started street car—Lich v. Wells, Mo.App., 296 S W 1043.

21. U S—May Department Stores Co. v. Bell, C C.A Mo, 61 F.2d 830
Kan.—Woods v. Kansas City, K V. & W. R. Co., 8 P 2d 404, 134 Kan. 755.
N Y.—De Roire v. Lehigh Valley R. Co, 199 N.Y S 652, 205 App Div. 549, citing **Corpus Juris** with approval.
10 C J p 1029 note 98

22. Cal.—Mudrick v. Market St. Ry. Co, App., 74 P 2d 328—Hellman v Los Angeles Ry. Corporation, 27 P. 2d 946, 135 Cal.App. 627, rehearing denied 28 P.2d 384, 135 Cal. App. 627.
Iowa.—Crozier v. Hawkeye Stages, 228 N.W. 320, 209 Iowa 313.
N.Y.—De Roire v. Lehigh Valley R Co., 199 N.Y.S. 652, 205 App.Div. 549.
Tenn.—Oliver v. Union Transfer Co, 71 S.W.2d 478, 17 Tenn.App. 694—Greyhound Lines, Inc. v. Patterson, 14 Tenn App. 652.
Tex—Schaff v. Sanders, Civ.App., 257 S.W. 670, affirmed, Com.App., 269 S W. 1034
10 C.J. p 1029 note 99.

23. N.J.—Feil v. West Jersey, etc, R Co., 72 A 362, 77 N.J.Law 502
10 C J. p 1029 note 2.

24. Md—Baltimore, etc., R. Co v. State, 63 Md. 135.
10 C J. p 1029 note 3.

25. Cal—Kilgore v. Brown, 266 P. 297, 90 Cal.App 555
Mo—Powell v St. Joseph Ry., Light, Heat & Power Co, 81 S W.2d 957, 336 Mo 1016—Porter v. St Joseph Ry, Light, Heat & Power Co., 277 S.W. 913, 311 Mo. 66—Kinchlow v. Kansas City, K. V. & W. Ry. Co, App., 264 S W 416—Timmons v Kurn, App, 100 S W.2d 952—Alewel v East St Louis & S Ry. Co, App., 26 S.W 2d 869—Malone v. Greyhound Lines, App., 22 S.W 2d 199—Smith v Creve Coeur Drayage & Motorbus Co., 296 S.W. 457, 220 Mo App. 1122—Heidt v. People's Motorbus Co. of St. Louis, 284 S W. 840, 219 Mo App. 683—Gibson v. Wells, App., 258 S W 1—Stofer v. Harvey, App, 204 S.W.

unless such evidence shows clearly what caused the accident.[26] He cannot avail himself of such presumption, however, where he has agreed that there shall be no liability on the carrier for injury to the passenger.[27] The application of the res ipsa loquitur doctrine against a carrier as to a passenger injured in a collision is not waived by proof of the negligence of the other party to the collision.[28]

f. Res Ipsa Loquitur; Applicability of Rule to Particular Accidents

(1) In general
(2) Collisions
(3) Explosives
(4) Derailments; wrecks of motor vehicles
(5) Machinery or appliances, and defects or breaks
(6) Sudden jerks; premature or sudden starts

(1) In General

The res ipsa loquitur doctrine applies to many kinds of accidents, such as overturning of cars, thrown or falling articles, and the like.

In the application of the general rule of res ipsa loquitur it has been held that the overturning or breaking down of a car or stagecoach is prima facie evidence of the carrier's negligence.[29] An accident caused by the washing away of an embankment, the breaking down of a bridge, or other casualty connected with the maintenance of the roadway, is prima facie evidence of negligence;[30] but it will not be presumed, in the absence of proof, that the carrier has exclusive possession of the tracks over a bridge owned by a municipality.[31] The presumption of negligence has also been held to arise where a passenger is injured during a fight between drunken passengers,[32] but no inference of failure to use due care for protection of a passenger arises merely from the fact that a fellow passenger committed an assault and battery on plaintiff.[33]

Falling or thrown articles. A presumption of negligence on the part of the carrier has been held to arise where a passenger is injured by an article thrown from a passing train,[34] as for example, a piece of coal,[35] or sparks or cinders,[36] or by the falling of some article in the car in which the passenger is being carried,[37] or by the falling of a pile of baggage.[38]

(2) Collisions

In general, a prima facie case is made against the carrier when it is shown that a collision occurred in which the passenger was injured.

As a general rule the happening of a collision between a train or car on which a passenger is riding, and another train or car of the same or another carrier, or with some obstruction on the track, whereby the passenger is injured, makes out a prima facie case of negligence,[39] and it is then incum-

587—Kilroy v. Kansas City & K. V. Ry. Co., App., 195 S.W. 522
10 C J p 1029 note 4

26. Mo.—Smith v. Creve Cœur Drayage & Motorbus Co, 296 S.W 457, 220 Mo App 1122.
Evidence held not to destroy right to submit case on res ipsa loquitur doctrine—Hurley v. Missouri Pac Transp. Co., App, 56 S W 2d 620, certiorari quashed State ex rel. and to Use of Hurley v. Becker, 66 S.W.2d 524, 334 Mo 537—Malone v. Greyhound Lines, Mo App, 22 S W.2d 199

27. Pa.—Crary v. Lehigh Valley R Co, 53 A. 363, 203 Pa 525, 93 Am S.R. 778, 59 L R A 815.
10 C.J. p 1029 note 5.

28. Cal—Robison v. McAlister, 13 P.2d 926—St. Clair v McAlister, 13 P 2d 924, 216 Cal. 95.

29. Kan—Bean-Hogan v. Kloehr, 175 P. 976, 103 Kan. 731, citing **Corpus Juris** with approval.
10 C.J p 1029 note 6.

30. U.S.—Gleason v. Virginia Midland R Co., 11 S.Ct 859, 140 U.S. 435, 35 L Ed 458, reversing 16 D C. 350.
10 C.J. p 1030 note 7.

31. N.Y—Meschneck v. Brooklyn, etc., R Co., 109 N.Y.S. 594, 125 App. Div. 265.

32. Pa.—Pittsburg, etc., R. Co. v. Pillow, 76 Pa. 510, 18 Am.R. 424.

33. N.J—Hoff v. Public Service Ry. Co., 103 A. 209, 91 N.J.Law 641, reversing 101 A 404, 90 N.J.Law 386.

34. Ark.—Missouri Pac R Co. v Angus, 65 S.W 2d 543, 188 Ark 300.
Mo—Thomas v St. Louis-San Francisco Ry. Co., App., 293 S.W. 1051, citing **Corpus Juris** with approval.
10 C.J. p 1030 note 10.

35. Ky.—Louisville, etc., R. Co. v. Reynolds, 71 S.W. 516, 24 Ky L. 1402.
10 C J. p 1030 note 11.

36. Ark—Batte v. St. Louis Southwestern Ry. Co, 199 S.W. 907, 131 Ark 568.
Tex—Schaff v Sanders, Civ.App, 257 S W. 670, affirmed, Com App., 269 S.W. 1034

37. Pa.—Bickley v. Philadelphia & R. Ry. Co, 101 A. 654, 257 Pa 369.
10 C J. p 1030 note 12.
Article falling from rack in car
In railroad passenger's action for injuries sustained when struck by satchel which fell from rack over passenger's head, passenger had burden to show dislodgement of satchel was due to some cause railroad should have foreseen.—Creahan v. Pennsylvania R Co, 187 A. 51, 123 Pa.Super 268.

38. N.Y.—Horowitz v. Hamburg-American Packet Co, 41 N.Y S 54, 18 Misc 24, reversed on other grounds 43 N Y.S 1156, 14 App. Div. 631

39. U S.—Southern Ry. Co v Hussey, C C.A.Mo., 42 F.2d 70, 74 A.L. R. 1172, certiorari granted 51 S. Ct. 75, 282 U.S 826, 75 L.Ed 736, affirmed 51 S Ct. 367, 283 U S 136, 75 L Ed. 908—Chicago Rys Co v. Kramer, Ill, 234 F. 245, 148 C.C.A. 147.
Ark—Kansas City Southern Ry Co. v Cockrell, 277 S.W. 7, 169 Ark. 698.
Kan.—Cloud v. Kansas-Oklahoma Traction Co., 173 P. 338, 103 Kan. 249, 7 A L.R. 1671.
Mo.—Lowder v. Kansas City Rys. Co., App., 221 S.W. 800.
N Y.—De Roire v. Lehigh Valley R. Co., 199 N.Y.S 652, 205 App.Div. 549, citing **Corpus Juris** with approval—Pierson v. Interborough Rapid Transit Co., 172 N.Y S. 492,

bent on defendant, in order to prevent a recovery, to prove that the injury was not due to its negligence but resulted from an inevitable accident or some cause against which human care and foresight could not have provided,[40] or, having so alleged as an affirmative defense, that the accident and resulting injuries were caused solely and only by the negligence of the other party to the collision.[41] The presumption of negligence is the only presumption arising from the fact of the collision,[42] and plaintiff has the burden of proving all other necessary elements of the case.[43] Plaintiff has the burden of proving negligence of the carrier in collision cases when the res ipsa loquitur doctrine does not apply,[44] and the doctrine will not apply when plaintiff's evidence shows the collision was caused, not by the carrier's negligence, but by the negligence of the other party to the collision.[45]

It has been held that, where the respective agencies which cause a collision are not both within the

184 App Div 678, affirming 168 N Y S 425, 102 Misc 130, dismissal of appeal denied 123 N.E. 885, 226 N.Y 689, and affirmed 126 N E 920, 227 N Y. 666.

Pa.—Snyder v. Philadelphia & R Ry. Co., 130 A 398, 284 Pa. 59—Williams v Philadelphia Rapid Transit Co., 101 A. 748, 257 Pa. 354—Zeaman v Philadelphia Rapid Transit Co, 62 Pa Super. 463

Tenn.—Illinois Central Ry. Co. v. Solinsky, 12 Tenn App 389—Nashville Railway & Light Co. v. Owen, 11 Tenn App. 19.

Tex.—Dallas Ry. Co. v. Skorodynski, Civ.App., 292 S.W 638.

W Va.—Hodge v. Sycamore Coal Co., 95 S.E. 808, 82 W.Va. 106.

10 C J p 1032 note 27

Particular acts causing collision

The facts constituting the negligence resulting in collision being peculiarly within the knowledge of defendant railway company, plaintiff passenger was not bound to prove the particular acts of commission or omission upon the part of the employees of defendant which caused the accident.—Arnett v Illinois Cent. R. Co., 176 N.W 322, 188 Iowa 540

Prima facie case of negligence shown by collisions

(1) Caused by the parted sections of a train coming together—Steele v. Southern R Co, 33 S E. 509, 55 S C 389, 74 Am.S R. 756—10 C.J. p 1033 note 32.

(2) Between a train or car with a bridge.—Wilkerson v. Corrigan Cons. St R Co, 26 Mo App. 144.

(3) Between motor carriers and objects on the side of the road.

La.—Rowland v. Caddo Transfer & Warehouse Co, 5 La.App. 156—Weikel v. Caddo Transfer & Warehouse Co, 5 La.App. 146.

Mo.—Story v. People's Motorbus Co of St. Louis, 37 S.W.2d 898, 327 Mo 719.

(4) With a train or car of another line at a crossing—Clark v. Chicago, etc., R Co, 29 S W 1013, 127 Mo. 197—10 C J p 1033 note 30

(5) With an animal on the track—Yates v United Rys Co of St. Louis, Mo.App., 222 S.W. 1034—10 C J. p 1033 note 31

Railroad motor cars

In action against railroad for death of construction contractor engaged in riding on railroad motorcar in collision with motorcar operated by another contractor, res ipsa loquitur rule is not inapplicable on theory that motorcar operated by other contractor was not under exclusive management and control of railroad, or on ground that contractor was contributorily negligent in failing to keep reasonable lookout, since contributory negligence does not affect application of res ipsa loquitur rule. The evidence showed that servant of railroad accompanying contractor had charge of motorcar and exclusive right to control its operation, so far as contractor was concerned, although contractor sometimes drove car.—International-Great Northern R. Co v. Lucas, Tex Com App, 99 S W 2d 297, reversing, Civ. App, 70 S W 2d 226, opinion corrected, Com App, 100 S W 2d 97.

Collision of airplanes see C.J S. title Aerial Navigation § 45.

40. Cal.—Scarborough v. Urgo, 216 P. 584, 191 Cal 341—Carnahan v Motor Transit Co., 224 P. 143, 65 Cal App 402.

La.—Rowland v. Caddo Transfer & Warehouse Co., 5 La App 156—Weikel v. Caddo Transfer & Warehouse Co, 5 La App. 146

Mo.—Hulen v. Wheelock, 300 S W 479, 318 Mo 502—Stegman v People's Motorbus Co. of St. Louis, App, 297 S W 189, 193.

10 C J p 1033 note 28.

Contrary proof

Implied negligence of owner of bus struck by truck, injuring passengers, may be removed by uncontradicted proof to contrary.—Cox v. Scott, 140 A. 390, 104 N J.Law 371, reversing Cox v. Rosenvinge, 135 A. 59, 4 N J Misc. 949

Effect of explanation

While proof of occurrence of a collision makes out a prima facie case of negligence, which the carrier sued for injury to a passenger must repudiate by proof, yet, when any explanation of the wreck is offered by defendant, the presumption falls, and the court should not then charge that the burden of proof is on the carrier to show that the wreck was not the proximate result of negligent operation—Lamar v. Panhandle & S. F Ry. Co, Tex Com.App, 248 S W. 34, reversing, Civ.App., 234 S W. 605

Oral proof of due care

A prima facie case made by plaintiff cannot be destroyed by oral proof tending to show due care by defendant, the sufficiency of such evidence being for the jury—Cecil v Wells, 259 S.W. 844, 214 Mo.App 193

41. Cal.—Crosby v. Pickwick Stages, Northern Division, 264 P. 346, 88 Cal App. 799—Schropshire v. Pickwick Stages, Northern Division, 258 P. 1107, 85 Cal.App 216.

42. **No presumption of injury**

In favor of street railroad's passenger suing its receivers, there is no presumption that she was injured at all in a collision, or consequently that her alleged condition resulted therefrom; the only presumption she can rely on is the presumption of negligence arising from the fact of collision—Stofer v. Dunham, Mo App., 208 S W. 641.

43. Mo.—Stofer v. Dunham, App, 208 S W. 641.

Matters for proof by plaintiff

Injured passenger, relying on doctrine of res ipsa loquitur, need prove only relation of passenger and carrier, carrier's exclusive control of car, collision, consequent injury, and extent—Smith v. Creve Cœur Drayage & Motorbus Co, 296 S W. 457, 220 Mo.App. 1122.

44. Mass.—Di Leo v. Eastern Massachusetts St. Ry. Co., 150 N E. 891, 255 Mass 140.

45. Cal.—Gritsch v. Pickwick Stages System, 22 P.2d 554, 131 Cal.App 774

N.Y.—Norris v. National Biscuit Co, 215 N Y S 478, 216 App.Div. 462.

In action against carrier alone

Where passenger suing stage owner for injuries sustained in collision did not sue owner of other colliding automobile, and evidence warranted inference that operator of other automobile was alone guilty of negligence, res ipsa loquitur doctrine did not apply—Gritsch v Pickwick Stages System, 22 P.2d 554, 131 Cal App. 774.

control of defendant carrier, a presumption of negligence does not arise,[46] but there is authority to the contrary.[47]

Collisions between vehicles on highways. While it has been held that no presumption of negligence arises from a collision between a motor carrier and another vehicle on a street or highway,[48] or between a street car and a vehicle on a street or highway[49] particularly where it is apparent that the vehicle was the cause of the accident,[50] or where it is doubtful as to whether the car or the vehicle caused the accident,[51] it has been held that collisions between a motor carrier and another vehicle on the highway raise a presumption of negligence,[52] and where a street car causes a collision with a vehicle on the street, a presumption of negligence on the part of the carrier arises.[53] A presumption of negligence cannot arise against both the car and the vehicle, unless it is apparent that they were joint instrumentalities in causing the injury.[54]

As between different companies, it has been held that the fact of the collision and injury raises a presumption of negligence against the company carrying the passenger, but not against the other company,[55] and the doctrine of res ipsa loquitur does not apply against the carrier when the car in which plaintiff was riding was struck by a car following it, but operated by another company.[56] When both the carrier and the other party to the collision are sued by the passenger, the doctrine of res ipsa loquitur does not apply as to such other party, who is obligated to exercise only ordinary care.[57]

Jumping in fear of collision. A presumption of negligence on the part of the carrier has been held to arise where a passenger is injured by jumping from a car, in a well grounded fear that a collision is about to take place.[58]

Objects projecting from other trains. The presumption of negligence has been held to arise where a passenger is struck by objects projecting from cars passing on adjoining tracks[59]

46. Colo.—Yellow Cab Co. v. Hodgson, 14 P.2d 1081, 91 Colo. 365, 83 A.L.R. 1156.
N.Y.—Plumb v. Richmond Light & R. Co., 187 N.Y.S. 38, 195 App.Div. 254, affirmed 135 N.E. 504, 233 N.Y. 285
10 C.J. p. 1033 note 33.

This Corpus Juris text has been quoted as authority in support of the proposition that, in joint action against taxicab owner and driver of other automobile for injuries sustained by taxicab passenger in collision resulting, "res ipsa loquitur" doctrine is inapplicable to taxicab owner, the other vehicle not being under his management and control. —Yellow Cab Co. v. Hodgson, 14 P.2d 1081, 91 Colo. 365, 83 A.L.R. 1156.

47. Iowa.—Crozier v. Hawkeye Stages, 228 N.W. 320, 209 Iowa 313.
Mo.—Zichler v. St. Louis Public Service Co., 59 S.W.2d 654, 332 Mo. 902—Cecil v. Wells, 259 S.W. 844, 214 Mo.App. 193—Gibson v. Wells, App., 258 S.W. 1.

48. Neb.—Knight v. Lincoln Traction Co., 255 N.W. 774, 127 Neb 447
Va.—Riggsby v. Tritton, 129 S.E. 493, 143 Va. 903, 45 A.L.R. 280, motion denied 133 S.E. 580, 45 A.L.R. 280.

Burden of proof on plaintiff
Negligence must be determined from facts bringing about collision between motor bus and automobile, and burden is upon passenger, suing for personal injuries, to prove negligence of bus driver as basis for recovery.—Knight v. Lincoln Traction Co., 255 N.W. 774, 127 Neb 447.

49. Mass.—Di Leo v. Eastern Massachusetts St. Ry. Co., 150 N.E. 891, 255 Mass 140—Sandler v. Boston Elevated Ry. Co., 130 N.E. 104, 238 Mass 148—McNiff v. Boston Elevated Ry. Co., 125 N.E. 391, 234 Mass 252.
Pa.—Wilkerson v. Pittsburgh Rys. Co., 163 A. 909, 309 Pa. 381—Welsh v. Jump House Wrecking Co. of Pennsylvania, 159 A. 170, 306 Pa. 228—Appenzeller v. Philadelphia Rapid Transit Co., 163 A. 387, 107 Pa.Super. 319—Zolden v. Shenango Valley Traction Co., 94 Pa.Super. 191.
10 C.J. p. 1033 note 34.

50. N.Y.—Plumb v. Richmond Light & R. Co., 135 N.E. 504, 233 N.Y. 285, affirming 187 N.Y.S. 38, 195 App.Div. 254.
10 C.J. p. 1033 note 35.

51. Cal.—Harrison v. Sutter St. R. Co., 66 P. 787, 134 Cal. 549, 55 L.R.A. 608
10 C.J. p. 1033 note 36.

52. Cal.—Scarborough v. Urgo, 216 P. 584, 191 Cal. 341—Strock v. Pickwick Stages System, 290 P. 432, 107 Cal.App. 298—Carnahan v. Motor Transit Co., 224 P. 143, 65 Cal.App. 402.
Iowa.—Crozier v. Hawkeye Stages, 228 N.W. 320, 209 Iowa 313
La.—Thibodeaux v. Star Checker Cab Co., App., 143 So. 101—Dawson v. Toye Bros. Yellow Cab Co., 131 So. 716, 15 La.App. 326
N.J.—Cox v. Scott, 140 A. 390, 104 N.J.Law 371, reversing Cox v. Rosenvinge, 135 A. 59, 4 N.J.Misc. 949.
Okl.—A. & A. Taxicab Co. v. Bass, 58 P.2d 567.

Rear end collision
Doctrine of res ipsa loquitur applies where motor bus driven in excess of lawful statutory speed collides with automobile going in same direction.—Pickwick Stages Corporation v. Messinger, 36 P.2d 168, 44 Ariz. 174.

53. Cal.—Atkinson v. United Railroads of San Francisco, 234 P. 863, 71 Cal.App. 82
Mo.—Zichler v. St. Louis Public Service Co., 59 S.W.2d 654, 332 Mo. 902
10 C.J. p. 1034 note 37

54. Cal.—Harrison v. Sutter St. R. Co., 66 P. 787, 134 Cal. 549, 55 L.R.A. 608.

55. Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, and appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720.
10 C.J. p. 1034 note 39.

56. Ind.—Union Traction Co. of Indiana v. Mann, 124 N.E. 510, 72 Ind.App. 50

57. Ind.—Union Traction Co. of Indiana v. Alstadt, 143 N.E. 879, 195 Ind. 389.

58. Del.—Eaton v. Wilmington City R. Co., 75 A. 369, 24 Del. 435.
10 C.J. p. 1034 note 40.

59. N.Y.—Breen v. New York Cent.,

(3) Explosives

Negligence is generally presumed when the passenger's injury results from an explosion on or about the car in which he is riding.

Injuries to a passenger caused by an explosion on or about the car in which he is riding,[60] such as by an explosion of the boiler of the locomotive,[61] or of the controller box of an electric car,[62] or of a lamp in the car or other vehicle,[63] have been held to make out a prima facie case of negligence on the part of the carrier unless it is evident that the explosion was such that it could not have been prevented by that high degree of care required of carriers[64] or the carrier shows it occurred through no fault of his own.[65]

(4) Derailments; Wrecks of Motor Vehicles

A presumption of negligence arises when injuries are shown to have been received by a passenger in a derailment accident, or when a motor carrier runs off the road.

Applying the rule previously stated, that negligence is not to be inferred from the mere happening of an accident, it has been held that derailment of a car, in and of itself, is not evidence of negligence;[66] but generally a presumption of negligence with regard to the condition of the track, roadbed, or machinery, or with regard to the operation of the train, arises where injuries are shown to have been received by a passenger in a derailment accident,[67] or, by analogy, when a motor vehicle leaves the road or highway,[68] and places on de-

etc., R Co., 16 N.E. 60, 109 N.Y. 297, 4 Am.S.R 450.
10 C J. p 1034 note 41.

60. Ark.—Butler County R. Co. v. Lawrence, 250 S.W. 340, 158 Ark. 271.
10 C.J. p 1037 note 56.

The burden was on defendant carrier to overcome the presumption that an explosion of the boiler of the motor car in which plaintiff was riding resulting in injury to plaintiff was not due to its negligence.—Butler County R. Co. v. Lawrence, 250 S. W. 340, 158 Ark. 271.

61. Mo.—Kelly v. Chicago, etc., R Co, 87 S.W. 583, 113 Mo.App. 468.
10 C.J. p 1037 note 57.

62. Kan.—Woods v. Kansas City, K. V. & W. R. Co., 8 P.2d 404, 134 Kan. 755.
10 C J. p 1037 note 58.

Complication of machinery, no excuse

That machinery of street car is complicated does not exclude application of res ipsa loquitur to case of passenger injured when controller of car exploded, causing him to jump.—Colorado Springs & Interurban Ry. Co. v. Reese, 169 P. 572, 69 Colo. 1.

63. N J.—Hughes v. Atlantic City, etc., R. Co., 89 A. 769, 85 N.J. Law 212, L R.A.1916A 927.
N.Y.—Wilkie v. Bolster, 3 E.D.Smith 327.

64. Mass.—Bigwood v. Boston, etc., R Co., 95 N.E. 751, 209 Mass. 345, 35 L R A.,N S., 113.

65. Colo.—Colorado Springs & Interurban Ry. Co. v. Reese, 169 P. 572, 69 Colo 1.

66. Mich.—Bury v. Detroit United Ry, 164 N.W. 460, 198 Mich. 447.

67. U.S.—Lehigh Valley R. Co. v. Ciechowski, C.C.A.N Y, 10 F.2d 82, certiorari denied 46 S Ct. 352, 270 U.S. 654, 70 L.Ed. 783—Pennsylvania Co. v. Clark, C.C.A.Ohio, 266 F. 182.
Ala.—Central of Georgia Ry. Co. v. Robertson, 91 So 470, 206 Ala 578—Central of Georgia R Co. v. Robertson, 83 So. 102, 203 Ala. 358.
Cal.—Lawrence v. Pickwick Stages, Northern Division, 229 P. 885, 68 Cal.App 494—Morgan v. Southern Pac. Co, 187 P. 74, 45 Cal App 229.
Ill.—Feldman v. Chicago Rys. Co, 124 N E 334, 289 Ill. 25, 6 A.L R. 1291, reversing 212 Ill App. 482—Klaustermeier v. St. Louis, S. & P. R. R., 222 Ill App. 374—Kanter v. St. Louis, S. & P. R. R., 218 Ill. App. 565.
Ind.—Union Traction Co. of Indiana v. Morris, 136 N.E. 861, 193 Ind. 313.
Iowa.—Lewis v. Cedar Rapids & I. C. R. & Light Co., 167 N W. 538, 183 Iowa 725, L R.A 1918E 826.
Kan.—Cloud v Kansas-Oklahoma Traction Co., 173 P. 338, 103 Kan. 249, 7 A.L.R. 1671
La.—Wade v. Houston & S. R. Co., 72 So. 220, 139 La. 759.
Mass.—Gilchrist v. Boston Elevated Ry., 172 N E. 349, 272 Mass. 346.
Miss.—Columbus & G. Ry. Co. v Phillips, 133 So 123, 160 Miss. 390
Mo.—Trowbridge v. Fleming, 269 S. W. 610—Watson v. Chicago Great Western R. Co., 287 S.W. 813, 221 Mo.App. 621—Jackmann v. St Louis & H. Ry. Co, App., 187 S W. 786.
Ohio.—Scrabic v. Cincinnati, N O. & T P. Ry Co, 182 N.E. 528, 42 Ohio App. 473—Lake Shore Electric R Co v. Hobart, 13 Ohio Cir Ct,N.S, 592.
Pa.—Shaughnessy v. Director General of Railroads, 118 A. 390, 274 Pa. 413, 23 A.L.R 1211.
Tex.—Dowdy v. Southern Traction Co., Com.App, 219 S.W. 1092, reversing, Civ App, 184 S.W. 687—Texas & P. Ry. Co. v. Stivers, Civ App., 211 S W. 319
Va.—Virginia Electric & Power Co. v. Lowry, 184 S.E 177—Chesapeake & O Ry Co. v. Baker, 143 S. E. 299, 150 Va 647, addendum to opinion denying rehearing 141 S E 753, 149 Va. 549, denying rehearing 140 S.E. 648, 149 Va 549—Hines v. Beard, 107 S E 717, 130 Va. 286.
W.Va.—Thomas v. Monongahela Valley Traction Co, 112 S E. 228, 90 W.Va. 681
10 C J. p 1034 note 42.

Extent of presumption

Presumption of railroad's negligence merely relieves one injured of necessity of alleging and proving specific negligence.—Bond v St Louis-San Francisco Ry. Co., 288 S W. 777, 315 Mo. 987.

Derailment after collision

(1) Although train collided with object not within carrier's control, the presumption of breach of duty persists, and the derailment and resulting injury charges the carrier with the burden of exculpating itself from presumable negligence.—De Roire v. Lehigh Valley R Co, 199 N.Y S 652, 205 App.Div. 549.

(2) When a derailment results from a collision of a passenger train with an animal on the track, a presumption of negligence arises against the carrier, which can be rebutted by the carrier only by showing that it was free from negligence, and to meet this burden it must show that in all matters which might have been connected with the accident it has exercised that high degree of care, skill, and foresight which is required of it by the nature of the business.—Eastern Texas Electric Co. v. Kappe, Tex Civ.App, 235 S W. 253, error refused.

(3) Where a passenger train collides with a freight on a side track and is derailed, a presumption of negligence arises as a fact.—Wichita Falls, R. & Fort Worth R Co. v. Baker, Tex Civ.App., 242 S W. 273

68. Cal.—Mansfield v. Pickwick Stages, Northern Division, Inc., 229 P. 890, 68 Cal App. 507—Leitert v

fendant the burden of accounting for the derailment and showing that it was without negligence on the part of its employees, or that the accident could not have been prevented by the exercise of the highest degree of care compatible with the prosecution of its business.[69] The presumption may be rebutted by evidence which makes it equally probable that the derailment was not due to negligence on defendant's part,[70] even without showing what caused the derailment,[71] or it may be rebutted by evidence showing that it was caused by the acts of some third person,[72] or by vis major;[73] but proof that the derailment occurred from some unaccountable cause has been held insufficient to overcome the presumption.[74]

While plaintiff need not show any negligence causing the derailment, if he alleges general negligence, he may show specific defects without destroying the presumption of negligence on the carrier's part,[75] and the right of a passenger to the inference of negligence arising from a motor vehicle's leaving the road is not lost by his introducing evidence of the topography of the country and the general surroundings of the scene of the accident,[76] nor testimony as to how the overturning of the vehicle occurred.[77] The doctrine of res ipsa loquitur does not apply when the cause of the derailment is definitely shown by positive evidence.[78]

The presumption that a traveler at a railroad crossing exercised due care because his own safety was involved does not apply to the driver of a motor carrier running off the road.[79]

The res ipsa loquitur doctrine does not apply where the carrier had no control or management of the train derailed, but the burden is on plaintiff to show that the negligence of the railroad, which hired its equipment and employees to the owner of the train, caused the accident.[80]

Pickwick Stages, Northern Division, 229 P. 889, 68 Cal.App. 504—Lawrence v. Pickwick Stages, Northern Division, 229 P. 885, 68 Cal.App. 494—Wright v. Yosemite Transp. Co., 175 P. 906, 38 Cal. App. 782—Wright v. Yosemite Transp. Co., 175 P. 905, 38 Cal.App. 277.

Or.—Francisco v. Circle Tours Sightseeing Co., 265 P. 801, 125 Or. 80—Coblentz v. Jaloff, 239 P. 825, 115 Or. 656.

Tenn.—Oliver v. Union Transfer Co., 71 S.W.2d 478, 17 Tenn.App. 694—Greyhound Lines, Inc., v. Patterson, 14 Tenn.App. 652.

69. U.S.—Lehigh Valley R. Co. v. Ciechowski, C.C.A.N.Y., 10 F.2d 82, certiorari denied 46 S.Ct. 352, 270 U.S. 654, 70 L.Ed. 783—Chicago, M. & St. P. Ry. Co. v. Irving, Wash., 234 F. 562, 148 C.C.A. 328.

Ala.—Central of Georgia Ry. Co. v. Robertson, 91 So. 470, 206 Ala. 578—Central of Georgia R. Co. v. Robertson, 83 So. 102, 203 Ala. 358.

Cal.—Morgan v. Southern Pac. Co., 187 P. 74, 45 Cal.App. 229.

Ill.—Kanter v. St. Louis, S. & P. R. R., 218 Ill.App. 565.

Mo.—Scheipers v. Missouri Pac. R. Co., 298 S.W. 51—Bond v. St. Louis-San Francisco Ry. Co., 288 S.W. 777, 315 Mo. 987—Trowbridge v. Fleming, 269 S.W. 610—Craig v. United Rys. Co. of St. Louis, 185 S.W. 205.

Pa.—Shaughnessy v. Director General of Railroads, 118 A. 390, 274 Pa. 413, 23 A.L.R. 1211—Doud v. Hines, 112 A. 528, 269 Pa. 182.

Tex.—Dowdy v. Southern Traction Co., Com.App., 219 S.W. 1092, reversing, Civ.App., 184 S.W. 687.

Va.—Chesapeake & O. Ry. Co. v. Baker, 140 S.E. 648, 149 Va. 549, rehearing denied 141 S.E. 753, 149 Va. 549, addendum opinion 143 S.E. 299, 150 Va. 647.

W.Va.—Thomas v. Monongahela Valley Traction Co., 112 S.E. 228, 90 W.Va. 681.

10 C.J. p 1035 note 43.

70. Ga.—Florida Cent., etc., R. Co. v. Rudulph, 38 S.E. 328, 113 Ga. 143.

10 C.J. p 1036 note 44.

71. Tex.—Davis v. Galveston, etc., R. Co., 93 S.W. 222, 42 Tex.Civ. App. 55.

10 C.J. p 1036 note 45.

72. U.S.—Chicago, M. & St. P. Ry. Co. v. Irving, Wash., 234 F. 562, 148 C.C.A. 328.

10 C.J. p 1036 note 46.

Burden of proving vandalism on defendant

Burden was on carrier to prove that wreck was caused by malicious tampering with switch and that carrier was not negligent in failing to discover condition in time to avert accident.—Sinan v. Atchison, T. & S. F. Ry. Co., 284 P. 1041, 103 Cal. App. 703.

Circumstantial evidence of vandalism

Where a passenger shows that there was a derailment which caused her injuries, and the carrier produces circumstantial evidence tending to show that the derailment was due to vandalism, plaintiff must show negligence by a preponderance of the evidence.—Chicago, M. & St. P. Ry. Co. v. Irving, Wash., 234 F. 562, 148 C.C.A. 328.

73. Mont.—Pierce v. Great Falls, etc., R. Co., 56 P. 867, 22 Mont. 445.

10 C.J. p 1036 note 47.

74. Tex.—Houston, etc., R. Co. v. Lindsey, 110 S.W. 995, 51 Tex.Civ. App. 67.

10 C.J. p 1036 note 48.

75. Mass.—Gilchrist v. Boston Elevated Ry., 172 N.E. 349, 272 Mass. 346.

Ohio.—Scrabic v. Cincinnati, N. O. & T. P. Ry. Co., 182 N.E. 528, 42 Ohio App. 473.

10 C.J. p 1036 note 49.

76. Cal.—Mansfield v. Pickwick Stages, Northern Division, Inc., 229 P. 890, 68 Cal.App. 507.

77. Cal.—Seney v. Pickwick Stages, Northern Division, 255 P. 279, 82 Cal.App. 226.

78. Va.—Chesapeake & O. Ry. Co. v. Baker, 141 S.E. 753, 149 Va. 549, denying rehearing 140 S.E. 648, 149 Va. 549, addendum opinion 143 S.E. 299, 150 Va. 647.

Defective rail

Doctrine of res ipsa loquitur held inapplicable to derailment due to transverse fissure in rail, being applicable only in absence of positive evidence.—Chesapeake & O. Ry. Co. v. Baker, 141 S.E. 753, 149 Va. 549, denying rehearing 140 S.E. 648, 149 Va. 549, addendum opinion 143 S.E. 299, 150 Va. 647.

79. W.Va.—Venable v. Gulf Taxi Line, 141 S.E. 622, 105 W.Va. 156.

80. U.S.—Sasinowski v. Boston & M. R. R., C.C.A.Mass., 74 F.2d 628.

Circus train transported under contract

Doctrine of res ipsa loquitur held inapplicable in action against railroad for death of circus employee resulting from derailment due to dropping of drawbar which coupled circus cars, where railroad under its contract to transport circus train

An allegation of willful injury to a passenger resulting from a derailment cannot be sustained by a prima facie presumption of the carrier's negligence resulting from an unexplained derailment.[81]

(5) Machinery or Appliances, and Defects or Breaks

Negligence is presumed where an accident occurs through the breaking, or defective condition, of machinery or appliances by means of which the passenger is carried.

Where an accident causing injuries to a passenger occurs through the breaking, or the defective condition of some portion, of the machinery or appliances by which the passenger is carried, a prima facie case of negligence on the part of the carrier is made out.[82] It is then incumbent on the carrier, in order to prevent a recovery, to show that the injury occurred without any negligence on its part, and that it was the result of an inevitable accident.[83] The passenger does not have the burden of proving latent defects in appliances and defendant's knowledge thereof.[84] Negligence is not inferable from the fact that a passenger fell in alighting from a car because of the height of the running board.[85] A passenger, catching his foot on a step while alighting from a vehicle, must prove that the injuries were caused by a visible defect which the carrier could have discovered.[86] The rule does not apply to a case where the injury results from some defect in the floor of the vehicle, perfectly visible to the passenger[87] or from striking a seat pedestal

had no control over circus cars.—Sasinowski v. Boston & M. R. R., C. C.A.Mass., 74 F.2d 628.

81. Ala.—Knight v. Tombigbee Valley R. Co., 67 So. 238, 190 Ala. 140.

82. U.S.—May Department Stores Co. v. Bell, C.C.A.Mo., 61 F.2d 830.
Cal.—Sander v. Los Angeles Ry. Corporation, 175 P. 901, 38 Cal. App. 222.
Fla.—Tampa Electric Co. v. Vavoudes, 149 So. 584, 111 Fla. 524.
Ill.—Appel v. Alton, G. & St. L. Traction Co., 207 Ill.App. 562.
Kan.—Cloud v. Kansas-Oklahoma Traction Co., 173 P. 338, 103 Kan. 249, 7 A.L.R. 1671.
Ky.—Consolidated Coach Corporation v. Hopkins, 14 S.W.2d 768, 288 Ky. 184.
La.—Martin v. Interurban Transp. Co., 131 So. 514, 15 La.App. 256.
Md.—Smith v. Blue Ridge Transp. Co., 191 A. 66.
N.J.—Barney v. Hudson & M. R. Co., 145 A. 5, 105 N.J.Law 274, affirmed 148 A. 917, 106 N.J.Law 230, 231—McPherson v. Hudson & M. R. Co., 127 A. 23, 100 N.J.Law 262, modified on other grounds 128 A. 231, 101 N.J.Law 410.
Pa.—De Marchi v. Central R. Co. of New Jersey, 107 A. 703, 264 Pa. 321—Finnegan v. Delaware River Ferry Co., 68 Pa.Super. 428.
10 C.J. p. 1036 note 51.

Nature of inference

When a passenger shows that he was injured through some defect in appliances of carrier, which might have been prevented by due care, jury may infer negligence, unless carrier proves that due care was exercised, which inference is a legal inference in sense that it is permitted by law, but not in sense that it is required.—McPherson v. Hudson & M. R. Co., 128 A. 231, 101 N.J. Law 410, modifying 127 A. 23, 101 N.J.Law 262.

Res ipsa loquitur doctrine held applicable where injuries are caused by:

(1) Blowout of tire.—Brisolara v. Caddo Transfer & Warehouse Co., 127 So. 57, 13 La.App. 27.

(2) Breaking of an axle.—Clarke v. Cardinal Stage Lines, 31 P.2d 1, 139 Kan. 280—10 C.J. p. 1037 note 53.

(3) Breaking of wheel.—Sakowski v. Baird, 69 S.W.2d 649, 334 Mo. 951—10 C.J. p. 1037 note 52.

(4) Breaking of seat.—Rosenbaum v. Union Ry. Co., 169 N.Y.S. 456.

(5) Breaking of strap on fare register permitting conductor to fall on passenger.—Batch v. Helena Light & Ry. Co., 159 P. 411, 52 Mont. 517.

(6) Breaking of tie rod.—Martin v. Interurban Transp. Co., 131 So. 514, 15 La.App. 256.

(7) Breaking suddenly of glass window.—Bressler v. New York Rapid Transit Corporation, 13 N.E.2d 772, 277 N.Y. 200, reversing 297 N.Y.S. 336, 251 App.Div. 890—Naylor v. Erie R. Co., 278 N.Y.S. 837, affirmed 283 N.Y.S. 996, 246 App.Div. 548.

(8) Defective door.—Schlossberg v. New York Rys. Co., 171 N.Y.S. 255.

(9) Defective seat.—Smith v. Blue Ridge Transp. Co., Md., 191 A. 66.

(10) Defective step.—Fitzgerald v. Boston Elevated Ry. Co., 174 N.E. 490, 274 Mass. 287.

(11) Defective trapdoor.—Johnston v. Director General of Railroads, 133 A. 158, 286 Pa. 166.

(12) Falling pole.—Stewart v. Barre & Montpelier Traction & Power Co., 111 A. 526, 94 Vt. 398.

(13) Shock of electricity because of a defect in the insulation or other appliances.
Miss.—Gulfport & Mississippi Coast Traction Co. v. Hicks, 76 So. 873, 116 Miss. 164
N.J.—McKittrick v. Public Service Ry. Co., 128 A. 226, 101 N.J.Law 262.
10 C.J. p. 1037 note 54.

(14) Trolley wire.
Ill.—Jensen v. East St. Louis Ry. Co., 202 Ill.App. 583.
Ky.—Kentucky Traction & Terminal Co. v. Roman's Guardian, 23 S.W. 2d 272, 232 Ky. 285.

Inference of defective appliance

That a door of an interurban car equipped with an automatic catch or spring to keep the door open closed on a passenger's hand spoke for itself, and raised an inference that the catch was defective, although there was testimony that after the accident the conductor examined the catch and found it in good condition.—Anderson v. Kansas City Rys. Co., 233 S.W. 203, 290 Mo. 1.

83. Ala.—Central of Georgia R. Co. v. Robertson, 83 So. 102, 203 Ala. 358.
Md.—Smith v. Blue Ridge Transp. Co., 191 A. 66.
Mo.—Kinchlow v. Kansas City, K. V. & W. Ry. Co., 264 S.W. 416
N.J.—McKittrick v. Public Service Ry. Co., 128 A. 226, 101 N.J.Law 262.
Pa.—De Marchi v. Central R. Co. of New Jersey, 107 A. 703, 264 Pa. 321.
10 C.J. p. 1037 note 55.

84. Ky.—Consolidated Coach Corporation v. Hopkins, 14 S.W.2d 768, 228 Ky. 184.

85. Mass.—Kinnarney v. Milford & U. St. Ry. Co., 134 N.E. 614, 241 Mass. 127.

86. N.J.—Heinige v. Little Ferry Bus Line, 171 A. 135, 12 N.J.Misc. 213.

87. Kan.—Cloud v. Kansas-Oklahoma Traction Co., 173 P. 338, 103 Kan. 249, 7 A.L.R. 1671.

which projected because the top had been pushed back.[88]

Breaking of glass; falling windows. While it has been held that negligence may be inferred from the breaking of glass, resulting in injury to a passenger,[89] and that where glass falls from a window suddenly and without warning the burden is on the carrier to show its freedom from negligence,[90] so where, in the case of breaking of glass, the facts and circumstances show that the accident could not have happened if the carrier had used ordinary care,[91] the doctrine of res ipsa loquitur has been held inapplicable in an action for injuries resulting from the breaking of a window due to its sudden and unexplained fall where the window was subject to the passenger's control[92] or to the breaking of a window where there was nothing to show the cause thereof, or any defect,[93] or to the falling out of a cracked glass, of which defendant was not charged with notice.[94]

The doctrine of res ipsa loquitur does not apply against an initial carrier to the breaking of a car window after the car has passed from the initial carrier into the custody of another carrier.[95]

A passenger injured by the sudden falling of a window has the burden of proving the carrier's negligence, the mere unexplained falling of the window not being evidence of negligence.[96]

Property belonging to and taken by a passenger into a car of a carrier is not an appliance of transportation, within the rule that, where an injury results from something improper or unsafe in the appliance of transportation, the burden is on the carrier to prove that such injury did not result from its negligence.[97]

Ice and snow. The burden is on the carrier to rebut the inference of negligence arising from snow and ice on the steps of its conveyances.[98] Plaintiff has the burden of showing icy condition was known to the carrier or had existed long enough that by the exercise of due care it could have been discovered and remedied.[99]

(6) Sudden Jerks; Premature or Sudden Starts

The carrier is presumed to have been negligent when it is shown that the injuries resulted from an unusual or extraordinary jerk or a sudden and unusual stop, or a sudden start while the passenger was boarding or alighting; but no such presumption arises merely from the fact of jerking or jolting, or stopping and starting.

As to injuries resulting from the sudden movement of a train or car, causing a jerk or jolt, the burden of proving which is on plaintiff,[1] it has been held that the fact of the jerk or jolt itself, when proved as being unusual or extraordinary in its nature, is prima facie evidence of negligence, the burden then being on defendant to show freedom

88. Mass.—Mulry v. Boston Elevated Ry. Co., 179 N.E. 595, 278 Mass. 210, 78 A.L.R. 1372.

89. N.J.—Wirth v. Hudson & M. R. Co., 194 A. 143, 119 N.J.Law 25—Scilimbracca v. Central R. Co. of New Jersey, 146 A. 665, 7 N.J. Misc. 635, affirmed 152 A. 920, 107 N.J.Law 192.

90. La.—Hart v. Gulf, M. & N. R. Co., App., 167 So. 166.
Mo.—Pennifold v. St. Louis Public Service Co., App., 59 S.W.2d 713.

91. Wis.—Sommerfield v. Chicago, N. S. & M. R. R., 180 N.W. 847, 173 Wis. 191.

92. Conn.—Briganti v. Connecticut Co., 175 A. 679, 119 Conn. 316

93. N.Y.—McKinney v. New York, W. & B. Ry. Co., 179 N.Y.S. 535.
Wis.—Sommerfield v. Chicago, N. S. & M. R. R., 180 N.W. 847, 173 Wis. 191.

94. N.Y.—Bressler v. New York Rapid Transit Corporation, 1 N.E.2d 828, 270 N.Y. 409, reversing 282 N.Y.S. 120, 245 App.Div. 814—Bressler v. New York Rapid Transit Corporation, 297 N.Y.S. 336, 251 App.Div. 890.

95. U.S.—Louisville & N. R. Co. v. Chatters, La., 49 S.Ct. 329, 279 U.S. 320, 73 L.Ed. 711, reversing, C.C.A., 26 F.2d 403, which affirmed, D.C., Chatters v. Louisville & N. R. Co., 17 F.2d 305, and certiorari granted 49 S.Ct. 26, 278 U.S. 590, 73 L.Ed. 523.

96. Mass.—Scott v. Boston Elevated Ry. Co., 176 N.E. 530, 276 Mass. 21—Luca v. Eastern Massachusetts St. Ry. Co., 171 N.E. 664, 271 Mass. 410.
N.C.—Saunders v. Norfolk & W. Ry. Co., 117 S.E. 4, 185 N.C. 289, 29 A.L.R. 1258.
However, it has been held that, where a window falls on the arm of a passenger, the happening of the accident raises a presumption of negligence on part of the railroad company—Paynter v. Atlantic City R. Co., 62 Pa.Super. 455.

97. N.Y.—Dusenbury v. Delaware, L. & W. R. Co., 158 N.Y.S. 681, 95 Misc. 241.

No presumption
That baggage is in the aisle and a passenger stumbles over it does not raise a presumption of negligence on the part of the street railroad—Selman v. City of Detroit, 278 N.W. 112, 283 Mich. 413.

98. Minn.—Gegere v. Chicago & N.W. Ry. Co., 220 N.W. 429, 175 Minn. 96

99. Mo.—Blankenship v. St. Louis Public Service Co., 71 S.W.2d 723.
Mont.—Heck v. Northern Pac. Ry. Co., 196 P. 521, 59 Mont. 106.
N.J.—Griffin v. Hohorst, Inc., 185 A. 535, 14 N.J.Misc. 421.
Wis.—Ennis v. Milwaukee Electric Ry. & Light Co., 232 N.W. 540, 202 Wis. 277.

Presence of ice on step of defendant's bus, causing alighting passenger's fall, does not invoke res ipsa loquitur doctrine.—Griffin v. Hohorst, 185 A. 535, 14 N.J.Misc. 421.

Matter within carrier's knowledge
Passenger, who slipped on icy step when boarding street car, need not show that icy condition of step existed when car left car barn in order to recover, since such information lay peculiarly with street railway—Olszowy v. Cleveland Ry. Co., 192 N.E. 366, 47 Ohio App. 529.

1. Kan.—Wall v. Union Traction Co., 196 P. 434, 108 Kan. 531.
Va.—Ellis v. Virginia Ry. & Power Co., 110 S.E. 382, 132 Va. 24.
10 C.J. p. 1030 note 15.

from negligence on its part;[2] and it is not necessary for plaintiff to go further and to show that the jerk or jolt was not in the course of the ordinary operation of the road,[3] but the presumption of negligence becomes conclusive unless it is shown that the jerking or jolting of the car was unavoidable in the exercise of the highest degree of care.[4] Thus a prima facie case has been held to be made out, under the doctrine of res ipsa loquitur, where it is shown that the passenger was injured by reason of the sudden and unusual lurching or jerking of a moving train or car, causing him to be thrown therefrom,[5] or by the sudden and unusual stopping of a train or car, causing him to fall,[6] or by reason of the sudden starting of a car while the passenger was boarding or alighting therefrom, after it had stopped,[7] or almost stopped,[8] at a regular stopping place.

Where jerk or jolt not unusual. On the other hand, the mere fact that the injury was caused by a jerk or jolt of the car does not raise a presumption of negligence, where it is not shown that the jerk or jolt was of an unusual or extraordinary nature,[9] particularly where there was no collision or injury to the car;[10] and it has been held that such presumption will not arise even from an unusual jerk and the resulting injury, but that plaintiff must show negligence on the part of the carrier in the construction of the road or in the management of the train or car;[11] and when defendant shows there

2. U.S.—Southern Pac. Co v. Hanlon, C.C.A.Cal., 9 F.2d 294.
Md.—United Rys. & Electric Co. of Baltimore v. Phillips, 99 A. 355, 129 Md. 328, L.R.A.1917C 384.
Mo.—Thompson v. Kansas City Public Service Co., App., 114 S.W.2d 145—Heidt v. People's Motorbus Co. of St. Louis, App., 9 S.W.2d 650—Rhodes v. Missouri Pac. R. Co., 255 S.W. 1084, 213 Mo.App. 515.
10 C.J. p 1030 note 16.

Discharge of full duty

Carrier had burden of showing passenger had not been thrown through opening of vestibule door while train was moving, or, if he had, that carrier discharged its full duty.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Galvin, C.C.A.Mich., 54 F.2d 202, certiorari denied 52 S. Ct. 407, 285 U.S. 551, 76 L.Ed. 941.

3. Mass.—Bell v. New York, etc., R. Co., 104 N.E. 963, 217 Mass. 408.

4. Okl.—St. Louis, etc., R. Co. v. Fitts, 140 P. 144, 40 Okl. 685, L.R.A.1916C 348.
10 C.J. p 1031 note 18.

5. N.C.—McGraw v. Southern Ry. Co., 175 S.E. 286, 206 N.C. 873
Or.—Richardson v. Portland Trackless Car Co., 233 P. 540, 113 Or. 544.
10 C.J. p 1031 note 19.

6. U.S.—Southern Pac. Co. v. Hanlon, C.C.A.Cal., 9 F.2d 294.
Ky.—Kentucky & T. Ry. Co. v. Ball, 194 S.W. 785, 175 Ky. 630.
N.Y.—Lombardi v. New York State Rys., 231 N.Y.S. 306, 224 App.Div. 438.
Pa.—Di Paolo v. Philadelphia Rapid Transit Co., 101 Pa.Super. 254.
10 C.J. p 1031 note 20.

7. Cal.—Goldstein v. United Railroads of San Francisco, 202 P. 155, 54 Cal.App. 322—Murray v. United Railroads of San Francisco, 193 P. 596, 49 Cal.App. 462.
Ill.—Heineke v. Chicago Rys. Co., 116 N.E. 761, 279 Ill. 210, affirming 199 Ill.App. 399.
Mo.—Paul v. St. Louis Public Service Co., App., 46 S.W.2d 910—Zimmerman v. Kansas City Public Service Co., 41 S.W.2d 579, 226 Mo.App. 369.
Tenn.—Nashville, C. & St. L. Ry. v. Akin, 203 S.W. 329, 140 Tenn. 34, citing **Corpus Juris** with approval
W.Va.—Bartlett v. Baltimore & O. R. Co., 99 S.E. 322, 84 W.Va. 120.
10 C.J. p 1031 note 21.

Extraordinary violence of street car movement need not be established to permit recovery for injuries caused by sudden starting, without warning, after car has stopped to permit passengers to alight.—Laub v. Philadelphia Rapid Transit Co., 97 Pa.Super. 323.

Inferences from sudden starting

(1) Proof of the sudden starting forward of an electric car as a passenger was alighting raises the inference that it was caused by the motorman, there being no other reasonable or probable cause to which to attribute it.—Hecke v. Dunham, Mo.App., 192 S.W. 120.

(2) In absence of evidence, there is a presumption that conductor in charge of a street car gave signal to start car, which resulted in injury to a passenger alighting.—Lerch v. Hershey Transit Co., 99 A. 800, 255 Pa. 190.

(3) The doctrine of res ipsa loquitur, as applied to the sudden starting of a passenger coach, warrants or authorizes an inference or assumption that sudden starting was due to negligence of those controlling train, but does not compel such inference or presumption.—Williamson v. Salt Lake & O. Ry. Co., 172 P. 680, 52 Utah 84, L.R.A.1918F 588

8. Mo.—Chapman v. Kansas City Rys. Co., 233 S.W. 177
Utah.—Paul v. Salt Lake City R. Co., 83 P. 563, 30 Utah 41.
10 C.J. p 1031 note 22.

A street railroad is presumed to have knowledge of the customary practice of the motormen to accelerate speed of cars only on go ahead signals from conductors, if such practices have continued for a substantial time.—Chapman v. Kansas City Rys. Co., Mo., 233 S.W. 177.

9. Md.—State v. United Railways & Electric Co. of Baltimore, 159 A. 916, 162 Md. 404, 83 A.L.R. 1307—Grinath v. Baltimore & Belair Electric Ry. Co., 125 A. 604, 145 Md. 290.
Mass.—Johnson v. Berkshire St. Ry. Co., 198 N.E. 154—Viglas v. Boston, R. B. & L. R. Co., 169 N.E. 780, 270 Mass. 264—Seidenberg v. Eastern Massachusetts St. Ry. Co., 165 N.E. 658, 266 Mass. 540.
Mo.—Provance v. Missouri Southern R. Co., App., 186 S.W. 955.
Neb.—McCann v. Omaha & Council Bluffs Street Ry. Co., 222 N.W. 633, 117 Neb. 786.
Pa.—Crawford v. Reading Transit & Light Co., 116 A. 542, 273 Pa. 74—Laub v. Philadelphia Rapid Transit Co., 97 Pa.Super. 323—Fornwalt v. Philadelphia Rapid Transit Co., 65 Pa.Super. 559.
Va.—Richmond-Ashland Ry. Co. v. Jackson, 162 S.E. 18, 157 Va. 628.
10 C.J. p 1031 note 23.

That passenger fell and sustained injuries when street car started raises no presumption of negligence on part of carrier or motorman.—Mendenhall v. Springfield Traction Co., Mo.App., 26 S.W.2d 50.

10. Pa.—Cline v. Pittsburg R. Co., 75 A. 850, 226 Pa. 586, 27 L.R.A., N.S., 936
10 C.J. p 1032 note 24.

11. Pa.—Delaney v. Buffalo, R. & P. Ry. Co., 109 A. 605, 266 Pa. 122.
Utah.—Morrissey v. Union Pac. R. Co., 249 P. 1064, 68 Utah 323.
10 C.J. p 1032 note 25.

was no sudden, unusual, or unnecessary jerk of the car the presumption disappears and plaintiff must introduce other evidence of negligence.[12] Thus the mere fact that a train or car was started or stopped with a sudden jerk does not of itself raise a presumption of negligence,[13] and this is also true of the sudden stopping of a taxicab.[14] When it is shown that the sudden stopping was to avoid a collision with another vehicle the doctrine of res ipsa loquitur does not apply.[15]

g. Res Ipsa Loquitur; Rebutting Presumption

The presumption of negligence is not conclusive, but may be rebutted by the carrier by any competent evidence showing its freedom from fault.

The presumption of negligence on the part of the carrier, arising from the circumstances of the injury to a passenger, under the doctrine of res ipsa loquitur, is a presumption of fact and not of law, and, although of itself sufficient to support a verdict for the passenger,[16] it may be rebutted by the carrier,[17] in doing which the burden is on the carrier to show that the accident was inevitable, or could not have been prevented by the exercise of the required degree of skill and care on its part,[18] or that it would not have occurred but for the passenger's own negligence.[19] Although it has been held that the carrier must explain the cause of the accident in order to rebut the presumption of negligence,[20] as a general rule the burden is not on it to furnish a satisfactory explanation of the cause of the accident, but merely to rebut the inference that it has failed to use due care,[21] and it is generally sufficient if the carrier produces sufficient evidence to balance the presumption without overcoming it by the preponderance of the evidence;[22] but it has been held that the burden is on the carrier to overcome the presumption of negligence to the satisfaction of the jury,[23] and that proof that the accident happened from some inexplicable cause,[24] or that the probabilities are equal that the accident did or did not result from the carrier's negligence,[25] does not satisfy the burden of proof to show freedom from negligence; and where a breach of contract of carriage is involved it has been held that a balance of the testimony will not preclude recovery where plaintiff has made out a prima facie case.[26] No inference or presumption obtains as

12. Ga.—Georgia Power Co. v. Watts, App., 192 S.E. 493.

13. Iowa.—Walters v. Des Moines City Ry., 179 N.W. 865, 191 Iowa 196.
N.Y.—Cohen v. Surface Transp. Corporation of New York, 289 N.Y.S. 678, 160 Misc. 247.
Pa.—Cook v. Philadelphia Rapid Transit Co., 182 A. 755, 120 Pa. Super. 565—Wood v. Pennsylvania R. Co., 170 A. 367, 111 Pa. Super. 430—Izard v. Philadelphia Rapid Transit Co., 100 Pa.Super. 240.
Tenn.—Nashville, C. & St. L. Ry. v. Akin, 203 S.W. 329, 140 Tenn. 34
10 C.J. p 1032 note 26.

Stopping or starting as cause

Where, in an action for death of a passenger about to alight, plaintiff does not show whether the injury was due to jerk of train in stopping, for which railroad would not be liable, or to sudden start without warning, for which it would have been liable, plaintiff could not recover.—Nashville, C. & St. L. Ry. v. Akin, 203 S.W. 329, 140 Tenn. 34.

14. Mass.—Conley v. Town Taxi, 10 N.E.2d 74.

No inference from mere fact of stopping

In taxicab passenger's action for injuries sustained as alleged result of sudden stop of taxicab, in absence of evidence to show existing conditions, inference was not warranted that purpose of stopping taxicab was to permit occupants to alight, or that cause of stop was not traffic conditions appearing in the street.—Conley v. Town Taxi, Mass., 10 N.E.2d 74.

15. Conn.—Robinson v. Connecticut Co., 189 A. 453, 122 Conn. 300.
Ill.—Letush v. New York Cent. R. Co., 267 Ill.App. 526.

16. Mo.—Roberts v. Schaper Stores Co., 3 S.W.2d 241, 318 Mo. 1190.
N.Y.—Salomone v. Yellow Taxi Corporation, 151 N.E. 442, 242 N.Y. 251, reversing 213 N.Y.S. 899, 215 App.Div. 790, and reargument denied 152 N.E. 445, 242 N.Y. 602.
10 C.J. p 1038 note 61.

17. La.—Foster v. New Orleans Public Service, 3 La.App. 514.
Miss.—Gulf & S. I. R. Co. v. Odum, 98 So. 60, 133 Miss. 543.
Mo.—Hartnett v. May Department Stores Co., App., 85 S.W.2d 644—Kilroy v. Kansas City & K. V. Ry. Co., App., 195 S.W. 522.

Presumption held rebutted

Where a passenger was injured by an unexplained explosion near his seat and there were no marks on or about the seat or in the car made by such explosion, and the railroad company showed that the car was inspected and cleaned that morning and no explosive left in it and that none was afterward seen in it, such evidence completely rebutted any presumption that arose on account of such explosion and entitled the railroad company to a directed verdict.—Gulf & S. I. R. Co. v. Odum, 98 So. 60, 133 Miss. 543.

18. Wash.—Hayes v. Staples, 225 P. 417, 129 Wash. 436.
10 C.J. p 1038 note 62.

19. Neb.—Lincoln Tract. Co. v. Webb, 102 N.W. 258, 73 Neb. 136, 119 Am.S.R. 879
10 C.J. p 1038 note 63.

20. Ark.—St. Louis, etc., R. Co. v. Mitchell, 21 S.W. 883, 57 Ark. 418
N.Y.—Burke v. State, 119 N.Y.S. 1089, 64 Misc. 558.

21. La.—Wark v. New Orleans Public Service, App., 168 So. 797.
10 C.J. p 1038 note 65.

22. Cal.—Bourguignon v. Peninsular Ry. Co., 181 P. 669, 40 Cal. App. 689.
10 C.J. p 1038 note 66.

Most satisfactory explanation required

Where a passenger transported by a carrier is injured in a derailment, and the carrier attempts to give a satisfactory explanation of the accident, or to show such care in all respects as to exclude the conclusion of want of care, the explanation or care shown must be most satisfactory.—Bourguignon v. Peninsular Ry. Co., 181 P. 669, 40 Cal.App. 689.

23. Va.—Murphy's Hotel v. Cuddy's Adm'r, 97 S.E. 794, 124 Va. 207.
10 C.J. p 1038 note 67.

24. Okl.—Muskogee Electric Tract. Co. v. Eaton, 152 P. 1109, 49 Okl. 344.

25. Iowa.—Arnett v. Illinois Cent. R. Co., 176 N.W. 322, 188 Iowa 540.
10 C.J. p 1039 note 69.

26. La.—Wallace v. Shreveport Rys. Co., App., 175 So. 86.

against the uncontradicted sworn testimony of all the eyewitnesses.[27]

h. Elevators and Escalators

In cases of injuries received on elevators or escalators, the burden of proving negligence is on plaintiff, aided by the presumption of negligence arising when the accident is such that it would not have happened had due care been used.

A passenger injured on an elevator has the burden of proving negligence on the part of the carrier or the operator of the elevator causing his injury;[28] and the same is true in escalator cases.[29] Mere proof of a defect in the elevator, whether latent or patent, merely tends to prove, but is not proof of, negligence;[30] but where plaintiff proves the fact of his injury from an accident which in the usual course of events would not have happened if due care had been used, a prima facie case, under the doctrine of res ipsa loquitur, is made out, and it is then incumbent on defendant, in order to prevent a recovery, to show that the accident was not due to negligence on its part,[31] or that the passenger's contributory negligence caused the injury.[32] The fact of the falling of an elevator while being operated as a carrier of passengers is presumptive evidence of either negligence in its operation or that it was out of repair or faultily constructed, and throws on the owner the burden of showing freedom from negligence,[33] but he has not the burden of explaining how it fell.[34] It has been held that where an elevator suddenly drops about four feet causing a person who is entering to fall against and injure another person who is a passenger in the car, and there is no showing why it

Presumption held not overcome

A street railroad was liable for injuries to paid passenger sustained in fall in aisle of car caused by alleged negligence of motorman in starting car with a jerk, where evidence of freedom from negligence to overcome passenger's prima facie case consisted only of motorman's denial that car started with jerk, there being no other witnesses, since a balance of testimony as to facts constituting negligence was insufficient to overcome prima facie case of negligence established—Wallace v. Shreveport Rys. Co., La.App., 175 So. 86.

27. Cal.—Ginochio v. City & County of San Francisco, 206 P. 763, 57 Cal.App. 150.

28. Ala.—Ensley Holding Co. v. Kelley, 158 So. 896, 229 Ala. 650
Mass.—Draper v. Cotting, 120 N.E. 365, 231 Mass. 51.
Pa.—McKnight v. S. S. Kresge Co., 132 A. 575, 285 Pa. 489.
Tex.—Texas Employers' Ins. Ass'n v. Chocolate Shop, Civ.App., 30 S.W.2d 416, affirmed, Com.App., 44 S.W.2d 989.
10 C.J. p 1039 note 70.

No presumption from mere fact of death

Where one riding in a passenger elevator fell over and was killed, no presumption of negligence on the part of the operator of the elevator can arise from that fact standing alone, the elevator being in good condition—Monaghan v. Equitable Life Ins. Co. of Iowa, 168 N.W. 892, 184 Iowa 352.

29. Mass.—Conway v. Boston Elevated Ry. Co., 152 N.E. 94, 255 Mass. 571.

Proof of responsibility required

Action based on negligence in operating escalators cannot be maintained unless proved affirmatively that defective condition was due to elevated railway's act or omission—Conway v. Boston Elevated Ry. Co., 152 N.E. 94, 255 Mass. 571.

30. Cal.—McKeon v. Lissner, 223 P. 965, 193 Cal. 297.

31. Ill.—Burdette v. Chicago Auditorium Ass'n, 166 Ill.App. 186.
Iowa.—Monaghan v. Equitable Life Ins. Co. of Iowa, 168 N.W. 892, 184 Iowa 352.
Mass.—Draper v. Cotting, 120 N.E. 365, 231 Mass. 51.—Cleary v. Cavanaugh, 106 N.E. 998, 219 Mass. 281.
Mo.—Roberts v. Schaper Stores Co., 3 S.W.2d 241, 318 Mo. 1190.
N.Y.—Courtney v. Gainsborough Studios, 174 N.Y.S. 855, 186 App.Div. 820.
Pa.—Petrie v. Kaufmann & Baer Co., 139 A. 878, 291 Pa. 211.—McKnight v. S. S. Kresge Co., 132 A. 575, 285 Pa. 489, both cases citing **Corpus Juris** as authority.
Va.—Murphy's Hotel v. Cuddy's Adm'r, 97 S.E. 794, 124 Va. 207.
Wis.—Dehmel v. Smith, 227 N.W. 274, 200 Wis. 292.
10 C.J. p 1039 note 71.

Escalators

Rule as to evidence making prima facie case is same for injured passenger in department store escalator as in elevator or train.—May Department Stores Co. v. Bell, C.C.A.Mo., 61 F.2d 830.

Presumption held to exist

(1) An elevator passenger has only to show that he was injured by the rapid descent and sudden stopping of the elevator under the control of defendant, to make out case presumptively showing negligence—Worden v. Central Fireproof Bldg. Co., 155 P. 839, 172 Cal. 94.

(2) Res ipsa loquitur maxim is applicable to injury to infant passenger on department store escalator resulting from breaking of a tooth of a comb plate.—May Department Stores Co. v. Bell, C.C.A.Mo., 61 F.2d 830.

(3) When passenger was injured by failure of passenger elevator to stop at proper place, fact raises presumption of negligence on part of owner of elevator.—McCardle v. George B. Peck Dry Goods Co., 195 S.W. 1034, 271 Mo. 111.

(4) The rule of res ipsa loquitur applies to action for the death of an employee of a transfer company, while loading a furnace on a freight elevator which suddenly started up, although deceased was in the employ of an independent contractor, the testimony showing that the elevator operator was in defendant's employ and under deceased's control only while serving him as he did any person using the elevator, and defendant owing deceased the same duty a railway carrier owes to passengers—Grimm v. Globe Printing Co., Mo., 232 S.W. 676.

(5) Petition alleging elevator started in motion and descended while plaintiff was alighting, causing plaintiff to fall, alleged general negligence within doctrine of res ipsa loquitur—Roberts v. Schaper Stores Co., 3 S.W.2d 241, 318 Mo. 1190.

Rebuttal

Presumption from accident that elevator owner was negligent may be rebutted by showing that utmost skill, foresight, and diligence could not prevent it—McKnight v. S. S. Kresge Co., 132 A. 575, 285 Pa. 489.

32. Mo.—Cooper v. Century Realty Co., 123 S.W. 848, 224 Mo. 709.

33. Cal.—Campbell v. Bradbury, 176 P. 685, 179 Cal. 364
10 C.J. p 1039 note 73.

34. N.Y.—Klein v. Fraser, 155 N.Y.S. 848, 169 App.Div. 812.—Gage v. Waldorf Astoria Hotel Co., 152 N.Y.S. 1019, 90 Misc. 331.

drops or that it is defective, or of any previous trouble, or that the operator was incompetent, or that the usual precautions were wanting, there is no negligence on the part of the owner[35] When proof is offered by the owner of the elevator, overcoming the presumption, the burden is then on plaintiff to show negligence.[36] When the only negligence specified in the complaint is the failure of defendant to keep the elevator in order and repair, the doctrine of res ipsa loquitur does not apply.[37]

§ 765. Admissibility of Evidence

a. In general
b. Relation of carrier and passenger
c. Competency and selection of carrier's employees
d. Circumstances affecting acts or omissions of carrier's employees
e. Condition of carrier's premises
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g. Condition of track or roadbed
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k. Subsequent repairs and precautions
l. Custom or course of business
m. Rules of carrier

a. In General

The general rules governing admissibility of evidence apply in actions by passengers against carriers in actions for personal injuries.

The rules governing the competency, relevancy, and materiality of evidence in civil actions generally apply in an action by a passenger for personal injuries.[38] Subject to these rules, any evidence is admissible which tends to show the situation of the parties and the circumstances immediately attending the accident or injury,[39] but evidence that is irrelevant, immaterial, or incompetent is, of course, inadmissible.[40]

35. Mich.—Elsey v. J. L. Hudson Co., 155 N.W. 377, 189 Mich. 135, L.R.A. 1916B 1284.

36. N.Y.—Courtney v. Gainsborough Studios, 174 N.Y.S. 855, 186 App. Div. 820

37. Cal.—McKeon v. Lissner, 223 P. 965, 193 Cal. 297.

38. **Evidence held admissible**

(1) Where, in an action for injuries to a passenger while alighting from a railroad car, a physician who had attended plaintiff some time afterward testified as to plaintiff's broken ribs at the time he called to see her, it was error for the court to refuse to permit him to answer a question whether plaintiff had not told him that just prior to the time of such examination she had sustained an injury by falling from a horse or mule.—Southern Ry. Co. v. Cothran, 42 So. 100, 149 Ala. 673.

(2) In a personal injury action against a railroad company, testimony of the amount of bills rendered by physicians for services to plaintiff is admissible, where the witness saw the first doctor present his bill and noted the amount, which was not objected to by plaintiff, and requested the other doctor to render his bill and saw the statement.—St. Louis, I. M. & S. Ry. Co. v. Hydrick, 160 S.W. 196, 109 Ark. 231.

39. Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720.
10 C.J. p. 1041 note 91.

Aggravation of injury

Under evidence that plaintiff requested surgeons to amputate leg above ankle, it was error to exclude evidence that he had accident insurance netting larger sum for such amputation, being persuasive of motive for self-inflicted injury.—Reynolds v. Alton, G. & St. L. Traction Co., 112 N.E. 668, 273 Ill. 207, reversing 194 Ill. App. 87.

Conduct of employee

In an action for injuries to passenger carried past her station and struck by another car in going back to her destination, evidence that conductor stopped the car at place beyond station and pointed out lights at place of destination was admissible under petition alleging that conductor directed plaintiff to alight at that place.—Gott v. Kansas City Rys. Co., Mo., 222 S.W. 827.

Conviction of driving under influence of liquor

Reception of testimony that truck driver had been convicted of driving while under influence of liquor at time of accident, and took an appeal which he dismissed on advice of counsel, was not error.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720.

Custom

Where a railway mail clerk was injured by failure of carrier to heat the mail car on a side track at the terminal, it was error, in his action for such injuries, to exclude evidence that it was customary for clerks to notify the carrier if they intended remaining in the car.—Louisville & N. R. Co. v. Dougherty, 185 S.W. 114, 170 Ky. 10, L.R.A. 1916E 464.

On question of culpability

That independent contractor repairing elevator told owner's employee, who told owner's manager, that elevator was safe for fifteen years, held admissible as affecting culpability for death of expressman where damages are measured by culpability rather than liability.—Levesque v. Hildreth & Rogers Co., 177 N.E. 623, 276 Mass. 429

Place of accident

Testimony by witness that he saw blood on tracks morning after accident is admissible as showing point of collision.—Alabama Great Southern R. Co. v. Bell, 76 So. 920, 200 Ala. 562.

40. Mass.—Kuhlen v. Boston, etc., R. Co., 79 N.E. 815, 193 Mass. 341, 118 Am.S.R. 516, 7 L.R.A.,N.S., 729
10 C.J. p. 1041 note 92.

Evidence held inadmissible

(1) In a passenger's action for injuries in which there was a count for wanton negligence, defendant cannot show, either as a defense to the wanton count or for the purpose of enlightening the jury in awarding punitive damages, that punitive damages were assessed in a suit by another passenger based upon the same alleged act of wanton negligence, the negligent act forming as many distinct and unrelated wrongs as there were individuals injured by it.—Alabama Power Co. v. Goodwin, 99 So. 158, 210 Ala. 657.

In an action against a carrier and a railroad for injuries resulting from a collision, defendants cannot bring into the case the relative duties and obligations between themselves, as the controversy involves only the liability of each to plaintiff.[41]

Report of accident. It has been held that where the carrier maintains a system of having accidents reported by employees, evidence that no such report had been made is admissible as tending to show that no such accident occurred;[42] but it has been held that evidence that no report of the accident had been made is inadmissible when objected to by plaintiff,[43] or where defendant otherwise had notice thereof.[44] Where plaintiff in an action for injuries inflicted by an employee has shown a ratification by defendant of the employee's acts, defendant may show what report its employee made to it of the affair.[45]

b. Relation of Carrier and Passenger

Competent evidence is admissible to prove or disprove the relation of carrier and passenger.

As bearing on the existence of the relation of carrier and passenger at the time of the accident, evidence is admissible which tends to prove[46] or to disprove[47] the injured person's right to ride on the car or other vehicle. Thus evidence is admissible which tends to show that the person injured was on the car or train by the invitation or with the acquiescence of one of the employees in charge thereof,[48] or, if he was on a car or part of the train not used for the accommodation of passengers, that he was there by the authority or direction of one of the employees.[49] Evidence is admissible which tends to show that the passenger, although he had not already paid his fare, intended to become a passenger and had at the time money sufficient to pay his fare,[50] or that he had a ticket entitling him to ride as passenger.[51] On the question whether an employee's pass or ticket was a gratuity or a part consideration for his wages, evidence that it was the carrier's custom to furnish other like employees with like transportation and as to what was said by the carrier's superintendent or manager in regard thereto is admissible.[52]

c. Competency and Selection of Carrier's Employees

As bearing on the competency of an employee, evidence of his habits and previous instances of negligence or care is admissible. Competent evidence is admissible to show the care taken in the selection of employees by the carrier.

Where the competency of an employee is in question, evidence of other specific acts of negligence by him is admissible to show his incompetency,[53]

(2) Where an injured passenger had a telephone conversation with the conductor of the car more than one year after the accident, in which the conductor asked if the passenger was going to sue the street railway, evidence of such conversation was irrelevant and wholly immaterial.—South Covington & C. Ry. Co. v. Goldsmith, 218 S.W. 286, 187 Ky. 68.

(3) Where it clearly appeared that crowded condition of car could not have contributed, it was proper to exclude question as to crowded condition.—Eaton v. New York, N. H. & H. R. R., 116 N.E. 815, 227 Mass. 113.

(4) In action for death of one thrown off platform at curve, evidence as to number of cars that "would" pass over curve daily and not number that "did" pass, that skull had previously been fractured, and that passenger drank intoxicants, offered to show his want of equilibrium, was properly excluded.—Halloran v. Boston Elevated St. Ry. Co., 112 N.E. 849, 224 Mass. 280.

(5) Testimony that injured party could not read pass containing agreement relieving railroad of liability for injuries was immaterial, and admission was prejudicial.—Wessman v. Boston & M. R. R., 152 A. 476, 84 N.H. 475.

(6) In an action for injury to a passenger, it is not material that one going through the car immediately after the accident saw no one who appeared to be injured, plaintiff in her testimony not claiming to have received any injury that might be visible to the casual observer, and saying that she made no complaint at the time.—Vuilleumier v. Oregon Water Power & Ry. Co., 105 P. 706, 55 Or. 129.

41. Mo.—Knox v. Missouri, K. & T. Ry. Co., 203 S.W. 225, 199 Mo.App. 64.

42. N.Y.—Hirsch v. Union Ry. Co. of New York, 96 N.Y.S. 333, 38 Misc. 527.
10 C.J. p. 1042 note 93.

43. D.C.—Guenther v. Metropolitan R. Co., 23 App.D.C. 493.

44. Ill.—Smith v. Chicago City R. Co., 169 Ill.App. 570.

45. Mo.—Hayes v. St. Louis R. Co., 15 Mo.App. 584.

46. Ill.—Springer v. Ford, 59 N.E. 953, 189 Ill. 430, 82 Am.S.R. 464, 52 L.R.A. 930, affirming 88 Ill.App. 529.
10 C.J. p. 1042 note 97.

47. Ky.—Morris v. City Transfer & Yellow Taxi Co., 294 S.W. 1030, 220 Ky. 219.
10 C.J. p. 1042 note 98.

Rule as to issuance of pass

Where issue existed whether work train gang laborer, injured when freight train on which he was riding was derailed, was passenger, railroad's rule tending to confirm its insistence that station agent had no authority to issue pass to laborer on freight train is improperly excluded.—Chesapeake & O. Ry. Co. v. Ringstaff, C.C.A. Ohio, 67 F.2d 482

48. Tex.—American Express Co. v. Ogles, 81 S.W. 1023, 36 Tex.Civ.App. 407.
10 C.J. p. 1043 note 99.

49. Ill.—East St. Louis, etc., R. Co. v. Zink, 82 N.E. 283, 229 Ill. 180.
10 C.J. p. 1043 note 1.

50. U.S.—Northern Pac. R. Co. v. Marinovich, Wash., 189 F. 328, 111 C.C.A. 60.
10 C.J. p. 1043 note 2.

51. Ill.—Collison v. Illinois Cent. R. Co., 88 N.E. 251, 239 Ill. 532.
10 C.J. p. 1043 note 3.

52. Wash.—Harris v. Puget Sound Electric R. Co., 100 P. 838, 52 Wash. 289.
10 C.J. p. 1043 note 4.

53. U.S.—McKinney v. Neil, C.C. Ohio, 16 F.Cas.No.8,865, 1 McLean 540.
10 C.J. p. 1043 note 5.

and, as bearing on his rashness or unfitness for his position, evidence of the use of reckless language by an employee has been held admissible.[54] Particular instances of care on the part of the employee are admissible to rebut evidence of his reputation for carelessness shown by evidence of particular instances of negligence,[55] as is also evidence of his known reputation for efficiency.[56]

Evidence of the habits and competency of an employee is admissible on the question of his negligence at the time of the accident complained of.[57] Thus the intemperate habits of an employee may be shown in evidence to prove negligence on his part, nor is this limited to drunkenness at the time of accident;[58] but where it is shown that the employee was negligent on the occasion in question, and his competency is not attacked, evidence as to his reputation for ability, prudence, etc., is not admissible as not being pertinent.[59] The fact that a taxi driver's license has been suspended and reissued to him is not evidence of his incompetency nor is it admissible as such.[60]

Care in selection of employees. Evidence as to the amount of care taken by the carrier in selecting its employees is not admissible on the question of their negligence,[61] nor is evidence that the employee was discharged after the accident admissible for this purpose.[62] However, evidence that the carrier employed and retained an incompetent employee is admissible to show negligence on its part in that respect,[63] as well as in respect to all the consequences of a failure of duty on the part of such employee.[64]

d. Circumstances Affecting Acts or Omissions of Carrier's Employees

In a proper case evidence of conditions and circumstances existing at the time and place of the accident or injury is admissible to prove or disprove the negligence of the carrier or its employees.

Evidence of the conditions and circumstances existing at the time and place of the accident or injury is admissible for the purpose of proving or disproving negligence on the part of defendant or its employees in causing the injury complained of.[65] Thus, as bearing on the carrier's negligence, evidence is admissible which tends to show notice to its employees of the passenger's physical condition[66] or danger at the time of the accident or injury,[67] and which tends to show whether or not in view of such notice it did all that was practicable to prevent such an accident as occurred.[68]

Abuse and insult. In an action for abusive or insulting language or conduct of an employee, plaintiff may show the continuance of the abusive or insulting acts even after he had been relieved from duty by another employee,[69] the manner and the

54. Tenn.—Nashville, etc., R. Co. v. Messino, 1 Sneed 220.
10 C.J. p 1043 note 6.

55. N.H.—Plummer v. Ossipee, 59 N.H. 55.

56. Ky.—Louisville, etc., R. Co. v. McEwan, 31 S.W. 465, 17 Ky.L. 406.
10 C.J. p 1043 note 8.

57. Pa.—Pennsylvania R. Co. v. Books, 57 Pa. 339, 98 Am.D. 229
10 C.J. p 1043 note 9.

58. Ind.—Pennsylvania Co. v. Newmeyer, 28 N.E. 860, 129 Ind. 401.
10 C.J. p 1044 note 10.

59. Tex.—Missouri, etc., R. Co. v. Farris, Civ.App., 126 S.W. 1174.

60. Mass.—Finnegan v. Checker Taxi Co., 14 N.E.2d 127.

61. Ga.—Augusta, etc., R. Co. v. Randall, 11 S.E. 706, 85 Ga. 297.

62. N.Y.—Schmitt v. Dry Dock, etc., R. Co., 3 N.Y.St. 257.

63. Miss.—Vicksburg, etc., R. Co. v. Patton, 31 Miss. 156, 66 Am.D. 552

64. Me.—Jones v. Co-operative Assoc. of America, 84 A. 985, 109 Me. 448, L.R.A.1915E 745.

65. Mass.—Powers v. Old Colony St. R. Co., 87 N.E. 192, 201 Mass. 66.
10 C.J. p 1044 note 16.

Evidence held admissible

Railroad sued for injuries resulting from glass which was pushed through excursion train coach door by third person who injured passenger alleged was disorderly, on ground that railroad failed to afford passenger adequate protection after having reasonable grounds for believing that violence was imminent from third person, could, under rule of collective facts, question railroad's inspector of police who was aboard train, as to inspector's knowledge of any unusual or boisterous conduct of third person immediately preceding third person's breaking of glass.—Louisville & N. R. Co. v. Courson, 174 So. 474, 234 Ala. 273.

66. Ky.—Louisville, etc., R. Co. v. Bell, 179 S.W. 400, 166 Ky. 400.
10 C.J. p 1044 note 17.

Intoxication of passenger

(1) In action for death of intoxicated passenger from defendant's negligence, and in permitting him to fall or jump from car, evidence as to extent of his intoxication within reasonable time before and after he was on train was competent.—Louisville & N. R. Co. v. Mudd's Adm'x, 191 S.W. 102, 173 Ky. 330.

(2) In suit for injuries to passenger from fall in waiting station after being removed from electric train when suffering cerebral hemorrhage, excluding conductor's cross-examination testimony that on previous trips passenger had shown evidence of intoxication is error, where conductor on direct had testified he believed passenger intoxicated when he removed him from car.—Fagerdahl v. North Coast Transp. Co., 28 P.2d 107, 175 Wash. 600, modified on other grounds 35 P.2d 46, 178 Wash. 482.
10 C.J. p 1044 note 17 [a].

67. Mass.—Nute v. Boston, etc., R. Co., 100 N.E. 1099, 214 Mass. 184.
10 C.J. p 1044 note 18.

Evidence held inadmissible

In action for death of passenger on ground that defendant's trainmen knew, or could have known, of his intoxication, but negligently permitted him to fall or jump from car, evidence as to his sobriety three or four hours before he boarded train is too remote.—Louisville & N. R. Co. v. Mudd's Adm'x, 191 S.W. 102, 173 Ky. 330.—10 C.J. p 1044 note 18 [a].

68. Mass.—Coy v. Boston El. R. Co., 98 N.E. 1041, 212 Mass. 307.

69. Mo.—Malecek v. Tower Grove, etc., R. Co., 57 Mo. 17.
10 C.J. p 1045 note 23.

tone of voice accompanying the language used,[70] the physical effect such conduct had on plaintiff,[71] and the presence of others on the car at the time,[72] but not evidence having no tendency to prove the cause of action.[73] Defendant may show the employee's general reputation for politeness;[74] but evidence that the abuse or insult was brought about by the misconduct of the passenger is admissible only in mitigation of damages.[75]

Assault. Evidence of conditions and circumstances existing at the time is admissible in an action against a carrier for an assault on a passenger by an employee of the carrier,[76] or by a fellow passenger,[77] or other persons.[78] In an action for an assault by an employee, evidence is admissible which tends to show his employment[79] and duties,[80] and the capacity in which he acted.[81]

Evidence that the passenger had at some previous time made threats against the employee is inadmissible,[82] as is also evidence that the employee had been criminally prosecuted for the assault,[83] or subsequently been discharged.[84]

e. Condition of Carrier's Premises

Evidence as to conditions existing at the time and place of the accident is admissible to show negligence of the carrier with regard to its station premises or platforms; and competent evidence is admissible to show notice of such conditions.

As bearing on the question of the carrier's negligence with regard to its station premises or platforms, evidence is admissible as to the conditions existing there at the time of the accident,[85] and as

70. Ala.—Alabama Great Southern R. Co. v. Pouncey, 61 So. 601, 7 Ala App. 548.
10 C.J p 1045 note 29.

71. U S —Austro-American S. S. Co. v. Thomas, N.Y , 248 F 231, 160 C.C A. 309, L.R.A 1918D 873.

72. Tex —San Antonio Tract. Co. v. Lambkin, Civ.App., 99 S.W. 574.

73. U.S —Austro-American S. S. Co. v. Thomas, N.Y., 248 F 231, 160 C C.A. 309, L.R A 1918D 873.

Criminal statute

In action against steamship company for notifying passenger that check was worthless and threatening ejection, Italian statute as to attributing to another an act exposing such other to public scorn is inadmissible having no bearing on the cause of action —Austro-American S. S. Co v. Thomas, N Y , 248 F. 231, 160 C.C.A. 309, L R.A.1918D 873.

74. Ga.—Georgia Southern, etc., R. Co v. Ransom, 63 S E 525, 5 Ga. App. 740.

75. Ala.—Birmingham R , etc , Co v. Coleman, 61 So 890, 181 Ala. 478.
10 C.J. p 1045 note 32.

76. Wis —Berg v. Chicago, etc , R. Co , 131 N W. 902, 146 Wis. 419.
10 C J. p 1044 note 20

Evidence held immaterial

In action against railroad company for assault by brakeman, it not being shown that brakeman struck plaintiff, evidence of plaintiff's physical condition was not material.— Blackburn v. Williamson & P. C. Ry. Co., 202 S.W. 500, 180 Ky. 254.

77. Ala —Southern R Co. v. Haynes, 65 So. 339, 186 Ala 60.
Va —Norfolk, etc., R Co. v. Birchfield, 54 S E. 879, 105 Va. 809.
10 C J p 1044 note 21

Previous conduct of intoxicated passenger

In passenger's action against railroad for injuries inflicted by a fellow passenger, evidence as to the conduct of such fellow passenger at railroad station while waiting for train was properly admitted for purpose of proving that ticket agent knew or should have known that such fellow passenger was drunk, quarrelsome, and in a dangerous condition, and that he was intending to board train.—Falzarano v. Delaware, L. & W. R. Co , 194 A. 75, 119 N.J Law 76

78. Condition of plaintiff

In action by passenger against street railway for injuries sustained from assault by third persons, testimony that passenger's arm was not well at time of assault is admissible, since condition of arm might have necessitated greater protection —Birmingham Electric Co. v. Driver, 166 So. 701, 232 Ala. 36.

To show motive for assault

In action by passenger against street railway for injuries received on street car from assault claimed by railway to have resulted from labor dispute, admission of passenger's testimony as to where he worked during preceding May while strike was on is not error, since tending to show motive for assault —Birmingham Electric Co. v. Driver, 166 So 701, 232 Ala 36.

79. Ind —Southern R. Co. v Crone, 99 N.E. 762, 51 Ind App. 300.
10 C J. p 1045 note 22.

80. N Y —Brewster v. Interborough Rapid Transit Co., 123 N.Y S. 992, 68 Misc 348.

81. Md —Philadelphia, etc , R Co. v. Green, 71 A. 986, 110 Md. 32.
10 C J. p 1045 note 24.

82. Ky.—Louisville & N. R Co v. Mason, 251 S.W 184, 199 Ky. 337.
10 C J. p 1045 note 25.

83. W.Va.—Layne v. Chesapeake, etc , R. Co , 69 S E. 700, 68 W.Va. 213, 31 L R.A ,N S , 414.
10 C J. p 1045 note 26.

84. Ark —Pine Bluff, etc R Co v. Washington, 172 S W. 872, 116 Ark. 179

85. Ky.—Louisville, etc., R. Co v. Payne, 118 S W 352, 133 Ky. 539, 19 Ann Cas 294.
10 C J. p 1045 note 34.

Evidence held admissible

(1) In action for death of prospective passenger struck by automobile on approach to station, testimony of railroad ticket agent that municipality controlled light near where accident happened is admissible — Petrillo v. Kolbay, 165 A. 346, 116 Conn. 389.

(2) Testimony that it would have been good engineering to have used movable platform as part of temporary structures during construction was competent —Harrington v Boston Elevated Ry. Co , 118 N E 880, 229 Mass 421, 2 A.L R 1057

(3) In action by plaintiff, who in going to station to take train, instead of entering through passenger gate, started from street crossing diagonally across tracks, and was injured by falling on cattle guards, plaintiff should have been permitted to show when the cattle guards were installed, and whether they were installed on both sides of the crossing —Kovarik v. Long Island R Co., 178 N Y.S. 705, 189 App Div. 534

Evidence held inadmissible

(1) In alighting passenger's action for injuries evidence of preliminary suggestions as to preferable type of subway platform not binding defendant for fault in plan adopted is rightly excluded —Bartol v. City of Boston, 156 N E 844, 259 Mass 323.

(2) Where decedent fell on station platform in attempting to board

to whether the station was a regular, or only a flag, station.[86] However, evidence as to conditions existing at other places,[87] or at the same place at other times before or after the accident,[88] is inadmissible, unless it appears that the conditions have remained the same, as where only a short space of time has intervened.[89] Evidence of statements of a member of a railroad commission to an official of the railroad company with regard to the condition of a station and its platform is admissible to show notice of its condition to the company.[90] Evidence as to the small cost for which a defect at a station could be remedied is admissible as proving want of care on the part of the company in not making repairs before the accident.[91]

Evidence tending to show how the accommodations at the station at which the accident occurred compare as to safety with those of other stations is admissible for the purpose of showing lack of care on the part of the carrier in failing to furnish proper accommodations, particularly where the objecting party has introduced like evidence with respect to other stations.[92]

f. Condition of Vehicles and Appliances

Competent evidence is admissible on the question of the carrier's negligence relative to injuries caused by the condition of its cars or other vehicles or appliances.

On the question of the carrier's negligence relative to injuries caused by its cars or other vehicles or appliances, evidence tending to show their condition or equipment at the time of the accident is admissible.[93] For this purpose, evidence as to the condition of the car or vehicle at other times before or after the accident is admissible where it does not appear that there has been a change in its condition in the meantime;[94] but it has been held that in the absence of proof that the condition has remained the same such evidence is inadmissible.[95] Evidence of the defective condition of a part of the vehicle, which did not cause the injury, is immaterial.[96]

Evidence as to the condition of other cars or vehicles is generally held inadmissible, in the absence of proof that they are similarly constructed and equipped as the car or vehicle in question;[97] but, for the purpose of determining whether a car was properly equipped, evidence may be admitted as to whether other cars had been constructed in the same manner,[98] or as to whether a certain improvement had extensively been known and used prior to the time of the accident,[99] or as to the possibility, and ease or difficulty, of procuring something different, better, and safer than the safety device used, where the question is whether its use was negligence.[1] When the contention is not that the

train, evidence as to box cars standing on house track which did not contribute to injury is improper—Louisville & N R Co v. Rowland's Adm'r, 286 S.W. 929, 215 Ky 663.

86. Ark—Chicago, etc., R. Co. v. Stanford, 106 S W. 205, 84 Ark. 406

87. N Y—McKinney v New York Consol R. Co., 129 N E 652, 230 N Y 194, reversing 172 N.Y.S. 906, 186 App Div. 959
10 C J. p 1045 note 36.

88. U S—Chicago, etc, R. Co. v. Rorvig Minn, 217 F. 953, 133 C. C.A 625
10 C J. p 1045 note 37.

89. Ind—New York, etc., R. Co v. Mushrush, 37 N.E. 954, 38 N E. 871, 11 Ind.App. 192.
10 C J p 1045 note 38

90. S C—Smoak v Savannah, etc, R. Co., 43 S.E. 662, 65 S C. 299.

91. N.H.—Haskell v. Manchester St. R. Co, 64 A. 186, 73 N H 587.

92. Va—Chesapeake, etc, R. Co. v. Barger, 72 S.E. 693, 112 Va. 688

93. Ala—Southern R Co. v Harrington, 52 So 57, 166 Ala. 630, 139 Am S R 59.
10 C J. p 1046 note 42

Evidence held admissible

Evidence of construction and condition of heater in taxicab floor is admissible on question of driver's negligence in refusing to help remove drunken passenger, burned on the heater, from floor to seat—Schmuck v. Heilman, 161 A 420, 106 Pa Super. 12.

94. Mich—Dorrance v. Michigan United R. Co., 141 N.W. 697, 175 Mich 198, Ann.Cas 1915A 763.
10 C J p 1046 note 43.

Evidence admissible or erroneously excluded

(1) Testimony that plate on which plaintiff slipped was terribly worn, slick, and dished some two weeks before accident is competent—S. S Kresge Co. v. McCallion, C.C A.Mo., 58 F 2d 931.

(2) Even though a declaration of a street car passenger did not authorize recovery for injuries caused by defective appliances, evidence that the brake was defective, so as to require greater care in properly setting it to avoid its being accidentally released, was admissible on the issue of whether the conductor was negligent in setting the brake because of the greater care imposed on him by his knowledge of its condition—Washington & O. D Ry Co v. Smith, 289 F. 582, 53 App D C. 184

(3) Where, on injury to a passenger by derailment, a carrier was charged with negligence in running rapidly over track recently repaired, and in failing to provide cars with proper equipment and with defective attachments, it was error to refuse permission to the carrier to show disclosures of an inspection of the cars some shortly after and the balance the next day, it being incumbent on the carrier to meet and disprove the alleged acts which would give application to the rule of res ipsa loquitur.—Payne v. Cohlmeyer, C C A.Ill., 275 F. 803.

95. D.C.—Lewis v. Washington Ry & Electric Co, 285 F 977, 52 App. D C. 243.
10 C.J. p 1046 note 44.

96. Ala.—Bradley v. Lewis, 100 So. 324, 211 Ala. 264

97. Mass—Unterberg v Boston Elevated Ry. Co, 164 N E. 478, 266 Mass. 10.
10 C.J. p 1046 note 45.

98. Ala—Central of Georgia R Co. v. Storrs, 53 So. 746, 169 Ala 361.
10 C J. p 1047 note 46.

99. Pa—Strobel v. Park, 140 A. 877, 292 Pa 200, 57 A L R 253.
10 C J p 1047 note 47.

1. Mass.—Draper v Cotting, 120 N. E. 365, 231 Mass. 51.

equipment as such was insufficient, but that it was so worn as no longer to serve its purpose, testimony to bring out how the equipment compared with that on other vehicles is inadmissible.[2]

Rules for maintenance of elevators, promulgated by a state industrial accident commission, are admissible on the question of negligent maintenance of an elevator.[3]

Notice of condition. Notice to the carrier of a defect from which injury to a passenger has resulted is competent evidence, irrespective of the source of the notice;[4] and, as bearing on the question of notice, evidence is admissible to show that plaintiff had complained to the carrier of the defect,[5] or that a report had been furnished to it showing the vehicle's condition;[6] but evidence of complaints as to the condition of a car, made by the passengers to each other, and not to the carrier's employees, is not admissible.[7] Rumor among the employees of the carrier as to the condition of any of the means of transportation, although not admissible to prove the bad condition of the same,[8] is admissible to show notice to carrier of its bad condition.[9]

Evidence of the time during which an obstruction over which plaintiff fell remained in the aisle of a car is admissible as bearing on whether the carrier's employees knew or ought to have known of the obstruction.[10]

In a railroad mail clerk's action for injuries claimed to have been due to the insufficient or defective equipment of the mail car, United States statutes giving the postmaster-general authority to require certain things to be done by the carrier in connection with contracts to be made for the carriage of mail under the railroad mail service, sections of the postal laws and regulations containing provisions as to railroad mail cars and their equipment, and a pamphlet issued by the post-office department containing specifications for fixtures for mail cars are admissible.[11]

g. Condition of Track or Roadbed

Competent evidence of the condition of the track or roadbed at the time and place of the accident is admissible on the question of the carrier's negligence. In a proper case, evidence of conditions at other times or places may be admitted.

As bearing on the question of the carrier's negligence, evidence, if otherwise competent, is admissible as to the condition of its track or roadbed at the time and place of the accident,[12] and of notice thereof to the carrier's employees;[13] but where the evidence establishes negligence independently of the condition or construction of the track, evidence on the latter question is immaterial.[14] Evidence that a curve was constructed according to good engineering principles so that there would be a minimum of jarring and jolting is properly excluded as too remote in an action to recover for being thrown from a car as it rounded the curve.[15] A custom on the part of the carrier to keep its track in general good repair is not admissible to prove the good condition of the track.[16]

Reports of railroad officials prior to the accident are admissible, against the company, to show the condition of the track at the time of the accident,[17] as is also a report of the state railroad commis-

2. Conn.—Sickmund v. Connecticut Co., 189 A. 876, 122 Conn. 375.

3. Cal.—McKeon v. Lissner, 223 P. 965, 193 Cal. 297.

4. Wis.—Ferguson v. Truax, 110 N. W. 395, 111 N.W. 657, 112 N.W. 513, 132 Wis. 478, 14 L.R.A.,N.S., 350, 13 Ann Cas. 1092.
10 C J. p 1047 note 50.

5. Ala.—Southern R. Co. v. Harrington, 52 So. 57, 166 Ala. 630, 139 Am.S.R. 59.

6. Ky.—Chicago, etc., R. Co. v. Benedict, 159 S.W. 526, 154 Ky. 675.

7. Ky.—Louisville, etc, R. Co. v. Scalf, 110 S W. 862, 33 Ky.Law 721, 26 L.R A.,N.S, 263.

8. Mich.—Wormsdorf v. Detroit City R. Co, 42 N.W. 1000, 75 Mich. 472, 13 Am S R. 453.

9. Mich.—Wormsdorf v. Detroit City R. Co, supra.

10. Ala.—Atkinson v. Dean, 73 So. 479, 198 Ala. 262.

11. Va.—Washington, etc, R. Co. v. Carter, 85 S.E. 482, 117 Va. 424.

12. Mo.—Gardner v. Metropolitan St. R. Co, 122 S.W. 1068, 223 Mo. 389, 18 Ann.Cas. 1166.
10 C J. p 1047 note 56.

Evidence held admissible

(1) On the issues as to whether defendant was negligent in maintaining its trolley poles so near passing cars as to endanger the safety of passengers in the cars, evidence is admissible regarding the swaying of the cars as they pass the poles.—Capital Traction Co. v. Copland, 47 App.D C. 152.

(2) In action for death of street car passenger in collision resulting from derailment, evidence of arrangement between company and city by which city was required to relay foundation of track and that it had refused to do so is admissible.—Bury v Detroit United Ry., 164 N W 460, 198 Mich 447

(3) On issue whether railway company was negligent in not discovering position and condition of tree before it fell onto its track, evidence that track was straight for a distance of two hundred yards north of where tree stood is admissible.—Texas & P Ry. Co v. Hughes, Tex. Civ App, 192 S W. 1091, error refused.

13. Mo.—Bond v. St. Louis-San Francisco Ry. Co., 288 S.W. 777, 315 Mo 987.
10 C.J. p 1047 note 57.

14. Wis.—Hartwig v. Chicago, etc., R. Co, 5 N.W. 865, 49 Wis. 358.

15. Mass.—Halloran v. Boston Elevated St. Ry. Co, 112 N.E 849, 224 Mass. 280.

16. Tex.—Ft. Worth, etc., R Co v. Thompson, 21 S W. 137, 2 Tex Civ. App. 170.

17. U S.—Vicksburg, etc., R. Co v. Putnam, Ga., 7 S.Ct. 1, 118 U.S. 545, 30 L Ed. 257.
10 C.J. p 1049 note 69.

sioners.[18] Such reports must be distinguished from reports of the circumstances of the accident.[19]

As a general rule, the evidence to show the defective condition of the track must be confined to the place of the accident, or in the immediate vicinity where the conditions generally were the same;[20] and evidence as to the condition of the track at times and places other than the time when and place where the accident occurred is generally inadmissible.[21] Evidence as to the condition of the track at places other than that of the accident may be admitted to show negligence on the part of the carrier in the operation of the train.[22] Evidence as to the construction and maintenance of other roads is generally inadmissible to prove or disprove negligence in construction and maintenance at the place in question.[23]

It has been held that evidence of the general bad condition of the road is not admissible even on the question of exemplary damages.[24]

Limitations as to time. As a general rule, evidence of defects in the means of transportation, such as the track or roadbed, must be limited to defects existing at the time of the accident;[25] but where there is evidence showing that the condition of the track before and after the accident was substantially the same, evidence of its condition at such time is admissible to show its condition at the time of the accident,[26] and to show knowledge on the part of defendant of the existence of such condition.[27]

Where condition of whole structure in issue. Where, as in the case of a bridge, the condition of the structure as a whole is in issue, evidence is admissible as to the condition of portions of the structure other than that which gave way.[28]

h. Taking Up and Setting Down Passengers

Competent evidence of the conditions and circumstances existing at the time and place a passenger attempting to board or alight from a vehicle was injured is admissible on the question of negligence of the carrier.

Evidence as to the conditions and circumstances existing at the time and place a passenger was injured while alighting from or boarding a car or train is admissible on the question of the carrier's negligence in causing the injury,[29] unless under the

18. N.Y.—Baruth v. Poughkeepsie City, etc., R. Co., 85 N.Y.S. 822, 89 App.Div. 324.
10 C.J. p. 1049 note 70.

19. Ga.—Carroll v. East Tennessee, etc., R. Co., 10 S.E. 163, 82 Ga. 452, 6 L.R.A. 214.

20. Ill.—Klinck v. Chicago City R. Co., 177 Ill.App. 165, affirmed 104 N.E. 669, 262 Ill. 280, 52 L.R.A., N.S., 70, Ann.Cas.1915B 177.
10 C.J. p. 1047 note 59.

Condition in vicinity

In action against railroad company for death resulting from defective track, plaintiff may not only show defective condition of track at place of accident, but its condition on either side thereof, as corroborative.—Southern Ry. Co. v. Harper, 123 S.E. 154, 32 Ga.App. 267.

21. Wis.—Stewart v. Everts, 44 N.W. 1092, 76 Wis. 35, 20 Am.S.R. 17.
10 C.J. p. 1048 note 60.

22. Ill.—Jacksonville Southeastern R. Co. v. Southworth, 25 N.E. 1093, 135 Ill. 250, affirming 32 Ill.App. 307.
10 C.J. p. 1048 note 64

23. Cal.—Bosqui v. Sutro R. Co., 63 P. 682, 131 Cal. 390.
10 C.J. p. 1048 note 62.

24. Tex.—Missouri Pac. R. Co. v. Mitchell, 12 S.W. 810, 75 Tex. 77.

25. Mass.—Marshall v. Old Colony St. R. Co., 83 N.E. 860, 198 Mass. 18.
10 C.J. p. 1048 note 66.

26. Ill.—Chicago, etc., R. Co. v. Lewis, 33 N.E. 960, 145 Ill. 67, affirming 48 Ill.App. 274.
10 C.J. p. 1048 note 67.

27. Tex.—Houston, etc., R. Co. v. Richards, 49 S.W. 687, 20 Tex.Civ.App. 203.
10 C.J. p. 1048 note 68.

28. Or.—Leonard v. Southern Pac. Co., 28 P. 887, 21 Or. 555, 15 L.R.A. 221.
10 C.J. p. 1048 note 65.

29. Va.—Director General of Railroads v. Gordon, 114 S.E. 668, 134 Va. 381
10 C.J. p. 1049 note 72.

Evidence held admissible or erroneously excluded

(1) In action by a passenger for injuries, under allegation that while she was alighting the car suddenly started, the motorman in charge of the car could state whether he loosened the brakes, or did anything to cause the car to start forward.—Erwin v. Birmingham Ry., Light & Power Co., 76 So. 915, 200 Ala. 557

(2) In a passenger's action for injuries received while alighting by the sudden starting of the train to move it to its proper place at the station platform, evidence that no employees were stationed at the place the coaches first stopped, to warn or assist alighting passengers was admissible to prove that no warning was given, although plaintiff alleged no negligence in failing to assist her to alight.—Southern Ry. Co. v. Douglas, C.C.A.Tenn., 289 F. 325.

(3) Ruling requiring flagman, alleged to have shoved passenger from train, to detail duties with respect to assisting passenger from train is not erroneous.—St. Louis & S. F. Ry. Co. v. Mills, 124 So. 231, 220 Ala. 107.

(4) In a street car passenger's action for injuries sustained as she was alighting, it was not error to admit, over the objection that it was irrelevant, her testimony that she was not put off the car at the place where she intended to get off, but that she intended to get off there and walk back.—Georgia Ry. & Power Co. v. Murphy, 110 S.E. 680, 28 Ga.App. 173

(5) Plaintiff is properly permitted to show there were persons in uniform, apparently railway's employees, standing outside door from station to platform, and that brakeman near where she stepped into space between platform and car did not warn her.—Harrington v. Boston Elevated Ry. Co., 118 N.E. 880, 229 Mass. 421, 2 A.L.R. 1057.

(6) In action for injuries to man seeking to enter one-man street car, who was struck by rear end of car as it was swung around curve, excluding testimony of passenger, who stated that she informed motorman of presence of man coming to car, that man must have gone the other way, is error, where night was dark and rainy and passenger was

particular circumstances of the case it is incompetent, irrelevant, or immaterial.[30] Thus evidence may be admitted as to whether the place was a regular or usual stopping place;[31] but it has been held that evidence of a custom of stopping or not stopping at a particular place is not admissible, unless it is shown that the passenger had knowledge of such custom.[32] On the question of negligence in

in position for observation superior to that of motorman.—Mardorf v. Duluth-Superior Transit Co, 265 N W. 32, 196 Minn. 347.

(7) Excluding testimony showing banana peeling, found where passenger fell when alighting from coach, showed no indication of having been stepped on, is error.—Yazoo & M. V. R. Co. v. Hawkins, 132 So. 742, 159 Miss. 775.

(8) Where a witness testified that he was familiar with the sound of a gong used by the gripman, as distinguished from the sound of the bell the conductor used for starting signals his further testimony that it was the bell to start the car he heard ring at the time of plaintiff's injury was not inadmissible as a conclusion.—Kohr v. Metropolitan St. Ry. Co., 92 S.W. 1145, 117 Mo.App. 302.

(9) In an action against a street railway company for personal injuries sustained in alighting from a car, evidence that the passenger was struck and injured by the overhang of a car in rounding a curve and before he had a reasonable opportunity to leave the place of alighting is competent and should be submitted to the jury on the proximate cause of such injury.—Trail v. Tulsa St. Ry. Co., 222 P. 950, 97 Okl. 19.

(10) That rail in which plaintiff caught heel crossed highway used constantly by pedestrians without injury may be considered in determining negligence of street railroad in permitting plaintiff to alight there.—Low v. Harrisburg Rys. Co., 138 A. 852, 290 Pa. 365.

30. Wyo.—Chicago, etc., R. Co. v. Lampman, 104 P. 533, 18 Wyo 106, 25 L.R.A.,N.S., 217, Ann.Cas.1912C 788.
10 C.J. p 1049 note 73.

Evidence held inadmissible or properly excluded

(1) In passenger's action against railroad for injuries allegedly sustained because of failure of railroad to provide footstool to aid him in alighting from train, refusal to allow plaintiff to answer question whether he had or was offered assistance in getting off train is proper where railroad had no duty to provide footstool, complaint did not allege want of assistance, and evidence failed to show that railroad had notice of any such need by passenger Refusal to allow witnesses to be asked distance from running board to ground of particular automobile and nature of assistance rendered passengers alighting from particular train is not improper since inquiry could not properly be confined to one particular automobile or train—Roberts v. Kurn, 165 So. 77, 231 Ala. 384.

(2) In passenger's action for injuries, under allegation that while she was alighting the car suddenly moved backward, in the absence of evidence that the brake was released, evidence that if the brake were released at all the car would move was inadmissible—Erwin v. Birmingham Ry., Light & Power Co., 76 So. 915, 200 Ala. 557.

(3) In action for injuring plaintiff by starting street car while he was getting on, admitting evidence motorman left plaintiff on hospital steps was error.—De Gruchy v. City and County of San Francisco, 290 P. 491, 107 Cal.App. 622.

(4) In action against bus company and motorist for injuries to plaintiff when she was struck by automobile while attempting to board bus which had stopped on her side of street in answer to her signal, excluding traffic regulation prohibiting bus from receiving or discharging passengers at places other than curb of traveled way or established loading places is proper, where there was no curb or established loading place at point of accident.—Vaughn v. Healy, 182 A. 166, 120 Conn. 589.

(5) In action for death of prospective passenger caused by failure of interurban car, answering signal, to stop or slow down, admission of testimony of locomotive engineer that upon such signal proper railroading requires locomotive engine to whistle and stop was error.—Indiana Union Traction Co. v. Hiatt, 114 N.E 478, 65 Ind App. 233, reversing on rehearing 112 N.E. 406, rehearing denied 115 N.E. 101, 65 Ind.App. 233.

(6) Defendant carrier could not show injured passenger's statement to another that her husband was too intoxicated to render assistance at time of accident testified to by wife, where defendant offered no evidence showing husband's condition.—Stutsman v. Des Moines City Ry. Co, 163 N.W. 580, 180 Iowa 524.

(7) A question whether a crippled prospective street car passenger, in approaching a street car, was apparently unsafe or had perfect control of herself, and as to her being in possession of her powers, was properly excluded where witness had testified generally as to plaintiff's manner of getting on and off cars. —Mitchell v. Des Moines City Ry. Co, 141 N W 43, 161 Iowa 100

(8) In passenger's action for injuries sustained by movement of train while passenger was alighting, evidence relating to conductor's failure to use movable step is irrelevant—Louisville & N. R. Co. v Campbell 35 S.W.2d 26, 237 Ky. 182.

(9) Passenger's testimony that he did not know station, at which he was injured in alighting from moving train, was flag stop, is inadmissible—Louisville & N. R. Co v Whitaker, 300 S W. 912, 222 Ky. 302

(10) In action for injuries to passenger stepping or falling from platform after train had started from plaintiff's destination, which station plaintiff claimed had not been called, evidence that conductor had not taken up plaintiff's hat check marking his destination was immaterial and properly excluded—Louisville & N R. Co. v. Burk, 268 S.W. 844, 207 Ky. 1.

(11) Exclusion of testimony as to other holes near street car stop is not error in passenger's action for injuries after alighting, where hole in which plaintiff fell was identified. —Gast v. Boston Elevated Ry. Co, 169 N E 905, 270 Mass. 330.

(12) In action for injuries when car door closed on hand, conductor's testimony as to number of brakemen required by law on five-car train, and as to whether brakeman was in habit of fastening door back, was properly excluded—MacGill-Allen v New York, N H & H. R. Co, 118 N.E 248, 229 Mass. 162.

(13) Where a director of public safety exceeded authority in authorizing street railroad to disregard ordinance requiring street cars to stop on near side of intersection, evidence as to director's authority and his acts is properly excluded— Virginia Ry. & Power Co v. Taylor, 132 S W. 334, 144 Va 496.

31. R I—Moore v. Woonsocket St. R Co 63 A. 313, 27 R.I. 450, 114 Am S R 59
10 C J. p 1050 note 74.

Flag station

Proof that station, at which passenger was injured in alighting from moving train, was flag station, is admissible—Louisville & N R. Co v. Whitaker, 300 S W. 912, 222 Ky. 302.

32. Mass—Greer v. Union St. R. Co, 79 N E. 267, 193 Mass. 246.
10 C.J p 1050 note 75.

suddenly or prematurely starting a train or car, evidence is admissible as to the length of time the train or car stopped,[33] and evidence by other passengers that they also attempted to alight or board at the same place, but that the car started before they could do so, is admissible,[34] as is also evidence of the crowded condition of the car at the time;[35] and it has also been held that evidence of the length of time the train or car usually stopped at that place is admissible on such issue,[36] although there are cases to the contrary.[37] Evidence that the operator failed to stop when signaled is admissible as bearing on his negligently starting before plaintiff had time to alight after he finally did stop.[38]

Competent evidence is admissible to show the passenger's pain and suffering.[39]

Evidence that the passenger's subsequent conduct aggravated the injury is irrelevant on the question of defendant's negligence.[40]

i. Management and Operation of Conveyance

Competent evidence may be introduced on the question of the negligence of the carrier in the management and operation of a conveyance.

Evidence tending to show the conditions existing at the time and place of the accident is admissible on the question of the carrier's negligence in managing or operating the car or train which caused the injury,[41] as where the injury was caused by a collision,[42] or by sudden jerks or jolts, whether

33. Mich.—Tuttle v. Detroit, J. & C. Ry. Co., 159 N.W. 498, 193 Mich. 390.
10 C.J. p. 1050 note 76

34. Colo.—Franklin v. Visalia Electric R. Co., 131 P. 776, 21 Cal. App. 270.
10 C.J. p. 1050 note 77.

35. D.C.—Metropolitan R. Co. v. Jones, 1 App. D.C. 200

36. Conn.—Fuller v. Naugatuck R. Co., 21 Conn. 557
10 C.J. p. 1050 note 79.

37. Pa.—Windle v. Davis, 118 A. 503, 275 Pa. 23.
10 C.J. p. 1050 note 80.

38. Mo.—Moss v. Wells, 249 S.W. 411

39. Mo.—Looff v. Kansas City Rys. Co., 246 S.W. 578.

40. Ark.—Butler v. Arkansas Power & Light Co., 54 S.W.2d 984, 186 Ark. 611

41. Mass.—Pitcher v. Old Colony St. R. Co., 81 N.E. 876, 196 Mass. 69, 124 Am.S.R. 513, 13 L.R.A.,N.S., 481, 12 Ann.Cas. 886
10 C.J. p. 1051 note 81

Evidence held admissible

(1) In an action for injuries sustained in a train wreck, evidence that the train was running on regular time, and as to the distance between two points, was competent.—Day v. Lusk, Mo., 219 S.W. 597

(2) In an action by a postal clerk for personal injuries received while alighting from moving engine on which he had gone to notify the engineer of his failure to whistle for a mail station, it was not error to admit the postal regulations requiring plaintiff so to inform the engineer.—Rauscher v. Payne, 188 N.W. 1017, 152 Minn. 368

(3) Evidence that bus was practically demolished and that another passenger was badly mangled was admissible in passenger's action to recover for injuries.—Pickwick Greyhound Lines v. Silver, 125 So. 340, 155 Miss. 765

(4) In passenger's action for injuries, under doctrine of res ipsa loquitur, when falling from street car, evidence that car on which plaintiff was riding was crowded, and that doors were permitted to remain open, and passengers ride on the step, was relevant in determining whether car was being operated consistently with degree of care required of carrier under the circumstances.—Carlson v. Wells, 276 S.W. 26, 42 A.L.R. 1319

Evidence held inadmissible

(1) In action for injuries because of causing a jerk or lurch throwing plaintiff from a street car, evidence as to the previous conduct and habit of the conductor in sitting down and talking to passengers was incompetent to establish the condition at the time of the accident.—Starr v. Los Angeles Ry. Corporation, 201 P. 599, 187 Cal. 270.

(2) Evidence of proceedings years before in controversy between city and street railroad over use of one-man street cars is not material on issue whether railroad exercised required diligence toward aged and infirm passenger, in operating street car as one-man car.—Georgia Power Co. v. Braswell, 173 S.E. 763, 48 Ga.App. 654

(3) In an action against electric railway for death of passenger, admission of testimony as to the railroad's failure to purchase new controller boxes within the preceding three years, not merely for particular car, but for any car operated by it, is immaterial, in absence of evidence that a controller would wear out or become defective in three years, and being irrelevant as evidence of general neglect to prove negligence in operation of a particular car.—Quellmalz v. Atlantic Coast Electric Ry. Co., 110 A. 914, 94 N.J.Law 474

(4) In action by prospective passenger, where street car knocked automobile against her, admitting ordinances requiring sounding gong, inapplicable to facts, is error.—Alabama Power Co. v. Bass, 119 So. 625, 218 Ala. 586, 63 A.L.R. 1.

(5) Testimony of motorist riding alongside street car at point of accident offered upon issue of swaying of street car, having little or no probative value is inadmissible.—State v. United Railways & Electric Co. of Baltimore, 159 A. 916, 162 Md. 404, 83 A.L.R. 1307.

42. Iowa.—Parker v. Des Moines City R. Co., 133 N.W. 373, 153 Iowa 254, Ann.Cas.1913E 174.
10 C.J. p. 1051 note 82

Evidence held admissible

(1) While a railroad company is not liable for torts of its servants not occurring in the course of the service, where the engineer of a train fell asleep and his train collided with one ahead, evidence that, from whatever cause, he had not slept for twenty-three hours before collision, was admissible as bearing on the issue whether his conduct was reckless or merely negligent.—Davis v. McCree, C.C.A.Ohio, 299 F. 142, error dismissed 45 S.Ct. 94, 266 U.S. 582, 69 L.Ed. 452.

(2) In an action by a passenger against a street railway for injuries suffered in a collision, testimony that the rear end of one car was materially damaged, and that there were several people injured, was properly received as part of the res gestæ and as tending to show the force of the collision.—Gatv v. United Rys. Co., Mo., 251 S.W. 61.

(3) Where bus was not moved after collision with truck, testimony of witness arriving on scene within thirty-five minutes as to tracks of truck is admissible.—Cumberland &

such jerks or jolts were of an unusual nature.[43]

Rate of speed. As bearing on the carrier's negligence, evidence may be admitted as to the rate of speed at which the car or train was running at the time and place of the accident,[44] unless the negligence charged is such that the speed of the train or car has no bearing on it.[45] Such evidence should be based on some standard of rapidity, and show, at least approximately, the actual rate of speed, and that it was unsafe.[46] Thus, on the issue of such speed, the manner in which the passenger sustained his injury, together with other testimony, may be shown,[47] as may also the facts that the train or car was behind time,[48] that it lurched and the passengers were bumped about,[49] that it was being operated in violation of an ordinance as to rate of speed,[50] or in violation of a rule of the carrier[51] or of an order of the railroad commissioners,[52] and whether or not it was running at the usual speed.[53]

j. Other or Similar Acts and Accidents

Evidence of other or similar acts or accidents is generally not admissible to show independent acts of negligence, but in a proper case may be admissible as bearing on conditions existing at the time and place of the accident, and on the carrier's negligence or care at that time and place.

As a general rule, evidence of the conditions existing at other times and places, or of other accidents or acts of negligence on the part of the carrier or its employees, is not admissible to show independent acts of negligence,[54] and likewise evi-

Westernport Transit Co v. Metz, 149 A. 4, 158 Md 424, reargument denied 149 A. 565, 158 Md. 424, appeal dismissed American Oil Co. v. Metz, 51 S.Ct 40, 282 U.S. 801, 75 L.Ed 720.

(4) Evidence that employee was drunk five hours before accident is admissible—Cincinnati Traction Co. v. Baron, 3 Ohio N.P.,N.S., 633.

Evidence held inadmissible

In action for injuries to passenger in collision of street cars, motorman's testimony as to how far he was from other car when he concluded that there was danger of a collision is inadmissible, the question being when he should have reached such conclusion, and such question being for the jury.—Ganz v. Metropolitan St. R. Co., Mo., 220 S.W 490.

43. Mo.—Ownby v Kansas City Rys. Co., App., 228 S.W. 879
Neb.—McCann v. Omaha & Council Bluffs Street Ry Co., 222 N.W. 633, 117 Neb. 786
Ohio.—Cleveland Ry. Co. v. Merk, 180 N.E. 51, 124 Ohio St 596.
10 C.J. p 1051 note 83.

Evidence held inadmissible

Where defendant's conductor was allowed to testify that "there was no unusual jerk of the car, nor any jerking after it was stopped, other than the ordinary movement of the car after it was stopped," defendant was not entitled to have him answer the question, "Was the stop violent enough to cause you to lose your footing on the back end?"—Birmingham Ry., Light & Power Co. v. Mayo, 61 So. 289, 181 Ala 525.

44. Ky.—Consolidated Coach Corporation v Wright, 22 S.W.2d 108, 231 Ky. 713.
10 C.J p 1051 note 84.

Evidence held admissible

(1) Testimony of speed of autobus when quarter mile from place of accident is not too remote—Crosby v. Pickwick Stages, Northern Division, 264 P. 346, 88 Cal.App. 799—Schropshire v. Pickwick Stages, Northern Division, 258 P. 1107, 85 Cal.App. 216

(2) In passenger's action for injuries sustained when thrown to floor of taxicab by sudden stop made to avoid collision, passenger's testimony that he and companion called driver's attention to high rate of speed and requested driver to reduce speed is admissible on question of driver's alleged negligence—Mendler v. Town Taxi, Mass., 3 N.E.2d 15.

45. Ill.—Elgin, etc., Tract. Co. v. Hench, 132 Ill.App 535.
10 C.J. p 1052 note 85

46. Ill.—Chicago, etc., R. Co v Newell, 72 N.E. 416, 212 Ill. 332, appeal dismissed 25 S.Ct. 801, 198 U.S. 579, 49 L.Ed. 1171.
10 C.J p 1052 note 86.

47. N.C.—Carter v. Seaboard Air Line R. Co., 81 S.E. 321, 165 N.C. 244.

48. Ala.—St Louis, etc., R. Co. v. Savage, 50 So. 113, 163 Ala. 55.
10 C.J. p 1052 note 88.

49. Ill.—Alton Light, etc., Co. v. Oller, 119 Ill.App 181, affirmed 75 N.E. 419, 217 Ill. 15, 4 L.R.A. 399.

50. Ala.—Alabama Power Co v. Bass, 119 So. 625, 218 Ala. 586, 63 A.L.R. 1.
10 C.J. p 1052 note 90.

51. Mass.—Partelow v. Newton, etc., R. Co., 81 N.E. 894, 196 Mass. 24.
10 C.J. p 1052 note 91.

52. Mich.—Van Orman v. Lake Shore, etc., R. Co., 115 N.W. 968, 152 Mich 185.
10 C.J. p 1052 note 92.

53. Mass.—Worthen v. Grand Trunk R. Co., 125 Mass. 99.

54. Ill.—See Todd v. Chicago City Ry. Co., 197 Ill App. 544.
Mass.—Gast v. Boston Elevated Ry. Co., 169 N.E. 905, 270 Mass. 330.
N.Y.—Creasy v. Eastern Greyhound Lines v. New York, 291 N.Y.S. 746, 249 App Div. 59
Pa.—Deegan v. Pennsylvania R. Co., 160 A. 858, 307 Pa. 207.
Tex.—Texas & N. O. R. Co. v. McNeill, Civ.App., 270 S.W. 1038, citing **Corpus Juris** with approval.
Wash.—Nicktovich v. Olympic Motor Transit Co., 272 P. 736, 150 Wash. 278.
10 C.J. p 1052 note 94.

Evidence held inadmissible or properly excluded

(1) Testimony that witness one night almost hit girl where fatal accident occurred is inadmissible, where it was not shown that conditions were similar to or even approximated those existing at time of accident—Petrillo v Kolbay, 165 A. 346, 116 Conn. 389.

(2) Evidence that previously guard told plaintiff to pass through elevated train was properly excluded in absence of evidence that guard had authority to promulgate general order.—Rhoades v. Boston Elevated Ry Co., 122 N.E. 194, 232 Mass. 361.

(3) In action against street railway for injuries to passenger in collision with train at crossing, evidence that on that night a negligent accident occurred to street car and crew whereby they were delayed and were late at crossing was inadmissible—Bergfeld v. Dunham, Mo.App., 202 S.W 253

(4) In action against receivers of street railway for injuries to passenger at railroad crossing, evidence that on prior eastward trip car was delayed ten minutes on account of controller dropping off was inadmissible to prove negligence of conductor in failing to go ahead at crossing on westward trip to look for train—Bergfeld v. Dunham, Mo.App., 201 S.W. 640.

(5) In action against receivers of street railway for injuries to passen-

dence that accidents had not happened under similar conditions at other times or places is not admissible to disprove negligence at the time and place in question.[55]

Where, however, such evidence is confined to similar accidents or acts of negligence, at or near the place in question, it may be admitted as bearing on the conditions that probably existed at the time and place of the accident,[56] and evidence of continued use of an alleged defective vehicle before and after the injury without other accident has been held admissible to prove the condition at the time of the injury.[57] Such evidence may be admitted to show a previous and continuous defective or dangerous condition of things,[58] and to show notice to the carrier of such defects,[59] and, perhaps, when its purpose is to charge the carrier with notice of an employee's incompetency.[60] Evidence of other similar accidents is also admissible to rebut the carrier's evidence that it had carried a great many passengers without accident.[61]

Evidence as to the effect of the accident on other passengers is ordinarily not admissible,[62] unless the conditions surrounding the different passengers are shown to have been the same.[63] Where the only issue is the extent of plaintiff's injuries, evidence that other passengers were killed is inadmissible.[64] Such evidence has been held admissible to show the force of a collision[65] and to prove the conditions existing at the time of the accident.[66]

Evidence that on prior occasions footstools were provided for alighting passengers is admissible when limited to its bearing on whether defendant in the exercise of ordinary care was under a duty to provide such a stool.[67]

k. Subsequent Repairs and Precautions

Evidence of repairs and precautions made or taken after the accident is inadmissible to show negligence of the carrier, although in a proper case it may be admitted for other purposes.

ger at railroad crossing, evidence that car on prior eastward trip was delayed by controller dropping off was not admissible to show delay had thrown car behind time so that crew were too hurried to stop at crossing to look for train.—Bergfeld v. Dunham, Mo App, 201 S.W. 640.

(6) Witness testifying as to only knowing of one other case where street car stopped so violently, it was error to permit her to state where it was—McCann v. Omaha & Council Bluffs Street Ry. Co, 222 N. W. 633, 117 Neb. 786.

(7) In motor stage passenger's action for injuries sustained in collision, striking testimony of driver of other stage ahead that truck struck his stage also is not error.—Nicktovich v. Olympic Motor Transit Co, 272 P. 736, 150 Wash. 278.

55. Mo—Wright v Kansas City Terminal R Co., 193 S W. 963, 195 Mo.App. 480.
N.J.—Leech v. Hudson & M. R. Co., 174 A 537, 113 N.J.Law 366, affirmed 178 A. 754, 115 N J Law 114.
Tex—Texas & N. O. R. Co v McNeill, Civ App., 270 S.W. 1038, referring to **Corpus Juris** as authority for this proposition.
Utah.—Barlow v. Salt Lake & U. R Co, 194 P. 665, 57 Utah 312.
10 C.J p 1052 note 95.

56. U.S.—S. S. Kresge Co. v. McCallion, C.C A Mo., 58 F.2d 931.
Utah.—Barlow v. Salt Lake & U. R Co, 194 P 665, 57 Utah 312.
10 C J. p 1053 note 96.

Predicate required

Before evidence showing other accidents similar to plaintiff's accident in re-entering train after temporary absence could be introduced, it must be shown that conditions were similar.—Sellars v. Southern Pac. Co., 166 P 599, 33 Cal App. 701.

57. D C—Lewis v. Washington Ry & Electric Co, 285 F. 977, 52 App D C 243.

58. Tex—Eastern Texas Electric Co v Kappe, Civ.App., 235 S W. 253, error refused.
10 C J. p 1053 note 97.

59. D C—Capital Traction Co. v. Copland, 47 App D C 152.
Ky.—Louisville & N R Co v Priddy, 71 S W 2d 39, 254 Ky 173.
Mass—Parker v. Boston Elevated Ry Co, 174 N E 927, 273 Mass. 345—Boyd v. Boston Elevated Ry Co, 162 N E. 735, 264 Mass. 364.
Mo—Lowther v. St. Louis-San Francisco Ry. Co, 261 S W. 702, 214 Mo. App. 293.
N Y—Kovarik v. Long Island R Co, 178 N Y.S. 705, 189 App.Div 534.
Wash—Henry v. Navy Yard Route, 162 P 584, 94 Wash. 526.
10 C J. p 1053 note 98.

Where carrier obliged to know condition

In an action for injuries to an alighting passenger whose evidence showed the deposit of loose gravel on the platform, evidence that another passenger nearly fell, or that the gravel was loose and slid from under her foot, was not admissible to show notice, as it was the duty of the carrier to know the condition of the platform and it was not entitled to notice—Barlow v Salt Lake & U. R Co., 194 P. 665, 57 Utah 312.

Evidence held admissible

Exclusion of evidence, in action for death of passenger, of defendant's knowledge that prospective passengers waiting on adjacent highway had been killed or injured, was error, such evidence being admissible to explain decedent's position while awaiting approach of car.—Sacks v. Connecticut Co., 146 A. 494, 109 Conn. 221.

60. Colo—Denver City Tramway Co. v. Cowan, 116 P 136, 51 Colo 64.

61. Ill.—Illinois Cent R Co. v. Treat, 54 N.E 290, 179 Ill. 576, affirming 75 Ill.App. 327

62. Ky.—Consolidated Coach Corporation v. Garmon, 26 S W 2d 20, 233 Ky. 464.
10 C.J. p 1054 note 2.

Discretion of court

In action for injuries to passenger thrown to floor of car in which she was standing when motorman made emergency stop, in which the passenger testified that car was crowded, and that all standing passengers were hurled forward, railroad's testimony that no other claims for damages arising out of the accident were made, although as to collateral fact, is admissible in discretion of court.—Sullivan v. Minneapolis St Ry. Co., 200 N.W. 922, 161 Minn. 45.

63. Tenn—Tennessee Coach Co. v. Young, 80 S.W.2d 107, 18 Tenn. App. 592.
10 C J. p 1054 note 3

64. Ky.—Cincinnati, N O & T P. Ry. Co v. Perkins, 264 S W. 758, 204 Ky. 334.

65. Mo—Gaty v. United Rys. Co., 251 S.W. 61—Davis v. Fleming, App, 253 S.W 798.
Tex.—Tamar v. Panhandle & S. F. Ry. Co., Com.App., 248 S W. 34, reversing, Civ.App, 234 S.W. 605.
10 C.J. p 1054 note 3 [a] (2).

66. N J.—Benedetto v. Hudson & M. R. Co., 156 A. 37, 9 N.J.Misc. 758.

67. Utah.—Barlow v. Salt Lake & U. R. Co., 194 P. 665, 57 Utah 312.

According to some decisions, evidence of repairs or alterations made, or additional precautions taken, after an accident has occurred, is admissible as tending to show prior negligence as to the conditions existing at the time and place of the accident;[68] but by the weight of authority such evidence is held inadmissible for that purpose,[69] although it is admissible for the purpose of showing the condition of things at the time and place of the accident,[70] or to show defendant's control over the place where the accident occurred,[71] or to show that, contrary to the carrier's contention, it was not necessary to maintain the appliance causing the injury in the manner in which it was maintained.[72] The true and proper ground for the exclusion of such evidence is stated to be because it would be unjust that defendant should not take additional precautions against the recurrence of an accident without the risk of admitting previous negligence.[73]

l. Custom or Course of Business

In a proper case evidence of habit or custom or course of business of the carrier or passenger is admissible.

Where, in the absence of any question of evil intent or of any intent at all, the point of fact to be determined is whether or not the passenger or the carrier did a certain thing or did it in a particular way, and the direct testimony as to the fact is conflicting, evidence is admissible to show that the one or the other was in the habit of doing the thing in question, or accustomed to do it in a particular way.[74] The direct evidence as to the fact in question must, however, be conflicting,[75] or the testimony of the opposing witnesses must be based on the customary action with regard to the fact in question, to render such evidence admissible.[76] A custom or practice established by the carrier itself is not admissible to disprove negligence on its part,[77] but a general custom among other carriers, under similar conditions, may be so admitted;[78] and where plaintiff proves a custom as to particular cars the carrier may show that all cars followed such custom.[79]

Evidence of a custom as to what was done with passengers carried beyond their destination is not admissible, especially where there is no evidence that the passenger, injured in returning to his destination after having been carried past it, was informed of the custom or that the carrier offered to conform therewith.[80]

Evidence of a course of conduct for a considerable time without accident is admissible to show that such course of conduct was not negligent.[81]

A departure by the carrier from its usual course of conduct may be admissible to show negligence on its part.[82]

Inspection. Evidence that it was not customary to remove bolts for inspection is admissible on the question of defendant's exercise of due care in an action for injuries caused by the fall of an elevator due to a latent defect in such a bolt.[83]

Right of way at crossings. Evidence of a custom between two street railroad companies of giving one company the right of way at crossings is admissible, in an action against both companies for injuries received in a collision at a crossing, to

68. Ga.—Augusta, etc., R. Co. v. Renz, 55 Ga. 126.
Pa.—Pennsylvania R. Co. v. Henderson, 51 Pa. 315.

Cautious driving

In action for injuries sustained while passenger in automobile owned and operated by defendant, evidence that defendant drove differently and safely after accident is inadmissible to show previous negligence.—Desmarchier v. Frost, 99 A. 782, 91 Vt. 138.

69. Ky.—Louisville & N. R. Co. v. Rowland's Adm'r, 286 S.W. 929, 215 Ky. 663.
Minn.—Reid v. Minneapolis St. Ry. Co., 213 N.W. 43, 171 Minn. 31.
Ohio—Cleveland Ry. Co. v. Halterman, 153 N.E. 922, 22 Ohio App. 234.
10 C.J. p. 1054 note 6.

70. Ark.—St. Louis, etc., R. Co. v. Evans, 137 S.W. 568, 99 Ark. 69.
10 C.J. p. 1054 note 7.

71. Kan.—Tipton v. Topeka R. Co., 132 P. 189, 89 Kan. 451.
10 C.J. p. 1054 note 8.

72. Tex.—Texas Midland R. Co. v. Truss, Civ. App., 186 S.W. 249, error refused.

73. U.S.—Southern Pac. Co. v. Hall, Cal., 100 F. 760, 41 C.C.A. 50.
10 C.J. p. 1054 note 9.

74. Cal.—Sanchez v. Pacific Auto Stages, 2 P.2d 845, 116 Cal.App. 392.
Mo.—Beckner v. Kansas City Rys. Co., App., 232 S.W. 745.
Or.—Lawrence v. Portland Ry., Light & Power Co., 179 P. 485, 91 Or. 559, quoting **Corpus Juris** with approval.
10 C.J. p. 1054 note 11.

75. Ala.—Montgomery Light & Traction Co. v. Devinney, 75 So. 883, 200 Ala. 135.
10 C.J. p. 1055 note 12.

76. Mass.—Wentworth v. Eastern R. Co., 9 N.E. 563, 143 Mass. 248.
10 C.J. p. 1055 note 13.

77. Del.—MacFeat v. Philadelphia, etc., R. Co., 62 A. 898, 21 Del. 52.
10 C.J. p. 1055 note 14.

78. Minn.—Campbell v. Duluth, etc., R. Co., 120 N.W. 375, 107 Minn. 358, 22 L.R.A.,N.S., 190.
10 C.J. p. 1055 note 15.

79. Ind.—Indiana Union Traction Co. v. Hiatt, 115 N.E. 101, 65 Ind. App. 233, denying rehearing 114 N.E. 478, 65 Ind. App. 233.

80. Ala.—Birmingham R., etc., Co. v. Seaborn, 53 So. 241, 168 Ala. 658.

81. Ind.—Cleveland, etc., R. Co. v. Newell, 75 Ind. 542.

82. Ill.—Chicago, etc., R. Co. v. Fisher, 31 Ill.App. 36.

83. Mich.—Stapleton v. Furniture Exhibition Bldg. Co., 177 N.W. 139, 209 Mich. 385.

show which company was guilty of the greater negligence.[84]

Evidence of customary action of passengers may be admissible as affecting the duty of the carrier to take the proper precautions for their safety;[85] and to explain plaintiff's acts,[86] but such evidence must show more than the occasional practice of a single passenger.[87]

m. Rules of Carrier

In a proper case the rules of a carrier adopted for the government of the conduct of passengers or its employees may be admitted in evidence.

A rule of a carrier, adopted for the government of the conduct of passengers or of its employees in the operation of its trains, and which does not require more than the law requires of the carrier with respect to the matters covered by such rules, is admissible in evidence on the question of the carrier's negligence,[88] provided such rule is shown to have been in existence at the time of the accident,[89] and that the passenger had, or was chargeable with, notice thereof.[90] However, it has been held that such a rule is incompetent in behalf of the carrier;[91] and in some jurisdictions it has been held that a rule intended for the guidance of employees is not admissible to show either due care or negligence toward passengers.[92] Where the rule requires more than the law requires, or where it requires the performance of acts which the law does not recognize as a duty devolving on the carrier, it is inadmissible.[93] Where there is no violation of the rules of a public service commission they should not be admitted.[94]

§ 766. Weight and Sufficiency of Evidence

a. In general
b. Negligence generally; proximate cause
c. Applications of rules

a. In General

Proof by a preponderance of the evidence is necessary and sufficient in actions against carriers for injuries to passengers.

The rules of evidence which govern in civil actions generally control questions involving the weight and sufficiency of the evidence on all matters arising in an action by a passenger against a carrier for personal injuries.[95] Thus, all the facts constituting plaintiff's cause of action or defend-

84. Cal.—Howland v. Oakland Cons. St. R Co., 42 P 983, 110 Cal. 513.

85. Conn—Sacks v. Connecticut Co., 146 A. 494, 109 Conn. 221
10 C J p 1055 note 19.

Evidence held admissible

In an action for injuries from being pushed under a moving street car by a crowd of fellow passengers on Sunday, evidence of the behavior of the usual Sunday and holiday crowds was admissible as bearing on defendant's duty to anticipate the danger and guard against it, and the fact that at times the crowds were larger would make no difference, since the crowd, whether large or small, acted in the same way.—Grubb v. Kansas City Rys. Co., 230 S.W. 675, 207 Mo App. 16.

86. Ala.—Birmingham Electric Co v. Jones, 176 So 203, 234 Ala. 590

87. Pa.—Drake v. Pennsylvania R Co., 20 A 994, 137 Pa. 352, 21 Am S R. 883.

88. Mass.—McNeil v. New York, N H. & H. R. Co., 185 N E 471, 282 Mass 575—La Fond v. Boston & M R R, 94 N E. 693, 208 Mass 451.

Mo—Bond v. St Louis-San Francisco Ry. Co., 288 S.W 777, 315 Mo 987—Whitlow v. St. Louis-San Francisco Ry. Co., App, 282 S.W. 525, certiorari quashed State ex rel St Louis & San Francisco Ry Co. v. Daues, 290 S.W. 425, 316 Mo. 474

N.Y.—Hubsch v. Fifth Ave. Coach Co, 185 N.Y S. 475.

S C.—Tidwell v. Columbia Ry, Gas & Electric Co., 95 S.E. 109, 109 S C 34.
10 C.J. p 1055 note 24.

Limitation on admissibility

Rules of carrier of passengers regulating conduct of employees are admissible in evidence only where their violation is negligence complained of, or where they tend to prove defendant's guilt of negligence complained of, or constitute an admission that due care requires observance of conduct prescribed by such rules.—Sinopoli v. Chicago Rys Co, 147 N.E 487, 316 Ill 609

89. Mo.—Paquin v. St. Louis & S R Co., 90 Mo App. 118
10 C J p 1056 note 25.

90. N J—Walker v Silvio, 138 A. 510, 5 N J Misc 833.
10 C.J p 1056 note 26

91. Ill—West Chicago St R. Co v. Brown, 112 Ill App. 351.

92. N Y.—Longacre v. Yonkers R. Co, 140 N E 215, 236 N.Y. 119, 28 A.L R 1030, modifying 194 N Y S. 952, 202 App.Div. 845.
10 C J. p 1056 note 28.

93. Wyo.—Chicago, etc., R Co v. Lampman, 104 P. 533, 18 Wyo 106, 25 L.R.A ,N S., 217, Ann Cas 1912C 788.

94. Mass.—Bilodeau v. Fitchburg & L. St. Ry. Co., 128 N E. 872, 236 Mass. 526—London v Bay State St. Ry Co., 121 N E. 394, 231 Mass 480.

95. Tex—Heck v. San Antonio Public Service Co, Civ.App, 255 S W. 811.
10 C J. p 1056 note 31.

Evidence held sufficient

(1) To show a cause of action—Rowland v Caddo Transfer & Warehouse Co, 5 La.App 156.

(2) To make a prima facie case for plaintiff

N Y—Micklin v. Union Ry. Co. of New York City, 212 N.Y.S 291, 125 Misc 863—Karsch v Interborough Rapid Transit Co., 176 N.Y.S. 774

Tenn.—Greyhound Lines, Inc. v. Patterson, 14 Tenn App 652.
10 C J. p 1056 note 31 [a] (1).

(3) To take case to jury.—Keppler v. Wells, Mo., 238 S W 425.

(4) To sustain finding that fire in taxicab injuring passengers came from heater.—Durfey v. Milligan, 251 N.W. 356, 265 Mich 97
10 C.J p 1056 note 31 [a]

Evidence held insufficient

(1) To show unavoidable accident.—Brisolara v. Caddo Transfer & Warehouse Co, 127 So. 57, 13 La. App. 27.

(2) To disprove injury to passenger in bus by sudden turning of bus.—Mahfouz v Interurban Transp. Co, 135 So. 740, 17 La.App 241.

(3) To show that plaintiff made a business of being injured on railways—Tindall v Chicago & N. W. Ry. Co, 200 Ill App 556.
10 C.J p 1056 note 31 [b].

ant's defense must be established by a preponderance of the evidence.[96] Plaintiff must establish by a preponderance of the evidence the fact of the relation of carrier and passenger at the time of the accident,[97] and the same rules apply as to the com-

96. R.I.—Hanley v. Rhode Island Co., 99 A. 753.
Wis.—Ennis v. Milwaukee Electric Ry. & Light Co., 232 N.W. 540, 202 Wis. 277.
10 C.J. p. 1056 note 32

Evidence held sufficient

(1) To sustain a recovery.
U.S.—Pinson v. Kansas City Southern Ry. Co., C.C.A.Tex., 37 F.2d 652—Memphis St. R. Co. v. Townes, C.C.A.Tenn., 281 F. 127.
Ill.—Crane v. Railway Exp. Agency, 12 N.E.2d 672, 293 Ill.App. 328.
Neb.—Leon v. Chicago, B. & Q. R. Co., 167 N.W. 787, 102 Neb. 537, L.R.A.1918F 313.
N.Y.—Jones v. Eastern Greyhound Lines, 288 N.Y.S. 523, 159 Misc. 662.
Okl.—Missouri, Kansas & Oklahoma Coach Lines v. Benton, 10 P.2d 451, 157 Okl. 10.
Pa.—McQuaide v. Pittsburgh, C., C. & St. L. Ry. Co., 67 Pa.Super. 425.
10 C.J. p. 1056 note 32 [a] (1).

(2) To show that bus porter who let suitcase fall on passenger's head and neck was special employee of bus company for whose negligence bus company was liable.—Interurban Transp. Co. v. Reeves, 108 S.W.2d 594, 194 Ark. 321.

(3) To support verdict that injured plaintiff, at station platform to meet mother-in-law, was not a mere licensee.—St. Louis-San Francisco Ry. Co. v. Percifull, 2 S.W.2d 1112, 176 Ark. 1205.

(4) To establish that collision occurred.—Strock v. Pickwick Stages System, 290 P. 482, 107 Cal.App. 298.

(5) To warrant inference that traffic light had been installed and maintained by traffic authority of municipality, as regards right of bus driver to proceed in accordance with direction of traffic light.—Viggiano v. Connecticut Co., 191 A. 95, 122 Conn. 514.

(6) To establish that trainmaster was railroad's employee, rendering it liable for his negligence.—Sabol v. Chicago & N. W. Ry. Co., 238 N.W. 281, 255 Mich. 548, certiorari denied Chicago & N. W. Ry. Co. v. Sabol, 52 S.Ct. 265, 284 U.S. 688, 76 L.Ed. 581.

(7) To justify the jury's conclusion that a crowd in its rush to get on pushed plaintiff under a moving car.—Grubb v. Kansas City Rys. Co., 230 S.W. 675, 207 Mo.App. 16.

(8) To show that boy, who had fallen on the track in attempting to board a train after gates were closed, was alive when run over by an oncoming train.—Johnson v. Interborough Rapid Transit Co., 183 N.Y.S. 224, 192 App.Div. 639.

(9) To warrant finding of serious and permanent injuries to railway passenger.—Louisiana Ry. & Nav. Co. of Texas v. Smith, Tex.Civ.App., 285 S.W. 1104.

(10) To warrant jury finding that alleged injured person was injured in collision between street car and automobile.—Nelson v. Milwaukee Electric Ry. & Light Co., 222 N.W. 792, 197 Wis. 513.

(11) To justify finding that deceased fell down stairway leading from station platform to basement, and that the fall caused his death.—Falk v. Chicago & N. W. Ry. Co., 157 N.W. 904, 133 Minn. 41.

(12) To establish defendant's contention that sole cause of street car derailment in which passenger sustained injuries for which he was suing was the breaking of the axle of the car.—Virginia Electric & Power Co. v. Lowry, 184 S.E. 177, 166 Va. 207.

(13) To overcome prima facie case made out by passenger.—Bynum v. City of Monroe, La.App., 171 So. 116.
10 C.J. p. 1056 note 32 [a].

Evidence held insufficient

(1) To sustain a recovery.
U.S.—Pickwick Stage Lines v. Edwards, C.C.A.Utah, 64 F.2d 758.
La.—Goldenberg v. Nugent, App., 162 So. 459—Danove v. American Safe Deposit Co., App., 151 So. 93.
Mo.—Edmondson v. Missouri Pac. R. Co., 286 S.W. 439, 220 Mo.App. 294.
N.Y.—Yocum v. Interborough Rapid Transit Co., 231 N.Y.S. 922, 224 App.Div. 544.
Okl.—St. Louis & S. F. Ry. Co. v. Manley, 189 P. 177, 78 Okl. 59.
Pa.—Moore v. Philadelphia Rapid Transit Co., 87 Pa.Super. 393.
R.I.—Hanley v. Rhode Island Co., 99 A. 753.
10 C.J. p. 1056 note 32 [b] (1).

(2) To sustain allegation of complaint that decedent contracted safely to transport and deliver plaintiff by automobile to California.—McClure v. Johnson, Ariz., 69 P.2d 573.

(3) To warrant finding that express company's servant was acting within his employment when he shot plaintiff.—Lamanna v. American Express Co., 120 N.E. 30, 230 Mass. 564.

(4) To show that window which fell on street car passenger's arm was open to its full extent was latched.—Murray v. International Ry. Co., 251 N.Y.S. 320, 233 App.Div. 262.

(5) To show duty of carrier to give assistance to plaintiff.—St. Louis & S. F. Ry. Co. v. Dobyns, 157 P. 735, 57 Okl. 643.

(6) To require a finding that the passenger was injured, in view of the nature of such testimony, making it impossible to contradict it, and other testimony warranting the jury to disregard and disbelieve it.—Heck v. San Antonio Public Service Co., Tex.Civ.App., 255 S.W. 811.

(7) To show a custom of allowing people to ride on the back part of truck where goods were carried, which would be available to plaintiff.—Gruber v. Cater Transfer Co., 165 P. 491, 96 Wash. 544, L.R.A.1917F 422.

(8) To establish duty of carrier stopping bus at hotel, to exercise care to keep hotel in reasonably safe condition for passengers using rest rooms.—Pickwick Stage Lines v. Edwards, C.C.A.Utah, 64 F.2d 758.

(9) To sustain a finding that plaintiff's feet were frozen while on defendant's train.—Zoccolillo v. Oregon Short Line R. Co., 177 P. 201, 53 Utah 39.

(10) To establish conclusively that plaintiff's injury could not have been caused as alleged.—Missouri Pac. R. Co. v. McDade, 53 S.W.2d 595, 186 Ark. 317.

Insult to passenger by carrier's servant without physical injury was held to support cause of action for breach of contract.—Southern Ry. Co. v. Carroll, 70 So. 984, 14 Ala.App. 374.

97. Mass.—Guinevan v. Checker Taxi Co., 194 N.E. 100, 289 Mass. 295.
10 C.J. p. 1057 note 33.

Evidence held sufficient

(1) To show the injured person was a passenger at the time of the accident.
Ala.—Central of Georgia Ry. Co. v. Thomas, 104 So. 559, 20 Ala.App. 617.
Ark.—Caddo Transfer & Warehouse Co. v. Perry, 298 S.W. 337, 174 Ark. 1030.
Colo.—Yelloway, Inc., v. Garretson, 3 P.2d 292, 89 Colo. 375.
Ky.—Jesse v. Dunn, 51 S.W.2d 918, 244 Ky. 613.
La.—Scarborough v. Louisiana Ry. & Nav. Co., 82 So. 286, 145 La. 323.
Mass.—Guinevan v. Checker Taxi Co., 194 N.E. 100, 289 Mass. 295—Dion v. Drapeau, 150 N.E. 14, 254 Mass. 186.
Mich.—Perz v. Pere Marquette Ry. Co., 198 N.W. 208, 226 Mich. 452.
Minn.—Gruhl v. Northern Pac. Ry. Co., 168 N.W. 127, 140 Minn. 353.

panies or persons liable for the injuries,[98] but such | facts need not be established beyond all doubt.[99]

N.C.—Myers v. Kirk, 135 S.E. 788, 192 N.C. 700
R.I.—Chaufty v. De Vries, 102 A. 612, 41 R.I. 1.
Wis.—Nelson v. Milwaukee Electric Ry. & Light Co., 222 N.W. 792, 197 Wis. 513—Arneberg v. Chicago, M. & St. P. Ry. Co., 195 N.W. 844, 182 Wis. 85.
10 C.J. p. 1057 note 33 [a] (1).

(2) To warrant a finding, in an action for the death of one accompanying a shipment of live stock, that deceased was the caretaker entitled to accompany the stock under the contract of shipment, although the owner of the stock was also in the car—Adams v. Chicago, R. I. & P. Ry. Co., 161 N.W. 295, 179 Iowa 1334

(3) To warrant a finding that jitney driver's authority to take passenger was not limited to a particular route, and that he accepted plaintiff as a passenger and received his fare as the servant of his employer. —Chaufty v. De Vries, 102 A. 612, 41 R.I. 1.
10 C.J. p. 1057 note 33 [a].

Evidence held insufficient

(1) To show plaintiff was a passenger at the time of the injury.
Ill.—Todd v. Louisville & N. R. Co., 113 N.E. 95, 274 Ill. 201, L.R.A. 1916F 543—Foote v. Chicago, N. S. & M. R. Co., 256 Ill.App. 581—Cribb v. Chicago Rys. Co., 252 Ill.App. 33—Goodison v. Chicago, B. & Q. R. Co., 213 Ill.App. 56.
N.H.—Ingerson v. Grand Trunk Ry., 106 A. 488, 79 N.H. 154.
N.Y.—De Perri v. Motor Haulage Co., 173 N.Y.S. 189, 185 App.Div. 384.
10 C.J. p. 1057 note 33 [b] (1).

(2) To show plaintiff was guilty of fraud or deceit in presenting expired ticket, which conductor accepted—Chesapeake & O. Ry. Co. v. Burton, C.C.A.W.Va., 62 F.2d 110, 88 A.L.R. 756, certiorari denied 53 S.Ct. 507, 288 U.S. 617, 77 L.Ed. 990.

(3) To show that passenger, who was discharged from train in dark, some distance away from platform, and injured in fall while crossing tracks, had placed herself in custody of uncle who had met her, as against contention that railroad was relieved of responsibility.—Young v. Baldwin, C.C.A.Ark., 84 F.2d 841.

(4) To show that passenger had made any fraudulent representations in securing and using a pass.—McGrath v. Payne, Mo., 245 S.W. 1061.

(5) To show that deceased was a trespasser or mere licensee—Rhodehouse v. Director General of Railroads, 111 A. 662, 95 N.J.Law 355.
10 C.J. p. 1057 note 33 [b].

98. Minn.—Casey v. Northern Pac. Ry. Co., 213 N.W. 57, 171 Minn. 34
10 C.J. p. 1057 note 34.

Evidence held sufficient

(1) To establish ownership or operation by defendant.
Ill.—Princell v. Pickwick Greyhound Bus Lines, 262 Ill.App. 298—Wall v. Chesapeake & O. Ry. Co., 210 Ill.App. 136.
Kan.—Crawford v. Southern Kansas Stage Lines Co., 66 P.2d 601, 145 Kan. 580.
Mo.—Watkins v. Kansas City & W. B. R. Co., App., 209 S.W. 950—Olive v. United Rys. Co. of St. Louis, 193 S.W. 32, 197 Mo.App. 118.
Tex.—Dallas Ry. Co. v. Warlick, Civ. App., 268 S.W. 512, reversed on other grounds, Com.App., 285 S.W. 302.

(2) To show ownership of bus and operation by employee acting within the scope of his employment—Irwin v. Pickwick Stages System, 25 P.2d 998, 134 Cal.App. 443.

(3) To show ownership as purchaser or assignee of purchaser at foreclosure sale, the terms of which required assumption of all liabilities—White v. Chicago, P. & St. L. R. Co., 196 Ill.App. 459.

(4) To sustain finding that bus driver operating car on defendants' route under defendants' permit was defendants' agent in transportation of injured passenger, within meaning of Motorbus Law.—McCarthy v. Valdez, Tex.Civ.App., 10 S.W.2d 1051, error dismissed.

(5) To show that the chauffeur of a taxicab was under control of defendant taxicab company, and engaged in its business—Burke v. Shaw Transfer Co., 243 S.W. 449, 211 Mo.App. 353, certiorari quashed State ex rel. Shaw Transfer Co. v. Trimble, Sup., 250 S.W. 384

(6) To warrant finding that driver of bus was acting within scope of authority from defendant as bus owner.—Saunders v. Crawford, 164 So. 526, 122 Fla. 13.

(7) To show driver was acting within the scope of his employment—Baskin & Cole v. Whitson, 8 Tenn. App. 578.

(8) To establish that the proximate cause of accident was negligence of drivers of both taxicabs of different companies entering intersection authorizing recovery against both carriers—Hanley v. Checker Cab Co., 126 So. 274, 12 La.App. 562.

(9) To show negligence of taxicab company, whose driver stopped car with rear wheel between trolley rails, as well as negligence of the railway company.—Hughes v. Pittsburgh Transp. Co., 150 A. 153, 300 Pa. 55.

(10) To sustain finding that sidewalk surrounding subway station was within control of traction company sued for injuries, operating under lease of subway and entrances and approaches.—Smith v. Boston Elevated Ry. Co., 159 N.E. 501, 262 Mass. 18.

(11) To support finding that plaintiff was not injured by defendant's vehicle.—Young v. Gregory Bus Line, 1 Tenn.App. 282
10 C.J. p. 1057 note 34 [a].

Evidence held insufficient

(1) To establish identity of taxicab driver or show that he was taxicab company's agent or employee, as alleged in complaint, and hence insufficient to support verdict against such company.—United Transp. Co. v. Jeffries, App., 200 N.E. 424, superseded 5 N.E.2d 524, 211 Ind. 226.

(2) To show street railroad, owning majority stock of railroad on which passenger was injured, operated it in violation of statute—Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 244 N.Y. 84, 50 A.L.R. 599, reversing 217 N.Y.S. 156, 217 App.Div. 504, motion denied 155 N.E. 914, 244 N.Y. 602, 50 A.L.R. 599.

(3) To show that, by contract between carriers, initial carrier was liable for injuries after it had turned car over to connecting carrier—Cisco & N.E. Ry. Co. v. Proctor, Tex.Civ.App., 272 S.W. 308, affirmed Proctor v. Cisco & N.E. Ry. Co., Com.App., 277 S.W. 1047.
10 C.J. p. 1057 note 34 [b].

Conduct of carrier's counsel, together with evidence from which ownership may be inferred, may be sufficient to show defendant company's ownership of car.—Lucius v. Wells, Mo.App., 263 S.W. 546.

As between codefendants

In passenger's action for injuries in derailment against railroad and the Pullman Company, where the railroad's own witnesses testified that it was the duty of the railroad to inspect and repair the running gear of the Pullman cars while in use, and where there is no evidence that the Pullman Company was responsible for the roadbed, railroad could not complain of direction of verdict for Pullman Company.—Thompson v. Atlantic Coast Line R. Co., 102 S.E. 11, 113 S.C. 261.

99. Ala.—Louisville, etc., R. Co. v. Jones, 3 So. 902, 83 Ala. 376.

b. Negligence Generally; Proximate Cause

Negligence of the carrier, and proximate cause, must be proved by a preponderance of the evidence.

Negligence on the part of defendant, or employees, must be shown by a preponderance of the evidence.[1] It is not necessary that negligence be

1. La.—Woodley v Service Cab Co., App., 159 So 124
10 C.J. p 1058 note 37

Evidence held sufficient

(1) To justify a verdict or finding of negligence of defendant.
U.S.—Yellow Cab Co v Keane, C.C.A.Ill., 93 F.2d 290.
Cal.—Hartje v Olcott, 3 P.2d 340, 116 Cal.App. 712—McKeon v. Lissner, 262 P. 459, 87 Cal.App. 371—Anderson v San Francisco-Oakland Terminal Rys., 214 P. 289, 61 Cal.App. 21
Ill.—See Boland v. Gay, 201 Ill.App. 359.
La.—Scarborough v. Louisiana Ry. & Nav. Co., 82 So. 286, 145 La. 323
Mich.—Rice v. Michigan Ry. Co., 175 N.W. 454, 208 Mich. 123
Minn.—Gerin v. Chicago, M. & St. P. Ry. Co., 158 N.W. 630, 133 Minn. 395.
Mont.—Fisher v. Butte Electric Ry. Co., 249 P. 1013, 77 Mont. 85
N.J.—Rhodehouse v. Director General of Railroads, 111 A. 662, 95 N.J.Law 355.
N.Y.—Allessi v. New York Rapid Transit Corporation, 297 N.Y.S. 1011, 163 Misc. 815.
N.C.—Dunn v. Atlantic Coast Line R. Co., 93 S.E. 784, 174 N.C. 254
Pa.—Borden v. Lehigh Valley R. Co., 76 Pa.Super. 517.
10 C.J. p 1058 note 37 [a] (1).

(2) To warrant finding that conductor in charge of street car was negligent in allowing intoxicated passenger to stand in car where he was likely to fall and injure other passengers.—Virginia Ry. & Power Co. v. Hubbard, 91 S.E. 618, 120 Va. 661.

(3) To show that conductor was charged with notice of station at which eight year old passenger was to get off train, as respects railroad's liability for injuries sustained when boy jumped from train after it had failed to stop at his station.—Nashville, C. & St. L. Ry v. Harrell, Tenn.App., 110 S.W.2d 1032.

(4) To show that porter in closing car door knew that passenger's hand was on jamb thereof.—Schaff v. Gordon, Tex.Civ.App., 214 S.W. 638.

(5) To sustain finding that cinder which injured plaintiff passenger came from defendant's locomotive, which was passing on another track.—Malone v St. Louis-San Francisco Ry. Co., 213 S.W. 864, 202 Mo.App. 489.

(6) To support finding conductor of interurban car was negligent in not protecting passenger from robber.—Terre Haute, Indianapolis & Eastern Traction Co. v. Scott, 170 N.E. 341, 91 Ind.App. 690, rehearing denied 172 N.E. 659, 91 Ind.App. 690

(7) To show that the likelihood of a waiting passenger being so pushed by pressure of the crowd struggling to get on the car was a matter reasonably to be anticipated by defendant.—Grubb v Kansas City Rys. Co., 230 S.W. 675, 207 Mo.App. 16.

(8) To justify finding that adequate number of employees were not in attendance on elevated railway platform.—Bryant v. Boston Elevated Ry. Co., 122 N.E. 744, 232 Mass. 549.

(9) To support finding that defendant railroad was backing its engine over four miles an hour in violation of city ordinance, rendering it negligent.—Dunn v. Atlantic Coast Line R. Co., 93 S.E. 784, 174 N.C. 254.

(10) To show that bus driver, who attempted to jerk a trunk onto bus by its handle alone and without warning passenger helping him of such attempt was negligent.—Gaines v Teche Lines, La.App., 176 So. 134.
10 C.J. p 1058 note 37 [a].

Evidence held insufficient

(1) To show negligence.
U.S.—Missouri Pac. Transp. Co. v. Bennett, C.C.A.Neb., 95 F.2d 177.
Ga.—Green v Hines, 102 S.E. 899, 25 Ga.App. 202—Flanders v Atlanta Terminal Co., 95 S.E. 307, 21 Ga.App. 812
Ill.—Schwartz v. Chicago Rys. Co., 208 Ill.App. 232. See Van Zandt v. Metropolitan West Side Elevated Ry. Co., 205 Ill.App. 453.
Kan.—Brehm v. Atchison, T. & S. F. Ry. Co., 206 P. 868, 111 Kan. 242, 25 A.L.R. 1056—Brigham v. Union Traction Co., 164 P. 1076, 100 Kan. 435.
Ky.—Williams v. Louisville & N. R. Co., 210 S.W. 172, 183 Ky. 602
Mass.—Conley v. Town Taxi, 10 N.E.2d 74—Tsatsos v. Boston, R. B. & L. R. Co., 166 N.E. 633, 267 Mass. 365—Stanley v. Boston Elevated Ry. Co., 143 N.E. 338, 248 Mass. 494.
Mich.—Smith v. Peets, 186 N.W. 397, 217 Mich. 255.
N.Y.—Sadacca v. New York Rys. Co., 174 N.Y.S. 287, 186 App.Div. 582—Schasel v. International Ry. Co., 173 N.Y.S. 571, 185 App.Div. 194.
N.D.—Finlayson v. Yellow Cab Co., 217 N.W. 662, 56 N.D. 407.
R.I.—Thomas v. J. Samuels & Bro., 132 A. 8, 47 R.I. 206, reargument denied 132 A. 386.
Tenn.—Nashville, C. & St. L. Ry. v. Harrell, App., 110 S.W.2d 1032.
Tex.—Bragg v Houston Electric Co., Civ.App., 264 S.W. 245, affirmed Houston Electric Co v Bragg, Com.App., 276 S.W. 641, motion overruled 280 S.W. 188—Wichita Valley Ry. Co v. Helms, Civ.App., 261 S.W. 225
Va.—Walters v. Norfolk & W. Ry. Co., 94 S.E. 182, 122 Va. 149

(2) To show that the conductor or motorman had notice of the presence of the suitcase in the aisle, or that it had been in the aisle a sufficient length of time so that they should have taken notice of it.—Garner v. East St. Louis Ry. Co., 211 Ill.App. 201.

(3) To show any negligence in employing an elevator operator under sixteen years of age.—Hoffman v Ellis, 174 N.Y.S. 362, 106 Misc. 283.

(4) To permit recovery from railroad company for injuries sustained by eight year old passenger who jumped from train traveling from twenty-five to thirty-five miles per hour when train failed to stop at such passenger's station.—Nashville, C. & St. L. Ry. v. Harrell, Tenn.App., 110 S.W.2d 1032.

(5) To show negligence in that the brakeman did not fasten the car door back "securely."—Brehm v. Atchison, T. & S. F. Ry. Co., 206 P. 868, 111 Kan. 242, 25 A.L.R. 1056

(6) To show negligence of railway company in permitting blowing out of fuse.—Brasslavsky v. Boston Elevated Ry. Co., 145 N.E. 529, 250 Mass. 403.

(7) To take to jury question whether taxicab driver knew or should have known that heater in cab floor, on which drunken passenger was lying, was hot enough to burn him.—Schmuck v. Heilman, 161 A. 420, 106 Pa.Super. 12

(8) To show that passenger was in a helplessly drunken condition, so that conductor, in removing him to a car where his presence would not offend other passengers, was required to look after his safety by seeing that he was carefully seated in the car.—Louisville & N. R. Co v Phelps' Adm'r, 205 S.W. 793, 181 Ky. 689

(9) To justify a finding of negligence on defendant's part in running past platform at a high rate of speed after having observed plaintiff's signal.—Rice v Michigan Ry. Co., 175 N.W. 454, 208 Mich. 123.

(10) To establish building owner's negligence because maintaining inferior and antiquated type of elevator or in employing inexperienced and incompetent operator.—Brandon

proved beyond a reasonable doubt,[2] and it may be established by circumstantial, as well as by direct, evidence;[3] but, as a verdict for plaintiff cannot rest on mere conjecture or speculation,[4] the evidence must be sufficient to prove the essential facts constituting the negligence relied on,[5] and must consist of some reasonable evidence of well defined acts of negligence.[6] A mere probability or possibility that some one was wanting in care is not sufficient to justify a finding of negligence,[7] unless such probability or possibility is based on rational grounds and is supported by the facts proved;[8] and it is not sufficient to show an injury and that some part of the carrier's equipment had a part in the accident without any evidence showing a defect in construction or operation or facts from which such defect or dereliction might be inferred.[9] Where the evidence is equally as consistent with due care as with negligence, no recovery can be had.[10] These rules also apply to the proof of willfulness, wantonness, or recklessness.[11]

To justify a judgment of dismissal, the evidence

v Gottlieb, 132 So. 283, 16 La.App. 676.

(11) To support finding that the conductor was negligent in permitting plaintiff to go on the platform. —Griebenow v Chicago & M. E. Ry. Co., 171 N.W. 664, 169 Wis 12.
10 C.J. p 1058 note 37 [b].

Cause of plane crash

Evidence tending to establish that air transport company furnished sound plane, properly equipped, and an experienced pilot, but not explaining why pilot went fifty miles off his course and proceeded over dangerous territory at unsafe altitude, was insufficient to sustain verdict in its favor in suit for death sustained when plane crashed into mountain.—Goodheart v American Airlines, 1 N.Y.S.2d 288, 252 App Div 660

Presumption as preponderance

Where proof does not rebut prima facie showing contemplated in application of res ipsa loquitur doctrine, such prima facie showing supplemented by presumption would constitute proof by preponderance of evidence—Robison v. McAlister, Cal., 13 P.2d 926—St. Clair v. McAlister, 13 P.2d 924, 216 Cal. 95.

2. Wis.—Beery v. Chicago, etc., R. Co., 40 N.W. 687, 73 Wis. 197.
10 C.J. p 1058 note 38.

3. Conn.—Robinson v. Connecticut Co., 189 A. 453, 122 Conn. 300.
Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, and appeal dismissed American Oil Co v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720
10 C.J. p 1058 note 39.

Evidence held sufficient to raise presumption of negligence—Malone v Greyhound Lines, Mo.App., 22 S.W.2d 199

4. U.S.—Northern Ry. Co. v Page, Mass., 47 S.Ct. 491, 274 U.S. 65, 71 L.Ed. 929, reversing, C.C.A., Page v. United Fruit Co., 3 F.2d 747, certiorari granted Northern Ry. Co. v. Page, 46 S.Ct. 19, 269 U.S. 542, 70 L.Ed. 402.
Ark.—St. Louis-San Francisco Ry. Co. v. Evans, 109 S.W.2d 918, 194 Ark. 1156.
Ind.—Hines v Rollins, 179 N.E. 183, 97 Ind.App. 251.
Mass.—Holland v Boston & M. R. R., 181 N.E. 217, 279 Mass. 342
Miss.—Columbus & G. Ry. Co. v. Phillips, 133 So. 123, 160 Miss. 390
Pa.—Leglar v Pittsburgh, C., C. & St. L. R. Co., 131 A. 363, 284 Pa. 521.

5. Tex.—Wichita Valley Ry. Co. v Helms, Civ.App., 261 S.W. 225
10 C.J. p 1058 note 40.

Proof required

In bus passenger's action for injuries resulting from fall caused when bus started after having stopped at intersection, in order to permit inference of negligence by bus driver, passenger was obliged to prove by direct evidence that way in which bus was started was negligent, or to prove by what appeared to have taken place as physical fact that driver was negligent.—Cohen v. Surface Transp. Corporation of New York, 289 N.Y.S. 678, 160 Misc. 247.

Test of sufficiency

In action for death from fall on elevator, test of sufficiency of evidence is whether circumstances are such as to satisfy reasonable minds that death resulted from negligence of defendant—Strobel v. Park, 140 A. 877, 292 Pa. 200, 57 A.L.R. 253

Conflicting statements immaterial

Witness' conflicting statements were immaterial as regards sufficiency of evidence of negligence of driver of bus which skidded off road when driver attempted to avoid hitting mule, in view of other witnesses' testimony as to speed of bus, presence of mule, and condition of road — Tennessee Coach Co v. Young, 80 S.W.2d 107, 18 Tenn.App. 592

Evidence held insufficient

In bus passenger's action for injuries resulting from fall caused when bus started after having stopped at intersection, the fact that another passenger of bus lost his equilibrium when bus started is insufficient to show jerk caused when bus started was caused by negligence of driver, in absence of evidence showing other passenger was acting in such way as to prevent his being overbalanced by any change in motion of bus—Cohen v Surface Transp. Corporation of New York, 289 N.Y.S. 678, 160 Misc. 247.

6. U.S.—Cornette v. Baltimore & O. R. Co., Pa., 195 F. 59, 115 C.C.A. 61.

7. U.S.—Minneapolis, St. P. & S. S. M. Ry. Co. v Galvin, C.C.A.Mich., 54 F.2d 202, certiorari denied 52 S.Ct. 407, 285 U.S. 551, 76 L.Ed. 941.
10 C.J. p 1059 note 42

8. Mich.—Robinson v. Chicago, etc., R. Co., 97 N.W. 689, 135 Mich. 254.

9. Pa.—Wood v Pennsylvania R. Co., 170 A. 367, 111 Pa.Super. 430.

10. R.I.—Wilbour v. Rhode Island Co., 67 A. 445
10 C.J. p 1059 note 44.

11. S.C.—McLean v Atlantic Coast Line R. Co., 61 S.E. 900, 81 S.C. 100, 128 Am.S.R. 892, 18 L.R.A., N.S., 763
10 C.J. p 1059 note 45.

Evidence held sufficient

(1) To show wanton negligence
Ga.—Madden v. S. L. Mitchell Automobile Co., 94 S.E. 92, 21 Ga.App. 108
Ill.—Bernier v. Illinois Cent. R. Co., 215 Ill.App. 454, affirmed 129 N.E. 747, 296 Ill. 464.

(2) To warrant exemplary damages for injury to passenger in elevator.—Reel v Consolidated Inv. Co., Mo., 236 S.W. 43

Evidence held insufficient

(1) In action for death, by derailment, of employee of railroad company riding on free pass, to show willful or wanton misconduct of railway company or its servants—Lanier v. Bugg, 123 S.E. 145, 32 Ga.App. 294.

(2) In action for death, by collision of trains, of person riding on free pass, stipulating against liability for accident, to support charge of willful killing.—Ft. Wayne & Wabash Valley Traction Co v. Justus, 115 N.E. 585, 186 Ind. 464.

(3) In action for personal injuries received from falling out of defend-

should show care, so conclusively that the only fair inference is that the accident was one that could not have been guarded against by ordinary care.[12]

Proximate cause. Plaintiff must show by a preponderance of evidence that defendant's negligence or wrong in fact caused his injuries.[13] This fact may be shown by circumstantial evidence,[14] which must be of such strength and character as to warrant an inference or reasonable probability, from the facts proved, that defendant's negligence caused the injury;[15] and such evidence is not sufficient if it merely raises a surmise or conjecture that such was the fact,[16] as where the inference or proba-

ant's baggage truck driven by its servant, to show that the driver was guilty of gross negligence or of wantonly causing plaintiff's injury —Gruber v. Cater Transfer Co., 165 P. 491, 96 Wash. 544, L.R.A.1917F 422.

Proof of actual knowledge

Wantonness of carrier's servants must rest on servants' actual knowledge, but such knowledge need not be shown by direct proof —Birmingham Electric Co. v. Mann, 147 So. 165, 226 Ala. 379—Birmingham Electric Co. v. Guess, 131 So. 883, 222 Ala. 280.

12. N.Y.—Gage v. Waldorf Astoria Hotel Co., 152 N.Y.S. 1019, 90 Misc. 331.

13. Ark.—Turner v. Hot Springs St. Ry. Co., 75 S.W.2d 675, 189 Ark. 894.
Fla.—Atlantic Coast Line R. Co. v. Allen, 117 So. 333, 96 Fla. 419.
Kan.—Large v. Schaff, 167 P. 1054, 101 Kan. 372.
10 C.J. p. 1059 note 47.

14. N.Y.—Fagan v. Atlantic Coast Line R. Co., 115 N.E. 704, 220 N.Y. 301, L.R.A.1917E 663, reversing 155 N.Y.S. 609, 170 App.Div. 47.
10 C.J. p. 1059 note 48.

15. La.—Bertrand v. New Orleans Ry. & Light Co., 75 So. 217, 141 La. 490.
Mass.—McCarthy v. Boston Elevated Ry. Co., 112 N.E. 235, 223 Mass. 568.
10 C.J. p. 1059 note 49.

Evidence held sufficient

(1) To show defendant's negligence was the proximate cause of the injury.
Cal.—Boa v. San Francisco-Oakland Terminal Rys., 187 P. 2, 182 Cal. 93—Pedrow v. Federoff, 247 P. 212, 77 Cal.App. 164.
Ill.—See Bourland v. Louisville & N. R. Co., 199 Ill.App. 126.
La.—Woods v. Armour & Co., App., 154 So. 759.
Mont.—Fisher v. Butte Electric Ry. Co., 249 P. 1043, 77 Mont. 85.
N.Y.—Fagan v. Atlantic Coast Line R. Co., 115 N.E. 704, 220 N.Y. 301.
Pa.—Riff v. Pittsburgh Rys. Co., 148 A. 102, 298 Pa. 256.
Tex.—Texas & P. Ry. Co. v. Whittington, Civ.App., 292 S.W. 966—Schaff v. Gordon, Civ.App., 214 S.W. 638—Texas Midland R. Co. v. Truss, Civ.App., 186 S.W. 249, error refused.
10 C.J. p. 1059 note 49 [c] (1).

(2) To warrant finding that a passenger was injured when he fell from a train moving at a speed of forty to fifty miles per hour, without direct testimony to that effect.—Olivieri v. Hines, C.C.A.Pa., 271 F. 939.

(3) To sustain finding for bus passenger on ground that bus driver's negligence in driving unnecessarily close to center line of highway was proximate cause of passenger's injuries suffered when bus was sideswiped by automobile —Ross v. Bay City Transit Co., 56 P.2d 247, 12 Cal. App.2d 639.

(4) To support conclusion that negligent operation of stage was proximate cause of plaintiff's elbow, resting on windowsill, being struck by passing truck.—Strock v. Pickwick Stages System, 290 P. 482, 107 Cal.App. 298.

(5) To show that negligence of bus driver in collision proximately contributed to passenger's injuries.—Raddant v. Watson, 264 P. 589, 89 Cal.App. 103.

(5) To show plaintiff's injury was proximately and directly caused by defendant's stage leaving the highway and descending into a gulch —Leitert v. Pickwick Stages, Northern Division, 229 P. 889, 68 Cal.App. 504.

(7) To show that contusions were received by sudden turning and stopping of bus.—Mahfouz v. Interurban Transp. Co., 135 So. 740, 17 La.App. 241.

(8) To support a finding that plaintiff's injuries were produced by the street car accident —Fishleigh v. Detroit United Ry., 171 N.W. 549, 205 Mich. 145.

(9) To support a finding that injuries to a passenger were received as a consequence of a jerk of train. —Burkett v. Missouri Pac. R. Co., Mo.App., 208 S.W. 104.

(10) To show that defendant railway company's negligence in failing to have its station platform properly lighted was the proximate cause of the injury to plaintiff's wife.—Missouri, K. & T. Ry. Co. of Texas v. Bailey, Tex.Civ.App., 186 S.W. 230, error dismissed.

(11) To support finding of the jury that defendant's premises being in an unsafe condition was proximate cause of injury —Himstreet v. Chicago & N.W. Ry. Co., 166 N.W. 665, 167 Wis. 71.

(12) To justify finding that negligence in putting intoxicated person off at destination, without precaution for his safety, was proximate cause of death.—Fagan v. Atlantic Coast Line R. Co., 115 N.E. 704, 220 N.Y. 301, L.R.A.1917E 663, reversing 155 N.Y.S. 609, 170 App.Div. 47.

(13) To support judgment for plaintiff as against contention that deceased died of heart disease.— Louisville & N. R. Co. v. Rowland's Adm'r, 14 S.W.2d 174, 227 Ky. 841.

(14) To authorize recovery on theory of concurring negligence of bus driver and truck driver, as against contention that truck driver's negligence was an independent, intervening, and efficient cause —Capital Motor Lines v. Gillette, 177 So. 881, 235 Ala. 157.

(15) To show that bus driver's negligence proximately caused accident without any negligence of plaintiff contributing thereto —Kalogerakas v. Public Service Co-ordinated Transport, 150 A. 574, 8 N.J.Misc. 462.

(16) To justify finding that there was a direct causal connection between the negligence of defendant in not protecting a passenger from being crowded under a moving car by fellow passengers struggling to get on and her injury thus received, and also to enable the jury to find with reasonable certainty that her injury was due to such negligence rather than any other cause —Grubb v. Kansas City Rys. Co., 230 S.W. 675, 207 Mo.App. 16.
10 C.J. p. 1059 note 49 [c].

Expert testimony

Where plaintiff sues carrier for loss of an eye, he need not prove by expert that infection causing removal was caused by the injury, where there was other evidence justifying such inference —Missouri, K. & T. Ry. Co. v. Edmonds, 174 P. 1052, 73 Okl. 2.

Passenger's testimony that she did not know cause of her falling down steps is not conclusive against her on issue of carrier's negligence.— Texas & P. Ry. Co. v. Whittington, Tex.Civ.App., 292 S.W. 966.

16. Mass.—Gillis v. Boston, R. B. & L. R. Co., 165 N.E. 497, 266 Mass. 481.

bility that the injury was caused by defendant's negligence has no immediate connection with, or relation to, the established facts from which it is made.[17] Of course, no recovery can be had when the proximate cause of the injury was not the negligence of defendant,[18] nor where plaintiff's condition is shown by the evidence not to be the result of any injury received while a passenger.[19]

c. Applications of Rules

The rule that a preponderance of the evidence is necessary and sufficient in actions of this character is one of wide application.

The above rules as to the weight and sufficiency of the evidence apply in actions for injuries to passengers by reason of negligence in respect of the condition of the carrier's platforms, approaches, or other parts of the station premises,[20] or of its road-

Mo.—Hoffman v. Western Union Telegraph Co., App., 43 S.W.2d 902. 10 C.J. p 1059 note 50.

Evidence held insufficient to show

(1) Negligence as proximate cause —Trudell v. New York Rapid Transit Corporation, 289 N.Y.S. 53, 248 App.Div. 787.

(2) That swaying of street car on trucks was proximate cause of collision with pedestrian standing between tracks waiting for other car. —Elliott v. Market St. Ry. Co., 40 P. 2d 547, 4 Cal.App.2d 292.

(3) That accident was attributable to the running of the train, or to the act of any person in the employment of defendant.—Georgia R. & Banking Co. v. Moore, 90 S.E. 854, 146 Ga. 108.

(4) That son who died of abscess of brain and septicaemia allegedly resulting from injuries sustained in automobile collision, was injured in collision.—Holland v. Owners' Automobile Ins. Co. of New Orleans, La. App., 155 So. 780.

(5) That motorman's failure to keep a proper lookout was proximate cause of injury.—Fisher v. Butte Electric Ry. Co., 235 P. 330, 72 Mont. 594.

(6) That bright headlight on street car was the cause of injury and death of intending passenger run down by automobile when about to board street car.—Klingensmith v. West Penn Rys. Co., 123 A. 787, 279 Pa. 336.

(7) That slippery condition of steps was proximate cause of fall.— Chicago, R. I. & G. Ry. Co. v. Wisdom, Tex.Civ.App., 216 S.W. 241, reversed on other grounds Wisdom v. Chicago, R. I. & G. R. Co., Com.App., 231 S.W. 344.

(8) That death of passenger in the latter part of October from pneumonia, following injury on September 24, was the result of the accident.— Santolo v. Interborough Rapid Transit Co., 187 N.Y.S. 390, 196 App.Div. 34.

10 C.J. p 1059 note 50 [a].

Uncontradicted testimony

Plaintiff's uncontradicted testimony that she was injured while a passenger on defendant's street car, by being thrown against a seat by a violent jerk while she was going to the door to leave the car, which was uncontradicted, because no complaint of injury was made at the time, so that defendant could not identify the crew in charge of the car, does not establish conclusively that the injury to plaintiff was the result of plaintiff's negligence.—Robertson v. Washington Ry. & Electric Co., 279 F. 180, 51 App.D.C. 311.

17. Pa.—Ginn v. Pennsylvania R. Co., 69 A. 992, 220 Pa. 552.

18. Cal.—Northrup v. Pacific Electric Ry. Co., 47 P.2d 365, 8 Cal.App. 2d 189.

Evidence held sufficient

(1) To show proximate cause of injury was negligence of third person

Cal.—Northrup v. Pacific Electric Ry. Co., 47 P.2d 365, 8 Cal.App.2d 189.

Iowa.—Moss v. Mason City & C. L. R. Co., 251 N.W. 627, 217 Iowa 354.

(2) Evidence that for several years prior to accident in which taxicab passenger was injured driver had been subject to epileptic attacks, that examination by physician after accident disclosed froth at mouth, and that physician considered him suffering from epileptic attack at that time, disclosed that epileptic attack was sole cause of accident.— Wishone v. Yellow Cab Co., 97 S.W.2d 452, 20 Tenn.App. 229.

19. Ky.—Louisville & N. R. Co. v. Reid, 81 S.W.2d 408, 258 Ky. 753.

20. Mass.—Anjou v. Boston El. R. Co., 94 N.E. 386, 208 Mass. 273, 21 Ann.Cas. 1143.

10 C.J. p 1059 note 52.

Evidence held sufficient

(1) To sustain a recovery for injuries resulting from negligence in respect of platforms or stations.

Ill.—Molloy v. Chicago Rapid Transit Co., 166 N.E. 530, 335 Ill. 164.

N.J.—Hexamer v. Public Service Ry. Co., 132 A. 310, 4 N.J.Misc. 184.

N.Y.—Dashew v. Interborough Rapid Transit Co., 175 N.Y.S. 875.

Pa.—Palmer v. Philadelphia Rapid Transit Co., 100 Pa.Super. 380.

Tex.—Texas Electric Ry. v. Stewart, Civ.App., 217 S.W. 1081, error refused—Ft. Worth & D. C. Ry. Co. v. Brown, Civ.App., 205 S.W. 378.

10 C.J. p 1059 note 52 [a] (1).

(2) To show negligence in failing to provide a proper place for passengers to wait.

Kan.—Higgins v. Southern Kansas Stage Lines Co., 42 P.2d 599, 141 Kan. 641.

Ky.—Davis v. Allen, 251 S.W. 194, 199 Ky. 442.

Tex.—Texas & P. Ry. Co. v. Shaw, Civ.App., 218 S.W. 814, dismissed for want of jurisdiction—Chicago, R. I. & G. Ry. Co. v. Faulkner, Civ. App., 194 S.W. 651.

(3) To show negligence in maintaining lights.

Ill.—Newberry v. Baltimore & O. C. Terminal R. Co., 223 Ill.App. 304 —White v. Chicago, P. & St. L. R. Co., 196 Ill.App. 459.

Mo.—Payne v. Davis, 252 S.W. 57, 298 Mo. 645.

Tenn.—Union Bus Terminal v. Mennen, 14 Tenn.App. 551.

Tex.—Missouri, K. & T. Ry. Co. of Texas v. Bailey, Civ.App., 186 S.W. 230, error dismissed.

Wis.—Pleva v. Milwaukee Electric Ry. & Light Co., 246 N.W. 694, 210 Wis. 568—Zilles v. Milwaukee Electric Ry. & Light Co., 246 N.W. 693, 210 Wis. 564.

(4) To show that defendant was not negligent respecting the number of lights and their arrangement around the station.—Mills v. Illinois Cent. R. Co., 86 So. 750, 148 La. 217.

(5) To show negligence in failing to furnish guards

Ill.—Newberry v. Baltimore & O. C. Terminal R. Co., 223 Ill.App. 304.

Ky.—South Covington & C. St. Ry. v. Vanice, 278 S.W. 116, 211 Ky. 774.

(6) To show that sufficient time had elapsed before accident for the carrier, in the exercise of proper care, to have known and remedied the conditions.

Mass.—Solomon v. Boston Elevated Ry. Co., 176 N.E. 810, 276 Mass. 139—Fournier v. New York, N. H. & H. R. Co., 189 N.E. 574, 286 Mass. 7, 92 A.L.R. 610.

Pa.—Greenfield v. Pittsburgh & Lake Erie R. Co., 157 A. 587, 305 Pa. 456.

(7) To sustain finding that plaintiff, struck by truck on platform, was injured in exercise of due care, by negligence.—Aldrich v. Boston & M. R. R., 130 N.E. 482, 238 Mass. 29.

(8) To make out prima facie case of negligence by elevated railroad in failing to apply ashes or other substance to reduce slippery condition

bed and tracks;[21] or in respect of the condition of its cars or conveyances,[22] or other appliances and

of platform, and dismissal of complaint was error—Rosenthal v New York Rapid Transit Corporation, 208 N.Y.S 427, 124 Misc. 513.

(9) To show negligence in allowing platform to be overcrowded—Commerford v. Interborough Rapid Transit Co, 192 N.Y.S 349, 199 App Div. 852.

(10) To sustain judgment for plaintiff who fell on steps of escalator leading to elevated railroad, at time escalator was stationary and being used as stairway, on ground that steps were negligently maintained—Hart v. New York Rapid Transit Corporation, 292 N.Y.S. 762, 249 App.Div. 844.

(11) To show that defendant railroad was negligent in maintaining a signal operating rod at a height of five feet, seven inches above the ground in front of its station over a portion of the platform over which passengers were accustomed to walk.—Texas Midland R. Co v. Truss, Tex.Civ.App, 186 S.W 249, error refused.

10 C.J. p 1059 note 52 [a].

Evidence held insufficient

(1) To sustain a recovery for injuries resulting from negligence in respect of stations or platforms

Mass.—Mascary v. Boston Elevated Ry Co, 155 N.E. 637, 258 Mass. 524—O'Brien v. Boston Elevated Ry. Co, 145 N.E 259, 250 Mass. 192—Pearson v. Payne, 139 N.E. 488, 245 Mass 158—MacGilvray v. Boston Elevated Ry. Co, 118 N.E. 166, 229 Mass 65, 4 A.L.R. 283

Minn.—McDonnell v. St. Paul Union Depot Co, 195 N.W. 538, 157 Minn. 66.

Mo.—Hamilton v. Pryor, 201 S.W. 550, L.R.A.1918D 212.

N.J.—Maphete v. Hudson & M. Ry Co, 119 A. 777, 98 N.J.Law 369, affirmed 124 A. 925, 100 N.J.Law 180—Holt v. New York, S & W. R Co., 158 A. 469, 10 N.J.Misc. 214.

N.Y.—Sheehan v. New York Rapid Transit Corporation, 280 N.Y.S 316, 245 App Div. 737—Murphy v. Hudson & M R. Co., 167 N.Y.S. 895, 180 App.Div. 585—Tod v. Interborough Rapid Transit Co., 226 N.Y.S. 388, 131 Misc. 311, reversing 220 N.Y.S 174, 129 Misc 156—Wichman v. New York Consol. R. Co, 165 N.Y.S. 83

Pa.—Wilson v. Reading Co., 95 Pa Super. 570—Neves v. Pennsylvania R Co, 11 Pa Dist & Co 187.

Tex.—Fort Worth & D C. Ry. Co. v. Armitage, Civ.App., 39 S.W.2d 108, error refused—Eastern Texas Electric Co. v. Tucker, Civ.App., 287 S.W 71

(2) To show knowledge or notice actual or constructive, of dangerous condition.

Mass.—Sack v. Davis, 139 N.E. 819, 245 Mass 114.

N.Y.—Boettcher v. Dowling, 277 N.Y.S. 228, 243 App Div 397, affirmed 200 N.E. 316, 270 N.Y 557.

(3) To show that brick, over which passenger disembarking from train stumbled, had been allowed to remain on walk through negligence of terminal company maintaining passenger station or railroad using it.—Meridian Terminal Co v Stewart, 108 So. 496, 143 Miss. 523.

(4) To show negligence in allowing platform to be overcrowded—Farmer v Interborough Rapid Transit Co, 205 N.Y.S 479, 123 Misc. 383

(5) To support finding in plaintiff widow's favor on either of the issues whether or not the place where the accident occurred was on passenger depot premises, and whether or not the railroad had invited the traveling public to use such place for ingress to, or egress from, its station—Chicago, R. I. & G Ry. Co. v. Taylor, Tex.Civ.App., 225 S.W. 822, dismissed for want of jurisdiction.

10 C.J. p 1059 note 52 [b].

Conclusive evidence

While custom of others under like conditions was evidence tending to show that defendant railroad was not negligent in providing a safe and suitable place for the passage of its passengers from its coaches to a transfer boat, it was not conclusive evidence of that fact—Yazoo & M V. R Co. v. Hill, 216 S.W. 1054, 141 Ark. 378.

21. Wash.—Northern Pac. R Co. v Valentine, 126 P 99, 70 Wash. 95
10 C.J. p 1060 note 53

Evidence held sufficient to show negligence in respect of the condition of the tracks

Ill.—See Healy v. Chicago City Ry. Co., 196 Ill.App. 1.

Tex.—Gulf, C. & S. F. Ry. Co. v Franklin, Civ.App., 155 S.W. 553.

10 C.J. p 1060 note 53 [a].

Evidence held insufficient to show negligence in respect of the condition of the roadbed or tracks

Cal.—Marovich v. Central California Traction Co., 216 P. 595, 191 Cal. 295

Mich.—Bury v. Detroit United Ry., 164 N.W. 460, 198 Mich. 447

22. N.J.—Murphy v. North Jersey St. R Co, 80 A. 331, 81 N.J.Law 706, 35 L.R.A.,N.S., 592, reversing 73 A. 1119

10 C.J. p 1060 note 54.

Evidence held sufficient

(1) To make a prima facie case.

Mo.—Mulderig v. Wells, App., 257 S.W. 1060.

N.J.—Russell v Public Service Ry. Co., 139 A. 322, 104 N.J.Law 34.

N.Y.—Bohrman v. Nassau Electric R Co, 174 N.Y.S. 155.

(2) To sustain a recovery for negligence in respect of the condition of the car causing the injury.

Ark.—Missouri Pac. R. Co v. Blevins, 59 S.W 2d 25, 187 Ark. 1163—St. Louis-San Francisco Ry. Co v Daniels, 280 S.W. 354, 170 Ark 346

Cal.—Sander v Los Angeles Ry. Corporation, 175 P. 901, 38 Cal App 222

Conn.—Waters v. Connecticut Co, 155 A. 59, 113 Conn. 768—Connelly v. Connecticut Co., 140 A. 121, 107 Conn 236

Ill.—Gilberts v Rockford & I Ry. Co., 215 Ill.App. 324. See Emerson v. Chicago City Ry. Co., 203 Ill. App. 412—Bourland v. Louisville & N. R. Co., 199 Ill.App. 126.

Ky.—Davis v. Allen, 251 S.W. 194, 199 Ky. 442.

La.—Scarborough v. Louisiana Ry. & Nav. Co, 82 So. 286, 145 La 323.

Me.—Davis v. Waterville, F & O. St. Ry. Co, 102 A. 374, 117 Me. 32.

Mass.—Guinevan v. Checker Taxi Co, 194 N.E 100, 289 Mass. 295—Hartford v Boston Elevated Ry. Co., 182 N.E 476, 280 Mass. 288—Scott v. Boston Elevated Ry Co, 176 N.E. 530, 276 Mass 21—Parker v. Middlesex & B St Ry. Co., 129 N.E. 353, 237 Mass. 291.

Mich.—Trent v Pontiac Transp Co, 275 N.W. 501, 281 Mich. 586—Durfey v. Milligan, 251 N.W. 356, 265 Mich. 97.

N.H.—Young v. Grand Trunk Ry., 100 A. 603, 78 N.H. 605—Guevin v. Manchester St. Ry, 99 A. 298, 78 N.H. 289, L.R.A.1917C 410

N.Y.—Furiati v. Brooklyn & Queens Transit Corporation, 296 N.Y.S. 913, 251 App.Div. 858.

Pa.—Geisenberger v. Pennsylvania R. Co., 65 Pa Super. 376.

Tex.—Houston Electric Co. v. Pearce, Civ.App., 192 S.W. 558, dismissed for want of jurisdiction—Texas Midland R Co. v. Sikes, Civ.App, 185 S.W 412, error refused.

10 C.J. p 1060 note 54 [a] (1).

(3) To show negligence in construction and maintenance of elevator

Ark.—Williams-Echols Dry Goods Co. v. Wallace, 219 S.W 732, 142 Ark 363.

D.C.—Goldenberg Co. v. Schicht, 83 F.2d 593, 65 App D.C 336.

Nev.—Smith v. Odd Fellows Bldg. Ass'n, 205 P. 796, 46 Nev. 48, 23 A.L.R 38

Wash.—Kranzusch v. Trustee Co., 161 P. 492, 93 Wash. 629.

10 C.J. p 1060 note 54 [a] (2)–(11).

(4) To justify finding of store company's negligence in maintenance of escalator—S. S. Kresge Co. v. McCallion, C.C.A.Mo., 58 F.2d 931.

equipment used as a means of transportation;[23] or in respect of the management and operation of the cars or other conveyances in general;[24] or in respect of negligence whereby a passenger is caused

(5) To show negligence in inspection

Cal.—Wendler v. Pickwick Stages System, 24 P.2d 543, 133 Cal.App. 592—Jianou v. Pickwick Stages System, 296 P. 108, 111 Cal.App. 754

Conn.—Duffy v. J. W. Bishop Co., 122 A. 121, 99 Conn. 573.

R.I.—Colton v. Rhode Island Co., 100 A. 498, 40 R.I. 264.

Tex.—Missouri, K. & T. Ry. Co. of Texas v. Rogers, 201 S.W. 417.

(6) To show failure properly to equip coaches.—Chicago, R. I. & P. Ry. Co. v. Warren, 269 P. 368, 132 Okl. 107.

(7) To show negligence, in an action by a passenger against a carrier for injuries received by the sudden releasing of a trapdoor of a car, over which the passenger was invited to pass.—McBride v. Pennsylvania R. Co., 123 A. 765, 99 N.J.Law 464.

(8) To sustain a defense of latent defect

La.—Martin v. Interurban Transp. Co., 131 So. 514, 15 La.App. 256.

Mo.—Sakowski v. Baird, 69 S.W.2d 649, 334 Mo. 951.

(9) To warrant the finding that the carrier was guilty of no negligence.—Slomka v. Nassau Electric R. Co., 132 N.Y.S. 156, 191 App.Div. 727.

(10) To support finding of no failure of duty of carrier respecting inspection and repair of elevator in which injured plaintiff was riding.—Dehmel v. Smith, 227 N.W. 274, 200 Wis. 292.

(11) To support finding step, handle bar, and vestibule floor of street car were in good order, and floor free from slippery substance causing passenger to fall.—Brandt v. New Orleans Public Service, 132 So. 244, 15 La.App. 391.

(12) To show, in action by passenger who received burns from steam pipes beneath seat in railroad coach, that passenger occupying seat in usual and ordinary manner would have no occasion to come in contact with heated pipes.—Houston & T. C. R. Co. v. Werline, Tex.Civ.App., 84 S.W.2d 288, error dismissed.

(13) To meet a prima facie case.—Courtney v. Gainsborough Studios, 174 N.Y.S. 855, 186 App.Div. 820.

10 C.J. p. 1060 note 54 [a]

Evidence held insufficient

(1) To sustain a recovery for negligence in respect of the condition of the car which caused the injury.

U.S.—Old South Lines v. McCuiston, C.C.A.Ga., 92 F.2d 439.

Ariz.—Phoenix Ry. Co. of Arizona v. Beals, 181 P. 379, 20 Ariz. 386.

Ill.—See Duley v. Illinois Cent. R. Co., 202 Ill.App. 523.

Ky.—Louisville Ry. Co. v. Potter, 194 S.W. 308, 175 Ky. 258.

La.—Harrison v. New Orleans Public Service, App., 176 So. 418—Woodley v. Service Cab Co., App., 159 So. 124—Wylie v. Shreveport Rys. Co., App., 140 So. 715, affirmed 145 So. 513, 176 La. 193.

Md.—Hagerstown & F. Ry. Co. v. Wingert, 105 A. 537, 133 Md. 455.

Mass.—Mulry v. Boston Elevated Ry. Co., 179 N.E. 595, 278 Mass. 210, 78 A.L.R. 1372—Grabb v. Nahant & Lynn Street Ry. Co., 145 N.E. 927, 250 Mass. 401—Coleman v. Boston Elevated Ry. Co., 143 N.E. 819, 249 Mass. 155—O'Neill v. Boston Elevated Ry. Co., 142 N.E. 904, 248 Mass. 362—Labrie v. Donham, 138 N.E. 3, 243 Mass. 584—Kinnarney v. Milford & U. St. Ry. Co., 134 N.E. 614, 241 Mass. 127—Kerr v. Worcester Consol. St. Ry., 117 N.E. 310, 228 Mass. 281.

Minn.—O'Leary v. St. Paul City Ry. Co., 164 N.W. 659, 138 Minn. 163.

Mo.—Tevis v. United Rys. Co. of St. Louis, App., 185 S.W. 738.

N.J.—Griffin v. Hohorst, Inc., 185 A. 535, 14 N.J.Misc. 421.

N.Y.—Callahan v. New York Rys. Corporation, 256 N.Y.S. 779, 235 App.Div. 219—Devine v. Empire State R. R. Corporation, 231 N.Y.S. 623, 220 App.Div. 466—Commerford v. Interborough Rapid Transit Co., 192 N.Y.S. 349, 199 App.Div. 852.

Ohio.—Cincinnati Traction Co. v. Keil, 26 Ohio Cir.Ct.,N.S., 445.

Okl.—Chicago, R. I. & G. Ry. Co. v. Jones, 187 P. 233, 77 Okl. 140.

R.I.—Mattinson v. United Electric Rys. Co., 142 A. 161.

Tex.—Texas Employers' Ins. Ass'n v. Chocolate Shop, Civ.App., 30 S.W.2d 416, affirmed, Com.App., 44 S.W.2d 989.

Wis.—Ennis v. Milwaukee Electric Ry. & Light Co., 232 N.W. 540, 202 Wis. 277—Gardner v. Chicago & M. Electric Ry. Co., 159 N.W. 1066, 164 Wis. 541.

10 C.J. p. 1060 note 54 [b] (1).

(2) To show negligence because of failure to equip cars with certain safety appliances.—Marovich v. Central California Traction Co., 216 P. 595, 191 Cal. 295.

(3) To show negligence on the part of a carrier in failing to provide a guard or barrier for the door of a box car in which soldiers were being transported.—Gainer v. Hines, 184 N.Y.S. 768, 194 App.Div. 21.

(4) To show that window was raised and improperly fastened by servant, and not by person for whose act street railway was not responsible.—Murphy v. Boston Elevated Ry. Co., 118 N.E. 191, 229 Mass. 38.

(5) To show defective window latch, in absence of showing that window which fell on street car passenger's arm was latched.—Murray v. International Ry. Co., 251 N.Y.S. 320, 233 App.Div. 262.

(6) To show that step was defective.—Lewis v. Washington Ry. & Electric Co., 285 F. 977, 52 App.D.C. 243.

(7) To show that suitcase had been in aisle of coach before passenger stumbled over it long enough to charge train employees with notice that it was there and with negligence in not removing it.—Gulf, C. & S.F. Ry. Co. v. Blackmon, Tex.Civ.App., 56 S.W.2d 199, error refused.

(8) To rebut presumption of negligence arising from injury of passenger by falling through open trapdoor on vestibule platform of railroad car, which trapdoor opened as she was going to step on it.—Johnston v. Director General of Railroads, 133 A. 158, 286 Pa. 166.

(9) To sustain defense of latent defect.—Wendler v. Pickwick Stages System, 24 P.2d 543, 133 Cal.App. 592.

10 C.J. p. 1060 note 54 [b]

23. W.Va.—Mannon v. Camden Interstate R. Co., 49 S.E. 450, 56 W.Va. 554.

10 C.J. p. 1060 note 55.

Evidence held sufficient to raise issue of negligence in selecting, keeping in repair, and operating spark arresters.—Schaff v. Sanders, Tex.Com.App., 269 S.W. 1034, affirming, Civ.App., 257 S.W. 670.

24. Iowa.—Graham v. Chicago, etc., R. Co., 107 N.W. 595, 131 Iowa 741, 117 Am.S.R. 445, 7 L.R.A.,N.S., 603.

10 C.J. p. 1060 note 56.

Evidence held sufficient

(1) To establish a prima facie case of negligent management or operation

Ark.—Meeks v. Graysonia, N. & A. R. Co., 272 S.W. 360, 168 Ark. 966.

Cal.—McIntosh v. Los Angeles Ry. Corporation, 59 P.2d 959, 7 Cal.2d 90—Robison v. McAlister, 13 P.2d 926—St. Clair v. McAlister, 13 P.2d 924, 216 Cal. 95.

Mont.—Jepsen v. Gallatin Valley Ry. Co., 195 P. 550, 59 Mont. 125.

N.Y.—Lombardi v. New York State Rys., 231 N.Y.S. 306, 224 App.Div. 438.

Okl.—Chicago, R. I. & P. Ry. Co. v. Grace, 159 P. 1011, 61 Okl. 12.

Wash.—Hayes v. Staples, 225 P. 417, 129 Wash. 436.

(2) To show negligence in the

management or operation of a train or car and to sustain a recovery for injuries caused thereby

Ala.—Selma Street & Suburban Ry. Co v Vaughan, 73 So 19, 197 Ala. 477.

Cal.—Leonard v. Pickwick Stage System, 7 P.2d 1059, 120 Cal.App 512—Seney v Pickwick Stages, Northern Division, 255 P. 279, 82 Cal App. 226

Conn.—Duffy v J W. Bishop Co., 122 A 121, 99 Conn. 573

Ill.—Sage v. Johnson, 205 Ill App 85—Dunne v Boland, 199 Ill App. 308. See Heineke v Chicago Railways Company, 199 Ill App 399, affirmed 116 N E 761, 279 Ill. 210.

Kan.—Jerobek v. Safeway Cab, Transfer & Storage Co, 73 P.2d 1097, 146 Kan. 859

Ky.—Louisville & N. R. Co. v. Ashley, 183 S.W. 921, 169 Ky. 330, L. R A.1916E 763

Mass.—Johnson v. Berkshire St. Ry. Co, 198 N E. 154—Dorman v. Worcester Consol. St. Ry. Co, 177 N. E. 812, 277 Mass. 95—Sullivan v. Boston Elevated Ry. Co., 112 N E. 1025, 224 Mass. 405.

Mich.—Kriss v Field, 216 N.W. 460, 241 Mich. 42.

Minn.—Hoppe v. Boulevard Transp. Co, 215 N.W. 852, 172 Minn. 516

Mo.—Cooley v. Dunham, 195 S.W. 1058, 196 Mo.App. 399.

Neb.—Giffen v. Lincoln Traction Co., 225 N.W 232, 118 Neb. 459.

N J.—Kyse v. Delaware, L. & W. R. Co., 98 A 193, 89 N.J.Law 363.

N.Y.—Mintz v. International Ry. Co., 165 N.Y S. 563, 177 App.Div. 942.

Okl.—Chicago, R. I. & P. Ry. Co. v. Warren, 269 P. 368, 132 Okl. 107.

Va.—Virginia Ry. & Power Co. v. Cherry, 105 S.E. 657, 129 Va. 262.

10 C.J. p 1060 note 56 [a] (1).

(3) To show negligence in causing an unusual and unnecessary jerk or jar, or sudden stop.

Ark.—Missouri Pac. R Co. v. Cathey, 254 S.W. 374, 160 Ark. 153—Scullin v. Vining, 191 S.W. 924, 127 Ark. 124.

Cal.—McIntosh v. Los Angeles Ry. Corporation, 59 P.2d 959, 7 Cal 2d 90—Goldstein v. United Railroads of San Francisco, 202 P. 155, 54 Cal.App 322.

Ky.—Millers Creek R Co. v Blevins, 205 S W. 911, 181 Ky. 800.

La.—Thompson v. New Orleans Ry. & Light Co, 83 So. 19, 145 La. 805—Scarborough v. Louisiana Ry. & Nav. Co., 82 So. 286, 145 La. 323—Dillon v. New Orleans Public Service, App., 170 So. 406.

Mo.—Johnson v. St. Louis & S. F. R. Co., App, 190 S.W. 352—Modrell v. Dunham, App., 187 S W. 561, 564

Okl.—McLaughlin v. Union Transp. Co., 57 P.2d 868, 177 Okl. 115.

Pa.—Di Paolo v. Philadelphia Rapid Transit Co., 101 Pa Super. 254—Diffendorfer v. Pennsylvania R. Co, 67 Pa Super 187.

Wis.—Hanley v Milwaukee Electric Railway & Light Co, 263 N W. 638, 220 Wis 281, followed in 263 N W 641, 220 Wis 288

10 C J p 1060 note 56 [a] (3).

(4) To show negligence in operating vehicle at high speed.

Ind.—Union Traction Co. of Indiana v Barnett, 127 N E. 287, 75 Ind App. 19.

N J.—Warner v Public Service Coordinated Transport, 158 A. 333, 10 N J Misc. 122

(5) To show negligence in rounding curve at high speed

U.S.—Atchison, T. & S. F Ry. Co. v Tiefel, C C.A Cal, 28 F.2d 977.

Neb.—Baldwin v. Omaha & C B St. Ry Co., 181 N.W. 525, 105 Neb. 614.

Tenn.—Baskin & Cole v. Whitson, 8 Tenn.App. 578.

10 C J. p 1060 note 56 [a] (4), (7).

(6) To show negligence in failing to keep a lookout.

Kan.—Griffith v. Atchison, T. & S. F. Ry. Co., 164 P. 1094, 100 Kan. 475.

Va.—Safety Motor Transit Corporation v. Cunningham, 171 S.E. 432, 161 Va. 356

(7) To support finding that accident in which passenger was alleged to have been injured by sudden stopping of street car, could not have occurred on such car and in manner as alleged by passenger—Phillips v. Shreveport Rys. Co., La. App., 163 So. 845.

(8) To show absence of negligence in management or operation

Ark.—Harris v. Bush, 196 S W. 471, 129 Ark. 369.

Cal.—Tucker v. Pacific Electric Ry. Co., 161 P 1147, 174 Cal. 42—Frederick v. San Francisco-Oakland Terminal Rys., 191 P. 1020, 48 Cal. App. 336.

La.—Baptiste v. New Orleans Public Service, App., 161 So. 783

Tenn.—Oliver v. Union Transfer Co., 71 S.W.2d 478, 17 Tenn App. 694.

10 C.J. p 1060 note 56 [a].

Evidence held insufficient

(1) To show negligence in operation or management.

Cal.—Rystinki v. Central California Traction Co., 165 P. 952, 175 Cal. 336.

Conn.—Viggiana v. Connecticut Co., 191 A. 95, 122 Conn. 514—Tardieu v. Connecticut Co., 154 A. 173, 113 Conn. 94.

Ill.—Letush v New York Cent. R. Co., 267 Ill App. 526

La.—Karp v. Powers, 124 So. 781, 12 La.App 518

Mass.—Conley v. Town Taxi, 10 N.E. 2d 74—Chandler v. Boston Elevated Ry. Co., 158 N.E. 669, 261 Mass. 230—Burns v. Boston Elevated Ry Co., 138 N E. 802, 244 Mass 451.

Miss.—Gulf & S. I R. Co. v. Meyers, 75 So 244, 114 Miss 458.

N Y.—Ruppenthal v. Nassau Electric R Co, 181 N Y S. 617, 191 App. Div 487.

Pa.—Miller v. Pittsburgh, H, B. & N C. Rys Co., 157 A 330, 102 Pa. Super. 547—Holutin v Philadelphia Rapid Transit Co., 89 Pa. Super 326

10 C J p 1060 note 56 [b] (1) (3).

(2) To show excessive speed

Mass.—Tsatsos v. Boston, R. B & L. R Co, 166 N E 633, 267 Mass. 365

Wash.—Wade v. North Coast Transp. Co., 5 P 2d 985, 165 Wash 418

(3) To show negligence in making sudden stop.

Conn.—Robinson v. Connecticut Co., 189 A 453, 122 Conn. 300.

Mass.—Conley v. Town Taxi, 10 N. E 2d 74.

(4) To warrant finding that brakes were defective or negligently applied—Tsatsos v. Boston, R. B & L. R Co., supra.

(5) To warrant finding that noise of whistle was excessive and unreasonable.—Tsatsos v. Boston, R. B & L R. Co., supra.

(6) To show that conductor was under duty to give emergency stop signal when passenger stood on running board—Bigelow v. Boston Elevated Ry. Co., 115 N.E. 250, 226 Mass. 116.

(7) To show that defendant street railway company discovered plaintiff's dangerous position on car steps in time to avert his being knocked off by post—Horwitz v. Jefferson County Traction Co., Tex.Civ.App., 188 S.W. 26, error refused.

(8) To warrant finding that motorman or inspector was negligent in operating car under elevated structure, from which solution of soda, water, and vitriol was dripping—Flaherty v. Boston Elevated Ry. Co., 126 N E. 798, 235 Mass. 422.

10 C.J. p 1060 note 56 [b]

Evidence held insufficient to show negligence in respect of jerking or jolting

(1) Generally.

Ga.—Georgia Power Co. v. Watts, 192 S.E. 493, 56 Ga App. 322—Southern Ry. Co v. Whitehead, 120 S E. 700, 31 Ga.App 398.

La.—Veith v. New Orleans Ry. & Light Co., 92 So 730, 152 La. 47.

N J.—Lederer v. Public Service Coordinated Transport, 157 A. 119, 9 N J.Misc 1127.

N.Y.—Cohen v. Surface Transp. Corporation of New York, 289 N Y. S 678, 160 Misc 247.

Pa.—Jenkins v. Beyer, 180 A. 135, 118 Pa Super. 527.

(2) Mere characterization of the movement as a "terrific" or "violent" lurch.—Norfolk & W. Ry. Co. v.

to fall from a car or other vehicle.[25] These rules | also apply in respect of the derailment of a car

Birchett, Va., 252 F. 512, 164 C.C.A. 428, 5 A.L.R. 1028.

(3) Description of movement of a car as it was rounding a curve as "a jar," "a jolt," "a rather severe jolt," "a swinging jolt," etc.—Hagerstown & F. Ry. Co. v. State, 99 A. 376, 129 Md. 318.

(4) Street car passenger's testimony that her hands were wrenched from seats—Phinney v. Eastern Massachusetts St. Ry. Co., 189 N.E. 52, 285 Mass. 207.

(5) Testimony of plaintiff that, when electric car stopped, the "floor was all shook up" and threw her off her feet.—Walsh v. Boston Elevated Ry. Co., 152 N.E. 64, 256 Mass. 17.

(6) Testimony of plaintiff that street car started with a terrible jump, and that she got a sensation that floor of car was going to be torn from under her.—Convery v. Eastern Massachusetts St. Ry. Co., 147 N.E. 824, 252 Mass. 418.

(7) Premature birth of a child to a passenger—Elliott v. Chicago, M. & St. P. Ry. Co., Mo., 236 S.W. 17.

(8) Passenger's testimony that a sudden jolt or jar of the train threw her against the side of a seat, and her grip to the floor—Elliott v. Chicago, M. & St. P. Ry. Co., supra.

(9) Testimony indicating that moving trolley car jerked suddenly or violently, unless it clearly appears from other facts that movement of car was beyond passenger's reasonable anticipation—Cutler v. Philadelphia Rapid Transit Co., 179 A. 434, 319 Pa. 351.

(10) Evidence merely showing that just as passenger sat down at extreme end of side seat of street car sudden stopping of car caused her to slip off seat onto floor, and that suddenness of stop was such as to cause several passengers hanging onto straps to be twirled around and passengers on side seats to be jostled up against each other.—Endicott v. Philadelphia Rapid Transit Co., 177 A. 17, 318 Pa. 12.

(11) In actions for falls sustained by passengers through sudden stopping or starting of street car, statements that street car started violently are not sufficient to show negligent operation, but there must be evidence inherently establishing that occurrence was of unusual character, or evidence of its effect on other passengers sufficient to show such fact.—Endicott v. Philadelphia Rapid Transit Co., supra.

(12) To make out a prima facie case of negligence against the carrier.—Delaney v. Buffalo, R. & P. Ry. Co., 109 A. 605, 266 Pa. 122.
10 C.J. p. 1060 note 56 [c].

Elevators; evidence held sufficient

(1) To sustain a recovery for injuries to a passenger caused by negligent operation
Iowa—Stukas v. Warfield, Pratt, Howell Co., 175 N.W. 81, 188 Iowa 878.
Mo.—Dieterman v. Springfield Traction Co., App., 26 S.W.2d 866.
Tex.—American Nat. Ins. Co. v. Nussbaum, Civ.App., 230 S.W. 1102, dismissed for want of jurisdiction.

(2) To warrant inference, in passenger's action for injuries, that operator of elevator did something causing accident, under res ipsa loquitur doctrine.—Dehmel v. Smith, 227 N.W. 274, 200 Wis. 292.
10 C.J. p. 1060 note 56 [d].

Elevators; evidence held insufficient to show negligence in management or operation of elevator—Grimm v. Globe Printing Co., Mo., 232 S.W. 676—10 C.J. p. 1060 note 56 [e].

25. Mass.—Coy v. Boston El. R. Co., 98 N.E. 1041, 212 Mass. 307.
10 C.J. p. 1061 note 57.

Reasonable inference

Where there is evidence affording a reasonable inference that deceased's fall from a street car was caused by the motorman's negligence, recovery is not defeated by a possibility not supported by evidence that it was caused by vertigo—Selma Street & Suburban Ry. Co. v. Vaughan, 73 So. 19, 197 Ala. 477.

Evidence held sufficient

(1) To sustain a recovery for injuries received in falling or being thrown from a train or car through the negligence of the carrier.
Ill.—See Wimmer v. Chicago Rys. Co., 205 Ill.App. 426—McConnell v. Chicago Rys. Co., 199 Ill.App. 490.
La.—Funk v. New Orleans Ry. & Light Co., 91 So. 506, 150 La. 1046.
Mo.—Jacobs v. Kansas City Rys. Co., App., 217 S.W. 579—Shelton v. Chicago, M. & St. P. Ry. Co., App., 190 S.W. 46.
10 C.J. p. 1061 note 57 [a] (1).

(2) To warrant a recovery for injuries received in falling or being thrown through the open door or gate of the vehicle.
U.S.—Olivieri v. Hines, C.C.A.Pa., 271 F. 939.
Pa.—Jenkins v. Beyer, 180 A. 135, 118 Pa.Super. 527.
Va.—Richmond-Ashland Ry. Co. v. Jackson, 162 S.E. 18, 157 Va. 628.
10 C.J. p. 1061 note 57 [a] (3).

(3) To sustain finding that passenger, attempting to pass from one car to another, was thrown through open vestibule door when train lurched.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Galvin, C.C.A.Mich., 54 F.2d 202, certiorari denied 52 S. Ct. 407, 285 U.S. 551, 76 L.Ed. 941.

(4) To sustain finding of negligence of stage company in failing securely to latch door closing against end of seat.—McCormick v. Index Stages, 242 P. 1090, 137 Wash. 507.

(5) To warrant finding that car was swaying when plaintiff was thrown from rear vestibule, and that such movements were excessive, violent, and irregular, and that plaintiff would not have been thrown off and killed by following car had there not been negligence.—Bilodeau v. Fitchburg & L. St. Ry. Co., 128 N.E. 872, 236 Mass. 526.

(6) To show negligence in that employee should have foreseen that children, running out on car platform, might fall or jump therefrom, and, while not bound to close doors or drive children back, or put them off, could have been found negligent in failing to take any of such steps—Longacre v. Yonkers R. Co., 140 N.E. 215, 236 N.Y. 119, 28 A.L.R. 1030, modifying 194 N.Y.S. 952, 202 App. Div. 845.
10 C.J. p. 1061 note 57 [a].

Evidence held insufficient

(1) To sustain a recovery for injuries received in falling or being thrown from a train or car through the negligence of the carrier.
U.S.—Griggs v. Erie R. Co., C.C.A.N.J., 71 F.2d 966.
La.—Brandt v. New Orleans Public Service, 132 So. 244, 15 La.App. 391.
Md.—Callis v. United Rys. & Electric Co., 97 A. 715, 128 Md. 406.
Mo.—Dunn v. Alton R. Co., 104 S.W.2d 311, 340 Mo. 979.
N.H.—Lewis v. Boston & M. R. R., 106 A. 605, 79 N.H. 165.
N.Y.—Cull v. Union Ry. Co. of New York City, 183 N.Y.S. 275, 192 App. Div. 649—Longacre v. Yonkers R. Co., 182 N.Y.S. 373, 191 App.Div. 770.
N.D.—Olson v. Minneapolis, St. P. & S. S. M. Ry. Co., 175 N.W. 371, 43 N.D. 371.
Pa.—Waldov v. Philadelphia Rapid Transit Co., 182 A. 129, 120 Pa.Super. 304.
10 C.J. p. 1061 note 57 [b] (1).

(2) To warrant the submission to the jury of the question whether it was negligent for the motorman to leave a gate open, or that the failure to close such gate was a proximate or contributing cause to the injury of a passenger who fell from the moving car.—Marovich v. Central California Traction Co., 216 P. 595, 191 Cal. 295.

(3) To show violation of ordinance requiring carrier to keep doors

or train,[26] or motor carriers whose vehicles run off the road;[27] or in respect of negligence in causing a collision,[28] and also in actions for injuries to passengers, caused by the carrier's negligence in

closed—Brandt v New Orleans Public Service, 132 So 244, 15 La App 391

(4) To warrant inference that carrier negligently permitted vestibule door to be open—Scott v New York Cent R Co., 216 N Y S 163, 216 App Div. 623.

10 C J. p 1061 note 57 [b]

26. Cal—Roberts v Sierra R Co., 111 P 519, 527, 14 Cal.App 180.

10 C J. p 1062 note 58

Evidence held sufficient to sustain a recovery for injuries received because of a derailment

Ill—Klaustermeier v. St. Louis, S & P. R R., 222 Ill App 374—Kanter v St Louis, S. & P R. R., 218 Ill App. 565.

Kan.—Orr v Missouri Pac. Ry. Co., 157 P 421, 98 Kan. 120.

10 C J p 1062 note 58 [a]

Evidence held insufficient to sustain a recovery for injuries caused by a derailment.

Va—Chesapeake & O. Ry. Co v. Baker, 143 S E. 299, 150 Va 647, addendum to opinion denying rehearing 141 S E. 753, 149 Va. 549, denying rehearing 140 S.E. 648, 149 Va. 549.

Wis.—Smith v. Chicago, N. S. & M R. R., 193 N.W. 64, 180 Wis 259.

10 C J p 1062 note 58 [b].

27. **Evidence held sufficient**

(1) To support finding that driver was negligent in permitting automobile to run off road and overturn, and that his negligence was proximate cause of accident.—Westfall v. Kern, 43 P 2d 392, 96 Colo 383.

(2) To warrant finding of bus company's negligence in action for injuries resulting from driving car into ditch, submitted on res ipsa loquitur doctrine.—Francisco v Circle Tours Sightseeing Co., 265 P 801, 125 Or. 80.

28. Utah.—Dearden v. San Pedro, etc., R Co, 93 P. 271, 33 Utah 147

10 C.J p 1062 note 59.

Evidence held sufficient

(1) To show negligence in causing a collision and to sustain a recovery for injuries caused thereby.

U S.—Interstate Stage Lines Co v. Ayers, C.C.A.Mo. 42 F.2d 611—Detroit Taxicab & Transfer Co. v Callahan, C C.A Mich., 1 F.2d 911

Ark.—St. Louis-San Francisco Ry Co. v. Britton, 31 S.W 2d 756, 182 Ark. 437—Caddo Transfer & Warehouse Co. v. Perry, 298 S.W 337, 174 Ark. 1030.

Cal.—Raddaut v. Watson, 264 P. 589, 89 Cal App 103—Gornstein v. Priver, 221 P 396, 64 Cal App. 249—Kemp v Van Bezel, 199 P. 1099, 53 Cal.App. 312.

Colo—Yelloway, Inc, v Garretson, 3 P.2d 292, 89 Colo 375

Ill—Haly v Decatur Yellow Cab Co, 8 N.E 2d 210, 290 Ill App. 615 See Parker v. Chicago Rys Co, 200 Ill App. 9—Hertel v. Chicago City Ry Co., 198 Ill App 415

Kan—Harris v. Combs, 53 P 2d 485, 143 Kan. 42—Mathews v Kansas City Rys Co, 178 P 252, 104 Kan 92—Bean-Hogan v Kloehr, 175 P 976, 103 Kan. 731

La.—Guernsey v Toye Bros. Yellow Cab Co, App, 172 So 459—Thibodeaux v. Star Checker Cab Co, App, 143 So. 101

Me—Wakely v Androscoggin & K. Ry. Co., 177 A 613, 133 Me. 514.

Mass—Rea v. Checker Taxi Co, 172 N E. 612, 272 Mass 510.

Minn.—Useman v. Minneapolis St Ry Co, 268 N.W. 866, 198 Minn 79.

Mo—Perkins v. United Rys. Co of St. Louis, App, 243 S.W. 224—Katon v. Kansas City Rys. Co, App., 241 S.W 983

N J. — Super v Garfield-Passaic Transit Co, 155 A. 619, 9 N J Misc. 812—Jones v. People's Rapid Transit Co, 153 A 373, 9 N J Misc 315—Ward v. Lydiard, 141 A. 166, 6 N.J.Misc 370.

N.Y—Gilligan v. Jones, 282 N.Y S. 354, 246 App Div 531, affirmed 2 N. E 2d 694, 271 N Y 559

Pa—Lelar v Quaker City Cabs, 164 A 105, 108 Pa Super 15—Deady v. Philadelphia Rapid Transit Co, 100 Pa Super. 208.

R I.—Zmuda v McFarland, 165 A 446, 53 R I. 210.

Tenn—Nashville Ry. & Light Co. v Owen, 11 Tenn.App 19

Tex—San Antonio Traction Co. v. Roberts, Civ App, 152 S.W. 455

Va—Richmond-Washington Motor Coaches v. Austin, 152 S E 357, 154 Va 148.

Wash—Shanahan v. International Stage Co, 3 P 2d 1092, 164 Wash. 609—Sinclair v. Yabe, 199 P 725, 116 Wash 409—McDorman v Dunn, 172 P. 244, 101 Wash. 120

Wis—Carson v Leet, 203 N W 394, 186 Wis. 566—Naus v Chicago & M. Electric Ry. Co., 201 N W. 281, 185 Wis. 178.

10 C J. p 1062 note 59 [a] (1).

(2) To make a prima facie case.

Mo.—Gibson v. Wells, App, 258 S. W. 1—Moran v Kansas City Rys Co, App., 232 S W. 1111

N J—Anderson v. Green Cab Co, 133 A. 788, 102 N.J.Law 521, 4 N. J Misc. 629.

N.Y—Notter v Union Ry. Co. of New York, 286 N Y.S. 745, 247 App Div. 140.

R I.—De Nicola v. United Electric Rys. Co., 182 A. 1, 55 R.I. 402.

Tex—Dallas Ry Co v Skorodynski, Civ.App 292 S.W 638

10 C J. p 1062 note 59 [c].

(3) To warrant finding of negligent speed of taxicab in action for cab passenger's injuries—Thorgrimson v Shreveport Yellow Cabs, La App, 161 So. 49

(4) To sustain finding that taxicab was driven at unduly high speed in center of road, so as to crash into approaching car causing passengers' injuries—Chaput v. Lussier, 165 A. 573, 132 Me 48.

(5) To support conclusion that collision was due to negligence of bus driver in partly driving on wrong side of slippery road at speed of thirty miles per hour—Sengebush v. Edgerton, 180 A 694, 120 Conn. 367

(6) To warrant a finding that the accident was caused by the driver's negligence in driving too close to an ice wagon—Ivancich v. Davies, 199 P 784, 186 Cal. 520.

(7) To show that taxicab driver was negligent in failing to keep proper lookout for approaching automobile—Friede v. Toye Bros. Yellow Cab Co, La App, 156 So. 48

(8) To sustain finding that passenger was not, as claimed, injured by being thrown backward against window sill when street car, slowly making right turn, collided with truck, resulting in slight physical damage to each—Groce v. New Orleans Public Service, La App, 159 So. 166.

(9) To authorize finding that collision could have been avoided by exercise of care owing to passenger.—Cohen v Eastern Massachusetts St Ry. Co, 165 N.E. 113, 266 Mass. 283

(10) To justify a verdict against both the carrier and the other party to the collision.

Cal—Malone v. Red Top Cab Co. of Los Angeles, 60 P 2d 543, 16 Cal App 2d 268—Simmons v. Pacific Electric Ry. Co., 212 P. 637, 60 Cal.App. 129

Conn—Rosenberg v Matulis, 166 A. 397, 116 Conn. 675

Ind—Ft. Wayne & Northern Indiana Traction Co v. Parish, 119 N E. 488, 67 Ind.App. 597.

La.—Brook v. Interurban Motor Transp. Co., 100 So. 428, 156 La. 286.

Neb—Daly v Publix Cars, 259 N. W 163, 128 Neb 403

N Y—Martin v. North American Cement Corporation, 284 N Y.S. 192, 246 App Div. 858.

(11) To sustain finding that negligence of the carrier was the sole

taking up passengers[29] and in actions for injuries | to passengers caused by carrier's negligence in set-

cause of the collision.—Noah v. Black & White Cab Co, 32 P 2d 437, 138 Cal App 236

(12) To show negligence was that of third party only.

Ohio—Canton Motor Coach v. Hall, 189 N E 505, 46 Ohio App. 516.

Pa—Wilkerson v Pittsburgh Rys Co, 163 A. 909, 309 Pa 381.

(13) To show that carrier was not negligent

Cal—Billig v. Southern Pac Co, 219 P 992, 192 Cal 357

Ky—Fitzgerald v. South Covington & C St. Ry. Co., 234 S W. 738, 192 Ky. 819.

La—Gager v. Teche Transfer Co., App, 153 So. 69.

Mich.—King v. Neller, 199 N.W. 674, 228 Mich. 15.

Minn—Eliason v. Minneapolis St. Ry. Co, 158 N.W. 622, 133 Minn. 392.

(14) To show that speed of street car sideswiping wagon was not excessive—Larose v. New Orleans Public Service, 119 So 908, 10 La App 91

(15) To sustain a verdict for both defendants.—Day v. Brooklyn City R Co, 191 N Y S. 484, 199 App Div. 179.

(16) To sustain finding, in action by taxicab passenger for injuries sustained in collision, that motorist made left turn at intersection with due care, although motorist did not at all times watch approaching taxicab that later collided with him.—Noah v Black & White Cab Co., 32 P 2d 437, 138 Cal App 236.
10 C.J. p 1062 note 59 [a].

Evidence held insufficient

(1) To show negligence in causing a collision and to sustain a recovery for injuries caused thereby

U S—Third Ave Ry Co. v. Mills, N.Y, 249 F. 661, 161 C C.A. 571.

Cal—Rice v Smith, 24 P 2d 369, 133 Cal App. 403.

Ky.—Wigginton's Adm'r v. Rickert, 217 S W. 933, 186 Ky 650.

La.—Groce v. New Orleans Public Service, App, 159 So 166—Upton v. Bell Cabs, App, 154 So 359.

Neb.—Knight v. Lincoln Traction Co., 255 N.W. 774 127 Neb 447

N Y—Quinlan v Sixth Ave R Co., 4 Daly 487

Ohio—Ohio Traction Co v. Miller, 13 Ohio Cir Ct ,N.S , 67

Pa—Ruthberg v. Philadelphia Rapid Transit Co, 151 A 19, 300 Pa. 536—Howell v. Philadelphia Rapid Transit Co, 94 Pa Super 449.

R I—McKay v. Rhode Island Co, 113 A 673

10 C J p 1062 note 59 [b] (1).

(2) To show willful negligence of carrier—Dierickx v. Davis, 137 N E. 685, 80 Ind.App. 71, certiorari denied 44 S Ct. 36, 263 U.S. 709, 68 L.Ed. 518.

(3) To show that negligence of either carrier or other party caused collision—McNiff v. Boston Elevated Ry Co, 125 N E. 391, 234 Mass. 252

(4) To show conclusively that carrier failed to use the highest degree of care.—Lamar v Panhandle & S F. Ry Co., Tex Civ.App, 234 S W. 605, reversed on other grounds, Com App., 248 S.W. 34.

(5) To sustain verdict for injured street car passenger on theory that collision between street car and allegedly stalled automobile was due to excessive speed of street car on slippery tracks—Williams v. United Electric Rys Co., 167 A. 117, 53 R.I 472.

(6) To overcome presumption raised by doctrine of res ipsa loquitur—Illinois Central Ry. Co. v. Solinsky, 12 Tenn App 389.

(7) To support verdict for defendant.

N J—Gash v. Khan, 160 A. 367, 10 N J.Misc 708

N Y—Sanucci v. New York Cent. R Co., 228 N.Y.S. 505, 223 App.Div. 517.

(8) To make a prima facie case—Froio v. Eastern Massachusetts St Ry. Co, 142 N E 255, 247 Mass 474. 10 C.J. p 1062 note 59 [b].

Testimony exonerating employee

In passenger's action for negligent injury from railway collision against railroad and railroad employee, testimony of employee, exonerating himself, was not undisputed evidence of nonliability of railroad—Kansas City Southern Ry Co. v. Cockrell, 277 S W. 7, 169 Ark 698

29. Conn.—Kopacka v. New York, etc, R Co, 90 A 27, 88 Conn. 82 10 C J. p 1063 note 60.

Evidence held sufficient

(1) To sustain a recovery for injuries received by passenger attempting to board a car or train

Cal—Keyser v San Diego Electric Ry. Co, 60 P.2d 136, 16 Cal App 2d 48.

Ill—Phil v Springfield Consol. Ry Co., 219 Ill App. 588—Little v Peoria Ry Co, 215 Ill App. 385.

Ind—Terre Haute, Indianapolis & Eastern Traction Co v. Angelo, 169 N E 478, 95 Ind App 476

Ky.—Louisville & N R. Co v. Bowman, 270 S W. 471, 208 Ky. 39.

Mo—Baldwin v. Kansas City Rys Co, App., 214 S W. 274—Elliott v. United Rys. Co. of St. Louis, 214 S W 234, 201 Mo.App. 662—Burkett v Missouri Pac R. Co., App., 208 S W. 104.

N.J—Tansey v. Tedesco, 107 A. 419, 93 N.J.Law 259.

Okl—Muskogee Electric Traction Co. v. Latty, 187 P. 491, 77 Okl. 156.

Pa.—Ensor v. Pennsylvania R Co., 159 A 872, 306 Pa 451—Ferrara v West Jersey & S R. Co, 71 Pa. Super. 290.

Va—Burr v. Virginia Railway & Power Co., 145 S E 833, 151 Va. 934

(2) To sustain a recovery for injuries to a prospective passenger.

Ark.—Ft Smith Light & Traction Co. v. Phillips, 206 S.W 453, 136 Ark. 310

N.J—Olsen v. White Way Tours, 153 A. 267, 9 N.J.Misc. 181.

N Y—Campbell v. Richmond Light & R Co, 127 N E 271, 228 N.Y 383, reversing 168 N Y.S 813, 181 App Div. 320, and reargument denied 129 N.E 906, 229 N.Y. 537.

Tex.—Texas Electric Ry. v. Stewart, Civ App., 217 S.W. 1081, error refused.

(3) To justify inference that passenger was in act of boarding car, and conductor should have known such fact—Garlinski v Chicago City Ry Co., 257 Ill App 414

(4) To show that passenger's injury would probably not have occurred if there had been a platform stool or porter at car which she was re-entering after a temporary absence—Sellars v. Southern Pac. Co, 166 P 599, 33 Cal App 701

(5) To warrant finding that street car motorman could have seen prospective passenger crossing street in time to have checked or stopped car—Schimmelpfenning v. Wells, Mo, 24 S W.2d 154.

(6) To show that electric railway operated car at negligent rate of speed in approaching regular local stopping place—Lake Shore Electric Ry. Co v. Ordway, 156 N.E 235, 24 Ohio App. 317.

(7) To warrant finding that passenger was not, as contended, injured in boarding train when conductor released passenger's arm requiring passenger to seize handrail—St. Louis, S F & T. Ry Co. v Gore, Tex Civ App, 69 S W 2d 186, error dismissed

(8) To support finding that carrier was not negligent—Foote v. Chicago, N S. & M R. Co, 256 Ill. App. 581.

(9) To show that railroad, sued for injuries passenger sustained while boarding train, was not negligent in obstructing passageway.—Hail v. Missouri-Kansas-Texas R. Co. of Texas, Tex.Civ.App., 30 S.W. 2d 1062, affirmed Missouri-Kansas-Texas R. Co. of Texas v. Hail, Com. App., 48 S.W.2d 589.

ting down passengers,[30] such as in starting the car | before the passenger has had a reasonable oppor-

(10) To support verdict for defendant.
Cal.—Dwyer v. Los Angeles Ry. Corporation, 2 P.2d 468, 115 Cal.App. 709.
La.—Jones v. New Orleans Public Service, 140 So. 871, 19 La.App. 699.
Mass.—Gerber v. New York Cent. R. R., 192 N.E. 837, 288 Mass. 318.
10 C.J. p. 1063 note 60 [a].

Evidence held insufficient

(1) To raise issue regarding railroad's negligence in not having employee assist passenger in boarding train when he was injured.—Hail v. Missouri-Kansas-Texas R. Co. of Texas, Tex.Civ.App., 30 S.W.2d 1062, affirmed Missouri-Kansas-Texas R. Co. of Texas v. Hail, Com.App., 48 S.W.2d 589.

(2) To show willful and wanton negligence of motorman whose car struck prospective passenger.—Covert v. Rockford & I. Ry. Co., 132 N.E. 504, 299 Ill. 288.

(3) To show that train, on which plaintiff, holding a drover's pass, was seeking to take passage in caboose, stood at usual place where such trains stand before starting.—Texas & N. O. R. Co. v. Tillman, Tex.Civ.App., 197 S.W. 1128, error refused.

(4) To support verdict against railroad for alleged injuries to passenger when caught in door during attempt to board trolley car.—Grace v. Atlantic City & S. R. Co., 157 A. 439, 10 N.J.Misc. 38.

(5) To support judgment for defendant.—Bentrovato v. Concourse Bus Line, 200 N.Y.S. 356.

Evidence held insufficient to show negligence

(1) In taking up passenger.
Ala.—Southern Ry. Co. v. Hayne, 95 So. 879, 209 Ala. 186.
Cal.—Gaskill v. Pacific Electric Ry. Co., 159 P. 200, 30 Cal.App. 593.
La.—Dale v. New Orleans Ry. & Light Co., 80 So. 588, 144 La. 357.
N.Y.—Hessler v. New York Rys. Co., 167 N.Y.S. 863.
Okl.—Chicago, R. I. & P. Ry. Co. v. Reinhart, 160 P. 51, 61 Okl. 72.
Pa.—Harrar v. Philadelphia Rapid Transit Co., 92 Pa.Super. 242.
10 C.J. p. 1063 note 60 [b] (1).

(2) As to prospective passenger.
Cal.—Gore v. Market Street Ry. Co., 48 P.2d 2, 4 Cal.2d 154.—Elliott v. Market St. Ry. Co., 40 P.2d 547, 4 Cal.App.2d 292.
Me.—Robitaille v. Androscoggin & K. Ry. Co., 121 A. 540, 122 Me. 570.
Mass.—Fairbanks v. Boston Elevated Ry. Co., 129 N.E. 367, 237 Mass. 127.
Mo.—McMiens v. United Rys. Co. of St. Louis, 202 S.W. 1082, 274 Mo. 326.
Va.—Veale v. Virginia Ry. & Power Co., 131 S.E. 200, 144 Va. 210.

(3) In suddenly increasing speed of car as passenger attempted to board it.—Ginochio v. City and County of San Francisco, 228 P. 428, 194 Cal. 159.—10 C.J. p. 1063 note 60 [b] (3).

(4) In closing platform or door over steps before passenger had reasonable time and opportunity to board train.—Palen v. Wheelock, C.C.A.Mo., 13 F.2d 34.

(5) In closing vestibule door on train.—Palen v. Wheelock, supra.

30. Mo.—Weber v. Kansas City Cable R. Co., 12 S.W. 804, 13 S.W. 587, 100 Mo. 194, 18 Am.S.R. 541, 7 L.R.A. 819.
10 C.J. p. 1063 note 61.

Evidence held sufficient

(1) To sustain a recovery for negligence in setting down a passenger.
Ill.—See Larson v. Chicago City Ry. Co., 209 Ill.App. 531.
Mass.—Poppel v. Boston Elevated Ry. Co., 155 N.E. 267, 258 Mass. 389.
Mich.—Pawlicki v. Detroit United Ry., 158 N.W. 162, 191 Mich. 536.
Minn.—McMurray v. Twin City Motor Bus Co., 228 N.W. 154, 178 Minn. 561.
Mo.—Stakebake v. Union Pac. R. Co., App., 185 S.W. 1166.
Pa.—Montalini v. Pennsylvania Co., 100 A. 806, 256 Pa. 249.
Tex.—Ft. Worth & D. C. Ry. Co. v. Courtney, Civ.App., 214 S.W. 839, dismissed for want of jurisdiction.—St. Louis Southwestern Ry. Co. of Texas v. Preston, Civ.App., 194 S.W. 1128, affirmed, Com.App., 228 S.W. 928.—Wichita Falls Traction Co. v. Berry, Civ.App., 187 S.W. 415, error dismissed.
10 C.J. p. 1063 note 61 [b] (1).

(2) To show negligence in making sudden stop.
Conn.—Spiro v. Bridgeport Auto Transit Co., 155 A. 416, 113 Conn. 773.
Mass.—Danofsky v. Boston Elevated Ry. Co., 117 N.E. 4, 228 Mass. 97.
Mo.—Goodwin v. Wells, 285 S.W. 112, 220 Mo.App. 1.
Va.—Virginia Ry. & Power Co. v. Bailey, 96 S.E. 275, 123 Va. 250.

(3) To sustain a recovery for injuries caused a passenger while alighting from a moving train or car.
Ark.—St. Louis, I. M. & S. Ry. Co. v. Duffey, 183 S.W. 748, 122 Ark. 429.
Minn.—Leonczak v. Minneapolis, St. P. & S. S. M. Ry. Co., 201 N.W. 551, 161 Minn. 304.
10 C.J. p. 1063 note 61 [b] (2).

(4) To support verdict for plaintiff struck by street car when alighting from jitney bus.—Alexander v. Matteucci, 135 A. 820, 5 N.J.Misc. 133.

(5) To establish the railroad's negligence in failing to light the station platform or its surroundings, carrying plaintiff beyond it, inviting him to alight in an unfamiliar place in the darkness, and failing to give him any warning or instructions.—Payne v. Davis, 252 S.W. 57, 298 Mo. 645.—Copeland v. Davis, Mo.App., 253 S.W. 427.

(6) To warrant finding that passenger was killed by falling into a river after being misled into alighting on a bridge, when his train stopped at a water tank after a brakeman called his station.—Larson v. Green Bay & W. R. Co., 192 N.W. 63, 179 Wis. 510.

(7) To show negligence in failing to assist passenger in alighting.
Iowa.—Olson v. Des Moines City Ry. Co., 170 N.W. 466, 186 Iowa 384.
Mo.—Turner v. Wabash R. Co., App., 211 S.W. 101.

(8) To sustain finding that defendant was negligent because of the manner in which the conductor or brakeman assisted her off the car.—Steketee v. Waters, 159 N.W. 368, 193 Mich. 177.

(9) To show negligence in respect of the location of the step box.—Spry v. Missouri Pac. R. Co., 211 P. 1112, 112 Kan. 580.

(10) To establish that passenger fell from step of street car because step was negligently in improper position.—Baptiste v. New Orleans Public Service, 127 So. 655, 13 La.App. 625.

(11) To authorize a finding that defendant raised the step before plaintiff reached a position of safety.—McCormack v. United Rys. Co. of St. Louis, Mo.App., 238 S.W. 579.

(12) To show that an electric railway company did not authorize its employees to invite and assist passengers to use the baggage and mail compartment of a combination car in leaving the car.—Davidson v. Washington & O. D. Ry., 105 S.E. 669, 129 Va. 99.

(13) To rebut successfully passenger's prima facie case that street car motorman negligently closed automatic door as passenger was descending, causing plaintiff's leg to become jammed between door and iron rod, and causing passenger to fall.—Carter v. New Orleans Public Service, La.App., 146 So. 49.
10 C.J. p. 1063 note 61 [b].

Evidence held insufficient

(1) To sustain a recovery for negligence in setting down a passenger.

tunity to reach a place of safety in boarding[31] or | alighting from[32] a train or car, or in failing to pro-

Conn.—Byrne v Connecticut Co., 195 A. 184, 123 Conn. 304.
Ill.—Coultis v. Illinois Terminal Co., 3 N.E.2d 166, 285 Ill.App. 600—Jaroszewski v. Chicago Rys. Co., 241 Ill.App. 1. See Palm v. Rockford City Traction Co., 200 Ill.App. 115.
Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Francis, 220 S.W. 739, 187 Ky. 703—Kentucky & T. Ry. Co. v. Ball, 194 S.W. 785, 175 Ky. 630.
La.—Lakios v. New Orleans, T. & M. Ry. Co., App., 147 So. 525—Betts v. Shreveport Rys. Co., 137 So. 615, 18 La.App. 282—Delhomer v. St. John the Baptist Parish School Board, 126 So. 272, 12 La.App. 580—Burnett v. New Orleans Public Service, 7 La.App. 743—Bass v. Illinois Central Ry. Co., 4 La.App. 175.
Me.—Mahan v. Hines, 115 A. 132, 120 Me. 371.
Mass.—Rogers v. Boston Elevated Ry. Co., 141 N.E. 285, 246 Mass. 478.
N.H.—Currier v. Boston & M. R. R., 97 A. 741, 78 N.H. 586.
N.Y.—Beltz v. Buffalo, R. & P. Ry. Co., 119 N.E. 81, 222 N.Y. 433, reversing 160 N.Y.S. 1124, 171 App. Div. 976—Johnson v. Brooklyn & Queens Transit Corporation, 292 N.Y.S. 323, 249 App.Div. 779.
S.C.—Bennett v. Atlantic Coast Line R. Co., 123 S.E. 327, 129 S.C. 13.
Tex.—Lattimer v. Texas & Pac. Ry. Co., Civ.App., 106 S.W.2d 727—Texas & N. O. R. Co. v. Jones, Civ. App., 187 S.W. 717.
Va.—Walters v. Norfolk & W. Ry. Co., 94 S.E. 182, 122 Va. 149.
10 C.J. p. 1063 note 61 [c] (1).

(2) To sustain a recovery for injuries caused a passenger while alighting from a moving car.—Marovich v. Central California Traction Co., 216 P. 595, 191 Cal. 295—10 C.J. p. 1063 note 61 [c] (2).

(3) To show that street car was operated with defective step mechanism or that mechanism was carelessly operated.—Wylie v. Shreveport Rys. Co., 145 So. 513, 176 La. 193, affirming, App., 140 So. 715.

(4) To warrant a finding that a conductor of a train was personally negligent, where a passenger was injured while alighting.—Watts v. Spokane, P. & S. Ry. Co., 171 P. 901, 88 Or. 192.

(5) To show, as a matter of law, a street railroad's negligence in permitting passenger to alight at other than usual stopping place.—Scherer v. Philadelphia Rapid Transit Co., 145 A. 76, 295 Pa. 199.

(6) To show that a man in cap and uniform, assisting passengers to alight by a door not intended for passengers, was an employee of the company or acting for it.—Davidson v. Washington & O. D. Ry., 105 S.E. 669, 129 Va. 99.

(7) To sustain, in an action for injuries to a passenger who claimed she fell from a street car when her skirt caught on a basket which another passenger had set on the platform near the steps, thereby tripping her and throwing her to the ground, the contention of the carrier that plaintiff had reached the ground in safety and thereafter fell from some unknown cause.—Hopkins v. New Orleans Ry. & Light Co., 90 So. 512, 150 La. 61, 19 A.L.R. 1362.
10 C.J. p. 1063 note 61 [c].

Violation of rule of public utilities commission requiring motor busses to stop at extreme right of available roadway when taking on or discharging passengers would justify finding of negligence.—Hyde v. Connecticut Co., 188 A. 266, 122 Conn. 236.

31. N.Y.—Akersloot v. Second Ave. R. Co., 30 N.E. 195, 131 N.Y. 599, 15 L.R.A. 489, affirming 8 N.Y.S. 926.
10 C.J. p. 1064 note 62.

Evidence held sufficient

(1) To sustain a recovery for negligence in starting car or train while passenger was attempting to board it.
Cal.—Riley v. Southern Pac. Co., 207 P. 699, 57 Cal.App. 477.
Ga.—Georgia Ry. & Power Co. v. Freeney, 96 S.E. 575, 22 Ga.App. 457.
Ill.—See Devine v. Chicago City Ry. Co., 195 Ill.App. 304.
N.J.—Moore v. Atlantic & Suburban Ry. Co., 144 A. 309, 7 N.J.Misc. 105.
N.Y.—Marinelli v. New York Rys. Co., 175 N.Y.S. 539.
Pa.—Donnelly v. Pennsylvania Co., 97 A. 272, 252 Pa. 175.
Tex.—Texas & N. O. R. Co. v. Tillman, Civ.App., 197 S.W. 1128, error refused.
10 C.J. p. 1064 note 62 [a] (1).

(2) To sustain a recovery for injuries received when car was started in unusual manner before passengers were seated.—Hallinan v. Worcester Consol. St. Ry. Co., 172 N.E. 862, 273 Mass. 27—Convery v. Eastern Massachusetts St. Ry. Co., 147 N.E. 824, 252 Mass. 418.

(3) To afford ground for reasonable inference that the conductor knew that plaintiff intended to board the car, and to show defendant's knowledge of such intent.—Morris v. Detroit United Ry., 193 N.W. 871, 223 Mich. 264.
10 C.J. p. 1064 note 62 [a].

Evidence held insufficient to sustain recovery for negligence in starting or jerking a train or car while passenger was boarding it.
La.—Murphy v. New Orleans Public Service, App., 169 So. 890.
Md.—Brocato v. United Rys. & Electric Co. of Baltimore, 99 A. 792, 129 Md. 572.
Tex.—Hail v. Missouri-Kansas-Texas R. Co. of Texas, Civ.App., 30 S.W.2d 1062, affirmed Missouri-Kansas-Texas R. Co. of Texas v. Hail, Com.App., 48 S.W.2d 589.
10 C.J. p. 1064 note 62 [b].

Intention bona fide to become passenger, and acceptance by carrier, may be shown by attendant circumstances and by implications therefrom.—Gulf, M. & N. R. Co. v. Bradley, 142 So. 493, 167 Miss. 603.

32. Del.—Girardo v. Wilmington, etc., Tract. Co., 90 A. 476, 5 Boyce 25.
10 C.J. p. 1064 note 63.

Evidence held sufficient

(1) To sustain a recovery for injuries received when the train or car was started or jerked while passenger was alighting.
Cal.—Baker v. Market St. Ry. Co., 11 P.2d 912, 123 Cal.App. 688—Andrews v. San Diego Electric Ry. Co., 205 P. 700, 56 Cal.App. 414.
Fla.—Atlanta & St. A. B. Ry. Co. v. Kelly, 82 So. 57, 77 Fla. 479.
Ga.—Southern Ry. Co. v. Williams, 91 S.E. 894, 19 Ga.App. 462.
Ill.—Kapella v. Chicago Rys. Co., 228 Ill.App. 528. See Ensminger v. Chicago Rys. Co., 205 Ill.App. 603—Feldman v. Chicago Rys. Co., 205 Ill.App. 288—Emerson v. Chicago City Ry. Co., 203 Ill.App. 412—McConnell v. Chicago Rys. Co., 199 Ill.App. 490.
Ind.—Hines v. Rollins, 179 N.E. 183, 97 Ind.App. 251.
Iowa.—Elmore v. Des Moines City Ry. Co., 224 N.W. 28, 207 Iowa 862.
Ky.—Kentucky Traction & Terminal Co. v. Peel, 214 S.W. 874, 185 Ky. 207—Louisville Ry. Co. v. Farmer, 206 S.W. 619, 182 Ky. 368.
Me.—Clapp v. Cumberland County Power & Light Co., 117 A. 307, 121 Me. 356.
Mich.—Tuttle v. Detroit J. & C. Ry. Co., 159 N.W. 498, 193 Mich. 390.
Minn.—Stevens v. St. Paul City Ry. Co., 167 N.W. 1045, 140 Minn. 306.
Mo.—Huntington v. Kansas City Rys. Co., App., 233 S.W. 95—Hartweg v. Kansas City Rys. Co., App., 231 S.W. 269—Roach v. Kansas City Rys. Co., App., 228 S.W. 520—Patterson v. Lusk, App., 196 S.W. 65.
N.Y.—Mallory v. International Ry. Co., 231 N.Y.S. 385, 224 App.Div. 455—Bradley v. Waverly, Sayre & Athens Traction Co., 191 N.Y.S. 451.
Ohio.—Cleveland Ry. Co. v. Smith, 172 N.E. 409, 35 Ohio App. 204—Northern Ohio Traction & Light Co. v. Schrock, 7 Ohio App. 229.

vide a safe place for setting down passengers;[33] | and also apply in actions for injuries caused by

Okl.—Oklahoma Union Ry Co v. Bertrand, 264 P. 621, 129 Okl 263.
R.I.—Buttera v. Rhode Island Co, 110 A. 71—Brown v. Rhode Island Co, 102 A 965.
Tenn.—Nashville, C & St. L Ry. v. Akin, 203 S.W 329, 140 Tenn 34
Tex.—Dallas Ry Co. v. Hallum, Civ. App., 276 S W 460—Houston E. & W. T. Ry. Co v. Lynch, Civ.App, 208 S W. 714.
Va.—Virginia Trust Co. v. Raymond, 91 S E 613, 120 Va. 674.
10 C.J. p 1064 note 63 [a] (1).

(2) To sustain finding that conductor gave starting signal or that movement of car was due to negligence in starting the car.—Fitzpatrick v. Boston Elevated Ry. Co., 112 N.E. 94, 223 Mass. 475.

(3) To show that plaintiff fell after alighting from car—Young v. New Orleans Ry. & Light Co., 86 So. 268, 147 La. 820

(4) To establish that train had stopped before passenger undertook to alight—Louisville & N. R. Co. v Campbell, 35 S.W.2d 26, 237 Ky. 182

(5) To show that negligence in suddenly starting street car was proximate cause of passenger's injuries.—Smith v. Dallas Ry. Co, Tex. Civ App, 8 S.W.2d 548, error dismissed

(6) To sustain verdict for defendant.
Ill.—See Schuman v. Chicago Rys Co., 198 Ill.App. 447.
Kan.—Hunter v Joplin & P. Ry. Co., 197 P. 1092, 109 Kan. 169.
Tex.—Fox v. Houston & T. C. Ry. Co, Civ.App., 186 S.W. 852.
10 C J. p 1064 note 63 [a].

Evidence held insufficient

(1) To sustain a recovery for negligence in starting or moving a train or car before a passenger had a reasonable opportunity to alight in safety.
Ala.—Erwin v. Birmingham Ry., Light & Power Co, 76 So. 915, 200 Ala. 557.
Ill.—See Rockstroch v. Calumet & S. C. Ry. Co, 210 Ill.App. 250—Dallas v. East St. Louis & Suburban Ry. Co., 203 Ill.App. 129—Joseph v. Chicago City Ry. Co, 202 Ill.App. 159—Davenport v. Calumet & South Chicago Ry. Co., 197 Ill App 372.
La.—Rainey v. New Orleans Public Service, App., 171 So 585—Wark v. New Orleans Public Service, App, 168 So. 797—Barnes v. Shreveport Rys Co., 120 So. 551, 9 La.App. 261—Hebert v. New Orleans Public Service, 119 So. 575, 10 La App. 341
Me.—Clapp v. Cumberland County Power & Light Co, 117 A. 307, 121 Me. 356
Mass.—Gollis v. Eastern Massachusetts St. Ry., 149 N.E. 607, 254 Mass. 157
N.J.—Fish v. Atlantic City & S R. Co., 156 A. 326, 9 N J Misc. 1051—Rappoport v. Atlantic City & Seashore Ry. Co, 152 A. 706, 9 N J Misc 51—Martin v. Public Service Co-ordinated Transport, 152 A 699, 9 N J Misc 54—Lawson v West Jersey & Seashore R. Co., 144 A. 187, 7 N J.Misc. 116.
N Y.—Dumanski v Stradone, 232 N Y S 485, 225 App.Div 181.
10 C J p 1064 note 63 [b] (1).

(2) To warrant inference that car was started in unusual way—Desautels v. Massachusetts Northeastern St. Ry. Co., 177 N E 578, 276 Mass. 381

(3) To show that motorman applied power negligently—Desautels v. Massachusetts Northeastern St. Ry. Co, supra.

(4) To show negligent operation—Desautels v. Massachusetts Northeastern St. Ry. Co., supra.

(5) To defeat verdict for plaintiff.—Burnham v. Peoria Ry. Co., 223 Ill App 573
10 C J. p 1064 note 63 [b].

Proof of sudden jerk of street car permits inference that it was caused by motorman, where there is no other probable agency to which to attribute such starting.—Lammert v. Wells, Mo.App, 282 S.W. 487.

Elevator; evidence held sufficient to establish prima facie case.—Roberts v Schaper Stores Co., 3 S W.2d 241, 318 Mo. 1190.

33. Md.—Topp v. United R, etc., Co., 59 A. 52, 99 Md 630, 1 Ann.Cas 912.
10 C J p 1065 note 64.

Negligence is sufficiently shown, in action for injury to trolley car passenger while alighting to temporary platform, by evidence showing that accident would not have happened had appliance been properly cared for—Gormley v. Union Paving Co., 95 Pa.Super. 78.

Evidence held sufficient

(1) To sustain a recovery for negligence in failing to provide a safe place for setting down passengers
Ark.—Lusk v. Craft, 187 S.W. 176, 124 Ark. 599.
La.—Thomas v Shreveport Rys. Co., 127 So 119, 13 La App 212.
Mo.—Ganahl v. United Rys. Co. of St. Louis, 197 S.W. 159, 197 Mo. App. 495.
R.I.—Whitworth v. United Electric Rys Co, 137 A. 781, 48 R.I. 301.
Tex.—Texas & N. O. R. Co. v. McNeill, Civ App, 270 S W 1038—Houston, E. & W T Ry. Co. v. Hooper, Civ.App., 184 S W 347, error refused—Galveston, H & S. A. Ry Co. v. Williams, Cr App., 217 S.W 420

(2) To sustain a recovery for injuries received in being required or invited to alight at a place other than the regular platform or stopping place.
La.—Johnson v. City of Monroe, App, 147 So 519.
Pa.—Miller v. Lehigh Valley R Co, 138 A 89, 290 Pa. 130

(3) To sustain a recovery for injuries received when alighting at a temporary platform.—Gormley v Union Paving Co, 95 Pa.Super. 78.

(4) To sustain finding that crews stopping train before reaching station was negligent in permitting passenger to use defective wooden path between tracks.—McCarron v Erie R. Co, 159 A 807, 10 N.J Misc. 498

(5) To sustain finding that bus owner did not exercise required care toward seven-year-old passenger, struck by truck, in inviting him to alight, in the traveled portion of the highway from bus stopping on left side of highway—Roden v Connecticut Co., 155 A. 721, 113 Conn 408.
10 C J. p 1065 note 64 [a].

Evidence held insufficient

(1) To sustain a recovery for negligence in failing to furnish a safe place for setting down passengers
Cal.—Choquette v. Key System Transit Co., 5 P 2d 921, 118 Cal. App. 643
Ill.—Feeney v. Chicago City Ry. Co, 220 Ill.App 400.
La.—Melilli v. Jacobs, App, 170 So 279—Campbell v. N. O Public Service, 133 So. 542, 16 La.App. 210
Mass.—Gast v. Boston Elevated Ry Co., 169 N E. 905, 270 Mass 330—Williamson v. Boston Elevated Ry. Co., 156 N.E. 22, 259 Mass 229
Pa.—Scherer v. Philadelphia Rapid Transit Co., 145 A. 76, 295 Pa. 199—Low v. Harrisburg Rys. Co, 138 A. 852, 290 Pa. 365.

(2) To show that defendant railroad in stopping near destination called for in plaintiff's drover's pass stopped at usual and customary place.—Texas & N. O. R. Co. v. Tillman, Tex.Civ App., 197 S.W. 1128, error refused.

(3) To show negligence, in action against street railroad, where plaintiff passenger, having alighted from street car not stopping at regular stop, was immediately struck by automobile.—Lacks v. Wells, 44 S.W. 2d 154, 329 Mo. 327.
10 C J. p 1065 note 64 [b].

Tilting of step box

The fact that a step box tilted over when an alighting passenger stepped upon it is not sufficient to authorize a jury to find that rough-

abuse or assaults on passengers by the carrier's employees[34] or by the actions, abuse, or assaults by fellow passengers,[35] or for personal indignities offered a passenger by a conductor or other employee.[36]

§ 767. Trial

The trial of an action for personal injuries by a passenger against a carrier is governed by the rules applicable to the trial of civil actions generally, as stated in the C.J.S. title Trial, and, so far as applicable, by the rules applicable to actions for personal injuries generally, as stated in the C.J.S. title Negligence §§ 251–305, also 45 C.J. p. 1278 note 1 et seq.

§ 768. Questions of Law and Fact

a. In general
b. Existence of relation of carrier and passenger
c. Negligence in general
d. Care as to children and others under disability
e. Acts or omissions of carrier's employees in general
f. Number and efficiency of employees
g. Acts of fellow passengers or other third persons
h. Condition and use of carrier's premises, tracks, and roadbed
i. Taking up passengers
j. Operating trains where passengers are being received or discharged
k. Condition of cars and equipment
l. Operation of cars
m. Passing other vehicles or objects
n. Collisions
o. Derailments; running off road
p. Setting down passengers
q. Care as to persons accompanying passengers
r. Proximate cause of injury
s. Companies and persons liable
t. Conditions and operation of elevators and escalators

a. In General

In actions by passengers against carriers for personal injuries, questions of law and fact are governed by general rules. When there is evidence sufficient to sustain a finding of the existence or nonexistence of a material

ness or unevenness in the surface caused the tilting—Yazoo & M. V. R. Co. v Skaggs, Miss., 179 So. 274

34. Ky.—Ashland Coal & Iron Ry. Co. v. Elswick, 225 S.W. 244, 189 Ky. 507.
10 C.J. p. 1065 note 65.

Evidence held sufficient

(1) To sustain a recovery by a passenger for an assault by an employee of the carrier
Ky.—Ohio Valley Electric Ry. Co. v. Webb, 259 S.W. 697, 202 Ky. 341—Louisville & N. R. Co. v. Bennett, 209 S.W. 358, 183 Ky. 445.
Mo.—Morton v. St. Louis-San Francisco Ry. Co., 20 S.W.2d 34, 323 Mo. 929—Knoell v. Kansas City, C., C. & St. J. Ry. Co., App., 198 S.W. 79.
Tex.—Schaff v. Wright, Civ. App., 251 S.W. 515

(2) To show injuries could have resulted from assault—Morton v. St. Louis-San Francisco Ry. Co., supra.

(3) To warrant the submission to the jury of the question of actual damages resulting from humiliation and disgrace caused by an assault.—Sonnen v. St. Louis Transit Co., 76 S.W. 691, 102 Mo.App. 271.
10 C.J. p. 1065 note 65

Evidence held insufficient to sustain a recovery by a passenger for assault by an employee of a carrier.
La.—Smith v. New Orleans Public Service, 127 So. 16, 12 La.App. 692
Miss.—Mobile & O. R. Co. v. Farrior, 75 So. 777, 115 Miss. 96.
S.C.—Hutchison v. Southern Ry. Co., 95 S.E. 181, 109 S.C. 90.
10 C.J. p. 1065 note 65 [b].

Speculative evidence

In an action for assault and abuse by defendant's train conductor, evidence consisting solely of plaintiff's testimony has been held highly speculative as to whether the assault caused the recurrence of fits.—St. Louis Southwestern Ry. Co. v. Hagler, 254 S.W. 1071, 160 Ark. 543.

35. Mo.—Sira v. Wabash R. Co., 21 S.W. 905, 115 Mo. 127, 37 Am.S.R. 386
10 C.J. p. 1065 note 66

Evidence held sufficient

(1) To sustain a recovery for injuries caused by acts of fellow passengers
Ala.—Birmingham Electric Co. v. Driver, 166 So. 701, 232 Ala. 36
Ark.—Butler County R. Co. v. Exum, 187 S.W. 329, 124 Ark. 229
D.C.—Washington Ry. & Electric Co. v. Perry, 47 App.D.C. 90
Ky.—Louisville & I. R. Co. v. Garr, 273 S.W. 540, 209 Ky. 841—Payne v. Combs, 249 S.W. 1031, 198 Ky. 749
N.J.—Falzarano v. Delaware L. & W. R. Co., 194 A. 75, 119 N.J.Law 76—Hoff v. Public Service Ry. Co., 101 A. 404, 90 N.J.Law 386, reversed on other grounds 103 A. 209, 91 N.J.Law 641, 15 A.L.R. 860.

(2) To authorize finding that carrier knew, or should have known, that plaintiff's fellow passenger was drunk, and if not put off train would require personal observation.—Memphis, D. & G. R. Co. v. Trussell, 183 S.W. 981, 122 Ark. 516.

(3) To warrant jury in finding that railroad employees should have anticipated by exercise of due care that brawling, drunken individual, who inflicted injuries on fellow traveler, was an undesirable and objectionable passenger to ride on its train.—Falzarano v. Delaware, L. & W. R. Co., 194 A. 75, 119 N.J.Law 76

(4) To show that motorman and conductor of street car failed to use ordinary care to protect passenger from assault by fellow passenger.—El Paso Electric Co. v. Cannon, Tex.Civ.App., 69 S.W.2d 532, reversed on other grounds, Com.App., 99 S.W.2d 907
10 C.J. p. 1065 note 66.

Evidence held insufficient to sustain a recovery for injuries caused by acts of fellow passengers.
Ala.—Hines v. Miniard, 86 So. 23, 204 Ala. 514, 12 A.L.R. 238
Md.—Pugh v. Washington Ry. & Electric Co., 113 A. 732, 138 Md. 226
Mass.—MacGilvray v. Boston Elevated Ry. Co., 118 N.E. 166, 229 Mass. 65, 4 A.L.R. 283
10 C.J. p. 1065 note 66 [b]

36. N.C.—Harrison v. Norfolk-Southern R. Co., 113 S.E. 678, 184 N.C. 86.
10 C.J. p. 1065 note 67.

fact in issue, and the evidence is conflicting or is such that reasonable minds might draw different conclusions therefrom the question is one for the jury. The court may determine the matter only when there is no evidence, or when the evidence is legally insufficient or is undisputed.

In an action by a passenger against a carrier for personal injuries, questions of law are ordinarily to be determined by the court and it is error to submit them to the jury.[37] Issues of fact, on the other hand, are ordinarily to be determined by the jury under proper instructions from the court.[38]

Where there is sufficient evidence on which the jury might justifiably find the existence or the nonexistence of material facts in issue, and the evidence is conflicting or of such a character that reasonable minds might draw different conclusions therefrom, the issues should be submitted to the jury for determination, as the weight of the evidence and the credibility of the witnesses are matters for determination by the jury;[39] and in such

37. Md.—Baltimore, etc., R. Co. v. Carr, 17 A. 1052, 71 Md. 135.
10 C.J. p. 1065 note 70

Construction of municipal ordinance applicable to operation of street cars, and question whether it is in force is for court.—Schimmelpfenning v. Wells, Mo., 24 S.W. 2d 154

Reasonableness of rules of carrier
In New York the question of whether regulations made by carrier for protection of its passengers are reasonable is for court.—Garricott v. New York State Rys., 119 N.E. 94, 223 N.Y. 9, L.R.A.1918D 929, reversing 151 N.Y.S. 1117, 167 App.Div. 953.

Whether suit authorized
In a suit by a passenger for injuries, whether suit brought by plaintiff was authorized by her was a question of law and fact for the court.—Beardon v. St. Louis, I. M. & S. Ry. Co., 146 S.W. 861, 103 Ark. 341.

The degree of care required of a common carrier is a question of law for court, but whether such care was exercised by carrier is fact question for jury.—Jones v. Youngstown Municipal Ry. Co., 12 N.E.2d 279, 133 Ohio St. 118.

38. Pa.—Hawkins v. Director General of Railroads, 121 A. 46, 277 Pa. 213.
10 C.J. p. 1066 note 71.

Reasonableness of rules of carrier
Where conduct of injured passenger was in no way affected by a regulation of defendant carrier with regard to point at its platform where cars should stop, question of reasonableness of regulation is properly submitted to jury.—Boston Elevated Ry. Co. v. Teele, Mass., 248 F. 424, 160 C.C.A. 434.

Notice of injury
In action for injuries received from fall on ice on street railway platform, where court permitted amendment to declaration that statutory notice of injury caused by ice had been given, whether such notice had been given was properly submitted to jury where the evidence was conflicting.—Klein v. Boston Elevated Ry. Co., Mass., 200 N.E. 6.

39. U.S.—Louisville & N. R. Co. v. Chatters, C.C.A.La., 26 F.2d 403, affirming, D.C., Chatters v. Louisville & N. R. Co., 17 F.2d 305, certiorari granted Louisville & N. R. Co. v. Chatters, 49 S.Ct. 26, 278 U.S. 590, 73 L.Ed. 523, reversed on other grounds 49 S.Ct. 329, 279 U.S. 320, 73 L.Ed. 711.—Pennsylvania Co. v. Clark, C.C.A.Ohio, 266 F. 182

Ala.—Louisville & N. R. Co. v. Courson, 174 So. 474, 234 Ala. 273.—Louisville & N. R. Co. v. Holmes, 87 So. 574, 205 Ala. 47.—Willingham v. Birmingham Ry., Light & Power Co., 83 So. 95, 203 Ala. 351.

Ark.—Missouri Pacific Transp. Co. v. Sharp, 108 S.W.2d 579, 194 Ark. 405.

Cal.—Hanton v. Pacific Electric Ry. Co., 174 P. 61, 178 Cal. 616.

Ill.—Moore v. Aurora, E. & C. R. Co., 92 N.E. 573, 246 Ill. 56.

Kan.—Cross v. Chicago, R. I. & P. R. Co., 242 P. 469, 120 Kan. 58.

Md.—Stewart Taxi-Service Co. v. Spencer, 132 A. 153, 149 Md. 635.

Mich.—Pawlicki v. Detroit United Ry., 158 N.W. 162, 191 Mich. 536.

Minn.—Falk v. Chicago & N. W. Ry. Co., 157 N.W. 904, 133 Minn. 41.

Mo.—Winkler v. Pittsburgh, C., C. & St. L. R. Co., 10 S.W.2d 649, 321 Mo. 27.—Rosenzweig v. Wells, 273 S.W. 1071, 308 Mo. 617.—Weissman v. Wells, 267 S.W. 400, 306 Mo. 82.—Smith v. St. Louis Public Service Co., App., 84 S.W.2d 161.—Roussell v. St. Louis-San Francisco Ry. Co., App., 257 S.W. 516.—Middleton v. St. Joseph Ry., Light, Heat & Power Co., 195 S.W. 527, 196 Mo.App. 258.

N.Y.—Hogel v. Bee Line, 284 N.Y.S. 848, 246 App.Div. 833.—Supple v. International Ry. Co. 203 N.Y.S. 749, 208 App.Div. 547.—Bush v. Christopher & T. St. R. Co., 16 N.Y.S. 212, 41 N.Y.St. 92

Pa.—Little v. West Penn Railways Co., 29 Pa.Dist. 826.

Tex.—Haskins v. Panhandle & S. F. Ry. Co., Civ.App., 89 S.W.2d 831, error dismissed.—Curtis v. Dallas Ry. & Terminal Co., Civ.App., 73 S.W.2d 964, error dismissed.—Vick v. Schaff, Civ.App., 260 S.W. 916.—Wichita Falls Traction Co. v. Berry, Civ.App., 187 S.W. 415, error dismissed.

Va.—Barnard Bus Lines v. Weeks, 158 S.E. 870, 156 Va. 465.—Virginia Ry. & Power Co. v. Dressler, 111 S.E. 243, 132 Va. 342, 22 A.L.R. 301.

W.Va.—Duty v. Chesapeake & O. Ry. Co., 73 S.E. 331, 70 W.Va. 14.
10 C.J. p. 1066 notes 72, 73

Evidence held sufficient to require submission to jury
(1) For injury to passenger pushed from car by crowd.—Dashew v. Interborough Rapid Transit Co., 175 N.Y.S. 875.

(2) In an action for injury to a passenger in a street car.—Omaha & C. B. St. Ry. Co. v. McKeeman, Neb., 250 F. 386, 162 C.C.A. 456.

(3) In an action for injury to passenger's eye from cinder from locomotive.—Schaff v. Sanders, Tex. Civ.App., 257 S.W. 670, affirmed, Com. App., 269 S.W. 1034

(4) In a passenger's action for an assault by a conductor.—Flynn v. St. Louis Southwestern Ry. Co., Mo. App., 190 S.W. 371.

(5) In passenger's action for damages caused by insulting language of railroad conductor.—Phillips v. Atlantic Coast Line R. Co., 158 S.E. 274, 160 S.E. 323, 76 A.L.R. 415.

(6) In passenger's action for injuries in overturning of bus.—Perry v. Pickwick Stages of Oregon, 243 P. 787, 117 Or. 598.

(7) On question as to the negligence of carrier accepting passenger on freight train.—Osborne v. Southern R. Co., 96 S.E. 34, 175 N.C. 594.

(8) On question of willful or wanton negligence.—McCree v. Davis, C.C.A.Ohio, 280 F. 959.

(9) On question whether pneumonia and tuberculosis resulted from la grippe.—Texas & P. Ry. Co. v. Shaw, Tex.Civ.App., 218 S.W. 814, dismissed for want of jurisdiction.
10 C.J. p. 1066 note 72 [a].

Evidence of failure to exercise highest degree of care and diligence in protecting a passenger makes the case a proper one for a jury.—Snow v. Philadelphia Rapid Transit Co., 84 Pa.Super. 236.

a case it is error for the court to take the case from the jury by nonsuit, dismissal, direction of a verdict, or peremptory instruction.[40] However, where there is no evidence on an issue of fact,[41] or where the evidence is legally insufficient to sustain a finding as to such fact,[42] or is undisputed and of such a character that only one inference can reasonably be drawn therefrom,[43] the question becomes one for the determination of the court as a matter of law and the court should dispose of it without the intervention of a jury,[44] as by dismissal or nonsuit, by sustaining a demurrer to the evidence, or by directing a verdict.[45]

b. Existence of Relation of Carrier and Passenger

The existence of the relation of carrier and passenger is generally a question for the jury.

It is ordinarily a question for the jury as to whether the relation of carrier and passenger existed between defendant and the person injured, at the time of the injury,[46] unless the evidence is

Knowledge of limitations of pass

Whether plaintiff riding on defendant's car as a cook of the W Co., under an agreement by the latter with the carrier, had knowledge of the pass and the provisions thereof under which she was being carried, limiting the carrier's liability, is, under the evidence, a question of fact for the jury.—Western Maryland Ry Co. v. Shatzer, 120 A. 840, 142 Md. 274.

Evidence that instrumentality of carrier caused injury

The weight of evidence that plaintiff was injured by road's instrumentality was for jury under rule that, if passenger is injured, presumption of negligence arises.—Comer v. Atlantic Coast Line R. Co., 90 S.E. 188, 105 S.C. 480.

Improbability of testimony

In action for personal injuries due to alleged failure of defendant railroad to give plaintiff a reasonable opportunity to board train at a flag station, the court did not err in refusing to direct verdict for defendant on ground that plaintiff's story of what happened was inherently incredible as the credibility of the witness is for the jury.—Louisville & N. R. Co. v. Quinn, 219 S.W. 789, 187 Ky. 607.

In action for injuries resulting from being forced off moving train by brakeman of defendant railway, whether plaintiff's evidence was unreasonable, contradictory, and untrue was for the jury.—Gannaway v. Pitcairn, Mo.App., 109 S.W.2d 78.

40. N.Y.—Zemmel v. Interborough Rapid Transit Co., 181 N.Y.S. 384.—Dashew v. Interborough Rapid Transit Co., 175 N.Y.S. 875.
10 C.J. p 1067 note 74.

41. Neb.—Zancanella v. Omaha & C. B. St. R. Co., 142 N.W. 190, 93 Neb. 774.
10 C.J. p 1067 note 75.

Unavoidable accident

(1) Issue of unavoidable accident was not raised in action against railroad for death of construction contractor riding on railroad motor car, where there was no testimony that accident would have happened even if both contractor and railroad were exercising due care.—International-Great Northern R. Co. v. Lucas, Tex.Com.App., 99 S.W.2d 297, reversing, Civ.App., 70 S.W.2d 226, opinion corrected, Com.App., 100 S.W.2d 97.

(2) In passenger's action for injuries sustained when railroad's motor coach backing into station collided with another coach standing near station, evidence held not to raise issue of unavoidable accident, but to conclusively establish that collision was result of negligence of motorman in failing to keep proper lookout.—St. Louis Southwestern Ry. Co. v. Varnell, Tex.Civ.App., 97 S.W.2d 320.

42. U.S.—Sasinowski v. Boston & M. R. R., C.C.A.Mass., 74 F.2d 628.
Mass.—Finnegan v. Checker Taxi Co., 14 N.E.2d 127.
Ohio.—Cincinnati Traction Co. v. Keil, 24 Ohio Cir.Ct.,N.S., 445.
10 C.J. p 1067 note 76.

Evidence held insufficient to take case to jury

(1) On the question of defendant's ownership of car causing injury.—Lackland v. United Rys. Co. of St. Louis, 191 S.W. 1104, 197 Mo.App. 62.

(2) On question of fraud.—Edmondson v. Missouri Pac. R. Co., 286 S.W. 439, 220 Mo.App. 294.

43. Ala.—Southern R. Co. v. Norwood, 64 So. 604, 186 Ala. 49.
N.J.—Keeney v. Delaware, etc., R. Co., 94 A. 604, 87 N.J.Law 505.

44. Mo.—Price v. St. Louis Transit Co., 102 S.W. 626, 125 Mo. 67.
Ohio.—Cincinnati Traction Co. v. Keil, 26 Ohio Cir.Ct.,N.S., 445.

45. N.H.—Vaughan v. Boston & M. R. R., 103 A. 129, 78 N.H. 615.
10 C.J. p 1067 note 79.

Immaterial matter

Failure to prove statement which was not basis of claim did not entitle defendant to general charge as to count containing statement.—St. Louis & S. F. Ry. Co. v. Mills, 124 So. 231, 220 Ala. 107.

46. U.S.—Erie R. Co. v. Gordon, C.C.A.N.J., 30 F.2d 101.
Ala.—Alabama Great Southern R. Co. v. Bell, 76 So. 920, 200 Ala. 562.
Cal.—Hart v. Fresno Traction Co., 167 P. 885, 175 Cal. 489.
Fla.—Atlantic Coast Line R. Co. v. Webb, 150 So. 741, 112 Fla. 449.
Ga.—Smith v. Bugg, 134 S.E. 116, 35 Ga.App. 488.
Ill.—Foote v. Chicago, N. S. & M. R. Co., 256 Ill.App. 581. See Healy v. Chicago City Ry. Co., 196 Ill. App. 1.
Ky.—Jesse v. Dunn, 51 S.W.2d 918, 244 Ky. 613.
Md.—Pennsylvania R. Co. v. Hoover, 120 A. 526, 142 Md. 251.
Minn.—Rau v. Smuda, 221 N.W. 232, 175 Minn. 328.—Gegere v. Chicago & N. W. Ry. Co., 220 N.W. 429, 175 Minn. 96.
Miss.—Teche Lines v. Keller, 165 So. 303, 174 Miss. 527.
Mo.—Gossett v. Kansas City Public Service Co., App., 17 S.W.2d 372.—Watts v. Fleming, 298 S.W. 107, 221 Mo.App. 1123.
N.J.—Brennan v. Public Service Ry. Co., 148 A. 775, 106 N.J.Law 464.
N.Y.—Salomone v. Yellow Taxi Corporation, 151 N.E. 442, 242 N.Y. 251, reversing 213 N.Y.S. 899, 215 App.Div. 790, reargument denied 152 N.E. 445, 242 N.Y. 602.—Supple v. International Ry. Co., 203 N.Y.S. 749, 208 App.Div. 547.
N.C.—Loggins v. Southern Public Utilities Co., 106 S.E. 822, 181 N.C. 221.
Okl.—Chicago, R. I. & P. Ry. Co. v. Warren, 269 P. 368, 132 Okl. 107.—Chicago, R. I. & P. Ry. Co. v. Shadid, 159 P. 913, 60 Okl. 188.
Pa.—Berkebile v. Johnstown Traction Co., 99 A. 871, 255 Pa. 310.
10 C.J. p 1067 note 80.

Existence of emergency authorizing invitation to ride free

It would be a question for the jury to determine whether an emergency existed which justified or authorized a motorman in the state of Maine to permit an eleven year old school child to ride free by reason of a fall of snow which was not so deep as to prevent another school child from walking in the highway beside the track, assuming that the motorman had implied authority to give free rides in emergency cases, under a statute prohibiting giving of free rides generally, but permit-

insufficient to be submitted, or is undisputed and such that but one conclusion can be reasonably drawn therefrom, in which case the court alone may dispose of the question.[47]

c. Negligence in General

The question of the carrier's negligence with respect to the injury of the passenger is ordinarily one for the jury, unless the evidence is insufficient or is undisputed, in which case the court should dispose of the question.

In accordance with the general rules, the question of the carrier's negligence with respect to the injury sustained by the passenger is one of fact for the jury and should be submitted to them, where there is sufficient evidence to go to the jury, and it is conflicting or such that different conclusions reasonably might be drawn therefrom,[48] and in

ting it in emergencies—Meloon v. Davis, C C A N H, 292 F. 82.

Employee as passenger

In an action against a street railway for injuries to its employee claiming to have been riding on its car as a passenger, whether the employee was a passenger is a question for the jury—Bernard v. Michigan United Traction Co., 178 N.W. 43, 210 Mich. 333.

Invitation to become passenger

(1) Whether plaintiff was passenger on street car through implied invitation by stopping of car, is for jury—Kendall v. Worcester Consol. St. Ry Co, 125 N.E. 139, 234 Mass. 66.

(2) Whether passengers were being received and discharged from street car, which plaintiff attempted to enter, is for jury—Nuttall v. Worcester Consol. St. Ry. Co., 114 N E 291, 225 Mass. 167

(3) The stopping of a train where not scheduled to stop, about time another train was scheduled to stop, did not, as matter of law, constitute implied invitation to board, but the question is one of fact for the jury.—McPartland v Boston, R. B. & L. R. R., 136 N E 168, 242 Mass. 346.

Whether relation had arisen

(1) Whether decedent, whose body was found on cowcatcher after train plowed through station platform, intended to be passenger, is for jury. —Erie R. Co. v. Gordon, C.C.A N.J., 30 F.2d 101.

(2) Whether plaintiff in action for injuries sustained while attempting to board train had acquired rights of passenger when injured is a fact question for jury—Gerber v New York Cent. R. R, 192 N E 837, 288 Mass. 318.

(3) In an action against a railroad for an assault and battery by employee in railroad office, whether plaintiff was, at the time of the assault, a passenger of defendant railway, is for the jury.—Clark v. Bland, 106 S.E. 491, 181 N.C. 110.

(4) Whether plaintiff suing for injuries received in boarding bus had become passenger entitled to high degree of care and a chance to reach place of safety within vehicle before it was started is for jury.—Coyle v. Worcester Consol. St. Ry. Co, 173 N E 586, 273 Mass 475

(5) Evidence that deceased paid his fare to some one who demanded it of him while riding on defendant's interurban train makes it a jury question whether deceased paid an authorized person or was a trespasser—Pearson v. Piedmont & N. Ry. Co, 99 S E 811, 112 S C 220.

(6) In action for injuries on railroad station premises to which plaintiff had gone with family six hours before departure of train he intended to take, question of reasonableness of time in which plaintiff went to station is for the jury.—Baker v. Williams, Tex Civ App, 198 S W. 808.

10 C J. p 1067 note 80 [a].

Persons riding on passes

Whether a pass was required or was being used by plaintiff, the employee of a telegraph company, while she was traveling as cook on one of her employer's camp cars, under an agreement with the carrier, is, on conflicting evidence, a jury question.—Western Maryland Ry. Co. v Shatzer, 120 A. 840, 142 Md 274—10 C J p 1067 note 80 [c].

Propriety of peremptory instruction in case of injury to alleged passenger after alighting from car depends upon whether defendant owed plaintiff any duty—Trout's Adm'r v. Ohio Valley Electric Ry. Co., 43 S.W 2d 507, 241 Ky. 144.

47. Minn.—Tuder v. Oregon Short Line R. Co, 160 N W 785, 135 Minn 294, L.R.A 1917C 86.
Va—Virginia Ry & Power Co v Dressler, 111 S E 243, 132 Va 342, 22 A.L R 301.
10 C.J. p 1068 note 81.

Where passenger voluntarily leaves car

In an action by one claiming to be a passenger when assaulted by motorman after leaving a street car on a public street, where the evidence showed that plaintiff left the car voluntarily, the court properly refused to submit question whether he was a passenger—Willingham v. Birmingham Ry, Light & Power Co., 83 So. 95, 203 Ala. 351.

Evidence held insufficient to take to the jury, in action by work train gang laborer for injuries sustained when freight train on which he was riding from place of work to town where he lived, was derailed, the question whether laborer was passenger at time of injury—Chesapeake & O. Ry. Co v. Ringstaff, C C.A Ohio, 67 F 2d 482—10 C J p 1068 note 81 [a].

48. U.S.—Chicago, M & St. P Ry Co. v. Harrelson, C C A Mo, 14 F 2d 893—Boston Elevated Ry Co. v. Teele, Mass, 248 F. 424, 160 C. C.A 434—New England R. Co v Hyde, Mass., 101 F 401, 41 C C A. 549, certiorari denied 21 S Ct. 924, 181 U.S 619, 45 L Ed. 1031
Ark—Missouri Pac R Co. v. McDade, 53 S W 2d 595, 186 Ark 317
Ga.—Payne v. Lyon, 111 S E. 226, 28 Ga App 246, reversed on other grounds 114 S.E 892 154 Ga 501, conformed to 115 S E 138, 29 Ga. App. 327
Ill—Kramer v. Safeway Lines, App, 13 N E 2d 995
Ky—Lexington & E Ry. Co. v. Robinson, 216 S W 86, 186 Ky. 739—Louisville & N. R. Co. v. Sinclair, 188 S.W 648, 171 Ky. 562.
Mass—Ward v. Boston Terminal Co., 190 N E. 726, 286 Mass 517—Kelly v. Boston, Revere Beach & Lynn R Co, 164 N E. 624, 266 Mass. 23—Burnham v. Boston & M R. R, 116 N E. 735, 227 Mass. 422
Miss—Teche Lines v Britt, 170 So. 294
Mo—Bond v. St. Louis-San Francisco Ry Co, 288 S W. 777, 315 Mo. 987
N J—Rhodehouse v Director General of Railroads, 111 A 662, 95 N J. Law 355—Giardini v. McAdoo, 107 A 437, 93 N.J Law 138—Gross v. Hudson & Manhattan R. R., 185 A. 365, 14 N J Misc 374—Paling v. New York Cent R. Co., 146 A 788, 7 N J Misc. 554, affirmed 150 A. 920, 106 N J Law 586
N.Y—Goldweber v. New York Consol R. Co, 173 N.Y S. 470
Ohio—Greyhound Lines v. Kunze, 181 N E. 503, 41 Ohio App. 508
Pa—McQuaide v. Pittsburgh, C, C. & St. L. Ry. Co 67 Pa Super. 425.
S.C—Derrick v. Columbia Ry., Gas & Electric Co., 137 S.E. 682, 139 S. C 200
Tex—Scott v. Texas Electric Ry. Co, Com.App., 32 S W 2d 641, reversing Texas Electric Ry. Co. v. Scott, Civ.App., 21 S.W.2d 24—

such case it is error for the court to dispose of such question without the intervention of the jury, as by giving an affirmative charge, sustaining a demurrer to the evidence, directing a verdict for defendant, or granting a nonsuit.[49] The question of negligence, however, should not be submitted to the jury where the evidence on that question is legally insufficient,[50] or is undisputed and is such that but one conclusion can be reasonably drawn therefrom with regard to such negligence;[51] but in such case the court should of itself dispose of the question, as by granting a nonsuit or dismissal, or by directing a verdict for defendant,[52] or should render a judgment non obstante veredicto.[53]

Where a presumption of negligence exists against a carrier in case of an injury to a passenger, it is primarily for the jury to determine whether or not the carrier was negligent when it has introduced evidence to rebut such presumption,[54] although the

Houston, E & W T. Ry Co. v. Hooper, Civ App, 184 S.W 347, error refused—International & G. N. Ry. Co. v Williams, Civ App., 183 S.W 1185, error refused.

W.Va—Holtman v. Norfolk & W. Ry Co, 136 S E. 855, 103 W.Va. 194

10 C J p 1068 note 84

"Care and diligence is generally a mixed question of law and fact. When the facts are undisputed and the deductions therefrom indisputable, or the duty is fixed by the law and is the same under all circumstances, the question is for the court. But if the facts are disputed, or the inference of negligence is a matter of discretion, it must be submitted to the jury."—Central of Georgia R Co v Robertson, 83 So 102, 105, 203 Ala 358.

Ambulance service

In an action against persons furnishing ambulance service, it is a question for the jury as to whether the dropping by an employee of defendant of the stretcher on which the patient was being carried was due to negligence or to an "accident," which is any casualty which could not be prevented by ordinary care and diligence, or an occurrence which human prescience and prudence cannot foresee or forestall—Moseley v. Patterson, 107 S E 623, 27 Ga App. 133

Uncontradicted testimony

Even if the testimony as to the accident in which a street car passenger was injured was uncontradicted, such testimony did not conclusively establish negligence, if it was open to more than one inference, in which case the jury alone were authorized to determine what inference should be drawn from it—Robertson v Washington Ry. & Electric Co, 279 F 180, 51 App D C 311.

Whether or not injured person is passenger, as affecting rule

In a suit for injuries to a woman, who after she alighted from a street car and while crossing the track behind it caught her foot in a trailing rope as the car started, whether injuries received were due to the company's negligence is for the jury, whether or not she was to be regarded as a passenger at the time of the accident—Landis v. Wichita R & Light Co, 203 P. 1109, 110 Kan 205.

Where plaintiff's evidence makes out a prima facie case

(1) In action against a common carrier for negligent injury, evidence showing relation of passenger and carrier, manner in which accident happened, and injury, makes a prima facie case for the plaintiff, and defendant's motions for nonsuit and directed verdict were properly denied—Coblentz v. Jaloff, 239 P 825, 115 Or 656.

(2) That bus passenger made prima facie case under res ipsa loquitur doctrine did not forestall jury's consideration of evidence tending to absolve defendant, even though submitted by plaintiff—Story v People's Motorbus Co of St. Louis, 37 S W 2d 898, 327 Mo. 719

10 C J. p 1068 note 84 [a].

Test of sufficiency of evidence

Where the evidence bearing upon railroad's negligence favorable to plaintiff, discarding all evidence favorable to the defendant, was sufficient to support a verdict for plaintiff, defendant's liability was for the jury—Nevill v. Gulf, C & S. F Ry. Co, Tex.Civ App, 187 S W 388, reversed on other grounds, Com App., 244 S W. 980, which is reversed 252 S W 483

Vicious dog in station

Negligence of railroad in permitting in station a vicious dog which bit passenger is for jury—Kansas City Southern Ry Co. v. Pinson, C C A Tex, 61 F 2d 1001—Pinson v Kansas City Southern Ry. Co, C C A Tex, 37 F 2d 652—10 C J. p 1068 note 84 [b].

49. N J—Rhodehouse v. Director General of Railroads, 111 A. 662, 95 N J.Law 355.

10 C J p 1069 note 85.

50. Md—Hevell v. Baltimore Transit Co, 196 A 103—Hagerstown & F Ry. Co v. State, 99 A 376 129 Md. 318.

10 C J p 1069 note 86.

51. Tenn.—Memphis St Ry Co. v. Cavell, 187 S.W. 179, 135 Tenn 462—Memphis St. Ry v Mitchum, 6 Tenn Civ.A 227.

10 C J. p 1069 note 87.

52. U S—Holland v. Director General of Railroads, C C.A.N.J, 273 F. 928—Spiesberger v Michigan Cent. R. Co, Ill., 235 F. 864, 149 C C.A. 176.

Ill—Grubczak v. Chicago Rys. Co., 242 Ill App. 384.

Ky—Hawkins v. Louisville & N. R Co., 202 S.W. 632, 180 Ky 295, 3 A.L R 637

Mass.—Hamilton v. Boston, R B. & L R. R., 134 N E 371, 240 Mass 458

N.Y—Brown v. Klein, 245 N.Y.S 654, 230 App.Div. 681

Pa.—Burns v Pennsylvania R Co., 144 A. 103, 294 Pa 277—Fittipaldi v Philadelphia Rural Transit Co, 163 A 397, 107 Pa.Super. 385.

Tex—Hail v. Missouri-Kansas-Texas R. Co. of Texas, Civ App, 30 S W 2d 1062, affirmed Missouri-Kansas-Texas R. Co. of Texas v. Hail, Com App, 48 S.W 2d 589—Vivian v San Antonio, U & G. R. Co., Civ App, 196 S W 267, error refused.

10 C J. p 1069 note 88.

53. Pa—Creahan v. Pennsylvania R Co., 187 A 51, 123 Pa Super. 268.

54. Cal.—Karsey v City and County of San Francisco, 20 P.2d 751, 130 Cal App 655, citing **Corpus Juris** text as authority.

Ga—Seaboard Air Line Ry Co v. Fountain, 160 S E 789, 173 Ga. 593—Holmes v. Georgia Power Co, 162 S E 403, 44 Ga App 588, reversed on other grounds Georgia Power Co. v. Holmes, 165 S E 284, 175 Ga 487, conformed to Holmes v Georgia Power Co., 165 S E 918, 45 Ga App 826.

S C—Porter v Davis, 110 S.E. 121, 118 S C 153—Thompson v Atlantic Coast Line R Co, 102 S E 11, 113 S C 261.

10 C J. p 1069 note 89.

Boys throwing stones

In action for injury to subway train passenger by glass from broken window, whether presumption of want of care and negligence arising from accident to passenger had been overcome by railroad's explanation that glass was broken by boys

carrier may make such a showing of freedom of negligence as will entitle him to have the question determined as a matter of law.[55] Indeed, even when there is a presumption of negligence arising from a failure on the part of the carrier to explain how an accident happened, it is for the jury to say whether the presumption, which is only prima facie evidence of negligence, entitles plaintiff to a verdict.[56]

d. Care as to Children and Others under Disability

Whether proper care was exercised by the carrier toward a passenger unable to care for himself is generally a question for the jury.

Whether in a particular case the carrier is under the duty of rendering special assistance to a passenger,[57] and whether the carrier exercised proper care with respect to a child,[58] or a passenger who by reason of intoxication,[59] sickness,[60] or other infirmity or disability was unable to care for himself,[61] or whether the carrier was negligent in failing to secure medical attention for an injured passenger,[62] is ordinarily a question for the jury. Where, however, there is nothing to show that there was any failure to exercise due care with respect to the passenger it is proper for the court to sustain a demurrer to the evidence[63] or direct a verdict for defendant.[64]

e. Acts or Omissions of Carrier's Employees in General

Generally it is for the jury to determine whether the acts or omissions causing the injury were acts or omissions of an employee of the carrier acting within the scope of his employment, and whether such acts or omissions constituted negligence, gross negligence, malice, wantonness, or recklessness.

Except where the evidence is insufficient to be submitted, or is clear and undisputed,[65] it is generally a question for the jury as to whether the acts

on the outside throwing stones against it was for jury.—Bressler v. New York Rapid Transit Corporation, 13 N.E.2d 772, 277 N.Y. 200, reversing 297 N.Y.S. 336, 251 App. Div. 890.

Expert testimony as overcoming presumption

In action against railroad for injuries to passenger in derailment, court cannot say, as a matter of law, that the mere opinion of an expert witness that the cause of the accident was a broken bolt, which could not have been detected by the most expert inspection, is sufficient to overcome the presumption of negligence.—Thompson v. Atlantic Coast Line R. Co., 102 S.E. 11, 113 S.C. 261.

55. Wash.—Hayes v. Staples, 225 P. 417, 129 Wash. 436.

56. N.Y.—Salomone v. Yellow Taxi Corporation, 151 N.E. 442, 242 N.Y. 251, reversing 213 N.Y.S. 899, 215 App.Div. 790, reargument denied 152 N.E. 445, 242 N.Y. 602.

57. Okl.—Dickinson v. Tucker, 176 P. 949, 74 Okl. 43.—St. Louis & S. F. Ry. Co. v. Dobyns, 157 P. 735, 57 Okl. 643.
Tex.—International & G. N. Ry. Co. v. Williams, Civ.App., 183 S.W. 1185, error refused.

58. U.S.—Chicago, M. & St. P. Ry. Co. v. Harrelson, C.C.A.Mo., 14 F.2d 893.
Ala.—Central of Georgia Ry. Co. v. Thomas, 104 So. 559, 20 Ala.App. 617.
Ark.—Citizens' Bank v. Fairweather, 191 S.W. 911, 127 Ark. 63.
N.C.—Brantley v. Atlantic Coast Line R. Co., 190 S.E. 731, 211 N.C. 454.
Ohio.—Morris v. Cincinnati Traction Co., 20 Ohio N.P.,N.S., 607.
Tex.—Southern Traction Co. v. Reagor, Civ.App., 186 S.W. 272, error refused.
10 C.J. p. 1069 note 90.

Child on escalator

Negligence of department store as respects injury to infant passenger on escalator is for jury under res ipsa loquitur maxim.—May Department Stores Co. v. Bell, C.C.A.Mo., 61 F.2d 830.

59. Ill.—Panor v. Northwestern Elevated R. Co., 228 Ill.App. 162.
N.Y.—Fardette v. New York & S. Ry. Co., 180 N.Y.S. 179, 190 App. Div. 543.
Pa.—Jameitis v. Wilkes-Barre Ry. Co., 121 A. 317, 277 Pa. 437.—Kradel v. Pittsburgh, H., B. & N. C. Ry. Co., 100 A. 128, 255 Pa. 427.
10 C.J. p. 1069 note 91.

60. U.S.—Chicago, B. & Q. R. Co. v. Schrimpf, Minn., 236 F. 200, 149 C.C.A. 390.
Mich.—Tozer v. Michigan Cent. R. Co., 162 N.W. 280, 195 Mich. 662.
10 C.J. p. 1069 note 92.

Failure to open waiting room for passengers' accommodation

In an action for failing to open a station at the proper time, whereby a sick passenger was exposed to a hailstorm and made worse, conflicting evidence as to the time of opening the station requires submission of the issue to the jury.—Ginn v. U. S. Railroad Administration, 103 S.E. 548, 114 S.C. 236.

Punitive damages

Where there is no evidence to warrant punitive damages in an action for failure to open a station, thereby exposing a sick passenger to the weather, it is error not to direct a verdict for defendant as to punitive damages.—Ginn v. U. S. Railroad Administration, 103 S.E. 548, 114 S.C. 236.

61. Ark.—Hines v. Patterson, 225 S.W. 642, 146 Ark. 367.—Pittman v. Hines, 221 S.W. 474, 144 Ark. 133.
Ga.—Georgia Power Co. v. Braswell, 173 S.E. 763, 48 Ga.App. 654.
Minn.—Carroll v. St. Paul Union Depot Co., 204 N.W. 470, 164 Minn. 28.
Tex.—Stewart v. Houston & T. C. Ry. Co., Com.App., 229 S.W. 577, error refused.
Va.—Kercher's Adm'r v. Richmond, F. & P. R. Co., 142 S.E. 393, 150 Va. 108.
10 C.J. p. 1070 note 93.

Evidence held sufficient, in an action against a carrier for injuries to an aged and feeble passenger sustained in alighting because of the refusal of the conductor to furnish the passenger necessary assistance, to justify the refusal of a nonsuit, and a peremptory instruction requested by a defendant.—Holmes v. Atlantic Coast Line R. Co., 106 S.E. 567, 181 N.C. 497.

62. Miss.—Hughes v. Gregory Bus Lines, 128 So. 96, 157 Miss. 374.

63. Kan.—Imel v. Atchison, T. & S. F. Ry. Co., 163 P. 807, 100 Kan. 130.

64. Ky.—Louisville & N. R. Co. v. Mudd's Adm'x, 191 S.W. 102, 173 Ky. 330.

65. N.Y.—Huntington v. Union Ry. Co. of New York City, 258 N.Y.S. 676, 144 Misc. 341.
10 C.J. p. 1070 note 94.

To warrant directed verdict for corporation, evidence rebutting passengers' prima facie case that at

or omissions which caused the injury were the acts or omissions of an employee of the carrier,[66] whether he was at the time acting within the scope of his employment[67] and whether the acts or omissions constituted negligence[68] or whether they amounted to gross negligence, malice, wantonness, or recklessness.[69] When a passenger seeks to recover for mistreatment by an employee, on conflicting evidence it is for the jury to determine whether he was mistreated in the manner claimed.[70]

Whether an employee, in making an assault on a

time of accident corporation owned bus, and that driver was employed by it and acting within scope of employment, must be uncontradicted, clear, and free from reasonable suspicion.—Irwin v Pickwick Stages System, 25 P.2d 998, 134 Cal.App. 443

Evidence held insufficient to warrant directed verdict

Evidence to rebut passengers' prima facie case that at time of accident bus driver was employed by corporation and acting within scope of employment.—Irwin v. Pickwick Stages System, 25 P.2d 998, 134 Cal. App. 443

Proof of willful, wanton, or gross negligence in operating of train past signal, and colliding with train ahead, resulting in death of holder of pass held insufficient for jury—Bowman v. Pennsylvania R Co., 149 A. 877, 299 Pa 558, certiorari denied 51 S.Ct. 27, 282 U S. 849, 75 L Ed 752.

66. Pa—Bickley v. Philadelphia & R Ry Co., 101 A. 654, 257 Pa 369.
10 C J p 1070 note 95.

67. Cal—Cromwell v. Los Angeles Ry. Corporation, 283 P. 375, 102 Cal.App. 499.
D C.—Seymoure v. Director General of Railroads, 290 F. 291, 53 App. D C 316.
Minn—Rau v. Smuda, 221 N.W. 232, 175 Minn. 328.
Mo.—Gannaway v. Pitcairn, App., 109 S W.2d 78.
N J—Nell v. Godstrey, 101 A. 50, 90 N J.Law 709.
N C.—Cole v. Atlantic Coast Line R Co., 191 S.E. 353, 211 N.C. 591.
Tenn.—Baskin & Cole v. Whitson, 8 Tenn App. 578.
10 C.J. p 1070 note 96.

Conductor boarding car

Conflicting evidence presented jury issue whether conductor, who, in boarding street car, knocked down prospective passenger, boarded car to relieve conductor thereon and was therefore acting within the scope of his employment—Cromwell v. Los Angeles Ry Corporation, 283 P. 375, 102 Cal App. 499.

Evidence sufficient to make question for jury

Evidence that three employees of a railroad company, who were also peace officers, were employed by the company to keep order about the station and meet incoming trains and to arrest persons who were drunk or disorderly, is sufficient to make it a question for the jury whether the officers were acting in the scope of their employment in going upon a train to arrest a passenger, notwithstanding testimony by one of them that it was not their duty to go upon the train unless requested by the conductor, and they had not been so requested—Louisville & N R Co. v. Mason, 251 S.W 184, 199 Ky. 337.

68. Fla—Florida Motor Lines v. Bradley, 164 So. 360, 121 Fla. 591.
Ky—Dix v. Gross, 111 S.W.2d 673, 271 Ky. 231—B-Line Cab Co v Lake, 110 S.W 2d 1083, 270 Ky 763.
Mass—Mercier v. Union St. Ry Co, 125 N E. 181, 234 Mass 85.
Minn—Benson v. Northland Transp. Co, 274 N W. 532.
N.J—Barney v. Hudson & M R. Co, 145 A. 5, 105 N J.Law 274, affirmed 148 A. 917, 106 N J Law 230, 231.
N.Y—Feldman v. New York Rys. Co., 158 N Y.S. 698.
Ohio.—Jones v. Youngstown Municipal Ry. Co., 12 N.E 2d 279, 133 Ohio St. 118.
Okl.—Tulsa Yellow Cab, Taxi & Baggage Co. v. Salomon, 75 P 2d 197, 181 Okl. 519
Or—Adams v Portland Ry., Light & Power Co., 171 P. 219, 87 Or 602, L R.A 1918D 526
Tenn.—Blount County v. Perry, 7 Tenn.App 340.
Tex.—Schaff v. Gordon, Civ.App, 214 S W. 638.
Wash.—Osborne v. Galusha, 254 P. 1086, 143 Wash. 127
10 C.J. p 1070 note 97.

Negligence in continuing to work

(1) Where a street car motorman, after having experienced two periods of dizziness, and who was not feeling well, fainted in his cab and thereby caused a collision with another car, resulting in injuries to plaintiff, the question as to whether or not he was in the exercise of reasonable care in continuing to run his car was for the jury—Goldman v New York Rys. Co, 173 N.Y S. 737, 185 App.Div. 739.

(2) Where driver of passenger stage suddenly collapsed, causing accident and injury to passenger, whether driver who had been feeling ill was negligent in staying alone in driver's compartment without advising any one of his condition held for jury.—Duran v. Pickwick Stages System, 35 P.2d 148, 140 Cal.App 103

Advising passenger to jump from moving car

In action by passenger injured while jumping from street car beyond control while it was going at a great speed down a hill, whether conductor was negligent in advising plaintiff to leave the car is a question for the jury—Hellar v. Kansas City Rys. Co, Mo.App., 237 S.W. 811.

Expelling disorderly passenger

Whether bus driver exercised proper care for safety of passengers in attempting to expel disorderly passenger as alleged, so as to render bus owner liable for injuries sustained by passenger in the ensuing fracas, was for trier of facts.—Spalt v. Eaton, 196 A. 736, 119 N J Law 343, affirming 192 A. 576, 118 N.J Law 327.

In trial without jury

(1) The question is one of fact for the trial court.—Wendler v Pickwick Stages System, 24 P.2d 543, 133 Cal App. 592.

(2) Whether the employee of an operator of an auto stage exercised due care to discover defect in wheel and avoid accident was question for court trying action without jury.—Jianou v. Pickwick Stages System, 296 P. 108, 111 Cal.App. 754.

69. Ala—Birmingham Electric Co v. Mann, 147 So. 165, 226 Ala. 379—Louisville & N. R. Co v. Weathers, 50 So. 268, 163 Ala 48.
Ohio—Wiley v. Green Cab Co., 179 N E. 419, 41 Ohio App. 88.
10 C J. p 1070 note 98.

Punitive damages

In action for injuries to a passenger from an assault by a street car conductor with an iron bar, in view of disparity between the age and size of the conductor and plaintiff, the conductor being a young man of twenty-two, and plaintiff being sixty-three and weighing only one hundred and forty-eight pounds, notwithstanding plaintiff's conduct may have started trouble between them, the question of punitive damages should not have been eliminated, and refusing an instruction to that effect was not error.—Hunter v. Kansas City Rys. Co., 248 S.W. 998, 213 Mo.App. 233.

70. Miss.—Yazoo & M. V R Co. v. Sanders, 72 So. 144, 111 Miss 733.

passenger, was acting within the general scope of his employment,[71] whether the assault was willful,[72] whether the assault was justified by the conduct of the passenger,[73] and whether the employee in committing the assault used more force than was necessary to repel an assault on him by the passenger,[74] are generally questions of fact for the jury. Likewise, on conflicting evidence, it is for the jury to determine whether a female passenger, alleged to have been forcibly ravished by an employee of the carrier, voluntarily yielded her person.[75]

The liability of a carrier for injuries to a passenger transported by an independent contractor is, on disputed evidence, a question for the jury.[76]

f. Number and Efficiency of Employees

Negligence of the carrier with regard to the number and efficiency of employees is ordinarily a question for the jury.

Where the evidence is conflicting or is such that reasonable minds might draw different conclusions therefrom, negligence as to the number and efficiency of employees at a particular place,[77] or in the operation of cars,[78] is ordinarily a question for the jury, such as whether it was negligence to operate a street car without a conductor.[79] There is, of course, no question for the jury as to such matters where the evidence is insufficient, or is clear and undisputed.[80]

g. Acts of Fellow Passengers or Other Third Persons

Generally it is for the jury to say whether the carrier's employees exercised proper care to protect a passenger from the acts of fellow passengers or other third persons.

Whether or not the carrier's employees exercised proper care to protect a passenger from the acts of fellow passengers,[81] or of other third persons,[82]

71. Mo.—Sturgis v. Kansas City Rys Co., App., 228 S.W. 861—Dorton v Kansas City Rys. Co, 224 S.W. 30, 204 Mo.App 262
Pa.—Durando v. Philadelphia Rapid Transit Co, 80 Pa.Super. 65
Tex.—Davis v. Teague, Civ.App, 256 S.W. 957.
10 C.J. p 1070 note 99.

Employee or deputy sheriff
In an action for assault, etc., on a passenger by special agent of the carrier, on conflicting evidence the question in what capacity the assaulting party was acting, as a deputy sheriff or as an employee, as special agent of the carrier, was for the jury.—Baker v. Hines, 213 P. 313, 88 Okl. 266.

72. Mo.—Morton v. St. Louis-San Francisco Ry. Co, 20 S.W.2d 34, 323 Mo. 929.

73. D.C.—Mt. Vernon & Marshall Hall Steamboat Co v. McKenney, 46 App.D.C. 99.
Ky.—Louisville Ry Co v. Kramer, 11 S.W.2d 930, 226 Ky. 739—Louisville & N. R. Co. v. Bennett, 209 S.W. 358, 183 Ky. 445.
Tex.—Houston E. & W. T. Ry. Co v. Mathews, Civ.App, 1 S.W.2d 754, reversed on other grounds, Com.App, 12 S.W.2d 163.
10 C.J. p 1070 note 1.

74. Tex.—St. Louis Southwestern R. Co v. Huddleston, Civ.App, 178 S.W. 704.
10 C.J. p 1070 note 2.

75. U.S.—Dickinson v. Scruggs, Tenn., 242 F. 900, 155 C.C.A. 488.

76. Ala.—Dixie Stage Lines v. Anderson, 134 So. 23, 222 Ala. 673.

77. N.J.—Sandler v. Hudson & M. R. Co., 151 A. 99, 8 N.J.Misc. 537, affirmed 156 A. 459, 108 N.J.Law 203.
10 C.J. p 1070 note 3.

78. Iowa.—Kelly v. Muscatine, B. & S. R. Co, 191 N.W. 525, 195 Iowa 17
Tenn.—Wishone v. Yellow Cab Co, App, 97 S.W.2d 452
10 C.J. p 1070 note 4.

Testimony of employee for jury to consider
Motorman's competency and freedom from negligence could not be conclusively established by himself or witnesses called for purpose; what he did or did not do could be accepted in evidence, and the jury only was competent to find truth therefrom.—Colorado Springs & Interurban Ry. Co. v. Reese, 169 P. 572, 69 Colo. 1.

79. Ala.—Armstrong v. Montgomery St. R. Co, 26 So. 349, 123 Ala. 233.
10 C.J. p 1071 note 5.

80. N.Y.—Wynn v. Central Park, etc., R. Co, 30 N.E. 721, 133 N.Y. 575, reversing 14 N.Y.S. 172.
10 C.J. p 1071 note 6

81. Ala.—Hines v. Minard, 86 So. 23, 204 Ala. 514, 12 A.L.R. 338
Ark.—Payne v. McDonald, 233 S.W. 813, 150 Ark. 12—Hines v. Rice, 218 S.W. 851, 142 Ark. 159.
Kan.—Holmes v. Fleming, 253 P. 224, 122 Kan. 652
Mass.—Franz v. Holyoke St. Ry. Co, 132 N.E. 270, 239 Mass. 565
Mo.—Koenig v. St. Louis Public Service Co, App, 45 S.W.2d 896—Liljegren v. United Rys. Co. of St. Louis, App, 227 S.W. 925—Abernathy v. Missouri Pac. R. Co, App, 217 S.W. 568
N.J.—Skillen v. West Jersey & S. R. Co., 115 A. 372, 96 N.J.Law 492.
Pa.—McMullin v. Philadelphia Rapid Transit Co, 116 A. 832, 273 Pa. 159—Coyle v. Philadelphia & R. Ry. Co, 100 A. 1005, 256 Pa. 496—Lerch v. Hershey Transit Co, 99 A. 800, 255 Pa. 190
Tex.—Pacific Greyhound Lines v. Vermillion, Civ.App, 87 S.W.2d 312, error dismissed—Nevill v. Gulf, C. & S. F. Ry. Co, Civ.App, 187 S.W. 388, reversed on other grounds, Com.App., 244 S.W. 980, which is reversed 252 S.W. 483
10 C.J. p 1071 note 7.

Evidence held to raise question for jury as to duty of employees
(1) In action by passenger for injuries caused by abusive manner, language, and immodest conduct of an insane negro passenger in the same car, as to the duty to plaintiff of the porter immediately to report her complaint to the conductor —Hines v. Minard, 94 So. 302, 208 Ala. 176.

(2) Whether railroad employees had duty under circumstances to eject drunken passenger from train before he committed assault on another passenger and whether, if such was impossible under the circumstances, employees failed in their duty to keep such passenger away from fellow passengers whom he was approaching and threatening, was for the jury.—Falzarano v. Delaware, L. & W. R. Co, 194 A. 75, 119 N.J.Law 76

82. Mich.—Moffit v. Grand Rapids Ry. Co., 200 N.W. 274, 228 Mich. 349.
Mo.—Williams v. East St. Louis & S. Ry. Co, 232 S.W. 759, 207 Mo.App. 233
10 C.J. p 1071 note 8.

is ordinarily a question for the jury, unless the evidence is insufficient to be submitted, or is clear and undisputed.[83]

On conflicting evidence it is for the jury to say whether a passenger, assaulted by another passenger, provoked the difficulty and was therefor responsible for his own injury.[84]

h. Condition and Use of Carrier's Premises, Tracks, and Roadbed

Proper care of the carrier with respect to the condition of its station premises, platforms, and approaches, and the condition of its track and roadbed at the place where the injury occurred, is ordinarily for determination by the jury.

It is ordinarily a question for the jury as to whether the carrier exercised proper care with regard to the condition of its walks, platforms, or other station premises at the time of the injury,[85] such as whether such premises were properly lighted at the time,[86] or whether the platform used for boarding and alighting from trains or cars was constructed and maintained in a reasonably safe condition,[87] unless the evidence is insufficient to go

Protection from mob

In an action by a negress against a carrier for damages for permitting her to ride in a street car into the city of East St. Louis at the time a mob was attacking negroes in such city, without her knowledge, resulting in injury to her, whether defendant had knowledge of the operation of the mob which attacked the car, or other mobs in the city at the time in question, in time to have warned plaintiff of her danger, and to have taken reasonable precaution for her safety and protection, is a question for the jury—Williams v. East St Louis & S. Ry. Co., 232 S.W 759, 207 Mo App 233.

83. Ky.—Peak v. Louisville & N. R. Co., 297 S.W 1107, 221 Ky. 97.
N.Y—Hershey v. New York, O & W Ry. Co, 179 N.Y.S 396, 189 App Div. 270.
S.C—Stalnaker v. Southern Ry. Co., 180 S.E. 357, 176 S.C. 408.
10 C J p 1071 note 9.

Evidence held insufficient to go to jury in action by live stock shipper, who had been permitted by railroad to travel with stock in stock car, for injuries committed by a robber, who had boarded the car—Beasley v. Hines, 219 S W. 757, 143 Ark 54, 15 A L R 864.

84. Ark.—Hines v. Meador, 224 S.W. 742, 145 Ark 356.

85. Ark—Mills v Franklin, 196 S. W. 928, 130 Ark. 80.
Conn—Pins v. Connecticut Co., 102 A. 595, 92 Conn 310.
Ill.—Reivitz v. Chicago Rapid Transit Co, 158 N.E. 380, 327 Ill 207
Ky—Louisville & I. Ry Co v Jones, 250 S W. 822, 199 Ky. 150, 33 A.L.R. 165
Md—Pennsylvania R. Co. v. Hoover, 120 A. 526, 142 Md 251
Mass.—Solomon v. Boston Elevated Ry. Co., 176 N.E 810, 276 Mass. 139—Smith v. Boston Elevated Ry Co, 159 N E 501, 262 Mass. 18—Cook v Boston Elevated Ry Co, 142 N E. 824, 248 Mass 142
Minn—Falk v. Chicago & N W. Ry Co, 157 N.W. 904, 133 Minn 41.
Mo—Finn v. Terminal R Ass'n of St. Louis, App., 97 S.W.2d 890—Martin v. Missouri Pac. R. Co., App., 253 S W. 1083—Wright v Kansas City Terminal Ry. Co., 193 S W. 963, 195 Mo App 480.
N.J—Leech v. Hudson & M R Co, 174 A. 537, 113 N J.Law 366, affirmed 178 A 754, 115 N J Law 114—Portley v Hudson & M R Co., 168 A. 184, 111 N J Law 204, affirmed 172 A 384, 113 N J Law 13—Holt v. New York, S & W. R Co, 166 A. 156, 110 N J.Law 505—Costello v Director General of Railroads, 112 A 861, 95 N J Law 538—Pabst v Hudson & M R Co., 133 A 74, 4 N J Misc 414.
N Y—Heffron v New York Cent & H R R Co., 119 N E 1024, 223 N.Y 473, reversing 161 N Y S 1128, 175 App Div 962—Allessi v New York Rapid Transit Corporation, 297 N.Y.S 1011, 163 Misc. 815—Ulrich v Interborough Rapid Transit Co., 159 N Y.S 868, 95 Misc. 588—Ulrich v Interborough Rapid Transit Co, 157 N.Y S 753.
N C.—Goodman v Queen City Lines, 180 S.E 661, 208 N.C 323.
N D—Wall v Great Northern Ry. Co., 175 N W 705, 43 N D 422.
Pa—Deegan v Pennsylvania R. Co, 160 A 858, 307 Pa. 207—Yocum v. Philadelphia & West Chester Traction Co, 70 Pa Super 510.
Utah—Stonebreaker v. Bamberger, 54 P 2d 418, 88 Utah 310
Wis—Himstreet v Chicago & N. W Ry. Co, 166 N.W 665, 167 Wis 71.
10 C J. p 1071 note 10.

Failure to warn of conditions

In a proper case it is for the jury to determine whether carrier was negligent in failing to inform passenger that in transfer between depots on walk jointly provided by carriers, she would be obliged to cross railroad tracks, and in failing to warn passenger, going between stations at junction over walk, of approaching train.—Boyle v. Waters, 166 N W. 114, 199 Mich. 478.

Former passengers

In action against railroad for injuries sustained by former passenger who was permitted to remain in station before going to station of connecting railroad, and who fell into an unguarded pit in returning to station from toilet on station premises, the question of whether the railroad kept premises in a reasonably safe condition is a question of fact for the jury—Sink v Grand Trunk Western Ry. Co., 198 N.W. 238, 227 Mich 21.

Constructive notice of conditions

Where witness testified to seeing banana skin on station platform one hour and a half before plaintiff slipped thereon, whether railroad had constructive notice of its presence is for jury.—Deegan v Pennsylvania R. Co, 160 A 858, 307 Pa. 207.

Negligence as matter of law

Sanitary Code rule 52, Vernon's Sayles Civ.St.Annot.1914 art 4553a, requiring each depot, etc, while in use for accommodation of public to be heated, if necessary, etc, applies to case of passengers waiting for a delayed train, and failure to perform that duty would be negligence as a matter of law—Chicago, R. I & G. Ry. Co. v. Faulkner, Tex. Civ.App., 194 S.W. 651.

Direction of verdict improper

It was error for the court to peremptorily instruct the jury to find damages for plaintiff suing for injuries resulting from failure to heat passenger waiting room, where the proof of injury and its cause is not certain and conclusive—Davis v Day, 89 So 814, 127 Miss 140.

86. Mass.—McCarthy v. Boston, R. B. & L. R. Co., 159 N.E. 507, 262 Mass 56
Mich—Boyle v. Waters, 166 N.W. 114, 199 Mich. 478.
N.Y—Creasy v. Eastern Greyhound Lines of New York, 291 N.Y S. 746, 249 App Div. 59.
Pa—McAllister v. Pennsylvania R. Co, 187 A. 415, 324 Pa 65, affirming 182 A. 738, 121 Pa.Super. 131—Wolf v. Smith, 97 A. 853, 252 Pa. 562.
10 C J. p 1071 note 11.

87. Md—Jackson v Hines, 113 A. 129, 137 Md 621.
Mass—Klein v. Boston Elevated Ry. Co., 200 N.E. 6—Regan v. Boston

to the jury,[88] in which case it is proper to direct a verdict for defendant.[89] It is also ordinarily a question for the jury as to whether the carrier had or was chargeable with knowledge that a platform not intended for passengers would be used by them,[90] or whether the carrier impliedly invited intending passengers to use a certain approach to the station.[91] Where it is purely speculative whether defendant was guilty of any negligence with regard to its premises, the question should not be submitted to the jury.[92]

Condition of tracks and roadbed. Negligence with respect to the condition of the track or roadbed at the place where the injury occurred is also ordinarily a question for the jury,[93] unless the evidence thereon is insufficient to go to the jury, or is clear and undisputed.[94]

i. Taking Up Passengers

Negligence of a carrier with respect to taking up passengers is generally a question for the jury.

Where the evidence is conflicting, or is such that reasonable minds might draw different conclusions therefrom, it is ordinarily for the jury to say whether or not the carrier was guilty of negligence with respect to taking up a passenger,[95] such as

& M. R. Co., 113 N.E. 200, 224 Mass. 418.
Mo.—Oesch v. St. Louis Public Service Co., 59 S.W.2d 758, 228 Mo. App. 1055—Lowther v. St. Louis-San Francisco Ry. Co., 261 S.W. 702, 214 Mo.App. 293—Roussell v. St. Louis-San Francisco Ry. Co., App., 257 S.W. 516.
N.J.—Swallow v. Hudson & M. R. Co., 191 A. 775, 118 N.J.Law 157—Sandler v. Hudson & M. R. Co., 151 A. 99, 8 N.J.Misc. 537, affirmed 156 A. 489, 108 N.J.Law 203.
N.Y.—Allessi v. New York Rapid Transit Corporation, 297 N.Y.S. 1011, 163 Misc. 815.
Utah.—Barlow v. Salt Lake & U. R. Co., 194 P. 665, 57 Utah 312.
10 C.J. p. 1072 note 12.

Temporary platform

Whether it was reasonable for railway in performance of duty of passenger to provide guards or to give warning, where extensive changes were under way at station, and whether due care required railway to install movable platform at place of injury, as part of temporary structures, are questions of fact.—Harrington v. Boston Elevated Ry. Co., 118 N.E. 880, 229 Mass. 421, 2 A.L.R. 1057.

88. U.S.—Chesapeake & O. Ry. Co. v. Burton, C.C.A.W.Va., 50 F.2d 730
Iowa.—Stout v. Chicago, R. I. & P. Ry. Co., 200 N.W. 596, 198 Iowa 1017.
Mass.—Renzi v. Boston Elevated Ry. Co., 199 N.E. 738—Sisson v. Boston Elevated Ry. Co., 178 N.E. 733, 277 Mass. 431—Parker v. Boston Elevated Ry. Co., 174 N.E. 927, 273 Mass. 345—Boyd v. Boston Elevated Ry. Co., 162 N.E. 735, 264 Mass. 364.
Mo.—Taylor v. Kansas City Terminal Ry. Co., App., 240 S.W. 512.
N.H.—Wessman v. Boston & M. R. R., 152 A. 476, 84 N.H. 475.
N.Y.—Lang v. Interborough Rapid Transit Co., 183 N.Y.S. 270, 193 App.Div. 56.
10 C.J. p. 1072 note 12 [b].

89. Minn.—Shepley v. Minneapolis Motor Bus Terminal Co., 230 N.W. 264, 180 Minn. 84
N.J.—Seckler v. Pennsylvania R. Co., 174 A. 501, 113 N.J.Law 299

90. Ark.—St. Louis, etc., R. Co. v. Grider, 161 S.W. 1032, 110 Ark. 437

91. Mo.—Chase v. Atchison, etc., R. Co., 114 S.W. 1141, 134 Mo.App. 655.

92. Ohio—Greyhound Lines v. Martin, 189 N.E. 244, 127 Ohio St. 499

93. U.S.—Chicago, M. & St. P. Ry. Co. v. Irving, Wash., 234 F. 562, 148 C.C.A. 328.
Cal.—Morgan v. Southern Pac. Co., 187 P. 74, 45 Cal.App. 229
Mo.—Thomas v. St. Louis-San Francisco Ry. Co., App., 293 S.W. 1051—Whitlow v. St. Louis-San Francisco Ry. Co., App., 282 S.W. 525, certiorari quashed State ex rel. St. Louis & San Francisco Ry. Co. v. Daues, 290 S.W. 425, 316 Mo. 474.
Pa.—Lindsay v. Beaver Valley Traction Co., 83 Pa.Super. 274.
10 C.J. p. 1072 note 15.

Carrier's negligence in constructing bridge which gave way, wrecking train and injuring passenger, is for jury.—Curry v. St. Louis-San Francisco Ry. Co., 296 S.W. 473, 221 Mo.App. 1.

Safety devices at switches

Negligence of carrier in failing to maintain safety appliance in proper condition, with result that train passed through open switch onto another railroad, is for jury, in passenger's action for injuries—Southern Ry. Co. v. Hussey, C.C.A.Mo., 42 F.2d 70, certiorari granted 51 S.Ct. 75, 282 U.S. 826, 75 L.Ed. 736, affirmed 51 S.Ct. 367, 283 U.S. 136, 75 L.Ed. 908.

Evidence held sufficient to go to jury

Evidence of a carrier's negligence in failing to frequently inspect an embankment.—Pennsylvania Co. v. Clark, C.C.A.Ohio, 266 F. 182.

94. Ga.—Georgia R., etc., Co. v. Gilleland, 66 S.E. 944, 133 Ga. 621.
Mich.—Whipple v. Michigan Cent. R. Co., 90 N.W. 287, 130 Mich. 460.

Evidence held insufficient

(1) Where the evidence is insufficient, the issue of defendant's negligence in failing to use a switch stand, which automatically signaled when it was interfered with, is not for the jury.—Delaware, L. & W. R. Co. v. Donahue, N.Y., 238 F. 770, 151 C.C.A. 620.

(2) Where plaintiff intending passenger, was standing on platform and train drew into station, and when front of engine had not quite reached point on track opposite to where he was standing, he was struck in the side by a discarded railroad spike, flattened in two places near its end or point, which flattened places were bright and new-looking, and no one knew where the spike came from, and it appeared track had been inspected thirty-five or forty minutes before, the court erred in not directing verdict for defendant carrier in action for injuries.—St. Louis-San Francisco Ry. Co. v. Gleaves, C.C.A. Ark., 294 F. 523.

95. U.S.—Mathis v. Tutweiler, C.C.A.Tenn., 295 F. 661—Boston Elevated Ry. Co. v. Teele, Mass., 248 F. 424, 160 C.C.A. 434
Ala.—Birmingham Electric Co. v. Jones, 176 So. 203, 234 Ala. 590—Montgomery Light & Traction Co. v. O'Connor, 85 So. 384, 204 Ala. 24.
Conn.—Vaughn v. Healy, 182 A. 166, 120 Conn. 589—Moyles v. Connecticut Co., 160 A. 307, 115 Conn. 80—Sacks v. Connecticut Co., 146 A. 494, 109 Conn. 221.
Fla.—Tampa Electric Co. v. Gibson, 161 So. 727, 119 Fla. 112
Ga.—Norton v. Georgia Ry. & Power Co., 110 S.E. 459, 28 Ga.App. 167
Ill.—Sage v. Johnson, 205 Ill.App. 85. See Kelly v. Chicago City Ry. Co., 207 Ill.App. 464, affirmed 119 N.E. 622, 283 Ill. 640.
Iowa.—Carlisle v. Davenport & M. Ry. Co., 159 N.W. 667, 178 Iowa 224.
Mass.—Gerhart v. Holyoke St. Ry. Co., 128 N.E. 421, 236 Mass. 392
Minn.—Smith v. Chicago, R. I. & P. Ry. Co., 159 N.W. 963, 134 Minn. 404.

whether it was negligent in assisting, or in failing to assist, a passenger to board a train or car,[96] or whether it exercised proper care with respect to the place at which the train or car stopped,[97] or whether the carrier induced the public to believe that they were invited to board trains at a place other than a regular stopping place.[98] It is also ordinarily a question for the jury as to whether the carrier was negligent in starting or moving a train or car while a passenger was boarding it,[99]

Mo.—Sugarwater v. Fleming, 293 S.W. 111, 316 Mo. 742—Griffin v. Missouri Power & Light Co., App., 99 S.W.2d 474—Link v. Atlantic Coast Line R. Co., App., 233 S.W. 834—Willi v. United Rys. Co. of St. Louis, 224 S.W. 86, 205 Mo.App. 272.

N.J.—Courtney v. Public Service Ry. Co., 115 A. 740, 96 N.J.Law 308, affirmed 117 A. 925, 97 N.J.Law 564.

N.Y.—Brott v. Auburn & S. Electric R. Co., 115 N.E. 273, 220 N.Y. 92, reversing 154 N.Y.S. 1113, 169 App. Div. 913—Meyers v. Hines, 191 N.Y.S. 773, 199 App.Div. 594—Gubernick v. Interborough Rapid Transit Co., 205 N.Y.S. 31, 123 Misc. 153—Armour v. Interborough Rapid Transit Co., 154 N.Y.S. 93, 90 Misc. 665.

Ohio.—Keifer v. Cleveland Ry. Co., 8 Ohio App. 272.

Pa.—Dickun v. Pittsburgh Rys. Co., 161 A. 739, 308 Pa. 20—Forrest v. Philadelphia Rapid Transit Co., 104 A. 663, 261 Pa. 383—Morris v. Pittsburgh Rys. Co., 100 A. 971, 256 Pa. 390.

R.I.—Barlik v. United Electric Rys. Co., 197 A. 452, reargument denied 198 A. 359.

S.C.—Towill v. Southern Ry. Co., 127 S.E. 559, 131 S.C. 423.

Tenn.—Tennessee Electric Power Co. v. Bainbridge, App., 95 S.W.2d 1261.

Tex.—Ft. Worth & D.C. Ry. Co. v. Hawley, Civ.App., 235 S.W. 659, dismissed for want of jurisdiction—Texas Electric Ry. v. Stewart, Civ. App., 217 S.W. 1081, error refused.

Wash.—Switzer v. City of Seattle, 294 P. 225, 159 Wash. 540, modified on other grounds 298 P. 347.

10 C.J. p. 1072 note 17.

Particular questions of fact

(1) Negligence of elevated railway as cause of steps folding up and throwing passenger boarding car to rear platform.—Fitzgerald v. Boston Elevated Ry. Co., 174 N.E. 490, 274 Mass. 287.

(2) In an action for injuries to a passenger, received when he was boarding a street car and the slack of the trolley rope fastened to the grab rail wound around his hand and fingers as the trolley jumped from the wire, whether defendant's conductor was negligent in fastening the trolley rope to the grab rail—Flaherty v. Boston Elevated Ry. Co., 141 N.E. 505, 247 Mass. 44.

(3) In passenger's action for injuries sustained while boarding moving train, whether railroad negligently failed to give customary warning call "All aboard."—Missouri-Kansas-Texas R. Co. of Texas v. Hail, Com.App., 48 S.W.2d 589, affirming Hail v. Missouri-Kansas-Texas R. Co. of Texas, Civ.App., 30 S.W.2d 1062.

(4) Whether motorman suddenly and negligently opened doors of street car causing them to strike prospective passenger.—Meyer v. Omaha & Council Bluffs St. Ry. Co., 251 N.W. 841, 125 Neb. 712.

(5) Whether motorman was negligent in neither seeing nor hearing intending passenger who rapped on door twice and in starting street car without notice, striking intending passenger.—Cleveland Ry. Co. v. Krofta, 180 N.E. 641, 125 Ohio St. 126.

(6) Question of negligence, where plaintiff was struck by overhang of street car which started while plaintiff was on narrow curved platform between two cars when in act of boarding second car.—Lasater v. Conestoga Traction Co., 160 A. 447, 306 Pa. 500.

(7) Negligence in speeding up street car and failing to see pedestrian and sound gong.—Johnson v. City of Seattle, 250 P. 409, 141 Wash. 385.

(8) It could not be ruling as matter of law that it would be negligence to call out or to fail to call out "wide step," and whether train between which and platform plaintiff fell consisted of four or five cars, and whether plaintiff could recover if she attempted to go upon first car at regular stopping place, are questions for the jury.—Harrington v. Boston Elevated Ry. Co., 118 N.E. 880, 229 Mass. 421, 2 A.L.R. 1057.

(9) It was not negligence as matter of law for street car company, operating two cars on cross-town line, to have its conductor leave car to turn switch at end of route, as respects passenger boarding car while conductor was so engaged.—Clarke v. New York Rys. Co., 171 N.Y.S. 248.

96. Cal.—Hellman v. Los Angeles Ry. Corporation, 27 P.2d 946, 135 Cal.App. 627, rehearing denied 28 P.2d 384, 135 Cal.App. 627—Sanchez v. Pacific Auto Stages, 2 P.2d 845, 116 Cal.App. 392—Sellars v. Southern Pac. Co., 166 P. 599, 33 Cal.App. 701.

Ga.—Metts v. Louisville & N. R. Co., 182 S.E. 531, 52 Ga.App. 115.

Tex.—Southern Traction Co. v. Reagor, Civ.App., 186 S.W. 272, error refused.

10 C.J. p. 1073 note 18.

Not matter of law

A carrier does not as a matter of law owe a passenger the duty of assistance in entering its cars, unless conditions exist showing that such assistance is necessary and it is apparent to the employees of the carrier or is made known or is desired by the passenger.—Bird v. Schaff, Tex.Civ.App., 206 S.W. 711.

97. U.S.—Davis v. Olson, C.C.A. Minn., 298 F. 921—Boston Elevated Ry. Co. v. Teele, Mass., 248 F. 424, 160 C.C.A. 434.

Cal.—Sanchez v. Pacific Auto Stages, 2 P.2d 845, 116 Cal.App. 392.

10 C.J. p. 1073 note 19.

98. Ill.—Chicago, etc., R. Co. v. Doan, 62 N.E. 826, 195 Ill. 168, affirming 93 Ill.App. 247.

10 C.J. p. 1073 note 20.

99. U.S.—Philadelphia Rapid Transit Co. v. Alcorn, C.C.A.Pa., 266 F. 50.

Ala.—Birmingham Electric Co. v. Wood, 130 So. 786, 222 Ala. 103—Louisville & N. R. Co. v. Banks, 76 So. 472, 16 Ala.App. 188.

Cal.—Hellman v. Los Angeles Ry. Corporation, 27 P.2d 946, 135 Cal.App. 627, rehearing denied 28 P.2d 384, 135 Cal.App. 627.

Ill.—Stanton v. Chicago City Ry. Co., 119 N.E. 291, 283 Ill. 256, affirming 205 Ill.App. 385—Fels v. Chicago Motor Coach Co., App., 9 N.E.2d 265.

Mass.—Gerber v. New York Cent. R. R., 192 N.E. 837, 288 Mass. 318—Coyle v. Worcester Consol. St. Ry. Co., 173 N.E. 586, 273 Mass. 475—Fournier v. Holyoke St. Ry. Co., 154 N.E. 546, 258 Mass. 257—Nuttall v. Worcester Consol. St. Ry. Co., 114 N.E. 291, 225 Mass. 167.

Mich.—Sullivan v. Detroit United Ry., 182 N.W. 33, 213 Mich. 679.

Minn.—Mardorf v. Duluth-Superior Transit Co., 261 N.W. 177, 194 Minn. 537.

Mo.—Hudson v. Kansas City Rys. Co., 246 S.W. 576—Zimmerman v. Kansas City Public Service Co., 41 S.W.2d 579, 226 Mo.App. 369—Altheimer v. People's Motorbus Co. of St. Louis, App., 6 S.W.2d 976—Hayward v. People's Motorbus Co. of St. Louis, App., 1 S.W.2d 252—Boggess v. Kansas City Rys. Co., 229 S.W. 404, 207 Mo.App. 1.

N.H.—Robinson v. Boston & M. R. R., 160 A. 473, 85 N.H. 474.

N.J.—Nogrady v. Erie R. Co., 144 A. 803, 105 N.J.Law 396—Sullivan v.

or before he had reached a seat in the car.[1] However, where the evidence is insufficient to show negligence, the question should not be submitted to the jury,[2] but the court may properly direct a verdict for defendant.[3]

j. Operating Trains Where Passengers Are Being Received or Discharged

Whether operating a train or car at a place where another train or car is taking on or discharging passengers is negligence, and whether the train or car so operated was operated in a negligent manner, are ordinarily for the jury to determine.

Whether the operation of a train or car at a place where another train or car is receiving or discharging passengers is negligence,[4] whether the operator of the train or car which the injured passenger intended to board was negligent,[5] or whether the train or car which caused the injury to a passenger or intending passenger who was rightfully on or near the tracks at a station or regular stopping place was operated at the time in a negligent manner,[6] is ordinarily a question of fact for the jury. Where the evidence is insufficient, or is clear

La Frade, 185 A. 665, 14 N.J Misc 482, affirmed 189 A. 365, 117 N J Law 442.

N Y —Haynes v. Elmira Water, Light & R Co., 170 N.Y S 369, 182 App Div. 472

Or.—Rostad v. Portland Ry, Light & Power Co., 201 P. 184, 101 Or. 569

Pa —Bracken v. Philadelphia Rapid Transit Co., 15 Pa Dist 229

Utah —Williamson v. Salt Lake & O Ry Co., 172 P 680, 52 Utah 84, L. R A 1918F 588.

10 C J p 1073 note 21.

Sudden jerks

Evidence that sudden start of motor bus broke passenger's grip on supporting bar and threw her against seat, causing injuries, justified submitting case to jury —McRae v Boston Elevated Ry Co., 176 N.E. 773, 276 Mass 82.

Not matter of law

(1) It is not necessarily culpable negligence as matter of law to start street car before passenger has reached place of safety, as the rule governing depends on facts of each case.—Hopson v Union Traction Co., 167 P 1059, 101 Kan 499.

(2) A carrier does not as matter of law owe duty of stopping trains at stations for sufficient time to enable passengers who have gotten on safely to find seats —Blume v Chicago, M. & St P Ry Co., 158 N.W. 418, 133 Minn. 348, Ann.Cas 1918D 297.

Demurrer to evidence properly overruled

(1) Where the only eyewitness of an accident testified that deceased got on the step of a street car which he had signaled to stop, and while he was on the step the car started with a jerk, and deceased fell with his head in the direction taken by the car, and there was nothing to show whether deceased had hold of the handrail or what he might have done to overcome a sudden jerk, the manner of the accident was not so contrary to physical laws that a demurrer to the evidence should have been sustained.—Beckner v. Kansas City Rys Co, Mo App, 232 S W. 745

(2) In action by passenger for personal injuries received while boarding car, when it started with a jerk, that plaintiff testified that she was thrown forward instead of backward or pitched in a certain direction while standing in peculiar position that she was, has been held not contrary to physical laws requiring sustaining demurrer to evidence —Traynor v. Wells, Mo App., 273 S W 1100.

1. Ala —Bradford v Birmingham Electric Co., 149 So 729, 227 Ala. 285.

Md —Grinath v. Baltimore & Belair Electric Ry. Co., 125 A. 604, 145 Md. 290

N Y.—Waterman v. Empire State R. R, 206 N Y.S 630, 211 App.Div 170

Pa —Wood v. Pennsylvania R. Co, 170 A. 367, 111 Pa.Super. 430

Tex.—Dallas Ry. & Terminal Co. v Travis, Civ App, 46 S W 2d 743, affirmed 78 S W 2d 941, 125 Tex 11

10 C.J p 1073 note 22.

Reasonable time to reach seat

Whether conductor gave woman carrying child and leading another reasonable time to find seat for herself and children before causing train to move held for jury —Riggs v. Norfolk-Southern R. Co., 124 S E. 749, 188 N C. 366

2. Mich —Kerr v. City of Detroit, Department of Street Railways, 238 N W. 190, 255 Mich 446

Ohio —Cleveland Ry. Co. v. Barragate, 180 N.E 694, 125 Ohio St 190

R I.—Peters v. United Electric Rys Co., 165 A. 773, 53 R I. 251, modified on other grounds 167 A. 122

Evidence held insufficient to make issue for jury of primary negligence of street railroad company in action for injuries to intending passenger from overswing of turning car, in view of plaintiff's own admissions.—De Lorme v. St Louis Public Service Co, Mo.App, 61 S.W 2d 247.

3. Mass —Parker v. Boston Elevated Ry Co., 174 N E. 927, 273 Mass 345 —Bean v. Eastern Massachusetts St Ry Co, 168 N.E 807, 269 Mass. 206—Boyd v. Boston Elevated Ry Co., 162 N E. 735, 264 Mass. 364.

4. U.S.—Southern Ry. Co. v. Hobson, C C A.Ga., 43 F 2d 715—Pennsylvania R Co v. Rogers, N.J, 244 F 76, 156 C C.A 504

Ala —Alabama City, G. & A. Ry. Co. v Bessiere, 72 So. 325, 197 Ala 5

Cal —Ferran v Southern Pac. Co., 44 P 2d 533, 3 Cal 2d 350—Wilkinson v. United Railroads of San Francisco, 232 P 131, 195 Cal 185.

Mass —McCarthy v Boston, R B. & L. R Co., 159 N E 507, 262 Mass. 56.

10 C J p 1074 note 23

5. Ala —Montgomery Light & Traction Co v. O'Connor, 85 So. 384, 204 Ala. 24

6. Ala —Montgomery Light & Traction Co v O'Connor, supra.

Cal —Lewis v Pacific Electric Ry Co, 272 P. 346, 94 Cal App 748

Mass —Somerville v. New York, N. H & H. R Co 189 N E. 592, 285 Mass 539—Lipski v. Boston Elevated Ry Co, 143 N E 335, 248 Mass. 508

Mich —Schnurr v Detroit United Ry, 193 N W. 772, 222 Mich 591—Boyle v. Waters, 166 N.W 114, 199 Mich. 478

10 C.J p 1074 note 24.

Injury to prospective passenger in safety zone

In action against street railroad for injuries received from being struck by rear end of street car while it was rounding a curve at time when plaintiff was standing in a safety zone marked off by street railroad, whether motorman of street car knew that place occupied by plaintiff was a position of peril to her held question for jury. Where plaintiff, standing in safety zone, maintained by street car for safety of its passengers, was struck by rear end of street car rounding a curve, whether or not street railroad was charged with negligence in maintaining safety zone as it was maintained, and whether or not motorman exercised reasonable care in rounding curve knowing that plaintiff was occupying a perilous position, held for jury. Whether a motorman of street car has right to assume that an adult pedestrian will not stand so close to track as to be struck by street car as it swings out in rounding a curve

and undisputed, there is no question for the jury,[7] and a verdict for defendant may properly be directed.[8]

k. Condition of Cars and Equipment

Negligence with respect to the construction and maintenance of cars and equipment is a question for the jury, except where the evidence is clear and undisputed or is insufficient to go to the jury.

Except where the evidence is insufficient to go to the jury, or is clear and undisputed,[9] whether or not the carrier was negligent with respect to the construction and maintenance, in a safe condition, of the car, equipment, or appliances which caused the injury, is ordinarily a question for the jury.[10]

cannot be determined as a matter of law, but is governed by fact limitations, as it is knowledge of possible injury and not certainty of it that imposes duty on operator to use all reasonable means to avoid injury—Mangan v Des Moines City Ry. Co., 203 N.W. 705, 200 Iowa 597, 41 A.L.R. 368

7. Ky.—Louisville & N. R. Co. v Kilburn, 113 S.W.2d 844, 272 Ky. 44.

Neb.—Lofgren v Omaha & C., B. St. Ry. Co., 174 N.W. 222, 103 Neb. 723

Evidence held insufficient, on question of gross negligence, in action for injuries to a street car passenger after alighting and while crossing the tracks—Davis v. Saginaw-Bay City Ry. Co., 157 N.W. 390, 191 Mich. 131

8. U.S.—Nutter v. Chesapeake & O. Ry. Co., C.C.A.W.Va., 72 F.2d 982.

9. U.S.—Windham v. Atlantic Coast Line R. Co., C.C.A.Ala., 71 F.2d 115.

Ala.—Rowe v. Alabama Power Co., 167 So. 324, 232 Ala. 257

Ky.—Louisville Ry. Co. v. Potter, 194 S.W. 308, 175 Ky. 258

Mass.—Hahesy v. Boston Elevated Ry. Co., 165 N.E. 114, 266 Mass. 307.

Mo.—Jones v. St. Louis-San Francisco Ry. Co., 5 S.W.2d 101, 222 Mo. App. 1220.

N.J.—Hunter v. Public Service Ry. Co., 144 A. 305, 105 N.J.Law 300—Conover v. Delaware, L. & W. R. Co., 106 A. 384, 92 N.J.Law 602

N.Y.—Moll v. Niagara Gorge R. Co., 264 N.Y.S. 761, 238 App.Div. 528.

Ohio—Gorman v. City of Cleveland, 159 N.E. 136, 26 Ohio App. 109.

Or.—Morrison v. Pacific Northwest Public Service Co., 30 P.2d 344, 146 Or. 225.

Pa.—Swink v. Philadelphia Rapid Transit Co., 120 A. 827, 277 Pa. 220—De Walt v. Pittsburgh Rys. Co., 106 A. 110, 263 Pa. 236

R.I.—Bines v. United Electric Rys. Co., 148 A. 417, 50 R.I. 438.

Tenn.—Wilson v. Nashville, C. & St. L. Ry., 65 S.W.2d 637, 16 Tenn.App. 695

Tex.—St. Louis Southwestern Ry. Co. of Texas v. Rutherford, Civ.App., 184 S.W. 700, error refused.

10 C.J. p. 1075 note 26.

Evidence held insufficient to require submission

(1) Falling of railroad car's window or closing of door on passenger's hand, without evidence of defect or negligence—MacGill-Allen v. New York, N. H. & H. R. Co., 118 N.E. 248, 229 Mass. 162.

(2) Existence of ice upon street car step whereon passenger slips, without more.—Olszowy v. Cleveland Ry. Co., 192 N.E. 366, 47 Ohio App. 529.

(3) Failure to submit whether street car operator was negligent in permitting suitcase in aisle is not error, where evidence did not disclose that motorman knew of suitcase—Phinney v. Eastern Massachusetts St. Ry. Co., 189 N.E. 52, 285 Mass. 207.

(4) Railway is entitled to directed verdict where passenger falling over luggage in car aisle offered no evidence respecting railroad's knowledge of obstruction, as the mere presence of luggage in the aisle is not per se sufficient to show negligence.—Costello v. Chicago, R. I. & P. Ry. Co., 217 N.W. 434, 205 Iowa 1077.

(5) Where passenger entered coach and took vacant seat by window that was then open, and placed her arm on the window sill, and after the train had gone about eight miles the window fell upon the arm and injured it, the rule of res ipsa loquitur did not apply, and the passenger should have been nonsuited, although she testified she neither touched the window nor did anything else to cause it to fall—Saunders v. Norfolk & W. Ry. Co., 117 S.E. 4, 185 N.C. 289, 29 A.L.R. 1258.

(6) Evidence that burn received by passenger from steam pipes beneath seat in railroad coach was caused by railroad's negligence, is insufficient, where heating system used was of standard approved type generally in use, there was no evidence that different or safer method was in use by any railroad, or could have been provided, or that appliances were defective or dangerous, or that any other person had received burns from pipes, and passenger using car in usual and ordinary manner would not come in contact with pipes.—Houston & T. C. R. Co. v. Werline, Tex.Civ.App., 84 S.W.2d 288, error dismissed.

10. U.S.—Long v. Atlantic Coast Line R. Co., S.C., 238 F. 919, 151 C.C.A. 653.

Ark.—Arkansas Power & Light Co. v. Hughes, 76 S.W.2d 53, 189 Ark. 1015—Chicago, R. I. & P. Ry. Co. v. McCrary, 16 S.W.2d 466, 179 Ark. 444—Butler County R. Co. v. Lawrence, 250 S.W. 340, 158 Ark. 271—Kansas City Southern Ry. Co. v. Teater, 186 S.W. 294, 124 Ark. 1

Cal.—Cox v. Central California Traction Co., 259 P. 987, 85 Cal.App. 596.

Colo.—Colorado Springs & Interurban Ry. Co. v. Reese, 169 P. 572, 69 Colo. 1.

Conn.—Sickmund v. Connecticut Co., 189 A. 876, 122 Conn. 375

Ill.—Molloy v. Chicago Rapid Transit Co., 166 N.E. 530, 335 Ill. 164.

Ind.—Pittsburgh, C., C. & St. L. Ry. Co. v. Arnott, 126 N.E. 13, 189 Ind. 350

Iowa.—Olson v. Des Moines City Ry. Co., 170 N.W. 466, 186 Iowa 384—Calvert v. Des Moines City Ry. Co., 169 N.W. 641, 184 Iowa 1238.

Ky.—Consolidated Coach Corporation v. Hopkins, 14 S.W.2d 768, 228 Ky. 184—Louisville & N. R. Co. v. Rowland's Adm'r, 14 S.W.2d 174, 227 Ky. 841—Louisville & I. Ry. Co. v. Jones, 250 S.W. 832, 199 Ky. 150, 33 A.L.R. 165

Md.—Smith v. Blue Ridge Transp. Co., 191 A. 66—Baltimore & O. R. Co. v. Davis, 137 A. 30, 152 Md. 427—Washington, B. & A. Electric R. Co. v. Fitch, 136 A. 529, 152 Md. 137—Hines v. Watkins, 112 A. 299, 137 Md. 211.

Mass.—Hartford v. Boston Elevated Ry. Co., 182 N.E. 476, 280 Mass. 288—Scott v. Boston Elevated Ry. Co., 176 N.E. 530, 276 Mass. 21—Wissell v. Worcester Consol. St. Ry. Co., 158 N.E. 659, 261 Mass. 364—Fitzmaurice v. Boston, R. B. & L. R. Co., 152 N.E. 239, 256 Mass. 217—Bagnell v. Boston Elevated Ry. Co., 142 N.E. 63, 247 Mass. 235—Parker v. Middlesex & B. St. Ry. Co., 129 N.E. 353, 237 Mass. 291.

Minn.—Gegere v. Chicago & N. W. Ry. Co., 220 N.W. 429, 175 Minn. 96—Bulin v. Great Northern Ry. Co., 201 N.W. 307, 161 Minn. 226—Rittle v. St. Paul City Ry. Co., 183 N.W. 146, 149 Minn. 216.

Miss.—Yazoo & M. V. R. Co. v. Hawkins, 140 So. 873, 163 Miss. 505.

Mo.—Taylor v. Missouri Pac. R. Co., 279 S.W. 115, 311 Mo. 604—Brindley v. Wells, 271 S.W. 48, 308 Mo. 1—Pennifold v. St. Louis Public Service Co., App., 59 S.W.2d 713—

Thus it is ordinarily a question for the jury whether it was negligence to leave the vestibule connection between two cars unlighted on a dark night,[11] or to leave the outside or trapdoor of the vestibule open, without a guard,[12] or whether a condition existed which, in the exercise of the care required of him, an employee of the carrier should have discovered and remedied, or warned the passenger thereof.[13]

1. Operation of Cars

Whether the train, car, or other vehicle of the carrier was negligently operated is a question for the jury, unless the state of the evidence is such as to permit or require the court to determine it.

Unless the insufficiency, or the clear and undisputed character, of the evidence makes it a question for the court,[14] the question whether or not the train or the car which caused the injury was, at the time, operated with the proper degree of care and skill is generally for the jury.[15] Thus it is

Smith v. Kansas City Public Service Co, 56 S.W.2d 838, 227 Mo App 675—Tueteberg v. St Louis Public Service Co., App, 41 S W 2d 956

Mont.—Garvin v. Butte Electric Ry. Co, 169 P. 40, 54 Mont 196.

N.H.—Seaver v Manchester St. Ry., 97 A. 220, 78 N.H 584.

N.J.—Agry v Pennsylvania R. Co., 150 A. 401, 106 N J Law 476, reversing 146 A 587, 7 N J.Misc. 579—Holda v. Public Service Co-ordinated Transport, 168 A. 753, 11 N. J Misc 879.

N Y.—Wyatt v. Interborough Rapid Transit Co, 172 N.Y.S. 223

N C.—Lindsey v Atlantic Coast Line R Co, 92 S E. 166, 173 N C. 390

Ohio.—Olszowy v. Cleveland Ry Co, 192 N.E. 366, 47 Ohio App 529—Reis v Cincinnati Traction Co., 13 Ohio N P ,N S, 166.

Okl.—Chicago, R. I & P Ry Co v. Shelton, 273 P 988, 135 Okl 53—St Louis & S. F R Co v. McClain, 162 P. 751, 63 Okl. 75

Pa.—Orms v. Traction Bus Co, 150 A 897, 300 Pa. 474—De Bouvier v Pennsylvania R Co, 107 A 775, 264 Pa 443—Saunders v Altoona & Logan Valley Electric Ry. Co., 84 Pa.Super 385

R.I.—Tomei v United Electric Rys. Co., 163 A 479.

S.C.—Hall v. Southern Ry. Co., 160 S E. 584, 162 S.C. 260.

Tex.—Houston Electric Co. v Bragg, Com.App., 276 S.W. 641, affirming Bragg v. Houston Electric Co., Civ. App., 264 S.W 245, motion overruled, Com App., Houston Electric Co v. Bragg, 280 S W 188—Texas & Pac. Ry Co v Hanson, Civ App., 189 S W. 289, error refused.

Wash.—French v Spokane & I. E. R Co, 172 P. 1159, 102 Wash. 236.

10 C.J p 1074 note 25.

Jury could infer carrier's negligence, where trapdoor forming apparently safe part of vestibule floor of railroad car went down, injuring passenger.—Rogers v. New York Cent. R. Co, 150 A. 357, 106 N.J. Law 394

Where box car used for passengers

In a soldier's action for injuries sustained by falling from the door of a box car, it was for the jury to decide whether, as a practical thing, guards or the like had been designed and put in use to such extent that the carrier should have known of them.—Gainer v. Hines, 184 N Y.S. 768, 194 App Div. 21.

Electric shock

In action by passenger on street car for injuries from electric shock, if explanation of defendant leaves case with no disputed fact, verdict may be directed, but if testimony presents disputed material facts, or if reasonably divergent inferences may be drawn by fair-minded men, from material facts not disputed, question is for jury, mere weight of evidence not being criterion as to whether case should go to jury.—McKittrick v Public Service Ry. Co., 128 A 226, 101 N J Law 262

11. U.S.—Bronson v Oakes, Minn., 76 F 734, 22 C.C.A 520

Ala.—Clanton v. Southern R. Co, 51 So 616, 165 Ala. 485, 27 L R A, N.S, 253

12. Ga.—Central of Georgia Ry Co v Deas, 96 S E 267, 22 Ga App. 425

N J.—Potter v Pennsylvania R Co., 174 A. 734, 113 N J Law 441.

10 C J. p 1075 note 28.

13. U S.—Chesapeake & O. Ry Co v. Burton, C.C A W.Va, 62 F 2d 110, 88 A L R. 756, certiorari denied 53 S.Ct. 507, 288 U S 617, 77 L.Ed. 990.

Ala.—Atkinson v Dean, 73 So 479, 198 Ala 262

Conn.—Dunne v. Connecticut Co, 195 A. 183

Mass.—Poulos v Labbe, 195 N.E. 893—Scott v. Boston Elevated Ry. Co., 176 N E. 530, 276 Mass. 21.

Mo.—Vortriede v. St. Louis Public Service Co, App., 58 S.W.2d 492

R.I.—Bines v United Electric Rys. Co., 133 A. 624.

Banana peel on doorsill

Evidence, in a passenger's action for injuries received when he stepped on a banana peel and fell to the ground, held to authorize submission of the issue of the carrier's negligence in permitting the banana peel to remain upon the doorsill—Ft. Worth & D. C Ry. Co v. Yantis, Tex.Civ.App., 185 S W. 969, error refused.

14. Ala.—Mosley v. Teche Lines, 166 So. 800, 232 Ala. 110.

10 C J p 1075 note 30.

Direction of verdict for defendant required or proper

(1) In action for death of person riding on drover's pass.—Texas & N O R Co. v. McElheny, Tex Civ App, 294 S.W 287

(2) In action by passenger for injuries from being struck by opening of coach door by flagman while passenger was stooping to pick up suit case, where the evidence showed that injury resulted from mere accident and was not due to any negligence of railroad company or its servants.—Louisville & N R Co v. Bunnell, 104 So. 344, 20 Ala.App. 583.

(3) Where jolt of car or closing of door on passenger's hand, or both in combination, did not warrant finding of carrier's negligence.—Caramicos v. New York, N. H & H. R Co, 178 N E. 542, 277 Mass 364

(4) Testimony that passenger, standing on car platform as train was entering station, was thrown off his feet and lost hold on guard rail because of allegedly unusual and extreme jolt is insufficient, as matter of law, to show railroad's negligence, where train's speed was six miles per hour, and there was no evidence of defect in car or track or of carelessness in running train.—McKay v Boston & M R. R., 188 N E. 390, 284 Mass. 606.

15. U.S.—New York Cent. R Co v Johnson, C C A.Mo., 27 F 2d 699, certiorari granted 49 S.Ct. 27, 278 U S. 590, 73 L Ed 523, reversed on other grounds 49 S.Ct. 300, 279 U S. 310, 73 L Ed. 706, amended 49 S Ct. 417—New York, N H & H Ry Co. v Kilby, Mass, 233 F. 252, 147 C.C A 258.

Ark.—Ft Smith Light & Traction Co. v. Phillips, 206 S W 453, 136 Ark 310.

Cal.—Horney v. Dillingham, 253 P. 970, 81 Cal App. 443.

Colo.—Colorado Springs & Interurban Ry Co. v. Reese, 169 P. 572, 69 Colo. 1

Conn.—Belledeau v. Connecticut Co, 149 A. 127, 110 Conn. 625, followed

generally a question for the jury as to whether the carrier was negligent as to the overloaded or overcrowded condition of the car;[16] or whether it was negligent as to the rate of speed at which the car was running at the time of the accident;[17] whether it was negligent in failing to keep a proper lookout;[18] whether it was negligent as to causing a passenger to fall or to be pushed or thrown from the car,[19] such as by reason of its crowded

in Cavanaugh v Connecticut Co., 149 A 131, 110 Conn. 698—Sacks v. Connecticut Co, 146 A. 494, 109 Conn 221.

Ill.—Kaldunski v. Chicago City Ry. Co, 250 Ill.App. 475

Ky—Adams v. Hilton, 110 S.W 2d 1088, 270 Ky. 818—Consolidated Coach Corporation v. Hopkins, 14 S.W 2d 768, 228 Ky. 184.

Md—Washington & R Ry. Co. of Montgomery County v. Sullivan, 110 A 478, 136 Md. 202.

Mass—Moulton v. Boston Elevated Ry. Co., 127 N.E. 886, 236 Mass. 234—Mercier v. Union St. Ry. Co., 125 N.E 181, 234 Mass. 85.

Mich.—Borski v. City of Wakefield, 215 N.W 19, 239 Mich. 656—Bury v. Detroit United Ry., 164 N W. 460, 198 Mich. 447.

Mo.—Delfosse v. United Rys. Co. of St Louis, 201 S W. 860—Jordan v St. Louis Public Service Co., App., 103 S W.2d 552, quoting **Corpus Juris** text—Carter v. Wells, App, 40 S.W.2d 725—Lincoln v St. Louis-San Francisco Ry. Co., 7 S.W.2d 460, 223 Mo App. 46—Hellar v Kansas City Rys. Co., App, 237 S W. 811—Willi v United Rys Co. of St. Louis, 224 S W 86, 205 Mo.App. 272

N J—Van Keuren v Erie R Co., 157 A 545, 10 N J Misc. 6—Benedetto v. Hudson & M R. Co., 156 A 37, 9 N J Misc 758—Anthony v. Public Transit Co, 130 A. 895, 3 N.J. Misc 1204

Ohio—Northern Ohio Traction & Light Co v. Jenkins, 3 Ohio App. 161.

Or.—Lamm v. Silver Falls Timber Co, 277 P. 91, 133 Or. 468, reversed on other grounds 286 P 527, 133 Or. 468, rehearing denied 291 P. 375, 133 Or. 468, appeal dismissed 51 S.Ct. 214, 282 U.S. 812, 75 L Ed. 727.

Pa.—Sperry v. White Star Lines, 172 A. 646, 315 Pa. 361—Bickel v. Reed, 179 A. 762, 118 Pa Super. 335.

R.I.—Keefe v. United Electric Rys. Co., 195 A. 599.

10 C.J. p 1075 note 29.

Negligence of taxicab driver

If the driver of a cab saw or, if reasonably alert, ought to have seen a hole in the street, and apprehended that danger to the passengers was likely to result from driving into it, considering the speed at which he was moving, and could have avoided the hole, then the court would not have been warranted in holding, as matter of law, that his conduct did not involve negligence.—O'Connell v. Quaker City Cab Co., 84 Pa.Super. 323.

Operation with knowledge of defect

In action for injuries to a passenger on a jitney bus, when a tire exploded raising the floor under plaintiff so as to strike and inflict injury, and three times before the explosion the driver had left his seat to observe the source of a peculiar noise emanating apparently from the wheel, whether defendant was negligent in operation of the bus was properly a question for jury—Klorman v. Drogin, 123 A. 760, 99 N.J.Law 422, 31 A.L.R. 1191

Operation in tunnel

Testimony showing that, when passing through a tunnel half a mile long, the trainmen did not close the transoms or windows of a passenger coach, that the quantity of smoke and gas entering the car was very unusual, nearly suffocating passengers, and tending to show that the fireman stoked the engine immediately before entering the tunnel, is sufficient to require submission of the question of negligence of the railroad company to the jury—Cincinnati, N. O. & T. P. Ry. Co. v. Ball, C.C.A.Tenn., 288 F. 173.

16. Minn.—Oletzky v Great Northern Ry. Co., 169 N.W. 715, 141 Minn. 218.

Mo.—Jordan v. St. Louis Public Service Co., App., 103 S W.2d 552.

N.J.—Egner v. Hudson & M. R. Co., 162 A 554, 109 N.J Law 367

N.Y.—Allessi v. New York Rapid Transit Corporation, 297 N Y.S 1011, 163 Misc 815—Dashew v. Interborough Rapid Transit Co., 175 N Y S. 875.

Okl.—Sand Springs Ry. Co. v Smith, 203 P 207, 84 Okl. 211.

Wash—Carton v. Eyres & Seattle Drayage Co., 201 P. 737, 117 Wash. 536.

10 C J. p 1075 note 31.

Violation of ordinance fixing capacity

As the violation of an ordinance fixing the carrying capacity of street cars would be negligence, in an action for injuries to passenger thrown to floor of car in which she was standing when motorman made emergency stop, question of whether ordinance fixing carrying capacity of street car was violated is for jury—Sullivan v. Minneapolis St. Ry. Co., 200 N.W. 922, 161 Minn. 45.

17. U.S.—Nevin Bus Lines v. Ritenour, C.C A Ohio, 61 F 2d 637—Mareiniss v. Sheeran, C.C.A.N.Y., 31 F.2d 976.

Cal—Gritsch v Pickwick Stages System, 22 P 2d 554, 131 Cal App. 774—Holt v. Yellow Cab Co. of San Diego, 12 P.2d 472, 124 Cal. App. 385.

Md—Washington, B. & A E. Ry. Co. v. State, 113 A 338, 137 Md. 538.

Miss.—Pickwick Greyhound Lines v Silver, 125 So. 340, 155 Miss. 765.

Mo.—Unterlachner v Wells, 296 S. W 755, 317 Mo 181—Timmons v. Kurn, App., 100 S W.2d 952—Alewel v East St. Louis & S. Ry. Co., App, 26 S.W.2d 869

N Y—Rogers v Burke, 241 N.Y.S. 414, 229 App Div. 361.

Ohio.—A. F. Waite Taxi & Livery Co. v. McGrew, 16 Ohio App 219.

Or—Odrlin v. Dugan, 1 P.2d 599, 137 Or. 140.

Pa.—Petri v. Pittsburgh Rys. Co., 195 A. 107.

S.C.—Nelson v. Charleston & W. C. Ry. Co, 121 S.E. 198, 92 S C. 151.

Tenn. — Tennessee Coach Co v. Young, 80 S W.2d 107, 18 Tenn App. 592

10 C.J. p 1075 note 32.

Evidence held insufficient to go to the jury on the question of negligence as to the rate of speed.—Bowling Green-Hopkinsville Bus Co. v Edwards, 59 S.W 2d 584, 248 Ky. 684—10 C J. p 1075 note 32 [c].

18. Mont.—Fisher v. Butte Electric Ry. Co., 249 P. 1043, 77 Mont 85.

The amount of vigilance required of a bus driver as a carrier of passengers while driving along street car tracks is a question for the jury.—Simmons v. Pacific Electric Ry. Co., 212 P. 637, 60 Cal App 129.

19. U.S.—Giger v. New York, N. H. & H. R. Co., C C.A.N.Y., 60 F.2d 63.

Ala—Birmingham Electric Co. v. Glenn, 141 So. 537, 224 Ala. 620

Cal.—Mudrick v Market St. Ry Co, App., 74 P.2d 328.

Ill.—Roberts v Economy Cabs, 2 N. E 2d 128, 285 Ill App 421. See Roberts v. Chicago City Ry. Co., 205 Ill App. 594.

Mo.—Pietzuk v. Kansas City Rys. Co, 232 S.W. 987, 289 Mo. 135—Daly v. Pryor, 198 S.W. 91, 197 Mo.App. 583.

N.J.—Wall v. G. R. Wood, Inc, 197 A. 41, 119 N.J.Law 442—Ryan v. Public Service Ry. Co., 134 A. 650, 103 N.J.Law 145—Schott v. Weiss, 105 A 192, 92 N J.Law 494.

N.Y.—Libaris v. Murray, 299 N.Y.S. 184, 252 App.Div 781—McKinney v. Canadian Pac. Ry. Co, 213 N. Y.S. 168, 215 App Div. 786.

condition,[20] or by a sudden and unusual lurch, jerk, or jolt of the car,[21] or whether it was otherwise negligent in operating the train or car in such a manner as to cause sudden and unusual stops, lurches, jerks, or jolts, thereby causing injury.[22]

Tex—Haskins v. Panhandle & S. F. Ry. Co., Civ.App., 89 S.W.2d 831, error dismissed.

10 C.J. p. 1075 note 33

20. Mo—Meyers v. Wells, 273 S.W. 110.

Ohio—Beierla v. Hockenedel, 157 N. E. 573, 25 Ohio App. 186.

Pa.—Panek v. Scranton Ry. Co., 102 A. 274, 253 Pa. 589

10 C.J. p. 1076 note 34.

21. U.S.—Great Northern Ry. Co. v. Shellenbarger, C.C.A.Or., 54 F.2d 606, certiorari denied 52 S.Ct. 580, 286 U.S. 555, 76 L.Ed. 1290—Minneapolis, St. P. & S. S. M. Ry. Co. v. Galvin, C.C.A.Mich., 54 F.2d 202, certiorari denied 52 S.Ct. 407, 285 U.S. 551, 76 L.Ed. 941.

Cal.—Gumpel v. San Diego Electric Ry. Co., 172 P. 605, 178 Cal. 166.

Ill.—Norton v. Richardson, App., 13 N.E.2d 868—Raphael v. Chicago & West Towns Rys., 11 N.E.2d 831, 293 Ill.App. 58

Ky.—Louisville & N. R. Co. v. Burk, 268 S.W. 844, 207 Ky. 1.

Mass.—Danofsky v. Boston Elevated Ry. Co., 117 N.E. 4, 228 Mass. 97.

Mich.—Larskowski v. Detroit United Ry., 159 N.W. 530, 193 Mich. 409

Mo.—Meyers v. Wells, 273 S.W. 110—Dunn v. Alton R. Co., App., 88 S.W.2d 224—Rooker v. Deering Southwestern Ry. Co., 226 S.W. 69, 206 Mo.App. 79.

Ohio—Stark Electric R. Co. v. Brooks, 114 N.E. 245, 94 Ohio St. 324

Okl.—Chicago, R. I. & P. Ry. Co. v. Larmon, 45 P.2d 76, 172 Okl. 461.

Pa.—Miller v. Pennsylvania R. Co., 154 A. 924, 303 Pa. 524—De Marchi v. Central R. Co. of New Jersey, 107 A. 703, 264 Pa. 321—Panek v. Scranton Ry. Co., 102 A. 274, 253 Pa. 589

Wis.—Markowitz v. Milwaukee Electric Railway & Light Co., 271 N.W. 380.

10 C.J. p. 1076 note 35.

22. U.S.—Delaware, L. & W. R. Co. v. Byrne, C.C.A.N.J., 60 F.2d 268—Southern Pac. Co. v. Hanlon, C.C.A.Cal., 9 F.2d 294.

Ark.—Arkansas Power & Light Co. v. Mart, 65 S.W.2d 39, 188 Ark. 202—Hunter v. Mullins, 203 S.W. 590, 136 Ark. 530.

D.C.—Capital Traction Co. v. Lyon, 24 F.2d 262, 57 App.D.C. 396.

Ill.—Heineke v. Chicago Rys. Co., 116 N.E. 761, 279 Ill. 210, affirming 199 Ill.App. 399—Kaldunski v. Chicago City Ry. Co., 250 Ill.App. 475.

Ky.—Chesapeake & O. Ry. Co. v. Hay, 88 S.W.2d 318, 261 Ky. 566—Chesapeake & O. R. Co. v. Hay, 58 S.W.2d 228, 248 Ky. 69—McDermott v. Louisville & N. R. Co., 206 S.W. 6, 182 Ky. 22—Kentucky & T. Ry. Co. v. Ball, 194 S.W. 785, 175 Ky. 630—Louisville & N. R. Co. v. Bland, 188 S.W. 468, 171 Ky. 424—Louisville & N. R. Co. v. Ashley, 183 S.W. 921, 169 Ky. 330, L.R.A.1916E 763.

La.—Wallace v. Shreveport Rys. Co., App., 175 So. 86.

Md.—Washington Ry. & Electric Co. v. Anderson, 177 A. 282, 168 Md. 224—Western Maryland Ry. Co. v. Shatzer, 120 A. 840, 142 Md. 274

Mass.—Mendler v. Town Taxi, 3 N.E.2d 15—Revsbech v. Boston Elevated Ry. Co., 175 N.E. 734, 275 Mass. 317—Pickard v. Boston Elevated Ry. Co., 166 N.E. 561, 267 Mass. 133—Weiner v. Boston Elevated Ry. Co., 160 N.E. 259, 262 Mass. 539—Gray v. Boston Elevated Ry. Co., 146 N.E. 244, 251 Mass. 167.

Minn.—Underdahl v. Minneapolis St. Ry. Co., 259 N.W. 78, 193 Minn. 548—Sullivan v. Minneapolis St. Ry. Co., 200 N.W. 922, 161 Minn. 45.

Mo.—Toomey v. Wells, 276 S.W. 64, 310 Mo. 696—Elliott v. Chicago, M. & St. P. Ry. Co., 236 S.W. 17—Crenshaw v. St. Louis Public Service Co., App., 52 S.W.2d 1035—Paul v. St. Louis Public Service Co., App., 46 S.W.2d 910—Mendenhall v. Springfield Traction Co., App., 26 S.W.2d 50—Lincoln v. St. Louis-San Francisco Ry. Co., 7 S.W.2d 460, 223 Mo.App. 46—Rhodes v. Missouri Pac. R. Co., 255 S.W. 1084, 213 Mo.App. 515—Fletcher v. Kansas City Rys. Co., App., 221 S.W. 1070—Shafer v. Kansas City Rys. Co., App., 201 S.W. 611—Husbands v. St. Louis Electric Terminal Ry. Co., App., 196 S.W. 78—Cooley v. Dunham, 195 S.W. 1058, 196 Mo.App. 399—Modrell v. Dunham, App., 187 S.W. 561, 564

Neb.—Wilson v. Omaha & C. B. St. Ry. Co., 157 N.W. 626, 99 Neb. 693.

N.J.—Buckalew v. Eaton, 191 A. 773, 118 N.J.Law 188—Cohn v. Public Service Co-Ordinated Transport, 162 A. 641, 109 N.J.Law 387—Seimner v. Public Service Co-ordinated Transport, 151 A. 624, 107 N.J.Law 159.

N.Y.—Quinn v. Colonial Motor Coach Corporation, 195 N.E. 211, 266 N.Y. 584, reversing 275 N.Y.S. 634, 242 App.Div. 812—Fish v. Brooklyn & Queens Transit Corporation, 285 N.Y.S. 4, 246 App.Div. 843—Mintz v. International Ry. Co., 165 N.Y.S. 563, 177 App.Div. 942—Bergman v. Brooklyn & Queens Transit Corporation, 297 N.Y.S. 727, 163 Misc. 762—Zemmel v. Interborough Rapid Transit Co., 172 N.Y.S. 162.

Ohio.—Wilkey v. Cleveland Ry. Co., 177 N.E. 637, 123 Ohio St. 679—Cleveland Ry. Co. v. Hunt, 156 N.E. 133, 116 Ohio St. 291—Featherstone v. Cleveland Ry. Co., 167 N.E. 606, 32 Ohio App. 93—Cleveland Ry. Co. v. Mueller, 166 N.E. 391, 31 Ohio App. 488.

Pa.—Young v. Pennsylvania R. Co., 129 A. 91, 283 Pa. 234—Kleine v. Pittsburgh Rys. Co., 97 A. 395, 252 Pa. 214—Bickel v. Reed, 179 A. 762, 118 Pa.Super. 335—Dress v. Schuylkill Ry. Co., 83 Pa.Super. 149—Murphy v. Altoona & Logan Valley Electric Ry. Co., 81 Pa.Super. 504—Bliss v. Philadelphia Rapid Transit Co., 73 Pa.Super. 173—Gould v. Atlantic City R. Co., 68 Pa.Super. 431

R.I.—Roy v. United Electric Rys. Co., 164 A. 513, 53 R.I. 122—Adams v. United Electric Rys. Co., 128 A. 197, 46 R.I. 312.

Tex.—Panhandle & S. F. Ry. Co. v. Jones, Civ.App., 105 S.W.2d 443—Gulf, C. & S. F. Ry. Co. v. Baldwin, Civ.App., 2 S.W.2d 520

Wash.—Humphreys v. City of Seattle, 281 P. 994, 152 Wash. 339, modifying 277 P. 834, 152 Wash. 339

Wis.—Hanley v. Milwaukee Electric Railway & Light Co., 263 N.W. 641, 220 Wis. 288—Hanley v. Milwaukee Electric Railway & Light Co., 263 N.W. 638, 220 Wis. 281.

10 C.J. p. 1076 note 36.

Sufficiency of defendant's explanation

(1) Whether prima facie case made by passenger in caboose injured by sudden stopping of train was overcome by brakeman's uncontradicted testimony that such sudden stopping was caused by trespasser stepping on coupling pin in climbing off car is for jury—Gibson v. Southern Pac. Co., C.C.A.Tex., 67 F.2d 758, certiorari denied Southern Pac. Co. v. Gibson, 54 S.Ct. 458, 291 U.S. 673, 78 L.Ed. 1062

(2) In action by passenger injured when thrown to floor when street car made unusual and violent stop, whether, notwithstanding defendant's explanation, motorman exercised required care, is for jury—Karsey v. City and County of San Francisco, 20 P.2d 751, 130 Cal.App. 655.

(3) Trolley company's explanation that sudden stop was to avoid collision with truck held insufficient to take case from jury in passenger's personal injury action.—Di Paolo v. Philadelphia Rapid Transit Co., 101 Pa.Super. 254.

m. Passing Other Vehicles or Objects

Whether there was any negligence in operation in passing other vehicles or objects is ordinarily a question for the jury.

Whether in passing other vehicles or objects near the track the car was operated in a negligent manner, whereby the passenger was struck by such other vehicle or object and injured, is generally a question for the jury.[23] Thus it is generally a question for the jury as to whether notice or warning should have been given to the passengers of the danger of injury from such vehicles or objects.[24]

Direction of a verdict for defendant is proper where there is insufficient proof of negligence of the carrier in an action by a passenger allegedly injured when the car passed too near another vehicle or object.[25]

n. Collisions

Ordinarily it is for the jury to determine whether the carrier was guilty of negligence with respect to a collision in which a passenger is injured.

It is generally a question for the jury as to whether the carrier was negligent with respect to a collision between its trains or cars,[26] or between

Refusal of peremptory instruction proper

In an action by passenger for injury caused by a jerk or lurch of car, where the evidence does not sustain the burden upon defendant under Code 1906 § 1985, to show freedom from negligence—Gulf & S. I. R. Co v. Meyers, 75 So. 244, 114 Miss. 458

Evidence held insufficient to go to jury

(1) Evidence insufficient to show unusual nature of jolts and jerks causing passenger to fall.—Viglas v. Boston, R. B & L. R. Co, 169 N.E. 780, 270 Mass 264

(2) Evidence that jolt, which caused train passenger to place hand on door frame and door to close, was unusual—Caranicos v New York, N H & H R. Co, 178 N.E. 542, 277 Mass. 364.

(3) Evidence that two violent successive jerks of trolley car threw passenger forward and then backward against seat when she arose to leave car—Cutler v. Philadelphia Rapid Transit Co, 179 A. 434, 319 Pa. 351.

(4) Evidence merely showing sudden stopping of street car which threw passenger, awaiting to alight, to floor.—Hody v. Pittsburgh Rys Co, 178 A 302, 318 Pa 272—Smith v. Pittsburgh Rys. Co, 171 A 879, 314 Pa. 541.

(5) Evidence merely showing sudden jerk of street car which threw passenger violently to floor while walking in car.—McClusky v Shenango Valley Traction Co, 161 A. 424, 105 Pa.Super. 275.

(6) Evidenee of sudden stopping or jerking of street car when automobile struck side of street car—Cook v. Philadelphia Rapid Transit Co, 182 A. 755, 120 Pa.Super. 565.

(7) In passenger's action against bus company for injuries received when passenger was thrown from seat when driver stopped bus suddenly while moving at slow rate of speed, to avoid collision with automobile which stopped suddenly in front of bus.—Robinson v. Connecticut Co, 189 A 453, 122 Conn. 300

(8) In an action for personal injuries sustained as a result of the suddenness with which such train was attempted to be stopped, in a futile effort to avoid collision with an automobile on the track at a village highway crossing—Letush v New York Cent R. Co, 267 Ill App. 526.

(9) In passenger's action for injuries on sudden stopping of turning street car, caused by collision between automobile, caught by car's overswing, and parked truck.—Wheeler v. Des Moines City Ry. Co, 215 N.W. 950, 205 Iowa 439, 55 A.L.R 473.

(10) In bus passenger's action for injuries resulting from fall caused when bus started after having stopped at intersection—Cohen v Surface Transp Corporation of New York, 289 N.Y.S. 678, 160 Misc. 247.

(11) In passenger's action for injuries sustained because of jerk of street car which came after she had boarded street car and after car had been set in motion—Yager v. Marshall, 196 N.E. 375, 129 Ohio St 584.

(12) In action by passenger injured when hurled to the floor by jolting and jumping of a street car.—Crawford v. Reading Transit & Light Co, 116 A. 542, 273 Pa 74.

(13) In street car passenger's personal injury action, based on fall following sudden stop of car—Iszard v. Philadelphia Rapid Transit Co., 100 Pa.Super 240

(14) In action for death of mail clerk—Morrissey v. Union Pac R. Co, 249 P. 1064, 68 Utah 323.

(15) On question of injury by willful negligence.—Tuder v. Oregon Short Line R. Co., 160 N.W. 785, 135 Minn. 294, L.R.A 1917C 86.

(16) Where passenger, who sought to recover for personal injuries resulting from violent starting and jerking of street car, stated that car started violently, but there was no evidence as to any unusual or violent starting of car, nonsuit should be granted.—Uffelman v. Philadelphia Rapid Transit Co, 98 A. 574, 253 Pa 394.

10 C.J. p 1076 note 36 [b].

23. Mass.—Finnegan v. Checker Taxi Co, 14 N.E 2d 127—Freedman v. Eastern Massachusetts St Ry Co, 12 N E 2d 739.
Mo.—Smith v. Kansas City Rys. Co., App, 204 S W. 575
Pa—Zaltouski v Scranton Ry. Co., 165 A 847, 310 Pa. 531.
R I—Mousally v United Electric Rys Co., 195 A. 224.
10 C J. p 1076 note 37.

Refusal to instruct for defendant held proper

In a passenger's action for injuries by reason of a lurch of the train, causing her arm to fall outside the window and strike a locomotive on a side track, it was not error to refuse an instruction to find for defendant because the testimony failed to show negligence in that the trainmen testified as to the position of a "clearance post" beyond which locomotives were not allowed to pass on the side track, and that it was impossible for one to extend an arm far enough out of the window to strike a locomotive on such side track, where they were contradicted by evidence that plaintiff's arm did strike a locomotive on the side track.—Lancaster v Knighton, Tex Civ.App, 230 S W 876, dismissed for want of jurisdiction.

24. Conn—Maher v. Connecticut Co, 155 A 854, 113 Conn. 556, 77 A.L.R 426
10 C J. p 1077 note 38
25. Mich—Thomas v City of Detroit, 248 N W. 583, 263 Mich. 166.
10 C.J. p 1076 note 36 [a].
26. Minn—Birdsall v Duluth-Superior Transit Co, 267 N.W. 363.
Mo—Hulen v Wheelock, 300 S W. 479, 318 Mo. 502—Walquist v. Kansas City Rys. Co, 237 S.W. 493, 292 Mo. 34—Ganz v. Metropolitan St R. Co., 220 S W. 490.
Pa.—Zeaman v. Philadelphia Rapid Transit Co., 62 Pa.Super. 463.

its train or car and the train or car of another carrier at a crossing,[27] or on the same track,[28] or between the carrier's conveyance and another vehicle at a street, road, or highway intersection,[29] or between its train or car and a wagon or other vehicle or object on or near the track,[30] or between a motor vehicle of the carrier and some other vehicle or object on or near the street, road, or highway.[31]

Where the evidence conclusively shows the neg-

R.I.—Chappell v. United Electric Rys. Co., 152 A. 738, 51 R.I. 148.
Tex.—Northern Texas Traction Co. v. Cordova, Civ.App., 252 S.W. 226.
10 C.J. p. 1077 note 39

Wanton negligence

Evidence that the engineer of a railroad train at night had not slept for twenty-three hours, that he passed and saw block signals showing that there was a train ahead, that he became drowsy and, without warning his fireman, fell asleep, and his train, passing a brakeman who had been sent back and who signaled him to stop, crashed at full speed into the train ahead which was standing at a station, tended to show such a reckless disregard of duty by the engineer as amounted to wanton negligence, and required submission of that issue to the jury.—Davis v. McCree, C.C.A.Ohio, 299 F. 142, error dismissed 45 S.Ct. 94, 266 U.S. 582, 69 L.Ed. 452.

27. Cal.—McNeil v. East Bay St. Rys., 32 P.2d 598, 220 Cal. 591.
Mo.—Bergfeld v. Dunham, App., 228 S.W. 891.
10 C.J. p. 1077 note 40.

28. Mo.—Morris v. Union Depot Bridge & Terminal R. Co., 8 S.W.2d 11, 320 Mo. 371.
Tex.—Texas & P. Ry. Co. v. Thompson, Civ.App., 286 S.W. 536.

29. Ark.—Arkansas Power & Light Co. v. Boyd, 65 S.W.2d 919, 188 Ark. 254
Cal.—Forbell v. Pacific Electric Ry. Co., 254 P. 890, 200 Cal. 718—Crosby v. Pickwick Stages, Northern Division, 264 P. 346, 88 Cal. App. 799—Schropshire v. Pickwick Stages, Northern Division, 258 P. 1107, 85 Cal.App. 216.
Conn.—Di Rossi v. Connecticut Co., 188 A. 926, 122 Conn. 372.
Ind.—Yellow Cab Co. v. Kruszynski, App., 196 N.E. 136.
Iowa.—Morris v. La Bahn, 189 N.W. 797, 194 Iowa 377.
Md.—Sun Cab Co. v. Reustle, 192 A. 292—Stewart Taxi-Service Co. v. Spencer, 132 A. 153, 149 Md. 635.
Mass.—Turner v. Berkshire St. Ry. Co., 198 N.E. 178—Cohen v. Eastern Massachusetts St. Ry. Co., 165 N.E. 113, 266 Mass. 283—Froio v. Eastern Massachusetts St. Ry. Co., 142 N.E. 255, 247 Mass. 474.
Mo.—Gibson v. Wells, App., 258 S.W. 1.
N.J.—Dickson v. Ackerman, 168 A. 269, 111 N.J.Law 583
N.C.—Headen v. Bluebird Transp. Corporation, 191 S.E. 331, 211 N.C. 639.
Okl.—Oklahoma Ry. Co. v. Mount, 9 P.2d 11, 155 Okl. 275
Or.—Ramsdell v. Frederick, 285 P. 219, 132 Or. 161.
Pa.—Farrell v. Boggs & Buhl, 106 A. 198, 263 Pa. 221—Caplan v. Philadelphia Rapid Transit Co., 92 Pa.Super. 251
R.I.—Drewett v. United Electric Rys. Co., 188 A. 877—Finlay v. Plante, 160 A. 865, 52 R.I. 325
Va.—Hogan v. Miller, 157 S.E. 540, 156 Va. 166.
Wis.—Carson v. Leet, 203 N.W. 394, 186 Wis. 566.

Whether carrier should have protected crossing by gates and flagman is for jury.—Lehigh Valley R. Co. v. Ciechowski, C.C.A.N.Y., 10 F.2d 82, certiorari denied 46 S.Ct. 352, 270 U.S. 654, 70 L.Ed. 783

Whether plaintiff's testimony relieves defendant of liability

Whether plaintiff's testimony and inferences therefrom, in an action against a street railway company for injuries to a passenger in a collision between a street car and a motor truck, were such as to relieve defendant, which offered no testimony, from liability, is a question for the jury.—Cecil v. Wells, 259 S.W. 844, 214 Mo.App. 193.

Freedom from negligence as a matter of law

Where jitney bus driver proceeded to cross intersection in front of car over which he had the right of way, and, on discovery that such automobile was turned so as to cross path of the jitney bus, turned in same direction as such automobile and could have avoided collision if such automobile had not struck the rear wheel of the bus, the driver did not as a matter of law fail to exercise the high degree of care which he owed his passenger.—McCaffrey v. Automobile Liability Co., Limited, Mutual, 186 N.W. 585, 176 Wis. 230.

30. Ala.—Birmingham Electric Co. v. Mealing, 108 So. 511, 214 Ala. 597—Birmingham Ry., Light & Power Co. v. Beal, 76 So. 1, 200 Ala. 409.
Ga.—Bailey v. Georgia Ry. & Power Co., 124 S.E. 907, 32 Ga.App. 793.
Ind.—Ft. Wayne & Northern Indiana Traction Co. v. Parish, 119 N.E. 488, 67 Ind.App. 597.
Kan.—Zimmerman v. Kansas City Public Service Co., 286 P. 669, 130 Kan. 338.
Mich.—Parr v. City of Detroit, 262 N.W. 443, 272 Mich. 659.
Mo.—Zichler v. St. Louis Public Service Co., 59 S.W.2d 654, 332 Mo. 902—Moran v. Kansas City Rys. Co., App., 232 S.W. 1111.
N.H.—Giguere v. Boston & M. R. R., 167 A. 561, 86 N.H. 294
N.Y.—Plumb v. Richmond Light & R. Co., 135 N.E. 504, 233 N.Y. 285, affirming 187 N.Y.S. 38, 195 App.Div. 254—Rogers v. Burke, 241 N.Y.S. 414, 229 App.Div. 361—Warne v. Brooklyn Heights R. Co., 162 N.Y.S. 455, 175 App.Div. 559
Pa.—Welsh v. Jump House Wrecking Co. of Pennsylvania, 159 A. 170, 306 Pa. 228—Riff v. Pittsburgh Rys. Co., 148 A. 102, 298 Pa. 256—Appenzeller v. Philadelphia Rapid Transit Co., 163 A. 387, 107 Pa.Super. 319—Carradus v. Pittsburgh Rys. Co., 86 Pa.Super. 159
W.Va.—Koon v. Monongahela West Penn Public Service Co., 192 S.E. 332
10 C.J. p. 1077 note 41.

31. U.S.—Southern Kansas Stage Lines v. Gibson, C.C.A.Okl., 87 F.2d 23
Ark.—Missouri Pac. Transp. Co. v. Norwood, 90 S.W.2d 480
Ill.—Garvey v. Chicago Rys. Co., 171 N.E. 271, 339 Ill. 276.
Ky.—Wilford v. Cooper, 98 S.W.2d 39, 266 Ky. 64—McGraw v. Ayers, 58 S.W.2d 378, 248 Ky. 166
Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, and appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720
Mo.—Story v. People's Motorbus Co. of St. Louis, 37 S.W.2d 898, 327 Mo. 719—Hurley v. Missouri Pac. Transp. Co., App., 56 S.W.2d 620, certiorari quashed State ex rel. and to Use of Hurley v. Becker, 66 S.W.2d 524, 334 Mo. 537—Myerson v. People's Motorbus Co. of St. Louis, App., 297 S.W. 451—Stegman v. People's Motorbus Co. of St. Louis, App., 297 S.W. 189, 193.
N.J.—Schreiber v. Public Service Coordinated Transport, 169 A. 629, 112 N.J.Law 199—Fedor v. Skrivonek, 152 A. 448, 9 N.J.Misc. 7—Lunaski v. S. Kosson & Sons, 149 A. 760, 8 N.J.Misc. 265—Schafnacher v. Gray Bus Line, 135 A. 86, 4 N.J.Misc. 980—Kaltman v. Bocino, 126 A. 654, 2 N.J.Misc. 1125.

ligence of the carrier's employee causing the collision, a directed verdict for plaintiff is proper,[32] or the court may instruct the jury that defendant was negligent.[33]

When uncontradicted proof to overcome the presumption of negligence arising from the happening of a collision is offered, the question then becomes one for the court.[34]

When the evidence fails to show any negligence, the question of negligence is not to be submitted to the jury.[35]

o. Derailments; Running Off Road

The question of the negligence of a carrier whose train or car is derailed, or whose motor vehicle runs off the road, is generally one for the jury.

Whether the carrier was negligent with respect to the derailment of a train or car, by reason of which a passenger was injured, is generally a question for the jury,[36] and, where there is evidence of negligence, the question is for the jury, even though there is evidence that the derailment was caused by the acts of a third person,[37] or an act of God,[38] or evidence tending to show that defendant exercised the highest possible degree of care.[39] Similarly, whether a motor carrier was negligent is for the jury to determine in an action for injuries sustained by a passenger when a motor vehicle runs off the road.[40]

N C—Lancaster v B. & H Coach Line, 150 S.E. 716, 198 N C 107.
Pa—Brown v. Cunningham Cab Co., 92 Pa Super. 356.
Wis—Dauplaise v. Yellow Taxicab Co, 235 N W. 771, 204 Wis 419.

Collision in tunnel

Whether bus driver was negligent, in driving bus through tunnel at distance of only fifteen feet from car ahead, was question of fact in a collision case.—Stille v Nevin Bus Lines, 143 A 413, 9 N J Misc. 449

Evidence held insufficient to go to jury

(1) Evidence, in passenger's action for injuries sustained when bus standing on highway was struck by overtaking motorist, as to whether bus should have displayed red light because of weather conditions, where motorist testified he saw bus as he rounded curve; also evidence of whether bus driver stopped bus on road when a clear view of bus could not be had from distance of one hundred and fifty feet in either direction so as to render bus company liable for injuries sustained by passenger when overtaking motorist collided with bus—Boileau v Williams, 185 A. 429, 121 Conn. 432.

(2) Evidence as to negligence in bus passenger's action for injury when bus stopped suddenly in attempt to avoid collision with automobile which stopped in front of it—Canton Motor Coach v. Hall, 189 N E 505, 46 Ohio App. 516.

Direction of verdict for defendant

In passenger's action for injuries against receiver of street railroad company, divergence between pleading of injury proximately resulting from collision between street car and automobile, and proof of injury caused by sudden stopping of street car immediately prior to collision with automobile, constitutes a complete failure of proof and not mere variance, entitling receiver to direction of verdict.—Hughes v. Kiel, Mo.App., 100 S.W.2d 48.

32. Cal.—McCarthy v. Pacific Electric Ry Co, 255 P 868, 82 Cal App 503.
Tenn—Memphis St Ry. v Mitchum, 6 Tenn Civ A 227.

33. Tex—Galveston Electric Co. v Biggs, Civ App, 14 S W.2d 307, error refused

34. N J—Cox v Scott, 140 A 390, 104 N J Law 371, reversing Cox v Rosenvinge, 135 A. 59, 4 N.J Misc 949.

35. N J.—Cox v Scott, supra
Wis—Moen v. Madison Rys. Co, 254 N W 643, 215 Wis. 253—Moen v Madison Rys. Co., 254 N.W. 641, 215 Wis 248.

36. U S—Lehigh Valley R Co v Ciechowski, C.C.A N.Y, 10 F.2d 82, certiorari denied 46 S.Ct 352, 270 U S. 654, 70 L Ed. 783—Panama R Co v Strobel, C C A.Canal Zone, 282 F 52.
Ala.—Central of Georgia Ry. Co v. Robertson, 91 So. 470, 206 Ala. 578.
Ark—St. Louis-San Francisco Ry. Co. v. Cox, 283 S.W. 31, 171 Ark. 103
Ill—Kanter v St Louis, S. & P. R. R, 218 Ill App 565
Iowa—Boston v Keokuk Electric Co., 221 N.W 508, 206 Iowa 753—Guthrie v. Muscatine, B. & S. Ry Co, 192 N.W 260.
Mass—Gilchrist v. Boston Elevated Ry, 172 N.E. 349, 272 Mass 346
Miss.—Columbus & G Ry. Co. v. Phillips, 133 So. 123, 160 Miss 390.
Mo—Trowbridge v. Fleming, 269 S. W. 610—Van Tresse v. Kansas City Public Service Co, 4 S.W.2d 1095, 222 Mo.App. 671.
N D—Hurley v Chicago, M. & St. P. Ry Co., 189 N W. 322, 48 N D 1251.
Pa.—Ward v. Southern Pennsylvania Traction Co., 80 Pa Super. 394.
S.C.—Thompson v. Atlantic Coast Line R. Co., 102 S.E. 11, 113 S C. 261.
Tex.—Heck v. San Antonio Public Service Co, Civ App., 255 S W. 811.
Va.—Hines v Beard, 107 S.E. 717, 130 Va 286.
10 C J. p 1077 note 42.

Duty of court

After evidence for both sides is in, in action by passenger for injuries sustained in a derailment, and motion is made to take decision from jury, court has duty to determine whether evidence is equally balanced or preponderates for one side, and whether there is any reasonable hypothesis on which jury could base a finding of defendant's negligence, and, if there is, to submit case to jury.—Virginia Electric & Power Co. v Lowry, Va., 184 S.E 177.

37. U S.—Delaware, L & W R. Co. v Donahue, N Y, 238 F. 770, 151 C C A 620
Pa—Audino v New Castle & Lowell Ry Co., 83 Pa Super. 257.

Tampering with switch

(1) In action by passenger for injuries sustained when train ran into open switch, question whether wreck was caused by malicious tampering with switch is for jury.
U S.—Delaware, L & W. R. Co. v. Donahue, N.Y., 238 F. 770, 151 C. C A. 620.
Cal.—Sinan v. Atchison, T & S. F Ry Co, 284 P. 1041, 103 Cal.App. 703.

(2) Where passenger train ran into open switch, negligence in employees' failure to notify train master that switch had been spiked is for jury—Sinan v Atchison, T. & S. F. Ry. Co., supra.

(3) Where train wreck was caused by open switch, carrier's negligence in not discovering condition in time to avert accident is for jury.—Sinan v Atchison, T. & S. F. Ry. Co., supra.

38. Mo.—Bond v. St. Louis-San Francisco Ry Co., 288 S.W. 777, 315 Mo. 987

39. Mo—Scheipers v. Missouri Pac. R Co., 298 S.W. 51

40. Ky.—Consolidated Coach Corpo-

Where the presumption of negligence arising when a passenger is injured as the result of a derailment has been rebutted by uncontradicted evidence, a directed verdict for defendant is proper,[41] although whether the presumption has been overcome has been held for the jury, even though defendant's evidence as to the cause of the derailment is uncontradicted.[42]

p. Setting Down Passengers

Negligence of the carrier with respect to the setting down of passengers is generally a question for the jury.

It is ordinarily a question for the jury under the evidence as to whether the carrier was negligent with respect to setting down a passenger,[43] such as, whether it was negligent in assisting or in failing to

ration v. Earls' Adm'r, 94 S W 2d 6, 263 Ky. 814—Consolidated Coach Corporation v. Wright, 22 S.W.2d 108, 231 Ky 713

Miss.—Oliver Bus Lines v. Skaggs, 164 So 9, 174 Miss 201

N J—Davis v. Public Service Coordinated Transport, 174 A. 540, 113 N J Law 427

N C—Love v. Queen City Lines, 174 S E 514, 206 N C. 575—Berry v Inter-Carolina Motor Bus Co., 151 S E 245, 198 N.C 817

Pa.—Deacon v. Shea, 86 Pa.Super 373.

Tenn—Greyhound Lines, Inc., v. Patterson, 14 Tenn App 652.

Wash—Poropat v. Olympic Peninsula Motor Coach Co, 299 P. 979, 163 Wash 78

Evidence sufficient to go to the jury

(1) On evidence that after a tire on an auto stage blew out the stage ran about three hundred feet with no appreciable decrease in speed, struck a tree, overturned, and injured a passenger, whether driver exercised the proper degree of care cannot be determined as a matter of law in carrier's favor.—McMillan v Auto Interurban Co., 221 P. 314, 127 Wash. 625.

(2) Where plaintiff showed injury while riding for hire and in usual manner on conveyance furnished and that injury was caused by defect in, or management of, conveyance, which ran off the road, carrier's evidence that he had exercised proper care in testing and inspecting conveyance did not destroy presumption arising from circumstances of accident, and ultimate question was for jury—Hayes v. Staples, 225 P. 417, 129 Wash. 436

41. N J—Glassmeyer v Pennsylvania R Co., 167 A 750, 11 N.J.Misc. 675.

Va—Virginia Electric & Power Co. v. Lowry, 184 S.E. 177

42. Pa—Shaughnessy v Director General of Railroads, 118 A. 390, 274 Pa. 413, 23 A L.R 1211—Doud v. Hines, 112 A. 528, 269 Pa 182.

43. U S.—Spiesberger v Michigan Cent. R. Co., Ill, 235 F. 864, 149 C C.A. 176.

Ark.—Missouri Pacific Transp. Co v Sharp, 108 S.W.2d 579—Missouri Pac. Transp Co. v. Robinson, 86 S W.2d 913, 191 Ark. 428.

Cal—Brizzolari v Market St Ry. Co, 46 P 2d 783, 7 Cal.App 2d 246

Ill—Paris v East St. Louis Ry. Co, 275 Ill.App 241.

Iowa.—Olson v. Des Moines City Ry. Co., 170 N W. 466, 186 Iowa 384.

Ky.—Cincinnati, N O & T. P. Ry. Co. v. Francis, 220 S W. 739, 187 Ky 703.

Mich—Chalker v Detroit, G., H. & M. Ry. Co, 173 N W 532, 207 Mich. 138.

Minn—Leban v Range Rapid Transit Co 208 N.W. 533, 167 Minn. 40—Van House v. Canadian Northern Ry Co, 192 N W. 493, 155 Minn. 57, 28 A L R. 357

Mo—Chapman v. Kansas City Rys Co, 217 S W 290—Jordan v. St Louis Public Service Co., App., 103 S W.2d 552—McCormack v United Rys. Co of St. Louis, App, 238 S. W 579—Chapman v. Kansas City Rys. Co, App, 217 S.W. 623.

N.Y—Harris v. Brooklyn & Queens Transit Corporation, 291 N.Y.S. 963, 249 App Div. 749—Morey v New York Cent. R Co, 254 N.Y S 531, 234 App.Div 210, affirmed 184 N.E 148, 260 N Y. 691

N C.—Woods v North Carolina Public Service Co, 94 S E. 459, 174 N.C 697, 1 A L R. 492

N.D—Arnold v Minneapolis, St. P. & S. S. M. Ry. Co., 228 N.W. 456, 59 N D. 59

Ohio.—Jackson v Cleveland Ry. Co., 146 N E 75, 111 Ohio St. 631.

Pa—Windle v. Davis, 118 A. 503, 275 Pa. 23—Minster v. Philadelphia Rapid Transit Co., 176 A 72, 115 Pa Super. 562—Mink v. Philadelphia Rapid Transit Co, 93 Pa Super. 63—Pitts v Philadelphia Rapid Transit Co., 84 Pa Super. 395—Hall v. Lehigh Valley R. Co., 74 Pa.Super. 52

Va.—Walters v. Norfolk & W. Ry. Co, 94 S.E. 182, 122 Va. 149.

Wash.—Holm v. City of Seattle, 294 P 261, 159 Wash. 618.

W.Va—Kaufman v. Charleston Transit Co, 186 S E. 617.

10 C.J. p 1078 note 43.

Negligence as to passenger alighting from moving train or car

(1) Whether alighting from a moving train was at the direction or invitation of the conductor and whether giving such direction or invitation was actionable negligence are questions for the jury.—Fullerton v. Chicago Great Western R. Co., 199 N W 93, 159 Minn. 475

(2) Whether street car company was liable for injury to passenger falling on pavement after alighting from slowly moving car and being struck by automobile is question for jury.—Fitzgerald v. Des Moines City Ry. Co, 207 N W 602, 201 Iowa 1302

(3) Whether the carrier was guilty of negligence in opening car doors while car was in motion, thereby inviting the passenger to attempt to alight, is a question for the jury

Cal—Duffield v. Payne, 227 P 217, 66 Cal App 767

Iowa—Fitzgerald v Des Moines City Ry Co., 207 N W 602, 201 Iowa 1302.

Mo—Hibler v Kansas City Rys. Co, 237 S.W. 1014, 292 Mo. 14—Tillery v. Harvey, App., 214 S W. 246

N J.—Trimboli v. Public Service Coordinated Transport, 168 A. 572, 111 N.J Law 481

10 C.J. p 1078 note 43 [a].

Evidence held insufficient to go to jury

(1) Evidence of railroad's negligence causing death of passenger who fell from moving train at destination station—Carlson v. Boston & M. R R, 168 N.E 171, 269 Mass 60

(2) Evidence of passenger injured while alighting from motor bus—Hoovis v. Bellinkoff, 246 N.Y.S. 52, 138 Misc. 762.

(3) Evidence as to whether motorman who was in sole charge of car was negligent in moving car forward before passenger walked beyond overhang of the car.—Steinburg v Milwaukee Electric Railway & Light Co., Wis., 266 N.W. 793.

(4) Evidence of negligence of bus company, in respect of injuries to passenger while attempting to alight from bus—Doscher v Public Service Co-ordinated Transport, 149 A. 758, 8 N J Misc. 256.

(5) Evidence as to railroad's negligence, in action against railroad for injuries sustained by passenger who, after alighting from car, had his leg run over by train.—Brooks v. Southern Ry Co, C.C A.Ga., 86 F 2d 920, certiorari denied 57 S Ct. 613, 300 U.S. 674, 81 L.Ed. 880.

(6) Fact that unassisted woman passenger with child in arms slipped and fell does not in itself entitle her

assist a passenger in alighting,[44] or in failing to apply brakes so as to prevent the car from rolling,[45] or in suddenly starting or moving the car while a passenger was alighting,[46] or in suddenly

to go to jury on issue of carrier's negligence—Gatchell v. Boston Elevated Ry. Co., 130 N.E. 94, 238 Mass. 185

(7) That plaintiff while alighting was crowded by other passengers and fell did not make question for jury—Ritchie v. Boston Elevated Ry. Co., 131 N.E. 67, 238 Mass. 473.

44. Ala.—Mobile & O. R. Co. v. Barber, 56 So. 858, 2 Ala.App. 507
Ark.—Payne v. Thurston, 230 S.W. 561, 148 Ark. 456.
Ga.—Metts v. Louisville & N. R. Co., 182 S.E. 531, 52 Ga.App. 115
Mo.—Mahaney v. Kansas City, Clay County & St. Joseph Auto Transit Co., 46 S.W.2d 817, 329 Mo. 793—Lackey v. Missouri & K. I. Ry. Co., 264 S.W. 807, 305 Mo. 260.
Pa.—Hager v. Philadelphia & R. Ry. Co., 104 A. 599, 261 Pa. 359.
Tex.—Wisdom v. Chicago, R. I. & G. Ry. Co., Com.App., 231 S.W. 344, reversing Chicago, R. I. & G. Ry. Co. v. Wisdom, Civ.App., 216 S.W. 241—Williams v. Galveston, H. & S. A. Ry. Co., Civ.App., 196 S.W. 309—International & G. N. Ry. Co. v. Williams, Civ.App., 183 S.W. 1185, error refused.
10 C.J. p. 1078 note 44

Where duty to assist not shown

Carrier's duty to assist sick, aged, or infirm passengers to alight depends on the circumstances of case; but, where there is no evidence that a passenger falls within such exception to general rule, the submission of carrier's negligence in not assisting him to alight is reversible error.—Dickinson v. Tucker, 176 P. 949, 74 Okl. 43.

Evidence insufficient to go to jury

In an action against a street railroad for injuries to alighting passenger, in which the evidence showed that the passenger was a comparatively young woman, with nothing to indicate that she was not physically strong and able to take care of herself under ordinary circumstances, and that her mother, an older woman, had alighted alone in safety, and could have relieved the passenger of the baby in her arms if necessary, the submission to jury of whether the motorman's failure to assist the passenger in alighting with the baby in her arms was negligence is error.—Southwestern Gas & Electric Co. v. Nichols, Tex.Civ.App., 254 S.W. 515.

45. Mass.—McAvoy v. Boston Elevated Ry. Co., 175 N.E. 103, 275 Mass. 9

46. U.S.—Virginia Public Service Co. v. Silver, C.C.A.Va., 68 F.2d 230.
Ala.—Smith v. Southern Ry. Co., 164 So. 903, 231 Ala. 381—Birmingham Electric Co. v. Guess, 131 So. 883, 222 Ala. 280—Mobile Light & R. Co. v. Gallasch, 97 So. 733, 210 Ala. 219—Central of Georgia Ry. Co. v. Williams, 84 So. 633, 17 Ala.App. 259.
Ariz.—Phoenix Ry. Co. of Arizona v. Beals, 181 P. 379, 20 Ariz. 386.
Ark.—Missouri Pac. R. Co. v. Hinkle, 109 S.W.2d 433.
Cal.—Baker v. Market St. Ry. Co., 11 P.2d 912, 123 Cal.App. 688—Murray v. United Railroads of San Francisco, 193 P. 596, 49 Cal.App. 462
Ill.—Lundquist v. Chicago Rys. Co., 137 N.E. 92, 305 Ill. 106, affirming 221 Ill.App. 654. See McConnell v. Chicago Rys. Co., 199 Ill.App. 490.
Iowa.—Havens v. Omaha & Council Bluffs St. Ry. Co., 207 N.W. 677—Walters v. Des Moines City Ry., 179 N.W. 865, 191 Iowa 196
Ky.—Chesapeake & O. Ry. Co. v. Smith, 83 S.W.2d 488, 259 Ky. 821—Louisville & I. R. Co. v. Whitesides, 270 S.W. 19, 207 Ky. 733—Johnson v. Louisville & N. R. Co., 200 S.W. 50, 179 Ky. 81.
Mass.—Mucci v. Boston Elevated Ry. Co., 159 N.E. 513, 262 Mass. 308
Mich.—Tuttle v. Detroit, J. & C. Ry. Co., 159 N.W. 498, 193 Mich. 390
Minn.—Larson v. Wisconsin Ry., Light & Power Co., 164 N.W. 666, 138 Minn. 158—Benoe v. Duluth St. Ry. Co., 164 N.W. 662, 138 Minn. 155
Mo.—Lammert v. Wells, App., 282 S.W. 487—Whitaker v. Kansas City Rys. Co., App., 209 S.W. 632—Davis v. Metropolitan St. Ry. Co., App., 185 S.W. 1170.
N.J.—Jackson v. Delaware, L. & W. R. Co., 170 A. 22, 111 N.J.Law 487—Schunck v. Central R. Co. of New Jersey, 168 A. 218, 111 N.J.Law 244, affirmed 171 A. 794, 112 N.J.Law 500
N.Y.—Schwartz v. New York & N.S. Traction Co., 174 N.Y.S. 147
Or.—Carlson v. Portland Ry., Light & Power Co., 254 P. 809, 121 Or. 519.
Pa.—Hawkins v. Director General of Railroads, 121 A. 46, 277 Pa. 213—Kozak v. Philadelphia Rapid Transit Co., 92 Pa.Super. 574—Hassan v. Reading Co., 89 Pa.Super 592.
R.I.—Robishaw v. United Electric Rys. Co., 175 A. 477—Broderick v. Rhode Island Co., 104 A. 689.
S.C.—Gladden v. Southern Ry. Co., 141 S.E. 90, 142 S.C. 492.
Tenn.—N., C. & St. L. Ry. v. Buchanan, 7 Tenn.Civ.App. 56
Tex.—Mathews v. North Texas Traction Co., Civ.App., 243 S.W. 718.
Va.—Virginia Electric & Power Co. v. Walker, 148 S.E. 694, 152 Va. 883.
W.Va.—Malone v. Monongahela Valley Traction Co., 141 S.E. 440, 105 W.Va. 60.
10 C.J. p. 1078 note 45.

Wanton negligence

Inference of wanton conduct cannot be submitted, where requiring inference on inference that motorman was signaled to start while passenger was disembarking—Birmingham Electric Co. v. Guess, 131 So. 883, 222 Ala. 280.

Reasonable time to alight

(1) What is a reasonable time for a street car to stop in discharging passengers depends on the circumstances of each particular case, and is generally a mixed question of law and fact for jury determination.—Cain v. Kanawha Traction & Electric Co., 102 S.E. 119, 85 W.Va. 434.

(2) In a passenger's action for injuries, conflicting evidence makes it a question of fact for the jury as to whether the station of plaintiff's destination was properly announced on arrival of the train and whether she was allowed a reasonably sufficient time to disembark from the train, circumstanced and conditioned as she was.—Gulf, C. & S. F. Ry. Co. v. Conley, Civ.App., 236 S.W. 521, reversed on other grounds, Com.App., 252 S.W. 737, affirmed 260 S.W. 561, 113 Tex. 472, 32 A.L.R. 1183.
10 C.J. p. 1078 note 45 [b].

Evidence held insufficient

In passenger's action for injuries sustained in falling when street car started, evidence warranted directed verdict for defendant—Desautels v. Massachusetts Northeastern St. Ry. Co., 177 N.E. 578, 276 Mass. 381—10 C.J. p. 1078 note 45 [a]

Demurrer to evidence

(1) Testimony of passenger, falling while alighting on sudden starting of car, that she fell with head in direction in which car was going, was not so contrary to physical law as to require sustaining of demurrer to evidence.—Hoffman v. Dunham, Mo.App., 202 S.W. 429.

(2) Plaintiff's testimony as to the way he fell when open street car was suddenly started while he was alighting was not so contrary to physical or natural laws as to authorize sustaining of demurrer to evidence.—Middleton v. St. Joseph Ry., Light, Heat & Power Co., 195 S.W. 527, 196 Mo.App. 258

(3) Testimony, in woman passenger's action against street railway company, that her injuries resulted from being dragged when seized by her right hand by the conductor as she was thrown by sudden starting of the car was not such as to justify demurrer to the evidence on the ground that the accident as described

or violently starting the car after stopping just before reaching the alighting place and while a passenger was alighting or preparing to alight,[47] or in suddenly increasing the speed of a car which had slowed down for the apparent purpose of allowing a passenger to alight and while he was attempting so to do,[48] or in setting down a passenger at an improper time or place,[49] or in failing to provide a reasonably safe place to alight[50] or in failing to

was a physical impossibility—Keith v Kansas City Rys. Co., Mo App., 231 S W. 1046

Direction of verdict for plaintiff

Undisputed testimony as to manner of operation of bus and plaintiff's injury warrants directed verdict for plaintiff in action for such injuries—Amsdill v. Detroit Motorbus Co, 206 N W. 494, 233 Mich 150.

Nonsuit

A nonsuit is improper under evidence showing that defendant's street car stopped on grade and plaintiff, about to alight, was injured when car suddenly and violently started and stopped.—Laub v Philadelphia Rapid Transit Co., 97 Pa.Super. 323.

47. Ark—Missouri Pac. R. Co. v. Berry, 241 S W. 888, 154 Ark. 210.
La.—Nelson v. Vicksburg, S. & P. Ry. Co., 75 So. 212, 141 La. 475.
Mass—McNeil v. New York, N H. & H. R Co., 185 N.E. 471, 282 Mass. 575.
Mo—Hays v. Metropolitan St. Ry. Co, App, 201 S.W 566.
N.J—Scott v. Atlantic City & S. R. Co., 132 A. 239, 4 N J Misc 193.
Tenn—Young v. Gregory Bus Line, 1 Tenn App. 282.
10 C J. p 1079 note 46.

48. U S.—Spiesberger v. Michigan Cent R Co., Ill, 235 F. 864, 149 C C A. 176.
Ohio—Grubbs v. Cincinnati, L. & A. St. Ry Co, 17 Ohio N P ,N S., 356.
10 C.J. p 1079 note 47.

49. Ala.—Hammett v. Birmingham Ry., Light & Power Co., 81 So 22, 202 Ala 520
Minn—Lentz v. Minneapolis & St. Paul Suburban R Co., 160 N.W. 794, 135 Minn. 310
Mo.—Gott v. Kansas City Rys. Co, 222 S.W 827—Irby v. St. Louis Public Service Co, App., 82 S W.2d 118—Watts v. Fleming, 298 S W 107, 221 Mo App. 1123.
N.J.—Smith v. Delaware, L & W. R. Co., 99 A. 205, 89 N J.Law 643—Gore v. Delaware, L. & W R. Co., 98 A. 389, 89 N J.Law 224.
N.Y.—Krupnick v. Branikowski, 3 N E.2d 210, 271 N.Y. 612, reversing 284 N.Y.S 407, 246 App Div. 782.
Ohio.—Cincinnati Street Ry. Co. v. Mueller, 200 N.E 770, 51 Ohio App. 314—Cleverdon v. Lake Shore Elec Ry. Co., 20 Ohio Cir.Ct.,N.S., 550, affirmed 80 N.E. 1128, 75 Ohio St. 618.
Pa.—Gourlay v Philadelphia Rapid Transit Co, 100 Pa.Super. 419.
10 C.J. p 1079 note 48.

Invitation to alight

(1) Whether facts alleged authorized conclusion that defendant had extended invitation to passenger to alight at other than regular stopping place, is for jury—Waters v. Texas Electric Ry, Tex.Civ.App., 267 S.W. 1005

(2) In passenger's action for injuries sustained when struck by another train while alighting, whether the situation at the rear end presented invitation to alight from forward end of particular car is question for jury.—Kinder v. Erie R. Co., 162 A. 387, 109 N.J Law 469, reversing 146 A. 923, 7 N.J Misc. 637, following 137 A 88, 103 N.J Law 316.

Evidence held insufficient

(1) To take to jury question of motorman's negligence, where street car stopped in middle, rather than at edge, of intersection, and former passenger, after alighting, was injured by automobile—MacLearn v. Iowa Southern Utilities Co., 234 N W. 851, 212 Iowa 555

(2) Evidence of motorman's negligence in not warning or assisting passenger.—Tefft v. Boston Elevated Ry. Co, 188 N.E. 507, 285 Mass. 121.

(3) In action for death of passenger from being carried beyond his destination and put off at dangerous place, where he was killed by freight train while crossing tracks to reach his station.—Ferrick v. Baltimore & O R Co., 103 A. 559, 260 Pa. 176

Motor carriers

(1) In action by taxicab passenger for injuries sustained when he was struck by automobile just after getting out of taxicab, whether taxicab driver had so parked taxicab that there was space of more than fifteen feet of main-traveled portion of street left unobstructed is for jury—Checker Cab & Baggage Co. v. Harrison, 87 S W 2d 32, 191 Ark. 564.

(2) Where defendant stopped its bus in the middle of the street in discharging plaintiff as a passenger, whereby plaintiff was injured by being hit by an automobile unlawfully passing the bus on the right side, it was for the jury to determine whether under the circumstances the driver of the bus might reasonably have anticipated that automobile drivers would pass the bus on the right-hand side.—Paris v. East St. Louis Ry. Co, 275 Ill App. 241.

(3) In passenger's action against bus company for injuries sustained when her foot slipped off curb, while alighting from bus and attempting to step onto curb about two feet from outer edge of bus step, whether company was negligent because of manner in which motorman drove bus alongside curb was for jury under evidence.—Thomason v. Chicago Motor Coach Co., 10 N.E.2d 714, 292 Ill App. 104

(4) Whether proper care for motor bus passengers' safety requires that a particular bus should be driven to curb when it is reasonably convenient to do so on a particular occasion may be presented as a fact question.—Thomason v. Chicago Motor Coach Co., supra.

(5) In taxicab passenger's action for injuries sustained when cab was struck by overtaking automobile while passenger was alighting, whether taxicab driver was negligent in stopping on street at place where it was likely that overtaking vehicle would be unable to pass to left or to stop because of street car rails and icy ruts is for jury—Paulos v Koelsch, 263 N W. 913, 195 Minn. 603

(6) Question of negligence of cab driver, in respect of injury to passenger struck by automobile, while alighting from cab in driveway on left side of street, was for jury.—Bien v. Meyers, 155 A. 480, 9 N.J. Misc 676.

(7) Whether defendant operating motor bus, by stopping bus ten feet from curb, created dangerous condition, constituting negligence, which caused injuries to passenger struck by automobile on alighting, is a question of fact for jury—Cleveland Ry Co. v. Crooks, 181 N.E. 102, 125 Ohio St 280.

50. U.S—Young v. Baldwin, C.C A. Ark, 84 F.2d 841.
Ark.—Beach v. Eureka Traction Co., 203 S W. 834, 135 Ark. 542.
Ga—Holmes v Georgia Power Co., 162 S.E. 403, 44 Ga App. 588, reversed on other grounds Georgia Power Co v Holmes, 165 S E. 284 175 Ga. 487, conformed to Holmes v. Georgia Power Co., 165 S E. 918, 45 Ga.App 826.
Kan.—Kennedy v. Fleming, 221 P. 249, 114 Kan. 853.
Ky.—Cincinnati, N & C Ry. Co. v. Trenkamp, 295 S W. 866, 220 Ky. 552—Mayhew v. Ohio Valley Electric Ry. Co., 254 S W 202, 200 Ky. 105
Mass.—McManus v. Boston Elevated Ry. Co., 160 N E. 529, 262 Mass. 519.
Miss—Gulfport & Mississippi Coast Traction Co. v. Raymond, 128 So. 327, 157 Miss. 439.

provide or furnish reasonably safe means for a passenger to alight.[51]

q. Care as to Persons Accompanying Passengers

It is generally for the jury to determine whether the carrier was negligent as to a person accompanying a passenger.

Negligence of the carrier as to a person who was injured while at its station or on a car for the purpose of meeting or accompanying passengers is generally a question for the jury.[52]

r. Proximate Cause of Injury

It is generally for the jury to determine under the evidence whether the negligence of the carrier was the proximate cause of the injury to the passenger.

It is ordinarily a question for the jury, under the evidence, to say whether the injuries for which recovery is sought were proximately caused by the carrier's negligence or other wrong,[53] or whether

Mo.—Caley v. Kansas City, 48 S.W.2d 25, 226 Mo.App. 934—Brooks v. Union Depot Bridge & Terminal R. Co., 258 S.W. 724, 215 Mo.App. 643.

N.J.—Malzer v. Koll Transp. Co., 156 A. 639, 108 N.J.Law 296—Pabst v. Public Service Ry. Co., 141 A. 773, 104 N.J.Law 537.

N.Y.—Engel v. Brooklyn & Queens Transit Corporation, 299 N.Y.S. 186.

N.C.—Lane v. Southern Ry. Co., 134 S.E. 855, 192 N.C. 287, 51 A.L.R. 1114.

N.D.—Faubion v. Minneapolis, St. P. & S. S. M. Ry. Co., 177 N.W. 371, 45 N.D. 269.

Ohio.—Poehl v. Cincinnati Traction Co., 151 N.E. 806, 20 Ohio App. 148.

Pa.—Gerlach v. City of Philadelphia, 157 A. 212, 103 Pa.Super. 401—Fissell v. Hines, 78 Pa.Super. 179—Hall v. Lehigh Valley R. Co., 74 Pa.Super. 52.

Utah.—Barlow v. Salt Lake & U. R. Co., 194 P. 665, 57 Utah 312.

Va.—Virginia Ry. & Power Co. v. Taylor, 132 S.E. 334, 144 Va. 496.

10 C.J. p. 1079 note 49.

Passenger alighting after smashup

Whether trolley company failed properly to safeguard passengers, where one stepped on screw in alighting after smashup, is a question for jury.—Carradus v. Pittsburgh Rys. Co., 86 Pa.Super. 159.

51. Ark.—Yazoo & M. V. R. Co. v. Hill, 216 S.W. 1054, 141 Ark. 378.

Ga.—Metts v. Louisville & N. R. Co., 182 S.E. 531, 52 Ga.App. 115.

Mo.—Mahaney v. Kansas City, Clay County & St. Joseph Auto Transit Co., 46 S.W.2d 817, 329 Mo. 793—Tanner v. Chicago, R. I. & P. Ry. Co., App., 258 S.W. 730—Bate v. Harvey, App., 195 S.W. 571.

Or.—Nelson v. United Rys. Co., 166 P. 763, 85 Or. 427.

Pa.—Lawton v. Philadelphia Rapid Transit Co., 151 A. 13, 300 Pa. 532.

Tex.—Texas & N. O. R. Co. v. Parry, Civ.App., 1 S.W.2d 760, reversed on other grounds, Com.App., 12 S.W.2d 997—Southwestern Gas & Electric Co. v. Nichols, Civ.App., 254 S.W. 515—Williams v. Galveston, H. & S. A. Ry. Co., Civ.App., 196 S.W. 309—Wichita Falls Traction Co. v. Berry, Civ.App., 187 S.W. 415, error dismissed.

10 C.J. p. 1079 note 50.

Where negligence not proximate cause

In passenger's action for personal injury, court was not warranted in submitting defendant's failure sufficiently to light front exit of car and step thereof where such failure was not the proximate cause of injury.—Stout v. Chicago, R. I. & P. Ry. Co., 200 N.W. 596, 198 Iowa 1017.

52. U.S.—Lowden v. McClung, C.C.A.Ark., 80 F.2d 694.

Ga.—Central of Georgia Ry. Co. v. Weathers, 108 S.E. 556, 27 Ga.App. 375.

Kan.—Cannon v. Atchison, T. & S. F. Ry. Co., 167 P. 1050, 101 Kan. 363, L.R.A.1918A 559.

Mo.—Lewis v. Illinois Cent. R. Co., 3 S.W.2d 371, 319 Mo. 233.

Okl.—St. Louis & S. F. R. Co. v. Stacy, 171 P. 870, 77 Okl. 165—Chicago, R. I. & P. Ry. Co. v. Brooks, 179 P. 924, 72 Okl. 208.

10 C.J. p. 1079 note 51.

Opportunity to alight

Where plaintiff, who had assisted his mother and two children to board defendant's train, was injured while alighting from the train after it had started, on the conductor's refusal to stop the train to let him off after being requested to do so and with notice of plaintiff's object in boarding the train, the issue of negligence was for the jury.—Missouri, K. & T. Ry. Co. of Texas v. Churchill, Tex.Com.App., 212 S.W. 155, affirming, Civ.App., 171 S.W. 517, rehearing denied, Com.App., 213 S.W. 253.

53. Ala.—Birmingham Electric Co. v. Jones, 176 So. 203, 234 Ala. 590.

Ark.—Missouri Pacific Transp. Co. v. Sharp, 108 S.W.2d 579, 194 Ark. 405—Reed v. Baldwin, 92 S.W.2d 392, 192 Ark. 491—Checker Cab & Baggage Co. v. Harrison, 87 S.W.2d 32, 191 Ark. 564—Missouri Pac. R. Co. v. Hall, 53 S.W.2d 432, 186 Ark. 270—Ft. Smith Traction Co. v. Oliver, 46 S.W.2d 647, 185 Ark. 227—Butler County R. Co. v. Lawrence, 250 S.W. 340, 158 Ark. 271—Mills v. Franklin, 196 S.W. 928, 130 Ark. 80.

Cal.—Lafferty v. Market St. Ry. Co., 46 P.2d 996, 7 Cal.App.2d 698—Brizzolari v. Market St. Ry. Co., 46 P.2d 783, 7 Cal.App.2d 246—Duran v. Pickwick Stages System, 35 P.2d 148, 140 Cal.App. 103—Even v. Pickwick Stages System, 293 P. 700, 109 Cal.App. 636—Aydlott v. Key System Transit Co., 286 P. 456, 104 Cal.App. 621.

Conn.—Di Rossi v. Connecticut Co., 188 A. 926, 122 Conn. 372—Roden v. Connecticut Co., 155 A. 721, 113 Conn. 408.

Ga.—Norton v. Georgia Ry. & Power Co., 110 S.E. 459, 28 Ga.App. 167.

Ill.—Yasbec v. Sprague, App., 13 N.E.2d 868.

Ind.—Pittsburgh, C., C. & St. L. Ry. Co. v. Friend, 118 N.E. 593, 70 Ind.App. 366.

Iowa.—Fitzgerald v. Des Moines City Ry. Co., 207 N.W. 602, 201 Iowa 1302—Kelly v. Muscatine, B. & S. R. Co., 191 N.W. 525, 195 Iowa 17—Carlisle v. Davenport & M. Ry. Co., 159 N.W. 667, 178 Iowa 224.

Ky.—McGraw v. Ayers, 58 S.W.2d 378, 248 Ky. 166—Consolidated Coach Corporation v. Garmon, 26 S.W.2d 20, 233 Ky. 464—Kentucky Traction & Terminal Co. v. Roman's Guardian, 23 S.W.2d 272, 232 Ky. 285—Louisville & N. R. Co. v. Rowland's Adm'r, 14 S.W.2d 174, 227 Ky. 841.

Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, and appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720—Washington, B. & A. Electric R. Co. v. Fitch, 136 A. 529, 152 Md. 137—United Rys. & Electric Co. of Baltimore v. Perkins, 136 A. 50, 152 Md. 105—Stewart Taxi-Service Co. v. Spencer, 132 A. 153, 149 Md. 635.

Mass.—Hartford v. Boston Elevated Ry. Co., 182 N.E. 476, 280 Mass. 288—Gilchrist v. Boston Elevated Ry., 172 N.E. 349, 272 Mass. 346.

Mich.—Adelsperger v. City of Detroit, 227 N.W. 694, 248 Mich. 399—Herter v. City of Detroit, 222 N.W. 774, 245 Mich. 425.

Minn.—Paulos v. Koelsch, 263 N.W. 913, 195 Minn. 603—Sullivan v. Minneapolis St. Ry. Co., 200 N.W. 922, 161 Minn. 45—Draves v. Min-

they were caused by some act of the person injured, as stated infra § 803, or by the acts of some third person.[54]

On the other hand, where the facts are undis-

neapolis & St P. Suburban R. Co., 172 N.W 128, 112 Minn 321.

Miss—Teche Lines v Keller, 165 So. 303, 174 Miss 527—Hughes v. Gregory Bus Lines, 128 So. 96, 157 Miss 374

Mo—Schulz v St Louis-San Francisco Ry Co, 4 S W 2d 762, 319 Mo. 8—Hulen v Wheelock, 300 S W. 479, 318 Mo 502—Bond v St Louis-San Francisco Ry. Co., 288 S W. 777, 315 Mo. 987—Hamilton v. Missouri Pac. Ry. Co., 270 S W. 100—Weissman v. Wells, 267 S.W. 400, 306 Mo 82—Finn v Terminal R. Ass'n of St. Louis, App, 97 S. W 2d 890—Alewel v. East St. Louis & S. Ry. Co., App, 26 S.W.2d 869—Willi v. United Rys Co. of St. Louis, 224 S.W. 86, 205 Mo. App 272—Shafer v. Kansas City Rys Co, App, 201 S.W. 611.

Neb—Tighe v Interstate Transit Lines, 263 N W. 483, 130 Neb 5—McCann v. Omaha & Council Bluffs Street Ry. Co., 222 N W. 633, 117 Neb. 786.

N.J.—Galamb v Erie R. Co, 156 A. 128, 108 N.J.Law 7—Russell v. Public Service Ry. Co., 139 A. 322, 104 N.J Law 34—McKittrick v. Public Service Ry. Co, 128 A. 226, 101 N J.Law 262—DenBleyker v. Public Service Co-Ordinated Transport, 164 A. 695, 11 N.J Misc 101—Benedetto v. Hudson & M. R. Co, 156 A. 37, 9 N J.Misc. 758—Sandler v. Hudson & M. R. Co, 151 A. 99, 8 N.J.Misc 537, affirmed 156 A 459, 108 N J Law 203.

N.Y—Williams v New York Rapid Transit Corporation, 238 N.Y.S 778, 248 App Div. 765, affirmed 6 N.E 2d 58, 272 N.Y. 366—Fulton v Kalbach, 179 N.Y.S 604.

N.C.—Cole v. Atlantic Coast Line R. Co., 191 S.E. 353, 211 N C. 591—Lane v. Southern Ry Co., 134 S. E 855, 192 N.C. 287, 51 A.L.R. 1114

N.D.—Hurley v. Chicago, M & St. P. Ry. Co., 189 N.W. 322, 48 N. D. 1251.

Ohio.—Community Traction Co v. Freeman, 156 N E. 598, 116 Ohio St. 448—Beierla v. Hockenedel, 157 N.E. 573, 25 Ohio App. 186.

Okl—Trail v Tulsa St. Ry. Co, 222 P. 950, 97 Okl. 19—Muskogee Electric Traction Co v. Latty, 187 P. 491, 77 Okl. 156—St. Louis & S. F. R. Co. v McClain, 162 P. 751, 63 Okl 75.

Pa—Finley v. Philadelphia Rapid Transit Co, 106 A. 786, 263 Pa. 403—Kradel v. Pittsburgh, H., B & N C Ry. Co, 100 A. 128, 255 Pa. 427.

R.I—Keefe v. United Electric Rys. Co., 195 A. 599—Drewett v. United Electric Rys. Co., 188 A. 877.

S C—Hall v. Southern Ry. Co., 160 S E 584, 162 S C 260—Anderson v. Hampton & Branchville R. & Lumber Co., 132 S E. 47, 134 S C. 185

Tenn.—Greyhound Lines, Inc. v. Patterson, 14 Tenn.App. 652

Tex—Fort Worth v D. C. Ry Co. v. Miller, 247 S W. 503, 112 Tex. 350—Galveston, H. & S. A Ry. Co v. Bell, 216 S.W. 390, 110 Tex. 104, affirming, Civ App, 165 S W 1—Greer v. Thaman, Com.App., 55 S.W.2d 519, reversing, Civ.App., 34 S.W.2d 378—Texas & N O Ry. Co. v. Rooks, Com.App., 292 S W. 536, affirming, Civ App, 283 S W. 622, rehearing denied, Com.App, 293 S W. 554—Dallas Ry. Co. v. Warlick, Com App., 285 S W 302, reversing, Civ App, 268 S W 512—Texas & N. O. R. Co v. Ewing, Civ.App., 46 S.W 2d 398, error dismissed—Schaff v. Gordon, Civ App, 214 S. W. 638—Southern Traction Co. v. Reagor, Civ.App, 186 S W. 272, error refused—Texas Midland R. Co. v. Sikes, Civ App., 185 S W. 412, error refused.

Va.—Virginia Ry & Power Co. v. Taylor, 132 S E 334, 144 Va. 496.

Wash—Tobin v. City of Seattle, 221 P. 583, 127 Wash. 664—Carton v. Eyres & Seattle Drayage Co, 201 P 737, 117 Wash. 536—Blystone v. Walla Walla Valley Ry. Co., 165 P. 1049, 97 Wash 46.

Wis.—Nelson v. Milwaukee Electric Ry. & Light Co, 222 N.W. 792, 197 Wis. 513

10 C.J. p 1080 note 52.

Whether external cause alleged by defendant as causing injury was sole cause is question for jury—State ex rel St. Louis & San Francisco Ry. Co. v. Daues, 290 S.W 425, 316 Mo 474, quashing certiorari Whitlow v. St. Louis-San Francisco Ry Co., App., 282 S.W. 525.

Excessive speed

In passenger's action for injuries from overturning bus, whether speed of fifty miles per hour caused bus to lose tire and overturn is for jury—Nevin Bus Lines v. Ritenour, C C.A Ohio, 61 F 2d 637—10 C.J. p 1080 note 52 [a].

Joint and concurrent negligence

(1) In street car passenger's action against street railroad and a truck owner for injuries sustained in a head-on collision between street car and truck while crossing bridge, whether collision was caused by joint and concurrent negligence of truck driver in continuing race with an automobile crowding him onto tracks of approaching street car and of street car motorman in failing to stop car or keep a lookout was for jury—Petri v. Pittsburgh Rys. Co., Pa., 195 A. 107.

(2) Whether street railroad's negligence or wanton or intentional wrong, concurring with negligence of driver of automobile knocked against prospective passenger, proximately caused her injury, was for jury—Alabama Power Co v. Bass, 119 So. 625, 218 Ala. 586, 63 A L R 1.

(3) In passenger's action against street railway and another company as joint tort-feasors, whether concurrent acts of both or separate acts of either, were proximate cause, was for the jury.—Georgia Ry & Power Co. v. Ryan, 100 S.E. 713, 24 Ga.App 288.

(4) Whether joint and concurrent negligence of driver of truck and motorman of street car striking parked truck which injured intending passenger was proximate cause of injury was for jury—Louisville Taxicab & Transfer Co. v. Reno, 35 S.W 2d 902, 237 Ky. 452.

(5) Whether railroad's negligence concurred with passenger's act in accidentally applying emergency brakes, causing another passenger's death when coaches broke apart, was for jury under evidence—Gulf, C. & S. F. Ry Co. v. Ballew Tex.Com App, 66 S W.2d 659, reversing, Civ. App., 39 S.W.2d 180.

Physical facts

(1) Whether plaintiff's injury was a physically possible result of the negligence complained of is a question for the jury.

U.S.—Virginia Public Service Co v. Silver, C.C.A Va., 68 F 2d 230—Frates v Thomas, C.C A.Okl., 57 F 2d 535.

Mass—Burnham v. Boston & M. R R, 116 N E 735, 227 Mass. 422

Okl.—A & A Taxicab Co. v. Bass, 58 P 2d 567.

10 C J. p 1080 note 52 [d] (1).

(2) When a previously injured person becomes a passenger, in his action for negligence causing further injuries, extent of injuries received in prior accident and the extent of injuries received in stage accident for which the carrier would be liable are for jury.—Poropat v. Olympic Peninsula Motor Coach Co., 299 P. 979, 163 Wash 78.

10 C.J. p 1080 note 52 [d].

54. Ark.—Baldwin v. Wingfield, 85 S W 2d 689, 191 Ark. 129.

Cal—Johnson v. Pickwick Stages System, 291 P. 611, 108 Cal App. 279.

Conn.—Boileau v. Williams, 185 A. 429, 121 Conn 432.

Ill.—Kanter v. St. Louis, S. & P. R. R., 218 Ill.App. 565.

puted, the question of proximate cause of an injury to a passenger is for the court;[55] and, where plaintiff fails to prove that the negligence of the carrier was the proximate cause of the injury, there is no case for the jury,[56] and it is proper for the court to grant a nonsuit or to direct a verdict for defendant.[57]

When injuries are sustained after the relation of passenger and carrier has terminated, whether the cause of the accident was too remote to allow compensation by way of damages is a question of law for the court.[58]

s. Companies and Persons Liable

On conflicting evidence it is for the jury to determine what company or person is responsible for the passenger's injuries.

Where the evidence is conflicting, it is a question for the jury as to which one of several companies or persons is responsible for the injuries,[59] or whether both or all were guilty of negligence.[60] However, the liability of a defendant should not be submitted on insufficient evidence,[61] and, where the undisputed evidence shows that the sole proximate cause of the injuries was the failure on the part of one of two carriers sued jointly to exercise the care and diligence to insure the safety of its passengers which is required by law, the court may grant a nonsuit as to the other carrier.[62] Similarly, in an action against a carrier and another for injuries resulting from a collision, a binding instruction in favor of the carrier is proper where there is no showing of negligence on the part of the carrier.[63] Where there is no proof that either defendant owned, operated, or had anything to do with the car causing the injuries, a verdict in favor of each defendant should be directed on request;[64] but, when joint negligence is charged, and plaintiff is entitled to go to the jury as to one of defendants, a nonsuit as to all defendants is improper.[65]

While lessees of a station are not liable to permissive licensees in the absence of willful or wanton negligence, in a action by a passenger on a bus line for injuries received at the station of the lessees by reason of the condition of the premises, evidence of simple negligence is insufficient to take the case to the jury.[66]

t. Conditions and Operation of Elevators and Escalators

Under and subject to the rules above discussed, the question of the negligence in the construction, main-

Ky.—B-Line Cab Co. v Lake, 110 S.W.2d 1083, 270 Ky. 763.
Md.—Sun Cab Co v. Reustle, 192 A. 292—Stewart Taxi-Service Co v. Spencer, 132 A. 153, 149 Md. 635.
Mo.—Zichler v. St. Louis Public Service Co., 59 S.W.2d 654, 332 Mo. 902—Delfosse v United Rys Co. of St Louis, 201 S.W. 860—Timmons v. Kurn, App., 100 S.W.2d 952.
N.J.—McPherson v. Hudson & M. R. Co., 127 A. 23, 100 N.J Law 262, modified 128 A. 231, 101 N.J.Law 262—Scalimbracca v. Central R. Co of New Jersey, 146 A. 665, 7 N.J.Misc. 635, affirmed 152 A. 920, 107 N.J Law 192
10 C.J. p. 1080 note 54.

Signal to start while passenger is alighting

In a passenger's action for injuries received on starting of car before she had alighted, question whether signal for starting of car was given by conductor or another passenger, as claimed by defendant, is, on conflicting evidence, for jury.—Lerch v Hershey Transit Co., 99 A. 800, 255 Pa. 190.

55. Ky.—Louisville & N. R. Co v Turner, 292 S.W. 758, 219 Ky. 92.
N.C.—Garland v. Carolina, C. & O. Ry., 90 S.E. 779, 172 N.C. 638, L.R.A.1917B 706.
10 C.J. p. 1080 note 55.

56. U.S.—Betcher v. Southern Pac. Co., C.C.A.Tex., 29 F.2d 735.
Ill.—Coffin v. Chicago City Ry. Co., 251 Ill.App. 169
Ky.—Louisville & N. R. Co. v Fields, 246 S.W. 130, 197 Ky. 135.
N.Y.—Dusenbury v. Delaware, L. & W. R. Co., 158 N.Y.S. 681, 95 Misc. 241.
Ohio.—Canton Motor Coach v. Hall, 189 N.E. 505, 46 Ohio App. 516.
Tex.—Houston & T. C. R. Co. v. Werline, Civ.App., 84 S.W.2d 288, error dismissed
Utah.—Morrissey v. Union Pac. R. Co., 249 P. 1064, 68 Utah 323.
Wis.—Moen v Madison Rys. Co., 254 N.W. 641, 215 Wis. 248, followed in 254 N.W. 643, 215 Wis. 253.
10 C.J. p. 1080 note 56.

57. Ark.—Lowden v. Scott, 95 S.W. 2d 630, 192 Ark. 887.
Ga.—Moseley v. Patterson, 107 S.E. 623, 27 Ga.App. 133.
Ky.—Gray v Louisville Ry. Co., 211 S.W. 560, 184 Ky. 182.
Mass.—Finnegan v. Checker Taxi Co., 14 N.E.2d 127.
Mich.—Takacs v Detroit United Ry., 207 N.W. 907, 234 Mich. 42.
10 C.J. p. 1080 note 57.

58. N.J.—Kelson v. Public Service R. Co., 110 A. 919, 94 N.J Law 527.

59. N.C.—Myers v. Kirk, 135 S.E. 788, 192 N.C. 700
Pa.—Windle v Davis, 118 A. 503, 275 Pa. 23
10 C.J. p. 1080 note 58.

Agreement between defendants

In action against two railroads for personal injuries to a passenger, where it appeared that one had been running trains over the track of the other for fourteen years, the court did not err in submitting to the jury the question as to whether there was an agreement between the roads—Texas & N. O. R. Co v. Jones, Tex. Civ.App., 201 S.W. 1085.

60. U.S.—Southern Ry Co. v. Hussey, C.C.A.Mo., 42 F.2d 70, 74 A.L.R. 1172, certiorari granted 51 S.Ct. 75, 282 U.S. 826, 75 L.Ed. 736, affirmed 51 S.Ct. 367, 283 U.S. 136, 75 L.Ed. 908.
Cal.—Burke v. Dillingham, 258 P. 627, 84 Cal.App. 736.
Ky.—Louisville Taxicab & Transfer Co. v. Reno, 35 S.W.2d 902, 237 Ky. 452.

61. N.C.—Love v. Queen City Lines, 174 S.E. 514, 206 N.C. 575.

62. Pa.—Cleary v Quaker City Cab Co., 132 A. 185, 285 Pa. 241.
10 C.J. p. 1081 note 59

63. Pa.—Cole v. National Casket Co., 101 Pa.Super. 207.

64. Mich.—Randolph v. Detroit United Ry., 181 N.W. 44, 213 Mich. 100.

65. Pa.—Martin v. Steen, 167 A. 609, 109 Pa.Super. 263.

66. N.C.—Goodman v. Queen City Lines, 180 S.E. 661, 208 N.C. 323.

tenance, or operation of elevators or escalators whereby a passenger is injured is for the determination of the jury.

In case of injury to a passenger on an elevator or escalator, it is generally a question for the jury, under the evidence, to say whether the owner or proprietor of the elevator or escalator was negligent with respect to its construction and maintenance,[67] or with respect to the manner in which it was operated at the time of the injury.[68] On the other hand, the court must take the case from the jury when from all the evidence no negligence appears.[69]

67. Ala.—Ensley Holding Co. v. Kelley, 158 So. 896, 229 Ala. 650.
Cal.—McKeon v. Lissner, 223 P. 965, 193 Cal. 297
Mass.—Levesque v. Hildreth & Rogers Co., 177 N.E. 623, 276 Mass. 429—Du Bois v. Boston Elevated Ry. Co., 176 N.E. 920, 276 Mass. 98.
Mich.—Stapleton v. Furniture Exhibition Bldg. Co., 177 N.W. 139, 209 Mich. 385.
Mo.—Grote v. Hussmann, 223 S.W. 129, 204 Mo.App. 466.
N.J.—Richter v. L. Bamberger & Co., 165 A. 289, 11 N.J.Misc. 229.
Wash.—Engstrand v. Hartnett, 180 P. 132, 106 Wash. 404.
10 C.J. p. 1081 note 60.

Safety devices

(1) Whether appliances on elevator were out of order, and to what extent failure to use safety appliances tended to show negligence, are questions for the jury.—Draper v. Cotting, 120 N.E. 365, 231 Mass. 51.

(2) Where state laws and municipal building code required doors of automatic elevators to be kept in safe operating condition and in good repair, evidence that plaintiff desiring to use elevator in defendant's building fell into shaft by reason of defective condition of automatic elevator, which permitted door to be opened when elevator cab was at different floor, justifies submission of issue of defendant's negligence to the jury under rule of res ipsa loquitur.—Cramer v. Mergard, 11 N.E. 2d 108, 56 Ohio App. 493.
10 C.J. p. 1081 note 60 [a].

Weight of evidence and credibility of witnesses

In action for injury to passenger on department store escalator, credibility of defendant's witnesses and weight of their evidence was for jury.—May Department Stores Co. v. Bell, C.C.A.Mo., 61 F.2d 830.

Proximate cause

Evidence that plaintiff fell into shaft by reason of defective condition of automatic elevator, which permitted door to be opened when elevator cab was at different floor, from which inference of negligence could be drawn under the building laws, with evidence that, on other occasions, door opened when cab was not at floor, which was known to lessee of premises, together with evidence that in opening door plaintiff's fingers were caught and he was precipitated into shaft, makes a case for the jury on issue of proximate cause.—Cramer v. Mergard, 11 N.E. 2d 108, 56 Ohio App. 493.

68. U.S.—National Biscuit Co. v. Litzky, 22 F.2d 939, C.C.A.Mich., 56 A.L.R. 853.
Ala.—Johnson v. Hopkins, 105 So. 663, 213 Ala. 492
Cal.—Parsons v. Easton, 195 P. 419, 184 Cal. 764
Ky.—Otis Hidden Co. v. Newhouse, 264 S.W. 731, 204 Ky. 324.
Md.—O'Neill & Co. v. Crummitt, 190 A. 763
Mass.—Harrington v. Little, 174 N.E. 237, 274 Mass. 81—Waters v. Cotting, 116 N.E. 824, 227 Mass. 405.
Mich.—Sikora v. Fellowcraft Club, 161 N.W. 826, 195 Mich. 49.
Mo.—Hesemann v. May Department Stores Co., 39 S.W.2d 797, 225 Mo. App. 584.
N.Y.—Kantrowitz v. Bergmann, 163 N.Y.S. 996, 177 App.Div. 190.
Pa.—Bell v. City of Pittsburgh, 146 A. 567, 297 Pa. 185, 64 A.L.R. 1542—Petrie v. Kaufmann & Baer Co., 139 A. 878, 291 Pa. 211—McKnight v. S. S. Kresge Co., 132 A. 575, 285 Pa. 489.
R.I.—Vrooman v. Shepard Co., 190 A. 452
Wash.—Davis v. Burke, 156 P. 525, 90 Wash. 495.
Wis.—Brendlson v. Ed. Schuster & Co., 168 N.W. 198, 167 Wis. 566
10 C.J. p. 1081 note 61.

Whether elevator operator was in elevator at time of accident is a question for jury.—McKnight v. S. S. Kresge Co., 132 A. 575, 285 Pa. 489.

Negligent starting of elevator

Because elevator operator received instructions to go ahead from passenger who had nothing to do with operation of elevator, he was not relieved of duty of exercising care in starting, whether duty of attention to plaintiff's decedent was excused by the talk was a question for the jury, at most.—Sikora v. Fellowcraft Club, 161 N.W. 826, 195 Mich. 49.

Lookout

In passenger's action for injuries sustained while leaving elevator, whether operator failed to keep a proper lookout before closing door, to ascertain whether anyone was leaving elevator, is for jury.—City Nat. Bank v. Pigott, Tex.Civ.App., 270 S.W. 234.

Aggravating circumstances

In action under Rev.St.1919 § 4217, for death of elevator passenger, evidence that doors of elevator would not latch, which was known to operator and manager of building, and that operator attempted to run elevator from basement knowing of such condition, makes the question whether facts constituted aggravating circumstances one for jury.—Williams v. Short, 268 S.W. 706, 219 Mo.App. 99, transferred, Mo., 263 S.W. 200.

Liability of company operating

In a passenger's action against elevator company for injuries in fall of elevator in courthouse, refusal to direct verdict for the elevator company is not error where the company was operating the elevator, which had not yet been accepted by the county.—Otis Elevator Co. v. Walstad, C.C.A.Fla., 37 F.2d 895.

Proximate cause

(1) In action for death on elevator, where decedent was caught between floor of elevator and wall, submission of question of probable cause to jury is proper. Cause of death, where decedent suddenly fell while riding on elevator and was caught between elevator and wall, is a question for jury.—Strobel v. Park, 140 A. 877, 292 Pa. 200, 57 A.L.R. 253.

(2) In passenger's action for injuries sustained while leaving elevator, whether operator's failure to keep proper lookout constituted negligence which was proximate cause of accident is for jury.—City Nat. Bank v. Pigott, Tex.Civ.App., 270 S.W. 234.
10 C.J. p. 1080 note 52 [e].

69. Cal.—Schwerin v. H. C. Capwell Co., 34 P.2d 1050, 140 Cal.App. 1.
10 C.J. p. 1081 note 62.

Evidence held insufficient for jury

(1) In customer's action for injuries sustained when thrown to floor while leaving ascending escalator in defendant's store.—Wordell v. Shepard Co., R.I., 192 A. 464.

(2) Evidence as to operator's negligence in not discovering presence of old banana skin.—Ensley Holding Co. v. Kelley, 158 So. 896, 229 Ala. 650

(3) Evidence as to whether defendant knew or should have known of presence of banana peel in its passenger elevator.—Thomas v. J.

§ 769. Instructions

a. In general
b. Requests for instructions
c. Invading province of jury
d. Conformity to pleadings and evidence
e. Instructions as to proximate cause of injury
f. Instructions as to presumptions and burden of proof

a. In General

In actions by a passenger against a carrier for personal injuries, the rules of civil actions generally and actions for negligence require that the court properly instruct the jury as to the law applicable to the facts, and the duty or degree of care required of the carrier under the particular circumstances.

Instructions, in an action by a passenger against a carrier for personal injuries, are governed by the rules applicable to instructions in civil actions generally, and more particularly in actions for negligence. Thus, in such an action each party is entitled to instructions covering his theory of the case,[70] and in its charge to the jury the court must correctly state the law applicable to the facts,[71] do-

Samuels & Bro., 132 A. 8, 47 R.I. 206, reargument denied 132 A. 386.

(4) In an action for injuries in passenger elevator in office building, it was error for the court to submit to the jury whether or not it was negligence not to furnish a device which would prevent the elevator being moved while the doors were open, the only evidence concerning such device being that such device was used in department stores and apartment houses, and opinions of experts that such devices were not practicable in an office building—Getty v. Hutton, 188 P. 10, 110 Wash. 124.

70. Ky.—Chesapeake & O. R. Co. v. Hay, 58 S.W.2d 228, 248 Ky. 69.
Mich.—Chalker v. Detroit, G. H. & M. Ry. Co., 173 N.W. 532, 207 Mich. 138.
Mo.—Wiard v. Dunham, 210 S.W. 873.
10 C.J. p. 1081 note 66.

Proper instructions stated

In action for injuries to passenger who was injured, as he claimed, when thrown by sudden jerk from steps after train had stopped at his station and had started to leave it, wherein defense was that plaintiff stepped from train.—Louisville & N. R. Co. v. Burk, 268 S.W. 844, 207 Ky. 1.

Instructions held proper

(1) Instruction in an action for the death of an alleged passenger, sufficiently submitting the defense that deceased did not intend to pay any fare and had no right on the train and was a trespasser.—Payne v. Allen, 110 S.E. 345, 28 Ga.App. 8, reversed on other grounds 116 S.E. 640, 155 Ga. 54, conformed to 116 S.E. 642, 30 Ga.App. 80.

(2) In action against street railroad for injuries to passenger, in view of defendant's evidence, an instruction that the mere fact that the conductor was on duty and in charge of the car did not deprive him of his right to defend his person, and that, if plaintiff attempted to strike him without being first assailed, plaintiff could not recover, held proper, although plaintiff's evidence was to the contrary.—Wiard v. Dunham, Mo., 210 S.W. 873.

Instruction held erroneous

An instruction that, as plaintiff has introduced no evidence that motorman of defendant's street car struck decedent pursuant to instructions by defendant, jury must find that he did not do so pursuant to any such instructions, is error, plaintiff's theory being that motorman was acting under defendant's instructions in answering conductor's emergency call, and hence that defendant was liable for any injuries resulting from motorman's negligent, wanton, or tortious act in performing duty while so acting.—Galloway v. United Railroads of San Francisco, 232 P. 491, 69 Cal.App. 770.

71. Cal.—Gritsch v. Pickwick Stages System, 22 P.2d 554, 131 Cal.App. 774.
Conn.—Petrillo v. Kolbay, 165 A. 346, 116 Conn. 389.
Ill.—Bernier v. Illinois Cent. R. Co., 213 Ill.App. 530. See Benson v. Chicago City Ry. Co., 208 Ill.App. 613.—Horst v. St. Louis Electric Terminal Ry. Co., 199 Ill.App. 169.
Ind.—Mishler v. Chicago, S. B. & N. I. Ry. Co., 122 N.E. 657, 188 Ind. 189.
Kan.—Cloud v. Kansas-Oklahoma Traction Co., 173 P. 338, 103 Kan. 249, 7 A.L.R. 1671.
Minn.—Gerin v. Chicago, M. & St. P. Ry. Co., 158 N.W. 630, 133 Minn. 395.
Mo.—May v. Chicago, B. & Q. R. Co., 225 S.W. 660, 284 Mo. 508.
Okl.—Chicago, R. I. & P. Ry. Co. v. Dizney, 160 P. 880, 61 Okl. 176.
Wash.—Osborne v. Galusha, 254 P. 1086, 143 Wash. 127.
10 C.J. p. 1081 note 67.

Instructions held proper and sufficient

(1) Generally

Ala.—Bradford v. Birmingham Electric Co., 149 So. 729, 227 Ala. 285.
Ill.—See Heineke v. Chicago Rys. Co., 199 Ill.App. 399, affirmed 116 N.E. 761, 279 Ill. 210.
Ky.—Arnett v. Chesapeake & O. Ry. Co., 248 S.W. 1040, 198 Ky. 491.
Mo.—Unterlachner v. Wells, 296 S.W. 755, 317 Mo. 181.—Kirk v. Kansas City Terminal Ry. Co., App., 27 S.W.2d 739.
N.J.—Leech v. Hudson & M. R. Co., 174 A. 537, 113 N.J.Law 366, affirmed 178 A. 754, 115 N.J.Law 114.
N.Y.—Conti v. New York Cent. R. Co., 176 N.Y.S. 365, 187 App.Div. 829.
Pa.—Bowman v. Pennsylvania R. Co., 149 A. 877, 299 Pa. 558, certiorari denied 51 S.Ct. 27, 282 U.S. 849, 75 L.Ed. 752.
Tenn.—Yellow Cab Co. v. Teller, 9 Tenn.App. 416.
Vt.—Desmarchier v. Frost, 99 A. 782, 91 Vt. 138.
10 C.J. p. 1081 note 67 [a] (1).

(2) As to who is an employee—Interurban Transp. Co. v. Reeves, 108 S.W.2d 594, 194 Ark. 332.

(3) As to liability of a carrier for negligent acts of persons assisting passengers.—Interurban Transp. Co. v. Reeves, supra.

(4) In an action for assault by an employee.
D.C.—Capital Traction Co. v. Morgan, 44 App.D.C. 237.
Mo.—Parris v. Deering Southwestern Ry. Co., App., 227 S.W. 1071.—Dorton v. Kansas City Rys. Co., 224 S.W. 30, 204 Mo.App. 262.—Flynn v. St. Louis Southwestern Ry. Co., App., 190 S.W. 371.
10 C.J. p. 1081 note 67 [a] (2).

(5) In actions for injuries sustained by an intending passenger, or when boarding a train or car.
U.S.—Boston Elevated Ry. Co. v. Teele, Mass., 248 F. 424, 160 C.C.A. 434.
Conn.—Moyles v. Connecticut Co., 160 A. 307, 115 Conn. 30.
Mass.—Harrington v. Boston Elevated Ry. Co., 118 N.E. 880, 229 Mass. 421, 2 A.L.R. 1057.
Mo.—Vogts v. Kansas City Rys. Co., App., 228 S.W. 526.—Burkett v. Missouri Pac. R. Co., App., 208 S.W. 104.
10 C.J. p. 1081 note 67 [a] (4).

(6) In actions for injuries from starting of car before passenger was seated.

Ala.—Bradford v. Birmingham Electric Co, 149 So 729, 227 Ala. 285
Ark.—Arkansas Power & Light Co v Mart, 65 S.W.2d 39, 188 Ark. 202.

(7) In actions for injuries from sudden jerks, jolts, or stops.
Ark.—Harris v. Bush, 196 S W. 471, 129 Ark 369
Conn.—Lawlor v. Connecticut Co., 186 A. 491, 121 Conn 511.
Mo.—Simmons v Wells, 20 S.W.2d 659, 323 Mo 882—Laycock v. United Rys. Co. of St Louis, App., 227 S.W 883, certified questions answered 235 S.W. 91, 290 Mo. 344.

(8) In actions by passenger injured in a collision
Ga.—Atlanta & W. P. R. Co. v. Reese, 110 S E 750, 28 Ga App. 275.
Mass.—Tuttle v. Connecticut Valley St. Ry Co., 132 N.E. 360, 239 Mass 553.
Mo.—Kinchlow v. Kansas City, K V. & W. Ry. Co, 264 S W 416—Bergfeld v Kansas City Rys. Co, 227 S W 106, 285 Mo. 654
N Y.—Norris v. National Biscuit Co., 215 N Y S. 478, 216 App.Div. 462
R.I.—Houghton v. Baillargeon, 167 A. 115, 53 R I 475.

(9) In actions for injuries to alighting passenger.
Mo.—Relford v. Kansas City Public Service Co., 50 S W 2d 171
Pa.—Pitts v. Philadelphia Rapid Transit Co., 84 Pa Super. 395.
Wash.—Nollmeyer v Tacoma Ry & Power Co, 164 P. 229, 95 Wash 595.

(10) In actions for injuries to an alighting passenger by a sudden jerk, stop, or movement of the car
Ala.—Birmingham Ry, Light & Power Co v. Gray, 71 So. 689, 196 Ala 653.
Cal.—Baker v. Market St Ry Co, 11 P 2d 912, 123 Cal App. 688
Ind.—Indianapolis Traction & Terminal Co. v Thornburg, 125 N.E 57, 74 Ind App 642.
Mass.—McNeil v New York, N. H. & H. R. Co, 185 N.E 471, 282 Mass. 575.
Mo.—McMahon v. Kansas City Rys. Co., App, 233 S.W. 64—Morris v. Kansas City Rys Co, App., 223 S.W 784
10 C J. p 1081 note 67 [a] (3).

(11) In an action for setting down a passenger at an improper place —Gulfport & Mississippi Coast Traction Co. v Raymond, 128 So. 327, 157 Miss. 439—10 C J. p 1081 note 67 [a] (6).

(12) In an action for injuries to a passenger after alighting from car. —Gulfport & Mississippi Coast Traction Co. v. Raymond, supra.

(13) In actions for injuries to persons accompanying passengers.
Ga.—Central of Georgia Ry Co. v. Hill, 94 S.E. 50, 21 Ga App 231.
Mo.—Lewis v. Illinois Cent. R Co, 50 S.W.2d 122.

(14) In an action for injuries to caretaker of stock.
Ind.—Heed v. Gummere, 136 N.E. 5, 192 Ind. 227.
Tex.—Roberts v Ft Worth & D C Ry. Co, Civ App, 229 S W 954.

(15) In actions for injuries to passengers on a mixed train—Millers Creek R Co v. Blevins, 205 S W. 911, 181 Ky. 809.

(16) In actions for injuries to elevator passenger
Ark.—Williams-Echols Dry Goods Co. v. Wallace, 219 S.W. 732, 142 Ark. 363.
Mass.—Draper v Cotting, 120 N.E 365, 231 Mass 51
Mo.—McDermed v. Baker, App, 20 S.W 2d 597
Wash.—Davis v Burke, 156 P 525, 90 Wash 495.
10 C J. p 1081 note 67 [a] (11).

(17) In actions for injuries to passengers on escalators—Hesemann v. May Department Stores Co., 39 S W. 2d 797, 225 Mo App 584

(18) As to effect of violation of statute as evidence of negligence— Finnegan v Checker Taxi Co., Mass., 14 N.E 2d 127

(19) When an action for injuries caused by the act of trainmen in shutting car door while plaintiff, an intending passenger, was on the car steps, whereby he was jolted to the ground, was not based solely on theory of a willful and wanton act, and only on proof of which recovery would be justified, the rule that, in a suit based on a willful and wanton act, it is error to instruct the jury that defendant would be liable on proof of negligent conduct alone does not apply—Hines v. Evitt, 103 S.E. 865, 25 Ga App. 606
10 C J. p 1081 note 67 [a].

Instructions held erroneous

(1) Generally
Ga.—Augusta-Aiken Ry & Electric Corp. v Andrews, 93 S E. 543, 20 Ga App. 789.
Miss.—Yazoo & M. V R. Co. v Hawkins, 132 So. 742, 159 Miss. 775.
Mo.—Unterlachner v. Wells, 278 S W. 79—Hurley v. Missouri Pac Transp Co, App, 56 S.W 2d 620, certiorari quashed State ex rel and to Use of Hurley v Becker, 66 S W 2d 524, 334 Mo. 537—Parris v Deering Southwestern Ry Co., 208 S W. 97, 203 Mo App. 182
10 C J. p 1081 note 67 [b] (1).

(2) In an action for injuries to a passenger by a sudden jerk, stop, or movement.
Ky.—Chesapeake & O R. Co v. Hay, 58 S W.2d 228, 248 Ky 69—Louisville & I. R. Co. v. Roberts, 228 S.W. 681, 190 Ky. 744.
Mo.—Altheimer v People's Motorbus Co. of St. Louis, App, 6 S W 2d 976

(3) In actions for injuries to passengers alighting from car.
Ky.—Chesapeake & O R Co v. Daniel, 251 S W 1007, 199 Ky 817—Chesapeake & O R. Co. v Mollett, 251 S W. 1005, 199 Ky. 813
Mo.—Mahaney v Kansas City, Clay County & St. Joseph Auto Transit Co, 46 S W 2d 817, 329 Mo. 793—Patterson v Lusk, App., 196 S W. 65

(4) In an action for injury to passenger by robber.—Terre Haute, Indianapolis & Eastern Traction Co v. Scott, 150 N.E 777, 197 Ind 587, 43 A L R. 1029.

(5) In action for personal injuries due to alleged failure of defendant railroad to give plaintiff a reasonable opportunity to board train at a flag station—Louisville & N R Co. v. Quinn, 219 S W 789, 187 Ky. 607

(6) In action for injuries sustained by person riding on train on pass —Dunn v Alton R Co, Mo App, 88 S W 2d 224

(7) In action for injuries by one waiting for a street car near highway crossing—Fisher v Butte Electric Ry Co., 235 P. 330, 72 Mont. 594.

(8) In action against street car company by motorists and street car passenger for injuries sustained when automobile collided with street car—Taddeo v Tilton, 289 N.Y S. 427, 248 App.Div. 290

(9) In an action by a passenger against a carrier, where defendant seeks to avoid liability on the grounds that the transfer line had been leased, and was in possession of, and was being operated by, other parties, at the time the cause of action arose, it is reversible error to instruct the jury that, although such transfer had in effect been made, defendant would still be liable, unless plaintiff had notice thereof.—Brownell v. Burke, 221 P. 1026, 97 Okl. 50.

(10) Instruction on duty of automobile driver to stop at stop sign at street intersection is erroneous as submitting admitted existence of sign to jury as question of fact, and as making obedience to ordinance a matter of discretion, rather than positive duty.—Washington v City of Seattle, 16 P 2d 597, 170 Wash 371, 86 A.L R. 113.
10 C J p 1081 note 67 [b].

Relation of passenger and carrier

(1) Where, if plaintiff was injured while disembarking from train and making his way to station, he necessarily passed over narrow and limited space between two trains, in which there was a steam pit, into which he stepped, instruction that, if

he disembarked from coach and was making his way to the station, he was a passenger, and as such the railroad owed him duty of extraordinary care, was not error.—Georgia R & Banking Co. v. Brooks, 119 S.E 424, 30 Ga App 692.

(2) In an action for the death of a passenger, an instruction pursuant to Civ Code 1910 § 2715, that a carrier might demand prepayment of fare, but that, if by its permission persons entered into its vehicle with the intention of being carried, an obligation to pay fare was implied, and the reciprocal liability of the carrier arose, is not erroneous.—Payne v. Allen, 110 S.E 345, 28 Ga. App. 8, reversed on other grounds 116 S E 640, 155 Ga 54, conformed to 116 S E 642, 30 Ga App 80

(3) Refusal of charge that passenger on street car ceases to be such when car stops and passenger steps in safety from car onto street is not error—Gulfport & Mississippi Coast Traction Co v. Raymond, 128 So 327, 157 Miss 439

(4) An instruction that if plaintiff did not have hold of car for purpose of entering, when car started, she was not passenger is properly denied—Fournier v Holyoke St Ry Co, 154 N E. 546, 258 Mass. 257 10 C J p 1081 note 67 [d]

Instructions in actions against several defendants

(1) In action against street railway company and director general of railroads for injuries to street car passenger, instruction that train crew's failure to send man to crossing in advance of moving cars would not necessarily be negligence, as they were only required to give reasonable and timely notice of car's approach, is not error as to street railway company, although not bound by admissions in complaint—Union Traction Co of Indiana v Alstadt, 143 N E 879, 195 Ind 389

(2) An instruction, authorizing recovery against bus company and owner of truck with which it collided if negligence of both defendants concurred to produce passenger's injuries, is proper—Cumberland & Westernport Transit Co. v. Metz, 149 A 4, 158 Md 424, reargument denied 149 A 565, 158 Md. 424, and appeal dismissed American Oil Co v Metz, 51 S Ct. 40, 282 U.S. 801, 75 L.Ed 720.

(3) In action for injuries sustained by street car passenger when street car collided with truck, the street railroad is entitled to charge that if jury found that truck was turned on to track when street car was so close that collision was inevitable in exercise of reasonable care, railroad was entitled to verdict.—Roach v Yonkers R. Co, 271 N.Y S. 289, 242 App Div. 195.

(4) In an action by a street car passenger to recover for injuries suffered in a collision between street car and freight train, where street railway strenuously contended that plaintiff was injured through the negligence of the railroad company, and submitted numerous instructions to the jury on that theory, court did not err in charging that any negligence of the railroad company did not relieve the street railway of using that degree of care for plaintiff's safety set out in the other instructions given, and that if such negligence, if any, caused or directly contributed to cause injuries to plaintiff, the latter was entitled to recover.—Bergfeld v. Dunham, Mo. App, 228 S W 891

(5) In action for taxicab passenger's injuries sustained because of alleged negligence of driver, refusal to instruct that if taxicab corporation and others combined for purpose of undertaking jointly a specific adventure for profit for purpose of conducting business of operating taxicabs for carrying passengers for hire, and if in carrying out such purpose one of them negligently caused injury to plaintiff, then jury should find against driver and corporation, is error Instructing that, unless jury found that plaintiff was entitled to verdict against both defendants, verdict should be for both defendants, is error, where defendants were charged with commission of joint tort—Gale v. Independent Taxi Owners Ass'n, 84 F 2d 249, 65 App D C. 396

Omissions

Although the petition alleged that defendant negligently and carelessly caused and permitted its street car to be moved and jerked in a sudden, violent, and unusual manner causing plaintiff to be thrown down, an instruction submitting the question whether defendant "negligently" caused the car to be moved and jerked in a sudden and violent manner was not erroneous because of the omission of the word "unusual"—Fletcher v. Kansas City Rys Co, Mo.App., 221 S.W. 1070.

Instructions as to damages

(1) In an action for injuries to a passenger when a step broke, the usual damage prayer in negligence cases of such character, requested by plaintiff, was properly granted.—Hines v. Watkins, 112 A. 299, 137 Md 211

(2) An instruction as to damages for future pain and suffering, where the question was the present worth if added to the verdict as of its date, is not reversible error—Montalini v. Pennsylvania Co, 100 A. 806, 256 Pa. 249

(3) Instruction, that if jury find for plaintiff they will assess her damages at such sum as would fairly compensate her for injury from assaults and insults of fellow passenger, was proper—Memphis, D. & G. R. Co. v. Trussell, 183 S W. 981, 122 Ark 516

(4) Where a motorman dragged a passenger from a position in the aisle of the car to the front part of the car, on the claim that he was obstructing the aisle and preventing the passage of other passengers, it is proper for the trial court, in an action by the passenger against the railway company, to instruct the jury that if they find for plaintiff they should consider the injured feelings of plaintiff, the indignity endured, the humiliation, wounded pride, mental suffering, and the like, and to allow such sum as the jury might think proper, not exceeding the amount named in the declaration.—Capital Traction Co v Morgan, 44 App D C. 237.

(5) In an action for injuries to a female passenger, who was compelled to ride in the smoker and subjected to insults therein, an instruction to find for the plaintiff such damage as the jury believed she has sustained, not exceeding the amount sued for, without furnishing to the jury any guide for determining the amount of damage that should be assessed, was erroneous—Payne v. Combs, 249 S W. 1031, 198 Ky 749.

(6) Instruction permitting passenger who was stabbed by fellow passenger to recover damages from street railroad for past and future mental and physical pain and for past and future impairment to labor and earn money, is not erroneous because permitting double recovery.—El Paso Electric Co v. Cannon, Tex Civ App, 69 S W 2d 532, reversed on other grounds, Com.App., 99 S. W 2d 907.

(7) An instruction on the damages for an assault by a conductor on a passenger, was fatally defective, for failure to distinguish the effects of the wrongful acts committed by the conductor, from the effects of those which were rightful—Briggs v. Lusk, Mo App., 190 S.W. 380.

Exemplary damages

(1) In passenger's action for wanton and willful assault, it is not error to instruct that the jury could in their discretion assess punitive damages as a punishment, and as a protection to society, and a warning to others—Flynn v. St. Louis Southwestern Ry. Co, Mo.App., 190 S.W. 371.

(2) In a passenger's action for assault by a motorman where matters of provocation are pleaded and proved, an instruction that the jury might consider any matter of provocation in mitigation of punitive dam-

ing so in definite and explicit terms,[72] defining, limiting, and explaining, when necessary, the different terms or expressions used.[73] An instruction which covers the case generally is ordinarily sufficient, in the absence of a request for more particular instructions.[74]

The instructions must correctly define and explain the duty or degree of care and skill required of the carrier to its passengers under the circumstances of the particular case.[75]

ages is proper.—Ohio Valley Electric Ry. Co. v. Webb, 259 S.W. 697, 202 Ky. 341
10 C.J. p 1081 note 67 [f].

72. Ala.—Birmingham R., etc., Co. v. Landrum, 45 So. 198, 153 Ala. 192, 127 Am.S.R. 25.
10 C.J. p 1082 note 68.

73. Mo.—Nolan v. Metropolitan St. R. Co., 157 S.W. 637, 250 Mo. 602
10 C.J. p 1083 note 69.

Definitions held required

In action for passenger's injuries, definition of "negligence" and 'ordinary care," as applied to carrier's duty in transportation of passenger, is required by Rev.St.1925 art. 2189.—Gulf, C. & S. F. Ry. Co. v. Hitt, Tex.Civ.App., 60 S.W.2d 864.

Explanation held required

In action by passenger for injuries alleged to have been received in boarding train, instruction relating to duty of railroad, stating that steps of train were unreasonably high from ground, should have been explained by adding "so as to render them dangerous or hazardous for use of entering passengers."—Cincinnati, N. O. & T. P. Ry. Co. v. Duvall, 92 S.W.2d 363, 263 Ky. 387.

Instructions defining terms or expressions held proper

(1) Instructions defining negligence as applied to a common carrier

Tenn.—Baskin & Cole v. Whitson, 8 Tenn.App. 578.

Tex.—Amberson v. Woodul, Civ.App., 108 S.W.2d 852.

(2) Instruction defining "negligence," "ordinary care," "proximate cause," and "contributory negligence."—Gulf, C. & S. F. Ry. Co. v. Hitt, Tex.Civ.App., 60 S.W.2d 864.

Instructions held not erroneous

(1) Instruction on care owed plaintiff attempting to enter street car, as requiring highest degree of care but not defining "passenger," but requiring a finding of facts which were tantamount thereto.—Amos v. Fleming, 285 S.W. 134, 221 Mo.App. 559.

(2) Instruction defining vis major, as requiring carrier to exercise highest practicable care and foresight to anticipate vis major.—Whitlow v. St. Louis-San Francisco Ry. Co., Mo.App., 282 S.W. 525, certiorari quashed State ex rel. St. Louis & San Francisco Ry. Co. v. Daues, 290 S.W. 425, 316 Mo. 474.

(3) Instruction failing to define the word 'passenger."—McMahon v. Kansas City Rys. Co., Mo.App., 233 S.W. 64

(4) Instruction in action by one injured when boarding a street car either by starting of the car or by shutting the vestibule door before plaintiff had boarded the car, not defining the word "negligently," since the facts which the jury, under the instruction, had to find before they could find for plaintiff made the starting of the car or shutting of the door negligent, and since defendant used the same term without definition and if it were deemed necessary defendant would have defined it but did not.—Vogts v. Kansas City Rys. Co., Mo.App., 228 S.W. 526.

(5) In an action against a street car company for injuries to passenger from collision with a truck, an instruction sending the case to the jury without telling them what acts would constitute negligence, nor in what respect defendant was negligent, is not erroneous, since negligence was presumed under the res ipsa loquitur rule.—Gibson v. Wells, Mo.App., 258 S.W. 1.

Failure to request definition

Taxicab company's failure to request definition of "highest degree of care and diligence" required of carrier precluded complaint of absence of definition, when the jury presumably understood meaning.—Bezera v. Associated Oil Co., 3 P.2d 622, 117 Cal.App. 139.

74. Ind.—Citizens' St. R. Co. v. Shepherd, 65 N.E. 765, 30 Ind.App. 193.
10 C.J. p 1083 note 70.

Instructions held proper or not erroneous

(1) In an action against a street railway company for injuries to a passenger in a collision between a street car and a motor truck, an instruction authorizing a verdict against defendant if the motorman negligently failed to exercise the highest degree of care and thereby directly contributed to cause the collision, is not erroneous as authorizing a verdict for plaintiff on a general finding of negligence on any theory evolved by it without regard to the evidence, it being defendant's duty, under the res ipsa loquitur rule, to show that the collision did not occur through any negligence on its part.—Cecil v. Wells, 259 S.W. 844, 214 Mo.App. 193

(2) An instruction in general terms that if the jury found that defendant failed to exercise the highest practicable degree of care in the maintenance of his elevator, and as a direct result thereof cables broke and the elevator fell and plaintiff was injured thereby, verdict must be for plaintiff, was not erroneous for not requiring finding on the specific acts of negligent conduct, as to which plaintiff had offered evidence.—Reel v. Consolidated Inv. Co., Mo., 236 S.W. 43.

(3) In action against railroad for injuries resulting in rupture, or hernia, in left groin of cattle caretaker riding in caboose, instruction submitting injury in the words, if caretaker "sustained an injury to his person in the region of his left groin," is not error as too general and as failing to confine jury to injury alleged.—Panhandle & S. F. Ry. Co. v. Jones, Tex.Civ.App., 105 S.W. 2d 443.

75. D.C.—Francis v. Fitzpatrick, 89 F.2d 813, 67 App.D.C. 69.
Ill.—Schluraff v. Shore Line Motor Coach Co., 269 Ill.App. 569.
10 C.J. p 1083 note 71.

When charge on exact degree not required

While as to appliances a carrier of passengers is bound to exercise the highest degree of care, such carrier is only required to exercise reasonable care in other matters; and where highest degree is not required, court need not charge as to exact degree required.—Thoresen v. New York State Rys., 162 N.Y.S. 397, 98 Misc. 37.

Instructions held proper and sufficient

(1) As to duty or degree of care required in general

U.S.—Pennsylvania Co. v. Clark, C.C.A.Ohio, 266 F. 182.

Cal.—Wallden v. Market St. Ry. Co., 9 P.2d 602, 121 Cal.App. 647.—Burke v. Dillingham, 258 P. 627, 84 Cal.App. 736.

Conn.—Dwyer v. Connecticut Co., 131 A. 838, 103 Conn. 678

Ga.—Southern Ry. Co. v. Bartlett, 162 S.E. 831, 44 Ga.App. 710.—Georgia R. & Banking Co. v. Brooks, 119 S.E. 424, 30 Ga.App. 692

Ill.—See Boland v. Gay, 201 Ill.App. 359.—Heineke v. Chicago Rys. Co., 199 Ill.App. 399, affirmed 116 N.E. 761, 279 Ill. 210

Iowa.—Worez v. Des Moines City Ry. Co., 156 N.W. 867, 175 Iowa 1.

Ky.—Louisville & N. R. Co. v. Campbell, 35 S.W.2d 26, 237 Ky. 132.

Miss.—Teche Lines v. Britt, 170 So. 294.
Mo—Scott v. Kansas City Rys. Co., 229 S.W. 178—Breen v. United Rys. Co. of St. Louis, 204 S.W. 521—Alewel v. East St Louis & S. Ry. Co., App., 26 S.W.2d 869—Whitlow v. St. Louis-San Francisco Ry. Co., App., 282 S.W. 525, certiorari quashed State ex rel. St. Louis & San Francisco Ry. Co. v. Daues, 290 S.W. 425, 316 Mo. 474—Bergfeld v. Dunham, App., 228 S.W. 891 — Rooker v. Deering Southwestern Ry. Co., 226 S.W. 69, 206 Mo.App. 79—Cooley v. Dunham, 195 S.W. 1058, 196 Mo.App. 399
N.J.—Jones v. People's Rapid Transit Co., 153 A. 373, 9 N.J.Misc. 315
Ohio.—Cincinnati Traction Co. v. Baron, 3 Ohio N.P.,N.S., 633
R.I.—Keefe v. United Electric Rys. Co., 195 A. 599.
Tenn — Tennessee Coach Co. v. Young, 80 S.W.2d 107, 18 Tenn. App. 592.
Tex.—Commercial Standard Ins. Co. v. Shudde, Civ.App., 76 S.W.2d 561, error granted—Cisco & N. E. Ry. Co. v. Proctor, Civ.App., 272 S.W. 308, affirmed Proctor v. Cisco & N. E. Ry. Co., Com.App., 277 S.W. 1047.
Wash.—Duggins v. International Motor Transit Co., 280 P. 50, 153 Wash. 549.
10 C.J. p 1083 note 71 [a] (1).

(2) As to passengers boarding trains or cars.
U.S.—Chicago, M. & St. P. Ry. Co. v. Harrelson, C.C.A.Mo., 14 F.2d 893—Puget Sound Electric Ry. v. Matson, Wash., 253 F. 33, 165 C.C.A. 53.
Ga.—Seaboard Air Line Ry. v. Brewton, 99 S.E. 226, 23 Ga.App. 621, reversed on other grounds 102 S.E. 439, 150 Ga. 37, and vacated 102 S.E. 920, 25 Ga.App. 168.
Ill.—Hatcher v. Quincy Horse Ry. & Carrying Co., 111 N.E. 1005, 272 Ill. 347, affirming 193 Ill.App. 590.
Ind.—Chicago, L. S. & S. B. Ry. Co. v. Brown, 115 N.E. 368, 66 Ind.App. 126.
Mo.—Taylor v. Wells, App., 7 S.W.2d 424.

(3) As to starting of trains or cars.—Bales v. Kansas City Public Service Co., 40 S.W.2d 665, 328 Mo. 171.

(4) As to an alighting passenger.
Ala.—Birmingham Electric Co. v. Shephard, 110 So. 604, 215 Ala. 316.
Ill.—See Horst v. St. Louis Electric Terminal Ry. Co., 199 Ill.App. 169.
Ky.—Louisville Ry. Co. v. Osborne, 188 S.W. 419, 171 Ky. 348.
Miss.—Yazoo & M. V. R. Co. v. Hawkins, 140 So. 873, 163 Miss. 505.
Mo.—Roach v. Kansas City Rys. Co., App., 228 S.W. 520
N.J.—Williams v. Hudson & M. R. Co., 141 A. 168, 6 N.J.Misc. 337, affirmed Williams v. Pennsylvania R. Co., 143 A. 921, 9 N.J.Misc. 218, and Williams v. Hudson & M. R. Co., 151 A. 486, 105 N.J.Law 259.
Ohio.—Cleveland Ry. Co. v. Smith, 172 N.E. 409, 35 Ohio App. 204
Okl.—Tulsa Yellow Cab, Taxi & Baggage Co. v. Salomon, 75 P.2d 197, 181 Okl. 519—Muskogee Electric Traction Co. v. Elsing, 208 P. 264, 86 Okl. 286.
W.Va.—Twyman v. Monongahela West Penn Public Service Co., 191 S.E. 541.
10 C.J. p 1083 note 71 [a] (2).

(5) As to duty in bringing train or car to a stop to discharge passengers.
Mo.—Carroll v. Missouri Power & Light Co., 96 S.W.2d 1074, 231 Mo. App. 265.
Wis.—Hanley v. Milwaukee Electric Railway & Light Co., 263 N.W. 638, 220 Wis. 281, followed in 263 N.W. 641, 220 Wis. 288.
10 C.J. p 1083 note 71 [a] (4).

(6) As to passengers falling or thrown from moving trains or cars.—Louisville & N. R. Co. v. Hutcherson, 8 Tenn.App. 235.

(7) As to passengers on freight trains—Paris & G. N. R. Co. v. Atkins, 234 S.W. 66, 111 Tex. 306, affirming, Civ.App., 185 S.W. 306.

(8) As to passenger on roller coaster—Pontecorvo v. Clark, 272 P. 591, 95 Cal.App. 162.

(9) As to care with respect to station premises, approaches, or platforms.—Hexamer v. Public Service Ry. Co., 132 A. 310, 4 N.J.Misc. 184.

(10) As to persons accompanying passengers.—Lewis v. Illinois Cent. R. Co., Mo., 50 S.W.2d 122.

(11) As to operation of motor vehicle for carriage of passengers.
Ill.—Roberts v. Economy Cabs, 2 N.E.2d 128, 285 Ill.App. 424.
Ky.—Consolidated Coach Corporation v. Earls' Adm'r, 94 S.W.2d 6, 263 Ky. 814.
Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, and appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720.
Mass.—Turner v. Berkshire St. Ry. Co., 198 N.E. 178.
Mich.—King v. Neller, 199 N.W. 674, 228 Mich. 15.
N.J.—Mazzei v. Bennett, 141 A. 11, 6 N.J.Misc. 317, affirmed in part Mazzei v. Nucar Forwarding Corporation, 143 A. 380, 105 N.J.Law 218.

(12) In action by customer against store company for injuries in slipping while alighting from escalator, instruction authorizing recovery, if defendant was guilty of even slight negligence under rule applicable to carriers, is proper.—S. S. Kresge Co. v. McCallion, C.C.A.Mo., 58 F.2d 931.
10 C.J. p 1083 note 71 [b].

Instructions held erroneous

(1) As to the duty or degree of care required in general.
Cal.—Mudrick v. Market St. Ry. Co., App., 74 P.2d 328.
Ill.—See Todd v. Chicago Rys. Co., 210 Ill.App. 227.
Ind.—Pittsburgh, C., C. & St. L. Ry. Co. v. Stephens, 157 N.E. 58, 86 Ind.App. 251—Public Utilities Co. v. Whitehead, 134 N.E. 894, 78 Ind. App. 85
Mo.—Provance v. Missouri Southern R. Co., App., 186 S.W. 955.
N.Y.—Kelly v. International Ry. Co., 212 N.Y.S. 309, 214 App.Div. 652.
N.C.—Dunn v. Atlantic Coast Line R. Co., 93 S.E. 784, 174 N.C. 254.
Tex.—Wichita Valley Ry. Co. v. Williams, Civ.App., 3 S.W.2d 141, certified questions answered 288 S.W. 425, 116 Tex. 253.
10 C.J. p 1083 note 71 [b] (1).

(2) As adopting incorrect standard of care—Washington v. City of Seattle, 16 P.2d 597, 170 Wash. 371, 86 A.L.R. 113

(3) As requiring too high a degree of care.
U.S.—Payne v. Cohlmeyer, C.C.A.Ill., 275 F. 803.
Ind.—Indiana Rys. & Light Co. v. Armstrong, 138 N.E. 830, 79 Ind. App. 486.
Mo.—Walquist v. Kansas City Rys. Co., 237 S.W. 493, 292 Mo. 34—Brooks v. Illinois Terminal Co., App., 93 S.W.2d 1099—Engle v. St. Joseph Ry., Light, Heat & Power Co., App., 44 S.W.2d 175.
Tex.—Gulf, C. & S. F. Ry. Co. v. Conley, 260 S.W. 561, 113 Tex. 472, 32 A.L.R. 1183, affirming, Civ.App., 252 S.W. 737, which reversed 236 S.W. 521—Texas & N. O. R. Co. v. Ewing, Civ.App., 46 S.W.2d 398, error dismissed.
10 C.J. p 1083 note 71 [b] (2)

(4) As not imposing as great a duty as the carrier was bound to bear.
Ala.—Louisville & N. R. Co. v. Bowen, 103 So. 872, 212 Ala. 690.
Mo.—Weissman v. Wells, 267 S.W. 400, 306 Mo. 82—Stofer v. Kansas City Public Service Co., 41 S.W.2d 614, 226 Mo.App. 376.
10 C.J. p 1083 note 71 [b] (3).

(5) As to alighting passengers.
Ill.—See Schechtman v. Chicago Rys. Co., 198 Ill.App. 23.
Kan.—Cloud v. Kansas-Oklahoma Traction Co., 173 P. 338, 103 Kan. 249, 7 A.L.R. 1671
Miss.—Louisville & N. R. Co. v. Compiretto, 102 So. 837, 137 Miss. 766.
Neb.—Lieb v. Omaha & C. B. St. Ry. Co., 228 N.W. 364, 119 Neb. 222
N.Y.—Calascione v. Garrison, 201 N.

An instruction must not be confusing or misleading to the jury,[76] and it must not be argumenta-

Y S. 154, 206 App.Div. 285—Weiser v. Dry Dock E. B. & B R. Co., 188 N.Y S. 856.
Tex—Galveston Electric Co v. Marangola, Com App, 283 S.W. 777, reversing, Civ App., 273 S.W 311—San Antonio & A. P. Ry Co v Wiuvar, Civ.App., 257 S W. 667.

(6) As to duty to assist passenger —Southern Ry. Co. v. Lawson, 114 So. 288, 22 Ala App 180, reversed on other grounds 114 So. 290, 217 Ala. 1, 55 A.L R. 385.

(7) As to care in assisting passenger —Southern Ry. Co. v. Lawson, supra.

(8) As to the duty or degree of care required to furnish a safe place to alight.
Ark—Davis v. Kelly, 237 S W. 698, 152 Ark. 151.
Mo—Gott v. Kansas City Rys. Co., 222 S W. 827.
10 C.J. p 1083 note 71 [b] (5).

(9) As to passengers attempting to board a train or car.
Minn.—Richey v. Minneapolis St. Ry. Co., 160 N.W. 188, 135 Minn. 54.
Or—Lawrence v. Portland Ry, Light & Power Co, 179 P. 485, 91 Or. 559.

(10) As to prospective passengers passing over the tracks—Bernier v. Illinois Cent. R. Co., 213 Ill App. 530.

(11) As to care required toward passengers on a mixed train.
Ky—Kentucky & T. Ry Co v. Ball, 194 S W. 785, 175 Ky. 630.
Mo—Patterson v. Lusk, App., 196 S. W. 65.

(12) As to duty in collision cases. —Gritsch v. Pickwick Stages System, 22 P.2d 554, 131 Cal.App. 774.

(13) As to degree of care required to discover and prevent obstructions on tracks—Thomas v. Monongahela Valley Traction Co., 112 S.E. 228, 90 W.Va. 681.

(14) As to care with respect to station premises, approaches, or platforms.
N J.—Holtzman v. Hudson & M. R. Co, 128 A. 623, 101 N.J Law 255—Cooney v. Hudson & M. R Co., 138 A. 512, 5 N J Misc. 842—Pabst v. Hudson & M. R. Co., 133 A. 74, 4 N.J Misc. 414.
Tex—Eastern Texas Electric Co. v. Tucker, Civ.App., 287 S W. 71.

(15) In actions for injuries resulting from acts of fellow passengers or other third persons.
Ala.—Birmingham Electric Co. v. Driver, 166 So. 701, 232 Ala. 36.
Ark—Bush v. Snow, 199 S.W. 115, 131 Ark. 341.
Mo.—Utterback v. St. Louis & S. F. Ry. Co., 189 S W. 1171.

(16) In action for injuries to elevator passenger.—McDermed v. Baker, Mo.App, 20 S W.2d 597.

(17) As to passenger injured on escalator.—McBride v. May Department Stores Co., 177 N.E. 773, 39 Ohio App 420, affirmed May Department Stores Co. v McBride, 178 N. E 12, 124 Ohio St. 264.
10 C.J. p 1083 note 71 [b].

Use of adjectives

Charge using merely adjectives in describing carrier's duty of care toward passengers is incorrect practice.—Wichita Valley Ry. Co. v Williams, 288 S.W. 425, 116 Tex. 253, answering certified questions, Civ. App, 3 S.W.2d 141

Incomplete instruction

Charge that carriers must exercise very high degree of care in handling passengers was incomplete, and refusal to amend was error.—Wichita Valley Ry. Co. v. Williams, 288 S W. 425, 116 Tex. 253, answering certified questions, Crv App., 3 S W 2d 141.

76. Fla—Motor Transit Co. v. Studstill, 176 So 769
Md.—American Stores Co. v. Herman, 171 A. 54, 166 Md. 312
Mo—Porter v. Chicago, B. & Q R. Co., 28 S.W 2d 1035, 325 Mo. 381—Parlon v. Wells, 17 S W 2d 528, 322 Mo. 1001—Unterlachner v. Wells, 278 S W. 79.
Tex.—Texas & P. Ry. Co. v. Whittington, Civ.App, 292 S.W. 966.
10 C.J. p 1084 note 72.

Instructions held not misleading

(1) In general.
Cal.—Freeman v. Adams, 218 P. 600, 63 Cal App. 225.
Ill—Stanton v Chicago City Ry. Co., 119 N E. 291, 283 Ill. 256, affirming 205 Ill.App 385—Gilberts v. Rockford & L Ry. Co., 215 Ill. App. 324.
Ky—Louisville & N. R. Co. v. Ashley, 183 S W 921, 169 Ky 330, L. R.A 1916E 763.
Mo—Grubb v. Kansas City Rys. Co., 230 S W. 675, 207 Mo App. 16.
Utah.—Barlow v. Salt Lake & U. R. Co., 194 P. 665, 57 Utah 312
Wash—Duggins v. International Motor Transit Co., 280 P. 50, 153 Wash. 549.
10 C J. p 1084 note 72 [b] (1).

(2) As to injury to boarding passengers.—Witham v. Lusk, Mo App., 190 S.W. 403—10 C.J. p 1084 note 72 [a] (4).

(3) As to injury to alighting passengers.
Ky.—Louisville Taxicab & Transfer Co. v. Hubbard, 97 S.W.2d 411, 265 Ky. 564—Kentucky Traction & Terminal Co v. Peel, 214 S.W. 874, 185 Ky. 207.
Mo—Parlon v Wells, 17 S.W 2d 528, 322 Mo. 1001—Roach v. Kansas City Rys Co, App., 228 S.W. 520.
Utah—Barlow v Salt Lake & U. R Co, 194 P 665, 57 Utah 312
10 C J p 1084 note 72 [a] (2)

(4) As to passenger injured by sudden jerks, stops, or movements of cars
U S.—Chesapeake & O. Ry Co. v. Needham, W Va., 244 F. 146, 156 C C A. 574.
Ky.—South Covington & C. St. Ry Co v Moore, 186 S W. 638, 170 Ky 760.

(5) As to passengers injured in collisions
Cal—McKinnon v. United Railroads of San Francisco, 203 P. 122, 55 Cal.App. 96.
Md.—American Stores Co. v. Herman, 171 A. 54, 166 Md 312.
Wash.—McDorman v. Dunn, 172 P 244, 101 Wash. 120.

(6) As to injuries to passengers on station premises—Martin v. Missouri Pac. R. Co., Mo.App., 253 S.W 1083

(7) As to damages—El Paso Electric Co v. Cannon, Tex Civ App, 69 S W 2d 532, reversed on other grounds, Com.App., 99 S W.2d 907

(8) Charge denying recovery for street car passenger's injuries if car was operated with "due care."—Bradford v. Birmingham Electric Co., 149 So. 739, 227 Ala. 285.

(9) Instruction charging street railroad with highest degree of care —Birmingham Electric Co. v. Shephard, 110 So. 604, 215 Ala. 316.

(10) Instruction that, if death was caused by defendant's negligence as alleged, and deceased exercised ordinary care, jury should find defendant guilty.—McFarlane v. Chicago City Ry. Co., 123 N E 638, 288 Ill 476, affirming 212 Ill.App. 664.
10 C J. p 1084 note 72 [a].

Instructions held misleading

(1) In general.
Ala—Louisville & N. R. Co. v. Holmes, 87 So 574, 205 Ala. 47—O'Brien v. Birmingham Ry., Light & Power Co., 72 So. 343, 197 Ala. 97.
Conn—Boileau v. Williams, 135 A 429, 121 Conn. 432.
Ind—Pittsburgh, C, C. & St. L. Ry. Co. v. Arnott, 126 N E 13, 189 Ind 350.
Mo.—Schimmelpfenning v. Wells, 24 S W 2d 154—Laible v. Wells, 296 S W. 428, 317 Mo. 141.
N.J.—Benedetto v Hudson & M. R. Co, 156 A 37, 9 N J.Misc 758.
10 C.J p 1084 note 72 [b] (1).

(2) In actions for injuries sustained while attempting to board a train or car.
Ala—Birmingham Electric Co. v. Cleveland, 113 So. 403, 216 Ala. 455.

tive,[77] or conflicting, inconsistent, or contradictory.[78]

Instructions as a whole. An instruction must be complete in itself; but the charge is to be considered as a whole, and the fact that one part of it, considered separately, might be open to objection ordinarily does not vitiate it, if it is correct in its entirety.[79] An erroneous instruction is not cured by a subsequent contradictory instruction,[80] unless the latter makes direct reference to, and withdraws or qualifies, the erroneous instruction,[81] nor by an instruction which does not correct the fault of the erroneous instruction,[82] or which has no relation to it;[83] and it has been held that each instruction must state the law correctly as far as it goes, and that, if an instruction erroneously stating the law is given, it is reversible error, although the proper limitations are stated in other instructions.[84]

b. Requests for Instructions

In accordance with general rules, an instruction properly requested by a passenger or a carrier as to material matter must be given where not covered by other instructions.

In an action by a passenger against a carrier for personal injuries, as in other actions, it is error to refuse a properly requested instruction on a material matter which is not sufficiently covered by other instructions given.[85] A requested instruction

Mo—Erny v Wells, 293 S W. 119, 316 Mo 798
10 C.J. p 1084 note 72 [b] (3)

(3) In actions for injuries from derailments.—Sinan v. Atchison, T & S. F Ry. Co, 284 P. 1041, 103 Cal.App 703.

(4) In action for injuries from breaking of defective appliances—Mulderig v. Wells, Mo.App., 257 S W. 1060.

(5) As to necessity for assisting passenger.—Texas & P. Ry. Co v Whittington, Tex.Civ App., 292 S W. 966

(6) As to construction and maintenance of station and appurtenances—Seaboard Air Line Ry. Co. v. Pemberton, 79 So. 393, 202 Ala. 55.

(7) As to damages.
Ala—Birmingham Electric Co. v. Mealing, 108 So. 511, 214 Ala. 597.
Mo—Porter v. Chicago, B & Q R Co, 28 S W 2d 1035, 325 Mo. 381.
10 C.J. p 1084 note 72 [b] (8).

(8) Charge susceptible of construction making street railroad liable for injury to passenger, although exercising extraordinary care in furnishing safe place to alight.—Georgia Ry. & Power Co. v. Gilbert, 146 S E 33, 39 Ga.App 56, followed in 146 S.E. 34, 39 Ga.App. 58.

(9) Instruction, in stage passenger's action for injuries sustained in intersectional collision with automobile, respecting automobiles on through streets together with instruction on speed, as instructing jury that if stage driver crossed intersection in excess of fifteen miles an hour, he was negligent—Gritsch v. Pickwick Stages System, 22 P 2d 554, 131 Cal App. 774.

(10) In passenger's action for injuries when falling from street car, instruction that, if plaintiff was not thrown by a jolt of the car, but by another person pushing or crowding him, he could not recover, is misleading, in view of fore part of same instruction, telling jury that fact that car was crowded and doors permitted to remain open was not to be considered as any evidence of defendant's negligence—Carlson v. Wells, Mo, 276 S W. 26, 42 A.L R 1319.
10 C J. p 1084 note 72 [b].

77. Tex—Southern Traction Co. v. Ellis, Civ App, 198 S W. 983, dismissed for want of jurisdiction
10 C.J. p 1085 note 73.

78. Ill—See Benson v. Chicago City Ry. Co, 208 Ill App 613.
Or—Stamos v Portland Electric Power Co, 274 P. 915, 128 Or 310.
10 C.J p 1085 note 75.

Instructions held conflicting, inconsistent, or contradictory

(1) Instructions in action for injuries from sudden lurch, which threw passenger from car.—Simmons v. Wells, 20 S.W 2d 659, 323 Mo. 882

(2) An instruction allowing recovery on a passenger's injuries on a finding of negligence based either on a quick and sudden lurch of the train in stopping or on the place and manner and means provided for alighting is inconsistent with another instruction requiring the jury to find for defendant unless they believed that its servants stopped the train with a quick and sudden jerk and unless they further believed that defendant's agents were negligent in carrying plaintiff's wife past the station and having her alight where they did.—Shipley v. Missouri, K. & T Ry. Co. of Texas, 217 S W. 137, 110 Tex. 194, reversing, Civ App., 199 S W. 661.

79. Cal—Gotsch v. Market St. Ry., 265 P 268, 89 Cal.App. 477.
S C.—Jernigan v Atlantic Coast Line R Co, 86 S E. 198, 102 S C. 62.
10 C.J. p 1086 note 78.

Relation of passenger and carrier

Where one of the instructions stated that plaintiff was not a passenger while the train was standing at the station unless actually attempting to board the train or so near the train and in such a position as to indicate his intention to board it, an objection that the instructions as a whole stated that plaintiff was a passenger from the time he went on the station platform was untenable—Riley v. Southern Pac Co, 207 P 699, 57 Cal App. 477.

80. Ind—Indiana Rys. & Light Co. v. Armstrong, 138 N E 830, 79 Ind. App. 486.
10 C.J. p 1087 note 79.

81. Tex.—Missouri, etc, R. Co v. Mills, 65 S.W. 74, 27 Tex Civ App. 245

82. Ind.—Abney v. Indiana Union Tract Co., 83 N E 387, 41 Ind.App. 53.

83. N.C—Wagner v. Atlantic Coast Line R. Co., 61 S E. 171, 147 N.C. 315, 19 L R A,N S, 1028.

84. Ill.—Rabner v. Chicago City R Co., 84 N E. 201, 233 Ill 169, reversing 133 Ill App. 628

85. Conn—Miller v. Connecticut Co., 152 A. 879, 112 Conn. 476.
Ga.—Central of Georgia Ry Co. v Hopkins, 89 S E. 186, 18 Ga.App 230
Neb—Lieb v. Omaha & C., B. St Ry Co., 228 N W. 364, 119 Neb 222.
N.Y.—McKinney v. New York Consol R Co., 129 N E. 652, 230 N.Y. 194, reversing 172 N.Y S 906, 186 App Div. 959—McNamara v New York State Rys, 230 N Y.S 751, 224 App Div. 342—Lieberman v New York Rapid Transit Corporation, 238 N. Y.S. 400, 135 Misc. 834.
Tex—Wright v Schaff, Civ.App, 228 S W. 333
W.Va.—Koon v Monongahela West Penn Public Service Co., 192 S E. 332.
10 C J. p 1087 note 85.

Requested instructions erroneously refused

(1) Instruction in death case as to motorman's duty to keep proper lookout.—Sacks v. Connecticut Co, 146 A. 494, 109 Conn. 221.

(2) Instruction, in action by passenger for injuries caused by abusive

need not be given in the exact language in which it is requested; it is sufficient if it is covered in substance,[86] and, in the absence of a statute or rule of court prohibiting it, the court may modify a defective or erroneous instruction requested, and give it in its modified form,[87] provided the instruction, as modified, is not an improper statement of the law as applied to the facts of the case.[88] Where a requested instruction contradicts correct and appropriate instructions already given, it is error to give it without modification.[89]

It is not error to refuse a requested instruction on matters already substantially covered by other

manner, language, and immodest conduct of an insane negro passenger in same car, that it was the carrier's duty to accept the negro as a passenger—Hines v. Minniard, 86 So. 23, 204 Ala. 514, 12 A L R 238.

(3) Instruction, in action for injuries received by passenger, shoved into position of danger and struck by approaching train, that, if accident was sole result of being forced too close to track by misconduct of other passengers, verdict should be for defendant.—Alabama Great Southern R. Co. v. Bell, 76 So. 920, 200 Ala. 562.

(4) Instruction, in action for injuries to street car passenger ejected by a third person, that a street car motorman or conductor had no right to interfere with the city police officer in the conduct of his affairs unless it is plain to them that he is the aggressor and is abusing his authority.—Birmingham Ry., Light & Power Co. v. Lipscomb, 73 So 962, 198 Ala. 653.

(5) Charge that, even if plaintiff was misled by announcement of station and attempted to get off, yet, if servants and agents of carrier were in exercise of that degree of care due plaintiff, plaintiff could not recover.—Southern Ry. Co. v. Penn, 89 S E. 489, 18 Ga App 431.

(6) Instruction, in action against street railway by girl passenger who jumped from car moving backward down incline, that, if some one other than employees on the car released brakes, plaintiff could not recover.—Delfosse v. United Rys. Co. of St. Louis, Mo., 201 S.W. 860.

(7) Instruction, in an action for injuries to a passenger caused by sudden jerk of car, that, unless the evidence shows that the jerk was unusual and extraordinary, the verdict must be for the defendant—Fornwalt v. Philadelphia Rapid Transit Co, 65 Pa.Super 559.

(8) Instruction, in taxicab passenger's action for injuries sustained because of alleged negligence of driver, that operator of taxicab for hire is a common carrier and is required to exercise highest degree of care for safety of persons who are carried as passengers—Gale v. Independent Taxi Owners Ass'n, 84 F.2d 249, 65 App D C 396.

(9) Instruction, in taxicab passenger's action for injuries sustained because of alleged negligence of driver, that, for a corporation to be liable as a carrier, it is sufficient if the corporation controls one of the instrumentalities essential in carrying on the business of carrying passengers for hire—Gale v. Independent Taxi Owners Ass'n, supra

(10) Instructions that owner owed passenger, injured when leaving elevator, highest degree of care and defining highest care.—McDermed v. Baker, Mo.App, 20 S W.2d 597.

(11) Instruction that carrier is not insurer of safety of passengers and is liable only for negligence—Stofer v. Kansas City Public Service Co, 41 S W.2d 614, 226 Mo.App. 376.

(12) In action for injuries sustained by plaintiff passenger in alighting from a train, the court should have given requested instruction that if, at the time the train on which plaintiff was a passenger started away from the station (plaintiff's destination), plaintiff had not reached the platform of the car in which she was riding, there is a fatal variance between the pleading and the proof, and the verdict must be for defendant.—Central of Georgia Ry. Co. v. Williams, 83 So. 63, 203 Ala. 339.

(13) In action for injuries received while boarding street car, where negligence of defendant and contributory negligence of plaintiff were measured by different standards of care, refusal to instruct that, in addition to propriety of plaintiff's conduct by test of ordinary care, defendant was under duty to exercise highest degree of care for safety of persons in transporting and receiving them for passage, was error—Stewart v. St Louis Public Service Co., Mo App, 75 S.W.2d 634.

86. Iowa—Hoffman v. Cedar Rapids, etc., R. Co, 139 N.W 165, 157 Iowa 655, Ann.Cas.1915C 905.
10 C J p 1087 note 86.

87. Mass—Moulton v. Boston Elevated Ry. Co., 127 N.E. 886, 236 Mass 234.
Mo—Grubb v. Kansas City Rys. Co., 230 S W 675, 207 Mo.App. 16.
10 C.J p 1087 note 87.

Instructions held properly modified

(1) The words, "by a preponderance of the evidence," are properly stricken from the requested instruction in a passenger's action for injury that, to rebut plaintiff's prima facie case from his showing that the taxicab was overturned, defendant must make a certain showing—Dowd v. Atlas Taxicab & Auto Service Co, 202 P. 870, 187 Cal. 523.

(2) Plaintiff, in an action for injury in alighting just after boarding a street car on being informed that it was going to the barn, having testified to a positive agreement with the conductor that the conductor would stop and he would get off there, defendant's requested instruction was properly modified by insertion of the quoted words, so as to read as follows: Even if plaintiff did get on the car and his bundle was kicked therefrom, "in the absence of any agreement to stop, if you so find," this did not require the crew to stop the car to permit plaintiff to alight till it had reached the next regular stopping place.—Chapman v. Kansas City Rys. Co, Mo., 233 S.W. 177.

(3) Instruction that passenger is presumed to have taken risks incidental to automobile traveling was properly modified by words "careful and prudent operation over road he traveled."—Venable v. Gulf Taxi Line, 141 S E. 622, 105 W Va. 156.

88. Mass.—Krock v. Boston El. R. Co., 101 N.E. 968, 214 Mass. 398.
10 C J. p 1087 note 88.

Instruction as modified held correct

Requested instruction, as modified to the effect that, if skidding of bus, causing passenger's injuries, occurred without negligence, passenger cannot recover was correct.—Heidt v. People's Motorbus Co. of St. Louis, Mo.App., 9 S W.2d 650

Modification rendering instruction erroneous

Where the issue under the pleadings and evidence was whether plaintiff was thrown from a street car by a sudden jerk or voluntarily stepped off the car, an instruction for defendant, if plaintiff voluntarily stepped off the car while in motion, was erroneously modified by adding "unless . . . it was moving so slowly that it was safe for him to alight," since as modified it presented neither plaintiff's nor defendant's theory of the case—Leonard v United Rys Co of St. Louis, Mo App., 239 S.W. 892.

89. Ark—Steptoe v. St Louis, etc., R. Co., 177 S.W. 417, 119 Ark. 75.

instructions,[90] or to refuse instructions which, as applied to the facts of the case, fail to state the law correctly,[91] or which request a ruling on a particular view of the evidence,[92] or, as shown in subdivision a, are so worded as to be calculated to mislead the jury, or are on immaterial or unessential matters, or on matters not in issue.[93]

90. U S—Frates v. Thomas, C C A Okl., 57 F 2d 535—Omaha & C., B St. Ry. Co. v. McKeeman, Neb, 250 F. 386, 162 C.C A. 456
Ala.—Birmingham Electric Co v Guess, 131 So 883, 222 Ala. 280—Birmingham Electric Co. v Cleveland, 113 So. 403, 216 Ala. 455.
Cal—Lawrence v. Pickwick Stages, Northern Division, 229 P. 885, 68 Cal.App 494.
Ill—See McHatton v. Alton, Granite & St. L Traction Co, 206 Ill.App. 474.
Ind—Union Traction Co. of Indiana v. Alstadt, 143 N E. 879, 195 Ind. 389.
Mass.—Turner v. Berkshire St. Ry. Co, 198 N.E. 178
Miss.—Gulfport & Mississippi Coast Traction Co. v. Raymond, 128 So. 327, 157 Miss. 439.
N D—Arnold v. Minneapolis, St. P. & S S. M Ry. Co, 228 N.W. 456, 59 N.D. 59.
Tenn.—Memphis St. Ry. v. Felts, 6 Tenn Civ A 303
Tex.—Northern Texas Traction Co. v. Evans, 193 S W. 1067, 108 Tex. 356
Va—Richmond-Ashland Ry. Co. v. Jackson, 162 S E 18, 157 Va. 628
10 C J. p 1087 note 90.

Converse of instructions given

In an action against a street railway, where plaintiff passenger's theory was that the car was started before she was clear of it, and defendant's theory was that she fell, after safely alighting from the car, by twisting her foot on the rough edges of the brick street, and there was no evidence of contributory negligence, it was not error to refuse to give an instruction presenting the converse of one given by the court that "the jury will find for defendant, unless they believe from the evidence that when the plaintiff was leaving the car, and before she was clear of the car, the defendant's employés negligently and carelessly started said car, and by reason of such starting of said car the plaintiff was thrown," etc.—South Covington & C. Ry Co. v Goldsmith, 218 S W. 286, 187 Ky. 68

91. U S.—Virginia Public Service Co. v Silver, C C.A Va., 68 F.2d 230—Mendelson v. Davis, C.C A.Neb, 281 F. 18.
Ark.—St. Louis-San Francisco Ry Co. v. Daniels, 280 S W. 354, 170 Ark. 346.
Ill.—See Todd v. Chicago City Ry. Co, 197 Ill.App. 544
Mass.—Fournier v Holyoke St. Ry. Co., 154 N E. 546, 258 Mass. 257—Dion v. Drapeau, 150 N E 14, 254 Mass. 186.
Minn.—McMurray v Twin City Motor Bus Co., 228 N W. 154, 178 Minn. 561.
Mo—Thomas v. St Louis-San Francisco Ry. Co., App, 293 S.W 1051—Mulderig v. Wells, App., 257 S W 1060.
Mont—Garvin v. Butte Electric Ry. Co, 169 P. 40, 54 Mont. 196.
N.J.—Hewitt v. Atlantic & S. Ry. Co, 132 A 500, 4 N J.Misc. 339.
Ohio—Mahoning Valley Ry. Co. v. De Pascale, 71 N E. 633, 70 Ohio St. 179, 65 L R.A. 860—Lake Shore Electric Ry. Co v. Ordway, 156 N. E. 235, 24 Ohio App. 317.
Tenn—Memphis St Ry. v. Felts, 6 Tenn.Civ.A 303.
Tex.—Eastern Texas Electric Co. v. Kappe, Civ.App, 235 S W. 253, error refused.
Vt—Stewart v. Barre & Montpelier Traction & Power Co, 111 A. 526, 94 Vt 398.
Va—Richmond-Ashland Ry. Co v. Jackson, 162 S.E. 18, 157 Va. 628
Wash—Bradley v. City of Seattle, 294 P. 554, 160 Wash. 100.
W.Va.—Venable v. Gulf Taxi Line, 141 S E 622, 105 W.Va. 156.
10 C.J p 1088 note 91.

Instructions held properly refused

(1) In actions for injuries to a boarding passenger—Birmingham Electric Co. v. Wood, 130 So. 786, 222 Ala. 103.

(2) In actions for injuries received by passenger alighting from car
U S.—Virginia Public Service Co. v. Silver, C C A.Va, 68 F.2d 230.
Ky.—Louisville Ry Co. v. Branham, 88 S.W.2d 968, 261 Ky. 748.
Mo.—Taylor v. Missouri Pac. R. Co., 279 S.W. 115, 311 Mo. 604—Rogers v. Kansas City Rys. Co., App., 204 S.W. 595.

(3) As to duty to furnish a safe place for passengers to alight.—Checker Cab & Baggage Co. v. Harrison, 87 S.W.2d 32, 191 Ark. 564.

(4) In actions for injuries resulting from acts of fellow passengers.
Ala.—Birmingham Electric Co. v. Driver, 166 So. 701, 232 Ala. 36.
Mo—Grubb v Kansas City Rys Co., 230 S W. 675, 207 Mo App. 16

(5) Requested instructions in collision cases.
Cal—Carnahan v. Motor Transit Co., 224 P. 143, 65 Cal.App. 402.
N H.—Giguere v. Boston & M. R. R., 167 A 561, 86 N H. 294.
Okl.—Muskogee Electric Traction Co. v. Bolin, 232 P 105, 105 Okl. 142
Pa—Moraski v Philadelphia Rapid Transit Co., 142 A 276, 293 Pa. 224.

(6) In actions for injuries to elevator passenger—O'Neill & Co. v Crummitt, 190 A 763, 172 Md. 697.

(7) Prayer as to right of way at time of taxicab accident.—Stewart Taxi-Service Co v. Spencer, 132 A. 153, 149 Md. 635.

(8) In an action by a passenger injured by contact with a trolley pole, an instruction to the effect that in order to find for plaintiff the jury must find that the pole "unnecessarily and negligently imperiled the safety of passengers," was properly refused, as requiring that, in addition to negligence, the jury must find that defendant unnecessarily imperiled the safety of plaintiff.—Capital Traction Co. v. Copland, 47 App. D C. 152

(9) In action for injuries to minor while riding in defendant's automobile, with passenger who had hired vehicle, refusal of instruction that, if plaintiff was guest or gratuitous passenger, she could not recover, unless defendant was guilty of gross negligence, was not error, when, as a matter of law, on the evidence plaintiff was a passenger for hire—Dion v. Drapeau, 150 N.E. 14, 254 Mass. 186.

(10) Where injury was received when alterations were under way, it was not error to refuse to instruct that defendant was not required to give notice of space between platform and car, due to temporary condition, and that if space was only ten inches, plaintiff could not recover—Harrington v Boston Elevated Ry Co, 118 N E. 880, 229 Mass 421, 2 A.L.R 1057.

Refusal to read statute

In taxicab passenger's action for injuries sustained when taxicab was struck by overtaking automobile as passenger was alighting, based on taxicab driver's alleged negligence in stopping where it was unlikely that overtaking vehicle would be able to pass to left or to stop, refusing to read to jury statute forbidding parking of vehicles so that there was not fifteen feet free space of pavement to left is not error—Paulos v. Koelsch, 263 N W. 913, 195 Minn. 603

92. Mass—Neelon v. Hirsh & Renner, 151 N.E 302, 255 Mass. 285.

93. Iowa.—Stutsman v Des Moines City Ry Co., 163 N.W. 580, 180 Iowa 524.
N J—Rapp v. Butler-Newark Bus Line, 138 A. 377, 103 N.J.Law 512, affirmed 140 A. 921, 104 N.J.Law 444
Tex.—Eastern Texas Electric Co. v.

c. Invading Province of Jury

In an action by a passenger against a carrier for personal injuries, the instructions given must not take from the jury matters proper for their consideration and determination.

Issues of fact submitted to the jury must be by instructions which clearly and fully state and define such issues.[94] Proper evidence bearing on the liability of the carrier, introduced without objection, should not be withdrawn or excluded from the jury's consideration;[95] and an instruction is erroneous which invades the province of the jury,[96] as where it withdraws or excludes a material issue of fact from the jury,[97] as by assuming, as a matter of law, the existence or nonexistence of material facts in issue,[98] or by assuming or charging that certain facts do or do not constitute negligence.[99] An instruction is also erroneous which unduly emphasizes a particular fact in issue.[1] However, an instruction which defines the duty or degree of care required of the carrier and leaves the facts of the case to be found by the jury, and also leaves them to say whether the facts found constitute negligence as defined, is not objectionable as withdrawing that issue from the jury.[2] So, an instruction which assumes or charges that certain acts made negligence by law,[3] or on which the facts are unequivocal,[4] constitute negligence, or which assumes as a matter of law a fact which is of common knowledge[5] or which is declared by a provision of a statute or constitution,[6] is not erroneous.

d. Conformity to Pleadings and Evidence

Instructions in an action by a passenger against a carrier for personal injuries must conform and be confined to the issues made by the pleadings and the evidence.

The instructions must conform and be confined to the issues made by the pleadings and evidence, and on which the case has been tried.[7] An instruction

Kappe, Civ.App., 235 S.W. 253, error refused.
10 C J p 1088 note 93.

94. Ill.—West Chicago St. R. Co v. McCafferty, 77 N.E. 153, 220 Ill. 476.
10 C J. p 1088 note 95.

95. Ohio.—Cleveland Ry. Co. v. Wiesenberger, 15 Ohio App. 437.

96. Cal.—Pilcher v. Tanner Motor Livery, 33 P.2d 58, 138 Cal.App. 558.
10 C J. p 1088 note 96.

97. Wis.—Ferguson v. Truax, 110 N. W. 395, 111 N W. 657, 112 N W. 513, 132 Wis. 478, 14 L.R A.,N.S., 350, 13 Ann.Cas. 1092.
10 C J. p 1088 note 97.

Instructions held erroneous

(1) In action by passengers injured when car of livery corporation collided with automobile at street intersection, instruction that driver of car was negligent as matter of law for violating speed law was reversible error in view of evidence, excessive verdict, and statute imposing on passengers burden of establishing that violation of speed law constituted negligence.—Pilcher v. Tanner Motor Livery, 33 P.2d 58, 138 Cal. App. 558.

(2) Instruction relating to whether plaintiff was passenger and circumstances warranting recovery.—Gulf, M. & N. R Co. v. Bradley, 142 So. 493, 167 Miss. 603.

(3) Instruction, directing finding for plaintiff if defendant failed during cold and chilly weather to keep waiting room warm for one hour before arrival of train or if it so failed to furnish heat at other time while depot was kept open for accommodation of public, is error, where evidence as to necessity of heat was conflicting—Gulf, C. & S. F. Ry Co v. Williams, Tex.Com App., 268 S W 149, reversing, Civ App , 251 S.W. 553.

98. Ark.—St. Louis, etc , R. Co. v. Bostic, 180 S.W. 988, 181 S W. 135, 121 Ark 295.
10 C.J. p 1089 note 98.

99. Mass.—Plummer v. Boston El. R Co , 84 N E 849, 198 Mass. 499.
10 C.J. p 1089 note 99.

1. Tex.—Missouri, etc., R. Co. v. Dunbar, 108 S W. 500, 49 Tex.Civ. App. 12.
10 C J. p 1089 note 1.

2. Iowa—McGovern v. Interurban R Co., 111 N.W. 412, 136 Iowa 13, 125 Am.S.R. 215, 13 L R.A.,N.S., 476.
10 C J. p 1089 note 2.

3. Mo—Fields v. Metropolitan St. R. Co., 155 S.W. 845, 169 Mo.App. 624
10 C.J p 1089 note 3.

4. Ill.—Chicago City R. Co v. Carroll, 68 N E. 1087, 206 Ill. 318, affirming 102 Ill.App. 202.
10 C.J p 1089 note 4.

5. Mass.—Lindenbaum v. New York, etc., R. Co., 84 N.E 129, 197 Mass. 314.

6. Tex.—Duck v. St. Louis, etc., R. Co , Civ.App., 63 S W. 891.
10 C J p 1089 note 6.

7. Mo.—Collins v. Wells, 30 S W. 2d 28, 325 Mo 736
Tex.—Payne v. Kindel, Civ.App , 239 S.W. 1011.
10 C.J. p 1089 note 8.

Where a complaint fails to state a cause of action, an instruction entitling an injured passenger to recover, if proving averment in the complaint, is error—Terre Haute, Indianapolis & Eastern Traction Co v Scott, 150 N E 777, 197 Ind 587, 43 A L R 1029

Instructions held proper under pleadings and evidence

(1) Generally

U S.—Memphis St. Ry. Co. v. Pierce, Tenn , 257 F. 659, 168 C C.A. 609
Ala.—Birmingham Electric Co. v. Shelton, 163 So. 633, 231 Ala. 110
Cal.—Rystinki v. Central California Traction Co , 165 P. 952, 175 Cal 336—Baker v. Market St Ry. Co , 11 P 2d 912, 123 Cal App. 688.
D.C.—Washington & O D Ry. Co v Smith, 289 F. 582, 53 App.D C. 184.
Ga.—Atlanta & W. P. R Co. v. Reese, 110 S E 750, 28 Ga App. 275.
Ill.—Panor v. Northwestern Elevated R Co., 228 Ill App. 162.
Ind.—Pittsburgh, C., C. & St L Ry. Co v. Arnott, 135 N E 365, 80 Ind App. 40.
Ky.—Louisville & N. R. Co. v. Priddy, 71 S.W.2d 39, 254 Ky. 173.
Md.—Damico v. Washington, B. & A. Electric R. Co., 148 A. 821, 158 Md. 470.
Miss.—Pickwick Greyhound Lines v. Silver, 125 So. 340, 155 Miss. 765.
Mo.—Kirkpatrick v. Wells, 6 S.W.2d 591, 319 Mo. 1040—Roberts v. Schaper Stores Co., 3 S W 2d 241, 318 Mo. 1190—Hulen v. Wheelock, 300 S.W. 479, 318 Mo 502—Sugarwater v Fleming, 293 S.W. 111, 316 Mo. 742—Taylor v. Missouri Pac. R. Co., 279 S.W. 115, 311 Mo. 604—Hartnett v. May Department Stores Co., App., 85 S.W.2d 644—Irby v. St. Louis Public Service Co., App., 82 S W 2d 118—Koenig v. St. Louis Public Service Co , App , 45 S W 2d 896—Myerson v. People's Motorbus Co. of St Louis, App , 297 S W. 455—Ownby v. Kansas City Rys.

Co., App, 228 S W 879—Paul v Dunham, App, 214 S W. 263—Witham v. Lusk, App., 190 S W. 403.
Neb—Fielding v. Publix Cars, 277 N W 331.
N J.—McClure v. Public Service Ry. Co, 132 A 236, 4 N J Misc. 177.
N C—Welch v Independent Coach Line, 150 S E 717, 198 N.C 130.
Ohio—Jones v. Youngstown Municipal Ry. Co, 12 N E 2d 279, 133 Ohio St 118—Steinman v. Cleveland Ry. Co, 155 N E 149, 23 Ohio App. 448.
Pa.—Montalini v. Pennsylvania Co., 100 A. 806, 256 Pa 249
Tex—Panhandle & S F. Ry. Co. v. Jones, Civ App, 105 S W.2d 443—El Paso Electric Co v. Cannon, Civ.App, 69 S W.2d 532, reversed on other grounds, Com.App., 99 S W 2d 907—San Antonio Public Service Co. v. Wellman, Civ.App, 288 S.W 582—St. Louis Southwestern Ry. Co of Texas v McMichael, Civ App., 191 S W. 186, error refused
Wash.—Poropat v. Olympic Peninsula Motor Coach Co, 299 P. 979, 163 Wash 78—Osborne v. Galusha, 254 P. 1086 143 Wash. 127—Hayes v Staples, 225 P. 417, 129 Wash. 436.
W Va—Venable v. Gulf Taxi Line, 141 S E 622, 105 W Va 156.
10 C J. p 1089 note 8 [a] (1).

(2) As to persons accompanying passengers—Lewis v. Illinois Cent. R Co, Mo, 50 S W.2d 122.

(3) As to passengers assaulted by employees of carrier.—State ex rel. United Rys. Co. of St. Louis v. Allen, Mo, 240 S.W 117

(4) As to duty to treat passenger courteously—Virginia Ry. & Power Co. v Deaton, 137 S.E. 500, 147 Va 576.

(5) As to boarding passengers
Cal—Hellman v. Los Angeles Ry. Corporation, 27 P 2d 946, 135 Cal App. 627, rehearing denied 28 P.2d 384, 135 Cal.App. 627—Lynch v. Market St. Ry. Co., 19 P.2d 1009, 130 Cal App. 433.
Mich—Sullivan v. Detroit United Ry, 182 N.W. 33, 213 Mich. 679.
Mo.—Pietzuk v. Kansas City Rys. Co, 232 S W. 987, 289 Mo 135—Paul v. Dunham, App, 214 S W. 263
N J—Nogrady v. Erie R. Co, 144 A. 803, 105 N.J.Law 396.
10 C J p 1089 note 8 [a] (2).

(6) As to alighting passengers.
Ala—Southern Ry. Co. v. Laxson, 114 So 288, 22 Ala.App. 180, reversed 114 So. 290, 217 Ala. 1, 55 A L.R. 385
Cal—Baker v Market St. Ry. Co., 11 P.2d 912, 123 Cal App. 688.
Ga.—Hines v. Hendricks, 104 S E 520, 25 Ga App. 682.
Ill.—Paris v. East St. Louis Ry. Co, 275 Ill.App. 241.
Ky—Louisville Ry. Co. v Branham, 88 S W 2d 968, 261 Ky. 748—Chesapeake & O Ry. Co. v Smith, 83 S W.2d 488, 259 Ky. 821—Louisville & N. R. Co v. Burk, 268 S.W 844, 207 Ky 1
Mo—Took v Wells, 53 S.W 2d 389, 331 Mo 249—Collins v. Wells, 30 S W 2d 28, 325 Mo. 736—Parlon v Wells, 17 S W 2d 528, 322 Mo 1001—Moss v Wells, 249 S W. 411—Gilmartin v Wells, App., 56 S.W.2d 623—Lay v Wells, App, 274 S W 933—Higbee v Fleming, App., 269 S W 673—Brooks v. Union Depot Bridge & Terminal R Co, 258 S W. 724, 215 Mo App. 643—Lass v. Kansas City Rys. Co, App., 233 S W 70—Tillery v. Harvey, App, 214 S.W 246—Bond v. Metropolitan St. Ry. Co, App, 204 S W. 934
N C—Graham v. Norfolk-Southern R Co, 93 S E 428, 174 N C 1.
Okl—Chicago, R. I. & P. Ry Co v. Forrester, 177 P. 593, 72 Okl. 8, 8 A.L R 163
Tex.—Texas & N. O. Ry Co. v. Rooks, Com App, 292 S.W 536, affirming, Civ App, 283 S W. 622, and rehearing denied, Com App, 293 S W. 554—Texas & N. O. R Co. v McNeill, Civ App, 270 S W 1038
Utah—Barlow v. Salt Lake & U. R Co., 194 P. 665, 57 Utah 312
Va—Virginia Ry. & Power Co v. Taylor, 132 S.E. 334, 144 Va 496.
Wash—Alstead v. Kapper, 236 P 799, 135 Wash. 21.
10 C J. p 1089 note 8 [a] (3).

(7) As to whether passenger injured when alighting from street car was still a passenger—Virginia Ry & Power Co v. Taylor, supra.

(8) As to when plaintiff became a passenger.—Atlanta Northern Ry. Co v. Brown, 125 S E 465, 159 Ga 212, reversing Brown v Atlanta Northern Ry. Co, 120 S.E 677, 31 Ga App. 429, vacated 125 S.E 795, 33 Ga.App. 194.

(9) As to injury by derailment.
Ark—Fourche River Valley & I T Ry. Co. v. Camp, 214 S.W. 35, 139 Ark 406.
Iowa.—Kelly v Muscatine, B & S. R. Co, 191 N.W. 525, 195 Iowa 17.
10 C.J. p 1089 note 8 [a] (4).

(10) As to injury by collision.
Cal—McKinnon v. United Railroads of San Francisco, 203 P. 122, 55 Cal App 96.
Ind—Yellow Cab Co. v. Kruszynski, App, 196 N.E. 136.
Ky—Louisville & Interurban R. Co v. Kerr, 287 S W 926, 216 Ky 407.
Mo.—Keyes v Chicago, B. & Q. R. Co, 31 S W.2d 50, 326 Mo. 236—Morris v. Union Depot Bridge & Terminal R. Co, 8 S.W 2d 11, 320 Mo 371—Hulen v Wheelock, 300 S. W. 479, 318 Mo. 502—Varley v. Columbia Taxicab Co,, 240 S.W 218—Bergfeld v Kansas City Rys Co., 227 S.W. 106, 285 Mo. 654—McGinnis v. St. Louis Public Service Co., App, 44 S W 2d 886—Alewel v East St. Louis & S Ry. Co., App., 26 S.W.2d 869—Johnson v. Kansas City Rys. Co., App, 233 S W. 942.
R.I.—Keefe v. United Electric Rys Co, 195 A 599.

(11) As to injuries from sudden jerks, jolts or movements of cars
Ark.—Arkansas Power & Light Co. v Graves, 75 S.W.2d 57, 189 Ark 743—St. Louis-San Francisco Ry Co. v Britton, 31 S W 2d 756, 182 Ark. 437.
Ga—Georgia Ry & Power Co. v Murphy, 110 S.E. 680, 28 Ga.App 173.
Mo.—Connor v. Kansas City Rys Co., 250 S W. 574, 298 Mo. 18—Laycock v United Rys. Co of St Louis, 235 S W 91, 290 Mo. 344, answering certified questions, App, 227 S.W 883—Weise v. Harrison, App., 89 S W 2d 148—Dunn v. Alton R Co, App, 88 S.W 2d 224—Beurskens v Dunham, App., 193 S W. 855.
N J—McClure v. Public Service Ry Co, 132 A 236, 4 N J.Misc 177

(12) As to injuries on escalator—Hartnett v. May Department Stores Co, supra.

(13) As to injury from failure to heat waiting room.—Texas & P. Ry Co. v. Shaw Tex Civ App, 218 S W 814, dismissed for want of jurisdiction—Chicago, R I & G. Ry Co v. Faulkner, Tex Civ App., 194 S W 651.

(14) As to accidental injury.—Holmes v. Georgia Power Co, 162 S. E 403, 44 Ga App. 533, reversed on other grounds Georgia Power Co. v. Holmes, 165 S.E 284, 175 Ga 487, conformed to Holmes v. Georgia Power Co., 165 S E 918, 45 Ga.App 826.

(15) In an action against a carrier for injuries to a passenger in ejecting another passenger.—Frazier v. Public Service Ry Co, 123 A 867, 99 N J.Law 501, 1 N J.Misc. 361.

(16) Charge that, if alleged injury to passenger was an accident, he could not recover, was not error, where authorized by the evidence in the case.—Hill v. Chattanooga Ry & Light Co., 93 S E. 1027, 21 Ga. App. 104.

(17) Under the passenger's evidence that he knew the country around his station, and, after such station was called, went on the platform as the train slowed down, but that, without stopping, it suddenly accelerated its speed in rounding a curve past the station, and threw him off, the court should base recovery on the sudden acceleration of speed.—Louisville & N. R. Co v. Bland, 188 S.W. 468, 171 Ky. 424
10 C.J. p 1089 note 8 [a].

is erroneous or properly refused which is not confined to, and in conformity with, issues made by the pleadings and evidence,[8] as where the instruction requested or given is abstract,[9] or charges on a theory not put in issue by the pleadings,[10] or not supported by the evidence,[11] which requires a find-

8. N Y —Goodheart v. American Airlines, 1 N Y S 2d 288, 252 App Div. 660
Tex.—San Antonio & A. P. Ry. Co v. Wiuvar, Civ App., 257 S W. 667
10 C J. p 1091 note 9.

Instructions held erroneous under the pleadings and evidence

(1) Generally.

Ala —Alabama Power Co v. Maddox, 151 So. 575, 227 Ala 628.
Ark.—Davis v. Kelly, 237 S.W. 698, 152 Ark. 151.
Ga.—Southern Ry. Co v. Smallwood, 99 S E. 539, 23 Ga.App. 810.
Mass.—Revsbech v Boston Elevated Ry. Co, 175 N E. 734, 275 Mass 317—Neelon v. Hirsh & Renner, 151 N.E. 302, 255 Mass. 285.
Mo.—Unterlachner v Wells, 278 S.W. 79—Thomas v. St. Louis-San Francisco Ry. Co, App, 293 S.W. 1051 —Hellar v Kansas City Rys Co., App, 237 S.W. 811—Shaffer v. St. Louis & S. F Ry. Co, 208 S.W 145, 201 Mo.App. 107.
N J.—Benedetto v. Hudson & M R Co., 156 A. 37, 9 N J.Misc. 758.
N.Y.—O'Brien v. New York Rys Co, 174 N Y.S 116, 185 App.Div 867—Murphy v. Hudson & M R Co, 167 N.Y S. 895, 180 App.Div. 585—Saperstein v Schrenkeisen, 161 N. Y.S. 289, 97 Misc 363.
Ohio.—Palm v. Community Traction Co, 167 N E 604, 32 Ohio App. 89.
Or.—Perry v. Pickwick Stages of Oregon, 243 P 787, 117 Or. 598.
Tex.—Texas & P. Ry Co. v. Perkins, Civ.App, 284 S.W. 683.
10 C J. p 1091 note 9 [a] (1).

(2) As to injury to a boarding passenger.

Cal.—Wallden v. Market St. Ry. Co, 9 P.2d 602, 121 Cal App. 647—Starkey v. Market St. Ry. Co, 265 P. 839, 90 Cal.App. 249—Ginochio v. City and County of San Francisco, 206 P. 763, 57 Cal App 150.
Ga.—Jones v Western & A. R Co, 99 S.E 388, 23 Ga.App. 725.
Ky.—Louisville & N. R Co. v Kilburn, 113 S.W.2d 844, 272 Ky. 44.
Mo.—Maloney v. United Rys. Co. of St. Louis, 237 S W. 509—Stephens v. Mobile & O. R. Co., App, 285 S.W. 151—Lairson v. Kansas City Rys. Co., App, 232 S.W. 484.
10 C.J. p 1091 note 9 [a] (2).

(3) As to injuries to an alighting passenger

Mo —Engle v. St. Joseph Ry., Light, Heat & Power Co, App., 44 S W. 2d 175—Green v. Chicago, B. & Q. R Co, 251 S.W. 931, 213 Mo.App. 583—Roach v. Kansas City Rys. Co., App, 228 S.W. 520—Chapman v. Kansas City Rys. Co., App., 217 S W. 623—Tillery v. Harvey, App., 214 S W 246.
Or.—Carlson v. Portland Ry, Light & Power Co., 254 P. 809, 121 Or. 519.
Tex —Southwestern Gas & Electric Co. v Nichols, Civ.App, 254 S W. 515.
10 C.J p 1091 note 9 [a] (3).

(4) In actions for injuries resulting from collisions.

Ala.—Birmingham Electric Co. v. Mealing, 108 So 511, 214 Ala 597
Ky.—B-Line Cab Co. v. Lake, 110 S. W.2d 1083, 270 Ky. 763—Consolidated Coach Corporation v. Garmon, 26 S W.2d 20, 233 Ky. 464—Louisville & Interurban R. Co. v. Kerr, 287 S W. 926, 216 Ky. 407.
Mo.—Lass v. Kansas City Rys Co, App, 233 S W. 70
N.Y —Roach v Yonkers R. Co, 271 N Y.S 289, 243 App Div. 195.
Ohio —Canton Motor Coach v. Hall, 189 N.E. 505, 46 Ohio App 516.

(5) Where a commuter, while standing between tracks after signaling approaching north-bound train to stop, was struck by overhang of south-bound locomotive, court properly omitted to instruct on last clear chance doctrine, since it did not necessarily appear that from plaintiff's position between tracks defendant's employees had such knowledge of plaintiff's peril as to make doctrine applicable —Ferran v. Southern Pac. Co., 44 P.2d 533, 3 Cal 2d 350.

(6) Where the petition by a female passenger, who claimed she was directed to ride in the smoker and was therein insulted by other passengers, did not claim that the smoking of the other passengers in the car was offensive, or that she so informed the conductor, it was error for the instructions to allow the jury to award damages for the smoking —Payne v. Combs, 249 S W. 1031, 198 Ky. 749.

(7) In a shopper's action against store owner for injuries sustained while leaving an elevator, refusal of prayer to effect that shopper should have anticipated likelihood of operator's suddenly lowering elevator as she was stepping out is not error, under evidence —O'Neill & Co. v. Crummitt, Md, 190 A. 763.
10 C.J. p 1091 note 9

9. N.Y.—Richardson v. Nassau Electric R Co, 180 N.Y.S. 109, 190 App. Div. 529.
10 C J. p 1085 note 74.

Instructions held not erroneous as abstract

(1) Instruction defining negligence, in suit by passenger for injury to eye by flying glass allegedly due to railroad's negligence.—Baldwin v Wingfield, 85 S.W.2d 689, 191 Ark. 129.

(2) Instruction defining carrier's duty to passengers, in action for personal injuries by intending passenger who boarded car not in service —Damico v. Washington, B. & A. Electric R. Co, 148 A 821, 153 Md. 470.

(3) In an action for injuries to plaintiff while boarding a car of defendant railroad where there was evidence that he was not near the car at the time he claimed to have been injured, and did not call a doctor for four months, or notify the railroad of his injury until still later, an instruction that the fact he was injured at some time was not proof that he was injured at the time and in the manner he claimed, was not erroneous, as not supported by evidence.—Ulrich v Chicago, B & Q. R. Co, 220 S W. 682, 281 Mo. 697.

(4) It was duty of railroad conductor and its servants in charge of train to exercise highest degree of care and diligence in conserving safety of passenger, and it was responsible for slightest negligence on part of its servants proximately causing injuries to a passenger; and charge to that effect was not abstract in action for injuries to minor whose evidence showed he was commanded by conductor to put heavy suitcase in rack —Central of Georgia Ry. Co. v. Thomas, 104 So. 559, 20 Ala App. 617.

Illustrative instructions

An instruction on the comparative degree of care required by a carrier of goods and a carrier of persons, given for the purpose of comparison and illustration, is not erroneous although such matter was not in issue —Wilkinson v. Phoenix Ry. Co of Arizona, 236 P. 704, 28 Ariz. 216

10. Mo —Vulgamott v. Hines, App, 229 S W 394.
N.J —Gilliard v Public Service Ry. Co, 110 A. 688, 94 N J Law 288.
10 C J. p 1092 note 10.

11. Mo.—Maloney v. United Rys. Co. of St. Louis, 237 S W. 509—Reel v Consolidated Inv Co, 236 S.W. 43 —Oesch v St. Louis Public Service Co., 59 S W.2d 758, 228 Mo. App 1055.
Neb.—Tighe v Interstate Transit Lines, 263 N.W. 483, 130 Neb 5.
Tex —El Paso Electric Co. v. Cannon, Civ App, 69 S.W.2d 532, reversed on other grounds, Com App, 99 S.W.2d 907—Fort Worth & D. C. Ry. Co v. Kidwell, Civ.App., 249

ing on an immaterial issue,[12] or which ignores or omits to charge on a material element or material matter in issue,[13] or disregards or ignores a material part of the evidence.[14]

An instruction is not erroneous because it fails to instruct as to immaterial matters.[15]

As a passenger suing a carrier is not obliged to go to the jury on each and every charge or theory of negligence embodied in his petition, but may abandon such as he chooses, defendant cannot complain of an instruction, otherwise proper, which omits a requirement of a finding of a particular fact alleged in the petition.[16]

e. Instructions as to Proximate Cause of Injury

The jury must be properly instructed on the necessity of the negligence or wrong of the carrier charged in the declaration or complaint being the proximate cause of the passenger's injury.

In stating the conditions authorizing a recovery, the instructions must include the condition that the negligence or wrong charged in the declaration or complaint was the proximate cause of the injury,[17]

S.W. 303, certified questions answered, Com.App., 245 S.W. 667, 112 Tex. 89—American Nat. Ins. Co. v. Nussbaum, Civ.App., 230 S.W. 1102, dismissed for want of jurisdiction—Ft. Worth & D. C. Ry. Co. v. Courtney, Civ.App., 214 S.W. 839, dismissed for want of jurisdiction—Bird v. Schaff, Civ. App., 206 S.W. 711.

10 C.J. p. 1092 note 11.

Instructions held erroneous as not supported by the evidence

(1) In an action against a railroad for assault by its employee, an instruction on assault by employee, in view of the absence of testimony of any abuse or assault by any employee of defendant in the line of his duty.—Missouri Pac. R. Co. v. Kellogg, 262 S.W. 675, 164 Ark. 548.

(2) Instruction basing verdict for defendant bus company on finding that passenger, injured in descending from bus, alighted before driver had reasonable opportunity to offer assistance.—Mahaney v. Kansas City, Clay County & St. Joseph Auto Transit Co., 46 S.W.2d 817, 329 Mo. 793.

(3) Instruction, in substance, authorizing verdict for defendant if collision between street car and truck was result of unavoidable accident, unmixed with negligence, where the evidence negatived unavoidable accident.—American Stores Co. v. Herman, 171 A. 54, 166 Md. 312.

(4) An instruction submitting to the jury the question whether the failure to equip a street car with a rear-view mirror was negligence, and whether such negligence contributed to the injury of a passenger who fell from the moving car, was erroneous, where the evidence was insufficient to show either that the omission to install such equipment was negligence or that it contributed to plaintiff's injury.—Marovich v. Central California Traction Co., 216 P. 595, 191 Cal. 295.

(5) Instruction that if station agent or "any other employee," pushed plaintiff from car, he could recover, is prejudicially erroneous, where testimony was that he had been pushed by station agent.—Krasnicki v. Boston & M. R. R., 117 N.E. 348, 228 Mass. 354.

Instructions held not improper

(1) Instruction to find for passenger, if passenger was kicked by railroad employee, is not error because the evidence showed employee used knee in pushing passenger.—Morton v. St. Louis-San Francisco Ry. Co., 20 S.W.2d 34, 323 Mo. 929.

(2) Instruction to find for passenger if he was violently thrown into toilet room by railroad employee is not error, for want of evidence that plaintiff was thrown, under evidence that passenger was pushed into room.—Morton v. St. Louis-San Francisco Ry. Co., supra.

12. Mo.—Chapman v. Kansas City Rys. Co., 217 S.W. 290.

13. Ala.—Tennessee, A. & G. Ry. Co. v. Rossell, 88 So. 362, 18 Ala. App. 17.
Ark.—Meeks v. Graysonia, N. & A. R. Co., 272 S.W. 360, 168 Ark. 966.
Mo.—Hellar v. Kansas City Rys. Co., App., 237 S.W. 811—Murdock v. Dunham, App., 206 S.W. 915.
Ohio—Cleveland Ry. Co. v. Hill, 12 Ohio App. 125.
Tex.—San Antonio Public Service Co. v. Wellman, Civ.App., 288 S.W. 582—Wichita Falls, R. & Fort Worth R. Co. v. Baker, Civ.App., 242 S.W. 273—Wright v. Schaff, Civ.App., 228 S.W. 333.

10 C.J. p. 1093 note 12.

Instructions held erroneous

(1) A carrier must exercise the highest degree of practical care and diligence in the protection of its passengers from accident, but is held to only ordinary care where the person injured is not a passenger, and hence an instruction, in an action for death by accident, charging the highest degree of care, when whether deceased was in fact a passenger was an issue in the case, was erroneous.—Carr v. Fagan, 123 A. 492, 278 Pa. 587.

(2) In action against street railway for injuries received on station platform, based on theory that relation between defendant and plaintiff had been that of carrier and passenger, instruction charging defendant with duty of exercising highest degree of care, without requiring jury to find that relation of carrier to passenger must have existed at time of accident, is erroneous.—Banks v. Kansas City Rys. Co., 217 S.W. 488, 280 Mo. 227.

14. Mo.—Scheipers v. Missouri Pac. R. Co., 298 S.W. 51—Blackford v. St. Joseph Ry., Light, Heat & Power Co., 21 S.W.2d 491, 223 Mo.App. 1194.

10 C.J. p. 1093 note 13.

15. Mo.—Stephens v. Mobile & O. R. Co., App., 285 S.W. 151—Findley v. Wells, App., 260 S.W. 506—McDermott v. United Rys. Co. of St. Louis, App., 236 S.W. 1080.

10 C.J. p. 1093 note 14.

16. Mo.—Dunn v. Alton R. Co., App., 88 S.W.2d 224.

17. Cal.—Gritsch v. Pickwick Stages System, 22 P.2d 554, 131 Cal.App. 774.
Conn.—Moyles v. Connecticut Co., 160 A. 307, 115 Conn. 80.
Ky.—McGraw v. Ayers, 58 S.W.2d 378, 248 Ky. 166.
Md.—Cumberland & Westernport Transit Co. v. Metz, 149 A. 4, 158 Md. 424, reargument denied 149 A. 565, 158 Md. 424, and appeal dismissed American Oil Co. v. Metz, 51 S.Ct. 40, 282 U.S. 801, 75 L.Ed. 720.
Mo.—Kirkpatrick v. Wells, 6 S.W.2d 591, 319 Mo. 1040—Tueteberg v. St. Louis Public Service Co., App., 41 S.W.2d 956—Whitlow v. St. Louis-San Francisco Ry. Co., App., 282 S.W. 525, certiorari quashed State ex rel. St. Louis & San Francisco Ry. Co. v. Daues, 290 S.W. 425, 316 Mo. 474.

10 C.J. p. 1093 note 15.

Instructions held proper

(1) An instruction, if the injuries were sustained as the proximate consequence of a mere accident, to find for the carrier, is proper, since it must be interpreted as excluding culpable negligence.—O'Brien v. Bir-

and should define "proximate cause";[18] but it has been held that as the words "proximate cause" have a well defined meaning as being the nearest or the closest in place and time, an instruction which employs these words is not bad because it omits further to define the meaning thereof.[19] An instruction is erroneous which authorizes a recovery on a finding of negligence on the part of defendant without regard to whether such negligence was the cause of the injury complained of,[20] or without regard to the question of plaintiff's contributory negligence, where the existence of such negligence is put in issue.[21] Likewise, an instruction is erroneous which requires that plaintiff show that the carrier's negligence was one or more of the proximate causes of the injury,[22] or permits the jury to find that certain acts constituted causal negligence when they were in fact merely incidental.[23]

f. Instructions as to Presumptions and Burden of Proof

The jury must be instructed properly as to the presumptions and the burden of proof applicable to the particular case; and in a proper case appropriate instructions as to the application of the res ipsa loquitur doctrine to injuries sustained by passengers should be given.

The court must correctly instruct the jury on the law as to the presumptions and burden of proof applicable to the facts of the case.[24] When the

mingham Ry., Light & Power Co., 72 So. 343, 197 Ala. 97.

(2) Instruction authorizing recovery for injury to street car passenger, unless sole proximate cause was something other than street railroad's negligence, is not prejudicially erroneous—Jenkins v. Kansas City Public Service Co., 275 P. 136, 127 Kan. 821.

In actions against carrier and others

(1) In passenger's action against proprietor of stage and driver of an automobile for injuries sustained when the stage tipped over in avoiding the automobile, instructions that, if injuries were proximate result of combination of negligent acts, it was unnecessary to inquire into their relation in period of time, or whether they were concurrent, successive, "or independent," or whether one proximately contributed to the result more than the other, might better have omitted the quoted words.—Freeman v. Adams, 218 P. 600, 63 Cal.App. 225.

(2) In trolley car passenger's action for the injuries against the carrier and a motorist, instruction that if motorist's act was proximate cause of accident verdict must be for defendant carrier is properly refused.—Miller v. Connecticut Co., 152 A. 879, 112 Conn. 476.

(3) In a taxicab passenger's action for injuries against the taxicab company and one whose automobile collided with the taxicab, instructions authorizing a verdict against each defendant if both defendants violated a speed ordinance, and as a direct result thereof the taxicab and automobile collided and plaintiff was injured, did not authorize a recovery unless the violation of the ordinance was the direct cause of the injury—Varley v. Columbia Taxicab Co., Mo., 240 S.W. 218.

(4) In action against owner of building for injuries to plaintiff when freight elevator started, in view of evidence that plaintiff or his fellow employee inadvertently started car, the court should have charged on owner's request that, if either of them, or the table they were carrying caused elevator lever to move, and car to start, verdict must be for defendant, and that, if sole proximate cause of accident was act of helper and other employee, verdict must be for owner—Courtney v. Gainsborough Studios, 174 N.Y.S. 855, 186 App.Div. 820

(5) Failure to charge that truck driver's attempt to pass street car from rear was proximate cause of collision with approaching street car, causing injuries to passenger therein, is not error, where it was at most a concurrent cause.—Riff v. Pittsburgh Rys. Co., 148 A. 102, 298 Pa. 256.

18. Ohio.—Kelley v. Ohio Traction Co., 157 N.E. 765, 24 Ohio App. 539.
10 C.J. p 1093 note 16.

Definition held proper or not objectionable

An instruction that "proximate cause" was one which by unbroken and continuous sequence produced a result, or from which such result might reasonably have been foreseen or anticipated "by a very careful, cautious, and prudent person," is not objectionable for use of quoted language—Dallas Ry. Co. v. Hallum, Tex.Civ.App., 276 S.W. 460.

Definition of "proximate cause" held erroneous because not applying standard of ordinary care and prudence to element of foreseeableness—South Plains Coaches v. Behringer, Tex.Civ.App., 32 S.W.2d 959, error dismissed.

Effect of criminal statute

That a driver was running bus, at time of collision injuring passenger, in excess of speed specified in criminal statutes did not affect question of propriety of charge defining proximate cause which did not apply standard of ordinary care to element of foreseeableness—South Plains Coaches v. Behringer, Tex.Civ.App., 32 S.W.2d 959, error dismissed.

19. W.Va.—Brogan v. Union Tract. Co., 86 S.E. 753.

20. Cal.—Brizzolari v. Market St. Ry. Co., 46 P.2d 783, 7 Cal.App.2d 246.
Ind.—Pittsburgh, C., C. & St. L. Ry. Co. v. Arnott, 126 N.E. 13, 189 Ind. 350.
10 C.J. p 1094 note 18.

21. Ga.—West End, etc., St. R. Co. v. Mozely, 4 S.E. 324, 79 Ga. 463.

22. Or.—Stamos v. Portland Electric Power Co., 274 P. 915, 128 Or. 310.

23. Mo.—Lewis v. Illinois Cent. R. Co., 3 S.W.2d 371, 319 Mo. 233.

24. Ala.—Bradford v. Birmingham Electric Co., 149 So. 729, 227 Ala. 285.
Cal.—Mudrick v. Market St. Ry. Co., App., 74 P.2d 328.
10 C.J. p 1094 note 21.

Instructions held proper

(1) Generally.
Cal.—White v. Red Mountain Fruit Co., 199 P. 318, 186 Cal. 335
Kan.—Landis v. Wichita R. & Light Co., 203 P. 1109, 110 Kan. 205.
Minn.—Sullivan v. Minneapolis St. Ry. Co., 200 N.W. 922, 161 Minn. 45.
Mo.—Lammert v. Wells, 13 S.W.2d 547, 321 Mo. 952—Scott v. Kansas City Rys. Co., 229 S.W. 178—Faulk v. Kansas City Rys. Co., App., 247 S.W. 253
N.C.—White v. Hines, 109 S.E. 31, 182 N.C. 275.
Tex.—Wichita Falls, R. & Fort Worth R. Co. v. Baker, Civ.App., 242 S.W. 273.
Wash.—Nollmeyer v. Tacoma Ry. & Power Co., 164 P. 229, 95 Wash. 595.

(2) Instruction that the fact that the accident happened, in absence of "preponderance" of evidence regard-

circumstances of the particular case require or justify the application of the res ipsa loquitur doctrine, see supra § 764, appropriate instructions should be given the jury as to the presumption of negligence arising from the happening of the accident and the injury to the passenger;[25] and in

ing cause, was some evidence of negligence—Gilchrist v. Boston Elevated Ry., 172 N.E. 349, 272 Mass. 346.

(3) Instruction that taxicab passenger's death in collision raised inference of negligence, which "throws upon the common carrier burden of showing" it, was not at fault—Bezera v. Associated Oil Co., 3 P.2d 622, 117 Cal.App. 139.

(4) Instruction that bus company injuring passenger must prove affirmative defense of third party's negligence does not place on defendant burden of proving it was not negligent—Schropshire v. Pickwick Stages, Northern Division, 258 P. 1107, 85 Cal.App. 216, followed in Crosby v. Pickwick Stages, Northern Division, 264 P. 346, 88 Cal.App. 799.

(5) In an action for injuries to a passenger when a step broke—Hines v. Watkins, 112 A. 299, 137 Md. 211.

(6) In action against interurban railway for injuries to passenger in partial derailment—Kilroy v. Kansas City & K. V. Ry. Co., Mo.App., 195 S.W. 522.

(7) An instruction that, if plaintiff proved that while she was riding in defendant's elevator there was an accident by reason of a defect therein or in the operation thereof, she need not prove exactly the cause of the accident, was not erroneous, as removing the burden of proving negligence, it meaning simply that if plaintiff showed she was hurt by reason of such defect she need not show the exact cause of the accident.—White v. Red Mountain Fruit Co., 199 P. 318, 186 Cal. 335.

(8) Charges that, if proximate cause of injury was not defendant's negligence, but was intervening cause by third party, and if there was no direct and proximate cause because of intervening party, mere fact third party was negligent did not bar right of plaintiff to sue defendant for her injuries provided it was liable, do not place on defendant, the double burden of showing its negligence was not proximate cause and that injury was from intervening act of separate agency.—Rome Ry. & Light Co. v. King, 126 S.E. 294, 33 Ga.App. 383.

(9) In action by passenger against railway for injuries received from sudden breaking of window, instruction that mere injury raised no presumption that injury was caused by negligence of railway and that burden was on passenger to prove how accident was caused and that verdict must be for railway unless accident was result of its negligence is proper.—Tittlebaum v. Pennsylvania R. Co., 174 A. 89, 167 Md. 397, 10 C.J. p. 1094 note 21 [a].

Instructions held erroneous as to presumptions and burden of proof

(1) In general—Zimmerman v. Kansas City Public Service Co., 41 S.W.2d 579, 226 Mo.App. 369.

(2) In actions for injuries to an alighting passenger.—Gray v. Los Angeles Ry. Corporation, 230 P. 970, 69 Cal.App. 123.

(3) Instruction requiring plaintiff to prove all allegations of negligence, in action for wrongful death of passenger struck by street car—Sacks v. Connecticut Co., 146 A. 494, 109 Conn. 221.

(4) Instruction in personal injury action that burden was on carrier to prove that it did all that could be done to guard against injury to passenger—Lake Shore Electric Ry. Co. v. Shepherd, 192 N.E. 740, 48 Ohio App. 167.

(5) Instruction erroneously putting on defendant the affirmative of the issue presented by the question to the jury: Was the car in motion when plaintiff attempted to board it?—Kausch v. Chicago & Milwaukee Electric Ry. Co., 180 N.W. 808, 173 Wis. 220.

(6) In an action for death of plaintiff's intestate, where specific acts of negligence were alleged, an instruction that, if the jury believed decedent was killed while riding as a passenger on defendant's street car, defendant was called on to show either that death was occasioned by inevitable casualty or was due to contributory negligence, is erroneous as requiring defendant to exculpate itself, not only from the negligent acts and omissions charged, but also from all others conceivably applicable to the case.—Marovich v. Central California Traction Co., 216 P. 595, 191 Cal. 295.

(7) In action by passenger against railway for injuries received from sudden breaking of window, instruction that presumption was that injury resulted from railway's negligence and that passenger was entitled to recover unless jury found from evidence that injury did not result from railway's negligence is improper—Tittlebaum v. Pennsylvania R. Co., 174 A. 89, 167 Md. 397.

(8) In action for injuries sustained by thirteen year old boy passenger who was alleged to have been precipitated from cable car by sudden jerks of car, instructions stating that proof that injuries were caused by operation of car raised "presumption" of negligence of carrier were prejudicial error, as requiring jury to presume facts stated in instructions until contrary was proved.—Mudrick v. Market St. Ry. Co., Cal.App., 74 P.2d 328, 10 C.J. p. 1094 note 21 [b].

25. U.S.—Otis Elevator Co. v. Walstad, C.C.A.Fla., 37 F.2d 895.
Ariz.—Pickwick Stages Corporation v. Messinger, 36 P.2d 168, 44 Ariz. 174.
Cal.—Snyder v. Tanner Motor Livery, App., 50 P.2d 1051—Barr v. Venice Giant Dipper Co., 32 P.2d 980, 138 Cal.App. 563—Hellman v. Los Angeles Ry. Corporation, 27 P.2d 946, 135 Cal.App. 627, rehearing denied 28 P.2d 384, 135 Cal.App. 627—Lynch v. Market St. Ry. Co., 19 P.2d 1009, 130 Cal.App. 433—Holt v. Yellow Cab Co. of San Diego, 12 P.2d 472, 124 Cal.App. 385—Roher v. Leonard & Holt, 276 P. 357, 97 Cal.App. 720—Kilgore v. Brown, 266 P. 297, 90 Cal.App. 555—Burke v. Dillingham, 258 P. 627, 84 Cal.App. 736—Horney v. Dillingham, 253 P. 970, 81 Cal.App. 443.
N.Y.—Plumb v. Richmond Light & R. Co., 187 N.Y.S. 38, 195 App.Div. 254, affirmed 135 N.E. 504, 233 N.Y. 285.
Ohio—Columbus Ry., Power & Light Co. v. Lombard, 168 N.E. 619, 33 Ohio App. 47.
S.C.—Comer v. Atlantic Coast Line R. Co., 90 S.E. 188, 105 S.C. 480.

Instructions held proper or erroneously refused

(1) In action for injuries from fall of passenger elevator resulting from breaking of cable, it was proper for court, in instructing jury as to presumption of negligence, to omit to state that the injury must have resulted from the operation of elevator in order to raise such presumption—Campbell v. Bradbury, 176 P. 685, 179 Cal. 364.

(2) A customer's action against storekeeper for injuries sustained on escalator when escalator suddenly jerked is properly submitted under res ipsa loquitur rule, notwithstanding testimony that electrical current was supplied by power company and that interruption of current by power company would cause escalator to jerk, since testimony of storekeeper's witnesses was not conclusive, as one of storekeeper's witnesses testified that interruption of current would not cause escalator to jerk, and since one operating instrumentalities as

those jurisdictions where by statute the presumption of negligence arises when an injury is shown to have been caused by the running of a train or cars, supra § 764 it is proper so to instruct the jury.[26] An instruction which places the burden of producing proof from which the presumption will arise on plaintiff in the first instance is proper.[27] It is error to give an instruction which places on plaintiff the additional burden of proving defendant's negligence,[28] or to instruct that the carrier's negligence cannot be presumed;[29] but the instructions must not relieve plaintiff of the burden resting on him on the whole case to show the carrier's negligence;[30] and where the carrier has undertaken to meet the prima facie case by showing the injury was not the result of negligence, an instruction requiring plaintiff to prove negligence by a preponderance of the evidence is not erroneous.[31] No instruction on the presumption of negligence arising from the accident need be given when plaintiff has clearly proved the negligence of the carrier as alleged,[32] and in such a case, it is proper to instruct that plaintiff cannot recover unless he has proved by a preponderance of the evidence that the accident happened as claimed in his testimony.[33] No instruction on the presumption of negligence

carrier of passengers cannot escape liability under res ipsa loquitur rule by procuring current from another —Hartnett v. May Department Stores, Co, Mo.App., 85 S.W.2d 644.

(3) Instruction that railroad is presumed negligent in wreck of train and injury to passenger is not erroneous.—Schulz v St. Louis-San Francisco Ry. Co., 4 S.W.2d 762, 319 Mo. 8.

(4) An instruction on the res ipsa loquitur doctrine is proper, and is erroneously refused where the carrier's negligence has been alleged generally.

Cal.—Duran v. Pickwick Stages System, 35 P.2d 148, 140 Cal.App. 103—Johnson v Pickwick Stages System, 291 P. 611, 108 Cal.App. 279—Bourguignon v. Peninsular Ry. Co, 181 P. 669, 40 Cal.App 689.

Mo.—Porter v St. Joseph Ry, Light, Heat & Power Co., 277 S.W. 913, 311 Mo. 66

Instructions held erroneous

(1) In passenger's action for injuries resulting from premature movement of an elevator, charge that application of res ipsa loquitur rule meant that defendants, because accident had happened on their elevator, were required to explain if they could why accident happened was reversible error, since it stated, in effect, that defendants as a matter of law had duty of going forward with evidence, instead of permitting jury to determine significance of proof.—Wildauer v. Rudnevitz, 197 A. 252, 119 N.J.Law 471.

(2) Where plaintiff in action for wrongful death sustained when airplane crashed into mountain pleaded and introduced evidence to establish specific acts of negligence on part of pilot in traveling along unfamiliar course over dangerous mountainous area, which allegedly resulted in accident, submission of case to jury on theory of res ipsa loquitur was error, except to charge.—Goodheart v. American Airlines, 1 N.Y.S.2d 288, 252 App.Div. 660.

"Presumption" or "inference"

In action for death of passenger, when street car in which he was riding struck a truck, use of word "presumption" in instruction on doctrine of res ipsa loquitur instead of "inference" has been held not fatal—Atkinson v. United Railroads of San Francisco, 234 P. 863, 71 Cal.App 82.

Instruction that sudden starting of car "raises," an inference was erroneous, and should have been "warrants" or "authorizes" an inference of negligence—Williamson v. Salt Lake & O. Ry. Co., 172 P. 680, 52 Utah 84, L.R.A.1918F 588.

26. Ga.—Hill v. Chattanooga Ry. & Light Co, 93 S.E. 1027, 21 Ga.App. 104.

Injury in other jurisdiction

As the lex fori applies to all matters affecting the remedy, in passenger's action in Georgia for injury sustained in Tennessee, charge that on proof of injury by running of defendant's cars the presumption arose that allegations of negligence in petition were well founded was not error.—Hill v. Chattanooga Ry & Light Co., 93 S.E. 1027, 21 Ga.App. 104.

Instructions on statutory presumption held proper or not erroneous

(1) As permitting recovery without evidence negligence was proximate cause of injury—Western & A. R. R. v. Dobbs, 137 S.E. 407, 36 Ga.App. 516

(2) As failing to require proof of injury.—Western & A. R. R. v. Dobbs, supra.

(3) A charge that if plaintiff proved an injury while a passenger he would cast on carrier the burden showing that injury was not caused by its negligence, and that plaintiff by ordinary care could have avoided it, and that carrier must disprove its negligence by a preponderance of the testimony, was not reversible error because too general and indefinite.—Hines v Hendricks, 104 S.E. 520, 25 Ga.App 682.

Alighting passengers

A charge on statutory presumption against railroads is proper in suit by passenger injured in alighting from street car—Georgia Ry & Power Co. v. Gilbert, 146 S.E. 33, 39 Ga.App. 56, followed in 146 S.E. 34, 39 Ga.App. 58

27. Ga.—Pitner v. Southern Ry. Co, 141 S.E. 670, 37 Ga.App. 722
Mo.—Paul v St. Louis Public Service Co, App, 46 S.W.2d 910.
10 C.J. p 1095 note 24

28. Mo.—Fowlkes v. Fleming, 17 S.W.2d 511, 322 Mo. 718—Roberts v Schaper Stores Co, 3 S.W.2d 241, 318 Mo 1190.
10 C.J. p 1095 note 25.

Instruction held not to require proof of negligence

Charge placing burden of proving care on railroad after proof of injury to passenger was not objectionable as placing burden of proving railroad's negligence on passenger.—Pitner v. Southern Ry. Co., 141 S.E. 670, 37 Ga.App. 722.

29. Mo.—Carlson v. Wells, 276 S.W. 26, 42 A.L.R. 1319.

30. Colo.—Seeing Denver Co v. Morgan, 185 P. 339, 66 Colo. 565
Tex.—Lamar v. Panhandle & S. F. Ry. Co, Civ.App., 234 S.W. 605, reversed on other grounds, Com.App, 248 S.W. 34.

31. Miss.—Smith v. Gulf, M & N R. Co, 129 So. 599, 158 Miss. 188

32. Fla.—Atlantic Coast Line R. Co. v. Hamlett, 89 So. 337, 81 Fla. 872

Evidence held not specific

(1) As to cause of collision between street car and motorbus—Stegman v. People's Motorbus Co. of St. Louis, Mo.App, 297 S.W. 189, 193.

(2) As to cause of collision between street cars.—Fowlkes v. Fleming, 17 S.W.2d 511, 322 Mo. 718

33. Mo.—Powell v St. Joseph Ry., Light, Heat & Power Co., 81 S.W.2d 957, 336 Mo. 1016.

need be given when the presumption has been removed by the introduction of rebuttal testimony,[34] and the giving of such an instruction has been held erroneous where the testimony in the case sufficiently explains every material fact connected with the injury, as in such case the question of negligence or no negligence is to be decided from the facts of the case.[35] When the res ipsa loquitur rule applies, the jury should be instructed that the burden is on defendant to show facts rebutting the presumption of negligence thus raised,[36] and it is error to refuse to instruct that the only duty on defendant is to show reasonable care and that there is no duty to explain how the accident happened.[37]

Instructions on presumptions and the burden of proof must be in such terms as are not calculated to confuse or mislead the jury;[38] but the instruction need not refer in express terms to the burden of proof if it is so worded that the jury cannot fail to understand the law on the subject.[39]

§ 770. Verdict, Findings, and Judgment

General rules apply to verdicts, findings, and judgments in actions by passengers against carriers for personal injuries.

The verdict, findings, and judgment, in an action against a carrier for personal injuries, are governed by the rules applicable in civil cases generally.[40]

34. Ga.—Woodall v. Georgia Power Co., 165 S.E. 311, 45 Ga.App. 526—Holmes v. Georgia Power Co., 162 S.E. 403, 44 Ga.App. 588, reversed on other grounds Georgia Power Co. v. Holmes, 165 S.E. 284, 175 Ga. 487, conformed to Holmes v. Georgia Power Co., 165 S.E. 918, 45 Ga.App. 826.

Instruction held erroneous

In action against owner of building for injuries to plaintiff when freight elevator started, instruction that jury need not determine precise cause for starting, and that mere happening of accident, unexplained, constituted prima facie evidence of negligence, is erroneous, where defendant's evidence renders inapplicable the rule of res ipsa loquitur.—Courtney v. Gainsborough Studios, 174 N.Y.S. 855, 186 App.Div. 820.

35. Ga.—Seaboard Air Line Ry. Co. v. Fountain, 160 S.E. 789, 173 Ga. 593—Georgia Power Co. v. Braswell, 173 S.E. 763, 48 Ga.App. 654.

36. U.S.—Interstate Stage Lines Co. v. Ayers, C.C.A.Mo., 42 F.2d 611.
Cal.—Hellman v. Los Angeles Ry. Corporation, 27 P.2d 946, 135 Cal.App. 627, rehearing denied 28 P.2d 384, 135 Cal.App. 627—Holt v. Yellow Cab Co. of San Diego, 12 P.2d 472, 124 Cal.App. 385—Atkinson v. United Railroads of San Francisco, 234 P. 863, 71 Cal.App. 82.
Mo.—Whitlow v. St. Louis-San Francisco Ry. Co., App., 282 S.W. 525, certiorari quashed State ex rel. St. Louis & San Francisco Ry. Co. v. Daues, 290 S.W. 425, 316 Mo. 474.
10 C.J. p 1095 note 26.

Instructions held not erroneous

(1) As requiring carrier to disprove negligence by a preponderance of the evidence.—Lynch v. Market St. Ry. Co., 19 P.2d 1009, 130 Cal.App. 433—Atkinson v. United Railroads of San Francisco, 234 P. 863, 71 Cal.App. 82—10 C.J. p 1095 note 26 [a].

(2) As placing excessive burden on railroad.—Georgia Ry. & Power Co. v. Gilbert, 146 S.E. 33, 39 Ga.App. 56, followed in 146 S.E. 34, 39 Ga.App. 58.

(3) An instruction that if jury found that while plaintiff was passenger thereon, escalator stopped and violently jerked, and that such happening was extraordinary, and that plaintiff was injured thereby, jury might infer that it was occasioned by some negligence of defendant storekeeper, and that storekeeper had burden of bringing forward evidence to rebut inference of negligence and to establish that injuries resulted from cause which highest degree of care would not have avoided, was not erroneous on ground that it placed on storekeeper burden of showing that jerking did not result from storekeeper's negligence.—Hartnett v. May Department Stores Co., Mo.App., 85 S.W.2d 644.

Instructions held erroneous

(1) As requiring defendant to overcome presumption of negligence by a preponderance of the evidence.
Cal.—Olinger v. Pacific Greyhound Lines, 46 P.2d 774, 7 Cal.App.2d 484.
Iowa.—Preston v. Des Moines Ry. Co., 241 N.W. 648, 214 Iowa 156.

(2) As placing too great a burden on the carrier.—Hines v. Beard, 107 S.E. 717, 130 Va. 286.

37. N.Y.—Courtney v. Gainsborough Studios, 174 N.Y.S. 855, 186 App.Div. 820.

38. Mo.—Watson v. Chicago Great Western R. Co., 287 S.W. 813, 221 Mo.App. 621.
10 C.J. p 1094 note 22.

Instructions held not misleading, confusing, or prejudicial

(1) Charge on the law as to presumption of negligence and the law as to carrier's diligence in action for assault.—Bugg v. Carter, 131 S.E. 297, 34 Ga.App. 819.

(2) Instruction on presumption of negligence when vehicle is operated in excess of statutory speed limit.—Yellow Cab Co. v. Kruszynski, Ind.App., 196 N.E. 136.

(3) Instruction on burden of proof as to avoidance of negligence of motorbus driver colliding with car while on wrong side of road, injuring bus passenger.—Offerdahl v. Motor Transit Co., 252 P. 773, 80 Cal.App. 667.
10 C.J. p 1094 note 22 [a].

Instructions held not clear

In stage passenger's action against stage proprietor and owner of an automobile for injuries sustained when the stage tipped over in avoiding the automobile, instruction that plaintiff was not required to show particularly what specific act of negligence produced the injury, but only that accident could not have ordinarily occurred, had due care been employed by defendants, if not actually erroneous, as stating the rule of res ipsa loquitur, should have been omitted in interest of clarity.—Freeman v. Adams, 218 P. 600, 63 Cal.App. 225.

Instructions held erroneous

Instruction putting burden on passenger injured by derailment to prove every fact necessary for recovery is error where general instruction authorized recovery unless derailment could have been avoided by highest care.—Watson v. Chicago Great Western R. Co., 287 S.W. 813, 221 Mo.App. 621.

39. N.Y.—Buck v. Manhattan R. Co., 10 N.Y.S. 107, 15 Daly 550, affirmed 31 N.E. 628 mem., 134 N.Y. 589 mem.
10 C.J. p 1094 note 23.

40. **Construction of findings or verdicts**

(1) In action for injuries to passenger, special finding that plaintiff signed release and received a sum as therein stated will not be construed as finding that she received such sum understandingly as satisfaction of claim, in view of rule requiring findings to be harmonized with general verdict.—Orr v. Mis-

Thus the verdict or findings must be specific and certain,[41] must be pertinent to the issues made by the pleadings and evidence,[42] and must find all facts essential to a recovery or a defense.[43]

souri Pac. Ry. Co., 157 P. 421, 98 Kan 120.

(2) Finding that acts of agents or servants were wanton and reckless does not include a finding that injury and death were caused by railroad's negligence—Cotter v. Boston, R B & L. R. Co., 129 N E. 426, 237 Mass 68.

(3) In an action against a railroad company by a passenger who was shot as a result of the alleged negligence of the conductor in handling a pistol, findings that the conductor was negligent, that such negligence was the proximate cause of the injury, that the passenger requested the conductor to show him the operation of the safety device, but did not request to see how the pistol operated, together with findings that the passenger was guilty of no negligence, etc., do not necessitate a judgment for the railroad company on the theory that, as the passenger requested to see the operation of the safety device, the conductor was outside of his duties when he discharged the pistol—Texas Midland R R. v. Monroe, Tex.Civ.App, 229 S.W. 349, dismissed for want of jurisdiction.

(4) In action for injuries to bus passenger sustained in collision with a truck, a finding that the driver of the bus was negligent and that such negligence was the proximate cause of the accident necessarily involved the finding that the negligence of the driver of the truck was not the sole cause of the injury—Interstate Casualty Co. of Birmingham v Hogan, Tex.Civ App, 232 S.W. 354.
10 C J p 1095 note 27 [a].

Conclusiveness of findings

(1) The finding against plaintiff passenger on the first count of her petition against defendant street railway seeking damages for injuries when a car door closed on her wrist concluded the question of defendant street railway's liability as to the cause of action counted on—Carney v. United Rys. Co. of St. Louis, 226 S W. 308, 205 Mo.App. 495.

(2) Finding against plaintiff passenger on the first count of her petition against defendant street railway seeking damages for injuries when a car door closed on her wrist did not conclusively establish the fact that plaintiff passenger received no blow whatever by the closing of the door, so that she was not dazed when she alighted to the street, and unable momentarily to extricate herself from danger from the swing of the rear end of the car, which struck her and inflicted the injuries for which she seeks recovery in the second count—Carney v. United Rys. Co. of St. Louis, supra.
10 C J p 1095 note 27 [b]

Right to findings on evidence

In bus passenger's action, where evidence showed that automobile struck defendant's bus near left front wheel, defendant was entitled to finding by jury based on such testimony.—South Plains Coaches v. Behringer, Tex Civ App., 32 S.W 2d 959, error dismissed.

41. Cal.—Frascona v. Los Angeles Ry. Corporation, 191 P. 968, 48 Cal App. 135
10 C.J p 1095 note 28.

Answers nullifying themselves

Answers to special interrogatories whether defendant's employees willfully killed deceased, "Yes, by negligence" nullify themselves—Ft. Wayne & Wabash Valley Traction Co. v. Justus, 115 N E 585, 186 Ind. 464, reversing, App, 108 N.E. 754.

42. Cal—Frascona v. Los Angeles Ry. Corporation, 191 P. 968, 48 Cal App. 135.
Ill.—West Chicago St. R. Co. v. McNulty, 46 N E. 784, 166 Ill. 203, affirming 64 Ill App. 549.
10 C.J. p 1095 note 29.

Findings held within issues

In action against taxicab company by passenger for injuries sustained when taxicab ran into curbing when driver attempted to avoid collision at intersection, finding of jury that driver was guilty of negligence in failing to exercise proper precautions prior to entering intersection was within issues framed by pleadings alleging that driver failed to exercise utmost prudence and foresight to avoid injury to passenger prior to, and at time of, collision—Jerobek v. Safeway Cab, Transfer & Storage Co., 73 P.2d 1097, 146 Kan. 859.

Findings not responsive to issues

Where a complaint alleged defendant's act of negligence in starting the street car before plaintiff alighted, a finding that defendant operated its car in a negligent manner, thereby injuring plaintiff, is insufficient and not responsive to the issue as tendered by the complaint.—Frascona v. Los Angeles Ry. Corporation, 191 P. 968, 48 Cal App. 135.

Findings adopting plaintiff's theory of case

In an action for injuries sustained by a jitney bus passenger riding on the running board, from contact with a standing truck, where there was evidence that the fender on the truck was higher than that on the bus, and might strike a passenger on the running board without first striking the fender of the bus, and the court's finding did not state what part of the two machines came in contact with plaintiff's leg, it cannot be said that the court adopted the theory that plaintiff's leg protruded, rather than the theory that the injury was due to the difference in height of the two fenders—Ivancich v. Davies, 199 P. 784, 186 Cal. 520

43. Wis.—Jirachek v. Milwaukee Electric R., etc., Co, 121 N W 326, 139 Wis. 505, 131 Am.S.R. 1070.
10 C.J. p 1095 note 30.

Finding on proximate cause

In action against railroad for injury to shipper when riding in a box car, in absence of affirmative finding that injury in car, and not a subsequent injury in a wagon, was proximate cause of death, or of finding that injury in car and subsequent injury concurred as cause of death, there was no basis for judgment against the railroad.—Missouri, K & T Ry. Co. of Texas v. Norris, Tex Com.App., 222 S.W. 1097, reversing, Civ.App., 184 S.W. 261.

Findings held unnecessary

(1) In a personal injury action against a street railway company, where the allegations of the complaint charge clearly that the injuries were received as a direct result of defendant's negligence in the operation of its south-bound car, and the court having so found, the result of the action could not be changed by a finding for defendant with respect to negligence in the operation of its north-bound car which struck plaintiff subsequently, and failure to make such finding is not erroneous—Rucker v. San Diego Electric Ry Co, 183 P. 578, 41 Cal.App. 787.

(2) In a passenger's personal injury action against a street railway company, where the court sitting without a jury found that defendant was free from all the acts of negligence charged against it in the complaint, outside agencies contributing to the cause of accident were immaterial and need not be found, where the findings made adequately cover the issues pleaded.—Frederick v. San Francisco-Oakland Terminal Rys., 191 P. 1020, 48 Cal.App. 336

(3) Where a passenger's complaint against his carrier alleged carelessness, recklessness, and negligence on the part of defendant's autobus driver causing collision with another automobile, a finding of negligence following substantially the allegation of the complaint was sufficient without a specific finding that the driver of the other automobile, not mentioned in the pleadings, was negligent, although, if he was, it would be probable that the defendant was

The verdict, findings, or judgment must be supported by the weight of the evidence;[44] otherwise it should be set aside,[45] although a verdict on conflicting evidence ordinarily will not be disturbed,[46] especially where it is not manifestly against the weight of the evidence.[47]

A verdict that the carrier was not negligent, but was liable to plaintiff as a passenger for the injuries sustained, is self-contradictory,[48] as is a verdict exonerating the owner of a vehicle from negligence of the driver, while holding liable a company engaged with the owner in the joint enterprise of operating the vehicle.[49]

Where final instructions, which become the law of the case, leave no ground on which the jury can find defendant negligent, a verdict against the carrier, contrary to the law of the case, cannot stand.[50]

Where special findings, or answers to special interrogatories, are inconsistent and in irreconcilable conflict with the general verdict, the former control, and judgment should be entered on the special findings notwithstanding the general verdict;[51] but special findings which are inconsistent with, or contradictory of, each other, or which are uncertain in their meaning, will not overcome the general verdict.[52]

A judgment cannot be entered on findings inconsistent with each other.[53] It is not improper, in an action against the carrier and its employee, to render judgment against the carrier on a verdict against it when no verdict is returned as to the employee.[54]

§ 771. Damages

a. In general
b. Expenses; loss of time
c. Physical and mental suffering

a. In General

A passenger sustaining injury as a result of the carrier's negligence or breach of duty is entitled to damages.

Following the general rule of damages, a passenger who has sustained injury through the carrier's negligence or breach of duty is entitled to compensation for both the direct and the consequential results of the act or omission complained of, the consequential damages being limited to those which are the proximate results of the wrong done,[55] and not including those which are too remote, as not be-

not.—Baker v. Western Auto Stage Co, 192 P. 73, 48 Cal.App. 283.

44. N.Y.—Giltman v. Brooklyn Heights R. Co., 113 N.Y.S. 1046, 129 App.Div. 654.

45. Me.—Lawford v. Bangor Ry. & Electric Co., 102 A. 180, 116 Me. 520.
10 C.J. p. 1095 note 32.

46. Mich.—Musliner v. Detroit United Ry., 163 N.W. 894, 197 Mich. 409.
10 C.J. p. 1095 note 33.

47. Ill.—Christ v. Chicago R. Co., 191 Ill.App. 69.

48. Pa.—Jones v. Pennsylvania R. Co., 137 A. 796, 289 Pa. 424.

49. Ind.—United Transp. Co. v. Jeffries, 5 N.E.2d 524, 211 Ind. 226

50. N.Y.—Lang v. Interborough Rapid Transit Co., 183 N.Y.S. 270, 193 App.Div. 56

51. Ill.—Ebsary v. Chicago City R. Co., 45 N.E. 1017, 164 Ill. 518, affirming 61 Ill.App. 265
10 C.J. p. 1096 note 35.

Special findings held inconsistent with general verdict

Where the jury returned a general verdict in favor of a passenger, who asserted that she was thrown to the floor by the sudden starting of the car and injured, but in response to a special question, as to whether the car started in the usual way, stated that they did not know, the finding is so inconsistent as to destroy the general verdict in the passenger's favor.—Wall v. Union Traction Co., 196 P. 434, 108 Kan. 531.—10 C.J. p. 1096 note 35 [a].

Special findings held not inconsistent with general verdict

(1) In action by one struck by truck on station platform.—Lake Erie & W. R. Co. v. McConkey, 113 N.E. 24, 62 Ind.App. 447.

(2) In action for injuries received while boarding bus.—Stradling v. Hahn, 163 N.E. 527, 88 Ind.App. 117.

(3) In an action by a passenger, who claimed to have been thrown from a car while attempting to alight.—Fosche v. Union Traction Co., 196 P. 423, 108 Kan. 585.

(4) In an action for injuries resulting from tripping over rail at station.—Cleveland Ry. Co. v. Halterman, 153 N.E. 922, 22 Ohio App. 234

(5) In action by passenger injured by tripping over baggage when ordered to stand back by bus driver who was fighting fire under bus.—Greyhound Lines v. Kunze, 181 N.E. 503, 41 Ohio App. 508
10 C.J. p. 1096 note 35 [b].

52. Ind.—Louisville, etc., Tract. Co. v. Worrell, 86 N.E. 78, 44 Ind.App. 480
10 C.J. p. 1096 note 36.

53. Tex.—Stiles v. Union Terminal Co., Civ.App., 1 S.W.2d 947, error refused.
10 C.J. p. 1096 note 37.

Findings held not inconsistent

(1) In an action for injuries to a jitney bus passenger riding on the running board.—Ivancich v. Davies, 199 P. 784, 186 Cal. 520.

(2) In action by passenger falling or thrown from train.—Galveston, H. & S.A. Ry. Co. v. Easton, Tex.Civ.App., 257 S.W. 924.

(3) In taxicab passenger's action against cab company and street railway.—Dallas Railway & Terminal Co. v. Price, Tex.Civ.App., 94 S.W.2d 884, error granted.

(4) In street car passenger's action for injuries sustained while alighting.—Prellwitz v. Milwaukee Electric Ry. & Light Co., 157 N.W. 523, 163 Wis. 84

54. Kan.—Whitesell v. Joplin & P. Ry. Co., 222 P. 133, 115 Kan. 53.

55. Minn.—Ford v. Minneapolis St. R. Co., 107 N.W. 817, 98 Minn. 96, 8 Ann.Cas. 902
10 C.J. p. 982 note 13.

Loss of property in wrongful ejection of passenger

Although a carrier is not liable on its contract for loss of a passenger's effects which the passenger keeps in her own possession, it is liable for a loss sustained as a result of the wrongful acts of its

ing the legal or natural result of the negligence or wrong.[56] Where a passenger has received personal injuries by reason of the carrier's negligence, he is, as a general rule, entitled to full compensation for all damages past, present, and prospective, including the pecuniary loss, physical and mental suffering, and any incurable hurt, proximately resulting from the carrier's negligence;[57] but to recover for future consequences it must be reasonably certain that such consequences will follow from the injury.[58]

b. Expenses; Loss of Time

The damages recoverable by the passenger include reasonable expenses, and compensation for time lost from the passenger's business or profession, including diminished earning capacity.

The pecuniary loss recoverable by the injured passenger includes reasonable expenses for medical attendance and nursing,[59] even though the bills therefor have not been paid,[60] but there must be proof of the amount contracted to be paid or of the reasonable value of such services;[61] and it has been held that there can be no recovery if the services were rendered gratuitously.[62] If further expenses for a surgical operation or medical treatment or attendance will necessarily be required in the future, that fact also may be considered in estimating the damages.[63]

Loss of time. Damages for loss of time during which the injured passenger is disabled from attending to his business or profession may also be recovered,[64] including damages for such prospective loss of time, or loss of earnings, as is reasonably certain to result in the future,[65] such as from his diminished capacity to earn money, by reason of the permanent nature of his injury.[66] It is not essential to a recovery for loss of time that there is an actual deduction from the injured passenger's salary for the time lost by reason of his injuries.[67] In all cases prospective damages must be legally certain in order to be recoverable.[68]

c. Physical and Mental Suffering

Recovery may be had for mental, as well as physical, suffering, and in some jurisdictions mental suffering alone is sufficient, but in others mental suffering must be connected with bodily pain, or with circumstances of malice, insult, or inhumanity.

A passenger who has had personal injury inflicted on him through the carrier's negligence is entitled to reasonable compensation for both the physical pain and the mental anguish resulting from the injury,[69] and this includes, where the passenger has not fully recovered at the time of the trial, damages for future physical and mental suffering which is reasonably certain to result from the injury.[70] Thus, in cases of active maltreatment of the passenger, as where he has been assaulted by employees of the carrier or by fellow passengers, in the presence of the conductor in charge of the train and without interference on his part, the carrier is liable to make full compensation for the injuries inflicted, including damages for outraged feelings and mental suffering caused by such maltreatment;[71] and, where a passenger is assaulted by the carrier's employees, he is entitled to at least

servants in assaulting and arresting the passenger and ejecting her from the train, as a result of which she was separated from her effects and they were lost.—Louisville & N. R. Co. v. Mason, 251 S.W. 184, 199 Ky. 337.

56. U.S.—Haile v. Texas, etc., R. Co., La., 60 F. 557, 9 C.C.A. 134, 23 L.R.A. 774.
10 C.J. p 982 note 14.

Disability not caused by defendant
Where paralysis sustained by apoplexy victim would in any event have followed stroke, victim could not recover damages for disability from bus company which had failed to summon assistance for victim who was riding as a passenger on company's bus at time stroke was sustained.—Searcy v. Interurban Transp. Co., 179 So. 75, 189 La. 183, reversing, App., 179 So. 93, reversing 171 So. 468.

57. U.S.—Denver, etc., R. Co. v. Roller, Cal., 100 F. 738, 41 C.C.A. 22, 49 L.R.A. 77.
10 C.J. p 983 note 15.

58. Cal.—Cordiner v. Los Angeles Tract. Co., 91 P. 436, 5 Cal.App. 400.
10 C.J. p 983 note 16.

59. Ill.—Chicago City R. Co. v. Henry, 75 N.E. 758, 218 Ill. 92.
10 C.J. p 983 note 18.

60. Mo.—Wilbur v. Southwest Missouri Electric R. Co., 85 S.W. 671, 110 Mo.App. 689.

61. Iowa.—Bowsher v. Chicago, etc., R. Co., 84 N.W. 958, 113 Iowa 16.
10 C.J. p 983 note 20.

62. Ill.—Malott v. Woods, 109 Ill. App. 512.
10 C.J. p 983 note 21.

63. Ill.—Chicago City R. Co. v. Henry, 75 N.E. 758, 218 Ill. 92.
10 C.J. p 983 note 22.

64. Ill.—Chicago Union Tract. Co. v. Brethauer, 79 N.E. 287, 223 Ill. 521, 114 Am.S.R. 352, affirming 125 Ill.App. 204.
10 C.J. p 983 note 23.

65. U.S.—Washington & G. R. Co. v. Harmon, D.C., 13 S.Ct. 557, 147 U.S. 571, 37 L.Ed. 284.
10 C.J. p 984 note 24.

66. Ill.—Chicago Cons. Tract. Co. v. Schritter, 78 N.E. 820, 222 Ill. 364, affirming 124 Ill.App. 578
10 C.J. p 984 note 25.

67. Ind.—Ohio, etc., R. Co. v. Dickerson, 59 Ind. 317.
10 C.J. p 984 note 26.

68. Ky.—Louisville, etc., R. Co. v. Minogue, 14 S.W. 357, 90 Ky. 369, 29 Am.S.R. 378.
10 C.J. p 984 note 27.

69. S.C.—Medlin v. Southern Ry. Co., 141 S.E. 185, 143 S.C. 91, 56 A.L.R. 767.
10 C.J. p 984 note 29.

70. U.S.—Denver, etc., R. Co. v. Roller, Cal., 100 F. 738, 41 C.C.A. 22, 49 L.R.A. 77.
10 C.J. p 985 note 30.

71. N.Y.—Barad v. New York Rapid Transit Corporation, 295 N.Y.S. 901, 162 Misc. 458.
10 C.J. p 985 note 31.

nominal damages, even though the damages alleged resulted from other sources.[72]

Necessity for physical injury, insult, or malice. It is generally held, however, that mental suffering is the subject of damages only when connected with bodily pain, or with circumstances of malice, insult, or inhumanity,[73] although some authorities support the more liberal rule that mental suffering, although not itself sufficient to support an action, constitutes an element of damages whenever it naturally and proximately ensues from the injury complained of, and such injury is sufficient to give a passenger a cause of action;[74] and the rule precluding recovery for mental shock alone does not prevent recovery for an assault where, before stopping the train, the conductor took hold of the passenger to eject him for nonpayment of fare.[75]

§ 772. Exemplary Damages

a. In general
b. For acts of employees

a. In General

Exemplary damages may be recovered of a carrier guilty of willfulness, wantonness, or gross negligence toward passengers.

Where a carrier is guilty of willfulness, wantonness, or gross negligence in the selection of its employees, the establishment of regulations, or in failing to provide safe appliances, whereby a passenger is injured, exemplary damages may be awarded against it.[76] However, in order that the carrier may be held liable for exemplary damages for defects in its equipment, it must appear that it had knowledge of such defects.[77]

b. For Acts of Employees

Mere negligence on the part of its employees will not subject a carrier to liability for exemplary damages. While exemplary damages may generally be recovered for malicious, wanton, or grossly negligent acts of the carrier's employees, in some jurisdictions participation, authorization, or ratification of such acts by the carrier is essential.

Exemplary damages cannot be assessed against a carrier for injuries caused to a passenger by the acts of its employees, where they could not have been assessed against such employees; in other words, in the absence of willful misconduct or reckless indifference on the part of the carrier's employees affecting the safety of the traveling public in general, the damages must be confined to compensation, and exemplary damages cannot be assessed against the carrier for injuries caused by the merely negligent or wrongful acts of its employees.[78]

There is some conflict in the authorities as to the right of a passenger to recover exemplary damages from a carrier for injuries sustained through the malicious, wanton, or grossly negligent acts of the carrier's employees; and indeed the right to recover such damages in a civil action against the carrier, or in any civil action, has been questioned.[79] When the passenger's action for damages for an assault and battery committed on him by an employee of the carrier is based on the theory of a breach of the contract of safe transportation, no punitive damages can be recovered.[80]

72. Tex.—Fielder v. St. Louis, etc., R Co., 112 S.W. 699, 51 Tex.Civ. App. 244.

73. Mo.—Briggs v. Lusk, App., 190 S.W. 380.
10 C.J. p 985 note 33

74. Ala.—Louisville & N. R Co. v. Robinson, 105 So 874, 213 Ala 522.
N.Y.—Gillespie v. Brooklyn Heights R. Co., 70 N.E. 857, 178 N.Y. 347, 102 Am.S.R 503, 66 L.R.A. 618, reversing 81 N.Y.S. 1127, 80 App.Div. 640
S.C.—Lipman v. Atlantic Coast Line R. Co., 93 S.E. 714, 108 S.C. 151, L.R.A.1918A 596.
10 C.J. p 986 note 34.

Insulting and abusive language
Railroad passenger, abused and insulted by conductor, may recover for mental suffering without showing that acts would have caused mental suffering to person of ordinary prudence—Medlin v. Southern Ry. Co., 141 S.E. 185, 143 S.C 91, 56 A.L.R. 767—10 C.J. p 986 note 34 [c].

75. Mo.—Briggs v. Lusk, App., 190 S.W. 380.

76. W.Va.—Barker v. Ohio River R Co., 41 S.E. 148, 51 W.Va. 423, 90 Am.S.R. 808.
10 C.J. p 986 note 36.

77. Ala.—Richmond, etc., R. Co v. Vance, 9 So. 574, 93 Ala. 144, 30 Am.S.R. 41.
10 C.J. p 986 note 37.

78. Kan.—Middleton v. Missouri Pac R. Co., 212 P. 909, 112 Kan. 793.
Ky.—Louisville & N. R. Co. v. Wilkins' Guardian, 136 S.W. 1023, 143 Ky. 572, Ann.Cas.1912D 518.
N.C.—Meeder v. Seaboard Air Line Ry., 91 S.E. 527, 173 N.C. 57.
Pa.—Gerlach v. Pittsburgh Rys. Co., 94 Pa.Super. 121.
W.Va.—Cooper v. Chesapeake & O Ry. Co., 132 S.E. 739, 101 W.Va. 268.
10 C.J. p 987 note 38.

Liability dependent on conduct of employee
Where an elevator was in charge of the engineer of a large building, to whom the suggestions of the inspector were referred, the owner's liability for exemplary damages for injury to a passenger was determinable by the conduct of the engineer.—Reel v. Consolidated Inv. Co., Mo., 236 S.W. 43.

Where employee's acts courteous
Where railroad conductor, upon discovering, as he thought, that plaintiff had not purchased ticket to her destination, treated her with sufficient courtesy in insisting she pay fare, etc., she could not recover punitive damages in her action against him and the road.—Mobile & O. R. Co. v. Farrior, 75 So. 777, 115 Miss. 96.

79. Mo.—McKeon v. Citizens' R. Co., 42 Mo. 79.
10 C.J. p 987 note 39.

80. Ark.—Missouri Pac. R Co. v. Prude, 247 S.W. 785, 156 Ark. 583, reversed on other grounds 44 S.Ct. 450, 265 U.S. 99, 68 L.Ed. 919.

In some jurisdictions, however, exemplary damages may be recovered against the carrier for injuries caused by the tortious acts of its employees, within the scope of their employment, without reference to any authorization, participation, or ratification of the torts by the carrier, where such acts are committed maliciously, wantonly, or with gross negligence.[81] Thus the carrier may be liable in exemplary damages for wanton misconduct or gross negligence of its conductor or other employees in assaulting a passenger, or in failing to protect him from assault by fellow passengers or others,[82] without regard to whether the employee previously manifested ill will or malice toward the passenger,[83] or for his malicious, willful, and wanton insulting conduct toward a passenger;[84] but, in other jurisdictions, however, the carrier is liable for exemplary damages in such cases only where it has participated in, previously authorized, or subsequently ratified its employee's willful, wanton, or malicious acts, or gross negligence,[85] or where it has been guilty of negligence in employing or retaining the employee.[86] Thus in these jurisdictions a carrier is not liable in exemplary damages for a malicious or wanton assault on a passenger by one of its employees, when it did not authorize, participate in, or ratify such assault.[87] The mere subsequent retention of the employee who has been guilty of such willful or wanton conduct does not of itself amount to such a ratification of his acts as to render the carrier liable for exemplary damages,[88] but it is evidence thereof, and when considered together with the other circumstances may be sufficient to show such ratification,[89] as where the carrier retains such employee with knowledge that he is incompetent or unfit for the position he occupies.[90]

"Gross negligence," within the above rules, has been held to consist in that entire want of care which raises a presumption of a conscious indifference to the passenger's safety,[91] or in that course of conduct which, under the particular circumstances, discloses a reckless indifference to consequences without the exertion of any substantial effort to avoid them.[92] On the other hand, however, it has been held that negligence may be gross without being willful or intentional,[93] and that the absence of slight care in the management of a train or in keeping the track in repair is such gross negligence as will authorize exemplary damages.[94]

§ 773. Amount of Damages

a. In general
b. Circumstances affecting amount
c. Excessive or inadequate damages

a. In General

The amount of damages, except exemplary damages, should be such a sum as the jury determines, under

81. S.C.—Phillips v. Atlantic Coast Line R. Co., 158 S.E. 274, 160 S.C. 323, 76 A.L.R. 415.
10 C.J. p. 987 note 40.

Failure to take up passenger
The first duty of a train crew, in case of a wreck, is to the passengers, and a conductor failing to stop on signal and pick up a passenger who was on his train when wrecked, and whom he had promised to pick up when he overtook him, warrants punitive damages — Nelson v. Charleston & W. C. Ry. Co., 121 S.E. 198, 92 S.C. 151.

82. Ky.—Ohio Valley Electric Ry. Co. v. Webb, 259 S.W. 697, 202 Ky. 341.
Mo.—Dorton v. Kansas City Rys. Co., 224 S.W. 30, 204 Mo.App. 362.
N.C.—Clark v. Bland, 106 S.E. 491, 181 N.C. 110.
10 C.J. p. 988 note 41.

83. Tex.—Houston E. & W. T. Ry. Co. v. Mathews, Civ.App., 1 S.W.2d 754, reversed on other grounds, Com.App., 12 S.W.2d 163.

84. Miss.—Illinois Cent. R. Co. v. Hickman, 111 So. 588, 146 Miss. 394.
S.C.—Phillips v. Atlantic Coast Line R. Co., 158 S.E. 274, 160 S.C. 323, 76 A.L.R. 415.
10 C.J. p. 988 note 42.

Inexcusable conduct
Evidence that a conductor, although notified that a passenger required assistance in alighting, because old and weak, refused to furnish a step box or permit a boy to get one, and was rude and rough and used insulting language, and threatened to carry her if she could not get off, tended to show inexcusable conduct justifying punitive damages.—Holmes v. Atlantic Coast Line R. Co., 106 S.E. 567, 181 N.C. 497.

85. U.S.—Pullman Co. v. Hall, C.C.A.W.Va., 46 F.2d 399
Ohio.—Columbus Ry., Power & Light Co. v. Harrison, 143 N.E. 32, 109 Ohio St. 526—Cleveland Ry. Co. v. Lesko, 177 N.E. 606, 39 Ohio App. 339.
10 C.J. p. 988 note 43.

86. Ohio.—Columbus Ry., Power & Light Co. v. Harrison, 143 N.E. 32, 109 Ohio St. 526—Cleveland Ry. Co. v. Lesko, 177 N.E. 606, 39 Ohio App. 339
10 C.J. p. 989 note 44.

87. N.D.—Voves v. Great Northern R. Co., 143 N.W. 760, 26 N.D. 110, 48 L.R.A.,N.S., 30 and note.
10 C.J. p. 989 note 45.

88. U.S.—Pullman Co. v. Hall, C.C.A.W.Va., 46 F.2d 399
10 C.J. p. 989 note 46.

89. Tex.—Denison, etc., R. Co. v. Randell, 69 S.W. 1013, 29 Tex.Civ.App. 460.
10 C.J. p. 989 note 47.

90. N.Y.—Cleghorn v. New York Cent., etc., R. Co., 56 N.Y. 44, 15 Am.R. 375.
10 C.J. p. 989 note 48.

91. U.S.—Milwaukee & St. P. R. Co. v. Arms, Iowa, 91 U.S. 489, 23 L.Ed. 374
10 C.J. p. 990 note 49.

92. Miss.—Teche Lines v. Pope, 166 So. 539, 175 Miss. 393

Operation of bus at railroad crossing
A bus driver, who made no attempt to stop bus until within less than ten feet of railroad crossing, is "grossly negligent," entitling passenger injured in collision with train to punitive damages.—Teche Lines v. Pope, 166 So. 539, 175 Miss. 393.

93. Ill.—Jacksonville, etc., R. Co. v. Southworth, 32 Ill.App. 307, affirmed 25 N.E. 1093, 135 Ill. 250
Ky.—Louisville, etc., R. Co. v. McCoy, 81 Ky. 403.

94. Ky.—Louisville, etc., R. Co. v. McCoy, 81 Ky. 403.
10 C.J. p. 990 note 51.

proper instructions, will fairly and reasonably compensate the passenger for his injuries.

Where the damages to a passenger are only such as are capable of direct proof and assessment at a money value, of course no question can be made as to the amount of damages to be recovered; but in all those actions of passengers against carriers that involve the consideration of physical pain or mental suffering, or both, and which constitute much the larger number of such actions, the law can, in the nature of things, furnish no definite estimate of the compensation to be awarded, and the amount is therefore committed to the judgment and sound discretion of the jury, under proper instructions from the court as to the elements to be considered, and, except where exemplary damages are proper, should be such sum as will fairly and reasonably compensate the person injured,[95] not exceeding the amount claimed.[96]

When the action is against both the carrier and an employer, a larger amount of damages may be awarded against the carrier than against its employee.[97]

A passenger may recover substantial damages from the carrier for insulting conduct of the carrier's employee, and is not limited to nominal damages.[98]

b. Circumstances Affecting Amount

(1) In general

(2) Effect of passenger's negligence or imprudence

(1) In General

The passenger's position in life, his business or profession, his means for earning money, and the extent to which they are affected may be considered in determining the amount of damages to be awarded.

In determining the amount of damages, aside from the elements heretofore considered, the jury may take into consideration the injured passenger's position in life, the business or profession in which he is engaged, the means at his disposal to earn money, and the extent to which they are affected in consequence of the injury.[99] Thus, the jury may consider the business in which he is engaged, and the extent and amount of his ordinary business,[1] and his expectation of life, where the injury is permanent.[2] However, the injured passenger cannot show the number of his family and the fact that they are dependent on him for support, for the purpose of increasing the damages.[3]

Deduction of insurance money. The carrier cannot avoid or diminish its liability to make full compensation for the injury inflicted, by showing that the passenger has received a sum from an insurance company on account of his injury.[4]

Previously existing disease or injury. Where the negligence of a carrier results in the infliction of an injury on a passenger, and the passenger's physical condition at the time of the injury is such, by reason of a previously existing injury or diseased condition, as to aggravate the injury, the carrier cannot claim immunity from the aggravated result because it did not know of the passenger's physical condition and could not foresee the special injury complained of; the passenger is entitled to full compensation for the injury inflicted.[5]

(2) Effect of Passenger's Negligence or Imprudence

It is proper to consider the passenger's negligence or imprudence in determining the amount of the award; and provocative language or conduct on his part is proper for consideration in a passenger's action for assault by an employee.

While the carrier is bound to make compensation for all the consequences resulting directly and proximately from its wrong, the passenger on the other hand is bound by law to use ordinary care and prudence to render his injury or loss no greater than is necessary under the circumstances; and, where a passenger has suffered by reason of the carrier's wrong, no aggravation of the injury or unreasonable expense incurred, attributable to the passenger's negligence or voluntary act of imprudence, may be considered in determining the compensation to which he is entitled,[6] but, if the passenger uses

95. Ala.—Birmingham R., etc., Co. v Rutledge, 39 So. 338, 142 Ala. 195. 10 C.J. p. 990 note 52.

Refusal to open station

For railroad's failing negligently or willfully to open its passenger station a reasonable length of time before the arrival of a train as required by statute, an intending passenger can recover some damages, that is, actual damages, for loss of time or inconvenience.—Ginn v U. S. Railroad Administration, 103 S.E. 548, 114 S.C. 236.

96. Ky.—Louisville R. Co. v Frick, 165 S.W. 649, 158 Ky. 450. 10 C.J. p. 990 note 53.

97. S.C.—Spigener v Seaboard Air Line Ry., 98 S.E. 330, 111 S.C. 405

98. Miss.—Illinois Cent. R. Co. v. Cox, 100 So. 520, 136 Miss. 123.

99. Ind.—Louisville, etc., R. Co. v. Miller, 37 N.E. 343, 141 Ind. 533 10 C.J. p. 990 note 55.

1. U.S.—Wade v. Leroy, N.Y., 20 How. 34, 15 L.Ed. 813. 10 C.J. p. 991 note 56.

2. Ind.—Louisville, etc., R. Co. v Miller, 37 N.E. 343, 141 Ind. 533. 10 C.J. p. 991 note 57

3. Wis.—Kreuziger v. Chicago, etc., R. Co., 40 N.W. 657, 73 Wis. 158. 10 C.J. p. 991 note 58

4. Md.—Baltimore City Pass. R. Co. v. Baer, 44 A. 992, 90 Md. 97. 10 C.J. p. 991 note 59

5. U.S.—Southern Pac. Co. v. Cavin, Cal., 144 F. 348, 75 C.C.A. 350. 10 C.J. p. 991 note 60.

6. U.S.—Texas & P. R. Co. v. White,

ordinary care in this regard, as in employing an ordinarily careful and skillful surgeon or physician, the carrier is liable for unfavorable results.[7]

Provocative language or conduct on the part of a passenger, whereby an assault by an employee is brought on and he is injured, may be considered in mitigation of damages,[8] where the provocation and the assault are substantially coincident,[9] although there is authority to the contrary.[10] A finding that the passenger attacked or abused the employee will relieve the carrier from exemplary damages for an assault by the employee.[11] Where the employee assaults the passenger, substantial rather than merely nominal damages are recoverable even though the passenger was the aggressor.[12]

Comparative negligence. In some jurisdictions the negligence of the passenger, which is only slight as compared with that of the carrier, will not defeat a recovery, but the recovery will be apportioned according to the relative negligence,[13] unless the passenger's negligence is the sole cause of the injury.[14]

c. Excessive or Inadequate Damages

The jury's award against the carrier will not be interfered with unless excessive, in which case it may be set aside, or the excess ordered remitted. This applies to exemplary as well as compensatory damages.

Since it is the peculiar province of the jury to fix the amount of damages, where they have rendered a verdict, a court will not set it aside on the ground that it is excessive unless the amount is so obviously disproportionate to the injury proved as to justify the conclusion that the jury must have been influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case; but where the verdict is thus obviously excessive it will be set aside,[15] or the amount of the excess may

Tex., 101 F. 928, 42 C.C.A. 86, 62 L.R.A. 90.
10 C.J. p 991 note 62.

7. N.Y.—Hickenbottom v. Delaware, etc., R. Co., 25 N.E. 379, 122 N.Y. 91
10 C.J. p 992 note 63.

8. S.C.—Lipman v. Atlantic Coast Line R. Co., 93 S.E. 714, 108 S.C. 151, L.R.A. 1918A 596.
10 C.J. p 992 note 64.

9. Mass.—Jackson v. Old Colony St. R. Co., 92 N.E. 725, 206 Mass. 477, 30 L.R.A.,N.S., 1046, 19 Ann.Cas. 615.
10 C.J. p 992 note 65

10. Ohio—Mahoning Valley R. Co. v. DePascale, 71 N.E. 633, 70 Ohio St. 179, 65 L.R.A. 860, 1 Ann.Cas. 896.
10 C.J. p 992 note 66.

11. Tex.—Houston, E. & W. T. Ry. Co. v. Mathews, Com.App., 12 S.W. 2d 163, reversing, Civ.App., 1 S.W. 2d 754.

12. N.Y.—Schwartz v. New York Rys. Co., 160 N.Y.S. 1081.

13. Fla.—Florida R. Co. v. Dorsey, 52 So. 963, 59 Fla. 260.
10 C.J. p 992 note 67.

14. Fla.—Louisville, etc., R. Co. v. Willis, 51 So. 134, 58 Fla. 307.

15. Ind.—Ft. Wayne & Northern Indiana Traction Co. v. Ridenour, 123 N.E. 720, 71 Ind.App. 263.
10 C.J. p 992 note 70

Damages held excessive

$375, in an action for personal injuries caused by failure of railway company to stop passenger train and let plaintiff off at her station.—Mobile & O. R. Co. v. Currie, 73 So. 868, 113 Miss. 45—10 C.J. p 992 note 70 [a].

Damages held not excessive

(1) $100, for cursing and abuse of drunken passengers, sickness from the smoke in the car, and damage to a basket of clothes.—Butler County R. Co. v. Exum, 187 S.W. 329, 124 Ark. 229

(2) $250, to female passenger assaulted and insulted by fellow passenger.—Memphis, D. & G. R. Co. v. Trussell, 183 S.W. 981, 122 Ark. 516.

(3) $333, as damages for mental and physical suffering of plaintiff shipper in connection with boarding of caboose.—Texas & N. O. R. Co. v. Tillman, Tex.Civ.App., 197 S.W. 1128, error refused

(4) $450, for business man of apparent respectability, who was assaulted by subway railroad employee while business man was passenger in subway train.—Barad v. New York Rapid Transit Corporation, 295 N.Y.S. 901, 162 Misc. 458.

(5) $500, for assault by conductor.—Ft. Wayne & Northern Indiana Traction Co. v. Ridenour, 123 N.E. 720, 71 Ind.App. 263.

(6) $500, for injuries to a passenger from the breaking of glass.—Washington Ry. & Electric Co. v. Perry, 47 App.D.C. 90.

(7) $500, to colored passenger excluded from carrier's station during cold and stormy weather.—Higgins v. Southern Kansas Stage Lines Co., 42 P.2d 599, 141 Kan. 641.

(8) $666, for injuries sustained in attempting to alight from caboose of moving train.—Texas & N. O. R. Co. v. Tillman, Tex.Civ.App., 197 S.W. 1128, error refused.

(9) $700, for injuries to passenger assaulted by conductor.—Bugg v. Carter, 131 S.E. 297, 34 Ga.App. 819.

(10) $1,000, for assault and insulting conduct of fellow passenger—Hines v. Rice, 218 S.W. 851, 142 Ark. 159

(11) $1,000 to wife and $150 to husband, where woman was injured by a fall from a street car.—Buttera v. Rhode Island Co., R.I., 110 A. 71.

(12) $1,125.35, for injury to a railway passenger, resulting from her being misled by trainmen in disembarking at the wrong station.—Missouri, K. & T. Ry. Co. of Texas v. Dickson, Tex.Civ.App., 153 S.W. 933.

(13) $1,500, actual damages to passenger assaulted by conductor for pain and suffering, headaches, and loss of sleep, and for impaired earning capacity.—Houston E. & W. T. Ry. Co. v. Mathews, Tex.Civ.App., 1 S.W.2d 754, reversed on other grounds, Com.App., 12 S.W.2d 163.

(14) $1,500, for injuries sustained in collision—Memphis St. Ry. v. Mitchum, 6 Tenn.Civ.A. 227.

(15) $1500, in action by woman passenger against street railway company for employees' failure to protect her from assault by two other women passengers, who were intoxicated.—Southern Traction Co. v. Coley, Tex.Civ.App., 211 S.W. 265, dismissed for want of jurisdiction.

(16) $1,500, to passenger thrown down by the jerk of a street car—Fletcher v. Kansas City Rys. Co., Mo.App., 221 S.W. 1070.

(17) $1,700, to a passenger, willfully and maliciously assaulted by motorman.—Ohio Valley Electric Ry. Co. v. Webb, 259 S.W. 697, 202 Ky. 341.

(18) $2,000, for abusive treatment by conductor in threatening to eject negro woman from train.—Houston E. & W. T. Ry. Co. v. Anderson, Civ.

be ordered to be remitted.[16] This rule applies where the verdict includes exemplary damages as well as where the damages are merely compensatory.[17]

Where the amount of damages awarded is so small that it is evident that the jury must have overlooked some material element of damage, the court may grant relief by setting it aside as being inadequate under the circumstances.[18]

I. CONTRIBUTORY NEGLIGENCE OF PERSON INJURED

§ 774. General Rules

The doctrine of contributory negligence applies as between passenger and common carrier.

A passenger must exercise ordinary care, and such care only, for his own safety, that is, such care as an ordinarily prudent man would exercise for his safety and security under the same circumstances.[19] No person is ever absolved from exer-

App., 10 S.W.2d 767, reversed on other grounds 36 S.W.2d 983, 120 Tex 200.

(19) $2,000, for injuries caused by taking cold when compelled to vacate a drawing room.—Pullman Co. v. Cox, Tex.Civ.App., 220 S.W. 599, dismissed for want of jurisdiction.

(20) $2,000, for injuries sustained while alighting from car.—Pawlicki v. Detroit United Ry., 158 N.W. 162, 191 Mich. 536

(21) $2,500, for pain and suffering from being thrown down in street car—Nelson v. Milwaukee Electric Ry. & Light Co., 222 N.W. 792, 197 Wis. 513

(22) $2,500, to woman thrown from a car while alighting.—Brown v. Rhode Island Co., R.I., 102 A. 965.

(23) $2,500, to passenger who suffered an apoplectic stroke, but was deposited as a drunk in the station without medical attention for over twenty-four hours.—Searcy v. Interurban Transp. Co., 179 So. 75, 189 La 183, reversing, App., 179 So. 93, reversing 171 So. 468.

(24) $3,000, for injuries sustained in collision.—Lowder v. Kansas City Rys. Co., Mo.App., 221 S.W. 800.

(25) $5,000, to motorbus passenger, who sustained marked loss of hearing.—Marcus v. White Star Lines, 175 A. 490, 316 Pa. 380.

(26) $12,000, where the evidence in a personal injury suit by street car passenger tended to show that her injuries were permanent.—Houston Electric Co. v. Pearce, Tex.Civ.App., 192 S.W. 558, dismissed for want of jurisdiction.

(27) $13,800, where a street car passenger, a physician earning over three hundred dollars a month, had his right forearm fractured, his right wrist stiffened, both bones of leg fractured, the ankle bones stiffened, the leg shortened one and one-half inches, he being confined to bed for eight weeks and rendered unable to resume his practice as a physician for eight and one-half months.—Rice v. Michigan Ry. Co., 175 N.W 454, 208 Mich. 123.

(28) $19,500, for injuries to a female passenger aged twenty-nine years, earning a yearly income of five thousand six hundred dollars, it being doubtful if she would ever fully recover.—Swendsen v. Pacific Electric Ry. Co, 166 P. 21, 175 Cal. 502.

10 C.J. p 992 note 70 [b].

16. Miss.—Illinois Cent. R. Co. v. Cox, 100 So. 520, 136 Miss. 123.

10 C.J. p 994 note 71.

Damages reduced

(1) $700, reduced by $450—Central of Georgia Ry. Co v. Williams, 84 So. 633, 17 Ala App. 259.

(2) $750, reduced to $200.—Briggs v. Lusk, Mo.App., 190 S.W. 380.

(3) $2,500 reduced to $250, with interest and costs.—Spearman v. Toye Bros. Auto & Taxi-Cab Co., 114 So. 591, 164 La. 677.

(4) $5,000, reduced by remittitur to $3,750.—Schaff v. Wright, Tex.Civ. App., 251 S.W. 515.

10 C.J. p 994 note 71 [a].

17. Ky.—Louisville Southern R. Co. v. Minogue, 14 S.W 357, 90 Ky. 369, 12 Ky.L. 378, 29 Am.S.R. 378.

10 C.J. p 994 note 72.

Award held excessive

(1) $900, punitive damages for assault and abusive language used by defendant's conductor during an altercation against plaintiff, a passenger, reduced to $500.—St. Louis Southwestern Ry. Co. v. Hagler, 254 S.W. 1071, 160 Ark. 543.

(2) A verdict in excess of $1,000 against a carrier on account of the insulting and offensive enforcement by its conductor of the separate coach law.—Illinois Cent. R Co. v. Cox, 100 So 520, 136 Miss. 123.

(3) $2,000, for insults by train porter to passenger, excessive by $1,500, and reduced under statute—Barbknecht v. Great Northern Ry. Co., 212 N.W. 776, 55 N.D. 104.

(4) $2,500, punitive damages for an assault, being five times the amount of the compensatory damages allowed.—Hunter v. Kansas City Rys. Co., 248 S.W. 998, 213 Mo.App. 233.

10 C.J. p 994 note 72 [a].

Award held not excessive

(1) $2.00 actual and $498 punitive damages, for insulting insinuation that plaintiff was attempting to obtain ticket without paying—Knoell v. Kansas City, C., C. & St. J. Ry. Co., Mo.App., 198 S.W. 79.

(2) $1,500 punitive damages, in addition to $500 compensatory damages, for a wanton and lustful assault committed by a conductor on a female passenger.—Flynn v. St. Louis Southwestern Ry. Co, Mo.App., 190 S.W. 371.

(3) $4,500 actual damages and $1,000 punitive damages, for assault by employee.—Dorton v. Kansas City Rys. Co, 224 S.W. 30, 204 Mo.App. 262.

(4) $15,000, for injuries to bus passenger in crossing collision, where verdict included punitive damages.—Teche Lines v. Pope, 166 So. 539, 175 Miss 393.

10 C.J. p 994 note 72 [b].

18. Ill.—Hanson v. Urbana, etc., St. R. Co., 75 Ill.App. 474.

N.Y.—Tooker v. Brooklyn Heights R. Co., 80 N.Y.S. 969, 80 App.Div. 371.

Damages held inadequate

A verdict in favor of plaintiff for five dollars was inadequate, in action by passenger assaulted and abused by conductor.—Samuels v. New York City Ry. Co., 101 N.Y.S 534, 52 Misc. 137.

19. Cal.—McKinley v. Dalton, 17 P. 2d 160, 128 Cal.App. 298.

Ill.—See Kaber v. Borland, 201 Ill App. 516.

La.—Louviere v Southwestern Traction & Power Co., 77 So. 293, 294, 142 La. 590, quoting **Corpus Juris** with approval.

Mo.—Moutria v. East St. Louis Ry. Co., App, 76 S.W.2d 427.

Pa.—Klingensmith v. West Penn Rys. Co., 154 A 811, 303 Pa. 487.

Tex.—Dallas Ry. & Terminal Co. v. Travis, 78 S.W.2d 941, 125 Tex. 11, affirming, Civ.App., 46 S.W.2d 743.

10 C.J. p 1096 note 39.

Absence of contributory negligence

(1) Passenger in public carrier, as taxicab, cannot be charged with responsibility for collision.—Dawson v.

cising reasonable care for his own safety simply because he is a passenger for hire;[20] carriers of passengers have the right to assume that passengers will exercise the care of a reasonably prudent man,[21] and it is a well established rule, that, although there has been negligence on the part of the carrier contributing to the injuries, if the passenger fails to exercise ordinary care, and his failure is proximately connected with his injuries, he is guilty of contributory negligence which will defeat a recovery,[22] and a recovery will be defeated as well where the negligence of the passenger exposes him to injury as where it cooperates in causing the misfortune from which the injury results.[23] However, the negligence of a passenger or intending passenger will not bar his recovery unless it contributes to his injury,[24] and, although the conduct of a passenger has contributed to the injury sustained, yet if such conduct has not been in a legal sense imprudent or negligent, he may recover, provided the carrier is in fault.[25] Moreover, the doing of an act by a passenger of a nature which would ordinarily constitute contributory negligence barring recovery will not necessarily preclude recovery by the passenger where he was induced by the carrier to do such act.[26]

What constitutes passenger's negligence. A passenger is not to be deemed guilty of negligence unless he has, or is charged with, knowledge of a defect or peril, and then fails to use ordinary care to avoid injury,[27] and it is elementary law that a passenger is not obliged, in the exercise of ordinary care, to anticipate negligence on the part of the carrier, but may rely on the carrier's observance of its legal duty to exercise a high degree of care

Toye Bros Yellow Cab Co, 131 So 716, 15 La.App. 326.

(2) A passenger, who was injured by a trunk falling on him proximately caused by bus driver's negligence in relying on handle alone in jerking trunk onto bus, was not contributorily negligent, where driver had as much opportunity as passenger owning trunk to learn of faulty handle.—Gaines v. Teche Lines, La App., 176 So. 134.

(3) Statement by one who hired taxicab in response to driver's question that hospital to which she desired to go was out H street on B avenue, was not direction that he should return on H street, so as to preclude recovery for injuries received while so returning.—Hathaway v. Coleman, 169 P. 414, 35 Cal App. 107.

20. U.S—Pennsylvania R Co v. Rogers, N J, 244 F. 76, 156 C.C.A. 504.
Me—Chaput v. Lussier, 165 A. 573, 132 Me. 48
Md—Washington, B & A. E Ry. Co. v State, 113 A. 338, 137 Md. 538.

Rule as to guest inapplicable

Rule as to recovery for injuries by guest who rides without exercising any care for his own safety held not applicable to persons riding in taxicab as passengers—Chaput v. Lussier, 165 A. 573, 132 Me. 48.

21. U.S—The Empress of Scotland, D C.N.Y., 11 F 2d 783, affirmed, C C A, McKay v. Empress of Scotland, 24 F 2d 1018.

22. U.S.—Aschenbrenner v. U. S. Fidelity & Guaranty Co., 54 S Ct. 590, 292 U S 80, 78 L.Ed. 1137, reversing, C C.A., U. S. Fidelity & Guaranty Co. v. Aschenbrenner, 65 F 2d 976, certiorari granted Aschenbrenner v. U. S. Fidelity & Guaranty Co., 54 S Ct. 229, 290 U S. 622, 78 L.Ed. 543, and rehearing denied 54 S.Ct 861, 292 U S. 615, 78 L Ed. 1474—The Empress of Scotland, D. C.N Y., 11 F 2d 783, affirmed, C C A., McKay v. Empress of Scotland, 24 F.2d 1018.
Ala—Louisville & N. R. Co. v. Martin, 73 So. 909, 198 Ala 540.
Ga—Hill v. Chattanooga Ry. & Light Co., 93 S.E 1027, 21 Ga App. 104
Ill—Bartz v. Chicago City Ry. Co, 116 Ill App. 554.
Kan—Senning v. Arkansas Valley Interurban Ry. Co, 165 P 863, 101 Kan. 78.
Ky—Adams v. Hilton, 110 S.W 2d 1088, 270 Ky. 818—Paducah Traction Co v. Weitlauf, 195 S W. 99, 176 Ky. 82, L R.A 1917F 353.
La—Mills v. Illinois Cent. R Co, 86 So 750, 148 La. 217—Smith v. Service Cab Co., App, 155 So. 774
N D—Dahl v. Minneapolis, St P & S S M. Ry. Co., 223 N W. 37, 57 N D. 538
Va—Pennsylvania R. Co v. Jenkins, 96 S E. 170, 123 Va. 211
W Va—Slaven v. Baltimore & O R Co, 171 S.E 818, 114 W Va. 315—Peters v. Monongahela Transport Co, 155 S E 178, 109 W.Va. 417.
10 C.J. p 1097 note 40.

Observing suitcase in aisle

Where passenger testified that she saw a suitcase protruding into aisle when she boarded car and that suitcase was not moved throughout trip, passenger could not recover, since she was contributorily negligent, having seen suitcase as she entered car.—Selman v. City of Detroit, 278 N.W. 112, 283 Mich. 413.

Riding with drunken driver

Although negligence of driver of vehicle is not imputable to passenger, yet the conduct of a passenger in entering an automobile and continuing to ride therein, when he knew or must have known driver was intoxicated, establishes negligence barring recovery, and rule applies to a passenger in a vehicle for hire as well as guest—Wayson v. Rainier Taxi Co, 239 P. 559, 136 Wash. 274, 45 A L R 290.

Use of narrow platform

Where one going to a ferry pier to meet an incoming passenger and passing from the train shed to the open pier, which was dark, was blinded by the lights when he reentered the shed, his attempt to use a narrow platform connecting the two main platforms while so blinded, instead of waiting until his eyes became accustomed to the light, held negligence as matter of law, where he knew the platform was elevated and that he might be injured if he walked off of it.—Jackson v. Hines, 113 A. 129, 137 Md. 621.

23. Mo—Moutria v. East St. Louis Ry. Co, App, 76 S W 2d 427.
10 C J. p 1098 note 41

24. Mo—Sugarwater v. Fleming, 293 S W. 111, 316 Mo. 742.

25. Ala.—Louisville & N. R. Co. v Martin, 73 So 909, 198 Ala. 540
10 C J. p 1098 note 42.

26. W.Va—Donnally v. Payne, 109 S.E. 760, 89 W.Va. 585.

Carrier's invitation or restraint

A passenger may take a position or do an act resulting in his injury on the carrier's invitation or inducement, or in consequence of a restraining influence imposed by the carrier which otherwise would bar recovery, without incurring such negligence or contributory negligence, where involving no greater risk than an ordinarily prudent man would assume under the circumstances.—Donnally v. Payne, 109 S E. 760, 89 W.Va 585.

27. Md—United R., etc., Co. v. Riley, 71 A. 970, 109 Md. 327.
10 C.J p 1098 note 46.

for the safety of passengers.[28] In this connection it has been held that a passenger is under no duty to anticipate the presence of obstructions in the aisle of a conveyance,[29] nor to ascertain the fitness of the operator of the vehicle,[30] nor to inspect the appliances furnished by a carrier,[31] and that he may properly assume that the operator of the vehicle will exercise the care essential to safe transportation,[32] and that all parts and appliances of the vehicle are reasonably safe and fit for use.[33] Where, however, the negligence of the carrier is apparent to the passenger, he should thereafter exercise ordinary care to avoid injury which might result to him from such negligence.[34]

Assumption of risk A passenger never assumes the risk of a carrier's negligence,[35] and it has been said that, strictly speaking, the doctrine of assumed risks has no bearing on actions of this character, although the facts which would lead to its invocation in an action between master and servant may affect the issue of contributory negligence in an action between passenger and carrier.[36] The more generally accepted view is that a passenger does assume all risks not resulting from the carrier's negligence and necessarily incident to travel,[37] such as those peculiar to the particular vehicle in which he is riding,[38] and that the defense of assumption of risk may be set up in an action against a carrier.[39] It should be borne in mind, however, that the only risks assumed are those of accidents which arise after the carrier has done its full duty, that is, the ordinary incidents of travel.[40]

What law governs. The law of contributory negligence of the state where a passenger was injured while traveling between points therein governs in an action for the injury.[41] This is in conformity with the general rule, which has been discussed in § 679, that the lex loci delicti controls actions against a carrier for injuries resulting from its negligence.

§ 775. Statutory Provisions

The effect of a passenger's contributory negligence is in some instances governed by statutes specifically dealing with such subject.

Where statutes define the legal effect of a passenger's contributory negligence or the like, the rights of passenger and common carrier in such respect are controlled by the applicable statute.[42] Under statutes providing that railroads shall be li-

28. Ill.—Metz v. Yellow Cab Co., 248 Ill.App. 609
Miss.—Tri-State Transit Co. v. Martin, 179 So. 349
Mo.—Caley v. Kansas City, 48 S.W.2d 25, 226 Mo.App. 934
Wis.—Naus v. Chicago & M. Electric Ry. Co., 201 N.W. 231, 185 Wis. 178.

29. Ala.—Atkinson v. Dean, 73 So. 479, 198 Ala. 262

30. Ky.—Morris v. City Transfer & Yellow Taxi Co., 294 S.W. 1030, 220 Ky. 219

Cab driver
Taxicab passenger has no duty to exercise care to learn whether driver is sober or intoxicated.—Morris v. City Transfer & Yellow Taxi Co., 294 S.W. 1030, 220 Ky. 219.

31. Ark.—Chicago, R. I. & P. Ry. Co. v. McCrary, 16 S.W.2d 466, 179 Ark. 444.

Footrest in railroad coach
Ark.—Chicago, R. I. & P. Ry. Co. v. McCrary, 16 S.W.2d 466, 179 Ark. 444.

32. Ky.—Shelton Taxi Co. v. Bowling, 51 S.W.2d 468, 244 Ky. 817

33. Kan.—Jenkins v. Kansas City Public Service Co., 275 P. 136, 127 Kan. 821.

34. Ga.—Hill v. Chattanooga Ry. & Light Co., 93 S.E. 1027, 21 Ga.App. 104.
Minn.—Rau v. Smuda, 221 N.W. 232, 175 Minn. 328.

Negligence known to passenger
Duty of passenger to exercise ordinary care to avoid consequences of carrier's negligence does not arise until such negligence is apparent, or in exercise of ordinary care would be apparent, but where such negligence is known to the passenger he must use due care to avoid injury therefrom.—Hill v. Chattanooga Ry. & Light Co., 93 S.E. 1027, 21 Ga.App. 104

35. Mo.—Toroian v. Parkview Amusement Co., 56 S.W.2d 134, 331 Mo. 700
10 C.J. p. 1098 note 44.

36. Ind.—Indianapolis & Cincinnati Traction Co. v. Helms, 121 N.E. 279, 70 Ind.App. 137
Tex.—St. Louis Southwestern Ry. Co. of Texas v. Christian, Civ.App., 191 S.W. 175, error refused

37. Mo.—Toroian v. Parkview Amusement Co., 56 S.W.2d 134, 331 Mo. 700.
Tex.—Dallas Ry. & Terminal Co. v. Travis, Civ.App., 46 S.W.2d 743, affirmed 78 S.W.2d 941, 125 Tex. 11
Va.—Richmond-Ashland Ry. Co. v. Jackson, 162 S.E. 18, 157 Va. 628.
W.Va.—Koon v. Monongahela West Penn Public Service Co., 192 S.E. 332.

38. Tex.—Fort Worth & D. C. Ry. Co. v. Hawley, Civ.App., 235 S.W. 659.—Texas & N. O. R. Co. v. Tillman, Civ.App., 197 S.W. 1128, error refused.

Caboose
One riding on the caboose of a freight train, although as a passenger, assumes the increased risk incident to such mode of travel, and cannot recover for injuries resulting, in the absence of negligence of the railway.—Nashville, C. & St. L. Ry. v. Hopper, 217 S.W. 661, 142 Tenn. 200.

39. Mo.—Toroian v. Parkview Amusement Co., 56 S.W.2d 134, 331 Mo. 700.

40. Fla.—Florida East Coast R. Co. v. Carter, 65 So. 254, 67 Fla. 335, Ann.Cas.1916E 1299.
10 C.J. p. 1098 note 45.

Unavoidable risks
"And, also while it is undoubtedly true that a passenger must take the risks incident to the mode of travel and the character of the means of conveyance which he adopts, such risks are only those which cannot be avoided by the carrier by the use of the utmost degree of care and skill in the preparation and management of the means of conveyance."—Matteson v. Teche Greyhound Lines, La.App., 178 So. 272, 273.

41. U.S.—Long v. Atlantic Coast Line R. Co., S.C., 238 F. 919, 151 C.C.A. 653.

42. U.S.—Jones v. Chicago, R. I. & P. Ry. Co., C.C.A.Neb., 260 F. 929.
10 C.J. p. 1098 note 43.

able for all damages to passengers except where arising from the passenger's "criminal negligence," the term "criminal negligence" means gross negligence.[43]

Statutes dealing with specific instances of contributory negligence, such as a passenger's violation of regulations or his jumping from a moving vehicle, are considered in subsequent sections.

§ 776. Persons under Disability

a. In general
b. Children
c. Intoxicated passengers

a. In General

Acts which would amount to contributory negligence if done by a normal person may not constitute negligence where performed by one physically or mentally impaired, although such a person should exercise the care reasonably to be expected of one in such condition.

What will constitute failure to exercise ordinary care on the part of the passenger may depend on the mental and physical capacity of the passenger himself, and acts which might be negligent in a normal person may not be contributory negligence in view of the passenger's disability, such as will defeat his recovery for injury where the carrier has been negligent, as no greater care can be required of him than his ability will allow him to exercise.[44] A passenger suffering from a physical disability should take such care as may be required and feasible in view of his condition,[45] and it has been held that, if a passenger is laboring under a disability, increasing his liability to accident, he will be guilty of negligence and cannot recover for an injury sustained if he does not make known his infirmity to the carrier's agent.[46] The fact that the carrier does know of the passenger's impaired condition will not, however, relieve the latter of the duty of exercising such care as may be reasonable and possible for one of such condition.[47]

Duty to have attendant. It has been held that if a passenger is incapable of taking care of himself he should have an attendant along to render him such assistance as he may require,[48] but, as shown infra § 803, a failure to provide such an attendant or protector does not amount to contributory negligence as a matter of law. Where a passenger incapable of taking proper care of himself is accompanied by an attendant, the negligence of the latter will be regarded in law as the negligence of the passenger attended, when he has been injured in consequence of such negligence.[49]

b. Children

The age, intelligence, and experience of a child passenger should be considered in determining whether or not he was guilty of contributory negligence. While the negligence of an accompanying parent may not be imputed to the child passenger, the presence of the parent may operate to relieve the carrier from the duty of observing extra precautions in respect of the child.

The same care, discretion, and foresight cannot be required of a child of immature years as of an ordinary adult, but he is required to exercise such care and judgment as may reasonably be expected of a child of the same age and mental development as the one in question, and to that extent he is responsible for acts or omissions contributing to his own injury.[50] Age is not the only element for consideration, but there should also be taken into account the intelligence, capacity, and experience of the child.[51]

Negligence of parent. The negligence of the parent will not, in general, be imputed to the child so as to defeat recovery by the child for an injury received;[52] but if the child is in charge of the par-

43. U.S.—Jones v. Chicago, R. I. & P. Ry., supra.
Neb.—Union Pac. R. Co. v. Roeser, 95 N.W. 68, 69 Neb. 62—Chicago, B. & Q. R. Co. v. Hyatt, 67 N.W 8, 48 Neb. 161, 167—Chicago, B. & Q. R. Co. v. Hague, 66 N.W. 1000, 48 Neb. 97—Missouri Pac. R. Co. v. Baier, 55 N.W. 913, 37 Neb. 235, error dismissed 14 S.Ct. 1149, 154 U.S. 510, 38 L.Ed. 1083—Chicago, B. & Q. R. Co. v. Landauer, 54 N.W. 976, 36 Neb. 642—Omaha & R. V. R. Co. v. Chollette, 49 N.W. 1114, 33 Neb. 143.

44. Mont.—Gohn v. Butte Hotel Co., 295 P. 262, 265, 88 Mont. 599, quoting **Corpus Juris.**
Or.—Watts v. Spokane, P. & S. Ry. Co., 171 P. 901, 88 Or. 192.
10 C.J. p 1098 note 47.

45. Ill.—Bushman v. Calumet & South Chicago Ry. Co., 214 Ill. App. 435.
Duty of deaf man to use his eyes
Where a passenger had been deaf for a number of years, and on alighting from a street car failed to hear another car approaching and by which he was struck, his negligence in failing to look for other cars barred recovery.—Bushman v. Calumet & South Chicago Ry. Co., 214 Ill. App. 435.

46. N.H.—Foss v. Boston, etc., R. Co., 21 A. 222, 66 N.H. 256, 49 Am. S.R. 607, 11 L.R.A. 367.
10 C.J. p 1099 note 48.

47. Del.—Clayton v. Philadelphia, B. & W. R. Co., 106 A. 577, 7 Boyce 343.

48. Miss.—New Orleans, etc., R. Co. v. Statham, 42 Miss. 607, 97 Am.D. 478.

49. Ill.—Ohio, etc., R. Co. v. Stratton, 78 Ill. 88.
N.Y.—Morrison v. Erie R. Co., 56 N.Y. 302—Willetts v. Buffalo, etc., R. Co., 14 Barb. 585.

50. N.J.—Heinige v. Little Ferry Bus Line, 171 A. 135, 12 N.J.Misc. 213
10 C.J. p 1099 note 52.
Five year old boarding street car
Child of five could not be contributorily negligent in boarding street car, so as to prevent recovery for leg injury received when motorman allegedly closed door and raised step too soon.—Dallas Ry. & Terminal Co. v. Curtis, Tex.Civ.App., 53 S.W.2d 85, error refused.

51. W.Va.—Trippett v. Monongahela West Penn Public Service Co., 130 S.E. 483, 100 W.Va. 319.

52. Vt.—Ploof v. Burlington Tract. Co., 41 A. 1017, 70 Vt. 509, 43 L.R.A. 103.

ent the carrier may be relieved by that fact from any extra caution with reference to the child on account of its immature years, and the negligence of the parent or person in charge of the child may therefore tend to rebut negligence of the carrier.[53]

c. Intoxicated Passengers

The intoxication of a passenger is one circumstance to be considered on the issue of contributory negligence, and may or may not bar his recovery for injuries sustained while intoxicated.

The voluntary intoxication of a passenger does not relieve him of the duty of exercising ordinary care for his own safety;[54] and is a circumstance to be considered as bearing on the question whether by his own conduct he brought the injury on himself, and, if so, may be sufficient to defeat a recovery.[55] It has been held that a drunken passenger should exercise such care for his safety as may usually be expected of a sober passenger of ordinary prudence under like circumstances.[56] On the other hand, the mere fact that a passenger is intoxicated at the time of receiving an injury caused by the negligence of the carrier will not, as a matter of law, defeat a recovery,[57] and where the intoxication of the passenger is not a direct and proximate cause of his injury such intoxication cannot be classified as contributory negligence barring recovery.[58] Where a common carrier owes to a passenger a special duty to protect him because of his intoxication, his intoxication is considered as only a condition under which the problem of liability must be solved, and a remote and not a proximate cause of injury, even though intoxication may have been present and have affected the conduct of the passenger.[59]

§ 777. Acts in Emergencies

A passenger is not contributorily negligent in acting erroneously in the face of apparent imminent peril where the situation arises from the carrier's fault and the passenger lacks time for deliberation.

In determining whether the passenger has exercised ordinary care to avoid the injury which he has received as a result of the carrier's negligence, it sometimes becomes a question whether he has been negligent in doing an act which would in itself have been presumptively negligent, but for the circumstances which, it is claimed, justified it in the attempt to escape a threatened injury, such as a collision, and the rule is well established that, if the passenger acts as a reasonably prudent person would have done in view of the danger as it appeared to him, he is not guilty of contributory negligence so as to bar his right of recovery against the carrier, although, if he had not acted thus in the attempt to avoid injury, he would have been safe.[60] The same rule is applicable to the failure of the

Iowa.—Wymore v. Mahaska County, 43 N.W. 264, 78 Iowa 396, 16 Am.S.R. 449, 6 L.R.A. 545.

53. U.S.—The Burgundia, D.C.N.Y., 29 F. 464.
Ill.—Savage v. Illinois Cent. R. Co., 164 Ill.App. 634.
Ky.—Sandifer v. Louisville, etc., R. Co., 89 S.W. 528, 28 Ky.L. 464.
N.Y.—Morrison v. Erie R. Co., 56 N.Y. 302.

54. Ill.—Wilcke v. Henrotin, 89 N.E. 329, 241 Ill. 169.

55. Ill.—O'Rourke v. Louisville & N.R. Co., 197 Ill.App. 45.
Ky.—Cincinnati, N. O & T. P. Ry. Co. v. Francis, 220 S.W. 739, 187 Ky. 703.
Me.—Mahan v. Hines, 115 A. 132, 120 Me. 371.
10 C.J. p 1100 note 57.

Intoxication resulting in reckless conduct

"The rule is that an intoxicated passenger who becomes indifferent or reckless, and in consequence fails to exercise ordinary care to protect himself from danger, and is injured, will be denied a recovery, and he cannot rely upon intoxication as an excuse for failure to exercise care for his own safety"—McDermott v. Louisville & N. R. Co., 206 S.W. 6, 8, 182 Ky. 22.

Where no special duty on carrier

"In cases where there is no special duty resting upon the defendant to protect the plaintiff from the results of his own intoxication, the fact that plaintiff was intoxicated, if it was a contributing cause of the injury, is a bar to the action."—Fardette v. New York & S Ry. Co., 180 N.Y.S. 179, 181, 190 App.Div. 543.

56. Iowa.—Hughes v. Chicago, etc., R. Co., 129 N.W. 956, 150 Iowa 232.
10 C.J. p 1100 note 55.

57. Kan.—O'Keefe v. Kansas City Western R. Co., 124 P. 416, 87 Kan. 322, 48 L.R.A.,N.S., 135.
10 C.J. p 1100 note 56.

58. N.Y.—Fagan v. Atlantic Coast Line R. Co., 115 N.E. 704, 220 N.Y. 301, L.R.A.1917E 663, reversing 155 N.Y.S. 609, 170 App.Div. 47.

Drunken passenger left in dangerous place

Where a railroad accepted an intoxicated passenger for transportation, the passenger's intoxication, when he was assisted from the train at destination and negligently left in a dangerous situation, was not contributory negligence, although he was negligent in becoming intoxicated, since his intoxication previous to and at the time the road unlawfully placed him in a hazardous situation was not a direct and proximate cause of his injury later by a train.—Fagan v. Atlantic Coast Line R. Co., 115 N.E. 704, 220 N.Y. 301 reversing 155 N.Y.S. 609, 170 App.Div. 47.

59. N.Y.—Fardette v. New York & S. Ry. Co., 180 N.Y.S. 179, 190 App. Div. 543.

60. Cal.—Drury v. Los Angeles Ry Corporation, 282 P. 525, 102 Cal. App. 58.
La.—Guidry v. Morgan's Louisiana & T. R. & S. S. Co., 74 So. 534, 140 La. 1007, L.R.A.1917D 962.
10 C.J. p 1101 note 58.

Falling passenger clinging to handlebar

Although passenger of street car falling off rear platform while rounding curve could have saved herself from serious injury by not clinging to handlebar, if ordinarily prudent person would have so acted under similar circumstances, passenger will nevertheless be excused from penalty of what might otherwise amount to contributory negligence.—Drury v Los Angeles Ry. Corporation, 282 P. 525, 102 Cal.App. 58.

No duty to calculate chances

"This court has uniformly held that on occasions where a passenger is suddenly confronted by imminent danger he cannot reasonably be ex-

passenger to attempt to avoid or escape threatened injury.[61] The danger need only be apparent in order to relieve the passenger from the charge of contributory negligence,[62] but the appearances must be such as would reasonably cause alarm to a person of ordinary prudence under the same circumstances; it will not be sufficient that the passenger became alarmed by reason of appearances produced wholly or in part by the carrier, if these appearances were not such as reasonably to cause alarm,[63] and it is also necessary that the alarm arise from the carrier's negligence and that the appearance of danger was imminent, so as to leave no time for deliberation.[64]

Alighting from moving vehicle to avoid impending danger. Where a passenger, as the result of the misconduct or negligence of the carrier, is placed in such a perilous position as to render his jumping from a moving vehicle an act of reasonable precaution, such as to avoid an apparent collision or overturning, and he leaps therefrom and thereby sustains an injury, he is not guilty of contributory negligence, and the carrier will be answerable in damages,[65] and recovery has been allowed where the passenger was in no real danger but was induced through misconduct attributable to the carrier to believe that he was in danger.[66]

However, if a passenger induced by a groundless fear jumps from a moving vehicle and is injured in consequence he cannot recover.[67]

The matter of a passenger's alighting from a moving vehicle is further considered infra § 793.

§ 778. Acts to Avoid Inconvenience

A passenger may be guilty of contributory negligence where he incurs danger voluntarily and for the mere purpose of avoiding inconvenience.

Where a passenger, to avoid suffering some inconvenience only, voluntarily runs into an obvious danger and injury ensues, he will be held guilty of contributory negligence and cannot recover.[68] However, it has been held that, if the inconvenience is very great, and the danger run in avoiding it is very slight, it may not be unreasonable to incur that danger.[69]

§ 779. Violations of Regulations or Directions

A passenger may be guilty of contributory negligence where he acts in disregard of reasonable regulations or directions of the carrier, provided that he has timely notice thereof. In some jurisdictions there are statutes governing such matters.

It will in general constitute negligence on the part of a passenger to violate the reasonable regulations made by the carrier with reference to the safety of passengers, and for an injury resulting from such violation he cannot recover, although the injury is attributable in part to the negligence of

pected to calculate chances, or to deliberate upon the means of escape, but that he must of necessity judge of the danger by the circumstances as they at the instant appear to him, and not by the result. Immediate action and decision are required of him, and if he acts as a man of ordinary prudence placed in similar circumstances, and in doing so makes an effort to escape injury and is injured, the railroad company is responsible to him for his damages"—Yazoo & M. V. R. Co. v. Hill, 216 S. W. 1054, 1057, 141 Ark. 378

61. Colo.—Montgomery v. Colorado Springs, etc., R. Co., 114 P. 659, 50 Colo. 210.
10 C.J. p. 1101 note 59.

Failure to warn driver

Passengers held not contributorily negligent in failing to warn taxicab driver of impending danger when driver suddenly made left turn in front of rapidly approaching truck, and an automobile passenger is not obliged to protest manner of operating automobile, where danger arises so unexpectedly that statement or act of passenger would not change situation or might increase danger—Zmuda v. McFarland, 165 A. 446, 53 R.I. 210.

62. Ala.—Selma St., etc., R. Co. v. Owen, 31 So. 598, 132 Ala. 420
Mo.—Moore v. Metropolitan St. R. Co., 176 S.W. 1120, 189 Mo. App. 555
10 C.J. p. 1101 note 60

63. Ark.—St. Louis, etc., R. Co. v. Murray, 18 S.W. 50, 55 Ark. 248, 29 Am.S.R. 32, 16 L.R.A. 787.
10 C.J. p. 1102 note 61

64. Mo.—Delfosse v. United Rys. Co. of St. Louis, 201 S.W. 860.
10 C.J. p. 1102 note 62

65. Pa.—Lehner v. Pittsburg R. Co., 72 A. 525, 223 Pa. 208, 132 Am.S.R. 729, 16 Ann.Cas. 83
10 C.J. p. 1102 note 63

Jumping under threat of being shot

Conduct of passenger in jumping from moving street car when conductor curses whole bunch and threatens to shoot is not inexcusable, he not being required to weigh nicely chances between which he chooses—Hendrix v. United Rys. Co. of St. Louis, Mo., 193 S.W. 812.

Motorbus passenger

Ky.—McGraw v. Ayers, 58 S.W.2d 378, 248 Ky. 166.

66. Ala.—Alabama Great Southern R. Co. v. Hunt, 86 So. 97, 17 Ala. App. 566, certiorari granted Ex parte Alabama Great Southern R. Co., 86 So. 100, 204 Ala. 504.

Victim of practical joke

Whenever a common carrier by direct action or negligent connivance threatens a passenger with summary execution as a spy, besides mutilation of his valuable organs, and thereby produces such terror in his mind as to induce him to alight from a rapidly moving train to escape injury, the carrier is liable, under the sudden emergency doctrine, "be the passenger a Solomon or a simpleton"—Alabama Great Southern R. Co. v. Hunt, 86 So. 97, 100, 17 Ala. App. 566, certiorari granted Ex parte Alabama Great Southern R. Co., 86 So. 100, 204 Ala. 504, and cause remanded for further consideration on ground that instructions imposed too broad a duty on the carrier in respect of protecting him from threats of fellow passengers.

67. Mo.—Delfosse v. United Rys. Co. of St. Louis, 201 S.W. 860
10 C.J. p. 1102 note 64.

68. Wash.—Kroeger v. Seattle Electric Co., 79 P. 1115, 37 Wash. 544

69. Md.—Western Maryland R. Co. v. Stanley, 61 Md. 266, 48 Am.R. 96
10 C.J. p. 1102 note 66.

the carrier;[70] but, in order to charge a passenger with contributory negligence for such a violation, he must have had notice of the rule or regulation at the time, or must have been charged with notice thereof.[71] A breach of the carrier's rule will not amount to contributory negligence where it appears that the carrier has waived or abrogated the rule, as by permitting it to be disregarded.[72]

Disregarding directions or warnings. The passenger should be guided by the directions of the employees in charge, with reference to his own safety, and may be guilty of contributory negligence in failing to observe warnings or cautions thus given,[73] although the act done by him is one customarily done by others.[74] However, to charge a passenger with negligence in disobeying such a warning, the warning must be timely,[75] must reasonably come to his notice,[76] and he must have reason to know that it is intended for his safety.[77]

To make a warning effectual, it is not essential that the employees in charge should enforce compliance with it.[78]

§ 780. Acts by Permission or Direction of Employees

The fact that a passenger acts in conformity to the permission or direction of the carrier may absolve him from contributory negligence in doing acts which would otherwise constitute such negligence, although even where he acts pursuant to such permission or direction the passenger must exercise reasonable care for his own safety.

Where a passenger acts in conformity to a permission or direction given by a conductor or other agent of the carrier, acting within the scope of his employment, and such conduct on his part will not expose him to a known or apparent danger which a prudent man would not incur, he will not be guilty of contributory negligence, although his conduct may result in bringing injury on him.[79] Misdirec-

70. U S —Houston v Delaware, L. & W. R. Co., C C A.N.J., 274 F. 599
Ga —Bailey v. Georgia Ry. & Power Co., 124 S E 907, 32 Ga App 793.
Pa —Tiers v Pennsylvania R. Co., 141 A. 487, 292 Pa 522
10 C J p 1103 note 68.
"Where a railroad company undertakes the transportation of passengers for an agreed price, the contract includes many things. The passenger agrees to be bound by all the company's reasonable rules and regulations for entering, occupying and leaving trains, and if injury befalls him by reason of disregard of the regulations which are necessary to the conduct of the business, the company will not be liable even though the negligence of one of its servants concurred in causing the mischief."—Seltzer v. Philadelphia & R Co., 69 Pa.Super. 309, 315

71. Ill —Harley v. Aurora, etc, R. Co, 182 Ill App 643
Md.—United R, etc., Co. v Hertel, 55 A. 428, 97 Md. 382
Mass.—Cutts v. Boston El R Co., 89 N.E. 211, 202 Mass 450
10 C J. p 1103 note 69.

72. Ga —Bailey v. Georgia Ry. & Power Co, 124 S E. 907, 32 Ga App. 793.
10 C J. p 1103 note 70.

Waiver not shown

Where caretaker in charge of stock was told by a railway employee that the train would stop, so he could get on board, the employee's subsequent query as to whether he could not board the train while it was moving slowly, without any express or implied threat that he would miss the train, if he refused to board it while moving, was not a waiver of requirement of contract, under which he was carried, that he should remain in the caboose while the train was in motion.—Hulet v. Payne, C.C.A N.D, 282 F 401—10 C J. p 1103 note 70 [a].

73. La —La Rosa v. New Orleans Public Service, 121 So. 379, 10 La. App. 324.
10 C J. p 1103 note 71.

Standing on platform

For a passenger on fast-moving train operated outside of municipality to stand on platform, particularly after warning not to do so, is "contributory negligence" defeating recovery for injuries resulting therefrom, although there is negligence of carrier's employees.—Louviere v Southwestern Traction & Power Co., 77 So. 293, 142 La. 590, L R.A 1918C 169.

74. Ill —Raymond v Chicago, etc., R. Co., 126 Ill.App 240.

75. Ind.—Louisville, etc, R. Co. v. Bean, 36 N.E. 443, 9 Ind App. 240.

76. Cal —Lynn v. Southern Pac. Co., 36 P 1018, 103 Cal. 7, 24 L.R.A. 710.
10 C.J p 1104 note 74

77. Ill.—West Chicago St. R. Co. v. Johnson, 54 N E 334, 180 Ill. 285, affirming 77 Ill App. 142.
10 C J. p 1104 note 75.

78. Mo.—Aufdenberg v St. Louis, etc, R. Co, 34 S.W 485, 132 Mo. 565—Sherman v. Hannibal, etc, R. Co, 72 Mo. 62, 37 Am R. 423.

79. Ark.—Ft. Smith Traction Co. v. Oliver, 46 S W.2d 647, 185 Ark 227
Cal —Gornstein v. Priver, 221 P. 396, 64 Cal.App. 249.
Del —Clayton v. Philadelphia, B & W. R. Co., 106 A. 577, 7 Boyce 343
10 C.J. p 1104 note 78.

Matter for consideration of jury

While instruction of a carrier's employee in the line of his authority will not excuse or justify an act by a passenger which is obviously dangerous, such instruction or invitation where the act is not obviously dangerous may be considered by the jury in connection with other facts in determining whether the passenger was negligent and the degree of negligence —Southern Ry Co v. Whitehead, 120 S.E. 700, 31 Ga App. 398

Riding on steps or platform

(1) A passenger may rely on the invitation of a brakeman to occupy a place on car steps preparatory to getting off when the train stops or slows at a station —Shelton v. Chicago, M & St. P. Ry. Co., Mo App., 190 S.W. 46.

(2) The mere fact that a person rides on a crowded car or the platform of such a car on the invitation of the carrier cannot be regarded as contributory negligence per se.—Sand Springs Ry Co. v. Smith, 203 P. 207, 84 Okl 211.

Seated with legs dangling over edge of truck

One of several passengers on a truck, rented for the carriage of passengers, permitted to seat themselves with their legs dangling over the end, from which the staves were taken out, with the knowledge of the driver, who gave no warning of danger, was not guilty of negligence contributing to her injury, when another rented truck which was following collided with that on which she was riding.—Gornstein v. Priver, 221 P. 396, 64 Cal.App. 249.

tions by persons in charge of a train as to the proper place for passengers to get off will render the carrier liable to one who, acting in reasonable reliance on the directions given, is injured,[80] and an alighting passenger may properly rely on information given him by a brakeman relative to the movement of trains.[81] However, a passenger's duty to obey directions of a carrier's agent does not extend to cases where the passenger has knowledge that obedience will lead to apparent danger,[82] and where he does so may assume the risk involved,[83] and the fact that a passenger acts in conformity to the permission or direction of the carrier's agent or employee does not absolve him from the duty of using reasonable care under existing circumstances to protect himself from injury.[84]

Where an agent of the carrier undertakes to escort a passenger or prospective passenger across a highway in connection with travel or proposed travel on the vehicles of the carrier, the passenger is not relieved of the duty to exercise ordinary care for his own safety, although he may to some extent rely on the protection of such escort and need not exercise the same degree of care as if proceeding alone.[85]

Getting on or off moving vehicle. An illustration of rule just stated is furnished by cases with reference to injuries received by a passenger who attempts to get on board of, or alight from, a vehicle while moving. Such an act is generally regarded as contrary to reasonable prudence, as shown infra § 793; but, if it is done in response to the invitation or direction of the person in charge of the train, the passenger may thereby be exonerated from fault.[86] However, the passenger is not exonerated if the act is manifestly, to the judgment

Opening elevator door as invitation to step out

Relative to contributory negligence of passenger, injured in alighting from passenger elevator when its floor was several inches below that of the hall, opening of elevator door by operator could be considered as substantial assurance of safety.—Bemis v. Plant, 106 A. 764, 93 Conn. 554.

80. Del.—Clayton v. Philadelphia, B. & W. R. Co., 106 A. 577, 7 Boyce 343.
10 C.J. p 1104 note 79.

Direction implied from call of "all out"

Train conductor's calling out "all out for Atlanta," passenger's destination, indicated that conductor was ready for passenger to disembark, and gave passenger right to assume that railroad had furnished safe place for her to alight.—Metts v. Louisville & N. R. Co., 182 S.E. 531, 52 Ga.App. 115.

81. Ark.—Missouri Pac. R. Co v. Kennedy, 239 S.W. 376, 153 Ark. 77.

Temporary departure from train

A passenger, in temporarily alighting from a railroad train at an intermediate station, was entitled to rely on information as to prospective movements of the train given him on his request by the railroad company's brakeman, based on the customary movements of that train or on the orders under which it was operating.—Missouri Pac. R. Co. v Kennedy, 239 S.W. 376, 153 Ark. 77.

82. Ind.—Hudnut v. Indiana De Luxe Cab Co., 182 N.E. 711, 98 Ind. App. 44.

83. N.J.—McGrath v. Delaware, L. & W. R. Co., Sup., 100 A. 753.

Passing from coach to coach of moving train

Passenger thrown from platform of coach of moving train, while passing from one coach to another in obedience to command of member of train crew, which involved manifest danger under existing circumstances, held to have assumed risk.—McGrath v. Delaware L. & W. R. Co., Sup., 100 A. 753.

84. Conn.—Cohen v. Eastern Stages, 164 A. 383, 116 Conn. 210.
Ga.—Southern Ry. Co. v. Whitehead, 120 S.E. 700, 31 Ga.App. 398
Tex.—Texas & N. O Ry. Co. v. Rooks, Com.App., 293 S.W. 554, denying rehearing 292 S.W. 536, which affirmed, Civ.App., 283 S.W. 622.
Va.—Pennsylvania R. Co. v. Jenkins, 89 S.E. 96, 119 Va. 186.

Negligent signal by bus driver

Negligence of bus driver in signaling to passenger to cross road to board another vehicle does not absolve passenger from using reasonable care to protect himself from injury.—Cohen v. Eastern Stages, 164 A. 383, 116 Conn. 210.

Stepping off street car and into path of auto

A passenger who goes to the front door as a street car approaches his stop and stands there waiting for the doors to be opened by the motorman, and the motorman does open them while the car is in motion, cannot say that the motorman invites him to alight, or that he has a right to assume that the motorman has exercised the highest degree of care for his protection, and that it is safe to attempt to alight; and, assuming that opening door of vestibule of street car is an invitation to alight, a passenger stepping through the open door in broad daylight, while the car was moving very slowly, with the result that he was struck by the rear fender of an automobile traveling in the same direction, was guilty of contributory negligence; the danger being obvious and apparent.—Twaddell's Adm'r v. South Covington & C. St. Ry. Co., 255 S.W. 1027, 201 Ky. 97.

85. Cal.—Sanchez v. Pacific Auto Stages, 2 P.2d 845, 116 Cal.App. 392.

86. Del.—Clayton v. Philadelphia, B. & W. R. Co., 106 A. 577, 7 Boyce 343, citing **Corpus Juris** with approval.
Mo.—Gunn v. United Ry. Co of St. Louis, 193 S.W. 814, 270 Mo. 517, L.R.A. 1917D 1131.
10 C.J. p 1105 note 81.

Opening door of moving street car

(1) A passenger on a street car is entitled to rely on a well-established custom that the motorman will not open the doors to allow passengers to alight until the car comes to a full stop, and, where the motorman opens the doors, his act may be considered as a direction for passengers to alight then and there.—Tillery v. Harvey, Mo.App., 214 S.W. 246.

(2) If, as claimed, a street car conductor opened the door and told a passenger to alight, while the car was moving, and while standing on the step, the car increased its speed with a sudden jerk, injuring him, the company was not exonerated because the conductor opened the door at the passenger's request.—Leonard v. United Rys. Co of St. Louis, Mo. App., 239 S.W. 892

Contract provisions as not controlling

Although the transportation contract of an owner accompanying a shipment of live stock provided that

of a reasonable person, imprudent, or contrary to the authority of the employee who gives the direction.[87] The mere advice or counsel of those in charge of the train as to getting on or off while the train is in motion will not be enough to excuse the passenger in doing a negligent or wrongful act.[88]

§ 781. Proximate Cause

To bar recovery, the negligence of a passenger must be the proximate cause of his injury. It has been held that the concurring negligence of the carrier and the passenger will bar a recovery, although the concurring negligence of the carrier and a stranger will not.

Carriers are not responsible for injuries resulting from the contributory negligence of the passenger, as shown supra § 774; in other words, the carrier is not responsible where the injury was the proximate result of the negligence or willful act of the passenger.[89] It has been held that the passenger's negligence, in order to prevent a recovery,

he was to remain in the caboose and not to get on and off the caboose while in motion, the owner could nevertheless sue for personal injuries sustained in alighting from the train while in motion on the advice of the conductor, the suit not being one for breach of contract, but for an injury resulting from the negligent act of defendant's employee under the maxim respondeat superior, imputing liability to a master for the negligent act of a servant within the servant's employment, irrespective of any contract.—Missouri Pac R. Co v. Hanna, 247 S.W. 1044, 157 Ark. 32, certiorari granted 43 S. Ct. 702, 262 U.S. 740, 67 L.Ed. 1209, and error dismissed 45 S.Ct. 36, 266 U.S. 184, 69 L.Ed. 235.

87. Del.—Clayton v. Philadelphia, B & W. R. Co., 106 A. 577, 7 Boyce 343.
10 C.J. p 1105 note 82.

88. Del.—Clayton v. Philadelphia, B. & W. R Co., supra.
10 C.J p 1105 note 83.

89. Ala.—Southern Ry. Co. v. Pruett, 77 So. 49, 200 Ala. 675.
Cal.—Metzler v. Los Angeles Railway Corporation, 279 P. 190, 99 Cal.App 656.
Ga.—Atlanta Northern Ry. Co. v Goode, 91 S.E. 886, 19 Ga.App. 555
Ill.—See Kaber v. Borland, 201 Ill. App. 516.
La.—Crettet v. New Orleans City R Co., 98 So. 657, 154 La. 1034.
Miss.—Dantzler Shipbuilding & Drydocks Co. v. Hurley, 81 So. 163, 119 Miss. 473, 4 A.L.R. 1487, suggestion of error denied 81 So 406.
Mo.—Smuzynski v. East St. Louis Ry. Co., App., 93 S.W.2d 1058.
Pa.—Shade v. Union Traction Co., 7 Pa.Dist. 34; 20 Pa.Co. 292.
Tex.—Crow v. Southwestern Transp. Co., Civ.App., 73 S.W.2d 607, error refused—St. Louis, S. F. & T. Ry. Co. v. Gibson, Civ.App., 211 S.W. 263.
W.Va.—Twyman v. Monongahela West Penn Public Service Co., 191 S.E. 541—Slaven v. Baltimore & O. R. Co, 171 S.E. 818, 114 W.Va. 315—Nutter v. Chesapeake & O. Ry. Co., 166 S.E. 815, 113 W.Va. 94.
10 C.J. p 1105 note 85.

Assuming perilous position

Negligence of intending passenger, struck while attempting to board moving train by train on parallel track, in placing himself in perilous position on narrow space between tracks, held proximate cause of his injury.—Matthews v. Central of Georgia Ry. Co., 169 S.E. 41, 46 Ga. App. 699.

Resting hand on gate as proximate cause of fall

Any fault of carrier's machinery or employees in only partially opening gates of street car when stopped for passengers was not a proximate cause of fall of a passenger, who, in alighting while the car was standing still, put her hand on a gate for support or to widen the space, whereupon they suddenly opened, causing her to fall; her fall was attributable to her own act.—Smith v. Bradley, 89 So. 273, 206 Ala. 128.

Riding with leg over door of auto

Where, in an action for injury to a passenger in an automobile, resulting in his death, the jury could reasonably have found that deceased rode with one leg protruding from the car, which was driven slowly near a water tank without sufficient force to damage the fender coming in contact therewith, or throw him from the car, and that he fell from the car, due to his leg being caught between the car and the tank, thereby pulling him from his car as it passed forward, they could have found that he was negligent, and that such negligence was the proximate cause of the injury.—Guilfoile v. Smith, 116 A. 237, 97 Conn. 271.

Misuse of appliance

Where a passenger is injured in attempting to use a step box, in boarding or alighting from a train, without looking at it, and stumbles over or against it when he should have stepped on it, his injuries are attributable to his misuse of the appliance, and not to its inadequacy, and the carrier is not liable for his injuries.—Scott v. Vicksburg, S & P. Ry. Co, 90 So. 840, 150 La. 537, 20 A.L.R. 903.

Standing too close to track

(1) Prospective passenger's negligence in standing so close to tracks as to be struck by overhang of trolley extending twenty-three inches beyond rail held proximate cause of injury, barring his recovery.—Sawyer v. Androscoggin Electric Co., 159 A. 119, 131 Me. 60.

(2) Where person awaiting train crossed track in front of it, but remained so close as to be struck by the train, the position she assumed, and not speed of train or brilliancy of headlight, was the cause of the injury.—Kent v. Ogden, L. & I Ry. Co., 167 P. 666, 50 Utah 328.

Other acts constituting proximate cause

(1) Employer, who transported employees to and from their homes in an automobile truck for a small consideration, was not liable for death of employee, who jumped from moving truck upon truck driver's failure to stop directly opposite his gate, the proximate cause of the injury causing death being the voluntary act of employee in jumping from truck, and not the negligence of the driver.—Dantzler Shipbuilding & Dry Docks Co. v. Hurley, 81 So. 163, 119 Miss 473, 4 A.L.R. 1487, suggestion of error denied 81 So. 406.

(2) Passenger's action in jumping from moving train constituted intervening cause of injury for which he alone was responsible.—Fort Worth & D. C. Ry. Co. v. Armitage, Tex. Civ.App., 39 S.W.2d 108, error refused.

(3) Where a street car contained a sign inviting passengers to leave by the front exit, and plaintiff went to the rear platform to alight, although defendant did not allow her time to alight safely, and failed to close the vestibule door before starting the car according to its custom, its acts were not the proximate cause of the injury where plaintiff voluntarily alighted from the moving car while it was running at the rate of eighteen miles an hour.—Kirby v. United Rys. Co. of St. Louis, Mo., 242 S.W. 79.

(4) Proximate cause shown where plaintiff stepped off the wrong side of the train in the dark.—Fort

must have been such as materially contributed to the injury.[90] Negligence of the passenger having no proximate connection with his injury will not bar a recovery,[91] as where the passenger's injury was not caused by his intoxication,[92] or by his violation of regulations or directions of the carrier,[93] or by his negligence in mounting or alighting from a moving vehicle,[94] or in riding on the platform or steps of the vehicle,[95] or in leaving a vehicle from or at the wrong place.[96]

If the injured passenger and the carrier are equally negligent, or, in other words, if their negligence concurs in causing the injury, there can be no recovery.[97]

The concurring negligence of the carrier and a stranger will not defeat a recovery.[98]

§ 782. Injury Avoidable Notwithstanding Contributory Negligence

Where a carrier has the last clear chance to prevent the injury to a negligent passenger, it will be liable in damages for its failure to do so.

The doctrine of the preceding section that contributory negligence to defeat recovery must be the proximate cause of the injury leads to a well recognized rule that, if the negligence of the passenger is known to the employees of the carrier, or in the exercise of proper care might have been known to them, and by the exercise of the degree of care required of carriers for the protection of their passengers the injury likely to result from such negligence might have been avoided, then the carrier is liable for the fault of its employees in not avoiding such injury, such fault being deemed the proximate cause thereof, while the negligence of the passenger becomes the remote cause.[99] This rule

Worth & D. C Ry. Co v. Armitage, supra.
10 C.J. p 1105 note 85 [c].

90. Miss—Yazoo, etc, R. Co. v. Byrd, 42 So. 286 89 Miss. 308.
10 C J. p 1107 note 87

91. U S.—Fish v. Ball, C C A Utah, 93 F.2d 853—Harmon v. Barber, Ohio, 247 F 1, 159 C.C.A. 219, certiorari denied 38 S.Ct 335, 246 U. S 666, 62 L.Ed. 929
Ind—Heed v. Gummere, 136 N.E. 5, 192 Ind 227.
S C.—Comer v Atlantic Coast Line R. Co, 90 S E. 188, 105 S C. 480.
Tex.—Texas & N O. R. Co. v. Parry, Civ.App, 1 S.W 2d 760, reversed on other grounds, Com.App, 12 S. W 2d 997—Houston E & W. T. Ry. Co v. Lynch, Civ.App., 208 S. W. 714—Ablon v. Electric Express & Baggage Co., Civ App, 206 S.W. 717, affirmed Electric Express & Baggage Co v. Ablon, 218 S.W 1030, 110 Tex. 235.
10 C J. p 1105 note 85.

Failure to act

The negligence of a passenger on a private carrier in doing nothing for his own safety must be shown to be the proximate, efficient, and essential cause of his injury, to constitute contributory negligence—Duffy v J. W Bishop Co., 122 A. 121, 99 Conn. 573

Failure to ask station agent for key to toilet

Where plaintiff elderly lady who had been waiting in station while local mixed freight train on which she was traveling switched, desiring to use toilet and seeing none about station, returned to caboose, and after using toilet there was injured, while standing in aisle, by alleged violent jerking of train, held, failure of plaintiff to ask station agent for information concerning station toilet or for key was not proximate cause of injury.—Meeks v Graysonia, N. & A. R. Co., 272 S W. 360, 168 Ark 966.

Riding with leg over door of auto

If a passenger while riding in an automobile with a part of his leg over the car door was injured at the time of a collision of the car with some fixed or moving object in the highway caused by the negligent operation of the car, it does not follow that the proximate cause of the injury was due to the passenger's negligence, even though passenger would not have been injured if he had kept his leg in the car, and in an action by a passenger against a carrier to recover for personal injuries, recovery will not be barred by reason of negligence of the plaintiff unless the evidence establishes that such negligence was the proximate cause of his injuries—Guilfoiel v. Smith, 111 A. 593, 95 Conn 442.

92. La.—Grennon v. New Orleans Public Service, 120 So. 801, 10 La App. 641
10 C.J. p 1105 note 85 [f].

93. Minn—Gerin v. Chicago, M. & St P Ry. Co., 158 N W. 630, 133 Minn 395

Contract regulations

Railroad could not escape liability for death of stock caretaker, caused by derailment simply because he violated shipping contract requirement that he remain in caboose, it not being shown that violation of contract had anything to do with causing injury—Heed v. Gummere, 136 N E. 5, 192 Ind 227.

94. N.Y.—Van Ostran v. New York Central, etc, R. Co, 35 Hun 590, affirmed 104 N Y 683
10 C.J. p 1105 note 85 [b], [c].

95. S.C.—Talbert v Charleston, etc., R. Co., 81 S E 182, 97 S C. 465
10 C J. p 1105 note 85 [a].

Injury occurring on restarting of train

The fact that plaintiff had been riding on the platform of the train did not bar his recovery where the train had come to a full stop, plaintiff was on his way down the steps to alight at a station, and his injury was proximately due to the sudden restarting of the train which threw him to the ground.—Comer v. Atlantic Coast Line R. Co., 90 S E. 188, 105 S C. 480

96. S C—Whitworth v. Columbia, etc, R. Co., 85 S E. 402, 101 S C. 213.
10 C J. p 1105 note 85 [g].

Wrong station

Leaving train at wrong station held not direct and proximate cause of injury to passenger in alighting thereat, where injury resulted from brakeman's misplacing of box or stool on to which plaintiff stepped—Texas & N O R. Co. v. Rooks, Tex Civ.App., 283 S W 622, affirmed, Com App., 292 S W. 536, and rehearing denied 293 S W. 554.

97. Ga.—Pickett v Central of Georgia R. Co, 74 S E 1027, 138 Ga. 177, Ann.Cas 1913C 1380.
10 C.J. p 1107 note 86.

98. Ala—Atkinson v. Dean, 73 So 479, 198 Ala 262.

Baggage blocking aisle

Action against carrier for injuries to passenger caused by falling over baggage left in aisles of car by other passengers may be defeated if passenger was guilty of contributory negligence, but negligence of stranger in obstructing aisle concurring with that of carrier will not defeat action—Atkinson v. Dean, 73 So. 479, 198 Ala. 262.

99. Cal.—Lorry v. Englander Drayage & Warehouse Co., 291 P. 467, 108 Cal App. 116.

applies when, and only when, the carrier has actual or constructive knowledge of the passenger's danger,[1] when the situation of the passenger is in fact one of peril,[2] when the carrier realizes, or should realize, that the passenger cannot or will not avail himself of any opportunity for escape,[3] and

Conn.—Pond v Connecticut Co., 114 A. 532, 96 Conn 451

Ga.—Bailey v Georgia Ry & Power Co 124 S.E 907, 32 Ga App. 793.

Mich.—Schnurr v. Detroit United Ry., 193 N.W. 772, 222 Mich 591

Mo.—Took v Wells, 53 S W 2d 389, 331 Mo 249—Bode v. Wells, 15 S W 2d 335, 322 Mo 386.

N Y.—Johnson v Interborough Rapid Transit Co, 183 N Y S. 224, 192 App Div 639.

Ohio.—McGinn v Columbus Ry. & Light Co., 4 Ohio App 398

Va.—Meanley v Petersburg, H. & C P Ry. Co, 112 S E. 800, 133 Va 173

Wash.—Switzer v City of Seattle, 294 P. 225, 159 Wash. 540, modified in other respects 298 P 347.

10 C.J. p 1107 note 89

Duty of carrier generally

Trainmen observing plaintiff in a position of peril while attempting to board a moving train were bound to do nothing to increase his hazard and were required to exercise reasonable care to diminish it and to avoid injury.—Webb v Missouri O & G Ry Co., 179 P. 17, 74 Okl 223

Danger zone

Danger zone, under humanitarian doctrine, is reached at moment plaintiff approaches so near point of collision and under such circumstances that it is or reasonably should be apparent to defendant carrier or its servants that plaintiff cannot or will not stop before coming into defendant's path.—Kent v Kiel, Mo App., 97 S W 2d 885.

Intoxicated passenger

Street railroad held not to have discharged full duty, after discovering dangerous position of prospective passenger in intoxicated condition within few feet of rails.—Grennon v. New Orleans Public Service, 120 So. 801, 10 La App. 641.—10 C J p 1107 note 89 [h].

Prospective passenger obviously oblivious to danger

While an engineer may ordinarily presume that pedestrians near tracks will observe an approaching train and avoid injury, yet if a passenger so standing appears oblivious of his danger and apparently will not save himself, the engineer, when he discovers that fact, should do all in his power to avoid injury.—Gordon v. Director General of Railroads, 104 S.E 796, 128 Va. 426

Riding on running board in violation of ordinance

Negligence of plaintiff, who was injured while violating an ordinance, like his negligence in any other form, must proximately contribute to the injury in order to constitute a bar to recovery, and it does not so contribute in contemplation of law if, after plaintiff's peril is or ought to be discovered, defendant has a last clear chance to avoid the injury; and, where the motorman of a street car knew that plaintiff passenger was riding on the running board of the car in violation of ordinance, the street railway was liable for negligence of such motorman in failing to stop his car when he saw or should have seen that a standing truck would throw plaintiff from the running board.—Virginia Ry. & Power Co v Cherry, 105 S E. 657, 129 Va 262

Running over same man twice

Where pedestrian, crossing in front of approaching street car at street intersection preparatory to boarding street car, was struck and in attempting to release him motorman backed car and ran over pedestrian's leg again, street railroad held liable for second injury irrespective of whether pedestrian was negligent in first instance.—Tennessee Electric Power Co v. Bainbridge, Tenn App., 95 S.W 2d 1261.

In Wisconsin

(1) The last clear chance doctrine was expressly repudiated by a decision holding that any change in the Wisconsin law must come from legislative action, the decision being that a person who had negligently stepped into elevator shaft and was precipitated to bottom of shaft by negligent operation of elevator was properly nonsuited, in absence of showing of gross negligence on part of operator, the doctrine of last clear chance or supervening negligence not obtaining in state.—Switzer v. Detroit Inv. Co, 206 N W 407, 188 Wis 330

(2) Another case holds that, in action against street railroad by prospective passenger who walked in front of approaching street car without looking, plaintiff's negligence was not excused by negligence of motorman who failed to stop after acknowledging plaintiff's signal to stop.—Peters v. Milwaukee Electric Ry. & Light Co, 259 N W 724, 217 Wis. 481.

1. Cal.—Tucker v. Pacific Electric Ry. Co, 161 P. 1147, 174 Cal. 42

Conn.—Tardieu v. Connecticut Co., 154 A. 173, 113 Conn 94.—Pond v Connecticut Co., 111 A. 621, 95 Conn. 437.

Ind.—Mulvaney v. Terre Haute, I. & E. Traction Co., 124 N.E. 682, 71 Ind.App 270.—Evansville Rys. Co. v Miller, 111 N.E 1031, 64 Ind. App 206

Mo.—Higgins v Terminal R. Ass'n of St. Louis, App., 97 S W 2d 892

N.H.—Robinson v Boston & M. R. R, 160 A 473, 85 N H 474

Tex.—Ft. Worth & D. C. Ry Co v Hawley, Civ App., 235 S W. 659, dismissed for want of jurisdiction.

Attempt to board car

Last clear chance doctrine did not apply in absence of motorman's knowledge of peril of plaintiff attempting to board another car.—Mulvaney v. Terre Haute, I. & E. Traction Co., 124 N E 682, 71 Ind. App 270.

2. **Riding in separate compartment of car containing horses**

Where plaintiff, in violation of his contract with defendant which contemplated that he ride in the caboose, rode in an emigrant car with two other persons and his horses, which were separated from the remainder of the car by a strong partition, held that while plaintiff's position was not a safe place to ride, it was not so perilous as to bring it within the humanitarian doctrine, the word "peril" as used in that doctrine meaning something more than a bare possibility of an injury occurring.—State ex rel. Vulgamott v Trimble, 253 S W 1014, 300 Mo 92, quashing opinion Vulgamott v Payne, App., 245 S.W. 592

3. Conn.—Tardieu v. Connecticut Co, 154 A. 173, 113 Conn 94

Mo.—Butler v. United Rys. Co. of St Louis, 238 S W 1077, 293 Mo. 259.—Tuck v. St. Louis-San Francisco Ry. Co, 268 S.W 682, 217 Mo.App 442.

Passenger's duty to step out of danger

(1) Where prospective passenger stood so near track in using flag that train could not pass without hitting him, engineer had right to assume that deceased would act as ordinarily prudent man in regard to his own safety and would step out of danger before train could strike him, even though it did not slacken its speed.—Tuck v. St. Louis-San Francisco Ry. Co., 268 S W. 682, 217 Mo App 442.

(2) The motorman of a car, approaching prospective passenger standing near track waiting for it to stop, would have been justified, if he saw her, in assuming that she would move to a place of safety on the approach of the car, if she was standing too close.—Butler v United Rys. Co. of St. Louis, 238 S.W. 1077, 293 Mo. 259.

when the carrier's opportunity of preventing the injury by the exercise of due care is later in point of time than that of the passenger.[4] Where the carrier does in fact do everything reasonably possible to save the passenger from injury as soon as his peril is perceived, the doctrine of the last clear chance may not be invoked against the carrier.[5]

Constructive knowledge on the part of the carrier gives rise to an opportunity to prevent injury where an employee of the carrier actually sees the passenger and the passenger's situation is such as to indicate to a man of ordinary prudence that he is in danger of being injured,[6] or where the passenger is in a situation of peril from which he cannot extricate himself and it is the duty of the carrier to keep a lookout;[7] but where there is not sufficient time after the discovery of plaintiff's peril for the employees of defendant to prevent the injury, there is no room for the application of the rule,[8] as where the injury to the passenger results from his own unexpected and not reasonably to be anticipated act in moving from a position of safety into one of peril and the carrier lacks time to take any effective steps to prevent injury.[9]

There is authority, however, to the effect that it is a misuse of terms to speak of the passenger's conduct in such case as contributory negligence, and that the rule in question is but the statement in another form of the proposition that antecedent misconduct or negligence on the part of the passenger, such as could not have had any influence on the conduct of the carrier, will not defeat a recovery for injuries inflicted by the immediate negligence of the carrier.[10]

§ 783. Willful or Wanton Injury; Gross Negligence

The willful and wanton misconduct or gross negligence of a carrier may preclude it from relying on the defense of a passenger's contributory negligence.

Contributory negligence will not be a defense to an action by a passenger against the carrier where the latter has willfully or wantonly inflicted injury on the former,[11] or has been guilty of gross neg-

4. Conn.—Pond v. Connecticut Co., 111 A. 621, 95 Conn. 437.
Ind.—Evansville Rys Co. v. Miller, 111 N.E 1031, 64 Ind.App. 206.
Me.—Sawyer v. Androscoggin Electric Co, 159 A. 119, 131 Me. 60
Mo.—Tuck v St. Louis-San Francisco Ry. Co., 268 S.W. 682, 217 Mo. App 442.
Ohio.—Steinman v. Cleveland Ry. Co., 155 N.E. 149, 23 Ohio App. 448.
Tex.—Lee v. Baker, Civ.App, 251 S. W. 580.
10 C.J. p 1108 note 90.

Passenger's opportunity to retire

An intending passenger, who took a position so near the track that he was liable to be injured, and had knowledge of the approach of the car, and could have retired from his dangerous position at any time before being struck, cannot recover under the doctrine of last clear chance, as the opportunity of the motorman to prevent the accident was not later in point of time than that of the intending passenger.—Union Traction Co. of Indiana v. Smith, 127 N.E. 308, 74 Ind App 345.

5. La.—Cox v. Ardis Building Co., 7 La.App. 125.
Tex.—Lee v. Baker, Civ.App., 251 S. W. 580

6. Ind.—Evansville Rys. Co. v. Miller, 111 N.E. 1031, 64 Ind.App. 206.

7. Ky.—Louisville R. Co. v. Hudgins, 98 S.W. 275, 124 Ky. 79, 30 Ky.L. 316, 7 L.R.A.,N.S., 152.
10 C.J. p 1108 note 92.

8. Mo.—Butler v. United Rys. Co. of St. Louis, 238 S.W. 1077, 293 Mo 259.
10 C.J. p 1108 note 93.

Danger apparent only when too late to stop train

Last clear chance doctrine held inapplicable in action by forty-five year old prospective passenger of intelligence who knew electric train was approaching, and who continued to walk along platform eighteen inches from outer edge of thirteen and one-half-inch third rail cover, for injuries sustained when struck by train with thirteen and one-half to fourteen and one-half-inch overhang, where engineer first saw passenger when train was about two hundred sixteen feet away, realized her position of danger when train was about thirty-six feet from her, gave repeated signals, and applied emergency brakes and brought train to a stop about thirty-six feet beyond point where she was struck.—McKeown v. Northwestern Pac. R. Co, Cal.App., 66 P.2d 1250.

9. Md.—Washington, B & A. E. Ry. Co. v. State, 113 A. 338, 137 Md. 538.
Mo.—Schall v. United Rys. Co. of St. Louis, 212 S.W. 890—McMiens v. United Rys. Co. of St. Louis, 202 S.W. 1082, 274 Mo. 326
Va.—Derring's Adm'r v. Virginia Ry. & Power Co., 95 S.E. 405, 122 Va. 517.

Stepping into path of car only four feet distant

In action for death of plaintiff's intestate struck by interurban car at crossing, where plaintiff's own testimony showed that deceased stepped from door of shelter house, only four feet away from track, upon the track immediately in front of the car, so that it was impossible for the motorman to check speed to an effectual extent before car struck deceased, the doctrine of the last clear chance held inapplicable.—Van Sickle v. Grand Rapids, G. H. & M. Ry Co., 182 N.W. 132, 213 Mich 261.

10. U.S.—Pennsylvania R. Co. v Reed, N.Y., 60 F. 694, 9 C.C.A. 219
Cal.—Tobin v. Omnibus Cable Co., 34 P. 124, 4 Cal.Unrep.Cas. 214.
10 C.J. p 1108 note 94.

11. Kan.—Harbert v. Kansas City El. R. Co., 138 P. 641, 91 Kan. 605, 50 L.R.A.,N.S., 850
10 C.J. p 1108 note 95.

What not wanton misconduct

A motorman, operating a car in a country district, was not guilty of wanton misconduct in running down and killing an intending passenger, who was standing two feet from the track, signaling the car, and was struck by the overhang of the steps, being entitled to anticipate, for a time at least, that decedent would remove herself from her position of peril, where there was nothing to indicate that passengers were accustomed to stand within such zone of danger when cars were approaching, or, that being there, they were not accustomed to withdraw as cars approached beyond the danger point, and that the motorman knew, or ought to have known, this.
Conn.—Pond v. Connecticut Co., 111 A. 621, 95 Conn. 437.

ligence in so doing.[12] However, in some jurisdictions gross negligence on the part of the carrier does not of itself preclude defendant from relying on the contributory negligence of plaintiff.[13]

§ 784. While on Premises or Approaches; Going on Track

A passenger must exercise ordinary care to protect himself from injury by vehicles or other instrumentalities while at or approaching a railroad station, although he may properly assume in the first instance that the carrier will observe its duty relative to maintenance and operation of station facilities and vehicles. So, too, where the passenger goes onto the track his duty of care is commensurate with existing circumstances, but he may rely on the carrier to observe proper precautions to protect him from injury by passing trains or cars.

A person, who goes about the station and premises or car step, or passes along the approaches to railroad trains or cars in connection with waiting for, going on board of, or alighting from, a train or car must take reasonable care for his own safety; otherwise he is guilty of contributory negligence which may preclude him from recovering for the resulting injuries.[14] Thus it is his duty to occupy the premises provided for his use while waiting for trains, and in going to and from the carrier's depot, offices, platforms, and trains, and to use the ways and means provided for that purpose, and if instead of so doing he negligently uses a way which is dangerous the carrier is not liable,[15] unless the safe approaches are not sufficiently indicated, and the passenger without any negligence on his part takes the unsafe way,[16] or unless, as it has been held, the injury was caused by the carrier's gross negligence.[17] A passenger may use the station platform for any lawful purpose connected with his journey, and for which it was manifestly intended, but he must exercise reasonable care in so doing.[18] The passenger may, however, rely on the carrier's adoption of all necessary and reasonable precautions in respect of the maintenance and operation of the station and its facilities and appurtenances,[19] and, where he is himself in the exercise of due care, may hold the carrier responsible for injuries arising from its negligent maintenance or operation of a station or its facilities or appurtenances.[20]

Ill.—See Louden v. Terminal R. Ass'n of St. Louis, 206 Ill.App. 87

12. Miss.—Reed v. Yazoo, etc., R. Co., 47 So. 670, 94 Miss. 639—Yazoo, etc., R. Co. v. Humphrey, 36 So. 154, 83 Miss. 721

13. Ky.—Newport News, etc., R. Co. v. Boles, 13 Ky.L. 208

14. Ky.—Illinois Cent. R. Co. v. Sanderson, 192 S.W. 869, 175 Ky. 11, L.R.A.1917D 890

La.—Mills v. Illinois Cent. R. Co., 86 So. 750, 148 La. 217.

Pa.—Martin v. Steen, 167 A. 609, 109 Pa.Super. 263.

R.I.—Villa v. United Electric Rys. Co., 155 A. 366, 51 R.I. 384, 75 A.L.R. 282.

10 C.J. p 1109 note 98.

Turnstile

It is duty of passenger, in attempting to pass through turnstile to board cars, not to run against it with such force as to injure herself, and if she does so she is guilty of contributory negligence.—South Covington & C. St. Ry. Co. v. Elder, 266 S.W. 1088, 206 Ky. 178, 40 A.L.R. 826.

Walking into hole

Intending passenger who, while looking for street car, stepped into obvious hole about six inches from rail and fell, held contributorily negligent.—Baudry v. New Orleans Public Service, Inc.App., 145 So. 36.

Shelter as "station"

A shelter or structure having three sides but no windows, provided by carrier and used by passengers when awaiting the arrival of cars, held a "station" as respected degree of care to be used by passengers.—Wilkinson v. United Railroads of San Francisco, 232 P. 131, 195 Cal. 135.

15. Ala.—Montgomery & E. R. Co. v. Thompson, 77 Ala. 448, 54 Am.R. 72.

Wash.—Clark v. City of Seattle, 252 P. 100, 141 Wash. 634.

10 C.J. p 1109 note 99.

Headlong rush in dark

A passenger who without looking rushes through a door partly open into a dark hallway leading to basement in depot, thinking it a door to toilet, and by stepping across a three-foot landing falls down the stairs and is injured, is guilty of contributory negligence.—Illinois Cent. R. Co. v. Sanderson, 192 S.W. 869, 175 Ky. 11, L.R.A.1917D 890.

16. Tex.—Missouri Pac. R. Co. v. Long, 16 S.W. 1016, 81 Tex. 253, 26 Am.S.R. 811.

10 C.J. p 1110 note 1.

17. Mich.—Peregre v. Lake Shore, etc., R. Co., 122 N.W. 535, 158 Mich. 225.

18. Or.—Abbot v. Oregon R. Co., 80 P. 1012, 46 Or. 549, 114 Am.S.R. 885, 1 L.R.A.,N.S., 851, 7 Ann.Cas. 961.

10 C.J. p 1110 note 3.

Walking off platform in dark

Where a passenger walked out of the station on a dark night onto a platform which she knew was raised above the ground, and after the door was closed behind her cutting off all light she started in a direction opposite to that intended and walked off the platform without paying particular attention to where she was going, she was contributorily negligent as a matter of law, and could not recover.—Hines v. Hadnot, Tex.Civ.App., 220 S.W. 186.

19. Va.—Burr v. Virginia Railway & Power Co., 145 S.E. 833, 151 Va. 934.

Gate

In going through gate in picket fence maintained by street railroad about its loop, it was not duty of plaintiff, a prospective passenger, to watch the gate lest it close suddenly without warning and injure her.—Earley v. Rhode Island Co., R.I., 100 A. 405.

Means of access generally

Passengers have right to assume that means of access to stations and trains are reasonably safe.—Bradley v. Erie R. Co., 147 A. 572, 106 N.J.Law 51, reversing 143 A. 743, 105 N.J.Law 1.

20. N.J.—Bradley v. Erie R. Co., supra.

Passenger not using regular approach

Even if prospective passenger taking unofficial pathway to station platform, was wrongdoer until reaching it, such would not relieve railroad of duty thereafter, and that passenger, falling on station platform, reached it from a path, and was not traveling direct route from station to train, did not relieve the carrier from liability.—Byron v. Boston & M. R. R., 136 A. 250, 82 N.H. 434.

Selection of uncovered platform

That intended passenger, who fell

A passenger or prospective passenger waiting at a station or other regular stopping place for a train, car, or bus is required to exercise ordinary care to protect himself from injury by approaching vehicles,[21] although he need exercise only ordinary care as measured by the circumstances surrounding the situation,[22] and may properly assume that the carrier will itself exercise due care for his safety in respect both of the operation of vehicles[23] and conditions at the station or other stopping place which might lead to injury from trains or cars.[24]

The passenger must exercise reasonable care not to pass or to stand too near the track, and if he fails to exercise such care, whereby he is struck by an ordinary train or car, he cannot recover;[25] but this duty exists as to cars of ordinary width only,[26] and a person who is on a station platform waiting to board an approaching car or train may, in the absence of knowledge that his position is perilous, assume that he may occupy any part of the platform without danger of being struck by a passing train or car;[27] nor will a passenger be held guilty

on ice on station platform, proceeded by uncovered platform, rather than by more distant covered platform, held not conclusively to show negligence—Byron v. Boston & M. R. R., 136 A. 250, 82 N.H. 434.

21. Pa.—Coyle v. Philadelphia & R. Ry. Co., 100 A. 1005, 256 Pa. 496.

Holding arm in front of approaching bus

Fifty-two year old man standing near highway in evening with one foot on tarvia shoulder and other on concrete roadbed, signaling approaching bus with headlights burning to stop by holding out arm, and struck on arm by bus, held contributorily negligent—Baryluk v. United Electric Rys. Co., 166 A. 356, 55 R.I. 306.

22. Mo.—Willi v. United Rys. Co. of St. Louis, 274 S.W. 24.

23. Ala.—Birmingham Electric Co. v. Jones, 176 So. 203, 234 Ala. 590

Pa.—Coyle v. Philadelphia & R. Ry. Co., 100 A. 1005, 256 Pa. 496

Headlight and warning whistle

Passenger waiting at station on car platform not only has right to expect headlight on approaching car, but also has right to expect that warning bell or whistle will be sounded, and that car will stop at platform.—Willi v. United Rys. Co. of St. Louis, Mo., 274 S.W. 24.

24. Pa.—Coyle v. Philadelphia & R. Ry. Co., 100 A. 1005, 256 Pa. 496.

Controlling crowd at station

Deceased, as an intending passenger, had a right to assume that defendant would perform its duty and take reasonable precautions to protect him from danger while waiting with a crowd to board its train, and might assume that defendant's train would approach station with such care as the circumstances required, and that its employees would prevent him from being pushed against moving train by the crowd attempting to board it.—Coyle v. Philadelphia & R. Ry. Co., 100 A. 1005, 256 Pa. 496

25. Ala.—McWilliams v. Louisville & N. R. Co., 115 So. 246, 217 Ala. 192.

Cal.—McKeown v. Northwestern Pac. R. Co., App., 66 P.2d 1250.

D.C.—Edgerton v. Baltimore & O. R. Co., 6 App.D.C. 516.

Ill.—Covert v. Rockford & I. Ry. Co., 132 N.E. 504, 299 Ill. 288—Foreman Trust & Savings Bank v. Chicago Rapid Transit Co., 252 Ill.App. 151 See McCausland v. Chicago City Ry. Co., 198 Ill.App. 200.

Ind.—Union Traction Co. of Indiana v. Smith, 127 N.E. 308, 74 Ind.App. 345.

Kan.—Kern v. Kansas City, L. & W. Ry. Co., 264 P. 1067, 125 Kan. 506.

La.—Grennon v. New Orleans Public Service, 120 So. 801, 10 La.App. 641.

Me.—Sawyer v. Androscoggin Electric Co., 159 A. 119, 131 Me. 60.

Mass.—Notaro v. Boston Elevated Ry. Co., 173 N.E. 431, 273 Mass. 296—Mann v. Boston Elevated Ry. Co., 152 N.E. 741, 256 Mass. 236.

Mich.—Devore v. Rapid Ry. Co., 209 N.W. 111, 235 Mich. 405

Wis.—Schildt v. Johnson, 159 N.W. 805, 164 Wis. 102.

10 C.J. p. 1110 note 4.

Duty to step back

Ordinary prudence required an intending passenger, standing on a platform within two feet of the track and signaling the approaching car, to step back so that she would not be struck by the overhang of a stop—Pond v. Connecticut Co., 111 A. 621, 95 Conn. 437

Slight movement by crowd

Where person, waiting for car, stood too near track, fact that crowd moved her a little was no excuse, where she did not change position—Notaro v. Boston Elevated Ry. Co., 173 N.E. 431, 273 Mass. 296.

Swaying car

Pedestrian, standing between car tracks waiting for street car, who was familiar with scene of accident, had boarded cars at that place numerous times and who failed to step out of path of approaching car after having had opportunity to notice that car was swaying held contributorily negligent when struck by car as it passed.—Elliott v. Market St. Ry. Co., 40 P.2d 547, 4 Cal.App.2d 292.

Thirteen and one half to fourteen and one half inch overhang

Forty-five year old prospective passenger of intelligence who knew electric train was approaching, and who continued to walk along platform eighteen inches from outer edge of thirteen and one-half-inch third rail cover flush with platform, held contributorily negligent and not entitled to recover for injuries sustained when struck by train with overhang of thirteen and one half to fourteen and one half inches even though she thought she was safe—McKeown v. Northwestern Pac. R. Co., Cal.App., 66 P.2d 1250.

Taking child through station window close to track

Where it appeared that plaintiff suing for personal injuries was standing on a platform of an electric railway station not intended for the use or accommodation of the public, which was warned against its use at this place by signs, and that when about to take a child through a rear window from a woman there with him to meet an incoming passenger, he was struck by the rear door of one of defendant's passing cars, proceeding around the station very close to the wall, held that he was guilty of contributory negligence, although he testified no alarm signals were given, and he did not know the car was passing until he was struck.—Meanley v. Petersburg, H. & C. P. Ry. Co., 112 S.E. 800, 133 Va. 173.

Track as itself warning of danger

Railroad track on which trains are constantly running is itself a warning to any passenger who has reached years of discretion, and who is possessed of ordinary intelligence, that it is not safe to walk on track or near enough to be struck by passing train without exercise of constant vigilance, and failure of such person to exercise such care and watchfulness and to make use of all his senses to avoid danger incident to such situation is "negligence per se."—McKeown v. Northwestern Pac. R. Co., Cal.App., 66 P.2d 1250.

26. Tex.—Denison, etc., R. Co. v. Craig, 80 S.W. 865, 35 Tex.Civ.App. 548.

27. Ind.—Evansville Rys. Co. v. Miller, 111 N.E. 1031, 64 Ind.App. 206.

10 C.J. p. 1111 note 6.

of contributory negligence where without fault of his own he is pushed by a waiting crowd into a position of danger on or near the track.[28]

Going on or crossing track; duty to stop, look, and listen. Reasonable care is required of a passenger or prospective passenger in going on or crossing a railroad track for the purpose of reaching or leaving his train or car, and if he fails to exercise such care, whereby he is injured, he is guilty of contributory negligence;[29] and if he unnecessarily or without valid cause goes onto the track or steps against or in front of an approaching car or train, he may not recover for resultant injury.[30] Ordinarily on approaching railroad tracks

28. Ala.—Alabama Great Southern R Co. v. Bell, 76 So. 920, 200 Ala 562.

29. U S.—Twyman v. Baltimore & O. R. Co, C.C.A.W.Va., 295 F 639.
Ark.—Reed v. Baldwin, 92 S.W.2d 392.
Cal.—Anderson v Market St. Ry. Co., 2 P 2d 529, 116 Cal App. 282—Lewis v Pacific Electric Ry. Co, 272 P 346, 94 Cal.App. 748.
Conn.—Moyles v. Connecticut Co., 160 A 307, 115 Conn. 80.
Ill.—Mortell v. Richardson, App., 2 N E.2d 567.
Mo.—State ex rel. Peters v. Reynolds, 214 S W 121—Peters v. Lusk, 206 S W. 250, 200 Mo App 372.
Ohio.—Lake Shore & M S R Co. v Hotchkiss, 24 Ohio Cir Ct 431.
Va.—Barksdale v Southern Ry Co., 148 S E 683, 152 Va. 604.
Wis.—Jacky v. McAdoo, 177 N.W. 885, 172 Wis. 262.
10 C J p 1111 note 7.

Measure of passenger's duty generally

Although an intending passenger going to a railroad station may rely on the railroad company to use ordinary care to protect her against injury by its trains, the passenger owes the corresponding duty to use ordinary care to protect herself, and the failure to use such care on her part is negligence.—Washington-Virginia Ry Co v. Struder, 111 S E 239, 132 Va 368.

Full use of senses

Due care required of prospective passenger approaching a railway track can be satisfied only by full use of senses of sight and hearing at the last moment of opportunity before passing line between safety and peril and injured passenger who fails to use common prudence before stepping on track cannot recover.—Peters v. Milwaukee Electric Ry & Light Co, 259 N.W. 724, 217 Wis 481.

Inviting motorman to back car

Intending passenger struck by street car, backed off trestle on his call that he could not enter car, held contributorily negligent in not having stepped aside to an available place of safety before calling to the motorman.—Tomey v. West Penn Rys. Co., 150 A 612, 300 Pa. 189.

30. Kan.—Grisham v. Union Traction Co, 181 P. 119, 121, 104 Kan 712, quoting **Corpus Juris.**
La.—Blanco v. New Orleans Ry. & Light Co, 73 So. 774, 140 La. 693.
Mass.—Fitzpatrick v. Boston Elevated Ry. Co., 144 N.E. 75, 249 Mass 140
Mo.—State ex rel. St. Louis-San Francisco Ry Co. v. Reynolds, 233 S.W. 219, 289 Mo 479, quashing Martin v. St. Louis-San Francisco Ry Co, App., 227 S.W. 129—Branstetter v. Chicago & A R Co., App., 225 S.W. 1035
Pa.—Dahl v. Pennsylvania R Co, 119 A 656, 275 Pa 554—Goller v Baltimore & O. R Co., 78 A. 929, 229 Pa 412.
Va.—Barksdale v. Southern Ry Co, 148 S E 683, 152 Va 604—Derring's Adm'r v. Virginia Ry. & Power Co, 95 S E. 405, 122 Va 517.
10 C J. p 1111 note 8.

Changing direction of travel

Where an intending passenger was in a position of safety when the carrier's train rounded a curve, and from this position his own act in changing his direction of travel brought him into contact with the train, and he was killed, his act amounted to contributory negligence, and the carrier is not responsible.—Washington, B. & A. E Ry Co v State, 113 A 338, 137 Md 538

Cloudy day

Where plaintiff, intending to take a train shortly due, crossed a railroad track toward a point where it was customary for passengers to await the arrival of trains, and was struck by a train which she could have seen approaching for a distance of three miles if she had looked, the view being wholly unobstructed, although it appeared that she carried an umbrella and a pocketbook and held her hat on with one hand, the day being cloudy, with perhaps a trace of rain, plaintiff was guilty of contributory negligence, justifying direction of a verdict for defendant.—Bradley v. Davis, 193 N W. 819, 223 Mich. 275.

Crossing at prepared place

One who crosses a railroad track at a place prepared for such purposes to become a passenger on a railroad train must exercise reasonable care not to be struck by other trains on parallel tracks, and if he fails to look and is struck while in the act of stepping in front of a moving train, he will be held guilty of contributory negligence.—Lynn v. Pittsburgh & L E R Co., 110 A. 271, 267 Pa. 41

Failure to look

(1) Where there was no evidence that there was a train immediately preceding the interurban train which killed decedent, and no other unusual circumstances to warrant a belief that no train was approaching, it was contributory negligence for an intending passenger to attempt to cross the track without looking for an approaching train.—Washington-Virginia Ry. Co. v. Struder, 111 S E. 239, 132 Va. 368.

(2) Prospective passenger who when within seven and three-fourths feet of car tracks failed to look toward approaching street car to see whether he could cross in safety, held contributorily negligent as matter of law when struck by street car, notwithstanding pedestrian had signaled motorman that he wanted to board street car, and that motorman had nodded his head in response to signal.—Peters v. Milwaukee Electric Ry & Light Co, 259 N.W. 724, 217 Wis. 481.

Mistake as to which train was approaching

That an intending passenger, struck by a train when crossing a railroad track to reach a platform from which to board a passenger train, thought that train approaching was the one he was to take, and that it would slow up before reaching the station, does not furnish a legal excuse for failure to exercise reasonable care.—Lynn v. Pittsburgh & L. E. R Co., 110 A 271, 267 Pa. 41

Running directly into path of car

Pedestrian running directly into path of approaching street car while crossing street on pedestrian lane, intending to board car, held contributorily negligent as matter of law.—Anderson v. Market St Ry. Co., 2 P. 2d 529, 116 Cal.App 282.

Sleep-dazed passenger

Decedent, waiting at station to take a train, who was dozing, and who on being apprised that train was coming, rushed out on platform, and, while in a dazed condition was struck by pilot beam, when train had been visible for six hundred feet and headlight was burning and there were lights about station, was guilty of contributory negligence.—Leard v. Pennsylvania R. Co., 99 A. 798, 255 Pa. 289.

a passenger should stop, look, and listen,[31] and especially is this true where there is no invitation or inducement to cross,[32] as where the car or train is not standing at a place appointed by the carrier for the exit or entrance of passengers,[33] or where the passenger alights from the wrong side of a train,[34] or where the passenger is warned of an approaching train, such as by the closing of platform gates,[35] or the lowering of crossing gates,[36] or where in disregard of the warnings of others he attempts to cross in front of an approaching train clearly visible and close at hand.[37] Where a passenger, after alighting from a street car, goes behind the car and attempts to cross a parallel track without taking proper precautions as to looking and listening for an approaching car, he is guilty of contributory negligence.[38]

However, a passenger who is in the act of going to or leaving the train or car at a place where there is an express or implied invitation for him so to do, as where it is necessary for him to cross the tracks, may assume that the railroad company will so operate its other trains, or otherwise perform its duty, as not to put him in peril,[39] and he is not un-

Stepping from platform to signal car

Where a prospective passenger is in a place of safety on a station platform, and needlessly steps onto the track to signal an approaching car which he has reason to believe will pass the point where he is standing before coming to a stop, and because of misjudging the speed of the car fails to get off the track in time and is hit, he is guilty of contributory negligence barring recovery.—Keller v. Stark Electric R. Co., 12 Ohio App. 326.

31. Ala.—McWilliams v. Louisville & N. R. Co., 115 So. 246, 217 Ala. 192.

32. Mass.—Wheelwright v. Boston, etc., R. Co., 135 Mass. 225.
10 C.J. p 1113 note 12.

Invitation not implied

Invitation to intending passenger to take train from wrong side could not be implied from open gates of car platform where crossing gates were lowered.—Kelley v. Boston, R. B. & L. R. R., 180 N.E. 229, 278 Mass. 469.

Signal station

Prospective passenger of interurban car, who waited for car at crossing which was not a regular stopping place and at which cars stopped only on signal, was required in the exercise of reasonable care to look and to see whether approaching car was in dangerous proximity before stepping on track, and where he had traveled on such cars almost daily for two years from crossing at which rules giving meaning of whistles were posted, and who signaled approaching car to stop and stepped from shelter house on track immediately in front of car after car had blown two blasts in reply to signal to stop, signifying that it would not stop in accordance with posted rules, held contributorily negligent.—Van Sickle v. Grand Rapids, G. H. & M. Ry. Co., 182 N.W. 132, 213 Mich. 261.

33. Minn.—DeKay v. Chicago, etc., R. Co., 43 N.W. 182, 41 Minn. 178, 16 Am.S.R. 687, 4 L.R.A. 632.
10 C.J. p 1113 note 13.

34. U.S.—Chicago, M. & St. P. Ry. Co. v. Lowell, Minn., 14 S.Ct. 281, 151 U.S. 209, 38 L.Ed. 131.
10 C.J. p 1113 note 14.

35. Mass.—Debbins v. Old Colony R. Co., 28 N.E. 274, 154 Mass. 402.

36. Mass.—Kelley v. Boston, R. B. & L. R. R., 180 N.E. 229, 278 Mass. 469.

Duty of care commensurate with danger

One walking upon crossing in disregard of warning gates must exercise care commensurate with danger.—Kelley v. Boston, R. B. & L. R. R., 180 N.E. 229, 278 Mass. 469.

37. U.S.—Twyman v. Baltimore & O. R. Co., C.C.A.W.Va., 295 F. 639.

Facing with death

While a railroad company owes a higher degree of care for the safety of an intending passenger at a station than to a traveler at a highway crossing, the distinction does not extend to exempting the passenger from responsibility for attempting to cross in front of an approaching train, plainly visible and very near, and where he loses his race with death the railroad cannot be held responsible.—Twyman v. Baltimore & O. R. Co., C.C.A.W.Va., 295 F. 639.

38. N.J.—Eagen v. Jersey City, etc., St. R. Co., 67 A. 24, 74 N.J.Law 699, 11 L.R.A.,N.S., 1058, 12 Ann.Cas. 911.
10 C.J. p 1114 note 17.

39. Cal.—Ferran v. Southern Pac. Co., 44 P.2d 533, 3 Cal.2d 350.—Wilkinson v. United Railroads of San Francisco, 232 P. 131, 195 Cal. 185.
Mo.—Schimmelpfenning v. Wells, 24 S.W.2d 154.—Sugarwater v. Fleming, 293 S.W. 111, 316 Mo. 742.
Pa.—Kissinger v. Pittsburgh Rys. Co., 180 A. 137, 119 Pa.Super. 110.
Wash.—Hohman v. City of Seattle, 38 P.2d 242, 179 Wash. 663.
10 C.J. p 1112 note 9.

Assumption that car will stop at appointed place

In determining whether prospective passenger, killed by car on which she desired to take passage, was guilty of contributory negligence, every act of hers must be considered with her assumption that car would stop, point being place where passengers were received. Prospective passenger clearly visible with suitcase in hand hurrying to pole marked "stopping place" is entitled to assume car will be stopped.—Brott v. Auburn & S. Electric R. Co., 115 N.E. 273, 220 N.Y. 92, reversing 154 N.Y.S. 1113, 169 App.Div. 913.

Assumption that car will stop on schedule

Intending passenger crossing track to board approaching interurban car traveling on schedule time of regular car could assume car would stop.—Klingensmith v. West Penn Rys. Co., 154 A. 811, 303 Pa. 487.

No duty to wait

Intending passenger seeing interurban car approaching at sufficient distance for him to cross tracks if operated in reasonable manner was not bound to wait.—Klingensmith v. West Penn Rys. Co., 154 A. 811, 303 Pa. 487.

Signaling motorman

(1) Where intending passenger at regular stopping place timely signaled motorman and was required to cross tracks to enter car, she was entitled to assume that motorman would control car accordingly and stop at usual place.—Moyles v. Connecticut Co., 160 A. 307, 115 Conn. 80.

(2) Prospective passenger had right to assume interurban car would obey municipal ordinance requiring it to stop in response to signals, and to cross track in light thereof.—Indianapolis & Cincinnati Traction Co. v. Helms, 121 N.E. 279, 70 Ind.App. 137.

(3) Intending passenger had right to assume that street car motorman was keeping watch ahead, that he saw passenger's signal of intention to become passenger and would stop, and that motorman would approach crossing at reasonable rate of speed.—Hohman v. City of Seattle, 38 P.2d 242, 179 Wash. 663.

Speed and control

Woman killed while crossing street

der the same obligation to look out for his own safety by looking and listening as is incumbent in general on a person who approaches a railroad track with intent to cross it.[40] In case the circumstances are such that a person crossing a track at a station is not bound to look for trains, the fact that he does look but does not look effectually so as to see an approaching train does not of itself make him guilty of contributory negligence.[41]

The question of contributory negligence is ordinarily one to be resolved by examination of all the circumstances involved;[42] in some cases the circumstances have been such that the conduct of plaintiff was held not to constitute negligence per se,[43] and in other cases that if there was reasonable cause to believe that there was no danger, failure to stop, look, and listen was not negligence per se.[44]

§ 785. Boarding Train or Car

One boarding a car, elevator, or other vehicle of a carrier may properly assume that the carrier has observed its duty in respect of providing for the safe entrance and exit of passengers, but must exercise such care for his own safety as the circumstances require or be barred by contributory negligence from recovery for resultant injury.

While it is the duty of a carrier to provide safe and reasonable means of ingress to its cars or other vehicles employed for the carriage of passengers, on the performance of which duty the passenger has a right to rely,[45] it is equally the duty of a passenger in boarding the same to use the means provided with reasonable circumspection and care, what is such care depending on the circumstances of the particular case;[46] and the foregoing rules apply with respect to passengers entering or leav-

car tracks to board car at station in sparsely settled district need only guard against injury from car approaching with reasonable speed and under control.—Dickun v. Pittsburgh Rys. Co., 161 A. 739, 308 Pa. 20.

40. Cal.—Ferran v. Southern Pac. Co., 44 P.2d 533, 3 Cal.2d 350—Anderson v. San Francisco-Oakland Terminal Rys., 214 P. 289, 61 Cal. App. 21, citing **Corpus Juris.**
Md.—Washington, B. & A. E. Ry. Co. v. State, 113 A. 338, 339–340, 137 Md. 538, quoting this **Corpus Juris** statement with approval.
Pa.—Dickun v. Pittsburg Rys. Co., 161 A. 739, 308 Pa. 20—Klingensmith v. West Penn Rys. Co., 154 A. 811, 303 Pa. 487.
10 C.J. p 1112 note 10.

Strict rule inapplicable

(1) In such cases the strict rule as to looking and listening which is in general applicable to persons crossing the tracks of railroad companies does not apply, the passenger having a right to suppose that the place where he is allowed to get on board, or alight from, a train or car is a safe place.—Shutt v. Cumberland Valley R. Co., 24 A. 305, 149 Pa. 266—10 C.J. p 929 note 48.

(2) He also has the right to assume that all trains will comply with the law by giving warning, displaying lights, etc.
Ill.—Chicago, etc., R. Co. v. Doan, 93 Ill.App. 247, affirmed 62 N.E. 826, 195 Ill. 168.
Mass.—Sonier v. Boston, etc., R. Co., 6 N.E. 84, 141 Mass. 10.

41. U.S.—Delaware, etc., R. Co. v. Price, N.J., 221 F. 848, 137 C.C.A. 406, certiorari denied 35 S.Ct. 939, 238 U.S. 636, 59 L.Ed. 1500.
10 C.J. p 1113 note 16.

42. Cal.—Ferran v. Southern Pac. Co., 44 P.2d 533, 3 Cal.2d 350—Lewis v. Pacific Electric Ry. Co., 272 P. 346, 94 Cal.App. 748.
10 C.J. p 1114 note 19.

43. Ga.—Atlanta Cons. St. R. Co. v. Bates, 30 S.E. 41, 103 Ga. 333.
Kan.—Stuckey v. Dunham, 151 P. 1107, 96 Kan. 427.

Negligence per se

Where passenger, who was waiting to board train, proceeded to walk from station with forty other passengers, between two trackbeds to the place where passengers usually boarded train, and while so doing was struck by locomotive of arriving train, passenger who claimed she was either unable to see headlight of train because it was so dim, or was blinded because it was so bright, was contributorily negligent as a matter of law.—Louisville & N. R. Co. v. Kilburn, 113 S.W.2d 844, 272 Ky. 44.

44. Pa.—Dahl v. Pennsylvania R. Co., 119 A. 656, 275 Pa. 554—Lynn v. Pittsburgh & L. E. R. Co., 110 A. 271, 267 Pa. 41.
10 C.J. p 1113 note 11.

Injury at place provided for taking on passengers

A passenger, lawfully on premises of an interurban railroad at place provided for stopping of cars to take on passengers, is not negligent per se in failing to stop, look, and listen before crossing intervening track to board car, and a passenger killed by one interurban car while stepping across tracks to board car approaching in opposite direction, held not negligent as a matter of law in failing to stop, look, and listen.—Wilkinson v. United Railroads of San Francisco, 232 P. 131, 195 Cal. 185.

45. Kan.—Jenkins v. Kansas City Public Service Co., 275 P. 136, 127 Kan. 821.
N.J.—Bradley v. Erie R. Co., 147 A. 572, 106 N.J.Law 51, reversing 143 A. 743, 105 N.J.Law 1.
10 C.J. p 1114 note 20

Assumption as to approaches to car

Passenger entering a car may assume that the carrier has performed its duty in making the approach to the car safe.—Bickley v. Philadelphia & R. Ry. Co., 101 A. 654, 257 Pa. 369.

Passageway

Passengers going to trains have right to presume that apparent passageway from stations and trains is reasonably safe.—Bradley v. Erie R. Co., 147 A. 572, 106 N.J.Law 51, reversing 143 A. 743, 105 N.J.Law 1.

46. Ky.—Burnett v. Louisville & N. R. Co., 281 S.W. 510, 213 Ky. 540.
Mo.—May v. Chicago, B. & Q. R. Co., 225 S.W. 660, 284 Mo. 508.
Pa.—Murray v. Philadelphia Rapid Transit Co., 140 A. 522, 292 Pa. 72—Gardner v. West Penn Rys. Co., 106 A. 302, 263 Pa. 284.
10 C.J. p 1114 note 21.

Attempt to board in face of closed vestibule door

Passenger attempting to enter car by opening closed vestibule door and stepping off after train had attained speed, held contributorily negligent.—Robinson v. Boston & M. R. R., 160 A. 473, 85 N.H. 474.

Entering from "wrong" side

One attempting to board on west side of north-bound street car was guilty of contributory negligence.—Mulvaney v. Terre Haute, I. & E. Traction Co., 124 N.E. 632, 71 Ind. App. 270—10 C.J. p 1114 note 21 [c].

High car steps

That injured passenger attempted to board interurban car knowing that steps were unreasonably high did not constitute contributory negligence.—Terre Haute, Indianapolis & Eastern

ing elevators.[47] It is not negligence in itself to attempt to get on the front platform of a street car, although the rear platform is the usual place for boarding,[48] particularly where there has been an invitation to get on in that way.[49]

After signal to start. It has been held that it is not contributory negligence as a matter of law for a person to board a train or car after a signal to start is given, but before the train or car is put in motion.[50]

Direction of employee. The direction of the conductor or other employee in charge of a train or car to an intending passenger, as to his method of getting on the same, is within the scope of his authority, and in complying with this direction the passenger is not guilty of negligence unless he exposes himself to open and apparent danger.[51]

§ 786. At Place Other than Station or Platform

Whether or not it is contributory negligence for one to attempt to board a car or train at other than its regular stopping place will depend on the particular circumstances involved.

With reference both to steam and street cars it is not negligence per se to attempt to get on board at a place other than a regular stopping place, the question being one of fact under the circumstances,[52] unless under the circumstances of the partic-

Traction Co. v. Angelo, 169 N.E. 478, 95 Ind.App. 476—10 C.J. p. 1114 note 21 [g]

Knowledge of conditions

Passenger boarding train must be held to knowledge of physical conditions before her eyes—Davis v. Olson, C.C.A.Minn., 298 F. 921.

Reentering train

A passenger after a temporary absence from train was not required to enter another car adjacent to the platform, where her own car was not so adjacent.—Sellars v. Southern Pac. Co., 166 P. 599, 33 Cal.App. 701—10 C.J. p. 1114 note 21 [f].

Stumbling over step box

A carrier is not the insurer of a passenger against the consequences of his own negligence in using a step box furnished for use in boarding trains, as where his negligence consisted in attempting to use such appliance without looking at it and in stumbling over or against it when he should have stepped on it.—Scott v. Vicksburg, S. & P. Ry. Co., 90 So. 840, 150 La. 537, 20 A.L.R. 908.

Subway car

A subway operator was not liable for injuries sustained by woman who fell into twelve-inch space between car platform and station platform of subway station when woman attempted to board train, where there was no crowding, light situation was normal, and ordinary use of her eyesight would have enabled woman to avoid the accident.—Dunn v. Murray, 1 N.Y.S.2d 708, 166 Misc. 294.

Contributory negligence not shown

(1) Generally.—Little v. Peoria Ry. Co., 215 Ill.App. 385.

(2) Where plaintiff passenger was injured by the sudden starting of defendant's street railways company's car which she was boarding, caused to lose her balance, and was dragged and thrown upon the pavement, plaintiff was not negligent because she held to the upright rod or stanchion instead of letting go at once.—Baldwin v. Kansas City Rys. Co., Mo.App., 214 S.W. 274.

(3) Where passenger on a platform was moving toward the electric car with other passengers and was not bound to anticipate that the car, apparently having come to a stop, would start forward with a sudden jerk and throw the passengers nearest the train against him, thereby pushing him off the platform, a charge of contributory negligence cannot be urged against him in an action for resulting injuries—Litwinavage v. Schuylkill Ry. Co., 124 A. 293, 280 Pa. 53.

(4) It is not want of ordinary prudence for minor to attempt to board street car, standing at station waiting for passengers, without assistance of an escort although such escort was at hand—Northern Texas Traction Co. v. Crouch, Tex.Civ.App., 202 S.W. 781.

47. Mich.—Blankertz v. Mack & Co., 248 N.W. 889, 263 Mich. 527.
Wash.—Davis v. Burke, 156 P. 525, 90 Wash. 495.
10 C.J. p. 1114 note 21 [l].

Defective door

That decedent stepped through the doorway of an automatic, or passenger operated, elevator shaft without looking to see whether the cage was in place, held not contributory negligence precluding recovery for her death where the customary use of the elevator justified her in assuming that the door could not be opened unless the cage was in place.—Jacobi v. Builders' Realty Co., 164 P. 394, 174 Cal. 708, L.R.A.1917E 696.

Open door as invitation to enter

(1) Open door of passenger elevator constitutes invitation to enter without special investigation, and where darkness prevents the discovery of the absence of the elevator cage the question of contributory negligence is one for the jury.—Gohn v. Butte Hotel Co., 295 P. 262, 88 Mont. 599.

(2) Where, however, there is no insufficiency of light, person who, on finding elevator door partially open, opened door and stepped into shaft, was held to have failed to exercise ordinary care for his own safety—Switzer v. Detroit Inv. Co., 206 N.W. 407, 188 Wis. 330.

48. N.Y.—Dixon v. Brooklyn City, etc., R. Co., 3 N.E. 65, 100 N.Y. 170.
10 C.J. p. 1115 note 22.

49. N.Y.—De Rozas v. Metropolitan St. R. Co., 43 N.Y.S. 27, 13 App.Div. 296.

50. Mass.—Dawson v. Boston, etc., R. Co., 30 N.E. 466, 156 Mass. 127.
10 C.J. p. 1116 note 25.

51. Wash.—Irish v. Northern Pac. R. Co., 29 P. 845, 4 Wash. 48, 31 Am.S.R. 899.
10 C.J. p. 1116 note 24.

Conductor's order to stand back from car step

An intending passenger about to board a street car on a middle track in a street containing three tracks was not bound to assume that the conductor would direct her to do an act which under the circumstances was dangerous, and was not bound to assume that on account of other cars it was dangerous to step back from the step when directed to do so to permit passengers to descend.—Montgomery Light & Traction Co. v. O'Connor, 85 So. 334, 204 Ala. 24.

52. Kan.—Haas v. Wichita R., etc., Co., 132 P. 195, 89 Kan. 613, 48 L.R.A.,N.S., 974.
10 C.J. p. 1116 note 26.

Car stopped at unusual place expressly to receive passengers

Where a street car is temporarily stopped at a place other than a regular stopping place, and not to receive or discharge passengers, if one attempts to get on or off and is injured by the starting of the car the company cannot be charged with negligence, unless the conductor or motorman knew, or had reason to know, that an attempt to get on or off was being made, although such rule is inapplicable where the car

ular case the attempt is so fraught with danger as to make it negligence as a matter of law,[53] or unless the attempt is made in violation of a reasonable regulation as to the place of entering cars, known to the passenger.[54] Where a carrier has been in the habit of receiving passengers at another place without objection, it is not negligence per se for a passenger to get on at that place while the train is standing still and there is no apparent danger in so doing.[55] Where the rule of a railroad company requires passengers of a combined freight and passenger train to get on wherever it is convenient to stop, it is not negligence for a passenger to board the train while it is standing a short distance from the station platform.[56]

§ 787. Moving Train or Car

It is ordinarily regarded as contributory negligence for a passenger to board or attempt to board a moving train, car or elevator, although the circumstances may be such as to preclude such act from being properly held negligent.

It may be stated, as a general rule, that attempting to board a moving train is presumably a negligent act, and, in the absence of evidence of circumstances tending to excuse the act, no recovery can be had for an injury thereby sustained,[57] particularly where such act is in violation of an ordinance or statute,[58] or where the passenger has been warned against making the attempt,[59] or where the gates or doors of the cars are closed at the time of the attempt.[60] Even though the carrier fails to stop the train in order for passengers to get on at the proper place, or does not stop it for a reasonable length of time, this will not in itself excuse the passenger in negligently attempting to get on the train while moving.[61] Nevertheless, it is not in all cases negligence per se to make such an attempt, as the circumstances surrounding the passenger at the time must be considered in determining whether he was negligent;[62] and, unless the circumstances are so unequivocal as to make the matter a question of law for the court, the issue

had stopped for the express purpose of receiving passengers.—Elliott v. United Rys Co. of St. Louis, 214 S.W. 234, 201 Mo.App. 662

Entering car from wrong side

Railroad company held not liable for loss of leg, through sudden movement of its train, of one who claimed he came to its depot to meet a brother coming in on a train, where the injured man was hurt by an outgoing train while seeking to enter it, not from the side where passengers were boarding it, where there was a platform, but from the other side, where there was no platform, no lights, and the doors to the train were closed.—Magee v. Missouri, K. & T. Ry. of Texas, Tex.Civ.App., 222 S.W. 636, dismissed for want of jurisdiction.—10 C.J. p. 1116 note 26 [a].

Mail clerk

Where postal clerk, injured while boarding a mail car, had for many years boarded the car while the engine was stopped to take water, it was his duty to ascertain whether the engine was in position to take in water, where it would be for a period sufficient to enable him to board the car.—Lambert v. Philadelphia, B. & W. R. Co., 125 A. 765, 145 Md. 662

53. W.Va.—Raines v. Chesapeake, etc., R. Co., 70 S.E. 711, 68 W.Va. 694, 33 L.R.A.,N.S., 583.
10 C.J. p. 1116 note 27.

54. Iowa.—McDonald v. Chicago, etc., R. Co., 26 Iowa 124, 96 Am.D. 114.

55. N.Y.—Keating v. New York Cent., etc., R. Co., 49 N.Y. 673.
10 C.J. p. 1116 note 29.

56. Ky.—Louisville, etc., R. Co. v. Long, 22 S.W. 747, 94 Ky. 410, 15 Ky.L. 199.

57. U.S.—Aschenbrenner v. U. S. Fidelity & Guaranty Co., Cal., 54 S.Ct. 590, 292 U.S. 80, 78 L.Ed. 1137, reversing, C.C.A., U. S. Fidelity & Guaranty Co. v. Aschenbrenner, 65 F.2d 976, certiorari granted Aschenbrenner v. U. S. Fidelity & Guaranty Co., 54 S.Ct. 229, 290 U.S. 622, 78 L.Ed. 543, and rehearing denied 54 S.Ct. 861, 292 U.S. 615, 78 L.Ed. 1474.
N.C.—Wallace v. Norfolk Southern R. Co., 93 S.E. 731, 174 N.C. 171.
Okl.—Webb v. Missouri, O. & G. Ry. Co., 179 P. 17, 74 Okl. 223.
10 C.J. p. 1116 note 32

Brakeman's signal no excuse

For a passenger to attempt to board a freight box car, with no platform and steps, but merely an iron grabrod and crossbars, when it is going six miles an hour, is negligence, and invitation by signal of brakeman to board train held not to prevent passenger's attempt to board freight box car moving six miles an hour being negligence.—Travis v. Alabama Great Southern R. Co., 73 So. 983, 199 Ala. 38.

Through train

The danger of attempting to board a through passenger train at a place where it is not scheduled to stop and at a time when it is traveling at a speed of from twelve to fifteen miles per hour is so obvious that it should be known to all rational men, and the act of voluntarily risking it must be deemed negligence per se.—Lee v. Baker, Tex.Civ.App., 251 S.W. 580.

58. Iowa.—Young v. Chicago, etc., R. Co., 69 N.W. 682, 100 Iowa 357
10 C.J. p. 1117 note 33.

59. Mass.—Gallagher v. West End St. R. Co., 30 N.E. 486, 156 Mass. 157.
Mo.—Fulks v. St. Louis, etc., R. Co., 19 S.W. 818, 111 Mo. 335.

60. Wis.—Sigl v. Green Bay Tract. Co., 135 N.W. 506, 149 Wis. 112, 39 L.R.A.,N.S., 65.
10 C.J. p. 1117 note 35

Trap door shut

Undertaking to board train in motion with trap door closed down over steps is negligent act per se, in absence of circumstances excusing act.—Palen v. Wheelock, C.C.A.Mo., 13 F.2d 34.

61. Ga.—Ricks v. Georgia Southern, etc., R. Co., 45 S.E. 268, 118 Ga. 259
10 C.J. p. 1117 note 36.

62. N.C.—Wallace v. Norfolk Southern R. Co., 93 S.E. 731, 174 N.C. 171.
Okl.—Webb v. Missouri, O. & G. Ry. Co., 179 P. 17, 74 Okl. 223.
10 C.J. p. 1117 note 37.

Unusual conditions

Whether conduct of passenger, injured while attempting to board train leaving station prior to time told him on alighting, was reasonably careful must be judged by natural and actual effect on passenger of such unusual condition.—Redfield v. New York Cent. R. Co., C.C.A.Mo., 83 F.2d 62.

of contributory negligence in boarding a moving train is ordinarily one of fact for the jury, as shown infra § 803. In this connection, a distinction, founded on the rapidity of the train's motion, has been made by some of the decisions, it being held that a person who attempts to get on a train while it is moving slowly is not, as a matter of law, guilty of contributory negligence.[63]

Street cars. As to street cars, the general doctrine that it indicates negligence to attempt to get on board a car while it is moving is not so strictly applied,[64] and it has been announced in a majority of cases in which the subject has been passed on that in the absence of special circumstances it is not negligence per se so to do,[65] particularly where it is moving slowly,[66] as where it has been slowed up in response to the signal of one desiring to get on board, although it has not come to a full stop,[67] although other authorities take the view that attempting to board a moving street car constitutes negligence per se,[68] as where the attempt is made in violation of an ordinance on the subject.[69]

Where the attempt to board a moving street car is attended with unusual and extraordinary dangers, such conduct is ordinarily regarded as contributory negligence, barring recovery by an injured passenger.[70]

Elevator. It has been held negligence to board a moving elevator.[71]

§ 788. Alighting from Train or Car

An alighting passenger may properly proceed on the assumption of the carrier's due observance of its legal duties in respect of measures essential to his protection, but must nevertheless take reasonable care for his own safety, and he will be barred from recovery for injuries resulting from his own contributory negligence, as in failing to look where he is stepping or proceeding in careless disregard of other and approaching vehicles.

It is the duty of a passenger, in alighting from a train or other vehicle, to exercise reasonable care for his safety, and if he fails to exercise such care, whereby he is injured, he is guilty of contributory negligence precluding a recovery,[72] as where the

63. Kan.—Atchison, etc., R. Co. v. Holloway, 80 P. 31, 71 Kan. 1, 114 Am.S.R. 462.
10 C.J. p 1118 note 39.

64. Ind.—Citizens' St. R. Co. v. Spahr, 33 N.E. 446, 7 Ind.App 23.
N.Y.—Lobsenz v. Metropolitan St. R. Co., 76 N.Y.S. 411, 72 App.Div. 181.

65. S.C.—Wise v. Columbia R., etc., Co., 77 S.E. 924, 94 S.C. 254.
10 C.J. p 1118 note 41.

Circumstances as controlling

Attempt to board moving street car does not necessarily constitute contributory negligence, but whether it does depends on circumstances.—Morrissey v. City and County of San Francisco, 286 P. 433, 104 Cal. App. 536.

66. Mass.—Payne v. Springfield St. R. Co., 89 N.E. 586, 203 Mass. 425.
10 C.J. p 1118 note 42.

Question of fact

Where intending passenger is injured in attempting to board slowly moving street car, railway will be liable, although act of passenger was immediate cause of injury, if his act should not be imputed to him as fault, a question of fact.—Virginia Ry. & Power Co. v. Arnold, 92 S.E. 925, 121 Va. 204.

67. Minn.—Sahlgaard v. St Paul City R. Co., 51 N.W. 111, 48 Minn. 232.
10 C.J. p 1119 note 43.

68. Pa.—Sang v. Pittsburgh, H., B. & N. C. Ry. Co., 80 Pa.Super 524.—Lawrence v. Union Traction Co., 12 Pa.Dist. 301.
10 C.J. p 1118 note 41 [a].

Dictum to the effect that a passenger getting on street car must anticipate that it may start with abrupt movement.—Laub v. Philadelphia Rapid Transit Co., 97 Pa. Super. 323.

69. Cal.—Schultheiss v. Los Angeles Ry. Corporation, 54 P.2d 49, 11 Cal. App.2d 525.

70. Mo.—Mathews v. Metropolitan St. R. Co., 137 S.W. 1003, 156 Mo. App. 715.
10 C.J. p 1119 note 44

71. La.—Cox v. Ardis Building Co., 7 La.App. 125.

Closing door

Where, at the time of plaintiff's approach to an elevator, the door was closing and the car moving upward, and in his haste to enter plaintiff caught hold of the door and prevented it from closing and fell or climbed into the moving elevator and lay on the floor thereof with his legs protruding so that he was injured when one leg came into contact with the top of the door frame as the elevator ascended, plaintiff was guilty of contributory negligence barring recovery.—Cox v. Ardis Building Co., 7 La.App. 125.

72. U.S.—Chicago, M. & St. P. Ry. Co. v. Youngers, C.C.A.S.D., 5 F.2d 784.
Ark.—Missouri Pac. Transp. Co. v. Robinson, 86 S.W.2d 913, 191 Ark. 428.
Cal.—Trulsson v. Southern Pac. Co., 183 P. 686, 42 Cal.App. 404.
Ill.—Feeney v. Chicago City Ry. Co., 220 Ill.App. 400.—Bushman v. Calumet & South Chicago Ry. Co., 214 Ill.App. 435.
Ky.—Louisville & N. R. Co. v. Harrington, 87 S.W.2d 379, 261 Ky. 212
La.—Betts v. Shreveport Rys. Co., 137 So. 615, 18 La.App. 282.
Mich.—Davis v. Saginaw-Bay City Ry. Co., 157 N.W. 390, 191 Mich. 131.
Miss.—Yazoo & M. V. R. Co. v. Skaggs, 179 So. 274, 278, citing **Corpus Juris** for this rule and refers to cases there cited as authority therefor.
Mo.—Lacks v. Wells, 44 S.W.2d 154, 329 Mo. 327.—Smuzynski v. East St. Louis Ry. Co., 93 S.W.2d 1058, 230 Mo.App. 1095.
N.Y.—Wilson v. International Ry. Co., 199 N.Y.S. 562, 205 App.Div. 275
Ohio.—Manville v. Indiana, C. & E. Ry. Co., 9 Ohio N.P.,N.S., 510.
Pa.—Mulford v. Philadelphia Rapid Transit Co., 165 A. 837, 310 Pa. 521.—Dahl v. Pennsylvania R. Co., 119 A. 656, 275 Pa. 554.—Twersky v. Pennsylvania R. Co., 104 A. 63, 261 Pa. 6.—Fittipaldi v. Philadelphia Rural Transit Co., 163 A. 397, 107 Pa.Super 385.
Va.—Virginia Electric & Power Co. v. Lenz, 164 S.E. 572, 158 Va. 732
W.Va.—Twyman v. Monongahela West Penn Public Service Co., 191 S.E. 541.
10 C.J. p 1119 note 47.

Assumption of risk

Passenger undertaking to alight from train by jumping from vestibule floor fifty-one inches above station platform assumed risk, precluding recovery for injury proximately resulting from such conduct.—Slaven v. Baltimore & O. R. Co., 171 S.E. 818, 114 W.Va. 315.

passenger is negligent in alighting backward,[73] or in the manner in which he uses a step box or stool.[74] However, an alighting passenger may act on the assumption that the carrier will take proper precautions for his safety,[75] such as that of exercising care to see that the platform, steps, or running boards are in a reasonably safe condition,[76] unless the passenger knows, or by the exercise of ordinary care could know, that they are defective or in an unsafe condition,[77] and where the passenger acts on the assumption that the carrier has or will perform its duty and without disregard of factors indicating danger, he will not be held guilty of contributory negligence.[78] Where, in alighting, a pas-

Degree of care required

Relative to contributory negligence of a passenger, who after alighting on crowded station platform was struck by the train moving up, he was not required to exercise, with reference to the tracks, as high a degree of care as a pedestrian at grade crossing—Windle v. Davis, 118 A. 503, 275 Pa. 23.

Bus

(1) Generally.

Ark.—Missouri Pac. Transp. Co. v Robinson, 86 S.W.2d 913, 191 Ark. 428.

Pa.—Fordyce v. White Star Bus Lines, 155 A. 98, 304 Pa. 106.

(2) Bus driver's negligence in creating dangerous situation did not relieve passenger of duty to use ordinary care for her own safety in alighting.—Curtis v. Capitol Stage Lines Co., Mo.App., 27 S.W.2d 747.

(3) Aged woman in possession of all her faculties was obliged to use them to discover her surroundings, if unknown to her, before alighting from mired bus.—Curtis v. Capitol Stage Lines Co., supra.

Street car

(1) Street car passenger, placing foot on step when exit door was only partly open and step not completely down, was guilty of negligence causing injuries sued for.—Wylie v. Shreveport Rys. Co., App., 140 So. 715, affirmed 145 So. 513, 176 La. 193.

(2) The rule imposing duty on pedestrians to keep out of danger of outswing from ordinary movements of street car applies to alighting passengers after they have reasonable time and opportunity to alight and remove themselves from zone of danger and to intending passengers as regards passing of car while coming to a stop.—Birmingham Electric Co. v. Jones, 176 So. 203, 234 Ala. 590.

(3) Street car passenger, stepping into visible depression in pavement after alighting from street car, was contributorily negligent, notwithstanding alleged obstruction of view by passengers preceding her.—Mulford v. Philadelphia Rapid Transit Co., 165 A. 837, 310 Pa. 521.

(4) Street car passenger who, after alighting in daylight, caught foot in obvious hole near rail and fell, was guilty of contributory negligence.—Vincent v New Orleans Public Service, 138 So. 129, 18 La.App. 704.

Taxi

Passenger alighting from taxi cannot close his eyes to obvious danger or to danger as easily seen by, or as well known to, him as to driver, and intrust his safety absolutely to driver, but must exercise ordinary care for his own safety and must see and hear that which ordinarily prudent person, in similar circumstances, should see and hear.—Hensley v. Braden, 91 S.W.2d 34, 262 Ky. 672.

Train

(1) A passenger, forced to alight next to a track, cannot be excused from remaining thereon, or in such close proximity thereto as to be struck by a passing train, when it appears she had ample opportunity to get to a position of safety.—Gordon v. Director General of Railroads, 104 S.E. 796, 128 Va. 426.

(2) Carrier's failure to announce arrival of train at passenger's destination does not justify passenger in attempting to alight from vestibule floor fifty-one inches above station platform, and passenger jumping from vestibule floor of railroad coach fifty-one inches above station platform is guilty of contributory negligence, precluding recovery for injuries—Slaven v Baltimore & O. R. Co., 171 S.E. 818, 114 W.Va. 315.

73. Mo.—Curtis v. Capitol Stage Lines Co., App., 27 S.W.2d 747.
10 C.J. p 1119 note 47 [c].

74. La.—Scott v. Vicksburg, S. & P. Ry. Co., 90 So. 840, 150 La. 537, 20 A.L.R. 908.
Pa.—Dixon v. Pennsylvania R. Co., 98 Pa.Super. 557.
Tex.—St. Louis, S. F. & T. Ry. Co. v. Gibson, Civ.App., 211 S.W. 263.

Stepping on side of stool

La.—Deblanck v. Texas & P. R. Co., 6 La.App. 433.

Use of handrail

It is the obligation of an alighting passenger, and particularly an aged and infirm man, to go down steps without hurry, to look where he is going, to look for the step box and see that he steps on it, and, to enable him to more certainly do this, to use the handrail.—Yazoo & M. V. R. Co. v. Skaggs, Miss., 179 So. 274.

Absence of step; failure to look

Passenger's testimony that she failed to look before alighting from train, and was injured because of absence of portable step, established her own negligence, precluding recovery.—Dahl v. Minneapolis, St. P. & S. S. M. Ry. Co., 223 N.W. 37, 57 N.D. 538.

Cripple's descent without step as not negligent

A crippled passenger injured by alighting from defendant's train without assistance after defendant's servants had abandoned him was not deprived of his right of recovery merely because he knew there was no portable step present at the bottom of the car steps, but nevertheless attempted to alight without assistance, providing he used ordinary care.—Turner v. Wabash R. Co., Mo.App., 211 S.W. 101.

75. Cal.—Harrell v. Fresno Traction Co., 163 P. 504, 32 Cal.App. 510.
10 C.J. p 1120 note 48.

Defect in vestibule floor

Passenger could assume that street railroad had taken precautions for safety of passengers in leaving car, and her failure to look for defects in floor of vestibule, when passing out of street car, was not contributory negligence.—Jenkins v. Kansas City Public Service Co., 275 P. 136, 127 Kan. 821.

76. Or.—Goodson v. Portland Electric Power Co., 279 P. 559, 130 Or. 145.
10 C.J. p 1120 note 49.

77. Del.—Smithers v. Wilmington City R. Co., 167 A. 167, 22 Del. 422.
10 C.J. p 1120 note 50.

Tilting of steps

If plaintiff appreciated danger of alighting when door was not entirely open and steps were therefore tilted up about two inches, defense of contributory negligence was established—Peters v. Chicago Rys. Co., 138 N.E. 629, 307 Ill. 202.

78. Ill.—Thomason v. Chicago Motor Coach Co., 10 N.E.2d 714, 292 Ill.App. 104.
La.—Shally v. New Orleans Public Service, Sewerage & Water Board, 1 La.App. 770, affirmed 105 So. 606, 159 La. 519.

senger without knowledge of actual danger assumes a position which is apparently free from danger, he is not guilty of contributory negligence.[79]

Injuries from traffic, as in crossing other tracks. A passenger alighting from a train, car, or other vehicle should exercise ordinary care in avoiding injury from passing traffic,[80] and in crossing tracks,[81] and is guilty of contributory negligence barring recovery where he heedlessly crosses or walks on another track in front of an approaching train or car,[82] or heedlessly runs into the side of

"Jerking" of train

(1) Passenger alighting from train is under no obligation to use care to protect herself against danger arising from sudden jerk of train.—Galamb v. Erie R. Co., 156 A. 128, 108 N.J.Law 7.

(2) Where a train had come to a stop at a station where plaintiff's minor son, who was a passenger, was to have alighted, he was acting on an implied invitation of defendant to get off there, by the stopping of the train, and where his foot was caught between the bumpers and mashed through the negligent jerking of the train and the negligent failure to cover the bumpers with a steel plate, it was held that there was no contributory negligence on the part of the child or of his grandfather, in whose charge he was at the time.—Scarborough v. Louisiana Ry. & Nav. Co., 82 So. 286, 145 La. 323.

Unfolding of trolley step

Where trolley car was standing still, and door, which operated in conjunction with folding step, was sufficiently open for a passenger to pass through, and as she placed her foot on the step it unfolded beneath her and threw her to the ground, such circumstances alone did not constitute contributory negligence by passenger.—Micklin v. Union Ry. Co. of New York City, 212 N.Y.S. 291, 125 Misc. 863.

Rounding curve

Passengers leaving street car were not bound to anticipate that motorman would so negligently proceed forward around curve as to cause injury.—Lyons v. Pittsburgh Rys. Co., 152 A. 687, 301 Pa. 499.

Elevator cases

(1) Elevator passenger who tried to leave the elevator when it was stopped and opened on the fifth floor of the building, under the mistaken belief that he had reached the ground floor, was not guilty of negligence contributing to his injuries when the operator shut the door on his foot and leg, catching and holding him while the elevator descended.—American Nat. Ins. Co. v. Nussbaum, Tex.Civ.App., 230 S.W. 1102, dismissed for want of jurisdiction.

(2) Passenger, who sustained injuries while leaving elevator, was not required to warn operator that she was about to leave car.—City Nat. Bank v. Pigott, Tex.Civ.App., 270 S.W. 234.

Passenger not under duty of close inspection

Stopping of street car constitutes assurance to passenger of safety of alighting place, on which passenger may rely without making close inspection.—Caley v. Kansas City, 48 S.W.2d 25, 226 Mo.App. 934.

79. Conn.—White v. Connecticut Co., 92 A. 411, 88 Conn. 614, L.R.A. 1915C 609.

80. Ill.—Jaroszewski v. Chicago Rys. Co., 241 Ill.App. 1.

Duty to look

Passenger leaving street car where vehicular traffic is not held up by regulations or light must look for approaching traffic, and where he fails to do so, his contributory negligence will preclude recovery for injury by automobile, avoidable by exercise of care.—Cleveland Ry. Co. v. Sebesta, 166 N.E. 898, 121 Ohio St. 26.

Mistake as to location

Stage passenger struck by automobile while crossing highway after discharge across road from usual stopping place was contributorily negligent, where after walking around to rear of stage he paid no attention to traffic because he thought he was on opposite side of pavement.—Lewis v. Pacific Greyhound Lines, 34 P.2d 616, 147 Or. 588, 96 A.L.R. 718.

Squeezed between cars

An alighting passenger who was squeezed between two cars when one of them started moving was guilty of contributory negligence in having unnecessarily attempted to pass or stand between such cars during rush hour.—Jaroszewski v. Chicago Rys. Co., 241 Ill.App. 1.

Two-way traffic

Alighting street car passenger was bound to govern action by knowledge that two-way traffic was permitted on paved half of street.—Jones v. City of Seattle, 257 P. 393, 144 Wash. 188.

81. Pa.—Richards v. Pittsburgh Rys. Co., 184 A. 854, 122 Pa.Super. 88.

Within single step of safety

Passenger alighting from street car has duty to exercise care while crossing tracks and until reaching position of safety, and where she alighted from southbound car, crossed tracks, heard and saw approaching northbound street car, did not step away from track although one step would have carried her to safety, and was struck by the northbound car several seconds thereafter, such passenger was contributorily negligent, barring recovery for injuries received.—Richards v. Pittsburgh Rys. Co., 184 A. 854, 122 Pa.Super. 88.

82. Cal.—Klusman v. Pacific Electric Ry. Co., 213 P. 38, 190 Cal. 441.—Locke v. Los Angeles Ry. Corporation, 51 P.2d 1111, 10 Cal.App.2d 478.—Finn v. Los Angeles Ry. Corporation, 6 P.2d 548, 119 Cal.App. 513.—Trulsson v. Southern Pac. Co., 183 P. 686, 43 Cal.App. 404.

Ill.—Bushman v. Calumet & South Chicago Ry. Co., 214 Ill.App. 435.

Mo.—Zlotnikoff v. Wells, 295 S.W. 129, 220 Mo.App. 869.

N.Y.—Schasel v. International Ry. Co., 173 N.Y.S. 571, 185 App.Div. 194.

Pa.—Walker v. Philadelphia Rapid Transit Co., 117 A. 680, 274 Pa. 121.

Va.—Virginia Electric & Power Co. v. Kelly, 159 S.E. 75, 156 Va. 916.—Gordon v. Director General of Railroads, 104 S.E. 796, 128 Va. 426.

Wash.—Woodruff v. City of Seattle, 251 P. 559, 141 Wash. 360.

Passing to front of car

In administrator's action for death of intestate, who after having alighted from and passed around in front of street car was struck by car coming from opposite direction, it was held that physical facts were such that motorman, no matter how negligent, incompetent, or malicious, could not have run down intestate if intestate had exercised due care in stepping on track.—Goodman v. Detroit United Ry., 175 N.W. 146, 208 Mich. 279.

Passing to rear of car

Alighting passenger crossing tracks in rear of car and struck by car on parallel track where he could see it approaching one thousand seven hundred feet is guilty of contributory negligence barring recovery for injuries.—Davis v. Saginaw-Bay City Ry. Co., 157 N.W. 390, 191 Mich. 131.

Priority of right as to crossing

No question as to priority of right as to crossing between an alighting passenger and a street car approaching on a different track can arise where the passenger got off a moving street car twenty-five feet away

a train or car.[83]

A passenger alighting from a street car at a regular station or stop may, however, assume that tracks intervening between him and the station or street will be kept safe while he is crossing, as the ordinary rule requiring one to stop, look, and listen before crossing tracks does not apply in all its strictness to such a situation, and the fact that the passenger under these circumstances attempts to cross without looking or listening will not necessarily render him guilty of contributory negligence.[84] A passenger may also assume, in the absence of notice to the contrary, that when he is changing cars at an intersection, a car standing on an adjacent track will not be started without warning,[85] that cars at an intersection point will not travel in excess of the legal speed limit,[86] that cars approaching a standing car which is discharging passengers will signal their approach and proceed at a reasonable rate of speed,[87] that trains near the regular place of egress from a railroad station will be operated with due regard for the safety of alighting and departing passengers,[88] and that the safe passage of other transferring passengers ahead of him is an indication that he may cross the tracks at the same point without danger.[89]

Time of, and time consumed in, alighting. One who goes aboard a train to assist other passengers is under no duty to depart until such time as may be necessary to enable the train to leave on schedule.[90] Although it is the duty of a departing passenger to alight with reasonable promptness,[91] he may act on the assumption that he will be given a reasonable opportunity to alight in safety.[92]

Directions or suggestions of carriers' agents. Alighting from a train or other vehicle as directed or suggested by the conductor, brakeman, or other employee in charge is not necessarily negligence,[93] although it may amount to such.[94]

§ 789. Preparing to Leave Conveyance before It Stops

The fact that a passenger leaves his seat and approaches the door of a moving vehicle preparatory to

from the crossing—Bushman v Calumet & South Chicago Ry Co, 214 Ill.App. 435.

Not customary stopping place

A passenger alighting from a moving street car where it does not usually discharge passengers, and, without stopping to look or listen, immediately passing behind it and suddenly emerging and struck by a car passing in opposite direction, is negligent, as he could not assume that motorman of colliding car could make an immediate stop in anticipation of discharge of passengers at that place.—Dodds v Omaha & C. B. St Ry Co, 178 N.W. 258, 104 Neb. 693.

83. La.—McKernan v. New Orleans Ry & Light Co, 81 So. 601, 144 La. 997

Vision obscured by umbrella

Where plaintiff left street car and started across street in a hurry because it was raining, and so did not take time to go to regular crossing, and in holding her umbrella she obstructed her vision and did not see an approaching street car and ran into it from the side, she was negligent barring recovery—McKernan v New Orleans Ry & Light Co, 81 So 601, 144 La 997.

84. Conn—Cecil v. Connecticut Co., 123 A. 443, 100 Conn 286.
Mich—Terrill v Michigan United Traction Co., 183 N W. 46, 214 Mich 478—Terrill v. Michigan United Traction Co. 171 N W 340, 204 Mich 652.
Ohio.—Mahoning Valley Ry. Co. v. Kazanecka, 7 Ohio App. 289.

85. Mo—Wilson v. Wells, 13 S W. 2d 541, 321 Mo 929.

86. Mo.—Wilson v. Wells, supra—Kent v Kiel, App., 97 S.W 2d 885.

87. N.Y.—Wall v. International Ry. Co., 135 N.E 512, 233 N Y. 309, reversing 188 N.Y S. 550, 195 App. Div 685.

88. W.Va—Pierce's Ex'x v. Baltimore & O. R. Co., 128 S.E. 832, 99 W.Va. 313.

Respecting degree of care required of passenger

Passenger leaving railroad station by way across track, using means of egress which company has provided, or which is customarily used with its knowledge and consent, while not absolved from duty to exercise care, may be justified in presuming, in absence of warning, that trains will not be so operated as to impose on him high degree of care required of traveler at public railroad crossing—Pierce's Ex'x v Baltimore & O R Co., 128 S.E 832, 99 W Va 313.

89. Mo—Kent v. Kiel, App, 97 S. W 2d 885

Court's consideration of passage by others

In action for injuries received by street car passenger when struck by street car after walking between street car on which he had been riding and car behind which it had stopped at intersection, court would consider fact that other passengers transferring from street car had passed between two cars with safety, in determining whether passenger exercised reasonable care.—Kent v. Kiel, Mo App., 97 S.W.2d 885.

90. Ala.—Mobile & O R Co. v Davis, 137 So. 525, 223 Ala 600

91. Wyo—Chicago, etc., R Co v. Lampman, 104 P 533, 18 Wyo 106 25 L R A,N S., 217, Ann.Cas.1912C 788.
10 C.J p 1120 note 52.

92. Cal.—Harrell v Fresno Traction Co, 163 P. 504, 32 Cal App. 510
Colo.—Denver Tramway Co v. Johnson, 179 P 143, 66 Colo. 50.
10 C J. p 1120 note 53.

Alighting in usual way

In an action for personal injury to a passenger by a failure to stop a street car a reasonably sufficient time to allow him to safely alight evidence that he was getting off in the usual way tends to prove that he was alighting with reasonable dispatch.—Muskogee Electric Traction Co. v. Cooper, 193 P 39, 79 Okl. 271

93. N J.—Watson v. Camden, etc, R. Co, 26 A. 136, 55 N J Law 125, 39 Am S R 624, 19 L.R A 487.
10 C J p 1120 note 54.

94. **Flagman's suggestion**

Passenger alighting from train has duty to exercise reasonable care for his own safety, notwithstanding suggestion of flagman to get off—Louisville & N. R Co v. Harrington, 87 S.W.2d 379, 261 Ky 212

Urging of cab driver

Passenger who, on urging of taxicab driver unable to drive flush with curb because of parked automobiles, jumped from cab to curb could not recover for injuries sustained.—Hudnut v. Indiana De Luxe Cab Co., 182 N.E. 711, 98 Ind App. 44.

alighting does not necessarily render him guilty of contributory negligence, but the question of his negligence must be solved in the light of the surrounding circumstances.

It is not necessarily negligence for a passenger to leave his seat as the train or car approaches his destination, but before it comes to a stop; whether or not it is negligence is dependent on the circumstances, and is generally a question of fact.[95] Where a passenger leaves his seat and approaches or goes onto the platform at the invitation of the carrier's employees, ordinarily he will not be deemed negligent,[96] but it has been held that the announcement of a station by the conductor does not constitute an invitation to passengers bound for such station to leave their seats.[97] Although going onto the platform or steps before the car stops is not necessarily negligence per se, there are authorities holding that such rule applies only where the passenger has given notice of his intention to alight.[98] It has been held that the rule that going onto a platform of a moving train or car is not necessarily negligence applies only where the passenger has given notice of his intention to alight,[99] that a passenger going into the vestibule of a moving train assumes the risks incidental to its running and stopping in the usual way,[1] that the circumstances may be such as to render the act of the passenger in going to the threshold of or on the platform or steps of a train or car an act of negligence,[2] and that it is negligence to go on the platform or steps where the circumstances within the passenger's knowledge are such as to render the act dangerous.[3]

Injuries from doors. Where a passenger is injured by the door of a vehicle while alighting or preparing to alight, he may or may not be guilty of contributory negligence in accordance with the particular circumstances involved.[4]

95. Ark.—Lashlee v. Bush, 195 S.W. 375, 129 Ark. 257.
Mo.—Modrell v. Dunham, App., 187 S.W. 561, 564.
10 C.J. p 1120 note 55.

96. Ala.—Southern R. Co. v. Roebuck, 31 So. 611, 132 Ala. 412.
10 C.J. p 1121 note 57.

Calling street
Where, after a street car passenger had been told by conductor that she would be let off at a street, the conductor called the street and the car slowed up, it was not negligence to arise and approach door.—Modrell v. Dunham, Mo.App., 187 S.W. 561, 564.

Opening of doors
Passenger having no knowledge to contrary may assume, when doors of street car are open, that street car has stopped, but opening of street car doors is not invitation to alight to passenger who knows that street car has not stopped.—Simmons v. Wells, 20 S.W.2d 659, 323 Mo. 882

97. **Station announced several times while train slowing down**
Where name of next station was called two or three times by conductor while train was slowing down for station, it was not a request to passenger to get up and go to door while train was moving.—Lashlee v. Bush, 195 S.W. 375, 129 Ark. 257.

98. Ky.—Louisville & N. R. Co. v. Spears' Adm'r, 232 S.W. 60, 192 Ky. 64.
La.—Shalley v. New Orleans Public Service, 105 So. 606, 159 La. 519, affirming 1 La.App. 770.
Ohio.—Grubbs v. Cincinnati, L. & A. St. Ry. Co., 17 Ohio N.P.,N.S., 356
10 C.J. p 1121 note 56.

99. Wash.—Caywood v. Seattle Electric Co., 110 P. 420, 59 Wash. 566
10 C.J. p 1121 note 58.

1. Ky.—Louisville & N. R. Co. v. Spears' Adm'r, 232 S.W. 60, 192 Ky. 64

2. Ark.—Lashlee v. Bush, 195 S.W. 375, 129 Ark. 257.

Jerked off lower step of car
Passenger, who voluntarily passed onto platform of train approaching station and was standing on lower car step grasping grabiron with one hand, was negligent as matter of law and could not recover for injuries resulting from sudden jerk of train before it came to full stop, where accident would not have happened if passenger had remained in safe place.—Randall v. Boston, R. B. & L. R. Co., 193 N.E. 329, 289 Mass. 241.

Passenger opening door
Passenger voluntarily and without invitation or necessity opening door as train approached station, and standing on threshold with one hand on door casing and other on door knob, was negligent as matter of law.—Locke v. Hines, 135 N.E. 138, 241 Mass. 284.

3. Cal.—Clark v. Atchison, etc., R. Co., 128 P. 1032, 164 Cal. 363.
10 C.J. p 1122 note 59.

Standing in open exit pit while rounding curve at thirty to thirty five miles an hour
Passenger, standing at exit of street car having vacant seats, and thrown from it by its motion, was guilty of contributory negligence.—Stenger v. Arnold, 253 P. 392, 81 Colo. 33, 50 A.L.R. 1361.

4. N.J.—Agry v. Pennsylvania R. Co., 150 A. 401, 106 N.J.Law 476, reversing 146 A. 587, 7 N.J.Misc. 579
Pa.—L'Hommedieu v. Delaware, L. & W. R. Co., 101 A. 933, 258 Pa. 115.
10 C.J. p 1122 note 60.

Free swinging door
A railway carrier is not liable for injuries sustained by a passenger of mature years, who on leaving the car at her destination places her fingers in the door jamb of the passenger coach, and the door is blown shut by a gust of wind, when she knew that the door was not fastened and knew it had been swinging freely "all the time" during her railway journey of sixty-five miles.—Brehm v. Atchison, T. & S. F. Ry. Co., 206 P. 868, 111 Kan. 242, 25 A.L.R. 1056.

Steadying self while alighting
(1) Passenger who, in alighting from taxicab, was injured when he placed fingers in opening at hinges of open front door to steady himself and driver closed front door was not entitled to recover for resulting injuries in absence of showing that driver willfully caused injury, since passenger was guilty of contributory negligence, irrespective of whether driver sometimes looked to see that passengers did not have their fingers in such openings.—Abent v. Michigan Cab Co., 273 N.W. 289, 279 Mich. 617.

(2) A passenger on an interurban car having a vestibule in the center, with swinging doors communicating with back and forward compartments, was not guilty of contributory negligence, as a matter of law, in placing her hand against the door jamb and immediately behind the rear of the door to steady herself while alighting, preventing a recov-

Passenger in elevator. It is not necessarily contributory negligence for a passenger on an elevator to step forward when the operator slows down the car and reaches out as if to open the door.[5]

§ 790. Dangers on Station Platform; Safe Exit

While a passenger may ordinarily assume that he is being provided with a safe place for alighting, he must nevertheless exercise due care for his own safety, as by avoiding obvious dangers in or about a station platform.

A passenger must exercise reasonable care to avoid danger on or about the platform or other place for alighting, but he has the right to assume that a place which is safe from hidden dangers is provided, and, unless the danger is such as would naturally suggest itself to one of ordinary understanding and prudence, he will not be guilty of contributory negligence in acting on that assumption.[6]

§ 791. Mode of Exit in General

Passengers may assume in the first instance that the means of exit provided by the carrier are safe, but should exercise ordinary care for their own protection and should not follow an obviously unsafe route where a safe route is available.

Where the carrier has provided a safe way of egress from its cars or other vehicles used for the transportation of passengers, and the passenger knows, or has means of ascertaining it, it is the duty of the latter, as a general rule, to use the way provided, with due care and prudence;[7] and, although a passenger may act on the assumption that the usual exit from the train or station is a safe one, he may be negligent in taking a way which is not the usual one, or one not indicated by the carrier in some way as proper.[8] A passenger let off at a point beyond the station is negligent in following an unsafe way back to the station instead of an available safe route.[9] It does not follow, however, that, because a safe way is provided, a passenger is bound, at his peril, to ascertain the fact and to avail himself of that way, when he sees that another way, apparently safe, is in general use by the passengers with the tacit permission of the employees of the company. Such use and such permission are calculated to induce the belief that the way is provided, in part at least, for the egress of passengers, and that a passenger is expected to make use of it should he elect to do so; and, under such circumstances, it cannot be declared, as a matter of law, that it is negligence to adopt this plan of exit.[10] A passenger may assume that the carrier has provided a safe exit from its station, and, where put off in the dark, cannot be held responsible for mistakenly following a wrong path.[11]

§ 792. Alighting at Improper Place

While a passenger may ordinarily proceed on the assumption that a carrier has performed its duty in respect of stopping vehicles at places safe for the alighting of passengers, he must use due care in getting off, and may be guilty of contributory negligence barring recovery where he alights at an improper place, as between stations or on the wrong side of the vehicle.

As a general rule, although a train or car has come to a full stop, it is the duty of a passenger to exercise reasonable care to ascertain whether it is a stop for the purpose of discharging passengers, and, in alighting thereat, if it is his destination,[12] although the passenger may act on the assumption that the carrier will perform its duty as

ery for injuries to her hand from the closing of the door—Anderson v. Kansas City Rys Co., 233 S.W. 203, 290 Mo. 1.

5. U.S—National L. Ins. Co. v McKenna, Iowa, 226 F. 165, 141 C.C.A. 163.

6. U.S—Young v. Baldwin, C.C.A. Ark., 84 F.2d 841.
Or.—Abbott v. Oregon R. Co, 80 P. 1012, 46 Or. 549, 114 Am.S.R. 885, 1 L.R.A.,N.S., 851, 7 Ann.Cas. 961.
10 C.J. p 1122 note 62.

Duty of self care
A passenger on leaving a train must use ordinary care for her own safety on the depot platform.—Roussell v. St. Louis-San Francisco Ry. Co., Mo.App., 257 S.W. 516.

Loose gravel
Unless a railroad platform was obviously dangerous, an alighting passenger had a right to assume it to be safe, and was under no obligation to search for loose gravel or articles on which she might step and fall.—Barlow v. Salt Lake & U. R. Co, 194 P. 665, 57 Utah 312.

Stepping into switch point
Passenger, injured when she stepped into switch point and fell, after alighting from train in dark, some distance from platform, was not chargeable with knowledge of safe way or that way she took was dangerous, and hence was not contributorily negligent so as to authorize directed verdict for railroad.—Young v. Baldwin, C.C.A.Ark., 84 F. 2d 841.

7. Pa.—Flanagai v. Philadelphia, etc., R. Co., 37 A. 341, 181 Pa. 237.
10 C.J. p 1122 note 63.

8. Vt.—Sullivan v. Delaware, etc., Canal Co., 47 A. 1084, 72 Vt. 353.
10 C.J. p 1122 note 64

9. Pa.—Griffin v. Baltimore & O. R. Co, 67 Pa Super. 392.

Use of trestle
Pa.—Griffin v. Baltimore & O. R. Co., 67 Pa Super. 392.

10. Tex.—Missouri Pac. R. Co. v. Long, 16 S.W. 1016, 81 Tex. 253, 26 Am.S.R. 811.
10 C.J. p 1123 note 65.

11. Wis.—Pleva v. Milwaukee Electric Ry. & Light Co., 246 N.W. 694, 210 Wis. 568—Zilles v. Milwaukee Electric Ry. & Light Co., 246 N.W. 693, 210 Wis. 564.

Not a trespasser
Passenger who mistook whereabouts and directions after getting off train at dark railroad station was not trespasser as matter of law, because, while searching for exit, he continued across cattle guard on right of way.—Pleva v. Milwaukee Electric Ry. & Light Co., 246 N.W. 694, 210 Wis. 568—Zilles v. Milwaukee Electric Ry. & Light Co., 246 N.W. 693, 210 Wis. 564.

12. U.S.—Chicago, M. & St. P. Ry. Co. v. Youngers, C.C.A.S.D., 5 F. 2d 784.
Me.—Mahan v. Hines, 115 A. 132, 120 Me. 371.

to stopping the train or car at a proper place for him to alight;[13] but whether it constitutes negligence on the part of a passenger to get off the train at any other place than the usual and recognized place for passengers to alight will depend largely on whether there has been an invitation, express or implied, to alight at the unusual place.[14] To alight at a place which is in fact dangerous, and without an express or implied invitation, may be contributory negligence;[15] but, although the place may be dangerous, or other than a regular stopping place, if it is indicated by the carrier in any way as a proper place for alighting, as where the passenger is invited by the conductor or other agent to alight, the question of whether the passenger used proper precautions is one of fact, and he will not be guilty of negligence as a matter of law unless there was obvious danger in alighting.[16] Where a passenger is put off at a place other than his destination, he has a right to assume that the place selected for him to alight is reasonably safe for that purpose;[17] but he must exercise reasonable care on his part in alighting,[18] as in selecting the proper part of the train from which to alight,[19] and in proceeding to the place of his destination.[20] A passenger voluntarily selecting an exit from a train or car other than that designated by the carrier assumes the risk of injury, and, if the carrier is not chargeable with notice that passengers are using a different exit than it has selected, it may not be held responsible for their protection in so doing.[21]

A passenger on a street car has a right to assume that the place where the car stops for him to alight is a safe place unless it is obviously dangerous,[22] and a failure on his part to look down when

Pa.—Seltzer v. Philadelphia & R. Ry. Co., 69 Pa.Super. 309.
10 C.J. p 1124 note 75

13. Tex.—Texas & N. O. R. Co. v. Tillman, Civ.App., 197 S.W. 1128, error refused
10 C.J. p 1124 note 76.

Invitation to alight between regular stations

A passenger who, because train did not regularly stop at his station, had ticket for station beyond could rightfully assume that conductor was not exceeding his authority in inviting him to alight, on train being required, on account of freight train, to stop a few yards short of his station, and, being invited to alight when train at night was required to stop a short distance from station could rightfully assume conductor was not inviting him to alight at an unsafe place.—St. Louis Southwestern Ry. Co. of Texas v. Woodall, Tex.Com.App., 207 S.W. 84, reversing, Civ.App., 159 S.W. 1012.

14. Va.—Chesapeake, etc., R. Co. v. Smith, 49 S.E. 487, 103 Va. 326.
10 C.J. p 1124 note 77.

15. Me.—Ouellette v. Grand Trunk R. Co., 76 A. 280, 106 Me. 153, 138 Am.S.R. 340
10 C.J. p 1124 note 79.

Hurrying in the dark

Plaintiff, a passenger in a day coach at night, was asleep when the train stopped at his station, but awoke after the train started, and a brakeman offered to stop it and did so, opening the vestibule doors while it was still moving, then going inside to signal. Plaintiff went to the lower step, and when the train stopped was holding to the handrail and reaching for the ground with his foot, when, as he testified, the train started, throwing him off, and he fell through a trestle and was injured. He was not seen by the brakeman after signaling. Plaintiff lived in the town, and knew the location of the trestle. It was held that there was no invitation to him to alight at that place, that it was his duty to wait until the trainmen could ascertain its safety, and that in failing to do so and in hastening to alight he was chargeable with contributory negligence.—Chicago, M. & St. P. Ry. Co. v. Youngers, C.C.A. S.D., 5 F.2d 784.

Semaphore stop

In an action for death of a passenger who negligently jumped off or fell from the train at a semaphore stop and was run over on the track, his negligence must be regarded as continuing and precludes recovery unless some independent negligence of defendant intervened.—Mahan v. Hines, 115 A. 132, 120 Me. 371.

16. Del.—Clayton v. Philadelphia, B. & W. R. Co., 106 A. 577, 7 Boyce 343.
10 C.J. p 1125 note 80.

17. Ala.—Melton v. Birmingham R., etc., Co., 45 So. 151, 153 Ala. 95, 16 L.R.A.,N.S., 467.
10 C.J. p 1125 note 81.

18. Kan.—Miller v. Kansas City Public Service Co., 15 P.2d 453, 136 Kan. 283.
10 C.J. p 1125 note 82.

Alighting at water tank near bridge

Where a passenger chose not to alight at a station, but at a water tank near a bridge, such choice and his knowledge of the location require him to use reasonable care to see that he alighted at the only safe place to alight from the train.—St. Louis & S. F. R. Co. v. Quinette, Okl., 251 F. 773, 164 C.C.A. 7.

19. U.S.—St. Louis & S. F. R. Co. v. Quinette, Okl., 251 F. 773, 164 C.C.A. 7.

Choosing wrong car

A passenger familiar with the conditions at a station, and knowing that he might safely alight from forward end of a smoking car opposite a water tank, who chose to alight from the forward end of a Pullman behind the smoking car, and failed to look where he might have seen the spans of a bridge, and alighted without waiting for the porter to place a step, and before discovering a secure footing, and fell from a bridge, was guilty of contributory negligence.—St. Louis & S. F. R. Co. v. Quinette, Okl., 251 F. 773, 164 C.C.A. 7.

20. Pa.—Crawford v. Shenango Valley Traction Co., 157 A. 40, 102 Pa. Super. 440
10 C.J. p 1125 note 83.

Leaving car between regular stops

In action against street railroad, passenger leaving car between regular stops and crossing cartway in face of approaching automobile plainly visible, which struck her, was contributorily negligent.—Crawford v. Shenango Valley Traction Co., 157 A. 40, 102 Pa.Super. 440.

21. N.Y.—Trudnowski v. New York Cent. R. Co., 221 N.Y.S. 686, 220 App.Div. 503.

22. Conn.—Powers v. Connecticut Co., 74 A. 931, 82 Conn. 665, 26 L.R.A.,N.S., 405
10 C.J. p 1125 note 84.

Regular stop

Passenger, until told otherwise, had right to assume that street car would stop only at regular stop, and it was not negligence on his part to proceed to alight on this assumption.—Johnston v. City of Monroe, La.App., 147 So. 519.

alighting is not of itself negligence;[23] but, where such a passenger knows of dangers at the place at which he desires to alight, and voluntarily attempts to alight there, he is guilty of contributory negligence.[24]

Alighting from wrong end of car. There may be regulations requiring passengers to get off at the rear platform, so as to render it negligent to get off at the front platform, defeating recovery for any injury resulting therefrom,[25] unless some existing necessity requires a violation of such regulation.[26] It is not, however, as a rule, negligence per se to get off at the front platform.[27] Where it is the usual custom of passengers to alight at the front platform, it may be negligence for a passenger who knows of this custom to alight at the rear platform;[28] but, although it may be better to leave a car by the front end, leaving by the rear platform cannot, in the absence of a rule prohibiting it, be said to be negligence per se.[29] In the absence of a regulation to the contrary, a passenger has the right to alight from either end of a car; he has the right to assume that there is a safe means of egress from both ends, and he can be convicted of negligence only when he attempts to make his exit after he discovers, or by the exercise of proper care should have discovered, that the place is unsafe.[30]

Alighting on wrong side. It may be negligent to get off on the wrong side of the car, as where there is a platform or other conveniences provided for the alighting of the passenger at one side of the car and not at the other; and, if this is contrary to the regulation or plain intent of the carrier, or is manifestly dangerous, it will constitute contributory negligence.[31] In general, however, unless there is some indication that only one side is a safe place to alight, as by providing a platform or other conveniences, it is not negligence per se for a passenger to alight on either side,[32] especially where the carrier has either expressly or impliedly invited passengers to alight on either side.[33]

Act in emergency. In the event of an emergency arising through no fault of the carrier, the act of a passenger in leaving the vehicle by an emergency exit without necessity may constitute contributory negligence barring recovery for resultant injury.[34]

§ 793. Alighting from Moving Train or Car

a. In general
b. Failure to stop at proper place for sufficient time
c. Advice, permission, or direction of carrier's agents
d. Warnings

23. N.H.—Bass v. Concord St. R. Co., 46 A. 1056, 70 N.H. 170.

24. La.—Serio v. New Orleans Ry. & Light Co., 91 So. 70, 150 La. 632.
10 C.J. p. 1126 note 86

25. Md.—Baltimore City Pass. R. Co. v. Wilkinson, 30 Md. 224

26. Md.—Baltimore City Pass. R. Co. v. Wilkinson, supra
10 C.J. p. 1123 note 70.

27. Mo.—Rearden v. St. Louis, etc., R. Co., 114 S.W. 961, 215 Mo. 105.
10 C.J. p. 1123 note 71

28. Ind.—Pittsburgh, etc., R. Co. v. Aldridge, 61 N.E. 741, 27 Ind.App. 498
10 C.J. p. 1123 note 72.

29. Mich.—Cartwright v. Chicago, etc., R. Co., 18 N.W. 380, 52 Mich. 606, 50 Am.R. 274.
10 C.J. p. 1123 note 73.

30. Pa.—Fern v. Pennsylvania R. Co., 95 A. 590, 250 Pa. 487

No exit announced by trainmen

A railroad passenger is not negligent, precluding his recovery for injuries while alighting from a train, merely because he failed to leave train through a particular door of car, where selection of that exit had not been announced by trainmen.—Atlanta & St. A. B. Ry. Co. v. Kelly, 82 So. 57, 77 Fla. 479.

Unlocked door without attendant

Alleged contributory negligence of a passenger cannot be predicated on his act in leaving the car at a door where there was no attendant, when the door was left unlocked, although there was another door, which was open, at which an attendant was stationed.—Ft. Worth & D. C. Ry. Co. v. Yantis, Tex.Civ.App., 185 S.W. 969, error refused.

31. Pa.—Seltzer v. Philadelphia & R. Ry. Co., 69 Pa.Super. 309.
Tex.—Armitage v. Fort Worth & D. C. Ry. Co., Civ.App., 65 S.W.2d 376, error refused.
10 C.J. p. 1123 note 66.

Disregard of regulations

"When a railroad has provided safe and convenient means of ingress and egress to and from its trains upon one side of its track, it has in this particular discharged its whole duty to passengers, and it is not bound to anticipate that, in disregard of its reasonable and known regulations, they will alight from the opposite side."—Seltzer v. Philadelphia & R. Ry. Co., 69 Pa.Super. 309, 315.

32. Pa.—Chamberlain v. Director General of Railroads, 118 A. 550, 275 Pa. 47.
10 C.J. p. 1123 note 67.

33. N.J.—Atlantic City R. Co. v. Goodin, 42 A. 333, 62 N.J.Law 394, 72 Am.S.R. 652, 45 L.R.A. 671
10 C.J. p. 1123 note 68.

Occasional alighting as not establishing custom

"An occasional alighting and discharging of passengers on the wrong side will not establish a custom permitting passengers to leave on the side opposite to where they are required to leave, or on the nonplatform side. There should be evidence of such continuous use for a period of time that the company's assent to such use may be lawfully inferred."—Seltzer v. Philadelphia & R. Ry. Co., 69 Pa.Super. 309, 316.

34. Pa.—Mackowski v. Philadelphia Rapid Transit Co., 108 A. 168, 265 Pa. 34.

Collision

In view of a verdict for defendant, establishing for purposes of appeal that it was not negligent, and that plaintiff was negligent, defendant was not liable for injury to plaintiff, a passenger, who, after a collision and in the excitement, was injured by stepping from an emergency rear door, because there was no step, whereas, if she had kept her seat, she would not have been injured.—Mackowski v. Philadelphia Rapid Transit Co., 108 A. 168, 265 Pa. 34.

a. In General

While a passenger's act in alighting from a moving vehicle may be contributory negligence per se, as where it is moving at a rapid rate or where he descends in the dark, ordinarily the negligent or nonnegligent character of such conduct is an issue of fact to be determined from consideration of all the circumstances involved.

There may be circumstances attending an attempt to alight from a moving train or car which will justify the court in declaring such conduct negligence per se;[35] under statutes expressly declaring such conduct to be contributory negligence there can be no recovery,[36] and even where the mere act of a passenger's jumping from a train in motion is not considered negligence per se, if the act is obviously dangerous and without reasonable necessity, real or apparent, it constitutes contributory negligence as a matter of law, and will defeat a recovery for injury caused thereby.[37] However, ordinarily it is not contributory negligence per se for a passenger voluntarily to alight from a moving train; ordinarily it is a question of fact for the jury to determine whether the passenger, under the circumstances, acted as a reasonably cautious and prudent man would have acted under like circumstances.[38]

Street cars. In the absence of special circumstances, it is not negligence per se for a passenger to alight from a moving street car, as where it has not come to a full stop or is moving slowly, but the question is one of fact dependent on the circumstances of the particular case;[39] but an attempt to alight from a street car while in motion, without any effort to cause a stoppage or slowing up of the car, or under circumstances which make the attempt obviously dangerous, constitutes contributory negligence per se.[40] It has also been held that a

35. U.S.—Murray v. Southern Pac Co., Cal., 236 F. 704, 150 C.C.A. 36.
Ky.—Louisville & N. R. Co. v. Chadwell's Adm'r, 280 S.W. 89, 212 Ky. 723—Louisville & N. R. Co. v. Derrickson, 185 S.W. 1114, 170 Ky. 334.
La.—Butler v. New Orleans Public Service, App., 173 So. 209.
Minn.—Leonczak v. Minneapolis, St. P. & S. S. M. Ry. Co., 201 N.W. 551, 161 Minn. 304.
Mo.—Kirby v. United Rys. Co. of St. Louis, 242 S.W. 79.
Ohio—Wehrenberg v. Cincinnati Traction Co., 2 Ohio N.P.,N.S., 271.
W.Va.—Bartley v. Western Maryland Ry. Co., 95 S.E. 443, 81 W.Va. 795.
10 C.J. p. 1126 note 88

Assumption of risk

(1) A passenger who does not wait for train to stop or sees that it is not going to stop, and gets off and is injured, assumes risk of getting hurt on alighting, and can recover only where some negligent act such as a defective platform or unusual motion of train accompanies act of stepping from train.—Rooker v. Deering Southwestern Ry. Co., Mo.App., 204 S.W. 556.

(2) Passenger jumping from moving train took dark side of track as he found it, railway having no duty to light that side which was opposite depot.—Fort Worth & D. C. Ry. Co. v. Armitage, Tex.Civ.App., 39 S.W.2d 108, error refused.

(3) Where train fails to stop at station of destination of passenger and passenger is not directed or induced at the time by act or word of railroad company's agent to get off, passenger who gets off while train is moving at rapid rate of speed does so at his own risk.—Nashville, C. & St. L. Ry. v. Harrell, Tenn.App., 110 S.W.2d 1032.

Duty of awaiting complete stop

Passenger in motor bus has duty of remaining therein until it comes to complete stop before attempting to alight.—George v. Caddo Transfer & Warehouse Co., 119 So. 880, 9 La.App. 202.

36. **Killed by jump**

Under Railroads and Canals Act § 55, providing that one injured by jumping from a car while in motion shall be deemed to have contributed to the injury sustained, and shall not recover therefor from the company owning or operating the railroad, there can be no recovery for the death of one jumping off the train while moving.—Houston v. Delaware, L. & W. R. Co., C.C.A.N.J., 274 F. 599

Recovery denied despite acts of trainmen who invite alighting

Passenger on railroad operated under General Railroad Act, who when train slowed down and when trainmen called "Park Place, last stop, Newark," walked to front of car following another passenger and finding door open stepped off moving train mistakenly believing that it had stopped, could not recover for injury, as no act or direction of trainmen interfered with her free agency or diverted her attention.—Zelman v. Pennsylvania R. Co., 107 A. 442, 93 N.J.Law 57.

37. Ga.—Walker v. Georgia R., etc., Co., 50 S.E. 121, 122 Ga. 368.
10 C.J. p. 1130 note 3

38. Colo.—Denver Tramway Co. v. Johnson, 179 P. 143, 66 Colo. 50.
Ky.—Louisville & N. R. Co. v. Chadwell's Adm'r, 280 S.W. 89, 212 Ky. 723.
Minn.—Rauscher v. Payne, 188 N.W. 1017, 152 Minn. 368.
Pa.—Hawkins v. Director General of Railroads, 121 A. 46, 277 Pa. 213—Montalini v. Pennsylvania Co., 100 A. 806, 256 Pa. 249.
Vt.—Amidon v. Twin State Gas & Electric Co., 147 A. 694, 102 Vt. 267
10 C.J. p. 1126 note 89.

The test of a passenger's negligence in alighting from a moving train is not whether he knew, or should have known, that it was dangerous for him to alight, but whether his act in jumping from a moving train amounted to want of that degree of care which an ordinarily careful and prudent man would use under the same or similar circumstances.—Texas & N. O. R. Co. v. Tillman, Tex.Civ.App., 197 S.W. 1128, error refused.

Violation of city ordinance

Passenger in autobus who saw door open, and, thinking bus had stopped, stepped out and was injured, was not guilty of negligence per se, because of city ordinance prohibiting entering or leaving motorbusses when moving.—Alstead v. Kapper, 236 P. 799, 135 Wash. 21.

39. Mo.—Hibler v. Kansas City Rys. Co., 237 S.W. 1014, 292 Mo. 14.
N.H.—Wright v. Boston & M. R. R., 139 A. 370, 83 N.H. 136, 56 A.L.R. 975
N.J.—Trimboli v. Public Service Coordinated Transport, 168 A. 572, 111 N.J.Law 481
Ohio.—Grubbs v. Cincinnati, L. & A. St. Ry. Co., 17 Ohio N.P.,N.S., 356
Wash.—Nollmeyer v. Tacoma Ry. & Power Co., 164 P. 229, 95 Wash. 595
10 C.J. p. 1128 note 95.

40. La.—Butler v. New Orleans Public Service, App., 173 So. 209.
Mo.—Delegarder v. Wells, App., 258 S.W. 7.
10 C.J. p. 1129 note 96.

passenger assumes the risk of injury where he alights from a moving street car.[41]

Particular factors for consideration. Whether alighting from a moving vehicle is culpable or excusable will depend on a variety of circumstances, such as the rapidity of the motion of the car or train,[42] whether the passenger reasonably believed the vehicle to be at a standstill,[43] whether it was night or day,[44] the distance from the car to the ground or other surface on which the passenger proposed to alight,[45] the circumstances limiting the free agency of the person alighting,[46] such as emergencies considered supra § 777, the age and vigor of the passenger,[47] his condition as to being encumbered with baggage[48] or clothing,[49] the manner in which he attempted to alight,[50] and whether or not he alighted to escape from a position of peril.[51] It has been held negligence per se where a passenger voluntarily jumps from a moving train in the dark,[52] or where at the time of taking the leap he is encumbered with luggage,[53] or where the train or car is moving at a dangerous rate of speed,[54] or even where the train is moving slowly, if he is in a weak physical condition or of an advanced age.[55]

Utterly heedless act

Where plaintiff, a young woman eighteen years of age, familiar with the movements of street cars, and in full possession of her faculties, stepped from a street car while it was running at the rate of eighteen miles per hour, she was guilty of such contributory negligence as precludes a recovery where it does not appear that she was excited, or was confronted with any emergency or peril, or that her attention was diverted.—Kirby v. United Rys. Co. of St. Louis, Mo., 242 S.W. 79.

Without looking

A street car passenger who undertakes to alight while the street car is in motion, with the door half open, at night, at or near the middle of the street, without looking for approaching automobiles, is barred from recovering from the street car company for injuries sustained on being struck by passing automobile, because of his own negligence.—Hevell v. Baltimore Transit Co., Md., 196 A. 103.

41. La.—Gipson v. Shreveport Traction Co., 77 So. 129, 142 La. 497, L.R.A. 1918B 1130.

Car slowing down

Man sixty years of age and apparently in full possession of faculties, who stepped off street car when it had slowed down within few feet of its regular stopping place, assumed risk of danger, which was as apparent to him as to conductor.—Gipson v. Shreveport Traction Co., 77 So. 129, 142 La. 497, L.R.A. 1918B 1130.

42. Ark.—St. Louis, I. M. & S. Ry. Co. v. Duffey, 183 S.W. 748, 122 Ark. 429.
Ky.—Louisville & N. R. Co. v. Derrickson, 185 S.W. 1114, 170 Ky. 334.
Minn.—Rauscher v. Payne, 188 N.W. 1017, 152 Minn. 368.
Mo.—Kirby v. United Rys. Co. of St. Louis, 242 S.W. 79.
10 C.J. p. 1128 note 90.

Slowly moving train

It is not negligence per se for a passenger to alight at his station from a slowly moving train.—Louisville & N. R. Co. v. Chadwell's Adm'r, 280 S.W. 89, 212 Ky. 723.

43. N.H.—Wright v. Boston & M. R. R., 139 A. 370, 83 N.H. 136, 56 A.L.R. 975.
Vt.—Amidon v. Twin State Gas & Electric Co., 147 A. 694, 102 Vt. 267.

Justification for believing bus at standstill

Whether a passenger, killed in alighting from a moving bus, was justified in believing it at a standstill when she alighted "depends upon the attending circumstances, the actual speed of the bus at the time, whether it was running smoothly or otherwise, the deceased's position in it, what could be seen outside from any viewpoint reasonably available to her before she alighted, had it reached the place where she was accustomed to leave it, etc."—Amidon v. Twin State Gas & Electric Co., 147 A. 694, 696, 102 Vt. 267.

Mistake respecting stoppage of street car

Passenger, undertaking to leave open street car before it stops under mistaken belief that it has stopped, is not necessarily negligent, where the accident occurred at night when the visibility of objects and conditions might be affected.—Wright v. Boston, & M. R. R., 139 A. 370, 83 N.H. 136, 56 A.L.R. 975.

44. Ark.—St. Louis, I. M. & S. Ry. Co. v. Duffey, 183 S.W. 748, 122 Ark. 429.
10 C.J. p. 1128 note 91.

45. Ark.—St. Louis, I. M. & S. Ry. Co. v. Duffey, supra.
10 C.J. p. 1128 note 92.

46. Minn.—Rauscher v. Payne, 188 N.W. 1017, 152 Minn. 368.

47. Ark.—St. Louis, I. M. & S. Ry. Co. v. Duffey, 183 S.W. 748, 122 Ark. 429.
10 C.J. p. 1128 note 93.

Recovering from illness

A woman of forty four who was just recovering from a spell of sickness was negligent in attempting to alight from a train moving in excess of five miles an hour.—Louisville & N. R. Co. v. Chadwell's Adm'r, 280 S.W. 89, 212 Ky. 723.

48. U.S.—Murray v. Southern Pac. Co., Cal., 236 F. 704, 150 C.C.A. 36.
10 C.J. p. 1128 note 94.

49. Ky.—Louisville & N. R. Co. v. Chadwell's Adm'r, 280 S.W. 89, 212 Ky. 723.

Woman impeded by clothing of a character precluding free movement held negligent under existing circumstances in alighting from a train moving at least in excess of five miles an hour.—Louisville & N. R. Co. v. Chadwell's Adm'r, 280 S.W. 89, 212 Ky. 723.

50. Ky.—Louisville & N. R. Co. v. Chadwell's Adm'r, supra.

Back toward front of moving train

Where deceased, carrying a grip in his left hand, started down the steps of a moving train grasping a handhold with his right hand so that he was turned with his back toward the forward motion of the train and while in this position either stepped down or was thrown, with fatal results, his conduct constituted contributory negligence as matter of law barring recovery.—Murray v. Southern Pac. Co., Cal., 236 F. 704, 150 C.C.A. 36.

Stepping off at right angles to the motion of the train is an indication of contributory negligence.—Louisville & N. R. Co. v. Chadwell's Adm'r, 280 S.W. 89, 212 Ky. 723.

51. Minn.—Rauscher v. Payne, 188 N.W. 1017, 152 Minn. 368.

52. Ala.—Hunter v. Louisville, etc., R. Co., 43 So. 802, 150 Ala. 594, 9 L.R.A.,N.S., 848.
10 C.J. p. 1131 note 4.

53. Ala.—Hunter v. Louisville, etc., R. Co., supra.
10 C.J. p. 1131 note 5.

54. Ky.—Louisville & N. R. Co. v. Chadwell's Adm'r, 280 S.W. 89, 212 Ky. 723.
10 C.J. p. 1131 note 6.

55. Md.—Cumberland Valley R. Co. v. Maugans, 61 Md. 53, 48 Am.R. 88.
10 C.J. p. 1131 note 7.

A presumption of negligence in alighting from a moving train may be overcome by proof of the fact that the starting of the train or car and the alighting from it were simultaneous acts.[56] Even where a passenger has only partly descended the steps of a car when it starts without allowing sufficient time for him to alight, the suddenness of the situation presented and the excitement caused thereby may be such as to free him from the charge of contributory negligence in nevertheless attempting to alight.[57]

b. Failure to Stop at Proper Place for Sufficient Time

The carrier's failure to stop its vehicle at the proper place or for the proper length of time does not in itself relieve a passenger from contributory negligence in attempting to alight in the face of danger from motion of the vehicle, although such fault on the part of the carrier is a factor for consideration and, in conjunction with other circumstances, may operate to excuse the alighting passenger for what would otherwise be deemed negligence.

In general with reference to either trains or street cars it may be said that the fact that the train or car is not stopped at the proper alighting place, or moves on without stopping long enough to enable the passenger to alight, will be no excuse for his incurring danger, in attempting to get off, even if it is to avoid being carried beyond his destination;[58] but the passenger may be excused for what would otherwise be deemed negligence barring recovery where through fault of the carrier in failing to stop,[59] or in stopping for an insufficient length of time,[60] he is placed in a position of emergency. If the speed has been checked so as to indicate an intention that he shall alight, or so as to render it not hazardous so to do, the act of alighting before the train or car has come to a full stop will not necessarily be negligent, unless the danger attending the attempt is obvious to a person of ordinary prudence and intelligence.[61] Thus, if a street car has failed to stop or slow up on the signal of the passenger indicating his desire to alight, he is not justified in attempting to get off while it is in rapid motion;[62] but, if the speed of the car is reduced in apparent response to the passenger's signal, it is not necessarily negligent to attempt to alight before it has come to a full stop.[63]

Where the carrier does stop its vehicle long enough to permit a passenger to alight, and he steps from the vehicle after it has started, he is ordinarily guilty of contributory negligence per se barring recovery for resultant injuries.[64]

A passenger is not guilty of negligence in failing to protect himself from movement of a street car occurring after a stop, such as a stop for the purpose of letting him alight.[65]

56. Ill.—North Chicago St. R. Co. v. Brown, 52 N.E. 864, 178 Ill. 187, affirming 76 Ill. App. 654
10 C.J. p. 1133 note 13.

57. Mich.—Smalley v. Detroit, etc., R. Co., 91 N.W. 1027, 131 Mich. 560
10 C.J. p. 1133 note 14

58. N.C.—Moore v. Southern Ry. Co., 182 S.E. 131, 208 N.C. 670.—Stamey v. Southern Ry. Co., 182 S.E. 130, 208 N.C. 668
10 C.J. p. 1129 note 97.

Flag station

Sixty-one-year old man, injured in alighting from train picking up speed in passing flag station to which he had purchased ticket not yet taken up by conductor, was held contributorily negligent as matter of law.—Louisville & N. R. Co. v. Whitaker, 300 S.W. 912, 222 Ky. 302.

59. Cal.—Vietti v. Hines, 192 P. 80, 48 Cal. App. 266.
10 C.J. p. 1129 note 97.

Danger of missing important engagement

Where a passenger was placed in a difficult position, so that he was compelled to decide in an instant of time whether he would jump from a moving train or miss an important engagement, by reason of refusal of carrier to stop the train, he could not be expected to act with the highest degree of prudence, and, if it happened that he did not exercise the best judgment with that degree of prudence which he would have shown under ordinary circumstances, he would not be held to have been guilty of such negligence as would preclude him from recovery, where injury resulted to him from jumping.—Vietti v. Hines, 192 P. 80, 48 Cal. App. 266

60. La.—Guidry v. Morgan's Louisiana & T. R. & S. S. Co., 74 So. 534, 140 La. 1007, L.R.A.1917D 962.
10 C.J. p. 1129 note 97.

61. Conn.—Elwood v. Connecticut R., etc., Co., 58 A. 751, 77 Conn. 145, 1 Ann.Cas. 779.
N.C.—Moore v. Southern Ry. Co., 182 S.E. 131, 208 N.C. 670.
Tenn.—Tennessee R. Co. v. Kingsley, 10 Tenn.App. 637.
10 C.J. p. 1130 note 98.

"Pick-up" of train indicating danger

Passenger alighting from train, which had slowed down for her station but had not stopped, and was going a "tiny bit faster" when she and her companions jumped, was contributorily negligent as a matter of law.—Moore v. Southern Ry. Co., 182 S.E. 131, 208 N.C. 670.—Stamey v. Southern Ry. Co., 182 S.E. 130, 208 N.C. 668.

62. Ga.—Outen v. North, etc., R. Co., 21 S.E. 710, 94 Ga. 662.
10 C.J. p. 1130 note 99.

63. Mo.—Dawson v. St. Louis Transit Co., 76 S.W. 689, 102 Mo. App. 277
10 C.J. p. 1130 note 1.

64. Ky.—Chesapeake & O. Ry. Co. v. Thompson, 270 S.W. 464, 208 Ky. 32.—Chesapeake & O. R. Co. v. Daniel, 251 S.W. 1007, 199 Ky. 817.—Chesapeake & O. R. Co. v. Mollett, 251 S.W. 1005, 199 Ky. 813

65. Ohio.—Mansfield Public Utilities & Service Co. v. Wolfe, 14 Ohio App. 39.

No duty to anticipate movement

Duty of passenger to protect himself against natural movements of street car applies to movements which passenger has reasonable grounds to anticipate, and not to movements when car is stopped to permit passenger to alight.—Virginia Public Service Co. v. Silver, C.C.A.Va., 68 F.2d 230

Stop for railroad crossing

Where a car had stopped before crossing an intersecting railroad, and, while the conductor was ahead near the railroad track, a passenger started to alight, when the conductor signaled the motorman to come ahead and the passenger was thrown by the sudden forward movement of

c. Advice, Permission, or Direction of Carrier's Agents

While it is ordinarily not regarded as negligence for a passenger to alight from a moving vehicle on the advice, permission, or direction of a trainman or similar employee, nevertheless, where the circumstances are such as to render such conduct clearly imprudent, the order or suggestion of the trainman will not excuse the passenger for alighting

A passenger is not guilty of negligence per se in jumping from a moving train or car by the advice, direction, invitation, or order of the conductor or other authorized employee of the carrier, on whose opinion or judgment in the matter he has a right to rely, if the danger of such an act would not be apparent to a prudent man, as where the train at the time is moving slowly; and in such case it becomes the province of the jury to say how far the passenger's act may be excused, and whether or not it was negligent.[66] If, however, the danger attending such conduct on the part of the passenger is so obvious that a prudent man would not encounter it, as where, at the time that he jumped, the train was moving at a rapid rate of speed, he is, as a matter of law, guilty of contributory negligence and cannot recover for an injury sustained thereby,[67] and recovery will be denied where the conduct of the carrier claimed to constitute an invitation to alight did not legally amount to such an invitation and where the act of the passenger in alighting from the moving vehicle was negligent.[68]

d. Warnings

To alight from a moving vehicle in the face of warnings by the carrier or its agents is ordinarily negligence, although the circumstances may be such as to rebut any inference of imprudent conduct. Failure of a trainman to warn a passenger against his obvious design to descend from a moving train will not excuse the passenger's contributory negligence in so doing.

Where a passenger alights from a moving train or car, contrary to the warning of the carrier through its known regulations or its employees, he is guilty of contributory negligence and cannot recover for an injury received in such attempt,[69] unless an ordinarily careful and prudent person might have made the attempt under the same circumstances.[70]

Failure to warn. The fact that the carrier's agent fails to warn a passenger of the danger of alighting while the vehicle is in motion, even though such agent knew or might have known of the pas-

the car, it was held that he was not guilty of contributory negligence.—Mansfield Public Utilities & Service Co v Wolfe, 14 Ohio App. 39.

66. Cal.—Vietti v Hines, 192 P. 80, 82, 48 Cal App 266, quoting **Corpus Juris** with approval.
Ill.—Wood v. Illinois Cent R Co., 201 Ill App. 439
La.—George v. Caddo Transfer & Warehouse Co, 119 So. 880, 9 La. App 202.
10 C J. p 1131 note 9.

Assurances of safety
In determining whether passenger alighting from moving train was negligent, it is proper to consider that trainmen advised alighting, and gave assurances of safety.—Leonczak v. Minneapolis, St. P & S. S M. Ry. Co, 201 N W 551, 161 Minn 304.

67. Ga.—Southern R. Co v. Bandy, 47 S E 923, 120 Ga. 463, 102 Am S R. 112
10 C J. p 1132 note 10.

At night
Passenger, who was injured when thrown to ground while alighting from moving railway train near depot at midnight, was contributorily negligent, notwithstanding suggestion of flagman that he alight from train at time he did.—Louisville & N R. Co. v. Harrington, 87 S W 2d 379, 261 Ky. 212.

Threat of arrest
Passenger was not justified in alighting from rapidly moving train by command of trainmen or threat of arrest, unaccompanied by force or threat of immediate bodily harm.—St Louis, I. M & S. Ry. Co. v. Duffey, 183 S.W. 748, 122 Ark. 429

68. Vt.—Amidon v. Twin State Gas & Electric Co., 147 A. 694, 102 Vt 267.

Mere announcement of station cannot ordinarily be construed as an invitation to alight from a moving train.—Wood v. Illinois Cent. R Co., 201 Ill App. 439—10 C J. p 1131 note 9 [c] (1), (2).

Open door on unused side of train
Where a passenger had just come aboard a through train bound for a distant station, and the vestibule doors on the side of the train used for exit and entrance of passengers had been closed, the fact that a door was left open on the unused side of the train, where the station platform was in darkness, could not be construed as an invitation to a passenger bound for a distant station to alight from the train after it had started, and he was contributorily negligent in doing so.—Fort Worth & D C. Ry. Co v. Armitage, Tex Civ App, 39 S W 2d 108, error refused.

Opening bus door
Bus passenger is not justified in attempting to alight before bus has stopped because of fact that porter had opened door.—George v. Caddo Transfer & Warehouse Co., 119 So. 880, 9 La.App. 202.

Public conveyance of any character
"The mere opening of the exit door of a public conveyance of whatever character following a request by a passenger to be let off at the next stop does not constitute an invitation to him to alight when the vehicle is in motion if he knows, or in the exercise of the care of a prudent person ought to have known, that fact . . . It is a matter of common knowledge to all persons of ordinary intelligence that the act of alighting from moving vehicles is attended with danger, and the fact that many do it does not lessen the element of chance or afford relief to one who is injured through his own folly"—Amidon v. Twin State Gas & Electric Co., 147 A. 694, 695, 102 Vt. 267.

69. Pa.—New York, etc., R. Co. v Enches, 17 A. 991, 127 Pa. 316, 14 Am S R. 848, 4 L R A. 432—Pennsylvania R. Co. v Aspell, 23 Pa. 147, 62 Am D 323.
Wis.—Jewell v. Chicago, etc., R Co., 12 N W 83, 54 Wis. 610, 41 Am R 63
10 C J p 1133 note 11.

Preoccupation
A woman passenger on a street car, who through preoccupation, and while unmindful of conductor's attempt to warn her of danger, attempted to alight while the car was in motion, was not entitled to recover damages from operating company for injury sustained.—Boulden v Shreveport Rys. Co, 83 So 211, 145 La 976.

70. Mo.—Bond v. Chicago, etc., R Co., 99 S W. 30, 122 Mo App. 207.

senger's intention, does not relieve the passenger of the legal results of his contributory negligence [71]

§ 794. Conduct While in Transit

Generally speaking, a passenger in transit may rely on the carrier's fulfillment of its duty to protect him without being guilty of contributory negligence, although where he fails to use his own senses to avoid obvious danger he may be contributorily negligent.

The duty of the carrier to look out for the safety of the passenger justifies a passenger, while in transit, in assuming that it will use the degree of care for his protection which the law requires, and he is not bound to take precautions against dangers which are not apparent or brought to his knowledge,[72] and is not contributorily negligent in taking a seat beside an intoxicated passenger,[73] nor in carrying packages while in transit,[74] nor is a passenger, having no control over the operator of the vehicle, guilty of contributory negligence in failing to take steps to prevent dangerous operation thereof,[75] nor, aside from the question of control, need

71. W Va—Bartley v. Western Maryland Ry. Co, 95 S E 443, 81 W.Va 795.

On steps in presence of brakeman

Where a passenger stood on the steps of a moving train preparatory to alighting therefrom, the failure of a nearby brakeman to warn him against his apparent design to alight did not excuse the passenger's negligence in stepping down from the moving train—Bartley v. Western Maryland Ry. Co., 95 S.E. 443, 81 W. Va. 795.

72. Ill—Metz v. Yellow Cab Co., 248 Ill.App 609.

Ky.—Shelton Taxi Co. v. Bowling, 51 S.W.2d 468, 244 Ky. 817

La—Landix v. New Orleans Ry. & Light Co, 73 So. 668, 140 La 529.

Minn.—McKellar v. Yellow Cab Co, 181 N.W. 348, 148 Minn. 247.

Pa.—Diffenderfer v Pennsylvania R Co, 67 Pa Super. 187.

Tenn.—Louisville & N. R Co. v. Hutcherson, 8 Tenn.App. 235.

10 C J. p 1133 note 16.

Invitation to cross bridge

Where bridge across canal was open because of trouble with its mechanism, and conductor on street car issued transfers and invited passengers to cross on a steam railroad bridge to reach cars on the other side, it was held that a passenger who was caught by a train while crossing the bridge was not guilty of contributory negligence in acting on the invitation—Thompson v. New Orleans Ry. & Light Co., 87 So. 716, 148 La. 698.

Lack of heat

Although there was fuel and a stove in the car in which plaintiff and his wife were riding, plaintiff's failure to build a fire, the car becoming cold, is not contributory negligence precluding recovery for injuries to his wife from cold.—St. Louis Southwestern Ry. Co. of Texas v. Rutherford, Tex Civ App, 184 S W. 700, error refused—10 C.J. p 1134 note 18 [b].

Obstruction in aisle

A carrier of passengers being bound to exercise a high degree of care, a passenger who fell on stepping on a round piece of wood left in the aisle of a railroad car cannot be held guilty of contributory negligence in failing to discover it, because the servants of the carrier who failed to discover the piece of wood were negligent, for the passenger might proceed on the assumption that the carrier had performed its duty.—Texas & Pacific Ry Co. v. Hanson, Tex.Civ.App, 189 S.W. 289.

Unheeded warning

Taxicab passengers who requested driver to reduce high rate of speed while traveling on slippery roadway when it was snowing were not precluded from recovery for injuries sustained when thrown to floor of taxicab by sudden stop made to avoid collision on ground of negligence in not requesting driver to stop and allow passengers to leave taxicab, since passengers could reasonably assume that driver would heed warnings and reduce speed—Mendler v. Town Taxi, Mass., 3 N E 2d 15.

73. **Woman passenger, no other seat available**

A woman passenger, who, on entering a chair car found all seats taken except one beside a drunken man, asleep, which she took, was not guilty of negligence contributing to her injuries and shock when insulted and touched by such drunken man, the conductor not having endeavored to secure her another seat—Hines v. Rice, 218 S W 851, 142 Ark. 159

74. **Bundles in lap**

That street car passenger was carrying packages in lap and attempted to hold to seat to resist sudden jolt was not negligence—Cooper v Georgia Power Co, 162 S E. 302, 44 Ga. App. 581.

75. Ark—Arkansas Power & Light Co. v Boyd, 65 S W.2d 919, 188 Ark. 254.

Conn.—Duffy v. J. W. Bishop Co., 122 A. 121, 99 Conn 573.

Minn—McKellar v. Yellow Cab Co., 181 N W 348, 148 Minn. 247.

Wash—Garrow v. Seattle Taxicab Co, 238 P 623, 135 Wash. 630, 45 A.L R. 293.

Directions respecting destination

Taxicab passenger's control over driver is restricted to giving directions as to destination, and does not extend to manner of operating cab—Chaput v. Lussier, 165 A. 573, 132 Me. 48

Failing lights

Passenger was under no duty, after taxicab headlights had failed, to warn driver of taxi company engaged in business of transporting passengers for hire.—Shelton Taxi Co. v Bowling, 51 S.W 2d 468, 244 Ky. 817

Fast driving of motor vehicles

(1) A passenger in a motorcar provided by defendants to transfer their passengers to the line of another company is not guilty of contributory negligence, because he took no steps to lessen the speed of the motorcar, the passenger having no control over the driver.—Harmon v Barber, Ohio, 247 F. 1, 159 C C A. 219, certiorari denied 38 S.Ct. 335, 246 U.S. 666, 62 L.Ed 929.

(2) Passenger's failure to warn bus driver that he was driving too fast did not render passenger injured when bus overturned contributorily negligent—Nevin Bus Lines v Ritenour, C.C.A Ohio, 61 F.2d 637.

(3) A passenger in taxicab, which passenger had hired to perform transportation service, was not contributorily negligent in failing to leave vehicle because driver had operated taxicab at greater rate of speed than one ordinarily drives, especially where driver had assured passenger that he would take care of passenger—Adams v Hilton, 110 S W 2d 1088, 270 Ky. 818.

Hole in street

Irrespective of her ability to look through opaque and frost covered cab windows, a woman passenger riding in a taxi owed no duty to warn the driver of a hole in the street, and in her suit for damages arising from a miscarriage brought about when the cab struck the hole at a rapid rate of speed, the defense of contributory negligence could not be based on the passenger's failure to warn the driver of the hole—Reitz v. Yellow Cab Co, 248 Ill App. 287

Imminent collision of trolley car

Street car passenger was not contributorily negligent, as regards intersectional collision with truck, be-

the passenger protest the manner of operation of a vehicle where not chargeable with knowledge of impending danger,[76] although where the passenger does have some control over the conduct of the operator of a vehicle,[a] it has been held that he is obligated to warn such operator, on discovery thereof, against careless driving.[77]

A passenger is bound to take notice of the usual conditions and hazards of travel,[78] and to exercise a degree of care commensurate with obvious dangers or with such as are within the comprehension of persons of ordinary foresight and prudence,[79] and may be guilty of contributory negligence where he distracts the attention of the operator of the vehicle,[80] and is not relieved of the duty of using his own senses of sight, hearing, and perception;[81] and if he fails to exercise due care to protect himself against a known danger, or one reasonably to be expected, he is guilty of contributory negligence.[82] These rules apply in case of an injury from a defective window[83] or door,[84] and to cases involving elevators.[85]

cause she did not warn motorman that truck was not going to make required stop, since passenger had no right to interfere with motorman, and could assume that he would take whatever precaution was necessary.—Arkansas Power & Light Co v. Boyd, 65 S.W.2d 919, 188 Ark. 254.

One-way street

Passenger's failure to protest or prevent taxicab driver from proceeding in wrong direction along one-way street did not require finding of her contributory negligence, nor render her a trespasser as against the driver.—Rea v. Checker Taxi Co., 172 N.E. 612, 272 Mass. 510.

Wrong side of street

Taxicab passengers' presence in cab at time law of road was violated by going on the wrong side of the street, would not prevent their recovery against cab owner for injuries, if such violation was without their fault.—Chaput v. Lussier, 165 A. 573, 132 Me. 48.

76. R.I.—Zmuda v. McFarland, 165 A. 446, 53 R.I. 210.
Wash.—Garrow v. Seattle Taxicab Co, 238 P. 623, 135 Wash. 630, 45 A.L.R. 293.
Wis.—Scales v. Boynton Cab Co, 223 N.W. 836, 198 Wis. 293, 69 A.L.R. 978.

77. Ohio—Wiley v. Green Cab Co., 179 N.E. 419, 41 Ohio App. 88.

Taxi

When a passenger engages a taxicab for hire, the driver is within reasonable limitations subject to the instructions of such passenger, and when the passenger discovers that the driver is operating the cab in a dangerous manner a duty devolves on the passenger to remonstrate and to demand more care in the operation of the taxicab.—Wiley v. Green Cab Co, 179 N.E. 419, 41 Ohio App. 88.

Speed

Although mere speed at which taxicab is driven is not matter with which passenger need ordinarily concern himself, his conduct, as to warning driver against excessive speed, must be that of reasonably prudent person under similar circumstances.—Garrow v. Seattle Taxicab Co., 238 P. 623, 135 Wash. 630, 45 A.L.R. 293.

78. U.S.—Mareiniss v. Sheeran, C.C.A.N.Y., 31 F.2d 976.
Conn.—Cavanaugh v. Connecticut Co., 149 A. 131, 110 Conn. 698.—Belledeau v Connecticut Co., 149 A. 127, 110 Conn. 625.
Ga.—Hicks v. Southern Ry. Co, 99 S.E. 218, 23 Ga.App. 594, affirmed 101 S.E. 798, 149 Ga. 713.

Jolting of street car

That some jolting is usual when street car rounds curve is fact of which passengers are bound to take notice and guard against.—Mareiniss v. Sheeran, C.C.A.N.Y., 31 F.2d 976.

Natural movement of electric bus

A passenger must be held to anticipate the natural movements of the type of vehicle he boards, and in the case of an electric bus running over streets must expect and guard against the uneven movements to be expected, which differ from the smoother running of a trolley on rails, and one injured by a fall sustained while passing down the aisle of an electric bus has been denied recovery where no unusual motion nor sudden stop was revealed by the evidence.—Baptiste v. New Orleans Public Service, La.App., 161 So. 783

79. Mich.—Kutchai v. Moreton, 187 N.W. 339, 218 Mich. 242.

80. **Making driver tipsy and abusing him**

Passenger of taxicab who gave driver several drinks of whisky, and distracted driver's attention by verbally abusing and threatening him, was not entitled to recover for injuries sustained in accident.—Smith v. Service Cab Co, La.App., 155 So. 774

81. N.Y.—Piper v New York Cent., etc., R. Co, 50 N.E. 851, 156 N.Y. 224, 66 Am.S.R. 560, 41 L.R.A. 724, reversing 34 N.Y.S. 1072, 89 Hun 75

82. Ga.—Hicks v. Southern Ry. Co, 99 S.E. 218, 23 Ga.App. 594, affirmed 101 S.E. 798, 149 Ga. 713
Mich.—Amyot v. Duluth, S. S. & A. Ry. Co, 214 N.W. 140, 238 Mich. 663.
W.Va.—Peters v. Monongahela Transport Co., 155 S.E. 178, 109 W.Va. 417.
10 C.J. p 1134 note 18.

Knowledge that safety bar had been removed

If plaintiff railway mail clerk in performance of his duties went to door of poorly lighted mail car while train was in motion, knowing that safety bar had been removed, and was thrown out of car door because he failed to take proper precautions, his contributory negligence would bar recovery.—Carter v. Washington & O. D. Ry., 95 S.E. 464, 122 Va. 458

83. Pa.—Paynter v. Atlantic City R Co, 62 Pa.Super. 455.
10 C.J. p 1134 note 19.

84. Utah.—Christensen v. Oregon Short Line R. Co, 99 P. 676, 35 Utah 137, 20 L.R.A.,N.S., 255, 18 Ann.Cas. 1159.
10 C.J. p 1134 note 20.

Door jerked shut

Where railroad used baggage car for buffet car attaching heavy bars inside car across door openings without any warning to passengers of danger involved in coming into contact with bars, passenger was, as matter of law, not guilty of contributory negligence in resting his arm on crossbar, but such position of passenger was mere incident or condition of injury sustained when car stopped with jerk causing door to close, and it was no defense to railroad that its negligence would have been harmless but for passenger's location in particular position where passengers were expected.—Shafer v. Chesapeake & O. Ry. Co., 14 S.W.2d 780, 228 Ky. 219.

85. Ala.—O'Rourke v Woodward, 77 So. 679, 201 Ala. 265.

Sitting on elevator trucks

If an accident to plaintiff while riding on a freight elevator in an office building was the result of plaintiff's sitting down on trucks on the elevator, causing them to move and carry him into the open space between the floor of the elevator and the ceiling of the floor above, he could not recover.—O'Rourke v Woodward, 77 So. 679, 201 Ala. 265

Overcrowded car. It has been held that a passenger riding on an overcrowded car assumes the resulting inconvenience[86] and increased risk;[87] but there is authority to the contrary.[88]

Passengers on freight or mixed trains must exercise care and prudence commensurate with the increased dangers ordinarily incident to the operation of such trains.[89] Such a passenger assumes the inconveniences and additional risks that are usually and reasonably incident to transportation on such a train;[90] but he does not assume any risks which arise from a lack of proper care on the part of the carrier,[91] and hence is not required to anticipate extraordinary dangers incident to the carrier's negligence.[92] Thus, drovers and persons accompanying stock on a freight train assume all inconveniences and risks that are usually and reasonably incident to the operation of such a train and to taking care of the stock,[93] and will be denied recovery where injury resulted from their own contributory negligence,[94] as in the case of a violation of contract requirements.[95] Although derailment is more liable to happen to a freight train than to a regular passenger train, yet, as to the condition of the ties and roadway for moving trains safely, a passenger on such a train assumes no greater risk than does a passenger on an ordinary passenger train.[96]

§ 795. Standing in Car

A passenger may be guilty of contributory negligence by standing in a moving train or car while in transit, although whether or not such conduct constitutes negligence is ordinarily to be determined from the circumstances of the particular case.

A passenger is not justified in incurring the risk incident to standing in a car, and thus subjecting himself to injury from jerks and jars which would not imperil his safety if he were properly seated, and this may constitute contributory negligence,[97] particularly where he does so in violation of a warning posted in a prominent place in the car or given by an employee in charge thereof.[98] In as much, however, as it is not generally practicable or usual in the course of the business to require passengers to remain in a seat without moving, from the beginning to the end of a journey, the circumstances of the particular case must deter-

86. Kan.—Lobner v. Metropolitan St. R. Co., 101 P. 463, 79 Kan. 811, 21 L.R.A.,N.S., 972.

87. Mass.—McCumber v. Boston El R. Co., 93 N.E. 698, 207 Mass. 559, 32 L.R.A.,N.S., 475
10 C.J. p. 1136 note 28.

88. Tex.—St. Louis Southwestern R. Co. v. Tittle, Civ.App., 115 S.W. 640.
Wis.—Ward v. Chicago, etc., R. Co., 78 N.W. 442, 102 Wis. 215.
10 C.J. p. 1136 note 29.

89. Mo.—Harris v. Hannibal, etc., R. Co., 1 S.W. 325, 89 Mo. 233, 58 Am.R. 111.
N.C.—Suttle v. Southern R. Co., 64 S.E. 778, 150 N.C. 668.
10 C.J. p. 1135 note 21.

90. Ky.—Millers Creek R. Co. v. Blevins, 205 S.W. 911, 181 Ky. 800.
N.C.—Coon v. Southern Ry. Co., 88 S.E. 510, 171 N.C. 759.
10 C.J. p. 1135 note 22.

91. N.C.—Coon v. Southern Ry. Co., supra.
10 C.J. p. 1135 note 23.

92. N.D.—McGregor v. Great Northern R. Co., 154 N.W. 261, 31 N.D. 471.
10 C.J. p. 1135 note 24.

93. Ind.—Lake Shore, etc., R. Co. v. Teeters, 77 N.E. 599, 166 Ind. 335, 5 L.R.A.,N.S., 425, affirming, App., 74 N.E. 1014.
10 C.J. p. 1135 note 25.

94. Kan.—Shore v. Atchison, T. & S. F. Ry. Co., 171 P. 612, 102 Kan. 542.
Mo.—Lincoln v. St. Louis-San Francisco Ry. Co., 7 S.W.2d 460, 223 Mo.App. 46.

Leaning on brake wheel

A live stock shipper accompanying shipment, who, while standing on ladder at end of car, grasped brake wheel and leaned over to cross to other side, was guilty of negligence barring recovery for injuries from fall caused by turn of brake wheel.—Eiler v. Atchison, T. & S. F. Ry. Co., 157 P. 261, 98 Kan. 150.

95. Mo.—State ex rel. Vulgamott v. Trimble, 253 S.W. 1014, 300 Mo. 92, quashing Vulgamott v. Payne, App., 245 S.W. 592.

Failure to ride in caboose

Where plaintiff's contract of shipment of household goods, implements, and horses contemplated that he ride in the caboose, but instead he rode in the emigrant car, and was injured from being struck by a horse when the car suddenly stopped while being spotted at a stockyard, it was held that he was guilty of contributory negligence precluding recovery unless the facts came within the humanitarian doctrine.—State ex rel. Vulgamott v. Trimble, 253 S.W. 1014, 300 Mo. 92, quashing Vulgamott v. Payne, App., 245 S.W. 592.

Violation not shown

(1) Provision of cattle caretaker's contract reading, "will not walk or stand on any track at stations or other places at night without lantern," applied only when caretaker was on track, and did not apply where caretaker fell into ditch while walking along side of train toward caboose.—Edmondson v. Missouri Pac. R. Co., Mo.App., 8 S.W.2d 103.

(2) A shipper of live stock, given free transportation in consideration of caring for the stock, had a right to enter the car at a station in the morning to feed and care for the stock, and having no control of the movement of the cars or train, violated no valid term of his contract by being in the car at a station to feed and care for the stock.—Lusk v. McBride, 175 P. 747, 73 Okl. 283.

96. U.S.—Reber v. Bond, C.C.Miss., 38 F. 822.
Ky.—Ohio Valley R. Co. v. Watson, 21 S.W. 244, 93 Ky. 654, 14 Ky.L. 611, 40 Am.S.R. 211, 19 L.R.A. 310.

97. Ark.—Meeks v. Graysonia, N. & R. Co., 272 S.W. 360, 168 Ark. 966.
10 C.J. p. 1136 note 31.

Speeding street car

A passenger, fifty-seven years old, who voluntarily abandoned his seat in an open street car which was running rapidly, and was voluntarily standing without holding to anything, although handholds were available, while the efforts of the motorman to stop the car within a few feet caused it to wabble and sway, failed to exercise ordinary care.—Columbus R. Co. v. Hammett, 110 S.E. 220, 27 Ga.App. 785.

98. Ark.—St. Louis Southwestern R. Co. v. Wyman, 178 S.W. 423, 119 Ark. 530.
10 C.J. p. 1136 note 32.

mine whether a passenger is negligent in standing in a car while it is in motion.[99] At any rate when the car is crowded so that passengers cannot all be accommodated with seats, it is not negligent for a passenger to stand, if he takes proper precautions in doing so.[1]

Failure to take seat before starting of vehicle. It has been held that, if a train stops a reasonable time at the station to allow passengers to enter the cars, and a reasonable time thereafter for them to be seated, a passenger who fails to sit down and is thrown down and injured by the starting of the train after the usual signal is sounded is guilty of contributory negligence;[2] but the passenger may act on the presumption that he will have a reasonable opportunity to take a seat before the car is moved.[3]

Standing near door. Where the circumstances are such as to indicate danger in so doing, it may be contributory negligence for a passenger voluntarily to stand near the door of the car, whereby he is injured by reason of his being thrown through the door and from the car.[4]

§ 796. Changing Position

Passengers are not necessarily negligent in changing their positions while on a moving vehicle, although they may be deemed negligent where failing to exercise due care in walking about on such a vehicle.

It is not negligence per se for a passenger to move from one part of the car to another while it is in motion, but whether or not it is negligence depends on the circumstances of the particular case.[5] If, however, a passenger leaves the place provided for him and unnecessarily goes to a place of greater danger, he assumes the risk, and cannot excuse himself on the plea that he or others believed it to be safe;[6] and if he fails to exercise such care and prudence as is required by the additional risk which he incurs in moving about, he is guilty of contributory negligence.[7] Passengers walking about on traveling trains assume the risk of injury from ordinary movements of the trains in starting, running, or stopping, although they do not assume the risk arising from negligent jerking to and fro of the train in a violent and unusual manner.[8]

Passing from one car to another. Whether a passenger is guilty of contributory negligence in passing from one car of a moving train to another depends on the circumstances of the particular case, and it is not negligence per se for him so to do,[9] particularly where the cars are vestibuled.[10] A passenger while voluntarily passing from one car to another assumes the risk of injury caused by the ordinary movement of a train of good construction and repair over a track in good condition,[11] and

99. Ark.—Louisiana, etc., R. Co. v. Willis, 158 S.W. 114, 108 Ark. 477, 50 L.R.A.,N.S., 441.
10 C.J. p 1136 note 33.

Freight train
It is common knowledge that a good deal of switching is necessary when local freight trains stop at a station, and such fact, together with age and experience of passenger injured during switching operations, are to be considered in determining question of contributory negligence of such passenger in standing in aisle talking to fellow traveler.—Meeks v. Graysonia, N. & A. R. Co., 272 S.W. 360, 163 Ark. 966—10 C.J. p 1136 note 33 [b].

Passing to more distant seat
A street car passenger was not negligent as a matter of law simply because she did not seat herself at the very first opportunity, but passed to a seat more distant from the door.—Shafer v. Kansas City Rys. Co., Mo., 201 S.W. 611.

1. U.S. — Trumbull v. Erickson, Colo., 97 F. 891, 38 C.C.A. 536.
10 C.J. p 1136 note 34.

2. Ga.—Macon, etc., R. Co. v. Moore, 33 S.E. 889, 108 Ga. 84.
Tex.—International, etc., R. Co. v. Copeland, 60 Tex. 325.
10 C.J. p 1137 note 35.

3. Mich.—Moore v. Saginaw, etc., R. Co., 78 N.W. 666, 119 Mich. 613.
10 C.J. p 1137 note 36.

4. Ala.—Thompson v. Duncan, 76 Ala. 334.
Mass.—Foley v. Boston, etc., R. Co., 79 N.E. 765, 193 Mass. 332, 7 L.R.A.,N.S., 1076.
10 C.J. p 1137 note 37.

5. Ill.—North Chicago St. R. Co. v. Baur, 79 Ill. App. 121, affirmed 53 N.E. 568, 179 Ill. 126, 45 L.R.A. 108.
10 C.J. p 1137 note 38.

Seeking better seat
Passenger is not guilty of contributory negligence in leaving car in search of more commodious seat or more agreeable surroundings in another car.—Oliver v. New York Cent. R. Co., 173 N.E. 543, 273 Mass. 216.

Voluntarily leaving direct car seat
Passenger voluntarily leaving seat could not recover for injuries received in fall as result of sudden stopping of street car.—Bogart v. City of Detroit, 233 N.W. 406, 252 Mich. 534.

6. U.S.—Chicago, etc., R. Co. v. Myers, Minn., 80 F. 361, 25 C.C.A. 486.

7. N.J.—Hodler v. Public Service R. Co., 88 A. 1071, 85 N.J.Law 346.
10 C.J. p 1138 note 41.

Oiling engine at wrong time
In action for injuries by plaintiff, who had fare paid as passenger, and was riding in one of two engines being transported for his employer, it was held that plaintiff was guilty of negligence, where he got off to oil his engine after train had stopped for about one minute on automatic block signal.—Chesapeake & O. Ry. Co. v. Jones, 92 S.E. 820, 120 Va. 784.

Swinging out from running board
Plaintiff, in attempting to pass outside of passenger standing on running board of car, was guilty of contributory negligence, barring recovery for injuries received when he was struck by pole close to track.—Milliken v. Rhode Island Co., 99 A. 1023, 40 R.I. 82.

8. Ark.—Lashlee v. Bush, 195 S.W. 375, 129 Ark. 257.

9. Ark.—St. Louis, etc., R. Co. v. Pollock, 123 S.W. 790, 93 Ark. 420.
10 C.J. p 1138 note 43.

10. N.J.—Rivers v. Pennsylvania R. Co., 83 A. 883, 83 N.J.Law 513, reversing 76 A. 455, 80 N.J.Law 217.
10 C.J. p 1138 note 44.

11. Ga.—Auld v. Southern R. Co., 71 S.E. 426, 136 Ga. 266, 37 L.R.A., N.S., 518.
10 C.J. p 1138 note 45.

will be guilty of contributory negligence if he fails to exercise ordinary care and prudence in the attempt,[12] as where he voluntarily attempts to pass at a time when, or a place where, it is unusually dangerous for him so to do;[13] but he does not assume any risk of injury resulting from the carrier's negligence.[14]

Temporarily leaving car. A passenger is not required to remain aboard a train until he reaches his destination, but may at regular stopping places leave the train for refreshment, exercise, or for any other purpose not inconsistent with his character as a passenger, provided he exercises due care and prudence in doing so.[15]

By direction of carrier's employees. Where a passenger in passing from one car to another while a train is in motion acts under the direction of the conductor or other servant of the carrier, and the danger in so passing is not obvious, he is not guilty of contributory negligence per se.[16]

§ 797. Projecting Body or Limb from Car

Although it is ordinarily negligent for a passenger to ride with part of his body protruding from the vehicle, this does not always follow as matter of law and the question ultimately resolves itself into one of fact to be determined in the light of the type of vehicle and other circumstances of the particular case.

Riding with any part of the body protruding through a car window and extending beyond the outer surface of the window or car is ordinarily regarded as contributory negligence of the passenger barring recovery against the carrier for resultant injury,[17] although in the final analysis the issue of whether such conduct constitutes contributory negligence in any given case is one to be determined in the light of the circumstances involved,[18] and as to street cars there is less strictness in the rule with reference to the elbow or arm projecting, or holding on to the posts of an open car, or the like, than in the case of ordinary railroads, and it is generally held not to be negligence per se so to do.[19] It is not negligence for the passenger to sit with his elbow on the window sill, the window being open, but without protruding it beyond the car, although by reason of some sudden jolt or jar his arm is thrown outside and he is injured.[20]

A passenger on a motor vehicle sitting with part of his body protruding from such vehicle assumes the risks ordinarily incident to his position,[21] and where his position proximately contributes to his injury he may be guilty of negligence barring recovery,[22] although where the injury sustained was not the proximate result of the position assumed, there

12. S.C.—Hunter v. Atlantic Coast Line R. Co., 51 S.E. 860, 72 S.C. 336, 110 Am.S.R. 605.
10 C.J. p 1138 note 46.

13. Miss.—Dougherty v. Yazoo, etc., R. Co., 36 So. 699, 84 Miss. 502.
10 C.J. p 1138 note 47.

Open door in vestibule
A passenger who went through vestibule in train and saw trapdoor open, assumed the risk of attempting to return through the vestibule while such trapdoor was open, and court properly refused plaintiff's request to instruct that "a passenger does not assume acts of negligence on the part of carrier's servants."—Mendelson v. Davis, C.C.A. Neb., 281 F. 18.

14. Mo.—Johnston v. St. Louis, etc., R. Co., 130 S.W. 413, 150 Mo.App. 304.
10 C.J. p 1138 note 48.

15. Va.—Southern R. Co. v. Smith, 28 S.E. 173, 95 Va. 187.
10 C.J. p 1138 note 42.

16. Miss.—Davis v. Louisville, etc., R. Co., 10 So. 450, 69 Miss. 136.
10 C.J. p 1139 note 49.

17. R.I.—Malakia v. Rhode Island, 89 A. 337, 36 R.I. 149, 50 L.R.A., N.S., 42.
10 C.J. p 1139 note 50.

Clear knowledge of danger
"A passenger on a street car, who knows that the windows are screened and barred in order to prevent those who ride in it from putting their heads, arms, and elbows out and receiving injuries from cars upon an adjacent track, trees, or other objects from which such injury may be threatened, who has also observed the posted notices giving warning upon that subject, and who, nevertheless, standing upon the platform, leans upon the closed grill, or gate, and projects his elbow beyond the side line of the car, is not entitled to recover damages for an injury sustained from a car passing upon the adjacent track, since such injury must be attributed to the want of ordinary care on his part which his information requires."—Babin v. New Orleans Ry. & Light Co., 72 So. 288, 139 La. 822

18. Ill.—Gilberts v. Rockford & I. Ry. Co., 215 Ill.App. 324
Mo.—Leister v. Wells, 254 S.W. 75, 300 Mo. 262.
Wis.—Spencer v. Milwaukee, etc., R. Co., 17 Wis. 503, 84 Am.D. 758.
10 C.J. p 1139 note 51.

19. D.C.—Chapman v. Capital Tract Co., 37 App. 479—Georgetown, etc., R. Co. v. Smith, 25 App. 259, 5 L.R.A.,N.S., 274.
10 C.J. p 1140 note 53.

Arm projecting two or three inches
It is not negligence per se for street car passenger to sit with arm projecting two or three inches out of window on side next to car approaching on parallel track at curve, even though bars on window suggest danger.—Georgia Ry. & Power Co. v. Ogletree, 134 S.E. 830, 35 Ga.App. 765

20. Or.—Moakler v. Willamette Valley R. Co., 22 P. 948, 18 Or. 189, 17 Am.S.R. 717, 6 L.R.A. 656.
10 C.J. p 1140 note 52.

21. Cal.—Gornstein v. Priver, 221 P. 396, 64 Cal.App. 249.

22. Conn.—Guilfoile v. Smith, 116 A. 237, 97 Conn. 271.

Leg protruding from door
A passenger riding in an automobile on the street of a populous community, with one leg protruding from one of the doors in such a way as to make it liable to come in contact with passing objects, is negligent.—Guilfoile v. Smith, 111 A. 593, 95 Conn. 442.

is no basis for a finding of contributory negligence.[23] A statute prohibiting any person from riding on the rear of any vehicle without the consent of the driver and from riding with any part of his body protruding and from hanging on to any street car or vehicle whatever, has been held inapplicable to a bus passenger riding with his elbow extending over the window sill and injured when his arm brushed against a trolley pole.[24]

Projecting body from step or platform. It may be negligence, depending on the circumstances, for a passenger in either a railroad or a street car to stand on the side of the car or on the platform and to swing or project his body out so as to come in contact with obstacles.[25]

§ 798. Riding in Dangerous or Improper Place

a. In general
b. Cars not intended for passengers
c. Platform, running board, or steps

a. In General

Riding in a dangerous place on the vehicle is ordinarily contributory negligence, although the circumstances may be such that the passenger's conduct in so riding will not preclude recovery.

A passenger who, without some reasonable necessity or excuse therefor, rides in a place not intended for passengers, and which is more dangerous than the places where passengers are permitted to ride, is thereby chargeable with contributory negligence, and cannot recover for injuries resulting to him by reason of his assuming such extra hazard, although the question is one of fact as to whether the hazard was increased and the injury resulted by reason thereof;[26] and, if the dangerous character of the position is known to the passenger, it is no excuse for his placing himself there that the trainmen know that it is unsafe and do not prevent him from occupying it.[27] However, riding in an unsafe place does not forfeit the passenger's right to care,[28] and, where the nature of the accident was such that the danger of injury was not enhanced in consequence of the position occupied by the passenger, or where the accident was of such a nature that it was as likely to occur in one portion of the vehicle of transportation as in another, his right of recovery will not be affected by the fact that he was occupying an improper place.[29] For some purposes it is necessary for one who is being transported as a passenger, such as a drover on a freight train accompanying cattle, to ride in a more hazardous place than that provided for the transportation of passengers, and the assumption of any necessary hazard of this kind will not be contributory negligence.[30] A drover or other person accompanying property being transported may, however, be negligent in assuming unnecessary hazards so as to defeat his right to recover for injuries resulting therefrom.[31]

Riding on top of car. In the absence of some

23. Conn—Guilfoile v. Smith, 111 A. 593, 95 Conn. 442.
Ill—Rowan v. Bartonville Bus Line, 242 Ill.App. 451.

Collision

One seating herself on a truck, on which she was a passenger, with her legs hanging over the end, with the owner's tacit approval and consent, did not assume the risk of danger created by the negligence of the owner's drivers in a collision; and she was not contributorily negligent in permitting her attention to be diverted while conversing with a fellow passenger, with the result that she did not see the imminence of a collision with the other truck in time to draw her legs up out of harm's way, she not being required to exercise extraordinary precaution to anticipate negligence, but only such ordinary precaution as persons of reasonable care and prudence usually exercise—Gornstein v. Priver, 221 P. 396, 64 Cal.App. 249.

24. N.Y.—Connor v. Western New York Motor Lines, 164 N.E. 892, 250 N.Y. 165, affirming 228 N.Y.S. 771, 224 App.Div. 696.

25. Wash—Rose v. Northern Pac. R. Co., 143 P. 145, 81 Wash. 684, L.R.A.1915B 166.
10 C.J. p. 1140 note 54.

26. Ill—Blair v. Chicago, O. & P. R. Co., 205 Ill.App. 160.
10 C.J. p. 1141 note 55.

Riding on fender

Bus passenger riding on fender, and thereby obstructing driver's view, was guilty of contributory negligence proximately causing injury in collision with tar kiln used in repairing streets—Kuykendall v. Independent Coach Line, 145 S.E. 770, 196 N.C. 423.

27. Mass—Files v. Boston, etc., R. Co., 21 N.E. 311, 149 Mass. 204, 14 Am.S.R. 411.
10 C.J. p. 1141 note 56.

28. Mo.—Willmott v. Corrigan Cons. St. R. Co., 16 S.W. 500, 17 S.W. 490, 106 Mo. 535.

29. U.S.—Florida Cent., etc., R. Co. v. Sullivan, Fla., 120 F. 799, 57 C.C.A. 167, 61 L.R.A. 410.
10 C.J. p. 1141 note 58.

Riding on top of crates on express wagon

Son of consignee of express, injured by being thrown when driver ran horse-drawn express wagon into telephone pole, was not negligent in riding on top of crates of turkeys, he being strong and heavy and having firm grasp on the wagon; and contributory negligence of the son of consignee of express, who, having assisted the driver load the turkey crates on the express wagon, was, while riding, thrown off when wagon was run into telephone pole, could not be predicated on his not passing a rope around the crates, or not raising the rear end gate, it not having been his duty to do so—Ablon v. Electric Express & Baggage Co., Tex.Civ.App., 206 S.W. 717, affirmed Electric Express & Baggage Co. v. Ablon, 218 S.W. 1030, 110 Tex. 235.

30. Ind—Lake Shore, etc., R. Co. v. Teeters, 77 N.E. 599, 166 Ind. 335, 5 L.R.A.,N.S., 425, affirming, App., 74 N.E. 1014
10 C.J. p. 1142 note 59.

31. N.D.—Wahlen v. Great Northern R. Co., 137 N.W. 576, 23 N.D. 607.
10 C.J. p. 1142 note 60.

reasonable necessity therefor, it is contributory negligence for a passenger to ride on top of a car, such as a freight car or a caboose,[32] even though he does so with the permission, or on the suggestion, of one of the trainmen[33] or of a station agent.[34]

Riding on the bumper of a street car has been held to be contributory negligence,[35] although passengers have been in the habit of so riding,[36] and to ride so against the warning of the conductor is contributory negligence per se.[37] Where, however, a passenger is permitted to ride on the bumper he is not necessarily negligent in doing so.[38]

b. Cars Not Intended for Passengers

Whether riding in cars not intended for passengers constitutes contributory negligence will depend on the circumstances of the particular case.

The question whether or not a passenger is guilty of contributory negligence in riding in a car not intended for passengers, such as a baggage, mail, or express car, is generally one of fact dependent on the circumstances of the case;[39] but to ride in such a car without the consent of the carrier's employees is usually considered negligence per se so far as absolutely to defeat recovery for injuries which are caused by anything likely to happen by reason of the construction or use of the car for its appropriate purpose, or which would not have been sustained had the passenger been in a proper place, since from the usual proximity of the baggage or express car to the engine it is the first car to give way to a shock in case of a collision, and is hence a more perilous position than a passenger car.[40] If the passenger takes such a position with the knowledge or permission of the conductor or other employee in charge of the train, it is not of itself such contributory negligence as will exonerate the carrier,[41] and one riding on a vehicle not designed for carrying passengers assumes only such risks as are incident to the particular mode of conveyance, and will not be held guilty of contributory negligence barring recovery where the proximate cause of injury was a collision.[42] If, however a passenger rides in a baggage or express car in violation of a known regulation of the carrier, and receives an injury in consequence of such violation, he cannot recover against the company,[43] even though he so rides with the knowledge or permission of the conductor, for the conductor cannot, in violation of a known rule of the company, license a passenger to occupy a place of danger so as to make the company responsible;[44] but in some jurisdictions it is not contributory negligence for a passenger to remain in a baggage car with the permission of the conductor or other employees of the carrier in disregard of a rule of the carrier.[45] Where a statute provides that a railroad company shall not be liable for any injury to a person riding in the mail or ex-

32. Ky.—Patterson v. Louisville, etc., R. Co., 128 S.W. 1068, 138 Ky. 648, 137 Am.S.R. 405, 30 L.R.A.,N.S., 425.
10 C.J. p. 1142 note 61.

33. S.C.—McLean v. Atlantic Coast Line R. Co., 61 S.E. 900, 1071, 81 S.C. 100, 128 Am.S.R. 892, 18 L.R.A.,N.S., 763.

34. Ark.—Little Rock, etc., R. Co. v. Miles, 40 Ark. 298, 48 Am.R. 10.

35. N.Y.—Feldheim v. Brooklyn, etc., R. Co., 107 N.Y.S. 413, 122 App.Div. 883.
10 C.J. p. 1150 note 12.

Place of notorious danger

The bumper of a street car is a place so notoriously dangerous that to ride thereon is negligence per se, which will ordinarily prevent a recovery, and the fact that the carrier has established its custom of accepting passengers who do ride on the bumper will not excuse the passenger for taking the chance, so that one who rides standing partly on the bumper and partly on the chain supporting the car fender and is injured when the chain breaks and throws him to the ground is precluded by his contributory negligence from recovery for resultant injuries.—Ward v. Pittsburgh Rys. Co., 63 Pa.Super. 139.

36. Ohio.—Columbus R. Co. v. Muns, 27 Ohio Cir.Ct. 277.

37. Mich.—Nieboer v. Detroit Electric R. Co., 87 N.W. 626, 128 Mich. 486.

38. Tex.—Beaumont Tract. Co. v. Happ, 122 S.W. 610, 57 Tex.Civ.App. 427.

39. Md.—Dawson v. Maryland Electric R. Co., 86 A. 1041, 119 Md. 373.—Baltimore, etc., R. Co. v. State, 18 A. 1107, 72 Md. 36, 20 Am.S.R. 454, 6 L.R.A. 706.
10 C.J. p. 1142 note 65.

Failure to ride in caboose

Owner authorized to accompany property in box car was not barred from recovering for injury by negligent operation of train because he could have ridden in caboose.—St. Louis-San Francisco Ry. Co. v. Britton, 31 S.W.2d 756, 182 Ark. 437.

40. Fla.—Florida Southern R. Co. v. Hirst, 11 So. 506, 30 Fla. 1, 32 Am.S.R. 17, 16 L.R.A. 631.
10 C.J. p. 1143 notes 66, 67.

41. Or.—Harvey v. Deep River Logging Co., 90 P. 501, 49 Or. 583, 12 L.R.A.,N.S., 131.
10 C.J. p. 1143 note 68.

Sick passenger carried into baggage car

Where a baggageman directed the brother and husband of a sick passenger to place her cot near a pile of trunks in the baggage car, although there was other room, and that was the place designated for the carrying of such passengers, the passenger cannot be deemed guilty of negligence, contributing to the accident, resulting from the falling of the trunks, because her cot was placed in a position of danger, nor can she be deemed to have assumed the risks involved.—Tozer v. Michigan Cent. R. Co., 162 N.W. 280, 195 Mich. 662.

42. W.Va.—Hodge v. Sycamore Coal Co., 95 S.E. 808, 82 W.Va. 106.

43. U.S.—Hulet v. Payne, C.C.A.N.D., 282 F. 401.
10 C.J. p. 1143 note 69.

44. Fla.—Florida Southern R. Co. v. Hirst, 11 So. 506, 30 Fla. 1, 32 Am.S.R. 17, 16 L.R.A. 631.
10 C.J. p. 1143 note 70.

45. Minn.—Jones v. Chicago, etc., R. Co., 45 N.W. 444, 43 Minn. 279.
N.J.—New York, etc., R. Co. v. Ball, 21 A. 1052, 53 N.J.Law 283, 286.
10 C.J. p. 1143 note 71.

press cars or on the engine, it is not necessary, in order to prevent recovery, that such statute should also in express terms prohibit a recovery by the person injured.[46]

Riding on engine. A locomotive engine is obviously not intended for passengers, and it has been held that, if a passenger takes a place on an engine without being assigned thereto by the conductor or some other authorized person, he will assume the risk involved,[47] and will be guilty of negligence; and, if this negligence proximately contributes to an injury received by him in that position, he cannot recover unless wanton or intentional misconduct on the part of the carrier or its employees is shown,[48] although it is held not to be negligence per se for a shipper of live stock to ride on the engine.[49] Where, however, a passenger rides on the engine under the permission or direction of the conductor or engineer, he is not necessarily guilty of negligence, unless the danger of so doing is obvious,[50] or unless his so doing is in violation of a known regulation of the carrier.[51]

c. Platform, Running Board, or Steps

Riding on the platform, running board, or steps of a train, street car, or other vehicle is not necessarily negligence, but may constitute contributory negligence where the facts are such that a person of ordinary prudence would not so ride.

Whether or not the act of riding on the platform or steps of a railroad car is negligent is generally a question of fact dependent on the circumstances of the particular case.[52] Where the danger is so obvious that a person of ordinary prudence would not subject himself to it,[53] as where a passenger rides on the platform or steps of a railroad car while the train is in rapid motion, without any reasonable necessity or excuse therefor, there being room for him inside the car,[54] or where his condition is such as to make his presence on the platform dangerous while the train is moving at any rate of speed,[55] he is generally regarded as assuming the risks of his position, which are incident to a proper and ordinary operation of the train,[56] and as being guilty of contributory negligence per se, so as to defeat a recovery for injuries received by reason of his riding in such position,[57] particularly where he does so in violation of a regulation of the carrier,[58] or of statutes prohibiting passengers from riding on platforms, or providing that railroads shall not be liable for injuries sustained by a passenger while so riding in violation of posted regulations,[59] or of a warning given by the conductor or other employee in charge.[60] Where the statute does not

46. Cal.—Cullen v. Southern Pac. R. Co., 2 Cal.Unrep.Cas 9.

47. La.—Welch v. Natchez, U. & R. Ry Co., 82 So. 196, 145 La. 206

48. Ala.—Brown v. Scarboro, 12 So. 239, 97 Ala. 316
10 C.J. p 1143 note 73.

49. Tex.—Missouri, etc., R. Co. v. Avis, 91 S.W. 877, 41 Tex.Civ.App. 72, affirmed 93 S.W. 424, 100 Tex 33.

50. Or.—Radley v. Columbia R. Co., 75 P. 212, 44 Or. 332, 1 Ann.Cas 447
10 C.J. p 1143 note 75.

51. Ga.—Dixon v. Central of Georgia R. Co., 80 S.E. 512, 14 Ga.App 216
10 C.J. p 1144 note 76.

52. Okl.—Chicago, R. I. & P. Ry. Co. v. Grace, 159 P. 1011, 61 Okl 12.
10 C.J. p 1144 note 78.

53. Ga.—Myrick v. Macon R., etc., Co., 64 S.E. 296, 6 Ga.App. 38

54. Ill.—Blair v. Chicago, O. & P. R. Co., 205 Ill.App. 160
10 C.J. p 1144 note 80

Failure to enter crowded coach

Where plaintiff's intestate was the only passenger who sat on the platform of a car, and was killed when his knees came in contact with a bridge where the side clearance was only six and one-half inches, the intestate must be deemed guilty of negligence where the other passengers boarding the train after intestate were able to enter the coaches although they were crowded.—Wagner v. Pennsylvania R. Co., 109 A. 635, 266 Pa. 326.

55. Ga.—Augusta Southern R. Co. v. Snider, 44 S.E. 1005, 118 Ga. 146.

56. U.S.—Griggs v. Erie R. Co., C.C.A.N.J., 71 F.2d 966.
Pa.—Hildebrand v. Pennsylvania R. Co., 192 A. 111, 326 Pa. 161.
10 C.J. p 1144 note 82.

57. U.S.—St. Louis, etc., R. Co. v. Leftwich, Ark., 117 F. 127, 54 C.C.A. 1.
Pa.—Hildebrand v. Pennsylvania R. Co., 192 A. 111, 326 Pa. 161.
10 C.J. p 1144 note 83.

58. N.Y.—Higgins v. New York, etc., R. Co., 15 N.Y.Super. 132.
10 C.J. p 1145 note 84.

59. U.S.—Griggs v. Erie R. Co., C.C.A.N.J., 71 F.2d 966.—Houston v. Delaware, L. & W. R. Co., C.C.A. N.J., 274 F. 599, applying New Jersey statute.
N.Y.—Kettell v. Erie R. Co., 163 N.Y.S. 640, 176 App.Div. 430, applying New Jersey statute.
10 C.J. p 1145 note 85

Collision

A passenger, who is injured by the shock of a collision while standing on the platform of a moving train, in violation of a rule of the carrier promulgated under Revisal 1905 § 2628, cannot recover, where he would not have received the injury, had he remained in his seat in the coach.—Bane v. Norfolk & S. R. Co., 97 S.E. 11, 176 N.C. 247, 2 A.L.R. 90.

Need not force way

Under a statute prohibiting a passenger from riding on the platform, contrary to posted notice, or verbal instructions if there is available room inside, it is the duty of a passenger to go inside if he can reasonably do so, but he is not required to force his way through a crowd of men and women in order to determine whether or not there is a seat.—Fish v. Ball, C.C.A.Utah, 93 F.2d 853.

Strict construction unnecessary

The courts must enforce the Utah statute prohibiting passengers from riding on the platform when there is available room inside, but should bear in mind that the reason for the statute in the main no longer exists and avoid the injustice of too strict a construction.—Fish v. Ball, C.C.A.Utah, 93 F.2d 853.

60. W.Va.—Fisher v. West Virginia, etc., R. Co., 24 S.E. 570, 42 W.Va. 183, 33 L.R.A. 69.
10 C.J. p 1145 note 86.

require the warning or notice to be printed in any other language than English, it is immaterial that the passenger was unable to read English.[61]

Where, however, a passenger is compelled by necessity to ride on the platform,[62] as where the car is so crowded that there is no reasonable accommodation inside, the act of riding on the platform is not necessarily negligent, if ordinary care is exercised by the passenger in so doing, but such negligence ordinarily depends on the circumstances,[63] nor is such act ordinarily negligent where the passenger so rides by the express or implied direction or consent of the employees in charge of the train,[64] nor where other special facts indicate that the passenger was in the exercise of ordinary care in riding on the platform.[65] Nevertheless, it has been held that the fact that there are no seats in the car does not justify a passenger in riding on the platform, if, by reasonable effort, he can find standing room on the inside,[66] particularly where he has been warned of the danger of standing on the platform and ordered to go inside.[67]

On street cars in general. The rule as to street cars is more liberal than as to ordinary railroad cars, and it is generally said not to be negligence per se to ride on the platform of a street car, but the question is one of fact depending on the circumstances of the particular case,[68] and ordinarily the passenger is not negligent, particularly where he so rides by the express or implied direction or consent of the employees in charge of the car,[69] although his so riding may be negligent where it is in violation of a known regulation of the carrier,[70] or of an ordinance;[71] and it has been held not to be negligence per se in such cases, even though the passenger fails to hold on to railings or other convenient supports.[72]

In many cases, however, it is said to be negligent to ride on the platform or steps of a street car in rapid motion,[73] unless the crowded condition of the car makes it necessary,[74] or unless the carrier has, by an established custom, permitted passengers to

61. N.C.—Bane v. Norfolk & S. R Co., 97 S.E. 11, 176 N.C. 247, 2 A.L.R. 90.

62. S.C.—Brice v. Southern R. Co., 67 S.E. 243, 85 S.C. 216, 27 L.R.A.,N.S., 768.
10 C.J. p 1145 note 87.

Nausea

Passenger suffering sudden attack of nausea on suburban train was not contributorily negligent in being on platform with open gate from which he was thrown.—Dunn v. Chicago, R. I. & P. Ry. Co., 248 Ill.App. 26.

63. Ill.—Blair v. Chicago, O. & P. R. Co., 205 Ill.App. 160.
Minn.—Rolette v. Great Northern R. Co., 97 N.W. 431, 91 Minn. 16, 1 Ann.Cas. 313.
10 C.J. p 1145 note 88.

Idle gesture

If there were no vacant seats in an electric railroad car and a passenger was compelled to ride in the rear vestibule, a direction of the conductor to the passenger to go inside and take a seat was an idle gesture and did not render applicable the statute prohibiting a passenger from riding on the platform contrary to verbal instructions of the trainmen if available room is furnished inside.—Fish v. Ball, C.C.A.Utah, 93 F.2d 853.

64. Tenn.—Louisville & N.R.R. Co. v. Hutcherson, 8 Tenn.App. 235.
W.Va.—Norvell v. Kanawha, etc., R. Co., 68 S.E. 288, 67 W.Va. 467, 29 L.R.A.,N.S., 325.
10 C.J. p 1146 note 89.

65. **Mistake as to stopping place**

Despite general rules as to contributory negligence and Rev.L.1910, § 1423, excusing the carrier from liability for injury to a passenger riding on the platform contrary to posted regulations, a passenger who believed when a freight train stopped that it had reached its destination and went on caboose platform to alight is not guilty of negligence in remaining thereon, when he finds the train has to go a short distance, if he holds securely to guard rail.—Chicago, R. I. & P. Ry. Co. v. Grace, 159 P. 1011, 61 Okl. 12.

66. N.Y.—Graville v. Manhattan R. Co., 12 N.E. 51, 105 N.Y. 525, 59 Am.R. 516.
10 C.J. p 1146 note 90.

67. Minn.—Rolette v. Great Northern R. Co., 97 N.W. 431, 91 Minn. 16, 1 Ann.Cas. 313.

68. Ill.—Blair v. Chicago, O. & P. R. Co., 205 Ill.App. 160.
Mich.—Larskowski v. Detroit United Ry., 159 N.W. 530, 193 Mich. 409.
10 C.J. p 1146 note 92.

69. N.Y.—Fardette v. New York & S. Ry. Co., 180 N.Y.S. 179, 190 App.Div. 543.
10 C.J. p 1147 note 93.

70. Ill.—Blair v. Chicago, O. & P. R. Co., 205 Ill.App. 160.
10 C.J. p 1147 note 94.

71. Cal.—Schultheiss v. Los Angeles Ry. Corporation, 54 P.2d 49, 11 Cal.App.2d 525.

72. Ala.—Birmingham R., etc., Co. v. Girod, 51 So. 242, 164 Ala. 10, 137 Am.S.R. 17.
10 C.J. p 1147 note 95.

73. Pa.—Elmer v. Pittsburgh Rys. Co., 96 A. 1054, 251 Pa. 505.
10 C.J. p 1147 note 96.

Duty to go inside

"It is the duty of a passenger to go inside of the car, and if he is injured while standing upon the platform the burden is upon him to show that there was no unoccupied room inside of the car, or, if there was such room, that it was impracticable for him to reach it because of the crowded condition of the passageway leading thereto. Failing to meet that burden, he is chargeable with contributory negligence and cannot recover."—Panek v. Scranton Ry. Co., 102 A. 274, 275, 258 Pa. 589.

Riding on platform for personal convenience

Where a passenger chose to stand near the open door of an interurban car, to smoke a cigar, after being requested to step inside, the railway company was not liable for his death by being thrown from the car running around a curve at a speed not excessive.—Hagerstown & F. Ry. Co. v. State, 99 A. 376, 129 Md. 318.

74. Pa.—Elmer v. Pittsburgh Rys. Co., 96 A. 1054, 251 Pa. 505.—Little v. West Penn Railways Co., 29 Pa.Dist. 826.
10 C.J. p 1147 note 96.

Collision

Passenger compelled to stand on platform because of crowded condition of street car is not contributorily negligent, as regards right to recover for injuries sustained in collision.—Bacon v. New Orleans Public Service, 137 So. 213, 18 La.App. 96, rehearing denied 137 So. 866, 18 La.App. 96.

ride on the platform;[75] and it is has been held that in case of a crowd on the platform it may be negligence to ride in such a position.[76]

The passenger, however, assumes the additional risks necessarily incident to his position, arising from the proper operation of the car,[77] but not those arising from the negligence of the carrier;[78] and it is his duty to exercise reasonable care to protect himself from injury, commensurate with the additional risk assumed,[79] and hence, under the circumstances a failure to hold on may constitute such negligence as to defeat recovery for resulting injury,[80] or there may be contributory negligence barring recovery where the passenger was under the influence of liquor when riding on the platform.[81]

Running board or steps of vehicle. The question of negligence in riding on the running board or steps of a street car or other vehicle is usually one of fact depending on the circumstances of the particular case.[82] It has been held under some circumstances to be negligence per se to ride in such position,[83] as where so riding is in violation of an ordinance.[84] In such a case, the passenger assumes the ordinary risks of danger arising from such position,[85] such as that of being struck by

75. D.C.—Hart v. Capital Tract. Co., 35 App.D.C. 502.
10 C.J. p. 1148 note 97.

76. N.Y.—Mullane v. New York City R. Co., 99 N.Y.S. 798, 51 Misc. 24—Tregear v. Dry Dock, etc., R. Co., 14 Abb.Pr.N.S., 49.
10 C.J. p. 1148 note 98.

77. N.J.—Raeuber v. Public Service Ry. Co., 98 A. 192, 89 N.J.Law 366.
10 C.J. p. 1148 note 99.

78. D.C.—Capital Tract. Co. v. Brown, 29 App.D.C. 473, 12 L.R.A., N.S., 831, 10 Ann.Cas. 813.
La.—McMahon v. New Orleans R., etc., Co., 53 So. 857, 127 La. 544, 32 L.R.A.,N.S., 346.
10 C.J. p. 1148 note 1.

Unbalancing car

Rule that one voluntarily boarding crowded train and standing on platform without effort to obtain a seat cannot assign overcrowding as negligence, does not prevent recovery by street railway passenger injured when car jumped tracks owing to overbalance of load.—Landix v. New Orleans Ry. & Light Co., 73 So. 668, 140 La. 529.

79. N.C.—Wagner v. Atlantic Coast Line R. Co., 61 S.E. 171, 147 N.C. 315, 19 L.R.A.,N.S., 1028.
10 C.J. p. 1148 note 2.

80. Ky.—South Covington, etc., R. Co. v. Physioc, 92 S.W. 305, 124 Ky. 153, 29 Ky.L. 14.
10 C.J. p. 1148 note 3.

81. Ill.—Berner v. East St. Louis & S. Ry. Co., 207 Ill.App. 544.

82. Cal.—Ivancich v. Davies, 199 P. 784, 186 Cal. 520.
Ga.—Bailey v. Georgia Ry. & Power Co., 124 S.E. 907, 32 Ga.App. 793.
Pa.—Little v. West Penn Railways Co., 29 Pa.Dist. 826.
R.I.—Capuono v. Rhode Island Co., 102 A. 721.
10 C.J. p. 1148 note 4.

To gain relief from nausea

A railroad was not liable for injuries sustained by passenger who, to relieve himself of nausea, got on lower back step of car on side away from station, which was not passenger's destination, and fell when train was started with a violent jerk, where passenger made no effort to make use of toilet which was temporarily occupied, nor to find an unoccupied toilet in another car, and passenger was not generally obliged to leave train to relieve himself of his nausea.—Savell v. Southern Ry. Co., C.C.A.Ga., 93 F.2d 377, 114 A.L.R. 1261.

83. La.—Matthews v. New Orleans Public Service, Inc., 8 La.App. 463.
Mass.—Daley v. Boston, R. B. & L. R. Co., 134 N.E. 376, 241 Mass. 78.
Ohio.—Martin v. Cincinnati Traction Co., 11 Ohio N.P.,N.S., 479.
10 C.J. p. 1144 note 83 [a], p. 1149 note 5.

Choosing crowded running board in preference to smoke filled car

A passenger on an electric train, who to avoid heat and smoke in a smoking car, where he had standing room, left it and boarded an overcrowded open car having a side step the whole length of it by forcing and wedging himself between persons already standing on the step, was contributorily negligent as matter of law, so as to preclude recovery for injuries sustained when he lost his balance and fell as the car lurched in passing over a crossing.—Taylor v. Bamberger Electric R. Co., 220 P. 695, 62 Utah 552.

Excursion train

Although train on which he was riding was the last one on which his excursion ticket was good, it was negligence for a passenger to ride on the steps of the coach, unless his doing so was absolutely unavoidable.—Hogg v. Kansas City, S. & G. Ry. Co., 72 So. 705, 139 La. 972.

Fast moving street car

Passenger who attempts to stand on step of fast moving street car, which is wet with rain, and falls and is injured, cannot recover from railway, being negligent.—Viator v. New Orleans Ry. & Light Co., 71 So. 733, 139 La. 439.

In face of warnings

Where a passenger, after warning from conductor on other occasions that such act was dangerous, stood on the lower step and was thrown, he was, as matter of law, guilty of contributory negligence precluding recovery.—Callis v. United Rys. & Electric Co., 97 A. 715, 128 Md. 406.

Intoxication

Intoxicated passenger riding on running board of taxicab, who fell off and was run over by another car, was guilty of contributory negligence as matter of law.—Bergsrud v. Maryland Casualty Co., 229 N.W. 655, 201 Wis. 141.

Room inside

"Riding outside of the car on the step is unusual, dangerous, and negligent if there is room inside."—Matthews v. New Orleans Public Service, Inc., 8 La.App. 463.

Six-inch clearance

A boy eighteen years of age boarding a crowded street car, which he could not enter, and standing on a step where he knew that there was only six inches clearance between the car and any other car that would pass on the next track, was guilty of contributory negligence.—Schmidt v. West Penn Rys. Co., 112 A. 22, 269 Pa. 72.

84. Cal.—Schultheiss v. Los Angeles Ry. Corporation, 54 P.2d 49, 11 Cal.App.2d 525.

Proximate cause of injury

Where violation of ordinance in riding on running board of autobus approximately contributed to passengers' injuries, passengers were guilty of negligence as matter of law.—Lorry v. Englander Drayage & Warehouse Co., 291 P. 467, 108 Cal.App. 116.

85. N.J.—Brennan v. Public Service Ry. Co., 148 A. 775, 106 N.J.Law 464—Raeuber v. Public Service Ry. Co., 98 A. 192.
Pa.—Little v. West Penn Railways Co., 29 Pa.Dist. 826.
10 C.J. p. 1149 note 6.

Must exercise care

Passenger who was thrown from

passing cars or objects near the track,[86] but he does not assume extraordinary risks resulting from the carrier's negligence.[87]

However, it is not negligence per se to ride on the steps or running board, where the vehicle is crowded;[88] and in such cases the passenger may assume that the carrier will take reasonable precautions to protect him;[89] although he himself must exercise care commensurate to the situation.[90] Where a passenger ran for a train and then remained on the steps to catch his breath and was struck by an object near the track, it was held that his action was not barred by a statute relating to a railroad's nonliability for injuries resulting from a passenger's going on or remaining on a platform in violation of regulations, nor by a statute relating to trespassers on tracks and declaring the rule as to persons jumping on or off car while in motion.[91]

§ 799. Pleading

General rules control as to the sufficiency of pleading contributory negligence of a passenger, and as to the issues, proof, and variance in cases involving such matter.

As already stated in § 761 supra, the rule in some states is that plaintiff must aver freedom from contributory negligence, while in others such negligence is to be pleaded by defendant to defeat plaintiff's recovery.

Sufficiency of pleading. According to some authorities a general averment of contributory negligence without specifying the acts constituting it is sufficient.[92] Other authorities, however, hold that all the facts constituting the contributory negligence must be set out,[93] including the causal connection between such negligence and the injury complained of;[94] and a mere general statement that the injury resulted from contributory negligence is not sufficient.[95] A plea of contributory negligence should, it has been held, concede the negligence of defendant, since the plea is by way of confession and avoidance,[96] and the plea of contributory negligence need not deny, and may even

step of car by sudden jerk of train was required to exercise ordinary care for his own safety.—Savell v. Southern Ry. Co., C.C.A.Ga., 93 F.2d 377, 114 A.L.R. 1261.

86. Ohio—Martin v. Cincinnati Traction Co., 11 Ohio N.P.,N.S., 479
10 C.J. p 1149 note 7.

87. Ohio.—Cincinnati Traction Co. v. Bachman, 16 Ohio App. 129.
10 C.J. p 1149 note 8.

88. Ind.—Frank Bird Transfer Co. v. Morrow, 72 N.E. 189, 36 Ind.App. 305
Mich.—Morris v. Detroit United Ry., 193 N.W. 871, 223 Mich. 264, citing **Corpus Juris** with approval.
Pa.—Little v. West Penn Railways Co., 29 Pa.Dist. 826.
10 C.J. p 1149 note 9.

Jitney

It was not negligence as a matter of law to ride on the running board of an inclosed jitney bus, where the bus was crowded and the passenger could not get inside the entrance.—Ivancich v. Davies, 199 P. 784, 186 Cal. 520.

89. Ohio—Cincinnati Traction Co. v. Bachman, 16 Ohio App. 129.
Pa.—Little v. West Penn Railways Co., 29 Pa.Dist. 826.
10 C.J. p 1150 note 10.

90. N.Y.—Ward v. International R. Co., 99 N.E. 262, 206 N.Y. 83, Ann.Cas.1914A 1170.
10 C.J. p 1150 note 11.

Permission of carrier

A passenger who rides on footboard of open street car by permission of carrier must exercise care commensurate with the danger of his position.—Capuono v. Rhode Island Co., R.I., 102 A. 721.

Riding backward

A jitney bus passenger must use ordinary care, but whether, in a given case, it was a want of ordinary care to ride backward on the running board, instead of facing in the direction in which the bus was traveling, must be determined by the circumstances of the case.—Ivancich v. Davies, 199 P. 784, 186 Cal. 520.

91. U.S.—Lehigh Valley R. Co. v. Stevenson, C.C.A.N.J., 17 F.2d 748.

92. Ky.—Louisville & N.R. Co. v. Bland, 188 S.W. 468, 171 Ky. 424.
10 C.J. p 1150 note 18.

93. Ala.—Birmingham Ry., Light & Power Co. v. Hunt, 76 So. 918, 200 Ala. 560.
10 C.J. p 1150 note 19.

Pleading held sufficient

(1) In passenger's action for injuries, plea that plaintiff negligently stepped from the street car into the way of a rapidly approaching motorcycle, without looking or listening, was sufficient.—Hammett v. Birmingham Ry., Light & Power Co., 81 So. 22, 202 Ala. 520.

(2) Allegations of fact showing that plaintiff passenger's negligence was sole cause of her injury would amount to a specific denial of allegation that defendant's negligence was the proximate cause, and might amount to a plea of contributory negligence.—Haight v. Omaha & C.B. St. Ry. Co., 166 N.W. 248, 101 Neb. 841.
10 C.J. p 1150 note 19 [a].

Pleading held insufficient

(1) In action for injuries to passenger by falling over baggage placed in aisle of car by passenger, plea of contributory negligence, alleging that plaintiff negligently failed to look out for a suitcase while walking in said aisle, but not showing a duty to look, was bad on demurrer because failing to aver facts sufficient to show the particular contributory negligence set up as a defense.—Atkinson v. Dean, 73 So. 479, 198 Ala. 262.

(2) In action for passenger's death, where it was claimed railroad company was negligent in exposing him to draft when ill, it was held that answer did not raise question of negligence of passenger in making, and of his medical adviser in advising, the trip.—Chicago, B. & Q.R. Co. v. Schrimpf, Minn., 236 F. 200, 149 C.C.A. 390.

(3) Plea alleging passenger was negligent in undertaking to leave train after failing to do so while train stopped, was insufficient to show contributory negligence.—St. Louis & S.F. Ry. Co. v. Mills, 124 So. 231, 220 Ala. 107.
10 C.J. p 1150 note 19 [b].

94. Ala.—Birmingham R., etc., Co. v. Girod, 51 So. 242, 164 Ala. 10, 137 Am.S.R. 17.
10 C.J. p 1151 note 20.

95. Ala.—Birmingham R. Light, etc., Co. v. Lee, 45 So. 292, 153 Ala. 79.

96. Cal.—Harrell v. Fresno Traction Co., 163 P. 504, 32 Cal.App. 510.

Use of general denial

An answer consisting of a general denial, with allegation that plaintiff was injured after he had alighted

expressly admit, the negligence charged by plaintiff,[97] although it has also been held that under progressive precedent and a fair and liberal construction of pleadings the doctrine that a plea of contributory negligence of a passenger is one in confession and avoidance should be discarded, and that the carrier may properly deny his own negligence and at the same time aver that the passenger's negligence was the sole cause of his injuries.[98] Where a count charges simple negligence, a plea setting up contributory negligence is not demurrable, although the count contains language indicating willfulness or wantonness.[99] A plea that plaintiff assumed the risk of injury in doing certain acts is improper, where such acts are covered by a general denial,[1] or by a plea of contributory negligence;[2] and if it is the intention of such a plea to set up that the injury to the passenger could not have been avoided by the exercise of the care incumbent on the carrier, and that the danger was obvious or known to the passenger, such facts should be alleged.[3]

A replication or reply denying the passenger's contributory negligence generally without denying the particular facts alleged in the answer is sufficient.[4]

Issues, proof, and variance. Under general rules the matters to be considered and the evidence offered on the issue of contributory negligence must be limited to the issues made by the pleadings.[5] Where the burden with reference to contributory negligence is regarded as resting on plaintiff, then defendant may introduce evidence of such negligence under a general denial;[6] but where contributory negligence is treated as an affirmative defense, it should be pleaded specially,[7] unless it appears from plaintiff's own pleading or proof.[8]

§ 800. Presumptions and Burden of Proof

Although there is contrary authority, it is generally held that a passenger is, in the absence of countervailing evidence, presumed to have been in the exercise of due care for his own safety, and that the burden rests on the carrier to prove contributory negligence.

In some jurisdictions, in order to recover for an injury alleged to have been caused to a passenger by the negligence of the carrier, plaintiff must show that he was in the exercise of due care with respect to the occurrence from which the injury arose; in other words, the burden rests on plaintiff to show that he was not guilty of contributory negligence,[9] unless the action is for a willful or intentional injury;[10] but where plaintiff rebuts any presumption of negligence on his part, it is then incumbent on defendant to show contributory negligence.[11]

In other jurisdictions, and in some cases under the influence of statutory provisions changing the former rule, contributory negligence on the part of the passenger is regarded as a matter of defense, and where negligence on the part of the carrier resulting in injury to the passenger is shown, and contributory negligence is not involved in the facts alleged and proved by the passenger, the burden of proving contributory negligence is on the carrier;[12]

from street car, does not put in issue contributory negligence, it not being a plea in confession and avoidance—Harrell v. Fresno Traction Co., 163 P. 504, 32 Cal.App. 510

97. Ala.—Birmingham R., etc., Co. v. Yates, 53 So. 915, 168 Ala. 381

98. Or.—Wallace v. Portland Ry., Light & Power Co., 204 P. 147, 103 Or. 68.

99. Ala.—Birmingham R. Light, etc., Co. v. Wright, 44 So. 1037, 153 Ala. 99.

1. Mo.—Parks v. St. Louis, etc., R. Co., 77 S.W. 70, 178 Mo. 108, 101 Am.S.R. 425.
10 C.J. p. 1151 note 24.

2. Mo.—Parks v. St. Louis, etc., R. Co., supra.

3. Mo.—Parks v. St. Louis, etc., R. Co., supra.

4. Ky.—Louisville, etc., R. Co. v. Wolfe, 80 Ky. 82, 3 Ky.L. 576.

5. Ga.—Macon, etc., R. Co. v. Anderson, 49 S.E. 791, 121 Ga. 666—Savannah Electric Co. v. Fosterling, 84 S.E. 976, 16 Ga.App. 196.
10 C.J. p. 1151 note 29.

Discovered peril

Allegations that railroad employees negligently failed to stop train when they discovered passenger, having alighted to retrieve hat, was in position of peril in trying to reboard train, were sufficient to raise issue of discovered peril as against general demurrer.—Teal v. Southern Pac. Ry. Co., Tex.Civ.App., 31 S.W.2d 337, error refused—10 C.J. p. 1151 note 29 [a].

Evidence of attempt to board train at regular stop

Evidence that plaintiff, injured by defendant railroad, was attempting to board the train at a regular stopping place, was admissible as to care exercised by her in view of defendant's plea of the general issue with leave to give in evidence any matter that would be a good defense if specially pleaded, and contending that plaintiff was negligent.—Louisville & N.R. Co. v. Holmes, 87 So. 574, 205 Ala. 47.

6. S.C.—Kennedy v. Southern R. Co., 38 S.E. 169, 59 S.C. 535.
10 C.J. p. 1151 note 30.

7. Mo.—Zimmerman v. Kansas City Public Service Co., 41 S.W.2d 579, 226 Mo.App. 369.
10 C.J. p. 1151 note 31.

8. Mo.—Allen v. St. Louis Transit Co., 81 S.W. 1142, 183 Mo. 411.
10 C.J. p. 1151 note 32.

9. Mass.—Hurley v. New York, N.H. & H.R. Co., 146 N.E. 235, 251 Mass. 53.
Mich.—Selman v. City of Detroit, 278 N.W. 112, 283 Mich. 413.
N.Y.—Meyers v. Hines, 191 N.Y.S. 773, 199 App.Div. 594—Griffith v. Long Island R. Co., 132 N.Y.S. 641, 147 App.Div. 693, appeal granted 133 N.Y.S. 1124, 148 App.Div. 929.
10 C.J. p. 1151 note 34.

10. Ind.—Conner v. Citizens' St. R. Co., 45 N.E. 662, 146 Ind. 430.

11. Iowa.—Raymond v. Burlington, etc., R. Co., 21 N.W. 495, 65 Iowa 152.

12. U.S.—Young v. Baldwin, C.C.A. Ark., 84 F.2d 841—Harmon v. Barber, Ohio, 247 F. 1, 159 C.C.A. 219, certiorari denied 38 S.Ct. 335, 246 U.S. 666, 62 L.Ed. 929.
Ala.—Alabama Great Southern R. Co.

and this rule applies, although the passenger in his complaint negatives contributory negligence,[13] although where plaintiff's own pleadings or proof raise a presumption of the passenger's contributory negligence, the burden then rests on him to remove such presumption by showing his freedom from contributory negligence.[14] Where a passenger sustains injury while riding on the platform of a car, the burden rests on him to prove that it was not reasonably practicable for him to go inside.[15]

Presumptions. There is a presumption against the negligence[16] or suicide[17] of a passenger, and in the absence of evidence to the contrary the law presumes that he exercised reasonable care and caution to avoid injury,[18] although the presumption against contributory negligence of the passenger will not take the place of affirmative proof of the negligence of the carrier.[19] Where it is necessary, customary, or convenient for passengers to cross tracks at railroad stations, the mere crossing of the track will not raise a presumption of the passenger's negligence;[20] nor will a presumption of the passenger's negligence arise from the fact that he fell from a street car.[21] On the other hand, where the various trainmen have all climbed aboard a waiting train, to the prospective passenger's knowledge, and where the latter is familiar with the usual conditions preliminary to starting, it has been held that a presumption arises that he knows the signal to start has been given,[22] and under statutes providing that any person injured while jumping on or off a moving train shall be deemed to have contributed to the accident, the boarding or alighting from a moving train raises a presumption of the passenger's negligence.[23]

Rules of carrier and functions of officers. A passenger is presumed to have knowledge of the rules of the carrier which have properly been posted or

v Hunt, 86 So. 97, 17 Ala.App 566, certiorari granted Ex parte Alabama Great Southern R. Co., 86 So. 100, 204 Ala. 504.

Ind.—Pittsburgh, C., C. & St L. Ry. Co. v Friend, 142 N E 709, 194 Ind. 579, rehearing overruled 143 N.E. 879, 194 Ind. 579—Louisville & Southern Indiana Traction Co. v. Miller, 142 N E. 410, 82 Ind.App. 344—Public Utilities Co v. Whitehead, 134 N.E. 894, 78 Ind App. 85.

La.—Cusimano v. New Orleans Public Service, 127 So. 376, 170 La 95, reversing 122 So. 903, 12 La.App. 586—Hopkins v New Orleans Ry & Light Co., 90 So. 512, 150 La. 61, 19 A.L.R. 1362—Gaines v. Teche Lines, App., 176 So 134—Rizzo v. New Orleans Ry & Light Co., 7 La App. 686.

Md.—Baltimore & O. R Co. v. Davis, 137 A. 30, 152 Md. 427.

Mo.—Gurtman v. Lusk, 208 S W. 61.

Neb—Haight v. Omaha & C B St Ry. Co., 166 N W. 248, 101 Neb 841.

Tex.—Texas Electric Ry. v. Hooks, Civ.App., 211 S.W. 654, dismissed for want of jurisdiction—Wells Fargo & Co. v. Lowery, Civ.App., 197 S.W 605, error refused.

But in Texas it has also been held that plaintiff, suing for death of iceman from fall on customer's defective elevator, had burden of proof as to contributory negligence.—Texas Employers' Ins. Ass'n v. Chocolate Shop, Tex.Civ App., 30 S.W.2d 416, affirmed, Com.App., 44 S W.2d 989—10 C J p 1152 notes 37, 40.

Alighting passenger

(1) Burden is on street railway carrier to establish affirmatively contributory negligence of passenger injured on alighting from street car.—Thomas v Shreveport Rys. Co., 127 So 119, 13 La.App. 212

(2) Street railway had burden of proving contributory negligence of passenger who stepped off car into rut of ice—Wilson v. Berlin St. Ry., 149 A 602, 84 N.H 285.

Defective approach to station

In action for injuries sustained by prospective passenger because of defects in approach to station platform, defendant had the burden of showing contributory negligence—Gurtman v. Lusk, Mo., 208 S W. 61.

Defective car door

Burden was on railway company to prove fault of injured postal clerk, relieving it of liability for negligence in furnishing mail car with defective door.—Baltimore & O. R. Co. v. Davis, 137 A. 30, 152 Md 427.

Falling glass

In street railway passenger's action for injury from glass falling while closing window, company had burden of showing contributory negligence—Russell v. Public Service Ry Co., 139 A. 322, 104 N.J Law 34.

Unheated waiting room

Burden of proving contributory negligence was properly placed on railroad failing to heat waiting room, petition and evidence not establishing prima facie plaintiffs' negligence as matter of law.—Gulf, C & S F. Ry. Co. v. Williams, Tex.Civ App., 290 S W. 846

Use of street car straps or holds

In action for injuries sustained by street car passenger because of car's sudden jerk, street railroad company had burden to prove that passenger did not hold onto handholds in car—Dallas Railway & Terminal Co. v. Harris, Tex.Civ.App., 81 S.W. 2d 716.

13. U.S.—Fitchburg R Co. v. Nichols, Mass., 85 F. 945, 29 C.C.A 500 10 C J. p 1152 note 39.

14. Ohio.—Friedberger v. Baltimore & O S. W. R. Co., 9 Ohio App. 173 10 C J p 1152 note 41.

15. Pa.—Elmer v. Pittsburgh Rys Co., 96 A. 1054, 251 Pa. 505.

16. N.J—Jackson v. Delaware, L & W. R. Co., 170 A. 22, 111 N.J. Law 487.

17. Mo—Daly v. Pryor, 198 S.W. 91, 197 Mo App. 583.
N J.—Jackson v. Delaware, L. & W. R Co., 170 A. 22, 111 N J Law 487.

18. Mo—Daly v. Pryor, 198 S W 91, 197 Mo.App. 583.
10 C J. p 1152 note 38.

19. Mo.—Daly v. Pryor, supra.

20. Cal.—Wilkinson v. United Railroads of San Francisco, 232 P. 131, 195 Cal. 185.

21. Cal—Goldstein v. United Railroads of San Francisco, 202 P. 155, 54 Cal.App. 322.

Proper management of car as very fact in issue

Where a passenger was injured by a fall from a street car which she alleged was caused by a sudden start or jerk of the car, which defendant denied, defendant was not entitled to inference of negligence on the part of plaintiff from the mere fact of injury and on the assumption that the car was properly managed, that being a fact in issue.—Goldstein v. United Railroads of San Francisco, 202 P. 155, 54 Cal.App. 322

22. Ill.—Foote v. Chicago, N. S. & M. R. Co., 256 Ill App. 581.

23. N.J—Zelman v Pennsylvania R Co., 107 A. 442, 93 N J.Law 57.

otherwise published, and the burden of proving ignorance thereof devolves on plaintiff,[24] as does also the burden of proving a waiver of such rules.[25] He is also presumed to have knowledge of the functions of the usual officers employed by railroad companies.[26]

Injury avoidable notwithstanding contributory negligence. The burden of proving that the carrier by reasonable care could have avoided injury to the passenger after the peril to him was discovered, and notwithstanding that he was guilty of contributory negligence, is on plaintiff.[27]

§ 801. Admissibility of Evidence

Subject to general rules governing the admissibility of evidence, it is ordinarily proper to introduce on the issue of a passenger's contributory negligence evidence of the circumstances and surroundings attending the accident, such as the failure of others to apprehend the approach of danger and the age and sex of the injured passenger.

General rules controlling admissibility of evidence in civil cases govern the admissibility of evidence bearing on a passenger's contributory negligence in actions for injuries brought against a carrier.[28] In respect of the issue of contributory negligence, evidence is admissible relative to the circumstances attending the injury,[29] such as the age and sex of the injured passenger,[30] his knowledge of signals given,[31] failure of others to apprehend the approach of danger,[32] the rocking of the vehicle,[33] and the surroundings at the place of the injury, and the passenger's familiarity, or lack of it, therewith.[34]

24. Miss.—Southern R. Co. v. Kendrick, 40 Miss. 374, 90 Am.D. 332. 10 C.J. p 1153 note 42.

25. Iowa.—Young v. Chicago, etc., R. Co., 69 N.W. 682, 100 Iowa 357.

26. D.C.—Dye v. Virginia Midland R. Co., 20 D.C. 63.

27. Ark.—St. Louis, etc., R. Co. v. Watson, 134 S.W. 949, 97 Ark. 560.
Va.—Richmond Passenger, etc., Co. v. Allen, 43 S.E. 356, 101 Va. 200.

28. Ala.—Dixie Stage Lines v. Anderson, 134 So. 23, 222 Ala. 673. 10 C.J. p 1153 note 48.

City ordinance

In action for injuries sustained when passenger was attempting to board street car, ordinances making it unlawful to board moving street cars or ride on car steps was admissible, in view of uncontradicted testimony that street car was in motion when passenger attempted to board it.—Schultheiss v. Los Angeles Ry. Corporation, 54 P.2d 49, 11 Cal. App. 2d 525.—10 C.J. p 1153 note 48 [d]

Company rule

Unless rule of company excluding passengers from motorman's cab was to promote the safety of passengers, and its existence brought to the knowledge of plaintiff, injured by collision while riding in cab, rule was inadmissible.—Bassett v. Milwaukee Northern Ry. Co., 170 N.W. 944, 169 Wis. 152.

29. Cal.—Sellars v. Southern Pac. Co., 166 P. 599, 33 Cal.App. 701.
Mass.—Poppel v. Boston Elevated Ry. Co., 155 N.E. 267, 258 Mass. 389.
Mo.—Van Leer v. Wells, App., 263 S.W. 493.
10 C.J. p 1153 note 49.

Catching fingers in elevator door

In action for injuries sustained by fall into elevator shaft, plaintiff's testimony that his fingers caught in door, causing him to be precipitated into elevator shaft due to defective condition of automatic elevator, which permitted door to be opened when cab was at another floor, should have been considered by jury as bearing on the question of contributory negligence and as tending to rebut a presumption of contributory negligence of plaintiff.—Cramer v. Mergard, 11 N.E.2d 108, 56 Ohio App. 493.

Intoxication

While voluntary intoxication of a passenger is not per se contributory negligence, it may be considered, with other facts contributing to the injury, in determining whether, without the passenger's negligence, the accident would not have happened.—McDermott v. Louisville & N. R. Co., 206 S.W. 6, 182 Ky. 22.

Remonstrance to driver

Remonstrances directed to driver of bus shortly before accident and remarks of driver that he was doing the driving, were admissible.—Dixie Stage Lines v. Anderson, 134 So. 23, 222 Ala. 673.

30. Cal.—Sellars v. Southern Pac. Co., 166 P. 599, 33 Cal.App. 701.

31. Mich.—Van Sickle v. Grand Rapids, G. H. & M. Ry. Co., 182 N.W. 132, 213 Mich. 261.

Decedent's knowledge of meaning of whistles

In action for death of plaintiff's intestate struck by interurban car at crossing on failure of car to stop notwithstanding stop signal given car by deceased, where there was testimony that the car, following such signal, had blown two blasts of its whistle, and where there was testimony that deceased had boarded interurban car from such crossing almost daily for two years, testimony as to notice of rules giving meaning of whistles being posted at such crossing, was admissible to show that deceased should have known what the two blasts signified.—Van Sickle v. Grand Rapids, G. H. & M. Ry. Co., 182 N.W. 132, 213 Mich. 261.

32. Mass.—Poppel v. Boston Elevated Ry. Co., 155 N.E. 267, 250 Mass. 389.

Failure of others to see approaching car

Evidence that others, with decedent and motorman on out-bound car, did not see in-bound car which struck decedent, was material on question of due care.—Poppel v. Boston Elevated Ry. Co., 155 N.E. 267, 250 Mass. 389.

33. Mo.—Van Leer v. Wells, App., 263 S.W. 493.

Street car

In action for injuries to passenger struck by projecting roof of station building as street car passed with plaintiff and others standing on footboard, testimony that car, because of speed, rocked from side to side, was admissible as tending to acquit plaintiff of contributory negligence in leaning out from car.—Van Leer v. Wells, Mo.App., 263 S.W. 493.

34. Conn.—Hesse v. Meriden, etc., Tramway Co., 54 A. 299, 75 Conn. 571.
10 C.J. p 1154 note 50.

Crowded back platform

In action against carrier for personal injury, evidence as to number of passengers on the car, and that the back platform was crowded, was admissible to show why plaintiff attempted to board front platform instead of the rear end.—Georgia Ry. & Power Co. v. Freeney, 96 S.E. 575, 22 Ga.App. 457.

Sign

In street car passenger's action for injuries, evidence regarding sign requesting passengers to be at place where plaintiff was when injured when they desired to leave, was admissible.—Pickard v. Boston Elevat-

It has been held that evidence is admissible as to the custom or habits of other passengers under the same or similar circumstances,[35] but in some cases evidence of this character has been held inadmissible.[36] Evidence of the injured passenger's habit or usual conduct on other occasions is not admissible as to his conduct at the time of the injury.[37]

§ 802. Weight and Sufficiency of Evidence

General rules governing the weight and sufficiency of evidence apply to evidence of a passenger's contributory negligence, as where such negligence is claimed with respect to the conduct of a passenger entering or leaving a conveyance or to his actions thereon while it is in transit.

The rules respecting weight and sufficiency of evidence as to contributory negligence generally apply in actions by a passenger against a carrier.[38] The evidence in particular cases has been held sufficient[39] or insufficient[40] to show contributory negligence of a passenger, or sufficient[41] or insufficient[42] affirmatively to show that the passenger was in the exercise of due care, as where evidence was held sufficient or insufficient to show contributory negligence in crossing tracks[43] or a highway,[44] or in respect of an injury from a door,[45] or in the use of a station or its approaches,[46] or to show that the

ed Ry. Co., 166 N.E. 561, 267 Mass. 133

35. Ga.—Auld v. Southern R. Co., 71 S.E. 426, 136 Ga. 266, 37 L.R.A., N.S., 518
10 C.J. p. 1154 note 51.

36. Ky.—Hayden v. Chicago, etc., R. Co., 170 S.W. 200, 160 Ky. 836, L.R.A. 1915C 181.
10 C.J. p. 1154 note 52.

37. N.H.—Eaton v. Boston, etc., R. Co. 40 A. 112, 67 N.H. 422.
10 C.J. p. 1154 note 53.

38. Conn.—Kruck v. Connecticut Co., 80 A. 162, 84 Conn. 401.
10 C.J. p. 1155 note 57.

Testimony of eyewitnesses as controlling

Evidence as to surroundings at crossing are important in case of conflict in evidence, or where there are no eyewitnesses, but where there are eyewitnesses of an accident to a person waiting for the train, their testimony is necessarily controlling. —Kent v. Ogden, L. & I. Ry. Co., 167 P. 666, 50 Utah 328.

39. Cal.—Gore v. Market Street Ry. Co., 48 P.2d 2, 4 Cal.2d 154.
Mass.—Notaro v. Boston Elevated Ry. Co., 173 N.E. 431, 273 Mass. 296.
Okl.—St. Louis & S.F. Ry. Co. v. Manley, 189 P. 177, 78 Okl. 59.
Pa.—Lynn v. Pittsburgh & L.E.R. Co., 110 A. 271, 267 Pa. 41. See Moss v. Blue Ridge Transportation Co., 30 Pa.Dist. & Co. 154.
Tex.—Stiles v. Union Terminal Co., 1 S.W.2d 947, error refused.
W.Va.—Nutter v. Chesapeake & O. Ry. Co., 166 S.E. 815, 113 W.Va. 94.
Wis.—Karshan v. Milwaukee Electric Ry. & Light Co., 212 N.W. 643, 192 Wis. 269.
10 C.J. p. 1155 note 57 [a].

40. U.S.—Chicago, B. & Q.R. Co. v. Schrimpf, Minn., 236 F. 200, 149 C.C.A. 390.
Cal.—Hammond v. Pacific Electric Ry. Co., 164 P. 50, 32 Cal.App. 756.
Mich.—Rice v. Michigan Ry. Co., 175 N.W. 454, 208 Mich. 123.
Minn.—Falk v. Chicago & N.W. Ry. Co., 157 N.W. 904, 133 Minn. 41.
N.Y.—Keilt v. Staten Island Rapid Transit Co., 27 N.Y.S. 847, 75 Hun 579, 58 N.Y.St. 738.
10 C.J. p. 1155 note 57 [b].

Condition to make trip

In action against railroad company for death of passenger, who was in weakened condition when he started on journey, evidence was insufficient to show that passenger, who was exposed and chilled through negligence of company, was not in condition to make the trip.—Chicago, B. & Q.R. Co. v. Schrimpf, Minn., 236 F. 200, 149 C.C.A. 390.

41. Cal.—Hartje v. Olcott, 3 P.2d 340, 116 Cal.App. 712.
Ill.—White v. Chicago P. & St. L.R. Co., 196 Ill.App. 459.
Ky.—Louisville & N.R. Co. v. Priddy, 71 S.W.2d 39, 254 Ky. 173.

Signaling in prescribed manner

In an action for the death of a man who was intending to board an interurban car at night, evidence which tended to show that he attempted to signal the car in the prescribed manner and was killed before he could reach safety, was sufficient to warrant the jury in finding that he was not contributorily negligent.—Carlisle v. Davenport & M. Ry. Co., 176 N.W. 699, 188 Iowa 676.

42. N.Y.—Ruppenthal v. Nassau Electric R. Co., 181 N.Y.S. 617, 191 App.Div. 487.

Absence of nurse's negligence not shown

In action against street railway for injuries to boy of five and one half years, on car with his brother and in charge of a nurse, when he jumped from front platform after his brother and had his leg run over, evidence was insufficient to sustain finding of negligence of motorman and conductor, and of absence of contributory negligence of the nurse.—Longacre v. Yonkers R. Co., 182 N.Y.S. 373, 191 App.Div. 770.

43. Mo.—Sugarwater v. Fleming, 293 S.W. 111, 316 Mo. 742.
N.Y.—Ruppenthal v. Nassau Electric R. Co., 181 N.Y.S. 617, 191 App.Div. 487.
Va.—Hendricks v. Virginia Electric & Power Co., 172 S.E. 160, 161 Va. 793.—Washington-Virginia Ry. Co. v. Struder, 111 S.E. 239, 132 Va. 368.
W.Va.—Nutter v. Chesapeake & O. Ry. Co., 166 S.E. 815, 113 W.Va. 94.

Stepping in front of approaching car

Evidence that prospective passenger was watching approaching car at all times and that, although cars had frequently not stopped for her on signal, she proceeded across track in front of on-coming car, which did not slacken speed, in order that she might board it at safety station, showed such contributory negligence as to bar recovery against street car company.—Gore v. Market Street Ry. Co., 48 P.2d 2, 4 Cal.2d 154.

44. Cal.—Sanchez v. Pacific Auto Stages, 2 P.2d 845, 116 Cal.App. 392.

Accompanied by carrier's agent

Evidence sustained the verdict that a passenger who, having started across highway accompanied by bus company's agent for purpose of reaching bus, did not look to left or right, was not contributorily negligent.—Sanchez v. Pacific Auto Stages, 2 P.2d 845, 116 Cal.App. 392.

45. Cal.—Hartje v. Olcott, 3 P.2d 340, 116 Cal.App. 712.
Ky.—Louisville & N.R. Co. v. Priddy, 71 S.W.2d 39, 254 Ky. 173.

46. Mo.—Gurtman v. Lusk, 208 S.W. 61.
Tex.—Stiles v. Union Terminal Co., Civ.App., 1 S.W.2d 947, error refused.—Fort Worth & D.C. Ry. Co. v. Kidwell, Civ.App., 249 S.W. 303, certified questions answered 245 S.W. 667, 112 Tex. 89.

Disobeying instructions

In action for injuries sustained when bus passenger, seeking rest room in bus station, entered wrong door and fell down basement stairway, evidence was held to sustain finding that passenger was negligent

passenger's negligence was the proximate cause of his injury.[47]

Entering conveyance. A preponderance of the evidence is necessary to prove or disprove contributory negligence in entering or boarding a car or conveyance,[48] and in the notes below will be found reference to cases wherein the evidence was held sufficient[49] or insufficient[50] to show the passenger's contributory negligence in boarding or entering a vehicle, as in the case of a moving vehicle,[51] or one with ice-coated steps,[52] or wherein the evidence has been held insufficient to bring the case of a boarding passenger within the last clear chance doctrine.[53]

Contributory negligence while in transit. Where there is a claim of contributory negligence of the passenger while in transit, such claim should be proved by a preponderance of the evidence,[54] and the evidence in particular cases has been held sufficient[55] or insufficient[56] to show the contributory

in entering basement door, and in failing to follow directions of bus driver.—Crow v. Southwestern Transp Co, Tex Civ App., 73 S.W.2d 607, error refused.

Failure to see hole

Evidence did not show conclusively that plaintiff was negligent in not seeing a hole in the approach to the station platform, or in not looking for it—Gurtman v. Lusk, Mo, 208 S W 61.

Icy platform

Evidence did not conclusively show negligence of passenger, falling on icy platform in proceeding to train. —Byron v. Boston & M. R. R., 136 A. 250, 82 N.H 434.

47. N Y—Hoffman v. Ellis, 174 N Y.S 362, 106 Misc. 283.
10 C J. p 1155 note 58.

Sole proximate cause

Evidence showing prospective passenger crossed car line directly in front of approaching street car, and was run over, established contributory negligence as sole proximate cause of injuries.—Hendricks v. Virginia Electric & Power Co., 172 S.E 160, 161 Va. 793.

48. Mo—New v. St. Louis, etc., R Co, 89 S W. 1043, 114 Mo.App 379.
N Y.—Wallace v. Third Ave. R. Co., 55 N Y S 132, 36 App.Div. 57.
10 C.J p 1155 note 59.

49. Cal—Gaskill v. Pacific Electric Ry. Co., 159 P. 200, 30 Cal App. 593.
Ill.—Foote v. Chicago, N S & M R. Co, 256 Ill.App. 581. See Baitty v Toledo, P. & W. Ry. Co, 196 Ill. App 225
La.—Murtes v. New Orleans Public Service, App, 158 So 260
Mass—Gerber v New York Cent R R, 192 N E. 837, 288 Mass. 318
Va—Washington-Virginia Ry. Co v. Struder, 111 S.E. 239, 132 Va. 368
10 C J p 1155 note 59 [a].

Street car

La.—Murtes v. New Orleans Public Service, App., 158 So. 260.

Train

Cal—Gaskill v. Pacific Electric Ry. Co, 159 P. 200, 30 Cal App 593.
Mass.—Gerber v. New York Cent. R. R., 192 N.E 837, 288 Mass. 318.
N J.—Lozier v. Delaware, L & W. R. Co, 130 A. 454, 3 N J.Misc 988.

Wearing oversize shoes

In an action for injuries to a street car passenger dressed in clown's costume by the sudden stopping of a street car, evidence was sufficient to warrant a finding that in wearing a pair of heavy shoes, several sizes too large, he was guilty of negligence which proximately contributed to the injury.—Neal v. Northern Texas Traction Co, Tex Civ.App, 258 S.W. 877.

Wet step

Evidence that step of train was wet, unknown to passenger slipping thereon in daytime, authorized inference that passenger could have avoided slipping by exercising care —Pitner v Southern Ry. Co, 141 S E 670, 37 Ga App. 722.

Street car

Cal.—Morrissey v. City and County of San Francisco, 286 P. 433, 104 Cal App. 536

50. Cal.—White v Red Mountain Fruit Co, 199 P. 318, 186 Cal 335.
Ill.—Sage v. Johnson, 205 Ill.App. 85.
Mo—Hayward v People's Motorbus Co. of St. Louis, App, 1 S.W 2d 252.
N Y—Altberger v. New York Consol. R Co, 162 N.Y.S. 739
Tex—Texas Midland R Co v. Truss, Civ.App, 186 S.W. 249, error refused.
10 C J p 1155 note 59 [b].

Bus

Evidence was held to eliminate question of contributory negligence as showing injury by premature starting of bus, not in attempt to board moving bus—Hayward v People's Motorbus Co. of St. Louis, Mo. App., 1 S.W.2d 252.

Elevator

Evidence was insufficient to show that plaintiff, injured by an elevator starting up as she stepped into it, was guilty of contributory negligence.—White v Red Mountain Fruit Co, 199 P. 318, 186 Cal. 335

51. Cal.—Morrissey v. City and County of San Francisco, 286 P. 433, 104 Cal App. 536—Gaskill v. Pacific Electric Ry Co., 159 P 200, 30 Cal App 593
La—Murtes v. New Orleans Public Service, App., 158 So 260.
Mass—Gerber v New York Cent. R R, 192 N E 837, 288 Mass 318.
N J—Lozier v Delaware, L & W. R Co, 130 A 454, 3 N J.Misc. 988
10 C J. p 1155 note 59 [a] (2), [b] (2)

52. N Y—Furiati v Brooklyn & Queens Transit Corporation, 296 N Y S 913, 251 App Div. 858.

53. Ala—Travis v Alabama Great Southern R. Co., 73 So 983, 199 Ala 38.

Freight car

Evidence did not bring within the last chance doctrine the case of injury to a passenger when attempting to board freight box car going six miles an hour—Travis v Alabama Great Southern R. Co, 73 So 983, 199 Ala 38

54. Ohio.—Cincinnati, L. & A. Elec St. Ry v Lohe, 27 Ohio Cir Ct R. 138.
10 C J p 1155 note 61

Prima facie evidence

Failure of live stock caretaker to ride in caboose while train by which stock was shipped was in motion, as required by shipping contract, was not prima facie evidence of contributory negligence, where derailment was caused by wreck—Heed v. Gummere, 136 N E. 5, 192 Ind. 227.

55. La—Nee v New Orleans Public Service, 123 So. 135, 11 La App. 1.
Mich—Smith v Peets, 186 N W 397, 217 Mich 255
10 C J. p 1155 note 61 [a].

Unused flashlight

Evidence that experienced caretaker of live stock, in climbing out of freight caboose at night to inspect stock, did not use flashlight and fell from bridge over which caboose had stopped and was injured, was held to show contributory negligence barring recovery by him.—Gartner v. Chicago & N W. Ry. Co, 207 N.W. 937, 114 Neb. 458.

56. Colo.—Colorado Springs & Interurban Ry Co v. Reese, 169 P. 572, 69 Colo. 1.

negligence of a passenger in transit, as in the case of a passenger riding in an elevator,[57] or traveling on the platform, running board, or steps of a bus, car, or train.[58]

Leaving conveyance. The carrier should prove by a preponderance of the evidence the contributory negligence of a passenger in leaving the conveyance,[59] and in the notes below reference is made to cases wherein the evidence was held sufficient[60] or insufficient[61] to show the contributory negligence of a departing passenger, as in the use of a stool or alighting step,[62] or of a grab handle,[63] or in an attempt to alight from a moving vehicle,[64]

Ill—Rowan v. Bartonville Bus Line, 242 Ill App 451.
Minn—Johnson v. Evans, 170 N.W. 220, 141 Minn. 356—Gerin v. Chicago, M. & St. P. Ry. Co, 158 N.W. 630, 133 Minn. 395.
N H.—Flaherty v. Manchester St. Ry., 99 A 89, 78 N.H. 254.
N J—Gottlieb v. Uzzolino, 167 A. 26, 11 N J.Misc. 567
10 C J. p 1155 note 61 [b].

Burned on lurching of car

In mail clerk's action against railroad for injuries received from burn when thrown by lurch of car against uncovered pipe carrying live steam, it was held that neither contributory negligence nor assumption of risk were conclusively shown—Bulin v. Great Northern Ry. Co., 201 N W. 307, 161 Minn 226

Seated in car at time of collision

Evidence that injured passenger while sitting in street car was thrown on floor, by collision, justified finding that passenger was exercising due care—Cohen v. Eastern Massachusetts St. Ry. Co., 165 N.E. 113, 266 Mass. 283.

57. Heel extending beyond platform

In an action for injuries to a wholesaler's customer riding in an unlighted elevator on a dark day, evidence was sufficient to warrant a finding that he was not guilty of contributory negligence in allowing his heel to extend beyond the platform of the elevator.—Williams-Echols Dry Goods Co v. Wallace, 219 S.W. 732, 142 Ark. 363.

58. Mich—Murphy v. Manistee Ry. Co, 161 N.W. 876, 194 Mich 595.
Okl—Chicago, R. I & P. Ry Co. v. Warren, 269 P. 368, 132 Okl. 107.

Jitney

In an action for injuries to a jitney bus passenger riding on the running board, evidence was held to warrant a finding that the accident was caused by the driver's negligence in driving too close to an ice wagon, and an implied finding that plaintiff was not guilty of a want of ordinary care in the position he assumed on the running board.—Ivancich v Davies, 199 P. 784, 186 Cal 520

Respecting crowded character of vehicle

(1) Evidence was insufficient to show that a train on which decedent was riding was so crowded as to make absolutely unavoidable his riding on the steps and absolve him from contributory negligence—Hogg v. Kansas City, S & G Ry. Co, 72 So 705, 139 La 972.

(2) Evidence established that street car was crowded and that injured passenger was on platform at time of collision with motortruck.—Bacon v. New Orleans Public Service, 137 So. 213, 18 La App 96, rehearing denied 137 So. 866, 18 La. App. 96.

Respecting proximate cause

Evidence established passengers' conduct in riding on running board of autobus was proximate cause of their injuries when bus collided with truck—Lorry v. Englander Drayage & Warehouse Co, 291 P 467, 108 Cal App. 116

59. Pa.—Lehner v Pittsburg R Co., 72 A. 525 223 Pa. 208, 132 Am.S R 729, 16 Ann.Cas. 83
10 C J p 1155 note 60

60. Conn—Cohen v. Eastern Stages, 164 A 383, 116 Conn 210.
Ill.—Wood v. Illinois Cent. R Co, 201 Ill App. 439. See Kelly v. Chicago City Ry. Co, 202 Ill App 239—Winters v Aurora, E. & C Rys Co, 198 Ill App. 52—Murten v. Chicago City Ry. Co, 198 Ill App 28.
La—Delhomer v. St. John the Baptist Parish School Board, 126 So 272, 12 La App. 580.
Mass.—Hurley v New York, N. H. & H. R. Co, 146 N.E. 235, 251 Mass 53.
Miss.—Yazoo & M. V R. Co. v Skaggs, 179 So. 274.
N Y—Trudnowski v. New York Cent. R. Co, 221 N.Y.S. 686, 220 App Div. 503.
Ohio—Cincinnati Traction Co. v. Keil, 26 Ohio Cir Ct, N.S, 445.
Pa—Fordyce v White Star Bus Lines, 155 A. 98, 304 Pa 106.
10 C J p 1155 note 60 [a].

Failure to look

Evidence that decedent, struck by automobile on alighting from car, failed to look, was held to establish contributory negligence as matter of law.—Jones v City of Seattle, 257 P. 393, 144 Wash. 188.

61. Ill.—See Cannon v Chicago Rys. Co, 205 Ill.App. 423
La—Thomas v. Shreveport Rys. Co, 127 So 119, 13 La App 212.
Mass—Guinevan v. Checker Taxi Co, 194 N.E. 100, 289 Mass. 295.
Mich—Boyle v. Waters, 166 N W 114, 199 Mich 478.
Minn—Leonczak v. Minneapolis, St P & S S M. Ry Co, 201 N W 551, 161 Minn 304
Mo.—Took v. Wells, 53 S W 2d 389, 331 Mo. 249—Stakebake v. Union Pac R Co, App, 185 S W 1166
Tex—International-Great Northern R. Co. v Oehler, Civ App, 262 S W 785—Texas & N. O R. Co. v. Tillman, Civ App, 197 S W. 1128, error refused.
10 C J p 1155 note 60 [b].

Catching foot on switch box

In action by plaintiff passenger for injuries sustained when stepping from lower step of passenger coach to platform, as result of her foot catching on the edge of a board or box covering certain wires or switching apparatus running along the platform just beneath the lower step of the coach, it was held jury was warranted in finding that plaintiff was not guilty of contributory negligence—Galveston, H & S A Ry Co. v Williams, Tex.Civ.App., 217 S. W. 420.

62. Stepping on side of stool

In passenger's suit for injuries, while alighting from train, evidence showed she was not without fault, having placed her foot at side of stool railroad furnished for alighting, so that it slipped off and she fell—Nicholls v Texas & P Ry Co, 80 So. 252, 144 La. 197

63. Icy steps

In an action by a passenger to recover for personal injuries sustained as a result of slipping on, and falling from, the icy step of a trolley car when alighting, the evidence was held to support the jury's conclusion that plaintiff did take hold of the grab handle or bar on the trolley before she slipped, and that she was not guilty of contributory negligence—Connelly v Connecticut Co., 140 A. 121, 107 Conn 236

64. Ill—Wood v. Illinois Cent. R. Co, 201 Ill App. 439 See Palm v. Rockford City Traction Co, 200 Ill App. 115.
La.—Christie v. New Orleans Public Service, App, 152 So. 131
Minn.—Leonczak v. Minneapolis, St. P. & S. S. M. Ry. Co, 201 N.W. 551, 161 Minn 304—Van House v. Canadian Northern Ry. Co, 192 N W 493, 155 Minn 57, 28 A.L.R. 357.

or to show facts warranting application of the doctrine of discovered peril or the last clear chance.[65]

§ 803. Questions of Law and Fact

a. In general
b. Entering conveyance
c. Conduct while in transit
d. Leaving conveyance
e. Permission or direction of carrier's employee
f. Acts in emergencies
g. Persons under disability
h. Elevator and escalator cases

a. In General

Questions of law respecting the contributory negligence of a passenger are for the court and on conflicting evidence questions of fact are for the jury.

The contributory negligence of a passenger is a question of law for the court, where there is no substantial controversy as to the facts which are such that but one reasonable conclusion can be drawn therefrom, and in such a case the court may dispose of the question by dismissal, nonsuit, or a peremptory instruction.[66] It is well settled, however, that the question of the passenger's contributory negligence is one for the determination of the jury where the material facts of the case are disputed, and even where the facts are undisputed, if the evidence is of such a character that different conclusions can be reasonably drawn therefrom.[67] Whether the carrier's employees were guilty of

Mo—Sivicek v. Dunham, 219 S.W. 594.

Descending steps

Testimony that passenger was in act of stepping down on lower step of street car while doors thereof were open and before car came to complete stop, was held to establish passenger's contributory negligence, in action for injuries sustained when sudden stop caused passenger to be thrown into street.—Waldov v. Philadelphia Rapid Transit Co, 182 A. 129, 120 Pa Super. 304.

Slow moving train

In action against defendant railroad, evidence was insufficient to show that plaintiff shipper, riding on drover's pass, was negligent in alighting from moving train as it slowly climbed hill, after passing his station—Texas & N. O. R. Co v Tillman, Tex Civ.App, 197 S.W 1128, error refused.

Knowledge that vehicle was moving

Evidence was held to show that passenger knew or should have known that bus was moving when she alighted.—Amidon v Twin State Gas & Electric Co., 147 A 694, 102 Vt. 267.

65. U S—Houston v Delaware, L & & W R. Co, C C A N.J, 274 F. 599

66. Ala—Williford v. Atlantic Coast Line R. Co, 113 So. 44, 216 Ala 309.
Cal.—Starr v. Los Angeles Ry. Corporation, 201 P. 599—Williams v. East Bay Motor Coach Lines, 60 P 2d 320, 16 Cal.App. 169.
Kan—Cross v. Chicago, R I & P. R Co, 242 P. 469, 120 Kan. 58.
Tex.—Hail v. Missouri-Kansas-Texas R Co. of Texas, Civ App., 30 S W. 2d 1062, affirmed Missouri-Kansas-Texas R. Co. of Texas v Hail, Com App, 48 S.W.2d 589
Wash.—Luckkart v. Director General of Railroads, 200 P. 564.
10 C.J. p 1156 note 63.

Crossing tracks

N.Y.—Ricciardell v. New York Cent., etc., R. Co., 150 N Y.S. 593, 165 App Div. 152.
10 C J. p 1156 note 63.

Failure to watch approaching car

Where at time intending passenger was injured he was waiting to board car, which he could see approaching, and which he had signaled to stop, and, thinking it would stop when it reached usual place and that he was far enough from track for car to pass, he took his eyes off it when it was about fifty feet from him, and about this time was hit, there was no error in granting nonsuit.—Lee v. Georgia Ry. & Power Co, 127 S E. 150, 33 Ga.App. 543.

Obviously too close to track

Where person awaiting train stood so near track as to be struck and it appeared that the tracks were visible to persons on the train, it was held that the court should have granted a nonsuit or directed a verdict—Kent v. Ogden, L. & I. Ry. Co., 167 P. 666, 50 Utah 328.

Evidence held insufficient to show contributory negligence as matter of law

(1) Generally.
Iowa—Mangan v. Des Moines City Ry Co., 203 N.W. 705, 41 A L R 368
Ky—Davis v Allen, 251 S W. 194, 199 Ky 442
Md—United Rys & Electric Co of Baltimore v. Perkins, 136 A. 50, 152 Md. 105—Western Maryland Ry Co v. Shatzer, 120 A 840, 142 Md 274.
Mass—Gerhart v. Holyoke St. Ry. Co., 128 N.E 421, 236 Mass. 392.
Mo—Sugarwater v. Fleming, 293 S. W. 111, 316 Mo 742.
R I.—Capuono v. Rhode Island Co, 102 A. 721
Tex—Texas Electric Ry v. Stewart, Civ App, 217 S.W 1081, error refused.
Wis.—Himstreet v. Chicago & N. W. Ry. Co., 166 N W. 665, 167 Wis. 71.

(2) In action for death of one struck by passenger coach, decedent was not negligent as matter of law in walking into yards to board coach—Curtis v. Mauger, 114 N E 408, 186 Ind 118.

(3) One going to a ferry pier to meet an incoming passenger was not negligent as matter of law in going from the train shed on the open pier, with others, as the boat came in, in remaining there until the door was closed, in reëntering the shed through another door, or in using a narrow platform in returning to the part of the shed where passengers were being discharged.—Jackson v. Hines, 113 A. 129, 137 Md. 621.

67. U S.—St. Louis Merchants' Bridge Terminal Ry. Co. v. Munger, C C.A.Mo, 246 F. 938.
Ala—Birmingham Electric Co. v. Jones, 176 So. 203, 234 Ala. 590
Conn—Boileau v Williams, 185 A. 429, 121 Conn. 432.
Ill—Gilberts v. Rockford & I Ry. Co, 215 Ill App 324. See Healy v. Chicago City Ry. Co., 196 Ill App 1
Ky.—Louisville & N. R. Co. v. Sinclair, 188 S.W. 648, 171 Ky. 562.
Md—Baltimore & O R Co. v Davis, 137 A 30, 152 Md. 427.
Mass—Bilodeau v. Fitchburg & L. St Ry Co, 128 N.E. 872, 236 Mass 526
Mo.—Schimmelpfenning v. Wells, 24 S W 2d 154—Higgins v. Terminal R. Ass'n of St. Louis, App, 97 S W 2d 892.
N.J—Agry v. Pennsylvania R Co, 150 A. 401, 106 N.J.Law 476, reversing 146 A 587, 7 N J.Misc. 579.
Pa.—Hager v. Philadelphia & R Ry. Co, 104 A. 599, 261 Pa. 359—Little v. West Penn Railways Co, 29 Pa.

such willful and wanton conduct as to excuse contributory negligence on the part of the passenger is ordinarily a question of fact for the jury,[68] as is also the question whether the passenger was justified in believing that a particular rule or regulation of the carrier had been permitted to fall into disuse,[69] or questions involving the humanitarian or last clear chance doctrine.[70]

On conflicting evidence, it is a question of fact for the jury whether a passenger was guilty of contributory negligence while using the premises, platforms, or station approaches of the carrier,[71] as in stumbling over or into an obstruction,[72] such

Dist. 826—Lindsay v Beaver Valley Traction Co, 83 Pa Super. 274
Tenn—Union Bus Terminal v. Mennen, 14 Tenn App. 551
Tex.—Texas Midland R R. v. Monroe, 216 S W. 388, 110 Tex. 97, reversing, Civ.App., 155 S W. 973
W.Va—Koon v Monongahela West Penn Public Service Co., 192 S.E. 332
10 C.J. p 1156 note 64.

Sleeping passenger

That passenger is asleep just before or at time he is injured by reason of defect in conveyance or driver's negligence does not make him contributorily negligent as a matter of law; but contributory negligence of passenger in being asleep in automobile which turned over was a question for the jury—Jesse v. Dunn, 51 S W 2d 918, 244 Ky. 613.

Evidence held sufficient to take question to jury

Minn—Rau v Smuda, 221 N.W. 232, 175 Minn 328.
Tex.—Panhandle & S. F. Ry. Co v Jones, Civ App., 105 S.W.2d 443.

68. Ark—Rodgers v. Choctaw, etc, R. Co., 89 S W 468, 76 Ark. 520, 113 Am S.R. 102, L R.A.,N S., 1145.
10 C J p 1156 note 65.

69. Tex—San Antonio, etc., R. Co. v. Lynch, Civ.App., 55 S.W. 517.

70. Conn—Pond v. Connecticut Co., 114 A. 532, 96 Conn. 451.
Ga—Lacy v Georgia Ry & Power Co, 141 S E. 816, 37 Ga.App 724.
Mo.—Bode v. Wells, 15 S W.2d 335, 322 Mo. 386—Griffin v. Missouri Power & Light Co., App., 99 S W. 2d 474—Kent v. Kiel, App., 97 S W 2d 885—Anderson v. Pryor, App, 209 S.W 122
Okl—Missouri, K. & T. Ry Co v. Smith, 223 P. 373, 97 Okl 152
Va—Meanley v. Petersburg, H & C P Ry. Co., 112 S E. 800, 133 Va 173—Gordon v. Director General of Railroads, 104 S E 796, 128 Va. 426

Baggage truck

In action against terminal association for injuries sustained by salesman when seeing company representative off on train when hand-propelled baggage truck was run over salesman's foot, whether truckman propelling baggage truck could have seen that salesman was in position of peril, as regards salesman's right to recover under humanitarian rule, truckman having called out a warning before moving truck past salesman, was for jury.—Higgins v Terminal R Ass'n of St. Louis, Mo App, 97 S W 2d 892.

Fall on elevated tracks

Evidence in an action for death of a boy killed by an oncoming train after he fell on the tracks of an elevated railroad in attempting to board a train after the gates were closed, was held to present a question for the jury as to whether defendant's employees exercised ordinary care after discovery of his peril.—Johnson v. Interborough Rapid Transit Co., 183 N.Y S. 224, 192 App. Div. 639.

Evidence held insufficient to take question to jury

(1) Generally.

Mo—State ex rel St. Louis-San Francisco Ry. Co v. Reynolds, 233 S.W 219, 289 Mo. 479, quashing Martin v. St Louis-San Francisco Ry. Co, App., 237 S.W. 129—De Lorme v. St. Louis Public Service Co., App, 61 S W.2d 247.

(2) Where deceased approaching a station to board a train stepped upon a switch track immediately in front of moving locomotive, and where there was no evidence that trainmen saw deceased in his perilous position, or that train could have been stopped if they had seen him, court's refusal to submit the last clear chance doctrine was proper.—Branstetter v. Chicago & A. R. Co., Mo App, 225 S W. 1035.

(3) Evidence was insufficient to warrant the submission of an action against street railroad, for death of prospective passenger who lost balance on car step and fell backward to pavement, to jury on the theory of discovered peril.—San Antonio Public Service Co. v. Fraser, Tex. Civ.App, 91 S W 2d 948.

(4) Evidence was insufficient to raise issue of discovered peril by railroad employees of passenger, who had alighted to retrieve hat, in attempting to reboard train.—Teal v. Southern Pac. Ry Co, Tex Civ App, 31 S W 2d 337, error refused

(5) Evidence, in action for injuries to plaintiff, swept from car step by girder, was insufficient for jury, under New Jersey last clear chance doctrine.—Lehigh Valley R Co v. Stevenson, C.C.A.N J., 17 F 2d 748.

71. Cal.—MacGregor v. Pacific Electric Ry. Co, 59 P 2d 123, 6 Cal 2d 596
Mass—Klein v. Boston Elevated Ry. Co, 200 N E. 6
Pa.—Norris v. Pennsylvania R. Co, 177 A 785, 317 Pa. 586.
Tex.—Stiles v Union Terminal Co, Civ App., 1 S W 2d 947, error refused—Ft. Worth & D. C. Ry Co. v. Brown, Civ.App, 205 S.W. 378—Texas Midland R. Co. v. Truss, Civ App., 186 S W. 249, error refused.
10 C J. p 1157 note 75.

Catching foot in switch

Where a street railroad impliedly invited its patrons to cross tracks to a landing at a street intersection, a pedestrian whose foot was caught in a switch was not contributorily negligent as a matter of law because he deviated from the path provided, where the lights established to guide patrons were not lighted—Brooks v Union Depot Bridge & Terminal R. Co, 258 S W. 724, 215 Mo.App. 643

Cold waiting room

The failure of a woman accompanied by her husband and little children to seek a warm room when she discovered the waiting room was cold, which would have required her to cross the tracks and go some distance and might have rendered it impossible for her to cross back ahead of the train when it came, and her failure to seek a warmer coach when the first one she entered was cold, were not held questions of contributory negligence as a matter of law—Davis v. Allen, 251 S.W. 194, 199 Ky 442

Rolling gate

In action against street railroad for injuries to plaintiff when she was struck by gate operating on rollers in picket fence erected by road about its loop, question whether plaintiff was negligent in not seeing gate approaching her before it struck her was for jury—Earley v Rhode Island Co, R I, 100 A 405

Walking off unguarded platform

Question of contributory negligence of person waiting for train in walking off end of unlighted and unguarded platform into ditch is for jury.—Wolf v. Smith, 97 A. 853, 252 Pa. 562.

72. Mass.—Regan v. Boston & M. R Co, 113 N.E. 200, 224 Mass 418
Ohio—Cleveland Ry. Co. v Halterman, 153 N.E. 922, 22 Ohio App 234.

as a defect in the tracks,[73] or a car fender,[74] or being struck by a vehicle while standing[75] or walking[76] too close to the tracks, or while standing on the tracks,[77] or crossing the same,[78] as in the

Banana skin

Pa.—Deegan v. Pennsylvania R. Co., 160 A. 858, 307 Pa. 207.

Broom

Where a passenger leaving carrier's ladies' room at station fell over broom allegedly left by carrier's servant at the point of accident, the passenger's contributory negligence was a question for the jury.—Portley v. Hudson & M. R. Co., 168 A. 184, 111 N.J.Law 204, affirmed 172 A. 384, 113 N.J.Law 13.

Dirt pile

Contributory negligence of a passenger for failure to see pile of dirt into which she stepped, causing her to fall down steps leading from railroad station to street, was a question for the jury.—Norris v. Pennsylvania R. Co., 177 A. 785, 317 Pa. 586.

Hole

Whether an intending passenger was guilty of contributory negligence in stepping into a hole in the floor in a waiting room in course of being repaired was for the jury.—Louisville & N. R. Co. v. Minnix, 260 S.W. 15, 202 Ky. 472.

Notch in station platform

In action against railroad for injuries sustained by plaintiff while running to catch train when he caught his heel in notch in edge of station platform and fell between two cars of train, whether plaintiff was contributorily negligent was for jury, where different conclusions could have been drawn from evidence on that issue.—Swallow v. Hudson & M. R. Co., 191 A. 775, 118 N.J.Law 157.

Wire on grass plot

Whether passenger, tripping over wire on grass plot, was negligent, was for jury.—Heffron v. New York Cent. & H. R. R. Co., 119 N.E. 1024, 223 N.Y. 473, reversing 161 N.Y.S. 1128, 175 App.Div. 962.

73. N.J.—Bradley v. Erie R. Co., 147 A. 572, 106 N.J.Law 51, reversing 143 A. 743, 105 N.J.Law 1.

74. N.H.—Guevin v. Manchester St. Ry., 99 A. 298, 78 N.H. 289, L.R.A.1917C 410.

75. Ala.—Alabama Great Southern R. Co. v. Bell, 76 So. 920, 200 Ala. 562.—Seaboard Air Line Ry. v. Laney, 75 So. 15, 199 Ala. 654.
Mass.—Gerhart v. Holyoke St. Ry. Co., 128 N.E. 421, 236 Mass. 392.
Mo.—Laurent v. United Rys. Co. of St. Louis, 191 S.W. 992.—Rabushka v. Wells, App., 22 S.W.2d 870.—Flynn v. Kansas City Rys. Co., App., 226 S.W. 974.
N.J.—Munroe v. Pennsylvania R. Co., 90 A. 254, 85 N.J.Law 688, Ann.Cas. 1916A 140.
N.Y.—Hoffman v. Lehigh Valley R. Co., 177 N.Y.S. 140, 188 App.Div. 414.
Wash.—Switzer v. City of Seattle, 294 P. 225, 159 Wash. 540, opinion modified on rehearing 298 P. 347.

Car catching umbrella

Whether passenger, waiting for east-bound car and thrown to ground by west-bound car catching her umbrella, was guilty of negligence, was for jury.—Campbell v. Richmond Light & R. Co., 127 N.E. 271, 228 N.Y. 383, reversing 168 N.Y.S. 813, 181 App.Div. 320, reargument denied 129 N.E. 906, 229 N.Y. 537.

Use of safety zone

Where plaintiff, while standing in safety zone maintained by street railroad for safety of its passengers, was struck by rear end of street car rounding a curve, as plaintiff had right to rely on safety zone as a safe place to stop, and in view of fact that she did not know that car was about to turn corner, it was held that it cannot be said as matter of law that plaintiff was guilty of contributory negligence.—Mangan v. Des Moines City Ry. Co., 203 N.W. 705, 200 Iowa 597, 41 A.L.R. 368.

Waiting between tracks

Where commuter, while standing between north and south-bound tracks in front of station after signaling north-bound train to stop, was struck by overhang of locomotive of a later south-bound train, question of commuter's contributory negligence was for jury under evidence.—Ferran v. Southern Pac. Co., 44 P.2d 533, 3 Cal.2d 350.

76. Wash.—Hohman v. City of Seattle, 38 P.2d 242, 179 Wash. 663.

Car swinging on curve

In prospective passenger's action for injuries sustained when struck by rear end of street car swinging on curve, when street car beside which he was walking started up without warning, question of contributory negligence of prospective passenger was for jury.—Mardorf v. Duluth-Superior Transit Co., 261 N.W. 177, 194 Minn. 537.

Side swiped by trolley

Contributory negligence of intending passenger caught by side swing of trolley car while passing along narrow passageway at terminal station was a question for the jury.—Burr v. Virginia Railway & Power Co., 145 S.E. 833, 151 Va. 934.

77. Mont.—Mihelich v. Butte Electric Ry. Co., 281 P. 540, 85 Mont. 604.

Signaling

Whether passenger on track signaling and injured by unlighted cinder trucks in front of car was negligent, was for jury.—Indianapolis & Cincinnati Traction Co. v. Hardwick, 123 N.E. 249, 70 Ind.App. 192.

78. U.S.—McLaughlin v. Pennsylvania Co., Ohio, 257 F. 545, 168 C.C.A. 529.—St. Louis Merchants' Bridge Terminal Ry. Co. v. Munger, Mo., 246 F. 938, 159 C.C.A. 210.—Pennsylvania R. Co. v. Rogers, N.J., 244 F. 76, 156 C.C.A. 504.
Cal.—Rucker v. San Diego Electric Ry. Co., 183 P. 578, 41 Cal.App. 787.
Ind.—Indiana Union Traction Co. v. Hiatt, 114 N.E. 478, 65 Ind.App. 233, rehearing denied 115 N.E. 101, 65 Ind.App. 233.
Md.—Washington, B. & A. R. Co. v. State, 116 A. 911, 140 Md. 115.
Mass.—Reardon v. Boston Elevated Ry. Co., 136 N.E. 153, 242 Mass. 383.
Mo.—Schimmelpfenning v. Wells, 24 S.W.2d 154.—Unterlachner v. Wells, 296 S.W. 755, 317 Mo. 181.—Unterlachner v. Wells, 278 S.W. 79.—Willi v. United Rys. Co. of St. Louis, 274 S.W. 24.
N.J.—Bergmann v. Public Service Ry. Co., 120 A. 193, 98 N.J.Law 487.—Courtney v. Public Service Ry. Co., 115 A. 740, 96 N.J.Law 308, affirmed 117 A. 925, 97 N.J.Law 564.—Rhodehouse v. Director General of Railroads, 111 A. 662, 95 N.J.Law 355.—Van Keuren v. Erie R. Co., 157 A. 545, 10 N.J.Misc. 6.
N.Y.—Brott v. Auburn & S. Electric R. Co., 115 N.E. 273, 220 N.Y. 92, reversing 154 N.Y.S. 1113, 169 App.Div. 913.
Ohio.—Lake Shore Electric Ry. Co. v. Ordway, 156 N.E. 235, 24 Ohio App. 317.
Pa.—Dickun v. Pittsburgh Rys. Co., 161 A. 739, 308 Pa. 20.—Klingensmith v. West Penn Rys. Co., 154 A. 811, 303 Pa. 487.—Lynn v. Pittsburgh & L.E. R. Co., 110 A. 271, 267 Pa. 41.—Kissinger v. Pittsburgh Rys. Co., 180 A. 137, 119 Pa.Super. 110.
R.I.—Grimes v. United Electric Rys. Co., 193 A. 740.
Tex.—Texas Electric Ry. v. Rowell, Civ.App., 211 S.W. 788, dismissed by agreement.
Wash.—Johnson v. City of Seattle, 250 P. 409, 141 Wash. 385.
10 C.J. p. 1157 note 76.

Failure to look and listen

(1) In action for death of pedestrian from injuries sustained when struck by street car while crossing in front of street car preparatory to boarding it at intersection, whether

case of a passenger crossing the tracks in connection with boarding[79] or alighting from[80] a car or train.

b. Entering Conveyance

A passenger's conduct in entering a vehicle, as in boarding one in motion, may constitute contributory negligence or its absence as matter of law, although as a general rule such issue is a question of fact addressed to the jury.

Where the evidence is undisputed, or, if disputed, is of such a nature that reasonable minds can come to but one conclusion therefrom, it is a question of law for the court as to whether a passenger was guilty of contributory negligence in boarding a train or car,[81] although on conflicting evidence the question of a passenger's contributory negligence in boarding a train, car, or other vehicle is one of fact for the jury,[82] as where he boards it at a

pedestrian was negligent in failing to look again after entering on track was for jury—Tennessee Electric Power Co. v Bainbridge, Tenn.App., 95 S.W.2d 1261.

(2) Pedestrian's failure to look and listen before crossing tracks of an electric railway in public street, where street cars have not exclusive right of way, is not negligence, as matter of law.—Tennessee Electric Power Co. v. Bainbridge, supra.

Misjudgment of speed

Negligence of intending passenger in misjudging speed of approaching car was a question for the jury, and intending passenger was not negligent, as matter of law, for attempting to pass before approaching car with reasonable belief that he could do so.—Sugarwater v. Fleming, 293 S.W. 111, 316 Mo. 742.

Regular car stop

Contributory negligence of intending passenger at regular stopping place, who timely signaled street car and was required to cross tracks to enter car, as regards injuries received when struck by car at point beyond regular stopping place, was a fact question for jury.—Moyles v. Connecticut Co., 160 A. 307, 115 Conn 80.

More than one conclusion reasonably possible

Whether an intending passenger, struck on railroad tracks while attempting to cross to board a train, was negligent, is a question for the jury, unless it is clear that reasonable minds can reach only the conclusion that a person of ordinary prudence would not have made the attempt under the circumstances.—McLaughlin v. Pennsylvania Co., Ohio, 257 F. 545, 168 C.C.A. 529.

Evidence held sufficient to take question to jury

Cal.—Wilkinson v. United Railroads of San Francisco, 232 P. 131, 195 Cal. 185.

79. Crossing ahead of approaching train

In action by passenger struck by train while boarding another train which had stopped at station, contributory negligence of plaintiff in crossing tracks ahead of approaching train was a question for jury—Somerville v. New York, N. H. & H. R. Co., 189 N.E. 592, 285 Mass 539.

80. Conn.—Cecil v. Connecticut Co., 123 A. 443, 100 Conn 286.

Ill.—Eilers v. Peoria Ry. Co., 200 Ill.App. 487. See Louden v. Terminal R. Ass'n of St. Louis, 206 Ill App. 87.

Mass.—Hayes v. Boston Elevated Ry. Co., 169 N.E. 483, 269 Mass 448—Lipski v. Boston Elevated Ry. Co., 143 N.E. 335, 248 Mass. 508.

Mich.—Terrill v. Michigan United Traction Co., 183 N.W. 46, 214 Mich. 478.

Mo.—Wilson v. Wells, 13 S.W.2d 541, 321 Mo. 929—Kent v. Kiel, App., 97 S.W.2d 885.

N.Y.—Wall v. International Ry. Co., 135 N.E. 512, 233 N.Y. 309, reversing 188 N.Y.S. 550, 195 App.Div. 685

Leaving car at irregular stopping place

Mass.—Poppel v. Boston Elevated Ry. Co., 155 N.E. 267, 258 Mass 389.

Struck by unlighted car

In action for injuries from being struck by electric railway car, claimed to have been running without lights, as plaintiff crossed the tracks after alighting from a car going in the opposite direction, the issues of negligence and contributory negligence were questions for the jury.—Washington & R. Ry. Co. of Montgomery County v. Sullivan, 110 A. 478, 136 Md 202.

Stop, look, and listen rule

(1) Where a passenger is struck by train while leaving railroad premises at conclusion of journey, the stop, look, and listen rule does not apply in all strictness, and it is for jury to say whether passenger exercised ordinary care for his own safety.—MacGregor v. Pacific Electric Ry. Co., 59 P.2d 123, 6 Cal.2d 596.

(2) Whether passenger on westbound electric train who was carried to a point some distance from pedestrian crosswalk and who after detraining walked back toward crosswalk and after looking to rear walked with her back toward approaching eastbound train, without noticing it until too late to avoid injury, was guilty of contributory negligence was for the jury.—MacGregor v. Pacific Electric Ry. Co., supra.

(3) Where street car company has regular stations at which cars habitually stop for persons to get on and off, the mere fact that a passenger fails to look and listen before crossing tracks intervening between the place where he alights and the station does not constitute contributory negligence as a matter of law.—Terrill v. Michigan United Traction Co., 171 N.W. 340, 204 Mich. 652.

(4) Whether a passenger, who had alighted from a standing train at a station and was crossing railway tracks by a planked way provided for that purpose, must look and listen was a question for the jury.—Spofford v. Central R. Co. of New Jersey, 98 A. 246, 89 N.J.Law 273

(5) Failure of passenger to look or listen as he necessarily crosses tracks in leaving train, is not necessarily contributory negligence as matter of law, negligence depending on peculiar facts of case.—Dunn v Atlantic Coast Line R. Co., 93 S.E. 784, 174 N.C. 254.

81. Ala.—Smith v. Birmingham R. Light, etc., Co., 41 So. 307, 147 Ala. 702.

10 C.J. p 1117 note 38.

Evidence held insufficient to show contributory negligence as matter of law

Evidence was insufficient to show as a matter of law that a passenger in reentering a train after temporary absence was guilty of contributory negligence — Sellars v Southern Pac. Co., 166 P. 599, 33 Cal.App. 701.

82. U.S.—Davis v. Olson, C.C.A. Minn., 298 F. 921.

Ark.—Missouri Pac. R. Co. v. Henry, 269 S.W. 51, 168 Ark. 146.

Ga.—Hill v. Chattanooga Ry. & Light Co., 93 S.E. 1027, 21 Ga.App 104.

Ill.—Garlinski v. Chicago City Ry. Co., 257 Ill.App. 414

Ky.—Burnett v. Louisville & N. R. Co., 281 S.W. 510, 213 Ky. 540

Mass.—Coyle v. Worcester Consol St. Ry. Co., 173 N.E. 586, 273 Mass 475—Threlkeld v. Boston Elevated Ry. Co., 146 N.E. 367, 251 Mass. 141—Nuttall v. Worcester Consol

place other than a station platform, or other regular stopping place.[83]

Moving vehicle. The circumstances may be such that it constitutes contributory negligence as a matter of law for a passenger to board a moving vehicle;[84] but the mere act of boarding a moving vehicle does not of itself constitute negligence per se, and the question of whether or not a passenger was guilty of contributory negligence in entering or attempting to enter a vehicle while it was in motion ordinarily resolves itself into one of fact,[85] as in the case of a slowly moving car, train, or bus,[86] and it is also for the jury to say as matter of fact whether the passenger did attempt to board the moving vehicle,[87] or whether the vehicle was actually in motion at the time of the attempt to board it.[88]

St Ry. Co., 114 N.E. 291, 225 Mass 167.

Mich.—Sullivan v. Detroit United Ry., 182 N.W. 33, 213 Mich. 679—Sibert v. Detroit United Ry, 164 N.W. 370, 198 Mich. 117

N.J.—Gross v. Hudson & Manhattan R. R., 185 A. 365, 14 N.J.Misc. 374.

N.Y.—Johnson v. Interborough Rapid Transit Co, 183 N.Y.S. 224, 192 App.Div. 639—Feldman v. New York Rys. Co, 158 N.Y.S. 698.

Okl.—Muskogee Electric Traction Co. v. Latty, 187 P. 491, 77 Okl. 156.

Pa.—Lasater v. Conestoga Traction Co, 160 A. 447, 306 Pa. 500—Bickley v. Philadelphia & R. Ry Co, 101 A. 654, 257 Pa. 369

S.C. — Anderson v. Hampton & Branchville R. & Lumber Co., 132 S.E. 47, 134 S.C. 185

Tex.—Dallas Ry & Terminal Co. v Travis, 78 S.W.2d 941, 125 Tex. 11, affirming, Civ.App., 46 S.W.2d 743

Wash.—Tobin v. City of Seattle, 242 P. 2, 137 Wash. 177.

10 C.J. p 1117 note 38–p 1119 note 45–p 1158 note 77.

Bundle laden passenger

(1) Where plaintiff was carrying large bundle making it necessary to enter sideways, and her hand was caught by door which closed suddenly after she had boarded train, issue of contributory negligence was for the jury in an action against the railroad.—Gross v. Hudson & Manhattan R.R., 185 A. 365, 14 N.J.Misc. 374.

(2) Contributory negligence of passenger, who was encumbered with bundles which demanded her attention, and which occupied her arms as she was getting in taxicab without assistance, and who slipped and fell due to icy running board of defendant's taxicab, was a question for the jury.—Finney v. Norwood, 270 N.W. 592.

Ice-coated platform

Whether an injured passenger was guilty of contributory negligence in entering a car platform on the carrier's invitation, without warning that the platform was covered with ice, is a question of fact.—Altberger v. New York Consol. R. Co., 162 N.Y.S. 739.

Jostling crowd

Question of passenger's contributory negligence in attempting to board car in jostling crowd at terminal station was for jury.—South Covington & C St. Ry. v. Vanice, 278 S.W. 116, 211 Ky. 774.

Boisterers

Whether plaintiff, injured due to boisterous, violent, and disorderly conduct of other persons, was in exercise of due care in boarding car, was for the jury.—Franz v. Holyoke St Ry. Co, 132 N.E. 270, 239 Mass 565

Worn and slippery step

In action for injuries sustained by slipping on a worn and slippery bus step, whether passenger was guilty of contributory negligence was for jury.—Sickmund v Connecticut Co, 189 A. 876, 122 Conn. 375

83. Mo.—Vrooman v. Harvey, 197 S.W. 118.
10 C.J. p 1158 note 79.

84. Ga.—Meeks v. Atlantic, etc, R. Co, 50 S.E. 99, 122 Ga. 266.
Ill.—Chicago, etc, R. Co. v. Gore, 96 Ill.App 553.

85. U.S.—Redfield v. New York Cent. R. Co, C.C.A.Mo, 83 F.2d 62
Cal.—Hart v. Fresno Traction Co., 167 P. 885, 175 Cal. 489
Ill.—Little v. Peoria Ry. Co, 215 Ill.App. 385.
Ind.—Pittsburgh, C., C & St L. Ry. Co v. Friend, 142 N.E. 709, 194 Ind. 579, rehearing overruled 143 N.E. 879, 194 Ind 579
N.J.—Nogrady v. Erie R. Co., 144 A. 803, 105 N.J.Law 396.
Tex.—Ft. Worth & D. C. Ry. Co. v. Hawley, Civ.App., 235 S.W. 659, dismissed for want of jurisdiction.
10 C.J. p 1158 note 78.

Child in arms

Whether one with part of family on train was guilty of contributory negligence in attempting to board moving train with child in arms, was for jury.—Pittsburgh, C., C. & St. L. Ry Co. v Friend, 118 N.E. 598, 70 Ind.App. 366.

Delay in boarding

In passenger's action for injuries sustained while boarding moving train, whether passenger negligently delayed getting aboard train was for jury.—Missouri-Kansas-Texas R Co of Texas v. Hail, Tex.Com.App, 48 S.W.2d 589, affirming Hail v. Missouri-Kansas-Texas R. Co of Texas, Civ.App., 30 S.W.2d 1062.

Rate of speed in doubt

Whether passenger was contributorily negligent in attempting to board moving train was for jury, on conflicting testimony as to whether it was moving slowly or rapidly —Missouri Pac. R. Co. v. Henry, 269 S.W. 51, 168 Ark. 146.

Slackening of speed

Whether slackening of speed by moving street car is invitation to board car while in motion is question of fact.—Morrissey v City and County of San Francisco, 286 P. 433, 104 Cal.App. 536.

Trains

A passenger, who has temporarily left his train at an intermediate station, in attempting to reboard the train, when it is in motion, is not guilty of contributory negligence as a matter of law.—Missouri Pac. R. Co. v. Kennedy, 239 S.W. 376, 153 Ark 77.

86. Ga.—Haynie v. Central of Georgia Ry. Co, 93 S.E. 258, 20 Ga.App. 599.
N.Y.—Wiener v. Fifth Avenue Coach Co, 164 N.Y.S. 667.
Va.—Virginia Ry. & Power Co. v Arnold, 92 S.E. 925, 121 Va. 204

Sudden jerk

Where plaintiff, desiring to take passage on street car, attempted to board the same as it was moving slowly at a point where it was scheduled to stop to receive passengers, it was held that the car having started with a sudden jerk, which threw plaintiff to the pavement, etc, he could not be deemed negligent as a matter of law.—Millar v. Nassau Electric R. Co., 179 N.Y.S. 293, 189 App.Div. 748.

87. N.Y.—Meyers v. Hines, 191 N.Y.S. 773, 199 App.Div. 594.

May have been pushed

Whether an intending passenger on a station platform was pushed against the side of a slowly moving train, and by reason thereof fell, or fell in attempting to board the moving train, was for the jury.—Meyers v. Hines, 191 N.Y.S. 773, 199 App. Div. 594.

88. Mass.—Gerber v. New York Cent. R. R., 192 N.E. 837, 288 Mass. 318.

c. Conduct While in Transit

It is ordinarily for the jury to decide whether the conduct of a passenger injured while in transit, as in riding on the platform or steps of a vehicle, constituted contributory negligence, although the circumstances may be such as to render the question one of law for the court.

The conduct of a passenger while in transit may be such as to constitute contributory negligence or its absence as a matter of law,[89] as, for example, whether he exercised due care in riding on the platform, or steps, or running board of a car.[90] Where the evidence is conflicting or doubtful, it is, however, a question of fact for the jury to determine whether a passenger who was injured while in transit was at the time guilty of contributory negligence,[91] as in remaining on the steps or platform

Train at station

Whether one injured while attempting to board train at station exercised due care was for the jury on conflicting evidence as to whether he made attempt before or after train started.—Gerber v. New York Cent. R. R., 192 N.E 837, 288 Mass. 318.

89. Mo.—Perkins v. United Rys. Co of St. Louis, App., 243 S W. 224.

Position not contributing to injury

Where the evidence of plaintiff and the other witnesses to the accident showed that plaintiff's injury was caused by a stake on a wagon, which the street car in which she was riding was then passing, being thrust in the window by her seat, and pinning her arm against the back of the seat, there was no necessity to submit the issue of contributory negligence even if there were some evidence that her arm was a little bit outside of the window just before the accident, since that position did not contribute to the injury.—Perkins v. United Rys. Co. of St. Louis, Mo App., 243 S W 224.

Evidence held insufficient to warrant direction of verdict for carrier

Ill.—Dunn v. Chicago, R. I. & P. Ry. Co, 248 Ill App. 26.

Iowa—McDonald v. Yellow Taxicab Co., 184 N.W. 291, 192 Iowa 1183.

90. Pa.—Germantown Pass. R. Co. v. Walling, 97 Pa 55, 39 Am.R. 796.

Nonsuit unwarranted

In action by taxicab passenger for injuries sustained when taxicab struck pole, refusal to nonsuit because evidence showed passenger did not get out when driver speeded was proper.—Baker v. Turano, 152 A. 446, 8 N.J.Misc. 919.

91. U.S—Frates v. Thomas, C.C.A. Okl., 57 F.2d 535.

Cal.—Horney v. Dillingham, 253 P. 970, 81 Cal.App. 443

Conn.—Duffy v J. W. Bishop Co, 122 A. 121, 99 Conn. 573—Montambault v. Waterbury & Milldale Tramway Co, 120 A. 145, 98 Conn 584.

D.C—Capital Traction Co. v. Copland, 47 App D.C 152.

Ga—Davis v. Jones, 129 S.E 892, 34 Ga App 7.

Ill.—Hoffman v. Yellow Cab Co, 238 Ill App. 269—Gilberts v. Rockford & I. Ry. Co., 215 Ill App. 324 See Roberts v. Chicago City Ry. Co, 205 Ill App. 594.

Iowa—Adams v Chicago, R I & P. Ry. Co., 161 N W. 295, 179 Iowa 1334.

Kan—Fike v Huguenin, 28 P 2d 721, 138 Kan. 866.

Ky.—Reo Bus Lines Co v. Dickey, 292 S W. 791, 219 Ky. 307

Md—Cumberland & Westernport Transit Co. v. Metz, 149 A 4, 158 Md 424, reargument denied 149 A. 565, 158 Md 424, appeal dismissed American Oil Co. v. Metz, 51 S Ct. 40, 282 U S 801, 75 L.Ed. 720.

Mass—Pickard v. Boston Elevated Ry. Co, 166 N E. 561, 267 Mass. 133.

Minn—Doody v. St. Paul City Ry. Co., 270 N.W. 583.

Mo.—Lincoln v. St. Louis-San Francisco Ry. Co, 7 S W.2d 460, 223 Mo App. 46

Mont.—Jepsen v Gallatin Valley Ry. Co, 195 P. 550, 59 Mont 125.

N J—Colletto v Hudson & M. R. Co, 100 A 200, 90 N J Law 315.

N Y.—Goldweber v. New York Consol R Co, 173 N Y S. 470.

N D—Wall v. Great Northern Ry. Co, 175 N.W 705, 43 N D. 422.

Ohio—Beirla v. Hockenedel, 157 N. E 573, 25 Ohio App. 186.

Okl—Chicago, R. I. & P. Ry. Co v. Warren, 269 P. 368, 132 Okl. 107.

Or.—Perry v. Pickwick Stages of Oregon, 243 P. 787, 117 Or. 598.

Pa—De Marchi v. Central R. Co. of New Jersey, 107 A. 703, 264 Pa. 321.

S.C—Pearson v. Piedmont & N. Ry. Co, 99 S E. 811, 112 S.C 220

Tex—Yoes v Texas & P. Ry Co., Civ App, 211 S W. 311, error refused.

Wash.—Garrow v. Seattle Taxicab Co, 238 P. 623, 135 Wash 630, 45 A L R. 293.

Wis—Scales v Boynton Cab Co., 223 N W. 836, 198 Wis. 293, 69 A.L R. 978.

10 C J. p 1159 note 84.

Failure to warn motorman

In action by street railroad passenger injured in collision between street car and backing train, whether passenger was contributorily negligent in failing to warn motorman of approaching train was for jury.—Moutria v East St Louis Ry. Co, Mo App, 76 S.W 2d 427.

Falling over baggage

(1) In action for personal injuries to passenger caused by falling over baggage placed in aisle by other passengers, evidence on issue of contributory negligence was held to present jury question—Atkinson v. Dean, 73 So. 479, 198 Ala. 262.

(2) Woman, carrying small baby, injured by sudden jerk of street car causing her to stumble over baggage, was not guilty of contributory negligence as matter of law in not seeing baggage.—Heineke v. Chicago Rys Co., 116 N E 761, 279 Ill. 210, affirming 199 Ill App 339.

Feet under footrest

Passenger on railroad coach extending his feet under footrest was held not as a matter of law contributorily negligent, where he did not know rest was improperly turned upward—Chicago, R I & P Ry. Co. v McCrary, 16 S W.2d 466, 179 Ark. 444.

Fire

In passenger's action against motor carrier for injuries sustained when he dived through window on bus catching fire while gas tank with intake inside bus was being filled, whether passenger was contributorily negligent in supplying another passenger with match which caused fire when it was lit was for jury—Williams v Safe Bus, 186 S. E. 482, 210 N.C. 400.

Riding in cold coach

Ky—Davis v. Allen, 251 S W. 194, 199 Ky. 442

Utah.—Zoccolillo v. Oregon Short Line R. Co, 177 P. 201, 53 Utah 39.

Taxi passenger's failure to remonstrate

(1) Taxicab passenger, injured in collision with truck, was not contributorily negligent as matter of law in failing to warn taxicab driver when blocks away from scene of accident to remove his hand from back of seat in front of plaintiff, as he did when passenger sitting beside him protested, nor in failing to protest against conversation between him and latter passenger—Zeller v. Mayson, 179 A. 179, 168 Md. 663.

(2) Whether passenger, failing to remonstrate with driver when taxicab, as passenger claimed, was driven thirty or thirty-five miles an hour on city street, was contributorily

temporarily after boarding a vehicle,[92] or failing to find a seat forthwith;[93] or in going to the platform or steps,[94] or otherwise preparing to leave the vehicle[95] before it stopped; or in subjecting himself to possible injury by a door or window;[96] or in standing in the vehicle;[97] or in changing his position,[98] or walking down the aisle of a vehicle;[99] or in passing from one car to another;[1] or in transferring from one vehicle to another,[2] or in projecting his arm, head, or other parts of his

negligent, was for jury.—Ramsdell v. Frederick, 285 P 219, 132 Or. 161

Evidence held sufficient to carry issue to jury

Ark.—Hunter v. Mullins, 203 S.W 590, 136 Ark. 520.

Evidence held insufficient to carry question to jury

(1) Evidence in action for injury to minor son of consignee of express from being thrown from top of load, when driver ran express wagon into telephone pole, was insufficient to go to jury on issue of contributory negligence in not having hold on wagon —Ablon v. Electric Express & Baggage Co, Civ App, 206 S W. 717, affirmed Electric Express & Baggage Co. v. Ablon, 218 S W. 1030, 110 Tex. 235

(2) Evidence that plaintiff had set her grip down in the aisle of defendant's railway car, and that, when the collision occurred, she fell forward, striking her feet against the grip, was not sufficient to raise the issue of contributory negligence—Schaff v. Beale, Tex Civ.App., 250 S. W. 757.

92. Hesitating because of crowd

Where plaintiff had boarded a crowded car, the doors of which could not be closed while he stood on the steps, and he did not attempt to enter therein immediately, because he did not want to push his way through the crowd, but when he started to go inside the car suddenly lurched and he fell out, sustaining injuries, it was held that, although it was his duty to board the car and reach a place of safety with reasonable celerity, he was not guilty of contributory negligence as a matter of law merely because he hesitated as he did—Morris v. Detroit United Ry., 193 N.W. 871, 223 Mich. 264.

93. Cal.—Karsey v. City and County of San Francisco, 20 P.2d 751, 130 Cal App. 655.

First available seat

Passenger is not under duty as matter of law to take first available seat, nor to anticipate, as matter of law, a sudden and violent jerk of train, and whether circumstances require passenger to take first available seat is ordinarily a question for jury.—Burnett v Louisville & N R. Co., 281 S W. 510, 213 Ky. 540

94. U.S.—Spiesberger v. Michigan Cent R Co, Ill., 235 F. 864, 149 C.C.A. 176.

Ky.—Louisville & N. R. Co. v. Spears' Adm'r, 232 S W 60, 192 Ky 64—Louisville & N. R Co v Bland, 188 S W 468, 171 Ky. 424

Tex.—Vick v Schaff, Civ App., 260 S.W 916—Burkes v Northern Texas Traction Co., Civ App., 185 S W. 428, error refused

10 C J. p 1159 note 85.

Sudden jerk

In an action by a passenger thrown from the steps of a car when the train which had practically stopped was started with a sudden jerk, question of contributory negligence was for the jury.—Spiesberger v. Michigan Cent R Co., Ill, 235 F. 864, 149 C C.A 176.

95. Mass.—Randall v. Boston, R. B & L. R. Co, 193 N E. 829, 289 Mass 241.

Minn.—Underdahl v Minneapolis St. Ry. Co., 259 N.W. 78, 193 Minn 548

S C.—Valentine v. Seaboard Air Line Ry. Co, 127 S E. 724, 131 S C. 382

10 C J. p 1159 note 86.

Going between coaches to request stopping of train

Passenger who by reason of failure to announce station did not learn of arrival until after train had started was not, as matter of law, guilty of negligence in going between coaches to request employee to stop train, resulting in his being thrown by sudden jerk, although person to whom he spoke was not in fact employee but news butch—Louisville & N. R. Co. v. Burk, 268 S.W. 844, 207 Ky. 1.

Leaning against sliding subway door

Whether passenger was negligent in leaning against sliding door of subway car while waiting for train to stop at station was for jury.—Chasn v. Interborough-Rapid Transit Co, 227 N.Y.S. 279, 222 App.Div. 642.

Leaving seat

Whether passenger on street car used ordinary care, if, with bundles in her arms, she arose to alight before car had come to stop, was for jury.—Doody v. St. Paul City Ry. Co, Minn, 270 N.W. 583.

96. N J.—Colletto v Hudson & M R. Co., 100 A 200, 90 N.J Law 315—Paling v New York Cent. R. Co, 146 A. 788, 7 N J Misc 554, affirmed 150 A. 920, 106 N.J Law 586.

N Y.—Goldweber v New York Consol. R Co, 173 N Y S 470.

Tex.—Schaff v. Gordon, Civ App., 214 S W. 638.

Closing window

Street railway passenger, injured by glass when closing window, was not contributorily negligent per se for not calling motorman to close window—Russell v. Public Service Ry Co, 139 A. 322, 104 N.J Law 34.

Hand on door jamb

Passenger's possible negligence in placing hand on jamb of door opened by brakeman, and injured when door closed as train slowed down, was a question for the jury—Agry v. Pennsylvania R. Co, 150 A. 401, 106 N J Law 476, reversing 146 A. 587, 7 N.J Misc. 579.

97. Ark.—Meeks v. Graysonia, N. & A. R. Co, 272 S.W. 360, 168 Ark 966.

Cal.—Graff v. United Railroads of San Francisco, 172 P. 603, 178 Cal 171.

Ohio.—Beierla v. Hockenedel, 157 N E. 573, 25 Ohio App. 186.

10 C J. p 1159 note 87.

Failure to use handholds

Whether passenger who was injured by falling to floor of street car which jerked suddenly was contributorily negligent in failing to hold onto handholds was for jury —Dallas Railway & Terminal Co v Harris, Tex Civ.App., 81 S.W 2d 716

98. Mo. — Provance v. Missouri Southern R. Co., App, 186 S.W. 955

10 C J. p 1159 note 88.

99. Mass.—Convery v. Eastern Massachusetts St. Ry. Co, 147 N E. 824, 252 Mass. 418.

1. Ark.—Kansas City Southern Ry. Co. v. Teater, 186 S W. 294, 124 Ark. 1.

Pa.—De Marchi v. Central R Co. of New Jersey, 107 A. 703, 264 Pa. 321.

10 C.J. p 1160 note 89.

Thrown while rounding curve

In action for death of plaintiff's husband, who was thrown from open platform of a car while going forward to a smoking car, when a fast train without diminution of speed was rounding a curve, it was held that whether deceased, being ignorant of condition of roadbed, was required to anticipate an unusual jerk caused by condition, was for jury—De Marchi v Central R. Co. of New Jersey, 107 A. 703, 264 Pa. 321.

2. Changing busses

In action against bus company for injuries received when passenger fell into hole on road while transferring from one bus to another, passenger's contributory negligence was a ques-

body beyond the side of the vehicle;[3] or in riding with some part of his person on a window sill or the like without projecting it beyond the side of the vehicle,[4] or in riding in a dangerous or improper place,[5] such as in a car not intended for passengers,[6] or riding on the platform,[7] or on the steps or footboard,[8] of the vehicle.

tion for the jury—Damm v East Penn Transp. Co., 182 A. 720, 120 Pa Super. 381.

3. Ill.—Gilberts v. Rockford & I. Ry. Co., 215 Ill App 324
Kan.—Fike v. Huguenin, 28 P.2d 721, 138 Kan. 866.
Mo.—Crone v United Rys Co. of St. Louis, 236 S.W. 654.
N.J.—Thibodeau v. Hamley, 112 A. 320, 95 N.J Law 180.
10 C.J. p 1160 note 90.

Bars as warning

Whether iron bars, three inches apart, guarding open windows of an electric railway car, give a warning to a passenger to keep all portions of his body within the car, and, if they do, whether the warning is sufficient, are questions of fact.—Capital Traction Co. v. Copland, 47 App.D.C. 152.

4. **Elbow on window sill of bus**

Bus passenger who rested his elbow on window sill of bus and whose arm was not outside outer edge of sill was not as matter of law contributorily negligent, so as to bar recovery from bus company for injury to arm resulting when bus and automobile sideswiped—Ross v. Bay City Transit Co., 56 P.2d 247, 12 Cal.App.2d 639.

5. Ark.—St. Louis, etc., R. Co. v. Kitchen, 136 S.W. 970, 98 Ark. 507, 50 L.R.A.,N.S., 828
10 C.J. p 1160 note 91.

Bus fender

In action for injuries received by passenger of automobile bus, evidence showing that plaintiff had been riding outside on fender, although there were vacant seats inside of bus, was properly submitted to jury on question of plaintiff's contributory negligence.—Strong v. Olsen, 241 P. 107, 74 Cal.App. 518.

Doubt respecting position

Conflicting evidence as to whether deceased was on a pilot in front of engine or was standing on a platform between cars of defendant's interurban railway, when killed, was held to make his contributory negligence a jury question—Pearson v. Piedmont & N. Ry. Co., 99 S.E. 811, 112 S.C. 220.

6. Ga.—Gardner v. Waycross Air-Line R. Co., 25 S.E. 334, 97 Ga. 432, 54 Am.S.R. 435.
10 C.J. p 1160 note 92.

Baggage car

Passenger, leaving passenger coach and going into baggage car ahead on personal matter, and injured therein when train was derailed, was not as matter of law guilty of negligence preventing recovery, conclusion not being altered by fact that passengers remaining in their coach were not injured nor that notices were posted that passengers were not allowed therein, especially where passenger did not see such notice on account of position in which it was posted, the question being for the jury.—Davis v. Jones, 129 S.E. 892, 34 Ga.App. 7.

Stock car

(1) A caretaker of live stock was not contributorily negligent as a matter of law in riding in the stock car instead of, as required by the contract, in the caboose, which had been attached after the train started, and of which he was not shown to have been notified.—Adams v. Chicago, R. I. & P. Ry. Co., 161 N.W. 295, 179 Iowa 1334.

(2) Where a passenger on a freight train, who was accompanying a horse, on the suggestion of the conductor rode in the car with the animal for the purpose of putting out any fire which might be lighted in the bedding, the car being next to the engine, it was held that the question of his contributory negligence in so riding was for the jury.—Jepsen v. Gallatin Valley Ry. Co., 195 P. 550, 59 Mont. 125

7. Ark.—Kansas City Southern Ry. Co. v. Teater, 186 S.W. 294, 124 Ark. 1.
D.C.—Washington Ry. & Electric Co. v. Kramer, 44 App.D.C. 154 b.
Mass.—Oliver v. New York Cent. R. Co., 173 N.E. 543, 273 Mass. 216.
Ohio—Stark Electric R. Co. v. Brooks, 114 N.E. 245, 94 Ohio St. 324
Okl.—Chicago, R. I. & P. Ry. Co. v. Warren, 269 P. 368, 132 Okl. 107.
Pa.—Elmer v. Pittsburgh Rys. Co., 96 A. 1054, 251 Pa. 505—Ward v. Southern Pennsylvania Traction Co., 80 Pa.Super. 394.
Tex.—Galveston, H. & S. A. R. Co. v. Easton, Civ.App., 257 S.W. 924.
Wis.—Griebenow v. Chicago & M. E. Ry. Co., 171 N.W. 664, 169 Wis. 12—Bassett v. Milwaukee Northern Ry. Co., 170 N.W. 944, 169 Wis. 152.
10 C.J. p 1160 note 93.

Ordinarily question of fact

Ordinarily it is a question of fact whether the mere circumstance that a passenger injured was riding on the platform of the car, instead of taking a seat within, was contributory negligence.—Fardette v New York & S. Ry. Co., 180 N.Y.S. 179, 190 App.Div. 543.

Crowded platform

Whether a person, who enters a car of a street railway company which is already crowded and rides on a crowded platform and is injured, is guilty of contributory negligence is a question to be determined by the jury under all the circumstances—Sand Springs Ry. Co. v Smith, 203 P. 207, 84 Okl. 211

Fingers pinched by sliding plates

Conflicting evidence as to whether passenger in vestibule train was passing through cars to find more commodious seat or loitering on platform between cars made issue for jury of passenger's contributory negligence when his fingers were caught between unprotected sliding plates.—Oliver v. New York Cent. R. Co., 173 N.E. 543, 273 Mass. 216.

Front platform of electric car

Independently of statute, it is not negligence per se for passenger to stand on front platform of moving electric car, and in passenger's action for personal injury when thrown from front platform of electric car while rounding curve, plaintiff's contributory negligence was a question for jury—Graff v. United Railroads of San Francisco, 172 P. 603, 178 Cal. 171.

Rear platform

In an action for injury from being thrown from the rear platform of a street car while rounding a curve, it was held, on the evidence, that plaintiff's contributory negligence was a question for the jury—Gumpel v. San Diego Electric Ry. Co., 172 P. 605, 178 Cal. 166

Vacant seats

In an action for injuries to a passenger riding on the platform of an electric car, evidence was held to make a question for the jury as to whether there were any vacant seats so as to render applicable a statute prohibiting passengers from riding on the platform, when there is available room inside—Fish v. Ball, C.C.A. Utah, 93 F.2d 853.

Vestibuled platform

There is no rule which makes it negligence as matter of law for a passenger to pass over or stand on vestibuled platforms connecting passenger cars, and in an action for injury to a passenger while standing temporarily on the vestibuled platform between two cars, the question of contributory negligence was for the jury—New York, N. H. & H. Ry. Co v Kilby, Mass., 233 F. 252, 147 C.C.A. 258.

Not negligence per se

A passenger is not contributorily negligent as a matter of law in standing on the inclosed platform of an electric railroad car when there are no seats available.—Fish v. Ball, C.C.A. Utah, 93 F.2d 853

8. Ga.—Bailey v. Georgia Ry. &

d. Leaving Conveyance

It is ordinarily a question of fact for the jury whether or not a passenger was guilty of contributory negligence when leaving a conveyance, such as a moving vehicle, although where the rate of speed or other matters indicate alighting was in the face of obvious danger the issue becomes one of law for the court.

While the circumstances may be such as to render the question of an alighting passenger's contributory negligence or the absence thereof a question of law[9] as where he alighted at an improper place,[10] on conflicting evidence it is for the jury to decide as a question of fact whether or not the passenger's conduct when leaving the vehicle constituted contributory negligence,[11] as in alighting

Power Co., 124 S.E. 907, 32 Ga.App 793

Md.—Hines v. Watkins, 112 A. 299, 137 Md. 211.

Mo.—Shelton v. Chicago, M. & St. P. Ry. Co., App., 190 S.W. 46.

Ohio.—Stark Electric R. Co. v. Brooks, 114 N.E. 245, 94 Ohio St. 324.

10 C.J. p. 1160 note 93.

Crowded car

A street car passenger is not conclusively guilty of contributory negligence in remaining on the step after finding that he could not get inside the car, owing to the crowded condition thereof.—Smith v. Kansas City Rys. Co., App., 204 S.W. 575.

Prior to statute

Riding on running board of automobile was not contributory negligence as matter of law prior to statute.—Bergsrud v. Maryland Casualty Co., 229 N.W. 655, 201 Wis. 141.

9. Md.—Hevell v. Baltimore Transit Co., 196 A. 103.

Pa.—Shade v. Union Traction Co., 7 Pa.Dist. 34, 20 Pa.Co. 292.

10 C.J. p. 1157 note 70.

Compulsory nonsuit proper

Evidence that passenger, after alighting on curve of track, walked near track, and was struck by overhang of street car, held to render compulsory nonsuit proper.—Duffy v. Philadelphia Rapid Transit Co., 140 A. 496, 291 Pa. 564.

Direction of verdict for defendant unwarranted

(1) Where a passenger, after seeing others alight by means of a stool placed below the car step, returned to the car on an errand, and then stepped off without looking again for the stool, which in the meantime had been removed, and was injured by a resulting fall, he was not criminally negligent as a matter of law, so as to lose his right to recover, under Rev.St.Neb. 1913 § 6052, and it was error to direct a verdict for the railroad.—Maple v. Union Pac. R. Co., C.C.A.Neb., 264 F. 89.

(2) In an action for injuries to a passenger who stepped from a street car onto a stake and thereby severely sprained his ankle, evidence that the stake was one of a row which had been placed there by the city engineer and had been there for some time, that the passenger knew generally of the presence of the row of stakes, but not of the location of the particular stake, and that the car stopped at night with the step directly over the stake, held sufficient to take to the jury the issue of the street car company's negligence and of the passenger's contributory negligence, so that it was error to direct a verdict for defendant.—Mayhew v. Ohio Valley Electric Ry. Co., 254 S.W. 202, 200 Ky. 105.

Evidence held insufficient to establish contributory negligence as matter of law

(1) Generally.—Payne v. Davis, 252 S.W. 57, 298 Mo. 645.—Green v. Chicago, B. & Q. R. Co., 251 S.W. 931, 213 Mo.App. 583.—Turner v. Wabash Ry. Co., Mo.App., 211 S.W. 101.

(2) That passenger continued to alight after noticing that doors were not fully opened and that step was tilted up, held insufficient to establish contributory negligence as a matter of law.—Peters v. Chicago Rys. Co., 138 N.E. 629, 307 Ill. 202.

10. Pa.—Scanlon v. Philadelphia Rapid Transit Co., 57 A. 521, 208 Pa. 195.

11. Ala.—Smith v. Southern Ry. Co., 164 So. 903, 231 Ala. 381.—Alabama Power Co. v. Hall, 103 So. 867, 212 Ala. 638.

Ark.—Missouri Pac. Transp. Co. v. Robinson, 86 S.W.2d 913, 191 Ark. 428.

Cal.—Duffield v. Payne, 227 P. 217, 66 Cal.App. 767.

Conn.—Spiro v. Bridgeport Auto Transit Co., 155 A. 416, 113 Conn. 773.

Ill.—Griswold v. Chicago Rys. Co., 170 N.E. 845, 339 Ill. 94, affirming 253 Ill.App. 498.—Thomason v. Chicago Motor Coach Co., 10 N.E.2d 714, 292 Ill.App. 104.—Davis v. East St. Louis & S. Ry. Co., 9 N.E.2d 254, 290 Ill.App. 540.—See Appel v. Alton, G. & St. L. Traction Co., 207 Ill.App. 562.—Louden v. Terminal R. Ass'n of St. Louis, 206 Ill.App. 87.

Ky.—Chesapeake & O. Ry. Co. v. Clarke, 189 S.W. 882, 172 Ky. 811.

Md.—Washington, B. & A. Electric R. Co. v. Fitch, 136 A. 529, 152 Md. 137.

Mass.—McNeil v. New York, N. H. & H. R. Co., 185 N.E. 471, 282 Mass. 575.—McManus v. Boston Elevated Ry. Co., 160 N.E. 529, 262 Mass. 519.—Mucci v. Roston Elevated Ry. Co., 159 N.E. 513, 262 Mass. 308.

Mich.—Steketee v. Waters, 159 N.W. 368, 193 Mich. 177.

Mo.—Carney v. United Rys. Co. of St. Louis, 236 S.W. 308, 205 Mo.App. 495.—Turner v. Wabash Ry. Co., App., 211 S.W. 101.

N.H.—Wilson v. Berlin St. Ry., 149 A. 602, 84 N.H. 285.

N.J.—Kinder v. Erie R. Co., 162 A. 387, 109 N.J.Law 469, reversing 146 A. 923, 7 N.J.Misc. 637, followed in 137 A. 88, 103 N.J.Law 316.—Malzer v. Koll Transp. Co., 156 A. 639, 108 N.J.Law 296.—Galamb v. Erie R. Co., 156 A. 128, 108 N.J.Law 7.—Pabst v. Public Service Ry. Co., 141 A. 773, 104 N.J.Law 537.—Alexander v. Matteucci, 135 A. 820, 5 N.J.Misc. 183.

N.Y.—Krupnick v. Branikowski, 3 N.E.2d 210, 271 N.Y. 612, reversing 284 N.Y.S. 407, 246 App.Div. 782.—Wilson v. International Ry. Co., 199 N.Y.S. 562, 205 App.Div. 275.

N.D.—Arnold v. Minneapolis, St. P. & S. S. M. Ry. Co., 228 N.W. 456, 59 N.D. 59.

Ohio.—Mahoning & S. Ry. & Light Co. v. Leedy, 136 N.E. 198, 104 Ohio St. 487.—Grubbs v. Cincinnati, L. & A. Electric St. R. Co., 17 Ohio Cir.Ct.,N.S., 425, appeal dismissed 13 Ohio Law 64, 60 Wkly. Law Bul. 200.

Okl.—St. Louis-San Francisco Ry. Co. v. Loftus, 234 P. 607, 109 Okl. 141.

Or.—Goodson v. Portland Electric Power Co., 279 P. 559, 130 Or. 145.—Watts v. Spokane, P. & S. Ry. Co., 171 P. 901, 88 Or. 192.

Pa.—Hager v. Philadelphia & R. Ry. Co., 104 A. 599, 261 Pa. 359.—Jenkins v. Beyer, 180 A. 135, 118 Pa.Super. 527.

R.I.—Tomei v. United Electric Rys. Co., 163 A. 479.

Tex.—St. Louis Southwestern Ry. Co. of Texas v. Watts, 216 S.W. 391, 110 Tex. 106, reversing, Civ.App., 173 S.W. 909.—Texas & N. O. Ry. Co. v. Rooks, Com.App., 292 S.W. 536, affirming, Civ.App., 283 S.W. 622, and rehearing denied, Com.App., 293 S.W. 554.

Utah.—Barlow v. Salt Lake & U. R. Co., 194 P. 665, 57 Utah 312.

Va.—Chesapeake & O. Ry. Co. v. Tinsley, 89 S.E. 860, 119 Va. 423.

Wash.—Anderson v. Grandy, 283 P. 186, 154 Wash. 547.

W.Va.—Kaufman v. Charleston Transit Co., 186 S.E. 617, 117 W.Va. 591.—Donnally v. Payne, 109 S.E. 760, 89 W.Va. 585.

Wis.—Pleva v. Milwaukee Electric Ry. & Light Co., 246 N.W. 694,

at a place other than the station or platform,[12] or on the wrong side of the vehicle,[13] or by means of slippery steps,[14] or when transferring from one vehicle to another,[15] or when stumbling over an obstruction,[16] or slipping on loose gravel,[17] or stepping into a hole[18] or rut.[19]

Moving vehicle. The circumstances may be such as to render it a question of law whether a passenger was contributorily negligent in leaving a vehicle while it was in motion.[20] Ordinarily, however,

210 Wis 568—Zilles v. Milwaukee Electric Ry & Light Co, 246 N.W. 693, 210 Wis. 564.
10 C J p 1158 note 80.

Assisting another

In an action for injuries to a passenger thrown to the ground while assisting his daughter to alight, evidence held sufficient to take the case to the jury.—Capital Traction Co. v. Hoover, 45 App.D C 247.

Bus door striking hand

In action by passenger on motorbus for injury to hand while alighting, from closing of door from contact with another automobile, evidence held to make plaintiff's contributory negligence question for jury.—Leban v. Range Rapid Transit Co., 208 N.W. 533, 167 Minn. 40.

Crowd

Contributory negligence of passenger in crowded train in attempting to alight with crowd, instead of waiting, held question for jury—Morey v. New York Cent. R. Co, 254 N.Y.S 531, 234 App.Div 210, affirmed 184 N E. 148, 260 N.Y. 691.

Familiarity with conditions

Whether plaintiff was so familiar with the condition of the ground that it was contributory negligence on her part to alight at a place of alleged obvious danger held for the jury—Beach v. Eureka Traction Co, 203 S.W. 834, 135 Ark. 542.

Struck by passing auto

In action by plaintiff for injuries from being struck by passing automobile while she was alighting from defendant's street car, question of contributory negligence held for jury.—Woods v. North Carolina Public Service Co., 94 S E. 459, 174 N.C. 697, 1 A L R. 942.

Use of handholds

Passenger, who was thrown against brake handle when in act of alighting from street car which suddenly started and stopped, held not contributorily negligent as matter of law because she did not make use of handholds to steady herself.—Virginia Public Service Co. v. Silver, C C.A.,Va., 68 F 2d 230.

Evidence held sufficient to take question to jury

N.Y.—Creasy v. Eastern Greyhound Lines of New York, 291 N.Y.S. 746, 249 App Div. 59.

Evidence held insufficient to take question to jury

(1) Street car.—Bakkensen v. Minneapolis St Ry. Co., 238 N.W. 489, 184 Minn. 274.

(2) Taxi—Paulos v. Koelsch, 263 N W. 913, 195 Minn 603.

12. Ill—See Aur v. East St. Louis Ry Co, 194 Ill App. 193.
Mo.—Payne v. Davis, 252 S W. 57, 298 Mo. 645.
Ohio.—Cleverdon v. Lake Shore Electric Ry Co, 20 Ohio Cir.Ct.,N S, 550, affirmed Lake Shore Electric Ry. Co. v. Cleverdon, 80 N.E. 1128, 75 Ohio St. 618.
Pa.—Miller v. Lehigh Valley R. Co., 138 A. 89, 290 Pa. 130
Tex—Missouri, K. & T. Ry. Co. of Texas v. Churchill, Com App., 212 S W 155, affirming, Civ App, 171 S W. 517, rehearing denied, Com. App., 213 S W 253—Waters v. Texas Electric Ry, Civ.App, 267 S W 1005—Fort Worth & D. C. Ry. Co v. Lovett, Civ App, 243 S W. 519
10 C J. p 1159 note 82.

Custom

Where, through previous custom, street car passengers had the implied permission of the street railway to alight at a point where the car was stopped for switching, a passenger who knew of the custom was not, as matter of law, negligent in attempting to leave the car when it was so stopped, so that she was injured when it started, the question being for the jury—Stahl v. Southern Michigan Ry. Co., 178 N W. 710, 211 Mich. 350.

Failure to await brakeman's assistance

Evidence in action for injury to passenger in alighting from car, which, at night, had stopped away from station platform, held to call for submission of contributory negligence in not waiting for brakeman to assist, and in otherwise not exercising proper care—Missouri Pac R Co. v. Crawford, 270 S W. 517, 168 Ark. 430.

13. Pa—Roberts v. Pennsylvania R. Co, 86 A. 284, 238 Pa. 404, Ann.Cas. 1914C 502.
10 C J. p 1159 note 83.

14. Conn.—Connelly v. Connecticut Co., 140 A 121, 107 Conn 236.
Md.—Washington, B. & A. Electric R. Co. v. Fitch, 136 A. 529, 152 Md 137.
Mass.—Bagnell v. Boston Elevated Ry. Co, 142 N.E. 63, 247 Mass 235
R I—Tomei v. United Electric Rys Co., 163 A. 479.

Ice

In passenger's action against street railway company for injuries received in alighting from street car, whether passenger was guilty of contributory negligence in descending from car by way of known icy step was for jury—Rickabaugh v Youngstown Municipal Ry. Co., 9 N E.2d 900, 55 Ohio App 431.

15. **Attempting jump to boat**

In an action by plaintiff for damages for the death of her husband, caused by his attempting to jump from a stage plank provided by the defendant railroad for him and other passengers being transferred from coaches to transfer boat, question of contributory negligence held for the jury.—Yazoo & M. V R Co. v. Hill, 216 S W. 1054, 141 Ark. 378.

16. Mo.—Roussell v. St. Louis-San Francisco Ry. Co., App., 257 S.W 516

17. **Gravel hidden by dress**

Whether a passenger who was injured when gravel on a platform slipped under her foot as she was alighting was negligent was a question of fact for the jury, although she had bundles in her arms, stepped down without asking for help, and did not take hold of the railing, where she testified that, because of her dress, she could not see the loose gravel on the platform—Barlow v Salt Lake & U. R. Co., 194 P. 665, 57 Utah 312.

18. Mo—Caley v. Kansas City, 48 S W.2d 25, 226 Mo App 934.
Ohio—Poehl v. Cincinnati Traction Co, 151 N E. 806, 20 Ohio App 148
Pa—Gourlay v. Philadelphia Rapid Transit Co, 100 Pa Super. 419—Fissell v. Hines, 78 Pa Super 179—Hall v Lehigh Valley R. Co, 74 Pa Super. 52.

19. N H—Wilson v. Berlin St. Ry, 149 A. 602, 84 N H 285.

20. Cal.—Fitzgerald v Southern Pac. Co., 173 P. 91, 36 Cal.App. 660.
10 C.J. p 1157 note 71.

Obviously dangerous speed

(1) Where the uncontradicted testimony shows that plaintiff left the train when it was moving at a rate of speed that made it probably unsafe to a reasonably prudent man to undertake to alight, he was negligent as a matter of law—Louisville & N R. Co v. Derrickson, 185 S.W. 1114, 170 Ky. 334.

(2) Where plaintiff stepped from a street car while it was running at the rate of eighteen miles per hour, such act was negligence per se, and the court may direct a verdict for defendant.—Kirby v. United Rys. Co. of St. Louis, Mo., 242 S.W. 79.

it is not negligence as matter of law to leave a vehicle in motion, and as a rule the question is one of fact addressed to the jury.[21] The question of whether or not the passenger did attempt to alight from a vehicle while it was moving is also ordinarily one of fact for the jury.[22]

e. Permission or Direction of Carrier's Employee

Where the mere fact that a passenger acted in accordance with the permission or direction of the carrier's agents does not as a matter of law absolve him from a charge of contributory negligence, such permission or direction ordinarily raises an issue of fact for the jury.

Where the evidence tends to prove an invitation, inducement, or constraint of the carrier's agent causing the passenger to take a reasonable risk, he is not guilty of contributory negligence as matter of law,[23] but the issue as to such negligence is one of fact for the jury.[24]

The mere fact that the passenger acted with the permission of the carrier's agent does not absolve the passenger from a charge of contributory negligence in doing an obviously dangerous act.[25]

21. Ala.—Mobile & O R. Co v Davis, 137 So. 525, 223 Ala. 600—St Louis & S. F. Ry. Co v. Mills, 124 So. 231, 220 Ala. 107—Central of Georgia Ry. Co v. Mathis, 71 So. 674, 196 Ala. 32—Central of Georgia Ry. Co. v. Williams, 84 So. 633, 17 Ala App. 259.
Cal.—Poak v Pacific Electric Ry. Co, 170 P. 159, 177 Cal 190—Fitzgerald v. Southern Pac Co, 173 P. 91, 36 Cal App 660.
Ga.—Central of Georgia Ry. Co. v. Weathers, 108 S.E. 556, 27 Ga App. 375—Southern Ry Co. v. Williams, 91 S E. 894, 19 Ga App. 462.
Ill.—Wood v. Illinois Cent. R. Co, 201 Ill App 439.
Ind.—Pittsburgh, C., C & St. L. Ry. Co. v. Boys, 123 N.E. 482, 71 Ind. App. 102
Iowa —Bersie v. Chicago, M. & St. P. Ry. Co, 211 N.W. 250, 202 Iowa 1090.
Ky.—Chesapeake & O R. Co v. Mollett, 251 S W. 1007, 199 Ky. 817—Chesapeake & O R Co. v. Mollett, 251 S W. 1005, 199 Ky. 813—Kentucky Traction & Terminal Co. v Peel, 214 S W. 874, 185 Ky. 207—Louisville & N. R. Co v. Derrickson, 185 S.W. 1114, 170 Ky. 334.
Mo.—Sivicek v. Dunham, 219 S.W. 594—Bogrees v Wabash Ry. Co, App., 266 S.W. 333—Williams v. Missouri Pac. R. Co., App., 243 S. W. 188—Bond v. Chicago, B. & Q Ry Co, 99 S.W. 30, 122 Mo App. 207.
N D.—Faubion v. Minneapolis, St. P. & S S. M Ry. Co., 177 N W 371, 45 N D. 269.
Ohio.—Cleveland Ry. Co. v Hill, 12 Ohio App 125.
Tenn —Tennessee R Co. v. Kingsley, 10 Tenn App 637.
Tex.—Fort Worth & D C Ry. Co v. Lovett, Civ.App, 243 S W. 519.
Va —Virginia Ry & Power Co. v. Arnold, 92 S.E. 925, 121 Va. 204.
Wash —Alstead v. Kapper, 236 P 799, 135 Wash 21—Yenney v Pacific Northwest Traction Co., 215 P. 38, 124 Wash. 660
10 C J. p 1158 note 81.

Elements for consideration
It is not under all circumstances a negligent act to alight from a moving train, the rate of speed, the circumstances which limit the free agency of the person alighting, and his position, if one of peril, being elements to be considered, and, within reasonable limits, his negligence is a question for the jury.—Rauscher v Payne, 188 N W. 1017, 152 Minn 368

At night
Where a passenger fell and was injured in alighting from a moving train in the nighttime after being told by its operatives that his station had been reached and opened the door for him to alight, the question as to whether he was negligent in his failure to examine where he was going to alight was for the jury.—Williams v Missouri Pac R. Co., Mo. App, 243 S W. 188.

Belief that car had stopped
Whether street car passenger was negligent in starting to alight under belief that car had stopped, held a question for the jury—Drake v. Northern Texas Traction Co, Tex Civ. App, 197 S W. 610, error refused.

Slowly moving street car
Whether passenger is guilty of negligence in attempting to alight from slowly moving street car is ordinarily a question of fact for jury—Fitzgerald v Des Moines City Ry. Co., 207 N W. 602, 201 Iowa 1302.

Thrown by sudden jerk
It is not negligence as a matter of law for the passenger to alight from a moving train, where his testimony was that he was caused to alight by its sudden and unanticipated jerk.—Chicago, R I. & G Ry. Co. v. Comstock, Tex.Civ.App, 189 S.W. 109, error refused.

Train slowing down for station
In an action against a carrier for damages for personal injuries, whether plaintiff was guilty of contributory negligence in attempting to alight from a moving train, which simply slowed down for the station, held for the jury—Vietti v Hines, 192 P 80, 48 Cal.App. 266.

Train stopping for insufficient time
If a train does not stop a reasonably sufficient time to enable a passenger to alight with safety, it is not negligence per se for the latter to attempt to do so after the train starts, providing it is not traveling at such a rate of speed as to make it apparent to an ordinarily prudent man that it would be dangerous to attempt it.—Cincinnati, N. O. & T P. Ry Co v Francis, 220 S.W. 739, 187 Ky. 703.

22. Pa.—Hawkins v. Director General of Railroads, 121 A 46, 277 Pa 213.
S C.—Comer v. Atlantic Coast Line R. Co, 90 S.E. 188, 105 S.C 480.

23. Ga.—Southern Ry. Co v. Whitehead, 120 S.E. 700, 31 Ga App 398
W.Va —Donnally v. Payne, 109 S.E 760, 89 W.Va. 585

24. Ark —Tri-State Transit Co of Louisiana v. Miller, 65 S W.2d 9, 188 Ark 149, 90 A L R. 1389.
Cal —Sanchez v. Pacific Auto Stages, 2 P.2d 845, 116 Cal.App 392.
Minn.—Joseph v. Chicago, B & Q. R. Co, 160 N W 689, 135 Minn. 239.
Mo.—Bogrees v. Wabash Ry. Co, App, 266 S W. 333.
W.Va.—Donnally v. Payne, 109 S.E. 760, 89 W.Va. 585

Alighting at direction of conductor
In an action by a passenger against a carrier for injuries sustained in alighting from a moving train, alleged at the direction and invitation of the conductor, the defense of contributory negligence held for the jury.—Fullerton v. Chicago Great Western R. Co, 199 N W. 93, 159 Minn. 475.

25. N.J.—Karnitsky v Machanic, 109 A. 303, 94 N.J.Law 127.

Riding on step
The fact that the driver of a jitney bus operating as a common carrier permitted a passenger to ride on the step, which was a place of danger, does not disprove that it was negligence per se for plaintiff to ride there, unless the bus was crowded.—Karnitsky v. Machanic, 109 A. 303, 94 N.J Law 127.

f. Acts in Emergencies

The existence of an emergency and the conduct of the passenger confronted therewith as respects a charge of contributory negligence are ordinarily questions of fact addressed to the jury.

Whether in a case of emergency the apprehension of danger was such as reasonably to cause alarm to the passenger,[26] or to justify the conduct he pursued,[27] and whether or not he acted with due care in the emergency,[28] are ordinarily not matters of law but questions of fact for the jury.

g. Persons under Disability

The claimed contributory negligence of a passenger suffering under a disability, such as age or intoxication, is ordinarily a question of fact for the jury's decision.

Whether a person under disability, such as a child, an enfeebled person, or an intoxicated person, was guilty of contributory negligence relative to his injuries is ordinarily a question for the jury under the evidence,[29] and it is not contributory negligence as matter of law for a passenger unable to take care of himself to fail to provide an attendant.[30]

h. Elevator and Escalator Cases

The contributory negligence of a passenger in an elevator or on an escalator is ordinarily a question of fact, although circumstances may reduce the issue to one of law.

In an action to recover damages for injury or death occasioned by the use of defective machinery

26. Md.—Western Maryland R. Co. v. Herold, 22 A. 323, 74 Md. 510, 14 L.R.A. 75.
10 C.J. p 1160 note 94.

Under threat of death

Where a passenger jumped from a moving train to escape other passengers who were pursuing and threatening to kill him, his contributory negligence is not a question of law, but one of fact for the jury.—Utterback v. St. Louis & S. F. Ry. Co., Mo, 189 S.W. 1171.

27. Cal.—Drury v. Los Angeles Ry. Corporation, 282 P. 525, 102 Cal. App. 58.

Clinging to handlebar

Whether danger confronting street car passenger falling off rear platform justified clinging to handlebar held for jury.—Drury v. Los Angeles Ry. Corporation, 282 P. 525, 102 Cal. App. 58.

28. Ala.—Louisville & N. R. Co. v. Martin, 73 So. 909, 198 Ala. 540.
Ill.—Jensen v East St. Louis Ry. Co., 202 Ill.App. 583.
Ky.—McGraw v. Ayers, 58 S.W.2d 378, 248 Ky. 166—Kentucky Traction & Terminal Co. v. Roman's Guardian, 23 S.W.2d 272, 232 Ky. 285.
Wash.—Heva v. City of Seattle, 272 P. 41, 150 Wash. 61.
10 C.J. p 1160 note 95.

Attempt to rescue companion thrown onto trestle

Where passenger on crowded car was thrown off into darkness by violent lurch on a bridge and went on trestle of overhead crossing, and his companion alighted and walked back along trestle from which he fell, whether rescuer's fall was due to railway's negligence, and whether he was foolhardy, were for jury.—Wagner v. International Ry. Co., 133 N.E. 437, 232 N.Y. 176, 19 A.L.R. 1, reversing 180 N.Y.S. 957, 189 App. Div. 925.

Confusion on crossing tracks

Where a passenger alighting from a street car waited until the car had gone a distance of seventy five feet or more and then, in obedience to an apparent signal from the motorman of the car following, she crossed the tracks, and, seeing a car approaching on the other track, became confused and hesitated and was struck, it could not be said as a matter of law that she was guilty of negligence in attempting to cross, since one suddenly put in peril will not be held negligent for choosing the alternative which proved the more dangerous.—Schnurr v. Detroit United Ry., 193 N.W. 772, 222 Mich. 591.

Jumping in wrong direction

That result showed that deceased, whose death resulted from injury caused by his attempt, when emergency arose, to jump from stage plank to transfer boat provided by defendant company for him and other passengers could have escaped mortal injury by jumping on the sand, did not make his act negligent as a matter of law.—Yazoo & M. V. R. Co. v. Hill, 216 S.W. 1054, 141 Ark. 378.

29. Ga.—Madden v. S. L. Mitchell Automobile Co., 94 S.E. 92, 21 Ga. App. 108.
W.Va.—Trippett v. Monongahela West Penn Public Service Co., 130 S.E. 483, 100 W.Va. 319.
10 C.J. p 1157 note 67.

Age

(1) Whether an old woman defective of sight and hearing was guilty of contributory negligence in stepping off of a moving street car, held a question of fact.—Poak v. Pacific Electric Ry. Co., 170 P. 159, 177 Cal. 190.

(2) In an action against a railroad for injuries to an aged female passenger in leaving the train at destination, if the jury found the trainman announced all out for the station, and followed it by telling plaintiff to get off, it is for them to say whether plaintiff was warranted in believing she was to get off before reaching the station, taking into consideration her physical and mental condition.—Clayton v. Philadelphia, B. & W. R. Co., 106 A. 577, 7 Boyce, Del., 343.

Childhood

Negligence of eight year old girl killed by defendant's train is question of fact to be determined from age capacity, intelligence, and experience of deceased.—Molloy v. Chicago Rapid Transit Co., 166 N.E. 530, 335 Ill. 164.

Intoxication

(1) Whether passenger who fell into railroad cut after alighting from street car was intoxicated at all, or to what extent, held for jury, on issue of his contributory negligence.—Alabama Power Co. v. Hall, 103 So. 867, 212 Ala. 638.

(2) Whether deceased passenger, compelled to ride on rear platform of a car by conductor by reason of intoxication and the fact that he was carrying a sack of clams and fish poles, was negligent, having fallen from the car while rounding a bend, held for the jury.—Fardette v. New York & S. Ry. Co., 180 N.Y.S. 179, 190 App.Div. 543.

Evidence held insufficient to take issue to jury

In passenger's action for personal injuries sustained as result of negligent operation of taxicab, evidence regarding intoxication of passenger held insufficient to take issue of contributory negligence to jury, there being no evidence showing causal connection between intoxication and injury.—Yellow Taxicab & Baggage Co. v. Cooke, 42 P.2d 826, 171 Okl. 269.

30. Mont.—Gohn v. Butte Hotel Co., 295 P. 262, 88 Mont. 599.
10 C.J. p 1099 note 50
The duty to have an attendant is considered generally supra § 776.

in an elevator, or by the negligence of the conductor thereof in its operation, the question whether or not the passenger was guilty of negligence which contributed to his injury or death is usually one of fact for the determination of the jury, under the court's instructions as to what constitutes contributory negligence,[31] although under some circumstances it becomes solely a question of law, as where there is no dispute as to the facts, and where the passenger pursued a course of conduct contributing to his injury which, under the circumstances, evinced such a careless disregard for his safety as to constitute contributory negligence per se.[32] The foregoing principles apply also to injuries sustained on a moving stairway or escalator.[33]

§ 804. Instructions

a. In general
b. Conformity to pleadings and issues
c. As to presumptions and burden of proof

a. In General

General rules govern instructions relative to contributory negligence of a passenger, such as one entering, traveling in, or alighting from, a vehicle.

General rules apply to instructions relative to the contributory negligence of a passenger in his action against the carrier,[34] and in accordance therewith the courts have held particular instructions

31. Ala.—Johnson v. Hopkins, 105 So. 663, 213 Ala. 492.
Cal.—McKeon v. Lissner, 262 P. 459, 87 Cal.App. 371.
Ky.—Otis Hidden Co. v. Newhouse, 264 S.W. 731, 204 Ky. 324.
Mich.—Sikora v. Fellowcraft Club, 161 N.W. 826, 195 Mich. 49.
Nev.—Smith v. Odd Fellows Bldg. Ass'n, 205 P. 796, 46 Nev. 48, 23 A.L.R. 38.
N.Y.—Zucker v. Ephraim Realty Corporation, 275 N.Y.S. 593, 243 App. Div. 543—Hoffman v. Ellis, 174 N.Y.S. 362, 106 Misc. 283—Teich v. Seidman's Garage, 188 N.Y.S. 488
Pa.—McKnight v. S. S. Kresge Co., 132 A. 575, 285 Pa. 489.
Tex.—City Nat. Bank v. Pigott, Civ. App., 270 S.W. 234.
10 C.J. p 1160 note 96.

Automatic elevator

In prospective tenant's action against operators of apartment building for injuries caused by defective condition of automatic elevator when she walked into elevator shaft, thinking elevator in place, in which there was evidence that the door would not have been open if the elevator had been in good condition, the question of the prospective tenant's contributory negligence was one for the jury.—McKeon v. Lissner, 223 P. 965, 193 Cal. 297.

Entering elevator not level with floor

It is not negligence, as a matter of law, for one invited to enter an elevator by the opening of the door to step down a foot, nor to step into it without observing whether the platform is exactly even with the floor, the care required being for the jury.—White v. Red Mountain Fruit Co., 199 P. 318, 186 Cal. 335.

Foot over edge of moving elevator

Negligence of plaintiff, aged fifteen years, in allowing his foot to project over the edge of a moving elevator floor, and question whether he had sufficient intelligence to appreciate the danger held a jury question.—Citizens' Bank v. Fairweather, 191 S.W. 911, 126 Ark. 63.

Poking head into shaft

In an action against a power company for injuries to plaintiff when in attempting to signal an elevator he put his head into the shaft, case held for jury under the evidence on the issue of plaintiff's contributory negligence.—Consolidated Gas, Electric Light & Power Co. v. Green, 113 A. 103, 137 Md. 503.

Walking into shaft

Where plaintiff, injured in elevator shaft on the premises of defendant, with whom he had been transacting business, walked through an open door into the shaft in a poorly lighted portion of the building, past defendant's employee, who stood with back to opening, indicating that passengers could enter if they desired, the question whether plaintiff was contributorily negligent was for the jury.—Grote v. Hussmann, 223 S.W. 129, 204 Mo.App. 466.

32. Ill.—Beidler v. Branshaw, 65 N.E. 1086, 200 Ill. 425, reversing 102 Ill.App. 187.
10 C.J. p 1161 note 97.

33. **Escalator not in motion**

In an action by passenger for injuries received on escalator at station, trial judge erred in holding as matter of law that plaintiff was not in the exercise of due care in using an escalator not in motion, it being in evidence that she started up the escalator before she knew that it was not in motion.—Cook v. Boston Elevated Ry. Co., 142 N.E. 824, 248 Mass. 142

34. Ala.—Montgomery Light & Traction Co. v. O'Connor, 85 So. 384, 204 Ala. 24.
Cal.—Graff v. United Railroads of San Francisco, 172 P. 603, 178 Cal. 171—Riley v. Southern Pac. Co., 207 P. 699, 57 Cal.App. 477.
Conn.—Montambault v. Waterbury & Milldale Tramway Co., 120 A. 145, 98 Conn. 584.
Ill.—Eilers v. Peoria Ry. Co., 200 Ill. App. 487.
Mass.—Bilodeau v. Fitchburg & L. St. Ry. Co., 128 N.E. 872, 236 Mass. 526.
Ohio.—Cincinnati Traction Co. v. Burkhardt, 4 Ohio App. 103.
Pa.—Klingensmith v. West Penn Rys. Co., 123 A. 787, 279 Pa. 336.
Tex.—Texas Electric Ry. v. Stewart, Civ.App., 217 S.W. 1081, error refused—Texas & P. R. Co. v. Pierce, 30 S.W. 1122, 10 Tex.Civ.App. 429.
Wash.—Calhoun v. Portland Ry., Light & Power Co., 178 P. 805, 105 Wash. 592.
W.Va.—Trippett v. Monongahela West Penn Public Service Co., 130 S.E. 483, 100 W.Va. 319.
10 C.J. p 1161 note 2—p 1162 note 4, p 1163 note 9—p 1164 note 18, p 1167 notes 25–28.

Confusing character of instructions

(1) An instruction that plaintiff was contributorily negligent in alighting from a moving train unless the carrier failed to stop its train a sufficient length of time to enable her to alight therefrom in safety, and she was compelled to choose between leaving the car while it was moving slowly or being carried beyond her destination, provided she did not act when a reasonably prudent person in the exercise of ordinary care and caution would have refrained from alighting under the circumstances, was confusing under the facts, where there was no testimony she was compelled to make the choice referred to, and the evidence was conflicting as to whether the train stopped long enough to enable her to alight.—Chesapeake & O. R. Co. v. Daniel, 251 S.W. 1007, 199 Ky. 817—Chesapeake & O. R. Co. v. Mollett, 251 S.W. 1005, 199 Ky. 813.

(2) Instructions held not confusing.—Giguere v. Boston & M. R. R., 167 A. 561, 86 N.H. 294.
10 C.J. p 1163 note 11.

Misleading character of instructions

(1) In an action by a crippled pas-

given or requested proper[35] or improper,[36] such as instructions relative to the care required of children and others under disability,[37] or of a person faced with an emergency,[38] or instructions respecting the care or negligence of a passenger awaiting and seeking transportation,[39] entering a conveyance,[40] or in course of transit,[41] or leaving a conveyance.

senger against a railroad company for injuries sustained in being compelled to alight from a passenger train without assistance, an instruction that plaintiff was negligent if he stepped down without looking to see if there was a portable step in place was misleading.—Turner v. Wabash Ry. Co., Mo.App., 211 S.W. 101.

(2) An instruction to effect that plaintiff could not recover if she attempted to alight while train was moving was misleading in that jury might infer that she could not recover if train was moving at any time after she left her seat.—Rooker v. Deering Southwestern Ry. Co., Mo. App., 204 S.W 556.

(3) In an action for injuries to a passenger when thrown from defendant's street car, an instruction on negligence of plaintiff in attempting to alight while car was in motion held not misleading—Northern Texas Traction Co. v. Evans, 193 S.W. 1067, 108 Tex. 356.
10 C.J. p 1163 note 11.

Evidence held sufficient to warrant instruction

(1) Generally.—Harris v. Bush, 196 S.W. 471, 129 Ark. 369.

(2) Slight evidence of a passenger's contributory negligence is sufficient to warrant an instruction thereon.—McDermott v. Louisville & N R. Co., 206 S.W. 6, 182 Ky. 22.

35. Ga.—Southern Ry. Co. v. Bartlett, 162 S.E. 831, 44 Ga.App. 710.
Mo.—Sparks v. Harvey, App., 214 S.W. 249.
Ohio.—Rudin v. Cincinnati Traction Co., 18 Ohio N.P.,N.S., 260
Tex.—Wells Fargo & Co. v. Lowery, Civ.App., 197 S.W. 605, error refused.

36. Ga.—Cooper v. Georgia Power Co., 162 S.E. 302, 44 Ga.App. 581—Seaboard Air Line Ry. v. Cooper, 93 S.E. 281, 20 Ga.App. 550.
Ill.—Eilers v. Peoria Ry. Co., 200 Ill.App. 487.
Mass.—Bilodeau v. Fitchburg & L. St Ry. Co., 128 N.E. 872, 236 Mass. 526.

37. Cal.—Mudrick v. Market St. Ry. Co., App., 74 P.2d 328.
Ky.—Fields v. Cannon Ball Cab & Bus Co., 25 S.W.2d 1046, 233 Ky. 383
Ohio.—Cincinnati Traction Co. v. Burkhardt, 4 Ohio App. 103.
Tex.—San Antonio Public Service Co. v. Fraser, Civ.App., 91 S.W.2d 948.
W.Va.—Trippett v. Monongahela West Penn Public Service Co., 130 S.E. 483, 100 W.Va. 319.

Boy on steps of moving train

In an action for the death of plaintiff's fourteen-year old son by falling through an open vestibule door of a train on which he was a passenger, an instruction defining "contributory negligence," as the failure to exercise such care for his own safety as would be used by a boy of the same age, capacity, and experience under the same or similar circumstances, held not erroneous without proof of his want of discretion, there being no presumption that he possessed sufficient intelligence to have known and appreciated the danger incident to going on the platform and steps while the train was in motion.—Galveston, H. & S.A. Ry. Co. v. Henry, Tex.Civ.App., 252 S.W. 210.

Contributory negligence and carrier as insurer

In action for injuries to eight year old boy from falling or jumping off platform of moving passenger car, where evidence justified defense of contributory negligence, instruction making carrier absolute insurer of safety of passengers, was reversible error.—Trippett v. Monongahela West Penn Public Service Co., 130 S.E. 483, 100 W.Va. 319.

38. Ala.—Alabama Great Southern R. Co. v. Hunt, 86 So. 97, 17 Ala.App. 566, certiorari granted Ex parte Alabama Great Southern R. Co., 86 So. 100, 204 Ala. 504.

39. U.S.—St. Louis Merchants' Bridge Terminal Ry. Co. v. Munger, Mo., 254 F. 298, 165 C.C.A. 586
Ala.—Montgomery Light & Traction Co. v. O'Connor, 85 So. 384, 204 Ala. 24.
Mo.—Sugarwater v. Fleming, 293 S.W. 111, 316 Mo. 742—Willi v. United Rys. Co. of St. Louis, 274 S.W. 24—Gurtman v. Lusk, 208 S.W. 61
Pa.—Klingensmith v. West Penn Rys. Co., 123 A. 787, 279 Pa. 336.
Tex.—Texas Electric Ry. v. Stewart, Civ.App., 217 S.W. 1081, error refused—St. Louis Southwestern Ry. Co. of Texas v. McMichael, Civ.App., 191 S.W. 186, error refused.

Assumptions on signalling street car

Omission to charge that, if decedent signaled car of desire to become passenger, she was entitled to assume that motorman would see signal and control progress of car, was error, and omission to charge that decedent was entitled to assume that car would approach stopping point under control, and that assumption should be considered on question of contributory negligence, was error.—Sacks v. Connecticut Co., 146 A. 494, 109 Conn. 221.

40. Cal.—Ginochio v. City and County of San Francisco, 228 P. 428, 194 Cal. 159—Riley v. Southern Pac. Co., 207 P. 699, 57 Cal.App. 477
Ga.—Georgia Ry. & Power Co. v. Freeney, 96 S.E. 575, 22 Ga.App. 457.
Ill.—Little v. Peoria Ry. Co., 215 Ill.App. 385.
Mass.—Gerber v. New York Cent. R.R., 192 N.E. 837, 288 Mass. 318.
Minn.—Van House v. Canadian Northern Ry. Co., 192 N.W. 493, 155 Minn. 57.
Mo.—Vrooman v. Harvey, 197 S.W. 118—Sparks v. Harvey, App., 214 S.W. 249
Or.—Kuniholm v. Portland Electric Power Co., 289 P. 1055, 133 Or. 246
Tex.—San Antonio Public Service Co. v. Fraser, Civ.App., 91 S.W.2d 948.

Attempt to board in narrow space

Where deceased went into narrow and obviously dangerous place in attempt to board a street car and was crushed, instruction that if deceased had full time to board car and attempted to board moving car railroad was not liable held erroneous, and refusing to instruct that deceased was bound to exercise reasonable care and that railroad employees could assume that he would exercise senses held error.—Virginia Ry. & Power Co. v. Burr, 133 S.E. 776, 145 Va. 338.

Boarding moving car

In action for injuries while attempting to board car, after motorman had slowed down in response to signal given, instruction for defendant company that plaintiff had no right to attempt to board car while in motion held erroneous.—Vrooman v. Harvey, Mo., 197 S.W. 118.

Holding with one hand only

In action by passenger for injuries alleged to have been received in boarding train, contributory negligence instruction should have been given where passenger had used only right hand in gripping railing to steps without also grasping opposite railing with left hand.—Cincinnati, N.O. & P. Ry. Co. v. Duvall, 92 S.W.2d 363, 263 Ky. 387.

41. Cal.—Strong v. Olsen, 241 P. 107, 74 Cal.App. 518.
Conn.—Montambault v. Waterbury & Milldale Tramway Co., 120 A. 145, 98 Conn. 584.
D.C.—Capital Traction Co. v. Copland, 47 App.D.C. 152
Ga.—Georgia Ry. & Power Co. v. Ogletree, 134 S.E. 830, 35 Ga.App. 765.
Ky.—Adams v. Hilton, 110 S.W.2d 1088, 270 Ky. 818—Shelton Taxi

ance,[42] as in the case of one alighting from a moving vehicle,[43] or instructions relative to care or negligence of a passenger in an elevator.[44] The instruction should include a proper charge as to the degree of care required of the passenger under the circumstances,[45] his right to rely on the exercise of due care on the part of the carrier,[46] as to his neg-

Co. v. Bowling, 51 S.W.2d 468, 244 Ky. 817.
Mich.—Herter v. City of Detroit, 222 N.W. 774, 245 Mich. 425.
N.J.—Thibodeau v. Hamley, 112 A. 320, 95 N.J.Law 180.
Pa.—Panek v. Scranton Ry. Co., 102 A. 274, 258 Pa. 589.
Tex.—St. Louis Southwestern Ry. Co. of Texas v. Christian, Civ.App., 191 S.W. 175, error refused.
Wis.—Naus v. Chicago & M. Electric Ry. Co., 201 N.W. 281, 185 Wis. 178.

Assumption of risk while on platform or steps

(1) In passenger's action for injury when thrown from front platform of electric car, requested instruction as to his assumption of risk while standing there was properly refused, where it included risk from motorman's negligent operation of car.—Graff v. United Railroads of San Francisco, 172 P. 603, 178 Cal. 171.

(2) Instruction that passenger assumed ordinary risk incident to riding on street car steps held proper.—Simmons v. Wells, 20 S.W.2d 659, 323 Mo. 882.

Duty to caution driver

In action by taxicab passenger for injuries, where owing to storm, there was considerable danger, and plaintiff realized that driver was not exercising proper caution, and was driving too fast, and had opportunity to warn him, but did not, instructing jury, that if ordinarily prudent person would have cautioned driver, and plaintiff's failure to do so, contributed to accident, he was guilty of contributory negligence and could not recover, was proper.—Garrow v. Seattle Taxicab Co., 238 P. 623, 135 Wash. 630, 45 A.L.R. 293.

Leaving seat

(1) In an action for injuries to a passenger, it is error to refuse an instruction to the effect that, if the plaintiff left his seat on the rear platform of the car and stepped on the running board, while the car was in motion and traveling twenty-five miles an hour, he was guilty of contributory negligence.—Washington Ry. & Electric Co. v. Kramer, 44 App. D.C. 154 b.

(2) Instructions in passenger's action against street railroad, in effect stating that leaving seat while car was moving constituted contributory negligence, held properly denied.—Capital Traction Co. v. Lyon, 24 F.2d 262, 57 App.D.C. 396.

Riding with leg protruding

Certain conduct may be so obviously negligent as to justify a court in so describing it, and hence there was no error in a charge that "a passenger riding in an automobile in the street of a populous community with one leg protruding from one of the doors of the car in such way as to make it liable to come in contact with passing objects is negligent in conduct, and defendant would not be liable if this negligence was a proximate cause of his injury"—Guilfoile v. Smith, 116 A. 237, 97 Conn. 271.

42. D.C.—Capital Traction Co. v. Hoover, 45 App.D.C. 247.
Ga.—Savannah Electric Co. v. Johnson, 103 S.E. 798, 25 Ga.App. 517.
Ill.—See Louden v. Terminal R. Ass'n of St. Louis, 206 Ill.App. 87.
Mich.—Kirkpatrick v. Muskegon Traction & Lighting Co., 162 N.W. 99, 195 Mich. 519.
Mo.—Hereford v. Kansas City Rys. Co., 220 S.W. 899—Turner v. Wabash Ry. Co., App., 211 S.W. 101.
Pa.—Baron v. Wilkes-Barre Ry. Co., 71 Pa.Super. 103.
Tex.—Drake v. Northern Texas Traction Co., Civ.App., 197 S.W. 610, error refused—Galveston, H. & S.A. Ry. Co. v. Brassell, Civ.App., 186 S.W. 428, error refused—Ft. Worth & D. C. Ry. Co. v. Yantis, Civ.App., 185 S.W. 969, error refused.

Knowledge that car was approaching

Instruction that if plaintiff knew that car which struck him was approaching, or in exercise of reasonable observation and care might have known it, he could not recover, was correct.—Laws v. Hammond, W. & E. C. Ry. Co., 128 N.E. 52, 79 Ind.App. 650.

43. U.S.—Southern Ry. Co. v. Douglas, C.C.A.Tenn., 289 F. 325.
Ala.—Van Tinder v. Birmingham Ry., Light & Power Co., 80 So. 858, 202 Ala. 474.
Ark.—St. Louis, I. M. & S. Ry. Co. v. Duffey, 133 S.W. 748, 122 Ark. 429.
Ga.—Atlantic Coast Line R. Co. v. Andrews, 93 S.E. 261, 20 Ga.App. 605.
Ill.—See Stanton v. Chicago City Ry. Co., 205 Ill.App. 385, affirmed 119 N.E. 291, 283 Ill. 256.
Ky.—Chesapeake & O. R. Co. v. Daniel, 251 S.W. 1007, 199 Ky. 817—Chesapeake & O. R. Co. v. Mollett, 251 S.W. 1005, 199 Ky. 813.
Minn.—Leonczak v. Minneapolis, St. P. & S. S. M. Ry. Co., 201 N.W. 551, 161 Minn. 304—Van House v. Canadian Northern Ry. Co., 192 N.W. 493, 155 Minn. 57, 28 A.L.R. 357.
Mo.—Keppler v. Wells, 238 S.W. 425—Rooker v. Deering Southwestern Ry. Co. App., 204 S.W. 556.
Tex.—Northern Texas Traction Co. v. Evans, 193 S.W. 1067, 108 Tex. 356.

44. Cal.—White v. Red Mountain Fruit Co., 199 P. 318, 186 Cal. 335.

45. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Christian, Civ. App., 191 S.W. 175, error refused.
10 C.J. p. 1162 note 5.

Care as affected by passenger's intoxication

Where street railroad defended action, for death of prospective passenger who lost balance on car step and fell backward to pavement, on ground that he was intoxicated, conventional definition of ordinary care, as used in contributory negligence instruction, as that degree of care that person of ordinary prudence would use under same or similar circumstances held objectionable as not including element of intoxication.—San Antonio Public Service Co. v. Fraser, Tex.Civ.App., 91 S.W.2d 948.

"Ordinary" and "high" degrees of care

In street car passenger's personal injury action against street car company, court having defined term "ordinary care" as applied to passenger was required to define term "high degree of care" as applied to company.—Dallas Ry. & Terminal Co. v. Travis, 78 S.W.2d 941, 125 Tex. 11, affirming, Civ.App., 46 S.W.2d 743.

Charge held sufficient

Charge that, if passenger could have anticipated that protruding arm out of window would result in its breaking, he was guilty of contributory negligence, held equivalent to instruction that standard of care chargeable to him was that of ordinarily prudent man.—Georgia Ry. & Power Co. v. Ogletree, 134 S.E. 830, 35 Ga.App. 765.

46. Ind.—Bird Transfer Co. v. Krug, 65 N.E. 309, 30 Ind.App. 602.

Charge relieving passenger of duty of self-care

A charge, in a passenger's action for injuries alleged to have been received when he stepped on a banana peel on the car sill and fell to the platform, that the passenger could rely on the carrier keeping its floor, doorsill, and platform free and clear of banana peeling and other slippery substance is erroneous, as relieving the passenger from any obligation to watch out for his own safety.—Ft. Worth & D. C. Ry. Co. v. Yantis, Tex. Civ.App., 185 S.W. 969, error refused.

Instruction sufficient

In action by passenger for inju-

ligence being the proximate cause of his injuries,[17] as to comparative negligence, where such doctrine prevails;[48] and where the facts make the doctrine of the last clear chance or humanitarian rule applicable, but not otherwise, the court should give proper instructions covering such doctrine.[49]

b. Conformity to Pleadings and Issues

Instructions relative to a passenger's contributory negligence should be given only where such issue has been properly raised, and should conform to the pleadings and issues.

Where defendant pleads contributory negligence on the part of plaintiff, and there is evidence tending to show it, a charge submitting the question to the jury may and should be given[50] Where, however, the issue of contributory negligence is not raised by either the pleadings or the evidence, the court need not and should not instruct the jury on that question,[51] and, where the evidence is such that contributory negligence must be inferred therefrom, the court may and should draw the inference and instruct the jury accordingly.[52] The court, in submitting the issue of contributory negligence, should confine the charge strictly to the acts pleaded and relied on as evidence;[53] and hence an in-

ries from collision between street car and truck, an instruction as to passenger's right to rely on employees exercising high degree of care, although involved and lacking clearness, held not prejudicial error. —Naus v. Chicago & M. Electric Ry. Co., 201 N.W. 281, 185 Wis. 178.

47. Ala.—Southern R. Co. v. Morgan, 59 So. 432, 178 Ala. 590.
10 C.J. p 1162 note 7.

Construction and propriety of instructions as to proximate cause generally

Cal.—Graff v. United Railroads of San Francisco, 172 P. 603, 178 Cal. 171.
Kan.—Hopson v. Union Traction Co., 167 P. 1059, 101 Kan. 499.
N.C.—Dunn v. Atlantic Coast Line R. Co., 93 S.E. 734, 174 N.C 254
Tex.—Northern Texas Traction Co. v. Evans, 193 S.W. 1067, 108 Tex. 356.
Wash.—Calhoun v. Portland Ry, Light & Power Co, 178 P. 805, 105 Wash. 593.

Riding on bumper as condition and not cause of injury

Where a passenger told by his conductor to take the car ahead was crushed by such car and the one following because of the release of the brakes on the front car, which thereupon backed into the rear car, an instruction that, if plaintiff was attempting to ride on the bumper, he was not in the exercise of due care, held erroneous, plaintiff's stand on the bumper being a condition, and not the proximate cause of the injury.—Montambault v. Waterbury & Milldale Tramway Co., 120 A. 145, 98 Conn. 584.

48. Ga.—Southern R. Co. v. Gore, 58 S.E. 180, 128 Ga. 627.
Tex.—Missouri, etc, R Co. v. Cannady, 82 S.W. 1069, 36 Tex.Civ.App. 646.
10 C.J. p 1163 note 8.

49. U.S.—Houston v. Delaware, L. & W. R. Co, C.C.A.N.J., 274 F. 599.
Ark.—Ft Smith Light & Traction Co. v. Phillips, 206 S.W. 453, 136 Ark 310.
Cal.—Hellman v. Los Angeles Ry Corporation, 27 P.2d 946, 135 Cal. App 627, rehearing denied 28 P.2d 384, 135 Cal.App 627.
Conn.—Sacks v. Connecticut Co., 146 A. 494, 109 Conn 221.
Md.—United Rys. & Electric Co. of Baltimore v Perkins, 136 A 50, 152 Md. 105.
Mo.—Gott v. Kansas City Rys. Co, 222 S.W. 827—Higgins v. Terminal R Ass'n of St. Louis, App., 97 S.W.2d 892—Edmondson v. Missouri Pac. R Co, App, 8 S.W.2d 103—Flynn v. Kansas City Rys. Co., App., 226 S.W. 974.
N.H.—Giguere v. Boston & M. R. R., 167 A 561, 86 N.H 294.
Va.—Virginia Ry. & Power Co. v Burr, 133 S.E. 776, 145 Va. 338—Gordon v. Director General of Railroads, 104 S.E. 796, 128 Va 426.

As to burden of care on carrier

In an action against a railroad for personal injuries by being struck on the station platform by an incoming train instructions on the doctrine of the last clear chance held not erroneous as imposing on defendant a greater burden than that of using ordinary care to avoid injuring plaintiff after the discovery of his peril.—Missouri, K. & T Ry. Co. v. Smith, 223 P. 373, 97 Okl 152.

Sufficiency of evidence to warrant instruction

In an action for injuries to a street car passenger, struck by the rear fender as the car rounded a curve after the passenger alighted, evidence held sufficient to warrant an instruction on the doctrine of last clear chance—Virginia Trust Co v. Raymond, 91 S.E. 613, 120 Va. 674.

50. Ill.—See Louden v. Terminal R. Ass'n of St. Louis, 206 Ill App. 87.
Kan.—Hunter v. Joplin & P Ry. Co., 197 P. 1092, 109 Kan. 169—Binder v. Union Pac. R. Co., 194 P. 314, 108 Kan. 47.
10 C.J. p 1165 note 19.

Frozen feet

In an action by a passenger for damages for frozen feet, where carrier set up failure of plaintiff to complain or notify the conductor that the car was cold, as constituting contributory negligence, it was error to refuse to instruct respecting plaintiff's duty in such respect.—Zoccolillo v Oregon Short Line R Co., 177 P. 201, 53 Utah 39.

Instructions construed as not excluding contributory negligence

Instructions in action by passenger who fell off platform of street car held not to exclude contributory negligence in attempting to board car while in motion.—Drury v. Los Angeles Ry. Corporation, 282 P. 525, 102 Cal App. 58.

51. Mass.—Gerber v. New York Cent. R. R., 192 N.E. 837, 288 Mass. 318.
Mo.—Scott v. Kansas City Rys. Co., 229 S.W. 178.
Ohio.—James v. Cincinnati Traction Co., 146 N.E. 211, 111 Ohio St. 710.
Pa.—Patterson v. Pittsburgh Rys. Co., 185 A 283, 322 Pa. 125.
10 C.J. p 1165 note 20.

Standing in taxi

In an action for injuries to a passenger in a taxicab, where the only evidence of alleged contributory negligence in standing up in the cab while intoxicated, as a result of which he staggered through a glass partition, was the testimony of driver that a companion of plaintiff made a statement in the latter's presence that if he had been seated he would not have gone through the glass, defendant was not entitled to have the jury instructed on the question. —Ramlo v. 500 Taxicab Co., 206 P. 20, 119 Wash 379.

Struck by mail sack

Evidence, in action for injuries to one waiting on station platform to board train when struck by mail sack thrown therefrom, held not to warrant instruction on contributory negligence.—Missouri Pac. R. Co. v. Angus, 65 S.W.2d 543, 188 Ark. 300.

52. Md.—Jackson v. Hines, 113 A. 129, 137 Md. 621.

53. Mo.—Keppler v. Wells, 238 S.W. 425.
10 C.J. p 1165 note 21.

struction is erroneous which is not applicable to the pleadings and the evidence,[54] as where it ignores or omits to charge on a material matter in issue,[55] or on a material part of the evidence,[56] although where the issue is raised by the evidence, an instruction thereon may be proper even though it has not been raised by the pleadings.[57]

c. As to Presumptions and Burden of Proof

The court should instruct the jury properly as respects presumptions affecting the issue of a passenger's contributory negligence and relative to the burden of proof on such question.

The court should duly instruct the jury relative to presumptions affecting the issue of a passenger's contributory negligence,[58] and as to the burden of proof.[59] In jurisdictions where the burden is on plaintiff to negative contributory negligence, an instruction to this effect should be given;[60] but in jurisdictions which require defendant to show con-

Alighting passenger

In action for injuries to a passenger received while alighting, the charge on contributory negligence should be confined to such acts or omissions as are alleged and supported by evidence.—Payne v. Kindel, Tex.Civ.App., 239 S.W. 1011.

Cold waiting room

Separate charge as to husband's contributory negligence held not warranted in action against railroad for failure to heat waiting room.—Gulf, C. & S. F. Ry. Co. v. Williams, Tex. Civ.App., 290 S.W. 846.

Standing or moving car

Instruction that plaintiff was not contributorily negligent in going on street car steps preparatory to boarding car held improperly given as submitting plaintiff's contributory negligence even if she tried to board moving street car, although pleadings were limited to her boarding standing car.—Hellman v. Los Angeles Ry. Corporation, 27 P.2d 946, 135 Cal.App. 627, rehearing denied 28 P.2d 334, 135 Cal.App. 627.

Instructions sufficiently supported by pleading and evidence

(1) Generally.

Ga.—Georgia Power Co. v. Holmes, 165 S.E. 284, 175 Ga. 487, reversing Holmes v. Georgia Power Co., 162 S.E. 403, 44 Ga.App. 588, and conformed to 165 S.E. 918, 45 Ga.App. 826.

Ind.—Laws v. Hammond, W. & E. C. Ry. Co., 128 N.E. 52, 79 Ind.App. 650.

Mo.—Sugarwater v. Fleming, 293 S.W. 111, 316 Mo. 742.

N.J.—Ploeser v. Central R. Co. of New Jersey, 105 A. 228, 92 N.J.Law 490.

(2) Humanitarian doctrine.

Ark.—Reed v. Baldwin, 92 S.W.2d 392, 192 Ark. 491.

Mo.—Schimmelpfenning v. Wells, 24 S.W.2d 154.—Amos v. Fleming, 285 S.W. 134, 221 Mo.App. 559.

10 C.J. p 1165 note 21 [a].

54. Cal.—Gainer v. United Railroads of San Francisco, 208 P. 1013, 58 Cal.App. 459.
Ga.—Hill v. Chattanooga Ry. & Light Co., 93 S.E. 1027, 21 Ga.App. 104.
Ill.—See Louden v. Terminal R. Ass'n of St. Louis, 206 Ill.App. 87.
Ky.—Payne v. Simmons, 255 S.W. 863, 201 Ky. 33, 33 A.L.R. 814.
Wash.—Johnson v. City of Seattle, 250 P. 409, 141 Wash. 385.
10 C.J. p 1166 note 22.

Assumption of risk

In action for injuries sustained by plaintiff on street car step not based on ordinary movement of car, instruction on assumption of risk held properly refused.—Amos v. Fleming, 285 S.W. 134, 221 Mo.App. 559.

55. Mass.—Krock v. Boston El. R. Co., 101 N.E. 968, 214 Mass. 398.
10 C.J. p 1166 note 23.

56. Ark.—St. Louis, etc., R. Co. v. Shaw, 125 S.W. 654, 94 Ark. 45, 140 Am.S.R. 98.
10 C.J. p 1167 note 24.

57. Ohio.—Rickabaugh v. Youngstown Municipal Ry. Co., 9 N.E.2d 900, 55 Ohio App. 431.

Alighting by way of known icy step

In passenger's action for injuries received in alighting from street car, charge on issue whether passenger was contributorily negligent in descending from car by way of known icy step was not error, where issue arose from evidence, notwithstanding it was not raised by the pleading.—Rickabaugh v. Youngstown Municipal Ry. Co., 9 N.E.2d 900, 55 Ohio App. 431.

58. Ga.—Hill v. Chattanooga Ry. & Light Co., 93 S.E. 1027, 21 Ga.App. 104.
Mo.—Lewis v. Illinois Cent. R. Co., 3 S.W.2d 371, 319 Mo. 233.
Tex.—Texas & N. O. Ry. Co. v. Rooks, Com.App., 292 S.W. 536, affirming, Civ.App., 283 S.W. 622, and rehearing denied, Com.App., 293 S.W. 554.—Drake v. Northern Texas Traction Co., Civ.App., 197 S.W. 610 error refused.
Wash.—Alstead v. Kapper, 236 P. 799, 135 Wash. 21.

Assumption of risk

In action against street car company for injuries sustained by passenger on car which collided with automobile, refusal to instruct that passenger was presumed to have taken upon himself risks incident to traveling while car was being carefully operated held error where not substantially covered by any other instruction.—Koon v. Monongahela West Penn Public Service Co., W.Va., 192 S.E. 332.

Riding on platform

In passenger's action for injury, instruction that as matter of law, notwithstanding his place of added peril on front platform legal presumption of negligence arose against carrier from fact of injury was erroneous.—Graff v. United Railroads of San Francisco, 172 P. 603, 178 Cal. 171.

Change of presumption

The presumption established by Gen.L. c 231 § 85, that a person injured or killed was in the exercise of due care, etc., disappears when evidence is introduced showing the facts bearing on the question of care, and court erred, in passenger's action for injuries, in charging that, unless defendant satisfied them that plaintiff was not exercising due care, "then the presumption remains with her."—Bagnell v. Boston Elevated Ry. Co., 142 N.E. 63, 247 Mass. 235.

59. Ga.—Rome Ry. & Light Co. v. King, 126 S.E. 294, 33 Ga.App. 383.

Proper instruction

In an action for injuries to a passenger when a step broke, defendant's granted prayer that the burden was on plaintiff to establish by the weight of evidence that his injuries were caused by defendant's negligence, etc., properly submitted the issue of contributory negligence.—Hines v. Watkins, 112 A. 299, 137 Md. 211.

Improper instruction

Instruction that railroad must prove passenger's contributory negligence by preponderance of evidence held erroneous as limiting source from which evidence must come.—Pittsburgh, C., C. & St. L. Ry. Co. v. Stephens, 157 N.E. 58, 86 Ind.App. 251.

Degree of passenger's intoxication

Instruction that defendant had the burden of proving that degree of plaintiff's intoxication was the cause of injury was erroneous.—Lewis v. Illinois Cent. R. Co., 3 S.W.2d 371, 319 Mo. 233.

60. Iowa.—Hutchens v. Cedar Rapids, etc., R. Co., 103 N.W. 779, 128 Iowa 279.

tributory negligence on the part of plaintiff, an instruction to this effect is proper,[61] and a charge which in effect instructs the jury that the burden is on plaintiff to prove want of contributory negligence is erroneous.[62] Where, however, the issue of contributory negligence is raised by plaintiff's own evidence, it has been held error to instruct that the burden of proving contributory negligence is on defendant.[63]

§ 805. Verdict and Findings

General rules control the verdict and findings in actions involving the contributory negligence of a passenger.

General rules apply to the verdict and findings relative to the contributory negligence of a passenger.[64] The court may refuse to submit for special findings questions which cannot control or affect the general verdict.[65] In the absence of statute no particular form is required in a submission of a special interrogatory as to contributory negligence; it is sufficient if it substantially presents the issue.[66] Where the special findings can be reconciled with the general verdict, the latter will control and judgment must be entered accordingly;[67] but if the special findings are in irreconcilable conflict with the general verdict, they will control such verdict and judgment must be entered on them notwithstanding the general verdict.[68] In order to support a judgment thereon the findings must not be inconsistent.[69] A general verdict or finding must be supported by the weight of the evidence; otherwise it may be set aside,[70] or a judgment thereon reversed,[71] and a new trial granted.[72]

J. EJECTION OF PASSENGERS AND INTRUDERS

§ 806. Right to Eject and Grounds Therefor in General

A person rightfully on a carrier's vehicle as a passenger may not be ejected without good cause.

While a person who is rightfully on a carrier's vehicle may not be lawfully ejected without good cause,[73] yet, as will appear in §§ 808–829 infra, a carrier may properly eject a person from its vehicle for various reasons. Even when lawful, however, the ejection must be in a proper manner, see infra §§ 822–824, and at a proper time and place, see infra § 821.

61. Cal.—Hellman v. Los Angeles Ry. Corporation, 27 P.2d 946, 135 Cal.App. 627, rehearing denied 28 P.2d 384, 135 Cal.App. 627.
Tex.—Smith v. Dallas Ry. Co., Civ. App., 8 S.W.2d 548, error dismissed —Texas & N. O. R. Co. v. Rooks, Civ.App., 283 S.W. 622, affirmed, Com.App., 292 S.W. 536, rehearing denied 293 S.W. 554
10 C.J. p 1167 note 31

62. Cal.—Riley v. Southern Pac. Co., 207 P. 699, 57 Cal.App. 477.
10 C.J. p 1167 note 32.

63. Md.—United R., etc., Co. v. Riley, 71 A. 970, 109 Md. 327.
10 C.J. p 1167 note 33.

64. Ind.—Louisville, etc., R. Co. v. Miller, 37 N.E. 343, 141 Ind. 533
Tex.—Darden v. Southern Tract. Co., Civ.App., 172 S.W. 200—Texas, etc., R. Co. v. Gray, Civ.App., 71 S.W. 316.
10 C.J. p 1167 note 34.

Findings as to passenger's negligence requiring judgment for carrier

In an action by plaintiff who was injured in jumping from a moving train which he had boarded for the purpose of assisting passengers, special findings showing that he jumped from the train held to necessitate judgment for defendant showing plaintiff's contributory negligence—Cannon v. Atchison, T. & S. F. Ry. Co., 167 P. 1050, 101 Kan. 363, L.R.A. 1918A 559.

Construction of finding, where passenger stood on platform

In an action for injuries to a passenger from the shock of a collision while standing on the platform of a moving train, contrary to Revisal 1905 § 2628, and a posted rule of the carrier a finding of the jury that plaintiff was not injured by the negligence of defendant held equivalent to a finding that defendant's negligence in causing the collision was not the proximate cause of plaintiff's injury.—Bane v. Norfolk & S. R. Co., 97 S.E. 11, 176 N.C. 247, 2 A.L.R. 90.

Verdict justified

In action against taxicab company for conscious suffering of passenger who was fatally injured when taxicab driver attempted to pass between bus and automobile, verdict for plaintiff was justified under allegation that negligence of company's servant resulted in pain and suffering of passenger—Finnegan v. Checker Taxi Co., Mass., 14 N.E.2d 127.

65. Mich.—Dykstra v. Grand Rapids, etc., R. Co., 130 N.W. 320, 165 Mich. 13.
10 C.J. p 1168 note 35.

66. Wis.—Ward v. Chicago, etc., R. Co., 78 N.W. 442, 102 Wis. 215.

67. Ind.—Indiana R. Co. v. Maurer, 66 N.E. 156, 160 Ind. 25—Southern R. Co. v. Roach, 78 N.E. 201, 38 Ind.App. 211.

68. Ky.—Adams v. Louisville, etc., R. Co., 32 Ky. 603, 6 Ky.L. 686.

69. Tex.—St. Louis, S. F. & T. Ry. Co. v. Gibson, Civ.App., 211 S.W. 263
10 C.J. p 1168 note 39.

Findings not inconsistent

(1) Findings held not affirmatively to show contributory negligence in crossing track to get on right side to board so as to be inconsistent with general verdict for plaintiff.—Indiana Union Traction Co. v. Hiatt, 114 N.E. 478, 65 Ind.App. 233, rehearing denied 115 N.E. 101, 65 Ind.App. 233.

(2) Affirmative findings in answer to questions whether passenger's failure to use ordinary care contributed to cause the accident when he fell down basement stairway held merely to establish that passenger's negligence was a contributing cause, and not that it was a proximate cause.—Crow v. Southwestern Transp. Co., Tex.Civ.App., 73 S.W.2d 607, error refused

70. N.Y.—Wolf v. Metropolitan St. R. Co., 81 N.Y.S. 257, 82 App.Div. 629
Ohio.—Cincinnati, etc., Electric R. Co. v. Lohe, 27 Ohio Cir.Ct. 138.
10 C.J. p 1168 note 40.

71. N.Y.—Maloney v. Metropolitan St. R. Co., 88 N.Y.S. 638, 95 App. Div. 393—Clancy v. Yonkers R. Co., 84 N.Y.S. 789, 88 App.Div. 612.

72. Mich.—Crowe v. Michigan Cent. R. Co., 106 N.W. 395, 142 Mich. 692.

73. Iowa.—Meyers v. Keokuk Electric Co., 180 N.W. 738, 190 Iowa 693.
10 C.J. p 727 note 81.

Ejection from palace and sleeping cars is considered in § 913 infra.

§ 807. Statutory Regulations

Statutory regulations and provisions with respect to the ejection of passengers and intruders are treated in the sections to the subject matter of which they relate infra §§ 808–829.

§ 808. Persons Objectionable as Passengers

A carrier not only has the right, but may have the duty, to eject a person who is objectionable, offensive, dangerous, or annoying, or who may reasonably be expected to become so, even though such person has paid his fare or another passenger has promised to look after him.

It is not only the right of a carrier to eject from the vehicle a person who is objectionable, offensive, dangerous, or annoying to other passengers,[74] or who so conducts himself, even without any overt act of disturbance, as reasonably to warrant the inference that he may become a source of annoyance,[75] but under certain circumstances it may become the duty of the carrier to eject such a person,[76] as where his conduct or condition is such as to cause serious annoyance, discomfort, or danger to other passengers.[77] The fact that the passenger has paid his fare,[78] or that another passenger has promised to look after him,[79] does not affect the right or duty.

The same right of control or ejection may be exercised with reference to the station or office of the carrier.[80]

Persons who may be objectionable include an intoxicated passenger who is causing, or threatening to cause, annoyance, danger, or discomfort to other passengers;[81] a person who is sick and in a helpless

74. Ky.—Casteel v. American Airways, 88 S.W.2d 976, 261 Ky. 818.
N.J.—Spalt v. Eaton, 192 A. 576, 118 N.J.Law 327—Frazier v. Public Service Ry. Co., 116 A. 769, 97 N.J. Law 37.
Pa.—Gerlach v. Pittsburgh Rys. Co., 94 Pa.Super. 121.
10 C.J. p 727 note 82, p 729 note 92.

Corpus Juris cited
Mo.—Parris v. Deering Southwestern Ry. Co., 208 S.W. 97, 98, 203 Mo.App. 182.

Rude and profane conduct
Pa.—Gerlach v Pittsburgh Rys. Co., 94 Pa Super. 121.

Violent and insulting conduct
N.J.—Frazier v. Public Service Ry. Co, 116 A. 769, 97 N.J.Law 37.

Under statutes
(1) In Alabama under a statute providing that conductors of trains may eject passengers when disorderly, or when using profane, vulgar, or obscene language, it is immaterial to the right of a conductor to eject a passenger for using obscene language whether his conduct is in fact offensive to other passengers.—Nashville, etc, R. Co., v. Moore, 41 So. 984, 148 Ala. 63.

(2) In Kentucky under the express provisions of a statute it is the duty of the conductor to put off a passenger who shall, in the hearing of persons or other passengers and to their annoyance, utter obscene or profane language, or behave in a boisterous or riotous manner, and the conductor need not wait until he reaches the next station.—Louisville, etc., R. Co. v. Setser, 128 S. W. 341, 138 Ky 476.

(3) In West Virginia the right of ejection authorized by a statute giving officers of common carriers the right to eject disorderly persons from trains, is not dependent on the personal safety, or reasonable comfort or convenience of other passengers.—Wilhelm v. Parkersburg, etc, R. Co, 82 S.E. 1089, 74 W.Va 678.

Assistance of other passengers
The conductor may call to his aid, in ejecting an offender, such passengers as are willing to assist him—Spalt v. Eaton, 192 A. 576, 118 N.J Law 327.
What persons may be refused transportation see supra § 538.

75. N.J.—Spalt v. Eaton, supra.
10 C.J. p 728 note 88, p 729 note 92.

Female of notorious reputation
A railroad company may rightfully exclude from the women's car a female passenger whose reputation is so notoriously bad as to furnish reasonable grounds to believe that her conduct will be offensive, or whose demeanor at the time is annoying to other passengers; but she cannot be excluded for unchastity not affecting her conduct nor furnishing reasonable grounds to believe that she will misbehave in the car, when her conduct at the time is ladylike and unexceptionable—Brown v. Memphis & C R. Co, C.C Tenn., 7 F. 51.

76. Ky.—Casteel v. American Airways, 88 S.W.2d 976, 261 Ky 818.
Mo.—Liljegren v. United Rys. of St. Louis, App., 227 S.W. 925
N.J.—Falzarano v. Delaware, L & W. R. Co, 194 A. 75, 119 N.J Law 76—Spalt v. Eaton, 192 A 576, 118 N.J.Law 327—Frazier v. Public Service Ry. Co., 116 A. 769, 97 N J Law 37.

77. Ky.—Casteel v. American Airways, 88 S.W.2d 976, 261 Ky 818
Mo.—Liljegren v United Rys. of St Louis, App., 227 S.W. 925.
N.J.—Falzarano v. Delaware, L. & W. R Co, 194 A. 75, 119 N.J.Law 76.
10 C.J. p 729 notes 89, 92.
Protection against injuries from fellow passengers, see supra § 695.

Likelihood of staging holdup
Conductor and other members of train crew had right and duty to eject passenger "when they became apprehensive that he was liable to stage a holdup and had a gun."—Falzarano v. Delaware, L. & W. R. Co., 194 A. 75, 79, 119 N.J Law 76.

78. Ind.—Indianapolis Tract., etc., Co v. Lockman, 96 N.E. 970, 49 Ind.App. 143.
Mo.—Leonard v. St Louis Transit Co., 91 S.W. 452, 115 Mo App. 349.
10 C.J p 728 note 85, p 729 note 96.

79. Ky.—Louisville, etc., R. Co. v. Setser, 128 S.W. 341, 138 Ky. 476.

80. **Grounds for ejection**
The traveling public are not bound to govern their behavior by the whims of an obstinate station keeper, or to leave the room whenever he thinks proper to drive them out; they are invited by the railroad company and are entitled to remain there so long as they have occasion so to do, and commit no offense against the good order of the place and the reasonable regulations made to govern it.—People v McKay, 9 N. W 486, 46 Mich 439, 41 Am.R. 169—10 C.J p 728 note 87.

81. Mo.—Liljegren v. United Rys. Co. of St Louis, App, 227 S.W. 925.
N.J.—Spalt v. Eaton, 192 A. 576, 118 N.J Law 327.
10 C.J. p 729 note 92.

Corpus Juris is quoted as possibly the best statement of the law on this subject in Abernathy v. Missouri Pac. R. Co., Mo App, 217 S.W. 568, 570.

condition,[82] or who has a contagious disease;[83] an insane person;[84] one who annoys and disturbs other passengers by the use of unseemly or insulting language;[85] one who is unruly or boisterous, or interferes with the carrier's business,[86] and one who places himself in such a position of danger that the carrier is unwilling to assume the duty of carrying him in such position.[87] On the other hand, no regulation of the carrier will justify the ejection of a passenger on account of color or race by its employee.[88]

§ 809. Intruders and Trespassers in General

A carrier has the right and duty to eject a trespasser, but may not inflict injury upon him because of his trespassing.

Where a person comes upon a railroad train or car as a trespasser, the railroad company has the right[89] and duty[90] to eject him therefrom. However, the fact that a person is a trespasser on a train does not forfeit him his legal rights;[91] a trespasser is not to be regarded as an outlaw, and a carrier has no right to inflict injury upon him because of his trespassing.[92]

Particular matters relating to the ejection of intruders and trespassers are considered in connection with the ejection of passengers under the appropriate headings infra §§ 810-854.

§ 810. Failure or Refusal to Pay Fare or Produce Ticket

a. In general

b. Fare of child

Corpus Juris cited

Mo.—Koenig v. St. Louis Public Service Co., App., 45 S.W.2d 896, 898.

Slight intoxication early in a trip does not justify ejection later on where there is no misconduct on the part of the ejected person.—Chesapeake & O. Ry. Co. v. Moore, 205 S.W. 594, 181 Ky. 550.

Degree and effect of intoxication; rule limited

(1) "The fact that an individual may have drunk to excess will not, in every case, justify his ejection from a public conveyance. It is rather the degree of intoxication, and its effect upon the individual, and the fact that, by reason of the intoxication he is dangerous or annoying to the other passengers, that gives the right and imposes the duty of expulsion."

Mo.—Abernathy v. Missouri Pac. R. Co., App., 217 S.W. 568, 570.

N.Y.—Putnam v. Broadway, etc., R. Co., 55 N.Y. 108, 114, 14 Am.R. 190.

(2) But a person need not be so much under the influence of liquor as to render him mentally and physically incapable of taking care of himself to warrant his ejection.

Ky.—Chesapeake, etc., R. Co. v. Crank, 108 S.W. 276, 128 Ky. 329, 32 Ky.L. 1202, 16 L.R.A.,N.S., 197.

Miss.—Yazoo, etc., R. Co. v. Davidson, 63 So. 340, 106 Miss. 108.

Vomiting

It is the duty of a conductor of a street car to remove at once an intoxicated passenger who is vomiting to the discomfort of other passengers

Ky.—Chesapeake, etc., R. Co. v. Crank, 108 S.W. 276, 128 Ky. 329, 32 Ky.L. 1202, 16 L.R.A.,N.S., 197.

Mass.—Cobb v. Boston Electric R. Co., 60 N.E. 476, 179 Mass. 212.

82. Ky.—Casteel v. American Airways, 88 S.W.2d 976, 261 Ky. 818.

83. U.S.—Paddock v. Atchison, T. & S. F. R. Co., C.C.Mo., 37 F. 841, 4 L.R.A. 231.

84. Ala.—Hines v. Miniard, 86 So. 23, 204 Ala. 514, 12 A.L.R. 238.

An unattended insane person may be removed, if necessary to the reasonable safety and comfort of other passengers, at the first station where he may be properly cared for.—Hines v. Miniard, 86 So. 23, 204 Ala. 514, 12 A.L.R. 238.

85. N.J.—Spalt v. Eaton, 192 A. 576, 118 N.J.Law 327.

10 C.J. p 727 note 83, p 729 note 93.

Loudness of tone

Objectionable language, in order to constitute ground for ejection, must be used in a tone sufficiently loud to annoy and disturb other passengers.—Chicago City R. Co. v. Pelletier, 24 N.E. 770, 134 Ill. 120.

86. Neb.—Sorenson v. Lincoln Tract. Co., 142 N.W. 702, 94 Neb. 91.

10 C.J. p 728 note 84, p 729 note 94.

Particular acts held grounds for ejection

(1) Willful interference with the apparatus of the car, and disorderly conduct.—Dobbins v. Little Rock R., etc., Co., 95 S.W. 794, 79 Ark. 85, 9 Ann.Cas. 84

(2) Attempting to obtain money or property from any person by any game or device in violation of statute.—Com. v. Marcum, 132 S.W. 215, 135 Ky. 1, 24 L.R.A.,N.S., 1194.

Particular acts held not grounds for ejection

(1) One who protests with the conductor against what he considers unnecessary roughness in handling an intoxicated person does not thereby subject himself to ejection.—Weber v. Brooklyn, etc., R. Co., 62 N.Y.S. 1, 47 App.Div. 306.

(2) The vomiting of a sick person, not under the influence of liquor, held not to subject him to ejection within the meaning of a statute requiring ejection of a person who annoys other passengers.—Chesapeake, etc., R. Co. v. Crank, 108 S.W. 276, 32 Ky.L. 1202.

87. Mo.—Parks v. St. Louis, etc., R. Co., 77 S.W. 70, 178 Mo. 108, 101 Am.S.R. 425.

88. Pa.—Derry v. Lowry, 6 Phila. 30.

89. Ala.—Ashworth v. Alabama, etc., R. Co., 99 So. 191, 211 Ala. 20.

10 C.J. p 731 note 22—52 C.J. p 637 note 32.

Failure to produce ticket or pay fare as trespassing see infra § 810 a.

Person boarding train at unauthorized place

Common carriers by rail need not receive passengers at place not station, junction, or transfer point, where it stops at crossing with another railroad, and one who gets on at such place contrary to orders of trainmen may be ejected.—Carpenter v. Minneapolis, St. P., R. & D. Electric Traction Co., 157 N.W. 902, 133 Minn. 46.

Boarding car by force

A person not permitted to board a car because of certain regulations with respect to urban traffic may be ejected if he attempts to do so by force.—Campbell v. Milwaukee Electric Ry. & Light Co., 170 N.W. 937, 169 Wis. 171, 6 A.L.R. 628.

90. Mo.—Swift v. St. Louis-San Francisco R. Co., App., 15 S.W.2d 964.

91. Ohio.—Cincinnati, etc., R. Co. v. Boyer, 18 Ohio Cir.Ct. 327, 10 Ohio Cir.Dec. 199.

92. Kan.—Lampkin v. Chicago Great Western R. Co., 44 P.2d 210, 141 Kan. 763.

Liability for wrongful ejection see infra §§ 828, 829

Manner of ejection see infra §§ 822-824.

c. Passenger carried past or short of destination
d. Time or opportunity to produce ticket or pay fare
e. Offer, tender, or payment of cash fare
f. Payment of back fare
g. When failure or refusal is justified
h. Failure to procure ticket or permit for freight train

a. In General

A passenger who fails or refuses, on demand, to present a proper ticket or other evidence of right to transportation, or to pay fare, may be ejected, even though he may have purchased a ticket and lost it; and it has been held, with some dissent, immaterial that the conductor saw the ticket or knew of its purchase.

A person traveling as a passenger on a carrier's vehicle may be ejected for his failure or refusal, on demand to present or produce a proper ticket, or other evidence of his right to transportation, or to pay the required fare,[93] such persons being declared by some authorities to become trespassers;[94] and statutes in effect so prescribing have been applied or construed in several cases.[95] In other words, it is a reasonable regulation of a carrier that the passenger not only shall have a ticket or other evidence of his right to transportation, but also shall present it when required by the conductor, or surrender it on demand, and for a refusal so to do he may be ejected.[96]

One who changes cars and upon entering the second car fails or refuses to pay a second fare or present a transfer[97] which is good on its

93. Ark.—Ft. Smith & Van Buren Dist. v. Kidd, 241 S.W. 374, 153 Ark. 489.
Ill.—Cohen v. Cleveland, C. & St. L. Ry. Co., 197 Ill.App. 88.
Kan.—Lampkin v. Chicago Great Western R. Co., 44 P.2d 210, 141 Kan. 763.
La.—Lichtenstein v. New Orleans Ry. & Light Co., 103 So. 769, 158 La. 284.
Miss.—Gulf, M. & N. R. Co. v. Mason, 163 So. 825, 174 Miss. 43.
Mo.—Boettler v. St. Louis-San Francisco Ry. Co., App., 300 S.W. 528—Green v. United Rys. Co of St. Louis, 206 S.W. 237, 200 Mo.App. 303.
Pa.—Anderson v. Union Traction Co., 7 Pa.Dist. 41.
S.C.—Ashe v. Southern Ry. Co., 89 S.E. 482, 104 S.C. 414.
Tenn.—Howell v. Nashville Interurban Ry., 4 Tenn.App. 304.
Tex.—Chicago, R. I. & G. Ry. Co. v. Edwards, Civ.App., 232 S.W. 356—Fleck v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 191 S.W. 386.
10 C.J. p 731 note 22, p 743 note 8 [c].

Corpus Juris quoted

Ala.—Louisville & N. R. Co. v. Hamby, 93 So. 698, 699, 208 Ala. 75.

Presentation of a foreign token, that is, a token issued by a company other than the one on whose car the person presenting it was riding, is not a proper payment of fare—Howell v. Nashville Interurban Ry., 4 Tenn.App. 304.

Canadian coin

One who refuses to pay fare except with a Canadian coin may not recover damages for his ejection—Lichtenstein v. New Orleans Ry. & Light Co., 103 So. 769, 158 La. 284.

A check given by a conductor as evidence of a party's right to passage must be produced for a succeeding conductor.

Vt.—Jerome v. Smith, 48 Vt. 230, 21 Am.R. 125.
W.Va.—Price v. Chesapeake, etc., R. Co., 33 S.E. 255, 46 W.Va. 538.

A person who was refused a return ticket, upon arriving at his destination, may be ejected for attempting to make the return trip without a ticket, even though he had a contract entitling him to a return ticket—Wilt v. Wabash R. Co., 21 Ohio Cir. Ct. 579, 11 Ohio Cir.Dec. 589.

Baggage check

(1) The fact that a passenger has a baggage check does not prevent his being ejected from a train on his refusal to present a ticket or to pay fare.
Idaho.—Tarr v. Oregon Short Line R. Co., 93 P. 957, 14 Idaho 192, 125 Am.S.R. 151.
Mo.—Bolles v. Kansas City Southern R. Co., 115 S.W. 459, 134 Mo.App. 696.
Tex.—Texas, etc., R. Co. v. Smith, 84 S.W. 852, 38 Tex.Civ.App. 4.

(2) But under a statute so providing it has been held that a passenger need not surrender his ticket or pay the fare until his baggage check has been delivered up to him or he has reached the station to which the baggage was to be checked.—Tarr v. Oregon Short Line R. Co., supra.

94. Kan.—Lampkin v. Chicago Great Western R. Co., 44 P.2d 210, 141 Kan. 763.
Mich.—Willett v. King, 168 N.W. 986, 203 Mich. 295.
10 C.J. p 731 note 22.
Ejection of trespassers generally see supra § 809.

95. Cal.—Wasserman v. Los Angeles Ry. Corporation, 193 P. 130, 184 Cal. 202.
10 C.J. p 732 note 23.

96. Ala.—Louisville & N. R. Co. v. Hamby, 93 So. 698, 700, 208 Ala. 75, quoting **Corpus Juris.**
Va.—Virginia Electric & Power Co. v. Wynne, 141 S.E. 829, 149 Va. 882.
10 C.J. p 732 note 24.
Exhibition and surrender of tickets generally see supra § 609.

Refusal to present mileage book with exchange ticket, as required by the terms of the mileage book, makes one liable to ejection—Mason v. Seaboard Air Line R. Co., 75 S.E. 25, 159 N.C. 183, Ann.Cas 1914B 911.

97. Wash.—Kirk v. Seattle Electric Co., 108 P. 604, 58 Wash. 283, 31 L.R.A.,N.S., 991.
10 C.J. p 733 note 29.

Conversely, a passenger cannot be ejected for refusal to pay fare where he presents a transfer entitling him to transportation.
Ill.—Chicago Union Tract. Co. v. Brethauer, 125 Ill.App. 204, affirmed 79 N.E. 287, 223 Ill. 521, 114 Am.S.R. 352.
Mo.—Carmody v. St. Louis Transit Co., 99 S.W. 495, 122 Mo.App. 338.

Conductor's knowledge of payment of fare

(1) A conductor may eject a passenger for violation of a company rule that one transferring from one line to another must present a transfer or pay fare on the second line, even though the conductor of the first line shouted to the former that the party in question had paid the first fare and should be passed.—Crowley v. Fitchburg, etc. R. Co., 70 N.E. 56, 185 Mass. 279

(2) But where, owing to his inability to procure a ticket before starting, a passenger pays cash fare to a conductor who fails to give him a receipt, it has been held that he may not be ejected by the conductor of another train to which it was necessary for him to transfer for refusing to pay a second time, where the second conductor had actual knowledge of the payment to the first conductor.—Homiston v.

face[98] may be ejected, unless his failure to have a valid transfer check is due to fault of some employee of carrier having authority in such matters.[99]

The fact that a passenger has actually purchased a ticket, which he is unable to produce upon demand, does not relieve him of the consequences of failure to do so.[1] Thus, where his ticket has been lost or misplaced, a passenger may be ejected if he refuses to pay fare;[2] and, although there is authority to the contrary,[3] it has been held immaterial that the conductor of the train had seen the ticket or had knowledge of its purchase.[4]

Presenting detached coupon. Where, under a rule of the carrier, a passenger is not entitled to transportation upon presenting a detached coupon, he may be ejected if he presents such a coupon and refuses to pay fare,[5] especially if he also refuses to exhibit the book to the conductor.[6]

b. Fare of Child

Under most authorities, if a child's custodian fails to pay its fare, both may be ejected, even though the custodian has paid or tendered his own fare; under others, a custodian paying or tendering his own fare may not be ejected, even though the child is.

Under most authorities, failure or refusal to pay the fare required for a young child will justify the ejection of both the child and the accompanying parent or other custodian,[7] even though the fare of the person in whose custody the child is has been paid or tendered.[8] There is authority, however, that where a person accompanying a minor child

Long Island R. Co., 22 N.Y.S. 738, 3 Misc 342

Attached cars

Where a passenger boards one car and pays his fare and then decides to change to a car attached to the rear, he must pay his fare in the latter car or he may be ejected therefrom.—Lasker v. Third Ave. R. Co., 57 N.Y.S. 395, 27 Misc. 824—10 C.J. p 733 note 29 [g].

98. Pa.—Anderson v. Union Traction Co., 7 Pa.Dist. 41.

Ordinance granting right to transfer

One riding on a traction car by virtue of a transfer the right to which exists under a valid ordinance cannot lawfully be ejected even though the ordinance is being made the subject of test litigation.—Chicago Union Tract. Co. v. Brethauer, 125 Ill.App. 204, affirmed 79 N.E. 287, 223 Ill. 521, 114 Am.S.R. 352.

99. Ga.—Hornesby v. Georgia R., etc., Co., 48 S.E. 339, 120 Ga. 913, 1 Ann.Cas. 391.

1. Ga.—Foskey v. Wrightsville & T. R. Co., 92 S.E. 34, 19 Ga.App. 670.

Mo.—Boettler v. St. Louis-San Francisco Ry. Co., App., 300 S.W. 528.

10 C.J. p 732 note 26.

2. Miss.—Gulf, M. & N. R. Co. v. Mason, 163 So. 825, 174 Miss. 43

Tex.—Fleck v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 191 S.W. 386.

10 C.J. p 732 note 26.

Exhibition and surrender of ticket where ticket is lost see supra § 613.

"The reason is obvious. Passage tickets, in the absence of restrictive conditions, are assignable, and good in the hands of anyone. If the loss of a ticket were a sufficient excuse for nonpayment of fare, the carrier might be subjected to the burden of carrying two or more persons for a single fare."—Fleck v. Missouri, K. & T. Ry. Co. of Texas, Tex.Civ.App., 191 S.W. 386, 389—10 C.J. p 732 note 26 [b].

Offer to prove loss

A passenger has no right to be carried on an offer to prove that he has lost his ticket.—Harp v. Southern R. Co., 47 S.E. 206, 119 Ga. 927, 100 Am.S.R. 212.

3. Okl.—Dickinson v. Bryant, 172 P. 432, 69 Okl. 297, L.R.A.1918E 978.

Ticket recovered by agent

Where a passenger lost her ticket and the ticket agent recovered it and notified the conductor of that fact, it was wrongful to eject the passenger.—Dickinson v. Bryant, 172 P. 432, 69 Okl. 297, L.R.A.1918E 978.

Duty to accept passenger's explanation

(1) Where conductor is in doubt regarding ticket, he can refuse to accept passenger's explanation of absence of ticket only at peril of liability of carrier, in case jury finds that explanation was reasonable and in fact true.—Yazoo & M. V. R. Co. v. Mullen, 131 So. 101, 158 Miss. 774.

(2) But a conductor need not accept explanation regarding passenger's failure to produce ticket which is untrue although apparently reasonable.—Yazoo & M. V. R. Co. v. Mullen, supra.

4. Ga.—Foskey v. Wrightsville & T. R. Co., 92 S.E. 34, 19 Ga.App. 670.

Tex.—Fleck v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 191 S.W. 386

10 C.J. p 732 note 25.

A passenger's statement that he purchased a ticket need not be accepted by the conductor.—Gulf, M. & N. R. Co. v. Mason, 163 So. 825, 174 Miss. 43

5. Ark.—Ft. Smith & Van Buren Dist. v. Kidd, 241 S.W. 374, 153 Ark. 489

10 C.J. p 734 note 36.

6. Md.—United R., etc., Co. v. Hardesty, 51 A. 406, 94 Md. 661, 57 L.R.A. 275.

Tenn.—Louisville, etc., R. Co. v. Harris, 9 Lea 180, 42 Am.R. 668.

7. Ala.—Birmingham Electric Co. v. Maze, 166 So. 50, 231 Ala. 539, citing **Corpus Juris.**

Ark.—St. Louis-San Francisco Ry. Co. v. Smith, 244 S.W. 741, 155 Ark. 519.

Ky.—Louisville & N. R. Co. v. Watson, 255 S.W. 1056, 1057, 201 Ky. 108, citing **Corpus Juris.**

Tex.—Fleck v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 191 S.W. 386.

10 C.J. p 733 note 30.

So under statute

Ark.—St. Louis-San Francisco Ry. Co. v. Smith, 244 S.W. 741, 155 Ark. 519

Payment not waived

A conductor does not waive the right to require payment of a child's fare by passing the child without demanding the fare, where he returns later to inquire of the accompanying grandmother as to the child's age.—Birmingham Electric Co. v. Maze, 166 So. 50, 231 Ala. 539

That the custodian is a minor does not affect the operation of the rule.—Warfield v. Louisville, etc., R. Co., 55 S.W. 304, 104 Tenn. 74, 78 Am.S.R. 911.

But a parent accompanying an adult child may not be ejected if he has complied with the rules.—Louisville, etc., R. Co. v. Maybin, 5 So. 401, 66 Miss. 83.

8. Ala.—Birmingham Electric Co. v. Maze, 166 So. 50, 231 Ala. 539.

Ark.—St. Louis-San Francisco Ry. Co. v. Smith, 244 S.W. 741, 155 Ark. 519.

has paid or tendered his own fare he may not be required to leave the train, although the carrier is not liable if he voluntarily chooses to do so;[9] under this view the child may be ejected without the ejection of the accompanying parent or custodian.[10]

If, through mistake of a conductor in judging a child's age, the child is wrongfully ejected, the parent may leave the train and recover damages for the ejection.[11]

c. Passenger Carried Past or Short of Destination

A passenger carried beyond his destination through his own fault may be ejected in default of payment for further transportation; but when not at fault he may not, under some authorities, be ejected for refusal to pay additional fare, although he may under others; and if he offers fare to a farther stop, he may not be ejected. A passenger on a car which turns back short of his destination may not remain for the return journey without payment.

Where a passenger's own neglect causes him to be carried beyond his destination, he is not entitled to free passage to the next station, and may be put off in default of payment;[12] likewise, he is not entitled to a return trip to his destination, and may be put off on refusal to pay.[13] While it has been held that, even where a passenger is carried past his destination through the failure of the conductor or other proper employee to call the station or street, he has no right to remain on such train or car without the payment of another fare,[14] other authority is to the effect that where the passenger is not at fault he may not be ejected for refusal to pay the additional fare.[15] If the passenger offers to pay his fare to a regular stop farther on, he may not be ejected.[16] It is unnecessary that the passenger tender the unpaid fare for the distance he has already traveled beyond his destination at the time he tenders it to the next station, in the absence of a demand therefor.[17]

Where a street car company breaks its contract with a passenger by turning back the car at a point short of the passenger's destination, the passenger's right of action for a breach of the contract is complete, but he is not entitled to remain on the car for its return journey without payment of another fare.[18]

d. Time or Opportunity to Produce Ticket or Pay Fare

A passenger acting in good faith is entitled to a reasonable opportunity and time to produce his ticket or pay his fare, after which, on failure to do either, he may be ejected. What is a reasonable opportunity or time depends largely on the circumstances of each case.

A passenger is entitled, on demand, to a reason-

Tex.—Fleck v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 191 S.W. 386.

10 C.J. p. 733 note 30

9. Cal.—Cox v. Los Angeles Terminal R. Co., 41 P. 794, 109 Cal. 100

Ill.—Pittsburgh, etc., R. Co. v. Dewin, 86 Ill. 296.

Infant child accompanying younger sisters

Cal.—Cox v. Los Angeles Terminal R. Co., 41 P. 794, 109 Cal. 100

Infant for whom no fare was required

There can be no recovery in behalf of one of several children accompanying their parents on a train because such child, being under the age at which fare was required, left the train upon the ejection of some of the other children for whom the required fare was not paid.—Pittsburgh, etc., R. Co. v. Dewin, 86 Ill. 296

10. Mass.—Beckwith v. Cheshire R. Co., 8 N.E. 875, 143 Mass. 68.

11. U.S.—Gibson v. East Tennessee, V. & G. R. Co., C.C.Tenn., 30 F. 904.

12. Tex.—Texas Pac. R. Co. v. James, 18 S.W. 589, 82 Tex. 306, 15 L.R.A. 347.

10 C.J. p. 739 note 75.

Tender of fare not required

However, such a passenger is under no duty to seek out the conductor to tender fare, and may not be ejected for failure to tender fare before a demand therefor, where he has not lost his rights as a passenger by evidencing an intent not to pay.—Vanderbeck v. Chicago, M., St. P. & P. Ry. Co., 230 S.W. 390, 210 Iowa 230.

13. N.Y.—Markowitz v. New York Rys. Co., 176 N.Y.S. 778, 188 App. Div. 482

14. Minn.—Willard v. St. Paul City R. Co., 133 N.W. 465, 116 Minn. 183.

Tex.—Missouri, etc., R. Co. v. Richardson, Civ.App., 131 S.W. 1139.

10 C.J. p. 739 note 76.

15. Ark.—Hines v. Smith, 224 S.W. 612, 145 Ark. 218.

Ga.—Atlantic Coast Line R. Co. v. Summerall, 139 S.E. 923, 37 Ga. App. 294

N.Y.—Markowitz v. New York Rys. Co., 176 N.Y.S. 778, 188 App. Div. 482.

10 C.J. p. 754 note 96

Failure to give opportunity to alight

If defendant failed in its duty to give plaintiff passenger a reasonable opportunity to alight at destination, and carried him beyond destination against his will, and the car was to return immediately to the point of plaintiff's destination, it is not unreasonable to hold that defendant was under a duty to permit plaintiff to make the short return journey without molestation, and without exacting an additional fare.—Markowitz v. New York Rys. Co., 176 N.Y.S. 778, 188 App.Div. 482.

16. Ark.—Hines v. Smith, 224 S.W. 612, 145 Ark. 218.

Ga.—Southern Ry. Co. v. Williams, 91 S.E. 46, 146 Ga. 200.

Okl.—Lusk v. Land, 178 P. 93, 74 Okl. 212

Passenger asleep

(1) The fact that a passenger was sleeping when the train stopped at his station is immaterial.—Southern Ry. Co. v. Williams, 91 S.E. 46, 146 Ga. 200.

(2) Even though the carrier may have had no duty to awake a passenger when he arrived at his station, he may not be ejected upon offering fare to the next station.—Lusk v. Land, 178 P. 93, 74 Okl. 212

(3) However, in such a case a mere willingness to pay the fare, not communicated to the conductor, will not be sufficient.—Texas Pac. R. Co. v. James, 18 S.W. 589, 82 Tex. 306, 15 L.R.A. 347.

17. Ga.—Southern Ry. Co. v. Williams, 91 S.E. 46, 146 Ga. 200.

18. N.J.—Wright v. Orange, etc., R. Co., 73 A. 517, 77 N.J.Law 774, 23 L.R.A.,N.S., 571.

able opportunity to produce his ticket or pay the cash fare,[19] but it is necessary that he be acting in good faith,[20] and that he make a request for a reasonable time if he cannot readily produce his ticket.[21] The passenger has a duty to keep the ticket where it can be readily found,[22] and if he is unable to produce it within a reasonable time, and does not pay,[23] or offer to pay,[24] the cash fare, he may be ejected, even though he believes in good faith that he may yet be able to find it.[25]

What is a reasonable opportunity or time to allow a passenger to produce his ticket or pay his fare must depend largely on the facts and circumstances of each particular case.[26] It has been held that a passenger should be permitted to go to another part of the train to obtain funds from a friend who is willing to supply them.[27]

e. Offer, Tender, or Payment of Cash Fare

A person on a train or car in good faith without a ticket may not be ejected if he, or a third person with his assent, offers to pay the proper amount of cash fare on a demand therefor; but no further tender need be made after the conductor has refused to accept payment or a ticket, or after payment has once been made or tendered. A tender of a larger denomination of money than is permitted is not a proper tender.

The mere fact that one enters a train or car without a ticket does not furnish an excuse for putting him off; if he offers to pay cash fare, the carrier ejects him at its peril,[28] at least if he has entered in good faith.[29] Although one having the status of a passenger is under no duty to tender his fare before a demand by the conductor,[30] after there has been a demand he is bound to tender payment unconditionally.[31]

19. Ala.—Louisville & N. R. Co. v. Copeland, 117 So. 176, 217 Ala. 556—Louisville & N. R. Co. v. Crick, 117 So. 167, 217 Ala. 547—Louisville, etc., R. Co. v. Dawson, 66 So. 905, 11 Ala.App. 621.
10 C.J. p 732 note 26 [a], p 735 note 46, p 749 note 52.
Opportunity to pay fare to avoid ejection see infra § 812.

Corpus Juris quoted

Ala.—Louisville & N. R. Co. v. Hamby, 93 So. 698, 701, 208 Ala. 75

If a conductor withdraws his acceptance of a pass, as he is bound by statute to do when it is presented by one not entitled to ride thereon, he may not eject such person until he has given him a reasonable opportunity to pay his fare.—Louisville, etc., R. Co. v. Dawson, 66 So. 905, 11 Ala.App. 621.

20. Va.—Mangum v. Norfolk & W. Ry. Co., 99 S.E. 686, 125 Va. 244, 5 A.L.R. 346.
10 C.J. p 735 note 46.

Depositing money with conductor

The fact that a passenger hands some money to the conductor for him to hold while such passenger searches for his ticket does not constitute a payment of his fare, but should only be considered on the question of his good faith in attempting to gain time to find his ticket.—Anderson v. Louisville, etc., R. Co., 120 S.W. 298, 134 Ky. 343, 20 Ann.Cas. 920.

21. Miss.—Gulf, M. & N. R. Co. v. Mason, 163 So. 825, 174 Miss. 43

If there is no request for additional time to search for his ticket, a passenger may be ejected at once.—Louisville, etc., R. Co. v. Mason, 58 So. 963, 4 Ala.App. 353, 357.

22. Miss.—Gulf, M. & N. R. Co. v. Mason, 163 So. 825, 174 Miss. 43.

23. D.C.—Capital Tract. Co. v. Brinley, 43 App.D.C. 430.

Miss.—Gulf, M. & N. R. Co. v. Mason, 163 So. 825, 174 Miss. 43.

Va.—Mangum v. Norfolk & W. Ry. Co., 99 S.E. 686, 125 Va. 244, 5 A.L.R. 346.

24. Ga.—Foskey v. Wrightsville & T. R. Co., 92 S.E. 34, 35, 19 Ga.App. 670.

25. Ga.—Foskey v. Wrightsville & T. R. Co., supra.

"One might search for a ticket, either in good or bad faith, from the beginning to the end of his journey. Certainly his mere belief that he may yet be able to find the ticket will not entitle one to remain on the train. The railroad company in the discharge of its duties to the public, cannot stop and wait until the passenger has satisfied himself that the ticket is lost beyond recall. If the train continue to run as long as the passenger is willing to search for his ticket, he may thereby have his ride without paying his fare. His misfortune, if he has in fact lost his ticket, cannot prejudice the right of the railroad company to eject him from its train upon the failure to surrender his ticket after he has been given a reasonable opportunity to find and present the ticket."—Foskey v. Wrightsville & T. R. Co., supra.

26. Ala.—Louisville & N. R. Co. v. Hamby, 93 So. 698, 701, 208 Ala. 75, quoting Corpus Juris.
10 C.J. p 735 note 48.

The time it takes a street car to go a quarter of a mile cannot be said, as a matter of law, to be a reasonable time, in the absence of evidence as to the speed at which the car was traveling—Huba v. Schenectady R. Co., 83 N.Y.S. 157, 85 App.Div. 199.

Ticket with companion

Where a passenger leaves his ticket in the custody of another passenger in the farthest part of a crowded street car, and the conductor forcibly ejects him within a minute or two after having first demanded his fare, he is not given a reasonable opportunity to secure and present his ticket, and the carrier is liable in damages.—Northern Ohio Tract., etc., Co. v. Wieland, 23 Ohio Cir.Ct.,N.S., 123.

27. N.C.—Clark v. Wilmington, etc., R. Co., 91 N.C. 506, 49 Am.R. 647
Ohio—Guy v. Pittsburgh etc., R. Co., 9 Ohio S. & C.P. 23, 6 Ohio N.P. 3.

28. La.—Ford v. East Louisiana R. Co., 34 So. 585, 110 La. 414.

29. Tenn.—Allen v. Chicago, R. I. & P. R. Co., 185 S.W. 713, 135 Tenn. 6, L.R.A.1916E 1092.

Reason for rule

"The place to turn him back is at the car steps or entrance, and if, by reason of the company's failure to have its employe at such place to supervise the traffic, the offeror thus enters one of the cars, it is not reasonable that he should be ejected, at least after the train starts."—Allen v. Chicago, R. I. & P. R. Co., 185 S.W. 713, 715, 135 Tenn. 6, L.R.A.1916E 1092

30. Iowa.—Vanderbeck v. Chicago, M., St. P. & P. Ry. Co., 230 N.W. 390, 392, 210 Iowa 230.

"Passengers on a train do not seek out the conductor to tender fares. On the contrary, the conductor invariably visits the passenger and calls for the fare."—Vanderbeck v. Chicago, M., St. P. & P. Ry. Co., supra

31. Mo.—Green v. United Rys. of St. Louis, 206 S.W. 237, 200 Mo.App. 303.
10 C.J. p 733 note 28.

Tender conditioned on issuance of transfer

A tender of fare upon the condition that the conductor issue a

However, a further tender or payment is not necessary, in order to make an ejection wrongful, where the conductor indicates that he cannot, or will not, accept a payment of fare,[32] or has refused a ticket tendered by the passenger and entitling him to transportation,[33] or if the passenger has already paid or tendered the proper fare.[34]

Tender or payment of fare to avoid ejection after a prior failure or refusal to produce a ticket or pay fare is considered in § 812 infra.

Amount and denomination of tender. A passenger may be ejected if the amount tendered is less than that which the carrier is bound by law to collect,[35] but where the conductor demands more fare from a passenger than he should be required to pay, the passenger need not tender the right amount, but may refuse to pay the amount demanded, and, if ejected, may recover damages.[36] A tender of a larger denomination of money to a street railway conductor than he is permitted by the rules of the company to accept in payment of the fare is not a proper tender.[37]

Tender by another. A tender of fare made by another person on behalf of a passenger is just as effective as though made by the passenger himself, provided the latter assents to it;[38] but where a passenger is being wrongfully ejected for nonpayment of fare, the fact that he refuses to permit another to pay his fare does not preclude him from recovering for all injuries and damages suffered from the wrongful ejection.[39]

f. Payment of Back Fare

A passenger who has traveled part of his journey without paying fare or presenting a proper ticket must pay for the whole journey or be ejected.

Where a passenger has traveled part of his journey without paying fare[40] or presenting a proper

transfer is not such a tender as will entitle a person to remain on a street car, even though such person would be entitled to the transfer after first paying the fare, and even though the conductor refused to issue the transfer in any event, thus making an unconditional tender unavailing—Green v. United Rys. Co of St Louis, 206 S.W 237, 200 Mo App. 303—10 C.J. p 733 note 28 [a].

32. Tex.—Southern Kansas R. Co v. Wallace, Civ.App., 152 S W 873

33. R I—Arnold v Rhode Island Co 66 A. 60 28 R I. 118, 163, 125 Am S R. 721.
10 C.J. p 749 notes 57, 58.

Courses open to passenger

Where a passenger has a right to be carried on his ticket, he may insist on being so carried, and if he is ejected he is entitled to recover the damages sustained thereby, although he might take the other course and pay his fare, rather than be ejected, and then recover such damages as he sustains in that event—Pennsylvania County v Bray, 25 N E. 439, 125 Ind 229.

Belief that ticket is valid

Where, before boarding a train, an ejected passenger presented his ticket to the brakeman whose duty it was to inspect it, and was passed into the train as if he held valid transportation, and the ticket itself did not suggest otherwise, he was justified in believing that it was good on the portion of the road on which he was traveling, and, so believing, he was within his legal rights when he parleyed with the conductor about the validity of his ticket, and did not tender the money for his fare on the first demand—Short v. St. Louis, etc., R. Co., 130 S W. 488, 150 Mo App. 359

34. Mich.—Burnham v. Detroit, etc., R. Co., 133 N W 952, 168 Mich. 55, Ann.Cas.1913B 1204.
10 C J. p 749 note 58.

35. Ga.—Central of Georgia Ry Co. v. Britt, 94 S.E. 283, 21 Ga.App. 314.

A tender of the customary fare which is less than the amount fixed by the railroad commission is insufficient.—Central of Georgia Ry Co v. Britt, 94 S.E. 283, 21 Ga App 314.

Fare to intermediate station taken out

Where a passenger tenders an insufficient amount, stating that he will not pay more, and the conductor takes out the fare to an intermediate station and returns the balance, the passenger is entitled, on reaching such station, to pay the fare demanded from that point to his destination and to continue his journey—Chicago, etc., R. Co. v. Bryan, 90 Ill. 126.

Passenger not ascertaining fare rules

If the fare called for is more than the passenger supposes it should be, and he is at fault for not ascertaining the rules with regard to payment of fare, he should pay the amount demanded and investigate later—Sage v. Evansville, etc., R. Co., 33 N E. 771, 134 Ind. 100—Toledo, etc., R. Co. v. Wright, 68 Ind. 586, 34 Am.R. 277.

36. Ind.—Chicago St., etc., R. Co. v. Graham, 29 N.E. 170, 3 Ind.App. 28, 50 Am S.R. 256.
10 C J. p 750 note 60

37. Ga.—Burge v. Georgia R., etc., Co., 65 S E. 879, 133 Ga. 423, 18 Ann.Cas. 42.

Tenn.—Knoxville Tract. Co v Wilkerson, 99 S W. 992, 117 Tenn. 482, 9 L.R.A.,N.S., 579, 10 Ann Cas. 641.
Amount of tender generally see supra § 593.

Amounts held too large

(1) A five-dollar bill.—Burge v. Georgia R., etc., Co., 65 S E. 879, 133 Ga. 423, 18 Ann.Cas. 42.

(2) A ten-dollar bill—Knoxville Tract. Co v. Wilkerson, 99 S W. 992, 117 Tenn. 482, 9 L.R.A.,N S., 579, 10 Ann.Cas. 641.

38. U.S.—Missouri, etc., R Co. v. Smith, Ind.T., 152 F. 608, 81 C.C.A. 598 10 Ann.Cas. 939
Ky.—Kentucky Cent. R. Co. v. Houston, 7 Ky.Op. 96
Mo.—Gates v. Quincy, etc., R. Co., 102 S.W 50, 125 Mo.App. 334.
Tenn.—Louisville, etc., R Co. v. Garrett, 8 Lea 438, 41 Am.R. 640.

A passenger's silence when a tender is made in his behalf may be construed as an acceptance or acquiescence.—Gates v Quincy, etc., R. Co., 102 S.W 50, 125 Mo App 334.

If a passenger repudiates the offer of a bystander, the conductor need not accept it.—Muldowney v. Pittsburg, etc., Tract. Co., 8 Pa Super. 335

39. Ala.—Birmingham R., etc., Co v. Lee, 45 So 164, 153 Ala. 386.

40. Ala.—Manning v. Louisville, etc., R. Co., 11 So 8 95 Ala. 392, 36 Am.S.R. 225, 16 L R A. 55
Ill.—Chicago etc., R. Co. v Adams, 60 Ill.App. 571.
Mo.—Davis v. Kansas City, etc., R. Co., 53 Mo. 317, 14 Am R. 457.

Ticket from station not yet reached

A passenger who boards a train with a ticket between two stations, neither of which has yet been reached, may be ejected if he refuses to

ticket[41] he may not continue his journey to his destination unless he pays fare for the distance already traveled as well as for the balance of the trip.

g. When Failure or Refusal Is Justified

If a carrier is at fault for a passenger's inability to procure a proper ticket, or if the passenger has surrendered his ticket to a proper employee, his ejection is wrongful, but he may be ejected if he declines to pay because he is not furnished a seat.

It has been held that if a conductor has been notified of a passenger's inability, through the fault of the carrier, to procure a ticket,[42] or if, through the mistake of the carrier's agent, one has failed to receive a ticket to the destination called for,[43] such passenger may not properly be ejected for failure to produce a ticket; nor is a conductor justified in ejecting a person who has purchased a ticket and surrendered it to a brakeman or other proper employee.[44]

A passenger who, in accordance with the posted rules of the company, drops his fare into a box used for that purpose, may not be removed for nonpayment of fare because of private directions to the employees, of which he had no knowledge, that when the car was crowded they were to collect the fares.[45]

Carrier's failure to furnish seat. Although, as appears in § 645 supra, it is the duty of a carrier to furnish seats as well as transportation to those taking passage on its cars, a passenger declining to pay fare because all of the seats are already occupied, may rightfully be ejected, since he has no right to insist on transportation free of charge because not furnished with a seat; in such a case, he should either pay his fare or leave the car immediately upon being afforded a reasonable opportunity to do so.[46]

h. Failure to Procure Ticket or Permit for Freight Train

A passenger who has had a reasonable opportunity to procure a ticket or permit for passage on a freight train may be ejected for failure to do so, except, according to some authorities, where he has acted in good faith and the ticket agent is at fault. Where there has been a custom of accepting cash fares on freight trains, a passenger is entitled to reasonable notice of a change of rule.

One who insists on transportation on a freight train in violation of conditions attached to the privilege of transportation on such trains that the passenger shall have procured a ticket, or, in addition thereto, a permit to ride on such train, may be ejected;[47] but the carrier cannot enforce such a condition unless a reasonable opportunity to procure a ticket or permit has been afforded the passenger.[48]

While it has been held that a conductor is not bound by any agreement which the passenger has, or claims to have, made with the ticket agent before entering the car, and that a passenger may be ejected, notwithstanding he was told by the ticket agent that he might ride on that train,[49] under other authorities a passenger who has endeavored in good faith to comply with the conditions, but, through the fault of the ticket agent was rendered unable to do so, cannot rightfully be ejected.[50] Thus a carrier has been held liable for the ejection of a passenger for failure to have a permit, where he had asked the ticket agent for one and had been told that the conductor would give him one,[51] where the ticket agent had agreed to deliver a permit to the conductor but had failed to do so,[52] and where such agent had told the passenger that his ticket en-

pay fare for the whole journey.—Chicago, etc., R. Co. v. Adams, 60 Ill. App. 571

Readmission after ejection see infra §.826.

41. Ala.—Manning v Louisville, etc., R. Co., 11 So. 8, 95 Ala. 392, 36 Am.S.R. 225, 16 L.R.A. 55

Forfeited ticket

Where the conductor discovers, after the journey is partially completed, that the passenger is traveling on a forfeited ticket, such passenger may be ejected if he fails to pay fare for the entire journey.—Manning v Louisville, etc., R. Co., 11 So. 8, 95 Ala. 392, 36 Am.S.R. 225, 16 L.R.A. 55.

42. Ark.—St. Louis Southwestern R. Co. v. Hammett, 136 S.W. 191, 98 Ark. 418.

Ind.—Pittsburgh, etc., R. Co. v Street, 59 N.E. 404, 26 Ind.App. 224.

Mo.—Harkless v. Chicago, etc., R. Co., 132 S.W. 29, 151 Mo.App. 463

10 C.J. p 734 note 40.

43. Ill.—Cohen v. Cleveland, C. & St. L. Ry. Co., 197 Ill.App. 88.

44. Tex.—Galveston, etc., R. Co. v. Short, Civ.App. 173 S.W. 615—Galveston, etc., R. Co. v. Short, Civ. App., 163 S.W. 601.

10 C.J. p 734 note 41.

But if delivery is to an unauthorized employee, the passenger is not excused for failure to produce the ticket, and if the employee does not have the prescribed badge on his cap the passenger takes the risk as to whether he is authorized to receive it.—Galveston, etc., R. Co. v Short, Tex.Civ.App., 163 S.W. 601

45. Pa.—Perry v. Pittsburgh Union Pass. R. Co., 25 A. 772, 153 Pa. 236.

46. Ga.—Rossman v. Georgia Ry. & Power Co., 91 S.E. 90, 146 Ga. 264, L.R.A.1917C 483.

10 C.J. p 734 note 44.

47. Mich.—Thomas v Chicago, etc., R. Co., 40 N.W. 463, 72 Mich. 355.

10 C.J. p 735 note 50.

48. Mo.—Gardner v. St. Louis etc., R. Co., 93 S.W. 917, 117 Mo.App. 138.

10 C.J. p 735 note 51.

49. Tex.—Houston, etc., R. Co. v. Stell, 67 S.W. 537, 28 Tex.Civ.App. 280.

10 C.J. p 736 note 52.

50. Wash.—Olson v. Northern Pac. R. Co., 96 P. 150, 49 Wash. 626, 18 L.R.A.,N.S., 209.

10 C.J. p 736 note 53.

51. Tex.—Houston, etc., R. Co. v. White, Civ.App., 61 S.W. 436

52. Ala.—Louisville, etc., R. Co. v. Hine, 25 So. 857, 121 Ala. 234.

titled him to ride without a permit.[53]

Notice of change of rule. Where the carrier has been in the habit of receiving payment of fare in cash on freight trains, and changes its rules so as to require the purchase of a ticket by the passenger before entering the car, he is entitled to reasonable notice of such change; and where he has not had reasonable notice, and takes passage in ignorance of the change, the railroad company is liable for his ejection by the conductor.[54]

§ 811. Extra Fares or Charges

A passenger without a ticket may be ejected for refusal to pay an authorized extra fare, unless he has not been afforded a reasonable opportunity to purchase a ticket or has been refused one without just cause, and a passenger may be ejected for not paying for extra accommodations, or, where attempting to use tickets to successive intermediate points, for refusing to pay the extra amount necessary to equal the required through rate.

A passenger who enters a carrier's vehicle without a ticket and refuses to pay an extra fare or charge, as required by the reasonable regulations of the carrier in such cases, may be ejected,[55] provided the carrier has afforded a reasonable opportunity for passengers to purchase tickets.[56] If such an opportunity is not afforded a passenger,[57] or if the carrier has refused, without just cause, to sell a passenger a ticket,[58] or if the extra fare demanded is a greater amount than the carrier has authority to exact,[59] the passenger is entitled to transportation upon the payment or tender of the regular fare. The fact that a passenger had purchased a ticket, but lost it, does not justify his refusal to pay extra fare.[60]

It has been said that a conductor or agent who passes on the merits of an excuse offered by a passenger for not having provided himself with a ticket, or who refuses to hear such excuse when offered, does so at the peril of the carrier.[61]

Through fare. Where the fare to a certain destination is higher when a through ticket is purchased than when tickets to successive intermediate points are purchased, a passenger attempting to make the trip by the latter method in violation of a statute requiring the higher fare may be ejected, unless he complies with the conductor's demand for the extra fare necessary to equal the higher rate;[62] thus a passenger making an interstate journey may

53. Ill.—Illinois Cent. R Co. v. Davenport, 52 N.E. 266, 177 Ill. 110

54. Tenn.—Lane v. East Tennessee, etc., R. Co., 5 Lea 124

55. Ala.—Southern Ry. Co. v. Blackwell, 100 So. 215, 211 Ala. 216
Ky.—Chesapeake & O. Ry. Co. v. Hill, 284 S.W. 1047, 215 Ky. 222, 48 A.L.R. 327.
Tenn.—Southern Ry. Co. v. Pickle, 197 S.W. 675, 138 Tenn. 238
10 C.J. p. 690 note 45, p. 736 note 55
Extra charge on failure to purchase ticket generally see supra § 601.

The parent or custodian of an infant, who is responsible for its fare, may be ejected on failure or refusal to pay it together with the extra charge.—Lankford v. Southern R. Co., 81 S.E. 998, 165 N.C. 653.

Explanation of extra fare
A passenger is entitled to receive information, upon request, as to why an extra charge is made in a particular case.—Briggs v. Lusk, Mo. App., 190 S.W. 380.

Effect of accepting regular fare
However, if a conductor accepts an offer of fare at the regular rate, he may not thereafter eject the passenger for refusal to pay the additional amount which he originally had a right to demand.—Louisville, etc., R. Co. v. Joplin, 55 S.W. 206, 21 Ky.L. 1380.—10 C.J. p. 736 note 58.

56. Ala.—Southern Ry. Co. v. Blackwell, 100 So. 215, 211 Ala. 216.—Louisville & N. R. Co. v. Harper, 83 So. 142, 203 Ala. 398.
Ky.—Chesapeake & O. Ry. Co. v. Hill, 284 S.W. 1047, 215 Ky. 222, 48 A.L.R. 327
10 C.J. p. 736 note 60.

Absence of ticket agent
(1) Will justify a passenger's refusal to pay extra fare.—Louisville & N. R. Co. v. Harper, 83 So. 142, 203 Ala. 398

(2) But there is authority to the effect that such absence does not excuse a passenger from paying the additional fare, and that if he does refuse to pay such fare he has no right to resist ejection.—Monnier v. New York Cent., etc., R. Co., 67 N.E. 569, 175 N.Y. 281, 96 Am.S.R. 619, 62 L.R.A. 357, reversing 75 N.Y.S. 521, 70 App.Div. 405.

Application for ticket after office is closed
Where the ticket office is kept open until the advertised time for the departure of the train, and the passenger is unable to obtain a ticket because he does not apply until after that time, when the office is closed, he cannot complain that an opportunity has not been furnished him to buy a ticket, and on his refusal to pay the train fare he may be ejected.
Ill.—St. Louis, etc., R. Co. v. South, 43 Ill. 176, 92 Am.D. 103
Mass.—Swan v. Manchester, etc., R. Co., 132 Mass. 116, 42 Am.R. 432

Failure to maintain a ticket office at a place where passengers are permitted to board a train will justify a refusal, by a passenger boarding at such a place, to pay an extra fare; maintenance of an office at a distance of one-eighth of a mile from such a point is not sufficient.—Chesapeake & O. Ry. Co. v. Hill, 284 S.W. 1047, 215 Ky. 222, 48 A.L.R. 327.

57. Ala.—Louisville & N. R. Co. v. Harper, 83 So. 142, 203 Ala. 398.
10 C.J. p. 736 note 60.

A conductor's ignorance of the fact that a passenger did not have a reasonable opportunity to purchase a ticket does not excuse the carrier.—Southern Ry. Co. v. Blackwell, 100 So. 215, 211 Ala. 216.

58. Ind.—Indianapolis, etc. R. Co. v. Rinard, 46 Ind. 293.—Cleveland, etc., R. Co. v. Beckett, 39 N.E. 429, 11 Ind.App. 547.—Lake Erie etc., R. Co. v. Close, 32 N.E. 588, 5 Ind.App. 444

59. Kan.—Atchison, etc., R. Co. v. Dickerson, 45 P. 975, 4 Kan.App. 345
Mich.—Chamberlain v. Lake Shore etc., R. Co., 68 N.W. 423, 110 Mich. 614
N.C.—Williams v. Atlantic Coast Line R. Co., 69 S.E. 402, 153 N.C. 360
10 C.J. p. 737 note 62.

60. Tex.—Houston, etc., R. Co. v. Faulkner, Civ.App., 63 S.W. 655.

61. Ga.—Southern R. Co. v. Jones, 68 S.E. 1011, 8 Ga.App. 225.

62. Ind.—Arbuckle v. State, 124 N.E. 395, 188 Ind. 444.
Miss.—Illinois Cent. R. Co. v. Holman, 64 So. 7, 106 Miss. 449
Okl.—Missouri, K. & T. Ry. Co. v.

be compelled to pay the interstate rate as prescribed by the interstate commerce commission.[63]

Extra accommodations. A passenger may be ejected from a car in which are provided special accommodations for which he has not paid.[64]

§ 812. Tender or Payment to Avoid Ejection

a. Before steps taken for ejection
b. After steps taken for ejection

a. Before Steps Taken for Ejection

A passenger who has previously failed, on demand or within a reasonable time, to produce a ticket or pay fare, may not be ejected if, before any steps are taken to eject him, he, or, a third person in his behalf, offers to pay.

Although a passenger has failed, on demand or within a reasonable time, to produce a proper ticket or pay the fare, yet he may not be rightfully ejected if, before any steps are taken to eject him, he offers to pay the fare,[65] at least if he was acting in good faith in his prior refusal to pay.[66] This right of a passenger to tender his fare and continue his journey continues only until the conductor has given the signal to stop the train for the purpose of ejecting him;[67] but a stop made at a regular station is not such a stop as will justify the conductor's refusal to accept a proper tender.[68]

Tender by third person. If the tender to avoid ejection is made by a third person in behalf of the passenger about to be ejected, it should be accepted by the conductor the same as though it were made by the party himself,[69] unless the latter has repudiated the offer.[70]

b. After Steps Taken for Ejection

A tender of fare made after steps have been taken to eject a passenger at a place where the train or car does not regularly stop need not be accepted, at least if the passenger is not in good faith; but in the case of a train stopped at a regular station, a tender made at any time before the ejection is complete should be accepted.

If a passenger, having failed to produce a proper ticket or pay fare, makes an offer or tender of fare after steps have been taken to eject him at a place which is not a regular stopping place for the vehicle on which he is traveling, it is generally held that the tender comes too late and that the ejection may be lawfully completed;[71] thus, if a conductor has

Ashinger, 162 P 814, 63 Okl. 120, L.R.A.1917D 1180.
Tex.—Chicago, R. I. & G. Ry. Co. v. Edwards, Civ.App., 232 S.W. 356.

63. Miss.—Illinois Cent. R. Co. v Holman, 64 So. 7, 106 Miss. 449.
Okl.—Missouri, K. & T. Ry Co. v. Ashinger, 162 P 814, 63 Okl. 120, L.R.A.1917D 1180.
Tex.—Chicago, R. I. & G. Ry. Co. v. Edwards, Civ.App., 232 S.W. 356.

64. Ky.—Louisville, etc., R. Co. v. Ashley, 183 S.W. 921, 169 Ky. 330, L.R.A.1916E 763.
Mont.—Doherty v. Northern Pac. R Co., 115 P. 401, 43 Mont. 294, 36 L.R.A.,N.S., 1139.

65. Ga.—Foskey v. Wrightsville & T. R. Co., 92 S.E. 34, 19 Ga.App. 670
Ind.—Baltimore, etc., R. Co. v. Norris, 46 N.E. 554, 17 Ind.App. 189, 60 Am.S.R. 166.
Tex.—Fleck v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 191 S.W. 386.
Va.—Mangum v. Norfolk & W. Ry Co., 99 S.E. 686, 125 Va. 244, 5 A.L.R. 346
10 C.J. p 748 note 49.

Offer, tender, or payment of cash fare generally see supra § 810 e.

That a passenger engaged in an altercation with the conductor was not sufficient provocation for the conductor to eject him after a tender of fare to the first regular station.—Baltimore, etc., R. Co. v. Norris 46 N.E. 554, 17 Ind.App. 189, 60 Am.S.R. 166.

Necessity of second demand

The duty of tendering fare in such a case is on the passenger and there need not be a new demand by the conductor for the passenger's fare before the ejection.—United R., etc. Co. v. Hardesty, 51 A. 406, 94 Md. 661, 57 L.R.A. 275.

66. Va.—Mangum v. Norfolk & W. Ry. Co., 99 S.E. 686, 125 Va. 244, 5 A.L.R. 346

67. Va.—Mangum v. Norfolk & W. Ry. Co., supra.

Pulling the bell rope once is not a sufficient step taken toward the ejection of a passenger to justify a conductor's refusal to accept a tender of fare, when the signal for stopping the train properly consists of two pulls.—Mangum v. Norfolk & W. Ry. Co., 99 S.E. 686, 125 Va. 244 5 A.L.R. 346.

68. N.Y.—O'Brien v. New York Cent., etc., R. Co., 80 N.Y. 236.

69. Ind.—Baltimore, etc., R. Co. v. Norris, 46 N.E. 554, 17 Ind.App. 189, 60 Am.S.R. 166.
10 C.J. p 751 note 71.

70. Wash.—Kirk v. Seattle Electric Co., 108 P. 604, 58 Wash. 283, 31 L.R.A.,N.S., 991

71. N.C.—Norman v. East Carolina R. Co., 77 S.E. 345, 161 N.C. 330, Ann.Cas 1914D 917.
Tex.—Fleck v Missouri, K. & T Ry Co. of Texas, Civ.App., 191 S.W. 386
Va.—Mangum v. Norfolk & W. Ry. Co., 99 S.E. 686, 125 Va. 244, 5 A.L.R. 346.
10 C.J. p 750 note 62, p 751 note 64

Reasons for rule

(1) "The reason assigned in support of the rule is that if one passenger might, by his unjustifiable conduct, delay the train to put him off, another might do the same thing, thus producing the utmost irregularity in the running of the trains and jeopardizing the safety of the carrier's property and the lives of other passengers."—Fleck v. Missouri, K & T. Ry. Co. of Texas, Tex.Civ.App., 191 S.W. 386, 390.

(2) "Having invited an appeal to force, the passenger cannot at his option, reserve the privilege of shielding himself from its application, by invoking the protection of a contract, the implied conditions of which he has violated."—Pease v. Delaware, etc., R. Co., 5 N.E 37, 101 N.Y. 367, 371, 54 Am.R. 699.

Discretion of conductor

Where the conductor has begun to remove an intruder for refusal to pay his fare, an offer to pay may be accepted or not, at the discretion of the conductor.—Galveston, etc., R. Co. v. Turner, Tex.Civ.App., 23 S.W. 83.

Overdue transfer

Where a passenger holding an overdue transfer, which the conductor refuses to accept, persists in declining to pay his fare until after the conductor has rung his bell and called on the motorman to assist

given the signal to stop a train or car for the purpose of ejecting a passenger, a tender then made need not be accepted.[72] However, there is authority to the effect that, if a passenger has acted in good faith in his refusal to pay the proper fare, and if he did not enter the train with any intention of avoiding payment, then his offer to pay,[73] or the offer of another to pay for him,[74] when made before the train has actually stopped, should be accepted; conversely, if his refusal to pay proceeded from a fraudulent purpose, his offer,[75] or the offer of a third person,[76] made after the process of ejection has begun, need not be accepted by the conductor, nor need his offer if his conduct was violent and abusive.[77]

Where steps are taken to eject a passenger from a train which has stopped at a regular station, an offer by the passenger[78] or a third person[79] to pay the required fare, made before the ejection has been completed, should be accepted, as the reason assigned for the first stated rule, namely, delay of the train, is not applicable in such a case.[80]

§ 813. Defective or Invalid Ticket

A passenger presenting a defective or invalid ticket or transfer may, as a general rule, be ejected if he refuses to pay fare Authorities conflict as to whether the face of a ticket is conclusive as to the passenger's right to transportation.

As a general rule, where the ticket offered by a passenger is void or otherwise not such as to entitle him to transportation at the time and on the train or car for which it is offered, and he refuses to pay fare or otherwise show himself entitled to transportation, he may be ejected,[81] particularly where he knows that his ticket is worthless[82] The fact that a passenger acted in good faith in seeking to ride on an insufficient ticket, believing it valid, does not relieve him of the consequences of its insufficiency;[83] but a passenger who acts in good faith is entitled to a proper demand for fare before he may be ejected because of the invalidity of his ticket,[84] and after the conductor's refusal to accept his ticket he is entitled to a reasonable parley with the conductor to determine whether he should pay

in ejecting him, the passenger becomes a trespasser, and his ejection may be completed, even if he then offers to pay his fare.—Capital Tract Co. v Brinley, 43 App.D.C. 430.

In Kentucky

(1) The general rule as above stated has been applied—Chesapeake, etc., R. Co. v. Friend, 169 S.W. 509, 159 Ky 778, L.R.A.1915C 148

(2) But there is earlier authority indicating that if an actual tender of the fare is made, even after steps have been taken to eject a passenger, the conductor's act in refusing the fare and in completing the ejection is wrongful—Louisville, etc. R. Co v. Cottongim, 119 S.W 751—Louisville etc. R Co v Cottongim, 104 S.W. 280, 31 Ky L. 871, 13 L.R.A.,N.S., 624

In Missouri

(1) Under a statute providing that a passenger may be ejected, for refusal to pay fare, at any usual stopping place, it has been held that an ejection at any other place is wrongful if the passenger makes an actual tender of the money, even though such tender is made after the conductor has given the signal to stop the train—Holt v. Hannibal, etc., R. Co., 74 S.W 631, 174 Mo 524, affirming 87 Mo App 203—Short v. St. Louis, etc, R Co., 130 S.W. 488, 150 Mo.App 359.

(2) But a person who has acted in bad faith in refusing to pay fare and had no intention of paying when he entered the train is a trespasser and may be ejected, under such circumstances, even though he made an actual tender—Beck v Quincy, etc., R. Co., 108 S.W. 132, 129 Mo App. 7.

72. D.C—Capital Tract. Co. v. Brinley, 43 App D.C 430
Va—Mangum v. Norfolk & W Ry. Co., 99 S.E. 686, 125 Va. 244, 5 A.L.R. 346.
10 C.J. p 750 note 62.

Tender before stop signal completed

Where the signal to stop a train was two pulls of the bell rope, and after the conductor had given one pull the passenger who was to be ejected offered to pay the fare, the subsequent ejection was wrongful, as the offer was made before the signal was completed.—Mangum v Norfolk & W. Ry Co 99 S.E. 686, 125 Va. 244, 5 A.L.R. 346

73. Ind.T—Missouri, etc., R Co v Smith, 89 S.W 668, 6 Ind.T 99, reversed on other grounds 152 F 608, 81 C.C.A. 598, 10 Ann.Cas 939
Tex—Texas, etc., R. Co. v. Bond, 62 Tex. 442, 50 Am.R. 532

74. Tenn.—Louisville, etc., R. Co v Garrett, 8 Lea 438, 41 Am.R. 640

75. U.S.—Missouri etc, R. Co v Smith, 152 F 608, 81 C.C.A. 598, 10 Ann.Cas 939, reversing 89 S.W 663, 6 Ind.T. 99.

76. U.S.—Missouri, etc., R. Co. v. Smith, supra
10 C.J. p 752 note 75.

77. U.S.—Gould v Chicago, etc., R Co., Minn., 18 F. 155, 5 McCrary 502

78. Tex.—Fleck v Missouri, K. & T. Ry. Co of Texas, Civ.App., 191 S.W. 386
Readmission after ejection see infra § 826.

79. Mo—Randell v. Chicago, etc., R Co., 76 S.W 493, 102 Mo App 342.

80. Tex.—Fleck v. Missouri, K. & T. Ry Co. of Texas, Civ.App., 191 S.W. 386.

81. Ala.—Birmingham Electric Co v. Putman, 109 So 890 21 Ala App 431, petition dismissed 109 So 891, 215 Ala. 107.
Mo—Woods v. Metropolitan St. R. Co., 48 Mo App 125.
N.Y.—Caffrey v United Traction Co., 192 N.Y.S. 95, 199 App.Div. 208
Tex.—Chicago, R. I. & G. Ry. Co. v. Edwards, Civ.App 232 S.W. 356
Va—Mangum v. Norfolk & W. Ry Co., 99 S.E. 686, 125 Va. 244, 5 A.L.R 346.
10 C.J. p 739 note 78.

Corpus Juris cited

Iowa—Foley v. Chicago Great Western R Co., 217 N.W. 563, 564

Mileage book not good for interstate journey

Where a passenger left a town in Texas to go to a town in Oklahoma, and on his return paid cash across the state line to a point where he intended to stop, but did not do so, the conductor has a right to eject him when on continuing his return trip he refused to pay other fare than mileage from a Texas mileage book, not good for "an interstate journey or any portion thereof" and tender of which the conductor refused—Chicago, R. I. & G Ry Co. v. Edwards, Tex.Civ.App., 232 S.W. 356.

82. N.H.—Whittemore v. Boston, etc., R. Co., 83 A. 125, 76 N.H. 338.
10 C.J. p 740 note 79.

83. Tex.—Freeman v. Costley, 124 S.W 458, 58 Tex.Civ.App. 388.
10 C.J. p 740 note 80.

84. Miss.—Jones v Mobile & O. R. Co., 72 So. 1009, 112 Miss. 283.

fare or leave the train.[85]

It has been said that the conductor is the sole judge of the validity of a ticket.[86]

Transfers. In conformity with the general rule stated above, a street car passenger may be ejected on presenting an invalid transfer and refusing to pay the regular fare.[87] Thus, where a passenger attempts to use a transfer at a different point[88] or on a different route[89] from that indicated, he may be ejected if he refuses to pay the cash fare; and it is immaterial that the conductor at first accepted the transfer.[90]

Conclusiveness of ticket. When a defective or invalid ticket or transfer is presented to a conductor, it is, according to one view, the conductor's duty to listen to a reasonable explanation by the passenger as to the defect or invalidity;[91] the opposing view is that the face of the ticket or transfer is conclusive as to whether or not the passenger presenting it is entitled to transportation thereon.[92] Particular applications of these conflicting views will be considered in §§ 814-818 infra.

§ 814. Failure to Comply with Conditions of Ticket in General

Ordinarily, a passenger may be ejected for failure to comply with conditions of his ticket; and, although there is contrary authority, this rule has been held applicable where lack of compliance is due to the carrier's fault. In varying circumstances, ejection for noncompliance with conditions as to stop-over, signing of tickets, and identification has been held or held not proper.

Ordinarily, a passenger who fails or refuses to comply with the conditions of his ticket may be ejected.[93] However, if a passenger's failure to comply with such a condition precedent to his right to transportation is due to the fault of the carrier or an employee, he is, according to some authorities, entitled to ride on the ticket without such compliance, and the carrier will be liable for his ejection,[94] as where the passenger was not notified of a condition upon the validity of the ticket;[95] but, according to other authorities, the rule is held to be otherwise, under the doctrine that as between the conductor and the passenger the face of the ticket is conclusive as to the passenger's right to trans-

Order for a ticket

An ignorant negro woman who boarded a train under the belief, in good faith, that an order for a ticket was a ticket may not be ejected by a conductor without a demand for the fare.—Jones v. Mobile & O. R Co., 72 So. 1009, 112 Miss 383.

85. Va.—Mangum v. Norfolk & W. Ry Co, 99 S.E. 686, 125 Va 244, 5 A.L.R. 346.

86. Va.—Mangum v. Norfolk & W. Ry. Co, supra.

87. Cal.—Wasserman v. Los Angeles Ry Corporation, 193 P 130, 184 Cal. 202.
N.Y.—Caffrey v. United Traction Co., 192 N.Y.S. 95, 199 App.Div. 208.
Pa.—Anderson v. Union Traction Co., 7 Pa.Dist 41.
10 C.J. p 740 note 83.

88. Mo.—Percy v. Metropolitan St R Co, 58 Mo.App. 75.
N.Y.—Rubinger v. New York R Co., 144 N.Y.S. 765, 83 Misc 37.
S.C.—Taylor v Spartanburg R., etc., Co., 82 S.E. 404, 98 S.C. 206, 52 L.R.A.,N.S., 908, Ann.Cas.1916D 585.

89. Pa.—Anderson v. Union Traction Co., 7 Pa.Dist. 41.
10 C.J. p 740 note 85.

90. N.Y.—Rubinger v. New York R. Co 144 N.Y.S. 765, 83 Misc. 37.

91. Miss.—Yazoo & M. V. R. Co. v. Mullen 131 So. 101, 158 Miss 774.
Tenn.—Louisville & N. R. Co. v. Hadley, 11 Tenn App. 642.

92. Ala.—Birmingham Electric Co v. Putman, 109 So. 890, 21 Ala App 431, petition dismissed 109 So. 891, 215 Ala 107.
Va.—Virginia Electric & Power Co. v. Wynne, 141 S.E. 829, 833, 149 Va. 882
"As between the conductor of the street car and a passenger, the face of the passenger's transfer ticket is conclusive evidence as to the extent of his right to ride, and it is the duty of a passenger . . . if he has not the required ticket or token evidencing his right to travel on that car, to pay his fare or quietly leave the car, when requested, and resort to his appropriate remedy for the damages he has sustained"—Virginia Electric & Power Co. v. Wynne, supra.

93. U.S.—Central Trust Co. of New York v. East Tennessee, V. & G. R. Co, C.C.Ga., 65 F. 332.
Tenn.—Louisville etc., R. Co. v. Blair, 55 S.W. 154 104 Tenn. 212.
10 C.J. p 740 note 87

Condition as to stamping

Where round trip tickets are sold with the condition that they are to be stamped by an agent on identification of the person presenting the ticket as the purchaser or otherwise, one who insists on being transported under the return portion of the ticket without compliance with the condition may be ejected.
U.S.—Central Trust Co. of New York v. East Tennessee, V. & G. R. Co., C.C.Ga., 65 F. 332.
Tenn.—Louisville, etc., R. Co. v. Blair 55 S.W. 154, 104 Tenn. 212.
10 C.J. p 741 note 96.

94. Ind.—Pittsburgh, etc., R. Co. v. Street, 59 N.E. 404, 26 Ind.App. 224.
Tenn.—Louisville, etc., R Co. v. Blair, 55 S.W. 154, 104 Tenn. 212.
10 C.J. p 741 notes 95, 98.
Defect in ticket due to agent's mistake generally see infra § 816.

Exchange of mileage ticket

Where a passenger was prevented from exchanging a mileage ticket for an exchange ticket, as required, by the fact that the agent's supply of exchange tickets was exhausted his ejection for attempting to ride on the mileage ticket was wrongful.—Pittsburgh, etc., R. Co v. Street, 59 N.E. 404, 26 Ind.App. 224.

Unstamped ticket

(1) A passenger may not be rightfully ejected because his ticket is unstamped where he presented it to the conductor upon boarding a train and was told by him that it was all right.—Louisville, etc., R Co. v. Blair, 55 S.W. 154, 104 Tenn. 212.

(2) Other cases in which carrier was at fault see 10 C.J. p 741 note 98.

(3) Interstate commerce rules do not so peremptorily require validation of return tickets at a terminal point as to authorize the ejection of passengers because their tickets are not validated, where the want of validation is due to a refusal by the agent at the terminal point.—Texas, etc., R. Co. v. Wharton, Tex.Civ.App., 145 S.W. 282.

95. N.C.—Norman v. East Carolina R. Co, 77 S.E. 345, 161 N.C. 330, Ann.Cas.1914D 917.

portation.[96]

Condition prohibiting stop-over. A passenger traveling on a ticket or pass which is good only for a continuous trip may be ejected if he stops over and then resumes his journey without paying fare.[97] On the other hand, ejection was held unlawful where permission to stop over was secured from an authorized train agent.[98]

Conditions as to signing and identification. There is authority holding that the mere absence of a purchaser's signature on a ticket requiring it does not of itself invalidate the ticket so as to subject him to ejection.[99]

Where a ticket provides that only the person to whom it was issued may use it, a passenger who presents such a ticket and does not fit the description thereon may be ejected,[1] unless the conductor to whom it is presented knows such person to be the real owner.[2] It has been both held[3] and denied[4] that a passenger may offer further proof of his identity where it appears on the face of the ticket that he is not entitled to transportation thereon.

§ 815. Where Time Limit Has Expired

A passenger riding on an expired ticket may be ejected, unless the time limit has been waived, or the failure to use the ticket within the time limit was due to the act of the carrier or its agent, or the limitation is not made apparent to the passenger.

If a ticket or transfer contains a valid limitation as to the time within which it may be used, one who insists on transportation thereunder, without paying fare, after the expiration of the limit may be ejected,[5] unless such limitation has been waived,[6] or the failure to use the ticket or transfer within the time limit is caused by some act of the carrier,[7] such as the fault of its agent in giving a mis-

96. U S.—Central Trust Co. of New York v East Tennessee, V. & G R. Co, C.C.Ga., 65 F. 332.
10 C J p 742 note 99.

Agent's refusal to countersign ticket
The fact that an agent told a passenger, upon the latter's presenting a ticket for countersignature, that it was unnecessary does not excuse a noncompliance with that condition—Central Trust Co of New York v East Tennessee, V. & G R. Co., C.C Ga, 65 F 332

97. Mo—Petty v St. Louis, etc R. Co. 130 S W. 85, 149 Mo App 360, 10 C J p 740 note 88

Indorsement of stop-over privilege on ticket
Where a carrier's regulation requires that the privilege of stopping over must be indorsed on the ticket by the conductor, one who has stopped over may be ejected upon attempting to continue his journey without such indorsement—Beebe v Ayres, 28 Barb, N Y, 275—Dunphy v Erie R. Co., 42 N.Y Super 123—Denny v New York Cent, etc, R. Co., 5 Daly, N Y, 50.

98. N Y—Tarbell v Northern Cent R. Co, 24 Hun 51

Permission from a conductor was held insufficient where authority to give it was vested exclusively in the train agent.—Petrie v. Pennsylvania R. Co, 42 N J Law 449

99. Okl—Chicago, etc, R. Co v Newburn, 110 P. 1065, 27 Okl. 9, 30 L R.A,N S, 432
10 C J. p 741 note 94.

Reason for rule
"The requirement of the signature was for the benefit of the company. It was beneficial to it that no one but the purchaser should use the ticket, and the time when that fact was intended to be made manifest was at the time of its purchase. It may be said to be a matter of common knowledge that passengers purchasing tickets state to ticket agents their route and destination and rely largely on the agents to supply them with tickets meeting their requirements. And certainly it cannot be said to be a reasonable and just rule which would permit the agent of a company to sell and deliver to a passenger a ticket in such condition that the same will be refused and the passenger ejected on its presentation."—Chicago, etc, R Co v Newburn, 110 P 1065, 1066, 27 Okl. 9, 30 L R A,N.S, 432

Waiver by agent's failure to procure signature
Even if such absence did have the effect of invalidating the ticket, a ticket agent's failure to procure the signature at the time he sold the ticket would be considered as a waiver of the requirement.—Chicago, etc., R. Co v Newburn, 110 P 1065, 27 Okl. 9, 30 L R A,N S, 432

1. N Y—Parish v. Ulster, etc., R. Co, 90 N Y S. 1000, 99 App.Div. 10.

Difference in sex
(1) Where the ticket indicates that the owner is a "Mr." and the passenger presenting it is a woman, she may be ejected, though she is in fact the true owner and the "Mr" was inserted by mistake on the part of the selling agent—Parish v Ulster, etc., R. Co, 90 N Y.S. 1000, 99 App Div. 10.

(2) But it has been held that, where a passenger was otherwise perfectly described, he may not be ejected by a conductor because the punch marks erroneously made by the selling agent indicated that the passenger was a female instead of a male.—Illinois Cent R. Co v. Gortikov, 45 So. 363, 90 Miss 787, 122 Am S R 324, 14 L R.A,N.S, 464.

2. N Y—Parish v Ulster etc., R. Co., 85 N E 153, 192 N.Y. 353, reversing 98 N Y S. 1109, 113 App Div. 894

3. Miss—Illinois Cent. R. Co v Gortikov 45 So. 363, 90 Miss. 787 122 Am.S.R. 324, 14 L.R.A.,N S., 464.

4. Ga.—Central of Georgia R. Co v. Cannon, 32 S E. 874, 106 Ga. 828.

5. Ala.—Birmingham Electric Co. v. Putman, 109 So 890, 21 Ala App. 431, petition dismissed 109 So 891, 215 Ala 107.
N.Y.—Caffrey v United Traction Co, 192 N.Y.S 95, 199 App.Div 208.
10 C.J p 742 note 2
Time limit generally see supra § 618.

6. Ill—Pennington v. Illinois Cent R Co, 69 Ill.App 628
Iowa.—Trezona v Chicago, etc, R Co, 77 N W. 486, 107 Iowa 22, 43 L R.A 136

Permitting part of journey
The fact that a passenger was permitted to ride part of his journey on an expired ticket does not constitute a waiver of the time limitation—Hill v Syracuse, etc., R Co, 63 N. Y 101

7. Ohio—Diehl v Cincinnati Traction Co, 6 Ohio App 151
Okl—Atchison, T & S. F. Ry Co. v Vosburg, 270 P. 58, 132 Okl. 196.
10 C J. p 742 note 4

Absence of car at transfer point during time limit
Mich—Heffron v Detroit City R. Co, 52 N W 802, 92 Mich. 406, 31 Am.S R. 601, 16 L R.A. 345
N.Y—Daniel v. Brooklyn Heights R. Co., 121 N.Y.S 577, 67 Misc 78.

dated ticket,[8] or one which has expired or will expire before the journey can be completed.[9] If the limitation does not appear on the face of the ticket, but is based on some rule not known to him, a passenger who in good faith attempts to use the ticket in violation of such a rule may not be ejected.[10]

However, it has been held that a conductor must rely entirely on the face of the ticket in determining its validity, and that he need not accept a passenger's statement as to why he has an expired ticket.[11]

§ 816. Where Defect Is Due to Agent's Mistake

a. Rule that ticket is conclusive evidence as to right to transportation
b. Rule that ticket is not conclusive evidence as to right to transportation
c. Reliance on representations of agent

a. Rule That Ticket Is Conclusive Evidence as to Right to Transportation

In several jurisdictions, the face of a ticket is held conclusive as to the passenger's right to transportation, so that if, because of the fault of the carrier's agent, it is defective or invalid, the passenger may be ejected without a hearing of his account of the transaction.

In contrast to the rule stated in subdivision b of this section, it is held in several jurisdictions that, even though the defect or invalidity appearing on a ticket or transfer is due to the fault or mistake of an agent of the carrier, yet a conductor may eject a passenger presenting such a ticket or transfer, on the ground that, as between the conductor and passenger, the face of the ticket is conclusive as to the passenger's right or lack of right, to transportation,[12] and that, in such a case, the conductor need not listen to or believe the passenger's account of the transaction, but the passenger should either pay his fare or walk quietly off the train, and then resort to an action against the company for breach of contract.[13] This is particularly true where the passenger by using ordinary diligence could have discovered the mistake.[14]

b. Rule That Ticket Is Not Conclusive Evidence as to Right to Transportation

In some jurisdictions, the rule is that, where the fault of a carrier's agent is the cause of a passenger's having a defective or invalid ticket, the conductor should listen to the passenger's explanation, if reasonable, and that the carrier is liable if the passenger is ejected; but if the passenger fails to exercise ordinary prudence in accepting a defective ticket, ejection may be justifiable.

Although a different rule has considerable support, as shown in subdivision a of this section, authorities in a number of jurisdictions support the rule that a carrier may not rightfully eject a passenger who, without fault on his own part, presents a ticket or transfer which is defective or invalid, when the defect in, or the invalidity of, the ticket is due to the fault, mistake, or negligence of one of the carrier's agents,[15] as where such agent issues

Incorrectly punched transfer

(1) Where a conductor punched an erroneous time on a passenger's transfer, the carrier is liable if it ejects the passenger for presenting an invalid transfer.—Diehl v. Cincinnati Traction Co., 6 Ohio App. 151.

(2) Where the time on a transfer is punched in two different places, the one indicating an earlier time and the other a later time, the one which would indicate that the transfer is valid should be accepted as the correct punch—Laird v. Pittsburg Traction Co., 31 A. 51, 166 Pa. 4

Wrong time limit on round trip ticket

Tex.—Gulf, etc., R. Co. v. Halbrook, 33 S.W. 1028, 12 Tex.Civ.App. 475.

8. Okl.—Atchison, T. & S. F. Ry. Co. v. Vosburg, 270 P. 58, 132 Okl. 196. 10 C.J. p. 743 note 5.

9. Ark.—St. Louis Southwestern R. Co. v. Furlow, 99 S.W. 689, 81 Ark. 496. 10 C.J. p. 743 note 5.

10. Ga.—Georgia R. Co. v. Baldoni, 12 S.E. 364, 115 Ga. 1013.
Mass.—Maroney v. Old Colony, etc., R. Co., 106 Mass. 153, 8 Am.R. 305
Mich.—Carvey v. Detroit, etc., R. Co., 95 N.W. 716, 133 Mich. 659.

11. Ala.—Birmingham Electric Co. v. Putman, 109 So. 890, 21 Ala. App. 431, petition dismissed 109 So. 891; 215 Ala. 107.
Va.—Virginia Electric & Power Co. v. Brown, 144 S.E. 708, 151 Va. 686.

12. Cal.—Wasserman v. Los Angeles Ry. Corporation, 193 P. 130, 184 Cal. 202.
Contra Elser v. Southern Pac. Co., 94 P. 852, 7 Cal.App. 493.
Ill.—Pennsylvania R. Co. v. Connell, 112 Ill. 295, 54 Am.R. 238
Contra Cohen v. Cleveland, C. & St. L. Ry. Co., 197 Ill.App. 88.
Pa.—Anderson v. Union Traction Co., 7 Pa.Dist. 41.
Va.—Virginia Electric & Power Co. v. Brown, 144 S.E. 708, 151 Va. 686—Virginia Electric & Power Co. v. Wynne, 141 S.E. 829, 149 Va. 882.
10 C.J. p. 743 note 8.
Nature and effect of ticket generally see supra § 603.

So under statute

Cal.—Wasserman v. Los Angeles Ry. Corporation, 193 P. 130, 184 Cal. 202.

Street car and steam railroad distinguished

'The conclusion . . . [is not warranted] that the conductor of a street passenger railway car stands in the same position to his employer as an agent whose assurances when selling a ticket bind his employer as does the ticket agent of a steam railroad company."—Anderson v. Union Traction Company, 7 Pa.Dist. 41, 47.

13. Cal.—Wasserman v. Los Angeles Ry. Corporation, 193 P. 130, 184 Cal. 202.
Va.—Virginia Electric & Power Co. v. Brown, 144 S.E. 708, 151 Va. 686 10 C.J. p. 743 note 8.

14. N.Y.—Wiggins v. King, 36 N.Y.S. 768, 91 Hun 340

15. Ind.—Union Traction Co. of Indiana v. Smith, 123 N.E. 4, 70 Ind. App. 40.
Miss.—Yazoo & M. V. R. Co. v. Mullen, 131 So. 101, 158 Miss. 774.
Mo.—Ferguson v. Missouri Pac. R. Co., 177 S.W. 616—Ferguson v. Missouri Pac. Ry. Co., App., 186 S.W. 1134.
N.C.—Creech v. Atlantic Coast Line

a ticket which is not for the route or destination designated by the passenger.[16] In such a case, it is the duty of the conductor to listen to a reasonable explanation by the passenger as to why his ticket or transfer apparently does not entitle him to the desired transportation;[17] but it is not a conductor's duty to accept an explanation which is untrue in fact, although apparently reasonable.[18]

The rule first stated is particularly applicable where, from the ticket itself, or from surrounding circumstances known to the conductor, the probability of a mistake on the part of the agent in issuing the ticket is so strong as to reasonably require further investigation before the passenger is ejected.[19] Conversely, an ejection may be justifiable if the passenger himself is mainly at fault with regard to the mistake, as where he accepts and attempts to use a ticket which he knows or by the use of ordinary prudence or diligence could know is defective.[20] On his part, it is the passenger's duty to heed the reasonable explanations and warnings of the conductor or other agents of the carrier.[21]

A conductor need not carry out a ticket agent's agreement, or allow a passenger to ride on a ticket, when to do so would result in a violation of law,[22] although the carrier might be liable for the agent's wrongful act in furnishing the ticket[23]

c. Reliance on Representations of Agent

According to some authorities, a passenger has a right to rely on the representations of a carrier's agent with respect to the validity of his ticket, even as against the terms of the ticket itself, if the agent has apparent authority to make such representations, and ejection in such circumstances is improper; but other authorities hold to the contrary.

In conformity with the rule set out in subdivision b of this section supra, that ejection is improper where the defect in a ticket is due to the fault of the carrier's agent, authorities in several jurisdictions hold that where a passenger is not reasonably chargeable with knowledge as to the nature of the ticket furnished him by the agent, he is not bound as a matter of law to read his ticket, but has a right to rely on the agent's representations, and may recover for being ejected from a train on which he supposed that he had a right to be transported, although, so far as the conductor ejecting him is concerned, the ticket was not good on that train under the carrier's rules.[24] Even as against

R Co, 93 S E 453, 174 N C. 61, L R A.1918D 1030.
Ohio—Diehl v. Cincinnati Traction Co, 6 Ohio App 151.
Okl—Atchison, T & S. F Ry. Co v Vosburg, 270 P 58, 60 132 Okl. 196, citing **Corpus Juris.**
Tenn—Louisville & N R. Co v. Hadley, 11 Tenn.App 642.
10 C J. p 744 note 11, p 745 note 14.

Improper transfer ticket given by conductor
Ind.—Union Traction Co of Indiana v. Smith, 123 N E. 4, 70 Ind.App 40
Ohio—Diehl v. Cincinnati Traction Co, 6 Ohio App. 151.

Mutilated ticket
(1) A carrier is liable for the refusal of the conductor to accept a valid ticket and for ejecting the passenger, even though the ticket was mutilated and difficult to decipher, unless the condition of the ticket which rendered it defective was the fault of the passenger—Houston, etc., R Co. v. Crone, Tex Civ App., 37 S.W. 1074.

(2) That a ticket in two parts, the upper of which entitled a holder to travel on a connecting line, was so torn by the conductor that part of the upper half was missing did not justify an ejection by the connecting carrier because of the mutilation of the ticket—Rouser v North Park St R. Co, 56 N W 937, 97 Mich 565.

An agent's failure to issue a going coupon along with the return coupon of a round trip ticket does not give a conductor the right to eject a person presenting such ticket.—Ferguson v Missouri Pac. Ry Co, Mo.App, 186 S W. 1134

An agent's act in changing the point of destination designated in a ticket creates liability on the carrier for a subsequent ejection by a conductor, especially where the latter is not entirely free from blame because of his refusal to send a telegram, at the passenger's expense, to ascertain the facts—Creech v. Atlantic Coast Line R. Co, 93 S E. 453, 174 N.C 61, L R A.1918D 1030.

Where a conductor has actual knowledge that a ticket entitles the person presenting it to transportation, he may not rightfully eject such person, even though the face of the ticket apparently indicates otherwise. —Parish v. Ulster, etc, R. Co, 85 N E 153, 192 N.Y 353 reversing 98 N.Y S 1109, 113 App Div. 894.

16. Ga.—Atlantic Coast Line R. Co v. Parker, 139 S E. 581, 37 Ga App. 218.
Tenn—Louisville & N R Co v Hadley, 11 Tenn App 642.

The passenger's failure to examine the ticket is not negligence; he "has the right to assume that the agent has issued him the ticket applied for."—Atlantic Coast Line R. Co. v. Parker, 139 S.E. 581, 583, 37 Ga.App 218.

17. Ind.—Union Traction Co. of Indiana v. Smith, 123 N.E. 4, 70 Ind App. 40.

Miss.—Yazoo & M. V. R Co v. Mullen, 131 So. 101, 158 Miss. 774.
Tenn.—Louisville & N R. Co v. Hadley, 11 Tenn.App 642.
10 C.J. p 744 note 11, p 745 note 13

18. Miss.—Yazoo & M. V. R. Co v. Mullen, 131 So 101, 158 Miss 774.

If a conductor is in doubt as to the truth of a reasonable explanation of a defect in a ticket, his refusal to accept the explanation is at the peril of liability on the part of his company.—Yazoo & M. V R Co v Mullen, 131 So. 101, 158 Miss. 774.

19. U S—Baltimore & O. R. Co. v Thornton, Va., 188 F. 868, 110 C C A. 502
10 C J. p 745 note 12.

20. Ohio.—Diehl v. Cincinnati Traction Co., 6 Ohio App. 151.
10 C J. p 744 note 11, p 745 note 15.

21. S C—Saunders v Atlantic Coast Line R. Co., 85 S E 167, 101 S C 11.

22. S C—Saunders v. Atlantic Coast Line R. Co., supra.

23. S C—Saunders v. Atlantic Coast Line R. Co, supra.

24. S C—Smith v. Southern R. Co, 70 S E. 1057, 88 S.C. 421, 34 L.R A., N S., 708
10 C J. p 745 note 19.
Representations and acts of agent relative to tickets generally see supra § 602.

Defect not apparent on face of ticket
If the defect in a ticket is not apparent on its face to the purchaser,

the terms of the ticket itself it has been held that the passenger may rely on representations of the agent as to the sufficiency of the ticket which is furnished him,[25] or which he presents as evidence of his right to transportation,[26] provided the agent has apparent authority to make such representations,[27] and provided the passenger to whom they are made does not have actual knowledge that the agent is acting without authority and in violation of a company rule or limitation in the ticket.[28] A passenger is not presumed to know that the agent is acting without authority.[29]

On the other hand, on the theory, set out in subdivision a of this section supra, that a conductor need not accept a passenger's explanation as against the face of the ticket, it has been held by some authorities that a passenger may be ejected when his ticket affirmatively shows that he has no right to transportation, even though he was told by an employee that it would be good.[30]

§ 817. Taking Wrong Train

If a passenger is at fault for taking the wrong train, such as one that does not stop at his destination, he may be ejected unless he pays fare, if the carrier, through its agents, is at fault, the passenger may, under some authorities, but not under others, be ejected on his failure to pay fare.

In general it is the duty of the passenger to ascertain what train will take him to his destination, and if, through his own carelessness or mistake and without being misled by those authorized to act for the carrier in the matter, he takes the wrong train, or one which does not stop at his point of destination, and does not pay the fare, he may properly be ejected therefrom.[31] Thus, where a passenger boards a train which does not, under the rules of the company, stop at the station for which he is bound, he may be required to pay fare to the first station beyond, where the train does stop, and, on his refusal so to do, he may be put off the train at

and he relies on the agent's representation that it is good for passage, his subsequent ejection by a conductor for failure to have a proper ticket is wrongful.—Murdock v Boston, etc., R Co., 137 Mass 293, 50 Am R. 307.

Limitation on back of pass

A person holding a pass is not bound by a limitation which appears on the reverse side rather than the face, in the absence of proof that he had actually read it.—San Antonio, etc., P. R. Co. v. Newman, 43 S.W. 915, 17 Tex.Civ.App. 606.

25. U.S.—New York, L. E. & W. R. Co v. Winter, Mass., 12 S.Ct. 356, 143 U.S. 60, 36 L.Ed. 71.
S.C.—Smith v. Southern R. Co., 70 S.E. 1057, 88 S.C. 421 34 L.R.A., N.S., 708
Tenn.—Louisville & N. R. Co. v. Hadley, 11 Tenn.App. 642.
10 C.J. p 746 note 21.

Reason for rule

The ticket is not conclusive of the right of a passenger to transportation, but he may stand on his contract with the agent.—Gulf etc., R. Co v. Rather, 21 S.W. 951, 3 Tex.Civ. App. 72.

Written extension of time indorsed on ticket

La.—Randall v New Orleans, etc., R. Co., 13 So. 166, 45 La.Ann. 778.

Ticket for wrong destination

Where the ticket agent himself erroneously issues a ticket for the wrong destination and, on this fact being called to his attention assures the purchaser that it is good to the desired destination, an ejection by a conductor, to whom these facts are explained, is wrongful.—Louisville & N. R. Co. v. Hadley, 11 Tenn.App. 642.

Agent's failure to correct wrong impression

Where a ticket was good for a certain number of days and the purchaser gave his interpretation of what day was intended as the expiration date and the ticket agent did not correct him, the purchaser was held to be entitled to transportation until the day named by him without being subject to ejection—Nelson v. Long Island R. R. Co., 7 Hun, N.Y., 140.

Where two railroads have a joint agent and use the same track the passenger may rely on the representations of such agent that a ticket sold for one will be good on the train of the other—Texas, etc., R Co v Dye, Tex Civ App., 33 S.W. 551

26. Ind.—Pittsburgh, etc., R. Co v. Street, 59 N.E. 404, 26 Ind.App. 224.

A mileage ticket providing that it must be exchanged for a regular transportation ticket may nevertheless entitle one to transportation without having been so exchanged where it was presented to a ticket agent who was out of regular tickets and who represented that it would be good for the desired transportation.—Pittsburgh, etc., R Co. v. Street, 59 N.E 404, 26 Ind.App. 224.

27. S.C.—Smith v Southern R. Co., 70 S.E. 1057, 88 S.C. 421
Tex.—San Antonio, etc., P. R Co v Newman, 43 S.W. 915, 17 Tex Civ App. 606, 34 L.R.A.,N.S., 708.

28. Tex.—San Antonio, etc., P. R Co. v. Newman, supra.

29. S.C.—Smith v Southern R. Co., 70 S.E. 1057, 88 S.C. 421, 34 L.R.A., N.S., 708.
10 C.J. p 746 note 22.

30. Cal.—Wasserman v. Los Angeles Ry Corporation, 193 P. 130, 184 Cal 202.
10 C.J. p 746 note 23.

Statement by street car conductor

Cal.—Wasserman v. Los Angeles Ry Corporation, 193 P. 130, 184 Cal 202.

31. Ala.—Louisville & N. R Co v Copeland, 117 So 176, 217 Ala. 556—Louisville & N. R. Co. v. Crick, 117 So. 167, 217 Ala. 547
Iowa.—Wilkes v Chicago, R. I. & P Ry. Co., 198 N.W. 44, 198 Iowa 832, 36 A.L.R. 1012
Ky.—Louisville & N. R. Co v. Hawkins, 293 S.W. 972, 219 Ky. 400, citing Corpus Juris.
N.Y.—Fagan v Atlantic Coast Line R. Co., 115 N.E. 704, 220 N.Y. 301, L.R.A 1917E 663, reversing 155 N.Y.S 609, 170 App.Div. 47.
10 C.J. p 737 note 64.
Payment of fare by passenger on wrong train see supra § 596

Passenger as trespasser

Railroad may consider one taking passage on train not scheduled to stop at his destination as a trespasser.—Fagan v. Atlantic Coast Line R. Co., 115 N.E. 704, 220 N.Y. 301, L.R.A 1917E 663, reversing 155 N.Y.S 609, 170 App.Div. 47.

Going in wrong direction

Ind.—Godfrey v. Ohio, etc., R. Co., 18 N.E. 61, 116 Ind. 30.
Tex.—England v International, etc., R Co., 73 S.W. 24, 32 Tex.Civ.App 86.

Ticket invalid under interstate commerce schedule

Iowa.—Foley v. Chicago Great Western R. Co., 217 N.W. 563, 205 Iowa 72.

a point short of his destination,[32] such as the preceding stopping place,[33] unless the rule prohibiting the train from stopping at his station has been waived or has become obsolete by its continued nonenforcement.[34]

Where carrier is at fault If the carrier is responsible for the mistake of a passenger in taking the wrong train,[35] as where the passenger was misled by the acts or statements of the carrier's agents,[36] such passenger, according to some authorities, may not rightfully be ejected. It has been said to be the carrier's duty to give the passenger such information or instruction as is reasonably necessary to enable him to pursue his journey with safety and dispatch,[37] and the passenger may rely on such information or instruction given him by the carrier's agents when they are acting within the apparent scope of their authority[38] Further, in the absence of information to the contrary, a passenger may rely on a custom of the carrier to carry passengers on a particular train on like tickets.[39] However, if the passenger knows, or has reason to believe, that the information given him by an employee is incorrect,[40] as where it is manifestly erroneous,[41] or that there is a rule or regulation of the carrier making the agent incompetent to give such information[42] or prohibiting the conductor from stopping the train at the station at which the passenger wishes to stop,[43] ejection is not wrongful.

On the other hand, other authorities hold that, even though a carrier through its agents, is at fault, it is the passenger's duty, when informed that he is on the wrong train, to get off and wait for the proper train or to tender the proper fare, and that he cannot recover damages for an ejection, his remedy being to recover for the damages caused by the servant's misdirection.[44] Thus a passenger who boards a train that does not stop at his destination may be required to leave the train at the first regular stopping place, if there is one, or, if not, to pay fare to the next station beyond his destination and, on refusal to do so, may suffer ejection.[45] Further, it has been held that infor-

32. Ky—Flood v Chesapeake, etc, R. Co., 80 S W. 184, 25 Ky L. 2135.
10 C J p 737 note 65

33. Tex.—Missouri, etc, R. Co v Dice, Civ.App., 168 S.W. 478
10 C J p 737 note 66.

34. Tex—Missouri, etc., R. Co v Herring 127 S W. 1155 130 S W 1039, 61 Tex Civ.App 543
10 C J p 738 note 67

35. Ill.—Davis v. Illinois Cent. R. Co, 233 Ill.App 539
Iowa—Wilkes v Chicago, R I & P Ry Co, 198 N W 44, 198 Iowa 832, 36 A.L R. 1012.
Pa.—Weathers v. Pennsylvania R Co, 94 Pa Super 50.
10 C J p 738 note 68
Rule that ticket is not conclusive as to passenger's right to transportation see supra § 816 b

Conductor's and carrier's wrong distinguished

"The conflict in the cases arises, in some instances, from the fact that the court has looked alone to the act of the conductor in ejecting a traveler presenting a ticket entitling him to be transported to a station at which the train did not stop, and, finding it to be one he was authorized or required to do by instructions or regulations the carrier was entitled to promulgate, has reached the conclusion that his act was not wrongful . . . This reasoning ignores the fact that the question is not between the complaining party and the conductor, but between such party and the company, and that the conductor's act may be one required of him by the company, and yet one that the company itself, in the situation presented, had no right to do . . . The act of the conductor in ejecting the passenger may be rightful from his standpoint, and yet wrongful from the standpoint of the company where, acting through another authorized agent, it had directed the passenger to take the train."—Wilkes v Chicago, R I & P Ry. Co., 198 N.W 44, 46, 197 Iowa 832.

A conductor must listen to the explanation of a passenger on the wrong train, to the effect that the ticket agent who sold her her ticket and the conductor on the previous train had told her that her ticket entitled her to travel over that route.—Illinois Cent. R. Co v. Harper, 35 So. 764, 83 Miss. 560, 102 Am.S R 469, 64 L R.A 283.

36. Ill—Davis v. Illinois Cent. R Co, 233 Ill.App 539
Ky—Louisville & N R Co. v. Hawkins, 293 S W 972, 219 Ky 400
Pa—Weathers v. Pennsylvania R. Co, 94 Pa Super. 50, 54, citing **Corpus Juris.**
Tex—Southern Pac. Co v Ulmer, Civ.App, 282 S W. 305, affirmed, Com App., 286 S W. 193
10 C J p 738 note 68

Passenger directed to train by gatekeeper to whom ticket was presented—Louisville & N. R. Co v Hawkins, 293 S.W 972, 219 Ky. 400

"Where two roads jointly maintain a Union Station and run into and out of that station, and a party holding a ticket over one of the roads, by misdirection of their joint employés or the employés of the wrong train, takes passage on the wrong train, the true rule is that she is not a trespasser . . but is entitled to ride on the wrong train to the reasonably safe and convenient point from which she can reach a train on the proper road . . . and her ejection at . . . [such a] point . . . [is] proper"—Mobile & O R. Co. v. Dill, 191 S W. 80, 81, 173 Ky 412.

37. Pa.—Weathers v Pennsylvania R Co, 94 Pa.Super. 50.

38. Pa—Weathers v. Pennsylvania R Co, supra.
Tex.—Missouri, etc. R Co. v. Carlisle, Civ App, 145 S W. 653.
10 C.J p 738 note 68 [b]
Reliance on agent's representations when ticket is defective see supra § 816 c.

39. Cal.—Delmonte v. Southern Pac. Co, 83 P. 269, 2 Cal.App. 211

40. Ga—Atkinson v. Southern R. Co, 39 S.E. 888, 114 Ga. 146, 55 L R.A. 223
Md.—Johnson v. Philadelphia, etc, R Co, 63 Md. 106

41. Pa.—Weathers v. Pennsylvania R Co, 94 Pa Super 50.

42. Ga—Atkinson v. Southern R Co 39 S.E. 888, 114 Ga. 146, 55 L R A 223.

43. Ga.—Atkinson v. Southern R. Co, supra.

44. Mo—Drew v Wabash R. Co, 107 S W. 478, 129 Mo App 459
10 C J p 738 note 72.
Rule that ticket is conclusive of a passenger's right to transportation see supra § 816 a.

45. Ala.—Louisville & N. R. Co v Copeland, 117 So 176, 217 Ala 556
—Louisville & N R Co v Crick, 117 So 167, 217 Ala. 547

mation as to the train upon which a passenger's ticket entitles him to transportation, or as to the time of the train's departure, need be furnished by the ticket agent only upon a due request therefor;[46] accordingly, the failure of a ticket agent voluntarily to tell a passenger over which of two roads his ticket is good is not such negligence as to authorize a recovery from the company for the passenger's ejection from a train on which the ticket is not good, particularly where the ticket shows plainly over which road it is good.[47]

§ 818. Mistake of Conductor as to Right to Transportation

a. In general

b. First conductor's failure to give proper evidence of right to continue journey

a. In General

A carrier is liable for a passenger's ejection resulting from the mistake or lack of judgment of the conductor to whom such passenger presents a ticket or transfer which should entitle him to transportation, even though the conductor acts in good faith; but where the latter has mistakenly exacted less than the proper fare and requests the balance, the passenger may be ejected for refusal to pay.

Where the passenger has done what is necessary under the rules of the carrier to entitle him to transportation, the carrier will be liable for his ejection from the vehicle by reason of mistake or want of judgment on the part of the conductor ejecting him, although the conductor acts in good faith,[48] as the conductor's good faith in such cases will be material only on the question of punitive damages.[49] If a conductor knows, or has good reason to know, that a passenger is entitled to transportation, the carrier will be liable for the latter's ejection, although the evidence of the right to ride which the passenger produces is technically irregular or insufficient.[50] A carrier is liable for the ejection of a passenger for failure to pay fare after the conductor has accepted and retained the ticket,[51] or refused to honor a valid ticket[52] or transfer,[53] it being unnecessary in such a case, for the passenger to pay his fare and then resort to an action to recover it back.[54]

If a conductor has by mistake taken less than the required fare, and he subsequently demands the balance, the passenger may be ejected if he refuses

Reason for rule

The ticket "is the sole and conclusive evidence of the contract for transportation between a passenger who boards a train that does not stop at his destination, and the conductor."—Louisville & N. R. Co. v. Copeland, 117 So. 176, 217 Ala. 556—Louisville & N. R. Co. v. Crick, 117 So. 167, 171, 217 Ala. 547.

46. Ala.—Louisville & N. R. Co. v. Copeland, 117 So. 176, 217 Ala. 556—Louisville & N. R. Co. v. Crick, 117 So. 167, 217 Ala. 547.
10 C.J. p 739 note 73.

47. Ky.—McKinley v. Louisville, etc., R. Co., 127 S.W. 483, 137 Ky. 845, 28 L.R.A.,N.S., 611.
10 C.J. p 739 notes 73, 74.

48. Ohio.—Cincinnati Northern Tract. Co. v. Rosnagle, 95 N.E. 884, 84 Ohio St. 310, 35 L.R.A.,N.S., 1030, Ann.Cas.1912C 639.
10 C.J. p 746 note 24.

Refusal to receive genuine, although worn coin

Ill.—Chicago Union Tract. Co. v. McClevey, 126 Ill.App. 21.
Mo.—Ruth v. St. Louis Transit Co., 71 S.W. 1055, 98 Mo.App. 1.
Ohio.—Cincinnati Northern Tract. Co. v. Rosnagle, 95 N.E. 884, 84 Ohio St. 310, 35 L.R.A.,N.S., 1030, Ann.Cas.1912C 639.
10 C.J. p 746 note 24 [a].

A conductor's refusal to accept mileage coupons for a passenger's fare and his ejection of the passenger are wrongful where the passenger had attempted to comply with the requirement that the coupons be exchanged for a ticket but had been refused such an exchange by the ticket agent.—Dorsett v. Atlantic Coast Line R. Co., 72 S.E. 491, 156 N.C. 439.

49. N.C.—Edwards v. Southern R. Co., 78 S.E. 219, 162 N.C. 278.

50. Minn.—Krueger v. Chicago, etc., R. Co., 71 N.W. 683, 68 Minn. 445, 64 Am.S.R. 487.
10 C.J. p 747 note 37.
Probability of agent's mistake see supra § 816 b.

Transfer with correct and incorrect punches

Where a transfer has two punches, one correct and the other showing it to be invalid, as being too old, the conductor has no right to treat the transfer as old and ignore the correct time punched thereon, and the company is liable for the passenger's ejection.—Laird v. Pittsburgh Tract. Co., 31 A. 51, 166 Pa. 4.

Rule or practice as to transfers

(1) A transfer designating a different line from the one on which the holder is traveling, but which is valid according to the rule and practice of the carrier, may not be rejected by a conductor, even though a statute requiring the carrier to issue transfers did not require that such a rule and practice be adopted by the carrier.—Arnold v. Rhode Island Co., 66 A. 60, 28 R.I. 118, 163, 125 Am.S.R. 721—10 C.J. p 746 note 30.

(2) A conductor may not refuse to accept a transfer issued at a certain point on the ground that the carrier did not issue transfers at that point, when such a transfer had in fact been issued and the company was bound by law to issue transfers at such point.—Chiert v. Interurban St. R. Co., 92 N.Y.S. 781.

51. N.C.—Mott v. Atlantic Coast Line R. Co., 79 S.E. 867, 164 N.C. 367—Edwards v. Southern R. Co., 78 S.E. 219, 162 N.C. 278.
Pa.—Case v. Delaware, etc., R. Co., 43 A. 319, 191 Pa. 450.
10 C.J. p 746 note 26.

52. Ky.—Cincinnati, etc., R. Co. v. Carson, 140 S.W. 71, 145 Ky. 81.
Mo.—Ferguson v. Missouri Pac. R. Co., 128 S.W. 799, 144 Mo.App. 262.
Tex.—Texas, etc., R. Co. v. Lynch, 94 S.W. 1093, 43 Tex.Civ.App. 121.

Where a ticket is apparently genuine, a conductor is bound to ascertain that it was not purchased from the company's agent, as stated by the passenger, before he may eject him.—Ferguson v. Missouri Pac. R. Co., 128 S.W. 799, 144 Mo.App. 262.

53. R.I.—Arnold v. Rhode Island Co., 66 A. 60, 28 R.I. 118, 163, 125 Am.S.R. 721.

54. R.I.—Arnold v. Rhode Island Co., supra.
10 C.J. p 746 note 29.

to pay the additional fare and attempts to ride further than the distance for which he has paid.[55]

b. First Conductor's Failure to Give Proper Evidence of Right to Continue Journey

Where one conductor is at fault in failing to give a passenger proper evidence of his right to transportation to present to a succeeding conductor, the passenger, according to some authorities, may not be ejected by the latter if he makes explanation and is without fault and in good faith, but, according to other authorities, the passenger may be ejected in such a case if he refuses to pay fare.

Where one conductor is required to furnish a passenger with proper evidence to be presented to a succeeding conductor showing the passenger's right to be transported and continue his journey on the second conductor's car or train, and the first conductor, through mistake or negligence, fails to furnish proper evidence and in consequence the passenger is ejected by the second conductor for refusal to pay fare, the carrier, according to some authorities is liable for the ejection,[56] in such a case the second conductor should heed the passenger's explanation as to why he could not produce proper evidence of his right to continue his journey.[57] Thus a carrier is liable for a passenger's ejection resulting from the first conductor's taking up the passenger's ticket,[58] or the "hat check" given in lieu of the ticket,[59] and leaving the latter with nothing to show his right to continue his journey on a succeeding train; and the same result is reached where a conductor or other authorized employee tears off and returns to a passenger the wrong part of his ticket.[60] A passenger ejected for lack of proper evidence of his right to transportation must not be at fault himself if he is to recover, as for wrongful ejection, on the ground that such lack was due to a conductor's mistake,[61] thus he cannot knowingly board a car with a ticket which on its face does not entitle him to ride.[62] A passenger accepting a transfer in good faith is not bound to stop and examine it to see that no mistake has been made as he may assume that the conductor has given him a proper transfer.[63]

On the other hand, there are authorities holding that a succeeding conductor is not required to heed a passenger's explanation as to the first conductor's mistake, and may eject him upon his failure to present proper evidence of his right to transportation and his refusal to pay fare,[64] and that the passenger, in such a case, should pay fare or leave the

55. Ind.—Lake Erie, etc., R. Co v. Mayo, 30 N.E. 1106, 4 Ind.App. 413
10 C.J. p 747 note 32

56. Ind.—Union Traction Co. of Indiana v. Smith, 123 N.E. 4, 70 Ind App 40.
Miss.—Yazoo & M. V. R. Co v. Mullen, 131 So 101, 158 Miss 774.
Ohio—Diehl v. Cincinnati Traction Co., 6 Ohio App. 151.
10 C.J. p 747 note 34—p 748 note 45.
Defect due to mistake of agent generally see supra § 816.

Defective or invalid transfer
Ind.—Union Traction Co of Indiana v. Smith, 123 N.E. 4, 70 Ind.App. 40.
Ohio—Diehl v Cincinnati Traction Co., 6 Ohio App 151
10 C.J. p 748 note 45

57. Ind.—Union Traction Co. of Indiana v Smith, 123 N.E. 4, 70 Ind App 40
Miss.—Yazoo & M. V. R. Co. v. Mullen, 131 So. 101, 158 Miss 774
10 C.J. p 748 note 45.

Explanation must be reasonable and true
Miss.—Yazoo & M. V. R. Co v. Mullen, 131 So 101, 158 Miss. 774.

Passenger's failure to make any explanation before he is put off the car will not defeat recovery, but may be considered as bearing on the question of his good faith.—Cleveland City R. Co. v. Conner, 78 N.E. 376, 74 Ohio St. 225, 6 Ann.Cas. 941.

58. Miss.—Yazoo & M. V. R. Co. v. Mullen, 131 So 101, 158 Miss. 774
10 C.J. p 747 note 35.

Passengers stopping over
U.S.—Scofield v. Pennsylvania Co., Ohio, 112 F. 855, 50 C.C.A. 553, 56 L.R.A. 224.

Passenger changing trains
N.C.—Sawyer v Norfolk Southern R. Co., 86 S.E. 166, 171 N.C. 13
10 C.J. p 747 note 35.

59. Miss.—Yazoo & M. V. R. Co v. Mullen, 131 So. 101, 158 Miss. 774

60. N.Y.—Cohen v Erie R. Co., 160 N.Y.S. 1091, 97 Misc. 1.
10 C.J. p 747 note 36

Return part of round-trip ticket
(1) Where a passenger on his return journey presents the going part of a round-trip ticket and is ejected because of that fact, the carrier is liable if the conductor on the going trip by mistake tore off and retained the return part of the ticket.—Cohen v. Erie R. Co., 160 N.Y.S. 1091, 97 Misc. 1—10 C.J. p 747 note 39.

(2) In such a case however, there may be no recovery for a wrongful ejection unless the passenger was ignorant of the conductor's mistake and his ignorance was due to no negligence of his own.—Wiggins v King, 36 N.Y.S. 768, 91 Hun 340—10 C.J. p 748 note 40 [a].

(3) If the action is brought for a breach of contract, there may be a recovery of compensatory damages resulting from the failure, because of the first conductor's negligence, to carry the passenger.—Harrison v Pennsylvania R. Co., 118 N.Y.S. 1022.

61. Ohio.—Diehl v. Cincinnati Traction Co., 6 Ohio App. 151.

62. N.Y.—Nicholson v Brooklyn Heights R. Co., 103 N.Y.S. 310, 118 App.Div. 13

63. Ohio.—Diehl v. Cincinnati Traction Co., 6 Ohio App. 151.
10 C.J. p 748 note 46.

64. Cal.—Wasserman v. Los Angeles Ry. Corporation, 193 P. 130, 184 Cal. 202.
10 C.J. p 747 note 38—p 748 notes 41, 43.

Reason for rule
"To make the conductor the judge of the truth of the passenger's statements against the conditions printed on the transfer itself would tend to demoralize the orderly conduct of the business of the carrier, and give rise to disputes and breaches of the peace."—Wasserman v. Los Angeles Ry Corporation, 193 P. 130, 131, 184 Cal. 202

Transfer invalid at point where offered
Cal.—Wasserman v Los Angeles Ry. Corporation, 193 P. 130, 184 Cal. 202

Evidence corroborating passenger's explanation
The conductor on a train, to which a passenger making the first half of a round trip had changed, need not accept the statement that the first

car,[65] and seek redress against the carrier for breach of its contract to give a proper transfer.[66]

§ 819. Failure or Refusal to Comply with Regulations

a. In general
b. Riding on freight trains

a. In General

A carrier may enforce its reasonable rules and regulations, such as those pertaining to the reservation of cars for women, the separation of races, and the conducting of business in its vehicle or premises, by ejecting from its vehicle or premises a person violating such rules; but the enforcement must be reasonable and in good faith.

A passenger is bound to conform to the reasonable rules and proper regulations of the carrier on whose vehicle he is traveling,[67] and upon his failure to do so may be ejected from the vehicle or premises.[68]

The enforcement of regulations must be reasonable and in good faith, and a passenger should not be ejected if it appears to the employee acting for the company that the failure to comply has been without fault on the part of the passenger;[69] and a conductor has no right to discriminate against a passenger in enforcing a company rule.[70] While a rule requiring the exhibition of tickets before entering a train,[71] or prohibiting the entrance to a train in a certain manner, as by leaping on to the rear platform,[72] may be enforced by preventing the forbidden act, the violation of such rule should not be made the ground for a subsequent ejection from the train when the occasion for enforcing the rule has passed.[73]

Apart from the particular rules and regulations considered in this section, the effect of a passenger's failure to comply with the reasonable rules or regulations of a carrier is considered in other connections in §§ 810, 811, and 815–818 supra, and §§ 821, 824–826, 828 and 829 infra.

Reservation of cars for women. A male passenger who enters a car in violation of a reasonable regulation reserving it for the accommodation of women and their male escorts may be ejected therefrom if he enters it with knowledge of such regulation or refuses to leave it after being informed thereof;[74] but it has been held that, since a carrier is bound to furnish seats to passengers, if practicable, see supra § 645, a male passenger who peaceably enters the "ladies' car" because he

conductor had taken up the going coupon and failed to issue a check evidencing the passenger's right to continue that part of his journey, even though such passenger could show his return trip coupons, as such coupons were not conclusive of the fact that he had purchased a round-trip ticket.—Van Dusan v. Grand Trunk R. Co., 56 N.W. 848, 97 Mich. 439, 37 Am.S.R. 354.

65. Neb.—Jones v. Omaha, etc., R. Co., 146 N.W. 959, 95 Neb. 798.
10 C.J. p. 748 note 43.

66. Ark.—Little Rock R., etc., Co. v. Goerner, 95 S.W. 1007, 80 Ark. 158, 7 L.R.A.,N.S., 97, 10 Ann.Cas. 273, distinguished in St. Louis etc., R. Co. v. Baty, 114 S.W. 218, 88 Ark. 282.
10 C.J. p. 748 note 43.

67. Ala.—Louisville & N. R. Co. v. Copeland, 117 So. 176, 217 Ala. 556.—Louisville & N. R. Co. v. Crick, 117 So. 167, 217 Ala. 547.
N.Y.—Caffrey v. United Traction Co., 192 N.Y.S. 95, 199 App.Div. 208.
10 C.J. p. 730 note 1.
Power of carrier to make regulations generally see supra § 570

The Corpus Juris text is cited in Davis v. Kirklen, Tex.Civ.App., 253 S.W. 330, 331.

68. Cal.—Wasserman v. Los Angeles Ry. Corporation, 193 P. 130, 131, 184 Cal. 203, quoting **Corpus Juris** statement.
N.Y.—Caffrey v. United Traction Co., 192 N.Y.S. 95, 199 App.Div. 208.
10 C.J. p. 729 note 95–p. 730 note 1.

Intoxicated passenger
Ky.—Stringfield v. Louisville R. Co., 105 S.W. 1190, 32 Ky.Law 578.

Dogs accompanying passengers
(1) A passenger may be ejected for failure to comply with a regulation prohibiting dogs in a passenger coach.
Iowa.—Gregory v. Chicago, etc., R. Co., 69 N.W. 532, 100 Iowa 345
Mass.—Hull v. Boston, etc., R. Co., 96 N.E. 58, 210 Mass. 159, 36 L.R.A.,N.S., 406, Ann.Cas.1912C 1147.

(2) But it has been held that a passenger's ejection from a street car is not justified by his failure to comply with a rule requiring all dogs, when carried on the cars, to be tied in the front vestibule.—Little Rock R. etc., Co. v. Bracy, 165 S.W. 450, 111 Ark. 613.

Standing on platform
(1) A passenger may be ejected for violation of a regulation against riding on the platform of a car.
Ark.—Dobbins v. Little Rock R., etc., Co., 95 S.W. 794, 79 Ark. 85, 9 Ann.Cas. 84
N.Y.—Montgomery v. Buffalo R. Co., 58 N.E. 770, 165 N.Y. 139, affirming 48 N.Y.S. 849, 24 App.Div. 454.
Wis.—Coombs v. Southern Wisconsin R. Co., 155 N.W. 922, 162 Wis. 111, L.R.A.1916D 539.

(2) And it is immaterial that a carrier customarily permitted passengers to ride in such a place.—Liversidge v. Berkshire St. R. Co., 96 N.E. 665, 210 Mass. 234, 36 L.R.A.,N.S., 993.

Getting on at wrong place
Minn.—Carpenter v. Minneapolis, etc., Tract. Co., 157 N.W. 902, 133 Minn. 46.

69. Mass.—Hall v. Power, 12 Metc. 382, 46 Am.D. 698.
N.Y.—Penfield v. Cleveland, etc., R. Co., 50 N.Y.S. 79, 26 App.Div. 413
Wis.—Wightman v. Chicago, etc., R. Co., 40 N.W. 689, 73 Wis. 169, 9 Am.S.R. 778, 2 L.R.A. 185.

70. Ga.—Seaboard Air Line R. Co. v. Lindsey, 79 S.E. 361, 13 Ga.App. 461.

71. Ill.—Illinois Cent. R. Co. v. Louthan, 80 Ill.App. 579

72. N.Y.—Smith v. Manhattan R. Co., 18 N.Y.S. 759 affirmed 33 N.E. 1083, 138 N.Y. 623.

73. N.Y.—Smith v. Manhattan R. Co., supra.

74. N.Y.—Peck v. New York Cent., etc., R. Co., 70 N.Y. 587
10 C.J. p. 731 note 18.
Reasonableness of rules setting apart particular cars for particular classes see supra § 571.

is unable to find a seat elsewhere may recover damages if he is forcibly ejected therefrom by the officials.[75]

Separation of races. A passenger may be ejected from a train for refusing to obey a regulation requiring passengers of a particular race to occupy a car set aside for them.[76] Likewise, a passenger may be ejected from a car or compartment set apart for passengers of another race, and be compelled to go into another car or compartment set apart for passengers of his own race, under regulations of the carrier providing for such separation,[77] and such regulations may be made and enforced by virtue of a statute requiring carriers to provide separate accommodations for the white and colored races;[78] but a passenger should not be compelled to make a change from one coach to another at a time when it is dangerous for him so to do.[79]

In the absence of a federal statute regulating the matter, a carrier is not justified in evicting an interstate passenger for refusal to occupy that part of a car set apart for his race unless it is shown that a rule or regulation of the carrier requiring the segregation of races is in fact in existence and in force, and that such rule is a reasonable one.[80]

Conducting business in carrier's vehicle or depot. A public conveyance is not intended as a place for the conducting of business by a passenger, and, unless there is a general custom to the contrary,[81] the carrier may eject from its vehicle of carriage a person who persists in carrying on a business therein against its rules.[82] Similarly, a carrier may eject a person from its depot premises for violating a reasonable rule prohibiting the pursuit of a certain business on the premises,[83] or regulating the manner in which a permitted business may be conducted.[84]

b. Riding on Freight Trains

One riding on a freight train in violation of the carrier's rule may be ejected, but a railroad accustomed to carrying passengers on freight trains is liable for ejection therefrom as from passenger trains, unless it notifies prospective passengers of the discontinuance of the custom.

The conductor of a freight train may eject a person violating a rule of the carrier prohibiting the carriage of passengers on such trains.[85] The fact that the station agent promised such person that he would give the conductor authority to carry him as a passenger on such a train will not make a subsequent ejection unlawful.[86]

75. Wis.—Bass v. Chicago, etc., R. Co., 36 Wis. 450, 17 Am. R. 495

76. Tenn.—Chesapeake, etc., R. Co. v. Wells, 4 S.W. 5, 85 Tenn. 613

77. Ala.—Mobile, etc., R. Co. v. Spenny, 67 So. 740, 12 Ala. App. 375, certiorari denied 68 So. 870
Ark.—St. Louis, etc. R. Co. v. Mynott, 102 S.W. 380, 83 Ark. 6
Miss.—Waldauer v. Vicksburg R., etc., Co., 40 So. 751, 88 Miss. 200
10 C.J. p. 730 note 6.
Separate accommodations for races generally see supra § 645.

Ejection of negro from colored compartment

Where a negro passenger on the train of defendant railway company entered the compartment of a coach designated as the negro smoker, in which were several white men, and the conductor in charge forcibly ejected the negro therefrom on account of the presence of the white men, his removal there was unlawful, and the carrier was liable.—Chicago, R. I. & P. Ry. Co. v. Sharp, 209 P. 646, 87 Okl. 98

78. Ark.—Bradford v. St. Louis, etc., R. Co., 124 S.W. 516, 93 Ark. 244
Miss.—Waldauer v. Vicksburg etc., R. Co., 40 So. 751, 88 Miss. 200
10 C.J. p. 730 note 6 [a] (1).

The carrier itself must comply with the statute in order to justify an ejection, and merely posting a sign in the car indicating in which part of the car members of each race shall sit is not sufficient compliance with a provision that cars shall be divided by a partition or adjustable screen.—Waldauer v. Vicksburg, etc., R. Co., 40 So. 751, 88 Miss. 200.

79. Ala.—Central of Georgia R. Co. v. Carleton, 51 So. 27, 163 Ala. 62—Carleton v. Central of Georgia R. Co., 46 So. 495, 155 Ala. 326, 16 Ann. Cas. 445

80. D.C.—Washington, B. & A. Electric R. Co. v. Waller, 289 F. 598, 53 App. D.C. 200, 30 A.L.R. 50

An oral regulation, in order to be binding and justify an eviction, must be more than an oral instruction to conductors, there must be such notice given that a passenger will have actual knowledge of the regulation, or such notice that knowledge may be imputed to him.—Washington, B. & A. Electric R. Co. v. Waller, 289 F. 598, 53 App. D.C. 200, 30 A.L.R. 50

81. Ind.—Indianapolis St. R. Co. v. Hockett, 67 N.E. 106, 161 Ind. 196, affirming 64 N.E. 633
10 C.J. p. 731 note 8

82. U.S.—Barney v. The D. R. Martin, N.Y., 2 F.Cas.No.1,030, 11 Blatchf. 233, dismissing appeal 91 U.S. 365, 23 L.Ed. 439.
Mass.—Com. v. Power, 7 Metc. 596, 41 Am.D. 465
N.Y.—Barney v. Oyster Bay, etc., Steamboat Co., 67 N.Y. 301, 23 Am. R. 115

83. Ga.—Fluker v. Georgia R., etc., Co., 8 S.E. 529, 81 Ga. 461, 12 Am. S.R. 328, 2 L.R.A. 843.
10 C.J. p. 731 note 10
Soliciting
(1) For a hotel.—St. Louis, etc., R. Co. v. Osborn, 55 S.W. 142, 67 Ark. 399

(2) One who habitually solicits business for an inn may properly be ejected, even though on the particular occasion he was on the depot premises with a ticket and a bona fide intention of boarding a train, but did not disclose his purpose to the servant ejecting him.—Com. v. Power, 7 Metc., Mass., 596, 41 Am.D. 465

84. Mich.—Cole v. Rowen, 50 N.W. 138, 88 Mich. 219, 13 L.R.A. 848

85. Ga.—Higgins v. Southern R. Co., 25 S.E. 837, 98 Ga. 751
Mich.—Thomas v. Chicago, etc., R. Co., 40 N.W. 463, 72 Mich. 355.
Tex.—Grahn v. International, etc., R. Co., 93 S.W. 104, 100 Tex. 27, 123 Am.S.R. 767, 5 L.R.A.,N.S., 1025
Carrier's right to refuse or regulate transportation of passengers on freight trains see supra § 539
Ejection from freight train for failure to have ticket or permit see supra § 810 h.

86. Ind.—Indianapolis, etc., R. Co. v. Kennedy, 77 Ind. 507.

However, as a railroad which is accustomed to carry passengers on freight trains is under a duty to receive and to carry such persons as offer themselves, see supra § 539, such a railroad is liable for an ejection to the same extent as for ejection from a passenger train,[87] unless it has discontinued such custom and notified prospective passengers of that fact.[88]

Release of liability on mixed train. A statute requiring railroad companies to carry passengers upon "freight trains to which a caboose is attached," but permitting a limitation of liability except for willful negligence, is not applicable to a passenger on a mixed train, so that an ejection of a passenger on such a train for his refusal to sign a release of liability is wrongful.[89]

§ 820. What Constitutes Ejection

To constitute an ejection, it is not necessary that violence be used; so ejection may occur where a passenger is informed that he must leave the vehicle at a designated time and place. A carrier is not liable for an ejection if the passenger leaves voluntarily or is removed by a law officer.

In determining the liability of the carrier, where it is claimed that the ejection has been either without cause, or in an improper manner, it is not necessary, in order that an ejection may be said to have occurred, that any violence shall have been used,[90] as an ejection may occur where a passenger is informed by the conductor or other authorized employee of the carrier that he must leave the vehicle at a designated time and place.[91] This is particularly true where it is made apparent to the passenger that force will be used unless the order to get off is obeyed,[92] as where a command to get off is followed by threats to throw the passenger off, even though the carrier's employee does not actually touch the passenger;[93] and it is immaterial that there is nothing insulting in the conductor's words or manner in making such a threat.[94] However, a person will not be justified in getting off at a dangerous place or time at the mere requirement or command of a conductor or other employee of the carrier, if such command is not attended with force, threats, or overpowering intimidation.[95]

A carrier is not liable for an ejection if the passenger leaves the vehicle voluntarily,[96] as where

Mo.—Marshall v. St. Louis, etc., R. Co., 78 Mo. 610.

87. Wis.—Boehm v. Duluth, etc., R. Co., 65 N.W. 506, 91 Wis. 592.
10 C.J. p. 731 note 14

88. Cal.—Wieland v. Southern Pac. Co., 82 P. 226, 1 Cal.App. 343

89. Kan.—Schwartz v. Missouri, etc., R. Co., 109 P. 767, 83 Kan. 30.

What constitutes mixed train

(1) A train which has freight cars, a combination mail, baggage, and express car, and a passenger coach, and which runs on a regular schedule and stops at passenger platforms to receive and discharge passengers, is a mixed train.—Schwartz v. Missouri, etc., R. Co., 109 P. 767, 83 Kan. 30.

(2) Mixed train generally see Mixed Train, 40 C.J. p. 1231 notes 45, 46.

90. Tex.—Southern Pac. Co. v. Ulmer, Civ.App., 282 S.W. 305, 308, citing **Corpus Juris** affirmed, Com.App., 286 S.W. 193.
10 C.J. p. 752 note 79.

A passenger need not be "compelled" to leave a train in the sense that irresistible force is used, in order that there be a wrongful ejection.—Southern Pac. Co. v. Ulmer, Tex.Civ.App., 282 S.W. 305, affirmed, Com.App., 286 S.W. 193.

91. Ill.—Wilson v. Cleveland, C., C. & St. L. Ry. Co., 245 Ill.App. 72.—Davis v. Illinois Cent. R. Co., 233 Ill.App. 539.

Ky.—Guy v. Interstate Transit, 51 S.W.2d 455, 244 Ky. 479

Mo.—Ferguson v. Missouri Pac. Ry. Co. App., 186 S.W. 1134.

Tex.—Chicago, R. I. & G. Ry. Co. v. Carroll, 193 S.W. 1068, 108 Tex. 378.—Southern Pac. Co. v. Ulmer, Civ.App., 282 S.W. 305, affirmed, Com.App., 286 S.W. 193.
10 C.J. p. 752 note 79.

Passenger on wrong train because of misdirection by the carrier's agent.—Southern Pac. Co. v. Ulmer, Tex.Civ.App., 282 S.W. 305, affirmed, Com.App., 286 S.W. 193

Passenger told to leave train at the wrong station through the mistake of the conductor suffers ejection.—Wilson v. Cleveland, C., C. & St. L. Ry. Co., 245 Ill.App. 72.

Leaving train after change of carriers

If a change of carriers operating a train intervenes between the time a conductor informs a passenger that she must leave the train at a certain stop and the time when that stop is reached, so that the conductor so directing the passenger is not on the train at the time of arrival at that stop, the first carrier is liable for the ejection of such passenger if she leaves in consequence of that conductor's order.—Chicago, R. I. & Gulf Ry. Co. v. Carroll, 193 S.W. 1068, 108 Tex. 378.

Coercion by fear

The fact that a conductor told a passenger that he would rather she got off at a certain station, as it was dangerous for her with her infant children to proceed on the train to her destination may be sufficient to show that she was coerced by the conductor to leave the train, for coercion may result from fear.—Louisville, etc., R. Co. v. Quinn, 39 So. 616, 145 Ala. 657

92. Minn.—Morrill v. Minneapolis St. R. Co., 115 N.W. 395, 103 Minn. 362, 123 Am.S.R. 341

N.Y.—Ray v. Cortland, etc., Tract. Co., 46 N.Y.S. 521, 19 App.Div. 530.
10 C.J. p. 752 note 81.

93. Indiana, etc., R. Co. v. Ditto, 64 N.E. 222, 158 Ind. 669.
10 C.J. p. 752 note 81.

94. Ga.—Georgia R., etc., Co. v. Baker, 54 S.E. 639, 125 Ga. 562, 114 Am.S.R. 246, 7 L.R.A.,N.S., 103, 5 Ann.Cas. 484
10 C.J. p. 753 note 82.

95. U.S.—Bosworth v. Walker, Ill., 83 F. 58, 27 C.C.A. 402.

Ill.—Chicago, etc., R. Co. v. Moran, 129 Ill.App. 38
10 C.J. p. 753 note 83.

96. La.—Cady v. New Orleans, T. & M. Ry. Co., 145 So. 680, 176 La. 341

Tex.—Southern Kansas Ry. Co. of Texas v. Wallace, Com.App., 206 S.W. 505, reversing, Civ.App., 152 S.W. 873.

Particular facts held not to constitute ejection

Where a passenger entered one of several cars waiting for passengers

a passenger, upon discovering that she does not have her tickets, leaves the train under the advice and suggestion of but without compulsion by, the conductor,[97] or where a passenger who fails to get off at the station of his destination requests that the train be stopped and, upon a compliance with this request, alights and walks back to the station,[98] or where a passenger leaves a train against the advice of the conductor, who has offered to keep the baggage check as security for payment of the fare pending a determination as to whether the ticket presented is a valid one.[99]

The removal of a passenger from one car to another in enforcing a regulation, such as that requiring the separation of races, is not an ejection,[1] unless it is done wrongfully, or in a negligent or insulting manner.[2]

Removal by law or health officer. A removal of a passenger by a law officer on a charge of disorderly conduct does not create liability on the part of the carrier for wrongful ejection where its employee did not assist in or request the removal.[3]

A passenger's obedience to the order of a quarantine or health officer that he leave the train has been held not to be a wrongful ejection for which the carrier is liable, although the carrier's employee does not interfere to prevent the ejection;[4] but there is also authority to other effect.[5]

§ 821. Place or Time of Ejection

a. In general
b. Statutory designation of place

a. In General

When a person is rightfully ejected from a carrier's vehicle, the ejection need not, apart from statute, be at a regular stopping place. It must be at such a time and place, and in such circumstances, that the person ejected is not exposed to danger or injury, and an employee is chargeable with knowledge of the perils of a dangerous place of ejection.

Where there is proper occasion for ejecting a person from a carrier's vehicle, as when he refuses or fails to pay the required fare or produce a proper ticket,[6] or when he refuses to comply with the proper rules and regulations of the carrier, or is guilty of improper conduct,[7] the ejection, in the absence of a statute providing otherwise, need not be at a regular station or stopping place, but may be made at any safe point. However, whether or not a person may be ejected only at a regular station, rather than at a point between stations, has been held to depend largely on the circumstances of each particular case.[8] The carrier has been required to afford the passenger a reasonable opportunity to leave the vehicle in safety,[9] so, in any event, the ejection must be at such

and, after becoming involved in a controversy with the conductor, voluntarily left that car and then was told by the conductor that he could not ride on that car, but should take passage on one of the others, there was no ejection—Dobbins v. Little Rock R., etc., Co., 95 S.W. 794, 79 Ark. 85, 9 Ann.Cas. 84.

97. Tex.—Southern Kansas Ry. Co. of Texas v. Wallace, Com.App., 206 S.W. 505, reversing, Civ.App., 152 S.W. 873.

98. La.—Cady v. New Orleans, T. & M. Ry. Co., 145 So. 680, 176 La. 341.

A train need not be backed up to the station where there was no demand or request that it be done—Cady v. New Orleans, T. & M. Ry. Co., 145 So. 680, 176 La. 341.

99. Mo.—Boling v. St. Louis, etc., R. Co., 88 S.W. 35, 189 Mo. 219.

1. Ark.—Bradford v. St. Louis, etc., R. Co., 124 S.W. 516, 93 Ark. 244
Ky.—Southern R. Co. v. Thurman, 90 S.W. 240, 121 Ky. 716, 28 Ky.L. 699, 2 L.R.A.,N.S., 1108
Failure to comply with regulation as to separation of races see supra § 819 a.

2. Ky.—Southern R. Co. v. Thurman, supra.
10 C.J. p. 753 note 87.

3. U.S.—Kinchlow v. Peoples Rapid Transit Co., App.D.C., 88 F.2d 764
Where a colored passenger refused to exchange seats at the request of a bus driver, which request was in conformity with the segregation law, and a policeman was called in to compel compliance therewith and arrested the passenger upon her persistent refusal to comply with, and resistance to, the demand, the carrier was held not liable for an ejection.—Kinchlow v. Peoples Rapid Transit Co., App.D.C., 88 F.2d 764

4. Ga.—Baldwin v. Seaboard Air-Line R. Co., 58 S.E. 35, 128 Ga. 567, 13 L.R.A.N.S., 360.
10 C.J. p. 753 note 89

5. Miss.—St. Louis, etc., R. Co. v. Roane, 46 So. 711, 93 Miss. 7.

6. D.C.—Burch v. Baltimore, etc., R. Co., 3 App.D.C. 346, 26 L.R.A. 129.
Ga.—Rossman v. Georgia Ry. & Power Co., 91 S.E. 90, 146 Ga. 264, L.R.A.1917C 483
Mich.—Willett v. King, 168 N.W. 986, 203 Mich. 295.
10 C.J. p. 753 note 91.

Reason for rule
"If persons intent on defrauding railroad companies may lawfully insist upon being carried from station to station before being ejected, it is not apparent why they would not thereby be enabled, by re-embarking upon subsequent trains, to ride the whole length of a road and all the time without payment of fare."—Burch v. Baltimore, etc., R. Co., 3 App.D.C., 346, 350, 26 L.R.A. 129.

Ejection of passenger
D.C.—Burch v. Baltimore, etc., R. Co., 3 App.D.C. 346, 26 L.R.A. 129.
Mich.—Willett v. King, 168 N.W. 986, 203 Mich. 295

Sleeping passenger carried by station
Tex.—Gulf, etc., R. Co. v. Green, Civ.App., 141 S.W. 341.

7. Ky.—Chesapeake, etc., R. Co. v. Crank, 108 S.W. 276, 128 Ky. 329, 32 Ky.L. 1202, 16 L.R.A.,N.S., 197.
10 C.J. p. 753 note 91.

8. S.C.—Paul v. Southern Ry. Co., 155 S.E. 884, 158 S.C. 550.

9. Ga.—Rossman v. Georgia Ry. & Power Co., 91 S.E. 90, 146 Ga. 264, L.R.A.1917C 483.

a time[10] and place,[11] and under such circumstances,[12] that the person ejected will not be exposed to peril, danger, or serious personal injury, particularly if he is manifestly incapacitated for looking out for himself;[13] but, subject to these limitations, the time, place, and circumstances under which a person may be ejected have been held to be largely within the conductor's discretion.[14]

An employee of a carrier who ejects a passenger at a dangerous place is chargeable with knowledge of the perils of such place;[15] and an ejected passenger, acting in good faith, has been held entitled to assume that the place selected by the conductor for him to alight is safe.[16]

b. Statutory Designation of Place

A carrier must comply with a statute designating the places where ejection may be made; but where such a statute refers to ejection for failure to pay fare, its application has been limited thereto.

Where there is a statute limiting the exercise of a carrier's right of ejection to specified places, such as a usual stopping place,[17] a regular station,[18]

10. Ala.—Birmingham Electric Co v Maze, 166 So. 50 231 Ala. 539.
N.C.—Ledford v. Louisville & N. R. Co., 125 S.E 540, 188 N C 808
10 C.J p 754 note 1.

An ejection at nine o'clock at night and at an improper place is wrongful.—McNairy v. Norfolk & W R. Co, 90 S.E 497, 172 N C. 505.

Pending storm

A trespasser who is capable of taking care of himself need not be put off at a regular station because, at the time of ejection, there is a storm pending, and a possibility that he may be caught in it.—Burch v. Baltimore, etc., R. Co, 3 App D C. 346, 26 L R A. 129.

11. Ala.—Birmingham Electric Co v. Maze, 166 So. 50 231 Ala. 539
D.C.—Burch v Baltimore, etc, R Co, 3 App.D C. 346 26 L R A. 129
Ga.—Rossman v. Georgia Ry & Power Co, 91 S E 90, 146 Ga. 364, L.R A 1917C 483.
La.—Gates v Bisso Ferry Co, App, 172 So 829
Mich.—Willett v. King, 168 N W 986, 203 Mich 295.
N C—Ledford v. Louisville & N. R. Co., 125 S E. 540, 188 N C. 808.
Tenn.—Louisville & N R Co v Hadley, 11 Tenn App. 642.
10 C J p 753 note 91, p 754 note 1

Dark surroundings

Evidence of forcible ejection of passenger from train into dark surroundings after passing destination showed that ejection was made without reference to passenger's comfort —Atlantic Coast Line R. Co. v. Summerall, 139 S E 923, 37 Ga.App 294.

Train crossing trestle

Where an employee of a railroad company compelled a trespasser to jump from the train when it was passing over a trestle during the nighttime, his act was wanton and cruel, and damages should be awarded for injuries resulting therefrom — Louisville & N. R Co v. Marlin, 186 S.W. 595, 135 Tenn 435, L R A 1917A 417

A regular station is not an improper place to eject a passenger, although there is no hotel for public accommodation at that place — Hall v Memphis, etc, R. Co, C C. Tenn, 15 F. 57.

12. Ala.—Birmingham Electric Co v. Maze, 166 So. 50, 231 Ala. 539 —Johnson v. Louisville, etc, R Co, 16 So. 75, 104 Ala. 241, 53 Am. S R 39.
N.C.—Ledford v. Louisville & N R. Co., 125 S E. 540, 188 N C 808

13. D C—Burch v. Baltimore, etc, R. Co, 3 App D.C 346, 351 26 L. R.A 129.
Mich.—Willett v King, 168 N W 986, 203 Mich. 295.
10 C J p 755 notes 4, 6 p 756 note 7.
Carrier's liability for injuries to helpless person ejected in dangerous place see infra § 830

"When . . . a trespasser is a person more or less incapable of taking care of himself—a child, a lunatic, an imbecile, a person under the influence of intoxicating liquor—considerations of humanity will demand that he receive different treatment from that awarded to the ordinary adult man in the full possession of all his faculties"—Burch v Baltimore, etc, R. Co, supra

14. Ala.—Birmingham Electric Co v Maze, 166 So 50, 231 Ala 539

15. Ala.—Central of Georgia R. Co v Bagley, 55 So 894, 173 Ala. 611
Tex.—Gulf, etc, R Co v. Green, Civ App, 141 S.W 341

16. Ala.—Central of Georgia R Co v. Bagley, 55 So 894, 173 Ala. 611

17. N C—McNairy v. Norfolk & W. R. Co, 90 S E 497, 172 N C. 505.
10 C J p 753 note 92.

What constitutes

(1) A "usual stopping place" does not mean a "station or passenger station," but rather a place reasonably safe for the discharge of passengers, thus, the ejection of a passenger is at a proper place where it is at a point at which a large number of employees engaged in mills are received and discharged by the carrier in going to and coming from a city, accessible dwelling houses being not more than five hundred or six hundred feet away, and a hotel within sixty rods—Habeck v Chicago, etc., R. Co, 132 N W 618, 146 Wis 645, Ann.Cas 1912C 485.

(2) But **a side track** at which there is no shelter is not a usual stopping place within the meaning of the statute.—McNairy v. Norfolk & W R. Co, 90 S E 497, 172 N C 505

Although a passenger could have prevented his ejection by paying an extra charge demanded, he may complain of his ejection at a place not permitted by statute—McNairy v Norfolk & W R. Co, 90 S.E. 497, 172 N C 505

Statute construed as permissive

A statute providing that a conductor "may" put off a passenger, who refuses to pay fare, at any usual stopping place "is permissive, and not prohibitory, in its terms . . the law does not prohibit the railroad company . . from doing the same thing for the same or any other valid reason, or at any other place"—Toledo, etc., R Co v Wright, 68 Ind. 586, 594, 34 Am R 277

18. Ill.—Illinois Cent. R. Co v Latimer, 21 N E 7, 128 Ill. 163.
10 C J. p 753 note 92.

What constitutes

(1) A regular station is a place on a railroad where passenger trains usually stop to have persons get on and off—Illinois Cent R. Co v. Latimer, 21 N E 7, 128 Ill. 163

(2) A passenger station must be a stopping place at which tickets are ordinarily sold—Baldwin v. Grand Trunk R. Co, 15 A. 411, 64 N H 596

(3) But a water tank is not a regular station, within the meaning of this law, although it may be a regular stopping place—Chicago, etc, R. Co v Flagg, 43 Ill. 364, 92 Am.D 133

Ejection in a town must be at the place where the railroad has its depot—Illinois Cent. R Co. v. Latimer, 21 N E. 7, 128 Ill. 163.

or near[19] or opposite[20] a dwelling house, the carrier will be liable if the ejection is not at a place of the class or classes specified, even though, it has been held, ejection of a passenger at a usual stopping place would, in the particular circumstances, take him to his destination.[21]

Statutes designating the place where a person may be ejected for refusal to pay fare have been restricted in their application to cases in which ejection was for that reason,[22] an ejection for other reasons being permissible at any convenient or safe point selected by the officer in charge of the vehicle.[23] Thus, such a statute has been held inapplicable to the ejection of a mere trespasser who has entered the train with no intention of paying his fare,[24] or to the ejection of a passenger who has failed to alight at his station after being given an opportunity so to do.[25]

§ 822. Manner of Ejection

a. In general
b. Trespassers

a. In General

Even though a carrier has a right to eject a person, it must not do so in an improper manner. In ejecting a passenger, it must exercise at least reasonable and ordinary care, and, if he is under physical disability, care as demanded by such disability.

The fact that a carrier has a right, in a particular instance, to eject a person does not justify an ejection in an improper,[26] unlawful,[27] or negligent[28] manner, or without regard for the safety[29] or rights[30] of the ejected person. Thus a passenger may not be ejected under circumstances which may result in serious,[31] wanton, or unnecessary[32] injury to him.

In ejecting a passenger, a carrier has been held bound to exercise reasonable[33] or ordinary[34] care,

19. Mo.—Boettler v. St. Louis-San Francisco Ry. Co., App., 300 S.W. 528
N.C.—McNairy v. Norfolk & W. R. Co., 90 S.E. 497, 172 N.C. 505.
10 C.J. p. 753 note 92

What is "near"

(1) An ejection at a point where a person can see a dwelling house "across the field" is a sufficient compliance with the statute.—Petty v. St. Louis, etc., R. Co., 130 S.W. 85, 149 Mo.App. 360.

(2) An ejection at a point one hundred feet from a dwelling house is a sufficient compliance.—Boettler v. St. Louis-San Francisco Ry. Co., Mo. App., 300 S.W. 528.

(3) But a point three-quarters of a mile from a dwelling is not sufficient.—McNairy v. Norfolk & W. R. Co., 90 S.E. 497, 172 N.C. 505

20. Mich.—Willett v. King, 168 N.W. 986, 203 Mich. 295.

What is "opposite"

"Opposite," within the meaning of the statute, may be defined as "placed over against, standing or situated over against or in front; facing," thus a person ejected from a train at a point about two city blocks from a dwelling house facing the right of way is ejected "opposite" the dwelling house.—Willett v. King, 168 N.W. 986, 989, 203 Mich. 295.

21. Ark.—St. Louis, etc., R. Co. v. Branch, 45 Ark. 524.

22. Ark.—St. Louis, etc., R. Co. v. Lewis, 61 S.W. 163, 69 Ark. 81
10 C.J. p. 754 note 94.

The common-law right to eject a person without reference to stations is not impaired beyond the statutory restriction in the case of ejection for refusal to pay fare.—St. Louis, etc., R. Co. v. Lewis, 61 S.W. 163, 69 Ark. 81.—McCook v. Northup, 45 S.W. 547, 65 Ark. 225

What constitutes refusal to pay fare

(1) Neglect to purchase a ticket before entering the train, when required by a rule of the company, amounts to a refusal to pay fare, and justifies an ejection only at a regular station.
Ark.—McCook v. Northup, 45 S.W. 547, 65 Ark. 225.
Ill.—Chicago, etc., R. Co. v. Flagg, 43 Ill. 364, 92 Am.D. 133.—Illinois Cent. R. Co. v. Sutton, 42 Ill. 438, 92 Am.D. 81.

(2) But a passenger's refusal to surrender his ticket does not constitute the same offense as nonpayment of fare, so that the statute does not apply in such a case.—Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420, 12 Am.D. 138.

23. Fla.—South Florida R. Co. v. Rhodes, 5 So. 633, 25 Fla. 40, 23 Am.S.R. 506, 3 L.R.A. 733

24. Mo.—Short v. St. Louis, etc., R. Co., 130 S.W. 488, 150 Mo.App. 359
10 C.J. p. 754 note 97.

25. Ark.—St. Louis, etc., R. Co. v. Lewis, 61 S.W. 163, 69 Ark. 81.

26. Ala.—Birmingham Electric Co. v. Maze, 166 So. 50, 231 Ala. 539.
Ky.—Casteel v. American Airways, 88 S.W.2d 976, 261 Ky. 818

Special circumstances as to the manner of making an ejection otherwise lawful may render it wrongful.—Foskey v. Wrightsville & T. R. Co., 92 S.E. 34, 19 Ga.App. 670.

27. Ala.—Birmingham Electric Co. v. Maze, 166 So. 50, 231 Ala. 539.

Duty imposed by law

Cause of action for street railway conductor's expulsion in unlawful manner of person who refuses to pay fare does not rest on carrier-passenger relationship, but on duty imposed by law.—Birmingham Electric Co. v. Maze, 166 So. 50, 231 Ala. 539.

28. N.J.—Spalt v. Eaton, 192 A. 576, 118 N.J.Law 327.

Welfare of other passengers for whose protection the removal of an objectionable passenger is undertaken, cannot be disregarded in the removal.—Spalt v. Eaton, 192 A. 576, 118 N.J.Law 327.

29. La.—Horsthemke v. New Orleans Ry. & Light Co., 84 So. 210, 146 La. 931
N.C.—Ledford v. Louisville & N. R. Co., 125 S.E. 540, 188 N.C. 808

30. Ky.—Casteel v. American Airways, 88 S.W.2d 976, 261 Ky. 818.

31. Ala.—Birmingham Electric Co. v. Maze, 166 So. 50, 231 Ala. 539.
N.C.—Ledford v. Louisville & N. R. Co., 125 S.E. 540, 188 N.C. 808.
10 C.J. p. 756 note 11

"Menace of substantial injury"

N.C.—Ledford v. Louisville & N. R. Co., 125 S.E. 540, 541, 188 N.C. 808.

32. Wash.—Backlund v. Puget Sound Tract., etc., Co., 150 P. 3, 86 Wash. 257.
10 C.J. p. 756 note 11.

33. Ky.—Casteel v. American Airways, 88 S.W.2d 976, 261 Ky. 818.
10 C.J. p. 756 note 11.

34. Iowa.—Hobbs v. Illinois Cent. R. Co., 152 N.W. 40, 171 Iowa 624.
Tex.—Williamson v. Chicago, etc., R. Co., 122 S.W. 897, 57 Tex.Civ.App. 502.—Ft. Worth, etc., R. Co. v. Gribble, 102 S.W. 157, 46 Tex.Civ.App. 78.
10 C.J. p. 756 note 11.

although the highest degree of care has been required by other authority.[35]

The use of abusive, insulting, or threatening language in ejecting a passenger is an ejection in an improper manner for which a carrier may be liable,[36] the duty of treating a passenger respectfully continuing until actual expulsion.[37]

Passenger under physical disability. Where a passenger is ejected because of his illness, infirmity, or helplessness, a higher degree of prudence and care for his safety must be observed;[38] and, after a passenger so afflicted has been removed, the duty to use reasonable care and diligence for his safety still continues,[39] at least to the extent of making temporary provision for him.[40]

If a passenger is in such an intoxicated condition that his ability to take care of himself is interfered with, it is particularly true that due regard for his safety must be exercised in expelling him.[41]

b. Trespassers

In removing a trespasser, a carrier must exercise ordinary care for his safety, and not unnecessarily or intentionally injure him; by some authorities it is liable only for wanton or willful injury to him. In ejecting a trespasser of tender years, greater care is required than in the case of more mature persons.

In removing a trespasser, a carrier is bound to exercise ordinary care for his safety,[42] as contrasted, by some decisions, with the duty to exercise the highest degree of care in ejecting a passenger.[43] Other statements are that a carrier is liable only for inflicting wanton, willful, or reckless injury upon a trespasser,[44] and that the carrier owes a trespasser the duty of not unnecessarily and intentionally injuring him.[45] The carrier is not required to consider his mere convenience.[46]

Ejection of trespassers from moving trains or cars is considered in § 823 infra, and the use of force against, and resistance by, trespassers in § 824.

If the trespasser is an infant of tender years, it is the duty of a carrier to use ordinary care in removing him,[47] or to see that he is not ejected in such a manner as to imperil his life or limb,[48] the test being the use of due care under the circumstances;[49] but a greater degree of care is required in removing an infant trespasser of tender years than in the case of an adult or more mature person.[50] There is no duty on the part of railroad

Statements of degree of care required generally see supra § 678.

Ordinarily prudent person

A carrier is liable for the acts of its employee in ejecting a passenger if injury results therefrom and the acts are such as an ordinarily prudent person would not do under like circumstances.—Bettis v. Chicago, etc., R. Co., 108 N.W. 103, 131 Iowa 46.

35. Ky.—Louisville & N. Ry. Co. v. Copley, 197 S.W. 648, 177 Ky. 171.
10 C.J. p 757 note 15.

36. Ala.—Birmingham Electric Co. v. Maze, 166 So. 50, 52, 231 Ala. 539, citing Corpus Juris.
10 C.J. p 758 note 25.

A threat to a passenger to "slap her off" is such language.—Birmingham Electric Co. v. Maze, 166 So. 50, 52, 231 Ala. 539.

37. Ga.—Louisville, etc., R. Co. v. Forrest, 65 S.E. 808, 6 Ga.App. 766.

38. Ky.—Casteel v. American Airways, 88 S.W.2d 976, 261 Ky. 818.
10 C.J. p 757 note 12.

39. Ky.—Casteel v. American Airways, supra.
10 C.J. p 757 note 19.

40. Ky.—Casteel v. American Airways, supra.

41. La.—Horsthemke v. New Orleans Ry. & Light Co., 84 So. 210, 146 La. 931.

Protection from passing trains

It is negligence to eject a passenger when he is known to be too intoxicated to protect himself from trains passing the place of ejection.—Lee v. Atlantic Coast Line R. Co., 97 S.E. 158, 176 N.C. 95.

42. Ky.—Louisville & N. Ry. Co. v. Copley, 197 S.W. 648, 177 Ky. 171.—Louisville & N. R. Co. v. Ashley, 183 S.W. 921, 169 Ky. 330, L.R.A.1916E 763.
10 C.J. p 757 note 16—52 C.J. p 637 note 37.

43. Ky.—Louisville & N. Ry. Co. v. Copley, 197 S.W. 648, 177 Ky. 171.
10 C.J. p 757 note 15.

44. Mo.—Drogmund v. Metropolitan St. R. Co., 98 S.W. 1091, 122 Mo. App. 154.
Porto Rico.—Ramirez v. American R. Co., 23 Porto Rico 298.
52 C.J. p 638 note 38.
Liability for willful, wanton, and reckless acts generally see infra § 828 b.

Insult and abuse

"It was . . . [the conductor's] duty, even toward this trespasser, not to willfully and maliciously wrong him by insulting and abusing him when he put him off."—Alabama, etc., R. Co. v. Livingston, 36 So. 256, 84 Miss. 1.

45. Mo.—Drogmund v. Metropolitan St. R. Co., 98 S.W. 1091, 122 Mo. App. 154.
Porto Rico.—Ramirez v. American R. Co., 23 Porto Rico 298.
10 C.J. p 757 note 17.

46. Kan.—Atchison, etc., R. Co. v. Gants, 17 P. 54, 38 Kan. 608, 5 Am.S.R. 780.

47. Mo.—Quirk v. Metropolitan St. Ry. Co., 210 S.W. 103, 200 Mo.App. 585.

Reckless conduct or gross negligence on the part of the carrier's servants is not essential to justify a recovery.—Petrowski v. Philadelphia, etc., R. Co., 107 A. 331, 263 Pa. 531.

48. Pa.—Stephanik v. Baltimore, etc., R. Co., 89 A. 827, 243 Pa. 43.

Duty to afford reasonable protection

Where it is the duty of a brakeman to keep trespassers off the train and a young boy boards the train, he should afford him reasonable protection, and not put him off or attempt to put him off in a negligent manner.—Southard v. Kansas City Southern R. Co., Mo.App., 191 S.W. 1101.

49. Pa.—Petrowski v. Philadelphia, etc., R. Co., 107 A. 331, 263 Pa. 531.

50. U.S.—Southern R. Co. v. Shaw, Ga., 86 F. 865, 31 C.C.A. 70.
Porto Rico.—Ramirez v. American R. Co., 23 Porto Rico 298, 300.
"In other words . . . the conduct of the carrier might, depending upon circumstances, be wanton with regard to a child of tender years

employees to search trains for and remove infant trespassers.[51]

§ 823. From Moving Train or Car

a. In general
b. Trespassers

a. In General

A carrier may be liable for the ejection of a person from a train or car moving at a dangerous speed even though no special injury results.

In general, it is negligence to expel a person from a train or a car while it is moving at a dangerous rate of speed, and the carrier will be liable for the resulting injury if the negligent employee is acting within the scope of his employment,[52] notwithstanding a rule of the carrier prohibits the ejection of persons while trains are in motion;[53] and a statute in effect prescribing such rule has been applied.[54] A passenger may recover damages for being ejected from the vehicle of a carrier while it is in motion, although no special injury results to him.[55]

b. Trespassers

A carrier may be liable for the willful or forcible ejection of a trespasser, by its employee, from a train or car moving at a dangerous speed, or for acts by him causing the trespasser to jump from or leave such train or car. A moving train should be stopped, or its speed reduced, so as to render it safe for a trespasser to alight.

While it has been held that a railroad company is not liable for ejecting a trespasser from a moving train where its speed is not so great that an injury to him would reasonably be expected to occur,[56] yet where the train is moving there may be liability for the ejection or injuries resulting therefrom.[57] Thus, if a trespasser is willfully or forcibly ejected while the train or car is moving at a dangerous rate of speed, the carrier is liable.[58] It is also liable if its employee forces a trespasser to jump from or leave a moving train at a dangerous place,[59] or while it is running at a dangerous rate of speed;[60] so, throwing missiles at him,[61] or using threatening language or acts toward him,[62] may create liability in the carrier if such act results in his jumping from the vehicle, at least when it causes him to lose his presence of mind or self-control,[63] or so terrifies him as to

when it would not be so with a youth in command of his physical forces or a healthy adult."—Ramirez v. American R. Co., supra.

51. Pa.—Osalek v. Baltimore, etc., R. Co., 145 A. 582, 295 Pa. 553—Petrowski v. Philadelphia, etc., R. Co., 107 A. 381, 263 Pa. 531.

52. Tex.—Missouri, K. & T. Ry. Co. of Texas v. Anderson, Civ.App., 198 S.W. 795.
10 C.J. p 759 note 37.
Contributory negligence in alighting from moving train or car see supra § 793 and infra § 832.
Liability for willful or malicious acts of employees within scope of employment generally see infra § 828 b.

Intoxicated passenger
Where it is necessary to eject a passenger from a street car because he is drunk, he should not be ejected while the car is in motion, unless it is absolutely necessary to save the life of the conductor or of a passenger, or to prevent great bodily harm.—Stringfield v. Louisville R. Co., 105 S.W. 1190, 32 Ky.L. 578.

53. Mo.—Curtis v. Chicago, etc., R. Co., 73 S.W. 1133, 99 Mo.App. 508—Curtis v. Chicago, etc., R. Co., 73 S.W. 1103, 99 Mo.App. 502.

54. Mo.—Holt v. Hannibal, etc., R. Co., 74 S.W. 631, 174 Mo. 524—Harkless v. Chicago, etc., R. Co., 132 S.W. 29, 151 Mo.App. 463.
10 C.J. p 760 note 39.

55. N.Y.—Oppenheimer v. Manhattan R. Co., 18 N.Y.S. 411.

So under statute
Mo.—Holt v. Hannibal etc., R. Co., 87 Mo.App. 203, reversed on other grounds 74 S.W. 631, 174 Mo. 524.

56. Wis.—Bolin v. Chicago, etc., R. Co., 84 N.W. 446, 108 Wis. 333, 81 Am.S.R. 911
52 C.J. p 637 note 34.

Attempt to board train
(1) A trespasser detected while climbing on rapidly moving train may be ordered off or his attempt be resisted with reasonable force while the train is still in motion, and he cannot by merely gaining a foothold on the train compel the company to permit him to ascend, or to stop the train for his convenience.—Powell v. Erie R. Co., 58 A. 930, 70 N.J. Law 290.

(2) Where trespasser persists in boarding moving train notwithstanding repeated warnings to desist, and he is finally forced to drop from the train by the brakeman and receives injuries, the railroad company is not liable.—Johnson v. Chicago, etc., R. Co., C.C.Iowa, 94 F. 473.

(3) But it has been held that a trespasser who is injured while trying to climb on a slowly moving train which he was prevented from doing by a brakeman may recover damages from the railroad company for an injury caused by the use of unnecessary force by the brakeman.—Louisville, etc., R. Co. v. Bernard, 37 S.W. 841, 18 Ky.L. 672.

57. Tex.—Missouri, K. & T. Ry. Co. of Texas v. Anderson, Civ.App., 198 S.W. 795.
Liability to trespassers for injuries generally see supra § 700.

Train moving fifteen miles per hour
Tex.—Missouri, K. & T. Ry. Co. of Texas v. Anderson, Civ.App., 198 S.W. 795

58. Ky.—Louisville & N. Ry. Co. v. Copley, 197 S.W. 648, 177 Ky. 171.
52 C.J. p 638 note 52.
Ejection of trespasser by use of unnecessary force generally see infra § 824 a.
Willful acts of employees in ejecting persons generally see infra § 828 b.

59. Tenn.—Louisville & N. R. Co. v. Marlin, 186 S.W. 595, 135 Tenn. 435, L.R.A. 1917A, 417.
52 C.J. p 639 note 53

60. Ind.—Indianapolis St. R. Co. v. Hockett, 67 N.E. 106, 161 Ind. 196.
52 C.J. p 639 note 54.

61. S.C.—Polatty v. Charleston, etc., R. Co., 45 S.E. 932, 67 S.C. 391, 100 Am.S.R. 750.
52 C.J. p 639 note 55.

62. Okl.—Folley v. Chicago, etc., R. Co., 84 P. 1090, 16 Okl. 32.
52 C.J. p 639 note 56.

63. Mass.—Mugford v. Boston, etc., R. Co., 52 N.E. 1078, 173 Mass. 10.
N.J.—Powell v. Erie R. Co., 58 A. 930, 70 N.J. Law 290, 1 Ann.Cas. 774.

cause him to believe that he can save himself from bodily hurt only by jumping off.[64]

It has been declared that a railway can properly discharge a trespasser upon its train only when it is brought to a standstill;[65] under other authority a trespasser, before being forcibly ejected from a moving train, should be given a reasonable opportunity to alight without being exposed to unnecessary danger,[66] and it should be stopped, or its speed so checked as to render it safe for him to alight.[67] The fact that an employee discharged his duty with reference to ejecting trespassers from the train in an improper manner, as by ejecting them while it was in rapid motion, does not relieve the carrier from liability.[68]

§ 824. Use of Force and Resistance

a. Use of force
b. Resistance

a. Use of Force

A carrier is liable for an unlawful ejection even though no unnecessary force is used; but where the ejection is lawful the carrier's employees, or police called by them, may use only necessary force, and it is liable for the use of unnecessary force. The amount of force that may be used may depend on the resistance.

A passenger unlawfully ejected from a carrier's vehicle may recover damages even though no unnecessary force was used in ejecting him;[69] the use of violence in accomplishing a wrongful ejection aggravates the tort.[70] It has been held that if excessive force is used in an ejection, it is unnecessary to determine whether the person ejected was rightfully on the train.[71] When there exist lawful grounds for ejection, the carrier's employees, although entitled to use such force as is reasonably necessary to accomplish the ejection,[72] may use no more than that, the carrier being liable for an ejection in which unnecessary force or violence is used, or for injuries sustained, by the person ejected, because of the use of unnecessary force or violence;[73] but in this connection should be noted the holdings, stated in § 828, as to the scope of the employee's authority as affecting the

64. Tex.—Baker v. Cobb, Civ.App., 221 S.W. 314.

65. S.C.—Polatty v. Charleston, etc., R. Co., 45 S.E. 932, 67 S.C. 391, 100 Am.S.R. 750
Utah.—Morgan v. Oregon Short Line R. Co., 74 P. 523, 27 Utah 92.

Young boy ordered off moving street car

(1) Where the conductor of a street railway car orders a young trespassing boy off the car and he is discovered by the motorman to be in a position of peril on the steps, the failure of the motorman to stop the car or draw the boy back constitutes negligence.—Quirk v. Metropolitan St. Ry. Co., 210 S.W. 106, 200 Mo.App. 593, certiorari quashed State ex rel. Metropolitan St. Ry. Co. v. Ellison, Sup., 224 S.W. 820.

(2) In such a case the carrier is liable for injuries received by the boy if he slips under the wheels in attempting to alight while the car is still in motion.—Quirk v. Metropolitan St. Ry. Co., 210 S.W. 103, 200 Mo.App. 585.

66. Tex.—Texas, etc., R. Co. v. Mother, 24 S.W. 79, 5 Tex.Civ.App. 87.
Va.—Chesapeake, etc., R. Co. v. Anderson, 25 S.E. 947, 93 Va. 650.

67. Ky.—Illinois Cent. R. Co. v. McManus, 67 S.W. 1000, 24 Ky.L. 31.

68. Tex.—St. Louis, B. & M. Ry. Co. v. Zamora, Civ.App., 110 S.W. 2d 1242.

69. Ill.—Cohen v. Cleveland, C. & St. L. Ry. Co., 197 Ill.App. 88.
10 C.J. p 757 note 22.

70. La.—Johnson v. New Orleans Great Northern Ry. Co., 75 So. 731, 141 La. 807.

71. N.J.—Bottstein v. Erie R. Co., 87 A. 94, 84 N.J.Law 404

72. Cal.—Galloway v. United Railroads of San Francisco, 197 P. 663, 51 Cal.App. 575.
Ga.—Rossman v. Georgia Ry. & Power Co., 91 S.E. 90, 146 Ga. 264, L.R.A.1917C 483
Ill.—Cohen v. Cleveland, C. & St. L. Ry. Co., 197 Ill.App. 88.
Mo.—Green v. United Rys. Co. of St. Louis, 206 S.W. 237, 200 Mo.App. 303—Curran v. United Rys. Co. of St. Louis, 196 S.W. 56, 197 Mo.App. 397.
N.Y.—Lasker v. Third Ave. R. Co., 57 N.Y.S. 395, 27 Misc. 824.
Tex.—Samaritano v. Galveston, H. & S.A. Ry. Co., Civ.App., 230 S.W. 1049, dismissed for want of jurisdiction.
Va.—Virginia Electric & Power Co. v. Brown, 144 S.E. 708, 151 Va. 686
10 C.J. p 757 note 21.

Import of "ejected"

The word "ejected," as applied to the ejection of passengers, imports the idea of being forcibly expelled or thrust from the train.—Louisville, etc., R. Co. v. Ogles, 83 S.E. 631, 142 Ga. 720.

73. U.S.—Pendleton v. Kinsley, C.C.R.I., 19 F.Cas.No.10 922, 3 Cliff. 416
Ala.—Birmingham Electric Co. v. Maze, 166 So. 50, 231 Ala. 539—Bates v. Birmingham Ry., Light & Power Co., 82 So. 14, 203 Ala. 54
Cal.—Galloway v. United Railroads of San Francisco, 197 P. 663, 51 Cal.App. 575
Ga.—Rossman v. Georgia Ry. & Power Co., 91 S.E. 90, 146 Ga. 264, L.R.A.1917C 483.
Ill.—Cohen v. Cleveland, C. & St. L. Ry. Co., 197 Ill.App. 88.
Ky.—Louisville & N. Ry. Co. v. Copley, 197 S.W. 648, 177 Ky. 171.
La.—Lichtenstein v. New Orleans Ry. & Light Co., 103 So. 769, 158 La. 284.
Mass.—Ramsden v. Boston & A. R. Co., 104 Mass. 117, 6 Am.R. 200—Holmes v. Wakefield, 12 Allen 580, 90 Am.D. 171.
Minn.—Carpenter v. Minneapolis, St. P., R. & D. Electric Traction Co., 157 N.W. 902, 133 Minn. 46.
Mo.—Green v. United Rys. Co. of St. Louis, 206 S.W. 237, 200 Mo.App. 303
10 C.J. p 758 note 24.
Liability for willful, wanton, reckless, or malicious acts of employees in ejecting see infra § 828 b.

In enforcing a reasonable regulation providing for the expulsion of one who fails to produce a transfer or pay fare, a carrier may not inflict wrongs and injuries upon a passenger.—Virginia Electric & Power Co. v. Wynne, 141 S.E. 829, 149 Va. 882.

Applying foot

Such an application of force by a street railway conductor as "applying his foot to . . . [a female passenger's] posterior part," held to be unjustified, especially when it was done as she undertook to alight from the car.—Bates v. Birmingham Ry., Light & Power Co., 82 So. 14, 203 Ala. 54.

Taking hold of passenger before stopping train

A conductor who takes hold of a

carrier's liability. Thus a carrier may be held liable for an assault by its employee on a passenger,[74] unless the assault is incited by the passenger's violence or aggressive conduct;[75] but indecent, insulting, and provoking language, unaccompanied by threats or violence, does not justify an assault by an employee.[76]

The amount of force that may be used in an ejection may depend on the resistance offered;[77] but the courts will not weigh with exact nicety the amount of force necessary to overcome the resistance.[78]

Persons not passengers; trespassers. A carrier is entitled to use such force or show of violence as is reasonably necessary, having regard to the attendant circumstances, to accomplish the ejection of a trespasser;[79] but, as a passenger relationship need not exist in order to create liability on the part of a carrier,[80] the rule, subject to qualifications as to the scope of the employee's authority, infra § 828, is that no unnecessary force may be used in ejecting even a person, including a trespasser, who is not a passenger, and that the carrier is liable for injuries received as a result of the use of unnecessary force in effecting the removal of such person,[81] or for a wrongful assault upon him.[82]

Anticipating resistance; assistance by police. If a passenger gives the conductor to understand that he will resist ejection, the conductor is justified in using force in putting him off, especially after having repeatedly told him that he must pay his fare or get off.[83]

When a conductor has a right to eject a person, he may call in a police officer to eject him,[84] as where there is reason to anticipate resistance by a trespasser,[85] and the officer may use necessary force to eject.[86] In such a case the police have been held to act as agents of the carrier, so that the latter is liable for any excessive force used by them.[87]

b. Resistance

Generally a passenger may resist a wrongful ejection and recover for injuries received while doing so; but

female passenger, before stopping the train, for the avowed purpose of ejecting her for failure to pay a sufficient fare, renders the company liable because of the use of unnecessary force.—Briggs v. Lusk, Mo.App., 190 S.W. 380.

Liability for ill treatment

Tenn.—Springer Transp. Co. v. Smith, 1 S.W. 280, 16 Lea 498.

Although a passenger could have prevented his ejection by paying the extra charge demanded, he may complain of an ejection with violence and unnecessary force and in a manner humiliating to him before a car full of other passengers.—McNairy v. Norfolk & W. R. Co., 90 S.E. 497, 172 N.C. 505

74. Mass.—Bryant v. Rich, 106 Mass. 180, 8 Am.R. 311, affirmed 21 Wall., U.S. 41, 22 L.Ed. 476.
Mo.—Malecek v. Tower Grove, etc., R. Co., 57 Mo. 17.
10 C.J. p. 758 note 24 [e].

75. Ga.—City Electric R. Co. v. Shropshire, 28 S.E. 503, 101 Ga. 33.
Mo.—Garrett v. St. Louis Transit Co., 118 S.W. 68, 219 Mo. 65, 16 Ann.Cas. 678.
10 C.J. p. 757 note 21 [c], p. 759 note 28.

76. Ark.—Little Rock R., etc., Co. v. Bracy, 165 S.W. 450, 111 Ark. 613.
N.Y.—Weber v. Brooklyn, etc., R. Co., 62 N.Y.S. 1, 47 App.Div. 306

77. Wash.—Kirk v. Seattle Electric Co., 108 P. 604, 58 Wash. 283, 31 L.R.A.,N.S., 991.
10 C.J. p. 757 note 21, p. 758 note 24 [b]—52 C.J. p. 637 note 36

78. U.S.—Hall v. Memphis, etc., R. Co., C.C.Tenn., 15 F. 57.
10 C.J. p. 757 note 21 [b], p. 761 note 47 [a].

79. Tex.—Samaritano v. Galveston, H. & S. A. Ry. Co., Civ.App., 230 S.W. 1049, dismissed for want of jurisdiction.
52 C.J. p. 637 note 36.

80. Cal.—Galloway v. United Railroads of San Francisco, 197 P. 663, 666, 51 Cal.App. 575.
10 C.J. p. 758 note 26
"It is the duty of every one, whether he is a motorman on the street car or not, to refrain from committing any assault upon any person, whether such person be a passenger or not."—Galloway v. United Railroads of San Francisco, supra.

81. Ky.—Louisville & N. Ry. Co. v. Copley, 197 S.W. 648, 177 Ky. 171.—Louisville & N. R. Co. v. Ashley, 183 S.W. 921, 169 Ky. 330, L.R.A. 1916E 763.
10 C.J. p. 757 note 16 [a], p. 758 notes 24, 26—52 C.J. p. 638 note 51.

82. Cal.—Galloway v. United Railroads of San Francisco, 197 P. 663, 51 Cal.App. 575.

But throwing rocks at a minor trespasser while on top of a coach, and firing a shot in the air for the purpose of scaring him, has been held not to show an unlawful assault in accomplishing his ejection.—Samaritano v. Galveston, H. & S. A. Ry. Co., Tex.Civ.App., 230 S.W. 1049, dismissed for want of jurisdiction.

83. Mass.—McGarry v. Holyoke St. R. Co., 65 N.E. 45, 182 Mass. 123

84. La.—Lichtenstein v. New Orleans Ry. & Light Co., 103 So. 769, 770, 158 La. 284.
Right to arrest or detain passenger see infra § 827.
"What a conductor may do himself in this respect he may cause to be done by an officer of the law."—Lichtenstein v. New Orleans Ry. & Light Co., supra.

85. U.S.—Texas, etc., R. Co. v. Diefenbach, Tex., 167 F. 39, 92 C.C.A. 501
Tex.—Houston, etc., R. Co. v. Ritter, 41 S.W. 753, 16 Tex.Civ.App. 482.
10 C.J. p. 759 note 30.

86. Tex.—Houston, etc., R. Co. v. Ritter, supra.

87. U.S.—Texas, etc., R. Co. v. Diefenbach, Tex., 167 F. 39, 92 C.C.A. 501.

Ejection from waiting room

Tex.—Texas Midland R. Co. v. Geraldon, 117 S.W. 1004, 54 Tex.Civ.App. 71.
Wash.—Whitlock v. Northern Pac. R. Co., 109 P. 188, 59 Wash. 15
10 C.J. p. 759 note 32.

Mistreatment in arrest

Where a passenger's misconduct justified his arrest the carrier was held not liable for his mistreatment by police officers who were arresting him at the request of the conductor.—Carver v. Carolina, etc., R. Co., 85 S.E. 293, 165 N.C. 204.

he should not resist a lawful ejection, and if he does he cannot recover for injuries received, unless resistance is necessary for defense against injury, or the force applied in ejecting is unreasonable, unnecessary, wanton, or malicious.

Although there is authority indicating the contrary,[88] generally, a person who is rightfully on the vehicle of a carrier may resist a wrongful ejection therefrom[89] to a reasonable extent,[90] or to such an extent as may be necessary to make it appear that he is being ejected by compulsion and against his will,[91] so long as the resistance does not amount to a criminal disturbance of the peace.[92] Similarly, where the carrier's employees, without authority, attempt to eject a person in an improper manner or at an improper place, he may resist to such an extent as is necessary to maintain his rights.[93]

On the other hand, if an employee of a carrier is acting lawfully in ejecting a person, as where the latter is violating a reasonable rule or regulation of the company, then the ejected person has no right to resist, but should peaceably leave the vehicle upon request.[94] The question whether an ejection is or is not lawful is determined by the principles stated in §§ 806-823 supra.

Resistance to increase or decrease damages. Resistance otherwise improper is not justified by the ejected person's purpose of increasing the damages which he may recover;[95] but one need not submit to a wrongful ejection in order to economize the damages.[96]

Injuries during ejection. A passenger rightfully subject to ejection,[97] or a trespasser,[98] who resists a conductor's attempt to expel him is not entitled to damages for injuries received during the ejection, unless resistance is necessary for defense against impending personal injury,[99] or unless the force applied in ejecting him is unreasonable or unnecessary,[1] or willful or wanton, or malicious.[2] On the other hand, a carrier is liable for injuries received by one while resisting an unlawful ejection.[3]

88. Ill.—Chicago Union Tract. Co. v. Brethauer, 125 Ill.App. 204, affirmed 79 N.E. 287, 223 Ill. 521—Schaefer v. North Chicago St. R. Co., 82 Ill.App. 473—Chicago, etc., R. Co. v. Wilson, 23 Ill.App. 63.

89. U.S.—New York, etc., R. Co. v. Winter, Mass., 12 S.Ct. 356, 143 U.S. 60, 36 L.Ed. 71.
10 C.J. p 760 note 43, p 762 note 48.

90. U.S.—Brown v. Memphis & C. R. Co., C.C.Tenn., 7 F. 51.
Ind.—Louisville, etc., R. Co. v. Wolfe, 27 N.E. 606, 128 Ind. 347, 25 Am.S.R. 436.

91. U.S.—New York, etc., R. Co. v. Winter, Mass., 12 S.Ct. 356, 143 U.S. 60, 73, 36 L.Ed. 71.
10 C.J. p 760 note 44.

92. Iowa.—Ellsworth v. Chicago, etc., R. Co., 63 N.W. 584, 95 Iowa 98, 29 L.R.A. 173.

93. Ind.—Indianapolis Tract., etc., Co. v. Lockman, 96 N.E. 970, 49 Ind.App. 143.
10 C.J. p 760 note 45.

94. U.S.—Hall v. Memphis, etc., R. Co., C.C.Tenn., 15 F. 57.
Cal.—Wright v. California Cent. R. Co., 20 P. 740, 78 Cal. 360.
Conn.—Norton v. Consolidated R. Co., 63 A. 1087, 79 Conn. 109, 118 Am.S.R. 132, 6 Ann.Cas. 943.
Ill.—Kiley v. Chicago City R. Co., 59 N.E. 794, 189 Ill. 384, 82 Am.S.R. 460, 52 L.R.A. 626—Illinois Cent. R. Co. v. Louthan, 80 Ill.App. 579.
Kan.—Atchison, etc., R. Co. v. Gants, 17 P. 54, 38 Kan. 608, 5 Am.S.R. 780.
N.Y.—Monnier v. New York Cent., etc., R. Co., 67 N.E. 569, 175 N.Y. 281, 96 Am.S.R. 619, 62 L.R.A. 357, reversing 75 N.Y.S. 521, 70 App Div. 405—Taylor v. Nassau Electric R. Co., 53 N.Y.S. 5, 32 App.Div. 486.
Or.—Peabody v. Oregon R., etc., Co., 26 P. 1053, 21 Or. 121, 12 L.R.A. 823.
Wash.—Loy v. Northern Pac. R. Co., 122 P. 372, 68 Wash. 33.

95. U.S.—Hall v. Memphis, etc., R. Co., C.C.Tenn., 15 F. 57.
Wash.—Loy v. Northern Pac. Ry Co., 122 P. 372, 68 Wash. 33.
10 C.J. p 761 note 47 [d].
Aggravation, mitigation, and reduction of damages generally see infra § 852.

96. Iowa.—Ellsworth v. Chicago, etc., R. Co., 63 N.W. 584, 95 Iowa 98, 29 L.R.A. 173.

97. Ill.—Kiley v. Chicago City R. Co., 59 N.E. 794, 189 Ill. 384, 82 Am.S.R. 460, 52 L.R.A. 626—Devine v. Chicago City R. Co., 141 Ill.App. 583, affirmed 86 N.E. 689, 237 Ill. 278—Chicago Union Tract. Co. v. Brethauer, 125 Ill.App. 204, affirmed 79 N.E. 287, 223 Ill. 521—Chicago, etc., R. Co. v. Cosgrove, 83 Ill.App. 421—Illinois Cent. R. Co. v. Louthan, 80 Ill.App. 579—North Chicago St. R. Co. v. Olds, 40 Ill. App. 421—Chicago, etc., R. Co. v. Wilson, 23 Ill.App. 63.
Mo.—Randell v. Chicago, etc., R. Co., 76 S.W. 493, 102 Mo.App. 342.
N.Y.—Taylor v. Nassau Electric R. Co., 53 N.Y.S. 5, 32 App.Div. 486.
Or.—Peabody v. Oregon R., etc., Co., 26 P. 1053, 21 Or. 121, 12 L.R.A. 823.
10 C.J. p 761 note 47 [f].

98. Ill.—North Chicago St. R. Co v. Olds, 40 Ill.App. 421.
Kan.—Atchison, etc., R. Co. v. Brown, 42 P. 588, 2 Kan.App. 604.

99. U.S.—Hall v. Memphis, etc., R. Co., C.C.Tenn., 15 F. 57.
Resisting a dangerous ejection from a moving train does not constitute negligence defeating a recovery for death resulting from such ejection.—English v. Delaware, etc., Canal Co., 66 N.Y. 454, 23 Am.R. 69—Sanford v. Eighth Ave. R. Co., 23 N.Y. 343, 80 Am.D. 286.
Efforts to cling to train to prevent falling under the wheels cannot be considered as a resistance by a trespasser to those attempting to remove him while the train is in motion.—Southern R. Co. v. Shaw, Ga., 86 F. 865, 31 C.C.A. 70.

1. Ill.—Devine v. Chicago City R. Co., 141 Ill.App. 583, affirmed 86 N.E. 689, 237 Ill. 278—Chicago Union Tract. Co. v. Brethauer, 125 Ill.App. 204, affirmed 79 N.E. 287, 223 Ill. 521—North Chicago St. R. Co. v. Olds, 40 Ill.App. 421.

2. Ill.—Illinois Cent. R. Co. v. Louthan, 80 Ill.App. 579—Chicago, etc., R. Co. v. Wilson, 23 Ill.App. 63.
Kan.—Atchison, etc., R. Co. v. Brown, 42 P. 588, 2 Kan.App. 604.
Mo.—Randell v. Chicago, etc., R. Co., 76 S.W. 493, 102 Mo.App. 342.
Or.—Peabody v. Oregon R., etc., Co., 26 P. 1053, 21 Or. 121, 12 L.R.A. 823.
Liability for willful, wanton, or malicious acts of employees in general see infra § 328 b.

3. Ind.—Louisville, etc., R. Co. v. Wolfe, 27 N.E. 606, 128 Ind. 347, 25 Am.S.R. 436.
Iowa.—Ellsworth v. Chicago, etc., R.

§ 825. Return of Fare or Ticket

While the conduct of the passenger leading to his ejection may under some circumstances be such as to forfeit his rights in any sum paid by him for transportation, ordinarily the carrier cannot eject a passenger and retain a fare paid by him in excess of the proper fare to the place of ejection.

In general, a carrier which has accepted money in payment of fare or for the purchase of a ticket cannot eject the passenger for failure to pay a proper fare, without returning to him the amount paid after deducting the proper fare to the place of ejection.[4] This rule has been applied where the ejection is because of a refusal of the passenger to pay an extra sum demanded because of not having purchased a ticket before getting on the train,[5] or where a passenger is ejected for riding on the platform of a car although there was no room inside, where his fare has been accepted or his ticket retained,[6] or where a ticket is refused when presented after a stop-over on the ground that it has expired.[7] So, where a passenger who has paid full fare is accompanying a child and is ejected for failure to pay an additional fare demanded for the child, his own fare or the unearned part thereof, after deducting the fare of himself and the child to the place of ejection, must be returned.[8] A passenger who is ejected because he is too ill to complete the journey,[9] or because he is intoxicated and guilty of disorderly conduct,[10] has been held to be entitled to have returned to him the unearned portion of his fare.

The conductor has the right to retain out of the money paid by the passenger the proper fare for transporting him to the place where he is ejected,[11] even though the passenger had no desire and expressed no intention to secure transportation to that place.[12]

On the other hand, it has been held that failure to comply with a reasonable regulation results in a forfeiture of the full amount paid for the ticket,[13] and that a passenger who has surrendered a ticket which is void and worthless because the time limit has expired is not wrongfully ejected, even though the conductor improperly retains the worthless ticket, at least where such passenger did not promise to pay fare on the condition that the ticket be returned.[14] A passenger who is ejected from an extra fare car on his refusal to pay the extra fare is not entitled to the return of his ticket when he is invited to ride in a car for which he has paid transportation.[15]

Time and necessity for tender. A tender of the unearned portion of the fare, where a passenger is entitled to the same, may be at any time up to the time of ejection;[16] but not after ejection.[17] A

Co., 63 N.W. 584, 95 Iowa 98, 29 L.R.A. 173.

10 C.J. p 760 note 43.

4. Ind.—Brown v. Terre Haute, I. & E. Traction Co., 110 N.E. 703, 113 N.E. 313, 63 Ind.App. 327.

10 C.J. p 762 notes 50, 54.

5. Cal.—Bland v. Southern Pac. R. Co., 55 Cal. 570, 36 Am.R. 50

Minn.—Wardwell v. Chicago, etc., R. Co., 49 N.W. 206, 46 Minn. 514, 24 Am.S.R. 246, 13 L.R.A. 596.

6. N.Y.—Hanna v. Nassau Electric R. Co., 45 N.Y.S. 437, 18 App.Div. 137.

7. Me.—Burnham v. Grand Trunk R. Co., 63 Me. 298, 18 Am.R. 220

Stop-over

Where defendant's ticket agent represented to plaintiff that it was necessary to purchase but one ticket to enable him to pass over the road, stopping over night at an intervening station, and plaintiff purchased a ticket, paying the fare demanded for the whole distance, the conductor, having been informed of the representations of the ticket agent, was not authorized to expel plaintiff from the train on refusing the ticket on the second day on the ground that it was indorsed, "Good for this day only," without first offering to return the excessive fare paid or to deduct it from the fare demanded, although the rules of the company prohibited passengers from stopping over on such tickets.—Burnham v. Grand Trunk R. Co., 63 Me. 298, 18 Am.R. 220.

8. Ky.—Louisville & N. R. Co. v. Watson, 255 S.W. 1056, 201 Ky. 108.

10 C.J. p 762 note 50 [b].

Tender of stop-over check

Where the ticket is such that a stop-over may be had thereon, the conductor may tender a stop-over check instead of money, but to retain the ticket and eject the parties from the train renders the company liable in damages.—Lake Shore, etc., R. Co. v. Orndorff, 45 N.E. 447, 55 Ohio St. 589, 60 Am.S.R. 716, 38 L.R.A. 140.

9. Ky.—Casteel v. American Airways, 88 S.W.2d 976, 261 Ky. 818

10. Ind.—Baltimore, etc., R. Co. v. McDonald, 68 Ind. 316

Under a statute authorizing the ejection of an intoxicated passenger, the conductor may, after tendering him such "proportion of the fare he has paid, as the distance he then is from the place to which he has paid his fare bears to the whole distance for which he has paid his fare," remove such a passenger from the train.—Baltimore, etc., R. Co. v. McDonald, 68 Ind. 316.

11. Ky.—Louisville & N. R. Co. v. Watson, 255 S.W. 1056, 201 Ky. 108

10 C.J. p 762 note 53.

12. Minn.—Wardwell v. Chicago, etc., R. Co., 49 N.W. 206, 46 Minn. 514, 24 Am.S.R. 246, 13 L.R.A. 596, overruling on this point Du Laurans v. First Div. St. Paul, etc., R. Co., 15 Minn. 49, 2 Am.R. 102.

10 C.J. p 762 note 53.

13. Iowa.—Gregory v. Chicago, etc., R. Co., 69 N.W. 532, 100 Iowa 345.

Rule prohibiting dogs in a coach

Iowa.—Gregory v. Chicago, etc., R. Co., 69 N.W. 532, 100 Iowa 345.

14. Cal.—Elliott v. Southern Pac. R. Co., 79 P. 420, 145 Cal. 441, 68 L.R.A. 393.

15. Cal.—Wright v. Central R. Co., 20 P. 740, 78 Cal. 360.

16. Ky.—Louisville & N. R. Co. v. Watson, 255 S.W. 1056, 201 Ky. 108.

17. Cal.—Bland v. Southern Pac. R. Co., 55 Cal. 570, 36 Am.R. 50

Minn.—Wardwell v. Chicago, etc., R. Co., 49 N.W. 206, 46 Minn. 514, 24 Am.S.R. 246, 13 L.R.A. 596.

A duty to carry the passenger is reimposed on the railroad when the passenger makes a tender of the full amount after ejection.—Bland v.

conductor is not required to make an actual tender of the return fare until a time just preceding the ejection, and, if a passenger voluntarily leaves the train in the absence of and without the knowledge of the conductor, he waives the necessity of such a tender.[18]

§ 826. Readmission after Ejection

A passenger who has been ejected for nonpayment of fare at a point other than a regular stopping place is not entitled to reënter the train on a tender of the fare nor, where he has been ejected at a regular stopping place, on tender of the fare from such place to his destination. One who has been wrongfully ejected is entitled to reenter on tender of the fare.

As a general rule the carrier is not required to permit a passenger who has been rightfully ejected to reënter its train;[19] so, where a passenger has been rightfully ejected at a place other than a regular station or stopping place because of his failure or refusal to produce a proper ticket or to pay his fare, he is not entitled to reënter the train on a tender of the required fare.[20] Where he has been ejected at a regular stopping place, he is not as a rule regarded as having a right to reënter the same train on a tender of a ticket or the fare from the point of ejection to his destination, and he must tender the full fare from the point where he first boarded the train to his destination;[21] and this is true, although he purchases a ticket from the station of ejection to that of his destination and attempts to board the train in good faith and belief of his legal rights.[22] Further, even in case of a tender of the full fare, it has been intimated that the carrier is under no further duty to transport the passenger on the same train.[23] On the other hand, if a passenger boards a train in good faith, believing that his ticket entitles him to ride to his destination, and is ejected at an intermediate station, he may at such station purchase a ticket to his destination and board the same train with a right to be carried thereon,[24] although he cannot do so if his refusal to pay fare before his original ejection was any part of a scheme to obtain transportation for less than the regular rate.[25] So, where a passenger has quietly submitted to expulsion from a train after a dispute as to the route over which his ticket entitled him to be carried, he is entitled to be carried to his destination on the

Southern Pac. R. Co., 55 Cal. 570, 36 Am.R. 50

Ejection for violation of a reasonable rule

One who is ejected for violation of a reasonable rule requiring a permit to ride on a freight train is not damaged by the ejection, even though the fare is not returned to him until after the ejection, there having been no previous demand by the passenger for the return of the fare—Ellis v. Houston, etc., R. Co., 70 S.W. 114, 30 Tex.Civ.App. 172.

18. Ky.—Louisville & N. R. Co. v. Watson, 255 S.W. 1056, 201 Ky. 108.

A conductor is entitled to an opportunity to perform the condition precedent to the exercise of his right to eject.—Louisville & N. R. Co. v. Watson, 255 S.W. 1056, 201 Ky. 108.

Specific command

Where the conductor has given the passenger a specific command to leave the train at a certain place, then no further notice to him is necessary in order to place the burden on him to make the tender before such passenger leaves.—Louisville & N. R. Co. v. Watson, 255 S.W. 1056, 201 Ky. 108.

19. S.C.—Phillips v. Atlantic Coast Line R. Co., 73 S.E. 75, 90 S.C. 187, 38 L.R.A.,N.S., 1151, Ann.Cas.1913C 1244

Tex.—Fleck v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 191 S.W. 336

Violation of rules

Where a passenger has been ejected because he has violated valid rules of the company, he cannot demand as a matter of right, even upon complying with the rule violated, to be taken back at once unless he is put off at a regular stopping station and unless at least he then and there obtains a ticket or tenders his fare. —Nelson v. Long Island R. Co., 7 Hun, N.Y., 140.

Willful refusal to pay fare

While at common law a carrier must accept passengers who present themselves in a proper manner, and are ready and willing to comply with the reasonable rules of the company, the carrier may enforce a reasonable rule preventing a passenger who has willfully refused to pay his fare and provoked ejection from reëntering the train from which he was ejected.—Phillips v. Atlantic Coast Line R. Co., 73 S.E. 75, 90 S.C. 187, 38 L.R.A., N.S., 1151, Ann.Cas.1913C 1244.

A statute which makes it the duty of a carrier to stop at advertised stations a sufficient time for receiving and letting off passengers refers merely to passengers beginning or ending passage at such stations, and cannot be construed as requiring a carrier to receive as a passenger one who had been ejected for misconduct affording ground for ejection from the train which he is seeking to reenter—Phillips v. Atlantic Coast Line R. Co., 73 S.E. 75, 90 S.C. 187, 38 L.R.A.,N.S., 1151, Ann.Cas.1913C 1244.

20. Conn.—Crocker v. New London, etc., R. Co., 24 Conn. 249.

Ga.—Foskey v. Wrightsville & T. R. Co., 92 S.E. 34, 19 Ga.App 670.

Mass.—O'Brien v. Boston, etc., R. Co., 15 Gray 20, 77 Am.D. 347.

N.C.—Pickens v. Richmond, etc., R. Co., 10 S.E. 556, 104 N.C. 312

Va.—Mangum v. Norfolk & W. Ry. Co., 99 S.E. 686, 125 Va. 244, 5 A.L.R. 346

10 C.J. p 751 note 65.

Tender or payment of fare to avoid ejection after steps have been taken to eject a passenger see supra § 812 b.

21. Ga.—Foskey v. Wrightsville & T. R. Co., 92 S.E. 34, 19 Ga.App 670.

N.C.—Pickens v. Richmond, etc., R. Co., 10 S.E. 556, 104 N.C. 312.

10 C.J. p 752 note 76.

Under an Arkansas statute, one found without pass or ticket may be ejected where he refuses to pay fare from the point of embarkation to his destination, although he tenders his fare from the point where the train then is to his destination—Chicago etc., R. Co. v. Watkins, 175 S.W. 1157, 117 Ark. 488, L.R.A.1915E 311.

22. Iowa—Stone v. Chicago & N. W. R. Co., 47 Iowa 82, 29 Am.R. 458

23. Ga.—Coyle v. Southern R. Co., 37 S.E. 163, 112 Ga. 121.

24. N.H.—Whittemore v. Boston, etc., R. Co., 83 A. 125, 76 N.H. 388.

N.Y.—Ward v. New York Cent., etc., R. Co., 9 N.Y.S. 377, 56 Hun 268.

25. N.H.—Whittemore v. Boston, etc., R. Co., 83 A. 125, 76 N.H. 388.

same train after he has offered to pay his fare.[26] Where a passenger has been wrongfully ejected at a station, he does not forfeit his right to reënter the train and to proceed as a passenger on the payment of fare.[27] Further, one who has been illegally ejected from a train does not lose his rights as a passenger and has the right to reënter it, although not put off at a regular station, and to continue his journey on tender of the regular fare from the point at which he boarded the train to his destination;[28] and it has been held that a passenger who is wrongfully ejected has a right to reënter, and if, in his endeavor so to do, he receives an injury, he may recover therefor unless there was on his part a want of reasonable care or prudence which produced or essentially contributed to produce such injury.[29]

Reëntry to procure fare. A passenger who has been given an opportunity to procure money to pay his fare before he is ejected either at a station or at a place other than a station at which the train is stopped for the purpose of ejecting him has no right to demand that he be allowed to reënter the train for the purpose of procuring money to pay his fare,[30] although, where he has been given no opportunity before ejection to procure money to pay his fare from a friend who is on the train with him; his request to reënter the train to procure the money has been held to be improperly refused.[31]

§ 827. Right to Arrest or Detain Passenger

In the absence of a statutory authority the carrier has no right to arrest or detain a passenger, but may do so under statutory authority.

The carrier, in the absence of statutory authority, has no right to cause the arrest of a passenger ejected for nonpayment of fare,[32] nor to detain or imprison him,[33] and, if the ejection for refusal to pay fare is illegal, the subsequent arrest and detention of a passenger is, of course, wrongful.[34]

However, under some statutes a railroad conductor is authorized to act as a peace officer, and may arrest a passenger if he has reasonable ground for believing him intoxicated,[35] even though it may afterward appear that he was not intoxicated,[36] or if the passenger fraudulently evades, or attempts to evade, the payment of fare, or refuses to pay fare.[37]

§ 828. Liability for Wrongful Ejection

a. Acts of employees or agents generally
b. Willful, wanton, reckless, or malicious acts
c. Liability for acts subsequent to ejection

a. Acts of Employees or Agents Generally

Generally the carrier is liable for the acts of its serv-

26. Ky.—Louisville, etc., R. Co v. Breckenridge, 34 S.W. 702, 99 Ky. 1, 17 Ky L. 1303.

27. Tenn.—Choctaw, etc., R. Co v. Hill, 75 S.W. 963, 110 Tenn. 396.

A discharged employee, whose ejection was wrongful because made without a demand for fare, could reenter the train on a tender of the amount necessary to take him from the point of ejection to his destination.—Choctaw, etc., R. Co. v. Hill, 75 S.W. 963, 110 Tenn. 396.

28. Va.—Mangum v. Norfolk & W Ry. Co., 99 S.E. 686, 125 Va. 244, 5 A.L.R. 346.

29. Conn.—Crocker v. New London, etc., R. Co., 24 Conn. 249.

30. Tex.—Fleck v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 191 S.W. 386

31. Tex.—Gulf, C. & S. F. Ry. Co v. Bunn, 95 S.W. 640, 41 Tex.Civ. App. 503.

32. Ark.—Ft. Smith & Van Buren Dist. v. Kidd, 241 S.W. 374, 153 Ark. 489.

Carrier's liability for passenger's wrongful arrest or detention caused by act of agent or employee see C.J.S. title False Imprisonment § 40, also 25 C.J. p 507 note 44—p 510 note 72.

33. N.Y.—Lynch v. Metropolitan El. R. Co., 90 N.Y. 77, 43 Am.R. 141

Tex.—San Antonio, etc., R. Co. v. Nappier, Civ.App., 141 S.W. 564.

10 C.J. p 762 notes 59, 60.

Liability for fare, a debt

A carrier may not detain or imprison a passenger who, after the trip is completed, is unable to produce his ticket, as the charge for carriage is a debt which must be enforced by the same remedies that any creditor has against his debtor. —Lynch v. Metropolitan El. R. Co., 90 N.Y. 77, 43 Am.R. 141.

Liability not dependent on negligence

The liability of a carrier for the misconduct of its agent at a station in confining in the station room a passenger ejected from the train for his failure to pay fare or to produce a ticket does not depend on negligence.—San Antonio, etc., R. Co v. Nappier, Tex.Civ.App., 141 S.W. 564

34. Pa.—Richards v. Pennsylvania R. Co., 70 Pa.Super. 257.

Va.—Mangum v Norfolk & W. Ry. Co., 99 S.E. 686, 125 Va. 244, 5 A.L.R. 346.

Imprisonment in baggage car

Va.—Mangum v. Norfolk & W. Ry. Co., 99 S.E. 686, 125 Va. 244, 5 A.L.R. 346.

A passenger's refusal to converse with a conductor on the question of where he had boarded the train and what his destination was, the conductor's questions being directed for the purpose of ascertaining whether or not the passenger had paid his fare, does not justify the arrest of such passenger where it was a fact that he had surrendered his ticket.—Richards v. Pennsylvania R. Co., 70 Pa.Super. 257.

35. Ark.—Memphis, etc., R. Co. v. Trussell, 183 S.W. 981, 122 Ark. 516—St. Louis, etc., R. Co v. Waters, 152 S.W. 137, 105 Ark. 619—St. Louis, etc., R. Co. v. Hudson, 130 S.W. 534, 95 Ark. 506

Ky.—Louisville, etc., R. Co. v. Bell 179 S.W. 400, 166 Ky. 400

10 C.J. p 762 note 61.

Liability of carrier for acts of employee as police officer in general see supra § 693.

36. Ark.—St. Louis, etc., R. Co. v. Waters, 152 S.W. 137, 105 Ark. 619 —St. Louis, etc., R. Co v. Hudson, 130 S.W. 534, 95 Ark. 506.

37. Mass.—Krulevitz v. Eastern R. Co., 9 N.E. 613, 143 Mass. 228—Beckwith v. Cheshire R. Co., 8 N.E. 875, 143 Mass. 68.

10 C.J. p 763 note 62.

ants or agents in wrongfully ejecting a person from its vehicles or waiting rooms when such acts are within the course or scope of their employment.

A carrier is generally held liable for the wrongful acts of an employee or agent in ejecting a person from its conveyances[38] or waiting rooms[39] so far as the employee or agent is acting within the course or scope of his employment. This is true where the employee is acting within the general scope of his employment, although his wrongful acts were an abuse of his authority and were not within the performance of his prescribed duties,[40] but it has been held that the wrongful act of a special agent must have been within his capacity as an agent.[41] Where the ejection of a passenger is wrongful, the carrier is liable for the acts of its servants or agents although the ejection is done through an error of judgment,[42] and although the carrier's employee acted in good faith,[43] and without regard to the care exercised.[44]

A distinction is sometimes drawn between cases relating to the ejection of passengers and those relating to the ejection of trespassers, under which it is held that in the case of a passenger it is immaterial whether or not the employee was acting within the scope of his employment since the carrier must afford protection to its passengers.[45]

Acts of particular employee. Not all employees of a carrier will be held to have been acting within the scope of their employment in ejecting persons from trains or cars.[46] Since it is within the scope and course of employment of a conductor to determine who is entitled to transportation on his train or car, the carrier will be held liable for his wrongful acts in ejecting a person therefrom,[47]

38. U.S.—Louisville & N. R. Co. v. Burns, Tenn., 242 F. 411, 155 C.C.A. 187.
N.Y.—Higgins v. Watervliet Turnpike & R. Co., 46 N.Y. 23, 7 Am.R. 293.
Pa.—Weathers v. Pennsylvania R. Co., 94 Pa.Super. 50.
10 C.J. p 763 note 67.

A violation of instructions does not take a servant's act outside the scope of his employment.—Higgins v. Waterlviet Turnpike & R. Co., 46 N.Y. 23, 7 Am.R. 293.

Liability founded on law of agency

The liability of a railroad company for the improper conduct of its employees in removing a trespasser from its trains or cars is founded on the law of agency, and not on the duty imposed by law on common carriers.—Farber v. Missouri Pac. R. Co., 22 S.W. 631, 116 Mo. 81, 20 L.R.A. 350.

39. Ga.—Mooneyham v. Nashville, C. & St. L. Ry. Co., 126 S.E. 736, 33 Ga.App. 406.
Iowa.—Johnson v. Chicago, R. I. & P. R. Co., 12 N.W. 329, 58 Iowa 348.
10 C.J. p 763 note 69.

Exclusion of colored person from a waiting room set apart for his race.—St. Louis Southwestern R. Co. v. Green, 139 S.W. 307, 99 Ark. 572.

Passenger waiting for train on another road

Where agent in charge of a station wrongfully ejects a passenger while the latter is waiting for the train of another railroad, the agent is acting within the scope of his employment.—Johnson v. Chicago, R. I. & P. R. Co., 12 N.W. 329, 58 Iowa 348.

Although a carrier is under no duty to maintain a waiting room, where it actually does so a passenger is entitled to use it and may recover for the act of an agent in unjustifiably ejecting him.—Mooneyham v. Nashville, C. & St. L. Ry. Co., 126 S.E. 736, 33 Ga.App. 406.

40. U.S.—Louisville & N. R. Co. v. Burns, Tenn., 242 F. 411, 155 C.C.A. 187—Pendleton v. Kinsley, C.C.R.I., 19 Fed.Cas.No.10,922, 3 Cliff. 416.
Tenn.—Springer Transp. Co. v. Smith, 1 S.W. 280, 16 Lea 498.

Rules of carrier

A passenger's right to recover cannot be affected by any rule of the carrier prescribing the duties of its agents or conductors.—Baltimore & O. R. Co. v. Thornton, Va., 188 Fed. 868, 110 C.C.A. 502.

41. W.Va.—Clark v. Norfolk & W. Ry. Co., 100 S.E. 480, 84 W.Va. 526, 7 A.L.R. 117.

Special agent deputized by prohibition officers

One who is a special agent of a carrier does not create liability on the company by his act of assisting in the expulsion of a passenger when he is acting as a deputy prohibition officer engaged in searching the train at the time of his wrongful act, such act being outside of his duty to the carrier.—Clark v. Norfolk & W. Ry. Co., 100 S.E. 480, 84 W.Va. 526, 7 A.L.R. 117.

42. N.Y.—Rowe v. Brooklyn Heights R. Co., 81 N.Y.S. 106, 80 App.Div. 477.
10 C.J. p 764 note 76.

43. Ga.—Seaboard Air-Line R. Co. v. O'Quin, 52 S.E. 427, 124 Ga. 357, 2 L.R.A.,N.S., 472.
10 C.J. p 764 note 84.
Obviating liability for exemplary damages see infra § 852.

44. Ark.—St. Louis, etc., R. Co. v. Osborn, 55 S.W. 142, 67 Ark. 399.
Md.—Maryland, etc., R. Co. v. Knight, 89 A. 1091, 122 Md. 576.

45. Tex.—Missouri, etc., R. Co. v. Brown, Civ.App., 135 S.W. 1076.
10 C.J. p 764 note 75
Removal of trespassers from trains generally see C.J.S. title Railroads § 930, also 52 C.J. p 641 note 77—p 642 note 91.

46. Mo.—Griffin v. Kansas City Rys. Co., 204 S.W. 826, 199 Mo.App. 682

Ejectment of trespassers

(1) As a general rule, authority or duty to remove trespassers from a train or cars is in the employee in charge thereof.—Swift v. St. Louis-San Francisco R. Co., Mo.App., 15 S.W.2d 964—52 C.J. p 641 note 77.

(2) With respect to particular trains or cars, authority to eject trespassers may be vested in other employees, such as the engineer with respect to his engine.
Ky.—Louisville, etc., R. Co. v. McCoy, 197 S.W. 801, 177 Ky. 415
Tex.—Galveston, etc., R. Co. v. Zantzinger, 53 S.W. 379, 93 Tex. 64, 77 Am.S.R. 829, 47 L.R.A. 282, affirming, Civ.App., 49 S.W. 677.

(3) A fireman has been held to act within the scope of his employment in compelling a boy to get off a freight train.—Chicago, etc., R. Co. v. Matukas, 147 P. 1038, 47 Okl. 302, L.R.A.1917C 1066.

(4) A fireman employed to coal the engine and do such other incidental work in and about the engine and tender as is necessary to operate the engine has been held to be without authority, and to be acting beyond the scope of his employment, in leaving the engine and going back over the train to eject a trespasser.—Illinois Cent. R. Co. v. Green, 94 So. 793, 130 Miss. 622.

47. Ala.—Louisville & N. R. Co. v. Harper, 83 So. 142, 203 Ala. 398
Mass.—Ramsden v. Boston & A. R. Co., 104 Mass. 117, 6 Am.R. 200.

even though in so doing he is violating instructions[48] or although his act was motivated by personal spite or ill will.[49] Such liability extends also to the acts of persons employed by the conductor to assist him in the ejection.[50]

A brakeman on a railroad does not necessarily have the authority, in consequence of his general employment, to determine who is entitled to transportation, or to eject persons not so entitled, and, if he acts without such authority, his acts are not chargeable to the carrier;[51] but, where it is within the scope of his duty to eject, then for his wrongful or negligent acts the carrier is liable, although he violates his instructions or the rules of the company.[52] In some jurisdictions a brakeman is held to have implied authority to remove trespassers, by virtue of his employment,[53] but in others he is held to have no such implied authority, so that his authority must be shown to have been given, or acquiesced in, by the company.[54] Such authority may be shown by a custom of brakemen to eject trespassers, of which custom the company has, or should have, knowledge,[55] or by the fact that he has been placed in charge of the train or cars.[56] A distinction has been made, in regard to a brakeman's authority, between passenger and freight trains, a brakeman on a passenger train being held under more of a duty to remove trespassers than a brakeman on a freight train,[57] but this distinction has been denied,[58] or disregarded.[59] A brakeman's authority to put trespassers off a freight train necessarily includes the right to keep them off, and to forbid and prevent their getting on again.[60] It has been held that, even though the conductor is the only one authorized to eject a trespasser, the company is liable for the assault of a brakeman or flagman, causing a person to jump from a moving train, on the ground that it is the duty of the conductor

Mo.—Griffin v. Kansas City Rys. Co., 204 S.W. 826, 199 Mo.App. 682
10 C.J. p 764 note 76 [a], p 765 note 89

A conductor is a carrier's vice principal in the matter of collecting fares, and may subject the carrier to liability for his acts while engaged in those duties.—Louisville & N. R. Co. v. Harper, 83 So. 142, 203 Ala. 398.

Abuse of authority

A carrier is liable for any abuse of authority by a conductor in his act of ejecting a person.—Hamilton v. Third Ave. R. Co., 35 N.Y.Super. 118, reversed on other grounds 53 N.Y. 25

Conductor's act caused by another agent

When train conductor is betrayed by authorized agent of carrier into injuring passenger, passenger may count on conductor's act as against defendant railroad for act of defendant's alter ego.—Louisville & N. R. Co. v. Crick, 117 So. 167, 217 Ala. 547, followed in Louisville & N. R. Co. v. Copeland, 117 So. 176, 217 Ala. 556.

Error in judgment

A carrier is responsible for an ejection by its conductor, made through an error in judgment.—Chicago Union Tract. Co. v. McClevey, 126 Ill.App. 21.

Trespassers

Ordinarily authority is vested in the conductor of the train to eject trespassers.—Folley v. Chicago, etc., R. Co., 84 P. 1090, 16 Okl. 32—52 C.J. p 641 note 73.

48. Tex.—Gulf, etc., R. Co. v. Conder, 58 S.W. 58, 23 Tex.Civ.App. 488.
10 C.J. p 765 note 89.

Respondeat superior will not lie unless the particular injury was done by his command or with his assent.—Allegheny Valley R. Co. v. McCain, 91 Pa. 442.

49. Mo.—Griffin v. Kansas City Rys. Co., 204 S.W. 826, 199 Mo.App. 682

50. Mass.—Hull v. Boston, etc., R. Co., 96 N.E. 58, 210 Mass. 159, 36 L.R.A.,N.S., 406, Ann.Cas.1912C 1147—Coleman v. New York, etc., R. Co., 106 Mass. 160.
N.J.—Jardine v. Cornell, 14 A. 590, 50 N.J.Law 485.
Wash.—Mills v. Seattle, etc., R. Co., 96 P. 520, 50 Wash. 20, 19 L.R.A., N.S., 704.
10 C.J. p 765 note 90.

51. Iowa.—Marion v. Chicago, etc., R. Co., 13 N.W. 415, 59 Iowa 428.
10 C.J. p 765 note 93

52. Mass.—McKeon v. New York, etc., R. Co., 67 N.E. 329, 183 Mass. 271, 97 Am.S.R. 437.
10 C.J. p 765 note 95.

53. Ga.—Georgia Southern & F. Ry. Co. v. Thomas, 90 S.E. 80, 18 Ga.App. 511.
52 C.J. p 641 note 81.

Effect of express authority in conductor

The fact that the conductor has express authority to eject a trespasser does not mean that it is exclusive, so as to deprive the brakeman of implied authority.—West Jersey, etc., R. Co. v. Welsh, 42 A. 736, 62 N.J.Law 655, 72 Am.S.R. 659.

Rules of company

A brakeman on a passenger train has authority to remove in a lawful manner a trespasser upon the train, whether or not the authority is conferred by the rules of the company.—Hoffman v. New York Cent., etc., R. Co., 87 N.Y. 25, 41 Am.R. 337, affirmed 46 N.Y.Super. 526.

54. Mass.—Harrington v. Boston, etc., R., 100 N.E. 606, 213 Mass. 338, 45 L.R.A.,N.S., 813, Ann.Cas. 1914A 597.
52 C.J. p 641 note 83.

55. Mo.—Marcum v. Missouri, etc., R. Co., 122 S.W. 1148, 139 Mo.App. 217.
Tex.—Texas, etc., R. Co. v. Mother, 24 S.W. 79, 5 Tex.Civ.App. 87
Va.—Chesapeake, etc., R. Co. v. Anderson, 25 S.E. 947, 93 Va. 650

That company rules prohibit a brakeman from interfering with trespassers except under the direction of the conductor is immaterial.
Mo.—Marcum v. Missouri, etc., R. Co., 122 S.W. 1148, 139 Mo.App. 217.
Tex.—Houston, etc., R. Co. v. Rutherford, Civ.App., 62 S.W. 1069, affirmed 62 S.W. 1056, 94 Tex. 518.

56. Mass.—Bjornquist v. Boston, etc., R. Co., 70 N.E. 53, 185 Mass. 130, 102 Am.S.R. 332.

57. Mass.—McKeon v. New York, etc., R. Co., 67 N.E. 329, 183 Mass. 271, 97 Am.S.R. 437.

58. Or.—Newkirk v. Oregon-Washington R., etc., Co., 273 P. 707, 128 Or. 28, 35, 72 A.L.R. 530

59. Ga.—Georgia Southern & F. Ry. Co. v. Thomas, 90 S.E. 80, 18 Ga.App. 511.

60. Mo.—Barnes v. Missouri Pac. R. Co., Mo.App., 192 S.W. 1040

Assault under mistake as to return to train

The fact that a brakeman assaulting trespassers is mistaken in thinking that they are going to get back on the train will not relieve the company from liability, although the act is one of the brakeman's ill will.—Barnes v. Missouri Pac. R. Co., Mo.App., 192 S.W. 1040.

to restrain those under him from assaulting even a trespasser.[61]

Where the driver of a street car has authority to eject from the car those not entitled to transportation, the carrier will be liable for his wrongful or negligent acts in so doing,[62] but not where he is not intrusted with the general management and control of the car but has specific duties such as a gripman or motorman.[63]

Statutory duty. Where a conductor in ejecting a passenger does so in the discharge of a specific duty imposed on him by statute, and not in enforcing any private right or rule of the carrier, the carrier is not liable for damages in an action by a passenger for wrongful ejection.[64]

Ejection by colluding employee. Where an employee on a train collusively agrees to carry a person without requiring the payment of fare, the company is not liable for injuries caused by such employee in forcing such person to leave the train while it is in motion, since, being a joint trespasser with such person, he does not represent the carrier in the transaction.[65]

What law governs. The law governing an ejection of a passenger, and the rights and liabilities arising therefrom, is the law of the place where the ejection was made.[66]

b. Willful, Wanton, Reckless, or Malicious Acts

A carrier, under the more generally accepted rule, is liable for willful, wanton, reckless, or malicious acts of its employees in the ejection of a passenger so far as the acts are committed within the course of their employment.

A carrier is ordinarily held liable for the damages resulting from a wrongful ejection by its employees, even though they act recklessly, willfully, or maliciously, if their acts are done in the discharge of their duties as employees or in the course of their employment,[67] and this rule has been applied, even though the person ejected is a trespasser,[68] as the carrier owes a duty to a trespasser not to injure him willfully or wantonly.[69] This rule is applied in some jurisdictions in fixing the liability for exemplary damages, which is considered infra § 853. According to some authorities, however, the carrier is not liable for the wanton or willful acts of its employees in making an ejection.[70]

Acts of particular employees. In accordance with these rules, where such servant or employee is at

61. N.C.—Cook v. Southern R. Co., 38 S.E. 925, 128 N.C. 333.
10 C.J. p 759 note 37 [b].

62. Ky.—Louisville City R. Co. v. Mercer, 11 Ky.L. 810.
10 C.J. p 765 note 91.

63. Mo.—Drolshagen v. Union Depot R. Co., 85 S.W. 344, 186 Mo. 258.
10 C.J. p 765 note 92.

64. Okl.—Stratford v. Midland Valley R. Co., 128 P. 98, 36 Okl. 127.
10 C.J. p 764 note 87.

65. Tex.—Grahn v. International, etc., R. Co., 93 S.W. 104, 100 Tex. 27, 123 Am.S.R. 767, 5 L.R.A.,N.S., 1025.
10 C.J. p 760 note 41.

66. Ky.—Louisville & N. R. Co. v. Southern Ry. Co., 36 S.W.2d 20, 237 Ky. 618.
10 C.J. p 764 note 88.

Agent's act in misrouting ticket

Ky.—Louisville & N. R. Co. v. Southern Ry. Co., 36 S.W.2d 20, 237 Ky. 618.

67. Cal.—Galloway v. United Railroads of San Francisco, 197 P. 663, 51 Cal.App. 575.
Ill.—Cohen v. Cleveland, C. & St. L. Ry. Co., 197 Ill.App. 83.
Ind.—Terre Haute & I. R. Co. v. Fitzgerald, 47 Ind. 79
Iowa.—McKinley v. Chicago, etc., R. Co., 44 Iowa 314, 24 Am.R. 748, affirmed 25 L.Ed. 272, 99 U.S. 147.
Kan.—Lampkin v. Chicago Great Western R. Co., 44 P.2d 210, 141 Kan. 763.
Ky.—Louisville & N. Ry. Co. v. Copley, 197 S.W. 648, 177 Ky. 171.
Mo.—Tanger v. Southwest Missouri Electric R. Co., 85 Mo.App. 28.
Wis.—Herschman v. Chicago, M. & St. P. Ry. Co., 186 N.W. 613, 176 Wis. 209—Lugner v. Milwaukee Electric R., etc., Co., 131 N.W. 342, 146 Wis. 175.
10 C.J. p 763 note 70, p 764 note 74—52 C.J. p 639 note 63.

A malicious motive by a conductor in wrongfully ejecting a passenger does not excuse a carrier from liability.—Passenger R. Co. v. Young, 21 Ohio St. 518, 8 Am.R. 78.

Criminal or willful acts

Iowa.—McKinley v. Chicago, etc., R. Co., 44 Iowa 314, 24 Am.R. 748, affirmed 25 L.Ed. 272, 99 U.S. 147.

Kicking one from moving train, held to be a willful assault.—Moore v. Atchison, etc., R. Co., 110 P. 1059, 26 Okl. 682.

If the employees act for their own ends, and not for the purpose of exercising their authority and of performing their duties as employees, the carrier is not liable.
Ill.—Chicago, etc., R. Co. v. Randolph, 65 Ill.App. 208.
Iowa.—Marion v. Chicago, etc., R. Co., 13 N.W. 415, 59 Iowa 428.
Miss.—Yazoo, etc., R. Co. v. Anderson, 25 So. 865, 77 Miss. 28.
N.Y.—Murphy v. Central Park, etc., R. Co. 48 N.Y.Super. 96.
10 C.J. p 764 note 74—52 C.J. p 640 note 64.

Line of service

A carrier is responsible for the malicious and wanton acts of its servant in ejecting a passenger, whether done in the line of its service or not, if done during the course of the discharge of its duty to the master which relates to the passenger.—Tanger v. Southwest Missouri Electric R. Co., 85 Mo.App. 28.

68. Kan.—Lampkin v. Chicago Great Western R. Co., 44 P.2d 210, 141 Kan. 763.
10 C.J. p 758 notes 24, 26—52 C.J. p 639 note 63.
Use of force generally see supra § 824 a.
Removing trespasser from moving train see § 823 b supra.

Shooting trespasser

Kan.—Lampkin v. Chicago Great Western R. Co., 44 P.2d 210, 141 Kan. 763.

69. Ga.—Georgia Southern & F. Ry. Co. v. Thomas, 90 S.E. 80, 18 Ga.App. 511.

70. N.Y.—Hibbard v. New York, etc., R. Co., 15 N.Y. 455.
Pa.—Pennsylvania Co. v. Toomey, 91 Pa. 256.

the time acting within the scope of his employment in removing a trespasser, a railroad company will be liable for injuries caused by the willful, wanton, or reckless acts of a conductor,[71] a flagman on a train,[72] a crossing flagman or tender,[73] an engineer,[74] a motorman,[75] or a brakeman.[76] While it has been held that a brakeman's act in seizing and placing a boy in the cab of an engine, and the act of the enginemen in detaining him there for a while, are not within the scope of their employment, yet, the boy's presence there being contrary to the rules of the company, the act of the enginemen in frightening the boy so as to cause him to jump in front of an engine passing on another track is within the scope of their employment and the railroad company is liable for the boy's injuries.[77]

Joint trespassers Where a person bribes an employee to permit him to ride on a train or car, such employee and person thereby become joint trespassers, and the employee's authority to represent the company in ejecting such person, if he had such authority, thereby ceases, so that the railroad company is not thereafter liable for his acts, although willful or wanton, in ejecting him, unless he afterward receives express authority to make the ejection;[78] and this is also true as to a person who is ejected because he refuses to pay, for the privilege of riding, an employee who has no authority to collect fares.[79]

c. Liability for Acts Subsequent to Ejection

A carrier may be liable for an assault committed by its employees on a passenger after his ejection if the employees were within the course of their employment in commencing the assault; but the carrier is not liable for an assault brought on by the passenger's own conduct, nor for assaults by persons not its employees.

A carrier has been held liable for the wrongful acts of its employees, toward a passenger, committed subsequent to the latter's ejection.[80] Thus, where a carrier's employees failed to use ordinary care in ejecting a passenger, it is liable for an assault on him by such employees after the ejection, provided the employees commenced the assault while acting within the scope of their employment.[81] However, the carrier is not liable if the assault is a separate transaction brought on by the passenger's conduct.[82]

The carrier is not liable for the failure of its employees to use ordinary care to protect from the assaults of others a passenger whom they have ejected.[83]

§ 829. Companies and Persons Liable

A carrier may be held liable for a wrongful ejection of a passenger by another carrier where the first carrier

71. Tex.—Southern Pac. R. Co. v. Kennedy, 29 S.W. 394, 9 Tex.Civ. App. 232
52 C.J. p. 640 note 69.

Striking boy
It is within the line of a conductor's duty to eject licensees and trespassers, and a conductor's act in striking a newsboy and ejecting him creates liability on the part of the company.—Griffin v. Kansas City Rys. Co., 204 S.W. 826, 199 Mo.App. 682.

No liability for an unauthorized act of a conductor—Samaritano v. Galveston, H. & S. A. Ry. Co., Tex. Civ.App., 230 S.W. 1049, dismissed for want of jurisdiction.

Shooting
(1) A railroad company is liable for the act of a conductor in shooting a trespasser while he is in the act of alighting, unless the shooting is not done for the purpose of forcing the trespasser to get off, but merely from personal resentment.—Southern Pac. R. Co. v. Kennedy, 29 S.W. 394, 9 Tex.Civ.App. 232
Right of particular employees to remove trespassers generally see supra § 809 b.

(2) The act of firing a shot into the air for the purpose of frightening boys off a train is not a wrongful exercise of authority on the part of a conductor.—Samaritano v. Galveston, H. & S. A. Ry. Co., Tex.Civ App., 230 S.W. 1049, dismissed for want of jurisdiction.

72. Ky.—Louisville & N. Ry. Co. v. Copley, 197 S.W. 648, 177 Ky. 171.
52 C.J. p. 640 note 70.

73. Mo.—Winn v. Kansas City Belt R. Co., 151 S.W. 98, 245 Mo. 406.
N.H.—Patenaude v. Boston, etc., R., 87 A. 249, 77 N.H. 74.

74. Ill.—Chicago, etc., R. Co. v. West, 17 N.E. 788, 125 Ill. 320, 8 Am.S.R. 380, affirming 24 Ill.App. 44.
52 C.J. p. 640 note 72.

75. Cal.—Galloway v. United Railroads of San Francisco, 197 P. 663, 51 Cal.App. 575.

76. Ga.—Georgia Southern & F. Ry. Co. v. Thomas, 90 S.E. 80, 18 Ga. App. 511
52 C.J. p. 640 note 73, p. 641 notes 81, 83.

77. Pa.—Stephanik v. Baltimore, etc., R. Co., 89 A. 827, 243 Pa. 43.

78. Minn.—Brevig v. Chicago, etc., R. Co., 66 N.W. 401, 64 Minn. 168.
52 C.J. p. 640 note 66

79. Miss.—Illinois Cent. R. Co. v. Latham, 16 So. 757, 72 Miss. 32.

80. Va.—Mangum v. Norfolk & W. Ry. Co., 99 S.E. 686, 125 Va. 244, 5 A.L.R. 346

Arrest and imprisonment of a passenger in the baggage car of a train.—Mangum v. Norfolk & W. Ry. Co., 99 S.E. 686, 125 Va. 244, 5 A.L.R. 346.

81. Mo.—McDonald v. St. Louis, etc., R. Co., 146 S.W. 83, 165 Mo.App. 75.
10 C.J. p. 759 note 33.

82. Ill.—Chicago, etc., R. Co. v. Stratton, 111 Ill.App. 142.

Conduct justifying assault
If a disorderly passenger defies the conductor, draws a pistol, and thereby induces the conductor to arm himself in order to expel him from the train; and if after expulsion he still uses grossly obscene and profane language, reeking with insult, on which a mutual combat with pistols ensues, the railroad company is not liable for the consequences, although the expelled passenger is wounded in the conflict, even if the conductor, excited by danger and irritated by insult, is not fully excusable for the shooting. It is unjust to a master wrongfully to unfit his servant for exercising the care and prudence which are essential in guarding the master's interest and performing the servant's duty.—Peavy v. Georgia R. Co., 8 S.E. 70, 81 Ga. 485, 12 Am.S.R. 334.

83. Mo.—McDonald v. St. Louis, etc., R. Co., 146 S.W. 83, 165 Mo.App. 75.

contracted with the passenger on behalf of the second, or where the ejection was due to the fault of an employee of the second carrier when he was also acting as agent for the first; but a sleeping car company and a railroad company have each been held not liable for an ejection by the other.

One carrier may be held liable for a wrongful ejection by another carrier,[84] as where a passenger contracts for transportation for a certain journey with one carrier and is ejected by a connecting carrier; in such a case the initial carrier may be held liable.[85] Where a ticket agent of one carrier acts as the agent of another carrier, the latter company is liable for ejecting a passenger for the reason that he presented an improper or defective ticket, the defect in which was caused by the fault or mistake of the ticket agent[86] or the validating agent.[87] However, it has been held that a carrier whose agent issues a defective ticket is not liable for the passenger's wrongful ejection by a connecting carrier, where the mistake in the ticket and its explanation were apparent to the latter's conductor,[88] or where the agent who sold the ticket had no knowledge of a rule of the connecting carrier to the effect that the ticket sold would not be good on the train from which the passenger was ejected.[89]

A wrongful ejection by a railroad conductor will not render a sleeping car company liable; and it has also been held that such an ejection by a sleeping car conductor will not render the railroad company liable,[90] but, with respect to the latter proposition, there is authority indicating a different rule in the case of the ejection of passengers.[91]

An express company that contracted with a shipper of stock to carry him in the car used for his stock is not liable as a joint tort-feasor with the railroad company which ejected him from a passenger coach in which he was riding, there being no room for him in the stock car.[92]

Ejection from waiting room. Where two carriers maintain jointly a waiting room at a junction point of both roads, an eviction from the room by an agent of both carriers acting within the scope of his authority creates liability on the part of both carriers.[93] Further, where two railroad companies

84. Ky.—Guy v. Interstate Transit, 51 S.W.2d 455, 244 Ky. 479.
N.C.—Creech v. Atlantic Coast Line R. Co., 93 S.E. 453, 174 N.C. 61, L.R.A.1918D 1030

85. Ky.—Guy v. Interstate Transit, 51 S.W.2d 455, 244 Ky. 479.

86. N.C.—Creech v. Atlantic Coast Line R. Co., 93 S.E. 453, 174 N.C. 61, L.R.A.1918D 1030
10 C.J. p. 765 note 96.

Creation of agency

When carrier recognizes tickets sold over its line by connecting carrier, agent of latter becomes agent of road contracting for transportation. In other words, where there exists a reciprocal relationship between the two carriers for the carrying of passengers, the agent of the one road is also the agent for the other when he sells a ticket for transportation over the latter.—Louisville & N. R. Co. v. Copeland, 117 So. 176, 217 Ala. 556—Louisville & N. R. Co. v. Crick, 117 So. 167, 217 Ala. 547.

Point of destination on ticket changed

Where a ticket agent of a connecting carrier makes a change in the point of destination indicated on a passenger's ticket, so that he is ejected from the carrier on which he later continues his journey, the latter company is liable inasmuch as the ticket agent was acting as its agent in making such change.—Creech v. Atlantic Coast Line R. Co., 93 S.E. 453, 174 N.C. 61, L.R.A.1918D 1030.

Return coupon of round trip ticket

(1) Railroad ejecting passenger presenting return coupon of ticket, sold by connecting carrier, on which coupon return route was not designated, is liable where railroad had accepted ticket for initial trip.—Louisville & N. R. Co. v. Copeland, 117 So. 176, 217 Ala. 556—Louisville & N. R. Co. v. Crick, 117 So. 167, 217 Ala. 547.

(2) Return coupon on ticket not designating routing over connecting carrier is not void.—Louisville & N. R. Co. v. Copeland, supra—Louisville & N. R. Co. v. Crick, supra.

Stipulation in ticket limiting liability

If a carrier, in selling a ticket over a connecting line, does so only as an agent of the connecting carrier, and the ticket provides that the former shall not be responsible for the acts or negligence of the latter, then there may be no liability for a wrongful ejection by the connecting carrier.—Guy v. Interstate Transit, 51 S.W.2d 455, 244 Ky. 479.

87. Ind.—Illinois Cent. R. Co. v. Allbright, 100 N.E. 885, 54 Ind.App. 203.
Tex.—Texas, etc., R. Co. v. Wharton, Civ.App., 145 S.W. 282.

Mistake in validating

Ind.—Illinois Cent. R. Co. v. Allbright, 100 N.E. 885, 54 Ind.App. 203.

Refusal to validate

Tex.—Texas, etc., R. Co. v. Wharton, Civ.App., 145 S.W. 282

88. Miss.—Alabama, etc., R. Co. v. Holmes, 23 So. 187, 75 Miss. 371.

89. Tex.—Chicago, etc., R. Co. v. Carroll, Civ.App., 151 S.W. 1116.

90. U.S.—Paddock v. Atchison, T. & S. F. R. Co., C.C.Mo., 37 F. 841, 4 L.R.A. 231.
Ejection of passengers from palace or sleeping cars generally see infra § 913.

91. Tex.—Blake v. Kansas City Southern R. Co., 85 S.W. 430, 38 Tex.Civ.App. 337.

Passengers and trespassers distinguished

While the conductor of a Pullman car forming part of a railroad company's train is, in his dealings with its passengers, to be regarded as its servant, making it responsible for his acts as if he were directly employed by it, this is not so as respects his dealings with a trespasser on the train and car.—Blake v. Kansas City Southern R. Co., 85 S.W. 430, 38 Tex.Civ.App. 337.

92. N.C.—Teeter v. Southern Express Co., 90 S.E. 761, 172 N.C. 616, reargument denied 90 S.E. 927, 172 N.C. 620.

93. Ga.—Mooneyham v. Nashville, C. & St. L. Ry. Co., 126 S.E. 736, 33 Ga.App. 406.

Statements by agent without authority

Statements made by the agent of one of two such carriers at the initial point of a passenger's journey, which journey contemplated transportation over both lines, to the effect that the waiting room would remain open all night, are not binding on the other carrier as an agreement to keep the room open, where it appears that the agent making the state-

use the same depot, one of them owning it, both may be held liable to a passenger for an assault on him in, and for his ejection from, the waiting room, notwithstanding an agreement between them providing otherwise.[94]

§ 830. Proximate Cause of Injury

For a carrier to be liable for damages or injuries to an ejected person, they must, in general, be the proximate or natural consequence of the ejection; and this is true of persons ejected while in a helpless condition.

A carrier is liable for such damages as proximately result from a wrongful ejection,[95] or for such injuries as are the natural and probable consequence thereof;[96] further, even though a carrier has a right to expel a person,[97] it should not do so at such a time and place, or under such circumstances, that serious injury will probably and naturally result.[98] Conversely, a carrier may not be held liable for injuries sustained by a person in immediate connection with his ejection,[99] or for injuries received subsequent thereto,[1] if the ejection is not the proximate cause of the injuries received, or, as otherwise stated, if the injury received is not the natural and probable consequence thereof; and this is true, even though the act of ejection is itself wrongful[2] or negligent.[3]

Helpless condition of person ejected. Even though a person is in a helpless condition and is negligently ejected, the carrier is not liable for injuries received subsequent to the ejection if it was not the proximate cause of the injuries;[4] but, if a

ments had no authority over, or duties to perform in connection with, the waiting room.—Mooneyham v Nashville, C. & St. L. Ry. Co., 126 S. E. 736, 33 Ga.App. 406.

94. Ky.—Ashland Coal & Iron Ry. Co v Elswick, 225 S.W. 244, 189 Ky. 507.

95. Ky.—Casteel v American Airways, 88 S.W.2d 976, 261 Ky. 818. 10 C.J. p 755 note 3.

Injuries from exposure

Where a passenger is wrongfully ejected on a cold night, and as a result thereof freezes parts of his body, the carrier is liable for such injuries.—Meyers v. Keokuk Electric Co., 180 N.W. 733, 190 Iowa 693.

96. Pa.—Weathers v. Pennsylvania R. Co., 94 Pa.Super. 50

Proximate and remote damages see infra § 851.

97. Ala.—Birmingham Electric Co. v Maze, 166 So. 50, 231 Ala. 539 10 C.J. p 755 note 3.

98. Ala.—Birmingham Electric Co. v Maze, supra.
10 C.J. p 755 note 3.
Time and place of ejection generally see supra § 821.

99. N.J.—Justesen v Pennsylvania R. Co., 106 A. 137, 92 N.J.Law 257
Tex.—Texas & N. O. R. Co. v. Bass, Civ.App., 54 S.W.2d 172.
Utah.—Bergman v Denver & R. G. R. Co., 178 P. 68, 53 Utah 213.
10 C.J. p 756 note 8

Stepping into hole

Injuries sustained from stepping into a hole on alighting from a train, held not proximately caused by the conductor's wrongful order to the injured person to leave the train.—Texas & N. O. R. Co. v. Bass, Tex.Civ.App., 54 S.W.2d 172.

Intervening agency

Where defendant railroad company's information bureau wrongly informed plaintiff that a quarantine in another state had been lifted, whereupon plaintiff with her baby traveled over defendant's line in a Pullman car and was removed therefrom after the car had been taken over by another railroad company because of such quarantine, the conductor of the other road was the culpable and efficient agency intervening between defendant's dereliction and plaintiff's injury, and defendant was not liable. —Justesen v Pennsylvania R. Co., 106 A. 137, 92 N.J.Law 257.

1. Cal.—Lammers v. Pacific Electric Ry. Co., 199 P. 523, 186 Cal. 379
Iowa.—Meyers v. Keokuk Electric Co., 180 N.W. 733, 190 Iowa 693
Md.—State v Washington, B. & A. Electric R. Co., 101 A. 546, 130 Md. 603
Pa.—Weathers v. Pennsylvania R. Co., 94 Pa.Super. 50.
10 C.J. p 756 note 8

Ejected person struck by another train

(1) Where an ejected passenger was struck at a point about a mile distant from the place of ejection by a different train from that from which he was expelled, his death resulting therefrom was not the natural and probable consequence of the ejection.—State v Washington, B. & A. Electric R. Co., 101 A. 546, 130 Md. 603.

(2) Ejection held not the proximate cause of injuries received from another train at a distance of three-fourths of a mile from the point of ejection and six hours later, where the injured party had once left the place of danger.—Lammers v Pacific Electric Ry. Co., 199 P. 523, 186 Cal. 379.

(3) Passenger ejected from car, who thereafter walks along defendant's tracks, assumes risk of its perils.—State v. Washington, B. & A. Electric R. Co., supra.

Illness resulting from exposure

Pa.—Weathers v Pennsylvania R. Co., 94 Pa.Super. 50.

2. Iowa.—Meyers v. Keokuk Electric Co., 180 N.W. 733, 190 Iowa 693.
Md.—State v. Washington, B. & A. Electric R. Co., 101 A. 546, 130 Md. 603
Pa.—Weathers v. Pennsylvania R. Co., 94 Pa.Super. 50
Tex.—Texas & N. O. R. Co. v. Bass, Civ.App., 54 S.W.2d 172.

3. Cal.—Lammers v Pacific Electric Ry. Co., 199 P. 523, 186 Cal. 379.
Pa.—Weathers v. Pennsylvania R. Co., 94 Pa.Super. 50.
Utah.—Bergman v. Denver & R. G. R. Co., 178 P. 68, 53 Utah 213.
10 C.J. p 756 note 9.

Rule applied to trespasser

Trespasser suing for injuries from falling under wheels while stealing ride under passenger car could not recover on ground that railroad employee negligently ordered him to jump off while train was moving, unless such order was cause of trespasser's attempt to leave train.—Bergman v. Denver & R. G. R. Co., 178 P. 68, 53 Utah 213.

4. Cal.—Lammers v. Pacific Electric Ry. Co., 199 P. 523, 186 Cal. 379.
10 C.J. p 756 notes 8, 10

Subsequent injury to intoxicated person

(1) A railroad was not liable for injuries to person on track, on theory that it had negligently ejected him for failure to produce ticket or fare, although he was in a helpless condition as a result of intoxication or other causes, where injuries were sustained three fourths of a mile from the place of the ejectment, the ejectment in such case not being the proximate cause of the injuries.—Lammers v. Pacific Electric Ry. Co., 199 P. 523, 186 Cal. 379.

person's condition is such that he is incapable of taking care of himself, then the carrier may be liable for injuries resulting from his ejection,[5] at least if the conductor knows,[6] or has reason to believe,[7] that he is in such a condition.

§ 831. Defenses

Matters of defense which are peculiar to an action ex contractu cannot be availed of in an action in tort for ejection. Such a cause of action will not be regarded as waived by subsequent conduct on the part of the passenger not inconsistent therewith.

In a tort action for ejection, matters of defense going only to a contractual liability are not available.[8]

A refusal of a passenger who has been wrongfully ejected to reënter the train will not forfeit his right of action for the ejection;[9] on the other hand, where a passenger has been wrongfully ejected, he does not waive his cause of action therefor by subsequently obtaining transportation after a compliance with the conditions imposed by the carrier.[10] Where a passenger is ejected because a ticket is not validated, the carrier's agent having erroneously refused to do so, he does not waive his right to recovery by reason of the fact that he procured access to the train from which he is ejected by the purchase and presentation of a local ticket.[11]

Where a carrier ejects a passenger on a specified ground, it is doubtful whether it can set up a subsequently discovered ground as a justification.[12]

Effect of penalty. A passenger may have a remedy by way of an action for damages notwithstanding a penalty is imposed by statute on the carrier for its wrongful act.[13]

§ 832. Contributory Act or Negligence

A carrier is not liable for injuries sustained by an ejected person as the proximate result of his own negligence; but the doctrine of contributory negligence does not apply where the ejection is willful, wanton, or reckless.

A person ejected from a train, car, or waiting room cannot, as a general rule, recover therefor

(2) Even though the ejected person is drunk, if he is able to take care of himself and can walk and talk intelligently, the carrier is not liable for his injuries or death occurring after the ejection.—Simms v. Stark Electric Ry. Co., 6 Ohio App. 264.
10 C.J. p. 756 note 10.

5. Mich.—Willett v. King, 168 N.W. 986, 203 Mich. 295.
N.C.—Lee v. Atlantic Coast Line R. Co., 97 S.E. 158, 176 N.C. 95.
10 C.J. p 755 notes 4, 5—52 C.J. p 638 note 43.

Injury by another train

(1) A carrier may be held liable for injuries resulting from being run over by another train.—Lee v. Atlantic Coast Line R. Co., 97 S.E. 158, 176 N.C. 95.

(2) This is true, even though the employees in charge of the second train used all ordinary care and diligence to avoid the accident.
Ga.—Macon, etc., R. Co. v. Moore, 54 S.E. 700, 125 Ga. 810.
Tex.—Texas Cent. R. Co. v. Rose, Civ.App., 172 S.W. 756.

Intoxicated person

(1) A carrier is liable for injuries resulting to one who is ejected when he is intoxicated to such a degree that he cannot properly take care of himself, where the conductor ejecting him has reason to know he is in such a condition.—Lee v. Atlantic Coast Line R. Co., 97 S.E. 158, 176 N.C. 95—10 C.J. p 755 note 6.

(2) It is immaterial that he was ejected at the same place at which he entered the train.—Fagg v. Louisville, etc., R. Co., 63 S.W. 580, 111 Ky. 30, 23 Ky.L. 383, 54 L.R.A. 919.

6. Mich.—Willett v. King, 168 N.W. 986, 203 Mich. 295.
10 C.J. p 755 notes 4, 6, p 756 note 7.

Station agent's knowledge not imputed to company

U.S.—Korn v. Chesapeake & O. R. Co., Ohio, 125 F. 897, 62 C.C.A. 417, 63 L.R.A. 872

7. N.C.—Lee v. Atlantic Coast Line R. Co., 97 S.E. 158, 176 N.C. 95.

8. Mo.—Spry v. Missouri, etc., R. Co., 73 Mo.App. 203

A rescission of the contract of carriage after a wrongful ejection will not constitute a defense in the absence of a release of the damages for such wrongful ejection in the contract of rescission.—Spry v. Missouri, etc., R. Co., 73 Mo.App. 203.

Return of fare

If the passenger is wrongfully ejected, the fact that his fare is returned will not preclude a recovery by him for the injury which he sustains.—Whittemore v. Boston, etc., R. Co., 36 A. 824, 77 N.H. 61.

Ticket purchased on Sunday

The fact that a passenger was riding on a ticket purchased on Sunday is no defense to an action for ejection at a place prohibited by statute, since such an action is ex delicto for the tortious ejection, and not ex contractu for a breach of a Sunday contract.—Masterson v. Chicago, etc., R. Co., 73 N.W. 757, 102 Wis 571.

Condition in pass

A carrier which has refused to recognize any contractual relations existing by virtue of a pass under which a person was claiming a right to transportation cannot invoke a condition therein providing for the release of liability for the carrier's negligence toward a person using the pass, even if such a provision is valid.—Galveston, H. & S. A. Ry. Co. v. Mullen, Tex.Civ.App., 198 S.W. 409, error refused.

9. Ala.—Louisville, etc., R. Co. v. Hine, 25 So. 857, 121 Ala. 234

10. Ga.—Southern R. Co. v. Wood, 39 S.E. 894, 114 Ga. 140, 55 L.R.A. 536.
10 C.J. p 764 note 79.

Securing proper validation of ticket
Ga.—Southern R. Co. v. Wood, 39 S.E. 894, 114 Ga. 140, 55 L.R.A. 536.

Paying additional fare demanded, because of passenger not having procured ticket on reboarding train after ejection, wrongful because at a place not permitted by statute—McNairy v. Norfolk & W. R. Co., 90 S.E. 497, 172 N.C. 505.

11. Tex.—Atchison, etc., R. Co. v. Lucas, 144 S.W. 1126, 105 Tex. 82, 39 L.R.A.,N.S., 512.
10 C.J. p 764 note 80.

12. Ga.—Georgia R. Co. v. Baldoni, 42 S.E. 364, 115 Ga. 1013.
10 C.J. p 764 note 81.

13. N.Y.—Charbonneau v. Nassau Electric R. Co., 108 N.Y.S. 105, 123 App.Div. 531.
10 C.J. p 764 note 83.

where he has himself been guilty of contributory negligence, as a proximate result of which he is injured;[14] and the fact that he was intoxicated at the time does not exempt him from responsibility for such negligence;[15] but negligence on the part of the person ejected will not preclude a recovery where it is merely a remote cause of the injury,[16] or where his injury was avoidable notwithstanding his act of negligence.[17]

Contributory negligence of passengers generally is considered in §§ 774-805 supra.

Particular acts of a passenger which have been held not to constitute contributory negligence include the attempt of a passenger, entitled to a stop-over, to resume his journey without a ticket, where his ticket was wrongfully taken up by the first conductor;[18] a passenger's failure to observe the mistake of a conductor in returning to him the wrong portion of his ticket,[19] or in giving him a defective transfer;[20] and a passenger's failure to examine his ticket to ascertain mistakes of the ticket agent,[21] at least where there is nothing suspicious to put him on inquiry;[22] and a passenger carried past his destination because he fell asleep is not at fault in relying on the conductor's assurance that he would be awakened at his destination.[23] On the other hand, a passenger who takes the wrong train by mistake has no recourse against the company for an ejection, if his mistake was not induced by the latter;[24] and a husband has been held negligent so as to preclude his recovery of damages for his wife's ejection where he permitted her to take passage on a train without a ticket or money for fare.[25]

Alighting from moving train or car A passenger ordered to leave a moving train under such circumstances as to justify him in the belief that he will be ejected if he does not go without force cannot be charged with contributory negligence, as a matter of law, for jumping from the train;[26] nor is a passenger negligent for leaving a car going at a rate of speed which does not reasonably appear to be dangerous, when commanded to do so by the conductor.[27] On the other hand, for a person to leave a train or car while it is moving at a dangerous rate of speed, on the mere order of the carrier's employee,[28] not accompanied by threats or personal violence sufficient to cause him to lose self-control,[29] is negligence on his part.

Negligence after ejection completed. A carrier is not liable for injuries resulting from an ejected passenger's attempt to reboard a moving train;[30] nor may an ejected passenger recover for injuries received as a result of his reboarding the train and riding as a "blind passenger."[31]

14. Mo.—Randell v Chicago, etc., R. Co., 76 S.W. 493, 102 Mo.App. 342.
10 C.J. p 766 note 5.

15. Ala.—Johnson v. Louisville, etc., R. Co. 16 So. 75, 104 Ala. 241, 53 Am.S.R. 39.
10 C.J. p 766 note 6.

16. Ala.—Southern R. Co. v. Bunnell, 36 So. 380, 138 Ala. 247.
Ark.—St. Louis, etc., R. Co. v. Kilpatrick, 54 S.W. 971, 67 Ark. 47.
10 C.J. p 766 note 7.

17. N.Y.—Hart v. Metropolitan St. R. Co., 69 N.Y.S. 906, 34 Misc. 521.

18. U.S.—Scofield v. Pennsylvania Co., Ohio, 50 C.C.A. 553, 112 F. 855, 56 L.R.A. 224.

19. Ky.—Louisville, etc., R. Co. v. Fish, 127 S.W. 519, 43 L.R.A.,N.S., 584.

Need of last part of ticket

However, a passenger has been held chargeable with notice that it is necessary for him to have the last of two parts of a ticket in order to complete his journey.—Galveston, etc., R. Co. v. Short, Tex.Civ.App., 163 S.W. 601.

20. N.Y.—Jacobs v. Third Ave. R. Co., 75 N.Y.S. 679, 71 App.Div. 199, 10 N.Y.Ann.Cas. 462, reversing 69 N.Y.S. 981, 34 Misc. 512.

21. Ga.—Atlantic Coast Line R. Co v. Parker, 139 S.E. 581, 37 Ga.App. 218.
Ky.—Louisville & N. R. Co. v. Sandlin, 272 S.W. 912, 209 Ky. 442.
10 C.J. p 766 note 12

"Where a person applies to a railroad ticket agent for a ticket to a certain point by way of a certain route, and the agent, in response to that request, issues him a ticket, the person to whom the ticket is issued has the right to assume that the agent has issued him the ticket applied for, entitling him to transportation to the point named, over the route designated; and his failure to examine the ticket for the purpose of ascertaining whether it entitles him to the transportation applied for would not be negligence."—Atlantic Coast Line R. Co. v. Parker, 139 S.E. 581, 582, 37 Ga.App. 218.

22. Ky.—Louisville & N. R. Co. v. Sandlin, 272 S.W. 912, 209 Ky. 442.

23. Ga.—Atlantic Coast Line R. Co. v. Summerall, 139 S.E. 923, 37 Ga. App. 294.

24. Ind.—Union Traction Co. of Indiana v. Smith, 123 N.E. 4, 70 Ind.App. 40.

25. Tex.—Galveston, etc., R. Co. v. Scott, 79 S.W. 642, 34 Tex.Civ.App. 501.

26. Cal.—Kline v. Central Pac. R. Co., 37 Cal. 400, 99 Am.D. 282.
Tex.—International, etc., R. Co. v. Hassell, 62 Tex. 256.
W.Va.—Boggess v. Chesapeake, etc., R. Co., 16 S.E. 525, 37 W.Va. 297, 23 L.R.A. 777.
10 C.J. p 766 note 13

In the case of an infant, not as much show of force on the part of the conductor is required as in the case of a mature person.—Kline v. Central Pac. R. Co., 37 Cal. 400, 99 Am.D. 282.

27. Ala.—Highland Ave., etc., R. Co. v. Winn, 9 So. 509, 93 Ala. 306.

28. U.S.—Bosworth v. Walker, Ill., 83 F. 58, 27 C.C.A. 402.
Ill.—Chicago, etc., R. Co. v. Moran, 129 Ill.App. 38.

29. Utah.—Bergman v. Denver & R. G. R. Co., 178 P. 68, 53 Utah 213.

Trespasser [illegible] **with freight car**

Utah.—Bergman v. Denver & R. G. R. Co., 178 P. 68, 53 Utah 213.

30. Ky.—Chesapeake, etc., R. Co. v. Saulsberry, 66 S.W. 1051, 112 Ky. 915, 23 Ky.L. 2341, 56 L.R.A. 580.

31. Wis.—Herschman v. Chicago, M. & St. P. Ry. Co., 186 N.W. 613, 176 Wis. 209.

Where an ejected passenger walks along the tracks and, at a point some distance from the place of ejection, is injured by another train, the injury is the result of his own want of care;[32] but, in particular circumstances, a wrongfully ejected passenger has been held not negligent in walking a few hundred feet on the tracks to get back to the depot.[33]

Willful, wanton, or reckless ejection. The doctrine of contributory negligence does not apply where the carrier's acts in ejecting a person are willful, wanton, or reckless, and the injury complained of ensues as a result thereof;[34] so a passenger's voluntary intoxication will not prevent a recovery for personal injuries where undue violence is used in ejecting him.[35]

Unnecessary resistance to ejection on the part of a passenger has been held contributory negligence, even where the passenger is right and the conductor wrong.[36]

§ 833. Actions for Wrongful Ejection

In general, actions against a carrier for the wrongful ejection of a passenger are controlled by the rules of usual application to civil actions, as is shown by the matters specifically considered in the following sections.

§ 834. Nature and Form

Of the common law forms of actions in tort, trespass will lie for a forcible and unlawful ejection, while case is the proper remedy for a lawful ejection in an unlawful manner or for a detention after an ejection.

Trespass will lie against a carrier for forcibly ejecting a passenger, where the ejection is unlawful in itself,[37] but it will not lie for damages sustained by reason of detention after a forcible ejection. In the latter situation, case is the proper remedy,[38] as it is where the ejection is lawful, but is performed in an unlawful manner.[39]

The question of when an action for ejection should be in tort and when on the contract is considered in C.J.S. title Actions § 49 e (5).

§ 835. Jurisdiction and Venue

Ordinarily, an action in contract for ejection should be brought in the place where the contract was to be performed, and an action in tort in the place where the ejection occurred.

An action for a wrongful ejection which is based on the carrier's breach of its contract should be brought in the county where the contract was to be performed;[40] but where it is based on the tort, it should be brought in the county where the ejection took place.[41]

§ 836. Time to Sue and Limitations

In the absence of specific statutory provisions, an action against a carrier for wrongful ejection is controlled by the limitations applicable to other civil actions discussed in the title Limitations of Actions.

Examine pocket parts for later cases.

32. Md.—State v. Washington, B. & A. Electric R. Co, 101 A. 546, 130 Md 603.

33. Tex.—Houston, etc., R. Co. v. Devainy, 63 Tex. 172.

Falling through trestle on dark night

One wrongfully ejected on a dark night a few hundred feet in the station was not negligent in walking back on the tracks, so as to prevent a recovery for injuries received from falling through a trestle which he did not know was there.—Houston, etc., R. Co. v. Devainy, 63 Tex 172.

34. Mo.—Randell v. Chicago, etc., R. Co., 76 S.W. 493, 102 Mo App. 342
10 C.J. p 767 note 15.

35. Md.—Maryland, etc, R. Co. v. Tucker, 80 A. 688, 115 Md. 43.
Tex.—St. Louis Southwestern R. Co. v. Johnson, 68 S.W. 58, 29 Tex.Civ. App. 184.
10 C J. p 767 note 16.

36. U.S.—Hall v. Memphis & Charleston R. Co., C.C.Tenn., 15 F. 57.

37. R.I.—Adams v. Union R. Co., 42 A. 515, 21 R.I. 134, 44 L.R.A. 273.
10 C J. p 780 note 2.

38. W.Va.—Barnum v. Baltimore, etc., R. Co., 5 W.Va. 10.
10 C J. p 780 note 4.

39. Ill.—St. Louis, etc., R. Co. v. Dalby, 19 Ill. 353.

40. Ga.—Sutton v. Southern R. Co, 29 S.E 53, 101 Ga. 776.

41. S.C.—Cornelius v. Atlantic Grey Hound Lines, 180 S E. 791, 177 S. C. 93.
10 C J. p 780 note 7.

Nonresident

Where nonresident, who had used going portion of round-trip ticket on bus from point in another state to point within state and from whom driver of bus on going trip had taken part of return ticket, was allegedly ejected "in a rude manner" by bus driver within the state where she had boarded bus for return trip, cause of action against bus company, a foreign corporation, arose at place where nonresident was ejected, and circuit court of county where ejection took place had jurisdiction. —Cornelius v. Atlantic Grey Hound Lines, 180 S E. 791, 177 S.C. 93.

Connecting carriers

(1) Where a passenger purchases a ticket over several connecting lines, and after using the same over the initial road is ejected from the train on a connecting road because of the failure of the agent of the company from which he purchased the ticket properly to stamp the same, his cause of action against the company that sold him the ticket for such wrongful ejection originates in the county where the ejection occurs, and not in the one where the ticket is purchased.—Georgia Southern, etc, R. Co. v. Pearson, 47 S E. 904, 120 Ga. 284.

(2) One with a through ticket over three lines of railroad who is ejected prior to becoming a passenger on the last road cannot bring an action for illegal ejection in the county where such last road is located.—Cooper v. Colorado & S. Ry. Co., Tex Civ.App, 298 S.W. 612.

§ 837. Pleading

a. Declaration, complaint, or petition
b. Plea or answer
c. Replication or reply
d. Issues, proof, and variance

a. Declaration, Complaint, or Petition

(1) Ejection generally
(2) Place, time, or manner of ejection
(3) Damages

(1) Ejection Generally

The declaration, complaint, or petition in an action for wrongful ejection should clearly state all facts necessary to constitute a cause of action.

The declaration, complaint, or petition, in an action for a wrongful ejection, must allege every material fact which constitutes the ground of plaintiff's cause of action, in clear and concise language.[42] Plaintiff should allege facts essential to show the right to transportation,[43] such as facts showing that the relation of passenger and carrier had arisen,[44] or that the train was one on which plaintiff was entitled to be carried,[45] or that it was a train which under the rules of the carrier stopped at the destination to which plaintiff was entitled to be transported.[46]

A count which states merely conclusions, and not the facts from which the conclusions are drawn, is insufficient;[47] and so a mere general allegation that an ejection was wrongful does not state a good cause of action.[48]

Negligence. A general allegation of the facts constituting negligence on the part of defendant's employee in ejecting plaintiff is sufficient without alleging the details wherein the negligence consisted,[49] and without describing the particular employee[50] or the kind of train.[51]

Under a statute it has been held that, if no negligence is alleged in an action against a carrier founded on an alleged wrongful ejection, the wrong complained of is improper conduct and the law relating to diligence and negligence is not involved.[52]

Tender of fare; extra fare. It is not necessary that plaintiff should allege a strict legal tender of his fare, but it is sufficient to allege that he was willing and ready to pay it and that he offered so to do.[53]

Where plaintiff was without a ticket when ejected, he should allege that he tendered the proper

42. Ala.—Louisville, etc, R. Co. v. Perkins, 39 So. 305, 144 Ala. 325.
Ga.—Riley v. Wrightsville, etc., R. Co, 65 S.E. 890, 133 Ga. 413, 24 L.R.A.,N.S., 379, 18 Ann Cas. 208
Idaho.—Lindsay v Oregon Short Line R. Co., 90 P. 984, 13 Idaho 477, 12 L.R.A.,N.S., 184.
10 C.J. p 780 note 11.

Allegations held sufficient
Ala.—Louisville & N. R. Co. v Hamby, 93 So. 698, 208 Ala. 75—Central of Georgia R. Co. v. Bagley, 55 So 894, 173 Ala. 611.
Ga.—Macon, etc., R. Co. v. Moore, 54 S.E. 700, 125 Ga. 810—Central of Georgia Ry. Co. v. Andrews, 141 S.E. 430, 37 Ga.App. 626—Atlantic Coast Line R. Co. v. Summerall, 139 S.E. 923, 37 Ga.App 294—Mooneyham v. Nashville, C. & St. L. Ry Co., 126 S.E. 736, 33 Ga. App. 406
Wash.—Casey v. Oakes, 50 P. 53, 17 Wash. 409.
10 C.J. p 781 note 27.

Name of carrier's agent
Petition in passenger's action for ejection disclosing an unnamed agent as carrier's agent at certain designated office was not subject to general demurrer calling for name of agent, as company is presumed to know names of its employees, while public is not.—Miller v Southern Ry Co., 94 S.E. 619, 21 Ga.App. 367.

Necessity of walking back to station
(1) Allegation that plaintiff was forced to walk back to station, was not demurrable on ground that it did not appear why he was forced to walk back, especially where petition showed that he was without money —Miller v. Southern Ry. Co., 94 S.E. 619, 21 Ga.App. 367.

(2) In passenger's action for ejection, allegation that he was forced to walk back to a station was not demurrable on ground that it did not show why he did not stay at certain place, where petition did not show proximity or existence of such place.—Miller v. Southern Ry. Co., supra.

Allegations held insufficient
Ala.—McGhee v. Reynolds, 29 So. 961, 129 Ala. 540.
Ga.—Southern R. Co v. Bailey, 85 S.E. 847, 143 Ga. 610, L.R.A.1915E 1043

43. W.Va.—Barnum v. Baltimore, etc., R. Co., 5 W.Va. 10.
10 C.J. p 780 note 12.

44. Ga.—Southern R. Co. v. Dyson, 34 S.E. 997, 109 Ga. 103.
10 C.J. p 780 note 12.

45. Ind.—Lake Erie, etc., R. Co. v. Lucas, 47 N.E. 842, 18 Ind.App 239.
10 C.J. p 781 note 17

46. Mo.—Drew v. Wabash R. Co., 107 S.W. 478, 129 Mo.App. 459.
10 C.J. p 781 notes 17, 18.

47. Ga.—Atlantic Coast Line R. Co. v. Thomas, 82 S.E. 299, 14 Ga.App. 619.
Miss.—Mitchell v Southern R. Co., 27 So. 834, 77 Miss. 917.

48. W.Va.—Barnum v. Baltimore, etc., R. Co., 5 W.Va. 10.
10 C.J. p 781 note 27 [c].

49. Ala.—Birmingham R. Light, etc., Co v. Yielding, 46 So. 747, 155 Ala. 359
10 C.J. p 782 note 30.

50. Ala.—Montgomery Tract. Co v Fitzpatrick, 43 So. 136, 149 Ala. 511, 9 L.R.A.,N.S., 851.
10 C.J. p 782 note 31.

51. Ind.—Wabash R. Co. v. Savage, 9 N.E. 85, 110 Ind. 156.

52. Ga.—Georgia Ry. & Power Co. v. Turner, 125 S.E. 598, 33 Ga.App 101.
"Breach of duty of diligence" toward one entitled thereto is ordinarily termed negligence.—Georgia Ry & Power Co. v. Turner, supra.

53. Cal.—Tarbell v. Central Pac. R. Co., 34 Cal. 616.
W.Va.—White v. Chesapeake, etc., R. Co., 26 W.Va. 800.

Allegation held to show sufficient tender
N.C.—Knowles v Norfolk Southern R. Co., 9 S.E. 7, 102 N.C. 59.

fare at the train rate in lieu of the ticket when the same was demanded of him;[54] and in order to justify his refusal to pay such fare, at a greater rate than the cost of a ticket, he must allege facts which show that he used due diligence in an effort to procure a ticket, and that his failure to have one was attributable to the fault of defendant.[55]

Eviction from station or waiting room. If the complaint is for a wrongful ejection from a station, it must show that plaintiff was there with the intention to be transported as a passenger.[56] Allegations as to statements of an agent or employee that a waiting room would remain open all night for the accommodation of passengers, without a showing of the authority of such employee, are properly stricken on special demurrer.[57]

Matters of defense. Plaintiff need not negative matters of defense;[58] thus, it is not necessary for him to allege that he was free from contributory negligence or fault in connection with the ejection,[59] or that at the time of his ejection he was complying with the reasonable rules of the company, or that he was not about to violate any of such reasonable rules.[60]

If the pleading is insufficient it may be corrected by amendment,[61] or on defendant's motion to make more definite and certain.[62] Defendant may have superfluous and immaterial allegations stricken out on motion.[63]

(2) Place, Time, or Manner of Ejection

Where the ejection is rightful but the place or manner wrongful, the facts showing such wrongfulness must be alleged.

If plaintiff has been rightfully ejected for refusal to pay fare, he must allege that he was ejected at an improper place or with unnecessary or excessive force.[64]

Where a complaint proceeds on the theory that unnecessary force was used in expelling a person, the facts alleged must show not merely that force was used but that the force used was unnecessary[65] or excessive.[66] If the act of an employee is alleged to be malicious, it is necessary also to allege that it was committed in the course of his employment;[67] but it is not necessary to al-

54. Ga.—Wilson v. Southern R. Co., 84 S.E. 445, 143 Ga. 189.

55. Kan.—Avey v. Atchison, etc. R Co., 11 Kan. 448.
10 C.J. p 781 note 22.

56. Ala.—Louisville, etc., R. Co. v. Kay, 62 So. 1014, 8 Ala.App. 562.
Vt.—Harris v. Stevens, 31 Vt. 79, 73 Am.D. 337.

Complaint held sufficient
Ala.—Louisville, etc., R. Co. v. Kay, 62 So. 1014, 8 Ala.App. 562.

57. Ga.—Mooneyham v. Nashville, C & St. L. Ry. Co., 126 S.E. 736, 33 Ga.App. 406.

58. Tex.—Missouri, etc., R. Co. v. Herring, 127 S.W. 1155, 130 S.W. 1039, 61 Tex.Civ.App. 543.
10 C.J. p 783 note 37.

59. Fla.—South Florida R. Co. v. Rhodes, 5 So. 633, 25 Fla. 40, 23 Am.S.R. 506, 3 L.R.A. 733.
Ind.—Louisville, etc., R. Co. v. Goben, 42 N.E. 1116, 15 Ind.App. 123—Lake Erie, etc., R. Co. v. Matthews, 41 N.E. 842, 13 Ind.App. 355

60. Fla.—South Florida R. Co. v. Rhodes, 5 So. 633, 25 Fla. 40, 23 Am.S.R. 506, 3 L.R.A. 733.

61. Ga.—Georgia R., etc., Co. v. Murden, 10 S.E. 235, 83 Ga. 753.
10 C.J. p 780 note 14.

62. Mo.—Ruebsam v. St. Louis Transit Co., 83 S.W. 984, 108 Mo.App. 437
10 C.J. p 781 note 15.

63. Ala.—McGhee v. Reynolds, 29 So. 961, 129 Ala. 540.
Kan.—Chase v. Atchison, etc., R. Co., 79 P. 153, 70 Kan. 546.
10 C.J. p 781 note 25.

Allegation held not irrelevant
Allegation that while walking back to station plaintiff was notified that no colored person could safely traverse the country and was forced to hire a guide, was not wholly irrelevant.—Miller v. Southern Ry. Co., 94 S.E. 619, 21 Ga.App. 367.

64. Ga.—Rossman v. Georgia Ry. & Power Co., 91 S.E. 90, 146 Ga. 264, L.R.A.1917C 483.
Ind.—Pittsburgh, etc., R. Co. v. Haislup, 79 N.E. 1035, 39 Ind.App. 394.

Allegations held sufficient
(1) To sustain a cause of action, the gravamen of which is the violent and malicious expulsion and not breach of contract.—Terre Haute, etc., R. Co. v. Fitzgerald, 47 Ind. 79.

(2) To state a cause of action, the gravamen of which is the rough and insulting expulsion of plaintiff.—Casey v. Oakes, 50 P. 53, 17 Wash. 409.

(3) To show negligence in ejecting a person at a certain point.—Bragg v. Norfolk, etc., R. Co., 67 S.E. 593, 110 Va. 867.

(4) Where a petition alleged illegal expulsion from a train in a rough manner, an amendment, stating that in expelling plaintiff defendant's agents used more force than was necessary was proper.—Southern Ry. Co. v. Fleming, 80 S.E. 325, 141 Ga. 69.

Allegations held insufficient
(1) To show that ejection was at an improper place.—Rossman v. Georgia Ry. & Power Co., 91 S.E. 90, 146 Ga. 264, L.R.A.1917C 483.

(2) To show negligence in ejecting a person at a certain point.—Bragg v. Norfolk, etc., R. Co., 67 S.E. 593, 110 Va. 867.

(3) To show unnecessary force.
Ga.—Rossman v. Georgia Ry. & Power Co., supra.
Ill.—Churchill v. Chicago, etc., R. Co., 67 Ill. 390.
Ind.—Chicago, etc., R. Co. v. Bills, 3 N.E. 611, 104 Ind. 13.

Allegation must claim willful injury
Ind.—Indianapolis St. R. Co. v. Hockett, App., 64 N.E. 633

65. Ind.—Chicago, etc., R. Co. v. Bills, 3 N.E. 611, 104 Ind. 13.

Resistance
An allegation that one was ejected with force or violence does not show that the force used was excessive or more than was necessary as some force may be necessary if there is resistance.
Ill.—Churchill v. Chicago, etc., R. Co., 67 Ill. 390.
Ind.—Chicago, etc., R. Co. v. Bills, 3 N.E. 611, 104 Ind. 13.

66. Ill.—Churchill v. Chicago, etc., R. Co., 67 Ill. 390.

67. Ky.—Louisville & N. Ry. Co. v. Copley, 197 S.W. 648, 177 Ky. 171

lege that plaintiff was a passenger at the time of his ejection, where the action is for an assault in ejecting plaintiff in a willful and unnecessarily forcible manner,[68] unless the ejection was from a freight train, in which case such an allegation is necessary in order to remove the presumption that the freight train was confined exclusively to the transportation of freight.[69]

A complaint which states facts that show only an assault will not support an action for ejection without an averment that plaintiff was actually put off the car.[70]

(3) Damages

Allegations as to damages should show a causal connection between the ejection and the injuries; where punitive damages are sought, the injury should be shown to have been willful or wanton.

The allegation of damages in an action for a wrongful ejection is governed by the rules relative to allegations of damages in other civil actions.[71] The allegation should show a causal connection between the wrongful or improper ejection and the injuries sustained;[72] it having been held sufficient to allege that as a proximate consequence of the ejection plaintiff was injured, specifying the injury,[73] or that the injury complained of was caused by the negligence of an employee of the carrier.[74]

In a count for wrongful ejection, an allegation claiming punitive damages should be stricken on motion where there is no averment of willful or wanton injury.[75]

b. Plea or Answer

The plea or answer is governed by the rules applicable to such a pleading in civil actions generally.

A plea or answer, in an action for a wrongful ejection, is governed by the rules regulating pleas or answers in civil cases generally.[76] A plea is bad if it neither confesses nor traverses the complaint.[77] A defense that plaintiff was riding on a free pass which the conductor withdrew, can be availed of only by special plea confessing the pass and setting up the withdrawal to avoid it,[78] and a plea relying on the fact that plaintiff was not a person to whom a pass could be issued within the limitations of a statute, is insufficient, where it does not specifically allege that plaintiff was not an employee, officer, or other person designated in the statute as a person entitled to transportation under the pass.[79] Where defendant intends to rely on a defense that no more force than necessary was used in ejecting plaintiff, it should be pleaded in avoidance;[80] and a plea which attempts to justify an ejection is insufficient if it does not have such an allegation as to the force used.[81] A violation of the carrier's rules,[82] and, in some jurisdictions, contributory negligence,[83] when relied on as a defense, must be specially pleaded. An allegation that plaintiff's ticket was defaced has been held to be insufficient without a further showing that it was defaced through some fault of plaintiff.[84]

A plea need not anticipate and avoid matters which are properly matters for a replication.[85]

68. Mo.—Adams v. St. Louis, etc., R. Co., 130 S.W. 48, 149 Mo.App. 278
Where conductor's willful misconduct is the gist of an action, a petition is not deficient for failing to plead that plaintiff had a pass entitling him to transportation.—Devero v. Atlantic Coast Line R. Co., 181 S.E. 421, 51 Ga.App. 699.

69. Ind.—Smith v. Louisville, etc., R. Co., 24 N.E. 753, 124 Ind. 394
Mo.—Snyder v. Hannibal, etc., R. Co. 60 Mo. 413—Whitehead v. St. Louis, etc., R. Co., 22 Mo.App. 60, affirmed 11 S.W. 751, 99 Mo. 263, 6 L.R.A. 409.

70. Ray v. United Tract. Co., 89 N.Y.S. 49, 96 App.Div. 48

71. Ga.—Miller v. Southern Ry. Co., 94 S.E. 619, 21 Ga.App. 367.
10 C.J. p. 782 note 33

Duty to anticipate injury
Allegations, in petition in suit for ejection of passenger, that he was forced to hire a guide back to station, if containing any element of recovery would be demurrable without allegations showing defendant's duty to anticipate and prevent such particular injury.—Miller v. Southern Ry. Co., 94 S.E. 619, 21 Ga.App. 367.

72. Ill.—Keeshan v. Elgin, etc., Tract Co., 82 N.E. 360, 229 Ill. 533, affirming 132 Ill.App. 416.

73. Ala.—Birmingham R. Light, etc., Co. v. Yielding, 46 So. 747, 155 Ala. 359.

74. Idaho.—Lindsay v. Oregon Short Line R. Co., 90 P. 984, 13 Idaho 477, 12 L.R.A.,N.S., 184

75. Ala.—Louisville, etc. R. Co. v. Dawson, 66 So. 905, 11 Ala.App. 621.

76. Ala.—Birmingham R., etc., Co. v. Smith, 69 So. 910, 14 Ala.App. 264.
Tex.—Galveston, etc., R. Co. v. Short, Civ.App., 163 S.W. 601—International, etc., R. Co. v. Kentle, 2 Tex.App.Civ.Cas. § 303.
10 C.J. p. 783 note 40.

77. Ala.—Bates v. Birmingham Ry., Light & Power Co., 82 So. 14, 203 Ala. 54
10 C.J. p. 783 notes 41, 42

78. Ala.—Louisville, etc., R. Co. v. Dawson, 66 So. 905, 11 Ala.App. 621.

79. Ala.—Louisville, etc., R. Co. v. Dawson, supra.

80. Mass.—Jackson v. Old Colony St. R. Co., 92 N.E. 725, 206 Mass. 477, 30 L.R.A.,N.S., 1046, 19 Ann.Cas. 615.

81. Ala.—Moore v. Nashville, etc., R. Co., 34 So. 617, 137 Ala. 495.
Ejection for disorderly conduct
Ala.—Moore v. Nashville, etc., R. Co., 34 So. 617, 137 Ala. 495.

82. 10 C.J. p. 783 note 46.

83. N.C.—Sawyer v. Norfolk Southern R. Co., 86 S.E. 166, 171 N.C. 13.

84. Tex.—Texas & N. O. R. Co. v. Barrow, Civ.App., 56 S.W.2d 260, error refused.

85. Ala.—Birmingham R. Light, etc., Co. v. McDonough, 49 So. 960 153

c. Replication or Reply

General rules of pleading control as to the replication or reply

Plaintiff's replication or reply is governed by the rules applying to such pleadings in civil cases generally,[86] thus, it should plead matters germane to the allegations of the plea or answer.[87]

A waiver of a defense, if relied on, must be pleaded.[88]

d. Issues, Proof, and Variance

The proof must conform to the issues and a material variance is fatal.

In an action for a wrongful or improper ejection, only such matters as are material and are properly put in issue by the pleadings and the proof need be considered;[89] and plaintiff or defendant is entitled to rely only on such cause of action,[90] or matter of defense,[91] as is properly alleged.

If an action is brought on the theory that plaintiff was ejected with unnecessary force, it proceeds on the ground that an unlawful act was committed, and facts showing that unnecessary force was used must be shown;[92] and, further, in an action brought for the commission of wrongful acts by defendant in accomplishing an ejection, there can be no recovery on the theory that defendant was at fault in omitting to do certain things.[93] When a complaint, however, proceeds on the theory that plaintiff was rightfully on the train and wrongfully ejected therefrom, it is incumbent on him to show that he was rightfully on the train,[94] and, in such a case,[95] or, in case of an action for ejection brought on the theory that the ejection was under such circumstances as showed willful and wanton misconduct,[96] it is unnecessary to show the degree of force used. In an action for a wrongful ejection there can be no recovery for a breach of contract in carrying plaintiff beyond his station.[97]

A plea of the general issue puts in issue all material averments of the complaint;[98] and a special denial of allegations in a complaint raises the issue of the truth of the allegations denied.[99] A defense that the ticket presented by a passenger was invalid is not inconsistent with a claim that the ticket was out of date.[1]

The fact that a special plea of contributory negligence is filed in addition to a plea of the general issue does not waive the necessity for proof which the plea of the general issue casts on plaintiff.[2] It is not necessary, however, to prove immaterial allegations.[3]

Evidence admissible under pleadings. Only such evidence is admissible on behalf of plaintiff[4] or

Ala. 122, 127 Am.S.R. 18, 13 L.R.A., N.S., 445.
10 C.J. p 783 note 48.

86. Ala.—Louisville, etc., R. Co. v. Mason, 58 So. 963, 4 Ala.App. 353.
Pa.—McElroy v. The Railroad Co., 7 Phila. 206.
10 C.J. p 784 note 49.

87. Ala.—Louisville, etc., R. Co. v. Dawson, 66 So. 905, 11 Ala.App. 621.
10 C.J. p 784 note 50.

88. Iowa.—Trezona v. Chicago, etc., R. Co., 77 N.W. 486, 107 Iowa 22, 43 L.R.A. 136.

89. Tex.—International, etc., R. Co. v. Ing, 68 S.W. 722, 29 Tex.Civ.App. 398.
10 C.J. p 784 note 53.

90. Ala.—Moore v. Nashville, etc., R. Co., 34 So. 617, 137 Ala. 495.
10 C.J. p 784 note 54.

91. Ala.—Southern R. Co. v. Lynn, 29 So. 573, 128 Ala. 297.
Ill.—Malmgren v. Aurora, etc., R. Co., 193 Ill.App. 241.

92. Ind.—White v. Evansville, etc., R. Co., 33 N.E. 273, 133 Ind. 480—Chicago, etc., R. Co. v. Bills, 3 N.E. 611, 104 Ind. 13.

93. Utah.—Bergman v. Denver & R. G. R. Co., 178 P. 68, 53 Utah 213

Failure to stop moving train

Where a trespasser brings an action for injuries resulting from threats and intimidations which forced him to leave a train while going at a dangerous rate of speed, there can be no recovery on the theory that the company was at fault in not stopping the train when an employee saw plaintiff start to go under it—Bergman v. Denver & R. G. R. Co., 178 P. 68, 53 Utah 213.

94. Ind.—White v. Evansville, etc., R. Co., 33 N.E. 273, 133 Ind. 480—Chicago, etc., R. Co. v. Bills, 3 N.E. 611, 104 Ind. 13.

95. Ind.—Chicago, etc., R. Co. v. Bills, supra.

96. Ga.—Devero v. Atlantic Coast Line R. Co., 181 S.E. 421, 51 Ga.App. 699.

Circumstances held to show willful and wanton misconduct

The ejection of a young woman, who was traveling alone, on a dark night while a heavy rain was falling, and at a small station after the depot was closed, and where there was no shelter, constituted willful and wanton misconduct on the part of the conductor ejecting her, without regard to the degree of force used.—Devero v. Atlantic Coast Line R. Co., 181 S.E. 421, 51 Ga.App. 699.

97. Ky.—Louisville, etc., R. Co. v. Lewis, 21 S.W. 341, 14 Ky.Law 770.

98. Ala.—McGhee v. Cashin, 30 So. 367, 130 Ala. 561.

99. Ark.—St. Louis-San Francisco Ry. Co. v. Smith, 244 S.W. 741, 155 Ark. 519.

Particular allegations denied

A complaint, alleging that the auditor of a train forcibly evicted plaintiff, and that it was unlawfully and willfully done, and an answer denying such allegations raised the issue of whether he was forcibly, unlawfully, and willfully evicted.—St. Louis-San Francisco Ry. Co. v. Smith, 244 S.W. 741, 155 Ark. 519

1. Tenn.—Louisville, etc., R. Co. v. Klyman, 67 S.W. 472, 108 Tenn. 304, 91 Am.S.R. 755, 56 L.R.A. 769.

2. Ala.—McGhee v. Cashin, 30 So. 367, 130 Ala. 561.
10 C.J. p 784 note 60 [a].

3. Mo.—Adams v. St. Louis, etc., R. Co., 130 S.W. 48, 149 Mo.App. 278.
Ohio—Allen v. Lake Shore, etc., R. Co., 47 N.E. 1037, 57 Ohio St. 79.
10 C.J. p 785 note 61.

4. Iowa.—Everett v. Chicago, etc., R. Co., 28 N.W. 410, 69 Iowa 15, 58 Am.S.R. 207.
10 C.J. p 785 note 62.

defendant[5] as tends to support the matters put in issue by the pleadings. Thus, if plaintiff, in his pleading, seeks to recover for an unlawful ejection, and not for a removal with unnecessary force, it has been held that unnecessary force cannot be shown if the removal itself was justifiable,[6] and, if the recovery sought is for an expulsion in an improper manner and the allegations are only as to the use of abusive language, plaintiff is confined in his proof to the language used.[7] Plaintiff cannot prove declarations made by a ticket agent in the absence of any averment of such declarations;[8] but proof of a reasonable and necessary rule or regulation is admissible under a general denial.[9]

Variance. If there is a material variance between plaintiff's pleadings and proof it is fatal to a recovery.[10] An immaterial variance, however, which in no wise prejudices defendant's case will not affect plaintiff's recovery.[11] Thus, where the essence of a complaint is the excessive force and violence used in accomplishing an ejection, a variance between an allegation that plaintiff was a passenger, and proof that she was only an intruder, is immaterial.[12]

§ 838. Presumptions and Burden of Proof

a. Presumptions
b. Burden of proof

a. Presumptions

General rules control as to the existence and effect of presumptions in actions for the wrongful ejection of passengers.

The act of the conductor in requiring an increased fare may be presumed lawful.[13] In the absence of a passenger's explanation of the reason for failing to provide himself with a ticket, there is a presumption that tickets were on sale at the office where he should have purchased one.[14] If there is no evidence to the contrary, it will be presumed that a transfer given to a passenger in due course was a proper token of transfer and that it entitled the passenger to passage on the car to which he transferred,[15] and further, that the conduct of the conductor in refusing to receive the transfer was unwarranted.[16] Where the weight of testimony is to the effect that a ticket offered to a conductor was still in force and had not expired, the act of the conductor in destroying the ticket, contrary to his duty, raises a presumption that, if preserved, it would have supported plaintiff's claim.[17] Although a count for the wrongful ejection of a passenger riding on a pass does not allege that he was a person to whom a pass could be issued, it will not be presumed that he was a person not entitled to such a pass, even though it will be presumed that it was a "free pass" within the meaning of a statute restricting its issuance to certain classes of persons.[18]

If a person accompanied by a child presumptively becomes a passenger on entering a car, that presumption is not conclusive and is rebutted on such person's failure to pay the child's fare on demand.[19]

Evidence held admissible

Mo.—Quirk v. Metropolitan St. Ry. Co., 210 S.W. 106, 200 Mo.App. 593, certiorari quashed State ex rel. Metropolitan St. Ry. Co. v. Ellison, Sup., 224 S.W. 820.
10 C.J. p 785 note 62 [a].

Evidence held inadmissible

Wis.—Lehan v. Chicago & N. W. Ry. Co., 172 N.W. 787, 169 Wis. 327
10 C.J. p 785 note 62 [b].

5. Ala.—Southern R. Co. v. Lynn, 29 So. 573, 128 Ala. 297.
10 C.J. p 785 note 63.

6. Ind.—Chicago, etc., R. Co. v. Field, 34 N.E. 406, 7 Ind.App. 172, 52 Am.S.R. 444.
N.H.—Johnson v. Concord R. Corp., 46 N.H. 213, 88 Am.D. 199

7. Ala.—Birmingham Electric Co. v. Maze, 166 So. 50, 231 Ala. 539.

8. Miss.—Wells v. Alabama, etc., R. Co., 6 So. 737, 67 Miss. 24.

9. Mo.—Logan v. Hannibal, etc., R. Co., 77 Mo. 663.—Perey v. Metropolitan St. R. Co., 53 Mo.App. 75

10. Ky.—Chesapeake, etc., R. Co. v. Collinsworth, 153 S.W. 241, 152 Ky. 197.
10 C.J. p 786 note 65.

11. Cal.—Clare v. Northwestern Pac. R. Co., 131 P. 323, 21 Cal.App. 214
10 C.J. p 786 note 66

12. Mo.—Randell v. Chicago, etc., R. Co., 76 S.W. 493, 102 Mo.App. 342.

13. Ind.—Smith v. Indianapolis St. R. Co., 63 N.E. 849, 158 Ind. 425.
10 C.J. p 786 note 73.

14. Ga.—Adams v. Louisville & N. R. Co., 109 S.E. 703, 27 Ga.App. 720

Passenger must pay train rate of fare where he is without a ticket and gives no reason for not procuring one, there being a presumption that tickets were on sale at the ticket office.—Adams v. Louisville & N. R. Co., 109 S.E. 703, 27 Ga.App. 720

15. Ala.—Birmingham R., etc., Co. v. Smith, 69 So. 910, 14 Ala.App. 624.
Mo.—Sommerfield v. St. Louis Transit Co., 84 S.W. 172, 108 Mo.App. 718.

16. Mo.—Sommerfield v. St. Louis Transit Co., supra.

17. Ky.—Louisville, etc., R. Co. v. Donaldson, 43 S.W. 439
It is conductor's duty, in any event, to turn the ticket into the auditor of the road.—Louisville, etc., R. Co. v. Donaldson, Ky., 43 S.W. 439.

18. Ala.—Louisville, etc., R. Co. v. Dawson, 66 So. 905, 11 Ala.App. 621.

Reason for the rule

As the statute makes the issuance of a "free pass" to persons outside the classes named therein a criminal offense, it would require a presumption that both plaintiff and defendant were guilty of a crime if the rule were otherwise.—Louisville, etc., R. Co. v. Dawson, 66 So. 905, 11 Ala.App. 621.

19. Ala.—Birmingham Electric Co. v. Maze, 166 So. 50, 231 Ala. 539

The authority of a brakeman to eject a passenger will not be presumed;[20] but where a person on a train or car represents himself to be the conductor, and he is dressed in the uniform of such an officer and actually collects fares from passengers, he will be presumed, in the absence of evidence to the contrary, to be such officer in the employ of the carrier, so as to render the latter liable for his act of wrongfully ejecting a passenger.[21]

Malice may be presumed from the wrongful act of a conductor in ejecting, without explanation or excuse, a passenger who presents a proper transfer and refuses to pay cash fare.[22]

Mental suffering, as a factor in the recovery of damages, may be inferred from the nature of the wrongful act of ejecting a passenger from a train or street car unlawfully, and with unnecessary force.[23]

b. Burden of Proof

Unless otherwise provided by statute, the burden of proof is on plaintiff in the first instance to prove the facts necessary to establish his cause of action and on defendant to prove matters of defense alleged by him.

As in other civil actions the burden of proof in an action for a wrongful or improper ejection is on plaintiff in the first instance to prove all facts necessary to establish his cause of action.[24] Thus, the burden of proof is on plaintiff, seeking to recover damages for his wrongful ejection as a passenger, to show that he was rightfully on the vehicle in which he was being transported;[25] and until this is shown the burden does not devolve on defendant to show that the ejection was lawful.[26] If defendant has denied plaintiff's allegations of an unlawful eviction, the burden is on the latter to prove his allegations.[27]

Plaintiff has the burden of proving that the negligence complained of was the proximate cause of the injuries received,[28] as well as the fact that defendant was negligent in ejecting the injured party,[29] or causing him to leave the train on which he was riding,[30] and where plaintiff used violence in resisting an ejection, the burden is on him to prove that his acts did not contribute to the injury.[31]

It is incumbent on defendant, when the burden is cast on it by the pleading and evidence, to prove matters of defense alleged by it,[32] such as that the ejection was properly made, or that it was made on statutory grounds.[33] Where a passenger who had previously given up his ticket is ejected, the presumption is against the carrier, and it devolves on it to show that the conductor acted rightly and under authority of the law.[34] A carrier has the burden of showing that it afforded prospective passengers a reasonable opportunity to purchase tickets, in order to justify its exaction of an extra charge from a passenger without a ticket.[35]

Under a statutory provision that the burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side, the burden of proof is on defendant, when it admits in its answer that plaintiff is entitled to actual damages.[36]

§ 839. Admissibility of Evidence

Subject to the general rules of evidence in civil actions, any evidence which is otherwise competent, which

20. Ill.—Illinois Cent. R. Co. v. Black, 122 Ill.App. 439.
Ind.—Lake Shore, etc. R. Co. v. Peterson, 42 N.E. 480, 43 N.E. 1, 144 Ind. 214.

21. La.—Lampkins v. Vicksburg, etc., R. Co., 8 So. 530, 42 La.Ann. 997.
10 C.J. p 786 note 74

22. Mo.—Sommerfield v. St Louis Transit Co., 84 S.W. 172, 108 Mo App. 718.

23. Cal.—Cosey v. Los Angeles Ry. Corporation, 219 P. 978, 192 Cal. 265.

24. Ala.—Birmingham R. Light, etc., Co. v. Turner, 45 So. 671, 154 Ala. 542.
10 C.J. p 786 note 76.

25. Ala.—Louisville, etc., R. Co. v. Mason, 58 So. 963, 4 Ala.App. 353.
10 C.J. p 786 note 77.

26. Ga.—Central of Georgia R. Co. v. Cannon 32 S.E. 874, 106 Ga. 828.

27. Ark.—St. Louis-San Francisco Ry. Co. v. Smith, 244 S.W. 741, 155 Ark. 519

28. Pa.—Kradel v. Pittsburgh, H., B. & N. C. Ry. Co., 100 A. 128, 255 Pa. 427.
Utah.—Bergman v. Denver & R. G. R. Co., 178 P. 68, 53 Utah 213.

29. Pa.—Kradel v Pittsburgh, H., B. & N C Ry. Co., 100 A. 128, 255 Pa. 427.

30. Utah.—Bergman v. Denver & R G. R. Co., 178 P. 68, 53 Utah 213.

31. Mass.—Jackson v. Old Colony St. R. Co., 92 N.E. 725, 206 Mass 477, 30 L.R.A.,N.S., 1046, 19 Ann. Cas. 615

32. Ky.—Choate v. Louisville Ry. Co., 49 S.W.2d 342, 243 Ky. 562.
10 C.J. p 787 note 82.

Prima facie case established by plaintiff

Where plaintiff makes out a prima facie case of injury resulting either from the negligence of the carrier's employee committed within the scope of his employment, or from wrongful acts committed by him as agent for the carrier and as a part of the transaction of the carrier's business the burden is then on the carrier to show that the act was not committed "in the transaction of the business of the agency," within the meaning of a statute making provision with respect thereto.—Galloway v. United Railroads of San Francisco, 197 P. 663, 51 Cal.App. 575.

33. Mo.—Ferguson v. Missouri Pac. R. Co, 128 S.W. 799, 144 Mo.App. 262.
10 C.J. p 787 note 84.

34. Ga.—Georgia R. Co. v. Homer, 73 Ga. 251.

35. Ala.—Southern Ry. Co v. Blackwell, 100 So. 215, 211 Ala. 216

36. Ky.—Louisville, etc., R. Co. v. Champion, 68 S.W. 143, 24 Ky.Law 87.

is relevant and material to the establishment of the facts in issue, may be admitted in actions for the wrongful ejection of a passenger.

Any evidence which is otherwise competent is, subject to the general rules of evidence, admissible where it tends to prove or disprove material facts in issue,[37] and evidence is not admissible where it is not so competent, material, and relevant.[38] Where plaintiff refused to pay fare, he may show that he was without means to do so on rejection of his ticket,[39] although it has been held that he cannot show that he attempted to borrow money from the conductor.[40] Where plaintiff refused to pay fare, he cannot testify that he was only joking and that he really intended to pay.[41]

Right to transportation. As bearing on the passenger's right to transportation, it has been held proper for him to show that his ticket was a proper one;[42] that "going" part of round-trip ticket had been accepted by defendant,[43] that he showed ticket to defendant's agent before boarding train;[44] that he had a receipt for a ticket given by defendant's agent at the time of purchase;[45] and that he made an attempt to procure a proper ticket before entering the car, as bearing on his good faith in entering the car.[46]

On behalf of defendant, evidence has been held admissible to show whether or not a person was acting in good faith and with the intention of becoming a passenger,[47] or as bearing on plaintiff's good faith in presenting an overdue transfer;[48] and on the question of whether or not plaintiff had paid his fare, defendant may introduce testimony to the effect that no one in the car in which plaintiff was traveling had offered to pay fare.[49]

37. N.C.—Lee v. Atlantic Coast Line R. Co., 97 S.E. 158, 176 N.C. 95.
10 C.J. p 787 note 88.

Matters held relevant

(1) Warning to conductor of danger of ejecting intoxicated plaintiff.—Veenstra v. United Rys & Electric Co of Baltimore, 129 A. 678, 148 Md. 512

(2) That no one fell at station where plaintiff was ejected.—Carney v. Pennsylvania R. Co., 63 Pa.Super 138

(3) Statements by agents of other railroads to show absence of negligence in choosing train.—Missouri Pac. R. Co v. Heard, 50 S.W.2d 971, 185 Ark. 1055.

Particular evidence held admissible to show

(1) The identity of a ticket offered.—McGhee v. Cashin, Ala. 40 So. 63

(2) Street car operator's state of mind.—Alter v Arkansas Power & Light Co., 67 S.W.2d 177, 188 Ark 681

(3) Reasonableness of time for keeping open waiting room.—Widener v. Alabama Great Southern R. Co., 69 So 558, 194 Ala. 115

(4) Whether representations were made to plaintiff as to tickets purchased.—Lexington, etc., R. Co. v Lyons, 46 S.W. 209, 104 Ky. 23, 20 Ky.Law 516.

(5) Conductor's knowledge of helplessness of ejected passenger.—Lee v. Atlantic Coast Line R. Co., 97 S.E. 158, 176 N.C. 95.

38. Ala.—McGhee v. Cashin, 40 So 63.
Ky.—Louisville & N. R. Co. v Watson, 255 S.W. 1056 201 Ky 108
N.J.—Tallman v. Triangle Bus Co., 132 A. 514, 4 N.J.Misc 330.
W.Va.—Clark v. Norfolk & W Ry Co., 100 S.E. 480, 84 W.Va. 526, 7 A.L.R 117
10 C.J. p 788 notes 89, 90

Particular evidence held inadmissible

(1) Loss of time from, and ill effects of, walking to and from place of work after ejection.—Tallman v. Triangle Bus Co., 132 A. 514, 4 N.J.Misc 330.

(2) Reason why passenger, after boarding train after ejection, paid cash fare to a point beyond which his ticket read.—McGhee v. Cashin, Ala., 40 So. 63

(3) Void warrant of justice of peace for search of passenger train for intoxicating liquor.—Clark v. Norfolk & W. Ry Co., 100 S.E. 480, 84 W.Va. 526, 7 A.L.R. 117.

(4) On refusal to pay fare, an attempt to procure a ticket before entering the train.—Perkins v. Missouri, etc., R. Co., 55 Mo. 201

(5) On refusal to pay fare, an offer by a third person to pay, after ejection began.—Perkins v. Missouri, etc., R. Co., supra

(6) Where plaintiff was ejected for not paying fare for infant in her charge, reason why she did not purchase ticket, whether she had previously carried it without paying fare, whether she had the means to pay its fare, or whether she offered to do so when she arrived at her destination.—Louisville & N.R. Co v Watson, 255 S.W. 1056, 201 Ky. 108.

Statute providing that on the trial of any person for an assault, etc., he may give in evidence any opprobrious words or abusive language used by the person assaulted at or near the time of the assault in extenuation or justification has no application to an action for ejection of a passenger because of his alleged misconduct.—Nashville, etc., R. Co v. Moore, 41 So 984, 148 Ala. 63.

39. Tex.—Atchison, etc., R. Co. v. Cunniffe, Civ.App., 57 S.W. 692.

40. Ala.—Southern R. Co. v. Bunnell, 36 So 380, 138 Ala. 247.

41. Ky.—Louisville, etc., R. Co. v Cottengim, 104 S.W 280, 31 Ky. Law 871, 13 L.R.A.,N.S., 624

42. Ala.—McGhee v. Cashin, 40 So. 63.

43. Ala.—Louisville & N. R. Co. v. Copeland, 117 So. 176, 217 Ala. 556.—Louisville & N. R. Co. v Crick, 117 So 167, 217 Ala. 547.

44. Ala.—Louisville & N R Co. v. Copeland, 117 So. 176, 217 Ala 556.—Louisville & N R. Co. v. Crick, 117 So. 167, 217 Ala. 547

45. Iowa.—Coine v Chicago, etc, R. Co., 99 N.W 134, 123 Iowa 458.

46. Mo.—Perkins v. Missouri, etc., R. Co., 55 Mo 201.
10 C.J. p 788 note 94.

47. Mo.—Powell v St. Louis, etc., R. Co., 129 S.W. 963, 229 Mo. 246

Plaintiff's conduct in failing to pay fare on a train immediately before entering the train from which he was ejected, is admissible.—Powell v. St. Louis, etc., R. Co, 129 S.W. 963, 229 Mo. 246.

48. D.C.—Capital Traction Co. v Brinley, 43 App.D.C. 430.

Regularly kept transportation records of the carrier are admissible to show the number of cars that passed a certain transfer point between the time plaintiff's transfer was issued and the time he boarded the car from which he was ejected, as such facts have a bearing on the latter's good faith in presenting an overdue transfer.—Capital Traction Co. v Brinley, 43 App.D.C. 430.

49. Pa.—Carney v. Pennsylvania R. Co., 63 Pa.Super 138.

Habit or custom; previous acts or conduct. Evidence of a custom among the conductors of defendant's road to issue to passengers on payment of cash fares credit slips of a certain kind,[50] or of a custom of a conductor in regard to taking up tickets and checking passengers,[51] or evidence that a train usually stopped at a particular place,[52] or that it was customary for defendant's brakeman to inspect passengers' tickets at a particular station,[53] has been held to be admissible. Testimony may be introduced to establish a custom of permitting passengers of both the white and colored races to occupy the back platform of defendant's cars;[54] but testimony by a witness that he had changed cars only at a certain point is inadmissible to prove a custom that cars stopped there as a transfer point.[55] Evidence that some employees, as a matter of practice, broke a certain rule of the company is inadmissible, without an offer to show that this practice was known to, and sanctioned by, the carrier;[56] and a carrier cannot show a custom of issuing tickets, such as that held by plaintiff, for certain days only, in the absence of any proof of knowledge on the part of the purchaser of the ticket that such a limitation existed.[57] Evidence offered to show the commission, on former occasions, of a passenger's acts indicating an attempt to avoid payment of fare,[58] or of mistakes by carrier's agent, which were similar to the mistake complained of,[59] or of a conductor's acts in knocking passengers down,[60] or testimony of a custom among the defendant's conductors of permitting old trackmen to ride free,[61] has been held inadmissible; but, in explanation of its conduct in wrongfully ejecting a passenger, defendant may prove plaintiff's misconduct on a prior trip, although such misconduct does not excuse the ejection.[62]

Evidence as to character. Evidence as to the character of a passenger,[63] or a conductor,[64] may not be given where it is not attacked.

Evidence as to damages. For the purpose of enhancing the damages, evidence of an employee's contemptuous manner and insulting conduct in unlawfully ejecting a passenger is admissible;[65] thus, a passenger's testimony regarding a conductor's alleged rudeness in the presence of other passengers and the audibility of their comments with respect to same is competent on the question of punitive damages.[66] Evidence, on the behalf of plain-

After fact of noncollection of fares is in evidence

Evidence that one conductor had told a succeeding conductor that he had collected no fares, while not admissible to prove the noncollection of fares, is, after the introduction of evidence to show that fact, admissible to show the communication of such fact from the one conductor to the other.—Purvis v. Atlanta Northern Ry. Co., 89 S.E. 571, 145 Ga. 517.

50. Mo.—Holt v. Hannibal, etc., R. Co., 74 S.W. 631, 174 Mo. 524, affirming 87 Mo.App. 203.

51. N.C.—Parrott v. Atlantic, etc., R. Co., 53 S.E. 432, 140 N.C. 546.

52. Tenn.—Louisville, etc., R. Co. v. Ray, 46 S.W. 554, 101 Tenn. 1.

For purpose of showing where a train stopped on a particular occasion, such evidence is admissible.—Louisville, etc., R. Co. v. Ray, 46 S.W. 554, 101 Tenn. 1.

53. Tex.—Missouri, etc., R. Co. v. Humphries, Civ.App., 157 S.W. 1174.

Ejection of passenger on wrong train

Tex.—Missouri, etc., R. Co. v. Humphries, Civ.App., 157 S.W. 1174.

54. Miss.—Waldauer v. Vicksburg, R., etc., Co., 40 So. 751, 88 Miss. 200.

Violation of statute requiring separation of races

Miss.—Waldauer v. Vicksburg R., etc., Co., 40 So. 751, 88 Miss. 200.

55. D.C.—Shortsleeves v. Capital Tract. Co., 28 App.D.C. 365, 8 L.R.A.,N.S., 287.

Boarding car at wrong transfer station

D.C.—Shortsleeves v. Capital Tract. Co., 28 App.D.C. 365, 8 L.R.A.,N.S., 287.

56. Pa.—Anderson v. Union Traction Co., 7 Pa.Dist. 41

10 C.J. p 790 note 16.

Evidence held inadmissible

(1) To show that some conductors had violated company regulations in stopping at a certain transfer point.—Shortsleeves v. Capital Tract. Co., 28 App.D.C. 365, 8 L.R.A.,N.S., 287.

(2) To show that some conductors ignored the terms of a transfer ticket, in violation of the company rules.—Anderson v. Union Traction Co., 7 Pa.Dist. 41.

Unauthorized ejection on previous occasions

Evidence that employees who had no authority to eject persons had, on former occasions, ejected plaintiff, is not admissible to show that an ejection on the occasion in question by such an employee was authorized, without a showing that the previous acts were within the knowledge of the carrier or the conductor.—Chicago, etc., R. Co. v. Moran, 129 Ill.App. 38.

57. Mich.—Carvey v. Detroit, etc., R. Co., 95 N.W. 716, 133 Mich. 659.

58. N.Y.—English v. Delaware, etc., Canal Co., 4 Hun 683, affirmed 66 N.Y. 454, 23 Am.R. 69.

Ejection of passenger who had paid his fare at the time of the ejection in question.—English v. Delaware, etc., Canal Co., 4 Hun 683, affirmed 66 N.Y. 454, 23 Am.R. 69.

59. Ala.—Southern R. Co. v. Bunnell, 36 So. 380, 138 Ala. 247.

60. Ky.—Louisville, etc., R. Co. v. Cottengim, 104 S.W. 280, 31 Ky. Law 871, 13 L.R.A.,N.S., 624.

61. Tex.—Missouri, etc., R. Co. v. Tarwater, 75 S.W. 937, 33 Tex.Civ.App. 116.

62. Ky.—Reasor v. Paducah, etc., Ferry Co., 153 S.W. 222, 152 Ky. 220, 43 L.R.A.,N.S., 820

63. Ga.—Savannah Electric Co. v. Badenhoop, 65 S.E. 50, 6 Ga.App. 371.

Mo.—Breen v. St. Louis Transit Co., 77 S.W. 78, 102 Mo.App. 479.

10 C.J. p 788 note 91.

64. Mo.—Berger v. Chicago, etc., R. Co., 71 S.W. 102, 97 Mo.App. 127.

10 C.J. p 789 note 13 [a] (1).

65. Cal.—Sloane v. Southern California R. Co., 44 P. 320, 111 Cal. 668, 32 L.R.A. 193.

10 C.J. p 789 note 5.

Statement that conductor talked "angry" was not erroneously admitted, where no objection was made at the time it was introduced in evidence.—Truel v. Missouri, etc., R. Co., 128 S.W. 223, 143 Mo.App. 380

66. Ark.—Missouri Pac. R. Co. v.

tiff, of an aggravating circumstance,[67] such as evidence tending to show that an ejection was made in bad faith,[68] or at a dangerous place,[69] has been held admissible on the question of punitive or exemplary damages; but evidence not tending to show that an ejection was maliciously, wantonly, or recklessly committed has been held inadmissible to show such damages.[70]

On behalf of defendant, evidence of an employee's honest belief and intent in making an ejection is admissible in disproving a passenger's claim to exemplary damages,[71] but is not proper or material where the passenger's claim is limited to compensatory damages.[72] In an action brought on the theory that excessive force was used in accomplishing an ejection, evidence bearing a relation to the question of malice has been held admissible on punitory issues.[73]

Evidence of loss of profits, when not shown to be the natural and proximate result of injuries received from an ejection, has been held inadmissible to show special damages.[74]

A conductor's statement of his reason for ejecting plaintiff has been held admissible on the question of damages.[75]

§ 840. Weight and Sufficiency of the Evidence

General rules as to the weight and sufficiency of evidence in civil actions are applicable.

The evidence to justify a recovery on plaintiff's behalf must preponderate and be of such weight and sufficiency as will reasonably justify the jury in finding the existence of all facts necessary to constitute his cause of action.[76] This rule has been applied with reference to a determination of the sufficiency of evidence as to such issues as the fact of the wrongful ejection of plaintiff,[77] the fact of ejection in an improper manner or at an improper time or place,[78] the negligence of defendant in

Heard, 50 S.W.2d 971, 185 Ark. 1055.

67. Ga.—Georgia R., etc., Co v. Davis, 65 S.E. 785, 6 Ga App 645—Louisville, etc., R. Co. v. Forrest, 65 S.E. 808, 6 Ga.App. 766.

68. Ga.—Georgia R., etc., Co. v. Davis, 65 S.E. 785, 6 Ga.App 645

Refusal to allow passenger to re-enter a car after he had been illegally ejected and had offered to pay his fare a second time.—Georgia R., etc., Co. v. Davis, 65 S.E. 785 6 Ga App. 645.

69. Ga.—Louisville, etc., R. Co. v. Forrest, 65 S.E. 808, 6 Ga.App 766.

70. Vt.—Wells v. Boston, etc., R Co, 71 A. 1103, 82 Vt. 108, 137 Am. S.R. 987.

Statement of third person to a conductor that he had seen a former conductor take up plaintiff's ticket is inadmissible, because the fact that the conductor disregarded this statement does not show that he acted maliciously, wantonly, or recklessly in ejecting plaintiff.—Wells v. Boston, etc., R. Co., 71 A. 1103, 82 Vt. 108, 137 Am.S.R. 987.

71. Ga.—Georgia R., etc., Co. v. Homer, 73 Ga. 251.
N.Y.—Yates v New York Cent., etc., R. Co., 67 N.Y. 100—Hamilton v. Third Ave. R. Co., 53 N.Y. 25.

72. Ky—Cincinnati, etc., R. Co. v. Cundiff, 179 S.W. 615, 166 Ky. 594, Ann.Cas.1916C 513.
N.Y.—Yates v New York Cent., etc., R. Co., 67 N.Y. 100.

Motive of carrier's special police officer in arresting plaintiff is inadmissible where the evidence justifies compensatory damages only.—Cincinnati, etc., R. Co. v. Cundiff, 179 S.W. 615, 166 Ky. 594, Ann.Cas.1916C 513.

73. Mo.—Hermann v. St. Joseph R., etc, Co., 129 S.W. 414, 144 Mo.App 147

Evidence held admissible
Evidence to the effect that plaintiff had had trouble on previous occasions with the men in charge of defendant's cars.—Hermann v. St Joseph R, etc., Co., 129 S.W. 414, 144 Mo.App 147.

74. Vt.—Wells v. Boston, etc., R. Co., 71 A. 1103, 82 Vt. 108, 137 Am. S.R. 987

Abandonment of contract to cut timber was held to be a voluntary abandonment.—Wells v. Boston, etc., R. Co., 71 A. 1103, 82 Vt. 108, 137 Am. S.R. 987.

75. Ala.—Louisville & N. R. Co v Copeland, 117 So. 176, 217 Ala. 556—Louisville & N R. Co. v. Crick, 117 So. 167, 217 Ala. 547.

76. Iowa.—Hawthorne v. Delano, 154 N.W. 590.
Tex.—International, etc., R. Co. v. Bohannon, Civ.App., 71 S.W. 776.
10 C J p 790 note 19.

Evidence held sufficient to support a verdict for plaintiff.
Ill.—Lips v. Chicago City Ry. Co., 209 Ill.App 332
Tex.—Missouri, K. & T. Ry. Co. of Texas v. Anderson, Civ.App., 198 S.W. 795.
10 C J. p 790 notes 19 [a] (1), 21 [a] (2).

Evidence held insufficient to sustain a verdict for plaintiff
N.J.—Balsavage v. Pennsylvania R Co., 136 A. 190, 5 N J Misc. 249.
Okl.—Chicago, R. I. & P. Ry Co v Montague, 186 P. 216, 77 Okl. 44.
10 C.J. p 790 note 19 h.

77. **Evidence held sufficient**
(1) To show the fact of the wrongful ejection.—Short v. St. Louis, etc., R Co, 130 S.W. 488, 150 Mo App. 359—10 C.J. p 790 note 21.

(2) To justify finding that plaintiff passenger was wrongfully expelled by defendant electric railway from its car when he desired to ride thereon, was able and willing to pay his fare, and was not intoxicated or disorderly.—Meyers v. Keokuk Electric Co, 180 N.W. 733, 190 Iowa 693.

(3) To show other matters see 10 C.J. p 790 note 19 [a] (2), (3).

Evidence held insufficient
(1) To establish the fact that plaintiff was wrongfully ejected.—Ingerson v. Grand Trunk Ry., 106 A. 488, 79 N.H. 154.

(2) To show other matters relating to a wrongful ejection see 10 C.J. p 790 note 19 [b].

78. **Evidence held sufficient**
(1) To show ejection in a rude manner and at a place other than passenger's destination.—Missouri Pac. R. Co v. Heard, 50 S.W.2d 971, 185 Ark. 1055.

(2) To sustain finding that defendant railroad ejected plaintiff passenger from moving train.—Leonczak v. Minneapolis, St. P. & S. S. M. Ry. Co., 201 N.W. 551, 161 Minn. 304.

(3) To show that plaintiff was ejected from a moving street car ruthlessly and without justification.—Horsthemke v. New Orleans Ry. & Light Co., 84 So. 210, 146 La. 931.

(4) To show that plaintiff was ejected at a place forbidden by statute, and after the conductor had accepted and retained his ticket.—

ejecting plaintiff,[79] the absence of contributory negligence,[80] the fact that defendant's servant was acting within the scope of his authority,[81] plaintiff's right to transportation,[82] plaintiff's opportun-

Mott v. Atlantic Coast Line R. Co., 79 S.E. 867, 164 N.C. 367.

(5) To show that an intoxicated passenger was not put off at a reasonably safe place and that he came to his death by drowning.—Bennett v. Seattle Electric Co., 105 P. 825, 56 Wash. 407.

(6) To sustain a finding, in an action for injuries to a passenger who was ejected from a car while it was in motion, that the car was moving at the rate of three or four miles an hour.—Hirte v. Eastern Wisconsin R., etc., Co., 106 N.W. 1068, 127 Wis. 230.

(7) To show the use of unnecessary force see 10 C.J. p 790 note 22 [a].

Evidence held insufficient

(1) To warrant a finding that a conductor used more force than was necessary.—McGarry v. Holyoke St. R. Co., 65 N.E. 45, 182 Mass. 123.

(2) To raise the issue of the use of any unnecessary force.—Missouri, etc., R. Co. v. Dice, Tex.Civ.App., 168 S.W. 478—10 C.J. p 790 note 22 b.

(3) To show that plaintiff's injury happened by being pushed from the train.—Riggs v. New Orleans, T. & M. Ry. Co., 87 So. 723, 148 La. 717.

(4) To show that conductor had pushed deceased off rapidly moving train.—Herschman v. Chicago, M. & St. P. Ry. Co., 186 N.W. 613, 176 Wis. 209—Lehan v. Chicago & N. W. Ry. Co., 172 N.W. 787, 169 Wis. 327.

(5) To show that plaintiff was ejected while he was intoxicated and while the train was in motion.—Knapp v. Northern Pac. R. Co., 106 P. 190, 56 Wash. 662.

(6) To establish the fact that plaintiff was kicked from the train by one of defendant's brakemen.—Murphy v. New York Cent., etc., R. Co., 92 N.Y.S. 192, 101 App.Div. 610.

(7) To show inhuman conduct of conductor in putting fourteen year old plaintiff off train boarded by mistake.—Bennett v. St. Louis-San Francisco Ry. Co., 7 S.W.2d 1028, 223 Mo.App. 28.

79. Evidence held sufficient

(1) To show gross negligence in ejecting plaintiff.—Louisville & N. R. Co. v. Hadley, 11 Tenn.App. 642.

(2) To justify finding that defendant's conduct in ejecting intoxicated person was negligent.—Fagan v. Atlantic Coast Line R. Co., 115 N.E. 704, 220 N.Y. 301, L.R.A.1917E 663, reversing 155 N.Y.S. 609, 170 App.Div. 47.

(3) To justify finding that plaintiff's failure to comply with a rule prohibiting a stop-over was due to defendant's negligence.—Union Traction Co. of Indiana v. Smith, 123 N.E. 4, 70 Ind.App. 40.

(4) To show that a motorman of a street car knew that plaintiff, a boy, was on the front step of the moving car and in a position of peril and thus was negligent in not preventing his injury.—Quirk v. Metropolitan St. R. Co., 210 S.W. 103, 200 Mo.App. 585.

(5) To warrant a finding in an action for injuries to a boy while alighting from a street car on which he had been invited by the motorman, that he was injured as the result of the conductor's negligence in compelling him to alight while the car was in motion.—South Covington, etc., R. Co. v. Burns, 150 S.W. 343, 150 Ky. 348.

(6) To support a verdict for plaintiff in an action for injuries to a passenger by being run over by another train after he was ejected from defendant's train.—St. Louis, etc., R. Co. v. Dallas, 124 S.W. 247, 93 Ark. 209.

80. Evidence held sufficient

Tex.—Missouri, K. & T. Ry. Co. of Texas v. Anderson, Civ.App., 198 S.W. 795.

10 C.J. p 791 note 25 [a] (2).

81. Evidence held sufficient

(1) To show that carrier's agent was acting within the scope of his authority.

Ill.—George v. Illinois Cent. R. Co., 197 Ill.App. 152

Mo.—Griffin v. Kansas City Rys. Co., 204 S.W. 826, 199 Mo.App. 682.

10 C.J. p 790 note 19 [a] (4).

(2) To warrant finding as to authority of carrier's special officer to eject those riding without tickets or beyond their destination, and that the officer ejecting plaintiff was claiming to exercise such authority.—Louisville & N. R. Co. v. Burns, Tenn., 242 F. 411, 155 C.C.A. 187.

(3) To show that the company had ratified the acts of the agent in ejecting the passenger.—Forrester v. Southern Pac. Co., 134 P. 753, 136 P. 705, 36 Nev. 247, 48 L.R.A.,N.S., 1.

Evidence held insufficient

To show that it was within the apparent scope of a railway conductor's authority to collect in cash a return fare with the going fare so as to render the railway liable, when, after such collection, plaintiff attempted to return on his train, and was ejected for nonpayment of fare.—Southern Ry. Co. v. Pickle, 197 S.W. 675, 138 Tenn. 238.

82. Evidence held sufficient

(1) To show that ticket called for immediate and continuous passage on the next train.—Nashville, C. & St. L. Ry. v. Mooneyham, 139 S.E. 589, 37 Ga.App. 236

(2) To warrant passenger's recovery for ejection from defendant's railway train for nonpayment of additional fare demanded where no ticket was purchased.—Louisville & N. R. Co. v. Boggs, 74 So. 337, 199 Ala. 225.

(3) To warrant a finding that the passenger paid his fare and believed in good faith that a permit issued to him was the evidence of his right to transportation, and that he was not at fault in failing to discover the agent's mistake in not giving him a ticket.—Olson v. Northern Pac. R. Co., 96 P. 150, 49 Wash. 626, 18 L.R.A.,N.S., 209.

(4) To show that a railroad ticket was from one to another specified station.—Chicago, etc., R. Co. v. Stratton, 111 Ill.App. 142.

Evidence held insufficient

(1) To establish custom of transporting grandchild without payment of fare, in an action by the accompanying grandmother for an ejection because of her refusal to pay grandchild's fare.—Birmingham Electric Co. v. Maze, 166 So. 50, 231 Ala. 539.

(2) To establish the fact that plaintiff had ever been a passenger.—Ingerson v. Grand Trunk Ry., 106 A. 488, 79 N.H. 154

(3) To warrant a finding that the conductor received plaintiff's ticket so as to entitle plaintiff to travel on it, or that he failed to notify plaintiff that it was of no value, or a finding that plaintiff intimated in any way that he would pay his fare or present a valid ticket if the other ticket should be returned.—Elliott v. Southern Pac. Co., 79 P. 420, 145 Cal. 441, 68 L.R.A. 393.

Connecting carrier

A verdict for plaintiff against an initial carrier for an ejection by a connecting carrier, was supported by evidence which indicated a contractual duty on the part of the initial carrier to provide plaintiff with transportation to his destination.—Guy v. Interstate Transit, 51 S.W.2d 455, 244 Ky. 479.

Identity of passenger

Where a passenger was ejected from a railroad train by reason of a defect in her return ticket in failing properly to describe her personal characteristics, evidence that the conductor who ejected her was the conductor who punched the ticket on the going trip, and that he was acquainted with her, was insufficient to establish that he had knowledge that plaintiff was the same person who presented the going part of the ticket, where he and the brakeman on the

ity to purchase a ticket before entering the train,[83] the proximate cause of death of an intoxicated passenger,[84] and the right to punitive or exemplary damages.[85]

On behalf of the defendant, the evidence must be reasonably definite and positive and of such sufficiency as will show a justification for the removal of plaintiff; mere general statements will not suffice.[86] Thus, evidence showing that plaintiff's ticket was refused because it was defaced does not prove a defense, in the absence of a showing that it was defaced through some fault of plaintiff.[87]

§ 841. Trial

The general rules applicable to trials of civil actions, which are discussed in the title Trial, are applicable to the trial of actions for the wrongful ejection of passengers. However, such matters as questions of law and fact, instructions, and the verdict and findings in such actions are discussed, so far as specifically applicable, in the following sections. Consult Pocket Parts for later cases.

§ 842. Questions of Law and Fact

As in other civil actions, questions of law are for the determination of the court and questions of fact are, in the case of a conflict of the evidence, to be determined by the jury where the trial is to a jury.

Questions of law are to be determined by the court,[88] and it is error to submit them to the jury;[89] issues of fact are ordinarily to be determined by the jury under proper instructions from the court.[90] If there is any evidence from which the jury may justifiably find the existence or the nonexistence of a fact in issue and the evidence is conflicting or is such that reasonable minds might arrive at different conclusions therefrom, the issue

going train both testified that they did not see plaintiff on such train, but that they remembered seeing plaintiff's daughter thereon.—Western Maryland R. Co. v. Schaun, 55 A. 701, 97 Md. 563.

83. Evidence held insufficient

Evidence that the ticket office was closed at a time thirty-five minutes before the train actually departed is not sufficient, without evidence that it remained closed from that time until the time of the train's departure, to warrant a finding that plaintiff did not have a reasonable opportunity to purchase a ticket.—Read v. Atlantic Coast Line R. Co., 91 S E. 378, 106 S C. 441.

84. Evidence held insufficient

Pa.—Kradel v. Pittsburgh, H., B. & N. C. Ry. Co., 100 A. 128, 255 Pa. 427

85. Evidence held sufficient

(1) To authorize an award of punitive or exemplary damages.

Ark.—Missouri Pac. R. Co. v. Heard, 50 S W 2d 971, 185 Ark. 1055.

Ga.—Atlantic Coast Line R. Co. v. Register, 139 S.E. 735, 37 Ga.App 219.

(2) To sustain a finding that the act of the conductor in ejecting the passenger was wanton, willful, and malicious, so as to justify the imposition of exemplary damages.

Ark.—Little Rock R., etc., Co. v. Dobbins, 95 S.W. 783, 78 Ark. 553.

Mo.—Gardner v. St. Louis, etc, R. Co, 93 S W. 917, 117 Mo.App. 138—Berger v. Chicago, etc, R. Co., 71 S.W. 102, 97 Mo.App. 127.

(3) To warrant the submission of the question of punitive damages to the jury—Hillebrand v. Wells, Mo. App., 270 S.W. 402.

Evidence of willful eviction of passenger from waiting room of railroad station authorized punitive damages.—Nashville, C. & St. L. Ry. v Mooneyham, 139 S.E. 589, 37 Ga. App. 236.

Evidence held insufficient

To sustain a verdict for plaintiff for a passenger's death alleged to have resulted from the company's wantonness in ejecting him from a train when he was drunk to insensibility, under conditions necessarily resulting in his drowning or freezing.—Mobile, etc, R. Co. v. Jackson, 46 So. 142, 92 Miss 517.

86. W.Va—Phillips v. Ohio Valley Electric Co., 90 S E. 342, 78 W.Va. 776

10 C J. p 791 note 24.

Evidence held sufficient

(1) To justify an ejection for intoxication and disorderly conduct.—Phillips v. Ohio Valley Electric Co., 90 S E. 342, 78 W.Va. 776.

(2) To show that a passenger who boarded a train without procuring a ticket did not exercise proper diligence to procure a ticket before the train started, and that he was not entitled to recover damages caused by his ejection from the train after it had left the depot.—Indianapolis, etc., R. Co. v. Kennedy, 77 Ind. 507.

(3) To show that no unnecessary force was used by the servants of the carrier in ejecting plaintiff.

Ill.—Malmgren v Aurora, etc., R. Co., 193 Ill.App 241.

Minn.—Carpenter v. Minneapolis, etc., Tract Co, 157 N.W. 902.

(4) To show that ejection was not wrongful by reason of the manner, time, or place.—Foskey v. Wrightsville & T. R. Co., 92 S.E. 34, 19 Ga. App 670.

(5) To show, as a matter of law, that plaintiff was given a sufficient time to pay his fare—Huba v. Schenectady R. Co., 83 N.Y S. 157, 85 App.Div. 199.

(6) To sustain a verdict for defendant.—Watson v Southern R Co., 64 S E 549, 132 Ga. 552

Evidence held insufficient

(1) To show that plaintiff had reasonable opportunity to purchase ticket.—Southern Ry. Co. v. Blackwell, 100 So 215, 211 Ala. 216.

(2) To show that plaintiff was a trespasser riding through collusion with a brakeman.—Texas, etc., R. Co. v. Black, 57 S.W. 330, 23 Tex.Civ. App 119.

(3) To show affirmatively that fare demanded was that fixed by schedule in force.—Adams v Central of Georgia Ry. Co., 73 So. 650, 198 Ala. 433.

87. Tex—Texas & N. O R. Co. v. Barrow, Civ.App., 56 S W 2d 260, error refused.

88. Ind—Lake Shore, etc., R Co. v. Peterson, 42 N.E. 480, 43 N.E 1, 144 Ind. 214.

10 C.J. p 791 note 27

89. Ark.—Little Rock R., etc., Co v. Goerner, 95 S.W. 1007, 80 Ark. 158, 7 L.R.A.,N.S., 97, 10 Ann.Cas. 273.

10 C J. p 791 note 28.

90. Ill.—Harris v. Atlantic-Pacific Stages, Inc., 260 Ill.App. 308

Iowa.—Vanderbeck v. Chicago, M., St. P. & P. Ry. Co., 230 N.W. 390, 210 Iowa 230.

Ky.—Louisville & N R. Co. v Baker's Adm'r, 210 S W. 674, 183 Ky. 795

Okl.—Dickinson v. Bryant, 172 P 432, 69 Okl 297, L.R.A.1918E 978.

S.C.—Douglas v Southern R. Co, 82 S.E. 439, 98 S C. 346—McKeown v Southern R. Co, 82 S E. 437, 98 S C. 338.

10 C J. p 791 notes 29, 33.

should be submitted to the jury for determination;[91] and in such a case the court should not take the issue from the jury by nonsuit, dismissal, direction of a verdict, or peremptory instruction.[92] If, however, there is no legally sufficient evidence on an issue of fact or the evidence thereon is clear and undisputed and such that but one conclusion can reasonably be drawn therefrom, the question becomes one for the court and should not be submitted to the jury,[93] but should be disposed of by the court alone, as by a dismissal or nonsuit, by sustaining a demurrer to the evidence,[94] or by directing a verdict.[95]

In the application of these rules, the following, among others, have been held to be questions of law: The reasonableness of a provision in a ticket,[96] and the legal effect of a ticket[97] and of the rules of a carrier relating to it;[98] and under the evidence in particular cases it has been held improper to submit questions as to whether a passenger was given a reasonable time in which to produce his ticket,[99] whether plaintiff suffered humiliation from an ejection;[1] or whether defendant's servants rendered plaintiff and her children such assistance as was required by defendant's rules and the circumstances of the case.[2]

Among other questions which have been held under the evidence and circumstances questions of fact for the jury are: Whether the person ejected was a passenger or a trespasser;[3] whether plaintiff's intestate was in fact ejected;[4] whether a prospective passenger was given a reasonable opportunity to procure a ticket[5] or to procure a permit to ride on a freight train;[6] whether a passenger was given a reasonable opportunity to produce a ticket or to pay his fare in lieu thereof;[7] whether a passenger paid the correct fare;[8] whether a passenger took a wrong train without fault on the part of the carrier;[9] whether a train not stopping at plaintiff's destination was boarded on invitation of trainman;[10] whether a reasonable opportunity to alight at his destination was given a passenger;[11] whether passenger asleep at destination was wrongfully ejected after passing it;[12] whether a transfer ticket was presented too late;[13] whether passenger's explanation as to right to ride on ticket was reasonable;[14] whether plaintiff, by reason of infirmity, was entitled to personal service or attention;[15] whether carrier was under duty to wake passenger asleep at destination;[16] whether an employee in effecting the ejection complained of was

91. Ky.—Louisville & N. R. Co. v. Baker's Adm'r, 210 S.W. 674, 183 Ky. 795.
10 C.J. p 791 note 33.

Failure to inform carrier of condition
Passenger, suing for ejection resulting in relapse into tubercular condition, is not without cause of action as matter of law because of failure to inform conductor that she had been affected with tuberculosis or of absence of irresistible force by him.—Southern Pac. Co. v. Ulmer, Tex.Civ.App., 232 S.W. 305, affirmed, Com.App., 236 S.W. 193.

92. Ala.—Louisville & N. R. Co. v. Hamby, 93 So. 698, 208 Ala. 75.
10 C.J. p 792 note 34.

93. Ark.—Brenner v. Jonesboro, etc., R. Co., 100 S.W. 893, 82 Ark. 128, 118 Am.S.R. 56, 9 L.R.A.,N.S., 1060, 12 Ann.Cas. 489.
10 C.J. p 792 note 35.

94. Mo.—Shular v. St. Louis, etc., R. Co., 2 S.W. 310, 92 Mo. 339.
10 C.J. p 792 note 35.

95. Ala.—Louisville, etc., R. Co. v. Dawson, 66 So. 905, 11 Ala.App. 621.
Ariz.—Roberts v. Smith, 52 P. 1120, 5 Ariz. 368.

Directed verdict held required
Mich.—Willett v. King, 168 N.W. 986, 203 Mich. 295.
Tex.—Chicago, R. I. & G. Ry. Co. v. Edwards, Civ.App., 232 S.W. 356.

Directed verdict held proper
In an action for injuries sustained through being shot by a deputy sheriff on being ejected from a train for nonpayment of fare, where the evidence did not raise the issue of the carrier's liability, a directed verdict for defendant was proper.—Samaritano v. Galveston, H. & S. A. Ry. Co., Tex.Civ.App., 230 S.W. 1049, dismissed for want of jurisdiction.

96. N.Y.—Hanley v. Brooklyn Heights R. Co., 96 N.Y.S. 249, 110 App.Div. 429.
10 C.J. p 791 note 30.

97. Mo.—Ligon v. St. Louis, etc., R. Co., 168 S.W. 647, 184 Mo.App. 187.
Tex.—Chicago, etc., R. Co. v. Carroll, Civ.App., 151 S.W. 1116.

98. Tex.—Chicago, etc., R. Co. v. Carroll, supra.

99. Ala.—Louisville & N. R. Co. v. Hamby, 93 So. 698, 208 Ala. 75.

1. Ark.—Brenner v. Jonesboro, etc., R. Co., 100 S.W. 893, 82 Ark. 128, 118 Am.S.R. 56, 9 L.R.A.,N.S., 1060, 12 Ann.Cas. 489.

2. Tex.—Fleck v. Missouri, K. & T. Ry. Co. of Texas, Civ.App., 191 S.W. 386.

3. Idaho.—Ramm v. Minneapolis & St. L. R. Co., 62 N.W. 751, 94 Idaho 296.
10 C.J. p 792 note 38.

4. Ky.—Louisville & N. R. Co. v. Baker's Adm'r, 210 S.W. 674, 183 Ky. 795.

5. Miss.—Rivers v. Kansas City, etc., R. Co., 38 So. 508, 86 Miss. 571.
10 C.J. p 792 note 39.

6. Minn.—Reed v. Great Northern R. Co., 78 N.W. 971, 76 Minn. 163

7. Fla.—Seaboard Air Line R. Co. v. Scarborough, 42 So. 706, 52 Fla. 425.
10 C.J. p 792 note 40.

8. N.J.—Tallman v. Triangle Bus Co., 132 A. 514, 4 N.J.Misc. 330

9. Ind.—Union Traction Co. of Indiana v. Smith, 123 N.E. 4, 70 Ind. App. 40.

10. Ill.—Davis v. Illinois Cent. R. Co., 233 Ill.App. 539.

11. N.Y.—Markowitz v. New York Rys. Co., 176 N.Y.S. 778, 188 App. Div. 482.

12. Iowa.—Vanderbeck v. Chicago, M., St. P. & P. Ry. Co., 230 N.W. 390, 210 Iowa 230.

13. N.Y.—Caffrey v. United Traction Co., 192 N.Y.S. 95, 199 App.Div. 208—Samanowitz v. New York Rys. Co., 163 N.Y.S. 550.

14. S.C.—Douglas v. Southern R. Co., 82 S.E. 439, 98 S.C. 346—McKeown v. Southern R. Co., 82 S.E. 437, 98 S.C. 338.

15. Okl.—Dickinson v. Bryant, 172 P. 432, 69 Okl. 297, L.R.A.1918E 978.

16. Iowa.—Vanderbeck v. Chicago, M., St. P. & P. Ry. Co., 230 N.W. 390, 210 Iowa 230.

acting within the scope of his employment;[17] whether owner of restaurant used as bus waiting room was agent of the carrier;[18] whether an ejected passenger was guilty of contributory negligence or failure to use reasonable care to prevent injury,[19] or whether the wrongful ejection was the proximate cause of the passenger's injuries.[20]

Manner, time, or place of ejection. On conflicting evidence it is for the jury to determine whether or not the carrier or his servant was guilty of negligence,[21] or of malicious,[22] or willful or wanton,[23] conduct, or of the use of unnecessary force,[24] in effecting an ejection.

Whether an ejection was at an improper time,[25] or place,[26] has also been held to be questions for the jury.

Damages. The assessment of damages is for the jury,[27] which may determine the question of actual damages,[28] or whether an employee's acts or conduct was such as to entitle plaintiff to punitive or exemplary damages,[29] or whether there were mitigating circumstances of such a nature as would justify the assessment of nominal damages only.[30]

§ 843. Instructions

The instructions in an action for the ejection of a passenger should clearly and accurately state the law applicable to the case in conformity to the issues made by the pleading and evidence and without invasion of the province of the jury.

Under the general rules governing instructions in civil cases, the court should correctly state the law applicable to the facts of the case,[31] in defi-

17. Cal.—Galloway v. United Railroads of San Francisco, 197 P 663, 51 Cal App 575.
10 C.J p 792 note 41.

When question of law

"Where the inference that he was not acting for the master within the general scope of his authority is not justified, it becomes a question of law, and so, likewise, when there is no room for an inference that he was pursuing an independent purpose of his own, the master would be liable as matter of law."—Barry v. Union R. Co., 94 N.Y.S. 449, 105 App.Div. 520, 525

18. Ill.—Harris v. Atlantic-Pacific Stages, Inc., 260 Ill.App. 308.

19. N.Y.—Cohen v Erie R. Co., 160 N.Y.S. 1091, 97 Misc. 1.
10 C.J p 793 note 49.

Avoidance of injury from exposure

Pa.—Weathers v. Pennsylvania R. Co., 94 Pa Super 50.
Tex.—Southern Pac. Co. v. Ulmer, Civ App., 296 S.W. 647

20. Md.—Veenstra v. United Rys. & Electric Co. of Baltimore, 129 A. 678, 148 Md. 512
10 C.J. p 793 note 48.

Order to alight from moving car

In boy's action for injuries, when ejected from defendant street railway's car as it was moving, question whether or not proximate cause of his getting off was the order of the conductor or of the motorman was held for the jury.—Quirk v. Metropolitan St. Ry Co., 210 S.W. 103, 200 Mo.App. 585.

21. Md.—Veenstra v. United Rys & Electric Co of Baltimore, 129 A. 678, 148 Md. 512.
N.Y.—Tumulty v. New York, N. H. & H. R. Co., 229 N.Y.S. 700, 224 App Div. 131.
S.C.—Paul v. Southern Ry Co., 155 S.E. 884, 158 S.C. 550.
Tex.—Southern Pac. Co. v. Ulmer, Civ.App., 282 S.W 305, affirmed, Com.App., 286 S.W. 193.
10 C.J. p 793 note 42

Failure to anticipate action

Where passenger, misled by carrier's agent, did what was natural and reasonable, and injury resulted, it cannot be held as matter of law that carrier could not have anticipated such action.—Weathers v Pennsylvania R. Co., 94 Pa Super. 50

Failure to notify crew of another train to stop for an ejected passenger—Southern Pac Co. v. Ulmer, Tex.Civ.App., 282 S.W 305, affirmed, Com.App., 286 S.W. 193.

Ejection from moving train or car

Mo.—Quirk v Metropolitan St. Ry. Co., 210 S.W. 106, 200 Mo.App. 593, certiorari quashed State ex rel. Metropolitan St. Ry Co v. Ellison, Sup., 224 S.W. 820.
10 C.J. p 793 note 46

Ejection of intoxicated person

N.Y.—Tumulty v. New York, N. H. & H. R. Co., 229 N.Y.S. 700, 224 App Div. 131.
10 C.J. p 793 note 42 [a].

22. Ariz.—Southern Pac. Co. v. Boyce, 223 P. 116, 26 Ariz. 162.
Mo.—Hartridge v. United Rys. Co. of St. Louis, App., 196 S.W 59
10 C.J. p 791 note 29 [a], p 793 note 47.

23. Ariz.—Southern Pac. Co. v. Boyce, 223 P. 116, 26 Ariz. 162.
Ga.—Devero v Atlantic Coast Line R. Co., 181 S.E. 421, 51 Ga.App. 699.
S.C.—Paul v Southern Ry Co., 155 S.E. 884, 158 S.C. 550.
10 C.J. p 793 note 47.

Particular acts

(1) Ejecting passenger at closed depot during rain.—Devero v. Atlantic Coast Line R. Co., 181 S.E. 421, 51 Ga.App. 699.

(2) Ejecting a passenger and two small children at a time when it was almost night and at a place where there was a deep cut and when a storm was threatening—Paul v. Southern Ry. Co., 155 S.E 884, 158 S.C. 550.

Whether carrier ratified the willful acts of a conductor, is a question for the jury.—Paul v. Southern Ry. Co., 155 S.E 884, 158 S.C. 550

24. Mo.—Green v. United Rys Co. of St Louis, 206 S.W. 237, 200 Mo. App. 303.
N.Y.—Samanowitz v. New York Rys. Co., 163 N.Y.S. 550.
N.C.—McNairy v. Norfolk & W. R. Co., 90 S.E. 497, 172 N.C 505.
10 C.J. p 793 note 43.

25. Ga.—Atlantic Coast Line R. Co. v Summerall, 139 S.E. 923, 37 Ga. App. 294

26. Ga.—Atlantic Coast Line R. Co. v Summerall, supra.
10 C.J. p.793 note 44.

Where statute required an ejection to be at a station or near a dwelling house, it is a question for the jury to determine whether or not an ejection took place near a dwelling house.—Loomis v. Jewett, 35 Hun, N.Y., 313

27. Ala.—Bates v. Birmingham Ry., Light & Power Co., 82 So. 14, 203 Ala. 54.

28. S.C.—Paul v Southern Ry Co., 155 S.E 884, 158 S.C. 550.

29. Ariz.—Southern Pac. Co v. Boyce, 223 P. 116, 26 Ariz. 162.
10 C.J. p 793 note 47.

30. Ala.—Bates v Birmingham Ry., Light & Power Co., 82 So. 14, 203 Ala. 54.

31. Mo.—Hartridge v. United Rys. Co of St. Louis, App., 196 S.W. 59.
10 C.J. p 794 note 51.
Instructions in civil cases see C.J.S. title Trial §§ 266–426, also 64 C.J. p 510 note 2–p 1008 note 15

Instructions held proper

Cal.—Galloway v. United Railroads

nite and explicit terms.[32] Instructions should not be abstract,[33] or conflicting, inconsistent, or contradictory;[34] misleading instructions, even though correctly stating an abstract proposition of law, are erroneous.[35] A portion[36] or excerpt[37] of a charge is to be read in connection with its context, and is to be considered with the whole of the charge;[38] accordingly, the fact that one portion considered separately might be open to objection does not constitute error, if the charge is correct in its entirety.[39] Mere errors of form or phraseology in instructions, such as are not calculated to mislead the jury or prejudice the rights of other parties, are immaterial.[40]

An instruction which covers the case generally is ordinarily sufficient in the absence of a request for further instructions in detail.[41] While a request for a proper instruction on matters not sufficiently covered by the charges as given should not be refused,[42] it is not error to refuse a requested instruction on matters already sufficiently covered by the charge as given,[43] or to refuse an instruction which incorrectly states the law,[44] or which charges as to immaterial or unessential matters,[45] or matters not in issue.[46]

A requested instruction may be modified by the court when to do so makes a clearer[47] or more correct[48] statement of the law, or when the instruction as modified is not harmful to the party making the request.[49]

Invading province of jury. As issues of fact must be submitted to the jury by instructions which clearly and fully state and define them,[50] an instruction is erroneous which invades the province of the jury by withdrawing or excluding an issue of fact from it;[51] thus, an instruction which assumes as a matter of law the existence or nonexistence of facts in issue, is erroneous,[52] and, under

of San Francisco, 197 P. 663, 51 Cal.App. 575.
10 C.J. p 794 note 51 [a].

Instructions held erroneous
Ark.—Hines v. Smith, 224 S.W. 612, 145 Ark. 218.
Cal.—Galloway v. United Railroads of San Francisco, 197 P. 663, 51 Cal.App. 575.
10 C.J. p 794 note 51 [b].

Instructions held properly refused
Ga.—Smith v. Savannah Electric Co., 102 S.E. 548, 25 Ga.App. 59.
Ill.—Cohen v. Cleveland, C. & St. L. Ry. Co., 197 Ill.App. 88.

Instructions held improperly refused
Ga.—Miller v. Southern Ry. Co., 94 S.E. 619, 21 Ga.App. 367.

Instruction as to degree of intoxication necessary to justify an ejection is erroneous, in view of a statute making it a criminal offense to be intoxicated on a train, or even to drink intoxicating liquor thereon.—George v. Illinois Cent. R. Co., 197 Ill.App. 152.

Humiliation, chagrin, and mortification
In a passenger's action against a carrier for ejection from its train, it was held that the instructions should cover the question whether the acts of the conductor were reasonable and necessary in ejecting the passenger, and whether in fact the passenger suffered humiliation, chagrin, and mortification.—Southern Kansas Ry. Co. of Texas v. Wallace, Tex.Com.App., 206 S.W. 505, reversing, Civ.App., 152 S.W. 373.

32. Ga.—Purvis v. Atlanta Northern R. Co., 72 S.E. 343, 136 Ga. 852.
10 C.J. p 795 note 53.

33. Ala.—Louisville & N. R. Co. v. Hamby, 93 So. 698, 208 Ala. 75.
10 C.J. p 796 note 55.

34. Mo.—Hartridge v. United Rys. Co. of St. Louis, App., 196 S.W. 59
10 C.J. p 796 note 56

35. Ark.—Hines v. Smith, 224 S.W. 612, 145 Ark. 218.
10 C.J. p 795 note 54.

36. Ala.—Louisville & N. R. Co. v. Copeland, 117 So. 176, 217 Ala. 556—Louisville & N. R. Co. v. Crick, 117 So. 167, 217 Ala. 547.

37. N.J.—Shoeffler v. Phillipsburg Horse Car R. Co., 100 A. 199, 90 N.J.Law 235.

Charge as to amount of force to be used in ejecting one improperly on defendant's car, which stated by illustration that if a passenger refused to leave and he was pushed off, that is all that would be necessary, is not an instruction that defendant might push such person off car regardless of consequences.—Shoeffler v. Phillipsburg Horse Car R. Co., 100 A. 199, 90 N.J.Law 235.

38. Ala.—Louisville & N. R. Co. v. Copeland, 117 So. 176, 217 Ala. 556—Louisville & N. R. Co. v. Crick, 117 So. 167, 217 Ala. 547.
10 C.J. p 796 note 57.

39. Fla.—Seaboard Air Line R. Co. v. Scarborough, 42 So. 706, 52 Fla. 425.

40. Tenn.—Choctaw, etc., R. Co. v. Hill, 75 S.W. 963, 110 Tenn. 396.
10 C.J. p 797 note 65.

41. Tenn.—Warfield v. Louisville, etc., R. Co., 55 S.W. 304, 104 Tenn. 74, 78 Am.S.R. 911.
10 C.J. p 796 note 58.

42. Md.—Maryland, etc., R. Co. v. Tucker, 80 A. 688, 115 Md. 43.
10 C.J. p 796 note 59.

43. Fla.—Seaboard Air Line R. Co. v. Scarborough, 42 So. 706, 52 Fla. 425.

44. Ga.—Atlantic Coast Line R. Co. v. Thomas, 82 S.E. 299, 14 Ga.App. 619
Tex.—Missouri, etc., R. Co. v. Dice, Civ.App., 168 S.W. 478—El Paso Electric R. Co. v. Alderete, 81 S.W. 1246, 36 Tex.Civ.App. 142.

45. Tex.—Quigley v. Gulf, etc., R. Co., Civ.App., 142 S.W. 633.

46. Miss.—Gallegly v. Kansas City, etc., R. Co., 35 So. 420, 83 Miss. 171.
Tex.—International, etc., R. Co. v. Hood, 122 S.W. 569, 57 Tex.Civ.App. 497.

47. Ark.—Little Rock R., etc., Electric Co. v. Dobbins, 95 S.W. 788, 78 Ark. 553.

48. Ill.—Chicago Cons. Tract. Co. v. Mahoney, 82 N.E. 868, 230 Ill. 562.
10 C.J. p 796 note 60.

Modification held not erroneous
Cal.—Galloway v. United Railroads of San Francisco, 197 P. 663, 51 Cal.App. 575
10 C.J. p 796 note 60 [a].

49. Mo.—Carmody v. St. Louis Transit Co., 99 S.W. 495, 122 Mo.App. 338.

50. Ark.—St. Louis, etc., R. Co. v. Day, 110 S.W. 220, 86 Ark. 104.
Md.—Rosenkovitz v. United R., etc., Co., 70 A. 103, 108 Md. 306.
Issues of fact as question for the jury see supra § 842 a.

51. Mich.—Butler v. Detroit, etc., R. Co., 101 N.W. 232, 138 Mich. 206.
10 C.J. p 797 note 68.

52. Ala.—Nashville, etc., R. Co. v. Moore, 41 So. 984, 148 Ala. 63.
10 C.J. p 797 note 69.

a statute, it has been held that an instruction containing an expression of opinion by the court on a controverted issue, requires the granting of a new trial [53]

Conformity to pleadings and issues The instructions must conform and be applicable to the issues as made by the pleadings[54] and the evidence.[55] Thus, an instruction which is not pertinent to the issues,[56] or which authorizes a recovery on a ground not relied on in the petition,[57] or which is based partly on facts of which there is insufficient evidence or no evidence in the record on which it can rest,[58] is erroneous, or, if a requested charge, is properly refused. However, it is not error to omit to charge on a matter not in issue.[59]

Damages. An instruction which leaves the amount of damages recoverable for injuries received from an ejection to the judgment and discretion of the jury, as based on the proof in the case, is not erroneous.[60] Where there is evidence to warrant it, an instruction authorizing a recovery for pain, humiliation, and disgrace as an element of compensatory damages is proper,[61] but it should require a finding that the humiliation suffered was the proximate result of the wrongful ejection.[62]

Instructions on the measure of damages should confine recovery to compensatory damages where there is no evidence to support an award of punitive damages.[63] An instruction authorizing the recovery of punitive or exemplary damages if the acts complained of were willfully, wantonly, or maliciously committed, is proper;[64] but an instruc-

53. Ga—Louisville, etc., R Co v. Ogles, 83 S E 681, 142 Ga. 720, 722

54. N Y—Huba v Schenectady R Co, 83 N.Y S 157, 85 App Div. 199
10 C J p 797 note 71

Instructions held proper

Ky—Choate v Louisville Ry. Co., 49 S W 2d 342 243 Ky 562

Mo—Quirk v Metropolitan St Ry. Co, 210 S W 103, 200 Mo App 585

55. Ga—Purvis v Atlanta Northern R Co, 72 S E 343, 136 Ga 852.
10 C J p 795 note 53 p 797 note 71.

Instructions held proper

(1) As authorized by, or applicable to, the evidence

Ga—Georgia Ry & Power Co v Turner, 125 S E. 598, 33 Ga App 101.

Utah—Bergman v Denver & R. G R Co, 178 P 68, 53 Utah 213.
10 C J p 795 note 53 [a].

(2) After a verdict where there was evidence to support such verdict—Carpenter v Washington, etc, R Co, D C, 7 S Ct. 1002, 121 U S 474, 30 L Ed. 1015

56. Mo—Sommerfield v St Louis Transit Co, 84 S W 172, 108 Mo App. 718

N Y—Ray v United Tract Co, 89 N. Y S 49, 96 App Div. 48

Instructions held erroneous

(1) For charging on a theory not in issue.

Ill—Wabash R Co v. Kingsley, 52 N.E 931, 177 Ill. 558, reversing 78 Ill App 236

Mo—Osteryoung v. St. Louis Transit Co, 84 S W 179, 108 Mo App 703—Ruebsam v St Louis Transit Co, 83 S W. 984 103 Mo App 437.

(2) For failure to charge on the decisive question on which a case, under the pleadings and proof turned—Louisville & N R Co v Hooker, 98 S W.2d 922, 266 Ky. 257

(3) Other instructions failing to charge on material matter in issue see 10 C J. p 797 note 74.

Charge held properly refused where it would not permit recovery on certain grounds of negligence which were in issue—Southern Pac Co v Ulmer, Tex Civ App., 282 S W. 305, affirmed, Com App., 286 S W 193

57. Ky—Mobile & O R Co v. Dill, 191 S W 80, 173 Ky 412

58. Ala—Louisville & N R Co. v Copeland, 117 So 176, 217 Ala 556—Louisville & N R Co v Crick, 117 So 167 217 Ala. 547—Louisville & N R Co v Hamby, 93 So 698, 208 Ala. 75

Instructions held erroneous

Ark—Hines v. Smith, 224 S W. 612, 145 Ark. 218

Ga—Louisville & N R Co v Ogles, 90 S E 476, 146 Ga 20—Nashville, C & St L Ry v Mooneyham, 139 S E 589, 37 Ga App 236.
10 C J p 795 note 53 [b]

59. Ill—Illinois Cent R Co. v Davenport, 52 N E. 266, 177 Ill. 110, affirming 75 Ill App 579
10 C J p 798 note 75

60. Ariz—Southern Pac. Co. v Boyce, 223 P 116, 26 Ariz 162.

Instruction held proper

Ariz—Southern Pac. Co v Boyce, 223 P 116, 26 Ariz 162

61. Mo—Hartridge v. United Rys. Co of St Louis, App., 196 S W. 59.

Instruction held erroneous

Instruction allowing a recovery of only nominal damages if plaintiff "suffered no injury" by virtue of his wrongful ejection is erroneous because not permitting damages for pain, humiliation and disgrace and it is erroneous in limiting recovery to nominal damages—Hartridge v United Rys Co of St. Louis, Mo App., 196 S W 59

Compensation for mental and physical pain

It was error to instruct that, if the jury found for plaintiff, an injured passenger, they should find for him any sum which the jury believed he was entitled to, not exceeding two thousand dollars, but in such case the jury should have been told that he was entitled to such damages as would reasonably compensate him for the mental and physical pain and suffering that he endured, if any, by reason of the negligent and wrongful acts of defendant's agents and servants—Chesapeake, etc, R Co v Crank, 108 S W. 276, 128 Ky 329, 32 Ky L. 1202, 16 L R A.,N S, 197

Shame and humiliation not pleaded

It is not necessary that there be a specific allegation of shame and humiliation in the petition, nor that there be specific proof thereof, in order that it may be included as an element of damages in an instruction, as it may be inferred by the jury from the nature and extent of the injuries—Berger v Chicago, etc., R Co 71 S W 102, 97 Mo App 127

62 Ky—Louisville & N R. Co v. Watson, 255 S W 1056, 201 Ky. 108

63. Ky—Louisville & N R Co v. Hooker, 98 S W 2d 922, 266 Ky. 257

Instruction interpreted as authorizing compensatory damages only

Mo—Griffin v Kansas City Rys Co., 204 S.W 826, 199 Mo App 682

64. Mo—Hillebrand v Wells, App., 270 S W 402.

Instructions held proper

Mo—Hillebrand v Wells, App, 270 S W 402
10 C J p 797 note 71 [a] (1), [b].

Instruction held too favorable to defendant

In an action against a street railroad company for ejection from a car with unnecessary force, an instruction that, if defendant's agent was inspired to use excessive force by actual malice or ill will, the jury might allow punitive damages is too

tion is erroneous if it charges that there may be a recovery of such damages if certain hypothetical facts are true when there is no evidence, tending to prove those facts.[65]

§ 844. Verdict and Findings

The verdict or findings should conform to the issues and the evidence.

The verdict or findings should be in accord with the issues and the evidence.[66] Where a verdict is contrary to the weight of the evidence, the court may grant a motion for a new trial.[67] A judgment cannot be entered on findings which conflict with each other or with the general verdict.[68] Where there is a verdict for defendant on one count, there can be no recovery by plaintiff on another count which has the same theory of recovery as was found adversely to him on the first count;[69] but, under instructions that if the jury found that the act of ejection was wantonly and maliciously committed it would "justify" exemplary damages, the failure of the jury to award exemplary damages does not warrant the conclusion that it did not find the act to be willful and malicious.[70]

§ 845. Appeal and Error

General rules as to the review of civil actions by appeal or writ of error as discussed in the title Appeal and Error apply to actions for the ejection of passengers. Consult Pocket Parts for later cases.

§ 846. Damages

In general, where a carrier unlawfully ejects a passenger, it is liable for whatever damages he sustains.

While, where a carrier unlawfully ejecting a passenger is in general liable for whatever damages he sustains,[71] his recovery, in the absence of malice or other aggravating circumstances justifying an award of punitive damages as considered in § 853 infra, is limited to compensatory damages.[72]

§ 847. Nominal or Substantial Damages

An unlawful ejection ordinarily authorizes a recovery at least of nominal damages, and according to some authorities, but not all, of substantial damages even in the absence of actual damages and although an award of exemplary damages is not justified.

A passenger who is wrongfully ejected by a carrier may recover at least nominal damages,[73] and, according to some authorities, his recovery is not limited thereto although he has suffered no physical injury for which he may recover,[74] nor pecuniary loss,[75] since the wrongful ejection is regarded as constituting more than a mere technical invasion of the passenger's rights.[76] Under this view, substantial damages have been allowed for the wrongful ejection of one either producing a

favorable to defendant, as plaintiff is also entitled to punitive damages if he was recklessly or wantonly thrown from the car—Lexington R. Co. v. O'Brien, 84 S.W. 1170, 27 Ky. L. 336.

65. Va.—Norfolk, etc., R. Co. v. Neely, 22 S.E. 367, 91 Va. 539.

Instructions held improper

Ill.—George v. Illinois Cent. R. Co., 197 Ill.App. 152.

Va.—Norfolk, etc., R. Co. v. Neely, 22 S.E. 367, 91 Va. 539.

66. Cal.—Eylenfeldt v. United R. Co., 151 P. 293, 28 Cal.App. 56.

Ga.—Atlantic Coast Line R. Co. v. Thomas, 82 S.E. 299, 14 Ga.App. 619.

Excessive force

Findings that the conductor pulled plaintiff passenger from his seat to the rear platform, called the motorman to his assistance, and that both with great force pulled, twisted, and jerked plaintiff, do not expressly or by implication indicate that the car crew used more force than was reasonably necessary to remove plaintiff from the car.—Wasserman v. Los Angeles Ry. Corporation, 193 P. 130, 184 Cal. 202.

Verdict held sustained

Ga.—Atlantic Coast Line R. Co. v. Thomas, 82 S.E. 299, 14 Ga.App. 619.

67. Ala.—Louisville, etc., R. Co. v. Perkins, 39 So. 305, 144 Ala. 325.

68. Wash.—Loy v. Northern Pac. R. Co., 122 P. 372, 68 Wash. 33.

Wis.—Di Benedetto v. Milwaukee Electric R., etc., Co., 136 N.W. 282, 149 Wis. 566.

69. Ala.—Kimbrell v. Louisville, etc., R. Co., 67 So. 586.

Verdict held to preclude recovery on either of two counts

Where the gravamen of each of two counts is the wrongful ejection of plaintiff because of his refusal to pay, on demand, more than the proper fare and the verdict of the jury indicated that there had never been a demand for such fare, there can be no recovery on a second count which, in addition to the foregoing cause of action alleges the "willful" and "wanton" ejection of plaintiff, as under the theory of either count, it was necessary that there be a wrongful ejection before there could be any recovery.—Kimbrell v. Louisville, etc., R. Co., Ala., 67 So. 586.

70. Mo.—Harless v. Southwest Missouri Electric R. Co., 99 S.W. 793, 123 Mo.App. 22.

71. Okl.—Dickinson v. Bryant, 172 P. 432, 69 Okl. 297, L.R.A. 1918E 978.

72. Ky.—Reasor v. Paducah, etc., Ferry Co., 153 S.W. 222, 152 Ky. 220, 43 L.R.A.,N.S., 820.

10 C.J. p. 767 note 17.

73. Ala.—Louisville, etc., R. Co. v. Laney, 69 So. 993.

Ky.—Reasor v. Paducah, etc., Ferry Co., 153 S.W. 222, 152 Ky. 220, 43 L.R.A.,N.S., 820.

Mo.—Holt v. Hannibal, etc., R. Co., 74 S.W. 631, 174 Mo. 524, reversing 87 Mo.App. 203.

Ejection in violation of statute

Mo.—Holt v. Hannibal, etc., R. Co., 74 S.W. 631, 174 Mo. 524, reversing 87 Mo.App. 203.

74. Ill.—Wilson v. Cleveland, C., C. & St. L. Ry. Co., 245 Ill.App. 72.

Iowa.—Vanderbeck v. Chicago, M. St. P. & P. Ry. Co., 230 N.W. 390, 210 Iowa 230.—Meyers v. Keokuk Electric Co., 180 N.W. 733, 190 Iowa 693.

75. Ill.—Wilson v. Cleveland, C., C. & St. L. Ry. Co., 245 Ill.App. 72.

76. Iowa.—Meyers v. Keokuk Electric Co., 180 N.W. 733, 190 Iowa 693.

ticket or standing ready to pay his fare,[77] or who is ejected under circumstances occasioning personal indignity and unnecessary humiliation[78] or discomfort or disgrace,[79] or for an ejection or threat to eject which amounts to an inexcusable trespass[80]

On the other hand, according to some authorities, nominal damages only may be recovered in the absence of actual damages.[81] Nominal damages only have been awarded in cases where the passenger could have averted expulsion by paying his fare,[82] or where his object in attempting to ride on the ticket presented was for the purpose of recovering damages,[83] or where he was under a duty to leave the train peaceably and brought on his ejection by refusing to do so.[84] A passenger who was threatened with ejection unless he paid his fare with a coin other than the one presented is not entitled to compensatory damages, where he was not actually ejected and suffered no delay or inconvenience.[85]

§ 848. Expense; Loss of Time; Inconvenience

The delay, inconvenience, or expense proximately resulting from a wrongful ejection is a proper element of damages

A passenger who is wrongfully ejected may recover compensation for any loss or additional expense due to a delay[86] or for an inconvenience suffered[87] There may be no recovery for such inconvenience and discomfort[88] or expense[89] which does not proximately result from the ejection

Recovery has been allowed for a delay, irrespective of the good faith accompanying the ejection and regardless of the fact that no actual damage was suffered;[90] but, on the other hand, damages for loss of time have been denied where there was no showing of a financial loss occasioned thereby[91]

It has been held that there may be a recovery for money expended for medical attendance,[92] for

77. Mich.—Zagelmeyer v. Cincinnati, etc, R. Co, 60 N.W. 436, 102 Mich. 214, 47 Am S R. 514.

78. Iowa.—Meyers v. Keokuk Electric Co., 180 N.W. 733, 190 Iowa 693

Va.—Mangum v. Norfolk & W Ry Co, 99 S.E. 686, 125 Va. 244, 5 A. L.R. 346.

Damages for humiliation and mental suffering generally see infra § 850

79. Va.—Mangum v. Norfolk & W Ry Co, 99 S E. 686, 125 Va. 244 5 A.L R. 346

80. Ga.—Georgia R., etc, Co. v Baker, 54 S E. 639, 125 Ga. 562, 114 Am.S.R. 246, 7 L.R.A.,N.S, 103, 5 Ann Cas 484.
10 C J p 767 note 20.

81. Ark.—St. Louis, etc., R. Co. v. Lunam, 60 S W. 951, 68 Ark. 621—St. Louis, etc., R Co. v Branch, 45 Ark. 524.
Ill.—Chicago, etc, R Co v Roberts 40 Ill. 503—Terre Haute, etc, R Co. v. Vanatta, 21 Ill. 188, 74 Am D 96
Wash.—Leek v. Northern Pac. R. Co., 118 P 345, 65 Wash 453
10 C J p 776 note 87.

Ejection rightful but at improper place

Ark.—St. Louis, etc., R. Co. v. Lunam, 60 S W 951, 68 Ark. 621—St. Louis, etc., R. Co. v Branch, 45 Ark. 524
Ill.—Chicago, etc, R. Co v. Roberts, 40 Ill. 503—Terre Haute, etc, R Co v. Vanatta, 21 Ill. 188, 74 Am. D. 96.

82. Ill.—Burn v. Chicago, etc., R. Co., 153 Ill.App. 319.

83. Ga.—Southern R. Co v. Barlow, 30 S E 732, 104 Ga. 213, 69 Am.S R. 166

Effect of good faith

Even though a passenger's ticket is legally sufficient, if he knows it will not be accepted for the transportation for which it is offered, and he is not in good faith in presenting it, he may recover only nominal damages On the other hand, if he is in good faith, he is entitled to recover whatever damages he may sustain, even though he may have had reason to believe that the ticket would not be accepted—Southern R. Co v Barlow, 30 S.E. 732, 104 Ga 213, 69 Am S R. 166.

84. Conn.—Norton v Consolidated R. Co., 63 A. 1087, 79 Conn 109, 118 Am.S.R. 132, 6 Ann.Cas. 943

85. R I.—Campopiano v Rhode Island Co., 97 A 597, 39 R.I. 105, L R.A 1916E 911

Conductor's refusal to accept Columbian half dollar

R I.—Campopiano v Rhode Island Co., 97 A 597, 39 R.I. 105, L.R.A. 1916E 911

86. Ill.—Cohen v. Cleveland, C. & St. L. Ry Co, 197 Ill App 88
10 C.J p 767 notes 19, 21.

Mistake of ticket agent

The rule has been applied in the case of an ejection of a passenger for his refusal to pay fare after presenting an improper ticket which was issued to him through a mistake of the ticket agent—Cohen v Cleveland, C & St. L Ry. Co, 197 Ill.App 88—10 C J p 768 note 23.

87. Ala.—Louisville & N R. Co v. Harper, 83 So. 142, 203 Ala 398
N C.—McNairy v Norfolk & W. R. Co, 90 S E. 497, 172 N C 505.
10 C J p 767 note 21.

88. Ky.—Mobile & O. R Co. v Dill, 191 S.W 80, 173 Ky. 412.

89. Cal.—Procter v. Southern California R. Co, 62 P. 306, 509, 130 Cal 20.
10 C J. p 768 note 24

90. Ill.—Wilson v. Cleveland, C., C. & St. L. Ry Co, 245 Ill App 72—Cohen v Cleveland, C. & St. L. Ry Co, 197 Ill.App. 88

91. N.J.—Justesen v Pennsylvania R. Co, 106 A. 137, 92 N J.Law 257

Recovery not allowed for loss of time

(1) Where there was no evidence of the value of a passenger s time, no recovery for loss of time could be allowed—Chicago, etc., R. Co v. Newburn, 110 P. 1065, 27 Okl. 9, 30 L.R.A.,N S, 432.

(2) It has been held, in a suit by a married woman for her wrongful ejection from a train, that while she could not recover for her loss of time, the jury might consider the length of time she was delayed in her journey and the length of time she suffered inconveniences and discomforts incident to and following her ejection.—Ferguson v Missouri Pac Ry Co, Mo.App., 186 S W. 1134.

92. Del.—Whittington v. Philadelphia, etc., R. Co., 93 A. 563.

money spent as a result of inaccurate information given by an agent of the carrier,[93] or for an additional fare paid because of a mistake of a ticket agent in issuing a ticket.[94] However, recovery by a wife for ticket and hotel expenses paid by her husband has been denied.[95]

Recovery for the value of the ticket or the unused portion thereof has been both allowed[96] and denied.[97]

In case the passenger has expended money for a ticket which, by reason of a mistake of the carrier's agent, is defective, in those jurisdictions which hold that the proper remedy in such case is an action for breach of contract rather than for a wrongful ejection, there may be a recovery of no more than the extra cost required for transportation to the place of destination,[98] in the absence of proof of any special damages.[99]

If an ejection is rightful but at an unsuitable place, recovery is limited to such sum as will fairly compensate the ejected passenger for the inconvenience and discomfort suffered by reason of the ejection at such place, if no additional expense was incurred, no time was lost, or no illness or personal injury was suffered.[1]

§ 849. Physical Injuries

Physical injuries, including resulting impairment of earning capacity or loss of time, are a proper element of damages.

Where physical injuries are suffered by a wrongful or negligent ejection or as a proximate result of such ejection or from the use of unnecessary force in connection with a rightful ejection, recovery may be had therefor,[2] including any impairment of earning capacity and loss of time resulting from the injury.[3]

§ 850. Humiliation and Mental Suffering

Humiliation and mental suffering resulting from the wrongful ejection are a proper element of damages, although there is a divergence of authority as to whether there must be an attendant physical injury or accompanying circumstances of violence, malice, or insult.

Subject to the qualification recognized in some jurisdictions that other elements of damage, such as physical injury or circumstances of violence, malice, or insult, must be present, and where they are the natural and proximate result of the wrongful act,[4] a passenger may recover by way of actual or compensatory damages for any humiliation, mental suffering or distress, indignity, shame, or disgrace which he may suffer by reason of his wrongful ejection by a carrier,[5] or by reason of his ejection in an improper manner[6] or at an im-

93. N.J.—Justesen v. Pennsylvania R. Co., 106 A. 137, 92 N.J.Law 257

Existence of quarantine

Where the information bureau of a railroad company informed plaintiff that the quarantine against infantile paralysis in another state had been lifted, thereby inducing plaintiff to take passage over its lines, and plaintiff was required to leave train because refused admission into the other state, defendant's liability is limited to restoration to plaintiff of the money which its wrong caused her to expend.—Justesen v. Pennsylvania R. Co., 106 A. 137, 92 N.J. Law 257.

94. Ill.—Cohen v. Cleveland, C. & St. L. Ry. Co., 197 Ill.App. 88

95. Mo.—Ferguson v. Missouri Pac. Ry. Co., App., 186 S.W. 1134.

96. Ky.—Chesapeake, etc., R. Co. v. Gatewood, 159 S.W. 660, 155 Ky. 102.

Tex.—St. Louis, etc., R. Co. v. McAnellia, Civ.App., 110 S.W. 936—Houston, etc., R. Co. v. Crone, Civ. App., 37 S.W. 1074.

97. Ark.—Dickinson v. Muse, 204 S.W. 609, 135 Ark. 76.

Mich.—Pierson v. Illinois Cent. R. Co., 123 N.W. 576, 159 Mich. 110

98. U.S.—Hall v. Memphis, etc., R. Co., C.C.Tenn., 15 F. 57.

Mich.—Brown v. Rapid R. Co., 96 N.W. 925, 134 Mich. 591—Brown v. Rapid R. Co., 90 N.W. 290, 130 Mich. 483.

99. U.S.—Hall v. Memphis, etc., R. Co., Tenn., 15 F. 57.

1. Ky.—Mobile & O. R. Co. v. Dill, 191 S.W. 80, 173 Ky. 412.

2. N.C.—McNairy v. Norfolk & W. R. Co., 90 S.E. 497, 172 N.C. 505
10 C.J. p. 768 note 26

3. Ky.—Louisville, etc., R. Co. v. Cottengim, 104 S.W. 280, 31 Ky. L. 871, 13 L.R.A.,N.S., 624

Mich.—Light v. Detroit, etc., R. Co., 130 N.W. 1124, 165 Mich. 433, 34 L.R.A.,N.S., 282

4. Idaho.—Lindsay v. Oregon Short Line R. Co., 90 P. 984, 13 Idaho 477, 12 L.R.A.,N.S., 184
10 C.J. p. 769 note 31

5. Ala.—Louisville & N. R. Co. v. Harper, 83 So. 142, 203 Ala. 398.

Ill.—Wilson v. Cleveland, C., C. & St. L. Ry. Co., 245 Ill.App. 72—Cohen v. Cleveland, C. & St. L. Ry. Co., 197 Ill.App. 88

Ind.—Union Traction Co. of Indiana v. Smith, 123 N.E. 4, 70 Ind.App. 40

Mo.—Hartridge v. United Rys. Co. of St. Louis, App., 196 S.W. 59—Davis v. Lusk, App., 190 S.W. 362—Ferguson v. Missouri Pac. Ry. Co., App., 186 S.W. 1134.

Okl.—Atchison, T. & S. F. Ry. Co. v. Vosburg, 270 P. 58, 132 Okl. 196—Dickinson v. Bryant, 172 P. 432, 69 Okl. 297, L.R.A.1918E 978.
10 C.J. p. 767 note 19, p. 768 note 30.

Annoyance, vexation, delay, and risk to which a passenger was subjected may be considered in the assessment of damages.—Wilson v. Cleveland, C., C. & St. L. Ry. Co., 245 Ill.App. 72.

Reasonable amount may be recovered, by an ejected passenger, for injured feelings and humiliation.—Atchison, T. & S. F. Ry. Co. v. Vosburg, 270 P. 58, 132 Okl. 196.

Party must have cause of action by reason of the wrong done, in order to recover for mental suffering or nervous shock.—Lindsay v. Oregon Short Line R. Co., 90 P. 984, 13 Idaho 477, 12 L.R.A.,N.S. 184.

6. N.C.—McNairy v. Norfolk & W. R. Co., 90 S.E. 497, 172 N.C. 505.
10 C.J. p. 768 note 30.

Unnecessary force

N.C.—McNairy v. Norfolk & W. R. Co., 90 S.E. 497, 172 N.C. 505.

proper place.[7] The fear involved in the apprehension attending, or which may follow, the ejection may be taken into account.[8]

However, there can be no recovery for humiliation or disgrace by an ejected passenger who boarded the car of a carrier with the expectation and for the purpose of being ejected.[9]

As independent grounds of recovery. Under rules of general application in the law of damages as to mental pain and suffering as independent grounds of recovery, which are discussed in C.J.S. title Damages § 64, also 17 C J. p 831 note 54–p 832 note 66, it is the rule in some jurisdictions that there can be no recovery for mental suffering unless a physical injury was sustained[10] or the wrongful act was attended by circumstances of violence, malice, or insult.[11] Under this rule, there can be no recovery for mental suffering or humiliation where the ejection, although wrongful, was made in good faith and under a mistaken belief that the passenger was not entitled to transportation.[12] On the other hand, if the wrongful ejection of the passenger is accompanied by acts which are insulting and abusive,[13] or wanton and malicious,[14] or willful and inhuman,[15] there can be a recovery for humiliation or mental suffering although they are not accompanied by a physical injury.

In other jurisdictions it is held that there may be a recovery for humiliation or mental suffering by virtue of the mere fact of the wrongful ejection[16] and in the absence of physical injury,[17] and irrespective of the manner in which the expulsion was performed.[18] Under this rule, it has been

Use of abusive or insulting language or conduct

Ky—Louisville & N R Co v. Gibson, 64 S W 2d 163, 250 Ky 814
Mo—Hartridge v. United Rys. Co of St Louis, App., 196 S W 59
Tex—Woodward v Texas & P Ry Co., 86 S W 2d 38, 126 Tex. 30, reversing Texas & P. Ry. Co v Woodward, Civ App., 53 S W.2d 82
10 C J. p 769 note 34

Unnecessary publicity

(1) If a wrongful ejection is accomplished with unnecessary publicity, the ejected party may recover damages for the humiliation suffered —Chicago, etc., R. Co. v Chisholm, 79 Ill 584—10 C J p 769 note 33

(2) The fact that only the conductor and a brakeman were present when a passenger was ejected does not prevent recovery for humiliation and disgrace—Kansas City, etc, R Co. v Little, 71 P 820, 66 Kan. 378, 97 Am S R. 376, 61 L R A 122

Use of abusive and insulting language in the presence of other passengers is a proper ground for the recovery of damages for mortification and humiliation—Louisville & N. R Co v Gibson, 64 S W 2d 163, 250 Ky 814.

7. N C—McNairy v Norfolk & W. R. Co, 90 S E 497, 172 N C 505
10 C.J p 768 note 30

8. Ohio—Cincinnati Northern Tract. Co. v Rosnagle, 95 N E 884, 84 Ohio St 310, 35 L R A,N S, 1030, Ann.Cas.1912C 639.
10 C J p 769 note 35

But mere anticipation of miscarriage, when no fact looking to it was testified to by anyone and the child was subsequently normally born, is not properly an element of damages—Louisville & N R Co v Watson, 255 S W 1056, 201 Ky 108

9. Mo—Green v United Rys. Co of St Louis, 206 S W. 237, 239, 200 Mo App 303
10 C J p 770 note 36
"According to plaintiff's own evidence, he invited ejection from defendant's car He went thereupon, armed with the law,' to demand what he conceived to be his rights, for the purpose of either obtaining the desired transfer or compelling defendant to put him off the car His testimony shows clearly that it was his purpose to make the conductor lay hands upon him and eject him from the car in order to lay the foundation for this action Under such circumstances, no recovery may be had for humiliation or disgrace by reason of being ejected in the presence of passengers or others"—Green v United Rys. Co. of St. Louis supra.

10. Ky—Mobile & O. R. Co. v. Dill, 191 S W 80, 173 Ky 412
10 C J p 770 notes 38, 40.

Illness

Ky—Mobile & O R Co. v. Dill, 191 S W 80, 173 Ky. 412.

Mental suffering growing out of physical pain

There may be a recovery for such mental pain and suffering as grows immediately out of, or results directly from, the physical pain endured by reason of a wrongful ejection—Atchison, etc, R. Co v Lamoreaux, 49 P. 152, 5 Kan App 813.

11. Ky—Louisville, etc, R Co v Wilsey, 12 S W 375, 11 Ky.L 419, 5 L R.A 855
Mo—Morris v. St. Louis, etc, R Co, 168 S W. 325 184 Mo App 65.
10 C.J p 770 note 39.

Malice and evil intent are implied from the act of ejecting a person from a moving train.—Harkless v Chicago, etc., R. Co, 132 S W 29, 151 Mo App 463

12. Mo—Glover v. Atchison, etc, R. Co, 108 S W 105, 129 Mo.App 563

13. Mo—Davis v. Lusk, App, 190 S W 362—Morris v St Louis, etc., R. Co, 168 S W 325, 184 Mo App. 65

Threats of expulsion and arrest

If, in threatening a passenger with ejection and arrest, he is wrongfully subjected to insults, abuse, or ill treatment by the agents of the carrier, and he is thereby caused to suffer humiliation and mental distress, he is entitled to damages, notwithstanding he may not have suffered any physical or property damage—Woodard v Texas & P Ry Co, 86 S W 2d 38, 126 Tex. 30, reversing Texas & P Ry Co v. Woodard, Civ. App, 53 S W.2d 82.

14. Mo.—Harkless v Chicago, etc., R Co., 132 S W. 29, 151 Mo App. 463

15. Mo—Harless v Southwest Missouri Electric R Co, 99 S W 793, 123 Mo App 22

16. Ala.—Louisville & N R Co v. Harper, 83 So. 142, 203 Ala 398
Ark.—St Louis, etc, R Co. v Trimble, 15 S W. 899, 54 Ark 354.
Ill—Chicago, etc, R. Co v Flagg, 43 Ill. 364, 92 Am D. 133—Wilson v. Cleveland, C, C. & St. L Ry Co, 245 Ill App 72

17. Ind—Union Traction Co of Indiana v Smith, 123 N E. 4, 70 Ind App 40
Wash.—Willson v Northern Pac R. Co, 32 P 468, 34 P. 146, 5 Wash. 621
10 C J. p 770 note 41

18. Ala—Louisville & N R. Co. v. Harper, 83 So 142, 144, 203 Ala. 398
"Such damages as humiliation and indignity, if suffered by him from his ejection from the car, are said to be elements of actual damages

held to be immaterial that the trainman was without fault,[19] or that he acted in good faith[20] or without the use of force or violence or insult,[21] or that his act was not wanton, malicious, or willful, but was the result of mistake or negligence[22]

Where fare is illegally exacted. Humiliation suffered and indignity done a passenger is also an element of damages where fare is illegally exacted from him, and he pays it in order to avoid an ejection.[23]

§ 851. Proximate and Remote Damages

Damages must be the natural and proximate consequences of the wrongful ejection.

A passenger may recover such damages as proximately,[24] or such as might reasonably be expected to,[25] flow from a wrongful ejection, or from an ejection in an improper manner[26] or at an improper place;[27] but there may be no recovery of damages which are not the natural and probable consequences of the wrongful act,[28] or of damages which are too remote,[29] even though they may be in some measure traceable to the expulsion.[30] Further, a passenger may not recover damages which he could have avoided by the use of ordinary care.[31] Thus, it has been held that there may be a recovery of damages resulting from peril or exposure, or from efforts to reach some place of security,[32] after an illegal ejection; but there may be no recovery of damages resulting from unnecessary exposure or effort.[33] A recovery of damages has been denied an ejected passenger for the humiliation resulting from subsequent comments of persons not present at the time of the ejection,[34] for injury to his good name[35] or to his business or professional reputation,[36] or for having been compelled to borrow money to pay an illegally exacted fare.[37]

arising 'from a sense of injury and outraged rights engendered by the ejection alone, without regard to the manner in which it was effected, and though done only through mistake' "—Louisville & N. R. Co. v. Harper, supra.

19. Okl.—Atchison, T. & S. F. Ry Co. v. Vosburg, 270 P 58 132 Okl 196—St. Louis, etc., R Co. v. Yount, 120 P. 627, 30 Okl 371.

20. Ill.—Chicago, etc., R. Co. v. Flagg, 43 Ill. 364, 92 Am.D. 133—Wilson v. Cleveland, C., C. & St. L. Ry. Co., 245 Ill.App. 72. Contra Mallott v Woods, 109 Ill App. 512
Wash.—Willson v. Northern Pac. R Co., 32 P 468, 34 P. 146, 5 Wash. 621.

21. Ill.—Chicago, etc., R. Co. v Flagg, 43 Ill. 364, 92 Am.D. 133—Wilson v. Cleveland, C., C. & St. L. Ry. Co, 245 Ill.App. 72.
Okl.—Atchison, T. & S. F. Ry. Co. v. Vosburg, 270 P. 58, 132 Okl. 196—St. Louis, etc., R Co. v. Yount, 120 P. 627, 30 Okl 371.
Wash.—Willson v. Northern Pac. R Co., 32 P. 468, 34 P. 146, 5 Wash. 621

22. Ill.—Lake Erie, etc, R Co. v Christison, 39 Ill.App. 495.
Iowa.—Coine v. Chicago, etc., R. Co., 99 N.W. 134, 123 Iowa 458

23. Ga.—Louisville, etc., R Co. v. Chivers, 75 S.E. 13, 11 Ga.App 236.
10 C.J. p 770 note 43.

24. Ala.—Louisville & N R. Co. v Harper, 83 So. 142, 203 Ala 398.
Ga.—Devero v. Atlantic Coast Line R Co., 181 S E. 421, 51 Ga.App 699
10 C.J. p 770 note 45.

Cold contracted by a passenger who was wrongfully ejected from a train on a rainy night is a consequential damage flowing naturally and directly from the wrongful act.—Davis v. Lusk, Mo.App., 190 S W 362.

Arrest and imprisonment

Where a conductor wrongfully ejects a passenger and causes his arrest for a supposed assault, the imprisonment and detention are the proximate results of the act, and are properly considered by the jury in assessing the damages.—Gulf, etc., R. Co. v. Conder, 58 S.W. 58, 23 Tex. Civ.App. 488.

25. Mo.—Davis v. Lusk, App., 190 S W. 362.

26. Utah—Morgan v. Oregon Short Line R. Co., 83 P. 576, 30 Utah 82.
10 C J. p 770 note 45.

27. Ky—Mobile & O. R. Co. v. Dill, 191 S W. 80, 173 Ky. 412.

28. Ga.—Devero v. Atlantic Coast Line R. Co., 181 S E. 421, 51 Ga. App. 699.
Iowa.—Meyers v. Keokuk Electric Co, 180 N.W. 733, 190 Iowa 693.
Proximate cause of injury see supra § 830

If injuries sustained by freezing are not proximately due to the act of wrongful ejection, no damages may be recovered on that account.—Meyers v Keokuk Electric Co., 180 N W. 733, 190 Iowa 693.

Damages for loss of contract

In an action by a passenger for wrongful ejection, wherein it appeared that plaintiff was on his way to a distant town to employ and gather together men for a lumber company with which he had a contract, and that by failure to fulfill his engagement with the men he lost his contract, damages for loss of such contract could not be recovered, as they did not ordinarily or naturally flow from the wrongful act of the carrier, nor were they within the reasonable contemplation of the parties.—Johnson v. Atlantic Coast Line R. Co, 113 S.E. 606, 184 N.C. 101, 25 A.L.R. 910.

Damages for ejection at unsuitable place are limited to those which proximately result from the ejection at such a place.—Mobile & O R Co v. Dill, 191 S.W. 80, 173 Ky. 412.

29. Mass.—Spade v. Lynn, etc, R. Co., 52 N.E. 747, 172 Mass. 488, 70 Am.S.R. 298, 43 L.R.A. 832.
Minn.—Hoffman v. Northern Pac. R. Co., 47 N.W. 312, 45 Minn 53.

30. Ga.—Devero v. Atlantic Coast Line R. Co., 181 S.E. 421, 51 Ga. App 699.

31. Tex.—Galveston, etc., R. Co. v. Scott, 79 S.W. 642, 34 Tex.Civ App. 501.

32. Ga.—Devero v. Atlantic Coast Line R. Co., 181 S.E. 421, 51 Ga. App. 699.
10 C.J. p 771 note 48.

33. Ga.—Devero v. Atlantic Coast Line R. Co., supra.
10 C.J. p 771 note 49.

34. Ala.—Louisville, etc., R Co. v. Hine, 25 So. 857, 121 Ala. 234.

35. Cal.—Procter v. Southern California R. Co., 62 P. 306, 130 Cal. 20.
Minn.—Carsten v. Northern Pac. R. Co, 47 N W. 49, 44 Minn 454, 20 Am S R. 589, 9 L.R.A, 688.

36. Wis.—Schmitt v. Milwaukee St. R. Co., 61 N W. 834, 89 Wis. 195.

37. Minn.—Hoffman v. Northern Pac. R. Co, 47 N W. 312, 45 Minn. 53
Tex.—Missouri, etc., R. Co. v. Welch,

In determining what physical injuries are proximate, it is competent to show the physical and mental condition of plaintiff which aggravated the injury, although such peculiar condition was not known to the carrier[38]

§ 852. Aggravation, Mitigation, and Reduction of Loss

It is the duty of the ejected passenger to use reasonable care to minimize his damage and avoid its aggravation. His own provocative conduct may tend to mitigate his damages, as may the element of good farth on the part of the carrier.

The passenger must lighten any consequential damages as far as he may do so by the exercise of ordinary care.[39] He should exercise reasonable care to extricate himself from his predicament and cannot recklessly or foolishly aggravate his inconvenience or suffering, although he is not bound at his peril to use the highest care.[40] Even though the ejection is wrongful, the passenger should not offer unnecessary resistance, thereby bringing on himself the exercise of force resulting in personal injury, and if he does so he may not recover for such injuries unless they were unnecessarily or maliciously inflicted.[41] A passenger will not be permitted to aggravate his injury or to enhance his damages by voluntary abandonment of the trip where he has been invited to board the train and resume his journey after he has been wrongfully ejected.[42]

Payment of fare It has been held that a passenger whose ticket or fare has been wrongfully rejected need not minimize his damages by paying an additional fare demanded,[43] more particularly where his financial circumstances would render his completion of his trip impossible after such a payment.[44] There is authority, however, holding that where a passenger is unable to produce a ticket which has been wrongfully retained by a previous conductor,[45] or where his right to be transported on the ticket presented by him is reasonably in dispute,[46] he should pay the fare requested, if possible, and not seek to increase his damages by refusing to pay.

Aggravating conduct of plaintiff. Improper conduct on the part of the ejected person may be shown in mitigation of damages.[47] Thus, it has been held that his use of abusive or provocative language may be shown in mitigation of compensatory as well as of exemplary damages,[48] although there is also authority to the effect that such language may be considered only in mitigation of punitive damages and not in mitigation of compensatory damages.[49] The fact that an ejected person employs unnecessary resistance may be considered in mitigation of damages.[50]

Good faith. While the good faith of a carrier's servants in ejecting a passenger, may not prevent a recovery of compensatory damages, it may be shown for the purpose of affecting the allowance or amount of exemplary damages.[51]

§ 853. Exemplary Damages

Under rules of general application, exemplary or punitive damages may be awarded.

Where the act of wrongful ejection is accompanied by circumstances which, under the rules discussed in C.J.S. title Damages §§ 117–127, also 17 C.J. p 968 note 68–p 997 note 33, give rise to a right to exemplary or punitive damages, such as malice, wantonness, violence, or gross negligence, exemplary damages may, as a general rule, be awarded[52] when the act of the carrier's servant in ejecting the passenger is within the general

94 S.W. 333, 100 Tex. 118, reversing, Civ.App., 91 S.W. 621—St. Louis Southwestern R. Co. v. Crane, Civ.App., 102 S.W. 738

38. U.S.—Mann Boudoir Car Co v. Dupre, Miss., 54 F. 646, 4 C.C.A. 540, 21 L.R.A. 239.
10 C.J. p 771 note 50

39. Ga.—Devero v. Atlantic Coast Line R. Co., 181 S.E. 421, 51 Ga. App. 699
Tenn.—Howell v. Nashville Interurban Ry., 4 Tenn.App. 304
10 C.J. p 772 note 63

40. Iowa.—Meyers v. Keokuk Electric Co., 180 N.W. 733, 190 Iowa 693
Ejection on a cold night
Iowa.—Meyers v. Keokuk Electric Co., 180 N.W. 733, 190 Iowa 693

41. Minn.—Morrill v. Minneapolis St. R. Co., 115 N.W. 395, 103 Minn. 362, 123 Am.S.R. 341.
10 C.J. p 772 note 64

42. Ala.—Louisville, etc., R. Co. v. Hine, 25 So. 857, 121 Ala. 234.

43. U.S.—Pennsylvania Co. v. Lenhart, Ill., 120 F. 61, 56 C.C.A. 467
10 C.J. p 772 note 66

44. Ky.—Louisville & N. R. Co. v. Sandlin, 272 S.W. 912, 209 Ky. 442.

45. Mich.—Van Dusan v. Grand Trunk R. Co., 56 N.W. 848, 97 Mich. 439, 37 Am.S.R. 354.

46. U.S.—Hall v. Memphis, etc., R. Co., C.C.Tenn., 15 F. 57
Tenn.—Howell v. Nashville Interurban Ry., 4 Tenn.App. 304

47. Ill.—Terre Haute, etc., R. Co. v. Vanatta, 21 Ill. 188, 74 Am.D. 96
10 C.J. p 771 note 58

48. Tex.—Texas, etc., R. Co. v. McAllister, Civ.App., 183 S.W. 82.

49. Ohio.—Mahoning Valley R. Co. v. De Pascale, 71 N.E. 633, 70 Ohio St. 179, 65 L.R.A. 860, 1 Ann.Cas. 896

50. U.S.—Hall v. Memphis, etc., R. Co., C.C.Tenn., 15 F. 57—Brown v. Memphis, etc., R. Co., C.C.Tenn., 7 F. 51.

51. U.S.—Pittsburgh, etc., R. Co. v. Russ, Ind., 67 F. 662, 14 C.C.A. 612.
10 C.J. p 771 note 57.

52. Ariz.—Southern Pac. Co. v. Boyce, 223 P. 116, 26 Ariz. 162.
Ga.—Georgia Ry. & Power Co. v. Turner, 125 S.E. 598, 33 Ga.App. 101
Mo.—Hartridge v. United Rys. Co. of St. Louis, App., 196 S.W. 59
Okl.—Atchison, T. & S. F. Ry. Co.

scope of his employment, although it may or may not have been ratified by the carrier.[53]

However, under the rule in some jurisdictions it is held that the carrier is not liable in exemplary damages for the willful or malicious acts of its employees in ejecting a passenger from its train or car unless it participated in,[54] previously authorized, or subsequently ratified[55] such acts, or has been guilty of misconduct in the employment of, or the retention in its employment of, the employee.[56]

On the other hand, whether the ejection is rightful or wrongful, if it is accomplished without malice or unnecessary force, or indignity, and with reasonable care, exemplary damages may be refused,[57] as where the passenger is ejected through a mistake on the part of the conductor without any willful or intentional violation of the passenger's rights.[58] Where a passenger's ejection is due to the fault of an agent or prior conductor in not furnishing the passenger with proper evidence of his right to ride, it has been held that exemplary or punitive damages cannot be recovered, in the absence of malice, wantonness, or willful wrong on the part of the conductor performing the ejection.[59] However, if the agent or first conductor is found to be grossly negligent or willful in making the mistake which resulted in the passenger's ejection, exemplary damages have been allowed on the theory that the ejection is the proximate result of such employee's act.[60] Even though a person is rightfully ejected, exemplary damages may be allowed where the carrier's employees use unnecessary force or violence in accomplishing the ejection.[61]

Compelling a passenger to pay money under threat of a wrongful ejection has been held sufficient to entitle the passenger to exemplary damages,[62] although there is authority to the con-

v Vosburg, 270 P. 58, 132 Okl. 196.
10 C J. p 772 note 69, p 773 note 70.

Ejection from moving train

Ejecting a passenger from a moving railway car with such force and in such a way as to cause him to fall to the ground and injure himself discloses conduct so malicious and reckless as to justify punitive damages even though the person ejected was merely a trespasser, because no more force than necessary to accomplish removal may be used—Southern Pac. Co. v. Boyce, 223 P. 116, 26 Ariz 162.

Honest mistake of conductor

Admitting that a conductor was honestly mistaken in his belief that a passenger's ticket entitled him to passage only to a certain station, such belief would not relieve his actions, in ejecting the passenger, from charge of being wanton, malicious, and reckless so as to render carrier liable for punitive damages, in view of evidence that the conductor wrongfully charged passenger with failure to purchase a ticket to his destination and then grabbed hold of him and shoved him toward the door, just previous to and at the time he was compelled to step or jump from the moving train.—Southern Pac Co. v. Boyce, 223 P. 116, 26 Ariz. 162

53. Ariz—Southern Pac. Co v. Boyce 223 P. 116, 26 Ariz. 162, quoting with approval the **Corpus Juris** statement
Okl—Atchison, T. & S F Ry Co. v. Vosburg, 270 P 58, 132 Okl 196
10 C J p 662 note 70 a, p 772 note 69.

54. Tex.—Texas & N O. R. Co v. O'Connor, Civ.App, 201 S.W. 437.
10 C J. p 772 note 68.

55. U.S.—Lake Shore, etc., R. Co v Prentice, Ill, 13 S Ct. 261, 147 U.S. 101, 37 L.Ed. 97.
10 C J. p 772 note 68.

Retention of employee

(1) Mere retention in employment by railroad company of conductor, after knowledge that he has wrongfully ejected passenger, does not require allowance of exemplary damages—Texas & N O R. Co. v. O'Connor, Tex Civ App, 201 S.W. 437.

(2) Where the carrier, after knowledge thereof, retains the servant in his employment, it ratifies the act and is liable to punitive damages
Mo.—Tanger v. Southwest Missouri Electric R. Co, 85 Mo App. 28.
Wis—Bass v. Chicago, etc., R. Co, 42 Wis. 654, 24 Am.R. 437.

56. N Y—Wright v Glens Falls, etc., R. Co., 48 N Y S 1026, 24 App Div 617.
57. Ky.—Louisville & N R. Co. v. Watson, 255 S W. 1056, 201 Ky 108.
Miss—Yazoo & M. V R. Co. v Mullen, 131 So 101, 158 Miss. 774.
Mo—Green v. United Rys. Co. of St. Louis, 206 S W. 237, 200 Mo App 303.
R I.—Campopiano v. Rhode Island Co., 97 A. 597, 39 R I. 105, L.R A 1916E 911.
S C.—Dean v. Charleston & W. C. Ry Co., 129 S E 833 132 S C. 476
Tenn—Howell v. Nashville Interurban Ry, 4 Tenn.App. 304.
10 C J p 774 note 72.

58. S C—Dean v. Charleston & W. C Ry. Co, 129 S E. 833, 132 S C 476
10 C J. p 775 note 73

Refusal of Columbian half dollar as fare—Campopiano v. Rhode Island Co, 97 A. 597, 39 R I. 105, L R A.1916E 911.

Passenger's failure to make explanation

It is particularly true that punitive damages will not be awarded where a passenger makes no objection or explanation to his ejection due to the mistake of the conductor.—Dean v Charleston & W. C. Ry. Co., 129 S.E. 833, 132 S C 476.

59. Miss—Yazoo & M V. R. Co v Mullen, 131 So. 101, 158 Miss. 774.
10 C J. p 775 note 74, p 775 note 75

60. U S.—Cowen v. Winters, Ohio, 96 F. 929, 37 C C.A. 628, affirming 90 F. 99.
10 C J p 775 note 76.

Evidence of agent's fraud or willfulness

It is not error to refuse to direct a verdict in favor of a carrier where there is evidence that the ticket agent was guilty of fraudulent or willful conduct in issuing a wrong ticket—Jordan v. Southern R. Co, 84 S E. 871, 100 S.C. 284.

61. Ariz.—Southern Pac. Co. v Boyce, 223 P. 116, 26 Ariz 162
Mo—Green v. United Rys Co. of St. Louis, 206 S W. 237, 200 Mo. App. 303.
Okl.—Atchison, T & S. F Ry. Co v. Vosburg, 270 P. 58, 132 Okl. 196
10 C.J. p 774 note 71.

Invited ejection

Mo—Green v. United Rys. Co. of St. Louis, 206 S W. 237, 200 Mo. App 303.

62. S C—Smith v. Southern R Co, 70 S E 1057, 88 S C. 421 34 L R A., N S., 708—Chiles v Southern R Co, 48 S E. 252, 69 S C. 327—My-

trary.[63]

Exemplary damages are not allowed as a matter of right,[64] but to justify their allowance the facts of vindictiveness and malice must expressly appear.[65] The mere fact that a person is unlawfully ejected does not entitle him to recover such damages.[66]

The presence of malice need not be evidenced by the manner in which the act is done; it may be inferred from the nature of the wrong done in view of the surrounding circumstances, as where a passenger is unlawfully ejected from a train at a time and place which greatly and unnecessarily aggravates the wrong.[67]

It has been held that exemplary damages cannot be recovered against a carrier, unless they could have been recovered against the employee making the wrongful ejection.[68]

Exemplary damages are allowed by way of punishment regardless of the amount of damages actually sustained.[69]

§ 854. - Inadequate or Excessive Damages

An award of damages will not ordinarily be disturbed in the absence of circumstances showing that is the result of passion, prejudice, or mistake.

As a general rule, the amount of damages to which a passenger is entitled for a wrongful ejection from a train or car is within the discretion of the jury or the court trying the cause, so far as the nonpecuniary elements are concerned,[70] and the decision of the jury is generally conclusive where the amount allowed is not so inadequate,[71] or is not so excessive,[72] as to induce the belief that the

ers v Southern R. Co., 42 S.E. 598 64 S C 514.

63. Iowa—Paine v Chicago, etc, R Co, 45 Iowa 569.

64. Ala.—Louisville, etc, R. Co. v. Bizzell, 30 So 777, 131 Ala. 429
Wis—Di Benedetto v. Milwaukee Electric R, etc., Co., 136 N.W 282, 149 Wis. 566.

65. N C.—Ammons v. Southern R Co, 52 S E 731, 140 N C 196.
10 C J p 775 note 81

Rudeness, insult, or aggravating circumstances calculated to humiliate a passenger must attend his ejection.—McNairy v Norfolk & W R. Co, 90 S E. 497, 172 N C. 505—10 C.J. p 775 note 81 [a].

66. Mo.—Green v. United Rys Co of St. Louis, 206 S W. 237, 200 Mo App 303.
S C—Dean v Charleston & W. C. Ry Co., 129 S E. 833, 132 S C 476

67. Ind—Jeffersonville R. Co v. Rogers, 38 Ind 116, 10 Am.R. 103
10 C J. p 775 note 82

68. N.Y.—Townsend v. New York Cent., etc, R Co, 56 N Y. 295, 15 Am R. 419.

69. Ala—Alabama Great Southern R. Co v Sellers, 9 So 375, 93 Ala. 9 30 Am S R 17
10 C J. p 776 note 84.

Nature of exemplary damages
Exemplary, punitive, or vindictive damages are given to vindicate the right, punish the wrong, and to set an example before others who may be prone to the commission of like offenses—McNairy v. Norfolk & W R. Co. 90 S.E. 497, 172 N C. 505

70. Tex.—Southern Pac. Co v Huggins, Civ App, 9 S W.2d 382
10 C J p 776 note 91

71. N.Y—Markowitz v. New York Rys. Co, 176 N Y S 778, 188 App Div. 482
10 C J p 776 note 92.

Damages held inadequate
One hundred dollars is inadequate for serious personal injuries, due to assault committed by employees of defendant railway company when ejecting plaintiff from a car for nonpayment of fare—Markowitz v New York Rys Co, 176 N Y.S. 778, 188 App Div 482.

72. Ill.—Davis v Illinois Cent. R Co, 233 Ill.App 539
Ky.—Louisville & N. R. Co v. Sandlin, 272 S W 912, 209 Ky. 442—Ashland Coal & Iron Ry Co v Elswick, 225 S W. 244, 189 Ky. 507—Chesapeake & O. Ry Co. v Moore, 205 S W 594, 181 Ky. 550
Okl.—Atchison, T. & S F Ry Co v Vosburg, 270 P. 58 132 Okl 196
Tex—Texas & N O. R Co. v. Barrow, Civ App, 56 S W.2d 260, error refused—Southern Pac Co v. Huggins, Civ App, 9 S W 2d 382—Southern Pac Co. v. Ulmer, Civ App, 282 S W. 305, affirmed, Com. App, 286 S W 193
10 C.J. p 776 note 93

Damages held not excessive
(1) $50, for ejection two miles from destination in a storm.—Davis v. Illinois Cent R. Co., 233 Ill App 539

(2) $250, for indignity and delay of twenty-four hours—Wilson v. Cleveland, C, C. & St. L. Ry. Co., 245 Ill App. 72.

(3) $500, there being evidence of humiliation, resulting nervousness, and sickness—Texas & N. O R Co v Barrow, Tex Civ App, 56 S W 2d 260, error refused.

(4) $500, for woman ejected from train before reaching destination, at lonely railroad station on dark and rainy night—Louisville & N. R Co v Sandlin, 272 S W. 912 209 Ky 442

(5) $500, although there was but slight loss of time, inconvenience and expense humiliation of passenger being aggravated by the conductor, in the presence of others, falsely accusing him of prior attempt to beat his way—Chesapeake & O. Ry Co v. Moore, 205 S W 594 181 Ky. 550

(6) $650, to young woman traveling with three-month old baby, for eviction in impolite manner—Atlantic Coast Line R Co v Register, 139 S E 735, 37 Ga App 219

(7) $716 53, for wrongful and forcible ejection from passenger train.—Atchison, T. & S F. Ry. Co v. Vosburg, 270 P 58, 132 Okl 196.

(8) $750, to passenger suffering with rheumatism and other infirmities, compelled to wait a day for the next train—Dickinson v. Bryant, 172 P 432, 69 Okl 297, L R A 1918E 978

(9) $1 200, for passenger who had just left hospital.—Louisville & N R Co v Hawkins, 293 S W. 972, 219 Ky 400

(10) $1,500, to female passenger, beaten and kicked out of a depot by a drunken man on her rejection of an indecent proposal, in the presence of depot agent and several other persons, notwithstanding her reputation for morality was bad, and that she used language toward such drunkard that could not have been used by a woman of sensitive feelings—Ashland Coal & Iron Ry Co. v Elswick, 225 S W 244 189 Ky 507.

(11) $1,750, to woman, eighty-one years old, forced to leave train—Southern Pac Co v Huggins, Tex. Civ App, 9 S W 2d 382

(13) $15 000, for mental anguish and relapse into active tubercular

jury were influenced by passion, partiality, corruption, or prejudice, or were misled by some mistaken view of the case; but if it is such as to induce such a belief, it may be set aside,[73] or the court may require the amount of an excessive verdict to be reduced to a sum which is not excessive.[74]

K. PASSENGER'S BAGGAGE OR EFFECTS

1. In General

§ 855. What Constitutes Baggage

Baggage includes in general such articles as a passenger takes with him for his personal use, comfort, and convenience, according to the habits or wants of the particular class to which he belongs, with reference either to his immediate necessities or to the ultimate purpose of his journey.

The terms "baggage" and "luggage," which have been regarded as synonymous or equivalent in meaning and as signifying one and the same thing,[75] are generally so defined as to include whatever articles a passenger usually takes with him for his own personal use, comfort, and convenience, according to the habits or wants of the particular class to which he belongs, either with reference to his immediate necessities or to the ultimate purpose of his journey.[76] It is not confined to wearing ap-

condition, because of exposure after ejection—Southern Pac. Co. v. Ulmer, Tex Civ App., 282 S W. 305, affirmed, Com App., 286 S.W. 193.

(13) Other cases holding damages not excessive see 10 C.J. p 776 note 93 [a].

Damages held not excessive where there was violence, insult, or abuse

(1) $250—White v. Metropolitan St. Ry. Co., 112 S.W. 278, 132 Mo. App. 339.

(2) $500—Louisville & N R. Co. v. Gibson, 64 S W.2d 163, 250 Ky. 814.

(3) $3,000—Horsthemke v. New Orleans Ry. & Light Co, 84 So. 210, 146 La. 931.

(4) Other cases so holding see 10 C.J. p 776 note 93 [b].

73. W.Va—Trice v. Chesapeake, etc., R. Co, 21 S E. 1022, 40 W.Va. 271.

Damages held excessive

(1) $250, where passenger told conductor that he would have to put him off forcibly, and that he would make a test case of it.—Louisville & N. R. Co. v. Boggs, 74 So. 337, 199 Ala. 225.

(2) $500, to boy under twelve years old not subjected to any indignity or insult, although he allegedly suffered illness from exposure to wintry weather.—Louisville & N. R. Co. v. Hooker, 98 S.W.2d 922, 266 Ky. 257.

(3) $500, for delay in journey, and incidental mental distress.—Ferguson v. Missouri Pac. Ry. Co., Mo.App., 186 S.W. 1134.

(4) $750, where no financial loss was suffered nor physical violence offered.—Chesapeake & O. Ry. Co. v. Hill, 284 S.W. 1047, 215 Ky. 222, 48 A.L.R. 327.

(5) $750, held excessive under the evidence.—Davis v. Lusk, Mo.App., 190 S.W 362

(6) $760, as actual damages, for the wrongful ejection of a passenger.—New Orleans & N. E. R. Co. v. Ward, 96 So. 401, 132 Miss. 462.

(7) $1,000, where passenger suffered nothing more than the inconvenience of discontinuing her trip, and being compelled to return to her mother's home, eight miles distant, in the daytime—Louisville & N. R. Co v. Watson, 255 S.W. 1056, 201 Ky 108.

(8) $3,000, for ejection of an aged man, who had a valid ticket, at a point six miles from the station on a dark night, in a driving rain, causing mental anguish, fear, and threat of pneumonia.—Houston E. & W. T. Ry. Co. v. Snow, Tex Civ.App., 201 S. W. 224.

(9) Other cases where damages have been held excessive see 10 C. J. p 778 note 94 [a].

Damages held excessive where there was violence, insult, or abuse

(1) $250.—Conlon v. Metropolitan St. R. Co, 69 N.Y.S. 653, 34 Misc. 394.

(2) $300.—Chicago, etc., R. Co. v. Stratton, 111 Ill.App. 142.

(3) $1,400—Sloane v. Southern California R. Co., 44 P. 320, 111 Cal. 668, 32 L.R.A. 193.

(4) $2,500.—Louisville, etc., R. Co. v. Wilsey, 12 S W. 275, 11 Ky.L. 419, 5 L.R.A. 855.

74. Ala.—Louisville & N. R. Co. v. Boggs, 74 So. 337, 199 Ala. 225.
Miss.—New Orleans & N. E. R. Co. v. Ward, 96 So. 401, 132 Miss 462.
Mo—Ferguson v Missouri Pac. Ry. Co., App., 186 S W. 1134.
Tex—Houston E. & W. T Ry. Co v. Snow, Civ.App, 201 S.W. 224—Missouri, K. & T. Ry. Co. of Texas v. Mitchell, 105 S.W. 827, 47 Tex.Civ App. 307.
10 C.J. p 779 note 95.

Damages reduced

(1) $250, reduced to $25, where passenger on refusal to pay additional fare was compelled to walk a mile and wait a half hour for another train.—Louisville & N. R. Co. v. Boggs, 74 So. 337, 199 Ala. 225.

(2) $500, reduced to $75.—Ferguson v. Missouri Pac. Ry. Co., Mo. App, 186 S W. 1134.

(3) $760, reduced to $350.—New Orleans & N. E. R. Co. v. Ward, 96 So 401, 132 Miss. 462

(4) $800, reduced to $100—St. Louis Southwestern Ry. Co. of Texas v. Reed, Tex Civ App., 185 S W. 1025

(5) $1 000, reduced to $100—Missouri, K. & T. Ry Co. of Texas v. Mitchell, 105 S.W. 827, 47 Tex.Civ. App. 307.

(6) $1 000, reduced to $500—Hillebrand v. Wells, Mo App., 270 S W. 402.

(7) $2,000 reduced to $1,000—Houston E. & W. T. Ry. Co. v. Snow, Tex Civ.App., 201 S W. 224.

(8) Other cases where damages have been reduced, see 10 C J. p 779 note 95 [a].

Damages not so excessive as to justify reduction

(1) $15,000, for mental anguish and relapse into active tubercular condition because of exposure after ejection from train—Southern Pac. Co. v. Ulmer, Tex.Civ.App., 282 S W. 305, affirmed, Com.App., 286 S.W. 193.

(2) $300, punitive damages to passenger who was invited to leave bus during stop and refused right to reenter bus which had been filled to capacity, and whose baggage left in bus was lost, although carrier promised to return baggage at destination.—Payne v. Atlantic Greyhound Bus Lines, 188 S.E. 426, 182 S C. 58.

75. Cal.—Pfister v. Central Pac. R. Co, 11 P. 686, 688, 70 Cal. 169, 59 Am.R. 404.
N.Y—Degrauw v. Long Island Electric R. Co., 60 N.Y.S. 163, 166, 43 App.Div. 502.
Okl—Choctaw, etc, R Co. v Zwirtz, 73 P. 941, 942, 13 Okl. 411.
10 C.J. p 1187 note 84.

76. Ark.—Bush v. Beauchamp, 201 S.W. 828, 829, 132 Ark. 582.

parel, and the carrier cannot restrict the right of a passenger to carry baggage necessary for his comfort or convenience by calling it wearing apparel.[77]

It is not practicable to say with precise accuracy just what the term "baggage" may or may not include.[78] As to the general definition of the term the authorities differ but little, although the results reached in the application of the definition to the facts of particular cases are often varied,[79] and depend in some measure at least on the particular circumstances.[80] Whether or not certain articles are within the term "baggage," so as to render a carrier liable for their loss, is to be determined from the character and length of the journey the owner is on, its purposes and objects, his station in life, and the habits and usages of the class of travelers to which he belongs.[81]

What constitutes "baggage" within the rules as to innkeepers' liability for loss or injury see C.J.S. title Innkeepers § 16, also 32 C.J. p. 550 notes 26–35.

Articles for use during journey and afterward. A traveler is in general entitled to carry with him as baggage such articles, having regard to the considerations set forth above, as are fairly and ordinarily necessary to his personal comfort and convenience, both during the journey and for a reasonable period thereafter; and regard must be had to the nature of the journey on which a passenger is bound; its immediate necessities as well as its ultimate purposes are to be considered.[82] Baggage, however, has been held not to include articles to be used after the consummation of the journey,[83] or which are not carried to supply any wants of the traveler, as such, on his journey.[84]

Rules and regulations. A state railroad commission when duly authorized by statute may make rules and regulations within the authority so con-

Iowa.—McElroy v. Iowa Cent. R. Co. 110 N.W. 915, 133 Iowa 544, 547

Minn.—Ferris v. Minneapolis & St. L. Ry. Co., 173 N.W. 178, 179, 143 Minn. 90 citing **Corpus Juris.**

N.Y.—Hasbrouck v. New York Cent., etc., R. Co., 95 N.E. 808, 202 N.Y. 363, 35 L.R.A.,N.S., 537, Ann.Cas. 1912D 1150, affirming 122 N.Y.S. 123, 137 App.Div. 532, affirming 118 N.Y.S. 735, 64 Misc. 478

Tex.—Texas & P. Ry. Co. v. Bryant, Civ.App., 11 S.W.2d 659, 660, error refused—Schaff v. Gibson, Civ. App., 258 S.W. 595, 598.

10 C.J. p. 1187 note 87.

Similar definitions of "baggage"

Fla.—Atlantic Coast Line R. Co. v. Campen Bros. Co., 154 So. 131, 132, 114 Fla. 386.

Ky.—Landesman-Hirshheimer Co. v. Louisville & N. R. Co., 199 S.W. 1050, 178 Ky. 712, L.R.A.1918C 105

N.C.—State v. Jenkins, 143 S.E. 538, 195 N.C. 747, 751

Tex.—Texas, etc., R. Co. v. Capps, 2 Tex.A.Civ.Cas. § 33.

Wash.—Wall-A-Hee v. Northern Pac. Ry. Co., 41 P.2d 786, 790, 180 Wash. 656.

W.Va.—Schuster v. Norfolk & W. Ry. Co., 102 S.E. 476, 85 W.Va. 658.

Personal to passenger

An essential element is that the property shall be personal to the passenger, and carried for his use and convenience.—Wall-A-Hee v. Northern Pac. Ry. Co., 41 P.2d 786, 180 Wash. 656.

Usage of passengers

In determining what is baggage "what such passenger has been in the habit of carrying in his travels for his personal convenience, or use, within a reasonable limit, and what a person so circumstanced is ordinarily in the habit of carrying" may be considered.—Cleveland-Akron Bus Co. v. Royoff, 159 N.E. 374, 375, 25 Ohio App. 538.

Receptacles and contents

"Ordinary baggage is made up of two elements. First, certain things which may become such; second, the bags, trunks, valises, satchels, packages or other receptacles in which these things are to be put before they can be deemed baggage. In other words, the bag or other receptacle and their contents are both necessary components of the legal idea conveyed by the term baggage."—State v. Missouri Pac. R. Co., 71 Mo.App. 385, 390.

Similarly defined by statute

Mo.—Doerner v. St. Louis, etc., R. Co., 130 S.W. 62, 149 Mo.App. 170.

Okl.—St. Louis, etc., R. Co. v. Dickerson, 118 P. 140, 29 Okl. 386.

Distinguished from other "property"

Baggage is property carried by the person, and stands on a different footing from the carriage of other property, so that a statute authorizing street surface railroads to carry persons and property in their cars cannot be presumed to limit the term "property" to baggage merely.—De Grauw v. Long Island Electric R. Co., 60 N.Y.S. 163, 43 App.Div. 502, affirmed 57 N.E. 1108, 163 N.Y. 597.

77. Tex.—Mexican Nat. R. Co. v. Ware, Civ.App., 60 S.W. 343

78. "The difficulty encountered in any attempt to frame a definition which will include all possible articles and exclude all else comes from the fact that, although there is a general rule commonly applied by the courts, a given article may properly be classified as baggage in one case and with like propriety be excluded from that classification in another case."—Hamilton v. Baggage & Omnibus Transfer Co., 192 P. 1058, 1060, 97 Or. 620

79. Ark.—Chicago, etc., R. Co. v. Whitten, 119 S.W. 835, 90 Ark. 462, 21 Ann.Cas. 726.

10 C.J. p. 1188 note 90.

80. Ala.—Louisville & N. R. Co. v. Hestle, 75 So. 835, 200 Ala. 137.

10 C.J. p. 1188 note 91.

81. Or.—Hamilton v. Baggage & Omnibus Transfer Co., 192 P. 1058, 1061, 97 Or. 620, quoting **Corpus Juris** with approval.

Tex.—Texas & P. Ry. Co. v. Bryant, Civ.App., 11 S.W.2d 659, error refused.

10 C.J. p. 1188 note 92.

Determining factors

In determining what constitutes baggage, the conveniences required for the journey, the duration of absence, and the position of the person involved are to be considered.—Louisville & N. R. Co. v. Hestle, 75 So. 835, 200 Ala. 137.

82. S.C.—Godfrey v. Pullman Co., 69 S.E. 666, 87 S.C. 361, Ann.Cas. 1912B 971

S.D.—House v. Chicago, etc., R. Co., 138 N.W. 809, 30 S.D. 321, Ann.Cas. 1915C 1045, 142 N.W. 736, 32 S.D. 209

10 C.J. p. 1188 note 93, p. 1189 note 94.

83. Ark.—St. Louis, etc., R. Co. v. Miller, 145 S.W. 889, 103 Ark. 37, 39 L.R.A.,N.S., 634

10 C.J. p. 1189 note 95.

84. Miss.—Mississippi Cent. R. Co. v. Kennedy, 41 Miss. 671.

10 C.J. p. 1189 note 96.

ferred as to what articles shall be transported as baggage between points within the state.[85]

An interstate carrier which carries on its operations under the authority of the interstate commerce commission is governed by the rules of the commission touching the subject of baggage and is permitted to carry as baggage only such goods as are designated as baggage in the applicable rules of the commission.[86] While, according to some cases, such a carrier may not, by its rules and regulations filed with the interstate commerce commission, limit the meaning of the term "baggage" so as to exclude articles which are included in the generally accepted meaning of the term,[87] the contrary view has been taken.[88] In any event a carrier may not effect such limitation by the use of doubtful language in a regulation so filed.[89]

Special contract. A special contract by virtue of which a carrier, to suit its own convenience, takes possession of a passenger's property may, it seems, cover articles which might not ordinarily be regarded as baggage, as affecting the liability of the carrier as such,[90] and in any event, if the carrier takes possession of the property of a passenger for hire, as a special bailee, for its own convenience, the liability of the carrier as bailee is broader than the liability of a common carrier in that it will include articles that would not be regarded as ordinary baggage.[91]

§ 856. Wearing Apparel

Wearing apparel for the reasonable use of the passenger, which is suitable to his circumstances and condition in life, may usually be transported as baggage.

A passenger is entitled to carry as baggage wearing apparel for his reasonable use, no matter how valuable, if suitable to his circumstances and condition in life.[92] This includes such wearing apparel as it would be necessary or reasonable for him to use after arriving at his destination;[93] and it has also been held to include cloth, to a reasonable amount, procured for the purpose of being made into wearing apparel.[94]

§ 857. Presents or Property of Others

Articles intended as presents or which belong to another than the passenger are not usually regarded as baggage.

Articles intended as presents,[95] or carried for the convenience of others,[96] do not come within the meaning of the term "baggage," and in such cases the carrier is liable only as gratuitous bailee; and it has been stated broadly that, if a passenger procures the carriage of property of another as baggage, without knowledge on the part of the carrier as to the true ownership, the carrier is a gratuitous bailee and is liable to the owner only for loss or damage caused by gross negligence or willful misconduct.[97] The fact that a passenger pays extra charges on a trunk and informs the carrier's agent of its contents but does not inform him that certain articles in it belong to another person, and that the carrier accepts the trunk under such a statement, does not constitute an implied contract that the carrier will carry such articles as freight or baggage so as to render it liable for their loss.[98] The mere presence of the name of the owner on a trunk containing such owner's property, taken by another as

85. Tex.—Texas & N O R. Co. v. Levy, Civ App., 199 S W. 513.

86. Cal.—Klein v. Southern Pac. Co., 218 P. 447, 63 Cal.App 185.
Pa.—Kaplan v. Director General of Railroads, 78 Pa Super. 195.

Notice to shipper

A person who attempts to ship certain property as baggage is charged with notice of rules as to what constitutes baggage in tariffs duly published and filed with the interstate commerce commission pursuant to the applicable federal statutes.—Kaplan v. Director General of Railroads, 78 Pa.Super. 195.

87. Ark.—Missouri Pac R Co. v. Pugh, 248 S W. 897, 157 Ark. 383, error dismissed 44 S.Ct. 2, 263 U S 724, 68 L.Ed 526, and petition dismissed 44 S.Ct 3, 263 U.S. 725, 68 L Ed 526—Bush v Beauchamp, 201 S W 828, 132 Ark. 582.

88. Ky.—Illinois Cent R. Co. v Fontaine, 289 S.W. 263, 217 Ky. 211, 52 A.L.R. 1064.

89. Ky.—Illinois Cent. R. Co. v. Fontaine, supra

90. Ohio.—Cleveland-Akron Bus Co v. Rogoff, 159 N E. 374, 25 Ohio App 538.

91. Ohio.—Cleveland-Akron Bus Co v. Rogoff, supra.

92. Ark.—Kansas City, etc., R. Co v McGahey, 38 S.W. 659 63 Ark. 344, 58 Am S R. 111, 36 L.R A. 781.
10 C.J. p 1189 note 97.

93. N Y.—Dexter v. Syracuse, etc., R. Co., 42 N Y. 326, 1 Am.R. 527.
10 C.J p 1189 note 98

94. U.S.—Mauritz v New York, etc., R Co., C C Wis., 23 F 765
N.Y.—Duffy v. Thompson, 4 E D. Smith 178.
10 C.J. p 1189 note 99

95. N.Y.—Nevins v. Bay State Steamboat Co., 17 N Y Super. 225.
Ohio.—Cleveland-Akron Bus Co. v. Rogoff, 159 N E. 374, 25 Ohio App. 538.

96. Ohio.—Cleveland-Akron Bus Co. v. Rogoff, supra.
W.Va.—Schuster v. Norfolk & W. Ry. Co., 102 S E. 476, 478, 85 W. Va. 658, citing **Corpus Juris** with approval.
10 C J. p 1189 note 3.

Jewelry of another

Ky.—Illinois Cent. R Co. v. Fontaine, 289 S.W. 263, 217 Ky. 211, 52 A.L.R. 1064.
10 C J. p 1189 note 3 [a], p 1190 note 11.

Money of another

Baggage for which a carrier is liable does not include money of one passenger contained in a valise which another passenger, with the knowledge of the first, delivers as his own luggage; and to such a passenger a carrier is not liable at all, because he has not been shown to have made any contract with it to transport the baggage.—Dunlap v. International Steamboat Co., 98 Mass 371.

97. Okl.—Chicago, R. I & P R Co. v. Bonner, 229 P. 266, 103 Okl. 131—Lusk v. Bloch, 168 P. 430, 66 Okl. 171, L R A 1918C 109

98. N.Y.—Talcott v. Wabash R. Co., 21 N.Y.S 318, 66 Hun 456.

his personal baggage, is not notice to the carrier that the contents of the trunk are not the property of the passenger, so as to charge the carrier as a carrier of baggage.[99]

Property of member of family or of relative. Members of the same family traveling together may carry their effects in the same trunk, or one may carry in his trunk the effects of the others, and each may recover for any loss to his baggage.[1] According to some cases, a passenger may carry as baggage articles of a reasonable amount or value which belong to members of his family who are not traveling with him,[2] or which he has purchased for such members,[3] but there is authority to the contrary.[4] It has been held that, where a passenger, without disclosing to the carrier the true ownership thereof, carries as his own baggage the personal effects of a relative not a member of the immediate family of the passenger, and not accompanying the passenger, the carrier is responsible therefor only in the capacity of gratuitous bailee, and the owner cannot recover for loss or injury without proof of the carrier's gross negligence or willful misconduct.[5]

§ 858. Jewelry and Similar Articles

Jewelry and like articles, suitable to the conditions and circumstances in life of the passenger and intended for personal use during the journey, may, in general, be regarded as baggage, in the absence of any valid statutory or other regulation to the contrary.

Jewelry, opera glasses, and like articles of personal adornment or convenience, suitable to the condition and circumstances in life of the passenger, and intended for personal use during the continuance of the journey, may properly be included as baggage;[6] but not where they are being carried by a traveler for the use of someone else, as shown above supra § 857, or for the purpose of business or sale.[7] Jewelry may be transported as baggage only under a special contract where a valid statute or a valid rule of a public body or commission so provides.[8]

A passenger's watch, when not carried on his person but in his trunk, may properly be taken as a part of his baggage, and he may recover for its loss as such.[9] It has been held, however, that a watch carried by a passenger on his person is not baggage.[10]

While, according to some cases, a carrier engaged in interstate commerce may not, by its rules and regulations filed with the interstate commerce commission, limit the meaning of the term "baggage" so as to exclude jewelry,[11] the contrary view has apparently been taken.[12] In any event the carrier may not effect such limitation by the use of doubtful language in a regulation so filed.[13]

99. W.Va.—Schuster v. Norfolk & W Ry. Co, 102 S.E. 476, 85 W Va. 658

1. Tex.—Payne v. Norman, Civ.App., 249 S W 882, 885 citing **Corpus Juris** with approval
W Va.—Schuster v. Norfolk & W Ry. Co 102 S E. 476, 478, 85 W. Va. 658, citing **Corpus Juris** with approval.
10 C J p 1189 note 5.

2. Ohio—Cleveland-Akron Bus Co v Rogoff, 159 N.E. 374, 25 Ohio App 538
10 C J p 1190 note 6

3. Ohio—Cleveland-Akron Bus Co v Rogoff, supra.
10 C.J p 1190 note 7.

4. N.Y.—Hurwitz v. Hamburg-American Packet Co., 56 N Y S. 379, 27 Misc 814.
Pa.—Bullard v Delaware, etc., R. Co, 21 Pa Super. 583
10 C J. p 1190 note 8.

5. W Va.—Schuster v. Norfolk & W. Ry Co, 102 S E 476, 85 W Va. 658

6. Ark.—Missouri Pac. R Co. v. Pugh, 248 S W. 897, 157 Ark 383, error dismissed 44 S Ct. 2, 263 U S 724, 68 L Ed. 526, and petition dismissed 44 S Ct. 3, 263 U S 725, 68 L Ed. 526
Ky.—Illinois Cent. R. Co v Fontaine, 289 S.W. 263, 266, 217 Ky 211, 52 A.L.R. 1064, citing **Corpus Juris** with approval.
Or.—Hamilton v. Baggage & Omnibus Transfer Co., 192 P. 1058, 97 Or. 620
10 C J p 1190 note 10.

Diamond ring worth three hundred dollars
Ark.—Bush v Beauchamp, 201 S W. 828, 132 Ark 582.

Gold locket and chain
Ark.—St Louis Iron Mountain & So. Ry Co. v Miller, 145 S.W. 889, 103 Ark 37, 39 L R A,N S, 634.

Rings and lavaliere
N Y.—Borden v. New York Cent. R. Co, 162 N Y S 1099, 98 Misc. 574

Thirty thousand dollars' worth of jewelry will not ordinarily be included in the term "baggage."—Michigan Cent. R. Co. v. Carrow, 73 Ill. 348, 24 Am R 248.

7. Ky.—Illinois Cent. R Co v Fontaine, 289 S W. 263, 266, 217 Ky 211, 52 A L.R. 1064, citing **Corpus Juris** with approval.
10 C.J p 1190 note 11

Not carried as samples
Where articles of jewelry carried by passenger in his trunk were intended for sale, they were not within rule of interstate commerce commission permitting transportation as baggage of samples used by commercial travelers in making sales, although the pieces sold were being constantly reordered.—Klein v. Southern Pac. Co, 218 P. 447, 63 Cal. App. 185.

8. Mo.—Russell v Quincy, etc., R. Co., 164 S W. 164, 177 Mo App 186.
10 C.J. p 1190 note 9.

9. N.Y.—Merrill v. Grinnell, 30 N. Y. 594—Torpey v. Williams, 3 Daly 162
10 C J. p 1190 note 12.

10. Mass.—Clark v Burns, 118 Mass. 275, 19 Am.R. 456.
Miss.—Mississippi Cent. R. Co. v. Kennedy, 41 Miss 671.

11. Ark.—Missouri Pac. R. Co. v. Pugh, 248 S W. 897, 157 Ark 333, error dismissed 44 S.Ct. 2, 263 U. S. 724, 68 L.Ed 526 and petition dismissed 44 S Ct. 3, 263 U.S 725, 68 L Ed. 526—Bush v Beauchamp, 201 S W. 828, 132 Ark. 582

12. Ky.—Illinois Cent. R. Co. v. Fontaine, 289 S W 263, 217 Ky 211, 52 A.L.R 1064.

13. Ky.—Illinois Cent R. Co. v Fontaine, supra.

Advisory or admonitory language
A provision, in a regulation so filed, that jewelry should not be in-

Furthermore, the view has been taken that a provision in a regulation filed, published, and put in force by a carrier, that jewelry should not be inclosed in baggage to be checked is not the equivalent of a provision that jewelry is not baggage or that it will not be transported as baggage.[14]

§ 859. Money

Such reasonable amount of money as is required to meet the actual and contingent expenses of a passenger during his journey may in general be regarded as baggage.

A traveler has the right to carry as part of his baggage such reasonable amount of money as will be required to meet his actual and contingent expenses during the entire journey.[15] In determining the amount properly required for such expenses, the passenger's entire trip is to be considered, and a proper allowance for sojourning on the way, together with a reasonable allowance for accidents, sickness, etc., such as a reasonably prudent man would consider it necessary to make, is to be included.[16] Money may be regarded as baggage only where it is taken bona fide for traveling expenses and personal use on the trip, and the amount is limited to what a reasonably prudent man would consider necessary for the purpose.[17] Money carried merely for transportation, or for business purposes, such as to make purchases, or for remittance, is not baggage, and in the absence of gross negligence the carrier will not be liable for the loss thereof,[18] unless it accepts it as baggage with full knowledge of the facts.[19] A county treasurer carrying with him funds belonging to his office cannot insist that such funds shall be carried as his baggage.[20]

Money in trunk, valise, or box. As a general rule money reasonably necessary and intended for traveling expenses is regarded as baggage, although carried in a trunk or valise.[21] This rule does not, however, include money carried by a passenger in his trunk with which he expects to buy merchandise,[22] or which is so carried merely for the purpose of transportation.[23]

§ 860. Particular Articles

General rules as to what is baggage apply in determining whether or not particular articles, such as books, papers, weapons, tools, or household goods are baggage.

In applying or considering the general rules stated above in §§ 855–857, in connection with the surrounding circumstances, it has been held or recognized that, among other articles,[24] the following may be regarded as baggage: A few books for reading,[25] the manuscript and books of a student, author, or professional man,[26] the papers and books of an attorney at law,[27] photographs of the passenger and of others,[28] photographs of articles, which are to be shown to prospective buyers,[29] the catalogues or manuscript price books of a traveling salesman,[30] weapons, such as one is in the

closed in personal baggage or checked is susceptible of the interpretation that it is merely advisory or admonitory and does not, therefore, exclude jewelry as baggage.—Illinois Cent. R. Co. v. Fontaine, 289 S.W. 263, 217 Ky. 211, 52 A.L.R. 1064.

14. N.Y.—Borden v. New York Cent. R. Co., 162 N.Y.S. 1099, 98 Misc. 574.

15. S.C.—Godfrey v. Pullman Co., 69 S.E. 666, 87 S.C. 361, Ann.Cas.1912B 971.
10 C.J. p. 1190 note 14.

16. N.Y.—Merrill v. Grinnell, 30 N.Y. 594.
10 C.J. p. 1191 note 15.

17. Tex.—San Antonio & A. P. Ry. Co. v. Green, Civ.App., 170 S.W. 110.

18. Ky.—Chesapeake, etc., R. Co. v. Hall, 124 S.W. 372, 136 Ky. 379, Ann.Cas.1912A 364.
10 C.J. p. 1191 note 16.

19. Ark.—St. Louis Southwestern R. Co. v. Berry, 30 S.W. 764, 60 Ark. 433, 46 Am.S.R. 212, 28 L.R.A. 501.

20. Cal.—Pfister v. Central Pac. R. Co., 11 P. 686, 70 Cal. 169, 59 Am.R. 404.

21. Or.—Hamilton v. Baggage & Omnibus Transfer Co., 192 P. 1058, 1061, 97 Or. 620, citing **Corpus Juris** with approval.
10 C.J. p. 1191 note 20.

In New York

(1) The rule stated in the text is operative.—Hasbrouck v. New York Cent., etc., R. Co., 95 N.E. 808, 202 N.Y. 363, 35 L.R.A.,N.S., 537, Ann.Cas.1912D 1150, affirming 122 N.Y.S. 123, 137 App.Div. 532, affirming 118 N.Y.S. 735, 64 Misc. 478—10 C.J. p. 1191 note 20.

(2) In some early cases the view was taken that money in a passenger's trunk was not baggage.—Nordemeyer v. Loescher, 1 Hilt., N.Y., 499—Grant v. Newton, 1 E.D.Smith, N.Y., 99
10 C.J. p. 1191 note 19.

22. Conn.—Hickox v. Naugatuck R. Co., 31 Conn. 281, 83 Am.D. 143.

23. Ga.—Hutchings v. Western, etc., R. Co., 25 Ga. 61, 71 Am.D. 156.
N.Y.—Drange County Bank v. Brown, 9 Wend. 85, 24 Am.D. 129.

24. **Articles regarded as baggage**

(1) Gold thimble carried in trunk by mother of two small children on a visit to her mother.—Louisville & N. R. Co. v. Hestle, 75 So. 835, 200 Ala. 137.

(2) Other articles.—Hamilton v. Baggage & Omnibus Transfer Co., 192 P. 1058, 97 Or. 620.
10 C.J. p. 1191 note 25 [a], [c].

25. Ark.—Kansas City, etc., R. Co. v. McGahey, 38 S.W. 659, 63 Ark. 344, 58 Am.S.R. 111, 36 L.R.A. 781.
Ind.—Doyle v. Kiser, 6 Ind. 242.

26. Ark.—Kansas City, etc., R. Co. v. McGahey, 38 S.W. 659, 63 Ark. 344, 58 Am.S.R. 111, 36 L.R.A. 781.
10 C.J. p. 1191 note 27.

27. U.S.—Hopkins v. Westcott, C.C.N.Y., 12 F.Cas.No.6,692, 6 Blatchf. 64.

28. Or.—Hamilton v. Baggage & Omnibus Transfer Co., 192 P. 1058, 97 Or. 620.
Tex.—San Antonio etc., R. Co. v. Green, Civ.App., 170 S.W. 110.

29. Ill.—Wingate v. Pere Marquette R. Co., 172 Ill.App. 314.
10 C.J. p. 1192 note 38 [a] (1).

30. Ark.—Kansas City, etc., R. Co. v. McGahey, 38 S.W. 659, 63 Ark. 344, 58 Am.S.R. 111, 36 L.R.A. 781.
10 C.J. p. 1192 note 29.

habit of carrying or taking with him for purposes of defense or adornment,[31] the guns and hunting apparatus of a hunter on a hunting expedition,[32] the fishing tackle of a fisherman on a fishing expedition,[33] and the cooking utensils of a camping party.[34]

On the other hand, among other articles,[35] which it has been held or recognized are not included in the term "baggage," are: A bicycle,[36] pictures or engravings,[37] photographs of articles, which are to be shown to prospective buyers,[38] or articles necessary only for the business in which the passenger intends to engage.[39]

Household goods. Furniture, bedding, and other household goods not intended for use during the journey are generally not regarded as baggage,[40] unless accepted as such by the carrier.[41] For such articles the carrier is liable, if at all, only as bailee; it is not liable as insurer, and cannot be compelled to carry them unless proper compensation is tendered.[42] According to some cases, however, such goods may be regarded as baggage so far as they are necessary for the personal use and convenience of a passenger and his family on their journey,[43] and a passenger may also carry whatever of such goods will be reasonably necessary for immediate use on arriving at his destination.[44]

Theatrical property. Costumes and paraphernalia of a traveling theatrical company are generally not regarded as baggage,[45] unless there is a general custom so to regard it.[46] It has been held, however, that manuscript music of an opera company is properly baggage when carried in a trunk checked by the company.[47]

Tools of trade. The tools or utensils used by a passenger in his trade or profession, and which he usually carries with him in his trunk, have been held to be baggage,[48] such as the tools of a traveling jeweler,[49] of a mechanic,[50] or of a carpenter,[51] or the instruments of a dentist or surgeon.[52]

But it has been held that certain memoranda and papers in the possession of an agent for an insurance company, which related exclusively to the business of the company, were not baggage.—Yazoo, etc., R Co v Georgia Home Ins Co, 37 So. 500, 85 Miss. 7, 107 Am S R. 265, 67 L.R A. 646

31. Ill.—Davis v. Michigan Southern, etc., R. Co., 22 Ill. 278, 74 Am. D 151—Woods v. Devin, 13 Ill. 746, 56 Am D 483.
10 C J p 1192 note 31.

Passenger traveling on business is not entitled to recover for two revolvers, one being all that can properly be considered as included within personal baggage.—Chicago, etc., R. Co v. Collings, 56 Ill. 212.

32. Ark.—Little Rock, etc., R. Co. v. Record, 85 S W 421, 74 Ark. 125, 109 Am.S R. 67.
10 C.J p 1192 note 32.

Not connected with journey
A gun and gun case taken by a passenger on a railroad trip not shown to be in any manner connected with the purpose and object of the trip is not "baggage."—House v. Chicago, etc., R. Co., 142 N W 736, 32 S D. 209, 138 N.W. 809, 30 S.D. 321, Ann.Cas 1915C 1045.

33. Ark.—Kansas City, etc., R Co v. McGahey, 38 S.W. 659, 63 Ark. 344, 58 Am.S.R. 111, 36 L.R A 781
S D—House v Chicago, etc., R. Co., 138 N W 809, 30 S D 321, Ann Cas. 1915C 1045, 142 N W 736, 32 S.D 209.

34. S.D.—House v. Chicago, etc., R. Co., supra.

35. **Articles not regarded as baggage**
Ga.—Georgia R. Co v Johnson, 38 S E. 954, 113 Ga 589
Pa.—Bullard v. Delaware, etc., R. Co, 21 Pa Super. 583.
10 C J p 1191 note 25 [b].

36. Mo.—State v. Missouri Pac. R Co, 71 Mo App 385.
10 C J p 1192 note 36.

37. Pa.—Patterson v. Union Transfer Co, 87 Pa Super. 257.
10 C.J. p 1192 note 38.

Unframed engravings
One hundred unframed engravings were not wearing apparel nor articles necessary and convenient for the traveler.—Patterson v. Union Transfer Co, 87 Pa.Super. 257.

38. Iowa.—McElroy v. Iowa Cent. R. Co, 110 N W 915, 133 Iowa 544

39. Ark.—St. Louis, etc., R. Co v. Miller, 145 S W. 889, 103 Ark. 37, 39 L.R.A.,N.S, 634

40. Tenn.—Yazoo, etc, R. Co. v. Baldwin, 81 S W 599, 113 Tenn 205.
10 C J. p 1193 note 44.

41. U.S.—Mauritz v New York, etc., R. Co, C C Wis. 23 F 765
Kan.—Kansas City, etc, R. Co v Morrison, 9 P. 225, 34 Kan. 502, 55 Am.R. 252.

42. Miss.—Mississippi Cent. R. Co. v Kennedy, 41 Miss. 671.
10 C.J p 1193 note 46.

43. Mass.—Connolly v. Warren, 106 Mass. 146, 8 Am R. 300
10 C J p 1193 note 47
As to passenger traveling by boat or vessel see C J S title Shipping § 196, also 58 C J. p 563 notes 58, 59

44. S.D.—House v. Chicago, etc., R. Co., 138 N W 809, 30 S D 321 Ann. Cas 1915C 1045, 142 N W. 736, 32 S.D. 209.
10 C.J p 1193 note 49.

45. Or.—Oakes v Northern Pac. R. Co, 26 P. 230, 20 Or 392, 23 Am S. R. 126, 12 L R A 318.
10 C J. p 1193 note 50.

46. U S.—Saunders v. Southern R. Co, Tenn., 128 F. 15, 62 C C A. 523.

47. Tex.—Texas, etc, R Co. v Morrison's Faust Co., 48 S W 1103, 20 Tex.Civ.App. 144.

48. U.S.—Hannibal & St. J R Co. v. Swift, Mo., 12 Wall 262, 20 L Ed. 423
Neb.—Sutton v. Payne, 196 N W 710, 111 Neb 455.
10 C.J. p 1192 note 40.

Butcher's tools have been held not to be baggage under the laws of Oklahoma.—Choctaw, etc., R Co. v. Zwirtz, 73 P. 941, 13 Okl. 411

49. Or.—Wells v Great Northern R. Co, 114 P 92, 116 P 1070, 59 Or. 165 34 L.R.A.,N.S, 818, 825.
10 C.J. p 1192 note 41.

50. Neb.—Sutton v. Payne, 196 N W. 710, 111 Neb 455.

51. Tex.—Texas, etc, R Co v. Russell, Civ App, 97 S W. 1090.
10 C.J. p 1192 note 42.

52. U.S.—Hannibal & St. J R Co. v. Swift, Mo., 12 Wall. 262, 20 L Ed. 423
Fla.—Brock v. Gale, 14 Fla. 523, 14 Am.R 356
10 C.J. p 1192 note 43.

§ 861. Merchandise Other than Personal Effects

a. In general
b. Salesman's samples
c. Acceptance with knowledge of character

a. In General

In general articles of merchandise which are not intended for the personal use of the passenger are not baggage.

At common law a carrier is responsible as an insurer only for the personal baggage of a passenger, and not for merchandise or other articles which properly constitute freight.[53] Articles of merchandise which are not for the personal use of the traveler on his journey, but which are carried for the purpose of sale or trade, are not ordinarily included in the term "baggage;"[54] the carrier is not obliged to carry them, except on the payment of additional compensation, and in the absence of knowledge thereof cannot be held liable for them as for baggage,[55] even though taken in a trunk, such as is usually used for holding personal effects, or mingled with other articles which are properly baggage.[56] The liability of the carrier in such a case is that of a gratuitous bailee, and, in order to recover for loss of, or injury to, the property carried, gross negligence or willful injury must be shown.[57] A carrier may, however, contract to carry as the baggage of a passenger merchandise which is not ordinarily regarded as baggage, and if it does so, it is liable as a common carrier.[58]

b. Salesman's Samples

Goods carried in a trunk as samples by a salesman are not usually regarded as baggage.

Goods carried by a passenger in his trunk as samples, with a view to enabling him to make sales of goods similar to the samples carried, are more properly mere merchandise, and are not to be included within the term "baggage;"[59] the fact that they are necessary to the object of the passenger's journey does not affect the rule.[60] Furthermore, according to some cases, the carrier's liability is not affected by proof that it was in the habit of carrying trunks known to contain samples used by traveling salesmen, where it does not appear that it was aware of the character of the trunk's contents in the particular case in which suit is

53. Ky.—Landesman-Hirshheimer Co. v. Louisville & N. Ry. Co., 199 S. W. 1050, 178 Ky. 712, L.R.A.1918C 105.

54. Cal.—Klein v. Southern Pac. Co., 218 P. 447, 448, 63 Cal.App. 185, quoting **Corpus Juris** as authority for this rule.

Minn.—Ferris v. Minneapolis & St. L. Ry. Co., 173 N.W. 178, 143 Minn. 90.

10 C.J. p 1193 note 53.

A statute requiring a carrier to carry a reasonable amount of luggage for each passenger, consisting of articles intended for the use of the passenger while traveling, or for his personal equipment, does not require it to carry merchandise or articles intended for business purposes.—Choctaw, etc. R. Co. v. Zwirtz, 73 P. 941, 13 Okl. 411

55. Cal.—Klein v. Southern Pac. Co., 218 P. 447, 448, 63 Cal.App. 185 quoting **Corpus Juris** with approval.

Fla.—Atlantic Coast Line R. Co. v. Campen Bros. Co., 154 So. 131, 14 Fla. 386

Ill.—Hamburg-American Packet Co. v. Gattman, 20 N.E. 662, 127 Ill. 598.

Minn.—McQuat v. Cook's Taxicab & Transfer Co., 176 N.W. 763, 145 Minn. 210.

10 C.J. p 1193 note 53

Rule in federal courts

In a case in which an interstate shipment was involved, the court said that "under the common law, as interpreted by the federal courts, a common carrier is not liable for the loss of merchandise checked as personal baggage."—Kaplan v. Director General of Railroads, 78 Pa.Super. 195, 199.

Taxicab

The driver of a taxicab which is licensed to carry passengers and their baggage but not to carry merchandise may refuse to carry merchandise.—Barr & Shoulberg v. Yellow Taxi Corporation, 265 N.Y.S. 754, 148 Misc. 855, affirmed 273 N.Y.S. 754, 152 Misc. 293.

Under a statute providing that every company shall check every parcel of "baggage" taken for transportation, a company is liable as a carrier only for what the passenger takes with him for his own personal use and convenience, unless the company by contract, express or implied has accepted other articles as baggage.—Illinois Cent. R. Co. v. Matthews, 72 S.W. 302, 114 Ky. 973, 24 Ky.L. 1766, 102 Am.S.R. 316, 60 L.R.A. 846

56. Cal.—Klein v. Southern Pac. R. Co., 218 P. 447, 448, 63 Cal.App. 185, quoting **Corpus Juris** with approval.

Fla.—Atlantic Coast Line R. Co. v. Campen Bros. Co., 154 So. 131, 114 Fla. 386.

10 C.J. p 1193 note 53

57. Fla.—Atlantic Coast Line R. Co. v. Campen Bros. Co., supra.

10 C.J. p 1194 note 54

58. Minn.—McKibbin v. Great Northern R. Co., 80 N.W. 1052, 78 Minn. 232

10 C.J. p 1195 note 60 [a].

59. Fla.—Atlantic Coast Line R. Co. v. Campen Bros. Co., 154 So. 131, 114 Fla. 386.

10 C.J. p 1194 note 55.

"Sample baggage"

(1) "Sample baggage," within the meaning of a provision of an interstate tariff schedule that such baggage is restricted to samples of goods, wares, or merchandise to be transported for use by a passenger in making sales or other disposition of the goods, wares, or merchandise represented, does not include merchandise which is not representative of other merchandise to be sold but which is in fact stock in trade which is to be offered for sale.—Araje v. Pennsylvania R. Co., 167 N.E. 497, 251 N.Y. 354, affirming 231 N.Y.S. 245, 225 App.Div. 73, reversing 223 N.Y.S. 542, 130 Misc. 29

(2) Apparently a like conclusion has been reached in a case in which the various tariff provisions were not set out in the opinion.—Klein v. Southern Pac. R. Co., 218 P. 447, 63 Cal.App. 185.

60. Iowa.—McElroy v. Iowa Cent. R. Co., 110 N.W. 915, 133 Iowa 544.

10 C.J. p 1194 note 55.

brought,[61] at least in the absence of any proof of a custom to transport the trunks as baggage without being informed of the character of their contents.[62] Where, however, by general custom a carrier transports trunks containing samples as the personal baggage of salesmen, it is liable as a common carrier, in the same manner and to the same extent as for personal baggage,[63] and, in accordance with the general rule stated below in subdivision c of this section, where the carrier accepts such samples as baggage with knowledge that they are offered for transportation as baggage, it thereby waives any objection on that ground, and its liability therefor is the same as that with reference to baggage in general.[64] It has been held, however, that, where the carrier charges and receives extra compensation for the transportation of such articles, it is liable for their loss, not on its contract for the transportation of the passenger and his personal baggage, but on its contract to carry the same as freight.[65]

A state railroad commission, when duly authorized by statute, may make a valid regulation that "baggage" shall include salesmen's samples for transportation between points within the state.[66]

c. Acceptance with Knowledge of Character

Where a carrier accepts as baggage articles or items of merchandise not usually regarded as baggage, with knowledge of their character and of the fact that they are offered for transportation as baggage, its liability as to such articles or items is the same as its liability as to baggage in general.

In general, where a carrier accepts as baggage articles or items of merchandise which are not properly baggage, with knowledge of their character and of the fact that they are offered for transportation as baggage, it thereby waives any objection on that ground, and its liability therefor is the same as that with reference to baggage in general,[67] as, for example, where the carrier accepts a trunk containing a salesman's samples, considered above in subdivision b of this section. If the carrier has any reasonable grounds for refusing to carry particular property of a passenger tendered as baggage, it must insist on them at the time such property is offered if it desires to avoid liability therefor; it cannot, after it has accepted the property and undertaken to carry it, insist that it might have refused to carry it, and is therefore not liable.[68] The mere fact, however, that passengers have been permitted to take with them packages of merchandise over a carrier's railroad, without objection, does not prove an agreement that any particular package is to be regarded as baggage or that it is transported at the risk of the carrier.[69]

Authority of agents. The general rule is, where there is any question as to the real character of the property offered as baggage, that the regular agent of the carrier, the baggage-master, has implied authority to accept or reject such property as baggage, and his determination is binding on the carrier,[70] unless the passenger has notice of a limitation on the baggage-master's authority in this respect.[71] It has been held that the carrier is bound by the act of its baggage-master in

61. Mass.—Alling v. Boston, etc., R. Co., 126 Mass. 121, 30 Am.R. 667.
Minn.—McKibbin v. Great Northern R. Co., 80 N.W. 1052, 78 Minn. 232.
10 C.J. p 1194 note 56.

62. Minn.—McKibbin v. Great Northern R. Co., supra.

63. Ky.—Landesman-Hirshheimer Co. v. Louisville & N. Ry. Co., 199 S.W. 1050, 178 Ky. 712, L.R.A.1918C 105.

64. Fla.—Atlantic Coast Line R. Co. v. Campen Bros. Co., 154 So. 131, 114 Fla. 386.
Ky.—Landesman-Hirshheimer Co. v. Louisville & N. R. Co., 199 S.W. 1050, 178 Ky. 712, L.R.A.1918C 105.
W.Va.—Schuster v. Norfolk & W. Ry. Co., 102 S.E. 476, 477, 85 W.Va. 658, citing **Corpus Juris** as to this statement.
10 C.J. p 1194 note 57.

Rules for hire when accepted without inquiry

Where a railroad company accepted trunks containing samples, and its agent demanded and received a small sum on account of excess weight, but made no request for information as to the contents, the company was liable as a bailee for hire.—Tamarin v. Pennsylvania Co., 53 Pa.Super. 83, affirmed 90 A. 433, 244 Pa. 100.
Sufficiency of knowledge or notice in general see infra subdivision c of this section.

65. N.Y.—Trimble v. New York Cent., etc., R. Co., 56 N.E. 532, 162 N.Y. 84, 48 L.R.A. 115, affirming 57 N.Y.S. 437, 39 App.Div. 403.
10 C.J. p 1195 note 58.

66. Tex.—Texas & N. O. R. Co. v. Levy, Civ.App., 199 S.W. 513.

67. Fla.—Atlantic Coast Line R. Co. v. Campen Bros. Co., 154 So. 131, 114 Fla. 386.
Minn.—Ferris v. Minneapolis & St. L. Ry. Co., 173 N.W. 178, 143 Minn. 90, citing **Corpus Juris** with approval.
10 C.J. p 1194 note 57, p 1195 note 60.

68. U.S.—Hannibal, etc., R. Co. v. Swift, Mo., 12 Wall. 262, 20 L.Ed. 423.
Mass.—Commonwealth v. Connecticut River R. Co., 15 Gray 447.
10 C.J. p 1195 note 60.

69. N.H.—Smith v. Boston, etc., R. Co., 44 N.H. 325.

70. Ark.—St. Louis Southwestern R. Co. v. Berry, 30 S.W. 764, 60 Ark. 433, 46 Am.S.R. 212, 28 L.R.A. 501.
10 C.J. p 1195 note 62, p 1194 note 57 [a].

Acceptance by agent with knowledge of nature of articles

Aside from schedules of rates provided for in Gen.L. 5231, a carrier was bound by the act of an agent in knowingly accepting trunks containing merchandise for transportation as baggage and placing them in the waiting room for the night with the expressed intent of checking them in the morning, such goods being burned during the night.—Simpson v. Central Vermont Ry. Co., 115 A. 299, 95 Vt. 388.

71. Iowa.—Bergstrom v. Chicago, etc., R. Co., 111 N.W. 818, 134 Iowa

checking as personal baggage goods which are ordinarily not regarded as personal baggage, with knowledge of the facts, where the passenger is ignorant of any limitation on the baggage-master's authority in this regard.[72] There is authority for the view, however, that the fact that a baggage-master checks merchandise as personal baggage, with knowledge of the facts, does not show that the carrier agrees to transport the merchandise or to become liable therefor as a common carrier where there is no showing that the baggage-master has authority to receive freight on a passenger train or to bind the carrier to carry merchandise on a passenger train.[73]

Sufficiency of knowledge or notice. In order to charge a carrier with liability for merchandise carried as baggage, the general rule is that there must be actual knowledge on the part of the carrier or its agents of the true character of the goods offered as baggage.[74] The carrier is not bound to inquire as to the nature of the property, but is entitled to assume that it consists of only such things as are properly baggage.[75] According to some cases, however, it is not necessary that the carrier be expressly notified that the articles are merchandise, or other than personal baggage, and it is sufficient if the agent has notice or knowledge sufficient to put him on inquiry.[76] While, according to some cases, the carrier is liable where the outward appearance of the box or trunk is such as to indicate the character of its contents,[77] the mere appearance of the trunk or other receptacle offered to be checked as one ordinarily in use for carrying merchandise or samples usually will not in itself charge the carrier with knowledge that it does contain merchandise or other than personal baggage.[78]

The fact that other agents of the carrier at other times and places have received and checked merchandise as baggage with knowledge of its true character will not operate as notice to the carrier of its character with respect to a trip in connection with which a claim is made,[79] and knowledge of the agent who checks the alleged baggage is not knowledge of the carrier where the agent acquires such knowledge while engaged in the transaction of his personal affairs.[80] The fact, however, that the carrier's agent is also the agent of another does not prevent attributing to the carrier the agent's knowledge of the nature of the articles involved, where in the transaction in which the agent's knowledge is acquired he acts for both his principals, and there is authority for the view that, where it clearly appears that information obtained by the carrier's agent outside his employment is actually in his mind when he acts for the carrier, such information will be imputed to, and will bind, the carrier, unless such information is obtained under circumstances that will make it the legal duty of the agent not to communicate it to the carrier.[81]

The mere payment of overweight charges on baggage does not of itself constitute notice that the trunk or other receptacle contains merchandise or articles other than ordinary baggage.[82]

223, 10 L.R.A.,N.S., 1119, 13 Ann. Cas. 239.
10 C.J. p 1196 note 63.

72. Iowa.—Bergstrom v. Chicago, etc., R. Co., supra.
10 C.J. p 1195 note 62 [a] (1).

73. Mass.—Blumantle v. Fitchburg R. Co., 127 Mass. 322, 34 Am.R. 376.

74. U.S.—Humphreys v. Perry, Ill., 13 S.Ct. 711, 148 U.S. 627, 37 L.Ed. 587, reversing, C.C., Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co., 39 F. 417.
10 C.J. p 1196 note 64.

75. Ohio.—Toledo, etc., R. Co. v. Bowler, etc., Co., 58 N.E. 813, 63 Ohio St. 274.
10 C.J. p 1196 note 65.

76. Mich.—Dahrooge v. Pere Marquette R. Co., 108 N.W. 283, 144 Mich. 544.—Amory v. Wabash R. Co., 90 N.W. 22, 130 Mich. 404.

77. Ark.—Kansas City, etc., R. Co. v. McGahey, 38 S.W. 659, 63 Ark. 344, 58 Am.S.R. 111, 36 L.R.A. 781.
10 C.J. p 1196 note 68.

78. Ky.—Landesman-Hirshheimer Co. v. Louisville & N. R. Co., 199 S.W. 1050, 178 Ky. 712, L.R.A.1918C 105.
10 C.J. p 1196 note 67.

Salesman's trunk or case

(1) A railroad company is not bound to take notice of the nature and contents of a trunk tendered for transportation as baggage merely because the trunk has the appearance of being a trunk used to carry drummers' samples.—Landesman-Hirshheimer Co. v. Louisville & N. R. Co., 199 S.W. 1050, 178 Ky. 712, L.R.A. 1918C 105.

(2) That certain cases were called "sample cases" is not conclusive proof that the carrier knew that they contained merchandise.—Rossier v. Wabash R. Co., 91 S.W. 1018, 115 Mo. App. 515.

79. Me.—Blumenthal v. Maine Cent. R. Co., 11 A. 605, 79 Me. 550.

80. Ala.—Central of Georgia R. Co. v. Joseph, 28 So. 35, 125 Ala. 313.
10 C.J. p 1195 note 62 [c].

81. Vt.—Simpson v. Central Vermont Ry. Co., 115 A. 299, 95 Vt. 388.

Agent for express company and for railroad company

Where station agent went to plaintiff's tent at fairgrounds with an express package as agent of an express company, but at the very time he delivered the package made suggestions about getting trunks to the station, at which time he acquired knowledge that the trunks would contain merchandise, which he afterward accepted as baggage, the view was taken that the agent acquired such knowledge while acting within the scope of his employment as defendant railroad company's agent.—Simpson v. Central Vermont Ry. Co., 115 A. 299, 95 Vt. 388.

82. Ky.—Illinois Cent. R. Co. v. Matthews, 72 S.W. 302, 114 Ky. 973, 24 Ky.L. 1766, 102 Am.S.R. 316, 60 L.R.A. 846.
10 C.J. p 1196 note 69.

Connecting carrier. Knowledge of the initial carrier is not sufficient to bind a connecting carrier, unless the agents of the former have authority to check merchandise so as to bind the latter.[83] It has been held that, where a passenger buys a through ticket over connecting roads from the agent of the initial carrier, and informs the initial carrier's baggage agent that one of the passenger's trunks contains merchandise, and the trunk is accepted as baggage with such notice, the passenger is entitled to recover for the loss thereof from the connecting carrier, even though it is not personal baggage.[84]

§ 862. Duty of Carrier to Receive and Transport Baggage

In general a common carrier has the duty to transport personal baggage of passengers as an incident to the contract of carriage, subject to reasonable and valid limitations as to weight and value.

A common carrier has the duty to receive and transport personal baggage of passengers,[85] and the contract or duty to carry baggage is an incident to the contract to carry the passenger,[86] the transportation of a reasonable amount of baggage as an incident to the passenger's contract for transportation is a part of the contract to the same extent as is the transportation of the person.[87] Although it was at one time considered that a carrier of passengers could not be made liable as a common carrier for the baggage of its passengers unless a distinct price was paid for its carriage,[88] the rule is now well settled that it is impliedly a part of the contract between the carrier and the passenger that the former will carry for the latter his personal baggage, under reasonable limitations as to weight and value, without additional charge, as the price paid for the ticket or for transportation embraces compensation for the carriage of the baggage, and no special consideration may be demanded by the carrier or need be paid;[89] and in some jurisdictions this duty is prescribed and regulated by statute.[90] This is a public duty, it is not granted as a favor, but may be demanded as a right,[91] except that, as this duty grows out of the contract of transportation, it does not in general arise until the person tendering the baggage has procured the right of transportation as a passenger.[92] The acceptance of free baggage or the checking of baggage as such implies that there is a passenger who intends to pursue the baggage on the train and claim it at destination.[93]

It is the duty of the carrier to receive and transport extra baggage for which an additional charge is paid.[94]

A passenger has the right to retain in his possession and under his control, and to have carried as a part of the transaction, a reasonable amount of personal baggage appropriate to the journey.[95]

83. Ohio.—Toledo, etc., R. Co v. Bowler, etc., Co., 58 N.E. 813, 63 Ohio St. 274.
10 C J. p 1196 note 70.

84. Ala.—Southern R. Co v. Foster, 60 So. 993, 7 Ala App 487.

85. Fla.—State v. Jacksonville Terminal Co, 106 So. 576, 90 Fla. 721.
10 C J. p 1196 note 73.

On excursion train

Where a passenger takes passage on an excursion train, he has the right to assume that his baggage will be under the care of the railroad's baggage-master, unless he knows that the passengers are to furnish a baggage-master of their own—Burnes v Chicago, etc., R. Co, 128 S.W. 236, 144 Mo.App 71.

86. Ark.—Bush v Beauchamp, 201 S.W 828, 132 Ark. 582.
Fla.—Atlantic Coast Line R Co v Campen Bros. Co, 154 So. 131, 114 Fla. 386.
Idaho—Smallwood v. Jeter, 244 P 149, 42 Idaho 169, citing **Corpus Juris** with approval.
Minn.—McQuat v Cook's Taxicab & Transfer Co, 176 N.W. 763, 145 Minn. 210
10 C J. p 1196 note 73, p 1197 note 76.

87. Ky.—Landesman-Hirshheimer Co. v Louisville & N. R. Co., 199 S W 1050, 178 Ky. 712, L.R.A.1918C 105

"Free baggage"

A reasonable amount of baggage transported as an incident to the passenger's contract for transportation is sometimes incorrectly referred to as "free baggage."—Landesman-Hirshheimer Co v Louisville & N R. Co, 199 S.W. 1050, 178 Ky. 712, L.R.A.1918C 105.

88. Ill.—Rice v. Illinois Cent. R Co, 22 Ill.App. 643

89. Wash.—Boxley v. Cochrane, 226 P. 1015, 130 Wash. 323, citing **Corpus Juris** with approval.
10 C J p 1196 note 73

Furnishing car for baggage

A local station agent has no power as a matter of law to contract to furnish the proprietor of a theatrical troupe a baggage car at each week-end for an indefinite period and at other stations—Newberry v. Seaboard Air Line R. Co, 76 S.E. 238, 160 N C 156.

90. Ark.—St. Louis, etc., R. Co v DeWitt, 171 S W. 906, 115 Ark 578
Okl.—Choctaw, etc., R Co. v. Zwirtz, 73 P 941, 13 Okl. 411.
10 C J p 1197 note 74.

91. Ga.—Hart v. Atlanta Terminal Co, 58 S.E. 452, 128 Ga. 754, 767

92. Ga.—Atlanta Terminal Co. v American Baggage, etc., Co, 54 S. E. 711, 125 Ga. 677.
10 C.J p 1197 note 76.

The payment of the passenger's fare is usually a necessary prerequisite to the binding of the carrier to liability for the transportation of the passenger's baggage.—St Louis, etc., R. Co v. De Witt, 171 S W 906, 115 Ark. 578.

93. Fla.—Atlantic Coast Line R. Co v. Campen Bros. Co, 154 So. 131, 114 Fla. 386.

94. N.Y.—Glasco v. New York Cent. R Co, 36 Barb. 557.
Extra baggage in general see infra § 865

95. N.Y.—Hasbrouck v. New York Cent., etc., R. Co., 95 N E 808, 202 N.Y. 363, 35 L.R.A.,N S, 537, Ann. Cas 1912D 1150, affirming 123 N Y. S 123, 137 App Div 532, affirming 118 N Y S 735, 64 Misc. 478.
10 C J. p 1201 note 35

Groceries

A ticket entitling one to "personal passage" does not entitle him to carry packages of groceries for the use of his family.—Bullock v. Delaware,

Illegal shipment. A carrier may properly refuse to transport into another state a trunk offered by a passenger as his personal baggage and accepted and checked as such, where the carrier subsequently discovers that the trunk contains intoxicating liquors and the shipment of such liquors into another state would constitute a violation of a federal statute.[96]

Facilities; regulation and discrimination. It is the duty of a carrier to provide a place, and suitable and convenient facilities, for the reception, deposit, and keeping of baggage of prospective and incoming passengers, and such facilities must be furnished without discrimination to all alike who desire to avail themselves thereof.[97]

Rules and regulations prescribing the duties of carriers by bus as to transporting baggage of passengers between points within the state, made by a state commission in accordance with authority duly conferred by statute, are binding on such carriers.[98] In some jurisdictions the authority of a state regulatory body to make rules and regulations affecting the activities of a terminal company which represents or acts for carriers in receiving and handling baggage includes authority to make just and reasonable regulations respecting the receipt, handling, and safe-keeping of baggage and to prevent unjust discrimination in this regard.[99]

In granting a certain amount of free baggage, the carrier may make reasonable rules and regulations with reference thereto provided they do not conflict with the duty of the carrier to the public in relation to baggage.[1] So the right of a passenger to take property with him into cars or other vehicles of conveyance is subject to reasonable regulation, not only as to what may be thus taken,[2] but also as to how far the carrier will be liable for articles retained by the passenger under his control, as shown infra § 869. While the view has been expressed that a rule of a carrier that a person intending to become a passenger shall purchase a ticket or pay fare before the company receives and becomes liable for his baggage is a reasonable regulation,[3] according to some cases, a rule that baggage shall not be received into the baggage room until a ticket shall have been procured is unreasonable.[4]

§ 863. Checking Baggage

The duty of a carrier to carry baggage may involve the duty to check such baggage to any destination on its line or to a point on a connecting line to which it sells a ticket. It is the duty of a carrier to avoid unjust and arbitrary discriminations among passengers in respect of checking baggage.

The general duty of a carrier to carry the baggage of its passengers requires that it shall check such baggage to any destination on its line,[5] or to a point on a connecting line to which it sells a ticket;[6] and it cannot refuse to check to certain stations on its line merely to avoid the transfer of passengers and their baggage to rival lines.[7]

L. & W. R. Co., 36 A. 773, 60 N.J.Law 24, 37 L.R.A. 417.

96. Mo.—Shannon v. Hines, 226 S.W. 283, 205 Mo.App. 629.

Unmarked trunks

Where the trunk delivered to the carrier was not labeled to show the consignee or that it contained intoxicating liquors, the carrier, on discovering that it contained intoxicating liquors, could refuse to transport it to another state, in view of the fact that a violation of U.S.Cr. Code § 240 would have resulted. A like rule would apply if the place in another state to which the trunk was to be shipped was in dry territory, in view of the federal statute as to shipments of intoxicating liquors into dry territory.—Shannon v. Hines, 226 S.W. 283, 205 Mo.App. 629.

97. Fla.—State v. Jacksonville Terminal Co., 106 So. 576, 584, 90 Fla. 721, citing **Corpus Juris** with approval.
Ga.—Hart v. Atlanta Terminal Co., 58 S.E. 452, 128 Ga. 754, 767.
10 C.J. p 1197 notes 78, 79.

98. N.C.—Knight v. Carolina Coach Co., 159 S.E. 311, 201 N.C. 261.

Number of pieces, weight, and value

A rule of the corporation commission as to the number of pieces, weight, and value of hand baggage to be carried by carriers by bus, adopted pursuant to the authority conferred by Pub.L.1927 c 136 was valid and binding on such carriers.—Knight v. Carolina Coach Co., 159 S.E. 311, 201 N.C. 261.

99. Fla.—State v. Jacksonville Terminal Co., 117 So. 869, 96 Fla. 295, 59 A.L.R. 324—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.

1. Fla.—Atlantic Coast Line R. Co. v. Campen Bros. Co., 154 So. 131, 114 Fla. 386.

2. N.J.—Runyan v. Central R. Co., 41 A. 367, 61 N.J.Law 537, 68 Am.S.R. 711, 43 L.R.A. 284, 44 A. 985, 64 N.J.Law 67, 48 L.R.A. 744.
10 C.J. p 1201 note 36.

3. Ind.—Lake Shore & M. S. R. Co. v. Foster, 4 N.E. 20, 104 Ind. 293, 54 Am.R. 319.

4. Ga.—Hart v. Atlantic Terminal Co., 58 S.E. 452, 128 Ga. 754.
Miss.—Coffee v. Louisville, etc., R. Co., 25 So. 157, 76 Miss. 569, 71 Am.S.R. 535, 45 L.R.A. 112.

5. Pa.—Pittsburgh, etc., R. Co. v. Lyon, 16 A. 607, 123 Pa. 140, 10 Am.S.R. 517, 2 L.R.A. 489.

In Florida there is no statute defining as a duty the checking of baggage to destination by common carriers.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.

6. Wash.—Gomm v. Oregon R., etc., Co., 101 P. 361, 52 Wash. 685, 25 L.R.A.,N.S., 537.
10 C.J. p 1197 note 82.

Authority of agent

The act of an agent of a connecting carrier in issuing through baggage checks on the purchase of a ticket on his own line, and the passenger's agreement to purchase a ticket to complete the journey, is within the apparent scope of his authority and binding on both carriers.—St. Louis, etc., R. Co. v. DeWitt, 171 S.W. 906, 115 Ark. 578.

7. Pa.—Pittsburgh, etc., R. Co. v. Lyon, 16 A. 607, 123 Pa. 140, 10 Am.S.R. 517, 2 L.R.A. 489.
10 C.J. p 1198 note 83.

A common carrier is not obliged, however, to accept any transfer agent's claim or identification check as the basis for the issuance by the carrier of a baggage check to destination, in the absence of any valid and controlling law or regulation so requiring.[8]

Penalty for refusal to check. Valid statutory provisions imposing a penalty on a carrier for refusing to check baggage or to give a check are given effect in accordance with the terms of such provisions duly construed,[9] but it has been held that such a statute is to be strictly construed and that the carrier will not be held liable where the case does not fall within the provisions of the statute as so construed.[10] Whether such a penalty is in the nature of liquidated damages must depend on the intent of the legislature as appearing in the statute.[11]

Rules and regulations; discrimination. A railroad company receiving baggage for interstate transportation is not required to give any other receipt than the customary baggage check, under the Interstate Commerce Act which requires a railroad company which receives property for transportation in interstate commerce to issue a receipt or bill of lading therefor.[12]

It is the duty of a common carrier to check baggage without unjust discriminations that affect passengers,[13] and in some jurisdictions at least a terminal company which represents or acts for carriers in receiving, handling, and checking baggage may not arbitrarily subject one class of passengers to inconvenience in the matter of identification of baggage for the purpose of checking, from which such company saves another class of passengers.[14] Whether or not there is an unjust discrimination in a particular case depends on the facts and on the controlling constitutional and statutory provisions and principles of law, and a determination as to whether a particular practice of a carrier is an unjust discrimination involves a consideration of the rights of the carrier together with other facts and circumstances affecting the matter.[15] An unjust discrimination by a common carrier in checking passengers' baggage may be remedied pursuant to constitutional and statutory provisions, even though the principles of the common law do not forbid such discrimination.[16]

In some jurisdictions the authority of a state regulatory body to make rules and regulations affecting the activities of a terminal company which represents or acts for carriers in receiving, handling, and checking baggage includes authority to make just and reasonable regulations respecting the checking of baggage, and to prevent unjust and arbitrary discrimination in that regard.[17] A regulation which purports to prevent discrimina-

8. Fla.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721

9. Mass.—Commonwealth v. Connecticut River R. Co., 15 Gray 447.
S.C.—Sullivan v. Southern R. Co., 54 S.E. 586, 74 S.C. 377
10 C.J. p. 1198 note 85.

Validity of statute

A statutory requirement that a railroad company shall not collect toll or fare from a passenger when it fails, neglects, or refuses to deliver the passenger a check for his baggage is valid and binding on such company as a part of the penalty for its failure and neglect to comply with the statute, and is in no sense a taking of property without due process of law within the inhibition of the Fourteenth Amendment to the constitution of the United States.—Tarr v. Oregon Short Line R. Co., 93 P. 957, 14 Idaho 192, 125 Am.S.R. 151.

10. Mo.—Mitchell v. Kansas City, etc., R. Co., 90 S.W. 1164, 116 Mo. App. 116.
10 C.J. p. 1198 note 86.

11. Va.—Norfolk, etc., R. Co. v. Irvine, 5 S.E. 532, 84 Va. 553

12. U.S.—Boston, etc., R. Co. v. Hooker, 34 S.Ct. 526, 233 U.S. 97, 58 L.Ed. 868, L.R.A.1915B 450, Ann. Cas.1915D 593, reversing 95 N.E. 945, 209 Mass. 593, Ann. Cas.1912B 669
Neb.—Bobidoux v. Chicago & N. W. R. Co., 204 N.W. 870, 113 Neb. 682, 41 A.L.R. 446.

13. Fla.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721

Special concessions to transfer agents

In a case in which there was involved a question as to discrimination in accepting, for the purpose of checking baggage, the claim checks of a transfer agent which brought baggage to a railroad station, the view was expressed that, while special concessions may be made to transfer agents by common carriers in some cases, the privileges so conferred may not be exercised so as to cause unjust discriminations affecting passengers.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.

14. Fla.—State v. Jacksonville Terminal Co., 117 So. 869, 96 Fla. 295, 59 A.L.R. 324.

15. Fla.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721

Practice not unjust discrimination

Requirement of railroad terminal company that passengers identify, for the purpose of checking, baggage transported to station by passengers' transfer agents who had not assumed obligation to indemnify terminal company was not an unjust discrimination, notwithstanding the terminal company accepted for the purpose of identification the claim check of a transfer company which had given to the terminal company a bond to indemnify the latter, if the terminal company did not unlawfully or unjustly discriminate in taking indemnification from responsible transfer agents.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.

16. Fla.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.

17. Fla.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.
Ga.—Atlanta Terminal Co. v. Georgia Public Service Commission, 137 S.E. 556, 163 Ga. 897.

Regulation of right of terminal company to protect itself

The exercise of the right of a terminal company to protect itself against the delicts of irresponsible transfer companies or persons who deliver to the terminal company the baggage of prospective passengers may reasonably be regulated by due

tion must, however, be reasonable, and a regulation which is manifestly and materially out of proportion to the benefit of mere convenience to accrue to certain passengers by the imposition of added risk on the terminal company is unreasonable and is not binding on such company, as, for example, a regulation by the state regulatory body which requires the terminal company to accept the claim checks of any transfer agent bringing baggage to the station, in lieu of actual identification of the baggage, for the purpose of checking, without regard to the reliability of the transfer agent or of the latter's assuming an obligation to indemnify the terminal company for loss or damage due to the acts or defaults of the transfer agent.[18] It has been held, however, that a state regulatory body, acting pursuant to authority duly conferred by statute, may require a terminal company to accept, for purposes of checking, the claim checks of any transfer agent who furnishes a proper and sufficient bond to indemnify the terminal company against loss or damage.[19] A regulation of this type has been construed as one which creates, and imposes on the terminal carrier, a duty, and not one which purports to deal with, or undertakes to prevent, an unjust discrimination.[20] In some jurisdictions, however, an order of the state regulatory body in respect of the handling and checking of baggage after it has been delivered to a terminal company must be predicated on an unjust discrimination.[21]

A regulation that baggage shall not be checked until a ticket has been procured is a reasonable one,[22] as is also a rule requiring the ticket to be exhibited to the proper agent before such checking is done.[23] A carrier may in general prescribe the conditions on which it will check property as to which special care in handling is required.[24]

§ 864. Charges and Liens on Baggage

A carrier has a lien on the baggage of a passenger for the charge for transportation of the passenger and baggage.

A carrier has a lien on the baggage of a passenger for the entire charge for transportation of the passenger and baggage, and it is immaterial whether the baggage has been checked, if it is still in the possession of the carrier when it seeks to enforce its lien,[25] unless the carrier is estopped to assert the lien.[26] While thus retaining baggage under a lien, the carrier is liable therefor as bailee.[27] It has been held, however, that a carrier has no lien on a passenger's baggage for the fare of a minor child of such passenger, accompanying the passenger, which the passenger refuses to pay.[28]

The mere facts that a rule of the carrier re-

process of law, particularly as it affects the duties of the terminal company to its traveling patrons.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.

Inconvenience in identifying baggage

The state railroad commission may, by reasonable regulation, prevent a terminal company from arbitrarily subjecting one class of passengers to inconvenience in the matter of identification of baggage for the purpose of checking, from which such company saves another class of passengers.—State v. Jacksonville Terminal Co., 117 So. 869, 96 Fla. 295, 59 A.L.R. 324.

18. Fla.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.

Right of terminal company to protect itself

The right of a terminal company to protect itself against the delicts of irresponsible transfer companies or persons who deliver to the terminal company the baggage of prospective passengers cannot lawfully be wholly denied.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.

19. Ga.—Atlanta Terminal Co. v. Georgia Public Service Commission, 137 S.E. 556, 163 Ga. 897.

Preventing discrimination

Where the terminal company has an agreement by which it accepts, for the purpose of checking baggage, the claim checks issued by a particular transfer agent who has furnished a bond to the terminal company to indemnify the latter from loss or damage for baggage handled by such transfer agent, the state regulatory body, acting pursuant to authority duly conferred by statute, may require the terminal company to accept the claim checks of all transfer agents who furnish a like bond.—State v. Jacksonville Terminal Co., 117 So. 869, 96 Fla. 295, 59 A.L.R. 324.

Effect of constitutional provision specifically conferring power on general assembly

An order of the public service commission which required a terminal company to receive in its baggage room baggage properly identified by a duplicate claim check of such persons, firms, or corporations which were engaged in the business of hauling baggage as complied with the order which contained a provision for a bond of indemnity, and to issue a train check to the owner presenting such duplicate claim check, did not violate the constitutional provision, art 4, § 2, par 1, Civ.Code § 6463, § 2-2501, which specifically confers on the general assembly power and authority to regulate railroad freights and passenger tariffs.—Atlanta Terminal Co. v. Georgia Public Service Commission, 137 S.E. 556, 163 Ga. 897.

20. Ga.—Atlanta Terminal Co. v. Georgia Public Service Commission, supra.

21. Ga.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.

22. Miss.—Coffee v. Louisville, etc., R. Co., 25 So. 157, 76 Miss. 569, 71 Am.S.R. 535, 45 L.R.A. 112.
10 C.J. p 1215 note 50.

23. Ga.—Hart v. Atlanta Terminal Co., 58 S.E. 452, 128 Ga. 754.

24. Mass.—Perkins v. New York, N. H. & H. R. Co., 122 N.E. 306, 232 Mass. 336.

Harp

Mass.—Perkins v. New York, N. H. & H. R. Co., 122 N.E. 306, 232 Mass. 336

25. Mo.—Cantwell v. St. Louis Terminal R. Assoc., 140 S.W. 966, 160 Mo.App. 393.
10 C.J. p 1198 note 89.

26. N.Y.—Moszkowitz v. International Nav. Co., 84 N.Y.S. 297.
10 C.J. p 1198 note 89.

27. Ga.—Southwestern R. Co. v. Bently, 51 Ga. 311.

28. Mo.—Cantwell v. St. Louis Terminal R. Ass'n, 140 S.W. 966, 160 Mo.App. 393.

quires that a check be attached to excess baggage on which the charge is paid, and that no such check is attached to the baggage involved, will not defeat a passenger's right to demand his baggage without paying excess, if in fact he has already paid the charge.[29]

If a person employs a carrier to transport the baggage of such person and pays the carrier in advance, another carrier who performs the service of transportation, without the authorization of the owner, is not entitled to a lien for his services, but, in respect of property which the owner is not entitled to carry as baggage, where a shipping merchant, who contracts with the owner to forward such property and who has not received payment in advance for the transportation, employs another to forward such property, the agent of such other is entitled to hold such property until the charges are paid.[30]

A final carrier which retains baggage on a mere blind charge of a previous carrier does so at its peril if the charge is not one connected with the transportation, and a terminal association which was not a carrier of a passenger or his baggage and which receives the baggage from the final carrier after the carriage is completed, in holding the baggage and asserting a lien thereon for a charge of a previous carrier, does so as a mere agent and has no greater right than the principal.[31]

Where the carrier ceases to be such and becomes a warehouseman, it has a lien on baggage left in storage for the storage charges and may detain the baggage until the lien is paid;[32] but a carrier is not entitled to storage charges on baggage which it has failed to deliver when called for.[33]

It has been held that an order of a state regulatory body which gives to traveling salesmen the right to a special exemption from storage charges on baggage after reaching destination which is not enjoyed by other travelers is unfair, unreasonable, and void.[34] Interstate passengers and shippers are charged with notice of the rates of common carriers of checked baggage as disclosed by published tariffs on file with the interstate commerce commission pursuant to acts of congress regulating interstate commerce,[35] and provisions of the Interstate Commerce Act, carrier's rules, filed with the interstate commerce commission, and orders of the commission as to rates and valuations are binding on the shipper and carrier of baggage transported in interstate commerce.[36]

Questions as to the right of a carrier to impose a charge for extra baggage or for the carriage of articles not ordinarily regarded as baggage, and as to the regulation and method of fixing extra charges, have been considered in some cases and are discussed in certain aspects infra § 865.

§ 865. Extra Baggage and Special Contracts

In the absence of any valid and controlling law or regulation to the contrary, a carrier may make an extra charge for value of baggage beyond a certain limit, for weight beyond a reasonable limit, or for the carriage of property not ordinarily regarded as baggage

In the absence of any valid and controlling law or regulation to the contrary, a carrier may make an extra charge for value beyond a reasonable limit fixed, and may require information as to the value for the purpose of determining such charge.[37] So subject to any valid statutory or other controlling regulation, a carrier may make an extra charge for weight beyond a reasonable limit,[38] or for accepting merchandise which is not properly

29. S.C.—Davis v. Atlantic Coast Line R. Co., 88 S.E. 273, 104 S.C. 63, 2 A.L.R. 102

30. N.Y.—Nordemeyer v. Loescher, 1 Hilt. 499.
10 C.J. p 1198 note 92.

31. Mo.—Cantwell v. St. Louis Terminal R. Ass'n, 140 S.W. 966, 160 Mo.App. 393
10 C.J. p 1198 note 92 [a].

32. N.Y.—Kressin v. New Jersey Cent. R. Co., 103 N.Y.S. 1002, 119 App.Div. 86.
10 C.J. p 1198 note 93.

33. Tex.—St. Louis Southwestern R. Co. v. Kelley, Civ.App., 173 S.W. 540.

34. Mo.—Atchison, T. & S. F. Ry. Co. v. Public Service Commission of Missouri, 192 S.W. 460

Discriminatory against interstate travelers

An order of the public service commission, made on complaint of traveling salesmen, fixing a different and lesser charge for storage of baggage on certain days for such travelers than was fixed by general regulation governing charges on baggage of other persons, was void as discriminatory against interstate travelers who were subject to the general regulation.—Atchison, T. & S. F. Ry. Co. v. Public Service Commission of Missouri, Mo., 192 S.W. 460

35. Neb.—Robidoux v. Chicago & N.W. R. Co., 204 N.W. 370, 113 Neb. 682, 41 A.L.R. 446.
Pa.—Kaplan v. Director General of Railroads, 78 Pa.Super. 195.

36. Ky.—Illinois Cent. R. Co. v. Fontaine, 239 S.W. 263, 217 Ky. 211, 52 A.L.R. 1064
Pa.—Kaplan v. Director General of Railroads, 78 Pa.Super. 195

37. U.S.—New York Cent., etc., R. Co. v. Fraloff, N.Y., 100 U.S. 24, 25 L.Ed. 531.

38. Ky.—Louisville, etc., R. Co. v. Miller, 162 S.W. 73, 156 Ky. 677, 50 L.R.A.,N.S., 819.
10 C.J. p 1198 note 97

Duty of passenger to make disclosure

Where there is a dispute at the receiving station between the carrier and the passenger as to the payment of an excess baggage rate on account of alleged overweight, it is the duty of the passenger to make a true explanation of his position to the carrier's agents, or at least to

baggage,[39] and, on accepting the extra amount charged, becomes liable as common carrier with reference to the merchandise thus accepted, to the same extent as though the goods were carried as freight.[40] Such a transaction as to excess value or weight, or as to merchandise which would not otherwise be properly checked as baggage, extra compensation being charged, may be treated as a separate contract,[41] and, according to some cases, knowledge by the carrier of the contents of the receptacles may be immaterial where no inquiry is made.[42] The mere fact that overweight charges are paid does not, however, convert the baggage into freight.[43]

Regulation and fixing rates; discrimination. State statutes regulating rates or charges for excess baggage[44] or providing for regulation by a public regulatory body[45] are given effect in accordance with their terms duly construed; and the purpose of some, if not all, such statutes is to prevent unfair discriminations.[46] A statute which makes it a misdemeanor for a carrier to charge more than a fixed sum for transporting excess baggage is not violated by a carrier's knowingly accepting merchandise as baggage and transporting it as such, and charging therefor a rate exceeding the maximum amount charged for carrying excess baggage.[47]

Under published tariffs on file with the interstate commerce commission, interstate passengers have a choice of rates for the carriage of baggage of a certain weight, dependent on the valuation placed by the passengers on the baggage, as affecting the extent of the carrier's liability.[48]

In general passengers are charged with notice of, and are bound by, tariffs filed by the carrier with the proper state authority,[49] or filed with the proper state and federal authorities and duly posted,[50] in accordance with the governing provisions of law, and interstate passengers are charged with notice of regulations of, and tariffs published by, the interstate commerce commission making provision for charges apportioned to the risk assumed by the carrier.[51]

Where a carrier's tariff of rates and charges has been filed with the proper public authorities in accordance with the governing provisions of law, and have become operative, the carrier may neither waive nor modify the provisions of such tariff.[52] The carrier must charge and collect, and the passenger must pay, the rates so fixed, without deviation, unless the rate is found to be unreasonable by the public regulatory body clothed with authority in that regard, and, where the rate is based on the value of the articles, it is the duty of the carrier to require the passenger to declare the value.[53] It has been held, in respect of an interstate transaction, however, that a railroad company cannot recover the tariff rate for an extra number of passenger tickets from a person with whom the company had contracted to transport a certain number of passengers and to furnish a special baggage car without charge, where such person had purchased enough tickets to entitle him to obtain a special baggage car without charge under the published tariff and the claim to recover for extra

give some reasonable account of the transaction to guide such agents in their actions—Davis v. Atlantic Coast Line R. Co., 88 S.E. 273, 104 S.C. 63, 2 A.L.R. 102.

39. Ga.—Dibble v. Brown, 12 Ga. 217, 56 Am.D. 460.
10 C.J. p 1198 note 97.

40. U.S.—Strouss v. Wabash St. L. & P. R. Co., C.C.Ohio, 17 F. 209.
10 C.J. p 1198 note 97.

41. N.Y.—Trimble v. New York Cent., etc., R. Co., 57 N.Y.S. 437, 39 App.Div. 403, affirmed 56 N.E. 532, 162 N.Y. 84, 48 L.R.A. 115.
10 C.J. p 1199 note 1.

Hunting dogs and parties

A carrier's undertaking to carry hunting dogs checked by a hunting party has been regarded as separable from the undertaking to carry the party.—Louisville & N. R. Co. v. Dickson, 73 So. 750, 15 Ala.App. 423, certiorari denied 74 So. 1005, 199 Ala. 699.

42. Pa.—Camden, etc., R. Co. v. Baldauf, 16 Pa. 67, 55 Am.D. 481.
10 C.J. p 1199 note 2.

43. Ill.—Hamburg-American Packet Co. v. Gattman, 20 N.E. 662, 127 Ill. 598
10 C.J. p 1199 note 3.

44. Ark.—St. Louis, etc., R. Co. v. Miller, 145 S.W. 889, 103 Ark. 37, 39 L.R.A.,N.S., 634.
10 C.J. p 1199 note 98.

45. Mich.—Michigan Cent. R. Co. v. Michigan R. Commn., 125 N.W. 549, 160 Mich. 355.
10 C.J. p 1199 note 99.

46. Ark.—St. Louis, etc., R. Co., 145 S.W. 889, 103 Ark. 37, 39 L.R.A., N.S., 634.
Mich.—Michigan Cent. R. Co. v. Murphy, 120 N.W. 1073, 156 Mich. 459.

47. Ark.—Kansas City, etc., R. Co. v. State, 46 S.W. 421, 65 Ark. 363, 67 Am.S.R. 933, 41 L.R.A. 333

48. Neb.—Robidoux v. Chicago & N. W. R. Co., 204 N.W. 870, 113 Neb. 682, 41 A.L.R. 446

49. Ohio.—Erie R. Co. v. Steinberg, 113 N.E. 814, 94 Ohio St. 189, L.R.A.1917B 787, Ann.Cas.1917E 661.

Tariff fixing rate on valuation

Ohio.—Erie R. Co. v. Steinberg, 113 N.E. 814, 94 Ohio St. 189, L.R.A. 1917B 787, Ann.Cas.1917E 661.

50. Mass.—Perkins v. New York, N. H. & H. R. Co., 122 N.E. 306, 232 Mass. 336

Tariff of excess or miscellaneous baggage charges

Mass.—Perkins v. New York, N. H. & H. R. Co., 122 N.E. 306, 232 Mass. 336.

51. Neb.—Robidoux v. Chicago & N. W. R. Co., 204 N.W. 870, 113 Neb. 682, 41 A.L.R. 446.

52. Mass.—Perkins v. New York, N. H. & H. R. Co., 122 N.E. 306, 232 Mass. 336

53. Ohio.—Erie R. Co. v. Steinberg, 113 N.E. 814, 94 Ohio St. 189, L.R.A.1917B 787, Ann.Cas1917E 661.

tickets arises solely out of the error of the agent of the carrier in issuing the tickets and in separating the party for transportation on different trains and dates.[54]

§ 866. Checks and Receipts

The usual baggage check delivered to a passenger does not embody the contract for transportation, but is a receipt furnishing evidence of ownership and a means of identifying the baggage.

The usual baggage check delivered to a passenger on receiving his baggage in no sense embodies the contract of carriage between the passenger and the carrier, but is a receipt merely, intended to afford evidence of ownership and for identifying the baggage,[55] and the mere fact that the passenger does not receive a check or other receipt is immaterial where the carrier actually receives the baggage into its possession.[56]

The delivery of a check is intended to relieve the passenger from any care or superintendence of the baggage while en route, and devolves such care on the carrier's agents.[57]

A claim check is a check or receipt given by a transfer company for baggage to be delivered at a railroad station and held in the baggage room until the check is presented by the passenger; and a claim check system sometimes includes the privilege of checking the baggage of prospective passengers at hotels and residences in advance of delivery at the passenger station.[58]

Questions as to the possession of a check or receipt as prima facie evidence of certain facts or as the basis of a presumption are discussed infra § 897.

2. Liability for Delay, Loss of, or Injury to, Baggage

§ 867. In General

A carrier, on assuming the care and custody of baggage, prima facie at least is liable as a common carrier in respect of such baggage, and its liability is in general that of an insurer.

Where a carrier assumes the care and custody of baggage, prima facie at least it assumes the liability of a common carrier as to such baggage,[59] and in general the liability of a carrier for the personal baggage of a passenger intrusted to its care, unless specially restricted or limited, is the same as its common-law liability as a carrier of goods,[60] and, therefore, its liability in case such baggage is lost, stolen, or injured is in general absolute[61] or, as usually stated, is that of an insurer,[62] unless the loss or injury is caused by an

54. Ohio—Columbus Tent & Awning Co v Cleveland, C, C. & St. L. Ry. Co., 10 Ohio App. 480

55. U S—Wiener v. Compagnie Generale Transatlantique, C C A N.Y., 61 F 2d 893, reversing, D C., 55 F 2d 252
Minn—Ferris v Minneapolis & St L. Ry. Co, 173 N W. 178, 180, 143 Minn 90, citing **Corpus Juris** with approval
Tex—Payne v Norman, Civ App, 249 S W. 882, 885, citing **Corpus Juris** with approval.
10 C.J p 1199 note 6.

A check is corroborative evidence, together with the passenger's ticket, of a contract to transport the passenger and his baggage.—Wilson v Chesapeake, etc, R. Co, 21 Gratt 654, 62 Va 654.

One check for trunk containing baggage of several passengers
The fact that only one check was given for a trunk which contained the baggage of several members of a family, all of whom had tickets or passes for transportation, which were presented to the carrier's agent when the trunk was checked, was immaterial in view of the rule that the check does not embody the contract of transportation but is merely a receipt—Payne v. Norman, Tex. Civ.App, 249 S W. 882.

56. Wash.—Boxley v. Cochrane, 226 P 1015, 130 Wash. 323, quoting **Corpus Juris.**
10 C J p 1199 note 7.

Carrier by stage
Wash—Boxley v. Cochrane, 226 P. 1015, 130 Wash. 323.

57. Ga.—Savannah, etc., R. Co. v. McIntosh, 73 Ga. 532.
10 C J. p 1200 note 13

58. Ga.—Hart v Atlanta Terminal Co., 58 S E. 452, 454, 128 Ga. 754, 758.
11 C J. p 826 note 9.

59. U S.—Globe & Rutgers Fire Ins Co. v. Winter Garden Co., C.C.A N Y., 92 F 2d 227, certiorari denied 46 S.Ct. 352, 270 U S 654, 70 L Ed 782
N.Y—Camden, etc., R. Co. v. Belknap, 21 Wend. 354.
Tex—Burnett v. Riter, Civ App, 276 S W. 347.

60. Tex.—Burnett v Riter, supra.
10 C J. p 1200 note 16.

61. Ga—Ford v. Atlantic Coast Line R. Co., 68 S.E. 1072, 8 Ga.App 295.
10 C J p 1200 note 16.

Statutory provision
In Oklahoma, in view of the fact that under statute, Rev.L.1910, § 807, the liability of a carrier of baggage intrusted to its care is the same as that of a common carrier of property, in the event of loss the carrier is liable unless the loss is occasioned by the act of God or unavoidable accident.—St. Louis & S. F R. Co v Giddings, 165 P 904, 65 Okl. 236—10 C J. p 1200 note 16.

62. Ill—See Doherty v Grand Trunk Western Ry Co, 194 Ill.App. 354.
Ky.—Illinois Cent. R Co v. Fontaine, 289 S.W. 263, 217 Ky. 211, 52 A.L.R 1064
Tex.—Burnett v. Riter, Civ App., 276 S W. 347
10 C.J. p 1200 note 16.

Exclusive possession
The view has been expressed that on obtaining by common carrier of exclusive possession of a passenger's baggage, it becomes insurer thereof.—Hessler v Detroit & C Nav. Co., 170 N.Y S. 513, 103 Misc. 551.

Negligence
(1) Common carriers' liability is more than liability for negligence; they are insurers of the safety of the article, subject to certain limitations—Barnet v. Pullman Co., 281 N. Y S 575, 155 Misc. 876

(2) Where a carrier, by obtaining exclusive possession of the baggage

act of God or the public enemy, considered infra § 868, by the negligence of the owner of the baggage, considered infra § 873, or by the inherent qualities of the baggage;[63] and this rule applies to carriers of passengers by stagecoach.[64]

As a carrier of goods is not liable as common carrier unless the carriage is for compensation, as shown supra § 3, so if the passenger is carried gratuitously,[65] if transportation of baggage is secured on the erroneous assumption that one is a passenger[66] or if the person who offers baggage for checking is not a passenger or does not intend to become a passenger, and conceals that fact,[67] the carrier is liable only as any other carrier of goods without compensation, that is, for such negligence as would charge a gratuitous bailee, although it is not necessary expressly to show payment of fare where the carriage is not understood to be gratuitous.[68] The mere fact that the owner of a trunk intends to obtain the transportation of such trunk by the improper use of the pass of another person which has expired does not relieve a terminal company of its liability as a bailee under a lucrative bailment where the trunk has been lost while in the possession of such company before the owner seeks to obtain possession for delivery to a carrier for transportation.[69]

Services of a red cap porter in carrying a passenger's hand baggage to train constitute part of the consideration for the price paid by the passenger for transportation and are not gratuitous, as affecting the carrier's liability, notwithstanding the carrier may, if it wishes, withhold porter service and the applicable tariff provides that, where red cap porter service is provided, hand baggage will be handled without charge by such porters.[70] So it has been held that a red cap porter who is in the general employment of a railroad company is an employee of such company so as to render the company liable to a passenger for the loss of hand baggage caused by the negligence of such porter while in possession of such baggage in order to take it to the passenger's train, even though the porter is not paid by the company for that type of service, and even though the company has not filed tariffs covering the services of red cap porters.[71]

Where a passenger places intoxicating liquors in a trunk for transportation in interstate commerce in violation of a federal statute, the lawful seizure of such liquors by government officers while in the carrier's possession terminates the liability of the carrier as such in respect of such liquors, but the carrier is liable at least as gratuitous bailee, and, therefore, for gross negligence, in respect of handling and dealing with the trunk and its contents

of a passenger, has become an insurer, negligence of the carrier need not be considered in determining the question of liability.—Hessler v. Detroit & C. Nav. Co, 170 N.Y.S. 513, 103 Misc. 551.

Checks mixed by employee of transfer company

Where a trunk was checked to the wrong place because an employee of transfer company employed by passenger attached wrong check to trunk, and trunk was in good condition when delivered to railroad company, the latter was liable for injury to trunk and for loss of articles contained therein, where the lock of the trunk was broken and the articles were stolen therefrom while in the possession of the railroad company and it gave no explanation as to how the damage occurred.—Davis v. Jones Transfer Co., 103 S.E. 520, 114 S.C. 162.

63. Ky.—Illinois Cent. R. Co. v. Fontaine, 289 S.W. 263, 217 Ky. 211, 52 A.L.R. 1064.
N.C.—Perry v. Seaboard Air Line R. Co., 88 S.E. 156, 171 N.C. 158, L.R.A. 1916E 478.

64. Wash.—Boxley v. Cochrane, 226 P. 1015, 130 Wash. 323.
10 C.J. p 1200 note 20.

65. Colo.—Denver, etc., R. Co. v. Johnson, 114 P. 650, 50 Colo. 187, Ann.Cas 1912C 627.
10 C.J. p 1200 note 22.

But, in a case in which the passes in question were actually based on compensation for services rendered, it was said that "common carriers undertaking the transportation of baggage on a free pass are held to the same degree of care as if the baggage were checked and carried on a ticket bought and paid for."—Texas & P. Ry. Co. v. Graham, Tex.Civ.App., 257 S.W. 642, 644, certiorari denied Lancaster v. Graham, 45 S.Ct. 225, 266 U.S. 632, 69 L.Ed. 478, and error dismissed 46 S.Ct. 202, 269 U.S. 541, 70 L.Ed. 402

Use of free pass in violation of Interstate Commerce Act

A person who rides on a free pass in violation of the applicable provisions of the Interstate Commerce Act as amended is not entitled to recover from the carrier for injury to property which was not caused willfully or wantonly.—Freihofer Baking Co. v. Payne, 77 Pa.Super. 570

66. Conn.—Beers v. Boston, etc., R. Co., 34 A. 541, 67 Conn. 417, 52 Am.S.R. 293, 32 L.R.A. 535.
10 C.J. p 1200 note 23.

67. Fla.—Atlantic Coast Line R. Co. v. Campen Bros. Co., 154 So. 131, 114 Fla. 386.

68. Pa.—McGill v. Rowland, 3 Pa. 451, 45 Am.D. 654.
10 C.J. p 1200 note 24.

69. Ala.—Birmingham Terminal Co. v. Thomas, 92 So. 803, 207 Ala. 363.

70. Cal.—Franklin v. Southern Pac. Co., 265 P. 936, 203 Cal. 680, 59 A.L.R. 118, certiorari denied Southern Pac. Co. v. Franklin, 49 S.Ct. 24, 278 U.S. 621, 73 L.Ed. 542.

71. Pa.—Booker v. Pennsylvania R. Co., 82 Pa.Super. 588.

Statutory provision as to baggage retained by passenger

The provision of Act of April 11, 1867, P.L. p 69, that no railroad company providing a car, or other place, for the deposit of passengers' baggage, shall be liable for loss of, or damage to, articles or property, not there deposited by the passenger, or which he places in the car in which he is to be transported, does not apply to hand baggage given to a red cap porter to take to train, until it is redelivered to the passenger.—Booker v. Pennsylvania R. Co., 82 Pa.Super. 588.

other than the intoxicating liquors.[72]

Where certain dogs taken on a hunting expedition have been delivered to, and accepted by, the carrier, the mere fact that servants of the owner and passenger care for the dogs does not relieve the carrier of liability for the negligence of its servants in respect of custody which is the proximate cause of the death of the dogs.[73]

The liability of the carrier, as dependent on whether or not certain articles are to be regarded as baggage, is considered in certain aspects in §§ 855–861 supra; and as dependent on the carrier's duty to receive, check, and transport baggage, supra §§ 862–865.

Tourist contract. A transit agent who undertakes to furnish transportation, and to conduct tourists on a trip through a foreign country, and to "look after the baggage and all details of the trip," is not liable for the loss of a tourist's baggage by a carrier employed on the route not under the control of such agent.[74]

What law governs. A carrier's liability for a passenger's baggage is generally governed by the law of the place where the contract to carry the passenger and his baggage is made,[75] unless it appears from the face of the contract that it was made with reference to the laws of some other place[76] or unless, according to some cases, the contract is to be performed in some other place.[77] It has been held that at least so far as delivery is concerned the law of the place where the baggage is to be delivered governs,[78] and that, where the contract is made in a foreign country, but there is no evidence as to the law of such country, the law of the forum governs.[79]

The rights and liabilities of an interstate passenger and the carrier in case of a loss of baggage depend on federal legislation, the agreement between the parties, and common-law principles, as accepted and enforced in federal courts.[80] The Interstate Commerce Act did not apply, however, to an interstate transportation of baggage by motor bus which occurred prior to the enactment of federal legislation regulating transportation by motor carriers.[81]

§ 868. Loss by Act of God or Public Enemy

A carrier is not liable for loss of baggage caused by an act of God, a public enemy, or an inevitable accident, in the absence of negligence of the carrier which contributes to the loss

The liability of a common carrier for baggage does not embrace losses caused by the act of God or a public enemy,[82] it is a complete defense to

72. Mo.—Shannon v. Hines, 226 S W 283, 205 Mo.App. 629

Confiscation and destruction of intoxicating liquors

The confiscation and destruction of the intoxicating liquors by the government officers after seizure, even though unlawful under the circumstance, did not affect the liability of the carrier.—Shannon v. Hines, 226 S W. 283, 205 Mo.App 629.

Notice of officer's intention to seize and confiscate

Where a United States revenue officer seized a trunk which contained whisky in violation of a federal statute and confiscated the trunk and its other contents as well as the whisky, when the whisky could have been readily removed from the trunk, the officer indicating at once an intention to confiscate not only the whisky but the trunk and other contents, the mere fact of the seizure and confiscation did not relieve the carrier of liability for failure properly to care for the trunk and the contents other than the whisky.—Shannon v. Hines, 226 S W. 283, 205 Mo App 629.

73. Ala.—Louisville & N. R. Co. v. Dickson, 73 So. 750, 15 Ala App. 423, certiorari denied 74 So. 1005, 199 Ala. 699.

74. N.Y.—Coleman v. Clark, 119 N. Y S. 881, 135 App.Div 55, affirmed 96 N E. 81, 203 N.Y. 36.

75. Mo.—Robert v. Chicago, etc., R Co., 127 S.W. 925, 148 Mo.App. 96 Ohio—Darlington v. Cleveland, C, C & St. L. Ry Co., 14 Ohio N.P.,N S, 427

10 C.J p 1201 note 25.

The laws of another state will be presumed to be the same as those of the state where the action is tried—Davis v. Chicago, etc., R. Co., 49 N W. 77, 83 Iowa 744.

76. N Y.—Curtis v Delaware, etc, R. Co, 74 N.Y. 116, 30 Am.R. 271

77. N Y.—Curtis v. Delaware, etc., R. Co, supra.

Pa.—Brown v. Camden, etc., R. Co, 83 Pa. 316, 318.

10 C J p 1201 note 27.

78. Ga.—Myers v. Atlantic Greyhound Lines, 184 S.E 414, 415, 52 Ga App. 698, citing **Corpus Juris** with approval.

N Y.—Curtis v. Delaware, etc., R. Co., 74 N.Y. 116, 30 Am.R. 271.

10 C J p 1201 note 28

79. Mo.—Drozinski v. Hamburg-American Line, 181 S.W. 1164, 193 Mo App 60.

80. U S.—New York Cent. & H. R. R. Co. v. Benham, Mo., 37 S Ct. 43, 242 U.S 148, 61 L.Ed. 210.

But in a case decided in 1913 the view was taken that the Carmack amendment did not apply to a shipment from a state into a foreign country.—Darlington v Cleveland, C., C. & St. L. Ry. Co., 14 Ohio N.P ,N S., 427.

Property not baggage

In an action in assumpsit to recover the value of a box of merchandise which was shipped from a point in one state to a point in another state and was never delivered, plaintiff was not entitled to recover where the property was received as baggage from plaintiff who did not produce a ticket and who was not, and did not intend to become, a passenger, and the property was not baggage within the meaning of tariffs duly published and filed with the interstate commerce commission pursuant to federal statutes.—Kaplan v. Director General of Railroads, 78 Pa. Super. 195.

81. Ga.—Myers v. Atlantic Greyhound Lines, 184 S E. 414, 52 Ga. App 698.

Tenn.—Dixie Greyhound Lines v. Kaplan, 89 S.W 2d 342, 169 Tenn. 513

82. Ky.—Illinois Cent. R. Co. v. Fontaine, 289 S.W. 263, 217 Ky. 211, 52 A L.R. 1064

N C.—Perry v. Seaboard Air Line R.

an action for the loss of baggage to show that the loss was occasioned by an inevitable accident.[83] If, however, the negligence of the carrier contributes to the loss, although caused primarily by an act of God, the carrier will be liable.[84]

§ 869. Where Passenger Retains Custody of His Baggage

Where a passenger voluntarily retains possession and control of his baggage, the carrier is not liable as a common carrier or as insurer in respect of such baggage, but is liable only for the negligence or fault of itself or its servants which causes the loss of, or injury to, such baggage.

While a carrier of passengers may become such a bailee of the baggage of a passenger as to have, with reference to such baggage, the liability of a common carrier of goods, as shown supra § 867, the passenger has the right to retain in his possession and under his control, and to have carried as a part of the transaction, a reasonable quantity of personal baggage appropriate to the journey, as shown supra § 862. This right of the passenger, however, to take personal belongings and other articles with him into the cars or other vehicles of conveyance is subject to reasonable regulation, not only as to what may be thus taken, as shown supra § 862, but also as to how far the carrier will be liable for articles retained by the passenger under his control.[85] A carrier may be liable where its servants use improper means to prevent the retention in the car by the passenger of articles which he is not entitled to carry.[86]

In order to fix or impose a common carrier's liability as insurer, there must in general be a delivery or surrender of the complete and exclusive care, possession, custody, and control of the baggage to the carrier, and, in the absence of such delivery or surrender, there is in general no liability except for negligence.[87] In the absence of a special agreement, a carrier does not assume control of such money or other personal effects as its passengers may bring into its vehicle of carriage;[88] the carrier, in such cases, does not assume the liability of a common carrier or insurer, its duty is merely to exercise reasonable care to protect such effects from loss or injury, and it becomes liable only for the failure of itself or its servants to exercise such reasonable care.[89] While there is authority for the

Co., 88 S.E. 156, 171 N.C. 158, L.R.A.1916E 473.
Okl.—St. Louis & S. F. R. Co. v. Giddings, 165 P. 904, 65 Okl. 236.
10 C.J. p 1201 note 30.

83. Pa.—Long v. Pennsylvania R. Co., 213 A. 459, 147 Pa. 343, 30 Am.S.R. 732 and note, 14 L.R.A. 741.
10 C.J. p 1201 note 30.

Liability defined by statute

In laying down the rule that a carrier is liable as a common carrier for loss of baggage, under Rev.L.1910 § 807, an exception in respect of a loss caused by an unavoidable accident has been recognized.—St. Louis & S. F. R. Co. v. Giddings, 165 P. 904, 65 Okl. 236.

84. Mo.—Ford v. Wabash Ry. Co., 300 S.W. 769, 318 Mo. 723, reversing, App., 266 S.W. 1032.
10 C.J. p 1201 note 31.

Negligent delay

Where a carrier negligently fails to send baggage on the same train with the passenger, it is liable for the loss of the baggage if it is destroyed, as a result of such delay, by an act of God.—Wald v. Pittsburg, etc., R. Co., 44 N.E. 888, 162 Ill. 545, 53 Am.S.R. 332, 35 L.R.A. 356, reversing 60 Ill.App. 460.

85. Wis.—Gleason v. Goodrich Transp. Co., 32 Wis. 85, 14 Am.R. 716.

86. Mo.—Smith v. Atchison, etc., R. Co., 97 S.W. 1007, 122 Mo.App. 85.
N.J.—Bullock v. Delaware, etc., R. Co., 36 A. 773, 60 N.J.Law 24, 37 L.R.A. 417.

87. Iowa.—Jensen v. Interstate Transit Lines, 266 N.W. 9, 221 Iowa 518.
Mich.—Blair v. Pennsylvania Greyhound Lines, 267 N.W. 578, 275 Mich. 636.
Tex.—Burnett v. Riter, Civ.App., 276 S.W. 347.
10 C.J. p 1202 note 40.

88. Conn.—Sperry v. Consolidated R. Co., 65 A. 962, 79 Conn. 565, 568, 118 Am.S.R. 169, 10 L.R.A.,N.S., 907, 9 Ann.Cas. 199.

89. U.S.—Globe & Rutgers Fire Ins. Co. v. Winter Garden Co., C.C.A.N.Y., 9 F.2d 227, certiorari denied 46 S.Ct. 352, 270 U.S. 654, 70 L.Ed. 782.
Ala.—Louisville & N. R. Co. v. Dickson, 73 So. 750, 15 Ala.App. 423, certiorari denied 74 So. 1005, 199 Ala. 699.
Ind.—Pinkus v. Pittsburgh, C., C. & St. L. Ry. Co., 114 N.E. 36, 65 Ind.App. 38.
N.Y.—Barnet v. Pullman Co., 281 N.Y.S. 575, 155 Misc. 876—Posner v. New York Cent. R. Co., 277 N.Y.S. 671, 154 Misc. 591—Hessler v. Detroit & C. Nav. Co., 170 N.Y.S. 513, 103 Misc. 551.
Tenn.—Nashville, C. & St. L. Ry. v. North, 6 Tenn.Civ.App. 20.
Tex.—Burnett v. Riter, Civ.App., 276 S.W. 347.
Wyo.—Union Pac. R. Co. v. Grace, 143 P. 353, 22 Wyo. 452, L.R.A. 1915B 608.
10 C.J. p 1202 notes 39, 40.

Liability of carrier as bailee for hire

Ala.—Louisville & N. R. Co. v. Dickson, 73 So. 750, 15 Ala.App. 423, certiorari denied 74 So. 1005, 199 Ala. 699.

Voluntary retention of possession

A carrier is not liable as insurer in respect of jewelry in the passengers' possession as baggage if, having made a rule requiring jewelry to be intrusted to it for safekeeping, the passenger chooses to retain possession.—Borden v. New York Cent. R. Co., 162 N.Y.S. 1099, 98 Misc. 574.

Complete or partial possession and control retained by passenger

Where a passenger on a railroad train carries his hand bag into the car with him and retains the entire or partial possession and control of it, the carrier will not be responsible for the loss unless negligence on the part of the carrier or its servants is shown.—Burnett v. Riter, Tex.Civ.App., 276 S.W. 347.

Duty to protect passenger's possession

While the owner of a package has possession of it in a car, the carrier is obligated to use reasonable and ordinary care and watchfulness to protect such possession as against other passengers and persons.—Foulke v. New York Consol. R. Co., 127 N.E. 237, 228 N.Y. 269, 9 A.L.

view that no liability attaches to a carrier by bus in connection with the handing out of hand baggage by its servants to passengers who have alighted,[90] it has been held that the carrier may be liable for the negligence of its servants in this regard.[91] This liability extends to loss occurring through an employee while acting within the scope of his employment in carrying a passenger's baggage to or from the train,[92] but does not extend to large sums of money or other property of exceptional value retained by the passenger in his control, without the knowledge of the carrier.[93] The mere fact of a loss, without any circumstance connecting it with a failure on the part of the carrier's employees to exercise due care, is not sufficient to show that it was caused by the carrier's negligence.[94]

It has been held that the carrier becomes liable as insurer where its employee, in order to clear the aisle of a car, takes hand baggage from the custody and control of the passenger and assumes control by depositing the baggage in another part of the car.[95]

Under a statutory provision that, whenever pas-

R. 1384, affirming 168 N.Y.S. 72, 180 App Div. 848.

Effect of alleged of carrier's employees

Carrier was not liable to passenger for loss of fur scarf when she was disturbed by sudden physical encounter between two other passengers in subway train, although carrier failed to have guard present in car, especially where there was no showing that, even though a guard were present, he could have interfered in time to prevent the loss —Milbauer v. Interborough Rapid Transit Co., 249 N.Y.S. 726, 139 Misc. 644.

Suitcase taken while passenger absent for luncheon

Railroad company was not liable for loss of a suitcase which was placed over the seat which the passenger occupied by a porter, and which was taken from car while train stopped to permit passengers to have lunch, in absence of showing that railroad company was given actual or constructive custody of suitcase or that carrier was negligent.—Posner v. New York Cent. R. Co., 277 N.Y.S. 671, 154 Misc. 591.

Baggage cars under control of theatrical company

(1) Where a railroad company, because of the number of tickets purchased by a theatrical company, furnished the latter several cars on which the theatrical company loaded its own baggage and props, and the railroad company had nothing to do with transportation except to haul such cars, the railroad company was liable for negligence only, in respect of baggage in such cars — Globe & Rutgers Fire Ins. Co. v. Winter Garden Co., C.C.A.N.Y., 9 F.2d 227, certiorari denied 46 S.Ct. 352, 270 U.S. 654, 70 L.Ed. 782.

(2) Where the manager of a theatrical company made a contract with a railroad company for the lease of baggage cars for the transportation of properties and effects to be used in a theatrical production and there was an express agreement that the railroad company was not to be considered a common carrier nor liable as such and that the theatrical company should assign a man to safeguard its effects while in the car, such manager was not entitled to recover for the loss of a trunk containing his personal property which was placed in one of the baggage cars by his agent.—McKeon v. New York, N. H. & H. R. Co., 164 N.Y.S. 312, 177 App.Div. 462.

Taxicab

Taxicab company was liable for a loss of merchandise where its driver permitted a stranger to enter its taxicab and ride away with such merchandise, which had been placed in the taxicab by plaintiff's employee who had intended to become a passenger. Taxicab driver, permitting cab to be loaded with merchandise as accommodation to passenger, must exercise due care to prevent theft thereof.—Barr & Shoulberg v. Yellow Taxi Corporation, 265 N.Y.S. 754, 148 Misc. 855, affirmed 273 N.Y.S. 754, 152 Misc. 293

Proximate cause of loss

Where a passenger, who was placed in a dark and crowded car, lost his baggage and the carrier had reason to know that the car would be crowded at that time, the darkness may be deemed the proximate cause of the loss.—Keith v. Atlantic Coast Line R. Co., 99 S.E. 812, 112 S.C. 297

90. N.Y.—Murphy v. Eastern Greyhound Lines of New York, 256 N.Y.S. 114, 235 App.Div. 109.

91. Mich.—Blair v. Pennsylvania Greyhound Lines, 267 N.W. 578, 275 Mich. 636.

Failure to deliver to proper passenger

(1) Where hand baggage of a passenger which has not been under the exclusive control of a carrier by bus is taken under the control of the carrier's driver, so that it may be handed to passengers who have alighted from the bus, the carrier becomes a bailee and is liable as such and not as an insurer, and in such case the carrier is liable only for negligence in failing to make due delivery.—Blair v. Pennsylvania Greyhound Lines, 267 N.W. 578, 275 Mich. 636

(2) While driver of bus, who had told passengers to alight and that he would hand out the baggage, was under no legal duty manually to deliver particular baggage to the passenger to whom it belonged or into the custody of such passenger, if the baggage was handed out and a passenger's failure to claim his baggage or to receive it was due to the negligence of the carrier's servant, the carrier was liable.—Blair v. Pennsylvania Greyhound Lines, supra.

92. N.Y.—Hasbrouck v. New York Cent., etc., R. Co., 95 N.E. 808, 202 N.Y. 363, 35 L.R.A.,N.S., 537, Ann. Cas.1912D 1150, affirming 122 N.Y.S. 123, 137 App.Div. 532, affirming 118 N.Y.S. 735, 64 Misc. 478.

Wyo.—Union Pac. R. Co. v. Grace, 143 P. 353, 22 Wyo. 452, L.R.A. 1915B 608.

10 C.J. p. 1202 note 41.

Conductor assisting passenger

Conductor, when he took possession of passenger's hand bag and carried it out of coach to assist her to alight, acted within scope of authority, and for his negligence company was liable.—Atlantic Coast Line R. Co. v. Barksdale, 124 S.E. 362, 32 Ga.App. 643

93. Ind.—Pinkus v. Pittsburgh, C., C. & St. L. Ry. Co., 114 N.E. 36, 65 Ind.App. 38.

10 C.J. p. 1203 note 42.

Basis of rule is that, under the ordinary contract of carriage, the carrier assumes no obligation by its contract as to articles which form no part of the passenger's ordinary luggage or personal effects.—Pinkus v. Pittsburgh, C., C. & St. L. Ry. Co., 114 N.E. 36, 65 Ind.App. 38

94. N.Y.—Cohen v. New York Cent., etc., R. Co., 105 N.Y.S. 483, 121 App.Div. 5.

Wyo.—Union Pac. R. Co. v. Grace, 143 P. 353, 22 Wyo. 452, L.R.A. 1915B 608.

95. Tenn.—Nashville, C. & St. L. Ry. v. North, 6 Tenn.Civ.App. 20.

sengers neglect or refuse to have their luggage checked and transported in a regular baggage car, it is carried at their risk, baggage which is not checked by the passenger and is received into the coach in which he is riding is carried at his risk, notwithstanding a porter aids the passenger by lifting the baggage into the coach.[96] A statutory provision that a carrier by motor vehicle shall be liable for loss or damage to baggage only when checked with the operator of the vehicle does not preclude a recovery for baggage which has not been checked and is retained by the passenger where the passenger leaves the vehicle without taking his baggage, pursuant to the invitation of the carrier's employee, and the vehicle makes a stop at an intermediate point.[97]

The view has been expressed that if a carrier refuses to take into its custody for transportation as baggage property properly transportable as baggage so that the passenger is compelled to retain custody while on the carrier's train, the passenger may hold the carrier to an insurer's liability in respect of such property.[98]

Baggage on rack or shelf in bus. A carrier by bus is not liable as a common carrier or as insurer for the loss of baggage placed on an open shelf or rack inside the bus above the seats whether the baggage was placed there by the passenger or by an employee or agent of the carrier, even though the baggage is not in plain view of the passenger while seated in the bus, since there is not a delivery to the carrier of complete care, custody, and control of the baggage, which is an essential element of the carrier's liability as common carrier or insurer, and, in such case, the carrier is not liable, if at all, except where there is negligence.[99] On the other hand, the carrier has been regarded as a bailee of hand baggage which is carried in a rack attached to the running board; such carrier is not an insurer, but, as bailee, is under the duty to exercise reasonable care.[1]

Custom or usage of carrier. A usage or custom to allow passengers to carry packages of merchandise in passenger cars, in derogation of the common-law contract of carriage, must be so general, certain, uniform, and notorious, that it can be concluded that the officers and agents of such company possessed knowledge of such usage, and acquiesced therein, in such manner that it became a part of the contract of carriage;[2] if such usage has been so acquiesced in as to amount to a regulation, the carrier can resume its rights under the law only after reasonable notice of its rescission of the regulation.[3]

Articles left in conveyance by passenger. Where the passenger leaves his baggage on his seat in the train, forgetting to take it with him on leaving the train at his destination, and it is afterward lost or stolen, he generally cannot hold the carrier liable for its loss.[4] If, however, he can show that the wrongful conduct of the carrier's employees was the proximate cause of the loss, either by their failing to take care of his baggage after full knowledge of the facts or in any other way, he may hold the

96. Okl.—Ayres v. Missouri-Kansas-Texas R. Co., 28 P.2d 992, 167 Okl. 163

97. S.C.—Payne v. Atlantic Greyhound Bus Lines, 188 S.E. 426, 182 S.C. 58.

Right of passenger to assume exercise of care

Under the circumstances described in the text, the passenger is entitled to assume that the baggage will be cared for and protected.—Payne v. Atlantic Greyhound Bus Lines, 188 S.E. 426, 182 S.C. 58.

98. N.Y.—Borden v. New York Cent. R. Co., 162 N.Y.S. 1099, 98 Misc. 574.

Regulation as to jewelry

(1) On a motion to set aside dismissal of the complaint on the pleadings and the opening of plaintiff passenger's counsel in an action for loss of jewelry which plaintiff had left momentarily on a table in defendant's dining car the existence of a rule, filed, published, and put in force by the carrier, to the effect that jewelry should not be inclosed in baggage to be checked, and that the carrier would not be responsible for such articles in baggage, was a refusal to take jewelry into the custody of the carrier, and, that, since no facilities for safe-keeping were proffered to the passenger who, therefore, was compelled to retain custody of the jewelry, the carrier could be held to an insurer's liability, notwithstanding the passenger might have forwarded the jewelry by registered mail, insured parcel post, express, or bonded messenger.—Borden v. New York Cent. R. Co., 162 N.Y.S. 1099, 98 Misc. 574.

(2) The view was expressed that the passenger was bound by the tariff provisions and their legal consequences, and was entitled to act on the basis of them and their consequences.—Borden v. New York Cent. R. Co., supra.

(3) On appeal subsequently taken from a judgment based on a verdict in favor of plaintiff in the same case, it was stated that the only cause of action was for negligence.—Borden v. New York Cent. R. Co., 168 N.Y.S. 742, 181 App.Div. 306.

99. Iowa.—Jensen v. Interstate Transit Lines, 266 N.W. 9, 221 Iowa 513.

Mich.—Blair v. Pennsylvania Greyhound Lines, 267 N.W. 578, 275 Mich. 636.

Nature of bailment

In such case, it has been held, there is not a bailment in respect of which negligence may be predicated.—Murphy v. Eastern Greyhound Lines of New York, 256 N.Y.S. 114, 235 App.Div. 109.

1. Tex.—Burnett v. Riter, Civ.App., 276 S.W. 347.

2. N.J.—Runyan v. Central R. Co., 44 A. 985, 64 N.J.Law 67, 48 L.R.A. 744.

10 C.J. p 1203 note 45.

3. N.J.—Runyan v. New Jersey Cent. R. Co., 41 A. 367, 61 N.J.Law 537, 68 Am.S.R. 711, 43 L.R.A. 284.

4. Miss.—Illinois Cent. R. Co. v. Handy, 63 Miss. 609, 56 Am.R. 846.

N.Y.—Tower v. Utica, etc., R. Co., 7 Hill 47, 42 Am.D. 36.

10 C.J. p 1203 note 47.

carrier responsible.[5] A package forgotten and left in a car by a passenger is in the custody and potential actual possession of the carrier, and it is the right and duty of the carrier to become, as to it and the owner, a gratuitous bailee, and this involves the right and duty to have possession and to use the care of a gratuitous bailee until the owner should call for the package.[6]

Where a carrier undertakes to provide a place for the safe-keeping of articles that may be inadvertently left by passengers on its cars, and makes it the duty of its employees to take charge of such articles, it will be deemed a part of its business to take and keep charge of such articles until called for by the owner.[7]

§ 870. Passenger Not Accompanying Baggage

While according to some cases a carrier is liable only as a gratuitous bailee if, through the fault of the passenger, the baggage is not transported on the conveyance on which the passenger travels and no extra compensation is paid, there is authority for the view that the fact that the passenger fails to travel on the same conveyance does not relieve the carrier of its liability as a carrier of baggage.

According to some cases, the undertaking of the carrier is to carry the passenger, and with him his reasonable baggage and, if through the passenger's fault the baggage does not go on the same conveyance with him, it must go as freight, and the carrier is entitled to added compensation therefor;[8] and, if no added compensation is paid, the contract is one of bailment for the benefit of the passenger as bailor, and the carrier's liability is that of a gratuitous bailee only.[9] The fact that baggage is carried on a train other than that on which the passenger travels does not, however, under all circumstances, relieve the carrier of liability as insurer in respect of such baggage, or of liability to the same extent as though the baggage were carried on the train on which the passenger travels.[10] Where the failure of the baggage to go on the same train with the passenger is due to the fault of the carrier, where, for any cause within the control and supervision of the carrier, the baggage is carried on another train, where the carrier expressly or impliedly consents that it shall go on a different train, or where baggage is checked through over different lines and the connection is so close at some point that there is not time to transfer the baggage to the train taken by the passenger, the liability of the carrier is the same as in cases where the baggage is carried on the same train with the passenger.[11] According to some cases, the carrier is liable as such for a passenger's baggage, whether the passenger's failure to go on the same train with it is caused by the carrier or the passenger;[12] and it has been held that this rule applies, even though the passenger did not use the ticket on which the baggage was checked.[13] So, there is authority for

5. Mass—Kinsley v. Lake Shore, etc., R. Co., 125 Mass. 54, 28 Am. R. 200.
10 C.J. p 1203 note 48

6. N.Y.—Foulke v. New York Consol. R. Co., 127 N.E. 237, 228 N.Y. 269, 9 A.L.R. 1384, affirming 168 N.Y.S. 72, 180 App.Div. 848

Right superior to that of another passenger

The right of the carrier to the custody and actual possession of a package left by a passenger is superior and paramount to any right of another passenger to take the package.—Foulke v. New York Consol. R. Co., 127 N.E. 237, 228 N.Y. 269, 9 A.L.R. 1384, affirming 168 N.Y.S. 72, 180 App.Div. 848.

7. N.Y.—Morris v. Third Ave. R. Co., 1 Daly 202, 23 How.Pr. 345.

8. Colo.—Denver, etc., R. Co. v. Doyle, 145 P. 688, 58 Colo. 327, L.R.A.1915D 113.
10 C.J. p 1203 note 50.

Where baggage is carried for extra compensation on a train other than that on which the passenger travels, the carrier is liable for loss of, or injury to, such baggage as a carrier of freight.—Perry v. Seaboard Air Line R. Co., 88 S.E. 156, 171 N.C. 158, L.R.A.1916E 478.

9. N.C.—Midgett v. Eastern Carolina Transp. Co., 104 S.E. 32, 180 N.C. 71
10 C.J. p 1204 note 51.

Gross negligence

Where no extra compensation is paid, the carrier is liable, as gratuitous bailee, only for gross negligence, which is the failure to exercise the care of a person of ordinary prudence undertaking to carry the goods of another without compensation.—Perry v. Seaboard Air Line R. Co., 88 S.E. 156, 171 N.C. 158, L.R.A.1916E 478.

10. N.C.—Perry v. Seaboard Air Line R. Co., supra.
Tex.—Texas & P. Ry. Co. v. Graham, Civ.App., 257 S.W. 642, certiorari denied Lancaster v. Graham, 45 S.Ct. 225, 266 U.S. 632, 69 L.Ed. 478, and error dismissed 46 S.Ct. 202, 269 U.S. 541, 70 L.Ed. 402
10 C.J. p 1204 notes 54, 55

11. N.C.—Perry v. Seaboard Air Line R. Co., 88 S.E. 156, 171 N.C. 158, L.R.A.1916E 478.
10 C.J. p 1204 notes 52–54.

12. Tex.—Texas & P. Ry. Co. v. Graham, Civ.App., 257 S.W. 642, 643, certiorari denied Lancaster v. Graham, 45 S.Ct. 225, 266 U.S. 632, 69 L.Ed. 478, and error dismissed 46 S.Ct. 202, 269 U.S. 541, 70 L.Ed. 402, citing **Corpus Juris**—Payne v. Boswell, Civ.App., 241 S.W. 761.
10 C.J. p 1204 note 55.

13. Tex.—Payne v. Boswell, supra.

Ticket not used and destroyed

Where one purchased ticket from defendant railroad company and checked her baggage to large city in order to take one of its through trains to her destination from such city, but traveled to such city over a different railroad, where she purchased a ticket for her destination and exchanged baggage checks, without any intent to defraud or deceive defendant, having destroyed the ticket on which the baggage was first checked, and the baggage was stolen at the depot where it was first checked, the carrier was liable for its loss as an insurer, and not as a mere warehouseman or gratuitous bailee.—Caine v. Cleveland, C., C. & St. L. Ry. Co., 185 N.W. 765, 217 Mich. 231, 23 A.L.R. 1442—Marshall v. Pontiac, etc., R. Co., 85 N.W. 242, 126 Mich. 45, 55 L.R.A. 650.

Intent not to use

It has been held that the carrier

the view that the mere fact that a passenger does not travel immediately to his destination over the same route over which his baggage is checked but, at an intermediate point, takes a side trip to a place in another state not on said route, does not affect the liability of the carrier in respect of such baggage.[14]

In the case of baggage consisting of articles used by a man, his wife, and their child, the view has been taken that the husband and father is sufficiently represented by his wife, as affecting the liability of the carrier, where the wife and child travel on the train on which the baggage is carried, notwithstanding the husband travels on a different train.[15]

A carrier's practice of giving checks in exchange for transfer company checks amounts to an agreement to receive the baggage when it arrives and to check it to its destination seasonably, and contemplates that it may not go by the train the passenger takes; hence the carrier's liability for the baggage so checked is not lessened because it does not go on the same train.[16]

Where the passenger and the carrier specially stipulate that his baggage will be transported only over such lines and between such stations as the passenger will travel on the same date, the contract controls, and if the passenger intentionally fails to travel on the same day with his baggage, the liability of the carrier for the baggage is that of a gratuitous bailee.[17]

§ 871. Conversion

In general, a carrier is liable where there is a conversion of a passenger's baggage by the carrier's employees or by a stranger.

The carrier is liable for the conversion of a passenger's baggage by its servants or agents, or by a stranger, where it results from a want of due care on the carrier's part,[18] and for a misdelivery of the baggage of a passenger the carrier will be liable as for conversion,[19] even though such misdelivery is made by reason of mistake or gross imposition or on a forged order.[20] In regard to articles stolen from the trunk of a passenger by an employee of the carrier, it has been held, however, that, where, under the particular circumstances, the common-law liability as carrier does not exist, and it is not liable on the contract of carriage in respect of such articles, the carrier is not liable as for conversion if it has no knowledge of the fact that such articles are in the trunk.[21]

Notwithstanding there has been a conversion of baggage, the passenger may lose or waive his right to recover more than nominal damages by voluntarily resuming control over the baggage,[22] but, after an action to recover for loss of baggage has been commenced and defendant's answer has been filed, plaintiff is not bound to accept a tender of the baggage.[23]

becomes liable as such for a passenger's baggage even though the passenger does not intend to, and in fact does not, use the ticket on which the baggage was checked.—Alabama Great Southern R. Co. v. Knox, 63 So. 538, 184 Ala. 485, 49 L.R.A.,N.S., 411—10 C.J. p 1204 note 56.

14. Tex.—Texas & P. Ry Co. v. Graham, Civ.App., 257 S.W. 642, certiorari denied Lancaster v. Graham, 45 S.Ct. 225, 266 U.S. 632, 69 L.Ed. 478, and error dismissed 46 S.Ct. 202, 269 U.S. 541, 70 L.Ed. 402.

15. N.Y.—Curtis v. Delaware, etc., R. Co., 74 N.Y. 116, 30 Am.R. 271.

16. N.Y.—Moffat v. Long Island R. Co., 107 N.Y.S. 1113, 123 App.Div. 719.

17. Ga.—Southern R. Co. v. Dinkins, etc., Hardware Co., 77 S.E. 147, 139 Ga. 332, 43 L.R.A.,N.S., 806.
Tenn.—Crout v. Yazoo, etc., R. Co., 176 S.W. 1027, 131 Tenn. 667, L.R.A.1915E 281

18. N.Y.—McCormick v. Pennsylvania Cent. R. Co., 1 N.E. 99, 99 N.Y. 65, 52 Am.R. 6.
Wyo.—Lake Shore, etc., R. Co. v. Warren, 6 P. 724, 3 Wyo. 134.
10 C.J. p 1205 notes 59, 61.

19. Mo.—Boone v. Missouri Pac. R. Co., App., 263 S.W. 495, certiorari granted Missouri Pac. R. Co. v. Boone, 45 S.Ct. 196, 266 U.S. 600, 69 L.Ed. 461, and affirmed 46 S.Ct. 341, 270 U.S. 466, 70 L.Ed. 688.
10 C.J. p 1205 note 60.

Subsequent delivery of trunk minus contents

A carrier's misdelivery or delivery to a wrong person of a trunk and contents, intrusted to it, is a conversion, although trunk is subsequently recovered and delivered, minus the contents, to proper person.—Boone v. Missouri Pac. R. Co., Mo.App., 263 S.W. 495, certiorari granted Missouri Pac. R. Co. v. Boone, 45 S.Ct. 196, 266 U.S. 600, 69 L.Ed. 461, and affirmed 46 S.Ct. 341, 270 U.S. 466, 70 L.Ed. 688.

20. Dak.—Waldron v. Chicago, etc., R. Co., 46 N.W. 456, 1 Dak. 351.
10 C.J. p 1205 note 60

21. Ky.—Illinois Cent. R. Co. v. Fontaine, 289 S.W. 263, 217 Ky. 211, 52 A.L.R. 1064, criticizing Chesapeake, etc., R. Co. v. Hall, 124 S.W. 372, 136 Ky. 379, Ann.Cas.1912A 364.

Reason for rule

The necessary element of dominion over the converted property, in order to render the carrier liable in trover as for conversion, was lacking in view of the fact that the carrier did not have knowledge that the converted property was in the trunk; knowledge of such fact on the part of carrier's servant who stole the property was not imputable to the carrier because the presumption was that such servant would not communicate such fact to the carrier.—Illinois Cent. R. Co. v. Fontaine, 289 S.W. 263, 217 Ky. 211, 52 A.L.R. 1064.

22. N.Y.—McCormick v. Pennsylvania Cent. R. Co., 80 N.Y. 353
10 C.J. p 1205 note 61 [a] (2), p 1230 note 1 [b].

23. Wyo.—Lake Shore, etc., R. Co. v. Warren, 6 P. 724, 3 Wyo. 134.
10 C.J. p 1205 note 59 [b], p 1230 note 1 [a].

§ 872. Delay

Delay in transporting and delivering baggage will ordinarily render the carrier liable for the resultant injury

The carrier is ordinarily liable for delay in transporting and delivering baggage, whether or not the baggage itself is injured[24] Although it has been held that the carrier is not bound to carry the baggage on the same train with the passenger but merely to transport it within a reasonable time,[25] where the baggage is delivered to the carrier in proper season, it is generally its duty to transport it on the same train with the passenger,[26] or on one which permits delivery at the time the passenger reaches his destination,[27] and a failure so to do constitutes negligence, unless there is some agreement or a sufficient excuse therefor,[28] as where the passenger gives some direction, or does something, or omits to do something which authorizes the carrier to send the baggage on some other train.[29]

Under some statutes, a passenger is entitled to recover from the carrier a penalty for delay in transporting baggage[30]

§ 873. Contributory Negligence

The contributory negligence of a passenger may defeat his right to recover for injury to, or loss of, baggage.

A passenger is obliged to exercise reasonable care in respect of his property which he takes with him,[31] and in general where a passenger has been guilty of negligence which contributes to the delay of, or loss of, or injury to, his baggage he cannot recover therefor[32] So, in case of loss to baggage retained by a passenger in his own custody, the carrier may defend on the ground that the proximate cause of the loss was the passenger's own negligence; the rule in this connection is the same as in others, and no liability exists on the part of the carrier, even when some want of care is shown, where the proximate cause of the loss complained of is the passenger's own want of care.[33]

While it has been stated broadly that, where a carrier has obtained exclusive possession of a passenger's baggage and thereby becomes an insurer, contributory negligence is not to be considered,[34] where baggage is checked to the wrong station, the passenger's failure to read a check given to him which would have disclosed the mistake is such contributory negligence as will defeat a recovery for delay in its return to him.[35]

§ 874. Limitation of Liability

In the absence of statutory or constitutional provisions to the contrary, the liability of a carrier as insurer of baggage may be limited by a fair and reasonable agreement between the carrier and the passenger.

The general liability of a carrier for the baggage of a passenger intrusted to its care, as in the transportation of other goods, is that of an insurer, as shown supra § 867, it being liable, at common law, to the full extent of the passenger's loss of, or injury to, his baggage,[36] provided the loss of injury is with respect to articles which properly constitute baggage.[37] However, except in so far as there is a statutory provision to the contrary,[38] this com-

24. Wis.—Alstschuler v Atchison, etc, R. Co, 144 N.W. 294, 155 Wis. 146, 49 L.R.A.N.S. 491.
10 C.J. p 1205 note 63.

25. Tex.—St. Louis Southwestern R. Co v Ray, 35 S.W. 951, 13 Tex. Civ App. 628

26. Colo.—Denver, etc., R. Co v Doyle, 145 P 688, 58 Colo 327, L.R.A.1915D 113.
Minn.—Conheim v. Chicago Great Western R. Co, 116 N.W. 581, 104 Minn. 312, 124 Am.S.R. 623, 17 L.R.A.N.S., 1091, 15 Ann.Cas. 389
10 C.J. p 1205 note 65.

27. S.C.—Sullivan v. Southern R. Co 54 S.E. 586, 74 S.C. 377.
10 C.J. p 1205 note 66.

28. Ind.—Toledo, etc., R. Co. v Tapp 33 N.E. 462, 6 Ind.App 304.
N.Y.—Glasco v. New York Cent. R. Co, 36 Barb 557.

29. Ill.—Wald v. Pittsburg, etc., R. Co, 44 N.E. 888, 162 Ill. 545, 53 Am.S.R. 332, 35 L.R.A. 356.

30. Ark.—St. Louis, etc., R. Co. v. Campbell, 158 S.W. 120, 108 Ark. 432

31. Pa.—Freihofer Baking Co. v. Payne 77 Pa.Super. 570

32. N.Y.—Hasbrouck v. New York Cent., etc., R. Co, 95 N.E. 808, 202 N.Y. 363, 35 L.R.A.,N.S., 537, Ann. Cas.1912D, 1150, affirming 122 N.Y.S. 123, 137 App.Div 532, which affirmed 118 N.Y.S. 735, 64 Misc. 478.
10 C.J. p 1206 note 70.

33. N.Y.—Barden v. New York Cent R. Co., 168 N.Y.S. 742, 181 App. Div. 306.
10 C.J. p 1206 note 71.
Baggage not in actual or constructive custody of carrier
Where a carrier did not have actual or constructive custody of baggage which a passenger had taken into a train, so that the carrier was not chargeable as bailee, it was unnecessary to consider the question as to the contributory negligence of the passenger whose baggage was missing when she returned to the train after leaving the train for luncheon at an intermediate station.—Posner v New York Cent. R. Co, 277 N.Y.S. 671, 154 Misc. 591.

34. N.Y.—Hessler v. Detroit & C. Nav. Co., 170 N.Y.S. 513, 103 Misc. 551.
But the view has been expressed that common carriers are insurers of the safety of the article, subject to certain limitations where there is contributory negligence on the part of the passenger—Barnet v Pullman Co, 281 N.Y.S. 575, 155 Misc. 876

35. La.—Gonthier v. New Orleans, etc., R. Co., 28 La.Ann 67.

36. Vt.—Ranchau v. Rutland R. Co., 43 A. 11, 71 Vt. 142, 76 Am.S.R. 761.

37. Mo.—Hubbard v Mobile, etc., R. Co, 87 S.W. 52, 112 Mo.App 459.
10 C.J. p 1206 note 76.

38. Tex.—Lancaster v. Smith, Civ. App, 244 S.W. 1076, affirmed, Com. App, 262 S.W. 74, error dismissed

mon-law obligation may be limited by a fair and reasonable agreement between the carrier and the passenger against loss or damage not resulting from the negligence of the carrier or its employees,[39] provided, according to some cases, an independent consideration, such as a reduced rate of fare, is given for such limitation;[40] and in some jurisdictions a contract for limitation of liability is authorized by statute.[41] Subject to limitations and qualifications as to assent of the passenger and as to the effect of a public notice, recognized in some cases and considered infra § 877, a carrier may, by a reasonable regulation brought to the notice of the passenger, requiring disclosure of exceptional value or compliance with other reasonable conditions, limit its liability,[42] but in general the passenger must have notice of the regulation[43] and an opportunity to comply with it.[44]

Limitation of liability of carriers for an interstate passenger's baggage is covered by the Interstate Commerce Act and amendments thereto,[45] and limitation of liability, to some extent at least, by published tariff, is permissible under the Carmack Amendment, 49 U.S.C.A. § 20 (11),[46] and this rule was not altered by the Cummins Amendment, as amended 49 U.S.C.A. § 20 (11).[47] A carrier should not use doubtful language where it seeks to limit its common-law liability in respect of the interstate transportation of baggage.[48]

Regulations or stipulations relied on as limiting the carrier's liability must be reasonable,[49] and whether or not a particular regulation is reasonable is generally a question of fact which must be determined from the circumstances of each case, as shown infra § 899. Such regulation also must not be inconsistent with any statute or with the duty of the carrier to the public,[50] and a carrier may not by rule or regulation relieve itself of liability imposed by statute where the statute prohibits such exemption from liability in this regard.[51]

Limitation as to train. A stipulation in a ticket sold at a reduced rate that the passenger's baggage shall be carried only over such lines and between such stations as the passenger shall travel on the day the baggage is presented for checking is valid, and releases the carrier from liability, as a carrier, for the loss of baggage where the passenger does not intend to, and does not, travel in accordance with the stipulation,[52] and, it seems, under some circumstances, releases the carrier from liability, as a carrier, for the loss of baggage carried on a train on which the passenger does not intend to,

46 S.Ct. 202, 269 U.S. 541, 70 L.Ed. 785
10 C.J. p 1206 note 77.

Statute not applicable
A statutory provision that no railroad company shall by any contract, receipt, rule, or regulation exempt itself from liability of a common carrier or carrier of passengers did not apply to a rule that a company's baggagemen shall not receive jewelers sample cases for transportation as ordinary baggage unless the owner has secured a permit from the company.—Weber Co. v. Chicago, etc., R. Co., 84 N.W. 1042, 113 Iowa 188.

39. Mass.—Perkins v. New York, N. N. & H. R. Co., 122 N.E. 306, 232 Mass. 336
10 C.J. p 1206 note 78.
Limiting liability to own line see infra § 888.

40. Ala.—Louisville & N. R. Co. v. Hestle, 75 So. 885, 200 Ala. 137.
10 C.J. p 1207 note 79.

41. Mont.—Rose v. Northern Pac. R. Co., 88 P. 767, 35 Mont. 70, 119 Am. St. R. 836.
10 C.J. p 1207 note 80.

42. Tenn.—Crout v. Yazoo, etc., R. Co., 176 S.W. 1027, 131 Tenn. 667, L.R.A. 1915E 281
10 C.J. p 1207 note 81.

43. N.Y.—Trimble v. New York Cent., etc., R. Co., 56 N.E. 532, 162 N.Y. 84, 48 L.R.A. 115, affirming 57 N.Y.S. 437, 39 App.Div. 403
10 C.J. p 1207 note 81 [c] (1).

44. N.Y.—Freeman v. Newton, 3 E. D. Smith 246.
10 C.J. p 1207 note 81 [b].

45. U.S.—Boston, etc., R. Co. v. Hooker, 34 S.Ct. 526, 233 U.S. 97, 58 L.Ed. 868, L.R.A. 1915B 450, Ann. Cas.1915D 593, reversing 95 N.E. 945, 209 Mass. 598, Ann.Cas.1912B 669.
Mo.—Treadway v. Terminal R. R. Ass'n of St. Louis, App., 84 S.W.2d 143.
10 C.J. p 1207 note 82.

46. U.S.—Galveston, H. & S. A. Ry. Co. v. Woodbury, 41 S.Ct. 114, 254 U.S. 357, 65 L.Ed. 301, reversing Woodbury v. Galveston, H. & S. A. Ry. Co., Tex.Civ.App., 209 S.W. 432.

Terminal association as agent of railroad company
Where contract of carriage for passenger and baggage was interstate and included holding of baggage at terminal for twenty-four hours and loss occurred prior to expiration of such period, railroad company and terminal company, as agent of railroad company, were entitled to benefit of contract of carriage and such baggage tariffs as were published by railroad with interstate commerce commission as respected association's liability for loss.—Treadway v. Terminal R. R. Ass'n of St. Louis, Mo.App., 84 S.W.2d 143.

47. U.S.—Galveston, H. & S. A. Ry. Co. v. Woodbury, 41 S.Ct. 114, 254 U.S. 357, 65 L.Ed. 301, reversing Woodbury v. Galveston & S. A. Ry. Co., Tex.Civ.App., 209 S.W. 432

48. Ky.—Illinois Cent. R. Co. v. Fontaine, 289 S.W. 263, 217 Ky. 211, 52 A.L.R. 1064.

49. Ala.—Louisville & N. R. Co. v. Hestle, 75 So. 885, 200 Ala. 137.
10 C.J. p 1207 note 83.

Baggage held at owner's risk
In citing **Corpus Juris**, the view was expressed that an unreasonable notice, regulation, or stipulation that baggage is held at the owner's risk will not release the carrier from liability.—Maxwell Operating Co. v. Harper, 200 S.W. 515, 517, 138 Tenn. 640.—10 C.J. p 1207 note 83 [a]

50. Pa.—Jacobs v. New Jersey Cent. R. Co., 19 Pa.Super. 13, affirmed 57 A. 982, 208 Pa. 535.

51. Ohio.—Erie R. Co. v. Steinberg, 113 N.E. 814, 94 Ohio St. 189, L.R.A.1917B 787, Ann.Cas.1917E 661

52. Ga.—Southern Ry. Co. v. Dinkins & Davidson Hardware Co., 77 S.E. 147, 139 Ga. 332, 43 L.R.A.,N.S., 806.
Tenn.—Crout v. Yazoo etc., R. Co., 176 S.W. 1027, 113 Tenn. 667, L.R.A.1915E 281.
10 C.J. p 1206 note 78 [c].

and, does not, travel, unless the stipulation is waived;[53] and such a stipulation is not invalidated by a custom of passengers not to travel with their baggage when checked, unless the carrier has knowledge of such custom, but it does not release the carrier from liability for baggage carried on a different train by accident, or for baggage carried on a regular baggage train, or where the carrier chooses not to forward the baggage on the passenger's train.[54]

Transportation of dogs. A passenger is not in general bound by a rule or regulation as to the carriage of dogs of which he has no knowledge.[55]

§ 875. As to Amount or Value of Baggage

Subject to certain restrictions, a carrier may, by contract, limit its liability to a specified amount or on the basis of an agreed value of the baggage.

While, in the absence of legislative enactment, the law does not prescribe any definite limit to the amount or value of baggage beyond which a carrier is not liable,[56] a carrier is usually required to carry as baggage for a particular passenger, and to assume liability as insurer in respect of, such articles only as, in quantity and value, do not exceed such as are ordinarily or usually carried by passengers of like station who proceed on like journeys,[57] and, subject to certain restrictions as to the nature of the liability recognized in some cases and considered infra § 876, a carrier may specially contract that it will be liable for a prescribed amount, and no more, provided such limitation is not unreasonable,[58] or may by contract limit its liability to a value agreed on for the purpose of fixing the rate for which the baggage is to be carried.[59] So reasonable regulations or notices, limiting the carrier's liability for baggage to a certain amount, unless its value is disclosed and an additional payment made for the excess over the amount named, have generally been regarded as valid when brought to the knowledge of the passenger,[60] or when passenger may be presumed to have knowledge,[61] but as a general rule the assent of the passenger is necessary in order to render a regulation or notice binding, as shown infra § 877. A valid regulation of a state regulatory body, adopted pursuant to statutory authorization, which fixes liability based on value will be given effect in a case in which such regulation is properly applicable.[62]

According to some cases, a limitation of liability to a certain amount or one which is based on the valuation of the property is not available to the carrier where there is a conversion of the baggage by the carrier,[63] or where the loss is caused by the carrier's negligence, as shown infra § 876.

53. Tenn.—Crout v. Yazoo, etc., R. Co., supra.
10 C.J. p 1207 note 87.

Acts or matters not constituting waiver

The custom of other agents of the carrier in receiving and checking baggage, contrary to the provisions of the contract here under consideration, did not constitute a waiver in the absence of a showing that such custom was expressly or impliedly known to the governing officials of the carrier.—Southern Ry. Co. v. Dinkins & Davidson Hardware Co., 77 S.E. 147, 139 Ga. 332, 43 L.R.A.,N.S., 806.

54. Tenn.—Crout v. Yazoo, etc., R. Co., 176 S.W. 1027, 131 Tenn. 667, L.R.A.1915E 281.

55. Ala.—Kansas City, etc., R. Co. v. Higdon, 10 So. 282, 94 Ala. 286, 33 Am.S.R. 119, 14 L.R.A. 515.
10 C.J. p 1208 note 93.

Special contract

The better rule is that a carrier which does not assume to act as such in the carriage of dogs on passenger trains, but which, on the request of a passenger, consents to carry a dog on a particular occasion, cannot be held liable as a common carrier for the subsequent loss of the dog while under its charge, although the carrier's agent may have been paid something for the carriage of the dog. The action, if any lies, is on the private, special contract, and not on any undertaking imposed by the common law on carriers.—Honeyman v. Oregon, etc., R. Co., 10 P. 628, 13 Or. 352, 57 Am.R. 20—10 C.J. p 1207 note 92 [a].

56. Tex.—Galveston, etc., R. Co. v. Fales, 77 S.W. 234, 33 Tex.Civ.App. 457.

57. U.S.—New York Cent., etc., R. Co. v. Fraloff, N.Y., 100 U.S. 24, 25 L.Ed. 531.
10 C.J. p 1208 note 95.

58. Mass.—Secoulsky v. Oceanic Steam Nav. Co., 112 N.E. 151, 223 Mass. 465.
Neb.—Sutton v. Payne, 196 N.W. 710, 111 Neb. 455.
10 C.J. p 1208 note 96.
Recovery of interest where liability limited see infra § 903.

59. Mass.—Perkins v. New York, N.H. & H. R. Co., 122 N.E. 306, 232 Mass. 336.
N.Y.—Minturn v. New York Cent. R. Co., 220 N.Y.S. 789, 220 App.Div. 222
Ohio.—Cunard Steamship Co. v. Thompson, 16 Ohio App. 506.
10 C.J. p 1208 note 96.

60. N.Y.—Kopetzky v. Cunard S. S. Co., 227 N.Y.S. 539, 131 Misc. 599.
10 C.J. p 1209 note 98.

61. N.Y.—Kopetzky v. Cunard S. S. Co., supra.

62. Ga.—Myers v. Atlantic Greyhound Lines, 184 S.E. 414, 52 Ga.App. 698.

63. Nev.—Zetler v. Tonopah, etc., R. Co., 143 P. 119, 37 Nev. 486, 129 P. 299, 35 Nev. 381, L.R.A.1916A 1270.
N.D.—Goldstein v. Northern Pac. Ry. Co., 164 N.W. 143, 37 N.D. 602, L.R.A.1918A 612.

Intra-state and interstate shipments compared

In respect of intra-state transportation, a carrier converting an article intrusted to it by delivery to wrong person thereby in effect abandons its contract with the shipper and cannot thereafter rely upon the provisions of such contract to limit its liability; but under the federal law misdelivery is not deemed a conversion depriving a carrier of the benefit of a limitation of liability.—Missouri Pac. R. Co. v. Boone, 46 S.Ct. 341, 270 U.S. 466, 70 L.Ed. 688, affirming Boone v. Missouri Pac. R. Co., Mo., 263 S.W. 495, certiorari granted Missouri Pac. R. Co. v. Boone, 45 S.Ct. 196, 266 U.S. 600, 69 L.Ed. 461.

Failure of a passenger to declare excess value and to pay excess charges at the time the baggage was checked does not permit the carrier to claim the benefit of a limitation as to the amount for which it is liable where the carrier's employee declined the passenger's offer to declare the excess value at the time of checking and the passenger was, and remains, willing to pay the excess charges and tenders payment in his pleading.[64] A rule or regulation that a railroad carrier shall not be liable in excess of a specified amount unless a greater value is declared when the baggage is received by the carrier or its agents does not apply so as to limit the liability of a terminal carrier to which the owner had delivered certain baggage to be held until called for, where, when the owner or his agent applies for such baggage in order to have it transported by the railroad carrier, the baggage has already been lost.[65]

A limitation of the amount of baggage which a passenger is entitled to have carried does not in general restrict or affect his common-law right to carry personal baggage with him,[66] but merely limits the accommodation which the passenger may have with respect to baggage committed to the custody of the carrier.[67]

Regulations promulgated by the director general of railroads which provided for limitation of liability based on the value of the baggage, during the federal war-time control of railroads, were upheld as valid and binding, even in respect of baggage transported between points in the same state.[68]

Statutory provisions which authorize a carrier to limit liability on the basis of value or recognize the carrier's right in this regard are given effect in accordance with their terms duly construed.[69] While the view has been taken that a statute which in general terms declares that the carrier shall be liable in respect of property carried as baggage up to the full value and regardless of its character, but which provides that the value in excess of a specified amount shall be stated and that the carrier may make a reasonable charge for the assumption of such liability in excess of said amount, does not effect a limitation of liability to such amount where the value is not stated,[70] a carrier may, by filing a schedule of rates and charges, containing a limitation in accordance with such statutory provision, with a public regulatory body, pursuant to the provisions of another statute, effect a limitation of liability.[71] In order successfully to claim the benefit of some statutes permitting limitation, the carrier must, by publication of schedules or otherwise, bring itself within the provisions of the statute.[72]

Statutory restriction or prohibition. An attempted limitation based on value is not available where it is in conflict with a governing statute.[73] In general a state statute that common carriers shall not limit or restrict their liability as it exists at common law, prevents a limitation based on the value of baggage transported between points within the state; a state statute which prohibits or prevents, either in all cases[74] or under the particular circumstances involved,[75] the giving effect to such a limitation applies and renders ineffective such a limitation in respect of the intra-state transportation of baggage over a railroad line after

64. Tex.—Payne v. Boswell, Civ. App., 241 S.W. 761.

65. Ala.—Birmingham Terminal Co. v. Thomas, 92 So. 803, 207 Ala. 363.

66. N.Y.—Hasbrouck v. New York Cent., etc., R. Co., 95 N.E. 803, 202 N.Y. 363, 35 L.R.A.,N.S., 537, Ann. Cas 1912D 1150, affirming 122 N.Y.S 123, 137 App.Div. 532, which affirmed 118 N.Y.S. 735, 64 Misc. 478
10 C.J. p 1209 note 5.

67. N.J.—Runyan v. New Jersey Cent. R. Co., 41 A. 367, 61 N.J. Law 537, 68 Am.S.R. 711, 43 L.R.A. 284.

68. N.C.—Powell v. Hines, 104 S.E. 533, 180 N.C. 665.
Tex.—McConnell v. Payne, Com.App., 262 S.W. 72, affirming Payne v. McConnell, Civ.App., 234 S.W. 942—Payne, Agent v. West, Civ.App., 251 S.W. 565.

Regulation not unreasonable
A regulation of the director general of railroads under federal control act, requiring value of baggage to be declared, and an additional sum paid where the baggage was of greater value than one hundred dollars, was not unreasonable.—Hines v. Burnett, 107 S.E. 657, 130 Va. 297.

69. N.Y.—Levett v. Draper, 185 N.Y.S. 891, 194 App.Div. 632.
10 C.J. p 1208 note 97.

Horses not "baggage" within meaning of statute
Shipment of horses in baggage car attached to passenger train was not "baggage" shipment within Rev.St. § 3673-1 permitting carrier to limit liability thereon in accordance with declared or released value, since term as used in statute is confined to articles of personal convenience usually carried by passengers for their personal use.—Wall-A-Hee v. Northern Pac. Ry. Co., 41 P.2d 786, 180 Wash. 656.

70. N.Y.—Robinson v. New York Cent., etc., R. Co., 129 N.Y.S. 1030, 145 App.Div. 391, affirmed 97 N.E. 1115, 203 N.Y. 627—Meister v. Woolverton, 125 N.Y.S. 439, 140 App.Div. 936.

71. N.Y.—Levett v. Draper, 185 N.Y.S. 891, 194 App.Div. 632.

72. Mo.—Bowles v. Payne, App., 251 S.W. 101.

73. Ohio—Erie R. Co. v. Steinberg, 113 N.E. 814, 94 Ohio St. 189, L.R.A.1917B 787, Ann.Cas.1917E 661.

74. Tex.—Lancaster v. Smith, Civ. App., 244 S.W. 1076, affirmed, Com. App., 262 S.W. 74, error dismissed 46 S.Ct. 202, 269 U.S. 541, 70 L.Ed. 785.

75. U.S.—Missouri Pac. R. Co. v. Boone, 46 S.Ct. 341, 270 U.S. 466, 70 L.Ed. 688, affirming Boone v. Missouri Pac. R. Co., Mo., 263 S.W. 495, certiorari granted Missouri Pac. R. Co. v. Boone, 45 S.Ct. 196, 266 U.S. 600, 69 L.Ed. 461.

the expiration of federal war-time control of such line, notwithstanding the operation of such statute was suspended during the period of such control, and it is not necessary that such statute should be reënacted after the expiration of such control in order to give it operative effect. During the period of federal war-time control, however, a regulation promulgated by the director general of railroads which provided for such a limitation was valid and binding in respect of intra-state transportation notwithstanding a state statute prohibited such a limitation.[76]

Limitations as to interstate transportation. Under the Interstate Commerce Act as amended by the Carmack Amendment and subsequent amendments, 49 U.S.C.A. § 20 (11), a carrier subject to the provisions of such statutes may, by due compliance with the applicable provisions in respect of filing of tariffs with the interstate commerce commission, limit its liability in respect of baggage transported in interstate commerce, on the basis of the value of the baggage,[77] and there is no distinction in this regard as to limitation of liability for loss of, or damage to, baggage in custody of carriers under contracts for transportation and such limitation in respect of baggage after transportation has actually been commenced.[78] An interstate passenger who consents to the lower of two alternative rates for the transportation of checked baggage, which are based on different values, is, in the event of a loss, estopped to recover more than the amount of the valuation on which the lower rate is based.[79]

A limitation of liability imposed by a tariff under regulations of the interstate commerce commission which in terms refers to baggage which is delivered to the carrier and checked does not apply to hand baggage taken into a coach by the passenger and generally retained in his possession.[80] A limitation of liability to a certain amount contained in an interstate tariff does not apply where the passenger, after completing a journey under a ticket covering interstate transportation, takes an intra-state journey, purchases a ticket therefor, rechecks his baggage on such ticket, without obtaining physical delivery, and the loss occurs after completion of interstate transportation.[81]

76. Tex.—McConnell v. Payne, Com. App., 262 S.W. 72, affirming, Civ. App. 234 S.W. 942—San Antonio U. & G. Ry Co. v. Nast, Civ.App., 240 S.W. 596, reversed on other grounds Nast v. San Antonio U. & G. Ry. Co., Com.App., 261 S.W. 1011.

77. Ark.—Bush v. Beauchamp, 201 S.W. 828, 132 Ark. 582.
Ky.—Illinois Cent. R. Co. v. Fontaine, 289 S.W. 263, 217 Ky. 211, 52 A.L.R. 1064.
Mo.—Shannon v. Hines, 226 S.W. 283, 205 Mo.App. 626.
Neb.—Robidoux v. Chicago & N. W. R. Co., 204 N.W. 870, 113 Neb. 682, 41 A.L.R. 446.
N.Y.—Lackaye v. Pennsylvania R. Co., 159 N.Y.S. 191, 95 Misc. 257
S.C.—Harris v. Southern R. Co., 85 S.E. 158, 100 S.C. 469.
Tex.—Payne v. Norman, Civ.App., 249 S.W. 832.
10 C.J. p. 1213 notes 30, 31, p. 1208 note 97 [a].

Amendment to Cummins amendment

(1) The Cummins amendment, Act of March 4, 1915, as amended by Act of Aug. 9, 1916, 49 U.S.C.A. § 20(11) did not alter the rule that, under the Carmack amendment, carriers may limit liability on the basis of value in respect of the baggage of passengers carried in interstate commerce.—Galveston, H. & S. A. Ry. Co. v. Woodbury, 41 S.Ct. 114, 254 U.S. 357, 65 L.Ed. 301, reversing Woodbury v. Galveston, H. & S. A. Ry. Co., Tex.Civ.App., 209 S.W. 432.

(2) Such Act of Aug. 9, 1916, expressly exempted baggage from the provisions of the Cummins amendment, so that railroad company's limitation of liability to a specified amount contained in a tariff filed with the interstate commerce commission and duly approved by the federal director general of railroads, was in effect at the time of loss, and restricted the passenger's recovery to such amount.—Culbreth v. Martin, 103 S.E. 374, 179 N.C. 678

Property carried for United States government

A duly published tariff authorized by a federal statute, containing a provision for the limitation of the liability of the carrier to a specified amount for the military kit of an enlisted man if a greater value is not declared applies where the United States government seeks to recover from the carrier for the loss of the kit of an enlisted man, which was carried as baggage in connection with his transportation pursuant to a government request.—Atlantic Coast Line R. Co. v. U. S., 62 Ct.Cl. 449.

Terminal association, as agent of railroad company, was entitled to benefit of provision for limitation of liability in railroad company's tariff filed with interstate commerce commission where contract of railroad company for interstate transportation of baggage provided for holding of baggage for application of passenger for twenty-four hours after arrival of baggage and the loss occurred in the hands of such association within such twenty-four hour period.—Treadway v. Terminal R. R. Ass'n of St. Louis, Mo.App., 84 S.W.2d 143.

78. Tex.—Jester v. Lancaster, Civ. App., 266 S.W. 1103.

Construction of proviso in amendment of Aug. 9, 1916

The words "carried on passenger trains" used in the proviso inserted by the amendment of Aug. 9, 1916, 39 U.S.St. at L. p. 441 c. 301, was intended to apply generally to carriers using such means of transporting passengers and their baggage.—Jester v. Lancaster, Tex.Civ.App., 266 S.W. 1103

Injury in baggage room or shed

Deposit by transfer company and receipt by railroad company of trunks in good faith for immediate transportation and its due embarkation in transit to another state, after being checked on passenger's ticket, constituted act of "interstate commerce," and recovery for damage to baggage from rain in railroad company's baggage room or shed before shipment was limited by tariff on file with interstate commerce commission.—Gus Mayer Co. v. Louisville & N. R. Co., 153 So. 249, 228 Ala. 290.

79. Neb.—Robidoux v. Chicago & N. W. R. Co., 204 N.W. 870, 113 Neb. 682, 41 A.L.R. 446.

80. Ga.—Atlantic Coast Line R. Co. v. Barksdale, 124 S.E. 362, 32 Ga.App. 643

81. S.C.—Herndon v. Southern Ry. Co., 111 S.E. 13, 118 S.C. 466.

In respect of interstate carriers over whose business congress has not exercised its power of regulation, a regulation of a state regulatory body, duly adopted pursuant to statute, fixing a limitation as to the liability of such a carrier based on the value of the baggage has been given effect.[82]

Waiver. The requirement of a statute that the value of baggage in excess of a specified amount shall be stated in order to enable the carrier to charge for the assumption of additional liability, being for the benefit of the carrier, may be waived by it, and the liability of the carrier is not limited to such specified amount where such requirement is waived; according to some cases waiver may be effected in such case by failure of the carrier to inquire as to value and its direction to its agents in its published tariffs not to make such inquiry,[83] or by failure to inquire as to value and to make additional charges,[84] but it has been held that, where the carrier has duly filed a schedule of rates and charges containing a limitation in accordance with the above statutory provision, with a public regulatory body, pursuant to the provisions of another statute, a waiver is not effected by a failure of a local agent to make inquiry as to value.[85] A passenger may not successfully claim that a limitation has been waived where it does not appear that the agent or employee with whom the passenger dealt had authority to waive such limitation.[86]

Stipulation for limitation as basis of right to recover. A passenger may not successfully rely on a stipulation in a block ticket by virtue of which he travels, limiting liability of the carrier for baggage to a specified amount unless a greater value is declared, to recover for loss of his personal property to the extent of the amount specified in the stipulation where the passenger does not deliver his property to the carrier for transportation as personal baggage but attempts to have it carried under a different and distinct contract.[87]

§ 876. As to Character of Liability

While a carrier may, by employing the proper method, limit its liability as insurer, it may not in general relieve itself of all liability caused by its negligence or wrongdoing or that of its employees.

The general rule is that a carrier may, by special contract or by a notice assented to by the passenger, limit its liability as insurer,[88] but that it cannot stipulate for exemption from all liability for losses caused by its own negligence or wrongdoing, or that of its servants or agents,[89] and, subject to certain qualifications or limitations hereinafter discussed, cannot, by stipulation, or provision in a tariff, limit or curtail its liability for loss or injury caused by such negligence.[90] Statutory provisions declaring invalid agreements for exemption or exoneration of carriers for loss or injury occasioned by negligence or faults of the carrier or its servants are given effect in accordance with their terms duly construed.[91] Some statutes placing a limit on the amount for which a carrier will be liable or authorizing a carrier to make such limitation do not apply to liability based on negligence.[92]

A carrier may not, as a general rule, impose

82. Ga.—Myers v. Atlantic Greyhound Lines, 184 S.E. 414, 52 Ga. App. 698.

Carrier by bus

The rule of the Georgia public service commission, adopted pursuant to Code 1933 § 68-617, as to limitation in respect of value, was given effect in the case of the baggage of a passenger by bus from a point in another state to a point in Georgia, who had purchased his transportation in such other state, where the loss of baggage occurred before congress had enacted any statute covering transportation by motor vehicle.—Myers v. Atlantic Greyhound Lines, 184 S.E. 414, 52 Ga.App. 698.

83. N.Y.—Robinson v. New York Cent., etc., R. Co., 129 N.Y.S. 1030, 145 App.Div. 391, affirmed 97 N.E. 1115, 203 N.Y. 627.
10 C.J. p 1209 note 3.

84. N.Y.—Meister v. Woolverton, 125 N.Y.S. 439, 140 App.Div. 926, affirming 121 N.Y.S. 606, 67 Misc. 167.

85. N.Y.—Lewett v. Draper, 185 N.Y.S. 891, 194 App.Div. 632.
But the view has been expressed that, where no inquiry is made by the carrier's agent as to the value of the contents of a trunk at its delivery for transportation, the limitation of damage contained in the published rates does not limit the damages caused by delay in delivery.—Bridge v. New York Cent., etc., R. Co., 150 N.Y.S. 146, 88 Misc. 35.

86. U.S.—Bachman v. Clyde S.S. Co., N.Y., 152 F. 403, 81 C.C.A. 329.
10 C.J. p 1209 note 4 [a] (1).

87. N.Y.—McKeon v. New York, N.H. & H. R. Co., 164 N.Y.S. 312, 177 App.Div. 462.

88. U.S.—Saunders v. Southern R. Co., Tenn., 128 F. 15, 62 C.C.A. 523.
10 C.J. p 1209 note 7.

89. Ala.—Mobile, etc., R. Co. v. Hopkins, 41 Ala. 486, 64 Am.D. 607
N.C.—Perkins v. New York, N.H. & H. R. Co., 122 N.E. 306, 232 Mass. 336.
10 C.J. p 1209 note 7.

A terminal company cannot by contract relieve itself of its common-law liability for its own negligence in respect of baggage.—Birmingham Terminal Co. v. Thomas, 92 So. 803, 207 Ala. 363.

90. U.S.—Franklin v. Southern Pac. Co., 265 P. 936, 203 Cal. 680, 59 A.L.R. 118, certiorari denied Southern Pac. Co. v. Franklin, 49 S.Ct. 24, 273 U.S. 621, 73 L.Ed. 542.
N.C.—Knight v. Carolina Coach Co., 159 S.E. 311, 201 N.C. 261.
10 C.J. p 1209 note 7.

91. Va.—Chesapeake, etc., R. Co. v. Beasley, 52 S.E. 566, 104 Va. 788, 3 L.R.A.,N.S., 183.
10 C.J. p 1210 note 8.

92. Mo.—Baack, etc., Millinery Co. v. Chicago, etc., R. Co., 164 S.W. 175, 177 Mo.App. 282.
N.Y.—Martin v. New Jersey Cent. R.

a limitation, without qualification, against liability beyond a specified amount in respect of loss of baggage caused by the negligence of itself or of its servants; accordingly a carrier is usually liable for the full value of the baggage in such case without regard to such limitation.[93]

There is authority for the view that a like rule applies, in respect of liability based on negligence, where there is a provision for limitation to a specified amount unless a greater value is declared and excess charges are paid.[94] It has been held or recognized, however, that a valid stipulation or regulation by which the charges are graduated according to the value of the baggage as fixed by the passenger and liability is in effect limited accordingly may be given effect even where the loss is caused by the negligence of the carrier,[95] at least where the transportation involved is interstate.[96] This rule, or qualification of the general rule against limitation of liability for negligence, is, according to some cases, based on the doctrine of estoppel,[97] that is, the passenger is estopped to claim a greater amount than the value which he has placed on his baggage.[98] A stipulation which limits the liability of a carrier to a specified amount unless a greater valuation is declared and an extra charge is paid is binding even in respect of a loss due to negligence where such stipulation is made in accordance with the requirement of a valid regulation by a public regulatory body, adopted by such body pursuant to authority conferred by statute.[99]

In respect of hand baggage checked by a traveler in a parcel room of a railroad company, a provision in the contract that the company shall not be responsible in excess of a specified amount has been held to be available to the carrier even in the case of negligence, on the theory that a limitation according to an agreed value does not contravene the principle that one cannot contract for exemption or limitation of liability for his own negligence.[1]

In New York, according to some cases, a carrier may by express stipulation limit or exempt itself from liability for the loss of goods occurring even from the negligence of its agents or servants,[2]

Co., 106 N.Y.S. 226, 121 App.Div. 552.
10 C.J. p 1210 note 9 [a].

93. Cal.—Franklin v. Southern Pac. Co., 265 P. 936, 203 Cal. 680, 59 A.L.R. 118, certiorari denied Southern Pac. Co. v. Franklin, 49 S.Ct. 24, 278 U.S. 621, 73 L.Ed. 542.
10 C.J. p 1210 note 9.

Hand baggage carried by porter

Notwithstanding a railroad company's tariff provided that, where red cap porter service is provided, hand baggage will be handled without charge by red cap porters to and from trains, and that liability on hand baggage so handled will be limited to a specified amount, it was held that, where hand baggage was lost through the negligence of a red cap porter to whom possession was delivered by the passenger with instructions to deliver such baggage on the train, the foregoing limitation did not prevent a recovery for full value. This rule was applied notwithstanding the passenger's journey was an interstate journey and the carrier had filed the above tariff provision with the interstate commerce commission.—Franklin v. Southern Pac. Co., 265 P. 936, 203 Cal. 680, 59 A.L.R. 118, certiorari denied Southern Pac. Co. v. Franklin, 49 S.Ct. 24, 278 U.S. 621, 73 L.Ed. 542.

Terminal company

In an action against a terminal company for failure to deliver baggage, in which the terminal company entered a plea to the effect that, under a provision of the contract involved, it would be liable in a specified sum only, it was held that defendant could not by contract relieve itself of its common-law liability for its own negligence.—Birmingham Terminal Co. v. Thomas, 92 So. 803, 207 Ala. 363.

94. N.C.—Cooper v. Norfolk Southern R. Co., 77 S.E. 339, 161 N.C. 400.
10 C.J. p 1210 note 9.

Intra-state transportation

N.C.—Cooper v. Norfolk Southern R. Co., 77 S.E. 339, 161 N.C. 400.

95. Cal.—Franklin v. Southern Pac. Co., 265 P. 936, 203 Cal. 680, 59 A.L.R. 118, certiorari denied Southern Pac. Co. v. Franklin, 49 S.Ct. 24, 278 U.S. 621, 73 L.Ed. 542.
Ohio.—Cunard Steamship Co. v. Thompson, 16 Ohio App. 506.

96. U.S.—Boston, etc., R. Co. v. Hooker, 34 S.Ct. 526, 233 U.S. 97, 58 L.Ed. 868, L.R.A.1915B 450, Ann.Cas.1915D 593, reversing 95 N.E. 945, 209 Mass. 598, Ann.Cas.1912B 669.
Mass.—Perkins v. New York, N. H. & H. R. Co., 122 N.E. 306, 232 Mass. 336.
Mo.—Wright v. Southern Pac. Co., 167 S.W. 1137, 181 Mo.App. 1137.
Neb.—Robidoux v. Chicago & N. W. R. Co., 204 N.W. 870, 113 Neb. 682, 41 A.L.R. 446.

But in a case which arose after the enactment of the Carmack Amendment, 49 U.S.C.A. § 20 (11), the view was expressed that there is nothing in the Interstate Commerce Act which authorizes a railroad company to limit its liability against its own negligence.—Wells v. Great Northern R. Co., 114 P. 93, 116 P. 1070, 34 L.R.A.,N.S., 818, 825.

Criminal act of passenger

Where plaintiff passenger checked a trunk for interstate transportation under an agreed valuation of one hundred dollars, and the trunk was seized by a government official by reason of its containing whisky in violation of a federal statute, and the carrier was negligent in permitting the government official to dispose of the trunk and contents other than the whisky, plaintiff could recover no more than one hundred dollars, notwithstanding his wrong in placing the whisky in the trunk may have changed the degree of care or other incidents of carrier's liability.—Shannon v. Hines, 226 S.W. 283, 205 Mo.App. 629.

97. Cal.—Franklin v. Southern Pac. Co., 265 P. 936, 203 Cal. 680, 59 A.L.R. 118, certiorari denied Southern Pac. Co., 49 S.Ct. 24, 278 U.S. 621, 73 L.Ed. 542.

98. Neb.—Robidoux v. Chicago & N. W. R. Co., 204 N.W. 870, 113 Neb. 682, 41 A.L.R. 446.

99. N.C.—Knight v. Carolina Coach Co., 159 S.E. 311, 201 N.C. 261.

1. Ark.—Missouri Pac. R. Co. v. Fuqua, 233 S.W. 926, 150 Ark. 145.

2. N.Y.—Prentice v. Decker, 49 Barb. 21.—Weinborg v. National SS. Co., 8 N.Y.S. 195, 57 N.Y.Super. 586.

and a limitation by contract to a value agreed on for the purpose of fixing the rate is effective even where the loss is due to the carrier's negligence.[3] A contract is not in general to be deemed to include a carrier's own negligence by any general words, nor unless it in clear and explicit form embraces such negligence,[4] and a clause simply releasing a carrier from liability for loss of goods will not include a case of its own negligence unless such exemption is expressly and plainly stated; but a clause in consideration of reduced rates, properly and reasonably limiting the liability of a carrier to a specified valuation of the goods received by it, will include a case of loss or damage arising from its own negligence without express mention thereof.[5]

Limitation in pass. It has been held that the fact that the passenger is using a free pass, which contains the limitation, does not alter the rule against limiting liability for negligence,[6] but there are also cases holding the contrary.[7]

§ 877. Necessity of Special Contract or Notice to Passenger

As a general rule the liability of a carrier in respect of baggage may be limited or restricted only by special contract or by notice or regulation duly assented to, or accepted by, the passenger, assent or acceptance may appear by implication. Tariffs containing provisions for limitation, duly filed with the interstate commerce commission, are binding or interstate passengers even in the absence of actual knowledge of such provisions on their part.

As a general rule, in the absence of statutory modification or qualification, a carrier can restrict its common-law liability only by a special contract with the passenger, or by a notice or regulation brought to the passenger's knowledge, and assented to or accepted by him, expressly or impliedly.[8] The ordinary passenger ticket, as shown above in § 603, does not purport to set forth the terms of the contract between the passenger and the carrier, and is merely evidence of the right to transportation; and, according to some cases, stipulations limiting the carrier's liability as to baggage, embodied in, or printed on, such a ticket are not prima facie binding on the passenger, and, to constitute limitation of the carrier's liability, such stipulations must be shown to have been known to, and accepted by, him.[9] In any event a passenger is not necessarily chargeable, as a matter of law, with a notice of limitation appearing on a ticket, so as to bind the passenger, and due consideration must be given to the form of the notice and its position on the ticket.[10] The usual receipt or check for baggage issued to a passenger does not, as shown supra § 866, embody the contract of carriage, and limitations set forth in baggage checks or receipts do not necessarily constitute a contract binding on the passenger.[11] So also it has been held that a person who checks hand baggage in a check or parcel room of a railroad company for safe-keeping is not bound by a printed notice on the check which purports to limit liability to a specified amount, unless such

Railroad company not acting as common carrier

Railroad company, which leased to manager of theatrical company baggage cars for transportation of effects used in theatrical production, did not act as a common carrier, so that it could contract against liability for negligence.—McKeon v. New York, N. H. & H. R. Co., 164 N.Y.S. 312, 177 App.Div. 462.

3. N.Y.—Minturn v. New York Cent. R. Co., 230 N.Y.S. 789, 220 App.Div. 222

4. N.Y.—Camden, etc., R., etc., Co. v. Burke, 13 Wend. 611, 28 Am.D. 488.
10 C.J. p 1210 note 11.

5. N.Y.—Gardiner v. New York Cent., etc., R. Co., 94 N.E. 876, 201 N.Y. 387, 34 L.R.A.N.S., 826, Ann.Cas.1912B 281, affirming 123 N.Y.S. 865, 139 App.Div. 17.
10 C.J. p 1210 note 13.

6. Ala.—Mobile, etc., R. Co. v. Hopkins, 41 Ala. 486, 94 Am.D. 607.

7. Ga.—Holly v. Southern R. Co., 47 S.E. 188, 119 Ga. 767.

Willful misconduct

Where plaintiff was traveling on a pass under an agreement thereon that the railroad company should not be liable for damage to property of such person by negligence of its agents or otherwise, such person could not recover for loss of baggage, except for willful misconduct.—Hutto v. Southern R. Co., 55 S.E. 445, 75 S.C. 295.

8. Kan.—Kansas City, etc., R. Co. v. Rodebaugh, 15 P. 899, 38 Kan. 45, 5 Am.S.R. 715.
Minn.—Ferris v. Minneapolis & St. L. Ry. Co., 173 N.W. 178, 143 Minn. 90.
10 C.J. p 1211 notes 18, 20.

9. Ohio.—Baltimore, etc., R. Co. v. Campbell, 36 Ohio St. 647, 38 Am.R. 617
Va.—Louisville & N. R. Co. v. Rieley, 93 S.E. 574, 121 Va. 469, L.R.A. 1918A 775.
10 C.J. p 1211 note 20.

General limitation as to value

A mere general limitation as to value, expressed in a printed form of contract, intended to be applicable to the baggage of all passengers using that form of ticket, even though signed by the carrier and the purchaser of the ticket, is not a bona fide agreement as to the value of the particular baggage, and amounts to no more than an arbitrary preadjustment of damages.—Southern R. Co. v. Dinkins, etc., Hardware Co., 77 S.E. 147, 139 Ga. 332, 43 L.R.A.,N.S., 806.

10. Mass.—Brown v. Eastern R. Co., 11 Cush. 97.
10 C.J. p 1211 note 20.

Passenger not informed of limitation

A limitation on the reverse side of a ticket purchased by a passenger by bus was not binding on such passenger where the passenger was not informed of the limitation.—King Bros. Transp. Co. v. Altherr, 29 Ohio N.P.,N.S., 275.

11. Ill.—See Mitchell v. Frank Parmelee Co., 209 Ill.App. 428.
Minn.—Ferris v. Minneapolis & St. L. Ry. Co., 173 N.W. 178, 143 Minn. 90.
10 C.J. p 1211 note 21.
Check or receipt issued by transfer company see infra § 891.

person has knowledge of the limitation and assents to it.[12] A ticket, however, which purports to set out the terms of the transportation of the passenger and his baggage may be deemed a contract, and the passenger may be bound by valid limitations of liability as to baggage plainly incorporated therein,[13] the presumption being, according to some cases, as shown infra § 897, that the person accepting it does so with knowledge of its contents and with the intention to be bound thereby. So the view has been taken that a passenger is chargeable with notice, and bound by a limitation in the ticket, where he has had the ticket in his possession for some time,[14] or where the stipulations are printed on the face of the ticket in clear and legible type,[15] or, in the absence of fraud, where he has signed the ticket, presumably after having read it and agreed to its conditions.[16] According to some cases, however, notice of the limitation must be brought home to the passenger before the train is started, and while he has an opportunity to leave the car and to remove his baggage.[17]

General public notices and filing with state regulatory body. In the absence of any statutory or other controlling rule to the contrary, a general public notice as to restrictions of a carrier's common-law liability in respect of baggage will not be binding on the passenger unless it is shown that he either expressly or impliedly assented thereto,[18] even though the passenger has knowledge of such notice.[19]

It has been held that a limitation in a schedule of rates published and filed with a state regulatory body as required by statute is not effective if not assented to by the passenger.[20] There is, however, authority for the view that a tariff or schedule filed with the proper state authorities is binding on the passenger.[21]

A carrier may not relieve itself of liability imposed by statute by any rule or regulation filed with the state regulatory body, where the statute contains an express prohibition against exemption.[22] Where an applicable statute requires that the declaration of value shall be in writing or that there shall be an agreement in writing fixing the released value, in order to permit a limitation based on value, an attempt to limit liability by a published tariff filed with a state regulatory body is not effective if there has not been due compliance with the statute requiring the declaration or agreement as to value to be in writing.[23]

In respect of intra-state transportation, a carrier may not successfully claim the benefit of provisions of a state statute that the value of baggage in excess of a specified amount shall be stated and that a reasonable charge may be made by the carrier for assuming liability in excess of such amount and for the carriage of baggage in excess of a specified weight, where the carrier has not published any schedule of charges under the provisions of the statute and has not by rule or otherwise sought to bring itself within such provisions.[24]

12. Tex.—Lancaster v. Sanford, Civ App., 225 S.W. 808
10 C.J. p 1211 note 21 [d] (1).

13. Mass.—Secoulsky v. Oceanic Steam Nav Co., 112 N.E. 151, 223 Mass. 465.
10 C.J. p 1213 note 23.

Inability to read English

Even though a passenger who accepted and used a ticket was unable to read the English language and was informed by the carrier's agent that it was not necessary to insure baggage, such passenger was bound by the terms of the ticket limiting liability for the loss of baggage to a specified amount.—Secoulsky v. Oceanic Steam Nav. Co., 112 N.E. 151, 223 Mass. 465

14. U.S.—The Kensington, D.C.N.Y., 88 F. 331, affirmed 94 F. 885, 36 C.C.A. 533, reversed on other grounds 22 S.Ct. 102, 183 U.S. 263, 46 L.Ed. 190

15. Mo.—Aiken v. Wabash R. Co., 80 Mo.App. 8
10 C.J. p 1212 note 25.

16. Mont.—Rose v. Northern Pac. R. Co., 88 P. 767, 35 Mont. 70, 119 Am.S.R. 836
10 C.J. p 1212 note 26.

17. Vt.—Ranchau v. Rutland R. Co., 43 A. 11, 71 Vt. 142, 76 Am.S.R. 761.
10 C.J. p 1212 note 27.

18. Minn.—Ferris v. Minneapolis & St. L. Ry. Co., 173 N.W. 178, 143 Minn. 90.
10 C.J. p 1213 note 28

Want of knowledge of notice

The rule that public notice is not binding on the passenger is applicable where the passenger has no knowledge of the notice.
La.—Logan v. Pontchartrain R. Co., 11 Rob. 24, 43 Am.D. 199.
Me.—Bean v. Green, 12 Me. 422
10 C.J. p 1213 note 29.

In Pennsylvania a carrier may limit its responsibility by a general notice, yet the terms of the notice must be clear and explicit, and the person with whom the carrier deals must be fully informed of the terms and the effect of the notice, and the limitation is to be confined to cases of special contracts, express or implied.—Camden, etc., R. Co. v. Baldauf, 16 Pa. 67, 55 Am.D. 481.—10 C.J. p 1213 note 29 [b].

19. N.Y.—Hollister v. Nowlen, 19 Wend. 234, 32 Am.D. 455
10 C.J. p 1213 note 28

20. Minn.—Ferris v. Minneapolis & St. L. Ry. Co., 173 N.W. 178, 143 Minn. 90.

21. Mass.—Perkins v. New York, N. H. & H. R. Co., 122 N.E. 306, 232 Mass. 336
N.Y.—Levett v. Draper, 185 N.Y.S. 891, 194 App.Div. 632

22. Ohio.—Erie R. Co. v. Steinberg, 113 N.E. 814, 94 Ohio St. 189, L.R.A.1917B 787, Ann.Cas.1917E 661

Schedule filed with public utilities commission

A common carrier cannot relieve itself of liability imposed by Gen. Code § 8994-1 by any rule or regulation contained in the schedule filed by it with the state public utilities commission.—Erie R. Co. v. Steinberg, 113 N.E. 814, 94 Ohio St. 189, L.R.A.1917B 787, Ann.Cas.1917E 661.

23. Wash.—Wall-A-Hee v. Northern Pac. Ry. Co., 41 P.2d 786, 180 Wash. 656.

24. Mo.—Bowles v. Payne, App., 251 S.W. 101.

It has been held, that, in the absence of any statute or rule requiring posting, the posting of notice of a regulation adopted, pursuant to statutory authorization, by a state regulatory body, limiting liability, is not required,[25] such regulation is presumed to be known to, or ascertainable by, the public, and no one is excused because of ignorance of such regulation.[26]

Regulations filed with interstate commerce commission. Under the Interstate Commerce Act as amended carriers must include in the schedule of rates filed regulations affecting passenger's baggage and the limitations of liability; and where a regulation limiting liability is so filed it is binding on the carrier and on the passenger,[27] even though the passenger has no knowledge thereof;[28] and this rule applies, in respect of a limitation based on the value of the baggage, even though the carrier does not inquire as to value.[29] The effect of permitting the carrier to file regulations as to the passenger's baggage which limit its liability except on payment of specified rates, is not to change the common-law rule that the carrier is an insurer of the safety of baggage against accidents not the act of God or the public enemy or the fault of the passenger, but the effect of such filing is to permit the carrier by such a regulation to obtain commensurate compensation for the responsibility assumed.[30]

Rule adopted by carrier under interstate commerce act

A rule of the carrier which limits or attempts to limit, its liability to a specified amount, under the Interstate Commerce Act, was not available to the carrier in view of the fact that the transportation involved was intra-state.—Bowles v. Payne, Mo App., 251 S W. 101.

25. Ga.—Myers v Atlantic Greyhound Lines, 184 S.E. 414, 52 Ga. App. 698.

26. Ga.—Myers v. Atlantic Greyhound Lines, supra.

27. Ky—Illinois Cent. R. Co. v. Fontaine, 289 S.W. 263, 217 Ky. 211, 52 A.L.R. 1064.
Mass.—Perkins v. New York, N H & H. R. Co, 122 N.E 306, 232 Mass. 336.
10 C J. p 1213 note 31.

But in a case which arose after the enactment of the Carmack Amendment, 49 U.S.C.A. § 20 (11), the view was expressed that there is nothing in the Interstate Commerce Act that makes a statement of limitation of liability in a schedule enforceable by the interstate commerce commission or binding on the shipper.—Wells v. Great Northern R. Co., 114 P. 92, 116 P. 1070, 59 Or. 165, 34 L.R.A.,N.S., 818, 825.

Limitation based on value

Limitation of carriers' liability for loss of baggage based on provision for declaration of value thereof, and payment of stated excess charge for excess liability over stated value to be carried free is such a regulation, within meaning of Interstate Commerce Act that publication and filing thereof with the interstate commerce commission in schedule of rates is sufficient to give notice to passenger of such limitation.
Mo.—Treadway v. Terminal R. R Ass'n of St. Louis, App., 84 S W 2d 143.
Neb.—Robidoux v. Chicago & N. W. R Co, 204 N W. 870, 113 Neb. 682, 41 A.L.R. 446.
10 C.J. p 1213 note 31 [a].

28. U S.—Boston, etc., R. Co. v. Hooker, 34 S Ct. 526, 233 U S 97, 58 L Ed. 868, L.R.A.1915B 450, Ann. Cas 1915D 593, reversing 95 N.E 945, 209 Mass. 598, Ann Cas 1912B 669
Mo.—Wright v Southern Pac Co., 167 S.W. 1137, 181 Mo.App. 137.
Neb.—Robidoux v. Chicago & N. W R Co, 204 N.W. 870, 113 Neb 682, 41 A.L.R. 446.
10 C.J. p 1213 note 31.

Transportation during federal war-time control

(1) In respect of intra-state and of interstate transportation during the period of federal war-time control, a schedule or regulation promulgated by the director-general of railroads and filed with the interstate commerce commission containing a limitation of baggage liability to a specified amount, unless a greater value was declared by the owner and excess charges paid, was notice of such limitation, and governed the amount recoverable in case of loss, even though the passenger had no knowledge of the existence of the schedule or regulation.
Tex.—San Antonio, U. & G. Ry. Co. v. Nast, Civ.App., 240 S W 596, reversed on other grounds Nast v. San Antonio, U & G Ry. Co, Com. App, 261 S W. 1011.
Va.—Hines v Burnett, 107 S.E. 657, 130 Va. 297.

(2) The rule applied notwithstanding a provision of a state statute, Vernon's Sayles Civ.St Annot.1914 art 703, that common carriers shall not limit or restrict their liability as it exists at common law.—Payne v. McConnell, Tex Civ.App., 234 S.W. 942, affirmed McConnell v. Payne, Com. App., 262 S W. 72.

Tariff covering intra-state shipment

It has been held that a tariff filed with the interstate commerce commission, which covered both interstate and intra-state shipments and which contained a limitation as to baggage based on value, was binding on a passenger in respect of an intra-state shipment, even though the passenger did not know of such tariff and did not consciously make an agreement as to value and limitation The mere failure to post notice as to where the tariff might be examined under a provision of N. Y Public Service Commissions L. § 28 did not affect the rule, even assuming that such provision was applicable to the tariff in question—Minturn v. New York Cent. R. Co., 220 N.Y S 789, 220 App.Div. 222.

29. U.S.—Boston, etc., R. Co. v. Hooker, 34 S.Ct. 526, 233 U S. 97, 58 L Ed. 868, L.R.A.1915B 450, Ann. Cas 1915D 593, reversing 95 N E 945, 209 Mass 598, Ann Cas 1912B 669.

Transportation during federal war-time control

A regulation promulgated by the director general of railroads and filed with the interstate commerce commission during the period of federal war-time control, limiting liability to a specified amount if a greater value was not declared, was binding on a passenger regardless of the failure of the carrier to inquire as to value. —San Antonio, U. & G. Ry Co. v. Nast, Tex.Civ.App., 240 S W. 596, reversed on other grounds Nast v San Antonio, U. & G. Ry. Co., Com.App., 261 S W. 1011.

30. U S.—Boston, etc., R. Co. v. Hooker, 34 S Ct. 526 233 U.S. 97, 58 L Ed. 868, L.R A.1915B 450, Ann. Cas 1915D 593, reversing 95 N E. 945, 209 Mass. 598, Ann.Cas 1912B 669
Ky.—Illinois Cent. R. Co. v. Fontaine, 289 S.W. 263, 217 Ky 211, 52 A.L R. 1064, citing **Corpus Juris** with approval.
10 C J p.1213 note 33.

§ 878. Construction of Special Contracts or Regulations; What Law Governs

A contract or regulation limiting the liability of a carrier is to be construed most strongly against the carrier

A contract or regulation limiting the liability of the carrier for baggage, being in derogation of the common law, is to be construed most strongly against the carrier,[31] and in the light of public policy.[32] The rule does not mean, however, that the contract or regulation is to be construed unreasonably, or that its effect is to be annulled by construction where its provisions are plain and admit of no question;[33] it is to be construed not only by its conditions, but also by the circumstances of the particular case.[34] "Wearing apparel," as used in a stipulation for limitation of liability includes articles of jewelry in ordinary use suitable to the station and condition in life of the passenger.[35]

What law governs. While, according to some cases, the validity and construction of a contract limiting liability is to be governed by the law of the place where the contract is made,[36] it has been held, in respect of an interstate transportation of baggage by motor bus which occurred prior to the enactment of federal legislation regulating transportation by motor carriers, that the law of the state in which the passenger's journey terminated and in which a public regulatory body had adopted a valid regulation fixing liability on the basis of value could be given effect in view of the fact that the contract was partly performed in that state.[37]

§ 879. Notice to Carrier of Nature and Value of Baggage

In the absence of a regulation requiring the disclosure of the nature and value of property offered as baggage, the passenger's failure to make such disclosure does not relieve the carrier of liability as a carrier of baggage, at least in the absence of wrongful concealment.

In the absence of any regulation, of the carrier that a passenger shall declare the value and character of the property offered by him as baggage, on a reasonable request therefor, the passenger is not bound to make such a declaration, and, if the carrier accepts the property without inquiry as to its character or value, in general it becomes liable for the loss of so much of it as properly constitutes baggage, although it might have properly refused to carry all of it.[38] The carrier may, however, make and enforce a regulation requiring passengers to certify to the baggage-master, or other agent, the value and character of the contents of their trunks, and may refuse to carry such property unless the certificate is made.[39] The duty of a passenger to declare the value of baggage, imposed by regulations of the interstate commerce commission which in terms refer to baggage delivered to the carrier and checked, refers only to baggage which the passenger has surrendered to the custody of the carrier and does not apply to hand baggage taken into a coach by the passenger and generally retained in his possession.[40]

In the absence of a special agreement, the carrier's common-law liability for baggage, of the nature of which it is ignorant, embraces only such articles as are baggage in a technical sense, as considered supra §§ 855–861, and if the passenger

31. Ill.—Mittlacher v. United American Lines, 233 Ill.App. 411.
10 C.J. p 1214 note 34.

Baggage marked "fragile" accepted at owner's risk

"Ordinary handling" in baggage tariff providing cases marked "fragile" and likely to be damaged by ordinary handling will not be accepted except at owner's risk, means ordinary wear and tear necessarily incidental to transportation where reasonable care is used.—Perkins v. New York, N. H. & H. R. Co., 122 N E. 306, 232 Mass. 336

32. Wash.—Gomm v. Oregon R., etc., Co., 101 P. 361, 52 Wash. 685, 25 L.R.A.,N.S., 537.
10 C.J. p 1214 note 35.

33. N.Y.—Wheeler v. Oceanic Steam Nav. Co., 25 N.Y.S. 578, 72 Hun 5, affirmed 43 N.E. 990, 149 N.Y. 576

Nature or character of liability

A contract under which a traveler checked a suit case in the parcel room of a railroad, providing that "the carrier will not be responsible for loss, damage, or detention of articles left in storage for any amount in excess of $25," was broad enough to cover liability on any account including negligence.—Missouri Pac. R. Co. v. Fuqua, 233 S.W. 926, 150 Ark. 145.

34. Wash.—Gomm v. Oregon R., etc., Co., 101 P. 361, 52 Wash. 685, 25 L.R.A.,N.S. 537.

35. Pa.—Hay v. Lehigh Valley R. Co., 17 Pa.Dist. 942

36. Mo.—Robert v. Chicago, etc., R. Co., 127 S.W. 925, 148 Mo.App. 96
10 C.J. p 1214 note 38

37. Ga.—Myers v. Atlantic Greyhound Lines, 184 S.E. 414, 52 Ga. App. 698

38. S.C.—Godfrey v. Pullman Co., 69 S.E. 666, 87 S.C. 361, Ann.Cas.1912B 971.
10 C.J. p 1214 note 41.

39. Va.—Norfolk, etc., R. Co. v. Irvine, 7 S.E. 233, 85 Va. 217, 1 L.R.A. 110
10 C.J. p 1214 note 42.

40. Ga.—Atlantic Coast Line R. Co. v. Barksdale, 124 S.E. 362, 32 Ga. App. 643

Baggage temporarily in custody of carrier's employees

The rule stated in the text is not affected by the fact that hand baggage is temporarily placed in the custody of the train officials for the passenger's accommodation and convenience when entering or leaving the train.—Atlantic Coast Line R. Co. v. Barksdale, 124 S.E. 362, 32 Ga. App. 643

uses any means to deceive the carrier as to the character of his property offered as baggage, or to conceal its value, he cannot recover in case of a loss for more than the carrier was bound to carry as actual baggage,[41] unless the loss occurs through the carrier's gross negligence.[42] The fact of delivery of a trunk or other receptacle in which personal baggage is generally carried is an implied representation that it contains baggage only, and a failure to disclose the nature of the contents as being other than baggage may constitute such concealment as to relieve the carrier from liability so far as the contents are not baggage; and this rule applies in the case of a loss of baggage through the ordinary negligence of the carrier.[43] If, however, the carrier has knowledge that certain property tendered as baggage is not such, and accepts it as baggage, it may be liable for its loss as such, as shown above in § 861. In respect of interstate transportation of baggage, it has been held that that carrier may be held liable for merchandise transported as sample baggage even though the merchandise is not "sample baggage" within the meaning of a tariff schedule duly filed with the interstate commerce commission, where the passenger's statement, made at the time of checking, as to the character or nature of the merchandise leaves such character or nature indeterminate and there is no fraud on the part of the passenger.[44]

§ 880. Commencement of Liability; Delivery and Acceptance

The liability of a common carrier as such for baggage commences when the baggage is delivered to, and accepted by, the carrier.

The liability of a common carrier as such for the baggage of a passenger commences with the delivery of such baggage to, and the express or implied acceptance by, the carrier, and not before.[45] Where baggage is received by a carrier for immediate transportation, the liability as a common carrier attaches from the time of receiving the baggage, although for the convenience of the carrier, and the purpose of the presence of the porter was to facilitate the passenger's entry on the train; and the liability of the railroad company was that of common carrier and not of warehouseman.—Franklin v. Southern Pac. Co., 265 P. 936, 203 Cal. 630, 59 A.L.R. 118, certiorari denied Southern Pac. Co. v. Franklin, 49 S. Ct. 24, 278 U.S. 621, 73 L.Ed. 542.

Not warehouseman

Where a railroad company received a passenger's trunk from an expressman, but when the passenger subsequently went to the station to check the trunk, it could not be found, and the passenger accepted a check from the baggage-master on his promise that he would send the trunk on, and she presented the check at her destination, but failed to get the trunk, it appearing that it had been stolen from the company, the company's relation to the trunk was that of common carrier, and not of warehouseman.—Williams v. New Jersey Cent. R. Co., 88 N.Y.S. 434, 93 App.Div. 582, affirmed 76 N.E. 1116, 183 N.Y. 518.

Agent's agreement

Rev.St. art 713, requiring transportation of goods in the order received, imposes no duty to forward goods until actually received, and in the absence of proof of authority of an agent to bind a carrier by special contract to forward trunks not in the possession of the carrier, the carrier was bound by its legal duty to transport only after actual receipt of the trunks, and there can be no liability in the absence of a duty.—Schaff v. Gibson, Tex.Civ.App., 258 S.W. 595.—10 C.J. p 1215 note 48 [b].

41. Ill.—See Mitchell v. Frank Parmelee Co., 209 Ill.App. 428.
Ky.—Landesman-Hirshheimer Co. v. Louisville & N. Ry. Co., 199 S.W. 1050, 178 Ky. 712, L.R.A.1918C 105.
10 C.J. p 1214 note 44.

Ownership, contents, or status

If carrier was deceived with reference to the ownership, contents, or status of trunks, it was not liable as insurer.—Atlantic Coast Line R. Co. v. Campen Bros. Co., 154 So. 131, 114 Fla. 386.

Baggage car leased to transport other property

Where manager of theatrical company leased from railroad company two baggage cars solely for transportation of theatrical effects, and placed therein trunk with his personal property of unusual value, not theatrical effects, he could not, for his fraud, recover for loss of part of contents of trunk, although it resulted from road's negligence.—McKeon v. New York, N. H. & H. R. Co., 164 N.Y.S. 312, 177 App.Div. 462.

42. Ill.—See Mitchell v. Frank Parmelee Co., 209 Ill.App. 428.
Neb.—Gibbons v. Chicago, etc., R. Co., 154 N.W. 226, 98 Neb. 696.
10 C.J. p 1214 note 45.

43. Ky. — Landesman-Hirshheimer Co. v. Louisville & N. Ry. Co., 199 S.W. 1050, 178 Ky. 712, L.R.A.1918C 105.
10 C.J. p 1214 note 47.
Appearance of receptacles as charging carrier with knowledge of contents in general see supra § 861.

44. N.Y.—Araje v. Pennsylvania R. Co., 167 N.E. 497, 251 N.Y. 354, affirming 231 N.Y.S. 245, 225 App.Div. 73, which reversed 223 N.Y.S. 542, 130 Misc. 29.

Rule providing for additional charge on discovery of nature of articles

In reaching the above conclusion the court considered and gave weight to the fact that a rule of the carrier, filed with its schedules, provided that when passengers fail to disclose nature of articles offered for checking and it develops that the transportation of such articles as baggage is not authorized, collection will be based on double the excess baggage rate for gross weight.—Araje v. Pennsylvania R. Co., 167 N.E. 497, 251 N.Y. 354, affirming 231 N.Y.S. 245, 225 App.Div. 73, which reversed 223 N.Y.S. 542, 130 Misc. 29.

45. Ala.—Gus Mayer Co. v. Louisville & N. R. Co., 153 So. 249, 228 Ala. 290.
Fla.—State v. Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721, quoting **Corpus Juris** as authority.
Mo.—Saffa v. Illinois Cent. R. Co., 279 S.W. 223, 218 Mo.App. 502.
Tex.—Schaff v. Gibson, Civ.App., 258 S.W. 595.
10 C.J. p 1215 note 48.

Hand baggage delivered to porter

Railroad company's liability in respect of hand baggage which was lost while in the possession of a red cap porter commenced when the baggage was delivered to such porter by the passenger with instructions to redeliver to the passenger on the train, where at the time of such delivery the passenger was in possession of tickets for interstate transportation, the train was about to de-

rier the passenger may consent to a delay of transportation.[46]

Purchasing ticket, obtaining check, and intention to become passenger A regulation that baggage will not be checked until a ticket has been procured is a reasonable one, as is also a rule requiring a ticket to be exhibited to the proper agent before such checking is done, as shown supra § 863. In general, however, where the baggage is delivered at the proper place and within a reasonable time, the carrier cannot limit or avoid liability by refusing to take charge of the baggage until the procurement of a ticket,[47] and, while the delivery must be with an intention to become a passenger,[48] it is not necessary that the passenger shall have bought his ticket if he in good faith intends to become a passenger;[49] nor in general is it necessary, in order to fix the carrier's liability, to show that the baggage has been checked, its liability commences from the time of actual delivery, properly made, without regard to whether or not a check has been issued.[50] It has been held, however, that, notwithstanding manual delivery to the carrier has been made, it is not liable as an insurer unless and until the relation of passenger and carrier arises.[51]

§ 881. What Constitutes Delivery to Carrier in General

In order to charge a common carrier with liability in respect of the care and transportation of baggage, there must be a delivery to, and acceptance by, an employee of the carrier who is authorized, or held out as authorized, to receive baggage.

In order that the delivery of baggage to a carrier may be such as to charge it with liability for its care and transportation, it must be delivered to, and accepted by, an employee who is authorized, or held out as authorized, to receive baggage; otherwise the carrier will not be liable.[52] The authority of a person acting as agent to bind the carrier by acceptance of baggage for transportation may be established by proof that such person has been allowed, in the ordinary course of business, thus to receive baggage and to bind the carrier with reference thereto.[53] Where delivery is made to the baggage-master it is sufficient, if made at the proper time and place, and an acceptance by him binds the carrier,[54] even where his acceptance is in violation of the regulations of his principal, if such regulations are unusual, and are not brought to the passenger's notice.[55] Delivery to an agent other than the baggage-master, having supervision and control over matters at the carrier's depot or station, is a delivery to the carrier, and is as binding as if the delivery had been to one whose special duty it was to receive baggage.[56] The carrier may be bound by delivery to a stranger, where such a delivery is caused by the improper directions of its agent to the passenger.[57]

Where the passenger's baggage is not accessible on his departure by the company's train, and he hands over to the baggage-master his check given him by another carrier, this amounts to a delivery to the company if it accepts the check and afterward undertakes to carry the baggage.[58] It has been held, however, that there is not a constructive delivery where a baggage check of one railroad company is delivered to the station agent of another company on the understanding that

46. Minn.—Shaw v. Northern Pac. R. Co., 41 N.W. 548, 40 Minn. 144.
10 C.J. p. 1215 note 49.

47. Miss.—Coffee v. Louisville, etc., R. Co., 25 So. 157, 76 Miss. 569, 71 Am.St.R. 535, 45 L.R.A. 112.
10 C.J. p. 1215 note 52.

48. Conn.—Beers v. Boston, etc., R. Co., 34 A. 541, 67 Conn. 417, 52 Am.St.R. 293, 32 L.R.A. 535.
10 C.J. p. 1215 note 53.

49. S.C.—Cone v. Southern R. Co., 67 S.E. 779, 85 S.C. 524, 21 Ann.Cas. 158.
10 C.J. p. 1215 note 54.
The rule stated in the text has apparently been recognized in a case where the ticket had been purchased before delivery to the carrier.—Gus Mayer Co. v. Louisville & N.R. Co., 153 So. 249, 228 Ala. 290.

Carrier may be liable as bailee at common law, for negligence in the loss of baggage, even though the relation of passenger and carrier did not exist.—Robinson v. New York Cent., etc., R. Co., 129 N.Y.S. 1030, 145 App.Div. 391, affirmed 97 N.E. 1115, 203 N.Y. 627.

50. S.C.—Cone v. Southern R. Co., 67 S.E. 779, 85 S.C. 524, 21 Ann.Cas. 158.
10 C.J. p. 1215 note 55.

51. Okl.—Schaff v. Samuels, 234 P. 195, 109 Okl. 133.

52. Wis.—Gleason v. Goodrich Transp. Co., 32 Wis. 85, 14 Am.R. 716.
10 C.J. p. 1216 note 56.

Sole employee present
A drayman, who as plaintiff's agent delivered a trunk to a terminal company without demanding a claim or baggage check, which was accepted by the only agent or employee in charge, without issuing a claim check, or any check, had a right to assume that the agent had the right to accept a trunk in behalf of the company.—Hines v. Wallace, 103 S.E. 439, 25 Ga.App. 377.

53. Ark.—St. Louis, etc., R. Co. v. Berry, 30 S.W. 764, 60 Ark. 433, 46 Am.St.R. 212, 28 L.R.A. 501.
10 C.J. p. 1216 note 57.

54. Me.—Wilson v. Grand Trunk R. Co., 57 Me. 138, 2 Am.R. 26.
Mass.—Jordan v. Fall River R. Co., 5 Cush. 69, 51 Am.D. 44.

55. Ind.—Lake Shore, etc., R. Co. v. Foster, 4 N.E. 20, 104 Ind. 293, 54 Am.R. 319.
10 C.J. p. 1216 note 59.

56. S.C.—Battle v. Columbia, etc., R. Co., 49 S.E. 849, 70 S.C. 329.
10 C.J. p. 1216 note 60.

57. Tex.—International, etc., R. Co. v. Folliard, 1 S.W. 624, 66 Tex. 603, 59 Am.R. 632.
10 C.J. p. 1216 note 61.

58. Iowa.—Warner v. Burlington, etc., R. Co., 22 Iowa 166, 92 Am.D. 389.

such agent will have the trunk forwarded from another station at which both companies maintain a common agent.[59]

Notwithstanding a check or receipt has been issued for a trunk by the carrier, the delivery of the trunk is not complete while it remains in the traveler's private dwelling.[60]

Notice to agent. The general rule is that where baggage is taken to a railroad station, and even to the place where baggage is usually received, some kind of notice must be given to some agent of the company authorized to accept the same in order to charge the carrier.[61] The carrier may, however, assent to the delivery of baggage at its station without notice to its agents, and this assent may be implied from its custom and course of business in allowing baggage to be deposited in its depots.[62]

§ 882. Time and Place of Delivery

In order to charge a carrier, as such, with liability in respect of baggage, delivery should not be made an unreasonably long time before the baggage is to be transported or the passenger is to depart, and should be made at the place provided for receiving baggage.

The delivery of baggage, to be binding on the carrier, must be made within a reasonable time before the time for it to be transported,[63] or before the intended departure of the passenger,[64] and the facilities offered for the receipt of baggage and the general custom of the place will furnish a basis for determining how long before the passenger intends actually to enter on his journey he may deliver his baggage to the carrier so as to render the carrier liable therefor.[65]

Where baggage is left with the carrier an unreasonable time before it is to be checked, in anticipation of a journey not about to be commenced, and to be called for and checked when the passenger is ready to begin his journey, the carrier is liable only as a warehouseman,[66] except in cases where the delay in shipment is the fault of the carrier.[67] A carrier has been regarded as a bailee for hire and not as a gratuitous bailee where it accepts a trunk several hours before the intended departure of the owner and the owner does not purchase a ticket and take passage because of the loss of the trunk while in the possession of the carrier at its station intermediate acceptance by it and the time when the owner arrives to take passage.[68] Notwithstanding a prospective passenger takes baggage to a station a considerable time before he intends to travel and the carrier is not charged with the duty of carrier, it may be under the duty to exercise reasonable care to protect the baggage from injury or destruction and may be liable for its own negligence in this regard.[69]

Place of delivery. Where a proper and suitable place for receiving baggage has been provided, delivery must be made at that place.[70] Where a trunk of an intending passenger is deposited at the usual and customary place for receiving baggage but the relation of passenger and carrier is not created, the carrier may be liable as warehouseman.[71]

59. Tenn.—Southern R. Co. v. Bickley, 107 S.W. 680, 119 Tenn. 528, 123 Am.S.R. 754, 14 L.R.A.,N.S., 359, 14 Ann.Cas. 910.

60. Ill.—Hosking v. Southern Pac. Co., 148 Ill.App. 11, affirmed 90 N.E. 669, 243 Ill. 320

61. N.C.—Williams v. Southern R. Co., 71 S.E. 346, 155 N.C. 260.
10 C.J. p 1216 note 63.

62. Iowa—Green v. Milwaukee, etc., R. Co., 38 Iowa 100, 41 Iowa 410.
10 C.J. p 1216 note 64.

63. Wis.—Goldberg v. Ahnapee, etc., R. Co., 80 N.W. 920, 105 Wis. 1, 76 Am.S.R. 899, 47 L.R.A. 221
10 C.J. p 1217 note 65.

64. Ala.—Gus Mayer Co. v. Louisville & N. R. Co., 153 So. 249, 228 Ala. 290.

Fourteen hours before departure of train

Under the circumstances, the carrier was under no obligation to assume liability as carrier fourteen hours before departure of train on which prospective passenger intended to travel.—Saffa v. Illinois Cent. R. Co., 279 S.W. 223, 218 Mo.App. 502.

65. N.C.—Williams v. Southern R. Co., 71 S.E. 346, 155 N.C. 260.
10 C.J. p 1217 note 66.

66. Mo.—Saffa v. Illinois Cent. R. Co., 279 S.W. 223, 218 Mo.App. 502.
10 C.J. p 1217 note 67.

Baggage already in carrier's hands as warehouseman

Where, fourteen hours before the departure of the train on which the prospective traveler intended to travel, he, on applying to check baggage then stored with carrier as a warehouseman, was told that he had time the following morning, his acquiescence and retention of baggage check previously given showed his assent that baggage should remain in storage with carrier as a warehouseman.—Saffa v. Illinois Cent. R. Co., 279 S.W. 223, 218 Mo.App. 502.

67. Minn.—Shaw v. Northern Pac. R. Co., 41 N.W. 548, 40 Minn. 144
10 C.J. p 1217 note 68

68. Miss.—New Orleans & N.E.R. Co. v. Thigpen, 105 So. 481, 141 Miss. 672.

69. Miss.—New Orleans & N.E. R. Co. v. Thigpen, supra.

Failure to keep premises in proper condition

Although a person who took his baggage to a station, intending to check it in anticipation of his departure next day, was not a passenger or shipper, so as to impose special obligations to care for the baggage on the carrier before it actually was checked, he was not a trespasser or mere licensee, and the carrier was liable for injury to the baggage caused by its negligent failure to maintain the premises in proper condition.—Reis v. Minneapolis & St. L. Ry. Co., 179 N.W. 83, 189 Iowa 988

70. Iowa.—Lennon v. Illinois Cent. R. Co., 103 N.W. 343, 127 Iowa 431
10 C.J. p 1217 note 69.

Due delivery to interstate carrier by transfer company shown

Ala.—Gus Mayer Co. v. Louisville & N. R. Co., 153 So. 249, 228 Ala. 290.

71. Okl.—Schaff v. Samuels, 234 P. 195, 109 Okl. 133.

§ 883. Continuance and Termination of Liability; Delivery

A carrier's liability as common carrier continues during transportation of, and for sufficient time thereafter to afford the carrier a reasonable opportunity to remove, the baggage.

A carrier's liability as common carrier or insurer for a passenger's baggage continues during transportation and for such a period thereafter as affords the passenger a reasonable opportunity to remove it,[72] and does not continue beyond such period,[73] and terminates as soon as the baggage has reached its destination and has been delivered to the owner[74] or his agent.[75]

It is the carrier's duty with regard to baggage which has reached its final destination to have it ready for delivery at the usual place of delivery with an employee in charge, until the passenger can in the exercise of due diligence call for and receive it,[76] and, where a delay in delivering the baggage to the passenger is due to the carrier's fault in not transporting it properly, or in otherwise not having it ready for delivery to him when called for, the liability of the carrier is thereby extended until the lapse of what is a reasonable time under the circumstances for the passenger to make another application for his baggage.[77] On the other hand, the carrier is entitled to a reasonable time within which to deliver the baggage, and what constitutes a reasonable time depends on the particular circumstances.[78] Where a statute so provides, a carrier is obligated to deliver every passenger's baggage, whether within the prescribed weight or not, immediately on the arrival of the passenger at his destination.[79]

Where it is the carrier's custom to allow baggage to be taken in charge by its employees to be delivered by them at a certain place and in a certain manner, it will be liable for the loss of baggage arising from the neglect of such employees to make the delivery according to custom.[80] There is not a delivery which will relieve the carrier of liability where the passenger, in order to protect his baggage after arrival at destination, removes it from a place of exposure where it has been left by the carrier's employees to a place at the station where it will be protected from the elements, even though the carrier or its employees do not have knowledge of such removal.[81]

Place of delivery. A delivery at a place other than that for which the contract of carriage calls is no delivery, and in such a case the carrier's liability continues until delivery at the proper point and notification to the passenger if the error has resulted in delay,[82] unless the passenger has waived his rights as to the place of delivery.[83] The facts that a passenger is allowed to stop over at an intermediate station and that the carrier, in disregard of the request of the passenger, checks and transports the passenger's baggage to the destination indicated by the ticket do not necessarily extend the liability of the carrier[84]

Surrender of check. A regulation requiring a passenger on receiving his baggage to surrender the check therefor is a reasonable one;[85] but a failure to tender such check will not relieve the carrier from liability where it makes an unqualified and continued refusal to deliver the baggage on demand.[86]

§ 884. Passenger's Duty to Remove; Carrier as Warehouseman

a. In general
b. What constitutes reasonable time

a. In General

It is the duty of a passenger to call for and remove his baggage within a reasonable time after it has ar-

72. Ill.—See Doherty v. Grand Trunk Western Ry Co, 194 Ill App. 354.

73. Ky.—Chesapeake & O. Ry Co. v. McClintock-Field Co., 297 S.W. 1112, 221 Ky. 142.
Minn.—White v. Chicago, M. & St. P. Ry Co, 186 N.W. 145, 151 Minn. 554.
Mo.—Saffa v Illinois Cent. R. Co, 279 S.W 223, 218 Mo.App. 502
Or.—Baggage & Omnibus Transfer Co v. City of Portland, 164 P. 570, 84 Or. 343, L.R.A 1917F 1080.
Va.—Chesapeake, etc., R. Co. v. Beasley, 52 S.E. 566, 104 Va. 788, 3 L.R.A.,N.S., 183.
10 C.J. p 1217 note 70

74. Me.—Wood v. Maine Cent. R. Co., 56 A. 457, 98 Me. 98, 99 Am.S.R 339.
10 C.J p 1217 note 71.

75. Ala.—Mobile, etc., R. Co. v Hopkins, 41 Ala. 486, 94 Am.D. 607
Ark.—St. Louis, etc, R. Co. v. Stone, 95 S.W. 470, 78 Ark. 318

76. Vt.—Ouimit v. Henshaw, 35 Vt. 604, 84 Am.D 646.
10 C.J p 1217 note 73.

77. Va.—Chesapeake, etc., R. Co v. Beasley, 52 S.E. 566, 104 Va. 788, 3 L.R.A.,N.S., 183
10 C.J p 1217 note 74.

78. Ga.—Georgia R., etc, Co v Phillips, 20 S.E. 646, 93 Ga. 801.
10 C.J p 1218 note 75.

79. Okl.—Kansas City, M. & O. Ry. Co. v. Fugatt, 150 P. 669, 47 Okl. 727.

80. La.—Fisher v. Geddes, 15 La. Ann. 14.

81. Tex.—Hines v. Robey, Civ.App., 225 S.W. 201.

82. Ind.—Toledo, etc., R Co v. Hammond, 33 Ind. 379, 5 Am.R. 231.
10 C.J p 1218 note 82.

83. Mass.—Patten v. Johnson, 131 Mass. 297.

84. N.Y.—Howell v. Grand Trunk R Co, 36 N.Y.S. 544, 92 Hun 423.
10 C.J. p 1218 note 82 [a].

85. Va.—Norfolk, etc., R. Co. v. Irvine, 7 S.E. 233, 84 Va 553, 85 Va. 217, 1 L.R.A. 110.
10 C.J. p 1218 note 80

86. Ind.—Cleveland, etc, R. Co v. Tyler, 35 N.E. 523, 9 Ind.App 689.

rived at its destination. After a reasonable time for removal has elapsed, the carrier's liability thereafter is that of a warehouseman only.

After baggage has arrived at its destination, it is the passenger's duty, in the absence of some special circumstances excusing him from so doing, to call for and take it away within a reasonable time,[87] even though he has not been notified of its arrival.[88] In general, if the baggage remains in the carrier's possession after the passenger has had a reasonable opportunity to remove it, the carrier's liability in respect thereof as carrier or insurer ceases, and its liability is only that of warehouseman and, as such, it is bound to exercise only ordinary care in protecting the baggage, and is liable only for loss or injury caused by its negligence,[89] particularly where after such time the carrier stores the baggage as it is its duty to do, at the expense of the passenger, in accordance with the usual practice, as shown infra § 886.

Where baggage is left with the carrier an unreasonable time before it is to be transported, the carrier is liable only as warehouseman, as shown above in § 882.

A regulation of a state regulatory body allowing intra-state passengers forty-eight hours for the removal of baggage is not unreasonable.[90] Where a contract for the interstate transportation of baggage provides for the holding of baggage for the application of the passenger for a period of twenty-four hours after its arrival, the duty of the carrier as such does not terminate prior to the expiration of such period and liability is determinable under the Interstate Commerce Act and not under rules applying to warehousemen.[91]

Baggage received by mistake. It has been held that the carrier may be made liable as warehouseman where it receives the baggage of a passenger owing to the mistake of a connecting line, on the ground that, whether or not it has received it properly, it is incumbent on the carrier to take ordinary care of it.[92]

b. What Constitutes Reasonable Time

As to what constitutes a reasonable time for the removal of baggage by a passenger depends in general on the peculiar facts and circumstances of each case.

No absolute rule can be laid down as to what is a reasonable time within which a passenger must call for and remove his baggage. What is a reasonable time depends largely on the peculiar facts and circumstances of each case,[93] such as the character of the station, the facilities there for receiving baggage, and the opportunities afforded by the carrier for delivering baggage when called for.[94]

The omission of a passenger to call for his baggage until the day following that of arrival at his destination is, under ordinary circumstances, unreasonable, and therefor the carrier ceases to be responsible as such and is liable merely as a warehouseman.[95] However, under some circumstances

87. Ala.—Louisville & N. R. Co. v. Hestle, 75 So. 885, 200 Ala. 137.
10 C.J. p 1218 note 84.

Reason for rule
The liability as carrier is rigid, and the passenger cannot extend it by postponing the time of taking possession to suit his own convenience.—White v. Chicago, M. & St. P. Ry. Co., 186 N.W. 145, 151 Minn. 554.

88. Iowa.—Hicks v. Wabash R. Co., 108 N.W. 534, 131 Iowa 295, 8 L.R.A.,N.S., 235
10 C.J. p 1219 note 85.

89. Ala.—Louisville & N. R. Co. v. Hestle, 75 So. 885, 200 Ala. 137.
Colo.—Denver, etc., R. Co. v. Doyle, 145 P. 688, 58 Colo. 327, L.R.A. 1915D 113.
Ill.—See Doherty v. Grand Trunk Western Ry. Co., 194 Ill.App. 354.
Ky.—Chesapeake & O. Ry. Co. v. McClintock-Field Co., 297 S.W. 1112, 221 Ky. 142.
Mo.—Saffa v. Illinois Cent. R. Co., 279 S.W. 223, 218 Mo.App. 502.
10 C.J. p 1219 note 87.

90. La.—Morgan's Louisiana & T. R. & S. S. Co. v. Louisiana Public Service Commission, 116 So. 720, 166 La. 119.

Passengers taking advantage of regulation limited in number
The fact that only five per cent of all passengers find it necessary to take advantage of the regulation does not of itself show that the regulation is unreasonable where the evidence is to the effect that the regulation does not work to the disadvantage and inconvenience of those passengers who do not take advantage of it.—Morgan's Louisiana & T. R. & S. S. Co. v. Louisiana Public Service Commission, 116 So. 720, 166 La. 119.

91. Mo.—Treadway v. Terminal R. R. Ass'n of St. Louis, App., 84 S.W.2d 143.

Terminal association receiving baggage from railroad company
The rule stated in the text was applied in determining the liability of a terminal association where a railroad company delivered baggage to such association on arrival at destination, such association could not find the baggage when the passenger applied for it within the twenty-four hour period, and such association set up the claim that it had acted as agent of the railroad company in handling the baggage.—Treadway v. Terminal R. R. Ass'n of St. Louis, Mo.App., 84 S.W.2d 143.

92. N.Y.—Fairfax v. New York Cent., etc., R. Co., 37 N.Y.Super. 516

93. Mo.—Saffa v. Illinois Cent. R. Co., 279 S.W. 223, 218 Mo.App. 502.
10 C.J. p 1219 note 91.

94. Colo.—Denver, etc., R. Co. v. Doyle, 145 P. 688, 58 Colo. 327, L.R.A.1915D 113.
10 C.J. p 1219 note 91.

Crowded condition of station
Allowance must be made for the crowded condition of the station and perhaps other circumstances.—White v. Chicago M. & St. P. Ry. Co., 186 N.W. 145, 151 Minn. 554.

Statute not applicable
Gen.Acts 1915 p. 710, dealing with excess baggage and charges therefor, and fixing time within which no storage shall be charged by carrier on such baggage, did not fix time within which road's liability for baggage as carrier shall continue.—Louisville & N. R. Co. v. Hestle, 75 So. 885, 200 Ala. 137.

95. Ill.—See Doherty v. Grand Trunk Western Ry. Co., 194 Ill.App. 354
Minn.—White v. Chicago, M. & St.

it is not unreasonable for a passenger arriving at his destination during the evening or late afternoon of one day to omit to call for his baggage until the morning of the following day.[96] Longer periods have been regarded as unreasonable, such as thirty hours,[97] a day and a half,[98] and from Friday night until Monday morning.[99] Failure of a passenger to call for his baggage within four hours after its arrival and before the closing of the station has been regarded as sufficient to relieve the carrier of liability as insurer.[1] On the other hand, it has been held that a failure to claim baggage until thirty-six hours after its arrival does not change the carrier's liability for its loss to that of a warehouseman without a showing that the loss was due to the delay.[2]

The reasonable time begins to run from the arrival of the baggage, and not of the passenger.[3] There is authority for the view that a passenger is not required to make a demand for his baggage immediately on arriving at his destination,[4] but the view has been expressed that, where it is the usual course of business to make delivery immediately on the arrival of the baggage, the rule as to reasonable time does not in general extend the time for delivery and acceptance beyond the time of arrival, as affecting the carrier's liability as such.[5]

The time is not ordinarily extended by an unusual circumstance for which the carrier is in no way responsible.[6]

§ 885. Baggage Remaining for Passenger's Accommodation

Where the carrier is in possession of baggage not for the purpose of transportation but merely for the convenience of the owner or passenger, the carrier is not liable as a common carrier in respect of such baggage, but is liable as warehouseman or bailee.

Where the passenger on arrival at his destination takes his baggage into his own exclusive possession and control, the carrier's liability as common carrier ends, and does not attach again by reason of the fact that the baggage agent, for the accommodation and convenience of the passenger, agrees to store it until sent for.[7] It has been held or recognized that, where the retention of possession by the carrier is at the request of the passenger, the status of the carrier is that of warehouseman, and that the carrier is under the duty to use ordinary care, at least where there is an agreement to pay storage charges.[8] According to some cases, however, if no storage charges are paid, the carrier is merely a gratuitous bailee, liable only

P. Ry Co, 186 N.W. 145, 151 Minn. 554, citing **Corpus Juris** with approval.
10 C.J. p 1220 note 92.

96. N.Y.—Burgevin v New York Cent., etc., R Co, 23 N.Y.S. 415, 69 Hun 479.
Wis.—Tallman v. Chicago, etc, R. Co, 118 N.W 205, 136 Wis. 648, 16 Ann Cas 711

97. Mo.—Saffa v. Illinois Cent. R. Co, 279 S.W. 223, 218 Mo App. 502.

Station open at all hours

Failure to remove baggage for approximately thirty hours, during which time the station was always open, had the effect of rendering the carrier liable only as warehouseman. —Saffa v. Illinois Cent R. Co., 279 S.W. 223, 218 Mo App. 502.

98. Colo.—Denver, etc., R. Co. v. Doyle, 145 P 688, 58 Colo 327, L. R.A.1915D 113.

99. Wis.—Hoeger v Chicago, etc, R Co, 23 N.W. 435, 63 Wis. 100, 53 Am.R. 271
10 C.J. p 1220 note 95

1. Ala.—Louisville & N. R. Co v Hestle, 75 So. 885, 200 Ala. 137.

2. N.J.—Larned v. New Jersey Cent R Co, 79 A. 289, 81 N.J Law 571.

3. Colo.—Denver, etc, R. Co. v. Doyle, 145 P 688, 58 Colo. 327, L R.A.1915D 113.

4. N.Y.—Cole v. Goodwin, 19 Wend. 251, 32 Am.D. 470.

5. Vt.—Ouimit v. Henshaw, 35 Vt 604 84 Am.D 646.
10 C.J. p 1220 note 98.

6. Ill.—Chicago, etc., R. Co v Boyce, 73 Ill. 510, 24 Am.R. 268
10 C.J p 1220 note 99

7. Tex.—Galveston, etc., R Co v. Smith, 17 S.W. 133, 81 Tex 479.
10 C.J p 1220 note 2.

8. Ark.—Jonesboro, L. C. & E. R. Co v. Davenport, 201 S.W 1114, 132 Ark. 596.
Miss.—Yazoo, etc., R. Co, v. Hughes, 47 So. 662, 94 Miss. 242, 22 L.R.A., N.S., 975
10 C.J p 1220 note 3

Storage of baggage

(1) Where trunk on arrival at station was left there under an agreement with terminal company that storage would be paid therefor, the liability of the terminal company was that of a warehouseman, as a bailee for hire, and not that of a common carrier.—Bowles v. Payne, 251 S.W. 101.

(2) The right of a terminal station company to charge storage on baggage left with it after the first twenty-four hours gives it a contingent benefit sufficient to charge it with liability for such baggage as upon a lucrative bailment, so that it would be liable for negligently failing to deliver the baggage, even though the terminal company had held the baggage for less than twenty-four hours.—Birmingham Terminal Co. v Thomas, 92 So. 803, 207 Ala. 363

(3) In determining whether or not the bailment was one for hire, it was held that a traveling salesman's sample case containing patterns and designs used in the business of soliciting orders, carried by him in the passenger coach, was baggage, within a notice of the carrier for the storage of baggage, and fixing charges for storage on each piece of baggage after remaining at the station for a specified time.—Milwaukee Mirror, etc., Works v. Chicago, etc, R Co, 134 N.W. 379, 148 Wis. 173, 38 L.R.A.,N.S., 383.

Where a carrier maintains two places in its depot for the storage of baggage at slightly different rates, a passenger has the option to select either place, in the absence of any objection by the carrier that the right place is not selected when he tenders the baggage for storage; and the carrier, by accepting it for storage in one place, is estopped from asserting that it should have been taken to the other place.—Milwaukee Mirror, etc., Works v Chicago, etc, R. Co, 134 N.W. 379, 148 Wis. 173, 38 L.R.A.,N.S., 383.

for gross negligence.[9]

In respect of baggage checked in a parcel room of a carrier by a passenger, for which a charge is made, the carrier acts in the capacity of warehouseman and assumes the obligation of a bailee for hire, involving the necessity of exercising ordinary care.[10]

§ 886. Duty to Store and Protect Baggage

A carrier, in its capacity as warehouseman, is under a duty properly to store baggage and to protect baggage so stored, and is liable for its negligent failure to comply with such duty.

It is the carrier's duty as warehouseman to store the baggage in a proper and suitable place and to exercise ordinary care and diligence in safely keeping it there and in protecting it, and it is liable for the loss resulting from negligence in the performance of this duty, such duty arising not under an independent contract, but as a part of the carrier's duty under the original contract of transportation.[11] There is authority for the view that it is a condition precedent to the change of the carrier's responsibility from that of a common carrier to that of a warehouseman that the baggage shall have been stored in a reasonably safe and secure warehouse and that, until this has been done, the carrier's liability remains that of common carrier.[12] Whether a carrier's duty as warehouseman requires the employment of a watchman, or the construction of fireproof depots, or the adoption of other precautions, must depend on the circumstances and the location of the depot.[13]

Where the carrier is in the relation of warehouseman, it is not responsible for the neglect of its employees to rescue baggage in the warehouse from destruction by fire when such employees are there, but not in the course of their employment,[14] although the rule is otherwise when they are present in the course of their employment.[15]

According to some cases, the duty to store and protect baggage extends only to articles which come within the definition of baggage, and does not include articles improperly checked as baggage.[16]

Some statutes imposing liability on railroad companies for destruction of property by fire do not apply to the loss of a passenger's baggage by a fire which was not caused by, or did not result from, the operation of a train.[17]

§ 887. Connecting Carriers and Through Tickets

While the relations between carriers over whose lines baggage is to be transported as a through shipment may be of such a character as to render them jointly and severally liable for a loss wherever it occurs, as a general rule, subject to certain qualifications as to the initial carrier, a carrier is not liable for a loss which does not occur on its line in the absence of a special contract, where the connecting lines are distinct and independent.

Where there are several connecting lines forming a united continuous line, all parts of one system under the same general direction and control, each is responsible for a loss; since the whole constitutes but one line, and each is the quasi partner of the others, they are jointly and severally liable for a loss wherever occurring.[18] Where, however, the connecting lines are distinct and independent, in the absence of a special contract no carrier can be rendered liable for a loss unless it is shown to have occurred on its lines,[19] except in those jurisdictions where the initial carrier is held to assume liability for the entire route, as shown infra § 888. The mere fact that several lines have an agreement by which tickets are to be sold by any one over the lines of the others, and baggage is to be checked accordingly, does not make them partners, or liable as such.[20]

In determining questions as to liability, the surrounding circumstances and the relations between the various carriers, as well as the provisions of the ticket, may be material considerations.[21]

9. Mass.—Clark v. Eastern R. Co., 1 N.E. 128, 139 Mass. 423.
10 C.J. p 1221 note 4.

10. Mich.—Fraam v. Grand Rapids, etc., R. Co., 126 N.W. 351, 161 Mich. 556, 29 L.R.A.,N.S., 834, 21 Ann.Cas. 96.
10 C.J. p 1220 note 3 [a].

11. Ala.—Central of Georgia R. Co v. Jones, 43 So. 575, 150 Ala. 379, 124 Am.S.R. 71, 9 L.R.A.,N.S., 1240.
Mass.—Nealand v. Boston, etc., R., 36 N.E. 592, 161 Mass. 67.
10 C.J. p 1221 notes 5, 6.

12. Ill.—Bartholomew v. St. Louis, etc., R. Co., 53 Ill. 227, 5 Am.R. 45.
10 C.J. p 1221 note 7.

13. Wis.—Pike v. Chicago, etc., R. Co., 40 Wis. 583.
10 C.J. p 1221 note 8.

14. Mass.—Aldrich v. Boston, etc., R. Co., 100 Mass. 31, 97 Am.D. 74, 1 Am.R. 76.

15. Tex.—Galveston, etc., R. Co. v. Smith, 17 S.W. 133, 81 Tex. 479.

16. Iowa.—Weber Co. v. Chicago, etc., R. Co., 84 N.W. 1042, 113 Iowa 188.
10 C.J. p 1221 note 11.

17. Ark.—Kansas City Southern R. Co. v. Thomas, 133 S.W. 1030, 97 Ark. 287.
10 C.J. p 1221 note 12.

18. Mich.—Wolf v. Grand Rapids, etc., R. Co., 112 N.W. 732, 149 Mich. 75.
10 C.J. p 1222 note 13.

19. Ill.—Pennsylvania R. Co. v. Connell, 112 Ill. 295, 54 Am.R. 238.
Tex.—Texas City Terminal Co. v. Thomas, Civ.App., 178 S.W. 707.
10 C.J. p 1222 note 14.

20. Kan.—Atchison, etc. R. Co. v. Roach, 12 P. 93, 35 Kan. 740, 57 Am.R. 199.
10 C.J. p 1222 note 16.

21. Kan.—Atchison, etc., R. Co. v.

Line of which several carriers own distinct parts. Where a carrier operates its cars over a line, distinct parts of which are owned by different companies, and such carrier's agent receives into its baggage car baggage of a passenger who has a ticket for a through passage over the entire line, such carrier may be liable for loss of baggage regardless of the particular point on the line at which the loss occurs.[22]

Interstate transportation. In view of the Carmack Amendment, 49 U.S.C.A. § 20 (11), under the practice in some jurisdictions a joint recovery for loss of baggage may be had against the initial carrier and a succeeding carrier which actually causes the loss.[23]

§ 888. Liability of Initial Carrier

a. In general
b. Limitation of liability

a. In General

In general the initial carrier is liable for a loss of baggage which occurs on its own line, and it may by contract assume liability for loss or injury which occurs in the course of through transportation beyond its line.

In general the initial carrier is liable for a loss of baggage which occurs on its own line.[24] Even when the initial carrier is liable only for losses occurring on its own line, a delivery by it to the succeeding carrier is necessary in order to enable the initial carrier to avoid liability, and, in order to be effective in this regard, the delivery must consist of such unequivocal acts of transfer of possession to the succeeding line as will permit the passenger to charge the latter line with the care and custody of the baggage.[25]

The initial carrier may by contract bind itself for the entire transportation to a destination beyond its own line, and thus render itself liable for loss of, or damage to, the baggage, whether on its own line or on the line of a connecting carrier which acts as its agent in carrying out the contract of transportation;[26] and it has been held that such a contract may be implied from the circumstances or from the usage of the initial carrier.[27]

According to what is known as the English doctrine, which is followed in a number of jurisdictions in this country, a carrier selling a through ticket and checking a passenger's baggage through to a point beyond its lines undertakes, in the absence of an express stipulation to the contrary, to insure the safe delivery of such baggage at the point to which the ticket is sold, and is therefore liable for loss of or injury to such baggage wherever occurring, the connecting carriers being regarded only as its agents in transporting the baggage;[28] and it has been held that this rule applies although the ticket contains a provision to the contrary, if the passenger had no notice thereof and did not assent thereto, as shown in the following subdivision of this section. It has also been held that the initial carrier's liability is not affected by the fact that the passenger is traveling on a through ticket, having a separate coupon for each line,[29] nor by the fact

Roach, 12 P. 93, 35 Kan. 740, 57 Am R. 199
10 C.J. p 1222 note 21.

22. N.Y.—Hart v. Rensselaer, etc., R. Co, 8 N.Y. 37, 59 Am D 447
23. Mo—Dietz v. Southern Pac. Ry Co., 28 S.W.2d 395, 225 Mo.App 39.
24. Ala.—Montgomery, etc., R. Co. v. Culver, 75 Ala. 587, 51 Am.R. 483
10 C J p 1226 note 47.
25. N.Y.—Hyman v. Central Vermont R. Co., 21 N.Y.S. 119, 66 Hun 202.
10 C.J p 1225 note 41, p 1226 note 47.
26. Ohio—Baltimore, etc., R. Co. v Campbell, 36 Ohio St. 647, 38 Am R. 617.
10 C.J p 1223 note 23.
27. Mo—Burnes v Chicago, etc., R Co., 150 S W. 1100, 167 Mo.App. 62
28. Ark.—Southwestern Transp Co v. Poye, 110 S W 2d 494, 194 Ark 982.
Ohio—Darlington v. Cleveland, C., C & St. L. Ry. Co, 14 Ohio N P, N S, 427.
Tenn.—Dixie Greyhound Lines v Kaplan, 89 S W 2d 342, 169 Tenn. 513
10 C J p 1223 note 24.

Notwithstanding rule of corporation commission

An initial carrier was not relieved of liability for actual value of passenger's baggage lost after delivery to connecting carrier, because of corporation commission rule restricting liability of carrier, since commission has no power to change statutory rule fixing liability of initial carrier—Southwestern Transp Co. v. Poye, 110 S W.2d 494, 194 Ark. 982.

Round-trip ticket

The applicability of the rule has apparently been recognized where the initial carrier sold a round-trip ticket and the loss occurred on the return trip.—Bush v Beauchamp, 201 S W 828, 132 Ark. 582.

Statutes making initial carrier liable for loss of or injury to property through its negligence or negligence of connecting carrier, giving initial carrier recourse on carrier causing loss, requiring carrier to carry baggage of passengers, and making carrier liable for actual damages on failure to deliver baggage in good condition with due diligence, reenact common-law rule relative to initial and connecting carriers.—Southwestern Transp Co v. Poye, 110 S W.2d 494, 194 Ark 982

In New York

(1) There have been decisions which apparently are in accordance with the rule stated in the text.—Hutchins v Pennsylvania R Co., 73 N E. 972, 181 N.Y. 186, 106 Am.S.R. 537—10 C J. p 1223 note 24.

(2) In other cases the view has been taken that, in the absence of a special contract or of a community of interest between the lines involved, the initial carrier is not liable for a loss which does not occur on its line—Milnor v. New York, etc., R. Co., 53 N.Y. 363, affirming 4 Daly 355—10 C J. p 1223 note 26, p 1224 note 31.

29. Tenn—Louisville, etc., R. Co v. Weaver, 9 Lea 38, 42 Am R. 654.
10 C J. p 1223 note 26.

that other carriers sell the passenger a return ticket at reduced rates in consideration of his releasing them from liability for the loss where such carriers are not liable in any event.[30] In other jurisdictions, however, in the absence of any partnership arrangement or contract for through transportation, the rule is that the initial carrier engages only to transport the baggage to the end of its line and there to deliver it to the connecting line, and therefore is liable only for such losses as occur on its own line or through its failure to make proper delivery of the baggage to the connecting line;[31] and it should not be held to assume liability throughout unless its intention so to do is clearly apparent;[32] and this rule has been in effect prescribed by some statutes.[33]

Interstate transportation. In view of the Carmack amendment, 49 U.S.C.A. § 20 (11), a carrier receiving baggage for interstate transportation over a connecting line is liable for a loss occurring on the line of a connecting or succeeding carrier;[34] but, as shown in the following subdivision of this section, the initial carrier may limit its liability to loss or injury occurring on its own line.

Neglect of initial carrier in checking. Independently of any special contract, the initial carrier is liable for any loss, whether occurring on its own or subsequent lines, due to its own negligence in failing properly to check or forward the baggage.[35]

b. Limitation of Liability

The initial carrier may, by contract, provide against its liability for loss of, or injury to, baggage which occurs beyond its lines.

In the absence of any governing statute or regulation providing otherwise, a carrier may, by contract, limit its liability to injuries to, or loss of, baggage occurring on its own lines,[36] and, in some jurisdictions at least, no special consideration is necessary in order to render such limitation valid.[37] Where the rule that the initial carrier is not liable for losses occurring beyond the terminus of its own line in the absence of the assumption of such liability by express contract or of the existence of an arrangement in the nature of a partnership exists between the lines involved is recognized, the fact that the passenger does not have knowledge of a condition printed on a through ticket providing that the initial carrier acts only as the agent of the connecting lines in selling the ticket and will not be responsible beyond its own line does not of itself render the initial carrier liable for a loss occurring beyond its own line.[38] In jurisdictions in which the rule that the initial carrier selling a through

30. Tenn.—Louisville, etc., R. Co. v. Weaver, supra.

31. N.H.—Lessard v. Boston, etc R. Co, 45 A. 712, 69 N.H. 648. 10 C.J. p 1224 note 31.

32. Me.—Perkins v. Portland, etc, R. Co., 47 Me. 573, 74 Am.D. 507. 10 C J p 1224 note 32.

33. Okl—Choctaw, etc., R. Co. v. Zwirtz, 73 P. 941, 13 Okl. 411.

34. Mo.—Dietz v. Southern Pac. Ry. Co., 28 S.W.2d 395, 225 Mo.App 39.
S D.—House v. Chicago, etc, R. Co., 138 N.W. 809, 30 S.D. 321, Ann. Cas.1915C 1045.

Round trip ticket

The applicability of the rule was recognized where the initial carrier sold a round-trip ticket and the loss occurred on the return trip.—Bush v. Beauchamp, 201 S.W. 828, 1?2 Ark. 582.

Transportation pursuant to request of United States government

An initial carrier which accepts a request from the United States government for the transportation of an enlisted man and issues a ticket thereon is bound by the provisions of the request, and the person carried cannot vary the request or bind the government to a limited responsibility indicated on the back of the ticket delivered to such person, and the initial carrier is liable for the loss of a kit bag of the enlisted man which occurred beyond its lines—Atlantic Coast Line R. Co. v. U. S., 62 Ct.Cl. 449

35. Mass.—Najac v. Boston, etc., R. Co, 7 Allen 329, 83 Am.D. 686. 10 C J. p 1224 note 30.

36. Tenn.—Dixie Greyhound Lines v. Kaplan, 89 S.W.2d 342, 169 Tenn. 513. 10 C.J. p 1224 note 34.

Consideration necessary

(1) A carrier may not limit its statutory liability for loss or damage to baggage or as an initial carrier, even by express contract, unless supported by consideration, such as reduction in fare.—Southwestern Transp. Co. v. Poye, 110 S.W.2d 494, 194 Ark. 982.

(2) Accordingly, where carrier offers one fare without limitation as to liability for loss of baggage and reduced fare with such a limitation, carrier, to enforce limitation, must show that it gave passenger option to accept either fare, and that passenger accepted contract containing limitation—Southwestern Transp. Co. v. Poye, supra.

Provision effecting limitation

(1) Provision of bus ticket that selling carrier acted only as agent in selling ticket and checking or carrying baggage thereon, and was not responsible for loss, damage, or injury beyond its own lines, constituted an effective limitation—Dixie Greyhound Lines v. Kaplan, 89 S.W. 2d 342, 169 Tenn. 513.

(2) In an earlier case, however, the view was taken that a stipulation that in selling the ticket the carrier acts as agent and is not responsible beyond its own line refers only to personal injuries and does not relieve the initial carrier of liability for loss of baggage beyond its line.—Coward v East Tennessee, etc, R. Co., 16 Lea, Tenn., 225, 57 Am.R. 226.

37. Tenn—Dixie Greyhound Lines v. Kaplan, 89 S.W.2d 342, 169 Tenn. 513.

Reason for rule

The view has been expressed that "it was not necessary to the validity of this restriction of responsibility that it rest on any consideration, because a carrier is not required to transport goods beyond the terminus of its lines."—Dixie Greyhound Lines v. Kaplan, 89 S.W.2d 342, 343, 169 Tenn. 513.

38. U.S.—Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co., C.C Mo., 31 F. 247.

ticket and checking baggage through to the passenger's destination is liable for losses occurring on any of the connecting lines is recognized, however, the view has been taken that a condition printed on the ticket limiting such carrier's liability to its own lines is not binding on the passenger unless it is brought to his knowledge.[39]

Interstate transportation. In respect of interstate transportation of baggage, the initial carrier may, by valid stipulation, limit its liability to a loss occurring on its own line, and a provision to that effect contained in a ticket issued by the initial carrier and in a tariff filed by such carrier with the interstate commerce commission is binding on the passenger and is effective, notwithstanding the ticket is not signed by the passenger and his attention is not called to the provision therein for limitation other than by delivery of the ticket to him.[40]

§ 889. Liability of Succeeding Carriers

In general each carrier engaged in through transportation of baggage is liable for a loss which occurs on its line.

Each carrier is liable for a loss shown to have occurred on its own line, or where it fails to account for baggage proved to have been delivered to it in good order by a preceding carrier,[41] and the fact that the initial carrier may also be liable does not affect the rule.[42]

The initial carrier has no power, in the absence of a special contract, to bind a connecting line so as to make it liable for injuries not occurring on the line of the latter,[43] and the fact that an initial carrier has sold a through ticket does not of itself render a subsequent carrier liable for loss or injury which does not occur on the line of the subsequent carrier.[44] In order that a connecting carrier may be held liable it must be shown that the baggage was delivered to it.[45]

Where a connecting carrier accepts a trunk for transportation pursuant to a through contract for the transportation of the passenger and his baggage, and the trunk is lost while in such connecting carrier's control, the fact that the baggage was not carried on the same train with the passenger, and without his knowledge or default was diverted in transit by an intermediate carrier, and failed to follow the route called for by the passenger's ticket is immaterial.[46]

Liability of last carrier. While there is authority for the view that a passenger who purchases a through ticket over a line of railroads, which has a coupon attached for each road, and who checks his baggage through to his destination may charge the last carrier with loss of the baggage whether or not it actually received the baggage,[47] as a gen-

39. Ark.—Southwestern Transp. Co v Poye, 110 S.W 2d 494, 194 Ark 932—Little Rock, etc., R Co v Record, 85 S W. 421, 74 Ark 125, 109 Am.S R. 67.
Ohio—Darlington v. Cleveland, C, C & St. L. Ry. Co., 14 Ohio N P., N S., 427.
10 C.J. p 1225 note 36.

In New York

(1) It has been held that the liability of a carrier selling a ticket to a passenger to a point beyond its own line for loss of baggage delivered to a connecting line in good order is not limited by conditions in fine print on a ticket, providing that in checking baggage beyond its own line the carrier restricts its liability to wearing apparel of a specified value, where there is no evidence that the passenger knew of such conditions and agreed to them—Hutchins v Pennsylvania R. Co, 73 N.E. 972, 181 N Y. 186, 106 Am S R. 537, affirming 86 N.Y S. 1138, 92 App Div. 612.

(2) There have been decisions, however, to the effect that the fact that the passenger did not have knowledge of, nor assent to, a limitation in his ticket that the initial carrier assumed no responsibility beyond its own line did not prevent its avoidance of liability for a loss occurring beyond its line.—Marmorstein v Pennsylvania R. Co., 34 N Y S 97, 13 Misc. 32
10 C J. p 1224 note 35

40. N Y—Ellsworth v. Delaware, L & W R Co, 236 N.Y S 289, 134 Misc 680.

41. Wash—Gomm v. Oregon R, etc., Co., 101 P 361, 52 Wash. 685, 25 L R A., N S, 537
10 C J. p 1225 note 37

Succeeding carrier charged with receipt of baggage

On a change of passage from one road to another, if the agent of the second road after receiving from the passenger the checks given to him by the initial carrier fails to find the baggage corresponding to such checks he must immediately notify the owner, or his line will be held to have received, and will be liable for loss of, the baggage—Davis v. Michigan Southern, etc., R. Co., 22 Ill. 278, 74 Am.D. 151.

42. Ill.—See Doherty v. Grand Trunk Western Ry. Co., 194 Ill.App 354.
Wash—Gomm v. Oregon R, etc, Co, 101 P 361, 52 Wash. 685, 25 L R. A,N S., 537.
10 C.J p 1225 note 38.

43. Ala.—Montgomery, etc., R. Co v Culver, 75 Ala. 587, 51 Am.R. 483

44. S C.—Felder v Columbia, etc., R. Co, 21 S.C 35, 53 Am.R. 656.
Tenn.—Furstenheim v. Memphis, etc., R. Co, 9 Heisk. 238.

45. N Y—Kessler v. New York Cent., etc, R. Co, 61 N.Y. 538.
10 C J p 1225 note 40.

Forwarding on another road

Where plaintiff's baggage arrived with him over another road at an intermediate point, and was not delivered to defendant carrier, but was forwarded by mistake on another road when he purchased his ticket from defendant carrier the next morning to continue his journey, defendant carrier was not liable for the loss, although the baggage agent who negligently forwarded the baggage was the joint agent of all of the roads at the station—Yazoo, etc., R Co v McCall, 57 So. 224, 100 Miss 827.

46. Ala.—Southern R. Co. v. Foster, 60 So 993, 7 Ala App. 487.

47. Ga.—Gaines v. Southern Stages, 181 S.E. 190, 51 Ga.App. 631.
10 C J. p 1225 note 42 [a].

Earlier case followed

In reaching the above conclusion the court said that it was requested

eral rule, in the absence of special statutes, the liability of the last carrier is similar to that of any intermediate carrier and it is liable only on proof of the receipt of the baggage by it, and of its failure to deliver in the same condition in which it received it.[48] In the absence of proof that the initial carrier was the agent of the last, or that there was a contract or arrangement, either express or implied, or a custom from which such contract or arrangement could be inferred as to the transportation of a passenger's baggage, the last carrier is not liable for injuries occurring to baggage on the initial or intermediate carrier's line.[49] Even where the rule imposing liability on the last carrier if the passenger purchases a through ticket is recognized, a carrier from whom a passenger purchases a ticket for transportation over the line of such carrier to final destination is not liable for the loss of baggage unless such carrier received the baggage, notwithstanding the first carrier which was not the agent of the last carrier checked the baggage to a point on the last carrier's line.[50]

The agreement of the baggage-master of the last carrier at a union station to forward baggage over the line of another carrier which uses such station has been construed to refer to forwarding the baggage when received at such station, and not to constitute an agreement to have the baggage sent to the union station from another station of the last carrier, at which it had properly been delivered, in order to forward over the other line, where the baggage-master has no knowledge that the baggage has been delivered at such other station.[51] It has been held that the baggage-master at the union station has no authority in such case to make an agreement to have the baggage forwarded from such other station of the last carrier.[52]

Interstate transportation. In the case of the interstate transportation of baggage, a succeeding carrier who causes the loss may be held liable.[53]

Limitation of liability. It has been held that a connecting carrier is entitled to the benefit of a provision for limitation of liability contained in a through ticket on which the baggage is checked,[54] even where the limitation is, in terms, in favor of the initial carrier.[55]

§ 890. Presumptions as to Where Injury or Loss Occurred

In case of failure to deliver baggage to the passenger at destination or of total loss, a presumption against the initial carrier arises. Failure to deliver to the passenger at destination or delivery in bad condition raises a presumption that the last carrier is responsible for the loss or injury.

It has been held or recognized that, in case of nondelivery at destination, or of total loss, a presumption of the liability of the initial carrier which received the baggage from the passenger arises,[56] and that accordingly, where the liability of the initial carrier is confined to its own line and delivery to a connecting carrier, the initial carrier must prove that the baggage was actually delivered to the connecting carrier in order that the initial carrier may avoid liability for nondelivery at destination or total loss, as shown infra § 897. While the view has been taken that, in case of a total loss of baggage, as distinguished from mere damage to it, a presumption of negligence arises against the initial carrier,[57] it has been held that failure of the last carrier to deliver baggage is not evidence of negligence on the part of the initial carrier.[58] In case of delivery in bad order by the last carrier, a presumption does not arise against the initial carrier.[59]

to review and overrule the case of Savannah, Florida & Western Ry. Co. v. McIntosh, 73 Ga. 552, but that a sufficient number of the justices did not agree to overrule that case.—Central of Georgia Ry. Co. v Dean 101 S.E. 771, 149 Ga. 650, conformed to 102 S.E. 45, 24 Ga.App. 713.

48. N.Y.—Kessler v. New York Cent. R. Co., 61 N.Y. 538.
10 C.J. p 1225 note 42.

49. Tex.—Texas, etc, R. Co v. Berry, 71 S.W. 326, 31 Tex.Civ.App. 3
10 C.J. p 1225 note 43.

50. Ga.—Gaines v. Southern Stages, 181 S.E. 190, 51 Ga.App. 631

51. Tex.—Gulf, etc., R. Co v. Chambers, Civ.App., 149 S.W. 1182

52. Tex.—Gulf, etc., R. Co. v. Chambers, supra.

53. Mo.—Dietz v. Southern Pac. Ry Co., 38 S.W.2d 395, 225 Mo.App 39.

54. Pa.—Hay v. Lehigh Valley R. Co, 17 Pa.Dist. 942.
10 C.J. p 1224 note 34 [b], [c].

55. Mo.—Aiken v. Wabash R. Co., 8 Mo.App. 8

But the view has been taken that a connecting carrier is not entitled to the benefit of a provision for limitation in a through ticket which, in terms, is for the benefit of the initial carrier.—Hasbrouck v New York Cent. etc. R Co, 118 N.Y.S. 735, 64 Misc. 478, affirmed on other grounds 122 N.Y.S 123, 137 App Div. 532, affirmed 95 N.E. 808, 202 N.Y. 363, 35 L.R.A.,N.S., 537, Ann.Cas. 1912D 1150.

Reason for rule

A connecting carrier, in receiving baggage from the initial carrier for further transportation, is the agent of the initial carrier and as such agent is entitled to claim the benefit of any part of the original contract of shipment.—Aiken v. Wabash R Co., 80 Mo.App. 8.

56. Ala.—Montgomery, etc., R Co. v. Culver, 75 Ala. 587, 51 Am.R. 483.
10 C.J. p 1226 note 47.

57. Tex.—Galveston, etc., R. Co v. Schafermeyer, 72 S.W. 1037, 31 Tex.Civ.App. 586

58. Mass.—Stimson v. Connecticut River R. Co., 98 Mass. 83, 93 Am. D. 140.

59. Ala.—Montgomery, etc., R. Co. v Culver, 75 Ala. 587, 51 Am.R 483.

As affecting the liability of the last carrier there is authority for the view that the delivery of baggage in good order and condition to the initial carrier raises a presumption that the baggage continued in that order and condition while in the possession of the initial carrier and remained in that order and condition at the time of delivery to the last carrier,[60] and a presumption prevails that a failure to deliver at the end of the transportation,[61] or delivery in bad condition,[62] is through the fault of the last carrier, until it has exonerated itself by showing that it did not receive the baggage or received it in the condition in which it reaches its destination, as shown infra § 897.

According to some cases, the fact that the baggage was injured or partly destroyed on reaching its destination does not create a presumption against any intermediate carrier[63] and does not cast on such carrier the burden of proving that it delivered the baggage in good condition to the next connecting carrier, as shown infra § 897; and a like rule applies as to want of a presumption against an intermediate carrier in respect of the loss of, and failure to deliver, the baggage.[64] There is authority for the view, however, that, where the initial carrier shows a delivery of the baggage to the next connecting carrier which is an intermediate carrier, in the condition in which it was received from the passenger, the presumption against the initial carrier in respect of a loss of baggage is rebutted and transferred to such connecting carrier,[65] and that the burden of rebutting such presumption is cast on such connecting carrier, as shown infra § 897.

Interstate transportation. The provisions of the Carmack Amendment, which imposes liability on the initial carrier for loss of baggage occurring on the line of a succeeding carrier, as shown supra § 888, have not abrogated nor changed the usual presumption that baggage shown to have been delivered in good condition to the initial carrier remained in that condition at the time of delivery to the last carrier, and that the loss or injury occurred while in the possession of the last carrier,[66] and the last carrier may not avoid liability for a loss unless it rebuts such presumption, as shown infra § 897. In respect of an intermediate carrier, however, there is no presumption that the loss occurred on its line[67]

§ 891. Transfer Companies

In general, a transfer company engaged in the business of transferring baggage to and from the stations of passenger carriers is liable in respect of baggage as a common carrier or insurer. A transfer company may generally limit its liability by special contract

While it has been broadly stated that the service rendered to the public who employ a local transfer company is accessorial in its nature and one which the law does not require a common carrier to perform,[68] in view of the rule generally recognized that transfer companies engaged in the business of transferring baggage to and from the stations of carriers of passengers are regarded as common carriers, as shown supra § 9, in general, such a company incurs the responsibility of a common carrier, or of insurer against all losses or damage except such as are caused by an act of God or the public enemy,[69] and is liable for injury to, or loss of, baggage as a carrier of baggage,[70] but is re-

60. Mo.—Dietz v. Southern Pac. Ry Co, 28 S.W.2d 395, 225 Mo.App 39
N.Y.—Maillard v. New York Cent. R Co, 273 N.Y.S. 63, 152 Misc. 244.
Presumption in case of final transportation by transfer company see infra § 691.

61. Mo.—Dietz v. Southern Pac. Ry. Co, 28 S.W.2d 395, 225 Mo.App 39
10 C.J. p 1226 note 48.

62. Ala.—Montgomery, etc., R. Co. v Culver, 75 Ala. 587, 51 Am.R. 483
10 C.J. p 1226 notes 46, 48.

63. Ala.—Montgomery, etc., R. Co. v Culver, supra.
10 C.J. p 1226 note 49.

64. Mo.—Dietz v. Southern Pac Ry Co, 28 S.W.2d 395, 225 Mo.App 39.

65. Tex.—Galveston, etc. R. Co. v. Schafermeyer, 72 S.W. 1037, 31 Tex.Civ.App. 586.

66. Mo.—Dietz v. Southern Pac. Ry. Co, 28 S.W.2d 395, 225 Mo.App. 39

Negligence

In an action against carriers for loss of baggage transported between states, proof of delivery to the initial carrier and nondelivery by the last carrier makes out a prima facie case of negligence against the last carrier.—Dietz v. Southern Pac. Ry Co, 28 S.W.2d 395, 225 Mo.App 39.

Articles taken from trunk

Delivery of trunk and contents in good condition to initial carrier raised presumption that trunk and contents continued in that condition while in possession of that carrier, and were so delivered by it to connecting and last carrier, and in absence of rebuttal proof owner was entitled to recover damages from connecting and last carrier for wearing apparel removed from trunk.—Maillard v. New York Cent. R. Co., 273 N.Y.S. 63, 152 Misc. 244.

67. Mo.—Dietz v. Southern Pac. Ry. Co, 28 S.W.2d 395, 225 Mo.App 39.

68. Fla.—State v Jacksonville Terminal Co., 106 So. 576, 90 Fla. 721.

69. Ill.—Stanfield v. Frank Parmelee Co, 223 Ill.App 199.
10 C.J. p 1226 note 50.

Unprecedented flood caused by an exceedingly heavy rainfall may be regarded as an act of God as affecting the liability of a transfer company.—Ford v. Wabash Ry Co, App, 266 S.W. 1032, reversed on other grounds 300 S.W. 769, 318 Mo. 723.

70. Ill.—Morrison v. Parmelee Co., 222 Ill.App 90.
10 C.J. p 1226 note 50.

In New York

(1) Public Service Commissions Law § 38, as originally enacted, providing that a common carrier of passengers is liable for the full value of property carried as baggage and permitting the carrier to make a rea-

leased from liability after it has made a proper delivery of the baggage.[71] Where the negligence of the transfer company concurs with an act of God and becomes a part of the direct and proximate cause of an injury to baggage, the company is liable.[72]

A contract with a transfer company by which such company undertakes to carry baggage from the railroad station and to deliver it at the passenger's residence, made after the completion of the passenger's journey by rail, is a new contract which is independent of the contract with the railroad company for the transportation of the baggage, as affecting the liability of the transfer company in respect of the baggage.[73]

In some jurisdictions, in determining the liability of a transfer company as a common carrier of goods or of baggage only, the term "baggage" is not given the same restricted meaning that is given to the term "baggage," under the rules, stated above in §§ 855-861, which apply in the case of transportation of baggage as an incident to the transportation of the owner as a passenger,[74] and, therefore, the liability of the transfer company is not necessarily determined by the nature of the articles carried.[75] It has been held that the traveler is not under a duty to inform the transfer company of the nature of the articles offered for transportation, in the absence of an inquiry by the company in that regard, and that the traveler's silence is not of itself a fraud or imposition on the company.[76] There is authority for the view, however, that, where a baggage check for a trunk is delivered to a transfer company in exchange for the latter's check, without disclosure that the trunk contains property other than ordinary baggage, the transaction amounts to a representation that the trunk contains only ordinary baggage, and is a fraud on the transfer company which will relieve it of liability for loss in an action on contract, where the trunk actually contains merchandise of large value.[77]

Where a passenger gives his baggage check to a transfer company at his destination for the further carriage of the baggage to his residence, the presumption is that the transfer company received the baggage from the railroad company in good condition,[78] and, where the baggage was delivered by the railroad company to the transfer company, there is a presumption that the loss occurred while in the hands of the transfer company as the last carrier.[79]

Limitation of liability. While some statutory provisions that it shall not be lawful for a common carrier to limit its common-law liability safely to deliver property by any stipulation or limitation expressed in the receipt given for such property apply to transfer companies,[80] and it has been held

sonable charge for assumption of liability for a declared value in excess of a specified amount, did not apply where a transfer company merely undertook to carry a trunk without undertaking to transport the owner and, incidentally, his trunk.—Morgan v Woolverton, 96 N.E 354, 203 N.Y 52, 36 L.R.A.,N.S., 640, affirming 120 N.Y.S. 1008, 136 App.Div. 351—10 C.J. p 1208 note 97 [d] (2).

(2) Prior to the foregoing decision by the court of appeals, it was held that § 38 applied to a transfer company, notwithstanding it did not carry passengers.—Meister v. Woolverton, 125 N.Y.S. 439, 140 App Div. 926, affirming 121 N.Y.S. 606, 67 Misc. 167—10 C.J. p 1208 note 97 [d] (1).

(3) Since the above decision by the court of appeals, § 38 has been amended by adding the words "baggage company, transfer company" after "common carrier," and the words "whether in connection with the transportation of the owner or not" after the words "carried as baggage."

71. Ala.—Anniston Transfer Co. v. Gurley, 18 So. 209, 107 Ala. 600, 34 L.R.A. 137.
10 C.J. p 1226 note 51.

72. Mo.—Ford v Wabash Ry Co., 300 S.W. 769, 318 Mo. 723, reversing, App., 266 S.W. 1032.

73. Mo.—Ford v. Wabash Ry. Co., supra.

74. Ill.—Stanfield v. Frank Parmelee Co., 223 Ill.App. 199.

Trunk and contents

In respect of the liability of a transfer company, a trunk and most of its contents have been regarded as "baggage," since the contents, with the exception of a few articles, consisted of wearing apparel.—Morrison v. Parmelee Co., 222 Ill.App. 90.

75. Ill.—Stanfield v. Frank Parmelee Co., 223 Ill.App. 199.

76. Ill.—Stanfield v. Frank Parmelee Co., supra.—Morrison v. Parmelee Co., 222 Ill.App. 90.

77. N.Y.—Nathan v. Woolverton, 127 N.Y.S. 442, 69 Misc. 425, affirmed 131 N.Y.S. 1130, 147 App Div. 908.

78. N.Y.—Springer v. Westcott, 37 N.Y.S 909, 2 App Div. 295.—Myerson v. Woolverton, 29 N.Y.S 737, 9 Misc. 186

Transfer company unloading baggage from car

The mere fact that the employees of the baggage express company unloaded the baggage from the baggage car and placed it in the baggage room of the carrier will not render the baggage company subsequently receiving checks for delivery to the passenger's residence liable for a portion of the baggage found to be missing when the checks are presented by the baggage company to the railroad company.—Aikin v. Westcott, 25 N.E. 503, 123 N.Y 363.

79. Pa.—Ensign v. Union Transfer Co., 88 Pa.Super. 26

80. Ill.—Stanfield v. Frank Parmelee Co., 223 Ill.App. 199.—Morrison v Parmelee Co., 222 Ill.App 90.

Want of assent by traveler

In view of the statutory provision, Cahill St. c 27 § 1, that a common carrier may not limit its common-law liability to deliver property safely, a traveler was not bound by provisions on the back of a check, received from a transfer company on delivery of a trunk and contents to the latter, that the check is given as a receipt on the representation, express or implied, and the understanding that said article of baggage does not exceed a specified amount in value and contains no other property than such personal effects known as

that a transfer company cannot limit its liability for the negligence of itself or of its servants,[81] a transfer company may in general by special contract limit its liability for the loss of, or injury to, baggage carried by it.[82]

A distinction has been made, in the matter of the effect of acceptance of receipts as affecting limitation of liability, between freight and baggage cases, as shown above in § 91, and, while there is authority for the view that a traveler is bound by a notice of limitation in a receipt issued by a transfer company, even though he did not read such notice,[83] in general where a person, on delivery of baggage to a local express or transfer company, receives a paper or check, which, from the circumstances of the transaction, he has a right to regard simply as a receipt or voucher, to enable him to forward and identify his property, and no notice is given to show that it embodies a special contract and is intended to serve some other purpose than as a voucher, no contract arises as a matter of law from the acceptance of the receipt,[84] and the passenger or traveler will not be bound by such a condition on the receipt, card, or check given to him unless he has knowledge of, and assents to, the condition,[85] or, as sometimes stated, unless notice of the limitation is brought to the attention of the traveler under circumstances from which his assent thereto may be implied,[86] omission of the shipper to read the paper is not per se negligence.[87] By virtue of some statutes, however, a traveler may be bound by a limitation contained in a receipt issued to him by a transfer company, even though he neither reads nor has actual knowledge of its terms.[88] A notice of limitation contained in a receipt issued by a transfer company is strictly construed against it.[89]

Some statutes, providing for a statement of the value of the baggage and authorizing the carrier to make a reasonable charge for the assumption of liability in excess of an amount in value specified in the statute, permit a transfer company to limit its liability by inserting a provision therefor in schedules of rates and charges where it files such schedules with a public regulatory body, and posts notice thereof, in accordance with other statutory provisions,[90] and a schedule duly filed constitutes of itself notice of the limitation to the traveler and

ordinary railroad baggage, and that the liability of the company for property other than such baggage shall be limited to that of involuntary bailee, at least in the absence of a showing that such provisions were brought to the attention of the passenger and that he assented to them —Stanfield v Frank Parmelee Co, 223 Ill.App 199

81. Pa.—Ensign v Union Transfer Co, 88 Pa.Super. 26.

82. La.—Lawes v New Orleans Transfer Co, 123 So 144, 11 La. App 170

N.Y.—Prentice v. Decker, 49 Barb 21.

83. U.S.—Hopkins v. Westcott, C.C. N.Y., 12 F.Cas.No 6,692, 6 Blatchf. 64.

84. La.—Lawes v. New Orleans Transfer Co, 123 So 144, 146, 11 La.App 170, quoting **Corpus Juris** text

N.Y.—Litcherman v. Barrett, 159 N.Y.S 929, 95 Misc 594

10 C.J. p 142 note 80.

85. Ill.—See Mitchell v. Frank Parmelee Co, 209 Ill App 428.

La.—Lawes v New Orleans Transfer Co., 123 So 144, 11 La.App 170

Minn.—Stine v Hines, 181 N.W 321 148 Minn 132

N.Y.—Madan v Sherard, 73 N.Y 329, 29 Am.R 153—Prentice v Decker, 49 Barb 21.

10 C.J. p 142 note 80

Trunk stolen by transfer company's employee

In a case in which a trunk delivered to a transfer company was stolen by the driver of such company's conveyance, it was held that, under the facts disclosed by the record, the liability of the company was not limited to the amount of maximum liability stated in a provision for limitation on the back of a check given to the traveler's sister on delivery of the trunk to the transfer company.—Fessler v. Detroit Taxicab & Transfer Co., 171 N.W. 360, 204 Mich. 694, 5 A.L.R. 983.

Rule as to interstate transportation not applicable

The rule, applicable to interstate transportation of baggage, which permits the carrier to limit liability by filing and publishing tariffs, in accordance with the applicable federal statutes, even though the passenger neither has knowledge of, nor assents to, the regulation, does not apply to a local transportation company.—Lawes v. New Orleans Transfer Co., 123 So 144, 11 La.App 170

86. Minn.—Stine v Hines, 181 N.W 321, 148 Minn. 132.

87. La.—Lawes v. New Orleans Transfer Co, 123 So 144, 146, 11 La.App. 170, quoting this **Corpus Juris** text with approval.

N.Y.—Madan v Sherard, 73 N.Y. 329, 29 Am.R 153—Morgan v. Woolverton, 120 N.Y.S. 1008, 136 App Div. 351, affirmed 96 N.E. 354, 203 N.Y 52, 36 L.R.A.,N.S., 640—Grossman v Dodd, 17 N.Y.S 855, 63 Hun 324, affirmed 33 N.E. 642, 137 N.Y 599.

88. Cal.—Merrill v. Pacific Transfer Co, 63 P 915, 131 Cal. 582.

10 C.J. p 1211 note 21 [b]

89. U.S.—Hopkins v. Westcott, C.C.N.Y., 12 F.Cas.No 6,692, 6 Blatchf. 64.

90. N.Y.—Levett v. Draper, 185 N.Y.S 891, 194 App Div 632.

Provisions, and amendment, of statute

(1) The rule stated in the text has been applied, under the provision of the Public Service Commissions Law § 38 that every common carrier, baggage company, transfer company, and railroad corporation shall be liable in respect of property carried as baggage, whether or not in connection with the transportation of the owner, up to the full value and regardless of its character, and that the value in excess of one hundred and fifty dollars shall be stated and the carrier may make a reasonable charge for the assumption of such liability in excess of said amount.—Levett v Draper, 185 N.Y.S 891, 194 App Div. 632

(2) Prior to the amendment of such provision of § 38 by adding the words "baggage company, transfer company" after "common carrier," and "whether in connection with the transportation of the owner or not" after "carried as baggage," such provision could not be the basis of a claim of limitation of liability by a transfer company which undertook to transport a trunk without transporting the owner.—Morgan v. Wool-

the limitation is effective, even though the traveler does not have actual knowledge of the limitation.[91] The mere failure of a local agent of the transfer company to inquire as to the value of the baggage is not a waiver of the limitation so established under the statutory provisions,[92] nor does the transfer company lose the right, on the ground of waiver or estoppel, to claim the benefit of the limitation merely because the receipt for baggage issued by it attempts to limit its liability to an amount less than that specified in the statute and in the schedules.[93]

§ 892. Actions for Delay, Loss or Injury

A provision of a tariff filed with the interstate commerce commission which fixes the time of delivery of the baggage instead of the time of giving notice of rejection by the carrier of the passenger's claim for loss as the time from which the period within which action must be brought shall run, contravenes the federal statutes regulating commerce and is ineffective, where the passenger's rights are governed by such statutes.

Where the rights of a passenger in respect of the loss of baggage are governed by provisions of the federal statutes for the regulation of commerce, a provision of a tariff filed with the interstate commerce commission as to the time within which action must be brought, which is based on the time of the delivery of the baggage rather than on the time of the giving of written notice by the carrier disallowing the passenger's claim, is violative of the Interstate Commerce Act, as amended by Act of Febr. 28, 1920, 49 U.S.C.A. § 20 (11), and is void.[94]

§ 893. Nature and Form

In general, trover will lie where baggage is wrongfully detained or is lost by delivery to the wrong person.

The question as to whether the remedy of a passenger for loss of or injury to baggage is by an action on contract or in tort has been considered under varying circumstances, and is treated in the title Actions § 49 e (5).

Trover may be maintained against a carrier for baggage which is wrongfully detained,[95] or where the goods intrusted to it are lost by its act, although without any wrongful intent, as where the carrier delivers the baggage to the wrong person by mistake or under a forged order,[96] or where the carrier ships the property as freight in defiance of the owner's right to have it carried as baggage or not at all.[97] Where, however, the baggage is lost through a mere omission of the carrier, as where it has been stolen or lost through its negligence, trover will not lie even after a demand and refusal, as in such case the owner should bring either assumpsit or a special action on the case.[98]

Assumpsit is not maintainable if the baggage is being carried free.[99]

verton, 96 N E 354 203 N Y. 52, 36 L R A ,N S., 640, affirming 130 N Y. S 1008, 136 App.Div 351.
10 C.J. p 1208 note 97 [d] (2).

Sufficiency of posting of notice

Where a transfer company had posted notice as to where its schedules are on file and available for inspection, in two offices on the main floor of the railroad station where its business was transacted, it can rely on a limitation of liability in such schedules, under Public Service Commissions Law § 28 requiring two notices to be exhibited in the office where the regular business was transacted, even though the transfer company also had a movable desk on the mezzanine floor of the station, to which passengers first came in leaving the trains, at which no notice was posted, such desk not being an "office" within the meaning of the statute.—Levett v. Draper, 185 N.Y. S. 891, 194 App.Div. 632.

91. N.Y.—Levett v. Draper, supra.

92. N.Y.—Levett v. Draper, supra.
10 C J. p 1209 note 3 [a].

But in earlier cases in which Public Service Commissions Law § 38 was under consideration, the view was expressed that the transfer company waived the benefit of the statute by a failure to inquire as to value and to make an excess charge—Meister v. Woolverton, 135 N.Y S 439, 140 App.Div. 926, affirming 121 N Y.S. 606 67 Misc. 167—Noel v Westcott Express Co, 158 N.Y.S. 702, 95 Misc 154

Reason for present rule

The fact of waiver always rests on intention voluntarily to relinquish a right, and the failure of a local agent to make inquiry as to excess value does not show any intention on the part of the transfer company voluntarily to relinquish any right, a local agent has no power, nor any presumed authority, to waive any such limitation when once that limitation is imposed by the act of the company in the filing of the schedules creating the limitation.—Levett v. Draper, 185 N Y S 891, 194 App. Div. 632.

Duty of traveler to inquire as to limitation

An owner of a trunk, who admitted she had a general knowledge that transfer companies limited their liability for loss of trunks intrusted to them, is put on inquiry to ascertain the particular limitation of liability before delivering the trunk to such company, and cannot rely on the omission of the company to inquire the value of the trunk as a waiver of its limitation of liability.—Levett v. Draper, 185 N.Y.S. 891, 194 App Div. 632.

93. N.Y.—Levett v. Draper, supra.

94. N Y.—Araje v. Pennsylvania R. Co, 223 N.Y S. 542, 130 Misc. 29, reversed on other ground 231 N Y. S. 245, 225 App.Div. 73, affirmed 167 N.E. 497, 251 N.Y. 354.

95. N Y.—Cass v. New York, etc., R. Co, 1 E.D.Smith 522.

Transfer company

An action for conversion against a transfer company has been sustained where it failed to make the transfer of baggage received by it for transfer, to deliver the same on demand, and to explain the manner of the loss or to show the exercise of due care to avoid the loss—Stine v. Hines, 181 N.W. 321, 148 Minn 132.

96. N Y.—Hawkins v. Hoffmann, 6 Hill 586, 41 Am.D. 767.

97. Ala.—Southern R. Co. v. Brown, 68 So 321, 192 Ala. 389.

98. Mass.—Holmes v. Doane, 3 Gray 328.
Mich.—Wolf v. Grand Rapids, etc, R. Co, 112 N W. 732, 149 Mich. 75
10 C.J. p 1220 note 6.

99. Mich.—Flint, etc., R Co. v. Weir, 37 Mich. 111, 26 Am.R. 499.

On failure of a transfer company, which, at the request of the owner of a trunk, has received from a railroad carrier, and accepted for storage in its own warehouse, such trunk, to deliver the trunk to the owner, the owner may elect to maintain either an action in the nature of assumpsit for breach of contract, an action in case for negligence, or, if there has been a conversion, an action in trover for conversion.[1]

§ 894. Right of Action and Persons Entitled to Sue

A passenger who checks, or is in possession of, baggage in connection with his transportation by the carrier may, under certain circumstances, maintain an action for loss or injury. The right of the owner to sue, notwithstanding he was not the passenger, has been recognized.

The person who checks, or has the right to possession of, baggage in connection with his transportation as passenger may bring an action for loss or injury, although he is not the real owner thereof.[2] The real owner may bring an action for the loss of, or injury to, his property, although he is not the person who as passenger checked the baggage for transportation,[3] but it has been held that he cannot maintain an action on the contract therefor,[4] and that a carrier is not liable, as carrier, to the owner of property carried as baggage where the relation of passenger and carrier does not exist between the owner and the carrier, unless at the time of the receipt of such property as baggage the carrier is informed that it does not belong to the passenger who carries it.[5] Where, however, the contract of carriage is made by an agent, or for the benefit, of the owner, the owner may maintain an action on the contract.[6]

Where sample cases are checked by a traveling salesman, his principal, to whom the goods belonged, may maintain an action for their loss,[7] even though the principal was undisclosed and the baggage was checked as the property of the agent.[8] It has been held, however, that, as a contract of transportation is personal, the principal cannot sue thereon for loss of, or injury to, the baggage even under an assignment of the claim by the salesman.[9] It has also been held that, where a member of a partnership takes personal property of the firm with him as baggage, the firm has no right of action against the carrier for injury thereto.[10]

Where baggage is wrongfully detained, the owner may assign his title thereto, and the assignee, after another demand therefor, may maintain an action in the nature of an action of trover.[11]

The holder of a single check for a trunk containing the baggage of the members of his family, who is the person with whom the contract of transportation was made, may sue for the entire loss, in view of the fact that the carrier would be protected by a judgment of such holder against claims of other members of the family.[12]

1. Or.—Hamilton v. Baggage & Omnibus Transfer Co., 192 P. 1058, 97 Or. 620.

Action in nature of assumpsit could be maintained under the facts stated in the text whether the trunk was stolen, misdelivered, or otherwise lost.—Hamilton v Baggage & Omnibus Transfer Co., 192 P 1058, 97 Or. 620

2. Ky—Illinois Cent. R. Co. v. Matthews, 72 S.W. 302, 114 Ky. 973, 24 Ky.L. 1766, 102 Am.S.R. 316, 60 L.R.A. 846

10 C J p 1230 note 11.

3. N C—Brick v. Atlantic Coast Line R. Co, 58 S.E. 1073, 145 N C. 203, 122 Am.S R. ,440, 13 Ann.Cas. 328

10 C.J p 1230 note 12.

United States government

United States government had a sufficient interest in a kit bag issued to an enlisted man in the army to authorize the enforcement by it of the liability of such carrier for the loss of such kit bag which was carried as baggage of such enlisted man.—Atlantic Coast Line R Co. v. U. S, 62 Ct.Cl. 449.

4. N.Y.—Weed v. Saratoga, etc., R. Co., 19 Wend. 534.

5. Okl.—Lusk v. Bloch, 168 P. 430, 66 Okl. 171, L.R.A.1918C 109.

6. Ala.—Louisville & N. R. Co. v. Dickson, 73 So. 750, 15 Ala.App. 423, certiorari denied 74 So. 1005, 199 Ala. 699.

Coöwners

Where one of two coöwners of dogs, taken on a hunting expedition, purchased the tickets for the entire party, and, in making the contract for the transportation of the dogs, acted for himself and for his coowner, the carrier was liable on the contract to both owners for loss of the dogs. The fact that one of the owners of the dogs was not present when the tickets were purchased by his coöwner did not defeat the right of both owners to sue for the carrier's breach of duty growing out of the contract for the transportation of the dogs, which was a contract either between the carrier and the coowners or for their sole benefit—Louisville & N. R Co v Dickson, 73 So 750, 15 Ala.App 423, certiorari denied 74 So. 1005, 199 Ala. 699.

Transportation of theatrical company

Where an agent for a theatrical company of actors and other employees contracted with a carrier for the transportation of such actors and employees and their baggage and personal effects, each could maintain an action on the contract for the loss of his baggage.—Spencer v. Wabash R Co, 55 N.Y.S. 948, 36. App Div. 446—10 C.J p 1231 note 13 [b].

7. N.Y.—Sloman v. Great Western R Co, 67 N Y. 208.

10 C.J. p 1231 note 14.

8. N.Y—Trimble v. New York Cent. etc., R. Co, 56 N.E. 532 162 N Y. 84, 48 L R.A. 115, affirming 57 N Y S 437, 39 App Div. 403.

10 C.J. p 1231 note 15

Salesman cannot recover

Ill.—Doherty v. Grand Trunk Western Ry. Co., 194 Ill.App. 354.

9. Kan.—Missouri Pacific R. Co. v Liveright, 53 P. 763, 7 Kan App. 772.

10 C J p 1231 note 16.

10. N J.—Pennsylvania R Co v. Knight, 33 A. 845, 58 N.J.Law 287

11. N.Y—Cass v. New York, etc., R. Co., 1 E.D.Smith 522

12. Tex.—Payne v. Norman, Civ. App, 249 S.W. 882.

Husband and wife. A husband may sue for the loss of baggage, although it is not transported on the train with him, but on another train with his wife.[13] He may also sue for loss of, or injury to, baggage belonging to his wife, where he travels with her,[14] where, having a free pass, he buys a ticket for his wife and delivers her trunk to the railroad company without informing the company that it is not his,[15] or where property used by the wife is community property and she consented to its transportation by the husband, notwithstanding she was not a passenger.[16]

According to some cases the wife may properly be joined with her husband in an action for the loss of her baggage, as shown infra § 895, and the right of a husband and wife to maintain an action for the wife's baggage which is not her separate property is not affected by the fact that the husband was traveling with the wife without a ticket and without paying fare.[17] It has been held that where the legal title to the property constituting the baggage is in the wife, she is the proper person to sue;[18] but if the wife knowingly permits her husband to sue for the loss of her property, and aids him in so doing, she is estopped to sue for the same again in her own name.[19]

Parent and child. A father may sue for the loss of baggage, consisting of wearing apparel and jewelry, which he has provided for the use of his infant daughter.[20] A father paying full fare for himself and traveling with an infant child of such tender years that by custom no fare is demanded for its carriage, may recover on the contract of carriage for loss of, or injury to, articles bought and used for the child, which articles are part of the father's baggage.[21]

Conditions precedent. It has been held that a state statutory provision requiring a demand in writing before bringing a suit against a common carrier has no application to a suit for loss of baggage during interstate transportation.[22] In case of trover for baggage wrongfully detained, a demand upon the directors of the company for the baggage need not be made; it is sufficient if the demand is made on its agents who are charged with the duty of receiving, keeping, and delivering baggage.[23]

§ 895. Parties

A wife may properly be joined with her husband in an action for loss of her baggage. In the case of interstate transportation of baggage, the initial carrier and a succeeding carrier which actually causes the loss may be joined as defendants in some jurisdictions.

According to some cases a wife may properly be joined with her husband in an action for the loss of her baggage.[24] Under the practice in some jurisdictions, the initial carrier and a succeeding carrier which actually causes the loss of baggage transported between states may be sued jointly in the same action.[25]

Various questions as to who may sue for loss of, or injury to, baggage have arisen, as considered above in § 894.

§ 896. Pleading

Plaintiff should plead the facts on which his right to recover is based, and defendant should plead facts constituting an affirmative defense. It is permissible to consider, as an element of a cause of action or as a ground of defense, only such matters as are properly put in issue by the pleadings and proof, and the proof should correspond with the pleadings.

General rules apply in an action against a carrier for delay in delivery of, loss of, or injury to, a passenger's baggage, with respect to the complaint, declaration, or petition,[26] or plea or an-

13. N.Y.—Curtis v. Delaware, etc., R. Co., 74 N.Y. 116, 30 Am.R. 271. 10 C.J. p. 1231 note 19.

14. Mich.—Withey v. Pere Marquette R. Co., 104 N.W. 773, 141 Mich. 412, 113 Am.S.R. 533, 1 L.R.A.,N.S., 352, 7 Ann.Cas. 57.
Tex.—Payne v. Norman, Civ.App., 249 S.W. 882, 885, citing **Corpus Juris** with approval.
10 C.J. p. 1231 note 20.

15. Mass.—Malone v. Boston, etc., R. Co., 12 Gray 388, 74 Am.D. 598.

16. Tex.—Texas & P. Ry. Co. v. Bryant, Civ.App., 11 S.W.2d 659, error refused.

17. Tenn.—Yazoo, etc., R. Co. v. Baldwin, 81 S.W. 599, 113 Tenn. 205.

18. U.S.—The State of New York, D.C.N.Y., 22 F.Cas.No.13,328, 7 Ben. 450.
N.Y.—Rawson v. Pennsylvania R. Co., 48 N.Y. 212, 8 Am.R. 543.

19. S.C.—Godfrey v. Pullman Co., 69 S.E. 666, 87 S.C. 361, Ann.Cas. 1912B 971

20. Tex.—Payne v. Norman, Civ.App., 249 S.W. 882, 885, citing **Corpus Juris** with approval.
10 C.J. p. 1231 note 26

21. Mich.—Withey v. Pere Marquette R. Co., 104 N.W. 773, 141 Mich. 412, 113 L.R.A.,N.S., 533, 1 L.R.A.,N.S., 352, 7 Ann.Cas. 57

22. S.D.—House v. Chicago etc., R. Co., 138 N.W. 809, 30 S.D. 321, Ann.Cas.1915C 1045.
10 C.J. p. 1230 note 8.

23. N.Y.—Cass v. New York, etc., R. Co., 1 E.D.Smith 522

24. Ohio.—Keith v. New York Cent. R. Co., 2 Ohio Dec. Reprint, 125, 1 West L.Mont. 451.
Tenn.—Yazoo, etc., R. Co. v. Baldwin, 81 S.W. 599, 113 Tenn. 205.

25. Mo.—Dietz v. Southern Pac. Ry. Co., 28 S.W.2d 395, 225 Mo.App. 39.

26. **Negligence**
(1) Where the carrier is under the duty to exercise ordinary care in respect of a harp shipped in a case marked "fragile, handle with care," a recovery for injury may be had under a count charging ordinary negligence.—Perkins v. New York, N. H. & H. R. Co., 122 N.E. 306, 232 Mass. 336.

swer,[27] or replication or reply.[28] Accordingly the complaint, petition, or declaration should allege facts showing the right to carriage of the baggage,[29] a delivery of the baggage to the carrier,[30] and some breach of duty on the part of the carrier.[31] So also, plaintiff's pleading should describe the articles lost or injured, and the extent of the loss or damage;[32] and, if special damages are claimed, it should allege facts showing notice to the carrier that it would be subject to special damages in case of nondelivery.[33] In an action for delay in delivery, however, the view has been taken that it is not necessary to itemize the articles involved.[34] Furthermore it is not necessary to describe the receptacle containing the articles as baggage.[35]

The declaration for lost baggage need not aver that plaintiff was a passenger, as this fact may be proved without averment by the possession of the baggage check and ticket,[36] or by the check alone, if it appears that such checks are not given until the passenger tickets are shown;[37] nor is it necessary to allege that the hire for carrying the baggage was part of the money paid for the ticket.[38]

Failure specifically to allege that defendant is a common carrier does not render a petition insufficient where the allegations of the petition show that defendant is such a carrier.[39] Where the pe-

(2) Complaint for failure to deliver baggage received by defendant terminal company for storage, which disclosed a contingent benefit to accrue to such company, was sufficient to charge defendant on a lucrative bailment and was sufficient against demurrer, notwithstanding it charged that defendant "negligently" failed and refused to deliver the baggage.—Birmingham Terminal Co v. Thomas, 92 So. 803, 207 Ala. 363.

Pleading evidence

A fact which is merely evidence of another fact in issue need not be pleaded.—Hines v. Talbert, Tex.Civ. App., 229 S.W. 679.

Complaints, petitions, or declarations sufficient

(1) In general

Ga.—Atlantic Coast Line R. Co. v. Barksdale, 124 S.E. 362, 32 Ga. App. 643.

Or.—Wells v. Great Northern R. Co., 114 P. 92, 116 P. 1070, 59 Or. 165, 34 L.R.A.,N.S., 818, 825

10 C.J. p 1231 note 29

(2) To state cause of action against carrier as warehouseman.

Fla.—Florida East Coast Ry. Co. v. Anderson, 148 So. 553, 110 Fla. 290.

Ga.—Southern R. Co. v. Rosenheim, 58 S.E. 81, 1 Ga.App. 766

10 C.J. p 1231 note 29 [b]

27. Ala.—Louisville & N. R. Co. v. Hestle, 75 So. 885, 200 Ala. 137.

N.Y.—Martin v. New Jersey Cent. R. Co., 106 N.Y.S. 226, 121 App.Div. 552.

10 C.J. p 1232 note 30.

28. **Replication required**

Where defendant carrier's plea set up facts showing plaintiff's failure to remove baggage within a reasonable time, sufficient to show defendant's discharge from liability as insurer, plaintiff should have presented by way of replication any peculiar facts or circumstances which would have excused delay in removal.—Louisville & N. R. Co. v. Hestle, 75 So. 885, 200 Ala. 137.

29. Ala.—Birmingham R. etc., Co. v. Grant, 56 So. 769, 2 Ala.App. 552.

10 C.J. p 1232 note 32.

Money as baggage

In view of the general rule that money can be regarded as baggage only when bona fide taken for traveling expenses and personal use on the trip, it is necessary to aver that such was the purpose for which the money was carried.—San Antonio & A. P. Ry. Co. v. Green, Tex.Civ.App., 170 S.W. 110.

Showing relation of carrier and passenger

The view has been taken that, where allegations are sufficient to show the relation of carrier and passenger, they are also sufficient to show the right to carriage of baggage.—Bonner v. De Mendoza, Tex. App., 16 S.W. 976.

30. S.C.—Park v. Southern R. Co., 58 S.E. 931, 78 S.C. 302.

10 C.J. p 1232 note 33

Allegations sufficient

In view of Rev.St. art. 710, requiring common carrier to give shipper on demand a bill of lading or memorandum in writing, a complaint in a suit against a connecting carrier for the value of a lost trunk and contents, alleging that shipper delivered baggage checks received from the first carrier to defendant, whose agent issued checks in lieu thereof, sufficiently showed delivery of the trunk to defendant, as against a demurrer, since such agent was without legal authority to issue checks in advance of actual receipt of the property and there was a presumption that he performed his duty.—Schaff v. Gibson, Tex.Civ.App., 258 S.W. 595.

31. Ala.—Birmingham R., etc., Co. v. Grant, 56 So. 769, 2 Ala.App. 552.

10 C.J. p 1232 note 35

Bill of particulars which does not state in terms that plaintiff was a passenger on the company's railroad, or that the company was guilty of any negligence, but which does allege that the property was delivered to the agent of the company to be forwarded as baggage on the first passenger train of the company, and that the carrier refused to deliver the property to plaintiff, but kept and retained it, is sufficient.—Chicago, etc., R. Co. v. Conklin, 3 P. 762, 32 Kan. 55

32. Tex.—Carter-Mullaly Transfer Co. v. Angell, Civ.App., 181 S.W. 237.

10 C.J. p 1232 note 36.

33. S.C.—Wehman v. Southern R. Co., 54 S.E. 360, 74 S.C. 286.

34. Tex.—Texas, etc., R. Co. v. Russell, Civ.App., 97 S.W. 1090.

10 C.J. p 1232 note 36.

35. Vt.—Ranchau v. Rutland R. Co., 43 A. 11, 71 Vt. 142, 76 Am.S.R. 761.

36. Ill.—Illinois Cent. R. Co. v. Copeland, 24 Ill. 332, 76 Am.D. 749.

37. Ill.—Illinois Cent. R. Co. v. Copeland, supra.

38. Vt.—Ranchau v. Rutland R. Co., 43 A. 11, 71 Vt. 142, 76 Am.S.R. 761.

39. Ohio.—Cleveland-Akron Bus Co. v. Rogoff, 159 N.E. 374, 25 Ohio App. 538.

Carrier by bus

In an action to recover for the loss of a hand bag and contents against a carrier by bus, allegations in the petition in reference to the carrying of passengers for hire, the giving of the hand bag into the possession of defendant, and the location of one of defendant's termini were sufficient to designate defendant as a common carrier, in view of a lack of denial that defendant was a common carrier and of lack of evidence that it was not a common carrier.—Cleveland-Akron Bus Co. v. Rogoff, 159 N.E. 374, 25 Ohio App. 538.

tition states the facts and charges the carrier generally, it is sufficient, and if the carrier is liable, either as carrier or as warehouseman, plaintiff is entitled to recover;[40] and the rule that the specific acts of negligence relied on must be pleaded does not apply to an action by a passenger for the destruction of his baggage before a reasonable time for its removal had elapsed.[41]

A complaint against a connecting carrier for loss of baggage should allege that the carriers were joint contractors, or that the connecting carrier had received the baggage.[42]

It has been held that a plea setting up a limitation of liability to a certain amount is insufficient where it neither shows a special contract entered into in consideration of reduced charges or special concessions nor negatives the unreasonableness of the limitation.[43]

The court may in a proper case and in the exercise of a sound discretion permit an amendment of the complaint to conform to the proofs.[44]

Issues, proof, and variance. Only such matters as are properly put in issue by the pleadings and proof may be considered as an element of the cause of action, or as grounds of defense,[45] and the proof must correspond with the pleadings.[46] An issue may be raised by plaintiff's denial in his reply of allegations in the answer, notwithstanding the petition contains no allegations as to the subject matter of such issue.[47]

Where the cause of action alleged in the petition is a loss of baggage in interstate transportation which is governed by federal laws, defendant is not deprived of a defense thereunder, under its general traverse, because of pleading a special defense founded on a state law.[48]

A carrier sued for the loss of baggage consisting of wearing apparel may not prove that the articles had a market value as second-hand articles and prove second-hand value; nor may it show that the passenger was a gambler and that he had in his trunk, in addition to the wearing apparel, a gambler's complete outfit.[49] In an action against a person employed to transfer plaintiff's suit case and contents to a railroad station, plaintiff may recover without proving the market value of the suit case and of the contents which consisted of wearing apparel, where such suit case and wearing apparel, because of use or other reasons, had no market value.[50]

§ 897. Evidence

a. Burden of proof and presumptions
b. Admissibility
c. Weight and sufficiency

a. Burden of Proof and Presumptions

The plaintiff has the burden of proving the elements of his cause of action; the defendant carrier has the burden of proving facts which constitute an affirmative defense and of rebutting presumptions favorable to the plaintiff. In general proof of delivery of baggage in good condition to the carrier and of the carrier's failure to redeliver or redelivery in bad condition raises a presumption in support of the plaintiff's right to recover which casts on the defendant carrier the burden of proving facts which relieve it of liability.

In an action against a carrier for the delay of, loss of, or injury to, baggage, the burden in the first instance is on plaintiff to prove the elements of his cause of action,[51] such as the delivery of

40. Iowa.—Warner v. Burlington, etc., R. Co, 22 Iowa 166, 92 Am.D. 389.

41. Mich.—Wallace v. Detroit, etc., R. Co, 142 N.W. 558, 176 Mich. 128, Ann.Cas.1915B 631.

42. S.C.—Felder v. Columbia, etc., R. Co., 21 S.C. 35, 53 Am.R. 656.
10 C.J. p 1232 note 44.

43. Ala.—Louisville & N. R. Co. v. Hestle, 75 So. 885, 200 Ala. 137.

44. Minn.—Stine v. Hines, 181 N.W. 321, 148 Minn. 132.

45. Pa.—Booker v. Pennsylvania R. Co, 82 Pa Super. 588.
10 C.J. p 1232 note 46.

46. Kan.—Stevens v. Harmon, 201 P. 72, 109 Kan. 593.
Mo.—Ford v. Wabash Ry Co., 300 S W 769, 318 Mo. 723, reversing, App., 266 S.W 1032.
10 C.J. p 1233 note 47.

Proving custom as evidence of fact in issue

In an action for loss of a trunk, proof of custom or usage, as to the delivery of trunks to the carrier, that it was customary to put them outside on the platform, was admissible as an evidentiary fact showing delivery, even in absence of allegation in the petition as to such custom.—Hines v Talbert, Tex Civ.App, 229 S.W. 679.

47. Ky.—Chesapeake & O. Ry. Co. v. McClintock-Field Co, 297 S W. 1112, 221 Ky. 142.

Negligence of defendant carrier

In an action to recover for the loss of baggage which was destroyed by fire while in the possession of the carrier, where defendant carrier, in its answer, alleged that it could not in the exercise of ordinary care have prevented the destruction of the baggage after arrival, a denial of such allegation, contained in plaintiff's reply, raised an issue as to negligence notwithstanding plaintiff did not, in his petition, allege negligence on the part of defendant.—Chesapeake & O. Ry. Co. v. McClintock-Field Co., 297 S W. 1112, 221 Ky. 142.

48. Mo.—Wright v. Southern Pac. Co., 167 S W. 1137, 181 Mo App 137.
10 C J. p 1233 note 48.

49. Tex.—Missouri, etc, R. Co. v. Hailey, Civ.App., 156 S W. 1119.

50. Kan.—Stevens v. Harmon, 201 P. 72, 109 Kan. 593.

51. Colo.—Denver Omnibus, etc., Co. v. Gast, 129 P. 233, 54 Colo. 17.
10 C.J. p 1233 note 53.

Money as baggage

In the case of money carried by a passenger in a trunk which is destroyed, it is necessary to prove that the money was carried bona fide for traveling expenses and personal use

his baggage to the carrier,[52] and that the loss did not occur before the baggage came into defendant's possession,[53] or after it left its possession.[54] In the case of baggage or personal effects taken into a coach and not checked as baggage, the burden is on plaintiff to show that they were lost through the carrier's negligence,[55] and, in some jurisdictions, that the passenger was not guilty of contributory negligence.[56]

Where plaintiff shows delivery of the baggage in good condition to the carrier, and the latter's failure to deliver the same, or that there was a loss or injury to the baggage when delivered to him, he makes out a prima facie case,[57] and it is then incumbent on defendant, in order to avoid liability, to show a proper delivery,[58] or that it has not converted the baggage,[59] or otherwise to explain why it has not been delivered, in such a way as to relieve the carrier of liability.[60] So, where plaintiff proves the receipt of the baggage by the carrier and the loss or injury while in its possession, it is then incumbent on the carrier to excuse itself by showing that the loss was caused by an act of God or of the public enemy, or by some inevitable accident,[61] or that its liability had been changed to that of a warehouseman.[62]

It has been held or recognized that, where the circumstances are such as to show that the carrier held the baggage as a warehouseman, the burden is on plaintiff to prove want of care on the part of defendant as the proximate cause of the loss or injury.[63] Where, however, negligence is the basis of the action, proof of delivery to the carrier and failure to account for the property without explanation is sufficient to raise a presumption of negligence and to cast on the carrier the burden to show that the baggage has not been lost or injured through its negligence.[64] Even where baggage is delivered to a carrier as gratui-

on the trip.—San Antonio, etc., R. Co. v. Green, Tex.Civ.App., 170 S.W. 110.

Removing trunk within reasonable time

Where certain articles were stolen from a trunk while it was in defendant carrier's baggage room during the night after the arrival of the passenger and her baggage, and there was neither allegation nor proof of negligence, the view was expressed that plaintiff was not entitled to recover without showing that she had called for her trunk within a reasonable time.—Church v. New York Cent., etc., Co., 116 N.Y.S. 560, affirmed 119 N.Y.S. 1117, 135 App. Div. 914, affirmed 95 N.E. 1125, 201 N.Y. 588.

52. Ga.—Gaines v. Southern Stages, 181 S.E. 190, 51 Ga.App. 631.
N.Y.—Lustig v. International Nav. Co., 78 N.Y.S. 885, 38 Misc. 802.
Tex.—Schaff v. Gibson, Civ.App., 258 S.W. 595.

53. Me.—McQuesten v. Sanford, 40 Me. 117.
Neb.—Ringwalt v. Wabash R. Co., 64 N.W. 219, 45 Neb. 760.
10 C.J. p. 1233 note 55.

54. N.Y.—Du Bois v. New York, etc., R. Co., 110 N.Y.S. 996.
10 C.J. p. 1233 note 56.

55. N.Y.—Knieriem v. New York Cent. R. Co., 96 N.Y.S. 602, 109 App.Div. 709—Posner v. New York Cent. R. Co., 277 N.Y.S. 671, 154 Misc. 591.
Tex.—Missouri, etc., R. Co. v. Kirkpatrick, Civ.App., 165 S.W. 500.

56. N.Y.—Posner v. New York Cent. R. Co., 277 N.Y.S. 671, 154 Misc. 591.

57. S.C.—Fleischman v. Southern R., 56 S.E. 974, 76 S.C. 237, 9 L.R.A., N.S., 519.
10 C.J. p. 1233 note 58.

58. N.Y.—Matteson v. New York Cent., etc., R. Co., 76 N.Y. 381.

59. N.Y.—Hasbrouck v. New York Cent., etc., R. Co., 95 N.E. 808, 202 N.Y. 363, 35 L.R.A.,N.S., 537, Ann.Cas.1912D 1150 affirming 122 N.Y.S. 123, 137 App.Div. 532, affirming 119 N.Y.S. 735, 64 Misc. 478.
10 C.J. p. 1233 note 60.

Transfer company

In an action in conversion against a transfer company, based on a loss of baggage which was received by it for transfer and which was not delivered to the railroad company, defendant has the burden of explaining the manner of the loss where it admitted that it received the baggage and alleged that it had delivered it to the railroad company.—Stine v. Hines, 181 N.W. 321, 148 Minn. 132.

60. S.C.—Meyer v. Atlantic Coast Line R. Co., 75 S.E. 209, 92 S.C. 101.
10 C.J. p. 1233 note 61.

Liability as bailee

In an action tried on the theory that the carrier would be liable as bailee, and treated as one in which negligence was charged, it was held that the carrier had burden to show that trunk was rifled in transit, and not while awaiting transportation.—Texas & P. Ry. Co. v. Bryant, Tex.Civ.App., 11 S.W.2d 659, error refused.

61. Mich.—Wallace v. Detroit, etc., R. Co., 142 N.W. 558, 176 Mich. 128, Ann.Cas.1915B 631.
10 C.J. p. 1234 note 62.

Transfer company

Where the evidence of both parties shows that defendant transfer company had taken charge of plaintiff's trunks, had them in its possession, and had been paid the charges to deliver them at plaintiff's residence, and that the trunks and their contents became watersoaked while in defendant's possession, there is a prima facie case for plaintiff, and defendant has the burden of proving its defense that the injury was caused by an act of God. If the evidence of the transfer company offered to establish the defense that the loss was caused by an act of God tends to show that the negligence of the company concurred to produce the damage it has the burden of showing that its negligence did not directly contribute to cause the damage.—Ford v. Wabash Ry. Co., 300 S.W. 769, 318 Mo. 723, reversing, App., 266 S.W. 1032.

62. Ill.—Bartholomew v. St. Louis, etc., R. Co., 53 Ill. 227, 5 Am.R. 45.
10 C.J. p. 1234 note 63.

63. Mass.—Murray v. International SS. Co., 48 N.E. 1093, 170 Mass. 166, 64 Am.S.R. 290.
10 C.J. p. 1234 note 64.

Transfer and storage company

Where plaintiff, as an arriving passenger, delivered his baggage check to a transfer company with directions to obtain the baggage and to store it until called for, the burden of proof as to negligence was on plaintiff in an action against the transfer company, as bailee, for loss of the baggage and failure to deliver to plaintiff.—Hamilton v. Baggage & Omnibus Transfer Co., 192 P. 1058, 97 Or. 620.

64. Mich.—Blair v. Pennsylvania

tous bailee, there may be an inference or presumption of negligence, according to some cases, where the carrier fails to redeliver to the owner, or loses, the baggage, and the carrier has the burden to rebut the presumption that the loss was caused by its negligence.[65] Where, however, plaintiff who seeks to recover from defendant carrier as a warehouseman had knowledge of the destruction of the baggage by fire before making formal demand therefor, failure to deliver on demand does not raise a presumption of want of care or of negligence on the part of the carrier, and plaintiff must show affirmatively that the destruction of the baggage was caused by the negligence of defendant or its agent.[66]

In an action based wholly on defendant's liability as a common carrier, defendant has the burden of proving that there was due compliance with the applicable statute as to the filing and posting of schedules in order successfully to claim the benefit of the provisions of schedules affecting its liability, and, while in sustaining this burden, defendant is entitled to the benefit of the presumption that the statute has fully been complied with where noncompliance is penalized, such presumption is not conclusive and the burden of proof remains on defendant unless the proof and the inferences are all in its favor.[67]

Where a passenger riding on a pass, and accompanied by his son who is riding on a ticket, has two bundles checked as baggage, it may be assumed in the absence of evidence to the contrary that the bundle containing his own property was checked on his pass.[68]

Limitation of liability. The burden of proving limitation of liability is on defendant carrier,[69] including the conditions on which the existence of the right to claim a limitation depends.[70] Thus it has been held that the burden of proof is on defendant to establish that there was a contract fairly and honestly made limiting its liability.[71]

According to some cases, there is a presumption that, under some circumstances, a passenger

Greyhound Lines, 267 N.W. 578, 275 Mich. 636.
10 C.J. p 1234 notes 66, 67, 64 [a].

Loss of hand baggage

(1) That hand bag of passenger was lost after delivery to conductor in charge of train, to be carried by him from coach when passenger was leaving, raised inference of loss by his negligence.—Atlantic Coast Line R. Co. v. Barksdale, 124 S.E. 362, 32 Ga.App. 643.

(2) In an action against a carrier by bus based on negligence, proof by plaintiff passenger of loss of hand bag taken in charge by agent of defendant established a prima facie case of negligence.

Mich.—Blair v. Pennsylvania Greyhound Lines, 267 N.W. 578, 275 Mich. 636.

Ohio.—Cleveland-Akron Bus Co. v. Rogoff, 159 N.E. 374, 25 Ohio App. 538.

65. Tex.—Texas & P. Ry. Co. v. Graham, Civ.App., 257 S.W. 642, certiorari denied Lancaster v. Graham, 45 S.Ct. 225, 266 U.S. 632, 69 L.Ed. 478, and error dismissed 46 S.Ct. 202, 269 U.S. 541, 70 L.Ed. 402.

Seizure of intoxicating liquors included as baggage

Where plaintiff seeks to charge defendant carrier, as a gratuitous bailee, for the loss of proper and lawful baggage which was seized by government officers, together with intoxicating liquors included as baggage, while in defendant's possession, it has been held that the burden is on defendant to prove that it exercised the care required of a gratuitous bailee to preserve the proper and lawful baggage after the presence of the intoxicating liquors was discovered.—Shannon v. Hines, 226 S.W. 283, 205 Mo.App. 629.

66. Ala.—Hestle v. Louisville & N. R. Co., 81 So. 149, 16 Ala.App. 657

67. Vt.—Simpson v. Central Vermont Ry. Co., 115 A. 299, 95 Vt. 388

68. Colo.—Denver, etc., R. Co. v. Johnson, 114 P. 650, 50 Colo. 187, Ann.Cas.1912C 627.

69. N.Y.—Morgan v. Woolverton, 120 N.Y.S. 1008, 136 App.Div. 351, affirmed 96 N.E. 354, 203 N.Y. 52, 36 L.R.A.,N.S., 640.
Pa.—Verner v. Sweitzer, 32 Pa. 208.

70. La.—Williams v. Pickwick-Greyhound Lines, 131 So. 860, 15 La.App. 344.

Matters which carrier must prove

That ticket sold to passenger contained stipulation for limitation of liability, and that tariffs containing provision for limitation of liability were on file with various state regulatory bodies — Williams v. Pickwick-Greyhound Lines, 131 So. 860, 15 La.App. 344.

Transfer company

Even though plaintiff had assented to a so-called contract with a transfer company containing a provision that, if the property in question exceeds a specific value, the company's liability to the extent of the full value shall be limited to that of an involuntary bailee, being for willful negligence only, the view was expressed by Thomson, J., that, in order to avoid liability for the full value, defendant had the burden of proving that the loss was not occasioned by its willful negligence.—Stanfield v. Frank Parmelee Co., 223 Ill.App. 199.

71. Minn.—Ferris v. Minneapolis & St. L. Ry. Co., 173 N.W. 178, 143 Minn. 90.

Transfer company

(1) Where a transfer company relies on a limitation of liability on the theory that the traveler accepted a receipt containing notice of the limitation, the company has the burden of proving the special contract
La.—Lawes v. New Orleans Transfer Co., 123 So. 144, 11 La.App. 170.
N.Y.—Morgan v. Woolverton, 120 N.Y.S. 1008, 136 App.Div. 351, affirmed 96 N.E. 354, 203 N.Y. 52, 36 L.R.A.,N.S., 640.
10 C.J. p 142 note 80.

(2) The view was expressed by Thomson, J., in specially concurring, that, where defendant transfer company sought to claim the benefit of a limitation of liability for loss of baggage, the burden was on it to show that plaintiff had knowledge that defendant was a carrier of baggage only, and not a common carrier of goods, in its relation to plaintiff, in view of the rule that a carrier of baggage only may not limit its liability unless knowledge of the status of the carrier in that regard is brought home to the owner of the property carried.—Stanfield v. Frank Parmelee Co., 223 Ill.App. 199.

who accepts a ticket containing a provision for limitation of the carrier's liability does so with the knowledge of the contents of the ticket and with the intention to be bound thereby,[72] and that the holder of the ticket read or was advised of the limitation.[73] So the acceptance and use by an interstate passenger of a railroad ticket which purports to limit liability are sufficient to establish an agreement which is prima facie valid, and the mere failure of the passenger to read matter plainly placed before him does not overcome the presumption of assent.[74] The view has been taken, however that the passenger's assent may not be presumed where he can neither read nor write and he has no knowledge of the provisions of the ticket.[75]

Connecting carriers. In the case of transportation of baggage over the lines of connecting carriers, it is necessary for plaintiff to show in some manner that the loss occurred in transit,[76] but, where the loss or destruction of the baggage has been shown, there is a presumption that the initial carrier is responsible as shown above in § 890, and such carrier has the burden or onus of proving that the loss did not occur while the baggage was in its possession,[77] as, for example, by showing delivery to the connecting carrier in the condition in which the baggage was received from the passenger.[78] So, where there is a presumption that loss of, or injury to, baggage occurred through the fault of the last carrier, based on failure to deliver to the passenger or on delivery in bad condition, considered above in § 890, in general such carrier has the burden of rebutting such presumption,[79] as, for example, by showing that baggage delivered to the passenger in bad condition was in the same condition when received by such carrier.[80] In view of the fact that, notwithstanding the Carmack amendment, there is a presumption that, in the case of interstate transportation, baggage shown to have been delivered in good condition to the initial carrier, remained in that condition at the time of delivery to the last carrier, and that the loss or injury occurred while in the possession of the last carrier, as shown above in § 890, the last carrier may not avoid liability unless it rebuts such presumption.[81]

The view has been taken that, in order to charge an intermediate carrier for a loss of baggage, plaintiff has the burden of proving definitely and specifically that the loss occurred on the line of such carrier,[82] and that the fact that baggage was in bad condition on reaching destination does not create a presumption against an intermediate carrier, as shown above in § 890, and does not cast on the intermediate carrier the burden of proving that it delivered the baggage in good condition to the next connecting carrier.[83] There is authority for the view, however, that, where the initial carrier shows a delivery of the baggage to the next connecting carrier which is an intermediate carrier, in the condition in which it was received from the passenger, the presumption against the initial carrier is rebutted and transferred to such connecting carrier, as shown above in § 890, and that the burden of rebutting such presumption is cast on such connecting carrier.[84]

Where the carrier claims that the contract for transporting the baggage over connecting lines was illegal, as being in violation of federal statutes, it has the burden of maintaining this claim.[85]

Possession of baggage check or receipt. The possession of a baggage check is prima facie evidence that the carrier has received and has not delivered the piece of baggage represented by it.[86]

72. Pa.—Jacobs v. New Jersey Cent. R. Co., 19 Pa.Super. 13, affirmed 57 A. 982, 208 Pa. 535.
10 C.J. p. 1212 note 23.
As to bill of lading see supra § 91.

73. Mo.—Aiken v. Wabash R. Co., 80 Mo.App. 8.
10 C.J. p. 1212 note 25 [a] (1) (2).

74. U.S.—New York Cent. & H. R. R. Co. v. Beaham, Mo., 37 S.Ct. 43, 242 U.S. 148, 61 L.Ed. 210.

Limitation based on value

The rule stated in the text was applied where the ticket purported to limit liability to a specified sum unless a greater value should be declared and excess charges paid.—New York Cent. & H. R. R. Co. v. Beaham Mo., 37 S.Ct. 43, 242 U.S. 148, 61 L.Ed. 210.

75. Vt.—Ranchau v. Rutland R. Co., 43 A. 11, 71 Vt. 142, 76 Am.S.R. 761.
10 C.J. p. 1212 note 25 [a] (3).

76. Tex.—Galveston, etc., R. Co. v. Schafermeyer, 72 S.W. 1037, 31 Tex.Civ.App. 586.

77. Ga.—Georgia Southern & F. R. Co. v. Du Bose, 71 S.E. 945, 9 Ga.App. 607.

78. Ala.—Montgomery, etc., R. Co. v. Culver, 75 Ala. 587, 51 Am.R. 483.
Tex.—Galveston, H. & S. A. Ry. Co. v. Schafermeyer, 72 S.W. 1037, 31 Tex.Civ.App. 586.
10 C.J. p. 1226 note 47.

79. Mo.—Dietz v. Southern Pac. Ry. Co., 28 S.W.2d 395, 225 Mo.App. 39.
10 C.J. p. 1226 notes 46, 48.

80. Ala.—Montgomery, etc., R. Co. v. Culver, 75 Ala. 587, 51 Am.R. 483.
10 C.J. p. 1226 notes 46, 48, p. 1234 note 71.

81. Mo.—Dietz v. Southern Pac. Ry. Co., 28 S.W.2d 395, 225 Mo.App. 39.

82. Mo.—Dietz v. Southern Pac. Ry. Co., supra.

83. Ala.—Montgomery, etc., R. Co. v. Culver, 75 Ala. 587, 51 Am.R. 483.
10 C.J. p. 1226 note 49.

84. Tex.—Galveston, etc., R. Co. v. Schafermeyer, 72 S.W. 1037, 31 Tex.Civ.App. 586.

85. Wis.—Altschuler v. Atchison, etc., R. Co. 144 N.W. 394, 155 Wis. 146, 49 L.R.A.,N.S., 491.

86. Ala.—Louisville & N. R. Co. v.

While the presumption or prima facie proof of delivery to the carrier based on possession of a baggage check or receipt, by another, may in general be rebutted by the carrier's evidence, or want of delivery to the carrier may be shown by evidence adduced by plaintiff passenger, under some circumstances such presumption or proof may be rebutted only by direct proof by the carrier that the baggage was never received by it, as shown below in subdivision c of this section, and the passenger need not prove that the carrier actually received the baggage, until the carrier has rebutted the constructive delivery evidenced by the check by proof that it never received the baggage.[87] The fact of possession of the check, together with proof that the baggage could not be found when inquired for and demanded by the passenger, raises a presumption of negligence on the part of the carrier.[88]

Such check is also prima facie evidence of the holder's ownership of the baggage,[89] and that the baggage was received by the carrier in good condition.[90]

Where a passenger delivers a check to the agent of a connecting line and receives its check in exchange therefor, the presumption is, in the absence of proof to the contrary, that the baggage has been received in due course by the latter line, and it is responsible therefor.[91]

b. Admissibility

General rules as to the admissibility of evidence apply in actions for loss of, injury to, or delay in delivery of, baggage.

General rules governing the admissibility of evidence apply in actions against a carrier for the delay of, injury to, or loss of, baggage.[92] Thus competent and relevant evidence as to the capacity in which defendant acted in dealing with the baggage is admissible where the question is in issue,[93] as is competent and relevant evidence as to the nature and value of the baggage, for the purpose of enabling the jury to find its value.[94] In an action for delay in delivering baggage, the owner may testify that he contracted with the carrier to transmit it to a certain point, without producing his check.[95] In an action for delay in delivering the baggage of a traveling salesman, whereby he was unable to sell goods, evidence that the time of the year was that in which his business was most active is admissible.[96]

Questions as to the competency as witnesses of parties or persons interested in the result of actions of the type here under consideration generally are considered in the C.J.S. title Witnesses § 129, also 70 C.J. page 201 notes 76, 77.

Admissions of agents of carrier. The declarations or admissions of an agent or servant of the company, with regard to the cause or circumstances of a loss of baggage, are not admissible against the carrier, unless shown to have been made within the authority of such servant or agent,[97] or to have been a part of the res gestæ.[98]

Childers, 98 So. 319, 19 Ala.App. 492.

Minn.—Ahlbeck v. St. Paul, etc., R. Co., 40 N.W. 364, 39 Minn 424, 12 Am S R. 661.

S.C.—Davis v. Atlantic Coast Line R. Co, 88 S.E. 273, 104 S.C. 63, 2 A. L.R. 102.

10 C.J. p 1199 note 8.

87. Ga.—Lewis v. Ocean SS Co., 76 S E. 1073, 12 Ga.App. 191.

88. Kan.—Atchison, etc., R. Co. v. Brewer, 20 Kan. 669.

Mo.—Zeigler v. Mobile, etc., R. Co, 39 So. 811, 87 Miss. 367.

89. Ark.—St. Louis, etc., R. Co. v. Stone, 95 S.W. 470, 78 Ark. 318.

10 C.J. p 1200 note 11.

90. U S.—Hannibal & St. J. R. Co. v. Swift, Mo., 12 Wall. 262, 20 L. Ed. 423.

10 C.J. p 1200 note 12.

91. Ala.—Louisville & N. R. Co v. Childers, 98 So. 319, 19 Ala.App. 492.

10 C J p 1200 note 14.

92. Kan.—Stevens v. Harmon, 201 P. 72, 109 Kan. 593.

S.C.—Davis v Atlantic Coast Line R. Co., 88 S E. 273, 104 S.C. 63, 2 A.L R. 102

10 C.J. p 1235 notes 76, 77 [b].

93. Mo.—Treadway v. Terminal R. R. Ass'n of St. Louis, App., 84 S. W 2d 143.

Terminal association as agent of carrier

In passenger's action for loss of baggage by railroad terminal association, exclusion of evidence that service rendered by association, in taking possession of baggage for purpose of holding it until delivery to plaintiff, was under contract with various railroads as agent for them and not on its own account, was error where plaintiff sought to hold association as warehouseman on theory that association in rendering service was independent contractor. —Treadway v. Terminal R. R. Ass'n of St. Louis, Mo.App., 84 S.W.2d 143.

94. S C.—Peixotti v. McLoughlin, 1 Strobh. 468, 47 Am D. 563.

10 C J. p 1235 note 77.

Market value at place other than destination

Where the evidence did not show clearly that certain dogs which died while in the possession of the carrier had a market value at the place of destination, evidence of market value at the market nearest to destination was relevant to the issues. —Louisville & N. R. Co v. Dickson, 73 So. 750, 15 Ala.App. 423, certiorari denied 74 So. 1005, 199 Ala. 699

95. S C.—Strange v. Atlantic Coast Line R. Co, 57 S.E. 724, 77 S C. 182.

96. S C.—Webb v. Atlantic Coast Line R. Co, 56 S.E. 954, 76 S C. 193, 9 L R.A.,N.S., 1218, 11 Ann. Cas 834.

97. Ohio.—Baltimore, etc., R. Co v. Campbell, 36 Ohio St 647, 38 Am. R. 617.

10 C.J p 1235 note 82

98. Kan.—Atchison, etc., R. Co v. Wilkinson, 39 P. 1043, 55 Kan. 83.

10 C.J. p 1235 note 82 [a].

Regulations of, or schedules filed with, interstate commerce commission. In an action for the loss of the hand bag of an interstate passenger, it has been held that a regulation of the interstate commerce commission limiting liability for baggage was properly excluded on the theory that the particular regulation in question did not apply to hand baggage.[99] It has been held, however, that schedules duly filed with the interstate commerce commission by a carrier, containing a provision for limitation of liability, are admissible on behalf of defendant in an action against a terminal association for loss of baggage transported in interstate commerce which was delivered to defendant by the carrier, where the loss occurred before the termination of the responsibility of the carrier as such and the question as to whether defendant acted as the agent of the carrier in respect of the baggage is in issue.[1]

c. Weight and Sufficiency

General rules governing the weight and sufficiency of evidence apply in actions for loss of, injury to, or delay in delivery of, baggage.

Rules as to the weight and sufficiency of evidence applicable in civil actions generally, apply in an action against a carrier for loss of, injury to, or delay in the delivery of, baggage.[2] In gen-

99. Ga.—Atlantic Coast Line R. Co. v. Barksdale, 124 S.E. 362, 32 Ga. App. 643

1. Mo.—Treadway v. Terminal R. R. Ass'n of St. Louis, App., 84 S.W. 2d 143

2. Minn.—Conheim v. Chicago Great Western R. Co., 116 N.W. 581, 104 Minn. 312, 124 Am.S.R. 623, 17 L.R.A.,N.S., 1091, 15 Ann.Cas. 389.
10 C.J. p. 1236 note 94.

Delivery over to connecting carrier

Where baggage has been checked over connecting lines, in order to relieve the initial carrier from liability for loss, its delivery to the next connecting line must be shown by such evidence as would be sufficient to charge such connecting line if the suit had been against it.—See Doherty v. Grand Trunk Western R. Co., 194 Ill.App. 354.
10 C.J. p. 1226 note 47.

Evidence sufficient

(1) To authorize recovery for damage to sample scales bolted in steel banded trunk, on theory of rough handling.—Hines v. Edwards, 106 S.E. 747, 26 Ga.App. 402.

(2) To show negligence of carrier, in absence of carrier's failure to show due care.—Blair v. Pennsylvania Greyhound Lines, 267 N.W. 578, 275 Mich. 636.

(3) To show that interstate carrier received baggage as common carrier and not as warehouseman.—Gus Mayer Co. v. Louisville & N. R. Co., 153 So. 249, 228 Ala. 290

(4) To support finding of negligence of carrier.
Ohio.—Cleveland-Akron Bus Co. v. Rogoff, 159 N.E. 374, 25 Ohio App. 538.
Tex.—Hines v. Robey, Civ.App., 225 S.W. 201
10 C.J. p. 1236 note 94 [a] (7)

(5) To support finding that carrier's employees took charge of hand baggage.—Nashville, C. & St. L. Ry. v. North, 6 Tenn.Civ.A. 20.

(6) To support judgment rendered for plaintiff, on appeal by him on ground that amount was insufficient.—McDaniels v. Payne, 92 So. 604, 207 Ala. 346.

(7) To support recovery by plaintiff in an action in conversion against a transfer company.—Stine v. Hines, 181 N.W. 321, 148 Minn. 132.

(8) To support verdict for defendant.—Gaines v. Southern Stages, 181 S.E. 190, 51 Ga.App. 631.

(9) To sustain finding that carrier was guilty of gross negligence.—Perkins v. New York, N. H. & H. R. Co., 122 N.E. 306, 232 Mass. 336

(10) To sustain finding that defendant carrier failed to exercise due care with respect to baggage left with its agent.—Jonesboro, L. C. & E. R. Co. v. Davenport, 201 S.W. 1114, 132 Ark. 596.

(11) To sustain finding that defendant railroad company could, by the exercise of reasonable care, have prevented the destruction by fire of suit case and contents checked by traveler in defendant's parcel room.—Missouri Pac. R. Co. v. Fuqua, 233 S.W. 926, 150 Ark. 145.

(12) To sustain finding that lost hand bag was never delivered to defendant carrier.—Baucum v. Hale, 124 So. 782, 11 La.App. 687.

(13) To sustain finding that merchandise contained in plaintiff's grip was accepted as baggage, with notice of its character and use.—Ferris v. Minneapolis & St. L. Ry. Co., 173 N.W. 178, 143 Minn. 90.

(14) To sustain special findings by the jury.—Stevens v. Harmon, 201 P. 72, 109 Kan. 593.

(15) To sustain or support verdict or judgment for plaintiff.
Ga.—Atlantic Coast Line R. Co. v. Barksdale, 124 S.E. 362, 32 Ga.App. 643.—Hines v. McWhirter, 106 S.E. 4, 26 Ga.App. 208.
Tex.—Texas & N. O. R. Co. v. Levy, Civ.App., 199 S.W. 513.
10 C.J. p. 1236 note 94 [a] (1).

Evidence insufficient

(1) To show contract by auto stage company to transport passenger's trunk shipped by boat.—Yorke v. Pickwick Stages System, 298 P. 331, 113 Cal.App. 566.

(2) To show delivery of trunk to defendant's agent in action for loss of trunk against receiver of second or destination carrier.—Schaff v. Gibson, Tex.Civ.App., 258 S.W. 595.

(3) To show gross negligence or willful misconduct of defendant so as to sustain judgment for plaintiff in action against carrier for negligence in carrying trunks checked as baggage by one other than owner.—Chicago, R. I. & P. R. Co. v. Bonner, 229 P. 266, 103 Okl. 131.

(4) To show that defendant carrier's tariff containing a limitation of liability was on file with various state regulatory bodies.—Williams v. Pickwick-Greyhound Lines, 131 So. 860, 15 La.App. 344.

(5) To show that ticket sold to passenger contained a stipulation for limitation of liability.—Williams v. Pickwick-Greyhound Lines, supra.

(6) To show theft by defendant carrier's servants of valuables left by plaintiff on table in defendant's dining car.—Barden v. New York Cent. R. Co., 168 N.Y.S. 742, 181 App.Div. 306.

(7) To support judgment for plaintiff.
N.Y.—Silverman v. New York Transfer Co., 192 N.Y.S. 799
Okl.—Kansas City Southern R. Co. v. Tucker, 236 P. 35, 108 Okl. 259

(8) To support judgment for plaintiff where the question involved was at what point or by whom baggage checks were mixed.—Goodman v. Michigan Cent. R. Co., 191 N.Y.S. 275.

(9) To support verdict for plaintiff based on alleged negligence of defendant carrier in failing to prevent destruction of baggage by fire after arrival at destination.—Chesa-

eral, in order that a particular fact in issue may be regarded as established, it must be proved by a preponderance of evidence.[3]

Loss of baggage may sufficiently be established by proof of delivery to the carrier and failure to deliver it at its destination, even without demand and refusal, if there is other evidence of loss;[4] but mere proof of nondelivery without proof of demand and refusal, or other evidence of loss, is not sufficient to show a conversion.[5]

The admission as to the value of lost baggage made by an immigrant to a steamship company on a printed blank and signed only by mark will not as a matter of law be given more weight than the immigrant's positive statement as to the actual value given at the trial.[6]

The issuance of a check for baggage and possession of it by the passenger is prima facie proof that the carrier has received the baggage, as shown above in subsection 897 a, and, while not conclusive on defendant carrier, such evidence is sufficient, in the absence of evidence to the contrary, to show that the baggage was delivered to defendant and that it is liable for loss of the baggage.[7]

Rebutting presumptions. An inference of negligence arising from a carrier's failure to account for the loss of baggage which had been stored with it is not overcome by evidence showing that the building used for the storage was safe and secure, in charge of trusty agents and servants, and properly guarded by day and night.[8] The presumption of negligence arising from the derailment of a train, by reason of which a passenger's baggage was destroyed, is not rebutted by evidence that the derailment and wrecking of the train were caused by a slide of dirt and rocks.[9]

Prima facie evidence that baggage was in good order when received by the carrier may be overcome by proof showing that it was not in good order when received, or by proof showing that it was in the same condition when received by the carrier as when delivered to the passenger at destination.[10]

In general the presumption or prima facie proof that the carrier has received baggage, which is based on the possession of a baggage check or receipt by another, considered above in subdivision a of this section, may be rebutted by the carrier's proof, or want of delivery to the carrier may be shown by evidence adduced by plaintiff passenger,[11] but, under some circumstances, such presumption or proof may be rebutted only by direct proof by the carrier that the baggage was never received by it.[12]

Offer to compromise not admission of liability. A mere offer by the carrier to compromise a claim against it is not conclusive evidence of its liability, nor is it entitled to any weight, unless the circumstances are such as to make it tantamount to an admission of liability.[13]

§ 898. Trial in General

Questions as to what are questions of fact, as to instructions, and as to verdicts and findings are considered below in §§ 899-901.

§ 899. Questions of Law and Fact

Where the evidence as to a matter in issue is conflicting or will reasonably support different inferences, the question is one of fact for the jury, or for the court as trier of the facts, to determine. Where, however, the evidence is insufficient or is undisputed, or is such that reasonable minds can reach but one conclusion, the question is one for the court to determine.

As in other civil cases, where the evidence on a matter in issue is conflicting, or is such that reasonable minds might come to different conclusions therefrom, the question is one of fact for determination by the jury or by the court as trier of the facts on a trial without a jury.[14] On the other hand, where the evidence is insufficient or

peake & O. Ry. Co. v. McClintock-Field Co., 297 S.W. 1113, 221 Ky. 142.

(10) To sustain finding that the value of lost baggage was equal to the amount awarded below—Hines v. Talbert, Tex.Civ.App., 229 S.W. 679.

3. Mich.—Wallace v. Detroit, etc., R. Co., 142 N.W. 558, 176 Mich. 128, Ann.Cas.1915B 631.

4. N.Y.—McCormick v. Pennsylvania Cent. R. Co., 1 N.E. 99, 99 N.Y. 65, 52 Am.R. 6—Garvey v. Camden, etc., R. Co., 1 Hilt. 280, 4 Abb.Pr. 171.
10 C.J. p 1237 note 95.

5. N.Y.—Tolano v. National Steam Nav. Co., 28 N.Y.Super. 318, 4 Abb.Pr.,N.S., 316, 35 How.Pr. 496.

6. Ill.—Haaga v. Austro-Americana Line, 173 Ill.App. 35.

7. Ala.—Louisville & N. R. Co. v. Childers, 98 So. 319, 19 Ala.App. 492.
10 C.J. p 1200 note 14 [a].

8. Ga.—Rome R. Co. v. Wimberly, 75 Ga. 316, 58 Am.R. 468.
10 C.J. p 1237 note 98.

9. N.C.—Thomas v. Southern R. Co., 42 S.E. 964, 131 N.C. 590.

10. Ill.—St. Louis, etc., R. Co. v. Hawkins, 39 Ill.App. 406.

11. Ill.—Hosking v. Southern Pac. Co., 148 Ill.App. 11, affirmed 90 N.E. 669, 243 Ill. 320.
10 C.J. p 1199 note 8 [a].

12. S.C.—Park v. Southern R. Co., 58 S.E. 931, 78 S.C. 302.

13. Ill.—Michigan Southern, etc., R. Co. v. Meyres, 21 Ill. 627.

14. Ala.—Louisville & N. R. Co. v. Dickson, 73 So. 750, 15 Ala.App. 423, certiorari denied 74 So. 1005, 199 Ala. 699.
Ill.—See Mitchell v. Frank Parmelee Co., 209 Ill.App. 428.

is undisputed, or such that reasonable minds can come to but one conclusion therefrom, in general the question becomes one of law for the court to determine, and may be disposed of by it without the aid of a jury, as, for example, by dismissal, nonsuit, peremptory instruction, affirmative charge, or by directing a verdict.[15] Where the evidence is conflicting or doubtful, or will support different inferences, it is generally a question for the trier or triers of the facts as to whether the baggage was properly delivered to the carrier;[16] whether the carrier had notice as to the contents of a trunk or box, so as to become liable for its loss after its acceptance for transportation, although it contained merchandise;[17] whether deception had been practiced as to ownership, contents, and status, of baggage;[18] whether owner, or person in possession, of baggage was, or intended to become, passenger;[19] whether the baggage reached the station to which it was checked;[20] whether there was a delivery of the baggage to the passenger,[21] whether the carrier delivered the baggage to its agent to be deposited in its warehouse;[22] whether under the circumstances the passenger called for his baggage within a reasonable time after its arrival;[23] whether the passenger was guilty of contributory negligence;[24] whether the passenger had notice of a condition limiting liability printed on

Minn.—Stine v. Hines, 181 N.W. 321, 148 Minn 132.

Mo.—Shannon v. Hines, 226 S.W. 283, 205 Mo.App. 629.

S.C.—Davis v Atlantic Coast Line R. Co., 88 S.E. 273, 104 S.C. 63, 2 A.L.R. 102.

Tex.—Jester v Lancaster, Civ.App., 266 S.W. 1103.

Vt.—Simpson v. Central Vermont Ry. Co., 115 A. 299, 95 Vt. 388.

10 C.J. p 1237 note 3.

Terminal company

In an action against terminal company for loss of trunk while acting as warehouseman, question as to liability of defendant was under the evidence, one of fact for the trial court in a case tried without a jury.—Bowles v. Payne, Mo.App., 251 S.W. 101.

15. Okl.—Kansas City Southern Ry. Co. v. Tucker, 236 P. 35, 108 Okl. 259.

10 C.J. p 1237 notes 3, 4.

Uncontradicted evidence

In a passenger's action for the loss of her trunk and contents, where her evidence showed that the journey was an intra-state one, and defendant offered no evidence on that point, a verdict was properly directed for plaintiff, where such direction was otherwise proper, in view of the rule that the trial judge may direct a verdict where defendant offers no evidence and the evidence of plaintiff points all one way.—Herndon v Southern Ry. Co., 111 S.E. 13, 118 S.C. 466.

Uncontradicted evidence as to value

Ala.—Louisville & N. R. Co. v. Childers, 98 So. 319, 19 Ala.App. 492.

Ky.—Hines v Denny, 227 S.W. 567, 190 Ky. 416.

Notice of contents of trunk

Where the facts are clear and undisputed the court may direct a verdict that defendant had notice that a trunk contained samples.—Trimble v. New York Cent., etc., R. Co., 56 N.E. 532, 162 N.Y. 84, 48 L.R.A. 115, affirming 57 N.Y.S. 437, 39 App.Div. 403

Reasonable time for removal of baggage

Where the facts are not in dispute, the question as to whether the passenger applied for his baggage within a reasonable time is for the court.

Ala.—Louisville & N. R. Co. v Hestle, 75 So. 885, 200 Ala. 137, 81 So. 149, 16 Ala.App. 657.

Minn.—White v. Chicago, M. & St. P. Ry. Co., 186 N.W. 145, 151 Minn. 554.

Mo.—Saffa v. Illinois Cent. R. Co., 279 S.W. 223, 218 Mo.App. 502

10 C.J. p 1238 note 8 [a]

Due care

Where the facts are not in dispute, it is for the court, and not for the jury, to say whether the carrier used ordinary care after storing baggage in its warehouse.—Kahn v. Atlantic, etc., R. Co., 20 S.E. 169, 115 N.C. 638

Proximate cause of loss

In an action by passenger who lost his baggage while riding in a dark and crowded car, the question as to whether the darkness was a proximate cause of the theft was a question of law for the court.—Keith v Atlantic Coast Line R. Co., 99 S.E. 812, 112 S.C. 297.

16. S.C.—Cone v. Southern R. Co., 67 S.E. 779, 85 S.C. 524, 21 Ann.Cas. 158.

10 C.J. p 1238 note 5.

17. N.Y.—Sloman v. Great Western R. Co., 67 N.Y. 208, reversing 6 Hun 546

Tex.—St. Louis, etc., R. Co. v Green, 97 S.W. 531, 44 Tex.Civ.App. 13.

10 C.J. p 1238 note 6.

18. Fla.—Atlantic Coast Line R. Co. v. Campen Bros. Co., 154 So. 131, 114 Fla. 386.

Ill.—See Mitchell v. Frank Parmelee Co., 209 Ill.App. 428

19. Fla.—Atlantic Coast Line R. Co. v. Campen Bros. Co., 154 So. 131, 114 Fla. 386

N.Y.—Rothman v. Hedges, 205 N.Y.S. 418, 123 Misc. 523.

20. Ala.—Louisville & N. R. Co. v Hestle, 75 So. 885, 200 Ala. 137.

21. Ga.—Georgia R. & Banking Co. v. Thompson, 13 S.E. 640, 86 Ga. 327

N.Y.—Matteson v New York Cent., etc., R. Co., 76 N.Y. 381.

22. Ga.—Georgia R. & Banking Co. v. Thompson, 12 S.E. 640, 86 Ga. 327.

23. Ala.—Louisville & N. R. Co. v. Hestle, 75 So. 885, 200 Ala. 137

Ky.—Chesapeake & O. Ry. Co. v. McClintock-Field Co., 297 S.W. 1112, 221 Ky. 142

Minn.—White v Chicago, M. & St. P. Ry. Co., 186 N.W. 145, 151 Minn. 554.

Mo.—Saffa v Illinois Cent. R. Co., 279 S.W. 223, 218 Mo.App. 502

10 C.J. p 1238 note 8.

24. N.Y.—Barden v. New York Cent. R. Co., 168 N.Y.S. 742, 181 App.Div. 306

Jewelry retained in passenger's possession

(1) On a motion to set aside dismissal of complaint on the pleadings and the opening of plaintiff's counsel in an action for the loss of jewelry which plaintiff passenger had momentarily left on a table in defendant carrier's dining car, in which the court regarded the carrier as an insurer because of its refusal to take custody of the jewelry for transportation as baggage, the view was taken that it could not be held, as a matter of law, that the loss was due to plaintiff's own act so as to relieve the carrier of liability, at least in the absence of the development of detailed facts by the taking of evidence.—Borden v New York Cent. R. Co., 162 N.Y.S. 1099, 98 Misc. 574

(2) On an appeal subsequently taken in the same case from a judgment for plaintiff based on a verdict, the view was taken that the contributory negligence of plaintiff was a complete defense, if not as a matter of law, at least as shown by

his ticket,[25] or on a check or receipt given to him,[26] or posted by the carrier in its baggage room;[27] whether the passenger had made a declaration of value or was limited to the maximum specified in the tariff rule;[28] whether the carrier had complied with a statute requiring filing and posting of schedules containing limitation of liability;[29] whether the loss or injury was caused by an act of God,[30] whether a certain occurrence was an act of God;[31] whether carrier's negligence concurred with act of God in causing loss or injury;[32] whether the carrier exercised due care or was guilty of negligence;[33] whether the carrier exercised ordinary care, as warehouseman, in storing and caring for the baggage;[34] whether there was willfulness on the part of the carrier's

the great weight of the evidence—Barden v. New York Cent. R. Co., 168 N.Y.S. 742, 181 App.Div. 306.

25. Mass.—Brown v. Eastern R. Co., 11 Cush. 97

26. Cal.—Merrill v. Pacific Transfer Co., 63 P. 915, 131 Cal. 582.
10 C.J. p. 1238 note 10.

Transfer company

(1) The question whether the party receiving a receipt from a transfer company containing a provision for limitation of liability, accepted it with notice of its contents, or with notice that it contained the terms of a special contract, so as to require him to acquaint himself with its contents, is one of evidence to be determined by the jury.—Lawes v. New Orleans Transfer Co., 123 So. 144, 11 La.App. 170, quoting Corpus Juris text—10 C.J. p. 142 note 82.

(2) In an action for loss of baggage, where it appeared that defendant transfer company received plaintiff's trunk and delivered a claim check, limiting liability to one hundred dollars, under the evidence it was a question for the jury whether or not plaintiff in accepting the claim check had actual or constructive knowledge of the liability printed thereon.—Stine v. Hines, 181 N.W. 321, 148 Minn. 132.

Bailment with transfer and storage company

Bailor of trunk with transfer and storage company was not as a matter of law bound by the unknown terms in fine print on a small pasteboard check reasonably understood by her to be a mere voucher or token for identification of the trunk, and accepted as such by her without objection.—Hamilton v. Baggage & Omnibus Transfer Co., 192 P. 1058, 97 Or. 620.

27. N.Y.—Williams v. New Jersey Cent. R. Co., 88 N.Y.S. 434, 93 App.Div. 582, affirmed 76 N.E. 1116, 183 N.Y. 518.

28. Wash.—Bostwick v. Washington Motor Coach Co., 77 P.2d 790.

29. Vt.—Simpson v. Central Vermont Ry. Co., 115 A. 299, 95 Vt. 388.

State statute

Notwithstanding the presumption that there has been due compliance by defendant carrier with statutory requirements as to filing and posting of schedules, on provisions of which the carrier relies to relieve itself of liability, the question as to whether there has been due compliance is for the jury unless the proof and inferences are all in favor of defendant.—Simpson v. Central Vermont Ry. Co., 115 A. 299, 95 Vt. 388.

30. Mo.—Ford v. Wabash Ry. Co., 300 S.W. 769, 318 Mo. 723, reversing, App., 266 S.W. 1032.

Uncontradicted evidence

Even though the evidence of defendant transfer company to show that injury to baggage while in its possession was caused by an act of God was not contradicted, plaintiff was entitled to have the jury pass on the weight, credibility, and sufficiency of defendant's evidence.—Ford v. Wabash Ry. Co., 300 S.W. 769, 318 Mo. 723, reversing, App., 266 S.W. 1032.

31. Ky.—Chesapeake & O. Ry. Co. v. McClintock-Field Co., 297 S.W. 1112, 221 Ky. 142.

Windstorm

Whether windstorm causing spreading of fire was so extraordinary as to amount to act of God was, under evidence, for jury.—Chesapeake & O. Ry. Co. v. McClintock-Field Co., 297 S.W. 1112, 221 Ky. 142.

32. Mo.—Ford v. Wabash Ry. Co., 300 S.W. 769, 318 Mo. 723, reversing, App., 266 S.W. 1032.

Protection of baggage from unprecedented flood

Whether or not a transfer company had taken due steps to protect baggage from injury from an unprecedented flood caused by an unusually heavy rainfall was a question of fact for the jury.—Ford v. Wabash Ry. Co., 300 S.W. 769, 318 Mo. 723, reversing, App., 266 S.W. 1032.

33. Mo.—Ford v. Wabash Ry. Co., supra—Shannon v. Hines, 226 S.W. 283, 205 Mo.App. 629.
10 C.J. p. 1234 note 66

Baggage lost in dark and crowded car

In an action by a passenger who lost his baggage while riding in a dark and crowded car, the question as to whether the carrier exercised due care in putting him into such car was for the jury.—Keith v. Atlantic Coast Line R. Co., 99 S.E. 812, 112 S.C. 297.

Handling of case marked "fragile"

Where defendant carrier claimed the benefit of a provision of its tariff that cases marked "fragile" or in any other manner indicating that the contents are of a fragile nature and likely to be damaged by "ordinary handling" will not be accepted except at owner's risk, and the phrase "ordinary handling" was construed to mean nothing more than the ordinary wear and tear necessarily incidental to transportation where reasonable care is used by the carrier, questions as to whether injury to harp in case marked "fragile" was caused by the way case was handled and as to whether handling was in ordinary way were for jury.—Perkins v. New York, N.H. & H.R. Co., 122 N.E. 306, 232 Mass. 336

Negligence as proximate cause

Negligence of porter and railroad as proximate cause of loss where passenger's suitcase could not be found was question for jury.—Girden v. Thompson, 136 A. 407, 5 N.J.Misc. 272 affirmed 138 A. 920, 104 N.J.Law 169.

Undisputed evidence

Although evidence that plaintiff's baggage, which he had left at the station preparatory to checking, was injured by water when the carrier's water tower fell and flooded the platform, and that the tower had been in a defective condition and leaning in the direction of the platform for some time, was undisputed, the determination of the carrier's negligence under the facts was for the jury, not for the court, so that a directed verdict for plaintiff was reversible error.—Reis v. Minneapolis & St. L. Ry. Co., 179 N.W. 83, 189 Iowa 988.

34. Mich.—Fraam v. Grand Rapids, etc., R. Co., 126 N.W. 851, 161 Mich. 556, 29 L.R.A.,N.S., 834, 21 Ann.Cas. 96.
10 C.J. p. 1238 note 12.

Gratuitous bailee

Proof of delivery to carrier and of its failure to deliver baggage, which, without the carrier's fault, did not accompany the passenger, is evidence of negligence sufficient to carry case to jury, although carrier was merely a gratuitous bailee thereof; but the jury should be instructed that carrier is not liable unless it failed to exercise the care of a person of ordinary prudence.—Midgett v. Eastern Carolina Transp. Co., 104 S.E. 32, 180 N.C. 71.

servants in not properly caring for baggage, as affecting award of punitive damages;[35] or whether there was an actual conversion of the baggage by the carrier.[36]

The right of the carrier to limit its liability is for the court.[37]

What constitutes baggage. The question as to what a passenger is entitled to carry with him as baggage depends on a variety of circumstances, as shown supra §§ 855-861, and the question as to whether any particular article, or property, may properly be deemed baggage, in view of the nature of the journey and the circumstances and condition of the passenger, is generally for the jury, under proper instructions from the court, or for the court as trier of the facts on a trial without a jury.[38] The question, however, becomes one of law for the court, where the facts are not disputed, or are such that reasonable minds can come to but one conclusion therefrom,[39] and in some cases the court may say, as a matter of law, that certain articles cannot be classed as baggage.[40] Whether certain jewelry exceeds in value that usually carried by passengers of the same station and character as plaintiff, and therefore is not properly baggage, is ordinarily a question for the jury.[41] Whether a particular sum of money is, under the circumstances, reasonably necessary for a passenger to carry is generally a question for the jury.[42]

The reasonableness of a regulation of a carrier as to the checking or carriage of baggage,[43] or of a regulation or stipulation limiting liability,[44] is a question of fact for the determination of the jury, under proper instructions from the court;[45] but if the facts are undisputed, the question is a proper one for the court to determine.[46]

§ 900. Instructions

The rules governing instructions in civil actions generally apply in actions for injury to, or loss of, baggage.

As in other civil actions, the instructions, in an action for the delay of, injury to, or loss of, baggage, must fully and clearly state the law applicable to the facts of the case,[47] defining the various terms and expressions used.[48] The instructions must be applicable to the issues raised by the pleadings and the evidence,[49] must not ignore material issues,[50] and must not invade the province of the jury by charging on the facts, or on the weight of evidence, where such a charge is not permissible in civil actions generally.[51]

§ 901. Verdict and Findings

A special issue submitted for a finding should not

35. S.C.—Payne v. Atlantic Greyhound Bus Lines, 188 S.E. 426, 182 S.C. 58.

36. Tex.—Jester v. Lancaster, Civ. App., 266 S.W. 1103.

37. Tex.—Houston, etc., R. Co. v. Seale, 67 S.W. 437, 28 Tex.Civ.App. 364.

38. N.Y.—Twersky v. Pennsylvania R. Co., 273 N.Y.S. 328, 152 Misc. 300.
Ohio.—Cleveland-Akron Bus Co. v. Rogoff, 159 N.E. 374, 25 Ohio App. 538.
10 C.J. p 1238 note 14.

Mixed question of law and fact
Or.—Hamilton v. Baggage & Omnibus Transfer Co., 192 P. 1058, 97 Or. 620.
Tex.—Schaff v. Gibson, Civ.App., 258 S.W. 595.
10 C.J. p 1238 note 14 [a]

Quantity and value
The question as to whether a given article of property both as to quantity and as to value is baggage is necessarily one of mixed law and fact, to be determined by the trier or triers of the facts under proper instruction, subject to the power of the court to correct abuse.—Hamilton v. Baggage & Omnibus Transfer Co., 192 P. 1058, 97 Or. 620.

39. Mass.—Connolly v. Warren, 106 Mass. 146, 8 Am.R. 300.
S.C.—Vlasservitch v. Augusta, etc., R. Co., 67 S.E. 306, 85 S.C. 291.
10 C.J. p 1238 note 15

40. Tex.—Jones v. Priester, 1 Tex.A.Civ.Cas. § 613.

41. Mo.—Doerner v. St. Louis, etc., R. Co., 130 S.W. 62, 149 Mo.App. 170.
Tex.—Bonner v. Blum, Civ.App., 25 S.W. 60.
10 C.J. p 1239 note 17

42. N.Y.—Fairfax v. New York Cent., etc., R. Co., 73 N.Y. 167, 29 Am.R. 119.
10 C.J. p 1239 note 18.

43. Wis.—Goldberg v. Ahnapee, etc., R. Co., 80 N.W. 920, 105 Wis. 1, 76 Am.S.R. 899, 47 L.R.A. 221.
10 C.J. p 1239 note 19.

44. N.Y.—Gardiner v. New York Cent., etc., R. Co., 94 N.E. 876, 201 N.Y. 387, 34 L.R.A.,N.S., 826, Ann.Cas.1912B 281, affirming 123 N.Y.S. 865, 139 App.Div. 17, and answering certified question 125 N.Y.S. 1121, mem. 140 App.Div. 907 mem.
10 C.J. p 1207 note 83

45. Pa.—Pittsburgh, C. & St. L. R. Co. v. Lyon, 16 A. 607, 123 Pa. 140, 10 Am.S.R. 517, 2 L.R.A. 489.
10 C.J. p 1239 notes 19, 20.

46. Pa.—Pittsburgh, C. & St. L. R. Co. v. Lyon, supra.

47. Ala.—Louisville & N. R. Co. v. Dickson, 73 So. 750, 15 Ala.App. 423, certiorari denied 74 So. 1005, 199 Ala. 699.
Ga.—Hines v. McWhirter, 106 S.E. 4, 26 Ga.App. 208
Mass.—Perkins v. New York, N. H. & H. R. Co., 122 N.E. 306, 232 Mass. 336.
Tex.—Burnett v. Riter, Civ.App., 276 S.W. 347.
10 C.J. p 1239 note 24.

48. N.C.—Williams v. Southern R. Co., 71 S.E. 346, 155 N.C. 260.
10 C.J. p 1239 note 25.

49. S.C.—Cone v. Southern R. Co., 67 S.E. 779, 85 S.C. 524, 21 Ann.Cas. 158.
10 C.J. p 1239 note 26.

50. N.Y.—Springer v. Westcott, 59 N.E. 693, 166 N.Y. 117
Tex.—Texas, etc., R. Co. v. Morrison Faust Co., 48 S.W. 1103, 20 Tex.Civ.App. 144.
10 C.J. p 142 note 80 [b].

51. S.C.—Harzburg v. Southern R. Co., 44 S.E. 75, 65 S.C. 539
10 C.J. p 1239 note 28.

restrict the issues presented by the evidence, and the evidence must support the verdict.

As in civil actions generally, a special issue submitted to the jury for a finding should not restrict or narrow the issues presented by the evidence.[52] The verdict must be supported by the evidence.[53]

A finding that a railroad company is liable for the loss of articles from a trunk and for injuries to the trunk has been regarded as a finding of law and not a finding of fact, where the undisputed evidence shows that the trunk was delivered to the railroad company in good order and was redelivered in damaged condition, without any explanation as to how the damage occurred.[54]

§ 902. Damages for Delay

The measure of damages for delay in the delivery of baggage, due to the negligence of the carrier, is the value of the use of the property during the period of delay, together with certain incidental expenses necessarily incurred in connection with the delay.

For delay in the delivery of baggage due to the negligence of a carrier, according to the rule stated in Corpus Juris and quoted with approval, the passenger is entitled to recover the value of the use of the property during the time of such delay, and such incidental expenses and damages as were in the contemplation of the parties when the contract was made, including in some cases expenses incurred in reasonable efforts to trace the baggage.[55] Under some circumstances, the measure of the value of the use of clothing which is part of the baggage is the difference between the cost of clothing purchased and the value at the time of delivery of the baggage.[56] It has been held, however, that the value of articles of clothing purchased by the passenger is not an element of damages where such articles can be used on other occasions and he received value for the money paid for such articles.[57]

Where the carrier accepts baggage with notice that the passenger requires it at a certain place at a certain time for a special purpose, the measure of damages is the injury to the special business attributable to the delay, including the expense and the loss of time incurred in a search for the delayed baggage;[58] but this does not include speculative profits arising on the mere hope of particular future transactions.[59] In case of delay in transporting or delivering a traveling salesman's samples, he is entitled to recover compensation for time lost and for actual reasonable expenses during the delay.[60] Loss of profits or other special damages arising from a failure to deliver baggage in time cannot, however, be recovered unless the carrier had notice, at the time of receiving the baggage, of the special circumstances which would render such damages probable in the event of delay.[61]

While the view has been taken that, where the articles transported as baggage have depreciated in value during the delay, the difference in value may be allowed as damages,[62] such rule does not apply where there was no intention to sell the articles thus carried,[63] or where plaintiff seeks to recover for damages consequential to the delay of his journey through defendant carrier's de-

52. Tex.—Burnett v. Riter, Civ.App., 276 S.W. 347.

53. Colo.—Denver, etc., R. Co. v. Johnson, 114 P. 650, 50 Colo. 187, Ann.Cas.1912C 627.
10 C.J. p 1239 note 31.

54. S.C.—Davis v. Jones Transfer Company, 103 S.E. 520, 114 S.C. 162.

55. Cal.—Klein v. Southern Pac. Co., 218 P. 447, 448, 63 Cal.App. 185, quoting **Corpus Juris** text.
Minn.—Conheim v. Chicago Great Western R. Co., 116 N.W. 581, 104 Minn. 312, 124 Am.S.R. 623, 17 L.R.A.,N.S., 1091, 15 Ann.Cas. 389.
N.Y.—Bridge v. New York Cent. & H. R. R. Co., 150 N.Y.S. 146, 88 Misc. 35.
10 C.J. p 1227 notes 56, 57.

56. N.Y.—Bridge v. New York Cent., etc., R. Co., 150 N.Y.S. 146, 88 Misc. 35.

57. Ark.—St. Louis, I. M. & S. R. Co. v. Campbell, 158 S.W. 120, 108 Ark. 432.

58. Cal.—Klein v. Southern Pac. Co., 218 P. 447, 448, 63 Cal.App. 185, quoting **Corpus Juris** text.

59. S.C.—Strange v. Atlantic Coast Line R. Co., 57 S.E. 724, 77 S.C. 182.

60. Ala.—St. Louis, etc., R. Co. v. Lully, 55 So. 937.
Ky.—Carnahan v. Chesapeake, etc., R. Co., 141 S.W. 49, 145 Ky. 676.
10 C.J. p 1227 note 61.
In Oklahoma
(1) The measure of damages for a carrier's delay in forwarding the sample trunks of a traveling salesman is the value of the use of the property during the delay, together with loss of time occasioned thereby, where the carrier's agent received the trunks with knowledge of the contents and intended use. The damages recoverable in such case include loss of time and inability to make sales, directly occasioned by the carrier's breach of duty.—Kansas City, etc., R. Co. v. Fugatt, 150 P. 669, 47 Okl. 727.
(2) As otherwise stated, where a carrier accepts and checks as baggage sample trunks of a traveling salesman with knowledge of their character, loss of time and inability to make sales because of delay in receiving trunks containing samples, and necessary and reasonable traveling expenses incurred in looking for the trunks or procuring other samples, will be regarded as within the contemplation of the carrier, so as to entitle such salesman to recover damages therefor, in case of such delay.—St. Louis-San Francisco Ry. Co. v. Freeman, 198 P. 298, 82 Okl. 6, 25 A.L.R. 72.

61. S.C.—Milhous v. Atlantic Coast Line R. Co., 55 S.E. 764, 75 S.C. 351.
10 C.J. p 1227 note 62.

62. N.Y.—Katz v. Cleveland, etc., R. Co., 91 N.Y.S. 720, 46 Misc. 259
10 C.J. p 1227 note 65.

63. Tex.—St. Louis, etc., R. Co. v. Hindsman, 1 Tex.A.Civ.Cas. § 204.

fault, and not for any supposed loss or damage caused by the delay as affecting the property involved or its marketable value.[64] A statute authorizing the recovery of damages due to detention of baggage refers to damage to the baggage on that account and not to detention of the passenger on account of delay of his baggage.[65]

Where the carrier accepts a trunk which contains articles which are not baggage, under the belief that the property offered is baggage, there cannot be a recovery of special damages for delay in transit.[66]

Mental suffering and inconvenience. In accordance with the rule generally recognized that mental pain and suffering will not alone constitute a sufficient basis for the recovery of substantial damages, stated in C.J.S. title Damages § 64, also 17 C. J. page 831 note 54, mental suffering or worry due to the delay in delivering baggage to the passenger is not an element of the damages recoverable.[67] Furthermore mere inconvenience due to such delay is not an element of damages,[68] especially not inconvenience which the passenger has the means of overcoming.[69]

Nominal damages may be recovered for an unreasonable delay, in the absence of proof of special damages.[70]

Exemplary damages may be recovered for a willful or wanton delay in transporting and delivering baggage,[71] or where the negligence causing the delay is so gross and reckless as to assume the nature of wantonness and willfulness.[72] Where, however, the carrier makes an earnest effort to trace and deliver the delayed baggage, an inference of willful misconduct is not warranted, and exemplary damages cannot be recovered for the delay.[73]

§ 903. Damages for Loss or Injury

In the case of loss of baggage, the measure of damages is in general the actual value of the articles to the owner at the time of the loss. In the case of injury to baggage, the measure of damage is in general the difference between the actual value of the articles injured just prior to the injury and their actual value just after the injury

As a general rule the measure of damages for the loss of baggage is the actual value to the owner of the articles constituting the baggage at the time of the loss,[74] taking into consideration the cost of the articles, the extent of their use, and their condition at the time of the loss,[75] together with interest from the date of the loss,[76] although, where a valid limitation of liability to a specified amount is applicable under the rules stated above in § 875, it has been held that neither interest nor damages for delay may be recovered.[77] The full value of the baggage is recoverable in case of loss or failure to deliver, up to the amount fixed as the maximum amount of recovery in a valid agreement or regulation.[78] If the articles lost have a market value, that is the correct

64. Tex.—International, etc., R. Co v Phillips, 63 Tex. 590.

65. Iowa.—Anderson v. Toledo, etc., R Co, 32 Iowa 86

66. Cal.—Klein v. Southern Pac. Co., 218 P 447, 63 Cal.App. 185

Articles not baggage under rules of interstate commerce commission

Cal.—Klein v. Southern Pac. Co., 218 P. 447, 63 Cal.App 185

67. Miss.—Mobile & O R. Co. v. Flannagan, 105 So. 749, 141 Miss. 7
10 C J. p 1228 note 68.

Interstate transportation

In view of the rule applied in the federal courts that there can be no recovery for mere "mental worry" not connected with physical injury, there can be no recovery for mental worry for delay in the delivery of baggage transported in interstate commerce—Mobile & O R. Co. v. Flannagan, 105 So. 749, 141 Miss. 7.

68. Ark.—St. Louis, etc., R Co v. Campbell, 158 S W. 120, 108 Ark. 432
10 C.J p 1228 note 68.

69. Tex.—Mexican Cent. R. Co. v. De Rosear, Civ.App., 109 S W. 949
10 C J p 1228 note 69.

70. Ga.—Ford v Atlantic Coast Line R. Co., 8 S E. 1072, 8 Ga.App 295.

71. S C.—Davis v. Atlantic Coast Line R. Co., 88 S E. 273, 106 S.C 63, 2 A.L.R. 102
10 C J p 1228 note 71.

72. S C.—Webb v. Atlantic Coast Line R Co., 56 S.E 954, 76 S.C 193, 9 L R A.,N S., 1213, 11 Ann. Cas 834
10 C.J p 1228 note 72.

73. S C.—Black v. Atlantic Coast Line R. Co., 64 S.E. 418, 82 S C. 478

74. U.S.—Wood v. Cunard SS Co., N Y., 192 F. 293, 112 C.C.A. 551, 41 L R.A.,N.S., 371.
10 C J p 1228 note 74.

75. Tex.—Missouri, etc., R. Co v Kirkpatrick, Civ App., 165 S W 500—Missouri, etc., R Co v. Hailey, Civ App., 156 S.W. 1119.
10 C J. p 1228 note 75

76. Fla.—Brock v. Gale, 14 Fla. 523, 14 Am.R. 356
10 C.J. p 1228 note 76.

77. Ga.—Myers v. Atlantic Greyhound Lines, 184 S.E. 414, 52 Ga. App 698.

78. Neb.—Sutton v. Payne, 196 N W. 710, 111 Neb 455.

Baggage of members of family in one trunk

In the case of the loss of baggage transported in interstate commerce, which was subject to a provision for limitation contained in a tariff published in accordance with federal statutes regulating interstate commerce, an award of two hundred fifty dollars was upheld where the baggage belonged to a married man, his wife, and their small child, the baggage was all transported in one trunk, and the limitation in the applicable tariff was construed to permit an award of one hundred dollars each for the baggage of the husband and wife and fifty dollars for that of the child.

Tex.—Payne v. Norman, Civ.App., 249 S.W. 882.

Conversion

A carrier delivering the baggage of an intra-state passenger to the wrong person was liable to the rightful owner under Rev.St 1919 § 10449, for its full value.—Boone v. Missouri Pac. R. Co., Mo.App., 263 S.W. 495, certiorari granted Missouri Pac R. Co v. Boone, 45 S Ct. 196, 266 U S. 600, 69 L Ed. 461, affirmed 46 S.Ct. 341, 270 U S. 466, 70 L Ed. 688.

measure of damages;[79] but as a passenger's baggage usually consists of clothing, and the like, which have no proper market value, the value of such articles is generally not merely what they might have been sold for in money at public or private sale, but their pecuniary value to their owner, not including any sentimental value.[80] This value is to be measured at the place of destination,[81] or at the place of delivery to the carrier, unless it appears that there is a difference in the value at that place and at the place of destination.[82]

The measure of damages for injury to baggage is the difference in the actual value of the same just prior to the injury and the actual value thereof just subsequent thereto,[83] and not the difference in the market value of similar articles at such time at the nearest place where such market obtains.[84] The proper method of arriving at its value at the time of injury is to take into consideration the cost of the articles constituting the baggage, the extent of their use, and their condition at the time of the injury.[85] Interest from the date of suit may be awarded.[86]

Some statutes limiting the carrier's liability for baggage do not prevent recovery of a larger amount where the liability is that of warehouseman.[87]

Effect of subsequent tender of baggage. In an action for loss of baggage which is subsequently tendered by the carrier, the measure of damages is any loss and expense occasioned by the delay, together with the value of the baggage at the time and place it should have been delivered, taking therefrom the value according to its condition at the time and place of actual delivery or tender.[88] Where part of the lost baggage is restored to the owner, although some of it may be damaged, yet if the tender is made within a reasonable time the owner must receive it, and he is then limited, in his right to recover, to the value of the part not returned and to the extent of the injury done to that returned.[89] However, a passenger cannot be compelled to accept a tender a year after the loss of the baggage.[90]

Special damages. Unless the carrier was informed of the special circumstances, or such circumstances might reasonably be supposed to have entered into the contemplation of the parties, special damages for the loss of, or injury to, baggage cannot be recovered,[91] such as the extra expense incurred on account of such loss,[92] the expense of searching for the lost baggage,[93] and attorney's fees in bringing the action.[94] Losses and expenses, in addition to the value of lost baggage may, however, be recovered if they may be regarded as within the contemplation of the parties,[95] and, as to such additional losses and expenses, the carrier is not relieved of liability by

Partial loss

In the case of a partial loss of baggage, checked on the lower of two alternative rates based on values, the agreed valuation does not fix an arbitrary limit of recovery, but a ratio, the proportion being the amount which the real value of the lost articles bears to the actual value of the entire baggage checked.—Robidoux v. Chicago & N. W. R. Co., 204 N.W 870, 113 Neb. 682, 41 A.L.R 446.

79. Neb.—Gibbons v. Chicago, etc., R Co., 154 N.W 226, 98 Neb. 696.
10 C.J. p 1228 note 77.

80. N.Y.—Twersky v. Pennsylvania R. Co, 273 N.Y.S. 328, 152 Misc. 300
10 C.J. p 1228 note 78.

Scroll and manuscript

N.Y.—Twersky v Pennsylvania R. Co., 273 N.Y.S 328, 152 Misc. 300.

81. Ala.—Louisville & N. R. Co. v. Dickson, 73 So. 750, 15 Ala.App. 423, certiorari denied 74 So 1005, 199 Ala. 699
S.C.—Turner v. Southern R. Co., 54 S.E. 825, 75 S.C. 58, 7 L.R.A.,N.S., 188.
10 C.J. p 1228 note 79.

82. Kan.—The Steam-Boat Majors v. Mason, 5 Kan. 670.

83. Tex.—Missouri, etc., R. Co. v. Hailey, Civ.App., 156 S.W. 1119.

Musical instrument

Where a violin was broken, the measure of damages embraced the expense of restoring the property to soundness, compensation for its loss during the period of disability, and the difference between its value before injury and after being repaired.—Schalscha v. Third Ave. R. Co., 43 N.Y.S. 251, 19 Misc. 141.

84. Okl.—St. Louis, etc., R. Co. v. Dickerson, 118 P. 140, 29 Okl. 386.
10 C.J. p 1229 note 83.

85. Tex.—Missouri, etc., R. Co. v. Hailey, Civ.App., 156 S.W. 1119.

86. Mo.—Ford v. Wabash Ry. Co., 300 S.W. 769, 318 Mo. 723, reversing, App., 266 S.W. 1032.

87. U.S.—Wiegand v. New Jersey Cent. R Co., C.C., 75 F. 370, affirmed 79 F. 991, 25 C.C.A. 681.

88. S.C.—Wall v. Atlantic Coast Line R. Co., 51 S.E. 95, 71 S.C. 337.
10 C.J. p 1229 note 85.

89. Tex.—Gulf, etc., R. v. Jackson, 15 S.W. 128, 4 Tex.A.Civ.Cas. § 47
10 C.J p 1229 note 86.

90. Wyo.—Lake Shore, etc., R. Co v. Warren, 6 P. 724, 3 Wyo. 134.

91. Fla.—Brock v. Gale, 14 Fla. 523, 14 Am.R 356.
10 C.J. p 1229 note 88.

92. Cal.—Merrill v. Pacific Transfer Co., 63 P. 915, 131 Cal. 582
Miss.—New Orleans, etc., R. Co v. Moore, 40 Miss. 39.
10 C.J. p 1229 note 89.

93. S.C.—Turner v. Southern R. Co., 54 S.E. 825, 75 S.C. 58, 7 L.R.A.,N.S., 188.
10 C.J. p 1229 note 90.

94. Miss.—New Orleans, etc., R. Co. v. Moore, 40 Miss. 39.

95. Okl.—St. Louis-San Francisco Ry. Co. v. Freeman, 198 P. 298, 82 Okl. 6, 25 A.L.R. 72.

Expenses

(1) It has been held that, under certain circumstances, the expenses incurred in searching for lost baggage may be recovered.—Ross v St. Louis, etc., R. Co., 170 S.W. 920, 185 Mo.App. 154—10 C.J. p 1219 note 90.

(2) In an action against a person who, acting as an agent of a railroad company, had employed plaintiff as a laborer for such company, and had agreed to be responsible for plaintiff's baggage in connection with transportation to the place of employment, plaintiff was entitled to re-

a stipulation for limitation of liability to a specified amount in respect of the baggage.[96] Damages for loss of commissions on sales which might have been made during the time the salesman was deprived of the use of samples are not recoverable, however, where such loss is not caused directly by the default of the carrier and is not such a loss as the parties could have contemplated, or where such loss of commissions is so speculative and dependent on numerous and changing contingencies as not to permit an approximately accurate ascertainment of the character or amount of the damages.[97]

Mental suffering is not ordinarily an element of damages for injury to, or loss of, a passenger's baggage;[98] but physical suffering and mental distress caused by the loss of medicines contained in a hand bag which was stolen may be included as an element of the damages recoverable.[99]

Nominal damages only can be recovered in the absence of proof of the value of the articles destroyed,[1] or where, although the carrier has been technically at fault, its fault has not been such as to make it liable for compensatory damages.[2]

Exemplary damages; penalty statutes. An award of exemplary damages has been upheld in an action in tort involving willful disregard of a passenger's rights in regard to furnishing accommodations and caring for baggage,[3] but, in an action based on alleged refusal to deliver baggage at destination and injury to such baggage, it has been held that negligence, however gross, will not justify an award of exemplary damages unless the carrier is guilty of willfulness, wantonness, or conscious indifference to consequences from which malice may be inferred.[4]

A statute providing that, if a railroad company carelessly or willfully injures, or allows to be injured or lost, any baggage, it shall be liable to the owner in a sum not less than double the amount of the actual damage, is highly penal and applies only to such baggage as in a proper sense is personal baggage.[5] So, also, a statute which requires a railroad company to pay a specified amount in addition to damages for injury to baggage where it has knowingly kept a willful or reckless person in its employment, or has permitted injury to, or destruction of, baggage through failure to provide sufficient help and facilities, is a penal statute and is to be strictly construed.[6]

L. TRANSPORTATION IN PALACE AND SLEEPING CARS

§ 904. Character and Status of Palace and Sleeping Car Companies

In the absence of a statute to the contrary, a sleeping car company is neither a common carrier nor an innkeeper; but its status as a public servant and its relation to the public imposes on it certain duties and liabilities in the carriage of passengers and their effects.

As stated in the text of Corpus Juris quoted with approval, palace and sleeping cars are operated in connection with railroad trains, generally

cover, in addition to the value of the baggage which was lost, an amount covering living expenses while he waited for the baggage at a certain place, on the inducement of defendant.—Atwood v. Mohler, 108 Ill App 416

96. Okl.—St. Louis-San Francisco Ry. Co. v. Freeman, 198 P. 298, 82 Okl. 6, 25 A.L.R. 72.

97. Ky.—Hines v. Denny, 227 S.W. 567, 190 Ky. 416.

98. Ark.—Chicago, etc., R. Co. v. Whitten, 119 S.W. 835, 90 Ark. 462, 21 Ann.Cas. 726.
10 C.J. p 1229 note 92

99. U.S.—Bacon v. Pullman Co., Ala. 159 F. 1, 89 C.C.A. 1, 16 L.R.A., N.S., 578, 14 Ann.Cas. 516, certiorari denied 28 S.Ct. 762, 210 U.S. 433, 52 L.Ed. 1136

1. U.S.—Fraloff v. New York Cent., & H. R., etc., R. Co., C.C.N.Y., 9 F.Cas.No.5,025, 10 Blatchf. 16.
10 C.J. p 1229 note 94.

2. N.Y.—McCormick v. Pennsylvania Cent. R. Co., 80 N.Y. 353.

3. S.C.—Payne v. Atlantic Greyhound Bus Lines, 138 S.E. 426, 132 S.C. 58
10 C.J. p 1230 note 96.

Amount

In an action in tort for the invasion of the rights of plaintiff passengers by failure to provide proper seating accommodations in a bus and by taking along plaintiffs' baggage in a bus from which plaintiffs had been excluded and destroying or losing such baggage, an award of three hundred dollars as punitive damages was not, as a matter of law, so excessive as to render the failure of the trial judge to reduce the amount an abuse of discretion.—Payne v. Atlantic Greyhound Bus Lines, 188 S.E. 426, 182 S.C. 58.

Refusal to check to, or deliver at, destination

An award of exemplary damages has been upheld in an action based on willful or wanton refusal to check baggage to the passenger's destination or to redeliver at destination

Pa.—Pittsburgh, etc., R. Co. v. Lyon, 16 A. 607, 123 Pa. 140, 10 Am.S.R. 517, 2 L.R.A. 489

S.C.—Sullivan v. Southern R. Co., 54 S.E. 586, 74 S.C. 377.
10 C.J. p 1230 note 96 [b], [c].

Refusal to receive

An award of exemplary damages has been upheld in an action based on unlawful and willful refusal to permit a passenger to board a train with personal baggage.

S.C.—McIntosh v. Augusta & A. R. Co., 69 S.E. 159, 87 S.C. 181, 30 L.R.A.,N.S., 889.
10 C.J. p 1230 note 96.

4. Ark.—Chicago, etc., R. Co. v. Whitten, 119 S.W. 835, 90 Ark. 462, 21 Ann.Cas. 726.

5. Miss.—New Orleans, etc., R. Co. v. Shackleford, 40 So. 427, 87 Miss. 610, 112 Am.S.R. 461, 4 L.R.A.,N.S., 1035, 6 Ann.Cas. 826.
10 C.J. p 1230 note 97.

6. N.Y.—Minturn v. New York Cent. R. Co., 220 N.Y.S. 789, 220 App.Div. 222.

by independent companies that make a business of the ownership and management of such cars, and the status of such a company, except where it is declared by a statutory or constitutional provision to be a common carrier, is not that of a common carrier of goods or of passengers,[7] nor that of an innkeeper,[8] although it bears some marked resemblance to each,[9] and is obviously a public means of transportation.[10] Such a company, however, is a public servant and its relation to the public imposes on it certain duties and liabilities in the carriage of passengers and their effects;[11] and the state may impose on it reasonable regulations for the common good, subject to the constitutional limitations for the protection of rights to life, liberty, and property.[12]

§ 905. Contract Duty in General

A purchaser of sleeping car accommodations can recover for damages sustained for failure to furnish such accommodations, or others equally good, in accordance with the terms of the contract. A ticket received for a berth in a sleeping car is merely a symbol indicating that the passenger is entitled to such accommodations.

The purchaser of sleeping car accommodations in a particular sleeper becomes for the period covered by the contract the owner of a special property right in that sleeper,[13] and is entitled to the accommodations for which he has contracted, and may recover damages if he is not furnished such accommodations,[14] or accommodations equally as good;[15] and the company cannot relieve itself from liability therefor by tendering him back the amount of the charges which have been paid by

7. U.S.—Martin v. New York, N. H. & H. R. Co., D.C.N.Y., 241 F. 696.
Ga.—Pullman Co. v. Strang, 132 S. E. 399, 35 Ga.App. 59, quoting **Corpus Juris** text and declaring the rule to be abundantly supported by the authorities there cited.
Md.—Steinberg v. Pullman Co., 144 A. 363, 156 Md. 329, quoting **Corpus Juris** text.
N.Y.—Posner v. New York Cent. R. Co., 277 N.Y.S. 671, 154 Misc. 591.
10 C.J. p 1168 notes 43, 44.

Interstate Commerce Act

(1) Under the provision of the Interstate Commerce Act that the term, "common carrier" as used in the act shall include sleeping car companies, makes such companies common carriers solely for the purposes of the act, which are to secure just and reasonable charges for transportation, and to prohibit unjust discriminations in the rendition of like services under similar circumstances, etc., and does not render sleeping car companies common carrier for other purposes.—Pullman Co. v. Strang, 132 S. E. 399, 35 Ga.App. 59.

(2) Other particulars of rule under this act see 10 C.J. p 1168 note 43 [b].

8. N.Y.—Barnet v. Pullman Co., 281 N.Y.S. 575, 155 Misc. 876.
10 C.J. p 1168 note 45—32 C.J. p 530 notes 38, 39.
"It is true that a sleeping car is a place for the reception of travelers, provided generally by the railroads to make traveling over their lines more attractive; but it is not an inn."—Garrett v. Southern Ry. Co., 90 S.E. 903, 904, 172 N.C. 737, L.R.A.1917F 885.

9. Md.—Steinberg v. Pullman Co., 144 A. 363, 156 Md. 329.
10 C.J. p 1169 note 46.

10. U.S.—Allen v. Pullman's Palace Car Co., Tenn., 24 S.Ct. 39, 191 U.S. 171, 183, 48 L.Ed. 134.

11. Ala.—Pullman Co. v. Lutz, 45 So. 675, 154 Ala. 517, 129 Am.S.R. 67, 14 L.R.A.,N.S., 907.
10 C.J. p 1169 note 47.

12. Wis.—State v. Chicago, etc., R. Co., 140 N.W. 70, 152 Wis. 341, Ann.Cas.1914C 478—State v. Redmon, 114 N.W. 137, 134 Wis. 89, 126 Am.S.R. 1003, 14 L.R.A.,N.S., 229, 15 Ann.Cas. 408

Letting down unoccupied upper berth

(1) A state statute prohibiting a sleeping car company, under a penalty, from letting down an unoccupied upper berth, when the lower berth is occupied, is unconstitutional under the due process clause of the Fourteenth Amendment as an arbitrary taking of property without compensation.—Chicago, etc., R. Co. v. State, 35 S.Ct. 869, 238 U.S. 491, 59 L.Ed. 1423, reversing 140 N.W. 70, 152 Wis. 341, Ann.Cas.1914C 478.

(2) Nor can such a statute be justified as a health measure under the police power of the state.—State v. Redmon, 114 N.W. 137, 134 Wis. 89, 126 Am.S.R. 1003, 14 L.R.A.,N.S., 229, 15 Ann.Cas. 408—10 C.J. p 1172 note 4.

(3) Such a statute cannot be justified as an amendment or alteration of the charter of the corporation under the reserve power of the state in that respect.—Chicago, etc., R. Co. v. State, supra.

13. Ala.—Pullman Co. v. Riley, 59 So. 761, 5 Ala.App. 561.

14. Ark.—Pullman Co. v. Walton, 239 S.W. 385, 152 Ark. 633, 23 A.L.R. 1298.
10 C.J. p 1169 note 51.
Damages for failure to furnish reserved accommodations see infra § 920.

Contract sustained by consideration

The demand for a berth on the part of the passenger, and the promise to furnish it on the part of the company, constitute a contract which binds the passenger to pay therefor, and binds the company to furnish it, and these mutual obligations and promises constitute a valid consideration for the contract, and where such a contract has been entered into, the company becomes bound to reserve the berth, and cannot excuse its failure to comply with its undertaking on the ground that other persons demanded the berth before the passenger presented himself to pay for or occupy it.
Ohio.—Pullman Co. v. Willett, 27 Ohio Cir.Ct. 649.
Tex.—Pullman Palace Car Co. v. Booth, Civ.App., 28 S.W. 719.

Porter a messenger, not agent

Where a Pullman passenger, refused admission to car his tickets called for, gave his tickets to a station porter with instructions to return to the ticket office and ascertain whether another berth could be had, the porter was the messenger of and not the passenger's agent and information given him by the ticket agent as to berth vacancies in the designated car not being communicated was not binding.—Pullman Co. v. Walton, 239 S.W. 385, 152 Ark. 633, 23 A.L.R. 1298.

Threat to transfer to another car

Where a woman who was ill and weak secured a ticket for a berth on defendant's Pullman car convenient to a berth occupied by her physician and to another occupied by her nurse, and was subsequently ordered to take a berth in another car because her berth had been sold to another, which threw plaintiff into a highly nervous state rendering her extremely ill and prostrate, and she was permitted to remain in the car by others voluntarily giving her berth, it was held, by a divided court, that defendant was liable.—Pullman Co. v. Anderson, 81 So. 276, 119 Miss. 791.

15. U.S.—Mann Boudoir Car Co. v. Dupre, Miss., 54 F. 646, 4 C.C.A. 540, 21 L.R.A. 289.
10 C.J. p 1169 note 52.

him,[16] by the fact that the holders of the tickets surrendered them and accepted the price of the tickets in return,[17] or by showing that he demanded the return of his railroad tickets from the railroad conductor.[18] Likewise, the company cannot escape liability on the ground that plaintiff should first have conferred with it and verified the agent's authority,[19] or on the ground that its agent did not understand the legal effect of the reservation.[20]

A carrier can lawfully contract and be bound by its contract to deliver Pullman tickets at a distant place, notwithstanding such delivery is to be performed beyond its lines and by an employee of another carrier;[21] and the person to whom such tickets are to be delivered is in a real sense a party thereto.[22] Such person is not bound by the printed portion of the receipt for the money for the ticket and berth, limiting the carrier's liability, unless known and assented to by the person purchasing the ticket.[23] Also, where the statute so provides, such a contract, where ambiguous or uncertain, is to be construed in favor of the person in whose favor the provision was made.[24]

Duty of passenger. The passenger, on his part, when he engages a berth in a sleeping car, impliedly agrees to conduct himself in a quiet and orderly manner, to take proper care of his berth while it is in his possession, and to give it up at the end of his journey in as good condition as when it was assigned to him, necessary wear excepted.[25]

Effect of ticket. There is a difference between the right of a passenger purchasing an ordinary railroad ticket, and the right which he obtains in buying a sleeping car ticket.[26] Where a passenger buys a right to a berth in a sleeping car, the ticket he receives is not a contract, but merely a symbol indicating to the sleeping car company's agent that the passenger is entitled to accommodations in the car named in the ticket,[27] and it may be varied or contradicted by parol evidence.[28] While, as between the conductor of the sleeping car and the passenger, the passenger's ticket is the sole evidence of the contract,[29] and the conductor is not required to accept the uncorroborated statement of a passenger that he has lost his ticket,[30] if the ticket is incorrect by reason of the fault of the selling agent, the sleeping car company is bound by the contract which was in fact made and cannot shield itself from liability for nonperformance of the actual contract on the ground that it had made a regulation which precluded its conductors from making any inquiry as to the real contract or from carrying it out.[31]

16. N.Y.—Braun v. Webb, 65 N.Y.S. 668, 32 Misc. 243.

17. Ark.—Pullman Co. v. Walton, 239 S.W. 385, 386, 152 Ark. 633, 23 A.L.R. 1298.
"There is no question involved of the right of the sleeping car company to require the purchase and exhibition of tickets and to promulgate and enforce rules with respect to the operation of its cars. This does not, however, absolve the company from liability for negligence of its servants in refusing to furnish accommodations in accordance with tickets purchased by patrons, and the company was not absolved from liability, in this instance, by the fact that the holders of the tickets surrendered them and accepted the price of the tickets in return. This is true for the reason that appellee had then been deprived of the use of the tickets by the refusal of the conductor to admit them to the car. In other words, it was not a voluntary surrender of the tickets in the sense that there was a cancellation or rescission of the contract, the terms of which had already been broken by the company's servant in refusing to admit the passengers into the car. All the passengers could do then was to surrender the tickets and accept return of the money, and the acceptance of the money did not waive the wrong or negligence of the servant in failing to comply with the contract."—Pullman Co. v. Walton, supra.

18. Ohio.—Pullman Co. v. Willett, 27 Ohio Cir. Ct. 649.

19. **Authority of ticket agent**
Where railroad ticket agent acting within apparent scope of his authority reserves sleeping car berth for prospective passenger, the passenger may rely on his authority, and need not first confer with carrier and verify agent's authority.—Bryant v. Atlantic Coast Line R. Co., 91 S.E. 1047, 19 Ga.App. 536.

20. Ala.—Pullman Co. v. Meyer, 70 So. 763, 195 Ala. 397.

21. Or.—Pierce v. Northern Pac. Ry. Co., 271 P. 976, 127 Or. 461, 62 A.L.R. 644.

Acceptance of cash
Where the person to whom the Pullman ticket was to be delivered was an aged, infirm, and inexperienced woman, the fact that she accepted cash instead of the ticket does not constitute such an election as to prevent her recovery.—Pierce v. Northern Pac. Ry. Co., 271 P. 976, 127 Or. 461, 62 A.L.R. 644.

22. Or.—Pierce v. Northern Pac. Ry. Co., supra.

23. Or.—Pierce v. Northern Pac. Ry. Co., supra.

24. **Contract to furnish berth**
Under such a statute and under such circumstances, the contract must be construed to mean that carrier contracted to furnish purchaser's mother with berth, not simply with cash, where "berth" was written over printed word "cash."—Pierce v. Northern Pac. Ry. Co., 271 P. 976, 127 Or. 461, 62 A.L.R. 644.

25. Ill.—Nevin v. Pullman Palace Car Co., 106 Ill. 222, 46 Am.R. 688.

26. Miss.—Armstrong v. Pullman Co., 66 So. 283, 108 Miss. 25, L.R.A.1915B 1202.

27. Ala.—Pullman Co. v. Riley, 59 So. 761, 5 Ala.App. 561.
Mass.—Lewis v. New York Sleeping Car Co., 9 N.E. 615, 143 Mass. 267, 58 Am.R. 135.

28. U.S.—Mann Boudoir Car Co. v. Dupre, Miss., 54 F. 646, 4 C.C.A. 540, 21 L.R.A. 289.

29. Ala.—Pullman Co. v. Riley, 59 So. 761, 5 Ala.App. 561.

30. Miss.—Armstrong v. Pullman Co., 66 So. 283, 108 Miss. 25, L.R.A.1915B 1202.

31. Ala.—Pullman Co. v. Riley, 59 So. 761, 5 Ala.App. 561.

§ 906. Duty as to Transportation

A sleeping car company does not undertake the duty of transporting passengers to their destination.

A sleeping car company, by furnishing cars under a contract with a railroad company to be used as sleeping cars by the traveling public, does not undertake the duty of transporting the passengers to their destination;[32] but the obligation which devolves on it by the sale of a ticket is to grant the purchaser the privilege of riding in its car and of using the additional comforts and conveniences which it furnishes.[33] It does, however, oblige itself to have throughout the entire line, as indicated on its tickets, suitable cars to allow an uninterrupted transit, to have provided such connections between the railroads intervening between the termini and over the route indicated on the tickets as, according to the regular trains running on such roads, will permit a continuous transit, and to see that these roads are so situated, manned, and operated as, according to their regularly established trains, to admit of a continuous passage over the route specified in the tickets;[34] and, where all these obligations are fulfilled, the sleeping car company cannot be held liable for the failure or refusal of the railroad company to perform its contract for the transportation of the passenger.[35]

§ 907. Duty to Receive Passengers

A sleeping car company is obliged to furnish accommodation, if it has a vacant berth at its disposal, to all passengers to whom no personal objection attaches. Statutes requiring separate accommodations for colored persons apply to sleeping car companies.

As in the case of carriers of passengers, one of the duties which a sleeping car company owes to the public is that of treating with fairness and without unjust discrimination all persons whose patronage is solicited; and when, therefore, a passenger who, under the rules of the company, is entitled to a berth on the payment of the usual fare, and to whom no personal objection attaches, enters the company's car at a proper time for the purpose of procuring accommodation, and applies in a proper manner for a berth, tendering the customary price therefor, the company is obliged to furnish the accommodation, provided it has a vacant berth at its disposal; and a refusal, without good excuse, to furnish accommodations to an unobjectionable person, on the usual and reasonable terms, is a breach of legal duty.[36] A sleeping car company's liability to persons seeking its accommodations rests solely on the breach of its implied obligation to furnish such accommodations as it holds itself out as offering to the public.[37] The company, however, cannot be held liable for refusing to furnish a berth, when so requested, where the only vacant berth is in a section which has been sold previously, even though the section has been sold to one person who occupies only one part thereof; nor can it be held liable for the refusal of its agent to sell a section, occupied at the time, from the point of the occupant's destination before that point has been reached.[38]

The right of a person to a berth or passage on a sleeping car, even though all the accommodations have not been taken, is not unlimited, but is subject to such reasonable regulations as the company may prescribe.[39] The company may, under a reasonable regulation, refuse to receive as a passenger one who is afflicted with a contagious or infectious disease, or one who is insane; and, if such person has already purchased a ticket, it is bound, as a condition to the rescission of the contract, to offer to return the purchase price of the ticket.[40]

Discrimination on account of color. Statutory provisions requiring separate accommodations for colored persons have been held to apply to sleeping cars.[41] Where a sleeping car company has contracted to furnish accommodations to a negro, it cannot defend an action for the breach of its contract on the ground that in the course of the journey the car entered a state where the transportation of negroes in the same car with white passengers was illegal, as in such case the con-

32. N.C.—Garrett v. Southern Ry. Co., 90 S.E. 903, 172 N.C. 737, L.R.A.1917F 885.
10 C.J. p. 1170 note 67.

33. U.S.—Calhoun v. Pullman Palace Car Co., C.C.Tenn., 149 F. 546, affirmed 159 F. 387, 86 C.C.A. 387, 16 L.R.A.,N.S., 575.
10 C.J. p. 1170 note 68.

34. U.S.—Pullman's Palace-Car Co. v. King, N.Y., 99 F. 380, 39 C.C.A. 573.
10 C.J. p. 1170 note 69.

35. U.S.—Louisville, etc., R. Co. v. Fisher, Tenn., 155 F. 68, 83 C.C.A. 584, 11 L.R.A.,N.S. 926.
10 C.J. p. 1170 note 70.

36. Ill.—Nevin v. Pullman Palace Car Co., 106 Ill. 222, 46 Am.R. 688.
10 C.J. p. 1170 note 72.

37. U.S.—Calhoun v. Pullman Palace Car Co., C.C.Tenn., 149 F. 546, affirming 159 F. 387, 86 C.C.A. 387, 16 L.R.A.N.S. 575.

38. U.S.—Searles v. Mann Boudoir Car Co., C.C.Miss., 45 F. 330.

39. Mont.—Doherty v. Northern Pac. R. Co., 115 P. 401, 43 Mont. 294, 36 L.R.A.,N.S. 1139.
10 C.J. p. 1170 note 77.

40. Ala.—Pullman Car Co. v. Krauss, 40 So. 398, 145 Ala. 395, 4 L.R.A., N.S., 103, 8 Ann.Cas. 218.
10 C.J. p. 1170 note 78.

41. Miss.—Alabama, etc., R. Co. v. Morris, 60 So. 11, 103 Miss. 511, Ann.Cas.1915B 613.

tract of the passenger was not that he should be carried in the same car with white persons in violation of law, but he had the right to assume that if such contingency arose he would be furnished with a berth in a coach or apartment of equal comfort and convenience separate from the white passengers.[42]

Husband and wife in same berth. Where a berth is contracted for by the husband, with the express understanding that it is engaged for the joint occupancy of himself and wife, or under circumstances which are not misleading within themselves, the refusal to permit such a joint occupancy without other reason than the difference of sex, and where such a refusal would amount to a breach of contract, gives to the injured party a right of action for damages; but, where the husband and wife individually contract for a berth, the company is not liable for a refusal to permit them to occupy the same berth.[43]

§ 908. Extra Fare and Ticket

The payment to the railroad of an extra fare for first-class passage, although this may be a prerequisite to the right to ride in a sleeping car, does not entitle the passenger to parlor or sleeping car accommodations without the payment of additional compensation to the sleeping car company. A sleeping car company may require those seeking its accommodations to purchase a ticket.

If a railroad company furnishes a sufficient number of first-class cars with the usual appliances and service for the accommodation of persons entitled to first-class passage, the payment of a first-class fare does not entitle a passenger to demand carriage in a parlor car in the train furnished with additional conveniences and service; and for such additional service and accommodations the company may lawfully demand a reasonable extra compensation from those passengers who from choice avail themselves thereof;[44] and it has this right notwithstanding the amount which the company may charge for a first-class passage is fixed by statute.[45] In case a passenger cannot obtain a seat in an ordinary car, he may pass into the drawing-room car without first asking the railroad conductor for a seat, and may recover for injuries received by reason of the attempt of the drawing-room car employee to eject him.[46]

Right to require ticket. A sleeping car company may lawfully require those seeking to be carried to purchase tickets, when convenient facilities therefor are afforded, to exhibit them to persons designated by it for that purpose,[47] and to surrender them, after securing their berths in the car, when required by the person in immediate charge;[48] and, if the passenger loses his ticket, he may be refused the accommodations for which he has paid,[49] although it has been held, as hereinafter stated in § 913, that he may not be ejected because of the loss of his ticket.

Necessity of railroad ticket. Where by a contract between the sleeping car company and the railroad company the latter company determines what passengers shall be entitled to occupy the sleeping cars, the sleeping car company is not liable for a refusal to furnish a berth to a passenger who, under the rules of the railroad company, is not authorized to use the sleeping car, such as for a refusal in accordance with the terms of its agreement with the railroad company to furnish sleeping car accommodations to one not holding a first-class railroad ticket,[50] or to one not holding a ticket for transportation for the whole route.[51] It is immaterial in this connection that the agent refusing to sell the berth was the agent of the sleeping car company as well as of the railroad company, as, in refusing such accommodation, he is acting as the agent of the railroad company, and not of the sleeping car company.[52]

§ 909. Safety and Comfort of Passengers

A sleeping car company is required to exercise a high degree of care for the personal safety and comfort of its passengers.

A sleeping car company, by its invitation to passengers to occupy its cars, holds itself out to the world as furnishing safe and comfortable cars, and, when it sells a ticket, there is an implied stipulation that its cars may be occupied with rea-

42. Tex.—Pullman Palace Car Co. v. Cain, 40 S.W. 220, 15 Tex.Civ.App. 503

43. Tex.—Pullman Palace Car Co. v. Bales, 15 S.W. 785, 80 Tex. 211.

44. Mont.—Doherty v. Northern Pac. R. Co., 115 P. 401, 43 Mont. 294, 36 L.R.A.,N.S., 1139
10 C.J. p. 1171 note 86.

45. Ark.—St. Louis, etc., R. Co. v. Hardy, 17 S.W. 711, 55 Ark. 134.

46. N.Y.—Thorpe v. New York Cent., etc., R. Co., 76 N.Y. 402, 32 Am.R. 325

47. Ark.—Pullman Co. v. Walton, 239 S.W. 385, 152 Ark. 633, 23 A.L.R. 1298

48. Ill.—Pullman Palace Car Co. v. Reed, 75 Ill. 125, 20 Am.R. 232.

49. N.Y.—Buck v. Webb, 11 N.Y.S. 617, 58 Hun 185.

50. U.S.—Lemon v. Pullman Palace Car Co., C.C.Miss., 52 F. 262
Ill.—Pullman Palace Car Co. v. Lee, 49 Ill.App. 75.

51. Mass.—Lawrence v. Pullman's Palace Car Co., 10 N.E. 723, 144 Mass. 1, 59 Am.R. 58.

52. U.S.—Lemon v. Pullman Palace Car Co., C.C.Miss., 52 F. 262.
10 C.J. p. 1171 note 94.

sonable safety and comfort as sleeping cars.[53] A sleeping car company is required to exercise a high degree of care for the personal safety and comfort of its passengers,[54] but, although there is authority to the contrary,[55] it is not held to that highest degree of care which attaches to a common carrier.[56] The acts of the conductor and the porter of a sleeping car with reference to the safety of the passenger are within the scope of their employment so as to render the company liable for their negligence or misconduct.[57] The sleeping car company, however, is not an insurer of the safety of its passengers, and, in order for it to be liable for injuries to its passengers, it must appear that the injury was a direct result of some neglect of duty on its part,[58] but the fact that the railroad company was also concurrently negligent with the sleeping car company does not relieve such company of liability for its negligent acts if they contributed directly to the passenger's injury.[59] Accordingly the passenger cannot complain of inconvenience or discomfort which is incidental to the operation of the car.[60]

A passenger on a sleeping car has the right to ex-

53. U.S.—Campbell v. Pullman Palace Car Co., C.C.Iowa, 42 F. 484, affirmed 14 S.Ct. 1151, 154 U.S. 513, 38 L.Ed. 1069.
10 C.J. p. 1171 note 96.

Protection from humiliation

"When a person having a ticket which entitles him to a ride on a railroad train presents such railroad ticket for the inspection of an agent, who is authorized by the Pullman Company to sell Pullman car accommodation, and, after inspection of the railroad ticket, the Pullman agent sells to the intending passenger a seat or berth in the Pullman car, entitling the purchaser to Pullman privileges and service, a contract arises from the payment of the passenger for the Pullman accommodations that the Pullman Company will use all the care and diligence required of passengers to see to it that the passenger is afforded the full enjoyment of the Pullman privileges, the use of his seat or berth, rest if he desires, and other conveniences and comforts of the Pullman service, including protection, as far as the Pullman Company can give it, from acts or conduct likely to subject the passenger to humiliation, indignity or embarrassment."—Bonner v. Pullman Co., 159 S.E. 382, 385, 160 S.C. 531, 76 A.L.R. 922

54. Md.—Steinberg v. Pullman Co., 144 A. 363, 156 Md. 329.

Aged passenger

It was duty of carrier, contracting to furnish sleeping car facilities, to extend to passenger seventy-six years of age proper care under circumstances.—Pierce v. Northern Pac. Ry. Co., 271 P. 976, 127 Or. 461, 62 A.L.R. 644.

Compelling passenger to change cars

Where sleeping car passenger was aroused by sleeping car employee and compelled to leave the car in which he was sleeping and directed to another car not heated, in which he was refused a berth, and compelled to sit in clothing which had become wet by exposure to rain during the transfer, the sleeping car company was liable therefor, and could not defend by showing that the railway company had told it to make the transfer.—Pullman Co. v. McGowan, Tex.Civ.App., 210 S.W. 842, error refused.

Ejection of passenger see infra § 913

Lack of control of trains immaterial

The duty arising from the relation of carrier and passenger between a sleeping car company and its passenger to use proper care in transferring the passenger from one sleeper to another is not affected by the fact that the company does not control the trains to which its coaches are attached.—Pullman Co. v. McGowan, Tex.Civ.App., 210 S.W. 842, error refused.

55. S.C.—Bonner v. Pullman Co., 159 S.E. 382, 160 S.C. 531, 76 A.L.R. 922.—Caldwell v. Pullman Co., 128 S.E. 504, 132 S.C. 321.
10 C.J. p. 1171 note 98.

Highest degree of care

A sleeping car company is held to the highest degree of care, which is the same degree required of a railroad company.—Forbes v. Pullman Co., 135 S.E. 563, 137 S.C. 433

56. Ga.—Pullman Co. v. Strang, 132 S.E. 399, 35 Ga.App. 59.
Md.—Steinberg v. Pullman Co., 144 A. 363, 156 Md. 329

57. Tex.—Pullman Co. v. McGowan, Civ.App., 210 S.W. 842, error refused.
10 C.J. p. 1172 note 99.

Same as common carrier

Pullman company is chargeable with the same high degree of accountability for wrongful and tortious acts of its servants as is a common carrier.—Caldwell v. Pullman Co., 128 S.E. 504, 132 S.C. 321.

58. Md.—Griffith v. Pullman Co., 121 A. 362, 142 Md. 514.

Closing door on hand

A passenger cannot complain of the closing of a door so as to injure his hand, where the porter closing it had no knowledge that the passenger's hand was in a dangerous position.—Wilkins v. Pullman Co., C.C.Pa., 166 F. 1004.

Gate open at end of car

Negligence of Pullman company and railway company in not seeing that gate of tourist car was closed was the concurrent proximate cause of injury to passenger stepping from tourist car to baggage car as train was cut between them at station.—Galveston, H. & S. A. Ry. Co. v. Packard, Tex.Civ.App., 193 S.W. 397, error refused.

Ice on sill of car

Railroad and Pullman company were required to exercise only reasonable care for safety of passenger in acquiring knowledge of ice on sill of car, and, if ice could not be seen by reasonable inspection, they were not liable for fall.—Connell v. Oregon Short Line R. Co., 168 P. 337, 51 Utah 20.

Inability to open door

Any negligence of the porter of a Pullman car, placed on a siding in a city to await the next train, in temporarily going away, leaving a woman passenger alone, was not the proximate cause of any injury to her from fright on being unable, with the single effort made, to open the door, although it could be opened by turning the knob and applying a twelve-pound pull; as it could not be anticipated that she could not open it, and that, if she could not, such result would follow.—Pullman Co. v. Gutierez, Tex.Civ.App., 198 S.W. 1065, dismissed for want of jurisdiction.

Injury from sneezing

Injury to passenger's back by sneezing, or attempting to suppress sneezing, because she had to travel in drafty chair car without heat operated by railroad company, cannot be said to be proximate and natural result of breach by defendant Pullman company of contract to furnish berth, "proximate cause" being the active efficient cause which sets in motion a train of events that in their natural sequence might and ought to be expected to produce an injury as undisturbed by any independent intervening cause.—O'Neil v. Pullman Co., 260 S.W. 798, 214 Mo.App. 283.

59. Tex.—Pullman Co. v. McGowan, Civ.App., 210 S.W. 842, error refused.

60. U.S.—Edmundson v. Pullman

pect those conveniences which are ordinarily furnished in such cars, and for which he has paid,[61] and there is an implied agreement on the part of the company that it will keep and furnish such supplies and conveniences as are usual and necessary to the health and comfort of the passengers.[62]

It is the duty of a sleeping car company, or of a railroad company if it furnishes the sleeping car, to give a passenger reasonably safe means for getting into and out of a berth,[63] to furnish proper attendance,[64] to furnish lights and to use reasonable diligence to maintain them in the toilet room and other parts of the car which are subject to use by the passengers at various times,[65] and to keep the aisle of the car free from obstruction and open to the use of the passengers, and the passengers may assume that they can safely pass through the car.[66] Where a sleeping car company accepts as a passenger a sick person on the way to a hospital, it is the duty of the employees of such company to see that the passenger is properly taken from the car to the depot at her destination; and this duty is not waived by the fact that the conductor telegraphed for an ambulance and to plaintiff's friends to meet her, since in so doing the conductor acted as the passenger's agent.[67]

Baggage in aisle. If a passenger places his personal baggage in the aisle of a car, and so obstructs the passageway, the sleeping car company is not chargeable with negligence unless it is shown that it had actual or constructive notice of the presence of the baggage in the aisle.[68] Where, however, the sleeping car company has such notice, it is liable if a passenger, while exercising reasonable care, is injured thereby.[69]

Duty to prepare berth. While it is the company's duty to have the passenger's berth made up and ready for his occupancy at the proper time,[70] the passenger cannot recover damages merely because the company's employee failed to comply immediately with the request for the preparation of his berth.[71]

Duty to notify and to awaken passenger. It is the duty of a sleeping car company to notify a passenger on its car of the train's arrival at his destination,[72] and to awaken the occupant of a berth in reasonable time for him to dress safely and comfortably and to leave the train at the point of his destination,[73] and a failure to perform such duties constitutes negligence.[74]

Palace-Car Co., Tex., 92 F. 824, 34 C.C.A. 382
10 C.J. p. 1172 note 1.

61. U.S.—Ozanne v. Illinois Cent. R. Co., C.C.Ky., 151 F. 900, affirmed 157 F. 1004, 85 C.C.A. 678
10 C.J. p. 1172 note 6

62. Ill.—Nevin v. Pullman Palace Car Co., 106 Ill. 222, 46 Am.R. 688

63. Ill.—Pullman's Palace Car Co. v. Fielding, 62 Ill.App. 577.

No negligence

Where the ladder used to ascend to an upper berth was not shown to be out of repair or broken, and where it is shown that others used the same ladder in safety, the fact that plaintiff fell from the ladder in ascending to her berth does not show negligence on the part of the sleeping car company.—Griffith v. Pullman Co., 121 A. 362, 142 Md. 514.

64. U.S.—Simms v. Pullman South Car Co., C.C.La., 22 F.Cas.No.12,869a.
Ill.—Pullman's Palace Car Co. v. Fielding, 62 Ill.App. 577.
10 C.J. p. 1172 note 9

65. Minn.—Spallen v. Pullman Co., 186 N.W. 233, 234, 151 Minn. 152.
10 C.J. p. 1172 note 10

'It is the duty of a sleeping car company to keep the aisles in its cars properly lighted at all times when the cars are occupied by passengers. At night, after the passengers have retired, it is customary and proper to turn off the lights in the ceilings of the cars. Passengers in the upper berths could not otherwise sleep with any degree of comfort. But the lights at either end of the car should be constantly lighted at night, so that passengers may see their way if they have occasion to walk through the aisle."—Spallen v. Pullman Co., supra.

66. S.C.—Chaldwell v. Pullman, 128 S.E. 504, 132 S.E. 321.
10 C.J. p. 1172 note 11

Leaving stepladder in aisle

Porter, if leaving stepladder projecting into main passageway, although folded and in use, resulting in injury to passenger, would be negligent.—Barrett v. Pullman Co., 153 A. 837, 85 N.H. 33.

67. Wyo.—Pullman Co. v. Finley, 125 P. 380, 20 Wyo. 456.
10 C.J. p. 1172 note 12.

68. Minn.—Spallen v. Pullman Co., 186 N.W. 233, 151 Minn. 152

Constructive notice

Whether a sleeping car company had constructive notice of such an obstruction depends on the length of time the bag had been in the aisle. If it had been there so long that defendant's employees would have discovered it if they had been reasonably vigilant in the discharge of their duties, defendant should be held to have had constructive notice. Where, however, the evidence wholly fails to show when the bag was put in the aisle, there is nothing on which to base a finding of constructive notice.—Spallen v. Pullman Co., 186 N.W. 233, 151 Minn. 152

69. S.C.—Chaldwell v. Pullman, 128 S.E. 504, 132 S.C. 321.

70. Ill.—Nevin v. Pullman Palace Car Co., 106 Ill. 222, 46 Am.R. 688

71. Miss.—Pullman's Palace Car Co. v. Ehrman, 4 So. 113, 65 Miss. 383

72. Ga.—Pullman Co. v. Strang, 132 S.E. 399, 35 Ga.App. 59.
10 C.J. p. 1172 note 16.

Proximate cause

Plaintiff's illness from being carried beyond station and put off by railroad after Pullman porter had failed to awaken him at his station did not result through an intervening agency, but was the natural or proximate result of alleged negligence of railroad.—Georgia Southern & F. Ry. Co. v. Corry, 96 S.E. 335, 22 Ga.App. 424, affirmed 99 S.E. 881, 149 Ga. 295

73. Wis.—McKeon v. Chicago, etc., R. Co., 69 N.W. 175, 94 Wis. 477, 59 Am.S.R. 910, 35 L.R.A. 252.
10 C.J. p. 1173 note 17.

74. Ga.—Pullman Co. v. Strang, 132 S.E. 399, 35 Ga.App. 59.

§ 910. Protection of Passenger in General

A sleeping car company must take reasonable precautions for the protection of its passengers, particularly during the sleeping hours.

A sleeping car company also has the duty of exercising a reasonable watch over the safety of its sleeping passengers, and of using all proper means within its power to preserve order in its cars during the journey, especially during the sleeping hours, and to permit the passengers peaceably to occupy the berths without any interference with their proper use and enjoyment;[75] and, if injuries arise through the failure of its employees in charge of the cars to exercise due care for the protection and comfort of persons using them in accordance with the regulation of the company, the company is liable.[76] A sleeping car company is not liable to a passenger for injuries which it had no reason to foresee,[77] but this does not mean that it is under no duty to maintain a watch over its sleeping passengers until a reasonable apprehension of danger arises.[78]

§ 911. Assaults and Insults by Employees

A sleeping car company is liable to its passengers for assaults committed on them by its employees; but not for wanton assaults entirely disconnected with their employment or which are induced by the passenger.

A sleeping car company is liable, like a carrier of passengers, for wrongful insults,[79] and for an assault on a passenger by an employee, such as a ticket agent,[80] or the porter,[81] but not for a wanton assault committed by the employee outside of the scope of his employment and the functions committed to him;[82] nor is the company liable for an assault by its employee, which was provoked by the wrongful conduct of the passenger.[83]

Rudeness of employees. It is the duty of a sleeping car company to investigate matters apparently showing improper conduct by passengers. Such investigation should be conducted without rudeness or greater publicity than necessary; but mere rudeness of manner in discharging the duty, not accompanied by violence, will not of itself be a cause of action, although it may be considered in aggravation of damages if a cause of action otherwise exists.[84]

Person lawfully on car, but not a passenger. The liability of a sleeping car company for injuries to a person not a passenger, but lawfully on the car, caused by the wanton and unprovoked assault by its employee, is not governed by the principles regulating the liability of common carriers, under the contract of carriage, for like assaults committed by their employees on passengers; but the obligation in such a case is independent of any contractual relation and is governed by the general principles of the law of master and servant, the company being liable as any other master for an injury caused by its employee in the course of his employment.[85]

§ 912. Assaults by Third Persons

A sleeping car company is liable for a failure to use due care to protect a passenger from insult or injury from a third person.

A sleeping car company, and also the railroad company, are liable for a failure to use due care to protect a passenger from insult or injury from third persons.[86] The company, however, cannot be held

75. U.S.—Pullman Co. v. Culbreth, C.C.A.Ala., 2 F.2d 540, 42 A.L.R. 164, affirming, D.C., Culbreth v. Pullman Co., 293 F. 402.
10 C.J. p 1173 notes 18, 19.

76. U.S.—Pullman Co. v. Culbreth, supra.
N.C.—Garrett v. Southern Ry. Co., 90 S.E. 903, 172 N.C. 737, L.R.A. 1917F 885.
10 C.J. p 1173 note 20.

77. U.S.—Hall v. Pullman Co., D.C. Fla., 253 F. 297.

Failure to answer call bell

Where passenger on Pullman car indicated that he intended to assault woman passenger in her berth, who rang bell for porter and conductor, and they failed to respond, whereupon assault was committed, Pullman company was not liable, unless it or the porter had reasonable ground to believe violence was imminent, as the failure to answer the call bell is not the natural or probable cause of the injury.—Hall v. Pullman Co., D.C.Fla., 253 F. 297—10 C.J. p 1173 note 21.

78. U.S.—Pullman Co. v. Culbreth, C.C.A.Ala., 2 F.2d 504, 42 A.L.R. 164, affirming, D.C., Culbreth v. Pullman Co., 293 F. 402.

79. Ala.—Pullman Co. v. Riley, 59 So 761, 5 Ala.App. 561.

80. N.C.—Lanier v. Pullman Co., 105 S.E. 21, 180 N.C. 406.

Tossing ticket in face

Action of the agent of the Pullman company in tossing plaintiff's ticket back into her face in a very rude and insolent manner, when she applied for a berth, constituted an assault, and would sustain an action; one of the implied contractual obligations of a carrier is to protect a passenger from insults or assaults by other passengers or the carrier's servants.—Lanier v. Pullman Co., 105 S.E. 21, 180 N.C. 406.

81. U.S.—Pullman Co. v. Hall, C.C. A.W.Va., 46 F. 399.
10 C.J. p 1173 note 24.

82. U.S.—Scheilling v. Pullman Co., D.C.Fla., 292 F. 768.
10 C.J. p 1173 note 25.

83. U.S.—Rohrback v. Pullman Palace Car Co., C.C.Pa., 166 F. 797.
10 C.J. p 1173 note 26

84. Tex.—Pullman Palace-Car Co. v. Bales, 15 S.W. 785, 80 Tex 211.

85. U.S.—Campbell v. Pullman Palace-Car Co., C.C.Iowa, 42 F. 484, affirmed 14 S.Ct. 1151, 154 U.S. 513, 38 L.Ed. 1069.
10 C.J. p 1173 note 28.

86. N.C.—Garrett v. Southern Ry. Co., 90 S.E. 903, 172 N.C. 737, L.R.A.1917F 885.
10 C.J. p 1173 note 30.

liable for injuries received by a passenger at the hands of an intruder, a stranger, or a fellow passenger, where its employees neither knew, nor in the light of surrounding circumstances were bound to know, that the danger threatened was to be apprehended, and failed to use their authority and power to protect the passenger therefrom;[87] nor does the company's duty to exercise reasonable care to protect passengers require it or its employees to prevent the arrest and removal of a passenger.[88]

§ 913. Ejection of Passengers

A sleeping car company may, if it uses no more force than is reasonably necessary, evict a passenger from the accommodations of its cars for a sufficient cause. It is liable, however, for wrongful eviction.

A palace or sleeping car company, like a railroad company, has a right to eject a passenger from the accommodations of its cars, for a sufficient cause,[89] provided it uses no more force than is reasonably necessary and acts in a considerate manner,[90] using ordinary care for such person's safety.[91] Thus a passenger may be ejected for refusing to pay the regular extra charge demanded for the accommodations in such a car,[92] or for failing to procure a proper railroad ticket,[93] or for insisting on bringing improper articles into the car.[94] Where, however, the ejection is made without a sufficient cause, or is otherwise wrongful, the company is liable for the injury resulting therefrom.[95]

A sleeping car company cannot be held liable for the ejection of a passenger from its car by the officers or agents of the railroad company where its own employees had nothing to do with such ejection.[96] It has also been held that the ejection of a passenger traveling on a second-class ticket from a sleeping car in accordance with the rules of the railroad company is the act of the railroad company and not of the sleeping car company, even though the conductor and the porter of the sleeping car assisted the employees of the railroad company in the ejection.[97]

Loss of ticket. Where the proof is clear and satisfactory that the passenger has bought his ticket, but has lost it, and the ticket is limited to a particular berth and trip, and the circumstances are such that it is reasonably certain that the company cannot be defrauded by the ticket being in the hands of another, the passenger should be allowed to have the berth,[98] and the company is liable for the act

Conspiracy with porter

Where the porter of a Pullman car conspired and colluded with a passenger in the latter's making of an assault on another passenger while in her berth, the Pullman company was liable to the assaulted passenger.—Hall v. Pullman Co., D.C.Fla., 253 F. 297.

Robbery with violence

Where a woman was assaulted by a negro, who tried to grab her pocketbook and dragged her and her six-year-old daughter across two tracks and a platform as she was about to board a sleeping car, the conductor, who was helping them into the car, entirely failing to protect them from assault and robbery, as he might have done, the Pullman company was liable, since it must guard passengers from the attacks of wrongdoers, if such attacks can be foreseen, and must protect them from annoyance and insult, not only from its own servants, but from all others.—Garrett v. Southern Ry. Co., 90 S.E. 903, 172 N.C. 737, L.R.A.1917F 885—10 C.J. p. 1173 note 30 [a].

87. U.S.—Hall v. Pullman Co., D.C.Fla., 253 F. 297.
10 C.J. p. 1173 note 31.

Intoxicated passenger

Carrier operating sleeping car was liable for damages, caused when drunken male passenger in a nude or partially nude condition fell or climbed into the berth of a female passenger, only if it knew, or in the exercise of reasonable care could have ascertained, the intoxicated condition of such passenger, and in the exercise of ordinary care could have anticipated that he would probably insult or injure the female passenger.—Tomme v. Pullman Co., 93 So. 462, 207 Ala. 511.

88. U.S.—Thompkins v. Missouri, etc., R. Co., C.C.A.Mo., 211 F. 391, 128 C.C.A. 1, 52 L.R.A.,N.S., 791.

89. Nev.—Crumley v. Southern Pac. Co., 177 P. 17, 42 Nev. 337.
10 C.J. p. 1173 note 33
Ejection of passengers and intruders from carriers generally see supra §§ 806–854.

90. Tex.—Pullman Co. v. Custer, Civ.App., 140 S.W. 847.

91. Ky.—Louisville & N. R. Co. v. Ashley, 183 S.W. 921, 169 Ky. 330, L.R.A.1916E 763.

Same as if ejected from train

"Conceding that she had no right to ride in the Pullman car without paying or tendering the extra fare required, and that she could be required to remove from that car into another upon her refusal to pay the fare, there is no doubt but that she entered the coach by mistake, and the servants of the railroad, in removing her from the coach, were required to use ordinary care for her safety, as to the time and place and manner of her removal, and, if there was failure to exercise such care, it was negligent. When she was commanded to leave the coach and go into another, it was an expulsion of her from the coach, and the same rule, it seems, should apply to the care required to be exercised in regard to her safety as if she were to be ejected from a train."—Louisville & N. R. Co. v. Ashley, 183 S.W. 921, 923, 169 Ky. 330, L.R.A.1916E 763.
Care in ejecting passenger generally see supra §§ 822–824

92. Nev.—Crumley v. Southern Pac. Co., 177 P. 17, 42 Nev. 337
10 C.J. p. 1174 note 34.

93. U.S.—Calhoun v. Pullman Palace Car Co., C.C.Tenn., 149 F. 546, affirmed 159 F. 387, 86 C.C.A. 387, 16 L.R.A.,N.S., 575.

94. Tex.—Pullman Co. v. Custer, Civ. App., 140 S.W. 847.
10 C.J. p. 1174 note 36.

95. Tex.—Pullman Co. v. McGowan, Civ.App., 210 S.W. 842, error refused.
10 C.J. p. 1174 note 37.

96. U.S.—Paddock v. Atchison, etc., R. Co., C.C.Mo., 37 F. 841, 4 L.R.A. 231
10 C.J. p. 1174 note 40.

97. Mass.—Lawrence v. Pullman's Palace Car Co., 10 N.E. 723, 144 Mass. 1, 59 Am.R. 58.
10 C.J. p. 1174 note 41

98. Ala.—Louisville, etc., R. Co. v. Laney, App., 69 So. 993
Ill.—Pullman Palace Car Co. v. Reed, 75 Ill. 125, 20 Am.R. 232.

of the conductor in compelling him to leave the car.[99]

What constitutes ejection. Any acts of the company's employees which oust a passenger from the accommodations to which he is entitled, or which prevent him from entering the car and enjoying such accommodations, constitute an ejection,[1] and this rule applies where a passenger leaves the car under protest, on the orders of the employee in charge,[2] or in order to avoid being transported to a place other than his destination,[3] but not where he leaves voluntarily.[4]

§ 914. Duties and Liabilities as to Passenger's Effects

While a sleeping car company is not an insurer of the safety of a passenger's effects, it is under a duty to maintain a reasonable watch, particularly during the sleeping hours, for the protection of its passenger's property, and is liable for a failure to do so. The company is liable for a loss of such property through theft by its employees.

Since, as stated supra § 904, a sleeping car company is considered to be neither a common carrier nor an innkeeper, it is generally held that a sleeping car company does not assume the exceptional liability for goods which the law imposes on common carriers of goods or innkeepers by reason of engaging in those public callings;[5] but the measure of its duty and liability must be determined from the nature of its specific and implied engagements with its patrons.[6] A sleeping car company is not an insurer of the safety of a passenger's property, luggage, and effects, but is liable only for injuries or loss due to its negligence,[7] and it has been held that the passenger must take ordinary care for the protection and safety of his property.[8] Accordingly, as hereinafter shown in § 919 c, mere proof of loss of luggage which is taken by the passenger into a sleeping car does not as a rule make out either an absolute or a prima facie case of liability against the company; but, where the company through its employees takes the passenger's property into its custody and control, a loss thereof may be sufficient to hold the company liable,[9] as, under such circumstances, the company is a bailee of the property and under a duty to return it or account for its failure to do so.[10]

99. N.Y.—Buck v. Webb, 11 N.Y.S. 617, 58 Hun 185.
Right to deny accommodations to person who has lost ticket see supra § 908.

1. Tex.—Pullman Co. v. Custer, Civ. App., 140 S.W. 847.
10 C.J. p 1174 note 42.

2. Tex.—Pullman Palace Car Co. v. Cain, 40 S.W. 220, 15 Tex.Civ.App 503.

3. Tex.—Pullman Palace Car Co. v. Hocker, 93 S.W. 1009, 41 Tex.Civ App. 607.

4. Tex.—Pullman Palace Car Co. v. Hocker, supra.

5. N.Y.—Barnet v. Pullman Co., 281 N.Y.S. 575, 155 Misc. 876.
10 C.J. p 1175 note 48.

Ordinary care required

Sleeping car companies are required to use only reasonable or ordinary care to guard the property of passengers from theft, and are not held to that high degree of care applicable to common carriers generally.—Pullman Co. v. Moise, Tex.Civ.App., 187 S.W. 249.

In Nebraska, however, it has been stated that "A sleeping-car company, so far as it renders service similar in kind to an innkeeper, is subject to the same liabilities; and where an article of wearing apparel belonging to a passenger in one of such cars has been placed in the care of the porter, and is stolen from the car, the company will be liable therefor."—Pullman Palace Car Co. v. Lowe, 44 N.W. 236, 38 Neb 239, 26 Am.S.R. 325 and note, 6 L.R.A. 809.

6. Ky.—Myers v. Pullman Co., 149 S.W. 1002, 149 Ky. 776, 41 L.R.A., N.S., 799.

7. Mo.—Fisher v. Pullman Co., 254 S.W. 114, 212 Mo.App. 280.
N.Y.—Goldstein v. Pullman Co., 116 N.E. 376, 220 N.Y. 549, L.R.A.1918B 1060, affirming 147 N.Y.S. 133, 161 App.Div. 756—Barnet v. Pullman Co., 281 N.Y.S. 575, 155 Misc. 876—Sneddon v. Payne, 187 N.Y.S. 185, 114 Misc. 537.
Ohio.—Pullman Co. v. Laws, 10 Ohio App. 344.
Pa.—Hartman v. Pullman Co., 10 Pa. Dist. & Co. 438—Marx v. Pullman Co., 7 Pa.Dist. & Co. 91.
Tex.—Pullman Co. v. Hays, Civ.App., 257 S.W. 686, certified questions answered, Com.App., 271 S.W. 1108, 114 Tex. 490—Pullman Co. v. Bullock, Civ.App., 231 S.W. 1112.
10 C.J. p 1175 note 50.

Conversion

Carrier was not liable in conversion for loss of passenger's valuables placed in berth over her own.—Pinkus v. Pittsburgh, C., C. & St. L. Ry. Co., 114 N.E. 36, 63 Ind.App 38.

Loss not foreseeable

Where a passenger, who was having his hand bag carried by a station porter, was detained outside a Pullman car for the purpose of having his ticket examined, and when he entered the car, in which the porter was supposed to have left his bag, it could not be found, the carrier cannot be held liable on the theory that the loss would not have happened, if he had been allowed access to the car at the same time with the porter, for the requirement was reasonable and the loss could not have been foreseen.—Sneddon v. Payne, 187 N.Y.S. 185, 114 Misc. 537.

8. Ohio.—Bonser v. Pullman Co., 2 Ohio App. 35.
Contributory negligence see infra § 917.

Loss during daytime

Pullman company is not liable for negligence in daytime unless property has been bailed with company, so that company, through its servants, has custody of property or has guaranteed to exercise watch over property.—Barnet v. Pullman Co., 281 N.Y.S. 575, 155 Misc. 876.

9. N.Y.—Palmer v. Pullman Co., 167 N.Y.S. 610.
10 C.J. p 1175 note 52.

Authority of porter

In so far as liability for loss of baggage is concerned, a Pullman porter acts within the scope of his employment in assisting boarding passengers with their baggage. The mere fact that the passenger tipped the porter does not make him his agent.—Van Dike v. Pullman Co., 261 N.Y.S. 292, 145 Misc. 452.

10. N.Y.—Reisinger v. Pullman Co., 238 N.Y.S. 228, 248 App.Div 171, reargument denied and order resettled 292 N.Y.S. 381.

Notwithstanding the fact that a palace or sleeping car company is not subject to the extraordinary liability of a common carrier or an innkeeper, it is required to exercise a reasonable degree of care to guard the baggage and effects of a passenger from loss or injury, and if through want of such care the baggage or personal effects of a passenger such as he might reasonably carry with him are stolen or injured, the company is liable[11] What is a reasonable degree of care must be measured with reference to the danger of theft or injury reasonably to be apprehended under the circumstances,[12] and such a degree of care the passenger is entitled to expect.[13]

As the contract for the use of a berth involves an implied invitation to a passenger to sleep, it is the duty of the company to maintain a reasonable watch over his property while he is so using the berth.[14] A higher degree of care may be required during the night while the passenger is sleeping than is required in the day when the passenger is charged with the duty of exercising reasonable diligence for the protection of his property;[15] but, if the passenger is asleep during the daytime, it has been held that the common usages of travel permit no distinction to be made between a loss while a passenger happens to be asleep during any particular hour of the night and a loss while he is asleep during the daytime[16] To fulfill this duty the company is required to maintain a careful and continuous watch in the interior of the car while the berths are occupied by sleepers,[17] and if there is a failure to discharge this duty by not providing competent and efficient employees,[18] or by imposing on them duties which make it impracticable for them to furnish adequate protection,[19] the sleeping car company is liable for any loss which may reasonably be attributable to negligence in this respect.

Baggage in custody of passenger. The mere fact that a passenger retains control and custody of his baggage does not relieve the company from liability for its loss, as the company is still in such relation to the passenger's property as to owe to him the exercise of reasonable care and vigilance, in the management of its car, to prevent possible theft.[20]

Baggage left in car. While the company's liability does not end until after the passenger has safely reached his destination with all of his effects,[21] when a passenger leaves the car at his destination, the company is entitled to suppose that he has taken with him his baggage and property, and, until the property is discovered by its agents to have been left, the company is charged with no duty concerning it.[22] It has been held, however, that the company should exercise ordinary care in looking out for, and taking care of, property casually left in the car, and in restoring it to the owner.[23]

Bailee

Pullman company, in assuming control and possession of boarding passenger's bag through porter became bailee thereof—Van Dike v. Pullman Co., 261 N Y S. 292, 145 Misc. 452

Duty to restore

Where the Pullman company assumed duty to take care of passenger's baggage, it was part of its duty and its porter's to restore such baggage to passenger in the morning, the porter having placed it in the upper berth of the passenger's section, or to account for it—Palmer v. Pullman Co., 167 N. Y S 610

11. U S—Wilkinson v. Pullman Co, D C Cal., 22 F 2d 177
N Y—Goldstein v. Pullman Co, 116 N E 376, 220 N Y 549, L R A. 1918B 1060, affirming 147 N.Y S. 133, 161 App Div 756—Holden v Davis, 196 N Y.S 552, 119 Misc. 492
10 C J. p 1175 note 55.

12. Pa—Marx v Pullman Co, 7 Pa Dist & Co 91.
10 C J p 1176 note 56

13. Ga—Hines v. Malone, 105 S.E 37, 25 Ga App 781
10 C J p 1176 note 57.

Unreasonable hazard

An occupant and patron of a sleeping or parlor car has the right to assume that the company maintaining that service will exercise ordinary care in protecting his baggage, and in the performance of its duties will do no act which would subject his property to unreasonable or unnecessary hazard—Hines v Malone, 105 S E 37, 25 Ga.App. 781.

14. U S—Wilkinson v Pullman Co., D C Cal, 22 F.2d 177.
Mo.—Fisher v. Pullman Co, 254 S W 114, 212 Mo.App 280.
N Y.—Holden v. Davis, 196 N Y S 552, 119 Misc 492
10 C.J. p 1176 note 58.

15. N Y.—Goldstein v Pullman Co., 116 N.E. 376, 220 N.Y. 549, L R A. 1918B 1060 affirming 147 N Y.S 133, 161 App Div 756
10 C J. p 1176 note 59.

16. N.Y—Robbins v. Pullman Co., 164 N Y.S 111.

17. U S—Wilkinson v. Pullman Co., D C Cal., 22 F.2d 177.
10 C J p 1176 notes 60, 61.

To arrange hours of employees

"It seems to me that it is the duty of a sleeping car company to so [sic] arrange the hours of duty of its employees that, while passengers are asleep in their berths during the night, a continuous and careful watch of the interior of the car will be maintained."—Wilkinson v Pullman Co, D C Cal, 22 F.2d 177, 179

18. Ala.—Pullman Palace Car Co v. Adams, 24 So. 921, 120 Ala. 581, 74 Am S R. 53, 45 L R.A. 767.
10 C J p 1176 note 62.

19. N Y.—Carpenter v. New York, etc, R. Co., 26 N.E. 277, 124 N Y. 53, 21 Am S R. 644, 11 L.R.A. 759.
10 C J. p 1176 note 63.

20 U.S—Wilkinson v. Pullman Co., D C Cal., 22 F.2d 177.
10 C J. p 1177 note 73.

21. Ind—Voss v. Wagner Palace Car Co., 43 N E. 20, 44 N E. 1010, 16 Ind App. 271.

22. Miss—Illinois Cent R. Co v. Handy, 63 Miss 609 56 Am R 846.
Tex.—Pullman Co. v Hays, Civ App., 257 S.W 686, certified questions answered, Com App, 271 S W 1108, 114 Tex. 490.

23. Ga—Kates v. Pullman's Palace Car Co, 23 S E. 186, 95 Ga. 810, 815
10 C J p 1177 note 76.

Sufficiency of watch. Where the doors in a car are left open and unguarded, thus giving access to unauthorized persons, or where the officers charged with the superintendence leave the car without that supervision by them on which the passenger has a right to rely, such negligence is shown as will render the company liable for a loss;[24] and it has been held that the company will be liable for a loss occasioned by theft during a relaxation of the watch, even though the relaxation is only for a few moments.[25] It is not required, however, that a watch shall be kept over the only open entrance of a moving train, or that the windows also shall be specially guarded.[26]

The company can be made responsible for the loss of baggage or property of a passenger only by its neglect to keep that reasonable guard which its contract with the passenger implies;[27] and if a proper watch is kept, and there is no proof connecting the watchman with the theft, the company cannot be held liable for a loss.[28]

Theft by employee. Without reference to the law regulating the liability of a sleeping car company for the loss of a passenger's property through its negligence, the company is liable for a loss of such property through theft by its employee,[29] unless the money or property stolen is not such as the passenger is entitled to take in the car with him as baggage.[30]

While passenger absent from berth. This duty does not terminate with the period during which the passenger is actually asleep, but extends to keeping a reasonable watch over such of his necessary baggage and belongings as he cannot conveniently take with him, or watch himself, while he is absent from his berth,[31] such as when preparing his toilet after rising,[32] or while he is using the necessary conveniences of the car,[33] or is walking up and down the aisle,[34] or is absent from the car at a meal station.[35]

§ 915. Property for Which Liable

A sleeping car company may be held liable for the loss of only such money, baggage, or other personal belongings as are reasonably necessary for a passenger to take on a journey.

The rule as to what luggage and effects the sleeping car company may become liable for, by reason of their being taken into its car by a passenger, is the same as that with reference to the liability of carriers in general for baggage with the possession of which the passenger does not actually part.[36] Thus, a sleeping car company is liable for the loss of only such money, baggage, or other personal belongings as are reasonably necessary for a passenger to take on a journey.[37] This includes clothing, ornaments, and such articles as are usually carried by travelers, together with a sum of money reasonably sufficient for the expenses of the journey in which the passenger is engaged.[38] In determining

24. Miss.—Illinois Cent. R. Co. v. Handy, 63 Miss. 609, 56 Am.R. 846.

25. Ala.—Pullman Palace-Car Co. v. Adams, 24 So. 921, 120 Ala. 581, 74 Am.S.R. 53, 45 L.R.A. 767

26. Ga.—Pullman's Palace Car Co. v. Hall, 32 S.E. 923, 106 Ga. 765, 71 Am.S.R. 293, 44 L.R.A. 790.

27. Ky.—Pullman Co. v. Pulliam, 218 S.W. 1005, 187 Ky. 213, citing Corpus Juris with approval.
Miss.—Illinois Cent. R. Co. v. Handy, 63 Miss. 609, 56 Am.R. 846.
10 C.J. p 1177 note 71.

28. Ky.—Myers v. Pullman Co., 149 S.W. 1002, 149 Ky. 776, 41 L.R.A., N.S., 799
10 C.J. p 1177 note 72.

29. Ohio.—Pullman Co. v. Roos, 9 Ohio App. 309.
10 C.J. p 1175 note 53.

Diamond

If a porter steals a passenger's diamond left under his pillow, the carrier, in contemplation of law, is guilty of negligence, and liable for its value.—Pullman Co. v. Bullock, Tex.Civ.App., 231 S.W. 1112.

Duty to employ trustworthy employees

It is the duty of a sleeping car company to employ competent and trustworthy employees and to exercise a high degree of care in protecting its passengers and their property, and if a sum of money reasonable to be carried, in view of the journey, is taken from a pillow by the porter in absence of the passenger, and while he is making up the berth, it is done in the course of the employment of the porter and the company is liable.—Pullman Co. v. Roos, 9 Ohio App. 309.

30. U.S.—Bacon v. Pullman Co., Ala., 159 F. 1, 89 C.C.A. 1, 16 L.R.A.,N.S., 578, 14 Ann.Cas. 516, certiorari denied 28 S.Ct. 762, 210 U.S. 433, 52 L.Ed. 1136.
10 C.J. p 1175 note 54.

31. N.Y.—Robbins v. Pullman Co., 164 N.Y.S. 111.

32. Ga.—Pullman Co. v. Green, 57 S.E. 233, 128 Ga. 142, 119 Am.S.R. 368, 10 Ann.Cas. 893.
10 C.J. p 1177 note 64

33. N.Y.—Williams v. Webb, 58 N.Y.S. 300, 27 Misc. 508.

34. Ala.—Pullman Palace-Car Co. v. Adams, 24 So. 921, 120 Ala. 581, 74 Am.S.R. 53, 45 L.R.A. 767.

35. Mo.—Dings v. Pullman Co., 154 S.W. 446, 171 Mo.App. 643.

36. Ga.—Pullman Co. v. Schaffner, 55 S.E. 933, 126 Ga. 609, 612, 9 L.R.A.,N.S., 407.

37. N.Y.—Van Dike v. Pullman Co., 261 N.Y.S. 292, 145 Misc. 452.
10 C.J. p 1177 note 83.

Stocks and bonds

A sleeping car company is not liable to a passenger for loss of stocks and bonds contained in a hand bag lost through its negligence, for they are not baggage.—Jandorf v. Pullman Co., 171 N.Y.S. 321, 104 Misc. 79.

38. U.S.—Wilkinson v. Pullman Co., D.C.Cal., 22 F.2d 177.
N.Y.—Reisinger v. Pullman Co., 288 N.Y.S. 228, 248 App.Div. 171, reargument denied and order resettled 292 N.Y.S. 381.
10 C.J. p 1178 note 84.

Camera

Where the Pullman company's porter took charge of a passenger's baggage and put it into the upper berth of the passenger's section, but could not produce a camera in the morning when called on therefor, the compa-

what amount of money or what effects are reasonably necessary for a passenger to take on a journey, regard must be had to his station in life, to the length, purpose, and probable duration of the journey,[39] and to the probable emergencies that may be expected to arise in the course of such journey,[40] and may include articles intended for his use after he leaves the car.[41] As to any excess of baggage or property beyond this, the company not having agreed to become a carrier in regard thereto, and having received no compensation for such a responsibility, and no notice from the passenger that such a duty was expected of it, is not liable for a loss or theft, even in case the theft is by its own employees.[42] It has been held, however, that this rule does not apply to funds left in the passenger's baggage, where the company's servant took personal possession of the effects, and where it is found as a fact that the porter purloined the property.[43]

A reasonable amount of jewelry and ornaments, according to the condition and circumstances in life of a passenger, may be carried as baggage,[44] but no jewels and ornaments carried for transportation merely, without any intention or purpose of using them on the journey, such as pocket jewels and ornaments wholly disconnected with the passenger's personal attire.[45]

Property of person not a passenger. A sleeping car company is not liable for loss of, or injury to, property belonging to a person not a passenger, even though it was in luggage of a passenger which was destroyed through its negligence, at least where such property was not intended to be for the use of the passenger.[46]

§ 916. Limitation of Liability

A sleeping car company cannot limit its liability for negligence.

Contracts of a sleeping car company for limitation of liability in case of negligence are invalid.[47] As the liability of the sleeping car company is for negligence only, such liability cannot be restricted by stipulations printed on the check given to the passenger,[48] nor by a rule posted in the car, especially where this rule is not brought to the attention of the passenger;[49] nor can any rule or stipulation to the contrary, if it is not known to the passenger, avail the company;[50] and it will not be presumed that the laws of a foreign state permitted the company to contract against liability for losses incurred by its own negligence.[51]

§ 917. Contributory Negligence

Except where the loss is caused by theft by the company's employee, negligence on the part of a passenger directly contributing to his loss or injury will defeat his right to recover therefor from a sleeping car company.

Contributory negligence of the passenger will defeat recovery for injuries received, where such contributory negligence, rather than the fault of the company, occasions the injury.[52] A passenger, however, on a sleeping car is only under a duty to act as the average person might have acted, and he is not required to take every precaution which he could have to prevent the accident.[53] Accordingly, a passenger who leaves his berth at night to go to the toilet room, after he has discovered that one of the night lights at the end of the aisle is out, is not contributorily negligent as a matter of law[54]

ny was liable for its loss.—Palmer v. Pullman Co., 167 N.Y.S 610

39. U S—Wilkinson v. Pullman Co., D C.Cal., 22 F 2d 177.
N Y.—Van Dike v. Pullman Co., 261 N Y S 292, 145 Misc. 452.
Ohio—Pullman Co. v. Roos, 9 Ohio App 309
10 C J p 1178 note 85.

40. N Y—Williams v. Webb, 58 N Y S 300, 27 Misc. 508, modifying 49 N Y S 1111, 22 Misc. 513

41. Mo—Hampton v Pullman Palace Car Co, 42 Mo App. 134.

42. N Y—Jandorf v. Pullman Co., 171 N Y S 321, 104 Misc. 79.
10 C J p 1178 note 88.

43. Tex.—Pullman Co v. Uribe, Civ. App, 225 S.W. 189.

44. U S—Wilkinson v. Pullman Co, D C Cal, 22 F.2d 177.
10 C J p 1178 note 89.

45. Ala.—Pullman Palace-Car Co v. Adams, 24 So. 921, 120 Ala. 581, 74 Am.S R. 53, 45 L.R A. 767.
10 C J. p 1178 note 90.

46. Pa.—Wilson v. Pullman Co., 65 Pa.Super 508.

47. Tex.—Stevenson v. Pullman Palace-Car Co, Civ App., 32 S W 335.

48. Tenn.—Louisville, etc., R. Co v. Katzenberger, 1 S W. 44, 16 Lea 330, 57 Am R. 232.
Tex.—Stevenson v Pullman Palace Car Co., Civ App., 26 S.W. 112

49. Ind.—Voss v. Wagner Palace Car Co, 43 N.E. 20, 44 N.E. 1010, 16 Ind.App. 271.

50. Mass.—Lewis' v. New York Sleeping Car Co., 9 N.E 615, 143 Mass 267, 58 Am.R. 135

51. Tex.—Stevenson v Pullman Palace Car Co, Civ App., 32 S W 335.

52. Mo.—Hardcastle v St. Louis-San Francisco Ry. Co., 10 S.W 2d 935, 321 Mo 14—Hardcastle v. Pullman Co., 10 S.W.2d 933, 320 Mo. 1239.
Tex.—Pullman Co. v. Castleberry, Civ App, 251 S W. 518.
10 C.J. p 1178 note 92.

Holding grip while descending from upper berth

Passenger, injured in descending from upper berth, was contributorily negligent as matter of law for holding clothes and grip in one hand.—Croty v. Pullman Co., C C A.Wis., 25 F.2d 563.

Standing in cold vestibule

Act of passenger in standing in cold vestibule after ejection from sleeping car berth constituted contributory negligence.—Pullman Co v Lopez, Tex.Civ.App., 278 S W. 339

53. N H.—Barrett v Pullman Co., 153 A. 837, 85 N H. 33.

54. Minn.—Spallen v. Pullman Co., 186 N.W 233, 151 Minn 152.

As to passenger's property. Where a passenger in a palace or sleeping car is guilty of negligence which contributes to the loss of or injury to his property, he cannot recover therefor,[55] as where the passenger while awake exposes to theft money or similar personal belongings which are in his exclusive custody, and leaves them, without notice to the employees of the company.[56] The passenger, however, will not be held to have been guilty of contributory negligence where he acted reasonably under the circumstances.[57] The mere fact that he failed to deposit his property in the safest place in the berth,[58] or utilized a receptacle in his berth, placed therein by the company for the use and convenience of an occupant,[59] does not preclude a recovery from the company for its negligence in permitting a theft thereof, as the company is bound to take reasonable care to prevent theft of the passenger's property, without regard to the part of the berth in which it is placed. Where the acts of alleged negligence on the part of the passenger were caused by the wrongful conduct of the company itself, the latter is estopped from claiming immunity because of such acts.[60] Where an alighting passenger intrusts his baggage to the care of the porter, he is justified in believing that the porter will take care of it until such time as he claims it.[61]

Theft by employee. For the theft of the necessary baggage or money of a traveler by one of its employees the company is liable, even though the traveler has been negligent in exposing the baggage or property in such a way as to induce the theft. In such a case the contributory negligence of the traveler cannot be considered the proximate cause of the loss, as it is the duty of the company, through its employees, to protect a passenger's property, even though it is exposed to theft by him.[62]

§ 918. Respective Duties and Liabilities of Railroad Company and Palace or Sleeping Car Company

The railroad and sleeping car companies are jointly and severally liable for injuries caused by the negligence of either of them to passengers or their effects, except that the railroad company is not liable for injuries due to the negligence of sleeping car employees with respect to their duties which arise peculiarly out of the contract to furnish sleeping car accommodations, and that the sleeping car company is not liable for negligent acts of the railroad company in regard to transportation.

The fact that a passenger rides on a palace or sleeping car attached to a train, under a contract with the palace or sleeping car company owning such car, does not relieve the railroad company from its ordinary obligations and duties to such passengers;[63] but in such cases, in all matters relating to the safe and comfortable transportation of the passengers, the conductor, the porter, and other employees on such cars are regarded as the employees of the railroad company, for whose carelessness or negligence in causing injuries to passengers thereon it is liable;[64] and this rule has been held to apply where a sleeping car is standing ready

55. Ohio.—Bonser v. Pullman Co., 2 Ohio App. 35.
10 C.J. p 1178 note 93.

56. Tex.—Pullman Co. v. Hays, Civ. App., 257 S.W. 686, certified questions answered 271 S.W. 1108, 114 Tex. 490.
10 C.J. p 1179 note 94.

57. N.Y.—Hood v. Pullman Co., 193 N.Y.S. 231, 120 Misc. 242.

Handing bag to porter
Passenger acted reasonably in handing bag to Pullman porter at steps leading into car, and then after five minutes going into car himself, as respects Pullman company's liability for loss of bag.—Van Dike v. Pullman Co., 261 N.Y.S. 292, 145 Misc. 452.

Placing jewelry in suitcase
In passenger's action against Pullman company, based on loss of suitcase left on station platform by Pullman porter and of jewelry contained in suitcase, passenger was not contributorily negligent in placing jewelry in suitcase instead of carrying it in handbag, where jewelry was useful and appropriate to purpose of passenger's journey in her station in life.—Reisinger v. Pullman Co., 288 N.Y.S. 228, 248 App.Div. 171, reargument denied and order resettled 292 N.Y.S. 381.

58. Ala.—Pullman Palace-Car Co. v. Adams, 24 So. 921, 120 Ala. 581, 74 Am.S.R. 53, 45 L.R.A. 767.
10 C.J. p 1179 note 95.

Danger of place of deposit
In the absence of evidence that the place selected was an unusual or dangerous place for a deposit of a passenger's wearing apparel, or that he knew or had reason to know that it could not or would not be as effectually guarded there as in any other place where he might have deposited it, the passenger cannot be held guilty of contributory negligence as a matter of law.—Florida v. Pullman Palace Car Co., 37 Mo. App. 598.—10 C.J. p 1179 note 96.

59. U.S.—Wilkinson v. Pullman Co., D.C.Cal., 22 F.2d 177.

60. Ga.—Kates v. Pullman Palace Car Co., 23 S.E. 186, 95 Ga. 810.

61. N.Y.—Reisinger v. Pullman Co., 288 N.Y.S. 228, 248 App.Div. 171, reargument denied and order resettled 292 N.Y.S. 381, 248 App.Div. 711.

62. Tex.—Pullman Co. v. Vanderhoeven, 107 S.W. 147, 48 Tex.Civ.App. 414.
10 C.J. p 1179 note 98.

63. Ga.—Georgia Southern & F. Ry. Co. v. Corry, 96 S.E. 335, 22 Ga.App. 424, affirmed 99 S.E. 881, 149 Ga. 295, citing Corpus Juris with approval.
Pa.—Rogers v. Philadelphia & R. Ry. Co., 103 A. 873, 260 Pa. 430.
10 C.J. p 1179 note 99.

64. Ga.—Georgia Southern & F. Ry. Co. v. Corry, 99 S.E. 881, 149 Ga. 295, 100 S.E. 48, 149 Ga. 295, affirming 96 S.E. 335, 22 Ga.App. 424.
10 C.J. p 1179 note 1.

Announcing station
(1) Passengers in a parlor car belonging to another company are passengers of the railroad company, and where the porter of the car, although not a servant of the railroad company, was allowed to announce stations, the railroad company is liable for his act.—Spiesberger

to receive passengers of the railroad company, although it is not attached to a train.[65] A railroad company drawing sleeping cars may also be held liable for defects in the sleeping car, especially where the passenger is not aware that it is under the management of the sleeping car company.[66] The fact that the railroad company may also be liable as a common carrier does not relieve the sleeping car company from any duty it may have assumed or been charged with by reason of its joining the railroad in the carriage of the passenger.[67] If the railroad company imposes and the sleeping car company undertakes to perform any duty which contributes to the safety of passengers while in transit, the passengers are entitled to the performance thereof by the sleeping car company, and, if it fails to perform that duty, it is negligent, and liable to its passengers for injuries resulting therefrom.[68] Both the railroad company and the sleeping car company are jointly and severally liable for injuries caused to passengers on a sleeping car, though the negligence or wrongs of the sleeping car company's employees with respect to the passenger's transportation;[69] and the sleeping car company is not relieved from liability by the fact that its employees acted under orders from the train conductor.[70]

On the other hand, a railroad company is not liable for injuries due to the carelessness or negligence of the sleeping car company's employees with respect to duties which arise peculiarly out of the contract of the sleeping car company to furnish sleeping car accommodations, as distinguished from the railroad company's contract of safe and comfortable transportation.[71] Likewise, the sleeping car company, not having undertaken the general duty of transporting the passenger, is not liable for the wrongful acts or negligence of the employees of the railroad company with respect to such transportation, as where the injury results from the negligent operation of the train, as this is a duty peculiarly assumed by the railroad company.[72] Also,

v Michigan Cent. R Co., Ill., 235 F 864, 149 C C A. 176.
10 C.J. p 1179 note 1 [b].

(2) Where, however, a passenger in a Pullman car was not notified when he had reached his destination, and the train was switched on the road of another company, and the passenger, after being transported some twenty miles over that road, was required by the conductor to leave the train during the night, and was unable to secure accommodation, the original company, whose employees failed to notify the passenger of his destination, was not liable in damages for illness caused by exposure, etc., as it was not the proximate result of the company's negligence—Georgia Southern & F. Ry Co v Corry, 99 S.E. 881, 149 Ga. 295, 100 S.E. 48, 149 Ga. 295, affirming 96 S E 335, 22 Ga App 424.

Failure to awaken passenger

Negligent failure of porter of Pullman car to awaken a passenger at his station, whereby he was carried beyond it and put off by conductor of train, with resulting illness, gave right of action against railway company—Georgia Southern & F Ry Co v Corry, 96 S E. 335, 22 Ga. App 424, affirmed 99 S.E. 881, 149 Ga 295

Failure to place step for alighting

A railroad is answerable for negligence of Pullman porter in not placing step for a passenger to alight resulting in personal injury, although porter was not its employee, in absence of any showing that Pullman car was not under its management, as passenger may assume that whole train is under one management.—Rogers v. Philadelphia & R. Ry Co., 103 A. 873 260 Pa 430

65. Colo—Denver, etc., R. Co v Derry, 108 P. 172, 47 Colo 584, 27 L.R.A.,N.S. 761
10 C J. p 1180 note 2

66. U.S—Pennsylvania Co v Roy, Ill., 102 U S 451, 26 L.Ed. 141
10 C J p 1180 note 3

67. U.S—Pullman Co v Waln, C C A Pa., 4 F.2d 1, 41 A.L.R. 1393, certiorari denied 46 S.Ct. 19, 269 U S 557, 70 L.Ed. 410

Joint enterprise

The fact that the Pullman company would not allow passengers to ride on their car unless they had purchased transportation tickets from railroad shows a joint enterprise.—Pullman Co. v. Waln, C C.A. Pa., 4 F.2d 1, 41 A.L.R. 1393, certiorari denied 46 S.Ct. 19, 269 U.S. 557, 70 L.Ed. 410.

68. U S—Pullman Co. v. Waln, supra.

Passenger, who fell from moving train through failure of Pullman company's employees to close side doors and trapdoors to vestibule of car as soon as train was put in motion, and husband have a right of action against Pullman company alone—Pullman Co. v. Waln, C.C.A Pa., 4 F 2d 1, 41 A.L.R. 1393, certiorari denied 46 S Ct. 19, 269 U S 557, 70 L Ed 410

That railroad rule required its conductor to pass through train and see that all vestibule doors were closed did not relieve the Pullman company from its duty under rules imposed by the railroad to see that outside doors and trapdoors were closed while train was in motion.—Pullman Co. v. Waln, C C A Pa., 4 F. 2d 1, 41 A.L.R 1393, certiorari denied 46 S Ct. 19, 269 U S 557, 70 L Ed. 410.

69. Tex—Pullman Co v. McGowan, Civ App., 210 S.W. 842, error refused.
10 C J p 1180 note 4

Primary and secondary liability

Pullman company is primarily and railway company secondarily liable for injuries resulting from former's negligence when acting as agent for railroad—Mixon v. Southern Ry Co., 138 S E 45, 139 S C. 343.

70. Tex.—Pullman Palace Car Co v Hocker, 93 S W. 1009, 41 Tex Civ App. 607

71. S C.—Campbell v. Seaboard Air Line R. Co., 65 S E 628 83 S.C. 448, 452, 137 Am.S R. 824, 23 L R A.,N.S., 1056.
10 C J. p 1180 note 6.
Who are employees of carrier see supra § 690.

72. Mo—Link v. Atlantic Coast Line R. Co., App., 233 S W. 834.
10 C J. p 1181 notes 7 8

Authority of Pullman company's agent

Where a passenger's railroad ticket reading from New York to Washington and thence to Chattanooga, provided that the ticket should be countersigned at New York, the passenger was bound to know that a sleeping car company could not guarantee the manner in which the railroad company should perform its contract, and that the sleeping car company's agent had no authority to agree that the passenger's ticket would be acceptable for transporta-

a railroad company is not liable for an assault and battery committed by an employee of a sleeping car company, wholly provoked by the person assaulted.[73]

As to trespassers. The law will not impute to the employees of the sleeping car company an agency for the railroad company as respects trespassers, as the reasons which justify the imputation of an agency or servanthood with respect to passengers wholly fail when applied to a trespasser.[74]

As to baggage. It has been held that a railroad company is liable for the loss of the luggage and effects of a passenger in a sleeping car, under the control of the employees of the sleeping car company,[75] although the contract between the railroad company and the sleeping car company exempts it from liability for baggage,[76] it being held that the liability of the two companies is both joint and several.[77] The railroad is, of course, liable where the loss is due to its own negligence.[78]

§ 919. Actions

a. In general
b. Pleading
c. Evidence
d. Trial

a. In General

General rules apply in actions arising out of the use and operation of sleeping cars.

General rules apply to actions for damages arising from the use and operation of sleeping cars. Accordingly, there must not be a misjoinder of causes of action.[79] Although the passenger may have a right of action on contract for breach of the express or implied undertaking of the sleeping car company to furnish accommodations, the refusal of the company without valid excuse to permit a proper person to avail himself of the accommodations of the sleeping car will support an action in tort.[80]

Venue. An action for damages for failure to provide a sleeping car berth reserved by plaintiff is properly brought in the county where the journey commenced, even though it terminated at a point without the state.[81]

What law governs. A sleeping car passenger's action for abuse and damages caused by the company's employee is governed by the laws of the state in which such acts were done.[82]

tion to Washington without being countersigned in New York, and might be countersigned in Washington.—Calhoun v. Pullman Company, Tenn., 159 F. 387, 86 C.C.A. 387, 16 L.R.A.,N.S., 575, affirming 149 F. 546.

Safe place to alight

A sleeping car company is not liable for injury suffered by plaintiff because she was not afforded a safe place to alight, and because of her having to walk back to the station, from the place of her disembarking, over a rough and dangerous railroad track.—Pullman Co. v. Strang, 132 So. 399, 35 Ga.App. 59.

73. Pa.—Rohrbach v. Pennsylvania R. Co., 22 Pa.Dist. 439.

74. Tenn.—Louisville & N. R. Co. v. Marlin, 186 S.W. 595, 135 Tenn 435, L.R.A.1917A 417.

"Reasons which justify the imputation of an agency or servanthood in respect of passengers wholly fail when applied to a trespasser. The railway company owes to its passengers the duty of highest care . . . while to a trespasser it owes only the duty to refrain from intentionally injuring him. . . . Having assumed a contract of carriage with a passenger, it cannot escape or evade its responsibility to him by turning him over to the employés of the Pullman Company. The law forbids it, and makes its veto perfect by treating the employés of the sleeping car company as the servants of the railway company, as respects such passengers. As to trespassers there is no contract and no duty of service, and public policy does not require the imputation of an agency."—Louisville & N. R. Co. v. Marlin, 186 S.W. 595, 598, 135 Tenn. 435, L.R.A.1917A 417.

Malicious acts

Where a Pullman car conductor unnecessarily and maliciously, and as a personal matter, compelled a trespasser to leave the train while it was passing over a trestle, and the trespasser was killed, the railroad company was not responsible, the Pullman conductor not being the company's agent as to such act—Louisville & N. R. Co. v Marlin, 186 S.W. 595, 135 Tenn 435, L.R.A.1917A 417.

75. D.C.—Robinson v. Southern R Co., 40 App.D.C. 549, 553, L.R.A. 1915B 621, Ann.Cas.1914C 959.
10 C.J. p 1181 note 10

76. Tenn.—Louisville, etc., R. Co. v. Katzenberger, 1 S.W. 44, 16 Lea 330, 57 Am.R. 232.

77. Miss.—Nelson v. Illinois Cent R Co, 53 So. 619, 98 Miss. 295, 306, 31 L.R.A.,N.S., 689.
10 C.J. p 1181 note 12.

78. Mass.—Kinsley v. Lake Shore, etc., R. Co., 125 Mass 54, 28 Am. R. 200.
10 C.J. p 1181 note 13.

79. **Connecting railroads**

A petition brought against three defendants jointly, a railroad company, the Pullman company, and another railroad, in which it is alleged that the first two defendants were negligent in permitting plaintiff to remain in the Pullman coach after it had been switched off from the line of the first carrier to the line of the other carrier, thereby diverting plaintiff from the proper route of her destination, and that the conductor of the last named carrier treated her "in a rude and ugly manner" in connection with her leaving the second train, presents a misjoinder of actions, in that it fails to set forth any acts of concurrent negligence contributing to the alleged injury.—Armstrong v. Southern Ry. Co, 116 S.E. 31, 29 Ga.App. 418.

80. Ill.—Nevin v. Pullman Palace Car Co, 106 Ill. 222, 46 Am.R. 688
Tex.—Pullman Palace-Car Co. v. Booth, Civ.App., 28 S.W. 719

81. Ga.—Bryant v. Atlantic Coast Line R Co., 91 S.E. 1047, 19 Ga. App. 536.

82. Miss.—Pullman Co. v. Alexander, 78 So. 293, 117 Miss. 348.

b. Pleading

General rules of pleading apply in actions of this character.

The rules applicable to the pleadings in civil actions generally apply in an action by a passenger against a sleeping car company for a breach of contract,[83] or for injuries to,[84] or ejection of,[85] a passenger, or for loss of, or injury to, the passenger's effects.[86] Contributory negligence in order to be available as a defense must be pleaded.[87]

Issues, proof, and variance. Such matters only can be considered as are properly put in issue by the pleadings and evidence in the case.[88] Plaintiff must recover, if at all, on the cause of action pleaded by him, and where there is material variance between his pleadings and proof, it is fatal to a recovery.[89] Where there is no question but that plaintiff's injury resulted from a fall caused by defendant's negligence, plaintiff is not obliged to establish with certainty the exact manner in which his injury was inflicted.[90]

c. Evidence

General rules govern as to presumptions and burden of proof, and as to the admissibility and the weight and sufficiency of evidence in actions against sleeping car companies.

The burden of showing a failure or neglect on the part of the company or its employees to exercise the care owed to the passenger and his effects is on plaintiff,[91] as is also the burden of showing that the wrong alleged was the proximate cause of his injury.[92] Mere proof of a loss of baggage or property by a passenger while occupying a berth does not make out a prima facie case or give rise to a presumption of negligence on the part of the company, but to sustain a recovery some evidence of negligence on its part must be shown,[93] as in case of such loss a presumption has been held to exist in favor of the company that it performed its duty toward its passengers.[94] Where, however, plaintiff shows that defendant was guilty of negligence, as for failure to keep a reasonable watch, defendant has the burden of explanation and of showing the exercise of a proper degree of care.[95] On the oth-

83. Ga.—Bryant v. Atlantic Coast Line R. Co., 91 S.E. 1047, 19 Ga. App. 536
10 C.J. p 1183 note 31.

Pleadings held sufficient
Ga.—Bryant v. Atlantic Coast Line R. Co., 91 S.E. 1047, 19 Ga.App. 536
Ohio.—Pullman Co. v. Roos, 9 Ohio App 309
10 C.J. p 1183 note 31 [a].

84. U.S.—Pullman Co. v. Cuttle, C.C.A.Ga., 2 F.2d 151
10 C.J. p 1183 note 32.

Assault by employee
A declaration charging that plaintiff was passenger on defendant's car, when its agent, servant, and employee assaulted her and made indecent proposals, was demurrable, where it did not allege the scope of such servant's duties.—Schilling v. Pullman Co., D.C.Fla., 292 F. 768.

Assault by passenger
A passenger's petition against railroad and sleeping car company for damages sustained by reason of assault by intoxicated fellow passenger stated no cause of action, although alleging that fellow passenger's intoxicated condition was known to conductors, where petition did not otherwise show that conductors might have reasonably anticipated the assault.—Powell v. Beasley, Ga.App., 194 S.E. 926

85. U.S.—Calhoun v. Pullman Palace Car Co., C.C.Tenn., 149 F. 546, affirmed 159 F. 387, 86 C.C.A. 387, 16 L.R.A.,N.S., 575

86. Ala.—Pullman Palace-Car Co. v. Adams, 24 So. 921, 120 Ala. 581, 74 Am.S.R. 53, 45 L.R.A. 767.
10 C.J. p 1184 note 34

87. U.S.—Wilkinson v. Pullman Co., D.C.Cal., 22 F.2d 177.
10 C.J. p 1184 note 35

88. Tex.—Pullman Co. v. Franks, Civ.App., 187 S.W. 501.
10 C.J. p 1184 note 36.

Evidence not admissible
Where plaintiffs purchased railway tickets at Baltimore to Newbern and paid for a berth in a Pullman from Washington to Goldsboro, and sued for failure to provide a berth at Washington, it was error, being beyond the allegations, to prove that the gateman would not let them through the gates of Baltimore in time to reach Washington before the departure of the Pullman in which their berth was reserved.—Sultan v. Pennsylvania R. Co., 96 S.E. 897, 176 N.C. 136

Retention of porter
Where no basis for punitive damages was laid in pleadings in action against carrier for assault by Pullman porter, question whether carrier ratified conduct of porter by retaining him was immaterial.—Pullman Co. v. v. Hall, C.C.A.W.Va., 46 F.2d 399.

89. Tex.—Pullman Co. v. Lopez, Civ.App., 278 S.W. 339
10 C.J. p 1184 notes 37, 38.

No variance
D.C.—Pullman Co. v. Eppler, 17 F.2d 670, 57 App.D.C. 82.

90. N.H.—Barrett v. Pullman Co., 153 A. 837, 85 N.H. 33.

91. N.Y.—Sneddon v. Payne, 187 N.Y.S. 185, 114 Misc. 537
10 C.J. p 1184 note 40.

92. Mass.—Randall v. New York, N.H. & H.R. Co., 115 N.E. 231, 236 Mass. 404.
10 C.J. p 1184 note 41.

93. Mass.—Randall v. New York, N.H. & H.R. Co., supra.
N.Y.—Goldstein v. Pullman Co., 116 N.E. 376, 220 N.Y. 549, L.R.A.1918B 1060, affirming 147 N.Y.S. 133, 161 App.Div. 756.
Tex.—Pullman Co. v. Bullock, Civ.App., 231 S.W. 1112.
10 C.J. p 1184 note 42.

94. N.Y.—Carpenter v. New York, etc., R. Co., 15 N.Y.St. 345, 14 Daly 459, affirmed 26 N.E. 277, 124 N.Y. 53, 21 Am.S.R. 644, 11 L.R.A. 759.

95. Mo.—Fisher v. Pullman Co., 254 S.W. 114, 212 Mo.App. 280
N.Y.—Holden v. Davis, 196 N.Y.S. 552, 119 Misc. 492.
10 C.J. p 1184 notes 44, 45.

Failure to exercise reasonable watch
Plaintiff boarded defendant's sleeping car at night, and the porter preceded him and placed his bag beside his berth, which was made up, and before retiring plaintiff went to the washroom and then returned to his former position. When he arose in the morning his bag was gone. While the mere proof of loss of property by a passenger while occupying a berth does not make out a prima facie case, a sleeping car company is a quasi bailee for hire and a quasi watchman, and under the doctrine of res ipsa loquitur it is

er hand, where plaintiff's baggage was intrusted to the care of defendant's employees, the passenger makes out a prima facie case by proving a demand for its return and the sleeping car company's refusal or inability to return it[96]

Since, ordinarily, as discussed in C.J.S. title Agency § 333 c (4), the principal is not liable for punitive or exemplary damages because of the wrongdoing of the agent unless he authorized or ratified it or participated therein, a passenger on a sleeping car, who was insulted and damaged by the acts of the porter, has the burden of proving, as a prerequisite to the recovery of punitive damages, that the company authorized or ratified the porter's acts.[97]

There is no presumption that a person under the influence of intoxicating liquors will commit an assault without provocation, nor will an inference be authorized from the mere fact of intoxication that a person in such condition might be reasonably expected so to conduct himself.[98]

The burden of proving the alleged contributory negligence of the passenger is generally on the company, unless it is established by the passenger's own evidence.[99]

The presence of a porter on the platform alongside defendant's sleeping cars, in full view of defendant's other employees, and the porter's wearing of the uniform, badge, and cap of defendant, have been held to raise a presumption that the porter was in defendant's employ.[1]

Where an accident happens, such as the falling of a berth, or the like, which is in its nature attributable to some defect in the car or appliances, it will make out a prima facie case of negligence on the part of the company.[2] Where, however, plaintiff was injured by slipping on the sill of a sleeping car of the latest and most approved type of construction, in perfect repair, the film of ice, if any, on the sill, which caused the fall, being so imperceptible that it could not be observed without getting down on the floor and scraping the sill with a knife, the doctrine of res ipsa loquitur does not apply.[3] Likewise, the doctrine does not apply in an action for injuries to a passenger caused by the sudden closing of a door in a sleeping car.[4]

Admissibility. General rules of evidence apply in an action by a passenger against a sleeping car company with respect to the admissibility of evidence,[5] irrespective of whether action is for failure to furnish accommodations reserved,[6] for injuries sustained by reason of company's negligence,[7]

not the injury, but the manner and circumstances of the injury that justify the inference of negligence, and plaintiff established a prima facie case of the sleeping car company's negligence in failing to exercise a reasonable watchfulness over the bag to prevent its loss during the night, shifting the burden of explanation to defendant, although plaintiff's burden to show negligence still remained.—Goldstein v. Pullman Co, 116 N.E. 376 220 N.Y 549, L.R.A 1918B 1060, affirming 147 N. Y S 133, 161 App Div. 756.

96. N.Y.—Van Dike v. Pullman Co., 261 N.Y.S. 292, 145 Misc 452.

97. Miss.—Pullman Co. v. Alexander, 78 So. 293, 117 Miss. 348.

98. Ga.—Powell v. Beasley, App., 194 S.E. 926.

99. Ala.—Pullman Palace-Car Co. v. Adams, 24 So. 921, 120 Ala. 531, 74 Am.S R 53, 45 L.R.A. 767.

1. N.Y.—Van Dike v. Pullman Co, 261 N.Y.S 292, 145 Misc. 452

2. Ohio.—Cleveland, etc, R. Co. v. Walrath, 38 Ohio St 461, 43 Am.R. 433.

3. Utah.—Connell v Oregon Short Line R. Co., 168 P. 337, 51 Utah 20

4. Wash.—Valentine v. Northern Pac. R. Co, 126 P. 99, 70 Wash 95.

5. U.S.—Pullman Co. v. Hall, C.C.A. W.Va, 46 F.2d 399.

S.C.—Bonner v. Pullman Co, 159 S E. 382, 160 S C. 531, 76 A L R. 922. 10 C J. p 1185 note 49

6. **Evidence held admissible**

(1) In an action to recover for a failure of the company to reserve a berth, evidence of the rudeness of the conductor in ejecting the passenger from the car is admissible—Pullman Palace Car Co. v. Booth, Tex Civ.App., 28 S W. 719.

(2) Also evidence of the inconvenience, annoyances, pain, and suffering incident to traveling in ordinary coaches is admissible—Aplington v. Pullman Co., 97 N.Y.S. 329, 110 App. Div. 250, 17 N.Y.Ann Cas. 455—10 C. J. p 1185 note 51.

(3) Likewise, evidence of the happenings at the place where the accommodations were to be furnished is admissible—Bonner v. Pullman Co, 159 S.E. 382, 160 S C. 531, 76 A. L R. 922—10 C.J. p 1185 note 52.

(4) As bearing on the question of the authority of the persons through whom sleeping car or palace car reservations were made, evidence that facts showing special injuries for failure to furnish accommodations were communicated to such persons is admissible—Pullman Co v. Meyer, Ala, 70 So. 763.

(5) To establish the authority of an agent to make such reservations, similar acts on his part and the recognition of them by the company under similar circumstances may be shown.

Ohio—Pullman Co. v. Willett, 27 Ohio Cir Ct 649.

Tex.—Pullman Palace Car Co v. Nelson, 54 S.W. 624, 22 Tex Civ. App 223.

7. **Evidence held admissible**

The agreement between the sleeping car company and the railroad, and the rules of both are admissible to show a breach of duty on the part of the sleeping car company's employees, which resulted in plaintiff's injuries.—Pullman Co v. Waln, C C. A Pa., 4 F.2d 1, 41 A L.R. 1393, certiorari denied 46 S.Ct. 19, 269 U.S. 557, 70 L.Ed. 410

Evidence held inadmissible

In an action for injuries sustained through the alleged negligence of a porter, evidence that the porter was usually careful, competent, and attentive is inadmissible, such evidence is not rendered admissible by the testimony of a witness for plaintiff that she had on one occasion noticed him doing his work in a manner tending to show that it put him in an unpleasant frame of mind—Harriman v Pullman Palace-Car Co, Mo., 85 F. 353, 29 C C.A. 191.

or for loss of property [8]

Weight and sufficiency. The weight and sufficiency of the evidence is governed by general rules [9] Plaintiff is not bound to prove his case beyond a reasonable doubt, a preponderance of the evidence being sufficient,[10] nor need he produce more evidence than is sufficient for the purpose of his case [11] Mere failure of plaintiff to avail himself of an opportunity to corroborate his own testimony by that of witnesses tendered by defendant cannot operate to his prejudice.[12]

d. Trial

The trial of an action against a sleeping car company is governed by general rules

Questions of law and of fact, in an action against a palace or sleeping car company by a passenger, are governed by the rules obtaining in civil actions generally. Thus, the reasonableness of a rule promulgated by the company concerning its passengers is generally regarded as a question for the court.[13] So, where the evidence is clear and undisputed in favor of plaintiff[14] or defendant,[15] the court may dispose of the case by directing a verdict; but where there is sufficient evidence to be submitted to the jury, and it is conflicting or doubtful, the issues should be submitted to the jury, with proper in-

Duties of porter

In action against sleeping car company for injury from being transported in an insufficiently heated car, testimony of defendant's assistant superintendent as to the duty of defendant's porter to build a fire in the sleeper was properly admitted—Pullman Co v McGowan, Tex Civ App, 210 S.W 842, error refused

In action against carrier for assault by Pullman porter, rejection of testimony of another porter that immediately after assault passenger made no charge that porter had touched her was error. Also, testimony that passenger had drunk whisky shortly before retiring and had whisky in her possession was admissible, where defense was that Pullman porter put hand in her berth solely in attempt to find whisky, and such fact was a circumstance for jury's consideration in determining damage to her from shock when Pullman porter put his hand in her berth—Pullman Co. v. Hall, C.C.A W Va., 46 F 2d 399.

8. Other robberies

(1) In an action for the loss of property, evidence of other robberies in the same car on the same night is competent as bearing on the absence of proper care by the company—Pullman Co. v Schober, Tex.Civ App., 149 S.W 236—10 C.J. p 1185 note 56.

(2) Such evidence, however, cannot be used to show that the passenger was in fact robbed.—Pullman Car Co. v. Gardner, 3 Pennyp.,Pa., 78

Declarations

(1) Declarations of other passengers that they had been robbed are hearsay evidence and inadmissible—Bevis v. Baltimore, etc., R Co, 26 Mo.App 19.

(2) Likewise, declarations of an employee as to his suspicions are not admissible—Bevis v Baltimore, etc., R. Co, supra.

(3) Declarations of an employee made at the time and constituting a part of the res gestæ are, however, admissible.—Strauss v. Pullman Palace Car Co, 7 La.App., Orleans, 67
10 C.J p 1185 note 60

Declarations, explanations, and suggestions of an employee of a sleeping car company whose duty it is to care for the passenger's baggage, made on the passenger's inquiry while on the car as to what had become of his baggage taken away by such employee, is admissible in an action for its loss—Hampton v Pullman Palace Car Co, 42 Mo App 134.

Unfounded fears

In an action against a sleeping car company for loss of passenger's clothes, testimony of plaintiff as to mental anxiety or fear which was in fact unfounded was inadmissible—Pullman Co v. Moise, Tex.Civ App, 187 S W 249.

9. Ky—Pullman Co. v Pulliam, 218 S W. 1005 187 Ky. 213.
10 C J p 1185 note 61

Evidence held sufficient

(1) To sustain a finding that sleeping woman was assaulted, and that she did not dream that she was assaulted.—Pullman Co. v. Pulliam, 218 S.W 1005, 187 Ky 213.

(2) To warrant finding of defendant's negligence—Caldwell v. Pullman Co, 128 S E 504, 132 S.C. 321.

(3) To authorize a reasonable deduction or conclusion by the jury that defendant's porter was guilty of the theft of plaintiff's diamond stud.—Pullman Co. v. Bullock, Tex. Civ App, 231 S.W 1112
10 C J p 1185 note 61 [a].

Evidence held insufficient

(1) To show that defendant by act or omission had violated any duty incumbent on it which caused the injury.—Griffith v. Pullman Co., 121 A. 362, 142 Md. 514.

(2) To show contributory negligence.—International-Great Northern R. Co v Purswell, Tex.Civ.App, 16 S W 2d 363

(3) To raise an issue of theft by porter—Pullman Co. v. Franks, Tex Civ.App, 187 S W. 501

(4) To show negligence of defendant company in failing to find rings left in ladies' dressing room, either before or after it knew of the loss—Pullman Co v. Hays, Tex Civ App, 257 S W 686, certified questions answered Com App, 271 S W 1108, 114 Tex 490.
10 C J p 1185 note 61 [b]

Luggage intrusted to station porter

In an action by a traveler, who had his hand bag carried into a Pullman car by a station porter or red cap and then was unable to find it, evidence did not warrant a finding that it was left in custody of Pullman employees, so as to make the carrier liable as an insurer—Sneddon v. Payne, 187 N Y S 185, 114 Misc 537

Porter's testimony that step box over which passenger tripped was not in passageway did not conclusively prove absence of negligence—Watson v. Pullman Co., 38 S W.2d 430, 238 Ky. 491.

That side doors and trapdoors were left open, and resulted in injuries to Pullman car passengers, were facts from which jury could infer lack of care on part of Pullman company in performing part of common joint duty to traveler in which it had united with railroad.—Pullman Co. v. Waln, C C A.Pa, 4 F 2d 1, 41 A.L.R. 1393, certiorari denied 46 S Ct 19, 269 U S. 557, 70 L Ed. 410

10. N.Y.—Van Dike v Pullman Co., 261 N Y S. 292, 145 Misc. 452
10 C J. p 1186 note 62.

11. La—Strauss v. Pullman Palace Car Co., 7 La App, Orleans, 67

12. La.—Strauss v. Pullman Palace Car Co., supra.

13. Ala.—Pullman Car Co v. Krauss, 40 So. 398, 145 Ala 395, 4 L.R.A., N S, 103, 8 Ann Cas. 108.
10 C J. p 1186 note 66.

14. N.Y—Van Dike v. Pullman Co., 261 N Y.S 292, 145 Misc. 452

15. Ky—Myers v Pullman Co, 149 S W. 1002, 149 Ky. 776, 41 L R.A., N S, 799.

structions.[16] The question whether or not the company exercised a reasonable and proper degree of care under the circumstances is for the determination of the jury, where the evidence is disputed, or is such that different conclusions might reasonably be drawn therefrom,[17] or is a question of fact for the court when sitting without a jury.[18] The question of the passenger's contributory negligence,[19] or whether his conduct was unreasonable so as to go in mitigation of damages,[20] is also generally one of fact under the evidence.

Instructions. The instructions, in an action by a passenger against a sleeping car company, must correctly and specifically state the law as applicable to the facts of the case.[21] Such instructions

16. U.S.—Pullman Co. v. Culbreth, C.C.A.Ala., 2 F.2d 540, 42 A.L.R. 164, affirming, D.C., Culbreth v. Pullman Co., 293 F. 402.
Mass.—Randall v. New York, N. H. & H. R. Co., 115 N.E. 231, 226 Mass. 404.
Mo.—Hale v. Pennsylvania R. Co., App., 200 S.W. 688.
N.H.—Barrett v. Pullman Co., 153 A. 837, 85 N.H. 33.
Or.—Pierce v. Northern Pac. Ry. Co., 271 P. 976, 127 Or. 461, 62 A.L.R. 644.
S.C.—Bonner v. Pullman Co., 159 S.E. 382, 160 S.C. 531, 76 A.L.R. 922.—Forbes v. Pullman Co., 135 S.E. 563, 137 S.C. 433.
Tex.—Pullman Co. v. Dudley, Civ. App., 77 S.W.2d 592.
10 C.J. p. 1186 note 68.

Evidence held sufficient to go to jury on question of defendant's negligence.
U.S.—Pullman Co. v. Cuttle, C.C.A. Ga., 2 F.2d 151.
S.C.—Mixon v. Southern Ry. Co., 138 S.E. 45, 139 S.C. 343.

Plaintiff entitled to nominal damages
Where because of breach of defendant Pullman company's contract to furnish berth plaintiff was compelled to ride in chair car, court properly refused peremptory instruction offered by defendant, plaintiff being entitled in any event to nominal damages.—O'Neil v. Pullman Co., 260 S.W. 798, 214 Mo.App. 283.

17. Ga.—Hines v. Malone, 105 S.E. 37, 25 Ga.App. 781.
Minn.—Spallen v. Pullman Co., 186 N.W. 233, 151 Minn. 152.
N.Y.—Reisinger v. Pullman Co., 288 N.Y.S. 228, 248 App.Div. 171, reargument denied and order resettled 292 N.Y.S. 381.
N.C.—Sultan v. Pennsylvania R. Co., 96 S.E. 897, 176 N.C. 136.
Tex.—Pullman Co. v. Moise, Civ. App., 187 S.W. 249.
10 C.J. p. 1186 note 69.

Placing baggage on platform
Whether defendant Pullman company's porter was negligent in placing alighting passenger's suitcase on station platform together with other passengers' luggage, as was customarily done, and cautioning passengers as they left car to claim right baggage was for jury in action for loss of suitcase and its contents.—Reisinger v. Pullman Co., 297 N.Y.S. 196, 252 App.Div. 87.

Stepladder protruding in passageway
Whether person of ordinary prudence would have left stepladder projecting into main passageway of train, causing injury to passenger, was for jury.—Barrett v. Pullman Co., 153 A. 837, 85 N.H. 33.

Tripping over step box
Evidence of injury to passenger when tripping over step box in aisle of vestibule, where it should not have been, made a case for the jury.—Watson v. Pullman Co., 38 S.W.2d 430, 238 Ky. 491.

18. N.Y.—Cassasa v. New York Cent., etc., R. Co., 95 N.Y.S. 648, 109 App.Div. 170.
10 C.J. p. 1186 note 70.

19. Mo.—Hardcastle v. St. Louis-San Francisco Ry. Co., 10 S.W.2d 935, 321 Mo. 14.—Hardcastle v. Pullman Co., 10 S.W.2d 933, 320 Mo. 1239.—Hale v. Pennsylvania R. Co., App., 200 S.W. 688.
Pa.—Rogers v. Philadelphia & R. Ry. Co., 103 A. 873, 260 Pa. 430.
10 C.J. p. 1186 note 71.

Evidence held insufficient to go to jury on question of contributory negligence.—Pullman Co. v. Eppler, 17 F.2d 670, 57 App.D.C. 82.

Leaving diamond under pillow
A passenger going from his berth to the washroom and leaving his diamond under his pillow was not guilty of contributory negligence as a matter of law.—Pullman Co. v. Bullock, Tex.Civ.App., 231 S.W. 1112.

Looking at light
Passenger injured in tripping over stepladder in aisle, was not contributorily negligent as matter of law because of knowing stepladder was being used and of looking at light in turning toward rear of car.—Barrett v. Pullman Co., 153 A. 837, 85 N.H. 33.

Jewelry in bag
(1) Whether a passenger in a sleeping car, who left overnight a five hundred dollar diamond pin in his traveling bag on the floor between berths, took such care of this pin as was commensurate with the occasion, was for the jury.—Hood v. Pullman Co., 198 N.Y.S. 231, 130 Misc. 242.
(2) Whether alighting passenger who permitted suitcase containing valuable jewelry to be taken by defendant Pullman company's porter with fifty or sixty other bags, without apprising him of facts, and remained in car until thirty other passengers had debarked and departed with their luggage was contributorily negligent so as to preclude recovery for loss of suitcase and its contents was for jury.—Reisinger v. Pullman Co., 297 N.Y.S. 196, 252 App. Div. 87.

20. N.Y.—Aplington v. Pullman Co., 97 N.Y.S. 329, 110 App.Div. 250, 17 N.Y.Ann.Cas. 455.

21. U.S.—Pullman Co. v. Hall, C.C.A.W.Va., 46 F.2d 399.—Pullman Co. v. Bullard, C.C.A.Ga., 44 F.2d 347.
Ga.—Pullman Co. v. Strang, 132 S.E. 399, 35 Ga.App. 59.
Mo.—Link v. Atlantic Coast Line R. Co., App., 233 S.W. 834.
10 C.J. p. 1186 note 74.

Contributory negligence
An instruction that plaintiff cannot recover if he was guilty of contributory negligence, without hypothesizing that the loss of the property sued for was caused by such contributory negligence, is erroneous.—Pullman Palace-Car Co. v. Adams, 24 So. 921, 120 Ala. 581, 74 Am.S.R. 53, 45 L.R.A. 767.

Instructions held free from error
N.C.—Brinkley v. Pullman Co., 142 S.E. 30, 195 N.C. 859.

Instructions held proper
An amended instruction for defendant in a suit for injuries received by plaintiff when boarding a Pullman car, requiring the jury, in order to find for plaintiff, to find the railroad company guilty of negligence in failing to place a foot stool in a safe position or on an even surface of the platform, and further to find plaintiff was not guilty of contributory negligence in failing to catch the handrail of the car, or give her child, which she was carrying, to an employee, was correct, and covered defendant's theory of the case.—Link v. Atlantic Coast Line R. Co., Mo.App., 233 S.W. 834.

Instructions held error
(1) In action for assault by porter on Pullman car passenger, instruction as to carrier's retention of Pullman conductor, who may have countenanced violation of liquor laws,

must conform to the pleadings and the evidence,[22] must not be misleading,[23] abstract,[24] or argumentative,[25] and must not ignore, or omit to charge on, material facts in issue,[26] express opinions on controverted facts,[27] nor withdraw or exclude an issue of fact from the jury.[28]

Verdict and findings. General rules governing verdicts and findings apply, and the verdict must not be based on mere conjecture or suspicion.[29] Where the findings of the jury are utterly inconsistent with each other a judgment cannot be rendered thereon,[30] and where special findings and the general verdict are not conflicting, the general verdict controls, and judgment should be entered thereon.[31]

§ 920. Damages

In an action against a sleeping car company for its breach of duty or negligence, the plaintiff, if entitled to recover, should be awarded such damages as, in the discretion of the jury, the evidence shows that he suffered as a result of the defendant's wrong. Damages for mental distress alone are not usually recoverable, nor are punitive damages unless the defendant has been guilty of recklessness or maliciousness.

In accordance with the usual rules of damages, in an action against a sleeping car company for failure to furnish accommodations or for loss or injury to a passenger or his effects, the amount of damages to be awarded rests largely in the discretion of the jury,[32] subject to the qualification that the damages allowed must not exceed that which the evidence shows that plaintiff suffered as a direct result of defendant's wrong or negligence.[33]

was prejudicial error—Pullman Co. v. Hall, C.C.A.W.Va., 46 F.2d 399

(2) As a sleeping car company was one of defendants, it was error to charge that it was a common carrier, and owed passenger duty of exercising extraordinary care and diligence for her safety.—Pullman Co. v. Strang, 132 S.E. 399 35 Ga.App 59

Instructions held properly refused

S.C.—Forbes v. Pullman Co., 135 S.E. 563, 137 S.C. 433.

22. Tex.—Pullman Co. v. Franks, Civ.App., 187 S.W. 501.

23. U.S.—Pullman Co. v. Hall, C.C.A.W.Va., 55 F.2d 139.

Mo.—Fisher v. Pullman Co., 254 S.W. 114, 212 Mo.App. 280.

10 C.J. p 1186 note 75.

24. Ala.—Pullman Palace-Car Co. v. Adams, 24 So. 921, 120 Ala. 581, 74 Am.S.R. 53, 45 L.R.A. 767.

25. Ala.—Pullman Car Co. v. Krauss, 40 So. 398, 145 Ala. 395, 4 L.R.A., N.S., 103, 8 Ann.Cas. 108.

26. Tex.—Pullman Co. v. McGowan, Civ.App., 210 S.W. 842, error refused.

10 C.J. p 1187 note 78.

Liability of joint tort-feasor

In passenger's action for injuries against sleeping car and railroad companies, the sleeping car company could not complain that the liability of the railway company was not submitted to the jury, so far as the judgment rendered against it in favor of the passenger was concerned, both it and the railway company being joint tort-feasors.—Pullman Co. v. McGowan, Tex.Civ.App., 210 S.W. 842, error refused.

27. Ga.—Pullman Co. v. Strang, 132 S.E. 399, 35 Ga.App 59.

28. Tex.—Pullman Co. v. Cox, Civ.App., 220 S.W. 599, dismissed for want of jurisdiction.

10 C.J. p 1187 note 79.

Elements of damage

Where the petition alleged and the evidence showed that a passenger was compelled to vacate a warm bed in a drawing room and take a cold berth in the sleeper, it was immaterial how the berth became cold, and, in the absence of contributory negligence with respect to an open window, the carrier was not entitled to have the damages sustained by reason of the open window excluded, although the petition did not allege negligence respecting the open window.—Pullman Co. v. Cox, Tex.Civ.App., 220 S.W. 599, dismissed for want of jurisdiction.

29. **Verdict not based on conjecture**

Recovery by passenger for injury sustained in tripping over stepladder in aisle was not based on conjecture because passenger did not see stepladder.—Barrett v. Pullman Co., 153 A. 837, 85 N.H. 33.

30. Tex.—Pullman Co. v. Castleberry, Civ.App., 251 S.W. 518.

31. Wyo.—Pullman Co. v. Finley, 125 P. 380, 20 Wyo. 456.

10 C.J. p 1187 note 82.

32. U.S.—Culbreth v. Pullman Co., D.C.Ala., 293 F. 402, affirmed, C.C.A., Pullman Co. v. Culbreth, 2 F.2d 540, 42 A.L.R. 164.

33. Ark.—Pullman Co. v. Walton, 239 S.W. 385, 152 Ark. 633.

10 C.J. p 1182 note 20

Recovery held not excessive

(1) $1,800 for broken toe and prolonged suffering, sustained from stumbling over a suitcase in aisle.—Caldwell v. Pullman Co., 128 S.E. 504, 132 S.C. 321.

(2) $2,000, where a passenger compelled to vacate a drawing room and take a cold berth in the sleeper contracted a severe cold, which continued for several weeks affecting her face and throat and producing neuralgia, inflammation, and soreness of the throat, and the neuralgia finally affected her teeth, and required the removal of two teeth, and as a result of her sickness she was unable to pursue her occupation of music teacher, at which she was earning $25 a day, for several weeks.—Pullman Co. v. Cox, Tex.Civ.App., 220 S.W. 599, dismissed for want of jurisdiction.

(3) $2,500, for carrier's failure to deliver Pullman accommodations from Buffalo, N. Y., to Stevenson, Wash., to lady seventy-six years old.—Pierce v. Northern Pac. Ry. Co., 271 P. 976, 127 Or. 461, 62 A.L.R. 644.

(4) $2,995, where plaintiff's left ankle was turned and she was bruised about her hips, legs, and spine—Lenk v. Atlantic Coast Line R. Co., Mo.App., 233 S.W. 834.

(5) $1,000 verdict, for added suffering, inconvenience, and discomfort from riding on the day coach, where a sick passenger was refused Pullman accommodation, and his suffering augmented by his failure to secure a comfortable bed during a fifteen-hour journey.—Pullman Co. v. Walton, 239 S.W. 385, 152 Ark. 633

10 C.J. p 1182 note 20 [b].

Recovery held excessive

(1) $250, for refusal of Pullman berth accommodation conforming to a passenger's ticket for a fifteen-hour journey, should be reduced to $25.—Pullman Co. v. Walton, 239 S.W. 385, 152 Ark. 633.

(2) $1,500, for failure to furnish passenger accommodations in a sleeping car other than that to which negroes were admitted.—Alabama, etc., R. Co. v. Morris, 60 So. 11, 103 Miss. 511, Ann.Cas.1915B 613

(3) $2,000, where woman who was ill was prostrated by excitement caused by defendant's conductor ordering her to leave the car in which her physician and nurse had berths, ordered reduced to $300.—Pullman

For the wrong of the sleeping car company through its employees in denying or failing to provide accommodations to a passenger, to which he is entitled, or in failing reasonably to provide for his safety and comfort, the damages recoverable are for the inconvenience, annoyances, pain, and suffering which result to him as a natural and probable result of the breach of duty, and which might or should have been foreseen or reasonably anticipated as a result thereof,[34] subject to the limitation that the damages recoverable cannot be enhanced by the negligence or willful conduct of the passenger;[35] and the damage may be mitigated by any unreasonable conduct on the part of the passenger.[36] If no other damages are sustained from a refusal of accommodations, at least the sum paid therefor, with interest, may be recovered.[37] Where the company is guilty of a tort as well as a breach of contract, the damages awarded must be commensurate with the injury, whether or not they were in contemplation of the parties at the time the contract was made.[38] There can, of course, be no recovery for damages which are not asked for in the pleadings,[39] or which are not the natural and probable result of the breach of duty and which could not reasonably have been anticipated as a probable consequence of the wrong.[40]

Loss of property. In accordance with the rules already discussed in § 915, a passenger, whose baggage has been lost through the negligence of the sleeping car company, is entitled to damages for the bag, or bags, and such of its contents as were reasonably appropriate to the journey and plaintiff's destination, bearing in mind his station in life, the duration of the journey, and its purposes.[41] Where the property in question has a market

Co. v. Anderson, 81 So. 276, 119 Miss. 791.

(4) $5,000, for carrying passenger beyond destination.—Pullman Co. v. Strang, 132 S.E. 399, 35 Ga.App. 59.

(5) $5,000, for an assault, committed by some unknown person laying hands on plaintiff in her berth, causing her to become nervous.—Pullman Co. v. Pulliam, 218 S.W. 1005, 187 Ky. 213.

(6) $15,000, for an assault on a woman passenger while sleeping in a berth, was excessive and a remittitur to $10,000 required, in view of the fact that plaintiff apparently was not seriously injured and that defendant had a rule requiring a guard in the aisle, which was disregarded by the employees.—Culbreth v. Pullman Co., D.C.Ala., 293 F. 402, affirmed C.C.A., Pullman Co. v. Culbreth, 2 F.2d 540, 42 A.L.R. 164
10 C.J. p 1182 note 20 [a].

34. Ark.—Pullman Co. v. Walton, 239 S.W. 385, 152 Ark. 633.
Tex.—Pullman Co. v. Castleberry, Civ.App., 251 S.W. 518.
10 C.J. p 1182 note 15.

Damages held not excessive

Where a passenger compelled to vacate a drawing room and take a cold berth in the sleeper contracted a severe cold, which continued for several weeks affecting her face and throat and producing neuralgia, inflammation, and soreness of the throat, and the neuralgia finally affected her teeth and required the removal of two teeth, and as a result of her sickness she was unable to pursue her occupation of music teacher, at which she was earning $25 a day, for several weeks, a verdict of $2 000 was not excessive.—Pullman Co. v. Cox, Tex.Civ.App., 220 S.W. 599, dismissed, for want of jurisdiction.

Nominal damages

(1) It is duty of a sleeping car company to notify its passenger of his arrival at destination, notwithstanding it is not a common carrier, and breach thereof is negligence, and passenger is entitled to nominal damages.—Pullman Co. v. Strang, 132 S.E. 399, 35 Ga.App. 59—10 C.J. p 1182 note 15 [d].

(2) Proof of technical trespass by insertion of pullman porter's hand into female passenger's berth would entitle plaintiff to recover only nominal damages, unless proof established additional damage.—Pullman Co. v. Hall, C.C.A.W.Va., 55 F.2d 139.

(3) The maxim "de minimis non curat lex" does not bar recovery where only nominal damages have been suffered, if a substantial right has been violated.—Pullman Co. v. Dudley, Tex.Civ.App., 77 S.W.2d 592.

Proximate result

Where a passenger was compelled to vacate a drawing room and take a cold berth in a sleeper, where she contracted a severe cold, causing neuralgia which affected her teeth and required the removal of two of them, and as a result of such sickness she was unable to pursue her occupation of music teacher, the damages on account of the injury to and loss of teeth and the loss of earnings were the proximate result of the negligence of the carrier.—Pullman Co. v. Cox, Tex.Civ.App., 220 S.W. 599, dismissed for want of jurisdiction.

Under Mexican law

A sleeping car passenger, who had a lower berth reserved for return trip from Mexico and was required to occupy upper berth, was not entitled to recover damages from sleeping car company for illness suffered while traveling in Mexico and allegedly emphasized because of having to ride in upper berth, where Mexican statutes, as interpreted by expert, permit recovery of damages only for loss of tangible things having pecuniary value.—Rauton v. Pullman Co., 191 S.E. 416, 183 S.C. 495

35. U.S.—Pullman's Palace-Car Co. v. King, N.Y., 99 F. 380, 39 C.C.A. 573.

36. N.Y.—Aplington v. Pullman Co., 97 N.Y.S. 329, 110 App.Div. 250, 17 N.Y.Ann.Cas. 455.

37. Ala.—Pullman Car Co. v. Krauss, 40 So. 398, 145 Ala. 395, 4 L.R.A., N.S., 103, 8 Ann.Cas. 108.
10 C.J. p 1182 note 18.

38. U.S.—Mann Boudoir Car Co. v. Dupre, Miss., 54 F. 646, 4 C.C.A. 540, 21 L.R.A. 289
10 C.J. p 1182 note 19.

39. Ga.—Georgia Southern & F. Ry. Co. v. Corry, 99 S.E. 881, 149 Ga. 295, affirming 96 S.E. 335, 22 Ga.App. 424—Georgia Southern & F. Ry. Co. v. Corry, 100 S.E. 48, 24 Ga.App. 168.

Petition held to be for nominal damages

A petition by a Pullman passenger who was carried beyond his destination was held to set forth a cause of action for the recovery of nominal damages.—Georgia Southern & F. Ry. Co. v. Corry, 99 S.E. 881, 149 Ga. 295, affirming 96 S.E. 335, 22 Ga.App. 424—Georgia Southern & F. Ry. Co. v. Corry, 100 S.E. 48, 24 Ga.App. 168

40. Ga.—Georgia Southern & F. Ry. Co. v. Corry, 96 S.E. 335, 22 Ga.App. 424, affirmed 99 S.E. 881, 149 Ga. 295
10 C.J. p 1183 note 21.

41. N.Y.—Van Dike v. Pullman Co., 261 N.Y.S. 292, 145 Misc. 452.

Not limited by statute

In an action to recover damages for loss or injury to personal prop-

value, that is the proper standard of value, but if it is not shown to be marketable, the value of the property to its owner furnishes the proper rule of recovery, that is, the actual loss in money which he sustains by being deprived of the articles.[42] Where the property stolen consisted of medicine and stimulants for a sick passenger, by reason of the loss of which she suffered unrelieved pain and distress incident to her condition, she is entitled to recover damages, not only for the value of the medicine and stimulants, etc., but also for physical suffering and mental distress caused by their loss.[43]

Mental distress. Although it has been held that a sleeping car company's breach of duty to a passenger which causes an infliction of injury to the feelings, mental suffering, or humiliation, even in the absence of physical injury, affords an adequate foundation for the award of actual or compensatory damages,[44] it has generally been held that mental distress is not a proper element of damages,[45] unless the breach of contract is accompanied by physical inconvenience or suffering,[46] or unless the case is one in which punitive damages would be allowed.[47]

Punitive damages. Where the company's employees have been guilty of recklessness, willfulness, or maliciousness in causing the passenger's injuries, punitive damages may be allowed, but not where such elements do not exist.[48] It has been held, however, that to justify the recovery of punitive damages, there must be either authorization or ratification of the employee's wrongful act.[49] Ratification, under such circumstances, involves the adoption of the act of the servant with knowledge of the facts;[50] and mere retention of the employee in the employment of the company does not necessarily amount to ratification.[51]

IV. FEDERAL EMERGENCY RAILROAD ACT

§ 921. Purpose and Effect of Act

This Act was designed to relieve the emergency existing at the time of its enactment in relation to interstate transportation. The provision prohibiting the elimination of existing routes with the consent of participating lines or order of the coördinator included such eliminations by the carriers, although there is authority also to the contrary.

The Emergency Railroad Transportation Act, 49 U.S.C.A. § 250 et seq, was intended to relieve the existing national emergency in relation to interstate transportation; and generally speaking, it was enacted to save certain railroads from bankruptcy and to perpetuate an efficient means of interstate transportation in the United States.[52]

erty carried in a hand bag and due to the negligence of a porter of a parlor car company, the amount that may be recovered is not limited by a statute which by its terms refers only to such baggage as the carrier takes into its possession and for which it gives receipt—Wilson v Pullman Co, 65 Pa.Super 429.

42. Ala.—Cooney v. Pullman Palace Car Co, 25 So. 712, 121 Ala. 368, 53 L.R.A. 690
Va.—Norfolk, etc., R Co. v. Lipscomb, 17 S.E. 809, 90 Va. 137, 20 L.R.A. 817.

43. U.S.—Bacon v. Pullman Palace Car Co., Ala., 159 F. 1, 89 C.C.A. 1, 16 L.R.A.,N.S., 578, 14 Ann.Cas. 516, certiorari denied 28 S.Ct. 762, 210 U.S. 433, 52 L.Ed. 1136.

44. S.C.—Bonner v. Pullman Co., 159 S.E. 382, 160 S.C. 531, 76 A.L.R. 922.
Tex.—Pullman Palace Car Co. v. Hocker, 93 S.W. 1009, 41 Tex.Civ. App. 607

Woman passenger whose clothes were stolen from berth in sleeping car, obliging her to walk lightly clad through train to her trunk in baggage car, might recover, as an element of damages, for her consequent humiliation and embarrassment.—Pullman Co. v. Moise, Tex.Civ.App., 187 S.W. 249

Unfounded fears

A passenger, however, is not entitled to recover for her mental anxiety or fear of some contingency, when the anxiety was unfounded and the contingency never came to pass—Pullman Co v Moise, Tex.Civ.App., 187 S.W. 249—Pullman Palace Car Co v. McDonald, 21 S.W. 945, 2 Tex Civ.App. 322.

45. Mo.—O'Neil v. Pullman Co., 260 S.W. 798, 214 Mo.App. 283.
10 C.J. p 1183 note 22.

Mental anxiety

Where the sleeping car company wrongfully denied accommodations to an invalid and those attending him, such attendants cannot recover for the mental anxiety suffered on account of the situation and condition of the invalid.—Pullman Co. v. Walton, 239 S.W. 385, 152 Ark. 633.

46. Ohio.—Pullman Co. v. Willett, 27 Ohio Cir.Ct. 649.

Under federal rule, in order to support a judgment against a sleeping car company for damages for mental anguish, it must have been caused by, or grown out of, bodily injury sustained by plaintiff.—Pullman Co. v Dudley, Tex.Civ.App., 77 S.W.2d 592.

47. Miss.—Pullman Co. v. Kelly, 38 So 317, 86 Miss. 87.

48. Ga.—Georgia Southern & F Ry Co v Corry, 99 S.E. 881, 149 Ga. 295, affirming 96 S.E. 335, 22 Ga. App. 424—Georgia Southern & F. Ry Co v. Corry, 100 S.E. 48, 24 Ga App 163
S.C.—Horton v. Pullman Co, 96 S.E. 289, 110 S.C. 311, 114 S.C. 59
10 C.J. p 1183 notes 27, 28.

49. U.S.—Pullman Co. v. Hall, C.C.A.W.Va., 46 F.2d 399

50. U.S.—Pullman Co v. Hall, supra.

51. U.S.—Pullman Co v. Hall, supra.

52. U.S.—Louisville & N. R. Co. v. U.S., D.C.Ill., 10 F.Supp. 185, 192 "In short, the act was to administer oxygen to critical patients and to relieve those who were suffering from sinking spells. Its tone forbids the conclusion that the strong carriers might exterminate the weaker competitor. Rather was it the announced policy of the Government to render assistance to all carriers and keep their heads above water until calmer times appeared."—Louisville & N. R. Co. v. U.S., supra.

The provision of the Act, 49 U.S.C.A. § 254 (1), that no routes now existing shall be eliminated except with the consent of all participating lines or on order of the coordinator, has been held to include the carriers in its prohibition against eliminating existing routes unless by the necessary consent or order; and, under this view, the provision applies although notice had been filed by the carrier of the intended elimination of the route, where the Act became law before the expiration of the thirty days' notice required by the Interstate Commerce Act, 49 U.S.C.A. § 6 (3).[53] It has been held, however, that the provision was intended to relate to the subject matter of the Emergency Railroad Transportation Act, and did not effect a curtailment of the powers and duties conferred upon the interstate commerce commission by the Interstate Commerce Act as amended, 49 U.S.C.A. §§ 6 (1, 3), 13 (1) and 15 (7); and, under this view, the filing and publishing of a new rate in accordance with the Interstate Commerce Act, 49 U.S.C.A. § 6, is proper even though such rate eliminates a joint rate without the consent of all the participating carriers.[54]

§ 922. Duties, Authority, and Power of Coordinator

The duties, authority, and powers of the coördinator are to be determined from the Act read as a whole.

In determining the duties, authority, and powers of the coördinator, the Act must be read as a whole and not merely looked at by sections.[55] The authority of the coördinator is not limited to those matters wherein his judgment coincides with that of regional coordinating committees of the railroads.[56] The mere fact that the coordinator failed to give plaintiff a hearing does not render an order by him void, as the hearing and determination of an administrative question by an administrative officer are not governed by the rules applicable to the trial of cases in a court of law or equity.[57]

§ 923. Jurisdiction of Courts; Review of Orders

The courts have no jurisdiction in the first instance to determine administrative matters. A person dissatisfied with an order of the coördinator must first apply for a review thereof by the interstate commerce commission.

A suit to enjoin a revocation of a through interstate route and joint rate, without the consent of all participating lines or an order of the coordinator, presenting a question whether under the proper construction of the statute a route already duly established had been lawfully abolished, involves only matters of law appropriate to a court.[58] A railroad which objected to joint rates filed by another carrier with the interstate commerce commission, on the ground that the rates amounted to

53. U.S.—Quanah, A. & P. Ry. Co. v. Panhandle & S. F. Ry. Co., C.C.A.Tex., 67 F.2d 826.

Old route remains established, under the facts set out in the text, and plaintiff, a railroad is entitled to have it so regarded, so that shippers who wish may route their goods accordingly, and so that plaintiff may receive its proper share of the traffic involved.—Quanah, A. & P. Ry. Co. v. Panhandle & S. F. Ry. Co., C.C.A.Tex., 67 F.2d 826.

54. U.S.—Atlantic Coast Line R. Co. v. Hampton & Branchville R. Co., C.C.A.S.C., 80 F.2d 797.

Not an amendment

The Emergency Railroad Transportation Act was not an amendment to the Interstate Commerce Act, and, therefore, did not change the powers or duties of the interstate commerce commission.—Missouri Pac. R. Co. v. U. S., D.C.Mo., 16 F.Supp. 752.

55. U.S.—Louisville & N. R. Co. v. U. S., D.C.Ill., 10 F.Supp. 185.

Elimination of existing route

Federal coördinator of transportation had authority under Emergency Railroad Transportation Act to prohibit establishment of proposed interchange of through passenger train equipment at Evansville, Ind., between the New York Central and the Chicago & Eastern Illinois railroads, where coördinator found that by substitution of such interchange existing routes would be eliminated without consent of participating lines and would unduly impair net earnings of the Chicago & Eastern Illinois railroad.—Louisville & N. R. Co. v. U. S., D.C.Ill., 10 F.Supp. 185.

56. U.S.—Louisville & N. R. Co. v. U. S., supra.

Nonaction of committee

The Act, 49 U.S.C.A. § 256 (a), provides "If, in any instance, a committee has not acted with respect to any matter which the coördinator has brought to its attention and upon which he is of the opinion that it should have acted, under the provisions of section 5, 49 U.S.C.A. § 255, he is hereby authorized and directed to issue and enforce such order." Where the coördinator sent a proposal to the committee asking them to investigate and report to him as soon as possible what action, if any, they were prepared to take on the proposal that through passenger traffic be routed over one railroad to the elimination of another, and where the committee failed to report on the effect of the proposal on the railroad deprived of such traffic, the committee failed to act thereon thereby justifying an order by the coördinator.—Louisville & N. R. Co. v. U. S., D.C.Ill., 10 F.Supp. 185.

57. U.S.—Louisville & N. R. Co. v. U. S., 10 F.Supp. 185, supra.

58. U.S.—Quanah, A. & P. Ry. Co. v. Panhandle & S. F. Ry. Co., C.C.A.Tex., 67 F.2d 826.

Injunction

(1) Injunction against revocation of through interstate route and joint rate by railway company without all participating lines' consent or railroad coördinator's order was the proper remedy of railway company adversely affected thereby, under Emergency Railroad Transportation Act, 49 U.S.C.A. § 254 (1).—Quanah, A. & P. Ry. Co. v. Panhandle & S. F. Ry. Co., C.C.A.Tex., 67 F.2d 826.

(2) Railway company's suit to enjoin revocation of joint through interstate route, without all participating lines' consent or railroad coordinator's order, was not moot after date fixed by notice of change, which was prohibited by statute effective before such date.—Quanah, A. & P. Ry. Co. v. Panhandle & S. F. Ry. Co., supra.

the closing of an existing joint route without the consent of all the participating lines, has been held to be required to exhaust its administrative remedy before the interstate commerce commission by procuring before it a determination of the reasonableness and legality of the rates under the new tariff before resorting to the courts.[59]

Under the provisions of the Act, 49 U.S.C.A. § 259, that any interested party dissatisfied with any order of the coördinator may, at any time prior to the effective date of the order, file a petition with the interstate commerce commission asking that such order be reviewed and suspended during such review, a person dissatisfied with an order of the coordinator must apply for a review thereof by the commission before seeking relief in the courts, notwithstanding the fact that the commission may deny his application and refuse to hear him on the merits of his petition.[60]

CARROM or CARROMS. In a popular sense, the word is used to describe the hitting and glancing away of one object from another; hence, in both the singular and the plural, a descriptive name in billiards where one ball strikes another, and then, glancing, strikes a third, and defined to be the hitting of two or three balls in succession by the cue ball from one stroke of the cue;[1] also a game played with disks where the object is not necessarily to strike two separate disks or balls, but to drive a disk into a pocket.[2]

Phrases: "Carrom Board," "carrom game," "Disco, The Great Carrom Game," "Five-Pin Cuban Carrom Game,"[3] and "The Game of Carroms"[4]

CARROTED FUR. In felt hat manufacturing, fur that has been treated by a solution of nitrate of mercury, so as to remove the water-repellent substance covering the fibers of the fur, causing the scales upon their surface to protrude to a greater extent than they do upon those of raw or uncarroted fur, and the body of the fiber itself to absorb moisture, making it more pliable and in this condition more easily to interlock with other fibers of fur, or of wool, distinguished from "raw fur" which has not been so treated.[5]

CARRUCA. In the civil law, a sort of four-wheeled traveling carriage.[6]

CARRY.

Present Tense

Used in its active transitive sense, the word has been said to connote transportation,[7] and has been defined as meaning to bear;[8] to bear or cause to be borne as from one place to another;[9] to convey, or transport.[10]

Used commercially the word has several connotations, derived from its primary meanings; and it has been defined as meaning to bear the charges or burden of holding or having, as stocks, merchandise, etc., from one time to another, to hold, to keep on one's books as a debtor, also to keep on hand, keep up, or maintain,[11] to possess, to support,[12] and also in a particular context, to advance.[13] "Carry" has been described as analogous to "ship;"[14] has been held equivalent to, or syn-

59. U.S.—Atlantic Coast Line R. Co. v. Hampton & Branchville R. Co., C.C.A.S.C., 80 F.2d 797.

60. U.S.—Louisville & N. R. Co. v. U.S., D.C.Ill., 10 F.Supp. 185, 191.
"In disposing of this contention we might observe that plaintiffs' right to apply to the Commission is clear. It is absolute and unqualified. No action of the Commission is necessary to permit them to make application for review of the coördinator's order. The coördinator may not prevent them from making application. The Commission, it is true, may, upon the presentation of the application, dismiss it, but in doing so the Commission must act. It must exercise its discretion. It is the action of the Commission that is essential. Whether the action be affirmative or negative is immaterial. The absolute right of plaintiffs to apply to the Commission and the latter's obligation to take action on the application make it necessary for the plaintiffs to apply first to the Commission before it applies to a court of equity for injunctive relief."—Louisville & N. R. Co. v. U.S., supra.

1. U.S.—Williams v. Mitchell, Ill., 106 F. 168, 170, 45 C.C.A. 265.

2. U.S.—Ludington Novelty Co. v. Leonard, C.C.N.Y., 119 F. 937, 940.—Williams v. Mitchell, Ill., 106 F. 168, 170, 171, 45 C.C.A. 265.

3. U.S.—Williams v. Mitchell, supra.

4. U.S.—Ludington Novelty Co. v. Leonard, C.C.N.Y., 119 F. 937, 940.—Williams v. Mitchell, Ill., 106 F. 168, 171, 45 C.C.A. 265.

5. U.S.—Matteawan Mfg. Co. v. Emmons Bros. Co., C.C.A.Mass., 253 F. 372, 375.

6. Adams Gloss.

7. N.Y.—Ettlinger v. Importers' & Exporters' Ins. Co. of New York, 245 N.Y.S. 145, 146, 138 Misc. 9.

8. U.S.—First Nat. Bank v. U.S., Ct.Cl., 38 F.2d 925, 930.
Mich.—Longford v. Rogers, 270 N.W. 692, 694, 278 Mich. 310.

9. U.S.—Chicago, R. I. & P. Ry. Co. v. Petroleum Refining Co., D.C.Ky., 39 F.2d 629, 630, quoting Standard D.

10. Ky.—Cassell v. Lexington, etc., Turnp. Road Co., 9 S.W. 502, 506, 701, 10 Ky.L. 486.
10 C.J. p. 1240 note 6.

11. U.S.—First Nat. Bank v. U.S., Ct.Cl., 38 F.2d 925, 930.
Cal.—San Francisco Realty Co. v. Linnard, 276 P. 368, 370, 98 Cal. App. 33.

12. U.S.—First Nat. Bank v. U.S., Ct.Cl., 38 F.2d 925, 930.

13. U.S.—First Nat. Bank v. U.S., supra.
Ark.—Mann v. Urquhart, 116 S.W. 219, 89 Ark. 239, 248.

14. Analogy discussed.
"The word 'ship' . . . express-

onymous with, "bear," see Bear 10 C.J.S. p 219 note 45, "convey," "transport,"[15] and "wear;"[16] and has been contrasted with, or distinguished from, "draw," "move," "pull," "push," "shove,"[17] and "sustain."[18]

Carry on. The term, when applied to business, has been said to have a well settled signification, and has been defined as meaning to advance,[19] to conduct,[20] to continue,[21] to continue to prosecute, to help forward, to keep in progress, to manage or be engaged in, to promote, or to prosecute,[22] and to transact.[23]

Carry out. To execute.[24]

Carry stock. To loan part of the purchase price of the stock, charging interest and crediting dividends and holding the stock as security for the loan;[25] to provide funds or credit for its payment for the period agreed upon from the date of purchase.[26] It has been said that the term might include a transaction where the whole purchase price is loaned, but this is not the usual arrangement.[27]

Other phrases: "Agreed to 'carry' the interest of another party" and "carry a full stock,"[28] "carry costs,"[29] "carry life insurance,"[30] "carry on business" and cognate phrases see Business 12 C.J.S. p 789 note 42–p 791 note 88, "carry on trade,"[31] "'carry' weight,"[32] "purchase or carry obligations or securities,"[33] and "used to carry passengers for a consideration."[34]

Carried

The past tense and past participle of "carry," which has been held equivalent to, or synonymous with, "transported,"[35] and contrasted with, or distinguished from, "forwarding"[36] and "worn."[37]

Phrases: "Carried on as a business for pecuniary gain" see Business 12 C.J.S. p 789 note 42, "carried on business," see Business 12 C.J.S. p 789 note 43, "insurance now carried or to be hereafter carried by him,"[38] "no measure can be declared 'carried,'"[39] and "usually 'carried' by tourists and travellers."[40]

Carrying

The present participle of the verb "carry," which primarily conveys the idea of transportation,[41] and has been specifically defined as the act or business of transporting from one place to another.[42]

es the idea of effecting movement by bearing, and it belongs to the same species as the words carry, convey, or transport"—Chicago, R. I. & P Ry Co v. Petroleum Refining Co, D C.Ky, 39 F 2d 629, 631

15. U.S.—Chicago, R I. & P. Ry. Co. v. Petroleum Refining Co., D. C Ky., 39 F 2d 629, 630
Mich —Langford v. Rogers, 270 N. W. 692, 694, 278 Mich 310.

16. Tenn.—Page v. State, 3 Heisk. 198, 200.

17. U S —Chicago, R. I. & P Ry. Co. v. Petroleum Refining Co, D.C Ky., 39 F 2d 629, 630
Mich —Langford v. Rogers, 270 N.W. 692, 694, 278 Mich. 310

18. With reference to weight
"The capacity of a motor truck to 'sustain' weight is one thing; and the capacity of a motor truck to 'carry' weight is another, for in carrying weight it must do more than sustain weight."—Campbell v. Cornish, 22 P.2d 63, 67, 163 Okl. 213

19. U S.—Ammons v. Brunswick-Balke-Collender Co, Ind.T., 141 F 570, 575, 72 C.C.A. 614, quoting Webster D.

20. Fla —Roberts v. State, 7 So 861, 26 Fla 360, 362
Pa —Harvey v. Vandegrift, 89 Pa. 346, 352.

21. Ark —Florsheim Bros Dry Goods Co. v. Lester, 29 S.W. 34, 60 Ark 120, 123, 46 Am S.R 162, 27 L.R A 505, quoting Worcester D.
10 C J. p 1240 note 13.

22. U.S —Cooper Mfg Co v. Ferguson, Colo., 5 S.Ct. 739, 742, 113 U. S 727, 28 L.Ed. 1137—Ammons v Brunswick-Balke-Collender Co., Ind. T., 141 F. 570, 575, 72 C C A 614.
N.Y.—In re Levy, 190 N Y.S. 333, 336, 198 App.Div 326—In re Deuel, 111 N Y S. 969, 972, 127 App.Div. 640
10 C.J p 1240 notes 15, 16.

23. Mont.—Territory v. Harris, 19 P. 286, 8 Mont. 140, 144.
N.J —Fleckenstein Bros. Co. v. Fleckenstein, 57 A. 1025, 66 N J Eq. 252, 254.

24. Ind.—Cartmel v. Newton, 79 Ind. 1, 2.
10 C.J. p 1240 note 21–22.

25. Pa.—Child's Estate, 13 Pa.Dist & Co. 237, 238.

26. Black L.D
N.Y.—Saltus v. Genin, 16 N Y Super. 250, 260

27. Pa.—Child's Estate, 13 Pa.Dist. & Co. 237, 239.

28. U.S —First Nat. Bank v. U. S, Ct.Cl., 38 F.2d 925, 930.

29. Meaning of the phrase
A verdict is said to "carry costs" when the party for whom the verdict is given becomes entitled to the payment of his costs as incident to such verdict.—Black L.D

30. U.S —First Nat. Bank v. U. S, Ct.Cl., 38 F 2d 925, 930.

31. U.S —Frick v. Webb, Cal, 44 S. Ct. 115, 117, 263 U.S 326, 68 L Ed 323.

Ohio —State v Deckebach, 149 N.E. 194, 195, 113 Ohio St. 347.

32. Okl —Campbell v. Cornish, 22 P. 2d 63, 67, 163 Okl 213.

33. U.S.—First Nat. Bank v. U S., Ct.Cl, 38 F.2d 925, 930.

34. Ky.—Insurance Co. of North America v. Lee, 24 S W.2d 278, 232 Ky. 556.

35. U.S.—Chicago, R. I. & P. Ry. Co. v. Petroleum Refining Co., D.C.Ky., 39 F.2d 629, 630.
10 C.J. p 1240 note 9 [d].

36. U.S.—Ogdensburg & L. C. R. Co. v. Pratt, Mass., 22 Wall. 123, 133, 23 L.Ed. 827.
10 C.J. p 1240 note 9 [d].

37. U.S.—Richardson v. Lawrence, C C.N Y., 20 F.Cas No.11,785, 1 Blatchf. 501, 502.
N Y —Ettlinger v. Importers' & Exporters' Ins. Co of New York, 245 N.Y.S. 145, 146, 138 Misc. 9.

38. Cal.—San Francisco Realty Co. v. Tannard, 276 P. 368, 370, 98 Cal. App. 33.

39. Ky —McKinney v. Barker, 203 S W. 303, 306, 180 Ky. 526, L R A. 1918E 581.

40. N.Y.—Ettlinger v. Importers' & Exporters' Ins. Co. of New York, 245 N.Y.S. 145, 146, 138 Misc. 9.

41. Mass —Coleman Bros. v. Union St. Ry. Co., 198 N E. 917, 919.

42. Okl —Campbell v. Cornish, 22 P 2d 63, 67, 163 Okl. 213.

Carrying arms or *Carrying weapons.* In a general sense, going armed, wearing weapons.[43] Regulation of the right to carry weapons and the manner of their carrying, see the C.J.S. title Weapons §§ 2–15, also 68 C.J. p 8 note 56–p 63 note 92.

Carrying away. The act of removal or asportation, which is essential to constitute certain crimes,[44] such as abduction see Abduction §§ 1, 6–10, kidnapping see the C.J.S. title Kidnapping § 1, also 35 C.J. p 903 notes 1–4 and p 903 note 32–p 904 note 40, and larceny see the C.J.S. title Larceny §§ 4–8, also 36 C.J. p 747 note–p 754 note 7.

Carrying on. Prosecution.[45] Certain phrases in which the words "carrying on" occur have received judicial interpretation, such as "carrying on a business, trade, or occupation in this state," see Business 12 C.J.S. p 789 note 46, "carrying on and doing business in the state," see Business 12 C.J.S. p 789 note 47, "'carrying on' a prosecution,"[46] "carrying on a trade,"[47] "carrying on business," see Business 12 C.J.S. p 789 note 54, and 10 C.J. p 1241 note 30, "carrying on of the work,"[48] "carrying on the mill,"[49] and "carrying on trade and commerce."[50]

Carrying out. Performance.[51] The term has been distinguished from "assent," see Assent 6 C.J.S. p 1020 note 85.

Other phrases: "Carrying about," see the C.J.S. title Intoxicating Liquors § 268, also 33 C.J. p 606 note 41 [e], "carrying a member,"[52] "carrying . . . commodities,"[53] "carrying concealed weapons," see the C.J.S. title Weapons §§ 2, 8, also 68 C.J. p 9 note 72–p 12 note 22, and p 35 note 7–p 36 note 22, "carrying forward, performing, or completing a contract,"[54] "carrying . . . in connection with commerce,"[55] "'carrying' of the stock,"[56] "carrying passengers for a consideration,"[57] "carrying passengers for compensation,"[58] "carrying passengers for hire,"[59] and "carrying passengers for pay;"[60] also where "carrying" is used adjectively, "carrying capacity," see Capacity 12 C.J.S. p 1118 note 83, "carrying charge" or "carrying charges,"[61] "'declared' carrying capacity," see Capacity 12 C.J.S. p 1118 note 85, "pounds carrying capacity," see Capacity 12 C.J.S. p 1117 note 66 and "prima facie carrying capacity," see Capacity 12 C.J.S. p 1118 note 95.

CAR SERVICE. See the title Carriers § 336.

CAR SERVICE ASSOCIATIONS. See the title Carriers § 335.

CART.

As a Noun

Primarily a carriage, or vehicle, with two wheels;[62] and so not included by the term "carriage," see Carriage 12 C.J.S. p 1153 note 22; and distinguished from "wagon."[63] In particular connections, however, the word has been said to have the more extended signification of a carriage in general,[64] and under some circumstances, it has been held that the term includes a four-wheeled wagon,[65] but, under other circumstances, that it does not include an automobile[66] or a peddler's wagon with four wheels;[67] and also that it is sometimes included, within the term "carriage," see Carriage 12 C.J.S. p 1153 note 19.

43. Tenn.—Page v. State, 3 Heisk. 198, 200

44. Burrill L.D.

45. Or.—Fitzgerald v. Neal, 231 P. 645, 650, 113 Or. 103.

46. Ga.—Page v. Citizens' Banking Co., 36 S.E. 418, 111 Ga. 73, 74, 84, 78 Am.S.R. 144, 51 L.R.A. 463 —Swift v. Witchard, 29 S.E. 762, 103 Ga. 193, 196—Woodruff v. Doss, 93 S.E. 316, 317, 20 Ga.App. 639

47. Ohio.—State v. Deckebach, 149 N.E. 194, 195, 113 Ohio St. 347.

48. Or.—Fitzgerald v. Neal, 231 P. 645, 650, 113 Or. 103.

49. U.S.—In re Hope Min. Co., D.C. Nev., 12 F.Cas.No.6,681, 1 Sawy. 710, 711.

50. Ohio—State v. Deckebach, 149 N.E. 194, 195, 113 Ohio St. 347.

51. Ind.—Cartmel v. Newton, 79 Ind. 1, 5

52. Tex.—Bennett v. Sovereign Camp W. W., Civ.App., 168 S.W. 1023.

53. Mass.—Coleman Bros. v. Union St. Ry. Co., 198 N.E. 917, 919.

54. Ohio.—Lingler v. Andrews, 10 N.E.2d 1021, 1023, 56 Ohio App. 487 —A. M. Lewin Lumber Co. v. Gutman, 171 N.E. 342, 343, 34 Ohio App. 458.

55. Mass.—Coleman Bros. v. Union St. Ry. Co., 198 N.E. 917, 919

56. Mass.—Pickering v. Demerritt, 100 Mass. 416, 421.

57. U.S.—Reed v. Bloom, D.C.Okl., 15 F.Supp. 600, 602.
Ky.—Insurance Co. of North America v. Lee, 24 S.W.2d 278, 279, 332 Ky. 556.
Va.—Cartos v. Hartford Accident & Indemnity Co., 169 S.E. 594, 597, 160 Va. 505.

58. Pa.—Orcutt v. Erie Indemnity Co., 174 A. 625, 626, 114 Pa.Super. 493

59. Mass.—Coleman Bros. v. Union St. Ry. Co., 198 N.E. 917, 918.

Pa.—Gross v. Kubel, 172 A. 649, 650, 315 Pa. 396, 95 A.L.R. 146
Wash.—City of Spokane v. Knight, 172 P. 823, 101 Wash. 656.

60. N.Y.—De Matteis v. Jones, 255 N.Y.S. 178, 235 App.Div. 634.

61. N.Y.—In re Campbell's Estate, 299 N.Y.S. 451, 455, 164 Misc. 640 —In re Kayares Theatricals, 298 N.Y.S. 680, 681, 164 Misc. 289

62. Tenn.—Webb v. Brandon, 4 Heisk. 285, 288.

63. Ala.—Favers v. Glass, 22 Ala. 621, 624, 58 Am.D. 272.
Tex.—Rodgers v. Ferguson, 32 Tex. 533, 535

64. Ala.—Favers v. Glass, 22 Ala. 621, 624, 58 Am.D. 272.

65. Nev.—Edgecomb v. His Creditors, 7 P. 533, 19 Nev. 149, 156.

66. Minn.—Whitney v. Welnitz, 190 N.W. 57, 153 Minn. 162, 28 A.L.R. 68.

67. Me.—Smith v. Chase, 71 Me. 164, 165.

Public cart. A vehicle kept for hire or used to carry merchandise, etc., for pay.[68]

Other phrases: "One horse or ox cart,"[69] "ox cart,"[70] and "wagon, cart, or dray;"[71] also "breaking carts," see Break 11 C.J.S. p 834 note 18, and "public carts and cartmen."[72]

As a Verb

To carry in a cart;[73] and in the past tense, "carted," carried or conveyed in a cart, hauled, being distinguished from "shipped."[74] The present participle, "carting," in a particular connection has been held to express a restriction on the motive power employed.[75]

CARTA. In Spanish law, a letter or epistle.[76]

In old English law, a charter, deed, or writing.[77]

Carta de foresta. In old English law, the charter of the forest; more commonly called Charta de Foresta.[78]

Carta indentata or indentura. See the C.J.S. title Deeds § 1, also 18 C.J. p 148 notes 27–33.

Carta mercatoria. A grant, made in 1303, to certain foreign merchants, in return for custom duties, of freedom to deal wholesale in all cities and towns of England; power to export their merchandise; and liberty to dwell where they pleased, together with other rights pertaining to speedy justice.[79]

CARTAGE. In a particular connection as an incident to sales on commission, "cartage" has been described as a charge made for the expense of delivering goods by cart or dray when the purchaser does not take them on the railroad track.[80]

CARTA NON EST NISI VESTIMENTUM DONATIONIS.[81]

CARTBOTE. See the C.J.S. title Common Lands § 1.

CARTE. In French marine law, a chart.[82]

CARTE BLANCHE. A white sheet of paper; an instrument signed, but otherwise left blank; and more specifically, a sheet given to an agent, with the principal's signature appended, to be filled up with any contract or engagement as the agent may see fit, hence, metaphorically, unlimited authority.[83]

CARTEL. As an agreement between hostile powers, for certain purposes in time of war, see the C.J.S. title War § 24, also 67 C.J. p 387 note 37. In another sense, now rare, a written challenge to a duel.[84] In Spanish law, a bill, a placard, or a poster.[85]

Cartel ship. As a vessel used for certain noncombatant purposes in time of war, see the C.J.S. title War § 24; see also 10 C.J. p 1245 notes 96–98.

CARTILLA. In the Spanish law, a certificate of proficiency which enables one to practice a profession.[86]

CARTMAN. A carrier who transports goods and merchandise in carts, usually for short distances, for hire;[87] also, more specifically, a person who hauls materials used in or for the construction of a building.[88] As to whether or not such a cartman is a common carrier see the C.J.S. title Carriers § 8.

68. U.S.—Barrett v. City of New York, C.C.N.Y., 183 F. 793, 797.
Ill.—Johnson Express Co. v. Chicago, 136 Ill.App. 368, 376.

69. Ala.—Favers v. Glass, 22 Ala. 621, 624, 58 Am.D. 272

70. Tenn.—Webb v. Brandon, 4 Heisk. 285, 288.

71. Minn.—Whitney v. Welnitz, 190 N.W. 57, 153 Minn. 162, 28 A.L.R. 68.

72. U.S.—Barrett v. City of New York, C.C.N.Y., 183 F. 793, 797.

73. Century D.

74. Kan.—Crystal Case Co. v. Arnett, 85 P. 302, 73 Kan. 774, 776.

75. Right of "carting" limited
A decree in partition in 1817, when steam railroads were unknown, giving each tenant the right of "carting" timber across the other's land held not to authorize a present owner of a tract of the land to construct a steam railroad over an adjoining tract.—Roper Lumber Co. v. Richmond Cedar Works, 73 S.E. 902, 158 N.C. 161, 166.

76. See 10 C.J. p 1243 note 41–p 1245 note 88.

77. Burrill L.D.
Carta de una parte or Charta de una parte—a charter or deed of one part.—Adams Gloss.
Carta partita de affrectamento—a charter-party of affreightment.—Adams Gloss.
Carta perdonationis—a charter of pardon.—Adams Gloss.

78. Black L.D.

79. Black L.D., citing 1 Holdsworth Hist.Eng.L. p 311.

80. Iowa.—Everingham v. Halsey, 78 N.W. 220, 221, 108 Iowa 709.

81. A maxim meaning "A deed is nothing but the vestment or clothing of the gift."—Adams Gloss.

82. Black L.D.

83. Black L.D.
"In the course of business, it not unfrequently occurs that, for the sake of convenience, signatures in blank are given with authority to fill them up. These are binding upon the parties. But the blank must be filled up by the very person authorized."—Bouvier L.D.

84. Black L.D.

85. Escriche Diccionario.

86. Escriche Diccionario.

87. Black L.D.
La.—See Equitable Real Estate Co. v. National Surety Co., 63 So. 104, 113, 133 La. 448.

88. La.—Equitable Real Estate Co. v. National Surety Co., supra.

Public cartman. The owner of a public cart.[89]

CARTON. An encasement not usually of permanent value and ordinarily used for the convenient transportation of its contents.[90]

CARTRIDGE. A case, capsule, shell, or bag of metal, pasteboard, or other material, holding a complete charge for a firearm; a charge for a firearm, or for blasting, in a case or shell of metal, paper, pasteboard, or cloth.[91]

Phrases: "'Cartridge' and 'bomb,'"[92] and "cartridge, shell, bomb, or similar device."[93]

CAR TRUST or CAR TRUST ASSOCIATION. See the C.J.S. title Railroads § 1, also 10 C.J. p 1245 notes 5, 6.

CAR TRUST SECURITIES. See the C.J.S. title Railroads § 1, also 10 C.J. p 1245 notes 7, 8.

CARTULARIES. Ancient English records containing documents and legal proceedings—the muniments of title of the great landowners, and other miscellaneous documents.[94]

CARTULARIOS. In the Spanish notarial system, the notary's clerks, who, as scribes or scriveners, draw up the "escrituras," or notarial instruments, many of which, listed under the heading "carta" in 10 C.J. pp 1143-1145, are called "cartas" of various kinds; also the ancient parchment books used for evidencing property rights of the church and kindred institutions.[95]

CARTULARY. A place where papers or records are kept.[96]

CARTWAY. A way established by law for a person who has not the benefit of a public highway, and for that reason alone;[97] sometimes specifically referred to as a "private cartway;"[98] also a quasi-public road in which the public has a direct personal interest.[99] The term has been contrasted with, or distinguished from, "highway"[1] "private railroad,"[2] and "private way."[3]

Public cartway. A cartway established for the use of all the public who may desire to use it, although its principal benefit inures to one individual.[4]

CARUCA. A four-wheeled carriage; also a plow, or a team for a plow, of four oxen abreast.[5]

CARUCAGE. The act of plowing; also a taxation of land by the caruca.[6]

CARUCAGIUM. Law Latin, in old English law, a kind of tax or tribute anciently imposed, upon every plow, for the public service.[7]

CARUCATA, CARUCATE, CARVAGE, or CARVE OF LAND. A certain quantity of land used as the basis for taxation;[8] a quantity of land containing as much as might be tilled by one plow in a year and a day, varying in different countries from sixty to one hundred and twenty acres.[9] The term "carucata," or "carucate," has been also defined as a team of cattle, or a cartload.[10]

CARUCATARIUS. Law Latin, one who held land in carvage, that is, in socage, or plow tenure.[11]

CARUE. A carve of land; plow land.[12]

CARWATKER. A kind of jack or crowbar used for moving cars conveniently.[13]

CAS. French, case; a or the case; an event or occurrence.[14]

89. U.S.—Barrett v. City of New York, C.C.N.Y., 183 F. 793, 797.

90. U.S.—U. S. v. Austin Nicholls & Co., N.Y., 22 S.Ct. 918, 186 U.S. 298, 300, 46 L.Ed. 1173—Oberteuffer v. Robertson, N.Y., 6 S.Ct. 462, 116 U.S. 499, 514, 29 L.Ed. 706

91. Ohio.—State v. Lindway, 2 N.E. 2d 490, 497, 131 Ohio St. 166, quoting New Standard D. and Webster New Int.D.

92. As suggesting an explosive "Mentioned together, they [cartridge and bomb] immediately suggest explosive objects."—State v. Lindway, 2 N.E.2d 490, 493, 497, 131 Ohio St. 166.

93. Ohio.—State v. Lindway, supra.

94. Black L.D., citing Holdsworth Hist.Eng.L. p 273.

95. Escriche Diccionario.

96. Black L.D.

97. N.C.—State v. Purify, 86 N.C. 681, 682.

98. N.C.—State v. Norris, 93 S.E. 950, 951, 174 N.C. 808.

99. N.C.—Barber v. Griffin, 74 S.E. 110, 158 N.C. 348, 350.

1. Pa.—McClenachan v. Curwin, 3 Yeates 362, 371.
10 C.J. p 1246 note 12 [a].

2. N.C.—Cozard v. Kanawha Hardwood Co., 51 S.E. 932, 139 N.C. 283, 288, 111 Am.S.R. 779, 1 L.R.A.,N.S., 969.

3. N.C.—State v. Haynie, 84 S.E. 385, 169 N.C. 277, 283.

4. Minn.—Rask v. Hendrum, 218 N.W. 115, 173 Minn. 572.

5. Bouvier L.D.

6. Bouvier L.D.

7. Adams Gloss., citing Spelman and Termes de la Ley.

8. Black L.D.
"Carucata" in law Latin, is a carve of land.—Adams Gloss.
"Carvage" is said to be the same as "carucage."—Black L.D.

9. See 10 C.J. p 1246 notes 18, 19. See also Bovata terræ 11 C.J.S. p 761 note 15

10. Black L.D.

11. Adams Gloss., citing Cowell.

12. Black L.D., citing Britton c 34.

13. Kan.—Butler v. White Eagle Oil Refining Co., 34 P.2d 120, 121, 140 Kan. 202.

14. Adams Gloss.

Cas fortuit. The French phrase corresponding to the Latin "casus fortuitus;" meaning a fortuitous event, an inevitable accident, an irresistible force, an "unforeseen event," or "vis major."[15]

CA. SA. See Abbreviations 1 C.J.S. p 276 note 5; also Capias ad Satisfaciendum 12 C.J.S. p 1120 notes 28–30.

CASA In Spanish law, house, the term being used in the several senses of that word in English.[16]

Casa real. The royal palace or the royal family, and, derivatively, the term is also used to designate a municipal building, a courthouse.[17]

CASACIÓN. A Spanish term, corresponding to the French cassation, and defined in the civil law as the process of annulling or setting aside some act or instrument, as the vacation of a judgment on appeal; hence a court of review is termed a "corte de casación."[18]

CASAMENTUM. In old European law, the land held by a vassal or tenant.[19]

CASAMIENTO. One of several Spanish terms for marriage.[20]

CASATA or CASSATA. Law Latin, in old European law, a house with land sufficient for the support of one family.[21]

CASATUS or CASSATUS. In old European law, a vassal or feudal tenant possessing a "casata," that is, his own dwelling, his own family, his own property.[22]

15. U.S.—Viterbo v. Friedlander, La., 7 S.Ct. 962, 973, 120 U.S. 707, 30 L.Ed. 776.
11 C.J. p 31 note 58.

16. Escriche Diccionario
See also Allanamiento de Morada, 3 C.J.S. p 883 notes 45, 46.
Casa de corrección—a reformatory, usually for women and children.—Escriche Diccionario.
Casa de huéspedes—a boarding house, hotel, or tavern.—Escriche Diccionario; see also C.J.S. title Innkeepers § 1.
Casa pública—literally a public house, hence a house of prostitution. —Escriche Diccionario.

17. Philippine.—Catbalogan v. Director of Lands, 17 Philippine 216, 223.

18. Escriche Diccionario.

19. Adams Gloss.

20. Escriche Diccionario.

21. Adams Gloss., citing Spelman.
Otherwise called "hida," a hide of land, and by Bede, "familia."—Black L.D.

22. Adams Gloss.

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Federal Supplement	615 F.Supp. 95
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CARRIERS

In view of the adoption in many jurisdictions of the Uniform Commercial Code, which is applicable to transactions entered into and events occurring after the date it becomes effective in a particular jurisdiction its provisions should be examined in connection with the use of this title

The "Motor Carrier Act 1935" and other statutes, in so far as they relate to the relationship of a land carrier and its customers, are considered in this Title, as relating to matters between the public authorities and the land carrier see other titles, such as Commerce, Constitutional Law, Motor Vehicles, etc Matters relating to carriers by air see the title Aerial Navigation, and to carriers by water see the title Shipping and like titles

§ 1. Kinds of Carriers

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1 U S—Sea Ins Co v Sinks, C C A Ill, 166 F 2d 623

La—Higginbotham v Public Belt Railroad Commission App 181 So 65 reh den 181 So 221 affd 188 So 395 192 La 525

S C—Windham v Pace, 6 S E 2d 270, 192 S C 271

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U S—Russell Transfer Inc v U S C A 547 F 2d 231

Ga—Undercofler v L C Robinson & Sons, Inc 141 S E 2d 847 111 Ga App 411 affd 144 S E 2d 755 221 Ga 391

N Y—Grazier v State, 181 N Y S 2d 994 15 Misc 2d 471 affd 192 N Y S 2d 647 9 A D 2d 829

S C—Huckabee Transport Corp v Western Assur Co of Toronto Canada, 121 S E 2d 705 238 S C 565

2 La—Higginbotham v Public Belt Railroad Commission, supra, n 1

3 Miss—Erwin Mills, Inc v Williams, 118 So 2d 339 232 Miss 335

Wis—C J S cited in United Parcel Service of Milwaukee v Public Service Commission, 4 N W 2d 138 142, 240 Wis 603 reh den 5 N W 2d 635 240 Wis 603

5 Ill—Crane v Railway Express Agency 15 N E 2d 866, 369 Ill 110

Pa—Betterman v American Stores Co 16 Cambria 113

Wash—McDonald v Irby 445 P 2d 192, 74 Wash 2d 431

Contractual exemption of liability for negligence. It has been broadly stated that a contractual exemption of liability from negligence as to a common carrier is void only when the carrier is acting in public, not private, capacity [5.5]

5.5 Fla—Russell v Martin, 88 So 2d 315

§ 2. In General

6 Ill—C.J.S. cited in Meyer v Rozran, 77 N E 2d 454 457 333 Ill App 301

Mont—Board of Railroad Comrs v Gamble-Robinson Co 111 P 2d 306, 111 Mont 441

Okl—C.J.S. cited in Fischer v Oklahoma City 174 P 2d 244 247 198 Okl 22, cert den 67 S Ct 1315 331 U S 824 91 L Ed 1840

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La—Greater Baton Rouge Port Commission v Cargill, Inc App 205 So 2d 151 annulled and set aside 214 So 2d 119, 252 La 718

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8 U S—U S v Contract Steel Carriers, Ind 76 S Ct 461 350 U S 409 100 L Ed 482—Cutter v Allied Van Lines, Inc D C Cal 349 F Supp 907 affd C A 514 F 2d 1196

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Me—Public Utilities Commission v Johnson Motor Transport, 84 A 2d 142, 147 Me 138

Mass—First National Stores v H P Welch Co, 55 N E 2d 200, 316 Mass 147

Mich—G & A Truck Line, Inc v Public Service Commission, 60 N W 2d 285 337 Mich 300—Greyhound Corp v Michigan Public Service Commission, 104 N W 2d 395 360 Mich 578

Pa—Merchants Parcel Delivery v Pennsylvania Public Utility Commission, Pa Super 28 A 2d 340 344, 150 Pa Super 120

Tex—C.J.S cited in Rogers v Crespo & Co, Civ App 259 S W 2d 928, 930—Texan Meat Co v Inness, Civ App, 308 S W 2d 956

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9 Tex—Austin Fireproof Warehouse Transfer Co v Faltinson supra, n 8

10 Ill—Meyer v Rozran, supra, n 8—Type & Press of Ill Inc v Gorter 164 N E 2d 223 24 Ill App 2d 186

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N Y—Friedman v State, 282 N Y S 2d 858 54 Misc 2d 448, mod on oth grds 297 N Y S 2d 850 31 A D 2d 992

11 U S—Sea Ins Co v Sinks, supra, n 1—C.J.S. cited in Chicago & N W Ry Co v Davenport, C A Iowa 205 F 2d 589 595, cert den 74 S Ct 320, 346 U S 930, 98 L Ed 422

Ill—Meyer v Rozran, supra, n 8—Type & Press of Ill, Inc v Gorter 164 N E 2d 223 24 Ill App 2d 186

Me—Public Utilities Commission v Johnson Motor Transport, supra, n 8

N C—State ex rel Utilities Commission v Gulf-Atlantic Towing Corp 110 S E 2d 886, 251 N C 105

Pa—Gornish v Pennsylvania Public Utility Commission, 4 A 2d 569, 134 Pa Super 565—Com v Babb 70 A 2d 660, 166 Pa Super 63

Wis—Brockway v Travelers Ins Co App 321 N W 2d 332, 107 Wis 2d 636

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12 U S—C.J.S. cited in Bowles v Wooter D C Ill, 65 F Supp 359, 363—C.J.S cited in Denver Petroleum Corp v Shell Oil Co D C Colo, 306 F Supp 289 303

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U S—National Trailer Convoy Inc v U S, D C Okl, 293 F Supp 634

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(4) N Y—W R Light Co, Inc v Rentar Warehousing & Distributing Corp 420 N Y S 2d 405 71 A D 2d 1020

13 U S—C.J.S. cited in U S v Stephen Bros Line, C A Fla 384 F 2d 118, 123—Cuccio v New Orleans Public Belt R R D C La 285 F Supp 373

Iowa—Circle Exp Co v Iowa State Commerce Commission, 86 N W 2d 888, 249 Iowa 651

Kan—C J S. cited in State ex rel Fatzel v Sinclair Pipe Line Co 304 P 2d 930, 941 180 Kan 425

Neb—Application of Thomson, 6 N W 2d 607, 142 Neb 477

N Y—Olive Kent Park v Moshassuck Transp Co 71 N Y S 2d 15 189 Misc 864, affd 80 N Y S 2d 729 274 App Div 765

N C—State ex rel Utilities Commissioner v Gulf-Atlantic Towing Corp 110 S E 2d 886 251 N C 105

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(3) Additional statements—Montgomery Ward & Co v Northern Pac Terminal Co of Or D C Or 128 F Supp 475—Grace Line Inc v Federal Maritime Bd C A 280 F 2d 790 cert den 81 S Ct 360 364 U S 933, 5 L Ed 2d 365

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U S—Florida Power & Light Co v Federal Energy Regulatory Commission, C A 660 F 2d 668 cert den 103 S Ct 800 459 U S 1156, 74 L Ed 2d 1003

N C—Jackson v Stancil 116 S E 2d 817 253 N C 291

Okl—Dolese Bros Co v Privett, 622 P 2d 1080

14 U S—Kelly v General Elec Co D C Pa 110 F Supp 4 affd C A 204 F 2d 692, cert den 74 S Ct 137 346 U S 886 98 L Ed 390—C J S cited in Semon v Royal Indem Co, C A La 279 F 2d 737 739—Cuccio v New Orleans Public Belt R R D C La 285 F Supp 373—Utica Mut Ins Co v Port Cargo Motor Lines, Inc D C N Y 478 F Supp 351 applying New Jersey law

Cal—Alves v Public Utilities Commission of Cal 260 P 2d 785 41 C 2d 344

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Other statements of rule

(4) Additional statements

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S C—Huckabee Transport Corp v Western Assur Co of Toronto, Canada, 121 S E 2d 105 238 S C 565

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(1) Standard Oil Co of New Jersey v Graham Oil Transport Corporation, Pa 59 Montg Co 196 affd 41 A 2d 414 157 Pa Super 41

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Me Public Utilities Commission v Johnson Motor Transport, supra, n 8

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Pa Franklin County Bd of Com'rs v Com Public Utility Commission, 313 A 2d 185 11 Pa Cmwlth 487

S D—Aberdeen Cable TV Service Inc v City of Aberdeen, 176 N W 2d 738 85 S D 57 cert den 91 S Ct 455 400 U S 991 27 L Ed 2d 439

Motor Carrier Act

D C—Vincent v U S Mun App 58 A 2d 829

Invitation to public with right of refusal held not to constitute public carrier

Miss—Erwin Mills, Inc v Williams, 118 So 2d 339 238 Miss 335

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15 Fla—C J S cited in Ruke Transport Line, Inc v Green App 156 So 2d 176, 178

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Me—In re United Parcel Service Inc 256 A 2d 443

Ohio—Hazelton v Public Utilities Commission of Ohio, 60 N E 2d 673, 145 Ohio St 34

16 Fla—C J S cited in Ruke Transport Line Inc v Green, App 156 So 2d 176 178

Iowa—Circle Exp Co v Iowa State Commerce Commission, 86 N W 2d 888, 249 Iowa 651

17 Cal—Samuelson v Public Utilities Commission of State, 227 P 2d 256, 36 Cal 2d 722

Fla—C J S cited in Ruke Transport Line Inc v Green, App 156 So 2d 176, 178

Miss—Erwin Mills, Inc v Williams, 118 So 2d 339, 238 Miss 335

Reason for refusal held sufficient

Neb—Application of Ferguson Trucking Co 81 N W 2d 915 164 Neb 85

One of the characteristics of a common carrier is that its contract usually consists of the terms and conditions in the uniform bill of lading,[17.5] and its charges are based upon published tariffs.[17.10]

17.5 Fla—Ruke Transport Line, Inc v Green, App, 156 So 2d 176

Md—Baltimore Tank Lines v Public Service Commission, 137 A 2d 187 215 Md 125

17.10 Fla—Ruke Transport Line, Inc v Green, App 156 So 2d 176

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18 U S—Northern Pac Co v Minneapolis, St P & S S M Ry Co C A Ill, 224 F 2d 181 cert den 76 S Ct 178, 350 U S 900, 100 L Ed 791

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20 U S—Tilson v Ford Motor Co supra, n 8—Republic Carloading & Distributing Co v Missouri Pac R Co C A Mo, 302 F 2d 381—Lone Star Steel Co v McGee, C A Tex, 380 F 2d 640, cert den 88 S Ct 480, 389 U S 977, 19 L Ed 2d 471

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Ill—Type & Press of Ill, Inc, v Gorter, 164 N E 2d 223 24 Ill App 2d 186

Mass—First National Stores v H P Welch Co supra, n 8

Okl—Dolese Bros Co v Privett, 622 P 2d 1080

Mere devices, etc—Gornish v Pennsylvania Public Utility Commission supra, n 11

Motor Carrier Act

U S—A W Stickle & Co v Interstate Commerce Commission, C C A Okl 128 F 2d 155 cert de 63 S Ct 46, 317 U S 650, 87 L Ed 523 ord withheld 63 S Ct 67 reh den 63 S Ct 154, 3 U S 707 87 L Ed 564

D C—Vincent v U S supra, n 14

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21 Ariz—Schade Transfer & Storage Co v Alaba Freight Lines, 254 P 2d 800, 75 Ariz 201

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22 U S—Sea Ins Co v Sinks, supra, n 1

Ariz—Quick Aviation Co v Kleinman 138 P 2d 89 60 Ariz 430

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23 Colo—McKay v Public Utilities Commission supra, n 14—Taussig v Moffat Tunnel Water & Development Co 106 P 2d 363 106 Colo 384

Iowa—Kvalheim v Horace Mann Life Ins Co, 21 N W 2d 533

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25 U S—Semon v Royal Indem Co, C A La, 279 F 2d 737

Mass—Mt Tom Motor Lines v McKesson & Robbins supra, n 8

26 Pa—Gornish v Pennsylvania Public Utility Commission, supra, n 11

Duty to serve all indifferently not lessened by its violation

U S—Semon v Royal Indem Co C A La, 279 F 2d 737

27 U S—Utica Mut Ins Co v Port Cargo Motor Lines, Inc, D C N Y 478 F Supp 351

28 U S—Lone Star Steel Co v McGee, C A Tex, 380 F 2d 640 cert den 88 S Ct 480, 389 U S 977 19 L Ed 2d 471

Iowa—Kvalheim v Horace Mann Life Ins Co 219 N W 2d 533

Tex—Mayhew v McFarland, 153 S W 2d 428, 137 Tex 391, mand conf to Civ App 154 S W 2d 214

Carrier need not solicit cargo

U S—U S v Stephen Bros Line, C A Fla, 384 F 2d 118

31 U S—U S v Stephen Bros Line, C A Fla, 384 F 2d 118

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N Y—Olive Kent Park v Moshassuck Transp Co, supra, n 13

32 U S—Utica Mut Ins Co v Port Cargo Motor Lines, Inc, D C N Y 478 F Supp 351

34 Cal—Nolan v Public Utilities Commission, 260 P 2d 790 41 C 2d 392

Pa—Gornish v Pennsylvania Public Utility Commission, supra, n 11

35 U S—Zima Corp v M V Roman Pazmish, D C N Y, 493 F Supp 268

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36 U S—Bowles v Wieter, D C Ill, 65 F Supp 359—U S v Smith, supra, n 8

N Y—Olive Kent Park v Moshassuck Transp Co supra, n 13

Pa—Standard Oil Co of New Jersey v Graham Oil Transport Corporation, supra, n 14

Tex—Austin Fireproof Warehouse Transfer Co v Faltinson, supra, n 8

43 Pa—Villari v James, 38 A 2d 379, 155 Pa Super 155

45 Neb—State ex rel State Ry Commissor v Rai[illegible]way, 7 N W 2d 502, 151 Neb 333

Person hauling own property

Md—Weiler v Kolb's Bakery & Dairy, 4 A 2d 170, 176 Md 91

N M—Lloyd McKee Motor, Inc v New Mexico State Corp Commission, 602 P 2d 1026, 93 N M 539

Ohio—Cooperative Legislative Committee of R R Brotherhoods v Public Utilities Commission, 80 N E 2d 159, 149 Ohio St 511

For hire or reward defined

Mich—Michigan Consol Gas Co v Sohio Petroleum Co, supra, n 12

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Miss—C J S. black letter summary quoted in Erwin Mills, Inc v Williams, 118 So 2d 339, 341, 238 Miss 335

52 U S—Brown & Root, Inc v American Home Assur Co, C A Tex, 353 F 2d 113, cert den 86 S Ct 1465, 384 U S 943, 16 L Ed 2d 541

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Personal operation

D C—In re Rice, 165 F 2d 617, 83 U S App D C 26

53. Common ownership or contractual relationship with railroad

U S—Lone Star Steel Co v McGee, C A Tex, 380 F 2d 640, cert den 88 S Ct 480, 389 U S 977, 19 L Ed 2d 471

§ 4. Private Carrier

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56 U S—Goldman v Hollywood Beach Hotel Co, C A Fla, 244 F 2d 413

N M—Lloyd McKee Motors, Inc v New Mexico State Corp Commission, 602 P 2d 1026, 93 N M 539

Commonly understood meaning as used by courts

Ariz—Visco v State ex rel Pickrell, 388 P 2d 155, 95 Ariz 154

Colo—C J S. quoted at length in McKay v Public Utilities Commission, supra, n 14

Ill—C J S. cited in Meyer v Rozran, supra, n 6

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S C—Hucklebee Transport Corp v Western Assur Co of Toronto, Ont., 121 S E 2d 105, 238 S C 565

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"Contract carrier"

U S—Costello v Smith, C A Conn, 179 F 2d 715, 16 A L R 2d 954—U S v Contract Steel Carriers, U S Ind, 76 S Ct 461, 350 U S 409, 100 L Ed 482—Home Ins Co v Riddell, C A Miss, 252 F 2d 1

Ariz—Crane v Amado, 214 P 2d 518, 69 Ariz 389

Me—Public Utilities Commission v Johnson Motor Transport, supra, n 8

Neb—Wells Fargo Armored Service Corp of Neb v Bankers Dispatch Corp., 182 N W 2d 648, 186 Neb 261—Wells Fargo Armored Service Corp of Neb v Bankers Dispatch Corp., 198 N W 2d 195, 188 Neb 584

N Y—Reliable Textile Co v Deptula Trucking Co, 326 N Y S 2d 217, 37 A D 2d 952, affd 291 N E 2d 721, 31 N Y 2d 824, 339 N Y S 2d 676

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57 U S—Lone Star Steel Co v McGee, C A Tex, 380 F 2d 640, cert den 88 S Ct 480, 389 U S 977, 19 L Ed 2d 471

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Trash collector

N H—New Hampshire Public Utilities Commission v Naughton, 134 A 2d 311, 118 N H 750

58 U S—Home Ins Co v Riddell, C A Miss, 252 F 2d 1—Lone Star Steel Co v McGee, C A Tex, 380 F 2d 640, cert den 88 S Ct 480, 389 U S 977, 19 L Ed 2d 471

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59 U S—Bigley Trucking Corp v U S, Ct Cl, 149 F Supp 141, 137 Ct Cl 903

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Mass—Greyvan Storage v Department of Public Utilities, 127 N E 2d 579, 332 Mass 712

Okl—Dolese Bros Co v Privett, 622 P 2d 1080

Pa—Merchants Parcel Delivery v Pennsylvania Public Utility Commission, supra, n 14

Conversion of a private carrier into a common carrier cannot be accomplished by mere legislature flat—Morel v Railroad Commission of California, 81 P 2d 144, 11 Cal 2d 488

Motor Carrier Act

U S—Interstate Commerce Commission v A W Stickle & Co, D C Okl, 41 F Supp 268, affd, C C A, 128 F 2d 155, cert den 63 S Ct 46, 317 U S 650, 87 L Ed 523, reh den 63 S Ct 154, 317 U S 707, 87 L Ed 564

§ 5. —— Common Carrier Acting as Private Carrier

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Necessity of showing private activity distinguishable from regular public [illegible]

D C—Overseas Nat Airways, Inc v C A B, C A, 307 F 2d 634, 113 U S App D C 297

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Cal—Executive Aviation, Inc v National Ins Underwriters, 94 Cal Rptr 347, 16 C A 3d 799

61 U S—Fleming v Chicago Cartage Co, C C A Ill, 160 F 2d 992—U S v Smith, C A Ohio, 215 F 2d 217

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Carrier rendering services under contract, etc.

Wis—Loly v Joint School Dist No 2, City of Cumberland, 166 N W 2d 809, 42 Wis 2d 253

Making of contract considered but not conclusive

Mass—Superline Transp Co v My Bread Baking Co, 214 N E 2d 885, 350 Mass 364

62 U S—Jackson v Northwest Airlines, D C Minn, 70 F Supp 501, affd C A, 165 F 2d 74, cert den 70 S Ct 20, 342 U S 812, 96 L Ed 2d 614

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§ 6. Railroad Companies

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65 U S—Michigan Millers Mut Fire Ins Co v Canadian Northern Ry Co, C C A Minn, 152 F 2d 292—C J S. quoted in Akron, Canton & Youngstown R Co v I C C, C A Ohio, 611 F 2d 1162, 1166, cert den 101 S Ct 97, 449 U S 830, 66 L Ed 2d 34

Mo—William A Smith Contracting Co v Missouri Pac R Co, App, 481 S W 2d 580, cert den 93 S Ct 900, 409 U S 1107, 34 L Ed 2d 687

Status not [illegible]gard by executing real estate contract

Ind—Pennsylvania R Co v Kent, 198 N E 2d 615, transfer den S.D., 202 N E 2d 893

Dual status where tracks leased to [illegible] plant

Ind—Penn Cent Co v Youngstown Sheet & Tube Co, 253 N E 2d 704, 146 Ind App 216

72 U S—Powell v U S, C C A N C, 112 F 2d 764

73 U S—Powell v U S, supra, n 72

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79 U S—Watterson v New York Cent R Co, C A Mich, 235 F 2d 114

84 Cal—Powell v Pacific Naval Air Base Contractors, 209 P 2d 631, 93 Cal App 2d 629

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88 Cal—Powell v Pacific Naval Air Base Contractors, supra, n 84

90 U S—Armour & Co v Alton R Co, C C A Ill, 111 F 2d 913, affd 61 S Ct 498, 312 U S 195, 85 L Ed 771

A stockyard company engaged in [illegible]ng and loading livestock shipped interstate by rail to and from stockyard was a "common carrier"—Union Stock Yard & Transit Co of Chicago v U S, supra, n 20

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25 US—Chicago & N W Ry Co v Davenport C A Tex 205 F 2d 589 cert den 74 S Ct 320, 346 U S 930 98 L Ed 422

§ 7. Express and Transportation Companies

35 Ga—Railway Exp Agency v Cook 32 S E 2d 822 198 Ga 715

Ill—Crane v Railway Express Agency 15 N E 2d 866, 369 Ill 110

Tex—Railway Exp Agency Inc v Miller Civ App 346 S W 2d 905 revd on oth grds 356 S W 2d 771 163 Tex 400

Va—Railway Exp Agency v Kessler, 52 S E 2d 102, 189 Va 301

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However where a carrier has a legal duty to carry express the express company is only an agent of the carrier 42.5

42.5 US—Boos v Railway Exp Agency Inc D C S D 153 F Supp 14 affd C A 253 F 2d 896

§ 8. Draymen, Carters, Truckmen, Etc.

48 Ill—Type & Press of Ill Inc v Gorter 164 N E 2d 223 24 Ill App 2d 186

N Y—People v Heckman Trucking Co 14 N E 2d 801 277 N Y 480

N C—Merchant v Lasater 30 S E 2d 217 224 N C 343

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54 US—Textron, Inc v Lowell Trucking Corp D C N Y, 74 F Supp 322—C.J.S. quoted in Home Ins Co v Riddell, C A Miss, 252 F 2d 1 4—C.J.S. cited in US v Stephen Bros Line, C A Fla, 384 F 2d 118, 123

Ky—Senters v Ratliff's Admr 128 S W 2d 724, 278 Ky 290—Parker v Stewart, 176 S W 2d 88, 296 Ky 48

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§ 10. Forwarding Agents

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60 US—US v Pethke, D C Colo 132 F Supp 22—Eisenhuber v US, D C N Y 144 F Supp 606—Aquascutum of London, Inc v SS American Challenger, C A N Y 426 F 2d 205

D C—National Carloading Corp v US, C A, 221 F 2d 81 95 US App D C 208

Mich—American Transp Co v Insurance Co of North America, 1 N W 2d 521 300 Mich 230, 141 A L R 913

Under the Freight Forwarder Act the forwarder has characteristics of both carrier and shipper—Chicago, M, St P & P R Co v Acme Fast Freight, N Y, 69 S Ct 692, 336 US 465 93 L Ed 817

63 US—Republic Carloading & Distributing Co v Missouri Pac R Co, C A Mo, 302 F 2d 381

64. Liability as to reconsignment

N Y—Wald-Green Food Corp v Acme Fast Freight, 103 N Y S 2d 768, 200 Misc 679, app den 109 N Y S 2d 191 279 App Div 766, affd 110 N Y S 2d 514, 200 Misc 687

67 Cal—Merchant Shippers Ass'n v Kellogg Exp & Draying Co 170 P 2d 923, 28 Cal 2d 594

§ 11. Companies Operating Pipe Lines

70 U S—Thomas v Amerada Hess Corp D C Pa, 393 F Supp 58

Ky—State Tax Commission v Petroleum Exploration, 68 S W 2d 777 779 253 Ky 119

Miss—Ohio Oil Co v Fowler 100 So 2d 128, 232 Miss 694

Okl—French v Ayres, 207 P 2d 308, 201 Okl 494

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71 U S—Montana-Dakota Utilities Co v Federal Power Commission, C A 169 F 2d 392, cert den 69 S Ct 82, 335 U S 853 93 L Ed 401

Ky—Texas Co v Com 198 S W 2d 316, 303 Ky 590

72 Okl—Gulf Oil Corp v State, 360 P 2d 933

Tex—Thompson v United Gas Corp, Civ App 190 S W 2d 504 err ref

Under some statutes, companies organized for the purpose of building or constructing pipelines for conveying and distributing oil and gas are authorized to exercise right of eminent domain and to build and construct pipelines along or across public lands.72.5

72.5. State penitentiary lands as "public lands"

Miss—State v Michigan Wisconsin Pipeline Co 360 So 2d 684

73 Ill—Tidewater Pipe Co v Board of Review of Crawford County 143 N E 87, 311 Ill 375

Kan—State ex rel Fatzer v Sinclair Pipe Line Co, 304 P 2d 930, 180 Kan 425

74 Mich—Michigan Consol Gas Co v Soluo Petroleum Co, 32 N W 2d 353 320 Mich 65

Tex—China-Nome Gas Co Inc v Riddle, Civ App 541 S W 2d 905 err ref no rev err

Company not common carrier

U S—Interstate Natural Gas Co v Louisiana Public Service Commission, D C La, 34 F Supp 980

Okl—Gulf Oil Corp v State, 360 P 2d 933

§ 12. Other Common Carriers

75. Radio station or network as not common carrier

U S—Federal Communications Commission v Sanders Bros Radio Station, 60 S Ct 693, 309 U S 470, 642, 84 L Ed 869, 1037—Federal Broadcasting System v Associated Broadcasting Co, C C A N Y, 167 F 2d 349, cert den 69 S Ct 43, 335 U S 821, 93 L Ed 375

D C—Federal Communications Commission v Stahlman, 40 F Supp 338, 75 U S App D C 176, affd 126 F 2d 124 75 U S App D C 176

Parking garage as not common carrier

Tenn Exec v Allright Auto Parks, Inc, 456 S W 2d 660, 61 Tenn App 543

78 D C—International Detective Service, Inc v I C C, C A, 595 F 2d 862, 194 U S App D C 55

Okl—Dymond Cab Co v Branson, 131 P 2d 1007, 191 Okl 604

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81 Va—Virginia Stage Lines v Com ex rel., 38 S E 2d 576, 185 Va 390

85 Kan—Nolan v Auto Transportation, 597 P 2d 614, 226 Kan 176

§ 13. Applicability of Law of Bailments

Tex—C.J.S. quoted in Beck v Lasater Civ App, 286 S W 2d 957 959, err ref no rev err

§ 14. Incorporation, Franchises and Powers

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Miss—Payne v Jackson City Lines, Inc, 70 So 2d 520 220 Miss 180

Carriers obligation to extend service areas is dependent on franchise

Cal—Greyhound Lines, Inc v Public Utilities Commission, 67 Cal Rptr 97, 438 P 2d 801, 68 C 2d 406

Termination of franchise

Or—Rose City Transit Co v City of Portland, 525 P 2d 1325, 18 Or App 369, mod on oth grds, 532 P 2d 339 271 Or 588

Transfer of franchise

Neb—Herman Bros, Inc v Spector Industries, Inc, 308 N W 2d 720, 209 Neb 513

91 U S—Montgomery Ward & Co v Northern Pac Terminal Co of Or, D C Or 128 F Supp 475

Tex—Col-Tex Refining Co v Hart, Civ App, 144 S W 2d 909 err ref

Strict construction

Tex—Dye Trucking Co v Miller, Civ App, 397 S W 2d 507, err ref no rev err

92 U S—Transcontinental Gas Pipe Line Corp v Borough of Milltown, Middlesex County, D C N J, 93 F Supp 287—In re Third Ave Transit Corp, C A N Y, 233 F 2d 310—Georgia S & F Ry Co v Atlantic Coast Line R Co, D C Fla, 250 F Supp 260, revd on oth grds, C A, 373 F 2d 493, cert den 88 S Ct 69, 389 U S 851, 19 L Ed 2d 120

§ 15. In General

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97 U S—Montgomery Ward & Co v Northern Pac Terminal Co of Or, supra, n 91

Ga—Beverley v De Kalb County, 77 S E 2d 740, 210 Ga 41, conf to 78 S E 2d 365, 88 Ga App 856

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N J—Application of Central R Co of N J, 127 A 2d 436, 43 N J Super 13

N Y—Dominguez v Consolidated Rail Corp, 443 N Y S 2d 334, 110 Misc 2d 929

N D—Kuhn v North Dakota Public Service Commission, 76 N W 2d 171

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Wis—C.J.S. cited in United Parcel Service of Milwaukee v Public Service Commission, 4 N W 2d 138, 142, 240 Wis 603, reh den 5 N W 2d 635, 240 Wis 603

Issuance of stock without approval

Md Public Service Comm'n of Md v Baltimore Transit Co, 114 A 2d 834, 207 Md 524

National transportation policy

U S—Dixie Highway Exp, Inc v U S D C Miss, 242 F Supp 1016

Restriction for protection of public interest

U S—Interstate Investors Inc v US D C N Y 287 F Supp 374 affd 89 S Ct 707 393 U S 479 21 L Ed 2d 687

98 U S—Atlantic Coast Line R Co v Public Service Commission of S C D C S C 77 F Supp 675

Ordinance requiring racial segregation held invalid

U S—Christian v Jemison C A La 303 F 2d 52, cert den 83 S Ct 287 371 U S 920, 9 L Ed 2d 229

Publicly owned carrier

Neb—Ritums v Howell 209 N W 2d 160, 190 Neb 503

99 Pa—Meyers v Pennsylvania Public Utility Commission 65 A 2d 256, 164 Pa Super 431

Public and private functions

Minn—Chicago Great Western Ry Co v Jesse, 82 N W 2d 227 249 Minn 324—Chicago M St P & P R Co v Chicago Great Western Ry Co 130 N W 2d 56, 268 Minn 500

1. Expenditures in excess of reasonable service not required

Neb—Application of Chicago, R I & P R Co 101 N W 2d 448 169 Neb 867

Combination of carriers

Utah—Greyhound Lines, Inc v Public Service Commission, 547 P 2d 199

§ 16. By State

3 U S—Carson v Vance Trucking Lines, Inc D C S C 245 F Supp 13

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N J—State v Traffic Tel Workers Federation of N J 66 A 2d 616, 2 N J 335 9 A L R 2d 854—Petition of New Jersey Natural Gas Co 263 A 2d 174 109 N J Super 324

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Pa—Gardner v Allegheny County, 114 A 2d 491, 382 Pa 88 Paradise v Pennsylvania Public Utility Commission 132 A 2d 754 184 Pa Super 8

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Regulation of private or contract carriers

Idaho—Kuhn v Box Canyon Livestock, Inc, 637 P 2d 1154, 102 Idaho 658

N M—Lloyd McKee Motors, Inc v New Mexico State Corp Commission 602 P 2d 1026, 93 N M 539

Wis—United Parcel Service of Milwaukee v Public Service Commission 4 N W 2d 138 240 Wis 603 reh den 5 N W 2d 635

Status as common carriers must appear

Cal—Samuelson v Public Utilities Commission of State, 227 P 2d 256, 36 Cal 2d 722

Statutory franchise

N C—State ex rel Utilities Commission v Queen City Coach Co 63 S E 2d 113 233 N C 119

Erection of artificial barriers to competition not contemplated

Pa—Com Pennsylvania Public Utility Commission v Purolator Courier Corp Cmwlth 355 A 2d 850 24 Pa Cmwlth 301

Requiring exempt carrier to file with commission

Utah—Heber Valley Truck, Inc v Utah Coal and Energy Inc 611 P 2d 389

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4 Md—Public Service Commission of Md v Baltimore Transit Co 114 A 2d 834 207 Md 524

5 Cal—Southern Pac Co v Railroad Commission of California, 87 P 2d 1055 13 Cal 2d 89

Kan—Kansas Power & Light Co v Mobil Oil Co 426 P 2d 60 198 Kan 556

N Y—State v New York Movers Tariff Bureau, Inc 264 N Y S 2d 931 48 Misc 2d 225

Tex—Colorado River Western Ry v Texas & N O R Co Civ App 283 S W 2d 768 err ref no rev err

And a carrier cannot, by making contracts for future transportation, prevent or postpone assertion by state of the power to regulate it[6]

7 N J—Pennsylvania R Co v Board of Public Utility Comrs, 93 A 2d 339 11 N J 43

8 U S—In re Independent Truckers, Inc D C Neb 212 F Supp 402

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Tenn—City of Chattanooga v Fanburg, 265 S W 2d 15 196 Tenn 226, 42 A L R 2d 1200

State held committed to regulated monopoly concept

Ariz—Arizona Corp Commission v Superior Court In and For Maricopa County 459 P 2d 489 105 Ariz 56—Creamer v Pioneer Transp Co 486 P 2d 220, 15 Ariz App 108

9 U S—Southern Ry Co v Alabama Public Service Commission, D C Ala, 91 F Supp 980, revd on oth grds 71 S Ct 762, 341 U S 341, 95 L Ed 1002

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Protection of competing carriers

Wash—State ex rel Railway Exp Agency, Inc v Washington Public Service Commission, 354 P 2d 711 57 Wash 2d 32

Precluding reasonable competition

Va—Park Bros Moving Corp v S & M Systems Corp, 218 S E 2d 441, 216 Va 322

10 U S—Weinberg v Northern Pac Ry Co, C C A Minn 150 F 2d 645

Cal People v Western Air Lines, supra, n 8

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Miss—Illinois Cent R R v Town of Goodman 173 So 2d 116 252 Miss 297

11 Ill—Alton R Co v Illinois Commerce Commission, 48 N E 2d 381, 382 Ill 473

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13 Colo—B & M Service, Inc v Public Utilities Commission, 429 P 2d 293 163 Colo 228

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19.5 Fla—Alterman Transport Lines, Inc v State App 405 So 2d 456

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N Y—Albany County v Capital Dist Transp Authority 355 N Y S 2d 839 44 A D 2d 476

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22 Neb—Ganka v Chicago & N W Ry Co, 191 N W 2d 438, 187 Neb 369

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(2) Power to investigate

Me—Cole's Exp v O'Donnell's Exp 163 A 2d 360, 156 Me 211

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42 Iowa—In re Iowa State Commerce Commission Docket No HA 2287—Investigation of Arrow Exp Forwarding Co 110 N W 2d 390, 252 Iowa 1237

43 Alaska—Mukluk Freight Lines Inc v Nabors Alaska Drilling, Inc 516 P 2d 408

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(2) Other matters

U S—American Cylinder Mfrs Committee v Department of Trans C A 9 Y 578 F 2d 24

Iowa—In re Iowa State Commerce Commission Docket No HA-2287—Investigation of Arrow Exp Forwarding Co 110 N W 2d 390 252 Iowa 1237

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Mo—State ex rel Smithco Transport Co v Public Service Commission App 307 S W 2d 761 transf to Sup 316 S W 2d 6

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44 **Strict rules of evidence inapplicable**

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46 U S—Cavalier Poultry Corp v Fawley Motor Lines, D C Va 138 F Supp 583, affd in part and revd in part on oth grds C A 235 F 2d 416—Haddad Craft Produce Co Inc v U S, D C Ark 376 F Supp 70

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(1) Other statements

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47 U S—Seaboard Air Line R Co v Daniel, S C 68 S Ct 426, 333 U S 118 92 L Ed 580

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50 U S—Eastern Exp Inc v U S D C Ind 198 F Supp 256, affd C A 82 S Ct 640, 369 U S 37 7 L Ed 2d 548

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57 **Contract carriers**

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58. **Revocation of permit**

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60 **Terminal companies**

(2) Other matters

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63 U S—Civil Aeronautics Bd v Modern Air Transport, D C N Y, 81 F Supp 803 affd C A 179 F 2d 622

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82 U S—Pennsylvania R Co v U S, D C Md, 54 F Supp 381 affd 65 S Ct 543, 323 U S 588, 89 L Ed 499—Watkins Motor Lines, Inc v I C C, C A 641 F 2d 1183

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89 U S—U S v South Buffalo Ry Co supra, n 87

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96 U S—U S v South Buffalo Ry Co supra, n 87

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4.5 U S—Boos v Railway Exp Agency Inc D C S D 153 F Supp 14 aff'd C A 253 F 2d 896—Memphis & L R R Co v Southern Exp Co Ark 6 S Ct 542, 117 U S 1 29 L Ed 791

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N C—State ex rel Utilities Commission v J D McCotter Inc 192 S E 2d 629 16 N C App 475 rev'd 194 S E 2d 859 283 N C 104

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N Y—East Coast Moving & Storage, Inc v Flappin, 355 N Y S 2d 525 78 Misc 2d 140

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La—Gulf Coast Pre-Mix Trucking Inc v Louisiana Public Service Commission 336 So 2d 849

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Idaho—Browning Freight Lines, Inc v Wood, 579 P 2d 120 99 Idaho 174

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W Va—Chesapeake & Potomac Co of West Virginia v State Tax Dept 239 S E 2d 918 161 W Va 77

If a carrier does not have the authority to perform a certain operation, it cannot perform that service by leasing another carrier's rights[6.5]

6.5 Utah—Mountain States Moving & Storage Co v Suhr Transport, Inc 508 P 2d 812, 29 Utah 2d 295

7 Cal—Security Truck Line v City of Monterey 256 P 2d 366, 117 C A 2d 441 reh den 257 P 2d 755 117 C A 2d 441—Security Truck Line v City of Monterey 256 P 2d 366, 117 C A 2d 441 reh den 257 P 2d 755 117 C A 2d 441

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Idaho—Application of Bermensolo, 352 P 2d 240 82 Idaho 254

Ill—Brinks, Inc v Illinois Commerce Commission, 431 N E 2d 1242 59 Ill Dec 485 103 Ill App 3d 851

Neb—Application of Denver Chicago Transport Co of Neb, 112 N W 2d 410, 172 Neb 862—Wells Fargo Armored Service Corp of Neb v Bankers Dispatch Corp 182 N W 2d 648 186 Neb 261—Wells Fargo Armored Service Corp of Neb v Bankers Dispatch Corp 198 N W 2d 195 188 Neb 584

Okl—Data Transmission Co v Corporation Commission, 561 P 2d 50

Pa—Railway Exp Agency, Inc v Pennsylvania Public Utility Commission, 171 A 2d 860, 195 Pa Super 394

Utah—Lake Shore Motor Coach Lines, Inc v Bennett, 333 P 2d 1061, 8 Utah 2d 293

Consideration of economic stability and continuity of service

Utah—Lake Shore Motor Coach Lines, Inc v Bennett, 333 P 2d 1061, 8 Utah 2d 293

Affirmative finding required

Tex—Railroad Commission v Brown Exp Inc., Civ App 399 S W 2d 863 revd on oth grds Sup 415 S W 2d 394

13 Colo—B D C Corp of Colo v Public Utilities Commission, 448 P 2d 615 167 Colo 472

Me—In re Powell, 358 A 2d 522—In re Lefebvre, 343 A 2d 204

Mo—State ex rel Inman Freight System v Public Service Commission, App., 600 S W 2d 650

Neb—Application of Christensen, 64 N W 2d 99, 158 Neb 601

N C—State ex rel Utilities Commission v Gulf-Atlantic Towing Corp, 110 S E 2d 886, 251 N C 105

Tex—Transportation League, Inc v Morgan Exp, Inc Civ App 436 S.W 2d 378, err ref no rev err

Notice of investigation required

Conn—Carroll v Public Utilities Commission, 207 A 2d 278 25 Conn Sup 459

Whether a particular carrier is required to obtain a permit or certificate of convenience depends on the terms of the governing statutes.[13.1]

13.1 Ariz—Pacific Greyhound Lines v Sun Valley Bus Lines, 216 P 2d 404, 70 Ariz 65—Quick Aviation Co v Klemmen, 133 P 2d 897 60 Ariz 430—Arizona Corp Commission v Superior Court In and For Maricopa County, 459 P 2d 489 105 Ariz 56

Fla—Service Coach Line v King, 50 So 2d 880

Hawaii—In re Honolulu Rapid Transit Co Ltd 507 P 2d 755 54 Haw 402

Idaho—Kuhn v Box Canyon Livestock Inc 637 P 2d 1154, 102 Idaho 658

Ill—Gulf Transport Co v Illinois Commerce Commission 93 N E 2d 336, 402 Ill 11

Iowa—Mid-America Pipeline Co v Iowa State Commerce Commission, 125 N W 2d 801 255 Iowa 1304—Cedar Rapids Steel Transp Inc v Iowa State Commerce Commission, 160 N W 2d 825 cert den 89 S Ct 1189 394 U S 918 22 L Ed 2d 451

Ky—Eck Miller Transfer Co v Armes, 269 S W 2d 287

La—State ex rel Hutton v City of Baton Rouge, 47 So 2d 665 217 La 857

Neb—Application of Moritz, 43 N W 2d 603 153 Neb 206

Pa—Allman v Pennsylvania Public Utility Commission, 27 A 2d 516, 149 Pa Super 353—Highway Exp Lines v Pennsylvania Public Utility Commission, 61 A 2d 461 164 Pa Super 145—Paradise v Pennsylvania Public Utility Commission 132 A 2d 754 184 Pa Super 8

Tex—Querner v Railroad Commission of Te Civ App 236 S W 2d 853 affd 242 S W 2d 166 150 Tex 490

Va—Frank L Cook Transfer v Com 83 S E 2d 733 196 Va 384

W Va—Atlantic Greyhound Corp v Public Service Commission 54 S E 2d 169 132 W Va 630

"Grandfather clause"

Fla—Midstate Hauling Co v Mason 177 So 2d 206—Hartman Transp Inc v Bevis, 293 So 2d 37

Ky—Com Air Transport v Stuart, 196 S W 2d 866, 303 Ky 69

Wash—Washington Utilities and Transp Commission v United Cartage, Inc 521 P 2d 217 25 Wash App 90

Proceedings

Ariz—Arizona Corp Commission v Gibbons, 344 P 2d 167 86 Ariz 210—Cagle Bros Trucking Service v Arizona Corp Commission, 394 P 2d 203 96 Ariz 270—Garbage Service Co v Arizona Corp Commission, 410 P 2d 682, 2 Ariz App 564

Mo—State ex rel Sandhaus v Missouri Public Service Commission, App 464 S W 2d 780

Neb—Application of Canada 47 N W 2d 507 154 Neb 256—Application of Houk 77 N W 2d 310, 162 Neb 717

Pa—Philadelphia-Pittsburgh Carriers, Inc v Pennsylvania Public Utility Commission, 138 A 2d 693, 185 Pa Super 588 Banks Inc v Pennsylvania Public Utility Comm n 448 A 2d 709, 68 Pa Cmwlth 196

Utah—Continental Bus System v Public Service Commission, 396 P 2d 404 16 Utah 2d 87

Competition

U S—Alexandria, Barcroft & Washington Transit Co v U S D C Va, 103 F Supp 607—Barrett Mobile Home Transport, Inc v U S D C Minn, 381 F Supp 1317

Ariz—Cagle Bros Trucking Service v Arizona Corp Commission, 394 P 2d 203, 96 Ariz 270

Colo—De Lue v Public Utilities Commission, 454 P 2d 939 169 Colo 159 cert den 90 S Ct 428 396 U S 956, 24 L Ed 2d 421—Public Utilities Commission v DeLue, 480 P 2d 1050, 175 Colo 317

Me—In re Lefebvre, 343 A 2d 204—In re Powell, 358 A 2d 522

Mo—State ex rel Philipp Transfer Lines, Inc v Public Service Commission App 599 S W 2d 82

Neb—Application of Moore v Transfer Inc of Norfolk, 253 N W 2d 313 198 Neb 491

Pa—Philadelphia-Pittsburgh Carriers, Inc v Pennsylvania Public Utility Commission, 138 A 2d 693 185 Pa Super 588—Reader v Pennsylvania Public Utility Commission, 162 A 2d 231 192 Pa Super 298—Railway Exp Agency Inc v Pennsylvania Public Utility Commission, 171 A 2d 860, 195 Pa Super 394

Va—Blanton v Package Delivery Inc v Pony Exp Courier Corp of Virginia, 247 S E 2d 397 219 Va 280

Motor Carrier Act not applicable

Neb—Application of Toronto Pipe Line Co Dallas, Tex 92 N W 2d 554 167 Neb 201

Proof required

Ill—Cooper v Illinois Commerce Commission, 364 N E 2d 396 7 Ill Dec 235 49 Ill App 3d 396

Neb—Application of Parsons, 147 N W 2d 521 181 Neb 185

Various other matters relating to certificates of convenience and necessity have been adjudicated.[13.2]

13.2 U S—Sand v U S D C Mass 266 F Supp 139—Dixie Highway Exp Inc v U S D C Miss 268 F Supp 239 revd on oth grds 88 S Ct 539 389 U S 409 19 L Ed 2d 639 on remand 287 F Supp 473

Ariz—Whitfield Transp v Tucson Warehouse & Transfer Co 276 P 2d 954 78 Ariz 136—Visco v State ex rel Pickrell 388 P 2d 155 95 Ariz 154

Colo—Ephraim Freightways, Inc v Public Utilities Commission of State of Colo 347 P 2d 960, 141 Colo 330

Fla—Wells Fargo Armored Service Corp of Fla v Mason, 196 So 2d 419—Sentinel Star Express Co v Florida Public Service Commission, 222 So 2d 503

Ill—People ex rel Continental Air Transport Co v Strouse, 244 N E 2d 171 41 Ill 2d 567

Kan—Warren Petroleum Corp v State Corp Commission, 285 P 2d 777 178 Kan 381—Missouri Pac R Co v State Corp Commission, 389 P 2d 813 192 Kan 575

La—George W Gang Transfer v Harris, 75 So 2d 28 226 La 117—Texas Pipe Line Co v Stem, App 190 So 2d 244 revd on oth grds 202 So 2d 266, 250 La 1104

Md—Maryland Transp Co v Public Service Commission 253 A 2d 896, 253 Md 618

Mich—George F Alger Co v Michigan Public Service Commission, 62 N W 2d 588, 339 Mich 104

Minn—Murphy Motor Freight Lines, Inc v Witte Transp Co 110 N W 2d 296, 260 Minn 440—Danken Transport, Inc v Hahne, 112 N W 2d 630, 261 Minn 218

Miss—Campbell Sixty-Six Exp Inc v Delta Motor Line, Inc 67 So 2d 252 218 Miss 198—Mississippi Public Service Commission v Holloway Transfer & Storage Co 148 So 2d 689, 247 Miss 184, err over 150 So 2d 411 247 Miss 184

Mo—State ex rel Transport Delivery Co v Public Service Commission of Mo App 414 S W 2d 322—State ex rel Philipp Transit Lines, Inc v Public Service Commission, App 523 S W 2d 353

Neb—Application of Petroleum Transport Co, 114 N W 2d 34, 173 Neb 564

N M—Transcontinental Bus System, Inc v State Corp Commission, 300 P 2d 948, 61 N M 369—Ferguson-Steere Motor Co v State Corp Commission 314 P 2d 894 63 N M 137

N Y—New York City Transit Authority v Jamaica Buses, Inc 192 N Y S 2d 72, 20 Misc 2d 659, affd 229 N Y S 2d 787 16 A D 2d 959

Okl—Mistletoe Exp Service v Corporation Commission of State of Okl, 316 P 2d 865

Pa—Marmer v Pennsylvania Public Utility Commission, 154 A 2d 262, 190 Pa Super 436—Railway Exp Agency, Inc v Pennsylvania Public Utility Commission, 171 A 2d 860, 195 Pa Super 394

R I—Yellow Cab Co of Providence v Public Utility Hearing Bd, 191 A 2d 23, 96 R I 247

Tex—State v Bilbo, Civ App 378 S W 2d 871, mod on oth grds, Sup, 392 S W 2d 121

Utah—Salt Lake Transfer Co v Barton Truck Line, Inc 335 P 2d 829, 8 Utah 2d 401

Va—McDaniel v Com 99 S E 2d 623 199 Va 287

Validity of findings or orders of commission

Ariz—Tucson Rapid Transit Co v Old Pueblo Transit Co, 289 P 2d 406, 79 Ariz 327—Arizona Corp Commission v Gibbons, 344 P 2d 167, 86 Ariz 210—Arizona Tank Lines, Inc v Arizona Corp Commission, 502 P 2d 539 18 Ariz App 390

Ark—Torrans v Arkansas Commerce Commission, 440 S W 2d 558, 246 Ark 930

Colo—Haney v Public Utilities Commission 574 P 2d 863 194 Colo 481

Fla—State ex rel Seaboard Air Line R Co v King, 93 So 2d 368—Scarlet Truck Service, Inc v Bevis, 259 So 2d 701

Hawaii—In re Honolulu Rapid Transit Co, Ltd 507 P 2d 755 54 Haw 402

La—Transway Inc v Louisiana Public Service Commission, 296 So 2d 305

N H—Household Goods Carriers Ass'n v Ouellette, 219 A 2d 699 107 N H 499

N C—State ex rel Utilities Commission v M L Hatcher Pickup & Delivery Services, Inc 259 S E 2d 791 43 N C App 662

Ohio—D G & U Truck Lines, Inc v Public Utilities Commission, 212 N E 2d 796, 4 Ohio St 2d 113—Montgomery Trucking Co v Public Utilities Commission, 217 N E 2d 222, 6 Ohio St 2d 205

Pa—Pittsburgh & L E R Co v Pennsylvania Public Utility Commission, 85 A 2d 646, 170 Pa Super 411

Utah—Lake Shore Motor Coach Lines, Inc v Bennett, 333 P 2d 1061 8 Utah 2d 293—Uintah Freightways v Public Service Commission, 390 P 2d 238, 15 Utah 2d 221—Continental Bus System v Public Service Commission, 396 P 2d 404 16 Utah 2d 87

Va—Park Bros Moving Corp v S & M Systems Corp, 218 S E 2d 441 216 Va 322

Collateral attack

Ariz—Tucson Rapid Transit Co v Old Pueblo Transit Co 289 P 2d 406, 79 Ariz 327—Kunkle Transfer & Storage Co v Superior Court In and For Maricopa County 526 P 2d 1270, 22 Ariz App 315

Revocation of certificate

Ind—Day Transfer Inc v E H Hamilton Trucking & Warehouse Service, Inc, App 408 N E 2d 632

Mich—Yellow Freight Systems, Inc v Michigan Public Service Commission 252 N W 2d 495 73 Mich App 476, app after remand 269 N W 2d 548 84 Mich App 241

Neb—Application of Neuswanger, 104 N W 2d 335 170 Neb 670

Ohio—Wrightsmith v Public Utilities Commission, 191 N E 2d 160, 174 Ohio St 537

Pa—Paradise v Pennsylvania Public Utility Commission, 132 A 2d 754 184 Pa Super 8

Tex—Herrin Petroleum Transport Equipment Corp v Railroad Commission of Texas, Civ App 619 S W 2d 588, err ref no re err

Va—Metro Van & Storage Co Inc v Com 221 S E 2d 127, 216 Va 544

Additional permit and proceedings therefor

Colo—Denver & R G W R Co v Public Utilities Commission, 351 P 2d 278, 142 Colo 400

Minn—Application of Paulson, 81 N W 2d 875, 249 Minn 236

Pa—Daily Motor Exp Inc v Pennsylvania Public Utility Commission, 130 A 2d 234, 183 Pa Super 120

Non-user as not pre-empting field

Pa—Philadelphia-Pittsburgh Carriers, Inc v Pennsylvania Public Utility Commission, 138 A 2d 693, 185 Pa Super 588

Termination

Fla—Dade Truck Sales, Inc v Bevis, 366 So 2d 759

Neb—Application of Ferguson Trucking Co, 101 N W 2d 444 169 Neb 851

Transfer of certificate

U S—Ray Price, Inc v U S, D C Neb 297 F Supp 55

Colo—De Lue v Public Utilities Commission, 454 P 2d 939 169 Colo 159 cert den 90 S Ct 428, 396 U S 956, 24 L Ed 2d 421

Ill—Carta-Back, Inc v Illinois Commerce Commission, 381 N E 2d 32, 21 Ill Dec 97 64 Ill App 3d 370

Mo—State ex rel Transport Delivery Co v Public Service Commission of Mo App 414 S W 2d 322—State ex rel Beaufort Transfer Co v Public Service Commission, App 593 S W 2d 241

Neb—Application of Burlington Truck Lines, Inc 102 N W 2d 450 171 Neb 331—Application of Neuwanger 104 N W 2d 235 170 Neb 676

Nev—City of North Las Vegas v Public Service Commission, 429 P 2d 66, 83 Nev 278

N C—State ex rel Utilities Commission v Colter 139 S E 2d 385 259 N C 269

Tex—Brown Exp Inc v Railroad Commission, 415 S W 2d 394—Railroad Commission of Texas v McKnight Civ App 619 S W 2d 255

Va—Brooks Transfer and Storage Co Inc v Turner 261 S E 2d 316, 220 Va 642

Proof of existing inadequacy necessary for finding of public need

Colo—Denver & R G W R Co v Public Utilities Commission, 351 P 2d 276 142 Colo 400—Colorado Transp Co v Public Utilities Commission, 405 P 2d 682, 158 Colo 136 Public Utilities Commission v Wecker Transfer & Storage Co, 451 P 2d 448, 168 Colo 339

Violations of anti-trust laws

Pa—Chemical Tank Lines Inc v Pennsylvania Public Utility Commission, 165 A 2d 668, 193 Pa Super 607 affd 178 A 2d 698 406 Pa 359

Rights under certificate determined as of date of issuance

U S—Ace Lines, Inc v U S D C Iowa, 197 F Supp 591

Other matters as to proof

Conn—Briggs Corp v Public Utilities Commission 174 A 2d 529 148 Conn 678

Neb—Wells Fargo Armored Service Corp of Neb v Bankers Dispatch Corp 198 N W 2d 195 188 Neb 584

Pa—Tranter v Pennsylvania Public Utility Commission, 288 A 2d 837, 4 Pa Cmwlth 585—Purolator Courier Corp v Pennsylvania Public Utility Commission, 414 A 2d 450, 51 Pa Cmwlth 377

Tex—Railroad Commission of Tex v Continental Bus System, Inc, 616 S W 2d 179

Adequacy of existing services

U S—Engel Van Lines, Inc v U S D C N J 374 F Supp 1217

Colo—Colorado Transp Co v Public Utilities Commission 405 P 2d 682, 158 Colo 136

Hawaii—Application of Charley's Tour & Transp Inc 522 P 2d 1272, 55 Haw 463

Ind—Shoup Buses, Inc v Public Service Commission, App 380 N E 2d 104

La—Truck Service, Inc v Louisiana Public Service Commission 236 So 2d 491, 256 La 343

Me—In re Powell, 358 A 2d 522

Neb—Application of Radio-Fone, Inc, 193 N W 2d 442, 187 Neb 637—Wells Fargo Armored Service Corp of Neb v Bankers Dispatch Corp 198 N W 2d 195 188 Neb. 584

N H—Household Goods Carriers Ass'n v Ouellette, 219 A 2d 699 107 N H 199

Ohio—Masters v Public Utilities Commission, 343 N E 2d 93, 45 Ohio St 2d 207, 74 O O 2d 322

Okl—Central Oklahoma Freight Lines, Inc v State ex rel Oklahoma Corp Commission, App, 610 P 2d 824

Pa—Com Public Utilities Commission v D'Agata Nat Trucking Co, 360 A 2d 279 25 Pa Cmwlth 365—Purolator Courier Corp v Pennsylvania Public Utility Commission, 414 A 2d 450, 51 Pa Cmwlth 377

Burden of proof

Ala—Redwing Carriers, Inc v Floyd & Beasley Transfer Co Inc, 341 So 2d 939

Haw—In re Honolulu Rapid Transit Co Ltd 507 P 2d 755, 54 Haw 402

Ind—Odle v Public Service Commission of Indiana, 297 N.E 2d 453, 155 Ind App 538

La—Southern Sugar Transport, Inc v Louisiana Public Service Commission, 324 So 2d 435

Minn—American Courier Corp v Loomis Armored Car Inc 200 N W 2d 175 294 Minn 207

Mo—State ex rel National Trailer Convoy Inc v Public Service Commission App 488 S W 2d 942

Neb—Application of Hagen Truck Lines, Inc 119 N W 2d 76, 174 Neb 646—Application of Summerman, 138 N W 2d 481 179 Neb 400

Ohio—R D S Mowery Inc v Public Utilities Commission of Ohio, 419 N E 2d 7 66 Ohio St 2d 22, 20 O O 3d 14

Pa—Armored Motor Service Corp v Pennsylvania Public Utility Commission, 411 A 2d 900, 49 Pa Cmwlth 623

Utah—Barton Truck Line, Inc v Public Service Commission, 510 P 2d 927 29 Utah 2d 392

W Va—Mountain Trucking Co v Daniels, 197 S E 2d 819 156 W Va 855

Revision of certificate

Mass—Holyoke St Ry Co v Department of Public Utilities, 198 N E 2d 413

Grant of temporary authority pending action on applications

Fla—Acme Moving & Storage Co of Jacksonville v Mason 167 So 2d 555

Best possible service held chief objective

N C—State ex rel Utilities Commission v Queen City Coach Co 166 S E 2d 441, 4 N C App 116

Ohio—D G & U Truck Lines, Inc v Public Utilities Commission, 212 N E 2d 796, 4 Ohio St 2d 113

Carrier not required to relitigate every applicable delegation in collateral proceedings

U S—T I McCormack Trucking Co v U S, D C N J, 251 F Supp 526 app after remand 298 F Supp 39

Individual commodity controlling

Tex—State v Bilbo, 392 S W 2d 121

Intent of commission as question of law

Tex—Dye Trucking Co v Miller Civ App, 397 S W 2d 507 err ref no rev err—Airport Coach Service, Inc v City of Fort Worth, Civ App 518 S W 2d 566, err ref no rev err

Prior violation of statute

Neb—Grocenold v Building Movers, Inc 247 N W 2d 629, 197 Neb 187

Ohio—D G & U Truck Lines, Inc v Public Utilities Commission, 212 N E 2d 796, 4 Ohio St 2d 113

Questions considered generally

Fla—Gulf Central Warehouse Center Inc v Bevis, 278 So 2d 595

Idaho—Grover v Ace Equipment Co, 496 P 2d 673, 94 Idaho 674

Neb—Application of Summerman, 138 N W 2d 481, 179 Neb 400—Wells Fargo Armored Service Corp of Neb v Bankers Dispatch Corp 182 N W 2d 648, 186 Neb 261—Wells Fargo Armored Service Corp of Neb v Bankers Dispatch Corp, 198 N W 2d 195, 188 Neb 584—Application of Schroeder, 315 N W 2d 630, 210 Neb 508

Pa—Brinks, Inc v Pennsylvania Public Utility Commission, 424 A 2d 1010, 56 Pa Cmwlth 371

Utah—Prichard Transfer, Inc v W S Hatch Co, 441 P 2d 135, 21 Utah 2d 106

Review order of commission

Ala—Redwing Carriers, Inc v Floyd & Beasley Transfer Co, Inc, 341 So 2d 939

Ariz—Best-Way Transp v The Red Ball Freight Lines, Inc, 499 P 2d 115, 17 Ariz App 537

Fla—Greyhound Lines, Inc, Greyhound Lines-East Division v Yarborough, 275 So 2d 1

La—Southern Sugar Transport, Inc v Louisiana Public Service Commission, 324 So 2d 435

Neb—Application of Summerman, 138 N W 2d 481 179 Neb 400—Wells Fargo Armored Service Corp of Neb v Bankers Dispatch Corp, 198 N W 2d 195 188 Neb 584

N H—Vautier v State, 291 A 2d 612, 112 N H 193

Ohio—D G & U Truck Lines, Inc v Public Utilities Commission, 212 N E 2d 796, 4 Ohio St 2d 113.

Okl—Hayes Motor Freight, Inc v Manning, 611 P 2d 241

Va—Blanton's Package Delivery, Inc v Pony Exp Courier Corp of Virginia, 247 S E 2d 397, 219 Va 280

Setting aside order denying certificate

Neb—Application of Summerman, 138 N W 2d 481, 179 Neb 400

Extension of certificate

Fla—Fleet Transport Co of Fla v Mason, 188 So 2d 294—Alterman Transport Lines, Inc v Yarborough, 276 So 2d 34

Neb—Nebraska State Ry Commission v Seward Motor Freight, Inc, 196 N W 2d 200, 188 Neb 223

Pa—Purolator Courier Corp v Pennsylvania Public Utility Commission, 414 A 2d 450, 51 Pa Cmwlth 377

Findings required

Ark—Chandler Trailer Convoy, Inc v Wood, 479 S W 2d 515, 251 Ark 966

N H—Household Goods Carriers Ass'n v Ouellette, 219 A 2d 699 107 N H 199

N C—State ex rel Utilities Commission v Queen City Coach Co, App, 166 S E 2d 441 4 N C App 116

Future as well as present needs considered

La—Huppenbauer v Kissinger, App 254 So 2d 636

Neb—Canada v Peake, Inc, 165 N W 2d 587, 184 Neb 52—Wells Fargo Armored Service Corp of Neb v Bankers Dispatch Corp, 182 N W 2d 648 186 Neb 261

N H—Household Goods Carriers Ass'n v Ouellette, 219 A 2d 699, 107 N H 199

Implied findings

Neb—Nebraska State Ry Commission v Seward Motor Freight, Inc, 196 N W 2d 200, 188 Neb 223

N H—Household Goods Carriers Ass'n v Ouellette, 219 A 2d 699, 107 N H 199

Interpretation of certificates

U S—Pittsburgh & New England Trucking Co v U S, D C Pa 345 F Supp 743 affd, 93 S Ct 235, 409 U S 904 34 L Ed 2d 169 reh den, 93 S Ct 514, 409 U S 1050, 34 L Ed 2d 504, affd, 93 S Ct 686, 409 U S 1070, 34 L Ed 2d 660

Neb—In re Rapid Film Service, Inc, 146 N W 2d 563 181 Neb 1—Nebraska State Ry Commission v Seward Motor Freight, Inc, 196 N W 2d 200, 188 Neb 223

Tex—Airport Coach Service, Inc v City of Fort Worth, Civ App 518 S W 2d 566, err ref no rev err

Evidence

U S—No Oilport v Carter, D C Wash 520 F Supp 334

Ala—Alabama Public Service Commission v Greyhound Lines, Inc, 346 So 2d 1136

Colo—De Lue v Public Utilities Commission, 454 P 2d 939, 169 Colo 159, cert den 90 S Ct 428, 396 U S 956, 24 L Ed 2d 421—Redwood Co, Inc v Jorgenson, App, 528 P 2d 415

Fla—Redwing Carriers, Inc v Mayo, 255 So 2d 516—Bleeker Transfer & Storage Co v Bevis, App, 299 So 2d 15

Ill—Ace Ambulance & Oxygen Service Co v Illinois Commerce Commission, 393 N E 2d 1322, 31 Ill Dec 15 75 Ill App 3d 17

Ind—Jack Gray Transport, Inc v Public Service Commission, 380 N E 2d 1250, 177 Ind App 576

Me—In re Lefebvre, 343 A 2d 204

Minn—American Courier Corp v Loomis Armored Car, Inc 200 N W 2d 175, 294 Minn 207

Mont—Empire Steel Mfg Co v Carlson, 622 P 2d 1016

Neb—Nebraska State Ry Commission v Seward Motor Freight, Inc, 196 N W 2d 200, 188 Neb 223—Wells Fargo Armored Service Corp of Neb v Bankers Dispatch Corp 198 N W 2d 195, 188 Neb 584

N H—O Neil v Public Utilities Commission, 410 A 2d 244 119 N H 930

N C—State ex rel Utilities Commission v J D McCotter Inc, 194 S E 2d 859, 283 N C 104

N D—Hentz Truck Line, Inc, Roseville, Minn v Elkin, 294 N W 2d 774

Okl—Western Motor Freight, Inc v State, 534 P 2d 926—Hayes Motor Freight Inc v Manning, 611 P 2d 241

Pa—Tranter v Pennsylvania Public Utility Commission, 288 A 2d 837 4 Pa Cmwlth 585—John Gibbons, Inc v Pennsylvania Public Utility Commission, 334 A 2d 806, 18 Pa Cmwlth 114

S C—Greyhound Lines, Inc v South Carolina Public Service Commission, 262 S E 2d 22, 274 S C 168

Tex—Apollo Transports, Inc v Railroad Commission of Texas, Civ App 610 S W 2d 872

W Va—Kanawha Valley Transp Co v Public Service Commission, 219 S E 2d 332, 159 W Va 88

Application for permit

Colo—Wells Fargo Armored Service Corp v Public Utilities Commission, 545 P 2d 707, 190 Colo 204

Neb—Wells Fargo Armored Service Corp of Neb v Bankers Dispatch Corp, 182 N W 2d 648, 186 Neb 261

Notice of hearing

Colo—Public Utilities Commission v DeLue, 486 P 2d 1050, 175 Colo 317

N D—Hentz Truck Line, Inc, Roseville, Minn v Elkin, 294 N W 2d 774

Unauthorized use of routes

Neb—Nebraska State Ry Commission v Seward Motor Freight, Inc, 196 N W 2d 200, 188 Neb 223

Tacking

Ariz—Best-Way Transp v Thunderbird Freight Lines, Inc 499 P 2d 115, 17 Ariz App 537

Neb—Nebraska State Ry Commission v Seward Motor Freight, Inc 196 N W 2d 200, 188 Neb 223

Ohio—Commercial Motor Freight, Inc v Public Utilities Commission 348 N E 2d 132, 46 Ohio St 2d 195 75 O O 2d 234

Extension of rights

Pa—Carl I Bieber, Inc v Pennsylvania Public Utility Commission, 281 A 2d 351, 3 Pa Cmwlth 236

Compliance with notice requirements

Ariz—Best-Way Transp v Thunderbird Freight Lines, Inc, 499 P 2d 115, 17 Ariz App 537

Effect of prior proceedings

Ariz—Best-Way Transp v Thunderbird Freight Lines, Inc, 499 P 2d 115, 17 Ariz App 537

Additional certificate

Colo—Rocky Mountain Airways, Inc v Public Utilities Commission 509 P 2d 804 181 Colo 170

Limitations in certificate

Fla—Tropical Coach Lines, Inc v Yarbrough, 272 So 2d 801

Action held overly drastic

Ill—Friedench Truck Service, Inc v Illinois Commerce Commission 288 N E 2d 79, 7 Ill App 3d 468

Findings not unreasonable

Neb—Wells Fargo Armored Service Corp of Neb v Bankers Dispatch Corp, 198 N W 2d 195, 188 Neb 584

Different factors emphasized from case to case

N H—Vautier v State, 291 A 2d 312, 112 N H 193

Carrier's good faith but illegal movements supporting grant

Pa—Johnson Motor Exp, Inc v Pennsylvania Public Utility Commission, 291 A 2d 545, 5 Pa Cmwlth 521

Shipper preference not controlling factor

Tex—Swift Foods, Inc v Railroad Commission of Tex, Civ App, 480 S W 2d 508

Determination entitled to great weight

Va—Bland and Ponder Texaco v Com ex rel State Corporation Commission, 191 S E 2d 236, 213 Va 161

"Necessity" construed

Fla—Gulf Central Warehouse Center, Inc v Bevis, 278 So 2d 595

Moot question

Colo—Waste Disposal v Public Utilities Commission, 520 P 2d 1039 184 Colo 428

Requirement of opportunity to existing carriers to improve service

Ariz—DGP Trucking Co v Fopa Trucking Co 547 P 2d 47 26 Ariz App 195

Contract lease for equipment

Pa—Com Public Utilities Commission v D Agata Nat Trucking Co 360 A 2d 279, 25 Pa Cmwlth 365

Factors considered

Ind—Coastal Tank Lines, Inc v Propane Transport, Inc, App, 416 N E 2d 440

Neb—Application of Nebraska Transport Co Inc 313 N W 2d 686, 210 Neb 269

Utah—PBI Freight Service v Public Service Commission of Utah, 598 P 2d 1352

Va—Atlantic Greyhound Lines of Virginia Inc v Jones Bus Co Inc 217 S E 2d 857 216 Va 255

Guidelines discriminatory

Colo—Denver Cleanup Service, Inc v Public Utilities Commission, 561 P 2d 1252, 192 Colo 537

Criteria for issuance

Ind—V I P Limousine Service, Inc v Herider-Sanders, Inc 355 N E 2d 441 171 Ind App 109

Not required to furnish regular service

N D—Hentz Truck Line, Inc, Roseville, Minn v Elkin, 294 N W 2d 774

Revocation of certificate for concealing future sale of stock erroneous

N H—Appeal of Global Moving & Storage of New Hampshire, Inc 451 A 2d 167 122 N H 784

There have been adjudications relating to the authority which may be conferred on a carrier by the commission.[135]

13.5 Fla—Florida Rock and Tank Lines, Inc v Hawkins, 372 So 2d 447

Me—In re Lefebvre, 343 A 2d 204—State v Dube, 409 A 2d 1102

Utah—Lewis v Wycoff Co 420 P 2d 264 18 Utah 2d 255

§ 21. Exclusive Privileges

Library References

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14 U S—In re Third Ave Transit Corp, C A N Y, 233 F 2d 310

§ 22. Use of Carrier's Premises

Library References

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§ 23. Contracts in Violation of Regulations

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21 Kan—Kansas Power & Light Co v Mobil Oil Co, 426 P 2d 60, 198 Kan 556

22 Mich—Grand Trunk Western R Co v Mount Clemens Sugar Co, 269 N W 208, 277 Mich 366, cert den 57 S Ct 514, 300 U S 670, 81 L Ed 2d 877

Test for "intra-plant switching" stated

Mich—Detroit Terminal R Co v Budd Wheel Co, 19 N W 2d 126, 129, 311 Mich 638

§ 24. Judicial Proceedings to Enforce or Restrain Enforcement of Regulations by Statutes or Orders of Railroad Commissions

23 U S—Trans-Pacific Airlines v Hawaiian Airlines, C A Hawaii, 174 F 2d 63

Ala—Jefferson Trucking Co v Alabama Public Service Commission, 348 So 2d 372

Ariz—Tucson Rapid Transit Co v Old Pueblo Transit Co 289 P 2d 406, 79 Ariz 327

Colo—Lane v Public Utilities Commission 381 P 2d 818 152 Colo 335

D C—Black United Front v Washington Metropolitan Area Transit Commission, C A 436 F 2d 227 141 U S App D C 73

Fla—Redwin Carriers, Inc v Carter 64 So 2d 557—Coast Cities Coaches, Inc v Mack, 64 So 2d 774

Ill—People v Gold Star Line, 74 N E 2d 62, 332 Ill App 136

Kan—Kansas City-Lea Haworth Bus Lines v State Corp Commission, 286 P 2d 143, 178 Kan 353—Atchison, T & S F Ry Co v State, Corp Commission, 322 P 2d 715, 182 Kan 603

Mich—Detroit & T S L R Co v Michigan Public Service Commission, 36 N W 2d 896, 324 Mich 195

Minn—State v Duluth, M & I R Ry Co 75 N W 2d 398 246 Minn 383 app dism 77 S Ct 46, 352 U S 804 1 L Ed 2d 38

Wash—South Bay Motor Freight Co v Schaaf, 101 P 2d 584, 3 Wash 2d 466—State ex rel Petroleum Transp Co v Washington Public Service Commission, 216 P 2d 177 35 Wash 2d 858

Effect of denial of review

Cal—Pratt v Coast Trucking, Inc, 39 Cal Rptr 332, 228 C A 2d 139

Unresolved matters may be litigated in appropriate civil court

Fla—State ex rel McKenzie v Willis, 310 So 2d 1

24 Cal—Nolan v Public Utilities Commission, 260 P 2d 790, 41 C 2d 392

Neb—Application of Moore's Transfer Inc of Norfolk, 253 N W 2d 313 198 Neb 491

25 U S—Vanko v Finley D C Ohio, 440 F Supp 656

Time of filing suit

(2) Other matters

Fla—Redwing Carriers, Inc v Carter 64 So 2d 557

Ohio—Crann Transp v Public Utilities Commission 120 N E 2d 436, 162 Ohio St 9

Order considered in entirety

N C—State ex rel North Carolina Utilities Commission v Attorney General, 163 S E 2d 638, 2 N C App 657

26 Iowa—In re Iowa State Commerce Commission, Docket No HA-2287-Investigation of Arrow Exp Forwarding Co 110 N W 2d 390, 252 Iowa 1237

Kan—Atchison, T & S F Ry Co v State Corp Commission, 203 P 2d 211 166 Kan 548

Mo—State ex rel Denton v Public Service Commission, App, 277 S W 2d 684

Okl—Dolese Bros Co v St Louis-San Francisco Ry Co 86 P 2d 800, 184 Okl 269

Pa—Daily Motor Exp, Inc v Pennsylvania Public Utility Commission, 130 A 2d 234, 183 Pa Super 120

Matters reviewable

Colo—Haney v Public Utilities Commission 574 P 2d 863, 194 Colo 481

D C—Washington, Marlboro & Annapolis Motor Lines v Public Utilities Commission of District of Columbia, C A 206 F 2d 490 93 U S App D C 63

Ill—Alton R Co v Illinois Commerce Commission ex rel Moulding-Brownell Corporation, 15 N E 2d 508, 368 Ill 584, affd 59 S Ct 340, 305 U S 548, 83 L Ed 344

Neb—Application of Howard McLean Co, 187 N W 2d 300 187 Neb 30

Ohio—Genesis, Inc v Public Utilities Commission, 364 N E 2d 10, 50 Ohio St 2d 181, 4 O O 3d 376

Okl—Mistletoe Exp Service v Corporation Commission of State of Okl, 316 P 2d 865

Pa—Philadelphia-Pittsburgh Carriers, Inc v Pennsylvania Public Utility Commission, 138 A 2d 693 185 Pa Super 588—Lang v Pennsylvania Public

Utility Commission 217 A 2d 758, 207 Pa Super 312

Appeal from lower court

Ala—Vann Exp Inc v Bee Line Exp Inc, 347 So 2d 1353

Ark—Torrans v Arkansas Commerce Commission, 440 S W 2d 558, 246 Ark 930

Jurisdiction existed

U S—Tri-State Motor Transit Co v International Transport, Inc D C Mo 343 F Supp 588 affd in part revd in part on oth grds C A 479 F 2d 171

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28. Closing of express offices

La—Railway Exp Agency Inc v Louisiana Public Service Commission 245 So 2d 18, 243 La 518

29 Miss—Mississippi Public Service Commission v Holloway Transfer & Storage Co 148 So 2d 689 247 Miss 184 err over 150 So 2d 411 247 Miss 184

30 Fla—Broward County Traffic Ass'n v May's 340 So 2d 1152

Ill—Allied Delivery System, Inc v Illinois Commerce Commission 417 N E 2d 777 49 Ill Dec 87 93 Ill App 3d 656

Ind—Dale Bland Trucking, Inc v Calcar Quarries Inc, App, 417 N E 2d 1157

Ky—Com ex rel Kentucky R R Commission v Railway Exp Agency, 387 S W 2d 298

Minn—American Courier Corp v Loomis Armored Car, Inc, 200 N W 2d 175, 294 Minn 207

Neb—Application of Abler Transfer Inc 73 N W 2d 667 161 Neb 378—Application of Basin Truck Co 90 N W 2d 268, 166 Neb 665—Nebraska State Ry Commission v Seward Motor Freight, Inc, 196 N W 2d 200, 188 Neb 223

Pa—Borough of Bridgewater v Pennsylvania Public Utility Commission, 124 A 2d 165, 181 Pa Super 84—Philadelphia-Pittsburgh Carriers, Inc v Pennsylvania Public Utility Commission, 138 A 2d 693 185 Pa Super 588

Extent of [illegible] in lieu transportation, etc—John Benkart & Sons Co v Pennsylvania Public Utility Commission, 7 A 2d 588 137 Pa Super 13—Modern Transfer Co v Pennsylvania Public Utility Commission, 12 A 2d 458, 139 Pa Super 197—Pennsylvania R Co v Pennsylvania Public Utility Commission 124 A 2d 685, 181 Pa Super 343—Daily Motor Exp Inc v Pennsylvania Public Utility Commission 130 A 2d 234 183 Pa Super 120

31 US—ICC v Smith, D C Pa 82 F Supp 39

Ala—Vann Exp, Inc v Bee Line Exp Inc, 347 So 2d 1353

Ark—Torrans v Arkansas Commerce Commission, 440 S W 2d 558, 246 Ark 930

Fla—Coast Cities Coaches, Inc v Florida R R and Public Utilities Commission, 139 So 2d 674

Ill—Allied Delivery System, Inc v Illinois Commerce Commission, 417 N E 2d 777 49 Ill Dec 87 93 Ill App 3d 656

Ky—Com ex rel Kentucky R R Commission v Railway Exp Agency, 387 S W 2d 298

Mont—Montana Citizens Freight Rate Ass'n v Board of R R Com'rs of Mont, 271 P 2d 1024, 128 Mont 127

Neb—Application of Basin Truck Co, 90 N W 2d 268, 166 Neb 665

N C—State ex rel Utilities Commission v Southern Ry Co, 124 S E 2d 510, 256 N C 359

Pa—City of Philadelphia v Pennsylvania Public Utility Commission, 102 A 2d 428 174 Pa Super 641—Railway Exp Agency Inc v Pennsylvania Public Utility Commission, 171 A 2d 860, 195 Pa Super 394

Tex—Railroad Commission v Brown Exp Inc Civ App, 399 S W 2d 863, revd on oth grds Sup, 415 S W 2d 394.

Review limited to record of agency proceedings

N M—McWood Corp v State Corp Commission 431 P 2d 52, 78 N M 319

32 Fla—Midstate Hauling Co v Mason, 177 So 2d 206

Neb—Application of Schmunk 65 N W 2d 386, 159 Neb 134

Pa—W J Deitter Transfer Co v Pennsylvania Public Utility Commission, 107 A 2d 264 175 Pa Super 472 app dism 75 S Ct 580 349 U S 903 99 L Ed 1240

Burden of proof

Minn—American Courier Corp v Loomis Armored Car Inc 200 N W 2d 175 294 Minn 207

N M—San Juan Coal & Coke Co v Santa Fe, S J & N R R 298 P 663 35 N M 336

33 N C—State ex rel Utilities Commission v Gulf-Atlantic Towing Corp 110 S E 2d 886 251 N C 105

36 D C—Baltimore & O R Co v Alabama Great Southern R Co C A 506 F 2d 1265 165 U S App D C 226

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38 Ill—Miller v Chicago Transit Authority, 90 N E 2d 262 339 Ill App 398

39 Ariz—Pacific Greyhound Lines v Sun Valley Bus Lines, supra, n 13 I

Discretion

U S—Tri-State Motor Transit Co v International Transport, Inc D C Mo 343 F Supp 588 affd in part, revd in part on oth grds C A 479 F 2d 171

Cessation of violation doe not bar injunction

U S—Tri-State Motor Transit Co v International Transport, Inc D C Mo 343 F Supp 588 affd in part revd in part on oth grds, C A, 479 F 2d 171

42 Tex—Railroad Commission v Oil Field Haulers Ass'n, Civ App 373 S W 2d 394

43 U S—Tri-State Motor Transit Co v International Transport, Inc D C Mo, 343 F Supp 588, affd in part, revd in part on oth grds C A 479 F 2d 171

N Y—Rensselaer County v Capital Dist Transp Authority 336 N Y S 2d 382, 71 Misc 2d 428 revd on oth grds 349 N Y S 2d 20, 42 A D 2d 445

45 U S—Clark v Poor, D C Ohio, 20 F 2d 182—Civil Aeronautics Bd v Modern Air Transport, D C N Y 81 F Supp 803, affd, C A, 179 F 2d 622

Ariz—Tucson Rapid Transit Co v Old Pueblo Transit Co 289 P 2d 406, 79 Ariz 327

Neb—R R "Dick" Wilson, Inc v Hargleroad, 86 N W 2d 177, 165 Neb 468

46 U S—U S v South Buffalo Ry Co, N Y, 68 S Ct 868, 333 U S 771, 92 L Ed 1077

Injunction will lie to restrain a carrier from increasing rates without complying with the Inflation Control Act of 1942, 50 U S C A. Appendix, § 961 et seq.[46.1]

46.1 D C—Henderson v Washington, Marlboro and Annapolis Motor Lines, 132 F 2d 729 77 U S App D C 26, cert den 63 S Ct 854 318 U S 779, 87 L Ed 1147

Other matters relating to injunctions have been adjudicated.[46.2]

46.2 U S—In re Roll Form Products, Inc C A N Y, 662 F 2d 150

Ariz—Tucson Rapid Transit Co v Old Pueblo Transit Co 289 P 2d 406, 79 Ariz 327—Visco v State ex rel Pickrell, 388 P 2d 155 95 Ariz 154

Neb—Ganka v Chicago & N W Ry Co 191 N W 2d 438 187 Neb 369

Tex—Colorado River Western Ry v Texas & N O R Co Civ App 283 S W 2d 768, err ref no rev err

A private suit for injunctive relief is permitted where there has been a clear and patent violation of the Interstate Commerce Act[46.3]

46.3 U S—Aacon Auto Transport, Inc v Medlin C A Fla 575 F 2d 1102 reh den 580 F 2d 1052

Purpose of provision

U S—Tri-State Motor Transit Co v International Transport, Inc C A Mo, 479 F 2d 171

Complaint insufficient

U S—Browning Freight Lines, Inc v Warberg Bros Co D C Idaho, 393 F Supp 127

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48 U S—U S v South Buffalo Ry Co D C N Y 69 F Supp 456, affd 68 S Ct 868, 333 U S 771 92 L Ed 1077

§ 25. In General

50 La—Dixie Pipeline Co v Barry App 227 So 2 1 writ ref 229 So 2d 731 255 La 145

52 Ariz—State v 1969 Volkswagon Bus, VIN 239199800, 1977 Wyoming License No 2365 App 586 P 2d 210, 120 Ariz 365

53 U S—Montgomery Ward & Co v Northern Pac Terminal Co of Or D C Or 128 F Supp 47

58 Mo—Smith v Thompson, 137 S W 2d 981, 23 Mo App 1151

59 Iowa—C J S cited in Circle Express Co v Iowa State Commerce Commission 86 N W 2d 888 24 Iowa 651

Mo—Smith v Thompson, supra, n 58

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60 Mo—Smith v Thompson, supra, n 58

§ 26. Time, Place, and Method of Receiving Freight

62 [illegible] penalty for improper packing—Smith v Thompson, Mo supra, n 58

§ 27. General Rule

Library References

Carriers ⇐39.

64 U S—Montgomery Ward & Co v Northern Pac Terminal Co of Or, supra, n 53—Quaker City Motor Parts Co v Inter-State Motor Freight System, D C Pa 148 F Supp 226—C J S. cited in Merchandise Warehouse Co v A B C Freight Forwarding Corp, D C Ind, 165 F Supp 67, 75—Johnson v Chicago M St P & P R Co, C A Idaho, 400 F 2d 968

Cal—Standard Oil Co of California v Johnson, 14 P 2d 577 24 Cal 2d 40

D C—Andrews v Chesapeake & Potomac Tel Co D C 83 F Supp 966

Ga—Beck & Gregg Hardware Co v Associated Transport 81 S E 2d 515 210 Ga 545—C J S cited in Ryder Truck Lines, Inc v Aladdin, Inc 13 S E 2d 446, 447 110 Ga App 579—Central of Georgia Ry Co v Woolfolk Chemical Works Limited 178 S E 2d 710 122 Ga App 789

Iowa—C J S quoted in Burlington Transp Co v Hallaway 12 N W 2d 167 169 234 Iowa 135 14 A L R 1238

Md—Baltimore Tank Lines v Public Service Commission, 137 A 2d 187 215 Md 125

Mich—G & A Truck Line Inc v Public Service Commission, 60 N W 2d 285, 337 Mich 300

Mo—William A Smith Contracting Co v Missouri Pac R Co, App 481 S W 2d 580 cert den 93 S Ct 900, 409 U S 1107, 34 L Ed 2d 687

N J—Weehawken Tp v Erie R Co 120 A 2d 593 2 N J 572

N Y—Madden v Queens County Jockey Club 7 N E 2d 697 296 N Y 249 1 A L R 2d 1160

Ohio—Fletcher v Coney Island, Inc, 134 N E 2d 37 165 Ohio St 150

Tex—Leslie v Houston Natural Gas Corp Civ App 280 S W 2d 353 err ref no rev err Cert den 77 S Ct 43 352 U S 829 1 L Ed 50

Wash—State v Great Northern Ry Co 167 P 103 98 Wash 197

Fairness and good faith of carrier

U S—Minneapolis & St L Ry Co v Pacific Gamble Robinson Co C A Minn 215 F 2d 126

Duties of freight forwarder

D C—National Motor Freight Traffic Ass'n, Inc v U S D C 205 F Supp 592, affd 83 S Ct 311 371 U S 223 9 L Ed 2d 273 reh den, op clarified 83 S Ct 688, 372 U S 246, 9 L Ed 2d 709

Duty extends to goods of competitor

U S—American Trucking Associations v Atchison, T & S F Ry Co Ill 87 S Ct 1608, 387 U S 397 18 L Ed 2d 847 reh den 88 S Ct 11 12, 389 U S 889 19 L Ed 2d 197

Statutory duty of pipeline carrier

U S—Thomas v Amerada Hess Corp, D C Pa, 393 F Supp 58

La—Texas Pipe Line Co v Stein, App 190 So 2d 244 revd on oth grds 202 So 2d 266, 250 La 1104

Duty of express carrier

U S—REA Exp Inc v U S, C A, 568 F 2d 940, cert den 98 S Ct 1485, 435 U S 923 55 L Ed 2d 516, and 98 S Ct 1486, 435 U S 923, 55 L Ed 2d 516

65 U S—Montgomery Ward & Co v Northern Pac Terminal Co of Or D C Or 128 F Supp 475—Brotherhood or Ry and S S Clerks, Freight Handlers, Exp and Station Emp AFL-CIO v Florida East Coast Ry Co Fla 86 S Ct 1420 384 U S 238, 16 L Ed 2d 501

As depending on compliance with tariff

U S—Christensen v Northern Pac Ry Co C A N D, 184 F 2d 534—Minneapolis & St L Ry Co v Pacific Gamble Robinson Co supra, n 64

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Common carriers have an obligation to continue service.[68.5]

68.5 D C—Michigan Consol Gas Co v Federal Power Commission, C A 283 F 2d 204, 108 U S App D C 409, cert den 81 S Ct 276, 364 U S 913 5 L Ed 2d 227

69 U S—Souken-Galamba Corporation v Atchison, T & S F Ry Co, D C Mo, 27 F Supp 902—Bigley Trucking Corp v U S, 149 F Supp 141 137 Ct Cl 903

Md—Public Tank Lines v Public Service Commission, 137 A 2d 187, 215 Md 125

§ 28. Excuses for Refusal to Receive and Transport

Library References

Carriers ⇐39, 43.

70 U S M[illegible] & St L Ry Co v Pacific Gamble Robinson Co, C A Minn, 215 F 2d 126—Montgomery Ward & Co v Northern Pac Terminal Co of Or, D C Or, 128 F Supp 475—Montgomery Ward & Co v Northern Pac Terminal Co of Or D C Or 128 F Supp 520

Ariz—State v Carroll, 526 P 2d 1238, 111 Ariz 216

Kan—Young v Santa Fe Trail Transp Co 298 P 2d 235, 179 Kan 678

71 D C—Asbury v Chesapeake & O Ry Co D C 314 F Supp 310

Embargo defined

(2) Other definitions—Froehling Supply Co v U S C A Ill 194 F 2d 637—Chicago & N W Ry Co v Union Packing Co, D C Neb, 373 F Supp 734 Affd C A 514 F 2d 30, petition den 527 F 2d 592

U S—I C C v Chicago, Rock Island, & Pac R Co C A Neb 501 F 2d 908, cert den 95 S Ct 1393 420 U S 972, 43 L Ed 2d 652

Embargo promulgated for protection of transportation

U S—Chicago & N W Ry Co v Union Packing Co D C Neb 373 F Supp 734, affd C A 514 F 2d 30, petition den 527 F 2d 592

Excess tonnage

U S—Interpace Corp v Pentrook Hauling Co Inc, D C Pa 389 F Supp 560, affd, C A 535 F 2d 1246

Embargo where justified relieves carrier of liability

U S—I C C v Chicago, Rock Island, & Pac R Co C A Neb 501 F 2d 908, cert den 95 S Ct 1393 420 U S 972, 43 L Ed 2d 652

Notice required

U S—General Foods Corp v Baker D C Md, 451 F Supp 873

Embargo where justified relieves carrier of liability

U S—General Foods Corp v Baker D C Md 451 F Supp 873

74 Ala—Herring v Alabama Great Southern R Co 184 So 180, 236 Ala 618, cert den 59 S Ct 583 309 U S 644 82 L Ed 1044

75 D C—U S v Pryba, C A 502 F 2d 391 cert den 95 S Ct 815 419 U S 1127 42 L Ed 2d 828

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80 C J S. cited in Ryder Truck Lines, Inc v Aladdin, Inc 139 S E 2d 446, 447 110 Ga App 579

Improperly packed items

D C—Household Goods Carriers Bureau v I C C C A 584 F 2d 437 189 U S App D C 279

81. Patent unfitness test

U S—Eastern Motor Exp Inc v A Maschmeyer Jr Inc C A N Y, 247 F 2d 826, 65 A L R 2d 765, cert den 78 S Ct 535 355 U S 959, 2 L Ed 2d 534

82 U S—Johnson Motor Transport v U S 149 F Supp 175, 137 Ct Cl 892

Ga—R C A Truck Lines, Inc v Georgia Rug Mill, Inc, 77 S E 2d 442, 88 Ga App 658, foll 77 S E 2d 445 88 Ga App 663

Mo—Textile Distributors, Inc v Roadway Exp, Inc, App 397 S W 2d 760

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90 U S—Johnson v Chicago, M, St P & P R Co C A Idaho, 400 F 2d 968

Ala—Ottinger v Water Works and Sanitary Sewer Bd 177 So 2d 320 278 Ala 213

Duty to protect cargo in possession

U S—General Foods Corp v Baker, D C Md, 451 F Supp 873

94 U S—Holt Motor Co v Nicholson Universal S S Co D C Minn, 56 F Supp 585

95 U S—Holt Motor Co v Nicholson Universal S S Co supra, n 94

D C—Asbury v Chesapeake & O Ry Co, D C 314 F Supp 310

Embargo

U S—Chicago & N W Ry Co v Union Packing Co, D C Neb, 373 F Supp 734, affd C A, 514 F 2d 30, petition den 527 F 2d 592

97 U S—North Am Van Lines, Inc v Heller, C A La 371 F 2d 629

99. No duty to provide sidetrack

Ga—Central of Georgia Ry Co v Woolfolk Chemical Works, Limited, 178 S E 2d 710, 122 Ga App 789

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Other excuses have been held not to absolve the carrier from liability[4.1]

4.1 U S—Montgomery Ward & Co v Northern Pac Terminal Co of Or, D C Or, 128 F Supp 520

§ 30. —— Tender of Goods

6 U S—Montgomery Ward & Co v Northern Pac Terminal Co of Or supra, n 4.1

§ 31. —— Prepayment of Charges

11 Okl—National Trailer Convoy Co v Mount Vernon Nat Bank & Trust Co of Fairfax County 420 P 2d 889

§ 32. Transportation to Points beyond Carrier's Line

16. Obligation present

Ohio—Baltimore & O R Co v Producers Livestock Co-op Ass'n, 131 N E 2d 275

§ 33. Actions for Refusal to Receive and Transport

Library References

Carriers ⇐45

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19 U S—Merchandise Warehouse Co v A B C Freight Forwarding Corp, D C Ind 165 F Supp 67—Pensack & Gordon, Inc v California Motor Exp C A Cal 323 F 2d 769, cert den 84 S Ct 517, 518, 375 U S 984, 11 L Ed 2d 472

23. Other parties defendant

U S—Montgomery Ward & Co v Northern Pac Terminal Co of Or D C Or 128 F Supp 475

24 Ga—Truitt v Southern Ry Co, 57 S E 2d 496, 80 Ga App 790

Complaint held sufficient

U S—Montgomery Ward & Co v Northern Pac Terminal Co of Or, supra, n 23

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25 U S—Montgomery Ward & Co v Northern Pac Terminal Co of Or D C Or 128 F Supp 520

36 U S—Montgomery Ward & Co v Northern Pac Terminal Co of Or D C Or 128 F Supp 475—Johnson v Chicago, M, St P & P R Co, C A Idaho, 400 F 2d 968

Burden as to rate

U S—Souken-Galamba Corporation v Atchison, T & S F Ry Co C C A Mo 124 F 2d 952, cert den 62 S Ct 917 315 U S 822, 86 L Ed 1218

The sufficiency of evidence generally is determined in accordance with general rules[39.1]

39.1 U S—Johnson v Chicago, M, St P & P R Co C A Idaho, 400 F 2d 968

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Evidence has been held sufficient to go to the jury on other questions.[41.5]

41.5 U S—Johnson v Chicago, M St P & P R Co C A Idaho, 400 F 2d 968

42 U S Montgomery Ward & Co v Northern Pac Terminal Co of Or supra, n 25

Attorney's fees

U S—Souken-Galamba Corporation v Atchison, T & S F Ry Co, D C Mo 28 F Supp 456

Damages not recoverable

U S—Souken-Galamba Corporation v Atchison, T & S F Ry Co supra, n 36

43 Time of ascertainment

Tex—Missouri-Kansas-Texas R Co v Noble, Civ App 271 S W 2d 146, err ref no rev err

46 U S—Souken-Galamba Corporation v Atchison, T & S F Ry Co supra, n 36

52 U S—Montgomery Ward & Co v Northern Pac Terminal Co of Or supra, n 25

§ 34. Injunction to Enjoin Refusal to Receive and Transport

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55 US—Quaker Ct. Motor Parts Co v Inter-State Motor Freight System DC Pa '48 F Supp 226

§ 35. Statement of Rule

Library References

Carriers ⇐40, 44, 208 et seq

58 US—Froehling Suppl. Co v US CA Ill 194 F 2d 637—Pacific Gamble Robinson Co v Minneapolis & St L Ry Co DC Minn 105 F Supp 794, affd in part and vac in part on oth grds CA 215 F 2d 126—Dugdale Packing Co v Atchison, T & S F Ry Co DC Mo 347 F Supp 1276

Ga—R C A Truck Lines, Inc v Georgia Rug Mill, Inc 77 S E 2d 442, 88 Ga App 658, foll 77 S E 2d 445 88 Ga App 663

Iowa—Lakatosh v Diamond Alkali Co 208 N W 2d 910

Mo—Williams v St Louis-San Francisco Ry Co 274 S W 935, 217 Mo App 662

Tex—Missouri-Kansas-Texas R Co v Noble, supra, n 43

10 C J p 73 53 note

Railroads are not obliged to own freight cars but may lease them—General American Tank Car Corporation v El Dorado Terminal Co., Cal 60 S Ct 325 308 U S 422, 84 L Ed 361 reh den 60 S Ct 465 309 U S 694 84 L Ed 1035

At carriers "convenience"

US—Atchison, T & S F Ry Co v Judson Freight Forwarding Co DC Cal, 49 F Supp 789 affd, CCA 150 F 2d 210—Atchison, T & S F Ry Co v White, D C Cal 49 F Supp 797 affd CCA 149 F 2d 919

Substituting equipment

US—Atchison, T & S F Ry Co v Judson Freight Forwarding Co supra—Atchison T & S F Ry Co v White, supra

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62. Other statements of duty

(2) Brownsville Nav Dist of Cameron County v St Louis, B & M Ry Co CCA Tex., 91 F 2d 502, revd on oth grds 58 S Ct 868, 304 U S 295 82 L Ed 1357 reh den 59 S Ct 55, 305 U S. 668 83 L Ed 433

(4) Suitable cars

La—Thibodaux Boiler Works v Southern Pac Transp Co., App., 302 So 2d 49

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65 La—Thibodaux Boiler Works v Southern Pac Transp Co., App 302 So 2d 49

66 US—Brownsville Nav Dist of Cameron County v St Louis, B & M Ry Co., C C A Tex., 91 F 2d 502, revd on oth grds 58 S Ct 868, 304 U S 295, 82 L Ed 1357 reh den 59 S Ct 55 305 U S 668, 83 L Ed 433—Elgin Coal Co v Louisville & N R Co DC Tenn., 277 F Supp 247, affd, C A., 411 F 2d 1043

67 US—Brownsville Nav Dist of Cameron County v St Louis, B & M Ry. Co., C C A Tex., 91 F 2d 502, revd on oth grds 58 S Ct 868, 304 U S 295 82 L Ed 1357 reh den 59 S Ct 55, 305 U S 668, 83 L Ed 433—Elgin Coal Co v Louisville & N R Co DC Tenn 277 F Supp 247 affd, C A 411 F 2d 1043

As at co[illegible] law etc—Brownsville Nav Dist of Cameron County v St Louis, B & M Ry Co., supra, n 62

69 US—Cooper-Jarrett, Inc v US DC Mo., 226 F Supp 318, affd 85 S Ct 49, 379 U S 6, 13 L Ed 2d 21

No duty to furnish facilities without limitations as to territory served

Mich—Grayling Corp v Michigan Public Service Com'n 104 N W 2d 395, 360 Mich 578

§ 36. Excuses for Failure to Furnish Cars

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76 U S—Shippers Car Supply Committee v I C C D C Or 169 F Supp 939 affd 79 S Ct 36, 358 U S 45 3 L Ed 2d 44

Tex—Texas Mexican Ry Co v Isbell Civ App 230 S W 2d 250 err ref

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92. Strike not always sufficient excuse

U S—Minneapolis & St L Ry Co v Pacific Gamble Robinson Co C A Minn 215 F 2d 126

Risk of crossing packet line held excuse

U S—Meier & Pohlmann Furniture Co v Gibbons, C A Mo 233 F 2d 296, cert den 77 S Ct 101 352 U S 879 1 L Ed 2d 80

The provisions of the Labor Management Relations Act have been held not applicable [91]

93.1 U S—Pacific Gamble Robinson Co v Minneapolis & St L Ry Co, supra, n 58—Minneapolis & St L Ry Co v Pacific Gamble Robinson Co supra, n 92

Other excuses have been held not to absolve the carrier from liability.[99]

99.1. Refusal of service by other carriers

U S—Pacific Gamble Robinson Co v Minneapolis & St L Ry Co supra, n 58—Montgomery Ward & Co v Northern Pac. Terminal Co of Or D C Or 128 F Supp 475

§ 37. Conditions Precedent to Shipper's Right to Cars

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1 U S—Brownsville Nav Dist of Cameron County v St Louis, B & M Ry Co C C A Tex., 91 F 2d 502, revd on oth grds 58 S Ct 868, 304 U S 295 82 L Ed 1357 reh den 59 S Ct 55 305 U S 668 83 L Ed 433

"Useless act" principle held not to apply

U S—Minneapolis & St L Ry Co v Pacific Gamble Robinson Co C A Minn 215 F 2d 126

9 U S—Minneapolis & St L Ry Co v Pacific Gamble Robinson Co., supra, n 1

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15 U S—Pacific Gamble Robinson Co v Minneapolis & St L Ry Co., D C Minn 105 F Supp 794 affd in part and vac in part on oth grds C A 215 F 2d 126

§ 38. Actions for Failure or Refusal to Furnish Cars

Library References

Carriers ⇐45, 220 et seq.

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25 Tex—C J S. cited in Missouri-Kansas-Texas R Co v Noble, Civ App 271 S W 2d 146, 157 err ref no rev err

Improper removal

U S—Minneapolis & St L Ry Co v Pacific Gamble Robinson Co., C A Minn 215 F 2d 126

28 Tex—C J S cited in Missouri-Kansas-Texas R Co v Noble, Civ App., 271 S W 2d 146, 156, err ref no rev err

Cause of action conclusively deemed to be under federal statute

Tex—Missouri-Kansas-Texas R Co v Noble, Civ App 271 S W 2d 146, err ref no rev err

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29 Ark—Excelsior Coal Co v Midland Valley Co 139 S W 2d 25 200 Ark 349

32 U S—Brownsville Nav Dist of Cameron Cour v St Louis, B & M Ry Co supra, n

33 U S—Brownsville Nav Dist of Cameron Cou v St Louis, B & M Ry Co supra n

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62 Tex—Texas Mexican Ry Co v Isbell, Civ Ap 230 S W 2d 250 err ref

63 Tex—Missouri-Kansas-Texas R Co v Noble supra, n 28

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77 U S—Pacific Gamble Robinson Co v Minneapolis & St L Ry Co supra, n 15—Minneapo & St L Ry Co v Pacific Gamble Robinson C C A Minn 215 F 2d 126

Held excused

U S—Meier & Pohlmann Furniture Co v Gibbo C A Mo 233 F 2d 296 cert den 77 S Ct 101 3 U S 879 1 L Ed 2d 80

88 U S—Pacific Gamble Robinson Co v Minn apolis & St L Ry Co D C Minn 134 F Sup 849

91. Duty to minimize damages

U S—Pacific Gamble Robinson Co v Minneapolis St L Ry Co supra, n 15

Other matters

U S—Pacific Gamble Robinson Co v Minneapolis St L Ry Co D C Minn 134 F Supp 849

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12 Tex—Missouri-Kansas-Texas R Co v Nob Civ App 271 S W 2d 146, err ref no rev e

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13 U S—Pacific Gamble Robinson Co v Minn apolis & St L Ry Co D C Minn 105 F Sup 794, affd in part and vac in part on oth grc C A 215 F 2d 126

14 U S—C J S cited in Polar S S Corp v Inla Overseas S S Corp C C A Va., 136 F 2d 835, & cert den 64 S Ct 83 320 U S 774, 88 L Ed 4

Allowance of interest within discretion of cou

U S—Minneapolis & St L Ry Co v Pacific Gam Robinson Co., C A Minn., 215 F 2d 126

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20 U S—Pacific Gamble Robinson Co v Minn apolis & St L Ry Co supra, n 13

21 U S—Pacific Gamble Robinson Co v Minn apolis & St L Ry Co., supra n 13

22. Carrier subject to attorney's fee

U S—Minneapolis & St L Ry Co v Pacific Gam Robinson Co supra, n 14

§ 40. In General

Library References

Carriers ⇐77, 208 et seq

25 Ill—H Piper Co v Summit Fast Freight, Ir 117 N E 2d 420, 1 Ill App 2d 298—People v Ni 125 N E 2d 856, 5 Ill App 2d 371 affd 1 N E 2d 12, 8 Ill 2d 136

Statutory construction

Kan—Young v Santa Fe Trail Transp Co., 298 P 235 179 Kan 678

Piggy back service defined

U S—Long Island R Co v U S., D C N Y 1 F Supp 823 825

26 U S—Textron Inc v Lowell Trucking Cor D C N Y 74 F Supp 322—Johnson v Chica M St P & P R Co., C A Idaho, 400 F 2d 9

Ill—Du Quoin Packing Co v Bonfield, 71 N E 173 330 Ill App 338

Mont—Sult v Scandrett 178 P 2d 405 119 Mont 5

Tex—Fletcher L Yarbrough & Co v Texas & N O Ry Co Civ App 226 S W 2d 257 err ref Cert den 71 S Ct 52, 340 U S 820, 95 L Ed 603

Maintenance of switch track serving industries

Ill—Alton R Co v Illinois Commerce Commission ex rel Moulding-Brownell Corporation, 15 N E 2d 508, 363 Ill 584, affd 59 S Ct 340, 305 U S 548, 83 L Ed 344

Relation to government

U S—U S v Bethke, D C Colo, 132 F Supp 22

"Trailer-on-flatcar" service

U S—American Trucking Associations v Atchison, T & S F Ry Co Ill, 87 S Ct 1608, 387 U S 397, 18 L Ed 2d 847 reh den 88 S Ct 11, 12, 389 U S 889, 19 L Ed 2d 197

Cannot palm off deficiencies onto shipper

U S—Federated Dept Stores, Inc v Brinke, C A Fla 450 F 2d 1223

Insurer of goods

Tex—Travelers Ins Co v Delta Air Lines, Inc Civ App 498 S W 2d 443

Duty to follow shipping instructions

Wis—Ideal Co v Interpace Corp, 266 N W 2d 423 83 Wis 2d 876

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27 U S Meltzer v Pennsylvania R Co, D C Pa 29 F Supp 840—Miller v AAACON Auto Transport, Inc, D C Fla 447 F Supp 1201

Conn Penfield Mfg Co v Chrstom. Cir A D 243 A 2d 87 5 Conn Cir 91

N Y—Concord Litho Co v Celes Trucking & Co nsolidating Terminal, Inc 302 N Y S 2d 229, 59 Misc 2d 1020

Tex—Tucker v Newth, Civ App 157 S W 2d 1010, err ref

28 U S—Winn-Dixie Mortgage Co, Inc v Brinks, Inc D C Ala 298 F Supp 366

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29 Mont—Sust v Scandrett, supra, n 26

Vt—Benoit v Central Vt Ry, 73 A 2d 321, 116 Vt 266, 33 A L R 2d 139

31. Duty not dependent on contract

Pa—Nusade Metal Products, Inc v Eazor Exp, Inc, 152 A 2d 275 189 Pa Super 593

33 U S—Ct Inc v Southern Pac Co, D C Mass, 303 F Supp 1158

34 La—Elliott v Wallace, App, 251 So 2d 831

Mass—Mt Tom Motor Lines v McKesson & Robbins, 89 N E 2d 3 325 Mass 45

35 Tex—Texas Mexican Ry Co v Isbell, Civ App 230 S W 2d 250, err ref

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36 Or—Timber Structures, Inc v Southern Pac Co, 390 P 2d 343, 237 Or 42, 16 A L R 3d 1102

39 Mich—Grand Trunk Western R Co v Mount Clemens Sugar Co, 269 N W 208, 277 Mich 366, cert den 57 S Ct 514, 300 U S 670, 81 L Ed 877

41 U S—General American Tank Car Corp v El Dorado Terminal Co Cal 60 S Ct 325, 308 U S 422, 84 L Ed 361, reh den 60 S Ct 465 309 U S 694, 84 L Ed 1035

Miss—Parker v Film Transit Co 18 So 2d 159, 194 Misc 542

§ 42. —— Inanimate Freight

47. No duty to furnish facilities

U S—U S v I C C, App D C, 77 S Ct 241 352 U S 158, 1 L Ed 2d 211

§ 44. Duty to Follow Shipping Directions

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84. Error in routing instructions

U S—Marquette Cement Mfg Co v Louisville & N R Co, D C Tenn 281 F Supp 944 affd C A 406 F 2d 731

86 U S—Great Northern Ry Co v Melton, C A Mont 193 F 2d 729

87 U S—Fleming & Sons v Gulf, C & S F Ry Co C A Tex 187 F 2d 536

§ 45. —— Routing

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91 U S—T & M Transp Co v S W Shattuck Chemical Co C C A Colo 148 F 2d 777

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7 Vt—C.J.S. cited in Benoit v Central Vermont Ry 73 A 2d 321 323, 116 Vt 266, 33 A L R 2d 139

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9 N Y—Dave Levine & Co v Wolf's Package Depot, 138 N Y S 2d 427 29 Misc 2d 1085 affd 150 N Y S 2d 543 1 A D 2d 874 app den 151 N Y S 2d 601, 1 A D 2d 949

13 U S—Fleming & Sons v Gulf C & S F Ry Co C A Tex 187 F 2d 536

§ 48. Miscellaneous Rights and Duties Imposed by Exceptional Circumstances

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24 U S—Northern Pac Ry Co v Associated General Contractors of N D D C N D 152 F Supp 126

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33. Held not insurer

Conn—Christ Church Parish v Cadet Chemical Corp, 199 A 2d 707 25 Conn Sup 191

The liability of the carrier should be predicated on its knowledge of the dangerous propensities of the substance it is transporting, together with its use of a standard of care commensurate with the dangerous character of the substance [33.5]

33.5 Conn—Christ Church Parish v Cadet Chemical Corp 199 A 2d 707, 25 Conn Sup 191

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39 U S—Kaiser Aluminum & Chemical Corp v Illinois Cent Gulf R Co, C A Mo, 615 F 2d 470, cert den 101 S Ct 249 449 U S 890, 66 L Ed 2d 116

Iowa—Murphy v Southern Iowa Route, 14 N W 2d 282, 234 Iowa 772, 152 A L R 1156

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N Y—Erie R Co v William J Pfeil, Inc, 11 N Y S 2d 155, 256 App Div 465

S C—Victor Fertilizer Co v Southern Ry Co, 24 S E 2d 499, 202 S C 294

Tex—C.J.S. cited in A J Tebbe & Sons Co v Brown Express, 341 S W 2d 642, 647 161 Tex 456—Texas & Pac Ry Co v Empacadora De Ciudad Juarez, S A, Civ App, 342 S W 2d 195, err ref no rev err

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49 Ill—Lash & Mages, Inc v Atchison, T & S F R Co, 111 N E 2d 362, 349 Ill App 540

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The rule applies as to transportation of other liquids [51.5]

51.5 Ill—Rylander v Chicago Short Line Ry Co 153 N E 2d 225 19 Ill App 2d 29 affd Sup 161 N E 2d 812, 17 Ill 2d 618

§ 50. —— Liability for Loss or Injury Caused by Defective Cars Not Owned by Carrier

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63 Iowa—C.J.S. cited in Jackson v Chicago, M St P & P R Co 30 N W 2d 97 100, 238 Iowa 1253

64 U S—C.J.S. quoted in U S v Gulf, M & O R Co D C La 259 F Supp 704, 709 affd C A 391 F 2d 545

Requisites for application of rule

U S—U S v Gulf, M & O R Co D C La, 259 F Supp 704 affd C A, 391 F 2d 545

65 U S—C.J.S. quoted in U S v Gulf, M & O R Co D C La 259 F Supp 704 709 affd C A 391 F 2d 545

Tex—Texas & P Ry Co v Empacadora De Ciudad Juarez, S A Civ App, 309 S W 2d 926, err ref no rev err

§ 51. —— Liability for Injury on Connecting Line Due to Defective Cars

69 Tex—Texas & P Ry Co v Empacadora De Ciudad Juarez, S A Civ App 309 S W 2d 926, err ref no rev err

70 Tex—Texas & P Ry Co v Empacadora De Ciudad Juarez, S A Civ App 309 S W 2d 926, err ref no rev err—C.J.S. cited in A J Tebbe & Sons Co v Brown Express, 341 S W 2d 642, 647, 161 Tex 456

§ 52. —— Contract or Custom as Affecting Liability

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71 U S—Peter Condales Co Inc v Southern Pac Co C A Ill 512 F 2d 1141

Kan—First Nat Bank of Girard v Bankers Dispatch Corp, 562 P 2d 32, 221 Kan 528

75 Kan—Nolan v Auto Transportes, 597 P 2d 614, 226 Kan 176

§ 53. —— Assumption of Risk by Shipper

77. Shipper usually not charged with knowledge of discoverable defects

Tex—A J Tebbe & Sons Co v Brown Express, 341 S W 2d 642, 161 Tex 456

78 Tex—Texas & Pac Ry Co v Empacadora De Ciudad Juarez, S A, Civ App, 342 S W 2d 195, err ref no rev err

80 Tex—A J Tebbe & Sons Co v Brown Express, 341 S W 2d 642, 161 Tex 456

§ 54. For Live Stock

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81 U S—Kaiser Aluminum & Chemical Corp v Illinois Cent Gulf R Co, C A Mo 615 F 2d 470, cert den 101 S Ct 249 449 U S 890, 66 L Ed 2d 116

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82 Tex—A J Tabbe & Sons Co v Brown Express, 341 S W 2d 642, 161 Tex 456

83 Tex—A J Tedford Grain Co v Brown Express, 341 S W 2d 642, ref n r e, Tex 456

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99 Tex—C J S cited in Gulf C & S F Ry Co v Sklar, Civ App 134 S W 2d 771, 773, writ dism

Orders as bedding

Tex—Panhandle & S F Ry Co v Montgomery, Civ App 140 S W 2d 241

Shipper's duty to inspect bedding

Tex—Gulf C & S F Ry Co v Sklar, supra

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1 Tex—Gulf, C & S F Ry Co v Sklar, supra, n 99

§ 55. —— Liability for Injury Caused by Defective Cars Not Owned by Carrier

4 Palace stock cars are cars which occupy to the shipment of stock the same place that palace sleeping cars do to passengers traveling over a railroad —Louisville & N R Co v Dies, 18 S W 266, 91 Tenn 177, 181, 30 Am St Rep 871

§ 56. —— Liability for Injuries on Connecting Line Due to Defective Cars

6 N J—Upjohn Co v Timpany, 402 A 2d 979, 168 N J Super 283

§ 60. Inanimate Freight

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31 U S—U S v Savage Truck Line, Inc, C A Va, 209 F 2d 442, 44 A L R 2d 984, cert den 74 S Ct 677, 347 U S 952, 98 L Ed 1098—Carrier Corp v Furness, Withy & Co, D C Pa, 131 F Supp 19—Empire Aluminum Corp v S S Korendijk, D C Ga, 391 F Supp 402

Conn—Penfield Mfg Co v Chrystom, Cir A D, 243 A 2d 87, 5 Conn Cir 91

S C—Mastropole v Transit Homes, Inc, 175 S E 2d 465, 254 S C 332, cert den 91 S Ct 365, 400 U S 967, 27 L Ed 2d 388

Quasi-fiduciary duty

U S—In re Penn Central Transp Co, D C Pa, 351 F Supp 1348

32 U S—Textron, Inc v Lowell Trucking Corp, D C N Y, 74 F Supp 322

Mich—C O Porter Machinery Co v Coleman, 44 N W 2d 845, 329 Mich 8

S C—Mastropole v Transit Homes, Inc, 175 S E 2d 465, 254 S C 332, cert den 91 S Ct 365, 400 U S 967, 27 L Ed 2d 388

General regulations as not affecting rules of common law liability

Ohio—Nationwide Mut Ins. Co v Peerless Ins Co, App, 194 N E 2d 154

33 U S—M & S Tomato Repacking Co v Boston & Maine Corp, D C Mass, 310 F Supp 186

Cal—Allred v Bekins Wide World Service, Inc, 120 Cal Rptr 312, 45 C A 3d 984

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Kan—Mid-Continent Grain Co v St Louis-San Francisco Ry Co, 203 P 2d 141, 166 Kan 641

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N C—Poole v Hartsell, 129 S E 2d 97, 258 N C 680

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Tex—Lee Roy Crawford Produce Co v Thompson, Civ App, 228 S W 2d 344, rev'd on oth grds 233 S W 2d 295, 149 Tex 357—Consolidated Copperstate Lines, Inc v Standard Asbestos Mfg & Insulating Co, Civ App, 378 S W 2d 704, writ ref n r e

Wash—Conger v Cordes Towing Service, Inc, 365 P 2d 20, 58 Wash 2d 876

"Piggy-back"

U S—Blue Bird Food Products Co v Baltimore & O R Co, C A Pa, 492 F 2d 1329

Liability shown

U S—Martin Imports v Courier-Newsom Exp, Inc, C A Ill, 580 F 2d 240, cert den 99 S Ct 574, 439 U S 993, 58 L Ed 2d 655

34 U S—Feinberg Kosher Sausage Co v Watson Bros Transp Co, D C Minn, 101 F Supp 403, aff'd C A, 193 F 2d 283

Highest degree of care to discover defects in heating system of private car

Wash—McCurdy v Union Pac R Co, 413 P 2d 617, 68 Wash 2d 457

35 Ariz—Southern Pac Co v Loden, 508 P 2d 347, 19 Ariz App 460

Cal—Newmark v Pacific Freight Lines, 155 P 2d 68, 67 Cal App 2d 548

Colo—Watson Bros Transp Co v Domenico, supra, n 33

N C—Pressythe v Atlantic Coast Line R Co, 52 S E 2d 360, 230 N C 195

Reasonable care

U S—Sarno v Southern Pac Co, D C Mass, 277 F Supp 628

§ 61. —— Refrigeration

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40. Heating required under tariff

Mo—Fadler v Chicago, R I & P R Co, App, 251 S W 2d 835

N H—Akerly v Railway Exp Agency, 77 A 2d 856, 96 N H 396

45 U S—Gordon H Mooney Ltd v Farrell Lines, Inc, C A N Y, 616 F 2d 619, cert den 101 S Ct 217, 449 U S 875, 66 L Ed 2d 96

46 Ga—Powell v Jerome, supra, n 33

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Wis—C J S. cited in Whitehall Packing Co, Inc v Safeway Truck Lines, Inc, 228 N W 2d 365, 370, 68 Wis 2d 369

Request held essential

La—Mistia v Railway Exp Agency, App, 61 So 2d 101

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47. Carrier held not negligent

Ohio—Thomas Foods, Inc v Pennsylvania R Co, 168 N E 2d 612, 112 Ohio App 76

49 U S—Watson Bros Transp Co v Feinberg Kosher Sausage Co, C A Minn, 193 F 2d 283

Ga—Powell v Jerome, supra, n 33

R I—Blount Seafood Corp v Arrow Transp Co, 124 A 2d 869, 84 R I 463

51 U S—U S v Reading Co, C A Pa, 289 F 2d 7

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53 Ga—C J S. cited in Powell v Jerome, 36 S E 2d 371, 375, 73 Ga App 257

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78 N D—Saetz v Braun, 116 N W 2d 628

Standard is conduct of ordinarily prudent pe

N D—Saetz v Braun, 116 N W 2d 628

79 Ill—Prince v Railway Exp Agency, 93 N E 2d 102, 341 Ill App 236

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82. Purpose of statutes

U S—Grigg v Southern Pac Co, C A Cal, 248 F 2d 949

Statute inapplicable where consignee is in charge destination—Grigg v Southern Pac Co, C A Cal, F 2d 949

93 Tenn—Frye v Railway Exp Agency, Inc, S W 2d 362, 41 Tenn App 429

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99. "Rough handling" defined

Tex—Southern Kansas R Co of Texas v Yarboro, 109 S W 390, 392, 49 Tex Civ App 407

54 C J p 1105 notes 44-46

5 Ill—Prince v Railway Exp Agency, 93 N E 2d 102, 341 Ill App 236

§ 64. —— Duty to Provide Fe Water, and Rest

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40 Tex—Texas & N O R Co v Lide, Civ App, S W 2d 685, err dism

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84 U S—Southern Pac Co v H Moffat Co., C C Nev, 154 F 2d 877, cert den 67 S Ct 54, cases, 329 U S 920, 91 L Ed 2d 624

§ 66. —— Care Required in Resp of Sick or Pregnant Anim

55 Ohio—Grosjean v Pennsylvania R Co, N E 2d 623, 146 Ohio St 643

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Mo—C J S cited in Jones v Thompson, 228 S W 673, 676, 360 Mo 285

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60 U S—Railroad Retirement Bd v Duquesne Warehouse Co, supra, n 58—U S v Savage Truck Line, Inc, C A Va, 209 F 2d 442, 44 A L R 2d 984, cert den 74 S Ct 677, 347 U S 952, L Ed 1098

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Tex—T I M E—DC, Inc v South ern Historical Wax Museum Corp, Civ App, 528 S W 2d 901

Federal regulation as to machinery

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61 Ind—Standard Oil Co v Soderling, supra, n 60

64 Mo—C.J.S. cited in Southe n Advance Bag & Paper Co v Terminal R Ass'n of St Louis, App, 171 S W 2d 107, 112—C.J.S. cited in Jones v Th gard, 228 S W 2d 673 676, 360 Mo 285—C.J.S. cited in Dunn v General Motors Corporation, 466 S W 2d 700, 704

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70 US—Blytheville Cotton Oil Co v Kurn, C C A Tenn, 155 F 2d 467—Association of Maryland Pilots v Baltimore & O R Co D C Md, 304 F Supp 548

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75 US—Association of Maryland Pilots v Baltimore & O R Co D C Md, 304 F Supp 548—Georgia Kraft Co v Terminal Transport Co, D C Tenn 343 F Supp 1240

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U.S.—Jarka Co poration of Pittsburgh v Pennsylvania R Co, D C Md, 42 F Supp 371, affd 130 F 2d 804

90. Tariff requiring consignee to unload

US—Loveless Mfg Co v Rock Island Exp, D C Okl 104 F Supp 809

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1. unloading

(1) US—Armour & Co v Alton R Co D C Ill, 27 F Supp 625 affd, C C A, 111 F 2d 913, affd 61 S Ct 498, 312 US 195, 85 L Ed 771

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12 N Y—Instrumental Systems Corp v Associated Rigging and Hauling Corp, 416 N Y S 2d 5, 70 A D 2d 529

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24.10 US—US v Savage Truck Line, C A, 209 F 2d 442, 44 A L R 2d 984, cert den 74 S Ct 677, 347 US 952, 98 L Ed 1098—Helms Exp Inc v US D C Del 186 F Supp 521

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N C—American Cigarette & Cigar Co v Garner, 47 S E 2d 854, 229 N C 173—Centennial Ins Co v Haley Transfer & Storage, Inc 196 S E 2d 822, 18 N C App 152

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Interstate Commerce Act codifies common law rule

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Conduct of local agent

U S—Cutten v Allied Van Lines, Inc, D C Cal 349 F Supp 907 affd C A 514 F 2d 1196

29 U S—Goldberger v M Peak, D C Pa 60 F Supp 498—L E Whitlock Truck Service, Inc v Regal Drilling Co C A Colo 333 F 2d 488

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(3) Other cases

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La—Jefferson Mfg Co v Bayou Shoppe, App 210 So 2d 912

(4) Other matters

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Application of rule limited

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33 U S—Michigan Millers Mut Fire Ins Co v Canadian Northern Ry Co C C A Minn 152 F 2d 292—Modern Tool Corp v Pennsylvania R Co D C N J 100 F Supp 595—F J McCarty Co v Southern Pac Co, C A Cal, 428 F 2d 690

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N C—American Cigarette & Cigar Co v Garner pta, n 27

Tex—Adams v Whatley Civ App 213 S W 2d

Liability where shipper furnishes guards

(1) Carrier liable before guards furnished

U S—Inland Trucking Corp v U S 281 F 2d 457 Ct Cl 642

(2) Shipper liable after guards furnished

U S—Inland Trucking Corp v U S 281 F 2d 457 Ct Cl 642

42 Cal—Allied v Bekins Wide World Service, 120 Cal Rptr 312, 45 C A 3d 984

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43 Ky—Lester v Kelley 132 S W 2d 67 279 767—Hayes Freight Lines v Hamilton, S W 2d 60

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Contract with government

(2) Other matters

U S—Inland Trucking Corp v U S, 281 F 2d 457 Ct Cl 642

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52 U S—Montgomery Ward & Co v Northern Terminal Co of Or D C Or 128 F Supp

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Wis—Hanaman v Liberty Trucking Co, supra, n

53. Similar statement

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54 Ga—Powell v Jerome, supra, n 27

§ 72. What Law Governs

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63 U S—Goldenberg v World Wide Shippers Movers of Chicago, Inc C A Ill 236 F 2d

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N Y—Cy Ruchman, Inc v Saland, 102 N Y S 2d 407 affd 102 N Y S 2d 409

Indemnity agreement

Idaho—Rungee v Allied Van Lines, Inc 449 P 2d 378 92 Idaho 718

64 U S—Empire Aluminum Corp v SS Korendijk, D C Ga 391 F Supp 402

65 Ala—Atlantic Coast Line Ry v Enterprise Cotton Oil Co 74 So 232, 199 Ala 57

N Y—Barbuzon Corp v Lock-Air Delivery Inc, 250 N Y S 2d 314 43 Misc 2d 151

Liability of a carrier for loss, damages or injury to interstate shipments is governed by the Interstate Commerce Act and the decisions of the federal courts construing the Act.[65.5]

65.5 U S—Missouri Pac R Co v H Rouw Co C A Tex 258 F 2d 445 cert den 79 S Ct 315 358 U S 929 3 L Ed 2d 302, reh den 79 S Ct 605 359 U S 932, 3 L Ed 2d 634

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§ 73. To What Classes of Carriers Rule Applicable

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67 Or—Clifford W Brown v Bonesteele, 344 P 2d 928, 218 Or 312

74 Ky—Senters v Ratliff's Adm r 128 S W 2d 724 278 Ky 290

§ 74. —— Private Carriers

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75 U S—Home Ins Co v Ruddell, C A Miss 252 F 2d 1

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76 U S—Bigley Trucking Corp v U S, 149 F Supp 141, 137 Ct Cl 903

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77 U S—Brown & Root, Inc v American Home Assur Co C A Tex, 353 F 2d 113, cert den 86 S Ct 1465, 384 U S 943, 16 L Ed 2d 541

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(2) Other cases

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U S—Aetna Ins Co v Cooper Wells & Co, C A Mich 234 F 2d 342

78 Ill—Meyer v Rozran, supra, n 32

Ky—Parker v Stewart, 176 S W 2d 88, 296 Ky 48

Neb—Lincoln Drug Co v Harman, supra, n 32—Sleezer v Lang, 102 N W 2d 435 170 Neb 239

Or—Clifford W Brown v Bonesteele, 344 P 2d 928, 218 Or 312

Tex—Beck v Lasater, Civ App 286 S W 2d 957, err ref no rev err

Delivery of airplanes

U S—Aviation Associates of Puerto Rico v Dixon Co D C Pa 333 F Supp 982

79 Me—Public Utilities Commission v Johnson Motor Transport, 84 A 2d 142, 147 Me 138

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N Y—Weiss Bros Stores, Inc v De Martis, 179 N Y S 2d 723 14 Misc 2d 522—Congharo v Central Mut Ins Co 191 N Y S 2d 412, 17 Misc 2d 448

§ 75. Excepted Causes Exempting Carriers from Liability

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83 U S—F J McCarty Co v Southern Pac Co D C Cal, 289 F Supp 875 Affd C A 428 F 2d 690

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89. Absence of certificate of authority

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§ 76. —— Act of God

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98 Ala—Louisville & N R Co v Finlay, supra, n 95

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7 U S—Farr Co v Union Pac R Co C C A Colo 106 F 2d 437

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25 La—Kaplan Rice Mill v Texas & N O R Co App 26 So 2d 42

§ 77. —— Act of the Public Enemy

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§ 78. —— Acts or Negligence of Shipper

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35. Conduct of carrier's inspector as not constituting waiver

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93 U S—Armour Research Foundation of Illinois Institute of Technology v Chicago R I & P R Co, C A Ill, 311 F 2d 493, cert den 83 S Ct 707, 372 U S 966, 10 L Ed 2d 129.

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98 N J—C J S quoted in W J Casey Trucking & Rigging Co, Inc v General Elec, 376 A 2d 603, 606, 151 N J Super 151.

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99 U S—C J S cited in Modern Tool Corp v Pennsylvania R Co, D C N J, 100 F Supp 595, 598—Armour Research Foundation of Illinois Institute of Technology v Chicago R I & P R Co, C A Ill, 297 F 2d 176, 1 A L R 3d 731.

N J—C J S quoted in W J Casey Trucking & Rigging Co, Inc v General Elec, 376 A 2d 603, 606, 151 N J Super 151.

No duty to disregard shipper's instructions

U S—Helms Exp, Inc v U S, D C Del, 186 F Supp 521.

2 U S—Standard Hotel Supply Co v Pennsylvania R Co, D C N Y, 65 F Supp 439.

3 Ark—Missouri Pac R Co v Stem, 256 S W 3, 161 Ark 405.

§ 79. —— Loss from Inherent Nature of the Property and Natural Causes

Library References

Carriers ⇐120, 216.

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12 US—F J McCarty Co v Southern Pac Co, D C Cal 289 F Supp 875 affd C A 428 F 2d 690—Fraser-Smith Co v Chicago, R I & P R Co C A Minn 435 F 2d 1396

Ark—Railway Express Agency v H Rouw Co 127 S W 2d 251, 197 Ark 1142—Kansas City Southern Ry Co v Shull, 136 S W 2d 1040, 199 Ark 932—Missouri Pac R Co v H Rouw Co, 155 S W 2d 693 202 Ark 1139

Cal—Convey-All Corp v Pacific Intermountain Exp Co Inc 174 Cal Rptr 443, 120 C A 3d 59

Colo—Denver-Chicago Trucking Co v Oyama, 188 P 2d 442, 117 Colo 359—Watson Bros Transp Co v Domenico, 194 P 2d 323, 118 Colo 133

Conn—Wells Laundry & Linen Supply Co v Acme Fast Freight, 85 A 2d 907, 138 Conn 458

Kan—Mid-Continent Grain Co v St Louis-San Francisco Ry Co 203 P 2d 141 166 Kan 641

La—C.J.S. quoted in Minot Hooper Co v Crowley Indus Bag Co App 217 So 2d 653, 659, writ ref 221 So 2d 517, 253 La 1082

Miss—Illinois Cent R Co v Paxton, 193 So 915 187 Miss 858—C.J.S quoted in Illinois Cent R Co v Buckley 185 So 2d 427 430

Mo—William A Smith Contracting Co v Missouri Pac R Co App 481 S W 2d 580, cert den 93 S Ct 900, 409 U S 1107 34 L Ed 2d 687

N J—C.J.S. cited in Joseph Toker Co v Lehigh Valley R Co, 97 A 2d 598, 600, 12 N J 608, 39 A L R 2d 318—Nopco Chemical Division v Blaw-Knox Co 281 A 2d 793, 59 N J 274

Tex—Trans-Cold Exp Inc v Hardin Tex Civ App 415 S W 2d 431—Loop Cold Storage Co v South Texas Packers, Inc, Civ App 483 S W 2d 914 revd in part on oth grds, Sup, 491 S W 2d 106

Va—Old Dominion Freight Line v Philip Morris, Inc, 207 S E 2d 851 215 Va 169

Under Carmack Amendment

(2) Other cases

U S—Larry's Sand Riches, Inc v Pacific Elec Ry Co C A Cal, 318 F 2d 690

Fla—Mc[illegible] v E A McCabe & Co, App 113 So 2d 879

13 U S—American Writing Ink Co v New York, N H & H R, D C Mass 80 F Supp 694—Delphi Frosted Foods Corp v Illinois Cent R Co, D C Ky 89 F Supp 55, affd C A, 188 F 2d 343 cert den 72 S Ct 53, 342 U S 833, 96 L Ed 630—C.J.S. cited in Austin v Seaboard Air Line R Co, C A Fla 188 F 2d 239

Ark—C.J.S. quoted in Railway Express Agency v H Rouw Co supra, n 12—Railway Express Agency v H Rouw Co, 128 S W 2d 989 198 Ark 423

Ga—Thomas Rogers-Dixson Co v Southern Ry Co, 53 S E 2d 702, 79 Ga App 449

La—Close v Missouri Pac R Co App, 191 So 596—Taormina Corporation v Lauckner-Hall Gulf SS Co, App 6 So 2d 235

Minn—Sutton v Minneapolis & St L Ry Co 23 N W 2d 561 222 Minn 233

N H—Akerly v Railway Exp Agency, 77 A 2d 856, 96 N H 396

Pa—Jackson & Perkins Co v [illegible] Transp Co 41 A 2d 635, 351 Pa 583, cert den 66 S Ct 42, 326 U S 733, 90 L Ed 427—Wareham v Railway Exp Agency 94 Pittsb Leg J 349

Tenn—C.J.S. cited in Illinois Cent R Co v H Rouw & Co, 159 S W 2d 839 841 25 Tenn App 475

Tex—Boyd v McCloskey Civ App, 515 S W 2d 25

Following shipper's direction

(2) Other cases

U S—[illegible] Kosher Storage Co v Watson Bros Transp Co D C Minn 101 F Supp 403 affd C A, 193 F 2d 283

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14 Fla—[illegible] R Co v Greco 25 So 2d 809 157 Fla 337

15 Implied warranties

La—Minot Hooper Co v Crowley Indus Bag Co App 217 So 2d 653 writ ref 221 So 2d 517 253 La 1082

16 Ga—R C A Truck Lines, Inc v Georgia Rug Mill, Inc 77 S E 2d 442, 88 Ga App 658 foll 77 S E 2d 445, 88 Ga App 663

Ill—Palmer v Gillarde, 38 N E 2d 352, 312 Ill App 230

Liability for patent defects

N J—W J Casey Trucking & Rigging Co Inc v General Elec Co, 376 A 2d 603, 151 N J Super 151

18 U S—Feinberg Kosher Sausage Co v Watson Bros Transp Co, supra, n 13—National Distillers Products Corp v Companhia Nacional de Navegacao, D C Pa, 107 F Supp 65

Ark—Railway Express Agency v H Rouw Co supra, n 13

D C—Smith's Transfer & Storage Co v Burgue, Mun App 34 A 2d 705

Tenn—Illinois Cent R Co v H Rouw & Co 159 S W 2d 839 25 Tenn App 475

19 Fla—Pennsylvania R Co v Greco, supra, n 14

Ill—Du Quoin Packing Co v Romfield, 71 N E 2d 173, 330 Ill App 338

Perishable goods

(3) Other cases

U S—Johnson Motor Transport v U S 149 F Supp 175, 137 Ct Cl 892—Missouri Pac R Co v Elmore & Stahl, Tex 84 S Ct 1142, 377 U S 134 12 L Ed 2d 194, reh den 84 S Ct 1880, 377 U S 984 12 L Ed 2d 752—Larry's Sandwiches, Inc v Pacific Elec Ry Co C A Cal 318 F 2d 690

D C—Dugdale Packing Co v Atchison, T & S F Ry Co, D C Mo 347 F Supp 1276

Ill—National Starch & Chemical Corp v McNamara Motor Exp Inc 189 N E 2d 776, 40 Ill App 2d 484

Mich—Van Lierop v Chesapeake & O Ry Co 57 N W 2d 431 335 Mich 702, cert den 74 S Ct 40 346 U S 834 98 L Ed 357

Tex—Missouri Pac R Co v Elmore & Stahl, Civ App, 360 S W 2d 839, affd, Sup 368 S W 2d 99 affd 84 S Ct 1142, 377 U S 134, 12 L Ed 2d 194 reh den 84 S Ct 1880, 377 U S 984 12 L Ed 2d 752

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20 Conn—Wells Laundry & Linen Supply Co v Acme Fast Freight, 85 A 2d 907 138 Conn 458

N H—Akerly v Railway Exp Agency supra, n 13

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Wis—C.J.S cited in Whitehall Packing Co Inc v Safeway Truck Lines, Inc, 228 N W 2d 365, 369 68 Wis 2d 369

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U S—Missouri Pac R Co v Elmore & Stahl, Tex, 84 S Ct 1142, 377 U S 134 12 L Ed 2d 194, reh den 84 S Ct 1880, 377 U S 984, 12 L Ed 2d 752

21 N M—Spurgin Corp v Dallas & Mavis Forwarding Co, Inc App, 559 P 2d 846, 90 N M 58, cert den 561 P 2d 1347, 90 N M 254

Tex—Thompson v Tankersley, 238 S W 2d 263 265

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25 La—C.J.S. quoted at length in Minot Hooper Co v Crowley Indus Bag Co, App 217 So 2d 653, 659 writ ref 221 So 2d 517 253 La 1082

Miss—C.J.S. quoted at length in Illinois Cent R Co v Buckley, 185 So 2d 427 430

Wis—C.J.S. quoted in Joseph Miller Co v Gateway City Transfer Co, 20 N W 2d 651 653 247 Wis 584

29. Heating of hay caused by moisture in hay when loaded

Miss—Illinois Cent R Co v Buckley, 185 So 2d 427

35 U S—Pilgrim Distributing Corp v Terminal Transport Co Inc D C Ohio 383 F Supp 204

Colo—Denver-Chicago Trucking Co v Oyama, supra, n 12

Wash—Lavagetto v Railway Exp Agency 209 P 2d 371, 34 Wash 578

36 U S—Standard Hotel Supply Co v Pennsylvania R Co supra, n 2

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39 Cal—Schraeder v Robinson, 177 P 2d 788, 78 Cal App 2d 328

Mo—Colley v Cox, App 266 S W 2d 778

Ohio—Trees v Pennsylvania R Co, 109 N E 2d 29, 91 Ohio App 497—Porter v Railway Exp Agency Inc 155 N E 2d 528

Tex—Panhandle & S F Ry Co v Wilson, Civ App 135 S W 2d 1062, err dism

Liability only for negligence

Tex—Holt v Lowden, Civ App 140 S W 2d 318

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42 Cal—C.J.S. quoted in Bauer v Jackson, 93 Cal Rptr 43 52, 15 C A 3d 358

43. Death of stallion

Iowa—Vander Beek v Chicago & N W Ry Co 278 N W 201 supra 286 N W 452, 226 Iowa 1363

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51 U S—Illinois Produce Intern Inc v Reliance Ins Co D C Ill 388 F Supp 29

§ 80. Necessity That Excepted Cause Be Proximate Cause

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56 Ala—West Bros Inc v Resource Management Service, Inc 214 So 2d 431, 283 Ala 78

Fla—Pennsylvania R Co v Greco, supra, n 14

Ky—Lerster v Kelley 132 S W 2d 67 279 Ky 767

La—C.J.S cited in Piazza v Louisiana & A Ry Co App 46 So 2d 670, 673—C.J.S quoted at length in Southwestern Sugar & Molasses Co v Industrial Molasses Corp App, 135 So 2d 481, 486

Neb—Redman Industries, Inc v Morgan Drive Away Inc, 138 N W 2d 708, 179 Neb 406

N J—W J Casey Trucking & Rigging Co Inc v General Elec Co 376 A 2d 603, 151 N J Super 151

Ohio—Toman v Pennsylvania R Co 51 N E 2d 231

Storm

(2) Other cases—Western Millers Mut Fire Ins Co v Thompson, supra, n 18

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57 U S—Levanno Co v American Pres[illegible] Lines, Limited, C A N Y 337 F 2d 729

Ala—West Bros Inc v Resource Management Service, Inc 214 So 2d 431 283 Ala 78

58 U S—Compania De Vapores Ins Co, S A v Missouri-Pacific R Co D C La 133 F Supp 942, affd, C A, 232 F 2d 657, cert den 77 S Ct 102, 352 U S 880, 1 L Ed 2d 80—Union Pac R Co v U S 292 F 2d 521, 154 Ct Cl 427

Contributory negligence of consignor immaterial

Minn—Powers v Stats, 70 N W 2d 344 244 Minn 515

59 U S—Johnson v Chicago, M St P & P R Co, C A Idaho, 400 F 2d 968

Ala—West Bros Inc v Resource Management Service, Inc 214 So 2d 431 283 Ala 78

Ariz—Railway Exp Agency v Schoen, 216 P 2d 420 70 Ariz 87

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61. Negligence not shown

US —P[illegible] F Supp 957

65 US —Bro[illegible] Corp DC Va[illegible] F Supp 95

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64 US —Standard Brands v Boston & M R R DC Mass 29 F Supp 593

Neb —Fairmont Creamery Co v Thompson, supra, n 7

Vt —Benoit v Central Vt Ry, 73 A 2d 321, 116 Vt 266, 33 A L R 2d 139

65 US —U S Leasco & N R Co DC Va 287 F Supp 297

66 La —CJS cited in Southwestern Sugar & Molasses Co v Louisiana Molasses Corp App 25 So 2d 45 450

§ 81. —— Negligent Delay of Transportation

68 US —Crump v Thompson, CA 4th, 171 F 2d 442

Pa —Kurtz v Pennsylvania R Co 51 Pa Dist & Co 679

Tex —Missouri-Kansas-Texas R Co of Tex Reeglem Provision Co Civ App 260 S W 2d 905 err ref no rev err

Absence of negligence

(2) Other cases

D C —Statler Hilton Hotel Corp v Wells Fargo Armored Service Corp App 370 A 2d 1255

Miss —Smithwick v Illinois Cent R Co 32 So 2d 862 202 Miss 868

Wis —Joseph Miller Co v Gateway City Transfer Co 20 N W 2d 651 247 Wis 584

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70 US —Mark v Union Pac R Co C A Kan 244 F 2d 268

72 US —Crump v Thompson, supra, n 68

Miss —Smithwick v Illinois Cent R Co, supra, n 68

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75 Fla —Pennsylvania R Co v Greco supra, n 14

§ 82. —— Loss Occurring During Deviation

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87 Ill —Pressed Steel Car Co v Lyons, 129 N E 2d 765 7 Ill 2d 95

Vt —Benoit v Central Vt Ry, supra, n 64

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93 Vt —Benoit v Central Vt Ry., supra, n 64

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3 Vt —Benoit v Central Vt Ry 73 A 2d 321 116 Vt 266, 33 A L R 2d 139

§ 83. —— Negligence in Not Avoiding or Preventing Loss or Injury

8 US —Johnson Motor Transport v U S, 149 F Supp 175, 137 Ct Cl 892—CJS cited in Association of Maryland Pilots v Baltimore & O R Co, D C Md, 304 F Supp 548 555

Neb —Fairmont Creamery Co v Thompson, 298 N W 551 139 Neb 677

N Y —General Cigar Co v Reading Co 38 N Y S 2d 636, 265 App Div 322

Tenn —Tennessee Packers, Inc v Tennessee Cent Ry Co, 319 S W 2d 502, 45 Tenn App 57

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11 U S —American Sugar Refining Co v Illinois Cent R Co D C La 193 F Supp 256

19 U S —Farr Co v Union Pac R Co C C A Colo 106 F 2d 637—Standard Brands v Boston & M R R D C Mass 29 F Supp 593—CJS cited in Inter-Hinkle Mill Co v Union Pac R Co C A Kan 238 F 2d 4 16

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26 U S —Standard Brands v Boston & M R R supra, n 19

§ 86 Duties after Disaster

Library References

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38. Carrier held not liable

U S —Western Millers Mut Fire Ins Co v Thompson D C Mo 95 F Supp 993

§ 87. Insurance by Carrier Against Usual Risks as Affecting Liability

Library References

Carriers ⇐125

40 U S —Axton-Fisher Tobacco Co v Ziffrin Truck Lines, D C Ky 36 F Supp 777 affd 126 F 2d 476

§ 88. What Law Governs

41 Cal —Bertonneau v Southern Pac Co, 120 P 53 17 Cal App 439

N Y —Roseweb Frocks v Rose, 52 N Y S 2d 901

Okl —Hefner v Owens, 280 P 2d 1025

13 C J p 257 note 95

However, a limitation contained in a foreign contract will not be enforced where the limitation is contrary to the public policy of the forum,[41.1] and in some cases such requirements of the contract as are to be wholly performed in the state of the forum are to be governed by the law of that state,[41.2] and it has also been held that the contract should be construed by the state where the negligent breach causing the injury occurs.[41.3]

41.1 Tenn —Louisville & N R R Co v Smith, 134 S W 866, 123 Tenn 678

13 C J p 258 note 96

41.2 Ga —J H Carter & Co v Southern R Co 59 S E 209, 3 Ga App 34

N H —Rixford v Smith, 52 N H 355 13 Am R 42

13 C J p 258 note 97

41.3 Pa —Hughes v Pennsylvania R Co, 51 A 990, 202 Pa 222, 97 Am S R 713, 63 L R A 513 affd 24 S Ct 132, 191 U S 477 48 L Ed 268

13 C J p 258 note 98

42 U S —Thomas Electronics, Inc v H W Taynton Co, D C Pa 277 F Supp 639

D C —Railway Exp Agency v Marchant Calculating Mach Co Mun App 52 A 2d 277

Fla —Hoagland v Railway Exp Agency 75 So 2d 822

Ga —H & M Motor Lines, Inc v Georgia Best Sales Co 253 S E 2d 841 149 Ga App 231

Ill —Berg v Schreiber, 92 N E 2d 88, 405 Ill 528, cert den 71 S Ct 79, 340 U S 851, 95 L Ed 624

La —Cute Togs of New Orleans, Inc v Railway Exp Agency Inc App, 333 So 2d 646

Okl —Hefner v Owens, supra, n 41

Tex —Lee Roy Crawford Produce Co v Thom Civ App 226 S W 2d 344 rev'd on oth grds S W 2d 295 149 Tex 357

Federal Aviation Act governing air carriers

U S —Tishman & Lipp, Inc v Delta Airlines, N Y, 275 F Supp 471 affd, C A, 413 F 2d

43. Warsaw Convention inapplicable to gratuitous transportation

N Y —Pick v Lufthansa German Airlines, 265 S 2d 63 48 Misc 2d 442

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45 In absence of evidence as to place of loss and the law of such place, the limitation of liability clause is governed by the law of the state where the contract was executed

Pa —Quaker Worsted Mills Corporation v Ho Trucking Corporation, 198 A 691 131 Pa Sup

§ 89. How Limitation of Liability Effected

Library References

Carriers ⇐151 et seq.

46 U S —Caten v Salt City Movers & Storage C C A N Y 149 F 2d 428—Chandler v Mayflower Transit Co, C A S C 374 F 2d

Ind —Hogan Transfer and Storage Corp v Way App 399 N E 2d 779

Kan —First Nat Bank of Girard v Bankers Disp Corp 562 P 2d 32, 221 Kan 528

La —Melancon v Juno, App 337 So 2d 652

Mont —Vandenbergh v Allied Van Lines, Inc P 2d 537 137 Mont 327 cert den 81 S Ct 69 U S 830, 5 L Ed 2d 57

N Y —Roseweb Frocks v Rose, supra, n 41—Bl aum v Atlantic Coast Line R Co 71 N Y 511 272 App Div 496

Pa —Villari v James, 38 A 2d 379 155 Pa Super

Tex —Fletcher L Yarbrough & Co v Texas & Ry Co 226 S W 2d 257, err ref Cert den S Ct 52, 340 U S 820, 95 L Ed 603—Mill Miller Motor Freight Lines v Gilliland, Civ A 232 S W 2d 886, err dism

Contract law to be applied

U S —Chandler v Aero Mayflower Transit Co S C, 374 F 2d 129

Estoppel

U S —Boeing Co v U S A C Transport Inc Wash, 539 F 2d 1228

47 Iowa—Stricker v Chicago & N W Ry System N W 2d 30, 241 Iowa 649

N J —Semi-Metals, Inc v Pinter Bros, 360 A 2d 70 N J 437

48 U S —Chandler v Aero Mayflower Transit C A S C 374 F 2d 129—Gordon H Mooney, v Farrell Lines, Inc C A N Y, 616 F 2d cert den 101 S Ct 217 449 U S 875, 66 L E 96

N J —Semi-Metals, Inc v Pinter Bros 360 A 2d 70 N J 437

Wash —Holmes v National Van Lines, Inc 350 864, 55 Wash 2d 861

Purpose of statute

U S —Southern Pac Transp Co v U S D C Cal F Supp 931

Ohio—Rabb v Railway Exp Agency, App 95 N 784

49 N Y —Kevork Allalemdjian, Limited v Tr 163 N Y S 2d 85 6 Misc 2d 976

Signature

U S —Caten v Salt City Movers & Storage Co su n 46

50 U S —Caten v Salt City Movers & Storage supra, n 46

Ga —Nashville, C & St L Ry v Ham, 50 S E 2d 78 Ga App 403

Kan —First Nat Bank of Girard v Bankers Disp Corp 562 P 2d 32, 221 Kan 528

N Y —Boorbaum v Atlantic Coast Line R Co supra n 46

Pa —Danec v Shober v North Co 221

Wash —Holmes v National Van Lines, Inc 350 P 2d 864 55 Wash 2d 861

False representation as to insurance

Tex —Trans-American Van Service, Inc v Shurzad Civ App 596 S W 2d 587

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51 Or —Clifford W Brown v Bonesteele, 344 P 2d 928, 218 Or 312

53 U S —Caten v Salt City Movers & Storage Co supra, n 46—Chesterberg v World Wide Shippers & Movers of Chicago Inc C A Ill 226 F 2d 198—Hamilton v Stallwell Van & Storage Co C A Pa 343 F 2d 453

Cal —Muelder v Western Greyhound Lines 87 Cal Rptr 297 8 C A 3d 319

N Y —Broobaum v Atlantic Coast Line R Co 71 N Y S 2d 511 272 App Div 496

No specific methodology

D C —National Motor Freight Traffic Ass'n, Inc v I C C C A 590 F 2d 1180, 192 U S App D C 63 cert den 99 S Ct 2822, 442 U S 909 61 L Ed 2d 275

55 N C —C J S. cited as Neece v Richmond Greyhound Lines, Inc 99 S E 2d 755 761 246 N C 547 68 A L R 2d 1341

Or —Clifford W Brown v Bonesteele, 344 P 2d 928, 218 Or 312

57 Or —Clifford W Brown v Bonesteele, 344 P 2d 928, 218 Or 312

58 U S —Chandler v Aero Mayflower Transit Co C A S C, 374 F 2d 129

Cal —McQueen v Tyler 142 P 2d 466, 61 Cal App 2d 263—Muelder v Western Greyhound Lines, 87 Cal Rptr 297 8 C A 3d 319

60 Ohio —Rabb v Railway Exp Agency supra, n 48

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64 U S —Chandler v Aero Mayflower Transit Co C A S C 374 F 2d 129

Cal —Fitch v Carpenter 161 P 2d 824, 70 Cal App 2d 827

N Y —Mickey Finn Clothes v Yale Transport Corporation, 23 N Y S 2d 84, 175 Misc 242—Kaydro Fr— v Inc v S & H Exp Inc 236 N Y S 2d 670

Tex —Trans-American Van Service, Inc v Shurzad, Civ App , 596 S W 2d 587

Notice given

N Y —St Laurent v Air Freight Transp Corp of New Jersey, 445 N Y S 2d 745 786 A D 2d 511

Wash Hol— v National Van Lines, Inc 350 P 2d 864, 55 Wash 2d 861

69 N Y —Fairchild Hiller Corp v Commuter Airlines, Inc 321 N Y S 2d 621, 66 Misc 2d 708

71 Cal —Muelder v Western Greyhound Lines, 87 Cal Rptr 297, 8 C A 3d 319

72 Ga —Nashville, C & St L Ry v Ham, supra, n 50

Filing and posting

N Y —Mickey Finn Clothes v Yale Transport Corporation, supra, n 64

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73 U S —Anton v Greyhound Van Lines, Inc , C A N H 591 F 2d 103

Ga —Nashville C & St L Ry v Ham, supra, n 50

Va —Smith v Pippin, 51 S E 2d 159, 188 Va 869—Sydnor & Hundley, Inc v Wilson Trucking Corp 194 S E 2d 733 213 Va 704

Requirement of opportunity to choose higher or lower liability by paying greater or lesser charge

U S —Spector—Christ v Industries, Inc v Railway Exp Agency Inc C A N C 434 F 2d 867

Rate inapplicable

U S —C & A Trans Co v U S 426 F 2d 480 193 Ct C 872

75 Ohio —Treer v Pennsylvania R Co 109 N E 2d 29 61 Ohio App 497

§ 91. —— Stipulations in Shipping Receipts or Bills of Lading

76 N Y —Cy Kuchman Inc v Saland, 102 N Y S 2d 407 affd 102 N Y S 2d 409—Peck v Lufthansa German Airlines 265 N Y S 2d 62 48 Misc 2d 442

Reformation on ground of mutual mistake

U S —Thomas T Trans World Airlines, Inc C A N J 457 F 2d 1053

Value tariff constituting contract

U S —North American Philips Corp v Emery Air Freight Corp D C N Y 432 F Supp 510 affd C A 579 F 2d 229

78 U S —Railway Exp Agency v Huntress, to Use of Royal Ins Co Minn App 51 A 2d 379

N Y —Rudolph Wurlitzer Co v Return Loads Bureau, 61 N Y S 2d 361 186 Misc 346, affd 54 N Y S 2d 704 269 App Div 738 affd 65 N E 2d 327 295 N Y 677—Sol Tammy Co Inc v Cohen 225 N Y S 2d 704 33 Misc 2d 373—General Precision Inc v Burnham Van Service, Inc 265 N Y S 2d 412, 24 A D 2d 271 affd 225 N E 2d 882, 19 N Y 2d 717 279 N Y S 2d 176—Fairchild Hiller Corp v Commuter Airlines, Inc 321 N Y S 2d 621 66 Misc 2d 708

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85 N Y —Sol Tammy Co Inc v Cohen, 225 N Y S 2d 704 33 Misc 2d 373

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91. "Constructive notice" defined

Cal —Muelder v Western Greyhound Lines, 87 Cal Rptr 297 8 C A 3d 319

92 Cal —McQueen v Tyler supra, n 58—Muelder v Western Greyhound Lines, 87 Cal Rptr 297 8 C A 3d 319

96 Cal —Muelder v Western Greyhound Lines, 87 Cal Rptr 297 8 C A 3d 319

Tex —Railway Exp Agency v Hueber Civ App 191 S W 2d 710

97 Cal —Muelder v Western Greyhound Lines, 87 Cal Rptr 297 8 C A 3d 319

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99 Tex —Travelers Ins Co v Delta Air Lines, Inc , Civ App 498 S W 2d 443

1 U S —Chicago, M St P & P R Co v Acme Fast Freight, N Y , 69 S Ct 692, 336 U S 465, 93 L Ed 817

Ky —Louisville & N R Co v Home Fruit & Produce Co 220 S W 2d 558, 310 Ky 269

La —V Rivera S En C v Texas & N O R Co , 31 So 2d 180 211 La 969 172 A L R 791 app dism and cert den 68 S Ct 71 332 U S 750, 92 L Ed 337—Normann v Burnham's Van Service, App 73 So 2d 640

Or —Timber Structures, Inc v Southern Pac Co 390 P 2d 343, 237 Or 42, 16 A L R 3d 1102

Pa —Gastwirth v P Mashbitz & Sons, Inc , 200 A 2d 766, 414 Pa 445

S C —Stephenson Mule Co v Powell, 15 S E 2d 389 199 S C 450—White v Southern Ry Co , 38 S E 2d 111 208 S C 319 165 A L R 988

Tex —Texas & N O R Co v McNatt, Civ App 223 S W 2d 651, err dism —Nationwide Horse Carriers, Inc v Johnston, Civ App 519 S W 2d 163 err ref no rev err

Incorporation by reference

U S —Seaboard Air Line R Co v U S C A Va 216 F 2d 855

Short form bill of lading

U S —Caribbean Produce Exchange, Inc v Sea Land Service, Inc D C Puerto Rico, 415 F Supp 88

2 Mo —Under Interstate Co rce Act Bunge Corp v Valley Line Supply & Equipment Co 480 S W 2d 859

3 U S —Marotta v Burnham Van Services, Inc D C Ill 478 F Supp 49

La —International Shoe Co v Flota Mercante Del Estado, App 29 So 2d 536

N Y —General Precision, Inc v Burnham Van Service, Inc 265 N Y S 2d 412, 24 A D 2d 271 affd 225 N E 2d 882, 19 N Y 2d 717 279 N Y S 2d 176

Okl —Railway Express Agency v Stephens, 83 P 2d 858 153 Okl 615

Va —Smith v Pippin 51 S E 2d 159 188 Va 869

Failure to receive copy

Fla —Schenk v United Van Lines, App 254 So 2d 575

4 Fla —Allied Van Lines, Inc v Bratton, 351 So 2d 344

5 S C —White v Southern Ry Co supra, n 1

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11 Iowa —Stricker v Chicago & N W Ry System, 40 N W 2d 30, 241 Iowa 649

12 Mont —Vandenbergh v Allied Van Lines, Inc 351 P 2d 537 137 Mont 327 cert den 81 S Ct 69 364 U S 830, 5 L Ed 2d 57

13 N Y —Surprise Furniture Co v Long Island R Co 107 N Y S 2d 316

17 Wash —Holmes v National Van Lines, Inc 350 P 2d 864 55 Wash 2d 861

Failure to deliver to consignee

Va —Sydnor & Hundley Inc v Wilson Trucking Corp 194 S E 2d 733 213 Va 764

Statutory provisions must be complied with.[18.1]

18.1 Pa —Paramount Dress Co v Kirby & Kirby 76 A 2d 432, 167 Pa Super 524—Gastwirth v P Mashbitz & Sons, Inc 200 A 2d 766 414 Pa 445

Shipper not prejudiced by failure to use statutory forms

U S —Glickfeld v Howard Van Lines C A Cal 213 F 2d 723

N Y —General Precision, Inc v Burnham Van Service, Inc 265 N Y S 2d 412, 24 A D 2d 271 affd 225 N E 2d 882, 19 N Y 2d 717 279 N Y S 2d 176

19 Tex —Lee Roy Crawford Produce Co v Thompson Civ App 228 S W 2d 344, rev'd on oth grds 233 S W 2d 295, 149 Tex 357

Required signature

N Y —General Precision, Inc v Burnham Van Service, Inc 260 N Y S 2d 308, 46 Misc 2d 586, mod on oth grds 265 N Y S 2d 412, 24 A D 2d 271, affd 225 N E 2d 882, 19 N Y 2d 717 279 N Y S 2d 176

20 U S —Carriage Bags, Ltd v Aerolineas Argentinas, D C Colo 521 F Supp 1363

Cal —Muelder v Western Greyhound Lines, 87 Cal Rptr 297 8 C A 3d 319

Ga —McCarthy v Allied Van Lines, Inc 288 S E 2d 69 160 Ga App 725

Iowa —Stricker v Chicago & N W Ry System, supra, n 11

23 N Y —General Precision, Inc v Burnham Van Service, Inc 265 N Y S 2d 412, 24 A D 2d 271 affd 225 N E 2d 882, 19 N Y 2d 717 279 N Y S 2d 176

Wash —Holmes v National Van Lines, Inc 350 P 2d 864 55 Wash 2d 861

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§ 93. —— Livestock Shipments

58 US—Lux Art Van Service, Inc v Pollard, C A Ariz, 344 F 2d 883 cert den 86 S Ct 85, 382 US 837 15 L Ed 2d 80

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64 US—Anton v Greyhound Van Lines, Inc C A NH 591 F 2d 103

Ariz—Orcutt v Tucson Warehouse & Transfer Co 318 P 2d 671 83 Ariz 200

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Choice held given to shipper

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69. Ratification of agents' acts

La—Normann v Burnham's Van Service, supra, n 1

§ 95. Consideration

73 US—Illinois Cent. R R v Moore, C A Tenn 228 F 2d 873

Cal—Hubbard v Matson Nav Co, supra, n 64

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(4) Other matters.

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83. Erroneous rate calculation insufficient

NY.—Chas Pfizer & Co v Acme Fast Freight, Inc 233 N Y S 2d 292, 36 Misc 2d 546

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86 US—Fort Worth & D Ry Co v US C A Tex, 242 F 2d 702

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Rule inapplicable to contract carrier

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§ 96. Reasonableness of Limitation

92 US—Hamilton v Stillwell Van & Storage Co, C A Pa 343 F 2d 453

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§ 97. Right to Limit Liability

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8 Tex—Rogers v Crespi & Co, Civ App 259 S W 2d 928

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Clause unconscionable and invalid

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15 Mo—C.J.S. cited in William A Smith Contracting Co v Missouri Pac R Co App 481 S W 2d 580, 583, cert den 93 S Ct 900, 409 U S 1107 34 L Ed 2d 687

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19. Conditions precedent

US—Thomas v National Delivery Ass'n, D C Pa, 24 F Supp 171—Hamilton v Dean Van Lines, Inc D C Pa 228 F Supp 671, mod on oth grds, C A 343 F 2d 453

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21 US—US v. Auto Driveaway Co C A Ill 464 F 2d 1380

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§ 98. What Limitations of Liability Permissible

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Pa—Quaker Worsted Mills Corporation v Howard Trucking Corporation, 198 A 691, 131 Pa Super 1—Villari v James, 38 A 2d 379, 155 Pa Super 155

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(10) Other matters

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36 US—Feinberg Kosher Sausage Co v Watson Bros Transp Co D C Minn, 101 F Supp 403, affd, C A 193 F 2d 283

41. Limitation of liability as effective between the parties

W Va—Sommerville v Pennsylvania R Co 155 S E 2d 865

42 U S—Chicago & N W R Co v Davenport C A Tex 205 F 2d 589 cert den 74 S Ct 329 346 U S 930 98 L Ed 422

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Va—Chesapeake & O R Co v Cotton Forge-Waynesboro Tel Co 224 S E 2d 317 216 Va 858

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U S—Falcon Auto Transport Inc v State Farm Mut Auto Ins Co C A N Y 537 F 2d 648 cert den 97 S Ct 742 429 U S 1042, 50 L Ed 2d 754

50 N Y—Wells & Coverly Inc v Red Star Exp Lines of Auburn Inc 306 N Y S 2d 710 62 Misc 2d 269

52 N Y—Wells & Coverly Inc v Red Star Exp Lines of Auburn, Inc 306 N Y S 2d 710 62 Misc 2d 269

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Pa—Yarnall v Railway Express Agency 32 Del Co 535

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66. No limitation permissible

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§ 101. —— Injuries to Live Stock

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91 N Y—National Blouse Corp v Felson, supra, n 32

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28 U S—Fort Worth & D Ry Co v U S C A Tex 242 F 2d 702

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Wis—Insurance Co of North America v Kneeli Furriers, Inc 153 N W 2d 532, 36 Wis 2d 563 28 A L R 3d 502

Limitation provision inapplicable

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(2) Estoppel of shipper

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Recovery not barred

U S—Cordingley v Allied Van Lines, Inc C A Mont 563 F 2d 960

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U S—Thomas Electronics, Inc v H W Taynton Co D C Pa 277 F Supp 639

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47. Particular amount not represented

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Tex—Lang v Shofner Civ App 175 S W 2d 701

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N Y.—Kaydro Fashions, Inc v S & H Exp Inc 236 N Y S 2d 670

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N Y—Kaydro Fashions, Inc v S & H Exp Inc, 236 N Y S 2d 670 Pomette Fashions Corp v Merchants Auto Delivery Corp, 237 N Y S 2d 6

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73. D C—Railway Exp Agency v Marchant Calculating Mach Co, Mun App, 52 A.2d 277

§ 105. —— Limiting Liability to That of Warehouseman or Forwarder

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87 Tex.—Texas & N O R Co v Sparks, Civ App 290 S W.2d 936

§ 109. —— Requiring Shipper to Insure

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1 U S—National Garment Co v New York, C & St L R Co C A Mo 173 F 2d 32

N Y—Beaumont v Pennsylvania R Co 127 N Y S 2d 216, mod on oth grds 131 N Y S 2d 652, 284 App Div 354 affd 127 N E 2d 80 308 N Y 920, cert den 76 S Ct 75 350 U S 838, 100 L Ed 2d 747—C J S cited in J M Rodriguez & Co Inc v Moore-McCormack Lines, Inc 299 N E 2d 243, 32 N Y 2d 425 345 N Y S 2d 993 966

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8 N C—Byers v Southern Express Co, 81 S E 741 165 N C 542, revd on oth grds 36 S Ct 410, 240 U S 612, 60 L Ed 825 L R A 1917A, 197

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9 U S—North American Philips Corp v Emery Air Freight Corp D C N Y 432 F Supp 519 affd C A 579 F 2d 229

10 U S—Feinberg Kosher Sausage Co v Watson Bros Transp Co D C Minn, 101 F Supp 403 affd C A 193 F 2d 283

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25 N Y—Miller v Greyvan Lines, 130 N Y S 2d 378 284 App Div 133, affd 126 N E 2d 183, 308 N Y 853—Miller v Greyvan Lines, 132 N Y S 2d 886, 284 App Div 133

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(6) Other matters

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35 N Y—Cohen v Cohen Hurwitz Trucking Corp, 113 N Y S 2d 226, 201 Misc 724

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N Y—National Blouse Corp v Felson, 79 N Y S 2d 765 274 App Div 164 app gr and rearg den 83 N Y S 2d 227, 274 App Div 875, affd 86 N E 2d 177, 299 N Y 612

38 U S—Rocky Ford Moving Vans, Inc v U S, C A Ark, 501 F 2d 1369

Other words and phrases have been construed.[38.5]

38.5. "Jettisoned"

N Y—Dantzig v Universal Carloading & Distributing Co, 185 N Y S 2d 718, 17 Misc 2d 928

"Except in case of carrier's negligence"

Or—Timber Structures, Inc v Southern Pac Co, 390 P 2d 343, 237 Or 42, 16 A L R 3d 1103

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40 U S—Sun Ins Office, Limited v Greyhound Van Lines, Inc D C Mass 289 F Supp 483

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74 U S—Atlantic Coast Line R Co v Georgia Packing Co C C A Ga, 164 F 2d 1, reh den 165 F 2d 169—Dalton v Delta Airlines, Inc C A Fla 570 F 2d 1244

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Pa—Wareham v Railway Exp Agency 94 Pittsb Leg J 349

75 U S—Standard Brands v Boston & M R R, D C Mass, 29 F Supp 593—Killian v Frontier Air lines, Inc D C Wyo, 150 F Supp 17

Ark—Railway Express Agency v H Rouw Co 127 S W 2d 251, 197 Ark 1142

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(3) Other matters

Or—Timber Structures, Inc v Southern Pac Co, 390 P 2d 343 237 Or 42, 16 A L R 3d 1102

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U S—Klicker v Northwest Airlines, Inc, C A Mont 563 F 2d 1310

Kan—First Nat Bank of Girard v Bankers Dispatch Corp 562 P 2d 32, 221 Kan 528

Nev—Perkins Van & Storage Co v Anderton, 354 P 2d 188, 76 Nev 351

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76 N Y—Bruce Glen, Inc v Emery Air Freight Corp, 264 N Y S 2d 876, 24 A D 2d 145—Pick v Lufthansa German Airlines, 265 N Y S 2d 63, 48 Misc 2d 442

79. Intent to cover commodities for storage rather than shipment

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81 N Y—Pick v Lufthansa German Airlines, 265 N Y S 2d 63, 48 Misc 2d 442

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86 U S—River Terminals Corp v Southeastern Sugar & Molasses Co C A La 253 F 2d 922, remd 79 S Ct 1210, 360 U S 411 3 L Ed 2d 1334

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96 U S—U S v New York, N H & H R Co C A Conn 211 F 2d 404—Thomas Electronics, Inc v H W Taynton Co, D C Pa 277 F Supp 639

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N Y—Young v Delta Air Lines, Inc, 432 N Y S 2d 390, 78 A D 2d 616

98 U S—Feinberg v Railway Exp Agency C C A Ill 163 F 2d 998 cert den 68 S Ct 351, 332 U S 847 92 L Ed 417

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1. Negligent employee of carrier entitled to benefit of limitation

N Y—Howard v Finnegans Warehouse Corp 307 N Y S 2d 1022, 33 A D 2d 1090

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8 Ohio—C.J.S. cited in Porter v Railway Exp Agency Inc 155 N E 2d 528, 532

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11 S C—C.J.S. quoted at length in White v Southern Ry Co 38 S E 2d 111 121 208 S C 319 105 A L R 988

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21 D C—Railway Exp Agency v Marchant Calculating Mach Co, Mun App 52 A 2d 277

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27 U S—Trilman & Lipp, Inc v Delta Airlines D C N Y, 275 F Supp 471 affd C A 415 F 2d 1401

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§ 115. Waiver or Loss of Benefit of Limitations

32 N Y—Emily Shops, Inc v Inter-State Truck Line, 139 N Y S 2d 561, 207 Misc 557 affd 148 N Y S 2d 915, 1 A D 2d 667 app den 149 N Y S 2d 216, 1 A D 2d 774 affd 161 N Y S 2d 46, 2 N Y 2d 405 141 N E 2d 566 cert den 78 S Ct 36, 355 U S 927 2 L Ed 2d 347

Carrier's nonconformity of services to tariff

N Y—American Van Lines, Inc v Bekins Van & Storage Co, Inc v Smith Bros, Inc 283 N Y S 2d 574 54 Misc 2d 486

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34 N Y—Emily Shops, Inc v Inter-State Truck Line, Inc 161 N Y S 2d 46 2 N Y 2d 405 141 N E 2d 566, cert den 78 S Ct 36 355 U S 927 2 L Ed 2d 40

42 Del—Van Dyke v Pennsylvania R Co Super 56 A 2d 345 7 Terry 529

D C—Railway Exp Agency v Marchant Calculating Mach Co supra n 2

Conversion not shown

U S—Gutkfeld v Howard Van Lines, C A Cal 247 F 2d 725

46 D C—Railway Exp Agency v Marchant Calculating Mach Co supra n 21

Actual conversion not shown

Del—Van Dyke v Pennsylvania R Co supra n 42

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50 Idaho—Johnson v Bekins Moving & Storage Co 350 P 2d 109 86 Idaho 569 7 A L R 3d 709 cert den 85 S Ct 257 379 U S 913 13 L Ed 2d 184

N D—Ventre Trans & Class Co v Hart Motor Exp Inc 101 N W 2d 541

Tenn—Ward v Gulf M & N R Co 134 S W 2d 967 23 Tenn App 533

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Rule held not applicable

U S—Minneapolis Soc of Fine Art v Railway Exp Agency Inc D C Minn 213 F Supp 129—Rocky Ford Moving Van Inc U S C A Colo 301 F 2d 1369

51 Okl—Seetapun v Illinois-California Exp Inc 518 P 2d 885

57 Idaho—Johnson Bekins Moving & Storage Co 389 P 2d 109 86 Idaho 569 7 A L R 3d 709, cert den 85 S Ct 257 379 U S 913 13 L Ed 2d 184

§ 117. As to Carriage of Goods Not within Scope of Duty to Carry

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58 U S—Caribbean Produce Exchange Inc v Sea Land Service, Inc D C Puerto Rico, 415 F Supp 88

N H—Bernardi Greater Shows v Boston & Maine R R 1 A 2d 360 89 N H 496, cert den 59 S Ct 787 306 U S 662, 83 L Ed 1059

60 U S—Michigan Millers Mut Fire Ins Co v Canadian Northern Ry Co D C Penn 58 F Supp 326, affd C C A 152 F 2d 292—Thomas v Atlantic Coast Line R Co C A Fla 201 F 2d 167 stating Florida law—Scott Truck Line, Inc v Chicago, R I & P R Co D C Ill 312 F Supp 511

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N H—Bernardi Greater Shows v Boston & Maine R R supra, n 58

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61 Mo—C.J.S. cited in William A Smith Contracting Co v Missouri Pac R Co App 481 S W 2d 580, 583 cert den 93 S Ct 900, 409 U S 1107 34 L Ed 2d 687

§ 118. Extending Common Law Liability

70 U S—Public Service Elec & Gas Co v Federal Power Commission C A N J 371 F 2d 1 cert den 88 S Ct 33 389 U S 849 19 L Ed 2d 119

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73 Tenn—Ward v Gulf M & N R Co, supra, n 50

76 Wash—Dolarmon Hotel Supply Co v Owl Transfer & Storage Co 143 P 2d 441, 19 Wash 2d 522, 89 A L R 106

Negligence defined

U S—Leathwood R Co v U S 149 F Supp 884 138 Ct Cl 66

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N J—Sem Metals, Inc v Pinter Bros 312 A 2d 892, 126 N J Super 24 mod on oth grds 343 A 2d 797 135 N J Super 464 affd 360 A 2d 385, 70 N J 457

N Y—Kaufman Pennsylvania R Co Mun App 47 N Y S 2d 639 affd 64 N Y S 2d 690

79 U S—Eastern Motor Exp Inc v A M Schmeiger Jr Inc C A N Y 247 F 2d 826, 65 A L R 2d 765 cert den 78 S Ct 535, 355 U S 959 2 L Ed 2d 531

The adoption of the Uniform Commercial Code has been held to repeal the bill of lading laws of the state.[79.5]

79.5 Tex—Brandt Airways Inc v El Paso Com Co Tex Civ App 517 S W 2d 915, err ref no rev cert den 96 S Ct 563 423 U S 1032, 46 L Ed 2d 405

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13 C J p 257 notes 93, 94

Bills of lading, origin or in foreign country are not governed by Federal Bill of Lading Act—Chesapeake & O R Co v State Nat Bank of Maysville, 133 S W 2d 511 280 Ky 444, 130 A L R 1306

81 Ala—Atlantic Const Line R Co v Holman, 33 So 2d 367 250 Ala 1, 175 A L R 1157

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Purpose of Bill of Lading Act

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82 N C—American Cigarette & Cigar Co v Garner, 47 S E 2d 854, 229 N C 173

§ 121. Receipts

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86 Ind—Hogan Transfer and Storage Corp v Waymire, App, 399 N E 2d 779

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87 N Y—C.J.S. cited in Chase Manhattan Bank v Nissho Pacific Corp, 254 N Y S 2d 571, 580, 22 A D 2d 215, Affd 212 N E 2d 897, 16 N Y 2d 999, 265 N Y S 2d 660

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12 U S—Pennsylvania R Co v Greene, D C Ala, 173 F Supp 657—U S v Mississippi Val Barge Line Co, C A Mo, 285 F 2d 381—Southern Pac Transp Co v Commercial Metals Co, Tex, 102 S Ct 1815, 456 U S 330, 72 L Ed 2d 114, on remand, C A, 686 F 2d 264

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15 U S—Delphi Frosted Foods Corp v Illinois Cent R Co, C A Ky, 188 F 2d 343, cert den 72 S Ct 53, 342 U S 833, 96 L Ed 630—U S v Lousville & N R Co, C A Ky, 221 F 2d 698—Johnson Motor Transport v U S, 149 F Supp 175, 137 Ct Cl 892

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Force of statute

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28. Noting condition not mandatory

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Price at destination not guaranteed

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29 U S—Hoover Motor Exp Co v U S C A Tenn 262 F 2d 832—Cutten v Allied Van Lines, Inc C A Cal 514 F 2d 1196

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Insufficient to satisfy plaintiff's burden of proof

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32. Absence of notation

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R I—Glass-Tite Industries, Inc v Spector Freight Systems, Inc 230 A 2d 254 102 R I 301

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36 U S—C J S cited in Westchester Fire Ins Co v Buffalo H & Savage Co D C N Y 40 F Supp 378 381 affd C C A 129 F 2d 319

37 S C—Tallon v Seaboard Coast Line R Co 202 S E 2d 16, 262 S C 23

38 U S—Oetker v Goldsmith, D C N Y 213 F Supp 421—First Nat Bank in St Louis v American Ins Co D C Mo 280 F Supp 620 affd C A 409 F 2d 1387

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43 U S—Oetker v Goldsmith, D C N Y 213 F Supp 421

Rights of party to be notified of arrival

U S—Columbia Trading Corp v Moore-McCormack Lines, Inc C A N Y 374 F 2d 864

44 Ill—Heckle v Bank of Mansfield of Mansfield, Mo supra, n 12

45 U S—Agricultural Lands v Panhandle & S F Ry Co D C Mo 60 F Supp 108—Oetker v Goldsmith, D C N Y 213 F Supp 421

22 C J p 127 note 74

No presumption that assignor is consignee

U S—Columbia Trading Corp v Moore-McCormack Lines, Inc C A N Y 374 F 2d 864

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54 Ark—Arkansas Exp v Columbia Motor Transport Co, 205 S W 2d 716, 212 Ark 1

58 U S—Standard Hotel Supply Co v Pennsylvania R Co D C N Y 65 F Supp 439—Delphi Frosted Foods Corp v Illinois Cent R Co C A Ky 188 F 2d 343 cert den 72 S Ct 53, 342 U S 833, 96 L Ed 630

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59 U S—C J S cited in Atlantic Coast Line R Co v Clinchfield Fuel Co D C S C, 94 F Supp 992, 994

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60 Mo—Resolute Ins Co v Morgan Drive-Away Inc App 403 S W 2d 913

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Uniform bill of lading

(2) Uniform bill on file with I C C binding

U S—City of Nome v Alaska S S Co D C Alaska, 321 F Supp 1063

§ 124. —— Validity

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66 La—International Shoe Co v Flota Mercante Del Estado, App 29 So 2d 536

67 La—International Shoe Co v Flota Mercante Del Estado, supra, n 66

71. Lack of signature of shipper i material

Fla—Schenk v United Van Lines, App 254 So 2d 575

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76 Ill—H Piper Co v Summit Fast Freight, Inc 117 N E 2d 420, 1 Ill App 2d 298

77 Mich—Wettlaufer Mfg Corp v Detroit Bank, supra, n 12

N C—Griggs v Stoker Service Co supra, n 12

Need not be prior to shipment

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87 Wash—Holmes v National Van Lines, Inc 350 P 2d 864 55 Wash 2d 861

§ 126. —— Construction

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90 U S—Mexican Light & Power Co v Pennsylvania R Co, D C Pa 33 F Supp 483—Lifschultz v U S D C N Y 144 F Supp 606

Fla—Antillean Marine Shipping Corp v La Universal De Seguros C Por A App 359 So 2d 516

Ill—Baltimore & O R Co v Illinois Steel Co 46 N E 2d 144 316 Ill App 516, revd on oth grds 64 S Ct 322, 320 U S 508, 88 L Ed 259

Ind—Hogan Transfer and Storage Corp v Waymire, App 399 N E 2d 779

N J—Upjohn Co v Tumpany 402 A 2d 979, 168 N J Super 283

Tex—Rountree v Lydick-Barmann Co Civ App 150 S W 2d 173, err dism

Utah—Garrett Freight Lines v Cornwall, 232 P 2d 786, 120 Utah 175

Wash—Transport Clearing Northwest v Bardahl Mfg Co 589 P 2d 1242, 22 Wash App 568

Particular bills of lading construed

(3) Other bills of lading—Pacific Coast Fruit Distributors v Pennsylvania R Co C A Cal 217 F 2d 273—Eastern Motor Exp Inc v A Maschmeyer Jr Inc C A N Y 247 F 2d 826, 65 A L R 2d 765 cert den 78 S Ct 535, 355 U S 959 2 L Ed 2d 534—Cutten v Allied Van Lines, Inc, D C Cal 349 F Supp 907 affd C A 514 F 2d 1196

Fla—Compania Cubana De Aviacion, S A v Comfort-Craft, Inc, App, 120 So 2d 48

Kan—First Nat Bank of Girard v Bankers Dispatch Corp 562 P 2d 32, 221 Kan 528

Vt—St Johnsbury & L C R R v Skeels & Wardman Inc 196 A 2d 485

Wis—L. L. Richards Machinery Co. v. McNamara Motor Exp., Inc., 97 N.W.2d 396, 7 Wis.2d 613.

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91 N.J.—Upjohn Co. v. Tumpany, 402 A.2d 979, 168 N.J.Super. 283.

Wash.—Transport Clearing Northwest v. Bardahl Mfg. Co., 589 P.2d 1242, 22 Wash.App. 568.

93 U.S.—Illinois Steel Co. v. Baltimore, 186 Misc. 346, affd. 54 N.Y.S.2d 704 & O.R. Co., Ill., 64 S.Ct. 322, 320 U.S. 508, 88 L.Ed. 259.

95 U.S.—Chicago Great Western Ry. Co. v. Hopkins, D.C.Minn., 48 F.Supp. 60.

96 La.—Red River Cotton Oil Co. v. Texas & P. Ry. Co., supra, n. 15.

98 Fla.—Antillean Marine Shipping Corp. v. La. Universal De Seguros C. Por A., App., 359 So.2d 516.

1 U.S.—U.S. v. Central of Georgia Ry. Co., D.C.Tenn., 411 F.Supp. 1023.

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3 U.S.—Baltimore & O.R. Co. v. U.S., D.C.Md., 217 F.Supp. 918.

N.J.—Semi Metals, Inc. v. Punter Bros., 343 A.2d 757, 135 N.J.Super. 464, affd. 360 A.2d 385, 70 N.J. 437.

4 U.S.—Strohmeyer & Arpe Co. v. American Line S.S. Corporation, C.C.A.N.Y., 97 F.2d 360.

Tex.—Phoenix Refining Co. v. Kilgore Nat. Bank, 143 S.W.2d 925, 135 Tex. 439.

No reliance

U.S.—T. J. Stevenson & Co., Inc. v. 81 193 Bags of Flour, C.A.Ala., 629 F.2d 338, reh. den. C.A., 651 F.2d 779, two cases.

6 U.S.—Hoover Motor Exp. Co. v. U.S., C.A.Tenn., 262 F.2d 832.

7 Pa.—Robertson Elec. Co. v. Capitol Trucking Corp., 79 A.2d 123, 168 Pa.Super. 430.

13 Okl.—Kluver v. Midwestern Transp., Inc., 534 P.2d 662.

14. "Shipper load and count"

La.—Fruehauf v. Illinois Cent. R. Co., App., 53 So.2d 433.

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18 U.S.—Reader v. Thompson, C.A.La., 197 F.2d 158.

La.—Tennessee Corporation v. Lackawanna Gulf S.S. Co., App., 6 So.2d 235.

Pa.—Evergreen Broom Mfg. Co. v. Pennsylvania R. Co., 105 A.2d 88, 378 Pa. 60.

Tex.—Texas & P. Ry. Co. v. George, Civ.App., 466 S.W.2d 659.

21 Pa. Robertson Elec. Co. v. Capitol Trucking Corp., supra, n. 7.

23 Va.—Norfolk Terminal Corp. v. U.S. Lines, Inc., 205 S.E.2d 400, 215 Va. 80.

Notation "shipper's load and count"

Wis.—Stella Cheese Co. v. Chicago, St. P., M. & O. Ry. Co., 21 N.W.2d 655, 248 Wis. 196.

24. Liability under Carmack Amendment

U.S.—F. A. Allied Dept. Stores, Inc. v. Brinks, D.C.Fla., 316 F.Supp. 1402, affd., C.A., 450 F.2d 1223.

27 Ill.—Mitchell Mfg. Co. v. Cooper-Jarrett, Inc., 165 N.E.2d 723, 25 Ill.App.2d 93.

Tex.—American Refining Co. v. Kilgore Nat. Bank, Civ.App., 121 S.W.2d 636, affd. 143 S.W.2d 925, 135 Tex. 439.

28 S.C.—C.J.S. quoted in Chilean Nitrate Sales Corp. v. Southern Railway-Carolina Div., 88 S.E.2d 242, 245, 227 S.C. 423.

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29 N.Y.—Bassett Mfg. Co. v. Long Island R. Co., 97 N.Y.S.2d 730, 277 App.Div. 142, reargument den. 100 N.Y.S.2d 225, 277 App.Div. 974.

S.C.—C.J.S. quoted in Chilean Nitrate Sales Corp. v. Southern Railway-Carolina Division, 88 S.E.2d 242, 245, 227 S.C. 423.

§ 128. —— Negotiability and Transfer

Library References

Modern Legal Forms Ch. 53, Pledges and Collateral Securities.

33 Ariz.—Arizona Feeds v. Southern Pac. Transp. Co., 519 P.2d 199, 21 Ariz.App. 346.

Ky.—Chesapeake & O.R. Co. v. State Nat. Bank of Maysville, 133 S.W.2d 511, 280 Ky. 444, 130 A.L.R. 1306.

34 U.S.—The Fernchiff, D.C.Md., 22 F.Supp. 728, cert. quest. ans. 59 S.Ct. 615, 306 U.S. 444, 83 L.Ed. 862, affd. 105 F.2d 1021—Iowa Beef Packers, Inc. v. Chicago Great Western Ry. Co., C.A.Ill., 402 F.2d 930.

Ky.—Chesapeake & O.R. Co. v. State Nat. Bank of Maysville, supra, n. 33.

Minn.—Schaefer Inc. v. Minneapolis, N. & S. Ry. Co., 94 N.W.2d 551, 254 Minn. 248.

Tenn.—Pulaski Highway Exp., Inc. v. Terminal Transport Co., Inc., App., 493 S.W.2d 103.

40 Pa.—Pennsylvania R. Co. v. Brownstein, 125 A.2d 618, 182 Pa.Super. 65.

Tex.—Abilene Storage Co. v. Eugene Fruit Growers Ass'n., Civ.App., 170 S.W.2d 511.

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43 Okl.—Seetapun v. Illinois-California Exp., Inc., 518 P.2d 885.

44 Ariz.—Southern Pac. Co. v. Agencia Joffroy, S.A., 174 P.2d 278—Hanning Lumber Co. v. Octavius Leon, Inc., 215 P.2d 909, 70 Ariz. 31.

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56 U.S.—C.J.S. cited in Agricultural Lands v. Panhandle & S.F. Ry. Co., D.C.Mo., 60 F.Supp. 108, 109—Danzas, Limited v. National Bank of Alaska, D.C.Alaska, 222 F.Supp. 671, am. on oth. grds., 226 F.Supp. 928.

Ariz.—Southern Pac. Co. v. Agencia Joffroy, S.A., supra, n. 44.

S.C.—Campbell v. Noble-Trotter Rice Milling Co., 198 S.E. 373, 188 S.C. 212.

Tex.—C.J.S. cited in East Tex. Motor Freight Lines v. W. H. Hutchinson & Son, Civ.App., 241 S.W.2d 759, 764, err. dism.

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57 Pa. Pennsylvania R. Co. v. Brownstein, 125 A.2d 618, 182 Pa.Super. 65.

Tex.—Abilene Storage Co. v. Eugene Fruit Growers Ass'n., supra, n. 40.

Wyo.—Hercules Powder Co. v. State Bd. of Equalization, 208 P.2d 1096, 66 Wyo. 268, reh. den. 210 P.2d 824, 66 Wyo. 268.

62 Ariz.—Southern Pac. Co. v. Agencia Joffroy, S.A., supra, n. 44.

Ky.—Chesapeake & O.R. Co. v. State Nat. Bank of Maysville, supra, n. 33—State Nat. Bank of Maysville v. Chesapeake & O. Ry. Co., 141 S.W.2d 869, 283 Ky. 443, 130 A.L.R. 1314, cert. den. 61 S.Ct. 73, 311 U.S. 689, 85 L.Ed. 446.

63 U.S.—In re Taub, C.C.A.N.Y., 4 F.2d 993.

Ariz.—Arizona Feeds v. Southern Pac. Transp. Co., 519 P.2d 199, 21 Ariz.App. 346.

Ky.—Chesapeake & O.R. Co. v. State Nat. Bank of Maysville, supra, n. 33.

N.H.—Auto Owners Finance Co. v. Evirs, 49 A.2d 507, 94 N.H. 180.

Tex.—Phoenix Refining Co. v. Kilgore Nat. Bank, supra, n. 4.

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67 Ky.—Chesapeake & O.R. Co. v. State Nat. Bank of Maysville, supra, n. 33.

N.Y.—Martin v. Huber, 68 N.Y.S.2d 53.

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72 N.Y.—Martin v. Huber, supra, n. 67.

75 N.Y.—Martin v. Huber, supra, n. 67.

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99 N.Y.—Framen Steel Supply Co. v. Irving Trust Co., 136 N.Y.S.2d 333, Affd. 167 N.Y.S.2d 430.

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25 Ariz.—Hanning Lumber Co. v. Octavius Leon, Inc., 215 P.2d 909, 70 Ariz. 31.

N.Y.—Eazor Exp. Inc. v. Lanza, 297 N.Y.S.2d 33, 31 A.D.2d 781, on remand 303 N.Y.S.2d 571, 60 Misc. 686—Eazor Exp., Inc. v. Lanza, 303 N.Y.S.2d 571, 60 Misc.2d 686.

No obligation to assignee when no goods received by carrier

U.S.—G.A.C. Commercial Corp. v. Wilson, D.C.N.Y., 271 F.Supp. 242.

No liability against the assignee is created by the transfer of a bill of lading [26.1]

26.1 S.C.—Campbell v. Noble-Trotter Rice Milling Co., 198 S.E. 373, 188 S.C. 212.

27 Ariz.—Hanning Lumber Co. v. Octavius Leon, Inc., supra, n. 25.

29 Tex.—Phoenix Refining Co. v. Kilgore Nat. Bank, 143 S.W.2d 925, 135 Tex. 439.

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30. Assignee held not entitled to sue carrier

U.S.—G.A.C. Commercial Corp. v. Wilson, D.C.N.Y., 271 F.Supp. 242.

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42 U.S.—Strohmeyer & Arpe Co. v. American Line S.S. Corporation, C.A.N.Y., 97 F.2d 360.

N.Y.—Martin v. Huber, 68 N.Y.S.2d 53—Chamberlain v. Wahhab, 90 N.Y.S.2d 604, 275 App.Div. 561, motion dism. 88 N.E.2d 324, 300 N.Y. 459—Framen Steel Supply Co. v. Irving Trust Co., 136 N.Y.S.2d 333, affd. 167 N.Y.S.2d 430.

Bill as security for loans or advances

(2) Other matters

U.S.—G.A.C. Commercial Corp. v. Wilson, D.C.N.Y., 271 F.Supp. 242.

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45 U.S.—Howe v. Allied Van Lines, Inc., C.A.Pa., 622 F.2d 1147, cert. den. 101 S.Ct. 528, 449 U.S. 992, 66 L.Ed.2d 289.

46. Failure of payment

U.S.—Clock v. Missouri-Kansas-Texas R. Co., D.C.Mo., 407 F.Supp. 448, affd. C.A., 553 F.2d 102.

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56 N.Y.—Framen Steel Supply Co. v. Irving Trust Co., supra, n. 42.

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61. Joint creditors

N.Y.—Framen Steel Supply Co. v. Irving Trust Co., supra, n. 42.

Failure of payment by transferee

U.S.—Clock v. Missouri-Kansas-Texas R. Co., D.C.Mo., 407 F.Supp. 448, affd., C.A., 553 F.2d 102.

66 Ga.—Sanchez v. Aaron Van Lines, Inc., 286 S.E.2d 469, 160 Ga.App. 173.

70. No right of action for common law negligence

U.S.—G.A.C. Commercial Corp. v. Wilson, D.C.N.Y., 271 F.Supp. 242.

71 Liability for goods not received as dependent on whether bill of lading is straight or order bill—Chesapeake & O.R. Co. v. State Nat. Bank of

Maysville 133 S W 2d 511 290 Ky 444 130 A L R 1306

Consignee not entitled to sue for goods not received by carrier

US—G A C Commercial Corp v Wilson D C N Y 271 F Supp 242

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78 US—Luse v Valley Steel Products Co C A Tex 293 F 2d 625

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87 US—C.J.S. cited in Danzas, Limited v National Bank of Alaska, D C Alaska, 222 F Supp 671 676, am on reh grds 226 F Supp 928

§ 129. —— Duplicate and Substituted Bills of Lading

92 US—Zervos v S S Sam Houston, D C N Y 427 F Supp 500, affd, C A 636 F 2d 1202, 1205, 1206

46 C J p 1137 note 14[b]

§ 130. Special Contracts for Transportation

Library References

Carriers ⇐61 et seq

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At Common law, a common carrier might on occasion carry by contract.[4.5]

4.5 US—Grace Line Inc v Federal Maritime Bd C A 280 F 2d 790, cert den 81 S Ct 380 364 US 933 5 L Ed 2d 365

5 US—Nyad Motor Freight, Inc v W T Grant Co C A N Y 486 F 2d 1112—International Railways of Central America v United Brands Co D C N Y 358 F Supp 1363

Idaho—Neer v McFarland, 291 P 2d 293 77 Idaho 286—King v Beatrice Foods Co 402 P 2d 966, 89 Idaho 52

Ill—Brinks Inc v Illinois Commerce Commission, 431 N E 2d 1242, 59 Ill Dec 485 103 Ill App 3d 851

Ky—Cockrell v Mountain Coal Co 342 S W 2d 679

Mass—Merrill v Kirkland Const Co Inc 310 N E 2d 106, 365 Mass 110

N Y—Sorge v Parade Publications Inc 247 N Y S 2d 317 20 A D 2d 338

N C—Brown v Bowers Const Co 73 S E 2d 147 236 N C 462

Tex—Paul Blackwell Co v Dallas Transfer & Terminal Warehouse Co Civ App 252 S W 2d 501 err ref no rev err

Alleged contract held confirming offer

Utah—Gammon v Federated Milk Producers Ass'n, 383 P 2d 402, 14 Utah2d 291

Contract held invalid for vagueness

US—Poultry Haulers, Inc v Pillsbury Co D C Ala 247 F Supp 556, affd, C A 353 F 2d 538

Contract terminable at will

Mo—Sharp v W & W Trucking Co 421 S W 2d 213

Mere agreement to make future contract

Tex—Schell v Travis Materials Co Civ App 469 S W 2d 7

Contract unenforceable

Tex—Cox Feedlots, Inc v Hope, Civ App 498 S W 2d 436, err ref no rev err

Safety regulations as part of contract

Wis—Locicero v Interpace Corp 266 N W 2d 423 83 Wis 2d 876

Contract lawfully terminated

US—Span East Airlines, Inc v Digital Equipment Corp D C Mass 486 F Supp 831

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7 Ohio—Hazelton v Public Utilities Commission of Ohio, 67 N E 2d 675 145 Ohio St 34

8 US—Hughes Transp v US 121 F Supp 212, 128 Ct Cl 221

Tex—Humble Oil & Refining Co v Texas & Pac Ry Co 289 S W 2d 547 155 Tex 483

9 Ga—McCarthy v Allied Van Lines, Inc 288 S E 2d 69 160 Ga App 725

Wash—Cascade Timber Co v Northern Pac Ry Co 184 P 2d 90, 28 Wash 2d 684

12 US—US v Lowther Trucking Co D C Ala 229 F Supp 812

13 N Y—Bruce Glen, Inc v Emery Air Freight Corp 264 N Y S 2d 876 24 A D 2d 145

15 US—Ferraro Inc v Georgia Pac Corp D C Del 313 F Supp 660

Agreements held supported by consideration

(3) Other agreements

US—Great Northern Ry Co v Melton, C A Mont 193 F 2d 729

Mont—Empire Steel Mfg Co v Carlson, 622 P 2d 1016

Agreements held without consideration

(3) Amount due on note

Tex—Cox Feedlots, Inc v Hope, Civ App 498 S W 2d 436, err ref no rev err

Mutual assent necessary

La—Southwest Fabricating & Welding Co v Roy L Jones, Inc App 190 So 2d 529

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22 **Provisions not read into contract**

US—International Railways of Central America v United Brands Co D C N Y 358 F Supp 1363

26. **Personal performance not required**

Wyo—Dees v Pearce, 311 P 2d 391 77 Wyo 211

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39 US—Wabco Trade Co Division of World Standard Export Ltd v S S Inger Skou, D C N Y 482 F Supp 444

Other modifications

Mo—Hunter v Carnation Co App 239 S W 2d 766

41 US—Pennsylvania R Co v Greene, D C Ala 173 F Supp 657

§ 132. —— Excuses for Nonperformance

45 Mo—Hunter v Carnation Co supra, n 39

Matters not constituting excuse

US—Behring Intern Inc v Imperial Iranian Air Force, D C N J 475 F Supp 396

§ 133. —— Particular Contracts Considered

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49 US—Southern Ry Co v Champion Papers, Inc C A N C 427 F 2d 155

Tex—Paul Blackwell Co v Dallas Transfer & Terminal Warehouse Co supra, n 5—Continental Transfer & Storage Co v Swann, Civ App, 278 S W 2d 413 err dism

50 US—International Railways of Central America v United Brands Co D C N Y 358 F Supp 1363

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58. **Leasing freight cars**

US—General American Tank Car Corp v El Dorado Terminal Co 60 S Ct 325, 308 U S 422, 84 L Ed 361 rehearing denied 60 S Ct 465 309 U S 694 84 L Ed 1035

63 Ga—Wells v H W Lay & Co 50 S E 2d 755 78 Ga App 364

64. **Facts held to show contract**

Cal—Ravel v Hubbard, 246 P 2d 88 112 C A 2d 255

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65 N Y—Bush Terminal Buildings Co v Bush Terminal R Co 63 N Y S 2d 744 affd 66 N Y S 2d 644 271 App Div 835 app den 67 N Y S 2d 486, 271 App Div 883 cert den 67 S Ct 1533 331 U S 843 91 L Ed 1864

Defenses

Ga—Elsner v Carheart Cartage Co, 184 S E 2d 685 124 Ga App 615

66 US—Poultry Haulers, Inc v Pillsbury Co, D C Ala 247 F Supp 556, affd C A 353 F 2d 538

Mutual mistake of fact relieving liability

Tex—Percy v John F Buckner & Sons, Civ App 280 S W 2d 641 err ref no rev err

68 Cal—Ravel v Hubbard, supra, n 64

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84 US—Lowden v Saunders Shields-Lonsdale Grain Co Mo 59 S Ct 612, 306 U S 516, 83 L Ed 953 reh den 59 S Ct 792, 307 U S 649, 83 L Ed 1528

Ill—Allied Delivery System Inc v Illinois Commerce Commission, 417 N E 2d 777 49 Ill Dec 87 93 Ill App 3d 650

Mich—Lakehead Pine Lbr. Co v Delvo, 64 N W 2d 903 340 Mich 25

Tex—Paul Blackwell Co v Dallas Transfer & Terminal Warehouse Co 252 S W 2d 501 err ref no rev err

Contract of private carrier

US—US v Louisville & N R Co C A Ky 221 F 2d 698

Me—Public Utilities Commission v Johnson Motor Transport, 84 A 2d 142, 147 Me 138

86 US—Sea Ins Co v Smks, C C A Ill, 166 F 2d 623

Liability to third person for breach of contract

US—Shinabarger v United Aircraft Corp D C Conn 262 F Supp 52, affd in part, C A, 381 F 2d 808

87 S C—Stephenson Mule Co v Powell, 15 S E 2d 389 199 S C 450

92. **Interstate Commerce Act**

Iowa—Cedar Rapids Hide & Fur Co v Railway Exp Agency 46 N W 2d 545 242 Iowa 412

93 Mich—Grand Trunk Western R Co v Mount Clemens Sugar Co 269 N W 208, 277 Mich 366, cert den 57 S Ct 514 300 U S 670 81 L Ed 877

Other contracts may create the relationship of bailment[94.1]

94.1 Mich—C O Porter Machinery Co v Coleman 44 N W 2d 845 329 Mich 8

§ 134. Actions for Breach of Contract

Library References

Carriers ⇐69, 220 et seq

98 US—Eastern Motor Exp Inc v A Masbaum Jr Inc C A N Y 247 F 2d 826, 65 A L R 2d 765 cert den 78 S Ct 535 355 U S 959 2 L Ed 2d 534

Performance by plaintiff condition precedent

Mo—Hunter v Carnation Co., supra, n 39

Action not maintainable

N Y—Terry v Dairymen's League Co-op Ass'n 157 N Y S 2d 71 2 A D 2d 494

99 Cal—Hill v Progress Co 180 P 2d 956, 79 Cal App 2d 771—Ravel v Hubbard, supra, n 64

Mo—Metals Refining Co v St Louis-San Francisco Co 137 S W 2d 977 234 Mo App 991

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A carrier also is entitled to sue for breach of the contract [1-5]

3.5 Colo—W R Hall Transp & Storage Co v Gunnison Wm Co 388 P 2d 768 154 Colo 72
Mich—Baxter Realty Co v Manning, 142 N W 2d 874, 3 Mich App 409

5 Ga—Wells v H W Lay & Co 50 S E 2d 755 78 Ga App 364

Petition or complaint held insufficient
Idaho—Neer v McFarland, 291 P 2d 293 77 Idaho 286

Consideration must be specifically pleaded
Tex—M C Winters, Inc v Cope, Civ App 498 S W 2d 484

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21. Evidence held sufficient
(3) To show other matters—Hill v Progress Co 180 P 2d 956, 79 Cal App 2d 771—Townsend v Flotill Products, 187 P 2d 466, 82 Cal App 2d 863
La—Conley v Johnson App 98 So 2d 847

Evidence held insufficient
US—Atchison, T & S F Ry Co v Judson Freight Forwarding Co D C Cal 49 F Supp 789 affd C C A, 150 F 2d 210
Cal—Hill v Progress Co supra

23. Burden of proof
(2) Other cases
Colo—Yockey v Graves, 281 P 2d 1004, 131 Colo 291
N C—Tilles v Calvine Cotton Mills, Inc 111 S E 2d 606, 251 N C 359

Evidence held admissible
(4) Other evidence
Ala—Blount County v Hollingsworth Civ 231 So 2d 324, 45 Ala App 401

Evidence held sufficient
(5) Generally—James H Craggs Const Co v King, C A Ga, 274 F 2d 1—Ets-Hokin & Galvan, Inc v Maas Transit, Inc, C A N D 380 F 2d 258, cert den 88 S Ct 481, 389 U S 977 19 L Ed 2d 471
Cal—Hill v Progress Co supra, n 21
Mo—Hunter v Carnation Co, App, 239 S W 2d 766
N M—Chavez v Aragon, 312 P 2d 805, 63 N M 46
Okl—Mullinix Const Co v Myers, 358 P 2d 187

Evidence held insufficient
(9) Other matters
Idaho—Neer v McFarland, 291 P 2d 293 77 Idaho 286

Prima facie case
N C—Tilles v Calvine Cotton Mills, Inc, 111 S E 2d 606, 251 N C 359

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24 Mich—Baxter Realty Co v Manning, 142 N W 2d 874, 3 Mich App 409.

Evidence held sufficient
25 Idaho—Curzon v Wells Cargo, Inc, 382 P 2d 906, 86 Idaho 38
Ind—Hopple v Star City Elevator Co, 173 N E 2d 76, 131 Ind App 585

Findings unnecessary
Cal—Ravel v Hubbard, 246 P 2d 88, 112 C A 2d 255

Question of law
N C—Brown v. Bowers Const. Co, 73 S E 2d 147, 236 N C 462

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26. Instructions
(3) Other matters
Okl—Mullinix Const Co v Myers, 358 P.2d 187
28 U S [illegible] Plumbing Inc v U S 462 F 2d 526, 199 Ct Cl 143
Ala—Blount County v Pate Brothers, Civ 231 So 2d 324, 45 Ala App 401
Ga—Bendle v Ortho Mattress, Inc 211 S E 2d 618, 133 Ga App 575

Interest, etc.
(2) Other cases
Colo—Denver-Albuquerque Motor Transport, Inc v Galligan, 358 P 2d 28, 145 Colo 71

Loss of profits
(2) Other statements
Idaho—King v Beatrice Foods Co 402 P 2d 966, 89 Idaho 52

29. Expenses in preparation for performance
Ga—Bendle v Ortho Mattress, Inc, 211 S E 2d 618 133 Ga App 575

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In action by carrier for breach of contract, ordinarily, the measure of damages is the revenue carrier would have received less costs and expenses [39.5]

39.5 Freight charges
N C—Tilles v Calvine Cotton Mills, Inc, 111 S E 2d 606, 251 N C 359

Deduction of depreciation of obsolescence of trucks purchased by refrigerated
Wash—Cement Distributors, Inc v Western Aggregates, 414 P 2d 789 68 Wash 2d 640

§ 135. In General

Library References
Carriers ⇐47, 207.

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44 Ga—Powell v Jerome, 36 S E 2d 371 73 Ga App 257

§ 141. Authority in Respect to Other Contracts

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40 Ky—Chesapeake & O R Co v State Nat Bank of Maysville, 133 S W 2d 511, 280 Ky 444 130 A L R 1306

42 U S—Toho Bussan Kaisha, Limited v American President Lines, Limited, D C N Y 155 F Supp 886, affd C A 265 F 2d 418 76 A L R 2d 1344

44 Tex—Phoenix Refining Co v Kilgore Nat Bank, 143 S W 2d 925 135 Tex 439

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47 Tex—Phoenix Refining Co v Kilgore Nat Bank, supra, n 44

§ 142. Delivery to and Acceptance by Carrier

52 U S—C.J.S. cited in Michigan Millers Mut Fire Ins Co v Canadian Northern Ry Co, D C Minn, 58 F Supp 326 328, affd, C C A 152 F 2d 292—Michigan Millers Mut Fire Ins Co v Canadian Northern Ry Co, C C A Minn, 152 F 2d 292—Illinois Cent R R v Moore, C A Tenn, 228 F 2d 873

Ark—Missouri Pac R Co v Stein, 256 S W 373, 161 Ark 405
Ga—Powell v Jerome, 36 S E 2d 371 73 Ga App 257
N Y—C.J.S. cited in S Natove & Co v Davis, 71 N Y S 2d 445, 448 mod on oth grds 77 N Y S 2d 330, 273 App Div 368
Tex—Fletcher L Yarbrough & Co v Texas & N O Ry Co Civ App, 226 S W 2d 257, err ref Cert den 71 S Ct 52, 340 U S 820, 95 L Ed 603—Panhandle & Santa Fe Ry Co v McDonald, Civ App 227 S W 2d 601 err ref

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53 Tenn—Cam-Sloan Co v Louisville & N R Co 424 S W 2d 787 221 Tenn 70

55 Ga—Powell v Jerome, supra, n 52

56 Ala—Herring v Alabama Great Southern R Co 184 So 180 236 Ala 618 cert den 59 S Ct 581 306 U S 644 83 L Ed 1044

57. Shipper has privilege of limiting inspection
Tex—S & D Wolf Co v Atchison T & S F Ry Co Civ App 301 S W 2d 272 err ref no rev er

However, the carrier may reserve a right to inspect.[57.5]

57.5. Right to examine contents
U S—U S v Blum, C A N Y, 329 F 2d 49 cert den 84 S Ct 1920, 377 U S 993 12 L Ed 2d 1045—U S v Averell, D C N Y 296 F Supp 1004
D C—U S v Pryba, C A, 502 F 2d 391 cert den 9 S Ct 815, 419 U S 1127, 42 L Ed 2d 828

Waiver of right to privacy by shipper
U S—U S v Averell, D C N Y 296 F Supp 1001

§ 143. —— Time and Place

59 U S—Montgomery Ward & Co v Northern Pac Terminal Co of Or D C Or, 128 F Supp 47

63 U S—Michigan Millers Mut Fire Ins Co v Canadian Northern Ry Co supra, n 52

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64 U S—Montgomery Ward & Co v Northern Pac Terminal Co of Or supra, n 59

66 Mo—State ex rel Wors v Hostetter, 124 S W 2d 1072, 343 Mo 945

§ 144. —— Notice of Delivery

71. Cars on private sidings
(2) Chicago, R I & P Ry Co v Williams, 160 S W 2d 123 205 Ark 428

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72 U S—Illinois Cent R R v Moore, C A Tenn 228 F 2d 873

75 Tex—Texas & N O R Co v J Kahn & Co, Civ App 156 S W 2d 262, err ref

§ 145. —— When Carrier's Liability as Such Attaches

77 U S—C.J.S. cited in Michigan Millers Mut Fire Ins Co v Canadian Northern Ry Co supra, n 52—C.J.S. cited in American Sugar Refining Co v Illinois Cent R Co D C La 103 F Supp 280, 286—Republic Carloading & Distributing Co v Missouri Pac R Co C A Mo 302 F 2d 381—George Bohannon Transp, Inc v Davis, C A Wyo, 323 F 2d 755

Ark—St Louis-San Francisco R Co v Lee Wilson & Co 206 S W 2d 175 212 Ark 474
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Va—Norfolk Terminal Corp v U S Lines, Inc, 205 S E 2d 400, 215 Va 80

Consideration of terms of tariff in determining delivery
N Y—Riegel Paper Corp v Branch Motor Exp Co, 207 N Y S 2d 697

Duty of loading held not to give rise to liability of common carrier
N Y—Riegel Paper Corp v Branch Motor Exp Co, 207 N Y S 2d 697

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78 U S—National Union Fire Ins Co v Atlantic & E C Ry Co C A N C 193 F 2d 943—Republic Carloading & Distributing Co v Missouri Pac R Co, C A Mo 302 F 2d 381—Dugdale Packing

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79 US—Martin Jessee Motors v Reading Co DC Pa 87 F Supp 318 affd CA 181 F 2d 766—Dugdale Packing Co v Atchison, T & SF Ry Co DC Mo 347 F Supp 1276

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SC—Chilean Nitrate Sales Corp v Southern Railway—Carolina Division, 58 S E 2d 242, 227 S C 423

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Act precedent to shipment

US—Illinois Cent R R v Moore, C A Tenn, 228 F 2d 873, stating Mississippi law

Tenn—Hohenberg Bros Co v Missouri Pac R Co App, 586 S W 2d 117

Assembling of packages held not receipt of goods by carrier

Tenn—Cam-Sloan Co v Louisville & N R Co 424 S W 2d 787 221 Tenn 70

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80 US—Illinois Cent R R v Moore, C A Tenn 228 F 2d 873

Settlement of breach of contract action

Va—Norfolk Terminal Corp v U S Lines, Inc 205 S E 2d 400, 215 Va 80

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85 Ga—Bell v Fitz, supra, n 77

86 Pa—C.J.S. quoted in Rohr v Logan, 213 A 2d 166, 169, 206 Pa Super 232

87 US—Regular Carloading & Distributing Co v Missouri Pac R Co C A Mo, 302 F 2d 381

Miss—C.J.S. cited in Delta & Pine Land Co v Illinois Cent R Co, 95 So 2d 572, 575 231 Miss 487

Okl—Atchison, T & SF Ry Co v Farmers Union Co-op Gin Co supra, n 79

Tex—C.J.S. quoted at length in Panhandle & Santa Fe Ry Co v McDonald, Civ App 227 S W 2d 601 602, err ref

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91 US—Martin Jessee Motors v Reading Co supra, n 79—Illinois Cent R R v Moore, C A Tenn, 228 F 2d 873

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Or—Clifford W Brown v Bonesteele, 344 P 2d 928, 218 Or 312

Tex—Texas & N O R Co v J Kahn & Co supra, n 75

Under some circumstances, liability does not start until the bill of lading is actually issued.92.5

92.5. Where foreign government seal broken and car inspected by United States government inspector

Tex—Texas & P Ry Co v Empacadora De Ciudad Juarez, S A Civ App, 309 S W 2d 926, err ref no rev err

93 La—Robertson v Louisiana Fruit Growers Ass'n App, 80 So 2d 190

94 Mo Metals Refining Co v St Louis-San Francisco Co supra, n 91

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95 Ark—St Louis-San Francisco R Co v Le Wilson & Co supra, n 77

3 Ga—Powell v First Nat Bank & Trust Co 199 S E 668, 58 Ga App 648

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§ 147. Custody and Control In Transit

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Mass—Rice & Lockwood Lumber Co v Boston & M R R 31 N E 2d 219 308 Mass 101

Miss—Powell v Aldridge 32 So 2d 146, 202 Miss 648

N Y—Sorge v Parade Publications, Inc 247 N Y S 2d 317 20 A D 2d 338—Koreska v United Cargo Corp 258 N Y S 2d 432 23 A D 2d 37

Rights of carriers as to possible contraband

Ariz—State v Fessler 503 P 2d 807 808 Ariz 586

Idaho—State v Portus 345 P 2d 325 103 Idaho 91

Duty of clerk of court to receive and disburse

Ohio—Maddox v Astro Investments 343 N E 2d 133 45 Ohio App 2d 203 74 O O 2d 312

Authority of carrier to inspect package

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12 Ark—Missouri Pac R Co v Clay 182 S W 2d 467 207 Ark 714

N Y—Koreska v United Cargo Corp 258 N Y S 2d 432, 23 A D 2d 37

14 N Y—Pennsylvania R Co v Brooklyn Contractors Machinery Exchange, 61 N Y S 2d 217

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17 La—Piazza v Louisiana & A Ry Co supra, n 11

Miss—Powell v Aldridge, supra, n 11

Wyo—Hercules Powder Co v State Bd of Equalization, 208 P 2d 1096, 66 Wyo 268, reh den 210 P 2d 824 66 Wyo 268

18 Ark—Missouri Pac R Co v Clay supra, n 12

19 Ark—Missouri Pac R Co v Clay supra, n 12

23 US—Atchison, T & SF Ry Co v Springer C A Ill 172 F 2d 346

Waiver

US—Atchison, T & SF Ry Co v Bowersock, C A Okl 307 F 2d 230

§ 148. —— Title to Goods

24 US—C.J.S. cited in General Cas Co of America v Arteca Films, Inc 278 F 2d 161 167, cert den 81 S Ct 103 364 US 863 5 L Ed 2d 85—G A C Commercial Corp v Wilson, D C N Y 271 F Supp 242

La—C.J.S. quoted at length in Piazza v Louisiana & A Ry Co App 46 So 2d 670, 674

Mass—American Garment Co v Taylor, 33 N E 2d 296 308 Mass 527 135 A L R 453

Consignee treated as owner

US—Kologel Co Ltd v Down in the Village, Inc D C N Y, 539 F Supp 727

N Y—American Banana Co Inc v Venezolana International de Aviacion S A (VIASA) 411 N Y S 2d 889 67 A D 2d 613 affd 404 N E 2d 1330, 49 N Y 2d 848 427 N Y S 2d 789—American Banana Co Inc v Venezolana International De Aviacion, S A 404 N E 2d 1330 49 N Y 2d 848, 427 N Y S 2d 789

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27 D C—W T Cowan, Inc v Wagshal, Mun App, 47 A 2d 94

Mass—Independent Lock Co v Acme Fast Freight, 116 N E 2d 841 330 Mass 681

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35 Wash—Rogers Walla Walla, Inc v Willis Shaw Frozen Express, Inc 596 P 2d 669 23 Wash App 540

40 Ark—C.J.S. quoted in Missouri Pac R Co v Clay 68 S W 2d 621, 624 205 Ark 300

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49 Conn—Railway Express Agency v Goodman's New York & Connecticut Express Corporation, 28 A 2d 869 129 Conn 386

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55 Adverse elements

US—North Am Van Lines, Inc v Heller, D C La 246 F Supp 641 affd C A 371 F 2d 629

56 Ariz—Southern Pac Co v Agencia Joffroy S A, supra, n 11

Ark—Missouri Pac R Co v Clay supra, n 12

N Y—Goldmann v Richard Shipping Corporation, 21 N Y S 2d 625

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64 US—North Am Van Lines, Inc v Heller D C La 246 F Supp 641 affd C A, 371 F 2d 629

65 US—North Am Van Lines, Inc v Heller, D C La 246 F Supp 641 affd C A 371 F 2d 629

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79 La—Henrikson v Herrin Transfer & Warehouse Co 43 So 2d 471 216 La 199

Neb—C J S. cited in Law v Employers Mut Casualty Co 43 N W 2d 188 190, 152 Neb 852

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80 U S—National Union Fire Ins Co v Atlantic & E C Ry Co C A N C, 193 F 2d 943

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La—Henrikson v Herrin Transfer & Warehouse Co, supra, n 79

81 Miss—Delta & Pine Land Co v Illinois Cent R Co 95 So 2d 572, 231 Miss 487

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§ 151. Custody and Control of Goods Stopped in Transitu

83 Ark—Kansas City Southern Ry Co v Shull, 136 S W 2d 1040 199 Ark 932

§ 152. Custody and Control of Goods Awaiting Delivery to Consignee

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85 Mass—Rice & Lockwood Lumber Co v Boston & M R R, 31 N E 2d 219 308 Mass 101

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87 Mass—Rice & Lockwood Lumber Co v Boston & M R R, supra, n 85

90 Mass—Rice & Lockwood Lumber Co v Boston & M R R supra, n 85

§ 153. —— Notice of Arrival of Goods and Reasonable Time to Remove Goods

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95 Ga.—Bell v Fitz, supra, n 80

Wash.—Dohrmann Hotel Supply Co v Owl Transfer & Storage Co supra, n 79

96 Wash—Dohrmann Hotel Supply Co v Owl Transfer & Storage Co supra, n 79

98 U.S—General Am Transp Corp v Indiana Harbor Belt R Co, C A Ill, 191 F 2d 865 cert den 72 S.Ct 636, 343 U S 905 96 L Ed 1324

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8. U S—[illegible] Exp v T S C Motor Freight Lines, C.A.Tex, 200 F 2d 797

13 N Y—General Refrigerators Corp v Acme Fast Freight, 60 N Y S 2d 370

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29 N Y.—General Refrigerators Corp v Acme Fast Freight, supra, n. 13

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34 U S—St. Louis-Southwestern Ry Co v Farrell, D C Ark, 114 F Supp 486, app dism C A 210 F 2d 655

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36 Tenn—Southern Ry Co v Varnell, 232 S W 2d 406, 33 Tenn App 550.

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47 N J.—C.J.S. cited in May v Huff, 79 A 2d 728, 731, 12 N J.Super 418

Gratuitous bailee

Ga [illegible] Inc v Southern Airways, Inc 229 S.E 2d 664 139 Ga App 808

48 La—Red River Cotton Oil Co. v Texas & P Ry Co, 44 So.2d 101, 216 La 519 cert den 70 S Ct 841, 339 U S 953, 94 L Ed 1366

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55 Tex—C.J.S. cited in Boring v Chicago, R I & P R. Co., Civ App 208 S.W 2d 416, 419

§ 154. —— Where Goods Are Held at Consignee's Request

64 Failure to hold as requested

N Y—Fine v Pennsylvania R Co 34 N Y S 2d 308

§ 155. —— Failure or Refusal of Carrier to Deliver Goods When Called For

70 Tex—Elizabeth-Perkins, Inc v Morgan Exp Inc Civ App 554 S W 2d 216

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§ 156. —— Liability of Carrier after Expiration of Reasonable Time That of Warehouseman

75 U S—General Am Transp Corp v Indiana Harbor Belt R Co C A Ill 191 F 2d 865 cert den 72 S Ct 636, 343 U S 905 96 L Ed 1324

D C—United Van Lines, Inc v U S, C A, 448 F 2d 1190, 145 U S App D C 267

Ga—Terminal Transport Co Inc v Burger Chef Systems, Inc 211 S E 2d 788, 133 Ga App 608

La—V Rivera S En C v Texas & N O R Co 31 So 2d 180, 211 La 969 172 A L R 791, app dism and cert den 68 S Ct 71 332 U S 750, 92 L Ed 337—Red River Cotton Oil Co v Texas & P Ry Co supra, n 48

Tex—Trans-Cold Exp Inc v Hardin, Civ App, 415 S W 2d 431—Chief Freight Lines Co v Holiday Inns of America, Inc Civ App 469 S W 2d 413

Utah—Barlow Upholstery & Furniture Co v Emmel, 533 P 2d 900

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77 Tex—Chief Freight Lines Co v Holiday Inns of America, Inc Civ App 469 S W 2d 413

§ 157. —— Nature and Extent of Carrier's Liability as Custodian or Warehouseman

80 In case of [illegible] to [illegible] goods warehoused by carrier law of carriers applies—Orcutt v Tucson Warehouse & Transfer Co, 318 P 2d 671 83 Ariz 200

82 U S—Textron, Inc v Lowell Trucking Corp D C N Y, 74 F Supp 322

83 La—Wagner v T S C Motor Freight Lines, supra, n 75

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84 La—Wagner v T S C Motor Freight Lines, supra, n 75

Tex—Trans-Cold Exp Inc v Hardin, Civ App, 415 S W 2d 431

Under common law principles of bailment, carrier ceases to be bailee when owner assumes control over railroad car and its contents.[86.5]

86.5. Rule modified by contract

Or—Timber Structures, Inc v Southern Pac Co, 390 P 2d 343, 237 Or 42, 16 A L R 3d 1102

87 Utah—Barlow Upholstery & Furniture Co v Emmel, 533 P 2d 900

89 U S—Eastern Wine Corp v New York Cent R Co, C A N Y 355 F 2d 30—Safeway Moving & Storage Corp v Aetna Ins Co, D C Va, 317 F Supp 238, mod on oth grds, C A 452 F 2d 79

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91 Ga—Bell v Fitz, 50 S E 2d 241 78 Ga App 28

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95. Flood

(2) Other cases—Kraft Hat Mfg Corporation v Universal Carloading & Distributing Co 7 N Y S 2d 679

§ 158. —— Actions against Carrier as Warehouseman

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99 La—Wagner v T S C Motor Freight Lines, supra, n 75

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Wash—Dohrmann Hotel Supply Co v Owl Transfer & Storage Co 143 P 2d 441, 19 Wash 2d 522, 148 A L R 1108

3 Mo—Robinson v Railway Exp Agency Inc, App, 329 S W 2d 242

N Y—Vanderbilt v Chelsea Fireproof Storage Warehouses, 80 N Y S 2d 302, 192 Misc 143

N C—Jordan v Eastern Transit & Storage Co, 146 S E 2d 43 266 N C 156

Ohio—Hardy v Ferguson Moving & Storage Co, 140 N E 2d 14, 104 Ohio App 98

Pa—Rohr v Logan, 213 A 2d 166, 206 Pa Super 232

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General rules as to issues, proof and variance apply [55]

5.5. Variance

N C—Jordan v Eastern Transit & Storage Co, 146 S E 2d 43, 266 N C 156

6 Ga—Bell v Fitz, 50 S E 2d 241, 78 Ga App 28

7. Evidence held sufficient to support recovery

Ark—United Van Lines v Haley 218 S W 2d 715, 214 Ark 938

N C—Jordan v Eastern Transit & Storage Co, 146 S E 2d 43 266 N C 156

Evidence held insufficient to support recovery

Ariz—Railway Exp Agency v Schoen, 216 P 2d 420, 70 Ariz 87

La—Wagner v T S C Motor Freight Lines, App, 181 So 625

N Y—Kraft Hat Mfg Corporation v Universal Carloading & Distributing Co, 7 N Y S 2d 679

Utah—Barlow Upholstery & Furniture Co v Emmel, 533 P 2d 900

8 Ohio—Hardy v Ferguson Moving & Storage Co, 140 N E 2d 14 104 Ohio App 98

9 Instructions held properly refused

N C—Jordan v Eastern Transit & Storage Co, 146 S E 2d 43 266 N C 156

Cost of repairing goods not beyond repair has been held to be the proper measure of damages [12.1]

12.1 La—Wagner v T S C Motor Freight Lines, supra, n 7

§ 159. In General

13 U S—Montgomery Ward & Co v Northern Pac Terminal Co of Or D C Or 128 F Supp 475

Mo—C.J.S. cited in Southern Advance Bag & Paper Co v Terminal R Ass'n of St Louis, App, 171 S W 2d 107 112

Tenn—Beaty Chevrolet, Inc v Commercial Auto Transit, Inc, App, 586 S W 2d 122

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14 N Y—Koreska v United Cargo Corp 258 N Y S 2d 432, 23 A D 2d 37

§ 160. Duty of Carrier to Make

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15 US—O'Kelley v US CCA Ark 116 F 2d 966 —Hanna Furnace Corporation v US DCNY 53 F Supp 341 affd 65 S Ct 41 323 US 667 89 L Ed 543, reh den 65 S Ct 112, 323 US 813, 89 L Ed 647—Montgomery Ward & Co v Northern Pac Terminal Co of Or supra, n 13

Ala—Alabama Great Southern R Co v Davidson, 10 So 2d 414 30 Ala App 600

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N Y—Olive Kent Park v Mosheassuck Transp Co 71 N Y S 2d 15 189 Misc 864, affd 80 N Y S 2d 729 274 App Div 765

N C—Merchant v Lassiter 30 S E 2d 217 224 N C 343

Va—Railway Exp Agency v Kessler 52 S E 2d 102 189 Va 301

Wash—Northwest Ins Co v Albrecht, 587 P 2d 1081 22 Wash App 16

Wis—Thompson v Liberty Trucking Co, 11 N W 2d 130, 243 Wis 478, 149 A L R 640

16 US—O'Kelley v US CCA Ark, 116 F 2d 966 Pennsylvania R Co v Moore-McCormack Lines, Inc, D C N Y 246 F Supp 143 affd CA 370 F 2d 430

19 US—Montgomery Ward & Co v Northern Pac Terminal Co of Or supra, n 13

22 Fla—Compagnia Cubana De Aviacion S A v Comfort-Craft, Inc App, 120 So 2d 48

Overweening force insufficient excuse

US Montgomery Ward & Co v Northern Pac Terminal Co of Or, supra, n 13

Reasonableness of delay insufficient excuse

US Montgomery Ward & Co v Northern Pac Terminal Co of Or D C Or, 128 F Supp 520

Picketing by union not sufficient

US Merchants Warehouse Co v A B C Freight Forwarding Corp, D C Ind, 165 F Supp 67

24 Vt—St John v Ry & L C R R v Skeels & Weedman, Inc 196 A 2d 485

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31 N J—Upjohn Co v Tumpany, 402 A 2d 979 168 N J Super 283

Tex Ferguson v Red Arrow Freight Lines, Civ App, 580 S W 2d 84

Acts constituting delivery

(3) Other acts

US—City of New York v Smith, D C N Y, 279 F Supp 866

Acts not constituting delivery

(3) Other acts

US Brockway-Smith Co v Boston and Maine Corp, D C Mass, 497 F Supp 814

Kan—O A Sutton Corp v McFarlane Transfer Co 233 P 2d 717, 171 Kan. 485 25 A L R 2d 766

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32 US Montgomery Ward & Co v Northern Pac Terminal Co of Or, supra, n 13

33 US—Loveless Mfg Co v Roadway Exp, D C Okl, 104 F Supp 809—Secretary of Agriculture of US v US Fla 74 S Ct 826, 347 US 645, 98 L Ed 1015

34 Mo.—C.J.S. cited in Jones v Thompson, 228 S W 2d 673 676, 360 Mo 285

35 US—Secretary of Agriculture of US v US Fla 74 S Ct 826, 347 US 645 98 L Ed 1015—William N Eustis & Co v US 317 F 2d 509

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39 N H—Kingston 1686 House, Inc v B S P Transp Inc, 427 A 2d 9 121 N H 93

40 US—Northern Pac Ry Co v Associated General Contractors of N D D C N D 152 F Supp 126

43 La—C.J.S. quoted in Robertson v Louisiana Fruit Growers Ass'n App 80 So 2d 190, 193

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46 Tex—Missouri, K & T R Co of Texas v Sealy Oil Mill & Manufacturing Co Civ App 123 S W 2d 948

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53 Mass—American Garment Co v Taylor supra n 15

Mich—Great Lakes Steel Corp v Detroit T & I R Co, 26 N W 2d 704 317 Mich 1

55 Mass—American Garment Co v Taylor supra, n 15

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(1) US—Universal Computer Systems Inc v Allegheny Airlines, Inc D C Pa 479 F Supp 639 affd C A 622 F 2d 579

Tex—Gulf C & S F Ry Co v Kempner, Civ App 275 S W 459 revd on oth grds Com App 282 S W 795

Prima facie evidence provisions of bailment statute held inapplicable

Tenn—Strickland Transp Co v Federated Dept Stores, Inc 451 S W 2d 677 224 Tenn 129

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92. Carmack Amendment applicable

US—American Synthetic Rubber Corp v Louisville & N R Co C A Ky 422 F 2d 462—Marquette Cement Mfg Co v Louisville & N R Co, D C Tenn 281 F Supp 944 affd C A 406 F 2d 731

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2 US—Railway Exp Agency v Smith, D C S C 116 F Supp 609

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4 D C—Iversen v U S, D C 63 F Supp 1001 affd 66 S Ct 825 327 U S 767 90 L Ed 2d 998, reh den 66 S Ct 963, 327 U S 819 90 L Ed 1041

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Ariz—Southern Pac Co v Loden, 508 P 2d 347, 19 Ariz App 460

7 US—Keystone Motor Freight Lines v Brannon-Signago Cigar Co 115 F 2d 736

9. "Constructive placement" construed

Wis—Chicago & North Western Ry Co v Afram Bros Co, 228 N W 2d 360, 68 Wis 2d 311

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§ 163. Place of Delivery

15 Mich—Great Lakes Steel Corp v Detroit, T & I R Co 26 n w 2d 704, 317 Mich 1

§ 164. —— Duty to Deliver at Destination Specified in General

16 US—Marquette Cement Mfg Co v Louisville & N R Co D C Tenn 281 F Supp 944, affd, C A 406 F 2d 731

Mich—Great Lakes Steel Corp v Detroit, T & I R Co supra, n 15

Or—Richardson v Railway Exp Agency, Inc, 482 P 2d 176

Wash—Dohrmann Hotel Supply Co v Owl Transfer & Storage Co 143 P 2d 441 19 Wash 2d 552, 149 A L R 1108

Sufficient delivery

US—Jarka Corporation of Baltimore v Pennsylvania R Co D C Md 42 F Supp 371 affd 130 F 2d 804

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(2) Other contracts

US—Embassy Moving & Storage Co v US, 424 F 2d 502, 191 Ct Cl 537

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23 Wash—Oregon-Washington R & Nav Co v C M Koop Co 120 P 2d 845, 12 Wash 2d 146, 138 A L R 633

24 US—Embassy Moving & Storage Co v. US, 424 F 2d 602, 191 Ct Cl 537

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28 Mass—Race & Lockwood Lumber Co v Boston & M R R, 31 N E 2d 219 308 Mass 101

30 Mass—Race & Lockwood Lumber Co v Boston & M R R supra, n 28

Tex—Trans-Cold Exp Inc v Hardin, Civ App, 415 S W 2d 431

31 US—Jarka Corporation of Baltimore v Pennsylvania R Co C C A Md, 130 F 2d 804—Hanna Furnace Corporation v US D C N Y, 53 F Supp 341 affd 65 S Ct 41, 323 US 667 89 L Ed 2d 543, reh den 65 S Ct 112, 323 US 813, 89 L Ed 647

Mich—C.J.S. quoted in Great Lakes Steel Corp v Detroit, T & I R Co, 26 N W 2d 704, 708, 317 Mich 1

32 US—City of New York v Smith, D C N Y, 279 F Supp 866

§ 166. —— Acceptance at Place Other than Destination Specified

34 US—Brooks v Pennsylvania R Co, C A N Y, 187 F 2d 869, cert den 72 S Ct 62, 342 US 837, 96 L Ed 633

La—C.J.S. quoted at length in Piazza v Iron & A Ry Co App, 46 So 2d 670, 674

§ 167. —— Duty to Deliver at Usual Place at Destination for Making Delivery

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40 US—Republic Cartage & Distributing Co v Missouri Pac R Co, C A Mo 302 F 2d 381

44 US—Loveless Mfg Co v Roadway Exp D C Okl, 104 F Supp 809

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51 N Y—Eazor Exp, Inc v Lanza, 303 N Y S 2d 571 60 Misc 2d 686

§ 168 —— Duty to Deliver at Suitable Place for Receipt of Goods by Consignee

60 Delivery to unloading pens of stockyard company etc—Armour & Co v Alton R Co, CCA Ill, 311 F2d 913, aff'd 374 US 398, 83 S Ct 1836, 10 L Ed 771

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63 La—L Frank & Co v Pinion Cow & Co, App, 43 So 2d 88

N M—CJS cited in H T Cole Const Co v Westfield Transp Inc, App, 520 P2d 789, 790, NM 802

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Refusal of tender held justified where goods were bundled together by carrier

N Y—Akron-Chicago Transp Co Specialized Trucks Corp, 260 N Y S 2d 164, 46 Misc 2d 55, motion den 265 N Y S 2d 829, 48 Misc 2d 805

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Tenn—Beaty Chevrolet Inc v Complete Auto Trans Inc, App, 586 S W 2d 122

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68 U S—Iowa Beef Packers, Inc v Chicago Great Western Ry Co, C A Ill, 402 F 2d 930

Kan—O A Sutton Corp v McMake Transfer Co, 233 P 2d 717, 171 Kan 485, 25 A L R 2d 709

§ 171. Personal Delivery

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82 Va.—CJS. cited in Railway Express Agency v Kessler, 52 S E 2d 102, 103, 189 Va 29

Point of destination defined

N J—Saunders v Adams Exp Co, 74 A 670, 671, 75 N J Law 441

49 C J p 1039 note 48

§ 172. To Whom Delivery Made

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88 U S—Granite & Quartzite Centre Inc v M S Virma, D C Ga, 374 F Supp 1124

Ariz—Southern Pac Co v Agencia Jolfroy, S A, 174 P 2d 278

N C—Griggs v Stoker Service Co, 50 S E 2d 914, 229 N C 572, 15 A L R 2d 798

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N C—Griggs v Stoker Service Co, 50 S E 2d 914, 229 N C 572, 15 A L R 2d 798

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21 Discontinuance of liability on bill of lading as negotiable instrument

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Mich—Grand Trunk Western R Co v City of Lansing, 239 N W 2d 5, 291 Mich 589

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(1) Harford Metal Products Corporation v Tidewater Express Lines, 36 A 2d 677, 183 Md 105

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78 U S—Pennsylvania R Co v Brown, supra, n 16

80 N C—Griggs v Stoker Service Co supra, n 24

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87 N C—Griggs v Stoker Service Co, supra, n 24

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(2) Other questions

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14 Ohio—Wilson Freight Forwarding Co v Cleveland, Columbus & Cincinnati Highway, 57 N E 2d 796, 74 Ohio App 54

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U S—Marquette Cement Mfg Co v Louisville & N R Co D C Tenn 281 F Supp 944, affd, C A, 406 F 2d 731

16 Wyo—Husky Hi-Power Inc v Salt Creek Freightways, 366 P 2d 1003

22. Presumptions

(3) Other presumptions—Wilson Freight Forwarding Co v Cleveland, Columbus & Cincinnati Highway, supra, n 14

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23 Expenses incurred

(3) Expenses held not recoverable

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25 Wash—Prentice v Union Pac R Co 182 P 2d 41 28 Wash 2d 212

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27 U S—Biltmore Mfg Co v Overnite Transp Co D C N C 157 F Supp 891

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28 U S—Biltmore Mfg Co v Overnite Transp Co D C N C 157 F Supp 891—Franser-Smith Co v Chicago, R I & P R Co C A Minn, 435 F 2d 1396

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U S—Pennsylvania R Co v Moore-McCormack Lines, Inc D C N Y 246 F Supp 143, affd, C A, 370 F 2d 430

67 Tex—Rountree v Lydick-Barmann Co, 150 S W 2d 173 err dism

72. Carrier's right to sell on shipper-consignee's wrongful abandonment of goods

U S—Fraser-Smith Co v Chicago, R I & P R Co, C A Minn 435 F 2d 1396

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78 N Y—Brooklyn Eastern Dist Terminal v Unex Credit Corp, 123 N Y S 2d 88

79 Ohio—Wilson Freight Forwarding Co v Cleveland, Columbus & Cincinnati Highway, supra, n 14

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92 U S—North Am Van Lines, Inc v Heller, C A La 371 F 2d 629

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50. Calling itself warehouseman does not alter carrier's liability

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74 La—Justin v Delta Motor Line, App, 43 So 2d 53

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(4) Ala—Compania Cubana De Aviacion, S A v Comfort-Craft, Inc, App, 120 So 2d 48

(6) To show other matters

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(2) N Y—Wigdor Furs v Railway Exp Agency, 97 N Y S 2d 867

(5) As to other matters

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(1) Oral contracts—Griggs v Stoker Service Co, 59 S E 2d 229, 229 N C 572, 15 A L R 2d 798

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8 U S—Missouri Pac R Co v Chas, 165 S W 2d 821, 305 Ark 369

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(2) Other issues

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41. Doctrine of deviation held not applicable

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2 U S—National Van Lines, Inc v Rich Plan Corp C A Tex 385 F 2d 800, 27 A L R 3d 1313

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2 Ind—Tyler Refrigeration Corp v IML Freight, Inc App 427 N E 2d 718

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16. Pleadings in actions generally

Ga—Atlanta Paper Co v New York, N H & H R Co 84 S E 2d 359 211 Ga 185

N J—Okin v Railway Exp Agency 44 A 2d 896, 24 N J Misc 8

20. Instruction properly refused

Ill—Donnell Hydraulic Co v Standish, 172 N E 2d 520, 29 Ill App 2d 74

21 U S—National Van Lines, Inc v Rich Plan Corp C A Tex 385 F 2d 800, 27 A L R 3d 1313

Tex—C J S. cited in Commercial Standard Ins Co v Gruver Civ App 217 S W 2d 95 99 err dism

Rule inapplicable to connecting carriers

Tex—Commercial Standard Ins Co v Gruver Civ App 217 S W 2d 95, err dism

Other matters relating to actions against carriers arising out of C O D shipments have been adjudicated.[21.5]

21.5. Waiver of tariff requirements by carrier

U S—North Coast Mfg Corp v Union Pac R Co D C Or 185 F Supp 287

22 U S—National Van Lines, Inc v Rich Plan Corp C A Tex, 385 F 2d 800, 27 A L R 3d 1313

D C—Willer v Railway Exp Agency Mun App 86 A 2d 104

23. Mitigation of damages

U S—National Van Lines, Inc v Rich Plan Corp C A Tex 385 F 2d 800, 27 A L R 3d 1313

24 U S—National Van Lines, Inc v Rich Plan Corp, C A Tex 385 F 2d 800, 27 A L R 3d 1313

Tex—Herrin Transp Co v Robert E Olson Co, Civ App, 325 S W 2d 826

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27 Ind—C.J.S. quoted in Kamarata v Hayes Freight Lines, 108 N E 2d 723 726, 123 Ind App 222

Neb—C J S. quoted in Truck Owners Freight Co v Poland, 10 N W 2d 473 474 143 Neb 634

Parties

N Y—Novick v Kirschbaum, 50 N Y S 2d 279

Complaint held not to state cause of action

N Y—Novick v Kirschbaum, supra

29 Neb—Truck Owners Freight Co v Poland, 10 N W 2d 473, 143 Neb 634

§ 187. In General

Library References

Carriers ⇐75, 92

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37 U S—Compagnie Transito Internationale Limited v Lykes Bros S S Co, C A N Y 243 F 2d 683

§ 190. General Rules of Liability

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Carriers ⇐98 et seq

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65 N Y—Cuccis v New York, N H & H R Co, 149 N Y S 2d 602

Carmack Amendment to Interstate Commerce Act

U S—Turner's Farms, Inc v Maine Cent R Co, D C Me 486 F Supp 694

§ 191 —— In Absence of Special Contract Generally

66 Colo—Denver-Albuquerque Motor Transport Inc v Gallagan, 358 P 2d 28 145 Colo 71

La—C.J.S. quoted at length in Justin v Delta Motor Line, App 43 So 2d 53, 57

Neb—C J S. quoted in Barnhart v Henderson, 24 N W 2d 854 861 147 Neb 689 982

N Y—Channing v Ruddle Aviation Co 119 N Y S 2d 552, 203 Misc 844

R I—Crown Displays, Inc v Calore Freight System, Inc, 348 A 2d 373 115 R I 483

Tex—C.J.S. cited in Herrin Transp Co v Robert E Olson Co, Civ App 325 S W 2d 826, 828

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67 N H—Fallgren v Railway Exp Agency, 100 A 2d 835 98 N H 333

Tex—Panhandle & S F Ry Co v Wilson, Civ App, 135 S W 2d 1062, err dism

69 U S—Gardner v Mid-Continent Grain Co, C C A Mo, 168 F 2d 819

Ala—West Bros, Inc v Resource Management Service, Inc 214 So 2d 431 283 Ala 78

Ariz—C.J.S. cited in Southern Pac Co v Loden, 508 P 2d 347, 351 19 Ariz App 460

N H—Fallgren v Railway Exp Agency, supra, n 67

Ohio—Strickler v Baltimore & Ohio R Co, 135 N E 2d 844 165 Ohio St 423

Wash—Oregon-Washington R & Nav Co v C M Kopp Co, 120 P 2d 845, 12 Wash 2d 146, 138 A L R 633

Colo—C.J.S. cited in Denver-Albuquerque Motor Transport, Inc v Gallagan, 358 P 2d 28 30, 145 Colo 71

N Y—Wehmatzki v Railway Express Agency, 7 N Y S 2d 672

Okl—W U Tel Co v Jordan Petroleum Co, 238 P 2d 820, 205 Okl 452

Pa—Isserman v Charlton Bros Transp Co, 60 Dauph Co 143

Tex—Southern Pac Co v H Rothstein & Sons, Civ App 304 S W 2d 383, err ref no rev err

70 U S—Condakes v Southern Pac Co D C Mass, 295 F Supp 119—Gold Star Meat Co v Union Pac R Co C A Colo 438 F 2d 1270

Ariz—C.J.S. cited in Southern Pac Co v Loden, 508 P 2d 347 351, 19 Ariz App 460

Fla—C J S. cited in Seaboard Air Line R Co v Lake Region Packing Ass'n, App 211 So 2d 25, 28

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71 U S—C.J.S. cited in Sanders v Mayflower, D C N C, 124 F Supp 77, 83—Zizzo v Railway Exp Agency, D C Mass, 131 F Supp 326

Fla—Compania Cubana De Aviacion, S A v Comfort-Craft, Inc, App, 120 So 2d 48

Ill—Stern McGiveny & Co v Keeshin Motor Exp Co 34 N E 2d 81, 310 Ill App 337

Tex—C.J.S. cited in Southern Pac Co v H Rothstein & Sons, Civ App, 304 S W 2d 383, 385 err ref no rev err

Damages resulting from neglect

(2) Other state cases

U S—Great Atlantic & Pac Tea Co v Atchison, T & S F Ry Co C A Ill, 333 F 2d 705, cert den 85 S Ct. 661, 373 U S 967, 13 L Ed 2d 560

72 U S—Condakes v Southern Pac Co D C Mass 295 F Supp 119

Ala—Alabama Great Southern R Co v Davidson, 10 So 2d 414 30 Ala App 600

Ark—St Louis-San Francisco Ry Co J W Myers Commission Co 185 S W 2d 288 208 Ark 1032

73 U S—Condakes v Southern Pac Co D C Mass 295 F Supp 21

76 U S—Lapidus v Chicago B & Q R Co D C Ill 161 F Supp 664

Ohio—Kohler v Baltimore & O R Co 63 N E 2d 834 76 Ohio App 235

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77 U S—Railway Exp Agency v Smith D C S C 116 F Supp 609

N Y—Cracas v New York N H & H R Co 149 N Y S 2d 602

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90 U S—Lapidus v Chicago, B & Q R Co D C Ill 161 F Supp 664

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95 N Y—Cohen v Varig Airlines, S A Empresa de Viacao Aerea Rio Grandense, 289 N Y S 2d 453 85 Misc 2d 653 mod on oth grds 390 N Y S 2d 515 84 Misc 2d 998 mod on oth grds 405 N Y S 2d 44 62 A D 2d 324

38. Meaning of "reasonable dispatch"

U S—Shippers Service Co v Norfolk & W Ry Co D C Ill 389 F Supp 1225 revd on oth grds C A 528 F 2d 56

§ 194. What is Reasonable Time

3 U S—Condakes v Southern Pac Co D C Mass, 295 F Supp 121—Turner's Farms, Inc v Maine Cent R Co D C Me 486 F Supp 694

Tex—C J S. cited in Herrin Transp Co v Southeastern Elec Co Civ App 310 S W 2d 343 349

4 Tex—Herrin Transp Co v Southeastern Elec Co, Civ App 310 S W 2d 343

5 Tex—C.J.S. cited in Transp Co v Southeastern Elec Co Civ App 310 S W 2d 343 349

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6 Tex—C.J.S. cited in Herrin Transp Co v Southeastern Elec Co Civ App, 310 S W 2d 343 349

19. Unreasonable

D C—Pennsylvania R Co v Newmyer Mun App, 100 A 2d 456

The rules have also been applied to various other periods.[22.1]

22.1. Unreasonable

U S—Railway Exp Agency v Smith D C S C 116 F Supp 609

Not unreasonable

N H—Fallgren v Railway Exp Agency 100 A 2d 835 98 N H 333

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24 Ill—Behn v Southern Pac Co, 118 N E 2d 625 2 Ill App 2d 62

25 Mo—C.J.S. cited in Ernest E Fadler Co v Chicago, R I & P R Co App, 261 S W 2d 394 398

Okl—Fleming v Blubaugh, 169 P 2d 289 197 Okl 196

28 Ga—Brown-Rogers-Dixson Co v Southern Ry Co 53 S E 2d 702, 79 Ga App 449

Ky—Joseph Degrazio Fruit Co v Louisville & N R Co 123 S W 2d 813, 276 Ky 168

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38 Ark—St Louis-San Francisco Ry Co v J W Myers Commission Co 185 S W 2d 288 208 Ark 1032

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44 Pa—Rosen v Railway Exp Agency, 50 A 2d 517 160 Pa Super 122

§ 195. What Constitutes Negligence

49 U S—Gardner v Mid-Continent Grain Co C C A Mo 165 F 2d 819

§ 196. Delay as Proximate Cause of Injury

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73 Kan—Schreppel v Campbell Sixty-Six Exp Inc 441 P 2d 821 201 Kan 445

§ 197. Excuses for Delay

87 U S—Gold Star Meat Co Union Pac R Co C A Colo 438 F 2d 1270

Ariz—C.J.S. cited in Southern Pac Co v Loden 508 P 2d 347 351 19 Ariz App 460

Fla—Seaboard Air Line R Co v Lake Region Packing Ass'n App 211 So 2d 25

§ 198. —— Acts of Shipper

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88 U S—Cooper v Chicago R I & P R Co, C A Iowa, 217 F 2d 683

§ 199. —— Advising Shipper as to Probable Delay

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1 U S—C.J.S. cited in Atchison, T & S F Ry Co v Jarboe Livestock Commission Co C C A Okl 159 F 2d 527 529—C.J.S. cited in Little Rock Packing Co v Chicago B & Q R Co D C Mo 116 F Supp 213, 220—C.J.S. quoted in Gold Star Meat Co v Union Pac R Co C A Colo 438 F 2d 1270, 1272—C.J.S. cited in Page Communications Engineers, Inc v Hellenic Lines, Ltd D C D C 356 F Supp 456, 458, affd C A 497 F 2d 684 162 U S App D C 97

Cal—Langley v Pacific Gas & Elec Co, 262 P 2d 846, 41 C 2d 655

Fla—Pennsylvania R Co v Greco, 25 So 2d 809 157 Fla 337

Tex—C J S cited in Southern Pac Co v H Rothstein & Sons, Civ App 304 S W 2d 383, 385 err ref no rev err

§ 201. —— Weather Conditions

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32 U S—Zezzo v Railway Exp Agency D C Mass, 131 F Supp 326

§ 202. —— Strike and Mobs

Tex—C.J.S. black letter text cited in Southern Pac Co v H Rothstein & Sons, Civ App 304 S W 2d 383, 385, err ref no rev err

41 Iowa—C.J.S. cited in Burlington Transp Co v Hathaway, 12 N W 2d 167, 169, 234 Iowa 135, 149 A L R 1238

Pa—Hickory Hat Co v Railway Exp Agency 75 Pa Dist & Co 234, 41 Luz Leg Reg 155

Corpus Juris Sec has been cited in discussion of carrier's duty to send trucks through a packet line—Consolidated Freight Lines v Dept of Pub Serv 94 P 2d 484, 485 200 Wash 659

§ 204. —— Compliance with Law

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59. Delay held not reasonably

Iowa—Huff v United Van Lines, 28 N W 2d 793, 238 Iowa 529

62. Contracts requiring notice

U S—Southern Pac Co v Miller Abattoir Co, C J N J 454 F 2d 357

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§ 210. —— Right of Action and Defenses

12 Vt—Needham v Boston & M R Co 74 A 226 82 Vt 518

Under Interstate Commerce Act

U S—Condakes v Southern Pac Co D C Mass 295 F Supp 121

Matters permitted

U S—St Louis-San Francisco R, Co v Neely, C A Ark 496 F 2d 1122

§ 212. —— Time to Sue and Limitations

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An action against the carrier for delay in transportation or delivery is barred when not commenced within the limitation period.[18.50]

18.50 N Y—Garfunkel v Southern Pac Co N Y S 2d 270

Ohio—Zang v Railway Express Co 196 N E 901 1 Ohio St 17

Statute held inapplicable

Mich—Great Lakes Steel Corp v Detroit, T & I Co, 26 N W 2d 704 317 Mich 1

§ 215. —— Pleading

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40 U S—Shippers Service Co v Norfolk & W R Co, C A Ill 528 F 2d 56

49. Pleading held not allege specific acts negligence

Colo—Denver-Albuquerque Motor Transport, Inc Galligan 358 P 2d 28 145 Colo 71

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50. Allegation held insufficient

N Y—May v United Van Lines, Inc 325 N Y S 676, 68 Misc 2d 193

54 Iowa—Huff v United Van Lines, 28 N W 2d 7 238 Iowa 529

56 Tex—Matthews-Carr v Brown Exp, Civ A 217 S W 2d 75

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68 Ariz—Southern Pac Co v Loden, 508 P 2d 19 Ariz App 460

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81 Tex—Texas & N O R Co v Mandell Civ A 117 S W 2d 1116

§ 216. —— Presumptions and Burden of Proof

page 421

96 U S—Pacific Portland Cement Co v Wes Pac R Co, C A Cal 184 F 2d 34 cert der S Ct 262, 340 U S 906, 95 L Ed 655

Tex—Railway Exp Agency v Ferguson, Civ App, S W 2d 462, err dism

Other presumptions

Fla—Seaboard Air Line R Co v Lake Region Pac Ass'n, App 211 So 2d 25

Pa—Pennsylvania R Co v DeRomo, 45 Luz L 277

3 U S—Atlantic Coast Line R Co v Georgia Ing Co, C C A Ga, 164 F 2d 1 reh den 165 169—Shippers Service Co v Norfolk & W Co, C A Ill 528 F 2d 56

Iowa—Huff v United Van Lines, 28 N W 2d 793 Iowa 529

Pa—Rosen v Railway Exp Agency 57 Pa Dist & Co 325 affd 50 A 2d 517 160 Pa Super 122

Tex—C.J.S. cited in Railway Exp Agency v Ferguson, Civ App 242 S W 2d 462, 464 err dism

The carrier has the burden of proving that the damage to the goods shipped was caused by the inherent nature of the goods rather than its own admitted delay in transit.[45]

4.5. Corn

US—Fraser-Smith Co v Chicago, R I & P R Co C A Minn 435 F 2d 1396

6 Wash—C.J.S. quoted at length in Lamb v Railway Exp Agency, Inc 320 P 2d 644, 645, 51 Wash 2d 616

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7 US—Condakes v Southern Pac Co D C Mass, 295 F Supp 121—Union Pac R Co v Bartlett & Co Grain, D C Mo, 393 F Supp 1347

Colo—Denver-Albuquerque Motor Transport, Inc v Galligan, 358 P 2d 28, 145 Colo 71

Fla—Seaboard Air Line R Co v Lake Region Packing Ass'n, App, 211 So 2d 25

Ill—Stern McGiveny & Co v Keeshin Motor Exp Co 34 N E 2d 81 310 Ill App 337

Iowa—Huff v United Van Lines, supra, n 3

Wash—Mojonnier & Sons, Inc v Railway Exp Agency, Inc 328 P 2d 167 52 Wash 2d 569

Strike

Tex—Southern Pac Co v H Rothstein & Sons, Civ App 304 S W 2d 383, err ref no rev err

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15 Mo—Colley v Cox, App, 266 S W 2d 778

17 US—Gohger Trading Co of N Y v Chicago & N W Ry Co C A Ill, 184 F 2d 876

18 US—Mark v Union Pac R Co, C A Kan 244 F 2d 268

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25 N H—Fallgren v Railway Exp Agency 100 A 2d 835, 98 N H 333

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31 Ill—Nolan v Southern Pac Co, 118 N E 2d 625, 2 Ill App 2d 62

33 US—Texas Instruments, Inc v Branch Motor Exp Co, D C Mass, 308 F Supp 1228, affd, C A 432 F 2d 564

Other matters as to the burden of proof with respect to damages have been adjudicated.[35]

35.5. Sale price

US—Great Atlantic & Pac Tea Co v Atchison, T & S F Ry Co C A Ill, 333 F 2d 705, cert den 85 S Ct 661 379 US 967, 13 L Ed 2d 560—Peter Cooper Corporation Co Inc v Southern Pac Co, C A Ill 512 F 2d 1141

§ 217. —— Admissibility of Evidence

page 426

44 Idaho—Ritchie v Oregon Short Line R Co 244 P 580, 42 Idaho 193, 45 A L R 909

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79 La—Sinagra v Illinois Cent R Co, 56 So 2d 233, 220 La 205

§ 218. —— Weight and Sufficiency of Evidence

page 430

95 Colo—Shotkin v Lindsley 193 P 2d 880 116 Colo 223

Necessity of introducing regulation relied upon

Tex—Missouri-Kansas-Texas R Co v Noble, Civ App 271 S W 2d 146, err ref no rev err

96 Ga—Brown-Rogers-Dixson Co v Southern Ry Co 53 S E 2d 702, 79 Ga App 449

S C—Kline Iron & Steel Co v Superior Trucking Co Inc 201 S E 2d 388, 261 S C 542

Evidence held sufficient to sustain judgment

(1) Ala—West Bros Inc v Resource Management Service, Inc 214 So 2d 431 283 Ala 78

La—H C Parker Inc v Herrin Transp Co La App 183 So 2d 606

Mo—Colley v Cox, App 266 S W 2d 778

Tex—Matthews-Carr v Brown Exp Civ App 217 S W 2d 75

Evidence held insufficient to support verdict

(1) Tex—Central Freight Lines v York, Civ App 135 S W 2d 186

Evidence held insufficient to sustain judgment

(1) Tex—Gulf, C & S F R Co v Kempner Com App 282 S W 795

97 Ky—Montgomery v Pennsylvania Ry Co, 137 S W 2d 412, 281 Ky 745

Wis—Chicago & North Western Ry Co v Afram Bros Co, 228 N W 2d 360, 68 Wis 2d 311

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98 Ill—H Piper Co v Summit Fast Freight Inc 117 N E 2d 420 1 Ill App 2d 298

Evidence insufficient

(2) Other matters

US—Lapidus v Chicago, B & Q R Co, D C Ill 161 F Supp 664

99. Railroad schedules

US—Condakes v Southern Pac Co D C Mass, 295 F Supp 121

1. Evidence held sufficient to show carrier's negligent delay

(1) Tex—Meyer v Thompson, Civ App, 284 S W 2d 384 err ref no rev err

(8) Other evidence

D C Pennsylvania R Co v Newmyer, Mun App, 100 A 2d 456

Evidence held insufficient to show negligent delay

(1) Atlantic Coast Line R Co v Georgia Packing Co, C C A Ga, 164 F 2d 1, reh den 165 F 2d 169

2. Evidence held sufficient to establish unreasonable delay

(3) Other cases—Huff v United Van Lines, 28 N W 2d 793, 238 Iowa 529

Tex—Gulf, C & S F Ry Co v Hills, Civ App, 320 S W 2d 687

Wash—Lamb v Railway Exp Agency, Inc, 320 P 2d 644, 51 Wash 2d 616

Evidence held insufficient to show unreasonable delay

(5) Other instances

US—Lapidus v Chicago, B & Q R Co, D C Ill 161 F Supp 664

La—Stewart v Florance, App, 218 So 2d 358

Evidence held to show that there was no unreasonable delay, etc.

Ohio—Kohler v Baltimore & O R Co, App 63 N E 2d 834

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4 US—Western Pac R Co v Pacific Portland Cement Co, D C Cal 84 F Supp 15, foll 84 F Supp 17 revd on oth grds, C A, 184 F 2d 34 cert den 71 S Ct 282, 340 US 906, 95 L Ed 655

5 US—Lapidus v Chicago, B & Q R Co, D C Ill, 161 F Supp 664—Great Atlantic & Pac Tea Co v Atchison, T & S F Ry Co C A Ill 333 F 2d 705 cert den 85 S Ct 661 379 US 967, 13 L Ed 2d 560—Union Pac R Co v Bartlett & Co, Grain, D C Mo 393 F Supp 1347

Negligence as proximate cause

(4) Other matters

Cal—Artists Embassy v Hunt, 320 P 2d 924, 157 C A 2d 371

6. Evidence insufficient to show excuse for delay

(4) Other evidence

Tex—Southern Pac Co v H Rothstein & Sons, Civ App 304 S W 2d 383, err ref no rev err

Wash—Lamb v Railway Exp Agency, Inc, 320 P 2d 644 51 Wash 2d 616

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9. Evidence held insufficient, etc.

(2) Other evidence

D C Pennsylvania R Co v Newmyer supra, n 1

Evidence insufficient to support finding of substantial worthlessness

US—Fraser-Smith Co v Chicago, R I & P R Co, C A Minn, 435 F 2d 1396

10 Tex—Missouri Pac R Co v Duncan, Civ App, 353 S W 2d 315

Wash—Lamb v Railway Exp Agency, Inc, 320 P 2d 644 51 Wash 2d 616

12 US—Gardner v Mid-Continent Gram Co, C C A Mo 168 F 2d 819—Southern Ry Co v Aluminum Co of America, C A Tenn 210 F 2d 139—Princess Pat, Limited v National Carloading Corp, C A Ill 223 F 2d 916

Chicago & N W Ry Co v Union Packing Co, D C Neb 326 F Supp 1304

D C—Pennsylvania R Co v Newmyer supra, n 1

Evidence held insufficient

US—Newman v US, 135 F Supp 953, 133 Ct Cl 429

Colo—Denver-Albuquerque Motor Transport, Inc v Galligan, 358 P 2d 28, 145 Colo 71

La—Sinagra v Illinois Cent R Co, 56 So 2d 233, 220 La 205

Condition of goods when delivered to carrier

Tex—Texas Mexican Ry Co v Slaughter Civ App, 241 S W 2d 749

§ 219. —— Trial

Library References

Carriers ⇐106, 230.

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16. Evidence held sufficient to go to jury

(1) US—Princess Pat, Limited v National Carloading Corp, C A Ill 223 F 2d 916

Evidence insufficient for submission to jury

(1) US—Atlantic Coast Line R Co v Georgia Packing Co, supra, n 1

Pa—Rosen v Railway Exp Agency, 57 Pa Dist & Co 325 affd 50 A 2d 517, 160 Pa Super 122

17 Tex—Herrin Transp Co v Southeastern Elec Co, Civ App, 310 S W 2d 343

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21 Ala—Alabama Great Southern R Co v Davidson, 10 So 2d 414, 30 Ala App 600

22 Ga—Brown-Rogers-Dixson Co v Southern Ry Co 53 S E 2d 702, 79 Ga App 449

Ohio—Kirchner v New York Central System, 94 N E 2d 283, 87 Ohio App 165

Tex—Texas & N O R Co v Stromberg, Civ App, 115 S W 2d 1126

23 S C—Kline Iron & Steel Co v Superior Trucking Co, Inc, 201 S E 2d 388, 261 S C 542

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29. Evidence held sufficient to go to jury

(4) Mitigation of damages—

peake & O Ry Co, 57 N W 2d [illegible] cert den 74 S Ct 40, 346 U S [illegible]

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37 Ga—Brown-Rogers-Dixson Co [illegible] Co supra n 22

38 Ga—Brown-Rogers-Dixson Co [illegible] Co supra, n 22

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42 Fla—Seaboard Air Line R Co [illegible] Packing Assn App 21 So 2d 75

§ 221. Damages for Delay

Library References

Carriers ⇐105, 225

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50 U S—Great Atlantic & Pac Tea Co v [illegible] T & S F Ry Co, C A Ill, 333 F 2d 705, cert den 85 S Ct 661, 379 U S 967, 13 L Ed 2d 562

51 Pa—Demuth & Manna Co v Pennsylvania R Co, 104 P L J 155

Mere wrongful delay insufficient to establish actual damage

U S—Great Atlantic & Pac Tea Co v Atchison, T & S F Ry Co, C A Ill, 333 F 2d 705, cert den 85 S Ct 661, 379 U S 967, 13 L Ed 2d 562

53 U S—Great Atlantic & Pacific Tea Co v Atchison, T & S F Ry Co, D C Ill, 224 F Supp 967, affd, C A, 333 F 2d 705, cert den 85 S Ct 661, 379 U S 967, 13 L Ed 2d 560

55 U S—Peyton v Railway Exp Agency, C C A Tex, 158 F 2d 671, cert den 67 S Ct 1685, 330 U S 846, 91 L Ed 1290, reh den 67 S Ct 1199, 331 U S 864, 91 L Ed 1869, 67 S Ct 1314, 331 U S 866, 91 L Ed 1870, and 67 S Ct 1523, 331 U S 868, 91 L Ed 1871

Pa—Demuth & Manna Co v Pennsylvania R R Co, 104 P L J 155

Lost profits

N Y—Lowes Glove Co v Acme Fast Freight, Inc, 282 N Y S 2d 869, 54 Misc 2d 429

§ 222. —— Elements and Measure In General

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64 Cal—Artists' Embassy v Hunt, 320 P 2d 934, 157 C A 2d 371

65 D C—Railway Express Agency v Hunter, to Use of Royal Ins Co, Mun App, 51 A 2d 570

Not conversion

U S—Eastern Shore of Virginia Produce Exchange v New York Cent R Co, C C A Va, 97 F 2d 565

§ 223. —— Depreciation in Market Value Generally

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79 U S—Crump v Thompson, C A Ark, 171 F 2d 442—Railway Exp Agency v Smith, D C S C, 116 F Supp 609—Gold Star Meat Co v Union Pac R Co, C A Colo, 438 F 2d 1270

Ill—Stern McGiveny & Co v Keeshin Motor Exp Co, 34 N E 2d 81, 310 Ill App 337—Behr v Southern Pac Co, 118 N E 2d 625, 2 Ill App 2d 62

Mass—Okin v Sullivan, 29 N E 2d 762, 307 Mass 227

Mich—Van Lierop v Chesapeake & O Ry Co, 57 N W 2d 431, 335 Mich 702, cert den 74 S Ct 43, 346 U S 834, 98 L Ed 357

N Y—Cuneo v New York N H & H R Co, 149 N Y S 2d 602

Ohio—Kohler v Baltimore & O R Co, 63 N E 2d 834, 76 Ohio App 235

[illegible] App [illegible] Co v [illegible] Co, 271 S W 2d [illegible] ref n r e v [illegible] 284 S W 2d [illegible] [illegible] Co v [illegible] Co, 233 S W 2d 765, cert den 85 S Ct 661, 379 U S 967, 13 L Ed 2d 560

[illegible] Co v Cotton Co, Cotton Concentrating Co [illegible] 273 S W 2d 713, err ref no rev

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33 [illegible] Co supra, n 70

[illegible] Co, cited in Wortham v Beaver-Lees [illegible] 339 Ga App 665

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9 [illegible] Co v Keesling Motor Exp Co, 34 N E 2d 81, 310 Ill App 337

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20 D C—Railway Exp Agency v Huntress to Use of Royal Ins Co, Mun App, 51 A 2d 379

§ 226. —— Incidental Expenses and Damages

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31 Iowa—Hull v Inland Nav Lines, 28 N W 2d 793, 238 Iowa 525

§ 227. —— Interest; Deduction of Freight Charges

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36. Right to interest held waived

Tex—Fort Worth & D C R Co v Ryan, Civ App, 271 S W 367

§ 228. —— Exemplary or Punitive Damages

62 U S—Peyton v Railway Exp Agency, C C A Tex, 158 F 2d 671, cert den 67 S Ct 1083, 330 U S 846, 91 L Ed 1290, reh den 67 S Ct 1199, 331 U S 864, 91 L Ed 1869, 67 S Ct 1314, 331 U S 866, 91 L Ed 1870, and 67 S Ct 1528, 331 U S 868, 91 L Ed 1871

§ 229. —— Special Damages

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66 U S—Peyton v Railway Exp Agency, supra, n 62—Gardner v Mid-Continent Grain Co, C C A Mo, 168 F 2d 819

N Y—Lowes Glove Co v Acme Fast Freight, Inc, 282 N Y S 2d 869, 54 Misc 2d 429

Ohio—C J S cited in Alton R Co v Oklahoma Furniture Mfg Co, 122 P 2d 152, 154, 190 Okl 216, 166 A L R 1030

S C—Kline Iron & Steel Co v Superior Trucking Co, Inc, 201 S E 2d 368, 261 S C 542

Whether action based on common law negligence or on bill of lading immaterial

Tex—Meyer v Thompson, Civ App, 284 S W 2d 384, err ref no rev err

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69 U S—C J S. quoted in Gardner v Mid-Continent Grain Co, C C A Mo, 168 F 2d 819, 822

Tex—Meyer v Thompson, Civ App, 284 S W 2d 384, err ref no rev err

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89 U S—C J S. cited in Gardner v Mid Continent Grain Co, C C A Mo, 168 F 2d 819, 822—C J S cited in Turner Farms, Inc v Maine Cent R Co, D C Me, 486 F Supp 694, 699

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3 Okl—Alton R Co v Oklahoma Furniture Mfg Co, 122 P 2d 152, 190 Okl 216, 166 A L R 1030

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9 Okl—Alton R Co v Oklahoma Furniture Mfg Co, supra, n 3

12. Constitutive notice not established

(3) Other cases—Alton R Co v Oklahoma Furniture Mfg Co, supra, n 3

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19 Okl—Alton R Co v Oklahoma Furniture Mfg Co, supra, n 3

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59 Ill—Scheppel v Arkansas-Best Freight System, Inc, 254 N E 2d 280, 117 Ill App 2d 66

61 Tex—Thompson v H Rouw Co, Civ App, 2 S W 2d 662, err ref no rev err

63 La—H C Parker, Inc v Herrin Transp Co, App, 185 So 606

Tex—Missouri-Kansas-Texas R Co v Noble Co, App, 271 S W 2d 140, err ref no rev err

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64 Tex—C J S. quoted in McCollum Exploration Co v Keough, Civ App, 146 S W 2d 1109, 111, affd, 163 S W 2d 620, 139 Tex 485, motion dis 167 S W 2d 727, 140 Tex 322

§ 230. —— Delay in Transportation of Corpse

70 Tex—Wells v Fuller, 23 S W 412, 4 Tex Civ App 213, err dism

74 Ga—Shook v Southern Ry Co, 113 S E 2d 101, 101 Ga App 126

§ 231. Claims in General

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76 Mass—Automated Donut Systems, Inc v Consolidated Rail Corp, 424 N E 2d 265, 12 Mass App 926

N Y—Active Ins Co v Bor-Air Freight Co, Inc, N Y S 2d 786, 72 Misc 2d 327

78 Ga—Terminal Transport Co, Inc v Burger Chef Systems, Inc, 211 S E 2d 788, 133 Ga App

§ 232. Waiver of Claim

79 U S—C J S quoted at length in Vitro Electric v U S, Ct Cl, 408 F 2d 1038, 1041, 187 Ct Cl 428

§ 233. Notice of Claim for Dama

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92 U S—Conagra, Inc v Burlington Northern, D C Neb, 438 F Supp 1266

N J—Rollei of America, Inc v T I M E—D C, 357 A 2d 33, 140 N J Super 560

N Y—Sanchez v Beacon Shipping Co, Inc, 434 S 2d 236, 79 A D 2d 591

95 Fla—Thibadeau v Santini Bros, Inc, App, 50 So 2d 550

96 Pa—American Eagle Fire Ins Co v N Y C, 31 Erie Co 92

§ 234. —— Necessity for Notice

1 Pa—Perlow v A A Acon Auto Transport, Inc, A 2d 399, 280 Pa Super 52

Failure to file notice not fatal

US—MGD Graphic Systems Americas Co v Acme Fast Freight Inc D C Ill 437 F Supp 10

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4 US—Delphi Frosted Foods Corp v Illinois Cent R Co D C Ky 89 F Supp 55 affd C A 188 F 2d 343 cert den 72 S Ct 53 342 U S 833, 96 L Ed 630—Northern Pac Ry Co v Mackie, C A Wash 195 F 2d 641—B A Walterman Co v Pennsylvania R Co C A Ohio, 295 F 2d 627

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Provision for notice held contractual and binding in United States

US—Delaware, L & W R Co v U S D C N Y 123 F Supp 579

Compliance mandatory

US—Atchison, T & S F Ry Co v Littleton Leasing & Inv Co Inc C A Okl, 582 F 2d 1237

5 US—Pennsylvania R Co v Greene, D C Ala 173 F Supp 657

Ark—Southern Newspapers v Missouri Pac R Co 227 S W 2d 639 216 Ark 831

Cal—Thayer v Pacific Elec Ry Co 11 Cal Rptr 560, 360 P 2d 56, 55 C 2d 430, cert den 82 S Ct 44 368 U S 826, 7 L Ed 2d 29

Ga—Henderson v National Carloading Corp 92 S E 2d 593 93 Ga App 716

Ky—Louisville & N R Co v Patton, 156 S W 2d 474 288 Ky 450

Mich—Central Wholesale Co v Chesapeake & O Ry Co 114 N W 2d 221 366 Mich 138

Pa—American Eagle Fire Ins Co v N Y C R R 31 Erie Co 92—Romeo v Delaware & Hudson R R Corp 56 Lack Jur 233—United Refrigerator Co v Rodgers Motor Lines, 57 Lack Jur 129 9 D & C 2d 581

S C—South Carolina Steel Corp v Southern Ry Co, 206 S E 2d 828, 262 S C 543

Tex—Texas & N O R Co v Rosenblum, Civ App 195 S W 2d 433, err ref—Texas & N O R Co v McNatt, Civ App 223 S W 2d 651 err dism—James G McCarrick Co v Thompson, Civ App, 227 S W 2d 832

W Va—Appalachian Electric Power Co v Virginian Ry Co supra, n 4

Construction of stipulation

US—Hudson v Chicago, St P, M & O R Co D C Minn 226 F 38

Mo—Robinson v Railway Exp Agency Inc App, 329 S W 2d 242

Notice timely

(2) Other cases—Acme Fast Freight v Chicago, M, St P & P R Co C C A N Y 166 F 2d 778, revd on oth grds 69 S Ct 692, 336 U S 465, 93 L Ed 817

Mo—Revolute Ins Co v Morgan Drive-Away Inc App, 403 S W 2d 913

Binding on federal government

US—U S v Chicago, R I & P R Co, C A Tex 200 F 2d 263

Uniform Bill of Lading construed

N J—Johnson & Dealaman, Inc v Wm F Hegarty Inc 224 A 2d 510, 93 N J Super 15

§ 235. —— Purpose and Validity of Provisions for Notice

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6 US—Northern Pac Ry Co v Mackie, C A Wash 195 F 2d 641

Ala—Atlantic Coast Line R Co v Holman, 33 So 2d 367 250 Ala 1 175 A L R 1157

Mass—United Mut Fire Ins Co v Railway Exp Agency 82 N E 2d 215 323 Mass 354

N J—Rollet of America Inc v T I M E—D C, Inc 357 A 2d 33 140 N J Super 560

N Y—Aetna Ins Co v Bor-Air Freight Co Inc, 338 N Y S 2d 786, 72 Misc 2d 327

Other statements of purpose

(5) Other statements

Cal—Thayer v Pacific Elec Ry Co 11 Cal Rptr 560, 360 P 2d 56, 55 C 2d 430, cert den 82 S Ct 44 368 U S 826, 7 L Ed 2d 29

N J—Johnson & Dealaman Inc v Wm F Hegarty Inc 224 A 2d 510, 93 N J Super 15

7 Ga—Terminal Transport Co Inc v Burger Chef Systems, Inc 211 S E 2d 788 133 Ga App 608

Mo—C J S. cited in Spitcaufsky v State Highway Commission of Missouri, 159 S W 2d 647, 654, 349 Mo 117—Robinson v Railway Exp Agency, Inc App 329 S W 2d 242

S C—South Carolina Steel Corp v Southern Ry Co 206 S E 2d 828, 262 S C 543

Tex—C J S quoted in Southern Traffic Bureau v Thompson, Civ App 232 S W 2d 742, 749 err ref no rev err

8 US—Minot Beverage Co v Minneapolis & St L Ry Co D C Minn 65 F Supp 293—Thompson v James G McCarrick Co, C A Tex 205 F 2d 897—Miller v AAACON Auto Transport, Inc D C Fla 447 F Supp 1201

§ 236. —— Effect of Special Constitutional and Statutory Provisions on Power to Stipulate for Notice

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9 **Regulation of minimum period for notice**

Kan—Anderson Cattle Co v Atchison, T & S F Ry Co 206 P 2d 124, 167 Kan 306

Uniform Commercial Code provision held inapplicable

N Y—Wells & Coverly Inc v Red Star Exp Lines of Auburn, Inc 306 N Y S 2d 710, 62 Misc 2d 269

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20 US—East Tex Motor Freight Lines v U S, C A Tex 239 F 2d 417

Conn—Shulman v Superior Trucking Co, 223 A 2d 407 3 Conn Cir 712

25 La—Lovelty Enterprises, Inc v Herrin Transp Co App 258 So 2d 151

N J—Upjohn Co v Timpany, 402 A 2d 979, 168 N J Super 283

Notice of claim

(7) Other cases

US—Delaware, L & W R Co v U S, supra, n 4

Ind—Bethlehem Steel Corp v Artim Transp System, Inc App 430 N E 2d 1185

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26 N Y—Cheberg v Delaware, L & W R Co, 40 N Y S 2d 44 180 Misc 176

29 Okl—Silver Motor Freight Lines v Automatic Web Guide Co 249 P 2d 994 207 Okl 390

30 US—Minot Beverage Co v Minneapolis & St L Ry Co supra, n 8

Ala—Atlantic Coast Line R Co v Holman, supra, n 6

31 N C—Productive Tool Corp v Pilot Freight Carriers, Inc 234 S E 2d 758, 33 N C App 241

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32 US—Minot Beverage Co v Minneapolis & St L Ry Co supra, n 8

§ 237. —— Requisites and Validity of Stipulations for Notice

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36 US—American Synthetic Rubber Corp v Louisville & N R Co C A Ky, 422 F 2d 462

Cal—Thayer v Pacific Elec Ry Co, 11 Cal Rptr 560, 360 P 2d 56 55 C 2d 430, cert den 82 S Ct 44 368 U S 826 7 L Ed 2d 29

Tex—C J S. cited in Herrin Transp Co v Southeastern Elec Co, Civ App, 310 S W 2d 343 346

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37 US—National Distillers Products Corp v Companhia Nacional De Navegacao, D C Pa 99 F Supp 458

Mo—C J S cited in Gilhoz v State Highway Commission, 153 S W 2d 18, 21, 348 Mo 211

N J—Rollet of America, Inc v T I M E—D C, Inc, 357 A 2d 33 140 N J Super 560

38 US—Miller v AAACON Auto Transport, Inc D C Fla, 447 F Supp 1201

Ill—Charley Hayashida Farms, Inc v Baker 306 N E 2d 673 16 Ill App 3d 514

Wis—Chicago, St P M & O Ry Co v Kileen, supra, n 4

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56. **Limitation unenforceable as to consignee not party to contract**

N Y—Wells & Coverly Inc v Red Star Exp Lines of Auburn, Inc 306 N Y S 2d 710, 62 Misc 2d 269

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61 N C—Greyvan Lines v Nesmith, Mun App 50 A 2d 434

N J—Rollet of America, Inc v T I M E—D C, Inc, 357 A 2d 33, 140 N J Super 560

64 N J—Rollet of America, Inc v T I M E—D C, Inc 357 A 2d 33, 140 N J Super 560

67 Tex—Texas & N O R Co v McNatt, supra, n 5

70 Mich—Dawien Corp v New York Cent R Co 43 N W 2d 887 328 Mich 360

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87 Ala—C J S. cited in Atlantic Coast Line R Co v Holman, 33 So 2d 367, 369 250 Ala 1, 175 A L R 1157

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89 Ala—Atlantic Coast Line R Co v Holman, supra, n 6

§ 238. —— To What Claims Stipulations Apply

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98 US—Norton v Shoemaker, D C N J, 72 F Supp 188

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19 Ga—Terminal Transport Co Inc v Burger Chef Systems, Inc 211 S E 2d 788, 133 Ga App 608

Tenn—Railway Exp Agency v General Shoe Corp, 276 S W 2d 725, 197 Tenn 561

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20 D C—Greyvan Lines v Nesmith, Mun App 50 A 2d 434

21 Mo—Vaughn & Wagner Quarry Co v K C K C R Co, Mo App, 127 S W 2d 569

N C—Rigsby Mfg Co v Pratt, 1 S E 2d 563, 215 N C 247

Tenn—Ramsey v Knox Gas Coverall Stove Corp, supra, n 10

22 Okl—Silver Motor Freight Lines v Automatic Web Guide Co, 249 P 2d 994, 207 Okl 590

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39 U S—Dalton v Delta Airlines Inc, C A Fla, 287 F 2d 1244

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49 Pa—Nassau Metal Products, Inc v Exner Express Inc, 152 A 2d 275, 189 Pa Super 593

§ 239. —— Requisites and Sufficiency of Notice

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50 U S—Thompson v James G McCarrick Co, C A Tex, 275 F 2d 897—Reiner v Thompson, D C La, 186 F Supp 279

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Okl—C J S, cited in Everest v Railway Exp Agency, 230 P 2d 900, 902, 204 Okl 450

Tex—C J S quoted at length in Southern Traffic Bureau v Thompson, Civ App, 232 S W 2d 742, 749, err ref no rev err

Ambiguity in limitation provision

N Y—Aetna Ins Co v Bor-Air Freight Co, Inc, 338 N Y S 2d 786, 72 Misc 2d 327

51 U S—Minot Beverage Co v Minneapolis & St L Ry Co, D C Minn, 65 F Supp 293

Ky—Louisville & N R Co v Patton, 256 S W 2d 474, 288 Ky 450

La—Novelty Enterprises, Inc v Herrin Transp Co, App, 258 So 2d 151

N Y—Bond Stores v Overland Package Freight Service, 13 N Y S 2d 928, 171 Misc 135

Okl—C J S, cited in Everest v Railway Exp Agency, supra, n 50

Pa—United Refrigerator Co v Rodgers Motor Lines, 9 D & C 2d 581, 57 Lack Jur 129

Claim

(3) Other matters

Alaska—Kvasnikoff v Weaver Bros, Inc, 405 P 2d 781

Under Uniform Bill of Lading

N Y—Interchemie, Limited v Eastern Exp, Inc, 310 N Y S 2d 370, 62 Misc 2d 850

Pa—United Refrigerator Co v Rodgers Motor Lines, 9 D & C 2d 581, 57 Lack Jur 129

52 U S—American Synthetic Rubber Corp v Louisville & N R Co, C A Ky, 422 F 2d 462

Cal—Thayer v Pacific Elec Ry Co, 11 Cal Rptr 560, 360 P 2d 56, 55 C 2d 430, cert den 82 S Ct 44, 368 U S 826, 7 L Ed 2d 29

Okl—C J S cited in Everest v Railway Exp Agency, supra, n 50

53 Cal—Thayer v Pacific Elec Ry Co, 11 Cal Rptr 560, 360 P 2d 56, 55 C 2d 430, cert den 82 S Ct 44, 368 U S 826, 7 L Ed 2d 29

Kan—C J S, cited in Nichols v Atchison, T & S F Ry Co, 299 P 2d 52, 58, 180 Kan 101

N Y—Adler Upholstery Fabrics v Akers Motor Lines, Inc, 282 N Y S 2d 560, 54 Misc 2d 360

Okl—C J S, cited in Everest v Railway Exp Agency, supra, n 50

S C—C J S, cited in Victor Fertilizer Co v Southern Ry Co, 24 S E 2d 499, 501, 202 S C 294

54 Ala—Atlantic Coast Line R Co v Holman, supra, n 50

Colo—Dillon v Goldstein, 268 P 2d 699, 129 Colo 233

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Kan—C J S, cited in Nichols v Atchison, T & S F Ry Co, 299 P 2d 52, 58, 180 Kan 101

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Pa—United Refrigerator Co v Rodgers Motor Lines, 57 Lack Jur 129, 9 D & C 2d 581

S C—C J S, cited in Victor Fertilizer Co v Southern Ry Co, supra, n 53

Tex—Thompson v Levy Bros Dry Goods Co, Ct App, 180 S W 2d 212, err dism

Other notices or claims sufficient

U S—Thompson v James G McCarrick Co, supra, n 50—Delaware L & W R Co v U S, D C N Y, 23 F Supp 579—McDowell Associates, Inc v Pennsylvania R R, D C N Y, 151 F Supp 994—Atlantic Coast Line R Co v Pioneer Products, Inc, C A Ga, 256 F 2d 431—American Synthetic Rubber Corp v Louisville & N R Co, C A Ky, 422 F 2d 462

Alaska—Kvasnikoff v Weaver Bros, Inc, 405 P 2d 781

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Ill—Cohen v Texas & N O R Co, 25 N E 2d 562, 303 Ill App 606

Kan—Nichols v Atchison T & S F Ry Co, 299 P 2d 52, 180 Kan 101

La—Acosta v Sasa Motor Freight Lines, Inc, App, 275 So 2d 643

Mich—Warren Alloy Co v Blair Transit Co, 109 N W 2d 793, 363 Mich 358

Mo—Resolute Ins Co v Morgan Drive-Away, Inc, App, 403 S W 2d 913

N Y—West Coast Marketing Corp v New York, N H & H R Co, 196 N Y S 2d 45—Adler Upholstery Fabrics v Akers Motor Lines, Ins, 282 N Y S 2d 560, 54 Misc 2d 360

Okl—Everest v Railway Exp Agency, 230 P 2d 900, 204 Okl 450

Necessity of supporting documents

N Y—Bond Stores v Overland Package Freight Service, supra, n 51

General requisites

U S—Atchison, T & S F Ry Co v Littleton Leasing & Inv Co, Inc, C A Okl, 582 F 2d 1237—Venetian Terrazzo Co v Chicago, R I & P R Co, D C Mo, 453 F Supp 1021

N Y—Bond Stores v Overland Package Freight Service, supra, n 51

Tenn—Strickland Transp Co v Federated Dept Stores, Inc, 451 S W 2d 677, 224 Tenn 129

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55 U S—Insurance Co of North America v Newtowne Mfg Co, C A Mass, 187 F 2d 675—American Synthetic Rubber Corp v Louisville & N R Co, C A Ky, 422 F 2d 462

Okl—C J S cited in Everest v Railway Exp Agency, supra, n 50

56 N Y—Bond Stores v Overland Package Freight Service, supra, n 51

57 U S—Delaware, L & W R Co v U S, supra, n 54

Cal—Thayer v Pacific Elec Ry Co, 11 Cal Rptr 560, 360 P 2d 56, 55 C 2d 430, cert den 82 S Ct 44, 368 U S 826, 7 L Ed 2d 29

Under Uniform Bill of Lading

Pa—United Refrigerator Co v Rodgers Motor Lines, 9 D & C 2d 581, 57 Lack Jur 129

58 U S—Thompson v James G McCarrick Co, supra, n 50

Amount of damages in written notice of claim

(2) Other matters

Alaska—Kvasnikoff v Weaver Bros, Inc, 405 P 2d 781

59 U S—Loveless v Universal Carloading & Distributing Co, C A Okl, 225 F 2d 637

Okl—C J S cited in Everest v Railway Exp Agency, 230 P 2d 900, 902, 204 Okl 450

60 Okl—C J S cited in Everest v Railway Exp Agency, 230 P 2d 900, 904, 204 Okl 450

61 U S—Loveless v Universal Carloading & Distributing Co, C A Okl, 225 F 2d 637

Colo—Union Pac R Co v Denver-Chicago Trucking Co, 253 P 2d 437, 126 Colo 581

Ill—Berg v Schreiber, 92 N E 2d 88, 405 Ill 528, cert den 71 S Ct 79, 340 U S 851, 95 L Ed 62

Ky—Louisville & N R Co v Patton, supra, n 5

Mo—Pitman Mfg Co v Commonwealth Transfer Co, 4 S W 2d 866

N Y—Schaffer v Pennsylvania R Co, 127 N Y S 466, affd 127 N Y S 2d 468

Correspondence between carrier and shipper

U S—Capon Textile Trading Co v Consolidated R Corp, D C N Y, 538 F Supp 1083

(2) Other matters

N Y—Interchemie, Limited v Eastern Exp, Inc, 310 N Y S 2d 370, 62 Misc 2d 850

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62 U S—Conagra, Inc v Burlington Northern, Inc, D C Neb, 438 F Supp 1266

Ariz—Plymouth Van Lines, Inc v Clarkson, 493 P 2d 924, 16 Ariz App 378

La—Novelty Enterprises, Inc v Herrin Transp Co, App, 258 So 2d 151

Mich—Dawkin Corp v New York Cent R Co, N W 2d 887, 328 Mich 360

Tex—C J S cited in Texas & N O R Co v Roseblum, Civ App, 195 S W 2d 433, 434, err ref

Letters not sufficient

U S—Venetian Terrazzo Co v Chicago, R I & P Co, D C Mo, 453 F Supp 1021

Ill—Louis v Prairie Assurance National Corp, N E 2d 757, 347 Ill App 211

N Y—Interchemie, Limited v Eastern Exp, Inc, N Y S 2d 370, 62 Misc 2d 850—Norma Corp Pilot Freight Carriers, Inc, 313 N Y S 2d 232, Misc 2d 684

Pa—United Refrigerator Co v Rodgers Motor Lines, 57 Lack Jur 129, 9 D & C 2d 581—United Refrigerator Co v Rodgers Motor Lines, 9 D & C 2d 581, 57 Lack Jur 129

Tenn—Strickland Transp Co v Federated Dept Stores, Inc, 451 S W 2d 677, 224 Tenn 129

Notations insufficient

(2) Other notations

Tex—Texas & N O R Co v McNatt, Civ App, S W 2d 651, err dism—James G McCarrick v Thompson, Civ App, 227 S W 2d 832

Invoice of expected repair cost insufficient

U S—Lucas Machine Division, New Britain Mach v New York Cent R Co, D C Ohio, 236 F Supp 281

63 U S—Insurance Co of North America v Newtowne Mfg Co, C A Mass, 187 F 2d 675

Kan—Rickel v Chicago B & Q R Co, 196 P 2d 165, Kan 563

66 Mass—United Mut Fire Ins Co v Railway Agency, 82 N E 2d 215, 323 Mass 354

69 Ill—Berg v Schreiber, 86 N E 2d 125, 337 App 477, affd 92 N E 2d 88, 405 Ill 528, cert den 71 S Ct 79, 340 U S 851, 95 L Ed

Mass—United Mut Fire Ins Co v Railway Agency, supra, n 66

72 U S—Insurance Co of North America v Newtowne Mfg Co, supra, n 63—Atlantic Coast R Co v Pioneer Products, Inc, C A Ga, F 2d 431—American Synthetic Rubber Corp Louisville & N R Co, D C Ky, 291 F Supp

Alaska—Kvasnikoff v Weaver Bros, Inc, 405 781

Ark—Southern Newspapers v Missouri Pac R, 227 S W 2d 639, 216 Ark 831

Fla—Terminal Transport Co v Lamtron Indus Inc, App, 233 So 2d 854

Ill—Lewis v Roth, 66 N E 2d 510, 328 Ill App

La—Novelty Enterprises, Inc v Herrin Transp Co App 258 So 2d 151

Under Uniform Bill of Lading

U S—Penn-North River Associates v Chesapeake & O Ry Co C A N J 562 F 2d 269

Pa—United Refrigerator Co v Rodgers Motor Lines, 9 D & C 2d 581 57 Lack Jur 129

Letters as sufficient notice

Fla—Vogue Optical Mfg Co Inc v National Van Lines, Inc App 339 So 2d 676

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79 U S—U S Steel Intern Inc v SS Lash Italia, D C N Y 439 F Supp 365

81 D C—Greyvan Lines v Nesmith supra, n 20

Mo—Robinson v Railway Exp Agency Inc App 329 S W 2d 242

N Y—Magid Handbags v Lifschultz Fast Freight 343 N Y S 2d 776, 73 Misc 2d 1093

82 U S—Reider v Thompson, supra, n 50

86. Notice by one not agent for owner insufficient

U S—Delphi Frosted Foods Corp v Illinois Cent R Co C A Ky 188 F 2d 343 cert den 72 S Ct 53 342 U S 833 96 L Ed 630

Owner need not present claim

Ohio—Franck v Railway Exp Agency 112 N E 2d 381, 159 Ohio St 343

Notice by agent held sufficient

Mo—Robinson v Railway Exp Agency, Inc App 329 S W 2d 242

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89 Alaska—Kvasnikoff v Weaver Bros Inc 405 P 2d 781

Colo—Denver-Chicago Trucking Co v Republic Drug Co 306 P 2d 1076, 134 Colo 461

93 Cal—Thayer v Pacific Elec Ry Co 11 Cal Rptr 560, 360 P 2d 56, 55 C 2d 430, cert den 82 S Ct 44 368 U S 826, 7 L Ed 2d 29

96 W Va—Appalachian Electric Power Co v Virginian Ry Co 29 S E 2d 471 126 W Va 626

97. Inspection agency

Tex—James G McCarrick Co v Thompson supra, n 62

Assistant general livestock agent

Kan—Nichols v Atchison, T & S F Ry Co 299 P 2d 52, 180 Kan 101

98. Warehouse company as agent

D C—Greyvan Lines v Nesmith, supra, n 20

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13 Otherwise under alternative provision of bill of lading

Colo—Denver-Chicago Trucking Co v Republic Drug Co 306 P 2d 1076, 134 Colo 461

16 U S—Acme Fast Freight v Chicago, M St P & P R Co C C A N Y 166 F 2d 778, rev'd on oth grds 69 S Ct 692, 336 U S 465 93 L Ed 817

Ill—Cohen v Texas & N O R Co 25 N E 2d 562, 303 Ill App 606

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20. Under Uniform Bill of Lading

N Y—Norca Corp v Pilot Freight Carriers, Inc 313 N Y S 2d 232, 63 Misc 2d 684

Pa—United Refrigerator Co v Rodgers Motor Lines, 9 D & C 2d 581 57 Lack Jur 129

Federal law for interstate shipments

Cal—Thayer v Pacific Elec Ry Co 11 Cal Rptr 560, 360 P 2d 56, 55 C 2d 430, cert den 82 S Ct 44, 368 U S 826, 7 L Ed 2d 29

Laches not shown

U S—Don Cartage Co v U S C A Mich 289 F 2d 623

21 U S—Insurance Co of North America v Newtowne Mfg C A Mass 187 F 2d 675

Claim made within time specified

D C—Greyvan Lines v Newmith Mun App 50 A 2d 434

Tex—Herrin Transp Co v Southeastern Elec Co Civ App 310 S W 2d 343

Claim not made within time specified

U S—Conagra, Inc v Burlington Northern, Inc D C Neb 438 F Supp 1266—Capon Textile Trading Co v Consolidated Rail Corp D C N Y, 538 F Supp 1083

Cal—Talei v Pan American World Airways, 183 Cal Rptr 532, 132 C A 3d 904

Ohio—Firestone Plantations Co v Erie R Co App 90 N E 2d 601

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23. Claim not made within time specified

U S—Delphi Frosted Foods Corp v Illinois Cent R Co C A Ky 188 F 2d 343 cert den 72 S Ct 53 342 U S 833 96 L Ed 630

Okl—Silver Motor Freight Lines v Automatic Web Guide Co 249 P 2d 994 207 Okl 390

25 Kan—Rickel v Chicago, B & Q R Co 196 P 2d 243, 185 Kan 503

27 Tex—C J S quoted in Texas & N O R Co v Gulf Distributing Co Civ App 226 S W 2d 653 654

§ 240. —— Excuses for Failure to Give Notice

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29 U S—C J S cited in Hopper Paper Co v Baltimore & O R Co C A Ill 178 F 2d 179 181, cert den 70 S Ct 797 339 U S 943 94 L Ed 1359

Neb—Indiana Harbor Belt R Co v Alpern, 296 N W 158, 139 Neb 14

N J—C J S. cited in Public Service Elec & Gas Co v Reading Co 85 A 2d 548, 549 17 N J Super 148, motions den 86 A 2d 318 17 N J Super 536, affd 89 A 2d 242, 9 N J 607

Tex—Farah Mfg Co Inc v Continental Airlines, Inc Civ App 524 S W 2d 815 err ref no rev err

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27 S C—C J S. cited in Blanton v Blanton, 325 S E 2d 340, 341 284 S C 250

On the other hand, it has also been held that a carrier's actual knowledge of a shipper's claim does not meet, or substitute for, a requirement that the shipper give written notice of a claim to the carrier.[305]

305 U S—General Elec Co v Brown Transport Corp, D C Va, 597 F Supp 1258 declining to follow Hopper Paper Co v Baltimore & O R 178 F 2d 179, cert denied 339 U S 943 70 S Ct 797 94 L Ed 1359

31 U S—Hughes-Gibb & Co Ltd v Flying Tiger Line, Inc, D C Ill 504 F Supp 1239

33 R I—Rhode Island Tool Co v New York, N H & H R Co, 114 A 2d 404 83 R I 201

35. Communications considered with actual knowledge held sufficient

U S—Stearns-Roger Corp v Norfolk & W Ry Co, D C Ill, 356 F Supp 1238

36 Ohio—White Cross Hospital v Chesapeake & O Ry Co App, 125 N E 2d 363

37 Ill—Louda v Prague Assurance National Corp, 106 N E 2d 757, 347 Ill App. 211

38 N J—Johnson & Deglaman, Inc v Wm F Hegarty Inc 224 A 2d 510, 93 N J Super 15

40 Kan—Nichols v Atchison, T & S F Ry Co, 299 P 2d 52, 180 Kan 101

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41 Kan—C.J.S. cited in Nichols v Atchison, T & S F Ry Co 299 P 2d 52, 57 180 Kan 101

50 Ohio—White Cross Hospital v Chesapeake & O Ry Co supra, n 36

§ 241. —— Waiver of Notice of Claim for Loss or Injury

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55 U S—Conagra, Inc v Burlington Northern, Inc D C Neb 438 F Supp 1266—Westhemeco Ltd v New Hampshire Ins Co D C N Y, 484 F Supp 1158

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56 U S—Loveless v Universal Carloading & Distributing Co C A Okl 225 F 2d 637

Ark—Southern Newspapers v Missouri Pac R Co, 227 S W 2d 639 216 Ark 831

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N Y—Schaffer v Pennsylvania R Co, 127 N Y S 2d 466, affd 127 N Y S 2d 468

Pa—American Eagle Fire Ins Co v N Y C R R, 31 Erie Co 92

57 U S—B A Walterman Co v Pennsylvania R Co, C A Ohio, 295 F 2d 627

58 Conn—Shulman v Superior Trucking Co 223 A 2d 407 3 Conn Cir 712

Ill—Berg v Schreiber, 86 N E 2d 125, 337 Ill App 477 affd 92 N E 2d 88, 405 Ill 528, cert den 71 S Ct 79, 340 U S 851 95 L Ed 624

59 Ill—Peters v United Van Lines, Inc, 402 N E 2d 378, 37 Ill Dec 488, 82 Ill App 3d 104

Facts held insufficient to show waiver

U S—Insurance Co of North America v Newtowne Mfg Co C A Mass, 187 F 2d 675

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64 Ga—Southern Ry Co v Turner, 42 S E 2d 790, 75 Ga App 219

Wis—Chicago, St P, M & O Ry Co v Kileen, 9 N W 2d 616, 243 Wis 161

66 U S—Foster Wheeler Energy Corp v Daily Exp, Inc D C Pa, 485 F Supp 268

68 U S—Union Carbide Corp v Consolidated Rail Corp D C Ill 517 F Supp 1094

Pa—Kinsey Distilling Corp v Pennsylvania R Co, 71 A 2d 802, 166 Pa Super 466

W Va—Appalachian Electric Power Co v Virginian Ry Co 29 S E 2d 471 126 W Va 626

69 S C—South Carolina Steel Corp v Southern Ry Co, 206 S E 2d 828, 262 S C 543

Facts not presenting case of waiver

U S—Insurance Co of North America v Newtowne Mfg Co, C A Mass, 187 F 2d 675—Lucas Mach Division, New Britain Mach Co v New York Cent R Co D C Ohio, 236 F Supp 281

Ind—Bethlehem Steel Corp v Artim Transp System, Inc App, 430 N E 2d 1185

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72 U S—Atlantic Coast Line R Co v Pioneer Products, Inc, C A Ga 256 F 2d 431

Obligation that claim be in writing not subject to waiver by air carrier

NY—Schwartz v Eastern Airlines, 308 N Y S 2d 992, 66 Misc 2d 46

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80 US—Pennsylvania River Associates v Chesapeake & O Ry Co, CA NJ, 552 F 2d 269

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93 NY—CJS cited in Leo Hess International Corp v Isthmian Steamship Co, 176 N Y S 2d 795, 796, 5 A D 2d 250, app and rearg den 173 N Y S 2d 985, 5 A D 2d 982

§ 242. Contractual Limitations as to Time of Bringing Suit

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4 US—Pennsylvania R Co v Miller, CC A Tex, 124 F 2d 160, 140 A L R 811, cert den 62 S Ct 1047, 316 US 676, 86 L Ed 1750—San Lorenzo Nursery Co v Western Carloading Co, D C N Y, 91 F Supp 553

D C—Hanger v Allied Van Lines, Inc, App, 203 A 2d 420

Ill—Cohen v Texas & N O R Co, 25 N E 2d 562, 303 Ill App 606

Mass—Robinson v Trustees of New York, N H & H R Co, 60 N E 2d 593, 318 Mass 121

N Y—Garfunkel v Southern Pac Co, 36 N Y S 2d 270—Borough Exp, Inc v Schoenbaum & Herrmann Exp, Inc, 260 N Y S 2d 563, 46 Misc 2d 939

Va—Sydnor & Hundley, Inc v Wilson Trucking Corp, 194 S E 2d 733, 213 Va 704

Contractual statute of limitations

US—Pathway Bellows, Inc v Blanchette, CA N Y, 630 F 2d 900, cert den 101 S Ct 1357, 450 U S 915, 67 L Ed 2d 340

Ill—Charley Hayashida Farms, Inc v Baker, 306 N E 2d 673, 16 Ill App 3d 514

5 Ill—Charley Hayashida Farms, Inc v Baker, 306 N E 2d 673, 16 Ill App 3d 514

6 US—US Steel Intern Inc v SS Lash Italia, D C N Y, 439 F Supp 365

Va—Sydnor & Hundley, Inc v Wilson Trucking Corp, 194 S E 2d 733, 213 Va 704

11 US—Holford v Louisville & N R Co, D C Tenn, 266 F Supp 408

12. What limitations reasonable

(3) N J—Lawrence R McCoy Co, Inc v S S Theomitor III, 336 A 2d 80, 133 N J Super 308

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16 Wis—Chicago & North Western Transp Co v Thoreson Food Products, Inc, 238 N W 2d 69, 71 Wis 2d 143

21 Mass—Robinson v Trustees of New York, N H & H R Co, supra, n 4

Writing insufficient

US—John Morrell & Co v Chicago R I & P R Co, C A Ill, 495 F 2d 331

23. Action on settlement agreement

US—Lone Star Cement Corp v Pennsylvania R Co, C A Ind, 356 F 2d 901

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27. Provision held inapplicable to carrier's agent

Wis—Hagen v Parker, 175 N W 2d 483, 46 Wis 2d 534

32 Va—Sydnor & Hundley, Inc v Wilson Trucking Corp, 194 S E 2d 733, 213 Va 704

33. Action barred

Va—Sydnor & Hundley, Inc v Wilson Trucking Corp, 194 S E 2d 733, 213 Va 704

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35 U S—Burns v Chicago, M St P & P R Co, D C Mo, 160 F Supp 405, aff'd C A, 192 F 2d 472

36 Disallowance shown

2) Other cases—Burns v Chicago, M St P & Pac R Co, C A Mo, 192 F 2d 472

42 Kan—Anderson Cattle Co v Atchison, T & S F Ry Co, 206 P 2d 524, 167 Kan 306

N Y—Aetna Ins Co v Bor-Air Freight Co, Inc, 338 N Y S 2d 786, 72 Misc 2d 327

45 Mass—Robinson v Trustees of New York, N H & H R Co, supra, n 4

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48 N Y—Norma Corp v Pilot Freight Carriers, Inc, 313 N Y S 2d 232, 63 Misc 2d 684

49 Iowa—C J S cited in Carter v Fleming, 25 N W 2d 873, 876, 238 Iowa 55

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57 Iowa—Carter v Fleming, 25 N W 2d 873, 238 Iowa 55

Tex—H Rouw Co v Texas & N O R Co, Civ App, 260 S W 2d 130

Suits held barred

Colo—Hepp v United Airlines, Inc, 540 P 2d 1141, 36 Colo App 350

Tex—H Rouw Co v Railway Exp Agency, Civ App, 238 S W 2d 223, err ref

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63 La—Neuss, Hesslein & Co v Louisville & N R Co, 50 So 2d 855, annulled in part and aff'd in part, 59 So 2d 195, 221 La 296

67 Iowa—Carter v Fleming, supra, n 57

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68. Contract provision valid and binding

(1) Carter v Fleming, supra, n 57

Contract prevails over state statute

La—Neuss, Hesslein & Co v Louisville N R Co, 59 So 2d 195, 221 La 296

69 La—International Shoe Co v Flota Mercante Del Estado, App, 29 So 2d 536

§ 243. —— Waiver of Limitation

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78 US—C.J.S. quoted at length in Burns v Chicago, M St P & Pac R Co, C A Mo, 192 F 2d 472, 475—McDowell Associates, Inc v Pennsylvania R R, D C N Y, 151 F Supp 894

Miss—L M Kirkpatrick Co v I C R Co, 195 So 692, 190 Miss 157, 135 A L R 607

N M—Barber v Southern Pac Co, 185 P 2d 979, 51 N M 396

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84. Waiver or estoppel not shown in respect of intrastate shipment

(3) Other cases

Pa—Kinsey Distilling Corp v Pennsylvania R Co, 71 A 2d 802, 166 Pa Super 466

§ 244. Nature and Form

Library References

Carriers ⇐127, 221.

86 N C—Peele v Hartsell, 129 S E 2d 97, 258 N C 680

Ohio—Slick Airways, Inc v Rennert, 175 N E 2d 844, 114 Ohio App 124

Pa—Quaker Worsted Mills Corporation v Howard Trucking Corporation, 198 A 691, 131 Pa Super 1

Agreement not subject to preliminary objection

Pa—Foster Type & Equipment Co v Hall's Motor Transit Co, 33 Northumb L J 186

Either ex delicto or ex contractu

Pa—Foster Type & Equipment Co v Hall's Motor Transit Co, 33 Northumb L J 186

Remedies in tort

U S—Atlantic Banana Co v M V Colanca, D C N Y, 342 F Supp 447, aff'd C A, 459 F 2d 752, ann 489 F 2d 752

87 US—Atchison T & S F Ry Co v Jarboe Livestock Commission Co, C C A Okl, 159 F 2d 527

No provisions of the Interstate Commerce Act, etc.

(2) Other cases—Robinson Elec Co v Capitol Trucking Corp, 79 A 2d 123, 168 Pa Super 430

Federal legislation controls

Pa—De Giacomo v Pennsylvania R Co, 87 Pa Dist & Co, 182

88 US—Lutak Meat Co v Baker, C A Colo, 446 F 2d 329

89 N Y—Surprise Furniture Co v Long Island R Co, 107 N Y S 2d 316

§ 245. Right of Action and Defenses

Library References

Carriers ⇐128, 129, 222, 223

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91 US—Mass v Braswell Motor Freight Lines, Inc, C A Cal, 577 F 2d 665

Ga—D H Overmyer Co v Nelson-Brantley Glass Co, 168 S E 2d 176, 119 Ga App 599

Since the publication of Corpus Juris Secundum it has been held on appeal that in an action brought by one other than the federal government for loss of mail the carrier may set up in defense that it is liable, if at all, to the federal government alone [99.1]

99.1 Ill—Aetna Ins Co v Illinois Cent R Co, Sup, 6 N E 2d 189, cert dism 58 S Ct 269, 302 U S 652, 82 L Ed 505

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6 US—Virginia Tobacco Co v Wilson, C A Va, 169 F 2d 652

Ga—Georgia Ports Authority v Mitsubishi Intern Corp, 274 S E 2d 699, 156 Ga App 304

La—Colotex v Railway Exp Agency, App, 32 So 2d 69

7 US—Inland Trucking Corp v U S, 281 F 2d 457, 150 Ct Cl 642—M & S Tomato Repacking Co v Boston & Maine Corp, D C Mass, 310 F Supp 186

Ark—Rountree v Farmers Cotton Oil Co, 182 S W 2d 464, 207 Ark 690

La—Snell v American Moving & Storage Co, App, 255 So 2d 381

Mo—Smith v Morgan Drive Away, Inc, App, 613 S W 2d 469

N J—Joseph Toker Co v Lehigh Valley R Co, 97 A 2d 598, 12 N J 608, 39 A L R 2d 318

N C—Barnard v Howard Sober, Inc, 38 S E 2d 153, 226 N C 392

Tex—Texas & N O R Co v J Kahn & Co, Civ App, 153 S W 2d 292, Err ref—Hunt v Lay, Civ App, 170 S W 2d 823

Acts under direction of shipper

Tex—Missouri Pac R Co v John B Hardwicke Co, Civ App, 380 S W 2d 706

Counterclaim for freight charges is proper.[75]

7.5 Fla—Ryder Truck Lines, Inc v Groff Industries, Inc, App, 263 So 2d 599

N Y—Frank M Herbert, Inc v M & P Scrap Iron & Metal Corp, 247 N Y S 2d 193, 41 Misc 2d 1028, aff'd 256 N Y S 2d 924, 23 A D 2d 630

§ 246 Jurisdiction and Venue

8 N Y—Schnee v Tishman, 27 N Y S 2d 728, 176 Misc 427

10 Pa—Coner v Delaware Lackawanna & Western R Co 7 D & C 2d 235 57 Lack Jur 61

16 U S—Aracon Auto Transport Inc v State Farm Mut Auto Ins Co C A N Y 537 F 2d 648, cert den 97 S Ct 742, 429 U S 1042, 50 L Ed 2d 754

Ky—Knight v Pennsylvania R R 132 S W 2d 950, 280 Ky 191

Tex—Wilson v Inmes, Civ App 336 S W 2d 437—Delta Western Transp Corp v Plantation Foods, Inc Civ App 455 S W 2d 957

In Georgia

(9) Other cases—Powell v First Nat Bank & Trust Co 199 S E 668, 58 Ga App 648—R C A Truck Lines, Inc v Georgia Rug Mill, Inc 77 S E 2d 442, 88 Ga App 658 foll 77 S E 2d 445 88 Ga App 663

Any court acquiring jurisdiction

U S—Central Rigging & Contracting Corp of Conn v J E Miller Transfer & Storage Co D C Pa 199 F Supp 40

Ark—Wills Shaw Frozen Exp v Digby 538 S W 2d 706, 260 Ark 284

§ 248. Time to Sue, and Limitations

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19. Not applicable to negligence actions

N M—Diebold Contract Services, Inc v Morgan Drive Away Inc App 617 P 2d 1330, 95 N M 9

20 La—Sizeler v Employers Liability Assur Corp App 102 So 2d 326

Suspension of limitation statute

La—Paul Klopstock & Co v United Fruit Co 131 So 25 171 La 296

Who may assert limitation

La—Edward Levy Metals, Inc v New Orleans Public Belt R R, 148 So 2d 580, 243 La 860

§ 249. Parties Plaintiff

21 Ill—Pielet v Chicago & W T Rys 77 N E 2d 862, 333 Ill App 651

22 U S—Delaware, L & W R Co v U S, D C N Y 123 F Supp 579

Ill—Type & Press of Ill Inc v Gorter 164 N E 2d 223 24 Ill App 2d 186

N J—C.J.S. cited in N Rothenberg & Son, Inc v Nako, 139 A 2d 783, 787, 49 N J Super 372

Tex—C.J.S. cited in Yellow Freight System, Inc v Hydraulic Products Co Civ App 482 S W 2d 659 663

23 D C—Railway Exp Agency v Huntress, to Use of Royal Ins Co Mun App, 51 A 2d 379

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32 S C—Victor Fertilizer Co v Southern Ry Co 24 S E 2d 499 202 S C 294

35 U S—McDowell Associates, Inc v Pennsylvania R R D C N Y, 151 F Supp 894

Cal—Schuette v Larson, 112 P 2d 275 44 Cal App 2d 296

37 U S—F J McCarty Co v Southern Pac Co, D C Cal 289 F Supp 875 Affd, C A, 428 F 2d 690

42 Ohio—Deer Park Baking Co v Cleveland & Chicago Motor Exp Co, App 68 N E 2d 824

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50 Mass—C.J.S. cited in Automated Donut Systems Inc v Consol Rail Corp, 424 N E 2d 265 268, 12 Mass App 326

Mo Metals Refining Co v St Louis-San Francisco Co 137 S W 2d 977 234 Mo App 991

N Y—David Crystal Inc v Ehrlich-Newmark Trucking Co 314 N Y S 2d 559 64 Misc 2d 325

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63 Fla—Housel v Ryder Truck Lines, Inc App 233 So 2d 424

Ga—Atlanta B & C R Co v Patterson, 43 S E 2d 177 75 Ga App 189

Pa—Foster Type & Equipment Co v Hall's Motor Transit Co 33 Northumb L J 186

64 S C—Victor Fertilizer Co v Southern Ry Co supra, n 32

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72 Mo—C.J.S. quoted at length in Metals Refining Co v St Louis-San Francisco Co supra, n 50—Vaughn v Wabash R Co 188 S W 2d 352, 239 Mo App 340

Tex—Curry Motor Freight Lines, Inc v Snell Oil Co Civ App 497 S W 2d 805 err ref no rev err

76 Ala—Dearborn Stove Co v Dean, 115 So 2d 253, 40 Ala App 459

77 N J—C.J.S. cited in N Rothenberg & Son Inc v Nako, 139 A 2d 783 787 49 N J Super 372

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83 N Y—Consolidated Box Co v Penn, 180 N Y S 2d 831 15 Misc 2d 705

84 Mo—C.J.S. cited in Green City Auction Co v Chicago, B & Q R Co 175 S W 2d 165 238 Mo App 1

Ohio—Toman v Pennsylvania R Co App 51 N E 2d 231

Pa—Tatum v Pennsylvania R Co 72 Pa Dist & Co 135

90 U S—American Sur Co of N Y v Baker C A N C 172 F 2d 689

Ga—Atlanta, B & C R Co v Patterson, supra, n 63

Tex—C.J.S. black letter statement quoted in Texas & N O R Co v H Rouw Co, Civ App 271 S W 2d 666, 671 err dism

Effect of lack of notice by carrier of special interest

Wash—Prentice v Union Pac R Co, 182 P 2d 41 28 Wash 2d 212

Bailee privity of owner

La—Avant v A-1 Moving & Storage Co, App, 260 So 2d 355

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91 U S—American Sur Co of N Y v Baker supra, n 90

Cal—Merchant Shippers Ass'n v Kellogg Exp & Draying Co 170 P 2d 923 28 Cal 2d 594

Tex—C.J.S. quoted at length in Texas & N O R Co v H Rouw Co Civ App, 271 S W 2d 666, 671, err dism

92 Ga—Atlanta, B & C R Co v Patterson, 37 S E 2d 422, 73 Ga App 551

Tex—Thompson v H. Rouw Co Civ App 237 S W 2d 662, err ref no rev err

96 Tex—Rose v Baker Civ App, 140 S W 2d 212, revd on oth grds 160 S W 2d 515, 138 Tex 554

99 La—Equitable Fire & Marine Ins Co v Railway Exp Agency, App, 71 So 2d 587

Tex—St Louis, B & M Ry Co v Farmer Civ App 166 S W 2d 163

Construction of statute

(2) Other matters—Davis v Livingston, C C A Cal, 13 F 2d 605

Receipt of payment from third person

Md—Newth-Morris Box Corp to Use of Auto Ins Co of Hartford, Conn, v Pennsylvania R Co, 78 A 2d 655, 197 Md 119

Ownership of property immaterial

N Y—Kayser-Roth Corp v Arrow Carrier Corp 207 N Y S 2d 748, 25 Misc 2d 786

Tex—Thompson v H Rouw Co., Civ App 237 S W 2d 662, err ref no rev err

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3 N J—Nako Mfg Co v C Richard & Sons, Inc 92 A 2d 501 22 N J Super 578

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18 Ga—Powell v First Nat Bank & Trust Co 199 S E 668, 58 Ga App 648

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28. Other defendants

U S—General Elec Co v Pennsylvania R Co D C Pa 161 F Supp 186

N Y—Shefter v Gilbert Storage Co 87 N Y S 2d 267

Tex—Connecticut Standard Ins Co v Ebner, Civ App 223 S W 2d 968 affd in part and revd in part on oth grds 226 S W 2d 507 149 Tex 28

§ 251. Declaration, Complaint, or Petition

Library References

Carriers ⇐131, 162, 227(1)

30 Pa—Universal Carloading v Motor Freight, 71 York 64

Pleadings held sufficient

Ala—Anderson v Railway Exp Agency 39 So 2d 689 34 Ala App 191 cert den 39 So 2d 692 252 Ala 128

Fla—Loveland Lazzara, App 215 So 2d 74

Ill—Type & Press of Ill Inc v Gorter 164 N E 2d 223 24 Ill App 2d 186

Mo—Weller Hayes Truck Lines, 197 S W 2d 657 355 Mo 695 app transf 192 S W 2d 677

N Y—Miles v Lehigh Valley R Co 293 N Y S 2d 426, 57 Misc 2d 518

N C—American Cigarette & Cigar Co v Garner 47 S E 2d 854 229 N C 173

Pa—Cohen v Delaware Lackawanna & Western R Co 7 D & C 2d 235 57 Lack Jur 61—Cohen v Delaware, L & W R Co, 7 D & C 2d 235 57 Lack Jur 61

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37 U S—Banco Continental v Curtiss Nat Bank of Miami Springs, C A Fla 406 F 2d 510

Negligence or contrary

(2) Other statements

U S—American Synthetic Rubber Corp v Louisville & N R Co C A Ky 422 F 2d 462

38. Complaint should refer to controlling federal legislation

Pa—Di Giacomo v Pennsylvania R Co 87 Pa Dist & Co 182

42 Ga—Atlanta, B & C R Co v Patterson, 37 S E 2d 422, 73 Ga App 551

Mo—Vaughn v Wabash R Co 188 S W 2d 352, 239 Mo App 340

Pleading sufficient

Ga—Powell v Jerome 36 S E 2d 371 73 Ga App 257

Ky—American Tobacco Co v Whitney 163 S W 2d 817 291 Ky 281

Pa—Foster Type & Equipment Co v Hall's Motor Transit Co 33 Northumb L J 186

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45 U S—Condikes v Smith, D C Mass, 281 F Supp 1014

Ky—American Tobacco Co v Whitney, supra, n 41

50 Pa—Humphrey v Railway Exp Agency 2 Lycoming Co L R 180—Foster Type & Equipment Co v Hall's Motor Transit Co 33 Northumb L J 186

52. Petition sufficient to show delivery

Ga Powell v First Nat Bank & Trust Co supra, n 18

N Y—International Business Machines Corp v Root's Exp Inc, 326 N Y S 2d 237, 68 Misc 2d 347

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62 Ky—Louisville & N R Co v Gibson 170 S W 2d 907 294 Ky 55

Miss—Southeastern Exp Co v Name 181 So 515 182 Miss 447

Tenn—Wayne Knitting Mills Delta Motor Lines 372 S W 2d 419 52 Tenn App 164

63 Ala—C J S cited in Anderson v Railway Exp Agency 39 So 2d 692 252 Ala 128

66 Ohio—Sugar v National Transit Corp 81 N E 2d 609, 82 Ohio App 439

70 Ga—Atlanta B & C R Co v Patterson supra n 41

Mo—Neeley v Hines, 227 S W 650 296 Mo App 621

Pa—Sperry v Hall's Motor Transit 4 Lycoming Co L R 80

Tex—Hunt v Lay Civ App 179 S W 2d 823—Texas & N O R Co v Conn Civ App 31 S W 2d 939

Pleading held sufficient

(3) Other pleadings—Suit v Scandrett 178 P 2d 405 119 Mont 570

S C—Meddin v Southern Ry-Carolina Division 62 S E 2d 109 218 S C 155

Pleading held insufficient

N Y—Reliable Textile Co v Deputata Trucking Co 326 N Y S 2d 217 37 A D 2d 952, affd 291 N E 2d 721, 31 N Y 2d 824 339 N Y S 2d 676

Pa—Pincus and Sons, Inc v Reading Co 5 D & C 2d 170

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71. Pleading held sufficient

(3) Other pleadings

U S—Banco Continental v Curtiss Nat Bank of Miami Springs, C A Fla 406 F 2d 510

72 U S—Atchison, T & S F Ry Co v Jarboe Livestock Commission Co C C A Okl 159 F 2d 527—Banco Continental v Curtiss Nat Bank of Miami Springs, C A Fla 406 F 2d 510

Mo—Carpenter v Hines, Mo App 239 S W 593

Where carrier does not accompany shipment of cattle no specific act of negligence need be alleged—Gulf C & S F Ry Co v Sklar Tex Civ App 134 S W 2d 771 err dism

76 Ga—R C A Truck Lines Inc v Georgia Rug Mill, Inc 77 S E 2d 442, 88 Ga App 658, foll 77 S E 2d 445, 88 Ga App 663

78 Del—Delaware Val Drug Co v Kline, Super 144 A 2d 403 1 Storey 242

79 Pa—Di Gregorio v Pennsylvania R Co supra n 38

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83 S C—C.J.S. cited in Meddin v Southern Ry-Carolina Division, 62 S E 2d 109, 112, 218 S C 155

87 Pa—Linde v Smith, 41 Schuyl Leg Reg 130

Vt—Benoit v Central Vt Ry 73 A 2d 321, 116 Vt 266, 33 A L R 2d 139

90 Ky—Louisville & N R Co v Home Fruit & Produce Co, 220 S W 2d 558, 310 Ky 269

La—International Shoe Co v Flota Mercante Del Estado, App 29 So 2d 536

Pa—Romeo v Delaware & Hudson R R Corp 56 Lack Jur 233—United Refrigerator Co v Rodgers Motor Lines, 9 D & C 2d 581 57 Lack Jur 129

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95 Pa—Pincus and Sons, Inc v Reading Co 5 D & C 2d 170

Pleadings sufficient

(4) Other pleadings—Barnhart v Henderson, 24 N W 2d 854 147 Neb 689 982

Tex—Herrin Transp Co v Sheldon Civ App 209 S W 2d 943

1 Tex—M-K-T Ry Co v Jaffee Cotton Products Mfg Co Civ App 193 S W 2d 986, err dism

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6 Ga—Atlanta, B & C R Co v Patterson 37 S E 2d 422 73 Ga App 551

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17 Ky—American Tobacco Co v Whitney, 163 S W 2d 817 291 Ky 281

Sufficiency of pleading

(3) Other matters

Pa—Rohr v Logan 213 A 2d 166, 206 Pa Super 232

Wis—Whitehall Packing Co Inc v Safeway Truck Lines, Inc 228 N W 2d 365 68 Wis 2d 369

Matters held not pleadable

Pa—Phoenix Ins Co v McDermott Bros Co 208 A 2d 245 416 Pa 569

23 Miss—Southeastern Exp Co v Name, 181 So 515 182 Miss 447

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33 Ga—Powell v First Nat Bank & Trust Co 199 S E 668 58 Ga App 648

35 Fla—Pennsylvania R Co v Greco, 25 So 2d 809 157 Fla 337

37 Tex—Herrin Transp Co v Sheldon, Civ App, 209 S W 2d 943

39 Tex—Thompson v Associated Growers of Brownsville, Civ App, 162 S W 2d 754

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42 N M—Fredenburgh v Allied Van Lines, Inc 446 P 2d 868, 79 N M 593

Tex—Clark v Nipper Civ App 315 S W 2d 439

47 Cal—Fitch v Carpenter 161 P 2d 824 70 Cal App 2d 827

§ 253. Replication or Reply

Library References

Carriers ⇐131, 227(3)

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64 Pa—Parrish v Delaware, L & W R Co, 65 Pa Dist & Co 547, 50 Lack Jur 149

Immaterial allegations not admitted by failure to reply

Ill—Mirski v Chesapeake & O Ry Co 202 N E 2d 22, 31 Ill 2d 423

§ 253½. Issues, Proof, and Variance

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71 N J—Silver Lining v Shein, 112 A 2d 315 34 N J Super 384 revd on oth grds 117 A 2d 182

Tex—Railway Exp Agency v Baum, Civ App, 250 S W 2d 423

72 D C—Waterman v Railway Express Agency, Mun App 31 A 2d 657

La—Piazza v Louisiana & A Ry Co, App 46 So 2d 670—Robertson v Louisiana Fruit Growers Ass'n, App 80 So 2d 190

N Y—Craver-Dickinson Seed Co v New York Cent R Co 80 N Y S 2d 631, 274 App Div 844

73 Ga—Walker Elec Co v Sullivan, 52 S E 2d 477, 79 Ga App 13

Ohio—Trees v Pennsylvania R Co, 109 N E 2d 29, 91 Ohio App 497

74 Mo—Scott County Mill Co v Thompson App, 255 S W 2d 121—Bunge Corp v Valley Line Supply & Equipment Co, 480 S W 2d 859

75 Colo—McKinley v Denver & R G W R Co 201 P 2d 905, 119 Colo 203

Specific acts not alleged

(2) Other matters

Ill—Oakland Meat Co v Railway Exp Agency, Inc, 196 N E 2d 361, 46 Ill App 2d 176, 4 A L R 3d 987

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78 U S—Southern-Plaza Exp Inc v Harville, C A Tex 233 F 2d 264

Cal—Schraeder v Robinson 177 P 2d 788 78 Cal App 2d 328

83 Tex—Thompson v San Pat Vegetable Co Civ App 207 S W 2d 195 err ref no rev err

Evidence admitted by pleadings

(5) Other evidence

Tex—Climate Engineering Co v Merchants Fast Motor Lines, Inc Civ App 459 S W 2d 695

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85 Tex—M-K-T Ry Co v Jaffee Cotton Products Mfg Co, supra, n 1

89 N C—Leary v Aero Mayflower Transit Co Inc, 207 S E 2d 781, 22 N C App 702

91 N Y—Craver-Dickinson Seed Co v New York Cent R Co supra, n 72

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4 Mass—Richards v New York, N H & H R Co 102 N E 2d 769 328 Mass 204

Mo—Vaughn & Vaughn v Quincy O & K C R Co App, 123 S W 2d 569

Pa—Ingraham v Charlton Bros Transp Co 60 Dauph Co 143

5 U S—Boh Bros Const Co v Perry Heavy Haulers, D C La 72 F Supp 102, affd, C C A, 166 F 2d 719

Mo—Metals Refining Co v St Louis-San Francisco Co 137 S W 2d 977 234 Mo App 991

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17. Value of goods in excess of amount claimed

Ga—Railway Express Agency v Southern Gas Co 65 S E 2d 61 83 Ga App 808

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19 Tex—Texas & P Ry Co v Empresadora De Ciudad Juarez, S A, Civ App 309 S W 2d 926, err ref no rev err—Climate Engineering Co v Merchants Fast Motor Lines, Inc Civ App 459 S W 2d 695

20 Vt—Benoit v Central Vt Ry, 73 A 2d 321, 116 Vt 266, 33 A L R 2d 139

§ 254. Presumptions and Burden of Proof

Library References

Carriers ⇐132, 163, 228(1).

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34 Ark—Kansas City Southern Ry Co v Shull, 136 S W 2d 1040, 199 Ark 932

La—Anzalone v Illinois Cent R Co, App, 53 So 2d 433—Aetna Ins Co v General Terminals Transfer & Storage, Inc App, 225 So 2d 72

N Y—Craver-Dickinson Seed Co v New York Cent R Co, 80 N Y S 2d 631 274 App Div 844

Pa—Yarnall v Railway Express Agency 32 Del Co 535

Tex—Missouri Pac R Co v Whittenburg and Alston, 424 S W 2d 427

W Va—Payne v Ace House Movers, Inc, 112 S E 2d 449, 145 W Va 86

Prima facie case of negligence of consignee in unloading established

Fla—Wajay Bakery Inc v Carolina Freight Carrier Corp App, 177 So 2d 544

Prima facie case shown

Tex—Red Arrow Freight Lines, Inc v Howe, Civ App 480 S W 2d 281, err ref no rev err

Wis—Allis-Chalmers Mfg Co v Eagle Motor Line Inc 198 N W 2d 162, 55 Wis 2d 39

Prima facie case

Fla—Ryder Truck Lines Inc v Groff Industries Inc App 263 So 2d 599

Tex—Boyd v McClester Civ App 515 S W 2d 25

Prima facie case not established

Fla—Ryder Truck Lines, Inc v Groff Industries Inc App 263 So 2d 599

36 Colo—Hepp v United Airlines, Inc 540 P 2d 1141 36 Colo App 350

Tex—Railway Exp Agency Inc v Miller Civ App 356 S W 2d 905 revd on oth grds 356 S W 2d 771 163 Tex 400

37 Or—Clifford W Brown v Borestecle, 344 P 2d 928 218 Or 312

38 US—L E Whitlock Truck Service Inc v Regal Drilling Co C A Colo 333 F 2d 488

Ala—C J S cited in Anderson v Railway Exp Agency 39 So 2d 689 34 Ala App 191 cert den 39 So 2d 692, 252 Ala 128

Ark—Railway Express Agency v H Rouw Co 127 S W 2d 251 197 Ark 1142

Fla—Ryder Truck Lines, Inc v Groff Industries Inc App 263 So 2d 599

La—Scientific Systems Corp v Ryder Truck Lines, Inc App 255 So 2d 385 writ den 256 So 2d 441 260 La 455

Tex—Janak v Thompson, Civ App 241 S W 2d 639 err ref no rev err—Red Arrow Freight Lines, Inc v Howe, Civ App 480 S W 2d 281 err ref no rev err

39 Tex—Texas-Arizona Motor Freight Inc v Bennett, Civ App 324 S W 2d 32

41 US—Tishman & Lipp, Inc v Delta Airlines, D C N Y 275 F Supp 471 affd C A 413 F 2d 1401—U S v Cloverleaf Cold Storage Co D C Iowa, 286 F Supp 680

Conn—Penfield Mfg Co v Christom Cir A D 243 A 2d 87 5 Conn Cir 91

D C—Chesapeake & O Ry Co v Gilbert Mun App 83 A 2d 327

Ga—Loo-Mac Freight Lines, Inc v American Type Founders, Inc 110 S E 2d 566, 100 Ga App 203

Ill—Meyer v Rozran, 77 N E 2d 454 333 Ill App 301—Type & Press of Ill Inc v Gorter 164 N E 2d 223 24 Ill App 2d 186

La—Kaplan Rice Mill v Texas & N O R Co App 26 So 2d 42

Miss—Illinois Cent R Co v Paxton, 193 So 915 187 Miss 858

Nev—Pacific Intermountain Exp Co v Leonard E Conrad Inc 502 P 2d 106, 88 Nev 569

N C—American Cigarette & Cigar Co v Garner 47 S E 2d 854 229 N C 173

Okl—Advance Air Conditioning Co v Cam's Truck Lines, 175 P 2d 338, 198 Okl 73

Pa—General Elec Co v Marianelli, 19 D & C 2d 519, 60 Lack Jur 97

Tenn—Tennessee Packers, Inc v Tennessee Cent Ry Co 319 S W 2d 502, 45 Tenn App 57

Tex—Hune v Lay Civ App 170 S W 2d 823

Affirmative defenses

Iowa—Vander Beek v Chicago & N W Ry Co 278 N W 201 206, supers 286 N W 452 226 Iowa 1363

Liability without fault due to burden of proof

Tex—Texas & Pac Ry Co v Empacadora De Ciudad Juarez S A Civ App 342 S W 2d 195 err ref no rev err

Presumption as to fault and responsibility of carrier

Tex—Travelers Ins Co v Delta Air Lines, Inc Civ App 498 S W 2d 443

42 N J—Nopco Chemical Division v Blaw-Knox Co 281 A 2d 793 59 N J 274

Plaintiff need not disprove defenses

Ohio—Rabb v Railway Exp Agency 95 N E 2d 784

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43 Consent of consignee presumed

Tex—Missouri Pacific R Co v Smith, 64 Tex 348 19 S W 509—Thompson v H Rouw Co Civ App 237 S W 2d 662, err ref no rev err—Davis v Wynne & Jackson, Com App 256 S W 256

44 N J—Valco Mfg Co v C Ruckard & Sons, Inc 92 A 2d 501 22 N J Super 578

Tex—East Tex Motor Freight Lines v W H Hutchinson & Son, Civ App 241 S W 2d 759 err dism

45 U S—Hamilton Foods v Atchison, T & S F Ry Co supra n 41

Colo—United Van Lines, Inc v Lagae 427 P 2d 872, 162 Colo 555

Ill—Mitchell Mfg Co v Cooper-Jarrett, Inc 165 N E 2d 723 25 Ill App 2d 93

Ohio—Rabb v Railway Exp Agency supra, n 42

S C—Chilean Nitrate Sales Corp v Southern Railway—Carolina Division, 88 S E 2d 242, 227 S C 423

46 Ill—Mitchell Mfg Co v Cooper-Jarrett, Inc 165 N E 2d 723 25 Ill App 2d 93

47 Conn—Penfield Mfg Co v Christom, Cir A D 243 A 2d 87 5 Conn Cir 91

Evidence held sufficient to rebut prima facie case

Ill—Mitchell Mfg Co v Cooper-Jarrett Inc 165 N E 2d 723 25 Ill App 2d 93

52 S C—Chilean Nitrate Sales Corp v Southern Railway—Carolina Division, 88 S E 2d 242, 227 S C 423

55 Ill—Mitchell Mfg v Cooper-Jarrett, Inc 165 N E 2d 723 25 Ill App 2d 93

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56 N J—Joseph Toker Co v Lehigh Valley R Co, 97 A 2d 598, 12 N J 608, 39 A L R 2d 318

57 U S—C J S cited in De Vries v Sig Ellingson & Co D C Minn 100 F Supp 781, 786, affd C A 199 F 2d 677 cert den 73 S Ct 505 344 U S 934 97 L Ed 719

Cal—C J S. black letter text quoted in Schraeder v Robinson, 177 P 2d 788 793 78 Cal App 2d 328

Ga—C J S quoted in Rome Elec v Railway Exp Agency 59 S E 2d 19 22, 81 Ga App 368

Neb—C J S cited in Halsey v Merchants Motor Freight, 71 N W 2d 311 314 160 Neb 732

58 U S—Inland Waterways Shippers Ass'n, Inc v Mississippi Val Barge Line Co D C Mo 194 F Supp 818, app dism C A 289 F 2d 374 cert den 82 S Ct 123 368 U S 876, 7 L Ed 2d 77—Empire Aluminum Corp v S S Korendijk, D C Ga 391 F Supp 402

Ala—Railway Exp Agency v Anderson, 45 So 2d 168, 35 Ala App 216

Cal—Merchant Shippers Ass'n v Kellogg Exp & Draying Co 170 P 2d 923, 28 Cal 2d 594

Conn—Wells Laundry & Linen Supply Co v Acme Fast Freight 85 A 2d 907, 138 Conn 458

Fla—United Steel & Strip Corp v Monex Corp, App 310 So 2d 339

Ga—Railway Exp Agency v L E Parker Fish Co, 75 S E 2d 180, 87 Ga App 779

Ill—Palmer v Gillarde, 38 N E 2d 352, 312 Ill App 230—Lash & Mages, Inc v Atchison, T & S F R Co 111 N E 2d 362, 349 Ill App 540

Iowa—Vander Beek v Chicago & N W Ry Co, supra, n 41

La—Normann v Burnham's Van Service, App, 73 So 2d 640—Robertson v Louisiana Fruit Growers Ass'n, App, 80 So 2d 190

Minn—Minneapolis Fire & Marine Ins Co v Baltimore & O R Co, 53 N W 2d 828, 237 Minn 111 33 A L R 2d 860

Mo—C J S cited in Robinson v Railway Exp Agency, Inc App 329 S W 2d 242, 246—Textile Distributors, Inc v Roadway, Exp, Inc, App 397 S W 2d 760

N Y—Uneeda Home Appliances, Inc v Long Island R Co 268 N Y S 2d 731 49 Misc 2d 953, app den 277 N Y S 2d 484 27 A D 2d 743

R I—Glass-Tite Industries, Inc v Spector Freight Systems, Inc 230 A 2d 254 102 R I 301

S C—Stephenson Mule Co v Powell 15 S E 2d 389, 199 S C 450

Tex—Missouri Pac R Co v Whittenburg & Alston, Civ App 417 S W 2d 489 affd Sup 424 S W 2d 427

60 U S—Tuchman v Pennsylvania R Co C A Pa 230 F 2d 787—Helmes Exp Inc v U S D C Del 186 F Supp 521

D C—Van-Pak, Inc v Cavalier Storage Corp App 208 A 2d 620

La—Cullier v Texas & Pac Ry Co App 303 So 2d 871 writ ref, Sup 307 So 2d 628

R I—Glass-Tite Industries, Inc v Spector Freight Systems, Inc 230 A 2d 254 102 R I 301

61 U S—C J S. quoted in Yeckes-Eichenbaum, Inc v Texas Mexican Ry Co C A Tex 263 F 2d 791 793 cert den 80 S Ct 75 361 U S 827, 4 L Ed 2d 70

Minn—Minneapolis Fire & Marine Ins Co v Baltimore & O R Co supra n 58

N J—Silver Lining, Inc v Shem, 117 A 2d 182, 37 N J Super 206

R I—Glass-Tite Industries, Inc v Spector Freight Systems, Inc 230 A 2d 254 102 R I 301

Tex—C J S quoted in Red Arrow Freight Lines, Inc v Howe, Civ App 480 S W 2d 281 285 err ref no rev err—Strickland Transp Co v Cummins Supply Co Civ App 488 S W 2d 181

62 U S—Reider v Thompson, D C La 116 F Supp 279—C J S. quoted in Yeckes-Eichenbaum, Inc v Texas Mexican Ry Co C A Tex 263 F 2d 791, 793, cert den 80 S Ct 75 361 U S 827 4 L Ed 2d 70

Ga—Loo-Mac Freight Lines, Inc v American Type Founders, Inc 110 S E 2d 566, 100 Ga App 203

La—L Frank & Co v Illinois Cent R Co supra, n 58

Minn—Minneapolis Fire & Marine Ins Co v Baltimore & O R Co, supra, n 58

Mo—C J S. cited in Textile Distributors, Inc v Roadway Exp Inc, App 397 S W 2d 760 763

Okl—Kluver v Midwestern Transp Inc 534 P 2d 662

Tex—C J S. quoted in Red Arrow Freight Lines, Inc v Howe Civ App 480 S W 2d 281 285, err ref no rev err

63 La—Home Furniture and Appliance v Red Ball Motor Freight, Inc App, 343 So 2d 319, cert den Sup 345 So 2d 1193

64 U S—Yeckes-Eichenbaum, Inc v Texas Mexican Ry Co D C Tex 165 F Supp 204, revd on oth grds C A 263 F 2d 791, cert den 80 S Ct 75, 361 U S 827 4 L Ed 2d 70

Conn—Ideal Plumbing & Heating Co v New York, N H & H R Co 124 A 2d 908, 143 Conn 640—Parrott Chemical Co v St Johnsbury Trucking Co Cir A D 257 A 2d 507, 5 Conn Cir 499

Fla—United Steel & Strip Corp v Monex Corp, App 310 So 2d 339 System, 94 N E 2d 283 87 Ohio App 165

Ill—Du Quoin Packing Co v Bomfield, 71 N E 2d 173, 330 ill App 338

La—Kaplan Rice Mill v Texas & N O R Co, App 26 So 2d 42—Frischhertz Elec Co v Standard Transp Co, 264 So 2d 646, 262 La 791

N J—Silver Lining v Shem, 112 A 2d 315 34 N J Super 384, revd on oth grds 117 A 2d 182

Ohio—Kirchner v New York Central System, 94 N E 2d 283, 87 Ohio App 165 42 O O 362

Tex—Missouri Pac R Co v Trautman Bros, Civ App, 301 S W 2d 240, err ref no rev err—C J S. cited in Rhinetubes, Inc v Lloyd, Civ App 335 S W 2d 269 273, err ref no rev err—C J S. cited in Red Ball Motor Freight, Inc v Dean, 549 S W 2d 41 44, err dism

Wis—C J S. quoted in Allis-Chalmers Mfg Co v Eagle Motor Lines, Inc 198 N W 2d 162, 165 55 Wis 2d 39

66 U S—C J S cited in Empire Aluminum Corp v S S Korendijk, D C Ga, 391 F Supp 402, 410

Pa—Gartford Trucking Inc v Liberty Can & Sign Co 90 Lanc L Rev 158

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67 Conn—Ideal Plumbing & Heating Co v New York, N H & H R Co 124 A 2d 908 143 Conn 640

La—Aetna Ins Co v General Terminals Transfer & Storage, Inc App 225 So 2d 72

68 N Y—C J S cited in Humboldt Lumber Co v Louisville & N R Co 15 N Y S 2d 587 588 258 App Div 797—C J S cited in Banner Mfg Co v Long Island R Co 97 N Y S 2d 730 732 277 App Div 142, reargument den 100 N Y S 2d 225 277 App Div 974

70 Mo—Textile Distributors, Inc v Roadway Exp Inc App 397 S W 2d 760

71 U S—Federated Dept Stores, Inc v Burke, C A Fla 450 F 2d 1223

N Y—Jersey Central Power & Light Co v Westinghouse Elec Corp 328 N Y S 2d 789 36 A D 2d 283

Tex—Missouri Pac R Co v John B Hardwicke Co Civ App 380 S W 2d 706

76 U S—Armour Research Foundation of Illinois Institute of Technology v Chicago R I & P R Co C A Ill 311 F 2d 493 cert den 83 S Ct 1091 372 U S 960 10 L Ed 2d 129

N Y—Standard Brands Chemical Industries, Inc v Pilot Freight Carriers, Inc 319 N Y S 2d 457 65 Misc 2d 1029

"Shipper's load and count" notation on bill of lading

U S—Dublin Co v Ryder Truck Lines, Inc C A Fla 417 F 2d 777

78 Okl—Kluver v Midwestern Transp Inc 534 P 2d 662

79 Ga—A A A Highway Express v Bone & Hendrix, 26 S E 2d 658 69 Ga App 763

La—Arwady v Texas & N O R Co supra n 58—Normann v Burnham's Van Service supra n 58

Mo—Transamerican Freight Lines v Manirome Art Marble Co 450 S W 2d 547 236 Mo App 272—C.J.S. cited in Robinson v Railway Exp Agency Inc 329 S W 2d 242 246

N J—Silver Liming, Inc v Shein 117 A 2d 182, 37 N J Super 206

Extent of burden

La—Yuspeh v Acme Fast Freight, App, 54 So 2d 866 affd 63 So 2d 743 222 La 747—Yuspeh v Acme Fast Freight, supra, n 58

Minn—Minneapolis Fire & Marine Ins Co v Baltimore & O R Co supra, n 58

Wis—Allis-Chalmers Mfg Co v Eagle Motor Lines, Inc 198 N W 2d 162 55 Wis 2d 39

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80 U S—Eastern Wine Corp v New York Cent R Co C A N Y, 355 F 2d 30

N Y—Hudson Handkerchief Mfg Corp v Porto Rican Exp Co 85 N Y S 2d 294 274 App Div 509 app den 86 N Y S 2d 462, 274 App Div 1055

82 Ga—A A A Highway Express v Bone & Hendrix, supra, n 79

La—Anzalone v Illinois Cent R Co App, 53 So 2d 433

Minn—Minneapolis Fire & Marine Ins Co v Baltimore & O R Co supra, n 58

N Y—Danziger v Pennsylvania R Co, 34 N Y S 2d 722

Pa—Standard Oil Co of New Jersey v Graham Oil Transport Corporation, 59 Montg 196, affd 41 A 2d 414 157 Pa Super 41

Although the shipper's bad loading has caused a derailment, the carrier may be held liable for delivery of the goods in a damaged condition if the damaged condition was not caused by the derailment.[84.5]

84.5 U S—Association of Maryland Pilots v Baltimore & O R Co D C Md 304 F Supp 548

85 U S—Winn-Dixie Montgomery Inc v Brinks, Inc D C Ala 298 F Supp 366—Condakes v Southern Pac Co D C Mass, 303 F Supp 1158—Association of Maryland Pilots v Baltimore & O R Co D C Md 304 F Supp 548

Cal—Brown-Forman Distillers Corp v Walkup Drayage & Warehouse Co 163 P 2d 878 71 Cal App 2d 795

Ga—Loo Mac Freight Lines, Inc v American Type Founders, Inc 110 S E 2d 566, 100 Ga App 203

N J—Joseph Toker Co v Lehigh Valley R Co, supra, n 56

Pa—General Elec Co v Marianelli, 19 D & C 2d 519 60 Lack Jur 97

R I—Blount Seafood Corp v Arrow Transp Co 124 A 2d 869 84 R I 463

S C—McElveen v Atlantic Coast Line R Co 43 S E 2d 485 210 S C 556

Tenn—Illinois Cent R Co v H Rouw & Co 150 S W 2d 839 25 Tenn App 475—Wayne Knitting Mills v Delta Motor Lines, 372 S W 2d 419 52 Tenn App 164

Tex—Tucker v Newth 157 S W 2d 1010 Civ App err ref

Vt—Ledoux v Railway Express Agency 35 A 2d 665 113 Vt 480

86 U S—Reider v Thompson, supra, n 62

Mo—Colley v Cox, App 266 S W 2d 778

Ohio—Elder & Johnston Co v Commercial Motor Freight, Inc of Ind 115 N E 2d 179 94 Ohio App 358

Tex—Griffin v Gulf C & S F Ry Co Civ App 298 S W 2d 659

87 U S—Reider v Thompson C A La 197 F 2d 158—General Elec Co v Pennsylvania R Co D C Pa 160 F Supp 186—Continental Can Co v Eazor Exp Inc C A N Y 354 F 2d 222—Winn-Dixie Montgomery Inc v Brinks Inc D C Ala 298 F Supp 366—Association of Maryland Pilots v Baltimore & O R Co D C Md 304 F Supp 548—Empire Aluminum Corp v SS Korendijk, D C Ga 391 F Supp 402

La—Rabon v Red Ball Motor Freight, Inc App 292 So 2d 332

N J—Silver Liming v Shein, supra, n 64

Okl—Kluver v Midwestern Transp Inc, 534 P 2d 662

Pa—Wareham v Railway Exp Agency, 94 Pittsb Leg J 349

Tex—Texas & P Ry Co v Empecadora De Ciudad Juarez, S A Civ App, 309 S W 2d 926, err ref no rev err

88 Wash—Lavagetto v Railway Exp Agency, 209 P 2d 371, 34 Wash 2d 578

90 U S—Central of Georgia R Co v U S 129 Ct Cl 278

91. Receipt relating only to outside condition

Tex—Strickland Transp Co v International Aerial Mapping Co, Civ App, 423 S W 2d 676

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92 U S—Minneapolis, St P & S S M R Co v Metal-Matic, Inc, C A Minn 323 F 2d 903—Condakes v Southern Pac Co D C Mass 303 F Supp 369

Ala—Anderson v Railway Exp Agency 39 So 2d 689 34 Ala App 191 cert den 39 So 2d 692, 252 Ala 128

Colo—McKinley v Denver & R G W R Co, 201 P 2d 905, 119 Colo 203

Ga—Walker Elec Co v Sullivan, 52 S E 2d 477 79 Ga App 13

N J—C J S. cited in Silver Liming, Inc v Shein, 117 A 2d 182 186 37 N J Super 206

Okl—Roadway Exp Inc v Solow 326 P 2d 1048

93 Pa—General Elec Co v Marianelli, 19 D & C 2d 519 60 Lack Jur 97

94 U S—Taylor v National Trailer Convoy Inc C A Okl, 433 F 2d 569—Marks Mfg Co v New York Cent R Co, C A Mich, 448 F 2d 68

Cal—Brignoli v Seaboard Transp Co, 178 P 2d 4 29 Cal 2d 782—Bauer v Jackson 93 Cal Rptr 15 C A 3d 358

Fla—Housel v Ryder Truck Lines, Inc App So 2d 424

Ill—Du Quoin Packing Co v Bonifield 71 N E 173 330 Ill App 338—Minski v Chesapeake & Ry Co 202 N E 2d 22, 31 Ill 2d 423

La—C J S cited in Piazza v Louisiana & A Ry C App 46 So 2d 670, 673

Md—John I Haas, Inc v American Export Ln Inc 205 A 2d 223 237 Md 73

Mo—Dugdale Packing Co v Lowden App S W 2d 832

N J—Joseph Toker Co v Lehigh Valley R Co, A 2d 598 12 N J 608 39 A L R 2d 318—Si Liming, Inc v Shein, 117 A 2d 182, 37 N J Su 206

N Y—Standard Brands Chemical Industries, Inc Pilot Freight Carriers Inc 319 N Y S 2d 457 Misc 2d 1029

N C—Weil's Inc v Overnite Transp Co 181 S E 749 11 N C App 554 cert den 183 S E 2d 24 N C 397

Okl—Advance Air Conditioning Co v Cam's Tr Lines, supra, n 41—Kluver v Midwestern Tran Inc 534 P 2d 662

Pa—Dane. v Shober 31 North Co 221—Arabian A Oil Co v Kirby & Kirby 90 A 2d 410, Pa Super 23—Foster Type & Equipment Co Hall's Motor Transit Co 33 Northumb L J 1

R I—Glass-Tite Industries, Inc v Spector Freight tems, Inc 230 A 2d 254 102 R I 301

Tex—Herrin Transp Co v Sheldon Civ App S W 2d 943—Texas & P Ry Co Empecad De Ciudad Juarez, S A Civ App 309 S W 2d err ref no rev err—Strickland Transp Co International Aerial Mapping Co Civ App S W 2d 676

Wis—Landaen v Railway Exp Agency 47 N W 727 259 Wis 178

Act of God in general

Mo—M F A Farmers Exchange o. Carthage, Mo Kurn App 205 S W 2d 878

(2) Other burdens of proof—Furpac Products Co Atchison T & S F Ry Co D C Mo 124 F Supp

(3) Other matters

U S—Compania De Vapores Inveo S A v Miss Pac R Co C A La 232 F 2d 657 cert den S Ct 102, 352 U S 880 1 L Ed 2d 80

Inherent nature or defects

(2) Miss—Illinois Cent R Co v Paxton supra 41

(5) Other instances

U S—Hamilton Mfg Co v Chicago & N W Ry C D C Wis 176 F Supp 546, revd on oth gr C A 277 F 2d 652

Ga—Loo-Mac Freight Lines, Inc v American T Founders, Inc 110 S E 2d 566 100 Ga App

Wis—Whitehall Packing Co Inc v Safeway Tr Lines, Inc 228 N W 2d 365 68 Wis 2d 369

Acts or negligence of shipper in general

(1) Pa—General Elec Co v Marianelli, 19 D C 2d 519 60 Lack Jur 97

Improper packing, loading, or preparation shipment

(1) U S—Modern Tool Corp v Pennsylvania Co D C N J, 100 F Supp 595

(4) Other instances

Ga—Loo-Mac Freight Lines, Inc v American T Founders, Inc, 110 S E 2d 566, 100 Ga App

Under Interstate Commerce Act

U S—Secretary of Agriculture v U S Utah, 76 S 244 350 U S 162, 100 L Ed 173—M & S Tow Repacking Co v Boston & Maine Corp D Mass 310 F Supp 186

Tex—Missouri Pac R Co v Whittenburg and Ab Civ App 380 S W 2d 733

Rule held not applicable where owner e witness

N C Peele v Hartsell, 129 S E 2d 97 258 N C

Exception to liability not shown

Ariz—Arizona Container Corp v Consolidated Freightways, 522 P 2d 772, 22 Ariz App 11

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97 US—Missouri Pac R Co v Elmore & Stahl, Tex 84 S Ct 1142, 377 US 134 12 L Ed 2d 194 reh den 84 S Ct 1880 377 US 984 12 L Ed 2d 752—F J McCarty Co v Southern Pac Co D C Cal 289 F Supp 875 affd C A 428 F 2d 690

99 Kan—Clubb v Hetzel, 198 P 2d 142, 165 Kan 594—Jukes v North Am Van Lines, Inc 309 P 2d 692, 181 Kan 12

Tex—Lang v Slofner Civ App 175 S W 2d 701

Vt—Senna v Gero, 109 A 2d 344 113 Vt 331

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3 Kan—Jukes v North Am Van Lines, Inc 309 P 2d 692, 181 Kan 12

N C—Neece v Richmond Greyhound Lines, Inc 99 S E 2d 756, 246 N C 547 68 A L R 2d 1341

Ohio—Rabb v Railway Exp Agency App 95 N E 2d 784

Okl—Sooner Freight Lines v Lester 185 P 2d 469 199 Okl 321—Hefner v Owens, 280 P 2d 1025

4. Strikes

Ill—Bowman Dairy Co v Megan, 15 N E 2d 878, 296 Ill App 20

9 Ark—Railway Express Agency v H Rouw Co 127 S W 2d 251 197 Ark 1142

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27 N Y—American Mach & Foundry Co v Santini Bros Inc 283 N Y S 2d 574 54 Misc 2d 886

Vt—C.J.S. cited in Senna v Gero, 109 A 2d 344 346, 118 Vt 331

29 S C—White v Southern Ry Co 38 S E 2d 111 208 S C 319, 165 A L R 988

32 D C—Jacobson v Pennsylvania R Co Mun App 54 A 2d 575

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34 Cal—Thayer v Pacific Elec Ry Co 11 Cal Rptr 560, 360 P 2d 56, 55 C 2d 430, cert den 82 S Ct 44 368 US 826, 7 L Ed 2d 29

43 US—Bronstein v Baltimore & O R Co, D C Pa 29 F Supp 837—Southwestern Sugar & Molasses Co v River Terminals Corp La, 79 S Ct 1210, 360 US 411, 3 L Ed 2d 1334—US v Mississippi Val Barge Line Co C A Mo, 285 F 2d 381

Fla Pennsylvania R Co v Greco, 25 So 2d 809, 157 Fla 337

Ill—C.J.S. cited in Oakland Meat Co v Railway Exp Agency, Inc, 196 N E 2d 361, 363 46 Ill App 2d 176, 4 A L R 3d 987

Iowa—Vander Beek v Chicago & N W Ry Co 286 N W 452, 226 Iowa 1363

Miss—Southern Exp Co v Name, 181 So 515 182 Miss 447

Tenn—Wayne Knitting Mills v Delta Motor Lines, 372 S W 2d 419, 52 Tenn App 164

44 Mo—Walton v A B C Fireproof Warehouse Co, 124 S W 2d 584, 233 Mo App 693—Haake v Missouri Pac R Co App, 443 S W 2d 206

S C—McCready v Atlantic Coast Line R Co, 48 S E 2d 193, 212 S C 449 cert den 69 S Ct 53 335 US 827, 93 L Ed 381

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45 US—Western Millers Mut Fire Ins Co v Thompson, D C Mo, 95 F Supp 993—Hamilton Mfg Co v Chicago & N W Ry Co, C A Wis 277 F 2d 652—Larry's Sandwiches, Inc v Pacific Elec Ry Co, C A Cal 318 F 2d 690

Mich—Van Lierop v Chesapeake & O Ry Co 57 N W 2d 431 335 Mich 702, cert den 74 S Ct 40, 346 US 834, 98 L Ed 357

Mo—Walton v A B C Fireproof Warehouse Co supra, n 44—Emerson Elec Mfg Co v Terminal R Ass'n of St Louis, App 262 S W 2d 323

N C—Precythe v Atlantic Coast Line R Co 52 S E 2d 360, 230 N C 195

Ohio—Elder & Johnston Co v Commercial Motor Freight, Inc of Ind 115 N E 2d 179 94 Ohio App 358

47 US—Johnson Motor Transport v U S Ct Cl 149 F Supp 175 137 Ct Cl 892—Inland Waterways Shippers Ass'n, Inc v Mississippi Val Barge Line Co D C Mo 194 F Supp 818, app dism C A 289 F 2d 374 cert den 82 S Ct 123 368 US 876, 7 L Ed 2d 77—Gordons Transports, Inc v U S 154 Ct Cl 1

Ariz—Arizona Container Corp v Consolidated Freightways, 522 P 2d 772, 22 Ariz App 11

Ark—Railway Express Agency v H Rouw Co 128 S W 2d 989 198 Ark 423—Kansas City Southern Ry Co v Shull, 136 S W 2d 1040, 199 Ark 932—Missouri Pac R Co v H Rouw Co 155 S W 2d 693 202 Ark 1139—Railway Exp Agency v Shull, 275 S W 2d 882, 224 Ark 476

Colo—Watson Bros Transp Co v Dominico, 194 P 2d 323 118 Colo 133

D C—Chesapeake & Ohio Ry Co v Gilbert, Mun App, 83 A 2d 327 329

Fla—Martin v E A McCabe & Co App 113 So 2d 879—E M G Leather Arts, Inc v Central Truck Lines Inc App, 165 So 2d 203

Ill—Palmer v Gillarde, 38 N E 2d 352, 312 Ill App 230

La—Denton v Ramsdell App 31 So 2d 873

Minn—Minneapolis Fire & Marine Ins Co v Baltimore & O R Co, 53 N W 2d 828, 237 Minn 111 33 A L R 2d 860

Mo—Schneider v Campbell 66 Exp Inc App 324 S W 2d 363

N H—Alcrly v Railway Exp Agency 77 A 2d 856, 96 N H 396

N Y—Stahl Bros Corporation v Long Island R Co 48 N Y S 2d 845, 183 Misc 486

Ohio—C.J.S. cited in Sugar v National Transit Corp 81 N E 2d 609 611 82 Ohio App 439—Employers' Fire Ins Co v United Parcel Service of Cincinnati, 99 N E 2d 794 89 Ohio App 447—Thomas Foods, Inc v Pennsylvania R Co., 168 N E 2d 612, 112 Ohio App 76

Pa—Delp v Rosenthal, 61 Lack Jur 97

Tex—Thompson v San Pat Vegetable Co Civ App, 207 S W 2d 195, err ref no rev err—Thompson v Bob Tankersley Produce Co Civ App, 289 S W 2d 840 err ref no rev err—Griffin v Gulf C & S F Ry Co Civ App 298 S W 2d 659—Texas-Arizona Motor Freight, Inc v Bennett, Civ App 324 S W 2d 32—Panhandle & S F Ry Co v Trautmann Bros Civ App 341 S W 2d 504 err ref no rev err

Frozen foods held perishable goods for purpose of burden of proof

U S—Larry's Sandwiches, Inc v Pacific Elec Ry Co C A Cal 318 F 2d 690

Presumption held rebuttable under federal law

Ga—Seaboard Air Line R Co v Henry Channa Corp, 66 S E 2d 113, 84 Ga App 442

Limitation of rule

Mich—Murray v New York Cent R Co, 50 N W 2d 748, 332 Mich 159

Presumption rebuttable

Mo—Resolute Ins Co v Morgan Drive-Away Inc App, 403 S W 2d 913

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48 Miss—Hornsby v Logaras, 49 So 2d 837

Presumption rebuttable

Mo—Resolute Ins Co v Morgan Drive-Away, Inc App 403 S W 2d 913

49 US—Cutten v Allied Van Lines, Inc, D C Cal, 349 F Supp 907, affd C A 514 F 2d 1196—Cutten v Allied Van Lines, Inc C A Cal, 514 F 2d 1196

Ala—West Bros Inc v Resource Management Service, Inc 214 So 2d 431 283 Ala 78

Ariz—C.J.S. cited in Arizona Container Corp v Consolidated Freightways, 522 P 2d 772, 775 22 Ariz App 11

Ark—Kansas City Southern Ry Co v Shull, 136 S W 2d 1040 199 Ark 932—C.J.S. cited in Red Line Transfer & Storage Co v Cash & Sons, L-P Gas Co 472 S W 2d 705 708 251 Ark 407

Colo—Watson Bros Transp Co v Dominico, supra, n 47—Wheelock Bros v Lindner Packing & Provision Co 273 P 2d 730 130 Colo 122

Conn—Wells Laundry & Linen Supply Co v Acme Fast Freight, 85 A 2d 907, 138 Conn 458

Ill—Palmer v Gillarde, supra, n 47—Lash & Mages, Inc v Atchison, T & S F R Co, 111 N E 2d 362, 349 Ill App 540—Oakland Meat Co v Railway Exp Agency, Inc 196 N E 2d 361, 46 Ill App 2d 176, 4 A L R 3d 987

La—Close v Missouri Pac R Co App 191 So 596—Mista v Railway Exp Agency App 60 So 2d 101

Mich—Tann v Allied Van Lines, Inc 146 N W 2d 682, 5 Mich App 309

N C—Fuller v Virginia & C S R Co 200 S E 403 214 N C 648

Ohio—Sugar v National Transit Corp 81 N E 2d 609, 82 Ohio App 439—Employers Fire Ins Co v United Parcel Service of Cincinnati, 99 N E 2d 794 89 Ohio App 447—Thomas Foods, Inc v Pennsylvania R Co 168 N E 2d 612, 112 Ohio App 76

Pa—Evergreen Broom Mfg Co v Pennsylvania R Co, 105 A 2d 88 378 Pa 60

S C—McCready v Atlantic Coast Line R Co supra, n 44

Tenn—Tennessee Packers, Inc v Tennessee Cent Ry Co 319 S W 2d 502, 45 Tenn App 57

Tex—Thompson v Bob Tankersley Produce Co, Civ App 289 S W 2d 840, err ref no rev err

Wash—Lavagetto v Railway Exp Agency 209 P 2d 371, 34 Wash 2d 578

Wis—L L Richards Machinery Co v McNamara Motor Exp Inc, 97 N W 2d 396, 7 Wis.2d 613

Preponderance of proof necessary to rebut presumption

Fla—Martin v E A McCabe & Co App, 113 So 2d 879

Proof insufficient to rebut presumption

U S—Gulf, M & O R Co v U S C A La, 391 F 2d 545

Fla—Martin v E A McCabe & Co, App, 113 So 2d 879

La—Kaplan Race Mill v Texas & N O R Co, App 26 So 2d 42

Mo—Resolute Ins Co v Morgan Drive-Away Inc App, 403 S W 2d 913

Tex—Missouri Pac R. Co v Flemister & Stahl, Civ App, 360 S W 2d 839 affd Sup, 368 S W 2d 99, affd 84 S Ct 1142, 377 U S 134 12 L Ed 2d 194, reh den 84 S Ct 1880, 377 U S 984, 12 L Ed 2d 752

Wash—Hogland v Klein, 298 P 2d 1099 49 Wash 2d 216

Extent of burden

Tex—Lee Roy Crawford Produce Co v Thompson, supra—Thompson v Tankersley Civ App 238 S W 2d 263

Prima facie showing of care

Ark—Railway Exp Agency v Shull, supra, n 47

53 U S—Atlantic Coast Line R Co v Georgia Packing Co, supra, n 49

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Mich—C O Porter Machinery Co v Colt 44 N W 2d 845, 329 Mich 8

57. Doctrine of res ipsa loquitur

Wash—Hogland v Klein, 298 P 2d 1099, 49 Wash 2d 216

Applicability of doctrine as depending on jury's finding as to cause

Cal—Exploration Drilling Co v Heavy Transport, Inc 33 Cal Rptr 747 220 C A 2d 397

Where defect in goods shown as cause of damage

Alaska—S Israel, Inc v Robertson, 394 P 2d 395

59 La—Kaplan Rice Mill v Texas & N O R Co supra, n 49

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A trucker is presumed to know bridge clearance so as to be liable for damages to his cargo from lack of clearance.[61 5]

63 5 Pa—Phoenix Ins Co v McDermott Bros Co 208 A 2d 245 416 Pa 569

66 N H—Alkeny v Railway Exp Agency supra, n 47

N Y—Kodish v Pennsylvania R Co 37 N Y S 2d 1014

70 U S—Little Rock Packing Co v Chicago, B & Q R Co D C Mo 116 F Supp 213—Southwestern Sugar & Molasses Co v River Terminals Corp La 79 S Ct 1210 360 U S 411 3 L Ed 2d 1334

Mass—Nicholas Zeo Inc v Railway Express Agency 58 N E 2d 127 317 Mass 374

Mo—M F A Farmers Exchange of Carthage, Mo v Kurn, App 205 S W 2d 878

N Y—Kodish v Pennsylvania R Co supra, n 66

Pa—Villari v James, 38 A 2d 379 155 Pa Super 155

Tex—Missouri-Kansas-Texas R Co of Tex v Roegelein Provision Co Civ App 260 S W 2d 605 err ref no rev err

Wis—L L Richards Machinery Co v McNamara Motor Exp Inc 97 N W 2d 396, 7 Wis 2d 613

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75 Fla—Atlantic Coast Line R Co v Cowart, 190 So 546, 140 Fla 596

Iowa—Vander Beek v Chicago & N W Ry Co, 278 N W 201, supers, 286 N W 452, 226 Iowa 1363

Mo—Vaughn v Wabash R Co 188 S W 2d 352, 239 Mo App 340

Nev—Garibaldi Bros Trucking Co v Waldren, 321 P 2d 248, 74 Nev 42

N C—Fuller v Virginia & C S R Co supra, n 49—Bennett v Atlantic Coast Line R Co 59 S E 2d 598, 232 N C 144

Ohio—C J S. cited in Grosjean v Pennsylvania R Co, 67 N E 2d 623, 626, 146 Ohio St 643—Franck v Railway Exp Agency, 112 N E 2d 381, 159 Ohio St 343

Pa—Villari v James, supra, n 70

Tex—Gulf, C & S F Ry Co v Sklar, Civ App 134 S W 2d 771 err dism—C J S. cited in Texas & N O R Co v Lide, Civ App 144 S W 2d 685, 686, err dism

Wis—Landaen v Railway Exp Agency, 47 N W 2d 727, 259 Wis 178—Rudy v Chicago, M, St P & P Ry Co 92 N W 2d 367, 5 Wis 2d 37

The C[illegible] t etc—Wilson v Pennsylvania R Co, 21 N E 2d 865 135 Ohio St 560

After the carrier has met its burden, the burden of proceeding with the evidence shifts to the shipper—Panhandle & S F Ry Co v Wilson, supra, n 49

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76 Ala—Anderson v Railway Exp Agency 39 So 2d 692, 252 Ala 128

Ga—Atlanta, B & C R Co v Patterson, 43 S E 2d 177 75 Ga App 189

79 Ga—Atlanta, B & C R Co v Patterson, supra, n 76

80 Colo—McKinley v Denver & R G W R Co 201 P 2d 905 119 Colo 203

82 Miss—A. Polk & Son v New Orleans & N E R Co 185 So 554

85 Tex—Panhandle & S F Ry Co v Wilson, supra, n 49

Where the carrier proves by uncontradicted evidence that it was not guilty of negligence, it will be presumed that injuries sustained during shipment occurred through the inherent vice, the nature, or the propensities of the animals [85 1]

85 1 Tex—Panhandle & S F Ry Co v Wilson, supra, n 49

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86 Mo—Colley v Cox, App 266 S W 2d 778

However, since the publication of Corpus Juris Secundum it has been held that in an action ex contractu against carrier for value of goods shipped and lost shipper need not show that human agency caused the loss—Vander Beek v Chicago & N W Ry Co 286 N W 452, 226 Iowa 1363

89 Mo—Colley v Cox, supra, n 86

91 Mo—Colley v Cox, supra, n 86

93 Mo—Colley v Cox, supra, n 86

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94 U S—Lux Art Van Service, Inc v Pollard, C A Ariz 344 F 2d 883 cert den 86 S Ct 85 382 U S 837 15 L Ed 2d 80

Ohio—C J S cited in Grosjean v Pennsylvania R Co 67 N E 2d 623 627, 146 Ohio St 643

96 U S—Lux Art Van Service Inc C A Ariz 344 F 2d 883 cert den 86 S Ct 85 382 U S 837 15 L Ed 2d 80

Wis—C J S cited in Rudy v Chicago, M St P & P Ry Co 92 N W 2d 367, 370, 5 Wis 2d 37

3 Ga—Atlanta, B & C R Co v Patterson, 43 S E 2d 177 75 Ga App 189

Ohio—C J S cited in Wilson v Pennsylvania R Co 21 N E 2d 865, 866, 135 Ohio St 560—C J S black letter [illegible]y quoted in Franck v Railway Exp Agency 112 N E 2d 381 384 159 Ohio St 343—Trees v Pennsylvania R Co, 109 N E 2d 29 91 Ohio App 497

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5 U S—Pennsylvania R Co v Greene, D C Ala 173 F Supp 657

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27 U S Tinker-Smith Co v Chicago, R I & P R Co, C A Minn 435 F 2d 1396

La—Yuspeh v Acme Fast Freight, 63 So 2d 743, 222 La 747—Normann v Burnham's Van Service App, 73 So 2d 640—Frischhertz Elec Co v Strickland Transp Co 264 So 2d 646, 262 La 791

Minn—Minneapolis Fire & Marine Ins Co v Baltimore & O R Co 53 N W 2d 828, 237 Minn 111, 33 A L R 2d 860

N J—C J S. cited in Silver Lining, Inc v Shem, 117 A 2d 182, 189, 37 N J Super 206

R I—Glass-Tite Industries, Inc v Spector Freight Systems, Inc 230 A 2d 254, 102 R I 301

Tex—Missouri Pac R Co v John Jancik Produce, Civ App 396 S W 2d 427

Proof of valueless property unnecessary

Wash—Western Steel Bldgs, Inc v Universal Carloading & Distributing Co, 413 P 2d 954 68 Wash 2d 522

No award

Fla—United Steel & Strip Corp v Monex Corp, App, 310 So 2d 339

28 Tex—Texas-Arizona Motor Freight, Inc v Bennett, Civ App, 324 S W 2d 32

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29 La—Piazza v Louisiana & A Ry Co, App, 46 So 2d 670

30 U S—Central of Georgia R Co v U S 128 Ct Cl 278

N Y—Hudson Handkerchief Mfg Corp v Porto Rican Exp Co 73 N Y S 2d 600 affd 73 N Y S 2d 82, revd on oth grds 85 N Y S 2d 294 274 App Div 509 app den 86 N Y S 2d 462 274 App Div 1055

Absence of market value

Tex—Texas & P Ry Co v Bussing, Civ App, 138 S W 2d 416—Dale Truck Line, Inc v R & M Well Servicing & Drilling Co Civ App, 325 S W 2d 848 err ref no rev err

Market value

(3) Burden on defendant carrier to show rule other than market value applicable

U S—Morgan v Norfolk & Western Ry Co C A Ill, 473 F 2d 1278

39 U S—General Elec Co v Pennsylvania R Co D C Pa 160 F Supp 186

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50 Vt—C J S cited in Benoit v Central Vt Ry 71 A 2d 321 323 116 Vt 266, 33 A L R 2d 139

§ 255. Admissibility of Evidence

Library References

Carriers ⇐133, 164, 228(3)

52 U S—Keystone Motor Freight Lines v Brannon Signago Cigar Co, C C A Tex 115 F 2d 776

Ala—White v Henry, 49 So 2d 779, 255 Ala 7

Cal—Gonzalez v Southern Pac Co 321 P 2d 865, 157 C A 2d 733

Ga—Atlanta, B & C R Co v Patterson supra, n 3

Mass—Swanton v Home Coal Co 235 N E 2d 803, 354 Mass 758

N C—Brown v Bowers Const Co 73 S E 2d 147, 236 N C 462

Tex—Texas & N O R Co v Sparks, Civ App 290 S W 2d 936—Boyd v McCleskey Civ App, 515 S W 2d 25

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53 Ga—Southern Ry Co v Black, 196 S E 291 57 Ga App 592—Brown-Rogers-Dixson Co v Southern Ry Co 53 S E 2d 702, 79 Ga App 449

Ky—Wabash Elevator Co v Illinois Cent R Co, 130 S W 2d 76, 279 Ky 164

54 N C—Byrd v Southern Ry Co 142 S E 589, 195 N C 873

62 D C—Chesapeake & O Ry Co v Gilbert, Mun App 83 A 2d 327

La—Sinagra v Illinois Cent R Co 56 So 2d 233, 220 La 205

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69 Ga—Powell v First Nat Bank & Trust Co, 199 S E 668, 58 Ga App 648

74 U S—Tuschman v Pennsylvania R Co C A Pa 230 F 2d 787

N Y—Kingsley Sportswear, Inc v Standard Hauling Co Inc, 374 N Y S 2d 19, 49 A D 2d 854

Tex—East Tex Motor Freight Lines v W H Hutchinson & Son, Civ App, 241 S W 2d 759 err dism

Inspection certificate

U S—S Strock & Co v Southern Pac Co D C Mass, 326 F Supp 695

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83 Mo—Colley v Cox, App, 266 S W 2d 778

87 U S—Bronstein v Baltimore & O R Co D C Pa 29 F Supp 837

Tex—Jancik v Thompson, Civ App 241 S W 2d 639, err ref no rev err

Custom

U S—Fulton v Chicago, Rock Island & P R Co, C A Mo 481 F 2d 326, cert den 94 S Ct 540, two cases, 414 U S 1040, 38 L Ed 2d 330.

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90 US—Lever Bros Co v Baltimore & O R Co C C A Md 164 F 2d 738

94 Mo—Dugdale Packing Co v Lowden, App 160 S W 2d 832

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30 La—Reuther v Seafood Co v Railway Exp Agency App 71 So 2d 419

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40 Ga—Brown-Rogers-Dixson Co v Southern Ry Co 53 S E 2d 702, 79 Ga App 449

41 D C—Posner Inc v Railway Exp Agency Mun App 117 A 2d 118

42 US—Modern Tool Corp v Pennsylvania R Co D C N J 100 F Supp 595

49 Mo—Devine v Rook, App 314 S W 2d 932

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54. Contractual limitation by shipper's agent

N Y—Weckler v Teller 172 N Y S 2d 596, 11 Misc 2d 874

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73 Mont—Vandenbergh v Allied Van Lines, Inc 351 P 2d 537 137 Mont 327 cert den 81 S Ct 69 364 U S 830, 5 L Ed 2d 57

Okl—Hefner v Owens, 280 P 2d 1025

Moving building to new location

Minn—Prodger v Zell, 113 N W 2d 168, 201 Minn 508

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85 US—Hamilton v Stillwell Van & Storage Co C A Pa 343 F 2d 453—Morgan v Norfolk & Western Ry Co, C A Ill 473 F 2d 1278

Ga—Kinsey v Bowman, Transp Inc 121 S E 2d 808, 104 Ga App 347

Tex—M-K-T Ry Co v Jaffee Cotton Products Mfg Co Civ App 193 S W 2d 986, err dism

86. Evidence inadmissible

(2) Other cases

Okl—St Louis-San Francisco Ry Co v Kittrell, 253 P 2d 1076, 208 Okl 147

89 Tex—C.J.S. cited in Missouri Pac R Co v John Janeik Produce, Civ App 396 S W 2d 427 428

93 Mo—Devine v Rook, App 314 S W 2d 932

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97 Tex—Missouri Pac R Co v John Janeik Produce, Civ App 396 S W 2d 427, 428

4 Iowa—C.J.S. cited in Conditioned Air Corp v Rock Island Motor Transit Co 114 N W 2d 304 308, 253 Iowa 961, 3 A L R 3d 679, cert den 83 S Ct 46, 371 U S 825, 9 L Ed 2d 64

Original account of sales at destination etc—Texas Mexican Ry Co v Slaughter Tex Civ App, 122 S W 2d 1101

5 Ky—Baltimore & O R Co v Carner, 426 S W 2d 938

11 D C—Smith's Transfer & Storage Co v Burgoyne, Mun App 34 A 2d 705

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22 Ga—Spainhour v Noland, 103 S E 2d 154 97 Ga App 362

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35 US—M J Tashjian & Co v Railway Express Agency, D C N Y 31 F Supp 182—Lewis Mach Co v Aztec Lines, C A Ill, 172 F 2d 746—Rhoades, Inc v United Air Lines, Inc C A Pa 340 F 2d 481

Cal—Brignoli v Seaboard Transp Co 178 P 2d 445 29 Cal 2d 782

Kan—Mid-Continent Grain Co v St Louis-San Francisco Ry Co 203 P 2d 141 166 Kan 641

Or—Clifford W Brown v Boneskeele, 344 P 2d 928 218 Or 312

Pa—Alwine v Pennsylvania R Co 48 Dauph Co 54—General Elec Co v Manarelli, 19 D & C 2d 519 60 Lack Jur 97

Tex—Panhandle & S F Ry Co v Montgomery Civ App 140 S W 2d 241—Boring v Chicago R I & P R Co Civ App 208 S W 2d 416

Wash—Mid-County Publishers v Le May 252 P 2d 268, 41 Wash 2d 852

Evidence sufficient

(1) US—Atchison, T & S F Ry Co v Jarboe Livestock Commission Co C C A Okl 159 F 2d 527—Smith v Railway Exp Agency D C Tenn 110 F Supp 911 Affd C A 212 F 2d 47

Ariz—Western Coach Corp v Vaughn, 452 P 2d 117 9 Ariz App 336

Ark—Missouri Pac R Co v J W Myers Commission Co 120 S W 2d 693 196 Ark 976—Railway Exp Agency v Shull 275 S W 2d 882, 224 Ark 476

Cal—Schuette v Larson 112 P 2d 275 44 Cal App 2d 296

Fla—Florida Inter-Island Shipping Corp v Willson Intern Limited, App 213 So 2d 593—Loveland v Lazzara, App 219 So 2d 74

Ga—Atlanta, B & C R Co v Patterson, 43 S E 2d 177 75 Ga App 189

Iowa—Cedar Rapids Hide & Fur Co v Railway Exp Agency 46 N W 2d 545 242 Iowa 412—Conditioned Air Corp v Rock Island Motor Transit Co 114 N W 2d 304 253 Iowa 961 3 A L R 3d 679 cert den 83 S Ct 46 371 U S 825 9 L Ed 2d 64

Kan—Rickel v Chicago, B & Q R Co 196 P 2d 243 165 Kan 503—Jukes v North Am Van Lines, Inc 309 P 2d 692, 181 Kan 12

Ky—Joseph Denunzio Fruit Co v Louisville & N R Co 123 S W 2d 813 276 Ky 168

Mich—Tann v Allied Van Lines, Inc 146 N W 2d 682, 5 Mich App 309

Minn—Minneapolis Fire & Marine Ins Co v Baltimore & O R Co 53 N W 2d 828 237 Minn 111 33 A L R 2d 860

Mo—Helm v Ross & Co, App 194 S W 2d 713—Textile Distributors, Inc v Roadway Exp Inc App 397 S W 2d 760

N M—Fredenburgh v Allied Van Lines, Inc 446 P 2d 868, 79 N M 593

Okl—Roadway Exp Inc v Solow, 326 P 2d 1048

Tex—Texas & Pac Ry Co v Emperadora De Ciudad Juarez, S A, Civ App 342 S W 2d 195 err ref no rev err—Roadway Exp, Inc v Naturalite, Inc, Civ App 435 S W 2d 555

(2) U S—Illinois Produce Intern, Inc v Reliance Ins Co, D C Ill 388 F Supp 29

La—American Sugar Refining Co v W L Richeson & Sons, App 45 So 2d 446

(7) Iowa Brown Mfg Co v Crouse, 102 N W 2d 154 251 Iowa 594

(8) Other evidence

U S—Larry's Sandwiches, Inc v Pacific Elec Ry Co C A Cal, 318 F 2d 690—Hamilton v Dean Van Lines, Inc D C Pa, 228 F Supp 671, mod on oth grds, C A 343 F 2d 453

Fla—Akers Motor Lines, Inc v Peaslee Metal Products, Inc, App, 218 So 2d 498—Winter Garden Citrus Products Co-op v Tavares & G R Co App 248 So 2d 200

Mass—Lapp Insulator Co v Boston & M R R, 112 N E 2d 359 330 Mass 205

Mich—Baxter Realty Co v Manning 142 N W 2d 874 3 Mich App 409

Okl—Roadway Exp v Gordon, 277 P 2d 146

Tenn—Southern Ry Co v Varnell, 232 S W 2d 406, 33 Tenn App 550

Tex—Texan Meat Co v Inness, 308 S W 2d 956—Texas & P Ry Co v Emperadora De Ciudad Juarez, S A Civ App 309 S W 2d 926, err ref no rev err—Herrin Transp Co v Southwestern Elec Co, Civ App 310 S W 2d 543

Evidence insufficient

(1) U S—Continental Distributing Co v Reading Co C C A Pa 168 F 2d 967

Ark—Railway Express Agency v H Rouw Co 127 S W 2d 251 197 Ark 1142—Missouri Pac R Co v H Rouw Co 155 S W 2d 693 202 Ark 1139

Ill—Actino Laboratories v Shippers Dispatch, 17 N E 2d 998 297 Ill App 646

S C—White v Southern Ry Co 38 S E 2d 111, 208 S C 319 165 A L R 988

(6) To show other matters

U S—Hunter Packing Co v Baltimore & O R Co C A Ill 210 F 2d 448

Colo—Wheelock Bros v Lindner Packing & Provision Co 273 P 2d 730 130 Colo 122

La—Piazza v Louisiana & A Ry Co App 46 So 2d 670

N M—Fredenburgh v Allied Van Lines, Inc 446 P 2d 868, 79 N M 593

Pa—Di Giacomo v Pennsylvania R Co 87 Pa Dist & Co 182

Tex—Texas Mexican Ry Co v Slaughter, Civ App 241 S W 2d 749—East Tex Motor Freight Lines v W H Hutchinson & Son, Civ App 241 S W 2d 759 err dism

(7) Other evidence

N C—Leary v Aero Mayflower Transit Co Inc 207 S E 2d 781 22 N C App 702

Tex—Texas & P Ry Co v Emperadora De Ciudad Juarez, S A Civ App, 309 S W 2d 926, err ref no rev err

Preponderance of evidence etc.

U S—Modern Tool Corp v Pennsylvania R Co D C N J 100 F Supp 595

(2) Evidence held to preponderate in support of claim

La—Bowlin v Herrin Transp Co App, 187 So 2d 167

Showing of facts by first-hand testimony in addition to shipper's records

N Y—Riegel Paper Corp v Branch Motor Exp Co 207 N Y S 2d 697

Prima facie case

U S—S Strock & Co v Southern Pac Co D C Mass 326 F Supp 695

Ark—Red Line Transfer & Storage Co v Cash & Sons L-P Gas Co 472 S W 2d 705 251 Ark 407

Cal—Bauer v Jackson, 93 Cal Rptr 43 15 C A 3d 358

Nev—Pacific Intermountain Exp Co v Leonard E Conrad, Inc 502 P 2d 106, 88 Nev 569

N J—Napco Chemical Division v Blaw-Knox Co 281 A 2d 793 59 N J 274

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36. Evidence sufficient

U S—Continental Distributing Co v Reading Co, supra, n 35

Ga—Atlanta, B & C R Co v Patterson, supra, n 35

Ill—Ætna Ins Co v Illinois Cent R Co, 283 Ill App 527 revd on oth grds 6 N E 2d 189 cert dism 56 S Ct 269 302 U S 652, 82 L Ed 505

Mo—Robinson v Railway Exp Agency, Inc App, 329 S W 2d 242

N C—Merchant v Lassiter, 30 S E 2d 217 224 N C 343

Evidence insufficient

(1) Tex—East Tex Motor Freight Lines v W H Hutchinson & Son, Civ App 241 S W 2d 759, err dism

Existence of special contract

(2) Other instances

Va—Norfolk Terminal Corp v U S Lines, Inc, 205 S E 2d 400, 215 Va 80

Degree of proof

(2) Other cases

N Y—Jersey Central Power & Light Co v Westinghouse Elec Corp 328 N Y S 2d 789 38 A D 2d 283

Tex—East Tex Motor Freight Lines v W H Hutcheson & Son, supra

37. Evidence sufficient

US—Moorhead v Stearns-Roger Mfg Co, C A 5 M 320 F 2d 26

La—Glazer Steel Corp v Strickland Transp Co App 261 So 2d 117

N Y—Olive Kent Park v Manhasset Transp Co 7 N Y S 2d 15, 189 Misc 364, affd 30 N Y S 2d 729, 274 App Div 765

Evidence held insufficient

Alaska—Schenderlin v Robertson, 394 P 2d 395

Miss—Erwin Mills Inc v Williams, 118 So 2d 339, 238 Miss 335

Tex—Beck v Lasater Civ App 286 S W 2d 957, ref no rev err

38. Evidence sufficient

(1) Powell v Jerome, 36 S E 2d 371, 73 Ga App 257

Neb—Barnhart v Henderson, 24 N W 2d 854, 147 Neb 689, 982

(2) W T Cowan Inc v Wagshal, D C Mun App 47 A 2d 94

39 Mass—Rice & Lockwood Lumber Co v Boston & M R R, 31 N E 2d 219, 308 Mass 101

N J—Joseph Toker Co v Lehigh Valley R Co, 97 A 2d 598, 12 N J 608, 39 A L R 2d 318

Vt—Ledoux v Railway Express Agency, 35 A 2d 665, 113 Vt 480

Evidence sufficient

U S—Illinois Cent R R v Moore, C A Tenn, 228 F 2d 873

Pa—Girard Trust Corn Exchange Bank v Brinks, Inc, 220 A 2d 827, 422 Pa 48

Tex—Railway Exp Agency v Hueber, Civ App, 191 S W 2d 710—Southern Pac Co v Builders Hardware, Inc, Civ App, 382 S W 2d 149, ref no rev err

Evidence insufficient

Colo—United Van Lines, Inc v Lagae, 427 P 2d 872, 162 Colo 555

Prima facie evidence

N J—Silver Lining, Inc v Shein, 117 A 2d 182, 37 N J Super 206

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40. Evidence sufficient to show amount or weight

Kan—Rickel v Chicago, B & Q R Co, supra, n 35

N Y—East Coast Moving & Storage, Inc v Flappin, 355 N Y S 2d 525, 78 Misc 2d 140

Evidence insufficient to show value at time of delivery

Pa—Di Giacomo v Pennsylvania R Co, supra, n 35

41 U S—World Wide Meats, Inc v Chicago & N W Transp Co, D C Iowa, 383 F Supp 807

Ark—Red Line Transfer & Storage Co v Cash & Sons L-P Gas Co, 472 S W 2d 705, 251 Ark 407

Tex—Loop Cold Storage Co v South Texas Packers, Inc, Civ App, 483 S W 2d 914, revd in part on oth grds, Sup, 491 S W 2d 106

Evidence sufficient

(1) U S—Condakes v Southern Pac Co, D C Mass, 303 F Supp 1158—Empire Aluminum Corp v S S Korendijk, D C Ga, 391 F Supp 402

Cal—Sch[illegible] v Robinson, 177 P 2d 788, 78 Cal App 2d 328

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Pa—Arabian Am Oil Co v Kirby & Kirby, 90 A 2d 410, 171 Pa Super 23

R I—Glass-Tite Industries, Inc v Spector Freight Systems, Inc, 230 A 2d 254, 102 R I 301

Tex—Texas & Pac Ry Co v Empacadora De Ciudad Juarez, S A, Civ App, 342 S W 2d 195, err ref no rev err—Port Terminal R Ass'n v Rohm & Haas Co, Civ App, 371 S W 2d 403

Vt—Ledoux v Railway Express Agency, supra, n 39

Wis—L L Richards Machinery Co v McNamara Motor Exp, Inc, 97 N W 2d 396, 7 Wis 2d 613—Whitehall Packing Co, Inc v Safeway Truck Lines, Inc, 228 N W 2d 365, 68 Wis 2d 369

(3) As to other matters—Delphi Frosted Foods Corp v Illinois Cent R Co, C A Ky, 188 F 2d 343, cert den 72 S Ct 53, 342 U S 833, 86 L Ed 630—Rhoades, Inc v United Air Lines, Inc, C A Pa, 340 F 2d 481

D C—Chesapeake & O Ry Co v Gilbert, D C Mun App, 83 A 2d 327

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Tex—Morris v Brown, Civ App, 337 S W 2d 759—Roadway Exp Inc v Naturalite, Inc, Civ App, 435 S W 2d 555—National Carloading Corp v Kitchen Designs, Inc, Civ App, 471 S W 2d 90

Evidence insufficient to show property delivered to carrier in good condition

U S—Dublin Co v Ryder Truck Lines, Inc, C A Fla, 417 F 2d 777

D C—Posins Inc v Railway Exp Agency, Mun App, 117 A 2d 118

Ga—Railway Exp Agency v L E Parker Fish Co, 75 S E 2d 180, 87 Ga App 779

La—Robertson v Louisiana Fruit Growers Ass'n, App, 80 So 2d 190—Ideal Bldg Materials, Inc v Herrin Transp Co, App, 159 So 2d 420

N J—Herman v Railway Exp Agency, 85 A 2d 284, 17 N J Super 10

N Y—Pacun v Railway Exp Agency, 146 N Y S 2d 543, 3 Misc 2d 598—Uneeda Home Appliances, Inc v Long Island R Co, 268 N Y S 2d 731, 49 Misc 2d 953, app den 277 N Y S 2d 484, 27 A D 2d 743

Pa—Di Giacomo v Pennsylvania R Co, supra, n 35—Delp v Rosenthal, 61 Lack Jur 97

Tenn—Wayne Knitting Mills v Delta Motor Lines, 372 S W 2d 419, 52 Tenn App 164

Tex—Missouri Pac R Co v Elmore & Stahl, Civ App, 360 S W 2d 839, affd Sup, 368 S W 2d 99, affd 84 S Ct 1142, 377 U S 134, 12 L Ed 2d 194, reh den 84 S Ct 1880, 377 U S 984, 12 L Ed 2d 752

Prima facie case

D C—Florence Banana Corp v Pennsylvania R R, App, 195 A 2d 399

N Y—International Business Machines Corp v Root's Exp, Inc, 326 N Y S 2d 237, 68 Misc 2d 347

Tex—Delta Western Transp Corp v Plantation Foods, Inc, Civ App, 455 S W 2d 957

Prima facie evidence

N J—Silver Lining, Inc v Shein, 117 A 2d 182, 37 N J Super 206

N Y—International Business Machines Corp v Root's Exp, Inc, 326 N Y S 2d 237, 68 Misc 2d 347

Circumstantial evidence

Tex—Red Arrow Freight Lines, Inc v Howe, Civ App, 480 S W 2d 281, err ref no rev err

42 U S—Blue Bird Food Products Co v Baltimore & O R Co, C A Pa, 492 F 2d 1329

La—Neuss, Hesslein & Co v Louisville & N R Co, 59 So 2d 195, 221 La 296—Rabon v Red Ball Motor Freight, Inc, App, 292 So 2d 332

Tex—Henwood v Polis & Hagan, Civ App, 231 S W 2d 720—Texan Meat Co v Inness, 308 S W 2d 956

Evidence sufficient

(1) U S—Sarno v South'n Pac Ro, D C Mass, 277 F Supp 628

Ark—Missouri Pac R Co v Haverty Furniture Co, 491 S W 2d 379, 254 Ark 12.

Ill—Oakland Meat Co v Railway Exp Agency Inc, 196 N E 2d 361, 46 Ill App 2d 176, 4 A L R 3d 987

Iowa—Crouse v Cadwell Transfer & Storage Co of Mason City, 285 N W 623, 226 Iowa 1083

La—Normann v Burnham's Van Service, App, 7[illegible] So 2d 640

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Mo—Textile Distributors, Inc v Roadway Exp, Inc, App, 397 S W 2d 760

Okl—Roadway Exp, Inc v Solow, 326 P 2d 1016

Tex—Brown Exp v Harris, Civ App, 202 S W 2d 678

Wash—Mid-County Publishers v Le May, 252 P 2d 268, 41 Wash 2d 852

Wis—L L Richards Machinery Co v McNamara Motor Exp, Inc, 97 N W 2d 396, 7 Wis 2d 613

Evidence insufficient, etc.

Ga—A A A Highway Express v Bone & Hendrix, 2[illegible] S E 2d 658, 69 Ga App 763—Rome Elec v Railway Exp Agency, 59 S E 2d 19, 81 Ga App 368

Mo—Turner v North Am Van Lines, App, 2[illegible] S W 2d 384

R I—Glass-Tite Industries, Inc v Spector Freight Systems, Inc, 230 A 2d 254, 102 R I 301

Tex—Railway Exp Agency v Ferguson, Civ App, 242 S W 2d 462, err dism

Prima facie case

Mass—Laboratory for Electronics, Inc v Downing & Perkins, Inc, 204 N E 2d 431, 348 Mass 784

Tex—Missouri Pac R Co v Elmore & Stahl, 368 S W 2d 99, affd 84 S Ct 1142, 377 U S 134, 12 L Ed 2d 194, reh den 84 S Ct 1880, 377 U S 984, 12 L Ed 2d 752

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43. Evidence sufficient

(3) Other cases

U S—L E Whitlock Truck Service, Inc v Regal Drilling Co, C A Colo, 333 F 2d 488—Continental Can Co v Eazor Exp Inc, C A N Y, 354 F 2d 222—M & S Tomato Repacking Co v Boston & Maine Corp, D C Mass, 310 F Supp 186

Fla—Terminal Transport Co v Lamtron Industries Inc, App, 233 So 2d 854

Ga—Washburn Storage Co v Elliott, 104 S E 2d 697, 98 Ga App 81

La—Minot Hooper Co v Crowley Indus Bag Co, App, 217 So 2d 653, writ ref 221 So 2d 517, 25 La 1082

Md—John I Haas, Inc v American Export Lines Inc, 205 A 2d 223, 237 Md 73

Tex—Texas & Pac Ry Co v Empacadora De Ciudad Juarez, S A, Civ App, 342 S W 2d 195, err ref no rev err—Morris v Brown, Civ App, 33[illegible] S W 2d 759

Evidence insufficient

(2) U S—Dugdale Packing Co v Atchison, T & S F Ry Co, D C Mo, 347 F Supp 1276

(3) Other cases

Cal—Merchant Shippers Ass'n v Kellogg Exp & Drying Co, 170 P 2d 923, 28 Cal 2d 594

La—Normann v Burnham's Van Service, supra, n 4[illegible]

Neb—Barnhart v Henderson, 24 N W 2d 854, 147 Neb 689, 982

Ohio—Toman v Pennsylvania R. Co, App, 51 N E 2d 231

Tex—Missouri Pac R Co v Trautmann Bros Co, App, 301 S W 2d 240, err ref no rev err

Wash—Home Ins Co of New York v Northern Pac Ry Co, 140 P 2d 507, 18 Wash 2d 798, 147 A L R 849

Wis—Landaen v Railway Exp Agency, 47 N W 2d 727, 259 Wis 178

44 Okl—Kluver v Midwestern Transp Inc, 53 P 2d 662

Pa—General Elec Co v Marianelli, 19 D & C 2d 51[illegible] 60 Lack Jur 97—Rohr v Logan, 52 Del Co 32[illegible] affd 213 A 2d 166, 206 Pa Super 232

Evidence sufficient

(1) U S—Compagnie De Vapores Insco, S A v Missouri Pac R Co, C A La, 232 F 2d 657, cert den 7

SCt 102 352 US 880 1 L Ed 2d 80—Ismert-Hincke Mill Co v Union Pac R Co CA Kan 238 F 2d 14

Tex—Missouri-Kansas-Texas R Co of Tex v Roegelein Provision Co Civ App 260 S W 2d 605 err ref no rev err

Mo—Robinson v Railway Exp Agency App 329 S W 2d 242

Evidence insufficient

(6) Other evidence

Tex—Southern Pac Co v Builders Hardware, Inc Civ App 382 S W 2d 149 err ref no rev err

45 US—Compania De Vapores Ins Co S A v Missouri-Pacific R Co D C La 133 F Supp 942, aff'd CA 232 F 2d 657 cert den 77 S Ct 102 352 US 880 1 L Ed 2d 80

Fla—United Steel & Strip Corp v Money Corp App 310 So 2d 339

Ill—B S Livingston & Co Inc v Bethlehem Steel Export Corp 323 N E 2d 49 25 Ill App 3d 121

Mo—Walter v A B C Fireproof Warehouse Co 124 S W 2d 584 233 Mo App 693

Ohio—Elder & Johnson Co v Commercial Motor Freight, Inc of Ind 115 N E 2d 179 94 Ohio App 358

Evidence sufficient

(1) US—Smith v Railway Exp Agency D C Tenn 110 F Supp 911 aff'd CA 212 F 2d 47—Bigley Trucking Corp v US 149 F Supp 141 137 Ct Cl 903

Ala—West Bros Inc v Resource Management Service, Inc 214 So 2d 431 283 Ala 73

Ariz—Cagle v Carr 418 P 2d 381 101 Ariz 225

Cal—Brown-Forman Distillers Corp v Walkup Drayage & Warehouse Co 163 Cal 878, 71 Cal App 2d 795

D C—W F Cowan, Inc v Wagshal, supra, n 38—Smith's Transfer & Storage Co v Murphy Mun App 115 A 2d 300

Ill—Lash & Mages, Inc v Atchison, T & S F R Co 111 N E 2d 362, 349 Ill App 540

La—Annalone v Illinois Cent R Co App, 53 So 2d 433

Mass—Fitchburg Gas & Elec Light Co v Samuel Evans Const Co 157 N E 2d 529 338 Mass 752

Neb—Numon v Stevens, 76 N W 2d 232, 162 Neb 339

N Y—General Cigar Co v Reading Co 38 N Y S 2d 636, 265 App Div 322—Automobile Ins Co of Hartford, Conn v Harry Trencher Furs, Inc 115 N Y S 2d 666, 202 Misc 475

S C—Mastropole v Transit Homes, Inc 175 S E 2d 465, 254 S C 332, cert den 91 S Ct 365, 400 U S 967, 27 L Ed 2d 388

Tex—Consolidated Cooperstate Lines, Inc v Standard Asbestos Mfg & Insulating Co Civ App, 378 S W 2d 704 err ref no rev err—Missouri Pac R Co v John B Hardcastle Co Civ App 380 S W 2d 706

Utah—Hafey v Paul Havens Co 377 P 2d 499 14 Utah 2d 77

Wash—Lavagetto v Railway Exp Agency 209 P 2d 371 34 Wash 2d 578—Mid-County Publishers v Le May 252 P 2d 268, 41 Wash 2d 852—McCurdy v Union Pac R Co, 413 P 2d 617, 68 Wash 2d 457

(2) US—Watson Bros Transp Co v Feinberg Kosher Sausage Co C A Minn, 193 F 2d 283

Tenn—Illinois Cent R Co v H Rouw & Co 159 S W 2d 839 25 Tenn App 475

(4) US—Delphi Frosted Foods Corp v Illinois Cent R Co, supra, n 41—Trautmann Bros Co v Missouri Pac R Co C A Tex, 312 F 2d 102

Alaska—Schenderlein v Robertson, 394 P 2d 395

Ill—Barker v Barker 95 N E 2d 135 342 Ill App 46

La—Stewart v Florane, App 218 So 2d 358

Mich—Insurance Co of North America v Schumacher, 129 N W 2d 403 373 Mich 394

Neb—Redman Industries, Inc v Morgan Drive Away Inc 138 N W 2d 708, 179 Neb 406

Pa—Jackson & Perkins Co v Mushroom Transp Co 41 A 2d 635 351 Pa 583, cert den 66 S Ct 42, 326 U S 733 90 L Ed 427

(5) Other matters

U S—Larry's Sandwiches, Inc v Pacific Elec Ry Co C A Cal 318 F 2d 690

D C—Smith's Transfer & Storage Co v Murphy Mun App 115 A 2d 300

Pa—Pennsy's v Pennsylvania R Co 183 A 2d 544 408 Pa 276—Girard Trust Corn Exchange Bank v Brinks, Inc 220 A 2d 827 422 Pa 48

Evidence insufficient

(1) U S—Atlantic Coast Line R Co v Georgia Packing Co C C A Ga 164 F 2d 1 reh der 165 F 2d 169—Austin v Seaboard Air Line R Co C A Fla 188 F 239—Larry's Sandwiches, Inc v Pacific Elec Ry Co C A Cal 318 F 2d 690

D C—Van-Pak, Inc v Cavaher Storage Corp App 208 A 2d 620

Ill—Meyer v Rozran, 77 N E 2d 454 333 Ill App 301

La—Denton v Ramsdell App, 31 So 2d 873—Stewart v Florane, App 218 So 2d 358

Mass—Nicholas Zeo, Inc v Railway Express Agency 58 N E 2d 127 317 Mass 374

Mich—Hershel Radio Co v Pennsylvania R Co 73 N W 2d 319 344 Mich 75

Mo—Haake v Missouri Pac R Co App 443 S W 2d 206

N Y—Neo-Smelting & Refining, Inc v Harris Warehouse Inc 175 N Y S 2d 405 13 Misc 2d 290—Weiss Bros Stores, Inc v De Martis, 179 N Y S 2d 723, 14 Misc 2d 522

N C—Stephenson Mule Co v Powell, S C 15 S E 2d 389 199 S C 450

Tex—Texas & P Ry Co v Empresadora De Ciudad Juarez, S A Civ App 309 S W 2d 926, err ref no rev err

Wis—M Capp Mfg Co v Moland, 126 N W 2d 34 22 Wis 2d 424

(5) Du Quoin Packing Co v Bonfield, 71 N E 2d 173 330 Ill App 338

N J—Joseph Toker Co v Lehigh Valley R Co 97 A 2d 598, 12 N J 608 39 A L R 2d 318

Ohio—Sugar v National Transit Corp 81 N E 2d 609 82 Ohio App 439

Pa—Arabian Am Oil Co v Kirby & Kirby 90 A 2d 410, 171 Pa Super 23

Tex—Thompson v San Pat Vegetable Co Civ App 207 S W 2d 195 err ref no rev err

(6) Other matters

U S—Pennsylvania R Co, v Greene, D C Ala 173 F Supp 657

Some competent evidence in record

U S—Minneapolis, St P & S S M R Co v Metal-Matic, Inc, C A Minn 323 F 2d 903

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46 N C—Roberson v Abbott, 29 S E 2d 210, 224 N C 853

Okl—Kurn v Mundy 150 P 2d 995, 190 Okl 71

Evidence sufficient

(1) Cal—Pilkinton v Davis, 248 P 2d 25, 113 C A 2d 451

N C—Bennett v Atlantic Coast Line R Co, 59 S E 2d 598, 232 N C 144

Pa—Villari v James, 38 A 2d 379 155 Pa Super 155

Tex—Gulf C & S F Ry Co v Sklar Civ App 134 S W 2d 771, err dism—Panhandle & S F Ry Co v McKinley supra, n 35—Texas & N O R Co v Lide, Civ App 144 S W 2d 685 err dism

(6) Boring v Chicago, R I & P R Co supra, n 35

Evidence insufficient

Ill—Bowman Dairy Co v Megan, 15 N E 2d 878, 296 Ill App 20

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47 D C—World Wide Meats, Inc v Chicago & N W Transp Co, D C Iowa, 383 F Supp 807

Wis—Whitehall Packing Co Inc v Safeway Truck Lines, Inc, 228 N W 2d 365 68 Wis 2d 369

Evidence sufficient

(1) US—Process Equipment Co v Denver Chicago Trucking Co D C Mass, 275 F Supp 698 Aviation Associates of Puerto Rico v Dixon Co D C Pa 333 F Supp 982

La—Wagner v T S C Motor Freight Lines, App 181 So 625 Hebert v Pierrotti, App 205 So 2d 888

Tex—Alamo Exp, Inc v Browning Mineral & Ore Co Civ App 457 S W 2d 588 err ref no rev err

Wash—Conger v Cordes Towing Service, Inc, 365 P 2d 20 58 Wash 2d 876

(4) La—Musta v Railway Exp Agency App, 60 So 2d 101

(6) To show other matters

U S—Feinberg Kosher Sausage Co v Watson Bros Transp Co D C Minn 101 F Supp 403 aff'd C A 193 F 2d 283

Okl—Roadway Exp v Gordon, 277 P 2d 146

Evidence insufficient

(1) U S—Firpine Products Co v Atchison, T & S F Ry Co D C Mo 124 F Supp 906

N Y—Surprise Furniture Co v Long Island R Co 107 N Y S 2d 316

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48 Ga—Brown-Rogers-Dixson Co v Southern Ry Co 53 S E 2d 702, 79 Ga App 449

Mo—Transamerican Freight Lines v Monark Egg Corporation, 161 S W 2d 687 236 Mo App 1047

Evidence sufficient

(1) Mo Bunge Corp v Valley Line Supply & Equipment Co, 480 S W 2d 859

Railway Exp Agency v A J Tebbe & Sons Co, supra, n 41—Gulf C & S F Ry Co v Hillis, Civ App 320 S W 2d 687

Mere proof of delay insufficient

Mo—Bunge Corp v Valley Line Supply & Equipment Co 480 S W 2d 859

49 **Evidence sufficient**

(1) Schraeder v Robinson supra, n 41

52 Tex—Panhandle & S F Ry Co v Montgomery, supra, n 35

Evidence sufficient

(1) US—Lever Bros Co v Baltimore & O R Co, C C A Md 164 F 2d 738—Boh Bros Const Co v Perry Heavy Haulers, C C A La 166 F 2d 719—Solway Metal Sales, Limited v Baltimore & O R Co, C A 344 F 2d 568 120 U S App D C 183

La—Minot Hooper Co v Crowley Indus Bag Co, App 217 So 2d 653, writ ref 221 So 2d 517, 253 La 1082

Minn—Sutton v Minneapolis & St L Ry Co 23 N W 2d 561, 222 Minn 233

Tex—Morris v Brown, Civ App, 337 S W 2d 759

Wash—Prentice v Union Pac R Co 182 P 2d 41 28 Wash 2d 212

(2) U S—Association of Maryland Pilots v Baltimore & O R Co D C Md 304 F Supp 548

Okl—Advance Air Conditioning Co v Cam's Truck Lines, 175 P 2d 338, 198 Okl 73

(3) U S—Blytheville Cotton Oil Co v Kurn, C C A Tenn 155 F 2d 467

(7) La—Kaplan Rice Mill v Texas & N O R Co App 26 So 2d 42

Minn—Sutton v Minneapolis & St L Ry Co supra, n 52

Wis—Whitehall Packing Co, Inc v Safeway Truck Lines, Inc 228 N W 2d 365, 68 Wis 2d 369

Evidence insufficient

(1) U S—Bigley Trucking Corp v U S, 149 F Supp 141, 137 Ct Cl 903—U S v Gulf M & O R Co, D C La 259 F Supp 704

Mich—C O Porter Machinery Co v Colt 44 N W 2d 845 329 Mich 8

Tex—Strickland Transp Co v International Aerial Mapping Co Civ App, 423 S W 2d 676

(6) To show other matters

N Y—Standard Brands Chemical Industries, Inc v Pilot Freight Carriers, Inc, 319 N Y S 2d 457 65 Misc 2d 1029

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55 Cal—McQuade v [illegible] 342 P 2d 466, 61 Cal App 2d 263

NY—Kessler Atlantic Adjustment Bureau v Trotta, 63 NYS 2d 85, 6 Misc 2d 476

Evidence sufficient

(2) NY—Dave Levine & Co v Wolff's Package Depot, 138 NYS 2d 427, 29 Misc 2d 1065, affd 150 NYS 2d 543, 1 AD 2d 874, app den 151 NYS 2d 601, 1 AD 2d 949

SC—White v Southern Ry Co, supra, n 35

(6) To show other matters—Schnauder v Robinson, supra, n 41

La—Southern Farm Bureau Cas Ins Co v Florane, App, 173 So 2d 545

NY—Cy Ruchman, Inc v Saland, 102 NYS 2d 410—Barbizon Corp v Lack-Air Delivery, Inc, 250 NYS 2d 314, 43 Misc 2d 151—Sternheim v Silver Bell of Roslyn, Inc, 321 NYS 2d 965, 66 Misc 2d 726

Tex—Nationwide Horse Carriers, Inc v Johnston, Civ App, 519 SW 2d 63, err ref no rev err

Va—Smith v Pappin, 91 SE 2d 159, 198 Va 869

Evidence insufficient

(1) NY—Hazar v Lan, 140 NYS 2d 529

(5) Okl—Sooner Freight Lines v Lester, 185 P 2d 469, 199 Okl 321

56. Evidence sufficient

(1) US—Thompson v James G McCarrick Co, CA Tex, 205 F 2d 897—Seaboard Air Line R Co v US, CA Va, 216 F 2d 855—Goldenberg v World Wide Shippers & Movers of Chicago, Inc, CA Ill, 236 F 2d 198

Cal—Thayer v Pacific Elec Ry Co, 11 Cal Rptr 560, 360 P 2d 56, 55 C 2d 430, cert den 82 S Ct 44, 368 US 826, 7 L Ed 2d 29

La—Anzalone v Illinois Cent R Co, App, 53 So 2d 433

(6) Claim not presented

Tex—Yellow Freight System, Inc v Hydraulic Products Co, Civ App, 482 SW 2d 659

Evidence insufficient

Ill—Louda v Prague Assurance National Corp, 106 NE 2d 757, 347 Ill App 211

NJ—Johnson & Dealaman, Inc v Wm F Hegarty, Inc, 224 A 2d 510, 93 NJ Super 15

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57. Evidence sufficient to show waiver

US—Atlantic Coast Line R Co v Pioneer Products, Inc, CA Ga, 256 F 2d 431

58 Ill—Cohen v Texas & N O R Co, 25 NE 2d 562, 303 Ill App 606

Wis—Mastercraft Paper Products, Inc v Consolidated Freightways, 200 NW 2d 596, 55 Wis 2d 674

Evidence sufficient

(1) US—Reader v Thompson, CA La, 197 F 2d 158—Smith v Railway Exp Agency, D C Tenn, 110 F Supp 911, affd CA, 212 F 2d 47—Glickfeld v Howard Van Lines, CA Cal, 213 F 2d 723—Illinois Cent R Co v Zaychero, CA Mo, 221 F 2d 934—Tuschman v Pennsylvania R Co, CA Pa, 230 F 2d 787—Texas Instruments, Inc v Branch Motor Exp Co, CA Mass, 432 F 2d 564

Ark—Rountree v Farmers Cotton Oil Co, 182 SW 2d 464, 207 Ark 690

Cal—Fitch v Carpenter, 161 P 2d 824, 70 Cal App 2d 827

D C—Waterman v Railway Express Agency, Mun App, 31 A 2d 657

Ga—Railway Exp Agency v Southern Gas Co, 65 SE 2d 61, 83 Ga App 808—Kinsey v Bowman Transp, Inc, 121 SE 2d 808, 104 Ga App 347

La—L Frank & Co v Illinois Cent R Co, supra, n 41—Ideal Bldg Materials, Inc v Herrin Transp Co, App, 159 So 2d 420—Glazer Steel Corp v Strickland Transp Co, App, 261 So 2d 117

Mo—Textile Distributors, Inc v Roadway Exp, Inc, App, 397 SW 2d 760—Resolute Ins Co v Morgan Drive-Away, Inc, App, 403 SW 2d 913

Mont—Vanderbergh v Allied Van Lines, Inc, 351 P 2d 537, 137 Mont 327, cert den 81 S Ct 69, 364 U S 830, 5 L Ed 2d 57

Pa—Quaker Worsted Mills Corporation v Howard Trucking Corporation, 198 A 691, 131 Pa Super 1—Penneys v Pennsylvania R Co, 183 A 2d 544, 408 Pa 276

Tenn—Atchison T & S F Ry Co v Ortiz, 361 SW 2d 113, 50 Tenn App 317

Tex—Strickland Transp Co v International Aerial Mapping Co, Civ App, 423 SW 2d 676—Roadway Exp, Inc v Naturalite, Inc, Civ App, 435 SW 2d 555

Wash—Mid-County Publishers v Le May, 252 P 2d 268, 41 Wash 2d 852

(2) US—Hamilton v Stillwell Van & Storage Co, CA Pa, 343 F 2d 453

Tex—M-K-T Ry Co v Jaffee Cotton Products Mfg Co, Civ App, 193 SW 2d 986, err dism

Wash—Mid-County Publishers v Le May, supra

(4) Wash—Mid-County Publishers v Le May, supra

(7) Other cases

US—National Distillers Products Corp v Companhia Nacional de Navegacao, D C Pa, 107 F Supp 65

La—Royal Furniture Co of Baton Rouge v Ryder Truck Lines, Inc, App, 216 So 2d 902, application not considered 217 So 2d 412, 253 La 317

Mo—Letsch Corp v Be-Mac Transp Co, App, 514 SW 2d 832

Tex—Royd v McCleskey, Civ App, 515 SW 2d 25

Wash—Western Steel Bldgs, Inc v Universal Carloading & Distributing Co, 413 P 2d 954, 68 Wash 2d 522

Evidence insufficient

(1) US—Continental Distributing Co v Reading Co, CCA Pa, 168 F 2d 967

D C—Ace Freight Forwarding Co v Baltimore & O R Co, App, 202 A 2d 649

Fla—Allstates Van Lines Corp v Lebenstein, App, 303 So 2d 33

N Y—Sherer v Universal Carloading & Distributing Co, 56 NYS 2d 283

Tex—Dale Truck Line v R & M Well Servicing & Drilling Co, Civ App, 286 SW 2d 446, err ref no rev err

Wash—Mid-County Publishers v Le May, supra

W Va—Payne v Ace House Movers, Inc, 112 SE 2d 449, 145 W Va 86

(3) To show other matters

NY—Pick v Lufthansa German Airlines, 265 NYS 2d 63, 48 Misc 2d 442

Tex—Missouri Pac R Co v Elmore & Stahl, Civ App, 360 SW 2d 839, affd Sup, 368 SW 2d 99, affd 84 S Ct 1142, 377 US 134, 12 L Ed 2d 194, reh den 84 S Ct 1880, 377 US 984, 12 L Ed 2d 752

Damage to building during moving operations

Minn—Prodger v Zell, 113 NW 2d 168, 261 Minn 508

Market value

Kan—Airight Sales, Inc v Graves Truck Lines, Inc, 486 P 2d 835, 207 Kan 753

59. Evidence sufficient

(1) Cal—Pilkinton v Davis, 248 P 2d 25, 113 CA 2d 451

(2) Mo—Devine v Rook, App, 314 SW 2d 932

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61 US—Southern-Plaza Exp, Inc v Harville, CA Tex, 233 F 2d 264

Ill—Pielet v Chicago & W R Rys, 77 NE 2d 862, 333 Ill App 651

Iowa—Vander Beek v Chicago & N W Ry Co, 286 NW 452, 226 Iowa 1363

Mo—Fadler v Chicago R I & P R Co, App, 25 SW 2d 835

NJ—Aspen Fish Products Co v Pennsylvania-Reading Seashore Lines, 21 A 2d 826, 127 NJ Law 209—Herman v Railway Exp Agency, 85 A 2d 284, 17 NJ Super 10

Okl—St Louis-San Francisco Ry Co v Kittrell, [illegible] P 2d 1076, 208 Okl 147

Pa—General Elec Co v Martanelli, 19 D & C 2d 510, 60 Lack Jur 97

Tenn—Tennessee Packers, Inc v Tennessee Cent R Co, 319 SW 2d 502, 45 Tenn App 57

62 Mo—Colley v Cox, App, 266 SW 2d 778

N C—Precythe v Atlantic Coast Line R Co, 9 SE 2d 360, 230 N C 195

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63 NY—Danziger v Pennsylvania R Co, 34 NY S 2d 722

Pa—National Carloading Corporation v Lee, 28 A 2d 811, 151 Pa Super 23

Tex—Thompson v Associated Growers of Brownsville, supra, n 35—Jancik v Thompson, Civ App, 261 SW 2d 639, err ref n rev err

64 US—Fireman's Fund American Ins Co [illegible] v Puerto Rican Forwarding Co, Inc, C A Puerto Rico, 492 F 2d 1294

Ark—Railway Express Agency v H Rouse Co, 121 SW 2d 989, 198 Ark 423

Mo—Transamerican Freight Lines v Marcrome Art Marble Co, 150 SW 2d 547, 236 Mo App 272—Resolute Ins Co v Morgan Drive-Away, Inc, App, 403 SW 2d 913

N C—Deal v Fredrickson Motor Exp Corp, 167 SE 2d 79, 4 N C App 487

Or—Clifford W Brown v Bonesteele, 344 P 2d 928, 218 Or 312

65 US—Atlantic Coast Line R Co v Georgia Packing Co, C C A Ga, 165 F 2d 169

Ala—Railway Exp Agency v Anderson, 45 So 2d 168, 35 Ala App 216

Iowa—Mountain v Albaugh, 290 N W 693, 227 Iowa 1282

Ky—Parker v Stewart, 176 S W 2d 88, 296 Ky 48

Miss—Illinois Cent R Co v Paxton, 193 So 915, 187 Miss 858

N H—Scott v J J Brady & Sons, Inc, 302 A 2d 108, 113 N H 65

Or—Clifford W Brown v Bonesteele, 344 P 2d 928, 218 Or 312

Tex—Texas & N O R Co v J Kahn & Co, Civ App, 156 S W 2d 292, err ref—Missouri-Kansas-Texas R Co of Tex v Roegelein Provision Co, Civ App, 260 S W 2d 605, err ref no rev err

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69 US—Thomas v National Delivery Ass'n, D C Pa, 24 F Supp 171

Cal—Brignoli v Seaboard Transp Co, supra, n 35

Vt—Senna v Gero, 109 A 2d 344, 118 Vt 331

Evidence held sufficient for jury

Ill—Type & Press of Ill, Inc v Gorter, 164 N E 2d 223, 24 Ill App 2d 186

75 Tex—Missouri Pac R Co v Rio Bravo Cattle Co, Civ App, 405 S W 2d 151

78 Ga—Harris v U S Fidelity & Guaranty Co, 216 S E 2d 127, 134 Ga App 739

Mo—Walton v A B C Fireproof Warehouse Co, supra, n 45

N Y—Riegel Paper Corp v Branch Motor Exp Co, 207 N Y S 2d 697

Tex—Farmers Gin Co v Texas Elec Ry Co, Civ App, 232 S W 2d 890, err ref no rev err

79 Ky—Wabash Elevator Co v Illinois Cent R Co, 130 S W 2d 76, 279 Ky 164

80 US—Commodity Credit Corp v Norton, C C A N J, 167 F 2d 161—Rhoades, Inc v United Air Lines, Inc, C A Pa, 340 F 2d 481

Ark—Red Line Transfer & Storage Co v Cash & Sons L-P Gas Co, 472 S W 2d 705, 251 Ark 407

DC—Krupsaw v W T Cowan Inc Mun App 61 A 2d 624

NJ—Silver Lining v Shein 112 A 2d 315 34 N J Super 384 revd 117 A 2d 182—Silver Lining, Inc v Shein, 117 A 2d 182, 37 N J Super 206

NC—Barnard v Howard Sober Inc 38 S E 2d 153 226 N C 392—Gurfein v Roadway Exp 90 S E 2d 397 243 N C 289

Ohio—Elder & Johnston Co v Commercial Motor Freight, Inc of Ind 115 N E 2d 179 94 Ohio App 358

Pa—Mervis & Co v Pennsylvania R R 101 Pittsb Leg J 55

Tex—Missouri Pac R Co v Trautmann Bros Civ App 301 S W 2d 240, err ref no rev err

Evidence held insufficient for jury

DC—Florence Banana Corp v Pennsylvania R R App 195 A 2d 399

81 Fla—E M G Leather Arts, Inc v Central Truck Lines, Inc App 165 So 2d 203

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83 U S—Tuchman v Pennsylvania R Co C A Pa 230 F 2d 787

Conn—Capobianco v Railway Exp Agency 58 A 2d 697 134 Conn 517

Ga—Walker Elec Co v Sullivan, 52 S E 2d 477 79 Ga App 13

86 Ala—Anderson v Railway Exp Agency 39 So 2d 689 34 Ala App 191 cert den 39 So 2d 692, 252 Ala 128

Ark—Fort Smith Cotton Oil Co v Swift & Co 124 S W 2d 1, 197 Ark 594

Ill—Palmer v Gillarde, 38 N E 2d 352, 312 Ill App 230

Ky—Joseph Denunzio Fruit Co v Louisville & N R Co supra, n 35

Inherent nature of, or defects in, goods

Fla—Van Buren County Fruit Exchange, Inc v Seaboard Air Line R Co App 175 So 2d 93

N H—Akerly v Railway Exp Agency 77 A 2d 856, 96 N H 396.

Tex—Thompson v Tankersley Civ App 238 S W 2d 263—Griffin v Gulf, C & S F Ry Co Civ App 298 S W 2d 659—Missouri Pac R Co v Trautmann Bros Civ App 301 S W 2d 240, err ref no rev err

87 U S—Taylor v National Trailer Convoy Inc C A Okl 433 F 2d 569—International Forwarding Co v Bison Freightways, Inc D C Pa, 316 F Supp 464

Ala—Louisville & N R Co v Finlay 185 So 904 237 Ala 116

Ill—Type & Press of Ill, Inc v Gorter, 164 N E 2d 223, 24 Ill App 2d 186

Miss—Hornsby v Logaras, 49 So 2d 837

Mo—Fadler v Chicago, R I & P R Co, supra, n 61

Mont—Sult v Scandrett, 178 P 2d 405 119 Mont 570

N C—N E Brewer Co v Yarbrough, 122 S E 2d 511 255 N C. 715

Pa—Villari v James, supra, n 46—Isenberg v Pennsylvania R Co 19 Monroe L R 97

S C—McCready v Atlantic Coast Line R Co, 48 S E 2d 193, 212 S C 449, cert den 69 S Ct 53 335 U S 827, 93 L Ed 381

Tenn—Frye v Railway Exp Agency, Inc 296 S W 2d 362, 41 Tenn App 429

Tex—Texas & N O R Co v Stemberg, Civ App 115 S W 2d 1126

Rebuttal of presumption

D C—Chesapeake & O Ry Co v Gilbert, Mun App 83 A 2d 327

N H—Akerly v Railway Exp Agency, supra, n 86

Proximate cause of injury, etc—Carson v Bye, 321 P 2d 604, 79 Idaho 495

Evidence held sufficient to raise question as to res ipsa loquitur

Cal—Fogelson Drilling Co v Heavy Transport, Inc 33 Cal Rptr 747 220 C A 2d 397

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88 U S—Morgan v Norfolk & Western Ry Co C A Ill 473 F 2d 1278

Fla—Atlantic Coast Line R Co v Cowart, 190 So 546, 140 Fla 596

Iowa—Vander Beek v Chicago & N W Ry Co 278 N W 201 supers 286 N W 452, 226 Iowa 1363

Ohio—Porter v Railway Exp Agency Inc 155 N E 2d 528

S C—McElveen v Atlantic Coast Line R Co 43 S E 2d 485 210 S C 556

Tex—Texas & N O R Co v Lide, Civ App 144 S W 2d 685 err dism

Failure to provide water, feed, and rest

N C—Fuller v Virginia & C S R Co 200 S E 403 214 N C 648

Guthe

Iowa—Vander Beek v Chicago & N W Ry Co supra

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91 Mo—Fadler v Chicago, R I & P R Co supra, n 61

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(2) Other matters

Fla—Van Buren County Fruit Exchange, Inc v Seaboard Air Line R Co App 175 So 2d 93

Tex—Texas & Pac Ry Co v Empresadora De Ciudad Juarez, S A Civ App 342 S W 2d 195 err ref no rev err

93 Mo—Dougan v Thompson, 150 S W 2d 518 237 Mo App 619

94 Fla—Van Buren County Fruit Exchange Inc v Seaboard Air Line R Co App 175 So 2d 93

95 Mo—Dougan v Thompson, supra, n 93

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98 Ark—St Louis Southwestern Ry Co v Fleming, 183 S W 2d 513, 207 Ark 921

Tex—Farmers Gin Co v Texas Elec Ry Co Civ App 232 S W 2d 890, err ref no rev err—Griffin v Gulf C & S F Ry Co Civ App, 298 S W 2d 659

Improper loading or packing

Tenn—Tennessee Packers, Inc v Tennessee Cent Ry Co 319 S W 2d 502, 45 Tenn App 57

Tex—National Carloading Corp v Kitchen Designs, Inc Civ App 471 S W 2d 90

Wis—Allis-Chalmers Mfg Co v Eagle Motor Lines, Inc 198 N W 2d 162, 55 Wis 2d 39

1 N H—Akerly v Railway Exp Agency 77 A 2d 856, 96 N H 396

N J—Aspen Fish Products Co v Pennsylvania-Reading Seashore Lines, 21 A 2d 826, 127 N J Law 209

3 U S—Chandler v Aero Mayflower Transit Co, C A S C 374 F 2d 129

Cal—Bauer v Jackson, 93 Cal Rptr 43, 15 C A 3d 358

N C Peck v Hartsell, 129 S E 2d 97 258 N C 680

Limitation of time for bringing suit

(3) Other cases

Mass—Lapp Insulator Co v Boston & M R R 112 N E 2d 359 330 Mass 205

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10 Mo—Walton v A B C Fireproof Warehouse Co 124 S W 2d 584, 233 Mo App 693

11 Kan—Frick-Reid Cattle Co v Atchison, T & S F Ry Co 206 P 2d 124, 167 Kan 306

Okl—T I M E Inc v Longs Carpet Co, 385 P 2d 456

Tex—S & D Wolf Co v Atchison, T & S F Ry Co, Civ App 301 S W 2d 272, err ref no rev err

Value of property

(1) Mo—Resolute Ins Co v Morgan Drive-Away Inc App, 403 S W 2d 913

Ohio Rabb v Railway Exp Agency App, 95 N E 2d 784

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13 Cal—Gonzalez v Southern Pac Co 321 P 2d 865, 157 C A 2d 733

Fla—E M G Leather Arts, Inc v Central Truck Lines, Inc App 165 So 2d 203

Pa—Evergreen Broom Mfg Co v Pennsylvania R Co 105 A 2d 88, 378 Pa 60

Whether advance payment was full contract price

Ala—White v Henry 49 So 2d 779 255 Ala 7

16 Ark—Rountree v Farmers Cotton Oil Co 182 S W 2d 464 207 Ark 690

17 Mo—Transamerican Freight Lines v Marble Art Marble Co 150 S W 2d 547 236 Mo App 272

20 U S—Atlantic Coast Line R Co v Georgia Packing Co C C A Ga 164 F 2d 1 reh den 165 F 2d 169

Mich—Murray v New York Cent R Co 50 N W 2d 748, 332 Mich 159

Okl—Kurn v Kearns, 181 P 2d 249 198 Okl 635

S C—Mastropolo v Transit Homes, Inc 175 S E 2d 465 254 S C 332, cert den 91 S Ct 365 400 U S 967 27 L Ed 2d 388

Tex—Missouri-Kansas-Texas R Co of Tex v Roegelein Provision Co Civ App 260 S W 2d 605 err ref no rev err

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25 Tex—Texas & P Ry Co v Bussing, Civ App, 130 S W 2d 416—Evans v Garrison, Civ App 155 S W 2d 659

26. Giving notice

Okl—Everest v Railway Exp Agency, 230 P 2d 900, 204 Okl 450

§ 259. —— Instructions

Library References

Carriers ⇐137, 167, 230(7) et seq

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31 Iowa—Vander Beek v Chicago & N W Ry Co, 286 N W 452, 226 Iowa 1363

S C—Victor Fertilizer Co v Southern Ry Co 24 S E 2d 499 202 S C 294

Wis—Mastercraft Paper Products, Inc v Consolidated Freightways, 200 N W 2d 596, 55 Wis 2d 674

Instruction held proper

U S—Southern-Plaza Exp Inc v Harville, C A Tex 233 F 2d 264

Ark—Fort Smith Cotton Oil Co v Swift & Co 124 S W 2d 1, 197 Ark 594

N H—Akerly v Railway Exp Agency supra, n 1

Wash—McCurdy v Union Pac R Co 413 P 2d 617 68 Wash 2d 457

Instruction properly refused

U S—Rhoades, Inc v United Air Lines, Inc, C A Pa 340 F 2d 481

Wash—Atkinson v Port of Seattle, 495 P 2d 686, 6 Wash App 693

32 Cal—Brignoli v Starboard Transp Co 178 P 2d 445, 29 Cal 2d 782

34 Pa—Pomento v Smith 4 Chest Co 343

36 Mass—Nicholas Zeo, Inc v Railway Express Agency, 58 N E 2d 127 317 Mass 374

Miss—Hornsby v Logaras, 49 So 2d 837

S C—Mastropolo v Transit Homes, Inc 175 S E 2d 465, 254 S C 332, cert den 91 S Ct 365 400 U S 967 27 L Ed 2d 388

Tex—St Louis, B & M Ry Co v Farmer, Civ App, 166 S W 2d 163

37 Mo—Walton v A B C Fireproof Warehouse Co supra, n 10

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42 Mo—Walton v A B C Fireproof Warehouse Co, supra, n 10

47 U S—Arnold J Rodin Inc v Atchison T & S F Ry Co C A Tex 477 F 2d 682

Ga—Brown-Rogers-Dixson Co v Southern Ry Co 53 S E 2d 702 79 Ga App 449

Res ipsa loquitur

Cal—Exploration Drilling Co v Heavy Transport Inc App 33 Cal Rptr 747

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48 U S—Commodity Credit Corp v Norton C C A N J 167 F 2d 161

Mo—Walton v A B C Fireproof Warehouse Co supra, n 10

N Y—Kodish v Pennsylvania R Co 37 N Y S 2d 1014

Instructions as to negligence generally held improper

(5) Dugdale Packing Co v Lowden, Mo App 160 S W 2d 832

Instructions as to negligent delay held proper

(3) Mo—Bunge Corp v Valley Line Supply & Equipment Co 480 S W 2d 859

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49 Mo—Walton v A B C Fireproof Warehouse Co supra, n 10

52 **Assumption of risk**

Wash—Atkinson v Port of Seattle, 495 P 2d 686 6 Wash App 693

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56 Mo—Walton v A B C Fireproof Warehouse Co supra, n 10

57 Mo—Dougan v Thompson, 150 S W 2d 518 237 Mo App 619

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59 Ala—Louisville & N R Co v Finlay 185 So 904 237 Ala 116

60 U S—Commodity Credit Corp v Norton supra, n 48

Ky—Louisville & N R Co v Gibson, 170 S W 2d 907 294 Ky 55

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62. **Instructions not warranted by evidence**

(3) Other instructions—Nicholas Zeo, Inc v Railway Express Agency supra, n 36

Wash—McCurdy v Union Pac R Co, 413 P 2d 617 68 Wash 2d 457

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71 Mo—Dougan v Thompson, 150 S W 2d 518, 237 Mo App 619

73 Ky—Wabash Elevator Co v Illinois Cent R Co 130 S W 2d 76, 279 Ky 164

Mo—Dougan v Thompson, 150 S W 2d 518, 237 Mo App 619

Instructions held proper

(9) Cal—Schroeder v Auto Driveaway Co 114 Cal Rptr 622, 523 P 2d 662, 11 C 3d 908

Mo—National Beef Packing Co v Missouri Pac R Co App, 479 S W 2d 155

S C—McCready v Atlantic Coast Line R Co, 48 S E 2d 193 212 S C 449, cert den 69 S Ct 53, 335 U S 827, 93 L Ed 381

Tex—M-K-T Ry Co v Jaffee Cotton Products Mfg Co Civ App, 193 S W 2d 986, err dism

Wash—McCurdy v Union Pac R. Co, 413 P 2d 617, 68 Wash 2d 457

Instructions held erroneous

(7) Walton v A B C Fireproof Warehouse Co, supra, n 10

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75 Ga—Seaboard Air Line R Co v Henry Chann Corp, 66 S E 2d 113 84 Ga App 442

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84 Ga—Walker Elec Co v Sullivan, 52 S E 2d 477 79 Ga App 73—Seaboard Air Line R Co v Henry Chann Corp supra, n 75

Iowa—Vander Beek v Chicago & N W Ry Co supra, n 21

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88 Ga—Walker Elec Co v Sullivan, supra, n 84

Erroneous instructions

(4) Other instructions

N J—Silver Lining, Inc v Snein 117 A 2d 182, 37 N J Super 206

91 Ga—Brown-Rogers-Dixson Co v Southern Ry Co supra, n 47

§ 260. —— Verdict and Findings

Library References

Carriers ⇐137, 168, 230(13)

95 Mich—Hecker Products Corporation v Transamerican Freight Lines, 296 N W 297 296 Mich 381

Pa—Quaker Worsted Mills Corporation v Howard Trucking Corporation, 198 A 691 131 Pa Super 1

Failure to find

Tex—Texas & R Ry Co v George, Civ App 466 S W 2d 659

96 Tex—Missouri Pac R Co v Whittenburg and Alston, 424 S W 2d 427

Refusal to make certain findings held not error

U S—Thomas Electronics, Inc v H W Taynton Co, D C Pa, 277 F Supp 639

Tex—Strickland Transp Co v International Aerial Mapping Co Civ App 423 S W 2d 676

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98. **Findings held not inconsistent**

Tex—Thompson v Bob Tankersley Produce Co Civ App 289 S W 2d 840 err ref no rev err

99 Ohio—Kirchner v New York Central System, 94 N E 2d 283 87 Ohio App 165

4 Cal—Schraeder v Robinson, 177 P 2d 788, 78 Cal App 2d 328

Tenn—Southern Ry Co v Varnell, 232 S W 2d 406, 33 Tenn App 550

Tex—Panhandle & S F Ry Co v Montgomery Civ App 140 S W 2d 241—Holt v Lowden, Civ App 140 S W 2d 318—Thompson v Lee Roy Crawford Produce Co 233 S W 2d 295 149 Tex 357

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Carriers ⇐231

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8 Pa—Pincus and Sons, Inc v Reading Co 5 D & C 2d 170

Tex—Thompson v Gibbs, Civ App 238 S W 2d 213, remd 240 S W 2d 287, 150 Tex 315

Notwithstanding verdict

Tex—Hune v Lay, Civ App, 170 S W 2d 823

§ 262. Damages

Library References

Corbin on Contracts §§ 1016, 1019

§ 263. —— Measure and Elements in General

Library References

Carriers ⇐135, 229.

11 U S—Chicago & N W R Co v Union Packing Co C A Neb 514 F 2d 30, petition den 527 F 2d 592—U S v Central of Georgia Ry Co D C Tenn 411 F Supp 1023

Ariz—Cagle v Carr 418 P 2d 381 101 Ariz 28

Cal—Schroeder v Auto Driveaway Co 114 Cal Rptr 622, 523 P 2d 662, 11 C 3d 908

Conn—Wells Laundry & Linen Supply Co v Acme Fast Freight 85 A 2d 907 138 Conn 458—Railroad Salvage of Conn Inc v Eazor Exp, Inc Super 287 A 2d 745 29 Conn Sup 354

Iowa—C J S cited in Conditioned Air Corp v Rock Island Motor Transit Co 114 N W 2d 304 30 253 Iowa 961 3 A L R 3d 679 cert den 83 S Ct 46 371 U S 825 9 L Ed 2d 64

La—Gore Products v Texas & N O R Co App 3 So 2d 418 adhered to 38 So 2d 233

Mo—Gammon v Armantrout App, 439 S W 2d 771—William A Smith Contracting Co v Missouri Pac R Co App 481 S W 2d 580 cert den 93 S Ct 900 409 U S 1107 34 L Ed 2d 687

Neb—Barnhart v Henderson, 24 N W 2d 854 147 Neb 689 982

N Y—Kodish v Pennsylvania R Co 37 N Y S 2d 1014

Tex—Roadway Exp Inc v Naturalite Inc Civ App 435 S W 2d 555

Wash—Mid-County Publishers v Le May 252 P 2d 268 41 Wash 2d 852

As otherwise stated, etc.

Mich—Tann v Allied Van Lines, Inc 146 N W 2d 682 5 Mich App 309

Injury to live stock; failure to breed

(2) Damages for value of unborn livestock not recoverable

Tex—Nationwide Horse Carriers, Inc v Johnston, Civ App 519 S W 2d 163 err ref no rev err

Loss of use

N M—Fredenburgh v Allied Van Lines, Inc., 446 P 2d 868 79 N M 593

12 U S—Producers Creamery Co v St Louis-San Francisco Ry Co D C Mo 87 F Supp 262—Railway Exp Agency v Smith C A Tenn, 212 F 2d 47

Cal—Schraeder v Robinson, supra, n 4

Mo—Gammon v Armantrout, App 439 S W 2d 771

N H—Richard D Brew & Co v Auclair Transp Inc, 211 A 2d 897, 106 N H 370 27 A L R 3d 978

N Y—State v Samfred Beltline Corp 297 N Y S 2d 466 31 A D 2d 865

Proof improper

Fla—Hillside Van Lines, Inc v Matalon, App 297 So 2d 848

13 U S—Meltzer v Baltimore & O R Co supra, n 11—Continental Distributing Co v Reading Co C C A Pa 168 F 2d 967—Reader v Thompson, C A La 197 F 2d 158

Mich—Hecker Products Corporation v Transamerican Freight Lines, 296 N W 297, 296 Mich 381

Wash—Oregon-Washington R & Nav Co v C M Kopp Co 120 P 2d 845, 12 Wash 2d 146, 138 A L R 633

Punitive damages prohibited

U S—Chandler v Aero Mayflower Transit Co, C A S C, 374 F 2d 129

Speculation

Conn—Railroad Salvage of Conn Inc v Eazor Exp, Inc. Super 287 A 2d 745 29 Conn Sup 354

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14 La—Laura v Railway Exp Agency Inc, App 249 So 2d 602

15 Mo—Gammon v Armantrout, App 439 S W 2d 771

20. **Damages held excessive**

(1) Tex—Nationwide Horse Carriers, Inc v Johnston, Civ App, 519 S W 2d 163, err ref no rev err

Damages held not excessive

(1) U S—Process Equipment Co v Denver Chicago Trucking Co D C Mass, 275 F Supp 698

Ala—White v Henry, 49 So 2d 779, 255 Ala 7

Ariz—Western Coach Corp v Vaughn, 452 P 2d 117 9 Ariz App 336

La—Hebert v Pierrotti App 205 So 2d 888

Mich—Van Lierop v Chesapeake & O Ry Co 57 N W 2d 431 335 Mich 702, cert den 74 S Ct 40 346 US 834 98 L Ed 357

Okl—Western Cas & Sur Co v J R Adams, Inc App 465 P 2d 794

Tex—Brown Exp v Harris, Tex Civ App 202 S W 2d 470

§ 264. —— Value of Goods Lost or Depreciation in Value of Goods Injured

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21 US—Association of Maryland Pilots v Baltimore & O R Co D C Md 304 F Supp 548—In re Penn Central Transp Co D C Pa 351 F Supp 1348

Ariz—Orcutt v Tucson Warehouse & Transfer Co 318 P 2d 671 83 Ariz 200

Cal—Wilson Furniture, Inc v Southern Pac Transp Co, 103 Cal Rptr 422, 27 C A 3d Supp 1

Conn—Railroad Salvage of Conn Inc v Eazor Exp Inc, Super, 287 A 2d 745, 29 Conn Sup 354

Fla—C.J.S. cited in Terminal Transport Co v Lamtron Industries, Inc, App 233 So 2d 854, 856

La—V Rivera S En C v Texas & N O R Co 31 So 2d 180, 211 La 969 172 A L R 791 app dism and cert den 68 S Ct 71 332 U S 750, 92 L Ed 337—Rabon v Red Ball Motor Freight, Inc App 292 So 2d 332

Mich—Van Lierop v Chesapeake & O Ry Co supra, n 20

Mo—Walton v A B C Fireproof Warehouse Co 124 S W 2d 584, 233 Mo App 693

N Y—Consolidated Box Co v Penn, 180 N Y S 2d 831, 15 Misc 2d 705

Ohio—Porta v Railway Exp Agency Inc 155 N E 2d 528

S C—McElveen v Atlantic Coast Line R Co 43 S E 2d 485, 210 S C 556

Tex—Thompson v Bob Tankersley Produce Co Civ App 289 S W 2d 840, err ref no rev err—Texas & P Ry Co v George, Civ App 466 S W 2d 659

Value at time of ... t, etc—Central of Georgia Ry Co v U S, 145 F Supp 536, 136 Ct Cl 775

Salvage value

Tex—Texas Mexican Ry Co v Slaughter, Civ App 241 S W 2d 749

Elements considered

U S—Fort Worth & D Ry Co v U S, C A Tex 242 F 2d 702

Tex—Missouri Pac R Co v John B Hardwicke Co Civ App, 380 S W 2d 706

24 U S—Thomas v National Delivery Ass'n, D C Pa, 24 F Supp 171—Gulf Refining v Rougeot, D C La 122 F Supp 700

Ga—Kinsey v Suburban Transp, Inc 121 S E 2d 808 104 Ga App 347

La—Gore Products v Texas & N O R Co supra, n 11 Piazza v Louisville & A Ry Co, App, 46 So 2d 670—Laura v Railway Exp Agency Inc App, 249 So 2d 602

Mo—Mid-Valley Sea Food Co v Gordons Transports, App 191 S W 2d 983

N Y—C.J.S. cited in J M Rodriguez & Co, Inc v Mount McGregor Lines, Inc 299 N E 2d 243 32 N Y 2d 425 345 N Y S 2d 993

Tex—Strickland Transp Co v Kool Koolson Mfg Co, Civ App 230 S W 2d 277—Thompson v A J Tebbe & Sons Co, Civ App, 241 S W 2d 627—Central Freight Lines, Inc v Clarke & Courts, Inc Civ App 413 S W 2d 927, err ref no rev err

Effect of Cummins-Carmack Amendments

(1) In ... Carr v Brown Exp Tex Civ App 217 S W 2d 75

(8) Other matters

Ala—West Bros, Inc v Resource Management Service, Inc 214 So 2d 431 283 Ala 78

Tex—Thompson v H Rouw Co Civ App 237 S W 2d 662, err ref no rev err

In absence of evidence of value at destination, etc.

(2) Other cases—McElveen v Atlantic Coast Line R Co supra, n 21

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25 U S—F J McCarty Co v Southern Pac Co D C Cal 289 F Supp 875 affd C A 428 F 2d 690—F J McCarty Co v Southern Pac Co C A Cal 428 F 2d 690—Federated Dept Stores, Inc v Brinke, D C Fla 316 F Supp 1402, affd C A 450 F 2d 1223

Ark—Kansas City Southern Ry Co v Shull, 136 S W 2d 1040, 199 Ark 932

Colo—Watson Bros Transp Co v Domenico, 194 P 2d 323 118 Colo 133

Fla—Terminal Transport Co v Lamtron Industries, Inc App, 233 So 2d 854

Ga—Spambour v Nolnd 103 S E 2d 154 97 Ga App 362—C.J.S. cited in Reynolds Aluminum Supply Co v Southeastern Freight Lines, Inc 127 S E 2d 877 878, 106 Ga App 656

Ill—Type & Press of Ill Inc v Gorter 164 N E 2d 223, 24 Ill App 2d 186—Mirski v Chesapeake & O Ry Co 202 N E 2d 22, 31 Ill 2d 423—Kennedy & Kratzer Inc v Chicago, B & Q R Co 245 N E 2d 910, 106 Ill App 2d 278

Iowa—C.J.S. cited in Conditioned Air Corp v Rock Island Motor Transit Co 114 N W 2d 304 306, 253 Iowa 961 3 A L R 3d 679 cert den 83 S Ct 46, 371 U S 825 9 L Ed 2d 64

La—C.J.S. cited in Piazza v Louisiana & A Ry Co App 46 So 2d 670 675—Ideal Bldg Materials, Inc v Herrin Transp Co App 159 So 2d 420—C.J.S. cited in Interiors, Inc v Ryder Truck Lines, Inc App 269 So 2d 496, 497

Mo—Colley v Cox, App 266 S W 2d 778—Devine v Rook, App 314 S W 2d 932

N M—Prod... burgh v Allied Van Lines, Inc 446 P 2d 868, 79 N M 593

Okl—Missouri Pac R Co v Ridley 383 P 2d 227

Pa—Humphrey v Pennsylvania R Co 5 Lycoming 117

S C—McElveen v Atlantic Coast Line R Co, supra, n 21

Tex—C.J.S. cited in Texas & N O R Co v H Rouw Co Civ App 271 S W 2d 666, 668, err dism—Yellow Freight System, Inc v Hydraulic Products Co, Civ App 482 S W 2d 659

Physical injury caused by delay

(2) Texas & N O R Co v Lide, Tex Civ App 117 S W 2d 479

Under the Cummins-Carmack Amendment to Interstate Commerce Act, etc.

U S—Federated Dept Stores, Inc v Brinke, D C Fla 316 F Supp 1402, affd C A 450 F 2d 1223

Weights and prices at intermediate point

U S—Atchison, T & S F Ry Co v Jarboe Livestock Commission Co, C C A Okl 159 F 2d 527

Compensatory damages as test

U S—Missouri Pac R Co v H Rouw Co, C A Tex, 258 F 2d 445, cert den 79 S Ct 315, 358 U S 929 3 L Ed 2d 302, reh den 79 S Ct 605 359 U S 932, 3 L Ed 2d 634

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26 U S—F J McCarty Co v Southern Pac Co C A Cal 428 F 2d 690

27 U S—Reider v Thompson, C A La 197 F 2d 158—U S v Fort Worth & D Ry Co D C Tex 141 F Supp 381 affd C A, 242 F 2d 702

Ill—Mirski v Chesapeake & O Ry Co 202 N E 2d 22, 31 Ill 2d 423

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30 La—C.J.S. black letter ... y quoted in Gore Products v Texas & N O R Co App 34 So 2d 418, 421 adhered to 38 So 2d 233

33. Rule inapplicable where another rule provides more accurate measure

U S—Great Atlantic & Pac Tea Co v Atchison, T & S F Ry Co C A Ill 333 F 2d 705 cert den 85 S Ct 661 379 U S 967 13 L Ed 2d 560

34 U S—U S v New York, N H & H R Co C A Conn 211 F 2d 404

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43. Reasonable expense

(2) Other matters

Tex—Southwestern Motor Transport Co v Valley Wholesale Cakers, Inc 427 S W 2d 597 37 A L R 3d 1114

Right of shipper to recover for expense of repairs

Ariz—Arizona Container Corp v Consolidated Freightways, 522 P 2d 772, 22 Ariz App 11

Fla—Terminal Transport Co v Lamtron Industries, Inc App 233 So 2d 854

Tenn—Wayne Knitting Mills v Delta Motor Lines, 372 S W 2d 419 52 Tenn App 164

It has been held that when the repairs admittedly restore the goods to their former condition plaintiff may not recover depreciation in addition to cost of repairs [43.5]

43.5 U S—Kirkhof Elec Co v Wolverine Exp Inc C A Mich 269 F 2d 147

50 Mo—Devine v Rook, App 314 S W 2d 932

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54 U S—F J McCarty Co v Southern Pac Co C A Cal 428 F 2d 690

D C—Greyvan Lines v Nesmith, Mun App 50 A 2d 434

Tex—C.J.S. cited in Texas & N O R Co v H Rouw Co Civ App 271 S W 2d 666 670, err dism

56 Okl—St Louis-San Francisco Ry Co v Kittrell, 253 P 2d 1076, 208 Okl 147

W Va—Payne v Ace House Movers, Inc 112 S E 2d 449 145 W Va 86

61 D C—Greyvan Lines v Nesmith, supra, n 54

Mo—Walton v A B C Fireproof Warehouse Co supra, n 21

63 Ark—Rountree v Farmers Cotton Oil Co 182 S W 2d 464 207 Ark 690

66 U S—Sunset Motor Lines, Inc v Lu-Tex Packing Co C A Tex 256 F 2d 495—Olsen v Railway Exp Agency Inc C A Okl, 295 F 2d 358

La—C.J.S. quoted in Piazza v Louisville & A Ry Co App 46 So 2d 670, 675—C.J.S. quoted in Ideal Bldg Materials, Inc v Herrin Transp Co App, 159 So 2d 420, 423

Mo—C.J.S. cited in Schroeder v Campbell, 66 Exp Inc App 324 S W 2d 363, 368

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67 S C—C.J.S. quoted in McCready v Atlantic Coast Line R Co 48 S E 2d 193 197 212 S C 449 cert den 69 S Ct 53, 335 U S 827 93 L Ed 381

68 Ohio—C.J.S. cited in Porter v Railway Exp Agency Inc 155 N E 2d 528 532

69. Rule applicable to perishable goods

U S—Missouri Pac R Co v H Rouw Co C A Tex 258 F 2d 445 cert den 79 S Ct 315 358 U S 929 3 L Ed 2d 302, reh den 79 S Ct 605 359 U S 932, 3 L Ed 2d 634

Tex—Texas Mexican Ry Co v Slaughter Civ App 122 S W 2d 1101—Texas Mexican Ry Co v Slaughter 241 S W 2d 749

70 U S—U S v Northern Pac Ry Co D C Minn 116 F Supp 277

Iowa—C.J.S. cited in Conditioned Air Corp v Rock Island Motor Transit Co 114 N W 2d 304 308, 253 Iowa 961 3 A L R 3d 679 cert den 83 S Ct 46, 371 U S 825 9 L Ed 2d 64

La—C.J.S. black letter [illegible] y quoted in Gore Products v Texas & N O R Co supra, n 30

Mo—C.J.S. cited in Meletio Sea Food Co v Gordons Transports, App 191 S W 2d 983 985

N Y—Automobile Ins Co of Hartford, Conn v Harry Trencher Furs, Inc 115 N Y S 2d 666, 202 Misc 475

71 Mo—Meletio Sea Food Co v Gordons Transports, supra, n 24

Where the shipper has replaced, or is able to replace, the lost goods, and thus retain his profit on the shipment, the carrier's liability is measured by the cost of replacement[71.5]

71.5 U S—H Daroff & Sons, Inc v Strickland Transp Co D C Pa 284 F Supp 510

72 U S—F J McCarty Co v Southern Pac Co D C Cal, 289 F Supp 875 affd C A 428 F 2d 690

Tenn—Parish & Parish Min Co v Serodino, Inc 372 S W 2d 433 52 Tenn App 196

Wis—Dairyland Co-op Cheese Ass n v Briggs Transfer Co 90 N W 2d 794 4 Wis 2d 439

74 Mo—Meletio Sea Food Co v Gordons Transports, supra, n 24

76 U S—National Distillers Products Corp v Companhia Nacional de Navegacao, D C Pa 107 F Supp 65

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§ 265. —— Interest and Costs

79. Contrary minority rule

Wash—Mojonnier & Sons, Inc v Railway Exp Agency Inc 328 P 2d 167, 52 Wash 2d 569

80 Tex—Panhandle & S F Ry Co v Montgomery supra, n 25

81 N Y—Consolidated Box Co v Penn, 180 N Y S 2d 831, 15 Misc 2d 705

82 Tenn—Wayne Knitting Mills v Delta Motor Lines, 372 S W 2d 419, 52 Tenn App 164

84 Fla Martin v E A McCabe & Co App, 113 So 2d 879

La—Dejean v Lo[illegible] Western R Co 118 So 822, 167 La 111—V. Rivera S En C v. Texas & N O R Co, supra, n 21

86 Tenn—C.J.S. cited in Inter-City Trucking Company v Mason & Dixon Lines, Inc 276 S W 2d 488, 492, 38 Tenn App 450

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90. In Kansas

(4) Other cases

Kan—Young v Santa Fe Trail Transp Co 298 P 2d 235 179 Kan 678

In Texas

(4) Stat[illegible]y amount allowed

Tex—Strickler Transp Co v Kool Kooshion Mfg Co, Civ App, 230 S W 2d 277

(5) Attorney's fees were not allowable at common law

Tex—Thompson v H Rouw Co, Civ App, 237 S W 2d 662, err ref no rev err

(6) Other matters

Tex—Red Ball Exp Inc v Naturahte, Inc Civ App, 435 S.W 2d 555

Award not to be based on statutory penalty

Fla—Allied Van Lines, Inc v Brewer, App 258 So 2d 496

91 Tex—Thompson v H Rouw Co, Civ App 237 S W 2d 662, err ref no rev err—South Eastern Motor Transport Co v Valley Worsted makers, Inc, 427 S W 2d 597, 37 A L R 3d 1114—C.J.S. cited in Yellow Freight System, Inc v Hydraulic Products Co, Civ App 482 S W 2d 659 662

§ 266. —— Incidental Damages

92 U S—Atchison, T & S F Ry Co v Jarboe Livestock Commission Co supra, n 25—Zucchero v Illinois Cent R Co D C Mo 121 F Supp 53 affd C A 221 F 2d 934—Illinois Cent R Co v Zucchero, C A Mo, 221 F 2d 934

93 U S—Campbell Soup Co v Darling Transfer Inc D C Neb 193 F Supp 408

Ga—Spainhour v Noland 103 S E 2d 154 97 Ga App 362

Particular expenses recoverable

(6) Other expenses

Pa—Girard Trust Corn Exchange Bank v Brinks, Inc 220 A 2d 827 422 Pa 48

Tex—Thompson v H Rouw Co, supra, n 24

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94 Mo—Textile Distributors, Inc v Roadway Exp Inc App, 397 S W 2d 760

N H—Richard D Brew & Co v Auclair Transp Inc 211 A 2d 897, 106 N H 370, 27 A L R 3d 978

6 Ga—Atlanta, B & C R Co v Patterson, 37 S E 2d 422, 73 Ga App 551

§ 267. —— Special Damages

Library References

Carriers ⇐135, 229(3)

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10 U S—Marquette Cement Mfg Co v Louisville & N R Co D C Tenn 281 F Supp 944 affd, C A 406 F 2d 731—F J McCarty Co v Southern Pac Co C A Cal, 428 F 2d 690

Mo—National Beef Packing Co v Missouri Pac R Co, App 479 S W 2d 155

N Y—Marcia Frocks v New York Dress Delivery 29 N Y S 2d 322

11 Iowa—C.J.S. cited in Conditioned Air Corp v Rock Island Motor Transit Co 114 N W 2d 304 308, 253 Iowa 961, 3 A L R 3d 679, cert den 83 S Ct 46, 371 U S 825, 9 L Ed 2d 64

Ohio—Strickler v Baltimore & Ohio R Co, 135 N E 2d 844, 165 Ohio St 423

Okl—St Louis-San Francisco Ry Co v Kittrell, 253 P 2d 1076, 208 Okl 147—Missouri Pac R Co v Ridley, 383 P 2d 227

To make notice of the special circumstances sufficient, etc.

(2) Other statements

U S—Marquette Cement Mfg Co v Louisville & N R Co D C Tenn 281 F Supp 944, affd, C A, 406 F 2d 731

Damages held not "special" within rule

(4) Cost of replacement

U S—Hycel, Inc v American Airlines, Inc D C Tex 328 F Supp 190

12 U S—Hycel, Inc v American Airlines, Inc D C Tex 328 F Supp 190

14 U S—L E Whitlock Truck Service, Inc v Regal Drilling Co, C A Colo, 333 F 2d 488

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§ 268. —— Remote or Speculative Damages

18 U S—Texas Instruments, Inc v Branch Motor Exp Co, D C Mass 308 F Supp 1228, affd C A 432 F 2d 564

§ 269. —— Exemplary Damages

20 Cal—Schroeder v Auto Driveaway Co 114 Cal Rptr 622, 523 P 2d 662, 11 C.3d 908

§ 270. —— Duty of Owner to Prevent or Reduce Damages

23 U S—F J McCarty Co v Southern Pac Co D C Cal 289 F Supp 875 affd C A, 428 F 2d 690

24 Tex—Herrin Transp Co v Sheldon, Civ App 209 S W 2d 943

§ 271. —— Matters in Mitigation

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29. Deduction unauthorized

(2) Other cases—Bronstein v Baltimore & O R Co D C Pa 29 F Supp 837—Meltzer v Pennsylvania R Co D C Pa 29 F Supp 840—Meltzer v Baltimore & O R Co D C Pa, 38 F Supp 391

Deduction unauthorized

Tex—Texas & N O R Co v H Rouw Co Civ App 271 S W 2d 666, err dism

30 N Y—Cy Ruchman, Inc v Saland, 102 N Y S 2d 410

Tex—Texas & N O R Co v Searcy Civ App, 228 S W 2d 366, err ref no rev err

§ 272. —— Deduction of Freight

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38 Colo—Denver-Chicago Trucking Co v Republic Drug Co 306 P 2d 1076, 134 Colo 461

Ky—Baltimore & O R Co v Carrier 426 S W 2d 938

La—Gore Products v Texas & N O R Co App, 34 So 2d 418, adhered to 38 So 2d 233

Mo—Walton v A B C Fireproof Warehouse Co, 124 S W 2d 584, 233 Mo App 693

Recovery allowed

La—V Rivera S En C v Texas & N O R Co, 31 So 2d 180, 211 La 969, 172 A L R 791 app dism and cert den, 68 S Ct 71 332 U S 750, 92 L Ed 337

39 Conn—C J S. cited in Railroad Salvage of Conn, Inc v Eazor Express, Inc, Super 287 A 2d 745, 748, 29 Conn Sup 354

40 U S—W A Stackpole Motor Transp Inc v Malden Spinning & Dyeing Co C A Mass, 263 F 2d 47

Ariz—C J S. cited in Arizona Container Corp v Consolidated Freightways, 522 P 2d 772, 775 22 Ariz App 11

41 Mo—Helm v Rice & Co App, 194 S W 2d 713

Shipper not entitled to recover unpaid freight charges

U S—H Daroff & Sons, Inc v Strickland Transp Co, D C Pa, 284 F Supp 510

§ 273. —— Abandonment on Account of Damage

44 Colo—Denver-Chicago Trucking Co v Republic Drug Co, 306 P 2d 1076, 134 Colo 461

Ill—Kennedy & Kratzer, Inc v Chicago, B & Q R Co 245 N E 2d 910, 106 Ill App 2d 278

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The carrier need not attempt to mitigate the consignee's damage once the consignee has given notice to the carrier that it intends to abandon the damaged shipment.[46.5]

46.5 U S—Fraser-Smith Co v Chicago, R I & P R Co, C A Minn, 435 F 2d 1396

47 U S—Baltimore Mfg Co v Overnite Transp Co D C N C 157 F Supp 891

Ill—C.J.S. cited in Kennedy & Kratzer, Inc v Chicago, B & Q R Co 245 N E 2d 910, 913 106 Ill App 2d 278

No duty to salvage

Wash—Western Steel Bldgs Inc v Universal Carloading & Distributing Co 413 P 2d 954 66 Wash 2d 522

Recovery undetermined value to some undetermined person held not defense

Wash—Western Steel Bldgs Inc v Universal Carloading & Distributing Co 413 P 2d 954 68 Wash 2d 522

48 Tex—CJS cited in Thompson v Tankersley Civ App 238 S W 2d 263 266

§ 274 —— Injury to Corpse

51. Damages held not recoverable

Okl—Long v Chicago, R I & P R Co 86 P 289 15 Okl 512, 6 L R A N S 883 5 Ann Cas 1005

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Cal—CJS cited in City Council of Santa Barbara v Superior Court, 3 Cal Rptr 796, 798 179 C A 2d 38

Neb—Application of Nebraska Limestone Producers Ass'n, 97 N W 2d 331 168 Neb 786

Peculiarly a field for administrative law

Ky—Louisville & N R Co v Com ex rel Kentucky R R Commission, 300 S W 2d 777

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58 Tex—Texas & N O R Co v Railroad Commission, 286 S W 2d 112, 155 Tex 323

Intent of Congress

US—Pennsylvania R Co v US D C Pa 202 F Supp 584

59 Fla—Seaboard Coast Line R Co v International Minerals & Chemical Corp 283 So 2d 45 cert den 94 S Ct 936, 415 U S 901 39 L Ed 2d 459

60. No power in commission to adjust rates to legalize competition

US—Lake Carriers Ass'n v US D C Ohio, 399 F Supp 386

Neb—Application of United Mineral Products Co 121 N W 2d 492, 175 Neb 285

Authority to extend rates

N Y—Rensselaer County v Capital Dist Transp Authority 336 N Y S 2d 382, 71 Misc 2d 428, revd on oth grds 349 N Y S 2d 20, 42 A D 2d 445

62 US—Sonken-Galamba Corp v Union Pac R Co, C C A Kan 145 F 2d 808

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64 US—Lowden v Simonds-Shields-Lonsdale Grain Co Mo 59 S Ct 612, 306 U S 516, 83 L Ed 953 reh den 59 S Ct 792, 307 U S 649 83 L Ed 1528—Cranor v Lowden, Mo 62 S Ct 763 315 U S 631 86 L Ed 1077 reh den 62 S Ct 1030, 316 U S 708, 86 L Ed 1775—US v Associated Air Transport, Inc C A Fla 275 F 2d 827

Miss—Illinois Cent R Co v N T Wax Grocery Co 45 So 2d 266, 208 Miss 675

Neb—Livestock Commission v Union Pac R Co 283 N W 498, 135 Neb 689—Chicago, B & Q R Co v Herman Bros Inc 82 N W 2d 395 164 Neb 247—Application of Nebraska Limestone Producers Ass'n, 97 N W 2d 331 168 Neb 786—Application of United Mineral Products Co 131 N W 2d 604 177 Neb 898

N Y—Kaufman v Pennsylvania R Co 47 N Y S 2d 639 affd 64 N Y S 2d 690

Pa—Jackson & Perkins Co v Mushroom Transp Co 41 A 2d 635 351 Pa 583 cert den 66 S Ct 42, 326 U S 733 90 L Ed 427

Tex—Southern Pac Co v Southern Rice Sales Co Civ App 174 S W 2d 1018, revd on oth grds 178 S W 2d 264 142 Tex 365

65 US—Cranor v Lowden C C A Mo 121 F 2d 645 affd 62 S Ct 763 315 U S 631 86 L Ed 1077 reh den 62 S Ct 1030, 316 U S 708 86 L Ed 1775

66 US—Atlantic Coast Line R Co v US Fidelity & Guaranty Co D C Ga 52 F Supp 177—Thompson v Texarkana Cotton Oil Corporation, D C Ark 54 F Supp 212

Pa—Jackson & Perkins Co v Mushroom Transp Co supra, n 64

Tex—Southern Pac Co v Southern Rice Sales Co 178 S W 2d 264 142 Tex 365—Southern Pac Co v Southern Rice Sales Co supra, n 64

Free storage

US—Western Oil & Fuel Co v Great Lakes Pipe Line Co C A Minn 210 F 2d 490

Collateral contracts

Tex—Berkins Van Lines Co v Cauble, Civ App 347 S W 2d 320

67 US—El Dorado Terminal Co v General American Tank Car Corportation, supra, n 66—Standard Hotel Supply Co v Pennsylvania R Co D C N Y 65 F Supp 439—Tex-O-Kan Flour Mills Co v Texas & P Ry Co C A Tex 178 F 2d 89 cert den 70 S Ct 665 339 U S 930, 94 L Ed 1350

Ark—St Louis-S F Ry Co v Pollard, 154 S W 2d 9 202 Ark 917

Cal—Groom v Holm, 1 Cal Rptr 410, 176 C A 2d 310

Del—Travers v Arctic Roofing, Super 27 A 2d 78, 3 Terry 41 affd 32 A 2d 559 3 Terry 293

Kan—Thompson v Richards, 146 P 2d 359 158 Kan 178

Mass—Railway Express Agency v Merchants, 42 N E 2d 805 311 Mass 704

Mich—Hecker Products Corporation v Transamerican Freight Lines, 296 N W 297 296 Mich 381—Watson-Higgins Milling Co v Pere Marquette Ry Co 43 N W 2d 43 328 Mich 5

Neb—Union Transfer Co v Reusch, 37 N W 2d 383 151 Neb 326

N Y—W R Grace & Co v Railway Exp Agency Inc 193 N Y S 2d 780, 9 A D 2d 425, affd 202 N Y S 2d 281, 8 N Y 2d 103 168 N E 2d 362, cert den 81 S Ct 69 364 U S 830, 5 L Ed 2d 57

Tex—National Carloading Corporation v Phoenix-El Paso Express Civ App 178 S W 2d 133, affd 176 S W 2d 564, 142 Tex 141 cert den 64 S Ct 1156 322 U S 747 88 L Ed 1578

Contract, estoppel or waiver precludes to alter rate

(2) Other matters

US—US v Associated Air Transport, Inc C A Fla 275 F 2d 827

Cal—Transmix Corp v Southern Pac Co 9 Cal Rptr 714 187 C A 2d 257

Waiver not permitted

US—Southern Ry Co v Aluminum Co of America, D C Tenn 119 F Supp 389 affd C A 210 F 2d 139—North Coast Mfg Corp v Union Pac R Co D C Or 185 F Supp 287—Ephraim v Safeway Trails, Inc C A N Y 341 F 2d 815

N Y—Bianchi v Sears, Roebuck & Co 116 N Y S 2d 512, 203 Misc 893 revd on oth grds 134 N Y S 2d 495 284 App Div 709 revd on oth grds 150 N Y S 2d 187 1 N Y 2d 63 133 N E 2d 699

68 US—Silent Sioux Corp v Chicago & N W Ry Co C A Iowa, 262 F 2d 474—US v Schupper Motor Lines, Inc C A N Y, 262 F 2d 859

Del—Artic Roofings v Travers, 32 A 2d 559, 3 Terry 293

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Or—Oregon-Washington R & Nav Co v Bean, 101 P 2d 230, 164 Or 266

Tex—Southern Pac Co v Southern Rice Sales Co supra, n 64—National Carloading Corporation v Phoenix-El Paso Express, supra, n 67

Vt—Montpelier & Wells River R R v Caldbeck-Cosgrove Corporation 8 A 2d 681 110 Vt 390

Liability for payment dependent solely on tariff

US—US v Associated Air Transport, Inc C A Fla 275 F 2d 827

Contract motor carriers

US—Bowser and Campbell v Knox Glass, Inc C A Pa 390 F 2d 193 cert den 88 S Ct 2061 392 U S 907 20 L Ed 2d 1365

69 N C—North Carolina Utilities Commission v Atlantic Coast Line R Co 29 S E 2d 912, 224 N C 283

70 Del—Artic Roofings v Travers, supra, n 68

71 US—Burlington Northern, Inc v US C A 549 F 2d 83

Proposed tariff properly rejected

D C—North Central Truck Lines, Inc v I C C C A 559 F 2d 802, 182 U S App D C 181

72 US—Lowden v Simonds-Shields-Lonsdale Grain Co supra, n 64

Waiver not permitted

(1) Lowden v Simonds-Shields-Lonsdale Grain Co D C Mo 19 F Supp 438, affd C C A 97 F 2d 816, revd on oth grds 59 S Ct 612, 306 U S 516, 83 L Ed 953 reh den 59 S Ct 792, 307 U S 649 83 L Ed 1528

(2) Lowden v Simonds-Shields-Lonsdale Grain Co supra

73 Ala—Herring v Alabama Great Southern R Co 184 So 180 236 Ala 618, cert den 59 S Ct 583 306 U S 644 83 L Ed 1044

Ky—Tobacco By-Products & Chemical Corporation v Western Dark Fired Tobacco Growers Ass'n, 133 S W 2d 723 280 Ky 469

La—International Shoe Co v Flota Mercante Del Estado, App 29 So 2d 536

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S C—White v Southern Ry Co 38 S E 2d 111 208 S C 319 165 A L R 988

Tex—Southern Pac Co v Southern Rice Sales Co supra, n 66

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74 US—Railroad Retirement Bd v Duquesne Warehouse Co App D C & N Y 66 S Ct 238, 326 U S 446, 90 L Ed 192

Purpose of requirement

N J—Southern Pac Co v Wheaton Brass Works, 76 A 2d 890, 5 N J 594, cert den 71 S Ct 614 341 U S 904 95 L Ed 1343

75 US—United Gas Pipe Line Co v Federal Power Commission, C A 220 F 2d 706, cert den 76 S Ct 86, 350 U S 844 100 L Ed 752—US v Spokane P & S Ry Co C A Or 261 F 2d 681

Neb—Chicago, B & Q R Co v Herman Bros, Inc 82 N W 2d 395 164 Neb 247

N C—North Carolina Utilities Commission v Atlantic Coast Line R Co supra, n 69

Expiration of temporary rate

Neb—Application of United Mineral Products Co 131 N W 2d 604 177 Neb 898

77 US—Kurn v Pittsburgh Plate Glass Co D C Mo 48 F Supp 574—Louisville & N R Co v US D C Ky 106 F Supp 999

Ill—Chicago, B & Q R Co v California Wine Co 40 N E 2d 624 313 Ill App 498

79 US—Utah Poultry Producers Co-Op v Union Pac R Co C C A Utah, 147 F 2d 975—Chicago, B & Q R Co v E Bermer & Sons, D C Minn, 56 F Supp 691—Great Northern Ry Co v Commodity Credit Corp D C Minn 77 F Supp 780, op am 81 F Supp 852

Miss—Illinois Cent R Co v N T Wax Grocery Co supra, n 64

80 US—Utah Poultry Producers Co-Op v Union Pac R Co supra, n 79—Great Northern Ry Co v Commodity Credit Corp supra, n 79

81 US—Utah Poultry Producers Co-Op v Union Pac R Co supra, n 79

§ 276. Terminology

82 US—Great Northern Ry Co v Commodity Credit Corp supra, n 79

Penalty charged by carrier for improper packing held not a "rate"—Smith v Thompson, 137 S W 2d 981 234 Mo App 1151

Flat rate

US—Great Northern Ry Co v Commodity Credit Corp, supra, n 79

Paper rate defined

Wash—Great Northern Ry Co v Department of Public Works of Washington, 296 P 142, 144, 161 Wash 29

46 C J p 1174 note 74

Competitive and non-competitive traffic defined

US—Northern Pac Ry Co v US, D C Minn, 41 F Supp 439 441 affd, 62 S Ct 1166 316 US 346, 86 L Ed 1521

"Lawful rate" defined

US—Kansas City S R Co v Carl, Ark 33 S Ct 391 227 US 639 57 L Ed 683—US v Associated Air Transport, Inc C A Fla, 275 F 2d 827

"Lawful rate" distinguishable from "legal rate"

US—Southern Ry Co v Louisville & N R Co D C Ky, 185 F Supp 645 affd, C A 289 F 2d 934

Comparable rates

US—Ch[illegible] Co v Tauber Oil Co, D C Iowa, 309 F Supp 904

Freight classification

US—Dutton-Lainson Co v US, D C Neb 371 F Supp 1352

84 US—Great Northern Ry Co v Armour & Co D C Ill 26 F Supp 964

[illegible] in carrier rate-making practice is the [illegible] or associating in a designated list of commodities, which because of their inherent quality or value, or of the risks involved in shipment, or because of the manner or volume in which they are shipped or loaded, or the like, may justly and conveniently be given similar rates

US—Director General of Railroads v Viscose Co Pa 41 S Ct 151, 254 US 498 65 L Ed 372

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87. Other definitions

US—New York, N H & H R Co v US, D C Conn 221 F Supp 370, affd 85 S Ct 419 379 US 343, 13 L Ed 2d 324

88 US—Atchison, T. & S F Ry Co. v US, 181 Ct Cl 315

Double-line rates

Rates for shipment over more than one line—Tucker v M[illegible] Pac R Co 108 P 89, 90, 82 Kan 222, revd on oth grds 33 S Ct 961, 230 US 340, 57 L Ed 1507.

Through rate distinguished

US—T[illegible] v US Mo, 72 S Ct 978, 343 US 549, 96 L Ed 1134—Denver & R G W R Co v Union Pac R Co, Colo & Neb, 76 S Ct 982, 351 US 321, 100 L Ed 1220—Denver & R G W R Co v US, D C Colo, 131 F Supp 372, revd on oth grds 76 S Ct 982, 351 US 321 100 L Ed 1220.

Test of "through rate"

US—Denver & R G W R Co v US, D C Colo, 131 F Supp 372, revd on oth grds 76 S Ct 982, 351 US 321, 100 L Ed. 1220

"Non-compensatory rate" is one which does not provide proper compensation to the carrier.[88.5]

88.5 Tex—Railroad Comm. v Oil Field Haulers Ass'n, Civ App, 369 S W 2d 931, reh den 373 S W 2d 394 revd on oth grds Sup, 381 S W 2d 183.

89 US—Great Northern Ry Co v Commodity Credit Corp, supra, n 79

90 US—Great Northern Ry Co v Commodity Credit Corp supra, n 79

Mont—Montana Citizens Freight Rate Ass'n v Board of R R Com'rs of Mont 271 P 2d 1024

92 US—US v Associated Air Transport, Inc C A Fla 275 F 2d 827—Union Pac R Co v Higgins, D C N D 223 F Supp 396

D C—US v I C C, C A 198 F 2d 958, 91 US App D C 178, cert den 73 S Ct 212, 344 US 893 97 L Ed 691

93 US—US v South Buffalo Ry Co D C N Y 69 F Supp 456, affd 68 S Ct 868 333 US 771 92 L Ed 1077

"Services in connection with transportation"

US—Waling v Baltimore Steam Packet Co, C C A Md, 144 F 2d 130

Transit [illegible]ed

US—Great Northern Ry Co v Commodity Credit Corp supra, n 79

"Inside collection" service

US—C & D Motor Delivery Co v US C C A Ohio, 150 F 2d 250

Pick up and delivery service defined

N Y—Bush Terminal Buildings Co v Bush Terminal R Co 63 N Y S 2d 744 753

94 US—Morningstar, Nicol, Inc, v Norton D C N J 62 F Supp 354—US v U S Smelting Refining & Min Co Utah, 70 S Ct 537 339 US 186, 94 L Ed 750, reh den 70 S Ct 994 339 US 972, 94 L Ed 1379

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98. "Point of origin" construed

US—Great Northern Ry Co v US, modity Credit Corp, D C Minn 77 F Supp 780, 787 788 790 am 81 F Supp 852

N C—Davis v Latham-Bradshaw Cotton Co 117 S E 391, 393 185 N C 387

"Loading capacity," as used in a tariff provision has been held to contemplate the utilization of the entire weight and space capacity of the car which has been furnished But it has also been held in a decision rejecting this view that the term relates to the size, space or compass of such car.[98.1]

98.1 US—Fort Worth & Denver City Ry Co v Childress Cotton Oil Co D C Tex 48 F Supp 937 affd, C C A, 141 F 2d 558—Atchison T & S F Ry Co v Guthrie Cotton Oil Co, C C A Okl, 139 F 2d 10

§ 277. Right of Carrier to Fix Rates

Library References

Carriers ⇐26 et seq.

99 US—Atchison T & S F Ry Co v Wichita Bd of Trade, Kan, 93 S Ct 2367 412 US 800, 37 L Ed 2d 350

N M—In re Atchison, T & S F Ry Co's Protest of Rates, 107 P 2d 123, 44 N M 608

Pick up and delivery charges

US—Cooper-Jarrett, Inc v US, D C Mo 226 F Supp 318, affd 85 S Ct 49, 379 US 6, 13 L Ed 2d 21

Free or reduced rate service to employees

Mass—New England Tel & Tel Co v Department of Public Utilities, 354 N E 2d 860, 371 Mass 67

1 US—Great Northern Ry Co v Commodity Credit Corp, D C Minn, 77 F Supp 780, op am 81 F Supp 852—Cooper-Jarrett, Inc v US D C Mo 226 F Supp 318 affd 85 S Ct 49 379 US 6, 13 L Ed 2d 21

4 US—Lynchburg Traffic Bureau v US D C Va 225 F Supp 874 affd 84 S Ct 1348, 377 US 270, 12 L Ed 2d 305, reh den 84 S Ct 1911 377 US 1010 12 L Ed 2d 1057—Luckenbach S S Co v US 179 F Supp 605 affd in part, vac in part on oth grds 80 S Ct 1611 364 US 280 4 L Ed 2d 1719

Mo—Baldwin v Scott County Milling Co 122 S W 2d 890, 343 Mo 915 revd on oth grds 59 S Ct 943, 807 US 478 83 L Ed 1409 reh den 60 S Ct 66, 308 US 631 84 L Ed 526

Pa—Betterman v American Stores Co 80 A 2d 66, 367 Pa 193 cert den 72 S Ct 49

Unlawful order

US—Atlantic Coast Line R Co v US 140 F Supp 569 136 Ct Cl 1

5 US—New York Cent R Co v US D C Mass 99 F Supp 394 affd 72 S Ct 201 342 US 890, 96 L Ed 667—A E West Petroleum Co v Atchison, T & S F Ry Co D C Mo 108 F Supp 644, affd C A 212 F 2d 812

Ind—Pennsylvania R Co v F E Mathias Lumber Co 47 N E 2d 158 113 Ind App 133

La—International Shoe Co v Flota Mercante Del Estado App 29 So 2d 536

Mo—Baldwin v Scott County Milling Co supra, n 4

As controlling in conflict with bill of lading

Ill—National Starch & Chemical Corp v McNamara Motor Exp Inc 189 N E 2d 776 40 Ill App 2d 484

7 US—Columbus & Greenville Ry Co v US, supra, n 5

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12 Cal—Southern Pac Co v Railroad Commission of California, 87 P 2d 1055 13 Cal 2d 89

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20 US—Chicago & N W Ry Co v US D C Ill, 195 F Supp 708

21 Ala—Roberson v Tennessee Valley Authority 186 So 727 237 Ala 279

24 Ill—Lowden v Illinois Commerce Commission, 33 N E 2d 430, 376 Ill 225

25 Pa—City of Philadelphia v Pennsylvania Public Utility Commission, 102 A 2d 428, 174 Pa Super 641

Power to [illegible] rates as provided by contract

US—DeBry & Hilton Travel Services, Inc v Capitol Intern Airways, Inc C A Utah, 541 F 2d 855

28 D C—Canadian Nat Ry Co v US D C 425 F Supp 290 affd 97 S Ct 1638, 430 US 961, 52 L Ed 2d 352

§ 278. Power of State to Fix or Regulate Rates

Library References

Carriers ⇐26 et seq

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Common carriers are engaged in public employment affecting the public interest, and, subject to the constitutional limitations against the impairment of vested rights, or depriving persons of property without due process of law, or depriving them of the equal protection of the law, a state has power to regulate the amount of charges by such carriers for the transportation of property within its own jurisdiction unless restricted by some contract in the charter.[32]

32 Fla—State v Georgia Southern & F Ry Co 190 So 527 139 Fla 115 123 A L R 914

Statute held [illegible]ovable

Cal—Southern Pac Co v Railroad Commission of California, supra, n 12

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40 N Y—Klein v O Dwyer 80 N Y S 2d 343 192 Misc 421

43 Neb—Application of Nebraska Limestone Producers Ass n, 97 N W 2d 331 168 Neb 786

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46 Ill—Rockwell Lime Co v Illinois Commerce Commission 26 N E 2d 99 373 Ill 309 cert den 61 S Ct 16, 311 U S 660, 85 L Ed 423

47 Tex—Texas & N O R Co v Railroad Commission, 286 S W 2d 112, 155 Tex 323

48 Tex—Texas & N O R Co v Railroad Commission, 286 S W 2d 112, 155 Tex 323

Validity of state commission's order

Ill—Rockwell Lime Co v Illinois Commerce Commission, supra, n 46

54 N Y—Pennsylvania R Co v State, 192 N Y S 2d 298, 17 Misc 2d 1074 app dism 217 N Y S 2d 84 9 N Y 2d 909 176 N E 2d 95 affd 223 N Y S 2d 541 15 A D 2d 269 affd 230 N Y S 2d 1004 11 N Y 2d 504, 184 N E 2d 588

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58 U S—Watab Paper Co v Northern Pac Ry Co, C C A Minn 154 F 2d 436

Cal—Southern Pac Co v Railroad Commission of California, supra, n 12

Neb—Farmers Union Livestock Commission v Union Pac R Co 283 N W 498 135 Neb 689—In re Motor Carriers, 150 N W 2d 275 181 Neb 697—Application of Howard McLean Co 187 N W 2d 300, 187 Neb 30

N J—In re Industrial Sand Rates, 308 A 2d 370 125 N J Super 48, affd 327 A 2d 427, 66 N J 12

N M—In re Atchison, T & S F Ry Co s Protest of Rates, 107 P 2d 123 44 N M 608

Pa—Pennsylvania R Co v Pennsylvania Public Utility Commission 4 A 2d 815 135 Pa Super 154—U S v Pennsylvania Public Utility Commission, 135 A 2d 93 184 Pa Super 380, revd on oth grds 143 A 2d 341 393 Pa 537 cert den 79 S Ct 126, 358 U S 884 3 L Ed 2d 112

Public utilities

S C—Darby v Southern Ry Co, 10 S E 2d 465, 194 S C 421

Express company rates

Ga—Railway Exp Agency v Cook, 32 S E 2d 822, 198 Ga 715

Rate-making function not limited by statute regarding discrimination

Tex—Texas & N O R Co v Railroad Commission, 286 S W 2d 112, 155 Tex 323

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60 Iowa—Green Bay Lumber Co v Chicago, B & Q R Co 284 N W 369

Ky—Artemus-Jellico R Co v Railroad Commission of Kentucky ex rel Rugby, 511 S W 2d 235

64 Cal—Southern Pac Co v Railroad Commission of California, supra, n 12

65. Effect of consent order on non-parties

W Va—Anchor Coal Co v Public Service Commission, 15 S E 2d 406, 123 W Va 439

66 Neb—Application of Nebraska Limestone Producers Ass n, 97 N W 2d 331 168 Neb 786

N J—In re Industrial Sand Rates, 308 A 2d 370, 125 N J Super 48, affd 327 A 2d 427, 66 N J 12

Particular powers held lacking by commission

Iowa—Chicago, B & Q R Co v Iowa State Commerce Commission, 105 N W 2d 633 252 Iowa 318

Mo—State ex rel Philipp Transit Lines, Inc v Public Service Commission, App 523 S W 2d 353

Powers conferred on commission

Neb—L E Whitlock Truck Service, Inc v Shippers Oil Field Traffic Ass'n, 105 N W 2d 588, 171 Neb 78

68 Cal—Southern Pac Co v Railroad Commission of California, supra, n 12

Or—In re Public Utilities Comm'r of Or 268 P 2d 605 201 Or 1

Power to establish emergency rates

S C—Darby v Southern Ry Co supra, n 58

Tex—Abilene & So Ry Co v Terrell, Civ App 131 S W 2d 37 err ref

Rates should not be used as price-fixing device

Tex—Texas & N O R Co v Railroad Commission, 286 S W 2d 112, 155 Tex 323

Statute construed

(1) Statute held procedural only

Iowa—Chicago, B & Q R Co v Iowa State Commerce Commission, 105 N W 2d 633 252 Iowa 318

(2) Authority to fix only maximum rates conferred

Iowa—Chicago, B & Q R Co v Iowa State Commerce Commission, 105 N W 2d 633 252 Iowa 318

(3) Other statutes

U S—Smith Canning & Freezing Co v Lloyd Krause, Inc C A Or 398 F 2d 128

Alaska—Kodiak Western Alaska Airlines, Inc v Bob Harris Flying Service Inc 592 P 2d 1200

Miss—Illinois Cent R Co v Jackson Ready-Mix Concrete, 137 So 2d 542, 243 Miss 72

Later enacted statutes not controlling

Neb—Application of United Mineral Products Co 131 N W 2d 388, 177 Neb 802

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69 Fla—Broward County Traffic Ass'n v Mayo, 340 So 2d 1152

When publication and notice required

Mont—State ex rel Montana Motor Tariff Bureau, Inc v Smith, 394 P 2d 758, 144 Mont 110

70 U S—Baltimore Shippers & Receivers Ass'n v Public Utilities Commission of State of Cal D C Cal 268 F Supp 830, affd 88 S Ct 694 389 U S 583, 19 L Ed 2d 783

Ark—Southeast Arkansas Freight Lines v Arkansas Corporation Commission, 166 S W 2d 262, 204 Ark 1023

Cal—River Lines Inc v Public Utilities Commission, 42 Cal Rptr 104, 398 P 2d 144 62 C 2d 244

Pa—City of Philadelphia v Pennsylvania Public Utility Commission, supra, n 25

71 Minn—State v Northern Pac Ry Co 39 N W 2d 752, 229 Minn 312

Neb—L E Whitlock Truck Service, Inc v Shippers Oil Field Traffic Ass'n, 105 N W 2d 588, 171 Neb 78

73 Ark—Household Goods Carriers v Arkansas Transp Commission, 562 S W 2d 42, 262 Ark 797

Miss—Illinois Cent R Co v Jackson Ready-Mix Concrete, 137 So 2d 542, 243 Miss 72

Power to set aside order

(2) Hearing required when suspended

Colo—Consolidated Freightways Corp of Del v Public Utilities Commission, 406 P 2d 83, 158 Colo 239

Continuing power not affected by pendency of suit to review rate

Tex—Texas & N O R Co v Railroad Commission 286 S W 2d 112, 155 Tex 323

Power to change, alter, amend, or abolish classification or rate

Mont—State ex rel Montana Motor Tariff Bureau, Inc v Smith, 394 P 2d 758, 144 Mont 110

76 Neb—Application of Chicago, B & Q R Co, 144 N W 2d 432, 180 Neb 587

N M—In re Atchison, T & S F Ry Co s Protest of Rates, supra, n 58

Statute authorizing reduced rates for government property held invalid

U S—U S v Public Utilities Commission of Cal D C Cal 141 F Supp 168 affd 78 S Ct 446, 355 U S 534 2 L Ed 2d 470, reh den 78 S Ct 713 356 U S 925 2 L Ed 2d 760

Special rate for senior citizens

Neb—In re Resolution 146, 187 N W 2d 760, 187 Neb 156

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78 **Rates commission authorized to regulate**

(1) Humble Oil & Refining Co v Railroad Commission of Texas, 128 S W 2d 9 133 Tex 330

(5) Other rates

U S—Smith Canning & Freezing Co v Lloyd Krause, Inc C A Or 398 F 2d 128

Colo—Consolidated Freightways Corp of Del v Public Utilities Commission, 406 P 2d 83, 158 Colo 239

Tex—Railroad Commission v Oil Field Haulers Ass n, Civ App 369 S W 2d 931 reh den 373 S W 2d 394 revd on oth grds, Sup 381 S W 2d 183

79 U S—Watab Paper Co v Northern Pac Ry Co supra, n 58

Pa—Philadelphia Transp Co v Pennsylvania Public Utility Commission, 17 D & C 2d 767 73 Dauph 16

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86 Or—Oregon-Washington R & Nav Co v Bean, 101 P 2d 230 164 Or 266

88 Neb—Farmers Union Livestock Commission v Union Pac R Co., supra, n 58

Okl—Oklahoma City-Ada-Atoka Ry Co v State, 248 P 2d 1005 207 Okl 50, app dism 73 S Ct 104 344 U S 861 97 L Ed 668

Pa—Baltimore & O R Co v Pennsylvania Public Utility Commission, 7 A 2d 488, 136 Pa Super 517

89 Va—Com ex rel Town of Appalachia v Old Dominion Power Co 34 S E 2d 364 184 Va 6, cert den 66 S Ct 139 326 U S 760, 90 L Ed 457

92 Okl—Oklahoma City-Ada-Atoka Ry Co v State, supra, n 88

94 Okl—Oklahoma City-Ada-Atoka Ry Co v State, supra, n 88

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96 Ky—Louisville & N R Co v Com ex rel Kentucky R R Commission, 314 S W 2d 940

Jurisdiction not defeated by acts of parties

Ill—Rockwell Lime Co v Illinois Commerce Commission, supra, n 46

§ 279. Power of Federal Government to Fix or Regulate Rates

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4 U S—Great Northern Ry Co v U S D C Del, 81 F Supp 921 affd 69 S Ct 750, 336 U S 933, 93 L Ed 1093

D C—National Motor Freight Traffic Ass n, Inc v U S D C 205 F Supp 592, affd 83 S Ct 311 371 U S 223 9 L Ed 2d 273, reh den, op clarified 83 S Ct 688, 372 U S 246, 9 L Ed 2d 709

Ind Pennsylvania R Co v F E Mathias Lumber Co 47 N E 2d 158 113 Ind App 133

N Y—Pennsylvania R Co v L N White & Co 116 N Y S 2d 361 280 App Div 587 rearg den and app gr 117 N Y S 2d 684, 281 App Div 658, affd 113 N E 2d 553, 305 N Y 801

"Section 22 quotation"

U S—Great Northern Ry Co v U S 312 F 2d 906, 160 Ct Cl 225

5 Ark—St Louis-San Francisco Ry Co v J W Myers Commission Co 185 S W 2d 288, 208 Ark 1032

7 U S—New York Cent R Co v U S D C N Y 267 F Supp 619—Greyhound Lines, Inc v U S D C Ill 268 F Supp 746, affd 88 S Ct 1616, 389 U S 216, 19 L Ed 2d 422

§ 289. Power of Courts to Fix Rates

9 US—US v Kansas City Southern Ry Co CA Mo 217 F 2d 751—Baltimore & O R Co v Alabama Great Southern R Co CA 5th 206 F 2d 1265 165 US App D C 226

DC—Spiegel v Public Utilities Commission of District of Columbia, C A 226 F 2d 29 96 U S App D C 307 cert den 76 S Ct 192, 350 U S 904 100 L Ed 794

Minn—Application of St Paul City Ry Co 64 N W 2d 487 242 Minn 188

Or—C.J.S. quoted at length in Valley & Siletz R Co v Flagg, 247 P 2d 639 654 195 Or 683

Pa—Pennsylvania R Co v Pennsylvania Public Utility Commission 4 A 2d 815 135 Pa Super 154

R I—United Elec Rys Co v Kennelly 90 A 2d 775 80 R I 64

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12 US—Alton R Co v U S D C Ill 58 F 2d 399 revd on oth grds 53 S Ct 124 287 US 229 77 L Ed 275—Northwestern Auto Parts Co v Chicago, B & Q R Co D C Minn 139 F Supp 521, revd on oth grds C A 240 F 2d 743 cert den 78 S Ct 16, 17 three cases, 355 US 815 2 L Ed 2d 32

14 Or—Oregon-Washington R & Nav Co v Corey 252 P 955 120 Or 517

Tex—Southern Pac Co v Southern Rice Sales Co Civ App 174 S W 2d 1018, revd on oth grds 178 S W 2d 264, 142 Tex 365

§ 281. Reciprocal Rights of Public and Carrier in Respect of Service and Rate of Compensation

17 US—Marnell v United Parcel Service of America, Inc, D C Cal, 260 F Supp 391

18 Conn—Guida v Public Utilities Commission, 148 A 2d 613, 166 Conn 328

19. Increase held proper

(2) Other matters

Ohio—Armco Steel Corp v Public Utilities Commission, 243 N E 2d 75, 16 Ohio St 2d 144

Zone of reasonableness

US—North Dak Wheat Com'n v US, C A N D 565 F 2d 621

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21. Threat of regulation

US—Stone v Farmers Loan & Trust Co 6 S Ct 334 388, 1191, 116 US 307, 29 L Ed 636

Wash—State ex rel Railway Exp Agency, Inc v Washington Public Service Commission, 354 P 2d 711 57 Wash 2d 32

24 US—Texas-Empire Pipe Line Co v Commissioner of Internal Revenue, C C A, 127 F 2d 220

D C—US v Davidson Transfer & Storage Co C A 259 F 2d 802, 104 U S App D C 72, revd on oth grds 79 S Ct 904, 359 U S 464, 3 L Ed 2d 952

25. U.S—North Dak Wheat Com n v US C A N D 565 F.2d 621

Tex—Abilene & So Ry Co v Terrell, Civ App, 131 S W.2d 37, err ref.

31. U.S—Western Transp Co v Wilson and Co, Inc C.A Ill, 682 F 2d 1227

D C—US v Davidson Transfer & Storage Co C A 259 F 2d 802, 104 U S App D C 72, revd on oth grds 79 S Ct 904, 359 U S 464 3 L Ed 2d 952

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33 Tex—Abilene & So Ry Co v Terrell, supra, n 25

§ 282. Reasonableness of Rates in General

Library References

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40 U S—Middlewest Motor Freight Bureau v U S D C Minn 234 F Supp 151—TNT Tariff Agents, Inc v I C C C A 525 F 2d 1089

Tex—Southwest Stone Co v Railroad Commission Civ App 173 S W 2d 325 Err ref—C.J.S. cited in Angelina & Neches River R Co v Railroad Commission Civ App 246 S W 2d 928, 931

Cost of operation plus fair profit

Tex—Railroad Commission v Oil Field Haulers Ass n, Civ App 369 S W 2d 931 reh den 373 S W 2d 394 revd on oth grds Sup 381 S W 2d 183

Question of fact

U S—Illinois Cent R Co v Interstate Commerce Com La 27 S Ct 700 206 U S 441 51 L Ed 1128—Pennsylvania R Co v U S C A Pa 315 F 2d 460 cert den 84 S Ct 47 375 U S 814, 11 L Ed 2d 50

41 US—US v Union Pac R Co, D C Mo, 34 F Supp 4 mod 61 S Ct 1064 313 U S 450, 85 L Ed 1453 reh den 62 S Ct 51 314 U S 707 86 L Ed 565—Middlewest Motor Freight Bureau v U S D C Minn, 234 F Supp 151

Tex—Abilene & So Ry Co v Terrell, supra, n 25

42 Ill—Alton R Co v Illinois Commerce Commission, 48 N E 2d 381, 382 Ill 478

44 N Y—Nassau County v Metropolitan Transp Authority 293 N Y S 2d 1017, 57 Misc 2d 1025

45 Ky—Louisville & N R Co v Com ex rel Kentucky R R Commission, 314 S W 2d 940

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49 Ill—Fleming v Illinois Commerce Commission, 57 N E 2d 384 388 Ill 138, app dism 65 S Ct 686, 324 U S 823 89 L Ed 1393 and 65 S Ct 687 three cases, 324 U S 824 89 L Ed 1393

Orders held unreasonable

Iowa—Chicago, B & Q R Co v Iowa State Commerce Commission, 105 N W 2d 633, 252 Iowa 318

51. Term "unreasonable" as used in state statute construed

Or—In re Public Utilities Com r of Or 268 P 2d 605 201 Or 1

52 Fla—International Minerals & Chemical Corp v Mayo, 217 So 2d 563 app after remand 246 So 2d 758

Ill—Fleming v Illinois Commerce Commission, supra, n 49

Pa—City of Philadelphia v Pennsylvania Public Utility Commission, 102 A 2d 428, 174 Pa Super 641

54 Fla—Southern Freight Ass n v Mason, 198 So 2d 317

§ 283. Determination of Reasonableness

Library References

Carriers ⇐12(6, 7).

58 Cal—California Portland Cement Co v Public Utilities Commission of Cal, 315 P 2d 709, 49 C 2d 171

Ill—Alton R Co v Illinois Commerce Commission, supra, n 42

Pa—City of Philadelphia v Pennsylvania Public Utility Commission, supra, n 52—Philadelphia Transp Co v Pennsylvania Public Utility Com'n 17 D & C 2d 767 73 Dauph 16

Unjust and unreasonable practice

US—Scott Paper Co v US D.C Pa, 372 F Supp 721 affd 95 S Ct 26, 419 U S 807 42 L Ed 2d 38

59 Cal—California Mfrs Ass n v Public Utilities Commission, 268 P 2d 1, 42 C 2d 530

Pa—Commonwealth ex rel Margiotti v Union Traction Co of Philadelphia, 44 Dauph Co 415 affd 194 A 661, 327 Pa 497

Factors to consider

N C—State ex rel Utilities Commission v Motor Carriers' Traffic Ass n, Inc, 192 S E 2d 580, 16 N C App 515

60 US—State of Ill v US D C Ill 146 F Supp 195 mod on oth grds 78 S Ct 304 355 U S 30, 2 L Ed 2d 292

Ill—Lowden v Illinois Commerce Commission, 3 N E 2d 430, 376 Ill 225

N C—State ex rel Utilities Commission v Motor Carriers Traffic Ass n, Inc 192 S E 2d 580, 8 N C App 515

R I—United Elec Rys Co v Kennelly, supra, n 9

Tex—Texas & N O R Co v Railroad Comm'n 286 S W 2d 112, 155 Tex 323

Wisdom of group system

Pa—Deitch Co v Pennsylvania Public Utility Commission, 203 A 2d 515 204 Pa Super 102

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61 Wash—State ex rel Allied Daily Newspapers of Wash v Washington Public Service Commission, 265 P 2d 270, 44 Wash 2d 1

62 Cal—Southern Pac Co v Railroad Commission of California, 87 P 2d 1055 13 Cal 2d 89

Ill—Alton R Co v Illinois Commerce Commission 48 N E 2d 381 382 Ill 478—City of Chicago v Illinois Commerce Commission, 213 N E 2d 550, 34 Ill 2d 49

Ind—Chicago & E I R Co v Public Service Commission of Ind 134 N E 2d 55 235 Ind 387

Neb—Chicago, B & Q R Co v Herman Bros Inc 82 N W 2d 405 164 Neb 265

N C—State ex rel Utilities Commission v State, 91 S E 2d 899 243 N C 685

Pa—New York Cent R Co v Pennsylvania Public Utility Commission, 155 A 2d 445 191 Pa Super 124

Tex—Southwest Stone Co v Railroad Commission Civ App, 184 S W 2d 691 err ref

W Va—Anchor Coal Co v Public Service Commission, 15 S E 2d 406 123 W Va 439

No duty to reject or annul rates

Colo—Denver-Laramie-Walden Truck Line, Inc v Denver-Fort Collins Freight Service, Inc 399 P 2d 242, 156 Colo 366

65 US—Watab Paper Co v Northern Pac Ry Co, C C A Minn 154 F 2d 436

Reduction below rate fixed by commission as within "zone of reasonableness"

Ala—Illinois Cent R Co v Thomas Alabama Kaolin Co 153 So 2d 794 275 Ala 236

Evidence

Neb—Application of Chicago, B & Q R Co 144 N W 2d 432, 180 Neb 587

Notice and hearing required

Neb—Application of Chicago, B & Q R Co 144 N W 2d 432, 180 Neb 587

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66 Neb—Mefford v Wilson Concrete Co 77 N W 2d 895, 163 Neb 137

67 U.S.—Watab Paper Co v Northern Pac Ry Co, supra, n 65.

69 US—Watab Paper Co v Northern Pac Ry Co v D C Minn 58 F Supp 923, affd C C A 154 F 2d 436

72 US—Watab Paper Co v Northern Pac Ry Co supra, n 69

Fla—Florida Rate Conference v Florida R R and Public Utilities Commission, 108 So 2d 601

Neb—Farmers Union Livestock Commission v Union Pac R Co 283 N W 498, 135 Neb 689—Chicago, B & Q R Co v Herman Bros, Inc 82 N W 2d 405, 164 Neb 265

Operation and effect of statute making rates conclusive

Tex—Gulf C & S F Ry Co v American Sugar Refining Co Civ App 130 S W 2d 1030, err ref —Railroad Commission v Oil Field Haulers Ass n, Civ App 442 S W 2d 874 err ref no rev err

Strict compliance not required

U S—Atchison, T & S F Ry Co v John Sexton & Co D C Kan 339 F Supp 1202

Rates correctly determined

Tex—Bayou Pipeline Corp v Railroad Commission 568 S W 2d 122

73. Acquiescence of parties in rate of fare

Minn—Application of St Paul City Ry Co 64 N W 2d 487 242 Minn 188

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77 Ill—City of Chicago v Illinois Commerce Commission, 213 N E 2d 550, 34 Ill 2d 49

N M—In re Atchison, T & S F Ry Co's Protest of Rates, 107 P 2d 123 44 N M 608

Pa—New York Cent R Co v Pennsylvania Public Utility Commission, 155 A 2d 445 191 Pa Super 124

W Va—Anchor Coal Co v Public Service Commission supra, n 62

Duty to reconcile conflicting testimony

Pa—Deitch Co v Pennsylvania Public Utility Commission, 203 A 2d 515 204 Pa Super 102

79 Okl—Oklahoma City-Ada-Atoka Ry Co v State, 248 P 2d 1005 207 Okl 50 app dism 73 S Ct 104 344 U S 861 97 L Ed 668

Wash—State v Railroad Commission, 92 P 457 47 Wash 627—State v Railroad Commission, 100 P 987 52 Wash 440

Right to be heard

Neb—In re Motor Carriers, 150 N W 2d 275 181 Neb 697

80 Ill—City of Chicago v Illinois Commerce Commission, 213 N E 2d 550, 34 Ill 2d 49

82 Okl—Oklahoma City-Ada-Atoka Ry Co v State, supra, n 79

Petition as notice

U S—Alton & S R R v U S D C Cal 49 F 2d 414—Market St Ry Co v Railroad Commission of State of Cal Cal 65 S Ct 770, 324 U S 548, 89 L Ed 1171, cert den 65 S Ct 1020, two cases, 324 U S 890, 89 L Ed 1438

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85 U S—State of Ill v U S D C Ill, 146 F Supp 195, mod on oth grds 78 S Ct 304 355 U S 300, 2 L Ed 2d 292

Cal—California Portland Cement Co v Public Utilities Commission of Cal, 315 P 2d 709 49 C 2d 171

Haw—In re Western Motor Tariff Bureau, Inc 486 P 2d 413, 53 Haw 14

Ind Baltimore & O R Co v Public Service Commission, 177 N E 2d 275, 132 Ind App 493

Ky—Louisville & N R Co v Com ex rel Kentucky R R Commission, 300 S W 2d 777

Neb—In re Rates 146, 187 N W 2d 760, 187 Neb 156

Pa—City of Pittsburgh v Pennsylvania Public Utility Commission 101 A 2d 127, 174 Pa Super 224

Tex—Angelina & Neches River R Co v Railroad Commission, Civ App 246 S W 2d 928

86. Rehearing

Mich—Central Transport, Inc v Salmon, 118 N W 2d 831 368 Mich 615

General rules as to weight and sufficiency of evidence apply.[86.1]

86.1 U S—National Gypsum Co (Huron Cement Division) v U S D C N Y 353 F Supp 941

Minn—Railroad and Warehouse Commission of Minn v Chicago & N W Ry Co 98 N W 2d 60, 256 Minn 227

Miss—Mobile & O R Co v Mississippi Public Service Commission 195 So 305, 188 Miss 698

Neb—Application of Nebraska-Iowa Area Producers Ass'n, 97 N W 2d 331 168 Neb 786

N J—Petition of Public Service Coordinated Transport, 74 A 2d 580, 5 N J 196

N C—State ex rel Utilities Commission v North Carolina Motor Carriers Ass'n, 117 S E 2d 271 253 N C 432

Pa—City of Philadelphia v Pennsylvania Public Utility Commission, 63 A 2d 391 164 Pa Super 96

87 Neb—Chicago, B & Q R Co v Herman Bros, Inc 82 N W 2d 395 164 Neb 247

Ohio—Ohio Coal Ass'n v Public Utilities Commission 128 N W 2d 39 164 Ohio St 108

Or—Valley & Siletz R Co v Flagg, 247 P 2d 639 195 Or 683

Pa—City of Philadelphia v Pennsylvania Public Utility Commission supra, n 86 1

Tex—Texas & N O R Co v Railroad Commission, 286 S W 2d 112, 155 Tex 323

88 Minn—Railroad and Warehouse Commission of Minn v Chicago & N W Ry Co 98 N W 2d 60, 256 Minn 227

Pa—Baltimore & O R Co v Public Utility Commission 4 A 2d 628 135 Pa Super 20

89 Cal—California Portland Cement Co v Public Utilities Commission of Cal 315 P 2d 709 49 C 2d 171

Ky—Louisville & N R Co v Com ex rel Kentucky R R Commission 314 S W 2d 940

Wash—State ex rel Bohon v Department of Public Service, 108 P 2d 663 6 Wash 2d 676

Finding held sufficient

(3) Other findings—Flemmg v Illinois Commerce Commission, supra, n 49

Miss—Illinois Cent R Co v Jackson Ready-Mix Concrete, 161 So 2d 207 248 Miss 798, err over 164 So 2d 798, 248 Miss 798

Findings held insufficient

Minn—Railroad and Warehouse Commission of Minn v Chicago & N W Ry Co 98 N W 2d 60 256 Minn 227

Pa—Baltimore & O R Co v Public Utility Commission, supra, n 88

90 U S—Texas Co v Chicago & Alton R Co C C A Ill 117 F 2d 210, cert den 61 S Ct 947, 313 U S 570, 85 L Ed 1528 reh den 61 S Ct 1109 313 U S 600, 85 L Ed 1552

Pa—Pennsylvania R Co v Public Utility Commission, 4 A 2d 622, 135 Pa Super 5—Baltimore & O R Co v Public Utility Commission, supra, n 88

91 Ala—Birmingham Elec Co v Alabama Public Service Commission, 47 So 2d 455 254 Ala 140

Ill—Rockwell Lime Co v Illinois Commerce Commission, 26 N E 2d 99 373 Ill 309 cert den 61 S Ct 16, 311 U S 660, 85 L Ed 423—Lowden v Illinois Commerce Commission, supra, n 60

R I—United Elec Rys Co v Kennelly 90 A 2d 775 80 R I 640

Commission must develop each rate case as to each item

Mont—Montana Citizens Freight Rate Ass'n v Board of R R Comrs of Mont 271 P 2d 1024 128 Mont 127

Unreasonable practice

U S—Scott Paper Co v U S, D C Pa 372 F Supp 721, aff'd 95 S Ct 26, 419 U S 807 42 L Ed 2d 38

92 U S—W S Dickey Clay Mfg Co v Corder C A Tex, 310 F 2d 764, cert dism 83 S Ct 1294 373 U S 906, 10 L Ed 2d 197

Neb—Application of Chicago, B & Q R Co, 144 N W 2d 432, 180 Neb 587

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93 Kan—Atchison, T & S F Ry Co v State Corp Commission, 203 P 2d 211, 166 Kan 548

Order held within scope of pleadings

Tenn—Tennessee Cent Ry Co v Pharr, 198 S W 2d 289 29 Tenn App 531 app transf 194 S W 2d 486, 183 Tenn 658

94 N J Petition of Public Service Coordinated Transport, supra, n 86 1

Order retaining jurisdiction

Ohio—Pennsylvania R Co v Public Utilities Commission, 26 N E 2d 583, 136 Ohio St 469

95. Date of publication as effective date

Iowa—Green Bay Lumber Co v Chicago, B & Q R Co 284 N W 369

96 U S—Texas Co v Chicago & Alton R Co supra, n 90

Wash—State ex rel Bonon v Department of Public Service, supra, n 89

Order of commission construed

(2) Other orders—Pennsylvania R Co v Public Utilities Commission, supra, n 94

Order should be definite and certain

Miss—Mobile & O R Co v Mississippi Public Service Commission, supra, n 86 1

§ 284. —— Review by the Courts

Library References

Carriers ⇐18.

1 Fla—Florida Rate Conference v Florida R R and Public Utilities Commission, 108 So 2d 601

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2 **Protection of rights insured**

(2) Other matters

N C—State ex rel Utilities Commission v North Carolina Motor Carriers Ass'n, 117 S E 2d 271 253 N C 432

5 Ill—Alton R Co v Illinois Commerce Commission, 48 N E 2d 381 382 Ill 478

6 Ill—Alton R Co v Illinois Commerce Commission, supra, n 5

7 Ill—Central Illinois Light Co v Illinois Commerce Commission 294 N E 2d 89 10 Ill App 3d 370

Ky—Louisville & N R Co v Com ex rel Kentucky R R Commission 314 S W 2d 940

Md—Baltimore Transit Co v Hessey 75 A 2d 76, 196 Md 141 cert den 71 S Ct 238, 340 U S 896, 95 L Ed 650

Neb—L E Whitlock Truck Service, Inc v Shippers Oil Field Traffic Ass'n, 105 N W 2d 588, 171 Neb 78

N J—Petition of Public Service Coordinated Transport, 74 A 2d 580, 5 N J 196

Appeal held moot

D C—Powell v Washington Metropolitan Area Transit Commission C A 466 F 2d 466, 151 U S App D C 295

Hawaii—In re Kuwaye Bros Inc, 435 P 2d 21 50 Haw 172

Appeal held not moot

N M—Atchison, T & S F Ry Co v State Corp Commission, 450 P 2d 431, 79 N M 793

Effect of pendency of interstate commerce commission investigation

N M—Atchison, T & S F Ry Co v State Corp Commission, 450 P 2d 431 79 N M 793

8 Ala—Birmingham Elec Co v Alabama Public Service Commission, 47 So 2d 449 254 Ala 119

Fla—Atlantic Coast Line R Co v U S Sugar Corp 47 So 2d 513—Atlantic Coast Line R Co v King, 47 So 2d 514

Ill—Central Illinois Light Co v Illinois Commerce Commission 294 N E 2d 89, 10 Ill App 3d 370

Md—Baltimore Transit Co v Hessey 75 A 2d 76, 196 Md 141 cert den 71 S Ct 238 340 U S 896, 95 L Ed 650

Pa—City of Pittsburgh v Pennsylvania Public Utility Commission, 43 A 2d 348, 157 Pa Super 595

Wash—State ex rel Puget Sound Nav Co v Department of Transp of Wash 206 P 2d 456, 33 Wash 2d 448

Substantial evidence rule applicable

Tex—Angelina & Neches River R Co v Railroad Commission, Civ App., 246 S W 2d 928

9 Tex—Gulf C & S F Ry Co v American Sugar Refining Co Civ App 130 S W 2d 1030, err ref

Wash—State ex rel Puget Sound Nav Co v Department of Transp of Wash supra n 8

Orders held not erroneous

Tex—Colorado River Western Ry v Texas & N O R Co Civ App 283 S W 2d 768, err ref no rev err

13 Ill—Central Illinois Light Co v Illinois Commerce Commission, 265 N E 2d 154 47 Ill 2d 257 app after remand 294 N E 2d 89 10 Ill App 3d 370

14. Removal proceeding

N M—Atchison, T & S F Ry Co v State Corp Commission, 450 P 2d 431, 79 N M 793

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17. Holders of specialized motor carrier certificates as to rail rates

Tex—Oil Field Haulers Ass'n v Railroad Commission, 381 S W 2d 183

On the other hand, a shipper who was not a party to the proceeding is not entitled to appeal, regardless of having had notice and having appeared therein [18.5]

18.5 Minn—J L Shely Co v Chicago, M St P & P R Co 91 N W 2d 116 252 Minn 535

21 Ala—Birmingham Elec Co v Alabama Public Service Commission, supra, n 8

Where court finds rate order invalid, the order must be regarded as if it had never existed—Gulf C & S F Ry Co v American Sugar Refining Co supra, n 9

Construction of judgment

Neb—Application of United Mineral Products Co, 131 N W 2d 604 177 Neb 898

Recovery on supersedeas bond after judgment

Neb—Application of United Mineral Products Co 131 N W 2d 604 177 Neb 898

22 Ala—Birmingham Elec Co v Alabama Public Service Commission, supra, n 8

23 Ill—Illinois Cent R Co v Illinois Commerce Commission, 56 N E 2d 432, 387 Ill 256 app dism 65 S Ct 686, 324 U S 823 89 L Ed 1392

Neb—Chicago B & Q R Co v Herman Bros Inc 82 N W 2d 395, 164 Neb 247

W Va—Anchor Coal Co v Public Service Commission, 15 S E 2d 406 123 W Va 439

24 Neb—Application of United Mineral Products Co 121 N W 2d 492, 175 Neb 285

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25 U S—Chicago & N W R Co v Union Pacific Co C A Neb, 514 F 2d 30, petition den 527 F 2d 592

Neb—Application of Nebraska Limestone Producers Ass'n, 97 N W 2d 331, 168 Neb 786

N C—State ex rel. Utilities Commission v Motor Carriers' Traffic Ass'n, Inc 192 S E 2d 580, 16 N C App 515

Wash—Northern Pac Ry Co v Department of Public Works, 217 P 507, 125 Wash 584, err dism 44 S Ct. 401, 264 U S 571, 68 L Ed 855, motion den 45 S Ct 196, and rev'd on oth grds 45 S Ct 412, 268 U S 39, 69 L Ed 837

Discretion of commission not interfered with

(2) Other matters

Neb—Application of United Mineral Products Co, 121 N W 2d 492, 175 Neb 285

Pa—Central R. Co of N J v Pennsylvania Public Utility Commission 285 A 2d 194, 3 Pa Cmwlth 654

Error of law committed

Pa—Pennsylvania Public Utility Commission v Laurel Pipe Line Co., 353 A 2d 84 23 Pa Cmwlth 559

27 Minn State v Northern Pac Ry. Co 39 N W 2d 752, 229 Minn 312

Neb—Application of Nebraska Limestone Producers Ass'n, 97 N W 2d 331, 168 Neb. 786

Ohio—Ohio Coal Ass'n v Public Utilities Commission, 128 N E 2d 39, 164 Ohio St 108

Pa—Philadelphia Transp Co v Pennsylvania Public Utility Commission, 39 A 2d 372, 350 Pa 373—City of Philadelphia v Pennsylvania Public Utility Commission, 102 A 2d 428, 174 Pa Super 641

Issues raised for first time on appeal not reviewable

Ariz—Arizona Tank Lines, Inc v Arizona Corp Commission, 502 P 2d 539 18 Ariz App 390

N C—State ex rel Utilities Commission v Department of Agriculture of State of N C 109 S E 2d 368, 250 N C 410

28 Ill—Sprague v Biggs, 62 N E 2d 420, 390 Ill 537

Or—Valley & Siletz R Co v Flagg, 247 P 2d 639 195 Or 683

Wash—State ex rel Bohon v Department of Public Service, 108 P 2d 663 6 Wash 2d 676

30 Minn—State v Northern Pac Ry Co, 22 N W 2d 569 221 Minn 400

Miss—Cobb Bros Const Co v Gulf M & O R Co 57 So 2d 570 213 Miss 706

Pa—Philadelphia Transp Co v Pennsylvania Public Utility Commission, 17 D & C 2d 767 73 Dauph 16

31 Minn—State v Northern Pac Ry Co supra, n 30

Pa—Deitch Co v Pennsylvania Public Utility Commission, 203 A 2d 515 204 Pa Super 102

Tex—Railroad Commission v Oil Field Haulers Ass'n, Civ App, 369 S W 2d 931 reh den 373 S W 2d 394, rev'd on oth grds, Sup, 381 S W 2d 183—Railroad Commission v Oil Field Haulers Ass'n, Civ App 442 S W 2d 874, err ref no rev err

32 N C—State ex rel Utilities Commission v Council of Southern Greyhound Amalgamated Divisions, 155 S E 2d 523, 271 N C 214

34 Pa—City of Philadelphia v Pennsylvania Public Utility Commission, supra, n 27

Tex—Abilene & So Ry Co v Terrell, Civ App 131 S W 2d 37 err ref

35 U S—Watab Paper Co v Northern Pac Ry Co, D C Minn 58 F Supp 923 affd, C C A 154 F 2d 436

Neb—Application of Nebraska Limestone Producers Ass'n, 97 N W 2d 331 168 Neb 786

Ohio—Toledo Edison Co v Public Utilities Commission, 118 N E 2d 531 161 Ohio St 221

Tex—Consolidated Chemical Industries v Railroad Commission, Civ App, 201 S W 2d 124, err ref no rev err

W Va—Anchor Coal Co v Public Service Commission, supra, n 23

36 Ark—Southeast Arkansas Freight Lines v Arkansas Corporation Commission 166 S W 2d 262, 204 Ark 1023

Minn—State v Northern Pac Ry Co supra, n 30

Neb—Application of Nebraska Limestone Producers Ass'n, 97 N W 2d 331 168 Neb 786

Tenn—Tennessee Cent Ry Co v Pharr, 198 S W 2d 289 29 Tenn App 531, app transf 194 S W 2d 486, 183 Tenn 658

Va—Lynchburg Traffic Bureau v Norfolk & W Ry Co, 147 S E 2d 744 207 Va 107

37 U S—Watab Paper Co v Northern Pac Ry Co supra, n 35

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38 Ky—Louisville & N R Co v Commonwealth ex rel Kentucky R R Commission, 300 S W 2d 777

Neb—Chicago, B & Q R Co v Herman Bros Inc 82 N W 2d 395 164 Neb 247

Wash—State ex rel Bohon v Department of Public Service, supra, n 28

39 Fla—International Minerals & Chemical Corp v Mayo, 217 So 2d 563, app after remand 246 So 2d 758

Tenn—Tennessee Cent Ry Co v Pharr, supra, n 36

Tex—Railroad Commission v. Oil Field Haulers Ass'n, Civ App, 442 S W 2d 874 err ref no rev err

41 U S—U S v Kansas City Southern Ry Co C A Mo, 217 F 2d 763

Tenn—Tennessee Cent Ry Co v Pharr, supra, n 36

42 Miss—Cobb Bros Const Co v Gulf, M & O R Co 57 So 2d 570 213 Miss 706

Ohio—Toledo Edison Co v Public Utilities Commission supra, n 35

Wis—Milwaukee & Suburban Transport Corp v Public Service Commission 108 N W 2d 729 1 Wis 2d 384

43 U S—Union Pac R Co v U S 61 S Ct 1064 313 U S 450, 85 L Ed 1453 reh den 62 S Ct 51 314 U S 707 86 L Ed 565

Ill—Illinois Cent R Co v Illinois Commerce Commission, supra, n 23

Neb—Chicago, B & Q R Co v Herman Bros, Inc 82 N W 2d 395, 164 Neb 247—Application of Nebraska Limestone Producers Ass'n, 97 N W 2d 331 168 Neb 786

Ohio—Toledo Edison Co v Public Utilities Commission, supra, n 35

Pa—Allegheny Ludlum Steel Corp v Pennsylvania Public Utility Commission, 70 A 2d 475 166 Pa Super 173

Tenn—Tennessee Cent Ry Co v Pharr supra, n 36

Tex—Angelina & Neches River R Co v Railroad Commission, Civ App, 246 S W 2d 928—Texas Industrial Traffic League v Railroad Commission of Tex, Civ App, 255 S W 2d 903, err ref no rev err

45 Fla—International Minerals & Chemical Corp v Mayo, 217 So 2d 563, app after remand 246 So 2d 758

Neb—Application of Nebraska Limestone Producers Ass'n, 97 N W 2d 331, 168 Neb 786

N J—In re Central R Co of N J 327 A 2d 427, 66 N J 12

Pa—City of Philadelphia v Pennsylvania Public Utility Commission, 95 A 2d 244 173 Pa Super 38

Remand

N C—State ex rel North Carolina Utilities Co v Attorney General, 163 S E 2d 638, 2 N C App 657

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51 Ill—Fleming v Illinois Commerce Commission, 57 N E 2d 384 388 Ill 138, app dism 65 S Ct 686, 324 U S 823 89 L Ed 2d 1393, and 65 S Ct 687 three cases, 324 U S 824 89 L Ed 1393

N Y—Nassau County v Metropolitan Transp Authority 293 N Y S 2d 1017, 57 Misc 2d 1025

Tenn—Tennessee Cent Ry Co v Pharr supra, n 36

Partial invalidity of rate order

Tex—Railroad Commission v Oil Field Haulers Ass'n, Civ App 369 S W 2d 931 reh den 373 S W 2d 394 rev'd on oth grds Sup 381 S W 2d 183

§ 285. Matters Considered in Determining Reasonableness

Library References

Carriers ⇐12.

55 U S—State of N Y v U S, D C N Y, 65 F Supp 856, affd 67 S Ct 1207, 331 U S 284, 91 L Ed 1492, reh den 67 S Ct 1527 331 U S 866 91 L Ed 1870, and 67 S Ct. 1528, 331 U S 866, 91 L Ed 1871

Detailed inventories not required

Ohio—Ohio Coal Ass'n v Public Utilities Commission, 128 N E 2d 39, 164 Ohio St 108

Matters having no bearing on reasonableness of rates

U S—Atchison, T & S F Ry Co v John Sexton & Co, D C Kan, 339 F Supp 1202

Minn—Railroad and Warehouse Commission of Minn v Chicago & N W Ry Co 98 N W 2d 60 256 Minn 227

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56 U S—U S v Union Pack R Co, D C Mo, 34 F Supp 4 mod 61 S Ct 1064 313 U S 450, 85 L Ed 1453 reh den 62 S Ct 51 314 U S 707 86 L Ed 565 Pacific Inland Tariff Bureau v U S

DC Or 129 F Supp 472 on supp 134 F Supp 210

Ill—Lowden v Illinois Commerce Commission 33 N E 2d 430, 376 Ill 225

Wash—CJS quoted at length in South Bay Motor Freight Co Schaaf 101 P 2d 584 586, 3 Wash 2d 466

Or—Valley & Siletz R Co Flagg, supra, n 28

Switching ex-barge freight

US—Tennessee Valley Authority v US DC Ala 96 F Supp 409

Local pride not a factor

Pa—Pennsylvania R Co v Pennsylvania Public Utility Commission, 195 A 2d 870 202 Pa Super 402

57 US—Pennsylvania R Co v US DC Pa 199 F Supp 586, revd on oth grds CA 315 F 2d 460, cert den 84 S Ct 47 375 US 814 11 L Ed 2d 50

Ill—Lowden v Illinois Commerce Commission supra, n 56

Entire system

US—RCA Communications v US DC NY 43 F Supp 851

Switching factors

(2) Other matters

Miss—Illinois Cent R Co v Jackson Ready-Mix Concrete, 137 So 2d 542, 243 Miss 72

Switching rates for several switching points

NC—State ex rel North Carolina Utilities Commission v Southern Ry Co 150 S E 2d 337 268 N C 204

Rates held not unreasonable on theory of vagueness

US—Central & Southern Motor Freight Tariff Ass n v US DC Del 273 F Supp 823 app after remand 345 F Supp 1389

58 US—Swift & Co v US 72 S Ct 716, 343 US 373, 96 L Ed 1008

Ohio—Duff Truck Line, Inc v Public Utilities Commission, 348 N E 2d 127 46 Ohio St 2d 186 76 O O 2d 229

Pa Pennsylvania R Co v Public Utility Commission, 4 A 2d 622, 135 Pa Super 5

Reasonableness determined from carrier's viewpoint as well as shippers

Wash—State ex rel Railway Exp Agency Inc v Washington Public Service Commission 354 P 2d 711 57 Wash 2d 32

59 US—Interstate Commerce Commission v Inland Waterways Corporation, Ill 63 S Ct 1290, 319 US 671 87 L Ed 1655—Scott Paper Co v US, DC Pa 372 F Supp 721, affd 95 S Ct 26, 42 US 807 42 L Ed 2d 38

Changed conditions

(2) Other matters

US—Stanislaus County v US, DC Cal 236 F Supp 146

Previous approval

US—Swift & Co v US, supra, n 58

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65 Ky—Louisville & N R Co v Com ex rel Kentucky R R Commission, 314 S W 2d 940

Neb—Application of Chicago, B & Q R Co 52 N W 2d 238, 155 Neb 387—Application of Chicago, B & Q R Co 52 N W 2d 241 155 Neb 392

Wash—State ex rel Allied Daily Newspapers of Wash v Wash Public Service Commission 265 P 2d 270, 44 Wash 2d 1

W Va—Anchor Coal Co v Public Service Commission, supra, n 23

§ 286. —— Value of Property Devoted to Public Service and Methods by Which It Is Determined

67 US—Union Pac R Co v US supra, n 43

Ill—City of Chicago v Illinois Commerce Commission, 213 N E 2d 550, 34 Ill 2d 49

NJ—Petition of Public Service Coordinated Transport 74 A 2d 580 5 N J 196

NC—State ex rel Utilities Commission v State, 89 S E 2d 727 243 N C 12, reh den 91 S E 2d 899 243 N C 685

Ohio—Toledo Edison Co v Public Utilities Commission, 148 N E 2d 531 161 Ohio St 221

Wash—South Bay Motor Freight Co v Schaaf supra, n 29

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72 Ohio—Ohio Coal Ass n v Public Utilities Commission, 128 N E 2d 39 164 Ohio St 108

76 S D—CJS cited in Chicago & N W Ry Co v Gilks, 148 N W 2d 581 589 82 S D 470, app after remand 159 N W 2d 293 83 S D 332

§ 287. —— Value of Service to Public and General Public Good

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24 US—Grand Trunk Western R Co v Brown DC Mich 32 F Supp 784

29 Wash—South Bay Motor Freight Co v Schaaf 101 P 2d 584 3 Wash 2d 466

31 US—US v Union Pac R Co DC Mo 34 F Supp 4 mod 61 S Ct 1064 313 US 450 85 L Ed 1453 reh den 62 S Ct 51 314 US 707 86 L Ed 565

Ark—Southeast Arkansas Freight Lines v Arkansas Corporation Commission, 166 S W 2d 262, 204 Ark 1023

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35 Cal—Southern Pac Co v Railroad Commission of California 87 P 2d 1055 13 Cal 2d 89

§ 288. —— Earnings

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46 Miss—Illinois Cent R Co v Jackson Ready-Mix Concrete, 137 So 2d 542, 243 Miss 72

Wash—South Bay Motor Freight Co v Schaaf supra, n 29

48 Md—Baltimore Transit Co v Hessey 75 A 2d 76, 196 Md 141 cert den 71 S Ct 238, 340 US 896, 95 L Ed 650

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§ 289. —— Cost of Plant and Deterioration

69 Pa—City of Philadelphia v Pennsylvania Public Utility Commission, 102 A 2d 428 174 Pa Super 641

70 NJ—Petition of Public Service Coordinated Transport, 74 A 2d 580, 5 N J 196

§ 290. —— Cost of Transportation to Carrier

75 Or—CJS cited in Valley & Siletz R Co v Flagg, 247 P 2d 639 649 195 Or 683

Pa—Baltimore & O R Co v Public Utility Commission, 4 A 2d 628, 135 Pa Super 20

Wash—South Bay Motor Freight Co v Schaaf supra, n 29

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77. **Insignificant differences in cost**

US—Central & Southern Motor Freight Tariff Ass n v US DC Del 273 F Supp 823 app after remand 345 F Supp 1389

79 US—Alabama Great Southern R Co v US DC Ill 88 F Supp 982, affd 71 S Ct 264, 340 US 216, 95 L Ed 225

Ill—Fleming v Illinois Commerce Commission, 57 N E 2d 384 388 Ill 138, app dism 65 S Ct 686, 324 US 823, 89 L Ed 1393, and 65 S Ct 687 three cases, 324 US 824, 89 L Ed 1393

NJ—Petition of Public Service Coordinated Transport, supra, n 70

Pa—City of Philadelphia v Pennsylvania Public Utility Commission, supra, n 69

Tex—Railroad Commission v Oil Field Haulers Ass n, Civ App 369 S W 2d 931 reh den 373 S W 2d 394 revd on oth grds Sup 381 S W 2d 183

Wash—South Bay Motor Freight Co v Schaaf supra, n 29

Wyo—CJS cited in Gore v John, 157 P 2d 552 559 61 Wyo 246

Efficient operation contemplated in rate increases

Neb—L E Whitlock Truck Service, Inc v Shippers Oil Field Traffic Ass n, 105 N W 2d 588 171 Neb 78

81 Ill—Fleming v Illinois Commerce Commission, supra, n 79

82 Ill—Fleming v Illinois Commerce Commission supra, n 79

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87 Pa—City of Philadelphia v Pennsylvania Public Utility Commission, supra n 69

89 Freeze of line haul rate does not of itself include cost of terminal services and facilities—Farmers Union Livestock Commission v Union Pac R Co 283 N W 498 135 Neb 689

§ 291. —— Mileage

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97. **Prejudice to particular port in equalization**

US—New York Cent R Co v US DC N Y 207 F Supp 483

1 NC—CJS cited in State ex rel Utilities Commission v North Carolina Motor Carriers Association, 117 S E 2d 271 277 253 N C 432

2 Wyo—CJS quoted in Gore v John, 157 P 2d 552, 560 61 Wyo 246

§ 292. —— Competition

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13 Ky—Louisville & N R Co v Com ex rel Kentucky R R Commission, 300 S W 2d 777

Neb—Application of Nebraska Limestone Producers Ass n, 97 N W 2d 331 168 Neb 780

Or—Valley & Siletz R Co v Flagg, 247 P 2d 639 195 Or 683

Pa—Deitch Co v Pennsylvania Public Utility Commission, 203 A 2d 515 204 Pa Super 102

Wash—South Bay Motor Freight Co v Schaaf 101 P 2d 584 3 Wash 2d 466

W Va—Anchor Coal Co v Public Service Commission, 15 S E 2d 406, 123 W Va 439

Statute construed

US—American Commercial Lines, Inc v Louisville & N R Co Ky 88 S Ct 2105, 392 US 571 20 L Ed 2d 1289

Cal—River Lines, Inc v Public Utilities Commission, 42 Cal Rptr 104 398 P 2d 144 62 C 2d 244

17 US—L T Barringer & Co v US Tenn 63 S Ct 967 319 US 1 87 L Ed 1171—State Corp Commission of Kan v US 184 F Supp 691

Pa—Deitch Co v Pennsylvania Public Utility Commission, 203 A 2d 515 204 Pa Super 102

18 US—Cooper-Jarrett, Inc v US DC Mo 226 F Supp 318 affd 85 S Ct 49, 379 US 6, 13 L Ed 2d 21

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19 Tex—Oil Field Haulers Ass n v Railroad Commission, 381 S W 2d 183

20 US—I C C v Mechling, Ill 67 S Ct 894 330 US 567 91 L Ed 1102—Cooper-Jarrett, Inc v US DC Mo 226 F Supp 318, affd 85 S Ct 49 379 US 16, 13 L Ed 2d 21

22 US—I C C v Mechling, supra, n 20

23 Pa—Baltimore & O R Co v Public Utility Commission, 4 A 2d 628, 135 Pa Super 20

24 Cal—Southern Pac Co v Railroad Commission of California, 87 P 2d 1055, 13 Cal 2d 89

28 Ky—Louisville & N R Co v Commonwealth ex rel Kentucky R R Commission, 300 S W 2d 777

29 Cal—Southern Pac Co v Railroad Commission of California, supra, n 24

Neb—Application of United Mineral Products Co, 134 N W 2d 598, 178 Neb 640

Wash—South Bay Motor Freight Co v Schaaf, supra, n 13

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30 Ky—Louisville & N R Co v Commonwealth ex rel Kentucky R R Commission, 314 S W 2d 940

Pa—Deitch Co v Pennsylvania Public Utility Commission, 203 A 2d 515, 204 Pa Super 102

31 Pa—Pennsylvania R Co v Pennsylvania Public Utility Commission, 4 A 2d 815, 135 Pa Super 154

§ 293. —— Character and Value of Goods Shipped

32 US—Sonken-Galamba Corp v Union Pac R Co, C C A Kan, 145 F 2d 808

33 Ohio—Baltimore & O R Co v Ace Rubber Products, 102 N E 2d 626

34 US—Sonken-Galamba Corp v Union Pac R Co, supra, n 32

Pa—Allegheny Ludlum Steel Corp v Pennsylvania Public Utility Commission, 70 A 2d 475, 166 Pa Super. 173

37 Tex—Wadel v American Airlines, Civ App, 269 S W 2d 855, err dism by agreement

38 Miss—Illinois Cent R Co v Jackson Ready-Mix Concrete, 137 So 2d 542, 243 Miss 72

41 N Y—Pennsylvania R Co v Brooklyn Contractor's Machinery Exchange, 61 N Y S 2d 217

§ 294. —— Local or Through Freight

Library References

Carriers ⇐12(3, 7), 28.

Although not required by statute motor common carriers of property may establish through rates.[42.5]

42.5 US—Great Western Packers Exp, Inc v US, D C Colo, 246 F Supp 151

43. Differential not required for small proportion differences

Neb—Application of United Mineral Products Co, 121 N W 2d 492, 175 Neb 285

46 U S—Interstate Commerce Commission v Inland Waterways Corporation, Ill, 63 S Ct 1296, 319 U S 671, 87 L Ed 1655

Ex-barge traffic

U S—Interstate Commerce Commission v Inland Waterways Corporation, supra

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48 U.S.—R F C v Leonard Refineries, D C Mich, 96 F Supp. 813

§ 295. —— Charging More for Short Than for Long Haul

51 U S—National Van Lines, Inc v U S, C A Ill, 355 F.2d 326—Accelerated Transport-Pony Exp Inc. v U S, 227 F Supp 815, affd 85 S Ct 43, 379 U.S 4, 13 L Ed 2d 21

52 U S—Ly[illegible] & Traffic Bureau v U S, D C Va, 84 F Supp. 1012, affd. 70 S Ct 148, 338 U S 864, 94 L Ed 529, reh den 70 S Ct 248, 338 U S 901, 94 L Ed. 555—Pa[illegible]ore & O R. Co v U S, D.C N.Y., 100 F Supp 1002

Ky—Louisville & N R Co v Commonwealth, 71 S W 910, 915, 114 Ky 787, 24 Ky Law Rep 1593, 1779

Minn—Scandrett v Higgins, 296 N W 26, 209 Minn 303

Motor-rail rates

US—New York Cent R Co v U S, D C N Y, 267 F Supp 619

Expertise not required for interpretation of law

U S—New York Cent R Co v U S, D C N Y, 267 F Supp 619

54 US—Igert v U S, D C Ala, 211 F Supp 42

Fla—Parrish v Railroad Commission of Florida, 190 So 769, 139 Fla 660

As to agreement on approval by Interstate Commerce Commission

US—Wirthmore Feeds, Inc v Baltimore & O R Co, D C N Y, 221 F Supp 745

Reasonably compensatory rate

US—A L Mechling Barge Lines, Inc v U S, D C Ill, 209 F Supp 744, revd on other grds, 84 S Ct 874, 376 U S 375, 11 L Ed 2d 788, rehearing denied, two cases, 84 S Ct 1625, 377 U S 960, 12 L Ed 2d 504

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59. Option of shipper as to routes

Minn—Scandrett v Higgins, supra, n 52

62. Effect of violation

U S—Great Northern Ry Co v U S, 156 Ct Cl 332

§ 296. —— Confiscatory Rates

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68 Fla—Southern Freight Ass'n v Mason, 198 So 2d 317

69. Rate held not confiscatory

Ohio—Casket Mfrs Ass'n of America v Public Utilities Commission of Ohio, 92 N E 2d 813, 153 Ohio St 560

Tex—Abilene & So Ry Co v Terrell, Civ App, 131 S W 2d 37, err ref

Applicability of ordinary tests of confiscation to emergency rates

Tex—Abilene & So Ry Co v Terrell, supra

§ 297. —— Other Matters Considered

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76 Md—Baltimore Transit Co v Hessey, 75 A 2d 76, 196 Md 141, cert den 71 S Ct 238, 340 U S 896, 95 L Ed 650

Pa—City of Philadelphia v Pennsylvania Public Utility Commission, 102 A 2d 428, 174 Pa Super 641

77. Diversion of some traffic to competing mode of transportation

U S—I C C v New York, N H & H R Co, Conn, 83 S Ct 1038, 372 U S 744, 10 L Ed 2d 108

78 Ill—Lowden v Illinois Commerce Commission, 33 N E 2d 430, 376 Ill 225

84. "Out of pocket costs" defined

U S Boston & M R R v U S, 153 F Supp 952

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95 Or—Valley & Siletz R Co v Flagg, 247 P 2d 639, 195 Or 683

Tex—Texas & N O R Co v Railroad Commission, 286 S W 2d 112, 155 Tex 323

Wash—State ex rel Allied Daily Newspapers of Wash v Washington Public Service Commission, 265 P 2d 270, 44 Wash 2d 1

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10 Neb—C.J.S. quoted in Application of United Mineral Products Co, 131 N W 2d 604, 607, 177 Neb 898

11 Neb—C.J.S. quoted in Application of United Mineral Products Co, 131 N W 2d 604, 607, 177 Neb 898

15 U S—National Carloading Corp v U S, 68 F Supp 150, 105 Ct Cl 479—General Motors Corp v U S, D C Mich, 267 F Supp 641, affd C A, 324 F 2d 404

Ill—Lowden v Illinois Commerce Commission, 33 N E 2d 430, 376 Ill 225

Kan—Thompson v State Corp Commission, 246 P 2d 257, 173 Kan 357

Pa—Allegheny Ludlum Steel Corp v Pennsylvania Public Utility Commission, 70 A 2d 475, 166 Pa Super 173

Wyo—C J S. cited in Gore v John, 157 P 2d 552, 561, 61 Wyo 246

ICC rates for identical services

Okl—St Louis-San Francisco Ry Co v State, 478 P 2d 354

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23 Pa—Pennsylvania R Co v Public Utility Commission, 4 A 2d 622, 135 Pa Super 5

29 Mont—Montana Citizens Freight Rate Ass'n v Board of R R Comr's of Mont, 271 P 2d 1034, 128 Mont 127

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33 Mont—Montana Citizens Freight Rate Ass'n v Board of R R Comr's of Mont, supra, n 29

However effect on interstate traffic which will result is to be considered Pennsylvania R Co v Pennsylvania Public Utility Commission, 4 A 2d 815, 135 Pa Super 154

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39 U S—U S v Union Pac R Co, D C Mo, 34 F Supp 4, mod 61 S Ct 1064, 313 U S 450, 85 L Ed 1453, reh den 62 S Ct 51, 314 U S 707, 86 L Ed 565

§ 298. Standard of Adequate Return

48 U S—Union Pac R Co v U S, 61 S Ct 1064, 313 U S 450, 85 L Ed 1453, reh den 62 S Ct 51, 314 U S 707, 86 L Ed 565

Cal—Southern Pac Co v Railroad Commission of California, 87 P 2d 1055, 13 Cal 2d 89

W Va—Anchor Coal Co v Public Service Commission, 15 S E 2d 406, 123 W Va 439

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52 U S—Burlington Northern, Inc v U S, C A, 555 F 2d 637

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A subsequent statute, Transportation Act, 49 U.S.C.A. § 15 b, nullifying the recapture clause and providing for the return of funds recovered from carriers thereunder and prescribing conditions on which such grant was made, has been held to be within the power of congress.[60.1]

60.1 U S—Richmond, F & P R Co v Early, C C A Va, 97 F 2d 312

§ 299. Evidence as to Reasonableness

65 U S—Bowles v Indianapolis Rys, D C Ind, 64 F Supp 865, affd C C A, 154 F 2d 218

Pa—Pennsylvania R Co v Public Utility Commission, supra, n 23—Baltimore & O R Co v Public Utility Commission, 4 A 2d 628, 135 Pa Super 20

Lowest published rate for similar service as prima facie evidence of reasonable rate

Neb—Application of Howard McLean Co, 187 N W 2d 300, 187 Neb 30

67 Neb—Application of United Mineral Products Co 121 N W 2d 492 175 Neb 285

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58 US—Chicago, M, St P & P R Co v Alouette Peat Products, Limited, C A Wash 253 F 2d 449

71 US—Crown Coach Co v US D C Mo 44 F Supp 547

Ill—Fleming v Illinois Commerce Commission, 57 N E 2d 384 388 Ill 138, app dism 65 S Ct 686, 324 US 823 89 L Ed 1393, and 65 S Ct 687 three cases, 324 US 824, 89 L Ed 1393

NJ—Petition of Suburban Transit Corp, 445 A 2d 406, 184 N J Super 90

N C—State ex rel Utilities Commission v Motor Carriers Traffic Ass'n, Inc, 192 S E 2d 580, 16 N C App 515

Pa—Central R Co of N J v Pennsylvania Public Utility Commission, 285 A 2d 194, 3 Pa Cmwlth 654

72 US—Bowles v Indianapolis Rys, supra, n 65

73 US—Hoboken Manufacturers R Co v U S D C N J 47 F Supp 779, revd on oth grds 64 S Ct 159 320 U S 368, 88 L Ed 107 reh den 64 S Ct 516, 321 U S 801 88 L Ed 1088

Pa—Allegheny Ludlum Steel Corp v Pennsylvania Public Utility Commission, 70 A 2d 475 166 Pa Super 173—Deitch Co v Pennsylvania Public Utility Commission, 203 A 2d 515 204 Pa Super 102

Tex—Texas & N O R Co v Railroad Commission 286 S W 2d 112, 155 Tex 323

In New Mexico

(3) Other cases—In re Atchison, T & S F Ry Co's Protest of Rates, 107 P 2d 123, 44 N M 608

76. Track-compelled competitive rates

Neb—Application of United Mineral Products Co 121 N W 2d 492, 175 Neb 285

77 US—City of Danville v Chesapeake & O Ry Co, D C Va, 34 F Supp 620

Presumption of unreasonableness

US v Virginia & O R Co v US, D C Md 217 F Supp 918

78 Pa—New York Cent R Co v Pennsylvania Public Utility Commission, 155 A 2d 445 191 Pa Super 124

Preponderance of evidence sufficient

Ohio—Boyle-Midway, Division of American Home Products Corp v Public Utilities Commission 266 N E 2d 838, 25 Ohio St 2d 11

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92. Evidence held immaterial

(3) Other evidence

Neb—Application of United Mineral Products Co, 121 N W 2d 492, 175 Neb 285

Rate comparison forms

Neb—Application of United Mineral Products Co 121 N W 2d 492, 175 Neb 285

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93 Ohio—Armco Steel Corp v Public Utilities Commission, 243 N E 2d 75, 16 Ohio St 2d 144

99 N C—State ex rel Utilities Commission v Motor Carriers Traffic Ass'n, Inc 192 S E 2d 580, 16 N C App 515

Pa—City of Philadelphia v Pennsylvania Public Utility Commission 102 A 2d 428, 174 Pa Super 641

Evidence sufficient to justify reduction of rate

Pa—Central R Co of N J v Pennsylvania Public Utility Commission 285 A 2d 194, 3 Pa Cmwlth 654

Evidence held sufficient to justify increase in rate

Ill—Central Illinois Light Co v Illinois Commerce Commission, 294 N E 2d 89 10 Ill App 3d 370

1 Neb—Application of Chicago, B & Q R Co 144 N W 2d 432, 180 Neb 587

Pa—Baltimore & O R Co v Public Utility Commission 4 A 2d 628, 135 Pa Super 20

Prima facie evidence

Neb—In re Motor Carriers, 150 N W 2d 275 181 Neb 697

Evidence held sufficient to justify exception

La—Arkansas & L M Ry Co v Louisiana Public Service Commission, 207 So 2d 760, 251 La 963

Insufficiencies in case agst rail and service

D C—D C Transit System, Inc v Washington Metropolitan Area Transit Commission, C A 466 F 2d 394 151 U S App D C 223 cert den 93 S Ct 688 409 U S 1086, 34 L Ed 2d 673

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5 N M—In re Atchison, T & S F Ry Co's Protest of Rates, 107 P 2d 123 44 N M 608

W Va—Anchor Coal Co v Public Service Commission, 15 S E 2d 406, 123 W Va 439

Evidence held sufficient

Ala—Illinois Cent R Co v Thomas Alabama Kaolin Co 153 So 2d 794 275 Ala 236

Cal—California Portland Cement Co v Public Utilities Commission of Cal 315 P 2d 709 49 C 2d 171

Fla—International Minerals & Chemical Corp v Mayo, 246 So 2d 758

Ill—Central Illinois Light Co v Illinois Commerce Commission, 294 N E 2d 89 10 Ill App 3d 370—Central Illinois Light Co v Illinois Commerce Commission, 294 N E 2d 96, 10 Ill App 3d 379

Mass—AAA Movers v Department of Public Utilities, 237 N E 2d 683 354 Mass 390

Minn—State v Northern Pac Ry Co 39 N W 2d 752 229 Minn 312

Miss—Illinois Cent R Co v Jackson Ready-Mix Concrete, 137 So 2d 542, 243 Miss 72

Neb—Application of Nebraska Limestone Producers Ass'n, 97 N W 2d 331 168 Neb 786—Application of Chicago, B & Q R Co 144 N W 2d 432, 180 Neb 587

N C—State ex rel Utilities Commission v Southern Ry Co, 124 S E 2d 510, 256 N C 359

Pa—Allegheny Ludlum Steel Corp v Pennsylvania Public Utility Commission, 70 A 2d 475 166 Pa Super 173—City of Pittsburgh v Pennsylvania Public Utility Commission, 101 A 2d 127, 174 Pa Super 224—City of Philadelphia v Pennsylvania Public Utility Commission, 102 A 2d 428, 174 Pa Super 641

Evidence held insufficient

N J—Petition of Public Service Coordinated Transport, 74 A 2d 580, 5 N J 196

Okl—St Louis-San Francisco Ry Co v State, 478 P 2d 354

Pa—Deitch Co v Pennsylvania Public Utility Commission, 203 A 2d 515, 204 Pa Super 102

Tex—Texas & N O R v Railroad Commission, 286 S W 2d 112, 155 Tex 323

Evidence held to show rates excessive

Ky—Louisville & N R Co v Com ex rel Kentucky Commission, 300 S W 2d 777

N C—State ex rel North Carolina Utilities Commission v Southern Ry Co 148 S E 2d 210, 267 N C 317, mod 150 S E 2d 337, 268 N C 204

7. Evidence held sufficient

Ky—Louisville & N R Co v Com ex rel Kentucky R R Com'n, 300 S W 2d 777

Pa—City of Philadelphia v Pennsylvania Public Utility Commission, 102 A 2d 428, 174 Pa Super 641

Necessity of determining cost

Mont—Montana Citizens Freight Rate Ass'n v Board of R R Com'rs of Mont, 271 P 2d 1024 128 Mont 127

Evidence held insufficient

N M—Atchison, T & S F Ry Co v State Corp Commission, 450 P 2d 431 79 N M 793

§ 300. Joint Rates and Division of Rates

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8. Land grant rates not cancelled

US—Thompson v Baltimore & O R Co D C Mo 59 F Supp 21 mod on oth grds C C A 155 F 2d 767 cert den 67 S Ct 122, 329 U S 762, 91 L Ed 657 and 67 S Ct 129 329 U S 762, 91 L Ed 657, motion over 72 F Supp 65

Essential feature

US—Chicago, M St P & P R Co v U S Wis 81 S Ct 1630, 366 U S 745 6 L Ed 2d 772

11 US—Chicago & E I R Co v Southern Ry Co C A Ind 261 F 2d 394

Joint rate for rail-truck service prohibited

Me—Public Utilities Commission v Bangor & A R Co 227 A 2d 796

Although not required by statute motor common carriers of property may establish joint rates [14.5]

14.5 US—Great Western Packers Exp Inc v U S D C Colo 246 F Supp 151

The existence of a joint rate for one group of carriers does not necessarily mean that the same rate would be proper for a different group [14.10]

14.10 US—Great Western Packers Exp, Inc v US, D C Colo, 246 F Supp 151

15 Provisions of Motor Carrier Act held exclusive

US—Acme Fast Freight v U S D C N Y 30 F Supp 968, affd 60 S Ct 810, 309 U S 638, 84 L Ed 993

17. Compliance by shipper

US—General Motors Corp v U S, D C Mich 359 F Supp 1168, affd C A 492 F 2d 1243

The Interstate Commerce Act contemplates the existence of through routes in the absence of joint rates,[17.5] and the establishment of joint rates is an act separate and distinct from the establishment of through routes.[17.10]

17.5 US—U S v Great Northern Ry Co, Minn 72 S Ct 985 343 U S 562, 96 L Ed 1142, reh den 73 S Ct 4 344 U S 848, 97 L Ed 659—General Motors Corp v U S D C Mich 359 F Supp 1168 affd, C A 492 F 2d 1243

17.10 US—U S v Great Northern Ry Co Minn 72 S Ct 985, 343 U S 562, 96 L Ed 1142, reh den 73 S Ct 4 344 U S 848, 97 L Ed 659

"Transit privilege"

US—General Motors Corp v U S D C Mich, 359 F Supp 1168, affd C A 492 F 2d 1243

18 US—Interstate Commerce Commission v Columbus & G Ry Co, Miss 63 S Ct 1209 319 U S 551 87 L Ed 1580, reh den 64 S Ct 26, 320 U S 809 88 L Ed 489

Motor Carrier Act

US—Acme Fast Freight v U S, supra, n 15

A lessor railroad that is an integral part of a lessee railroad is not entitled to a joint rate [18.1]

18.1 US—Group of Boston & Providence R Corp Stockholders v I C C D C Va 133 F Supp 488, affd 76 S Ct 300, 350 U S 926, 100 L Ed 810, reh den 76 S Ct 472, 350 U S 985 100 L Ed 853 reh den 78 S Ct 775 356 U S 948 2 L Ed 2d 822

19. Joint rate not effective on discontinuance

US—Great Western Packers Exp Inc v US DC Colo 246 F Supp [illegible]

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21 Neb—Application of United Mineral Products Co, 131 N W 2d 388, 177 Neb 802

Ohio—E A Schlaret Transfer Co v Public Utilities Commission, 190 N E 2d 910, 174 Ohio St 554

22 Neb—Application of United Mineral Products Co 131 N W 2d 388, 177 Neb 802

28 Neb—Application of United Mineral Products Co 131 N W 2d 388, 177 Neb 802

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39 Ill—Lowden v Illinois Commerce Commission, 33 N E 2d 430, 376 Ill 225

40 Neb—Application of United Mineral Products Co 131 N W 2d 388, 177 Neb 802

41 US—Baltimore & O R Co v Thompson D C Mo 89 F Supp 570, aff'd CA 180 F 2d 416

Division sheet held inapplicable to land grant rates

US—Thompson v Baltimore & O R Co supra, n 8

42 US—Atlantic Coast Line R Co v Baltimore & O R Co D C Md 16 F Supp 647 app dism CCA 91 F 2d 1007—Thompson v Baltimore & O R Co supra n 8—Baltimore & O R Co v Thompson, supra, n 41—C J S cited in Chicago & Eastern Illinois R Co v Southern Ry Co, C A Ind 261 F 2d 394 396

Junction settlement defined

US—Texas & P Ry Co v St Louis Southwestern Ry Co, C C A Mo, 158 F 2d 251 254 cert den 67 S Ct 866, 330 U S 825 91 L Ed 1275

44 US—Baltimore & O R Co v Thompson, supra, n 41

Forwarders under Motor Carrier Act held not entitled to share in joint rates

US—Acme Fast Freight v US, supra, n 15

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45 US—Thompson v Baltimore & O R Co C A Mo, 180 F 2d 416

Arbitration

US—Texas & P Ry Co v St Louis Southwestern Ry Co, C C A Mo, 158 F 2d 251, cert den 67 S Ct 866, 330 U S 825 91 L Ed 1275

48 US—Interstate Commerce Commission v Hoboken Manufacturers' R Co, N J, 64 S Ct 159, 320 U S 368, 88 L Ed 107, reh den 64 S Ct 516, 321 U S 801, 88 L Ed 1088

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58 U S—Hoboken Manufacturers' R Co v U S D C N J, 47 F Supp 779 rev'd on oth grds 64 S Ct 159, 320 U S 368, 88 L Ed 107, reh den 64 S Ct 516, 321 U S 801, 88 L Ed 1088

61 US—Interstate Commerce Commission v Hoboken Manufacturers' R Co, supra, n 48

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64 N H—Boston & M R R v Suncook Val R R 46 A 2d 773, 94 N H 81, cert den 67 S Ct 89 329 U S 731, 91 L Ed 632, reh den 67 S Ct 186, 329 U S 828, 91 L Ed 703

67 US—Atlantic Coast Line R Co v Baltimore & O R Co, supra, n 42

78 U S Baltimore & O R Co v Thompson, supra, n 41

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80 US—Baltimore & O R Co v Thompson, supra, n. 41—Thompson v Baltimore & O R Co supra, n. 45

87 US—Atlantic Coast Line R Co v Baltimore & O R Co, supra, n 42

89 U S—Thompson v St Louis-San Francisco Ry Co C A Mo 219 F 2d 166 cert den 75 S Ct 225 348 U S 964 99 L Ed 752

96. Inequitable retention by defendant

U S—Atlantic Coast Line R Co v Baltimore & O R Co supra, n 42

97. Evidence held admissible

U S—Atlantic Coast Line R Co v Baltimore & O R Co supra, n 42

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98 U S—Thompson v Baltimore & O R Co supra, n 45

Evidence held sufficient, etc.

U S—Atlantic Coast Line R Co v Baltimore & O R Co supra, n 42—Thompson v Baltimore & O R Co supra, n 8—Baltimore & O R Co v Thompson supra, n 41

Evidence held insufficient

U S—Atlantic Coast Line R Co v Baltimore & O R Co supra, n 8

99. Discretion of court

(1) Atlantic Coast Line R Co v Baltimore & O R Co supra, n 42

§ 301. Pooling Arrangements

6 Approval under another statute insufficient

US—Chicago & N W Ry Co v Peoria, & P V Ry Co D C Ill 201 F Supp 241 aff'd, C A 319 F 2d 117 cert den 84 S Ct 488, two cases, 375 U S 969 11 L Ed 2d 417 reh den 84 S Ct 658 376 U S 929 11 L Ed 2d 627

Sleeping car service

US—Brogan v Pennsylvania R Co, D C Ill 211 F Supp 881

7. Trust relationship not created by division of rates

US—In re Central R Co of N J, D C N J 273 F Supp 282, aff'd, C A 392 F 2d 589

8 US—Chicago & N W Ry Co v Peoria, & P V Ry Co D C Ill 201 F Supp 241, aff'd C A 319 F 2d 117, cert den 84 S Ct 488, two cases, 375 U S 969 11 L Ed 2d 417 reh den 84 S Ct 658 376 U S 929 11 L Ed 2d 627

Prohibition not applicable to pool imposed by Interstate Commerce Commission

U S Penn-Central Merger and N & W Inclusion Cases, N Y & Pa, 88 S Ct 602, 389 U S 486, 19 L Ed 2d 723

Effect of merger

US—Erie-Lackawanna R Co v U S, D C N Y 279 F Supp 316

Interline freight movements

US—In re Central R Co of N J, D C N J 273 F Supp 282, aff'd C A 392 F 2d 589

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The Interstate Commerce Act antipooling provision is an expression of transportation policy solely, not of labor policy.[95]

9.5. Designed to outlaw restraints on competition in marketing goods

US—Kennedy v Long Island R Co, C A N Y 319 F 2d 366, cert den 84 S Ct 75 375 U S 830, 11 L Ed 2d 61

The statutory prohibition is inapplicable to payments made to a carrier for strike insurance.[105]

10.5 US—Kennedy v Long Island R Co D C N Y, 211 F Supp 478, aff'd C A, 319 F 2d 366, cert den 84 S Ct 75, 375 U S 830, 11 L Ed 2d 61

§ 302. Filing, Publication, and Posting of Rates

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11 US—Boone v US, C C A Tenn 109 F 2d 590—OMR Pipe Line Co v Gurley Oil Co C A Ark 462 F 2d 172—Nyad Motor Freight, Inc v W T Grant Co, C A N Y 486 F 2d 1112

Duty prior to Freight Forwarders Act

N Y—Wald-Green Food Corp v Acme Fast Freight, 103 N Y S 2d 768, 200 Misc 679, app den 109 N Y S 2d 191 279 App Div 766, aff'd 110 N Y S 2d 514, 200 Misc 687

Filing as to transportations not as private carrier

US—Northern Fur Co v Minneapolis, St P & S S M Ry Co, C A Ill, 224 F 2d 181 cert den 76 S Ct 178 350 U S 900, 100 L Ed 791

Purpose

US—Ephraim v Safeway Trails, Inc C A N Y 341 F 2d 815

Kan—Kansas City Southern R Co v C H Albers Commission Co, 32 S Ct 316, 223 U S 573, 56 L Ed 556

Construction of rules relating to tariffs

US—Penn Cent Co v General Mills, Inc C A Minn 439 F 2d 1338

12 US—Cooper-Jarrett, Inc v U S D C Mo 226 F Supp 318, aff'd 85 S Ct 49 379 U S 6, 13 L Ed 2d 21

Purpose of requirement

(2) Other statements

US—Central & Southern Motor Freight Tariff Ass'n v U S, D C Del 273 F Supp 823, app after remand 345 F Supp 1389—Baker v Prolerized Chicago Corp D C Ill 335 F Supp 183—City of Charlotte v I C C C A 8, 671 F 2d 1080, cert den 103 S Ct 140, 459 U S 863 74 L Ed 2d 119

The [illegible] diversion intended by statute, etc.

(1) Other statements

US—Providence and Worcester R Co v U S C A 1, 666 F 2d 736

13 US—U S v Schupper Motor Lines, Inc C A N Y, 262 F 2d 859

Ill—Bass v Chicago Duluth & Georgian Bay Transit Co 89 N E 2d 430, 339 Ill App 246

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US—Northern Fur Co v Minneapolis, St P & S S M Ry Co C A Ill 224 F 2d 181, cert den 76 S Ct 178, 350 U S 900, 100 L Ed 791

Services of delay

US—Atchison, T & S F Ry Co v U S D C Kan 282 F Supp 430

14 U S—Aacon Auto Transport, Inc v State Farm Mut Auto Ins Co, C A N Y, 537 F 2d 648, cert den 97 S Ct 742, 429 U S 1042, 50 L Ed 2d 754

15 US—Chicago, M, St P & P R Co v Alouette Peat Products, Limited, C A Wash, 253 F 2d 449

17 US—Boone v U S supra, n 11

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18 US—Silent Sioux Corp v Chicago & N W Ry Co, C A Iowa, 262 F 2d 474

21 US—Central & Southern Motor Freight Tariff Ass'n v U S, D C Del, 273 F Supp 823 app after remand 345 F Supp 1389

Ga—Charleston & W C Ry Co v Merry Bros Brick & Tile Co 70 S E 2d 798 86 Ga App 104

29. Tariff to furnish standard upon which total charges computed

US—U S v Associated Air Transport, Inc C A Fla 275 F 2d 827

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30. Statute not violated

US—Long Island R Co v U S, D C N Y 307 F Supp 988

DC—National Trucking & Storage Co v Pennsylvania R Co CA 228 F 2d 23 97 US App DC 52

33 Where no specific charge is made

NH—Lakerly v Railway Exp Agency 77 A 2d 556 96 NH 396

34 Car turning service held not privilege

US—Long Island R Co v US DC NY 307 F Supp 589

Separate statement of guaranteed scheduling policy

DC—Ad Hoc Committee on Consumer Protection v US, DC 317 F Supp 370, app dism 91 S Ct 2204, 403 US 901 29 L Ed 2d 677

35 US—Western Transp Co v Wilson and Co Inc CA Ill, 682 F 2d 1227

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39 US—Norfolk & W Ry Co v Permaneer, Inc DC Mo 320 F Supp 749, affd CA 455 F 2d 76—Scaton & Co, D C Kan 309 F Supp 1202—Western Transp Co v E I Du Pont de Nemours and Co CA Ill 682 F 2d 1233

Kan—Graves Truck Line, Inc v Hy Plains Dressed Beef Inc 462 P 2d 130, 204 Kan 275

La—International Shoe Co v Flota Mercante Del Estado, App 29 So 2d 536

Mo—Long Island R Co v Midland Valley Lumber Co 164 S W 2d 930, 237 Mo App 147

NY Bianchi v Sears Roebuck & Co 134 N Y S 2d 495 284 App Div 709 revd on oth grds 150 N Y S 2d 187 1 N Y 2d 63 133 N E 2d 699

Conclusively presumed legal

(2) Other statements—White v Southern Ry Co 38 S E 2d 111 208 S C 319, 165 A L R 988

Pendency of proceeding does not suspend tariffs

Wash—State ex rel Pacific Inland Tariff Bureau v Clifford, 285 P 2d 569 46 Wash 2d 807

Under Motor Carrier Act

US—TIME Inc v US App D C & Tex 79 S Ct 904, 359 US 464 3 L Ed 2d 952

Under Federal Aviation Act

US—Tishman & Lapp, Inc v Delta Airlines, D C N Y 275 F Supp 471 affd, CA 413 F 2d 1401

"Legal" and "lawful" tariffs distinguished

US—Cincinnati, N O & T P Ry Co v Chesapeake & O Ry Co, CA Va, 441 F 2d 483

40 US—Chicago, B & Q R Co v Ready Mixed Concrete Co C A Neb, 487 F 2d 1263

NY Bianchi v Sears, Roebuck & Co, 116 N Y S 2d 512, 203 Misc 893, revd on oth grds 134 N Y S 2d 495 284 App Div, 709 revd on oth grds 150 N Y S 2d 187 1 N Y 2d 63, 133 N E 2d 699

Mere issuance of circular insufficient

US—Long Island R Co v US., D C N Y, 307 F Supp 988

41 US—Harrison Engineering & Const Corp v Atchison, T & S F Ry Co D C Mo, 78 F Supp 906

42 US—Cooper-Jarrett, Inc v US D C Mo 226 F Supp 318, affd 85 S Ct 49, 379 US 6, 13 L Ed 2d 21

No longer rate imposed by carrier

US—US v Associated Air Transport, Inc C A Fla 275 F 2d 827

43 US Plywood Distributing Corp v Terminal Transport Co, Inc D C Ohio, 383 F Supp 204—Brockette v Hub City Terminals, Inc, C A Ill 683 F 2d 1008

Ga—Charleston & W C Ry Co v Merry Bros Brick & Tile Co, 70 S E 2d 798, 86 Ga App 104

N J—Semi Metals, Inc v Punter Bros 312 A 2d 892, 126 N J Super 124, mod on oth grds 343 A 2d 757 135 N J Super 464, affd 360 A 2d 385, 70 N J 437

N Y—Pennsylvania R Co v Brooklyn Contractor's Trucking Freight Co 61 N Y S 2d 217—Chas Pfizer & Co v Acme Fast Freight, Inc 233 N Y S 2d 292, 36 Misc 2d 546—Norca Corp v Pilot Freight Carriers, Inc 313 N Y S 2d 232, 63 Misc 2d 654

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44 US—Southern Ry Co v Champion Papers, Inc D C N C 315 F Supp 65 affd 427 F 2d 155

Md—Shirks Motor Exp Corp v Forster Transfer & Rigging Co 133 A 2d 59 214 Md 18

N Y—Direct Waters Transport, Limited v Barnard Steel Corp 203 N Y S 2d 640 24 Misc 2d 569—Chas Pfizer & Co v Acme Fast Freight, Inc 233 N Y S 2d 292, 36 Misc 2d 546

45 US—Nyad Motor Freight, Inc v W T Grant Co C A N Y 486 F 2d 1112

D C—US v I C C 198 F 2d 958, 91 U S App D C 178, cert den 73 S Ct 212, 344 U S 893 97 L Ed 691

Ga—Ryder Truck Lines, Inc v Aladdin, Inc 139 S E 2d 446, 110 Ga App 579

Ky—Hayes Freight Lines v Hamilton 257 S W 2d 60

La—International Shoe Co v Flota Mercante Del Estado supra, n 39

Ohio—Thomas Foods, Inc v Pennsylvania R Co 168 N E 2d 612, 112 Ohio App 76

Contract with express company

(2) Other statements

Cal—Transmix Corp v Southern Pac Co 9 Cal Rptr 714 187 C A 2d 257

Control and responsibility test

US—Locust Cartage Co v Transamerican Freight Lines, Inc C A Mass 430 F 2d 334 cert den 91 S Ct 345, 400 US 964 27 L Ed 2d 383

48 US—Atchison, T & S F Ry Co v Bounden, C A Okl 307 F 2d 230

Ala—Robert S Armstrong & Bros Co v Rowland, 118 So 502, 22 Ala App 613

Ark—St Louis-S F Ry Co v Pollard, 154 S W 2d 9 202 Ark 917

Ga—Griffin Grocery Co v Pennsylvania R Co 92 S E 2d 254, 93 Ga App 546

Iowa—Green Bay Lumber Co v Chicago, B & Q R Co 284 N W 369—Kiernan v Greyhound Lines, Inc 156 N W 2d 310, 261 Iowa 788

Md—Shirks Motor Exp Corp v Forster Transfer & Rigging Co 133 A 2d 59 214 Md 18

Mo—Pennsylvania R Co v Chromalloy Corp App 424 S W 2d 104

N J—Semi Metals, Inc v Punter Bros, 343 A 2d 757 135 N J Super 464 affd 360 A 2d 385, 70 N J 437

N Y—W R Grace & Co v Railway Exp Agency Inc 202 N Y S 2d 281 8 N Y 2d 103 168 N E 2d 362, cert den 81 S Ct 69 364 U S 930, 5 L Ed 2d 57—Norca Corp v Pilot Freight Carriers, Inc 313 N Y S 2d 232, 63 Misc 2d 684

N C—Atlantic Coast Line R Co v West Paving Co, 94 S E 2d 523 228 N C 94

Government

US—Union Pac R Co v US 132 F Supp 230, 132 Ct Cl 213

49 US—St. Louis-San Francisco Ry Co v Miller Floors Inc, D C Okl 293 F Supp 869—Dugdale Packing Co v Atchison, T & S F Ry Co D C Mo, 347 F Supp 1276

Ala—Robert S Armstrong & Bros Co v Rowland, 118 So 502, 22 Ala App 613

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S C—Huddy v Railway Express Agency 188 S E 247 181 S C 508, 107 A L R 1437—White v Southern Ry Co supra, n 39

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Wis—Mellon v Johnson Co 219 N W 352, 196 Wis 69

Requirement of written diversion order

US—Atchison, T & S F Ry Co v Bounden, C A Okl 307 F 2d 230

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52 US—Chicago, M St P & P R Co v Alouette Peat Products, Limited, C A Wash 253 F 2d 449

Judicial remedy where not lawful for any reason

US—Middlewest Motor Freight Bureau v US C A Minn 433 F 2d 212, cert den 91 S Ct 2169 402 U S 999 29 L Ed 2d 165

Storage charges

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US—Norfolk & W R Co v North Am Car Corp D C Ill 455 F Supp 424

56. Carrier may "flag out" of filing of joint rates

US—Ajayem Lumber Corp v Penn Central Transp Co C A N Y, 496 F 2d 21 cert den 95 S Ct 151 419 U S 884, 42 L Ed 2d 124

Discriminating exceptions of carrier

D C—Southern Ry Co v U S D C 412 F Supp 1122, app after remand 502 F Supp 975

57 New rates for motor carriers

US—Crown Coach Co v U S D C Mo 44 F Supp 547

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67. Tariff held filed when received although file mark delayed

US—Lone Star Producing Co v Gulf Oil Corp, D C Tex 208 F Supp 85, revd on oth grds C A, 322 F 2d 28

70 US—US v Northern Pac Ry Co, D C Minn 180 F Supp 828

Cal—People v Ryerson, 50 Cal Rptr 246, 241 C A 2d 115

71 Mass—Nicholas Zeo, Inc, v Railway Express Agency 58 N E 2d 127 317 Mass 374

72. Tariff in effect pending hearing on remand

US—US v Northern Pac Ry Co, D C Minn, 180 F Supp 828

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81 US—Mogis v Lyman Richey Sand & Gravel Corp D C Neb, 90 F Supp 251, affd, C A, 189 F 2d 130, reh den 190 F 2d 202 cert den 72 S Ct 168, 342 U S 877 96 L Ed 659

N C—Atlantic Coast Line R Co v West Paving Co, supra, n 48

§ 303. Construction of Particular Tariffs

82 US—Union Pac R Co v US, 184 Ct Cl 785—Penn Cent Co v General Mills, Inc C A Minn, 439 F 2d 1338

S C—C E Luttrell & Co v Southern Ry Co 8 S E 2d 753 193 S C 438

Tariff invalid

US—Interstate Commerce Commission v Columbus & G Ry Co, Miss 63 S Ct 1209 319 U S 551, 87 L Ed 1580, reh den 64 S Ct 26, 320 U S 809, 88 L Ed 489

Particular tariffs construed

US—Bohn Drive-A-Way Co v US, 283 F 2d 697, 151 Ct Cl 164—T L M E Freight, Inc v U S, D C Tex 302 F Supp 573

94 US—Hughes Transp Inc v US 169 Ct Cl 63—Atchison, T & SF Ry Co v US 181 Ct Cl 315

DC—US v ICC CA 198 F2d 958 91 US App DC 178 cert den 73 S Ct 212 344 US 893 97 L Ed 691

Iowa—CJS cited in Coon Valley Gravel Co v Chicago, RI & PR Co 41 N W 2d 676 678 241 Iowa 487

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Construction to avoid absurd result

US—Glickfeld v Howard Van Lines, CA Cal 213 F 2d 723—National Van Lines, Inc v US CA Ill 355 F 2d 326

Construction to avoid unjust or improbable results

US—National Dairy Products Corp—Kraft Foods Division v Missouri Kansas-Texas R Co CA Tex 385 F 2d 173

85 US—National Van Lines, Inc v US CA Ill 355 F 2d 326—Union Pac R Co v US 434 F 2d 1341 193 Ct Cl 521

Construction to prevent unlawful discrimination

US—Chicago B & Q R Co v E Bermer & Sons, D C Minn 56 F Supp 691

86 Ohio—Saalfield Pub Co v Public Utilities Commission, 77 N E 2d 914 149 Ohio St 113

87 US—Union Pac R Co v US 184 Ct Cl 785—Penn Cent Co v General Mills, Inc C A Minn 439 F 2d 1338—Trans Ocean Van Service v U S 426 F 2d 329, 192 Ct Cl 75 op supp 470 F 2d 604 200 Ct Cl 122

DC—US v ICC, CA, 198 F 2d 958 91 US App D C 178, cert den 73 S Ct 212, 344 US 893 97 L Ed 691

SC—C E Luttrell & Co v Southern Ry Co supra, n 82

Tariffs strictly construed

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Construction to produce legal rates

US—National Van Lines, Inc v US CA Ill 355 F 2d 326

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88. US—Fort Worth & Denver City Ry Co v Childress Cotton Oil Co, D C Tex, 48 F Supp 937 affd, C C A 141 F 2d 558—Great Northern Ry Co v Commodity Credit Corp, supra, n 21—Petaluma & Santa Rosa R Co v Commodity Credit Corp supra, n 40—Western Transp Co v Wilson and Co, Inc CA Ill 682 F 2d 1227

89. **Misunderstandings as to effect to change rule of strict construction**

Cal—Transmix Corp v St[illegible] Pac Co, 9 Cal Rptr 714 187 C A 2d 257

91 US—Carpenter v Texas & N O R Co C C A Tex 89 F 2d 274 cert den 58 S Ct 23 302 US 703, 82 L Ed 543—A E West Petroleum Co v Atchison, T & S F Ry Co C A Mo, 212 F 2d 812—Western Transp Co v Wilson and Co Inc C A Ill 682 F 2d 1227

92 US—A E West Petroleum Co v Atchison, T & SF Ry Co, D C Mo, 108 F Supp 644—Baltimore & O R Co v Owens-Illinois Glass Co D C Ohio, 133 F Supp 680

Tenn—Hammond v McCallum & Robinson 167 S W 2d 981, 179 Tenn 531

93 US—West Coast Products Corp v Southern Pac Co, C A Cal 226 F 2d 830—National Van Lines, Inc v US C A Ill 355 F 2d 326

94 US—Raymond City Coal & Transportation Corporation v New York Cent R Co C C A Ohio, 103 F 2d 56 Bernstein Bros Pipe & Machinery Co v Denver & R G W R Co, C A Colo 193 F 2d 441

Ga—Charleston & W C Ry Co v Merry Bros Brick & Tile Co, 70 S E 2d 798, 86 Ga App 104

Mo—Pennsylvania R Co v Chromcraft Corp App 424 S W 2d 104

Neb—Union Transfer Co v Rerstrom 37 N W 2d 383 151 Neb 326

SC—C E Luttrell & Co v Southern Ry Co supra n 82

Tariff not given strained construction

US—Bolin Drive-A-Way Co v U S 283 F 2d 697 151 Ct Cl 164

"Sorting" defined

U S—Associated Wholesale Grocers, Inc v US D C Kan 272 F Supp 274

95 US—U S v Missouri Pac R Co C A Tex 250 F 2d 805 reh den 254 F 2d 598, cert den 79 S Ct 33 358 U S 821 3 L Ed 2d 62—Penn Cent Co v General Mills, Inc C A Minn 439 F 2d 1338

D C—U S v ICC supra, n 87

Wash—Floe v Cedergreen Frozen Pack Corp 226 P 2d 871 37 Wash 2d 886

96 US—De Ramus v Mengel Co D C Ky 74 F Supp 425

Mo—Pennsylvania R Co v Chromcraft Corp App 424 S W 2d 104

General Commercial understanding and acceptance

Wash—Floe v Cedergreen Frozen Pack Corp supra, n 95

Shipper's right to assume sense in which terms employed

Wash—Floe v Cedergreen Frozen Pack Corp supra, n 95

"First class rates" defined

US—Central & Southern Motor Freight Tariff Ass n v US D C Del 273 F Supp 823 app after remand 345 F Supp 1389

97 D C—Southern Ry Co v Acme Fast Freight 124 F 2d 229, 74 App D C 390

98 US—Louisiana & A Ry Co v Export Drum Co C A La 359 F 2d 311—Great Northern Ry Co v US 352 F 2d 375 173 Ct Cl 453—TIME Freight, Inc v US D C Tex, 302 F Supp 575

N Y—Bianchi v Sears Roebuck & Co, 116 N Y S 2d 512, 203 Misc 893 revd on oth grds 134 N Y S 2d 495, 284 App Div 709, revd on oth grds 150 N Y S 2d 187 1 N Y 2d 63 133 N E 699

Tariff or [illegible]t, etc—Armour & Co v Chicago, M, St P & Pac R Co, C A Ill 188 F 2d 603 cert den 72 S Ct 87 342 US 860, 96 L Ed 647

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99 US—Great Northern Ry Co v Commodity Credit Corp supra, n 21

2 US—Boone v US C C A Tenn 109 F 2d 560—Southern Ry Co v US 156 F Supp 740, 140 Ct Cl 413

Lower of two tariffs applied

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Reference to other tariff

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4 US—Harrison Engineering & Const Corp v Atchison, T & S F Ry Co D C Mo 78 F Supp 906

5 US—Trans Ocean Van Service v US, 426 F 2d 329 192 Ct Cl 75, op supp 470 F 2d 604, 200 Ct Cl 122

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US—Fort Worth & D Ry Co v Goodpasture, Inc, C A Tex 442 F 2d 1294

6 US—Harrison Engineering & Const Corp. v. Atchison, T. & S.F Ry. Co supra, n 4—Willingham v Seligman, C A Tex, 179 F 2d 257—Trans Intern Airlines, Inc v US, 351 F 2d 1001 173 Ct Cl 312

Effect of published exceptions

US—Seaboard Coast Line R R Co v US 192 Ct Cl 48

8 US—A E West Petroleum Co v Atchison, T & S F Ry Co D C Mo 108 F Supp 644 aff C A 212 F 2d 812

9 US—Chicago & N W Ry Co v Hunt-Wesson Foods, Inc C A Ill 504 F 2d 905

Cal—Transmix Corp v Southern Pac Co, 9 Cal Rptr 714 187 C A 2d 257—Southern Pac Co v U S Steel Corp Consol Western Steel Division, 9 Cal Rptr 135 229 C A 2d 94

D C—US v ICC C A 198 F 2d 958, 91 US App D C 178, cert den 73 S Ct 212 344 US 893, 97 L Ed 691

Mo—Pennsylvania R Co v Chromcraft Corp App 424 S W 2d 104

N Y—C J S cited in Bianchi v Sears, Roebuck & Co 150 N Y S 2d 187 1 N Y 2d 63 133 N E 2d 699 702

Other rules of construction considered

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10 US—Great Northern Ry Co v US 178 Ct Cl 226—Penn Cent Co v General Mills, Inc C A Minn 439 F 2d 1338

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Ga—Charleston & W C Ry Co v Merry Bros Brick & Tile Co, 70 S E 2d 798 86 Ga App 104

N Y—Bianchi v Sears, Roebuck & Co 150 N Y S 2d 187 1 N Y 2d 63, 133 N E 2d 699—Lehigh Valley R Co v Star Forwarders, Inc 289 N Y S 2d 82, 56 Misc 2d 535 aff'd 316 N Y S 2d 170 64 Misc 2d 791

Ohio—Baltimore & O R Co v Ace Rubber Products 102 N E 2d 626

Construction against United States

US—Reading Co v US, 126 F Supp 174, 130 Ct Cl 205

Ambiguity required to be reasonable one

US—Bolin Drive-A-Way Co v US, 283 F 2d 697, 151 Ct Cl 164—Christensen v Northern Pac Ry Co C A, 184 F 2d 534

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11 US—Great Northern Ry Co v Commodity Credit Corp supra, n 6

Iowa—Coon Valley Gravel Co v Chicago, R I & P R Co 41 N W 2d 676, 241 Iowa 487

Rates not applied retroactively

US—Sonken-Galamba Corp v Union Pac R Co, C C A Kan 145 F 2d 808

Construction by courts

US—West Coast Products Corp v Southern Pac Co C A Cal 226 F 2d 830

12 US—National Van Lines, Inc v US C A Ill 355 F 2d 326

14 US—TIME Freight Inc v US, D C Tex, 302 F Supp 575—Emery Air Freight Corp v US 499 F 2d 1255 205 Ct Cl 49

Mo—Pennsylvania R Co v Chromcraft Corp App, 424 S W 2d 104

Ohio—Saalfield Pub Co v Public Utilities Commission, 77 N E 2d 914 149 Ohio St 113

16 Mich—Grand Trunk Western R Co v Mount Clemens Sugar Co 269 N W 2d 208 277 Mich 366, cert den 57 S Ct 514 300 US 670, 81 L Ed 877

Engine hire agreement

Mich—Grand Trunk Western R Co v Mount Clemens Sugar Co supra

§ 304. Proceedings to Enforce Compliance by Carrier with Rates Fixed by Statute or Railroad Commission

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Va—Overnite Transp Co v Woodfin, 85 S E 2d 217 196 Va 747

Intent of legislature

Tex—Bayou Pipeline Corp v Railroad Commission, 568 S W 2d 122

21. Injunction denied

Fla—State ex rel Mason v Florida East Coast Ry Co App 176 So 2d 514

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26 32 C J p 236 note 91

27 Ky—Artemus-Jellico R Co v Railroad Commission of Kentucky ex rel Rigsby 511 S W 2d 235

35 Or—State By and Through Heltzel v O K Transfer Co 330 P 2d 510, 215 Or 8

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37 Me—In re Maine Motor Rate Bureau, 357 A 2d 518

Authority of court extinguished after remand

Wash—State ex rel Pacific Inland Tariff Bureau v Clifford, 285 P 2d 569 46 Wash 2d 807

Discretion held not abused

Wash—State ex rel Pacific Inland Tariff Bureau v Wright, 285 P 2d 576, 46 Wash 2d 819

Evidence held sufficient to justify increase

Fla—Gulf Oil Co v Bevis, 322 So 2d 30

Neb Nebraska Railroads of Omaha v Nebco, Inc 231 N W 2d 505, 194 Neb 322

N C—State ex rel Utilities Commission v Champion Papers, Inc 130 S E 2d 890, 259 N C 449

Evidence held insufficient

N C—State ex rel North Carolina Utilities Commission v Southern Ry Co 150 S E 2d 337 268 N C 204

Pleadings

Okl—Oklahoma Hardware Co v Corporation Carrier Division of Associated Motor Carriers of Okl 405 P 2d 87

"Fuel adjustment clause" implementation

N J Matter of Reds-Flo Corp 384 A 2d 1086, 76 N J 21

38. Basis of fixing tariff schedule

Ohio Federal Reserve Bank of Cleveland v Public Utilities Commission 343 N E 2d 114 45 Ohio St 2d 216, 74 O O 2d 326

39. Effect of judicial orders

Wash—State ex rel Pacific Inland Tariff Bureau v Clifford, 285 P 2d 569, 46 Wash 2d 807

40. Factors considered

Pa—Com Public Utility Commission v Laurel Pipe Line Co 370 A 2d 1252, 29 Pa Cmwlth 351

41 Pa—Com Public Utility Commission v Laurel Pipe Line Co 370 A 2d 1252, 29 Pa Cmwlth 351

42 Cal—California Trucking Ass'n v Public Utilities Commission 137 Cal Rptr 190, 561 P 2d 280, 19 C 3d 240

Action to compel commission to annul rates is premature where matter is pending before commission 42.5

42.5 Colo—Denver-Cuman Truck Line, Inc v Jim Chelf Inc 399 P 2d 244 156 Colo 372

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45 Ill—Sprague v Biggs, 62 N E 2d 420, 390 Ill 537

Particular matters with respect to issues, proof, and variance have been adjudicated.57.5

57.5. Failure to plead or prove rate as confiscatory

Tex—Railroad Commission v Oil Field Haulers Ass'n, Civ App 369 S W 2d 931, reh den 373 S W 2d 394 revd on oth grds Sup, 381 S W 2d 183

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58 Minn—State v Northern Pac Ry Co 22 N W 2d 569, 221 Minn 400

59 U S—Bowles v Indianapolis Rys D C Ind 64 F Supp 865 affd C C A 154 F 2d 218

Showing held sufficient

Tex—Oil Field Haulers Ass'n v Railroad Commission, 381 S W 2d 183

61 U S—Bowles v Indianapolis Rys, supra, n 61

67 Minn—State v Northern Pac Ry Co supra, n 58

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77 Order fixing rates not nullified by preliminary injunction subsequently dissolved—Green Bay Lumber Co v Chicago, B & Q R Co, Iowa, 284 N W 369

Court lacks power to extend limitation for suspension

Mont—State ex rel Chemical Transport v Bollinger 568 P 2d 172, 173 Mont 535

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84 Tex—Alamo Exp v Brown Exp, Civ App 234 S W 2d 62, err ref no rev err—Oil Field Haulers Ass'n v Railroad Commission, 381 S W 2d 183

89 Ill—Sprague v Biggs, supra, n 45

N J—Matter of Reds-Flo Corp 384 A 2d 1086, 76 N J 21

Pleadings held insufficient

Ill—Sprague v Biggs, 62 N E 2d 420, 390 Ill 537

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Other general rules of evidence are applicable.98.1

98.1. Admissibility

Ill—Sprague v Biggs, supra, n 45

Weight and sufficiency

Ill—Sprague v Biggs, supra, n 45

Mont—Montana Citizens Freight Rate Ass'n v Board of R R Comrs of Mont 271 P 2d 1024, 128 Mont 127

Neb—Nebraska Railroads of Omaha v Nebco, Inc 231 N W 2d 505 194 Neb 322

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3. Distribution of costs between interstate and intrastate traffic

Or—Valley & Siletz R Co v Flagg, 247 P 2d 639, 195 Or 683

Other general rules are applicable.61

6.1 Findings supported by preponderance of the evidence

Tenn—Gulf M & O R Co v Railroad and Public Utilities Commission, 271 S W 2d 23, 38 Tenn App 212

Burden of proof

Tex—Texas & N O R Co v Railroad Commission, 286 S W 2d 112, 155 Tex 323

Admissibility of evidence

Tex—Texas & N O R Co v Railroad Commission, 286 S W 2d 112, 155 Tex 323

Scope of review and relief

D C—D C Transit System, Inc v Washington Metropolitan Area Transit Commission, C A, 466 F 2d 394, 151 U S App D C 223 cert den 93 S Ct 688, 409 U S 1086, 34 L Ed 2d 673

Ill—City of Chicago v Illinois Commerce Commission, 153 N E 2d 574, 15 Ill 2d 11

Kan—Atchison, T & S F Ry Co v State Corp Commission 322 P 2d 715 182 Kan 603

Miss—Illinois Cent R Co v Jackson Ready-Mix Concrete, 137 So 2d 542, 243 Miss 72

Neb—L E Whitlock Truck Service, Inc v Shippers Oil Field Traffic Ass'n, 105 N W 2d 588, 171 Neb 78

Tex—Texas & N O R Co v Railroad Commission, 286 S W 2d 112, 155 Tex 323

Harmless error

Tex—Texas & N O R Co v Railroad Commission 286 S W 2d 112, 155 Tex 323—Railroad Commission v Oil Field Haulers Ass'n, Civ App 369 S W 2d 931, reh den 373 S W 2d 394 revd on oth grds Sup 381 S W 2d 183

Pleadings held sufficient

Miss—Illinois Cent R Co v Jackson Ready-Mix Concrete, 137 So 2d 542, 243 Miss 72

Tex—Texas & N O R Co v Railroad Commission, 286 S W 2d 112, 155 Tex 323

"Substantial evidence rule" held not applicable

Tex—Texas & N O R Co v Railroad Commission, 286 S W 2d 112, 155 Tex 323

Moot issues

Iowa—Chicago, B & Q R Co v Iowa State Commerce Commission, 105 N W 2d 633 252 Iowa 316

Minn—St Paul City Ry Co v City of St Paul, 106 N W 2d 452, 259 Minn 129

Questions of law and fact

Miss—Illinois Cent R Co v Jackson Ready-Mix Concrete, 137 So 2d 542, 243 Miss 72

Order held final although termed "interlocutory"

Ind—Baltimore & O R Co v Public Service Commission 177 N E 2d 275 132 Ind App 493

Issues not moot

Ind—Baltimore & O R Co v Public Service Commission, 177 N E 2d 275 132 Ind App 493

Commission's ——— of precondition to increases held valid

D C—Transit System, Inc v Washington Metropolitan Area Transit Commission, C A 466 F 2d 394, 151 U S App D C 223, cert den 93 S Ct 688, 409 U S 1086, 34 L Ed 2d 673

Courts have been held to have discretionary power to stay an order fixing rates pending appeal thereform.71

71 Minn—State v Northern Pac Ry Co 22 N W 2d 569 221 Minn 400

§ 308. —— Action to Set Aside Order of Commission Fixing Rates or Ordering Refund

8 Tex—Gulf, C & S F Ry Co v American Sugar Refining Co Civ App, 130 S W 2d 1030, err ref

Court's duty to determine reasonableness though rates not mentioned in statute

Iowa—Chicago, B & Q R Co v Iowa State Commerce Commission, 105 N W 2d 633 252 Iowa 318

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14 Or—Valley & Siletz R Co v Flagg, supra, n 3

Pa—Pennsylvania R Co v Pennsylvania Public Utility Commission, 4 A 2d 815 135 Pa Sup. 154

Tex—Texas Indus Traffic League v Railroad Commission of Tex Civ App 255 S W 2d 903 err ref no rev err

Moot questions

Tex—Abilene & So Ry Co v Terrell Civ App 131 S W 2d 37 err ref

15 N J—Matter of Commuter Operating Agency's Determination of Financial Results to Carriers for the Calendar Year 1977 396 A 2d 344 164 N J Super 311 app after remand 400 A 2d 72 166 N J Super 430

Tex—Texas & N O R Co v Railroad Commission 286 S W 2d 112 155 Tex 323

16 Ky—Louisville & N R Co v Commonwealth Kentucky R R Commission, 314 S W 2d 940

Tex—Texas Indus Traffic League v Railroad Commission of Tex supra n 14

17 U S—Seatrain Lines, Inc v U S D C N J 233 F Supp 199

Fairness of rates not determined in absence of evidence of necessary facts

Iowa—Chicago, B & Q R Co v Iowa State Commerce Commission, 105 N W 2d 633 252 Iowa 318

General rules control admissibility of evidence.[17.5]

17.5 Ariz—Old Pueblo Transit Co v Arizona Corp Commission, 329 P 2d 1108, 84 Ariz 389

18 Cal—Southern Pac Co v Railroad Commission of California, 87 P 2d 1052, 13 Cal 2d 125—Southern Pac Co v Railroad Commission of California, 87 P 2d 1055, 13 Cal 2d 89

Or—Valley & Siletz R Co v Flagg, supra, n 3

Pa—Pennsylvania R Co v Pennsylvania Public Utility Commission, supra, n 14

§ 309. Proceedings by Shipper or Consignee for Relief against Unreasonable Rates

23 D C—U S v I C C, App D C 69 S Ct 1410, 337 U S 426, 93 L Ed 1451

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26 Mo—Baldwin v Scott County Milling Co, 122 S W 2d 890, 343 Mo 915 revd on oth grds 59 S Ct 943, 307 U S 478, 83 L Ed 1409 reh den 60 S Ct 65 308 U S 631, 84 L Ed 526

28 D C—U S v I C C, supra, n 23

30 U S—Missouri-Kansas-Texas R Co v Sinclair Prairie Oil Co, C C A Okl 112 F 2d 553

49 U S C A § 16 is now 49 U S C A § 11706

Time cause of action accrues

49 U S C A § 16(e) is now 49 U S C A § 11706(g)

32 Ala—Illinois Cent R Co v Thomas Alabama Kaolin Co 153 So 2d 794 275 Ala 236

Ariz—Western Gillette, Inc v Arizona Corp Commission, App 592 P 2d 375, 121 Ariz 541

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35 Neb M[illegible] v Wilson Co [illegible] Co 77 N W 2d 895, 163 Neb 137

Illegal penalty approved by commission—Smith v T[illegible] 137 S W 2d 981, 234 Mo App 1151

37 Tex—Gulf C & S F Ry Co v Ames Sugar R[illegible] Co Civ App, 130 S W 2d 1030, err ref

38 Tex—Southwest Stone Co v Railroad Commission, Civ App 184 S W 2d 691, err ref

39 Pa—Pennsylvania R Co v Public Utility Commission 4 A 2d 622 135 Pa Super 5—Baltimore O R Co Public Utility Commission 4 A 2d 625 135 Pa Super 20

General rules as to weight and sufficiency of evidence apply[41]

43.1 Pa—Pennsylvania R Co v Public Utility Commission supra, n 39—Baltimore & O R Co v Public Utility Commission supra n 39

In jurisdictions where the regulatory commission has power to award reparation, considered supra § 278d(3), shippers who have been charged unreasonable rates are entitled to apply to the commission for an award of reparation[44]

44 Ill—Rockwell Lime Co v Illinois Commerce Commission 26 N E 2d 99 373 Ill 309 cert den 61 S Ct 16 311 U S 660 85 L Ed 423

Iowa—Green Bay Lumber Co v Chicago, B & O R Co 284 N W 369

N C—State ex rel North Carolina Utilities Commission v Norfolk Southern Ry Co 106 S E 2d 681 249 N C 477

Or—Oregon-Washington R & Nav Co v Bean 101 P 2d 230 164 Or 266

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52 N C—State ex rel North Carolina Utilities Commission v Norfolk Southern Ry Co 106 S E 2d 681 249 N C 477

60 N C—State ex rel North Carolina Utilities Commission v Norfolk Southern Ry Co, 106 S E 2d 681 249 N C 477

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67 U S—Texas Co v Chicago & Alton R Co C C A Ill 117 F 2d 210, cert den Funks Grove Grain Co v Alton R Co 61 S Ct 947 313 U S 570, 85 L Ed 1528 reh den 61 S Ct 1109, 313 U S 600, 85 L Ed 1552

68 U S—Texas Co v Chicago & Alton R Co supra, n 67

§ 311. Effect of Change of Rates after Shipment Has Commenced

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72 Cal—People v Ryerson, 50 Cal Rptr 246 241 C A 2d 115

§ 312. Charges Generally

Library References

Carriers ⇐188 et seq.

74 U S—Carbone Bros & Co v U S, D C N Y, 201 F Supp 157—Chicago & N W R Co v Union Packing Co, C A Neb, 514 F 2d 30, petition den 527 F 2d 592

Ala—Hiller v Goodwin, 65 So 2d 152, 258 Ala 700

Fla—Compania Cubana De Aviacion, S A v Comfort-Craft, Inc, App, 120 So 2d 48

Ill—Lowden v Illinois Commerce Commission, 33 N E 2d 430, 376 Ill 225

La—Pacific & Atlantic Shippers, Inc v American News Co, App 201 So 2d 119

Miss—Illinois Cent R Co v N T Wax Grocery Co, 45 So 2d 266, 208 Miss 675

Pa—Pennsylvania R R v Altmayer, Com Pl, 90 P L J 373

Wyo—Dees v Pearce, 311 P 2d 391, 77 Wyo 211

Collecting underbillings

Va—Chesapeake and Potomac Tel Co of Virginia v Bles, 243 S E 2d 473, 218 Va 1010

75 U S—U S v Louisville & N R Co C A Ky 221 F 2d 698

Ark—Johnston v Missouri Pac R Co 160 S W 2d 203 Ark 1036

Ill—Alton R Co v Gillarde 40 N E 2d 727 378 Ill 208

Pa—Tenenbaum Co v Solomon Co 105 P L J 6

Unauthorized carriage

U S—St Louis Southwestern Ry Co v Garvey Elevators, Inc C A Tex 505 F 2d 625

Contract interpretation

U S—Atchison, T & S F R Co v U S 572 F 2d 81 216 Ct Cl 54

76 Ariz—Arizona Feeds v Southern Pac Trans Co 519 P 2d 190 21 Ariz App 346

78 Iowa—Coon Valley Gravel Co v Chicago, R I & P R Co 41 N W 2d 676 241 Iowa 487

S C—Atlantic Coast Line R Co v Wannamaker Chemical Co, 57 S E 2d 311 216 S C 226

Tex—Texas & N O R Co v Yates, Com App [illegible] S W 2d 1050 139 Tex 89

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79 U S—Empire Petroleum Co v Sinclair Pipeline Co C A Colo 282 F 2d 913—Miller v Ideal Cement Co D C Wyo 214 F Supp 717

Neb—Union Transfer Co v Renstrom, 37 N W 2d 383 151 Neb 326

N Y—Erie R Co v Brainard 76 N Y S 2d 74

Pa—Yarnall v Railway Express Agency, 32 Del Co 535—Baltimore & O R Co v Feldbaum 107 A 2d 689 176 Pa Super 394

Tex—Humble Oil & Refining Co v Texas & P Ry Co Civ App 275 S W 2d 824 revd on oth grds Sup 289 S W 2d 547 155 Tex 483

80 U S—City of New Orleans v C B Fox Co D C La 33 F Supp 194—Strickland Transp Co v U S C A Tex 223 F 2d 466

81 N H—C J S quoted in Boston & M R R v Sullcook Val R R 46 A 2d 773 775 94 N H 81 cert den 67 S Ct 89 329 U S 731 91 L Ed 632 reh den 67 S Ct 186, 329 U S 828, 91 L Ed 701

Other matters with respect to charges and tariffs have been adjudicated by the courts.[81.5]

81.5 Guarantee of tariff charges

U S—Union Pac R Co v Higgins, D C N D, 27 F Supp 396

Storage-in-transit privileges at military installations

U S—Atchison, T & S F R Co v U S, 572 F 2d 840 216 Ct Cl 54

A common carrier is under no duty to specify the size of his consignor's shipments,[82.5] and thereby procure for him lower rates under the tariffs[82.10]

82.5 Cal—Kentner Truck Line, Inc v Maier Brewing Co, 6 Cal Rptr 572, 183 C A 2d 89

82.10 Cal—Kentner Truck Line, Inc v Maier Brewing Co 6 Cal Rptr 572, 183 C A 2d 89

Under the Interstate Commerce Act payment can not be made through the supplying of goods and services[84.5]

84.5 U S—In re Penn Central Transp Co C A Pa 477 F 2d 841, cert den 94 S Ct 219, 414 U S 923 38 L Ed 2d 157, 94 S Ct 231 414 U S 885 38 L Ed 2d 137

§ 313. —— Necessity for Prepayment

Library References

Carriers ⇐190.

85 Ill—Baltimore & O R Co v Illinois Steel Co, 46 N E 2d 144 316 Ill App 516, revd on oth grds 64 S Ct 322, 320 U S 508 88 L Ed 259

"Freight station" defined

Tenn—Burd v Southern R Co 42 S W 451 99 Tenn 719 727 63 Am S R 850

40 C J p 1331 note 17

88 N Y—Eazor Exp, Inc v Perlmutter 253 N Y S 2d 360, 22 A D 2d 49

89 U S—Atchison, T & S F Ry Co v Midland Cooperatives Inc D C Okl 306 F Supp 723

90 Wash—Transport Clearing Northwest v Bardahl Mfg Co 589 P 2d 1242, 22 Wash App 568

92. Carrier entitled to recover

Ill—Baltimore & O R Co v Illinois Steel Co supra, n 85

§ 314. —— Amount Allowable

Library References

Carriers ⇐189 et seq

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96 U S—Westinghouse Elec Corp v U S D C Pa 388 F Supp 1309

Neb—Jenkins v Watson-Wilson Transp System, Inc 163 N W 2d 123, 183 Neb 634

Pa—Nash v Chemical Corp 371 A 2d 992 246 Pa Super 595

Tex—Paul Blackwell Co v Dallas Transfer & Terminal Warehouse Co, Civ App 252 S W 2d 501 err ref no rev err

Effect of contract to dismiss rate case

U S—Atlantic Coast Line R Co v U S Sugar Corp C A Fla, 218 F 2d 426

Special contract as to amount of charges

U S—U S v Northern Pac Ry Co C A Minn 188 F 2d 277—Western Pacific R R Co v U S 157 Ct Cl 637

Fla—Florida East Coast Railway Co v Sheffield, App 349 So 2d 680

Goods stopped in transit

U S—North Am Van Lines, Inc v Heller D C La 246 F Supp 641 affd C A 371 F 2d 629

Rights and liabilities determined by tariffs

U S—North American Phillips Corp v Emery Air Freight Corp, C A N Y 579 F 2d 229

97 U S—Indiana Harbor Belt R Co v U S C A Ill, 510 F 2d 644, cert den 95 S Ct 2656, 422 U S 1042, 45 L Ed 2d 694, reh den 96 S Ct 158, 423 U S 884, 46 L Ed 2d 115—Chicago & N W R Co v Union Packing Co C A Neb, 514 F 2d 30, petition den 527 F 2d 592—Western Transp Co v E I Du Pont de Nemours and Co, C A Ill 682 F 2d 1233

Cal—West v Holstrom, 67 Cal Rptr 831 261 C A 2d 89

Conn—Materials, Inc v DeFonce Const Corp Com Pl 332 A 2d 788, 31 Conn Sup 426

D C—Pyramid Nat Van Lines v Goetze, Mun App 65 A 2d 595, motion over 66 A 2d 693—Dawson v U S D C 175 F Supp 264 affd, C A 281 F 2d 34, 108 U S App D C 201

Iowa—Coon Valley Gravel Co v Chicago, R I & P R Co, supra, n 73

La—Southern Pac Ry Lines v Smith, App 42 So 2d 564—Diaz Trucking Service v Kramer's Transfer & Storage, App 50 So 2d 71

Mo—Missouri Pac R Co v Terrell, App, 410 S W 2d 356

Mont—Hall Inc v Barrett Mobile Home Transport, Inc, 507 P 2d 523, 161 Mont 455

Neb—Application of United Mineral Products Co 131 N W 2d 388, 177 Neb 802

N J—Keuffer v Food Products Trucking Co 179 A 2d 754, 73 N J Super 285

N Y—Railway Exp Agency, Inc v Atlantic & Pacific Wire & Cable Co 172 N Y S 2d 749, 11 Misc 2d 511—Pan American World Airways, Inc v Overseas Raleigh Mfg, Ltd, 424 N Y S 2d 1, 73 A D 2d 879 motion den 403 N E 2d 186, 49 N Y 2d 780, 426 N Y S 2d 481 app dism in part, den in part 406 N E 2d 806, 49 N Y 2d 982, 428 N Y S 2d 951 mod on oth grds 416 N E 2d 1039, 51 N Y 2d 950, 435 N Y S 2d 703 cert den 101 S Ct 312, 452 U S 962 69 L Ed 2d 977

Or—Anodizing, Inc v OK Delivery System, Inc 613 P 2d 46 46 Or App 915

Pa—Betterman v American Stores Co 80 A 2d 65, 367 Pa 193 cert den 72 S Ct 49

Wash—Miles v Enumclaw Co-op Creamery Corporation, 121 P 2d 945 12 Wash 2d 377

Wis—Chicago & North Western Transp Co v Thorson Food Products, Inc 238 N W 2d 69 71 Wis 2d 143

Exclusive use rate

U S—Campbell 66 Express Inc v U S 392 F 2d 270, 157 Ct Cl 365—Pacific Intermountain Express Co v U S 167 Ct Cl 266

Ambiguity or reasonable doubt resolved against carrier

U S—U S v Missouri Pac R Co C A Tex 250 F 2d 805 reh den 254 F 2d 598 cert den 79 S Ct 33 358 U S 821 3 L Ed 2d 62—U S v Great Northern Ry Co C A Minn 337 F 2d 243—City of New Orleans, By and Through Public Belt R R Commission v Hansen & Tidemann, Inc D C La, 391 F Supp 910

Ill—National Starch & Chemical Corp v McNamara Motor Exp Inc 189 N E 2d 770, 40 Ill App 2d 484

Fair and reasonable construction

U S—Quaker State Oil Refining Corp v U S D C Pa 465 F Supp 75

Tenn—Minton v General Shale Products Corp 371 S W 2d 808, 52 Tenn App 60

Meaning of word used in tariff not disregarded

U S—U S v Great Northern Ry Co C A Minn 337 F 2d 243

Particular tariffs construed

U S—U S v Great Northern Ry Co C A Minn 337 F 2d 243—National Dairy Products Corp-Kraft Foods Division v Missouri-Kansas-Texas R Co C A Tex 385 F 2d 173—Chicago, R I & P R Co v Furniture Forwarders of St Louis, Inc D C Mo 272 F Supp 62, affd C A 393 F 2d 537

Va—Lynchburg Traffic Bureau v Norfolk & W Ry Co 147 S E 2d 744 207 Va 107

Reason for applying rule to common carriers

U S—A & F Trucking Corp v Liggett Drug Co D C N Y 253 F Supp 699

Ambiguities to be construed in favor of shipper

U S—Roach Asphalt Mfg Co v U S D C Ill 265 F Supp 568—Baggett Transp Co v U S 670 F 2d 1011, 229 Ct Cl 478

Quantum meruit theory for services rendered

U S—Baker v Prolerized Chicago Corp D C Ill 335 F Supp 183

Inappropriate to nonconsenting party

D C—Middle Atlantic Conference v U S, D C, 353 F Supp 1109

Full payment

Fla—Moore Meats, Inc v Alterman Transport, Inc App 301 So 2d 143

Full payment notwithstanding mistake

N C—Matthews v Acro Mayflower Transit Co Inc, 265 S E 2d 407 37 N C App 59 cert den 248 S E 2d 251 295 N C 647

No liability for misinterpretation of rates

U S—Illinois Cent Gulf R Co v Tabor Grain Co D C Ill 488 F Supp 110

Alaska—Walsky Const Co v Sea-Land Services, Inc 577 P 2d 241

98 U S—St Louis-San Francisco Ry Co v Miller Floors, Inc D C Okl 293 F Supp 869—Union Pac R Co v U S 490 F 2d 1385, 203 Ct Cl 368

Cal—West v Holstrom, 67 Cal Rptr 831 261 C A 2d 89

La—Haskins Trucking Co, Inc v Lynn Lake Transp Co Ltd App 350 So 2d 964

N J—Southern Pac Co v Wheaton Brass Works, 76 A 2d 890, 5 N J 594 cert den 71 S Ct 614 341 U S 904 95 L Ed 1343

N Y—Railway Exp Agency Inc v Gleeson, 153 N Y S 2d 161b, 2 Misc 2d 368—Bruce Glen Inc v Emery Air Freight Corp 264 N Y S 2d 876, 24 A D 2d 745

Pa—Delaware L & W R Co v Anthracite Overall Mfg Co 60 Lack Jur 32—Motor Freight Exp v Brocker Mfg 74 York 67

Tex—Yates Texas & N O R Co Com App 161 S W 2d 1050 139 Tex 89

Wash—Transport Clearing Northwest v Bardahl Mfg Co 589 P 2d 1242, 22 Wash App 568

Published tariffs cannot be waived

U S—Union Pac R Co v Higgins, D C N D 223 F Supp 396

Description of property by shipper held binding on him

Va—Lynchburg Traffic Bureau v Norfolk & W Ry Co 147 S E 2d 744, 207 Va 107

Bill of lading as evidence of identity of goods

U S—Southern Pac Transp Co v U S 454 F 2d 740, 197 Ct Cl 143

2 Fla—Florida East Coast Railway Co v Sheffield, App 349 So 2d 680

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3 Iowa—Stricker v Chicago & N W Ry System, 40 N W 2d 35 241 Iowa 649

4 U S—Mars Exp, Inc v David Masuk, Inc C A Conn 401 F 2d 891

Particular contracts construed

U S—Benton Rapid Exp, Inc v U S 171 F Supp 868, 145 Ct Cl 360

Notation on bill of lading only considered as evidence whether offer and acceptance

U S—U S v Francis, C A Cal 320 F 2d 191

5 U S—Common Carriers v U S 127 F Supp 197 130 Ct Cl 387

Mass—Rugg v Davis, 69 N E 2d 579, 320 Mass 388—Mt Tom Motor Lines v McKesson & Robbins, 89 N E 2d 3 325 Mass 45—Superline Transp Co v My Bread Baking Co 214 N E 2d 885 350 Mass 364

Wash—Miles v Enumclaw Co-op Creamery Corporation, 121 P 2d 945, 12 Wash 2d 377

While a shipper may have a cause of action against a carrier for breach of contract of carriage such as physical damage to goods, such an action does not affect the determination of the basic tariff rate[6.5]

6.5 Alaska—Walsky Const Co v Sea-Land Services, Inc 577 P 2d 241

7 U S—Southern Ry Co v U S, 100 Ct Cl 175, affd 64 S Ct 869 322 U S 72, 88 L Ed 1144

8 U S—Great Northern Ry Co v U S Ct Cl, 312 F 2d 901—Strickland Transp Co v U S, C A Tex 334 F 2d 172—Illinois Central Railroad Co v U S 157 Ct Cl 611

Ill—Suburban Motor Freight v Darling & Co, 108 N E 2d 920, 348 Ill App 393

Mo—United Van Lines, Inc v Claude, App, 550 S W 2d 227

Pa—Modern Transfer Co v Brown, 24 Beaver 3

Tex—Humble Oil & Refining Co v Texas & P Ry Co, Civ App 275 S W 2d 824 revd on oth grds, Sup 289 S W 2d 547 155 Tex 483

Freight

U S—Global Van Lines, Inc, v U S, 456 F 2d 717, 197 Ct Cl 575—Atchison, T & S F Ry Co v. John Sexton & Co D C Kan, 339 F Supp 1202—Illinois Cent Gulf R Co v Tabor Grain Co, D C Ill 488 F Supp 110

9 U S—Railway Exp Agency, Inc v Holt, D C Pa, 154 F Supp 644

N Y—Chas Pfizer & Co v Acme Fast Freight, Inc, 233 N Y S 2d 292, 36 Misc 2d 546

Pa—New York Cent R Co v [illegible] Co 12 A 2d 588 [illegible] Pa 8[illegible] cert [illegible] 31 311 U S 671 85 L Ed 431

Volume rate

US—Jet Forwarding [illegible] v U S Ct Cl [illegible] F [illegible] 987 194 Ct Cl 343—Container Transport Inc v U S Ct Cl 427 F 2d 1 [illegible] Ct Cl [illegible]

10 US—Tri-State Motor Transit Co U S C A Mo 490 F 2d 996—Union Pac R Co v J H Baxter & Co D C Or 404 F Supp [illegible]—Illinois Cent Gulf R Co v Tabor Grain Co D C [illegible] 488 F Supp 110—U S v Duncan Commercial, Inc D C Cal, 544 F Supp 1297 revd 702 F 2d 737

La—Loraine Transfer Co v Peacock's Inc App [illegible] So 2d 813

Size of car as factor

US—Texas Refining Co v Louisiana & Arkansas Ry Co C C A Tex 141 F 2d 486—Fort Worth & Denver City Ry Co v Childress Cotton Oil Co C C A Tex 141 F 2d 558—U S New York, N H & H R Co C A Mass 236 F 2d 101 revd on oth grds 78 S Ct 212, 355 U S 253 2 L Ed 2d 247—Reading Co v U S 56 Ct Cl 1

Construction of tariff rule not binding on courts

US—Commodity Credit Corp v Petaluma & Santa Rosa R Co C A Cal 190 F 2d 4[illegible]

Tariff as to empty containers meeting specified conditions construed

US—Louisiana & A Ry Co v Export Drum Co C A La 359 F 2d 311

Where lower tariff allowed to shipper meeting several requirements, all must be met

US—Louisiana & A Ry Co v Export Drum Co C A La, 359 F 2d 311

Identification of commodity

US—Great Northern Ry Co v U S 178 Ct Cl 226

Special agreed rates

US—Global Van Lines, Inc v U S, 456 F 2d 717 197 Ct Cl 575

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11 US—Souken-Galamba Corp v Thompson, C A Kan 225 F 2d 608, cert den 76 S Ct 154 350 U S 896, 100 L Ed 788—West Coast Products Corp v Southern Pac Co C A Cal 226 F 2d 830

D C—U S v I C C C A 309 F 2d 645, 114 U S App D C 25 motion den 323 F 2d 617, 116 U S App D C 315

Ill—Chicago B & Q R Co v California Wine Co 40 N E 2d 624, 313 Ill App 498

Minn—Chicago, R I & P R Co v Air-O-Flex Equipment Co, 126 N W 2d 773, 267 Minn 387

Neb—Mefford v Wilson Concrete Co 77 N W 2d 895, 163 Neb 137

Ohio—Baltimore & O R Co v Ace Rubber Products, 102 N E 2d 626

Coal

(3) Other [illegible]

US—[illegible]esapeake & O Ry Co v International Harvester Co, C A Ill, 272 F 2d 139

Machinery and appendages

(6) Other cases—U S v Missouri-Kansas-Texas R Co, C A Tex, 194 F 2d 777—Union Pac R Co v [illegible] Foods, Inc D C Neb, 432 F Supp 1033

Scrap iron

(1) U S ex rel Souken-Galamba Corporation v Missouri-Kansas-Texas R Co, D C Mo, 21 F Supp 931 affd C C A 98 F 2d 457, application for bill of review den 106 F 2d 899

(3) Other cases—North Eastern Auto Parts Co v Chicago, B & Q R Co, C A Minn 240 F 2d 743 cert den 78 S Ct 16, 17 three cases, 355 U S 815 2 L Ed 2d 32—U S v Frances, C A Cal 320 F 2d 191

N Y—Pennsylvania R Co v Brooklyn Contractors Mar[illegible]y Exchange 61 N Y S 2d 217

Use of Article

(2) Predo[illegible]l and not sporadic use determines [illegible]t of shipment

U S—Denver & R G W R Co v Resurrection Min Co D C Colo [illegible] F Supp 504—Louisville & N R Co v U S D C Ky 192 F Supp 557

[illegible] Other statements

U S—Hayes Freight Lines, Inc v U S 163 Ct Cl [illegible]—Western Pac R Co v U S C Cl 388 F 2d 312

Effect of determination of improper classification

[illegible]—Fla[illegible] Coastgreen Forest Pack Corp 226 P 2d 871 [illegible] Wash 2d 886

Jeep held passenger vehicle

U S—U S v Louisville & N R R C A Ky 217 F 2d 307

Agricultural implements

U S—Chicago B & Q R Co U S C A Ill 221 F 2d 811

Aircraft skin or metal covering

U S—Strickland Transp Co v Ling-temco-Vought Inc D C Tex 225 F Supp 253

Airplane landing mats

U S—Louisville & N R Co v U S, D C Ky 192 F Supp 557

Classification by analogy

U S—Northern Val Transfer Inc v I C C, D C N J 192 F Supp 600—Great Northern Ry Co v U S 170 Ct Cl 188

Military or naval property

U S—Central of Georgia Ry Co v U S, 153 Ct Cl 28

Article shipped in parts

U S—Union Pac R Co v U S 166 Ct Cl 150

Description of article

U S—Hayes Freight Lines, Inc v U S 163 Ct Cl 265

"Mechanical mule" held freight automobile

U S—Atlantic Coast Line R Co v U S 356 F 2d 154 174 Ct Cl 705

Sheet metal

U S—Roach Appleton Mfg Co v U S D C Ill 265 F Supp 568

Sprayers

U S—Seaboard Air Line R Co v U S 387 F 2d 651 181 Ct Cl 719

Classified secret materials shipped under fictitious description

U S—Navajo Freight Lines v U S 176 Ct Cl 1265

Cranes or derricks

U S—Western Pac R Co v U S Ct Cl 388 F 2d 312

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12 U S—Louisiana & A Ry Co v Export Drum Co, D C La 228 F Supp 89 revd on oth grds C A 359 F 2d 311

Minn—Chicago R I & P R Co v Air-O-Flex Equipment Co 126 N W 2d 773 267 Minn 387

N Y—Bianchi v Sears Roebuck & Co, 150 N Y S 2d 187 1 N Y 2d 63, 133 N E 2d 699

Utah—Western Pac R Co v Wasatch Chemical Co 217 P 2d 371, 117 Utah 411

Gasoline in drums and cans

U S—Reading Co v U S 126 F Supp 174 130 Ct Cl 205

"Boxing or crating"

U S—New Orleans & Northeastern R Co v U S, 137 F Supp 731 133 Ct Cl 535

Household goods

U S—Global Van Lines, Inc v U S Ct Cl, 456 F 2d 717 197 Ct Cl 575

13 U S—S Patti Const Co v Union Pac R Co C A Mo, 170 F 2d 634—Norfolk & W Ry Co v B I Holser and Co C A Ind 629 F 2d 486

Truckloads of specified number of pounds

Tenn—Minton v General Shale Products Corp App 371 S W 2d 808

Mixed carloads

U S—Union Pac R Co v U S 434 F 2d 1341 [illegible] Ct Cl 521

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14 U S—Louisiana & A Ry Co v Export Drum Co D C La 228 F Supp 89 revd on oth grds C A 359 F 2d 311

Mo—Pennsylvania R Co v Chromcraft Corp App 424 S W 2d 104

Emergency export rates

(1) Carpenter v Texas & N O R Co supra

Effect of conversion from export to domestic shipment

U S—U S v Chesapeake & O Ry Co C A Va [illegible] F 2d 213

Misrepresentation as to export rates

D C—U S v I C C C A 198 F 2d 958 91 U S App D C 178 cert den 73 S Ct 212, 344 U S 893 97 L Ed 2d 691

15 U S—Great Northern Ry Co v Com[illegible] Credit Corp D C Minn 81 F Supp 852—Chicago, R I & P R Co v Furniture Forwarders of St Louis, Inc D C Mo, 267 F Supp 175—Mars Exp Inc v David Masnik, Inc, C A Conn, 401 F 2d 891—Atchison, T & S F Ry Co v U S, 181 Ct Cl 315

16 Neb—Mefford v Wilson Concrete Co 77 N W 2d 895, 163 Neb 137

Tex—Humble Oil & Refining Co v Texas & Pac Ry Co 289 S W 2d 547 155 Tex 483

Export rates held inapplicable to domestic shipments

(3) Other statements

U S—Union Pacific Railroad Co v U S 163 Ct Cl 473

Geographical location of stations

U S—Atchison T & S F R Co v U S, 97 Ct Cl 271—Harrison Engineering & Const Corp v Atchison, T & S F Ry Co D C Mo, 78 F Supp 906—U S v Benjamin Motor Exp Inc D C Mass 147 F Supp 15 affd C A 251 F 2d 547

In absence of specific commodity rate provision

U S—Steffke Freight Co v Northwestern Steel & Wire Co, C A Ill 329 F 2d 308

17 U S—Mars Exp, Inc v David Masnik, Inc C A Conn 401 F 2d 891

D C—U S v I C C D C 142 F Supp 741

Ill—Chicago, R I & P R Co v Pacific Wine Co, 148 N E 2d 384, 12 Ill App 2d 535

Restrictions on intermediate rules

U S—Hygrade Food Products Corp v New York Cent R Co D C Ill 266 F Supp 946

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18 U S—Southern Pac Transp Co v U S Ct Cl 454 F 2d 740 197 Ct Cl 143

Ga—Charleston & W C Ry Co v Merry Bros Brick & Tile Co 70 S E 2d 798, 86 Ga App 104

Ohio—New York Cent R Co v A Schulman Inc 9[illegible] N E 2d 28—Baltimore & O R Co v Ace Rubber Products, 102 N E 2d 626

Okl—Oklahoma City-Ada-Atoka Ry Co v State, 248 P 2d 1005 207 Okl 50, app dism 73 S Ct 104, 344 U S 861 97 L Ed 668

Or—Anodizing, Inc v O K Delivery System, Inc 611 P 2d 41 46 Or App 415

Tex—Texas & N O R Co v W A Kelso Bldg Material Co Civ App, 250 S W 2d 426, err ref no rev err

Commodity and class rates or tariff

(1) U S—Atchison, Topeka and Santa Fe Ry Co v U S 156 Ct Cl 18

(2) Other statements

U S—Atchison, Topeka and Santa Fe Ry Co v U S 156 Ct Cl 18

Poison gases

U S—Great Northern Ry Co v U S 170 Ct Cl 188

Value of commodity shipped

US—Northern Pac Ry Co v US 355 F 2d 601 174 Ct Cl 233

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19 US—Great Northern Ry Co v US 170 Ct Cl 188—Great Northern Ry Co v US 178 Ct Cl 226—Emery Air Freight Corp v US 499 F 2d 1255, 205 Ct Cl 49

Ga—Charleston & W C Ry Co v Merry Bros Brick & Tile Co, 70 S E 2d 798, 88 Ga App 104

Ill—Chicago, B & Q R Co v California Wine Co supra, n 11

NY—Sewall v Weeks Moving & Storage Corp 172 N Y S 2d 773, 9 Misc 2d 338

Ohio—New York Cent R Co v A Schulman Inc supra, n 18—Seafield Pub Co v Public Utilities Comm 77 N E 2d 914 149 Ohio St 113

Tex—Marvin Brown, Inc v Missouri-Kansas-Texas R Co of Tex, Civ App 256 S W 2d 135 err ref no rev err

Shipment subject to higher rate

US—Commodity Credit Corp v Petaluma & Santa Rosa R Co C A Cal 190 F 2d 438—J H Rose Truck Line, Inc v US 462 F 2d 502, 199 Ct Cl 255—Union Pacific R Co v US 530 F 2d 322, 209 Ct Cl 83

First-class rate rather than double first-class rate

US—Buch Exp v US Ct Cl 132 F Supp 473 cert den 76 S Ct 837 351 US 940, 100 L Ed 1467

Rule inapplicable

US—Garrett Freightlines, Inc v US D C Idaho 236 F Supp 594

Articles within generic commodity description

US—Western Pac R Co v US Ct Cl 388 F 2d 312

Combined or attached goods

US—Southern Pac Transp Co v US, Ct Cl 454 F 2d 740, 197 Ct Cl 143

20 **"Aggregate rates"**

US—Central & Southern Motor Freight Tariff Ass'n v US D C Del 273 F Supp 823 app after remand 345 F Supp 1389

22. **Dismantled equipment**

US—Chicago, B & Q R Co v Duhamel Broadcasting Co D C S D 337 F Supp 481

24 US—Consolidated Freightways Corp of Delaware v Forty-Eight Insulations, Inc C A Ill 501 F 2d 1400

Designation of rate

(2) Other matters

US—Johnson Mach Works, Inc v Chicago, B & Q R Co, C A Iowa, 297 F 2d 793

Route suggested by carrier

US—Seaboard Coast Line R Co v US, 412 F 2d 1274, 188 Ct Cl 968

25 US—Woolsey Transport Co v George Rutledge Co C C A N J 162 F 2d 1016

Carriers not entitled to additional compensation

US—Global Van Lines, Inc v US, Ct Cl, 456 F 2d 717, 197 Ct Cl 575

Ill—Western Transp Co v Terminal Freight Co-op Ass'n, 429 N E 2d 1264 57 Ill Dec 901 102 Ill App 3d 469

Flat rates

US—Atchison, T & S F Ry Co v John Sexton & Co D C Kan, 339 F Supp 1202

27. **Responsibility for misrouting**

(6) Other cases—Southern Pac Co v Southern Rice Sales Co 178 S W 2d 264, 142 Tex 365

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28. **"Through" rates**

US—Atchison, T & S F Ry Co v John Sexton & Co, D C Kan 339 F Supp 1202

29 US—T & M Transp Co v S W Shattuck Chemical Co C C A Colo 148 F 2d 777—Johnson Mach Works, Inc v Chicago, B & Q R Co C A Iowa, 297 F 2d 793—Great Northern Ry Co v US 312 F 2d 906, 160 Ct Cl 225

Battery rates

US—Chicago, R I & P R Co v Furniture Forwarders of St Louis, Inc D C Mo 272 F Supp 62, affd C A 393 F 2d 537

Rule inapplicable where less expensive route temporarily unavailable

US—Seaboard Coast Line R Co v US 412 F 2d 1274 188 Ct Cl 968

31 US—S W Shattuck Chemical Co v T & M Transp Co C C A Colo 134 F 2d 394—A E West Petrol Co v Atchison, T & S F Ry Co D C Mo 108 F Supp 644 affd C A 212 F 2d 812—Great Northern Ry Co v US, Ct Cl 312 F 2d 901

Fla—Container Corp of America v Seaboard Air Line R Co 59 So 2d 757

La—Texas & N O R Co v Miller & Co App 4 So 2d 762

Mo—Walton v A B C Fireproof Warehouse Co 151 S W 2d 494 235 Mo App 939

Through rate held inapplicable

(2) Other cases—Great Northern Ry Co v Commodity Credit Corp, D C Minn 77 F Supp 780, op am 81 F Supp 852—Western Pac R R Co v US 144 Ct Cl 1

Waybill not conclusive

US—Lehigh Val R Co v U S 149 F Supp 884 138 Ct Cl 166

Rate pending establishment of through rate

US—Union Pac R Co v US 287 F 2d 593 152 Ct Cl 523

Factors considered

US—Samuel P Mandell Co v Pennsylvania R Co D C Pa 336 F Supp 565

32 US—US v Majure, D C Miss 162 F Supp 594—Great Northern Ry Co v Commodity Credit Corp D C Minn, 175 F Supp 104, app dism, C A, 280 F 2d 428

Circumstances under which aggregate rate may apply

US—Great Northern Ry Co v US 156 Ct Cl 332

33 US—Blandin Paper Co v Great Northern Ry Co D C Minn, 265 F Supp 761—Southern Pac Co v Brown, Fletcher & Brown Inc, C A Tex 409 F 2d 1331

Reconsigned shipments held through shipments

(3) Other shipments

US—Pennsylvania R Co v US 125 F Supp 233, 129 Ct Cl 781

Reconsignment tariff permitting aggregation of favorable rates

US—Great Northern Ry Co v US 156 Ct Cl 332

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35 US—S W Shattuck Chemical Co v T & M Transp Co supra, n 31

36 US—Union Pacific v US C A N Y 142 Ct Cl 340—Nyad Motor Freight, Inc v W T Grant Co C A N Y 486 F 2d 1112

Reshipment of different commodity

US—Boone v US supra, n 10

Identity of shipment need not be preserved

Cal—Southern Pac Co v US Steel Corp Consol Western Steel Division, 40 Cal Rptr 135 229 C A 2d 94

Segregation of live stock

US—Southern Pac Co v Miller Abattoir Co C A N J 454 F 2d 357

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37 US—Chicago & N W R Co v Connor Lumber & Land Co C A Wis 212 F 2d 712.

Cal—Southern Pac Co v Fish, 333 P 2d 133 166 C A 2d 353

38 Tex—Mueller-Huber Grain Co v Texas & N O R Co Civ App 193 S W 2d 573

Other statements

US—Southern Pac Co v US 169 Ct Cl 566

39 US—Great Northern Ry Co v Commodity Credit Corp supra, n 31

Cannot be deferred

US—Gulf M & O R Co v US 312 F 2d 921 160 Ct Cl 493

Construction

US—Gulf M & O R Co v US 312 F 2d 921 160 Ct Cl 493

Cal—Southern Pac Co v US Steel Corp Consol Western Steel Division, 40 Cal Rptr 135 229 C A 2d 94

40 US—Gulf M & O R Co v US 312 F 2d 921 160 Ct Cl 493—Southern Pac Co v US, 169 Ct Cl 566

Tex—Mueller-Huber Grain Co v Texas & N O R Co supra, n 38—St Louis & S F Ry Co v Texas Automatic Sprinkler Co Civ App 264 S W 2d 471

41 US—Louisville & N R Co v Red Comb Pioneer Mills, Inc D C Ky 149 F Supp 812

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48 US—Great Northern Ry Co v US 178 Ct Cl 226

Md—Shirks Motor Exp Corp v Forster Transfer & Rigging Co 133 A 2d 59 214 Md 18

51. **Effect of submitting lower incorrect freight rate**

Utah—Union Pac R Co v Sterling H Nelson & Sons, Inc 552 P 2d 649

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57 **Under transportation Act of 1940**

US—US v Pacific Elec Ry Co C A Cal, 172 F 2d 222—Atchison, Topeka & Santa Fe Railway Co v US 132 Ct Cl 753—Great Northern Ry Co v US Ct Cl 312 F 2d 901

Unless expressly stipulated, a special rate contract is not binding on other carriers,[58.1] and where no privity of contract exists between a freight forwarder and a trucker carrying the goods the special rates do not apply.[58.2] Where shipments do not conform with the requirements of the tariff as to wharfage and handling charges, such charges are not recoverable.[58.3] Other matters relating to United States government shipments have been adjudicated.[58.4]

58.1. Special rate contracts held permissible, not mandatory

US—US v Rebhke, D C Colo 132 F Supp 22

58.2 US—US v Rebhke, D C Colo 132 F Supp 22

58.3 D C—US v I C C D C 132 F Supp 34 affd 77 S Ct 241 352 US 158, 1 L Ed 2d 211

58.4 US—J H Rose Truck Line, Inc v US 462 F 2d 502, 199 Ct Cl 255

Rendition of expedited service

(1) Purely freight tariffs held inapplicable

US—St Louis-San Francisco Ry Co v US 280 F 2d 838, 150 Ct Cl 610

(2) Fact carrier will suffer loss on transaction held not to necessarily preclude application of ordinary tariff

US—St Louis-San Francisco Ry Co v US 280 F 2d 838 150 Ct Cl 610

Government agents authorize to contract only at rates offered to public

US—St Louis-San Francisco Ry Co v US Ct Cl 280 F 2d 838

Filing and posting of tariff rates not required

DC—Var-Pak, Inc v Cavalier Storage Corp App 208 A 2d 620

Cancellation of rate tenders

US—United Van Lines, Inc v U S 353 F 2d 741 173 Ct Cl 697

Government agents not authorized to contract for rate higher than lowest published tariff applicable

US—Great Northern Ry Co v U S 170 Ct Cl 188

Published rates not binding on carrier

US—Chicago, B & Q R Co v US Ct Cl 439 F 2d 1224, 194 Ct Cl 688

Tender as continuing offers to government agencies

US—C & H Transp Co v U S 436 F 2d 480, 193 Ct Cl 872

Construction of rate quotation

US—C & H Transp Co v U S 436 F 2d 480, 193 Ct Cl 872

Interpretation of rate agreements

US—Jet Forwarding, Inc v US Ct Cl 437 F 2d 987 194 Ct Cl 343—Container Transport Intern Inc v U S Ct Cl 437 F 2d 1365 194 Ct Cl 320

Valuation of shipment

US—C & H Transp Co v US 436 F 2d 480, 193 Ct Cl 872

Single-factor rate

US—Trans Ocean Van Service v US 426 F 2d 329 192 Ct Cl 75 op supp 470 F 2d 604 200 Ct Cl 122

Diversion of shipment

US—Trans Ocean Van Service v US 426 F 2d 329 192 Ct Cl 75 op supp 470 F 2d 604 200 Ct Cl 122

Compensation

US—Trans Ocean Van Service v US, 426 F 2d 329 192 Ct Cl 75 op supp 470 F 2d 604 200 Ct Cl 122

Charge for additional transportation

US—Trans Ocean Van Service v US 426 F 2d 329 192 Ct Cl 75 op supp 470 F 2d 604 200 Ct Cl 122

59 US—Louisville & N R Co v US DC Ky 106 F Supp 999

Condition not subject to waiver

US—Lowden v Simonds-Shields-Lonsdale Grain Co CCA Mo, 97 F 2d 816, rev'd on oth grds 59 S Ct 612, 306 US 516, 83 L Ed 953 reh den 59 S Ct 792, 307 US 649 83 L Ed 1528

Waiting time

US—Global Van Lines, Inc, v US 456 F 2d 717 197 Ct Cl 575

Compensable diversion of shipment

US—Trans Ocean Van Service v US Ct Cl 470 F 2d 604, 200 Ct Cl 122

Estoppel

Wash—Union Pac R Co v Steinbrenner Fruit, Inc 537 P 2d 1076, 13 Wash App 824

62 US—Commercial Carriers, Inc v US 161 F Supp 393 142 Ct Cl 297—Twentieth Century Aircraft, Inc v US, CA Cal, 351 F 2d 155

Mo—Smith v Thompson, 137 S W 2d 981, 234 Mo App 1151

63 US—Western Pac R Co v US 279 F 2d 258, 150 Ct Cl 1—Routed Thru-Pac, Inc v US 401 F 2d 789 185 Ct Cl 428

Tex—Texas & N O R Co v W A Kelso Bldg Material Co, Civ App 250 S W 2d 426, err ref no rev err

Ambiguous tariff schedule

La—Louisiana & A Ry Co v Louisiana Public Service Commission, 410 So 2d 1118

N Y—Lehigh Valley R Co v Star Forwarders, Inc 289 N Y S 2d 82, 56 Misc 2d 535, affd 316 N Y S 2d 170, 64 Misc 2d 791

Car tracing

U S—Long Island R Co v U S D C N Y 307 F Supp 988

64 U S—Commercial Carriers v U S 127 F Supp 197 130 Ct Cl 387

66. **Size of car as factor**

U S—Chicago & E I R Co v Midwest Homes, Inc C A Ind 371 F 2d 300

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73 U S—Lehigh Val R Co v U S 149 F Supp 884 138 Ct Cl 166

75 U S—Lehigh Val R Co v U S 149 F Supp 884 138 Ct Cl 166

76 U S—Lehigh Val R Co v U S 149 F Supp 884 138 Ct Cl 166—Chesapeake & O Ry Co v U S 161 F Supp 403 142 Ct Cl 204

77 U S—Florida Citrus Commission v U S D C Fla 144 F Supp 517 affd 77 S Ct 589 352 U S 1021 1 L Ed 2d 595

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79. **Irregular truck**

Wash—Floe v Cedegreen Frozen Pack Corp supra, n 11

88 U S—American Sheet & Tin Plate Co v U S D C Pa 15 F Supp 711 rev'd on oth grds 57 S Ct 804 301 U S 402, 81 L Ed 1186, reh den 58 S Ct 3 302 U S 772, 82 L Ed 599

An additional charge may be made for spotting services amounting to "industrial services" within a manufacturing plant.[89.1]

89.1 U S—Inland Steel Co v U S D C Ill 23 F Supp 291 affd 59 S Ct 415, 306 U S 153 83 L Ed 557

90. **Disallowance of storage charges**

US—Global Van Lines, Inc v US 456 F 2d 717 197 Ct Cl 575

91 US—Tex-O-Kan Flour Mills Co v Texas & P Ry Co C A Tex 178 F 2d 89 cert den 70 S Ct 665, 339 U S 930, 94 L Ed 1350

Wis—Hanaman v Liberty Trucking Co, 7 N W 2d 609 242 Wis 92

Storage tariff controls rights of parties

US—City of New Orleans v C B Fox Co D C La 33 F Supp 194

Storage charge after stoppage in transit

US—North Am Van Lines, Inc v Heller D C La 246 F Supp 641 affd C A 371 F 2d 629

Implied authorization to store goods

US—Global Van Lines, Inc, v US, 456 F 2d 717 197 Ct Cl 575

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92 US—Pilgrim Distributing Corp v Terminal Transport Co Inc, D C Ohio, 383 F Supp 204

Interstate Commerce Commission order held not applicable

US—Western Maryland Ry Co v Commodity Credit Corp, D C Md, 154 F Supp 508

95 US—North Am Van Lines, Inc v Heller C A La 371 F 2d 629

96. **Necessary warehouse handling**

US—Global Van Lines, Inc v US 456 F 2d 717 197 Ct Cl 575

98 Tex—Tank Lining Corp v Missouri Pac R Co, Civ App, 598 S W 2d 955

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5 US—Atchison T & S F Ry Co v Erman-Howell Division of Luria Steel & Trading Corp D C Ill 279 F Supp 625—Cincinnati, N O & T P Ry Co v Chesapeake & O Ry Co C A Va 441 F 2d 483—Illinois Cent Gulf R Co v Tabor Grain Co D C Ill 488 F Supp 110

Mich—Detroit Terminal R Co v Budd Wheel Co N W 2d 126 311 Mich 638

Tex—Marvin Brown, Inc v Missouri-Kansas-Texas R Co of Tex Civ App 256 S W 2d 135 err ref n rev err

6 D C—US v I C C C A 198 F 2d 958, 91 U S App D C 178 cert den 73 S Ct 212, 344 U S 893 97 L Ed 691

Effect of contract right to operate over another line

US—Southern Ry Co v Louisville & N R Co D C Ky 185 F Supp 645 affd C A 289 F 2d 94

8 U S—Harrison Engineering & Const Corp v Atchison T & S F Ry Co D C Mo 78 F Supp 906—Atchison, T & S F R Co v U S 10 F Supp 823 123 Ct Cl 127

Ill—Illinois Cent Gulf R Co v Sankey Bros Inc 384 N E 2d 543 23 Ill Dec 749 67 Ill App 3d 43 affd 398 N E 2d 3 34 Ill Dec 328 78 Ill 2d 5

Tex—Texas & N O R Co v W A Kelso Bldg Material Co Civ App 250 S W 2d 426, err ref no re err

9 U S—Alaska Freight Lines, Inc v U S 377 F 2 580, 180 Ct Cl 248

Neb—Farmers Union Livestock Commission v Union Pac R Co 283 N W 498 135 Neb 689

13. "Intra plant" and "intra terminal" switching

(6) Other cases

US—Koppers Co v U S D C Minn 114 F Supp 741

Miss—Illinois Cent R Co v M T Reed Const Co 51 So 2d 573

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17 U S—U S v Kansas City Southern Ry Co C A Mo 217 F 2d 763

Mich—Detroit Terminal R Co v Budd Wheel Co supra, n 5

Tex—Marvin Brown, Inc v Missouri-Kansas-Texas R Co of Tex supra, n 5

21 N Y—Bianchi v Sears Roebuck & Co 116 N Y S 2d 512, 203 Misc 893 rev'd on oth grds 134 N Y S 2d 495 284 App Div 709 rev'd on oth grds 150 N Y S 2d 187 1 N Y 2d 63 133 N E 2 699

22 US—Armour & Co v Alton R Co C C A Ill 111 F 2d 913 affd 61 S Ct 498 312 U S 195 85 L Ed 771

24. Charge for weighing cars

US—Atchison T & S F Ry Co v Simpson D C Kan 109 F Supp 616

§ 315. —— Charges as Affected by Transportation over Several Lines

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26 US—Atchison T & S F Ry Co v Bouzides, C A Okl 307 F 2d 230—Chicago & N W Transp Co v Soo Line R Co D C Ill 384 F Supp 22

Tex—Luther Moving & Storage, Inc v Roberts, Civ App 526 S W 2d 557

No recovery for failure to comply with shipping arrangements

Ohio—Baltimore & O R Co v Producers Livestock Co-op Ass'n, 131 N E 2d 275

Recovery of overpayment to other carrier

N C—Grissom v Heavy Duty Haulers, Inc 141 S E 2d 865 264 N C 450

"Interline freight" defined

US—Alaska Freight Lines, Inc v US 377 F 2d 580, 180 Ct Cl 248

27 N Y—New York, S & W R Co v Central R Co of N J 156 N Y S 2d 99 rev'd on oth grds 161

N Y S 2d 567 3 A D 2d 999 affd 181 N Y S 2d 504 5 N Y 2d 828 155 N E 2d 401

29 U S—Chicago & N W Transp Co v Soo Line R Co D C Ill 384 F Supp 226

30. "Combination rates"

U S—General Motors Corp v U S D C Mich 359 F Supp 1168 affd C A 492 F 2d 1243

Conditions in land grant equalization agreement

U S—Pacific Coast R Co v U S 165 Ct Cl 167

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33 U S—Chicago & E I R Co v Southern Ry Co C A Ind 261 F 2d 394

Mo—State ex rel Philipp Transfer Lines, Inc v Public Service Commission, App 599 S W 2d 82

"Transit privileges"

U S—General Motors Corp v U S D C Mich, 359 F Supp 1168, affd C A 492 F 2d 1243

39 La—Vincent v Atlas Van Lines, Inc App 219 So 2d 249

40 U S—Great Northern Ry Co v Commodity Credit Corp D C Minn 77 F Supp 780 op am 81 F Supp 852—St Louis-S F Ry Co v Thompson, D C Mo 117 F Supp 57 affd C A 218 F 2d 166, cert den 75 S Ct 525 348 U S 964 99 L Ed 752

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42. Risk of loss

D C—United Van Lines, Inc v U S C A 448 F 2d 1190, 145 U S App D C 267

45. Terminal carrier mere agent

U S—Pennsylvania R Co v Charles E Gibson Inc D C S C 23 F Supp 857

50 U S—Pennsylvania R Co v Greene, D C Ala 173 F Supp 657

§ 316. —— Who Liable for Charges

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61 U S—Smith-Perry Elec Co v Transport Clearings of Los Angeles, C A Tex 243 F 2d 819—Mazzo & Sons Exp v William M Perry Inc D C N Y 143 F Supp 156

Me—C J S. cited in Graf Bros Inc v D & E Realty Co, 244 A 2d 806, 808

N Y—Delaware, L & W R Co v Bank St Trucking & Cooperage Co 76 N Y S 2d 662

Pa—Pennsylvania R Co v Rubin, 198 A 521, 130 Pa Super 578—Palmer v Cassler 60 Pa Dist & Co 494

62 U S—Thompson v Texas-Mexican Cotton Oil Corporation, D C Ark 54 F Supp 212—Seaboard Ry System v Leyden Shipping Corp D C N Y 290 F Supp 742

Cal—California Motor Exp Limited v Chowchilla Union High School Dist, 20 Cal Rptr 768, 202 C A 2d 314

N Y—Centre Carriers, Inc v Barker 354 N Y S 2d 215, 44 A D 2d 312

Person who accepts benefits of tariff is bound by its limitations and reciprocal obligations

U S—Union Pac R Co v Higgins, D C N D 223 F Supp. 396

Double recovery not permitted

U S—Chicago & N W Ry Co v T Frederick Jackson, Inc D C Minn, 336 F Supp 1141

Consignor

U S Pipe Line v Hub City Terminals, Inc C A Ill 683 F 2d 1008

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64 U S—New York Cent R Co v Trans-American Petroleum Corporation, C C A Ill 108 F 2d 994 129 A L R 206—Chicago Great Western Ry Co v Hopkins, D C Minn 48 F Supp 60

Tariff laws not intended to determine who pays

U S—Atchison T & S F Ry Co v Midland Cooperatives, Inc D C Okl 306 F Supp 723

65 U S—Illinois Steel Co v Baltimore & O R Co Ill 64 S Ct 322, 320 U S 508 88 L Ed 259—Atchison, T & S F Ry Co v Midland Cooperatives, Inc D C Okl 306 F Supp 723—In re Penn-Dixie Steel Corp D C N Y 10 B R 878

Ariz—Arizona Feeds v Southern Pac Transp Co 519 P 2d 199 21 Ariz App 346

Neb—Hilt Truck Lines, Inc v House of Wines, Inc 299 N W 2d 767 207 Neb 568

N C—Atlantic Coast Line R Co v West Paving Co 44 S E 2d 523 228 N C 94

Tex—Walton Transp Co v Houston Pipe Line Co Civ App 358 S W 2d 744 err ref no rev err

Common law principles govern

D C—Middle Atlantic Conference v U S D C 353 F Supp 1109

66 U S—New York Cent R Co v Little-Jones Coal Co, D C Ill 25 F Supp 337—Illinois Steel Co v Baltimore & O R Co supra, n 65

Conn—New York, N H & H R Co v California Fruit Growers Exchange, 5 A 2d 353 125 Conn 241 cert den 60 S Ct 79 308 U S 567 84 L Ed 476

N C—Griggs v Stoker Service Co 50 S E 2d 914 229 N C 572, 15 A L R 2d 798

Purpose of "nonrecourse" clause

U S—Northern Pac Ry Co v Associated General Contractors of N D D C N D 152 F Supp 126

N Y—Penn Cent Transp Co v United Aero Marine Services, Inc 398 N Y S 2d 780, 91 Misc 2d 839

67 N Y—Flying Tiger Line v American Bank Note Co 96 N Y S 2d 618, 198 Misc 483

Tex—Walton Transp Co v Houston Pipe Line Co Civ App 358 S W 2d 744 err ref no rev err

70 Conn—New York N H & H R Co v California Fruit Growers Exchange, supra, n 66

Ga—Westover v United Van Lines, Inc 270 S E 2d 74 154 Ga App 865

Ind—Pennsylvania R Co v F E Mathias Lumber Co, 47 N E 2d 158 113 Ind App 133

71 U S—Porto Transport, Inc v Consolidated Diesel Elec Corp D C N Y 19 F R D 256—Southern Pac Co v Miller, Abattoir Co C A N J 454 F 2d 357

Ind—Pennsylvania R Co v F E Mathias Mathias Lumber Co, supra, n 70

N Y—Aero Mayflower Transit Co v Rae, 118 N Y S 2d 895 203 Misc 801

Pa—Pennsylvania R Co v Salsburg, 33 Luz Leg Reg 112

Tex—Berry v Best Motor Lines, Civ App 209 S W 2d 430

No demand made is immaterial

Pa—Pennsylvania R Co v Penn-Del Supply Co 32 D & C 2d 472, 11 Chest 432

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72 Pa—Pennsylvania R Co v Rubin, supra, n 61

Tex—Berry v Best Motor Lines, supra, n 71

73 Ill—New York Cent R Co v Palella, 28 N E 2d 494 306 Ill App 279

Mo—Illinois Cent R Co v A B Friedman & Co 161 S W 2d 440, 444, 236 Mo App 946, quoting C J S

Tex—Berry v Best Motor Lines, supra, n 71

74 U S—Southern Ry System v Leyden Shipping Corp D C N Y, 290 F Supp 742

Me—Boston & Maine R R v Hannaford Bros Co 68 A 2d 1, 144 Me 306

76 U S—Northern Pac Ry Co v Associated General Contractors of N D D C N D, 152 F Supp 126

Ariz—Arizona Feeds v Southern Pac Transp Co, 519 P 2d 199 21 Ariz App 346

N Y—C J S. quoted in Aero Mayflower Transit Co v Rae, 118 N Y S 2d 895, 898, 203 Misc 801

S C—Atlantic Coast Line R Co v Wannamaker Chemical Co 57 S E 2d 311 216 S C 226

81 N Y—Brown Transport Corp v United Merchants & Mfrs Inc 250 N Y S 2d 440, 21 A D 2d 303

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82 Ga—Westover v United Van Lines, Inc 270 S E 2d 74 154 Ga App 865

88 Pa—Delaware, L & W R Co v Nay Aug Lumber Co Comp Pl 43 Lack Jur 50, 56 York 9

90 S D—National Van Lines, Inc v Herbert, 140 N W 2d 36, 81 S D 633

91 Ill—Alton R Co v Gillarde, 40 N E 2d 727 378 Ill 308

92 Conn—New York, N H & H R Co v California Fruit Growers Exchange, supra, n 66

Ga—Bekins Van Lines Co v Barlow 181 S E 2d 908, 123 Ga App 601—Brown Transp Corp v Atcon, Inc 241 S E 2d 15 144 Ga App 301 cert den 99 S Ct 626, 439 U S 1014 58 L Ed 2d 687

Ind—Pennsylvania R Co v F E Mathias Lumber Co supra, n 70

N Y—Direct Winters Transport Limited v Barmarc Steel Corp 203 N Y S 2d 640, 24 Misc 2d 569

Effect of extension of credit to recovery

U S—Illinois Cent R Co v Western Smelting & Refining Co D C Neb 123 F Supp 3 app dism C A 220 F 2d 757 758

Joint and several liability

Tenn—Plastic Products Co v Cook Truck Lines, Inc 260 S W 2d 178, 195 Tenn 463

Extension of credit to freight forwarder as barring recovery from shipper who paid forwarder

U S—Farrell Lines Inc v Titan Indus Corp D C N Y 306 F Supp 1348, affd C A 419 F 2d 835 cert den 90 S Ct 1365 397 U S 1042, 25 L Ed 2d 653

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93 U S—Pennsylvania R Co v Charles E Gibson, Inc supra, n 45

95 D C—Middle Atlantic Conference v U S, D C 353 F Supp 1109

Me—Boston & Maine R R v Hannaford Bros Co supra, n 74

Pa—C J S quoted at length in Pennsylvania R Co v Gallagher 101 A 2d 401 402, 174 Pa Super 462

Published tariffs held insufficient notice

Cal—New York, N H & H R Co v Haslett Warehouse Co 51 Cal Rptr 219, 242 C A 2d 186

96 U S—City of New Orleans v C B Fox Co D C La 33 F Supp 194

98 U S—Reading Co v U S 128 F Supp 745 131 Ct Cl 44—C J S. cited in Alcoa S S Co Inc v Continental Spring Corp D C Md 170 F Supp 548 550—State Marine Intern Inc v Seattle-First Nat Bank, C A Wash 524 F 2d 245—Southern Pac Transp Co v Continental Shippers Assn, Inc D C Mo 485 F Supp 1313 Affd, C A 642 F 2d 236—Southern Pac Transp Co v Commercial Metals Co, Tex, 102 S Ct 1815 456 U S 336, 72 L Ed 2d 114, on remand, C A 686 F 2d 264

Ala—Pennsylvania R Co v Adams Mercantile Co 16 So 2d 796, 245 Ala 268

Ariz—Arizona Feeds v Southern Pac Transp Co 519 P 2d 199 21 Ariz App 346

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Ill—Baltimore & O R Co v Illinois Steel Co 46 N E 2d 144 316 Ill App 516, revd on oth grds 64 S Ct 322, 320 U S 508, 88 L Ed 259

La—Pennsylvania R Co v Mistrot, App 199 So 163 cert den 62 S Ct 64, 314 U S 632, 86 L Ed 507—Aero Mayflower Transit Co v Hankey App, 148 So 2d 465

Me—Boston & Maine R R v Hannaford Bros Co supra, n 74

Minn—Scandrett v Higgins, 296 N W 26, 209 Minn 303

Mo—Long Island R Co v Midland Valley Lumber Co 164 S W 2d 930 237 Mo App 147

Nev—Transport Clearings of Los Angeles v F J Purdy Iron & Metals, Inc 289 P 2d 172 71 Nev 297

N Y—Goodman v New York & Conn Exp Corp v Imperial Crown Toy Corp 71 N Y S 2d 555—Flying Tiger Line v American Bank Note Co supra n 67

N C—Griggs v Stoker Service Co supra, n 66

Pa—Pennsylvania-Reading Seashore Lines v Thomasville Stone & Lime Co 74 York 182—Pennsylvania R Co v Penn-Del Supply Co 32 D & C 2d 472, 11 Ches 432

Tenn—Tennessee Cent Ry Co v Cumberland Storage & Warehouse Co 260 S W 2d 208 36 Tenn App 684

Tex—National Carloading Corporation v Phoenix-El Paso Express, Civ App 178 S W 2d 133 affd 176 S W 2d 564 142 Tex 141 cert den 64 S Ct 1156 322 U S 747 88 L Ed 1578

No privity between shipper and terminal carrier

U S—Pennsylvania R Co v Charles E Gibson, Inc supra, n 45

Liability of government under ordinary bill of lading

U S—Southern Pac Co v U S, D C Del 93 F Supp 411 affd C A, 192 F 2d 438

Consignor liable by acceptance of bill of lading without his sig. placed

Cal—Kentner Truck Line, Inc v Maier Brewing Co 6 Cal Rptr 572, 183 C A 2d 89

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99 U S—National Trailer Convoy Inc v U S 345 F 2d 573 170 Ct Cl 823

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La—Texas & N O R Co v Miller & Co App 4 So 2d 762—Texas & Pac Ry Co v U S Fidelity & Guaranty Co, App 16 So 2d 671

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Relief from liability

U S—Chicago & N W Ry Co v T Frederick Jackson, Inc, D C Minn 336 F Supp 1141

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Wash—Alaska Marine Trucking v Carnation Co, 633 P 2d 105, 30 Wash App. 144, cert den 102 S Ct 2045, 456 U S 964, 72 L Ed 2d 490

4. Charges for further transportation directed by consignee

U S—Southern Pac Co v Brown, Alcantar & Brown, Inc C A Tex, 404 F 2d 187 mod on oth grds 409 F 2d 1331

Authorization to store goods required

Ill—Geiger Moving & Storage Co v Barter Engineering Corp 276 N E 2d 790, 2 Ill App 3d 548

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6. U S—New York Cent R Co v Little-Jones Coal Co D C Ill, 25 F Supp 337—New York Cent R Co v Trans-American Petroleum Corporation C C A Ill 108 F 2d 994 129 A L R 206

Ariz—Arizona Feeds v Southern Pac Transp Co 519 P 2d 199 21 Ariz App 346

Cal—Kentner Truck Line, Inc v Maier Brewing Co 6 Cal Rptr 572, 183 C A 2d 89

Conn—C J S cited in New York, N H & H R Co v California Fruit Growers Exchange, 5 A 2d 353 357 125 Conn 241 cert den 60 S Ct 79 308 U S 567 84 L Ed 476

La—Pennsylvania R Co v Mistrot App 199 So 163 cert den 62 S Ct 64 314 U S 632, 86 L Ed 507

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Nev—Transport Clearings of Los Angeles v F J Purdy Iron & Metals, Inc 289 P 2d 172, 71 Nev 297

N Y—C J S cited in Flying Tiger Line v American Bank Note Co 96 N Y S 2d 618, 620 198 Misc 483

Effect of fraud

U S—Thompson v Temple Cotton Oil Co D C Ark 54 F Supp 135—Thompson v Texarkana Cotton Oil Corporation D C Ark 54 F Supp 212

Provision of uniform bill of lading

(1) Chicago Great Western Ry Co v Hopkins, D C Minn 48 F Supp 60

(3) U S—Atlantic Coast Line R Co v Clinchfield Fuel Co D C S C 94 F Supp 992

Ala—Pennsylvania R Co v Adams Mercantile Co 16 So 2d 796, 245 Ala 268

Pa—Pennsylvania R Co v Gallagher 101 A 2d 401, 174 Pa Super 462

(4) Other cases

U S—Illinois Steel Co v Baltimore & O R Co Ill 64 S Ct 322, 320 U S 508, 88 L Ed 259—Southern Pac Co v Brown, Alcantar & Brown, Inc C A Tex 404 F 2d 187 mod on oth grds 409 F 2d 1331—Atchison T & S F Ry Co v Midland Cooperatives Inc D C Okl, 306 F Supp 723

Tex—East Tex Motor Freight Lines v Franklin County Distilling Co Civ App 184 S W 2d 505

7 La—Pennsylvania R Co v Mistrot, supra, n 6

8 U S—Illinois Cent R Co v Western Smelting & Refining Co, D C Neb, 123 F Supp 3 app dism, C A 220 F 2d 757 758

Government as consignor

U S—Southern Pac Co v U S D C Del 93 F Supp 411, affd C A 192 F 2d 438

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9 U S—Fleming Co v U S, 128 F Supp 745 131 Ct Cl 44

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11 Pa—Pennsylvania-Reading Seashore Lines v Thomasville Stone & Lime Co, 74 York 182

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12 Conn—New York, N H & H R Co v California Fruit Growers Exchange supra, n 6

Mo—Long Island R Co v Midland Valley Lumber Co, supra, n 6

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14 Mo—Long Island R Co v Midland Valley Lumber Co supra, n 6

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21 U S—Missouri Pac R Co v Lake Charles Grain & Grocery Co, D C La 320 F Supp 1064

Ariz—Arizona Feeds v Southern Pac Transp Co 519 P 2d 199 21 Ariz App 346

La Pennsylvania R Co v Mistrot, supra, n 6

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S D—National Van Lines, Inc v Herbert 140 N W 2d 36 81 S D 633

Wash—C J S cited in Lyon Van Lines, Inc v Cole 512 P 2d 1108 1111 9 Wash App 382

"Liability" refers to civil liability

U S—U S v General Expressways, Inc D C Colo 270 F Supp 115

Prepayment by consignor indicated in shipping documents

U S—Consolidated Freightways Corp of Del v Admiral Corp C A Ill 442 F 2d 56

Carrier estopped

U S—Consolidated Freightways Corp of Del v Admiral Corp C A Ill 442 F 2d 56

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N J—Penbrook Hauling Co Inc v Sovereign Constr Co Ltd 319 A 2d 277 128 N J Super 179, affd 346 A 2d 433 136 N J Super 395

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22 U S—Pacific Coast Fruit Distributors v Pennsylvania R Co C A Cal 217 F 2d 273

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23 U S—Akers Motor Lines, Inc v Lady Corset Comb Co D C Mass, 203 F Supp 156—Southern Ry System v Leyden Shipping Corp D C N Y 290 F Supp 742—O Boyle Tank Lines, Inc v Beckham C A Ga 616 F 2d 207

Ariz—Arizona Feeds v Southern Pac Transp Co 51 P 2d 199 21 Ariz App 346

N Y—Delaware, L & W R Co v Bank St Trucking & Cooperage Co 76 N Y S 2d 662

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Particular bill of lading provisions construed

U S—Pennsylvania R Co v Greene, D C Ala 17 F Supp 657

Consignee's duty not relieved by payment to consignor

U S—Empire Petroleum Co v Sinclair Pipeline Co C A Colo, 282 F 2d 913

24 U S—New York Cent R Co v Little-Jones Coal Co supra, n 6—Alton R Co v Tucker, C C A Tex 138 F 2d 796—O Boyle Tank Lines, Inc v Beckham C A Ga 616 F 2d 207

N J—Checker Van Lines v Siltek Intern, Ltd 408 A 2d 333 169 N J Super 102

N Y—Eazor Exp Inc v Perlmutter 253 N Y S 2d 360, 22 A D 2d 49

25 U S—Baldwin v Scott County Milling Co 91 S Ct 943, 307 U S 478, 83 L Ed 1409, reh den 60 S Ct 65 308 U S 631, 84 L Ed 526—Atchison, T & S F Ry Co v Midland Cooperative Inc D C Okl 306 F Supp 723—O'Boyle Tank Lines, Inc v Beckham, C A Ga 616 F 2d 207

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26 US—Empire Petroleum Co v Sinclair Pipeline Co C A Colo 282 F 2d 913—Northwestern Pac R Co v Buchwell Co C A Ala 349 F 2d 497

La—Aero Mayflower Transit Co v Hankey App 148 So 2d 465

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27 Pa—Acme Fast Freight, Inc v Heffler Super 180 A 2d 110, 197 Pa Super 633—Pennsylvania R Co v Penn-Del Supply Co 32 D & C 2d 472, 11 Chest 432

28 US—New York Cent R Co v Little-Jones Coal Co supra, n 6—Northern Pac Ry Co v Associated General Contractors of N D D C N D 152 F Supp 126—Union Pac R Co v Higgins, D C N D 223 F Supp 396

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Wis—Chicago & N W Transp Co v Krohn Cartage Co Inc 255 N W 2d 310, 79 Wis 2d 39

Dominion not assumed

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Ohio—Pennsylvania R Co v United Collieries, supra, n 28—Pennsylvania R Co v Senter 22 N E 2d 843, 61 Ohio App 497

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Effect of return of goods after acceptance

Pa—Baltimore & O R Co v Feldbaum, supra, n 21

Circumstances constituting exercise of dominion

Pa—Balt. & O.R Co v Feldbaum, supra, n 21

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30 U S—Northwestern Pac R Co v Buchwell Co C A Ala, 349 F 2d 497—Union Pac R Co v Hall Lumber Sales, Inc C A Wis 419 F 2d 1009 cert den 90 S Ct 2194 399 U S 905 26 L Ed 2d 559

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31 Minn—Scandrett v Higgins, 296 N W 26, 209 Minn 305

32 Ga—Seaboard Air Line R Co v Richmond Lumber Inc 136 S E 2d 144 109 Ga App 328

33 Ga—Seaboard Air Line R Co v Richmond Lumber Inc 136 S E 2d 144 109 Ga App 328

34 Carrier held to have contracted, etc.

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(2) Other statements

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Decisions that "charges follow"

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35 U S—Union Pacific R Co v Hall Lumber Sales Inc C A Wis 419 F 2d 1009 cert den 90 S Ct 2194, 399 U S 905 26 L Ed 2d 559

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36 US—Strickland Transp Co v Ling-Temco-Vought Inc D C Tex 223 F Supp 253

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37 Pa—Reading Co v Sobelman, supra, n 25

38 Tex—Missouri Pac R Co v Phelan Co Civ App 444 S W 2d 832, err dism

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39 US—Missouri Pacific R Co v National Milling Co C A N J, 409 F 2d 882

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Bill of lading stamped prepaid

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Ariz—Arizona Feeds v Southern Pac Transp Co, 519 P 2d 199 21 Ariz App 346

NY—Airborne Freight Corp v Irving Trust Co 275 N Y S 2d 863 26 A D 2d 507

40 Ga—Bekins Van Lines Co v Barlow 181 S E 2d 908, 123 Ga App 601

41 US—US v Mason & Dixon Lines, Inc C A Tenn 222 F 2d 646

45 US—Southern Pac Co v Brown, Alcantar & Brown, Inc, C A Tex 404 F 2d 187, mod on other grds 409 F 2d 1331

46 NH—American Red Ball Transit Co Inc v McCarthy 323 A 2d 897 114 N H 514 cert den 95 S Ct 1131, 420 U S 930, 43 L Ed 2d 401

Tenn—Plastic Products Co v Cook Truck Lines, Inc 260 S W 2d 178, 195 Tenn 463

47 Tenn—Tennessee Cent Ry Co v Cumberland Storage & Warehouse Co 260 S W 2d 208, 36 Tenn App 684

49 U S—Southern Pac Co v Brown, Alcantar & Brown Inc C A Tex 409 F 2d 1331

Me—Boston & Maine R R v Hannaford Bros Co, supra, n 25

Pa—In re Zimmerman's Estate, supra, n 29—Reading Co v Sobelman, supra, n 25—Baltimore & O R Co v Feldbaum 107 A 2d 689

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50 Pa—Reading Co v Sobelman, supra, n 25

51 U S—Pacific Coast Fruit Distributors v Pennsylvania R Co C A Cal 217 F 2d 273

Pa—Reading Co v Sobelman, supra, n 25

52 Ariz—Arizona Feeds v Southern Pac Transp Co 519 P 2d 199 21 Ariz App 346

To avail himself of the provisions of § 3(2) of the Interstate Commerce Act the consignee must bring himself within its terms [53.1]

53.1 Ohio—Pennsylvania R Co v Senter supra, n 29

§ 317. —— Payment of Charges at End of Transportation

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54 US—Illinois Steel Co v Baltimore & O R Co supra n 6

55 US—Baggett Transp Co v US 319 F 2d 864, 162 Ct Cl 570—C.J.S. cited in United Van Lines, Inc v United States, C A D C 448 F 2d 1190, 1192 145 U S App D C 267

Agent not to pay despite loss of cargo

US—National Trailer Convoy Inc v US 345 F 2d 573, 170 Ct Cl 823

Standard form of government bill of lading

US—National Trailer Convoy, Inc v US, 345 F 2d 573 170 Ct Cl 823

61 US—Baggett Transp Co v US 319 F 2d 864 162 Ct Cl 570

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67 N Y—Frank M Herbert, Inc v M & P Scrap Iron & Metal Corp, 247 N Y S 2d 193, 41 Misc 2d 1020, affd 256 N Y S 2d 924 23 A D 2d 630

§ 318. —— Actions to Recover Charges

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73 US—Chicago & N W R Co v Connor Land & Land Co C A Wis, 212 F 2d 712—Bowser and Campbell v Knox Glass, Inc, C.A Pa, 390 F 2d 193 cert den 88 S Ct 2061, 392 U S 907 20 L Ed 2d 1365

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Pa—Modern Transfer Co v Brown, 24 Beaver 3

Bill of lading basis of recovery for undercharges

U S—Von Der Ahe Van Lines, Inc v U S, 358 F 2d 999 175 Ct Cl 281 cert den 87 S Ct 83 385 U S 837 17 L Ed 2d 70

Recovery on quantum meruit

(2) Other matters

N Y Burger v Dynamic Imports, Inc 274 N Y S 2d 537 51 Misc 2d 988

Public policy

US—Southern Pac Transp Co v Campbell Soup Co CA Neb 455 F 2d 1219

Cal—R E Tharp, Inc v Miller Hay Co 67 Cal Rptr 854 261 CA 2d 81

Each bill of lading separate contract

Mo—Chicago R I & P R Co v Furniture Forwarders of St Louis Inc C A Mo 426 F 2d 385

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74 Del—Travers v Artic Roofing Super Ct 244 A 2d 78, 3 Terry 41 affd 32 A 2d 559 3 Terry 293

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Compliance with procedural to right of recovery must be complied with—Robertson v Tennessee Valley Authority 186 So 727 237 Ala 279

75 US—Baker v Ross & Co 444 F 2d 257 on remand, D C 336 F Supp 20

Cal—Pratt v Coast Trucking, Inc 39 Cal Rptr 232, 228 C A 2d 139

76 US—C.J.S. cited in Pennsylvania R Co v Greene, D C Ala 173 F Supp 657 656

NY—New York, S & W R Co v Central R Co of N J, 156 N Y S 2d 99 revd on oth grds 163 N Y S 2d 567 3 A D 2d 999 affd 181 N Y S 2d 504 5 N Y 2d 828, 155 N E 2d 401

78 Mo—Illinois Cent R Co v A B Friedman & Co 161 S W 2d 440 236 Mo App 946

N Y—Brooklyn Eastern Dist Terminal v Une Credit Corp, 123 N Y S 2d 88

80 Me—Boston & Maine R R v Hannaford Bros Co, supra, n 25

Tex—Berry v Best Motor Lines, supra, n 22

81 US—National Carloading Corp v Atchison T & S F Ry Co C C A Cal 150 F 2d 210—T & M Transp Co v S W Shattuck Chemical Co C C A Colo, 158 F 2d 909—Pacific Coast Fruit Distributors v Pennsylvania R Co supra, n 51

Md—Shurks Motor Exp Corp v Forster Transfer & Rigging Co 133 A 2d 59 214 Md 18

From date on which undercharges arose

US—Miller v Ideal Cement Co, D C Wyo 214 F Supp 717

Prejudgment interest on undercharge

US—Louisiana & A Ry Co v Export Drum Co C A La, 359 F 2d 311

82 Wash—Trudeau v Pacific States Box & Basket Co 148 P 2d 453, 20 Wash 2d 561

Other matters relating to the amount of recovery in an action to recover freight charges have been adjudicated [82.5]

82.5 US—Axinn & Sons Lumber Co, Inc v Long Island R Co D C N Y, 518 F Supp 733

Carrier entitled to difference between rate paid and reasonable value of services

N.Y—Ripley v International Rys of Central America, 209 N Y S 2d 289, 8 N Y 2d 430, 171 N E 2d 443

Court's power to determine appropriate rates

N Y—Ripley v International Rys of Central America, 209 N Y S 2d 289, 8 N Y 2d 430, 171 N E 2d 443

Estoppel

Mo—United Van Lines, Inc v Claude App 550 S W 2d 227

83 US—Illinois Steel Co v. Baltimore & O R Co, supra, n 6

Md—Shurks Motor Exp Corp v Forster Transfer & Rigging Co, 133 A 2d 59 214 Md 18

N Y Badger v Dynamic Imports, Inc 274 N Y S 2d 537, 51 Misc 2d 988

Wash—Lyon Van Lines, Inc v Cole, 512 P 2d 1108, 9 Wash App 382

Matters not constituting defense

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M —Long Island R Co v Midland Valley Lumber Co supra n 6

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84 Tex—Yates v Texas & N O R Co Civ App 144 S W 2d 916, revd on oth grds Com App 161 S W 2d 1050 139 Tex 89

85 US—Akers Motor Lines, Inc v Lady Cornell Comb Co D C Mass 203 F Supp 156—Burlington Northern, Inc v U S 462 F 2d 526, 199 Ct Cl 143

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Neb—Thompson v Shields, 4 N W 2d 1 141 Neb 508—Jenkins v Watson-Wilson Transp System, Inc 163 N W 2d 123 183 Neb 634

N J—D L & W R Co v Ginsberg 63 A 2d 300

N Y—Erie R Co v William J Pfeil, Inc 11 N Y S 2d 155 256 App Div 465—Baltimore & O R Co U S 156 F Supp 862 141 Ct Cl 128

Wis—Chicago & North Western Transp Co v Thoreson Food Products, Inc 238 N W 2d 69 71 Wis 2d 143

C.J.S. quoted at length in

Neb—Indian Harbor Belt R Co v Alpirn 296 N W 158 161 139 Neb 14

Claim for damage to goods

US—In re Penn Cent Transp Co D C Pa 339 F Supp 603

N Y—Gilbert Carriers Corp v Oneonta Dress Co 314 N Y S 2d 692, 35 A D 2d 695

No entitlement to recovery on counterclaim

Wis—Whitehall Packing Co Inc v Safeway Truck Lines, Inc 228 N W 2d 365, 68 Wis 2d 369

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86 N Y—Baltimore & O R Co v U S 158 F Supp 862, 141 Ct Cl 128

87 US—Burlington Northern Inc v U S 462 F 2d 526, 199 Ct Cl 143

D C—Pyramid Nat Van Lines v Goetze, Mun App 65 A 2d 595 motion over 66 A 2d 693

Ill—Palmer v Gillarde, supra, n 85

N Y—Willow Fabrics, Inc v Carolina Freight Carriers Corp 248 N Y S 2d 509, 20 A D 2d 864 affd 212 N E 2d 437 16 N Y 2d 929, 264 N Y S 2d 919

Equitable estoppel may not be availed of

US—Global Van Lines, Inc v U S 456 F 2d 717 197 Ct Cl 575

Mo—Wabash R Co v Berg, App 318 S W 2d 504

90 Fla—Ipec, Inc v International Printing Machinery Corp App 251 So 2d 911

91 US—Union Pac R Co v Corneh Seed Co D C Idaho 161 F Supp 52 Affd, C A 263 F 2d 127

Defense of estoppel available to government

US—US v Western Pac R Co Ct Cl 77 S Ct 161 352 US 59 1 L Ed 2d 126—Southern Pac Co v U S D C Del 243 F Supp 834

92 US—St Louis-San Francisco Ry Co v Miller Floors, Inc D C Okl 293 F Supp 869

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93 US—Illinois Cent R Co v Western Smelting & Refining Co D C Neb 123 F Supp 3 app dism C A, 220 F 2d 757 758—Navajo Freight Lines, Inc v U S 176 Ct Cl 1265—T I M E Freight Inc v U S D C Tex 302 F Supp 573

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Action for erroneous rebate

(2) Other cases

Tex—Thompson v Milwhite Co Civ App 1 S W 2d 148, err ref no rev err

Waiver

US—Atchison T & S F Ry Co v Judson Freight Forwarding Co D C Cal 49 F Supp 789 aff C C A 150 F 2d 210

Cal—Pennsylvania R Co v Midstate Horticultural Co 131 P 2d 544 21 Cal 2d 243 cert gr 63 S Ct 1174 319 U S 735 87 L Ed 1695

Limitations held only conduct of carrier able to relieve shipper of liability

Ohio—Railway Exp Agency Inc v Youngstown Plant & Flower Co 171 N E 2d 220

Interstate Commerce Act not applicable to suit pursuant to contract

US—Chicago & N W Transp Co v Soo Line R Co D C Ill 384 F Supp 226

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94 Tenn—Minton v General Shale Products Corp 371 S W 2d 808 52 Tenn App 60

95 Pa—Delaware, L & W R Co v Patterson Kelley Co 6 Monroe L R 80

Tex—Sanantex Oil Co v Thompson, Civ App 2 S W 2d 252

Purpose of limitation

US—Baker v Chamberlain Mfg Corp D C Ill, 3 F Supp 1314

96 US—Von Der Ahe Van Lines, Inc v U S, 3 F 2d 999 175 Ct Cl 281 cert den 87 S Ct 385 U S 837 17 L Ed 2d 70

Tenn—Minton v General Shale Products Corp 3 S W 2d 808 52 Tenn App 60

Point of delivery controls

US—Baker v Chamberlain Mfg Corp, D C Ill, 3 F Supp 1314

Three year limitation

US—Baker v Chamberlain Mfg Corp, D C Ill 3 F Supp 1314

98 Fla—Ipec, Inc v International Printing Machinery Corp, App 251 So 2d 911

99 US—Alton R Co v Tucker, supra, n 24—Arkansas Oak Flooring Co v Louisiana & A Ry Co supra, n 93—Seaboard Air Line R Co v Red Diamond Mills, D C Ga, 128 F Supp 606—Atchison, T & S F Ry Co v Rencheraft, Inc D C Mo 381 F Supp 603, affd, C A 503 F 2d 560, cert den 95 S Ct 1130, 420 U S 929, 43 L Ed 2d 401

Mich—Chesapeake & O Ry Co v Wiener, 58 N W 2d 918 336 Mich 548

1 Pa—McFeaters v Cooper Bessemer Corp 53 Pa Dist & Co 573

Tex—Thompson v Milwhite Co, Civ App 2 S W 2d 148, err ref no rev err

2 Tex—Texas & N O R Co v Yates, Com App 161 S W 2d 1050 139 Tex 89

3 US—Oregon-Washington R & Nav Co v Straus & Co C C A Or 73 F 2d 912, cert den 55 S Ct 551 294 U S 723 79 L Ed 1255—U S v New York, N H & H R Co, C A Mass 236 F 2d 10 revd on oth grds 78 S Ct 212, 355 U S 253, 2 L Ed 2d 247

Kan—Baldwin v Fennmore, 89 P 2d 883 149 Kan 825

Mass—Rugg v Davis, 69 N E 2d 579 320 Mass 38

N C—Griggs v Stoker Service Co 50 S E 2d 914 229 N C 572, 15 A L R 2d 798

Allegations held unsufficient

(1) Oregon-Washington R R & Nav Co v Farmers Nat Grain Corporation, D C Or 25 F Supp 607

4 Pa—Pennsylvania R Co v Rubin, 198 A 521 130 Pa Super 578—Pennsylvania-Reading Seashore Lines v Thomasville Stone & Lime Co 74 York 182

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6 Wis—Werner Transp Co v Shimon, 23 N W 2d 519 249 Wis 87

7 Pa—Pennsylvania R Co v Rubin, 197 A 521 130 Pa Super 578—Pennsylvania R Co v Penn-Del Supply Co 32 D & C 2d 472, 11 Chest 432

9 Cal—R E Tharp, Inc v Muller Hay Co 67 Cal Rptr 854 261 C A 2d 81

Pa—Martin v Barfield 66 Dist & Co 321 21 Northumb Leg J 93

10 US—Atchison, T & S F Ry Co v Jackson Freight Forwarding Co D C Cal 49 F Supp 789 affd C C A 150 F 2d 210

Correctness of department's determination of improper classification proper issue

Wash—Floe v Cedergreen Frozen Pack Corp 226 P 2d 871 37 Wash 2d 886

15. Identity of shipper and consignor

(2) Similar statements

Cal—Kentner Truck Line, Inc v Mauer Brewing Co 6 Cal Rptr 572, 183 C A 2d 89

Presumption that shipment is intrastate

US—Oregon-Washington R R & Nav Co v Farmers Nat Grain Corporation, supra n 3

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16 US—Buch Exp v U S Ct Cl 132 F Supp 473 cert den 76 S Ct 837 351 US 940, 100 L Ed 1467—Trans Ocean Van Service v U S 426 F 2d 329 192 Ct Cl 75 on supp 470 F 2d 604 200 Ct Cl 122

Mo—McCormack v Gerold, App 253 S W 2d 196

Classification or applicability of particular rate

(1) Ohio—New York Cent R Co v A Schulman, Inc 95 N E 2d 28

(5) Other matters

US—Garrett Freightlines Inc v U S D C Idaho, 236 F Supp 594

Service performed

US—Pacific Intermountain Express Co v U S 167 Ct Cl 266

17 Ariz—Arizona Feeds v Southern Pac Transp Co 519 P 2d 199 21 Ariz App 346

N C—Atlantic Coast Line R Co v Thrower 6 S E 2d 899 217 N C 77

Tenn—Haywood v McCallum & Robinson, 208 S W 2d 546, 30 Tenn App 539 cert den 68 S Ct 54, 332 US 756, 92 L Ed 342

Tex—Yates v Texas & N O R Co, Civ App 144 S W 2d 916, revd on oth grds, Com App 161 S W 2d 1050, 139 Tex 89

18 US—Cruncer v Lowden, C C A Mo 121 F 2d 645, affd 62 S Ct 763 315 US 631, 86 L Ed 1077 reh den 62 S Ct 1030, 316 US 708, 86 L Ed 1775—Atchison, T & S F Ry Co v Jackson Freight Forwarding Co, supra, n 10

Mass—Mt Tom Motor Lines v McKesson & Robbins, 89 N E 2d 3 325 Mass 45

Neb—Thompson v Shields, 4 N W 2d 1, 141 Neb 508

N C—Atlantic Coast Line R Co v Thrower, supra, n 17

Wash—Trudeau v Pacific States Box & Basket Co 148 P 2d 453 20 Wash 2d 561

Evidence held admissible

(3) Heuer Truck Lines v Brownlee, 31 N W 2d 375, 239 Iowa 267

(7) Other evidence

Pa—Pittsburgh v American Stores Co 80 A 2d 66, 367 Pa 193 cert den 72 S Ct 49

Evidence held inadmissible

(5) Other evidence

U S—Southern Pac Co v Brown, Alcantar & Brown, Inc C A Tex 404 F 2d 187 mod on oth grds 409 F 2d 1331

Me—Maine Cent R Co v Fred I Morrill Inc 174 A 2d 112, 157 Me 484

19 U S—Cruncer v Lowden supra, n 18—Southern Pac Co v H Moffat Co D C Nev 45 F Supp 924—Fenton Storage Co U S 92 Ct Cl 467

Ariz—Arizona Feeds v Southern Pac Transp Co 519 P 2d 199 21 Ariz App 346

La—Sibley L B & S Ry Co v Braswell Sand & Gravel Co App 199 So 427 reh den 10 N E 2d 68—Aero Mayflower Transit Co v Hennessy App 148 So 2d 465

Pa—New York Cent R Co v James B Berry Sons Co 12 A 2d 588 338 Pa 500 cert den 61 S Ct 31 311 U S 671 85 L Ed 431

Wis—Mastercraft Paper Products, Inc v Consolidated Freightways, 200 N W 2d 590, 55 Wis 2d 674

Evidence held sufficient

(1) U S—Oregon-Washington R & Nav Co v Pacific Continental Grain Co D C Or 38 F Supp 230—Pennsylvania R Co v National Textile & Mfg Co C A N Y 213 F 2d 466, cert den 75 S Ct 83 348 U S 852 99 L Ed 676—Thompson v St Louis-San Francisco Ry Co C A Mo 215 F 2d 166 cert den 75 S Ct 525 348 U S 964 99 L Ed 752

Colo—Ciocchetti v Rehfeld House Movers, Inc 430 P 2d 613 163 Colo 153

Ga—Spanhour v Noland, 103 S E 2d 154 97 Ga App 362

Tex—McCann v Central Forwarding, Civ App 211 S W 2d 794 err dism

(2) U S—U S v Louisville & N R Co supra, n 16—Railway Exp Agency Inc v Holt, D C Pa 154 F Supp 644

Ariz—Builders Supply Corp v Shipley 341 P 2d 940, 86 Ariz 153

Cal—Allure v Owl Materials Co 341 P 2d 854 172 C A 2d Supp 808

Idaho—Ontario Wood Products Co v Stoltenberg, 294 P 2d 270, 77 Idaho 443

La—Vincent v Atlas Van Lines, Inc App 219 So 2d 249

Mo—McCormack v Gerold, supra, n 16

Neb—Clute v Mach, 45 N W 2d 897 153 Neb 772—Schuetz v City Wide Rock & Excavating Co 113 N W 2d 609 173 Neb 516

Tex—Walton Transp Co v Houston Pipe Line Co Civ App 358 S W 2d 744 err ref no rev err

Wash—Herrett Trucking Co v J D Hamilton Fruit Co 358 P 2d 554 57 Wash 2d 910

(6) Ariz—Builders Supply Corp v Marshall 352 P 2d 982, 88 Ariz 89

(16) Other cases

U S—Ets-Hokin & Galvan, Inc v Maas Transport, Inc C A N D 380 F 2d 258 cert den 88 S Ct 481 389 U S 977 19 L Ed 2d 471—Consolidated Freightways Corp of Del v Admiral Corp C A Ill 442 F 2d 56

Ark—Chicago, R I & P R Co v McCoy Heavy Hauling, Inc, 390 S W 2d 141 239 Ark 373 cert den 86 S Ct 315, 382 U S 927 15 L Ed 2d 340

Colo—Gardner v Mid-Continent Coal & Coke Co 368 P 2d 204 149 Colo 122

Fla—Newton School Equipment Co v King Van Lines, Inc, App 237 So 2d 561

Ga—Seaboard Coast Line R Co v Hart, 171 S E 2d 383 120 Ga App 492

Ill—Palmer v Gillarde, 38 N E 2d 352, 315 Ill App 230—Ben's Tri-State Motor v John F Cuneo Co 38 N E 2d 514, 312 Ill App 379—New York Cent R Co v City of Chicago, 76 N E 2d 200, 332 Ill App 583

Ind—Southern Ry Co v Bruce, 99 N E 2d 447 122 Ind App 87 reh den 101 N E 2d 68, 122 Ind App 87

Kan—Overland Transp Inc v Frank J Herl and Sons, 506 P 2d 1113 211 Kan 450

La—Texas & N O R Co v Miller & Co App 4 So 2d 762—Diaz Trucking Service v Kramer's Transfer & Storage, App 50 So 2d 71—Cook Truck Lines Inc v Owens & Co App 102 So 2d 420

Mont—Hutchinson v Barrett Mobile Home Transport Inc 507 P 2d 523 161 Mont 455

Neb—Union Transfer Co v Renstrom, 37 N W 2d 363 151 Neb 326

Nev—O'Connell v Cox, 368 P 2d 761, 78 Nev 40

N H—Ace A Trucking Corp v Spherex, Inc 272 A 2d 856 106 N H 472

N Y—Berger v Dynamic Imports, Inc 274 N Y S 2d 537 51 Misc 2d 988

Pa—Betterman v American Stores Co 80 A 2d 66, 367 Pa 193 cert den 72 S Ct 49

Tex—Read v Southern Pac Co Civ App 123 S W 2d 292 err dism

Wash—Floe v Cedergreen Frozen Pack Corp supra, n 10—Mid-County Publishers v Le May 252 P 2d 268 41 Wash 2d 852

Evidence held insufficient

(3) U S—Denver & R G W R Co v Resurrection Min Co D C Colo 139 F Supp 564

(7) Other cases

U S—Trans Ocean Van Service v U S 426 F 2d 329, 192 Ct Cl 75 on supp 470 F 2d 604 200 Ct Cl 122

Colo—Beatty v Resler 118 P 2d 1087 108 Colo 440

La—Gros v Charles Orlando & Sons, Inc App 308 So 2d 520

N J—Sears Roebuck & Co v Langer Transport Corporation, 30 A 2d 56, 129 N J Law 490

N Y—Brooklyn Eastern Dist Terminal v Unex Credit Corp 123 N Y S 2d 86—Berger v Dynamic Imports, Inc 274 N Y S 2d 537 51 Misc 2d 988

Tenn—Henwood v McCallum & Robinson, supra, n 17

Wash—Floe v Cedergreen Frozen Pack Corp supra, n 10

Rebuttal of inference of co-carrier's liability

U S—Southern Pac Co v U S D C Del 93 F Supp 411 affd C A 192 F 2d 438

Not conclusive

N C—Pilot Freight Carriers, Inc v David G Allen Co Inc 206 S E 2d 750, 22 N C App 442, app after remand 212 S E 2d 699 25 N C App 315, cer den 215 S E 2d 625 287 N C 465 cert den 96 S Ct 786, 423 U S 1055 46 L Ed 2d 644

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20. Construction of tariff's and classifications, etc.

U S—Strickland Transp Co v Lang-Temco-Vought, Inc D C Tex 223 F Supp 253 Penn Cent Co v General Mills, Inc C A Minn 439 F 2d 1338

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21 U S—Oregon-Washington R R & Nav Co v Farmers Nat Grain Corporation, supra, n 3

N C—Atlantic Coast Line R Co v Thrower supra, n 17

Pa—New York Cent R Co v James B Berry Sons Co supra, n 19

Tex—Yates v Texas & N O R Co supra, n 17—Paul Blackwell Co v Dallas Transfer & Terminal Warehouse Co Civ App 252 S W 2d 501 err rev no rev err

Questions held for jury

(13) Other questions

U S—Johnson Mach Works, Inc v Chicago, B & Q R Co, C A Iowa, 297 F 2d 793—Southern Pac Co v Brown, Alcantar & Brown, Inc, C A Tex 404 F 2d 187 mod on oth grds 409 F 2d 1331

D C—Van-Pak, Inc v Cavalier Storage Corp App, 208 A 2d 620

Ga—Seaboard Coast Line R Co v Hart, 171 S E 2d 383 120 Ga App 492

Ky—Ware v Burchett, 321 S W 2d 395

Pa—Betterman v American Stores Co supra, n 19

23 Instructions improper or properly refused

Ill—Palmer v Gillarde, supra, n 19

24. Direction of verdict for carrier

(3) Other instances

US—Lehigh Valley R Co ... 133 Ct Cl 160

Administrative rulings involving charges against the government, as a shipper, are not binding in a judicial proceedings.[24.5]

24.5 US—Baltimore & O R Co v US 157 F Supp 862, 141 Ct Cl 128

§ 320. —— Right to Recover

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25 US—Dipo v Ringsby Trucks Lines, CA Utah 282 F 2d 126—Burlington Northern Inc v US 452 F 2d 526, 199 Ct Cl 143

Ky—C.J.S. cited in Barnes v Louisville & N R Co 140 S W 2d 1041, 1044, 283 Ky 261

Neb—Union Transfer Co v Registrar 37 N W 2d 383, 151 Neb 326

N C—State ex rel North Carolina Utilities Commission v Norfolk Southern Ry Co 100 S E 2d 661, 249 N C 477

Or—Oregon-Washington R & Nav Co v Bean 61 P 2d 230, 164 Or 266

Contract provision inapplicable

US—Stewart v US CA Wyo 327 F 2d 201

Statute providing for deduction by United States of overpayments does not apply to shippers

US—Delaware, L & W R Co v US D C N Y 123 F Supp 579

28 Okl—Oklahoma City-Ada-Atoka Ry Co v State, 248 P 2d 1005, 207 Okl 50, app dism 73 S Ct 104, 344 US 861, 97 L Ed 668

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47 US—Watab Paper Co v Northern Pac Ry Co C C A Minn 154 F 2d 436

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56 US—Humble Oil & Refining Co v Great Northern Ry Co, D C Mont 212 F Supp 747—US v Burlington Truck Line, Inc D C Mo 356 F Supp 582

57 US—Atchison, T & S F Ry Co v Jacobs Freight Forwarding Co, supra, n 10

58 US—Chicago, M, St P & P R Co v Alouette Peat Products, Limited, C A Wash 253 F 2d 449—Middlewest Motor Freight Bureau v U S, C A Minn., 433 F 2d 212, cert den 91 S Ct 2169, 402 U S 999, 29 L Ed 2d 165

Mo—Baldwin v Scott County Milling Co 122 S W 2d 890, 343 Mo 915, revd on oth grds 59 S Ct 943, 307 U S 478, 83 L Ed 1409, reh den 60 S Ct 55, 308 U S 631, 84 L Ed 526

59 US—Humble Oil & Refining Co v Great Northern Ry Co, D C Mont, 212 F Supp 747—Steffke Freight Co. v North Eastern Steel & Wire Co C A Ill, 329 F 2d 308

Motor Carrier Act

US—T I M E Inc v U S, App D C & Tex 79 S Ct 904, 359 U S 464, 3 L Ed 2d 952

64 U.S—Missouri-Kansas-Texas R Co v Sinclair Prairie Oil Co C C A Okl, 112 F 2d 553—Great Northern Ry Co v. U S Ct Cl, 312 F 2d 901

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65 U.S—Chicago, M, St P & P R Co v Alouette Peat Products, Limited, C A Wash, 253 F 2d 449

68 U S—Middlewest Motor Freight Bureau v U S C.A.Minn, 433 F 2d 212, cert den 91 S Ct 2169, 402 U S 999, 29 L Ed 2d 165

70 US—American Crystal Sugar Co v Great Northern Ry Co D C Ill 168 F Supp 80

§ 321. —— What Constitutes an Overcharge

73 US—Armour & Co v Chicago M St P & Pac R Co C A Ill 188 F 2d 603, cert den 72 S Ct 67, 342 U S 866, 96 L Ed 647

Kan—Wolf Keeler Co Atchison, T & S F Ry Co, 764 P 2d 368, 187 Kan 125

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76 U S—Great Northern Ry Co v U S Ct Cl 312 F 2d 901

77 U S—Middlewest Motor Freight Bureau v U S C A Minn 433 F 2d 212, cert den 91 S Ct 2169, 402 U S 999, 29 L Ed 2d 165

Or—Oregon-Washington R & Nav Co v Bean supra, n 25

78 U S—Armour & Co v Atchison T & S F Ry Co C A Ill 254 F 2d 719, cert den 79 S Ct 63, 358 U S 840, 3 L Ed 2d 75

81 Ariz—St Louis-S F Ry Co v Pollard, 154 S W 2d 922, 232 Ark 917

§ 322. —— Liability of Connecting Carriers for Overcharge

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94 U S—Missouri-Kansas-Texas R Co v Sinclair Prairie Oil Co supra, n 64

No liability for overcharge

U S—U S v Bethke D C Colo 132 F Supp 22

95 U S—Missouri-Kansas-Texas R Co v Sinclair Prairie Oil Co supra, n 64

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5 US—C.J.S. cited in Harrison Engineering & Const Corp v Atchison, T & S F Ry Co D C Mo 78 F Supp 906, 910—Stutt v U S C A Tex 218 F 2d 10, cert den 76 S Ct 48, 350 U S 822, 100 L Ed 734

Ala—C.J.S. cited in Tuskegee Homes Co v Oswalt, 26 So 2d 865, 869, 248 Ala 64

D C—U S v Davidson Transfer & Storage Co C A, 259 F 2d 802, 104 U S App D C 72, revd on oth grds 79 S Ct 904, 359 U S 464, 3 L Ed 2d 952

Equitable in origin and function

U S—Wilson Cypress Co v Atlantic Coast Line R Co C C A Fla 109 F 2d 623, cert den 60 S Ct 810, 310 U S 652, 84 L Ed 1417, 1418

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6 D C—U S v Associated Transport, Inc C A, 505 F 2d 356, 164 U S App D C 259

7 S C—C.J.S. cited in Moody v Stem 51 S E 2d 163, 168, 214 S C 45

12 US—Mohasco Industries, Inc v Acme Fast Freight, Inc, C A Miss 491 F 2d 1082, cert den 95 S Ct 74, 419 U S 842, 42 L Ed 2d 70

14. Findings and orders held foundation for actions

U S—National Van Lines, Inc v U S C A Ill, 326 F 2d 362

19 US—Great Northern Ry Co v U S Ct Cl, 312 F 2d 901

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Other matters relating to jurisdiction of the court have been adjudicated.[21.5]

21.5 US—T I M E v U S App D C & Tex 79 S Ct 904, 359 U S 464, 3 L Ed 2d 952—U S v Garner, D C N C, 236 F Supp 632

25 Filing of claim held valid requirement

US—Sachs v Universal Car Loading & Distributing Co D C Ill, 78 F Supp 619

26 US—Oklahoma Corp Commission v U S D C Okl, 388 F Supp 4

Neb—Farmers Union Livestock Commission v Union Pac R Co 283 N W 498, 135 Neb 689

27 U S—Shutt v U S supra, n 5

28. Shipper not permitted to maintain action

D C—U S v Associated Transport, Inc C A, 275 F 2d 366, 164 U S App D C 259

30 US—U S v DeQueen & E R Co D C Ark, 148 F Supp 545, revd on oth grds C A 271 F 2d 597—Barker v Louisiana & A Ry Co D C La 57 F R D 489

D C—U S v Associated Transport, Inc, C A, 275 F 2d 366, 164 U S App D C 259

Not applicable

US—Atlantic Coast Line R Co v US, 140 F Supp 569, 136 Ct Cl 1

33 US—Stott Briquet Co v New York Cent R Co D C Ohio 92 F Supp 115—Feinstein v New York Cent R Co D C N Y 159 F Supp 488

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38 US—Stott Briquet Co v New York Cent R Co, D C Ohio, 92 F Supp 115—Feinstein v New York Cent R Co D C N Y 159 F Supp 488

49 U S C A § 16(3)(c) is now 49 U S C A § 1706(b)(d)

49 U S C A § 16(3)(h) was repealed

A claim relating to a shipment of property accrues, under the Interstate Commerce Act, on delivery or tender of delivery by the carrier.[39.5]

39.5 49 U S C A § 11706(g)

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Since the publication of Corpus Juris Secundum, the circuit court of appeals has held that one who bears the burden of the unlawful charge is entitled to sue regardless of who initially pays the charge to the carrier.[47.1]

47.1 US—Gabbert v Atchison, T & S F Ry Co, C C A 93 F 2d 562

52. Government not entitled to preference

US—U S v Bethke, D C Colo 132 F Supp 22

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Under the Transportation Act, 49 U.S. C.A. § 66, the United States may recover overcharges against a motor carrier which has filed rates with the government as a party to a rate quotation.[62.5]

62.5 US—U S v Francis, C A Cal, 320 F 2d 191

66 US—Lynchburg Traffic Bureau v Smith's Transfer Corp of Staunton, Va, C A Va 339 F 2d 478

Ill—Baxter v Atchison, T & S F Ry Co, 35 N E 2d 563, 310 Ill App 616

69 Ill—Baxter v Atchison, T & S F Ry Co, supra, n 66

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85 US—Harrison Engineering & Const Corp v Atchison, T & S F Ry Co, D C Mo 78 F Supp 906—Atlantic Coast Line R Co v U S, Ct Cl 140 F Supp 569—U S v Northern Pac Ry Co, D C Minn, 180 F Supp 828—Illinois Cent R Co v Midwestern Gram Co, D C Mo 308 F Supp 323

Tex—Humble Oil & Refining Co v Texas & Pac Ry Co, 289 S W 2d 547, 155 Tex 483

Excessive rate of charge

US—U S v New York, N H & H R Co, C A Mass, 236 F 2d 101, revd on oth grds 78 S Ct 212, 355 U S 253, 2 L Ed 2d 247

86 U S—Sonken-Galamba Corp v Union Pac R Co C C A Kan 145 F 2d 808—Benjamin Motor Exp Inc v U S C A Mass 251 F 2d 547—U S v Francis, C A Cal 320 F 2d 191

89 U S—Harrison Engineering & Const Corp v Atchison T & S F Ry Co supra, n 85

Dismissal

U S—Lynchburg Traffic Bureau v Smith's Transfer Corp of Staunton Va C A Va 285 F 2d 733

91 D C—U S v I C C C A 198 F 2d 958 91 U S App D C 178 cert den 73 S Ct 212 344 U S 893, 97 L Ed 691—Humble Oil & Refining Co v Great Northern Ry Co D C Mont 212 F Supp 747

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92 U S—Armour & Co v Atchison, T & S F Ry Co C A Ill 254 F 2d 719 cert den 79 S Ct 63 358 U S 840 3 L Ed 2d 75

97 U S—Northwestern Auto Parts Co v Chicago B & Q R Co D C Minn 139 F Supp 521 revd on oth grds C A 240 F 2d 743 cert den 78 S Ct 16, 17 three cases, 355 U S 815 2 L Ed 2d 32

Evidence as to reasonableness or propriety of rates held inadmissible

(1) Morningstar Nicol, Inc v Norton D C N J 62 F Supp 354

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99 U S—Watab Paper Co v Northern Pac Ry Co C C A Minn 54 F 2d 436

Mo—Smith v Thompson, 137 S W 2d 981 234 Mo App 1151

Neb—Union Transfer Co v Renstrom, 37 N W 2d 383 151 Neb 326

Evidence held sufficient

(12) U S—Shutt v U S C A Tex 218 F 2d 10 cert den 76 S Ct 48, 350 U S 822, 100 L Ed 734

Mo—McCormack v Gerold, App 253 S W 2d 196

(14) To show other matters

U S—Chicago, M St P & P R Co v Alouette Peat Products, Limited, C A Wash 253 F 2d 449—U S v Canfield Driveaway Co D C Mich 159 F Supp 448

Cal—Transmix Corp v Southern Pac Co 9 Cal Rptr 714 187 C A 2d 257

Tex—Panhandle & Santa Fe Ry Co v Welch, Civ App 259 S W 2d 269

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1 U S—Harrison Engineering & Const Corp v Atchison, T & S F Ry Co D C Mo, 78 F Supp 906—Atlantic Coast Line R Co v U S Ct Cl 140 F Supp 569

Evidence held insufficient

(4) Other cases

U S—Illinois Cent R Co v Midwestern Grain Co D C Mo 308 F Supp 323—Chicago & N W R Co v Union Packing Co C A Neb 514 F 2d 30, petition den 527 F 2d 592

D C—U S v I C C, C A 198 F 2d 958, 91 U S App D C 178, cert den 73 S Ct 212, 344 U S 893 97 L Ed 691

10 U S—Harrison Engineering & Const Corp v Atchison T & S F Ry Co supra, n. 1

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15 U S—U S v Canfield Driveaway Co D C Mich 159 F Supp 448

16. Finding held not erroneous

U S—U S v Francis, C A Cal 320 F 2d 191

Finding held erroneous

U S—U S v Francis, C A Cal, 320 F 2d 191

18 U S—U S v Associated Transport, Inc C A 205 F 2d 366, 164 U S App D C 259

19 U S—City of Danville v Chesapeake & O Ry Co D C Va 34 F Supp 620

29 U S—City of Danville v Chesapeake & O Ry Co supra n 19

33 C J p 203 note 54[e]

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34 U S—City of Danville v Chesapeake & O Ry Co supra n 19

§ 325. —— Right to Lien

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35 Ga—Ivey v Knight & Boykin Poultry & Produce Co 131 S E 2d 147 107 Ga App 634

36 U S—In re R Hal Compton Crude Oil Purchasing Co D C Ill 39 F Supp 1

Ga—Ivey v Knight & Boykin Poultry & Produce Co 131 S E 2d 147 107 Ga App 634

Mo—Illinois Cent R Co v A B Friedman & Co 161 S W 2d 440 236 Mo App 946

Tex—Luther Moving & Storage, Inc v Roberts, Civ App 526 S W 2d 557

39 U S—In re Penn-Dixie Steel Corp Bkrtcy N Y 6 B R 817 affd D C 10 B R 878

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43 Kan—Rodgers v Arapahoe Pipe Line Co 313 P 2d 740, 181 Kan 579

45 U S—Arkansas Fuel Oil Co v Lesk, C C A La 133 F 2d 79

47 U S—New York Cent R Co v Trans-American Petroleum Corporation C C A Ill 108 F 2d 994 129 A L R 206

48 U S—Younger v Plunkett D C Pa 395 F Supp 702

In Louisiana

(2) Arkansas Fuel Oil Co v Lesk, C C A La 133 F 2d 79

Oil-field equipment

Kan—Rodgers v Arapahoe Pipe Line Co 313 P 2d 740 181 Kan 579

§ 326. —— Carriers Entitled to Lien in General

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64 U S—Pennsylvania R Co v Charles E Gibson, Inc D C S C 23 F Supp 857

§ 328. —— Property Subject to Lien

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87 Kan—Rodgers v Arapahoe Pipe Line Co, 345 P 2d 702, 185 Kan 424

Lessor of automobile shipped collect by lessee who defaulted lease held entitled to recover property without paying

N Y—Discount Rent-A-Car Corp v Universal Carloading & Distributing Co 259 N Y S 2d 65, 46 Misc 2d 288

Towing of automobile

Ill—People ex rel Carey v Lincoln Towing Service, Inc 369 N E 2d 94, 11 Ill Dec 640, 54 Ill App 3d 61

§ 329. —— Priority of Lien over Other Claims

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The carrier's lien has been held superior to a seller's lien 91.1

91.1. Unrecorded conditional sales contract

U S—Railway Exp Agency v Aiken, D C Ga, 106 F Supp 396

98 Okl—National Trailer Convoy Co v Mount Vernon Nat Bank & Trust Co of Fairfax County, 420 P 2d 889

§ 330. —— Waiver or Forfeiture of Lien

1 Ind—Tucker v Capital City Riggers, App 437 N E 2d 1043

4 Lien for storage of cars

Md—Darby v Baltimore & O R Co 270 A 2d 652, 259 Md 493

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22 Fla—Compania Cubana De Aviacion, S A v Comfort-Craft, Inc App 120 So 2d 48

§ 331. —— Enforcement of Lien

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31 Neb—Indiana Harbor Belt R Co v Alpara, 296 N W 158, 162, 139 Neb 14

Sale proper

U S—Datapoint Corp v Lee Way Motor Freight Inc C A Tex 572 F 2d 1128

37 Pa—Pennsylvania R R v Alemayer 90 Pittsb Leg J 373—Penn-sylvania R Co v DeRomo 41 Luz Leg Reg 287

Nonjudicial sale under storage lien

Md—Darby v Baltimore & O R Co 270 A 2d 652, 259 Md 493

Uniform Commercial Code

Ga—REA Express, Inc v Ginn, 205 S E 2d 94, 131 Ga App 33

Judgment limited to recovery from goods

Fla—Miller v Economics Laboratory Inc App 1 Dist 410 So 2d 642

Tex—Luther Moving & Storage, Inc v Roberts, Civ App 526 S W 2d 557

39 U S—Reading Co v U S 128 F Supp 745, 131 Ct Cl 44

40 Pa—Pennsylvania R Co v DeRomo, supra, n 37

Non-compliance no effect as to good faith purchases

Ga—REA Express, Inc v Ginn, 205 S E 2d 94 131 Ga App 33

44 Neb—C J S quoted at length in Indiana Harbor Belt R Co v Alpara, supra, n 31

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47 Ariz—Mountain States Bolt, Nut & Screw Co v Best-Way Transp, 568 P 2d 430, 116 Ariz 123

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La—C J S. black letter [illegible] quoted in Sibley, L B & S Ry Co v Braswell Sand & Gravel Co, App, 199 So 427, 428

66. At common law

U S—Prince Mfg Co v U S D C Ill 437 F Supp 1041

68 U S—Great Northern Ry Co v U S 312 F 2d 906, 160 Ct Cl 225—General Mills, Inc v U S D C Minn 364 F Supp 1278

69 U S—Illinois Cent R Co v Texas Eastern Transmission Corp C A Tex 533 F 2d 272, vac in part on oth grds, 551 F 2d 943

70 U S—St Louis Southwestern Ry Co v Mays, D C Ark, 177 F Supp 182—Reading Co v Commodity Credit Corp C A Pa, 289 F 2d 744—I C C v Oregon Pac Industries, Inc Or 95 S Ct 909, 420 U S 184, 43 L Ed 2d 121

72 U S—Pennsylvania R Co v Moore-McCormack Lines, Inc, D C N Y 246 F Supp 143, affd, C A 370 F 2d 430

DC—Iversen v U S DC 63 F Supp 1001 affd 66 S Ct 825 327 U S 767 90 L Ed 998 reh den 66 S Ct 963 327 U S 819 90 L Ed 1041

Kan—C J S quoted at length in Missouri-Kansas-Texas R Co v Standard Industries, Inc 388 P 2d 632, 636, 192 Kan 381

Part compensation, part penalty

U S—Baltimore & O C T R Co v U S C A 583 F 2d 678 cert den 99 S Ct 1529 two cases, 440 U S 968, 59 L Ed 2d 784

73 U S—Illinois Cent R Co v Texas Eastern Transmission Corp C A Tex 533 F 2d 272, vac in part on oth grds 551 F 2d 943

Includes compensatory and regulatory elements

U S—Prince Mfg Co v U S D C Ill 437 F Supp 1041

§ 335. Right to Demurrage Charges in General

76 U S—C J S. cited in Middle Atlantic Conference v U S D C 353 F Supp 1109 1113—Illinois Cent Gulf R Co v Golden Triangle Wholesale Gas Co C A Miss 586 F 2d 588

Pa—Pennsylvania R R v North Irwin Borough, 23 West Co 124

77 U S—Southern Pac Transp Co v Matson Navigation Co D C Cal 383 F Supp 154

Quasi contract not found

D C—Middle Atlantic Conference v U S, D C 353 F Supp 1109

La—City of New Orleans By and Through Public Belt R R Commission of City of New Orleans v Rapid Truck Leasing, Inc App 348 So 2d 1299

78 U S—Fort Worth & D Ry Co v Goodpasture, Inc C A Tex 442 F 2d 1294

Mich—Pennsylvania R Co v Evans Products Co 22 N W 2d 754 314 Mich 383

Right to demurrage, not shown

79 U S—Western Pac R Co v Pacific Portland Cement Co D C Cal 84 F Supp 15 foll 84 F Supp 17 revd on oth grds C A 184 F 2d 34 cert den 71 S Ct 282, 340 U S 906, 95 L Ed 655—Port Terminal R R Ass'n v Connell Rice & Sugar Co C A Tex 387 F 2d 355

80 U S—Chicago, R I & P R Co v Furniture Forwarders of St Louis, Inc, D C Mo 272 F Supp 62, affd C A 393 F 2d 537

No distinction is drawn between the right to demurrage where the carrier bears the expense of unloading and where the consignee does.[84.5]

84.5 U S Pennsylvania R Co v Moore-McCormack Lines, Inc D C N Y 246 F Supp 143, affd C A, 370 F 2d 430

It is immaterial to the right to recover demurrage that the consignee's inability to receive, which relieves carrier of the duty to unload before demurrage charges accrue, is not his fault.[84.10]

84.10 U S—Pennsylvania R Co v Moore-McCormack Lines, Inc, D C N Y, 246 F Supp 143, affd, C A., 370 F 2d 430—Union Pac R Co v U S, 490 F 2d 1385 203 Ct Cl 368

85 Neb—Chicago & N W Ry Co v Mallory, 23 N W 2d 735, 147 Neb 548

Period of time for loading and unloading is included as part of "transportation service"—Western Oil & Fuel Co v Great Lakes Pipe Line Co, C A Minn 210 F 2d 490

Right of demurrage based on established tariffs

U S—Furniture Forwarders of St Louis, Inc v Chicago, R I & P R Co C A Mo 393 F 2d 537—City of New Orleans, By and Through Public Belt R R Commission v Hansen & Tidemann Inc D C La 391 F Supp 910

Demurrage properly charged

U S—Kansas City Southern Ry Co v Kansas City Power & Light Co C A Mo 551 F 2d 1134

86 U S—Western Pac R Co v Pacific Portland Cement Co supra, n 73—Southern Pac Transp Co v Matson Navigation Co D C Cal 383 F Supp 154

87 U S—Great Northern Ry Co v U S 312 F 2d 906, 160 Ct Cl 225—Pennsylvania R Co v Moore-McCormack Lines, Inc D C N Y 246 F Supp 143 Affd C A 370 F 2d 430

Miss—Illinois Cent R Co v N T Wax Grocery Co 45 So 2d 266, 208 Miss 675

N Y—Pennsylvania R Co v Brooklyn Contractors Machinery Exchange, 61 N Y S 2d 217

Pa—Pennsylvania R Co v DeRomo, 45 Luz L Reg 277

90 U S—Prince Mfg Co v U S D C Ill 437 F Supp 1041

91 U S—Chicago, M, St P & P R Co v McCree & Co D C Minn 91 F Supp 57—Reading Co v Dexter-Carpenter Coal Co D C N Y 96 F Supp 650

Neb—Chicago & N W Ry Co v Mallory, supra, n 85

Pa—Delaware, L & W R Co v Nay Aug Lumber Co 43 Lack Jur 50, 56 York 9

Tenn—Tennessee Cent Ry Co v Cumberland Storage & Warehouse Co 260 S W 2d 208, 36 Tenn App 684

Purpose of detention rules

D C—American Export-Isbrandtsen Lines Inc v Federal Maritime Commission, C A 444 F 2d 824 143 U S App D C 360

92 Neb—Chicago & N W Ry Co v Mallory, supra, n 85

Wis—Scandrett v Worden-Allen Co 299 N W 52, 238 Wis 272

93 U S—Chicago, B & Q R Co v Blunk, D C Iowa, 101 F Supp 219—St Louis, Southwestern Ry Co v Mays, D C Ark 177 F Supp 182—City of New Orleans By and Through Public Belt R R Commission v Southern Scrap Material Co, Ltd D C La 491 F Supp 46

Kan—C J S quoted at length in Missouri-Kansas-Texas R Co v Standard Industries, 388 P 2d 632, 636, 192 Kan 381

Neb—Chicago & N W Ry Co v Mallory, supra, n 85

Tenn—Tennessee Cent Ry Co v Cumberland Storage & Warehouse Co supra, n 91

Wis—Scandrett v Worden-Allen Co supra, n 92

94 U S—Reading Co v Dexter-Carpenter Coal Co D C N Y, 96 F Supp 650—Chicago & N W Ry Co v Union Packing Co, D C Neb, 326 F Supp 1304

Kan—C J S. quoted in Missouri-Kansas-Texas R Co v Standard Industries, Inc 388 P 2d 632, 636, 192 Kan 381

95 Kan—C J S. quoted in Missouri-Kansas-Texas R Co v Standard Industries, Inc, 388 P 2d 632, 636, 192 Kan 381

Charges improper

U S—Kansas City Southern Ry Co v Kansas City Power & Light Co D C Mo, 430 F Supp 722, affd 551 F 2d 1134

96 U S—St Louis-Southwestern Ry Co v Farrell, D C Ark, 114 F Supp 486, app dism C A 210 F 2d 655

Kan—C J S. quoted in Missouri-Kansas-Texas R Co v Standard Industries, Inc 388 P 2d 632, 636, 192 Kan 381

§ 336. Conditions Precedent to Right

8 U S—Indiana Harbor Belt R Co v Jacob Stern Sons, D C Ill 57 F Supp 690—Chicago & N W Ry Co v Union Packing Co D C Neb 326 F Supp 1304

La—Sibley L B & S Ry Co v Braswell Sand & Gravel Co App, 199 So 427

Defense by shipper not claim within contract provision

U S—Reading Co v Commodity Credit Corp C A Pa 289 F 2d 744

§ 337. —— Reasonableness of Rules and Regulations

11 U S—Raymond City Coal & Transportation Corporation v New York Cent R Co C C A Ohio 103 F 2d 56

12 U S—Western Oil & Fuel Co v Great Lakes Pipe Line Co C A Minn 210 F 2d 490

13 U S—St Louis-Southwestern Ry Co v Farrell D C Ark, 114 F Supp 486, app dism C A 210 F 2d 655

§ 338. —— Notice of Demurrage Rules or of Contract Provisions

19 U S—Western Oil & Fuel Co v Great Lakes Pipe Line Co supra, n 12

21. Notice of procedure for filing excuse as necessary

U S—Colorado & S Ry Co v Southwestern Roofing & Sheet Metal Co D C Okl, 374 F Supp 28

§ 339. —— Filing Tariff Schedules and Posting Demurrage Rules

25 Kan—Missouri-Kansas-Texas R Co v Standard Industries, Inc 388 P 2d 632, 192 Kan 381

Pa—Reading Co v Farnhand, 53 Luz L Reg 1

§ 340. —— Delivery

29 U S—Pennsylvania R Co v Moore-McCormack Lines, Inc D C N Y, 246 F Supp 143 affd C A 370 F 2d 430

Wis—C J S. cited in Chicago & North Western Ry Co v Afram Bros Co 226 N W 2d 360, 362, 68 Wis 2d 311

Goods sold by railroad

Cal—Southern Pac Co v Hyman-Michaels Co, 147 P 2d 692, 63 Cal App 2d 757

44 U S—Houston Belt & Terminal R Co v Connell Rice & Sugar Co C A Tex, 411 F 2d 1220, cert den 90 S Ct 905, 397 U S 908, 25 L Ed 2d 89

Wis—Scandrett v Worden-Allen Co 299 N W 52, 238 Wis 272

§ 341. —— Notice of Readiness to Deliver

52 U S—Union Pac R Co v U S, 490 F 2d 1385, 203 Ct Cl 368

54 Ill—Illinois Cent R Co v Matthews Transfer Co, 270 N E 2d 47, 132 Ill App 2d 1084

Constructive placement

U S—Illinois Cent R Co v Ready-Mix Concrete, Inc D C La 323 F Supp 609

Wis—Chicago & North Western Ry Co v Afram Bros Co 228 N W 2d 360 66 Wis 2d 311

62 Ohio—New York Cent R Co v Karl Kiefer Mach Co 74 N E 2d 416 80 Ohio App 36

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(1) U S—Eastern Wine Corp v New York Cent R Co C A N Y 355 F 2d 30

(3) Empire Box Corp of Stroudsburg v Delaware L & W R Co C A N Y 171 F 2d 389 6 A L R 2d 874

§ 342 —— Failure of Consignee to Unload in Required Time

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74 U S—Illinois Cent R Co v Ready-Mix Concrete, Inc D C La 323 F Supp 609

La—Illinois Cent R Co v Glazer Steel Corp App 244 So 2d 679 writ ref 246 So 2d 863 258 La 559

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77 U S—City of New Orleans v C B Fox Co D C La 33 F Supp 194—Pacific Portland Cement Co v Western Pac R Co C A Cal 184 F 2d 34 cert den 71 S Ct 282, 340 U S 906, 95 L Ed 655—Chicago, B & Q R Co v U S Ct Cl 439 F 2d 1224 194 Ct Cl 688

Construed in shipper's favor

U S—Southern Ry Co v Aluminum Co of America, D C Tenn 119 F Supp 389 affd C A 210 F 2d 139—Chicago & N W Ry Co v Union Packing Co, D C Neb 326 F Supp 1304

80-81 U S—Raymond City Coal & Transportation Corporation v New York Cent R Co, supra, n 11 Pacific Portland Cement Co v Western Pac R Co supra, n 77

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87 U S—Indiana Harbor Belt R Co v Jacob Stern & Sons, supra, n 8

Or—C J S. cited in Sause Bros Ocean Towing Co Inc v Gunderson, Inc 510 P 2d 541 544 265 Or 568

93. Modification of contract

U S—Chicago, B & Q R Co v U S Ct Cl 439 F 2d 1224, 194 Ct Cl 688

94 U S—Chicago & N W Ry Co v Union Packing Co D C Neb 326 F Supp 1304

97 U S—Indiana Harbor Belt R Co v Jacob Stern & Sons, supra, n 8

99 U S—Indiana Harbor Belt R Co v Jacob Stern & Sons, supra, n 8

Private track

La Mello v J M Burgueres Co 120 So 15 16, 167 La 583, conf to 121 So 215

§ 344. Who Liable for Demurrage

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1 U S—Western Pac R Co v Pacific Portland Cement Co, D C Cal, 84 F Supp 15, foll in 84 F Supp 17 revd on oth grds C A, 184 F 2d 34 cert den 71 S Ct 282, 340 U S 906, 95 L Ed 655—Union Pac R Co v U S, 159 F Supp 613 141 Ct Cl 869

Pa—Pennsylvania R Co v DeRomo, 45 Luz L Reg 277

2 U S—Frechling Supply Co v U S C A Ill 194 F 2d 637—St Louis-Southwestern Ry Co v Farrell, D C Ark 114 F Supp 486, app dism C A 210 F 2d 655

La—Robertson v Louisiana Fruit Growers Ass'n, App 80 So 2d 190

Me—Giguere v Morrissette, 48 A 2d 257 142 Me 95

N Y—New York Cent R Co v Niagara Fruit Industries 104 N Y S 2d 814 278 App Div 892

Pa—Delaware, L & W R Co v Nay Aug Lumber Co Com Pl 43 Lack Jur 50 56 York 9

4 Miss—Illinois Cent R Co v N T Wax Grocery Co 45 So 2d 266, 208 Miss 675

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16. Insufficient exercise of dominion

La—Texas & P Ry Co v Great Nat Oil Corp of La 59 So 2d 426, 221 La 378

17 Tenn—Tennessee Cent Ry Co v Cumberland Storage & Warehouse Co 260 S W 2d 208, 36 Tenn App 684

Warehouseman as etc.

(2) Outside contract may not be charged with demurrage

D C—Middle Atlantic Conference v U S D C 353 F Supp 1109

§ 345. Excuses for Nonpayment

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25 U S—St Louis, Southwestern Ry Co v Mays, D C Ark 177 F Supp 182—Union Pac R Co v Bartlett & Co Grain, D C Mo 393 F Supp 1347—Illinois Cent Gulf R Co v Southern Rock, Inc C A Miss 644 F 2d 1138

Neb—C J S. cited in Chicago & N W Ry Co v Mallory 23 N W 2d 735 741 147 Neb 548

26 N C—Norfolk Southern Ry Co v Glover 24 S E 2d 250 222 N C 594

Freezing temperatures held not "act of God"

Mo—Missouri Pac R Co v Terrell, App 410 S W 2d 356

To claim relief under tariff rule providing for refund or cancellation of demurrage charges a claim for relief must be filed within the prescribed time.[27.5]

27.5 U S—Norton v N B Fairclough, Inc D C N J 72 F Supp 308—St Louis, Southwestern Ry Co v Mays, D C Ark, 177 F Supp 182—Port Terminal R R Ass'n v Connell Rice & Sugar Co C A Tex 387 F 2d 355

Relief as a condition precedent

U S—Colorado & S Ry Co v Southwestern Roofing & Sheet Metal Co D C Okl 374 F Supp 24

28 U S—Kansas City Southern Ry Co v Kansas City Power & Light Co D C Mo 430 F Supp 722, affd 551 F 2d 1134

Longshoremen's strike

U S—Port Terminal R R Ass'n v Connell Rice & Sugar Co C A Tex 387 F 2d 355

32. Tariff provision relative to "Loading"

(2) Other cases—Norton v Supreme Fuel Sales Co D C N J 72 F Supp 287

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35. Act of God

U S—Chicago, B & Q R Co v Edward Hines Lumber Co D C Ill, 320 F Supp 194

36 U S—Pennsylvania R Co v Moore-McCormack Lines, D C N Y 246 F Supp 143 affd C A 370 F 2d 430

Mich—Pennsylvania R Co v Evans Products Co 22 N W 2d 754 314 Mich 383

Wis—Scandrett v Worden-Allen Co, 299 N W 52, 238 Wis 272

37 U S—St Louis-Southwestern Ry Co v Farrell, supra, n 2

39 Ky—Chesapeake & O Ry Co v Gorman, 188 S W 2d 316, 300 Ky 230

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50 Pa—Pennsylvania R R v North Irwin Borough, Com Pl, 23 West Co 124

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U S—Prince Mfg Co v U S D C Ill 437 F Supp 1041

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61 U S—Baker v Chamberlain Mfg Corp D C Ill 356 F Supp 1314

64 Kan—C J S quoted in Missouri-Kansas-Texas R Co v Standard Industries, Inc 388 P 2d 632, 637 192 Kan 381

Pa—Reading Co v Ferdinand, 53 Luz L Reg 1

65 Kan—C J S quoted in Missouri-Kansas-Texas R Co v Standard Industries, 388 P 2d 632, 637 192 Kan 381

Pa—Reading Co v Ferdinand, 53 Luz L Reg 1

69 U S—Baker v Chamberlain Mfg Corp D C Ill 356 F Supp 1314

73 Pa—Pennsylvania R Co v Braddell, 60 York Leg Reg 57

74 U S—City of New Orleans By and Through Public Belt R R Commission v Southern Scrap Material Co Ltd D C La 491 F Supp 46

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75 U S—Chicago & N W Ry Co v Frechling Supply Co C A Ill 179 F 2d 133—Union Pac R Co v U S 159 F Supp 613, 141 Ct Cl 869—Union Pac R Co v Bartlett & Co Grain, D C Mo 393 F Supp 1347

Ohio—New York Cent R Co v Karl Kiefer Mach Co 74 N E 2d 416, 80 Ohio App 36

77 U S—Great Northern Ry Co v U S, 312 F 2d 906, 160 Ct Cl 225

Cal—Southern Pac Co v Hyman-Michaels Co 147 P 2d 692, 63 Cal App 2d 757

Mich—Pennsylvania R Co v Evans Products Co supra, n 36—Chesapeake & O Ry Co v Wiener 58 N W 2d 918, 336 Mich 548

N C—Norfolk Southern Ry Co v Glover, supra, n 26

Ohio—New York Cent R Co v Karl Kiefer Mach Co supra, n 75

Evidence held insufficient

(4) To show other matters—St Louis-Southwestern Ry Co v Farrell, D C Ark, 114 F Supp 486, app dism C A 210 F 2d 655—Illinois Cent R Co v Ready-Mix Concrete, Inc, D C La 323 F Supp 609

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N Y Penn Cent Transp Co v United Aero Marine Services, Inc 398 N Y S 2d 780, 91 Misc 2d 839

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78. Questions of law and fact

(2) New York Cent R Co v James B Berry Sons Co 12 A 2d 588, 338 Pa 500, cert den 61 S Ct 31 311 U S 671, 85 L Ed 431

Cal—Southern Pac Co v Hyman-Michaels Co supra, n 77

82 Mich—Grand Trunk Western R Co v Mount Clemens Sugar Co 269 N W 208, 277 Mich 366, cert den 57 S Ct 514, 300 U S 670, 81 L Ed 877

Interest is not allowable where it is unnecessary for full compensation[83.5]

83.5 D C—National Trucking & Storage Co v Pennsylvania R Co C A, 228 F 2d 23, 97 U S App D C 52

84 U S—Norton v Supreyer, D C N J, 72 F Supp 188

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86. Not arising out of same transaction

N Y—New York Cent R Co v Niagara Frut Industries, 104 N Y S 2d 814, 278 App Div 892

§ 349. —— At Common Law

92 U S—Montgomery Ward & Co v Northern Pac Terminal Co of Or D C Or 128 F Supp 475

Ill—Lewis v Roth, 66 N E 2d 510, 328 Ill App 571

N J—Gardiner v Monmouth Park Jockey Club 148 A 2d 1, 29 N J 47

N Y—Hewitt v New York, N H & H R Co 29 N E 2d 641, 284 N Y 117

Tex—Texas Mexican Ry Co v Isbell, Civ App 230 S W 2d 250, err ref

Unequal rates among shippers not forbidden

U S—American Trucking Associations v Atchison, T & S F Ry Co Ill, 87 S Ct 1608, 387 U S 397, 18 L Ed 2d 847, reh den 88 S Ct 11, 12, 389 U S 889, 19 L Ed 2d 197

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96 U S—Chicago & E I R Co v U S D C Ill 384 F Supp 298, affd 95 S Ct 1943, 421 U S 956, 44 L Ed 2d 445

D C—National Motor Freight Traffic Ass'n v U S D C, 268 F Supp 90, Affd 89 S Ct 49, 393 U S 18, 21 L Ed 2d 19

Fla—Alterman Transport Lines, Inc v State, App 405 So 2d 456

Ga—Griffin Grocery Co v Pennsylvania R Co 92 S E 2d 254, 93 Ga App 546

Ind—Pennsylvania R Co v F E Mathias Lumber Co, 47 N E 2d 158, 113 Ind App 133

Kan—O A Sutton Corp v McMaken Transfer Co 233 P 2d 717, 171 Kan 485, 25 A L R 2d 766

N C—Atlantic Coast Line R Co v West Paving Co 44 S E 2d 523, 228 N C 94

Pa—Lyons Transp Co v Mechanics Overall Supply Co, 27 Erie Co 80

Wis—Hansman v Liberty Trucking Co 7 N W 2d 609, 242 Wis 92

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U S—Cooper v Chicago R I & P R Co, C A Iowa, 217 F 2d 683

Motive for payment immaterial

U S—Union Pac R Co v U S 61 S Ct 1064, 313 U S 450, 85 L Ed 1452, reh den 62 S Ct 51, 314 U S 707, 86 L Ed 565

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U S—Stanislaus County, Cal v U S, D C Cal 193 F Supp 145

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U S—American Trucking Associations v Atchison, T & S F Ry Co, Ill, 87 S Ct 1608, 387 U S 397, 18 L Ed 2d 847, reh den 88 S Ct 11, 12, 389 U S 889, 19 L Ed 2d 197

Water carrier not exempted

U S—State of N Y v U S, C A, 568 F 2d 887, app after remand 600 F 2d 349, cert den 101 S Ct 242, 243, two cases, 449 U S 887, 66 L Ed 2d 113

97 U S—U S v Baltimore & O R Co Ohio, 68 S Ct 494, 333 U S 169, 92 L Ed 618—Boynton v Com of Va Va, 81 S Ct 182, 364 U S 454, 5 L Ed 2d 206

D C—U S v I C C, C A, 198 F 2d 958, 91 U S App D C 178, cert den 73 S Ct 212, 344 U S 893, 97 L Ed 691

Ill—Cohen v Texas & N O R Co, 25 N E 2d 562, 303 Ill App 606

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98 U S—Ohio Tank Car Co. v Keith Ry Equipment Co C C A Ill, 148 F 2d 4, cert den 66 S Ct 38, 326 U S 730, 90 L Ed 434—I C C v North Pier Terminal Co C C A Ill 164 F 2d 640, cert den 68 S Ct 1071, 334 U S 815, 92 L Ed 1746

Neb—Union Transfer Co v Renstrom 37 N W 2d 393, 151 Neb 326

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U S—Baker v Rice & Co D C Mo 336 F Supp 20

99 U S—Louisiana & A Ry Co v Export Drum Co D C La 226 F Supp 89, rev'd on oth grds C A 359 F 2d 311—Baltimore & O R Co v U S D C Pa 391 F Supp 249, affd C A 594 F 2d 856

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N J—Southern Pac Co v Wheaton Brass Works, 76 A 2d 890, 5 N J 594, cert den 71 S Ct 614, 341 U S 904, 95 L Ed 2d 1343—Time-DC, Inc v Tappins Inc 313 A 2d 234, 126 N J Super 179, affd 331 A 2d 620, 132 N J Super 5

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Utah—E L Murphy Trucking Co v Climate Control, Inc, 523 P 2d 1224

Purpose of Filing Act, etc.

U S—Union Pac R Co v U S, supra, n 96—Boone v U S C C A Tenn 109 F 2d 560

(2) Other statements

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Ohio—Railway Exp Agency, Inc v Youngstown Plant & Flower Co, 171 N E 2d 220

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U S—Mississippi Public Service Commission v U S, D C Miss, 124 F Supp 809, affd 75 S Ct 599, two cases, 349 U S 908, 99 L Ed 1244

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2 Neb—Application of United Mineral Products Co 121 N W 2d 492, 175 Neb 285

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3 U S—In re Third Ave Transit Corp C A N Y 233 F 2d 310—Smith Cumming & Freezing Co v Lloyd Krause, Inc, C A Or 398 F 2d 128

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N Y—Application of Love, 155 N Y S 2d 266

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9 Ill—Mound City Warehouse Co v Illinois Cent R Co 200 N E 2d 919, 51 Ill App 2d 103

10 N Y—Hewitt v New York, N H & H R Co, supra, n 6

13 U S—North American Phillips Corp v Emery Air Freight Corp, C A N Y 579 F 2d 229

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(2) Other matters

U S—Lynchburg Traffic Bureau v U S, D C Va F Supp 874, affd 84 S Ct 1348, 377 U S 270, L Ed 2d 305, reh den 84 S Ct 1911, 377 U S 1010, 12 L Ed 2d 1057—Baltimore & O R Co U S, D C Pa 391 F Supp 249, affd C A F 2d 856

N C—State ex rel Utilities Commission v North Carolina Motor Carriers Ass'n, 117 S E 2d 271, N C 432

Equal charges by all carriers for same distance not compelled by law

N C—State ex rel Utilities Commission v North Carolina Motor Carriers Ass'n, 117 S E 2d 271, N C 432

Acts held not unreasonably discriminatory

U S—Providence and Worcester R Co v U S C 666 F 2d 736

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U S—Stanislaus County, Cal v U S., D C Cal, F Supp 145

17 U S—Shaw Warehouse Co v Southern Ry C A Ala, 288 F 2d 759, reh den 294 F 2d

cert den 82 S Ct 433 369 U S 850 8 L Ed 2d 9 Reh den 83 S Ct 931 372 U S 950, 9 L Ed 2d 945—U S v Auto Driveaway Co C A Ill 464 F 2d 1366

Neb—Chicago, B & Q R Co v Herman Bros Inc 82 N W 2d 405 164 Neb 265

Or—In re Pacific Utilities Comr of Or 268 P 2d 665 201 Or 1

Prohibited preference

U S—North American Phillips Corp v Emery Air Freight Corp C A N Y 579 F 2d 229

18 U S—Union Pac R Co v U S D C Neb 132 F Supp 72, affd in part and rev'd in part on oth grds 76 S Ct 982, 351 U S 321 100 L Ed 1221—Kappers Co v U S D C Pa 166 F Supp 96

Neb—Application of Nebraska Limestone Producers Ass'n, 97 N W 2d 331 168 Neb 786

N C—State ex rel Utilities Commission v Nello L Teer Co 146 S E 2d 511 266 N C 366

Pa—Pennsylvania R Co v Public Utility Commission 4 A 2d 622, 135 Pa Super 5

Tenn—Ward v Gulf M & N R Co supra, n 15

Other unobjectionable discrimination

U S—Florida Citrus Commission v U S D C Fla 144 F Supp 517 affd 77 S Ct 589 352 U S 1021 1 L Ed 2d 595—Banta v U S D C N J 152 F Supp 59 app dism 78 S Ct 119 355 U S 33 2 L Ed 2d 71 affd 78 S Ct 123 355 U S 34 2 L Ed 2d 71—In re Penn-Dixie Steel Corp Bkrtcy N Y 6 B R 817 affd D C 10 B R 878

Ark—Choctaw O & G R Co v State, 84 S W 502 92 S W 26, 73 Ark 373

19 U S—Transcontinental Bus System Inc v C A B C A Tex 383 F 2d 466, cert den 88 S Ct 850 390 U S 920 19 L Ed 2d 979 app after remand 432 F 2d 1355

Pa—City of Philadelphia v Pennsylvania Public Utility Commission, 63 A 2d 391 164 Pa Super 96

Tex—Southwest Stone Co v Railroad Commission, supra, n 3

§ 352. —— Unjust Discrimination as Question of Law or Fact

20 N Y—Hewitt v New York, N H & H R Co 29 N E 2d 641 284 N Y 117

21 U S—Lake Carriers Ass'n v U S D C Ohio, 399 F Supp 386

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25. Held not a preference

U S—Atchison T & S F Ry Co v John Sexton & Co D C Kan 339 F Supp 1202

§ 354. Who Amenable to Law against Discrimination

The prohibition of the Interstate Commerce Act against discrimination applies to any person or corporation, whether a carrier or not.[29.1]

29.1. Concessions by city to shippers

U S—Union Pac R Co v U S, supra, n 15

§ 355. In Whose Favor Law Against Discrimination Operative

31 U S—L T Barringer & Co v U S supra, n 17

33 U S—I C C v North Pier Terminal Co C C A Ill 164 F 2d 640, cert den 68 S Ct 1071 334 U S 815 92 L Ed 1746

§ 356. —— Shippers

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34 U S—Minneapolis & St L Ry Co v Pacific Coast Robinson Co C A Minn 215 F 2d 126—Consolidated Shippers Ass'n v U S C A Cal, 328 F 2d 966

Mich—American Trans Co v Insurance Co of North America 1 N W 2d 524, 300 Mich 236, 141 A L R 913

Mo—Gates v Missouri Pac R Co 118 S W 2d 7 342 Mo 542, cert den 58 S Ct 76 305 U S 6 83 L Ed 364

Neb—Application of United Mineral Products Co 121 N W 2d 492, 175 Neb 285

Pa—Pennsylvania R Co v Public Utility Commission, supra, n 18

Term "shippers" includes forwarders

U S—U S v Chicago Heights Trucking Co Ill 60 S Ct 931 310 U S 344 84 L Ed 1243

Order held not discrimination against other shippers

Ala—Illinois Cent R Co v Thomas Alabama Kaolin Co 153 So 2d 794 275 Ala 230

§ 357 —— Connecting Carriers

36 U S—Atchison, T & S F Ry Co v U S D C Kan 194 F Supp 438—Omaha Grain Exchange v U S D C Neb 194 F Supp 929

Pacific Railroad Acts

U S—Southern Pac Co v U S D C Neb 277 F Supp 671 affd 88 S Ct 1442 390 U S 744 20 L Ed 2d 275

37 U S—Western Pac R Co v U S Cal 80 S Ct 338 382 U S 237 15 L Ed 2d 294 on remand D C 263 F Supp 140

40. Provisions broadly interpreted

U S—Southern Pac Co v U S D C Neb 277 F Supp 671 affd 88 S Ct 1442, 390 U S 744 20 L Ed 2d 275—Providence and Worcester R Co v U S C A 1 666 F 2d 716

Prior approval of preferential solicitation modified

U S—Southern Pac Co v U S D C Neb 277 F Supp 671 affd 88 S Ct 1442, 390 U S 744 20 L Ed 2d 275

§ 360. Discrimination as to Localities

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57 U S—State of N Y v U S, N Y 67 S Ct 1207 331 U S 284, 91 L Ed 1492, reh den 67 S Ct 1527 331 U S 866, 91 L Ed 1870, and 67 S Ct 1526, 331 U S 866, 91 L Ed 1871—Central & Southern Motor Freight Tariff Ass'n v U S D C Del 273 F Supp 823, app after remand 345 F Supp 1389

Neb—Application of United Mineral Products Co 121 N W 2d 492, 175 Neb 285—Application of Howard McLean Co 187 N W 2d 300, 187 Neb 30

Tex—Atchison T & S F Ry Co v Port of Beaumont Nav Dist of Jefferson County Civ App 438 S W 2d 843, err ref no rev err

59 U S—Baltimore & O R Co v U S D C N Y 22 F Supp 533—New York Cent R Co v U S D C N Y 207 F Supp 483

Neb—L E Whitlock Truck Service, Inc v Shippers Oil Field Traffic Ass'n, 105 N W 2d 588, 171 Neb 78

National Transportation policy

U S—Central & Southern Motor Freight Tariff Ass'n v U S, D C Del 273 F Supp 823 app after remand 345 F Supp 1389

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60 U S—Stanislaus County v U S D C Cal 236 F Supp 146

Geographic location

U S—Com of Virginia v C A B C A, 498 F 2d 129, cert den 95 S Ct 623, two cases, 419 U S 1048, 42 L Ed 2d 642

§ 361. Discrimination as to Particular Commodities

56 U S—Lynchburg Traffic Bureau v U S D C Va 225 F Supp 874 affd 84 S Ct 1348, 377 U S 270 12 L Ed 2d 305 reh den 84 S Ct 1911, 377 U S 1010 12 L Ed 2d 1057

§ 362. Services outside Scope of Carrier's Duty as Such

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71 Cal—Demeter v Anderson, 180 P 2d 998, 80 Cal App 2d 48

S C—Atlantic Coast Line R Co v South Carolina Public Service Commission, 144 S E 2d 212, 246 S C 447

75 S C—Atlantic Coast Line R Co v South Carolina Public Service Commission, 144 S E 2d 212, 246 S C 447

§ 363. Competition as Justifying Discrimination

76 U S—L F Barringer & Co v U S Tenn 63 S Ct 967 319 U S 1 87 L Ed 2d 1171—National Gypsum Co (Huron Cement Division) v U S, D C N Y 353 F Supp 941

Neb—Application of Nebraska Limestone Producers Ass'n 97 N W 2d 331 168 Neb 786

N C—State ex rel Utilities Commission v Nello L Teer Co 146 S E 2d 511 266 N C 366

Apparent economic discrimination not necessarily unjust

Neb—L E Whitlock Truck Service, Inc v Shippers Oil Field Traffic Ass'n, 105 N W 2d 588, 171 Neb 78

N C—State ex rel Utilities Commission v Bird Oil Co 273 S E 2d 232 302 N C 14

Burden on carrier

U S—Scott Paper Co v U S D C Pa 372 F Supp 721 affd 95 S Ct 26, 419 U S 807 42 L Ed 2d 38—A Lindberg & Sons, Inc v U S D C Mich, 408 F Supp 1032

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80 U S—Atchison T & S F Ry Co v U S D C Ill, 218 F Supp 359—National Gypsum Co (Huron Cement Division) v U S D C N Y 353 F Supp 941

84 U S—U S v Union Pac R Co D C Iowa, 173 F Supp 397 affd 80 S Ct 737 362 U S 327 4 L Ed 2d 766

Unlawful activity of competitor

U S—Stanislaus County v U S, D C Cal 236 F Supp 146

§ 364. In General

87 U S—Ohio Tank Car Co v Keith Ry Equipment Co C C A Ill 148 F 2d 4, cert den 66 S Ct 38, 326 U S 730, 90 L Ed 434—U S v U S Smelting Refining & Min Co supra, n 17—U S v I C C App D C 77 S Ct 241 352 U S 158, 1 L Ed 2d 211—Associated Wholesale Grocers, Inc v U S D C Kan 272 F Supp 274

Ohio—Kirchner v New York Central System, 94 N E 2d 283, 87 Ohio App 165—Trees v Pennsylvania R Co, 109 N E 2d 29 91 Ohio App 497

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88 Ill—Cohen v Texas & N O R Co 25 N E 2d 562, 303 Ill App 606

La—Louisiana & A Ry Co Louisiana Public Service Commission, 410 So 2d 1118

Miss—L M Kirkpatrick Co v I C R Co 195 So 692, 190 Miss 157 135 A L R 607

98 Miss—L M Kirkpatrick Co v ICR Co supra, n 88

91 Ill—Conen v Texas & N O R Co supra n 88

92 US—Hooper Paper Co v Baltimore & O R Co CA Ill 176 F 2d 179 cert den 70 S Ct 239 US 943 94 L Ed 1359

93 Miss—L M Kirkpatrick Co v ICR Co supra, n 88

Okl—Silver Motor Freight Lines v Arkansas Welt Grade Co 249 P 2d 994 207 Okl 292

W Va—CJS quoted in Appalachian Electric Power Co v Virginian Ry Co, 25 S E 2d 471 475 126 W Va 626

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94 Miss—L M Kirkpatrick Co v ICR Co supra, n 88

2. Settlement binding carrier to pay portion of third party claims held not discriminatory

US—Lone Star Cement Corp v Pennsylvania R Co CA Ind 356 F 2d 901

§ 365. Discrimination in Furnishing Facilities for Transportation

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6 US—Continental Shippers Ass'n v US CA Cal, 328 F 2d 966

9 US—L T Barringer & Co v US Tenn 63 S Ct 967 319 US 1 87 L Ed 1171—Martin Bros Box Co v ICC DC Or 128 F Supp 919 revd on oth grds, CA 219 F 2d 811 cert den 76 S Ct 50, 350 US 823 100 L Ed 735 motion den 76 S Ct 191—Produce Terminal Realty Corp v New York, N H & H R Co 110 F Supp 451

Ga—Southern Ry Co v Georgia Public Service Commission, 127 S E 2d 12, 218 Ga 157

10 US—El Dorado Oil Works v US Cal 66 S Ct 843, 328 US 12, 90 L Ed 1053—Union Pac R Co v US Iowa, 80 S Ct 737 362 US 327 4 L Ed 2d 766

Ill—Wilson & Co v Werner Transp Co 69 N E 2d 713 330 Ill App 25

Heating cars

(4) Other cases

N H—Akerly v Railway Exp Agency, 77 A 2d 856 99 N H 396

Pa—Jackson & Perkins Co v Mushroom Transp Co 41 A 2d 635, 351 Pa 583, cert den 66 S Ct 42, 326 US 733 90 L Ed 427

Sorting of shipper's goods as constituting discrimination

US—Associated Wholesale Grocers, Inc v US, D C Kan, 272 F Supp 274

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17 US—Michigan Millers Mut Fire Ins Co v C[illegible] Northern Ry Co, C C A Minn 152 F 2d 292.

N Y—Bush Terminal Buildings Co v Bush Terminal R Co, 63 N Y S 2d 744, affd 66 N Y S 2d 644 271 App Div 835, app den 67 N Y S 2d 486, 271 App Div 883, cert den 67 S Ct 1533, 331 US 843, 91 L Ed 1864

§ 366. —— Distribution of Cars

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24 US—St Louis, B & M Ry Co v Brownsville Nav Dist of Cameron County Tex 58 S Ct 868, 304 U S 295, 82 L Ed 1357 reh den 59 S Ct 55, 305 US 668, 83 L Ed 433—Chicago, R I & P Ry. Co v US, Ill 52 S Ct 87, 284 US 80, 76 L Ed 177—Martin Bros. Box Co v I C C, supra, n 9

§ 367. —— Switch Connections and Services

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50 N C—State ex rel Utilities Commission v Southern Ry Co 124 S E 2d 590 256 N C 359

52 U S—Pennsylvania R Co v U S D C Pa 216 F Supp 199

Mich—Detroit Terminal R Co v Budd Wheel Co Supreme n 52

55 U S—Hanna Furnace Corporation v U S D C N Y 53 F Supp 341 affd 65 S Ct 41 323 US 667 89 L Ed 542 reh den 65 S Ct 112, 323 US 813 89 L Ed 647

§ 368 —— Terminal Facilities

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66 U S—Atlantic Coast Line R Co v U S D C Ga 265 F Supp 360 affd 88 S Ct 42 371 U S 6, 9 L Ed 2d 43

§ 370. —— Expediting or Diverting Shipments

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82 Kan—Schreppel v Campbell Sixty-Six Exp Inc 441 P 2d 881 201 Kan 448

§ 371. —— Stop-over Privileges

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96. Failure to pay within credit period not discriminatory

U S—Continental Shippers Ass'n n U S C A Cal 328 F 2d 966

Long-standing record of late payments held discriminatory

U S—Continental Shippers Ass'n v U S C A Cal 328 F 2d 966

§ 372. Giving Credit to Some Parties and Requiring Payment of Others

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98 U S—U S v Pennsylvania R Co, D C Pa, 308 F Supp 293

Prepaid shipment to consignee held no preference

Ark—Missouri Pac R Co v Dermott Grocery & Commission Co 441 S W 2d 798, 246 Ark 1286

99 U S—U S v General Expressways, Inc, D C Colo 270 F Supp 115

N Y—Acme Mayflower Transit Co v Rae, 118 N Y S 2d 395 203 Misc 801

§ 374. Receiving Compensation Other than That Allowed by Law

7. Set-off

(2) Other statements

U S—U S v Pennsylvania R Co, D C Pa, 308 F Supp 293

§ 376. —— Duty of Carrier to Maintain Equality of Charges

9 US—Condakes v Southern Pac Co, D C Mass 295 F Supp 119—A Lindberg & Sons, Inc v US D C Mich 408 F Supp 1032—Atchison, T & S F Ry Co v U S C A, 549 F 2d 1186, cert den 98 S Ct 223, three cases 224 434 US 1 54 L Ed 2d 154

Neb—Application of Nebraska Limestone Producers Ass'n 97 N W 2d 331 168 Neb 786

N Y—Brooks Transp Co v Hilcrea Export & Import Corp 106 N Y S 2d 868

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(3) Other matters

Neb—Application of United Mineral Products Co 81 N W 2d 598, 178 Neb 640

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10 Tex—Leshe v Houston Natural Gas Corp Ct App, 280 S W 2d 353, err ref no rev err Cert den 77 S Ct 43

11 US—Chesapeake & O Ry Co v US, D C W Va, 11 F Supp 588 affd 56 S Ct 164, 296 US 187 80 L Ed 147

14 US—Feraco, Inc v Georgia Pac Corp, D C Del 313 F Supp 660—Chicago, B & Q R Co v Edward Hines Lumber Co D C Ill 320 F Supp 194—Missouri Pac R Co v Lake Charles Grain & Grocery Co D C La, 320 F Supp 1061—Nueces County Nav Dist No 1 v I C C C A 5, 674 F 2d 1055 cert den 103 S Ct 446, 459 US 1035 74 L Ed 2d 601—Western Transp Co v Wilson and Co, Inc, C A Ill 682 F 2d 1227

D C—U S v I C C, App D C 77 S Ct 241 352 US 158, 1 L Ed 2d 211

Mo—Long Island R Co v Midland Valley Lumber Co, 164 S W 2d 930, 237 Mo App 147

N Y—Kelleher Car-Loading & Distributing Co v Muller Paper Goods Co 134 N Y S 2d 659—W R Grace & Co v Railway Exp Agency, Inc, 191 N Y S 2d 780 9 A D 2d 425, affd 202 N Y S 2d 281 8 N Y 2d 103, 168 N E 2d 362 cert den 81 S Ct 69 364 US 830, 5 L Ed 2d 57

Tenn—Southern Ry Co v Mayer Myers Paper Co, 232 S W 2d 20, 191 Tenn 164

Switching charges

(4) Other cases

US—Swift & Co v US 72 S Ct 716 343 US 373, 96 L Ed 1008—Louisville & N R Co v St Regis Paper Co D C Fla 102 F Supp 713, affd C A, 201 F 2d 371—St Regis Paper Co v Louisville & N R Co, C A Fla 201 F 2d 371

Immaterial considerations

US—Arrow Transp Co v US, D C Ala, 176 F Supp 411, affd 80 S Ct 406, 361 US 353, 4 L Ed 2d 362

Knowing cooperation not required

US—Continental Shippers Ass'n v US, C A Cal, 328 F 2d 966

Carriers and regular shippers not equally "persons" within Act

US—Atchison, T & S F Ry Co v US, D C Ill, 244 F Supp 955, revd on oth grds 87 S Ct 1608, 387 US 397, 18 L Ed 2d 847, affd 87 S Ct 2094, 388 US 445, 18 L Ed 2d 1307, reh den 88 S Ct 11, 12, two cases, 389 US 889, 19 L Ed 2d 197

Rule of equality

US—Transcontinental Bus System, Inc v C A B C A Tex 383 F 2d 466, cert den 88 S Ct 850, 390 US 920, 19 L Ed 2d 979 app after remand 432 F 2d 1355

15 US—Atchison, T & S F Ry Co v US D C Ill 244 F Supp 955, revd on oth grds 87 S Ct 1608, 387 U S 397, 18 L Ed 2d 847, affd 87 S Ct 2094 388 U S 445, 18 L Ed 2d 1307

N J—Tune-DC, Inc v Tappuns, Inc, 313 A 2d 234, 126 N J Super 179 affd 331 A 2d 620, 132 N J Super. 5

The purpose of congress, etc.

(2) Applicability of act to "all-commodity" rates

US—All States Freight, Inc v New York, N H & H R Co, Conn, 85 S Ct 419, 379 US 343, 13 L Ed 2d 324—State of N Y v U S, C A, 568 F 2d 887, app after remand 600 F 2d 349, cert. den 101 S Ct 242, 243, two cases, 449 US 887, 66 L Ed 2d 113

Wash—Lyon Van Lines, Inc v Cole 512 P 2d 1108 9 Wash App 382

(c) Other statements

US—Southern Pac Transp Co v Commercial Metals Co Tex 102 S Ct 1815 456 U S 336, 72 L Ed 2d 114 on remand C A 680 F 2d 264

Ill—Illinois Cent Gulf R Co v Sankey Bros Inc 384 N E 2d 543 23 Ill Dec 749 67 Ill App 3d 435 affd 398 N E 2d 3, 34 Ill Dec 328, 78 Ill 2d 56

Wash—Alaska Marine Trucking v Carnation Co 633 P 2d 105 30 Wash App 144 cert den 102 S Ct 2045 456 U S 964 72 L Ed 2d 490

Discrimination against water carriers

US—Seatrain Lines Inc v US D C N J 233 F Supp 199—Atchison, T & S F Ry Co v U S D C Ill 300 F Supp 1351 affd 90 S Ct 568, 396 U S 275 24 L Ed 2d 467

Carrier's state of mind immaterial

N Y—Airborne Freight Corp v Irving Trust Co 275 N Y S 2d 863 26 A D 2d 507

Favoring large shippers prohibited

US—Central & Southern Motor Freight Tariff Ass'n v U S D C Del 273 F Supp 823 app after remand 345 F Supp 1389

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16 US—Atchison T & S F Ry Co v U S D C Kan 194 F Supp 438—Transcontinental Bus System, Inc v C A B C A Tex 383 F 2d 466 cert den 88 S Ct 850 390 U S 920 19 L Ed 2d 979 app after remand 432 F 2d 1355

17 US—Lynchburg Traffic Bureau v U S D C Va 225 F Supp 874 affd 84 S Ct 1348, 377 U S 270, 12 L Ed 2d 305 reh den 84 S Ct 1911 377 U S 1010, 12 L Ed 2d 1057—Cooper-Jarrett Inc v U S D C Mo 226 F Supp 318, affd 85 S Ct 49 379 U S 6, 13 L Ed 2d 21

N Y—Airborne Freight Corp v Irving Trust Co 275 N Y S 2d 863 26 A D 2d 507

Proof of competitive injury not required

US—A Lindberg & Sons, Inc v U S D C Mich 408 F Supp 1032

18 Conn—New York, N H & H R Co v California Fruit Growers Exchange, 5 A 2d 353 125 Conn 241 cert den 60 S Ct 79 308 U S 567 84 L Ed 476

19 US—U S v Benjamin Motor Exp Inc, D C Mass 147 F Supp 15 affd C A 251 F 2d 547—Eastern Freight Ways, Inc v U S, C A N Y 257 F 2d 703—Great Northern Ry Co v U S Ct Cl 312 F 2d 901

D C—U S v I C C App D C 77 S Ct 241 352 U S 158 1 L Ed 2d 211

20 US—State of N C v U S D C N C 128 F Supp 718, affd 76 S Ct 45 350 U S 805 100 L Ed 723

21 US—State of N C ex rel North Carolina Utilities Commission v I C C D C N C 347 F Supp 103 affd 93 S Ct 1362, 410 U S 919 35 L Ed 2d 582

23. "All commodity" rates

US—All States Freight, Inc v New York, N H & H R Co Conn, 85 S Ct 419 379 U S 343 13 L Ed 2d 324

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The statutory provisions forbidding carriers from discriminating in rates between connecting lines have been judicially construed.[24.5]

24.5 US—Western Pac R Co v U S Cal 86 S Ct 338, 382 U S 237 15 L Ed 2d 294, on remand, D C 263 F Supp 140—Central & Southern Motor Freight Tariff Ass'n Inc v U S D C Del 345 F Supp 1389

Under the Freight Forwarder Act, carriers may establish assembling and distribution rates, applicable to freight forwarders and others who employ carriers under like conditions, which differ from rates applying to others using the same facilities or services.[25.5]

Dissimilar operating conditions between two routes do not, per se, justify discrimination,[24.10] there must be something in the dissimilarity of operating conditions which would make it unjust to require a carrier to extend to a connecting carrier the same joint through rate arrangement which it maintains with another connecting carrier.[24.15]

24.10 US—Western Pac R Co v U S D C Cal 263 F Supp 140

24.15 U S—Western Pac R Co v U S D C Cal 263 F Supp 140

Undue prejudice not shown

US—State of N Y v U S C A 568 F 2d 887 app after remand 600 F 2d 349 cert den 101 S Ct 242, 243 two cases, 449 U S 887 66 L Ed 2d 113

25.5. Assembling rates applicable only when on the carrier used for line haul

D C—National Motor Freight Traffic Ass'n v U S D C 253 F Supp 661

Private individual shippers entitled to rates

D C—National Motor Freight Traffic Ass'n v U S D C 253 F Supp 661

Rates apply only to [illegible] into ... point for further movement beyond as part of carload or truckload lots

D C—National Motor Freight Traffic Ass'n v U S D C 253 F Supp 661

26 Ky—Chesapeake & O Ry Co v Gorman, 188 S W 2d 316, 300 K 230

Neb—L E Whitlock Truck Service, Inc v Shippers Oil Field Traffic Ass'n, 105 N W 2d 588 171 Neb 78

Tenn—Plastic Products Co v Cook Truck Lines, Inc 260 S W 2d 178, 195 Tenn 463

Tex—Texas & N O R Co v Railroad Commission, 286 S W 2d 112, 155 Tex 323

Cancellation of original charge in return for entirely new promise to pay forbidden

US—Empire Petroleum Co v Sinclair Pipeline Co C A Colo 282 F 2d 913

Collection of full established charge required

US—Empire Petroleum Co v Sinclair Pipeline Co C A Colo, 282 F 2d 913

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30 Tex—Texas & N O R Co v Railroad Commission, 286 S W 2d 112 155 Tex 323

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41 US—Missouri Pac R Co v U S D C Mo 16 F Supp 752—Pa[illegible]re & O R Co v U S D C Md 151 F Supp 258, vac in part on oth grds 78 S Ct 189 355 U S 175, 2 L Ed 2d 183, clarification den 78 S Ct 1133, 356 U S 970, 2 L Ed 2d 1145 clarification den 78 S Ct 1134, 356 U S 970, 2 L Ed 2d 1145—Chamber of Commerce of Fargo, N D v U S D C N D 276 F Supp 301—Las Cruces, TV Cable v F C C C A, 645 F 2d 1041 207 U S App D C 116

Neb—C.J.S. quoted at length in Chicago, Burlington & Quincy R Co v Herman Bros 82 N W 2d 395 404, 164 Neb 247

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42 US—Atchison T & S F Ry Co v U S D C Fl 215 F Supp 359

Mich—Detroit Terminal R Co v Budd Wheel Co 19 N W 2d 126, 311 Mich 638

Neb—Application of United Mineral Products Co 134 N W 2d 598, 178 Neb 640

43 US—State of N Y v U S supra, n 16—Swift & Co v U S 72 S Ct 716, 343 U S 373 96 L Ed 1008—Baltimore & O R Co v U S D C Md 151 F Supp 258, vac in part on oth grds 78 S Ct 189 355 U S 175 2 L Ed 2d 183, clarification den 78 S Ct 1133 356 U S 970, 2 L Ed 2d 1145 clarification den 78 S Ct 1134 356 U S 970, 2 L Ed 2d 1145

Identity of rates not required

U S—Chamber of Commerce of Fargo, N D v U S D C N D 276 F Supp 301

44 U S—Western Pac R Co v U S Cal 86 S Ct 338 382 U S 237 15 L Ed 2d 294 on remand, D C 263 F Supp 140—Chamber of Commerce of Fargo, N D v U S D C N D 276 F Supp 301

D C—U S v I C C C A 198 F 2d 958, 91 U S App D C 178, cert den 73 S Ct 212, 344 U S 893 97 L Ed 691

Md—Capital Transit Co v Bosley 62 A 2d 267 191 Md 502

Neb—Application of Nebraska Limestone Producers Ass'n 97 N W 2d 331 168 Neb 786

N C—State ex rel Utilities Commission v Nello L Teer Co 146 S E 2d 511 266 N C 366

Pa Pennsylvania R Co v Public Utility Commission, 4 A 2d 622, 135 Pa Super 5

45 U S—Chamber of Commerce of Fargo, N D v U S D C N D 276 F Supp 301

Cal—Southern Pac Co v Railroad Commission of California, 87 P 2d 1055 13 Cal 2d 89

46 Md—Capital Transit Co v Bosley supra, n 44

47 Fla—Florida East Coast Ry Co v King, 158 So 2d 523

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52 **Cost studies or cost data**

Fla—Florida East Coast Ry Co v King, 158 So 2d 523

53 Neb—Application of United Mineral Products Co 134 N W 2d 598 178 Neb 640

54 US—State of N Y v U S supra, n 16

[illegible] ... are not justification—Baldwin v Scott County Milling Co Mo 59 S Ct 943, 307 U S 478, 83 L Ed 1409 reh den 60 S Ct 65 308 U S 631 84 L Ed 2d 526—U S v Associated Air Transport, Inc C A Fla 275 F 2d 827—National Van Lines, Inc v U S, C A Ill, 355 F 2d 326—Chicago, B & Q R Co v Ready Mixed Concrete Co C A Neb, 487 F 2d 1263

55. **No immunity**

(2) Other matters

U S—Stanislaus County v U S D C Cal 236 F Supp 146—Piggott Transp Co v U S 670 F 2d 1011 229 Ct Cl 428

59 Fla—Florida East Coast Ry Co v King, 158 So 2d 523

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67 N C—State ex rel Utilities Commission v Nello L Teer Co 146 S E 2d 511 266 N C 366

Aggregate shipments

U S—Central & Southern Motor Freight Tariff Ass'n v U S D C Del 273 F Supp 823 app after remand 345 F Supp 1389

70 U S—Central & Southern Motor Freight Tariff Ass'n v U S D C Del, 273 F Supp 823, app after remand 345 F Supp 1389

§ 378. —— Charging More for Short Than for Long Haul

75 Neb—Application of United Mineral Products Co, 134 N W 2d 598, 178 Neb 640

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77 SC—Atlantic Coast Line R Co v South Carolina Public Service Commission, 144 S E 2d 212 246 S C 447

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99 Miss—Cobb Bros Const Co v Gulf M & O R Co 57 So 2d 570 213 Miss 706

Determination as to violation by comparing rates for like property

Va—Lynchburg Traffic Bureau v Norfolk & W Ry Co 147 S W 2d 744 207 Va 107

Provision held not violated

D C—Harborlite Corp v I C C 613 F 2d 1086, 198 U S App D C 355

Va—Lynchburg Traffic Bureau v Norfolk & W Ry Co 147 S E 2d 744 207 Va 107

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10 U S—Land O Lakes, Inc v United-Buckingham Freight Lines, Inc D C Minn 351 F Supp 02, op supp reconsideration den 359 F Supp 741

11 U S—U S v Boston & M R R D C Mass 157 F Supp 218

12 U S—U S v South Buffalo Ry Co D C N Y 69 F Supp 456, affd 68 S Ct 868, 333 U S 771 92 L Ed 1077

13 U S—Baldwin v Scott County Milling Co Mo 59 S Ct 943 307 U S 478 83 L Ed 1409 reh den 60 S Ct 05 308 U S 631 84 L Ed 2d 526—U S v General Motors Corp, C A Del 226 F 2d 745—U S v Pep Trucking Co D C N J 261 F Supp 480

Del—Travers v Artic Roofing, Super 27 A 2d 78 3 Terry 41, affd 32 A 2d 559 3 Terry 293—Schleiff v Baltimore & O R Co 130 A 2d 321 36 Del Ch 342

D C—Pyramid Nat Van Lines v Goetze, Mun App 65 A 2d 595, motion over 66 A 2d 693

La—Haskins Trucking Co, Inc v Lynn Lake Transp Co Ltd App 350 So 2d 964

N Y—Kelleher Car-Loading & Distributing Co v Muller Paper Goods Co 134 N Y S 2d 659

Involuntary rebate

N J—Southern Pac Co v Wheaton Brass Works, 76 A 2d 890, 5 N J 594, cert den 71 S Ct 614 341 U S 904 95 L Ed 1343

Assessment of illegal rebate

U S—U S v Michael Schiavone & Sons, Inc, D C Mass, 325 F Supp 48, mod on oth grds C A 450 F 2d 875

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14 U S—Northern Pac Ry Co v U S, Wash, 78 S Ct 514 356 U S 1, 2 L Ed 2d 545

16. Switching charges

(1) Pan American Petroleum Corporation v U S, D C La & Tex 18 F Supp 624 motion den 58 S Ct 407 motion den 58 S Ct 408 revd on oth grds 58 S Ct 771, 304 U S 156, 82 L Ed 1262

18 U S—Hanna Furnace Corporation v U S D C N Y, 63 F Supp 341, affd 65 S Ct 41, 323 U S 667 89 L Ed 543, reh den 65 S Ct 112, 323 U S 813, 89 L Ed 647—U S v Union Pac R Co D C Iowa, 173 F Supp 397, affd 80 S Ct 737, 362 U S 327 4 L Ed 2d 766—Key Line Freight, Inc v U S, C A Mich, 570 F 2d 97

Sale of land to shipper at less than fair market value

U S—U S v Michael Schiavone & Sons, Inc D C Mass, 304 F Supp 773 app dism 90 S Ct 565, 396 U S 275 24 L Ed 2d 466, vac on oth grds 430 F 2d 231 on remand 325 F Supp 48, mod on oth grds 450 F 2d 875

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22 U S—C J S cited in City of New Orleans By and Through Public Belt R R Commission v Hansen & Tidemann, Inc D C La 391 F Supp 910, 919

Lawful payment of damages

U S—Southern Pac Co v Miller Abattoir Co C A N J 454 F 2d 357

23. After end of transportation

U S—Koppers Co v U S D C Minn 114 F Supp 741

24 U S—American Sheet & Tin Plate Co v U S D C Pa 15 F Supp 711 revd on oth grds 57 S Ct 804 301 U S 402, 81 L Ed 1186, reh den 58 S Ct 3 302 U S 772, 82 L Ed 599—Koppers Co v U S supra, n 23

D C—U S I C C C A 198 F 2d 958 91 U S App D C 178, cert den 73 S Ct 212 344 U S 892 97 L Ed 69

Spotting service

U S—Pan American Petroleum Corporation U S supra, n 16—American Sheet & Tin Plate Co v U S supra

Actions to recover rebates

(1) Right of action

Del—Schleiff v Baltimore & O R Co Ch 130 A 2d 321 36 Del Ch 342

(2) Defenses

Del—Schleiff v Baltimore & O R Co Ch 130 A 2d 321 36 Del Ch 342

Breach of contract not a bar

U S—Southern Pac Co v Miller Abattoir Co C A N J 454 F 2d 357

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25 U S—American Sheet & Tin Plate Co v U S supra, n 24—New York Cent R Co v U S D C N Y 199 F Supp 955—Cooper-Jarrett, Inc v U S D C Mo 226 F Supp 318 affd 85 S Ct 49 379 U S 6, 13 L Ed 2d 21—U S v U S Steel Corp C A Minn 645 F 2d 1285

Cal—Southern Pac Co v Fish, 333 P 2d 133 166 C A 2d 353

29. Federal and state statutes compared

Colo—Denver & R G W R Co v Marty 353 P 2d 1095 143 Colo 496, 88 A L R 2d 1370

Recovery by hauler for services rendered under contract with railroad held not precluded

Ark—Chicago, R I & P R Co v McConnell Heavy Hauling, Inc 390 S W 2d 111, 239 Ark 373 cert den 86 S Ct 315 382 U S 927, 15 L Ed 2d 340

§ 381. —— Milling in Transit

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41 Tex—Mueller-Huber Grain Co v Texas & N O R Co, Civ App 193 S W 2d 573 575

§ 384. —— Other Modes of Discrimination

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48 U S—Central R Co of New Jersey v U S, N J 42 S Ct 80, 257 U S 527 66 L Ed 217—Southern Pac Co v H Moffat Co D C Nev 45 F Supp 924—Northern Pac Ry Co v Associated General Contractors of N D D C N D 152 F Supp 126

Conn—C J S. cited in New York, N H & H R Co v California Fruit Growers Exchange, 5 A 2d 353 360, 125 Conn 241 cert den 60 S Ct 79, 308 U S 567, 84 L Ed 476

Pa—Delaware, L & W R Co v Anthracite Overall Mfg Co 60 Lack Jur 32

Payment of bonus by city

U S—U S v Union Pac R Co Mo, 61 S Ct 1064 313 U S 450 85 L Ed 1453

Loans as illegal "concessions"

U S—U S v Union Pac R Co D C Iowa, 173 F Supp 397 affd 80 S Ct 737, 362 U S 327 4 L Ed 2d 766—U S v Food Fair Stores Inc C Fla 417 F 2d 62

49 Benefit of insurance

(1) U S—National Garment Co v New York C & St L R Co C A Mo 173 F 2d 32

(2) Insurance clause held not invalid—Home Ins Co of New York v Northern Pacific Ry Co 140 P 2d 507 18 Wash 2d 798 147 A L R 849

Necessity of fraud

(2) Mistake

U S—National Van Lines, Inc v U S C A Ill 329 F 2d 326

Carrier failing to collect charges extends credit

U S—Shaw Warehouse Co v Southern Ry Co, C A Ala 285 F 2d 759 reh den 294 F 2d 850, cert den 82 S Ct 933, 369 U S 850, 8 L Ed 2d 9 reh der 83 S Ct 931 372 U S 950 9 L Ed 2d 97

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51 U S—New York Cent R Co v Little-Jones Co Co D C Ill 25 F Supp 337—Empire Petroleum Co v Sinclair Pipeline Co C A Colo 282 F 2d 913

Conn—New York, N H & H R Co v California Fruit Growers Exchange, supra, n 48

52 Conn—New York, N H & H R Co v California Fruit Growers Exchange, supra, n 48

53 Mo—Missouri Pac R Co v Terrell, App 48 S W 2d 356

54 U S—Louisiana & A Ry Co v Export Drug Co D C La 228 F Supp 89 revd on oth grds C A 359 F 2d 311—St Louis-San Francisco Ry Co v Miller Floors, Inc D C Okl, 293 F Supp 869

55 U S—Baltimore & O R Co v U S, N Y, 59 S Ct 284 307 U S 507 83 L Ed 318

Minimize losses

U S—Baltimore & O R Co v U S supra

Rental of warehouse

(1) Baltimore & O R Co v U S supra

(2) Baltimore & O R Co v U S supra

(3) Other matters

U S—Southern Ry Co v U S, D C Ala, 186 F Supp 29

§ 385. —— Waiver of Valid Contractual Limitation of Liability

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58 U S—Christensen v Northern Pac Ry Co C A N D 184 F 2d 534

Iowa—Cartee v Fleming, 25 N W 2d 873 238 Iowa 55

Tex—Texas & N O R Co v McNatt, Civ App, 223 S W 2d 651, err dism

§ 386. In General

60 U S—Land O Lakes, Inc v United-Buckingham Freight Lines, Inc, D C Minn 351 F Supp 102, op supp, reconsideration den 359 F Supp 741

Tenn—Petition of Southern Lumber & Mfg Co 210 S W 639, 141 Tenn 325

61. Jurisdiction of court not precluded by labor board

U S—Pensack & Gordon, Inc v California Motor Exp C A Cal 323 F 2d 769 cert den 84 S Ct 517 518, 375 U S 984, 11 L Ed 2d 472

§ 387. Recovery of Excess Over Rate Charged Favored Shipper

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65 Fla—Seaboard Coast Line R Co v International Minerals & Chemical Corp, App 252 So 2d 816 cert den, Sup 283 So 2d 45 cert den 94 S Ct 936, 415 U S 901 39 L Ed 2d 459

Pa—Pennsylvania R Co v Pennsylvania Public Utility Commission 62 A 2d 267 169 Pa Super 58

§ 388 Recovery of Damages Resulting from Unjust Discrimination

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Carriers ⇐201

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68. Action under laws of other states

N H—McDuffee v Portland & R Co 52 N H 430 13 Am R 72

72. "Sail" in contract construed

U S—Archibald McNeil & Sons Co of New York v Western Maryland Ry Co D C Pa 42 F 2d 669 affd C C A 51 F 2d 1073 cert den 52 S Ct 41 284 U S 665 76 L Ed 563

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76 D C—U S v I C C C A 198 F 2d 958 91 U S App D C 178 cert den 73 S Ct 212 344 U S 893 97 L Ed 691

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89 Ark—Missouri Pac Ry Co v Kirten Gravel Co 44 S W 2d 674 184 Ark 1024

90. State Railway Commission

Neb—In re Resolution 146, 187 N W 2d 760 187 Neb 156

Quasi-judicial power

Neb—In re Resolution 146, 187 N W 2d 760, 187 Neb 156

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98 U S—Arkansas Oak Flooring Co v Louisiana & A Ry Co C C A La 166 F 2d 98, cert den 68 S Ct 1338, 334 U S 828, 92 L Ed 1756

2 A factor, etc—Hewitt v New York N H & H R Co 1 N Y S 2d 292, 166 Misc 186, affd 14 N Y S 2d 991 258 App Div 712 app den 15 N Y S 2d 824 258 App Div 792, affd 29 N E 2d 641 284 N Y 117

5. Complaint held sufficient

U S—Pensack & Gordon, Inc v California Motor Exp C A Cal 323 F 2d 769 cert den 84 S Ct 517 518, 375 U S 984 11 L Ed 2d 472

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17. Proof of competitive injury necessary

U S—A Lindberg & Sons, Inc v U S D C Mich 408 F Supp 1032

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24 Evidence held sufficient

(7) Other evidence

U S Birmingham Food Terminal, Inc v Southern Ry Co D C Ala 205 F Supp 640 app dism 83 S Ct 887 372 U S 524 9 L Ed 2d 965 affd 83 S Ct 887 372 U S 525, 9 L Ed 2d 965

Ga—Southern Ry Co v Georgia Public Service Commission, 127 S E 2d 12, 218 Ga 157

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28. Insts. held erroneous

(2) Other instructions

U S—U S v General Motors Corp C A Del 226 F 2d 745

29 U S—Northwestern Oil Co v Socony-Vacuum Oil Co C C A Wis 138 F 2d 967 cert den 64 S Ct 790 321 U S 792, 88 L Ed 1081—Birmingham Food Terminal, Inc. v Southern Ry Co, D C Ala 205 F Supp 640, app dism 83 S Ct 887 372 U S 524 9 L Ed 2d 965 affd 83 S Ct 887, 372 U S 525 9 L Ed 2d 965

30 U S—Birmingham Food Terminal Inc v Southern Ry Co D C Ala 205 F Supp 640, app dism 83 S Ct 887 372 U S 524 9 L Ed 2d 965 affd 83 S Ct 887 372 U S 525, 9 L Ed 2d 965

31 U S—Birmingham Food Terminal Inc v Southern Ry Co D C Ala 205 F Supp 640 app dism 83 S Ct 887 372 U S 924 9 L Ed 2d 965 affd 83 S Ct 887 372 U S 925 9 L Ed 2d 965

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34 Where party who has paid only reasonable rate, etc.

(2) Other cases

D C—U S v I C C C A 198 F 2d 958 91 U S App D C 178 cert den 73 S Ct 212, 344 U S 893 97 L Ed 691

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40 Determination

U S—U S v General Motors Corp C A Del 226 F 2d 745

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67 Act construed

U S—U S v Phillips Petroleum Co D C Del, 36 F Supp 480

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60. Evidence insufficient to show violation of statute

Tenn—Southern Ry Co v Pentecost, 330 S W 2d 321 205 Tenn 716

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67 U S—U S v Boston & M R R D C Mass 157 F Supp 218—U S v Union Pac R Co, D C Iowa, 173 F Supp 397 affd 80 S Ct 737 362 U S 327 4 L Ed 2d 766

Under commodities clause of Interstate Commerce Act

U S—U S v South Buffalo Ry Co, D C N Y 69 F Supp 456, affd 68 S Ct 868, 333 U S 771 92 L Ed 1077

70 U S—U S v South Buffalo Ry Co supra, n 67

§ 391. —— Suits Against State Railroad Commission

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78 U S—New York Cent R Co v Illinois Commerce Commission, D C Ill 77 F Supp 520

Tex—Southwest Stone Co v Railroad Commission, Civ App 184 S W 2d 691 err ref

79 Tex—Southwest Stone Co v Railroad Commission, supra, n 78

80 Tex—Southwest Stone Co v Railroad Commission, supra, n 78

§ 392. Contracts in Violation of Interstate Commerce Law

Library References
Carriers ⇐35

82 U S—Rosch v United Air Lines, Inc, D C N Y 146 F Supp 266—Van-Pak, Inc v Cavalier Storage Corp App 208 A 2d 620

Ark—St Louis-San Francisco Ry Co v J W Myers Commission Co, 185 S W 2d 288 208 Ark 1032

Fla—Brandon v Lichty 182 So 897 133 Fla 520

Ky—Tobacco By-Products & Chemical Corporation v Western Dark Fired Tobacco Growers Assn, 133 S W 2d 723 280 Ky 469

Md—Shirks Motor Exp Corp v Forster Transfer & Rigging Co 133 A 2d 59 214 Md 18

N Y—Douglass v John Aquino Sons, 16 N Y S 2d 196

Wis—Hanamon v Liberty Trucking Co, 7 N W 2d 609 242 Wis 92

Agreement of indemnification

U S—Chicago & N W Ry Co v Davenport, C A Tex 205 F 2d 589 cert den 74 S Ct 320, 346 U S 930, 98 L Ed 422

Contract held not invalid

U S—Ely-Holm & Galvan Inc v Mass Transport, Inc C A N D 380 F 2d 258, cert den 88 S Ct 481 389 U S 977 19 L Ed 2d 471

Cal—Pennsylvania R Co v Midstate Horticultural Co 121 P 2d 544 21 Cal 2d 243 cert gr 63 S Ct 1174 319 U S 735 87 L Ed 1695

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84 U S—Norton v Shotmeyer supra, n 82

85 U S—Chicago, B & Q R Co v Ready Mixed Concrete Co C A Neb 487 F 2d 1263

D C—Ad Hoc Committee on Consumer Protection v U S D C 317 F Supp 370, app dism 91 S Ct 2204 403 U S 901 29 L Ed 2d 677

86 Special contracts prohibited

Ark—St Louis-San Francisco Ry Co v J W Myers Commission Co supra, n 82

Wash—Oregon-Washington R & Nav Co v C M Kopp Co 120 P 2d 845, 12 Wash 2d 146, 138 A L R 633

Intricacies of private contract not allowed to result in discrimination

U S—Empire Petroleum Co v Sinclair Pipeline Co C A Colo 282 F 2d 913

87 U S—Chicago, B & Q R Co v Ready Mixed Concrete Co C A Neb 487 F 2d 1263—Farley Terminal Co Inc v Atchison, T & S F Ry Co, C A Cal 522 F 2d 1095, cert den 96 S Ct 423, 423 U S 996, 46 L Ed 2d 370—Western Transp Co v Wilson and Co Inc C A Ill 682 F 2d 1227

Ark—St Louis-San Francisco Ry Co v J W Myers Commission Co supra, n 82

Conn—C J S. cited in Materials, Inc v DeFonce Const Corp Com Pl 332 A 2d 788, 789 31 Conn Sup 426

D C—Van-Pak, Inc v Cavalier Storage Corp, App 208 A 2d 620

N M—Murchison v Allied Van Lines, Inc 394 P 2d 596, 74 N M 446

Tenn—Ward v Gulf M & N R Co, 134 S W 2d 917 23 Tenn App 533

Vt—Montpelier & Wells River R R v Caldbeck-Cosgrove Corporation, 8 A 2d 681, 110 Vt 390

Compromise agreement

U S—Atchison, T & S F Ry Co v Bouziden, C A Okl 307 F 2d 230

88 Ill—Baltimore & O R Co v Illinois Steel Co 46 N E 2d 144 316 Ill App 516, revd on oth grds 64 S Ct 322, 320 U S 508, 88 L Ed 259

N H—Fallgren v Railway Exp Agency 100 A 2d 835, 98 N H 333

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90 U S—Northern Val Transfer, Inc v I C C D C N J 192 F Supp 600—Time-DC, Inc v Tappans, Inc 313 A 2d 234, 126 N J Super 179 affd 331 A 2d 620, 132 N J Super 5

Tenn—Minton v General Shale Products Corp., 371 S W 2d 808 52 Tenn App 60

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93 U S—Louisville & N R Co v St Regis Paper Co, D C Fla 102 F Supp 713 affd, C A, 201 F 2d 371

97 Vt—Montpelier & Wells River R R v Caldbeck-Cosgrove Corporation, supra, n 87

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2 N Y—Bush Terminal Buildings Co v Bush Terminal R Co 47 N Y S 2d 330, affd 48 N Y S 2d 454 267 App Div 991, app den 50 N Y S 2d 173, 268 App Div 779

§ 393. —— Effect on Carrier's Right to Recover Schedule Rates

Library References
Carriers ⇐34

7 US—CJS cited in Atchison T & SF Ry Co v Judson Freight Forwarding Co DC Cal 49 F Supp 789 796 affd CCA 180 F 2d 210—Akers Motor Lines, Inc v Lade Council Com Co DC Mass 203 F Supp 156

Ala—Pennsylvania R Co v Adams Mercantile Co 16 So 2d 796 245 Ala 266

Cal—CJS cited in Gardner v Rich Mfg C 158 P 2d 23 25 68 Cal App 2d 725—Hoffenmueller v National Ice & Cold Storage Co 294 P 2d 433—West v Holstrom, 67 Cal Rptr 83 261 CA 2d 89—R E Tharp, Inc v Miller Hay Co 67 Cal Rptr 854 261 CA 2d 81

Conn—Materials, Inc v DeFonce Const Corp Com Pl 332 A 2d 788 31 Conn Sup 426

D C—Pyramid Nat Van Lines v Goetze Mun Arp 65 A 2d 595, motion over 66 A 2d 693

Ga—Southern Ry Co v Porter 44 S E 2d 668 76 Ga App 1

Ill—Baxter v Atchison T & S F Ry Co 25 N E 2d 563 310 Ill App 616

Kan—Thompson v Richards, 146 P 2d 359 158 Kan 178

Me—CJS. cited in Maine Cent R Co v Fred I Merrill, Inc 174 A 2d 112 114 157 Me 484

Nev—Transport Clearings of Los Angeles v F J Purdy Iron & Metals, Inc 289 P 2d 172 71 Nev 297

N J—CJS. cited in Southern Pac Co v Wheaton Brass Works, 76 A 2d 890, 894 5 N J 594 cert den 71 S Ct 614, 341 U S 904 95 L Ed 1345

N Y—Pennsylvania R Co v Brooklyn Contractors Machinery Exchange, 61 N Y S 2d 2 7

Pa—Reading Co v Sobelman, 19 A 2d 754 144 Pa Super 270

S C—Atlantic Coast Line R Co v Wannamaker Chemical Co 57 S E 2d 311 216 S C 226

Tenn—Southern Ry Co v Mayer Myers Paper Co 232 S W 2d 20, 191 Tenn 164

Tex—National Carloading Corporation v Phoenix-El Paso Express, Civ App 178 S W 2d 133 affd 176 S W 2d 564, 142 Tex 141 cert den 64 S Ct 1156, 322 U S 747 88 L Ed 1578

Land grant deductions

U S—The Queen v Baltimore & O R Co C C A Mo 155 F 2d 767 cert den 67 S Ct 122, 329 U S 762, 91 L Ed 657 and 67 S Ct 129 329 U S 762 91 L Ed 657

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8 U S—Porto Transport, Inc v Consolidated Diesel Elec Corp D C N Y 19 F R D 256—St Louis-San Francisco Ry Co v Miller Floors, Inc D C Okl 293 F Supp 869

Ark—St Louis-S F Ry Co v Pollard, 154 S W 2d 9, 202 Ark 917

Cal—Groom v Holm, 1 Cal Rptr 410, 176 C A 2d 310

Ill—Chicago B & Q R Co v California Wine Co, 40 N E 2d 624 313 Ill App 498

Mass—Railway Express Agency v Michelson, 42 N E 2d 805 311 Mass 704

Nev—Transport Clearings of Los Angeles v F J Purdy Iron & Metals, Inc 289 P 2d 172, 71 Nev 297

N Y—W R Grace & Co v Railway Exp Agency, Inc 202 N Y S 2d 281 8 N Y 2d 103, 168 N E 2d 362, cert den 81 S Ct 69 364 U S 830, 5 L Ed 2d 57

N C—Atlantic Coast Line R Co v West Paving Co 44 S E 2d 523, 228 N C 94

S C—Atlantic Coast Line R Co v Wannamaker Chemical Co supra, n 7

10 U S—Consolidated Rail Corp v Standard Milling Co D C N Y 508 F Supp 277—C.J.S. cited in In re Penn-Dixie Steel Corp Bkrtcy N Y, 6 B R 817, 822, affd, D C 10 B R 878—C.J.S. cited in In re Roll Form Products, Inc 662 F 2d 150, 154

Del—C.J.S. cited in Artic Roofings v Travers, 32 A 2d 559, 562, 3 Terry 293

Neb—C.J.S. cited in Union Transfer Co v Renstrom, 37 N W 2d 383 385, 151 Neb 326

Or—In re Public Utilities Comm'r of Or 2 P 2d 5 201 Or

S C—Atlantic Coast Line R Co v Wannamaker Chemical Co supra, n 7

11 U S—I Iowa & S Ry Co v Arkansas Oak Flooring Co D C La 69 F Supp 772 rev C C A 166 F 2d 98 cert den 68 S Ct 1338 335 U S 828 92 L Ed 1756—Rowe Furniture Co Inc D C N Y 46 F Supp 264

Conn—Materials, Inc v DeFonce Const Corp Com Pl 332 A 2d 788 31 Conn Sup 426

Del—C J S cited in Artic Roofings v Travers, supra, n 0

Kan—Thompson v Richards supra n 7

Ky—Tobacco By-Products & Chemical Corporation v Western Dark Fired Tobacco Growers Ass n 133 S W 2d 723 280 Ky 469—Chesapeake & O Ry Co Gorman 188 S W 2d 310, 300 Ky 230

Me—Maine Cent R Co v Fred I Merrill Inc 174 A 2d 112 157 Me 484

N C—Atlantic Coast Line R Co v West Paving Co supra n 8

In order to qualify as a "freight forwarder" it is not necessary that all functions authorized by the Interstate Commerce Act be performed, so long as a party proffers all the services described [15]

11.5 N C—Centennial Ins Co v Haley Transfer & Storage, Inc 196 S E 2d 822, 18 N C App 152

12 U S—Fort Worth & D C Ry Co v F Burkart Mfg Co supra, n 7—West Coast Products Corp v Southern Pac Co C A Cal 226 F 2d 830—U S v Garner D C N C, 134 F Supp 16—Atchison, T & S F Ry Co v Bowsden, C A Okl 307 F 2d 230

Cal—Pennsylvania R Co v Midstate Horticultural Co 131 P 2d 544 21 Cal 2d 243 cert gr 63 S Ct 1174 319 U S 735 87 L Ed 1695

Ill—Baltimore & O R Co v Illinois Steel Co supra, n 7

Mo—Long Island R Co v Midland Valley Lumber Co, 164 S W 2d 930, 237 Mo App 147

N C—Atlantic Coast Line R Co v West Paving Co supra, n 8

Pa—Pacific Elec Ry Co v C S Wetherill, Inc 5 D & C 2d 753 4 Bucks 21

S C—Atlantic Coast Line R Co v Wannamaker Chemical Co supra, n 7

Tex—National Carloading Corporation v Phoenix-El Paso Express, supra, n 7

Vt—Montpelier & Wells River R R v Caldbeck-Cosgrove Corporation, 8 A 2d 681 110 Vt 390

Wash—Union Pac R Co v Eyres Transfer & Warehouse Co, 121 P 2d 340 12 Wash 2d 282

Wis—Hanaman v Liberty Trucking Co 7 N W 2d 609 242 Wis 92

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13 U S—Kurn v Pittsburgh Plate Glass Co supra, n 8—Mid State Horticultural Co v Pennsylvania R Co Cal, 64 S Ct 128, 320 U S 356, 88 L Ed 96, mand conf to 146 P 2d 230, 23 Cal 2d 877

Tenn—Henwood v McCollum & Robinson 167 S W 2d 981 179 Tenn 531

Vt—Montpelier & Wells River R R v Caldbeck-Cosgrove Corporation, supra, n 12

14 U S—Porto Transport, Inc v Consolidated Diesel Elec Corp D C N Y 19 F R D 256

Ark—Pallican Co v Anderson, 172 S W 2d 431, 205 Ark 1056

Ind—Pennsylvania R Co v F E Mathias Lumber Co 47 N E 2d 158, 113 Ind App 133

Ky—Tobacco By-Products & Chemical Corporation v Western Dark Fired Tobacco Growers Ass n, supra, n 11

Miss—Illinois Cent R Co v N T Wax Grocery Co 45 So 2d 266, 208 Miss 675

Pa—Pacific Elec Ry Co v C S Wetherill, Inc, 5 D & C 2d 753 4 Bucks 21

15 U S—Bemiser Bros Pipe & Machinery Co Denver & R G W R Co, C A Colo, 193 F 441

Ga—Seaboard Coast Line R Co v Hart, 171 S E 383 120 Ga App 492

Kan—Thompson v Richards, 146 P 2d 359, 158 Kan 176—C.J.S. cited in Graves Truck Line, Inc v Plains Dressed Beef Inc 462 P 2d 130, 133, 3 Kan 275

N Y—Georges Transp Co v Emanuel M Katz, Inc 8 N Y S 2d 933—Sewall v Weeks Moving & Storage Corp 172 N Y S 2d 773 9 Misc 2d 338

N C—Atlantic Coast Line R Co v West Paving Co supra, n 8

Pa—Pennsylvania R Co v Pittsburgh Wool Co, 9 Pittsb Leg J 458—New York Cent R R Co v Solomon 74 Pa Dist & Co 398

Rule inapplicable where originating carrier is regulated

N Y—Ward Trucking Corp v Meldon Steel Co 25 N Y S 2d 352, 44 Misc 2d 570

16 U S—Atchison, T & S F Ry Co v Judson Freight Forwarding Co, D C Cal 49 F Supp 789 affd C C A 180 F 2d 210

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19. Under interstate commerce commission rule

Vt—Montpelier & Wells River R R v Caldbeck-Cosgrove Corporation, supra, n 12

24 U S—Petribone v Richardson, C C A Ind 127 F 2d 969

27 Ill—Baxter v Atchison, T & S F Ry Co supra n 7

§ 394. —— Effect on Shipper's Right to Recover for Loss or Injury

28 Cal—C.J.S. cited in Gardner v Rich Mfg Co 158 P 2d 23 29 68 Cal App 2d 725

N Y—C.J.S. cited in Wald-Green Food Corp v Acme Fast Freight, 103 N Y S 2d 768, 200 Misc 679, app den 109 N Y S 2d 191, 279 App Div 706, affd 110 N Y S 2d 514, 200 Misc 687

Tex—Mexican Light & Power Co v Texas-Mexican Ry Co Civ App 190 S W 2d 838, rev'd on other grds 193 S W 2d 964 145 Tex 50, affd 67 S Ct 1440, 331 U S 731, 91 L Ed 1779

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33 Del—C.J.S. cited in Artic Roofings v Travers, supra, n 10

34 U S—Atlantic Coast Line Ry Co v Bristol Steel & Iron Works, supra n 8—Pettigrew v Richardson, supra, n 24

Colo—Denver & R G W R Co v Marty 353 P 2d 1095 143 Colo 496, 88 A L R 2d 1370

S C—Atlantic Coast Line R Co v Park, 127 S E 2d 622, 241 S C 207

§ 396. Contracts in Violation of State Legislation

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37 U S—Steele v General Mills, Tex, 67 S Ct 439, 329 U S 431, 91 L Ed 402, reh den 67 S Ct 628, 329 U S 834 91 L Ed 700

Cal—Allure v Owl Materials Co 341 P 2d 854, 172 C A 2d Supp 808—Kentner Truck Line, Inc v Maier Brewing Co 6 Cal Rptr 572, 183 C A 2d 89

Iowa—Heuer Truck Lines v Brownlee, 31 N W 2d 375, 239 Iowa 257

38 Tex—Central Texas Iron Works, Inc v Red Arrow Freight Lines, Inc, Civ App, 440 S W 2d 674, err dism

39 Tex—Gulf C & S F Ry Co v American Sugar Refining Co Civ App 130 S W 2d 1030 err ref—Central Texas Iron Works, Inc v Red Arrow Freight Lines, Inc Civ App 440 S W 2d 674, err dism

41 Cal—Gardner v Rich Mfg Co 158 P 2d 23 68 Cal App 2d 725

42 Tex—Texas & N O R Co v East Texas Gravel Co Civ App 175 S W 2d 435 err dism

46 Iowa—Green Bay Lumber Co v Chicago, B & Q R Co 284 N W 369

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47 Wash—Jones v Northwest Airlines, 157 P 2d 728, 22 Wash 2d 863

Violation not shown

Ark—Arkansas Exp v Columbia Motor Transport Co 205 S W 2d 716, 212 Ark 1

It has been held in at least one jurisdiction that the duty to revise improper tariffs is a duty of the state regulatory body and not of the carrier[49.1]

49.1 Tenn—Gulf M & O R Co v Railroad and Public Utilities Commission, 271 S W 2d 23 38 Tenn App 212

50. Conference agreement approved by Public Service Commission

N Y—State v McBride Transp Inc 288 N Y S 2d 170, 56 Misc 2d 90

Contracts by United States The United States is free to contract for rates for intra-state transportation higher[53.5] or lower[53.10] than those set by state regulatory bodies

53.5. Additional services or privileges

U S—Alabama Highway Exp Inc v U S Ct Cl 175 F 2d 143, 146 Ct Cl 594

Rates continuing upon expiration of contract

U S—Alabama Highway Exp Inc v U S Ct Cl 175 F Supp 143, 146 Ct Cl 594

53.10 U S—Public Utilities Commission of State of Cal v U S, Cal 78 S Ct 446, 355 U S 534 2 L Ed 2d 470, reh den 78 S Ct 713, 356 U S 925 2 L Ed 2d 769

U S—Alabama Highway Exp Inc v U S Ct Cl, 175 F Supp 143, 146 Ct Cl 594

§ 397. —— Effect on Carrier's Right to Recover Scheduled Rates

56 U S—U S v Texas & N O R Co, C C A Tex 148 F 2d 896, cert den 66 S Ct 44 326 U S 735 90 L Ed 438—W S Dickey Clay Mfg Co v Corder C A Tex, 310 F 2d 764, cert dism 83 S Ct 1294, 373 U S 906, 10 L Ed 2d 197

Ala—Louisville & N R Co v Black Creek Coal & Coke Co 27 So 2d 473, 248 Ala 280

Cal—Butler v Bell Oil & Refining Co 161 P 2d 559, 70 Cal App 2d 728—Kentner Truck Line, Inc v Mater Dr...g Co 6 Cal Rptr 572, 183 C A 2d 89

Iowa—Heuer Truck Lines v Brownlee, supra, n 37

Mass—C.J.S. cited in Paretti v Alcandro, 58 N E 2d 155 159, 317 Mass 382—Rugg v Davis, 69 N E 2d 579, 320 Mass 388 Paretti v Alcandro, 58 N E 2d 155 317 Mass 382—Mt Tom Motor Lines v McKesson & Robbins, 89 N E 2d 3, 325 Mass 45

Minn—Johnston v L B Hartz Stores, 277 N W 414, 202 Minn 132 Hanley v Little Falls Mill & Mercantile Co, 19 N W 2d 161, 220 Minn 165

N C—Atlantic Coast Line R Co v West Paving Co supra, n 8

Pa—Yarnall v Railway Express Agency 32 Del Co 535

Tenn—Gulf M & N R Co v Hunt Bros Furniture Co 117 S W 2d 12, 173 Tenn 327

Tex—Gulf C & S F Ry Co v American Sugar Refining Co supra, n 39—Texas & N O R Co v East Texas Gravel Co supra, n 42—Humble Oil & Refining Co v Texas & P Ry Co Civ App 275 S W 2d 824 rev'd on oth grds 280 S W 2d 547 155 Tex 483

Utah—Denver & R G W R Co v Public Service Commission 259 P 2d 873 123 Utah 362

Carrier held as common carrier but entitled as contract carrier not entitled to recover difference between contract rate and common carrier tariff

Mass—Superline Transp Co v My Bread Baking Co 214 N E 2d 885 350 Mass 364

57 Ill—Mandel Bros Inc v Chicago Tunnel Terminal Co 117 N E 2d 774 2 Ill 2d 205

58 U S—Steele v General Mills, Tex 67 S Ct 439 329 U S 433 91 L Ed 402, reh den 67 S Ct 626 329 U S 834 91 L Ed 700

Iowa—Heuer Truck Lines v Brownlee, supra, n 37

Tex—Texas & N O R Co v Yates, Com App 161 S W 2d 1050, 139 Tex 89—Humble Oil & Refining Co v Texas & P Ry Co supra, n 56

The right of recovery may be defeated because of failure of a commission to file its rates in accordance with statutory regulations[59.1]

59.1 U S—Mogis v Lyman-Richey Sand & Gravel Corp C A Neb 189 F 2d 103 reh den 190 F 2d 202, cert den 72 S Ct 168 342 U S. 877, 96 L Ed 659

§ 398. In Absence of Special Contract

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60 La—Great Am Ins Co v Gulf States Truck Lines, App 37 So 2d 379

N Y—Piermont v Pennsylvania R Co 127 N Y S 2d 216, mod on oth grds 131 N Y S 2d 652, 284 App Div 354 Affd 127 N E 2d 80 308 N Y 920, cert den 76 S Ct 75, 350 U S 838, 100 L Ed 747—Silon Service, Inc v Pacific & Atlantic Shippers, Inc 291 N Y S 2d 79 30 A D 2d 190, affd 246 N E 2d 509 24 N Y 2d 15 298 N Y S 2d 700

S C—C.J.S. cited in Lucas v Garrett 41 S E 2d 212, 214 209 S C 521 169 A L R 660

62 U S—National Garment Co v New York, C & St L R Co C A Mo, 173 F 2d 32

63 U S—Aetna Ins Co v U S, 159 F Supp 831, 142 Ct Cl 771 reh den 162 F Supp 442

Ohio—Employers Fire Ins Co v United Parcel Service of Cincinnati, 99 N E 2d 800

Insurer held not subrogated

N Y—Lee v Barrett, 144 N Y S 941 82 Misc 475

§ 399. Under Special Contract

66 La—Alcus v Security Van Lines, Inc App 196 So 2d 278

67 Ind—Pennsylvania R Co v Kent, 202 N E 2d 893 246 Ind 101

Miss—Staple Cotton Co-op Ass'n v Yazoo & M V R Co, 197 So 828 189 Miss 387

Wash—Home Ins Co of New York v Northern Pac Ry Co 140 P 2d 507 18 Wash 2d 798 147 A L R 849

68 Miss.—Staple Cotton Co-op Ass'n v Yazoo & M V R Co supra, n 67

N H—Richard D Brew & Co v Auclair Transp, Inc 211 A 2d 897 106 N H 370, 27 A L R 3d 978

Pa—Townotor Co v Frank Cross Trucking Co, 211 A 2d 38, 205 Pa Super 448

Wash—C.J.S. cited in Home Ins. Co of New York v Northern Pac Ry Co., 140 P 2d 507, 510, 18 Wash 2d 798, 147 A L R 849

Invalid as discrimination

(1) Clause in bill of lading giving carrier benefit of any insurance on shipment was held invalid under § 2 of the Interstate Commerce Act 49 U S C A § 2, as giving carrier greater compensation than collected for regular service—Chase Fire Ins Co v Davis, C C A N Y 56 F 2d 361 76 A L R 1259 cert den 52 S Ct 36, 284 U S 658 76 L Ed 558—National Garment Co v New York C & St L R Co C A Mo 173 F 2d 32

(2) Particular kind of discrimination see supra §§ 364-375

Freight forwarder held not entitled to benefit provided for in bill of lading

N Y—Silon Service, Inc Pacific & Atlantic Shippers, Inc 291 N Y S 2d 79 30 A D 2d 190 affd 246 N E 2d 509 24 N Y 2d 15 298 N Y S 2d 700

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77 Loans or conditional payments, etc—Arabian Am Oil Co v Kirby & Kirby 90 A 2d 410, 171 Pa Super 23

§ 400. Who are Connecting Carriers

Library References

Carriers ⇐169

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79 U S—C.J.S. cited in Waterson v New York Central Railroad Company C A Mich 235 F 2d 114 115

N J—C.J.S. quoted at length in Herman v Railway Exp Agency 85 A 2d 284 287 17 N J Super 10

Companies held not connecting carriers

U S—Southern Ry Co v Louisville & N R Co, D C Ky 185 F Supp 645 affd C A 289 F 2d 934—Rhoades, Inc v United Air Lines, Inc C A Pa 340 F 2d 481

Mich—Morgenthaler Linotype Co v Transamerican Freight Lines, Inc 178 N W 2d 76 22 Mich App 688

86 Company held connecting carrier

U S—Little Rock Packing Co v Chicago, B & Q R Co, D C Mo 116 F Supp 213

§ 401. Rights, Duties and Liabilities of Initial Carrier

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Matters relating to charges as affected by transportation over several lines are dealt with supra § 315

89 U S—Ross & Co v U S D C Mo 213 F Supp 791

Ill—Wilson & Co v Werner Transp Co 69 N E 2d 713 330 Ill App 25

N J—Semi Metals, Inc v Pantel Bros 343 A 2d 757 135 N J Super 464 affd 360 A 2d 385 70 N J 437

Designation of route

U S—Johnson Mach Works, Inc v Chicago, B & Q R Co C A Iowa, 297 F 2d 793

91 U S—Chicago & N W R Co v Union Fidelity Co, C A Neb 514 F 2d 30, petition den 527 F 2d 592

Ohio—Deer Park Baking Co v Cleveland & Chicago Motor Exp Co, App 68 N E 2d 824

Initial carrier liable even though goods not returned to shipper

U S—Sunset Motor Lines, Inc. v Lu-Tex Packing Co C A Tex 256 F 2d 495

§ 402. —— Who Is Initial Carrier

Library References

Carriers ⇐169 et seq., 180, 219.

93 U S—Golger Trading Co of N Y v Chicago & N W Ry Co C A Ill 184 F 2d 876—Davis v St Louis Southwestern Ry Co D C La, 106 F Supp 547 affd, C A 204 F 2d 251 C.J.S. cited in Waterson v New York Cent R Co C A Mich, 235 F 2d 114 115—U S v Mississippi Val Barge Line Co C A Mo 285 F 2d 381

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Freight forwarder

N Y—Wald-Green Food Corp v Acme Fast Freight 103 N Y S 2d 768 200 Misc 679 app den 109 N Y S 2d 191 279 App Div 766 affd 110 N Y S 2d 514 200 Misc 687

94 U S—Rss & Co v U S D C Mo 213 F Supp 791

95 Tex—Texas & P Ry Co v Empacadora De Ciudad Juarez, S A C v App 309 S W 2d 926, err ref no rev err

Switching services

(4) Other matters

U S—U S v Mississippi Val Barge Line Co C A Mo 285 F 2d 381

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6 U S—Reader v Thompson, La 70 S Ct 499 339 U S 113 94 L Ed 698 reh den 70 S Ct 663 339 U S 936, 94 L Ed 1354

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7 Tex—Texas Mexican Ry Co v Mexican Light & Power Co 193 S W 2d 964 45 Tex 50 affd 67 S Ct 1440 331 U S 731 91 L Ed 1779

11 U S—Chicago, M St P & P R Co v Acme Fast Freight, supra, n 9

§ 404. —— In Absence of Statute or Special Contract for Through Transportation

13 U S—Johnson Motor Transport v U S 149 F Supp 175 137 Ct Cl 892—Continental Electronics Mfg Co v Navajo Freight Lines, Inc C A Tex 447 F 2d 1174

La—Samplex Mfg Corp v Cook Truck Lines, Inc App 88 So 2d 49

Mo—Scott County Mill, Co v Thompson, App 255 S W 2d 121

Neb—Elgin Mills, Inc v Chicago & N W Ry Co 128 N W 2d 384, 177 Neb 110

N J—Fluoro Elec Corp v Smith Transport, Limited, 156 A 2d 153, 58 N J Super 287 affd 160 A 2d 627 32 N J 277

N Y—Akron-Chicago Transp Co v Specialty Foods Corp 260 N Y S 2d 164 46 Misc 2d 554 motion den 265 N Y S 2d 829 48 Misc 2d 865

N C—Precythe v Atlantic Coast Line R Co 52 S E 2d 360, 230 N C 195

13. Alteration of liability

Tenn—Pulaski Highway Exp, Inc v Terminal Transport Co, Inc, App 493 S W 2d 103

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15 U S—American Alliance Ins Co v Brady Transfer & Storage Co, C C A Iowa, 101 F 2d 144—U S v Mississippi Val Barge Line Co C A Mo 285 F 2d 381

Mich—Harry Becker & Co v Wabash R Co, 55 N W 2d 776, 335 Mich 159

N Y—Outdoor Clothing Co v Universal Carloading & Distributing Co 3 N Y S 2d 586—Yeckes-Eschenbaum, Inc v McCarthy, 49 N E 2d 517, 290 N Y 437, motion den 50 N E 2d 1022, 291 N Y 642

Pa—Alwine v Pennsylvania R Co 15 A 2d 507, 141 Pa Super 558

Tex—Strickland Transp Co v Brown Exp, Civ App 321 S W 2d 357—A J Tebbe & Sons Co v Brown Express, 341 S W 2d 642, 161 Tex 456

Shipper required to rely on common law where inapplicability of statute shown

Tex—A J Tebbe & Sons Co v Brown Express, 341 S W 2d 642, 161 Tex 456

§ 405. —— Under Special Contract for Through Transportation

18 U S—U S v Mississippi Val Barge Line Co C A Mo 285 F 2d 381

Mo—Walton v A B C Fireproof Warehouse Co 151 S W 2d 494 235 Mo App 939

Tex—Thompson v W E Collins & Son Civ App 263 S W 2d 186—A J Tebbe & Sons Co v Brown Express, 341 S W 2d 642, 161 Tex 456

No liability for personal injuries

Ala—Motor Terminal & Transportation Co v Simmons, 180 So 597 28 Ala App 190

Common carriers, but not private carriers

Colo—McKay v Public Utilities Commission, 91 P 2d 965 104 Colo 402

Freight forwarder

N Y—Wald-Green Food Corp v Acme Fast Freight, 103 N Y S 2d 768, 200 Misc 679 app den 109 N Y S 2d 191 279 App Div 766, affd 110 N Y S 2d 514 200 Misc 687

Tenn—Cam-Sloan Co v Louisville & N R Co 424 S W 2d 787, 221 Tenn 70

"Through route"

(1) Defined

U S—Thompson v U S Mo 72 S Ct 978 343 U S 549 96 L Ed 1134—St Louis Southwestern Ry Co v U S Ky 38 S Ct 49 245 U S 136, 62 L Ed 199—Chicago, M St P & P R Co v U S, Wis 81 S Ct 1630, 366 U S 745 6 L Ed 2d 772—Seaboard Air Line R Co v U S 131 F Supp 129 affd 75 S Ct 579, 349 U S 902, 99 L Ed 1239 reh den 75 S Ct 781 349 U S 941, 99 L Ed 1269

(2) Test of existence

U S—Thompson v U S Mo 72 S Ct 978 343 U S 549 96 L Ed 2d 1134

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19 Pa—Schulte, Inc, v Daley's Blue Line Transfer Co, 40 Luz Leg Reg 415

25 Mo—Walton v A B C Fireproof Warehouse Co supra, n 18

"Through billing"

U S—Texas & P Ry Co v St Louis Southwestern Ry Co C C A Mo, 158 F 2d 251 254 cert den 67 S Ct 866, 330 U S 825 91 L Ed 1275

27 Tex—Thompson v Gibbs, Civ App, 238 S W 2d 213 rem'd 240 S W 2d 287, 150 Tex 315

28 Me—Martin v Canadian Pac Ry Co 1 A 2d 224, 136 Me 10

Through contract not shown

U S—A E West Petroleum Co v Atchison T & S F Ry Co, C A Mo 212 F 2d 812

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32 Ga—Thurston Motor Lines, Inc v Corry, 180 S E 2d 285 123 Ga App 231

40 U S—U S v Mississippi Val Barge Line Co, C A Mo, 285 F 2d 381

§ 406. —— Under Special Statutory Provisions

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64 U S—Scott Truck Line, Inc v Chicago, R I & P R Co, D C Ill 312 F Supp 511—World Wide Meats, Inc v Chicago & N W Transp Co D C Iowa, 383 F Supp 807

Ill—Wilson & Co v Werner Transp Co 69 N E 2d 713, 330 Ill App 25

Minn—Schaufler Inc v Minneapolis, N & S Ry Co 94 N W 2d 551, 254 Minn 248

N Y—General Cigar Co v Reading Co 38 N Y S 2d 636, 265 App Div 322—Miles v Lehigh Valley R Co 293 N Y S 2d 426, 57 Misc 2d 518

Ohio—Deer Park Baking Co v Cleveland & Chicago Motor Exp Co App, 68 N E 2d 824—Kirchner v New York Central System, 94 N E 2d 283 87 Ohio App 165—Thomas Foods, Inc v Pennsylvania R Co 168 N E 2d 612, 112 Ohio App 76

Or—Keith Brown Lumber Yard v Silver Wheel Freightlines, Inc 582 P 2d 45, 35 Or App 631

Pa—Schulte, Inc, v Daley's Blue Line Transfer Co supra, n 19

Tenn—Tennessee Packers, Inc v Tennessee Cent R Co 319 S W 2d 502, 45 Tenn App 57

Tex—Texas & N O R Co v Dingfelder & Bale Com App 133 S W 2d 967—Texas Mexican R Co v Mexican Light & Power Co supra, 7—Strickland Transp Co v Johnston, Civ App 238 S W 2d 717—Strickland Transp Co v Brown Exp, Civ App 321 S W 2d 357

Terminal express carrier

(2) Other matters

N Y—Storm v Pennsylvania R Co 220 N Y S 2d 30 Misc 2d 757

Motor Carrier Act

U S—Textron, Inc v Lowell Trucking Corp D C N Y, 74 F Supp 322

Provisions construed

U S—Long Prairie Packing Co v Midwest Emc Freight System Inc D C Mass, 429 F Supp 20

Tex—A J Tebbe & Sons Co v Brown Express, 3 S W 2d 642, 161 Tex 456

Initiating carrier subjected to rights of shipp

U S—Chicago & N W Ry Co v Union Packing C D C Neb 373 F Supp 734, affd C A 514 F 30, petition den 527 F 2d 592

Freight forwarder

U S—Season-All Industries, Inc v Merchant Shipper D C Pa 451 F Supp 727

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65 U S—Dees v American Cyanamid Co D C Miss 296 F Supp 615

67 U S—Arnold J Rodin Inc v Atchison, T & S F Ry Co C A Tex 477 F 2d 682

Other statements of purpose

U S—Season-All Industries, Inc v Merchant Shipper D C Pa 451 F Supp 727

68 U S—Strachman v Palmer C A Mass 177 F 2d 427 12 A L R 2d 687—Russ & Co v U S D C Mo, 213 F Supp 791—Dees v American Cyanamid Co, D C Miss, 296 F Supp 615—Scott Truck Line, Inc v Chicago, R I & P R Co D C Ill, 312 F Supp 511—Rocky Ford Moving Vans, Inc v U S, C A Ark 501 F 2d 1369

Ill—Mirski v Chesapeake & O Ry Co, 194 N E 2d 361 44 Ill App 2d 48, rev'd on oth grds 20 N E 2d 22, 31 Ill 2d 423

Mo—Illinois Cent R Co v A B Frankman & Co 16 S W 2d 440, 236 Mo App 946

Purpose of Motor Carriers Act

Ala—Bankers & Shippers Ins Co of N Y v Blackwell 51 So 2d 498, 255 Ala 360

Freight Forwarder Act of 1942

U S—Lifschultz v U S D C N Y 144 F Supp 606

N Y—Wald-Green Food Corp v Acme Fast Freight, 103 N Y S 2d 768, 200 Misc 679, app den 109 N Y S 2d 191, 279 App Div 766, affd 110 N Y S 2d 514, 200 Misc 687

Tenn—Cam-Sloan Co v Louisville & N R Co 424 S W 2d 787 221 Tenn 70

Tex—Thompson v American Abrasive Metals Co, Civ App, 253 S W 2d 83 err ref Cert den 74 S Ct 28 346 U S 816, 98 L Ed 343

Cummins amendment

Mich—Harry Becker & Co v Wabash R Co supra, n 15

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70 U S—Reader v Thompson, La 70 S Ct 499, 339 U S 113, 94 L Ed 698 reh den 70 S Ct 663 339 U S 936, 94 L Ed 2d 1354—Chicago & N W Ry Co v Union Packing Co, D C Neb, 373 F Supp 734 affd C A, 514 F 2d 30 petition den 527 F 2d 592

72 Tex—Port Terminal R Ass'n v Rohm & Haas Co, Civ App 371 S W 2d 403

73 N Y—Wald-Green Food Corp v Acme Fast Freight, supra, n 68

Tex—Southwestern Motor Transport Co v Valley Weathermakers Inc 427 S W 2d 597 37 A L R 3d 1114

74 N Y—Outdoor Clothing Co v Universal Carloading & Distributing Co supra, n 15

Motor Carrier Act

(1) Under Motor Carrier Act amending the Carmack act, consignor's action is maintainable against initial motor carrier

La—Surgi v McDonough Motor Express, App 187 So 693

Md—Great Coastal Exp to use of Great Am Ins Co v Fidelity & Guaranty Fire Corp 46 A 2d 93 186 Md 112

(2) Held not retrospective

N Y—Outdoor Clothing Co v Universal Carloading & Distributing Co 3 N Y S 2d 586

(3) Subrogation rights extend to "carrier" not "forwarder

Mich—American Transp Co v Insurance Co of North America, 1 N W 2d 521, 300 Mich 230, 141 A L R 913

(4) Other matters

U S—Rus & Co v U S D C Mo 213 F Supp 791

Tex—Strickland Transp Co v Brown Exp Civ App 321 S W 2d 357

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80 U S—Boh Bros Const Co v Perry Heavy Haulers, D C La 72 F Supp 102, affd C C A 166 F 2d 719

Mo—Schneider v Campbell, 66 Exp Inc App 324 S W 2d 363

82 U S—Reader v Thompson, C A La 176 F 2d 13 revd on oth grds 70 S Ct 499, 339 U S 113 94 L Ed 698, reh den 70 S Ct 663, 339 U S 936, 94 L Ed 1354

83 Tex—Southwestern Motor Transport Co v Valley Weathermakers, Inc 427 S W 2d 597 37 A L R 3d 1114

84 U S—Strachman v Palmer C A Mass 177 F 2d 427, 12 A L R 2d 687—L E Whitlock Truck Service, Inc v Regal Drilling Co C A Colo 333 F 2d 488

Unauthorized diversion

U S—Strickland Transp Co v Associated Distributing Co C A Tex 198 F 2d 546

86 U S—U S v Gulf M & O R Co D C La 259 F Supp 704 affd, C A 391 F 2d 545—Mollers Nursery Inc v Union Pac R Co D C Or 330 F Sup 863

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92 U S—Johnson Motor Transport v U S 149 F Supp 175 137 Ct Cl 892

95 U S—Rus & Co v U S D C Mo, 213 F Supp 791

Act of God

(2) Other cases—Little Rock Packing Co v Chicago, B & Q R Co, D C Mo 116 F Supp 213

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96 U S—Fulton v Chicago, Rock Island & P R Co C A Mo, 481 F 2d 326, cert den 94 S Ct 540, two cases, 414 U S 1040, 38 L Ed 2d 330

R I—Bird & Son v Palmer 33 A 2d 415, 69 R I 388

Tex—Texas-Arizona Motor Freight, Inc v Bennett, Civ App, 324 S W 2d 32

97 N C—Centennial Ins Co v Haley Transfer & Storage, Inc, 196 S E 2d 822, 18 N C App 152

R I—Bird & Son v Palmer, supra, n 96

98 N J—Fluoro Elec Corp v Smith Transport, Limited, 156 A 2d 153 58 N J Super 287 affd 160 A 2d 627, 32 N J 277

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Ky—Bonifield Bros Truck Lines, Inc v Edwards, 450 S W 2d 240

Goods obtained from freight forwarder

Tenn—Cam-Sloan Co v Louisville & N R Co 424 S W 2d 787 221 Tenn 70

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23 U S—Inland Waterways Shippers Assn, Inc v Mississippi Val Barge Line Co, D C Mo 194 F Supp 818, app dism C A 289 F 2d 374 cert den 82 S Ct 123 368 U S 876, 7 L Ed 2d 77

25 U S—Golger Trading Co of N Y v Chicago & N W Ry Co C A Ill 184 F 2d 876

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29 U S—Kenny s Auto Parts, Inc v Baker D C Pa 478 F Supp 461

31 Necessity of through bill of lading

U S—Mexican Light & Power Co v Pennsylvania R Co D C Pa 33 F Supp 483—U S v Seaboard Coast Line R R D C Va 384 F Supp 1103 app dism C A 517 F 2d 881

Tex—Mexican Light & Power Co v Texas-Mexican Ry Co Civ App 190 S W 2d 838 revd on oth grds 193 S W 2d 964 145 Tex 50 affd 67 S Ct 1440 331 U S 731 91 L Ed 1779

34 U S—Strachman v Palmer D C Mass 82 F Supp 161 vac in part on oth grds C A 177 F 2d 427 12 A L R 2d 687—Cordakes v Smith, D C Mass 281 F Supp 1014

35 N C—Leary v Aero Mayflower Transit Co Inc 207 S E 2d 781 22 N C App 702

36 On inspection made shortly after refusal of delivery

U S—Texas Instruments Inc v Branch Motor Exp Co C A Mass 432 F 2d 564

37 U S—Mexican Light & Power Co v Texas Mexican Ry Co Tex 67 S Ct 1440, 331 U S 731, 91 L Ed 1779

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40 U S—Mexican Light & Power Co v Texas Mexican Ry Co supra, n 37

41 U S Mexican Light & Power Co v Texas Mexican Ry Co, supra, n 37

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61 N Y—C J S cited in Wald-Green Food Corp v Acme Fast Freight, 103 N Y S 2d 768, 773 200 Misc 679 app den 109 N Y S 2d 191 279 App Div 766, affd 110 N Y S 2d 514 200 Misc 687

65 N Y—Wald-Green Food Corp v Acme Fast Freight, 103 N Y S 2d 768, 200 Misc 679 app den 109 N Y S 2d 191 279 App Div 766, affd 110 N Y S 2d 514 200 Misc. 687

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69 Tex—Strickland Transp Co v Wagner Civ App 374 S W 2d 251, err ref no rev err

73 Kan—Young v Santa Fe Trail Transp Co 298 P 2d 235 179 Kan 678

§ 407. —— Contracts Limiting Liability to Carrier's Own Line

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7 U S—General Am Transp Corp v Indiana Harbor Belt R Co C A Ill, 191 F 2d 865, cert den 72 S Ct 636, 343 U S 905, 96 L Ed 1324

9 U S Mexican Light & Power Co v Texas Mexican Ry Co Tex, 67 S Ct 1440, 331 U S 731, 91 L Ed. 1779—American Synthetic Rubber Corp v Louisville & N R Co, D C Ky, 291 F Supp 723 —S Pac All Industrials, Inc v Merchant Shippers, D C Pa 451 F Supp 727

Miss—New Orleans & N E R Co v Elias, 39 So 2d 274 205 Miss 658

Ohio—Thomas Foods, Inc v. Pennsylvania R Co 168 N E 2d 612, 112 Ohio App 76

Notation on bill of lading

U S—Federated Dept Stores, Inc v Brinke, C A Fla, 450 F 2d 1223

Written claim required

U S—Penn-North River Associates v Chesapeake & O Ry Co C A N J 562 F 2d 269

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10 U S—Strachman v Palmer D C Mass, 82 F Supp 161 vac in part on oth grds C A 177 F 2d 427 12 A L R 2d 687

16 N Y—Berger v 34th St Garage, Inc 219 N Y S 2d 74 28 Misc 2d 298, affd 158 N Y S 2d 754 2 A D 2d 972, affd 148 N E 2d 883 3 N Y 2d 701 171 N Y S 2d 824

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35. Necessity of filing claims within time limit

N Y—Wood & Selick v Wabash R Co 104 N Y S 2d 488, affd 107 N Y S 2d 1001 279 App Div 657

39. Inspection pending

U S—Federated Dept Stores, Inc v Brinke C A Fla 450 F 2d 1223

§ 408. —— Right of Carrier to Make Through Contract of Carriage and Also to Limit Liability to Its Own Line

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50 N Y Berger v 34th St Garage, Inc 171 N Y S 2d 824 3 N Y 2d 701 148 N E 2d 883

§ 409. —— Duty to Notify Connecting Carrier of Arrival of Goods

55 La—V Rivera S En C v Texas & N O R Co, 31 So 2d 180, 211 La 969 172 A L R 791 app dism and cert den 68 S Ct 71 332 U S 750, 92 L Ed 337

§ 410. —— Duty to Deliver Goods to Connecting Carrier

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62 Tex—Smith v Brown Exp, Civ App 343 S W 2d 550, err ref no rev err

Interlining; interchanging Interlining is the practice whereby a carrier, whose certified routes do not reach the shipment destination, transfers the shipment to another carrier for delivery.[72.5] One form involves a trip-lease, that is, the shipment trailer is taken by the transferee but no trailer is given in exchange, the trailer taken being leased by the transferor for completion of the trip.[72.10] An interchange involves a truckload quantity, so that the exchange of trailers eliminates the necessity of unloading and reloading.[72.15] Interchanging, thus, is a form of interlining whereby trailers are switched at the point of transfer.[72.20]

72.5 U S—Gilbertville Trucking Co v U S, Mass 83 S Ct 217, 221, 371 U S 115 9 L Ed 2d 177

72.10 U S—Gilbertville Trucking Co v U S Mass, 83 S Ct. 217, 221, 371 U S 115, 9 L Ed 2d 177

72.15 U S—Gilbertville Trucking Co v U S, Mass, 83 S Ct 217 221 371 U S 115, 9 L Ed 2d 177

72.20 U S—Gilbertville Trucking Co v U S, Mass, 83 S Ct 217, 221, 371 U S 115, 9 L Ed 2d 177

§ 412. —— What Constitutes Sufficient Delivery to Connecting Carrier

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81 Md—Great Coastal Exp to Use of Great Am Ins Co v Fidelity & Guaranty Fire Corp 46 A 2d 93 186 Md 112

§ 413. —— Duty to Give Shipping Directions to Connecting Carrier

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90 La—Duet v Sara Motor Freight Line, Inc App 301 So 2d 263

Me—Martin v Canadian Pac Ry Co 1 A 2d 224 136 Me 10

Minn—CJS cited in Schaefer Inc v Minneapolis, N & S Ry Co 94 N W 2d 551 560, 254 Minn 248

§ 414. —— Initial Carrier as Forwarder or Warehouseman

95 US—Locust Cartage Co v Trans-american Freight Lines, Inc C A Mass 430 F 2d 314 cert den 91 S Ct 365 400 US 964, 27 L Ed 2d 383

Pa—Philadelphia-Pittsburgh Carriers, Inc v Pennsylvania Public Utility Commission 138 A 2d 693 185 Pa Super 588

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97 US—Republic Carloading & Distributing Co v Missouri Pac R Co C A Mo 302 F 2d 381—Aquascutum of London Inc v S S American Champion, C A N Y 426 F 2d 205

98 Tex—Southern Pac Co v Southern Rice Sales Co Civ App 174 S W 2d 1018, revd on oth grds 178 S W 2d 264 142 Tex 365

99 Ohio—Deer Park Baking Co v Cleveland & Chicago Motor Exp Co App 68 N E 2d 824

6 US—Textron, Inc v Lowell Trucking Corp D C N Y 74 F Supp 322—General Am Transp Corp v Indiana Harbor Belt R Co C A 191 F 2d 865 cert den 72 S Ct 636, 343 US 905 96 L Ed 1324

Ill—Wilson & Co v Werner Transp Co 69 N E 2d 713 330 Ill App 25

7 Ill—Type & Press of Ill Inc v Gorter 164 N E 2d 223, 24 Ill App 2d 186

8 US—Textron, Inc v Lowell Trucking Corp supra, n 6

Ill—Type & Press of Ill Inc v Gorter 164 N E 2d 223, 24 Ill App 2d 186

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12 US—Pilgrim Distributing Corp v Terminal Transport Co Inc D C Ohio, 383 F Supp 204

Liability under Carmack amendment

US—Chicago & N W Ry Co v Union Packing Co, D C Neb, 373 F Supp 734, affd C A 514 F 2d 30 petition den 527 F 2d 592

13 Ga—Washburn Storage Co v Elliott, 92 S E 2d 28, 93 Ga App 456

§ 415. —— Acts of Initial Carrier Resulting in Injury after Delivery to Connecting Carrier

15. Improper loading

US—Federated Dept Stores, Inc v Brinke, C A Fla 450 F 2d 1223

§ 416. —— Delay in Transportation

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22 La—Simplex Mfg Corp v Cook Truck Lines, Inc., App 88 So 2d 49

27 US—Ray-O-Vac v Chicago & N W Ry Co D C Wis 121 F Supp 409

31 US—Condakes v Southern Pac Co D C Mass 295 F Supp 121

§ 418. Rights, Duties and Liabilities of Intermediate or Terminal Carrier

Library References

Carriers ⇐170 et seq., 219 et seq

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38 US—Ross & Co v US D C Mo 213 F Supp 791

Switching services

Tex—C Vollenweider & Sons v Southern Pac Lines, Civ App 121 S W 2d 639

39 Tex—Strickland Transp Co v Wagner Civ App 374 S W 2d 251 err ref no rev err

41. Notice of nondelivery

US—Tri-State Produce Co v Chicago B & Q R Co D C Iowa, 104 F Supp 452

Delivery carrier as warehouseman

US—Chicago & N W Ry Co v Union Packing Co D C Neb 373 F Supp 734 affd C A 514 F 2d 30, petition den 527 F 2d 592

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There is no liability for misquotation of rates.[46.5]

46.5 US—Johnson Mach Works, Inc v Chicago B & Q R Co C A Iowa, 297 F 2d 793

§ 419. —— Duty to Receive and Transport Goods

47 US—Montgomery Ward & Co v Northern Pac Terminal Co of Or D C Or 128 F Supp 520—Inland Waterways Shippers Ass'n, Inc v Mississippi Val Barge Line Co, D C Mo 194 F Supp 818 app dism C A, 289 F 2d 374 cert den 82 S Ct 123 368 US 876, 7 L Ed 2d 77

Mich—Harry Becker & Co v Wabash R Co, 55 N W 2d 776, 335 Mich 159

50 Mo—Emerson Elec Mfg Co v Terminal R Ass'n of St Louis, App, 262 S W 2d 323

58 Mich—Van Lierop v Chesapeake & O Ry Co 57 N W 2d 431, 335 Mich 702, cert den 74 S Ct 40, 346 US 834 98 L Ed 357

§ 420. —— Duty to Furnish Suitable Cars and Other Facilities

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66 Ga—Atlantic Coast Line R Co v Sperry Flour Co, 11 S E 2d 809, 63 Ga App 611

69 Tex—C J S cited in Texas & P Ry Co v Empacadora De Ciudad Juarez, S A Civ App, 309 S W 2d 926, 933 err ref no rev err

70 Tex—Texas & P Ry Co v Empacadora De Ciudad Juarez, S A Civ App, 309 S W 2d 926, err ref no rev err

71 US—Gordon H Mooney Ltd v Farrell Lines, Inc C A N Y, 616 F 2d 619, cert den 101 S Ct 217, 449 US 875, 66 L Ed 2d 96

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73 Ky—Brookfield Bros Truck Lines, Inc v Edwards, 450 S W 2d 240

Tex—Texas & P Ry Co v Empacadora De Ciudad Juarez, S A, Civ App 309 S W 2d 926, err ref no rev err

§ 421. —— Care of Goods in Transit

79 US—Gordon H Mooney Ltd v Farrell Lines Inc C A N Y 616 F 2d 619 cert den 101 S Ct 217 449 US 875 66 L Ed 2d 96

Duty to re-ice

(2) Other cases

US—US v Reading Co D C Pa, 184 F Supp 31 affd C A 289 F 2d 7

Ga—Powell v Stern 25 S E 2d 114 69 Ga App 26

§ 422. —— Duty to Follow Routing Instructions

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96 Ga—Pollard v Jeffers-Bonner Co 19 S E 2d 11 66 Ga App 757

§ 423. —— Duty to Deliver to Succeeding Carrier

2 N Y—Storm v Pennsylvania R Co 220 N Y S 347, 30 Misc 2d 757

§ 424. —— Liability for Loss or Injury

Library References

Carriers ⇐177, 219(5)

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7 US—US v Seaboard Coast Line R R D C V 384 F Supp 1103 app dism, C A 517 F Supp 881

Ga—Powell v Stern, 25 S E 2d 114 69 Ga App 26

Kan—Young v Santa Fe Trail Transp Co 298 P 235 179 Kan 678

La—Yuspeh v Acme Fast Freight App 54 So 2d 86 affd 63 So 2d 743, 222 La 747

N Y—New York & Honduras Rosario Min Co Ruddle Airlines, Inc 162 N Y S 2d 314 3 A D 2 457 affd 172 N Y S 2d 168, 4 N Y 2d 755, 1 N E 2d 93

N C—Cline v Virginia & C S R Co 29 S E 2d 68 224 N C 857

Pa—Jackson & Perkins Co v Mushroom Transp Co 41 A 2d 635 351 Pa 583, cert den 66 S Ct 4 326 US 733, 90 L Ed 427

Tex—Miller & Miller Motor Freight Lines v Gilliam Civ App 232 S W 2d 886, err dism

Fault of initial carrier

(2) Other matters

Cal—BBD Transp Co, Inc v Buller, 122 Cal Rpt 357 49 C A 3d 124

Nondelivery

(2) Other cases

Mass—Lapp Insulator Co v Boston & M R R 11 N E 2d 359, 330 Mass 205

Intrastate shipment or through bill of lading

US—Season-All Industries, Inc v Merchant Shipper D C Pa 417 F Supp 998, mod on oth grds 45 F Supp 727

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8 Ga—Atlanta, B & C R Co v Patterson, 4 S E 2d 177 75 Ga App 189

Switching carrier

(5) Other cases—Louisiana Southern Ry Co v Anderson, Clayton & Co C A La 191 F 2d 784

11 Mo—C J S cited in Ernest E Fadler Co v Chicago R I & P R Co, App 261 S W 2d 394 398

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12 US—Johnson Motor Transport v US, 14 F Supp 175 137 Ct Cl 892

19 US—Keystone Motor Freight Lines v Brannon-Signago Cigar Co supra, n 7—Commodity Credit Corp v Norton CCA NJ 167 F2d 161

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22 NJ—Lincoln Farm Products Corp v Central R Co of NJ 195 A2d 200, 81 NJ Super 161

23 US—Ross & Co v US DC Mo 213 F Supp 791—Litvak Meat Co v Baker CA Colo 446 F2d 329

Ill—Marsh v Chesapeake & O Ry Co 202 NE2d 22, 31 Ill 2d 423

Mo—Dietz v Southern Pac Ry Co 28 SW2d 395 225 Mo App 39

NY—Miles v Lehigh Valley R Co 293 NYS2d 426, 57 Misc 2d 518

Okl—Kluver v Midwestern Transp Inc 534 P2d 662

SC—McCready v Atlantic Coast Line R Co 48 SE2d 193 212 SC 449 cert den 69 SCt 53 335 US 827 93 L Ed 381

Tex—Southern Pac Co v Builders Hardware, Inc Civ App 382 SW 2d 149 err ref no rev err

Purpose of Carmack Amendment

US—Moller's Nursery Inc v Union Pac R Co, DC Or 330 F Supp 863—Arnold J Rodin, Inc v Atchison, T & S F Ry Co CA Tex 477 F2d 682—US v Seaboard Coast Line R R DC Va, 384 F Supp 1103, app dism CA 517 F2d 881

Iowa—Albion Elevator Co v Chicago & N W Transp Co 254 N W 2d 6, cert den 98 S Ct 301 434 US 904, 54 L Ed 2d 190

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25 US—Mexican Light & Power Co v Texas Mexican Ry Co Tex 67 S Ct 1440 331 US 731 91 L Ed 1779

26 US—US v Mississippi Val Barge Line Co CA Mo, 285 F2d 381

28 US—Standard Brands v Boston & M R R supra, n 23

Conn—Ideal Plumbing & Heating Co v New York, N H & H R Co 124 A 2d 908 143 Conn 640

La—Close v Missouri Pac R Co, App 191 So 596

NY—Goldberg v Delaware, L & W R Co 40 NY S 2d 44, 180 Misc 176

Carmack Amendment held inapplicable

US—Marks Mfg Co v New York Cent R Co CA Mich, 448 F 2d 68—US v Seaboard Coast Line R R, D C Va, 384 F Supp 1103 app dism CA 517 F 2d 881

Uniform Commercial Code inapplicable

US—Marks Mfg Co v New York Cent R Co CA Mich 448 F 2d 68

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29 NY—Goldberg v Delaware, L & W R Co, supra, n 28

RI—Bird & Son v Palmer 33 A 2d 415, 69 R I 388

31 SC—McCready v Atlantic Coast Line R Co, supra, n 23

34 US—Sawyer & Co v Atchison, T & S F Ry Co D C Mass, 282 F Supp 791—Marks Mfg Co v New York Cent R Co, CA Mich, 448 F 2d 68

Ill—Lloyd v Southern Ry Co 223 N E 2d 314, 79 Ill App 2d 1

La—Foster v Illinois Cent R Co, App 268 So 2d 81

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41 US—Arnold J Rodin, Inc v Atchison, T & S F Ry Co CA Tex, 477 F 2d 682

SC—McCready v Atlantic Coast Line R Co, supra, n 23

Tex—Strickland Transp Co v Johnston, Civ App, 238 S W 2d 717

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44 US—Minneapolis, St P & S S M R Co v Metal-Matic, Inc CA Minn 323 F 2d 903—Association of Maryland Pilots v Baltimore & O R Co D C Md 304 F Supp 548—Phoenix Ins Co v Monon R R CA Minn 438 F 2d 1403

Ky—Knight v Pennsylvania R R 132 S W 2d 950 280 Ky 191

La—C J S. cited in Bancroft v Yazoo & M V R Co 193 So 481 482, 194 La 115—Frischhertz Elec Co v Strickland Transp Co 264 So 2d 646 262 La 791

Mich—Harry Becker & Co v Wabash R Co 55 N W 2d 776, 335 Mich 159

Mo—Ernest E Fadler Co v Chicago, R I & P R Co App 261 S W 2d 394

Pa—Alwine v Pennsylvania R Co 48 Dauph Co 54

Tenn—Cain-Sloan Co v Louisville & N R Co 424 S W 2d 787 221 Tenn 70

Tex—C J S. quoted in Panhandle & S F Ry Co v Montgomery Civ App 140 S W 2d 241, 245—Consolidated Forwarding Co v Union Truck Depot, Inc Civ App 356 S W 2d 693

Shipment from foreign country not within statute

US—Strachman v Palmer CA Mass, 177 F 2d 427, 12 A L R 2d 687—Sklaroff v Pennsylvania R Co, D C Pa 90 F Supp 961, affd CA 184 F 2d 575

NY—Goldberg v Delaware, L & W R Co supra, n 28

Pa—Alwine v Pennsylvania R Co 15 A 2d 507 141 Pa Super 558

Local transportation company performing local service

NJ—New Jersey Bell Tel Co v Pennsylvania-Reading Seashore Lines, 78 A 2d 150, 11 NJ Super 129

Applicability of Carmack Amendment

US—Yeckes-Eichenbaum Inc v Texas Mexican Ry Co, D C Tex 165 F Supp 204, rev on oth grds, CA, 263 F 2d 791 cert den 80 S Ct 75, 361 U S 827, 4 L Ed 2d 70—Ross & Co v U S, D C Mo 213 F Supp 791

NY—Carr v Erie Lackawanna R Co 381 N Y S 2d 159 85 Misc 2d 713

Tex—Hauck v Gulf C & S F Ry Co Civ App 246 S W 2d 913 err ref no rev err

Transportation Act liberally construed

NJ—Valco Mfg Co v C Rickard & Sons, Inc, 92 A 2d 501 22 N J Super 578

§ 425. —— Liability for Delay

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Carriers ⇐176, 219(4)

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54 US—Sayed v Trans-Mediterranean Airways, D C Mich 509 F Supp 1167

58 US—Golger Trading Co of N Y v Chicago & N W Ry Co CA Ill, 184 F 2d 876

§ 426. —— Liability for Misdelivery

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71 US—Southern Exp v T S C Motor Freight Lines, C A Tex, 200 F 2d 797

Minn—Schaefer, Inc v Minneapolis, N & S Ry Co 94 N W 2d 551, 254 Minn 248

§ 429. Joint Liability

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77 NJ—Semi Metals, Inc v Prater Bros, 312 A 2d 892, 126 N J Super 124, mod. on oth grds 343 A 2d 757, 135 N J Super 464, affd 360 A 2d 385, 70 N J 437

84 US—Scott Truck Line, Inc v Chicago, R I & P R. Co, D C Ill, 312 F Supp 511—Agar Food Products Co v Chicago River & Indiana R Co, D C Ill 358 F Supp 1312, affd C A, 529 F 2d 529

Cal—BBD Transp Co, Inc v Buller, 122 Cal Rptr 357, 49 C A 3d 124

Insurer's liability

Ga—Seaboard Coast Line R Co v Freight Delivery Service, Inc 210 S E 2d 42, 133 Ga App 92

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86. Duty of care required of each carrier

Ohio—Thomas Foods, Inc v Pennsylvania R Co, 168 N E 2d 612, 112 Ohio App 76

Liability of ordinary bailee for hire

Ohio—Thomas Foods, Inc v Pennsylvania R Co 168 N E 2d 612, 112 Ohio App 76

Joint and several liability

D C—Sea-Land Service, Inc v Federal Maritime Commission, C A 404 F 2d 824 131 U S App D C 246

§ 432. Right of Connecting Carrier to Benefit of Limited Liability in Contract of Carriage

Library References

Carriers ⇐180(5).

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95 N Y—New York & Honduras Rosario Min Co v Riddle Airlines, Inc 152 N Y S 2d 753, mod on oth grds 162 N Y S 2d 314, 3 A D 2d 457 affd 172 N Y S 2d 168, 4 N Y 2d 755 149 N E 2d 93

Ohio—Ætna Ins Co v Railway Exp Agency 74 N E 2d 425 80 Ohio App 30

97 Ohio—Ætna Ins Co v New York Cent R R, 17 Ohio Supp 169

3 N Y—Kevork Allakmajian, Limited v Trotta, 163 N Y S 2d 85, 6 Misc 2d 976

4 Mo—Southern Advance Bag & Paper Co v Terminal R Ass'n of St Louis, App, 171 S W 2d 107

§ 433. —— Under Hepburn Act and Carmack Amendment

8 US—Sun Insurance Office Limited of London v Be-Mac Transport Co, C C A Mo 132 F 2d 535

Mass—Rice & Lockwood Lumber Co v Boston & M R R, 31 N E 2d 219, 308 Mass 101

§ 435. Actions

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16 Wis—Universal Cardahay & Distributing Co, Inc v Chippewa Motor Freight, Inc 284 N W 2d 79 91 Wis 2d 783

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17 Ill—Charley Hayashida Farms, Inc v Baker, 306 N E 2d 673 16 Ill App 3d 514

§ 436. —— Nature and Form

18 Ga—R C A Truck Lines, Inc v Georgia Rug Mill, Inc, 77 S E 2d 442, 88 Ga App 658 foll 77 S E 2d 445, 88 Ga App 663

19 Wis—Mastercraft Paper Products, Inc v Consolidated Freightways, 200 N W 2d 596, 55 Wis 2d 674

20 US—Litvak Meat Co v Baker C A Colo, 446 F 2d 329

General rules apply as to whether an action of trover will lie against one of the connecting carriers.[20.1]

20.1. Trover held not to lie

Me—Rutland v Boston & M R Co 9 A 2d 131 136 Me 328

§ 437. —— Jurisdiction and Venue

21 US—Season-All Industries, Inc v Merchant Shippers, D C Pa 451 F Supp 727

Tex—Curry Motor Freight Lines, Inc v Shell Oil Co Civ App 497 S W 2d 805 err ref no rev er

23 Operation of line within state

US—W D Lawson & Co v Penn Cent Co C A Tenn 456 F 2d 419—Season-All Industries Inc v Merchant Shippers, D C Pa 451 F Supp 727

Absence of service of process on a foreign initial carrier renders a complaint in assumpsit subject to preliminary objection.[23.5]

23.5 Pa—Cohen v Delaware, L & W R Co 7 D & C 2d 235 57 Lack Jur 61

24 US—K Shapiro, Inc v New York Cent R Co D C Mich 152 F Supp 722—Litvak Meat Co v Baker C A Colo 446 F 2d 329

Tex—Strickland Transp Co v Brown Exp Civ App 321 S W 2d 357

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26 Ky—Southern R Co v Avey 191 S W 460, 173 Ky 598

28 Tex—St Louis, I M & S R Co v White, Civ App 103 S W 673 err ref

Since common law suits in the nature of breach of contract for the interstate carriage of goods have been effectively preempted by the Carmack Amendment, a suit may be brought only in a state through or into which the defendant carrier operates a line of railroad.[30.05]

30.05 US—W D Lawson & Co v Penn Central Co 6 Cir 456 F 2d 419

N Y—Phillips-Van Heusen Corp v Denver & R G W R Co 351 N Y S 2d 515 76 Misc 2d 808

An action under a federal statute imposing liability on the terminal carrier for damages to interstate shipments may be maintained in any state where the carrier operates a line of railroad even though the cause of action arose outside the state.[30.1]

30.1 Ky—Knight v Pennsylvania R R 132 S W 2d 950, 280 Ky 191

A third-party suit may be maintained against a connecting carrier in a state even though the connecting carrier owns no lines in that state.[30.2]

30.2 US—First Flight Co v National Carloading Corp D C Tenn 209 F Supp 730

§ 438. —— Parties

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31 Tex—Texas & N O R Co v H Rouw Co Civ App, 271 S W 2d 666, err dism

"Holder"

(3) Other cases

N J—Valco Mfg Co v C. Rickard & Sons, Inc., 92 A 2d 501 22 N J Super 578

Shipper

(3) Other statements

US—Scott Truck Line, Inc v Chicago, R I & P R Co., D C Ill 312 F Supp 511

38 Ill—Du Quoin Packing Co v Bonfield, 71 N E 2d 173, 330 Ill App 338

Neb—Fairmont Creamery Co v Thompson, 298 N W 551, 139 Neb 677

41 US—Producers Creamery Co of Cabool Mo v St Louis-San Francisco Ry Co D C Mo 81 F Supp 208

N J—Semi Metals, Inc v Pinter Bros 312 A 2d 892, 126 N J Super 124 mod on oth grds 343 A 2d 757 135 N J Super 464 aff'd 360 A 2d 385 70 N J 437

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53 Miss—New Orleans & N E R Co v Elias, 39 So 2d 274 205 Miss 658

N Y—Outdoor Clothing Co v Universal Carloading & Distributing Co 3 N Y S 2d 586

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54 Petition or complaint held sufficient

(3) Other petitions or complaints

Mo—Ernest E Fadler Co v Chicago, R I & P R Co App 261 S W 2d 394

N Y—Miles v Lehigh Valley R Co 293 N Y S 2d 426, 57 Misc 2d 518

55 US—Strachman v Palmer, D C Mass 82 F Supp 161 vac in part on oth grds C A 177 F 2d 427 12 A L R 2d 687

Miss—New Orleans & N E R Co v Elias, 39 So 2d 274 205 Miss 658

Test

US—Fabiano Shoe Co Inc v Alitalia Airlines, D C Mass 380 F Supp 1400

Complaint failed to state cause of action

US—Fabiano Shoe Co., Inc v Alitalia Airlines, D C Mass 380 F Supp 1400

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63 La—Pizzitola v Yazoo & M V R Co 193 So 481 194 La 115—Gore Products v Texas & N O R Co App 34 So 2d 418 adhered to, 38 So 2d 233

N J—New Jersey Bell Tel Co v Pennsylvania-Reading Seashore Lines, 78 A 2d 150 11 N J Super 129

72 Ill—Charley Hayashida Farms, Inc v Baker, 306 N E 2d 673 16 Ill App 3d 514

73 S C—Victor Fertilizer Co v Southern Ry Co 24 S E 2d 499, 202 S C 294

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78 Colo—Union Transfer Co v Airline Exp 256 P 2d 902, 127 Colo 373

80 La—Piazza v Louisiana & A Ry Co, App., 46 So 2d 670

§ 440. —— Presumptions and Burden of Proof

Library References

Carriers ⇐185(1), 228(1).

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85 N Y—S Nattove & Co v Davis, 71 N Y S 2d 445, mod on oth grds 77 N Y S 2d 330, 273 App Div 368

Tex—C Vollenweider & Sons v Southern Pac Lines, Civ App, 121 S W 2d 639

87 US—Standard Brands v Boston & M R R, D C Mass, 29 F Supp 593—Bronstein v Baltimore & O R Co, D C Pa 29 F Supp 837

Mo—Scott County Mill Co v Thompson, App 255 S W 2d 121

88 La—Akin v Barras, App, 37 So 2d 883

91 US—Thomas v James G McCarrick Co, C A Tex 205 F 2d 897—Marks Mfg Co v New York Cent R Co, C A Mich, 448 F 2d 68

Purpose of Carmack Amendment

US—Litvak Meat Co v Baker, C A Colo, 446 F 2d 329—Millers Mut Ins Assn of Ill v Southern Ry Corp C A, 483 F 2d 1044

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95 N Y—Banner Mfg Co v Long Island R Co, 97 N Y S 2d 730 277 App Div 142, rearg den 100 N Y S 2d 225 277 App Div 974

99 La—Yuspeh v Acme Fast Freight, 63 So 2d 7, 222 La 747

2 Ill—Meyer v Southern Ry Co 223 N E 2d 31 79 Ill App 2d 1

Presumptions as to non-delivery

US—Tri-State Produce Co v Chicago, B & Q R C D C Iowa, 104 F Supp 452—Pennsylvania R C v US 155 F Supp 223 140 Ct Cl 122

3 US—US v Seaboard Coast Line R R, D C V 384 F Supp 1103, app dism C A, 517 F 2d 8

N J—Lincoln Farm Products Corp v Central R C of N J 195 A 2d 200, 81 N J Super 161

Tenn—Pulaski Highway Exp, Inc v Terminal Tran port Co Inc, App 493 S W 2d 103

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9 N J—Semi Metals, Inc v Pinter Bros 312 A 2 892, 126 N J Super 124, mod on oth grds 34 A 2d 757, 135 N J Super 464 affd 360 A 2d 38 70 N J 437

12 US—Sunset Motor Lines, Inc v Lu-Tex Packi Co C A Tex 256 F 2d 495

17 Okl—Kluver v Midwestern Transp, Inc, 53 P 2d 662

19 US—Tri-State Produce Co v Chicago, B & Q R Co supra, n 2

Tex—Texas & N O R Co v Dingfelder & Balsh Civ App 114 S W 2d 666, affd 133 N W 2d 967 134 Tex 156—Herrin Transp Co v Sheldon, Civ App 209 S W 2d 943

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24 Tex—Strickland Transp Co v Johnston, Civ App 238 S W 2d 717

32 N Y—Walton v De Cesare, 80 N Y S 2d 116

Ohio—Trees v Pennsylvania R Co 109 N E 2d 29, 91 Ohio App 497

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33 Conn—Ideal Plumbing & Heating Co v New York, N H & H R Co, 124 A 2d 908, 143 Conn 640

Ill—Mirski v Chesapeake & O Ry Co, 194 N E 2d 361 44 Ill App 2d 48, revd on oth grds 202 N E 2d 22, 31 Ill 2d 423

N J—New Jersey Bell Tel Co v Pennsylvania-Reading Seashore Lines, 78 A 2d 150, 11 N J Super 129—Valco Mfg Co v C Rickard & Sons, Inc 92 A 2d 501, 22 N J Super 578

Ohio—Grossman v Pennsylvania R Co, 67 N E 2d 623, 146 Ohio St 643

34 Miss—A Polk & Son v New Orleans & N E R Co., 185 So 554, 184 Miss 559

35 US—Commodity Credit Corp v Norton, C C A N J, 167 F 2d 161—Minneapolis, St P & S S M R Co v Metal-Matic, Inc, C A Minn 323 F 2d 903—Empire Aluminum Corp v S S Korendijk, D C Ga, 391 F Supp 402

Conn—Parrott Chemical Co v St Johnsbury Trucking Co Cir A D 257 A 2d 507 5 Conn Cir 499

Ga—Brown-Rogers-Dixson Co v Southern Ry Co, 53 S E 2d 702, 79 Ga App 449—Loo-Mac Freight Lines, Inc v American Type Founders, Inc 110 S E 2d 566, 100 Ga App 203

Ill—Mirski v Chesapeake & O Ry Co 194 N E 2d 361, 44 Ill App 2d 48, revd on oth grds 202 N E 2d 22, 31 Ill 2d 423

Mich—Van Lierop v Chesapeake & O Ry Co, 57 N W 2d 431, 335 Mich 702, cert den 74 S Ct 40, 346 U S 834 98 L Ed 357

N J—Herman v Railway Exp Agency 85 A 2d 284, 17 N J Super 10

N Y—Miles v Lehigh Valley R Co, 293 N Y S 2d 426, 57 Misc 2d 518

N C—Fuller v Virginia & C S R Co 200 S E 403, 214 N C 648

Tex—Strickland Transp Co v Johnston, supra, n 24

Under Carmack amendment

Tex—Braniff Airways, Inc v El Paso Coca Cola Co, Inc Civ App 517 S W 2d 915, err ref no rev er

cert den 96 S Ct 563 423 U S 1032, 46 L Ed 2d 405

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42 Ohio—Trees v Pennsylvania R Co supra, n 32

Tex—C J S. cited in Modern Wholesale Florist v Braniff Intern Airways, Inc 350 S W 2d 539 540 162 Tex 594

43 Evidence rebutting presumption

(7) Other matters

Conn—Parrott Chemical Co v St Johnsbury Trucking Co Cir A D 257 A 2d 507 5 Conn Cir 499

44 N J—Herman v Railway Exp Agency 85 A 2d 284 17 N J Super 10

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55. Carmack amendment does not apply to Airline carriage

Tex—Braniff Airways Inc v El Paso Com Co Inc Civ App 517 S W 2d 915 err ref no rev err cert den 96 S Ct 563 423 U S 1032, 46 L Ed 2d 405

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74 Mo—Schneider v Campbell, 66 Exp, Inc App, 324 S W 2d 363

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81. Proof of negligence

U S—Gohger Trading Co of N Y v Chicago & N W Ry Co C A Ill 184 F 2d 876

Mo—Ernest E Fadler Co v Chicago, R I & P R Co App 261 S W 2d 394

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90 U S—Tri-State Produce Co v Chicago, B & Q R Co D C Iowa, 104 F Supp 452

Ill—Mirski v Chesapeake & O Ry Co 194 N E 2d 361, 44 Ill App 2d 48 revd on oth grds 202 N E 2d 22, 31 Ill 2d 423

92 U S—Sunset Motor Lines, Inc v Lu-Tex Packing Co C A Tex 256 F 2d 495

§ 441. —— Admissibility of Evidence

Library References

Carriers ⇐185(2), 228(3).

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3 S C McCready v Atlantic Coast Line R Co 48 S E 2d 193 212 S C 449 cert den 69 S Ct 53, 335 U S 827, 93 L Ed 381

7 Tex—C Volkenweder & Sons v Southern Pac Lines, Civ App, 121 S W 2d 639

§ 442. —— Weight and Sufficiency of Evidence

Library References

Carriers ⇐185(3), 228(5).

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12 Cal—BBD Transp Co Inc v Buller 122 Cal Rptr 357 49 C A 3d 124

Ill—Mirski v Chesapeake & O Ry Co 194 N E 2d 361 44 Ill App 2d 48, revd on oth grds 202 N E 2d 22, 31 Ill 2d 423

13 Ill Mirski v Chesapeake & O Ry Co, 194 N E 2d 361 44 Ill App 2d 48, revd on oth grds 202 N E 2d 22, 31 Ill 2d 423 Myers v Southern Ry Co, 223 N E 2d 314, 79 Ill App 2d 1

Evidence held sufficient

(3) To show other matters—Pennsylvania R Co v U S 155 F Supp 223, 140 Ct Cl 122

14 U S—Thompson v James G McCarrick Co C A Tex 205 F 2d 897

Ohio—Trees v Pennsylvania R Co, 109 N E 2d 29 91 Ohio App 497

Evidence held sufficient

(2) U S—Federated Dept Stores, Inc v Brinke, D C Fla 316 F Supp 1402, affd C A 450 F 2d 1223

Ga—Acme Fast Freight v Southern Ry Co 21 S E 2d 493 67 Ga App 885

(3) As to other matters

Tex—Thompson v W E Collins & Son, Civ App 263 S W 2d 186

15 N J—Valco Mfg Co v C Rickard & Sons, Inc 92 A 2d 501 22 N J Super 578

16 Evidence held sufficient

(1) U S—U S v Seaboard Coast Line R R, D C Va 384 F Supp 1103 app dism C A 517 F 2d 881

Tex—Texas Mexican Ry Co v Slaughter Tex Civ App 122 S W 2d 1101

17 Miss—A Polk & Son v New Orleans & N E R Co 185 So 554 184 Miss 559

Tex—C Volkenweder & Sons Southern Pac Lines, supra, n 7

Evidence held sufficient

U S—Sunset Motor Lines, Inc v Lu-Tex Packing Co C A Tex 256 F 2d 495—Federated Dept Stores, Inc v Brinke C A Fla 450 F 2d 1223

Ill—Wilson & Co v Werner Transp Co 69 N E 2d 713 330 Ill App 25

Evidence held insufficient

(3) Other cases

U S—Minneapolis, St P & S S M R Co v Metal-Matic, Inc C A Minn 327 F 2d 903

N J—Valco Mfg Co v C Rickard & Sons, Inc supra, n 15

Tex—Herrin Transp Co v Sheldon, Civ App 209 S W 2d 943

Wis—Rudy v Chicago, M St P & P Ry Co 92 N W 2d 367 5 Wis 2d 37

18. Evidence held insufficient

(2) Other cases—Lang v Shofner Tex Civ App 175 S W 2d 701

19 Evidence held sufficient

(1) U S—Bronstein v Baltimore & O R Co D C Pa 29 F Supp 837

(10) Other cases—Textron, Inc v Lowell Trucking Corp D C N Y, 74 F Supp 322—Skaggs v Midland Val R Co D C Okl 233 F Supp 1004

Colo—Denver-Chicago Trucking Co v Republic Drug Co, 306 P 2d 1076, 134 Colo 461

Tex—American Airlines, Inc v Miller 356 S W 2d 771 163 Tex 400

Evidence held insufficient

(2) U S—Standard Brands v Boston & M R R D C Mass 29 F Supp 593—B C Truck Lines, Inc v Pilot Freight Carriers, Inc, D C Ga, 225 F Supp 1—Texas Instruments, Inc v Branch Motor Exp Co, D C Mass 308 F Supp 1228, affd C A 432 F 2d 564

Ohio—Grosjean v Pennsylvania R Co 67 N E 2d 623 146 Ohio St 643—Trees v Pennsylvania R Co supra, n 14

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20 Ga—Atlantic Coast Line R Co v Sperry Flour Co 11 S E 2d 809 63 Ga App 611

Evidence held sufficient

(7) Conn—Parrott Chemical Co v St Johnsbury Trucking Co Cir A D, 257 A 2d 507, 5 Conn Cir 499

(9) Other cases

N J—New Jersey Bell Tel Co v Pennsylvania-Reading Seashore Lines, 78 A 2d 150, 11 N J Super 120

21 Tex—Thompson v W E Collins & Son Civ App 263 S W 2d 186

22 U S—Palmer v Agwilines, Inc, D C N Y 42 F Supp 239 affd C C A 135 F 2d 689

Evidence held sufficient

(6) Other cases

Ohio—Atlas Metal Co v Nickel Plate Road, App, 119 N E 2d 88

Evidence held insufficient

(3) Other cases

U S—American Writing Ink Co v New York, N H & H R D C Mass 80 F Supp 694

Tex—Southwestern Motor Transport Co v Valley Weathermakers, Inc 427 S W 2d 597 37 A L R 3d 1114

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23 Mo—Ernest E Fadler Co v Chicago, R I & P R Co App 261 S W 2d 394

24 La—Bancroft v Yazoo & M V R Co, 193 So 481 194 La 115

25 Wis—Dairyland Co-op Cheese Ass'n v Briggs Transfer Co 30 N W 2d 794 4 Wis 2d 439

Evidence held sufficient, etc—Ideal Plumbing & Heating Co v New York, N H & H R Co 124 A 2d 906 143 Conn 640

Evidence held insufficient

(2) N Y—Banner Mfg Co v Long Island R Co, 97 N Y S 2d 730 277 App Div 142, reserg den 100 N Y S 2d 225 277 App Div 974

Prima facie liability

Ill—Mirski v Chesapeake & O Ry Co, 202 N E 2d 22, 31 Ill 2d 423

Ohio—Grosjean v Pennsylvania R Co supra, n 19

26 U S—Meltzer v Pennsylvania R Co, D C Pa, 29 F Supp 840

Ga—Acme Fast Freight v Southern Ry Co supra, n 14

La—Akin v Barnes, App 37 So 2d 883

Miss—A Polk & Son v New Orleans & N E R Co supra, n 17

Evidence held sufficient

(8) To establish other issues

U S—Sunset Motor Lines, Inc v Lu-Tex Packing Co C A Tex 256 F 2d 495—Don Cartage Co v U S C A Mich 289 F 2d 623—Schneffer's Motor Service, Inc v United Freight Forwarders, Inc, D C Minn 210 F Supp 287

Ill—Mirski v Chesapeake & O Ry Co 194 N E 2d 361 44 Ill App 2d 48, revd on oth grds 202 N E 2d 22, 31 Ill 2d 423—B S Livingston & Co, Inc v Bethlehem Steel Export Corp 323 N E 2d 49 25 Ill App 3d 121

Tex—A J Tebbe & Sons Co v Brown Express, 341 S W 2d 642, 161 Tex 456

Evidence held insufficient

(2) U S—Federated Dept Stores, Inc v Brinke, D C Fla 316 F Supp 1402, affd C A 450 F 2d 1223

(5) To show other matters—Tri-State Produce Co v Chicago, B & Q R Co D C Iowa 104 F Supp 452

Ill—Mirski v Chesapeake & O Ry Co 194 N E 2d 361, 44 Ill App 2d 48 revd on oth grds 202 N E 2d 22, 31 Ill 2d 423

Tex—A J Tebbe & Sons Co v Brown Express, 341 S W 2d 642 161 Tex 456

27 Ohio—Grosjean v Pennsylvania R Co, supra, n 19

Evidence held sufficient

Tex—Rhinetubes, Inc v Lloyd, Civ App 335 S W 2d 269 err ref no rev err

28 Ill—B S Livingston & Co Inc v Bethlehem Steel Export Corp, 323 N E 2d 49 25 Ill App 3d 121

(1) Md—John I Haas, Inc v American Export Lines, Inc 205 A 2d 223 237 Md 73

(5) Mo—National Beef Packing Co v Missouri Pac R Co App, 479 S W 2d 155

Evidence held insufficient

(2) Grosjean v Pennsylvania R Co, supra, n 19

(5) To sustain judgment against intermediate carriers—Strickland Transp Co v Johnston, Tex Civ App, 238 S W 2d 717

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38 Mich—Van Lierop v Chesapeake & O Ry Co 57 N W 2d 431 335 Mich 702, cert den 74 S Ct 40 346 U S 834 98 L Ed 357

39 U S—Rhoades, Inc v United Air Lines, Inc D C Pa 224 F Supp 341 Affd C A 340 F 2d 481

41 Ga—Seaboard Coast Line R Co v Freight Delivery Service Inc 210 S E 2d 42, 133 Ga App 92

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52 Neb—Fairmont Creamery Co v Thompson 298 N W 551 139 Neb 677

Evidence held insufficient to make issue for jury

(3) Other cases

Mo—Scott County Mill Co v Thompson, App 255 S W 2d 121

54 Ga—Atlantic Coast Line R Co v Sperry Flour Co supra, n 20

Ill—B S Livingston & Co Inc v Bethlehem Steel Export Corp 323 N E 2d 49 25 Ill App 3d 121

S C—Victor Fertilizer Co v Southern Ry Co 24 S E 2d 499 202 S C 294

55 Ga—Atlantic Coast Line R Co v Sperry Flour Co supra, n 20

Instructions held not improper

(3) Other cases

Mich—Van Lierop v Chesapeake & O Ry Co supra, n 38

Mo—Schneider v Campbell, 66 Exp Inc App 324 S W 2d 363

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58 Ga—Atlantic Coast Line R Co v Sperry Flour Co supra, n 20

59 N Y—Banner Mfg Co v Long Island R Co supra, n 25

61 Mo—Ernest E Fadler Co v Chicago, R I & P R Co supra, n 23

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65 Miss—New Orleans & N E R Co v Elias, 39 So 2d 274, 205 Miss 658

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A finding of low salvage value is a finding of no market value.[77.5]

77.5 U S—Sunset Motor Lines, Inc v Lu-Tex Packing Co, C A Tex 256 F 2d 495

§ 445. —— Damages

Library References

Carriers ⇐186, 229.

87 U S—Federated Dept Stores, Inc v Brinke, D C Fla, 316 F Supp 1402, affd C A 450 F 2d 1223—World Wide Meats, Inc v Chicago & N W Transp Co D C Iowa, 383 F Supp 807

La—Bancroft v Yazoo & M V R Co supra, n 24—Caliber v Texas & Pac Ry Co, App, 303 So 2d 871 writ ref Sup 307 So 2d 628

Market value less freight charges from salvage

U S—Chicago & N W Ry Co v Union Packing Co, D C Neb, 373 F Supp 734, affd, C A, 514 F 2d 30, petition den 527 F 2d 592

§ 446. Liability Over of Carrier Causing Loss or Injury

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98 Md—Great Coastal Exp to Use of Great Am Ins Co. v Fidelity & Guaranty Fire Corp 46 A 2d 93 186 Md 112

N Y—Hill Steamboat Line v Panama R. Co 160 N Y S 1103 97 Misc 22, affd 166 N Y S 1097, 179 App Div 927

N C—Produce Trading Co v Norfolk Southern R Co 100 S E 316, 178 N C 175

Tex—Burd v San Antonio Southern Ry Co Com App 261 S W 1021

Va—Lefebvre-Armistead Co v Southern Pac Co 128 S E 244 142 Va 800

At what point connecting carrier's responsibility attaches

U S—Palmer v Agwilines, Inc C C A N Y 135 F 2d 689

Delivering carrier may recover over

La—Duvall v Louisiana Western R Co 65 So 104 135 La 189

Determination of liability by proof of negligence or fault

Ky—Bonfield Bros Truck Lines, Inc v Edwards, 450 S W 2d 240

99. Contributory negligence

Va—Norfolk Terminal Corp v U S Lines, Inc 205 S E 2d 400, 215 Va 80

1. Initial carrier's failure to declare value as barring cross claim

U S—Texas Instruments, Inc v Branch Motor Exp Co D C Mass 308 F Supp 1228, affd, C A 432 F 2d 364

3 U S—Palmer v Agwilines, Inc D C N Y 42 F Supp 239 affd C C A, 135 F 2d 689

Va—Lefebvre-Armistead Co v Southern Pac Co 128 S E 244, 142 Va 800

4 Tex—Burd v San Antonio Southern Ry Co Com App 261 S W 1021

Va—Lefebvre-Armistead Co v Southern Pacific Co, supra, n 3

§ 447. Rights, Duties, and Remedies Inter Se

Library References

Carriers ⇐33, 171, 179.

A connecting carrier wrongfully deprived of its right to participate in the haul by the act of a preceding carrier in routing the shipment contrary to shipping instructions may be entitled to compensation from the carriers participating in the wrong.[81]

8.1. Rights of carrier by water and inland waterways corporation

U S—Inland Waterways Corporation v Atlantic Coast Line R Co, C C A Va 112 F 2d 753

§ 448. —— Traffic Arrangements between Carriers

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9. Withdrawal from common-law joint traffic arrangements

U S—Greyhound Lines, Inc v U S, D C Ill, 268 F Supp 746, affd 88 S Ct 416, 389 U S 216, 19 L Ed 2d 422

10 U S—Season-All Industries, Inc v Merchant Shippers, D C Pa, 417 F Supp 998, mod on oth grds 451 F Supp 727

N Y—Goldberg v Delaware, L & W R Co, 40 N Y S 2d 44, 180 Misc 176

11 Cal—BBD Transp Co Inc v Buller, 122 Cal Rptr 357, 49 C A 3d 124

12 U S—Ashworth Transfer Inc v U S, D C Utah, 315 F Supp 199

Particular contracts construed

(3) Other contracts

U S—Chicago & N W Ry Co v U S, D C Ill 195 F Supp 708

13 U S—Missouri-Kansas-Texas R Co v Sinclair Prairie Oil Co, C C A Okl, 112 F 2d 553

§ 449 —— Furnishing Facilities by Carrier to Connecting Lines

19 Between railroads and water carriers

U S—U S v Pennsylvania R Co N J 65 S Ct 471 323 U S 612, 89 L Ed 499

20 U S—City of Chicago v Atchison, T & S F R Co Ill 78 S Ct 1063 357 U S 77 2 L Ed 2d 1174

§ 450. —— Proceedings to Compel Carriers to Make Connections

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37 U S—U S v Pennsylvania R Co, supra, n 19

§ 451. General Statement

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43 U S—U S v Allied Chemical Corp D C N Y 431 F Supp 361

Wash—State v Cater's Motor Freight System, 179 P 2d 496, 27 Wash 2d 661

Defense to action for penalty for violation of schedule of rates

N Y—People v Salinsky 231 N Y S 2d 809 35 Misc 2d 1024

44 U S—Bud Antle, Inc v U S C A Cal, 593 F 2d 865

Reciprocal demurrage statutes

(1) Penal in nature

Kan—Missouri-Kansas-Texas R Co v Standard Industries, Inc 388 P 2d 632, 192 Kan 381

(2) Superseded

Kan—Missouri-Kansas-Texas R Co v Standard Industries, Inc 388 P 2d 632, 192 Kan 381

45 U S—Cordero v C I A, Mexicana De Aviacion, S A, D C Mont, 512 F Supp 205 affd in part, revd in part on oth grds C A, 681 F 2d 669

49 U S—Ashland Oil, Inc v Muller Oil Purchasing Co C A La 678 F 2d 1293

§ 452. Construction of Statutes

50 U S—U S v Lake Shore Motor Freight Co, D C Ohio 363 F Supp 401

La—Avant v A–1 Moving & Storage Co, App, 260 So 2d 355

51 Tex—National Carloading Corporation v Phoenix-El Paso Express, Civ App, 178 S W 2d 133, affd 176 S W 2d 564, 142 Tex 141, cert den 64 S Ct 1156, 322 U S 747 88 L Ed 1578

Invocation of penalty provisions of Interstate Commerce Act

U S—U S v Western Pac R Co C A Utah, 385 F 2d 161 cert den 88 S Ct 1805 391 U S 919 20 L Ed 2d 656

52 U S—U S v Mont St Johns Lumber Inc D C Pa 362 F Supp 826—Genstar Chemical Ltd v I C C, C A 665 F 2d 1304 215 U S App D C 1, cert den 102 S Ct 1750, 456 U S 905 72 L Ed 2d 161

Ga—City Exp Service, Inc v Rich's, Inc 250 S E 2d 867, 148 Ga App 123

Interstate Commerce Act and Motor Carrier Act of 1935 distinguished

U S—Consolidated Freightways v United Truck Lines, C A Or 216 F 2d 543, cert den 75 S Ct 582, 349 U S 905 99 L Ed 1242

53. Expressio unius rule applied

U S—Consolidated Freightways v United Truck Lines, supra, n 52

55 Wash—State v Cater's Motor Freight System, supra, n 43

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2. Complaint held sufficient
US—US v Western Pac R Co C A Utah, 385 F 2d 161 cert den 88 S Ct 1805 391 US 919 20 L Ed 2d 656

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18 City Exp Service, Inc v Rich's, Inc 250 S E 2d 867 148 Ga App 123

§ 462. Disobedience of Orders of Railroad Commission

20 Cal—People v Western Air Lines, 268 P 2d 723 42 C 2d 621 app dism 75 S Ct 87 348 US 859 99 L Ed 677

Orders of Interstate Commerce Commission
US—US v Western Pac R Co C A Utah, 385 F 2d 161 cert den 88 S Ct 1805 391 US 919 20 L Ed 2d 656—US v Pennsylvania R Co D C Pa 308 F Supp 293

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22. Practicable time for compliance
N C—North Carolina Utilities Commission v Atlantic Coast Line R Co 29 S E 2d 912, 224 N C 283

§ 472. —— Actions

Library References
Carriers ⇐19 et seq

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88. Action under statutes of other state
Mo—Coryell v Atchison T & S F Ry Co, 201 S W 77, 273 Mo 361

§ 474. Failure to Pay for Loss of, or Injury to, Goods

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1 La—V Rivera S En C v Texas & N O R Co 31 So 2d 180, 211 La 969 172 A L R 791 app dism and cert den 68 S Ct 71 332 US 750, 92 L Ed 337

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6 Ga—Southern Ry Co v Turner 42 S E 2d 790, 75 Ga App 219

Penalty imposed
Fla—Atlantic Coast Line R Co v Cowart, 190 So 546, 140 Fla 596

§ 475. —— Requisites and Sufficiency of Claim

13 N Y—Schwartz v Air France, 384 N Y S 2d 658, 87 Misc 2d 147

18 S C—Victor Fertilizer Co v Southern Ry Co 24 S E 2d 499, 202 S C 294

§ 478. —— Who May Sue and Who Liable

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44 S C—Victor Fertilizer Co v Southern Ry Co supra, n 18

§ 484. —— Federal Legislation In General

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83 US—US v Boston & M R R D C Mass 30 F Supp 780, revd on oth grds 117 F 2d 424

84 US—Boston & M R R v US, C C A Mass 99 F 2d 646—US v Boston & M R R, 117 F 2d 484

Mere e[illegible] etc.—US v Boston & M R R supra, n 83

89. Determined from circumstances
US—US v Boston & M R R, supra, n 83

92 US—US v Boston & M R R supra, n 83—Boston & M R R v US 117 F 2d 428

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93 US—Boston & M R R v U S supra, n 92

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6 US—Boston & M R R v U S C C A Mass, 117 F 2d 428

§ 487. —— Operation and Effect of Provisos Contained in Statute

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21 US—US v Boston & M R R C C A Mass 117 F 2d 424

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30 US—US v Boston & M R R C C A Mass 117 F 2d 424

31 US—Boston & M R R v US supra, n 6

38 US—US v Boston & M R R D C Mass 30 F Supp 776

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44 US—US v Boston & M R R supra, n 21

45 US—US v Boston & M R R supra, n 21

§ 489. —— Actions

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52 US—U S v New York Cent R R C C A Mass, 117 F 2d 433

62 US—US v Boston & M R R D C Mass, 30 F Supp 780, revd on oth grds 117 F 2d 424—US v New York Cent R R supra, n 52

64 US—Boston & M R R v US supra, n 6

Sufficiency of evidence
(1) US v Boston & M R R D C Mass, 21 F Supp 671, affd, C C A 99 F 2d 646
(2) US v Boston & M R R, D C Mass, 21 F Supp 673 affd, C C A 99 F 2d 635

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65 US—US v Boston & M R R supra, n 21—US v New York Cent R R, supra, n 52

66 US—US v Boston & M R R, supra, n 62

§ 490. —— Amount and Computation of Penalties

70. Permanent suspension of judgment unauthorized
US—US v Denver & R G W R Co, C A Utah, 223 F 2d 126

§ 497. —— Actions

page 1001

24 US—US v Phillips Petroleum Co, D C Del 36 F Supp 480

30. Petition held insufficient
US—Silent Sioux Corp v Chicago & N W Ry Co C A Iowa, 262 F 2d 474

§ 510. Unjust Discrimination

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Several sections of the Elkins Act, 49 U.S.C.A. §§ 42, 43, have been construed as providing for enforcement of the Interstate Commerce Act as distinguished from punishment for its violation, and to look to proceedings of the nature of equitable proceedings.[30 50]

30.50 Venue of proceedings to enjoin rebates and for forfeiture of treble amount—US v Phillips Petroleum Co D C Del 36 F Supp 480

Warehousemen who are neither shippers nor receivers of freight, in order to recover damages under the Interstate Commerce Act, arising out of a common carrier's operation of a terminal, are required to show that they were injured by the unlawful discrimination in relation to transportation.[30 55]

30.55. Warehousemen as within protection of Interstate Commerce Act
US—Shaw Warehouse Co v Southern Ry Co C A Ala 288 F 2d 759 reh den 294 F 2d 850, cert den 82 S Ct 933 369 U S 850, 8 L Ed 2d 9 reh den 83 S Ct 931 372 US 950 9 L Ed 2d 975

Evidence
US—Shaw Warehouse Co v Southern Ry Co C A Ala, 288 F 2d 759 reh den 294 F 2d 850, cert den 82 S Ct 933, 369 US 850, 8 L Ed 2d 9 reh den 83 S Ct 931 372 US 950, 9 L Ed 2d 975

Instructions
US—Shaw Warehouse Co v Southern Ry Co C A Ala, 288 F 2d 759 reh den 294 F 2d 850, cert den 82 S Ct 933 369 U S 850, 8 L Ed 2d 9 reh den 83 S Ct 931, 372 US 950, 9 L Ed 2d 975

Jury questions
US—Shaw Warehouse Co v Southern Ry Co C A Ala 288 F 2d 759, reh den 294 F 2d 850, cert den 82 S Ct 933 369 U S 850, 8 L Ed 2d 9 reh den 83 S Ct 931, 372 U S 950, 9 L Ed 2d 975

Damages
US—Shaw Warehouse Co v Southern Ry Co, C A Ala 288 F 2d 759, reh den 294 F 2d 850 cert den 82 S Ct 933 369 U S 850, 8 L Ed 2d 9 reh. den 83 S Ct 931, 372 U S 950, 9 L Ed 2d 975

§ 511. —— Against Shippers

31 US—Keith Ry Equipment Co v Association of Am Railroads, D C Ill., 64 F Supp 917

Statute not repealed
Ark—Roberts v St Louis, I M & S Ry Co., 130 S W 531 95 Ark 249

34 Miss—Illinois Cent R Co v N T Wax Grocery Co, 45 So 2d 266, 208 Miss 675

Intent to violate statute need not be shown
US—US v Food Fair Stores, Inc C A Fla 417 F 2d 62

Cal—People v Alves, 267 P 2d 858, 123 C A 2d 735

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78 Del—Schleff v Baltimore & O R Co Ch., 130 A 2d 321, 36 Del Ch 342

Evidence held to show receipt of concession
US—US v Food Fair Stores, Inc C A Fla., 417 F 2d 62

81. Questions held for court
Cal People v Alves, supra, n 34

82. Discretion not abused
Trial court, in imposing half the maximum penalty for each violation of statute did not abuse discretion—People v Alves, supra, n 34

§ 516. —— Charging Rates Different from Those Fixed by Schedule

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94 US—Nyad Motor Freight, Inc v W T Grant Co, C A N Y 486 F 2d 1112

99 US—El Dorado Terminal Co v General American Tank Car Corporation, C C A Cal 104 F 2d

903 revd on oth grds 60 S Ct 325 308 U S 422, 84 L Ed 361 reh den 60 S Ct 465 309 U S 694 84 L Ed 1035

4 U S—Powell v U S C C A N C 112 F 2d 764

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14 U S—Powell v U S C C A N C 112 F 2d 764—Union Petroleum Corp v U S C A Okl 376 F 2d 569 cert den 88 S Ct 57 389 U S 838, 19 L Ed 2d 101

Other matters have been held not to constitute defenses to a prosecution under the statutes for failure to observe the published tariffs [1] Receivers are subject to the provisions of the statutes [1 2]

14.1. Mistake of law and negligence of employees

U S—Powell v U S supra, n 4

14.2 U S—Powell v U S supra, n 4

§ 517. —— Unjust Discrimination

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36 U S—Continental Shippers Ass n v U S C A Cal 328 F 2d 966—U S v General Expressways, Inc D C Colo 270 F Supp 115

§ 518. —— Giving Rebates

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46 U S—C & D Motor Delivery Co v U S C C A Ohio, 150 F 2d 250—U S v Pep Trucking Co D C N J 261 F Supp 480

48 U S—U S v Key Line Freight, Inc D C Mich 404 F Supp 888—U S v Key Line Freight, Inc D C Mich 481 F Supp 91 affd C A 570 F 2d 97

What constitutes rebate

U S—El Dorado Terminal Co v General American Tank Car Corporation C C A Cal 104 F 2d 903 revd on oth grds 60 S Ct 325 308 U S 422, 84 L Ed 361 reh den 60 S Ct 465 309 U S 694 84 L Ed 1035

49 U S—U S v General Motors Corp C A Del 226 F 2d 745

50 U S—U S v Duncan Ceramics, Inc D C Cal 544 F Supp 1297 revd 762 F 2d 737

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52 U S—U S v Food Fair Stores Inc, C A Fla 417 F 2d 62

§ 521. —— Other Offenses

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There have been adjudications as to other offenses.[7 1 5]

73.5. Delivery without collection of charges

U S—U S v General Expressways, Inc D C Colo 270 F Supp 115

Knowing disclosures concerning shipment

U S—U S v Baltimore & O R. Co, D C Md 319 F Supp 1103

Transportation of hazardous materials

U S—U S v U S Pipe & Foundry Co D C Tenn, 415 F Supp 104

74 U S—Dearing v U S C C A Colo 167 F 2d 310—Berg v U S C A Cal 176 F 2d 122, cert den 70 S Ct 137 338 U S 876, 94 L Ed 537

§ 522. —— Prosecution and Punishment

Library References

Carriers ⇐21, 38.

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83 U S—Howitt v U S C C A Fla 150 F 2d 82 affd 66 S Ct 923 328 U S 189 90 L Ed 1162—U S v Pep Trucking Co D C N J 261 F Supp 480

85 U S—U S v Infinger Transp Co D C S C 316 F Supp 124

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96 Iowa—C J S cited in Heuer Truck Lines v Brownlee, 31 N W 2d 375 379 239 Iowa 267

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10 U S—U S v Key Line Freight Inc D C Mich 404 F Supp 888

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General rules govern in prosecutions generally against a carrier or its agents with respect to burden of proof, presumptions, and admissibility of evidence [2 7 1]

27.1. Presumptions

U S—Dearing v U S C C A Colo 167 F 2d 310

Admissibility

U S—Dearing v U S supra

Proof of specific intent not required

U S—U S v Indiana Trucking, Inc D C Ill 300 F Supp 765

Burden of proof

Cal—People v Flores, 133 Cal Rptr 759 62 C A 3d Supp 19

28 U S—Powell v U S C C A N C, 112 F 2d 764

Pa—Com v Bitzer 51 Lanc L Rev 85

Evidence held sufficient

(3) Dearing v U S supra, n 27 1

(4) Other evidence

U S—U S v Rudolph, C A N J 361 F 2d 832—U S v Essenfeld, D C N Y 267 F Supp 637—U S v Pennsylvania R Co D C Pa 308 F Supp 293

Pa—Com v Acernese, 59 Lack Jur 133

Evidence held insufficient

U S—Continental Shippers Ass n v U S C A Cal 328 F 2d 966—U S v States Marine Lines, Inc D C N Y 334 F Supp 84

29 U S—Howitt v U S, C C A Fla, 150 F 2d 82, affd 66 S Ct 923 328 U S 189, 90 L Ed 1162—C & D Motor Delivery Co v U S C C A Ohio 150 F 2d 250—U S v Key Line Freight, Inc D C Mich 404 F Supp 888

§ 524. —— Violations of Elkins Act

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34 U S—U S v Bornstein, D C Mass 19 F R D 254—U S v Union Pac R Co D C Iowa, 173 F Supp 397, affd 80 S Ct 737, 362 U S 327, 4 L Ed 2d 766

Indictment held sufficient to state offense for soliciting

U S—U S v Braverman, Cal, 83 S Ct 1370, 373 U S 405 10 L Ed 2d 444

36 U S—Union Petrol m Corp v U S, C A Okl, 376 F 2d 569 cert den 88 S Ct 57 389 U S 838, 19 L Ed 2d 101

37 U S—U S v Phillips Petroleum Co D C Del 36 F Supp 480

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49. Meaning of phrase "shall knowingly solicit or accept concessions"

U S—Boone v U S C C A Tenn 109 F 2d 560—Union Petroleum Corp v U S C A Okl 376 F 2d 569 cert den 88 S Ct 57 389 U S 838, 19 L Ed 2d 101

page 1027

64 U S—Boone v U S supra, n 49

Determination of value

U S—U S v North Carolina Granite Corp C A N C 288 F 2d 232

Purchase of land for less than fair market value

U S—U S v Michael Schiavone & Sons, Inc C A Mass 430 F 2d 231 on remand 325 F Supp 4 mod 450 F 2d 875

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75. Knowledge

U S—U S v General Motors Corp C A Del 226 F 2d 745

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83 Evidence held sufficient to support conviction—Boone v U S supra, n 49—Emerald Lumber Co v U S C A Ohio, 278 F 2d 840—U S v North Carolina Granite Corp C A N C 288 F 2d 232—U S v Michael Schiavone & Sons, Inc C A Mass 430 F 2d 231 on remand 325 F Supp 4 mod 450 F 2d 875

§ 525. —— Shipping Dangerous Goods without Giving Notice of Their Character

page 1030

94. Indictment insufficient

U S—U S v Deer D C Wash 131 F Supp 319

Knowledge of shipment of dangerous materials required

U S—U S v International Minerals & Chemical Corp Ohio, 91 S Ct 1697, 402 U S 558, 29 L Ed 2d 178

Instruction held erroneous

U S—U S v Thompson-Hayward Chemical Co, C A Mo 446 F 2d 583

§ 526. —— Other Offenses

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95. Under Insecticide Act

U S—U S v Sani-Pine Corp, C C A N Y 153 F 2d 1015

Other statutes may be violated by persons dealing with carriers.[4 5]

4.5. Engaging carrier operating illegally

Cal—Klein v Leatherman, 76 Cal Rptr 190, 270 C A 2d 792

Various matters have been adjudicated in connection with violations under the Federal Bills of Lading Act [8 5]

8.5. Intent as essential element

U S—U S v Aadal, D C N Y, 280 F Supp 862, affd C A 407 F 2d 381 cert den 89 S Ct 2114, 395 U S 967 23 L Ed 2d 754

Sufficiency of evidence

U S—U S v Aadal, D C N Y 280 F Supp 862, affd, C A, 407 F 2d 381 cert den 89 S Ct 2114, 395 U S 967 23 L Ed 2d 754

9 Evidence held erroneously excluded

U S—U S v Schultz, C A Ill 235 F 2d 684

Federal Motor Carrier Act, 49 U.S.C.A. § 322c, forbids rebates, concessions, or discrimination and the use of specified means to obtain transportation for less than the applicable rate [9 1]

9.1. Matters held concession

U S—C & D Motor Delivery Co v U S, C C A Ohio, 150 F 2d 250

Evidence held insufficient

(1) To sustain motions for directed verdict—C & D Motor Delivery Co v U S supra

(2) To support conviction—Hancock Mfg Co v U S C C A Mich 155 F 2d 827

Proof of actual discrimination unnecessary

U S—U S v Schupper Motor Lines, Inc C A N Y 262 F 2d 859

10. Evidence held sufficient, etc.

Tex—Johnson v State, 143 S W 2d 398 140 Tex Cr R 70

(2) Other cases—Bell v State, 91 S W 2d 711, 130 Tex Cr R 5—Fullbright v State, 101 S W 2d 571 131 Tex Cr R 640

Evidence held [illegible] to sustain conviction—Ferguson v State, 62 P 2d 1033 60 Okl Cr 220—Smith v State, 287 P 835 47 Okl Cr 184

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12. Indictments held sufficient generally

Tex—Bell v State, supra, n 10—Fullbright v State, supra, n 10

Indictments held insufficient generally

Okl—Davis v State, 52 P 2d 96, 58 Okl Cr 268—Hart v State, 60 P 2d 411 59 Okl Cr 396

§ 527. In General

Other matters relating to the shipper's liability have been adjudicated [16.5]

16.5. Shipping in proper condition

U S—Eastern Motor Exp, Inc v A Maschmeyer Jr, Inc C A N Y 247 F 2d 826, 65 A L R 2d 765 cert den 78 S Ct 535 355 U S 959 2 L Ed 2d 534

Evidence held sufficient

U S—Eastern Motor Exp Inc v A Maschmeyer Jr Inc, C A N Y 247 F 2d 826, 65 A L R 2d 765 cert den 78 S Ct 535 355 U S 959 2 L Ed 2d 534

Proximate cause

Ala—Malone Freight Lines, Inc v McCardle, 167 So 2d 274, 277 Ala 100

Servicing or repair of fire extinguisher

Ala—Malone Freight Lines, Inc v McCardle, 167 So 2d 274 277 Ala 100

Assumption of risk

Iowa—Lakatosh v Diamond Alkali Co 208 N W 2d 910

General rules govern in actions by carriers to enforce liability of shippers.[20.5]

20.5. Evidence

U S—Eastern Motor Exp Inc v A Maschmeyer Jr, Inc, D C N Y 141 F Supp 477, affd in part and revd in part, on oth grds, C A, 247 F 2d 826, 65 A L R 2d 765 cert den 78 S Ct 535, 355 U S 959 2 L Ed 2d 534—B C Truck Lines, Inc v Pilot Freight Carriers, Inc D C Ga, 225 F Supp 1

Questions of law and fact

Ala—Malone Freight Lines, Inc v McCardle, 167 So 2d 274, 277 Ala 100

Ga—Seaboard Coast Line R Co v Freight Delivery Service, Inc 210 S E 2d 42, 133 Ga App 92

Declaration, petition, or complaint held sufficient

Ga—Ryder Truck Lines, Inc v Aladdin, Inc, 139 S E 2d 446, 110 Ga App 579

Issues, proof, and variance

Ga—Ryder Truck Lines, Inc. v Aladdin, Inc, 139 S E 2d 446, 110 Ga App 579

Instructions

U S—American Hoist & Derrick Co v Chicago, M, St P & P R Co C A Ohio, 414 F 2d 68

Burden of proof

U S—Southern Pac Transp Co v U S D C Cal 456 F Supp 931

§ 528. Shipment of Dangerous Articles

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22 Iowa—Lakatosh v Diamond Alkali Co 208 N W 2d 910

25. Acts of independent agent

Iowa—Lakatosh v Diamond Alkali Co, 208 N W 2d 910

§ 529. In General

Library References

Carriers ⇐233 et seq

28 Cal People v Stolzoff 162 P 2d 743 71 Cal App 2d Supp 849

La—Brown v Homer-Doyline Bus Lines, App 23 So 2d 348

S C—Squires v Henderson, 36 S E 2d 738, 208 S C 58

29 Okl—Thompson v Walton, 297 P 2d 1084

30 Ga—C.J.S quoted in Scott v Torrance, 25 S E 2d 120, 127 69 Ga App 309

31 Idaho—Straley v Idaho Nuclear Corp 500 P 2d 218, 94 Idaho 917

§ 530. Public or Common Carrier in General

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The courts are without power to regulate common carriers of passengers.[33.5]

33.5 Neb—Application of Chicago & N W Ry Co 91 N W 2d 312, 167 Neb 61

34. "Transport" defined

Pa—Com v Benci, 68 Pa Dist & Co 379—Com v Cerne, 11 Monroe L R 73

Public [illegible] of [illegible] transit authority as not removing from general category of "common carrier"

Cal—Los Angeles Metropolitan Transit Authority v Public Utilities Commission, 31 Cal Rptr 463 382 P 2d 583

35 D C—Morris v District of Columbia, Mun App, 31 A 2d 652

N J—Lipton R Co v Kelly 28 A 2d 619 20 N J Misc 477

36 Ga—Scott v Torrance, supra, n 30

37 U S—C.J.S. quoted at length in Semon v Royal Indem Co D C La 179 F Supp 403, 405 affd, C A, 279 F 2d 737

Tenn—C.J.S. quoted in Hawkins County v Davis, 391 S W 2d 658, 661, 216 Tenn 262

38 N Y—Vogel v State, 124 N Y S 2d 563, 204 Misc 614, app dism 136 N Y S 376, 284 App Div 993

Tenn—C.J.S. quoted in Hawkins County v Davis, 391 S W 2d 658, 661 216 Tenn 262

39 U S—Dennison v Edwards, C A Ill, 416 F 2d 958

Ill Meyer v Rozran, 77 N E 2d 454, 333 Ill App 301

La—Hutchinson v Public Belt Railroad Commission, App 181 So 65 reh den 181 So 221 affd 188 So 395 192 La 525

Mass—First National Stores v H P Welch Co 55 N E 2d 200, 316 Mass 147

N Y—Grauer v State, 181 N Y S 2d 994, 15 Misc 2d 471 affd 192 N Y S 2d 647, 9 A D 2d 829

Utah—C.J.S cited in Realty Purchasing Co v Public Service Commission, 345 P 2d 606, 608, 9 Utah 2d 375

W Va—Brown v De Marie, 46 S E 2d 797, 131 W Va 264

Failure to cater to all the public

Iowa—Kvalheim v Horace Mann Life Ins Co 219 N W 2d 533

40 Ill—Illinois Highway Transp Co v Hantel, 55 N E 2d 710, 323 Ill App 364

Mass—Blair v Boston Elevated Ry Co 36 N E 2d 419 310 Mass 1

Minn—Cummings v Great American Casualty Co, 235 N W 617 183 Minn 112

Wash—Miles v Enumclaw Co-op Creamery Corporation, 121 P 2d 945 947 12 Wash 2d 377

Similar definitions

(4) Other definitions

Iowa—Kvalheim v Horace Mann Life Ins Co 219 N W 2d 533

Neb—Application of Ferguson Trucking Co 81 N W 2d 915 164 Neb 85

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42 U S—C.J.S. cited in Arrow Aviation, Inc v Moore, C A Neb, 266 F 2d 488 490, 73 A L R 2d 337

43 U S—Demetrion v Edwards, C A Ill 416 F 2d 958

Cal—Dzura v California Aviation Service, Inc 84 Cal Rptr 191, 4 C A 3d 191

Ill—Illinois Highway Transp Co v Hantel, supra, n 40

Iowa—Kvalheim v Horace Mann Life Ins Co 219 N W 2d 533

Mass—First National Stores v H P Welch Co, supra, n 39

Wyo—Rural Electric Co v State Board of Equalization, 120 P 2d 741 749, 57 Wyo 451

Question must be determined by character of [illegible]

(2) Other matters

U S—Semon v Royal Indem Co C A La 279 F 2d 737

47 Ill—Miller v Miller 69 N E 2d 878 395 Ill 273

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51 Tenn—C.J.S cited in Roberts v Knoxville Transit Lines, 259 S W 2d 883, 889, 36 Tenn App 595—C.J.S. quoted in Hawkins County v Davis, 391 S W 2d 658, 661 216 Tenn 262

Right of refusal critical criterion

U S—Semon v Royal Indem Co, D C La, 179 F Supp 403 affd C A, 279 F 2d 737

52 N Y—Anderson v Fidelity & Casualty Co of New York, 166 N Y S 640, 642, 100 Misc 411, mod on oth grds 170 N Y S 431, 183 App Div 170, affd 127 N E 584, 228 N Y 475, 9 A L R 1544

§ 531. Private Carrier in General

55 Ill Meyer v Rozran, supra, n 39

Minn—Hammerlind v Clear Lake Star Factory Skydiver's Club, 258 N W 2d 590, 95 A L R 3d 1273

Nev—Botts v Rushton, 172 P 2d 147 63 Nev 426

N Y—People v Lee, 336 N Y S 2d 18, 717 Misc 2d 239

Tenn—C.J.S. quoted in Hawkins County v Davis, 391 S W 2d 658, 661 216 Tenn 262

Contract carrier

Utah—Realty Purchasing Co v Public Service Commission, 345 P 2d 606, 9 Utah 2d 375

Motorist contracting to transport rider

N M—Trujillo v Chavez, 417 P 2d 893, 76 N M 703

Undertaking to serve particular class of individuals

U S—Dennison v Edwards, C A Ill 416 F 2d 958

56 Cal—Hopkins v Yellow Cab Co, 250 P 2d 330, 114 C A 2d 394

Mass—First National Stores v H P Welch Co supra, n 39

Pa—Com v Benci, supra n 34

Tenn—CJS cited in Roberts v Knoxville Transit Lines, 259 S W 2d 883 939 36 Tenn App 595—CJS quoted in Hawkins County v Davis 391 S W 2d 658 661 216 Tenn 262

Tex—Cedzwoda v Crane-Longley Funeral Chapel Civ App 273 S W 2d 455 affd 283 S W 2d 217 155 Tex 99

§ 532. Railroads; Street Railroads

58. Attendants for animals

Ill—Crane v Railway Express Agency, 12 N E 2d 672 293 Ill App 328 mod on oth grds 15 N E 2d 866, 369 Ill 110

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67 N H—Bernardi Greater Shows v Boston & Maine R R 1 A 2d 360, 89 N H 490, cert den 59 S Ct 787 306 U S 662, 83 L Ed 1059

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84. Chair lift up mountain

N Y—Grauer v State, 181 N Y S 2d 994 15 Misc 2d 471 affd 192 N Y S 2d 647 9 A D 2d 829—Battalla v State, 272 N Y S 2d 28, 26 A D 2d 203

§ 533. Elevators

Library References
Carriers ⇐235.5

86 U S—Otis Elevator Co v Seale, C A La 334 F 2d 928

Ga—Delk v Sellers, 254 S E 2d 446, 149 Ga App 439

Tex—O Connor v Dallas Cotton Exchange, Civ App 153 S W 2d 260

W Va—CJS cited in Brown v De Marie, 46 S E 2d 797 801 131 W Va 264

Manufacturer not common carrier

Ohio—McDonald v Haughton Elevator & Machine Co, 20 N E 2d 253 60 Ohio App 185

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87 U S—White v Sears, Roebuck & Co, C A Va 242 F 2d 821 66 A L R 2d 491—Suarez v Trans World Airlines, Inc, C A Ill 498 F 2d 612

Ark—Little Rock Land Co v Raper 433 S W 2d 836, 245 Ark 641

Ill—Mader v Mandel Bros Dep t Store 41 N E 2d 327 314 Ill App 263—Starczynski v Miltenberg, 55 N E 2d 299, 323 Ill App 283—Carson v Weston Hotel Corp, 115 N E 2d 800, 351 Ill App 523—Cobb v Marshall Field & Co App, 159 N E 2d 520, 22 Ill App 2d 143—Kaminsky v Arthur Rubloff & Co 218 N E 2d 860, 72 Ill App 2d 68

Ohio—Norman v Thomas Emery s Sons, Inc 218 N E 2d 480, 7 Ohio App 2d 41

Pa—Gabel v 1528 Walnut St Bldg Corp 50 A 2d 751 160 Pa Super 218

"Chair lift"

N Y—Vogel v State, 124 N Y S 2d 563 204 Misc 614, app dism 136 N Y S 2d 376, 284 App Div 993

91 U S—Wemer v May Department Stores Co, D C Cal 35 F Supp 895

Cal—Vandagriff v J C Penney Co, 39 Cal Rptr 671, 228 C A 2d 579

Mo—Haley v May Dept. Stores Co, App, 287 S W 2d 366

Pa—Wood v Kugler's Restaurant, 35 Pa Dist & Co 101

Escalator held not common carrier

La—Vallette v Maison Blanche Co App, 29 So 2d 528

§ 534. Other Passenger Carriers

93 Kan—Clark v Southwestern Greyhound Lines, 79 P 2d 906, 148 Kan 155

S C Hx pl ns v Stokes Bus Line, 18 S E 2d 675, 199 S C 132

94 U S—Kaus v Huston, D C Iowa, 35 F Supp. 327, affd, C C A, 120 F 2d 183—Rydberg v Mitchel, D C Alaska, 87 F Supp 639 12 Alaska 509—Shackelford v Mission Taxicab Co C A Cal 224 F 2d 857—Demetrion v Edwards, C A Ill 416 F 2d 958

Cal—People v One 1941 Buick 8 4-Door Sedan Engine No 54135130 147 P 2d 401 63 Cal App 2d 661

Conn—Cadwell v Watson, 60 A 2d 168, 134 Conn 640

D C—Butler v McCallip, Mun App 54 A 2d 644

Ill—Anderson v Yellow Cab Co 329 N E 2d 278, 28 Ill App 3d 656

Kan—King v Vets Cab, Inc 295 P 2d 605, 179 Kan 379 56 A L R 2d 1249

Ky—Fowler v Randle, 143 S W 2d 1049 284 Ky 164—Grigsby v Smith, 146 S W 2d 719 285 Ky 48—Preferred Acc Ins Co of N Y v Noe, 234 S W 2d 748, 314 Ky 245—Louisville Taxicab & Transfer Co v Jackson, 251 S W 2d 874 35 A L R 2d 783

Md—Brooks v Sun Cab Co 117 A 2d 554 208 Md 236

Mass—Gilmore v Acme Taxi Co 212 N E 2d 235, 349 Mass 651

Mo—Harding v Triplett, App 235 S W 2d 112

N Y—Kronstad v Pechtold, 46 N Y S 2d 124

Ohio—Brinkmoeller v Wilson, 325 N E 2d 233, 41 Ohio St 2d 223

Okl—Yellow Cab Operating Co v Robinson, 105 P 2d 535 187 Okl 669—Dymond Cab Co v Branson, 131 P 2d 1007 191 Okl 604

Pa—Kerr v Pennsylvania & Reading Ry Co 53 Pa Super 83

Tenn—Jenkins v General Cab Co of Nashville, 135 S W 2d 448 175 Tenn 409

Va—Simpson v Broadway-Manhattan Taxicab Corp 128 S E 2d 306, 203 Va 892

Carrier engaged in automobile rent business, etc.

(2) The contrary is true where automobile is rented to be driven by the hirer

Ohio—Hodge Drive-It-Yourself Co v City of Cincinnati, 175 N E 196, 123 Ohio St 284 77 A L R 889 affd 52 S Ct 144 284 U S 335, 76 L Ed 323

Okl—Dymond Cab Co v Branson, 131 P 2d 1007, 191 Okl 604

Tex—Ch Cr y etc—Stewart Taxi-Service Co v Spencer, 132 A 153 149 Md 635

Okl—Dymond Cab Co v Branson, supra

(2) Other cases

Kan—Shumate v Vets Cab, Inc 281 P 2d 1071, 177 Kan 600

Md—Kaufman v Taxicab Bureau, Baltimore City Police Dept 204 A 2d 521 236 Md 476, cert den 86 S Ct 95 382 U S 849 15 L Ed 2d 88

N C—Hardy v Ingram, 126 S E 2d 55, 257 N C 473

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95 Vt—Ready v Peters, 117 A 2d 374, 119 Vt 10

A state may be common carrier in operation of chair lift.[97.5] However a rope tow operator has been held not to be a common carrier.[97.10] One who operates a mule train between fixed termini is a common carrier.[97.15]

97.5 N Y—Grauer v State, 192 N Y S 2d 647 9 A D 2d 829

Other ski lift operators held common carriers

U S—Fisher v Mt Mansfield Co, C A Vt 283 F 2d 533

Ski lift not a common carrier

Mont—Pessl v Bridger Bowl, 524 P 2d 1101, 164 Mont 389

97.10 Cal—McDaniel v Dowell, 26 Cal Rptr 140, 210 C A 2d 26

97.15 Cal—McIntyre v Smoke Tree Ranch Stables, 23 Cal Rptr 339 205 C A 2d 489

98 Ga—Parker v G O Loving & Co, 79 S E. 77, 13 Ga App 284

Iowa—Valentine v Fehling, 135 N W 621 155 Iowa 138

1. Paid ambulance service

N J—Hollander v Smith & Smith 76 A 2d 697 16 N J Super 82 21 A L R 2d 902

Ambulance services not subject to Motor Carriers Act

U S—Jones v Giles, C A Wash 741 F 2d 245

Ambulance services are common carriers for tort liability purposes[1.5]

1.5 Fla—Nazareth v Herndon Ambulance Service, Inc App 5 Dist 467 So 2d 1076, review den 478 So 2d 53

§ 535. Nature of the Relation

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4 U S—Wabash R Co v Davidson, C C A Mich 168 F 2d 300

Kan—Shumate v Vets Cab Inc, 281 P 2d 1071 177 Kan 600

Mo—Williams v Illinois Cent R Co 229 S W 2d 1, 360 Mo 501 20 A L R 2d 322

N J—Gebhardt v Public Service Coordinated Transport, 137 A 2d 48, 48 N J Super 173

§ 536. What Law Governs

6 U S—Barnett v City of Detroit, D C Mich 139 F Supp 134, affd C A 245 F 2d 445—Gore v Northeast Airlines, Inc C A N Y 373 F 2d 717

Tex—Hudson v Continental Bus System, Inc Civ App 317 S W 2d 584, err ref no rev err—Garza v Greyhound Lines, Inc, Civ App, 418 S W 2d 595

Action timely filed

U S—Charalason v Northwest Airlines, Inc, D C Hawaii, 455 F Supp 492 Affd C A, 633 F 2d 529

7 Fla—Maultsby v Atlantic Coast Line R Co, App, 188 So 2d 561

Ky—Cincinnati, Newport & Covington Ry Co v Rothe, 252 S W 2d 668

8 Fla—Maultsby v Atlantic Coast Line, R Co App 188 So 2d 561

§ 538. Duty to Receive and Transport Passengers

Library References
Carriers ⇐236(1.1, 1.2).

9 U S—Wabash R Co v Davidson, C C A Mich 168 F 2d 300—Brotherhood of Ry and S S Clerks, Freight Handlers, Exp and Station Emp, AFL-CIO v Florida East Coast Ry Co, Fla 86 S Ct 1420, 384 U S 238, 16 L Ed 2d 501

Conn—Hunt v Clifford, 209 A 2d 182, 152 Conn 540

D C—Morris v District of Columbia, Mun App, 31 A 2d 652—Andrews v Chesapeake & Potomac Tel Co, D C, 83 F Supp 966

Ill—Duncan v Fisher 242 N E 2d 479, 101 Ill App 2d 213

Ind—Northern Ind Transit v Burk, 89 N E 2d 905, 228 Ind 162, 17 A L R 2d 572

La—Sizeler v Employers Liability Assur Corp App 102 So 2d 326

N J—Wechawken Tp v Erie R Co, 120 A 2d 593, 20 N J 572—CJS cited in Gebhardt v Public Service Coordinated Transport, 137 A 2d 48, 53, 48 N J Super 173

N Y—Madden v Queens County Jockey Club, 72 N E 2d 697 296 N Y 249 1 A L R 2d 1160—Jacobson v New York Racing Ass'n, Inc, 350 N Y S 2d 639 33 N Y 2d 144, 305 N E 2d 765

Ohio—Fletcher v Coney Island, Inc, 134 N E 2d 371, 165 Ohio St 150

Pa—Rockwell v Pennsylvania State Horse Racing Commission, 327 A 2d 211, 15 Pa Cmwlth 348

Tex—Cedzwoda v Crane-Longley Funeral Chapel, Civ App, 273 S W 2d 455, affd 283 S W 2d 217, 155 Tex 99

Unprofitable service

Neb—Application of Omaha Transit Co 94 N W 2d 461 167 Neb 703

Violation of anti-discrimination provisions shown

US—Karp v North Central Air Lines, Inc C A Wis 583 F 2d 364

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10 Conn—Hunt v Clifford, 209 A 2d 182, 152 Conn 540

Fla—Orlando Transit Co v Florida R R & Public Utilities Commission, 37 So 2d 321 160 Fla 795

Miss—Teche Lines, Inc v Lott, 198 So 292, 189 Miss 490

11 Conn—Hunt v Clifford, 209 A 2d 182, 152 Conn 540

13 NJ—Susquehanna Transit Commuters Ass'n v Board of Public Utility Com'rs, 151 A 2d 9 55 N J Super 377

Defense to charge of illegal transportation

US—Picking v Pennsylvania R Co C C A Pa 151 F 2d 240, reh den, C C A 152 F 2d 753

17 US—Sabon Investigation, Inc v Braniff Airways, Inc D C Ariz, 534 F Supp 683

Persons under arrest

US—Picking v Pennsylvania R Co, supra, n 13

18 Cal—People v Brophy, 120 P 2d 946, 49 Cal App 2d 15

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Continuance of service. Common carriers have the duty to continue service.[19.5]

19.5 D C—Mercy Consol Gas Co v Federal Power Commission, C A, 283 F 2d 204 108 U S App D C 409 cert den 81 S Ct 276 364 U S 913, 5 L Ed 2d 227

Various matters relating to discrimination with regard to terminal and restaurant facilities for passengers have been adjudicated.[20.5]

20.5. Where facilities an integral part of transportation service

(1) Passenger not bound to inquire about right to carrier to discriminate right to service without discrimination

US Boynton v Com of Va, Va 81 S Ct 182, 364 U S 454, 5 L Ed 2d 206

(2) Right to service without discrimination

U S Boynton v Com of Va, Va 81 S Ct 182, 364 U S 454, 5 L Ed 2d 206

Voluntary segregation signs

US—U S v City of Jackson, Miss, C A Miss, 318 F 2d 1, reh den 320 F 2d 870

21 Neb—Scarbrough v Automotive, Inc, 53 N W 2d 902, 155 Neb 749, 30 A L R 2d 1159

23 La—Austin v Delta Air Lines, Inc, App 246 So 2d 894

24 Fla Fontainebleau v Trans World Airlines, Inc, App 336 So 2d 373

25 US—Callaway v Hart, C C A Ala, 146 F 2d 103, cert den 65 S Ct 915 324 U S 866, 89 L Ed 1421

Mass Hall v Boston Elevated Ry Co 21 N E 2d 251, 303 Mass 242

Tex—Hunt v Dixie Motor Coach Corp, Civ App, 187 S W 2d 250, err ref w m

W Va—C.J.S. cited in Billy v Powell, 55 S E 2d 889 895, 133 W Va 278

28. Rule applies even if conclusion erroneous

La—Austin v Delta Air Lines, Inc, App, 246 So 2d 894

Statute not violated

U S—Snowden v Birmingham-Jefferson County Transit Authority D C Ala 407 F Supp 394 affd, C A 551 F 2d 862, reh den 554 F 2d 475

§ 539. —— On Freight and Special Trains or Cars

page 1044

46 Ohio—Sparks v New York Cent R Co, 69 N E 2d 441 80 Ohio App 50 reh den 70 N E 2d 233 second case, 80 Ohio App 50

§ 540. —— Remedy for Refusal of Transportation

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47 U S—Karp v North Central Airlines, Inc D C Wis, 437 F Supp 87 Affd in part, revd in part on oth grds, C A 583 F 2d 364

48 D C—Mason v Behen, C A, 543 F 2d 215, 177 U S App D C 68, cert den 97 S Ct 144 429 U S 852, 50 L Ed 2d 127 app after remand 554 F 2d 129

Ohio—Kalish v Trans World Airlines, Inc 362 N E 2d 994 50 Ohio St 2d 73, 4 O O 3d 195

52 Ohio—Kalish v Trans World Airlines, Inc 362 N E 2d 994 50 Ohio St 2d 73, 4 O O 3d 195

53 U S—Karp v North Central Airlines, Inc, D C Wis, 437 F Supp 87 Affd in part, revd in part on oth grds C A 583 F 2d 364

54 Ky—Southeastern Greyhound Lines v Klatt, 189 S W 2d 731 300 Ky 505

N J—Gebhardt v Public Service Co-ordinated Transport, 137 A 2d 48, 48 N J Super 173

57. Private remedies for common law torts

U S—Nader v Allegheny Airlines, Inc, Dist Col 96 S Ct 1978, 426 U S 290, 48 L Ed 2d 643

58 Ky—Southeastern Greyhound Lines v Klatt, supra, n 54

Action under laws of other states for discrimination

McDuffee v Portland, etc R Co 52 N H 430, 13 Am R 72

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59 N Y—Yurkanish v Blueway Trailways, 29 N Y S 2d 432

Bumped airline passenger

U S—Christensen v Northwest Airlines, Inc, D C Hawaii, 455 F Supp 492, affd C A, 633 F 2d 529—Christensen v Northwest Airlines, Inc C A Hawaii, 633 F 2d 529

N Y—Levy v Eastern Airlines, 449 N Y S 2d 906, 113 Misc 2d 847

62 U S—Wills v Trans World Airlines, Inc, D C Cal 200 F Supp 360

Ky—Southeastern Greyhound Lines v Klatt, supra, n 54

N J—Gebhardt v Public Service Co-ordinated Transport, 137 A 2d 48, 48 N J Super 173

63 U S—Sherrod v Piedmont Aviation, Inc, D C Tenn 516 F Supp 46

64 U S—Karp v North Central Air Lines, Inc C A Wis, 583 F 2d 364

Federal jurisdiction lacking

U S—Christensen v Northwest Airlines, Inc D C Hawaii, 455 F Supp 492, affd, C A, 633 F 2d 529

§ 541. Stealing Ride as Criminal Offense

Library References

Carriers ⇐22.

69. Applicability of statute

N Y—People v Papesmith, 174 N Y S 2d 860, 14 Misc 2d 300—People v Guns, 268 N Y S 2d 644 49 Misc 2d 883 app dism 225 N E 2d 576, 19 N Y 2d 703, 278 N Y S 2d 891

Federal transportation tax

N Y—People v Papesmith, 174 N Y S 2d 860, 14 Misc 2d 300

§ 543. Other Offenses

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Other offenses by passengers have been considered.[78.1]

78.1. Violation of segregation and segregation statute

U S—Morgan v Com of Va Va 66 S Ct 1050, 328 U S 373 90 L Ed 1317 165 A L R 574

N C—State v Harris, 197 S E 594 213 N C 758—State v Brown, 33 S E 2d 121 225 N C 22—State v Johnson, 51 S E 2d 186, 229 N C 701

Tex—Patillo v State, 47 S W 2d 847 120 Tex Cr R 568

Remaining in seat other than seat assigned

Ga—Glover v State, 124 S E 2d 484 105 Ga App 332

§ 544. In General

Library References

Carriers ⇐237

80 U S—C J S. quoted in Paul Revere Life Ins Co v First Nat Bank in Dallas, 359 F 2d 641 645

Tex—C.J.S. quoted in Warren v Commercial Cas Co, Civ App 248 S W 2d 315, 316, affd 254 S W 2d 762, 152 Tex 164

Relation held to exist

U S—Suarez v Trans World Airlines, Inc C A Ill 498 F 2d 612

Ill—Elliott v Illinois Cent R Co 47 N E 2d 375 318 Ill App 112

N Y Bardavid v New York City Transit Authority 440 N Y S 2d 648 82 A D 2d 776, app after remand 467 N Y S 2d 360 97 A D 2d 353, affd 463 N E 2d 1216, 61 N Y 2d 986, 475 N Y S 2d 364

Tex—Martin v Weaver Civ App 161 S W 2d 812, err ref

Relation held not to exist

Ill—Kaminsky v Arthur Rubloff & Co 218 N E 2d 860, 72 Ill App 2d 68

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81 U S—Wabash R Co v Davidson, supra, n 4

Cal—Rocha v Hulen, 44 P 2d 478, 482, 6 Cal App 2d 245

Ind—Long v Archer 46 N E 2d 818, 821, 221 Ind 186

Mo—Union Automobile Indemnity Ass'n v Reimann, App 171 S W 2d 721—Linam v Murphy, 232 S W 2d 937 360 Mo 1140

N D—Bentley v Oldetyme Distillers, 298 N W 417, 71 N D 52

Okl—Peoples Checker Cab Co v Dunlap, 307 P 2d 833

Similar definitions

(5) Other definitions

U S—Asdel Brenner v U S Fidelity & Guaranty Co Cal 54 S Ct 590, 593 292 U S 80, 78 L Ed 1137 reh den 54 S Ct 861, 292 U S 615, 78 L Ed 1474

N J—Fleming v Commercial Casualty Ins Co, 181 A 185 190, 116 N J Law 6

82 Fact that control of factors does not change relationship

Cal—McIntyre v Smoke Tree Ranch Stables, 23 Cal Rptr 339, 205 C A 2d 489

Matter to be considered

Wash—Zorotovich v Washington Toll-Bridge Authority 491 P 2d 1295, 80 Wash 2d 106

85 Cal—Whittaker v French, 235 P 2d 3 37 C 2d 744

Tenn—Richards v Parks, 93 S W 2d 639, 19 Tenn App 615

Va—Gale v Wilber 175 S E 739 163 Va 211

Contributing to [illegible], etc—Ashworth v Mansell, 156 N E 875 260 Mass 202

§ 545. Necessity of Contract

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86 U S—Wabash R Co v Davidson supra, n 4—Davidson v Wabash R Co D C Mich, 73 F Supp 416, revd on oth grds C C A 168 F 2d 300

Ill—Rotheli v Chicago Transit Authority 130 N E 2d 172

Me—Roberts v. Yellow Cab Co, 240 A 2d 733

Mo—Graves v Missouri Pac R Co 118 S W 2d 787 342 Mo 542, cert den 59 S Ct 76, 305 U S 617 83 L Ed 394

Mont—Hennessey v Intermountain Transp Co 102 P 2d 489 110 Mont 398

Okl—Peoples Checker Cab Co v Dunlap, 307 P 2d 833

Or—Neidert v Portland Stages, Inc 376 P 2d 92, 232 Or 514

S C—Horne v Southern Ry Co, 197 S E 31 186 S C 525, 116 A L R 745

Tex—Commercial Credit Co v Groseclose, Civ App 66 S W 2d 709 err dism

Wash—Fleming v City of Seattle, 275 P 2d 904, 45 Wash 2d 477

87. Air chauffeurs

U S Fleck v Compagnie Nationale Air France, C A Ga, 386 F 2d 323, cert den 88 S Ct 2053 392 U S 905, 20 L Ed 2d 1363

§ 546. Carrier's Employees

93 U S—Roberts v Chicago, R I & P R Co D C Minn 99 F Supp 895

95 Fla—Maultsby v Atlantic Coast Line R Co App, 188 So 2d 561

N J—Macieh v Erie R Co 37 A 2d 123 131 N J Law 427

Utah—Shurtliff v Oregon Short Line R Co 241 P 1058 66 Utah 161

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99 U S—C.J.S. cited in Sassaman v Pennsylvania R Co, D C N J, 49 F Supp 481, 483 affd, C C A 144 F 2d 950—Sassaman v Pennsylvania R Co C C A N J, 144 F 2d 950—Martin v Greyhound Corp C A Tenn 227 F 2d 501 cert den 76 S Ct 657, 350 U S 1013, 100 L Ed 873

1 U S—Sassaman v Pennsylvania R Co, C C A N J, 144 F 2d 950

Ga—Fowler v Western & A R R 42 S E 2d 499, 75 Ga App 156

Minn—Radosavljevich v St Paul City Ry Co, 8 N.W 2d 466, 214 Minn 427, 145 A L R 1027

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2 U S—Martin v Greyhound Corp D C Tenn 125 F Supp 362, revd on oth grds, C A, 227 F 2d 501, cert den 76 S Ct 657, 350 U S 1013 100 L Ed. 873

§ 547. Employees of Others Carried under Contract with Carrier

12 Ill—Crane v Railway Express Agency 15 N E 2d 866, 369 Ill 110

14 N H—Bernardi Greater Shows v Boston & Maine R R, 1 A 2d 360, 89 N H 490, cert den 59 S Ct. 787 306 U S 662, 83 L Ed 1059

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18 U S—C.J.S. cited in Roberts v Chicago, R I & P R Co D C Minn, 99 F Supp 895 897

§ 548 —— Postal Clerks and Express Messengers

22 U S—Jackson v Southern Ry Co C A Ga 317 F 2d 532, cert den 84 S Ct 77 375 U S 837 11 L Ed 2d 65

Mo—C.J.S cited in Jones v Thompson, 184 S W 2d 407 410 353 Mo 730—Nix v Gulf M & O R Co 240 S W 2d 709 362 Mo 187

Pa—Miller v Pennsylvania R Co, 84 A 2d 200, 368 Pa 507

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26 U S—Jacob v Pennsylvania R R C A Ohio, 203 F 2d 290

28 U S—Burgert v Union Pac R Co C A Mo 240 F 2d 207

§ 549. Persons Riding Gratuitously in General

32 N D—C J S black letter [illegible] quoted in Haser v Pape, 39 N W 2d 578 584 77 N D 36

34 Tex—C.J.S quoted in Watts v Hogan, 220 S W 2d 915, 917 err ref no rev err

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36 Mo—Chrum v St Louis Public Service Co 242 S W 2d 54

§ 550. Persons Riding on Passes

Library References
Carriers ⇐237

42. Not [illegible]

U S—Northern Pac R Co v Adams, Wash 24 S Ct 408, 192 U S 440, 48 L Ed 513

N Y—Hopkins v Island R Co 251 N Y S 2d 590 21 A D 2d 814

44 Va—Atlantic Greyhound Lines v Skinner 2 S E 2d 441, 172 Va 428

45 U S—Denver & R G W R Co v Clint, C A Colo 235 F 2d 445

N D—C J S cited in Haser v Pape, 39 N W 2d 578 584 77 N D 36

§ 551. —— On Drover's Passes or under Similar Arrangements

46 Ill—Crane v Railway Express Agency supra, n 12

Statutory exception

Ill—Crane v Railway Express Agency, 12 N E 2d 672, 293 Ill App 328, mod on oth grds 15 N E 2d 866, 369 Ill 110

Irrespective of statute

Ill—Crane v Railway Express Agency, 12 N E 2d 672, 293 Ill App 328, mod on oth grds 15 N E 2d 866, 369 Ill 110

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47 Mo—Graves v Missouri Pac R Co 118 S W 2d 787, 342 Mo 542, cert den 59 S Ct 76, 305 U S 617, 83 L Ed 394

§ 553. Persons Attending Passengers

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8 U S Pennikoff v Atlantic Coast Line R Co D C N Y 122 F Supp 100

Cal—Takashi Kataoka v May Department Stores Co 140 P 2d 467, 60 Cal App 2d 177

Ga—Atlanta & W P R Co v Hyde, 165 S E 466, 45 Ga App 548—Norris v Macon Terminal Co 198 S E 272, 58 Ga App 313

N Y—Foster-Waters v Pennsylvania R Co 281 N Y S 422, 245 App Div 826

Effect of nonarrival of expected passenger

Cal—Kircher v Atchison, T & S F Ry Co 195 P 2d 427 32 Cal 2d 176

§ 554. Commencement of Relation

Library References
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14 Cal—Grier v Ferrant 144 P 2d 631 62 Cal App 2d 306

Fla—Swilley v Economy Cab Co of Jacksonville, 46 So 2d 173

Me—Roberts v Yellow Cab Co, 240 A 2d 733

Tex—City of Houston v Matthews, Civ App 405 S W 2d 628

W Va—Billy v Powell, 55 S E 2d 889 133 W Va 278

16 U S—Wabash R Co v Davidson C C A Mich 168 F 2d 300

Colo—Publix Cab Co v Fessler 335 P 2d 865 138 Colo 547 75 A L R 2d 979

Ga—White v Boyd, App 198 S E 81

N Y—McMahon v Surface Transp Corp of N Y, 60 N Y S 2d 859 272 App Div 202

N C—Patterson v Duke Power Co 36 S E 2d 713, 226 N C 22

If carrier assumes responsibility etc.

Cal—Grier v Ferrant, supra, n 14

§ 555. —— Intent to Become Passenger in General

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19 U S—Wabash R Co v Davidson, supra, n 16

Cal—Grier v Ferrant, supra, n 14

D C—Baker v D C Transit System, Inc App 248 A 2d 829

Ky—Wise v Fannin, 207 S W 2d 764, 306 Ky 327

Mass—Gilmore v Acme Taxi Co 212 N E 2d 235 349 Mass 651

N C—Patterson v Duke Power Co supra, n 16

Okl—Peoples Checker Cab Co v Dunlap, 307 P 2d 833

Pa—Hamley v George, 76 A 2d 181, 365 Pa 543

R I—Gereau v Parenteau, 82 A 2d 396, 78 R I 314

S C—Horne v Southern Ry Co, 197 S E 31, 186 S C 525 116 A L R 745

Tenn—Schindler v Southern Coach Lines, 217 S W 2d 775 188 Tenn 169

20 Ga—Bailey v Louisville & N R Co 160 S E 2d 245, 117 Ga App 185

Me—Roberts v Yellow Cab Co 240 A 2d 733

24 Cal—Lagomarsino v Market St Ry Co 158 P 2d 982, 69 Cal App 2d 388

D C—Webster v Capital Transit Co, C A 200 F 2d 134, 91 U S App D C 284, cert den 73 S Ct 653, 345 U S 912, 97 L Ed 2d 1347—Baker v D C Transit System, Inc App 248 A 2d 829

R I—Gereau v Parenteau, supra, n 19

Relationship of bus [illegible] and carrier, etc.

(1) Relation held not to exist—Adkins v Raleigh Transit Co, 31 S E 2d 775 127 W Va 131

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26 Tenn—White Star Lines v Williams, 222 S W 2d 209, 32 Tenn App 177

§ 556. —— Going to or Awaiting Train or Car

Okl—C.J.S. black letter [illegible] quoted in Fullgraf v Oklahoma Ry Co, 111 P 2d 1072, 1074 188 Okl 592

32 Ind—Chicago South Shore & South Bend R R v Brown, 320 N E 2d 809 162 Ind App 493 reh den 323 N E 2d 681 162 Ind App 493

35 U S—Atkinson v Dixie Greyhound Lines, C C A Miss, 125 F 2d 237—Ketchum v Denver & R G W R Co, C A Utah, 175 F 2d 69—Day v Trans World Airlines, Inc D C N Y 393 F Supp 217 affd C A 528 F 2d 31 cert den 97 S Ct 246,

429 US 890, 50 L Ed 2d 172, reh den 97 S Ct 1162, 429 US 1124, 51 L Ed 2d 574

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N J—Rothstein v New York & L B R Co 3 A 2d 592, 121 N J Law 570

Okl—C[illegible] Ry Co v Austin, 207 P 2d 769, 201 Okl 567

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38 US—Ketchum v Denver & R G W R Co supra, n 35

Mass—McCabe v Boston Terminal Co 22 N E 2d 33, 303 Mass 450, vac 60 S Ct 725, 309 US 624, 84 L Ed 986

39 La—Schmitt v Algiers Public Service Co App 69 So 2d 754

41 Cal—Lagomarsino v Market St Ry Co supra n 24

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S C—Horne v Southern Ry Co supra, n 19

Tenn—City Transp Co v Noel, 216 S W 2d 691, 187 Tenn 676, 7 A L R 2d 545

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51 Mo Ashby v Illinois Terminal R Co 132 S W 2d 1076, 235 Mo App 454, cert quashed 144 S W 2d 142, 346 Mo 1029

§ 557. —— Signaling Car, Train, or Elevator, and Boarding Same

54 N Y—Sheridan v City of New York, 175 N Y S 2d 607, 6 A D 2d 125, affd 186 N Y S 2d 663, 6 N Y 2d 765, 159 N E 2d 208

55 Ill—Weaver v Sprague, 71 N E 2d 106, 330 Ill App 331

Minn—Fenton v Minneapolis St Ry Co 89 N W 2d 404, 252 Minn 75

N Y [illegible] v New York, N H & H R Co 120 N Y S 2d 294, 281 App Div 909

Okl—[illegible] Ry Co v Roebuck, 240 P 2d 775, 205 Okl 549

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56 Ill—Katamay v Chicago Transit Authority 289 N E 2d 623, 53 Ill 2d 27

Ky [illegible] v Randle, 143 S W 2d 1049, 284 Ky 164

57 N D—C J S. cited in Haser v Pape, 39 N W 2d 578, 583, 77 N D 36

62 Wis—Fondow v Milwaukee Elec Ry & Transport Co 56 N W 2d 841, 263 Wis 180

63 Ark—Hot Springs St Ry Co v Jones, 354 S W 2d 278, 234 Ark 693

Cal—Gray v City and County of San Francisco, 20 Cal Rptr 894, 202 C A 2d 319

Minn—Radermacher v St Paul City Ry Co 8 N W 2d 466, 214 Minn 427, 145 A L R 1027

Corpus Juris Se[illegible] has been cited by analogy in a case involving the duty of a railroad to maintain a lookout for persons on the track—Thrower v Henwood, 173 S W 2d 861, 867, 351 Mo 663

64 Ky—C.J.S. cited in Yellow Cab Co of Ashland v Murphy 243 S W 2d 42, 44

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67 Cal—Lagomarsino v Market St Ry Co supra, n 24

Ky—Fowler v Randle, supra, n 56

69 Ky—Fowler v Randle, supra, n 56

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73 Ill—Katamay v Chicago Transit Authority 289 N E 2d 623, 53 Ill 2d 27

Mass—Gorman v Massachusetts Bay Transp Authority 212 N E 2d 568, 350 Mass 760

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85 US—Wabash R Co v Davidson, supra, n 16

§ 558. —— Purchase of Ticket

91 US—De Nicolo v Palmer D C N Y 38 F Supp 874, affd 125 F 2d 126—C.J S. cited in Atkinson v Dixie Greyhound Lines, C C A Miss 125 F 2d 237, 239

Ill—Katamay v Chicago Transit Authority, App 273 N E 2d 510, 133 Ill App 2d 613, revd 289 N E 2d 633, 53 Ill 2d 27

W Va—Billy v Powell, supra n 14

97 Ohio—Smith v Greenville-Dayton Transp Co of Greenville, App 131 N E 2d 437

§ 559. —— Payment of Fare

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5 US—Wabash R Co v Davidson, C C A Mich 168 F 2d 300—Suarez v Trans World Airlines, Inc C A Ill 498 F 2d 612

Cal—Grier v Ferrant, 144 P 2d 631, 62 Cal App 2d 306—Lagomarsino v Market St Ry Co 158 P 2d 982, 69 Cal App 2d 388

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9 Wash—Fleming v City of Seattle, supra, n 5

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13 Less than amount required

Okl [illegible] Checker Cab Co v Dunlap, 307 P 2d 833

§ 560. —— Fraud or Evasion of Fare

16 US—Wabash R Co v Davidson, supra, n 5

La—Williams v Shreveport Yellow Cab Co App, 183 So 120

Okl—Peoples Checker Cab Co v Dunlap, 307 P 2d 833

18 US—Wabash R Co v Davidson, supra, n 5

§ 561. —— Acceptance by Carrier in General

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27 US—Wabash R Co v Davidson, 168 F 2d 300, supra, n 5

Cal—Lagomarsino v Market St Ry Co supra, n 5

Ga—McKay v City of Atlanta, 57 S E 2d 432, 80 Ga App 797

Mont—Hennessey v Intermountain Transp Co, 102 P 2d 489, 110 Mont 398

Okl—Peoples Checker Cab Co v Dunlap, 307 P 2d 833

§ 562. —— Invitation or Acquiescence of Carrier's Employees

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Ga—Metropolitan Transit System, Inc v Burton, 120 S E 2d 663, 103 Ga App 688

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34 Idaho—Clark v Tarr 283 P 2d 942, 76 Idaho 383

35 US—Vincenty v Eastern Air Lines, D C Puerto Rico 528 F Supp 171

Colo—Rice v Marlar 108 P 2d 868, 107 Colo 57

Fla—C.J.S. cited in Henderson v Tarver App 123 So 2d 369, 371

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36 Ga—Southeastern Greyhound Corporation v Graham, 26 S E 2d 371, 69 Ga App 621

37 US—Emerson v Carolina Cas Ins Co C A Ark 206 F 2d 13

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38 US—Ortiz v Greyhound Corp C A Md 275 F 2d 770

39 Relationship continues

Tex—H T Cab Co v Gunns, Civ App 280 S W 2d 360, err ref no rev err

§ 564. —— Leaving Vehicle

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Ky—Miller v Mills, 257 S W 2d 520

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55 Fla—Shear v Metropolitan Dade County App, 375 So 2d 1114

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Mo—Jones v Kurn, 157 S W 2d 797, 237 Mo App 657

Neb—Odom v Willms, 131 N W 2d 140, 177 Neb 698

N C—White v Chappell 14 S E 2d 843, 848, 219 N C 652

Ohio—Hudak v Penn-Ohio Coach Lines Co 57 N E 2d 93, 73 Ohio App 409

Tex—San Antonio Public Service Co v Turbin, Civ App 153 S W 2d 343—Dallas Ry & Terminal Co v Menefee, Civ App 190 S W 2d 150—Texas

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Status of infant passenger

Va—Tri-State Coach Corp v Studham, 62 SE 2d 894 191 Va 790

Re-entry not involving relationship

La—Lewis v Goodman, App 92 So 2d 723

56 Ala—Parker v Birmingham Elec Co 48 So 2d 873, 254 Ala 488

Ga—Co-op Cab Co v Singleton, 19 SE 2d 541 66 Ga App 874—Georgia Power Co v Weaver 23 SE 2d 730, 68 Ga App 652—Delta Air Lines, Inc v Milhrons, 73 SE 2d 598, 87 Ga App 334

Ill—Sims v Chicago Transit Authority 122 NE 2d 221 4 Ill 2d 60—Loring v Yellow Cab Co 337 NE 2d 428, 33 Ill App 3d 154

§ 565. —— After Leaving Vehicle at Destination

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64 US—CJS. cited in Ortiz v Greyhound Corp CA Md, 275 F 2d 770, 773—CJS. cited in Ortiz v Greyhound Corp DC Md 175 F Supp 14 19 affd CA, 275 F 2d 770

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NY—CJS. cited in White v Allegheny Cab Co 29 NYS 2d 272, 273

Relationship continues until exit completed

Mass—MacSwan v Metropolitan Transit Authority, 164 NE 2d 912, 340 Mass 499

65 US—CJS. cited in Ortiz v Greyhound Corp, CA Md 275 F 2d 770, 773

66 US—CJS. cited in Ortiz v Greyhound Corp, CA Md 275 F 2d 770, 773

La—Barringer v Employers Mut Liability Ins Co supra, n 35

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67. Duty owed to invitee

US—Ortiz v Greyhound Corp, CA Md 275 F 2d 770

68 Ohio—German v Muskingum Valley Transit Co 94 NE 2d 52

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69 Mass—McSwan v Metropolitan Transit Authority, 164 NE 2d 912, 340 Mass 499

71 Cal—McAlpine v Los Angeles Ry Corp, 154 P 2d 911 67 Cal App 2d 486

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Neb—Staab v Omaha & Council Bluffs St Ry Co 102 NW 2d 59, 170 Neb. 198

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RI—CJS. cited in Burke v United Elec Rys Co 83 A 2d 88 90 79 R I 50

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Wash—Wullbrandt v City of Seattle, 84 P 2d 123 196 Wash 645

Similar statements of rule

(2) Cal—Brandelius v City and County of San Francisco 306 P 2d 432, 47 C 2d 729

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Va—Tri-State Coach Corp v Studham 62 S E 2d 894, 191 Va 790

Held not terminated as matter of law

Wash—Peterson v City of Seattle, 316 P 2d 904 51 Wash 2d 187

72 Ky—Louisville Ry Co v Allen 246 S W 2d 443

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Mo—Meyer v St Louis Public Service Co 253 S W 2d 525 241 Mo App 1057

Or—Neadert v Portland Stages, Inc 376 P 2d 92, 232 Or 514

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73 Miss—Mississippi City Lines v Pollock, 13 So 2d 34 194 Miss 630, 145 A L R 1199

Miss—Cavazos v Geronimo Bus Lines, 247 P 2d 865 56 N M 624

Tex—Houston Transit Co v Zimmerman, Civ App 200 S W 2d 848

74 Ill—Sims v Chicago Transit Authority 115 N E 2d 96, 351 Ill App 314 revd on oth grds 122 N E 2d 221 4 Ill 2d 60

La—Barringer v Employers Mut Liability Ins Co supra, n 35

Mo—Meyer v St Louis Public Service Co, supra, n 72

§ 566. —— After Leaving Vehicle at Point Other than Destination

78 US—CJS. cited in Livingston v Seaboard Air Line R Co DCSC, 106 F Supp 886, 890

NC—White v Chappell supra, n 55

Mistaken person trying to reboard train held not passenger

US—Hairston v Pennsylvania R Co CA NY 284 F 2d 428

Taxi passenger

Ohio—Feldman v Howard, 226 N E 2d 564 10 Ohio St 2d 189

79 Iowa—CJS. quoted in Murray v Cedar Rapids City Lines, 48 N W 2d 256, 259, 242 Iowa 794

NY—White v Allegheny Cab Co supra, n 64

NC—Wilson v Pan-American Bus Lines, 9 S E 2d 1 217 N C 586

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81 Ga—Delta Air Corporation v Porter 27 S E 2d 758, 70 Ga App 152.

Using rest room and toilet

(2) Other statements

NY—Gold v Swiss Air Transp Co 307 N Y S 2d 166, 33 A D 2d 777

93 Tenn—CJS. quoted at length in McBroom v S E Greyhound Lines, 193 S W 2d 92, 95, 29 Tenn App 13

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95 Iowa—CJS quoted in Murray v Cedar Rapids City Lines, supra, n 79

98 Cal—Tognazzini v Market St Ry Co supra, n 5

Ill—Van Hoodebecke v Iowa Illinois Gas & Electric Co 57 N E 2d 652, 324 Ill App 88

3 La—Pugh v City of Monroe, App, 6 So 2d 83

Mo—Seiler v St Louis Public Service Co App 29[illegible] S W 2d 393

Wis—O Connor v Larrabee, 64 N W 2d 815 267 Wis 185

§ 567. Power to Regulate

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4 La—Hopkins v National Surety Co 97 So 297 154 La 61

Mont—Chicago, M St P & P R Co v Board of R R Com'rs, 255 P 2d 346, 126 Mont 568, certiorari denied Chicago, M St P & P R Co v Board of R R Com'rs of State of Mont 74 S Ct 40, 346 U S 823, 98 L Ed 349

NY—Levine v Long Island R Co 331 N Y S 2d 451 38 A D 2d 936, affd 287 N E 2d 272, 30 N Y 2d 907 335 N Y S 2d 565 cert den 93 S Ct 525, 409 U S 1040 34 L Ed 490

NC—Suddreth v City of Charlotte, 27 S E 2d 650, 223 N C 630

Power to regulate is comprehensive

Mont—Chicago M, St P & P R Co v Board of R R Com'rs, 255 P 2d 346, 126 Mont 568, cert den 74 S Ct 40, 346 U S 823 98 L Ed 349

Court held without power to regulate

Neb—Application of Chicago & N W Ry Co 91 N W 2d 312, 167 Neb 61

Reservation of exclusive control by state

NY—Bee Line, Inc v Nickerson, 303 N Y S 2d 950, 60 Misc 2d 931 affd 309 N Y S 2d 124 33 A D 2d 1106

5 Mo—Ernest E Fadler Co v Chicago, R I & P R Co App 261 S W 2d 394

Regulation beyond state limits invalid

N J—Erie R Co v State, 143 A 2d 224 51 N J Super 61

6 N C—Suddreth v City of Charlotte, 27 S E 2d 650, 223 N C 630

Wyo—Woodson v State, 116 P 2d 852, 57 Wyo 305

12 Md—Capital Transit Co v Bosley 62 A 2d 267, 191 Md 502

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14 La—City of Shreveport v Breazeale, 187 So 33, 191 La 1088

Regulation beyond corporate limits

Tenn—City Transp Co v Pharr, 209 S W 2d 15 186 Tenn 217

Elevators

Ga—Callaham v Carlson, 67 S E 2d 726, 85 Ga App 4

Particular regulations held invalid

NY—Public Porters Protective and Defense Ass'n of New York v O Connell, 167 N Y S 2d 479 6 Misc 2d 36

15. Validity of ordinance

La—City of Baton Rouge v Hutton, 49 So 2d 613, 218 La 371

Certificates of convenience and necessity are required by statute in some jurisdictions.[16.1]

16.1 Ariz—Arizona Corp Commission v Superior Court In and For Maricopa County, 459 P 2d 489 105 Ariz 56

Va—Atlantic Greyhound Corp v Com, 83 S E 2d 379 196 Va 183

Sale of certificate

W Va—Emery's Motor Coach Lines v Mellon Nat Bank & Trust Co of Pittsburgh 68 S E 2d 370, 136 W Va 735, 30 A L R 2d 529

Findings of commission

Ala—Alabama Public Service Commission v Higginbotham, 56 So 2d 401 256 Ala 621

Permit

Conn—Flanagan Ambulance Service, Inc v Public Utilities Commission, 286 A 2d 315, 161 Conn 215

Petition to review dismissed

Pa—Troiani Bros Inc v Com Public Utility Commission, 387 A 2d 980, 36 Pa Cmwlth 179

When a carrier seeks to increase or to discontinue existing services, the regulatory agencies have the duty to permit the addition or elimination of those services, the determining factor being public need or lack of such need [16.2]

16.2 Neb—Application of Chicago & N W Ry Co 60 N W 2d 662, 157 Neb 594—Application of Chicago, B & Q R Co 89 N W 2d 837 166 Neb 567

Service curtailments not limited to unprofitable routes

R I—United Transit Co v Public Utility Hearing Bd 192 A 2d 423 96 R I 435

20 U S—Moore v Atlantic Coast Line R Co D C Pa, 98 F Supp 375

§ 568. —— Power of Public Service Commissions

21 U S—Alexandria, Barcroft & Washington Transit Co v Washington Metropolitan Area Transit Commission, C A, 323 F 2d 777

Ark—Missouri Pac Transp Co v Ellis, 198 S W 2d 196, 210 Ark 958

Cal—Southern Cal Freight Lines v Public Utilities Commission, 220 P 2d 393, 35 Cal 2d 586

Ill—Illinois Cent R Co v Illinois Commerce Commission, 75 N E 2d 23 398 Ill 19—Black Hawk Motor Transit Co v Illinois Commerce Commission, 76 N E 2d 478, 398 Ill 542

La—City of Shreveport v Brevard, supra, n 14

Mo—State ex rel Railway Express Agency v Public Service Commission, 169 S W 2d 88, 237 Mo App 420

Neb—Safeway Cabs v Hosier 48 N W 2d 672, 154 Neb 533—In re Resler, 48 N W 2d 718, 154 Neb 624

S C—Darby v Southern Ry Co 10 S E 2d 465, 194 S C 421

Tex—Missouri Pac R Co v Railroad Commission, Civ App 398 S W 2d 339, err ref no rev err—Brown Exp Inc v Railroad Commission 415 S W 2d 394

Utah—Lake Shore Motor Coach Lines, Inc v Welling, 339 P 2d 1011 9 Utah2d 114—Continental Bus System v Public Service Commission, 396 P 2d 404, 16 Utah2d 87—Utah Parks Co v Kent Frost Canyon Land Tours, 430 P 2d 171 19 Utah2d 252—Barton Truck Line, Inc v Public Service Commission, 510 P 2d 927 29 Utah2d 392

Competition between carriers

Md—West v Williams, 173 A 259 167 Md 316

Constitutional limitations

Colo—City and County of Denver v Public Utilities Co 507 P 2d 871 181 Colo 38

Va—Southern Ry Co v Com, 68 S E 2d 552, 193 Va 291

Purpose

Ill—Prince v Atchison, T & S F Ry Co, 420 N E 2d 737 51 Ill Dec 323, 95 Ill App 2d 856

Neb—Application of Omaha Transit Co, 94 N W 2d 461 167 Neb 703—Application of Missouri Pac R Co, 126 N W 2d 679 176 Neb 501

Compliance with commission's safety regulations

Cal—Los Angeles Metropolitan Transit Authority v Public Utilities Com., 31 Cal Rptr 463 82 P 2d 583

Amendment of order

N C—State ex rel Utilities Commission v Carolina Coach Co 132 S E 2d 249 260 N C 43

Collateral attack

N C—State ex rel Utilities Commission v Carolina Coach Co 132 S E 2d 249, 260 N C 43

Co-operation and agreement between carriers

(1) In general

N C—State ex rel Utilities Commission v Carolina Coach Co, 132 S E 2d 249 260 N C 43

(2) Contracts are subject to commission's regulatory authority

N C—State ex rel Utilities Commission v Carolina Coach Co 132 S E 2d 249 260 N C 43

(3) Contract when approved constitutes an order of Commission

N C—State ex rel Utilities Commission v Carolina Coach Co, 132 S E 2d 249 260 N C 43

Effect of approval of contract by commission

N C—State ex rel Utilities Commission v Carolina Coach Co 132 S E 2d 249 260 N C 43

Jurisdiction to entertain appeal

R I—United Transit Co v Public Utility Hearing Bd 192 A 2d 423 96 R I 435

Modification and rescission of order; burden

N C—State ex rel Utilities Commission v Carolina Coach Co 132 S E 2d 249 260 N C 43

Order held lawful

R I—United Transit Co v Public Utility Hearing Bd 192 A 2d 423 96 R I 435

Power to investigate changes in freight service

Mich—Chesapeake & O Ry Co v Michigan Public Service Commission, 228 N W 2d 843, 59 Mich App 88

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22 Neb—Application of Chicago & N W Ry Co 60 N W 2d 662, 157 Neb 594

N J—New York, S & W R Co v Board of Public Utility Com'rs, 150 A 2d 656, 29 N J 513

Regulating connections with other carriers

(3) Other regulations

U S—U S v Mississippi Val Barge Line Co C A Mo 285 F 2d 381

Finding as to public convenience and necessity held not unreasonable

Va—Atlantic Greyhound Lines of Va v Silver Fox Lines, 131 S E 2d 284 204 Va 360

23 Neb—Application of Union Pac R Co, 31 N W 2d 552, 149 Neb 575

Va—Lynchburg Traffic Bureau v Com 54 S E 2d 66, 189 Va 612

24 Fla—Coast Cities Coaches, Inc v Dade County 178 So 2d 703

25. **Unnecessary requirement of service unreasonable**

Wis—City of Princeton v Public Service Commission, 68 N W 2d 420, 268 Wis 542

28. **Obedience to order required unless stayed by court**

Ill—Illini Coach Co v Illinois Highway Transp Co 166 N E 2d 161, 25 Ill App 2d 168

29 Ariz—Pacific Greyhound Lines v Sun Valley Bus Lines, 216 P 2d 404, 70 Ariz 65

Md—Capital Transit Co v Bosley supra, n 12

R I—Berberian v Public Utility Hearing Bd, 112 A 2d 876, 83 R I 28

Evidence held insufficient

Md—Public Service Commission of Md v Baltimore Transit Co 114 A 2d 834 207 Md 524

30. **Evidence held sufficient**

R I—Berberian v Public Utility Hearing Bd 192 A 2d 423 96 R I 435

Order held based on competent, material and substantial evidence

N C—State ex rel Utilities Commission v Carolina Coach Co 132 S E 2d 249 260 N C 43

31 Va—Lee Compton Lines v Com 65 S E 2d 515 192 Va 411

Support by substantial evidence

U S—Alexandria Barcroft & Washington Transit Co v Washington Metropolitan Area Transit Commission, C A 323 F 2d 777

32. **Decision not arbitrary**

R I—Berberian v Public Utility Hearing Bd 112 A 2d 876, 83 R I 28

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One carrier may not maintain an action for damages by way of restitution against another who is operating along the same route pursuant to a certificate and order that is subsequently voided by the state supreme court. [34.5]

34.5 Ill—Illini Coach Co v Illinois Highway Transp Co 166 N E 2d 161 25 Ill App 2d 168

If there are carriers already in the field, a utilities commission must determine, as part of its findings as to whether a new service is convenient and necessary, whether the service should be rendered by an existing carrier or by a new applicant. [34.10] A utilities commission need not approve or reject a carrier's application as submitted, but it may attach to the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may require. [34.15]

34.10 N C—State ex rel Utilities Commission v Carolina Coach Co 132 S E 2d 249, 260 N C 43

Transfer of stock to another carrier

N C—State ex rel Utilities Commission v Carolina Coach Co 153 S E 2d 461 269 N C 717

34.15. **Application construed**

N C—State ex rel Utilities Commission v Carolina Coach Co 132 S E 2d 249 260 N C 43

Finding construed

N C—State ex rel Utilities Commission v Carolina Coach Co 132 S E 2d 249 260 N C 43

Pleadings

N C—State ex rel Utilities Commission v Carolina Coach Co 132 S E 2d 249 260 N C 43

Where operations under certificates of convenience issued by a commission have been enjoined, and injunction affirmed on appeal, writ of certiorari should issue [34.20] and the order of the commission should be quashed. [34.25]

34.20 Fla—Phil's Yellow Taxi Co Inc of Miami Springs v King, 156 So 2d 510

34.25 Fla—Phil's Yellow Taxi Co, Inc of Miami Springs v King, Fla 156 So 2d 510

§ 570. Power to Make Regulations

39 Ga—Hughes v Georgia Power Co 15 S E 2d 466, 65 Ga App 163

Md—Price v Clawns, 25 A 2d 672, 180 Md 532

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40 U S—Whitcomb v Southern Bus Lines, C A Ky 177 F 2d 949

Tenn—Southeastern Greyhound Lines v Smith, 136 S W 2d 727 23 Tenn App 627

41 U S—Simmons v Atlantic Greyhound Corp, D C Va 75 F Supp 166

43 Ill—Parmelee Transp Co v Keeshin, C A Ill 292 F 2d 794 cert den 82 S Ct 376, 368 U S

944, 7 L Ed 2d 340, reh den 82 S Ct 437 368 US 972, 7 L Ed 2d 401

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56 US—Henderson v U S Mo 70 S Ct 843 339 US 816, 94 L Ed 1302

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68 US—Sp[illegible] v Atlantic Greyhound Corp supra, n 41

69 US—Day v Atlantic Greyhound Corp C A Va 171 F 2d 59—Henderson v US supra, n 56—Lyons v Illinois Greyhound Lines, C A Ill 192 F 2d 533

§ 573. Obedience to, and Enforcement of, Regulations

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82 Ill—Koontz v South Suburban Safeway Lines, 73 N E 2d 919, 332 Ill App 14

§ 575. As to Use of Carrier's Premises

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91 Ky—Yellow Cab Co of Ashland v Murphy 243 S W 2d 42

Md—Association of Independent Taxi Operators v Yellow Cab Co, 82 A 2d 106, 198 Md 181

N Y—Long Island R Co v Summers, 32 N Y S 2d 430, 263 App Div 889

Tex—Missouri Pacific Transp Co v Union Bus Lines, Civ App, 210 S W 2d 846, err ref no rev err

Cannot be used for commercial purposes

Cal—People v McKinnon, 103 Cal Rptr 897 500 P 2d 1097, 7 C 3d 899, cert den 93 S Ct 1891 411 US 931 36 L Ed 2d 390

94 Ky—Yellow Cab Co of Ashland v Murphy supra, n 91

98 Md—Association of Independent Taxi Operators v Yellow Cab Co, supra, n 91

§ 576. —— Exclusive Privileges

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6 Md—Association of Independent Taxi Operators v Yellow Cab Co 82 A 2d 106, 198 Md 181

9 N Y—People, on Inf of Gliotti, v Humphreys, 73 N Y S 2d 393, 190 Misc 244—New York Cent R Co v Arthela, 74 N Y S 2d 507 190 Misc 555—All Am Taxi, Inc v Asello, 224 N Y S 2d 219 32 Misc 2d 549

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12 N Y—Long Island R Co v Summers, 32 N Y S 2d 430, 263 App Div 889

14 Ky—C.J.S. quoted at length in Yellow Cab Co of Ashland v Murphy, 243 S W 2d 42, 45

§ 579. Right to Require Fare

Library References

Carriers ⇐249.

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30 Md [illegible] v Clawns, 25 A 2d 672, 180 Md 532

33 Cal—Dayton v Yellow Cab Co of San Fran[illegible]sco, 193 P 2d 959, 85 Cal App 2d 740

Ga—Teche Greyhound Lines v Daigrepont, 3 S E 2d 857 60 Ga App 389 affd 7 S E 2d 174 189 Ga 601, 127 A L R 217

Ohio—George v Youngstown Municipal Ry Co App 76 N E 2d 916

§ 580. Rate or Amount of Fare

Library References

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35 Ill—Sprague v Biggs, 62 N E 2d 420 390 Ill 537

Absence of free transfer held not denial of equal protection

N Y—Abrams v Ronan, 353 N Y S 2d 444 44 A D 2d 535 affd 327 N E 2d 638 36 N Y 2d 714, 367 N Y S 2d 484

36 Ill—Sprague v Biggs, supra, n 35

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39 Minn—Application of St Paul City Ry Co 64 N W 2d 487 242 Minn 188

40 Ill—Sprague v Biggs, supra, n 35

Net investment cost of property

Wis—Milwaukee & Suburban Transport Corp v Public Service Commission 108 N W 2d 729, 13 Wis 2d 384

42 Pa—Philadelphia Transp Co v Pennsylvania Public Utility Commission, 37 A 2d 138, 155 Pa Super 9 app ref 39 A 2d 372, 350 Pa 373

44 Cal—Market St Ry Co v Railroad Commission, 150 P 2d 196, 24 Cal 2d 378, affd 65 S Ct 770 324 US 548, 89 L Ed 1171, reh den 65 S Ct 1020 two cases, 324 US 890, 89 L Ed 1438

45 Ind—Public Service Commission of Ind v Indianapolis Rys 76 N E 2d 841, 225 Ind 656

47 Pa—City of Pittsburgh v Pennsylvania Public Utility Commission, 69 A 2d 844, 165 Pa Super 519

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51. Other rates held inconclusive

US—Wilmington City R Co v Taylor, D C Del 198 F 159

55 US—Puget Sound Traction, Light and Power Co v Reynolds, D C Wash 223 F 371

Ind—Public Service Commission of Ind v Indianapolis Rys supra, n 45

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61 Ill—Fleming v Illinois Commerce Commission, 57 N E 2d 384 388 Ill 138, app dism 65 S Ct 686, 324 US 823 89 L Ed 1393, and 65 S Ct 687, three cases, 324 US 824, 89 L Ed 1393

69 Cal—Market St Ry Co v Railroad Commission, supra, n 44

Ind—Public Service Commission of Ind v Indianapolis Rys, supra, n 45

Pa—Philadelphia Transp Co v Pennsylvania Public Utility Commission supra, n 42

Allowance for loss of interest

Wis—Duluth St Ry Co v Railroad Commission of Wisconsin, 152 N W 887 161 Wis 245

Franchise

Wis—Duluth St Ry Co v Railroad Commission of Wisconsin, supra

Intangibles

Wis—Duluth St Ry Co v Railroad Commission of Wisconsin, supra

Method held proper

Wis—Duluth St Ry Co v Railroad Commission of Wisconsin supra

Property not to be included in appraisal

Minn—Application of St Paul City Ry Co supra, n 39

Wis—Duluth St Ry Co v Railroad Commission of Wisconsin supra

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Wis—Duluth St Ry Co v Railroad Commission of Wisconsin supra

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71 Pa—Philadelphia Transp Co v Pennsylvania Public Utility Commission, supra, n 42

72 Ill—Sprague v Biggs, supra, n 35

78 Wis—Duluth St Ry Co v Railroad Commission of Wisconsin, supra, n 69

79 Pa—Philadelphia Transp Co v Pennsylvania Public Utility Commission, supra, n 42

§ 581. —— Rate Fixed by Carrier

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85 N Y—Jones v Rochester Transit Corp, 92 N Y S 2d 735, affd 98 N Y S 2d 773 277 App Div 939 rearg and app den 99 N Y S 2d 1014, 277 App Div 962

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93 Pa—City of Philadelphia v Pennsylvania Public Utility Commission, 57 A 2d 613 162 Pa Super 425

Rate held not unreasonable

Wis—Milwaukee & Suburban Transport Corp v Public Service Commission, 68 N W 2d 552, 268 Wis 573 app dism and cert den 76 S Ct 135, 350 US 877, 100 L Ed 775

94 US—Union Terminal Co v Pickett, C C A Tex 118 F 2d 328, cert den 61 S Ct 1115 313 US 591 85 L Ed 1546, vac 62 S Ct 55, 314 US 704, 86 L Ed 563, affd 62 S Ct 659 315 US 386, 86 L Ed 914 reh den 62 S Ct 909 315 US 830, 86 L Ed 1224

Pa—City of Philadelphia v Pennsylvania Public Utility Commission supra, n 93

96 Md—Capital Transit Co v Bosley 62 A 2d 267 191 Md 502

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6 Through route

US—US v Capital Transit Co 65 S Ct 1176, 325 US 357 89 L Ed 1663 rehearing denied 65 S Ct 1562, 325 US 896, 89 L Ed 2007

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19 US—Greyhound Corp v US 111 F Supp 259, 124 Ct Cl 758

23. Arbitrariness

N Y—Sayles v Interstate Busses Corp 66 N Y S 2d 377, 187 Misc 286

Construction

US—Greyhound Corp v US, supra, n 19

25 Ill—Koontz v South Suburban Safeway Lines, 73 N E 2d 919, 332 Ill App 14

26 US—Howitt v US C C A Fla 150 F 2d 82, affd 66 S Ct 923 328 US 189 90 L Ed 1162

Ark—C.J.S. cited in Pullman Co v Anderson, 172 S W 2d 431, 433, 205 Ark 1056

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27 Ky—Artemus-Jellico R Co v Railroad Commission of Kentucky ex rel Rigsby 511 S W 2d 235

Burden of proof

N Y—Baker v Swidler 325 N Y S 2d 284 37 A D 2d 883

§ 582. —— Legislative Regulation

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30 US—Seattle Electric Co v City of Seattle, D C Wash, 206 F 955

Ind—State ex rel Evansville City Coach Lines v Rawlings, 99 N E 2d 597 229 Ind 552

Md—Capital Transit Co v Bosley 62 A 2d 267 191 Md 502

Neb—Chicago & N W Ry Co v Mallory 23 N W 2d 735, 147 Neb 548

NY—City of Rochester v Public Service Commission 89 N Y S 2d 545 275 App Div 172, rearg den and app gr 90 N Y S 2d 697 275 App Div 972, affd 96 N E 2d 192, 301 N Y 801—People ex rel Coates Ry Co v Public Service Commission, 128 N Y S 384 143 App Div 769 affd 95 N E 1137 202 N Y 547—Levine v Long Island R Co, 331 N Y S 2d 451 38 A D 2d 936, affd 287 N E 2d 272, 30 N Y 2d 907, 335 N Y S 2d 565 cert den 93 S Ct 525 409 U S 1040, 34 L Ed 2d 490

Basis of power

(3) Sprague v Biggs, 62 N E 2d 420, 390 Ill 537

Same fare as for interstate service

NY—Transit Commission v Long Island R Co 294 N Y S 183 250 App Div 448, affd 10 N E 2d 562, 274 N Y 582

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NY—Public Service R Co v State, 223 N Y S 2d 541 15 A D 2d 269 affd 184 N E 2d 588, 11 N Y 2d 504, 230 N Y S 2d 1004

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31 NJ—Matter of Commuter Operating Agency's Determination of Financial Results to Carriers for the Calendar Year 1977, 396 A 2d 344 164 N J Super 311 app after remand 400 A 2d 72, 166 N J Super 430

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43 Ill—Fleming v Illinois Commerce Commission, 57 N E 2d 384, 388 Ill 138, app dism 65 S Ct 686, 324 U S 823 89 L Ed 1393, and 65 S Ct 687 three cases, 324 U S 824 89 L Ed 1393

Md—Baltimore Transit Co v Public Service Commission of Md, 112 A 2d 687 206 Md 533

Tex—Greyhound Corp v Stevens, Civ App 413 S W 2d 439

Wis Milwaukee & Suburban Transport Corp v Public Service Commission 108 N W 2d 729 13 Wis 2d 384

44 U S—Stone v Farmers' Loan & Trust Co 6 S Ct 334, 388, 1191 116 U S 307 29 L Ed 636

Ind—Public Service Commission v Indianapolis Rys 72 N E 2d 434, 225 Ind 30

Wash—State ex rel Railway Exp Agency, Inc v Washington Public Service Commission, 354 P 2d 711, 57 Wash 2d 32

Joint rates

(3) Other cases

Kan—Thompson v State Corp Commission 246 P 2d 257, 173 Kan 357

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47 Md—Capital Transit Co v Bosley, supra, n 30

48 Md Baltimore Transit Co v Public Service Commission of Md, supra, n 43

49 Md—Baltimore Transit Co v Public Service Commission of Md, supra, n 43

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53 Pa—City of Pittsburgh v Pennsylvania Public Utility Commission 69 A 2d 844, 165 Pa Super 519

60 Pa—City of Pittsburgh v Pennsylvania Public Utility Commission supra, n 53

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62 Fla—City of St Petersburg v Carter, 39 So 2d 804

Ill—Pullman Co. v Illinois Commerce Commission 60 N E 2d 232, 390 Ill 40

Mass—City of Fall River v Public Service Commission, 117 N E 915, 228 Mass 575

Minn—Application of Minneapolis St Ry Co 37 N W 2d 533, 228 Minn 435—City of Minneapolis v Minneapolis Transit Co, 133 N W 2d 364, 270 Minn 133

Wash—State ex rel Puget Sound Nav Co v Department of Transp of Wash 206 P 2d 456, 33 Wash 2d 448

63 Okl—St Louis-San Francisco Ry Co v State, 268 P 2d 845

Pa—City of Philadelphia v Pennsylvania Public Utility Commission 57 A 2d 613 162 Pa Super 425

Powers held plenary and self-executing

Neb—Application of Richling, 47 N W 2d 413 154 Neb 108

65 U S—Pullman Co v Railroad Commission of Texas, D C Tex 33 F Supp 675 revd on oth grds 61 S Ct 643 312 U S 496, 85 L Ed 971

D C—Spegel v Public Utilities Commission of District of Columbia, C A 226 F 2d 29 96 U S App D C 307, cert den 76 S Ct 182, 350 U S 904 100 L Ed 794

Minn—Application of St Paul City Ry Co, 64 N W 2d 487, 242 Minn 188

Pa—Betterman v American Stores Co 16 Cumb 113

66 U S—Bowles v Indianapolis Rys D C Ind 64 F Supp 865 affd 154 F 2d 218—Chicago, M, St P & P R Co v State of Ill Ill 78 S Ct 304 355 U S 300, 2 L Ed 2d 292

Neb—Marconnit v Effenbee, 283 N W 226, 135 Neb 564

N Y—Klein v O Dwyer 80 N Y S 2d 343, 192 Misc 421

Pa—City of Pittsburgh v Pennsylvania Public Utility Commission, 95 A 2d 555 173 Pa Super 87—Philadelphia Transp Co v Pennsylvania Public Utility Commission, 17 D & C 2d 767 73 Dauph 16

Street railroads

(3) Other cases—Puget Sound Traction Light & Power Co v Reynolds, D C Wash 223 F 371

Action held arbitrary and capricious

Wis—Milwaukee & Suburban Transport Corp v Public Service Commission, 108 N W 2d 729 13 Wis 2d 384

Statute held not to interfere with exclusive jurisdiction of commission

Wis—Milwaukee & Suburban Transport Corp v Public Service Commission, 108 N W 2d 729, 13 Wis 2d 384

Duty to assure reciprocity between service and fares

D C—D C Transit System, Inc v Washington Metropolitan Area Transit Commission, C A 466 F 2d 394 151 U S App D C 223 cert den 93 S Ct 688, 409 U S 1086, 34 L Ed 2d 673

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67 Pa—City of Pittsburgh v Pennsylvania Public Utility Commission, 78 A 2d 35, 168 Pa Super 95

Wash—State ex rel Puget Sound Nav Co v Department of Transp of Wash supra, n 62

68 Ill—Fleming v Illinois Commerce Commission supra, n 43

Md—Baltimore Transit Co v Hessey, 75 A 2d 76, 196 Md 141, cert den 71 S Ct 238, 340 U S 896, 95 L Ed 650—Baltimore Transit Co v Public Service Commission of Md 112 A 2d 687 206 Md 533

R I—United Transit Co v Public Utility Hearing Bd, 192 A 2d 423, 96 R I 435

69 D C—Spegel v Public Utilities Commission of District of Columbia C A, 226 F 2d 29 96 U S App D C 307 cert den 76 S Ct 182, 350 U S 904 100 L Ed 794

71 Ohio—Casket Mfrs Ass'n of America v Public Utilities Commission of Ohio, 92 N E 2d 813 153 Ohio St 560

Pa—City of Philadelphia v Pennsylvania Public Utility Commission supra, n 63

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76 Minn—Application of Minneapolis St Ry Co supra, n 62

78. Statute construed

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81 Minn—Application of Minneapolis St Ry Co supra, n 62

86 Pa—City of Philadelphia v Pennsylvania Public Utility Commission, supra, n 66

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94 U S—Pullman Co v Railroad Commission of Texas, supra, n 65

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Md—Baltimore Transit Co v Public Service Commission of Md, supra, n 68

Wis—Milwaukee & Suburban Transport Corp v Public Service Commission 68 N W 2d 552, 268 Wis 573 app dism and cert den 76 S Ct 135 350 U S 877 100 L Ed 775

95 N Y—Rensselaer County v Capital Dist Transp Authority 349 N Y S 2d 20, 42 A D 2d 445

Pa—City of Pittsburgh v Pennsylvania Public Utility Commission, 101 A 2d 127 174 Pa Super 224

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D C—Spegel v Public Utilities Commission of District of Columbia, D C 226 F 2d 29, 96 U S App D C 307 cert den 76 S Ct 182, 350 U S 904 100 L Ed 794

N J—Petition of Suburban Transit Corp 445 A 2d 406, 184 N J Super 90

96. Rehearing on commission's own motion

N J—Central R Co of N J v Department of Public Utilities, 81 A 2d 162, 7 N J 247

97 Ind Public Service Commission v Indianapolis Rys supra, n 44

Minn—Application of Minneapolis St Ry Co supra, n 62

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1 Ill—Fleming v Illinois Commerce Commission, 57 N E 2d 384 388 Ill 138, app dism 65 S Ct 686, 324 U S 823 89 L Ed 1393, and 65 S Ct 687 three cases, 324 U S 824 89 L Ed 1393

Md—Baltimore Transit Co v Public Service Commission of Md, 112 A 2d 687 206 Md 533

N J—Central R Co of N J v Department of Public Utilities, 81 A 2d 162, 7 N J 247

Consideration held given to obsolescence

Pa—City of Pittsburgh v Pennsylvania Public Utility Commission 78 A 2d 35 168 Pa Super 95

3 Ill—Fleming v Illinois Commerce Commission, supra, n 1

N J—Hudson & Manhattan R Co v Board of Public Utility Comm'rs, 84 A 2d 736, 16 N J Super 396

Order held supported by evidence

D C—Spegel v Public Utilities Commission of District of Columbia, C A 247 F 2d 84 101 U S App D C 93

N J—Petition of Suburban Transit Corp, 445 A 2d 406, 184 N J Super 90

Pa—City of Pittsburgh v Pennsylvania Public Utility Commission, supra, n 1

4 D C—Allied Civic Group v Public Utilities Commission of District of Columbia D C 125 F Supp 453

Md—Baltimore Transit Co v Public Service Commission of Md supra, n 1

Pa—City of Philadelphia v Pennsylvania Public Utility Commission, 95 A 2d 244, 173 Pa Super 38

R I—Mercier v Kennedy 113 A 2d 121 83 R I 75

Particular evidence held competent

N J—Central R Co of N J v Department of Public Utilities, supra, n 1

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N Y—Application of Love, 155 N Y S 2d 266

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D C—D C Transit System, Inc v Washington Metropolitan Area Transit Commission, C A , 350 F 2d 753 121 U S App D C 375

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D C—D C Transit System, Inc v Washington Metropolitan Area Transit Commission, C A , 466 F 2d 394 151 U S App D C 223, cert den 93 S Ct 688, 409 U S 1086, 34 L Ed 2d 673

5 Ill—Illinois Cent R Co v Illinois Commerce Commission, 56 N E 2d 432, 387 Ill 256 app dism 65 S Ct 686 324 U S 823 89 L Ed 1392—Fleming v Illinois Commerce Commission, supra, n 1

Pa—City of Philadelphia v Pennsylvania Public Utility Commission, 57 A 2d 613 162 Pa Super 425—City of Pittsburgh v Pennsylvania Public Utility Commission, 69 A 2d 844, 165 Pa Super 519—City of Philadelphia v Pennsylvania Public Utility Commission, 102 A 2d 428, 174 Pa Super 641

Reception of improper evidence held not prejudicial

Wis—Duluth St Ry Co v Railroad Commission of Wisconsin, 152 N W 887 161 Wis 245

6. Record on hearing, disclosed reserve for injury and damage claims should remain same

Wis—Milwaukee & Suburban Transport Corp v Public Service Commission, 108 N W 2d 729 13 Wis 2d 384

Net investment cost properly reduced

Wis—Milwaukee & Suburban Transport Corp v Public Service Commission, 108 N W 2d 729, 13 Wis 2d 384

9 Pa—City of Pittsburgh v Pennsylvania Public Utility Commission, 93 A 2d 715 172 Pa Super 230

Finding held supported by evidence

D C—Allied Civic Group v Public Utilities Commission of District of Columbia, supra, n 4

Pa—City of Pittsburgh v Pennsylvania Public Utility Commission, supra, n 1—City of Pittsburgh v Pennsylvania Public Utility Commission 95 A 2d 555, 173 Pa Super 87

Tex—Texas Indus Traffic League v Railroad Commission of Tex , Civ App 255 S W 2d 903 err ref no rev err

10 Ill—Fleming v Illinois Commerce Commission, supra, n 1

Pa—City of Philadelphia v Pennsylvania Public Utility Commission, supra, n 5

Finding of fair value not required

Pa—City of Pittsburgh v Pennsylvania Public Utility Commission, supra, n 1—City of Pittsburgh v Pennsylvania Public Utility Commission, supra, n 9

Tex—Texas Indus Traffic League v Railroad Commission of Tex Civ App 255 S W 2d 903, err ref no rev err

11 Pa—City of Philadelphia v. Pennsylvania Public Utility Commission, supra, n 5

13 Ill—Fleming v Illinois Commerce Commission, supra, n 1

14. Burden of proof as to reasonableness upon applicant

N J—Central R Co of N J v Department of Public Utilities, supra, n 1

Pa—City of Philadelphia v Pennsylvania Public Utility Commission, supra, n 4

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15. Changing character of order

R I—United Transit Co v Public Utility Hearing Bd 192 A 2d 423 96 R I 435

24. Members of armed forces

Pa—City of Pittsburgh v Pennsylvania Public Utility Commission 43 A 2d 348, 157 Pa Super 595

25. When in uniform

(1) Other cases

N J—Public Service R Co v Board of Public Utility Commrs 88 A 818 85 N J Law 423 affd 92 A 1087 86 N J Law 696—State v Mihm 94 A 789 87 N J Law 332, affd 37 S Ct 508, 244 U S 258, 61 L Ed 1117

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59 S C—Atlantic Coast Line R Co v South Carolina Public Service Commission, 144 S E 2d 212, 246 S C 447

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67 Colo—Berman v City and County of Denver 209 P 2d 754 120 Colo 218

Neb—Ritums v Howell, 209 N W 2d 160 190 Neb 503

N Y—McCabe v Voorhis, 153 N E 849, 243 N Y 401

Elevated railroad

Ill—Metropolitan West Side Electric Ry v City of Chicago, 104 N E 165 261 Ill 624

No county jurisdiction by implication

N Y—Bee Line, Inc v Nickerson, 303 N Y S 2d 950, 60 Misc 2d 931 affd 309 N Y S 2d 124 33 A D 2d 1106

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70. Initiative and referendum

La—Long v Shreveport 91 So 825 151 La 423 43 C J p 586 note 34 p 587 note 49

Outside territorial limits

(1) An ordinance cannot regulate fares of a street car company to be charged beyond the city limits—City of South Pasadena v Los Angeles Terminal R Co 41 P 1093 109 Cal 315

(2) An ordinance cannot tax land beyond limits for municipal purposes—Wells v Weston, 22 Mo 384 66 Am Dec 627

73 Tex—City of El Paso v El Paso City Lines, Civ App 227 S W 2d 278, err ref no rev err

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89 Tex—City of El Paso v El Paso City Lines, supra, n 73

90 Tex—City of El Paso v El Paso City Lines, supra, n 73

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98 Ky—Scott v Cincinnati, N & C Ry Co, 105 S W 2d 169, 268 Ky 383

Construction of particular agreements

(3) Other agreements

Wash—Peterson v Tacoma Ry & Power Co 111 P 338, 60 Wash 406, 140 Am St Rep 936

Motor coach transit companies

N Y—In re Fifth Ave Coach Lines, Inc 259 N Y S 2d 313, 46 Misc 2d 14, affd 261 N Y S 2d 784 23 A D 2d 463 motion den 216 N E 2d 604, 17 N Y 2d 664 269 N Y S 2d 443 mod on oth grds 219 N E 2d 410, 18 N Y 2d 212, 273 N Y S 2d 52, am on oth grds 221 N E 2d 174, 18 N Y 2d 741, 274 N Y S 2d 349, app dism 87 S Ct 1480, 386 U S 778, 18 L Ed 2d 524

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12. Filing requirements

La—Long v Shreveport, 91 So 825, 151 La 423 43 C J p 542 note 5

19 Not invalidated by company acceptance provision

Ky—Scott v Cincinnati, N & C Ry Co 105 S W 2d 169 268 Ky 383

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40 U S—International Ry Co v Press Cast, D C N Y 52 F 2d 293

Cal—Hurst v City and County of San Francisco, 201 P 2d 805 33 Cal 2d 298

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Minn—Minneapolis St Ry Co v City of Minneapolis, 40 N W 2d 353 229 Minn 502, app dism 70 S Ct 574 339 U S 907 94 L Ed 1335

Wis—Milwaukee Electric Ry & Light Co v Railroad Commission of Wisconsin, 142 N W 491 153 Wis 592—Duluth St Ry Co v Railroad Commission of Wisconsin, 152 N W 887 161 Wis 245

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43. In Massachusetts

(3) Other cases—Fall River v Public Service Commission, 117 N E 915 228 Mass 575

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52 Wis—Duluth St Ry Co v Railroad Co— of Wisconsin supra, p 40

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63 N Y—City of Rochester v Public Service Commission, 89 N Y S 2d 545 275 App Div 172, rearg den and app gr 90 N Y S 2d 697, 278 App Div 972, affd 96 N E 2d 192, 301 N Y 801

§ 584. —— Proceedings to Enforce, or Obtain Relief from, Rates

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73 Ind—State ex rel Evansville City Coach Lines v Rawlings, 99 N E 2d 597, 229 Ind 552

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N Y—Sheldon v New York City Transit Authority, 332 N Y S 2d 992, 39 A D 2d 950

74 Ind—Public Service Commission v Indianapolis Rys 72 N E 2d 434 225 Ind 30

Pa—City of Pittsburgh v Pennsylvania Public Utility Commission, 78 A 2d 35 168 Pa Super 95

75 Pa—City of Pittsburgh v Pennsylvania Public Utility Commission, 101 A 2d 127 174 Pa Super 224

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79 Ind—Public Service Commission of Ind v Indianapolis Rys 76 N E 2d 841 225 Ind 656

81. Money collected under terms of temporary injunction

Ind—Public Service Commission of Ind v Indianapolis Rys supra, n 79

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5 Ind Public Service Commission v Indianapolis Rys , 72 N E 2d 434 225 Ind 30

N Y—County Transp Co v Maltbie, 73 N Y S 2d 906, 189 Misc 743

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6. Entitlement to stay order shown

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13. Effect

Ill—Illinois Cent R Co v Illinois Commerce Commission, 56 N E 2d 432, 387 Ill 256, app dism 65 S Ct 686, 324 U S 823, 89 L Ed 1392

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23. Who may bring action

(3) Individual not suffering special damage may not sue—McNulty v Brooklyn Heights R Co 66 N Y S 57 31 Misc 674—Application of Love, 155 N Y S 2d 266

(1) Other persons

N Y—Westchester County v Koch, 438 N Y S 2d 951 108 Misc 2d 764 affd 450 N Y S 2d 388, 88 A D 2d 514

28 Ind—Public Service Commission v Indianapolis Rys supra, n 5

R I—United Transp Co v Public Utility Hearing Bd 192 A 2d 423 96 R I 435

Vt—City of Barre v Barre & M Traction & Power Co, 92 A 237 88 Vt 304

Order held to constitute finding

Wis—Duluth St Rv Co v Railroad Commission of Wisconsin, 152 N W 887 161 Wis 245

Question of fact

Wis—Duluth St Railway Co v Railroad Commission of Wisconsin, supra, n 28

Weight and sufficiency of evidence

Wis—Duluth St Ry Co v Railroad Commission of Wisconsin, supra, n 28

29 D C—Allied Civic Group v Public Utilities Commission of District of Columbia, 125 F Supp 453

Md—Baltimore Transit Co v Public Service Commission of Md 112 A 2d 687 206 Md 533

Neb—In re Resler 48 N W 2d 718, 154 Neb 624

N Y—Application of Love, 155 N Y S 2d 266

R I—United Transit Co v Public Utility Hearing Bd 192 A 2d 423 96 R I 435

Wis—Milwaukee & Suburban Transport Corp v Public Service Commission, 68 N W 2d 552, 268 Wis 573, app dism and cert den 76 S Ct 135 350 U S 877, 100 L Ed 775

Order held not unlawfully discriminatory

Wis—Duluth St Ry Co v Railroad Commission of Wisconsin, supra, n 28

30 Md—Baltimore Transit Co v Public Service Commission of Md supra, n 29

Held unreasonable

Wis—Duluth St Ry Co v Railroad Commission of Wisconsin, supra, n 28

33 Minn—Application of St Paul City Ry Co 50 N W 2d 483 235 Minn 226

Okl—Dolese Bros Co v St Louis-San Francisco Ry Co, 86 P 2d 800 184 Okl 269

Pa—City of Pittsburgh v Pennsylvania Public Utility Commission, 95 A 2d 555, 173 Pa Super 87

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D C—Public Utilities Commission of District of Columbia, C A 287 F 2d 337 109 U S App D C 298

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35 Pa—City of Philadelphia v Pennsylvania Public Utility Commission 102 A 2d 428, 174 Pa Super 641

Trial de novo

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37 Cal Market St Ry Co v Railroad Commission, 150 P 2d 196, 24 Cal 2d 378, affd 65 S Ct 770, 324 U S 548, 89 L Ed 1171 reh den 65 S Ct 1020, two cases, 324 U S 890, 89 L Ed 1438

Pa—Philadelphia Transp Co v Pennsylvania Public Utility Commission, 37 A 2d 138, 155 Pa Super 9 app ref 39 A 2d 372, 350 Pa 373—City of Pittsburgh v Pennsylvania Public Utility Commission, 78 A 2d 35, 168 Pa Super 95

Order held not discriminatory

N Y—Baker v Swidler 325 N Y S 2d 284 37 A D 2d 883

Wash—Puget Sound Electric Ry v Railroad Commission, 117 P 739 749 65 Wash 75 Ann Cas 1913B, 763

Statement of commission held not binding

Ky—Louisville Transit Co v Department of Motor Transp 286 S W 2d 536

38 Pa—Philadelphia Transp Co v Pennsylvania Public Utility Commission, supra, n 37

Moot question

Ky—Louisville Transit Co v Department of Motor Transp 286 S W 2d 536

Admissions limiting scope of review

Ky—Louisville Transit Co v Department of Motor Transp 286 S W 2d 536

39 R I—Mackerson v Kennelly 113 A 2d 121 83 R I 75—United Transit Co v Public Utility Hearing Bd 192 A 2d 423 96 R I 435

Burden of proof, etc.

(2) Other matters

Ill—City of Chicago v Illinois Commerce Commission, 153 N E 2d 574 15 Ill 2d 11

Determinations not to be disturbed unless supported by evidence

(6) Other matters

Ill—City of Chicago v Illinois Commerce Commission, 153 N E 2d 574 15 Ill 2d 11

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40 Pa—City of Pittsburgh v Pennsylvania Public Utility Commission 69 A 2d 844 165 Pa Super 519

42 N Y—Nassau County v Metropolitan Transp Authority 293 N Y S 2d 1017 57 Misc 2d 1025

Increase in motor bus fares

Minn—City of Minneapolis v Minneapolis Transit Co 133 N W 2d 364 270 Minn 133

46 Pa—City of Pittsburgh v Pennsylvania Public Utility Commission, supra, n 40

47. Evidence

(1) Held sufficient

Md—W M A Transit Co v Park Lawn Lounge, Inc 216 A 2d 738, 241 Md 356

§ 586 Recovery Back of Excessive or Unauthorized Charges

Library References

Carriers ⇐249, 257

page 1143

50 Tenn—Covert v Nashville, C & St L Ry, 208 S W 2d 1008, 186 Tenn 142, 1 A L R 2d 154

Conditions imposed where individual refunds not possible

D C—Nichols v Public Utilities Commission, C A, 318 F 2d 187 115 U S App D C 216, cert den 83 S Ct 1304 373 U S 913, 10 L Ed 2d 414

Passenger held not entitled to recover

D C—Moss v C A B C A, 521 F 2d 298, 172 U S App D C 198, cert den 96 S Ct 1460, 424 U S 966, 47 L Ed 2d 732, reh den 96 S Ct 1751, 425 U S 966, 48 L Ed 2d 211

Ill Bateman v Fallon, 89 N E 2d 280 339 Ill App 252, app transf 85 N E 2d 1 403 Ill 66

Limitations on recovery

U S—Wedberg v American Airlines, Inc D C Ill 336 F Supp 407

52. Peaceful refusal to pay overcharges held not precluded

N Y—People v Ransmith, 174 N Y S 2d 860, 14 Misc 2d 300

§ 587. Criminal Responsibility and Penalties for Excessive or Unauthorized Charges

Library References

Carriers ⇐20(4) et seq, 37, 38

56 26 C J p 1030 note 73[a]

58 U S—Howitt v U S Fla 66 S Ct 923, 328 U S 189 90 L Ed 1162

State prosecution

Wash—State v Crawford, 133 P 590, 74 Wash 248, 46 L R A N S 1039

page 1144

73 Tex—City of El Paso v El Paso City Lines Civ App 227 S W 2d 278 err ref no ref err

page 1146

94 U S—U S v Howitt D C Fla 55 F Supp 372, affd C C A 150 F 2d 82, affd 66 S Ct 923 328 U S 189 90 L Ed 1162

§ 589. —— Actions and Prosecutions

page 1147

12 Cal—People v Alves, 267 P 2d 858 123 C A 2d 735

§ 590. Time, Place, and Mode of Tender or Payment

Library References

Carriers ⇐250

page 1148

24 Cal—Orloff v Hollywood Turf Club, 242 P 2d 660, 110 C A 2d 340

§ 593. —— Amount of Tender; Making Change

page 1150

45 Mo—C J S cited in Geers v St Louis Public Service Co App 247 S W 2d 318, 321

§ 597. Purchase and Sale

page 1151

71 Okl—Thompson v Minnis, 202 P 2d 981 201 Okl 154

§ 598. —— Authority to Sell; Brokers

page 1152

73 "Scalper" defined see 56 C J p 135 notes 62–64 Scalper's business" defined see 56 C J p 135 note 66

76 Mo—Ex parte Pullman, 296 S W 366, 317 Mo 732

Adjudication has been made with respect to the issuance of a license to a travel broker.[80.5]

80.5. Benefit to carrier or public required

U S—Collette Travel Service, Inc v U S D C R I 263 F Supp 302

§ 602. Representations and Acts of Agent or Employee

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24. Carrier not bound by former agent

N Y—Antar v Trans World Airlines Inc 320 N Y S 2d 355 66 Misc 2d 93 affd 325 N Y S 2d 1019, 37 A D 2d 921

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37 Miss—Drue Greyhound Lines v Everett 187 So 508, 185 Miss 458

§ 603. Nature and Effect of Ticket

Library References

Modern Legal Forms Ch. 66, Tickets.

page 1158

47 N Y—Jones v Rochester Transit Corp, 92 N Y S 2d 735, affd 98 N Y S 2d 773 277 App Div 939, reard and app den 99 N Y S 2d 1014 277 App Div 962

50 Del—C.J.S. cited in Phoenix Finance Corporation v Iowa-Wisconsin Bridge Co 16 A 2d 789 792, 2 Terry 130

51 Ga—Kirkland v Atchison, T & S F Ry Co 121 S E 2d 411 104 Ga App 200

52 N Y—Jones v Rochester Transit Corp supra, n 47

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58 Del—Phoenix Finance Corporation v Iowa-Wisconsin Bridge Co supra, n 50

§ 604. —— Construction: What Law Governs

65 N Y—Scire v American Export Lines, 93 N Y S 2d 457 197 Misc 422

§ 607. Transferability of Tickets

page 1161

86 Del—Phœnix Finance Corporation v Iowa-Wisconsin Bridge Co supra, n 50

§ 608. Forfeiture of Ticket

Library References

Carriers ⇐249.

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7 N.Y—Weinstein v Long Island R Co, 282 N Y S 865, 157 Misc 117, affd 296 N Y S 246, 250 App Div 786

Construction

N Y.—Weinstein v Long Island R Co, supra

page 1163

12 But it has been held, etc

N Y—Weinstein v Long Island R Co supra, n 7

§ 609. Exhibition and Surrender of Tickets

24 Ga—Daugrepont v Teche Greyhound Lines, 7 S E 2d 174, 189 Ga 601, 127 A L R 217

§ 611. —— Holder of Commutation Ticket

page 1165

41. Wrongful retention of ticket

N J—J v. Pennsylvania R Co, 5 A 2d 480, 122 N J Law, 395.

§ 612. —— Coupon Tickets; Detachment of Coupons

Library References

Modern Legal Forms Ch. 66, Tickets.

§ 613. —— Where Ticket Is Lost

50 Ga—C.J.S. cited in Teche Greyhound Lines v Daugrepont, 3 S E 2d 857, 858, 60 Ga App 389, and affd 7 S E 2d 174, 189 Ga 601, 127 A L R 217

Passenger's loss

Ga—Daugrepont v Teche Greyhound Lines, supra, n 24

Ticket limited to particular bus or train

Ga—Daugrepont v Teche Greyhound Lines, 13 S E 2d 727 64 Ga App 626

§ 615. In General

Library References

Carriers ⇐249.

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75 N Y—Wyman v Pan American Airways, 43 N Y S 2d 420, 181 Misc 963 affd 48 N Y S 2d 459 267 App Div 947 app den 49 N Y S 2d 271 267 App Div 983 affd 59 N E 2d 785 293 N Y 878 cert den 65 S Ct 1029 324 U S 882, 89 L Ed 1432

Wis—Bentley v Fayas, 50 N W 2d 404 260 Wis 177 29 A L R 2d 205

Valid special contracts with the government will be enforced in accordance with their terms [80.1]

80.1 U S—Southern Pacific Co v U S, 87 Ct Cl 520

page 1168

84 Ill—Koontz v South Suburban Safeway Lines, 73 N E 2d 919 332 Ill App 14

§ 618. Limitations as to Time

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6 U S—Lipton v National Hellenic Am Lines, D C N Y 294 F Supp 308

§ 622. In General

Library References

Carriers ⇐249, 253.5.

Modern Legal Forms Ch. 12, Automobiles; Ch. 13, Aviation, Ch. 66, Tickets.

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83. Pass held gratuitous

U S—Gonzales v Baltimore & O R Co C A W Va, 318 F 2d 294 cert den 84 S Ct 208, 375 U S 911 11 L Ed 2d 151

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87. No compensation given

U S—Richards v Atchison, T & S F R Co, D C Iowa, 226 F Supp 812

Payment of seat reservation does not affect gratuity

U S—Richards v Atchison, T & S F R Co D C Iowa, 226 F Supp 812

88 N Y—Hopkins v. Island R Co, 251 N Y S 2d 590, 21 A D 2d 814

93 U S—Martin v Greyhound Corp C A Tenn 227 F 2d 501, cert den 76 S Ct 657 350 U S 1013 100 L Ed 873

Fla—Florida East Coast Ry Co v Booth, App, 148 So 2d 536

97. Dependent upon nature of pass

Mass—Tortorelli v New York Cent R Co, 95 N E 2d 674 326 Mass 583

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Misrepresentation of passenger in securing free pass for one claimed to be his wife does not render pass void as to passenger.[99.5]

99.5. Passenger held not unauthorized

Ill—Boyer v Atchison, T & S F Ry Co 217 N E 2d 303 70 Ill App 2d 214 affd 230 N E 2d 173 38 Ill 2d 31 cert den 88 S Ct 1038, 390 U S 949 19 L Ed 2d 1140

4 Ill—Crane v Railway Express Agency 15 N E 2d 866 369 Ill 110

§ 623. Passes Forbidden by Law

Library References

Carriers ⇐253.5

8 U S—Sussaman v Pennsylvania R Co C C A N J 144 F 2d 950

Issuance limited to employees

U S—Byrne v Pennsylvania R Co D C Pa 160 F Supp 655 affd 262 F 2d 906, cert den 79 S Ct 798 359 U S 960, 3 L Ed 2d 766

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Violation of the statute does not alter the status of the holder as passenger [15.5]

15.5 Ill—Boyer v Atchison T & S F Ry Co 217 N E 2d 303 70 Ill App 2d 214 affd 230 N E 2d 173 38 Ill 2d 31, cert den 88 S Ct 1038, 390 U S 949 19 L Ed 2d 1140

19 Pa—Johnstown Traction Co v Amalgamated Ass'n of St Elec. Ry & Motor Coach Employees, 72 Pa Dist & Co 323 15 Cambria 233

Constitutional provision construed

Wis—Dann County v McManus, 198 N W 2d 667 55 Wis 2d 413 70 A L R 3d 1313

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20. What officers within prohibition

(1) People v Williams 68 N E 60 176 N Y 9

§ 624. Revocability of pass

Library References

Carriers ⇐253.5

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36. Lifetime pass

Miss—Pierce v Illinois Cent R Co 183 So 2d 190, 254 Miss 806

§ 625. Early Rule

Library References

Corbin on Contracts § 1472.

40 U S—Georgakis v Eastern Air Lines, Inc. D C N Y, 512 F Supp 330

§ 626. Present Rules

Library References

Carriers ⇐307(1.5, 7, 8)

41 Mich—Kordish v Butler Aviation Detroit Inc, 303 N W 2d 238, 103 Mich App 566

Pa—Turek v Pennsylvania R Co 85 A 2d 845 369 Pa 341 cert den 72 S Ct 762, 343 U S 928, 96 L Ed 1339

Hijacking

U S—Karfunkel v Compagnie Nationale Air France, D C N Y 427 F Supp 971

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42. Under Warsaw Convention

U S—Maughe v Compagnie Nationale Air France, C A Cal 549 F 2d 1256, cert den 97 S Ct 2939 431 U S 974 53 L Ed 2d 1072

N Y—Seguritan v Northwest Airlines, Inc 446 N Y S 2d 397 86 A D 2d 658 affd 440 N E 2d 1339 57 N Y 2d 767 454 N Y S 2d 991

§ 627. —— By Contract

43 US—Dees v American Cyanamid Co DC Miss 296 F Supp 615

44 US—Ketchum v Denver & R G W R Co CA Utah, 175 F 2d 69

La—Levy v American Express, App 274 So 2d 857 affd Sup 287 So 2d 784

Mo—Plant v Thompson, 221 S W 2d 834 359 Mo 391

Pa—Turek v Pennsylvania R Co 64 A 2d 779 361 Pa 512

46 Ill—Crane v Railway Express Agency, 12 N E 2d 672, 293 Ill App 328 mod on oth grds 15 N E 2d 866, 369 Ill 110

Printed matter on back not accepted

Tex—Hudson v Continental Bus System, Inc Civ App 317 S W 2d 584 err ref no rev err

Exemption for breach of public duty not allowed

Tenn—Moss v Fortune, 340 S W 2d 902, 207 Tenn 426

47 US—Thompson v National R R Passenger Corp, C A Tenn 621 F 2d 814 cert den 101 S Ct 611 449 U S 1035 66 L Ed 2d 497

48 US—Carpenter v Klosters Rederi A/S, C A Fla 604 F 2d 11

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49 US—Ketchum v Denver & R G W R Co supra, n 44

Ky—Holeman v Louisville & N R Co 319 N W 2d 47 cert den 79 S Ct 1148, 359 U S 1012, 3 L Ed 2d 1036

§ 628. —— By Notice

51 US—Toman v Mid-Continent Airlines, D C Mo 107 F Supp 345

N Y—Maxtoum v New York, N H & H R R 115 N Y S 2d 238

Sufficiency of notice under Warsaw Convention

US—Block v Compagnie Nationale Air France, C A Ga 386 F 2d 323 cert den 88 S Ct 2053, 392 U S 905, 20 L Ed 2d 1363—In re Air Crash Disaster at Warsaw Poland, on March 14 1980, D C N Y, 535 F Supp 833 affd C A, 705 F 2d 85 cert den 104 S Ct 147, 464 U S 845, 78 L Ed 2d 138, reh den 104 S Ct 416, 464 U S 978, 78 L Ed 2d 353

N Y—Egan v Kollsman Instrument Corp 234 N E 2d 199 21 N Y 2d 160, 287 N Y S 2d 14 cert den 88 S Ct 1636, 390 U S 1039, 20 L Ed 2d 301—Bergman v Pan Am World Airways, Inc 299 N Y S 2d 982, 32 A D 2d 95—Jaffe v British Overseas Airways Corp 309 N Y S 2d 58, 34 A D 2d 527 app dism 264 N E 2d 349 27 N Y 2d 796, 315 N Y S 2d 856 Mertens v Pan American World Airways, Inc, 434 N E 2d 1060, 55 N Y 2d 398, 449 N Y S 2d 693

Time bar under Warsaw Convention despite absence of notice in ticket

US—Wright v Irish Intern Airlines, C A N Y, 436 F 2d 42

§ 629. In General

Library References

Carriers ⇐307

52 US—Chesapeake & O Ry Co v Pennsylvania R Co supra, n 8—Hall Signal Co v Texas Eastern Mfg & Mfg Co, C A Tex, 181 F 2d 923 Joseph v Pennsylvania R R, C A Ohio, 203 F 2d 290, 36 A L R 2d 1406 Marsh v Greyhound Corp C A Tenn 227 F 2d 501, cert den 76 S Ct 657 350 U S. 1013, 100 L Ed 873

D C—Shortley v North Eastern Airlines, D C 104 F Supp 152

Ga—Ætna Casualty & Surety Co v Prather, 2 S E 2d 115, 59 Ga App 797

Ill—Crane v Railway Express Agency supra, n 4

Mo—McKaig v Kansas City Terminal Ry Co App 355 S W 2d 409

N J—Horelick v Pennsylvania R Co, 99 A 2d 652, 13 N J 349 41 A L R 2d 1378 Berry v Pennsylvania R Co 193 A 2d 569 80 N J Super 321

N Y—Montalbano v New York Cent R Co 47 N Y S 2d 877 267 App Div 617

Ohio—Richard A Bergan, D O Inc v Ohio Bell Tel Co 375 N E 2d 410 54 Ohio St 2d 147 8 O O 3d 149

Pa—Turek v Pennsylvania R Co supra, n 44

53 Ky—Louisville & N R Co v George, 129 S W 2d 986, 279 Ky 24

Right of carrier to acquire insurance

Ind—Pennsylvania R Co v Kent, 202 N E 2d 893 246 Ind 101

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56 Ga—Isom v Southern, 199 S E 2d 89 129 Ga App 73

58 Ill—Crane v Railway Express Agency supra, n 4

60 US—Chervy v Peninsular & Oriental Steam Nav Co D C Cal 243 F Supp 654 affd C A 364 F 2d 908

62 US—Franklin Fire Ins Co v Chesapeake & O Ry Co C C A Ky 140 F 2d 898

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68 N Y—Montalbano v New York Cent R Co supra, n 52

69 US—Raslin v Compania de Vapores Realma, S P D C N Y 521 F Supp 337

§ 630. Degrees of Negligence

Rule not applied to passengers for hire

72 Ill—Crane v Railway Express Agency supra, n 46

§ 631. Negligence of Carrier and That of Its Employees

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76 S C—Parker v Bissonette, 26 S E 2d 497 203 S C 155 147 A L R 773

§ 632. Applications of Rule to Particular Classes of Passengers

page 1186

80 Ga—Fowler v Western & A R R, 42 S E 2d 499 75 Ga App 156

N Y—Montalbano v New York Cent R Co supra, n 52

Employee's wife included

US—Marsh v Greyhound Corp, C A Tenn 227 F 2d 501 cert den 76 S Ct 657, 350 U S 1013 100 L Ed 2d 873

§ 633. —— Employees of Others in General

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86 US—Jacob v Pennsylvania R R supra, n 52

Cal—Williams v E W Robasco Van Lines, 291 P 2d 453, 46 C 2d 14

N Y—Montalbano v New York Cent R Co supra, n 52

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90. Carriage held private

US—Foland v St Louis-San Francisco Ry Co, D C Kan, 208 F Supp 295

Injuries held within contract

US—Foland v St Louis-San Francisco Ry Co D C Kan, 208 F Supp 295

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96 Ga—Cato v Southern Ry Co 107 S E 98, 26 Ga App 578 conf to 106 S E 272, 151 Ga 308

§ 634. —— Gratuitous Passengers; Free Passes

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16 US—Richards v Atchison, T & S F R Co D C Iowa, 226 F Supp 812

Ohio—C J S black letter text quoted in Spanable v New York Cent R Co 69 N E 2d 441 443 80 Ohio App 50 reh den 70 N E 2d 233 second case, 80 Ohio App 50

Pa—Turek v Pennsylvania R Co 64 A 2d 779 361 Pa 512

17 US—Luersen v Seaboard Air Line R R, D C N Y 203 F Supp 707—Richards v Atchison, T & S F R Co, D C Iowa, 226 F Supp 812

Cal—Donnelly v Southern Pac Co, 118 P 2d 465, 18 Cal 2d 863

Ill—Boyer v Atchison T & S F Ry Co 181 N E 2d 372, 34 Ill App 2d 330 96 A L R 2d 400, stating federal law

Mo—Brown v Terminal R Ass'n of St Louis, App 298 S W 2d 471

N Y—Montalbano v New York Cent R Co 47 N Y S 2d 877 267 App Div 617—Hopkins v Island R Co 251 N Y S 2d 590, 21 A D 2d 814

Ohio—Spanable v New York Cent R Co 69 N E 2d 441 80 Ohio App 50, reh den 70 N E 2d 233 second case, 80 Ohio App 50

Va—Atlantic Greyhound Lines v Skinner 2 S E 2d 441 172 Va 428

Exemption restricted to carrier

S C—Parker v Bissonette, 26 S E 2d 497 203 S C 155 147 A L R 773

Particular classes of passengers held bound

(1) Ky—Cincinnati N O & T P Ry Co v Hansford, 205 S W 2d 346, 305 Ky 854—Holeman v Louisville & N R Co 319 S W 2d 47 cert den 79 S Ct 1148 359 U S 1012, 3 L Ed 2d 1036

N Y—Montalbano v New York Cent R Co supra

(2) US—Gonzales v Baltimore & O R Co C A W Va 318 F 2d 294 cert den 84 S Ct 208, 375 U S 911, 11 L Ed 2d 151

Ky—Holeman v Louisville & N R Co 319 S W 2d 47 cert den 79 S Ct 1148, 359 U S 1012, 3 L Ed 2d 1036

(3) N Y—McDougall v Lehigh Val R Co 198 N Y S 2d 91 21 Misc 2d 946

(5) Members of family of employee of another carrier

N Y—McDougall v Lehigh Val R Co 198 N Y S 2d 91 21 Misc 2d 946

Injury at point where pass ineffective

(2) Other matters

US—Schuller v Pennsylvania R Co D C N Y, 192 F Supp 502

Exemption clause for injuries to employees construed

US—Metropolitan Coal Co v Johnson, C A Mass 265 F 2d 173

Issuance as matter of course held not to affect gratuitous nature

N Y—McDougall v Lehigh Val R Co 198 N Y S 2d 91 21 Misc 2d 946

Terminal company held immune

Ohio—Lunsford v Cleveland Union Terminals Co 165 N E 2d 3 170 Ohio St 349

Negligence of redcap while passholder changed trains

Mo—McKaig v Kansas City Terminal Ry Co App 355 S W 2d 409

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20. Sleeping car ticket

US—Luersen v Seaboard Air Line R R D C N Y 203 F Supp 707

21 US—Richards v Atchison T & S F R Co DC Iowa, 226 F Supp 812

Cal—Donnelly v Southern Pac Co supra, n 17

Ky—Cincinnati, N O & T P Ry Co v Hansford, supra, n 17

Ohio—Seanabre v New York Cent R Co supra, n 17

22 Ill—Crane Railway Express Agency 13 Ill 2d 800, 369 Ill 1.3

Such a stipulation does not exculpate a carrier for injuries resulting from a violation of the Federal Safety Appliance Act.[25.5]

25.5 Ill—Boyer v Atchison, T & S F Ry Co 181 N E 2d 372, 34 Ill App 2d 330, 96 A L R 2d 400

26 US—Luersen v Seaboard Air Line R R DC N Y 203 F Supp 707—Richards v Atchison T & S F R Co D C Iowa, 226 F Supp 812—Catherine v Seaboard Coast Line R Co D C Fla 348 F Supp 43

Cal—Donnelly v Southern Pac Co, supra, n 17—Pratt v Western Pac R Co 22 Cal Rptr 108 213 C A 2d 573

Pa—Turek v Pennsylvania R Co supra, n 16

Meaning of "willful" or "wanton" negligence

Ky—Louisville & N R Co v George, 129 S W 2d 986, 279 Ky 24

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27 Ill—Kopta v Greer Shop Training, 64 N E 2d 570, 327 Ill App 470

In California, etc—Donnelly v Southern Pac Co supra, n 17

§ 635. —— Drovers' Passes or Contracts

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44. Jockeys accompanying race horses

Ill—Crane v Railway Express Agency supra, n 22

§ 638. Transportation over Connecting Lines

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64 US—Ephraim v Safeway Trails, Inc C A N Y 341 F 2d 815

N J—Glaser v Pennsylvania R Co 196 A 2d 539, 82 N J Super 16

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67 US—Wooten v Pennsylvania R Co C A Ind 288 F 2d 220, cert den 82 S Ct 34, 368 US 819, 7 L Ed 2d 24

§ 639. What Law Governs

70 Ohio—Thigpen v Greyhound Lines, Inc 229 N E 2d 107, 11 Ohio App 2d 179

71. Federal law controls in construing Federal Safety Appliance Act and Hepburn Act

Ill Boyer v Atchison T & S F Ry Co 181 N E 2d 372, 34 Ill App 2d 330, 96 A L R 2d 400

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Various matters relating to the application of the Warsaw Convention have been adjudicated.[78.5]

78.5. Construction of terms of Warsaw Convention

US—Block v Compagnie Nationale Air France, C A Ga., 386 F 2d 323 cert den 88 S Ct 2053, 392 US 905, 20 L Ed 2d 1363

N Y—Leppo v. Trans World Airlines, Inc 392 N Y S 2d 660, 56 A D 2d 813

Passenger on charter flight

Block v Compagnie Nationale Air France C A Ga 386 F 2d 323 cert den 88 S Ct 2053 392 U S 905 20 L Ed 2d 1363

Passenger traveling portion of way by bus

N Y—Egan v Kollsman Instrument Corp 234 N E 2d 199 21 N Y 2d 160 287 N Y S 2d 14 cert den 88 S Ct 1630, 390 U S 1039 20 L Ed 2d 301

Applicability of Warsaw Convention

U S—Tarar v Pan Am World Airways, Inc D C Tex 399 F Supp 335

Tolling of limitations

US—Flanagan v McDonnell Douglas Corp D C Cal 425 F Supp 770

Condition precedent to liability

U S—DeMarines v KLM Royal Dutch Airlines, C A Pa 580 F 2d 1193

§ 640. Duties as to Transportation in General

Library References

Carriers ⇐262

79 Idaho—C J S. cited in Clark v Tarr 270 P 2d 1016, 1017 75 Idaho 251

La—Grant v Baton Rouge Bus Co App 15 So 2d 123

Effect of municipal boundaries

Neb—Application of Omaha Transit Co 94 N W 2d 461 167 Neb 703

80 Pa—Acton v Pennsylvania-Reading Seashore Lines, 11 A 2d 203 138 Pa Super 605—La Sota v Philadelphia Transp Co, 219 A 2d 296, 421 Pa 386

Duty of safe carriage nondelegable

Tenn—Jenkins v General Cab Co of Nashville, 135 S W 2d 448, 175 Tenn 409

No express warranty

Pa—Sykes v Southeastern Pennsylvania Transp Authority 310 A 2d 277 225 Pa Super 69

82 US—Henderson v U S Md 70 S Ct 843 339 US 816, 94 L Ed 1302

Cal—Dayton v Yellow Cab Co of San Francisco, 193 P 2d 959 85 Cal App 2d 740

85 US—Nash v Air Terminal Services, D C Va 85 F Supp 545

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86 US—Henderson v U S supra, n 82

87 Cal—Dayton v Yellow Cab Co of San Francisco, supra, n 82

N D—Haser v Pape, 39 N W 2d 578 77 N D 36

Respectful and courteous treatment

N Y—Brown v Fifth Ave Coach Lines, Inc, 185 N Y S 2d 923, 16 Misc 2d 692

92 N Y—Owens v Italia Societa Per Azione Navigazione-Genova, 334 N Y S 2d 789 70 Misc 2d 719 affd 347 N Y S 2d 431 75 Misc 2d 104

§ 644. Receiving and Taking Up Passengers

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36 Ga—Atlantic Greyhound Corporation v Berry, 17 S E 2d 235 66 Ga App 117

§ 645. Accommodations and Facilities during Transit

Library References

Carriers ⇐262.5

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55 Cal—Dayton v Yellow Cab Co of San Francisco 193 P 2d 959 85 Cal App 2d 740

Urban Mass Transit Assistance Act

US—Michigan Paralyzed Veterans of America v Coleman D C Mich 545 F Supp 245

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59 Ky—Southeastern Greyhound Lines v Burton 216 S W 2d 920 309 Ky 150

62 US—Henderson v U S Md 70 S Ct 843, 339 US 816 94 L Ed 1302

Mich—People v Bob-Lo Excursion Co 27 N W 139 317 Mich 656 affd 68 S Ct 358, 333 US 92 L Ed 455

Disabled persons

N Y—Eastern Paralyzed Veterans Assn v Metropolitan Transp Authority 433 N Y S 2d 461 A D 2d 516

63 US—C.J.S. quoted at length in United States Pennsylvania R Co D C Pa 105 F Supp 619

70. Certain special facilities held sufficient

La—Levy v American Express, App 274 So 2d 857 affd Sup 287 So 2d 784

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75 N D—Haser v Pape, 39 N W 2d 578, 77 N D 36

81 US—Mitchell v U S, 61 S Ct 373 313 US 80 85 L Ed 1201

85 Ky—Southeastern Greyhound Lines v Bingham 185 S W 2d 540 299 Ky 381

S C—Llewellyn v Atlantic Greyhound Corporation, 2 S E 2d 673 204 S C 156

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88 N Y—Gallin v Delta Airlines Inc 434 N Y S 2d 316, 106 Misc 2d 477

91 Ky—Southeastern Greyhound Lines v Chumley 226 S W 2d 777 312 Ky 154

1 US—Mitchell v U S 61 S Ct 873 313 US 80, 85 L Ed 1201—Henderson v U S D C Md, 63 F Supp 906—Henderson v U S Md 70 S Ct 843, 339 U S 816, 94 L Ed 1302

N C—Pridgen v Carolina Coach Co 47 S E 2d 609 229 N C 46

Loading in rear of bus

US—Whiteside v Southern Bus Lines, C A Ky 177 F 2d 949

Regulation held invalid

US—Chance v Lambeth, C A Va 186 F 2d 879 cert den 71 S Ct 1001 341 US 941 95 L Ed 1367

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2 Va—C.J.S. cited in New v Atlantic Greyhound Corp 43 S E 2d 872, 878, 186 Va 726

Bus

Ky—Brumfield v Consolidated Coach Corp 40 S W 2d 356, 240 Ky 1

Segregation statute together with rules held constitutional

Va—Com ex rel v Carolina Coach Co of Va 66 S E 2d 572, 192 Va 745

Segregation statutes and ordinances held unconstitutional

US—Browder v Gayle, D C Ala., 142 F Supp 707 affd 77 S Ct 145 two cases, 352 US 903 1 L Ed 2d 114 reh den 77 S Ct 323 352 US 950, 1 L Ed 2d 245 reh den 77 S Ct 323 352 US 955 1 L Ed 2d 245

3 Ky—Louisville & N R Co v Renfro's Admr 135 S W 266, 142 Ky 590, 33 L R A N S 133

14. Calling officers

D C—Kinchlow v Peoples Rapid Transit Co 88 F 2d 764 66 App D C 382, cert den 57 S Ct 926, 301 US 693 81 L Ed 1349

§ 648. Transferring from One Car or Train to Another; Street Car Transfers

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66 Tenn—Campbell v E T & W N C Motor Transp Co 132 S W 2d 355 23 Tenn 332

76 Vt—City of Barre v Barre & M Traction & Power Co 92 A 237 88 Vt 304

Discontinuance of transfers

Va—Com ex rel Dowden v Richmond & R R Ry Co 80 S E 796, 115 Va 756

Amendment of ordinance

Va—Com ex rel Dowden v Richmond, etc R Co supra

77 N Y—People ex rel United Traction Co v Public Service Commission of State of New York, Second District, 153 N Y S 542, 167 App Div 498

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88 N Y People ex rel New York State Rys v Public Service Commission, Second Dist 153 N Y S 18, 167 App Div 279, affd 114 N E 1078 219 N Y 565

91 N Y—O'Reilly v Brooklyn Heights R Co 72 N E 517 179 N Y 450

93 N Y—Schenk v International Ry Co 146 N Y S 365

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4. Transfer check defined

Cal—Ex parte Lorenzen, 61 P 68, 128 Cal 431 435 79 Am S R 47 50 L R A 55

Mo—Seiler v St Louis Public Service Co App 295 S W 2d 393

63 C J p 789 notes 2, 3

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27 Cal—Ex parte Lorenzen, 61 P 68, 128 Cal 431 79 Am St R 47 50 L R A 55

§ 649. —— Penalty for Refusal to Issue or Accept Transfer

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41 N Y—Schenk v International Ry Co 146 N Y S 365

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Other cases dealing with the weight and sufficiency of the evidence have been determined.[71.1]

71.1. Evidence held insufficient

Ill—Chicago Union Traction Co v City of Chicago, 65 N E 470, 199 Ill 579

§ 650. —— Penalty for Unlawfully Selling or Buying Transfer

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77 Minn—City of St Paul v Robertson, 152 N W 777, 129 Minn 383

§ 652. —— Nature and Extent of Initial Carrier's Liability

81 U S—Ephraim v Safeway Trails, Inc, C A N Y 341 F 2d 815

Pa—[illegible] v Colonial Airlines, 75 Pa Dist & Co 347, 41 Luz Leg Reg 279

84 U S—Ephraim v Safeway Trails, Inc, C A N Y 341 F 2d 815

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95 N Y—Battle v Central Greyhound Lines of New York, Buffalo, 13 N Y S 2d 357 171 Misc 517

97 N J—Berry v Pennsylvania R Co 193 A 2d 569 80 N J Super 321

§ 653. —— Nature and Extent of Connecting Carrier's Liability

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1 Ark—Crown Coach Co v Gibson, 120 S W 2d 702, 196 Ark 1018

§ 654. Duty to Carry to, and to Stop at, Destination

Library References

Carriers ⇐262.

6 Ark—Missouri Pac Transp Co v Schmitz, 125 S W 2d 446, 197 Ark 903

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La—Hughes v Baton Rouge Electric Co, App 188 So 473—Matthis v Texas Louisiana Coach Co, App 18 So 2d 345

Pa—La Sota v Philadelphia Transp Co 219 A 2d 296, 421 Pa 386

7 Tenn—C J S. cited in Southeastern Greyhound Lines v Groves, 136 S W 2d 512, 515 175 Tenn 584 127 A L R 1378

10 Ark—Missouri Pac Transp Co v Schmitz supra, n 6

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15 Tenn—Southeastern Greyhound Lines v Groves supra, n 7

16. Right of bus passenger, whether adult or child

Va—Smith v Virginia Transit Co, 147 S E 2d 110, 206 Va 951

20 Miss—Dixie Greyhound Lines v Everett, 187 So 508, 185 Miss 458

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28 Va—Chesapeake & O Ry Co v Butler 20 S E 2d 516 179 Va 609

35 N Y—Brown v Fifth Ave Coach Lines, Inc 185 N Y S 2d 923, 16 Misc 2d 692

36 Ark—Missouri Pac Transp Co v Schmitz, supra, n 6

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48 Miss—Dixie Greyhound Lines v Everett, supra, n 20

§ 655. —— Stopping at Flag Stations

52 Mo—Nagel v Thompson, 170 S W 2d 416, 237 Mo App 1061

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58 Ga—Murphy v Georgia Power Co, 24 S E 2d 411 68 Ga App 825

59 Mo—Nagel v Thompson, supra, n 52

§ 656. —— Stopping at Places Other than Stations

65 Pa—C J S. cited in Maitland v Philadelphia Transp Co 40 A 2d 147, 148 156 Pa Super 338

According to some authority a bus passenger has the right to alight at any place he may designate between the points called for in his ticket.[67.1]

67.1 U S—Beeson v Tri-State Transit Co of La C C A Miss 146 F 2d 754

§ 657. —— Stopping at Platform or Suitable Place

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68 Ala—McElroy v Continental Tennessee Lines, Inc 367 So 2d 954

§ 659. Duty to Announce or Give Notice of Arrival at Station

Library References

Carriers ⇐262.

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9 Ala—Cole v Louisville & N R Co 100 So 2d 684 267 Ala 196

12 Ala—Cole v Louisville & N R Co 100 So 2d 684 267 Ala 196

§ 661. Time of Transportation; Delay

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37 Md—E H Koester Bakery Co v Poller, 50 A 2d 234—Beck v Baltimore Transit Co 58 A 2d 909 190 Md 506—Smith v Baltimore Transit Co 128 A 2d 413 211 Md 529

Miss—Tri-State Transit Co of Louisiana v Lee, 2 So 2d 547 191 Miss 42

S C—Llewellyn v Atlantic Greyhound Corporation, 28 S E 2d 673 204 S C 156

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Md—Smith v Baltimore Transit Co 136 A 2d 386, 214 Md 560

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45 N Y—Leeds v Metropolitan Transp Authority 452 N Y S 2d 551, 114 Misc 2d 797, affd 460 N Y S 2d 219 117 Misc 2d 329

S C—Llewellyn v Atlantic Greyhound Corporation, supra, n 37

57. Meaning of phrase "connecting lines"

U S—Atchison, T & S F Ry Co v City of Chicago, C A Ill 240 F 2d 930, affd 78 S Ct 1063, 357 U S 77 2 L Ed 2d 1174

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61. "Schedule" defined

Ind—Draper v Evansville & T H R Co 74 N E 889 165 Ind 117 119 6 Ann Cas 569

§ 662. Actions

67 U S—Cordero v Cia Mexicana De Aviacion, S A C A Cal 681 F 2d 669

§ 665. —— Pleading

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Carriers ⇐273.

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73 Petitions held sufficient

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95 Miss—C J S. cited in Dixie Greyhound Lines v Everett, supra, n 20

§ 666. —— Evidence

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4 S.C.—Llewellyn v. Atlantic Greyhound Corporation, 28 S.E.2d 673, 204 S.C. 156

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7 S.C.—Bowden v. Powell, 10 S.E.2d 8, 194 S.C. 482

9 Ala.—Coker v. Louisville & N.R. Co., 18 So.2d 84, 245 Ala. 545

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21 Ala.—Cole v. Louisville & N.R. Co., 100 So.2d 684, 267 Ala. 196

La.—Levy v. American Exp., 287 So.2d 784

Miss.—Dixie Greyhound Lines v. Everett, 187 So. 508, 185 Miss. 458

27 S.C.—Braswell v. Stokes, 5 S.E.2d 173, 191 S.C. 482

Tenn.—Southeastern Greyhound Lines v. Freels, 144 S.W.2d 743, 176 Tenn. 502

28 S.C.—Braswell v. Stokes, supra, n. 27

30 Ark.—Crown Coach Co. v. Gibson, 120 S.W. 702, 196 Ark. 1018

31 Ga.—Atlantic Greyhound Corporation v. Berry, 17 S.E.2d 235, 66 Ga.App. 117

§ 667. —— Trial

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Carriers ⇐273.

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43 U.S.—Day v. Atlantic Greyhound Corp., C.A.Va., 171 F.2d 59

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N.J.—Jiannine v. Pennsylvania R. Co., Sup., 5 A.2d 480, 122 N.J.Law 395

N.C.—Harris v. Queen City Coach Co., 10 S.E.2d 464, 220 N.C. 67

S.C.—Bowden v. Powell, supra, n. 7

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47 Tex.—Fry v. Dixie Motor Coach Corporation, 180 S.W.2d 135, 142 Tex. 589

48 Ky.—Southeastern Greyhound Lines v. Burris, 216 S.W.2d 920, 309 Ky. 150

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49 N.C.—Horton v. Carolina Coach Co., 5 S.E.2d 828, 216 N.C. 567

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50 Ark.—Missouri Pac. Transp. Co. v. Schmitz, 125 S.W.2d 448, 197 Ark. 903

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52 Ala.—Coker v. Louisville & N.R. Co., supra, n. 9

54 Ky.—Southeastern Greyhound Lines v. Burris, supra, n. 48

N.C.—Harris v. Queen City Coach Co., supra, n. 43

55 N.J.—Jiannine v. Pennsylvania R. Co., supra, n. 43

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§ 668. —— Costs

70 Ark.—Midland Valley R. Co. v. Horton, 165 S.W. 266, 112 Ark. 125—Midland Valley R. Co. v. Hefley, 165 S.W. 267, 112 Ark. 125

§ 669. Damages

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71. Returning passenger to destination as mitigation

Ala.—Nashville C. & St. L. Ry. v. Campbell, 101 So. 615, 212 Ala. 27

§ 670. —— Elements and Measure in General

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74 N.Y.—Brown v. Fifth Ave. Coach Lines, Inc., 185 N.Y.S.2d 923, 16 Misc.2d 692

Liberal rule applicable

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87 N.J.—Jiannine v. Pennsylvania R. Co., supra, n. 43

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96 Tex.—O'Connor v. Dallas Cotton Exchange, Civ.App., 153 S.W.2d 266

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99 N.J.—Jiannine v. Pennsylvania R. Co., supra, n. 43

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6 Tenn.—Southeastern Greyhound Lines v. Groves, supra, n. 5

8 Ala.—Coker v. Louisville & N.R. Co., 18 So.2d 84, 245 Ala. 545

§ 673. —— Nominal Damages

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26 Mo.—Nagel v. Thompson, 170 S.W.2d 416, 237 Mo.App. 1061

§ 674. —— Exemplary Damages

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§ 675. —— Inadequate or Excessive Damages

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39 Ga.—Atlantic Greyhound Corp. v. Austin, supra, n. 28

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§ 676. Carrier as Insurer

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Fla —Commodore Cruise Line, Ltd v Kormendi App, 344 So 2d 896

Ill —Lewis v Checker Taxi Co 103 N E 2d 192, 345 Ill App 301

La —Aime v Hebert, App, 282 So 2d 566

Miss —Evans v Jackson City Lines, 56 So 2d 80, 212 Miss 895

Va —Com v United Airlines, Inc 248 S E 2d 124 219 Va 374

62 Cal Price v Atchison, T & S F Ry Co 320 P 2d 933, 164 C A 2d 400

Ill —Lutz v Chicago Transit Authority 183 N E 2d 579, 36 Ill App 2d 79—Kirkwood v Checker Taxi Co 298 N E 2d 233, 12 Ill App 3d 129

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Md —Broady v Baltimore Transit Co 131 A 2d 707 213 Md 377—Ragonese v Hilferty 191 A 2d 422, 231 Md 520—Miller v Mass Transit Administration, 306 A 2d 261 18 Md App 220, affd 315 A 2d 772, 271 Md 256

Mass —Quigley v Wilson Line of Mass, Inc 154 N E 2d 77 338 Mass 125, 77 A L R 2d 499

Miss —Mississippi City Lines v Bullock, 13 So 2d 34 194 Miss 630, 145 A L R 1199

Mo Page v Wabash R Co supra, n 46

N J —Nazario v Hudson & M R Co 14 A 2d 521 125 N J Law 108, affd 17 A 2d 173 125 N J Law 509

N Y —Ligon v International Ry Co 55 N Y S 2d 444 269 App Div 809—Vogel v State, 124 N Y S 2d 563 204 Misc 614 app dism 136 N Y S 2d 376, 284 App Div 993

63 Ill —Elliott v Illinois Cent R Co, 47 N E 2d 375, 318 Ill App 112

N Y —Vogel v State, supra, n 62

Conduct of common carrier tested by comparing with that of other such carriers

Wis —Werlein v Milwaukee Elec Ry & Transport Co, 66 N W 2d 185, 267 Wis 392, 46 A L R 2d 1091

66 D C —D C Transit System, Inc v Carney App, 254 A 2d 402

N M —Hoskins v Albuquerque Bus Co 382 P 2d 700, 72 N M 217

N Y —Vogel v State, supra, n 62

67 Ky —Grigsby v Smith, 146 S W 2d 719 285 Ky 48

N Y —McLean v Triboro Coach Corp, 96 N E 2d 83 302 N Y 49—Jacobs v Green Bus Lines, Inc 201 N Y S 2d 979

68 U S —Nunn v Pennsylvania Greyhound Lines, D C Mich, 97 F Supp 357—Roth v Greyhound Corp, D C Pa, 149 F Supp 454, stating Indiana Law Madison Coal Co v Johnson, C A Mass 265 F 2d 173—Gerald v American Airlines, Inc, C A N Y 272 F 2d 35

Cal —Hopkins v Yellow Cab Co, 250 P 2d 330, 114 C A 2d 394—Riggs v City and County of San Francisco 304 P 2d 19, 146 C A 2d 481

D C —D C Transit System, Inc v Carney, App, 254 A 2d 402

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Mich —Frederick v City of Detroit Dept of St Railways, 121 N W 2d 918, 370 Mich 425—Bolton v City of Detroit 157 N W 2d 313 10 Mich App 589

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N J —Horelick v Pennsylvania R Co 94 A 2d 685 24 N J Super 413 affd 99 A 2d 652, 13 N J 349 41 A L R 2d 1278—Melchiarek v Hill Bus Co 175 A 2d 238, 70 N J Super 150 revd on oth grds 182 A 2d 557 37 N J 549

Wash —Jablinsky v Continental Pac Lines, Inc 364 P 2d 793 58 Wash 2d 702

W Va —Adkins v Raleigh Transit Co, Inc 31 S E 2d 775 127 W Va 131

Wis —Lloyd v S S Kresge Co 270 N W 2d 423 85 Wis 2d 296

69 N Y —Amoruso v New York City Transit Authority 207 N Y S 2d 855 12 A D 2d 11

Pa —Shaffer v Johnston, Com Pl 23 West Co 67

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70 S C —Horne v Southern Ry Co 197 S E 31 180 S C 525 116 A L R 745

Tex —Frontier Theatres Inc v Brown Civ App 362 S W 2d 360 revd on oth grds Sup 369 S W 2d 299

Utah—Johnson v Lewis, 240 P 2d 498 121 Utah 218

75 U S —U S by Mitchell v Jacksonville Terminal Co D C Fla 316 F Supp 567 affd in part, revd in part on oth grds C A 451 F 2d 418 cert den 92 S Ct 1607 three cases, 406 U S 906, 31 L Ed 2d 815 on remand 351 F Supp 452, on remand 356 F Supp 177—Duckworth v Greyhound Lines, Inc C A Tenn 469 F 2d 424

Ala —Louisville & N R Co v Maddox 183 So 849 236 Ala 594 118 A L R 1318—Montgomery City Lines v Jones, 20 So 2d 599 246 Ala 291—Cannon v Louisville & N R Co 42 So 2d 340, 252 Ala 571—Mobile Cab & Baggage Co v Busby 169 So 2d 314 277 Ala 292

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Ariz —Nichols v City of Phoenix, 202 P 2d 201 68 Ariz 124

Ark —Missouri Pac Transp Co v Shepherd, 157 S W 2d 501, 203 Ark 412—Greyhound Lines, Inc v Harmon, 396 S W 2d 291, 239 Ark 1031

Cal —Powell v Dell-Air Aviation, Inc 74 Cal Rptr 3 268 C A 2d 451—Acosta v Southern California Rapid Transit Dist, 84 Cal Rptr 184 465 P 2d 72, 2 C 3d 19

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Fla —Swilley v Economy Cab Co of Jacksonville, 46 So 2d 173—Edwards v Jacksonville Coach Co, 88 So 2d 543—Maultsby v Atlantic Coast Line R Co App 188 So 2d 561

Ga —Piller v Hanger Cab Co, 154 S E 2d 420, 115 Ga App 260

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Me —Doughty v Maine Central Transp Co, 39 A 2d 758, 141 Me 124 157 A L R 759

Md —Carolina Coach Co v Bradley, 299 A 2d 474 17 Md App 51—Mass Transit Administration v Miller, 315 A 2d 772, 271 Md 256

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Mont —Risken v Northern Pac Ry Co 350 P 2d 137 Mont 57

Neb —Pruitt v Lincoln City Lines, 22 N W 2d 651 Neb 204—Ware v Yellow Cab, Inc 225 N W 565 193 Neb 159

N J —Kinsey v Hudson & M R Co 35 A 2d 888, 1 N J Law 161

N M —Cavazos v Geronimo Bus Lines, 247 P 2d 56 N M 624—Thompson v Anderman 285 P 507 59 N M 400—Hole v Womack, 407 P 2d 75 N M 522

N Y —Siegelbaum v Dowling, 5 N Y S 2d 57 254 App Div 336, affd 20 N E 2d 1013, 280 N Y 644—Vogel v State, 124 N Y S 2d 563 204 Misc 614 app dism 136 N Y S 2d 376, 284 App Div 993—Grauer v State, 181 N Y S 2d 994 15 Misc 2d 471 affd 192 N Y S 2d 647, 9 A D 2d 829

N C —Charlotte City Coach Lines, Inc v Brotherhood of R R Trainmen, 118 S E 2d 37 254 N C 60—Hardy v Ingram, 126 S E 2d 55 257 N C 473—Mann v Virginia Dare Transp Co, Inc 19 S E 2d 558 283 N C 734

N D —Durick v Winters, 296 N W 744 70 N D 592—Kuntz v Steinbuch, 176 N W 2d 810

Ohio—McCarthy v Cincinnati St Ry Co 94 N E 627 88 Ohio App 454—Nicholas v Yellow Cab Co Ohio App 180 N E 2d 279—Miller v Ware Transp Co App, 197 N E 2d 562—Dietrich v Community Traction Co 203 N E 2d 344, 1 Ohio St 2d 38

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Pa —Whitley v Philadelphia Transp Co, 234 A 2d 922, 211 Pa Super 288—Sommers v Hessler 32 A 2d 17 227 Pa Super 41

R I —Lanzillotti v United Electric Rys Co, 32 A 2d 267 69 R I 173

S C —Singletary v Atlantic Coast Line R Co supra, n 46—Odom v Weatherbee, 81 S E 2d 788, 225 S C 253

S D —Henrichs v Inter City Bus Lines, 111 N W 2d 327 79 S D 267

Tenn —Knoxville Cab Co v Miller supra, n 46

Vt —Ready v Peters, 117 A 2d 374 119 Vt 10—Plosser v Burlington Rapid Transit Co, 149 A 2d 728 121 Vt 133

Va —Long's Baggage Transfer Co v Moore, 95 S E 2d 221, 198 Va 608—Shamblee v Virginia Transit Co, 132 S E 2d 712, 204 Va 591

Wash —Gentry v Greyhound Corp 283 P 2d 979 48 Wash 2d 631—Benjamin v City of Seattle, 44 P 2d 172, 74 Wash 2d 832

W Va —Gilmore v Huntington Cab Co 21 S E 2d 137 124 W Va 469—Abdulla v Pittsburgh & Weirton Bus Co 213 S E 2d 810 158 W Va 592, 89 A L R 3d 994

Wis —U S Fidelity & Guaranty Co v Milwaukee & Suburban Transport Corp 117 N W 2d 708, 18 Wis 2d 1—Sabinasz v Milwaukee & Suburban Transport Corp, 238 N W 2d 99 71 Wis 2d 218

Carrier owes passenger no delegable duty, etc.

(2) Other matters

Ky —Collins v Liquid Transporters, 262 S W 2d 382

Tex —Bennevendo v Houston Transit Co, Civ App 238 S W 2d 271 err ref no rev err

Ski lift facility

U S —Hunt v Sun Valley Co, Inc C A Idaho, 561 F 2d 744

Colo —Summit County Development Corp v Bagnoli 441 P 2d 658, 166 Colo 27

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76 US—Chicago, R I & P R Co v Fleischman C A Iowa, 204 F 2d 799

Ala—Mobile Cab & Baggage Co v Busby 169 So 2d 314, 277 Ala 292

Cal Accord v Southern California Rapid Transit Dist 84 Cal Rptr 184 465 P 2d 72, 2 C 3d 19—Cooper v National R R Passenger Corp 119 Cal Rptr 541 45 C A 3d 389 76 A L R 3d 1210

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Fla—Whitman v Red Top Sedan Service Inc App 218 So 2d 213

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Va—Tri-State Coach Corporation v Stidham, supra, n 46

77 US—C J S. cited in Ortiz v Greyhound Corp C A Md, 275 F 2d 770, 773

Ala—Cannon v Louisville & N R Co 42 So 2d 340 252 Ala 571

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US—Gatenby v Altoona Aviation Corp C A Pa 407 F 2d 443

78 US—Wilson v Northland Greyhound Lines, Inc, D C Mont, 166 F Supp 667

Statutory expression of rule

Cal—Gee v Briggs, 178 P 2d 459 78 Cal App 2d 720

79 Ala—Pollard v Williams, supra, n 46

Conn—Krentzman v Connecticut Co 70 A 2d 133, 136 Conn 239

Ga—Gazaway v Nicholson, 5 S E 2d 391, 61 Ga App 3, affd 9 S E 2d 154 190 Ga 345

Ky—Louisville & N R Co v Gregory 130 S W 2d 745, 279 Ky 295—KenTen Coach Lines v Siler 197 S W 2d 406, 303 Ky 263—Howard v Fowler 207 S W 2d 559 306 Ky 567—Louisville Ry Co v Allen, 246 S W 2d 443

Md—Kaplan v Safeway 99 A 2d 736, 203 Md 131—Rutkowsky v Baltimore Transit Co 160 A 2d 791 222 Md 433

Tex Hanson v Southwest Coaches, Civ App, 207 S W 2d 159—Holt v Greyhound Corp, Civ App, 396 S W 2d 507, err ref no rev err

W Va Wheeler v West Virginia Transp Co 51 S E 2d 318, 132 W Va 85

Similar expressions of the degree of care

(5) Other expressions

US Missouri-Kansas-Texas R Co v Ingram, C A Okl, 322 F 2d 286

Ala Mobile Cab & Baggage Co v Busby, 169 So 2d 314, 277 Ala 292

N J—Pope v Veterans Taxi Service, 235 A 2d 34, 97 N J Super. 274

80 Ala. Mobile Cab & Baggage Co v Busby 169 So 2d 314, 277 Ala 292

Cal—Cooper v National R R Passenger Corp 119 Cal Rptr. 541, 45 C A 3d 389 76 A L R 3d 1210

Ill—Anderson v Yellow Cab Co, 329 N E 2d 278, 28 Ill App 3d 656

La—Hurst v Fidelity General Ins Co, App, 185 So 2d 896, writ ref 187 So 2d 740, 249 La 578—Hurst v New Orleans Public Service, Inc App, 235 So 2d 103

Pa—Griffith v United Air Lines, Inc 203 A 2d 796, 416 Pa 1

Wis—Werlein v Milwaukee Elec Ry & Transport Co 66 N W.2d 185, 267 Wis. 392, 46 A L R 2d 1091

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83 U S—Hunter v Chicago, R I & P R Co D C Ill 172 F Supp 707 [illegible] affd 274 F 2d 449—Rader v Travelers Indem Co C A Wis 207 F 2d 66

Ala—Pollard v Cruise 101 So 237, 235 Ala 427

Ariz—Atcheson, T & S F Ry Co v France 54 P 2d 434 54 Ariz 340

Ark—St Louis-San Francisco Ry Co v Porter 52 S W 2d 546, 190 Ark 133—Missouri Pac R Co v Sorrells, 140 S W 2d 704 201 Ark 748—St Louis-Southwestern Ry Co v Holwell 103 S W 2d 175 204 Ark 567

Cal—Lewis v South San Francisco Yellow Cab Co 210 P 2d 92, 93 Cal App 2d 849—Jacob v Key System Transit Lines, 295 P 2d 569, 140 C A 2d 357—Price v Atcheson T & S F Ry Co 269 P 2d 933 164 C A 2d 400, stating Illinois law

Conn—Bowes v New England Transp Co 10 A 2d 589 126 Conn 200, 126 A L R 457—Cadwell v Watson, 60 A 2d 168, 134 Conn 640—McMahon v New York, N H & H R Co 71 A 2d 557 136 Conn 372, 27 A L R 2d 1281—Yu v New York N H & H R Co, 144 A 2d 56, 45 Conn 451

Fla—Whitman v Red Top Sedan Service Inc App 218 So 2d 213

Ill—McNealy v Illinois Cent R Co 193 N E 2d 879 43 Ill App 2d 460—Uebelein v Chicago Transit Authority 230 N E 2d 33 86 Ill App 2d 395

Kan—King v Vets Cab, Inc 265 P 2d 605, 179 Kan 379 56 A L R 2d 1249

Ky—Grigsby v Smith, supra, n 67—Southeastern Greyhound Lines, Inc v Chumley 226 S W 2d 777 312 Ky 154

La—Wooten v Thompson App 69 So 2d 557

Me—Gould v Maine Central Transp Co 1 A 2d 906 136 Me 83

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Mo—Case v St Louis Public Service Co supra, n 75—Hoeller v St Louis Public Service Co App, 199 S W 2d 7—State ex rel Siegel v McLaughlin, App, 315 S W 2d 499

N H—Beaudet v Boston & M R R 131 A 2d 65, 101 N H 4

N J—Kinsey v Hudson & M R Co supra, n 75—Harpell v Public Service Coordinated Transport, 120 A 2d 43, 20 N J. 309

N C—Harris v Atlantic Greyhound Corp, 90 S E 2d 710, 243 N C 346, 5° A L R 2d 939—Smith v Goforth, 209 S E 2d 887 24 N C App 104

Ohio—O'Reilly v Cleveland Ry Co 42 N E 2d 452, 68 Ohio App 537—Brunsmeyer v Wilson, 325 N E 2d 233 41 Ohio St 2d 223

Pa—Cranston v Aronimink Transp Co Com Pl, 31 Del Co 195—Angelo v Pittsburgh Rys Co Bus Dunson's, 151 A 2d 867, 189 Pa Super 574

R I—Sylvia v United Electric Railways Co 26 A 2d 478, 68 R I 39—Gillogly v New England Transp Co 57 A 2d 411 73 R I 456 Burke v United Elec Rys Co 83 A 2d 88, 79 R I 50

S C—Thomas v Atlantic Greyhound Corporation, 29 S E 2d 196 204 S C 247—Robinson v Duke Power Co., 48 S E 2d 808, 213 S C 185

Va—Yellow Cab Co v Eden, 16 S E 2d 625, 178 Va 325

Wash—Dennis v Maher supra, n 75—Wiggins v North Coast Transp Co 98 P 2d 675 2 Wash 2d 446—Anderson v Harrison, 103 P 2d 320, 4 Wash 2d 265—Boyd v City of Edmonds, 390 P 2d 706, 64 Wash 2d 94—McDonald v Irby, 445 P 2d 192, 74 Wash 2d 431

W Va—Adkins v Raleigh Transit Co Inc supra, n 68 Logan v Jenkins, 59 S E 2d 689, 134 W Va 400

Wis—Spicer v Milwaukee & Suburban Transport Corp 124 N W 2d 593 21 Wis 2d 635—Fleischman v Holz, 127 N W 2d 9 23 Wis 2d 415

Similar expressions of rule

(3) Wis—Bradford v Milwaukee & Suburban Transport Co 127 N W 2d 282, 25 Wis 2d 161

(4) Other expressions

Colo—Public Service Co v Fessler 335 P 2d 865, 138 Colo 547 75 A L R 2d 979

Ill—Eades v Checker Taxi Co 169 N E 2d 596, 27 Ill App 2d 298—Kerby v Chicago Motor Coach Co 171 N E 2d 412, 28 Ill App 2d 259—Hubbard v Checker Taxi Co 203 N E 2d 441 54 Ill App 2d 3[illegible]

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Mass—Duker v Boston & M R R, 105 N E 2d 376, 328 Mass 532

N C—Jackson v Stancil, 116 S E 2d 817, 253 N C 291

Or—Sampson v Grey Line Co 358 P 2d 516, 226 Or 71

Wash—Peterson v City of Seattle, 316 P 2d 904 51 Wash 2d 187—Kaiser v Suburban Transp System, 398 P 2d 14 65 Wash 2d 461 am 401 P 2d 350 65 Wash 2d 461

"Utmost care," etc.

N D—Kuntz v Steinwachuk 136 N W 2d 810

Va—Shamblee v Virginia Transit Co, 132 S E 2d 712, 204 Va 591

(2) Other statements

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Mass—Zedros v Kenneth Hudson, Inc 418 N E 2d 1279 [illegible] Mass App 1007

Okl—Lee v Darden, 421 P 2d 845

84 Va—Virginia Transit Co Tidd, 73 S E 2d 405 194 Va 418

85 US—American President Lines, Limited v Lundstrom, C A Or, 323 F 2d 817 8 A L R 3d 646—McPherson v Tamiami Trail Tours, Inc, C A Ga 383 F 2d 527

Cal—McIntyre v Smoke Tree Ranch Stables, 23 Cal Rptr 339 205 C A 2d 489

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La—C J S. cited in Alexander v Continental Southern Lines, Inc App 130 So 2d 539, 541

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86 Cal—Simmons v F W Woolworth Co, 329 P 2d 999 163 C A 2d 709

89 Ala—Pollard v Williams, supra, n 79—Montgomery City Lines v Jones, supra, n 75—Cannon v Louisville & N R Co, supra n 77

Ark—Missouri Pac R Co v Smith, 117 S W.2d 1068, 196 Ark 405

Cal—Dayton v Yellow Cab Co of San Francisco, 193 P 2d 959 85 Cal App.2d 740

Ill—Bushaw v Central Ill Elec & Gas Co, supra, n 83

Mass—Fournier v Central Taxi Cab, 118 N E 2d 767, 331 Mass 248

Ohio—Nicholas v Yellow Cab Co App, 180 N E 2d 279

Okl—Southwestern Motor Carriers v Nash, 159 P 2d 745 195 Okl 604

Vt—Charron v Canadian Pac Ry Co, 55 A 2d 614, 115 Vt. 225

90 US—Haggerson v Matanuska Val Lines, D C Alaska, 103 F Supp 579 13 Alaska 648

91 Ky—Ken-Ten Coach Co v Davis, 158 S W.2d 624 289 Ky 329

92 Cal—Dayton v Yellow Cab Co of San Francisco supra, n 89—Mac-Learn v City and County of San Francisco 273 P 2d 698, 127 C A 2d 263

Conn—Dokus v Palmer 33 A 2d 315 130 Conn 247

Iowa—Murray v Cedar Rapids City Lines 45 N W 2d 256, 242 Iowa 794—C J S cited in Farella v Illinois Cent R Co 69 N W 2d 73 6, 246 Iowa 661

N J—Spalt v Eaton, supra, n 83

Va—Cleveland v Danville Traction & Power Co supra, n 46

Wash—Harvey v Auto Interurban Co 220 P 2d 1093 36 Wash 2d 809

That passengers will act with reasonable regard for their own safety, etc.

(2) Other cases

La—Harris v Shreveport Rys Co App 83 So 2d 2[illegible]

93 U S—Tradewind Transp Co v Taylor C A Hawaii, 267 F 2d 185 cert den 80 S Ct 79 361 U S 829, 4 L Ed 2d 72

94 U S—Wilson v Capital Airlines, C A N C 240 F 2d 492

Fla—C J S. cited in Greyhound Corp v Morgan 1[illegible] So 2d 245 247

Ill—Brackenreck v Chicago Motor Coach Co 122 N E 2d 350, 4 Ill App 2d 84—Kerby v Chicago Motor Coach Co 171 N E 2d 412 28 Ill App 2d 259

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La—Gross v Teche Lines, 21 So 2d 378 207 La 354—Brown v Dunbar App 29 So 2d 357

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W Va—Brown v De Marie, 46 S E 2d 797 131 W Va 264

Carrier is not responsible for

(3) Ky—Conley's Adm'r v Ward 291 S W 2d 568

(4) Other instances

Md—Adams v Baltimore Transit Co 100 A 2d 781 203 Md 295

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95 U S—Greyhound Corp v Wilson, C A Ala 250 F.2d 509

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96 Cal—Connor v Pacific Greyhound Lines, 232 P 2d 500, 104 Cal App 2d 746

Ky—Lyons v Southeastern Greyhound Lines, 137 S W 2d 1107 282 Ky 106

97 U.S—Napolitano v Cram, D C N H 299 F Supp 427

Cal—Dayton v Yellow Cab Co of San Francisco, supra, n 89

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Ga—Savannah Transit Co v Odum, 125 S E 2d 538, 105 Ga App 740

Ky—Southeastern Greyhound Lines v Woods, 184 S W 2d 93 298 Ky 773

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N Y—Gold v Swiss Air Transp Co 307 N Y S 2d 166, 33 A D 2d 777

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98 Ariz.—Atchison, T & S F Ry Co v France, supra, n 83

Ky—Louisville Ry Co v Allen, 246 S W 2d 443

La—O[illegible] v Toye Bros Yellow Cab Co supra, n 52

Wash—Peterson v City of Seattle, 316 P 2d 904 51 Wash 2d 187

99 U.S.—Ortiz v Greyhound Corp D C Md 175 F Supp. 14 affd, C A 275 F 2d 770

Fla.—Chief Cab Operators v Carlebery, 68 So 2d 353.

Ill—Neering v Illinois Cent R Co 50 N E 2d 497 383 Ill 366, mand conf to 53 N E 2d 271 321 Ill App 625

Ky—Covington Cincinnati Elevated Railway & Transfer & Bridge Co v Schmidt 123 S W 2d 733 [illegible] Ky 517

La—Lewis v Goodman App 92 So 2d 723

U S—Carter American Airlines, Inc C A Tex 372 F 2d 9[illegible] 3 [illegible] R 2d 936

Cal—Mallard v City and County of San Francisco 323 P 2d 1[illegible] 178 C A 2d 597

Ill—Rehkopf v Chicago Transit Authority 130 N E 2d 172

Ky—Allen v Dillman 249 S W 2d 23

Okl—Kuehn v Hayes, 172 P 2d 779 197 Okl 521

Pa—Curry v Nicolitano, 33 A 2d 555 389 Pa 580

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4 U S—C J S cited in Goldman v Hollywood Beach Hotel Co C A Fla 244 F 2d 413 415—Arrow Aviation Inc v Moore C A Neb 266 F 2d 488 73 A L R 2d 737

Cal—Whitmore v French 235 P 2d 3 37 C 2d 744—Hart v Chaffin 300 P 2d 905 144 C A 2d 326

Ga—Fountain v Tidwell, 68 S E 2d 486 92 Ga App 499

Haw.—C J S cited in Grace v Kumelua, 386 P 2d 872, 875 37 Haw 261

Ky—Indianapolis & Southeastern Trailways, Inc v Blankenship 444 S W 2d 267

Mont—Pesel v Bridger Bowl, 524 P 2d 1101 164 Mont 389

Neb—Sleezer Lang 102 N W 2d 435 170 Neb 239

Nev—Botts v Rushton 172 P 2d 147 63 Nev 426

N C—C J S cited in Pemberton v Lewis, 69 S E 2d 512 514 235 N C 188

Ohio—Gallaher v Campbell, App 125 N E 2d 758

Or—C J S cited in Frangos v Edmunds, 173 P 2d 596, 608, 179 Or 577

Vt—Campbell v Campbell 162 A 379 104 Vt 468 85 A L R 620

Va—Jamison v Richardson, 93 S E 2d 140, 198 Va 190—C J.S. cited in Finck v Brock, 121 S E 2d 373 374, 202 Va 948

6 Cal—Whitmore v French, supra, n 4

8 Mo—Tabler v Perry 85 S W 2d 471 337 Mo 154—Adams v Le Bow 160 S W 2d 826, 236 Mo App 999

9. Care as to condition of vehicle

Ala—Armistead v Lenkert, 160 So 257 230 Ala 155

§ 679. What Law Governs

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11 U S—Caporrino v Pennsylvania R Co C A N Y 340 F 2d 20—Atlantic Coast Line R Co v Bennett 251 F 2d 934

Ark.—Crown Coach Co v Whitaker 186 S W 2d 940 208 Ark 535

Cal—C J.S quoted in Price v Atchison T & S F Ry Co 330 P 2d 933 940 164 C A 2d 400

Del—Mackey v O'Neal, Super 101 A 2d 337, 9 Terry 233

D C—Tobin v Pennsylvania R Co 100 F 2d 435 69 App D C 262, cert den 59 S Ct 488, 306 U S 640, 83 L Ed 1040

Ind—Chicago South Shore & South Bend R R v Brown, 320 N E 2d 809 162 Ind App 493, reh den 323 N E 2d 681 162 Ind App 493

Mo—Wagner v Missouri-Kansas-Texas R Co 275 S W 2d 262, 50 A L R 2d 1062—Elmore v Illinois Terminal R Co App 301 S W 2d 44

N J—Ivins v Public Service Interstate Transp Co 73 A 2d 592, 8 N J Super 94

N Y—Mazloum v New York, N H & H R Co 120 N Y S 2d 294 281 App Div 909—Mazloum v New York, N H & H R R 115 N Y S 2d 238—Woolf v Reed, 236 N Y S 2d 117 38 Misc 2d 285, revd on oth grds 243 N Y S 2d 542, 19 A D 2d 814

15 U S—Citrola v Eastern Air Lines, Inc, C A N Y 264 F 2d 815

D C—Tobin v Pennsylvania R Co supra, n [illegible]

In absence of any federal statute, question of liability of carrier to one for injuries sustained in course of interstate transportation is regulated by state law 15.5

15.5 Fla—Maultsby v Atlantic Coast Line R Co App 188 So 2d 561

§ 680. Care as to Passengers Who do not Pay Fare

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18 U S—Alderman v Baltimore & O R Co D C W Va 113 F Supp 881

Minn—Radermacher v St Paul City Ry Co 2 N W 2d 466, 214 Minn 427 145 A L R 1027

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Tex—C.J.S. cited in Watts v Hogan, 220 S W 2d 915, 917 err ref no rev err

Ordinary care

La—King v King, 217 So 2d 395 253 La 270

20. One riding on pass providing that rider assumes all risk, etc.

(2) Other matters

N Y—Hopkins v Island R Co 251 N Y S 2d 590, 21 A D 2d 814

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21 Ga—Arrington v Trammell, 62 S E 2d 451 83 Ga App 107

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Violation of Safety Appliance Act

Ill—Boyer v Atchison, T & S F Ry Co 230 N E 2d 173 38 Ill 2d 31 cert den 88 S Ct 1038, 390 U S 949 19 L Ed 2d 1140

§ 681. Care as to Passengers Riding in Places Not Designed for Them

26. Standard of care required of carrier held not applicable

Tenn Brown v Allright Auto Parks, Inc, App 456 S W 2d 660, 61 Tenn App 543

§ 682. Duty to Warn Passenger as to Danger

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27 Ark—C.J.S. cited in Crown Coach Co v Whitaker, 186 S W 2d 940, 943, 208 Ark 535

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28 Ala—Southeastern Greyhound Lines v Callahan, 13 So 2d 660, 244 Ala 449

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29 Conn—Bowes v New England Transp Co supra, n 28

La—Le Beau v Baton Rouge Bus Co App 136 So 2d 740

§ 683. Liability as Affected by Means of Conveyance

34 Ark—National Fire Ins Co v Yellow Cab Co 171 S W 2d 927 205 Ark 953—Capital Transp Co v Howard, 229 S W 2d 998, 217 Ark 333

Railroads distinguished

NJ—Blair v Erie Lackawanna Ry Co 305 A 2d 446, 124 N J Super 162

35 Ark—Capital Transp Co v Howard, supra, n 34

Colo—Rico v Marlar 108 P 2d 868 107 Colo 57

Ky—C.J.S. cited in Southeastern Greyhound Lines v Woods, 184 S W 2d 93 95 298 Ky 773

Mass—Hanes v Chereskue, 16 N E 2d 680, 301 Mass 112 Marshall v Carter, 17 N E 2d 205 301 Mass 372

Bus company etc.

US—Wallin v Greyhound Corp C A Tenn, 341 F 2d 521

(2) Other cases—Del Vecchio v Haflin Bus Co 50 A 2d 881 135 N J Law 339

Taxicab drivers

(1) D C—Bell Cab Co v Coppridge, 158 F 2d 540, 81 US App D C 337

Ill—Gordon v Checker Taxi Co 79 N E 2d 632, 334 Ill App 313

La—Eleazar v Illinois Cent R Co App 24 So 2d 387

N Y Dunkaway v Mordenti 103 N Y S 2d 621 199 Misc 898

Pa—Ferguson v Lewis, 232 A 2d 50 210 Pa Super 273

(4) Adams v Louisville Taxicab & Transfer Co, 211 S W 2d 397 307 Ky 405

Minn—Ford v Stevens, 157 N W 2d 510, 280 Minn 16

(6) Other cases

Fla—Aircraft Taxi Co v Perkins, App 227 So 2d 722

La—Fenton v Yellow Cab Co of Shreveport, App 61 So 2d 230—Fontenot v Fidelity General Ins Co 185 So 2d 896, writ ref 187 So 2d 740, 249 La 578

Md—Thomas v Terry, 226 A 2d 540 245 Md 480

Mass—O'Toole v Murphy 206 N E 2d 88 348 Mass 795

Pa—Stupka v People's Cab Co 264 A 2d 373, 437 Pa 509

Tramway

N H Boyd v Herbert Schneider Corp 374 A 2d 1187 117 N H 566

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37 N Y—C.J.S. cited in Kronstad v Pechtold, 46 N Y S 2d 124, 125

§ 685. —— Stagecoaches

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50 La—Hughes v Baton Rouge Electric Co, App 188 So 473—Grant v Baton Rouge Bus Co, App, 15 So 2d 123

Ordinary care to look and see if danger is present where there is reason to anticipate it

Mo—Bond v Kansas City Transit, Inc 401 S W 2d 440

51 D C—Washington v Washington Virginia & Maryland Coach Co, D C, 250 F Supp 888

Ohio—Gallaher v Cincinnati, App, 125 N E 2d 758

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52 US—Pullman v Auto Buses Interstate Lines, C A Tex 418 F 2d 673

Ark—Collier v Citizens Coach Co., 330 S W 2d 74 231 Ark 489

Fla—Yost v Miami Transit Co 66 So 2d 214

Mo—West v St Louis Public Service Co 357 S W 2d 69—Pierce v St Louis Public Service Co App 380 S W 2d 943

Tex—City of Dallas v Jackson 450 S W 2d 62

Defects in highway

(2) Other cases

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56 US—McDermott v Crown Zellerbach Corp C A La 418 F 2d 598

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La—Young v Fryoux, App 222 So 2d 638

Minn—C.J.S. cited in Lundstrom v Yellow Taxi Co of Minneapolis, 214 N W 2d 672, 675 298 Minn 224

N C—Smith v Camel City Cab Co 42 S E 2d 657 227 N C 572

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Va—Sykes v Langley Cabs, Inc, 176 S E 2d 417 211 Va 202

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High degree of care required

US—Denison v Edwards, C A Ill 416 F 2d 958

Utah—Smee v Salt Lake Transp Co 147 P 2d 875, 106 Utah 289

Taxicab company held not insurer of safety

Minn—Ford v Stevens, 157 N W 2d 510 280 Minn 16

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59 Mo—Payne v Stott, App 181 S W 2d 161

Pa—Leffler v Moore, 21 Beaver 97

§ 686. —— Street Cars of Various Kinds

A street railroad has the duty to transport passengers safely [59.5]

59.5 Mo—Burnett v St Louis Public Service Co 337 S W 2d 921

60 Cal—Troeman v Los Angeles Transit Lines, 185 P 2d 616, 82 Cal App 2d 183

Ill—Krueger v Richardson, App 61 N E 2d 399

Md—E H Koester Bakery Co v Poller, 50 A 2d 234

Mass—Holton v Boston Elevated Ry Co supra, n 27

N Y—Brennan v Brooklyn & Queens Transit Corporation, 17 N Y S 2d 648, 258 App Div 1055

62 N Y—Bardavid v New York City Transit Authority 440 N Y S 2d 648, 82 A D 2d 776, app after remand 467 N Y S 2d 360, 97 A D 2d 353 affd 463 N E 2d 1216, 61 N Y 2d 986, 475 N Y S 2d 364

64 Cal—Finley v City and County of San Francisco, 251 P 2d 687 115 C A 2d 116—Gray v City and County of San Francisco, 20 Cal Rptr 894, 202 C A 2d 319

D C—Cole v Capital Transit Co C A D C 195 F 2d 568, 90 US App D C, 289—Williams v Capital Transit Williams v Capital Transit Co, C A Co C A, 215 F 2d 487 94 US App D C 221

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Md—Dilley v Baltimore Transit Co 39 A 2d 469 183 Md 557, 155 A L R 627—E H Koester Bakery Co v Poller supra, n 60—Charlton Bros Transp Co v Gantt, 51 A 2d 642, 188 Md 85

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Neb—Whittaker v Omaha & C B St Ry Co 291 N W 275 137 Neb 800

Wis—Kalish v Milwaukee & Suburban Transport Corp 67 N W 2d 868 268 Wis 492

§ 687. —— Elevators

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72 US—Reynolds v May Department Stores Co C C A Mo 127 F 2d 396, cert den 63 S Ct 31 317 U S 639 87 L Ed 515—Otis Elevator Co v Seale, C A La 334 F 2d 928

Ark—Little Rock Land Co v Raper 433 S W 2d 836, 245 Ark 641

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Ill—Lyons v Michigan Blvd Bldg Co 73 N E 2d 776, 331 Ill App 482—Koenig v 399 Corp 240 N E 2d 164 97 Ill App 2d 345

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Riding "man lift"

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73 Cal—Parker v Manchester Hotel Co 85 P 2d 152, 29 Cal App 2d 446

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Ky—Kentucky Home Mut Life Ins Co v Wise, 364 S W 2d 338

Ohio—Wilms v Klein, App, 49 N E 2d 76—Norman v Thomas Emery's Sons, Inc 218 N E 2d 480, 7 Ohio App 2d 41

Pa—Straub v Mogul, 56 Pa Dist & Co 702

W Va—Brown v De Marie, 46 S E 2d 797, 131 W Va 264

Rule applied to owner of escalator

Cal—Vandagriff v J C Penney Co, 39 Cal Rptr 671 228 C A 2d 579

La—Wolverton v City Stores Co App, 363 So 2d 1321

74 Pa—Wood v Kugler's Restaurant, 35 Pa Dist & Co 101

Escalator not dangerous instrumentality

N Y—Jokelson v Allied Stores Corp 295 N Y S 2d 730 31 A D 2d 200, motion den 298 N Y S 2d 57 31 A D 2d 806

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More exacting in case of automatic elevators

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U S—Hotel Hawk Hotels Co v Boufocy C A Minn 227 F 2d 232, 56 A L R 2d 1047

N Y—Mallor v Wolk Enterprises, Inc 311 N Y S 2d 141 63 Misc 2d 187

Operator of freight elevator carrying passengers is required to exercise only ordinary care

N D—Krueger v North Am Creameries, 27 N W 2d 240

R I Robinson v Leach, 13 A 2d 250 65 R I 1

Duty to warn as to action of elevator

U S—Snorgrass v Sears, Roebuck & Co C A Ill, 275 F 2d 691

§ 688. Care Required in Employment of Employees

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82. High degree of care

U S—Spencer v Toussaint, D C Mich 408 F Supp 1067, op supp 425 F Supp 984

83 Conn—Cadwell v Watson, 60 A 2d 168 134 Conn 640

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N Y—Brown v Fifth Ave Coach Lines, Inc 185 N Y S 2d 923, 16 Misc 2d 692

Duty to know history and background of prospective employee

Kan—Atchison, T & S F Ry Co v Lopez, 531 P 2d 455, 216 Kan 108

84 Conn—Cadwell v Watson, supra, n. 83

Minn—Ford v Stevens, 157 N W 2d 510, 280 Minn 16

90 Mo—Tyler v Kansas City Public Service Co App 256 S W 2d 563

Ordinance inapplicable

Cal—Pole Position v Sisters of Charity of St Vincent De Paul, Inc, 314 P 2d 189 152 C A 2d 845

94. Not obliged to provide armed guards

La Hall v New Orleans Public Service, Inc App 347 So 2d 944

§ 689. Negligence and Wrongs of Carrier's Employees or Agents

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3 U S—Totson v Pan Am World Airways, Inc D C Tex 399 F Supp 335

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Ga—Styles v Dennard, 104 S E 2d 258 97 Ga App 635

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4 Ky—C J S cited in Gladdish v Southeastern Greyhound Lines, 169 S W 2d 297, 299 293 Ky 498

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N Y—White v Allegheny Cab Co 29 N Y S 2d 272—Brown v Fifth Ave Coach Lines, Inc, 185 N Y S 2d 923 16 Misc 2d 692

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Taxicab driver

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Duty owed by ambulance driver

N M—Otero v Physicians & Surgeons Ambulance Service, Inc, 336 P 2d 1070, 65 N M 319

Wrongful acts committed while contract of carriage existing

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5 Fla—Commodore Cruise Line, Ltd v Kormendi, App 344 So 2d 896

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6. Acts held not to constitute willful and wanton misconduct

N Y—Greene v Pennsylvania R Co 200 N Y S 2d 697 23 Misc 2d 894

7 Mass—Gilmore v Acme Taxi Co 212 N E 2d 235, 349 Mass 651

8. No liability to injured wife of taxicab driver

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10 Ky—Greer v Richards, Admr 115 S W 2d 587 273 Ky 91

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15 Fla—Nazareth v Herndon Ambulance Service Inc App 5 Dist 467 So 2d 1076 review den 478 So 2d 53

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31 U S—C J S. cited in O Brien v Public Service Taxi Co, D C Pa 83 F Supp 55 58 affd C A 178 F 2d 211

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50 N Y—di Suvero v Gem Window Cleaning Co 254 N Y S 2d 38, 22 A D 2d 781 affd 218 N E 2d 317 17 N Y 2d 831 271 N Y S 2d 275

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56. Driver held not independent contractor

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59 U S—American Fidelity & Cas Co v Pennsylvania Cas Co D C Tenn 97 F Supp 965 affd C A 188 F 2d 364 cert den 72 S Ct 88, 342 U S 860 96 L Ed 647

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Liability not calculated by notice of susceptible condition

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No liability where justified belief passenger not in danger

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Mont—Hickman v First Nat Bank of Great Falls, 11 P 2d 275 112 Mont 398

9. Notice of trespasser's presence

Pa—Frederick v Philadelphia Rapid Transit Co 10 A 2d 576, 337 Pa 136—Evans v Philadelphia Transp Co 212 A 2d 440, 418 Pa 567

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10 Pa—Frederick v Philadelphia Rapid Transit Co 10 A 2d 576, 337 Pa 136—Evans v Philadelphia Transp Co 212 A 2d 440 418 Pa 567

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Elevator inspector

D C—Casper v Barber & Ross Co C A, 288 F 2d 379 109 U S App D C 395

11. Persons alighting from arrivals

Ga—Hightower v City Council of Augusta, 184 S E 2d 678 124 Ga App 537

§ 701. Companies or Persons Liable

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22 Alaska—Alaska Airlines, Inc v Sweat, 568 P 2d 916, app after remand 584 P 2d 544

Mich—Mitcham v City of Detroit 94 N W 2d 388 355 Mich 182

Municipal officer held not liable—Gaglio v City of New York, C C A N Y 143 F 2d 904 cert den 65 S Ct 440 323 U S 798 89 L Ed 636

Governmental immunity

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Municipal corporation

Ga—Columbus v Hadley 203 S E 2d 872, 130 Ga App 599

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26 D C—Harlem Taxicab Ass'n v Nemesh, 191 F 2d 459 89 U S App D C 123

Tex—Martin v Weaver Civ App 161 S W 2d 812, err ref

28 N J—C J S. quoted at length in Horchick v Pennsylvania R Co, 94 A 2d 685 688, 24 N J Super 413 affd 99 A 2d 652, 13 N J 349 41 A L R 2d 278

30 N Y—Dorkin v American Exp Co 351 N Y S 2d 190, 43 A D 2d 877

31 U S—Spears v Transcontinental Bus System, C A Cal 226 F 2d 94, cert den 76 S Ct 326, 350 U S 950, 100 L Ed 828, reh den 76 S Ct 443, 350 U S 977 100 L Ed 847

Ill—Dregne v Five Cent Cab Co 40 N E 2d 739, 315 Ill App 539 affd 46 N E 2d 386, 381 Ill 594

37 Mo—State ex rel Thompson v Terte 207 S W 2d 487 357 Mo 229

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36. Assumption of liabilities by assignee of taxi license

Ill—Zydzik v Schuff 253 N E 2d 475 116 Ill App 2d 163

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44 Tex—Union Bus Lines v Young, Civ App 194 S W 2d 779

47 Iowa—CJS quoted in Rozmajzl v Northland Greyhound Lines, 49 N W 2d 501 507 242 Iowa 1135

48 Ill—Dregne v Five Cent Cab Co 46 N E 2d 386, 381 Ill 594

Miss—Meridian Taxicab Co v Ward 186 So 636 184 Miss 499 120 A L R 1346

49 D C—Tarman v Southard, C A 205 F 2d 705 92 U S App D C 297

50. Joint enterprise est blished

Tex—Martin v Weaver supra, n 26

Other relations considered

Tex—Martin v Weaver Civ App 161 S W 2d 812 err ref

51. Taxicab used at call and under colors of company

Ark—Black & White, Inc v Love, 367 S W 2d 427 236 Ark 529, 8 A L R 3d 809

53 Cal—Pfingst v Mayer 208 P 2d 1002, 93 Cal App 2d 265

Ill—Carson v Weston Hotel Corp 115 N E 2d 800 351 Ill App 523

La—Marquez v City Stores Co 371 So 2d 810 1 A L R 4th 137

Okl—Shipley v Bankers Life & Cas Co 377 P 2d 571

Owner of building is not liable for injuries relating to self-service elevators in absence of possession and control thereof, even though required to maintain, repair and inspect them 54.5

54.5. Alighting

NY—Petersen v Forty-Five Nevins St Corp 256 N Y S 2d 113 22 A D 2d 960, affd 218 N E 2d 343, 17 N Y 2d 885 271 N Y S 2d 311

§ 702. —— Connecting Carriers

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55 U S—Rookard v Mentonech, C A Cal 680 F 2d 1257

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57 U S Eshman v Safeway Trails, Inc, C A N Y 341 F 2d 815

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58 D C—Feig v American Airlines, Inc D C, 167 F Supp 843

59 Alaska Airlines, Inc v Sweat, 568 P 2d 916, app after remand 584 P 2d 544

60 Tex—Hudson v Continental Bus System, Inc, Civ App 317 S W 2d 584, err ref no rev err

61 Tex—Hudson v Continental Bus System, Inc Civ App, 317 S W 2d 584, err ref no rev err

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65 D C—Feig v American Airlines, Inc D C 167 F Supp 843

§ 703. —— Carrier or Contractor

72 Colo—Landis v McGowan, 165 P 2d 180, 114 Colo 355

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76 Ill—Kopta v Greer Shop Training, 64 N E 2d 570, 327 Ill App 470

N J—C.J.S. cited in Frank Martz Coach Co v Hudson Bus Transp. Co 44 A 2d 488, 491, 23 N J Misc. 342

§ 704. —— Carrier or Charterer

81 N J—Goldwyn v Coast Cities Coaches, 30 A 2d 295 129 N J Law 501

Generally, in absence of control a charterer is not liable for injury to passenger

Ga—Styles v Dennard, 104 S E 2d 258, 97 Ga App 635

§ 705. —— Carrier Permitting Use of Road or Train by Another

84 Ga—Greyhound Corp v Stokes, 86 S E 2d 804, 91 Ga App 674

Mont—C J S cited in Ahlquist v Mulvaney Realty Co 152 P 2d 137 147 116 Mont 6

86 Iowa—Rozmajzl v Northland Greyhound Lines, 49 N W 2d 501 242 Iowa 1135

§ 706. —— Carrier Using Other Road

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95 Mont—C J S cited in Ahlquist v Mulvaney Realty Co supra, n 84

§ 707. —— Lessor or Lessee

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7 Ind—Swallow Coach Lines v Cosgrove, 15 N E 2d 92, 214 Ind 532

Mont—C J S cited in Ahlquist v Mulvaney Realty Co 152 P 2d 137 147 116 Mont 6

8 Mo—State ex rel Thompson v Ierle 207 S W 2d 487 357 Mo 229

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10 D C—Greene v Hathaway 191 F 2d 656 89 U S App D C 229

12. Lessor held liable in elevator cases

Ill—Lyons v Michigan Blvd Bldg Co 73 N E 2d 776, 331 Ill App 482

Lessor held not liable in elevator cases

Ill—Kopta v Greer Shop Training 64 N E 2d 570, 327 Ill App 470—Carson v Weston Hotel Corp 115 N E 2d 800 351 Ill App 523

Lessor of taxicab held not liable

La—Morris v Kospelich, App 206 So 2d 155 writ issued 208 So 2d 535 251 La 1078 affd 218 So 2d 316, 253 La 413

14 Ark—C J S cited in Blagg v Strickland Transp Co 258 S W 2d 694 222 Ark 303

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22 Ky—American Fidelity & Cas Co v Pennsylvania Cas Co 258 S W 2d 5

27 Mass—Grace v Boston Elevated Ry 76 N E 2d 664, 322 Mass 224

29 Mass—Grace v Boston Elevated Ry supra, n 27

31 U S—American Fidelity & Cas Co v Pennsylvania Cas Co D C Tenn, 97 F Supp 965, affd C A, 188 F 2d 364, cert den 72 S Ct 86, 342 U S 860, 96 L Ed 647

Ky—American Fidelity & Cas Co v Pennsylvania Cas Co supra, n 22

§ 708. —— Carriers Using Same Station Facilities; Union Depot Company

34 Mont—C.J.S. cited in Ahlquist v Mulvaney Realty Co 152 P 2d 137 147, 116 Mont 6

35 Ark—Crown Coach Co v Whitaker 186 S W 2d 940, 208 Ark 535

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36 N Y—Mazloum v New York, N H & H R R 115 N Y S 2d 238

38 N Y—Mazloum v New York, N H & H R R, 115 N Y S 2d 238 stating Massachusetts law

39 Mont—Ahlquist v Mulvaney Realty Co 152 P 2d 137 116 Mont 6

40 Mass—McCabe v Boston Terminal Co 22 N E 2d 33 303 Mass 450, vac 60 S Ct 725 309 U S 624 84 L Ed 986

N J—C J S cited in Horelick v Pennsylvania R Co 94 A 2d 685 687 24 N J Super 413 affd 99 A 2d 852, 13 N J 349 41 A L R 2d 1278

N Y—Mazloum v New York, N H & H R Co, 120 N Y S 2d 294 281 App Div 909

§ 709. —— Joint and Several Liability

44 U S—Bentley v Halliburton Oil Well Cementing Co C A Tex 174 F 2d 788—Ingham v Eastern Air Lines, Inc C A N Y 373 F 2d 227 cert den 88 S Ct 295 389 U S 931 19 L Ed 2d 292

Conn—Cukman v Div, 181 A 2d 116 149 Conn 456

Ill—Cooper v Safeway Lines, 26 N E 2d 632, 304 Ill App 302

Ky—Louisville Transit Co v Sexton, 471 S W 2d 20

La—Crawley v City of Monroe, App 26 So 2d 493—Dooner v Parish Cab Co App 147 So 2d 231

Neb—Pruitt v Lincoln City Lines 22 N W 2d 651 147 Neb 204

Wis—Wittig v Kepler 82 N W 2d 341 275 Wis 415

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45 Fla—Kenan v Houstoun, 7 So 2d 837, 150 Fla 357

Ohio—Bauer v Pullman Co, 220 N E 2d 366, 8 Ohio App 2d 1

48 U S—Gates v Greyhound Corp D C Miss 197 F Supp 341

W Va—Miller v Blue Ridge Transp Co, 15 S E 2d 400, 123 W Va 428

53 La—Brown v Homer-Doyline Bus Lines, App 23 So 2d 348

54. Partnership or joint enterprise

(2) Other cases

Miss—Rawlings v Ingalsbe, 52 So 2d 630, 211 Miss 760

§ 710. —— Liability of Agents and Servants

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60 Ala—Southeastern Greyhound Lines v Culligan, 13 So 2d 660, 244 Ala 449

Miss—Lambert v Lott, 222 So 2d 816

N Y—Zayet v Spivack, 42 N Y S 2d 85

Corpus Juris Secundum cited in connection with rule—Pollard v Coulter 191 So 231, 233, 238 Ala 421

61 Ala—Southeastern Greyhound Lines v Culligan, supra, n 60

To recover against an employee of the carrier, the causal negligence must be traced to him 63.1

63.1 Ala—Pollard v Coulter supra, n 60

§ 712. Defenses in General

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70. Contract invalid

Ind—Swallow Coach Lines v Cosgrove, 15 N E 2d 92, 214 Ind 532

71 Ky—Louisville Taxicab & Transfer Co v Barr, 209 S W 2d 719 307 Ky 28

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80. Under Federal Employers' Liability Act

N J—Mucich v Erie R Co 14 A 2d 56, 18 N J Misc 466, affd 29 A 2d 412, 20 N J Misc 494, affd 33 A 2d 586, 130 N J Law 448, affd 37 A.2d 123, 131 N J Law 427

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Customer held invitee

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82 U S—Greyhound Corp v Wilson C A Ala 250 F 2d 509—CJS cited in Ortiz v Greyhound Corp, C A Md, 275 F 2d 770, 772—Vincenty v Eastern Air Lines, D C Puerto Rico, 525 F Supp 171

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In Texas

(1) Crown Coach Co v Whitaker 156 S W 2d 940 208 Ark 535 applying Texas rule

83 U S—Federal Ins Co v Bomila Colon C A Puerto Rico, 392 F 2d 662—Federal Ins Co v Bomilla Colon, C A Puerto Rico 392 F 2d 662

Ark—Crown Coach Co v Whitaker 156 S W 2d 940 208 Ark 535

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Ill—Neering v Illinois Cent R Co 50 N E 2d 497 383 Ill 366, mand conf to 53 N E 2d 271 321 Ill App 625—Neering v Illinois Cent R Co 53 N E 2d 271, 321 Ill App 625

Ky—Southeastern Greyhound Lines v Woods, 184 S W 2d 93 298 Ky 773—Yellow Cab Co of Ashland v Murphy, 243 S W 2d 52

La—Sewell v Gulf C & S F Ry Co App 11 So 2d 923

Mass—Connelly v Boston Elevated Ry Co 34 N E 2d 494 309 Mass 177

Mich—Thurkow v City of Detroit, 291 N W 29 292 Mich 617

Mo—Ostresh v Illinois Terminal R Co, 313 S W 2d 19

Mont—Ahlquist v Mulvaney Realty Co, supra, n 39

N Y—Drachenberg v. Long Island R Co 44 N Y S 2d 892, 266 App Div 1021

Pa—Anschel v Pennsylvania R Co 29 A 2d 694 346 Pa 123

Defects held insufficient to impose liability

Ill—Walker v Chicago Transit Authority 416 N E 2d 10, 48 Ill Dec 115 92 Ill App 3d 120

N Y—Parker v Port Authority, 197 N Y S 2d 975 22 Misc 2d 421

84 U S—Sassaman v Pennsylvania R Co D C N J 49 F Supp 481 affd, C C A, 144 F 2d 950

Mich—Woodard v Saginaw City Lines, Inc 112 N W 2d 512, 365 Mich 273

Standard method of construction

(3) Other defects—Van Wagner v West Shore R Co 12 A 2d 242, 124 N J Law 433

Va—Virginia Stage Lines v Newcomb, 47 S E 2d 446, 187 Va 677

85 U S—Sassaman v Pennsylvania R Co supra, n 84—Cestaro v Pennsylvania Greyhound Lines, C C A Pa, 139 F 2d 566—CJS. quoted in Greyhound Corp v Wilson, C A Ala 250 F 2d 509 511

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Va—Virginia Stage Lines v Newcomb supra, n 84

86 Cal—Rosser v Union Pac R Co supra, n 83

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89 Okl—Mid-Continent Coaches Inc v Guthrie, supra, n 86

90 Statutory liability for injury on "road"

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Pitfalls near platform

2) Other cases—Louisville & N R Co v Richard, 185 S W 2d 961 31 Ala App 197 cert den 14 So 2d 564 244 Ala 595

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N Y—Prince v City of New York, 415 N Y S 2d 200 98 Misc 2d 692

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§ 714. Safe Approaches; Ingress and Egress

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Md—Kaplan v Baltimore & O R Co 113 A 2d 415, 207 Md 56

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N Y—Williams v Long Island R Co, 62 N E 2d 212, 294 N Y 318—Hunt v New York Cent R Co, 103 N Y S 2d 355 198 Misc 817—Reynolds v Westchester Ferry Corp 114 N Y S 2d 756

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Subway turnstile

N Y—Lefkowitz v City of New York, 52 N Y S 2d 879, 269 App Div 666, affd 77 N E 2d 788, 78 N Y 769

Slippery floor

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98 N Y—Bravado v Murray, 12 N Y S 2d 893, 257 App Div 271 affd 28 N E 2d 29 283 N Y 619—Parker v Port Authority 197 N Y S 2d 975, 22 Misc 2d 421

Obligation to inform

N Y—Hunt v New York Cent R Co supra, n 97

99 U S—Polara v Trans World Airlines, Inc C A N Y 284 F 2d 34

La—Green v Taca Intern Airlines 304 So 2d 357

Carrier not insurer

N J—Bohn v Hudson & M R Co supra, n 97

High degree of care required

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Md—Dilley v Baltimore Transit Co 39 A 2d 469, 181 Md 557 155 A L R 627

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1 U S—Stevenson v Pennsylvania R Co, D C N Y 291 F Supp 364

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8 Cal—Sexton v Key System Transit Lines, 301 P 2d 612, 144 C A 2d 719

10 Ill—Elliott v Illinois Cent R Co, 47 N E 2d 375 318 Ill App 112

N J—Buehrer v Erie R Co 111 A 2d 257 17 N J 283

12 N Y—Bruno v Vernon Park Realty Inc 154 N Y S 2d 587, 2 A D 2d 770

14 N Y—Reynolds v Westchester Ferry Corp 114 N Y S 2d 756

16. A public street is not to be regarded as a passenger station, etc.

Mich—Paultanis v Nutt, 69 N W 2d 825 342 Mich 335

18 N C—Patterson v Duke Power Co, 36 S E 2d 713, 226 N C 22

§ 716. Safety of Place for Getting on Board or Alighting

22 U S—Reuter v Eastern Air Lines, C A Ala 226 F 2d 443

Fla—Kenan v Howdeshell, 7 So 2d 837, 150 Fla 357

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"High degree of care" required

Ark—Halpern v Hot Springs St Ry Co 302 S W 2d 535, 227 Ark 910

Protection of passengers

La—Shelts v J [illegible] App 254 So 2d 668

After ejectment of unruly passenger

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§ 717. Safety of Stations, Platforms, Walks and Loading Places

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38 Warning held unnecessary

N Y—Tomayo v Murray supra, n 35

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41 U S—Lowden v Denton, C C A Mo 110 F 2d 274 cert den 60 S Ct 1100, 310 U S 652, 84 L Ed 1417—Ratliff v Chesapeake & O Ry Co C C A Ky 116 F 2d 155

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"Reasonably safe"

(2) Other cases

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N Y—Feinstein v New York City Transit Authority, 190 N Y S 2d 304

Explosive

(2) Other matters.

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Statute inapplicable

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48 N J—Horelick v Pennsylvania R Co supra, n 41

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50 La—C J S black letter [illegible] quoted in Hayes v Illinois Cent R R, App 83 So 2d 160, 162

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51. Absence of negligence

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53. Baggage cart

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8. Determination of reasonable time

(1) Other determinations

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70. Matters considered

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N M—Cavazos v Geronimo Bus Lines, 247 P 2d 865, 56 N M 624

Wis—Verbeten v Huettl, supra, n 81

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97 Wash—Wullbrandt v City of Seattle, supra, n 82

99 Mo—Swanstyn v St Joseph Light & Power Co App 459 S W 2d 24

3 Wis—Burke v Milwaukee & Suburban Transport Corp 159 N W 2d 700, 39 Wis 2d 682

§ 725. Boarding or Alighting from Moving Train or Car

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11 La—Pugh v City of Monroe, App 6 So 2d 83

12 Wash—Evans v Yakima Val Transp Co, 239 P 2d 336, 39 Wash 2d 841

19 Mass—Friend v Boston & Maine R R, 82 N E 2d 5 323 Mass 349

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23 Tenn—Paschall v Southern R Co 208 S W 2d 531 186 Tenn 102

28. Failure to close door not invitation to board

N J—Kovacs v Pennsylvania R Co, 184 A 2d 873, 76 N J Super 451

§ 726. Operating Other Cars or Trains

31 Cal—Lagomarsino v Market St Ry Co 158 P 2d 982, 69 Cal App 2d 388

Ill—Farr v Chicago & E I R Co, 131 N E 2d 120, 8 Ill App 2d 168

Pa—Hamley v George, 76 A 2d 181 365 Pa 543

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32 Pa—Hamley v George, supra, n 31

38 Ill—Sams v Chicago Transit Authority, 122 N E 2d 221, 4 Ill 2d 60

40 Pa—Hamley v George, supra, n 31

§ 727. Assistance of Passengers

Library References

Carriers ⇐287(4), 303(8)

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46 D C—Sullivan v Yellow Cab Co, App 212 A 2d 616

Ga—Bailey v Louisville & N R Co, 160 S E 2d 245, 117 Ga App 185

Ky—Wise v Fannin, 207 S W 2d 764 306 Ky 327

La—Cary v New Orleans Public Service, Inc, 250 So 2d 92, writ ref 253 So 2d 67, 259 La 808—C J S. cited in Crear v National Fire & Marine

Ins Co 469 So 2d 329 335 writ den 475 So 2d 364 reconsideration not considered 477 So 2d 698

Me—Roberts v Yellow Cab Co 240 A 2d 733

Mo—Atcheson v Braniff Intern Airways, 327 S W 2d 112

NH—Beaudet v Boston & M R R 131 A 2d 65 101 NH 4

NC—White v Chappell, 14 S E 2d 843 219 N C 652

Ohio—Gray v Youngstown Municipal Ry Co 117 N E 2d 27 160 Ohio St 511

Pa—Schuckel v Yellow Cab Co of Philadelphia, 85 A 2d 138, 369 Pa 356

RI—Shipman v United Electric Railways Co 26 A 2d 478, 68 R I 39

W Va—Pritchard v City Lines of West Virginia, 66 S E 2d 276, 136 W Va 278

Wis—Pazik v Milwaukee Electric Ry & Transport Co 15 N W 2d 804 245 Wis 583—Smith v Chicago & N W Ry Co, 18 N W 2d 352, 246 Wis 628

Corpus Juris Sec quoted as statement of common rule—Ken-Ten Coach Co v Davis, 158 S W 2d 624, 626, 289 Ky 329

47 Conn—C J S. cited in Yu v New York, N H & H R Co 144 A 2d 56, 59 145 Conn 451

Iowa—C.J.S. cited in Fanelli v Illinois Cent R Co 69 N W 2d 13, 17 246 Iowa 661

Ky—Southeastern Greyhound Lines v Woods, 184 S W 2d 93 298 Ky 773—Wise v Fannin, supra, n 46

Ohio—Somerset v Simson, App 141 N E 2d 781

49 Negligence not shown

Ga—Korn v Tamiami Trail Tours, Inc 133 S E 2d 616, 108 Ga App 510

57 Ky—Griffin v Louisville Taxicab & Transfer Co 188 S W 2d 449 300 Ky 279

NH Beaudet v Boston & M R R, 131 A 2d 65 101 NH 4

Employee held not negligent

Tenn—Campbell v E T & W N C Motor Transp Co 132 S W 2d 355 23 Tenn App 332

W Va Pritchard v City Lines of West Virginia, supra, n 46

Highest degree of care exacted

NY—Vogel v State, 124 N Y S 2d 563, 204 Misc 614 app dism 136 N Y S 2d 376, 284 App Div 993

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59. Highest degree of care

Ky—Griffin v Louisville Taxicab & Transfer Co supra, n 57

64 NH—Allen v State, 260 A 2d 454 110 N H 42

N C—C.J.S. cited in Hardy v Ingram, 126 S E 2d 55 56, 257 N C 473

66 Ark Missouri Pac R Co v Smith, 117 S W 2d 1068, 196 Ark 405

Fla Pivdal v City of Miami, App, 105 So 2d 502

Kan—Elliott v Chicago, R I & P R Co 454 P 2d 124, 203 Kan 273

Wis—Fleischman v Holz, 127 N W 2d 9, 23 Wis 2d 412

Common

D C—Sullivan v Yellow Cab Co App 212 A 2d 616

67 U S—Hutton v Chicago, R I & P R Co, D C Ill 172 F Supp 747 Revd C A 272 F 2d 449

Ark—Missouri Pac R Co v Smith, supra, n 66

Conn—Yu v New York, N H & H R Co 144 A 2d 56, 145 Conn 451

Kan—C.J.S. cited in King v Vets Cab, Inc 295 P 2d 605, 608, 179 Kan 379 56 A L R 2d 1249

Mass Meehan v Metropolitan Transit Authority, 185 N E 2d 649 345 Mass 50

Mich—Paulsons v Nutt, 69 N W 2d 825 342 Mich 335

N H—Beaudet v Boston & M R R 131 A 2d 65 101 N H 4

S D—Carey v Jack Rabbit Lines, Inc, 309 N W 2d 824

Wis—Fleischman v Holz, 127 N W 2d 9 23 Wis 2d 415

68 Fla—Pivdal v City of Miami App 105 So 2d 502

Ga—Bailey v Louisville & N R Co 160 S E 2d 245 117 Ga App 185

Iowa—Fanelli v Illinois Cent R Co 69 N W 2d 13 246 Iowa 661

N H—Beaudet v Boston & M R R 131 A 2d 65 101 N H 4

Wis—Pazik v Milwaukee Electric Ry & Transport Co supra, n 46

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69 Ala—Western Ry of Ala v Brown, 196 So 2d 392, 280 Ala 543

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D C—Sullivan v Yellow Cab Co App 212 A 2d 616

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La—Cox v Toye Bros Yellow Cab Co App 144 So 2d 548

Me—Roberts v Yellow Cab Co 240 A 2d 733

N H—Beaudet v Boston & M R R 131 A 2d 65 101 N H 4

Pa—Schuckel v Yellow Cab Co of Philadelphia, 85 A 2d 138, 369 Pa 356

70 Ark—Missouri Pac Transp Co v Guthrie, 299 S W 2d 829 227 Ark 566

71 Kan—Elliott v Chicago, R I & P R Co 454 P 2d 124 203 Kan 273

72 La—C.J.S. quoted in Crear v National Fire & Marine Ins Co 469 So 2d 329 335 writ den 475 So 2d 364 reconsideration not considered 477 So 2d 698

74. Aged and blind woman assisted by husband

N H—Beaudet v Boston & M R R 131 A 2d 65 101 N H 4

76 N H—Beaudet v Boston & M R R 131 A 2d 65 101 N H 4

N Y—C.J.S. cited in Kronstad v Pechtold, 46 N Y S 2d 124 126

§ 728. Appliances and Means for Boarding or Alighting

79 U S—Weeks v Denver Tramway Corporation C C A Colo 108 F 2d 509—C.J.S. cited in Ortiz v Greyhound Corp C A Mo 275 F 2d 770, 773

Cal—McBride v Atchison, T & S F Ry Co supra n 69

D C—Schaller v Capital Transit Co C A 239 F 2d 73 99 U S App D C 253—Bray v D C Transit System, Inc Mun App, 179 A 2d 387

Kan—King v Vets Cab, Inc 295 P 2d 605 79 Kan 379 56 A L R 2d 1249

N J—Bistany v Bennett 17 A 2d 778 126 N J Law 107

Leaving place of safety

La—Matte v Continental Trailways, Inc App 259 So 2d 653 remd 279 So 2d 60

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82 Ohio—Mills v City of Cleveland, 117 N E 2d 471 97 Ohio App 78

85 Mo—Page v Wabash R Co App 206 S W 2d 691

N M—C.J.S. quoted at length in Ellis v Southern Pac Co, 169 P 2d 551 552, 50 N M 76

86 Ala—Western Ry of Ala v Brown, 196 So 2d 392, 280 Ala 543

§ 729. Opportunity and Time for Getting on Board or Alighting

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90 Ill—Rowley v Fred, 71 N E 2d 483 330 Ill App 433

Md—Miller v Mass Transit Administration, 306 A 2d 261 18 Md App 220 affd 315 A 2d 772, 271 Md 256

N J—Sullivan v La Frade, 185 A 665 14 N J Misc 482, affd 189 A 365 117 N J Law 442

Pa—Hill v West Penn Rys Co 16 A 2d 527 340 Pa 297

Bus driver held not negligent

N C—Petterson v Duke Power Co 36 S E 2d 713 226 N C 22

91 N Y—O Callaghan v Let Service Corp, 219 N Y S 2d 439 31 Misc 2d 17

Okl—Oklahoma Ry Co v Parker, 203 P 2d 875 201 Okl 193

93 Del—Cannon v Delaware Electric Power Co Super 24 A 2d 325 2 Terry 415

Ky—Dudley v Blue Ribbon Lines Corp 217 S W 2d 620 309 Ky 305

La—Hughes v Baton Rouge Electric Co App 188 So 473—Robin v New Orleans Public Service, Inc App 292 So 2d 926

Mich—Sherman v Flint Trolley Coach, 8 N W 2d 115, 304 Mich 494

Mo—C J S cited in Bichle v Frazier 232 S W 2d 465 467 360 Mo 1068

Pa—Mervine v Aronomink Transp Co 35 A 2d 255 348 Pa 475

Tex—Moore v Citizen Civ App 559 S W 2d 105 revd on oth grds Sup 565 S W 2d 43

Wis—Jacobs v Milwaukee & Suburban Transport Corp 165 N W 2d 162, 41 Wis 2d 661

94 Kan—C J S. quoted in O'Sullivan v Wichita Transp Corporation, 92 P 2d 23 25 150 Kan 280

La—Hughes v Baton Rouge Electric Co supra, n 93

Person under incapacity

La—Vidal v Liberty Mut Ins Co App 232 So 2d 786—Walker v New Orleans Public Service, Inc App 245 So 2d 763

Md—Miller v Mass Transit Administration, 306 A 2d 261 18 Md App 220, affd 315 A 2d 772, 271 Md 256

97 Ark—Missouri Pac R Co v Smith, supra, n 66

D C—Schaller v Capital Transit Co C A, 239 F 2d 73 99 U S App D C 253

Ga—Georgia Power Co v Weaver 23 S E 2d 730, 68 Ga App 652

Ill—North Chicago St R Co v Cook, 33 N E 958, 145 Ill 551—Goertz v Chicago & N W Ry Co 153 N E 2d 486 19 Ill App 2d 261

La—Hughes v Baton Rouge Electric Co, supra, n 93

Mich—Wells v Flint Trolley Coach, Inc 88 N W 2d 285 352 Mich 35—Bolton v City of Detroit, 157 N W 2d 313 10 Mich App 589

Mo—Mayor v St Louis Public Service Co 269 S W 2d 101

Ohio—Dietrich v Community Traction Co, 203 N E 2d 344, 1 Ohio St 2d 38

Pa—Maitland v Philadelphia Transp Co, 40 A 2d 147 156 Pa Super 338 Morrison v Philadelphia Transp Co 45 A 2d 18, 353 Pa 269

Tenn—Paschall v Southern Ry Co, supra, n 23

Wis—Williams v Milwaukee & Suburban Transport Corp 155 N W 2d 100, 37 Wis 2d 402

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99 Ga—C.J.S. cited in Beardsley v Suburban Coach Co 63 S E 2d 911 915, 83 Ga App 381

1 Bus driver held not negligent

Fla—De Mendoza v Board of County Com'rs, App, 221 So 2d 797

La—Holmes v New Orleans Public Service, Inc App 242 So 2d 1247

2 Ill—Goertz v Chicago & N W Ry Co 153 N E 2d 486, 19 Ill App 2d 261

N Y—Williams v Long Island R Co, 62 N E 2d 212, 294 N Y 318

4 Mo—Mayor v St Louis Public Service Co, 269 S W 2d 101

5 Ill—Jurkiewicz v Illinois Cent R Co 145 Ill App 44

Employees of a carrier of passengers have a duty to know, if by the exercise of due care, caution and diligence in discharge of duties they could know, whether a passenger is attempting to alight

5.5 Ill—North Chicago St R Co v Cook 33 N E 958, 145 Ill 551—Jurkiewicz v Illinois Cent R Co 145 Ill App 44—Goertz v Chicago & N W Ry Co 153 N E 2d 486, 19 Ill App 2d 261

6 Mo—Mayor v St Louis Public Service Co supra n 4

Okl—Oklahoma Ry Co v Parker 303 P 2d 475 207 Okl 193

S C—Flynn v Carolina Scenic Stages 107 S E 2d 264 237 S C 340

What constitutes reasonable time

(2) Other statements

Mich—Bolton v City of Detroit 57 N W 2d 315 10 Mich App 589

Bus

Tex—Texas, N M & Okl Coaches v Williams, Civ App 191 S W 2d 60 err ref n r m

10 Mo—Mayor v St Louis Public Service Co supra, n 4

§ 730. Moving Train While Passenger Is Boarding or Alighting

13 N Y—Williams v Long Island R Co supra n 2

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15 Mo—Hoffman v St Louis Public Service Co 255 S W 2d 736

Bus

Wash—Becker v Tacoma Transit Co 311 P 2d 638 50 Wash 2d 688

16 La—Roach v New Orleans Public Service Inc App, 380 So 2d 673

19 Mich—Bolton v City of Detroit, 157 N W 2d 313, 10 Mich App 589

§ 731. Care at Places Other than Regular Stopping Places

Library References

Carriers ⇐287(1) 303(1)

24 Ky—Smith v Blue Ribbon Lines, Inc 227 S W 2d 185, 312 Ky 246

Wis—Verbeten v Huettl, 34 N W 2d 803 253 Wis 510

26. U S—Shapiro v Yellow Cab Co D C Pa 79 F Supp 348

D C—Swank v Capital Transit Co C A, 220 F 2d 807 95 U S App D C 127

Pa—Carroll v City of Pittsburgh, 84 A 2d 505 368 Pa 436—Coyne v Pittsburgh Rys Co, 141 A 2d 830, 393 Pa 326—Coyne v Pittsburgh Rys Co, 106 P L J 279 affd 141 A 2d 830, 393 Pa 326

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27. Duty after passenger has alighted

Ohio—Dietrich v Community Traction Co 203 N E 2d 344 1 Ohio St 2d 38

30 La—Blanchard v Baton Rouge Bus Co, App 131 So 2d 232.

Pa—Troy v Scranton Transit Co, 81 A 2d 547 368 Pa 361

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38 Pa—Coyne v Pittsburgh Rys Co, 141 A 2d 830, 393 Pa 326

39 Ky—Southeastern Greyhound Lines v Woods 314 S W 2d 937 [illegible] Ky 777

Pa—Maryland & Philadelphia Transit Co 50 A 2d 56 Pa Supr 338

40 Wash—Wullbrandt v City of Seattle 171 P 2d 212, 25 Wash 2d 29

41 Ky—Southeastern Greyhound Lines v Woods, supra n 39

La—Johnson v New Orleans Public Service, Inc App 129 So 2d

Wash—Wullbrandt v City of Seattle 84 P 2d 123 196 Wash 645

Bus

D C—Perrin v D C Transit System App 218 A 2d 513

K—Smith v Blue Ribbon Lines, Inc supra, n 24

Va—Virginia Electric & Power Co v Thomas, 23 S E 2d 148 180 Va 292—Smith v Virginia Transit Co 117 S E 2d 110 206 Va 951

42 Va—Cleveland v Danville Traction & Power Co 18 S E 2d 913 179 Va 256

43. Injury by automobile

(2) Other cases

Pa—Harris v DeFelice, 109 A 2d 174

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44. Bus

U S—Beeson v Tri-State Transit Co of La C C A Miss 146 F 2d 754

48 Pa—Kelly v Wartluft, 45 Pa Dist & Co 581

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54. Boy alighting from bus

N M—Thompson v Anderman 285 P 2d 507 59 N M 430

57. Sudden unexpected stop

La—Barnes v Tove Bros Yellow Cab Co App, 204 So 2d 83

69 Pa—Coyne v Pittsburgh Rys Co 141 A 2d 830 393 Pa 326

§ 732. Care as to Persons Not Passengers

Library References

Carriers ⇐304

62 N J—Shump v Pennsylvania R Co 83 A 2d 521 8 N J

Duty to notify railroad employee

Mass—Boyd v New York, N H & H R Co, 127 N E 2d 164 332 Mass 607

63 Pa—Connor v D L & W R Co 40 Lack Jury 171

64 Ala—Sims v Warren, 27 So 2d 803 248 Ala 391

Cal—Sipperly v San Diego Yellow Cabs, 201 P 2d 543 89 Cal App 2d 645

Ill—Kalamaty v Chicago Transit Authority App 273 N E 2d 510 133 Ill App 2d 613 revd 289 N E 2d 625 53 Ill 2d 27

Mass—Boyd v New York, N H & H R Co supra, n 62

Miss—C J S. cited in McClellan v Illinois Cent R Co 37 So 2d 738, 740, 204 Miss 432

N J—Shump v Pennsylvania R Co 78 A 2d 111, 11 N J Super 88 affd 83 A 2d 521 8 N J 1—Shump v Pennsylvania R Co, supra, n 62

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69. Right to assume due care of carrier

Miss—Gulf M & O R Co v Smith, 50 So 2d 898, 210 Miss 768

75 Miss—McClellan v Illinois Cent R Co 37 So 2d 738, 204 Miss 432

N J—Shump v Pennsylvania R Co supra, n 64

Knowledge of porter

S C—Nelson v Atlantic Coast Line R Co, 4 S E 2d 273 191 S C 345

76 Ark—Missouri Pac R Co v Lucter 115 S W 2d 278, 195 Ark 985

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77 Vt—Charron v Canadian Pac Ry Co 55 A 2d 614 115 Vt 225

78 N J—Shump v Pennsylvania R Co supra, n 62

83 N J—Shump v Pennsylvania R Co supra, n 64

§ 733. Street Car Cases

Library References

Carriers ⇐303(1).

87 D C—Crusade v Capital Transit Co Mun App 63 A 2d 878, 8 A L R 2d 229

Mich—Paultanis v Nutt, 69 N W 2d 825 342 Mich 335

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89 Mo—Wilson v Kansas City Public Service Co App 238 S W 2d 73

92 Ala—Waddell v Crescent Motors, 69 So 2d 414, 260 Ala 124

Pa—Curry v Napolitano, 133 A 2d 555 389 Pa 580

95 Wash—Wullbrandt v City of Seattle, supra, n 41

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99 Conn—Egan v Connecticut Co 38 A 2d 282, 131 Conn 152

Ill—McKenzie v Friel, 61 N E 2d 407, 326 Ill App 258

8 Sudden stop causing injury to passenger is negligence where resulting from motorman's inattention to vehicles on road ahead until too late to avoid sudden stop to prevent collision—In re Connecticut Co, C C A Conn, 107 F 2d 734

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9. Mechanically operated doors

Md—Broady v Baltimore Transit Co, 131 A 2d 707 215 Md 377

10 Ill—Ruzgis v Richardson, 14 N E 2d 968, 295 Ill App 376

La—Taylor v City of Shreveport, App 29 So 2d 792

Mo—Beahan v St Louis Public Service Co, App, 213 S W 2d 253—Young v Kansas City Public Service Co 255 S W 2d 113

N Y—Schwartz v Brooklyn & Queens Transit Corporation, 36 N Y S 2d 70, 264 App Div 905

Purpose of ordinance

Ky—Louisville Transit Co v Jones, 291 S W 2d 49

12 Pa—Shuckel v Yellow Cab Co of Philadelphia 85 A 2d 138, 369 Pa 356

13 Mo—Bond v Kansas City Transit, Inc, 401 S W 2d 440

14 Ala—Waddell v Crescent Motors, 69 So 2d 414, 260 Ala 124

Wash—Wullbrandt v City of Seattle, 84 P 2d 123, 196 Wash 645

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16 Md—Baltimore Transit Co v Brooks, 167 A 2d 596, 224 Md. 242

Mo—Trzecki v St Louis Public Service Co 251 S W 2d 676

18 Ill—C J S. quoted at length in Kiesel v Chicago Transit Authority 126 N E 2d 170, 172, 6 Ill App 2d 13

Md—Baltimore Transit Co v Brooks, 167 A 2d 598, 224 Md 242

19 Ga—Dishuggar v Suburban Coach Co 66 S E 2d 242, 84 Ga App 498

La—Taylor v City of Shreveport, supra, n 10

Mich—Paultanis v Nutt, 69 N W 2d 825 342 Mich 335

R I—New England Tree Expert Co v United Electric Rys Co 169 A 325, 54 R I 35

Violation of statute

Pa—Reed v Scranton Transit Co 12 A 2d 553 339 Pa 225

Requiring exist from particular side

(3) Other cases—Reed v Scranton Transit Co supra

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20 Ky—Louisville Transit Co v Jones, 291 S W 2d 49

La—Cary v New Orleans Public Service, Inc 250 So 2d 92, writ ref 253 So 2d 67 259 La 808

21 Ill—Kiesel v Chicago Transit Authority 126 N E 2d 170, 6 Ill App 2d 13

24 Minn—Patton v Minneapolis St Ry Co 77 N W 2d 433 247 Minn 368 58 A L R 2d 921

27 Ky—Louisville Transit Co v Jones, 291 S W 2d 49

Mo—Beahan v St Louis Public Service Co supra, n 10—Young v Kansas City Public Service Co supra, n 10

Ohio—O'Reilly v Cleveland Ry Co 42 N E 2d 452, 68 Ohio App 537

29 Ill—Rowley v Friel 71 N E 2d 183 330 Ill App 433

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31 Conn—Egan v Connecticut Co 38 A 2d 282, 131 Conn 152

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43 Ga—Georgia Power Co v Weaver, 23 S E 2d 730, 68 Ga App 652

Pa—Lewis v Pittsburgh Rys Co 200 A 704 132 Pa Super 394

Wis—Hadrian v Milwaukee Electric Railway & Transport Co 1 N W 2d 755 241 Wis 122, mod on oth grds on reh 5 N W 2d 765, 241 Wis 122

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59 Ind—C.J.S. quoted in Gary Rys v Chumcoff 96 N E 2d 685 122 Ind App 139 transfer den 103 N E 2d 203 230 Ind 309

La—Thomas v Shreveport Rys Co App 187 So 822—C.J.S quoted in Hughes v Baton Rouge Electric Co App 188 So 473 476

Md Przyborowski v Baltimore Transit Co 59 A 2d 687 191 Md 63

Mass Berger v Massachusetts Bay Transp Authority 246 N E 2d 665, 355 Mass 695

Pa—Kennedy v Philadelphia Rapid Transit Co 10 A 2d 793, 138 Pa Super 371

68 Ala—C.J.S. cited in Montgomery City Lines v Hawes, 20 So 2d 536, 538, 31 Ala App 564 cert den 20 So 2d 541, 246 Ala 287

Neb—C.J.S. cited in Whittaker v Omaha & C B St Ry Co, 291 N W 275 279 137 Neb 800

61 Kan—C.J.S. cited in O'Callahan v Wichita Transp Corporation, 92 P 2d 23 25 150 Kan 280

La—Miller v New Orleans Public Service, App 196 So 86

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63 Cal—Moeller v Market Street Ry Co 81 P 2d 475 27 Cal App 2d 562

Pa—Lewis v Pittsburgh Rys Co supra, n 43

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74 Cal—Moeller v Market Street Ry Co supra, n 63

76 Mich—C.J.S. cited in Rogers v City of Detroit, Department of Street Railways, 286 N W 167 168, 289 Mich 86

80 Ill—McKenzie v Friel, 61 N E 2d 407, 326 Ill App 258

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86 Mo—Beahan v St Louis Public Service Co supra, n 10—C J S cited in Hoffman v St Louis Public Service Co 255 S W 2d 736, 740

92 Md—Przyborowski v Baltimore Transit Co supra, n 59

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95 Tex—Young v Dallas Railway & Terminal Co Civ App 136 S W 2d 915 Err dism judg correct

§ 734. Elevator Cases

3 N Y—Harrington v Kedem Realty Corp 217 N Y S 2d 387, 13 A D 2d 1027

Negligence not shown

N C—Routh v Hudson-Belk Co of Asheboro Inc 139 S E 2d 1, 263 N C 112

4 Cal—Harris v Smith, 112 P 2d 907 44 Cal App 2d 694

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11 Floor level as to passenger entering car

N C—Routh v Hudson-Belk Co of Asheboro, Inc 139 S E 2d 1 263 N C 112

§ 735. Sufficiency and Maintenance in General

Library References

Carriers ⇐288 et seq.

12 U S—Daily v Palmer C C A N Y 161 F 2d 960—McFadden v New York, N H & H R Co D C N Y 176 F Supp 465

Conn—Cadwell v Watson, 60 A 2d 168, 134 Conn 640

D C—Crusade v Capital Transit Co, Mun App 63 A 2d 878, 8 A L R 2d 229

Fla—Loftin v Florida Cities Bus Co, 32 So 2d 166, 159 Fla 514

N Y—Barbato v Vollmer, 76 N Y S 2d 528, 273 App Div 169—Soucy v Greyhound Corp 276 N Y S 2d 173 27 A D 2d 112

N C—C.J.S. cited in Mann v Virginia Dare Transp Co Inc 198 S E 2d 558, 565 283 N C 734

Bus tires

Miss—Lambert v Lott 222 So 2d 816

Wash—Keesling v Northwest Greyhound Lines, 229 P 2d 335, 38 Wash 2d 289

Statute manifestly to foreign objects

Okl—Southwestern Greyhound Lines v Smith, 277 P 2d 157

Safety Appliance Act as not conferring right of action

U S—Puterman v Pennsylvania R Co, D C N Y 148 F Supp 428

Persons entitled to protection of Federal Safety Appliance Act

Ill—Boyer v Atchison, T & S F Ry Co, 181 N E 2d 372, 34 Ill App 2d 330, 96 A L R 2d 400—Boyer v Atchison T & S F Ry Co 230 N E 2d 173, 38 Ill 2d 31, cert den 88 S Ct 1038, 390 U S 949 19 L Ed 2d 1140

Red, flashing signals on bus

Or—Lasley v Dorsey Bus Co, 531 P 2d 278, 271 Or 228

13. Degree of care

(3) Other matters

U S—Gates v Greyhound Corp, D C Miss 197 F Supp 341

N Y—Miller v Inter City Transp Co, 221 N Y S 2d 433 31 Misc 2d 777

14. Extent of liability stated

Mass—O'Leary v Metropolitan Transit Authority 159 N E 2d 91 339 Mass 328

Leased equipment

N C—Mann v Virginia Dare Transp Co Inc 198 S E 2d 558 283 N C 734

15 Ky—Roland v Coleman, 198 S W 2d 978, 303 Ky 650—Northcutt v Cincinnati, N & C Ry Co 217 S W 2d 631 309 Ky 265

La—Creech v Shreveport Rys Co App 43 So 2d 295

Mass—Rannetter v Berkshire St Ry Co 18 N E 2d 342, 301 Mass 598

§ 736. Inspection

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16 Cal—Gray v City and County of San Francisco, 20 Cal Rptr 894 202 C A 2d 319

D C—Bray v D C Transit System, Inc Mun App 179 A 2d 387

La—Jones v Baton Rouge Electric Co App 192 So 539

Mo—Fairley v St Louis Public Service Co 352 S W 2d 393, transf to Sup 362 S W 2d 549

Wash—Heggen v City of Seattle, 288 P 2d 830, 47 Wash 2d 576

Mode of inspection insufficient

(2) Other instances

La—Netter v New Orleans Public Service, Inc App 347 So 2d 941 1 A L R 4th 1244

Leased equipment

N C—Mann v Virginia Dare Transp Co Inc 198 S E 2d 558, 283 N C 734

20 La—Jones v Baton Rouge Electric Co supra, n 16

§ 737. Latent Defects

24 Wash—C.J.S entire section quoted in Heggen v City of Seattle, 288 P 2d 830, 834 47 Wash 2d 576

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28 Ala—Southeastern Greyhound Lines v Callahan, 13 So 2d 660, 244 Ala 449

N J—Gagho v Yellow Cab Co Super 164 A 2d 353

N Y—Albert v State, 362 N Y S 2d 341, 80 Misc 2d 105

Liability after discovery of defects

La—Buswell v Missouri Pacific Transp Co App 184 So 399

A carrier is not liable for mechanical defects of which it has no prior knowledge [28.5]

28.5 N J—Gagho v Yellow Cab Co Super, 164 A 2d 353

31 La—Beach v Union Brewing Corporation, App 187 So 332

§ 738. Well Known and Approved Machinery and Appliances

33 Cal—Greyhound Lines, Inc v Superior Court In and For Shasta County, 83 Cal Rptr 343 3 C A 3d 356, cert den 91 S Ct 100, 400 U S 868, 27 L Ed 2d 108

35 Iowa—C.J.S. cited in Treacy v McIntosh, 176 N W 2d 819 822, 49 A L R 3d 285

Me—Gould v Maine Central Transp Co, 9 A 2d 263, 136 Me 336

37 Me—C.J.S. cited in Gould v Maine Central Transp Co supra, n 35

Pa—Morrison v Philadelphia Transp Co, 45 A 2d 18, 353 Pa 269

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40 Md—E H Koester Bakery Co v Poller 50 A 2d 234

Wash—Leach v School Dist No 322 of Thurston County 85 P 2d 666, 197 Wash 384

§ 739. Care as to Track

Library References

Carriers ⇐290.

41 Iowa—Tiemeyer v McIntosh, 176 N W 2d 819 49 A L R 3d 285

N J —Byron v Public Service Coordinated Transport, 5 A 2d 483 122 N J Law 451

45. Liability for grades constructed by another

U S —Illinois Cent R Co v Staples, C A Mo 272 F 2d 829

§ 741. Safe Cars or Other Vehicles

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63 U S —Hennessey v Burlington Transp Co D C Mont 103 F Supp 660—Jacobson v New York N H & H R Co D C Mass 109 F Supp 513 affd, C A 206 F 2d 153 affd 74 S Ct 474 347 U S 909 98 L Ed 397

Ala —Cannon v Louisville & N R Co 42 So 2d 340 252 Ala 571

D C —D C Transit System Inc v Smith, Mun App 173 A 2d 216

Ill —C.J.S. cited in Krueger v Richardson, 61 N E 2d 399, 403

Ky —Roland v Coleman, supra, n 15

La —Jones v Baton Rouge Electric Co supra, n 16—Kendall v New Orleans Public Service, App 45 So 2d 541

Mass —Bannister v Berkshire St Ry Co supra n 15—Blair v Boston Elevated Ry Co 36 N E 2d 419 310 Mass 1

N J —Stee v Richardson, 381 A 2d 789 75 N J 304

Ohio—Hall v Redifer Mun 79 N E 2d 237

Pa —Boylan v Carbondale Transfer Co 32 Pa Dist & Co 109, 39 Lack Jur 73

What is not negligence

(3) Iowa—T[illegible]yer v McIntosh, 176 N W 2d 819, 49 A L R 3d 285

La Burt v Texas & P Ry Co App 35 So 2d 801

Absolute liability under Safety Appliance Act

U S —Neal v Saga Shipping Co C A Tex 407 F 2d 481 cert den 89 S Ct 2143 395 U S 986, 23 L Ed 2d 775 reh den 90 S Ct 45 396 U S 871 24 L Ed 2d 129

Ill —Boyer v Atchison T & S F Ry Co 230 N E 2d 173, 38 Ill 2d 31 cert den 88 S Ct 1038, 390 U S 949 19 L Ed 2d 1140

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64 N C —C.J.S. quoted in Mann v Virginia Dare Transp Co., Inc., 198 S E 2d 558 565 566, 283 N C 734

Or —Simpson v Gray Line Co, 358 P 2d 516, 226 Or 71

65 Mass —Bannister v Berkshire St Ry Co 18 N E 2d 342, 301 Mass 598

Keeping floor dry at all times

La —Ellizey v New Orleans Public Service, Inc App 365 So 2d 10—Casborn v New Orleans Public Service Inc., App 4 Cir 448 So 2d 176, writ den 452 So 2d 174 overruling DeClouet v New Orleans Pub Serv Inc, La App 434 So 2d 130

66 U S —Williams v New Jersey-New York Transit Co., C C A N Y, 113 F 2d 649, cert den 61 S Ct 393, 311 U S 712, 85 L Ed 463

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68 Mo —Page v Wabash R Co., App 206 S W 2d 691

Tenn —Shirley v Louisville & N R Co, 251 S W 2d 440, 36 Tenn App 72, 34 A L R 2d 356

Wis —Rieschl v Wisconsin Michigan Power Co., 294 N W. 521 236 Wis 116

Duty as to bus entrances

Wis [illegible] Ford v Milwaukee & Suburban Transport Co 130 N W 2d 282, 25 Wis 2d 161

70 Tires

Or —Simpson v Gray Line Co 358 P 2d 516, 226 Or 71

71 Ala —Southeastern Greyhound Lines v Callahan supra, n 28

Ohio—Hall v Redifer supra, n 63

Okl —Southeastern Greyhound Lines v Smith, 277 P 2d 157

73 Ill —Boyer v Atchison, T & S F Ry Co 230 N E 2d 173 38 Ill 2d 31 cert den 88 S Ct 1038 390 U S 949 19 L Ed 2d 1140

75 U S —Hennessey v Burlington Transp Co D C Mont 103 F Supp 660

76 U S —Williams v New Jersey-New York Transit Co, supra, n 66

77 U S —Yanick v Pennsylvania R Co D C N Y 192 F Supp 368

N Y —Zechner v Fiat Service Corp 76 N Y S 2d 461

80 Mo —Jackson v Bi-State Transit System, App 550 S W 2d 228

Ohio—C.J.S. cited in Sengel v Columbus & Southern Ohio Electric Co 40 N E 2d 170, 171 69 Ohio App 402

Safety glass

Wis —Werlein v Milwaukee Elec Ry & Transport Co 66 N W 2d 185 267 Wis 392, 46 A L R 2d 1091

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83 U S —Calloway v Hart C C A Ala 146 F 2d 103 cert den 65 S Ct 915 324 U S 866, 89 L Ed 1421

Ala —Cannon v Louisville & N R Co supra, n 65

Conn —C.J.S. cited in McMahon v New York N H & H R Co 71 A 2d 557 559 136 Conn 372 17 A L R 2d 1081

84 D C —Pomeroy v Pennsylvania R Co D C 132 F Supp 257 revd on oth grds C A 239 F 2d 435 99 U S App D C 272, cert den 77 S Ct 861 353 U S 950, 1 L Ed 2d 859

§ 742. Elevator Cases

88 Ill —Cobb v Marshall Field & Co 159 N E 2d 520 22 Ill App 2d 143—Stewart v Beegun, 261 N E 2d 491 126 Ill App 2d 120

Ky —Sabriston's Adm r v Otis Elevator Co 64 S W 2d 588, 251 Ky 222

La —Adamson v Westinghouse Elec Corp App, 236 So 2d 556

Md —Otis Elevator Co v Embert, to Use and Benefit of South St Corp, 84 A 2d 876, 198 Md 585

Mass —Bernstein v Highland Associates of Worcester, Inc 294 N E 2d 576, 1 Mass App 132, 64 A L R 3d 1016

N Y —Moriarty v New York Cent R Co, 124 N Y S 2d 284

Ohio—Feinberg v Bereal Hotel Co, App, 85 N E 2d 296 revd on oth grds, 89 N E 2d 569, 152 Ohio St 417

Or —White v Milner Hotels, Inc 518 P 2d 631 267 Or 628

Escalator

(2) Other matters

Cal —Vandagriff v J C Penney Co 39 Cal Rptr 671 228 C A 2d 579

Colo —Majors v J C Penney Co Inc 506 P 2d 399 31 Colo App 568

Ga —Brown v J C Penney Company, 180 S E 2d 364 123 Ga App 233

La —Cannon v D H Holmes, Ltd, App 274 So 2d 799—Norberg v Sears, Roebuck & Co App 321 So 2d 795

Apparatus held not an "elevator"

Cal —Rodin v American Can Co., 284 P 2d 530, 133 C A 2d 524

Mich —Preston v Slezak 175 N W 2d 759 383 Mich 442

Facts held not negligence as matter of law

Cal —Guerra v Hartbery Hotels, Inc 53 Cal 2d 266, 1 Cal Rptr 330, 347 P 2d 674—Rollins v Department of Water and Power City of Los Angeles, Cal Rptr 162, 209 C A 2d 526

Nondelegable duty to maintain in reasonably safe condition

N Y —Mallor v Wolk, Properties, Inc 311 N Y S 141 63 Misc 2d 187

Tex —Otis Elevator Co v Bond, Civ App 373 S W 518, remd Sup 388 S W 2d 681 on remand 3 S W 2d 519

Particular facts not constituting negligence

La —Cannon v D H Holmes, Ltd App 274 So 799

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89 Cal —Longway v McCall 5 Cal Rptr 818, 1 C A 2d 723

Ill —Stewart Beegun 261 N E 2d 491, 126 Ill App 2 120

Ky —Sabriston's Adm r v Otis Elevator Co., supra, n 88

Freight elevators

Iowa—Hull v Bishop-Stoddard Cafeteria, 24 N W 2 364 op supp 26 N W 2d 429

Obvious and apparent danger

Ill —Murphy v Ambassador East, 370 N E 2d 124, 1 Ill Dec 501 54 Ill App 3d 980

92 N D —Krueger v North Am Creameries, 2 N W 2d 240

93 Or —White v Milner Hotels, Inc 518 P 2d 631 267 Or 628

94 Ind —Tribune-Star Pub Co v Fortden, 1 N E 2d 548, 124 Ind App 618

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Carriers ⇐295(1.2).

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Ala —Southeastern Greyhound Lines v Callahan, supra n 28

Ariz —Nichols v City of Phoenix, 202 P 2d 201 68 Ariz 124

Cal —Ford v Carew & English, 200 P 2d 828, 88 Cal App 2d 199

Conn —Riley v Connecticut Co., 29 A 2d 759 129 Conn 554

D C —D C Transit System Inc v Carney App 254 A 2d 402

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Ill —Cooper v Safeway Lines, 26 N E 2d 632, 304 Ill App 302—K[illegible]ewski v Bluebird Air Service, 53 N E 2d 131 321 Ill App 340, cer dism 59 N E 2d 853 389 Ill 462

Ky —Southeastern Greyhound Lines v Burns, 216 S W 2d 920, 309 Ky 150—Conley's Adm r v Ward, 291 S W 2d 568

La —Chisholm v Ryder App 56 So 2d 316

Me —Hayes v New England Greyhound Lines, 116 A 2d 665 151 Me 169

Md —Kaplan v Baltimore & O R Co., 113 A 2d 415, 207 Md 56

Miss —Teche Lines v Pittman, 4 So 2d 293 191 Miss 735 138 A L R 220

Mo —S[illegible]g Kansas law—Statler v St Louis Public Service Co, App 300 S W 2d 831—Snyder v St Louis Public Service Co, 329 S W 2d 721

Mont —Rogers v Western Airline, 602 P 2d 171 184 Mont 170

N Y —Barbato v Vollmer supra, n 12—Hoffman v Lehman, 126 N Y S 2d 608, 204 Misc 1053, mod on oth grds 145 N Y S 2d 105, 286 App Div 487—Thomas v Central Greyhound Lines, Inc, 180 N Y S 2d 461, 6 A D 2d 649—Miller v Inter

Civ Transp Co 221 N Y S 2d 433 31 Misc 2d 777

Pa—Shaffer v Johnston Com Pl 23 West Co 67—Doyle v Philadelphia Transp Co 55 A 2d 583 161 Pa Super 556

RI—Gillogly v New England Transp Co 57 A 2d 411 76 R I 456

Tex—F & N Taxi v Haynes, Civ App 262 S W 2d 117 err ref no rev err

Utah—Horsley v Robinson, 186 P 2d 592, 112 Utah 227

Duty of trolley car motorman

(4) Other duties

Pa—Cuneo v Philadelphia Transp Co 176 A 2d 896, 405 Pa 532

Duty to follow preceding vehicle at reasonable distance

Wash—Torrez v Peck, 356 P 2d 703 57 Wash 2d 302

Opportunity to avoid accident

Pa—Evans v Philadelphia Transp Co 212 A 2d 440, 418 Pa 567

Duty of mule driver

Tex—West v Mello, Civ App 424 S W 2d 266 err ref no rev err

Bus

US—Sutherland v Auch Inter-Borough Transit Co D C Pa 366 F Supp 127

La—Johnson v New Orleans Public Service Inc App 344 So 2d 34 application den Sup 346 So 2d 218

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96 US—Hennessey v Burlington Transp Co D C Mont 103 F Supp 660—Talbott v Chicago & N W Ry Co C A Iowa, 243 F 2d 322, 68 A L R 2d 661

Del—Winter v Pennsylvania R Co Super 57 A 2d 750, 5 Terry 203

Ill—Kneer v Peoria-Rockford Bus Lines, 86 N E 2d 159 337 Ill App 389—Olender v Gottlieb, 101 N E 2d 622, 344 Ill App 552

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La—Herbert v White Top Cabs, App 8 So 2d 158—Nauck v Cooperative Cab Co App 185 So 2d 345, writ ref 186 So 2d 630 249 La 383—Reed v City of Alexandria, App 212 So 2d 286—Walsh v New Orleans Public Service, Inc App 323 So 2d 505

Me—Gould v Maine Central Transp Co 1 A 2d 908, 136 Me 83

Mass—Rogers v Cambridge Taxi Co 59 N E 2d 89 317 Mass 578

Mo—Grace v St Louis Public Service Co App 263 S W 2d 866

N Y—Zeichner v Fiat Service Corp supra, n 77

Ohio—Stafford v Central Greyhound Lines, App, 34 N E 2d 587

Injury from baggage

Tex—Halloran v Greyhound Corp, Civ App, 396 S W 2d 507 err ref no rev err

97 Ariz—Nichols v City of Phoenix, supra, n 95

N Y—Hart v Lehman, supra, n 95

98 Fla—Butler v Borowsky App 120 So 2d 656

1 Ga—Underwood v Atlanta & W P R Co 124 S E 2d 758, 105 Ga App 340, affd in part and revd in part on oth grds 126 S E 2d 785, 218 Ga 193 on remand 127 S E 2d 318, 106 Ga App 467

Va—Hubbard v Murray 3 S E 2d 397 173 Va 448

2 Cal—Spencer v Los Angeles Ry Corporation, 126 P 2d 940, 52 Cal App 2d 679

Minn—Dix v Harris Machinery Co 60 N W 2d 628, 240 Minn 218

Rule held inapplicable

Ky—Howard v Fowler 20 S W 2d 559 306 Ky 567

Wis—Burke v Milwaukee & Suburban Transport Corp 159 N W 2d 700 39 Wis 2d 682

3 Ohio—Feinberg v Bereal Hotel Co App 85 N E 2d 296, revd on oth grds 89 N E 2d 569 152 Ohio St 417

Tex—Biscayne Texas Properties v Miner Civ App 502 S W 2d 225 err ref no rev err

Wash—Shelee v Hill, 287 P 2d 479 47 Wash 2d 362

Facts held not negligence as matter of law

Cal—Rollins v Department of Water and Power City of Los Angeles, 26 Cal Rptr 102 209 C A 2d 526

Escalator

Cal—Vandagriff v J C Penney Co 39 Cal Rptr 671 228 C A 2d 579

§ 744. Providing for Safety and Comfort of Passengers on Trains

Library References

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8 Mass—C J S cited in Silver v New York Cent R Co 105 N E 2d 923, 924 329 Mass 14

S C—C J S. cited in Humphries v Stokes Bus Line, 18 S E 2d 675 676, 199 S C 132

S D—C J S. cited in Heinrichs v Inter City Bus Lines, 111 N W 2d 327 331 79 S D 267

Degree of heat

S D—Heinrichs v Inter City Bus Lines, 111 N W 2d 327 79 S D 267

In a proper case, however, the carrier may be liable for injuries inflicted by a dog carried in the car[91]

9.1 Cal—Westwater v Southern Pac Co 101 P 2d 154 38 Cal App 2d 369

10 Del—Winter v Pennsylvania R Co, Super 57 A 2d 750, 5 Terry 203

D C—Butler v McCalip, Mun App, 54 A 2d 644

Minn—Hall v Minneapolis St Ry Co 26 N W 2d 178, 223 Minn 243

Passenger's body protruding from window

N J—Byron v Public Service Coordinated Transport, 5 A 2d 483 122 N J Law 451

Passenger's body protruding from window

La—Fontenot v Fidelity General Ins Co App 185 So 2d 896, writ ref 187 So 2d 740, 249 La 578

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11 N Y—Bunt v New York Cent R Co, 9 N Y S 2d 320, 256 App Div 832, affd 23 N E 2d 557 281 N Y 756

15 Del—Winter v Pennsylvania R Co supra, n 10

Miss—Crosby v Columbus & G Ry Co, 181 So 139 182 Miss 771

Tenn—Morgan v Y & M V R R Co 172 S W 2d 1013, 26 Tenn App 384

Conduct and acting or not indicating negligence

(4) Mobile City Lines v Huffman, 60 So 2d 333 257 Ala 603

Ga—Pate v Wade, 110 S E 2d 43, 100 Ga App 79

18 Ark—Hot Springs St Ry Co v Hill, 128 S W 2d 369, 198 Ark 319

N C—C J S. cited in Childs v Dowdy 188 S E 2d 638, 640, 14 N C App 535

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21 U S—Wallin v Greyhound Corp, C A Tenn 341 F 2d 521

La—Netter v New Orleans Public Service, Inc App 347 So 2d 941 1 A L R 4th 1244

Md—Lusby v Baltimore Transit Co 72 A 2d 754 195 Md 118

Or—Baker v Rose City Transit Co, 361 P 2d 257 227 Or 110

Responsibility of common carrier by motor bus stated

La—Johnson v Continental Southern Lines, Inc App 113 So 2d 114 74 A L R 2d 1328—Hurst v New Orleans Public Service, Inc App 235 So 2d 103

Continuous supervision not required

La—Hurst v New Orleans Public Service, Inc App, 235 So 2d 103

22 D C—Bray v D C Transit System, Inc Mun App 179 A 2d 387

N Y—Greenstein v New York City 76 N Y S 2d 870, 273 App Div 869

R I—Ponton v United Electric Rys Co, 200 A 425, 61 R I 203 117 A L R 518

23 U S—Greyhound Corp v Jones, C A Colo 327 F 2d 904

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25 Me—Morneault v Boston & M R R 68 A 2d 260, 144 Me 300

N Y—Hart v Lehman, 151 N Y S 2d 522

26 Conn—Kunz v Connecticut Co, 16 A 2d 831 127 Conn 364

Kan—C J S. cited in Picou v Kansas City Public Service Co 134 P 2d 686, 690, 156 Kan 452

La—Hurst v New Orleans Public Service, Inc App 235 So 2d 103

Tex—Jackson v Dallas Ry & Terminal Co Civ App 273 S W 2d 463 err ref no rev err

27 La—C J S. entire passage quoted in Jones v Baton Rouge Electric Co App 192 So 539 541—C J S entire passage quoted in Johnson v Continental Southern Lines, Inc, App 113 So 2d 114, 117 74 A L R 2d 1328—Alexander v Continental Southern Lines, Inc App 130 So 2d 539—C J S. cited in Henderson v Baton Rouge Bus Co App 217 So 2d 422, 426

N J—Greer v Public Service Co-ordinated Transport, 12 A 2d 844 124 N J Law 512

N Y—Hart v Lehman 151 N Y S 2d 522

Insufficient to charge carrier

(2) Other cases

U S—Nimm v Pennsylvania Greyhound Lines, D C Mich 97 F Supp 357—Wallin v Greyhound Corp, C A Tenn 341 F 2d 521

Continuous supervision not required

U S—Nimm v Pennsylvania Greyhound Lines, supra

29 U S—Williams v New Jersey-New York Transit Co C C A N Y, 113 F 2d 649 cert den 61 S Ct 393 311 U S 721 85 L Ed 463

N C—Williams v Queen City Coach Co 44 S E 2d 883, 228 N C 790

Duty to inspect

(2) Other cases

Tex—Arrine Motor Coaches v Caver 226 S W 2d 830, 148 Tex 521

Carrier held not liable

La—Quigley v Louisiana & A Ry Co App, 206 So 2d 791

Doctrine of res ipsa loquitur held inapplicable

La—Quigley v Louisiana & A Ry Co App 206 So 2d 791

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30 Ky—Louisville Ry Co v Logan, 206 S W 2d 80, 306 Ky 35—Adkins v Greyhound Corp 357 S W 2d 860

N Y—Yavneh v Long Island R Co 12 N Y S 2d 445

Tenn—Knoxville Cab Co v Miller 138 S W 2d 428 176 Tenn 88

Carrier held not liable

(4) Ill—Morris v Chicago Transit Authority, 328 N E 2d 208, 28 Ill App 3d 183

§ 745. Overcrowding

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32 D C—Butler v McCalip, supra, n 10

N Y—Trudell v New York Rapid Transit Corporation, 22 N E 2d 244 281 N Y 82—Ligon v International Ry Co 55 N Y S 2d 444 269 App Div 909

S C—Thomas v Atlantic Greyhound Corporation 29 S E 2d 196, 204 S C 247

Tex—C J.S. quoted at length in Dallas Ry & Terminal Co v Windsor Civ App 206 S W 2d 127 129

33 Mo—Justice v East St Louis City Lines, Inc 375 S W 2d 150

34 Ill—Lutz v Chicago Transit Authority 183 N E 2d 579 36 Ill App 2d 79

N Y—Marko v New York Rapid Transit Corporation 18 N Y S 2d 449

35. Extent of liability stated

Mass—O Leary v Metropolitan Transit Authority 159 N E 2d 91 339 Mass 378

Fresalptors

N Y—Perez v Hearn Dept Store Corp 326 N Y S 2d 127, 37 A D 2d 842, motion den 289 N E 2d 552 31 N Y 2d 698 337 N Y S 2d 509 affd 309 N E 2d 868 34 N Y 2d 526 354 N Y S 2d 97

36 Cal—Sweet v Los Angeles Ry Co 179 P 2d 824 79 Cal App 2d 195

N J—Miller v Public Service Coordinated Transport, 81 A 2d 148 7 N J 155 26 A L R 2d 1215

37 Ga—Bibb Transit Co v Scarborough 83 S E 2d 221 90 Ga App 427

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Mo—Justice v East St Louis City Lines, Inc 375 S W 2d 150

N J—Sek v Hudson & Manhattan R Co 68 A 2d 480 5 N J Super 104

N Y—Ligon v International Ry Co supra, n 32

S C—Thomas v Atlantic Greyhound Corporation supra, n 32

§ 746. Liability for Collisions

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Cal—Ford v Carew & English, 200 P 2d 828 89 Cal App 2d 199

D C—Williams v Capital Transit Co, C A 215 F 2d 487 94 U S App D C 221

Ill—Miller v Chicago Transit Authority 121 N E 2d 348 3 Ill App 2d 223

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Ky—Louisville Taxicab & Transfer Co v Smallwood, 224 S W 2d 450, 311 Ky 405

La—Duane v Toye Bros Yellow Cab Co App 148 So 2d 451—Picataci v Guttierez, App 163 So 2d 130, writ ref 164 So.2d 363 246 La 382—Young v Fryous, App 222 So 2d 628

Md—Sun Cab Co. v Hall, 86 A 2d 914 199 Md 461

Mo—Douglas v St Louis Public Service Co 231 S W 2d 157 360 Mo 869—Dickerson v St Louis Public Service Co 286 S W 2d 820, 365 Mo 738

N Y—Renken v Brooklyn & Queens Transit Corporation, 4 N Y S 2d 927 254 App Div 873, app den 7 N Y S 2d 222, 255 App Div 784, affd 20 N E 2d 1014, 280 N Y 646

Wash—Dennis v Maher 84 P.2d 1029 197 Wash 286

Proper lookout

(2) Other matters

La—Landry v Ed's Cab Serv., Inc., App., 185 So 2d 27

Taxicab company not insurer

La—Addison v Checker Cab Co App 337 So 2d 592

40 U S Dia n v Gorum, D C La 45 F Supp 833

Fla—Carlton v Miami Transit Co., App., 147 So 2d 581

Ill—Olender v Gottlieb, 101 N E.2d 622, 344 Ill App 552

Ky—Southeastern Greyhound Lines v Donohue, 182 S W 2d 324 298 Ky 139—Greyhound Corp v Allen 353 S W 2d 558

La—Oppenheim v Toye Bros Yellow Cab Co App 7 So 2d 420 affd 14 So 2d 854 203 La 1067—Brooks v Arthur Motor Coaches, App 35 So 2d 786—Elkins v Travelers Indem Co App 41 So 2d 123—Duane v Toye Bros Yellow Cab Co App 148 So 2d 451

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Mo—Snyder v St Louis Public Service Co 329 S W 2d 721

N Y—Zeichner v Fiat Service Corp 76 N Y S 2d 461—Lowenbein v Doyle, 145 N Y S 2d 756, 208 Misc 990

N C—Banks v Shepard, 52 S E 2d 215 230 N C 86

Pa—Dowlin v Short Line, Inc 3 Chest Co 109

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The violation of a statute has been held not to be negligence [52]

52.1. Violation not the proximate cause of collision

N J—Lutz v Westwood Transp Co 106 A 2d 329 31 N J Super 285

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54 Pa—Killen v Pennsylvania R Co 102 A 2d 140, 376 Pa 320

55 Conn—Callahan v Grady 7 A 2d 225 125 Conn 733

Ga—Pillen v Hanger Cab Co 154 S E 2d 420, 115 Ga App 260

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Kan—Taggart v Yellow Cab Co of Wichita, 131 P 2d 924 156 Kan 88

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Pa—Beerschmitt v Hall, 23 Lehigh Co Leg J 315—Parker v Charlone, 137 A 2d 317, 391 Pa 566

S C—Robinson v Duke Power Co, 48 S E 2d 808, 213 S C 185

Care required

(1) Pa—Langan v Lewis, 232 A 2d 50, 210 Pa Super 273

(7) Other degrees of care

Ga—Phillips v Howard, 136 S E 2d 473 109 Ga App 404

Right of way; through streets

(2) Tex—El Paso City Lines v Prieto, Civ App 191 S W 2d 59—El Paso City Lines v Dudney, Civ App 280 S W 2d 303, err ref no rev err

Utah—Sine v Salt Lake Transp Co 147 P 2d 875, 106 Utah 289

(3) Longo v Yellow Cab Co D C Pa., 79 F Supp 478

(5) La—Young v New Orleans Public Service, App., 35 So 2d 881 Picataci v Guttierez, App 163 So 2d 130, writ ref 164 So 2d 363 246 La 382.

(6) Ala—Decatur Transit v Jennings, supra, n 39

(8) Other cases

Ga—Lusk v Smith 137 S E 2d 734 110 Ga App 36

La—Mansfield v Toye Bros Yellow Cab Co 78 So 2d 544

Md—Greyhound Lines, Inc v Alderson, 336 A 2d 881 26 Md App 277

Mo—McCarthy v Sebben 331 S W 2d 601

Lookout

(3) Other cases—Adams v Louisville Taxicab & Transfer Co 211 S W 2d 397, 307 Ky 405

Stopping or slowing down at intersection

(6) Other cases

La—Lampkin v U S Fidelity & Guaranty Co, App 99 So 2d 147—Wise v Prescott App 142 So 613 annulled 151 So 2d 356, 244 La 157

N Y—Halwick v Finch 281 N Y S 2d 655 28 A D 954

Pa—Marden v Philadelphia Transp Co 60 A 2d 163 Pa Super 189

Duty held not relieved by introduction of traffic officers and signal lights

Pa—Angelo v Pittsburgh Rys Co Bus Division, 19 A 2d 867 189 Pa Super 574

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56 U S—Hagenson v Matanuska Val Lines, D C Alaska, 103 F Supp 579 13 Alaska 648

Del—Lightburn v Delaware Power & Light Co 16 A 2d 64 3 Storey 186

Ky—Payne v B-Line Cab Co, 282 S W 2d 342

La—Trapa v Toye Bros Yellow Cab Co App, 131 So 2d 184—Le Beau v Baton Rouge Bus Co App 136 So 2d 740—Roth v Lloyd S Gauben, Inc App 144 So 2d 675—Planchard v New Orleans Public Service, Inc App 192 So 2d 197, writ ref 193 So 2d 531 250 La 25

Mo—Sams v Adams Transfer & Storage Co 291 S W 2d 593

N J—Garvey v Public Service Co-ordinated Transport 57 A 2d 14, 136 N J Law 533

Va—Gamble v Hill, 156 S E 2d 888, 208 Va 171

Rear-end collision

Tex—Yellow Cab Co v Davila, Civ App 454 S W 2d 266 err ref no rev err

57 U S—Hennessey v Burlington Transp Co, D C Mont 103 F Supp 660—Dahl v Moac Service Co D C N Y 112 F Supp 499

Ill—Cooper v Safeway Lines, 26 N E 2d 632, 301 Ill App 302

Ky—Lyons v Southeastern Greyhound Lines, 137 S W 2d 1107 282 Ky 106

Md—Yellow Cab Co v Bonds, 225 A 2d 41 245 Md 86

N Y—Hardie v Stern, 120 N Y S 2d 805

Pa—Polando v Blue Ridge Transp Co 97 A 2d 838 374 Pa 485

Wis—McCauley v Balsley 8 N W 2d 299 242 Wis 528

Failure to keep lookout to rear

La—Willis v Aetna Cas & Sur Co, App 152 So 2d 593

58 Fla—Tampa Electric Co v Jones, 190 So 26, 138 Fla 746—Red Top Cab & Baggage Co v Rothermund, 14 So 2d 665 153 Fla 321

La—Gross v Teche Lines, 21 So 2d 378, 207 La 354—Elkins v Travelers Indem Co supra, n 40—Dixon v Jenkins, App 139 So 2d 49

N Y—De Martino v Brooklyn & Queens Transit Corporation, 18 N Y S 2d 40, 258 App Div 1072, affd 33 N E 2d 254, 285 N Y 593—Collins v Troy Fifth Ave Bus Co 90 N Y S 2d 191 275 App Div 986

N C—Banks v Shepard, 52 S E 2d 215, 230 N C 86

Wis—McCauley v Balsley supra, n 57

§ 747. —— Concurrent Negligence of Two Carriers

59 Cal—Davis v City and County of San Francisco, 114 P 2d 359, 45 Cal App 2d 443

§ 748. —— Avoidance of Collisions with Animals, Vehicles, or Other Obstacles on or near Track

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65. Warning of danger

(3) Other cases

Mo—Chynski v St Louis Public Service Co App, 251 S W 2d 344

Pa—Cassell v Pittsburgh Rys Co 165 A 2d 632, 402 Pa 135

67 US—Barber v Teche Greyhound Lines, D C Fla 115 F Supp 209

Miss—C.J.S. cited in Teche Lines v Pittman, 4 So 2d 293, 295 191 Miss 735, 138 A L R 220

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(2) Other matters

Mass—Quast v Metropolitan Transit Authority 170 N E 2d 841, 341 Mass 733

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69 Wis—Lever v Northland-Greyhound Lines of Illinois, 286 N W 68, 231 Wis 554

71 Ky—Fisher v Louisville Transit Co, 303 S W 2d 272

La—Trippi v Toye Bros Yellow Cab Co, App, 133 So 2d 184

Tenn—Young v Tennessee Electric Power Co 122 S W 2d 821, 22 Tenn App 308

72 Conn—Anthony v Connecticut Co, 92 A 672, 88 Conn 700

§ 749. Dangerous Rate of Speed

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Ariz—Alexander v Pacific Greyhound Lines, 177 P 2d 229, 65 Ariz 187

Ga—Phillips v Howard, 136 S E 2d 473, 109 Ga App 404

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It is negligence toward passengers

(6) Ky—Louisville Taxicab & Transfer Co v Kelley, 455 S W 2d 535

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It is not negligence toward passengers

(2) Other illustrations

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Wash—Wilcoxen v City of Seattle, 203 P 2d 658, 32 Wash 2d 734—Hedges v Chicago, M, St P & P R Co 379 P 2d 199, 61 Wash 2d 418

Whether jerk violates or unusual dependent on circumstances

Mass—Cantara v Massachusetts Bay Transp Authority 323 N E 2d 759 3 Mass App 81

82 US—Oliver v Yellow Cab Co, supra, n 81

Ind—Chicago & Calumet Dist Transit Co v Stravatzakes, 156 N E 2d 902, 129 Ind App 337—Geary v Chicago & Calumet Dist Transit Co, 245 N E 2d 187, 144 Ind App 192

Kan—Dryden v Kansas City Public Service Co, 238 P 2d 501 175 Kan 31

Ky—Ken-Ten Coach Lines v Hughes, 202 S W 2d 172, 304 Ky 692

Okl—Yellow Cab Operating Co v Robinson, 105 P 2d 535 187 Okl 669

Pa—Shedlock v Wyoming Valley Auto Bus Co Com Pl 34 Luz L Reg Rep 312, affd 17 A 2d 384 340 Pa 377

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Va—C.J.S. cited in Crist v Washington, Virginia and Maryland Coach Co 85 S E 2d 213 215, 196 Va 642, cert den 76 S Ct 50, 350 U S 823, 100 L Ed 736, reh den 76 S Ct 176, 350 U S 905, 100 L Ed 794

Wash—Cassels v City of Seattle, 81 P 2d 275 195 Wash 433

Conduct held to constitute negligence

(4) Other instances

D C—D C Transit System, Inc v Carney, App 254 A 2d 402

Conduct held not to constitute negligence

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Key physical factor stated

Mass—Cantara v Massachusetts Bay Transp Authority, 323 N E 2d 759 3 Mass App 81

83 Mass—Berger v Massachusetts Bay Transp Authority, 246 N E 2d 665, 355 Mass 695

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La—Hughes v Baton Rouge Electric Co, supra, n 81—Wooten v Thompson, App, 69 So 2d 557

Md—Smith v Baltimore Transit Co 128 A 2d 413 211 Md 529—Retkowsky v Baltimore Transit Co 160 A 2d 791 222 Md 433

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Mich—Sherman v Flint Trolley Coach, 8 N W 2d 115 304 Mich 404

N Y—Tradell v New York Rapid Transit Corporation, 22 N E 2d 244 281 N Y 82

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Sudden acceleration or stopping

(1) Mass—Bray v Boston Elevated Ry 21 N E 2d 957, 303 Mass 379

Pa—Martin v Pennsylvania Greyhound Lines, 22 Northumb Leg J 266

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(5) Other cases

Mich—Russ v City of Detroit, Dept of St Rys 53 N W 2d 353 333 Mich 505

Beyond passenger's reasonable anticipation

D C—Klenk v Capital Transit Co, Mun App 139 A 2d 275

Pa—Kennedy v Philadelphia Rapid Transit Co 10 A 2d 793 138 Pa Super 371—Cocivera v Philadelphia Transp Co 152 A 2d 272, 190 Pa Super 50

(2) Similar statements

Pa—Zager v Pittsburgh Railways Co 165 A 2d 30, 401 Pa 516

Sufficient violence to indicate negligence necessary

(2) Negligence not indicated

Pa—Miller v Pittsburgh Rys Co 144 A 2d 514 187 Pa Super 334

(3) Other instances

Pa—Zager v Pittsburgh Railways Co 165 A 2d 30 401 Pa 516

Violent stop of bus not per se negligence

D C—Washington v Washington, Virginia & Maryland Coach Co, D C, 250 F Supp 888

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85 US—Murray v Rio Grande Motorway C A Utah, 171 F 2d 82—Barnett v City of Detroit D C Mich, 139 F Supp 134, affd, C A, 245 F 2d 445—Reitan v Travelers Indem Co C A Wis 267 F 2d 66—Oliverius v Pennsylvania R Co C A Ind 290 F 2d 909

Ark—Missouri Pac R Co v Baum, supra, n 84—St Louis-San Francisco Ry Co v Porter supra, n 84

D C—Wiggins v Capital Transit Co Mun App, 122 A 2d 117 57 A L R 2d 1—Schefler v Capital Transit Co C A 239 F 2d 73, 99 U S App D C 253—Klenk v Capital Transit Co Mun App 139 A 2d 275

Fla—Rivers v Jacksonville Coach Co App 134 So 2d 869, decision quashed and remand Sup 144 So 2d 308—Transit Cas Co v Parbelt, App 382 So 2d 359

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Md—Kaufman, by Deutch v Baltimore Transit Co 78 A 2d 464 197 Md 141—Retkowsky v Baltimore Transit Co 160 A 2d 791 222 Md 433—Baltimore Transit Co v Pue, 220 A 2d 551 243 Md 256

Mass—Cushman v Boston, W & N Y St Ry Co supra, n 84—Tsacoyeanes v Canadian Pac Ry Co 162 N E 2d 23 339 Mass 726—Berger v Massachusetts Bay Transp Authority 246 N E 2d 665 355 Mass 695

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Okl—C J S. quoted in Broome v Atchison, T & S F Ry Co, 271 P 2d 1099, 1100

Pa—Smith v Pittsburgh Rys Co 175 A 2d 844 405 Pa 340

Wash—Wiggins v North Coast Transp Co supra, n 84—Wilcoxen v City of Seattle, supra, n 81—Nopson v City of Seattle, 207 P 2d 674, 33 Wash 2d 772—Gentry v Greyhound Corp 283 P 2d 979 46 Wash 2d 631

W Va—Browning v Monongahela Transp Co 27 S E 2d 481 126 W Va 195

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86 Fla—Loftin v Anderson, 66 So 2d 470

Ky—Morrison v Kentucky Bus Lines, Inc 356 S W 2d 757—Moore v Lexington Transit Corp 418 S W 2d 245

La—Oppenheim v Toye Bros Yellow Cab Co supra, n 40—Picataca v Gutt[illegible] 163 So 2d 130 writ ref 164 So 2d 363, 246 La 382 Pu[illegible]ll v Logan Cab Co, App 276 So 2d 324, writ den, Sup, 278 So 2d 507

Md—Bal[illegible]n Transit Co v O'Donovan, 78 A 2d 647, 197 Md 274

Mass—C[illegible]y v M[illegible]t Bay Transp Authority, 295 N E 2d 173 1 Mass App 815

Mich—Waterman v City of Detroit, supra, n 85—Cashaw v Great Lakes Greyhound Lines, 49 N W 2d 183, 331 Mich 291

Miss—Teche Lines v Putman, 4 So 2d 293 191 Miss 735 138 A L R 220

Mo—Jarboe v Kansas City Public Service Co 220 S W 2d 27, 359 Mo 8—Lukitsch v St Louis Public Service Co, 246 S W 2d 749 362 Mo 1071

N H Ma[illegible]ald v Public Service Co of N H, 41 A 2d 247, 93 N H 276

N Y—Hoffman v Lehman, 145 N Y S 2d 105, 286 App Div 487, affd 159 N Y S 2d 839 2 N Y S 2d 824, 140 N E 2d 749—Z[illegible]chart[illegible] v Fist Service Corp, 76 N Y S 2d 461

Ohio—C[illegible]ugielewicz v City of Cleveland, App, 104 N E 2d 703—Str[illegible]anos v City of Cleveland, App, 77 N E 2d 504

Wis—Jacobs v Milwaukee & Suburban Transport Corp, 165 N W 2d 162, 41 Wis 2d 661

Assuming car will stay on right side of road

(2) O[illegible] g vehicle—Green v Baton Rouge Bus Co, La App, 66 So 2d 344

87 U.S. [illegible]ber v Teche Greyhound Lines, D C Fla 115 F Supp 209

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88 Ark—Hot Springs St Ry Co v Ross, 261 S W 2d 789 222 Ark 546

D C—D C Transit System, Inc v Carrye, App 254 A 2d 402

Fla—Jacksonville Coach Co v Rivers, 144 So 2d 308

La—Cooper v Hargreve, App 210 So 2d 64

Mo—Oblamski v St Louis Public Service Co App 251 S W 2d 344

Evidence, nor surmise, required to show negligence

Mo—Lukitsch v St Louis Public Service Co 246 S W 2d 74 362 Mo 1071

91 Kan—C J S cited in Wilson v Union Pac R Co 90 P 2d 1115 1117 150 Kan 127

92. Employee held not negligent

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§ 751. Acts in Emergencies

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Okl—C J S. quoted in Dunber v American Airlines, Inc 376 P 2d 226, 231

Pa—Lambert v Pittsburgh Rys Co 175 A 2d 870, 405 Pa 364

Tenn—Stacks v Veteran's Cab Co 366 S W 2d 539 51 Tenn App 272

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94 Fla—Loftin v Anderson, 66 So 2d 470—Mulkey v Zimmerman App 181 So 2d 546

La—Johnson v Shreveport Transit Co App, 137 So 2d 463—Shannon v Shreveport Transit Co App 149 So 2d 206, application den 150 So 2d 770, 244 La 152

However, it has also been held that the degree of care never changes,[95 5] and is the highest degree of care,[95 10] or the care of a very prudent and cautious person.[95 15] Nevertheless, such rule does not require the exercise of the same ordered judgment in an emergency as under other and more ordinary circumstances.[95 20]

95.5 Ky—Ken-Ten Coach Lines v Siler 197 S W 2d 406, 303 Ky 263

95.10 Conn—Cadwell v Watson, 60 A 2d 168 134 Conn 640

D C—Cole v Capital Transit Co C A 195 F 2d 568, 90 U S App D C 289

Ky—Ken-Ten Coach Lines v Siler, 197 S W 2d 406, 303 Ky 263—Roberts v Greyhound Lines, Inc 427 S W 2d 804

Mo—Lukitsch v St Louis Public Service Co, 246 S W 2d 749 362 Mo 1071

N J—Massotto v Public Service Coordinated Transport, 176 A 2d 280 71 N J Super 39

Ohio—Stremanos v City of Cleveland, App, 77 N E 2d 504

Mere observance of rules of road insufficient

Ky—Conley's Adm'r v Ward, 291 S W 2d 568

95.15 Tex—Texas Bus Lines v Whatly Civ App 210 S W 2d 626, err ref no rev err

95.20 Ky—Louisville Ry Co v Logan, 206 S W 2d 80, 306 Ky 35

La—Oppenheim v Toye Bros Yellow Cab Co, 7 So 2d 420 affd 14 So 2d 854 203 La 1067—Wayne v New Orleans Public Service, App, 52 So 2d 55—Baker v Shreveport Rys Co, App 68 So 2d 228—Maroun v New Orleans Public Service, App 83 So 2d 397—Sepulvado v General Fire & Cas Co App 146 So 2d 428

Negligence of a third person does not affect the obligation to use due care,[95 25] and observance of such negligence may require increased care.[95 30] The doctrine of nonliability in the case of sudden emergency requires that the carrier be free from negligence in creating the emergency,[95 35] and that proper action be taken in the emergency.[95 40] In the face of imminent peril the employee in charge must bring the vehicle under such control that it can be stopped absolutely to avoid the threatened danger.[95 45]

95.25 Fla—Barnes v Liebig, 1 So 2d 247 146 Fla 219

95.30 Fla—Barnes v Liebig, 1 So 2d 247 146 Fla 219

95.35 U S—Lachman v Pennsylvania Greyhound Lines, C C A Va 160 F 2d 496

La—Baker v Shreveport Rys Co App 68 So 2d 228

Miss—Washington v Terrell, 185 So 2d 925

Mo—Mullen v St Louis Public Service Co, App, 388 S W 2d 950 transf to Sup 389 S W 2d 838

Question is not only what the carrier's employee did after he was faced with the emergency but how he happened to become involved in it

D C—Cole v Capital Transit Co C A, 195 F 2d 568 90 U S App D C 289—Williams v Capital Transit Co 215 F 2d 487 94 U S App D C 221

95.40 La—Buswell v Missouri Pac Transp Co App 184 So 399

N J—Sibley v City Service Transit Co 63 A 2d 708, 1 N J Super 199 affd 66 A 2d 864, 2 N J 458

95.45 Ark—Missouri Pac Transp Co v Miller, 299 S W 2d 41, 227 Ark 351

§ 752. Passengers Riding in Dangerous Places

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2 D C—Schaller v Capital Transit Co, C A 239 F 2d 73 99 U S App D C 253—Pennsylvania R Co v Pomeroy C A, 239 F 2d 435, 99 U S App D C 272, cert den 77 S Ct 861 353 U S 950, 1 L Ed 2d 859

N Y—Trudell v New York Rapid Transit Corporation 22 N E 2d 244, 281 N Y 82

§ 754. Duty to Injured Passenger

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8 Ind—L S Ayres & Co v Hicks, 40 N.E 2d 334, reh den 41 N E 2d 195 356, 220 Ind 86

Miss—C J S. cited in Alabama Great Southern R Co v Taylor, 199 So 310, 312, 190 Miss, 69

9 Miss—C J S. quoted at length in Continental Southern Lines, Inc v Robertson, 133 So 2d 543, 544 545 241 Miss 796, 92 A L R 2d 653

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13 Ind—L S Ayres & Co v Hicks, supra, n 8

§ 755. General Rule

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Cal—Sweet v Los Angeles Ry Co 179 P 2d 824, 79 Cal App 2d 195—Connor v Pacific Greyhound Lines, 232 P 2d 500, 104 Cal App 2d 746—Bua v G I Taxi Co 9 Cal Rptr 118, 186 C A 2d 612

DC—Ross v Pennsylvania R Co, Mun App 55 A 2d 346.

Fla—Harvin v Kenan, 26 So 2d 668, 157 Fla 603

Ill—McNealy v Illinois Cent R Co 193 N E 2d 879 43 Ill App 2d 460—Dawkins v Chicago Transit Authority, 284 N E 2d 362, 5 Ill App 3d 758

Ky—Southeastern Greyhound Lines v Donohue, 182 S W 2d 328, 298 Ky 139—Howard v Fowler, 207 S W 2d 559 306 Ky 567—Adkins v Greyhound Corp, 357 S W 2d 860

La—Taylor v City of Shreveport, App 29 So 2d 792—Kendall v New Orleans Public Service, App 45 So 2d 541—Cary v New Orleans Public Service, Inc 250 So 2d 92, writ ref 253 So 2d 67 259 La 808—Wagner v New Orleans Public Service Inc, App, 297 So 2d 733, writ den, Sup, 302 So 2d 15

Md—Sun Cab Co v Cusack, 121 A 2d 188, 209 Md 354

Miss—Mississippi City Lines v Bullock, 13 So 2d 34 194 Miss 630, 145 A L R 1199

Mo—Rothweiler v St Louis Public Service Co App, 224 S W 2d 569 revd on oth grds 234 S W 2d 552, 361 Mo 259—Thomas v Kansas City Public Service Co, App 289 S W 2d 141

Mont—Fergus County v Intermountain Transp Co 102 P 2d 489, 110 Mont 398

NJ—Weinberger v G R Wood, Inc, 12 A 2d 689 124 N J Law 518

NY—Accetta v City of New York, 48 N Y S 2d 487—Vogeley v City of New York, 48 N Y S 2d 487—Sullivan v Abraham & Straus, Inc 75 N Y S 2d 221

NC—Harris v Atlantic Greyhound Corp 90 S E 2d 710, 243 N C 346, 58 A L R 2d 939

Pa—Frederick v Philadelphia Rapid Transit Co 10 A 2d 576, 337 Pa 136

Tenn—Young v Tennessee Electric Power Co, 122 S W 2d 821, 22 Tenn App 308

Tex—O'Day v Sakowitz Bros, Civ App 462 S W 2d 119, err ref no rev err

Wash—Shuler v Hill, 287 P 2d 479

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Reasonable anticipation

(2) Other cases

Iowa—Murray v Cedar Rapids City Lines, 48 N W 2d 256, 242 Iowa 794

NJ—Weigold v Public Service Coordinated Transport, 114 A 2d 295 35 N J Super 354 affd 120 A 2d 43, 20 N J 309

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16 US—Wilson v Cornell C A Mich, 233 F 2d 799

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17 N.Y.—Decchalle v New York World Telegram Corp 248 N Y S 2d 1021, 20 A D 2d 892, affd 206 N E 2d 868, 15 N Y 2d 923 258 N Y S 2d 845

Sole legal cause relieving others of liability

La—Foab v New Orleans Public Service Inc App 4 Cir 471 So 2d 295, writ den 475 So 2d 364 reconsideration not considered 477 So 2d 698

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18 US—Atlantic Greyhound Corp v Lauritzen, C A Tenn 182 F 2d 540

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19 Ga—Central of Ga Ry Co v Roberts, 97 S E 2d 149, 213 Ga 135

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Md—Commissioner of Motor Vehicles v Baltimore & Annapolis R Co, 263 A 2d 592, 257 Md 529

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N M—Thompson v Anderman, 285 P 2d 507 59 N M 400

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Pa—Dowlin v Short Line, Inc 3 Chest Co 109

Negligence of third person

(2) Other cases

La—Baker v. Shreveport Rys Co, App 68 So 2d 228

N Y—Sheehan v City of New York, 354 N E 2d 832, 40 N Y 2d 496, 387 N Y S 2d 92

Acts held not intervening causes

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20 US—Oliver v Yellow Cab Co C A Ill 98 F 2d 192—Missouri-Kansas-Texas R Co v Ingram, C A Okl 322 F 2d 286—Falcon v Auto Buses Interurbanos, C A Tex, 418 F 2d 673

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Ky—Southeastern Greyhound Lines v Donohue, supra, n 15

La—Kendall v New Orleans Public Service, supra, n 15

Md—Smith v Baltimore Transit Co, 136 A 2d 386, 214 Md 560

Minn—Hall v Minneapolis St Ry Co 26 N W 2d 178, 223 Minn 243

Miss—Mississippi City Lines v Bullock, supra, n 15

Mo—McFarland v St Louis Cab Co App, 282 S W 2d 861

Or—Snyder v Portland Traction Co 185 P 2d 563 182 Or 344

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Failure to warn of danger

(2) Other cases—Crawley v City of Monroe, La App 26 So 2d 493

Negligence or tort of third person causing injury

(7) Other instances

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Acts held proximate cause

(4) Other acts—Brown v Gorum, D C La 45 F Supp 833

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N Y—Dasson v Third Ave Transit Corp 52 N Y S 2d 266, 268 App Div 1044

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Acts held not proximate cause

(7) Other acts

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Ill—Boyer v Atchison, T & S F Ry Co 217 N E 2d 303 70 Ill App 2d 214 Affd 230 N E 2d 173 38 Ill 2d 31 cert den 88 S Ct 1038, 390 U S 949 19 L Ed 2d 1140

La—Gross v Teche Lines, 21 So 2d 378, 207 La 354

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23 Pa—Hughes v Philadelphia Transp Co 35 A 2d 544 154 Pa Super 162

Acts held not proximate cause

(3) Other acts—Gross v Teche Lines, supra, n 22

24 U S—Ratliff v Chesapeake & O Ry Co C C A Ky 116 F 2d 155

La—Waller v King, 188 So 2d 231—Young v Fryoux, App 222 So 2d 638

N Y—Kerner v Surface Transp Corporation of New York, 28 N Y S 2d 126, 262 App Div 89

Or—Sanders v Rose City Transit Co 480 P 2d 709 258 Or 1

Tex—Couch v Hale, 404 S W 2d 920

Not proximate cause

(2) Other cases

Tex—Texas & N O R Co v Solgaard, Civ App 223 S W 2d 665 revd on oth grds 229 S W 2d 777 149 Tex 181

25 Ariz—Alexander v Pacific Greyhound Lines, 177 P 2d 229 65 Ariz 187

Ga—Piller v Hanger Cab Co 154 S E 2d 420 115 Ga App 260

Wis—Nayes v Milwaukee Electric Ry & Light Co 294 N W 812, 237 Wis 141

Act of carrier held proximate cause

(4) Other cases

La—Batiste v Robottom's Mortuary App 258 So 2d 663

Okl—Yellow Dime Cab Co v Pike, 158 P 2d 469 195 Okl 373

Held not proximate cause

(1) Md—E H Koester Bakery Co v Poller 50 A 2d 234

(5) Other instances

Ky—Greyhound Corp v Allen, 353 S W 2d 558

30 Tex—Houston Transit Co v Zimmerman Civ App 200 S W 2d 848

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30 Ill—Hyde v Saunders, 86 N E 2d 843 338 Ill App 205

Held proximate cause

(2) Other cases—Verbeten v Huettl supra, n 22

Acts held not proximate cause

(7) Va—Smith v Virginia Transit Co 147 S E 2d 110, 206 Va 951

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31 D C—Crusade v Capital Transit Co Mun App 63 A 2d 878 8 A L R 2d 229

Ill—Krueger v Richardson, supra, n 18

Ky—Southeastern Greyhound Lines v Donohue, supra, n 15

Tex—El Paso Electric Co v Barker, 137 S W 2d 17 134 Tex 496

Wis—Turk v H C Prange Co 119 N W 2d 365 18 Wis 2d 547

Defective equipment held not proximate cause

(2) Other matters

Md—Smith v Baltimore Transit Co 136 A 2d 386 214 Md 560

Negligence of third person

(3) Other cases Merritt v Interstate Transit Lines, C A Iowa, 171 F 2d 605

Pa—Archer v Pennsylvania R Co 72 A 2d 609 166 Pa Super 538

32 Ky—Greyhound Terminal of Louisville v Thomas, 209 S W 2d 478, 307 Ky 44

Mo—West v Thompson, App 151 S W 2d 129

Failure to provide proper place for alighting

(2) Other matters

Ohio—Dietrich v Community Traction Co 203 N E 2d 344, 1 Ohio St 2d 38

§ 757. Nature and Form

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Process Requirements of a statute relating to service of process upon foreign corporations apply to actions by passengers for personal injuries [33.5]

33.5 "Managing agent" construed

N Y—Hardaway v Illinois Cent R Co 170 N Y S 2d 584 9 Misc 2d 705

§ 758. Right of Action and Conditions Precedent

Library References

Carriers ⇐310 et seq.

34. No cause of action for breach of contract

U S—Hunt v Sun Valley Co Inc C A Idaho 561 F 2d 744

N Y—Albert v State, 362 N Y S 2d 341 80 Misc 2d 105

Contract clause in Warsaw convention not intended to be exclusive cause of action

U S—Tokio Marine and Fire Ins Co Ltd v McDonnell Douglas Corp C A N Y 617 F 2d 936

The fact that plaintiff has made numerous prior claims and has suffered numerous prior or subsequent injuries does not bar his right of action [35.5]

35.5 La—Burgin v Checker Cab Co App 240 So 2d 559

No federal statute confers any right of action for the death of a passenger due to violation of the Safety Appliance Acts [37.1]

37.1 U S—Jacobson v New York, N H & H R Co C A Mass 206 F 2d 153, affd 74 S Ct 474 347 U S 909 98 L Ed 1067

38. Condition subsequent

Conn—Bulkley v Norwich & W Ry Co 70 A 1021 81 Conn 284 129 Am S R 212

40. Immediate notice not required

N Y—Taylor v New York City Transit Authority 405 N Y S 2d 95, 63 A D 2d 630

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42 Ill—Sims v Chicago Transit Authority 122 N E 2d 221 4 Ill 2d 60

45 N C—Shortley v Northwestern Airlines, D C 104 F Supp 152

§ 759. Jurisdiction and Venue

50 Va—Solomon v Atlantic Coast Line R Co 46 S E 2d 369 187 Va 240

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52 Mo—State ex rel Thompson v Terte, 207 S W 2d 487 357 Mo 229

N Y—Wesse v Southern Pac Co, 18 N Y S.2d 86, 173 Misc 670

Tex—Southern Pac Co v Blake, 128 S W 668 61 Tex Civ App 396, err ref

Federal Safety Appliance Act

Ill—Boyer v Atchison, T & S F Ry Co 230 N E 2d 173 38 Ill 2d 31 cert den 88 S Ct 1038 390 U S 949 19 L Ed 2d 1140

However, a foreign carrier not doing business in the forum is not subject to suit for an injury not occurring in the forum. [52.5]

52.5 U S—Wilcox v Pennsylvania R Co D C N Y 269 F Supp 326

N Y—Hardaway v Illinois Cent R Co 170 N Y S 2d 584 9 Misc 2d 705

53 Ga—Radcliffe v Boyd Motor Lines, Inc 70 S E 2d 4 129 Ga App 725

Ky—Black v Bishop, 209 S W 2d 482, 307 Ky 40—Gess v Wilder 36 S W 2d 617 237 Ky 82

Special venue statutes

U S—Still v Missouri Pac R Co, D C Okl, 195 F Supp 78

Treaty jurisdiction under Warsaw convention

U S—Vergara v Aeroflot "Soviet Airlines" (General Dept of Intern Air Services, Union of Soviet Socialistic Republics), D C Neb 390 F Supp 1266

N Y—Rinck v Deutsche Lufthansa A G, 395 N Y S 2d 7 57 A D 2d 370 affd 376 N E 2d 929 41 N Y 2d 714 405 N Y S 2d 456

54 Ga—United Motor Freight Terminal Co v Dozier 39 S E 2d 496, 74 Ga App 244

Ky—Black v Bishop, supra, n 53—Wilson v Little, 293 S W 2d 715

Okl—Clark v Walworth, 56 P 2d 355, 176 Okl 340

Tex—Texas & N O R Co v Tankersley Civ App 295 S W 2d 253

55 Cal—Williamson v Pacific Greyhound Lines, 153 P 2d 990 67 Cal App 2d 250

Ga—Louisville & N R Co v Meredith, 18 S E 2d 53, 66 Ga App 488 affd 21 S E 2d 101 194 Ga 106—Modern Coach Corp v Faver, 73 S E 2d 497 87 Ga App 221

La—Johnson v New Orleans Public Service, Inc App 293 So 2d 203

N C—Hill v Atlantic Greyhound Corp, 51 S E 2d 183, 229 N C 728

56 Kan—Welsh v Atchison T & S F Ry Co 287 P 2d 1019 167 Kan 303

57 Ky—Black v Bishop, supra, n 53

Tex—Texas & N O R Co v Tankersley, supra, n 54

59 Ky—Turner's Adm'x v Louisville & N R Co 62 S W 1025, 110 Ky 879 23 Ky L R 340—Silver Fleet Motor Express v Casey 155 S W 2d 863, 288 Ky 233

Ohio—New York, C & St L R Co v Mattinger 25 N E 2d 349 136 Ohio St 271

Tex—Burlington-Rock Island R Co v Garlitz, Civ App 151 S W 2d 889

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60 N Y—Brady v Rockland Coaches, 55 N Y S 2d 588

§ 760. Parties

Library References

Carriers ⇐309.

61 Ky—Louisville Taxicab & Transfer Co v Smallwood 224 S W 2d 450, 311 Ky 405

Mo—Hammond v Crown Coach Co 263 S W 2d 362, 364 Mo 508

N Y—Freeman v Manhattan Cab Corp 150 N Y S 2d 674, 1 Misc 2d 601

Ohio—Stafford v Central Greyhound Lines, App, 34 N E 2d 587

Wash—Lewis v Bertero, 77 P 2d 786, 194 Wash 186

Petition to join additional parties held insufficient

Pa—Kaley v Wartluft, 45 Pa Dist & Co 581

71 Cal—Grier v Ferrant, 144 P 2d 631, 62 Cal App 2d 306

§ 761. Declaration, Complaint, or Petition

Library References

Carriers ⇐245, 314

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73 Ga—Columbus Electric & Power Co v Wheat 123 S E 44 32 Ga App 366

Mo—Hall v St Louis Public Service Co App 259 S W 2d 88, transf Sup 266 S W 2d 597

74 US—Sparks v Chicago & E I R Co D C Ill 42 F Supp 1019

SC—Lentz v Carolina Scenic Coach Lines, 38 S E 2d 11 208 S C 278

76 Kan—Welsh v Atchison, T & S F Ry Co supra, n 56

Ohio—Tobin v Penn-Ohio Coach Lines Co App 34 N E 2d 1018

Declaration, complaint, or petition held sufficient, etc.

(7) Pfiefer v Yellow Cab Co of Atlanta, 76 S E 2d 225 88 Ga App 221 foll 76 S E 2d 229 88 Ga App 227

(11) Louisville & N R Co v Richard, 14 So 2d 561 31 Ala App 197 cert den 14 So 2d 564 244 Ala 595

(14) Loftin v Florida Cities Bus Co 32 So 2d 166, 159 Fla 514—Edwards v Jacksonville Coach Co 88 So 2d 543

(19) Other cases

US—Shipley v Atlantic Greyhound Corp D C W Va 164 F Supp 327

Cal—Rodin v American Can Co 284 P 2d 530, 133 C A 2d 524

Fla—Swilley v Economy Cab Co of Jacksonville, 46 So 2d 173

Ga—Covington v Brewer, 115 S E 2d 368 101 Ga App 724—Reeves v Southeastern Motor Lines, Inc 115 S E 2d 588, 102 Ga App 193

Ill—Carson v Weston Hotel Corp 115 N E 2d 800, 351 Ill App 523

NC—Hood v Queen City Coach Co, 99 S E 2d 925, 246 N C 684

Ohio—German v Muskingum Valley Transit Co 94 N E 2d 52

Declaration, complaint, or petition held insufficient, etc.

(2) Fla—Harvin v Kenan, supra, n 15

Ga—Hanks v Georgia Power Co 72 S E 2d 198, 86 Ga App 654, foll 72 S E 2d 202, 86 Ga App 660

Tenn—Matthews v Southern Coach Lines, 229 S W 2d 340, 190 Tenn 282

Wash—Wullbrandt v City of Seattle, 84 P 2d 123, 196 Wash 645

(4) Other cases

US—Weeks v Denver Tramway Corporation, C C A Colo 108 F 2d 509

Ala—Capital Motor Lines v Loring, 189 So 897 238 Ala 260

Kan—Jones v Kansas City Public Service Co, 147 P 2d 723 158 Kan 367

(4) Other matters

Miss—Wilson v Terry 67 So 2d 387 218 Miss 531

Federal Safety Appliance Act

Ill Boyce v Atchison, T & S F Ry Co, 230 N E 2d 173, 38 Ill 2d 31 cert den 88 S Ct 1038, 390 U S 949 19 L Ed 2d 1140

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77 US—Sparks v Chicago & E I R Co, supra, n 74

78 Fla—Swilley v Economy Cab Co of Jacksonville, supra, n 76

Ky—Louisville & N R Co v Barnes Admx, 180 S W 2d 546, 297 Ky 616

Allegations held sufficient to show breach of duty

(4) Failure to furnish safe toilet facilities

Cal—Cooper v National R R Passenger Corp, 119 Cal Rptr 541, 45 C A 3d 389 76 A L R 3d 1210

79 Cal—Cooper v National R R Passenger Corp, 119 Cal Rptr 541 45 C A 3d 389 76 A L R 3d 1210

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86. **Allegations held sufficient**

(3) Other cases—Greer v Ferrant, supra, n 71

Allegations held insufficient

(2) Ill—Carson v Weston Hotel Corp 97 N E 2d 620, 342 Ill App 602

91. **Taxicab passenger**

(2) Other instances

Miss—Wilson v Terry supra, n 76

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93 Ga—Louisville & N R Co v Meredith supra, n 55

Idaho—Straley v Idaho Nuclear Corp 500 P 2d 218, 94 Idaho 917

Ill—Hill v Sprague, 24 N E 2d 887 303 Ill App 229

Md—Lusby v Baltimore Transit Co, 86 A 2d 407 199 Md 283

Mo—Hall v St Louis Public Service Co supra, n 73

Ohio—Brown v Pennsylvania Greyhound Lines, 15 Ohio Supp 1

Allegations held sufficient

(13) Other cases

Cal—Freitas v Peerless Stages, 239 P 2d 671 108 C A 2d 749 33 A L R 2d 778

Del—Winter v Pennsylvania R Co, Del Super 61 A 2d 398, 5 Terry 429

Ga—Korn v Tamiami Trail Tours, Inc 133 S E 2d 616, 108 Ga App 510

Ill—Elliott v Illinois Cent R Co 47 N E 2d 375 318 Ill App 112

Iowa—Fisher v Des Moines Transit Co 111 N W 2d 633 253 Iowa 195

La—Sewell v Gulf C & S F Ry Co App 11 So 2d 923

Mo—Payne v Stott, App 181 S W 2d 161—Hoeller v St Louis Public Service Co App 199 S W 2d 7

Mont—Whitney v Northwest Greyhound Lines, 242 P 2d 257 125 Mont 528

Allegations held insufficient

(2) Harvin v Kenan, 26 So 2d 668, 157 Fla 603

(6) Other cases—Winter v Pennsylvania R Co Del Super, 57 A 2d 750, 5 Terry 203

Ga—Central of Georgia Ry Co v Roberts, 100 S E 2d 883, conf to 101 S E 2d 588, 96 Ga App 742—Korn v Tamiami Trail Tours, Inc 133 S E 2d 616, 108 Ga App 510

Kan—White v Larkin, 224 P 2d 668, 170 Kan 317

N Y—Hunt v New York Cent R Co 103 N Y S 2d 355 198 Misc 817

Tenn—Memphis St Ry Co v Brown, 260 S W 2d 401 37 Tenn App 96

Tex—Colonia v San Antonio Transit Co Civ App 223 S W 2d 335 err dism

Wis—Moen v Madison Rys Co 225 N W 821 199 Wis 168, foll 225 N W 822, 199 Wis 171

(7) Other allegations

Md—Lusby v Baltimore Transit Co, 72 A 2d 754 195 Md 118

Mo—Welch v Thompson, 210 S W 2d 79 357 Mo 703

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95 Ark—McLean v Missouri Pac Transp Co, 187 S W 2d 727 208 Ark 822

Ga—Crane v Doolittle, 154 S E 2d 634, 115 Ga App 309

Mo—Van Houten v Kansas City Public Service Co 122 S W 2d 868, 233 Mo App 423—Welch v Thompson, supra, n 93

Res ipsa loquitur

Cal—Rodin v American Can Co supra, n 76

96 Ala—Powell v Goforth, 188 So 2d 766, 279 Ala 601

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97 Mo—Hall v St Louis Public Service Co, 266 S W 2d 597, transf App, 259 S W 2d 88

Ohio—Brown v Pennsylvania Greyhound Lines, 15 Ohio Supp 1 29 O O 442

4 **Allegations held specific**

(3) Other allegations—Boulos v Kansas City Public Service Co Mo App 215 S W 2d 750 revd on oth grds 323 S W 2d 446, 359 Mo 763

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13 US—Alderman v Baltimore & O R Co D C W Va 113 F Supp 881

14 Cal—Cooper v National R R Passenger Corp 119 Cal Rptr 541 45 C A 3d 389 76 A L R 3d 1210

15 US—Sutton v Great Lakes Greyhound Lines, D C Ky 51 F Supp 715

Ga—Lusk v Smith, 137 S E 2d 734 110 Ga App 36

Kan—Campbell v Kansas Power & Light Co 193 P 2d 177 165 Kan 134

Mo—Harding v Kansas City Public Service Co 188 S W 2d 60—Hoeller v St Louis Public Service Co App 199 S W 2d 7

16 Kan—Marsh v Atchison, T & S F Ry Co 271 P 2d 247 176 Kan 430

17 Md—St Michelle v Catania, 250 A 2d 874 252 Md 647

18 Ala—Birmingham Electric Co v Guess, 131 So 883, 222 Ala 280

22 Cal—Connell v Clark, 200 P 2d 26, 88 Cal App 2d 941

23 Ga—Southeastern Greyhound Corporation v Graham, 26 S E 2d 371 69 Ga App 621

Idaho—Clark v Tarr 270 P 2d 1016, 75 Idaho 251

N Y—Manfredonia v American Airlines, Inc 416 N Y S 2d 286, 68 A D 2d 131

Complaints held insufficient

(2) Other complaints

D C—Abrams v Baltimore & O R Co C A 223 F 2d 331 96 U S App D C 39

Ga—Schofwin v Wilbanks, 70 S E 2d 792, 86 Ga App 99

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27 **Assault by driver**

Mass—Gilmore v Acme Taxi Co, 212 N E 2d 235 349 Mass 651

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43. **Allegations held sufficient**

Ala—Simpson v Ward, 77 So 2d 376, 38 Ala App 49 cert den 77 So 2d 383 262 Ala 703

Allegations held insufficient

Ga—Hanks v Georgia Power Co 72 S E 2d 198 86 Ga App 654, foll 72 S E 2d 202, 86 Ga App 660

Tex—Colonia v San Antonio Transit Co, Civ App 223 S W 2d 335 err dism

44 La—Pugh v City of Monroe, App 6 So 2d 83

45. **Allegations held sufficient**

(3) Other allegations

Ala—Parker v Birmingham Elec Co, 48 So 2d 873 254 Ala 488—Western Ry of Ala v Brown, 196 So 2d 392, 280 Ala 543

Ga—Hanks v Georgia Power Co supra, n 43

Mo—Moses v Kansas City Public Service Co 188 S W 2d 538, 239 Mo App 361

Allegations held insufficient

(3) Other allegations

Fla—Swilley v Economy Cab Co of Jacksonville, 46 So 2d 173

48 Ala—Parker v Birmingham Elec Co supra, n 45

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51 Ga—Bibb Transit Co v Scarborough, 83 S E 2d 221 90 Ga App 427

Del—Cannon v Delaware Electric Power Co, Super, 24 A 2d 325, 2 Terry 415

Ky—Cincinnati Newport & Covington Transp Co v Fischer 357 S W 2d 870

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63 Ga—Bibb Transit Co v Scarborough, supra, n 51

65 U S—Sparks v Chicago & E I R Co D C Ill 42 F Supp 1019

66 Del—Winter v Pennsylvania R Co Super 61 A 2d 398 5 Terry 429

Fla—Edwards v Jacksonville Coach Co, 88 So 2d 543

Ga—Greyhound Corp v Stokes 86 S E 2d 804 91 Ga App 674

Iowa—Band v Reinke, 298 N W 865 230 Iowa 515

Tex—Houston Transit Co v McQuade, Civ App 223 S W 2d 64, err ref

68 Ga—Besssman v Greyhound Bus Depot of Atlanta, 58 S E 2d 922 81 Ga App 428

69 Ga—Rome Ry & Light Co v Keel 60 S E 468 3 Ga App 769

Complaint not demurrable

(2) Other complaints—Hallow v Atlantic Coast Line R Co 24 S E 2d 633 222 N C 740

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70 La—Pugh v City of Monroe, supra, n 44

Allegations held sufficient

Ga—Piller v Hanger Cab Co 154 S E 2d 420 115 Ga App 260

(2) Other cases

Ala—Montgomery City Lines v Jones, 20 So 2d 599 246 Ala 291

Cal—Grier v Ferrant, 144 P 2d 631 62 Cal App 2d 306

Fla—Loftin v Florida Cities Bus Co 32 So 2d 166, 159 Fla 514

Ga—Reeves v Southeastern Motor Lines, Inc 115 S E 2d 588 102 Ga App 193—Savannah Transit Co v Odum, 125 S E 2d 538, 105 Ga App 740

Ind—Chicago & Calumet Dist Transit Co v Stravatzakes, 156 N E 2d 902, 129 Ind App 337

Complaint held insufficient

(2) Other cases—Southeastern Stages v Abdella, 41 S E 2d 799 75 Ga App 38

Wis—Reque v Milwaukee & Suburban Transport Corp 95 N W 2d 752 7 Wis 2d 111 reh den 97 N W 2d 182, 7 Wis 2d 111

72 Tex—Rodriquez v Zavala, Civ App 279 S W 2d 604

74. Allegation showing concurrent negligence

(2) Other allegations—Sparks Bus Line v Spears, 124 S W 2d 1031 276 Ky 600

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77 Mass—White v New York Cent R Co 145 N E 2d 583, 336 Mass 379

§ 762. Plea or Answer

79 Ala—Williford v Atlantic Coast Line R Co 113 So 44 216 Ala 309

Ohio—Hatso v Red Cab Co 67 N E 2d 553 77 Ohio App 301

Amendment

Okl—A & A Cab Operating Co v Allen, 147 P 2d 792, 194 Okl 103

Allegation of contributory negligence as conclusion improper

La—Parnell v City of Monroe, App, 98 So 2d 820

Limitations properly pleaded

N Y Bergman v Pan Am World Airways, Inc 299 N Y S 2d 982 32 A D 2d 95

80 Mo—Chrum v St Louis Public Service Co 242 S W 2d 54

81 Tex—Hunt v Drive Motor Coach Corp Civ App 187 S W 2d 250 err ref w m

83. Plea held not new matter

Ga—Atlantic Coast Line R Co v Thomas, 64 S E 2d 301 83 Ga App 477

Under statute abolishing the plea of general issue and requiring explicit admissions or denials of each allegation, a carrier with knowledge of plaintiff's status as passenger should admit such allegation,[90.5] or, lacking such knowledge, under statute should plead insufficient knowledge to form a belief, and attach a supporting affidavit to the pleading[90.10]

90.5 Ill—McNealy v Illinois Cent R Co, 193 N E 2d 879 43 Ill App 2d 460

Failure to deny held admission of status

Ill—Kelly v Chicago Transit Authority 217 N E 2d 560 69 Ill App 2d 316

90.10 Ill—McNealy v Illinois Cent R Co 193 N E 2d 879 43 Ill App 2d 460

§ 763. Issues, Proof, and Variance

Library References

Carriers ⇐245, 315.

91 Md—Pennsylvania R Co v Cook, 26 A 2d 384 180 Md 633 140 A L R 1188

Mo—Johnson v Kansas City Public Service Co 265 S W 2d 417

Tenn—Paschall v Southern Ry Co 208 S W 2d 531 186 Tenn 102

Tex—Cox v Ekstrom, Civ App 163 S W 2d 845, err ref

Wis—Fleischman v Holz, 127 N W 2d 9 23 Wis 2d 415

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92. Reliance on res ipsa loquitur doctrine

(1) Cal—Gamwell v Key System Transit Lines, 294 P 2d 1035 140 C A 2d 308

(5) Other matters

Mo—Fairley v St Louis Public Service Co App 389 S W 2d 378—Statler v St Louis Public Service Co App 300 S W 2d 831

93 Mo—Payne v Stott, App 181 S W 2d 161

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2 Mo—Payne v Stott, App 181 S W 2d 161

4 Ill—Neering v Illinois Cent R Co, 50 N E 2d 497 383 Ill 366 mand conf to 53 N E 2d 271 321 Ill App 625

Mich—Scott v Cleveland, 103 N W 2d 631 360 Mich 322

R I—Ponton v United Electric Rys Co 200 A 425 61 R I 203 117 A L R 518—Murphy v United Electric Rys Co, 11 A 2d 440, 64 R I 168

Wash—Cassels v City of Seattle, 81 P 2d 275 195 Wash 433

Essential elements

(2) Other cases

Ill—Lewis v Checker Taxi Co 103 N E 2d 192, 345 Ill App 301

6 Mo—Gillespie v Terminal R Ass'n of St Louis, App, 204 S W 2d 598

Wash—Bolander v Northern Pac Ry Co 388 P 2d 729, 63 Wash 2d 659

7 Miss—Yazoo & M V R Co v Smith, 196 So 230 188 Miss 856

Mont—Skelton v Great Northern Ry Co, 100 P 2d 929 110 Mont 257

N Y—Feibelmann v Compagnie Nationale Air France, 334 N Y S 2d 492, 70 Misc 2d 718

12 Ala—Western Ry of Ala v Brown, 196 So 2d 392, 280 Ala 543

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13 U S—Booth v Pioneer Yellow Cab Co D C Pa 46 F Supp 155—Hill v Pennsylvania Greyhound Lines, C A Pa 174 F 2d 171

Fla—Atlantic Greyhound Lines v Lovett, 184 So 133, 134 Fla 505

Ind—Pittsburgh, C C & St L Ry Co v Retz, 125 N E 424 71 Ind App 581

Ky—Lousville & N R Co v Taylor, 253 S W 2d 27

Mo—Hill v Montgomery 176 S W 2d 284 352 Mo 147

Ohio—Fitzgerald v City of Cleveland, 68 N E 2d 568

S C—Lentz v Carolina Scenic Coach Lines, 38 S E 2d 11, 208 S C 278

14 Or—Maynard v Oregon R Co, 72 P 590, 43 Or 63

16 Or—Snyder v Portland Traction Co 185 P 2d 563 182 Or 344

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17 Ky—V T C Lines v Taylor, 134 S W 2d 991 281 Ky 83

20 Ga—Harmon v Givens, 77 S E 2d 223 88 Ga App 629

N Y—Traeger v Farragut Gardens No 1, 107 N Y S 2d 525, 201 Misc 18

Ohio—Rigney v Cincinnati St Ry Co 131 N E 2d 413 99 Ohio App 105 50 A L R 2d 1443

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24 U S—White v Sears, Roebuck & Co, C A Va 242 F 2d 821, 66 A L R 2d 491

Va—Southern Passenger Motor Lines v Burks, 46 S E 2d 26, 187 Va 53

Evidence held admissible

(3) Other evidence

Ill—Baltes v Checker Taxi Co 169 N E 2d 596, 27 Ill App 2d 298

Mo—Fuerst v St Louis Public Service Co App, 368 S W 2d 550—Diener v Mid-American Coaches, Inc 378 S W 2d 509

28. Variance held not to exist

(10) Other cases

Ala—Western Ry of Ala v Brown, 196 So 2d 392, 280 Ala 543

Fla—Dunn Bus Service v Wise, 191 So 509 140 Fla 191

Ill—Campbell v Goldblatt Bros 49 N E 2d 817, 320 Ill App 138

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29 Ky—Beckwith v Louisville Ry Co, 124 S W 2d 737 276 Ky 499

N Y—DuBose v Velez, 313 N Y S 2d 881 63 Misc 2d 756

R I—Collins v Palmer 37 A 2d 658, 70 R I 143

Tex—Panhandle & S F Ry Co v Villarreal, Civ App 153 S W 2d 350

30. Variances held immaterial

Mass—Cantara v Massachusetts Bay Transp Authority, 323 N E 2d 759 3 Mass App 81

34 Conn—Cadwell v Watson, 60 A 2d 168, 134 Conn 640

Ill—Miller v Cummings, 55 N E 2d 403, 323 Ill App 297

La—Thomas v Shreveport Rys Co, App 187 So 822

N J—Auchter v Elbott Bus Corporation, 198 A 376, 120 N J Law 105

Variances held immaterial

(6) Other variances

Tenn—Lousville & N R Co v Powell, 11 Tenn App 253

§ 764. Presumptions and Burden of Proof

Library References

Carriers ⇐246, 316(1.5).

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42 US—Gonzales v Baltimore & O R Co C A W Va 318 F 2d 294 cert den 84 S Ct 208 375 U S 911 11 L Ed 2d 151

Ala—Cannon v Louisville & N R Co 42 So 2d 340, 252 Ala 571

Cal—Hamilton v Pacific Electric Ry Co 86 P 2d 829 12 Cal 2d 598

Fla—Kenan v Houstoun, 7 So 2d 837, 150 Fla 357

Ill—Dregne v Five Cent Cab Co 46 N E 2d 386, 381 Ill 594—Beachenstock v Chicago Motor Coach Co 123 N E 2d 350, 4 Ill App 2d 84

Ky—Louisville & N R Co v George, 129 S W 2d 986, 279 Ky 24

La—Shaw v New Orleans Public Service, App, 188 So 187

Mich—Max v City of Detroit, 60 N W 2d 145, 337 Mich 674

Mo—Mallett v St Louis Public Service Co 308 S W 2d 720—Burnett v St Louis Public Service Co 337 S W 2d 921

NJ Mathesen v Public Service Coordinated Transport, 1 A 2d 418, 121 N J Law 163

Pa—Carroll v City of Pittsburgh, 84 A 2d 505 368 Pa 436

Tex—Houston Transit Co v Zimmerman, Civ App 200 S W 2d 848—Dallas Ry & Terminal Co v Black, 257 S W 2d 416, 152 Tex 343—Jackson v Dallas Ry & Terminal Co, Civ App 273 S W 2d 463 err ref no rev err

Ownership, operation or control

(3) Gilmore v Huntington Cab Co 21 S E 2d 137 124 W Va 469

(5) Other cases—Carson v Weston Hotel Corp, 115 N E 2d 800, 351 Ill App 523—Nilsson v Checker Taxi Co 281 N E 2d 721, 4 Ill App 3d 718

Md—Safeway Trails, Inc v Smith, 159 A 2d 823 222 Md 206

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43 Ill—Heffernan v Mandel Bros, 17 N E 2d 523 297 Ill App 272

La—Burgin v Checker Cab Co App, 240 So 2d 559—Cary v New Orleans Public Service, Inc, 250 So 2d 92, writ ref 253 So 2d 67 259 La 808

Pa—Swartz v Harrisburg Taxicab & Baggage Co, 81 Dauph 331

Passenger's ignorance of facts

La—Pierce v Toye Bros Yellow Cab Co App 8 So 2d 562, affd 11 So 2d 236

46 D C—Marchetti v Olyowski, C A, 181 F 2d 285 86 U S App D C 215

N Y—Norris v Eckman, 129 N Y S 2d 100

Wash—Van Court v Lodge Cab Co 89 P 2d 206, 198 Wash 530

49 Ind—Evansville City Coach Lines, Inc v Atherton, 179 N E 2d 293, 133 Ind App 304

Taxicab bearing name of company

Tex—H T Cab Co v Gunns, Civ App, 280 S W 2d 360, err ref. no rev err

Other presumptions have been indulged.[50.5]

50.5. Operator of ambulance not violating law, but driving on right path of roadway

Mo—Richardson v Wendel, 401 S W 2d 455

52 Ill—[illegible] v Chicago Motor Coach Co, supra, n 42—Baltes v Checker Taxi Co, 169 N E 2d 596, 27 Ill App 2d 298

Va—Crist v Washington, Virginia and Maryland Coach Co, 85 S E 2d 213, 196 Va. 642, cert den 76 S Ct 50, 350 U S 823, 100 L Ed 736, reh den 76 S Ct 176, 350 U S 905, 100 L Ed 794

53 Cal—Dodge v San Diego Elec Ry Co., 208 P 2d 37 92 Cal App 2d 759

Ohio—Fink v New York Cent R Co App., 56 N E 2d 931

Burden not shifted by res ipsa loquitur rule

(3) Other instances

Cal—Schoenbach v Key System Transit Lines, 335 P 2d 725 168 C A 2d 302

D C—Missile Cab Ass'n v Rogers, Mun App 184 A 2d 845

Presumption only circumstantial evidence to be considered by jury

Or—Simpson v Gray Line Co, 358 P 2d 516, 226 Or 71

55 Tolman v Wieboldt Stores, Inc, 233 N E 2d 33, 38 Ill 2d 519—Barnes v Toye Bros Yellow Cab Co App, 204 So 2d 83

La—King v King, App 217 So 2d 395 253 La 270—Henderson v Baton Rouge Bus Co, App 217 So 2d 422

Pa—Foley v Reading Co 35 A 2d 315, 348 Pa 485

Wash—Heggen v City of Seattle, 288 P 2d 830, 47 Wash 2d 576

Sudden stop

N J—Pope v Veterans Taxi Service, 235 A 2d 34, 97 N J Super 274

Burden to show nonapplicability of statute

La—Reed v City of Alexandria, App 212 So 2d 286

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56 La—Roy v New Orleans Public Service, App 76 So 2d 425

Defendant may rely on weakness of plaintiff's case

Ill—Ivy v Chicago Transit Authority 161 N E 2d 881 23 Ill App 2d 251

Defendant not required to have theory of occurrence

Ill—Ivy v Chicago Transit Authority 161 N E 2d 881 23 Ill App 2d 251

57 U S—Davidson v Wabash R Co, D C Mich 73 F Supp 416, revd on oth grds C C A, 168 F 2d 300

La—Burnett v Yellow Cab Co of Shreveport, App 50 So 2d 670

Ohio—Bolser v Smalley, 101 N E 2d 147 89 Ohio App 161

Wash—Van Court v Lodge Cab Co supra, n 46

60. Holder of nontransferable ticket not presumed trespasser

N Y—Rothstein v New York & L B R Co 3 A 2d 592, 121 N J Law 570

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71 Wash—Van Court v Lodge Cab Co supra, n 46

72 U S—De Nicolo v Palmer, C C A N Y, 125 F 2d 126—Murray v Rio Grande Motorway, C A Utah, 171 F 2d 82

Ala—Montgomery City Lines v Jones, 20 So 2d 599 246 Ala 291—Waddell v Crescent Motors, 69 So 2d 414, 260 Ala 124

Cal—Profeta v Sears, Roebuck & Co, 318 P 2d 19 155 C A 2d 439

D C—Ross v Pennsylvania R Co Mun App, 55 A 2d 346—Pennsylvania R Co v Pomeroy, C A, 239 F 2d 435 99 U S App D C 272, cert den 77 S Ct 861, 353 U S 950, 1 L Ed 2d 859

Fla—Tampa Transit Lines v Cordin, 62 So 2d 10—Carlton v Miami Transit Co, App 147 So 2d 581—City Cab Co of Orlando, Inc v Green, App, 308 So 2d 540

Ill—Russell v Richardson, 24 N E 2d 185, 302 Ill App 589—Nilsson v Checker Taxi Co, 281 N E 2d 721 4 Ill App 3d 718

Ky—Fitzwater v Cincinnati, N & C R Co, 234 S W 2d 186, 314 Ky 157—Morrison v Kentucky Bus Lines, Inc, 356 S W 2d 757

La—Pearce v Toye Bros Yellow Cab Co App, 20 So 2d 377—Harris v Shreveport Rys Co App, 83 So 2d 517—Johnson v Continental Southern Lines, Inc, App, 113 So 2d 114, 74 A L R 2d 1328

Me—Roberts v Yellow Cab Co 240 A 2d 733

Md—Kaplan v Baltimore & O R. Co, 113 A 2d 415, 207 Md 56—Jones v Baltimore Transit Co, 127 A 2d 649 211 Md 423—Baltimore Transit Co v Poe, 220 A 2d 551 243 Md 256

Mass—Knych v Trustees of New York N H & H R Co 69 N E 2d 575 320 Mass 339—Ginsberg v Metropolitan Transit Authority 131 N E 2d 919 333 Mass 514—Egan v Metropolitan Transit Authority, 146 N E 2d 495 336 Mass 505—Spuller v Metropolitan Transit Authority 204 N E 2d 913 348 Mass 576

Mich—Oppenheim v Pitcairn, 292 N W 374 293 Mich 475

Minn—Derrick v St Paul City Ry Co 89 N W 2d 629, 252 Minn 102

Mo—Abramovitz v Wellston Taxi Co App 208 S W 2d 834—Venditti v St Louis Public Service Co 226 S W 2d 599 360 Mo 42—Stephens v St Louis Public Service Co 276 S W 2d 138—Swiastyn v St Joseph Light & Power Co App, 459 S W 2d 24

N J—Byron v Public Service Coordinated Transport, 5 A 2d 483, 122 N J Law 451—Snell v Coast Cities Coaches, 83 A 2d 797, 15 N J Super 595

N Y—Yedmak v City of New York, 91 N Y S 2d 195, affd 90 N Y S 2d 678 275 App Div 953—Hart v Lehman 151 N Y S 2d 522

Ohio—Glaze v City of Cleveland, App 92 N E 2d 416—Stine v Springfield City Lines, Inc 155 N E 2d 245, 106 Ohio App 429

Pa—Flank v Philadelphia Transp Co 201 A 2d 225 203 Pa Super 474

Tenn—Gray v Brown, 217 S W 2d 769 188 Tenn 152

Tex—El Paso Electric Co v Barker, 137 S W 2d 17, 134 Tex 496—Garza v San Antonio Transit Co Civ App 180 S W 2d 1006, err ref

Va—Cleveland v Danville Traction & Power Co 18 S E 2d 913 179 Va 256

Wash—White v Greyhound Corp 280 P 2d 670, 46 Wash 2d 260

W Va—Laphew v Consolidated Bus Lines, 55 S E 2d 881, 133 W Va 291

Prima facie case

(2) Other instances

U S—Greyhound Corp v Ault, C A Ga, 238 F 2d 198

La—Peters v City of Monroe, App, 91 So 2d 428.

Notice of conditions

(4) Pa—Poskin v Pennsylvania R Co 110 A 2d 865 177 Pa Super 348

(5) Other matters

Ill—Katamay v Chicago Transit Authority App, 273 N E 2d 510, 133 Ill App 2d 613 revd 289 N E 2d 623, 53 Ill 2d 27

La—Hurst v New Orleans Public Service, Inc, App 235 So 2d 103

N J—Karmazin v Pennsylvania R Co 196 A 2d 803 82 N J Super 123 reh den 198 A 2d 97, 82 N J Super 435

Presumption does not arise merely from presence of foreign object

La—Alexander v Continental Southern Lines, Inc, App 130 So 2d 539—Hurst v New Orleans Public Service, Inc, App, 235 So 2d 103.

73 U S—Hinton v Chicago, R I & P R Co C A Ill, 272 F 2d 449—Williams v Reading Co, C A Pa 175 F 2d 32

Ala—Hodge v Birmingham Electric Co, 184 So 40, 236 Ala 586—Montgomery City Lines v Jones, supra, n 72

Cal—Kahnwell v Stevens, 336 P 2d 250, 168 C A 2d 370

Ind—Tribune-Star Pub Co v Fortwendle, 115 N E 2d 215 124 Ind App 618, reh den 116 N E 2d 548, 124 Ind App 618

Ky—McKeehan v Louisville & N R Co, 172 S W 2d 580, 294 Ky 821

La—Schmitt v Algiers Public Service Co, supra, n 43

Me—Hill v St Louis Public Service Co, 221 S W 2d 130, 359 Mo 220

Md—Kaplan v Baltimore & O R Co, supra n 72

Mass—Koczur v Flanagan, 27 N E 2d 483, 306 Mass 121—Dennis v Trailways of New England Inc., 244 N E 2d 733

Mich—Mitchell v Stroh Brewery Co 15 N W 2d 144 309 Mich 231

Mo—Girratono v Kansas City Public Service Co 251 S W 2d 59 363 Mo 359—Long v St Louis Public Service Co App 288 S W 2d 417—Justice v East St Louis City Lines, Inc 375 S W 2d 150

Ohio—Kokinos v Ohio Greyhound 92 N E 2d 386 153 Ohio St 435—Stine v Springfield City Lines, Inc 155 N E 2d 245 106 Ohio App 429

Pa—Dupont v Pennsylvania R Co, supra, n 42—Homa v Wilkes-Barre Transit Corp, 147 A 2d 377 394 Pa 309—Bavaro v West Penn Rys Co 31 West Co 299—Flank v Philadelphia Transp Co 201 A 2d 225 203 Pa Super 474

Tenn—Cincinnati, N O & T P Ry Co v Denton, 140 S W 2d 796, 24 Tenn App 81

Tex—O Day v Salowitz Bros Civ App 462 S W 2d 119 err ref no rev err

Va—Virginia Transit Co v Tidd 73 S E 2d 405 194 Va 418

Wash—Evans v Yakima Val Transp Co 239 P 2d 336, 39 Wash 2d 841

Held not necessary for plaintiff to prove a negation

Wash—Kiessling v Northwest Greyhound Lines, 229 P 2d 335, 38 Wash 2d 289

Negativing use of equipment by other carriers

Ill—McNealy v Illinois Cent R Co 193 N E 2d 879 43 Ill App 2d 460

The presumption of negligence as to carriers applies only to railroads as discussed infra subdivision d, and it does not apply to other types of common carriers.[73.5]

73.5. Bus

Miss—Tri-State Transit Co v Moody 12 So 2d 920, 194 Miss 714—Goodwin v Gulf Transport Co 453 So 2d 1035

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75 Mass—McKnight v Red Cab Co 64 N E 2d 433 319 Mass 64

76. Burden where plea not new matter

Ga—Atlantic Coast Line R Co v Thomas, 64 S E 2d 301 83 Ga App 477

78 Tex—Bradford v Fort Worth Transit Co Civ App, 450 S W 2d 919 err ref no rev err

82 U S—O'Brien v Public Service Taxi Co, D C Pa 83 F Supp 55 affd, C A 178 F 2d 211—Hollinquest v Kansas City Southern Ry Co D C La 88 F Supp 905—Estepp v Norfolk & W Ry Co C A Ky 192 F 2d 889

Ala—C.J.S. cited in Southeastern Greyhound Lines v Callahan, 13 So 2d 660, 663 244 Ala 449—Cannon v Louisville & N R Co supra, n 42

Ariz—C.J.S. cited in Southwestern Coca Cola Bottling Co v Northern, 177 P 2d 219, 221, 65 Ariz 172

Cal—Stark v Yellow Cab Co 202 P 2d 802, 90 Cal App 2d 217—McMillen v Southern Pac Co 303 P 2d 788, 146 C A 2d 216

D C—Mirsale Cab Ass'n v Rogers, Mun App, 184 A 2d 845

Ga—Piller v Hanger Cab Co 154 S E 2d 420, 115 Ga App 260

Ill—Heffernan v Mandel Bros supra, n 43—Krueger v Richardson, App 61 N E 2d 399—Cobb v Marshall Field & Co 159 N E 2d 520, 22 Ill App 2d 143

Ky—Conley's Adm'r v Ward, 291 S W 2d 568

La—Carter v New Orleans Public Service, Inc, 305 So 2d 481—Vaughn v New Orleans Public Service, Inc App 314 So 2d 545

Mass—Vieira v East Taunton St Ry Co, 70 N E 2d 841 320 Mass 547

Minn—Derrick v St Paul City Ry Co 89 N W 2d 629, 252 Minn 102

Mo—Mueller v St Louis Public Service Co, 214 S W 2d 1 358 Mo 247

Ohio—Hall v Redifer Mun 79 N E 2d 237

Pa—Higgins v Pennsylvania R Co Com Pl 32 West Co 161—Amorose v Western Md Ry Co 81 A 2d 895 368 Pa 1—Poborsky v Pennsylvania Elec Co 17 Cambria 17—Ludlam v Moore, 21 Beaver 97

Va—Watts v Richmond F & P R Co 52 S E 2d 129 189 Va 258 7 A L R 2d 1418

Wash—Shay v Parkhurst, 229 P 2d 510, 38 Wash 2d 341

W Va—Laphew v Consolidated Bus Lines, supra, n 72—Mulroy v Co-operative Transit Co 95 S E 2d 63 142 W Va 165—Flanagan v Mott, 114 S E 2d 331 145 W Va 220

Wis—Zuno v Milwaukee Elec Ry & Transport Co 74 N W 2d 791 272 Wis 21

Extent of burden

(1) Isabella v West Virginia Transp Co 51 S E 2d 318 132 W Va 85

Permissible inference only

(2) Other cases

Mo—Duncker v St Louis Public Service Co, App 241 S W 2d 64

Each case stands on own facts so far as presumptions concerned

Ala—Holmes v Birmingham Transit Co, 116 So 2d 912, 270 Ala 215

Doctrine applicable although plaintiff attempts to show cause

U S—Becker v American Airlines, Inc D C N Y 200 F Supp 839

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83 Ariz—Alexander v Pacific Greyhound Lines, 177 P 2d 229 65 Ariz 187

Cal—Freitas v Peerless Stages, 239 P 2d 671, 108 C A 2d 749 33 A L R 2d 778

D C—D C Transit System, Inc v Smith, Mun App 173 A 2d 216

Ill—Krueger v Friel 71 N E 2d 815 330 Ill App 557—Kirkwood v Checker Taxi Co 298 N E 2d 233 12 Ill App 3d 129

Mich—Sherman v Flint Trolley Coach, 8 N W 2d 115 304 Mich 404

Mo—Lewis v Zapata, 166 S W 2d 541 350 Mo 446—Belding v St Louis Public Service Co 215 S W 2d 506, 358 Mo 491

N J—Watson v Pennsylvania-Reading Seashore Lines, 7 A 2d 796 122 N J Law 614

Pa—Bavaro v West Penn Rys Co supra, n 73

S C—Poliakoff v Shelton, 8 S E 2d 494 193 S C 398

Utah—Morrissey v Union Pac R Co 249 P 1064 68 Utah 323

Wash—Benton v Farwest Cab Co 389 P 2d 418, 63 Wash 2d 859

No presumption of negligence arises from injuries received by

(13) Other matters

Cal—Gray v City and County of San Francisco, 20 Cal Rptr 894, 202 C A 2d 319

La—Johnson v Continental Southern Lines, Inc, App 113 So 2d 114 74 A L R 2d 1328

S D—Kramer v Sioux Transit, Inc 180 N W 2d 468, 85 S D 232

84 U S—Norfolk & W Ry Co v Estepp, C A Ky 204 F 2d 880

Ky—Conley's Adm'r v Ward, 291 S W 2d 568

Passenger safely alighting from car

(3) Other instances

Neb—Saab v Omaha & Council Bluffs St Ry Co, 102 N W 2d 59 170 Neb 198

85 U S—Wilson v Capital Airlines, C A N C 240 F 2d 492—Talbott v Chicago & N W Ry Co v C A Iowa, 243 F 2d 322, 68 A L R 2d 661

Ala—Southeastern Greyhound Lines v Callahan, 13 So 2d 660, 244 Ala 449

Cal—Prunty v Allred, 165 P.2d 935 73 Cal.App 2d 67—Gray v City and County of San Francisco, 20 Cal Rptr 894, 202 C A 2d 319

Del—Winter v Pennsylvania R Co Super, 57 A 2d 750 5 Terry 203

D C—D C Transit System, Inc v Smith, Mun App 173 A 2d 216

Iowa—Edwards v Des Moines Transit Co 99 N W 2d 920, 251 Iowa 163—Fisher v Des Moines Transit Co 111 N W 2d 633 253 Iowa 195

Ky—Lyons v Southeastern Greyhound Lines, 137 S W 2d 1107 282 Ky 106

Me—Mor[illegible]ult v Boston & M R R 68 A 2d 260, 144 Me 300

Md—Smith v Baltimore Transit Co 136 A 2d 386, 214 Md 560

Mich—Thurkow v City of Detroit, 291 N W 29, 292 Mich 617

Mo—West v Thompson, App, 151 S W 2d 129—Snyder v Hedges, App 381 S W 2d 376

N Y—Seidlin v City of New York, 104 N Y S 2d 313, 199 Misc 732

Okl—Southwestern Greyhound Lines v Smith, 277 P 2d 157

Pa—Dupont v Pennsylvania R Co, supra, n 42—Kabakeris v Pennsylvania R Co, 108 P L J 204

S C—Poliakoff v Shelton, supra, n 83

Wash—Evans v Yakima Val Transp Co, 239 P 2d 336, 39 Wash 2d 841

Negligence held not to be presumed

(7) Injury to passenger while boarding bus

Ark—Hot Springs St Ry Co v Jones, 354 S W 2d 278, 234 Ark 693

(8) Other matters

Pa—Sevast v Lancaster Yellow Cab and Baggage, Inc 58 Lanc Rev 411

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87 Cal—Pellegrino v Los Angeles Transit Lines, 179 P 2d 39 79 Cal App 2d 40

Md—Greeley v Baltimore Transit Co, 22 A 2d 460, 180 Md 10

Tenn—City Transp Co v Noel, 216 S W 2d 691 187 Tenn 676, 7 A L R 2d 545

88 Iowa—Fanelli v Illinois Cent R Co 69 N W 2d 13, 246 Iowa 661

La—Brott v Texas & P Ry Co supra, n 55

93 Cal—Gray v City and County of San Francisco, 20 Cal Rptr 894 202 C A 2d 319

Iowa—Edwards v Des Moines Transit Co, 99 N W 2d 920, 251 Iowa 163

Mich—Bolton v City of Detroit, 157 N W 2d 313, 10 Mich App 589

94 U S—Sierocinski v E I Du Pont De Nemours & Co C C A Pa 118 F 2d 531—Longo v Yellow Cab Co supra, n 73—Estepp v Norfolk & W Ry Co, C A Ky, 192 F 2d 889

Ala—Southeastern Greyhound Lines v Callahan, supra, n 85—Greyhound Corp v Brown, 113 So 2d 916, 269 Ala 520

Ark—Johnson v Greenfield, 198 S W 2d 403, 210 Ark 985

Cal—Prunty v Allred, supra, n 85—Poliakoff v City and County of San Francisco, 276 P 2d 126, 129 C A 2d 137—Jacob v Key System Transit Lines, 295 P 2d 569, 140 C A 2d 357

D C—Slaughter v D C Transit System, Inc, C A, 261 F 2d 741 104 U S App D C 275

Fla—Rivers v Jacksonville Coach Co, App, 134 So 2d 869, decision quashed and remand Sup 144 So 2d 308.

Ill—Halowatsky v Central Greyhound Lines, 35 N E 2d 541, 311 Ill App 127—McKenzie v Friel, 61 N E 2d 407, 326 Ill App 258

Ky—Adams v Louisville Taxicab & Transfer Co, 211 S W 2d 397 307 Ky 405

La—Games v Baton Rouge Bus Co, App, 175 So 2d 719—Landry v Ed's Cab Service, Inc App, 185 So 2d 27—Fontenot v Fidelity General Ins Co, App, 185 So 2d 896, writ ref 187 So 2d 740, 249 La 578

Mass—McKnight v Red Cab Co supra, n 75—Knych v Trustees of New York, N H & H R Co supra, n 72

Mo—Grace v St Louis Public Service Co App, 263 S W 2d 866—Thomas v Kansas City Public Service Co App 289 S W 2d 141

NJ—Wilson v Public Service Coordinated Transport, 20 A 2d 368, 126 N J Law 250—Hewitt v Atlantic City & S R Co 21 A 2d 598, 19 N J Misc 536—Bohn v Hudson & M R Co 108 A 2d 5 16 N J 180—Benton v Starkman, 139 A 2d 412, 49 N J Super 251

Ohio—Hall v Redifer, supra, n 82—Lamberg v Hotel Olmsted Co 89 N E 2d 569, 152 Ohio St 417—Glaze v City of Cleveland, supra, n 72

Old—T[illegible] Bus System, Inc v Sumo[illegible], 367 P 2d 160

Pa—Killen v Pennsylvania R Co 102 A 2d 140, 376 Pa 320—Lambert v Pittsburgh Rys Co 109 P L J 196, affd in part and rev on oth grds in part 175 A 2d 870, 405 Pa 364

SC [illegible]off v Shelton, supra, n 83

Tex—Fort Worth & D Ry Co v Britton Civ App 310 S W 2d 654, err ref no rev err

Va—Watts v Richmond, F & P R Co supra, n 82

Wash—Anderson v Harrison, 103 P 2d 320, 4 Wash 2d 265—Nopson v City of Seattle, 207 P 2d 674 33 Wash 2d 772

W Va—Abdulla v Pittsburgh & Weirton Bus Co 213 S E 2d 810, 158 W Va 592, 89 A L R 3d 994

Wis—Turk v H C Prange Co, 119 N W 2d 365 18 Wis 2d 547

Cause of accident unknown to plaintiff

La—Weems v Toye Bros Yellow Cab Co, App 93 So 2d 242

Taxicab companies

(1) Formosa v Yellow Cab Co supra, n 82

Risk of nonpersuasion in defendant

Pa—Black v A E Troutman Co, 122 A 2d 201 385 Pa 138

Presumption only shifts burden of going forward with evidence

Ala—Hu[illegible] v P[illegible]ingham Transit Co, 116 So 2d 912, 270 Ala 215

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97 Iowa—Peterson v De Luxe Cab Co, 281 N W 737, 225 Iowa 809

1 Mich—M[illegible]chem v City of Detroit 94 N W 2d 388, 355 Mich 182—Bolton v City of Detroit, 157 N W 2d 313 10 Mich App 589

2 Wash—Nopson v City of Seattle, 207 P 2d 674 33 Wash 2d 772

Presumption stems from duty

NY—Silvern v Iliad Agallo 195 N Y S 2d 32

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4. In Florida

(1) Kenan v Houstoun, 7 So 2d 837, 150 Fla 357

In Louisiana

(2) Other cases—Cavalier v Nola Cabs, Inc App, 96 So 2d 102

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7 Fla—Lawson v Loftin, 21 So 2d 202, 155 Fla 685

Ga—McVeigh v Harrison, 22 S E 2d 752, 68 Ga App 316

10 Ohio—Funk v New York Cent R Co, App 56 N E 2d 931

11 US—Young v US D C N D, 295 F Supp 329

Conn—Kunz v Co[illegible] A Co 16 A 2d 831 127 Conn 364

DC [illegible] v Capital Transit Co 127 F 2d 329 75 U S App D C 337, cert den 63 S Ct 61 317 U S 632, 87 L Ed 510—Ross v Pennsylvania R Co Mun App, 55 A 2d 316 Bray v D C Transit System, Inc Mun App 179 A 2d 387

Fla—Th[illegible] v Miami Transit Co 100 So 2d 620

Ill [illegible]ack v Vancil, 92 N E 2d 526, 340 Ill App 432—Ivy v Chicago Transit Authority 161 N E 2d 881 23 Ill App 2d 251—Cox v Yellow Cab Co 337 N E 2d 15 61 Ill 2d 416 85 N W 2d 905 249 Iowa 185

Iowa—Stites v Des Moines Transit Co 85 N W 2d 905, 249 Iowa 185

La—Brott v Texas & P Ry Co, App 35 So 2d 801—Wooten v Thompson, App 69 So 2d 557

Md—Smith v Baltimore Transit Co 136 A 2d 386, 214 Md 560

Mass—Gunsberg v Metropolitan Transit Authority 131 N E 2d 919 333 Mass 514—Bernstein v Highland Associates of Worcester Inc 294 N E 2d 576, 1 Mass App 132, 64 A L R 3d 1016

Mo—Hill v St Louis Public Service Co 221 S W 2d 130, 359 Mo 220—Niklas v Metz, 222 S W 2d 795 359 Mo 601

N J—McKinney v Public Service Interstate Transp Co 72 A 2d 326, 4 N J 229

Ohio—Glaze v City of Cleveland, App 92 N E 2d 416

12 Ill—Cox v Yellow Cab Co, 306 N E 2d 738 16 Ill App 3d 665 affd 337 N E 2d 15 16 Ill 2d 416

Mo—Hughes v East St Louis City Lines, App 149 S W 2d 440

Pa—Nebel v Burrell, 41 A 2d 873 352 Pa 70

Wis—Turk v H C Prange Co 119 N W 2d 365 18 Wis 2d 547

13 Ky—Cox v Wilson, 267 S W 2d 83 44 A L R 2d 830

La—Theard v Travelers Ins Co App 208 So 2d 413 application den 210 So 2d 506, 252 La 262

Pa—Schilling v Pittsburgh Rys Co 145 A 2d 688 394 Pa 126

Doctrine held inapplicable

(5) Other cases

U S—Stout v American Bus Lines, C A N Y, 200 F 2d 833—Or v Southern Pac Co C A Cal 226 F 2d 841

Ala—Holmes v Birmingham v Transit Co 116 So 2d 912, 270 Ala 215

Cal—Aboudara v City and County of San Francisco, 251 P 2d 32, 114 C A 2d 630—Finley v City and County of San Francisco, 251 P 2d 687 115 C A 2d 116—Monastero v Los Angeles Transit Co 280 P 2d 187 131 C A 2d 156

D C—Pomeroy v Pennsylvania R Co D C 132 F Supp 257, revd on oth grds, C A 239 F 2d 435 99 U S App D C 272, cert den 77 S Ct 861 353 U S 950 1 L Ed 2d 859

Fla—City Cab Co of Orlando, Inc v Green, App 308 So 2d 540

Idaho—Straley v Idaho Nuclear Corp 500 P 2d 218, 94 Idaho 917

Ill—Krotke v Chicago R I & P R Co 327 N E 2d 212, 26 Ill App 3d 493

Ky—Moore v Lexington Transit Corp 418 S W 2d 245

Mo—K[illegible]nes v St Louis Public Service Co App 251 S W 2d 973

N Y—Blake v City of New York, 108 N Y S 2d 847 279 App Div 751 affd 107 N E 2d 603 304 N Y 698—Bizoza v Avenue B & East Broadway Transit Co, 131 N Y S 2d 649

Pa—Sevast v Lancaster Yellow Cab & Baggage Inc 196 A 2d 842, 413 Pa 250

S D—Hearnchs v Inter City Bus Lines, 111 N W 2d 327, 79 S D 267

14 U S—Pennsylvania R Co v Pomeroy C A 239 F 2d 435, 99 U S App D C 272, cert den 77 S Ct 861 353 U S 950, 1 L Ed 2d 859—Talbott v Chicago & N W Ry Co C A Iowa

U S—Morneault v Boston & M R R, 243 F 2d 322, 68 A L R 2d 661—Herman v United Air Lines, Inc D C Colo, 157 F Supp 65

Ill—Louis v Checker Taxi Co 47 N E 2d 351 318 Ill App 71

Md—Broady v Baltimore Transit Co 131 A 2d 707 213 Md 377

N J—Wilson v Public Service Co-ordinated Transport, 20 A 2d 368 126 N J Law 250

17 U S—Greyhound Corp v Blakley C A Wash 262 F 2d 401

Mo—Berry v Kansas City Public Service Co 121 S W 2d 825 343 Mo 474—Oblamski v St Louis Public Service Co App 251 S W 2d 344

Ohio—Kaltenbach v Cleveland, Columbus & Cincinnati Highway, 80 N E 2d 640, 82 Ohio App 10

Wash—Anderson v Harrison, 103 P 2d 320, 4 Wash 2d 265

18 Tenn—Schindler v Southern Coach Lines, 217 S W 2d 775 188 Tenn 169

Tex—Colossa v San Antonio Transit Co Civ App 223 S W 2d 335, err dism

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20 Mo—Hall v St Louis Public Service Co App 259 S W 2d 88, transf, Sup, 266 S W 2d 597

Ohio—Shadwick v Hills, 69 N E 2d 197, 79 Ohio App 143

Tex—Sims v Dallas Ry & Terminal Co Civ App, 135 S W 2d 142

Pleading held general, permitting application of doctrine

(3) Cal—Jacob v Key System Transit Lines, 295 P 2d 569 140 C A 2d 357

21 N Y—Mallor v Wolk Properties, Inc 311 N Y S 2d 141, 63 Misc 2d 187

22 Cal—Gish v Los Angeles Ry Corporation, 90 P 2d 792, 13 Cal 2d 570

Iowa—Peterson v De Luxe Cab Co 281 N W 737 225 Iowa 809

25 Mo—Belding v St Louis Public Service Co App 205 S W 2d 866, revd on oth grds Sup 215 S W 2d 506—Belding v St Louis Public Service Co 215 S W 2d 506, 358 Mo 491—Vendum v St Louis Public Service Co 226 S W 2d 599 360 Mo 42

Mont—Whitney v Northwest Greyhound Lines, 242 P 2d 257, 125 Mont 528

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26 Mo—Lochmoeller v Kiel, App 137 S W 2d 625

Evidence held not to destroy right, etc.

N Y—Mallor v Wolk Properties, Inc 311 N Y S 2d 141 63 Misc 2d 187

29 U S—Union Pac R Co v Stanger C C A Idaho 132 F 2d 982

Mont—Whitney v Northwest Greyhound Lines, supra, n 25

Pa—Schulz v Reading Transp Co, 47 A 2d 213 354 Pa 373

30 U S—Norfolk & W Ry Co v Estepp, C A Ky 204 F 2d 880

The doctrine of res ipsa loquitur has been held applicable in other situations [31]

33.1 Cal—Rogers v Los Angeles Transit Lines, 289 P 2d 226, 45 C 2d 414—Seffert v Los Angeles Transit Lines, 15 Cal Rptr 161 364 P 2d 337 56 C 2d 498

D C—Levy v D C Transit System, Inc Mun App 174 A 2d 731

La—Toutenot v Fidelity General Ins Co App 185 So 2d 896, writ ref 187 So 2d 740, 249 La 578

Mo—Fairley v St Louis Public Service Co, 352 S W 2d 393 transf to, Sup 362 S W 2d 549

Neb—Saab v Omaha & Council Bluffs St Ry Co, 102 N W 2d 59 170 Neb 198

Airplane accident

U S—Becker v American Airlines, Inc, D C N Y 200 F Supp 839

38 U S—Norfolk & W Ry Co v Estepp supra, n 30

39 U S—Norfolk & W Ry Co v Estepp, supra, n 30

D C—Capital Transit Co v Jackson, 149 F 2d 839 80 U S App D C 162, 161 A L R 1110, cert den 66 S Ct 143 326 U S 762, 90 L Ed 2d 459

Idaho—Straley v Idaho Nuclear Corp 500 P 2d 218 94 Idaho 917

Ill—Krueger v Richardson App 61 N E 2d 399

Kan—Misner v Hawthorne, 212 P 2d 346, 168 Kan 279

Mo—Hill v St Louis Public Service Co supra, n 11—Rothweiler v St Louis Public Service Co

App 224 S W 2d 569 revd on oth grds 234 S W 2d 552, 561 Mo 259

Neb—Hickey v Omaha & Council Bluffs St Ry Co 1 N W 2d 304 140 Neb 665

N J—Sibley v City Service Transit Co 66 A 2d 864 2 N J 458

N Y—Lehman v Brooklyn & Queens Transit Corporation, 30 N Y S 2d 716—Norris v Kornspan 129 N Y S 2d 100—Silvern v Barbagallo, 195 N Y S 2d 32

Doctrine held inapplicable

Tex—Hickman v Greyhound Corp, Civ App 396 S W 2d 507 err ref no rev err

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40 D C—Jones v Capital Transit Co, supra, n 39

Iowa—Rosengarl v Northland Greyhound Lines, 49 N W 2d 501, 242 Iowa 1135

La—Perret v Toye Bros Yellow Cab Co, App 17 So 2d 835 adhered to 20 So 2d 377—Coleman v Continental Southern Lines, Inc App 107 So 2d 69

43 Wash—Arnold v Sanstol, 260 P 2d 327 43 Wash 94

44 Mo—Bailey v Kansas City Public Service Co supra, n 17

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47 Cal—Taylor v Luxor Cab Co 246 P 2d 45 112 C A 2d 46

Mo—Hill v St Louis Public Service Co Supra n 11

48 Ky—Vogt v Cincinnati, Newport & Covington St Ry Co 229 S W 2d 491, 312 Ky 668

Neb—Ware v Yellow Cab, Inc 225 N W 2d 565, 193 Neb 159

Ohio—Robinson v Ferguson, 149 N E 2d 152, 105 Ohio App 311, motion for reconsideration den 152 N E 2d 157 105 Ohio App 311

Pa—Sevast v Lancaster Yellow Cab & Baggage, Inc 196 A 2d 842, 413 Pa 250—Sevast v Lancaster Yellow Cab and Baggage Inc 58 Lanc Rev 411

Wash—White v Greyhound Corp, 280 P 2d 670, 46 Wash 2d 260

Fact of collision insufficient to support verdict

Pa—Di Mezzo v Raditz, 164 A 2d 55, 193 Pa Super 103

49. N D—Dunck v Winters, 296 N W 744, 70 N D 592

Pa—Kelly v Philadelphia Transp Co, 23 A 2d 57, 146 Pa Super 445

52. Cal—Dieterle v Yellow Cab Co 93 P 2d 171 34 Cal App 2d 97—Bennett v Los Angeles Motor Coach Co 119 P 2d 164, 48 Cal App 2d 37—Sumner v Los Angeles Ry Corporation, 126 P 2d 940, 52 Cal App 2d 679—Wilson v Los Angeles Trona Stages, 284 P 2d 951 133 C A 2d 756—Jacob v Key System Transit Lines, 295 P 2d 569 140 C A 2d 357

Mo—Hoffbauer v St Louis Public Service Co 353 S W 2d 635

N J—Garvey v Public Service Coordinated Transport, 57 A 2d 14, 136 N J Law 533

N Y—Manzi v Grand Ave Cab Co, 345 N Y S 2d 120, 42 A D 2d 607

Utah—Horsley v Robertson, 186 P 2d 592, 112 Utah 227

Wis—Cushing v Meehan, 95 N W 2d 796, 7 Wis 2d 30

59 U S—Norfolk & W Ry Co v Estepp C A Ky, 204 F 2d 880

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62 Ill—Krueger v Richardson, supra, n 39

65 Ill—Krueger v Richardson, supra, n 39

66. Pa—Sylvester v Pennsylvania R Co, 53 A 2d 537 357 Pa 213

67 U S—Norfolk & W Ry Co v Estepp, supra, n 59—C.J.S. cited in Louisville & N R Co v Adams, C A Fla., 292 F 2d 153, 155

Ala—Pollard v Williams, 191 So. 225 238 Ala 391

Cal—Price v Atchison T & S F Ry Co 330 P 2d 933 164 C A 2d 400

N Y—Nixon v New York Cent R Co 199 N Y S 2d 721 10 A D 2d 870 app den 204 N Y S 2d 85 10 A D 2d 981

Ohio—Fink v New York Cent R Co 56 N E 2d 456, 144 Ohio St 1

Pa—MacDonald v Pennsylvania R Co 36 A 2d 492, 348 Pa 558

Wash—Bolander v Northern Pac Ry Co 388 P 2d 729 63 Wash 2d 659

Pres. of contributory negligence as against carrier's employee—Pollard v Coulter 191 So 231 238 Ala 421

68 Ky—V T C Lines v Taylor 134 S W 2d 991 281 Ky 83—Grigsby v Smith 146 S W 2d 719 285 Ky 48

N C—C.J.S. cited in Mann v Virginia Dare Transp Co Inc 198 S E 2d 558 566, 283 N C 734

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69 U S—Bergen v U S C A Alaska, 222 F 2d 949 15 Alaska 548

Ala—Pollard v Williams, supra, n 67—Pollard v Coulter supra, n 67

Pa—MacDonald v Pennsylvania R Co supra, n 67

72 U S—Wallar v Southern Pac Co D C Cal 37 F Supp 475

Criminal act of third person not presumed

Ala—Pollard v Williams, supra, n 67

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82 U S—Atlantic Coast Line R Co v De Mayo, C A Fla 222 F 2d 462

Ark—C J S. quoted at length in Johnson v Greenfield, 198 S W 2d 403 406, 210 Ark 985

La—Johnson v Continental Southern Lines, Inc App 113 So 2d 114 74 A L R 2d 1328—Alexander v Continental Southern Lines, Inc App 130 So 2d 539—Quigley v Louisiana & A Ry Co App 206 So 2d 791

Mo—Hall v St Louis Public Service Co 266 S W 2d 597 transf App, 259 S W 2d 88

Neb—Saab v Omaha & Council Bluffs St Ry Co 102 N.W 2d 59 170 Neb 198

N Y—Keenan v Sheehan, 129 N Y S 2d 883, 205 Misc 183, affd 134 N Y S 2d 386, 284 App Div 895

N C—Humphries v Queen City Coach Co 45 S E 2d 546, 228 N C 399

Ohio—Femberg v Bereal Hotel Co, App 85 N E 2d 296, revd on oth grds 89 N E 2d 569, 152 Ohio St 417

Okl—C.J.S. quoted at length in Tri-state Oriental Bus System, Inc v Simons, 367 P 2d 160, 162

Pa—Nebel v Burrelli, supra, n 12—Seburn v Luzerne & Carbon County Motor Transit Co 148 A 2d 534, 394 Pa 577.

S C—Horne v Southern Ry Co, 197 S E 31, 186 S C 525 116 A L R 745

Tex—Simpson v Dallas Ry & Terminal Co Civ App 143 S W 2d 416, err dism, judg correct—Coastal Coaches v Ball, Civ App 234 S W 2d 474, 22 A L R 2d 955 err ref no rev err

Res ipsa loquitur doctrine held applicable etc.

(3) Johnson v Greenfield, 198 S W 2d 403, 210 Ark 985

D C—Missile Cab Ass'n v Rogers, Mun App, 184 A 2d 845

(4) Cal—Adam v Los Angeles Transit Lines, 317 P 2d 642, 154 C A 2d 535

(8) Zuno v Milwaukee Elec Ry & Transport Co, 74 N W 2d 791 272 Wis 21

(9) U S—Gerard v American Airlines, Inc., C A N Y., 272 F 2d 35

Ohio—Hall v Redifer Mun, 79 N E 2d 237

(15) Other instances

N J—Gagho v Yellow Cab Co, 164 A 2d 353

Ohio—Wagner v Pullman Co 220 N E 2d 366, 8 Ohio App 2d 1

Rule inapplicable

Colo—Oil Bldg. Corp v Hemmann, 488 P 2d 1126, 29 Colo App 564

Fla—Waite v Jackson's Byrons Enterprises, Inc App 254 So 2d 28

La—Brechtel v Gulf States Elevator Corp App 195 So 2d 403

Pa—Sevast v Lancaster Yellow Cab and Baggage, Inc 58 Lanc Rev 411

83 Ark—Little Rock Land Co v Raper 433 S W 2d 836, 245 Ark 641

Hawaii—Cozine v Hawaiian Catamaran Limited, 412 P 2d 669 49 Haw 77, reh den 414 P 2d 428, 49 Haw 77

La—Jones v Baton Rouge Electric Co App 192 So 539

84 Ark—Johnson v Greenfield, supra, n 82

Wis—Zuno v Milwaukee Elec Ry & Transport Co 74 N W 2d 791 272 Wis 21

85 U S—Talbott v Chicago & N W Ry Co, C A Iowa, 243 F 2d 322, 68 A L R 2d 661

Iowa—C J S quoted in Fanelli v Illinois Cent R Co 69 N W 2d 13 21 246 Iowa 661

87 N Y—Yednak v City of New York, 91 N Y S 2d 195 affd 90 N Y S 2d 678 275 App Div 953—Vaccaro v Safchik, 172 N Y S 2d 762, 9 Misc 2d 336

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89 Pa—Archer v Pennsylvania R Co 72 A 2d 609 166 Pa Super 538

91 **Doctrine held not applicable**

Mass—Ginsberg v Metropolitan Transit Authority 131 N E 2d 919 333 Mass 514

93 Pa—Dupont v Pennsylvania R Co 10 A 2d 444, 337 Pa 89 129 A L R 1337

94 N Y—Bressler v New York Rapid Transit Corporation, 297 N Y S 336, 251 App Div 890, revd on grd that facts warranted application of the doctrine 13 N E 2d 772, 277 N Y 200

96 Ohio—Glaze v City of Cleveland, supra, n 11

Tenn—Morgan v Y & M V R R Co 172 S W 2d 1013 26 Tenn App 384

99 Pa—Moore v Baltimore & O R Co 7 A 2d 162, 136 Pa Super 182

Grease

Pa—Pierce v Delaware, L & W R Co 57 A 2d 876, 358 Pa 403

Slippery substance

Tex—Jackson v Dallas Ry & Terminal Co, Civ App 273 S W 2d 463 err ref no rev err

1 Ala—Holmes v Birmingham Transit Co 116 So 2d 912, 270 Ala 215

Cal—McMillen v Southern Pac Co 303 P 2d 788, 146 C A 2d 216

La—Johnson v Shreveport Rys Co App 50 So 2d 655

Mass—Mathieu v Springfield St Ry 101 N E 2d 358, 328 Mass 13

N Y—Desmond v Doyle, 160 N Y S 2d 738 5 Misc 2d 490

Va—Shamblee v Virginia Transit Co 132 S E 2d 712, 204 Va 591

Vt—C.J.S. cited in Plocsser v Burlington Rapid Transit Co 149 A 2d 728 732, 121 Vt 133

Sudden stop

Pa—Connolly v Philadelphia Transp Co 216 A 2d 60, 420 Pa 280, 18 A L R 3d 1

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2 U S—Matsumoto v Chicago & N W Ry Co, C C A Ill 168 F 2d 496, cert den 69 S Ct 52, 335 U S 826, 93 L Ed 380

Cal—Hardin v San Jose City Lines, 260 P 2d 63 41 C 2d 432

D C—Williams v Capital Transit Co C A., 125 F 2d 487, 94 U S App D C 221

Ky—Cincinnati, Newport & Covington Ry Co v Rothe, 252 S W 2d 668

La—Gonzales v Toye Bros. Yellow Cab Co App 198 So 379—Burnett v Yellow Cab Co of Shreveport, App 50 So.2d 670—Johnson v Shreveport Transit Co App 137 So.2d 463

Mich—Smith v Department of Street Railways, City of Detroit, 207 N W 2d 924 46 Mich App 291

Mo—Welch v Thompson, 210 S W 2d 79, 357 Mo 703—Caddell v Gulf, M & O R Co App, 217 S W 2d 751—Kastanis v St Louis Public Service Co App, 251 S W 2d 973

NY—Newell v Brooklyn Bus Corporation, 7 N Y S 2d 512, 255 App Div 857 affd 20 N E 2d 1015 280 N Y 650—Cassab v Hees, 27 N Y S 2d 178, 261 App Div 1114—Schulz v Finn, 75 N Y S 2d 15, 273 App Div 780

Okl—Denco Bus Co v Keller, 212 P 2d 469 202 Okl 263

Pa—Angelo v Pittsburgh Rys Co Bus Division, 151 A 2d 867 189 Pa Super 574

Tex—Mattox v C R Anthony Co, Civ App, 326 S W 2d 740, err ref no rev err

No conflict between rules

Cal—Tast v City and County of San Francisco, 300 P 2d 74, 143 C A 2d 787

Sudden stop

Pa—Connolly v Philadelphia Transp Co 216 A 2d 60, 420 Pa 280, 18 A L R 3d 1

3 Mo—Bush v St Louis Public Service Co, 215 S W 2d 506, 358 Mo 491

4 US—Wichita Transp Corp v Braly supra, n 2

Ky—Cincinnati, Newport & Covington Ry Co v Rothe, supra, n 2

NJ—Pope v Veterans Taxi Service, 235 A 2d 34, 97 N J Super 274

Each case of this character rests on its own particular facts in determining whether the doctrine of res ipsa loquitur is applicable.[4.1]

4.1 Mo—Hale v St Louis Public Service Co, App, 238 S W 2d 876

5 Cal—Mudrick v Market Street Ry Co, 81 P 2d 950, 11 Cal 2d 724, 118 A L R 533

Del—Mackey v O'Neal, Super 101 A 2d 337, 9 Terry 233, stating Maryland law

Idaho—Straley v Idaho Nuclear Corp, 500 P 2d 218, 94 Idaho 917

Mo—Williams v St Louis Pub Serv Co, 253 S W 2d 97—West v St Louis Public Service Co, 357 S W 2d 69

Pa—Miller v Pittsburgh Rys Co, 144 A 2d 514 187 Pa Super 334

Inferences must have factual basis

Md—Kaufman, by Deutch v Baltimore Transit Co, 78 A 2d 464, 197 Md 141

Bus

D C—Washington v Washington, Virginia & Maryland Coach Co D C 250 F Supp 888

6 US—Wichita Transp Corp v Braly supra, n 2

Ala—Birmingham Electric Co v Davis, 13 So 2d 888, 244 Ala 338

Ariz—Phen v All American Bus Lines, 110 P 2d 227 56 Ariz 567

D C—Cole v Capital Transit Co C A D C, 195 F 2d 568, 90 U S App D C 289

Ky—Cincinnati, Newport & Covington Ry Co v Rothe, supra, n 2

Mass—Whippen v Massachusetts Bay Transp Authority 235 N E 2d 805, 354 Mass 99

Mo—Nix v Gulf, M & O R Co, 240 S W 2d 709 362 Mo 187 McCaffery v St Louis Public Service Co., 252 S W 2d 361

N Y—Dickinson v Doyle, 160 N Y S 2d 738, 5 Misc 2d 490

Tex—Mattox v C R Anthony Co, Civ App, 326 S W 2d 740, err ref no rev err

Taxicab

N J—Pope v Veterans Taxi Service, 235 A 2d 34 97 N J Super 274

7 Ark—Jones v Missouri Pac R Co 150 S W 2d 742, 202 Ark 333

Inferences from sudden starting

(4) Other [illegible]

Md—Kaufman, by Deutch v Baltimore Transit Co supra, n 5

9 Del—Mackey v O'Neal, Super, 101 A 2d 337 9 Terry 233, stating Maryland law

D C—Wiggins v Capital Transit Co Mun App 122 A 2d 117 57 A L R 2d 1

Iowa—Edwards v Des Moines Transit Co 99 N W 2d 920, 251 Iowa 163

La—Vallette v Maison Blanche Co App 29 So 2d 528

Mass—Matheu v Springfield St Ry 101 N E 2d 358, 328 Mass 13

Mo—Caddell v Gulf, M & O R Co supra, n 2

Okl—Flippen v Union Transp Co, 296 P 2d 173

Pa—Miller v Pittsburgh Rys Co 144 A 2d 514 187 Pa Super 334

Tenn—Memphis St Ry Co v Brown, 260 S W 2d 401 37 Tenn App 96

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12. Sudden stop

Pa—Connolly v Philadelphia Transp Co 216 A 2d 60, 420 Pa 280 18 A L R 3d 1

13 Mass—Bray v Boston Elevated Ry 21 N E 2d 957 303 Mass 379

15 Ala—Cannon v Louisville & N R Co 42 So 2d 340, 252 Ala 571

Ark—Hot Springs St Ry Co v Ross, 261 S W 2d 789 222 Ark 546

Mo—Lukutsch v St Louis Public Service Co 246 S W 2d 749 362 Mo 1071

17 Ala—Pollard v Williams, 191 So 225 238 Ala 391

Ariz—Phen v All American Bus Lines, supra, n 6

Cal—Armenti v Los Angeles Metropolitan Transit Authority 28 Cal Rptr 653 213 C A 2d 333

Del—Delaware Coach Co v Reynolds, 71 A 2d 69 6 Terry 226

Ga—Alabama Great Southern R Co v McBryar, 15 S E 2d 563, 65 Ga App 153

Ill—Carson v Weston Hotel Corp 115 N E 2d 800 351 Ill App 523

Mont—Hickman v First Nat Bank of Great Falls, 117 P 2d 275 112 Mont 398

W Va—Mulroy v Co-operative Transit Co 95 S E 2d 63, 142 W Va 165

Presumption held rebutted

(2) Other matters—Norfolk & W Ry Co v Estepp C A Ky, 204 F 2d 880

Ala—Holmes v Birmingham Transit Co 116 So 2d 912, 270 Ala 215

18 Cal—Nelson v American Airlines, Inc 70 Cal Rptr 33 263 C A 2d 742

Ga—Eason v Crews, 77 S E 2d 245 88 Ga App 602

La—Adams v Great Am Indem Co App, 116 So 2d 307

Pa—Angelo v Pittsburgh Rys Co Bus Division, 151 A 2d 867 189 Pa Super 574

19 Ala—Cannon v Louisville & N R Co supra, n 15

21 La—Owens v Monzingo, App 191 So 581—Jones v Baton Rouge Electric Co App 192 So 539—Coleman v Continental Southern Lines, Inc, App 107 So 2d 69—Landry v Travelers Indem Co App 155 So 2d 102

22 US—Shackelford v Mission Taxicab Co C A Cal 224 F 2d 857

Cal—Price v Atchison, T & S F Ry Co 330 P 2d 933 164 C A 2d 400

23 La—Matthews v Texas Louisiana Coaches, App 18 So 2d 345—Wise v Prescott, 151 So 2d 356 244 La 157

26 US—Matsumoto v Chicago & N W Ry Co supra, n 2

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28 N Y—Zubko v Mary Immaculate Hospital, 241 N Y S 2d 69 19 A D 2d 643 motion den 243 N Y S 2d 689 13 N Y 2d 904, 193 N E 2d 513 affd 249 N Y S 2d 878 14 N Y 2d 681 198 N E 2d 909

R I—Potentum v Leach, 13 A 2d 250, 65 R I 1

29 US—White v Sears, Roebuck & Co C A Va 242 F 2d 821 66 A L R 2d 491

Cal—Simmons v F W Woolworth Co, 329 P 2d 999, 163 C A 2d 709

N Y—Rojas v Pennsylvania Tunnel & Terminal R Co 47 N Y S 2d 82

30 **Prima facie case**

Ohio—Isaacs v Warren Terrace, Inc 277 N E 2d 88, 31 Ohio Misc 65

31 Cal—Guerra v Handlery Hotels, Inc 1 Cal Rptr 330 347 P 2d 674 53 C 2d 266

D C—Greet v Otis Elevator Co, D C App 187 A 2d 896

Ill—Carson v Weston Hotel Corp supra, n 17

La—Tarantino v City Stores Co (Maison Blanche Division) App, 278 So 2d 149 writ den Sup 281 So 2d 741

Mo—Clark v Linwood Hotel, Inc 291 S W 2d 102, 365 Mo 982

N Y—Whyte v Craig Hall, Inc, 74 N Y S 2d 128, 272 App Div 603—Ross v Bloomingdale Bros Inc 127 N Y S 2d 87 205 Misc 104—Enslein v Hudson & Manhattan R Co 165 N Y S 2d 630 8 Misc 2d 87 affd in part and revd in part on oth grds 176 N Y S 2d 70, 6 A D 2d 833 Affd 185 N Y S 2d 810, 6 N Y 2d 723, 158 N E 2d 504—Mallor v Woll Properties, Inc, 311 N Y S 2d 141 63 Misc 2d 187

Ohio—Feinberg v Bereal Hotel Co 85 N E 2d 296, revd on oth grds 89 N E 2d 569 152 Ohio St 417

Pa—Mihaylo v Grossinger, 51 Lack Jur 17

Tex—Bond v Otis Elevator Co 388 S W 2d 681, on remand, Civ App 391 S W 2d 519

Escalators

US—White v Sears, Roebuck & Co C A Va 242 F 2d 821 66 A L R 2d 491

(2) Other matters

Cal—Vandagriff v J C Penney Co 39 Cal Rptr 671, 228 C A 2d 579

La—Cannon v D H Holmes, Ltd App, 274 So 2d 799

Utah—Sanone v J C Penney Co 404 P 2d 248, 17 Utah 2d 46

Wis—Turk v H C Prange Co 119 N W 2d 365, 18 Wis 2d 547

Presumption held to exist

(6) Other cases

US—Blackhawk Hotels Co v Bonfoey, C A Minn 227 F 2d 232, 56 A L R 2d 1047

Ky—Kentucky Home Mut Life Ins Co v Wise, 364 S W 2d 338

Doctrine held not applicable

US—Trigg v J C Penney Co D C N M 307 F Supp 1092

Cal—Sample v S H Kress & Co 12 Cal Rptr 198, 190 C A 2d 503

32 Ill—Heffernan v Mandel Bros 17 N E 2d 523 297 Ill App 272

33 Ariz—Nieman v Jacobs, 347 P 2d 702, 87 Ariz 44

Ill—Starczynski v Miltenberg, 55 N E 2d 299 323 Ill App 283—Carson v Weston Hotel Corp supra, n 17

N Y—Leed v Robert Joshua, Limited, 72 N Y S 2d 3

34 La—Lachney v Wellans Inc App 32 So 2d 850

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36 US—Trigg v J C Penney Co D C N M 307 F Supp 1092

Courts have passed on the applicability of the doctrine of res ipsa loquitur in other instances relating to elevators and escalators [37]

37.1. Doctrine held inapplicable

U S—Montgomery-Ward & Co v Sewell C A Tex 205 F 2d 463—Buchanan v U S D C Minn 190 F Supp 523 affd C A 305 F 2d 738

Ariz—Nieman v Jacobs, 347 P 2d 702, 87 Ariz 44—First Nat Bank of Ariz v Otis Elevator Co 406 P 2d 430, 2 Ariz App 80 reh den 411 P 2d 34 2 Ariz App 596

Ark—Little Rock Land Co v Raper 433 S W 2d 836, 245 Ark 641

Cal—Hendershott v Macy s, 322 P 2d 596 158 C A 2d 324

Colo—Majors v J C Penney Co Inc 506 P 2d 399 31 Colo App 568

N J—Dombrowska v Kresge-Newark, Inc 183 A 2d 111 75 N J Super 271

N Y—Finn v Pennsylvania R Co 175 N Y S 2d 425 6 A D 2d 813—Simram v Gertz Dept Stores, 207 N Y S 2d 306—Mallor v Wolk Properties, Inc 311 N Y S 2d 141 63 Misc 2d 187

Okl—Seay v General Elevator Co 522 P 2d 1022

Tex—Bond v Otis Elevator Co 388 S W 2d 681 on remand, Civ App 391 S W 2d 519

Doctrine held applicable

U S—J C Penney Co v Eubanks, C A Okl 294 F 2d 519

Ill—Cobb v Marshall Field & Co 159 N E 2d 520 22 Ill App 2d 143

La.—Tarantino v City Stores Co (Marson Blanche Division), App 278 So 2d 149 writ den Sup 281 So 2d 741

N Y—Harrington v Kedem Realty Corp 217 N Y S 2d 387 13 A D 2d 1027

§ 765. Admissibility of Evidence

Library References

Carriers ⇐245, 317.

38 La—Shaw v New Orleans Public Service, App 188 So 187

Mass—Viera v East Taunton St Ry Co 70 N E 2d 841 320 Mass 547

N C—Farmer v Lands, 127 S E 2d 553, 257 N C 768

Ohio—In re Hyde, 79 N E 2d 224, 149 Ohio St 407

Evidence held admissible

(3) Other evidence

Ariz—First Nat Bank of Ariz v Otis Elevator Co 406 P 2d 430, 2 Ariz App 80 reh den 411 P 2d 34, 2 Ariz App 596

Ark—Black & White, Inc v Love, 367 S W 2d 427 236 Ark 529 8 A L R 3d 809

D C—D C Transit System, Inc v Slingland C A 266 F 2d 465 105 U S App D C 264, 72 A L R 2d 1290, cert den 80 S Ct 62, 361 U S 819 4 L Ed 2d 64

N Y—Public v Forty-Five Nevins St Corp 232 N Y S 2d 420, 36 Misc 2d 178, revd on oth grds 256 N Y S 2d 113 22 A D 2d 960, affd 218 N E 2d 343, 17 N Y 2d 885 271 N Y S 2d 311

Discretion of court

Cal—Mc Coll v Los Angeles Metropolitan Transit Authority, 48 Cal Rptr 662, 239 C A 2d 302

39 U S—Thomson v Anderson, C C A S D 138 F 2d 272, 149 A L R 899—Callaway v Hart, C C A Ala, 146 F 2d 103, cert den 65 S Ct 915 324 U S 866, 89 L Ed 1421

Ark—Hot Springs St Ry Co v Hill, 128 S W 2d 369 198 Ark 319

Ill—Jones v Thompson, 32 N E 2d 997 309 Ill App 187

Ky—Conley v Jennings, 178 S W 2d 185 296 Ky 652—Miller v Mills, 257 S W 2d 520

N C—Hairston v Atlantic Greyhound Corporation, 18 S E 2d 166, 220 N C 642

Or—Snyder v Portland Traction Co 185 P 2d 563, 182 Or 344

Pa—Sylvester v Pennsylvania R Co, 53 A 2d 537, 357 Pa 213

Tex—Houston Transit Co v Zimmerman, Civ App 200 S W 2d 848

Custom

(1) Other evidence

Ill—Lebelem v Chicago Transit Authority 230 N E 2d 33 86 Ill App 2d 395

40 Colo—Rice v Marlar 108 P 2d 868 107 Colo 57

D C—Pulvari v Greyhound Corp D C 287 F Supp 104

Ga—Alabama Great Southern R Co v McBryar supra, n 17

Ill—Stollery v Sprague 22 N E 2d 276, 301 Ill App 209

Ky—Southeastern Greyhound Lines v Donohue, 182 S W 2d 328, 298 Ky 139—Southeastern Greyhound Lines v Bingham, 185 S W 2d 540 299 Ky 381—Miller v Mills, supra, n 39

Mass—Tortorelli v New York Cent R Co 95 N E 2d 674 326 Mass 583

N H—Rincourt v Boston & M R R 30 A 2d 453 92 N H 284

N J—Vaduro v Yellow Cab Co of Camden 77 A 2d 459 6 N J 102

N Y—Schulz v Finn, 75 N Y S 2d 15 273 App Div 780—Jokelson v Allied Stores Corp 295 N Y S 2d 730 31 A D 2d 200 motion den 298 N Y S 2d 57 31 A D 2d 806

Pa—Numamaker v New Alexandria Bus Co, 88 A 2d 697 371 Pa 28

Tenn—Brown v Allright Auto Parks, Inc App 456 S W 2d 660, 61 Tenn App 543

Va—Yellow Cab Co v Eden, 16 S E 2d 625 178 Va 325—Virginia Electric & Power Co v Thomas, 23 S E 2d 148 180 Va 292—Long's Baggage Transfer Co v Moore, 95 S E 2d 221 198 Va 608

Evidence held inadmissible

(7) Other evidence

Ark—Citizens Coach Co v Colber 348 S W 2d 873 233 Ark 912

Cal—Williams v E W Robinson Van Lines, 291 P 2d 453 46 C 2d 14

D C—Pulvari v Greyhound Corp C A 375 F 2d 322, 126 U S App D C 146

Fla—Checker Cab Operators v Castleberry 68 So 2d 353

Idaho—Clark v Tarr, 283 P 2d 942, 76 Idaho 383

Mo—Oglesby v St Louis Public Service Co App 338 S W 2d 357

Or—Sanders v Rose City Transit Co 480 P 2d 709 258 Or 1

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43 N Y—Arroyo v Judena Taxi, Inc 248 N Y S 2d 952, 20 A D 2d 888

45. Failure of passenger to report accident

La—Johnson v Shreveport Rys Co App 50 So 2d 655

46. Possession of weekly bus pass

D C—Howard v Capital Transit Co D C, 97 F Supp 578, affd 196 F 2d 593 90 U S App D C 359

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58 Tenn—Courtesy Cab Co v Keck, 440 S W 2d 610, 59 Tenn App 309

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85 U S—Greyhound Lines, Inc v Miller, C A Mo, 402 F 2d 134

Evidence held inadmissible

(3) Other evidence

Pa—Fischer v City of Philadelphia, 82 Pa Dist & Co 263

Wis—Furrer v Milwaukee & Suburban Transport Corp 162 N W 2d 537 40 Wis 2d 560

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87 Ga—Gray v Delta Air Lines, Inc, 192 S E 2d 521 127 Ga App 45

89 Mass—Hastings v Boston & M R R, 123 N E 2d 211 332 Mass 42

93 Ga—Daughtry v Georgia Power Co 6 S E 454 61 Ga App 505

Ill—Krueger v Friel, 71 N E 2d 815 330 Ill App 57

Mass—Silver v New York Cent R Co 105 N E 2d 923 329 Mass 14

Evidence held inadmissible

N J—Harpell v Public Service Coordinated Transport 114 A 2d 295 35 N J Super 354 affd 120 A 2d 41 20 N J 309

94. Evidence admissible or erroneously excluded

(4) Other evidence

Okl—St Louis, S F Ry Co v Davis, 258 P 2d 612

Evidence held inadmissible or erroneously refused

(4) U S—Strauss v Delta Air Lines, Inc, D C Pa 266 F Supp 559

95 U S—Ozark Air Lines, Inc v Larmer C A Iowa, 352 F 2d 9

Mass—Roslindale General Hospital, Inc v Beckwith Elevator Co 324 N E 2d 631 3 Mass App 723

Mo—Liebow v Jones Store Co 303 S W 2d 660

97 U S—Strauss v Delta Air Lines, Inc D C Pa 266 F Supp 559

N Y—Glennon v James McCreery & Co, 67 N Y S 2d 818, 271 App Div 977

Pa—Nestor v George, 46 A 2d 469 354 Pa 19

1 U S—Lee v Pennsylvania R Co C A 192 F 2d 226

Pa—Peffer v G C Murphy Co 17 D & C 2d 595, 71 Dauph 202

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3. Rule held inapplicable retroactively

N Y—Jokelson v Allied Stores Corp, 295 N Y S 2d 730 31 A D 2d 200 motion den 298 N Y S 2d 57 31 A D 2d 806

City ordinance

Fla—Chimeno v Fontainebleau Hotel Corp App 251 So 2d 351

12 Ga—Scott v Torrance, 25 S E 2d 120, 69 Ga App 309

Pa—Sylvester v Pennsylvania R Co 93 Pittsb Leg J 155 affd 53 A 2d 537, 357 Pa 213

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29 D C—Adams v Capital Transit Co 154 F 2d 859 81 U S App D C 78

Ohio—Dietrich v Community Traction Co 203 N E 2d 344 1 Ohio St 2d 38

Evidence held admissible or erroneously excluded

(11) Other cases

Mo—Oglesby v St Louis Public Service Co App, 338 S W 2d 357

Okl—Sprout v Oklahoma Ry Co 247 P 2d 972, 207 Okl 118

Or—Smith v Portland Traction Co 349 P 2d 286, 220 Or 215

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30 D C—Tobin v Pennsylvania R Co, 100 F 2d 435 69 App D C 262, cert den 59 S Ct 488, 306 U S 640, 83 L Ed 1040

N H—Beaudet v Boston & M R R, 131 A 2d 65, 101 N H 4

Evidence held inadmissible or properly excluded

(14) Other evidence

Cal—Bone-Hansen v Sisters of Charity of St Vincent De Paul, Inc, 314 P 2d 189 152 C A 2d 845

(15) Other instances

N Y—Trola v Long Island R Co, 169 N Y S 2d 79, 5 A D 2d 691

Ohio—Fiorelli v Yellow Cab Co of Cleveland, Inc App, 190 N E 2d 58

31 Ohio—Dietrich v Community Traction Co 203 N E 2d 344 1 Ohio St 2d 38

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41 Ala—Birmingham Elec. Co v Woodward 35 So 2d 369 33 Ala App 526

Iowa—Edwards v Des Moines Transit Co 99 N W 2d 920, 251 Iowa 163

Ky—Bowling Green-Hopkinsville Bus Co v Montgomery 129 S W 2d 535 278 Ky 837

Mass—Vieira v East Taunton St Ry Co 70 N E 2d 841 320 Mass 547

N Y—Reh v Haughton Elevator Co 312 N Y S 2d 578, 34 A D 2d 1086

Tex—Texas, N M & Okl Coaches, Inc v Hill, Civ App 266 S W 2d 412, revd on oth grds 272 S W 2d 91 153 Tex 581

42. Evidence held admissible

(5) Other evidence

Mo—Diener v Mid-American Coaches, Inc 378 S W 2d 509

N Y—Bennett v New York City Transit Authority 292 N Y S 2d 122, 239 N E 2d 215 22 N Y 2d 742

Evidence held inadmissible

(6) Other evidence—Abrego v Tri-State Transit Co La App 22 So 2d 681

Md—Greyhound Lines, Inc v Alderson, 336 A 2d 811, 26 Md App 277

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43 Cal—Waste v Pacific Gas & Electric Co 132 P 2d 311 56 Cal App 2d 191

Iowa—Fisher v Des Moines Transit Co 111 N W 2d 633 253 Iowa 195

Mass—Cochrane v Boston, W & N Y St Ry Co 65 N E 2d 6, 319 Mass. 177

Evidence held inadmissible

(2) Other instances

U S—Barnett v City of Detroit, Dept of St Rys C A Mich, 245 F 2d 445

(3) Other evidence

Minn—Flaherty v Minneapolis & St L Ry Co 87 N W 2d 633 251 Minn 345

44 Iowa—Barnard v Cedar Rapids City Cab Co 133 N W 2d 884, 257 Iowa 734

Ky—Louisville & N R Co v Gretory 130 S W 2d 745 279 Ky 295

Evidence held inadmissible

Cal—Gritsch v Packwick Stages System, App, 81 P 2d 257

51 Ky—Louisville & N R Co v Gregory supra, n 44

54 Conn—Wilkins v G Fox & Co, 7 A 2d 434, 125 Conn 738

Ky—Greer v Richards Admr, 115 S W 2d 568 273 Ky 91

Mo—Weaver v Scofield, App 198 S W 2d 240

Evidence held inadmissible or properly excluded

(8) Other evidence

Mass—Sweeney v Boston & M R R, 169 N E 2d 875 341 Mass 357

N J—Wassersun v Swern & Co 200 A 2d 783, 84 N J Super 1

Exclusion not abuse of discretion

Wash—Panstz v Orenge, 518 P 2d 726, 10 Wash App 317

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55 Mo—Johnson v Kansas City Public Service Co 228 S W 2d 796, 360 Mo 429

Tex—Dulaney Inv Co v Wood, Civ App 142 S W 2d 379 err dism judg correct

56 U S—Gillam v J C Penney Co C A Ind 341 F 2d 457

D C—Capital Transit Co v Webb, 142 F 2d 757 79 U S App D C 58—Hecht Co v Jacob C A 180 F 2d 13, 86 U S App D C 81

Mo—Morris v Kansas City Public Service Co 188 S W 2d 538, 239 Mo App 361

Tex—Dallas Ry & Terminal Co v Farnsworth, 227 S W 2d 1017 148 Tex 584

58 Conn—Wilkins v G Fox & Co, supra, n 54

D C—Meyers v Capital Transit Co 126 F 2d 231 75 U S App D C 256, foll in 126 F 2d 232 75 U S App D C 257

Ill—Miller v Chicago Transit Authority 223 N E 2d 323 78 Ill App 2d 375

N J—Harpell v Public Service Coordinated Transport 114 A 2d 295 35 N J Super 354, affd 120 A 2d 41 20 N J 309

59 Mass—Bannister v Berkshire St Ry Co 18 N E 2d 342, 301 Mass 598

Pa—Peffer v G C Murphy Co 17 D & C 2d 595 73 Dauph 202

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68 D C—Hecht Co v Jacobsen, supra, n 56

69 Mo—Gignoux v St Louis Public Service Co, App 180 S W 2d 784

N Y—Feinstein v New York City Transit Authority 190 N Y S 2d 304

Admissibility as effected by instructions

U S—Engel v F W Woolworth Co C A N Y 213 F 2d 482

74 U S—Louisville & N R Co v Adams, C A Fla 292 F 2d 153

Ill—Uebelein v Chicago Transit Authority 230 N E 2d 33 86 Ill App 2d 395

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85 Fla—Shaw v Congress Bldg Inc, App 113 So 2d 245

88 D C—Garrison v D C Transit System, Inc App 196 A 2d 924

Ohio—Hamilton v City of Cleveland, 110 N E 2d 50 93 Ohio App 93

R I—Shipman v United Electric Rys Co 40 A 2d 730 70 R I 454

Evidence held inadmissible or properly excluded

Mass—Keenan v Thibodeau, 170 N E 2d 419 341 Mass 452

90 R I—Shipman v United Electric Rys Co supra, n 88

92 N Y—Abady v Pennsylvania R Co 175 N Y S 2d 311 6 A D 2d 803 affd 186 N Y S 2d 657 6 N Y 2d 757 150 N E 2d 203

93 Ala—Waddell v Crescent Motors, 69 So 2d 414, 260 Ala 124

Tex—Airline Motor Coaches v Caver 226 S W 2d 830, 148 Tex 521

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95 Conn—Bowes v New England Transp Co 10 A 2d 589, 126 Conn 200, 126 A L R 457—Paley v Palmer 28 A 2d 844, 129 Conn 392

Fla—Safety Cabs v Benjamin 38 So 2d 432

Ky—Buren v Louisville Ry Co 165 S W 2d 352, 291 Ky 641

Me—Gould v Maine Central Transp Co, 9 A 2d 263 136 Me 336

N J—Houlihan v G R Wood, Inc 12 A 2d 689 124 N J Law 518

Pa—Lydiam v Moore, 21 Beaver 97

Va—New v Atlantic Greyhound Corp 43 S E 2d 872, 186 Va 726

Evidence held sufficient

(2) U S—Tri-State Transit Co of Louisiana v Grier C C A La 127 F 2d 719—Atlantic Coast Line R Co v De Mayo, C A Fla 222 F 2d 462

La—Bruce v Stuyvesant Ins Co, App 159 So 2d 424

Mich—Thurlow v City of Detroit, 291 N W 29 292 Mich 617

Okl—Denco Bus Co v Keller 212 P 2d 469 202 Okl 263

Tex—Otis Elevator Co v Bond, Civ App 373 S W 2d 518, remd Sup 384 S W 2d 681 on remand 391 S W 2d 519

(3) Isabella v West Virginia Transp Co 51 S E 2d 318 132 W Va 85

(5) To sustain findings

U S—Meehan v Central R Co of N J, D C N Y 181 F Supp 594

Ind—Klukas v Yount, 98 N E 2d 227 121 Ind App 160

La—Trepagnier v Douglas Public Service Corp App 101 So 2d 232

Mo—Cooley v St Louis Public Service Co, App 236 S W 2d 31

N Y—Krochling v City of New York, 61 N Y S 2d 474 270 App Div 909

R I—Halladay v Ingram, 82 A 2d 875 78 R I 464

(6) To show other matters

Cal—Kerr v Key System Transit Lines, 302 P 2d 884, 145 C A 2d 631

Conn—Skut v Boardman, 81 A 2d 110 137 Conn 675

Idaho—Clark v Tarr 283 P 2d 942, 76 Idaho 383

Ill—Cobb v Marshall Field & Co 159 N E 2d 520, 22 Ill App 2d 143—Nilsson v Checker Taxi Co 281 N E 2d 721 4 Ill App 3d 718

La—Burnett v Yellow Cab Co of Shreveport App 50 So 2d 670—Valence v Louisiana Power & Light Co App 50 So 2d 847

Mich—May v City of Detroit, 60 N W 2d 145, 337 Mich 674

N J—Stephens v Public Service Coordinated Transport 68 A 2d 487 5 N J Super 128

R I—Bossian v United Elec Rys Co 128 A 2d 843 85 R I 184

Tex—West v Mello, Civ App 424 S W 2d 266, err ref no rev err

W Va—Mulroy v Co-operative Transit Co 95 S E 2d 63 142 W Va 165

Evidence held insufficient

(4) Other cases

U S—Ingham v Eastern Air Lines, Inc C A N Y, 373 F 2d 227 cert den 88 S Ct 295 389 U S 931 19 L Ed 2d 292

Conn—Krentzman v Connecticut Co 70 A 2d 133, 136 Conn 239

La—Roy v New Orleans Public Service, App 76 So 2d 425

N Y—Enslein v Hudson & Manhattan R Co 165 N Y S 2d 630, 8 Misc 2d 87 affd in part and revd in part on oth grds 176 N Y S 2d 70, 6 A D 2d 833 affd 185 N Y S 2d 810, 6 N Y 2d 723, 158 N E 2d 504—Arroyo v Judena Taxi, Inc, 248 N Y S 2d 952, 20 A D 2d 888

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96 Cal—Hyman v Market St Ry Co 107 P 2d 485, 41 Cal App 2d 647

La—Wooten v Thompson, App 69 So 2d 557—Coleman v Continental Southern Lines, Inc, App 107 So 2d 69

Mo—Young v Kansas City Public Service Co, App, 255 S W 2d 113

Wis—Wittig v Kepler, 82 N W 2d 341 275 Wis 415

Evidence held sufficient

(1) U S—Carpini v Pittsburgh & Weirton Bus Co, C A Pa 216 F 2d 404—J C Penney Co v Eubanks, C A Okl 294 F 2d 519

Ark—Missouri Pac R Co v Lueter 115 S W 2d 278, 195 Ark 985

Ga—Georgia Power Co v Weaver 23 S E 2d 730, 68 Ga App 652

Ill—Herron v Yellow Cab Co, 217 N E 2d 311 70 Ill App 2d 76

Me—Morneault v Boston & M R R 68 A 2d 260, 144 Me 300

Mass—Friedman v Worcester St Ry Co 94 N E 2d 780 326 Mass 795

Miss—Continental Southern Lines, Inc v Robertson, 133 So 2d 543 241 Miss 796, 92 A L R 2d 653—Lambert v Lott, 222 So 2d 816

Ohio—Gallaher v Campbell App, 125 N E 2d 758

Pa—Troy v Pittsburgh Rys Co 132 A 2d 189 389 Pa 59

Va—Watts v Richmond F & P R Co 52 S E 2d 129 189 Va 258 7 A L R 2d 1418

W Va—Miller v Blue Ridge Transp Co 15 S E 2d 400 123 W Va 428

(11) W Va—Adkins v Raleigh Transit Co 31 S E 2d 775 127 W Va 131

(13) U S—Gates v Greyhound Corp D C Miss 197 F Supp 341

Fla—Lawson v Loftin 21 So 2d 202, 155 Fla 685

(14) As regards other matters

U S—Bergudo v Eastern Air Lines, Inc C A Pa 369 F 2d 874 reh den 376 F 2d 369 cert den 88 S Ct 1194 390 U S 996, 20 L Ed 2d 95 reh den 88 S Ct 1650, 391 U S 909 20 L Ed 2d 425 reh den 80 S Ct 2051 392 U S 917 20 L Ed 2d 1379—Flores v Pan Am World Airways, D C Puerto Rico, 259 F Supp 402

Kan—Emmerich v Kansas City Public Service Co 280 P 2d 615 177 Kan 443

Ky—Cincinnati N O & T P Ry Co v Hansford 205 S W 2d 346, 305 Ky 854—City Taxi Service, Inc v Gipson 289 S W 2d 723 foll 289 S W 2d 726

La—Crawford v Bullock App 20 So 2d 433 reh ref 21 So 2d 72, affd, 25 So 2d 226, 209 La 552

Evidence held insufficient

(1) U S—Ortiz v Greyhound Corp D C Md 175 F Supp 14 affd C A 275 F 2d 770

Cal—Guerra v Handlery Hotels, Inc 1 Cal Rptr 330, 347 P 2d 674 53 C 2d 266

La—Ensminger v New Orleans Public Service, App 65 So 2d 402—Anderson v Nola Cabs, Inc App 152 So 2d 250

Mich—Winfrey v S S Kresge Co 149 N W 2d 470, 6 Mich App 504

Miss—Ruff v Kurn, 193 So 449 187 Miss 532

N Y—Seidlin v City of New York, 104 N Y S 2d 313 199 Misc 732—Triola v Long Island R Co 169 N Y S 2d 79 5 A D 2d 691—Powell v George's Delivery Service, 285 N Y S 2d 1007 28 A D 2d 1120, affd 250 N E 2d 78, 24 N Y 2d 965 302 N Y S 2d 594

Ohio—Sebesta v Cleveland Ry Co App 47 N E 2d 912

Wash—Van Court v Lodge Cab Co 89 P 2d 206, 198 Wash 530

97. Evidence held sufficient

(1) Cal—Garcia v San Diego Elec Ry Co 170 P 2d 957, 75 Cal App 2d 729

Fla—Atlantic Greyhound Lines v Lovett, 184 So 133 134 Fla 505

Ill—Katamay v Chicago Transit Authority 289 N E 2d 623 53 Ill 2d 27

La—Warren v Yellow Cab Co of Shreveport, App 136 So 2d 319

Evidence held insufficient

(1) Ky—Louisville & N R Co v Webb, 248 S W 2d 429

La—Bailey v Owen, La App 19 So 2d 299—Deason v Greyhound Corp App, 106 So 2d 348

(11) As regards other matters

Tex—West v Mello, Civ App 424 S W 2d 266, err ref no rev err

Prima facie case

La—Alfred v Benoit, App 253 So 2d 797—Jones v New Orleans Public Service, Inc App 254 So 2d 652, writ ref 256 So 2d 289 260 La 402

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98 Colo—Landis v McGowan, 165 P 2d 180, 114 Colo 355

Ind—Indianapolis Rys v Boyer App, 26 N E 2d 62 108 Ind App 161

N Y—Crippin v Sunshine Transp Corporation, 20 N Y S 2d 750, 260 App Div 52, revd on oth grds 31 N E 2d 509 284 N Y 743

Evidence held sufficient

(1) Ill—Col[illegible]an v Dent 229 N E 2d 911 86 Ill App 2d 335

La—Pritchard v Wolfe, App 230 So 2d 612

(5) Ga—Radio Cabs v Tolbert 71 S E 2d 260 86 Ga App 181

(11) La—Jones v Massachusetts Bonding & Ins Co App 185 So 2d 871

Mass—Lodge v Congress Taxi Ass'n Inc 165 N E 2d 94 340 Mass 570

Tex—H T Cab Co v Ginns, Civ App 280 S W 2d 360 err ref no rev err Otis Elevator Co v Bond Civ App 373 S W 2d 518, remd Sup 388 S W 2d 681 on remand 391 S W 2d 519

(12) Other matters

Tex—Bradford v Fort Worth Transit Co Civ App 450 S W 2d 919 err ref no rev err

Evidence held insufficient

(1) Ga—Styles v Dennard 104 S E 2d 258, 97 Ga App 635—Clark v Atlanta Veterans Transp Inc, 148 S E 2d 921 113 Ga App 531

(4) Other matters

U S—Ephraim v Safeway Trails, Inc C A N Y 341 F 2d 815

Ga—Clark v Atlanta Veterans Transp Inc 148 S E 2d 921 113 Ga App 531

Mass—Lodge v Congress Taxi Ass'n, Inc 165 N E 2d 94 340 Mass 570

Tex—Dart v Yellow Cab Inc Civ App 401 S W 2d 874

Uncontradicted but unsupported testimony by plaintiff must be scrutinized carefully and a thorough consideration given to circumstances tending to disprove such testimony [99.5]

99.5 La—Franklin v Texas & P R Co, App, 35 So 2d 251 reh ref 35 So 2d 867—Ladmiranlt v Bravo Ferry Co App 72 So 2d 8—Tomasik v Shreveport Rys Co App, 98 So 2d 554

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1 U S—Gates v Greyhound Corp D C Miss 197 F Supp 341

Ala—Horton v Mobile Cab & Baggage Co, 198 So 2d 619 281 Ala 35

D C—Brown v Capital Transit Co 127 F 2d 329 75 U S App D C 337 cert den 63 S Ct 61 317 U S 632, 87 L Ed 510

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Ill—Louis v Checker Taxi Co 47 N E 2d 351 318 Ill App 71

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N C—Banks v Shepard, 52 S E 2d 215 330 N C 86

Okl—Southwestern Greyhound Lines v Smith, 277 P 2d 157

R I—Potemkin v Leach, 13 A 2d 250 65 R I 1

Va—Watts v Richmond, F & P R Co 52 S E 2d 129 189 Va 258, 7 A L R 2d 1418

Evidence held sufficient

(1) U S—Fisher v Mt Mansfield Co C A Vt, 283 F 2d 533—Town House, Inc v Pauhno, C A Guam, 381 F 2d 811

Ala—Western Ry of Ala v Brown 196 So 2d 392, 280 Ala 543

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Conn—Cuneo v Connecticut Co 2 A 2d 220, 124 Conn 647—Celentano v Dix, 181 A 2d 116, 149 Conn 456

D C—Butler v McCalip, Mun App 54 A 2d 644

Fla—Ace Cab Co v Garcia, App 140 So 2d 338—Bess Ambulance, Inc v Boll, App, 208 So 2d 308—Eastern S S Corp v Egan, App 246 So 2d 609 writ discharged, Sup 261 So 2d 133

Ga—Radio Cabs v Tolbert, 71 S E 2d 260, 86 Ga App 181—Savannah Transit Co v Williams, 129 S E 2d 417 107 Ga App 212

Ill—Koenig v 399 Corp 240 N E 2d 164 97 Ill App 2d 345

Ind—Chicago South Shore & South Bend R R v Brown, 320 N E 2d 809 162 Ind App 493 reh den 323 N E 2d 681 162 Ind App 493

La—Johnson v Ceaser App 304 So 2d 855—Shilmore v New Orleans Public Service, Inc App 311 So 2d 511

Mass—Glidden v Coghlin Elec Co 190 N E 2d 76, 346 Mass 761

Mich—Leeds v Masha, 43 N W 2d 92, 328 Mich 137

Minn—Anderson v Enfield, 70 N W 2d 409 244 Minn 474

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N J—Hewitt v Atlantic City & S R Co 21 A 2d 598, 19 N J Misc 536

N M—Hoskins v Albuquerque Bus Co 382 P 2d 700, 72 N M 217

N Y—Norris v Konopan, 129 N Y S 2d 100—Richter v Trailways of New England, Inc, 282 N Y S 2d 148 28 A D 2d 737

N D—Kuntz v Stelmachuk, 136 N W 2d 810

Okl—Southern Kansas Greyhound Lines v Hicks, 89 P 2d 278 184 Okl 581—Denco Bus Co v Keller 212 P 2d 469, 202 Okl 263—North v Williams, 366 P 2d 406

Pa—Cuneo v Philadelphia Transp Co 176 A 2d 896, 405 Pa 532—Gilbert v Korvette, Inc, 327 A 2d 94 457 Pa 602

S C—Odom v Weathersbee, 81 S E 2d 788, 225 S C 253

Tex—Rojas v Vuocolo, Civ App, 177 S W 2d 957, revd on oth grds 177 S W 2d 962, 142 Tex 152—Texas, New Mexico & Oklahoma Coaches v Hill, Civ App, 277 S W 2d 178, err ref no rev err

Va—Long's Baggage Transfer Co v Moore, 95 S E 2d 221 198 Va 608

W Va—Adkins v Raleigh Transit Co 31 S E 2d 775, 127 W Va 131

(11) As to other matters

Cal—Polisoulakos v City and County of San Francisco, 276 P 2d 126, 129 C A 2d 137—Wilson v Zemen, 285 P 2d 1026, 134 C A 2d 382

Ky—H P Selman & Co v Goldstein, 278 S W 2d 713

La—Reeves v Texas Mut Ins Co App 62 So 2d 853—Roy v New Orleans Public Service, App 76 So 2d 425—Rauschlolb v Continental Southern Lines, App 81 So 2d 87—Yarberry v Shreveport Rys Co App, 117 So 2d 637

Minn—Orchard v Northwest Airlines, 51 N W 2d 645, 236 Minn 42

Tex—City Transp Co of Dallas v Vatsures, Civ App 278 S W 2d 373 err dism

Evidence held insufficient

(1) U S—Johnston v Greyhound Corp, D C Md, 139 F Supp 551—Greene v Swissair Transport Co, C A N Y, 396 F 2d 126—D C Transit System, Inc v Perry App 337 A 2d 224

Ark—Capital Transp Co v Howard, 229 S W 2d 998, 217 Ark 333

Cal—Renzetti v Los Angeles Motor Coach Co, 119 P 2d 164, 48 Cal App 2d 37—Blodgett v Walker Scott Corp 221 P 2d 325, 99 Cal App 2d 251—Connor v Pacific Greyhound Lines, 232 P 2d 500, 104 Cal App 2d 746

Conn—Krentzman v Connecticut Co, 70 A 2d 133, 136 Conn 239

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Ill—Bushaw v Central Ill Elec & Gas Co, 106 N E 2d 896, 347 Ill App 556—Clark v Rockford Yellow Cab & Transfer Co, 144 N E 2d 467, 14 Ill App 2d 262

Ky—South-eastern Greyhound Lines v [illegible]s, 185 S W 2d 540, 299 Ky 381

La—Hudson v Arceneaux, App 169 So 2d 731 application den 170 So 2d 868, 247 La. 351, cert den 86 S Ct 114 382 U S 858, 15 L Ed 2d 96—Conway v Patterson, App, 201 So 2d 332, [illegible] den 203 So 2d 555 251 La 219 and 203 So 2d 556, 251 La 221

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Pa—Dayen v Penn Bus Co 69 A 2d 151 363 Pa 176 Meehan v Delaware, L & W R Co 53 Lack Jur 145

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W Va—Dunning v Monongahela Transp Co 27 S E 2d 481 126 W Va 195—Mulroy v Co-operative Transit Co 95 S E 2d 63 142 W Va 165

(12) In other respects

Ill—Hubbard v Checker Taxi Co 203 N E 2d 441 54 Ill App 2d 392

La—Lewis v Goodman, App 92 So 2d 723—Fink v Down Town Real Estate Co, App 168 So 2d 906

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NC—Leake v Queen City Coach Co 155 S E 2d 161, 270 N C 669

Tenn—Nashville C & St L Ry v Katzman, 258 S W 2d 730, 195 Tenn 127

Tex—Grady v Dallas Ry & Terminal Co Civ App 278 S W 2d 282, err ref no rev err

Prima facie case

La—Aime v Hebert, App 282 So 2d 566—Johnson v City of New Orleans, App 284 So 2d 794

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2 US—Williams v Reading Co C A Pa, 175 F 2d 32

3 US—Longo v Yellow Cab Co, D C Pa, 79 F Supp 478

Ala—Cannon v Louisville & N R Co, 42 So 2d 340, 252 Ala 571

NY—Keenan v Sheehan, 129 N Y S 2d 883, 205 Misc 183 affd 134 N Y S 2d 386, 284 App Div 895

Evidence held sufficient, etc.

Mo—Robert v New York Cent R Co, App, 122 S W 2d 1

Ill—Russell v Illinois Central R Co, 88 N E 2d 380, 338 Ill App 655

4 US—Chesapeake & O Ry Co v Jeter C A Va, 196 F 2d 175

Pa—Lewis v Pittsburgh Rys Co 200 A 704, 132 Pa Super 394

5 US—Chesapeake & O Ry Co v Jeter supra, n 4—Sue v Chicago Transit Authority C A Ill 279 F 2d 416—J C Penney Co v Westinghouse Elec Corp C A Ind 351 F 2d 561

Fla—City Cab Co of Orlando, Inc v Green, App 308 So 2d 540

Ky—Southeastern Greyhound Lines Inc v Chumley 226 S W 2d 777 312 Ky 154

Mo—Hoeller v St Louis Public Service Co, App 199 S W 2d 7

NY—Christensen v Surface Transp Corp of New York, 128 N Y S 2d 146, 283 App Div 349

Wash—Wiggins v North Coast Transp Co, 98 P 2d 675 2 Wash 2d 446

6 US—Johnston v Greyhound Corp D C Md 139 F Supp 551

9 Iowa—Edwards v Des Moines Transit Co 99 N W 2d 920, 251 Iowa 163

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12 Cal—Nelson v American Airlines, Inc 70 Cal Rptr 33 263 C A 2d 742

13 Cal—Nelson v American Airlines, Inc 70 Cal Rptr 33 263 C A 2d 742

Ill—Halowatsky v Central Greyhound Lines, supra, n 1

La—Hebert v Travelers Ins Co App 179 So 2d 513

Mass—Koczur v Flanagan, 27 N E 2d 483 306 Mass 121

Pa—Menarde v Philadelphia Transp Co 103 A 2d 681 376 Pa 497

Tex—Crawford v Continental Panhandle Lines, Inc Civ App 278 S W 2d 566

Evidence held sufficient

(1) Ky—Marshall v Van Meter 438 S W 2d 504

Miss—Lambert v Lott, 222 So 2d 816

Va—Long's Baggage Transfer Co v Moore, 95 S E 2d 221 198 Va 608

14 Mich—Mitcham v City of Detroit, 94 N W 2d 388, 355 Mich 182

Pa—Nebel v Burrelli, 41 A 2d 873 352 Pa 70

15 La—Franklin v Texas & P R Co App, 35 So 2d 867—Dickson v Yellow Cab Co of Shreveport, App 61 So 2d 230

Mass—Demmler v Railways of New England, Inc 244 N E 2d 733

Mo—Statler v St Louis Public Service Co App 300 S W 2d 831

Evidence held sufficient

(1) U S—Mullen v Texas & P Ry Co C A La 425 F 2d 269

Cal—Deshotel v Atchison, T & S F Ry Co, 300 P 2d 910 144 C A 2d 224

Conn—McNamara v Connecticut Railway & Lighting Co 9 A 2d 720, 126 Conn 127

D C—Grober v Capital Transit Co, D C 119 F Supp 100

Ga—English v Yellow Cab Co, 168 S E 2d 920 119 Ga App 828

Ill—Starczynski v Miltenberg, 55 N E 2d 299 323 Ill App 283

La—Fink v Down Town Real Estate Co App, 168 So 2d 906—Barnes v Toye Bros Yellow Cab Co, 204 So 2d 83

Mo—Pichler v Kansas City Public Service Co, 226 S W 2d 681, 360 Mo 12

N C—Garvey v Atlantic Greyhound Corp, 45 S E 2d 58, 288 N C 166

Okl—Oklahoma Ry Co v Wilson, 231 P 2d 688 204 Okl 488

Pa—Polando v Blue Ridge Transp Co, 115 A 2d 157 382 Pa 316

S C—Squires v Henderson, 36 S E 2d 738, 208 S C 58

Tenn—King v Leeman, 204 S W 2d 384, 30 Tenn App 206

Va—Yellow Cab Co v Eden, 16 S E 2d 625 178 Va 325

W Va—Laphew v Consolidated Bus Lines, 55 S E 2d 881, 133 W Va. 291

Wis—Rasmussen v Milwaukee Elec Ry & Transport Co, 47 N W 2d 730, 239 Wis 130, reh. den and mand mod as to costs 49 N W 2d 272—Kowalski v Great Am Indem Co of N Y 107 N W 2d 138, 12 Wis 2d 311

(5) Ill—Avram v Hammond, 107 N E 2d 882, 348 Ill App 68

Va—Virginia Electric & Power Co v Clark, 19 S E 2d 693 179 Va 596

(9) Jones v Thompson, 184 S W 2d 407 353 Mo 730

(14) La—Lacour v Continental Southern Lines, Inc App, 124 So 2d 588

(17) To show other matters

Ala—Greyhound Corp v Brown, 113 So 2d 916, 269 Ala 520

La—Fontenot v Fidelity General Ins Co App 185 So 2d 896, writ ref 187 So 2d 740, 249 La 578

N J—Grassi v Pennsylvania R Co 205 A 2d 895 86 N J Super 48

Evidence held insufficient

U S—Hanback v Seaboard Coastline R R, D C S C 396 F Supp 80

La—Coleman v Continental Southern Lines, Inc App 107 So 2d 69

Ohio—Stine v Springfield City Lines, Inc 155 N E 2d 245 106 Ohio App 429

Pa—Kabakeris v Pennsylvania R Co, 108 P L J 204

16 Ark—Capital Transp Co v Howard, 229 S W 2d 998, 217 Ark 333

Evidence held insufficient to show

(1) U S—Hinton v Chicago, R I & P R Co C A Ill 272 F 2d 449—Johnson v Continental Cas Co, C A Wis 269 F 2d 157—Harstad v U S C A Or 439 F 2d 779

Cal—Simmons v F W Woolworth Co, 329 P 2d 999 163 C A 2d 709

D C—Wiggins v Capital Transit Co Mun App, 122 A 2d 117 57 A L R 2d 1

Ky—Southeastern Greyhound Lines v Davis, 160 S W 2d 625, 290 Ky 362

La—Lacour v Continental Southern Lines, Inc, App 124 So 2d 588—Upkins v Downs, App 169 So 2d 256

Md—Kaplan v Solomon 99 A 2d 736, 203 Md 131

N Y—Trudell v New York Rapid Transit Corporation, 289 N Y S 53 248 App Div 787 revd on grd jury question was presented 22 N E 2d 244, 281 N Y 82—Marko v New York Rapid Transit Corporation, 18 N Y S 2d 449—Viner v Hudson Transit Lines, Inc, 157 N Y S 2d 986, 3 A D 2d 632—Zimmer v City of New York, 158 N Y S 2d 356—Kulovany v Ohrbach's, Inc, 158 N Y S 2d 495, 2 A D 2d 997

N C—White v Chappell, 14 S E 2d 843, 219 N C 652

Ohio—Thurman v City Ry Co, App, 136 N E 2d 452

Pa—Meehan v Delaware, L & W R Co 53 Lack Jur 145

Tex—El Paso Electric Co v Barker 137 S W 2d 17, 134 Tex 496—O'Day v Sakowitz Bros, Civ App 462 S W 2d 119, err ref no rev err

Wash—White v Greyhound Corp, 280 P 2d 670, 46 Wash 2d 260

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17 N H—Marwald v Public Service Co of N H, 41 A 2d 247 93 N H 276

18 Ky—Southeastern Greyhound Lines v Donohue, 182 S W 2d 328, 298 Ky 139

Pa—Jacobs v Caldwell, 115 A 2d 872, 179 Pa Super 348

Evidence held sufficient

(1) Renzetti v Los Angeles Motor Coach Co supra, n 1—Sweet v Los Angeles Ry Co, 179 P 2d 824 79 Cal App 2d 195

La—Treppagnier v Douglas Public Service Corp App, 101 So 2d 232

Ohio—Jones v Columbus & Southern Ohio Elec Co, 75 N E 2d 830, 82 Ohio App 46

(12) Other matters

Tex—Brewer v Dallas Ry & Terminal Co Civ App 247 S W 2d 435

20 Ill—Allen v Chicago Transit Authority, 114 N E 2d 468, 351 Ill App 194

N Y—Laudano v New York Rapid Transit Corp, 86 N Y S 2d 870, 275 App Div 712—Dalton v City of New York, 132 N Y S 2d 36, 283 App Div 1104

Evidence held sufficient

(1) U S—Ozark Air Lines, Inc v Larmer C A Iowa, 352 F 2d 9—Zatma v Greyhound Lines, Inc, C A N D, 442 F 2d 238

Cal—Hamilton v Pacific Electric Ry Co 86 P 2d 829 12 Cal 2d 598

D C—Capital Transit Co v Webb, 142 F 2d 757, 79 U S App D C 58.

Ill—Zydeck v Chicago & N W Ry Co 77 N E 2d 830, 333 Ill App 388—Walter v Illinois Cent R Co 154 N E 2d 331, 19 Ill App 2d 481

Mass—Rintone v Massachusetts Bay Transp Authority 329 N E 2d 139, 3 Mass App 759

Minn—Becker v Thomson 294 N W 214 208 Minn 332

N J—Van Wagner v West Shore R Co 12 A 2d 242 124 N J Law 453

Ohio—Kokinos v Ohio Greyhound, 92 N E 2d 386 153 Ohio St 435

Tex—Fort Worth & D Ry Co v Britton, Civ App 310 S W 2d 654 err ref no rev err

(3) Cal—McNulty v Southern Pac Co 216 P 2d 534 96 Cal App 2d 841

La—Wink v Thompson, supra, n 15

(6) Van Wagner v West Shore R Co supra

(12) Other cases

N Y—Maxlowm v New York, N H & H R R 115 N Y S 2d 238—Callaghan v City of New York, 128 N Y S 2d 206 283 App Div 388

Evidence held insufficient

(1) De Nicolo v Palmer D C N Y 33 F Supp 874 affd 125 F 2d 126

Cal—Gray v City and County of San Francisco, 20 Cal Rptr 894 202 C A 2d 319

Ill—Mendelhall v Illini Coach Co 172 N E 2d 412, 29 Ill App 2d 1

Mass—Rich v Boston Elevated Ry Co 55 N E 2d 953 316 Mass 615

Mich—Oppenheim v Pitcairn, 292 N W 374 293 Mich 475

N Y—Cavadi v New York City Transit Authority 182 N Y S 2d 930, 7 A D 2d 299 rearg den 185 N Y S 2d 219 8 A D 2d 594—Telsner v New York City Transit Authority, 221 N Y S 2d 782, 15 A D 2d 455

Pa—Fischer v City of Philadelphia, 82 Pa Dist & Co 263

Va—Virginia Stage Lines v Newcomb 47 S E 2d 446, 187 Va 677

(2) Ill—Darda v Chicago Transit Authority 241 N E 2d 478, 100 Ill App 2d 94

Mass—Reardon v Boston Elevated Ry Co 40 N E 865 311 Mass 228

N Y—Bertalaccio v City of New York, 56 N Y S 2d 427, 269 App Div 902—Rocher v New York City Transit Authority 172 N Y S 2d 836, 11 Misc 2d 951

Pa—Anschel v Pennsylvania R Co 29 A 2d 694 346 Pa 123

(4) N Y—Ryan v City of New York, 182 N Y S 2d 616, 7 A D 2d 298, affd 190 N Y S 2d 705, 6 N Y 2d 896, 160 N E 2d 924

(6) Other evidence—Welch v Thompson, 210 S W 2d 79 357 Mo 703

N Y—Parker v Port of Authority, 197 N Y S 2d 975, 22 Misc 2d 421

8 N Y—Stern v City of New York, 131 N Y S 2d 537, 283 App Div 1101

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21. Evidence held insufficient, etc.

(2) Other evidence—Sylvester v Pennsylvania R Co, Pa 93 Pittsb Leg J 155 affd 53 A 2d 537, 357 Pa 213

22. Evidence held sufficient

(1) U S—Stiles v Gove, C A Mont, 345 F 2d 991

N Y—Ross v Bloomingdale Bros, Inc 127 N Y S 2d 81, 205 Misc 104

(2) Missouri Pac Transp Co v Jones, 122 S W 2d 613 197 Ark 79—Missouri Pac R Co v Sorrells, 146 S W 2d 704 201 Ark 748

Ill—Lazarus v Fried, 73 N E 2d 647 331 Ill App 552

Ky—Louisville & N R Co v Taylor 253 S W 2d 27

La—Creech v Shreveport Rys Co App 43 So 2d 295

Mo—Robert v New York Cent R Co supra, n 3

N J—Sanders v Hudson & M R Co 3 A 2d 86, 121 N J Law 406, affd 5 A 2d 686, 122 N J Law 376

Pa—Boylan v Carbondale Transfer Co, 32 Pa Dist & Co 109 39 Lack Jur 73—Straub v Mogul, 56 Pa Dist & Co 702

Tex—Coastal Coaches v Ball, Civ App 234 S W 2d 474 22 A L R 2d 955 err ref no rev err

Wis—Raschl v Wisconsin Michigan Power Co 294 N W 521 236 Wis 116

(3) Cal—Harris v Smith, 112 P 2d 907 44 Cal App 2d 694

N Y—Ryback v Barocas, 225 N Y S 2d 402

(4) Burdines Inc v McConnell 1 So 2d 462, 146 Fla 512

Ill—Scott v Instant Parking, Inc, 241 N E 2d 517 100 Ill App 2d 293

(9) La—Henderson v Baton Rouge Bus Co App 217 So 2d 422

Md—Johnston v Greyhound Corp D C Md 139 F Supp 551

(14) Other cases

Cal—Adam v Los Angeles Transit Lines, 317 P 2d 642, 154 C A 2d 535

Ill—Hughes v Chicago Transit Authority 108 N E 2d 821 348 Ill App 394

La—Johnson v Continental Southern Lines, Inc App 113 So 2d 114 74 A L R 2d 1328—Brown v Baton Rouge Bus Co, App 137 So 2d 658

Mo—Wagner v Missouri-Kansas-Texas R Co 275 S W 2d 262, 50 A L R 2d 1062

N Y—Kaese v S S Kresge Co 186 N Y S 2d 753 8 A D 2d 908

Evidence held insufficient

(1) U S—Wallin v Greyhound Corp C A Tenn 341 F 2d 521

Conn—Paley v Palmer 28 A 2d 844 129 Conn 392

D C—D C Transit System, Inc v Smith, D C Mun App 173 A 2d 216—Taylor v D C Transit System, Inc App, 258 A 2d 455

Fla—Shaw v Red Top Cab & Baggage Co, App, 167 So 2d 760

Ill—Heffernan v Mandel Bros 17 N E 2d 523 297 Ill App 272

Ind—L S Ayres & Co v Hicks, 40 N E 2d 334, reh den 41 N E 2d 195, 356, 220 Ind 86

La—Etress v Shreveport Rys Co, App 33 So 2d 700

Mass—Bannister v Berkshire St Ry Co, 18 N E 2d 342, 801 Mass 598

Mo—Whalen v St Louis Public Service Co, App 351 S W 2d 788

N Y—Norris v Brooklyn & Queens Transit Corporation, 18 N Y S 2d 33 258 App Div 1081

N C—Pemberton v Lewis, 69 S E 2d 512, 235 N C 188

Or—Baker v Rose City Transit Co 361 P 2d 257 227 Or 110

Pa—Pierce v Delaware, L & W R Co 57 A 2d 876, 358 Pa 403

Tex—Walker v City Service Taxi & Bus, Civ App, 142 S W 2d 398 Err dism, judg correct

(2) Wilson v Public Service Coordinated Transport, 20 A 2d 368, 126 N J Law 250

(6) La—Hayes v Baton Rouge Bus Co App, 110 So 2d 212

Pa—Madera v Kester 124 A 2d 447 181 Pa Super 160

(10) Other matters

Ark—Little Rock Land Co v Raper, 433 S W 2d 836, 245 Ark 641

Iowa—Tiedgen v McIntosh, 176 N W 2d 819 49 A L R 3d 285

La—Bishop v Shreveport Rys Co, App, 63 So 2d 181—Fontenot v Fidelity General Ins Co App 185 So 2d 896 writ ref 187 So 2d 740, 249 La 578

Mass—Dolan v Boston & M R R, 105 N E 2d 376, 328 Mass 532—Egan v Metropolitan Transit Authority, 146 N E 2d 495 336 Mass 505

N Y—Jokelo v Allied Stores Corp 295 N Y S 2d 730, 31 A D 2d 200, motion den 298 N Y S 2d 57 31 A D 2d 806—Castaneo v Leventon, 308 N Y S 2d 1021, 34 A D 2d 539 affd 267 N E 2d 888, 28 N Y 2d 534, 319 N Y S 2d 76

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23 U S—Wallar v Southern Pac Co, D C Cal 37 F Supp 475

Cal—Pierson v Holly Sugar Corp, 237 P 2d 28, 107 C A 2d 298

Tex—El Paso Electric Co v Barker, 137 S W 2d 17 134 Tex 496

Evidence held sufficient, etc.

(2) Other instances

U S—Gerard v American Airlines, Inc C A N Y, 272 F 2d 35

Mont—Greenup v Community Transit Co 399 P 2d 418, 145 Mont 39

Pa—Peffer v G C Murphy Co 17 D & C 2d 595, 73 Dauph 202

Evidence held insufficient

U S—Gates v Greyhound Corp, D C Miss 197 F Supp 341

24 Cal—Wante v Pacific Gas & Electric Co 132 P 2d 311 56 Cal App 2d 191

Ky—Cincinnati, N & C Ry Co v Johnson, 136 S W 2d 769 281 Ky 565

La—Johnson v City of New Orleans, App 284 So 2d 794

Mich—Miller v Detroit Cab Co 221 N W 2d 342, 392 Mich 480

N Y—Zeffiro v Porfido, 38 N Y S 2d 393 265 App Div 185

N C—Banks v Shepard, 52 S E 2d 215 330 N C 86

Pa—Hawkins v Pittsburgh Rys Co 22 A 2d 73, 146 Pa Super 185—Mihaylo v Grossinger, 51 Lack Jur 17

Tenn—Cincinnati, N O & T P Ry Co v Denton, 140 S W 2d 796, 24 Tenn App 81

Evidence held sufficient

(1) U S—Stiles v Gove, C A Mont, 345 F 2d 991

Ark—Jones v Missouri Pac R Co, Ark, 150 S W 2d 742, 202 Ark 333

Cal—Pierson v Holly Sugar Corp, supra, n 23—Rocray v Peerless City Lines, Inc 323 P 2d 772, 159 C A 2d 265

Colo—Majors v J C Penney Co, Inc 506 P 2d 399, 31 Colo App 568

Ill—Darwin v Chicago Transit Authority, 90 N E 2d 924 340 Ill App 223—Townsend v Chicago Transit Authority 116 N E 2d 170, 1 Ill App 2d 77

Ky—Lyons v Southeastern Greyhound Lines, 137 S W 2d 1107, 282 Ky 106

La—Matthews v New Orleans Public Service, Inc, App 239 So 2d 420, writ ref 241 So 2d 255, 256 La 1158

Mo—Payne v Scott, App, 181 S W 2d 161—Williams v St Louis Public Service Co App 245 S W 2d 659 revd on oth grds, Sup, 253 S W 2d 97

N J—Tarnow v Hudson & Manhattan R Co 1 A 2d 73 120 N J Law 505 affd 3 A 2d 570, 121 N J Law 522

N Y—Enslein v Hudson & Manhattan R Co, 165 N Y S 2d 630, 8 Misc 2d 87, affd in part and revd in part on oth grds 176 N Y S 2d 70, 6 A D 2d 833 affd 185 N Y S 2d 810, 6 N Y 2d 723, 158 N E 2d 504

N C—Bumgardner v Allison, 78 S E 2d 752, 238 N C 621

Okl—Oklahoma Transp Co v Chisholm, 434 P 2d 299

Pa—Archer v Pittsburgh Rys Co, 37 A 2d 539, 349 Pa 547—Archer v Pennsylvania R Co, 72 A 2d 609, 166 Pa Super 538—Angelo v Pittsburgh Rys Co Bus Division, 151 A 2d 867, 189 Pa Super 574

(2) Ariz—Atchison, T & S F Ry Co v France, 94 P 2d 434 54 Ariz 140

Ark—Missouri Pacific Transp Co v Porter, 134 S W 2d 513, 199 Ark 225

Fla—Dunn Bus Service v Wise, 191 So 509, 140 Fla 191

Ill—McKenzie v Fried, 61 N E 2d 407, 326 Ill App 258—Zydeck v Chicago & N W Ry Co, supra, n 20—Sims v Chicago Transit Authority 129 N E 2d 23 7 Ill App 2d 21

Kan—Clark v Southeastern Greyhound Lines, 79 P 2d 906, 148 Kan 155

La—Cavalier v Nola Cabs, Inc App 96 So 2d 102—Llorens v City of Alexandria, App, 106 So 2d 342

Mass—Harrison v Boston Elevated Ry Co 55 N E 2d 707 316 Mass 463

Okl—Yellow Dune Cab Co v Pike, 158 P 2d 469 195 Okl 373

Pa—White v Pittsburgh Rys Co 200 A 932, 132 Pa Super 373

Wash—Cavels v City of Seattle, 81 P 2d 275 195 Wash 433

(3) US—De Back v U S D C Cal 29 F Supp 141 mod on oth grds 118 F 2d 208

Ark—St Louis-Southwestern Ry Co v Holwerk, 163 S W 2d 175 204 Ark 587

Ga—Bibb Transit Co v Scott, 114 S E 2d 43 101 Ga App 352

Ill—[illegible] v Chicago Transit Authority 99 N E 2d 706, 343 Ill App 648—McNealy v Illinois Cent R Co 193 N E 2d 879 43 Ill App 2d 460

Ind—Chicago & Calumet Dist Transit Co v Radjenovich, 212 N E 2d 161 141 Ind App 18

Ky—Cincinnati, Newport & Covington Transp Co v Fischer 357 S W 2d 870

La—Tomasik v Shreveport Rys Co App, 98 So 2d 554—Mattews v New Orleans Public Service, Inc, App 239 So 2d 420, writ ref 241 So 2d 255 256 La 1158

Md—Baltimore Transit Co v Pue, 220 A 2d 551, 243 Md 256

Mass—Cushman v Boston, W & N Y St Ry Co 65 N E 2d 6, 319 Mass 177

Mich—Baumgarten v Tasco, 20 N W 2d 144, 312 Mich 161

Miss—Mississippi Power & Light Co v Tripp, 183 So 514, 183 Miss 225

Mo—Gilmore v St Louis Public Service Co App 251 S W 2d 344

Neb—Whittaker v Omaha & C B St Ry Co 291 N W 275 137 Neb 800

N J—Ivins v Public Service Interstate Transp Co, 73 A 2d 592, 8 N J Super 94

N Y—Lee v Brooklyn & Queens Transit Corporation, 8 N Y S 2d 241, 255 App Div 984—Cassab v Hees, 27 N Y S 2d 178, 261 App Div 1114—Desmond v Doyle, 160 N Y S 2d 738, 5 Misc 2d 490—Stuhl v New York City Omnibus Corp 178 N Y S 2d 390, 11 Misc 2d 727

Ohio—Stine v Springfield City Lines, Inc 155 N E 2d 245, 106 Ohio App 429

Pa—Owen v York Rys Co 53 York Co 195—Miller v Pittsburgh Rys Co, 144 A 2d 514, 187 Pa Super 334

R I—Kondian v Yellow Cab Co 167 A 2d 551, 92 R I 182

Tex—Rapid Transit Lines, Inc v Doyle, Civ App, 450 S W 2d 767

Vt—Plosser v Burlington Rapid Transit Co 149 A 2d 728, 121 Vt 133

Wash—Keller v City of Seattle, 94 P 2d 184 200 Wash 573—Irvin v Spear, 248 P 2d 404 41 Wash 2d 224

(4) US—Delg v Chesapeake & O R Co, D C N Y 163 F Supp 188—Wilson v Northland Greyhound Lines, Inc, D C Mont, 166 F Supp 667

Ill—Ward v Peoria Transit Lines, 118 N E 2d 611 2 Ill App 2d 170

Kan—Emmerich v Kansas City Public Service Co 280 P 2d 615, 177 Kan 443

La—Bennett v Yellow Cab Co of Shreveport, App 50 So 2d 670—Hebert v Travelers Ins Co, App, 179 So 2d 513

Mo—Hopkins v St Louis Public Service Co, App, 382 S W 2d 442

Pa—Schulz v Reading Transp Co 47 A 2d 213, 354 Pa 373

Wis—Van Matre v Milwaukee Elec Ry & Transport Co 67 N W 2d 831 268 Wis 399

(6) La—Wise v Pre[illegible] 151 So 2d 356, 244 La 157

Tex—Couch v Hale, Civ App 404 S W 2d 920

Va—Virginia Transit Co v Tidd, 73 S E 2d 405 194 Va 418

(8) US—Keller v Brooklyn Bus Corporation, C C A N Y 128 F 2d 510

Cal—Sweet v Los Angeles Ry Co, supra, n 18—Aboudara v City and County of San Francisco, 251 P 2d 32, 114 C A 2d 630—Powell v Dell-Air Aviation, Inc 74 Cal Rptr 3, 268 C A 2d 451

Conn—Bowers v New York, N H & H R Co 151 A 2d 704 146 Conn 437

Ga—Reeves v Southeastern Stages, Inc 140 S E 2d 297 111 Ga App 12

Ill—Stollery v Sprague, 22 N E 2d 276, 301 Ill App 209—Russell v Illinois Central R Co 88 N E 2d 380, 338 Ill App 655

La—Wilson v Westside Transit Co App, 216 So 2d 353—Vidal v Liberty Mut Ins Co App 232 So 2d 786

Mo—Buehle v Frazier 232 S W 2d 465, 360 Mo 1068

Ohio—Ross v Cincinnati Transit Co 148 N E 2d 84 105 Ohio App 327

Okl—Brown v Reames, 364 P 2d 906

Tex—Franner v Joske Bros Co Civ App 227 S W 2d 392, err ref

Va—Crist v Washington, Virginia and Maryland Coach Co, 85 S E 2d 213, 196 Va 642, cert den 76 S Ct 50, 350 U S 823 100 L Ed 736, reh den 76 S Ct 176, 350 U S 905 100 L Ed 794

Wis—Yanggen v Wisconsin Michigan Power Co 4 N W 2d 130, 241 Wis 27

(9) Other cases

U S—Stout v American Bus Lines, C A N Y 200 F 2d 833

Cal—Abney v City and County of San Francisco, 252 P 2d 654 115 C A 2d 506

Conn—Pillou v Connecticut Co 123 A 2d 470 143 Conn 481

D C—Colton v Moore, D C 108 F Supp 425

Ill—Sumral v Chicago Transit Authority 213 N E 2d 150, 65 Ill App 2d 217

La—Hebert v Travelers Ins Co App 176 So 2d 513

Mich—Molnar v Gordon, 60 N W 2d 485 337 Mich 615

Ohio—Bowlin v Black & White Cab Co 219 N E 2d 221 7 Ohio App 2d 133

Pa—Evans v Philadelphia Transp Co 212 A 2d 440 418 Pa 567

R I—Bossian v United Elec Rys Co 128 A 2d 843, 85 R I 184

Tex—Couch v Hale, Civ App 404 S W 2d 920

Wash—Torrez v Peck, 356 P 2d 703 57 Wash 2d 302

Wis—Kouneski v Great Am Indem Co of N Y, 107 N W 2d 138, 12 Wis 2d 311

Evidence held insufficient

(1) US—Stout v American Bus Lines, D C N Y 102 F Supp 994, affd, C A 200 F 2d 833

Cal—Tucker v Los Angeles Transit Lines, 185 P 2d 616, 82 Cal App 2d 183

Conn—Paley v Palmer supra, n 22

D C—Wiggins v Capital Transit Co Mun App 122 A 2d 117, 57 A L R 2d 1

Fla—Nicholson v City of St Petersburg, App 163 So 2d 775

Ill—Halowatsky v Central Greyhound Lines, supra, n 1—Waters v Checker Taxi Co 193 N E 2d 606, 43 Ill App 2d 403

Ky—Dix v Carmack, 117 S W 2d 1036, 273 Ky 844—Howard v Fowler, 207 S W 2d 559 306 Ky 567—Morrison v Kentucky Bus Lines, Inc 356 S W 2d 757

La—Lee v Shreveport Rys Co App, 200 So 170—Valdry v Baton Rouge Bus Co App 5 So 2d 173—Mahfouz v Southern Bus Lines, App 33 So 2d 412—Johnson v Shreveport Rys Co, App, 50 So 2d 655—Scott v New Orleans Public Service, Inc App 176 So 2d 184

Mass—Maher v Boston & A R Co 24 N E 2d 513, 304 Mass 641—Barakat v Trustees of New York, N H & H R Co 42 N E 2d 272, 311 Mass 496

Miss—Lambert v Lott, 222 So 2d 816

Mo—Williams v St Louis Public Service Co 253 S W 2d 97—Quinn v St Louis Public Service Co, 318 S W 2d 316

N Y—Nepola v City of New York, 110 N Y S 2d 312, 279 App Div 862, affd 108 N E 2d 677 304 N Y 764—Shafter v New York City Transit Authority 171 N Y S 2d 598, 5 A D 2d 320, app and rearg den 173 N Y S 2d 991, 5 A D 2d 989

Pa—Christensen v Philadelphia Transp Co, 155 A 2d 400, 191 Pa Super 28—Smith v Pittsburgh Rys Co 175 A 2d 844 405 Pa 340

R I—Tetreault v Duchesne, 43 A 2d 162, 71 R I 184—Woodward v United Transit Co, 181 A 2d 622, 94 R I 446

Tex—Walker v City Service Taxi & Bus, supra, n 22

Wash—Evans v Yakima Val Transp Co, 239 P 2d 336, 39 Wash 2d 841

Wis—Dekeyser v Milwaukee Automobile Ins Co 295 N W 755 236 Wis 419—Mayer v Boynton Cab Co 66 N W 2d 136, 267 Wis 486

(2) Fla—Blackman v Miami Transit Co, App 125 So 2d 128, 92 A L R 2d 1387

Ky—Greyhound Corp v Allen, 353 S W 2d 558

La—Pierce v Toye Bros Yellow Cab Co App 8 So 2d 562, affd 11 So 2d 236—Colbert v Continental Southern Lines, Inc App 107 So 2d 69

N J—Wilson v Public Service Coord inated Transport, supra, n 22

Ohio—Stafford v Central Greyhound Lines, App 34 N E 2d 587

Pa—Turek v Pennsylvania R Co 85 A 2d 845, 369 Pa 341 cert den 72 S Ct 762, 343 U S 928, 96 L Ed 1339

Va—T E Ritter Corp v Rose, 107 S E 2d 479 200 Va 736

(3) Missouri Pac Transp Co v Bell, 122 S W 2d 958, 197 Ark 250

Cal—Dodge v San Diego Elec Ry Co 208 P 2d 37, 92 Cal App 2d 759

Ky—Fitzwater v Cincinnati, N & C R Co, 234 S W 2d 186, 314 Ky 157

La—Gonzales v Toye Bros Yellow Cab Co, App 198 So 379—Wooten v Thompson, App 69 So 2d 557—Pero v Shreveport Rys Co 78 So 2d 66

Md—Commissioner of Motor Vehicles v Baltimore & Annapolis R Co, 263 A 2d 592, 257 Md 529

Mass—Bray v Boston Elevated Ry, 21 N E 2d 957 303 Mass 379

Miss—Pickering v Continental Southern Lines, Inc, 168 So 2d 43, 250 Miss 694

Pa—Schilling v Pittsburgh Rys Co, 145 A 2d 688, 394 Pa 126

(9) Other evidence

Fla—Blackman v Miami Transit Co, App 125 So 2d 128, 92 A L R 2d 1387

Ill—Carson v Weston Hotel Corp, 115 N.E 2d 800, 351 Ill App 523—Malone v Chicago Transit Authority 222 N E 2d 93, 76 Ill App 2d 451

La—Fuller v Shreveport Rys Co, App, 68 So 2d 228

Md—Ager v Baltimore Transit Co 132 A 2d 469, 213 Md 414

N Y—McGrath v Jamaica Buses, Inc 168 N Y S 2d 360, 4 A D 2d 968

Pa—Kabakers v Pennsylvania R Co, 108 P L J 204

Evidence held insufficient to show negligence in respect of jerking or jolting

(1) US—Rentas v Travelers Indem Co, C A Wis, 267 F 2d 66

Ark—St Louis-San Francisco Ry Co v Porter 134 S W 2d 546, 199 Ark 133

Cal—Dempsey v Market Street Ry Co, App, 133 P 2d 849 subs op, 142 P 2d 929, 23 Cal 2d 110

Ky—Dudley v Blue Ribbon Lines Corp 217 S W 2d 629 309 Ky 308

La—Hughes v Baton Rouge Electric Co App, 198 So 379—Wooten v Toye Bros Yellow Cab Co, App 68 So 2d 107—Weems v Toye Bros Yellow Cab Co, App 93 So 2d 242

Mass—Carson v Boston El Ry 33 N E 2d 701 309 Mass 32

Ohio—Sharpsteen v Cincinnati St Ry Co, App, 31 N E 2d 885

Pa—Bollar v Pittsburgh Rys Co 33 A 2d 261, 153 Pa Super 199—Kulczak v West Penn Railways Co 11 Fay Co Leg J 168

R I—Murphy v United Electric Rys Co, 11 A 2d 440, 64 R I 168

Va—Richmond Greyhound Lines v Ramos, 12 S E 2d 789, 177 Va 20—Shuler v Virginia Transit Co 132 S E 2d 712, 204 Va 591

(2) Pa—Watson v Pittsburgh Rys Co 132 A 2d 718, 183 Pa Super 473

Elevators; evidence held sufficient

(1) U S—U S v Trubow C A C.l 214 F 2d 192

Cal—Richman v Green, 299 P 2d 890 143 C A 2d 470

Ill—McNulty v Reinert 27 N E 2d 574 305 Ill App 625—Starczynski v Miltenberg, supra, n 15—Alamo v Du Pont 136 N E 2d 542, 11 Ill App 2d 238

Ind—Crane Co v Newman 37 N E 2d 732, 111 Ind App 273

N D—Krueger v North Am Creameries, 27 N W 2d 240

(2) U S—Blackhawk Hotels Co v Bonfoey C A Minn 227 F 2d 232, 56 A L R 2d 1047

Tex—Mattox v C R Anthony Co Civ App 326 S W 2d 740, err ref no rev err

Elevator; evidence held insufficient, etc—Chance v Scarbrough Civ App 303 S W 2d 832, err ref no rev err

Escalator; evidence held sufficient

Cal—Profeta v Sears, Roebuck & Co 318 P 2d 19 155 C A 2d 439

Escalator; evidence held insufficient

Ariz—Estabrook v J C Penney Co 464 P 2d 325 105 Ariz 302

Elevator

Tex—Biscayne Texas Properties v Miner Civ App 502 S W 2d 225 err ref no rev err

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25 Fla—Jacobs v Harlem Cab, Inc App 183 So 2d 552

N Y—Fuller v Hudson Transp Co 90 N Y S 2d 129 275 App Div 985—Keenan v Sheehan, 129 N Y S 2d 883, 205 Misc 183 affd 134 N Y S 2d 386, 284 App Div 895

Tex—F & N Taxi v Haynes, Civ App 262 S W 2d 117 err ref no rev err

Va—Watts v Richmond, F & P R Co 52 S E 2d 129, 189 Va 258, 7 A L R 2d 1418

Evidence held sufficient

(1) Cal—Mudrick v Market Street Ry Co 81 P 2d 950, 11 Cal 2d 488, 118 A L R 533

Kan—Young v Kansas City Public Service Co, 135 P 2d 551 156 Kan 624

Miss—Evans v Jackson City Lines, 56 So 2d 80, 212 Miss 895—Garraga v Yellow Cab Co 77 So 2d 276, 222 Miss 739

Mo—McGinley v St Louis Public Service Co, 239 S.W 2d 321

(2) Ill—Bumblauskas v South Suburban Safeway Lines, Inc, 249 N E 2d 143 110 Ill App 2d 52

Mo—Dunnett v St Louis Public Service Co, 337 S W 2d 921

(7) Other cases

U S.—Fiedler v Chicago & N W Ry Co, C A Ill, 204 F 2d 515

Ala—Mahone v Birmingham Elec Co 73 So 2d 378, 261 Ala 132

Ga—Atlanta Transit System, Inc v Allen, 115 S E 2d 479, 101 Ga App. 751

Ky—Wilson v Little, 293 S W 2d 715

La—Dolan v New Orleans Public Service Inc App, 317 So 2d 688, writ den Sup, 322 So 2d 774

Mich—Bolton v City of Detroit, 157 N W 2d 313, 10 Mich App 589

Mo—Kraus v Kansas City Public Service Co 269 S W 2d 743—Shelley v St Louis Public Service Co App 279 S W 2d 182

N Y—Nieves v City of New York, 109 N Y S 2d 556, affd 116 N Y S 2d 927 280 App Div 972—Keenan v Sheehan, 134 N Y S 2d 386, 284 App Div 895

Evidence held insufficient

(1) U S—Orr v Southern Pac Co C A Cal 226 F 2d 841

Ala—Cannon v Louisville & N R Co 42 So 2d 340, 252 Ala 571

D C—Pennsylvania R Co v Pomeroy C A 239 F 2d 435 99 U S App D C 272 cert den 77 S Ct 861 353 U S 950 1 L Ed 2d 859

Ill—Mareno v Chicago Transit Authority 96 N E 2d 653 342 Ill App 443

La—Franklin v Texas & P R Co App 35 So 2d 251 reh ref 35 So 2d 867—Harris v Shreveport Rys Co App 93 So 2d 517

Md—Pennsylvania R Co v Cook 26 A 2d 384 180 Md 633 140 A L R 1188

Mich—Landis v City of Detroit, 263 N W 628, 287 Mich 407

N Y—Behnke v Brooklyn & Queens Transit Corporation, 31 N Y S 2d 28 263 App Div 737 app withdrawn 44 N E 2d 178, 288 N Y 487

N C—Pemberton v Lewis 69 S E 2d 512 235 N C 168

Pa—Simsky v Pennsylvania R Co 50 A 2d 293 355 Pa 499

Tex—Dallas Ry & Terminal Co v Reddy Civ App 254 S W 2d 795 err ref no rev err

(3) Mass—Dolan v Boston & M R R 105 N E 2d 376, 328 Mass 532

(4) Mo—Suarez v Thompson 283 S W 2d 584

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26 U S—Wallar v Southern Pac Co D C Cal 37 F Supp 475

Pa—Turek v Pennsylvania R Co 64 A 2d 779 361 Pa 512

Evidence held sufficient, etc—Western & A R R v Fowler Ga App 47 S E 2d 874 77 Ga App 206

27. Evidence held sufficient

(3) Other cases

Cal—James v American Buslines, 244 P 2d 503 111 C A 2d 273

Ga—Smoky Mountain Stages v Wright, 8 S E 2d 453 62 Ga App 121

Ky—Grigsby v Smith, 146 S W 2d 719 285 Ky 48

Minn—Wiest v Twin City Motor Bus Co, 52 N W 2d 442, 236 Minn 225

R I—Malatt v United Transit Co, 207 A 2d 39 99 R I 263

Wash—Kiessling v Northwest Greyhound Lines, 229 P 2d 335, 38 Wash 2d 289

Evidence held insufficient

Ky—Dix v Gross, 128 S W 2d 753, 278 Ky 348

N Y—Levings v Mohawk Coach Lines, 91 N Y S 2d 920, 275 App Div 1048, rearg den 93 N Y S 2d 305 276 App Div 784

28 Ill—Whittaker v Chicago Motor Coach Co, 80 N E 2d 81 334 Ill App 629

N Y—Shea v Judson, 28 N E 2d 885, 283 N Y 393

Tex—Brewer v Dallas Ry & Terminal Co, Civ App 247 S W 2d 435

Evidence held sufficient

(1) U S—Teche Lines v Boyette, C C A Miss 111 F 2d 579—Price v Greenway, C C A N J 167 F 2d 196—Longo v Yellow Cab Co D C Pa, 79 F Supp 478—Willits v Yellow Cab Co C A Ill 214 F 2d 612

Ark—Orford v Villines, 334 S W 2d 660, 232 Ark 103

Cal—Paul v Key System, 180 P 2d 940, 80 Cal App 2d 21—Stark v Yellow Cab Co 202 P 2d 802, 90 Cal App 2d 217

Conn—Callahan v Grady, 7 A 2d 225, 125 Conn 733—Cadwell v Watson, 60 A 2d 168 134 Conn 640

Ga—Georgia Stages v Young, 35 S E 2d 552, 73 Ga App 2—Harmon v Givens, 77 S E 2d 223 88 Ga App 629

Ill—Lau v West Towns Bus Co, 158 N E 2d 63 16 Ill 2d 442, cert den and app dism 80 S Ct 256, 361 U S 127 4 L Ed 2d 180—Morella v Melrose Park Cab Co 212 N E 2d 106, 65 Ill App 2d 175

Ind—Swallow Coach Lines v Cosgrove, 15 N E 2d 92, 214 Ind 532

Ky—Bowling Green-Hopkinsville Bus Co v Montgomery 129 S W 2d 535, 278 Ky 837

La—Bruce v Stuyvesant Ins Co App 159 So 2d 424—Hoyt v Holsum Cab Co App 217 So 2d 198

Md—Charlton Bros Transp Co v Garrettson 51 A 2d 642, 188 Md 85—Graff v Davidson Transfer & Storage Co 65 A 2d 566 192 Md 632

Mich—Albu v Sweeney, 94 N W 2d 834 355 Mich 385

Miss—Green v Middleton, 171 So 2d 500, 251 Miss 818

N J—Vadurro v Yellow Cab Co of Camden 77 A 2d 459 6 N J 102—Monihan v Public Service Interstate Transp Co 91 A 2d 585 22 N J Super 149

N C—Lancaster v Atlantic Greyhound Corporation, 14 S E 2d 820, 219 N C 679

Okl—Oklahoma Transp Co v Mitchell, 243 P 2d 350, 206 Okl 295—Peoples Checker Cab Co v Dunlap, 307 P 2d 833

Pa—Simkins v Barcus, 77 A 2d 717, 168 Pa Super 195—Kenny v Lieberman, 47 Luz L Reg 219, affd 142 A 2d 784, 187 Pa Super 6—Anderson v Pittsburgh Railways Co 225 A 2d 548, 423 Pa 550

R I—Godfrey v United Electric Rys Co 38 A 2d 308, 70 R I 244—Gillogly v New England Transp Co 57 A 2d 411 73 R I 456

S C—Hutto v American Fire & Cas Ins Co, 54 S E 2d 523, 215 S C 90

Tenn—Courtesy Cab Co v Keck, 440 S W 2d 610, 59 Tenn App 309

Tex—Bee Line Coaches v Folterman, Civ App, 207 S W 2d 986, err ref no rev err—Skyline Cab Co v Bradley Civ App 325 S W 2d 176, err ref no rev err

Wash—Arnold v Sanstol 260 P 2d 327, 43 Wash 2d 94

W Va—Laphew v Consolidated Bus Lines, 55 S E 2d 881 133 W Va 291—Flanagan v Mott, 114 S E 2d 331 145 W Va 200

(2) Del—Cannon v Delaware Electric Power Co, Super 24 A 2d 325 2 Terry 415

Iowa Rozmarl v Northland Greyhound Lines, 49 N W 2d 501, 242 Iowa 1135

(3) La—Burke v Toye Bros Yellow Cab Co, App, 28 So 2d 369

N Y—Coleman v Frank, 80 N Y S 2d 259, affd 80 N Y S 2d 358, 274 App Div 796

(7) Md—Sun Cab Co v Hall, 86 A 2d 914, 199 Md 461

(10) Cal—Roy v Mission Taxi Co 225 P 2d 920, 101 Cal App 2d 438

D C—D C Transit System, Inc v Shepherd, C A, 266 F 2d 465, 105 U S App D C 264, 72 A L R 2d 1290 cert den 80 S Ct 62, 361 U S 819, 4 L Ed 2d 64

Ill—Dodds v Chicago Transit Authority, 132 N E 2d 816, 9 Ill App 2d 388

Ind—Northern Ind Transit v Burk, 89 N E 2d 905, 228 Ind 162, 17 A L R 2d 572

Ky—Greer v Richards Admr, 115 S W 2d 568, 273 Ky 91

La—Robledet v Toye Bros Yellow Cab Co App, 185 So 540—Abrego v Tri-State Transit Co, supra, n 24

Miss—Mitchell-Davis Distributing Co v McDonald, 78 So 2d 597 223 Miss 573

Okl—Oklahoma Ry Co v Ivery 204 P 2d 978, 201 Okl 245

R I—Dietz v United Electric Rys Co 21 A 2d 277, 67 R I 161

(11) Ark—Veasey v East Tex Motor Freight Lines, 205 S W 2d 188 212 Ark 202

La—Blanchard v New Orleans Public Service, App, 25 So 2d 741—Margavio v Capone, App, 25 So 2d 743

(12) Cal—Armstrong v Pacific Greyhound Lines, 168 P 2d 457 74 Cal App 2d 367

Ky—Greer v Richards Admr 115 S W Donohue, 182 S W 2d 328, 298 Ky 139

La—Pierce v Toye Bros Yellow Cab Co App, 8 So 2d 562, affd 11 So 2d 236—Brown v Gonzales, App 77 So 2d 887

Neb—Wright v Lincoln City Lines, Inc., 81 N W 2d 170, 163 Neb 679

Ohio—Jones v Columbus & Southern Ohio Elec Co 75 N E 2d 830, 82 Ohio App 46

Tex—City of San Antonio v Ramundo, Civ App 411 S W 2d 428, err ref no rev err Sup 416 S W 2d 395

(13) US—Jackson v Missouri, Kan & Okl Coach Lines, D C Mo 63 F Supp 828

Cal—Kazanjian v Pacific Greyhound Lines, 206 P 2d 887 92 Cal App 2d 210

Ill—Kaeer v Peoria-Rockford Bus Lines, 86 N E 2d 159 337 Ill App 389

La—Scott v Baton Rouge Bus Co App 118 So 2d 486

Md—E H Koester Bakery Co v Poller 50 A 2d 234

Ohio—Behala v Langley App 121 N E 2d 204

Pa—Mack v Philadelphia Transp Co 60 A 2d 409 163 Pa Super 189

(15) Cal—Bovette v Los Angeles Transit Lines, 179 P 2d 80 78 Cal App 2d 860

(17) Other matters

US—Hennesey v Burlington Transp Co D C Mont 103 F Supp 660

Cal—Ford v Carew & English, 200 P 2d 828, 89 Cal App 2d 199

Fla—Wheeler v Yellow Cab Co of Orlando, 66 So 2d 501

Ga—Phillips v Howard, 136 S E 2d 473 109 Ga App 404

Ky—Roland v Beckham, 408 S W 2d 628

La—Chisholm v Ryder App 56 So 2d 316—Scott v Baton Rouge Bus Co, App, 118 So 2d 486—Landry v Ed's Cab Service, Inc App 185 So 2d 27

Md—Yellow Cab Co v Bonds, 225 A 2d 41 245 Md 86

Mich—Rogers v City of Detroit, 65 N W 2d 848 340 Mich 291

Miss—Washington v Terrell, 185 So 2d 925

Mo—Burnett v St Louis Public Service Co 337 S W 2d 921

Pa—Simkins v Barcus, supra

Tex—Ornelas v Moore Service Bus Lines, Civ App 410 S W 2d 919 err ref no rev err

Va—Selfe v Hale, 69 S E 2d 434, 193 Va 543

Wis—Cushing v Meehan, 95 N W 2d 796, 7 Wis 2d 30

Evidence held insufficient

(1) Fla—Red Top Cab & Baggage Co v Rothermund, 14 So 2d 665, 153 Fla 321—Kent v City of Coral Gables, 18 So 2d 477, 154 Fla 523

Ill—Clancy v Richardson, 23 N E 2d 399, 302 Ill App 99—Kerby v Chicago Motor Coach Co 171 N E 2d 412, 28 Ill App 2d 259

Ky—Lambert v Miller's Adm'r, 125 S W 2d 1019, 277 Ky 64—J C Wells Bus Co v Kennard, 156 S W 2d 873, 288 Ky 507

La—Elkins v Travelers Indem Co., App., 41 So 2d 123—Restelle v Fidelity & Cas Co of N Y, App, 41 So 2d 469—Greco v Checker Cab Co of New Orleans, App, 171 So 2d 746

N J—Taylor v Public Service Interstate Transp Co, 80 A 2d 220, 13 N J Super 125

N Y—Edward Ehrlbar Inc v Five Bros Excavating Corp, 245 N Y S 2d 288, 20 A D 2d 541

Ohio—Strand v Central Greyhound Lines, 34 N E 2d 587—Robinson v Ferguson, 149 N E 2d 152, 105 Ohio App 311 [illegible] 152 N E 2d 157 105 Ohio App 311

Pa—Seburn v Luzerne & Carbon County Motor Transit Co 148 A 2d 534 394 Pa 577

Va—Dey v Virginia Transit Co, 47 S E 2d 552, 187 Va 635

Wis—Dumke v Feltus, 283 N W 299 229 Wis 665—Dekeyser v Milwaukee Automobile Ins Co 295 N W 2d 755 236 Wis 419

(5) Md—E H Koester Bakery Co v Poller supra

(6) La—Fernandez v Tri-State Transit Co of Louisiana, supra, n 24

(7) Ga—Dennard v Styles, 114 S E 2d 317 101 Ga App 459

Ill—Turner v Cummings, 48 N E 2d 964 319 Ill App 225—Tomasello v Chicago Transit Authority 103 N E 2d 377 first case, 345 Ill App 412

(8) N Y—Wolf v F Murphy Storage Corporation, 15 N Y S 2d 942, 258 App Div 817

(9) To show other matters

La—Lacour v Continental Southern Lines, Inc App 124 So 2d 588

Mo—Burnett v St Louis Public Service Co 337 S W 2d 921

Pa—De Mezzes v Raditz, 164 A 2d 55 193 Pa Super 103

Tex—Ornelas v Moore Service, Bus Lines, Civ App, 410 S W 2d 919 err ref no rev err

Wis—Cushing v Meehan, 95 N W 2d 796, 7 Wis 2d 30

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29 Ark—Jones v Missouri Pac R Co 150 S W 2d 742, 202 Ark 333

Evidence held sufficient

(1) Rus v Yellow Cab Co 83 P 2d 959, 29 Cal App 2d 25—Mutch v San Diego Electric Ry Co, 102 P 2d 1100 39 Cal App 2d 327—Atherley v Market St Ry Co 108 P 2d 927 42 Cal App 2d 354—Gamwell v Key System Transit Lines, 294 P 2d 1035 140 C A 2d 308

Colo—Public Cab Co v Fessler 335 P 2d 865 138 Colo 547 75 A L R 2d 979

Ill—Klufetos v Friel, 77 N E 2d 849 333 Ill App 649—Shatkus v Checker Taxi Co 249 N E 2d 704 111 Ill App 2d 1

Kan—Smith v Wichita Transp Corp 293 P 2d 242, 179 Kan 8

La—Hall v New Orleans Public Service, Inc App, 92 So 2d 597

Mo—Hill v Montgomery 176 S W 2d 284, 352 Mo 147—White v St Louis Public Service Co 259 S W 2d 795 364 Mo 111

N Y—Grauer v State, 181 N Y S 2d 994 15 Misc 2d 471 affd 192 N Y S 2d 647 9 A D 2d 829

Okl—A & A Cab Operating Co v Drake, 192 P 2d 1004 200 Okl 229

R I—Colgan v United Electric Rys Co, 13 A 2d 385 65 R I 60

Wash—Becker v Tacoma Transit Co 314 P 2d 638 50 Wash 2d 688

W Va—Wine v City Lines of West Virginia, 62 S E 2d 260, 134 W Va 889

(10) Fla—Snider v Bancroft Inv Corp 61 So 2d 184

(11) Other evidence

US—Cimmino v Pennsylvania R Co C A N Y 340 F 2d 20

Cal—Monaco v Los Angeles Transit Co, 280 P 2d 187 131 C A 2d 156

N Y—Sheridan v City of New York, 186 N Y S 2d 663, 6 N Y 2d 765, 159 N E 2d 208

Evidence held insufficient

(6) Other evidence

Or—Baker v Rose City Transit Co, 361 P 2d 257, 227 Or 110

Evidence held insufficient to show negligence

(1) La—Brown v Dunbar, App 29 So 2d 357

N Y—Pickert v Rochester Transit Corp, 86 N Y S 2d 177, 274 App Div 1088

(2) La—Vaughn v Baton Rouge Bus Co, App 83 So 2d 664

Mass—Freeman v Boston Elevated Ry Co 21 N E 2d 242, 303 Mass 248

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30 Ark—Jones v Missouri Pac R Co supra, n 29

D C—Talbott v Yellow Cab Co of D C, Mun App, 121 A 2d 262

Ill—Ivy v Chicago Transit Authority 161 N E 2d 881 23 Ill App 2d 251

Mo—Abramovitz v Wellston Taxi Co App, 208 S W 2d 834

Evidence held sufficient

(1) Alabama Great Southern R Co v Alsup, C C A Miss 101 F 2d 175

La—Grant v Baton Rouge Bus Co App 15 So 2d 123

Mo—Gurley v St Louis Public Service Co, 256 S W 2d 755

N J—Tarnow v Hudson & Manhattan R Co 3 A 2d 570, 121 N J Law 522

N Y—Schladebach v Brooklyn & Queens Transit Corporation, 20 N Y S 2d 484 259 App Div 1018

Tex—Texas, N M & Okl Coaches v Williams, Civ App 191 S W 2d 66, err ref w m

Wis—Williams v Milwaukee & Suburban Transport Corp 155 N W 2d 100, 37 Wis 2d 402

(3) Ill—Kovacs v Richardson, 28 N E 2d 291 306 Ill App 194

(7) Ark—Missouri Pac Transp Co v Guthrie, 299 S W 2d 829 227 Ark 566

(14) To show other matters

Cal—Burge v Los Angeles Transit Lines, 217 P 2d 752, 97 Cal App 2d 292

Ill—Houston v Leyden Motor Coach Co 243 N E 2d 293 102 Ill App 2d 348—Perzovsky v Chicago Transit Authority 320 N E 2d 433 23 Ill App 3d 896

La—Wiggins v City of Monroe, App 25 So 2d 921—Spencer v Checker Cab Co of New Orleans, 100 So 2d 548—Rooker v Checker Cab Co of New Orleans, Inc App 145 So 2d 631

Mich—Brewer v City of Detroit, Dept of St Railways, 171 N W 2d 595 18 Mich App 598

N M—Dominguez v Albuquerque Bus Co, 273 P 2d 756, 58 N M 562, 50 A L R 2d 414

Evidence held insufficient

(1) Ill—Rotheli v Chicago Transit Authority 125 N E 2d 283 5 Ill App 2d 190, affd 130 N E 2d 172, 7 Ill 2d 172—Ptasinski v Chicago Transit Authority, 147 N E 2d 411, 16 Ill App 2d 149

Ky—Louisville & N R Co v Gregory, 125 S W 2d 231 276 Ky 730

La—Franklin v New Orleans Public Service, App 187 So 126—Young v Shreveport Rys Co App 1 So 2d 840—Anderson v City of Monroe, App 2 So 2d 499—Crawley v City of Monroe, App 26 So 2d 493—Etress v Shreveport Rys Co, App 33 So 2d 700—Joseph v Baton Rouge Bus Co App 86 So 2d 257

Mass—Langton v Mason, 186 N E 2d 711 345 Mass 764

N J—McKinney v Public Service Interstate Transp Co 72 A 2d 326, 4 N J 229

N M—Riesing v Potash Mines Transp Co, 417 P 2d 38, 76 N M 544

N Y—Boff v Brooklyn & Queens Transit Corporation, 19 N Y S 2d 222, 259 App Div 845—Stevenson v Brooklyn & Queens Transit Corporation, 21 N Y S 2d 19 259 App Div 1053—Simmons v New York Rapid Transit Corporation, 27 N Y S 2d 861, 262 App Div 779

N C—White v Chappell, 14 S E 2d 843, 219 N C 652

Pa—McDonald v Philadelphia Rural Transit Co 24 A 2d 37, 149 Pa Super 220—Pierce v Delaware, L & W R Co, 57 A 2d 876, 358 Pa 403

R I—Giroux v United Transit Co, 121 A 2d 323, 84 R I 26

Va—Virginia Electric & Power Co v Thomas, 23 S E 2d 148, 180 Va 292

(8) Other cases

Mass—Winer v Boston & M R R 143 N E 2d 215, 336 Mass 757

Tex—Dallas Ry & Terminal Co v Jarvis, 270 S W 2d 205 153 Tex 384

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31 La—Rabalais v Shreveport Transit Co App 121 So 2d 746

Evidence held sufficient

(1) Cal—McCormack v City and County of San Francisco, 14 Cal Rptr 79 193 C A 2d 96

Mo—Hoffman v St Louis Public Service Co 255 S W 2d 736

(3) Gray v City of Seattle, Wash 187 P 2d 310

Evidence held [illegible] etc—Lachney v Wellan's, Inc La.App 32 So 2d 850

(1) La—Gaines v Baton Rouge Bus Co App 175 So 2d 719

32 Ala—Simpson v Ward, 77 So 2d 376, 38 Ala App 49 cert den 77 So 2d 383 262 Ala 703

Cal—Waite v Pacific Gas & Electric Co supra, n 24—Burge v Los Angeles Transit Lines, 217 P 2d 752, 97 Cal App 2d 292—McMillen v Southern Pac Co 303 P 2d 788, 146 C A 2d 216

Ill—Goertz v Chicago & N W Ry Co 153 N E 2d 486 19 Ill App 2d 261

La—Dixon v XYZ, Westside Transit Corp App 314 So 2d 416

N Y—Hamm v Queens-Nassau Transit Lines, 20 N Y S 2d 849 260 App Div 106—McLean v Triboro Coach Corp 88 N Y S 2d 624 275 App Div 844

Va—Tri-State Coach Corp v Stidham 62 S E 2d 894 191 Va 790

Wis—Burke v Milwaukee & Suburban Transport Corp 159 N W 2d 700, 39 Wis 2d 682

Evidence held sufficient

(1) U S—Rausnitz v Philadelphia Transp Co D C Pa, 160 F Supp 188

Ark—Missouri Pacific Transp Co v Moody 134 S W 2d 868 199 Ark 483

Cal—Moeller v Market Street Ry Co 81 P 2d 475 27 Cal App 2d 562

Ga—Columbus Transp Co v Curry 122 S E 2d 584 104 Ga App 700

Ill—Hughes v Chicago Transit Authority 108 N E 2d 821 348 Ill App 394

Ind—Evansville City Coach Lines, Inc v Atherton, 179 N E 2d 293 133 Ind App 304

La—McFarland v City of Monroe, App 11 So 2d 19

Mich—Wells v Flint Trolley Coach Inc, 88 N W 2d 285, 352 Mich 35—Woodard v Saginaw City Lines, Inc 112 N W 2d 512, 365 Mich 273

Minn—Gillson v Osborne, 19 N W 2d 1 220 Minn 122—Swanson v Minneapolis, St Ry Co 90 N W 2d 514 252 Minn 484

Mo—Hoeller v St Louis Public Service Co App 199 S W 2d 7

N Y—Melendez v New York City Omnibus Corp 139 N Y S 2d 778

Pa—Phillips v Philadelphia Rapid Transit Co 45 Pa Dist & Co 33

(5) La—Parnell v City of Monroe, App 98 So 2d 820

(6) Cal—Pellegrino v Los Angeles Transit Lines, 179 P 2d 39, 79 Cal App 2d 40—Freitas v Peerless Stages, 239 P 2d 671, 108 C A 2d 749, 133 A L R 2d 778—Shertzer v Los Angeles Transit Lines, 268 P 2d 840, 124 C A 2d 412

Ill—Kortlander v Chicago Transit Authority, 205 N E 2d 516, 56 Ill App 2d 48

La—Rhodes v New Orleans Public Service, App, 195 So 861—Creech v Shreveport Rys Co, App, 43 So 2d 295

S D—Kramer v Sioux Transit, Inc 180 N W 2d 468, 85 S D 232

(7) As to other matters

Mo—Fennell v Illinois Cent R Co App 383 S W 2d 301

Pa—Coyne v Pittsburgh Rys Co, 141 A 2d 830, 393 Pa 326

Evidence held insufficient

(1) La—Latoof v Texas & Pac Ry Co, App, 195 So 652

N J—McKinney v Public Service Inter-State Transp Co 72 A 2d 326, 4 N J 229

(6) Other evidence

Mo—Swastyn v St Joseph Light & Power Co App 459 S W 2d 24

Ohio—Sherbert v Stinson, App 141 N E 2d 781

Pa—Pendleton v Philadelphia Transp Co, 103 A 2d 724 376 Pa 598

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33. Evidence held sufficient

(1) U S—Greyhound Corp v Jones, C A Colo 327 F 2d 904

Fla—Dade County v McKenna, App 179 So 2d 401

N M—Thompson v Anderman 285 P 2d 507 59 N M 400

N Y—Welch v Triple Cities Traction Corporation 38 N Y S 2d 616, 265 App Div 984 affd 50 N E 2d 238 290 N Y 836—Cordes v Surface Transp Corporation of New York, 40 N Y S 2d 878—Hall v Triboro Coach Corp 79 N Y S 2d 777 274 App Div 808—Thomas v Jamaica Buses, Inc 170 N Y S 2d 852, 5 A D 2d 843 affd 182 N Y S 2d 15 5 N Y 2d 862, 155 N E 2d 863

Tex—Houston Transit Co v Zimmerman Civ App 200 S W 2d 848

Wis—Wittig v Kepler 82 N W 2d 341 275 Wis 415

(2) Okl—Oklahoma Ry Co v Wilson 231 P 2d 688 204 Okl 488

Evidence held insufficient

(1) Missouri Pac R Co v Barnes, 140 S W 2d 698 200 Ark 751

La—Gabel v Baton Rouge Bus Co App 28 So 2d 64—Johnson v New Orleans Public Service, Inc App 139 So 2d 7

Mass—Dambergs v Massachusetts Bay Transp Authority 243 N E 2d 918

N J—Meelheim v Public Service Coordinated Transport, 1 A 2d 418, 121 N J Law 163—Bistany v Bennett 17 A 2d 778, 126 N J Law 107—McKinney v Public Service Interstate Transp Co supra, n 32

N Y—Keener v Tilton, 10 N Y S 2d 740 256 App Div 1034 rearg den 12 N Y S 2d 774 257 App Div 919—Carmichael v Carner 146 N Y S 2d 203, 286 App Div 1125

Pa—Reid v Scranton Transit Co 12 A 2d 553 339 Pa 225

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34. Evidence held sufficient

(1) U S—O Brien v Public Service Taxi Co D C Pa 83 F Supp 55 affd C A 178 F 2d 211

Miss—Yazoo & M V R Co v Smith, 196 So 230 188 Miss 856

N Y—Brockway v Mordenti, 103 N Y S 2d 621 199 Misc 898

(4) To show other matters—Connell v Clark 200 P 2d 26, 88 Cal App 2d 741

D C—Tarman v Southard, C A, 205 F 2d 705, 92 U S App D C 297

Fla—Henderson v Tarver App, 123 So 2d 369

Ga—Radio Cabs v Tolbert, 71 S E 2d 260, 86 Ga App 181

Ohio—George v Youngstown Municipal Ry Co, Ohio App 76 N E 2d 916

Evidence held sufficient, etc—Williams v Shreveport Yellow Cab Co, La App, 183 So 120

Va—New v Atlantic Greyhound Corp 43 S E 2d 872, 186 Va 726

35 N Y—Moriarty v New York City Transit Authority, 201 N Y S 2d 600 11 A D 2d 654

Pa—Pearlstein v Philadelphia Transp Co 162 A 2d 205 400 Pa 365

Evidence held sufficient

(1) Ark—Citizens Coach Co v Wright, 313 S W 2d 94, 228 Ark 1143

Ohio—Floyd v City of Cleveland 123 N E 2d 540, 99 Ohio App 282

Pa—La Sota v Philadelphia Transp Co 219 A 2d 296, 421 Pa 386

Tex—Kerrville Bus Co v Williams, Civ App, 206 S W 2d 262, err ref no rev err

(4) Mo—Thompson v St Louis Public Service Co App 242 S W 2d 299

(5) Other cases

N Y—Goodwin v City of New York, 134 N Y S 2d 373 206 Misc 740

Evidence held sufficient, etc—Wolf v East St Louis City Lines, C A Mo 173 F 2d 393

La—Bernard v Baton Rouge Bus Co App, 81 So 2d 456

N Y—Scalise v City of New York, 157 N Y S 2d 620 2 A D 2d 984 motion gr 162 N Y S 2d 616, 2 N Y 2d 978, 142 N E 2d 651, affd 169 N Y S 2d 26, 3 N Y 2d 951 146 N E 2d 786

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37 U S—Lisi v Alitalia-Linee Aeree Italiane, S p A C A N Y 370 F 2d 508, affd 88 S Ct 1193, 390 U S 455, 20 L Ed 2d 27 reh den 88 S Ct 1801, 391 U S 929 20 L Ed 2d 671

38 Ariz—First Nat Bank of Ariz v Otis Elevator Co 406 P 2d 430 2 Ariz App 80, reh den 411 P 2d 34 2 Ariz App 596

Cal—Ford v Carew & English, 200 P 2d 828, 89 Cal App 2d 199—Aboudara v City and County of San Francisco 251 P 2d 32, 114 C A 2d 630

D C—Mintz v Premier Cab Ass'n, 127 F 2d 744 75 U S App D C 389

Ill—Kelly v Chicago Transit Authority 217 N E 2d 560 69 Ill App 2d 316

Ky—Hardrick v Southeastern Greyhound Lines, 208 S W 2d 733 306 Ky 579

Mo—Brooks v St Louis Public Service Co, 275 S W 2d 252

N Y—Rudolph v City of New York, 77 N Y S 2d 793—Carrillo v Green Bus Lines, 78 N Y S 2d 233 273 App Div 969—Berner v United Airlines, 149 N Y S 2d 335 2 Misc 2d 260, affd 157 N Y S 2d 884 3 A D 2d 9, affd 170 N Y S 2d 340, 3 N Y 2d 1003 147 N E 2d 732

Pa—Guibourdanche v Hatalowich, 45 West 161

S C—Locklear v Southeastern Stages, 8 S E 2d 321, 193 S C 309

Tex—West v Mello, Civ App 424 S W 2d 266, err ref no rev err

Exercise of proper care

Ga—Eason v Crews, 77 S E 2d 245, 88 Ga App 602

Ill—Perzovsky v Chicago Transit Authority 320 N E 2d 433 23 Ill App 3d 896

Ind—Chicago South Shore & South Bend R R v Brown, 320 N E 2d 809 162 Ind App 493, reh den 323 N E 2d 681, 162 Ind App 493

Iowa Murray v Cedar Rapids City Lines, 48 N W 2d 256 242 Iowa 794

39 Ala—Montgomery City Lines v Hawes, 20 So 2d 536, 31 Ala App 564 cert den 20 So 2d 541, 246 Ala 287—Burmingham Elec Co v Woodward, 35 So 2d 369 33 Ala App 526

Ariz—Nichols v City of Phoenix, 202 P 2d 201, 68 Ariz 124

Ark—Missouri Pac R Co v Ball, 145 S W 2d 716, 201 Ark 584

Cal—Profeta v Sears, Roebuck & Co 318 P 2d 19, 155 C A 2d 439

Conn—Andrea v New York, N H & H R. Co, 131 A 2d 642, 144 Conn 340

Del—Delaware Coach Co v Reynolds, 71 A 2d 69, 6 Terry 226

D C—Alexandria, Barcroft & Washington Transit Co v Cox, C A 220 F 2d 379, 95 U S App D C 116—Bradley v D C Transit System, Inc, Mun App, 183 A 2d 551—Evans v Greyhound Corp, App, 200 A 2d 194

Ga—Co-op Cab Co v Howard, 15 S E 2d 924, 65 Ga App 252

Idaho—Clark v Tarr 283 P 2d 942, 76 Idaho 383

Kan—Pankey v Wyandotte Cab Inc 254 P 2d 305, 174 Kan 17

Ky—Buren v Louisville Ry Co 165 S W 2d 352, 291 Ky 641

Mo—Ashby v Illinois Terminal R Co 132 S W 2d 1076 235 Mo App 454, cert quashed 144 S W 2d 142, 346 Mo 1029—Page v Wabash R Co, App, 206 S W 2d 691—Mallett v St Louis Public Service Co 308 S W 2d 720

N H—O'Brien v Public Service Co, 58 A 2d 507, 93 N H 79

N Y—Brown v New York City Transit Authority 205 N Y S 2d 250, 27 Misc 2d 666

Okl—A & A Cab Operating Co v Drake, supra, n 29—Denco Bus Co v Keller, 212 P 2d 469 202 Okl 263

Pa—Stevens v Reading St Ry Co 47 Berks 191 affd in part and revd in part on oth grds 121 A 2d 128, 384 Pa 390—Stull v Barckhoff 45 West 9

SC—Nelson v Atlantic Coast Line R Co 4 S E 2d 273, 191 S C 345

Tex—El Paso Electric Co v Barker Civ App 116 S W 2d 433, revd on oth grds 137 S W 2d 17 134 Tex 496—H T Cab Co v Gunns, Civ App 280 S W 2d 360, err ref no rev err

Evidence held sufficient to require submission to jury

(10) Other cases

US—Greyhound Corp v Blakley C A Wash 262 F 2d 401

Ga—Atlantic Coast Line R Co v Thomas, 64 S E 2d 301, 83 Ga App 477

Ill—Baltes v Checker Taxi Co 169 N E 2d 596, 27 Ill App 2d 298

Ky—Wilson v Little, 293 S W 2d 715

Mich—Mutchem v City of Detroit, 94 N W 2d 388 355 Mich 182

NJ Beaton v Stuhman, 139 A 2d 412, 49 N J Super 251

Tenn—Jack M Bass & Co v Parker 343 S W 2d 879, 208 Tenn 38

Whether res ipsa loquitur doctrine applicable

Wash—Shay v Parkhurst, 229 P 2d 510, 38 Wash 2d 341

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40 U S—Carter v Kuns, C C A Ark, 127 F 2d 415

Miss Parkerson v Continental Southern Lines, Inc 168 So 2d 43, 250 Miss. 694

N Y—Trudell v New York Rapid Transit Corporation, 22 N E 2d 244 281 N Y 82

Pa—Castelli v Pittsburgh Rys Co, 165 A 2d 632, 402 Pa 135

R I McFarlane v United Electric Rys Co 27 A 2d 296, 68 R I 256

Wash—Young v City of Seattle, 376 P 2d 443 60 Wash 2d 805

42 Ariz—Nichols v City of Phoenix, supra, n 39

Ill—Dregne v Five Cent Cab Co 46 N E 2d 386, 381 Ill 594

Ky—Southern Greyhound Lines v Donohue, supra, n 28—Noble v Louisville Taxicab & Transfer Co, 255 S W 2d 493

N Y—Cross v Murray 24 N Y S 2d 500, 260 App Div 1030

N C—Watkins v Harris, 32 S E 2d 267, 224 N C 860

Evidence held insufficient to take case to jury

(3) Other cases

D C—Washington, Baltimore & Annapolis Motor Lines v Maske, 190 F 2d 621, 89 U S App D C 36, cert den 72 S Ct 56, 342 U S 834 96 L Ed 631 reh den 72 S Ct 199, 342 U S 895 96 L Ed 671

Fla—Swilley v Fourney Cab Co of Jacksonville, 56 So 2d 914—Checker Cab Operators v Carlisle, 68 So 2d 353

Iowa Edwards v Des Moines Transit Co 99 N W 2d 920, 251 Iowa 163

N J Melchiarck v Hill Bus Co 182 A 2d 557 37 N J 549

Tex Patterson v Reed, Civ App 253 S W 2d 444

43 Cal Roberts v Union Pac R Co 161 P 2d 821 70 Cal App 2d 759

44 U S. Missouri Pac Transp Co v O'Neal, C C A Ark, 105 F 2d 625

Scope of employment of driver

Tex—Condry v Mayfield, Civ App 460 S W 2d 513

45 Ariz—Johnson v Pacific Greyhound Lines, 177 P 2d 229, 65 Ariz 187

Del Murphy v O'Neal, 101 A 2d 337 9 Terry 233, stating Maryland law

Mo Hayes v St Louis Public Service Co, App, 382 S W 2d 442—Larkin v Consolidated Service Car Co, App 382 S W 2d 453

Neb—Gormley v Peoples Cab, 6 N W 2d 78, 142 Neb 346

N H—Rancourt v Boston & M R R 30 A 2d 453 92 N H 284

Ohio—Hall v Redifer 79 N E 2d 237

Pa—Dupont v Pennsylvania R Co 10 A 2d 444 337 Pa 89 129 A L R 1337—Steiner v Pittsburgh Railways Co 204 A 2d 254 415 Pa 549

46 U S—Wabash R Co v Davidson, C C A Mich 168 F 2d 300

Cal—Pierson v Holly Sugar Corp 237 P 2d 28 107 C A 2d 298—Brandelius v City and County of San Francisco, 306 P 2d 432, 47 C 2d 729—Orr v Los Angeles Metropolitan Transit Authority 29 Cal Rptr 355 213 C A 2d 699

D C—Capital Transit Co v Howard, 196 F 2d 593 90 U S App D C 359

Ga—Fowler v Western & A R R 42 S E 2d 499 75 Ga App 156

Ill—Marshall v First Am Nat Bank of Nashville, 233 N E 2d 430, 91 Ill App 2d 47

Iowa—Murray v Cedar Rapids City Lines, 48 N W 2d 256 242 Iowa 794

Mass—Tortorelli v New York Cent R Co 95 N E 2d 674 326 Mass 583

Mich—Steudle v Yellow and Checker Cab & Transfer Co, 282 N W 879 287 Mich 1

Mo—Graves v Missouri Pac R Co 118 S W 2d 787 342 Mo 542, cert den 59 S Ct 76, 305 U S 617 83 L Ed 394

Mont—Hennessey v Intermountain Transp Co 102 P 2d 489, 110 Mont 398

N J—Rothstein v New York & L B R Co 3 A 2d 592, 121 N J Law 570—Rourke v Hershock, 70 A 2d 489 3 N J 422

N Y—Montalbano v New York Cent R Co 47 N Y S 2d 877 267 App Div 617—Bruno v Vernon Park Realty, Inc 154 N Y S 2d 587 2 A D 2d 770—Warner v New York Cent R Co, 256 N Y S 2d 969 23 A D 2d 642, app after remand 311 N Y S 2d 351 34 A D 2d 275

N C—Perry v Davis, 196 S E 815, 213 N C 526

Okl—Peoples Checker Cab Co v Dunlap, 307 P 2d 833—Batts v Carter 312 P 2d 472

S C—Horne v Southern Ry Co, 197 S E 31 186 S C 525 116 A L R 745

Tex—San Antonio Public Service Co v Turbin Civ App 153 S W 2d 343

Va—Tri-State Coach Corp v Stidham supra, n 32

Whether relation had arisen

(7) Other cases

Mo—Roberts v Yellow Cab Co 240 A 2d 733

Mass—Gilmore v Acme Taxi Co 212 N E 2d 235 349 Mass 651

Miss—Rawlings v Ingalsbizen, 52 So 2d 630, 211 Miss 760

Persons riding on passes

(2) Whether pass is a gratuity or supported by consideration—Olsen v Draper, D C N Y 112 F Supp 859

Termination of relation

Fla—Henderson v Tarver, App 123 So 2d 369

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47 U S—Wabash R Co v Davidson, supra, n 46

Cal—Riggs v City and County of San Francisco, 304 P 2d 19 146 C A 2d 481

Ill—Sums v Chicago Transit Authority 129 N E 2d 23 7 Ill App 2d 21

Mont—Hennessey v Intermountain Transp Co, supra, n 46

S C—Horne v Southern Ry Co supra, n 46

48 U S—Oliverius v Pennsylvania R Co C A Ind 290 F 2d 909—Garrett v American Airlines, Inc C A Tex, 332 F 2d 939, 3 A L R 2d 930

Ala—Simpson v Ward, 77 So 2d 376, 38 Ala App 49 cert den 77 So 2d 383, 262 Ala 703

Ariz—Nichols v City of Phoenix, supra, n 39

Cal—Nelson v American Airlines, Inc, 70 Cal Rptr 33 263 C A 2d 742

Conn—McMahon v New York, N H & H R Co 71 A 2d 557 136 Conn 372, 17 A L R 2d 1081

D C—Powell v Safeway Trails, Inc, C A 269 F 2d 225 106 U S App D C 34—U S v Charles, C A 397 F 2d 712, 130 U S App D C 151 cert den 89 S Ct 220, 393 U S 897 21 L Ed 2d 178

Fla—Whitman v Red Top Sedan Service, Inc App 218 So 2d 213—Homan v Dade County App 248 So 2d 235 App after remand 272 So 2d 192

Ga—Modern Coach Corp v Faver 73 S E 2d 497 87 Ga App 221—Central of Georgia Ry Co v Roberts, 95 S E 2d 693 94 Ga App 600, revd on oth grds 97 S E 2d 149 213 Ga 145—Columbus v Hadley 203 S E 2d 872, 130 Ga App 599

Ill—Virginelli v Chicago Transit Authority 86 N E 2d 158, 337 Ill App 657—Lewis v Checker Taxi Co 103 N E 2d 192, 345 Ill App 301

Ind—L S Ayres & Co v Hicks, supra, n 38—Chicago South Shore & South Bend R R v Brown, 320 N E 2d 809 162 Ind App 493 reh den 323 N E 2d 681 162 Ind App 493

Kan—Misner v Hawthorne, 212 P 2d 336, 168 Kan 279—Jones v Yellow Cab & Baggage Co 271 P 2d 249 176 Kan 558

Ky—Fisher v Whitaker 260 S W 2d 651—Allen v Miles, 265 S W 2d 445 42 A L R 2d 1186—Louisville Taxicab & Transfer Co v Langley 265 S W 2d 931—Conley's Adm r v Ward, 291 S W 2d 568

Md—Dilley v Baltimore Transit Co, 39 A 2d 469 183 Md 557 155 A L R 627—Valench v Belle Isle Cab Co 75 A 2d 97 196 Md 118—Brooks v Sun Cab Co 117 A 2d 554, 208 Md 236

Mass—Boyd v New York, N H & H R Co 127 N E 2d 164 332 Mass 607

Mich—Mitcham v City of Detroit, 94 N W 2d 388, 355 Mich 182

Minn—Patton v Minneapolis St Ry Co 77 N W 2d 433 247 Minn 368, 58 A L R 2d 921—Derrick v St Paul City Ry Co 89 N W 2d 629 252 Minn 102

Mo—Duncker v St Louis Public Service Co App, 241 S W 2d 64—Dickerson v St Louis Public Service Co 286 S W 2d 820, 365 Mo 738—Liebow v Jones Store Co 303 S W 2d 660

N J—Harpell v Public Service Coordinated Transport, 114 A 2d 295, 35 N J Super 354, affd 120 A 2d 43 20 N J 309 Beaton v Stuhman 139 A 2d 412, 49 N J Super 251

N M—Thompson v Anderman, 285 P 2d 507 59 N M 400

N Y—Feinman v Manhattan Cab Corp 150 N Y S 2d 674 1 Misc 2d 601—Knase v Shearer, 291 N Y S 2d 473 30 A D 2d 741

N C—Banks v Shepard, 52 S E 2d 215 230 N C 86—Lunsford v Marshall, 55 S E 2d 194 230 N C 610—Smith v Goforth, 209 S E 2d 887 24 N C App 104

Ohio—Kokinos v Ohio Greyhound, 92 N E 2d 386, 153 Ohio St 435

Okl—Fullgraf v Oklahoma Ry Co 111 P 2d 1072, 188 Okl 592—A & A Cab Operating Co v Drake, supra, n 29—Sand Springs Ry Co v Cole, 279 P 2d 938

Pa—Rodgers v Yellow Cab Co, 147 A 2d 611 395 Pa 412

Tex—Smith v City Transp Co Civ App 245 S W 2d 296, err ref no rev err

Vt—Ready v Peters, 117 A 2d 374 119 Vt 10

Va—Crist v Washington, Virginia and Maryland Coach Co, 85 S E 2d 213 196 Va 642, cert den 76 S Ct 50, 350 U S 823 100 L Ed 736, reh den 76 S Ct 176, 350 U S 905 100 L Ed 794

Wash—Jablinsky v Coast Pac Lines, Inc, 364 P 2d 793 58 Wash 2d 702

Wis—Crowder v Milwaukee & Suburban Transport Corp, 159 N W 2d 723 39 Wis 2d 499

Where plaintiffs evidence makes out prima facie case

(3) Other cases—Isabella v West Virginia Transp Co 51 S E 2d 318, 132 W Va 85

Test of sufficiency of evidence

(2) Other cases

W Va—Isgan v Jenkins, 59 S E 2d 689 134 W Va 400

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49 Mo—Taylor v St Louis Public Service Co 303 S W 2d 608

50 U S—Gagliо v City of New York, C C A N Y 143 F 2d 904, cert den 65 S Ct 440 323 U S 798, 89 L Ed 636

Ala—Waddell v Crescent Motors, 69 So 2d 414 260 Ala 124

D C—Brown v Capital Transit Co 127 F 2d 329 75 U S App D C 337 cert den 63 S Ct 61, 317 U S 632, 87 L Ed 510

Ill—Dennick v Chicago Transit Authority 124 N E 2d 606, 4 Ill App 2d 587

Ky—Southeastern Greyhound Lines v Sampson, 210 S W 2d 775 307 Ky 251—Fisher v Louisville Transit Co 303 S W 2d 272

Me—Hayes v New England Greyhound Lines, 116 A 2d 655, 151 Me 169

Md—Ferguson v Baltimore & A R Co, 80 A 2d 9 197 Md 488—Smith v Baltimore Transit Co 128 A 2d 413, 211 Md 529

Mo—Munter v St Louis Public Service Co App 258 S W 2d 255—Quinn v St Louis Public Service Co 318 S W 2d 316

N J—Greco v Public Service Interstate Transp Co 51 A 2d 1, 135 N J Law 280—Henry v Public Service Coordinated Transport, 65 A 2d 636, 3 N J Super 140—Melicharek v Hill Bus Co 182 A 2d 557 37 N J 549

N Y—Schl- v Dowling, 13 N Y S 2d 628 257 App Div 1011 affd 28 N E 2d 724 283 N Y 721—Jackson v Allied Stores Corp 295 N Y S 2d 730, 31 A D 2d 200, motion den 298 N Y S 2d 57, 31 A D 2d 806

N C—Jenkins v City Coach Co 56 S E 2d 571 231 N C 208

Ohio—Stine v Springfield City Lines, Inc 155 N E 2d 245, 106 Ohio App 429

Pa—Fuller v Pennsylvania R Co 89 A 2d 795, 371 Pa 330, 34 A L R 2d 820

R I—Shipman v United Electric Rys Co, 40 A 2d 730, 70 R I 454

Wash—Gentry v Greyhound Corp 283 P 2d 979 46 Wash 2d 631

51 Fla—New Deal Cab Co v Stubbs, 90 So 2d 614

Neb—Hickey v Omaha & Council Bluffs St Ry Co 1 N W 2d 304, 14 Neb 665

Pa—Fuller v Pennsylvania R Co, supra, n 50

52 D C—Loketch v Capital Transit Co C A, 248 F 2d 609, 101 U S App D C 287

Ky—Holtheimer v Cox, 279 S W 2d 744

Mass—Frederick v Hines, 187 N E 2d 864 345 Mass 770

Miss—Reynolds v Snowden, 92 So 2d 232, 230 Miss 34

N Y—Lehman v Brooklyn & Queens Transit Corporation, 30 N Y S 2d 716—Kaszerman v Lehman, 136 N Y S 2d 677 affd 167 N Y S 2d 431

Tex—Sims v Dallas Ry & Terminal Co, Civ App 135 S W 2d 142

54 Ark—Johnson v Greenfield, 198 S W 2d 403 210 Ark 985

Cal—Freitas v Peerless Stages, 239 P 2d 671 108 C A 2d 749, 33 A L R 2d 778—James v American B lines 244 P 2d 503, 111 C A 2d 273

D C—Jackson v Capital Transit Co, Mun App 38 A 2d 108, affd 149 F 2d 839, 80 U S App D C 162, 161 A L R 1110, cert den 66 S Ct 143 326 U S 762, 90 L Ed 459

Ky—Cincinnati N O & T P Ry Co v Nelson, 184 S W 2d 108, 299 Ky 19

Mo—Payne v Stott, App, 181 S W 2d 161—Wenzel v St Louis Public Service Co 235 S W 2d 312, 361 Mo 448—McKnight v St Louis Public Service Co 235 S W 2d 560—Harding v Triplett, App 235 S W 2d 112—Long v St Louis Public Service Co App 288 S W 2d 417

Ohio—Welch v Rollman & Sons Co, 44 N E 2d 726 70 Ohio App 515

Wash—Kaiser v Suburban Transp System, 398 P 2d 14 65 Wash 2d 461 am 401 P 2d 350 65 Wash 2d 461

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56 U S—O Brien v Public Service Taxi Co D C Pa 83 F Supp 55, affd C A 178 F 2d 211

D C—A B & W Transit Co v Hall D C Mun App 175 A 2d 606

57 U S—Alabama Great Southern R Co v Alsup, C C A Miss 101 F 2d 175

Okl—Kum v Bayless, 172 P 2d 779 197 Okl 521—A & A Cab Operating Co v Drake, 192 P 2d 1004 200 Okl 229

58 Cal—Lilley v Key System Transit Lines, 289 P 2d 517 136 C A 2d 737

Hawaii—Grace v Kumalae, 386 P 2d 872, 47 Haw 281

Mo—Piehler v Kansas City Public Service Co 211 S W 2d 459 357 Mo 866

N Y—Clifton v Patroon Operating Corp 63 N Y S 2d 597 271 App Div 122

Pa—Pantuso v Pittsburgh Motor Coach Co 62 A 2d 56, 360 Pa 464

Child on escalator

U S—Lee v Pennsylvania R Co C A 192 F 2d 226

59 U S—Callaway v Hart supra, n 48

Conn—Dokus v Palmer 33 A 2d 315 130 Conn 247—McMahon v New York, N H & H R Co supra, n 48

N Y—Carrousseaux v City of New York, 127 N Y S 2d 761

Wash—Fleming v City of Seattle, 275 P 2d 904 45 Wash 2d 477

61 U S—Thiel v Southern Pac Co, supra, n 48—Fredelman v Palmer, D C N Y 65 F Supp 436

N J—Carter v Public Service Coordinated Transport, 136 A 2d 15 47 N J Super 379

N Y—O'Hanlon v Murray, 34 N E 2d 339, 285 N Y 321

Tex—Garcia v Clifford Jackson Funeral Homes, Civ App 526 S W 2d 750

Wash—Gray v City of Seattle, 187 P 2d 310

64 Ky—Louisville & N R Co v Barnes Admx, supra, n 50—Southeastern Greyhound Lines v Collins 205 S W 2d 1008, 305 Ky 829

65 Mass—O Leary v Metropolitan Transit Authority, 159 N E 2d 91 339 Mass 328

Mo—Van Volkenburgh v Kansas City Public Service Co App, 254 S W 2d 287

Ohio—Sawyer v Montgomery App, 47 N E 2d 666

Pa—Lunn v Boyd, 169 A 2d 103 403 Pa 231

R I—Potemkin v Leach 13 A 2d 250 65 R I 1

Proof of Willful, wanton, or gross negligence, etc.

(2) Other cases

Mo—Plant v Thompson, 221 S W 2d 834 359 Mo 391

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66 Ark—Chicago, R I & P Ry Co v King, 197 S W 2d 931, 210 Ark 872

D C—Marchetti v Olyowski, C A 181 F 2d 285, 86 U S App D C 215

Mo—Riley v St Louis Public Service Co App 245 S W 2d 666

N Y—di Suvero v Gem Window Cleaning Co, 252 N Y S 2d 735, revd on oth grds, 254 N Y S 2d 38, 22 A D 2d 871 affd 218 N E 2d 317 17 N Y 2d 831 271 N Y S 2d 275

Tex—West v Mello, Civ App 424 S W 2d 266 err ref no rev err

67 U S—Wooten v Pennsylvania R Co, C A Ind 288 F 2d 220, cert den 82 S Ct 34 368 U S 819, 7 L Ed 2d 24

Kan—Pankey v Wyandotte Cab Inc 254 P 2d 305 174 Kan 17

Ky—Griffin v Louisville Taxicab & Transfer Co 188 S W 2d 449 300 Ky 279

Mo—Ashby v Illinois Terminal R Co supra, n 39

N J—Sibley v City Service Transit Co, 66 A 2d 864, N J 458

N Y—di Suvero v Gem Window Cleaning Co 25, N Y S 2d 735 revd on oth grds 254 N Y S 2d 38, 22 A D 2d 871 affd 218 N E 2d 317, 17 N Y 2d 831 271 N Y S 2d 275

Ohio—Smith v Greenville-Dayton Transp Co of Greenville, App, 131 N E 2d 437

Vt—Anderson v Toombs, 117 A 2d 250, 119 Vt 40

W Va—Gilmore v Huntington Cab Co, 21 S E 2d 137, 124 W Va 469

68 U S—Wooten v Pennsylvania R Co C A Ind, 288 F 2d 220, cert den 82 S Ct 34, 368 U S 819, 7 L Ed 2d 24—Krasoski v Greyhound Lines, Inc C A Ohio, 402 F 2d 445

Ariz—Nichols v City of Phoenix, supra, n 39

Ark—Halperin v Hot Springs St Ry Co, 302 S W 2d 535, 227 Ark 910

Cal—Terrell v Key System 159 P 2d 704, 69 Cal App 2d 682—James v American Prairies, 244 P 2d 503 111 C A 2d 273

Del—Delaware Coach Co v Reynolds, 71 A 2d 69, 6 Terry 226

Ga—Central of Georgia Ry Co v Roberts, 95 S E 2d 693 94 Ga App 600 Revd on oth grds 97 S E 2d 149, 213 Ga 135

Ill—Rowley v Friel, supra, n 48—Hills v Chicago Transit Authority, 118 N E 2d 65, 2 Ill App 2d 44—Miles v Chicago Transit Authority, 172 N E 2d 647 29 Ill App 2d 373—Przybylski v Yellow Cab Co 285 N E 2d 506, 6 Ill App 3d 243

Ky—Cody v Nortof, 267 S W 2d 403

Mass—Welsh v Morse, 64 N E 2d 615, 319 Mass 167

Minn—Hall v Minneapolis St Ry Co, 26 N W 2d 178, 223 Minn 243—Nygren v Minneapolis St Ry Co 63 N W 2d 560 241 Minn 485

Mo—Nagel v Thompson, 170 S W 2d 416, 237 Mo App 1061—Heggeman v St Louis Public Service Co App 255 S W 2d 99—Goedecke v Bi-State Development Agency of Missouri-Illinois, App, 412 S W 2d 189

Miss—Mitchell-Davis Distributing Co v McDonald, 78 So 2d 597 223 Miss 573

N J—Ellis v Dowd, 27 A 2d 869, 128 N J L 607—Harpell v Public Service Coordinated Transport, 114 A 2d 295 35 N J Super 354, affd 120 A 2d 43, 20 N J 309

N Y—Clifton v Patroon Operating Corp supra, n 58—Israelson v New York City Transit Authority, 210 N Y S 2d 110, 12 A D 2d 799, affd 218 N Y S 2d 68 9 N Y 2d 997, 176 N E 2d 516

Ohio—Centofanti v Youngstown Municipal Ry Co, 105 N E 2d 633 157 Ohio St 396

Pa—Frederick v Philadelphia Rapid Transit Co 11 A 2d 576, 337 Pa 136—Morrison v Philadelphia Transp Co 45 A 2d 18, 353 Pa 269

Tex—Texas Bus Lines v Whatley Civ App, 218 S W 2d 626, err ref no rev err

W Va—Isabella v West Virginia Transp Co, supra, n 48

Evidence held sufficient for jury as to whether employee kept proper lookout

Mo—DeMariano v St Louis Public Service Co, 361 S W 2d 735

Whether intersection of vehicle between bus and curb for people

Ill—Gauchas v Chicago Transit Authority, 206 N E 2d 752, 57 Ill App 2d 396

Sleeping driver

Wash—Kaiser v Suburban Transp. System, 398 P 2d 14 65 Wash 2d 461, am on oth grds 401 P 2d 350, 65 Wash 2d 461

Opening door while vehicle in motion

Ill—Watson v Chicago Transit Authority 288 N E 2d 476, 52 Ill 2d 503

69 U S—Evens v Texas Pac-Missouri Pac Terminal R R of New Orleans, C C A La 134 F 2d 275, cert den 63 S Ct 1175, 319 U S 756, 87 L Ed 1709

Ga—Arrington v Trammell, 62 S E 2d 451 81 Ga App 107

NY—Soucy v Greyhound Corp 276 N Y S 2d 173 27 A D 2d 112

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71 Colo—Rice v Marlar 108 P 2d 868 107 Colo 57

Va—Simpson v Broadway-Manhattan Taxicab Corp 128 S E 2d 306, 203 Va 892

80 Or—McAdam v Royce, 272 P 2d 986, 202 Or 245

81 US Mayonbaug v Pennsylvania R Co C C A NJ 165 F 2d 50

Ark—Black & White Cab Co v Doville, 251 S W 2d 1005, 221 Ark 66

Cal—Terrell v Key System, supra, n. 68

Ga Metropolitan Transit System, Inc. v Burton, 120 S E 2d 663, 103 Ga App 688

Ill—Blackwell v Ferguson, 59 N E 2d 342, 324 Ill App 597—Uebelhoer v Chicago Transit Authority 230 N E 2d 33, 86 Ill App 2d 395

Iowa Murray v Cedar Rapids City Lines, 48 N W 2d 256, 242 Iowa 794

Mass—Holton v Boston Elevated Ry Co 21 N E 2d 251 303 Mass 242

Miss—Gulf, Mobile & N R Co v Thornberry 188 So 545, 185 Miss 576

Mo—Case v St Louis Public Service Co 192 S W 2d 595, 238 Mo App 1029

Ohio—H [illegible] v City of Cleveland, 110 N E 2d 50 93 Ohio App 93

Evidence held to raise question for jury as to duty of employees

(3) Other [illegible]

Ark—Citizens Coach Co v Wright, 313 S W 2d 94 228 Ark 1143

82 Fla—Florida East Coast Ry Co v Booth, App 148 So 2d 536—Homan v Dade County App 248 So 2d 235 App after remand 272 So 2d 192

Ga—Crane v Doolittle, 154 S E 2d 634 115 Ga App 309

Ill—Smith v West Suburban Transit Lines, Inc 326 N E 2d 449 27 Ill App 3d 220

Mass—Roach v Boston & Maine Corp 269 N E 2d 710, 359 Mass 753

NJ—Harpell v Public Service Coordinated Transport, 120 A 2d 43, 20 N J 309

NY—Watson v Adirondack Trailways, 359 N Y S 2d 912, 45 A D 2d 504

NC—Wilson v Pan-American Bus Lines, 9 S E 2d 1 217 N C 586—Smith v Camel City Cab Co 42 S E 2d 657, 227 N C 572

Evidence held sufficient to go to jury

NY—Amoruso v New York City Transit Authority, 207 N Y S 2d 855 12 A D 2d 11

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83 Ky [illegible] v Gilpin, 282 S W 2d 133

Mo—Shepard v Kansas City Public Service Co 162 S W 2d 318, 236 Mo App 1118

NY—Scalise v City of New York, 157 N Y S 2d 620, 2 A D 2d 984 motion gr 162 N Y S 2d 616, 2 N Y 2d 978, 142 N E 2d 651 affd 169 N Y S 2d 26, 3 N Y 2d 951, 146 N E 2d 786

Evidence held insufficient to go to jury, etc.

(2) Other cases

US Martin v Erie-Lackawanna R Co., C A Ohio, 388 F 2d 802

84 Mo—Thompson v St Louis Public Service Co., App., 242 S W 2d 299

85 US—Greyhound Corp v Wilson C A Ala 250 F 2d 509—Greyhound Lines, Inc v Miller C A Mo 402 F 2d 134

Ark [illegible] Pac R Co v Ball, 145 S W 2d 716, 201 Ark 584

Ga—Central of Georgia Ry Co v Roberts, 95 S E 2d 693, 94 Ga App 600 Revd on oth grds 97 S E 2d 149 213 Ga 135

Ill—Gursbey v Chicago Transit Authority 208 N E 2d 92, 59 Ill App 2d 188—Arden v Chicago Transit Authority, 232 N E 2d 501 89 Ill App 2d 214

Miss—Gulf M & O R Co v Smith 50 So 2d 898, 210 Miss 768

Mo—Jones v Kurn, 157 S W 2d 797 237 Mo App 657

Mont—Ahlquist v Mulvaney Realty Co 152 P 2d 137 116 Mont 6

N Y—Rudolph v City of New York, 77 N Y S 2d 793

Ohio—Kokinos v Ohio Greyhound, supra, n 48

Okl—Oklahoma Ry Co v Austin, 207 P 2d 769 201 Okl 567

Pa—Wessner v Blue Ridge Transp Co 1 Fay L J 159

Wash—Benjamin v City of Seattle, 447 P 2d 172, 74 Wash 2d 832

Constructive notice of conditions

Mass—Hastings v Boston & M R R 123 N E 2d 211 332 Mass 42

(2) Other cases—Bohn v Hudson & M R Co 103 A 2d 388, 30 N J Super 89 affd 108 A 2d 5 16 N J 180

Evidence held sufficient for jury

Ill—Walsh v Chicago Transit Authority 171 N E 2d 235 28 Ill App 2d 243

86 Ark—Crown Coach Co v Whitaker 186 S W 2d 940, 208 Ark 535

D C—Crusade v Capital Transit Co., Mun App 63 A 2d 878, 8 A L R 2d 229

Ill—Young v Illinois Cent R Co 49 N E 2d 268, 319 Ill App 311

Minn—Bixby v Minneapolis, Northfield & Southern Ry Co 283 N W 493 204 Minn 316

Mo—Gillespie v Terminal R Ass'n of St Louis, App 204 S W 2d 598

N J—Buchner v Erie R Co 111 A 2d 257 17 N J 283

Tenn—McBroom v S E Greyhound Lines, 193 S W 2d 92, 29 Tenn App 13

Wis—Wegner v Chicago & N W Ry Co 55 N W 2d 420, 262 Wis 402, 41 A L R 2d 279

87 Ark—Missouri Pac R Co v Ball, supra, n 85

D C—Tobin v Pennsylvania R Co 100 F 2d 435 69 App D C 262, cert den 59 S Ct 488, 306 U S 640, 83 L Ed 1040

Minn—Peterson v Minneapolis St Ry Co., 52 N W 2d 433 236 Minn 186

N J—Nazarro v Hudson & M R Co 14 A 2d 521 125 N J Law 108 affd 17 A 2d 173, 125 N J L 509—Bohn v Hudson & M R Co., 108 A 2d 5 16 N J 180—Buchner v Erie R Co 111 A 2d 257 17 N J 283

N Y—Iono v Murray, 10 N Y S 2d 492, 256 App Div 512—Percvoskin v New York Transit Corporation, 23 N Y S 2d 343 260 App Div 939—Leto v City of New York, 112 N Y S 2d 751

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N Y—Roches v New York City Transit Authority 172 N Y S 2d 836 11 Misc 2d 951

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88 U S—Lowden v Denton, C C A Mo 110 F 2d 274 cert den 60 S Ct 1100, 310 U S 652, 84 L Ed 1417—Gaglio v City of New York, supra, n 50

Ky—McKechan v Louisville & N R Co 172 S W 2d 580, 294 Ky 821

Md—Kaplan v Baltimore & O R Co., 113 A 2d 415 207 Md 56

Mo—Ostresh v Illinois Terminal R Co 313 S W 2d 19

N J—Sutton v Hudson & Manhattan R Co., 36 A 2d 422, 131 N J Law 331

N Y—Leto v City of New York, supra, n 87—Merganz v City of New York, 134 N Y S 2d 431—Goldstein v New York Cent R Co 245 N Y S 2d 148, 19 A D 2d 835

93 Cal—Finley v City and County of San Francisco 251 P 2d 687, 115 C A 2d 116

Kan—Emmerich v Kansas City Public Service Co 280 P 2d 615, 177 Kan 443

Evidence held sufficient to go to jury

(2) Other matters

U S—Metropolitan Coal Co v Johnson, C A Mass 265 F 2d 173

94 N J—Wright v Central R Co of New Jersey 11 A 2d 20, 124 N J Law 113

95 U S—Miscione v Pennsylvania R Co C A N Y 284 F 2d 428

Ark—Missouri Pac Transp Co v Johnson, 126 S W 2d 931 197 Ark 1129

Ill—Van Hoorebeke v Iowa Illinois Gas & Electric Co supra, n 48—McKenzie v Friel, 61 N E 2d 407 326 Ill App 258

Mass—Gorman v Massachusetts Bay Transp Authority 212 N E 2d 568, 350 Mass 760

Mich—Buchanan v Flint Trolley Coach Co 36 N W 2d 717 324 Mich 172

Mo—Lane v Supreme Cab Co App 374 S W 2d 527

N J—Rourke v Public Service Coordinated Transport, 66 A 2d 341 4 N J Super 44 affd 70 A 2d 489 3 N J 422—Monihan v Public Service Interstate Transp Co 91 A 2d 585 22 N J Super 149

W Va—Isgan v Jenkins, 59 S E 2d 689 134 W Va 400

Particular questions of fact

(10) Other questions

D C—Violette v Campbell, Mun App 134 A 2d 330

Kan—Dryden v Kansas City Public Service Co 238 P 2d 501 172 Kan 31

Mass—Michon v Metropolitan Transit Authority 185 N E 2d 649 345 Mass 50

N Y—Carrillo v Green Bus Lines, 78 N Y S 2d 233 273 App Div 969

Tenn—Schandler v Southern Coach Lines, 217 S W 2d 775 188 Tenn 169

Wash—Becker v Tacoma Transit Co 314 P 2d 638, 50 Wash 2d 688

Wis—Giannopoulos v Milwaukee Electric Ry & Transport Co 10 N W 2d 143 243 Wis 416

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96 Ga—Bailey v Louisville & N R Co., 160 S E 2d 245 117 Ga App 185

N H—Allen v State, 260 A 2d 454 110 N H 42

Okl—Barnes v Oklahoma Transp Co 318 P 2d 455

97 Ill—Garchas v Chicago Transit Authority 206 N E 2d 752, 57 Ill App 2d 396—Watson v Chicago Transit Authority, 299 N E 2d 58 12 Ill App 3d 684

N Y—Dobbins v Mumblow supra, n 48—Young v Jamaica Buses, 28 N Y S 2d 197 262 App Div 860

Or—Herron v Rose City Transit Co 411 P 2d 445 243 Or 64 app after remand 431 P 2d 831 247 Or 616

99 Ill—McGreevy v Chicago Transit Authority, 202 N E 2d 844, 53 Ill App 2d 320—Thomas v Chicago Transit Authority 253 N E 2d 492, 115 Ill App 2d 476

Md—Miller v Mass Transit Administration, 306, A 2d 261 18 Md App 220, affd 315 A 2d 772, 271 Md 256

N Y—Kessler v Fifth Ave Coach Co., 4 N Y S 2d 246 254 App Div 800

Ohio—Kelly v Columbus Ry., Power & Light Co 24 N E 2d 290, 62 Ohio App 397

Okl—Oklahoma Ry Co v Parker 203 P 2d 875, 201 Okl 193

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1 Ala—Montgomery City Lines v Hawes, 20 So 2d 536, 31 Ala App 5o4 cert den 20 So 2d 541 246 Ala 287

Tex—Dallas Railway & Terminal Co v Hendricks, Civ App 154 S W 2d 899, revd on oth grds., Com App 166 S W 2d 116, 140 Tex 93

2 Ill—Rogers v Chicago Transit Authority 92 N E 2d 776, 341 Ill App 46

Mich—Sherman v Flint Trolley Coach, 8 N W 2d 115 304 Mich 404

Evidence held insufficient, etc.

(2) Other cases

Me—Roberts v Yellow Cab Co 240 A 2d 733

Md Ferguson v Baltimore & A.R Co 80 A 2d 9 197 Md 488

Pa—Schuckel v Yellow Cab Co of Philadelphia 85 A 2d 138 369 Pa 356

3 D C—Perrino v D C Transit System Inc App 218 A 2d 519

4 U S—Basso v Palmer C C A N Y 138 F 2d 914

Ill—Rowley v Fnel, 71 N E 2d 183 330 Ill App 433

N C Perry v Davis, 196 S E 815 213 N C 526

Okl—Fullgraf v Oklahoma Ry Co, 111 P 2d 1072, 188 Okl 592

6 Cal—Lagomarsino v Market St Ry Co, 158 P 2d 982, 69 Cal App 2d 388

Md—Mass Transit Administration v Miller, 315 A 2d 772, 271 Md 256

Mass—Longm v Boston Elevated Ry Co, 34 N E 2d 682, 309 Mass 228

Complaint improperly dismissed

N Y—Towne v City of New York, 104 N Y S 2d 190, 278 App Div 833

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9 D C—Ross v Pennsylvania R Co, Mun App 55 A 2d 346—Pe toy v Pennsylvania R Co D C, 132 F Supp 257, revd on oth grds C A 239 F 2d 435 99 U S App D C 272, cert den 77 S Ct 861 353 U S 950 1 L Ed 2d 859

Kan—Pecou v Kansas City Public Service Co 134 P 2d 686 156 Kan 452

Ky. Peckwith v Louisville Ry Co, 124 S W 2d 737 276 Ky 499—Southeastern Greyhound Lines v Donohue, 182 S W 2d 328, 298 Ky 139

La—Sewell v Gulf, C & S F Ry Co App 11 So 2d 923

N J Dyson v Public Service Coordinated Transport, 5 A 2d 483, 122 N J Law 451—Greer v Public Service Coordinated Transport, 12 A 2d 844, 124 N J Law 512

N C—Williams v Queen City Coach Co 44 S E 2d 883, 228 N C 790

Ohio Hall v Redifer, Mun, 79 N E 2d 237

Pa—Corrigan v Lehigh Valley R Co, 40 Luz Leg Reg 21—Bavaro v West Penn Rys Co, 31 West Co 299

Evidence held insufficient to require submission

N Y Bardwell v New York, N H & H R Co, 213 N Y S 2d 168, 13 A D 2d 542, rearg den and app gr 217 N Y S 2d 505, 13 A D 2d 773 affd 182 N E 2d 281 227 N Y S 2d 672, 11 N Y 2d 847

(7) Other cases

Tenn—Shirley v Louisville & N R Co 251 S W 2d 440, 36 Tenn App 72, 34 A L R 2d 356

10 U S—Carter v Kurn, C C A Ark., 127 F 2d 415—Callaway v Hart, C C A Ala 146 F 2d 103 cert den 65 S Ct 915, 324 U S 866, 89 L Ed 1421—Dailey v Palmer C C A N Y, 161 F 2d 960—Wallin v Greyhound Corp, C A Tenn, 341 F 2d 521

Ala—Southeastern Greyhound Lines v Callahan 13 So 2d 660, 244 Ala 449

Cal—Troutman v Los Angeles Transit Lines, 185 P 2d 616, 82 Cal App 2d 183

D C—Capital Transit Co v Howard, 196 F 2d 593, 90 U S App D C 359

Ill—Ivy v Chicago Transit Authority, 161 N E 2d 881 23 Ill App 2d 251—McNealy v Illinois Cent R Co 193 N E 2d 879, 43 Ill App 2d 460

Ky—Yellow Cab Taxi v Dixon's Adm r, 218 S W 2d 53, 309 Ky 504

Me—Gould v Maine Central Transp Co, 1 A 2d 908 136 Me 83—Gould v Maine Central Transp Co 9 A 2d 263, 136 Me 336

Mass—McKnight v Red Cab Co, 64 N E 2d 433, 319 Mass 64—Knych v Trustees of New York, N H & H R Co 69 N E 2d 575, 320 Mass 339—Whippen v Massachusetts Bay Transp Authority 235 N E 2d 805, 354 Mass 99

Mo—Whalen v St Louis Public Service Co, App 351 S W 2d 788—Fairley v St Louis Public Service Co, 362 S W 2d 549—Since the [illegible] of Corpus Juris [illegible], the case of Brindley v Wells, 271 S W 48, 308 Mo 1, has been overruled the Court holding that a substantial case for jury was not made under the res ipsa loquitur doctrine, Cannamore v Bi-State Development Agency, 484 S W 2d 308 93 A L R 3d 771

N H—Bernardi Greater Shows v Boston & Maine R R 1 A 2d 360, 89 N H 490, cert den 59 S Ct 787 306 U S 662, 83 L Ed 1059

N Y—Trudell v New York Rapid Transit Corporation 22 N E 2d 244, 281 N Y 82—Redmond v Staten Island Coach Co, 59 N Y S 2d 874 270 App Div 823

Ohio—Bauer v Pullman Co 220 N E 2d 366, 8 Ohio App 2d 1

Okl—St Louis, S F Ry Co v Davis, 258 P 2d 612

R I—Ponton v United Electric Rys Co, 200 A 425 61 R I 203 117 A L R 518

S C—Humphries v Stokes Bus Line, 18 S E 2d 675 199 S C 132

S D—Henrichs v Inter City Bus Lines, 111 N W 2d 327, 79 S D 267

Tex—Simpson v Dallas Ry & Terminal Co, Civ App 143 S W 2d 416, err dism judg correct

Wash—Cotten v Wilson, 178 P 2d 287, 27 Wash 2d 314

Wis—Victorson v Milwaukee & Suburban Transport Co 234 N W 2d 332, 70 Wis 2d 336

Evidence held insufficient to establish absence of negligence as a matter of law—El Paso Electric Co v Barker 187 S W 2d 17 134 Tex 496

Failure to provide seat belts

Cal—Greyhound Lines, Inc v Superior Court In and For Shasta County 83 Cal Rptr 343, 3 C A 3d 356 cert den, S Ct 91 S Ct 100, 400 U S 868, 27 L Ed 2d 108

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12 D C—Pomeroy v Pennsylvania R Co D C 132 F Supp 257 revd on oth grds C A, 239 F 2d 435 99 U S App D C 272, cert den 77 S Ct 861 353 U S 950, 1 L Ed 2d 859

13 Mass—McKnight v Red Cab Co supra, n 10

Mo—Pierce v St Louis Public Service Co, App, 380 S W 2d 943

Wis—Bradford v Milwaukee & Suburban Transport Co 130 N W 2d 282, 25 Wis 2d 161

14 U S—Rettan v Travelers Indem Co C A Wis 267 F 2d 66

Ark—Midwest Bus Lines, Inc v Williams, 422 S W 2d 869, 243 Ark 854

Fla—Metropolitan Dade County v Gould, App, 170 So 2d 80

Ill—Piacente v Illinois Cent R Co 123 N E 2d 594, 4 Ill App 2d 113

Ky—Lyons v Southeastern Greyhound Lines, 137 S W 2d 1107, 282 Ky 106—Southeastern Greyhound Lines v Donohue, supra, n 9—Kopp v Louisville Taxicab & Transfer Co 257 S W 2d 891—Conley's Adm r v Ward, 291 S W 2d 568

Mass—O'Leary v Metropolitan Transit Authority, 159 N E 2d 91 339 Mass 328

Mich—Longfellow v City of Detroit, 5 N W 2d 457 302 Mich 542

Miss—Teche Lines v Pittman, 4 So 2d 293, 191 Miss 735 138 A L R 220

N M—Riseling v Potash Mines Transp Co 417 P 2d 38, 76 N M 544

Pa—Coyle v Pittsburgh Rys Co 27 A 2d 533 149 Pa Super 281—Monahon v Pittsburgh Rys Co, 27 A 2d 534 149 Pa Super 283

Tex—Carpenter v Dallas Railway & Terminal Co Civ App, 163 S W 2d 703—Cole v Missouri-Kansas-Texas R Co of Texas, Civ App 179 S W 2d 343 err ref—Mattox v C R Anthony Co Civ App, 326 S W 2d 740, err ref no rev err

15 Ark—Hot Springs St Ry Co v Ross, 261 S W 2d 789 222 Ark 546—Citizens Coach Co v Collier 348 S W 2d 873, 233 Ark 912

Cal—Reilly v California St Cable R Co 173 P 2d 872, 76 Cal App 2d 620

Colo—Landis v McGowan, 165 P 2d 180, 114 Colo 355

D C—Bradley v D C Transit System Inc Mun App 183 A 2d 551—Evans v Greyhound Corp, App 200 A 2d 194

Fla—Shaw v Congress Bldg Inc App 113 So 2d 245

Ill—Harrison v Yellow Cab Co 31 N E 2d 328, 30 Ill App 47—Schwickrath v Lowden, 46 N E 2d 162, 317 Ill App 431—Van Hoonbocke v Iowa Illinois Gas & Electric Co, 57 N E 2d 652, 326 Ill App 88—Holderness v Checker Taxi Co, 29 N E 2d 32 105 Ill App 2d 251

Iowa—Waterloo Sav Bank v Waterloo, Cedar Falls & Northern R R 60 N W 2d 572, 244 Iowa 1361

Ky—Dix v Carmack, 117 S W 2d 1036, 273 Ky 844

Mass—Brown v Boston Elevated Ry Co 21 N E 2d 233, 303 Mass 237—Flaherty v Collins, 61 N E 2d 12, 318 Mass 153—McNally v Union St Ry Co 146 N E 2d 374, 336 Mass 760

Mich—Routhier v City of Detroit, 61 N W 2d 593, 338 Mich 449, 40 A L R 2d 1114

Mo—Lewis v Zagata, 166 S W 2d 541 350 Mo 446—Biehle v Frazier, 232 S W 2d 465, 360 Mo 1088

N J—Goldwyn v Coast Cities Coaches, 30 A 2d 295, 129 N J Law 501—Ivins v Public Service Interstate Transp Co, 73 A 2d 592, 8 N J Super 94

N Y—Cross v Murray 12 N Y S 2d 627 257 App Div 858—Isserles v Gil-Ed Corp 221 N Y S 2d 128, 14 A D 2d 857

N C—Dickson v Queen City Coach Co 63 S E 2d 297, 233 N C 167

Okl—Southern Kansas Greyhound Lines v Hicks, 98 P 2d 278 184 Okl 581

Pa—Evans v Philadelphia Transp Co 212 A 2d 440, 418 Pa 567

Tex—Couch v Hale, Civ App 404 S W 2d 920

Va—Birtcherds Dairy v Randell, 23 S E 2d 229 180 Va 311

Wash—Fleming v City of Seattle, 275 P 2d 904, 48 Wash 2d 477—McDonald v Irby, 445 P 2d 192, 73 Wash 2d 431

Negligence of taxicab driver

(2) Other cases

Ala—Decatur Transit v Jennings, 45 So 2d 13, 253 Ala 322—Mobile Cab & Baggage Co v Busby, 169 So 2d 314 277 Ala 292

Pa—Ludlam v Moore, 21 Beaver 97

Evidence held sufficient to go to jury

Fla—Blackman v Miami Transit Co, App, 125 So 2d 128 92 A L R 2d 1387

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16 U S—Hinton v Chicago, R I & P R Co, D C Ill, 172 F Supp 747, revd on oth grds, C A, 272 F 2d 449

Ill—Lutz v Chicago Transit Authority, 183 N E 2d 579 36 Ill App 2d 79

N Y—Ligon v International Ry Co 55 N Y S 2d 444, 269 App Div 809

17 U S—Pennsylvania R R v Goldie, C A Mich 182 F 2d 9—Stout v American Bus Lines, C A N Y 200 F 2d 833

Ala—Decatur Transit v Jennings, supra, n 15

Cal—Dieterle v Yellow Cab Co 93 P 2d 171, 31 Cal App 2d 97

D C—Capital Transit Co v Beasley Mun App 141 A 2d 577

Fla—Wright v City of St Petersburg, App, 291 So 2d 639

Ga—East Ala Coach Lines v Boyd, 55 S E 2d 634, 81 Ga App 93

Ill—Stollery v Sprague, 22 N E 2d 276, 301 Ill App 209—McKenzie v Fnel, 61 N E 2d 407, 326 Ill App 258

Iowa—Womochil v Peters, 285 N W 151—Doser v Interstate Power Co 173 N W 2d 556

Ky—V T C Lines v Taylor, 134 S W 2d 991 281 Ky 83—Ken-Ten Coach Lines v Siler 197 S W 2d 406, 303 Ky 263—Adams v Louisville Taxicab & Transfer Co 211 S W 2d 397 307 Ky 405—Conley's Adm r v Ward, 291 S W 2d 568

Md—Jones v Baltimore Transit Co 127 A 2d 649, 211 Md 423

Mass—Viera v East Taunton St Ry Co 70 N E 2d 841 320 Mass 547

Mo—Hopkins v St Louis Public Service Co App 382 S W 2d 442

NJ—Goldwyn v Coast Cities Coaches, supra, n 15—Massotto v Public Service Coordinated Transport, 176 A 2d 280, 71 N J Super 39

Pa—Turek v Pennsylvania R Co 64 A 2d 779 361 Pa 512—Watson v Pittsburgh Rys Co 132 A 2d 718, 183 Pa Super 473—Parker v Charlone, 137 A 2d 317 391 Pa 566—Connelly v Philadelphia Transp Co 216 A 2d 60, 420 Pa 280, 18 A L R 3d 1

Utah—Horsley v Robinson, 186 P 2d 592, 112 Utah 227

Wash—Cotten v Wilson, supra, n 10

Wis—Levner v Northland-Greyhound Lines of Illinois, 286 N W 68, 231 Wis 554

Evidence held insufficient etc.

Ky—Spencer v City Taxi Service, Inc, 439 S W 2d 74

18 U S—McDermott v Crown Zellerbach Corp, C A La 418 F 2d 598

Cal—Pratt v Western Pac R Co 29 Cal Rptr 108, 213 C A 2d 573

Ill—Hill v Sprague, 24 N E 2d 887 303 Ill App 229—Hannaher v Blue Cab Co 54 N E 2d 257 322 Ill App 277

Iowa—Doser v Interstate Power Co 173 N W 2d 556

Ky—Conley's Adm'r v Ward, 291 S W 2d 568 Middleton v Partin, 347 S W 2d 75

Mich—Christoff v Noto, 42 N W 2d 732, 327 Mich 514

Mo—Ruth Baker v St Louis Public Service Co, 234 S W 2d 552, 361 Mo 259—Mullen v St Louis Public Service Co 389 S W 2d 838—Mullen v St Louis Public Service Co App, 380 S W 2d 950, transf to Sup 389 S W 2d 838

NJ Massotto v Public Service Coordinated Transport, 176 A 2d 280, 71 N J Super 39

Pa—Coyne v Pittsburgh Rys Co 141 A 2d 830, 393 Pa 326

Tex—Couch v Hale, Civ App 404 S W 2d 920

Wash—Wilcoxen v City of Seattle, 203 P 2d 658, 32 Wash 2d 734

19 Ark—St Louis-South[illegible] Ry Co v Holwerk, 163 S W 2d 175, 204 Ark 587

Cal—Mudrick v Market St Ry Co App 74 P 2d 328, subs op 81 P 2d 950, 11 Cal 2d 724 118 A L R 533—Wilson v City and County of San Francisco, 344 P 2d 828 174 C A 2d 273

D C—Butler v McCalip, Mun App, 54 A 2d 644—Lindsey v D C Transit Co Mun App 140 A 2d 306

Fla—Jacobs v Harlem Cab, Inc, App, 183 So 2d 552

Ill—P[illegible]ck v C[illegible]ags, 58 N E 2d 742, 324 Ill App 589

La—Vidal v Liberty Mut Ins Co, App, 232 So 2d 786

Mass—O'Toole v Murphy, 206 N E 2d 88, 348 Mass 795

Mo—Nix v Gulf M & O R Co 240 S W 2d 709 362 Mo 187—Wise v St Louis Public Service Co 357 S W 2d 902

N J—Miller v Public Service Coordinated Transport, 78 A 2d 426, 11 N J Super 427, affd 81 A 2d 148, 7 N J 185, 26 A L R 2d 1215—Barnes v Central R Co of New Jersey 177 A 2d 568, 71 N J Super 587

N Y—Libarus v Murray 299 N Y S 184, 252 App Div 781 rewd on oth. grds 14 N E 2d 628, 277 N Y 691, rearg den 16 N E 2d 119 278 N Y 599 motion den 6 N Y S 2d 348, 254 App Div 884

N C—Garvey v Atlantic Gr[illegible] Corp 45 S E 2d 58, 228 N C 166

Pa—Muzychuk to Use and Benefit of Burns v Yellow Cab Co 22 A 2d 670, 343 Pa 335

Evidence held insufficient to go to jury

N J—Wright v Central R Co of New Jersey, 11 A 2d 20, 124 N J Law 113

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21 Ark—Greyhound Lines, Inc v Harmon, 396 S W 2d 291 239 Ark 1031

Cal—Abney v City and County of San Francisco, 252 P 2d 654 115 C A 2d 506

Fla—Lawson v Loftin, 21 So 2d 202, 155 Fla 685

Ind—Geary v Chicago & Calumet Dist Transit Co, App 245 N E 2d 187 144 Ind App 192

Ky—Greer v Sm[illegible]field, 215 S W 2d 574, 308 Ky 674—Louisville Transit Co v Sexton, 471 S W 2d 20

Mass—Ferrick v Massachusetts Bay Transp Authority, 309 N E 2d 523, 2 Mass App 823

Md—Miller v Mass Transit Administration, 306 A 2d 261, 18 Md App 220, affd 315 A 2d 772, 271 Md 256

Mich—Bolton v City of Detroit, 157 N W 2d 313 10 Mich App 589

Mo—Markman v Bi-State Transit System, 457 S W 2d 769

N J—Fell[illegible]man v Byrnes, 49 A 2d 478, 134 N J L 568

N M—Hoskins v Albuquerque Bus Co 382 P 2d 700, 72 N M 217

N Y—Trudell v New York Rapid Transit Corporation, supra, n 10

Ohio—Miller v Warren Transp Co App, 197 N E 2d 562

Okl—Oklahoma Transp Co v Claiborn, 434 P 2d 299

Pa—McLaughlin v Southern Pennsylvania Traction Co, 32 Del Co 252—Miller v Pittsburgh Rys Co 144 A 2d 514 187 Pa Super 334

Tenn—Southern Coach Lines v Haddock, 194 S W 2d 347, 29 Tenn App 132

Tex—Grady v Dallas Ry & Terminal Co, Civ App 278 S W 2d 282, err ref no rev err

Va—Crist v Washington, Virginia and Maryland Coach Co 85 S E 2d 213 196 Va 642, cert den 76 S Ct 50, 350 U S 823, 100 L Ed 736, reh den 76 S Ct 176, 350 U S 905 100 L Ed 794

Evidence held insufficient for jury

Md Rejewsky v Baltimore Transit Co, 160 A 2d 791, 222 Md 433

22 U S Bassett v City of Detroit, D C Mich, 139 F Supp 134 affd C A, 245 F 2d 445—Greyhound Corp v Ault, C A Ga, 238 F 2d 198

Ala—Birmingham Electric Co v Davis, 13 So 2d 888, 244 Ala 338—Powell v Goforth, 188 So 2d 766, 279 Ala 601

Ariz—City of Phoenix v Mubarek Ali Khan, 229 P 2d 949, 72 Ariz 1

Cal—Acosta v Southern California Rapid Transit Dist, 84 Cal Rptr 184, 465 P 2d 72, 2 C 3d 19

Conn—Blennerhassett v Connecticut Co 199 A 443 124 Conn 687

Del—Delaware Coach Co v Reynolds, 71 A 2d 69 6 Terry 226

D C—Lindsey v D C Transit Co, Mun App, 140 A 2d 306—Capital Transit Co v P[illegible]y, Mun App 148 A 2d 577—Bradley v D C Transit System, Inc Mun App, 183 A 2d 551

Fla—Loftin v A[illegible]derson, 66 So 2d 470

Ga—Bibb Transit Co. v Scott, 114 S E 2d 43 101 Ga App 352

Ill—Hirshberg v Cummings, 57 N E 2d 284, 324 Ill App 62—Harris v Illinois Power Co, 60 N E 2d 581, 325 Ill App 624—Lazarus v Fnel, 73 N E 2d 647, 331 Ill App 552

Ind—Evansville City Coach Lines v Roger 99 N E 2d 435, 122 Ind App 119, reh den 102 N E 2d 504, 122 Ind App 119—Chicago & Calumet Dist Transit Co v Shavalekes, 156 N E 2d 902, 129 Ind App 337

Iowa—Waterloo Sav Bank v Waterloo, Cedar Falls & Northern R R 60 N W 2d 572, 244 Iowa 1364—Fisher v Des Moines Transit Co, 111 N W 2d 633, 253 Iowa 195

Kan—McQuin v Santa Fe Trail Transp Co, 122 P 2d 787, 155 Kan 111

Ky—Bridge Transit Co v Lesener 200 S W 2d 942, 304 Ky 403—Cincinnati, Newport & Covington Transp Co v Fischer 357 S W 2d 870—Moore v Lexington Transit Corp 418 S W 2d 245

Md—Smith v Baltimore Transit Co 128 A 2d 413 211 Md. 529—Baltimore Transit Co v Pue, 220 A 2d 551 243 Md 256

Mass—Viera v East Taunton St Ry Co supra, n 17—Tsaggaris v Canadian Pac Ry Co 162 N E 2d 23 339 Mass 726

Mich—Rogers v City of Detroit, Department of Street Railways, 286 N W 167 289 Mich 86—Burke v Enders, 9 N W 2d 537, 305 Mich 270—Kasza v City of Detroit, 120 N W 2d 784, 370 Mich 7

Minn—Urban v Minneapolis St Ry Co 96 N W 2d 698, 256 Minn 1

Mo—Hale v St Louis Public Service Co App 238 S W 2d 876—Routt v Bi-State Transit Development Agency App 423 S W 2d 202

N J—Auchter v Elliott Bus Corporation, 198 A 376, 120 N J Law 105

N Y—Wenman v Murray 12 N Y S 2d 200, 256 App Div 1109—Miller v Inter City Transp Co 221 N Y S 2d 433, 31 Misc 2d 777

N C—Smith v Safe Bus Co 3 S E 2d 362, 216 N C 22

Ohio—Sharpsteen v Cincinnati St Ry Co App 31 N E 2d 885—Fitzgerald v City of Cleveland, 68 N E 2d 568

Okl—Thompson v Walton, 297 P 2d 1084

Pa—Angelo v Pittsburgh Rys Co, Bus Division, 151 A 2d 867, 189 Pa Super 574—Connelly v Philadelphia Transp Co 216 A 2d 60, 420 Pa 280, 18 A L R 3d 1

Tenn—Stacks v Veterans Cab Co, 366 S W 2d 539 51 Tenn App 272

Tex—Dallas Ry & Terminal Co v Whitcomb, Civ App, 153 S W 2d 527, affd 163 S W 2d 616—Dallas Railway & Terminal Co v Hendricks, supra, n 1—Dallas Railway & Terminal Co v Young, Civ App, 155 S W 2d 414 err ref

Wash—Wilcoxen v City of Seattle, supra, n 18—Nopson v City of Seattle, 207 P 2d 674 33 Wash 2d 772

Sufficiency of defendant's explanation

(2) D C—Cole v Capital Transit Co C A D C 195 F 2d 568, 90 U S App D C 289

(4) Other cases

Mo—Gutierrez v St Joseph Light & Power Co, App. 294 S W 2d 360

Ohio—Miller v Warren Transp Co App 197 N E 2d 562

Tex—Sims v Dallas Ry & Terminal Co, Tex Civ App, 135 S W 2d 142

Evidence held insufficient to go to jury

(13) La—Rhodes v New Orleans Public Service, App 75 So 2d 549

(17) In other cases

U S—Barnett v City of Detroit, Dept of St Rys, C A Mich 245 F 2d 445

Ark—Missouri Pac R Co v Baum, 117 S W 2d 31, 196 Ark 237

D C—D C Transit System, Inc v Carney App, 254 A 2d 402

Fla—Miami Transit Co v Ford, App 159 So 2d 261

Md—Kaufman, by Deutch v Baltimore Transit Co 78 A 2d 464, 197 Md 141—Smithmier v Baltimore Transit Co, 141 A 2d 527 217 Md 52—Oliver v Baltimore Transit Co, 233 A 2d 772, 247 Md 625

Mass—De Gino v Metropolitan Transit Authority, 90 N E 2d 346, 325 Mass 760 Bagar v Massachusetts Bay Transp Authority, 246 N E 2d 665, 355 Mass 695

Ohio—Gastauer v Taxicabs of Cincinnati, Inc 143 N E 2d 621 103 Ohio App 511

Pa—Hawkins v Pittsburgh Rys Co, 22 A 2d 73 146 Pa Super 185—Wilson v Butler Motor Transit Co 84 A 2d 207 368 Pa 479

Evidence held sufficient to go to jury

D C—Washington v Washington, Virginia & Maryland Coach Co, D C, 250 F Supp 888

Okl—Oklahoma Ry Co v Jones, 250 P 2d 472, 207 Okl 476

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23 Ky—Southeastern Greyhound Lines v Webb, 230 S W 2d 99 313 Ky 71

Mich—Steudle v Yellow and Checker Cab & Transfer Co 282 N W 879, 287 Mich 1

Pa—Nobel v Burrell, 41 A 2d 873 352 Pa 70

26 Cal—Butigan v Yellow Cab Co 320 P 2d 500 49 C 2d 652, 65 A L R 2d 1

D C—Capital Transit Co v Jackson 149 F 2d 839 80 U S App D C 162, 161 A L R 1110, cert den 66 S Ct 143 326 U S 762, 90 L Ed 459

Kan—Clark v Southwestern Greyhound Lines, 79 P 2d 906, 148 Kan 155

Ky—Risen v Consolidated Coach Corporation 118 S W 2d 712, 274 Ky 342

Mo—Eickmann v St Louis Public Service Co 323 S W 2d 802

Ohio—Gallaher v Campbell, App 125 N E 2d 758

Pa—Dupla v P T C 38 Del Co 335 65 York Leg Rec 107

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27 Ill—Dodds v Chicago Transit Authority 132 N E 2d 816, 9 Ill App 2d 388

Md—Baltimore Transit Co v Sun Cab Co 124 A 2d 567 210 Md 555

29 Ala—Decatur Transit v Jennings, 45 So 2d 13 253 Ala 322—Horton v Mobile Cab & Baggage Co 198 So 2d 619 281 Ala 35

Ark—Missouri Pac Transp Co v Miller 299 S W 2d 41 227 Ark 351

Cal—Formosa v Yellow Cab Co 87 P 2d 716, 31 Cal App 2d 77—Grimes v Williams, 142 P 2d 749 61 Cal App 2d 304—Roy v Mission Taxi Co 225 P 2d 920, 101 Cal App 2d 438

D C—Birchall v Capital Transit Co Mun App 34 A 2d 624—Bell Cab Co v Coppridge, 158 F 2d 540, 81 U S App D C 337—Williams v Capital Transit Co C A 215 F 2d 487, 94 U S App D C 221

Fla—Ringler v McVeigh, App 109 So 2d 606

Ga—Crane v Doolittle, 158 S E 2d 426, 116 Ga App 572

Ill—Kornmeier v Yellow Cab Co 195 N E 2d 745 45 Ill App 2d 288—Kirkwood v Checker Taxi Co 298 N E 2d 233 12 Ill App 3d 129

Ind—Safety Cab, Inc v Ferguson, 205 N E 2d 827, 137 Ind App 644

Iowa—Womochil v Peters, 285 N W 151—Barnard v Cedar Rapids City Cab Co 133 N W 2d 884, 257 Iowa 734

Kan—Mahan v Kansas City Public Service Co 146 P 2d 383 158 Kan 206—Slade v City Cabs, Inc., 392 P 2d 127, 193 Kan 105

Mass—Farewell v Interstate Busses Corporation 30 N E 2d 850 307 Mass 553—DiLorenzo v Yellow Cab of Somerville, Inc., 269 N E 2d 699 359 Mass 751

Mich—Coburn v Goldberg, 40 N W 2d 150, 326 Mich 280

Minn—Anderson v Enfield, 70 N W 2d 409 244 Minn 474

Miss—Snowden v Skipper, 93 So 2d 834, 230 Miss 684

Mo—Watt v St Louis Public Service Co, 354 S W 2d 889—Hopkins v St Louis Public Service Co App, 382 S.W 2d 442—Richardson v Wendel, 401 S W 2d 455

N C—Marsh v Byrd, 200 S E 389, 214 N C 669—Perry v Sykes, 200 S E 923, 215 N C 39

Ohio—Dickerson v Russo, 81 N E 2d 276, 82 Ohio App 229

Pa—Miller v Pennsylvania R Co, 84 A 2d 200, 368 Pa 507—Anderson v Pittsburgh Railways Co 225 A 2d 548, 423 Pa 550—Lanigan v Lewis, 232 A 2d 50, 210 Pa Super 273

R I—Lanzillotti v United Electric Rys Co 32 A 2d 267 69 R I 173

Tex—Glazer v Wheeler Civ App 130 S W 2d 353 revd on oth grds 153 S W 2d 449, 137 Tex 341, 140 A L R 1301

Va—Birtcherds Dairy v Randell, supra, n 15—Atlantic Greyhound Corp v Shelton, 36 S E 2d 625, 184 Va 684

Wash.—Greene v Rothschild, 374 P 2d 566, 60 Wash 2d 508

Wis.—Levner v Northland-Greyhound Lines of Illinois, 286 N W 68 231 Wis 554

Issues sufficient to go to jury

Tex—Smith v City Transp Co Civ App 245 S W 2d 296 ref no re. err

Evidence held insufficient to go to jury

Ill—Tangahn v City of Chicago, 108 N E 2d 801 348 Ill App 390

Mo—Euler v Schulthes, App 522 S W 2d 155

Evidence held sufficient to go to jury

Md—Greyhound Lines, Inc v Alderson 336 A 2d 811 26 Md App 277

Miss—Smith v Dillon Cab Co 146 So 2d 879 245 Miss 198

Mo—McCarthy v Sebben, 331 S W 2d 601

W Va—Abdulla v Pittsburgh & Weirton Bus Co 213 S E 2d 810, 158 W Va 592, 89 A L R 3d 994

30 Ga—Modern Coach Corp v Faver 73 S E 2d 497 87 Ga App 221

Ill—Trust Co of Chicago v Richardson, 25 N E 2d 837 303 Ill App 652—Turner v Cummings, 48 N E 2d 964 319 Ill App 225

Minn—Reiton v St Paul City Ry Co 288 N W 155 206 Minn 216

Pa—Fisher v Pittsburgh Rys Co 34 A 2d 507 348 Pa 141—Doyle v Philadelphia Transp Co 55 A 2d 583 161 Pa Super 556

Wis—Kalish v Milwaukee & Suburban Transport Corp 67 N W 2d 868 268 Wis 492

31 U S—Falcon v Auto Buses Internacionales, C A Tex 418 F 2d 673

Ala—Capital Motor Lines v Loring, 189 So 897 238 Ala 260—Alabama Power Co v Ray 32 So 2d 219 249 Ala 568

Cal—Dieterle v Yellow Cab Co 93 P 2d 171 34 Cal App 2d 97—Armstrong v Pacific Greyhound Lines, 168 P 2d 457 74 Cal App 2d 367—Stewart v Miranda, 338 P 2d 941 170 C A 2d 373

D C—D C Transit System, Inc v Nunnally App 192 A 2d 131

Fla—Beers v Diamond Cabs, Inc App 104 So 2d 388

Ill—Cooper v Safeway Lines, 26 N E 2d 632, 304 Ill App 302—Walters v Checker Taxi Co 60 N E 2d 260 325 Ill App 578—Holderness v Checker Taxi Co 245 N E 2d 32 105 Ill App 2d 251

Kan—Fodor v Interstate Transit Lines, 86 P 2d 574 149 Kan 174

Ky—Consolidated Coach Corporation v Clark, 123 S W 2d 276, 276 Ky 156—Bowling Green-Hopkinsville Bus Co v Montgomery, 129 S W 2d 535, 278 Ky 837—Roland v Beckham, 408 S W 2d 628

Md—Yellow Cab Co v Bonds, 225 A 2d 41, 245 Md 86

Mich—Bordner v McKernan, 293 N W 889, 294 Mich 411—Albu v Sweeney, 94 N W 2d 834, 355 Mich 385—McKinney v Larges, 116 N W 2d 761 367 Mich 387

Miss—Anderson v Jaeger, 317 So 2d 902

Mo—Matthews v Mound City Cab Co, App, 205 S W 2d 243—Wirth v St Louis County Transit Co, 253 S W 2d 547

N J—Rymar v Lincoln Transit Co 30 A 2d 406, 129 N J Law 525—Sibley v City Service Transit Co 66 A 2d 864 2 N J 458

N Y—Nieves v Manhattan and Bronx Surface Transit Operating Authority, 297 N Y S 2d 743, 31 A D 2d 359 app den 250 N E 2d 253 24 N Y 2d 1030 302 N Y S 2d 852

Ohio—Grzywna v Youngstown Municipal Ry Co App, 77 N E 2d 84

Pa—Marshall v Erie Taxicab Co, 15 A 2d 925 340 Pa 241—Kenny v Lieberman, 142 A 2d 784, 187 Pa Super 6—Allan v Doherty, 150 A 2d 356, 395 Pa 277—Castelli v Pittsburgh Rys Co, 195 A 2d 794, 413 Pa 17

R I—Fahy v New England Transp Co, 32 A 2d 157 69 R I 181

S C—Campbell v Hall, 43 S E 2d 129, 210 S C 423—Robinson v Duke Power Co 48 S E 2d 808 213 S C 185

Tex—Galveston Transit Co v Morgan Civ App 408 S W 2d 728

Utah—Horsley v Robinson, supra, n 17

Va—Atlantic Greyhound Corp v Shelton, supra, n 29—Southern Passenger Motor Lines v Burks, 46 S E 2d 26, 187 Va 53

Wash—Dennis v Maher 84 P 2d 1029 197 Wash 286

Evidence held insufficient to go to jury

(3) Generally

Ky—Southeastern Greyhound Lines v Tincher, 102 S W 2d 334 298 Ky 151—Griffith v Fannin, 206 S W 2d 965 306 Ky 279—Greyhound Corp v Allen, 353 S W 2d 558

Va—Toler v Yellow Cab Co of Virginia, 18 S E 2d 250 179 Va 38

Direction of verdict for defendants

(2) Other cases

Ky—Walters v Southeastern Greyhound Lines, 240 S W 2d 63

Other matters relating to collisions have been held questions for the jury [31.5]

31.5. Weather conditions at time of collision

Ohio—Williams v Diamond Arrow Cabs, Inc., App, 169 N E 2d 651

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35 U S—Evans v Teche Lines, C C A Miss 112 F 2d 933

Ky—McGary v Louisville Taxicab & Transfer Co 266 S W 2d 329

Miss—Snowden v Skipper 93 So 2d 834 230 Miss 684

N J—Schneider v Rutherford Taxi Service 37 A 2d 79, 131 N J Law 419

Pa—Dupla v P T C 38 Del Co 335, 65 York Leg Rec 107

Complaint properly dismissed

N Y—Spinella v City of New York, 104 N Y S 2d 551, 278 App Div 847

36 U S—Louisville & N R Co v Adams, C A Fla 292 F 2d 153

Cal—Price v Atchison, T & S F Ry Co 330 P 2d 933 164 C A 2d 400

Ga—Arrington v Trammell, 62 S E 2d 451, 83 Ga App 107

Ill—Crane v Railway Express Agency 15 N E 2d 866, 369 Ill 110

Ky—Hall v Ratliff, 312 S W 2d 473

Minn—Derrick v St Paul City Ry Co 89 N W 2d 629, 252 Minn 102

Pa—Foley v Reading Co 35 A 2d 315, 348 Pa 485

Wash—Bolander v Northern Pac Ry Co 388 P 2d 729, 63 Wash 2d 659

Evidence held insufficient to go to jury

Pa—Turek v Pennsylvania R Co, 85 A 2d 845, 369 Pa 341, cert, den 72 S Ct 762, 343 U S 928, 96 L Ed 1339

Unless inference of negligence inescapable

N Y—Nixon v New York Cent R Co 199 N Y S 2d 721 10 A D 2d 870, app den 204 N Y S 2d 85 10 A D 2d 981

40 U S—Lachman v Pennsylvania Greyhound Lines, C C A Va, 160 F 2d 496

Ga—Scott v Torrance, 25 S E 2d 120 69 Ga App 309

Ky—V T C Lines v Taylor 134 S W 2d 991, 280 Ky 83—Conley v Jennings, 178 S W 2d 185 296 Ky 652

Pa—Schulz v Reading Transp Co, 47 A 2d 213, 354 Pa 373

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41 Ky—Cox v Wilson 267 S W 2d 83, 44 A L R 2d 830

Minn—Derrick v St Paul City Ry Co, 89 N W 2d 629, 252 Minn 102

42 U S—Union Pacific R. Co v Stenger, C C A Idaho, 132 F 2d 982

Ohio—Funk v New York Cent R Co 56 N E 2d 456 144 Ohio St 1

43 US—Humphrey v Fort Knox Transit Co D C Ky 58 F Supp 362, affd C C A 151 F 2d 602—Hinton v Chicago, R I & P R Co D C Ill 172 F Supp 747 revd on oth grds C A 272 F 2d 119 McGrath v Erie Lackawanna R Co C A NJ 460 F 2d 1312

Ala Mobile City Lines v Huffman, 60 So 2d 333 257 Ala 603

Ark—Missouri Pac R Co v Smith, 117 S W 2d 1068 196 Ark 405—Capitol Transp Co v Alexander, 242 S W 2d 833, 219 Ark 419

Cal—McMillen v Southern Pac Co 303 P 2d 788 146 C A 2d 216

Ga—Dishinger v Suburban Coach Co 66 S E 2d 242, 84 Ga App 498—Hardin v Victory Cab Co, 150 S E 2d 169, 114 Ga App 39

Ill—Sims v Chicago Transit Authority, 122 N E 2d 221, 4 Ill 2d 60—Pezansky v Chicago Transit Authority 320 N E 2d 433 23 Ill App 3d 896

Ky—Louisville Ry Co v Lowe, 133 S W 2d 742, 280 Ky 465—Louisville Ry Co v Allen, 246 S W 2d 443

Md—Baltimore Transit Co v Brooks, 167 A 2d 598 224 Md 242

Minn—Staloch v Rejman, 136 N W 2d 92, 271 Minn 315

Miss—Gulf Transport Co v Allen, 46 So 2d 436, 209 Miss 206

Mo—Mayor v St Louis Public Service Co, 269 S W 2d 101—Russell v St Louis County Cab Co Inc App 493 S W 2d 26

N J—Miller v Public Service Co-ordinated Transport, 81 A 2d 148, 7 N J 185, 26 A L R 2d 1215

N Y—Schlesinger v Brooklyn & Queens Transit Corporation, 20 N Y S 2d 484, 259 App Div 1018—Smith v Brooklyn & Queens Transit Corporation, 48 N Y S 2d 229 267 App Div 997. McLean v Triboro Coach Corp, 88 N Y S 2d 624, 275 App Div 844

N C—Ross v Atlantic Greyhound Corporation, 25 S E 2d 852, 223 N C 239

Ohio—O'Reilly v Cleveland Ry Co 42 N E 2d 452, 68 Ohio App 537—Fiorelli v Yellow Cab Co of Cleveland, Inc App 190 N E 2d 58

Okl—Sprout v Oklahoma Ry Co, 247 P 2d 972, 207 Okl 118

Pa Morrison v Philadelphia Transp Co supra, n 22—Homa v Wilkes-Barre Transit Corp 147 A 2d 377 394 Pa 309—Whitley v Philadelphia Transp Co 234 A 2d 922, 211 Pa Super 288

R I—Johnson v United Elec Rys Co, 65 A 2d 36, 75 R I 208

Tex—Dallas Ry & Terminal Co v Farnsworth, 227 S W 2d 1017 148 Tex 584

Va—Sykes v Langley Cabs, Inc, 176 S E 2d 417, 211 Va 202

Wash—Prantz v Orenge, 518 P 2d 726, 10 Wash App 317

Wis Tuma v Milwaukee & Suburban Transport Corp 162 N W 2d 537, 40 Wis 2d 560

Evidence held insufficient to go to jury

(2) Apple v Duke Power Co, 3 S E 2d 364, 215 N C 799

C McCuen v East Liverpool Bus Terminal Corp, App 89 N E 2d 494

Tex—Lapscomb v Houston Electric Co Civ App, 149 S W 2d 1042

(4) D C—Kieffer v Capital Transit Co, C A 214 F 2d 241, 94 U S App D C 95

(8) Other cases

US—Miller v Dixie Greyhound Lines, C C A Miss, 164 F 2d 977

Kan Thompson v Kansas City Public Service Co 156 P 2d 869 159 Kan 520

Me—Jordan v Portland Coach Co 107 A 2d 416, 150 Me 149

Pa—Curry v Napoleon, 8 D & C 2d 544, 27 Leh L J 150

Withdrawal of question proper where not element in case

Or—Smith v Portland Traction Co, 349 P 2d 286, 220 Or 215

Evidence held not incredible as to justify rejection

Mo—Leavitt v St Louis Public Service Co App, 340 S W 2d 131

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44 Conn—Andrea v New York, N H & H R Co 131 A 2d 642, 144 Conn 340—Yu v New York, N H & H R Co 144 A 2d 56, 145 Conn 451

Fla—Tampa Electric Co v Fleschaker 12 So 2d 901 152 Fla 701—Sumpter v Tamiami Trail Tours, Inc App 123 So 2d 732, 93 A L R 2d 232

Ga—Bailey v Louisville & N R Co 160 S E 2d 245 117 Ga App 185

Kan—King v Vets Cab, Inc 295 P 2d 605 179 Kan 379 56 A L R 2d 1249—Elliott v Chicago, R I & P R Co 454 P 2d 124 203 Kan 273

Mass—Ballou v Boston & M R R 171 N E 2d 857 341 Mass 696

Okl—Kurn v Bayless, 172 P 2d 779 197 Okl 521—Y & Y Cab Co v Ford, 252 P 2d 430 207 Okl 663—Sand Springs Ry Co v Cole, 279 P 2d 938

R I—Shipman v United Electric Railways Co, 26 A 2d 478, 68 R I 39

Wash—Boyd v City of Edmonds, 390 P 2d 706, 64 Wash 2d 94

Evidence sufficient to go to jury

(2) Other cases

Neb—Odom v Willms, 131 N W 2d 140, 177 Neb 698

N C—Hardy v Ingram, 126 S E 2d 55 257 N C 473

Pa—Silinsky v Pennsylvania R Co 50 A 2d 293 355 Pa 499

Tex—White v Southwest Coaches, Inc Civ App 292 S W 2d 823

Wis—Smith v Chicago & N W Ry Co 18 N W 2d 352, 246 Wis 628

46 Ala—Sampson v Ward, 77 So 2d 376, 38 Ala App 49 cert den 77 So 2d 383, 262 Ala 703

Ark—Missouri Pacific Transp Co v Moody, 134 S W 2d 868, 199 Ark 483—Jones v Missouri Pac R Co, 150 S W 2d 742, 202 Ark 333—Missouri Pac R Co v Jones, 162 S W 2d 38, 204 Ark 278—Adams v Summers, 263 S W 2d 711, 222 Ark 924

D C—Capital Transit Co v Howard, 196 F 2d 593 90 U S App D C 359

Ill—Russell v Richardson, 24 N E 2d 185, 302 Ill App 589—Hill v Sprague, 24 N E 2d 887, 303 Ill App 229—Machacek v Richardson, 33 N E 2d 504, 309 Ill App 574—Ostby v Chicago Transit Authority, supra, n 43—Goertz v Chicago & N W Ry Co 153 N E 2d 486, 19 Ill App 2d 261

Md—Jacobson v Julian 229 A 2d 108, 246 Md 549

Mich—Cole v Simpson, 1 N W 2d 2, 299 Mich 589—Clark v Shefferly 78 N W 2d 155, 346 Mich 332

Mo—Dashman v St Louis Public Service Co, App 239 S W 2d 553

Evidence held sufficient to go to jury

Ga—Smith v Atlanta Transit System, Inc, 127 S E 2d 857 106 Ga App 666

Mo—Oglesby v St Louis Public Service Co, App 338 S W 2d 357

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48 Mo—Abramovitz v Wellston Taxi Co, App, 208 S W 2d 834

49 Ark—Capitol Transit Co v Burns, 276 S W 2d 56, 224 Ark 755

Cal—Healy v Yellow Cab Co of California, 90 P 2d 116, 32 Cal App 2d 479—Greenleaf v Briggs, 178 P 2d 459, 78 Cal App 2d 720

Fla—Tampa Electric Co v Fleschaker supra, n 44

Ga—Greeson v Davis, 9 S E 2d 690, 62 Ga App 667—Jordan v Wiggins, 18 S E 2d 512, 66 Ga App 534

Md—Baltimore Transit Co v Brooks, 167 A 2d 598, 224 Md 242

Mass—Brown v Metropolitan Transit Authority 171 N E 2d 869 341 Mass 690—Weinberg v Massachusetts Bay Transp Authority 205 N E 2d 5 348 Mass 669

Mich—Knapp v City of Detroit, 294 N W 692, 295 Mich 311—Brewer v City of Detroit, Dept of St Railways, 161 N W 2d 410, 11 Mich App 465 app after remand 171 N W 2d 595 18 Mich App 598

Minn—Gillson v Osborne, 19 N W 2d 1 220 Minn 122

Mo—Moses v Kansas City Public Service Co 188 S W 2d 538, 239 Mo App 361—Beahan v St Louis Public Service Co App 213 S W 2d 253

N J—Sullivan v Coast Cities Coaches, 19 A 2d 442, 126 N J Law 300, affd 21 A 2d 736, 127 N J Law 226—Sullivan v Coast Cities Coaches, 21 A 2d 736, 127 N J L 226

N Y—Keener v Tilton, 28 N E 2d 912, 283 N Y 454—Hall v Triboro Coach Corp 79 N Y S 2d 777 274 App Div 808

N C—Boyan v Duke Power Co 40 S E 2d 467 227 N C 697

Okl—Y & Y Cab Co v Ford, 252 P 2d 430 207 Okl 663—Lee v Darden, 421 P 2d 845

Pa—Stevens v Reading St Ry Co 121 A 2d 128, 384 Pa 390

Motor carriers

(8) Other cases

Mo—Lanham v St Louis Public Service Co, App, 360 S W 2d 243

N C—Harris v Atlantic Greyhound Corp, 90 S E 2d 710, 243 N C 346, 58 A L R 2d 939

Pa—Flank v Philadelphia Transp Co 201 A 2d 225 203 Pa Super 474

50 Ark—Capitol Transit Co v Burns, 276 S W 2d 56, 224 Ark 755—Yellow Cab Co v Dossett, 426 S W 2d 792, 244 Ark 554

Cal—Parker v City and County of San Francisco, 323 P 2d 108, 158 C A 2d 597

Ill—Ruzgis v Richardson, 14 N E 2d 968, 295 Ill App 376—O'Shea v Chicago Motor Coach Co App, 66 N E 2d 482—Shanowat v Checker Taxi Co, 198 N E 2d 573 48 Ill App 2d 81

La—Cox v Toye Bros Yellow Cab Co, App, 144 So 2d 448

Mich—Javon v City of Detroit, Dept of St Railways, 151 N W 2d 813, 379 Mich 405—Brewer v City of Detroit, Dept of St Railways, 161 N W 2d 410, 11 Mich App 465 app after remand 171 N W 2d 595 18 Mich App 598

Minn—Gillson v Osborne, supra, n 49

Mo—Moses v Kansas City Public Service Co supra, n 49—Peyton v St Louis Public Service Co supra, n 49—Beahan v St Louis Public Service Co 237 S W 2d 105, 361 Mo 807

N J—Del Vecchio v Hafin Bus Co., 50 A 2d 881 135 N J Law 339—Rourke v Hemchork 70 A 2d 489, 3 N J 422—Karmazin v Pennsylvania R Co, 196 A 2d 803 82 N J Super 123, reh den 198 A 2d 97, 82 N J Super 435

N M—Hole v Womack, 407 P 2d 362, 75 N M 522

Ohio—Krauth v City of Cleveland, App 111 N E 2d 769

Okl—G A Nichols Co v Lockhart, 129 P 2d 599 191 Okl 296

Pa—Brown v Beaver Valley Motor Coach Co 76 A 2d 403 365 Pa 578

In failing to warn of danger

Mo—Wilson v Kansas City Public Service Co App 238 S W 2d 73

Pa—Krieger v Pennsylvania R Co 136 A 2d 79 390 Pa 496

Evidence held sufficient to go to jury

Mo—Williamson v St Louis Public Service Co, 252 S W 2d 295

Evidence held sufficient to go to jury

Cal—MacLean v City and County of San Francisco, 273 P 2d 698 127 C A 2d 263

Tex—White v Southwest Coaches, Inc., Civ App 292 S W 2d 823.

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51 U S—Williams v Reading Co., C A Pa., 175 F 2d 32

Ala—Birmingham Elec Co v Linn 34 So 2d 715 33 Ala App 486

Ark—Missouri Pac R Co v Glidewell 137 S W 2d 237 199 Ark 1187

Cal—Lilley v Key System Transit Lines, 289 P 2d 517 136 C A 2d 737

Conn—Andrea v New York, N H & H R Co 131 A 2d 642, 144 Conn 340

Mo—Van Houten v Kansas City Public Service Co 122 S W 2d 868, 233 Mo App 423—Page v Wabash R Co App., 206 S W 2d 691—Beahan v St Louis Public Service Co supra, n 49

N J—Segro v Public Service Coordinated Transport 68 A 2d 280, 4 N J Super 521

Evidence insufficient to go to jury

Mo—Swiastyn v St Joseph Light & Power Co App 459 S W 2d 24

Pa—Butterman v Delaware L & W R Co 12 A 2d 18, 337 Pa 465

52 Mass—Boyd v New York, N H & H R Co 127 N E 2d 164, 332 Mass 607

S C—Nelson v Atlantic Coast Line R Co., 4 S E 2d 273 191 S C 345

53 U S—Metropolitan Coal Co v Johnson C A Mass 265 F 2d 173—Falcon v Auto Buses Interna[illegible] C A Tex 418 F 2d 673

Ala—Louisville & N R Co v Maddox, 183 So 849 236 Ala 594 118 A L R 1318—Birmingham Electric Co v Davis, 13 So 2d 888 244 Ala 338—Decatur Transit v Jennings, 45 So 2d 13 253 Ala 322

Ark—Missouri Pac R Co v Smith supra, n 43—Missouri Pac R Co v Ball 145 S W 2d 716, 201 Ark 584—Yellow Cab Co v Dossett 426 S W 2d 792, 244 Ark 554

Cal—Rogers v Los Angeles Transit Lines, 289 P 2d 226, 45 C 2d 414—Parker v City and County of San Francisco, 323 P 2d 108, 158 C A 2d 597—Kabrenell v Stevens, 336 P 2d 250 168 C A 2d 370

Conn—Cuneo v Connecticut Co 2 A 2d 220 124 Conn 647

D C—Violette v Campbell, Mun App 134 A 2d 330—Slaughter v D C Transit System, Inc C A 261 F 2d 741 104 U S App D C 275

Fla—Florida East Coast Ry Co v Booth, App., 148 So 2d 536

Ga—Modern Coach Corp v Faver 73 S E 2d 497 87 Ga App 221—Ponder v McKinzie, 81 S E 2d 551, 89 Ga App 846—Covington v Brewer 115 S E 2d 368, 101 Ga App 724

Ill—Kane v Yellow Cab Co., 228 N E 2d 194, 84 Ill App 2d 287—Arden v Chicago Transit Authority 232 N E 2d 501, 89 Ill App 2d 214—Perzovsky v Chicago Transit Authority, 320 N E 2d 433 23 Ill App 3d 896

Iowa—Murray v Cedar Rapids City Lines, 48 N W 2d 256, 242 Iowa 794—Rommel v Northland Greyhound Lines, 49 N W 2d 501, 242 Iowa 1135

Kan—Fodor v Interstate Transit Lines, 86 P 2d 574, 149 Kan 174—Elliott v Chicago, R I & P R Co., 454 P 2d 124, 203 Kan 273

Ky—Adams v Louisville Taxicab & Transfer Co 211 S W 2d 397 307 Ky 405—Cody v Nortof, 267 S W 2d 403

Md—Dilley v Baltimore Transit Co., 39 A 2d 469 183 Md 557, 155 A L R 627

Mass—Simpson v Metropolitan Transit Authority 83 N E 2d 876, 323 Mass 757—Brown v Metropolitan Transit Authority, 189 N E 2d 214 345 Mass 636

Mich Dordoc v McKernan, 293 N W 889, 294 Mich 411—Longfellow v City of Detroit, supra, n 14—Coburn v Goldberg, 40 N W 2d 150, 326 Mich 280—McKinney v Larges, 116 N W 2d 761, 367 Mich 387

Minn—Gilkon v Osborne, supra, n 49—Orchard v Northwest Airlines, 51 N W 2d 645, 236 Minn 42—Patton v Fifty-fourth St Ry Co, 77 N W 2d 433, 247 Minn 368, 58 A L R 2d 921—Lott v Davidson, 109 N W 2d 336, 261 Minn 130—Staloch v Belsaas, 136 N W 2d 92 271 Minn 315

Mo—Pierce v St Louis Public Service Co App 380 S W 2d 943—Rawley v Eilermann Transfer Co App 390 S W 2d 937

N H—Bernardi Greater Shows v Boston & Maine R R 1 A 2d 360 89 N H 490 cert den 59 S Ct 787 306 U S 662, 83 L Ed 1059—O Brien v Public Service Co 58 A 2d 507 95 N H 79

N J—Hewitt v Atlantic City & S R Co., 21 A 2d 598 19 N J Misc 536—Vadurro v Yellow Cab Co of Camden 77 A 2d 459 6 N J 102

N M—Thompson v Anderman, 285 P 2d 507 59 N M 400

N Y—Zuckerman v New York Rapid Transit Corporation, 7 N Y S 2d 130 255 App Div 796—Ligon v International Ry Co 55 N Y S 2d 444 269 App Div 809—Frazier v Westchester St Transp Co 70 N Y S 2d 157 272 App Div 819 app den 72 N Y S 2d 274 272 App Div 909 affd 75 N E 2d 632, 297 N Y 620

N C—Marsh v Byrd, supra, n 29—Lancaster v Atlantic Greyhound Corporation, 14 S E 2d 820, 219 N C 679—Smith v Goforth, 209 S E 2d 887, 24 N C App 104

Ohio—O'Reilly v Cleveland Ry Co supra, n 43—Welch v Rollman & Sons Co 44 N E 2d 726, 70 Ohio App 515

Okl—Sprout v Oklahoma Ry Co 247 P 2d 972, 207 Okl 118—Sand Springs Ry Co v Cole, 279 P 2d 938

Pa—Coyne v Pittsburgh Rys Co 141 A 2d 830, 393 Pa 326—Castelli v Pittsburgh Rys Co 195 A 2d 794 413 Pa 17

R I—Preston v United Electric Rys Co 1 A 2d 126 61 R I 378—Grimley v United Electric Rys Co 4 A 2d 373 62 R I 192

S C—Nelson v Atlantic Coast Line R Co supra, n 52

Tenn—Southern Coach Lines v Haddock, 194 S W 2d 347 29 Tenn App 132

Tex—Galveston Transit Co v Morgan Civ App, 408 S W 2d 728—O Day v Salowitz Bros Civ App 462 S W 2d 119 err ref no rev err

Va—Independent Cab Ass'n v La Touche, 89 S E 2d 320 197 Va 367—Sykes v Langley Cabs, Inc 176 S E 2d 417 211 Va 202

Wash—Dennis v Maher supra, n 31—Wiggins v North Coast Transp Co 98 P 2d 675, 2 Wash 2d 446—Becker v Tacoma Transit Co 314 P 2d 638, 50 Wash 2d 688

W Va—Laphew v Consolidated Bus Lines, 55 S E 2d 881 133 W Va 291—Wine v City Lines of West Virginia, 62 S E 2d 260, 134 W Va 889

Wis—Cushing v Meehan, 95 N W 2d 796, 7 Wis 2d 30

Excessive speed

(2) Other matters

Ky—Middleton v Partin, 347 S W 2d 75

Physical facts

(1) Missouri Pac R Co v House, 168 S W 2d 421, 205 Ark 211

Evidence insufficient to go to jury

Tex—Patrick v Reed, Civ App., 253 S W 2d 444

Violation of statute

Ga—Pope v Associated Cab Co 83 S E 2d 310, 90 Ga App 560

Evidence held sufficient to go to jury

Miss—Smith v Dillon Cab Co 146 So 2d 879, 245 Miss 198

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54 U S—Hinton v Chicago, R I & P R Co, D C Ill., 172 F Supp 747 revd on oth grds C A., 272 F 2d 449

Ala—Pollard v Williams, 191 So 225, 238 Ala 391

Cal—Greenleaf v Briggs, supra, n 49

Fla—Blakely v Pahler, App 253 So 2d 140

Ill—Dodds v Chicago Transit Authority 132 N E 2d 816, 9 Ill App 2d 388

Miss—Smith v Dillon Cab Co., 146 So 2d 879, 245 Miss 198

N C—Ross v Atlantic Greyhound Corporation, supra, n 43

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55 Ky—Roberts v Kaufman Straus Co 273 S W 2d 821

N Y—Kuhn v Niagara Frontier Transit System, Inc., 215 N Y S 2d 617 13 A D 2d 902

R I—Fiocoelli v Yellow Cab Co 3 A 2d 246, 62 R I 73

Tex—Kinney v Wiley, Civ App., 224 S W 2d 348

56 Ind—Tribune-Star Pub Co v Fortwendle, 115 N E 2d 215 124 Ind App 618 reh den 116 N E 2d 548, 124 Ind App 618

Ky—Griffith v Fannin, 206 S W 2d 965 306 Ky 279

Me—Buck v Maine Cent Transp Co 118 A 2d 330, 151 Me 280

N J—McKinney v Public Service Interstate Transp Co 72 A 2d 326, 4 N J 229

Ohio—Ramey v Cincinnati St Ry Co 113 N E 2d 665 93 Ohio App 376

Or—Austin v Portland Traction Co 182 P 2d 412, 181 Or 470

Pa—Kelly v Philadelphia Transp Co 23 A 2d 57, 146 Pa Super 445

R I—Ponton v United Electric Rys Co 200 A 425, 61 R I 203 117 A L R 518

57 Pa—Seburn v Luzerne & Carbon Co Motor Transit Co 49 Luz L Reg 117 affd 148 A 2d 534, 394 Pa 577

59 U S—Wooten v Pennsylvania R Co., C A Ind., 288 F 2d 220, cert den 82 S Ct 34 368 U S 819, 7 L Ed 2d 24

Ark—Missouri Pacific Transp Co v Simon, 135 S W 2d 336, 199 Ark 289—Adams v Summers, 263 S W 2d 711, 222 Ark 924

Ga—English v Yellow Cab Co 168 S E 2d 920, 119 Ga App 828

Me—Johnson v Dubois, 256 A 2d 733

Pa—Gilbert v Korvette, Inc 327 A 2d 94, 457 Pa 602

Vt—Ready v Peters, 117 A 2d 374 119 Vt 10

Third person as agent of carrier

Idaho—Clark v Tarr 283 P 2d 942, 76 Idaho 383

60 U S—Atlantic Greyhound Corporation v McDonald, supra, n 31

Fla—Ringler v McVeigh, App., 109 So 2d 606

Ga—Chapman v Turnbull Elevator Inc., 158 S E 2d 438 116 Ga App 661

N J—Rynar v Lincoln Transit Co supra, n 31

61 Wash Anderson v Harrison, 103 P 2d 320, 4 Wash 2d 265

Evidence held sufficient for jury

Md—Safeway Trails, Inc v Smith, 159 A 2d 823, 222 Md 206

Mo—Richardson v Wendel, 401 S W 2d 455

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67 U S—Reynolds v May Department Stores Co supra, n 53—May Department Stores Co v Reynolds, C C A Mo., 140 F 2d 799—Domany v Otis Elevator Co., C A Ohio, 369 F 2d 604, cert den 87 S Ct 2073, 387 U S 942, 18 L Ed 2d 1327

Ark—Little Rock Land Co v Raper 433 S W 2d 836, 245 Ark 641

Cal—Vandagriff v J C Penney Co., 39 Cal Rptr 671 228 C A 2d 579

Colo—Nettrour v J C Penney Co 360 P 2d 964, 146 Colo 150

D C—McKay v Parkwood Owners, 139 F 2d 385, 78 U S App D C 260—Greer v Otis Elevator Co D C App., 187 A 2d 896

Fla—Chimeno v Fontainebleau Hotel Corp., App., 251 So 2d 351

Ill—Tolman v Wieboldt Stores, Inc 233 N E 2d 33, 38 Ill 2d 519

Ky—Wise v Kentucky Home Mut Life Ins Co., 420 S W 2d 573

Mass—Charter v Supreme Council of Royal Arcanum, 247 N E 2d 597 356 Mass 715

Neb—Weston v Gold & Co 94 N W 2d 380, 167 Neb 692

NJ—Pisano v S Klein on the Square, 188 A 2d 622, 78 N J Super 375

NY—Leed v Robert Joshua, Limited, 72 N Y S 2d 3

Ohio—Kunzie v Leeds, Inc 34 N E 2d 448, 66 Ohio App 469

Or—White v Milner Hotels, Inc 518 P 2d 631 267 Or 628

Pa—Mihaylo v Grossinger 51 Lack Jur 17

Tex—Dulaney Inv Co v Wood, Civ App, 142 S W 2d 379, err dism judg correct—O Day v Sakowitz Bros Civ App 462 S W 2d 119 err ref no rev err

Proximate cause

(2) Other matters

Ga—Covington v Brewer, 115 S E 2d 368, 101 Ga App 724

68 US—May Department Stores Co v Reynolds, supra, n 67

Ariz—First Nat Bank of Ariz v Otis Elevator Co 406 P 2d 430, 2 Ariz App 80, reh den 411 P 2d 34, 2 Ariz App 596

Cal—Longway v McCall 5 Cal Rptr 818, 181 C A 2d 723

Ky—Kentucky Home Mut Life Ins Co v Wise, 364 S W 2d 338

Md—Burch v Woodward & Lothrop, Inc 308 A 2d 439, 18 Md App 645

Mass—Snow v Metropolitan Transit Authority 80 N E 2d 49 323 Mass 21

Mich—Bradley v Bardick Hotel Co 11 N W 2d 257 306 Mich 600

Mo—Clark v Linwood Hotel, Inc, 291 S W 2d 102, 365 Mo 982—Liebow v Jones Store Co 303 S W 2d 660

NC—Young v Anchor Co 79 S E 2d 785, 239 N C 288

Ohio—Kunzie v Leeds, Inc supra, n 67—Welch v Rollman & Sons Co, supra, n 53—Feinberg v Bereal Hotel Co App, 85 N E 2d 296, revd on oth grds, 89 N E 2d 569, 152 Ohio St 417

Pa—Connelly v Faulkner & Baer Co, 37 A 2d 125 349 Pa 261, 152 A L R 555—Todd v Lit Bros 112 A 2d 810, 381 Pa 109—Gilbert v Korvette, Inc 327 A 2d 94, 457 Pa 602

RI—Po v Leach, 13 A 2d 250 65 R I 1

Wis—Senft v Ed Schuster & Co 27 N W 2d 464 250 Wis 406, foll 27 N W 2d 467 250 Wis 412

Proximate cause

(3) Other matters

US—S v City Stores Co, C A Ala 412 F 2d 897

Cal—S v F W Woolworth Co, 329 P 2d 999 163 C A 2d 709

Overruling

Mo—Haley v May Dept Stores Co App 287 S W 2d 366

Competency, experience, and training held not questions for jury

Wash—Shelee v Hill, 287 P 2d 479 47 Wash 2d 362

Contributory negligence

Cal—Fo v Depart of Water and Power City of Los Angeles, 26 Cal Rptr 162, 209 C A 2d 526

69 Ky—Arb ke v Stewart Dry Goods Co 291 S W 2d 525

Mass—Grace v Boston Elevated Ry 76 N E 2d 664 322 Mass 224

Tex—Ford v Leonard's, Civ App 228 S W 2d 192

Wis—Senft v Ed Schuster & Co supra, n 68

Evidence held insufficient for jury

(5) Other

Ariz—Nieman v Jacobs, 347 P 2d 702, 87 Ariz 44

Cal—Sample v S H Kress & Co 12 Cal Rptr 198, 190 C A 2d 503

Ill—Koenig v 399 Corp, 240 N E 2d 164, 97 Ill App 2d 345—Hanchett v Prudential Ins Co, 264 N E 2d 398, 130 Ill App 2d 184

Mass—Page v Thomas Long Co 173 N E 2d 926, 342 Mass 775

NJ—Dombrowska v Kresge-Newark, Inc 183 A 2d 111 75 N J Super 271

SC—King v J C Penney Co 120 S E 2d 229 238 S C 336

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70 Ga—Western & A R R v Fowler 47 S E 2d 874 77 Ga App 206

Idaho—Clark v Tarr supra, n 59

Ind—Chicago & Calumet Dist Transit Co v Radjenovich, 212 N E 2d 161 141 Ind App 18

Ky—H P Selman & Co v Goldstein, 278 S W 2d 713

Minn—Patton v Minneapolis St. Ry Co 77 N W 2d 433 247 Minn 368 58 A L R 2d 921

Mo—Payne v Stott, App, 181 S W 2d 161—Durmeier v St Louis County Bus Co 203 S W 2d 445—Jarboe v Kansas City Public Service Co 220 S W 2d 27 359 Mo 8—Hall v St Louis Public Service Co App 248 S W 2d 33

42 C J p 1276 note 8

Instructions held proper

(3) Other instructions

Ala—Holmes v Birmingham Transit Co 116 So 2d 912, 270 Ala 215

Instructions held erroneous

(1) Ark—Citizens Coach Co v Colher 348 S W 2d 873 233 Ark 912

71 Cal—Moeller v Market Street Ry Co, 81 P 2d 475 27 Cal App 2d 562

Ky—Lyons v Southeastern Greyhound Lines, 137 S W 2d 1107 282 Ky 106

NJ—Karmazin v Pennsylvania R Co 196 A 2d 803, 82 N J Super 123 reh den 198 A 2d 97 82 N J Super 435

NM—Thompson v Anderman, 285 P 2d 507 59 N M 400

Pa—Sheffield v Wyoming Valley Auto Bus Co Com Pl, 34 Luz L Reg Rep 312, affd 17 A 2d 384 340 Pa 377

Tenn—Henshaw v Continental Crescent Lines, Inc App 499 S W 2d 81

Wash—Wilcoxen v City of Seattle, 203 P 2d 658, 32 Wash 2d 734

W Va—Isabella v West Virginia Transp Co, 51 S E 2d 318, 132 W Va 85

Instructions held proper and sufficient

(1) US—Red Top Cab & Baggage Co v Mastlotti C A Fla 190 F 2d 668—Appenzellhuber v Illinois Cent R Co C A Mo 239 F 2d 306

Ark—Black & White Cab Co v Doville, 251 S W 2d 1005 221 Ark 66

Cal—Wilson v City and County of San Francisco, 344 P 2d 828, 174 C A 2d 273—Orr v Los Angeles Metropolitan Transit Authority 29 Cal Rptr 355, 213 C A 2d 699

D C—Howard v Capital Transit Co 163 F 2d 910, 82 U S App D C 351

Fla—Atlantic Greyhound Lines v Lovett, 184 So 133, 134 Fla 505

Ga—Radio Cabs v Tolbert, 71 S E 2d 260, 86 Ga App 181

Ill—Ptasinski v Chicago Transit Authority, 147 N E 2d 411 16 Ill App 2d 149—Heiser v Chastain, 285 N E 2d 601, 6 Ill App 3d 552

Ind—Indianapolis Rys v Boyer, App, 26 N E 2d 62, 108 Ind App 161

Mo—Farley v St Louis Public Service Co 352 S W 2d 393 transf to, Sup 362 S W 2d 549—Farley v St Louis Public Service Co App 389 S W 2d 378

N H—Murray v Boston & M R R, 224 A 2d 66, 107 N H 367

NJ—Bruce v Austin, 105 A 2d 680 31 N J Super 10

N C—Farmer v Landis, 127 S E 2d 553, 257 N C 768

Ohio—Hamilton v City of Cleveland 110 N E 2d 50 93 Ohio App 93—Gallaher v Campbell 125 N E 2d 758

Pa—Sevast v Lancaster Yellow Cab and Baggage Inc 58 Lanc Rev 411

S C—Llewellyn v Atlantic Greyhound Corporation, 28 S E 2d 673 204 S C 156

Wash—Kiesling v Northwest Greyhound Lines, 229 P 2d 335 38 Wash 2d 289—Shay v Parkhurst, 229 P 2d 510 38 Wash 2d 341

(4) New v Atlantic Greyhound Corp 43 S E 2d 872, 186 Va 726

(5) St Louis-Southwestern Ry Co v Holwerk, supra, n 19

Cal—Kerr v Key System Transit Lines, 302 P 2d 884 145 C A 2d 631—Seffert v Los Angeles Transit Lines, 15 Cal Rptr 161 364 P 2d 337 56 C 2d 498

Ill—Weaver v Sprague, 71 N E 2d 106, 330 Ill App 331—Klufetos v Fruel, 77 N E 2d 849 333 Ill App 649

Mo—Harris v St Louis Public Service Co 270 S W 2d 850

Wis—Affett v Milwaukee & Suburban Transport Corp 106 N W 2d 274 11 Wis 2d 604, 86 A L R 2d 227

(7) Cal—Tait v City and County of San Francisco, 300 P 2d 74 143 C A 2d 787

D C—A B & W Transit Co v Hall, Mun App 175 A 2d 606

Ga—Daughtry v Georgia Power Co 6 S E 2d 454, 61 Ga App 505

Ill—Russell v Illinois Central R Co 88 N E 2d 380, 338 Ill App 655

Iowa—Waterloo Sav Bank v Waterloo, Cedar Falls & Northern R R 60 N W 2d 572, 244 Iowa 1364

Ky—Fitzwater v Cincinnati, N & C R Co 234 S W 2d 186, 314 Ky 157

Mass—Carson v Boston El Ry 33 N E 2d 701 309 Mass 32—Aronson v Metropolitan Transit Authority, 163 N E 2d 643 340 Mass 272

Mich—Baker v Saginaw City Lines, Inc 113 N W 2d 912, 366 Mich 180

Mo—West v St Louis Public Service Co 357 S W 2d 69

Mont—Skelton v Great Northern Ry Co 100 P 2d 929 110 Mont 257

Vt—Ploesser v Burlington Rapid Transit Co 149 A 2d 728, 121 Vt 133

(8) US—Matanuska Val Lines, Inc v Neal, C A Alaska, 255 F 2d 632, 17 Alaska 425

Ark—Missouri Pac Transp Co v Miller, 299 S W 2d 41 227 Ark 351

Cal—Jacob v Key System Transit Lines, 295 P 2d 569 140 C A 2d 357—Pratt v Western Pac R Co 29 Cal Rptr 108, 213 C A 2d 573

Conn—Peck v Famon, 1 A 2d 143, 124 Conn 549—Cadwell v Watson, 60 A 2d 168, 134 Conn 640

Ga—Georgia Stages v Young, 35 S E 2d 552, 73 Ga App 2—Atlantic Coast Line R Co v Thomas, 64 S E 2d 301 83 Ga App 477

Ill—Roy v Chicago Motor Coach Co 102 N E 2d 752, 345 Ill App 296

Ind—Swallow Coach Lines v Cosgrove, 15 N E 2d 92, 214 Ind 532

Mich—Rogers v City of Detroit, 65 N W 2d 848 340 Mich 291

Mo—DeMariano v St. Louis Public Service Co 340 S W 2d 735

N J—Courtney v Garden State Lines, 199 A 38, 120 N J Law 294

Ohio—Robinson v City of Cleveland, Transit System, App 113 N E 2d 118

Pa—Nunemaker v New Alexandria Bus Co 88 A 2d 697 371 Pa 28

Wis—Jacobs v Milwaukee & Suburban Transport Corp 165 N W 2d 162, 41 Wis 2d 661

(9) Alabama Great Southern R Co v Alsup, C C A Miss 101 F 2d 175

Conn—Dokus v Palmer 33 A 2d 315 130 Conn 247

Fla—Thomason v Miami Transit Co 100 So 2d 620

Ill—Rotheli v Chicago Transit Authority 130 N E 2d 172

Kan—Elliott v Chicago, R I & P R Co 454 P 2d 124, 203 Kan 273

Mich—Max v City of Detroit 60 N W 2d 145 337 Mich 674

Mo—Oglesby v St Louis Public Service Co App 338 S W 2d 357

N H—Barton v Pelletier 95 A 2d 141 98 N H 90

Okl—Sand Springs Ry Co v Cole, 279 P 2d 938

Wash—Jackson v City of Seattle, 131 P 2d 172, 15 Wash 2d 505

(11) Ark—Capitol Transit Co v Burns, 276 S W 2d 56, 224 Ark 755

Ga—Beardsley v Suburban Coach Co 63 S E 2d 911 83 Ga App 381

(16) Ariz—First Nat Bank of Ariz v Otis Elevator Co 406 P 2d 430, 2 Ariz App 80, reh den 411 P 2d 34, 2 Ariz App 596

(17) May Department Stores Co v Reynolds, supra, n 67

Ohio—Gallaher v Campbell, App 125 N E 2d 758

(18) Ark—Yellow Cab Co v Dossett, 426 S W 2d 792, 244 Ark 554

Instructions held erroneous

(1) U S—Ingman v Pennsylvania Greyhound Lines, C C A Va, 160 F 2d 496

Cal—Forbes v Los Angeles Ry Corp, 160 P 2d 83 69 Cal App 2d 794—Ammenti v Los Angeles Metropolitan Transit Authority, 28 Cal Rptr 653, 213 C A 2d 333

Ga—Atlantic Coast Line R Co v Thomas, supra

Ind—Qualls v J C Penney Co, 245 N E 2d 860 144 Ind App 276

Ky—Transit Co v Leseuer, 200 S W 2d 942, 304 Ky 403

Md—Jacobs v Julian, 229 A 2d 108, 246 Md 549

Miss—Snowden v Skipper, 93 So 2d 834, 230 Miss 684

Mo—Lewis v Zagoto, supra, n 15—Venditti v St Louis Public Service Co, 226 S W 2d 599 360 Mo 42

Neb—Wright v Lincoln City Lines, Inc 81 N W 2d 170, 163 Neb 679

N.Y—Kuhn v Niagara Frontier Transit System, Inc 215 N Y S 2d 617 13 A D 2d 902—Telsner v New York City Transit Authority 221 N Y S 2d 782, 15 A D 2d 455

Ohio—Burchhill v Merchants Nat Bank & Trust Co App 183 N E 2d 457

Okl—Johnson v Santa Fe Trail Transp Co 244 P 2d 576, 206 Okl 455

Pa Bosson v Penn Central Transp Co 342 A 2d 393, 463 Pa 37

Tex—Dallas Ry & Terminal Co v Black, 257 S W 2d 416, 152 Tex 343

W.Va—Isgan v Jenkins, 59 S E 2d 689 134 W Va 400

(2) Cal—Middleton v California St Cable Ry Co, supra

Ind—Gary Rys v Chumcoff, 96 N E 2d 685, 122 Ind App 139 transfer den 103 N E 2d 203, 230 Ind. 309

Ky—Southeastern Greyhound Lines v Chumley, 226 S W 2d 777, 312 Ky 154

Mo—Routt v Bi-State Transit Development Agency App, 423 S W 2d 202

Mont—Skelton v Great Northern Ry Co, supra

Wash—Nelson v City of Seattle 207 P 2d 674, 33 Wash 2d 772

(3) Mo Parker v St Louis Public Service Co App 230 S W 2d 173, affd 237 S W 2d 105 361 Mo 807

Ohio—Somerville v City of Cleveland, 164 N E 2d 801, 111 Ohio App. 101

Wis—Furrer v Milwaukee & Suburban Transport Corp., 162 N.W 2d 537 40 Wis 2d 560

(7) Mo—Clark v St Louis Public Service Co App, 251 S.W 2d 344

Relation of passenger and carrier

(5) Other matters

Ill—Rotheli v. Chicago Transit Authority 125 N E 2d 283, 5 Ill App 2d 190, affd 130 N E 2d 172, 7 Ill 2d 172.

Va—Tri-State Coach Corp v Stidham 62 S E 2d 894 191 Va 790

Instructions in actions against several defendants

(6) Other instructions

Ga—Atlantic Coast Line R Co v Thomas, supra

Mo—Mollman v St Louis Public Service Co App 192 S W 2d 618

Exemplary damages

(3) Other instructions

Okl—Southwestern Greyhound Lines, Inc v Rogers, 267 P 2d 572

S C—Robinson v Duke Power Co 48 S E 2d 808, 213 S C 185

Construction of particular instructions

Mo—Loftus v Metropolitan St R Co, 119 S W 942, 220 Mo 470, 479

10 C J p 1081 note 67[h]

Specific negligent act

Mo—Schwinegruber v St Louis Public Service Co App 241 S W 2d 782

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72 Ind—Swallow Coach Lines v Cosgrove, supra, n 71

Wash—Heggen v City of Seattle, 288 P 2d 830, 47 Wash 2d 576

73 N H—Murray v Boston & M R R 224 A 2d 66, 107 N H 367

Instructions held not erroneous

(6) Other instructions

U S—Missouri Pac Transp Co v O'Neal, C C A Ark 105 F 2d 625

Cal—Mudrick v Market Street Ry Co 81 P 2d 950, 11 Cal 2d 724 118 A L R 533

Mo—Johnson v Kansas City Public Service Co 265 S W 2d 417

Okl—Transport Ins Co v McAlister 355 P 2d 576

75 Cal—Dodge v San Diego Elec Ry Co 208 P 2d 37 92 Cal App 2d 759

Conn—Riley v Connecticut Co 29 A 2d 759, 129 Conn 554

Ill—Hannaur v Chicago Transit Authority, 167 N E 2d 427, 25 Ill App 2d 454

Ky—Southeastern Greyhound Lines v Chumley 226 S W 2d 777 312 Ky 154

Tex—San Antonio Public Service Co v Turbin, supra, n 71

Instructions held proper and sufficient

(1) Atlantic Greyhound Corporation v Lyon, C C A Va 107 F 2d 157, cert den 60 S Ct 592, 309 U S 667 84 L Ed 1014—Red Top Cab & Baggage Co v Masslotti, C A Fla 190 F 2d 668—Stiles v Gove, C A Mont 345 F 2d 991

Ala—Southeastern Greyhound Lines v Callahan, 13 So 2d 660, 244 Ala 449—Mobile Cab & Baggage Co v Busby 169 So 2d 314, 277 Ala 292

Ark—Black & White Cab Co v Doville, 251 S W 2d 1005 221 Ark 66

Cal—Abney v City and County of San Francisco, 252 P 2d 654, 115 C A 2d 506

D C—Richmond, F & P R Co v Rule, C A, 248 F 2d 756, 101 U S App D C 343

Ga—Beardsley v Suburban Coach Co supra, n 71—Andrews Taxi & U-Drive It Co v McEver 114 S E 2d 145, 101 Ga App 383—Columbus Transp Co v Curry 122 S E 2d 584 104 Ga App 700

Idaho—Clark v Tarr 283 P 2d 942, 76 Idaho 383

Ill—Brackensick v Chicago Motor Coach Co, 123 N E 2d 350, 4 Ill App 2d 84—Dodds v Chicago Transit Authority, 132 N E 2d 816, 9 Ill App 2d 388

Iowa—Barnard v Cedar Rapids City Cab Co, 133 N W 2d 884, 257 Iowa 734

Ky—V T C Lines v Taylor 134 S W 2d 991 281 Ky 83—Cincinnati Newport & Covington Transp Co v Fischer 357 S W 2d 870—Wise v Kentucky Home Mut Life Ins Co, 420 S W 2d 573

La—Franklin v New Orleans Public Service, App, 187 So 126

Minn—Flaherty v Minneapolis & St L Ry Co, 8 N W 2d 633 251 Minn 345—Fenton v Minneapolis St Ry Co 89 N W 2d 404, 252 Minn 7

Mo—Nix v Gulf M & O R Co 240 S W 2d 709 Mo 187—Gutierrez v St Joseph Light & Power Co App 294 S W 2d 360—Ficken v Hopkins 389 S W 2d 193—Hopkins v St Louis Public Service Co App 382 S W 2d 442

N J—Gagho v Yellow Cab Co 164 A 2d 353

N Y—Barbato v Vollmer 76 N Y S 2d 528, 273 App Div 169

N C—Horton v Carolina Coach Co 5 S E 2d 828, 216 N C 567

Ohio—Centofanti v Youngstown Municipal Ry Co 105 N E 2d 633 157 Ohio St 396—Nicholas v Yellow Cab Co App, 180 N E 2d 279

Pa—Kenny v Lieberman, 47 Luz L Reg 219 affd 142 A 2d 784 187 Pa Super 6

S C—Robinson v Duke Power Co supra, n 71

Tenn—Brown v Allright Auto Parks, Inc, App 456 S W 2d 660, 61 Tenn App 543

Tex—Dallas Ry & Terminal Co v Black, 257 S W 2d 416 152 Tex 343—Hill v Texas, New Mexico & Oklahoma Coaches, Inc, 272 S W 2d 91, 153 Tex 581

Va—Terminal Cars, Inc v Wagner, 135 S E 2d 807, 205 Va 214

Wash—Anderson v Harrison 103 P 2d 320, 4 Wash 2d 265

Wis—Spicas v Milwaukee & Suburban Transport Corp, 124 N W 2d 593, 21 Wis 2d 635—Flessman v Holz, 127 N W 2d 9 23 Wis 2d 415

(2) Fla—Sumpter v Tamiami Trail Tours, Inc App, 123 So 2d 732, 93 A L R 2d 232

Ga—Daughtry v Georgia Power Co 6 S E 2d 454 68 Ga App 505

Mo—Harding v Kansas City Public Service Co, App, 188 S W 2d 60

N H—Murray v Boston & M R R, 224 A 2d 66, 107 N H 367

(3) Pager v Pennsylvania R Co, C C A N Y, 165 F 2d 56—Frederick v Yellow Cab Co of Philadelphia, C A Pa, 200 F 2d 483

N H—Murray v Boston & M R R 224 A 2d 66, 107 N H 367

(9) Neering v Illinois Cent R Co 53 N E 2d 271, 321 Ill App 625

(11) Cal—Ford v Carew & English, 200 P 2d 828, 89 Cal App 2d 199—Abney v City and County of San Francisco, supra

D C—Bell Cab Co v Coppridge, 158 F 2d 540, 81 U S App D C 337

Ga—Southeastern Greyhound Lines v Fisher, 34 S E 2d 906, 72 Ga App 717

Ind—Safety Cab, Inc v Ferguson, 205 N E 2d 827, 137 Ind App 644

Iowa—Morse v Century Cab Co 297 N W 877, 230 Iowa 443, 134 A L R 635

Ky—Greer v Superior field, 215 S W 2d 574, 308 Ky 674

Mich—Christoff v Noto, 42 N W 2d 732, 327 Mich 514

Minn—Fieve v Emmeck 78 N W 2d 343 248 Minn 122

Mo—Lewis v Zagata, supra, n 15—West v St Louis Public Service Co, 357 S W 2d 69

Ohio—Gallaher v Campbell, App, 125 N E 2d 758

Or—Frangos v Edmunds, 173 P 2d 596, 179 Or 577

(13) Other instructions

Cal—Abney v City and County of San Francisco, supra

Ill—Nowell v Chicago Transit Authority 120 N E 2d 243, 3 Ill App 2d 114

Mo—Hoffman v St Louis Public Service Co 255 S W 2d 736—Mayor v St Louis Public Service Co, 269 S W 2d 101

Wash—Shay v Parkhurst, 229 P 2d 510, 38 Wash 2d 341—Fleming v City of Seattle, 275 P 2d 904, 45 Wash 2d 477

Instructions held erroneous

(1) Ala—Montgomery City Lines v Jones, 20 So 2d 599, 246 Ala 291

Cal—Pezzoni v City and County of San Francisco 225 P 2d 14 101 Cal App 2d 123—Wilson v City and County of San Francisco, 344 P 2d 828, 174 C A 2d 273

Conn—Peck v Fanson, supra n 71

Ill—Live Stock Nat Bank of Chicago v Richardson 26 N E 2d 751 304 Ill App 591—Townsend v Chicago Transit Authority 116 N E 2d 170 1 Ill App 2d 77

Ky—Kentucky Home Mut Life Ins Co v Wise, 364 S W 2d 338

Minn—Urban v Minneapolis St Ry Co 96 N W 2d 698, 256 Minn 1

Mo—Rothweiler v St Louis Public Service Co 234 S W 2d 552, 361 Mo 259—Beahan v St Louis Public Service Co 237 S W 2d 105 361 Mo 807

N Y—Glick v New York Rapid Transit Corporation, 20 N Y S 2d 933, 259 App Div 1044—Scarzafava v Brooklyn & Queens Transit Corporation, 21 N Y S 2d 915

N C—Perry v Sykes, 200 S E 923, 215 N C 39

Or—Simpson v Gray Line Co 358 P 2d 516, 226 Or 71

R I—Burke v United Elec Rys Co, 83 A 2d 88, 79 R I 50

Tex—Texas, N M & Okl Coaches, Inc v Hill Civ App 266 S W 2d 412, revd on oth grds 272 S W 2d 91, 153 Tex 581

Wash—Gray v City of Seattle, 187 P 2d 310

(2) McSween v Murray 24 N Y S 2d 756, 261 App Div 198

Wash—Nopson v City of Seattle, 207 P 2d 674 33 Wash 2d 772

(3) Darda v Chicago Transit Authority 241 N E 2d 478, 100 Ill App 2d 94

Ky—Southeastern Greyhound Lines v Davis, 160 S W 2d 625, 290 Ky 362—Allen v Miles, 265 S W 2d 445, 42 A L R 2d 1186

N Y—Thomas v Central Greyhound Lines, Inc 180 N Y S 2d 461, 6 A D 2d 649

Pa—Nebel v Burrell, 41 A 2d 873, 352 Pa 70

(4) Nance v Fresno City Lines, 113 P 2d 244 44 Cal App 2d 868

Minn—Flaherty v Minneapolis & St L Ry Co 87 N W 2d 633 251 Minn 345

Ohio—McCarthy v Cincinnati St Ry Co 94 N E 2d 627 88 Ohio App 454

Okl—Johnson v Santa Fe Trail Transp Co, 244 P 2d 576, 206 Okl 455

Wash—Heggem v City of Seattle, 288 P 2d 830, 47 Wash 2d 576

(5) Hudak v Penn-Ohio Coach Lines Co 57 N E 2d 93 73 Ohio App 409

(8) Mo—Lockhart v St Louis Public Service Co 318 S W 2d 177

(9) Pickett v Rochester Transit Corp 86 N Y S 2d 177, 274 App Div 1088

(12) Cal—Burgess v Yellow Cab Co 320 P 2d 500, 49 C 2d 652, 65 A L R 2d 1

Mo—McCarthy v Seiben, 331 S W 2d 601

(14) Edme v New York Rapid Transit Corporation, 22 N Y S 2d 916, 260 App Div 872

Instructions held erroneous

(1) Pa—Evans v Philadelphia Transp Co 212 A 2d 440, 418 Pa 567

Failure to instruct held erroneous

D C—Mt Vernon Mfg Co v Virginia Stage Lines, 191 F 2d 770, 89 U S App D C 213

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76 Ill—Kovacs v Richardson, 28 N E 2d 291 306 Ill App 194—Holland v Chicago Transit Authority 84 N E 2d 861 337 Ill App 100

Instructions held not misleading

(1) U S—Fisher v Mt Mansfield Co C A Vt, 283 F 2d 533

Ga—Brand Ky v Suburban Coach Co supra, n 71

Mo—Young v St Louis Public Service Co 326 S W 2d 107—Ward v City Nat Bank & Trust Co of Kansas City 379 S W 2d 614

(5) Ark—Oxford v Villines, 334 S W 2d 660, 232 Ark 103

Instructions held misleading

(1) Ala—Mobile City Lines v Huffman 60 So 2d 333 257 Ala 603

Colo—Schoen v Boulder Stage Lines, Inc 412 P 2d 905 159 Colo 531

Ill—Kievel v Chicago Transit Authority 126 N E 2d 170, 6 Ill App 2d 13

Miss—Snowden v Skipper 93 So 2d 834 230 Miss 684

Mo—Schwamegruber v St Louis Public Service Co App 241 S W 2d 782—Grace v St Louis Public Service Co 249 S W 2d 409

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77 Cal—Kerr v Key System Transit Lines, 302 P 2d 884 145 C A 2d 631

Ill—Kovacs v Richardson, supra, n 76

Mo—Lindquist v Kansas City Public Service Co 169 S W 2d 366, 350 Mo 905

78 Mo—Fuller v St Louis Public Service Co App 245 S W 2d 675

79 U S—Basham v City Bus Co C A Okl 219 F 2d 547 52 A L R 2d 582

Cal—Dodge v San Diego Elec Ry Co 208 P 2d 37 92 Cal App 2d 759

Wash—Nopson v City of Seattle, Wash 207 P 2d 674 33 Wash 2d 772

85 U S—Booth v Pioneer Yellow Cab Co D C Pa 46 F Supp 155

Ill—Young v Illinois Cent R Co 49 N E 2d 268, 319 Ill App 311

Tex—San Antonio Public Service Co v Turbin, supra, n 71

Requested instructions erroneously refused

(14) Other instructions

Cal—Forbes v Los Angeles Ry Corp supra, n 71—Dempsey v Market St Ry Co, 179 P 2d 34 79 Cal App 2d 216

Ill—Elmore v Cummings, supra, n 75

Mo—Douglas v St Louis Public Service Co 231 S W 2d 157, 360 Mo 869

N Y—Dougherty v J & H Taxi Corp 76 N Y S 2d 553 273 App Div 865—Rivenburg v Spanish Am Skin Co 180 N Y S 2d 829 7 A D 2d 803

Ohio—Reiser v Cincinnati St Ry Co 109 N E 2d 284 92 Ohio App 24

Pa—Purcell v Ashland-Shamokin Auto Bus Co 26 Northumb L J 219

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86 Or—Gedney v Clark, 268 P 2d 357 201 Or 67

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90 Ark—Citizens Coach Co v Collier 348 S W 2d 873, 233 Ark 912

Ky—Louisville Taxicab & Transfer Co v Langley, 265 S W 2d 931

Tex—Texas, N M & Okl Coaches v Williams Civ App, 191 S W 2d 66, err ref w m

91 Cal—Dodge v San Diego Elec Ry Co supra, n 79

Mass—Harrison v Boston Elevated Ry Co 55 N E 2d 707 316 Mass 463

Mo—West v St Louis Public Service Co 357 S W 2d 69

Wash—Greene v Rothschild 374 P 2d 566, 60 Wash 2d 508

Instructions held properly refused

(1) Fisher v Whitaker Ky 260 S W 2d 651

N H—Murray v Boston & M R R 224 A 2d 66, 107 N H 367

N M—Hole v Womack, 407 P 2d 362, 75 N M 522

(2) U S—Greyhound Corp v Jones, C A Colo 327 F 2d 904

Mich—Max v City of Detroit 60 N W 2d 145 337 Mich 674

Okl—Sand Springs Ry Co v Cole, 279 P 2d 938

(3) Ark—Yellow Cab Co v Dossett, 426 S W 2d 792, 244 Ark 554

(4) Blackwell v Fernandez, 59 N E 2d 342, 324 Ill App 597

(5) U S—McDermott v Crowe Zellerbach Corp C A La 418 F 2d 598

Ga—Black & White Cab Co v Clark, 19 S E 2d 570, 67 Ga App 170

Ind—Chicago & Calumet Dist Transit Co v Radjenovich 212 N E 2d 161 141 Ind App 18

Miss—Snowden v Skipper 93 So 2d 834 230 Miss 684

Mo—Harding v Triplett, App 235 S W 2d 112—McFarland v St Louis Cab Co App 282 S W 2d 861

N Y—Barbato v Vollmer supra, n 75

Ohio—Robinson v City of Cleveland, Transit System, App 113 N E 2d 118

Wash—Anderson v Harrison, supra, n 75

Wis—Levner v Northland-Greyhound Lines of Illinois, 286 N W 68, 231 Wis 554

(6) Ill—Cobb v Marshall Field & Co 159 N E 2d 520 22 Ill App 2d 143

(11) Other instructions

U S—Engel v F W Woolworth Co C A N Y 213 F 2d 482—Pilch v Pennsylvania R Co C A N Y 245 F 2d 76

Ala—Pollard v Williams, 191 So 225 238 Ala 391—Linville v Crittenden, 133 So 2d 381 272 Ala 630

Cal—Wilson v City and County of San Francisco, 344 P 2d 828, 174 C A 2d 273

Ga—Bibb Transit Co v Scott, 114 S E 2d 43, 101 Ga App 352

Ill—Neering v Illinois Cent R Co supra, n 75

Mo—Statler v St Louis Public Service Co App 300 S W 2d 831

Ohio—Bolser v Smalley 101 N E 2d 147 89 Ohio App 161

92 D C—Grober v Capital Transit Co D C 119 F Supp 100

93 Ala—Birmingham Electric Co v Davis, 13 So 2d 888, 244 Ala 338

Cal—Formosa v Yellow Cab Co, supra, n 71

Ill—Harris v Illinois Power Co 60 N E 2d 581 325 Ill App 624

Ind—Chicago & Calumet Dist Transit Co v Stravatzakes, 156 N E 2d 902, 129 Ind App 337

N H—Murray v Boston & M R R 224 A 2d 66, 107 N H 367

Pa—Krieger v Pennsylvania R Co 136 A 2d 79, 390 Pa 496

Tenn—Stacks v Veteran's Cab Co 366 S W 2d 539 51 Tenn App 272

Va—Yellow Cab Co v Eden, 16 S E 2d 625 178 Va 325

W Va—Abdulla v Pittsburgh & Weirton Bus Co 213 S E 2d 810, 158 W Va 592, 89 A L R 3d 994

Mo—Payne v Stott, supra, n 70

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94 Ill—Ostby v Chicago Transit Authority 85 N E 2d 339 337 Ill App 216

Mo—Gignoux v St Louis Public Service Co App 180 S W 2d 784

7 U S—Remer v Flying Eagle Whiteway Lines, C A Conn 172 F 2d 831

Ala—Grissom v Dahart Ice Cream Co 40 So 2d 333 34 Ala App 282 cert den 40 So 2d 339 252 Ala 235

Ill—Ivy v Chicago Transit Authority 161 N E 2d 881 23 Ill App 2d 251

Miss—Lambert v Lott, 222 So 2d 816

Mo—Durmeier v St Louis County Bus Co 203 S W 2d 445—Jarboe v Kansas City Public Service Co 220 S W 2d 27 359 Mo 8—Girratono v Kansas City Public Service Co App 243 S W 2d 539 affd 251 S W 2d 59 363 Mo 359

Ohio—Centofanti v Youngstown Municipal Ry Co 105 N E 2d 633, 157 Ohio 396

Instructions held proper under pleadings and evidence

(1) Missouri Pac Transp Co v O'Neal, C C A Ark 105 F 2d 625—Greyhound Corp v Blakley C A Wash 262 F 2d 401.

Ala—South[illegible]tern Greyhound Lines v Callahan 13 So 2d 660, 244 Ala 449

Ark—Missouri Pac Transp Co v Shepherd, 157 S W 2d 501, 203 Ark 412

Cal Burnette v Los Angeles Transit Lines, 179 P 2d 80, 78 Cal App 2d 860 Pierson v Holly Sugar Corp., 237 P 2d 28, 107 C A 2d 298—Brandelius v City and County of San Francisco, 306 P 2d 432 47 C 2d 729

Ga—Radio Cabs v Tolbert, 71 S E 2d 260, 86 Ga App 181

Ill—Neering v Illinois Cent R Co., 53 N E 2d 271 321 Ill App 625—McNealy v Illinois Cent R Co 193 N E 2d 879, 43 Ill App 2d 460

Ind—Indianapolis Rys v Boyer App 26 N E 2d 62, 108 Ind App 161

Ky—Ken-Ten Coach Lines v Siler 197 S W 2d 406, 303 Ky 263

Mass—Harrison v Boston Elevated Ry Co 55 N E 2d 707 316 Mass 463

Mich—Csuresu v Muir, 6 N W 2d 531 303 Mich 323

Mo—Valley v Kansas City Public Service Co., App 259 S W 2d 387—Dennis v Sears, Roebuck & Co App., 461 S W 2d 325

Neb Pruett v Lincoln City Lines, 22 N W 2d 651 147 Neb 204

N H—Allen v State, 260 A 2d 454 110 N H 42

Ohio—Gallither v Campbell, App 125 N E 2d 758

Okl—Tulsa City Lines v Jo[illegible]ton., 226 P 2d 937 204 Okl 38

S C—Thomas v Atlantic Greyhound Corporation, 29 S E 2d 196, 204 S C 247—Robinson v Duke Power Co., 48 S E 2d 808, 213 S C 185

Va—Virginia Electric & Power Co v Clark, 19 S E 2d 693, 179 Va 596

64 C J p. 751 note 91

Wis—Crowder v Mil[illegible]kee & Suburban Transport Corp., 159 N W 2d 723 39 Wis 2d 499

(2) Carpenter v United Elec Rys Co., R I 100 A 2d 850, 81 R I 196

(3) Atlantic Greyhound Lines v Lovett, 184 So 133 134 Fla 505

(5) D[illegible]gley v. Georgia Power Co., 6 S E 2d 454 61 Ga App 505

Ind—N[illegible]l City Lines, Inc v. Hurst, 250 N E 2d 507, 145 Ind App 278

Wash [illegible]e v Tacoma Transit Co., 314 P 2d 638, 50 Wash 2d 688

(6) Ga—Alabama Great Southern R Co v McBryar, 15 S E 2d 563, 65 Ga App 153

Ky—I[illegible]ville Ry Co. v Lowe, 133 S W 2d 742, 280 Ky 465

Mo—Jones v Kurn, 157 S W 2d 797, 236 Mo App 794

N M—T[illegible]pson v [illegible] 285 P 2d 507, 59 N M 400

N C Hanes v Atlantic Greyhound Corp., 90 S E 2d 710, 243 N C 346, 58 A L R 2d 939

Okl—G A. Nichols Co v Lockhart, 129 P 2d 599, 191 Okl 296

(9) Western & A R R v Fowler, 47 S E 2d 874 77 Ga App 206

(10) Ark [illegible]ern Pac Transp. Co v Miller, 299 S W 2d 41, 227 Ark 351

Conn—Peck v Fanton, 1 A 2d 143, 124 Conn 549

Ill. [illegible]ber v Blue Cab Co., 54 N E 2d 257, 322 Ill App 277

Ind—Swallow Coach Lines v Cosgrove, 15 N E 2d 92, 214 Ind 532

Io[illegible] v Century Cab Co., 297 N W 877, 230 Iowa 443, 134 A L R 635

Md [illegible]n Transit Co v Sun Cab Co., 124 A 2d 567, 210 Md. 555

(11) D[illegible]gley v. Georgia Power Co., supra

Ill—Rotheli v Chicago Transit Authority, 125 N E 2d 283, 5 Ill App 2d 190, affd 130 N E 2d 172, 7 Ill 2d 172.

Mo—Mullen v St Louis Public Service Co., App., 380 S W 2d 950, transf to Sup 389 S W 2d 838

Okl—Transport Ins Co v McAlister, 355 P 2d 576

(12) Wash—Blood v Allied Stores Corp 381 P 2d 742, 62 Wash 2d 187

(18) Other instructions

Ark—Crown Coach Co v Whitaker 186 S W 2d 940, 208 Ark 535

Okl—Oklahoma Ry Co v Roebuck, 240 P 2d 775, 205 Okl 549

Wash—Greene v Rothschild 374 P 2d 566, 60 Wash 2d 508

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8 Mo—Shelley v St Louis Public Service Co App 279 S W 2d 182

Ohio—Centofanti v Youngstown Municipal Ry Co., 105 N E 2d 633 157 Ohio 396

Instructions held erroneous under the pleadings and evidence

(1) Cal—Trotman v Los Angeles Transit Lines, 185 P 2d 616, 82 Cal App 2d 183—Guerra v Handley Hotels, Inc 1 Cal Rptr 330 347 P 2d 674, 53 C 2d 266

Conn—Huntadi v Stratfield Hotel, 119 A 2d 321, 143 Conn 77

D C—Washington v Washington, Virginia & Maryland Coach Co., D C 250 F Supp 888

Ill—Sims v Chicago Transit Authority, 129 N E 2d 23, 7 Ill App 2d 21

Minn—Derrick v St Paul City Ry Co., 89 N W 2d 629 252 Minn 102

Mo—Mullen v St Louis Public Service Co 389 S W 2d 838—Snyder v Hedges, App., 381 S W 2d 376

Neb—Sanders v Chicago B & Q R Co 292 N W 35 138 Neb 67

N Y—Shafter v New York City Transit Authority, 171 N Y S 2d 598, 5 A D 2d 320, app and rearg den 173 N Y S 2d 991, 5 A D 2d 989

Wash—Nopson v City of Seattle, 207 P 2d 674, 33 Wash 2d 772

Wis—Crowder v Milwaukee & Suburban Transport Corp., 159 N W 2d 723, 39 Wis 2d 499

(3) Mo—Lanham v St Louis Public Service Co App 360 S W 2d 243

(4) Cal—Wilson v Los Angeles Trona Stages, 284 P 2d 951, 133 C A 2d 756

Or—Swam v Oregon Motor Stages, 82 P 2d 1084, 160 Or 1 118 A L R 1225—Frangos v Edmunds, 173 P 2d 596, 179 Or 577

10 Mo—Shelley v St Louis Public Service Co App 279 S W 2d 182

Wash—Anderson v Harrison, 103 P 2d 320, 4 Wash 2d 265

11 U S—Burlington Transp Co v Stoltz, C A Colo., 191 F 2d 915

Ga—Bibb Transit Co v Scott, 114 S E 2d 43, 101 Ga App 352

Ky—Cincinnati, Newport & Covington Transp Co v Fischer, 357 S W 2d 870

Okl—Johnson v Santa Fe Trail Transp Co., 244 P 2d 576, 206 Okl 455

Wash—Anderson v Harrison, supra, n 10

Instructions held erroneous as not supported by the evidence

Wash—Fleming v City of Seattle, 275 P 2d 904 45 Wash 2d 477

(6) Other instructions

Ala—Mobile City Lines v Huffman, 60 So 2d 333 257 Ala 603

Minn—Sutton v St Paul City Ry Co 90 N W 2d 722, 252 Minn 481

Instructions held not improper

(3) Other instructions

Cal—Hardin v San Jose City Lines, 260 P 2d 63 41 C 2d 432

Mo—Diener v Mid-American Coaches, Inc 378 S.W 2d 509

Va—Terminal Cars, Inc v Wagner, 135 S E.2d 802, 205 Va 214

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12 Va—Longs Baggage Transfer Co v Moore, 9 S E 2d 221, 198 Va 608

13 Ala—Henderson v Southern Ry Co., 191 So 234

Ill—Kovacs v Richardson, 28 N E 2d 291, 306 Ill App 194

Mont—Hickman v First Nat Bank of Great Falls, 17 P 2d 275 112 Mont 398

16 Ill—Ward v Peoria Transit Lines, 118 N E 2d 611, 2 Ill App 2d 170

17 Ga—Scott v Torrance, 25 S E 2d 120, 69 Ga App 309—Western & A R R v Fowler, supra, n 7

Iowa—Doser v Interstate Power Co 173 N W 2d 5[illegible]

Mo—Hoeller v St Louis Public Service Co supra, n 7—Padgett v St Louis Public Service Co., App 240 S W 2d 970

N Y—Bloom v New York City Transit Authority, 3[illegible] N Y S 2d 588, 42 A D 2d 696

Tex—Carpenter v Trinity & B V R Co Civ App., 1[illegible] S W 363, 368, revd on oth grds 184 S W 186—Airline Motor Coaches v Curry Civ App., 1[illegible] S W 2d 98, err ref w m

Wash—Wilcoxen v City of Seattle, 203 P 2d 658, 3 Wash 2d 734

Instructions held proper

(3) Other instructions

Ala—Henderson v Southern Ry Co, supra, n 1

Cal—Dieterle v Yellow Cab Co 128 P 2d 132, 5 Cal App 2d 691—Connor v Pacific Greyhound Lines, 232 P 2d 500, 104 Cal App 2d 746—Abbo v City and County of San Francisco, 252 P 2d 6[illegible] 115 C A 2d 506

D C—D C Transit System, Inc v Singleton, C A., 2[illegible] F 2d 465, 105 U S App D C 264, 72 A L R 2[illegible] 1290, cert den 80 S Ct 62, 361 U S 819, 4 L Ed 2d 64

Ga—Smith v Atlanta Transit System, Inc 127 S E 2[illegible] 857, 106 Ga App 666 Phillips v Howard, 1[illegible] S E 2d 473 109 Ga App 404

Ill—Stollery v Sprague, 22 N E 2d 276, 301 Ill App 209—Cobb v Marshall Field & Co., 159 N E 2[illegible] 520, 22 Ill App 2d 143

Mo—Diener v Mid-American Coaches Inc., 3[illegible] S W 2d 509—Fairley v St Louis Public Service Co., App 389 S W 2d 378

Ohio—Grzywna v Youngstown Municipal Ry Co supra, n 7—Gallither v Campbell, App., 1[illegible] N E 2d 758

Okl—Sand Springs Ry Co v Cole, 279 P 2d 9[illegible]

Tex—Airline Motor Coaches v Owens, Civ App., 1[illegible] S W 2d 802, err ref no rev err

Va—Terminal Cars, Inc v Wagner, 135 S E 2d 8[illegible] 205 Va 214

Wash—Anderson v Harrison, supra, n 10—Page v Spokane City Lines, Inc 317 P 2d 1076, 5 Wash 2d 308

In actions against carrier and others

(6) Other cases

U S—Red Top Cab & Baggage Co v Macliotto C A Fla., 190 F 2d 668

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18. Definition held proper or not objectionable

(2) Other definitions

Ill—Allen v Pire, 242 N E 2d 450, 102 Ill App 2d 42[illegible]

Definition of "proximate cause" held erroneous etc.

(2) Other cases

Ark—Colber v Citizens Coach Co., 330 S W 2d 7[illegible] 231 Ark 489

Tex—Black v Dallas Ry & Terminal Co., Civ App 254 S W 2d 147, affd 257 S W 2d 416, 152 Tex 343

19 Cal—Wilson v City and County of San Francisco, 344 P 2d 828 174 C A 2d 273

Mo—Atchison v Braniff Intern Airways, 327 S W 2[illegible] 112

28 Ga—Bibb Transit Co v Scarborough, 83 S E 2d 221, 90 Ga App 427

Mo—Thomas v Kansas City Public Service Co App 289 S W 2d 141

N C—Young v Anchor Co, 79 S E 2d 785 239 N C 288

24 Cal—Mudrick v Market Street Ry Co 81 P 2d 950, 11 Cal 2d 724, 118 A L R 533—Moeller v Market Street Ry Co 81 P 2d 475 27 Cal App 2d 562

Ind—Gary Rys v Williams, 89 N E 2d 560, 120 Ind App 21

Mo—Duncker v St Louis Public Service Co App 241 S W 2d 64—Wise v St Louis Public Service Co 357 S W 2d 902

Ohio—Anderson v City Cab Co App 38 N E 2d 214—Fink v New York Cent R Co 56 N E 2d 931

Instructions held proper

(1) Cal—Brandelius v City and County of San Francisco, 306 P 2d 432, 47 C 2d 729—Kabrenell v Stevens, 336 P 2d 250, 168 C A 2d 370

Ga—Brown v Kirland, 134 S E 2d 472, 108 Ga App 651

Ill—Stollery v Sprague, supra, n 17

Mo—Long v St Louis Public Service Co App, 288 S W 2d 417—Hanff v St Louis Public Service Co 355 S W 2d 922

N J—Sibley v City Service Transit Co 66 A 2d 864, 2 N J 458

Ohio—C[illegible] v Youngstown Municipal Ry Co, 105 N E 2d 633, 157 Ohio St 396

Pa—Takac v Bamford, 88 A 2d 86, 370 Pa 389—Martin v Philadelphia Suburban Transp Co, 257 A 2d 535 435 Pa 391

Tenn—Nash-Wilson Funeral Home, Inc v Greer 417 S W 2d 562, 57 Tenn App 191

Wash—Anderson v Hammer, supra, n 10

W Va—Isabella v West Virginia Transp Co 51 S E 2d 318, 132 W Va 85

Instructions held erroneous as to presumptions and burden of proof

(1) Bratt v Western Air Lines, C A Utah, 169 F 2d 214

Ala—Hodge v Birmingham Electric Co, 184 So 40, 236 Ala 586

Cal—Pezzoni v City and County of San Francisco, 225 P 2d 14, 101 Cal App 2d 123—Schumacher v Key System Transit Lines, 335 P 2d 725, 168 C A 2d 302

Ill—Carson v Weston Hotel Corp, 115 N E 2d 800, 351 Ill App 523

Minn—[illegible] v St Paul City Ry Co, 89 N W 2d 629, 252 Minn 102

Mo—Hughes v East St Louis City Lines, App, 149 S W 2d 440—Hoeller v St. Louis Public Service Co, supra, n 7—Rothweiler v St Louis Public Service Co, 234 S W 2d 552, 361 Mo 259

N C—Perry v Sykes, 200 S E 923 215 N C 39

W Va—Isgan v Jenkins, 59 S E 2d 689 134 W Va 400

(2) Ill—Goertz v Chicago & N W Ry Co 153 N E 2d 486, 16 Ill App 2d 261

(4) Alabama Great Southern R Co v McPhail, supra, n 7

(5) Cal—Mudrick v Market St Ry Co, App 74 P 2d 328, subs op 81 P 2d 950, 11 Cal 2d 724 118 A L R 533

Instructions held misleading

Ga—Atlantic Coast Line R Co v Thomas, 64 S E 2d 301, 83 Ga App 477

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25 U S—Ingram v Pennsylvania Greyhound Lines, C C A Va 160 F 2d 496

Ala—Pollard v Coulter 191 So. 231, 238 Ala 421

Cal—Middleton v Oakland St Cable Ry Co, 167 P 2d 239 73 Cal App 2d 641—Fontaine v Key System Transit Lines, 331 P 2d 991, 165 C A 2d 391

Ill—Carson v Weston Hotel Corp 115 N E 2d 800, 351 Ill App. 523

Mo—Sharon v Kansas City Public Service Co App 208 S W 2d 471—White v St Louis Public Service Co App 249 S W 2d 498, affd 259 S W 2d 795 364 Mo 111

N Y—Della Croce v City of New York, 162 N Y S 2d 703, 3 A D 2d 920

Ohio—Feinberg v Bereal Hotel Co, App 85 N E 2d 296, revd on oth grds, 89 N E 2d 569 152 Ohio St 417

Pa—Archer v Pittsburgh Rys Co 37 A 2d 539, 349 Pa 547

Instructions held proper or erroneously refused

(4) Mo—White v St Louis Public Service Co, 259 S W 2d 795 364 Mo 111

(5) Other instructions—Remer v Flying Eagle Whiteway Lines, C A Conn, 172 F 2d 831—Greyhound Corp v Blakley C A Wash 262 F 2d 401—Wooten v Pennsylvania R Co C A Ind, 288 F 2d 220, cert den 82 S Ct 34 368 U S 819 7 L Ed 2d 24—Stiles v Gove, C A Mont, 345 F 2d 991

Ark—Johnson v Greenfield, 198 S W 2d 403 210 Ark. 985

Cal—Kerr v Key System Transit Lines, 302 P 2d 884, 145 C A 2d 631—Rollins v Department of Water and Power City of Los Angeles, 26 Cal Rptr 162, 209 C A 2d 526

Fla—Thomason v Miami Transit Co, 100 So 2d 620

Ky—Hall v Ratliff, 312 S W 2d 473

Mo—Statler v St Louis Public Service Co App 300 S W 2d 831—Hornberger v St Louis Public Service Co 353 S W 2d 635

N J—Sibley v City Service Transit Co 63 A 2d 708 1 N J Super 199 affd, 66 A 2d 864 2 N J 458—Pisano v S Klein on the Square, 188 A 2d 622, 78 N J Super 375

Ohio—Doering v City of Cleveland, App, 114 N E 2d 273

S C—Robinson v Duke Power Co supra, n 7

Wash—Shay v Parkhurst, 229 P 2d 510, 38 Wash 2d 341

Wis—Turk v H C Prange Co, 119 N W 2d 365, 18 Wis 2d 547

Instructions held erroneous

(3) Other instructions

U S—Lobel v American Airlines, C A N Y, 192 F 2d 217, cert den 72 S Ct 558, 342 U S 945, 96 L Ed 703

Cal—Dempsey v Market St Ry Co 179 P 2d 34 79 Cal App 2d 216—Shaw v Pacific Greyhound Lines, 323 P 2d 391, 50 C 2d 153

D C—D C Transit System, Inc v Shoaf, C A, 266 F 2d 465 105 U S App D C 264 72 A L R 2d 1290, cert den 80 S Ct 62, 361 U S 819 4 L Ed 2d 64

Mo—Duncker v St Louis Public Service Co, App 241 S W 2d 64—Fuller v St Louis Public Service Co, App, 245 S W 2d 675—Fairley v St Louis Public Service Co, 362 S W 2d 549

Mont—Whitney v Northwest Greyhound Lines, 242 P 2d 257, 125 Mont 528

Neb—Weston v Gold & Co, 94 N W 2d 380, 167 Neb 692

Ohio—Fink v New York Cent R Co, supra, n 24

Pa—Pedretti v Pittsburgh Railways Co, 209 A 2d 289 417 Pa 581

Wash—Keller v City of Seattle, 94 P 2d 184, 200 Wash 573

Wis—Zuno v Milwaukee Elec Ry & Transport Co, 74 N W 2d 791 272 Wis 21

"Presumption" or "inference"

(2) Other matters

Or—Stampfer v Gray Line Co, 358 P 2d 516, 226 Or 71

Reliance upon res ipsa loquitur not lost

Mo—Schumacher v St Louis Public Service Co App, 241 S W 2d 782

Evidence held not to make instruction unnecessary

D C—Wright v Washington Virginia & Maryland Coach Co D C 250 F Supp 888

Instruction on res ipsa loquitur not required under circumstances

Ky—Moore v Lexington Transit Corp 418 S W 2d 245

Md Hersperman v Baltimore & A R Co 292 A 2d 140, 15 Md App 657

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26 Mo—Hall v St Louis Public Service Co 266 S W 2d 597 transf App 259 S W 2d 88

Instructions on statutory presumption held improper or erroneous

Ga—Pope v Associated Cab Co 83 S E 2d 310, 90 Ga App 560

27 Cal—Armstrong v Pacific Greyhound, Lines, 168 P 2d 457 74 Cal App 2d 367

28 Cal—Moeller v Market Street Ry Co, supra, n 24

Ill—Piacente v Illinois Cent R Co 123 N E 2d 594 4 Ill App 2d 113

30 Cal—Deshotel v Atchison, T & S F Ry Co 272 P 2d 71 126 C A 2d 303

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34 Mo—Quadlander v Kansas City Public Service Co 224 S W 2d 396, 240 Mo App 1134

35 Wis—Fleischauer v Holz, 127 N W 2d 9 23 Wis 2d 415

36 Cal—Dempsey v Market St Ry Co, supra, n 25—Stark v Yellow Cab Co 202 P 2d 802, 90 Cal App 2d 217—Shaw v Pacific Greyhound Lines, 323 P 2d 391 50 C 2d 153

Instructions held not erroneous

(4) Other cases

Mo—Burns v Kansas City Public Service Co 273 S W 2d 184

Pa—Takac v Bamford, 88 A 2d 86, 370 Pa 389

Instructions held erroneous

(3) Other instructions

N J—Gagho v Yellow Cab Co, 164 A 2d 353

38 Ga—Daughtry v Georgia Power Co, supra, n 7

Mo—Noe v Thompson, 173 S W 2d 896—Snyder v Hedges, App 381 S W 2d 376

Instructions held not misleading, confusing or prejudicial

Ill—Dyer v Chicago Motor Coach Co, 123 N E 2d 350, 4 Ill App 2d 84

Wis—Van Matre v Milwaukee Elec Ry & Transport Co 67 N W 2d 831, 268 Wis 399

Instructions held misleading

(1) Wash—Nopson v City of Seattle, supra, n 8

39 Cal—Stark v Yellow Cab Co, supra, n 36

§ 770 —— Verdict, Findings, and Judgment

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40 Mo—Eichmann v St Louis Public Service Co, 253 S W 2d 122, 363 Mo 651

N J—Brice v Austin, 105 A 2d 680

S C—Odom v Weathersbee, 81 S E 2d 788, 225 S C 253

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Construction of findings or verdicts

(5) Other cases

Ariz—Curlee v Morris, 231 P 2d 752, 72 Ariz 125

Nev—Harold's Club v Sanchez, 275 P 2d 384, 70 Nev 518

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Va—Barnard Bus Lines v Weeks, 158 S E 870, 156 Va 465—Richmond-Ashland Ry Co v Jackson, 162 S E 18 157 Va 628

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41 US—J C Penney Co v Eubanks, C A Okl, 294 F 2d 519

N Y—Freeman v Manhattan Cab Corp 150 N Y S 2d 674 1 Misc 2d 601

42 Pa—Turek v Pennsylvania R Co 85 A 2d 845, 369 Pa 341, cert den 72 S Ct 762, 343 U S 928 96 L Ed 1339

Tex—Otis Elevator Co v Bond, Civ App 373 S W 2d 518, remd, Sup, 388 S W 2d 681, on remand 391 S W 2d 519

Findings not responsive to issues

(2) Other cases

Ky—Greyhound Corp v Leadman 285 S W 2d 177 cert den 76 S Ct 64 350 U S 831 100 L Ed 741, reh den 76 S Ct 298, 350 U S 943 100 L Ed 822

43 La—Jakubec v Southern Bus Lines, App, 31 So 2d 282

Tex—Otis Elevator Co v Bond, Civ App 373 S W 2d 518, remd, Sup, 388 S W 2d 681 on remand 391 S W 2d 519

Finding on proximate cause

(2) Other cases

Tex—City Transp Co of Dallas v Vatsures, Civ App 278 S W 2d 373, err dism

Findings held unnecessary

(4) Other cases

Kan—Eldridge v Kansas City Public Service Co, 267 P 2d 923, 175 Kan 879

Mo—Gillespie v Terminal R Ass n of St Louis, App 204 S W 2d 598

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44 Ill—D[illegible]ct v Chicago Transit Authority 284 N E 2d 362, 5 Ill App 3d 758

N Y—Davey v Niagara Frontier Transit Co, 228 N Y S 2d 936

Or—Gal[illegible]gl v Portland Traction Co, 182 P 2d 354 181 Or 385

Wis—Van Matre v Milwaukee Elec Ry & Transport Co., supra, n 38

46 Ill—Craton v Alton United Cab Co 17 N E 2d 727, 297 Ill App 652

Tex—Smith v City Transp Co, Civ App 245 S W 2d 296, err ref no rev err

47. Ind—Tribune-Star Pub Co v Fortwendle, 115 N.E.2d 215, 124 Ind App 618, reh den 116 N.E.2d 548, 124 Ind App 618

51. Kan—O'Callahan v Wichita Transp Corporation, 92 P 2d 23, 150 Kan 280—Haley v Kansas City Public Service Co., 119 P 2d 449, 154 Kan 477

Ohio—Welch v Rollman & Sons Co 44 N E 2d 726, 70 Ohio App 515

Tex—Garza v San Antonio Transit Co, Civ App 180 S W 2d 1006, err ref.

Special findings held inconsistent with general verdict

(6) Other findings

Pa—[illegible] v [illegible]dge Yellow Cab Co., 97 A 2d 377 374 Pa. 208

Special findings held not inconsistent with general verdict

(6) Other cases—Ind—[illegible] Rys v Boyer supra, n 7

Kan—Dryden v Kansas City Public Service Co 238 P 2d 501, 172 Kan 31.

Minn—Lott v Davidson, 109 N.W 2d 336, 261 Minn 130.

O[illegible] H[illegible] v City of Cl[illegible]d, 110 N E 2d 50 93 Ohio App 93

53. **Findings held not inconsistent**

(2) Ind—Chicago South Shore & South Bend R R v Brown, 320 N.E 2d 809, 162 Ind App 493, reh den 323 N.E.2d 681 162 Ind App 493

(3) Tex—Dallas Railway & Terminal Co v Price, Civ.App., 94 S W 2d 884, affd 114 S W 2d 859 131 Tex. 319.

(5) Other cases—Martin v Weaver, Civ App 161 S W 2d 812, err ref—Fort Worth & D Ry Co v Britton, Civ App 310 S W 2d 654 err ref no rev err

54 N J—Maldonato v Ironbound Transp Co 156 A 275, 9 N J Misc 985

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55 Mo—Case v St Louis Public Service Co, 192 S W 2d 595 238 Mo App 1029

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57 U S—Bullock v Tamiami Trail Tours, Inc C A Fla, 266 F 2d 326

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71 U S—Bullock v Tamiami Trail Tours, Inc C A Fla 266 F 2d 326

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73 Ill—McManigal v Chicago Motor Coach Co 151 N E 2d 410, 18 Ill App 2d 183

Miss—Gulf, Mobile & N R Co v Thornberry, 188 So 545 185 Miss 576

74. **Insulting and abusive language**

(2) Other instances

N J—Gebhardt v Public Service Co-ordinated Transport, 137 A 2d 48 48 N J Super 173

§ 772. —— Exemplary Damages

76 U S—Hanback v Seaboard Coastline R R D C S C, 396 F Supp 80

Ark—Black & White Cab Co v Doville, 251 S W 2d 1005, 221 Ark 66

S C—Humphries v Stokes Bus Line, 18 S E 2d 675 199 S C 132

78 U S—Tolson v Pan Am World Airways, Inc D C Tex, 399 F Supp 335

D C—Sullivan v Yellow Cab Co App 212 A 2d 616

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81 Ill—McManigal v Chicago Motor Coach Co 151 N E 2d 410, 18 Ill App 2d 183

Okl—Southwestern Greyhound Lines, Inc v Rogers, 267 P 2d 572

Intoxication of cab driver

Tenn—Courtesy Cab Co v Keck, 440 S W 2d 610, 59 Tenn App 309

82 Fla—Atlantic Greyhound Lines v Lovett, supra, n 7—McLain v P[illegible]ot Coach Co[illegible]ation, 13 So 2d 221, 152 Fla 876—Albert v Miami Transit Co supra, n 57

N C—Hairston v Atlantic Greyhound Corporation, 18 S E 2d 166, 220 N C 642

86 N Y—Soucy v Greyhound Corp, 276 N Y S 2d 173 27 A D 2d 112

§ 773. —— Amount of Damages

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95 U S—Ephraim v Safeway Trails, Inc, D C N Y 230 F Supp 568, revd on oth grds, C A 341 F 2d 815.

Mich—Nowak v City of Detroit, 282 N W 221, 286 Mich 499

N Y—Freeman v Manhattan Cab Corp 150 N Y S 2d 674 1 Misc 2d 601

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15. **Damages held not excessive**

(29) Other amounts

U S—Hanback v Seaboard Coastline R R D C S C 396 F Supp 80

Fla—Atlantic Greyhound Lines v Lovett, 184 So [illegible] 134 Fla 505—Miami Transit Co v Yelles, [illegible] So 2d 787, 156 Fla 351

Ill—McManigal v Chicago Motor Coach Co, [illegible] N E 2d 410 18 Ill App 2d 183

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16. D[illegible]mages reduced

(5) Other amounts

Ark—Citizens Coach Co v Wright, 313 S W 2d [illegible] 228 Ark 1143

Okl—Southwestern Greyhound Lines, Inc v Rogers, 267 P 2d 572

17 Miss—Yazoo & M V R Co v Smith, 196 So 230, 188 Miss 856

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W Va—C.J.S. black letter [illegible]y quoted in Pritchard v City Lines of West Virginia, 66 S E 2d 276, 280, 136 W Va 278

19 U S—Cestaro v Pennsylvania Greyhound Lines, D C Pa 49 F Supp 1004 revd on oth grds 139 F 2d 566

Cal—Terrell v Key System, 159 P 2d 704 69 Cal App 2d 682—Dayton v Yellow Cab Co of San Francisco, 193 P 2d 959 85 Cal App 2d 740

D C—Butler v McCalip, Mun App, 54 A 2d 644

Fla—Harvin v Kenan, 26 So 2d 668, 157 Fla 603—Thousand v Miami Transit Co 100 So 2d 620

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N J—Lehman v Anderson, 99 A 2d 517 27 N J Super 444 affd 102 A 2d 385 14 N J 340

N Y—Morrison v New York Rapid Transit Corporation, 13 N Y S 2d 658 257 App Div 1000, revd on oth grds 27 N E 2d 48, 282 N Y 773

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Pa—Maitland v Philadelphia Transp Co 40 A 2d 147 156 Pa Super 338

S C—Singletary v Atlantic Coast Line R Co, 60 S E 2d 305 217 S C 212, 30 A L R 2d 326

Tenn—Gray v Brown, 217 S W 2d 769 188 Tenn 152

Tex—Texas & P Ry Co v Featherman, Civ App 351 S W 2d 633, err ref no rev err

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W Va—C.J.S. black letter [illegible]y quoted in Pritchard v City Lines of West Virginia, Inc 66 S E 2d 276, 280, 136 W Va 278

Duties of carriers and passengers reciprocal

Minn—Zuber v Northern Pac Ry Co, 74 N W 2d 641 246 Minn 157

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20 N M—Dominguez v Southwestern Greyhound Lines, 155 P 2d 138, 49 N M 13

Mutuality of obligation

Mo—C.J.S. cited in Young v Kansas City Public Service Co 270 S W 2d 788, 791

21 Mo—Atchison v Braniff Intern Airways, 327 S W 2d 112

22 U S—Sparks v Chicago & E I R Co, D C Ill 42 F Supp 1019

Cal—Tait v City and County of San Francisco, 300 P 2d 74, 143 C A 2d 787—Dzura v California Aviation Service, Inc, 84 Cal Rptr 191 4 C A 3d 191

La—Crawley v City of Monroe, App, 26 So 2d 493—Creech v Shreveport Rys Co App 43 So 2d 295

Minn—Gillson v Osborne, 19 N W 2d 1 220 Minn 122—Ball v Twin City Motor Bus Co, 30 N W 2d 523, 225 Minn 274, 9 A L R 2d 933

N Y—Tomayo v Murray, 19 N Y S 2d 138, 173 Misc 728

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W Va—Pritchard v City Lines of West Virginia, 66 S E 2d 276, 136 W Va 278

Wis—Arneson v Buggs, 286 N W 19 231 Wis 499

24 Cal—Miller v Schell, 308 P 2d 445, 149 C A 2d 346

25 Ala—Louisville & N R Co v Richard, 14 So 2d 561, 31 Ala App 197, cert den 14 So 2d 564 244 Ala 595

27 Cal—Burge v Los Angeles Transit Lines, 217 P 2d 752, 97 Cal App 2d 292

Fla—Swilley v Fed[illegible]ny Cab Co of Jacksonville, 46 So 2d 173

Tenn—C[illegible]ell v E T & W N C Motor Transp Co, 132 S W 2d 355, 23 Tenn App 332—Schandler v [illegible] Coach Lines, 217 S W 2d 775 188 Tenn 169

No duty to look closely for danger where no reason to anticipate danger

Mo—Bond v Kansas City Transit, Inc, 401 S W 2d 440

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28 Ill—Kackley v Central Illinois Traction Co, 201 Ill App 164

Md [illegible]or[illegible] v Sun Cab Co 117 A 2d 554 208 Md 236

Mass [illegible]n v Boston Elevated Ry Co 21 N E 2d 233, 303 Mass 237

Mo—Welch v Th[illegible]son, 210 S W 2d 79, 357 Mo 703—Dennis v Wood, 211 S W 2d 470, 357 Mo 886

Vt—C.J.S. cited in Ploesser v Burlington Rapid Transit Co, 149 A 2d 728, 734, 121 Vt 133

Passenger getting operator drunk

Ky—Louisville Taxicab & Transfer Co v Barr, 209 S W 2d 719, 307 Ky 28

Corpus Juris Cited in

Mo—Harding v Triplett, App, 235 S W 2d 112, 114

30 La—Rumpf v Callo, 132 So 763, 16 La App 12

32 Cal Fontana v Yellow Cab Co 87 P 2d 716, 31 Cal App 2d 77

34 Minn—Ball v Twin City Motor Bus Co, supra, n 22.

Tex [illegible] v South[illegible] Co[illegible] Civ App 207 S W 2d 159

In other cases it has been held that passengers were not guilty of contributory negligence.[34.5]

34.5 La. Peters v City of Monroe, App, 91 So 2d 428 Fi[illegible] v Travelers Ins Co, App 179 So 2d 513

35 U S—Dierks v Alaska Air Transport, D C Alaska, 109 F.Supp 695, 14 Alaska 159—Urban v Frontier Air Lines, D C Wyo., 139 F Supp 288

37 U S—De Back v U S., D C Cal 29 F Supp 141, mod on oth grds 118 F 2d 208—Urias v. El Paso City Lines, C A Tex, 477 F 2d 126

Cal—Cooper v National R R Passenger Corp, 119 Cal Rptr 541, 45 C A 3d 389, 76 A L R 3d 1210

La—Pero v [illegible] Rys Co supra, n 19

Vt. [illegible] v [illegible] Rapid Transit Co, 149 A 2d 728, 121 Vt 133

Va—[illegible] v Virginia Transit Co, 132 S E 2d 712, 204 Va 591

Jerks, jolts and stops

(1) Assumption of risk by bus passenger extends to usual and ordinary jerks, jolts and stops

D C—Washington v Washington, Virginia & Maryland Coach Co D C 250 F Supp 888

(2) Degree of suddenness to remove stop from category of normal jerks and jolts is coefficient of degree of care required of bus company

D C—Washington v Washington, Virginia & Maryland Coach Co, D C, 250 F Supp 888

38. Jars and jolts

Wash—Cassels v City of Seattle, 81 P 2d 275 195 Wash 433

No conflict between rules

Cal—Tait v City and County of San Francisco, 300 P 2d 74, 143 C A 2d 787

39 Ohio—Fay v Thrasher, 66 N E 2d 236, 77 Ohio App 179

Requisite elements

U S—Greyhound Corp v Blakley, C A Wash 262 F 2d 401

Ohio—Fay v Thrasher, supra

40 Ga—Central of Georgia Ry Co v Roberts, 95 S E 2d 693 94 Ga App 600, revd on oth grds 97 S E 2d 149, 213 Ga 135

Me—Gould v Maine Central Transp Co, 1 A 2d 908 136 Me 83

Miss—Smith v Dillon Cab Co, 146 So 2d 879 245 Miss 198

Mo—Meyer v St Louis Public Service Co 253 S W 2d 525, 241 Mo App 1057

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Unavoidable risks

La—Oppenheim v Toye Bros Yellow Cab Co App 7 So 2d 420, affd 14 So 2d 854 203 La 1067—Peters v City of Monroe, App 91 So 2d 428

§ 776. Persons Under Disability

Library References

Carriers ⇐323.

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44 U S—Suarez v Trans World Airlines, Inc C A Ill, 498 F 2d 612

S D—Ivy v Inter City Bus Lines, 111 N W 2d 327, 79 S D 267

45 U S—Barash v KLM Royal Dutch Airlines, D C N Y, 315 F Supp 389

Pa—Anschel v Pennsylvania R Co, 29 A 2d 694, 346 Pa 123

Wis—Pazik v Milwaukee Electric Ry & Transport Co 15 N W 2d 804, 245 Wis 583

46 S C—Singletary v Atlantic Coast Line R Co supra, n 19

No duty to warn carrier of ailment

Vt—Ploesser v Burlington Rapid Transit Co, 149 A 2d 728, 121 Vt 133

50 N Y—Moriarty v New York Cent R Co 124 N Y S 2d 284

51. Six-year old as capable of some degree of care

Hawaii—Grace v Kuwaiba, 386 P 2d 872, 47 Haw 281

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55 Cal—Cooper v National R R Passenger Corp 119 Cal Rptr 541 45 C A 3d 389 76 A L R 3d 1210

58 Ill—Chevalier v Chicago Transit Authority 86 N E 2d 838, 338 Ill App 119

§ 777. Acts in Emergencies

Library References

Carriers ⇐338.

60 U S—Kansas City Public Service Co v Shephard, C A Kan, 184 F 2d 945

Ill—Jacobsen v Cummings, 48 N E 2d 603 318 Ill App 464

Tenn—Young v Franklin Interurban Co 306 S W 2d 674 43 Tenn App 236

§ 778. Acts to Avoid Inconvenience

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68 Tex—Eastern Texas Electric Co v Reagan Civ App 228 S W 366

§ 779. Violations of Regulations or Directions

Library References

Carriers ⇐334.

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70 Minn—Dix v Harris Machinery Co 60 N W 2d 628, 240 Minn 218

71 N Y—De Leon v New York City Transit Authority 406 N E 2d 442, 50 N Y 2d 176, 428 N Y S 2d 625 app after remand 444 N Y S 2d 711, 85 A D 2d 593

75 U S—Dunn v Trans World Airlines, Inc C A Guam, 589 F 2d 408

§ 780. Acts by Permission or Direction of Employees

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80 La—Waggenspack v New Orleans Public Service Inc App 297 So 2d 733 writ den Sup 302 So 2d 15

Direction implied from call of "all out"

Ga—Bailey v Louisville & N R Co 160 S E 2d 245 117 Ga App 185

84 **Negligent signal by bus driver**

Neb—Gade v Carlson, 48 N W 2d 727, 154 Neb 710

§ 781. Proximate Cause

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89 U S—Swigart v Chicago & N W Ry Co, C A Ill 180 F 2d 177 31 A L R 2d 925 Pekarnichl v Chicago & N W Ry Co, C A Ill, 205 F 2d 434, cert den 74 S Ct 275 346 U S 916, 98 L Ed 411

Ark—De Queen & Eastern R Co v Hodges, 134 S W 2d 8, 199 Ark. 1187

Cal—Jonas v Los Angeles Ry Corporation, 136 P 2d 39 57 Cal App 2d 824

D C—Talbott v Yellow Cab Co of D C Mun App 121 A 2d 262

Ill—Ivy v Chicago Transit Authority 161 N E 2d 881 23 Ill App 2d 251

N Y—Gnos v Long Island R Co 76 N Y S 2d 434, 190 Misc 116

N C—Smith v Charlotte City Coach Lines, Inc 182 S E 2d 4 12 N C App 25 cert den 183 S E 2d 246, 279 N C 395

Ohio—Masters v New York Cent R Co 70 N E 2d 898, 147 Ohio St 293, cert den 67 S.Ct, 1519 331 U S 836, 91 L Ed 1848, reh den 68 S Ct 33, 332 U S 786, 92 L Ed 369

Pa—Wessner v Blue Ridge Transp Co 12 A 2d 559 338 Pa 161—Staller v Philadelphia Rapid Transit Co 14 A 2d 289 339 Pa 100—Troy v Scranton Transit Co 81 A 2d 547, 368 Pa 361

W Va—Pritchard v City Lines of West Virginia, 66 S E 2d 276, 136 W Va 278

Other acts as constituting proximate cause

(5) Additional acts—Vogel v State, 124 N Y S 2d 563 204 Misc 614, app dism 136 N Y S 2d 376, 284 App Div 993

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90 Mo—Young v Kansas City Public Service Co., 270 S W 2d 788—Horton v Swift & Co 415 S W 2d 801

91 Tex—International-Great Northern R Co v Lucas, Civ App 123 S W 2d 760 err ref cert den 60 S Ct 89 308 U S 573 84 L Ed 481

Wash—Jablinsky v Continental Pac Lines, Inc 364 P 2d 793, 58 Wash 2d 702

92 Conn—Dokus v Palmer 33 A 2d 315 130 Conn 247

97 U S—Atlantic Coast Line R Co v Mitchell, C C A Ga 157 F 2d 880

Mich—Davidson v City of Detroit Department of Street Railways, 12 N W 2d 413 307 Mich 420

Mo—Stephens v St Louis Public Service Co 276 S W 2d 138

98 U S—Young v Baldwin, C C A Ark 84 F 2d 841

§ 782. Injury Avoidable Notwithstanding Contributory Negligence

Library References

Carriers ⇐340

99 Miss—McClellan v Illinois Cent R Co 37 So 2d 738, 204 Miss 432

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2 Mo—Kasten v St Louis Public Service Co App 266 S W 2d 1

3 Mo—Kasten v St Louis Public Service Co supra, n 2

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4 N Y—Rees v City of New York, 135 N Y S 2d 311.

5 La—Lacour v Texas & P Ry Co App 32 So 2d 334

8 Md—Przybocwski v Baltimore Transit Co 59 A 2d 687, 191 Md 63

§ 784. While on Premises or Approaches; Going on Track

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14 U S—Ratliff v Chesapeake & O Ry Co C C A Ky, 116 F 2d 155—Chicago R I & P R Co v Humphreys, C A Okl 172 F 2d 644

Ky—Covington & Cincinnati Elevated Railway & Transfer & Bridge Co v Sandlin, 133 S W 2d 733 280 Ky 517

Me—Roberts v Yellow Cab Co 240 A 2d 733

Mo—Ostresh v Illinois Terminal R Co, 313 S W 2d 19

N Y—[illegible] v Dowling, 5 N Y S 2d 57, 254 App Div 336, affd 20 N E 2d 1013 280 N Y 644—Zobel v City of New York, 87 N Y S 2d 264, 275 App Div 722, 782, affd 88 N E 2d 722, 300 N Y 490, rearg den 90 N E 2d 489, 300 N Y 628

Pa—Szawalla v Reading Co, 119 A 177, 330 Pa 526—Anschel v Pennsylvania R Co, 29 A 2d 694 346 Pa 123

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15 Pa—Szawalla v Reading Co supra, n 14

20 Cal—Wil[illegible] v Pacific Greyhound Lines, 209 P 2d 146, 93 Cal App 2d 484

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23 U S—Thomson v Anderson, C C A S D 138 F 2d 272, 149 A L R 899

Mich—Dav[illegible] v City of Detroit, Department of Street Railways, 12 N W 2d 413, 307 Mich 420

N H—O'Brien v Public Service Co 58 A 2d 507 95 N H 79

25 Ark—St Louis-San Francisco Ry Co v Robinson, 120 S W 2d 567 196 Ark 964

Ill—Live Stock Nat Bank of Chicago v Richardson, 48 N E 2d 597 318 Ill App 537

N J—Long v Delaware, L & W R Co 21 A 2d 824 127 N J L 207

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29 Cal—Jonas v Los Angeles Ry Corporation, 136 P 2d 39 57 Cal App 2d 824

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N H—Masters v Public Service Co of New Hampshire, 25 A 2d 499 92 N H 85

30 Cal—Jonas v Los Angeles Ry Corporation, supra, n 29

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31 Cal—Jonas v Los Angeles Ry Corporation, supra, n 29

39 Cal—Sexton v Key System Transit Lines, 301 P 2d 612, 144 C A 2d 719

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44 Cal—Sexton v Key System Transit Lines, 301 P 2d 612, 144 C A 2d 719

§ 785. Boarding Train or Car

Library References

Carriers ⇐328

45 Ga—Southern Ry Co v Skinner 38 S E 2d 756, 74 Ga App 57

La—Creech v Shreveport Rys Co, App 43 So 2d 295

Okl—G A Nichols Co v Lockhart, 129 P 2d 599 191 Okl 296—Oklahoma Ry Co v Parker 203 P 2d 875 201 Okl 193

46 Colo—Publix Cab Co v Fessler, 335 P 2d 865, 138 Colo 547, 75 A L R 2d 979

Fla—Jacksonville Coach Co v Early 78 So 2d 369—Pivdal v City of Miami, App, 105 So 2d 502

Ky—Fowler v Randle, 143 S W 2d 1049 284 Ky 164—Cincinnati, Newport & Covington Transp Co v Fischer 357 S W 2d 870

Mo—Horton v Swift & Co 415 S W 2d 801

Pa—Schickel v Yellow Cab Co of Philadelphia, 85 A 2d 138, 369 Pa 356

Contributory negligence not shown

(1) Mo—Whalen v St Louis Public Service Co App 351 S W 2d 788

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47 U S—Franklin v Columbia Terminals Co, C C A Mo, 150 F 2d 667

Fla—MacMillan v Insurance Exchange Bldg 58 So 2d 163

Ill—Murphy v Ambassador East, 370 N E 2d 124 12 Ill Dec 501, 54 Ill App 3d 980

Pa—Jeffries v Security Bank Note Co 44 A 2d 579 353 Pa 171

§ 786. —— At Place Other than Station or Platform

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54. Taxicab

Ky—Louisville Taxicab & Transfer Co v Swift, 208 S W 2d 944, 306 Ky 618

§ 787. —— Moving Train or Car

57 U S—Swigart v Chicago & N W Ry Co, C A Ill 180 F 2d 177 31 A L R 2d 925—Petermuchl v Chicago & N W Ry Co C A Ill 205 F 2d 434, cert den 74 S Ct 275, 346 U S 916, 98 L Ed 411

D C—Jiggetts v Atlantic Coast Line R Co C A [illegible] F 2d 69 99 U S App D C 249 stating North Carolina law

N Y—Meagher v Long Island R Co, 261 N E 2d 38 27 N Y 2d 39, 313 N Y S 2d 378

59 Md Ferguson v Baltimore & A R Co 80 A 2d 9, 197 Md 488

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65 Ill—McKenzie v Friel, 61 N E 2d 407, 326 Ill App 258

66 Ill—Russell v Richardson, 24 N E 2d 185, 301 Ill App 589

69. Purpose of ordinance

Ill—Russell v Richardson supra, n 66

70 Ill—Johnson v Richardson, 33 N E 2d 509 301 Ill App 572

§ 788. Alighting from Train or Car

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Carriers ⇐333.

72 Fla—Pivdal v City of Miami, App, 105 So 2d 502—Towle v Greyhound Corp Southern Greyhound Lines Division, App, 132 So 2d 781

Ill—Vizard v Cummings, 48 N E 2d 432, 318 Ill App 545—O'Shea v Chicago Motor Coach Co, App 66 N E 2d 482

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Assumption of risk

(2) Other instances

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Bus

(1) Fla—Jacksonville Coach Co v Early, 78 So 2d 369

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Street car

(2) Young v Dallas Railway & Terminal Co Tex Civ App 136 S W 2d 915, err dism., judg correct

(5) Other cases

Mo—Wilson v Kansas City Public Service Co., App 238 S W 2d 73

Pa—Rogers v West Penn Rys Co 33 West Co 333

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(2) Other cases
Cal—Bua v G I Taxi Co 9 Cal Rptr 118 186 C A 2d 612
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US—Tollsen v Lehigh Val Transp Co C A Pa 234 F 2d 121
Mo—Wilson v Kansas City Public Service Co supra

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75 Ark—Missouri Pac R Co v Smith, 117 S W 2d 1068, 196 Ark 405
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76 N J—Horelick v Pennsylvania R Co, 94 A 2d 685 24 N J Super 413 affd 99 A 2d 652, 13 N J 349, 41 A L R 2d 1278
N C—Smith v Charlotte City Coach Lines, Inc, App 182 S E 2d 4, 12 N C App 25, cert den 183 S E 2d 246, 279 N C 395

77 Cal—Miller v Schell, 308 P 2d 445 149 C A 2d 346
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N Y—Thomas v Jamaica Buses, Inc 170 N Y S 2d 852, 5 A D 2d 843, affd 182 N Y S 2d 15, 5 N Y 2d 862, 155 N E 2d 863
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(3) Other cases
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79 Ala—Birmingham City Lines v Huffman, 60 So 2d 333, 257 Ala 603
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80 Mich—Max v City of Detroit, 60 N W 2d 145 337 Mich 674.
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(2) Other cases
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Va—Finch v Brock, 121 S E 2d 373 202 Va 948

81 Held not contributorily negligent as to train on wrong track
Pa—Krieger v Pennsylvania R Co 136 A 2d 79 390 Pa 496

82 Md—Schmidt v Greyhound Corp 177 A 2d 897 228 Md 15
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W Va—Pritchard v City Lines of West Virginia, 66 S E 2d 276, 136 W Va 278

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89 Mo—Young v Kansas City Public Service Co 270 S W 2d 788

§ 789. —— Preparing to Leave Conveyance before It Stops

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95 Cal—Hardin v San Jose City Lines, 260 P 2d 63 41 C 2d 432
N Y—McIvor v New York, N H & H R Co 201 N Y S 2d 681 10 A D 2d 961

96. Passenger assumes risks
Mich—Zawicky v Flint Trolley Coach Co, 286 N W 115, 288 Mich 655

1 US—Fiedler v Chicago & N W Ry Co, C A Ill, 204 F 2d 515

4 Evidence held insufficient to show assumption of risk
Pa—Whitley v Philadelphia Transp Co, 234 A 2d 922 211 Pa Super 288

§ 790. —— Dangers on Station Platform; Safe Exit

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6 Pa—Burton v Philadelphia Rapid Transit Co, 3 A 2d 18, 133 Pa Super 481

Bus passenger's duty to look and see what is plainly visible
Mo—Bond v Kansas City Transit, Inc, 401 S W 2d 440

Snow covered platform
Pa—Moore v Baltimore & O R Co, 7 A 2d 162, 136 Pa Super 182

§ 791. —— Mode of Exit in General

7 Mass—MacSwan v Metropolitan Transit Authority 164 N E 2d 912, 340 Mass 499

10. Pathway indicated by carrier
Ark—Crown Coach Co v Whitaker 186 S W 2d 940, 208 Ark 535

§ 792. —— Alighting at Improper Place

12 Pa—Maitland v Philadelphia Transp Co 40 A 2d 147, 156 Pa Super 338

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13 Wash—Boyd v City of Edmonds, 390 P 2d 706, 64 Wash 2d 94

15 Pa—Maitland v Philadelphia Transp Co, supra, n 12

22 Wash—Jackson v City of Seattle, 131 P 2d 172, 15 Wash 2d 505

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24 Pa—Malatesta v Penn Transit Co, 24 West 4—Harris v DeFelice, 103 P L J 408, affd 109 A 2d 174, 379 Pa 469

§ 793. —— Alighting from Moving Train or Car

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35 US—O'Daniel v Pennsylvania R Co D C Pa 72 F Supp 15 affd 162 F 2d 414, cert den 68 S Ct 157 two cases. 332 U S 817, 92 L Ed 394
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37 Fla—Harvin v Kenan, 26 So 2d 668, 157 Fla 603
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38 Miss—McClellan v Illinois Cent R Co, 37 So 2d 738, 204 Miss 432

39. Ordinance inapplicable
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51 Mass—Welsh v Morse, 64 N E 2d 615, 319 Mass 167

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66 US—Juggetts v Atlantic Coast Line R Co C A D C 239 F 2d 69, 99 U S App D C 249, stating North Carolina law

67 US—Juggetts v Atlantic Coast Line R Co, C A D C, 239 F 2d 69 99 U S App D C 249 stating North Carolina law
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§ 794. Conduct While in Transit

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N H—Mullins v Boston & Maine Transp Co 20 A 2d 636, 91 N H 402
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Mo—Routt v Bi-State Transit Development Agency, App 423 S W 2d 202

75 Ga—Andrews Taxi & U-Drive It Co v McEver 114 S E 2d 145, 101 Ga App 383
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77. Taxi

U S—McCord v Atlantic Coast Line R Co C A Ga 185 F 2d 603

Ind—Hudnut v Indiana De Luxe Cab Co 182 N E 711, 98 Ind App 44

78 U S—Johnston v Greyhound Corp D C Md 139 F Supp 551

La—Briggs v U S Fidelity & Guaranty Co App 224 So 2d 124 application den 226 So 2d 923 254 La 796

Md—Przyborowski v Baltimore Transit Co 59 A 2d 687 191 Md 63

Contributory negligence not shown

Tex—Texas & P Ry Co v Leatherman, Civ App 351 S W 2d 633 err ref no rev err

Vt—Ploesser v Burlington Rapid Transit Co, 149 A 2d 728, 121 Vt 133

79 Ky—Southeastern Greyhound Lines, Inc v Chumley 226 S W 2d 777 312 Ky 154

Md—Miller v Mass Transit Administration, 306 A 2d 261, 18 Md App 220 affd 315 A 2d 772, 271 Md 256

Contributory negligence not shown

La—Briggs v U S Fidelity & Guaranty Co App 224 So 2d 124 application den 226 So 2d 923 254 La 796

82 La—Johnson v Shreveport Rys Co App 50 So 2d 655

Md—Brooks v Sun Cab Co 117 A 2d 554 208 Md 236

N J—Lehman v Anderson, 102 A 2d 385 14 N J 340

83 Ohio—Thomas v Columbus Ry Power & Light Co, App 37 N E 2d 679

84. Passenger held not negligent because of attempt to shut taxicab door

La—Fontenot v Fidelity General Ins Co App 185 So 2d 896, writ ref 187 So 2d 740 249 La 578

85 U S—Buchanan v U S D C Minn 190 F Supp 523 affd C A 305 F 2d 738

N Y—Zubko v Mary Immaculate Hospital 241 N Y S 2d 69 19 A D 2d 643 motion den 243 N Y S 2d 689, 13 N Y 2d 904 193 N E 2d 513 affd 249 N Y S 2d 878, 14 N Y 2d 681 198 N E 2d 909

Hazard held not foreseeable or merited by passenger

N Y—di Suvero v Gem Window Cleaning Co, 252 N Y S 2d 735, rev'd on oth grds 254 N Y S 2d 38, 22 A D 2d 871 affd 218 N E 2d 317 17 N Y 2d 831, 271 N Y S 2d 275

§ 795. —— Standing in Car

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97 La—Le Beau v Baton Rouge Bus Co, App 136 So 2d 740

Pa—Bollar v Pittsburgh Rys Co, 33 A 2d 261 153 Pa Super 199—Maitland v Philadelphia Transp Co supra, n 12—Kulczak v West Penn Railways Co 11 Fay Co Leg J 168

Jerks, jars and the like

N M—Hoskins v Albuquerque Bus Co 382 P 2d 700 72 N M 217

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99 Pa—Staller v Philadelphia Rapid Transit Co, 14 A 2d 289 339 Pa 100

No hard and fast rule

Pa—Miller v Pittsburgh Rys Co, 144 A 2d 514 187 Pa Super 334

1 Cal—Sweet v Los Angeles Ry Co 179 P 2d 824, 79 Cal App 2d 195

Md—Baltimore Transit Co v Sun Cab Co 124 A 2d 567 210 Md 555

§ 796. —— Changing Position

5 U S—U S v De Back, C C A Cal 118 F 2d 208

Ill—Ward v Peoria Transit Lines, 118 N E 2d 611 2 Ill App 170

Held contributorily negligent

U S—Johnston v Greyhound Corp, D C Md 139 F Supp 551

Wis—Jacobs v Milwaukee & Suburban Transport Corp 165 N W 2d 162, 41 Wis 2d 661

7 Wis—Jacobs v Milwaukee & Suburban Transport Corp 165 N W 2d 162, 41 Wis 2d 661

10 U S—Carter v Kurn, C C A Ark 127 F 2d 415—Callaway v Hart, C C A Ala 146 F 2d 103, cert den 65 S Ct 915 324 U S 866, 89 L Ed 1421

N J—Holle v Delaware, L & W R Co 5 A 2d 874, 122 N J Law 358

§ 797. —— Projecting Body or Limb from Car

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17 Ala—C J S cited in Capitol Motor Lines v Billingsley, 21 So 2d 240, 243 246 Ala 501, 157 A L R 1207

18 Pa—Nebel v Burrell, 41 A 2d 873 352 Pa 70

19 Ala—C J S cited in Capital Motor Lines v Billingsley, supra, n 17

20 Va—Selfe v Fuller, 18 S E 2d 254 179 Va 30

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23 Ala—C J S cited in Capitol Motor Lines v Billingsley, 21 So 2d 240 245 246 Ala 501 157 A L R 1207

§ 798. —— Riding in Dangerous or Improper Place

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52 Md—Baltimore Transit Co v Sup Cab Co 124 A 2d 567 210 Md 555

Violation of ordinance as merely evidence of negligence—Trudell v New York Rapid Transit Corporation, 22 N E 2d 244, 281 N Y 82

57 Cal—Combs v Los Angeles Ry Corp, 177 P 2d 293 29 Cal 2d 606

59 N Y—Meagher v Long Island R Co 261 N E 2d 384 27 N Y 2d 39 313 N Y S 2d 378

Regulations not posted

N Y—Trudell v New York Rapid Transit Corporation, supra, n 52

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63 N Y—Trudell v New York Rapid Transit Corporation, 22 N E 2d 244, 281 N Y 82—Meagher v Long Island R Co 261 N E 2d 384 27 N Y 2d 39, 313 N Y S 2d 378

64 Mass—Harrison v Boston Elevated Ry Co, 55 N E 2d 707, 316 Mass 463

68. Statute inapplicable to street railroad

N Y—Trudell v New York Rapid Transit Corporation, supra, n 52

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84 Cal—Reeves v Laporte, 78 P 2d 465 25 Cal App 2d 680

85 U S—Reading Co v Van Ness, C C A N J 113 F 2d 189

§ 799. Pleading

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93 U S—McCune v Spantax, S A Transportes Aereos, D C N Y 66 F R D 619

Mo—Jarboe v Kansas City Public Service Co 228 S W 2d 27, 359 Mo 8

Pleading held sufficient

(3) Other pleadings

N C—Barbour v City Coach Co, 164 S E 2d 395, 3 N C App 185

§ 800. Presumptions and Burden of Proof

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9 U S—Swigart v Chicago & N W Ry Co C A Ill, 180 F 2d 177 31 A L R 2d 925—Fiedler v Chicago & N W Ry Co C A Ill 204 F 2d 515—Barrett v Chicago & N W Ry Co, C A Ill 207 F 2d 5—Blue v Pennsylvania R Co C A N Y, 201 F 2d 450

Cal—Combs v Los Angeles Ry Corp 177 P 2d 293, 29 Cal 2d 606

D C—Jaggetts v Atlantic Coast Line R Co, C A 239 F 2d 69, 99 U S App D C 249 stating North Carolina law

Ill—Russell v Richardson, 24 N E 2d 185, 302 Ill App 589

Mich—Mitchell v Stroh Brewery Co 15 N W 2d 144, 309 Mich 231

Mo—Fennell v Illinois Cent R Co App, 383 S W 2d 301, stating Illinois law

N Y—Norris v Kornspan, 129 N Y S 2d 100

In Massachusetts the contrary rule prevails by virtue of a statute—Snow v Boston Elevated Ry, 22 N E 2d 4 303 Mass 420

12 U S—Greyhound Corp v Blakley C A Wash, 262 F 2d 401

Ala—Hodge v Birmingham Electric Co, 184 So 40, 236 Ala 586

Ind—Chicago South Shore & South Bend R R v Brown, 320 N E 2d 809 162 Ind App 493, reh den 323 N E 2d 681 162 Ind App 493

Ky—Cincinnati, Newport & Covington Transp Co v Fischer 357 S W 2d 870, overruling Dudley v Blue Ribbon Lines Corp 309 Ky 308, 217 S W 2d 629

La—Wink v Thompson, App 2 So 2d 693

Mass—Snow v Boston Elevated Ry, supra, n 9

Minn—Thomsen v Reibel, 2 N W 2d 567 212 Minn 83

Tex—Houston Transit Co v Zuschlag, Civ App, 200 S W 2d 848

Wash—Jackson v City of Seattle, 131 P 2d 172, 15 Wash 2d 505

W Va—Isgan v Jenkins, 59 S E 2d 689, 134 W Va 400

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14 U S—O'Daniel v Pennsylvania R Co D C Pa, 72 F Supp 15, affd 162 F 2d 414, cert den 68 S Ct 157, two cases, 332 U S 817, 92 L Ed 394

18 La—Simoneaux v Checker Cab Co of New Orleans, App, 100 So 2d 548

N Y—di Suvero v Gem Window Cleaning Co 252 N Y S 2d 735 rev'd on oth grds 254 N Y S 2d 38, 22 A D 2d 871 affd 218 N E 2d 317 17 N Y 2d 831 271 N Y S 2d 275

19 Pa—Anschel v Pennsylvania R Co 29 A 2d 694, 346 Pa 123

The occurrence of an accident is insufficient in itself to warrant a conclusion of contributory negligence.[21.5]

21.5 La—Rooker v Checker Cab Co of New Orleans, Inc App 145 So 2d 631

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27 N Y—Rees v City of New York, 135 N Y S 2d 311

§ 801. Admissibility of Evidence

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28 Fla—Checker Cab Operators v Castleberry 68 So 2d 353

Evidence improperly excluded

Vt—Ready v Peters, 117 A 2d 374 119 Vt 10

29 US—Callaway v Hart, C C A Ala, 146 F 2d 103, cert den 65 S Ct 915, 324 US 866, 89 L Ed 1421

34 Cal—Fowler v Key System Transit Lines, 230 P 2d 339, 37 C 2d 65

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36 US—Peternuchl v Chicago & N W Ry Co C A Ill, 205 F 2d 434, cert den 74 S Ct 275, 346 U S. 916, 98 L Ed 411

37 Ala—Montgomery City Lines v Hawes, 20 So 2d 536, 31 Ala App 564 cert den 20 So 2d 541, 246 Ala 287

§ 802. Weight and Sufficiency of Evidence

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38 Ill—Zydeck v Chicago & N W Ry Co 77 N E 2d 830, 333 Ill App 388

Pa—Wessner v Blue Ridge Transp Co, 1 Fay L J 159

39 Ill—Live Stock Nat Bank of Chicago v Richardson, 48 N E 2d 597, 318 Ill App 537—Rogers v Chicago Transit Authority, 92 N E 2d 776, 341 Ill App 46—Hickey v Chicago Transit Authority 201 N E 2d 742, 52 Ill App 2d 132

N Y—Kuchinsky v City of New York, 111 N Y S 2d 395, 280 App Div 32 Revd on oth grds 111 N E 2d 865, 305 N Y 167

Tex—Western v Duggan, Civ App, 160 S W 2d 1010

W Va—Adkins v Raleigh Transit Co, 31 S E 2d 775, 127 W Va 131

40 U S.—Mullen v Texas & P Ry Co C A La, 425 F 2d 269

Ill—Rose v City of Chicago, 45 N E 2d 717, 317 Ill App 1—Zydeck v Chicago & N W Ry Co, supra, n 38—Sims v Chicago Transit Authority, 129 N E 2d 23, 7 Ill App 2d 21

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N Y—Norris v Kohlman, 129 N Y S 2d 100

N C—Lansford v Marshall, 55 S E 2d 194, 230 N C. 610

Pa—Delando v Blue Ridge Transp Co, 115 A 2d 157, 382 Pa 316

Wash—Jay v Greyhound Pac Lines, Inc 364 P 2d 793, 58 Wash 2d 702

41 Cal.—Harris v Smith, 112 P 2d 907, 44 Cal App 2d 694

Conn—McNamara v Connecticut Railway & Lighting Co, 9 A.2d 720, 126 Conn 127

D C—Capital Transit Co v Webb, 142 F 2d 757 79 U.S App D C 58

Ind—Chicago South Shore & South Bend R R v Brown, 320 N E 2d 809, 162 Ind App 493, reh den 323 N E 2d 681, 162 Ind App 493

Mass—Flynn v Boston Elevated Ry Co, 55 N E 2d 707, 316 Mass 463

Va—Selfe v Fuller, 18 S E 2d 254, 179 Va 30

W Va—Adkins v Raleigh Transit Co, supra, n 39

42 Ill—Rodgers v Chicago Transit Authority, 125 N E.2d 283, 5 Ill App.2d 190, affd 130 N E 2d 172, 7 Ill 2d 172

43 Pa.—Cuneo v Philadelphia Transp Co, 176 A 2d 896, 405 Pa. 532

45. Ga—Atlanta Transit System, Inc v Allen, 115 S E 2d 479, 101 Ga App 751

La—Dingle v Richards Center Inc, App 209 So 2d 350

46 U S—De Nicolo v Palmer D C N Y 38 F Supp 874 affd 125 F 2d 126

La—Wink v Thomas, supra, n 12

N Y—Mazloum v New York, N H & H R R 115 N Y S 2d 238

Pa—Anschel v Pennsylvania R Co supra, n 19

Va—Virginia Stage Lines v Newcomb, 47 S E 2d 446, 187 Va 677

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47 U S—Orr v Southern Pac Co, C A Cal 226 F 2d 841—Lento v Delaware, L & W R Co C A N Y, 374 F 2d 113, cert den 90 S Ct 1397 397 U S 1054, 25 L Ed 2d 670, reh den 90 S Ct 1875 398 U S 954, 26 L Ed 2d 298

Mich—Schmid v Morehead, 53 N W 2d 570, 333 Mich 611

49 U S—O'Daniel v Pennsylvania R Co supra, n 14

La—Goldsteen v Nola Cabs, Inc., App, 102 So 2d 74—Hayes v Baton Rouge Bus Co App, 110 So 2d 212

N Y—Rees v City of New York, 135 N Y S 2d 311

Or—Herron v Rose City Transit Co, 431 P 2d 831 247 Or 616

Wis—Jacobs v Milwaukee & Suburban Transport Corp, 165 N W 2d 162, 41 Wis 2d 661

Street car

Cal—Jonas v Los Angeles Ry Corporation, 136 P 2d 39, 57 Cal App 2d 824

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U S Pennsylvania v Chicago & N W Ry Co supra, n 36

Ohio—Masters v New York Cent, R Co, 70 N E 2d 898, 147 Ohio St 293, cert den 67 S Ct 1519 331 U S 836, 91 L Ed 1848, reh den 68 S Ct 33, 332 U S 786, 92 L Ed 369

50 Cal—Gamwell v Key System Transit Lines, 294 P 2d 1035, 140 C A 2d 308

Wis—Van Matre v Milwaukee Elec Ry & Transport Co, 67 N W 2d 831, 268 Wis. 399

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(2) Other cases

Kan—Smith v Wichita Transp Corp, 293 P 2d 242, 179 Kan 8

51 Ill—Eilers v Chicago Transit Authority, 119 N E 2d 449, 2 Ill App 2d 233

53 N Y—Rees v City of New York, supra, n 49

54 R I—Woodward v United Transit Co, 181 A 2d 622, 94 R I 446

Evidence held sufficient to show standing of plaintiff did not assume risk of injury

N M—Hoskins v Albuquerque Bus Co, 382 P 2d 700, 72 N M 217

55 U S—Johnston v Greyhound Corp, D C Md, 139 F Supp 551

Cal—Tucker v Los Angeles Transit Lines, 185 P 2d 616, 82 Cal App 2d 183—Gerfers v San Diego Transit System, 272 P 2d 930, 126 C A 2d 733—Tait v City and County of San Francisco, 300 P 2d 74, 143 C A 2d 787

D C—Butler v District of Columbia, Mun App, 54 A 2d 644

Fla—Motor Transit Co v Hutchinson, 19 So 2d 57, 154 Fla 798

Ill—Cobb v Marshall Field & Co, 159 N E 2d 520, 22 Ill App 2d 143

Mich—Tamboer v Fite, 55 N W 2d 824, 335 Mich 267

Tenn.—Gray v Brown, 217 S W 2d 769, 188 Tenn 152

Escalator

N Y—Abarr v Ohrbach's, Inc, 37 N Y S 2d 657, 265 App Div 855

Proximate cause

La—Harris v Shreveport Rys Co., App, 83 So 2d 517

56 Cal—Combs v Los Angeles Ry Corp, supra, n 9

La—Jakubec v Southern Bus Lines, App, 31 So 2d 282—Tomasik v Shreveport Rys Co, App 98 So 2d 554

Mo—Harding v Triplett, App 235 S W 2d 112

N Y—Desmond v Doyle, 160 N Y S 2d 738, 5 Misc 2d 490—Stuhlmap v New York City Omnibus Corp, 178 N Y S 2d 390, 11 Misc 2d 727

Va—Yellow Cab Co v Eden, 16 S E 2d 625, 178 Va 325

W Va—Lapkew v Consolidated Bus Lines, 55 S E 2d 881 133 W Va 291

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57 N Y—Kaese v S S Kresge Co, 186 N Y S 2d 753, 8 A D 2d 908

Evidence sufficient to support finding of no contributory negligence

U S—U S v Trubow, C A Cal, 214 F 2d 192

60 Ark—Missouri Pac Transp Co v Guthrie, 299 S W 2d 829, 227 Ark 566

D C—Swank v Capital Transit Co, C A, 220 F 2d 807, 95 U S App D C 127

Ill—Walter v Illinois Cent R Co, 154 N E 2d 331, 19 Ill App 2d 481

La—Deason v Greyhound Corp, App 114 So 2d 78—Schenker v Randle, App, 209 So 2d 327

Mich—Pantsios v Nutt, 69 N W 2d 825 342 Mich 335

Mo—Mallett v St Louis Public Service Co, 308 S W 2d 720

N M—Ellis v Southern Pac Co 169 P 2d 551, 50 N M 76

N C—Wingate v Atlantic & N C R Co 17 S E 2d 6, 220 N C 251

W Va—Pritchard v City Lines of West Virginia, 66 S E 2d 276, 136 W Va 278

61 U S—Sanders v Pennsylvania R Co, C C A N J 144 F 2d 950—Greyhound Corp v Jones, C A Colo, 327 F 2d 904

Ill—Madden v Chicago Transit Authority, 99 N E 2d 706, 343 Ill App 648

La—Johnson v Capital City Transit Lines, Inc, App, 113 So 2d 114, 74 A L R 2d 1328

N J—Sanders v Hudson & M R Co Sup, 3 A 2d 86, 121 N J Law 406, affd 5 A 2d 686, 122 N J Law 376

N Y—Melchior v New York City Omnibus Corp, 139 N Y S 2d 778

Wis—Zuno v Milwaukee Elec Ry & Transport Co 74 N W 2d 791 272 Wis 21

64 Ill—Goertz v Chicago & N W Ry Co, 153 N E 2d 486, 19 Ill App 2d 261

Miss—McClellan v Illinois Cent R Co, 37 So 2d 738, 204 Miss 432

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65 Mo—Gurley v St Louis Public Service Co, 256 S W 2d 755

§ 803. Questions of Law and Fact

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66 U S Barrett v Chicago & N W Ry Co C A Ill 207 F 2d 5

Cal—Williamson v Pacific Greyhound Lines, 209 P 2d 146, 93 Cal App 2d 484

Ill—Krotke v Chicago, R I & P R Co, 327 N E 2d 212, 26 Ill App 3d 493

Mich—Schmid v Morehead, 53 N W 2d 570, 333 Mich 611

N J—Massotto v Public Service Coordinated Transport, 176 A 2d 280, 71 N J Super 39

N Y—Schlenker v Dowling, 13 N Y S 2d 628, 257 App Div 1011, affd 28 N E 2d 724, 283 N Y 721—Abarr v City of New York, 55 N Y S 2d 69, 269 App Div 780, affd 66 N E 2d 300, 295 N Y. 789, motion den 67 N E 2d 526, 295 N Y 895

Va—Chesapeake & O Ry Co v Butler, 20 S.E 2d 516, 179 Va 609

Evidence held insufficient to show contributory negligence as matter of law

(1) U S—Fiedler v Chicago & N W Ry Co C A Ill 204 F 2d 515—American Airlines, Inc v Marchant, C A R I 249 F 2d 612, 75 A L R 2d 843

Minn—Bixby v Minneapolis, Northfield & Southern Ry Co 283 N W 493 204 Minn 316

67 U S—Cestaric v Pennsylvania Greyhound Lines, C C A Pa 139 F 2d 569 Murray v Rio Grande Motorway, C A Utah, 171 F 2d 82

Ark—Missouri Pac Transp Co v Kinney 135 S W 2d 56, 199 Ark 512

D C—Evans v Greyhound Corp App, 200 A 2d 194

Ga—Central of Georgia Ry Co v Roberts, 95 S E 2d 693 94 Ga App 600 Revd on oth grds 97 S E 2d 149 213 Ga 135—Columbus v Hadley, 203 S E 2d 872, 130 Ga App 599

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N J—Massotto v Public Service Coordinated Transport, 176 A 2d 280, 71 N J Super 39

N Y—Lashley v Brooklyn & Queens Transit Corporation, 18 N Y S 2d 70, 258 App Div 1088—Sorganti v Brooklyn & Queens Transit Corp 51 N Y S 2d 349—Rudolph v City of New York 77 N Y S 2d 793

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R I—Lanzillotti v United Electric Rys Co 32 A 2d 267, 69 R I 173

S D—Henrichs v Inter City Bus Lines, 111 N W 2d 327 79 S D 267

Tenn—Schneider v Southern Coach Lines, 217 S W 2d 775 188 Tenn 169

Tex—Cole v Dallas Ry & Terminal Co Civ App 264 S W 2d 753 err ref no rev err

W Va—Gilmore v Huntington Cab Co 21 S E 2d 137 124 W Va 469

Evidence held sufficient to take question to jury

U S—Zanna v Greyhound Lines, Inc C A N D, 442 F 2d 238

Ala—Louisville & N R Co v Richard, 14 So 2d 561 31 Ala App 197 cert den 14 So 2d 564 244 Ala 595

Mass—O'Toole v Murphy 206 N E 2d 88, 348 Mass 795

Mich—Thurkow v City of Detroit, 291 N W 29, 292 Mich 617

N Y—Washington v Long Island R Co 214 N Y S 2d 115, 13 A D 2d 710

Evidence held insufficient to take question to jury

U S—Greyhound Corp v Rickley C A Wash, 262 F 2d 401

Fla—Rogers v Orlando Transit Co, 70 So 2d 551

Minn—Thurnau v Reibel, supra, n 12

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70 Mo—Ashby v Illinois Terminal R Co, 132 S W 2d 1076, 235 Mo App 454, cert quashed, 144 S W 2d 142, 346 Mo 1029—Douglas v St Louis Public Service Co 231 S W 2d 157, 360 Mo 869

N Y—Kaufmann v City of New York, 111 N E 2d 865, 305 N Y 167

71 U S—Cestaric v Pennsylvania Greyhound Lines, supra, n 67

Ill—Young v Illinois Cent R Co 49 N E 2d 268 319 Ill App 311

Mich—Butler v City of Detroit 65 N W 2d 837 340 Mich 246

Mont—Ahlquist v Mulvaney Realty Co 152 P 2d 137 116 Mont 6

Ohio—Kokinos v Ohio Greyhound, 92 N E 2d 386 153 Ohio St 435

Evidence held sufficient to take question to jury

Ill—Walsh v Chicago Transit Authority 171 N E 2d 235 28 Ill App 2d 243

72 Ill—Elliott v Illinois Cent R Co 47 N E 2d 375 318 Ill App 112

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Mo—Young v Kansas City Public Service Co, 270 S W 2d 788

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75 U S—Thomson v Anderson, C C A S D 138 F 2d 272, 149 A L R 899

Mass—Longin v Boston Elevated Ry Co 34 N E 2d 682, 309 Mass 228

76 Mass—Brown v Boston Elevated Ry Co, 21 N E 2d 233 303 Mass 237

78 Okl—Fullgraf v Oklahoma Ry Co, 111 P 2d 1072, 188 Okl 592

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79 Cal—Sexton v Key System Transit Lines, 301 P 2d 612, 144 C A 2d 719

80 Mass—Snow v Boston Elevated Ry supra, n 9

Tex—Graham v Dallas Railway & Terminal Co Civ App, 165 S W 2d 1002, err ref

81 Ill—Live Stock Nat Bank of Chicago v Richardson, supra, n 39

Wis—Nye v Milwaukee Electric Railway & Transport Co 16 N W 2d 429, 246 Wis 135—Spleas v Milwaukee & Suburban Transport Corp 124 N W 2d 593 21 Wis 2d 635

Evidence held insufficient to show contrib tory negligence as matter of law

(2) Other instances

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Failure to ask assistance from chair lift attendants

N H—Allen v State, 260 A 2d 454 110 N H 42

82 U S—Huff v Louisville & N R Co C A La, 198 F 2d 347

Cal—Atherley v Market St Ry Co, supra, n 50—Garcia v San Diego Elec Ry Co 170 P 2d 957 75 Cal App 2d 729

D C—Tobin v Pennsylvania R Co, 100 F 2d 435 69 App D C 262, cert den 59 S Ct 488, 306 U S 640 83 L Ed 1040—Winthrop v D C Transit System, Inc, App, 293 A 2d 283

Fla—Sumpter v Tamiami Trail Tours, Inc, App 123 So 2d 732, 93 A L R 2d 232

Ill—Jacobsen v Cummings, 48 N E 2d 603, 318 Ill App 464—Pacorek v Cummings, 58 N E 2d 742, 324 Ill App 589—Weaver v Sprague, 71 N E 2d 106, 330 Ill App 331—Finley v Chicago, A & E Ry Co, 122 N E 2d 594, 3 Ill App 2d 436

Ky—Stallard v Witherspoon, 306 S W 2d 299

Md—Dilley v Baltimore Transit Co 39 A 2d 469 183 Md 557 155 A L R 627

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N H—O'Brien v Public Service Co, 58 A 2d 507, 95 N H 79

N Y—Young v Jamaica Buses, 28 N Y S 2d 197, 262 App Div 860—Schwartz v Brooklyn & Queens Transit Corporation 36 N Y S 2d 70, 264 App Div 905—Carrillo v Green Bus Lines, 78 N Y S 2d 233, 273 App Div 969

Pa—Gabel v 1528 Walnut St Bldg Corp 50 A 2d 751 160 Pa Super 218—Meehan v Delaware, L & W R Co 53 Lack Jur 145

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Tex—El Paso City Lines v Stanley, Civ App 209 S W 2d 810, err ref

W Va—Isagan v Jenkins, supra, n 12

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84 U S—Swigart v Chicago & N W Ry Co supra, n 9

N J—Kovacs v Pennsylvania R Co 184 A 2d 873, 76 N J Super 451

85 Ill—Finley v Chicago, A & E Ry Co supra, n 82

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86 Ill—Jacobsen v Cummings, supra, n 82

87 Ill—Holland v Chicago Transit Authority, 84 N E 2d 861 337 Ill App 100

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89 Cal—Rogers v Los Angeles Transit Lines, 289 P 2d 226, 45 C 2d 414

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90 Cal—Reeves v Lapinta, 78 P 2d 465 25 Cal App 2d 680

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N H—Mullins v Boston & Maine Transp Co, 20 A 2d 636, 91 N H 402

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W Va—Miller v Blue Ridge Transp Co, 15 S E 2d 400, 123 W Va 428

Evidence held insufficient to carry question to jury

(3) Other cases

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93 N C—Barbour v City Coach Co, 164 S E 2d 395, 3 N C App 185

94 Ill—Schwickrath v Lowden, 46 N E 2d 162, 317 Ill App 431

95 Cal—Wante v Facific Gas & Electric Co 132 P 2d 311 56 Cal App 2d 191

Mich—Longfellow v City of Detroit, 5 N W 2d 457 302 Mich 542

Ohio—Gibson v City R Co App 126 N E 2d 67

Wash—Cassels v City of Seattle, 81 P 2d 275 195 Wash 433

Wis—Banks v Chicago, M St P & Pac R Co 278 N W 860, 227 Wis 503

97 Cal—Dempsey v Market Street Ry Co 142 P 2d 929 23 Cal 2d 110

Ky—S[illegible] Greyhound Lines v Chumley 226 S W 2d 777, 312 Ky 154

NC—Garvey v Atlantic Greyhound Corp 45 S E 2d 58, 228 N C 106

Pa—Miller v Pittsburgh Rys Co, 144 A 2d 514, 187 Pa Super 334

W Va—Browning v Monongahela Transp Co 27 S E 2d 481 126 W Va 195

Failure to use handholds

(2) Other matters

Mo—Shanklin v St Louis Public Service Co App 370 S W 2d 649

1 US—Carter v Kurn, C C A Ark 127 F 2d 415

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3 Ala—Capitol Motor Lines v Billingsley 21 So 2d 240, 246 Ala 501, 157 A L R 1207

Cal—Rogers v Los Angeles Transit Lines, 289 P 2d 226, 45 C 2d 414

Ky—[illegible] Green-Hopkinsville Bus Co v Montgomery, 129 S W 2d 535, 278 Ky 837

Mo—Kasten v St Louis Public Service Co, App 266 S W 2d 1

Tex—Harrison v Southwest Greyhound, Civ App 207 S W 2d 159

4 Va—Selfe v Fuller 18 S E 2d 254 179 Va 30

5 Md—Public Service Transit Co v Sun Cab Co, 124 A 2d 567, 210 Md 555

Mo—Jones v Thompson 184 S W 2d 407 353 Mo 730

7 N Y—Trudell v New York Rapid Transit Corporation, 22 N E 2d 244 281 N Y 82

8 Cal—Combs v Los Angeles Ry Corp, 177 P 2d 293, 29 Cal 2d 606

Whether passenger was riding on car steps held for jury

Cal—Conrard v Pacific Electric Ry Co, 94 P 2d 567, 14 Cal 2d 375

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9 Ill—Glaum v Co[illegible] 47 N E 2d 359 317 Ill App 655

Mich—Jaxon v City of Detroit, Dept of St Railways, 143 N W 2d 571 3 Mich App 722, revd on oth grds 151 N W 2d 813 379 Mich 405

Mo—Carpenter v Kansas City Public Service Co, 330 S W 2d 797

Ohio—Pfaehmueller v Wilson, 325 N E 2d 233 41 Ohio St 2d 223

Pa—Whitley v Philadelphia Transp Co, 234 A 2d 922, 211 Pa Super 288

Evidence held insufficient to establish contributory negligence as matter of law

(1) Fla—Thomason v Miami Transit Co 100 So 2d 620

Ga—Georgia Power Co v Weaver, 23 S E 2d 730, 68 Ga App 652

Ill—Goertz v Chicago & N W Ry Co, 153 N E 2d 486, 19 Ill App 2d 261

Mass—Fi[illegible] v Boston & Maine R R, 82 N E 2d 5 323 Mass 349

Pa—Bo[illegible] v P[illegible] Rapid Transit Co 3 A 2d 18, 133 Pa Super 481—Curry v Napolitano, 133 A 2d 555 389 Pa 580

11 US—Hudson v Chicago, R I & P R Co D C Ill 172 F Supp 747, revd on oth grds C A 272 F 2d 449—Cayhi[illegible] Lines, Inc v Miller C A Mo, 402 F 2d 134

Ala—Western Ry of Ala v Brown, 196 So 2d 392, 280 Ala 543

Ark—Halpern v Hot Springs St Ry Co 302 S W 2d 535 227 Ark 910

Cal—Healy v Yellow Cab Co of California, 90 P 2d 116, 32 Cal App 2d 479—Blankenburg v Pacific Gas & Elec Co, 169 P 2d 909 28 Cal 2d 282—Greenleaf v Briggs, 178 P 2d 459, 78 Cal App 2d 720

Ga—Atlantic Coast Line R Co v Green, 106 S E 2d 814, 98 Ga App 704—Beck v Wade, 110 S E 2d 43 100 Ga App 79

Ill—Sims v Chicago Transit Authority 122 N E 2d 221 4 Ill 2d 60—Shanowat v Checker Taxi Co 198 N E 2d 573 48 Ill App 2d 81

Kan—King v Vets Cab, Inc 295 P 2d 605, 179 Kan 379 56 A L R 2d 1249—Elliott v Chicago, R I & P R Co 454 P 2d 124 203 Kan 273

Mich—Clark v Shefferly 78 N W 2d 155, 346 Mich 332—Wells v Flint Trolley Coach, Inc 88 N W 2d 285 352 Mich 35—Jaxon v City of Detroit, Dept of St Railways, 151 N W 2d 813 379 Mich 405

Minn—Nygren v Minneapolis St Ry Co, 63 N W 2d 560, 241 Minn 485—Patton v Minneapolis St Ry Co, 77 N W 2d 433, 247 Minn 368, 58 A L R 2d 921

Mo—Williamson v St Louis Public Service Co 252 S W 2d 295—Mallett v St Louis Public Service Co 308 S W 2d 720—Lawis v Kansas City Public Service Co, App, 333 S W 2d 526—Fennell v Illinois Cent R Co, App 383 S W 2d 301

Mont—Risken v Northern Pac Ry Co, 350 P 2d 831 137 Mont 57

N H—Isabelle v Public Service Co of New Hampshire, 37 A 2d 367 93 N H 189

N J—Sullivan v Coast Cities Coaches, 19 A 2d 442, 126 N J Law 300 affd 21 A 2d 736, 127 N J Law 226

N Y—Schlichtebeck v Brooklyn & Queens Transit Corporation, 20 N Y S 2d 484 259 App Div 1018

N C—Harris v Atlantic Greyhound Corp, 90 S E 2d 710, 243 N C 346, 58 A L R 2d 939

Okl—Cochran v Tulsa City Lines, Inc, 265 P 2d 1092

Pa—Goldy v White Transit Co 32 Luz Leg Reg 94—Boylar v Carbondale Transfer Co, 32 Pa Dist & Co 109 39 Lack Jur 73 Bigi[illegible] v Beaver Valley Motor Coach Co 76 A 2d 403, 365 Pa 578

Tex—Jackson v Dallas Ry & Terminal Co Civ App 273 S W 2d 463, err ref, no rev err

Vt—Ready v Peters, 117 A 2d 374 119 Vt 10

Va—Selfe v Hale, 69 S E 2d 434 193 Va 543—Sykes v Langley Cabs, Inc., 176 S E 2d 417, 211 Va 202

Wash—Boyd v City of Edmonds, 390 P 2d 706, 64 Wash 2d 94 Pantz v Orange, 518 P 2d 726, 10 Wash App 317

Wis—Furrer v Milwaukee & Suburban Transport Corp, 162 N W 2d 537 40 Wis 2d 560

Assisting another

(2) Other cases

Ky—Louisville Ry Co v Allen, 246 S W 2d 443

Mass—Boyd v New York, N H & H R Co 127 N E 2d 164, 332 Mass 607

Evidence held sufficient to take question to jury

Ala—Mobile City Lines v Huffman, 60 So 2d 333, 257 Ala 603

Cal—McMillen v Southern Pac Co 303 P 2d 788, 146 C A 2d 216

Ind—Terre Haute City Lines v Kroeger 59 N E 2d 575 115 Ind App 376

N C—Humphries v Queen City Coach Co 45 S E 2d 546, 228 N C 399

Pa—Brown v Ambridge Yellow Cab Co 97 A 2d 377 374 Pa 208

Evidence held insufficient to take question to jury

(3) Other instances

Ill—Ivy v Chicago Transit Authority 161 N E 2d 881, 23 Ill App 2d 251

Question for trier of facts

Conn—Yu v New York, N H & H R Co 144 A 2d 56, 145 Conn 451

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12 Ga—Columbus Transp Co v Curry 122 S E 2d 584, 104 Ga App 700

13 Ill—Lewis v Checker Taxi Co 103 N E 2d 192, 345 Ill App 301

14 Conn—Marley v New England Transp Co 53 A 2d 296, 133 Conn 586

18 Mich—Knapp v City of Detroit, 294 N W 692, 295 Mich 311

Ohio—Kranth v City of Cleveland, App 111 N E 2d 769

Pa—Stevens v Reading St Ry Co, 121 A 2d 128, 384 Pa 390

Evidence held insufficient to take question to jury

Wash—Jackson v City of Seattle, 131 P 2d 172, 15 Wash 2d 505

20 D C—Novas v Atlantic Coast Line R Co C A, 259 F 2d 956, 104 U S App D C 141

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21 Cal—Quirk v City and County of San Francisco, 232 P 2d 893 105 C A 2d 85

Ill—Russell v Richardson, supra, n 11

Mass—Perella v Boston Elevated Ry Co, 28 N E 2d 993 306 Mass 547—Welsh v Morse, 64 N E 2d 615, 319 Mass 167

N J—Schwenk v Central R Co of New Jersey 168 A 218, 111 N J Law 244, affd 171 A 794 112 N J Law 500

Pa—Muzychuk to Use and Benefit of Burns v Yellow Cab Co, 22 A 2d 670, 243 Pa 335

22 U S—Humphrey v Fort Knox Transit Co supra, n 11

Cal—Connard v Pacific Electric Ry Co, supra, n 8—McNulty v Southern Pac Co, 216 P 2d 534 96 Cal App 2d 841

Ill—Palazzotto v Chicago Transit Authority 76 N E 2d 805 333 Ill App 160

24 U S—Sutton v Great Lakes Greyhound Lines, D C Ky, 51 F Supp 715

Miss—McCellan v Illinois Cent R Co, 37 So 2d 738, 204 Miss 432

25 Ill—Lewis v Checker Taxi Co 103 N E 2d 192, 345 Ill App 301

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26 Ga—Central of Georgia Ry Co v Roberts, 95 S E 2d 693 94 Ga App 600, revd on oth grds 97 S E 2d 149, 213 Ga 135

27 Ill—McKenzie v Friel, App, 61 N E 2d 407

N J—Tarnow v Hudson & Manhattan R Co, 1 A 2d 73, 120 N J Law 505, affd 3 A 2d 570, 121 N J Law 522

28 Ga—Fo[illegible] v Associated Cab Co 83 S E 2d 310 90 Ga App 560

Ill—Jacobs v Cummings, 48 N E 2d 603, 318 Ill App 464

Mich—Bordner v McKernan, 293 N W 889, 294 Mich 411

29 Ala—S[illegible] v Ward, 77 So 2d 376, 38 Ala App 49 cert den 77 So 2d 383, 262 Ala 703

Conn—McMahon v New York, N H & H R Co 71 A 2d 557 136 Conn 372, 17 A L R 2d 1081

Hawaii—Grace v Kumalaa, 386 P 2d 872, 47 Haw 281

Tenn—Paschall v Southern Ry Co 208 S W 2d 531 186 Tenn 102

Childhood

(2) Other cases

N M—Thompson v Anderman, 285 P 2d 507 59 N M 400

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31 Cal.—Pierson v Holly Sugar Corp 237 P 2d 28 107 C A 2d 298—Miller v Schell, 308 P 2d 445 149 C A 2d 346—Rollins v Department of Water and Power, City of Los Angeles, 26 Cal Rptr 162, 209 C A 2d 526

Fla—[illegible] v Fontainebleau Hotel Corp, App 251 So 2d 351

Ill—Scott v Instant Parking, Inc, 241 N E 2d 517 100 Ill App 2d 293

N Y Page v 2632 Broadway, 111 N Y S 2d 908 279 App Div 1003—di Suvero v Gem Window Cleaning Co, 252 N Y S 2d 735, revd on oth grds 254 N Y S 2d 38, 22 A D 2d 871, affd 218 N E 2d 317 17 N Y 2d 831, 271 N Y S 2d 275

Ohio Feinberg v Bereal Hotel Co App 85 N E 2d 296, revd on oth grds 89 N E 2d 569, 152 Ohio St 417

Pa—Mihaylo v Greenspan 51 Lack Jur 17

Tex—Gold [illegible] Hat Mfg Co v Cowen Civ App, 136 S W 2d 867, err dism judg correct—Dulaney Inv Co v Wood, Civ App, 142 S W 2d 379, err dism judg correct

Wis.—Turk v H C Prange Co 119 N W 2d 365 18 Wis 2d 547

32 N.Y—Rosati v H W E, Inc 81 N Y S 2d 412

33 U.S—Myers v Kauffmann Department Stores, C C A Pa, 149 F 2d 968—Domany v Otis Elevator Co., C A Ohio, 369 F 2d 604 cert den 87 S Ct 2073, 387 U S 942, 18 L Ed 2d 1327

Cal Prof v Sears, Roebuck & Co, 318 P 2d 19, 155 C A 2d 439

Evidence held insufficient for jury

U S—Blue v Pennsylvania R Co, C A N Y 301 F 2d 450

§ 804. Instructions

Library References

Carriers ⇐348.

34 Ga.—Atlantic Coast Line R Co v Thomas, 64 S E 2d 301, 83 Ga App 477

Evidence held sufficient to warrant instruction

(1) Cal—Wilson v City and County of San Francisco, 344 P 2d 828, 174 C A 2d 273—Von Roux v Parking Square Garage Corp, 11 Cal Rptr 656, 189 C A 2d 626

Ky—Fisher v. Whitaker, 260 S W 2d 651

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36 Cal.—Combs v Los Angeles Ry Corp, supra, n 8—Williams v Pacific Greyhound Lines, 209 P 2d 146, 93 Cal App 2d 484—Wilson v City and County of San Francisco, 344 P 2d 828, 174 C A 2d 273.

Ohio Fa[illegible]s v Ohio Greyhound, 92 N E 2d 386, 153 Ohio St. 435.

Wash—J[illegible]ry v Co[illegible]l Pac Lines, Inc, 364 P 2d 793, 58 Wash 2d 702.

37. Cal—Mc[illegible]ck v Market St Ry Co, App 74 P 2d 328, subs. op 81 P 2d 950, 11 Cal 2d 724, 118 A L R 533

Conn—Dokus v Palmer, 33 A 2d 315, 130 Conn 247

Phrase "in any degree" or phrase "in the slightest degree" when used in [illegible] with respect to contr[illegible]y [illegible] held error

Ohio [illegible] v. F[illegible]gh & L E R Co, 217 N E 2d 217, 6 Ohio St 2d 192, overruling Bradley v Mansfield Rapid Transit, 93 N E 2d 672, 154 Ohio St 154.

38 N H—Allen v State, 260 A 2d 454, 110 N H 42

40 D C—Sullivan v Yellow Cab Co., App, 212 A 2d 616

W Va.—Ingan v Jenkins, 59 S E 2d 689, 134 W Va 400

Wis J[illegible]t v. Mil[illegible]e & Suburban Transport Corp, 165 N W 2d 162, 41 Wis 2d 661.

Escalator

Cal [illegible]v[illegible] v Sears, Ro[illegible]k & Co, 318 P 2d 19, 155 C A 2d 439

Boarding moving train

N Y—Triola v Long Island R Co 169 N Y S 2d 79 5 A D 2d 691

41 Cal—Nance v Fresno City Lines, 113 P 2d 244, 44 Cal App 2d 868—Middlet[illegible] v California St Cable Ry Co 167 P 2d 239 73 Cal App 2d 641—Wilson v City and County of San Francisco, 344 P 2d 828, 174 C A 2d 273

Ky—Southeastern Greyhound Lines, Inc v Chumley, 226 S W 2d 777 312 Ky 154—Fitzwater v Cincinnati, N & C R Co 234 S W 2d 186, 314 Ky 157—Cincinnati, Newport & Covington Transp Co v Fischer, 357 S W 2d 870

N H—Mullins v Boston & Maine Transp Co 20 A 2d 636, 91 N H 402

Wash—Jablinsky v Continental Pac Lines, Inc 364 P 2d 793, 58 Wash 2d 702

Duty to caution driver

(2) Other instructions

Ga—Pope v Associated Cab Co, 83 S E 2d 310, 90 Ga App 560

Leaving seat

(3) Other instances—Basham v City Bus Co, C A Okl, 219 F 2d 547, 52 A L R 2d 582

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42 Cal—Burge v Los Angeles Transit Lines, 217 P 2d 752, 96 Cal App 2d 292

Conn—Jacobs v. Connecticut Co 82 A 2d 151 138 Conn 80

Fla—Thomas v Miami Transit Co, 100 So 2d 620

Ga—Beardsley v Suburban Coach Co, 63 S E 2d 911 83 Ga App 381

Hawaii—Grace v. Kumalae, 386 P 2d 872, 47 Haw 281

Mo—Mallett v St Louis Public Service Co, 308 S W 2d 720

N J—Karmazin v Pennsylvania R Co 196 A 2d 803, 82 N J Super. 123, reh den 198 A 2d 97, 82 N J Super 435

N Y—Meagher v. Long Island R Co 261 N E 2d 384, 27 N Y 2d 39 313 N Y S 2d 378

Closing taxicab door on thumb

Ohio—Fiorelli v Yellow Cab Co of Cleveland, Inc App, 190 N E 2d 58

43 U S—Richards v New York, N H & H R Co, C A N Y 250 F 2d 609

N Y—Triola v Long Island R Co 169 N Y S 2d 79, 5 A D 2d 691—Meagher v Long Island R Co, 261 N E 2d 384 27 N Y 2d 39, 313 N Y S 2d 378

44 U S—Town House, Inc v Paulmo, C A Guam, 381 F 2d 811

Cal—Longway V McCall, 5 Cal Rptr 818, 181 C A 2d 723

Okl—Seay v General Elevator Co, 522 P 2d 1022

45 Cal—Burge v Los Angeles Transit Lines, supra, n 42—Wilson v City and County of San Francisco, 344 P 2d 828, 174 C A 2d 273

Ga—Atlantic Coast Line R Co v Thomas, supra, n 34

Mo—Pichler v Kansas City Public Service Co, 226 S W 2d 681, 360 Mo 12

Ohio Bchaa v Cincinnati St Ry Co, 69 N E 2d 160, 78 Ohio App 129

Charge held sufficient

(2) Other charges

Mo—Young v Kansas City Public Service Co, 270 S W 2d 788

46 Ky—Louisville Taxicab & Transfer Co v Barr, 209 S W 2d 719, 307 Ky 28

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47 Ga—Atlantic Coast Line R Co v Green, 106 S E 2d 814, 98 Ga App 704

O[illegible]y v M[illegible]d Rapid Transit, supra, n. 37—Fiorelli v Yellow Cab Co of Cleveland, Inc, App., 190 N E 2d 58

Construction and propriety of instructions as to proximate cause generally

Mo—Young v Kansas City Public Service Co, supra, n 45

49 Mo—Roach v Kansas City Public Service Co, 141 S W 2d 800

Instructions held erroneous or properly refused

Cal—Brandelius v City and County of San Francisco, 306 P 2d 432, 47 C 2d 729

50. Sufficiency of evidence to warrant instruction

U S—Greyhound Corp v Blakley C A Wash 262 F 2d 401

51 Ala—Louisville & N R Co v Richard, 14 So 2d 561, 31 Ala App 197 cert den 14 So 2d 564 244 Ala 595

Iowa—Morse v Century Cab Co 297 N W 877 230 Iowa 443 134 A L R 635

Mo—Clark v Linwood Hotel, Inc, 291 S W 2d 102, 365 Mo 982

Instructions as plaintiff's negligence being sole proximate cause held proper

Ala—Holmes v Birmingham Transit Co, 116 So 2d 912, 270 Ala 215

52 Ky—Dudley v Blue Ribbon Lines Corp 217 S W 2d 629 309 Ky 308—Cincinnati, Newport & Covington Transp Co v Fischer 357 S W 2d 870, overruling Dudley v Blue Ribbon Lines Corp, 217 S W 2d 629, 309 Ky 308

Ohio—Fries v Cincinnati St Ry Co 37 N E 2d 193, 138 Ohio St 537

53 Ill—Heiser v Chastain 285 N E 2d 601 6 Ill App 3d 552

Alighting passenger

(2) Evidence held improper as basis for instruction on contributory negligence

Cal—Bua v G I Taxi Co 9 Cal Rptr 118, 186 C A 2d 612

Instructions sufficiently supported by pleading and evidence

(1) Hodge v Birmingham Electric Co, 184 So 40, 236 Ala 586

N C—Harris v Atlantic Greyhound Corp, 90 S E 2d 710, 243 N C 346, 58 A L R 2d 939

Instructions held erroneous or properly refused

U S—Miscione v Pennsylvania R Co, C A N Y, 284 F 2d 428

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54. Assumption of risk

(2) Other matters

Ga—Bibb Transit Co v Scott, 114 S E 2d 43, 101 Ga App 352

55 Ala—Capitol Motor Lines v Pilmgeier supra, n 3

Ga—Johnson v Robeson, 77 S E 2d 232, 88 Ga App 548

58 Cal—Combs v Los Angeles Ry Corp supra, n 8

Mo—Jarboe v Kansas City Public Service Co, 220 S W 2d 27, 359 Mo 8

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62 U S—Moreau v Pennsylvania R Co, C C A Pa, 166 F 2d 543

§ 805. Verdict and Findings

Library References

Carriers ⇐349.

64 La—Jakubec v Southern Bus Lines, App, 31 So 2d 282

Construction

U S—Zatma v Greyhound Lines, Inc, C A N D, 442 F 2d 238

Ind.—Chicago South Shore & South Bend R R v Brown, 320 N E 2d 809, 162 Ind App 493, reh den 323 N E 2d 681, 162 Ind App. 493

67 Kan—Franklin v Kansas City Public Service Co 265 P 2d 1031 175 Kan 626

69 Tex—Graham v Dallas Railway & Terminal Co Civ App 165 S W 2d 1002, err ref

Findings inconsistent

Kan—King v Vets Cab, Inc 295 P 2d 605 179 Kan 379 56 A L R 2d 1249

Tex—Del Bosque v Heitmann Bering-Cortes Co, 474 S W 2d 450—Del Bosque v Heitmann Bering-Cortes Co, Civ App 468 S W 2d 522, affd 474 S W 2d 450

Findings not inconsistent

(3) Other findings

Tex Bradford v Fort Worth Transit Co Civ App, 450 S W 2d 919 err ref no rev err

72 Pa—Brown v Ambridge Yellow Cab Co, 97 A 2d 377, 374 Pa 208.

§ 806. Right to Eject and Grounds Therefor in General

Library References

Carriers ⇐350 et seq.

73 Ark—Arkansas Motor Carriers v Whitlock, 136 S W 2d 184, 199 Ark 820

DC Matthews v Southern Ry System, 157 F 2d 609 81 US App D C 263

Md—Dennis v Baltimore Transit Co 56 A 2d 813, 189 Md 610

Tenn—Johnson City Transit Co v Hall, 152 S W 2d 251 25 Tenn App 109

§ 808. Persons Objectionable as Passengers

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74 Md—Dennis v Baltimore Transit Co supra, n 73

Mich—Hartough v Safeway Lines, 285 N W 561 288 Mich 471, mod 288 N W 307, 288 Mich 703

Mo—White v Thompson App, 176 S W 2d 53

NJ—Spalt v Eaton, 192 A 576, 118 N J Law 327, affd 196 A 736, 119 N J Law 343

Assistance of other passengers

NJ—Spalt v Eaton, supra

Passenger ejected need not be formally tried and found guilty

Ohio—Bradbury v New York Cent R Co App, 180 N E 2d 839

75 NJ—Spalt v Eaton, supra, n 74

76 NJ—Spalt v Eaton, supra, n 74

77 Ill—C.J.S. cited in Powell v Ferrandez, 59 N E 2d 342, 345, 324 Ill App. 597

78 Md—Dennis v Baltimore Transit Co supra, n 73

81 La—Betz v Teche Lines, App, 7 So 2d 656

Mo—White v Thompson, supra, n 74

NJ—Spalt v Eaton, supra, n 74

W Va—C.J.S. cited in Billy v Powell, 55 S E 2d 889 895, 133 W Va 278

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85 NJ—Spalt v Eaton, supra, n 74

86 Md—Dennis v Baltimore Transit Co, supra, n 73

Statute construed

Ky—Louisville Taxicab & Transfer Co v Jackson, 251 S W 2d 874, 35 A L R 2d 783

88 US—Williams v Carolina Coach Co D C Va 111 F Supp 329 affd C A 207 F 2d 408

§ 810. Failure or Refusal to Pay Fare or Product Ticket

page 1611

93 Ga—Daugrepont v Teche Greyhound Lines, 7 S E 2d 174, 189 Ga 601 127 A L R 217

Ill—People v Ibom, 185 N E 2d 690, 25 Ill 2d 585

N Y—Van Damm v Long Island R Co, 52 N Y S 2d 218 183 Misc 814

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8 Ohio—George v Youngstown Municipal Ry Co App, 76 N E 2d 916

Right to question age of child

US—Flores v Pan Am World Airways, D C Puerto Rico, 259 F Supp 402

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23 Mo—White v Thompson, App, 176 S W 2d 53

§ 812. —— Tender or Payment to Avoid Ejection

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65 Ga—Daugrepont v Teche Greyhound Lines, 7 S E 2d 174, 189 Ga 601 127 A L R 217

71 Wash—Fleming v City of Seattle, 275 P 2d 904, 45 Wash 2d 477

§ 813. Defective or Invalid Ticket

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81. N Y—Van Damm v Long Island R Co 52 N Y S 2d 218, 183 Misc 814

§ 819. Failure or Refusal to Comply with Regulations

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67 Tenn—Johnson City Transit Co v Hall, 152 S W 2d 251 25 Tenn App 109

69 Tenn—Johnson City Transit Co v Hall, supra, n 67

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80 US—Williams v Carolina Coach Co D C Va, 111 F Supp 329 affd, C A, 207 F 2d 408—Carolina Coach Co v Williams, C A Va 207 F 2d 408

§ 820. What Constitutes Ejection

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90 Va—Houston v Strickland, 37 S E 2d 64, 184 Va 994, 165 A L R 537

91 Ky—Louisville & N R Co v Thomas, 183 S W 2d 19 298 Ky 494

N M—Manning v Atchison, T & S F Ry Co, 79 P 2d 922, 42 N M 381

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3 D C—Kinchlow v Peoples Rapid Transit Co 88 F 2d 764, 66 App D C 382, cert den 57 S Ct 926, 301 U S 693, 1 L Ed 1349

Ohio—Darden v Louisville & N R Co, 167 N E 2d 765 171 Ohio St 63

Where a colored passenger, etc.

D C—Kinchlow v Peoples Rapid Transit Co supra

§ 821. Place or Time of Ejection

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10 US—Bartley v Cincinnati, N O & T P Ry Co, D C Ky 67 F Supp 991

13 Va—Houston v Strickland, 37 S E 2d 64, 184 Va 994 165 A L R 537

17. What constitutes

(3) A "usual stopping place" is synonymous with "station" as used in Iowa statute, I C A § 477 57—Hotzel v Simmons, 45 N W 2d 683, 258 Wis 234

Discretion

Wis—Hotzel v Simmons, supra

§ 822. Manner of Ejection

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28 N J—Spalt v Eaton 192 A 576, 118 N J Law 327 affd 196 A 736 119 N J Law 343

Welfare of other passengers, etc.

N J—Spalt v Eaton supra

31 Va—Houston v Strickland, supra, n 13

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35 Tex—Dallas Ry & Terminal Co v Tucker, Civ App 280 S W 2d 600

39 US—Livingston v Seaboard Air Line R Co, D C S C 106 F Supp 886

41 US—Bartley v Cincinnati, N O & T P Ry Co supra, n 10

Va—Houston v Strickland, supra, n 13

42 US—Bartley v Cincinnati, N O & T P Ry Co, supra, n 10

§ 823. —— From Moving Train or Car

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62 Pa—McCray v Pittsburgh Rys Co., 200 A 717, 132 Pa Super 386

§ 824. —— Use of Force and Resistance

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72 Ill People v Ibom, 185 N E 2d 690 25 Ill 2d 585

Mo—White v Thompson, App 176 S W 2d 53

W Va—Billy v Powell, 55 S E 2d 889 133 W Va 278

73 Mo—White v Thompson, supra, n 72

W Va—Billy v Powell, supra, n 72

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77 Mich—Hartough v Safeway Lines, 285 N W 561 288 Mich 471, mod 288 N W 307 288 Mich 703

81 Ala—C.J.S. cited in Birmingham Electric Co v Bailey 15 So 2d 465, 467, 31 Ala App 275, cert den 15 So 2d 469 244 Ala 671

84 Mo—C.J.S. cited in White v Thompson, App 176 S W 2d 53 56

Ohio—Bradbury v New York Cent R Co App, 180 N E 2d 839

86 Md—Dennis v Baltimore Transit Co, 57 A 2d 813 189 Md 610

87 Ky—Hardrick v Southeastern Greyhound Lines, 208 S W 2d 733, 306 Ky 579

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97 La—Betz v Teche Lines, App 7 So 2d 656

§ 828. Liability for Wrongful Election

Library References

Carriers ⇐350.

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38 US—Williams v Carolina Coach Co D C Va, 111 F Supp 329 affd C A 207 F 2d 408

D C—Matthews v Southern Ry System, 157 F 2d 609, 81 US App D C 263

N M Manning v Atchison, T & S F Ry Co 79 P 2d 922, 42 N M 381

42 Md—Dennis v Baltimore Transit Co 56 A 2d 813 189 Md 610

43 Md—Dennis v Baltimore Transit Co supra, n 42

47 N M—Manning v Atchison, T & S F Ry Co supra, n 38

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64 DC—Matthews v Southern Ry System, supra, n 38

§ 831. Defenses

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The availability of other defenses has been adjudicated.[12.5]

12.5. Misapprehension as to conduct no defense

DC—Safeway Trails, Inc v Schmidt, App 225 A 2d 317

§ 834. —— Nature and Form

page 1650

37 Idaho—Clark v Tarr, 270 P 2d 1016, 75 Idaho 251

Ky—Southeastern Greyhound Lines v Conklin 196 S W 2d 961 303 Ky 87

§ 835. —— Jurisdiction and Venue

41 Ky—Southeastern Greyhound Lines v Conklin, supra, n 37

§ 836. —— Time to Sue and Limitations

Application of specific statutes of limitations has been considered

Statutes held inapplicable

Ark—St Louis, I M & S R Co v Mynott, 102 S W 380, 83 Ark 6

§ 837. —— Pleading

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42. Allegations held insufficient

Ga—Dupont v Teche Greyhound Lines, 7 S E 2d 174, 189 Ga 601 127 A L R 217

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66. Allegations held sufficient

Ala.—Birmingham Electric Co v Bailey 15 So 2d 469 244 Ala 671

§ 838. —— Presumptions and Burden of Proof

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29 Wis Hetzel v [illegible] 45 N W 2d 683 258 Wis 234

32 Ala Birmingham Electric Co v Bailey 15 So 2d 465, 31 Ala App. 275 cert den 15 So 2d 469, 244 Ala 671

§ 839. —— Admissibility of Evidence

37 Ga—McNatt v Greyhound Corp 137 S E 2d 740, 110 Ga App 30

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Ky—Lousville & N R Co v Thomas, 183 S W 2d 19, 298 Ky 494

38 Ky.—Lousville & N R Co v Thomas, supra, n 37—Southeastern Greyhound Lines v Conklin, 196 S.W 2d 961, 303 Ky 87

§ 840. —— Weight and Sufficiency of the Evidence

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76. Tenn.—Johnson City Transit Co v Hall, 152 S.W 2d 251, 25 Tenn App 109

Evidence held sufficient, etc.

Miss—Tri-State Transit Co of La v Worley 20 So 2d 477 197 Miss 663

Pa—McCray v Pittsburgh Rys Co 200 A 717 132 Pa Super 386

Evidence held insufficient, etc.

Tenn—Southeastern Greyhound Lines v Smith, 136 S W 2d 727 23 Tenn App 627

77. Evidence held sufficient

(1) Johnson City Transit Co v Hall supra, n 76

(3) Ohio—Bradbury v New York Cent R Co App 180 N E 2d 839

78 US—Bartley v Cincinnati N O & T P Ry Co D C Ky 67 F Supp 991

Evidence held sufficient

(7) W Va—Billy v Powell 55 S E 2d 889 133 W Va 278

(8) To show other matters—Houston v Strickland, 37 S E 2d 64 184 Va 994 165 A L R 537

Wis—Hotzel v Simmons, supra

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82 Ky—Cincinnati, N O & T P Ry Co v Jones, 148 S W 2d 725 285 Ky 588

§ 842. —— Questions of Law and Fact

page 1661

88 Tenn—Southeastern Greyhound Lines v Smith, supra, n 76

90 Ark—Arkansas Motor Coaches v Whitlock, 136 S W 2d 184 199 Ark 820

Tenn—Southeastern Greyhound Lines v Smith, supra, n 76

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91 Ky—Southeastern Greyhound Lines v Conklin, supra, n 38

Va—Houston v Strickland, supra, n 78

92 Mo—Geers v St Louis Public Service Co App 247 S W 2d 318

93 Evidence held insufficient for submission to jury

Ga—Garrett v Lousville & N R Co, 72 S E 2d 550, 86 Ga App 806

10 Ky—Cincinnati, N O & T P Ry Co v Jones, 148 S W 2d 725 285 Ky 588

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24 Ala—Birmingham Electric Co v Bailey 15 So 2d 465, 31 Ala App 275, cert den 15 So 2d 469 244 Ala 671

W Va—Billy v Powell, 55 S E 2d 889, 133 W Va 278

28. Proximate cause of injury

Ill—McSee v Chicago Motor Coach Co 96 N E 2d 381, 342 Ill App 238.

29 Ala—Birmingham Electric Co v Bailey, supra, n 24

§ 843. —— Instructions

31 Ky—Southeastern Greyhound Lines v Conklin, 196 S W 2d 961 303 Ky 87

Instructions held erroneous

Ky—Lousville & N R Co v Thomas, 183 S W 2d 19 298 Ky 494

Ohio—Bradbury v New York Cent R Co, App, 180 N E 2d 839

Instructions held proper

Mo—Geers v St Louis Public Service Co App, 247 S W 2d 318

Instructions held improperly refused

Ohio—Bradbury v New York Cent R Co, App, 180 N E 2d 839

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41 W Va—Billy v Powell, supra, n 24

42 Tenn—Southeastern Greyhound Lines v Smith, 136 S W 2d 727 23 Tenn App 627

43 Ark—Arkansas Motor Coaches v Whitlock, 136 S W 2d 184, 199 Ark 820

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55. Instructions held proper

(1) Atlantic Greyhound Lines v Lovett, 184 So 133, 134 Fla 505

56 Instructions held erroneous

(1) Matthews v Southern Ry System, 157 F 2d 609, 81 U S App D C 263

60 W Va—Billy v Powell, supra, n 24

Instruction held proper

Miss—Tri-State Transit Co of La v Worley, 20 So 2d 477 197 Miss 663

§ 846. Damages

Library References

Carriers ⇐375.

Corbin on Contracts § 1019.

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71 N D—Safeway Trails, Inc v Schmidt, App, 225 A 2d 317

Md—Dennis v Baltimore Transit Co, 56 A 2d 813, 189 Md 610

Va—Houston v Strickland, 37 S E 2d 64 184 Va 994, 165 A L R 537

72 U S—Williams v Carolina Coach Co D C Va 111 F Supp 329 affd, C A, 207 F 2d 408

Ky—Cincinnati, N O & T P R Co v Roberts, 148 S W 2d 728 395 Ky 593

Tenn—Johnson City Transit Co v Hull 152 S W 2d 251 25 Tenn App 109

§ 847. —— Nominal or Substantial Damages

Library References

Carriers ⇐391 et seq.

73 Tenn—Johnson City Transit Co v Hall, supra, n 72

§ 848. —— Expense; Loss of Time; Inconvenience

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86 Ky—Cincinnati, N O & T P Ry Co v Jones, 148 S W 2d 725, 285 Ky 588—Lousville & N R Co v Thomas, supra, n 31

§ 849. —— Physical Injuries

page 1668

2 Mo—White v Thompson, App 176 S W 2d 53

Tenn—Johnson City Transit Co v Hall, 152 S W 2d 251, 25 Tenn App 109

§ 850. —— Humiliation and Mental Suffering

5 Ky—Lousville & N R Co v Thomas, 183 S W 2d 19, 298 Ky 494

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10 Ky—Cincinnati, N O & T P R Co v Roberts, 148 S W 2d 728, 385 Ky 593

16 Ark—Arkansas Motor Coaches v Whitlock, 136 S W 2d 184 199 Ark 820

§ 851. —— Proximate and Remote Damages

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24. Ga—Daugrepont v Teche Greyhound Lines, 7 S E 2d 174, 189 Ga 601, 127 A L R 217

32 Ark—Arkansas Motor Coaches v Whitlock, supra, n 16

§ 853. —— Exemplary Damages

page 1671

52 Ala—Birmingham Electric Co v Bailey 15 So 2d 465 31 Ala App 275 cert den 15 So 2d 469 244 Ala 671

Md—Dennis v Baltimore Transit Co 56 A 2d 813 189 Md 610

Mo—Geers v St Louis Public Service Co App 247 S W 2d 318

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53 DC—Safeway Trails, Inc v Schmidt App 225 A 2d 317

57 Tenn—Johnson City Transit Co v Hall, supra, n 2

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65 US—Williams v Carolina Coach Co, D C Va 111 F Supp 329 affd C A, 207 F 2d 408

§ 854. —— Inadequate or Excessive Damages

70 N Y—C.J.S. cited in Goines v Penn R R 143 N Y S 2d 576, 588, 208 Misc 103, revd on oth grds 160 N Y S 2d 39 3 A D 2d 307, rearg den 166 N Y S 2d 303, 4 A D 2d 831

72 Ky—Louisville & N R Co v Thomas, supra, n 5

Damages held not excessive

(13) Tri-State Transit Co of La v Worley, 20 So 2d 477 197 Miss 663

Mo—Geers v St Louis Public Service Co, App. 247 S W 2d 318

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73. Damages held excessive

(9) Southeastern Greyhound Lines v Conklin, 196 S W 2d 961 303 Ky 87

Cl. Shadbury v New York Cent R Co App, 180 N E 2d 839

74 Tenn—Johnson City Transit Co v Hall, supra, n 2

§ 855. What Constitutes Baggage

76 Ill—Lang v Illinois Greyhound Lines, 28 N E 2d 345 306 Ill App 269

N Y—Cohen v Varig Airlines, S A Empresa de Viacao Aerea Rio Grandense, 380 N Y S 2d 450, 85 Misc 2d 653, mod on oth grds 390 N Y S 2d 515, 88 Misc 2d 998 mod on oth. grds 405 N Y S 2d 44, 62 A D 2d 324

Tenn—Ward v Gulf, M & N R Co, 134 S W 2d 917, 23 Tenn App 533

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80 Tenn—Ward v Gulf, M & N R Co, supra, n. 76

§ 858. —— Jewelry and Similar Articles

page 1677

7 US—S Nathan & Co v Red Cab, C C A Ind, 118 F 2d 864, cert den 62 S Ct 82, 314 U S 642, 86 L Ed 515—St Paul Fire & Marine Ins Co v Chicago Union Station Co C A Ill 253 F 2d 441 cert den 79 S Ct 49, 358 U S 830, 3 L Ed 2d 68

Ga—G C G Jewelry Mfg Corp v Atlanta Baggage & Cab Co 136 S E 2d 419, 109 Ga App 469

§ 859. —— Money

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15 N C—Clott v Greyhound Lines, Inc., 180 S E 2d 102, 278 N C 378

18 US—S Nathan & Co v Red Cab, supra, n 7

§ 861. —— Merchandise Other than Personal Effects

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53 Ill—Lang v Illinois Greyhound Lines, 28 N E 2d 345 306 Ill App 269

54 Ga—G C G Jewelry Mfg Corp v Atlanta Baggage & Cab Co 136 S E 2d 419 109 Ga App 469

57 N C—Neece v Richmond Greyhound Lines, Inc 99 S E 2d 756, 246 N C 547 68 A L R 2d 1341

59 Ga—G C G Jewelry Mfg Corp v Atlanta Baggage & Cab Co 136 S E 2d 419, 109 Ga App 469

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67 Ga—C.J.S. cited in G C G Jewelry Mfg Corp v Atlanta Baggage & Cab Co 136 S E 2d 419 424 109 Ga App 469

70. Acceptance by agent with knowledge of nature of articles

(2) Other matters

Ga—G C G Jewelry Mfg Corp v Atlanta Baggage & Cab Co 136 S E 2d 419 109 Ga App 469

§ 862. Duty of Carrier to Receive and Transport Baggage

Library References

Carriers ⇐387 et seq

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85 Ark—Strickland v Missouri Pac Transp Co, 115 S W 2d 830, 195 Ark 950

Tex—Airline Motor Coaches v Caver, 226 S W 2d 830, 148 Tex 521

87 Ga—C.J.S. cited in Nashville, C & St L Ry v Ham, 50 S E 2d 831 837 78 Ga App 403

N Y—Cohen v Varig Airlines, S A Empresa de Viacao Aerea Rio Grandense, 380 N Y S 2d 450, 85 Misc 2d 653, mod on oth grds 390 N Y S 2d 515, 88 Misc 2d 998, mod on oth grds 405 N Y S 2d 44 62 A D 2d 324

N C—C.J.S. cited in Neece v Richmond Greyhound Lines, Inc 99 S E 2d 756, 762, 246 N C 547 68 A L R 2d 1341

90. Interstate Commerce Act

Ga—Argo v Southeastern Greyhound Lines, 33 S E 2d 730, 72 Ga App 309

91 Ga—Nashville, C & St L Ry v Ham, 50 S E 2d 831, 78 Ga App 403

95 N C—Clott v Greyhound Lines, Inc 180 S E 2d 102, 278 N C 378

§ 863. —— Checking Baggage

Library References

Modern Legal Forms Ch. 12, Automobiles; Ch. 13, Aviation.

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5 Tex—Airline Motor Coaches v Caver Civ App, 222 S W 2d 286, revd on oth grds, 226 S W 2d 830, 148 Tex 521

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12. Federal regulations controlling

N Y—Sambur v Short Line System of Hudson Transit Lines, 112 N Y S 2d 514 201 Misc 595, affd 116 N Y S 2d 500, 280 App Div 983

17 Ga—Nashville, C & St L Ry v Ham, 50 S E 2d 831, 78 Ga App 403

§ 865. Excess Baggage and Special Contracts

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37 Iowa—Kiernan v Greyhound Lines, Inc 156 N W 2d 310, 261 Iowa 788

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40 N C—Neece v Richmond Greyhound Lines, Inc 99 S E 2d 756, 246 N C 547, 68 A L R 2d 1341

41. Construction and effect of special baggage car contract

Tenn—Ward v Gulf, M & N R Co 134 S W 2d 917, 23 Tenn App 533

48 Iowa—Kiernan v Greyhound Lines, Inc, 156 N W 2d 310, 261 Iowa 788

§ 866. Checks and Receipts

Library References

Modern Legal Forms Ch. 12, Automobiles; Ch. 13, Aviation.

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55 N Y—Sayles v Interstate Busses Corp 66 N Y S 2d 377 187 Misc 286—Cohen v Varig Airlines, S A Empresa de Viacao Aerea Rio Grandense, 380 N Y S 2d 450, 85 Misc 2d 653, mod on oth grds, 390 N Y S 2d 515 88 Misc 2d 998, mod on oth grds 405 N Y S 2d 44, 62 A D 2d 324

§ 867. In General

Library References

Carriers ⇐397 et seq

59 Ala—C.J.S. cited in Birmingham Terminal Co v Wilson, 31 So 2d 563, 565 249 Ala 397

Ark—Strickland v Missouri Pac Transp Co, 115 S W 2d 830, 195 Ark 950

Iowa—Murphy v Southern Iowa Route, 14 N W 2d 282, 234 Iowa 772, 152 A L R 1156

As bailee where no check given

N Y—Sayles v Interstate Busses Corp 66 N Y S 2d 377, 187 Misc 286

Warsaw convention

N Y—Schedlmayer v Trans Intern Airlines, 416 N Y S 2d 461, 99 Misc 2d 478

60 Tex—Frontier Theatres Inc v Brown, Civ App, 362 S W 2d 360, revd on oth grds, Sup, 369 S W 2d 299

Not responsible for acts of independent contractor

Ga—Aetna Cas & Sur Co v Yellow Cab Co, 256 S E 2d 117, 149 Ga App 754

61 US—Greene v New York Cent R Co, D C Mich 105 F Supp 944 affd, C A 209 F 2d 348

Ark—Strickland v Missouri Pac Transp Co, supra, n 59

Ohio—Royalty v Southeastern Greyhound Lines, 62 N E 2d 200, 75 Ohio App 322

Contract for carriage and tariff as determinative of liability

N Y—Beaumont v Pennsylvania R Co, 131 N Y S 2d 652, 284 App Div 354, affd 127 N E 2d 80, 308 N Y 920, cert den 76 S Ct 75 350 U S 838, 100 L Ed 747

Gross negligence

N Y—Margolis v Greyhound, 335 N Y S 2d 899, 71 Misc 2d 277

62 US—J & H Flyer Inc v Pennsylvania R Co, C A N Y, 316 F 2d 203

Ark—National Fire Ins Co v Yellow Cab Co 171 S W 2d 927 205 Ark 953

Fla—Chafin v Atlantic Coast Line R Co 58 So 2d 185 32 A L R 2d 625—Rudesill v Taxicabs of Tampa, Inc App 147 So 2d 180

Ga—Nashville, C & St L Ry v Ham, supra, n 17

Ill—Bass v Chicago, Duluth & Georgian Bay Transit Co 89 N E 2d 430, 339 Ill App 246

Mass—Clark v Checker Taxi Co 110 N E 2d 849, 330 Mass 20

N Y—Greenberg v United Airlines, Inc 414 N Y S 2d 240, 98 Misc 2d 544

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68 N Y—Rowman v Greenberg Lakewood & Mountain Line, 119 N Y S 2d 789 203 Misc 776

70. Liability of carrier as extending to redcaps generally

U S—J & H Flyer Inc v Pennsylvania R Co C A N Y 316 F 2d 203

71 N Y—Mays v New York N H & H R Co 97 N Y S 2d 909 197 Misc 1062

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Other matters relating to the transportation of animals as baggage have been adjudicated [7] 5

73.5. Liability for employee's acts

(1) Clerk held to act in scope of employment

U S—Mitchell v Union Pac R Co D C Cal 188 F Supp 869

(2) Carrier held liable for clerk's fraud causing animal's death

U S—Mitchell v Union Pac R Co D C Cal 188 F Supp 869

80 Ala—Kellett v Alaga Coach Lines, 37 So 2d 137 34 Ala App 152

Ill—Steindl v New York Cent R Co 15 N E 2d 899 296 Ill App 70

N C—Neece v Richmond Greyhound Lines, Inc 99 S E 2d 756, 246 N C 547 68 A L R 2d 1341

Tex—Continental Bus System v Ansel, Civ App 253 S W 2d 959

State courts bound by tariffs filed with Interstate Commerce Commission

Conn—Zedenberg v Greyhound Lines, Inc 209 A 2d 697, 3 Conn Cir 176

§ 869. Where Passenger Retains Custody of His Baggage

page 1692

85 Ala—C J S. cited in Birmingham Terminal Co v Wilson, supra, n 59

87 U S—Greene v New York Cent R Co, supra, n 61

Ala—Southeastern Greyhound Lines v Berne, 13 So 2d 696, 31 Ala App 178

Fla—C J S. cited in Chafin v Atlantic Coast Line R Co, 58 So 2d 185 186, 32 A L R 2d 625

Ga—Daugrepont v Teche Greyhound Lines 7 S E 2d 174, 189 Ga 601, 127 A L R 217

Iowa—Murphy v South Iowa Route, supra, n 59

Mass—Clark v Checker Taxi Co, 110 N E 2d 849, 330 Mass 20

N Y—Mays v New York, N H & H R Co, supra, n 71

N C—Smith v Camel City Cab Co 42 S E 2d 657, 227 N C 572

Passenger expelled from train

Ohio—Bradbury v New York Cent R Co., App, 180 N E 2d 839

88 Fla—C J S. cited in Chafin v Atlantic Coast Line R Co., 58 So 2d 185, 187, 32 A L R 2d 625

89 U S—Greene v New York Cent R Co., supra, n 61

Fla—C J S. cited in Chafin v Atlantic Coast Line R Co 58 So 2d 185 186, 32 A L R 2d 625—Rudisill v Taxicabs of Tampa, Inc App, 147 So 2d 180

Mass—Lynch v Pennsylvania R Co 71 N E 2d 114 320 Mass 694

N C—Neece v Richmond Greyhound Lines, Inc, 99 S E 2d 756, 246 N C 547 68 A L R 2d 1341—Clott v Greyhound Line, Inc 180 S E 2d 102, 278 N C. 378

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4 Mass—C J S. cited in Clark v Checker Taxi Co 110 N E 2d 849, 850, 330 Mass 20

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5 Ark—C J S. cited in National Fire Ins Co v Yellow Cab Co 171 S W 2d 927 929 205 Ark 953

Mass—Clark v Checker Taxi Co 110 N E 2d 849 330 Mass 20

N C—Clott v Greyhound Lines, Inc 180 S E 2d 102, 278 N C 378

§ 870. Passenger Not Accompanying Bassage

9 N C—Clott v Greyhound Lines, Inc 180 S E 2d 102 278 N C 378

§ 872. Delay

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24. Refusal as constituting conversion

N Y—Cohen v Varig Airlines, S A Empresa de Viacao Aerea Rio Grandense, 380 N Y S 2d 450 85 Misc 2d 653 mod on oth grds 390 N Y S 2d 515, 88 Misc 2d 998 mod on oth grds 405 N Y S 2d 44 62 A D 2d 324

25 Ill—Steindl v New York Cent R Co, 15 N E 2d 899 296 Ill App 70—Pum v Pennsylvania R Co 187 N E 2d 288 38 Ill App 2d 326

§ 873. Contributory Negligence

32 N Y—Manns v Pine Hills Taxi Co 386 N Y S 2d 301 87 Misc 2d 680

Defense not available under circumstances

N C—Clott v Greyhound Lines, Inc 180 S E 2d 102, 278 N C 378

What law governs

N Y—Scheidmayer v Trans Intern Airlines, 416 N Y S 2d 461 99 Misc 2d 478

§ 874. Limitation of Liability

Library References

Carriers ⇐405.

36 Ark—Strickland v Missouri Pac, Transp Co 115 S W 2d 830, 195 Ark 950

Ga—G C G Jewelry Mfg Corp v Atlanta Baggage & Cab Co 136 S E 2d 419, 109 Ga App 469

37 **"Baggage" defined**

N Y—Beaumont v Pennsylvania R Co 131 N Y S 2d 652, 284 App Div 354 affd 127 N E 2d 80, 308 N Y 920 cert den 76 S Ct 75 350 U S 838 100 L Ed 747

38. **Compliance with statute**

U S—J & H Flyer Inc v Pennsylvania R Co, C A N Y, 316 F 2d 203

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39 Conn—Zedenberg v Greyhound Lines, Inc, 209 A 2d 697, 3 Conn Cir 176

40 Alaska—Odom v Pacific Northern Airlines, Inc 393 P 2d 112

41 N C—Neece v Richmond Greyhound Lines, Inc, 99 S E 2d 756, 246 N C 547, 68 A L R 2d 1341

Tex—Greyhound Corp v Stevens, Civ App, 413 S W 2d 439

42 Conn—Zedenberg v Greyhound Lines, Inc 209 A 2d 697 3 Conn Cir 176

N J—Silvers v Pennsylvania R Co 215 A 2d 556, 89 N J Super 475

N Y—Stolk v Compagnie Nationale Air France, 299 N Y S 2d 58, 58 Misc 2d 1008, affd 316 N Y S 2d 455, 64 Misc 2d 859—Margolis v Greyhound, 335 N Y S 2d 899 71 Misc 2d 277

Va—C J S. cited in Peninsula Transit Corporation v Jacoby 26 S E 2d 97, 100 181 Va 697

45 N Y—Margolis v Greyhound, 335 N Y S 2d 899, 71 Misc 2d 277

Va—Greyhound Lines, Inc v. Mah, 219 S E 2d 842

Extension to baggage carried on motor vehicles

Mont—Shirazi v Greyhound Corp 401 P 2d 559 145 Mont 421

46 N Y—Beaumont v Pennsylvania R Co supra, n 37

47 Ohio—C J S quoted in Patton v Pennsylvania Greyhound Lines, 60 N E 2d 945, 75 Ohio App 100

50 N Y—Hartzberg v New York Cent R Co 41 N Y S 2d 345 181 Misc 129 affd 51 N Y S 2d 741, 268 App Div 904 app den 52 N Y S 2d 580, 268 App Div 978 affd 65 N E 2d 337 295 N Y 703 cert den 66 S Ct 1121 328 U S 849 90 L Ed 1622

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55. **Held not baggage**

N Y—Boxbaum v Atlantic Coast Line R Co 71 N Y S 2d 511 272 App Div 496

Exculpatory provisions invalid

N H—Davis v Northeast Airlines, Inc 362 A 2d 208, 116 N H 429

§ 875. —— As to Amount or Value of Baggage

57 U S—Greene v New York Cent R Co D C Mich, 105 F Supp 944 affd, C A 209 F 2d 348

58 Ark—Missouri Pac Transp Co v Williams, 182 S W 2d 762, 207 Ark 750

Cal—Lovinger v Greyhound Lines, Inc, 132 Cal Rptr 914 62 C A 3d 240

Approval of Interstate Commerce Commission

N Y—Beaumont v Pennsylvania R Co, supra, n 37

59. **Passenger estopped to assert valuation greater than declared**

N Y—Beaumont v Pennsylvania R Co supra, n 37

60 U S—Randall v Frontier Airlines, Inc, D C Ark 397 F Supp 840

Tex—Greyhound Corp v Stevens, Civ App, 413 S W 2d 439

61 Tex—Greyhound Corp v Stevens, Civ App, 413 S W 2d 439

62 U S—Kirchoff v Southern Pac Co, D C Cal 68 F Supp 877—Chambers & Associates v Trans World Airlines, D C N Y, 533 F Supp 426

Fla—Fennell v Trailways, App, 169 So 2d 858

Regulation held invalid

S C—Kirby v Carolina Stages, 40 S E 2d 165, 209 S C. 326

The sufficiency of other acts of the carrier to render a limitation of liability as to value have been adjudicated. [6] 5

63.5. Fraud in inducing contract for shipping

U S—Mitchell v Union Pac R Co, D C Cal, 188 F Supp 869

Willful misconduct

U S—Mitchell v Union Pac R Co, D C Cal, 188 F Supp 869

Fla—Companhia De Aviacao Faucett S A v Mulford, App 386 So 2d 300

N Y—Cohen v Varig Airlines (S A Empresa de Viacao Aerea Grandense), 405 N Y S 2d 44 62 A D 2d 324

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67 Pa—Benscoter v Martz Coach Co, 32 Luz Leg Reg 49

72 Va—Peninsula Transit Corporation v Jacoby, 26 S E 2d 97 181 Va 697

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77 U S—New York, N H & H R Co v Nothnagle, Conn 73 S Ct 986, 346 U S 128, 97 L Ed 1500

Ala—C J S. cited in Birmingham Terminal Co v Wilson, 31 So 2d 563, 566, 249 Ala. 397—Kellett v Alaga Coach Lines, 37 So 2d 137, 34 Ala App 152

Conn—Zaborski v Greyhound Lines, Inc 209 A 2d 697 3 Conn Cir 176

DC—Pennsylvania Greyhound Lines v Wells, Mun App 41 A 2d 837

Ga—Nashville, C & St L Ry v Ham, 50 S E 2d 831 78 Ga App 403

NY—Hartzberg v New York Cent R Co supra, n 50—Sayles v Interstate Busses Corp, 66 N Y S 2d 377 187 Misc 286

Okl—Patton v Pennsylvania Greyhound Lines, supra, n 47—Royalty v Southeastern Greyhound Lines, 62 N E 2d 200, 75 Ohio App 322

Okl—All Am Bus Lines v Schuster 189 P 2d 412, 199 Okl 628—Wilkes v Braniff Airways, 288 P 2d 377

Tex—Continental Bus System v Ansel, Civ App 253 S W 2d 959

Terminal association, as agent of railroad company, etc.

Mo—Treadway v Terminal R R Ass'n of St Louis, 136 S W 2d 401 235 Mo App 494

80 US—New York, N H & H R Co v Nothnagle, Conn 73 S Ct 986, 346 US 128, 97 L Ed 1500

NY—Sayles v Interstate Busses Corp supra, n 77

Held not "free baggage"

Iowa—Kiernan v Greyhound Lines, Inc 156 N W 2d 310, 261 Iowa 788

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83 No waiver by acceptance in violation of tariff of other baggage not lost

Mont—Shurazi v Greyhound Corp, 401 P 2d 559, 145 Mont 421

No waiver by acceptance of overweight baggage

Iowa—Kiernan v Greyhound Lines, Inc, 156 N W 2d 310, 261 Iowa 788

Limitations in special baggage car contracts may be waived by deviation.[86.1]

86.1 Tenn—Ward v Gulf, M & N R Co 134 S W 2d 917, 23 Tenn App 533

Waiver by deviation in carriage of goods generally see supra § 116

§ 876. —— As to Character of Liability

90 Nev—Las Vegas-Tonopah-Reno Stage Line, Inc v Burleson, 320 P 2d 1104, 74 Nev 24

91 NY—Cohen v Varig Airlines, S A Empresa de Viacao Aerea Rio Grandense, 380 N Y S 2d 450, 85 Misc 2d 653, mod on oth grds 390 N Y S 2d 515 88 Misc 2d 998, mod on oth grds 405 N Y S 2d 44, 62 A D 2d 324

Superseded provisions

Va—Peninsula Transit Corporation v Jacoby supra, n 72

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93 US—Kirchoff v Southern Pac Co, supra, n 62

Cal—Muckler v Western Greyhound Lines, 87 Cal Rptr 297, 8 C A 3d 319

Iowa—Murphy v Southern Iowa Route, 14 N W 2d 282, 234 Iowa 772, 152 A L R 1156

NY—Sayles v Interstate Busses Corp supra, n 77

Okl—Santa Fe Trail Transp Co v Newlon, 159 P 2d 713, 195 Okl 542

Hand baggage carried by porter

US—New York, N H & H R Co v Nothnagle supra, n 80.

Misdelivery

(1) Benefit of limitation not lost by mere negligence or mistake

US Fire Ins Co v United Airlines, Inc., D C N Y, 184 F Supp 814.

(2) Limitation not avoided by charging misdelivery as conversion

US Fire Ins Co v United Airlines, Inc, D C N Y, 184 F Supp 814

99 US—Kirchoff v Southern Pac Co supra, n 62

Ark—Missouri Pac Transp Co v Ellis, 198 S W 2d 196, 210 Ark 958

Va—Peninsula Transit Corporation v Jacoby supra, n 72

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3 N Y—McCloy v Pennsylvania R Co, 45 N Y S 2d 323 267 App Div 179, app den 47 N Y S 2d 303, 267 App Div 868

§ 877. —— Necessity of Special Contract or Notice to Passenger

8 NY—Levett v Draper 178 N Y S 670, 108 Misc 621 affd 185 N Y S 891, 194 App Div 632—Rosenquist v Atlantic Coast Line R Co 71 N Y S 2d 511 272 App Div 496—Stolk v Compagnie Nationale Air France, 299 N Y S 2d 58, 58 Misc 2d 1008, affd 316 N Y S 2d 455 64 Misc 2d 859

Okl—All Am Bus Lines v Schuster 189 P 2d 412, 199 Okl 628

Utah—Allen v Southern Pac Co, 213 P 2d 667 117 Utah 171

Va—Peninsula Transit Corporation v Jacoby 26 S E 2d 97 181 Va 697

Giving a choice of rates

NY—Hartzberg v New York Cent R Co 41 N Y S 2d 345, 181 Misc 129 affd 51 N Y S 2d 741, 268 App Div 904, app den 52 N Y S 2d 580, 268 App Div 978, affd 65 N E 2d 337, 295 N Y 703, cert den 66 S Ct 1121 328 US 849 90 L Ed 1622

9 La—Kendall v Teche Lines, App 197 So 810

Ohio—C.J.S. cited in Arthurs v Greyhound Corp, 189 N E 2d 460, 463

Tenn—C.J.S. cited in Tennessee Coach Co v Carter 182 S W 2d 121 122, 27 Tenn App 479

Warsaw Convention limitations

US—Evangelinos v Trans World Airlines, Inc D C Pa, 396 F Supp 95 revd on oth grds C A 550 F 2d 152

Ga—Delta Air Lines Inc v Isaacs, 233 S E 2d 212, 141 Ga App 209

NY—Stolk v Compagnie Nationale Air France, 299 N Y S 2d 58, 58 Misc 2d 1008, affd 316 N Y S 2d 455, 64 Misc 2d 859—Cohen v Varig Airlines, S A Empresa de Viacao Aerea Rio Grandense 380 N Y S 2d 450, 85 Misc 2d 653, mod on oth grds 390 N Y S 2d 515, 88 Misc 2d 998, mod on oth grds 405 N Y S 2d 44, 62 A D 2d 324

10 Ohio—C.J.S. cited in Arthurs v Greyhound Corp Minn, 189 N E 2d 460, 463

11 US—C.J.S. cited in Kirchoff v Southern Pac Co, D C Cal, 68 F Supp 877, 879—O'Brien v Pennsylvania R Co, D C N Y 184 F Supp 305

NY—Chris v Greyhound Bus Lines, 291 N Y S 2d 964, 57 Misc 2d 129

Pa—Dennis v West Ridge Transp Co 21 Erie Co 249

Baggage receipt held notice

Mont—Shurazi v Greyhound Corp, 401 P 2d 559, 145 Mont 421

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12 Mass—Kergald v Armstrong Transfer Exp Co, 113 N E 2d 53 330 Mass 254

Utah—Allen v Southern Pac Co, supra, n 8

N J—Silvers v Pennsylvania R Co 215 A 2d 556, 89 N J Super 475

NY—Leask v New York Cent R Co 247 N Y S 2d 913 42 Misc 2d 310

14 NY—C.J.S. cited in Margolis v Greyhound 335 N Y S 2d 899, 904, 71 Misc 2d 277

15 NY—Leask v New York Cent R Co, 247 N Y S 2d 913, 42 Misc 2d 310

Printing in minuscule type held insufficient

N Y—Stolk v Compagnie Nationale Air France, 299 N Y S 2d 58, 58 Misc 2d 1008, affd 316 N Y S 2d 455, 64 Misc 2d 859

20 Cal—Muckler v Western Greyhound Lines, 87 Cal Rptr 297 8 C A 3d 319

21 US—Kirchoff v Southern Pac Co, D C Cal 68 F Supp 877

Ill—Bass v Chicago, Duluth & Georgian Bay Transit Co 89 N E 2d 430, 339 Ill App 246

Miss—Campbell v Tri-State Transit Co 17 So 2d 327 196 Miss 367

NY—Sayles v Interstate Busses Corp, 66 N Y S 2d 377, 187 Misc 286

21 Pa—Cray v Pennsylvania Greyhound Lines, 110 A 2d 892, 177 Pa Super 275

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27 US—Mao v Eastern Air Lines Inc D C N Y, 310 F Supp 844

Ala—C.J.S. quoted at length in Kellett v Alaga Coach Lines, 37 So 2d 137, 141, 34 Ala App 152

DC—Pennsylvania Greyhound Lines v Wells, Mun App 41 A 2d 837

Mont—C.J.S. quoted at length in Shurazi v Greyhound Corp 401 P 2d 559 561 145 Mont 421

NY—C.J.S. quoted at length in Sayles v Interstate Busses Corp, 66 N Y S 2d 377, 380, 187 Misc 286

Ohio—Pennsylvania Greyhound Lines, 60 N E 2d 945 75 Ohio App 100—Royalty v Southeastern Greyhound Lines, 62 N E 2d 200, 75 Ohio App 322

Okl—All Am Bus Lines v Schuster, supra, n 8

Pa—C.J.S. quoted at length in Cray v Pennsylvania Greyhound Lines, 110 A 2d 892, 895, 177 Pa Super 275—Kistler v Royal Blue Coaches, Inc, 31 D & C 2d 102

28 US—Mao v Eastern Air Lines Inc, D C N Y, 310 F Supp 844

Ala—Kellett v Alaga Coach Lines, supra, n 27

Conn—Nothnagle v New York, N H & H R Co, 93 A 2d 165 139 Conn 278, affd 73 S Ct 986, 346 US 128, 97 L Ed 1500—Zaborski v Greyhound Lines, Inc, 209 A 2d 697, 3 Conn Cir 176

Ga—Argo v Southeastern Greyhound Lines, 33 S E 2d 730 72 Ga App 309—Nashville, C & St L Ry v Ham, 50 S E 2d 831, 78 Ga App 403

Okl—All Am Bus Lines v Schuster supra, n 8

Tex—C.J.S. quoted in Greyhound Corporation v Stevens, 413 S W 2d 439 447

29 Ohio—Royalty v Southeastern Greyhound Lines, supra, n 27

30. Opportunity of shipper to choose

Mont—Shurazi v Greyhound Corp 401 P 2d 559, 145 Mont 421

Reasonableness of regulation

Mont—Shurazi v Greyhound Corp, 401 P 2d 559 145 Mont 421

§ 878. —— Construction of Special Contracts or Regulations; What Law Governs

page 1707

31 D C Pennsylvania Greyhound Lines v Wells, supra, n 27

N Y—Sambur v Short Line System of Hudson Transit Lines, 112 N Y S 2d 514, 201 Misc 595, affd 116 N Y S 2d 500, 280 App Div 983

N C—Neece v Richmond Greyhound Lines, Inc 99 S E 2d 756, 246 N C 547 68 A L R 2d 1341

Particular contracts construed

Ark—Missouri Pac Transp Co v Williams, 182 S W 2d 762, 207 Ark 750

Tenn—Ward v Gulf, M & N R Co, 134 S W 2d 917 23 Tenn App 533

32 N Y—C.J.S. cited in Scire v American Export Lines, 93 N Y S 2d 457 465, 197 Misc 422

34 Ohio—Pennsylvania v Pennsylvania Greyhound Lines, supra, n 27

§ 879. Notice to Carrier of Nature and Value of Baggage

38 Ohio—State v Morris, 329 N E 2d 85 42 Ohio St 2d 307 71 O O 2d 294 cert den 96 S Ct 774 423 U S 1049 46 L Ed 2d 637

39 Ohio—Patton v Pennsylvania Greyhound Lines, supra, n 27

Declaration of value held sufficient

Iowa—Kiernan v Greyhound Lines, Inc 156 N W 2d 310, 261 Iowa 788

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41 U S—Tishman & Lipp, Inc v Delta Airlines, D C N Y, 275 F Supp 471, affd C A 413 F 2d 1401

Ga—G C G Jewelry Mfg Corp v Atlanta Baggage & Cab Co 136 S E 2d 419 109 Ga App 469

N Y—Hartzberg v New York Cent R Co supra, n 8—McCloy v Pennsylvania R Co supra, n 3

Bailee as to property not constituting baggage

U S—J & H Flyer Inc v Pennsylvania R Co C A N Y 316 F 2d 203

Jewelry salesman's sample case

U S—J & H Flyer Inc v Pennsylvania R Co C A N Y 316 F 2d 203

43 U S—S Nathan & Co v Red Cab, C C A Ind 118 F 2d 864 cert den 62 S Ct 82, 314 U S 642, 86 L Ed 515

Jewelry in sample cases

U S—Tishman & Lipp, Inc v Delta Airlines, D C N Y 275 F Supp 471, affd C A 413 F 2d 1401

§ 880. Commencement of Liability; Delivery and Acceptance

45 Ark—Strickland v Missouri Pac Transp Co 115 S W 2d 830, 195 Ark 950

N C—Clott v Greyhound Lines, Inc 180 S E 2d 102, 278 N C 378

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49 N Y—Hartzberg v New York Cent R Co supra, n 8

§ 883. Continuance and Termination of Liability; Delivery

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74 N Y—Berman v Trans World Airlines, 421 N Y S 2d 291 101 Misc 2d 511

76 N Y—Cohen v Varig Airlines, S A. Empresa de Viacao Aerea Rio Grandense, 380 N Y S 2d 450, 85 Misc 2d 563, mod on oth grds 390 N Y S 2d 515 88 Misc 2d 998, mod on oth grds 405 N Y S 2d 44, 62 A D 2d 324

§ 884. Passenger's Duty to Remove; Carrier as Warehouseman

Library References
Carriers ⇐404.

page 1712

89 Okl—Fisk v Bullard, 239 P 2d 424, 205 Okl 502

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3 N Y—Margolis v Greyhound, 335 N Y S 2d 899, 71 Misc 2d 277

§ 885. —— Baggage Remaining for Passenger's Accommodation

8. Storage of baggage

(4) Other matters

Iowa—Kiernan v Greyhound Lines, Inc, 156 N W 2d 310, 261 Iowa 788

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10 Okl—Fisk v Bullard, 239 P 2d 424 205 Okl 502

Utah—Allen v Southern Pac Co 213 P 2d 667 117 Utah 171

§ 887. Connecting Carriers and Through Tickets

Library References
Carriers ⇐406

page 1715

23 Ga—Argo v Southeastern Greyhound Lines, 33 S E 2d 730 72 Ga App 309

§ 888. —— Liability of Initial Carrier

24 N Y—Rossman v Greenberg Lakewood & Mountain Line, 119 N Y S 2d 789 203 Misc 776

§ 892. Actions for Delay, Loss or Injury

Library References
Carriers ⇐408

page 1722

94. Jurisdiction and venue

Ga—Turner v Southeastern Greyhound Lines, 40 S E 2d 777 74 Ga App 548

§ 894. —— Right of Action and Persons Entitled to Sue

page 1723

11 N Y—Cohen v Varig Airlines, S A. Empresa de Viacao Aerea Rio Grandense, 380 N Y S 2d 450 85 Misc 2d 653 mod on oth grds 390 N Y S 2d 515, 88 Misc 2d 998 mod on oth grds 405 N Y S 2d 44 62 A D 2d 324

§ 896. —— Pleading

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26. Complaints, petitions, or declarations sufficient

(1) Southeastern Greyhound Lines v Berne, 13 So 2d 696, 31 Ala App 178

D C—Zavodnik v Greyhound Corp Mun App, 165 A 2d 923

Ga—G C G Jewelry Mfg Corp v Atlanta Baggage & Cab Co, 136 S E 2d 419 109 Ga App 469

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30 Neb—Shuman Bros & Co v Nebraska Nat Hotel Co, 9 N W 2d 807, 143 Neb 404

31 Fla—Rudisill v Tarpons of Tampa, Inc, App 147 So 2d 180

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46 Ga—Nashville, C & St L Ry v Ham, 50 S E 2d 831, 78 Ga App 403

§ 897. —— Evidence

51 Ga—G C G Jewelry Mfg Corp v Atlanta Baggage & Cab Co 136 S E 2d 419 109 Ga App 469

Pa—Rascoter v Martz Coach Co 32 Luz Leg Reg 49

Value

Tex—Hicks v Glenn, Civ App 155 S W 2d 828

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55 U S—Greene v New York Cent R Co, D C Mich, 105 F Supp 944, affd, C A, 209 F 2d 348

57 Neb—Shuman Bros & Co v Nebraska Nat Hotel Co, supra, n 30

60 U S—Greene v New York Cent R Co supra, n 55

Neb—Shuman Bros & Co v Nebraska Nat Hotel Co, supra, n 30

N Y—Percy v Bay Ridge Operating Co Sup 10 N Y S 2d 549—Sayles v Interstate Busses Corp 66 N Y S 2d 377 187 Misc 286—Rossman v Greenberg Lakewood v Mountain Line, 119 N Y S 2d 789 203 Misc 776

61 La—Kendall v Teche Lines, supra, n 9

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70 Tenn—C J S cited in Tennessee Coach Co v Carter 182 S W 2d 121 122, 27 Tenn App 479

Prima facie case of duty casting burden of proof on carrier—Ward v Gulf, M & N R Co, supra, n 31

Court unable to rule on question without evidence of passenger's check of company tariff

D C—Zavodnik v Greyhound Corp Mun App, 165 A 2d 923

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72 Conn—Zeidenberg v Greyhound Lines, Inc 209 A 2d 697 3 Conn Cir 176

Duty of one unable to read English accepting baggage receipt

Mont—Shirazi v Greyhound Corp 401 P 2d 559 145 Mont 421

Passengers are presumed to know provisions of filed and published tariffs.[75.5]

75.5 Conn—Zeidenberg v Greyhound Lines, Inc 209 A 2d 697 3 Conn Cir 176

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92 U S—Greene v New York Cent R Co supra, n 55

Ala—Birmingham Terminal Co v Wilson, 31 So 2d 563 249 Ala 397

Ga—Nashville, C & St L Ry v Ham, supra, n 46

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2 N Y—Sambur v Short Line System of Hudson Transit Lines, 112 N Y S 2d 514 201 Misc 595 affd 116 N Y S 2d 500, 280 App Div 983

Tenn—Ward v Gulf, M & N R Co 134 S W 2d 917 23 Tenn App 533

(8) Lang v Illinois Greyhound Lines, 28 N E 2d 345 306 Ill App 269

Evidence sufficient

(16) As to other matters

U S—Mitchell v Union Pac R Co D C Cal 188 F Supp 869—O'Brien v Pennsylvania R Co, D C N Y, 184 F Supp 305

Ga—Nashville, C & St L Ry v Ham, 50 S E 2d 831 78 Ga App 403

Iowa—Kiernan v Greyhound Lines, Inc, 156 N W 2d 310, 261 Iowa 788

N Y—Rossman v Greenberg Lakewood & Mountain Line, 119 N Y S 2d 789 203 Misc 776

N C—Neece v Richmond Greyhound Lines, Inc, 99 S E 2d 756, 246 N C 547, 68 A L R 2d 1341

Evidence insufficient

(11) Other cases

Ill—Pum v Pennsylvania R Co, 187 N E 2d 288, 38 Ill App 2d 326

Neb—Shuman Bros & Co v Nebraska Nat Hotel Co, 9 N W 2d 807 143 Neb 404

N Y—Rossman v Greenberg Lakewood & Mountain Line, supra

Tex—Hicks v Glenn, Civ App, 155 S W 2d 828

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4 N Y—Scire v American Export Lines, 93 N Y S 2d 457 197 Misc 422

11 Neb—Shuman Bros. & Co v Nebraska Nat Hotel Co, supra, n 2

Evidence held sufficient in absence of rebutting evidence to warrant finding for passenger

Ohio—Arthurs v Greyhound Corp 189 N E 2d 460

§ 899 —— Questions of Law and Fact

Library References
Carriers ⇐408(6)

14 US—Greene v New York Cent R Co D C Mich 105 F Supp 944 affd C A 209 F 2d 348
Pa—Johnson v Frank Martz Coach Co 40 Luz Leg Reg 325

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15 Fla—Chafin v Atlantic Coast Line R Co 58 So 2d 185 32 A L R 2d 625
16 Ark—National Fire Ins Co v Yellow Cab Co 171 S W 2d 927 205 Ark 953
N C—Clott v Greyhound Lines, Inc, 180 S E 2d 102, 278 N C 378
24 Pa Bannister v Martz Coach Co, 32 Luz Leg Reg 49

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33 Ark—National Fire Ins Co v Yellow Cab Co, supra, n 16
N C—Neece v Richmond Greyhound Lines, Inc, 99 S E 2d 756, 246 N C 547 68 A L R 2d 1341

§ 902 Damages for Delay

Library References
Carriers ⇐408(5)

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61 Okl—All Am Bus Lines v Schuster, 189 P 2d 142, 199 Okl 628

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§ 903. Damages for Loss or Injury

74 N Y—Sayles v Interstate Busses Corp 66 N Y S 2d 377 187 Misc 286—Rossner v Greenberg Lakewood & Mountain Line, supra, n 2

Reasonable worth as asserted by passenger

Ohio—Arthurs v Greyhound Corp 189 N E 2d 460

Law applicable

N Y—Cohen v Varig Airlines, S A Empresa de Viacao Aerea Rio Grandense, 380 N Y S 2d 450, 85 Misc 2d 653, mod on oth grds 390 N Y S 2d 515, 88 Misc 2d 998, mod on oth grds 405 N Y S 2d 44, 62 A D 2d 324
80 N Y—Cohen v Varig Airlines, S A Empresa de Viacao Aerea Rio Grandense, 380 N Y S 2d 450, 85 Misc 2d 653, mod on oth grds 390 N Y S 2d 515, 88 Misc 2d 998, mod on oth grds 405 N Y S 2d 44, 62 A D 2d 324

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93 Miss—Campbell v Tri-State Transit Co, 17 So 2d 327 196 Miss 367
94 Okl—Fisk v Bullard, 239 P 2d 424 205 Okl 502

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98 Ga—Morse v Piedmont Hotel Co, 139 S E 2d 133 110 Ga App 509
La—Kendall v Teche Lines, App 197 So 810
4 N Y—Cohen v Varig Airlines, S A Empresa de Viacao Aerea Rio Grandense, 380 N Y S 2d 450, 85 Misc 2d 653 mod on oth grds 390 N Y S 2d 515 88 Misc 2d 998, mod on oth grds 405 N Y S 2d 44, 62 A D 2d 324

Exemplary damages may not be awarded where the carrier has not participated in nor approved of its employee's willful and wanton conduct.[4.5]

4.5 U S Mitchell v Union Pac R Co, D C Cal, 188 F Supp 869

§ 904. Character and Status of Place and Sleeping Car Companies

page 1740

7 Cal—C J S cited in Hicks v Scott, 120 P 2d 107 109 48 Cal App 2d 481—C J S cited in Berger v Southern Pac Co 300 P 2d 170, 173 144 C A 2d 1 60 A L R 2d 1104

Liability to tax

Miss—Miller v Gulf M & N R Co 127 So 690 157 Miss 69

12. Burden of proof

S C—Pullman Co v Public Service Commission, 120 S E 2d 214 238 S C 358
Burden on carrier to show reasonableness of charge for each car unreasonable
S C—Pullman Co v Public Service Commission, 120 S E 2d 214 238 S C 358

Profit and loss considered

S C—Pullman Co v Public Service Commission, 120 S E 2d 214, 238 S C 358

§ 909. Safety and Comfort of Passengers

Library References
Carriers ⇐409 et seq.

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53 Iowa—Fanelli v Illinois Cent R Co 69 N W 2d 13 246 Iowa 661
54 Cal—Hicks v Scott supra, n 7—C J S cited in Berger v Southern Pac Co 300 P 2d 170, 173 144 C A 2d 1 60 A L R 2d 1104
55 Cal—Hicks v Scott 120 P 2d 107, 48 Cal App 2d 481

57. Same as common carrier

Cal Berger v Southern Pac Co, 300 P 2d 170, 144 C A 2d 1 60 A L R 2d 1104

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64 U S—Pullman Co v Railroad Commission of Texas, D C Tex, 33 F Supp 675, revd on oth grds 61 S Ct 643, 312 U S 496, 85 L Ed 971

§ 910. —— Protection of Passenger in General

page 1746

75 Cal Hicks v Scott, supra, n 55

No duty to instruct how to use upper berths

U S—Hamilton v The Nassau, D C N Y 131 F Supp 125

§ 911. —— Assaults and Insults by Employees

79 Cal—C J S. cited in Berger v Southern Pac Co 300 P 2d 170, 174, 144 C A 2d 1 60 A L R 2d 1104

§ 912. —— Assaults by Third Persons

86. Joint liability with third person

Cal—Hicks v Scott, supra, n 55

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87 Cal—Hicks v Scott, supra, n 7

§ 914. Duties and Liabilities as to Passenger's Effects

page 1748

7 Ohio—Bradbury v New York Cent R Co, App 180 N E 2d 839

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15 N Y—C J S cited in Simpson v The Pullman Company, 174 N Y S 2d 109, 110, 6 A D 2d 684

§ 918 Respective Duties and Liabilities of Railroad Company and Palace or Sleeping Car Company

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67. Joint enterprise

(2) Other matters

Ohio—Bauer v Pullman Co, 220 N E 2d 366, 8 Ohio App 2d 1

§ 919. Actions

page 1754

80. No right of action in absence of contract

Ark—Pullman Co v Anderson, 172 S W 2d 431, 205 Ark 1056

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83 Cal—McBride v Atchison, T & S F Ry Co 279 P 2d 966, 44 C 2d 113
91 Ill—McCall v Pullman Co, 73 N E 2d 658, 331 Ill App 561

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2 Ohio—Bauer v Pullman Co 220 N E 2d 366, 8 Ohio App 2d 1
7 Cal—Hicks v Scott, 120 P 2d 107, 48 Cal App 2d 481

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9 U S—Pullman Co v Griffith, C C A Miss, 109 F 2d 612

Evidence held insufficient

(5) Other evidence

Cal Berger v Southern Pac Co 300 P 2d 170, 144 C A 2d 1 60 A L R 2d 1104
Iowa—Fanelli v Illinois Cent R Co 69 N W 2d 13, 246 Iowa 661

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16 Cal—McBride v Atchison, T & S F Ry Co, 279 P 2d 966, 44 C 2d 113
Ill—McCall v Pullman Co 73 N E 2d 658, 331 Ill App 561

Liability under res ipsa loquitur doctrine

Ohio Bauer v Pullman Co, 220 N E 2d 366, 8 Ohio App 2d 1
17 Cal—Hicks v Scott, supra, n 7

Placing baggage on platform

N Y—Rosenberger v Pullman Co, 297 N Y S 196, 252 App Div 87 rearg and motion for leave to appeal den 299 N Y S 767, 252 App Div 740, affd 14 N E 2d 388 277 N Y 679 rearg den 15 N E 2d 74, 278 N Y 485
Evidence held sufficient to go to jury Fanelli v Illinois Cent R Co supra, n 9

Placing baggage on rack

Minn—Zuber v Northern Pac Ry Co, 74 N W 2d 641, 246 Minn 157

19. Jewelry in bag

(2) Rosenberger v Pullman Co supra, n 17

Baggage on rack

Minn—Zuber v Northern Pac Ry Co 74 N W 2d 641 246 Minn 157

The question of the passenger's assumption of risk is also for the determination of the jury.[20.1]

20.1 Minn—Zuber v Northern Pac Ry Co, 74 N W 2d 641 246 Minn 157

21. Instructions held proper

(2) Other instructions

Cal Bagan v Southern Pac Co 300 P 2d 170 144 CA 2d 1 60 A L R 2d 1104

Burden of proof

Minn—Zuber v Northern Pac Ry Co, 74 N W 2d 641, 246 Minn 157

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28 Minn—Zuber v Northern Pac Ry Co 74 N W 2d 641 246 Minn 157

33. Recovery held excessive

(7) Other amounts—Reiss v Pullman Co 70 N Y S 2d 505 272 App Div 820

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CARROLL ISSUE A term that comes from the decision in Carroll Broadcasting Co. v. FCC, 258 F 2d 440, 103 U.S.App.D C. 346, in which it was held that an existing licensee has standing to contest the grant of a competitive license for the reason that economic injury to an existing station, while not in and of itself a matter of moment, becomes important when on the facts it spells diminution or destruction of service.[0.50]

0.50 D C—Southwestern Operating Co v FCC C.A 351 F 2d 834 835, 122 U.S App D C 137

See Telegraph, Telephones, Radio, and Television §§ 303, 304

CARRY.

Present Tense

7 Cal.—C.J.S. quoted in People v Smith, 164 P 2d 857, 858, 72 Cal App 2d Supp 875

8. Similarly expressed

To have upon or about one's person, hold to hold or bear, to act as a bearer—People v Smith, supra, n 7

It has also been defined as "to have or bear upon or about one's person, as a watch or weapon; locomotion not being essential."[10.1]

10.1 Pa—Commonwealth v Festa, 40 A 2d 112, 116, 156 Pa Super 329

To bear the expense of; to keep in force.[13.1]

13.1 Miss.—Hartford Accident & Indemnity Co v Hewes, 199 So 93, 97, 98, 190 Miss 225

To sustain the weight or burden of[13.2]

13.2 Ariz—Long v Dick, 347 P 2d 581, 582, 87 Ariz 25, 80 A L R 2d 949

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15 Wyo—C.J.S. cited in Western Auto Transports v City of Cheyenne, 120 P 2d 590, 591, 57 Wyo 351

The term may be substantially synonymous with "trial"[16.1]

16.1 Wyo—Western Auto Transports v City of Cheyenne 120 P 2d 590 591 57 Wyo 351

Carry on.

21–22 U S—Rosenblum v Anglim, D C Cal, 43 F Supp 889 891 affd C C A 135 F 2d 512

Other phrases

Other phrases more recently adjudicated[34.1]

34.1. Phrases construed

(1) "Carry on or defend action"—Swenson v Swenson, 13 N W 2d 531, 533, 245 Wis 124

(2) "Carry or have carried into" held equivalent to "introduce"—U S v Buckles, 97 S W 1022, 1024 6 Ind T 319

Carried

Phrases

Other phrases construed.

40.1 Phrases construed

"Carried for one-eighth" and "carried one-eighth interest," construed as understood among oil men—Winemiller v Page, 183 P 501 75 Okl 278

Carrying

41 Not limited to time when actually in motion

N J—J G Ries & Sons v Automobile Ins. Co of Hartford, Conn, 3 A 2d 610, 612, 121 N J Law 493

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Carrying arms or Carrying weapons.

43 Cal—C.J.S. quoted in People v Smith, supra, n 7

Carrying on.

Phrases more recently adjudicated.[50.1]

50.1. Phrases construed

(1) "Carrying on action"—Swenson v Swenson, 13 N W 2d 531, 534, 245 Wis 124

Other phrases:

59. "Sharing expense riding" does not constitute

Tex—North American Accident Ins. Co v Wyatt, Civ App, 160 S W 2d 298, 302

61. Held not to include

(1) Interest on mortgages not placed on property in connection with its purchase or made to meet taxes, assessments, interest.—Queen Boro Corporation v Commissioner of Internal Revenue, C C A, 134 F 2d 942, 944

(2) Penalties on taxes and water rates—Application of Manhattan Savings Bank, 43 N Y S 2d 386, 387, 181 Misc 338

Used adjectively, "carrying places."[61.1]

61.1 A strip of land between or along navigable waters over which, by the process of hauling, various points in the water route may be connected into a single avenue of commerce—Lumberg v University of Notre Dame, 282 N W 70, 73 74, 231 Wis 187

CART.

As a Noun

63 Tex—Cone v Lewis, 64 Tex 331 333, 53 Am R 767

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Other phrases:

Additional phrases which have been construed or defined.[72.1]

"Light cart" is a term which may be applied to an ordinary farmer's cart without springs, if driven with reins—Motron v Freeman, 26 J P 215

72.1. Phrases

CARTEL Defined see Monopolies § 41.

CARTRIDGE.

Phrases.

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Other phrases are set out in the note.[93.1]

93.1. Phrases

(1) "Pistol cartridges" are cartridges such as are adapted to, and are or may be used for, pistols of the size and calibre in ordinary use, including especially those capable of being carried about the person—Union Metallic Cartridge Co v Teague, 3 So 709, 710, 83 Ala 475

CARTWAY.

97 N C—Waldroup v Ferguson, 195 S E 615, 617, 213 N C 198

99. Specifically defined

A quasi-public way located in a rural section—Parsons v Wright, 27 S E 2d 534, 536, 537, 538, 223 N C 520

CARTWRIGHT ACT. The name applied to the California antitrust statute.[4.50]

4.50 U S—Siegel v Chicken Delight, Inc, D C Cal 271 F Supp 722, 724

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CASANOVA. An Italian Adventurer

Ala—Wilson v State, 39 So 2d 254, 255, 251 Ala 676

CASCADE.

An arrangement of the parts of an apparatus so that fluid passes, or is conceived to pass, from one to another down the series.

U S—In re Green, Cust & Pat App, 97 F 2d 130, 133